

Ten things for lawyers to know about the RCEP

The world's largest trade agreement, the Regional Comprehensive Economic Partnership (**RCEP**) was signed on 15 November 2020, concluding more than 30 rounds of negotiations over eight years. The RCEP has attracted significant recent attention as an important step forward in promoting economic integration within the Asia-Pacific region, particularly in light of the economic strain caused by the COVID-19 pandemic and the growing importance of data and digital transactions.

However, while the signing of the RCEP is clearly a milestone achievement, its likely practical impact on cross-border trade, investments, market entry and legal harmonisation across the region remains little understood. We set out below ten things for lawyers to know about the RCEP.

1_Once implemented, the RCEP will create the world's largest trade bloc and represent China's first participation in a multilateral trade agreement, but the USA and India remain absent

- The 15 initial parties to the RCEP are the 10 members of the Association of Southeast Asian Nations (**ASEAN**; i.e., Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam), China, Japan, South Korea, Australia, and New Zealand. Collectively, the initial parties represent almost 30 per cent of global GDP (USD 26.2 trillion) and 30 per cent of the world's population (2.2 billion people), creating the world's largest trade bloc.
- The RCEP is the first free trade agreement signed between Japan, China and South Korea, as well as the first multilateral free trade agreement signed by China.
- India had been a party to the negotiation process for the RCEP but withdrew in November 2019 over, inter alia, market access concerns, primarily with China. The USA is also not a party to the RCEP. There remains some hope that both nations could become future parties to the RCEP, or the rival Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) that came into force last year, but this remains speculative at this stage.

2_The RCEP is not yet in force, and ratification by each signatory may take some time to achieve

- The RCEP is not yet in force. It will only enter into force 60 days after six ASEAN parties and three non-ASEAN parties ratify it in accordance with local law. It is generally thought that the RCEP could take effect within the next two years, but there is little consensus on the exact timing. Even when ratified, it may take a while for less developed countries to satisfy some of the RCEP's requirements.

3_The RCEP improves trade and market access for goods among members, including providing tariff reductions and simplified customs procedures

- The RCEP offers tariff reductions and provides for simplified custom procedures and associated facilitation provisions to expedite clearance of goods, including the release of express consignments and perishable goods within six hours of arrival. However, bearing in mind the numerous existing FTAs in force (including the ASEAN+1 FTAs and the CPTPP) between many of the parties, the RCEP does not deliver significant new market access for goods in terms of tariff reduction and elimination. Nevertheless, many of the tariff outcomes under the RCEP are improvements over the status quo under existing FTAs, while China and Japan, Korea and Japan, and Japan and New Zealand do not have existing FTAs between each other.

4_The RCEP does not provide significant changes or enhanced market access for the trade in services

- What primarily holds the RCEP back from creating a common market style arrangement (such as the EU or the EEA) is that it provides little in the way of equivalency in the trade of services. The RCEP does establish rules for the supply of services, including obligations to provide access to foreign service suppliers (market access), to treat local and foreign suppliers equally (national treatment), and to treat foreign suppliers at least as well as suppliers of any other non-RCEP country (most-favoured nation (MFN) treatment). However, these rules stop short of any provisions that permits equivalency and free trade in services.

5_The RCEP levels the playing field for regional IP protection and enforcement

- The RCEP will raise standards of intellectual property (IP) protection and enforcement, including with respect to non-traditional trademarks such as sound marks and a wide range of industrial designs. The RCEP requires its parties to commit to accede to IP treaties that will enable companies to file a single patent or trademark application instead of having to file individual applications in each country. Although this is in line with the Madrid Protocol, which many parties to the RCEP have already signed up to, the RCEP provides uniformity of IP recognition between its members.

6_The RCEP signals an increased convergence and enforcement of competition laws in the region as well as greater regulatory co-operation among competition regulators

- The RCEP requires its parties to commit to maintaining competition law regimes based on international best practices and agreed principles including cross-border enforcement cooperation. Businesses must, however, continue to be alive to local regulations and practices while relying on precedents and case law on a regional basis.
- The examples of anti-competitive activities listed in the RCEP are traditional; they cover anti-competitive agreements, abuses of a dominant position and anti-competitive mergers and acquisition. But parties are expected to recognise the importance of setting up an independent competition authority, protecting the rights of defence, avoiding discrimination of treatment based on nationalities, ensuring transparency of review processes, etc. This may have a positive impact on the way investigations are conducted in some jurisdictions.
- The parties to the RCEP have also committed to increase their cooperation on various issues relating to competition law enforcement, including in actual anti-competitive cases, in particular those with multi-jurisdictional effects. Pan-regional and centralised strategies and good practice will become more and more important for businesses in the coming years.

- The parties to the RCEP without competition rules will have to adopt their own competition law regime. This primarily concerns Brunei, Laos and Myanmar, which committed to adopt their competition law regime no later than three years after the date of entry into force of the RCEP (i.e., by 15 November 2023). Cambodia will have five years to do so (i.e., by 15 November 2025).

7_The RCEP introduces a number of investment protections, but no ISDS provision (as of yet)

- The RCEP contains a number of investment protections that are, in most part, in line with those in other modern investment treaties. While the investment protections apply to measures adopted and maintained by a party to the RCEP to investors of another party to the RCEP and their investments, certain matters such as government procurement, subsidies or grants, and services supplied in the exercise of government authority are excluded from their scope.
- The major protections available under the RCEP include: (i) fair and equitable treatment (FET) and full protection and security standards that are tied to the minimum standard of treatment under public international law; (ii) national treatment standard; (iii) MFN standard, which does not apply to dispute-settlement; and (iv) protection against direct and indirect expropriation, which is subject to a specific carve-out relating to IP rights.
- Crucially, there is currently no investor-State dispute settlement (ISDS) provision in the RCEP that allows an investor to bring a direct claim (for example, by arbitration) against a State. However, the RCEP does provide that its parties are to enter into discussions on the settlement of investor-state disputes no later than two years after it enters into force.

8_Harmonisation of rules of origin concepts will lead to greater certainty on the costs and logistics of cross-border trades within the RCEP area

- A key practical achievement of the RCEP is the harmonisation of regional rules of origin concepts across its member states, thereby providing greater levels of certainty and consistency for business in managing their supply chains across the region.
- The benefits of harmonisation are expected to be significant, given the complexities of trade within the Asia Pacific region, especially as the trend for manufacturing shifts to less developed economies.

9 Rules on government procurement break a new ground

- The RCEP is the first trade agreement in which ASEAN as a whole as well as its individual members have included rules on government procurement. Pursuant to the RCEP, parties commit to publish laws, regulations and procedures regarding government procurement, while cooperation provisions set out a mechanism to facilitate consultation and exchange of information on government procurement matters. Each party is also to endeavour to publish such information in English.
- While the CPTPP contains more ambitious government procurement commitments, the RCEP marks the first time that major ASEAN countries such as Indonesia, Thailand, and the Philippines have committed to improved transparency and cooperation in central government procurement.

10 Recognition of digital trading relationships and the sharing of data across the region

- The RCEP includes a series of commitments on cross border data flows and the creation of a more conducive digital trade environment. It also attempts to limit the scope for governments to impose restrictions, including requirements to localise data, but there remain challenges to introducing a common set of rules for data processing, sharing and storage across the region.
- The RCEP also introduces provisions concerning the digitalisation of trade documentation and the use of electronic signatures and electronic authentication to facilitate cross-border trade – a trend of doing business that has in any case been recently accelerated by the COVID-19 situation.

Conclusion

The RCEP is not yet in force, and remains subject to ratification and implementing legislation. Its practical impact thus remains unclear and it is unlikely to have any immediate day-to-day impact for in-house lawyers.

The RCEP also falls short of creating a true single market, given its relatively limited focus on services (as opposed to goods). Further, in a number of respects, the RCEP adds little to the existing bilateral treaties that are already in force between the parties to the RCEP.

Nonetheless, signing of the RCEP is a significant move for regional co-operation and represents more than a symbolic victory. Through the RCEP, the world's largest trading bloc has reached some important – and unprecedented - consensus on a number of topical issues including procurement, competition, rules of origin concepts, and digital trading relationships, and opened doors for further harmonisation.