SID
Singapore Institute of Directors

The Directors' BULLETIN

ISSUE 3 • 2013

The Official Newsletter of Singapore Institute of Directors

MICA (P) 001/02/2012

Investing in Emerging Markets

Singapore Institute of Directors

MISSION STATEMENT

To promote the professional development of directors and corporate leaders and encourage the highest standards of corporate governance and ethical conduct

THE INSTITUTE'S OBJECTIVES ARE:

- To be the national association of company directors for the local business community. The SID works closely with its network of members, professionals such as accountants and lawyers, and the authorities to identify ways to uphold and enhance standards of corporate governance.
- To act as a forum for exchange of information on issues relating to corporate governance and directorship in Singapore. The SID plays a leading role in holding discussions and providing feedback to the authorities on matters of concern.
- To organise and conduct professional training courses and seminars to meet the needs of its members and company directors generally. Such courses aim to continually raise the professional standards of directors in Singapore by helping them raise their effectiveness through acquisition of knowledge and skills.
- To regularly publish newsletters, magazines and other publications to update members on relevant issues, keeping them informed of latest developments. These publications also serve as reference materials for company directors.
- To be responsible for the discipline of members. The SID has drawn up a code of conduct for directors in Singapore setting out the standards to ensure they discharge their responsibilities dutifully and diligently.

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Citigate Dewe Rogerson

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Nanyang Technological University

Annabelle Yip
Wong Partnership LLP

PUBLISHER
Singapore Institute of Directors
3 Shenton Way #15-08
Shenton House
Singapore 068805
Tel : 65 6227 2838
Fax : 65 6227 9186
Email: secretariat@sid.org.sg
Website: www.sid.org.sg

EDITOR
Kala Anandarajah

DESIGN
Wini Tenorio

PRINTER
Entraco Printing Pte Ltd

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FROM THE EDITOR

Welcome to the third issue of the Director's Bulletin. Half the year has gone by and things are much the same; and yet much change continues to be in the air, including a new manager for Manchester United, new and tighter employment rules for the employment of foreign works but with greater protection for employees overall in Singapore, seemingly relaxed investment policies in an increasing number of countries, and a clear shift from where the economic power centres of the world was to where it is now. All very unrelated matters, but yet changes which affect all in one way or another, depending on what concerns us at a particular moment in time.

A change which I touch on in this note is the heightened interest in investments in emerging markets in and around ASEAN. One cannot pin a particular date or time when the interest in the region started increasing, given that different countries seemingly opened to foreign investments at different times. But a date is not important; what is is how directors perceive, review, plan and decide if the company should invest in a particular jurisdiction. The process is very important and makes all the difference as to whether a director has exercised due diligence or acted negligently. Gerald Ong in the Roundtable discussion in the article *Investing In Emerging Markets – Focus On ASEAN* sums this up aptly when he provides a snapshot of what he would do as a director, which includes ensuring that he has a "trusted set of local lawyers", an appropriate "financial model", and having your "own bankers".

Gerald Ong is one of four experts who share their views on investing in the ASEAN region. The others include Ho Meng Kiat, Patrick Ang and Chris Woo, who hail from different expertise. The experts were identified precisely because of their diversity and for them to share with directors a snapshot of the key issues that abound and the relevant factors that have to be taken into account to surmount the issues and to invest into the countries. On the region, Chris notes that South East Asia "as a region is the clear poster child" for investments. He along with the other experts do acknowledge and recognise that each of the different countries attract different sorts of investments. For example, Singapore is the locale for funds whilst several of the other countries provide manufacturers with potential through the rising middle class, amongst other factors. What is consistent amongst all of the experts is that Myanmar is truly the "last market frontier" in the region, although Indonesia, Cambodia and to a lesser extent, Vietnam present opportunities.

Continuing on the theme of investment in ASEAN, a question that is always asked is what the extent of corruption in the various countries is. Presenting a fairly no holds barred look into the reality on the ground is Corene Crossin who shares insights on the practical problems that companies face. The problems are enhanced through the presence of laws which have extra-territorial reach, such as the US Foreign Corrupt Practices Act, the UK Bribery Act and the Singapore Prevention of Corruption Act. We also include an article on corruption under the US FCPA written by Thomas R. Fox and Ryan Morgan.

Two other articles follow in relation to investing in Myanmar and why Singapore continues to attract holding companies.

I am acutely aware that a collection of articles such as those included in this issue of the Bulletin are going to be barely sufficient to enlighten experienced directors interested in taking the companies they govern into the region. The aim is really to showcase some of the issues and perhaps connect directors to each other through common concerns that may exist.

The feature articles of this issue aside, you will see yet again that the Institute continues to be very active in pulling together a myriad of events, dialogues and seminars for your benefit. Many of the events are repeat programmes being part of the Institute's core programmes, including the Listed Company for Directors Programme 1, which continues to attract a good following of directors. Although a 101 session, the sharing that go on during this one day session has been elucidating and I am sure directors have enjoyed hearing from each other as questions are asked. We are continuing with our approach of having the events presented up front and the substantive articles following in the second half of the Bulletin. We trust that you have found this approach more readable.

On programmes, a further note on the upcoming Directors' Conference. In its 4th year, we are expecting a very good turn out this year as well, given the programme planned for the Conference. More details are set out at page 37. Do register early for the Conference. Sponsorship opportunities remain open; if you are interested, please do contact the Institute's secretariat.

Finally, with a heavy dose of sadness, I touch on the changing of the guards at the Institute very briefly. Suffice to say that one of the key persons behind the Institute, who saw it grow over the last decade and more, introduced numerous programmes and put it on the world's stage, will relinquish his Chairmanship of the Institute at the end of June. This man is none other than John Lim, one of Singapore's foremost gurus of Corporate Governance. As we at the Institute bid him farewell from his office bearing role, John has promised to continue to assist the Institute with its various endeavours. Please join me in wishing John the very best as he moves on to newer ventures. If you know John, you will know that he will not sit still, and will continue to contribute.

I end by thanking all of our contributors to this issue of the Bulletin. Our next issue of the Bulletin will focus on employment related issues, and what directors need to be aware of. If you have thoughts to share, please do send them in to the secretariat by the middle of July.

Wishing all of you well for the 2nd half of 2013.

Kind regards,

Kala Anandarajah
Editor

CHAIRMAN'S MESSAGE

Dear fellow members,

It is with a tinge of sadness, but not regret, that I write my last message in this Bulletin as the Chairman of your Institute. As many of you would probably have heard, or read in our Editor's note, I will be relinquishing my position as Chairman at the end of June, after almost 15 years of close involvement with SID, and almost right from its formation in July 1998 at the height of the Asian financial crisis. During this period, I have had the privilege of being involved in many aspects of the development and enhancement of corporate governance, as we know it today, not only in Singapore but also in the region.

Your Institute has been an active contributor to this development and I am most grateful to have had the opportunity to have played a small supportive role in it, together with many individuals and organizations, both within and outside our Council, who have collectively and individually supported the continued efforts to raise the standard of good governance here. These have certainly enabled Singapore to consistently retain her position at the top of the Asian corporate governance rankings of independent regional and international rating agencies and to maintain her status as an efficient and trusted global financial centre. Singapore has made significant progress in corporate governance since the Asian financial crisis and there is today far greater understanding of the role and responsibilities of directors compared to a decade ago. But as all of us are aware, corporate governance is a journey and we still have a considerable way to go.

While I am delighted that the latest amendments to our Listing Manual and the revised Code 2012 have rightly focused on risk management, effective boards, board diversity and having formal and transparent nomination and election processes, comprehensive performance evaluation, continued director training and development and shareholder relations, I believe greater emphasis should now be directed at effective implementation. With the increased expectation of directors by both regulators and shareholders and the increased complexity of the regulatory and business environment requiring greater commitment of time by non-executive directors it is clear that the demand for competent independent directors will continue to increase.

There have also been concerns expressed in various quarters that the above situation will lead to a shortage of competent independent directors and may result in an overload on some individuals. However, I am of the view that the situation where a small number of better known and more seasoned directors are encumbered with many directorships is more likely the result of companies preferring to appoint such known directors rather than widening their search to a larger pool of candidates and not necessarily the result of a shortage in the availability. I am also of the view that there is sufficient number of qualified individuals who have the skills, knowledge and the right personal attributes to be potentially effective directors but who may currently lack depth of experience. It is therefore critical that if board diversity, effectiveness and periodic renewal are to be achieved and sustained, capacity building must be a key focus for the corporate community going forward. This capacity building should also include the development of women directors where our current percentage of women on listed company boards is at a low 7.3%. I believe this low percentage is partly caused by inadequate numbers of senior women executives and professionals in the pipeline and which should be increased.

To remedy the current situation, a formal and comprehensive development programme should be set up, encompassing both classroom and practice oriented training and assessment for new and potential directors and which can help provide a sustained flow of trained candidates to meet the on-going needs of the corporate community. SID which is already offering a comprehensive programme of core training modules, including a diploma programme in partnership with the Singapore Management University, and various specialised functional courses will soon be increasing its offerings using the case study method of teaching. These courses can form the foundation for an effective and holistic capacity building programme for new directors and which should have the support of all stakeholders in our CG eco-system.

I would also like to repeat in this message a suggestion which I have made several times over the decade but which has not yet gained much traction. Although there have been criticisms about some executive directors holding too many external directorships I believe it would be beneficial both for the company and for the individual if companies are able to allow a senior member of their management the opportunity to sit on an external board as a non-executive director, subject of course to conflicts of interest. This provides such an individual with the opportunity to better appreciate the difference between the role of non-executive directors (in his external role as a non-executive director) and that of management and which would in turn help him in managing board dynamics in his executive role on his own board. Additionally, he would also be able to acquaint himself with good processes and practices in another company which may be adaptable and beneficial to his own organisation. This would enable senior management to gain valuable board experience while they are still in executive roles and help address the issue created by the preference of some companies to appoint only board members who already have board experience. I would like to commend this suggestion once again for consideration by those of us who are in a position to influence such an outcome.

I would also like to say a few words in this message about the change of leadership at your Institute. This change is part of the leadership and council renewal initiated last year when our Articles were amended to limit the tenure of elected council members to a maximum of 9 years (3 terms of 3 years each) and to allow for the co-option of up to 4 members (out of a total of 20 council members). Co-opted members may only be co-opted for one year each time and for a maximum of 2 consecutive years. The implementation of this new limit on tenure will be done over a period of 3 years.

The first phase of our renewal took place at our AGM last year when several of our long serving council members including Keith Tay, YC Boon, Reggie Thein and Lim Hock San retired to make way for new members. This, together with the decision to expand the Council to the maximum number of 20, allowed the Council to bring in a total of 7 new members and also increase its diversity. As a result, the Council currently has 12 members or 60% of its membership who have less than 5 years service, including 9 who have less than 2 years. This augurs well for the continued leadership of the Institute for the future.

Given the current strength, diversity and the profile of the Council I believe this is an excellent time for a leadership change and I am delighted to be able to hand over the mantle of our Institute to Willie Cheng who is currently 1st Vice-Chairman and who has been in the Council since March 2010. Willie is well known for his many leadership roles in both the corporate and social enterprise sectors, particularly in the latter and is well positioned to take our Institute to a new and higher level of growth.

SID has in the last decade grown significantly and today has a total membership of some 2,000 individuals and corporations. It provides a comprehensive range of training programmes for both new and experienced directors and has played a not insignificant role in contributing to the review and revision of regulations, the development and revision of best practice codes and the provision of thought leadership and guidance to the director community. It also conducts regular surveys of board practices, co-organizes the annual Best Managed Board Awards (BMBA) and Best CEO awards and an annual Directors Conference.

In identifying some of the contributions your Institute has made in helping to raise the standard of corporate governance here and increasing the awareness of the importance of good CG to sustainable value creation, I must add, without hesitation and reservation, that all these would not have been possible without the sustained and committed support and collaboration of our many partners, sponsors, regulators and the many individuals who have sacrificed much time and other resources to support the efforts of SID.

I am indeed grateful to all my Council colleagues, both past and present, honorary fellows and our Secretariat who have supported and worked tirelessly alongside me and to all of you members who have supported our programmes and activities. In particular, I would like to acknowledge the guidance, counsel and trust of our founding Chairman and President Chew Heng Ching whose call for support I answered 15 years ago and who ably led our Institute for the first 12 years of its existence. To each and everyone I would like to say a big thank you, both from myself and from SID.

The last 15 years have been immensely satisfying for me and I have learned and benefitted much from this experience. I have made many friends, both here, regionally and internationally and am humbled by the many opportunities given to me to contribute and lead at various levels.

Although many have said SID has done well I think much more remains to be done. I am confident that under Willie's leadership much more will be achieved. While I may step down from the leadership of SID at the end of June I will not be retiring completely, but will, where appropriate, continue to support our on-going CG efforts. It's farewell but not totally good-bye.

Thank you once again and may I wish each one of you good health, much success and happiness.

Warm regards,

John KM Lim
Chairman

SID Governing Council 2012/2013

Chairman : Mr John Lim Kok Min
First Vice-Chairman : Mr Willie Cheng
Second Vice-Chairman : Mr Adrian Chan Pengee
Treasurer : Mr Soh Gim Teik
Council Members :

Mrs Yvonne Goh	Mr Kevin Kwok
Mr Basil Chan	Mr David Conner
Mr Yeoh Oon Jin	Mrs Elaine Lim
Ms Yeo Lian Sim	Mr Lim Chin Hu
Ms Kala Anandarajah	Mr Robert Chew
Dr Ahmad Mohd Magad	Mr Kee Teck Koon
Mr Daniel Ee	Mr Chaly Mah
Mr Andy Tan Chye Guan	Ms Tan Yen Yen

Upcoming Talks/ Courses

Upcoming Events

JULY 2013

Tuesday, 9 July	LCD Director Programme Module 1 *Listed Company Director Essentials: Understanding The Regulatory Environment In Singapore: What Every Director Ought To Know*
Wednesday, 10 July	LCD Director Programme Module 2 (Morning Session) *Audit Committee Essentials*
	LCD Director Programme Module 3 (Afternoon Session) *Risk Management Essentials*
Thursday, 11 July	LCD Director Programme Module 4 (Morning Session) *Nominating Committee Essentials*
	LCD Director Programme Module 5 (Afternoon Session) *Remuneration Committee Essentials*
Thursday, 18 July	Defamation, Privacy And Reputation Management *By RHTLaw Taylor Wessing*
Wednesday, 24 July	EBL Module 5 *Investor And Media Relations*

SEPTEMBER 2013

Wednesday, 11 September	SID Directors Conference 2013
Tuesday, 17 September	LCD Director Programme Module 2 *Audit Committee Essentials*
Wednesday, 18 September	LCD Director Programme Module 3 *Risk Management Essentials*

SID-SMU Executive Certificate in Directorship

Modules	Programme Dates
Module 2: Assessing Strategic Performance: The Board Level View (3 days)	Monday, 15 July 2013, Tuesday, 16 July 2013 and Wednesday, 17 July 2013
Module 4: Risk and Crisis Management (2 days)	Tuesday, 20 August 2013 and Wednesday, 21 August 2013
Module 5: Strategic Corporate Social Responsibility and Investor Relations (2 days)	Tuesday, 23 July 2013 and Wednesday, 24 July 2013

Course schedule is subject to changes. Please refer to SID website at www.sid.org.sg for the latest dates.

How To Handle Difficult Questions At AGMs?

On 12 April 2013 at Marina Mandarin Singapore, Mr Mark Laudi, Chief Executive Officer of Hong Bao Media gave an enlightening presentation to more than 30 participants on useful tips to handle difficult questions better at AGMs. With shareholders being much more vocal than they have ever been and ever ready to speak up at AGMs and criticize corporate issues, Mr Mark Laudi also shared skills and tactics to help the participants to front shareholders' meeting with greater confidence.

All You Need To Know About The Personal Data Protection Act

Singapore has joined Malaysia and Philippines in ASEAN with the passing of the Personal Data Protection Act ("PDPA") which will come into force in mid-2014.

On 2 May 2013 at Marina Mandarin Singapore, Mr Rizwi Wun, Partner and Founding Member of RHTLaw Taylor Wessing LLP and Mr. John Ho Chi, Partner of Ernst & Young Advisory Pte Ltd gave an insightful presentation on Singapore's PDPA requirements, the penalties as well as the common challenges. With another 12 months for organisations to adjust, the speakers also provided information on how to embark on the journey to compliance.

The event was attended by 22 participants.

Improving Board Oversight Through Leading Practices

On 5 June 2013, Mr Donald Espersen, an independent internal audit advisor and member of the Institute of Internal Auditors (IIA) presented to about 20 participants on the Control Self-Assessment ("CSA"), a technique which allows process owners and management to participate in assessing the organisation's risk management and control processes.

The topics covered included:

- CSA: Origins, how it has evolved, recent applications, and lessons learnt for organisations
- Crafting a sustainable CSA program: The foundation, development and piloting, monitoring results
- Using CSA to develop an overall opinion on internal control: Confirming roles and responsibilities, gathering information, questions the Audit Committee may want to ask
- Internal auditing today: What is the internal audit's mission and value proposition
- Examples on how internal audit has added value to the business' strategic objectives
- The audit committee's expectations: What many audit committees have expected or valued and what some audit committees are starting to expect and value, identifying the expectation gaps
- Emerging practices and key resources: Audit committee communications practices, quality assessment and improvement programs, what the CAE may need from the audit committee

The event was held at Marina Mandarin Hotel Singapore.

Investing In Emerging Markets – Focus On ASEAN

Moderated By Kala Anandarajah,
SID Council Member and
Partner, Rajah & Tann LLP

Overview

A global economic tidal wave has caused and continues to be causing a shift in investment strategies and market growth over the last decade or so, and perhaps more visibly in the last couple of years, seemingly seeing a return to the world order that prevailed in ancient times where the economic powerhouses were what are now the most populous countries in the world. Somewhat straddling the two is ASEAN, which has a number of emerging markets and has seen and continues to see unparalleled growth in recent times. There are numerous reasons that can be attributed to this, including the fact that the ASEAN–China Free Trade Area, which came into effect on 1 January 2010, is the largest regional emerging market in the world. Given the potential, it is only natural that corporations across the world, including Singapore companies, would want to venture out of comfort zone and look to these remaining frontiers. But what risks abound? Is investing so easy that directors can simply leave the driving to management and enjoy the ride from the back seat?

Given these interesting questions, the Singapore Institute of Directors ("Institute") decided it was apt to do a round table discussion to gather thoughts and perhaps provide guidance on critical issues that companies, and in particular the directors, should consider when investing in the region. To ensure a balanced view, we sought comments from a businessman, a financial expert, an accountant and a lawyer. Each of the four individuals need no introductions

and are at the pinnacle of their careers. They are:

- **Mr Ho Meng Kit**, Chief Executive Officer, Singapore Business Federation
- **Mr Patrick Ang**, Deputy Managing Partner, M/s Rajah & Tann LLP (which has offices in 8 of the ASEAN countries and in China)
- **Mr Chris Woo**, Partner, PricewaterhouseCoopers Services LLP
- **Mr Gerald Ong**, Chief Executive Officer, PrimePartners Group

We set out here their thoughts on nine key questions. A common theme that emerges is that directors must do their homework before steering their companies into the new frontiers. DOING YOUR HOMEWORK is absolutely critical. And for those who do, it would appear that the rewards are immeasurable – a flip through the daily business newspapers and trawling through reputable news websites attest to this.

There is much buzz about investments flowing into Asia. Do you see this as true of what's happening?

Ho Meng Kit (HMK) – Dimming global growth prospects and soft domestic demand in Asia's two largest economies are slowing the pace of Asia's growth. Notwithstanding, the long term economic growth story in Asia is strong, supported by urbanisation, industrialisation and demographics. One notable trend is the intra-Asian investments flow. For example, there has been increasing flow of Japanese investments into ASEAN especially to Myanmar, Indonesia and South Asia driven by Japanese domestic factors and the increasing Sino-Japanese tensions which have affected Japanese business sentiments in mainland China. Chinese entrepreneurs have also stepped up their investments in ASEAN in the areas of infrastructure, transport, power, machinery and mining sectors.

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>
> *Ho Meng Kit*

Patrick Ang (PA) – Yes, there has been an increasing influx of investments into the ASEAN region as a whole. Specifically, based on the experience of our various country offices, Indonesia continues to draw foreign investors; Myanmar has been attracting a high number of enquiries and interest; while Vietnam has remained a highly attractive investment destination for investors from the European Union and the United States ever since its accession to the World Trade Organisation in 2007. Cambodia has also been gaining significant interest from such investors as well as interest from China and Korea; especially following the recent reforms undertaken in the country.

Chris Woo (CW) – Europe and Japan are seeing a slow down with even whisperings of stagnation. This is due to a combination of factors such as an aging population, excessive public spending and years of protracted recession. The rising tide of Asia has led to a range of investors that now see her as a means to not only fuel growth even as a place to raise capital in exchanges like Singapore and Hong Kong. This especially relates to European and Japanese mid-cap investors who are large in context of certain markets. Funds fuelled by excess liquidity are also looking for greater and faster returns.

Gerald Ong (GO) – This has certainly been the case since the Lehman Crisis in 2008. With Europe and the US slowing down and the continued loose monetary policy as epitomized by the various QE exercises, both financial and strategic investors have been looking towards Asia for growth and returns. Lately however, extremely low valuations in mature markets, especially of physical real estate in the US and some signs of US economic recovery has seen a flow of global monies back to the US.

Are there particular hot spots in Asia where you see the investments moving into? Do you see a bigger shift into the emerging markets in Asia, and if so, which particular emerging markets are on the top of the list?

HMK – One particular hot spot in ASEAN is Myanmar which has been touted as the "last market frontier" in South-East Asia. The opening of the Myanmar market and the gradual reform of Myanmar's political system have been an attractive proposition. Second on the list of hot spots in ASEAN is Indonesia which has demonstrated strong and resilient growth despite the recent years of international economic and financial turmoil.

PA – Myanmar is currently attracting the most attention amongst the various emerging markets in ASEAN as international investors try to capitalise on the opening up of that market. Cambodia should also be seen as a viable option for international investors as the country seeks to establish itself

in manufacturing services and other targetted sectors. Vietnam however continues to experience a general downward trend in both the size and number of inbound investments because of, among a slew of other issues, the weak local economy and the rising number of bad debts.

CW – South East Asia as a region is the clear poster child. Singapore is the locale for funds and investors seek a home to use as a spring board into the region. Indonesia, Malaysia, Vietnam and Thailand lead as countries for growth especially given the spending power of a rising middle class. Indonesia takes the lead in this respect with opportunities in the retail and fast-moving consumer goods ("FMCG") areas, recording an upbeat GDP growth for private consumption at 5.3% in 2012, according to the Asian Development Bank – http://www.adb.org/countries/indonesia/economy, which contributed almost half of the country's GDP growth on the expenditure side. While Indonesia's prospects may appear gloomy in the wake of the recent outlook downgrade by Standard and Poor's triggered mainly by political considerations related to next year's parliamentary and presidential elections, it remains South East Asia's market darling and continues to attract considerable investor inflows.

Extractive and agricultural industries remain the economic bedrock for emerging countries in South East Asia. Myanmar being one of the last new economic frontiers clearly presents such an opportunity. Energy and mining account for 55% of Myanmar's exports and 86% of its foreign direct investment (FDI) and world energy giants are hungrily eyeing the potentially oil and gas rich nation that remains relatively untapped. Gas sales abroad are also expected to more than double in 2013 as two large gas fields, Shwe and Zawtika, are scheduled to come online. Support from the international community in Myanmar is strong, clearly seen through the easing, suspending and lifting of sanctions on trade and investment. The strong desire of the Myanmar Government for reform coupled with the many opportunities in the country and its strong near term economic outlook of GDP growth at 6.3% in 2013, Myanmar is fast attracting a greater share of attention.

> Myanmar is currently attracting the most attention amongst the various emerging markets in ASEAN as international investors try to capitalise on the opening up of that market. Cambodia should also be seen as a viable option for international investors as the country seeks to establish itself in manufacturing services and other targetted sectors.
>
> *Patrick Ang*

GO – You really need to draw a distinction between the financial and strategic investment flows here. The impetus and rationale behind the flows for financial and strategic investments are totally different and correspondingly the geographical focus and investment time horizons are also different. Hence the markets in focus also changes depending on the nature of the investment.

What particular types of businesses are moving in? Is there a focus on any one sector or is it across the spectrum? Please share your personal insights too.

HMK – As ASEAN becomes an integrated single market and production base through the implementation of the ASEAN Economic Community by 2015, the ASEAN economy offers many foreign investors a myriad of business and investment opportunities. The type, scope and intensity of the investment projects in ASEAN will only be limited by the imagination and innovation of the investors.

The types of businesses attracted to a particular market will be determined to a large extent by the industries or business sectors that offer investors their best competitive advantage. For instance, Myanmar offers foreign investors the golden opportunity to establish their business presence early allowing these investors to maximise their returns when the Myanmar economy takes off in the future. Some of the industry hot spots in Myanmar are in the real estate / building construction sector, ICT / mobile phone telecommunications, automotive parts, agricultural machinery and parts, light manufacturing activities logistics, education and vocational skills training, hotels and hospitality and healthcare.

PA – In Cambodia, the agricultural sector is experiencing increased interest owing partly to the Cambodian government providing incentives to enhance certain agricultural crop production such as rice. In Vietnam, the construction and manufacturing sector is attracting large volumes of foreign investments owing to the fact that these businesses are largely labour-intensive, which enables them to benefit the most from the relatively low labour costs in Vietnam. Myanmar is seeing increased foreign investment over a wide range of sectors ranging from real estate to hospitality to construction, with no specific focus on a particular sector.

CW – Many private equity firms are showing heightened interest in Asian emerging markets to expand their portfolio companies. There are also more strategic buyers looking to expand beyond their traditional playing field of Europe and Japan. The retail and FMCG sectors are attractive areas in South East Asia. This is largely

> Many private equity firms are showing heightened interest in Asian emerging markets to expand their portfolio companies. There are also more strategic buyers looking to expand beyond their traditional playing field of Europe and Japan. The retail and FMCG sectors are attractive areas in South East Asia. This is largely driven by the population growth and increasing disposal income for discretionary consumption.
>
> *Chris Woo*

driven by the population growth and increasing disposal income for discretionary consumption. This is clearly the story in Indonesia. But the absence of infrastructure in emerging countries such as Myanmar also gives rise to investment opportunities for infrastructure operators, engineering and construction companies, private materials and financial firms. For instance, Myanmar has progressed a formal process of selecting two telecoms group to build and improve its national mobile network. The process attracted bids from most leading global telecoms group keen to tap into one of the few remaining untapped telecoms markets in the world. Myanmar has also seen Chinese investors establish an oil and gas pipelines across the country and, Indian and Thai companies exploring investment in ports within Myanmar.

GO – I keep a special eye on the Asian real estate sector (across all sub sectors). This is partly because of personal interest and partly because of the strong correlation between real estate investments and the Asian Consumption story. Obviously with the cheap monetary macro policies across Asia and the inflationary pressures, evidence of a real estate bubble has emerged and concerns about an eventual rise in global interest rates as the global economy slowly recovers, will have an obvious adverse impact on real estate valuations. What has been extremely positive is the pro-active stance taken by various monetary authorities across Asia, in managing such real estate bubbles.

What benefits can corporations going into the emerging markets expect to reap?

HMK – The primary motivation for most companies entering new markets would be to attain first-mover advantage. This has been the case with companies which entered China, Vietnam and India where these early market entrants gain significant control of resources, connections and manpower expertise.

The Food Empire's dominance in the former CIS countries for their instant coffee is a good example of first mover. Aside from this, new experiences associated with entering an emerging market offer companies fresh opportunities to acquire new customers, new management capabilities (e.g. sales and marketing, operations, product development and risk management), a wider talent pool and deeper market insights.

These experiences can help a company reshape its business model and reduce their learning curve when venturing into another emerging market with similar market characteristics. For example, Halal consumer products from foodstuff, fashion to toiletries developed for the Malaysian or Indonesian markets can be sold to customers in Central Asia, Middle East and Africa with a small degree of modification such as labelling changes.

PA – In general, emerging markets like Vietnam, Cambodia and Myanmar, provide the following benefits:

- Relatively low labour costs;
- Availability of natural resources;
- Generally investor friendly laws and regulation;
- Potentially good returns on investment; and
- Large untapped market and low penetration rate of many sectors providing tremendous growth opportunities.

CW – Investors can avail themselves to an abundant supply of natural resources, a large consumer population and a sizeable pool of young low cost labour. In Myanmar, strategic investors bringing capital, development in key infrastructure and creating jobs can also enjoy a warm welcome from an investment friendly government. The relevant laws and regulations are changing at a rapid pace to accommodate investments. Such a rapid pace of change allows investors to tap tax concessions and to an extent shape how the regulations are crafted and interpreted. This is in the interest of providing benefits for both the nation and investors.

GO – Generally, foreign investors (both strategic and financial) are looking for growth and returns that reflect risks taken. Again, one has to distinguish between strategic and financial investors. Because of the different investment time horizons, targeted investment amounts and sector focus, there are major differences between these 2 sets of investors.

Obviously, financial investors have much shorter time frames and much more liquidity, resulting in "hot flows" of liquidity that play havoc with economies that are smaller and / or with less robust regulatory frameworks. Because they have the ability to move in and out of markets at will and because global fund managers have large AUMs

they sometimes swamp the markets that they target. Their objectives are purely financial in nature and they would target higher IRRs than what they can achieve in their home markets

Strategic investors are by definition focussed on specific industries and typically establish points of presence with hard assets (an office / factory / subsidiary company) that are relatively illiquid. As such, their objectives tend to be driven by longer term strategic considerations – penetration of a foreign market, purchase of a technology or establishing of a manufacturing concern that reaps benefits from lower labour costs or tax benefits.

What are key points that businesses need to be alert to when they go into an emerging market? Please consider and provide insights from a pure investment / business perspective, from a financial perspective, from a legal perspective etc. Please also share actual experiences of companies who have gone in and the issues seen. Also please share if the issues are common across different countries or different, and if different, what the differences are.

HMK – Venturing into new markets is risky with challenges that arise from the different operating environment. Investing in a new market requires a deeper understanding of the market compared to trading given the increased risk and capital outlay associated with this entry option.

- Understanding the social-political environment is important for any investments. We know of companies who found their contract or partnerships nullified by new parties which came into power after a regime change e.g. Libya where some existing contracts of our companies with the Gaddafi government were no longer recognised by the new regime.
- Understanding the legal system of a country is important but knowing how the laws are interpreted and enforced is also important. This is particularly so for emerging markets where civil law (covering businesses) are antiquated. E.g. Intellectual property infringement is common in emerging markets, there are times where the court has passed judgement against the perpetrators but the judgement cannot be enforced effectively or vigorously.
- Understanding the financial system and taxation laws are key to ensuring that the overseas business entity can raise capital and repatriate profits home optimally.

PA – Each emerging market presents its own challenges that investors need to be aware of. Generally, across emerging markets, foreign investors should note

- the different business cultures;
- the need to engage in lobbying and to rely on connections or relationships; and
- possible bureaucratic red tape slowing things down.
- unfair competition;
- unfettered powers of government officials ; and
- need for good connections / networking with government entities.

For example, in Vietnam, investors should be aware of the following issues:

- Established market lobbying practices; and
- Bureaucratic risks.

To illustrate, even though the time for the processing of an application for a foreign investment license is officially 45 days, the average time taken for a license to be granted is usually 2-3 months and in some business sectors (such as distribution), the licensing process can take up to 9 months. Such processes can obviously be sped up through the use of consultants that usually charge a relatively large fee in order to "facilitate" or "expedite" the processes but the methods that these consultants use may sometimes raise queries. Further, even though restrictions on foreign investment have largely been removed from most industries, the requirement of a business license for the setting-up of all foreign investment vehicles carries an implicit bureaucratic risk in the form of administrative discretion of the licensing authorities. It is not unusual for authorities to reject license applications on non-specific grounds.

CW – Businesses need to carefully plan their legal and capital structure to provide for agility. There are many key considerations and each would vary accordingly to the dynamics of the investment. (1) What legal entity form should the investment take? (2) How should this held? (3) What is the correct level of paid-up capital versus debt? (4) What happens if I need send senior people to be based there? (5) How should I support the operations from offshore? (6) How can I provide for the repatriation of profits? (7) Should I plan for future co-investors and / or a possible exit? These and many other factors need to be considered as one picture. The legal structure cannot be designed without full consideration of the operational plans. The projections cannot be determined without a clear understanding of transaction that will occur onshore or where there is a need for offshore ones as well. While many of these questions can be tedious to address at the onset when everyone is anxious to plant a flag in a new market it is always best to exercise prudence to consider whether cash can be repatriated home without any tax leakage or foreign exchange controls? How do we determine the most efficient manner to fund the building of a factory? The key

considerations are generally universal. But differences obviously exist by geography, industry, operations, etc. There is no universal answer. A solution for an investment in Vietnam would not apply to another in Myanmar.

GO – Emerging or Frontier markets have by definition, the following:

- A less robust legal framework
- A less mature financial sector
- Local currencies that are volatile and that have "more expensive" interest rates
- Business practices that are extremely "local" and not international
- Accounting and legal standards that might not be sufficiently high
- Regulatory authorities that are not necessarily experienced enough or sufficiently exposed to international practises. Possibly inconsistent application of regulations
- Potential issues with corruption and bribery

What are the typical pitfalls that a corporation is likely to face? Provide practical insights.

HMK – Some of the typical pitfalls that a company is likely to experience are:

- Poor due diligence (DD). In some markets, effective DD alone is not possible due to the lack of credible sources / institutional repositories of corporate information that companies can rely on. The other common pitfall is simply the reluctance of companies to conduct basic DD on potential contacts / partners.
- Insufficient in-depth market feasibility studies conducted to measure the real extent of business opportunities and identify risk and profit expectations.
- Choice of wrong or incompatible local partner. In most cases, Singapore companies will have to listen to their lawyers to incorporate legally binding exit mechanisms in the event of a business relationship turning sour.
- Unfamiliarity with local bureaucracy navigation procedures.
- Inability to manage the often high level of red tape and facilitation practices
- Unclear or ever-changing ambiguous local rules and regulations governing the business sector / activity. In some markets, local interpretations of a legal regulation could vary from one officer to another.
- Failure to fully identify and manage risk points in the local market.
- Failure to fully understand the local labour / employment regulations and practices which can often lead to labour unrest, financial penalties which can disrupt operations. In some Asian markets, the courts will often rule arbitrarily in favour of the grievances / complaints of local employees.
- In summary, for Singapore companies entering a new foreign market, they need the counsel of three (3) important players – a lawyer / legal consultant, an accountant / tax consultant, and a banker / financial consultant.

PA – Foreign investors typically encounter the following pitfalls when investing in emerging markets:

- Failure to follow locally established practices;
- Failure to fully understand local laws and policies; and
- Failure to appreciate the risks associated with an emerging market and tailor expectations accordingly.

In Cambodia, many things are done based on locally established practices even though the law is clear on a particular point. Therefore, negotiations are key to ensuring that everything goes smoothly.

In Vietnam, a failure to understand local labour laws may lead to labour related problems. The labour laws in Vietnam generally favour employees, often at the expense of employers. It is notoriously difficult to terminate an employee without cause in Vietnam. Local businesses however have developed innovative ways of dealing with this – for example, having an undated mutual termination agreement signed by the employee upon grant of employment, or through more indirect means, such as passively "counselling out" sub-performers by keeping a public employee performance chart with details such as key performance indicators and peer assessments / evaluations.

In Myanmar, the common pitfall is that investors fail to appreciate the risks associated with a country that is just emerging into the world economy and thus presents a number of risks ranging from political, social, business to legal/ regulatory. Investors should therefore adjust their expectations and not expect matters to progress in the same manner and pace as they will in their home jurisdictions.

CW – See responses to previous questions above

GO – See responses to previous questions above

How important is it to have local partners when commencing a business? From a legal perspective, do the legal requirements mandate majority local ownership? What are some typical legal structures when going into an emerging market?

HMK – The legal requirement mandating majority local ownership will differ from market to market and within a specific market, from business sector to business sector.

Firstly, the importance of local partners depends on the country's regulatory requirements for local partners and local content. In certain emerging markets

like the Gulf Corporation Countries (UAE, Saudi Arabia, Oman etc.), companies there require a local sponsor as a majority shareholder with a minimal of 51%. There are exceptions for companies operating in specific places like freezones which allow companies to own majority or 100%. In specific sectors where the local governments are trying to encourage investments, exceptions where foreigners can hold majority shares are possible.

The second consideration is the industry you operate in, your business capabilities and resources will determine a company's entry model; either alone or through partnerships. If a company has the resources, entering the market on its own after extensive studies will be a good option as this would provide maximum control over the business and avoid issues relating to differences in partnerships.

The types of company structures vary from country to country depending on the legal regulations. Representative offices, sole proprietorship, partnerships incorporated companies are common business structures globally.

PA – Most emerging markets require local partners only for certain specified industries, but in any case, where an investor is unfamiliar with a particular market, having a local partner should facilitate the easier handling of issues. Also a local partner can bring intangible benefits including

- network and connection with the government which will facilitate and expedite lots of things;
- ability to bridge cultural differences and accompanying trust issues; and
- ability to speak the local language.

In Vietnam, a tried-and-tested route for foreign investment is the setting-up of a representative office (which is limited to marketing, PR and liaison activities) to establish market presence, before establishing a corporate presence (in the form of an limited liability company or a joint stock company – the latter being limited by shares and the former being limited by capital contribution percentages).

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>
> *Gerarld Ong*

In Myanmar, the preferred structure is a joint venture with the local partner though there has been several wholly owned foreign investments in sectors that are completely open to foreign participation.

In Cambodia, the preferred structures are a Limited Liability Company, a branch of a foreign company or a representative office (which is limited to conducting market research and marketing).

CW – To enter an emerging market and capture its potential, foreign investors ought to gain a comprehensive understanding of the lay of the land and make the necessary customization to fit local business environment rather than assuming approaches that may have worked in home country without making any adjustments. Foreign investors may wish to consider having local partners when commencing their businesses to accelerate growth in these emerging markets. Finding a right partner with the right capabilities who share common values in emerging countries is often a critical but necessary strategic endeavour.

A common joint venture structure take into account an investment in kind by the joint venture partner and a contribution of cash to fuel growth. How such capital is injected and structured needs to take into account the joint venture agreement. Is a buy out envisaged in the future? How will profits be extracted?

How a joint venture is to be formed and the relevant legal structures is critical. This may include interposing a holding company in a suitable location for holding investments in the emerging countries. Singapore is often one such favourable holding location due to general factors such as political stability, efficient infrastructures, well established market and relative ease in setting up of companies.

GO – We would encourage our strategic investor clients NOT to walk into a frontier market without a trusted local partner, unless the client is already experienced in that market. This is the case, even if the local legal framework permits 100% foreign ownership, UNLESS the objective of the strategic investor is to utilise the local presence for lower manufacturing costs and production is entirely targeted at foreign markets.

Financial investors are of course able to enter and exit at will, however, a clear idea of the liquidity of the market is necessary to prevent a situation whereby the financial investor gets stuck due of illiquidity arising from a "crisis situation".

Are facilitation payments expected when doing business in emerging markets?

HMK – "Facilitation payment" may be prevalence in any markets and not just in emerging markets. This is not encouraged as it increases the cost of doing business and to the cost of procurement. From the businesses' perspective, we should recognize that

doing business with integrity is the only right way of doing business. Companies seen to be doing business with integrity are more likely to attract and retain highly principled and motivated employees as well as ethically-orientated investors. In contrast, companies confronted with corruption face reputational damage.

PA – Investors generally continue to experience having to make facilitation payments in many emerging markets. Having said that, as the emerging markets develop, there is the expectation that incidences of such payments should reduce as governments seek to enforce or introduce more stringent anti-corruption laws. For example, recently, the Cambodian Anti-Corruption Unit (ACU) adopted an Anti-Corruption Law which makes any payment of non-regulated fees illegal and qualifies any such payment as a bribe. This has imposed difficulties on the operation of businesses in Cambodia, particularly those that are listed companies and are vulnerable to being seen as endorsing payment of non-regulated fees. Government entities, led by the ACU, are putting together fee schedules so that this issue can be avoided.

CW – PwC does not view any facilitation payments as a necessity when doing business in emerging or any markets.

GO – In many emerging and frontier markets, facilitation fees are considered necessary to establish a toe hold in the market. This typically puts the onus on the strategic investor to maintain their moral and ethical standards

What should a director of a company be specifically alert to when they decide to invest in an emerging market? What are some of the risk points they absolutely have to be aware of? How can they assure shareholders?

HMK – As mentioned above, understand the business environment from macro issues such as the social and political environment, financial systems to other industry level issues and general business practices are important in order to formulate a winning strategy that can deal with key risks and build a sustainable and rewarding business in new markets.

In depth market studies and careful planning with support from trusted local advisors will help the companies avoid unnecessary pitfalls that could lead to reputation risks, operational disruptions and financial losses. Executing strategies by the right type of management staff supported by the right alliance partners will ensure strategic alignment.

Therefore, developing the necessary management capabilities for good governance, ability to operate in new environment, capacity to deal with potential challenges and effective crisis management capabilities are all integral to building competitive advantage in emerging markets.

PA – A director who wishes to invest in an emerging market should be aware of the issues and pitfalls highlighted in the answers to questions 5 and 6 above.

In addition, the director should be aware of the driving forces behind the social, economical and political policies of an emerging market. Identifying the driving forces will allow businesses to react more quickly (and favourably) to changes in policy. For example, in a bid to drive down the high inflation rate in Vietnam in 2011 (more than 23%), a slew of anti-growth measures were taken by the government which resulted in lending rates of over 20%. The more astute businesses chose to repay their domestic loans, and to finance their working capital with offshore loans and the less savvy businesses were crippled by the high cost of funding. When the government decided to lower the loan to deposit ratio of banks (or increase the capital reserves of banks, depending on how you look at it), ostensibly to make sure that banks were not over-extending themselves but effectively adding another layer to the credit crunch, the deposit rate of local banks went up to around 16% for long term VND deposits. Again, the more astute businesses responded by moving shoring up their cash reserves and moving these into the local banks, effectively lowering their cost of borrowing (lending rate minus deposit rate).

On a more specific level, directors should be aware of market and industry practices and the legal and tax framework applicable to their chosen modes of investment.

Shareholders need to be assured that their directors are alive to the issues on the ground, and not just the issues that make it to the international newspapers.

CW – Please refer to the comments in questions (6) and (7) above.

GO – I sit on the Board of 2 listed companies, one of which invests in Vietnam and the other in China. For myself, prior to any investment decision, I specifically look out for the following:

- To ensure that we do not inadvertently breach local laws and regulations. This includes having clear internal codes and prohibitions against bribery / corruption. As such, having a trusted local set of lawyers is critical
- A robust financial model with sensitivity analysis built in. It is quite common for key variables to change and change drastically. It is also quite common for regulatory approvals to take significantly longer than anticipated. As such, the models must build in sufficient comfort taking into account these negative possibilities
- In many cases, we look to bring in our own bankers to finance our investments at the project level
- Most critically, we would look to ensure that the local partner is trustworthy, honest and financial sound. ■

Navigating Corruption Risk In South East Asia

By Corene Crossin, Managing Director of South East Asia Control Risks Group Limited

Overview

For companies seeking sustainable growth at a time of persistent global economic uncertainty, ASEAN offers an abundance of opportunities for foreign investors. Indonesia is anticipated to be in the top ten of the world's largest economies within the next 20 years. Philippines remains one of the most resilient economies in the region and is set to see 6% growth this year. Vietnam is set to grow at a steady 5%. Thailand is set to grow at a similar pace, with strong prospects for further growth next year. The new economic wunderkind of ASEAN, Myanmar, has attracted headlines and an upsurge in investor interest since undergoing dramatic political and economic reforms in the past two years.

This economic good news indicates that at one level all is well across ASEAN. However, in all of the emerging economies of South East Asia corruption remains a major challenge to international business. On one hand, the US, the UK and other Western governments have introduced strict laws making it a criminal offence to pay bribes abroad. On the other, standards of governance remain at best inconsistent in these markets. Well-managed international companies have no choice but to comply with their countries' anti-corruption laws but often face competitors who follow different standards. All too often there are deep inconsistencies between legal principle and commercial practice.

Corruption manifests in different jurisdictions in different guises, with some industrial sectors more prone to political interference and bribery than others. Across the emerging markets of South East Asia corruption remains a persistent challenge. For instance, despite having the region's most effective anti-corruption body, Indonesia's weak governance, complex and inefficient government approval processes, and

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poorly paid civil servants ensure that facilitation-payment risks will remain a considerable challenge for the foreseeable future.

The Philippines, like Indonesia, has been plagued by corruption at every level of society, and in particular at the hands of previous administrations. President Aquino was elected on a clean governance platform, and while progress has sometimes been slow he has considerably improved the picture at the central and higher-levels. Meanwhile in Malaysia foreign investors are often surprised by levels of corruption in the country: it has a poor record of non-politicised prosecution of corruption and lags behind Indonesia and the Philippines in efforts to improve governance.

Further to the North, money politics unfortunately still plagues Thailand, and certain ministries – notably those connected to land, transport, telecoms and energy – will remain prone to rent-seeking from politicians (and their cronies) seeking to capitalise on their (often) brief) spell in power. Finally, Thailand's neighbour, Myanmar is recovering from two decades of military rule, and was characterised by graft, a lack of transparency and the absence of an independent judiciary. Since the transition to civilian rule in March 2011 the government has strongly articulated its commitment to anti-corruption, recognising the need to attract foreign investment. However, as is the case in many emerging markets, the capacity to enforce commitments remains limited.

Increasing market share in South East Asia's emerging markets at the same time ensuring adherence to tough international and local anti-corruption laws will be the key challenge for senior managers and Boards of international businesses over the next five years. Drawing on Control Risks' extensive experience in assisting clients identify and actively reduce their exposure to corruption risks in South East Asia (and beyond), this paper outlines two key areas of corruption risk faced across emerging markets. The paper then asks whether it is possible for international companies to take full advantage of tantalising economic opportunities and apply effective zero tolerance anti-bribery and corruption policies. We believe it is possible, but genuine zero tolerance in many South East Asian economies takes considerable leadership, resources and resilience.

Navigating The Daily Grind

Control Risks recently commissioned the Economist Intelligence Unit ("EIU") to conduct a survey of corporate lawyers and company secretaries in a total of 316 companies worldwide. We asked respondents to identify their greatest integrity and corruption concerns and to tell us how they prepare their employees to meet these challenges.

The survey results indicated that the majority (58%) of respondents were most concerned by demands for 'operational bribes' from public officials such as customs officials. This mirrors concerns regularly expressed to us by senior managers of companies working across South East Asia. For the majority of companies with operations in Indonesia, Vietnam and Cambodia demands for facilitation payments (or operational bribes) to ensure the smooth running of their businesses are common place. Until the introduction of the UK Bribery Act in 2011, the majority of companies believed that such payments were an acceptable but regrettable cost of doing business in these jurisdictions. US companies in particular felt reassured that they could fall back on the limited "facilitation payment" exception under the US Foreign Corrupt Practices Act. However, the advent of the UK Bribery Act has changed the rules of the game as it has no facilitation payments exception: a bribe is a bribe no matter how small the sum involved.

A core challenge for doing business seeking compliance with international anti-corruption law in emerging markets in South East Asia then is to devise strategies to eliminate these payments. This is no easy task: the amounts of money that change hands are relatively small. Demands for operational bribes are particularly difficult to deal with because they are often accompanied by an implicit threat: "If you don't pay, your business will suffer". Frequently the public official involved will not themselves acknowledge that such payments are bribes. Rather, officials frequently see them as acceptable payments used to supplement meagre salaries, making resisting demands for these payments all the more difficult.

The FCPA, the UK Bribery Act and other similar national and international laws specifically forbid "indirect bribery" where a third party intermediary pays bribes on a company's behalf. The risk is therefore that one of these intermediaries might pass on part of his or her fee as a

bribe in return for favoured treatment in the award of a contract or the granting of a permit or license. Corruption risks associated with reliance on third parties such as commercial agents and consultants in were selected by 52% of the respondents and came second in our aforementioned survey.

Again, this finding reflects the day-to-day difficulties experienced by international companies in South East Asia when selecting, and then actively managing relationships with third parties. In Vietnam, for example, companies negotiating contracts with state owned enterprises are frequently provided a list of "preferred" third parties that they are then pressured to award contracts to. When the ownership structure of these third parties are scrutinised, however, it is common to uncover beneficial owners with close ties to public officials linked to the state owned enterprise or other influential political figures. Meanwhile in Indonesia, where demands for illicit payments are customary in interactions with government agencies, many international companies assume they can manage corruption risk by using third parties. In recent research we asked senior managers of international companies in Jakarta whether they could be confident that the third parties were not paying bribes on their behalf, one executive's answer was typical of the response of other corporate interviewees: "*We do due diligence, but frankly I don't want to know what they are doing on our behalf.*" This is a particularly high-risk approach to dealing with corruption: extraterritorial anti-corruption law prohibits "wilful blindness" of wrongdoing.

In discussions with clients across the region, the majority acknowledge that corruption is a persistent headache. Making a profit in a way that meets head office expectations, while remaining compliant with anti-corruption laws, and company policy, is a universal challenge. Equally challenging is communicating the day-to-day prevalence of corruption in key South East Asian markets to head office and tempering expectations about achievable growth in light of the complex operating environment. The question for companies seeking growth in South East Asia, then, is whether it is possible to take full advantage of tantalising economic opportunities and apply effective zero tolerance anti-bribery and corruption policies and procedures in Indonesia. We think it is possible, but it takes considerable tenacity.

Resolving Tensions Between Profit And Compliance

Best practice anti-corruption principles are now widely recognised and understood by the senior managers of international companies. Indeed the majority of companies have – at a minimum – formal statements prohibiting bribery and corruption, including anti-corruption policies. Increasingly companies are putting in place formal procedures to support these policies, including due diligence procedures for managing relationships with third parties and ensuing that anti-corruption clauses are incorporated into contracts with those third parties.

Yet policies, procedures and training programmes set at a headquarters level do not necessarily provide the complete solution for companies seeking to solve the complex integrity problems faced in day-to-day operations in South East Asia. Equally, we often find senior managers are frustrated when attempting to reconcile the significant resource requirements of implementing adequate anti-corruption procedures against pressure to cut costs, increase sales and grow margins.

Given these concerns, what can be done to effectively combat corruption in South East Asia? We believe the tension between compliance and achieving growth can be resolved. Companies that have successfully done so in Indonesia, Thailand, the Philippines and beyond have used a combination of creative problem solving, consistent training on company policy, and the intelligent selection and active management of third parties to reduce their exposure to corruption risk. These companies typically have had the clear support of head office that comes in the form of tangible financial assistance for compliance functions as well as acknowledgement that to do things right in challenging emerging markets will take longer than in other, less complex markets. ■

Increasing market share in South East Asia's emerging markets at the same time ensuring adherence to tough international and local anti-corruption laws will be the key challenge for senior managers and Boards of international businesses over the next five years. Drawing on Control Risks' extensive experience in assisting clients identify and actively reduce their exposure to corruption risks in South East Asia (and beyond), this paper outlines two key areas of corruption risk faced across emerging markets.

Investing In Myanmar – Ready For The Leap Of Faith?

Chester Toh, Partner and
Vimaljit Kaur, Senior Associate
Rajah & Tann LLP

The Golden Land of Myanmar is opening up after 60 years of isolation. In the past year and a half, the country has experienced a flood of potential foreign investors from various industries. Many came with expectation of tapping the country's rich resources and accessing a market of over 60 million people with potentially rising income levels. It is of course no easy task given that years of inward-looking policies have created a system that is not well-suited to 21st century commerce. One key challenge international investors face or are likely to face is ensuring international standards of corporate governance. Implementing group-wide compliance policies to one's operations in Myanmar is also not without its difficulties. As companies surge towards the country in exuberance, directors will need to be alive to the risks that investing in Myanmar bring.

Regulatory Environment

Foreign investors exploring opportunities in the country will typically find rules and regulations that date back to the British colonial days, with the exception of investment laws that are recently enacted. Myanmar's legal system has its origins in English law and shares some similarities with other British colonies such as Singapore, Malaysia and India. The Myanmar Companies Act of 1914 which is almost 100 years old has largely remained in its current form. Laws relating to company formation, liquidation, bankruptcy and accounting requirements are archaic and will require reform to bring them closer to international standards. In fact, the "Burmese way to Socialism" from 1962 to 1988 and military rule under the junta have resulted in a complex web of socialist legislation, notifications and military orders which are difficult to access and reconcile. This gives rise to greater challenges for compliance. In spite of recent reforms to tax legislation,

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the tax system remains opaque and there is widespread underpayment of taxes. Myanmar will need to address this tax leakage and recent signs are encouraging, with the formation of a new Board of Scrutinizing and Monitoring of Tax Collection to step up tax collection in the country.

Contrary to the myth that Myanmar has very little laws, foreign enterprises in Myanmar are heavily regulated. Foreign investors incorporating their company under the Myanmar Companies Act 1914 ("CA") will also need to obtain a Permit to Trade from the Directorate of Investment and Company Administration. Depending on the nature of the business activities, a company may also require approval from the Myanmar Investment Commission ("MIC") under the Foreign Investment Law 2012 and its implementing rules. Besides these usual permits, foreign businesses may also have to undertake registration with sectoral regulators and obtain approvals from local township offices before commencing business. Certain requirements imposed by regulatory authorities may be administrative in nature and may not be based on published laws and regulations which create another layer of difficulty from a compliance perspective.

Anti-Corruption Compliance

Corruption is a problem that is not uncommon to emerging markets. Even though it is an offence punishable under the Penal Code in Myanmar, there is very little enforcement and Myanmar continues to be consistently ranked by Transparency International as amongst the most corrupt nations in the world. The bureaucracy and red tape foster a practice of paying facilitation payments which the current Myanmar Government is very keen to eradicate. As Myanmar take strides towards cleaning up its civil service, the effects of these reforms will take time to gain traction with the junior governmental officials. Till this day, low level corruption is not uncommon. While gifts may be culturally acceptable, it becomes difficult in practice to draw the line between what is legally permissible and what amounts to a bribe. Directors of companies seeking to enter the Myanmar market must exercise caution, particularly in high-risk sectors such as mining, infrastructure development and energy. It is also important to conduct due diligence on agents, brokers and introducers who claim to assist companies in navigating the difficult regulatory environment. Taking a risk-based approach, executives responsible for developing the Myanmar market should be given additional training on anti-corruption that takes into account the local operating environment. Given the extra-territorial reach of anti-bribery laws from certain countries such as the US Foreign Corrupt Practices Act and the UK Bribery Act, foreign law compliance should also be a key tenet of a company's compliance measures.

Business Partners

In an emerging market such as Myanmar, it is not uncommon for international investors to look for local partners. In some cases, it may even be a necessity as certain sectors are not completely open to full foreign participation. However, finding the right local partner is one challenge that most companies face. Beyond the usual communication difficulties and cultural differences, companies have to understand that the pace of doing business and concluding a deal may take time as their counterparties may be used to a different tempo. As the country quickens its pace of opening up, in some instances there may be a mismatch in

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In an emerging market such as Myanmar, it is not uncommon for international investors to look for local partners. In some cases, it may even be a necessity as certain sectors are not completely open to full foreign participation. However, finding the right local partner is one challenge that most companies face. Beyond the usual communication difficulties and cultural differences, companies have to understand that the pace of doing business and concluding a deal may take time as their counterparties may be used to a different tempo.

expectations between foreign and local parties which may not be easy to bridge. It is however important to understand that as foreign parties assess their local partners, likewise the local partners are assessing the foreign parties at the same time. Even if both parties may be committed, relationship and trust cannot be built overnight. Further, while it may be natural for foreign companies to seek out well-connected partners, this can be a double-edged sword if the venture were to sour down the road and it becomes necessary for the foreign party to exit.

As part of corporate governance, companies also have to undertake due diligence on their business partners. However, decades of isolation and stifled economic development means that the country is something of an information "black hole" with little public access to official records of the company or filings with the Companies Registration Office. It is also difficult to undertake litigation and bankruptcy searches in Myanmar unlike in developed countries where such searches are par for the course. This dearth of reliable public data makes it difficult for investors to ascertain the standing of their potential local partners. International standards on corporate governance and best practices with regards to accounting and corporate reporting do not presently exist in Myanmar. Dual book-keeping is unfortunately still a common practice. While business integrity due diligence is provided by a handful of service providers, it is not widely undertaken except for certain foreign parties that are concerned with doing business with sanctioned individuals or entities.

Risk Assessment

In a difficult regulatory environment fraught with uncertainties, in making business decisions, directors will need to accept that there may not be clear-cut answers unlike investing in a developed country with a clear and transparent regulatory system where rule of law is upheld. In most instances, companies have to rely on advisors to assist with a risk assessment. It is therefore important to seek out advisors with a strong understanding of the Myanmar regulatory environment and possessing the skills set to undertake such risk assessment. Needless to say, companies seeking to invest in Myanmar will first require a clear sense of the institution's own appetite for risks. In the case of Myanmar, the road to the "gold mine" may be littered with "land mines" but the potential of Myanmar as an investment destination is unquestionable if the pace of reforms continues. It therefore only leaves the question – are you ready for the leap for faith? ■

Vimaljit Kaur is currently based in Rajah & Tann LLP's Yangon office. The views reflected in this article are the views of the authors and do not necessarily reflect the views of the global Ernst & Young organization or its member firms.

FEATURE

Attracting Holding Companies: Enabling Interest Deductions

By Jonathan Stuart-Smith,
Leader of the Global Tax Desks in Asia-Pacific and Daniel Dickinson,
Senior Manager, International Tax Services UK Tax Desk
Ernst & Young Solutions LLP

Overview

Many countries throughout the world have taken the view that attracting and retaining holding company activity is beneficial, either to seek GDP benefits, additional overall tax revenues, or both. Singapore is no exception.

When assessing the relative merits of potential holding company locations, multi-national companies ("MNCs") consider different commercial, practical and tax questions. Tax questions that may be considered include:

- Taxation of dividends received and capital gains on future disposals of investments
- Extent of tax treaty network
- Withholding tax regime
- Availability of local incentive arrangements
- Existence or nature of controlled foreign company provisions

When considering the above factors, Singapore often ranks amongst the most attractive regimes. In the Asia-Pacific region, Singapore often takes top spot alongside Hong Kong and Malaysia as the most competitive regimes, and also compares favorably with other attractive regimes further afield such as the Netherlands, Luxembourg, the UK and Switzerland.

However, an area where Singapore can be seen as lagging behind some territories is in the rules on tax relief for interest expense. In this regard, Singapore can perhaps take a leaf from the UK's book in allowing group relief for interest expense.

Where a company borrows to acquire equity investments, no relief is available in Singapore for interest expense incurred on that borrowing as dividend income received is, in most instances, tax exempt. These rules apply equally to borrowings entirely from unconnected third party lenders.

Even where interest expense is deductible in Singapore, if it results in deficits (for tax purposes) in the holding company which has borrowed the funds, these deficits cannot be set off against taxable profits arising to connected Singapore companies under Singapore's group relief rules.

However, an area where Singapore can be seen as lagging behind some territories is in the rules on tax relief for interest expense. In this regard, Singapore can perhaps take a leaf from the UK's book in allowing group relief for interest expense.

Singapore is not alone in seeking to restrict relief for interest deductions in this area. The US and Germany have had similar provisions in place for some time whilst Japan, the Netherlands and Spain have recently announced measures to tighten their rules on interest deductibility in these circumstances.

Comparison With The UK

In recent years, the UK authorities have adopted a deliberate policy to increase the UK's attractiveness for holding company activities. As part of this reform, the UK has made various changes such as introducing an exemption from corporation tax for dividends received in the UK, and significantly relaxing the UK's controlled foreign company rules.

During these reforms, the UK authorities have maintained the UK's flexible regime on relief for interest expense for UK corporation tax purposes.

Relief For Interest Expense

In many circumstances, the acquisition of non-UK investments by a UK holding company should not result in the UK holding company paying any additional future UK corporation tax because of exemptions from corporation tax for dividends and capital gains. However, that UK holding company is still entitled in principle to tax relief for interest expense incurred on loans taken up to fund the acquisition(s).

That is not to say that UK holding companies are entitled carte blanche to tax relief on any amount of interest expense incurred. The approach the UK authorities have taken is to allow relief for interest expense on acquisitions subject to various anti-avoidance provisions.

These provisions include so-called "thin capitalisation" provisions where UK companies must be comfortable that amounts borrowed, and the terms of that borrowing, are "arm's length". In other words would an unconnected third party lender have made the same loan on the same terms to the UK company in question?

A further set of rules is the so-called "worldwide debt cap" provisions. These are mechanically complex but in concept seek to prevent a UK taxpaying group of companies from disproportionately bearing the "worldwide" group's borrowings and interest costs.

Both of these anti-avoidance provisions are far less likely to apply where a UK company borrows directly from a third party. For example, it is generally difficult for the thin capitalisation rules to restrict an interest deduction where funds have been borrowed from a third party in a commercial transaction. In Singapore, even with direct borrowing from a third party, interest relief can still be restricted where the borrowing funds the acquisition of equity investments.

Group Relief

Where a UK holding company does borrow to fund an acquisition and the anti-avoidance provisions do not apply, it may well result in a loss for that company for UK corporation tax purposes because there may not be sufficient UK taxable profits against which to offset the deficit.

In those circumstances, the UK's flexible "group relief" system can allow relief for this deficit to be taken. On a current year basis, companies generating losses on interest can "surrender" those deficits to other UK companies making up their "group". A group includes all UK companies who are 75%-owned, directly or indirectly, by the same parent company. That parent company can be UK or non-UK resident.

The other UK companies in the group can offset these losses against other sources of taxable profits, such as from trading activities, interest income or taxable capital gains.

Conclusion

We consider that the inability of Singaporean holding companies to "surrender" interest expense or deficits to other Singapore resident companies under the existing group relief rules artificially forces groups to combine holding activities with trading activities in the same legal entity in order to provide some relief for the interest expense.

This puts Singapore at a disadvantage to other territories as MNCs often prefer to keep these activities separate, for example to facilitate efficient deployment of capital or future disposals of investments.

The recent Singapore Budget 2013 did not include any proposals to introduce group relief for interest expense. Is it too much to hope that, if interest expense is inherently "deductible" for one Singapore company, it can be available for relief against the profits of related Singapore entities? Let's keep our fingers crossed. ■

The views reflected in this article are the views of the authors and do not necessarily reflect the views of the global Ernst & Young organization or its member firms.

Overview Of Legal Considerations When Investing In Emerging Markets

By Ong Sin Wei, Partner, Corporate/ Mergers & Acquisitions Practice, WongPartnership LLP

With the ongoing Eurozone financial crisis and the US economy still recovering from the global financial crisis of 2007-2008, emerging markets are becoming important engines of global growth.

Until the recent slowdown, China and India, the two largest emerging countries, were the main engines of global growth. Of late, emerging countries in Southeast Asia such as Indonesia, Malaysia, Myanmar, Philippines and Thailand have been spotlighted by business publications and economists as representing the few bright spots in an otherwise moribund global growth outlook. These emerging markets have become the focus of the investment community and multinational companies.

Singapore's relatively limited domestic market and geographical location mean that Singapore companies as well as Singapore-based multinational companies are looking increasingly at such emerging countries within Southeast Asia to drive their next stage of growth.

In this article, we will look at some of the legal considerations that directors of Singapore-based companies should take into account when investing in these emerging markets.

Legal Institutional Development

Apart from the commercial viability of investing in an emerging country, key legal related factors that directors should consider (at the outset) when deliberating an investment would be (i) whether the targeted emerging country has a sufficiently robust / developed legal system and (ii) the enforcement culture. A sufficiently developed legal system (such as having a judicial system and laws / regulations on foreign investments) and a robust enforcement culture would provide directors with a level of comfort in respect of the company's proposed investments, in particular in terms of enforcing the company's rights (if needed) with respect to protecting its investments.

International Treaties Pertaining To An Emerging Country

The international treaties network of an emerging country would be an important legal consideration with respect to the structuring of investments into such emerging country. International treaties

Until the recent slowdown, China and India, the two largest emerging countries, were the main engines of global growth. Of late, emerging countries in Southeast Asia such as Indonesia, Malaysia, Myanmar, Philippines and Thailand have been spotlighted by business publications and economists as representing the few bright spots in an otherwise moribund global growth outlook.

include bilateral / regional tax treaties, bilateral investment treaties (BITs) and multilateral treaties.

Bilateral/Regional Tax Treaties

Bilateral / regional tax treaties, which are typically known as double taxation agreements (DTAs), serve, amongst others, to (i) prevent double taxation of income earned from one jurisdiction by a resident / company of another jurisdiction and (ii) make clear the taxing rights between the treaty partnering countries. By taking advantage of the bilateral / regional tax treaties network of an emerging country in structuring investments into such emerging country, the Singapore-based company would ensure tax efficiency in respect of its investments.

Bilateral Investment Treaties (BITs)

A bilateral investment treaty is an agreement entered into between countries which confers benefits and protections on private investments made by nationals and companies of one country in the other contracting country. The benefits and protections typically include (i) fair and equitable treatment – especially when compared to local investors, (ii) protection from expropriation and (iii) the ability to transfer funds freely. An understanding of the bilateral investment treaty network of an emerging country is important in structuring investments into such emerging country. Structuring investments through a country that has a bilateral investment treaty with such emerging country would enable the Singapore-based company to enjoy the benefits and protections under such bilateral investment treaty. Should there be a breach of the provisions of such bilateral investment treaty, the government of the emerging country may be sued directly for a breach of the treaty in a process known as investment treaty arbitration.

Multilateral Treaties

Directors should also consider if the targeted emerging country is a party to multilateral treaties such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention").

In reaching their investment decision, directors should consider the scenario where the company's investment turns sour and a settlement cannot be reached between the disputing parties. The directors will need to consider having a reliable form of dispute resolution in place to which they can turn to. It's not uncommon that recourse to the local courts of an emerging country may often be fraught with administrative complexity and uncertainty. As such, international arbitration is a standard alternative the directors should consider.

Unlike a judgement from a local court, an arbitration award made in a country which is a signatory to the New York Convention ("Convention Country") can generally be enforced in other Convention Countries. As Singapore is a signatory to the New York Convention, an arbitration award made in Singapore can be enforced in an emerging country (that is a Convention Country) and vice versa.

Investing In Emerging Markets

Existing Local Companies

A Singapore-based company seeking to gain exposure in an emerging country may do so by making direct investment in or acquiring equity and/or debt of (i) companies listed on the local stock exchange or (ii) unlisted companies. In doing so, the directors will need to consider, amongst others, the quality of corporate governance, accounting standards, level of corporate law development and the level of permitted foreign control and ownership (see below for a further discussion).

Establishing Of New Business Enterprises

An alternative to investing in existing local companies to gain exposure to the emerging countries would be for directors to establish new business enterprises.

The forms of business enterprises that are available for establishment will vary for each emerging country. Such local business enterprises may take the form of a corporate, joint-stock company, wholly owned foreign enterprise,

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branch office or representative office. In determining the form of business enterprise to be established, the directors should consider the following, amongst others:

- the scope of business to be carried out (in particular, where there are local restrictions as to the business scope / activities a particular form of business enterprise may carry out);
- ring-fencing the liabilities of the local business enterprise from the parent Singapore-based company;
- local requirements as to the number of local director(s) and foreign ownership requirements; and
- tax (including the form of business enterprise which is capable of taking advantage of the double taxation agreements (as discussed above)).

Joint Ventures Or Other Contractual Arrangements

Other avenues to gain exposure to the emerging countries would be to enter into contractual arrangements with existing local companies to take advantage of the local partner's existing business networks as well as its understanding of the local market.

Such contractual arrangements may be in the form of a joint venture (via the establishment of a new joint venture entity (locally or offshore) to be owned by the Singapore-based company and the local company, a partnership or a business co-operation agreement) or other commercial arrangements (such as franchising, distributorship or agency agreements).

Apart from the commercial viability of investing in an emerging country, key legal related factors that directors should consider (at the outset) when deliberating an investment would be (i) whether the targeted emerging country has a sufficiently robust/ developed legal system and (ii) the enforcement culture.

Local Regulations And Other Consideration

Regulated Activities

Some sectors of business to be carried out in emerging countries may be regulated and therefore require governmental authorisation, licensing, approval and / or permits. Examples of regulated sectors of business will typically include mining, maritime, insurance, healthcare, banking and other financial related business (such as fund management).

Each emerging country will have its own set of regulated sectors / activities. A Singapore-based company seeking to invest in the emerging country will need to consider if its proposed investment will fall within a regulated sector / activity of such emerging country. Where the proposed investment is in a regulated sector / activity of the emerging country, the company in planning such investment should consider, amongst others, (i) the application process for obtaining the relevant authorisation, licensing, approval or permits, (ii) whether an informal approach should be made to the relevant governmental body or regulator before a formal application is made to assess the likelihood of success, (iii) any incentive schemes that it could take advantage of and (iv) the timing it would take to obtain the relevant authorisation, licensing, approval or permits.

The international treaties network of an emerging country would be an important legal consideration with respect to the structuring of investments into such emerging country. International treaties include bilateral / regional tax treaties, bilateral investment treaties (BITs) and multilateral treaties.

Foreign Ownership Restrictions

Some emerging countries have a "negative list" which sets out the foreign ownership restrictions in relation to the types of business that can be invested by foreign investors. For example, the Indonesia Investment Coordinating Board (BKPM) in Indonesia has a "Negative Investment List" which sets out the foreign ownership restrictions with respect to the different types of business in Indonesia.

Each emerging country will have its own "negative list" and in general, there are often foreign ownership restrictions with respect to investing in regulated sectors / activities (mentioned above) of emerging countries.

A Singapore-based company seeking to invest in the emerging country will need to consider if there are any foreign ownership restrictions in relation to the sector of its proposed investment. If there are, the company will need to consider whether such foreign ownership restrictions will impact its commercial decision as it may not have the desired control over its investments and/or it may be restricted to a minority stake. Further, the company will need to consider and identify the local counterparts at an early stage that it would like to work with and

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to put in place relevant joint venture arrangements (which might entail lengthy negotiations).

In addition, some emerging countries have restrictions on foreign ownership of land or have different land tenure available. A Singapore-based company that is proposing to make investments (whether building and operating a hotel, a factory or other property developments) that involve land in an emerging country will need to consider, amongst others, if there are any restrictions on foreign ownership of land and the forms of land tenure available. As investments involving land would generally require a substantial capital outlay, decisions involving such investments should be factored in at an early stage (in particular, whether an investment would be feasible should the land tenure be available only for a short period).

Currency Exchange Rate Control And Restriction Of Repatriation

When making investments in emerging countries, a Singapore-based company will also need to consider if there are any local laws and regulations in relation to currency exchange rate control and / or repatriation of income or capital out of the emerging country.

Other Local Regulations

Having decided on the form of business presence in an emerging country, directors would also need to further consider local laws and regulations which pertain closer to the operational aspects of the business. These would include:

- employment law related matters such as minimum wages, minimum age of employees, minimum number of annual leave, statutory notice period for termination and restriction on non-compete provisions;
- mandatory / statutory pension schemes for employees;
- laws pertaining to social welfare for employees such as requirements to provide medical benefits, insurance coverage and housing;
- laws and regulations relating to data protection to ensure privacy for employees and / or customers; and
- anti-trust (or competition) laws which seek to protect local business enterprises from the dominant position of foreign companies (from developed countries).

Dispute And Governing Law

In general, the legal and judicial procedures of an emerging country for enforcing contracts and protecting foreign investors' rights remain complex and uncertain (as compared to developed countries).

As such, it is of paramount importance that care is taken with respect to structuring an investment in an emerging country. In so far as negotiating the governing law and dispute resolution clauses for any investment in emerging countries is concern, directors should:

- consider using Singapore law, which has established and developed legal principles, where possible;
- push for disputes to be resolved by an arbitral tribunal (rather than the local courts), with a seat in Singapore (as discussed above); and
- consider structuring deals so that the investment can be brought within the scope of the relevant treaties (as discussed above) to which the target emerging country is a party.

As evidenced above, apart from the commercial viability of investing in an emerging country, it is imperative that directors consider legal related factors as part of their decisions in making the investment. Consideration of such legal factors at the outset and careful structuring of the investments in the emerging country will mitigate the complexity and uncertainty of such investments. Further, it will provide a level of comfort to the company in respect of protecting its rights in such emerging market investments. ■

Board Responsibility Under The FCPA

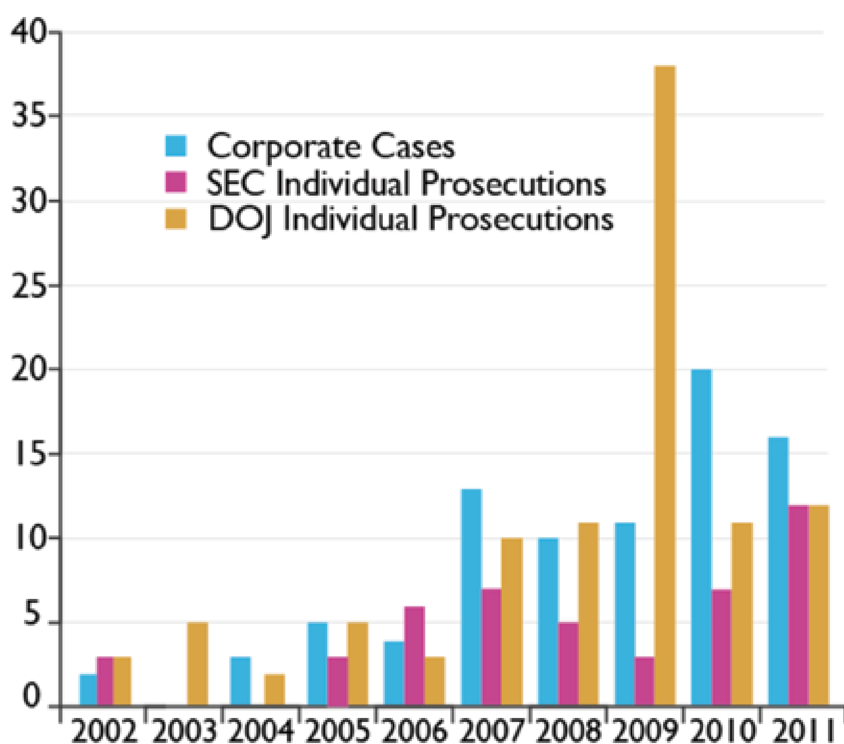
By Thomas R. Fox, General Counsel / Chief Compliance Officer, tomfoxlaw.com and
Ryan Morgan, Anti Corruption Specialist, World Compliance

The nightmare of every corporate director is to wake up to find out that the company of the Board he or she sits on is on the front page of the New York Times (NYT) for alleged illegal conduct. This nightmare came true for the Directors of Wal-Mart on Sunday, April 22, 2012, when on the front page of the Sunday Times, in an article entitled "Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle", the Times alleged that Wal-Mart's Mexican subsidiary had engaged in bribery of Mexican governmental officials and that the corporate headquarters in Bentonville, Arkansas, had covered up any investigations into these allegations. These allegations, if true, would have violated the US Foreign Corrupt Practices Act (FCPA) which prohibits US companies from engaging in bribery and corruption of foreign governmental officials, to obtain or retain any business benefit.

Although the FCPA was enacted in 1977, it was rarely enforced. This changed beginning in 2004, though the reasons are not entirely clear as to why there has been such an increase in enforcement. The below chart tracks the number of corporate and individual enforcement actions since 2002.

I. Legal Standard

What are the obligations of a Board member regarding the FCPA? Are the obligations of the Audit Committee under the FCPA at odds with a director's "prudent discharge of duties to shareholders"? Do the words prudent discharge even appear anywhere in the FCPA? "Under the US Sentencing Guidelines, the Board must exercise reasonable oversight on the effectiveness of a company's compliance program." The US Department of Justice (DOJ) Prosecution Standards posed the following queries: (1) Do the Directors



Source: Sherman and Sterling 2012 FCPA Digest

exercise independent review of a company's compliance program and (2) Are Directors provided information sufficient to enable the exercise of independent judgment?

As to the specific role of 'Best Practices' in the area of general compliance and ethics, one can look to Delaware corporate law for guidance. The case of Stone v. Ritter holds for the proposition that "a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate exists." From the case of In re Walt Disney Company Derivative Litigation, there is the principle that directors should follow the best practices in the area of ethics and compliance.

Unfortunately, many companies either do not have the incentive to spend the resources or take the rigorous approach to their anti-compliance programs. Albert Vondra, a partner with PricewaterhouseCoopers, has said that their attitude is "'We've got it covered,' but they don't". There must be written records demonstrating that the audit committee and that the board members asked questions and received answers regarding FCPA compliance issues. Such documentation demonstrates the Board members have "fulfilled their fiduciary obligations," Cassin, author of the FCPA Blog, has written.

Board failure to heed this warning can lead to serious consequences. David Stuart, a senior attorney with Cravath Swaine & Moore, noted that FCPA compliance issues can lead to personal liability for directors, as both the Securities and Exchange Commission (SEC) and DOJ have been "very vocal about their interest in identifying the highest-level individuals within the organization who are responsible for the tone, culture, or weak internal controls that may contribute to, or at least fail to prevent, bribery and corruption". He added that based upon the SEC's enforcement action against two senior executives at Nature's Sunshine, "Under certain circumstances, I could see the SEC invoking the same provisions against audit committee members – for instance, for failing to oversee implementation of a compliance program to mitigate risk of bribery".

"The risk management process must maintain an approach that is continually monitored and had continuing accountability."

II. When Things Get Bad

While generally the role of a Board should be to keep really bad things from happening to a Company, once really bad things have occurred the Board needs to take charge and lead the effort to rectify the situation or perhaps even save the company. While giving oversight to risk management through an Audit Committee or a Compliance Committee is a good first step, such a committee needs to have sufficient independence from the management which got the company into such hot water to begin with. For instance, regarding the News Corp internal investigation, a Wall Street Journal (WSJ) report quoted corporate governance expert Neil Minow for the following, "The probe cannot be conducted effectively while Mr. Murdoch is in charge."

In a recent White Paper entitled "Risk Intelligence Governance – A Practical Guide for Boards" the firm of Deloitte & Touche laid out six general principles to help guide Boards in the area of risk governance. These six areas can be summarized as follows:

- Define the Board's Role – There must be a mutual understanding between the Board, Chief Executive Officer (CEO) and senior management of the Board's responsibilities.

- Foster a culture of risk management – All stakeholders should understand the risks involved and manage such risks accordingly.
- Incorporate risk management directly into a strategy – Oversee the design and implementation of risk evaluation and analysis.
- Help define the company's appetite for risk – All stakeholders need to understand the company's appetite, or lack thereof, for risk.
- How to execute the risk management process – The risk management process must maintain an approach that is continually monitored and had continuing accountability.
- How to benchmark and evaluate the process – Systems need to be installed which allow for evaluation and modifying the risk management process as more information becomes available or facts or assumptions change.

All of these factors can be easily adapted to FCPA compliance and ethics risk management oversight. Initially, it must be important that the Board receives direct access to such information on a company's policies on this issue. The Board must have quarterly or semi-annual reports from a company's Chief Compliance Officer (CCO) to either the Audit Committee or the Compliance Committee. This commentator recommends that a Board create a Compliance Committee as an Audit Committee may more appropriate to deal with financial audit issues. A Compliance Committee can devote itself exclusively to non-financial compliance, such as FCPA compliance. The Board's oversight role should be to receive such regular reports on the structure of the company's compliance program, its actions and self-evaluations. From this information "…the Board can give oversight to any modifications to managing FCPA risk that should be implemented."

There is one other issue regarding the Board and risk management, including FCPA risk management, which should be noted. It appears that the SEC desires Boards to take a more active role in overseeing the management of risk within a company. The SEC has promulgated Regulation SK 407 under which each company must make a disclosure regarding the Board's role in risk oversight which "may enable investors to better evaluate whether the board is exercising appropriate oversight of risk." If this disclosure is not made, it could be a securities law violation and subject the company, which fails to make it, to fines, penalties or profit disgorgement.

> "Board members should focus their attention upon four core areas (1) structure, (2) culture, (3) areas of risk and (4) forecasts."

III. Four Areas Of Inquiry

In an article in the December 2011 issue of Compliance Week Magazine, entitled "Board Checklist: What Every Director Should Know", author Jaclyn Jaeger reported on a panel discussion at the Association of Corporate Counsel's 2011 Annual Meeting. The discussion was centered on four core areas upon which Directors should focus their attention: (1) structure, (2) culture, (3) areas of risk and (4) forecasts. The article focuses on each of these areas together with some questions proposed by panel participant Amy Hutchens, General Counsel and Vice President of Compliance and Ethics at Watermark Risk Management International, which she suggested a Board should ask of the company's CCO or General Counsel (GC).

A. Structure Questions

This area consists of questions which will aid in determining the fundamental sense of a company's overall compliance program. The questions should begin with the basics of the program through to how the program operates in action. Hutchens believes that such inquiries should allow each Board member to communicate the main elements of a compliance program. With those concepts in mind, Hutchens suggests that Board members ask some of the following structure questions.

- Who oversees the operation of the program?
- What is in the Code of Conduct? Is each Board member aware of corporate standards and procedures?
- How are complaints being received?
- Who conducts investigations and acts on the results?
- What corporate resources are being devoted to the compliance and ethics program?
- How much money is allocated to the program?
- What types of training is required? How effective is it?
- Have any compliance failures been detected? If so, how was such detection made?
- If a company's compliance program is less mature, what are the charter compliance documents?
- If a company's compliance program is more mature, there should be queries regarding the roles of the General Counsel vs. a Chief Compliance Officer. If a CCO is required, where would such person sit in the organization and what is the CCO reporting structure?

B. Culture Questions

This area of inquiry should focus on the culture of the organization regarding compliance. "Board members should have an understanding of what message is being communicated not only from senior management but also middle management." "… Equally important, the Board needs to understand what message is being heard at the lowest levels within the company." Hutchens suggests that Board members ask some of the following culture questions.

- When did the company last conduct a survey to measure the corporate culture of compliance?
- Is it time for the company to resurvey to measure the corporate culture of compliance?
- If a survey is performed, what are the results? Have any deficiencies been demonstrated? If so, what is the action plan going forward to remedy such deficiencies?
- Did any compliance investigations arise from a cultural problem?
- Regardless of any survey results, what can be done to improve the culture of compliance within the company?
- If there were any acquisitions, were they analyzed from a compliance culture perspective?
- Are there any M&A deals on the horizon, have they been reviewed from the compliance perspective?

C. Areas Of Risk

Here Hutchens recommends that Board members "need to know what process is being used to identify emerging risks." Such risk analysis would be broader than simply a legal / compliance risk assessment and should be tied to other matters, such as "business continuity planning and crisis response plans".

Another panel participant Jennifer MacDougal, Senior Counsel and Assistance Secretary of Jack-in-the-Box, noted that "the board of directors need to use their expertise and ask the right questions". Hutchens suggested that in the areas of risk, questions which a Board should ask are some of the following.

- What is the risk assessment process?
- How effective is this risk assessment process? Is it stale?
- Who is involved in the risk assessment process?
- Does the risk assessment process take into account any new legal or compliance best practices developments?
- Are there any new operations that pose substantial compliance risks for the company?
- Is the company tracking enforcement trends? Are any competitors facing enforcement actions?
- Has the company moved into any new markets which impose new or additional compliance risks?
- Has the company developed any new product or service lines which change the company's risk profile?

D. Forecast

Hutchens believes that ""a truly effective and informed board knows where the company stands not only at the present moment, but also has the strategic plan for how the compliance and ethics program can continue to grow."" My colleague Stephen Martin suggests that such knowledge is encapsulated in a 1-3-5 year compliance game plan. However, a compliance program should be nimble enough to respond to new information or actions, such as mergers or acquisitions, divestitures or other external events. If a dynamic changes, "you want to get your board's attention on the changes which may need to happen with the [compliance] program." Hutchens believes that such agility is best accomplished by obtaining buy-in from the Board through it understanding the role of forecasting the compliance program going forward.

The four-part approach suggested by Hutchens lays out a clear and logical program for a Board of Directors not only to understand its role in the compliance function but to play an active role. Any best practices compliance program has several moving parts, a CCO to lead the compliance program, a Compliance Department to execute the strategy and an engaged Board of Directors who oversee and participate. We applaud Hutchens approach and commend it for use by a company's Board of Directors.

> "The questions are not intended to be an exact checklist, but rather a way to provide insight and stimulate discussion on the topic of compliance."

IV. Twenty Questions

What are some of the questions that the Board of Directors should be asking? We posit that a large public company should have Compliance Sub-Committee of Board members. We list 20 questions below which reflect the oversight role of directors which includes asking senior management and themselves. The questions are not intended to be an exact checklist, but rather a way to provide insight and stimulate discussion on the topic of compliance. The questions provide directors with a basis for critically assessing the answers they get and digging deeper, as necessary.

The comments summarize current thinking on the issues and the practices of leading organizations. Although the

questions apply to most medium to large organizations, the answers will vary according to the size, complexity and sophistication of each individual organization.

Part A: Understanding The Role And Value Of The Compliance Committee

- What are the Compliance Committee's responsibilities and what value does it bring to the board?
- How can the Compliance Committee help the board enhance its relationship with management?
- What is the role of the Compliance Committee?

Part B: Building An Effective Compliance Committee

- What skill sets does the Compliance Committee require?
- Who should sit on the Compliance Committee?
- Who should chair the Compliance Committee?

Part C: Directed To The Board

- What is the Compliance Committee's role in building an effective compliance program within the company?
- How can the Compliance Committee assess potential members and senior leaders of the company's compliance program?
- How long should directors serve on the Compliance Committee?
- How can the Compliance Committee assist directors in retiring from the board?

Part D: Enhancing The Board's Performance Effectiveness

- How can the Compliance Committee assist in director development?
- How can the Compliance Committee help the board chair sharpen the board's overall performance focus?
- What is the Compliance Committee's role in board evaluation and feedback?
- What should the Compliance Committee do if a director is not performing or not interacting effectively with other directors?
- Should the Compliance Committee have a role in chair succession?
- How can the Compliance Committee help the board keep its mandates, policies and practices up-to-date?

Part E: Merging Roles of the Compliance Committees

- How can the Compliance Committee enhance the board's relationship with institutional shareholders and other stakeholders?
- What is the Compliance Committee's role in CCO succession?
- What role can the Compliance Committee play in preparing for a crisis, such as the discovery of a sign of a significant compliance violation?
- How can the Compliance Committee help the board in deciding CCO pay and bonus?

"The Wal-Mart case has driven home the need for focused Board of Directors oversight of a company's compliance program." With fines and penalties reaching into the $100 million range a company simply cannot afford to be without a best practices compliance program. However, having such a program in place is clearly not enough. There must be senior level management commitment to the company's compliance program. One of the key drivers of this senior level management is Board oversight. The Board needs to ask the hard questions and be fully informed of the company's overall compliance strategy going forward. If the Wal-Mart Board had fulfilled its legal obligations regarding compliance, the company might not have found itself on the front page of the New York Times. ■

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SID Directors Conference 2013

Corporate Governance:
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By Singapore Institute of Directors
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Over the last decade since the Corporate Governance Code was introduced in Singapore with effect from 2003, the Code and related provisions applicable to listed companies have been tweaked and tightened. Seemingly the form of corporate governance has improved considerably over the years. But has this truly translated into value for the multiple stakeholders of the corporation? Has this resulted in a robust, vibrant and effective capital market that seeks to attract further investment into the country and into the corporations?

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SID Directors Conference 2013

CONFERENCE PROGRAMME

0800	Registration
0900	Welcome Address *Chairman, SID*
	Guest of Honour Address *Mrs Josephine Teo, Minister of State, Ministry of Finance and Ministry of Transport*
	Keynote: Corporate Governance: Creating Value for the Long Term *Ambassador Linda Tsao Yang, Chairperson, Asian Corporate Governance Association, Hong Kong*
1000	Networking Coffee Break
1030	Panel Discussion **Value Creation: From Processes To Outcomes** Value creation is often deemed to be the most important outcome of a corporation. Structures and processes are created by boards and management to ensure this. Has this been the case? Have rules, processes and governance structures not been sufficiently implemented or have they overtaken the importance of outcomes? How do we deal with the deficit of trust that seems to be pervading the corporate markets? Or is it just better communication which is needed? This super panel of local and international speakers with their diverse backgrounds in governance will examine the different needs and demands of corporate governance in the light of value creation and how directors should respond to the changing corporate governance landscape. **Moderator:** *Mr Patrick Daniel, Editor-in-Chief, Singapore Press Holdings* **Discussants:** ▪ *Mr Dan Konigsburg, Managing Director & Global Leader, Deloitte Centre for Corporate Governance* ▪ *Mr Frank Lavin, CEO & Founder, Export Now* ▪ *Mr Lim How Teck, Chairman, Certis CISCO* ▪ *Ambassador Linda Tsao Yang, Chairperson, Asian Corporate Governance Association, Hong Kong*
1200	Lunch and Networking

CONFERENCE PROGRAMME (Cont'd)

<table>
<tr><td>1330</td><td>Panel Discussion

The CEO: Reconciling Compensation, Values and Value Creation

The CEO can be the best friend or the worst foe of shareholders and other stakeholders. Whilst there are all types of CEOs, it is clear that the CEO is a critical captain in the corporate entity to ensure that the corporation lands at the right ports at the right times as may be required.

Given the tough position that the CEO occupies, it is critical and indeed important that the CEO be appropriately compensated. The CEO is also expected to exhibit the right values and integrity in the discharge of his functions.

Additionally, the CEO is faced with these issues. Are current compensation packages appropriate? Do they provide the right incentives for performance while balancing fairness and equity relative to other stakeholders including shareholders, employees and the board.

This panel comprising those involved on different sides of CEO compensation will candidly discuss the issues.

Moderator: Mr Gautam Banerjee, Chairman, Blackstone Singapore; Former Executive Chairman, PricewaterhouseCoopers Singapore

Provocateur: Ms Wong Su-Yen, Managing Director, ASEAN, Mercer; Chairman, Singapore, Marsh & McLennan Companies

Discussants:

▪ Mr Piyush Gupta, CEO, DBS Group Holdings
▪ Mr Liew Mun Leong, Founding President & CEO , CapitaLand Group; Chairman, Changi Airport Group
▪ Mr Colin Low, President & CEO, Singapore Investment Development Corporation</td></tr>
<tr><td>1500</td><td>Networking Coffee Break</td></tr>
<tr><td>1530</td><td>Panel Discussion

The Shareholders: From Asking to Participating in Value Creation

Shareholders are often regarded as the single most important stakeholder in the corporation. Yet, there is no commonality amongst the shareholders; they come in diverse forms with differing needs and demands.

How can shareholders be effectively rallied to contribute towards effective value creation? How can we move them from simply asking questions to participating and taking a more active role, yet recognising that they are not there to manage the company? Hear from representatives of institutional as well as retail shareholders on where the balance can be found, with the ultimate aim of growing and preserving corporate value.

Moderator: Mrs Elaine Lim, Managing Director, Citigate Dewe Rogerson, i.MAGE

Provocateur: Mr Hugh Young, Managing Director, Aberdeen Asset Management Asia

Discussants:

▪ Mr Richard Eu, Group CEO, Eu Yan Sang
▪ Mr David Gerald, President & CEO, SIAS
▪ Mr Ron Sim, Founder & CEO, OSIM International</td></tr>
<tr><td>1700</td><td>Closing Remarks</td></tr>
<tr><td>1730</td><td>End</td></tr>
</table>

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Welcome Aboard

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Lee	Chye Beng Robin	Talbot	Roderick
Lee	Ong	Tan	Emily
Lindstrom	John		

June 2013

Bardon	Henri-Jean	Janamanchi	Balasubramaniam
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De Boursac	Nicholas	Lee	Shao Jie
De Witt	Caroline Clara	Liew	Yoon Sam
Dowling	Michael	Lim	Chung Aik
Dunsmore	John	Lim	Geok Mui Susan
Ee	Chee Hong	Ngo	Get Ping
Erb	Raphael	Quah	Su-Yin
Goh	Toh Chuan Kenneth	Robson	Stephen Gregory
Gonski	David	Siddiqui	Asif Iqbal
Goodwin	Michael	Tan	Cheng Imm Christina
Hee	Kim Pin Madalene	Teo	Li Lian
Hon	Shin Ming		

Call for articles, thoughts, snippets, etc.

The institute would like to hear from you. Send us aricles, thoughts or even short snippets of issues that you are keen on, that you want to share about, or that keeps you awake at night. It only needs to relate to directors and/or corporate governance. For articles, keep it to 1200 to 1500 words at most. Send your materials by email to the Institute at secretariat@sid.org.sg

Personal D&O Insurance

Allianz Insurance Company of Singapore Pte Ltd and Aon Singapore Pte Ltd in collaboration with the Singapore Institute of Directors (SID) have recently launched a Personal D&O Insurance program exclusive to SID members, protecting them against liability arising from their responsibilities as a director, of up to $1 million. The first group of policies has already been issued on the 15th October 2011.

Personal D&O Insurance provides similar protection as traditional D&O Insurance policies, but is taken out in the name of an individual director or officer rather than as an entire board of directors. Cover can be provided for up to three separate directorships.

Why Is It Necessary?

Personal D&O Insurance provides directors and officers with an individual, portable policy for their exclusive benefit. Such cover is relevant to all directors, and is of particular importance to the following:

- Directors of companies that do not purchase D&O Insurance.
- Directors of companies that purchase inadequate insurance, whether in terms of breadth of cover or policy limit.
- Independent directors.
- Directors who are resigning or retiring from their positions, and who seek run-off protection.
- Professionals who assume positions on client company boards.

"Independent directors are uniquely exposed to liability arising from the companies whose boards they sit, while lacking the ability to directly assure that the company purchases relevant insurance coverage to respond to these exposures," said Mr James Amberson, Regional Manager of Financial Lines for Allianz Insurance Company of Singapore. He added that the insurance program developed in collaboration with Aon and SID is a proactive response to this issue and provides directors with the opportunity to mitigate this risk for themselves.

"We are delighted to partner with Allianz and the SID in providing this innovative protection to directors in Singapore. Personal D&O Insurance provides the opportunity for directors to control the breadth and level of protection available to them," said Mr Michael Griffiths, Director of Professional Services at Aon Singapore.

Exclusive to SID Members

Personal D&O Insurance cover is available exclusively to SID members.

A $1 million Personal D&O Insurance policy covering up to three separate directorships will cost S$1,000 plus GST.

For further details please refer to the SID Website,
or call Gladys Ng at Aon Singapore on 6239 8880 or email gladys.ng@aon.com.