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Beyond Legal Risk: Why Businesses Need Lawyers Who Think Commercially

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"*As corporate transactions become increasingly complex, the value of legal advisers is no longer measured solely by their ability to identify risks, but by their capacity to navigate uncertainty, protect enterprise value and enable sustainable commercial growth.*"



In an increasingly complex business environment, the traditional perception of lawyers as guardians of legal compliance is undergoing a fundamental transformation. Businesses today expect their legal advisers to understand commercial priorities, anticipate regulatory developments and contribute meaningfully to strategic decision-making.

For corporate leaders, the challenge is rarely the absence of legal risk. Rather, it is determining which risks are acceptable, which can be commercially managed and which must remain non-negotiable.

These issues were explored recently at panel discussion titled *Navigating Deals: Balancing Legal Risk, Commercial Reality and Client Expectation*, which was hosted by the firm and the Association of Corporate Counsel (ACC) Malaysia. The panel was moderated by ACC representative, Ong Yin Ee, featuring RDS partners S. Saravana Kumar, Michele Kythe Lim and Dr Bahari Yeow.

Drawing on their respective experiences in high-stakes litigation, corporate governance, regulatory advisory and commercial negotiations, the panellists examined how legal expertise, when combined with commercial judgement, can become a source of competitive advantage for businesses.

From Legal Gatekeepers To Strategic Business Partners

The conventional relationship between lawyers and business executives has often been characterised by an inherent tension. While business leaders are trained to identify opportunities, lawyers are trained to anticipate what could go wrong.

However, Dr Bahari believes this tension, when properly managed, can create considerable value for an organisation.

According to him, a business operating without sufficient legal discipline may expose itself to significant liabilities, while one paralysed by excessive legal caution risks losing valuable commercial opportunities.

"*Risk is not always something to be eliminated. It is something to be understood, measured, allocated and consciously accepted*," he observed.

With more than 25 years of experience advising global and regional businesses on intellectual property, technology and commercial matters, Dr Bahari emphasised that identifying legal problems should represent the beginning, rather than the conclusion, of a lawyer's work.

Where a proposed transaction presents legal difficulties, advisers should explore alternative contractual structures, appropriate risk allocation and practical mitigation measures that enable the underlying commercial objective to be achieved.

There is, however, an important distinction between accepting commercial risk and disregarding legal or regulatory obligations. The former is an inherent feature of business; the latter cannot be justified by commercial expediency.

As Dr Bahari aptly put it: "*A good lawyer does not simply tell the business where the cliff is. A great lawyer helps the business find the passage across the mountain*."

Tax Risk As An Enterprise-Wide Concern

For Saravana, the changing nature of tax enforcement in Malaysia illustrates why legal considerations can no longer be compartmentalised within traditional corporate functions.

Historically, taxation was largely regarded as the responsibility of chief financial officers and tax departments. However, increasingly complex legislation, substantial tax assessments and the intersection between taxation and commercial documentation have made tax risk an enterprise-wide concern. Stamp duty is a particularly compelling example according to Saravana.

Within large organisations, agreements are routinely executed across multiple business units, often without a centralised mechanism for monitoring the resulting stamp duty obligations. The absence of clear internal accountability can leave businesses exposed to significant liabilities.

Drawing on his experience representing corporations in major tax disputes, Saravana cited a matter involving a stamp duty assessment of RM 774 million, where the taxpayer had taken the position that the instrument concerned was not subject to Malaysian stamp duty. The magnitude of such assessments demonstrates how a tax dispute can potentially exceed a company's annual profits and fundamentally alter the economics of a commercial transaction.

Saravana, who regularly advises multinational corporations, financial institutions and major Malaysian businesses on complex tax and regulatory matters, argued that legal advisers must understand the commercial rationale of a transaction before raising objections. Rather than simply highlighting potential liabilities, advisers should explain the available alternatives, their respective tax consequences and the measures that can be adopted to mitigate exposure.

"*Just because the transaction is risky, it does not mean the transaction is illegal*," he said, emphasising the importance of distinguishing legitimate commercial uncertainty from actual non-compliance.

The increasing breadth of tax exposure also requires greater collaboration between legal, finance, human resources and operational teams. Cross-border working arrangements may raise permanent establishment concerns. Payments to overseas service providers may attract withholding tax or service tax on imported taxable services. Contractual provisions may affect eligibility for transitional tax exemptions, while deficiencies in payroll systems can create substantial employment-related tax liabilities.

Saravana cited another matter involving a financial institution where the treatment of employee benefits within its payroll system resulted in tax exposure of RM 96 million before penalties. Such examples underscore the importance of identifying tax implications at the transaction design stage, rather than discovering them during a subsequent regulatory audit.

In an environment where tax legislation and administrative practices evolve rapidly, proactive tax governance is increasingly integral to protecting shareholder value.

Accelerating Transactions Without Compromising Governance

The pressure to execute transactions quickly is equally familiar to corporate boards, particularly in competitive markets where delays can undermine commercial opportunities.

However, speed and sound governance need not be competing objectives.

Michele, who before joining RDS was previously with the Institute of Corporate Directors Malaysia (ICDM) and former group general counsel and company secretary of IHH Healthcare, argued that the effectiveness of board oversight depends less on the volume of information presented than on its quality, relevance and reliability.

Management teams sometimes overwhelm directors with extensive documentation in the belief that comprehensive disclosure alone fulfils their responsibilities. What boards require, however, is properly evaluated information, clear recommendations and an understanding of the material risks associated with each available option.

Referring to Sections 213 and 214 of the Companies Act 2016, Michele highlighted the importance of informed decision-making, good faith, proper purpose and acting in the best interests of the company. The business judgement rule provides an important framework for directors making commercial decisions, subject to the applicable statutory requirements. Equally important is maintaining proper documentation of the deliberations and considerations underlying those decisions.

She advocated a more structured approach to transaction management, distinguishing between matters that must be resolved before signing, those that must be addressed before completion and those that can appropriately be managed afterwards. Running these workstreams concurrently allows businesses to maintain transaction momentum without compromising the integrity of board oversight.

Her advice to corporate management was succinct: "*Accelerate the process, not the board's decision*."

Beyond legal compliance, Michele also encouraged businesses to evaluate transactions through three fundamental questions: whether the proposed course of action is lawful, whether it creates sustainable value and whether it can be executed responsibly.

This broader approach requires consideration of reputational exposure, regulatory relationships, stakeholder expectations and the organisation's capacity to deliver its commitments. Good governance, in this context, is not an administrative burden. It is an institutional mechanism for protecting and sustaining enterprise value.

When Winning The Negotiation Means Losing The Business

Another dimension of commercially intelligent legal advice lies in recognising that a successful transaction extends beyond the execution of a contract.

Dr Bahari cautioned against excessive contractual negotiation, particularly where parties become preoccupied with securing every conceivable legal advantage at the expense of the underlying commercial relationship. "*You can negotiate a perfect contract and end up with an imperfect relationship*," he observed.

He proposed distinguishing between non-negotiable legal principles, commercially negotiable risks and matters requiring flexibility to preserve the business relationship. While fundamental legal protections must be maintained, excessive rigidity over less material contractual provisions can undermine trust, delay execution and create unnecessary friction between commercial partners.

Ultimately, the objective should not be to leave the counterparty feeling defeated, but to establish a contractual framework within which both parties have sufficient confidence to succeed.

This is particularly relevant in long-term commercial arrangements, where the parties' ability to cooperate and adapt to changing circumstances may prove as important as the contractual protections negotiated at the outset.

As Dr Bahari noted, perfection can sometimes be the enemy of commercial success.

The Next Generation Of Legal Advisory

The discussion also highlighted a broader transformation taking place within the legal profession.

General counsel are increasingly assuming responsibilities extending beyond conventional legal advisory into enterprise risk management, governance, sustainability, regulatory compliance and strategic decision-making. This evolution is changing what businesses expect from external law firms.

Michele emphasised that external advisers must develop a deeper appreciation of their clients' commercial priorities and adopt a multidisciplinary approach to problem-solving.

Dr Bahari similarly highlighted the value that external counsel bring through their exposure to different industries, transactions and disputes, enabling them to anticipate potential difficulties that may not be immediately apparent to individual organisations.

Saravana's experience in complex tax litigation further illustrates how insights gained from regulatory disputes can inform preventive strategies, transaction structuring and corporate risk management.

Together, the perspectives shared by the three RDS partners reflect an increasingly important model of legal advisory - one that brings together specialist expertise, boardroom experience, regulatory knowledge and commercial judgement.

While artificial intelligence and technological innovation will undoubtedly transform the delivery of legal services, the ability to exercise sound judgement, reconcile competing interests and navigate complex commercial realities will remain central to the profession.

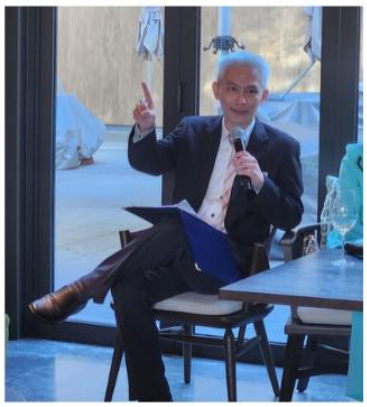
For businesses operating in an increasingly demanding regulatory and commercial environment, the most valuable legal advisers will not necessarily be those who provide the longest opinions or negotiate the most protective contracts.They will be those who understand what the business is seeking to achieve and possess the expertise, experience and judgement to help it get there.





















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