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IPBA Journal

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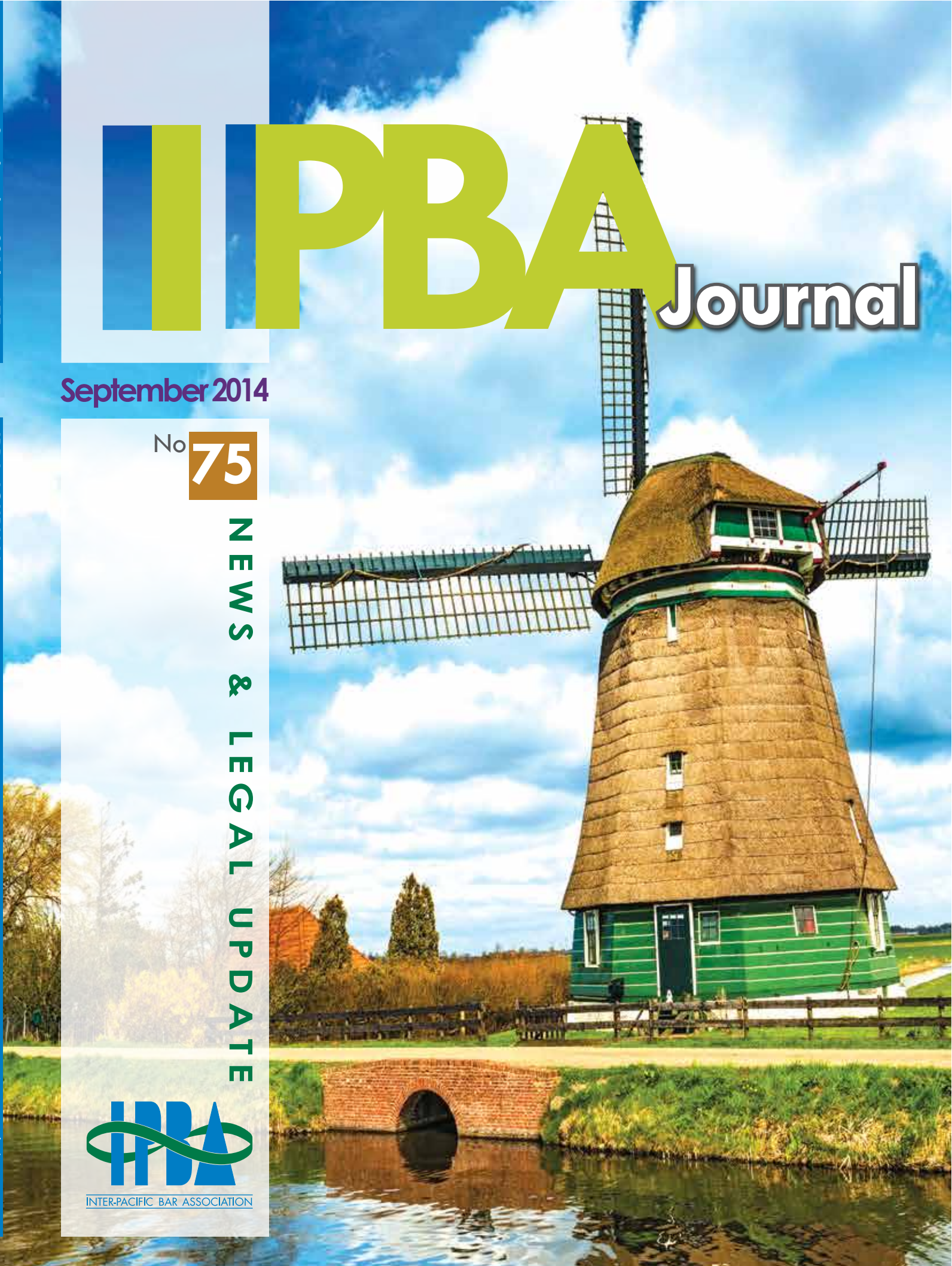
NEWS & LEGAL UPDATE



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The President's Message

William A. Scott
President

Dear Colleagues,

Greetings from Toronto to all IPBA members!

Some four months have now passed since my Presidential term began in Vancouver. The Association's leadership and the Secretariat have been very busy in the interim and I am pleased to report on a number of recent developments.

You will see in Secretary-General Yap Wai Ming's message details of various initiatives that are under way. These include a revamp of the IPBA website to give it a fresher look and make it more user-friendly and interactive for members. This will no doubt build on the successful launch of the new-look IPBA Journal last year under the guidance of Publications Committee officers Caroline Berube and Maxine Chiang. The recent introduction of regular "Eye on IPBA" bulletins will also serve to keep members abreast of current news about the Association and its activities, including regional events such as the upcoming IPBA gathering in Amsterdam on November 21st.

Work continues in preparation for the proposed incorporation of the IPBA and the update of its Constitution. A variety of issues are being addressed to ensure that the transition is seamless, reflects current practice and carefully preserves the unique and valuable features of the IPBA. We expect that a progress report will be provided at the Mid-Year Council Meeting in Brazil this September and that a detailed proposal will be furnished to all members in advance of our Annual General Meeting in Hong Kong next May.

The IPBA's Nominating Committee has held a number of conference calls to consider potential candidates for leadership positions in the Association. This is an important function and involves reviewing the credentials of a large number of individuals who have expressed interest in serving in a leadership role in the IPBA. Care is taken to ensure that there is an appropriate balance of representatives of both genders from different jurisdictions and firms, and that succession issues are addressed. This is essential to maintaining the vibrancy of the IPBA's various committees and the future development of the IPBA itself. Special thanks to Committee Coordinator Sylvette Tankiang for all of her excellent work in this regard.

As mentioned in my initial President's message, one of my objectives is to seek to strengthen relations between the IPBA and other complementary associations around the world. One way of doing this is to attend other associations' gatherings to meet with their leadership and members and raise awareness of the IPBA. I am grateful to Neil Russ, the JCM for New Zealand, who attended the Presidents of Law Associations in Asia ('POLA') conference in Auckland earlier this summer on behalf of the Association, and to Michael Cartier, Chair of the Technology & Communications Committee, who attended the annual meeting of l'Association International des Jeunes Avocats ('AIJA') in Prague in late August as the IPBA's representative.

For my part, in early August I attended the annual meeting of the American Bar Association in Boston and participated in the programme organised for some 45 leaders of bar associations and law societies from around the world. This included a half-day working session involving presentations on, among other topics, "The

Future of the Legal Profession & The Rule of Law" led by Fred Headon of the Canadian Bar Association and Dominique Borde of the Paris Bar Association, and "How the Financial Crisis Impacts the Legal Profession and Bar Organisations" presented by Anita Schlapfer of AIJA and Wifrido Fernandez of the Inter-American Bar Association.

The opportunity to meet many of my presidential counterparts as well as leaders of the ABA was valuable, and I came away with the certain knowledge that we all face similar challenges. The IPBA is well regarded internationally, although further work to make it better known is required. Many legal organisations outside of the Asia-Pacific region see closer ties with the IPBA as a means of building bridges between their own membership and leading lawyers throughout Asia and we should seek to capitalise on this opportunity. Apart from meeting with other associations' leadership, we are also in discussions with several bodies that have expressed an interest in entering into MOUs with the Association or possibly a new form of associate membership.

Looking forward, we can anticipate celebrating the IPBA's 25th anniversary in Hong Kong next May. Speaking from personal experience, the organisation of an annual conference is an enormous, time-consuming undertaking and President-Elect Huen Wong and his team of volunteers are to be commended for their efforts in preparing for what promises to be an outstanding and memorable event. In particular, and in keeping with what has become an IPBA tradition, Huen and his colleagues are undertaking an extensive series of pre-conference visits to various cities over the next few months to meet with IPBA members and promote HK2015. I encourage members to make every effort to offer them a warm welcome.

In the interim, I hope to see many of you in São Paulo and Rio de Janeiro in September at the two special conferences held in conjunction with our Mid-Year Council Meeting. The two conferences are organised by Shin Jae Kim and Ronaldo Veirano and their colleagues, and will be of great interest to all those with an interest in the ever-increasing business interaction between South America and the Asia-Pacific region.

William A. Scott
President

The Secretary-General's Message

Yap Wai Ming
Secretary-General

Dear IPBA Members,

The Council will be meeting in September. It is a pity that we could not have timed our meeting with the recently concluded World Cup that was hosted by Brazil. It would have been exciting to see the finals and conclude that with our Council meeting. I would bet that our Council meeting in Rio de Janeiro would have seen a record attendance by our Council members. But then again, we may have lost members to the post-games celebrations at the beautiful Copacabana beach, and many more attractions that Rio has to offer. During the World Cup, Singapore community centres screened every game in halls that were filled with hundreds of spectators coming in during the early hours to watch these games. My firm had a viewing at the office for the final game between Germany and Argentina, which started at 4am, with half a day being declared a rest day. Such was the dedication of football-crazy Asians who would have otherwise been slumbering in our beds during such unearthly hours but would sacrifice sleep to watch this once-in-four-years battle of the soccer giants.

When the IPBA decided to hold our Mid-Year Council Meeting in Rio de Janeiro this coming September 2014, it was not with the intention of combining the watching of the World Cup with our Council meetings. We hope that those who could not make it to Rio will still be able to contribute to the meeting despite the time zone difference via a new app that is being supported by one of our collaboration partners. Anywhere Pad is an app, available both on Play Store and the App Store, that was developed by my client, Azeus Systems Holdings Limited. This allows participants to join the meeting via their iPads and other forms of tablets and hand-held devices to 'follow' the progress of the meeting as it unfolds. Azeus has kindly provided free usage for a period of one year for IPBA members who are interested in trying out the app. We will be testing this app at our Rio Mid-Year Council Meeting. Council members who cannot be in Rio can still 'join' the meeting 'virtually', taking into account time differences. This app has been publicised in the July issue of our new monthly e-newsletter, 'Eye on IPBA', which is an initiative of the IPBA Secretariat.

You would have received at least four issues of 'Eye on IPBA' by now, and the fifth is in the works by the time you read this message in the IPBA Journal. We hope that members will have more recent online news updates of the various initiatives from all jurisdictions. For those JCMs and Committee Chairs who have interesting activities to share, please contact the Secretariat and we will be happy to post the news update on our 'Eye on IPBA'. It is intended to be more casual but informative. Feedback from all members on this newsletter will be most appreciated.

Other initiatives by the IPBA include measures for better communication with your local IPBA representatives: Jurisdictional Council Members (JCMs), At-Large Council Members, and Regional Coordinators. If you haven't already, you will be hearing directly from them about more activities in your area to enhance your experience as an IPBA member. We also encourage you to use the IPBA web site's JCM Forum feature, a posting feature that allows you to keep in touch with members in your own jurisdiction as well as with your membership leader. See the IPBA web site JCMs page for more information. (http://ipba.org/ipba-leadership/jcms/135/)

Although we've recently made some improvements to the IPBA web site, the current technology is several years old already so the site is being completely rebuilt as we speak. A brand new design, more user-friendly features, and an easily navigable interface are all planned. Watch for a greatly improved site this fall.

I last reported that we will be putting up the proposed corporatisation of IPBA for consideration at the Rio meeting. If corporatisation is approved by the Council, we will need to draw up a fresh set of constitutional documents for the corporatised entity that will, to the greatest extent possible, mirror the existing IPBA Constitution. This will, of course, be subject to local legal requirements of the country of incorporation. We will take this opportunity to review our IPBA Constitution and to update it on the practices that are currently not provided for. One such practice is the appointment of co-chairs to some committees. Our current Constitution is silent on co-chair appointments, and it leaves open the question of how votes are taken at Council meetings where co-chairs attend meetings. This has largely been academic because we have not recently had any hotly contested agenda items that we had to put before Council meetings for a majority vote.

The Secretariat updated me on the history of this Constitution Review Committee. It was formed in New Delhi in 2003 by Vivien Chan, and comprised past presidents Nobuo Miyake and Cecil Abraham. This arose out of an emergency situation that threatened the viability of the 2003 New Delhi Annual Conference. A political conflict was then brewing between India and Pakistan that could have potentially derailed the hosting of the New Delhi Conference. It was not viable to hold a physical Council Meeting as we had just concluded the Mid-Year Council Meeting then. The then IPBA Constitution did not provide for emergency meetings either. We had to hold an emergency Council meeting via telephone call to make a Council decision whether to proceed with the New Delhi Conference. The Committee made a major revision to the Constitution allowing for a majority of the Officers to make decisions in an emergency situation. That revision was adopted in 2006. The Committee never sat after that.

With the impending job scope to review the constitution, the nominating committee will be putting forward a proposal for the reconstitution of the Constitution Review Committee with new members. This reconstitution of the Committee will require Council's approval. I will keep you apprised of this as the committee and its activities develop.

As we move closer to the 25th Annual General Meeting and Conference in Hong Kong in 2015, I hope all of you will also take advantage of the early bird rates available under the direction of the host committee, led by IPBA President-Elect Huen Wong.

See you all in Rio soon!

Yap Wai Ming
Secretary-General

IPBA Upcoming Events		
Event	**Location**	**Date**
IPBA Annual General Meeting and Conference		
25th Annual General Meeting and Conference	Hong Kong	May 6-9, 2015
26th Annual General Meeting and Conference	Kuala Lumpur	Spring 2016
IPBA Mid-Year Council Meeting		
2014 Mid-Year Council Meeting (Council Members only)	Rio de Janeiro, Brazil	September 26-28, 2014
Regional Events		
IPBA Regional Conference: "The Global Inclusion of Latin America" (open to the public)	São Paulo, Brazil	September 25, 2014
IPBA Regional Conference: "The Global Inclusion of Latin America" (open to the public)	Rio de Janeiro, Brazil	September 29, 2014
IPBA All-day Workshop: Mergers & Acquisitions	Amsterdam, Netherlands	November 21, 2014
Supporting Events		
Kluwer Law International's "Turkey and Middle East: International Arbitration Summit"	Istanbul, Turkey	September 3, 2014
Kluwer Law International's "2nd Korea: Global Competition Law Forum"	Seoul, Korea	September 25, 2014
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ABA Section of International Law Fall Meeting	Buenos Aires, Argentina	October 21-25, 2014
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Euromoney LMG Asia Women in Legal Business Law Awards	Hong Kong	November 13, 2014
Kluwer Law International's "3rd Korea International Arbitration Summit"	Seoul, Korea	November 20, 2014
Marcus Evans' "Corporate Legal Excellence"	Kuala Lumpur, Malaysia	November 24-26, 2014
IFLR/ IPBA Asia Capital Markets Forum	Hong Kong	December 4, 2014
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IFLR/ IPBA Asia M&A Forum 2015	Hong Kong	March 10-11, 2015
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Interview with Geoffrey Ma, Chief Justice of the Hong Kong Court of Final Appeal

On 15 January 2014, Caroline Berube was granted an opportunity to interview the Honourable Chief Justice Geoffrey Ma, for the September 2014 issue of the *IPBA Journal*. The following is an excerpt of that interview. We give special thanks to Allan Leung of Hogan Lovells for arranging this special opportunity.

Mr Geoffrey Ma

Chief Justice Ma graduated with an LL.B. from the University of Birmingham in 1977, and practised as a Barrister in England and Wales. He was then called to the Bar of Hong Kong, Australia and Singapore, successively. In 1993, CJ Ma was appointed Queen's Counsel. He was appointed Recorder of the Court of First Instance of the Hong Kong High Court in 2000, and became a judge a year later and was elevated to the position of Justice of Appeal in 2002. He became Chief Judge of the High Court in 2003. In 2010, he was appointed as Chief Justice of the Hong Kong Court of Final Appeal.

1. What is the public's main concern regarding the law in Hong Kong?

People in Hong Kong are becoming increasingly interested in the concept of the rule of law and how it operates here. Although Hong Kong is now part of the People's Republic of China, it still maintains its common law heritage under the constitutional model prescribed by the Basic Law (Hong Kong's constitution) of one country, two systems. The Basic Law emphasises the principle of judicial independence.

Although this is the legal system, people are concerned as to how it works in practice and the extent of the interface between the Hong Kong

and Mainland judicial systems. The concern relates to whether there is in practice any influence from the Mainland courts on the Hong Kong Judiciary, on matters such as the appointment of judges. There is, of course, no such influence and demonstrably so.

One of the main themes of the Basic Law is the emphasis on human rights. In Hong Kong, we have also had a Bill of Rights, setting out constitutional rights. Since 1997, there have been many constitutional cases (almost always involving the Government) which have tested the limits of these rights. We have seen more public law cases in the last 17 years than there had been in the 50 years prior to 1997.

Our courts at all levels (from the Magistrates' courts through to the Court of Final Appeal) have dealt with many constitutional issues such as the freedom of expression, the freedom of demonstration – soon after 1997, there was a case in relation to burning the flag – to rights pertaining to sexual equality and homosexuality. Last year, we dealt with the position of transsexuals and their right to marry, in the case of W v The Registrar of Marriages.

It is difficult to pinpoint the reason for the increase in public law cases (usually in the form of applications for judicial review) but certainly a greater awareness of rights and a knowledge that the Government can be held accountable in the courts where it has acted outside the law are contributing factors. And it is, of course, essential in all of this that there exists a truly independent Judiciary where everyone – especially the Government and the authorities – are treated equally before the law.

2. Is there a greater interaction between Chinese civil law and Hong Kong common law since the retrocession?

The two systems are entirely different. The Mainland system can loosely be called a civil law system, and Hong Kong is a common law system. This is an inevitable consequence of the constitutional model of one country, two systems. By the way, the fact that Hong Kong follows the common law is stipulated expressly in the Basic Law.

3. Do you think that, at some point, the Mainland Chinese government is going to start to impose its views on the appointment of judges being made and censure certain topics?

There is no factual basis to support such a view, nor is there a legal basis for such a view either. The Basic Law runs completely counter to this. For example, the Basic Law states in no less than three provisions that there will be an independent judiciary in Hong Kong.

In reality, the Hong Kong Judiciary has shown its independence by being transparent in the way it has dealt with cases – always strictly according to the law and legal principles – and there are no signs of that changing. I can certainly say that as Chief Justice, I have never heard remotely of any instance of direct or indirect attempts from the Mainland to influence the independence of Hong Kong's judicial system.

4. What is the appeal process in Hong Kong and the role of the Court of Final Appeal?

Before 1997, there was a two-tiered appellate system, first to the Court of Appeal (in some cases the High Court, now called the Court of First Instance) and then to the Judicial Committee of the Privy Council in London. Since 1997, of course, the Privy Council has been replaced by the Court of Final Appeal. But there is still this dual appellate system. This is the common system in most common law jurisdictions.

5. Does the Court of Final Appeal have power to declare laws unconstitutional or must it defer to the Executive or the Legislature?

Under the Basic Law, there is power vested in the courts to declare laws passed by the legislature as unconstitutional and therefore such laws are of no effect. This is to be contrasted with the position, say, in Australia, New Zealand, or the United Kingdom, where the courts have no power to declare unconstitutional laws as void. The Hong Kong courts have exercised this power on a number of occasions.

6. How are foreign lawyers admitted to practise in Hong Kong? Are their roles limited to solicitor work or can they also be granted the right to appear in court?

As a foreign lawyer it is possible to register as a legal practitioner in Hong Kong but you can only practise foreign law. However, by passing the Overseas Lawyers Qualification Examination ('OLQE'), you may become a Hong Kong lawyer and you can also opt to become a barrister or a solicitor, because Hong Kong still has a dual profession.

7. How are foreign judgments and awards enforced in Hong Kong, and what is the process for foreign companies seeking to enforce a foreign judgment on Hong Kong assets?

Hong Kong does not differ from other common law jurisdictions. Concerning court judgments, many reciprocal arrangements under international conventions exist. In the absence of a convention, you can enforce it under common law.

In terms of arbitration awards, this is again a matter of conventions such as the New York Convention. Once awards are registered in Hong Kong, they are then treated as though they were judgments of a Hong Kong court.

8. What are the main legal challenges that Hong Kong is facing to keep its place as one of the soundest legal systems in the world?

It has to continue to enjoy the confidence of the public and of those who work or do business here. They have to trust that the system is a good one, one that implements the rule of law. The rule of law, put in simple terms, comprises first, the existence of good and fair laws, and second, the machinery to enforce those laws by an independent and effective judiciary. Hence, the challenge is to maintain this confidence, continue to have a truly independent judiciary and ensure that judges are of the highest quality within this system.

9. Do you see any differences in how the courts operate in Hong Kong and the United Kingdom?

There are some minor procedural differences between the United Kingdom and Hong Kong, but the practise of law is very similar. I suppose an indication of this is the number of lawyers and barristers from London who practise in Hong Kong.

10. Which legal specialties do you see growing in Hong Kong for the next decade?

Since Hong Kong is a commercial city, there remains a vast potential and demand for practices related to commerce and business law. However, since 1997 there have also been many public law cases (administrative and constitutional law, cases involving the Government, and human rights).

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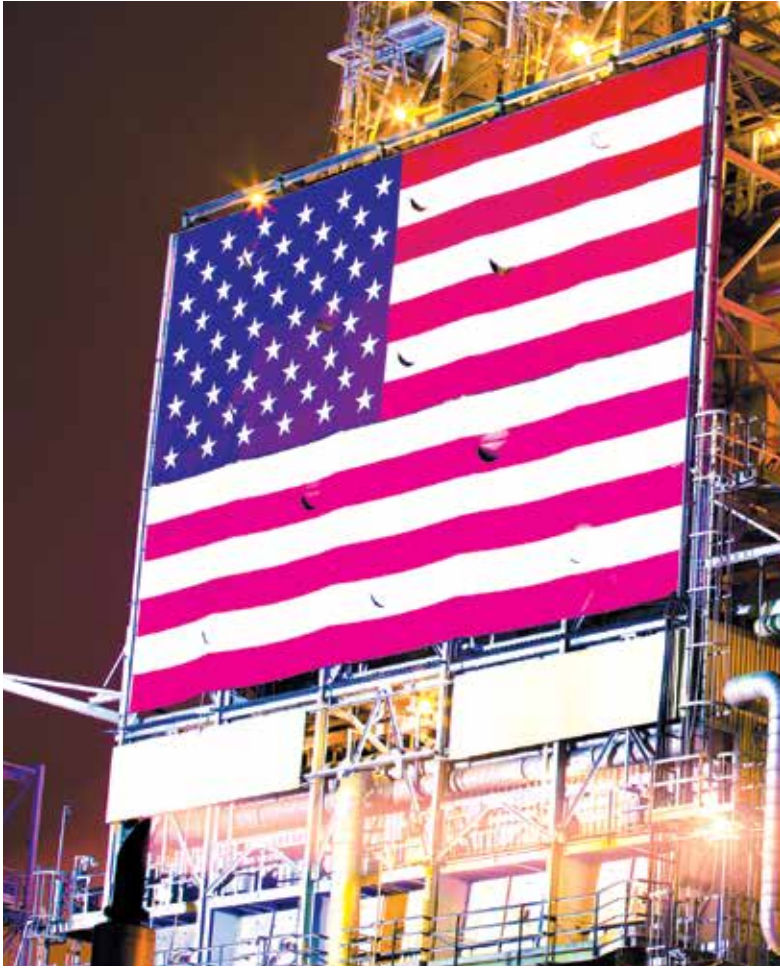
What Foreign Contractors Need to Know Before Operating in the United States



Like other industries, each year the construction industry becomes more global as companies look to grow by expanding into new markets. Increasingly, construction companies are looking to the US market as a growth target. This article examines some of the unique attributes of building projects in the US.

Every year more construction companies attempt to take their skills and expertise into new markets. Increasingly, companies are doing this by entering foreign markets. However, performing work in a foreign country creates unique challenges. That is especially true for foreign contractors expanding into the United States where the construction industry is heavily regulated at federal, state and local levels. In addition, the United States' legal system, which is based on common law, is quite different from the civil law system (or *Sharia* law) which is more common globally. This article will provide foreign contractors with the basic information necessary to ask the right questions before entering the US market. While neither the list nor the explanations are exhaustive, the foreign contractor that undertakes to appreciate the items discussed below will have a better chance at success.

1. Three Levels of Government Regulation May Apply: Federal, State and Local

In the US market, federal, state and local regulations (or some combination of the three) can apply to any given project. This is the most significant take-away from this article. In fact, most of the remaining 12 points either explain the impact of one of the three levels of regulation or the interplay between them.

Federal regulations apply uniformly to all 50 states (and US territories), while state regulations only apply in the state in which the project is located. Further, local regulations can be enacted by the municipality in which the project is located. The smart contractor will recognise that compliance with one level does not necessarily mean compliance with the others. For example, compliance with a federal regulation does not ensure compliance with state or local regulations. Often where state and federal regulations overlap, it is because the federal laws permit a more restrictive state or local version. Compliance with these additional rules can add costs and time to projects.

Identifying and understanding the right requirements ultimately requires research that must be repeated for each project in a new location. Fortunately, there are a few guideposts that allow a contractor to tailor its research. For example, if a contractor intends to contract with a private owner, then the contractor would be wise to focus its research on state regulations, being mindful to also check with the local jurisdiction where the project is located for any special rules.

2. Dispute Resolution: Administrative Boards and Litigation Versus Arbitration

The US legal system may be the most intimidating consideration in entering the US market. Disputes happen. Therefore, dispute resolution is inevitable. If the foreign contractor wishes to pursue the dispute legally, it must give proper notice and then pursue the claims in accordance with the contract.

For contracts with the US government, the foreign contractor may have to bring its claims before a specialised administrative board. Otherwise, the contractor will have to bring its claims in federal court, likely the Court of Federal Claims, where the applicable rules of procedure will have to be satisfied. Regardless of where the claim is initially heard, the contractor may also have to deal with the allowable appeals process. For instance, if the contractor believes the specialised board reached an erroneous result, it may appeal the decision to the Board of Contract Appeals, which will lead to increased litigation costs.

Lawsuits brought against state governments must be brought in courts of that state. Moreover, just like at the federal level, some states also have specialised administrative boards which hear disputes concerning claims against certain state government entities. Just like at the federal level, the state administrative boards and courts have their own system of appeals. While the processes may be similar, each state is slightly different and thus it cannot be assumed that what will be sufficient in one state will work in all.

For disputes between private parties, the contractor may be able to bring a suit in a state court or federal court, depending upon the facts of the claim.

Alternatively, the contract may require all disputes to be resolved by arbitration. Foreign contractors, who are unfamiliar with the litigation process in the US, should consider requiring arbitration. However, if arbitration is selected, the contractor will have to pick a forum to hear and administer the claim. The American Arbitration Association ('AAA') is one such possibility, but other organisations exist and each organisation will have its own rules and procedures that will help shape the time and the costs of the arbitration. Understanding the differences is important to making the right choice with respect to arbitration as compared to state or federal court.

The bottom line is, for better or for worse, dispute resolution in the US is incredibly complex. This description only provides a superficial gloss on the American legal system. The prudent foreign contractor will need to fully investigate the process and take steps to gain a detailed understanding. Knowledge of the process is the first step to making sure claim rights are not lost.

3. Fixed-price Contracts are the Standard

In the US, the majority of contracts are fixed-price or have a guaranteed maximum price. For private owners, the decision to require a fixed-price or maximum price contract is largely the product of a business decision rather than government regulation. But regardless of the reason for the predominate use of such contracts, the result is that the right to obtain an increase in the contract price is generally few and far between. As such, if the contractor miscalculates the proper costs, the contractor will likely have no choice but to complete the job at a loss. This is true, even if the contractor believes it is entitled to a proper price increase but the owner disagrees.

Contractors also tend to bear the risk of budgeting cost factors beyond their control, in the absence of escalation clauses or change of law provisions. When included in the contract, escalation clauses cover the contractor's unexpected increase in the cost of raw materials or labour to complete the project and change of law provisions can protect the contractor when a change in law increases the costs to comply with the law. Unfortunately, these types of clauses (which shift the risk of increases in cost to the owner) are generally not included in fixed price contracts. As such, foreign contractors need to make sure they have included a sufficient contingency to protect them in the event such issues develop.

4. Contract Requirements for Indemnification

In the US, indemnification clauses need to be prepared carefully as many states have anti-indemnity statutes or case law which regulate the extent to which a contractor or subcontractor may be required to indemnify another party and will void non-complaint clauses. For obvious reasons, a Prime Contractor might want to include an indemnity provision that requires its Sub-contractors to indemnify the Owner and the Prime from losses or claims caused by the Prime or Owner's negligence. However, these types of provisions, even if freely agreed to by the Subcontractor, are often illegal because most states have statutes that preclude indemnification for one's own negligence. Because of this fact, the foreign contractor that takes the time to research, craft, and update its subcontracts to include an enforceable indemnification clause for the states in which it is doing work will be ahead of the game in the event an accident occurs on the project for which indemnification would be valuable.

5. Local Preferences Requirements

While public projects are typically awarded to the lowest bidder, some states have laws that require public owners to abide by local hiring, purchasing, or contract-award preferences. In the case of public works contracts, local hiring preferences require a certain percentage of local workers; purchasing preferences require contractors to use supplies or materials that are made locally; and contract award preferences give an advantage to local bidders in the award of public contracts. Where such clauses exist and apply to the project solicitation, the result is the local contractor has a better chance at being awarded the project.

Fortunately, the use of preferences is regulated by statutes and often times the knowledgeable foreign contractor, through research and planning, can find a way to comply and establish a level playing field. For example, it is often possible for the foreign contractor to use locally-sourced materials, employ local workers for a project, or develop local headquarters in a desirable geographical region to satisfy the preference rules.

6. Preferences for Certain Subcontractors

The federal government and many state legislatures have enacted laws establishing contractor goals for hiring woman-owned or minority-owned subcontractors on publicly funded projects. Typically, the main requirement is that the contractor demonstrate a good faith effort to use woman- or minority-owned businesses as subcontractors on the project. So long as the contractor demonstrates sufficient good faith efforts, the regulations are satisfied. However, compliance may not be as easy one might think, as getting bids from suitable subcontractors often requires the Prime Contractor to seek them out.

7. State Licensing is a Requirement

Most states have strict contractor's licensing requirements that a foreign contractor must satisfy prior to operating in each state. While compliance with such

licensing requirements is rather easy and typically only involves at most an examination, demonstrating sufficient education or experience in the industry, showing some level of financial responsibility, obtaining the proper insurance coverage, and paying a fee, the failure to do so for each state can be draconian.

State laws extend very little mercy – if any at all – to the contractor that fails to comply with the state's licensing requirements. Some states authorise the project owner to rescind the contract or seek disgorgement of paid funds. That means the contractor will have to return monies paid, even for the work that was performed and was performed well. The contractor will also forfeit lien rights, which typically inure to the benefit of a licensed contractor, to recover unpaid contract fees. Further, violations of state licensing requirements can even lead to criminal charges.

8. Surety Bonds Guarantee the Contractor's Performance

Outside the US, the foreign contractor may be accustomed to the use of Letters of Credit ('LOC') to guarantee a project. In the US, the use of surety bonds and not LOCs is the standard. The significant difference between the two is evident upon the occurrence of a default. Suretyship is a tripartite relationship between the principal/obligor (contractor or subcontractor), obligee (the person to whom the contractor or subcontractor owed the duty of performance), and the surety. In the event the principal does not perform, the surety steps in and fulfils the principal's obligation or makes payment to the obligee. Unlike the surety bond, the LOC simply entitles the owners to the sum of money stated in the LOC. The owner must thereafter manage the completion of the project, if the contractor failed to perform, or, perhaps, pay subcontractors, if the contractor was not paying its subs.

Contractors who are not accustomed to guaranteeing performance with a surety bond must understand the difference between suretyship and insurance. Surety companies do not expect losses and require the principal to indemnify the surety for any losses incurred under the bond(s) that the contractor pays a fee for. Sureties require contractors to sign a general agreement of indemnity ('GAI'), which entitles the surety to much more than indemnity. GAI's can allow the surety to impose Uniform Commercial Code liens on collateral, demand cash collateral, demand the contractor to

State laws extend very little mercy to the contractor that fails to comply.

provide an accounting of its financing with verification, in addition to other rights set forth in the GAI and equitable rights (based on case law). Significantly, the surety usually requires that the contractor agree to be personally liable as well. As such, the exposure of the contractor can be much greater than what exists under a LOC arrangement.

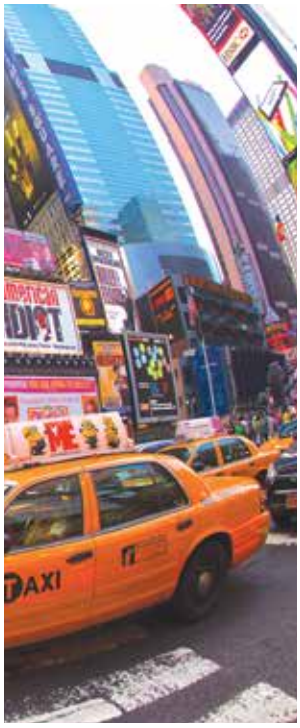
9. Entering the United States' Market May Limit Business Transactions in Other Countries

In certain countries, bribery may be commonplace and perhaps even essential to creating business opportunities. For foreign contractors working in such areas, entering the US market can affect the contractor's practices worldwide. The Foreign Corrupt Practices Act of 1977 ('FCPA') makes it unlawful to make payment to foreign officials to assist in obtaining business. Essentially, bribing government officials in foreign countries is a violation of US law. As such the price of entering the US market may be leaving another market.

The contractor must also observe US economic sanctions and embargoes that the Office of Foreign Assets Control ('OFAC') administers against certain geographic regions and governments. Sanction programs can be comprehensive or non-comprehensive. Comprehensive sanctions programs include Burma (Myanmar), Cuba, Iran, Sudan, and Syria. Non-comprehensive programs include the Western Balkans, Belarus, Cote d'Ivoire, Central African Republic Sanctions, Democratic Republic of the Congo, Iraq, Liberia (Former Regime of Charles Taylor), Persons Undermining the Sovereignty of Lebanon or Its Democratic Processes and Institutions, Libya, North Korea, Russia, Somalia and Zimbabwe as well as other programs targeting individuals and entities located around the world. Those programs currently relate to foreign narcotics traffickers, foreign terrorists, transnational criminal organisations and weapons of mass destruction proliferators.

Unsurprisingly, the United States recently promulgated Ukraine-related sanctions, which are intended to sanction those persons contributing to the current situation in the Ukraine.[1] It is important to note that in non-comprehensive programs, there are no broad prohibitions on dealings with countries, but only against specific named individuals and entities. The names are incorporated into the OFAC's list of Specially Designated Nationals and Blocked Persons ('SDN list') which includes over 6,000 names of companies and individuals who are connected with the sanctions targets.[2] The list of SDNs and the governments subject to sanctions changes and therefore must be checked periodically by contractors to insure they are not running afoul of US laws.

The contractor entering the US market must observe US economic sanctions and embargoes.



10. The Labour Force: Union Versus Non-Union

Foreign contractors entering the US market will eventually be confronted with a choice between implementing union or non-union work forces for projects. Union workers typically earn more than non-union workers. Unions have a long and storied history in the US and their ability to influence any industry's hiring requirements is cyclical. Despite the fact that union membership rates have been steadily declining in the US, the construction industry is different. The US

Department of Labor – Bureau of Labor Statistics reports that the construction industry has one of the top five rates of unionisation at 14.1%. This percentage varies considerably throughout the US. For 2013, all states in the Middle Atlantic and Pacific divisions reported union membership rates above the national average, and all states in the East South Central and West South Central divisions had rates below it. New York has the highest union membership rate in the US and North Carolina has the lowest; the higher the unionisation rate of the region, the higher the likelihood that the foreign contractor will have to bargain with a union to find an adequate and qualified labour force.

Further, some trades, such as steelworking, traditionally have stronger unions than other trades within the construction industry. Unfortunately, the Bureau of Labor Statistics does not aggregate and report the numbers of trades within the construction industry to evaluate which trades have the most influential unions.

11. Safety: OSHA and State OSHAs

The Occupational Safety and Health Act was enacted in 1970 and created the Occupational Safety and Health Administration ('OSHA') to ensure safe and healthful working conditions. Under the Act, the OSHA sets and enforces standards and provides training, outreach, education, and assistance. The Act covers most private sector employers and their workers, in addition to some public sector employers and workers in the 50 states and certain territories and jurisdictions under federal authority.

In the construction industry, the OSHA covers accident protection, e.g., mandating that machinery be safe, that persons are properly trained and are competent to operate those machines, etc.; fall protection, e.g., use of harnesses, secured ladders, etc.; sanitation, and many other aspects which the Act deems important for the health and welfare of construction workers. According to the OSHA, there are currently 22 States and jurisdictions operating OSHA approved state plans covering both the private sector and state and local government employees and five which cover public employees only.[3] States must set job safety and health standards that are 'at least as effective as' comparable federal standards and most of the states with approved plans simply adopted standards identical to federal ones. States have the option to enact legislation which regulates hazards not addressed by federal standards. Thus, compliance in one state might not be sufficient for all states.

12. State False Claims Acts

At least 22 states have false claim statutes which apply to government contracts. If construed broadly, these statutes reasonably include construction contracts.[4] False claims acts impose liability on persons and companies that defraud government programs. Consequently, a contractor that files a false claim for payment on a construction contract could be liable under a state false claims act and be required to pay significant civil penalties or damages. In addition, one part of a claim being deemed false can result in the loss of the entire claim.

13. Prompt Payment Acts

Prompt payment acts exist at the federal and state level. At the state level, there are also regulations for public and private contracts. Prompt payment acts require that contractors pay subcontractors within a certain period after receiving payment from the owner. The amount of time varies from state to state, but most states prescribe payment within 7 to 30 days. Only a handful of states do not have prompt payment acts for private contracts and New Hampshire is the only state that has not enacted a prompt payment act for public or private construction contracts.

Summary

While the methods of construction travel easily from one country to the next, to be truly successful in the US marketplace foreign contractors would be wise to look into the 13 issues addressed in this article. Those that do will have a better chance of success.

Notes:

1 http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx.
2 http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx.
3 https://www.osha.gov/dcsp/osp/.
4 This figure excludes those states that have whistle blower and Medicare fraud states only.

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Investment in Hydropower in Nepal

Nepal has explored just a miniscule percentage of its economically feasible hydropower generation. Therefore, a greater portion of its potential to generate hydropower is yet to be realised. Nepal, within its small expanse of 147,181 square kilometres, possesses a colossal capacity to meet not only its domestic electricity requirements but also cater for the clean energy demands of its neighbours.

Now more than ever, the use of clean energy is gaining momentum worldwide and investment in clean and renewal energy has become a pressing need. Almost all countries around the world hold the unanimous opinion that solar, wind, hydropower, biomass including biofuels and geothermal, are renewable energies. Hydropower, along with other renewable energies, undoubtedly serves as a best solution to combat climate change. It is an environmentally benign source of energy that helps reduce greenhouse gas emissions. Its benefits are that it has no fuel cost, provides low-cost electricity and there is ample opportunity for multi-purpose water use.

Hydropower Potential

Nepal is one of the richest countries in water resources, bordering India in the south, east and west and China in the north. The Himalayan range on the northern side, which has eight of the 14 highest peaks in the world above 8,000 metres, is the abode of a perennial source of water. This, along with around 6,000 rivers and rivulets with an annual runoff of about 225 billion cubic metres of flowing water and a favourable geographical set-up, endows this country with huge hydropower generation potential. Most of the surface water flows through four major river basins, i.e., Karnali, Mahakali, Narayani and Saptakoshi. The steep gradient of Nepal's topography also provides a conducive environment for the development of projects of different capacities that range from a one-kilowatt micro project to a massive 10,800-megawatt (MW) project.

Government estimates reveal that the technically and economically viable hydro power potential of the country in terms of installed capacity is about 43,000MW out of which only 704.779MW electricity has been generated to date, which is less than two percent of the total hydropower generation capacity. As of August 2014, 43 hydro power projects of above 1MW capacity are operating in Nepal with a total installed capacity of 718.099MW, ranging from the 1.02MW Tinau Hydropower Project to the 144MW Kali Gandaki-A Hydropower Project. The Kali Gandaki-A Hydropower Project is a peaking run-of-river project and currently is the largest hydropower project implemented so far in Nepal. Kulekhani-I with 60MW and Kulekhani-II with 32MW, are the only two storage projects operating in Nepal. Apart from Kulekhani I and Kulekhani II, the rest of the hydropower plants in the country are predominantly of the run-of-river type.

Government Policy on Private Investment

The Government of Nepal has adopted a liberal policy to augment private investment in the hydropower sector. Until 1991, the hydropower sector was under the purview of the government. With the enactment of the Hydropower Development Policy, 2049 (1992), the Government of Nepal opened the hydropower sector for private investment as an outcome of its liberalisation policy. One of the objectives of the Hydropower Development Policy, 2049 (1992) was to encourage national and foreign private sector investment for the development of hydroelectric power. Similarly, the Hydro

Power Development Policy, 2058 (2001) was adopted with the objective of attracting investment from the private sector, both domestic and foreign investors, as well as from the government sector and through joint ventures between the government and the private sector. The operation of generation, transmission and distribution projects could also be done through sole investment.

The Government is pursuing three approaches in the development of water resources. First, implementing small hydropower projects to meet the local demands in remote areas. Second, implementing medium hydropower projects to meet the national demand, including surplus for export. Third, implementing large hydropower projects to meet the regional demand for energy. Thus, the Government has adopted the policy of involving the private sector in the development of hydropower to meet the domestic needs and also to promote the export of electricity.

Nodal Agency

The Ministry of Energy, serving as a key nodal agency for formulation, implementation of policy, plans and programs relating to energy production and management, promotes private sector investment for energy development. The Government of Nepal (Allocation of Business) Rules, 2069 (2012) has entrusted the Ministry with the responsibility for national, regional and international liaison for the utilisation of energy and the bilateral or multilateral negotiations of treaties and agreements relating to utilisation of water resources.

The Department of Electricity Development under the Ministry administers the electricity licence regime. The Department of Industry under the Ministry of Industry provides foreign investment approval for hydropower projects having the capacity of less than 500MW. The Investment Board of the Government of Nepal regulates investment in hydro power projects having a capacity of 500MW or more.

The Nepal Electricity Authority is a statutory autonomous body responsible for generating, transmitting or distributing electricity within Nepal's power system. It is authorised to sell electricity to foreign countries or to purchase electricity from foreign countries, purchase electricity generated in the private sector and determine the tariff structure for electricity consumption.

Concession and Promotion under the Legal Regime

Over the years, the legal regime of Nepal has progressed to create an investment environment more palatable to private investors. A number of acts, rules and policies have been formulated to regulate the hydropower sector. Some of the important ones include the Electricity Act, 2049 (1992), Electricity Rules, 2050 (1993), Water Resources Act, 2049 (1992), Water Resources Rules, 2050 (1993), Environment Protection Act, 2053 (1997), Environment Protection Rules, 2054 (1997), Foreign Investment and Technology Transfer Act, 2049 (1992), Land Acquisition Act, 2034 (1977) and the Hydropower Development Policy, 2058 (2001).

Hydropower projects in Nepal are implemented based on the BOOT (Build, Operate, Own and Transfer) model and thus they should be transferred to the Government of Nepal after the expiry of the time period specified in the licence. The Electricity Act, 2049 (1992) prescribes the term of a survey licence to be five years maximum and the term of a generation licence, transmission licence or distribution licence is 50 years maximum. The Double Licensing System is followed in Nepal, where licences are issued in two stages. In the first stage, the survey licence is issued to conduct a survey for generation, transmission or distribution. In the second stage, a generation, transmission or distribution licence is issued after completion of works related to survey.

The Government of Nepal has provided an income tax holiday and certain tax benefits to promote hydropower projects. Hydro power projects are provided a 100 percent income tax exemption for the first 10 years and a 50 percent income tax exemption for the next five years after the commercial generation of electricity. Value Added Tax is exempted in relation to imports of machinery, equipment, and the tools required for hydro power projects that are not produced in Nepal. Similarly, a facility of zero rate Value Added Tax is provided in respect of the use of machinery, equipment, and tools required for hydro power projects that are produced in Nepal. Only one percent of customs duties are levied for the import of machinery, equipment, tools required for hydro electricity generation, transmission, distribution, operation or maintenance that is not produced in Nepal.

The Government has assured it will not nationalise hydropower projects, transmission systems and distribution systems operated by the private sector during the licence term. As per the Land Acquisition Act, 2034 (1977) the government can acquire land required for the purpose of the generation, transmission or distribution of electricity provided that the hydropower developer pays the requisite compensation. If such land is owned by the government, then it can be made available on lease for a period up to the term of the licence. The Lands Act, 2021 (1964) prescribes a land ceiling and limits the land that can be owned by a person. However, energy-based industries are exempted from the land ceiling.

The Environment Protection Act, 2053 (1997) and Environment Protection Rules, 2054 (1997) require an Initial Environment Examination ('IEE') to be conducted for the operation of electricity generation projects from 1MW to 5MW capacity and an Environmental Impact Assessment ('EIA') to be conducted for the operation of electricity generation projects with a capacity of more than 5MW. Now, the Rules have been amended specifying that an IEE shall suffice for the construction of an electricity transmission line.

As per the Immigration Act, 2049 (1992) and Immigration Rules, 2051 (1994), the Department of Immigration can issue a non-tourist visa to foreigners having obtained permission from the Government of Nepal to work for remuneration in any firm, company, industry or enterprise within Nepal which is valid for a maximum term of one year and can be extended as per necessity. Foreigners who have obtained permission to make investment in any trade or industrial enterprise in Nepal or in order to carry on export trade from Nepal, can be issued a business visa which is valid for a maximum term of five years and can be extended as per necessity. The Foreign Investment and Technology Transfer Act, 2049 (1992) and Electricity Act, 2049 (1992) ensure foreign investors 100 percent repatriation of their equity investment, reinvestment of the earnings derived from the equity investment and the loan investment in foreign currency at prevailing market rates of exchange.

Hydropower Project Financing Model

The Financing Model adopted in the Hydropower sector in Nepal can be broadly categorised as follows:

1. Government Model

The Nepal Electricity Authority is authorised under law to make appropriate arrangements to supply power by generating, transmitting and distributing electricity. The Nepal Electricity Authority through its subsidiary company can operate and develop hydro power projects.

2. Private Sector Model
This model involves sole investment by a domestic private investor or a joint venture between a domestic private investor and a foreign private investor.

3. Public Private Partnership Model
A public-private partnership model is a specific arrangement between one or more public entities and one or more private entities to develop a project jointly bearing the source of investment, risks and sharing profit as per the understanding between both parties. A hydropower project can be developed jointly by the Government of Nepal and a domestic private investor. Likewise, it can be developed by a joint venture between the Government of Nepal and a foreign private investor.

Hydropower Projects in the Pipeline

There are a number of export-oriented hydropower projects committed to be developed by international developers. Some of these include the 900MW (run-of-river) Upper Karnali Hydropower Project to be developed by GMR-ITD (Italian-Thai Development Public Company Limited) Consortium; 900MW (run-of-river) Arun-3 Hydro Project to be developed by Satluj Jal Vidyut Nigam Limited; 650MW (run-of-river) Tamakoshi-3 Hydropower Project to be developed by Statkraft Holding Singapore Pte Ltd (formerly known as SN Power Holding Singapore Pte Ltd); 600MW (run-of-river) Upper Marsyangdi-2 Hydropower Project to be developed by GMR Energy Limited; 400MW (run-of-river) Lower Arun Hydropower Project to be developed by Bras Power International; 216MW (run-of-river) Upper Trishuli-1 to be developed by Korea South East Power Company (KOSEP), Daelim International Company, Kyeryong International Construction Company and Jade Power Private Limited. Similarly, some of the hydropower projects that are being developed by international investors for domestic consumption are the 120MW Likhu-4 Hydropower Project, 82 MW Lower Solu Hydropower Project and the 37 MW Kabeli-A Hydropower Project.

The 10,800MW Karnali Chisapani Multipurpose Project, 5,600MW Pancheshwor Multipurpose Project and the 3,000MW Sapta Kosi High Dam Multipurpose Project are examples of mega scale storage projects that can be developed in Nepal. The Pancheshwor Multipurpose Project and the Sapta Kosi High Dam Multipurpose Project are bi-national hydropower projects to be jointly developed by Nepal and India to meet the objectives of both countries for the development of hydropower, irrigation, flood control and management and navigation.

Cross-Border Transmission Arrangement

For the enhancement of power exchange with India, construction of the first cross border 400-kilovolt (kV) Dhalkebar-Muzzaffarpur double circuit transmission line has already been initiated. The 140-kilometre transmission line will help improve the power exchange between Nepal and India, particularly the export of hydropower from the Tamakoshi basins. The project is expected to be completed by 2015. A 40-kilometre section of the Dhalkebar-Muzzaffarpur transmission line falls within Nepal and 140 kilometres in India. The Government has also prioritised construction of the 400 kV Bardaghat-Gorakhpur Cross-border Transmission Line. A detailed study of a 125-kilometre second cross-border transmission line is under way. A 25-kilometre section of the Bardaghat-Gorakhpur transmission line lies in Nepal and the remaining 100-kilometre section in India. Both countries also plan to undertake a 112-kilometre 400 kV Duhabi-Purnea Cross-border Transmission Line. A 22-kilometre section of the Duhabi-Purnia transmission line lies in Nepal and a section of around 90 kilometres in India. These cross-border transmission lines will be crucial to conduit the excess power from new hydro projects in Nepal to India.

Conclusion

Efforts and arrangements made by Nepal indicate the level of seriousness existing in the country towards promotion and development of the hydropower sector which has been declared as the priority sector of the country. Investors can grab the prevalent untapped hydropower potential and benefit from the vast opportunities. It can be confidently stated that the future for hydropower development in Nepal is promising.

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New Collective Redress Scheme in Japan

The Japanese Parliament enacted a new litigation scheme for consumer collective redress in December 2013, which will be in effect within three years. This short memorandum introduces this new scheme and analyses the possible impact of it.

Introduction

In transactions between businesses and consumers, consumers sometimes suffer from unfair loss caused by illegal business activities. However, these consumer damages are difficult if not impossible to recover due to various obstacles. Alleviating these difficulties has been said to be necessary in a number of countries for a long time, and then interestingly enough, similar collective redress schemes for consumer damages are currently being proposed or enacted in some advanced countries, including Japan.

This short memorandum discusses the background of the collective redress scheme for consumer damages, and then summarises the outline of a new litigation scheme for consumer collective redress recently enacted in Japan, and finally analyses the possible impact of this new scheme.

Background of Collective Redress Scheme for Consumer Damages

Difficulty in Recovering Consumer Damages and Necessity of Collective Redress

According to the principles of Japanese civil procedure, a judgment in a civil action binds only the parties to the said action, and only these parties can enjoy the benefit of that judgment.[1] This means that anyone who wishes to recover his damages through a civil action has to bring an action by himself. Such a principle would be in common among most countries, although there might be differences to some extent from country to country.

Imagine the following case. An English language school sets forth the terms and conditions with their students, in which there is a term that any tuition fee paid in advance shall not be refundable even if a student leaves the school in the middle of his/her course. In Japan, contract terms limiting a consumer's right to a refund in contracts between business and consumer are regarded as void by statutory rules,[2] so the said school is required to refund the tuition fee to the student after deducting the cost of the lessons the said student has attended, despite the existence of the contract term.

However, what if that English language school refuses to voluntarily pay back the tuition fee on the grounds of the existence of the term that limits the refund? As is clear from the said principle, any student who wants to be paid back will have to bring an action against the school, claiming that the limitation term is void by statutory rules. This situation would be the same even after one student brought an action and won the case. Unless the school repays voluntarily, any other students in a similar situation would not be able to enjoy the benefit of the precedent judgment. This is the basic principle of civil litigation. Eventually, everybody will have to bring an action.

Then, would it be an easy task for these students to seek a legal remedy through a civil action? Needless to say, bringing an action by themselves would not be a simple task for ordinary consumers, because they do not have enough legal knowledge. Even in a case in which a legal professional expects to easily win, ordinary consumers would find it quite demanding to establish their claim and present the evidence that is sufficient to persuade a judge.

Of course, these students might be able to engage lawyers to seek a legal remedy. In fact, lawyers would be of great help in a case where the amount of damages is relatively large and lawyers expect to surely win. However, an ordinary consumer would never pay legal fees to a lawyer to bring an action against the business if the amount of his damages was just US$1000. This means that the amount of money these consumers give up trying to recover would directly turn out to be a benefit to the business. If there were a thousand consumers in that similar situation, the business could gain unfair benefits of up to US$1 million at the cost of the consumers' loss.

Redress schemes for consumer damages are currently being proposed in advanced countries, including Japan.

Movement for Introducing Collective Redress in Various Countries

Consumer damages cannot be effectively recovered through ordinary civil litigation schemes. This difficulty in recovering consumer damages has been recognised in various countries for a long time, and it has been pointed out that a collective redress scheme would be necessary for the effective recovery of consumer damages. That is, a scheme that enables as many plaintiffs as possible to be bundled in a single action is necessary.

In the United States, class action schemes have often been used for the effective recovery of consumer damages. As a number of commentators point out, class action schemes in the US have a strong effect of binding all of the class members unless each class member opts out from the class. Actually, this scheme is quite effective; however, there is a strong criticism that lawyers abuse class action schemes as a means of blackmailing businesses.[3] So, few countries other than the US have introduced class action schemes so far.[4]

In comparison, the European Union and Japan seem to take a different approach to the US. In February 2012, the European Parliament adopted a resolution called 'Towards a coherent European approach to collective redress',[5] which proposed the introduction of a collective redress scheme within the field of competition law and consumer damages with an opt-in method managed by designated bodies or institutions. This resolution was aimed at alleviating the difficulty in recovering consumer damages by enabling these qualified bodies to bring actions without the consent of each consumer and allowing consumers to join in the procedure afterwards.

This resolution was followed by the Collective Redress Recommendation proposed in June 2013.[6] This recommendation urges member countries to introduce a collective redress scheme for the recovery of damages caused by infringements of EU laws in general.

In response to these trends in the EU, in France a new group action scheme has been enacted in March 2014,[7] and in the United Kingdom, a Draft Consumer Rights Bill was proposed in June 2013.[8]

In Japan as well, an injunction scheme led by Qualified Consumer Organisations to stop the use of unfair contract terms by businesses was enacted in 2006.[9] It was the first collective redress scheme introduced in Japan. Furthermore, more recently the Japanese Government submitted a new bill to introduce a new litigation scheme for the collective recovery of consumer damages in April 2013, and this bill was passed in December 2013.[10] This new scheme is, similar to the proposals in the EU, aimed at facilitating the recovery of consumer damages by enabling qualified bodies to bring an action and then allowing consumers to join in the procedure after the liability of the defendant has been determined by the court. This act will be in effect no later than 11 December 2016.

Outline of New Japanese Scheme

Among a number of interesting features, three points mentioned below would be most important in this new Japanese scheme.

Two-phase Procedure

First, the most important feature of this new scheme is that the procedure for the new scheme is clearly divided into two phases. In the first phase, the court considers only the common issues of the case based on a claim brought by a Specially Qualified Consumer Organisation, an SQCO,[11] and then the judge determines whether the defendant is liable to pay damages to the plaintiff class members. The common issues referred to in this scheme means the issues which relate to all of the class members commonly.[12] For example, in the English language school case referred to above, the validity of the contract term to limit the refund would be the common issue.

If the liability of the defendant is upheld by the judge in the first phase, the case will move on to the second phase.[13] At the beginning of the second phase, the claimant SQCO notifies all of the class members and urges them to join the procedure.[14] The Government expects that more consumers will join in the procedure, because they can join in after the liability of the defendant has been established. After class members join in, the defendant replies whether it accepts each claim of class member who joined in the procedure.[15] A claim fully accepted by the defendant will be determined as such.[16] If the defendant argues, the judge determines the amount of damages for each class member whose claim is argued.[17]

3.2 Brought only Only by SQCOs

The second important feature is that this new scheme can be brought only by SQCOs.[18] SQCOs are consumer bodies which are specially qualified by the Government and must meet very strict criteria for protecting consumer interests.[19]

On what grounds does this scheme limit the qualification to bring an action? First, because if a claimant lacking adequate legal knowledge or ability brings an action and loses the case, it might harm consumer interests.[20] In addition, it can be pointed out that it seems to aim at preventing abusive actions against businesses.

Limited Applicability

As the third point, it should also be noted that the types of cases applicable to this new scheme are really restricted.

First, a direct contractual relationship between consumer victims and the business is required in order for a claimant body to be able to bring an action against the said business.[21] This means that in a case of product liability, a claimant body cannot bring an action directly against the supplier which produced the defective products. That is because these products are usually sold to final consumers by retailers, so the final consumers have a direct contractual relationship with the retailers, not with the suppliers.

Next, only monetary claims are allowed in this scheme.[22] That is, claims that seek the provision of a service by a business cannot be commenced. In addition, claims for lost profit or consequential damages and personal damages such as bodily injury, are not allowed in this new scheme, even though they are monetary claims.[23]

As a result of these strict conditions mentioned above, a typical case that is applicable under this new scheme would be limited to a case where consumers are seeking the refund of money which the business illegally received based on a voidable contract term, such as in the English language school case referred to above.

Possible Impact of this New Scheme

Those who are against the introduction of this new scheme seem to insist as follows on this issue:[24] This new scheme would increase the litigation risk of businesses from the consumer side in the future, meaning businesses are more likely to be forced to pay back damages which they didn't have to do before. They warn that the introduction of this new scheme could have a negative impact on business activities and even the Japanese economy as a result.

However, such views cannot be seen to be reasonable for the following reasons.[25] First, this new scheme only requires businesses to pay back the money which they should have originally paid back to the victims. It does not impose punitive damages on the business like class action schemes in the US. In addition, the defendant businesses only have to refund the consumers who actually join in the procedure. It is obvious that this new scheme would put inappropriate pressure on the businesses side.

In fact, collective redress schemes for consumer damages could have a positive impact on the sustainable development of the market, because the appropriate recovery of consumer damages would not only prevent illegal business activities, but also strengthen consumer confidence in the market.

Conversely, there are serious reservations about the Japanese new scheme as to whether it would be effectively employed for consumer damages recovery. In particular, the burdens of SQCOs for bringing actions under this new scheme could be too heavy. For example, SQCOs have to bear the cost of notification to all class members,[26] even though these notifications are required only after the defendant loses in the first phase and the liability of the defendant has been established. In addition, SQCOs have to bear the cost of the procedure in the second phase, although a part of these costs could be compensated afterwards, as a reward, from the money which SQCOs have recovered from the defendant for class members.[27] As these costs might be over thousands of US dollars or even a million US dollars, these burdens could restrain SQCOs from bringing an action. Kansai Consumers Support Organization, the second largest DCB in the Kansai district, requires the introduction of effective measures for reducing such burdens such as financial support from the Government for this new scheme to be utilizised effectively.[28]

Despite these drawbacks, it is clear that this new collective redress scheme in Japan would be very significant as a fairer market will be established in Japan. In fact, this movement for consumer collective redress attracts international attention, especially for consumer organisations.[29] It is fair to say that this new scheme would contribute not only to the protection of consumer interests, but also to the establishment of a fairer market and the sustainable development of the market.

Notes:

1 Article 155 (1) Civil Procedure Act 1996 Act No 109 of July 26, 1996 (JPN).
2 Article 9 (i) Consumer Contract Act 2000 Act No. 61 of May 12, 2000 (JPN).
3 Commission, 'COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS "Towards a European Horizontal Framework for Collective Redress"' COM (2103)401 final, para 2.2.2.
4 Most states of Canada, and Australia are the examples which introduce a class action scheme.
5 European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI))
6 COMMISSION RECOMMENDATION of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).
7 LOI n° 2014-344 du 17 mars 2014 relative à la consommation (1).
8 Draft Consumer Rights Bill, June 2013 (UK).
9 Consumer Contract Act Amendment 2006 Act No. 56 of 7 June 7, 2006.
10 Act on special provisions of civil procedure for collective recovery of consumer property damages, Act No .96 of 11 December 11, 2013,
11 Ibid, Article 3 (1).
12 Ibid, Article 2 (iv).
13 Ibid, Article 12.
14 Ibid, Article 25.
15 Ibid, Article 42 (1).
16 Ibid, Article 42 (3).
17 Ibid, Articles 44 and 55.
18 Ibid, Article 3 (1).
19 Ibid, Article 2 (x).
20 A report of the expert panel of consumer committee for collective recovery of consumer damages, August 2011, Section 3.1.(1)(i), < http://www.cao.go.jp/consumer/history/01/kabusoshiki/shudan/doc/110822_houkokusho1.pdf> accessed September 22 2013 (Japanese).
21 Ibid [11], Article 3 (1).
22 Ibid [11], Article 3 (1).
23 Ibid[11], Article 3(2).
24 See: An emergency statement on collective litigation scheme in Japan on 25 March 25 2013 by Keidanren (Japan Business Federation), the American Chamber of Commerce in Japan, European Business Council in Japan, and other four business organizations, < http://www.keidanren.or.jp/policy/2013/023.html> accessed September 22 2013 (Japanese).
25 See: An emergency appeal for early realization of collective recovery scheme of consumer damages by three qualified consumer organisations in Kansan district, 27 March 27 2013, < http://www.kc-s.or.jp/upload/f10000357_1.pdf> accessed September 22 2013 (Japanese).
26 Ibid[11], Article 25.
27 Ibid[11], Articles 65 (4) (vi) and 76.
28 Kansai Consumers Support Organization, 'Opinion on collective recovery scheme for consumer damages', September 5 2012, <http://www.kc-s.or.jp/upload/f10000229_1.pdf> accessed 22 September 22 2013 (Japanese).
29 Consumer International reported twice on this new proposal in Japan in April and May 2013. 'Japan government considers group action plan' 10 April 10 2013 < http://www.consumersinternational.org/news-and-media/news/2013/04/japan/#.Uj8FvdK-2So>, and 'Japan: Group action law introduced' May 9 2013 < http://www.consumersinternational.org/news-and-media/news/2013/05/japan/#.Uj8FYtK-2So>, both accessed 22 September 22 2013.

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A Condition Precedent of 'Friendly Discussion' Before Arbitration is Enforceable

The English Commercial Court has upheld a dispute resolution clause which required the parties to attempt to resolve the dispute by "friendly discussion" before arbitrating.

In *Emirates Trading Agency v Prime Mineral Exports Limited*,[1] the English Commercial Court upheld a contractual term which required parties to first seek to resolve their dispute by 'friendly discussion' before starting arbitration. This is a departure from the position that agreements to negotiate, or to settle disputes amicably, are too uncertain to enforce.

The Fact

The claimant ('Emirates') agreed to purchase iron ore from the defendant ('PME') under a long-term contract which contained the following provision:

> 11. Dispute Resolution and Arbitration
>
> 11.1 In case of any dispute or claim arising out of or in connection with or under this LTC (...) the Parties shall first seek to resolve the dispute or claim by friendly discussion. Any party may notify the other Party of its desire to enter into consultation to resolve a dispute or claim. If no solution can be arrived at in between the Parties for a continuous period of 4 (four) weeks then the non-defaulting party can invoke the arbitration clause and refer the disputes to arbitration.
>
> 11.2 All disputes arising out of or in connection with this LTC shall be finally resolved by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce ("ICC"). The place of arbitration shall be in London ("UK"). The arbitration shall be conducted in the English language.

In the first shipment year, Emirates failed to lift all of the ore expected to be taken up and so PME sought liquidated damages. During the next shipment year, Emirates failed to lift any iron ore at all and so PME served a notice of termination of the contract and claimed liquidated damages. PME stated that it reserved its right to arbitrate in accordance with clause 11, without giving further notice, if the damages claimed were not paid within 14 days.

Several meetings took place between Emirates and PME during which Emirates asked for more time to pay the liquidated damages claim (and to find buyers for the unlifted ore). Six weeks after service of PME's notice, Emirates formally responded denying that PME was entitled to terminate the contract and referring to the 'ongoing settlement talks'. The meetings between the parties continued and settlement options were discussed. Ultimately the parties failed to reach a settlement and PME referred the dispute to arbitration in London, under the ICC rules, in accordance with clause 11.2.

Emirates challenged the jurisdiction of the arbitral tribunal, arguing that under clause 11.1 of the contract, it was a condition precedent to the tribunal's jurisdiction that the parties engage in 'friendly discussion', and that this condition had not been complied with. The arbitrators dismissed the jurisdictional challenge, holding that: (1) clause 11.1 did not contain an enforceable obligation; and (2) in any event, friendly discussion had taken place and so the alleged pre-condition (if enforceable) was satisfied.

Emirates then made an application to the English court, under section 67 of the Arbitration Act 1996, seeking an order that the arbitral tribunal lacked jurisdiction to hear the claim. Emirates again argued that clause 11.1 was a condition precedent to the tribunal's jurisdiction. It also argued that the clause required there to be a 'continuous period of 4 (four) weeks' of negotiations to resolve the claims, and that negotiations had not lasted 4 (four) weeks. PME argued that the relevant provision was merely an agreement to negotiate, and was therefore too uncertain to be enforceable; and that in any event, if clause 11.1 was enforceable, the condition had been complied with.

Enforceability of an Obligation to Enter Into 'Friendly Discussion'

Teare J reviewed the relevant authorities in this area.

In *Walford v Miles*[2] the House of Lords had ruled that a bare promise to negotiate was too uncertain to be enforceable as a contractual term. That question had arisen in the context of the owner of a business promising to end negotiations to sell the business to a third party, in exchange for the claimant promising to continue negotiations to buy the business.

Later cases had explored the enforceability of agreements to settle disputes by alternative dispute resolution ('ADR').

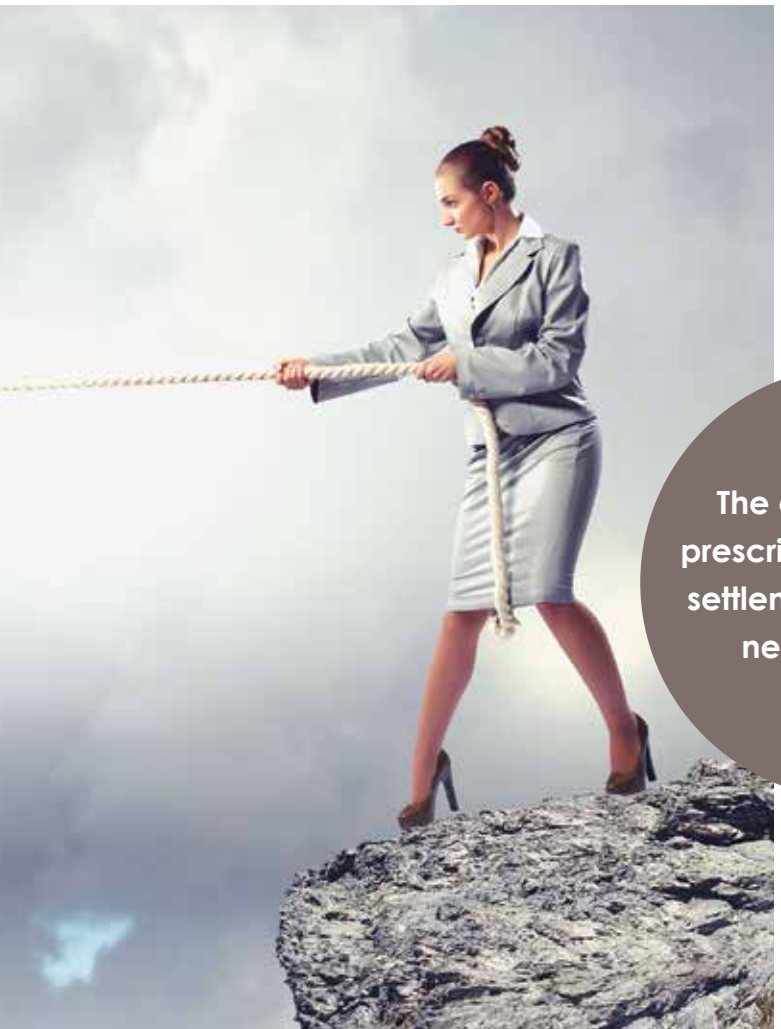
In *Cable & Wireless v IBM*,[3] Colman J had held that an obligation to attempt, in good faith, to settle a dispute through ADR was sufficiently certain to be enforced. The reason was that there was a specified procedure to be followed, namely one laid down by the Centre for Effective Dispute Resolution ('CEDR'). If it had not been clear what procedure should be followed, then the provision would have been unenforceable for lack of certainty.

Similarly, in *Sul America v Enesa Engenharis*,[4] the English Court of Appeal had held that an agreement to seek to resolve a dispute amicably by mediation did not create an enforceable obligation to start, or participate in, a mediation process unless the agreement set out the mediation process or referred to the services of a specific mediation provider.

In *Wah v Grant Thornton*,[5] Hildyard J had held that 'agreements to agree and agreements to negotiate in good faith, without more, must be taken to be

unenforceable: good faith is too open ended a concept or criterion to provide a sufficient definition of what such an agreement must as a minimum involve and when it can objectively be determined to be properly concluded.' However, Hildyard J had gone on to state that ADR clauses could be enforced in certain circumstances – in his decision, the test was not whether a clause was a valid provision for a recognised process of ADR, but whether the condition which the clause imposed was sufficiently clear and certain to be given legal effect.

Teare J noted that these authorities might be understood as having the effect that any obligation to enter into friendly discussion, as a pre-condition to arbitrating, was unenforceable. However, in his opinion, *Walford v Miles*[6] was to be distinguished on the basis that it did not relate to a dispute-resolution agreement. He noted that *Walford v Miles* had already been distinguished in other cases (which did not involve dispute resolution clauses), and also took comfort from recent developments in Australia and Singapore, and decisions of ICSID tribunals, which had upheld contractual obligations to engage in pre-arbitration negotiations.



Teare J concluded that the condition precedent in clause 11.1 was contractually binding, and should be enforced, for the following reasons:

1. The agreement was not incomplete in the sense that any essential term was lacking.

2. The obligation was not uncertain. An obligation to seek to resolve a dispute by friendly discussion imported a duty to act in good faith, and had an identifiable standard, namely fair, honest and genuine discussions aimed at resolving a dispute. The judge acknowledged that there might be difficulty proving whether, in fact, a breach had occurred but that should not be confused with the question of whether, analytically, the scope of the obligation was uncertain.

3. It was in the public interest to uphold such agreements when they are found as part of a dispute resolution clause. Commercial people expect the courts to enforce obligations which they have freely undertaken. Furthermore, the judge emphasised that there was a clear public policy in enforcing an agreement, the objective of which was to avoid expensive and time-consuming arbitration.

Scope of the Obligation Contained in Clause 11.1

The judge rejected Emirates' argument that clause 11.1 envisaged settlement negotiations lasting for a minimum of four continuous weeks. Instead, he found the clause to mean that arbitration could be invoked if the parties had had any friendly discussion, and a solution had still not been found after a continuous period of four weeks had elapsed: the clause did not prescribe how long the settlement discussions needed to last. Therefore, although compliance with the clause was a binding condition precedent to arbitration (and thus to the tribunal having jurisdiction), the parties had complied with it and the arbitration had been properly commenced.

The clause did not prescribe how long the settlement discussions needed to last.

Implications of This Judgment

The judge's conclusion that a clause requiring 'friendly discussion' was an enforceable condition precedent to arbitration is a notable change in the English courts' approach. The judge's decision has much to commend it, but it is foreseeable that the judgment will be used by recalcitrant parties to try to avoid or delay their being held to account.

When a dispute arises, it is now important for the prospective claimant to comply strictly with any provision in the contract which is arguably a pre-condition to starting arbitration. If that is not done, the prospective respondent may challenge jurisdiction at the outset or argue that the tribunal lacked jurisdiction at the enforcement stage and try to have the award set aside, causing significant extra delay and expense.

There may also be scope for disagreement as to exactly what steps are required by the clause in question (as occurred in the Emirates case itself) and whether those steps have been taken. When a dispute arises, parties should ensure there is enough 'open' evidence to show that any required steps have been taken: the content of negotiations is often without prejudice and inadmissible, and so it may be desirable to keep a separate record of when negotiations have taken place without containing the detail of what was said.

Lawyers advising business people in their contractual negotiations may have assumed that clauses requiring friendly discussion between parties before arbitration would not be enforceable, and may therefore have taken a somewhat relaxed view to the inclusion of such clauses in the contract. It is now clear that such clauses should be assumed to be enforceable and taken seriously. When negotiating such clauses, clients should consider whether they are really willing to have to go through such hoops before being able to arbitrate; and if so, their lawyers should ensure that the steps which are required are spelled out clearly.

Notes:

1 [2014] EWHC 2014 (Comm).
2 [1992] 2 AC 128.
3. [2002] EWHC 2059 (Comm).
4. [2012] 1 Lloyd's Reports 671.
5. [2013] Lloyd's Reports 11.
6. See fn. 1.

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Competition Regime of India – Opportunities and Challenges

The Competition Act of India became effective from 20 May 2009. The Competition Commission of India ('the Commission'), established under the Act, genuinely attempted to perform to the best of its abilities, however, much is still needed to be done. This article attempts to highlight the opportunities and challenges which the authorities under the Act and the stakeholders of the law, face day in and day out in India. It also tries to suggest a way forward.

Introduction

The Indian Competition regime under the Competition Act was set up on 14 October 2003, but due to a constitutional challenge by way of a Writ Petition on structural issues before the Supreme Court of India, the Commission remained non-functional until 20 May 2009. The Writ Petition[1] was finally disposed of by the Supreme Court on 20 January 2005 when the Court observed that in order to meet the challenge of the petitioner the respondents, i.e., the Government of India, might consider making a few amendments to the principal legislation. Although the Court was not directing the respondents to suggest to Parliament certain amendments, yet the observation of the Court was considered on its merits by the Government and a suitable amendment Bill was moved before Parliament. Parliament, in considering its legislative duties, examined the proposal in greater detail and finally made a few amendments to the Competition Act 2002 ('the Act') on 25 September 2007. The Act was thus amended and salient features of the amendments, in brief, included:

- an appellate tribunal, with one Chairman and two experts Members, was created to oversee the orders of the Commission on a first appeal;
- the appellate tribunal so constituted was to be headed by a judge of the Supreme Court of India or a Chief Justice of the High Court(s) of India;
- the Chairman and two other members of the Tribunal shall be whole time functionaries of the Tribunal;
- the merger control regime was converted from 'voluntary filing regime to mandatory filing regime'; and
- the strength of the Commission was reduced from eleven to seven.

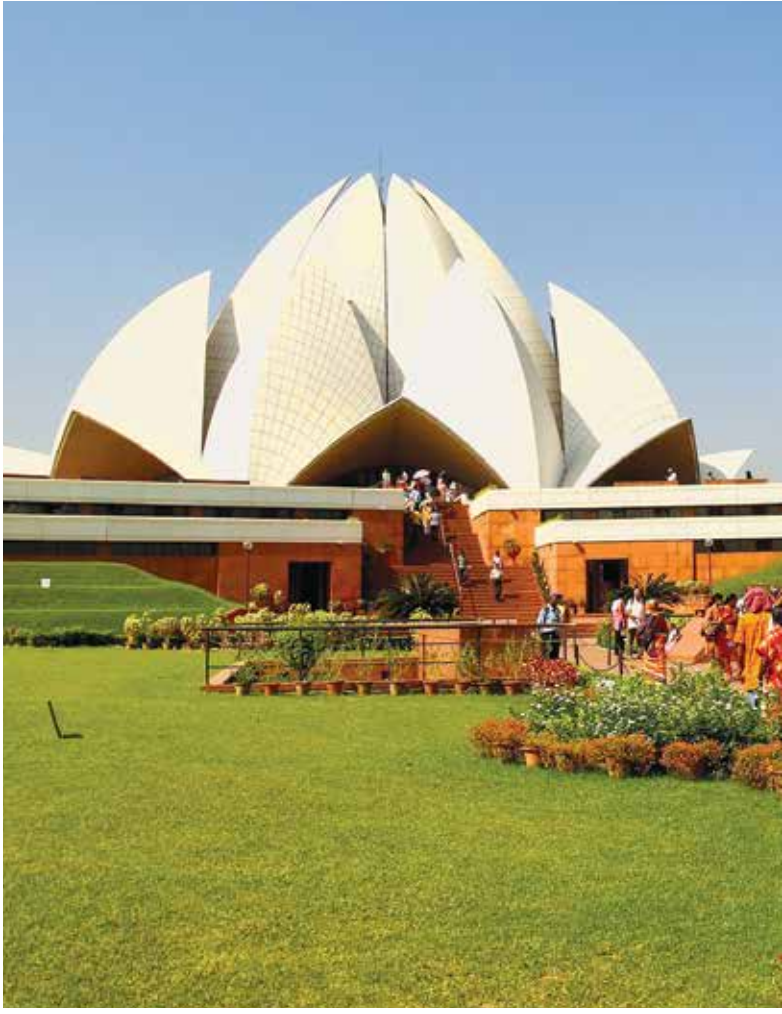
The Government of India notified the provisions relating to cartels, bid-rigging, Joint Ventures, refusal to deal, tie-ins, exclusive agreements, resale price maintenance and abuse of dominance on 15 May 2009 and made them enforceable with effect from 20 May 2009. Thus, the Commission, which was formally established on 14 October 2003, finally became operational in respect of the prohibition of anti-competitive agreements and abuse of dominance on 20 May 2009 and subsequently the merger control regime was made functional on 1 June 2011. The Government of India has the statutory mandate to notify different provisions of the Act on different dates and, in exercise of such powers, the provisions relating to the anti-competitive conduct of cases were notified effective 20 May 2009 and those relating to regulating merger control filings were notified effective 1 June 2011.

Objects and Purposes of the Act

India has several government-controlled companies, most of which were set up around the late fifties and some were established subsequently. These companies are typically categorised as public sector undertakings ('PSUs') and most of them compete with private companies, although such competition may not be a competition in the true sense since the Government is the majority shareholder in all of these companies and PSUs enjoy substantial state aid for their commercial and other functions. With the economic liberalisation of India in 1991, it was felt at the higher policy levels of the Government of India that unless markets in India were thrown open to competition in a real sense, that is, PSUs and private companies competed freely and fairly, the objective of economic liberalisation may not be achieved. But the challenge was how to ensure free and fair competition among enterprises since merely having such an objective would not be sufficient unless there was a mechanism or a definitive road map in place to achieve this target.

In the meantime, India became one of the signatories to the WTO Treaties on 1 January 1995, which further widened the scope of moving the agenda of economic liberalisation forward. It would not be out of place to mention that India had set up its first anti-trust or competition law regime in 1969 when it enacted the *Monopolies and Restrictive Trade Practices Act 1969* (the 'old Act'). However, due to economic justifications and the overall social policies of the late sixties and seventies, the Commission established under the old Act could not achieve its primary objective of ensuring competition within India. In the early and mid-nineties, India saw a surge of change and a great leap forward was made in relation to implementing economic and social policies within the country. A high-powered Committee[2] was constituted in 1999 by the Government to assess whether or not the old Act and the Commission set up under that Act should continue or a shift in paradigm should be considered to meet the objectives of the new economic policies.

The Committee submitted its report in 2000 when, among other suggestions, it concluded that the old Act and the Commission set up thereunder be repealed and dissolved respectively and a modern competition law regime be established in India. Interestingly, the Committee suggested that the legislation – if enacted

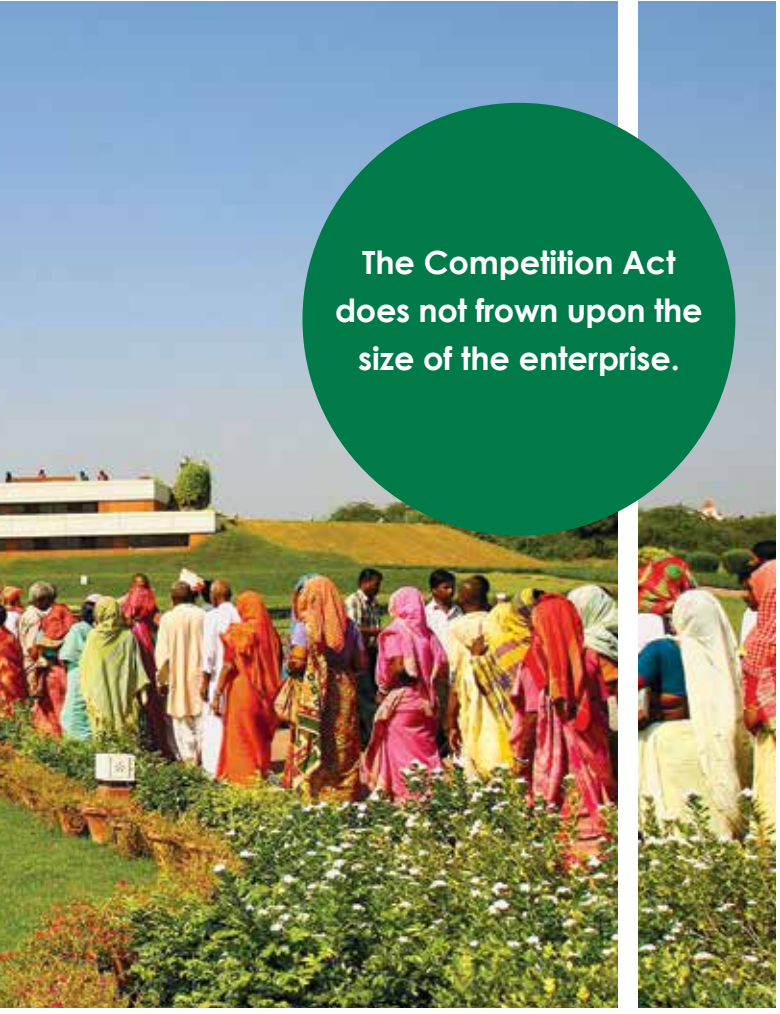


– should not distinguish between PSUs and private enterprises and a merger control regime should be one of the basic ingredients of the law. The report of the Committee extensively argued in favour of the need for establishing a modern competition law in India and, in the process, justified how an effective competition law regime could ensure overall economic growth, arrest market failure and ultimately empower consumers. The Preamble of the Act drafted later has in fact attempted to effectively capture this vision of the Committee.

The Act

The law prohibits business agreements which cause, or are likely to cause, an appreciable adverse effect on competition within India. Such agreements are declared void under the law.

On a finer analysis of the provisions of the prohibitory decrees of the law, one finds that agreements between competitors of price fixation, bid rotation or bid rigging, market allocation, and so on, are presumed to have an appreciable adverse effect on competition in India, although they are not considered *per se* illegal. Whereas, exclusive agreements, tie-in arrangements,



refusals to deal and resale price maintenance in a vertical chain business relationship between upstream and downstream enterprises are considered agreements which are likely to cause an appreciable adverse effect on competition in India. The difference between the two, i.e., horizontal and vertical agreements, is that in the former the legislative intent is that the opposite parties are mandated to rebut the presumption, whereas in the latter the informant or the petitioner has to prove its case. However, the law is based on the premise of the 'principles of natural justice',[3] and as such, even if the inquiry and investigation in cases of a breach arise out of a horizontal relationship, the opportunity of being heard is provided to the party allegedly in default of the law and is in-built into the law itself.

The law regulates mergers and amalgamations between enterprises. The word 'regulates' clearly indicates the intent of the law. It prohibits anti-competitive agreements and abuse of dominance by enterprises but does not prohibit mergers and amalgamations. The word 'regulates' has another condition precedent, which is that the parties to a combination that exceeds the combined statutory thresholds of 'assets' or 'turnover',[4] shall notify the Commission within 30 days of any binding document that the parties have entered into, before consummating the transaction. The Commission shall examine the transaction documents and assess whether or not the market within India, after the combination has been given effect, would have some adverse effect on competition. If it does not find any such concern, it would accord approval to the transaction as soon as possible and in any manner, but not beyond 210 days from the date of valid notification being made to the Commission by the parties.[5]

The Commission was conferred the power by the Government of India to regulate combinations (mergers) with effect from 1 June 2011. Between that date and 31 August 2014, it approved about 200 notifications that parties have, from time to time, filed. Interestingly, a handful of cases (about 10) were delayed from being accorded timely approval due to incomplete information from parties to the transactions. All the approved notifications received their approval within 45 days. One notification was seriously challenged before the COMPAT, but the same was dismissed on the ground that the appellant did not have *locus standi* to challenge not being party to the notification.[6]

Apart from the above, the Act also empowers the Commission to enter into international cooperation arrangements with overseas competition agencies so as to enable agencies across jurisdictions to share information as and when the occasion so arises, thus enabling authorities to minimise cross-border anti-competitive conduct of enterprises and also to expedite approval procedures in merger control cases. Until the end of April 2014, the Commission has entered into international cooperation arrangements with the Russian Antimonopoly authority, the United States' Federal Trade Commission and Department of Justice, the Australian Competition and Consumer Commission and the European Commission.

Opportunities

Unlike the predecessor regime, the Monopolies and Restrictive Trade Practices Act (the 'MRTPA' or 'old Act'), the Competition Act does not frown upon the size of the enterprise. Growth of companies by free and fair means is no longer considered bad in law. Therefore, it would be a great opportunity for companies to adopt pro-competitive business models and grow both vertically or horizontally without fear.

Companies may adopt time-tested fairer routes, i.e., innovation through research and development, gaining competitive advantages over competitors through intellectual property rights, economy-enhancing joint ventures, strategic buying out of not-so profitable companies, reducing costs on the input of raw materials by investing in upstream markets, cross-subsidising products in a transparent manner – the list goes on and companies have to engage in effective strategic planning to achieve such advantages. Companies must draw up plans to generate quantifiable surpluses which they may regularly pass on to customers and end consumers as part of doing business and also to show that they adopt a definitive corporate social responsibility. There can be expenses likely to be incurred on advertisements and promotion campaigns but care must be taken to strictly avoid engaging in false and disparaging advertisements with the intent to gain market share by unfair means.

In India, the Commission is the only authority to examine, scrutinise and inquire into anti-competitive conduct by companies. During its journey since 20 May 2009, it has examined around 350 cases of anti-competitive conduct but has issued remedial orders and/ or penalties only in about 13 to 15% of the cases, which clearly indicates that if parties can justify their business models and adduce justification for the same to the satisfaction of the authority, they should not be unnecessarily worried about the role and functioning of the authority. The headline-grabbing fines imposed by the Commission in the cement cartel cases[7] or in some other cases, at times may indicate that the Commission may be intruding into the business affairs of companies, but in reality fines have only been imposed after the parties have not been able to defend their business models and the Commission, in exercise of its statutory duties, imposed penalties as per the law. In India, the sooner companies decide to adopt pro-competitive business models, the better it will be for them. The opportunities to do so are fully provided to companies who decide to grab them quickly.

Challenges

Change is easier said than done as companies will not be able to change gears and adopt all of the pro-competitive business models overnight. There are substantial costs involved to adopt pro-competitive business models and in addition to the costs, companies must know how to really go about changing their existing way of doing business in India. Competition law is a mixture of micro-economics and law, as in order to adopt newer methods, companies need to identify suitable experts to help them in this task.

The Commission's orders are yet to get final approval from or be viewed by the Supreme Court of India and, as such, companies may not want to adopt drastic changes in their existing business models merely on the basis of the decisions of the Commission. The best course left open to companies in India is to slowly start adopting some internal competition law compliance programmes so as to enable them to share such internal documents with the Commission in the event they face any adverse orders of the Commission, which may act as a mitigating factor. Worldwide, some of the best-known companies that are vulnerable in relation to competition and anti-trust authorities, have adopted robust in-house competition law compliance manuals and are able to benefit from such manuals while defending inquires before anti-trust authorities.

The challenges are not merely against companies but can also be substantially found in respect of the Commission and its investigation wing – the office of the Director General ('DG'). It is argued that the first and foremost challenge is the adoption of 'due process' while handling cases by the Commission and the office of the DG. The authorities must adopt consistent procedure and processes while handling such matters. Any inconsistency may cause irreparable damage to the reputation of the authorities as aggrieved parties may exercise the option of the constitutional remedy of judicial review before the courts.

Transparency is another area of challenge which the authorities without fail must adopt as part of their functioning, as the law is based on the premise of adherence to the principles of natural justice. It is noteworthy that the substantive law ensures protection of confidential information as well as of the identities of parties disclosing such information to the Commission or the DG being disclosed or made known to the other parties to the dispute. However, the leakage of confidential information has been found in the public domain, especially in newspapers/media and none within the authorities has taken any responsibility for such inherent mismanagement resulting in loss of institutional reputation among stakeholders.

Finally, the core manpower of the Commission and the DG, on a regular basis departs as most re taken in on a short term deputation from government services and the loss of institutional memory causes unprecedented damage to the evolution of jurisprudence especially when the Commission is unable to issue public guidelines of the law for the benefit of the stakeholders. Thus, industry and other stakeholders as well as the authorities need to carefully consider international best practices and adopt them so as to convert challenges into opportunities. The belated filing of merger control notifications may cause substantial harm to parties as the CCI of late has decided to penalise defaulters with statutory fines even if the main transaction does not raise competition law concerns.[8]

Conclusion

The OECD in one of its reports published in March 2008 had, inter alia, observed that the Competition Act of India is 'state of the art' legislation. It is a great approbation to the legislatures of India. However, the challenge is implementation of this wonderful piece of legislation. It is noted that the Commission has been doing a great job in spite of the challenges but there is scope to improve its performance. The industry may not be fully aware of the complexities associated with the competition law but it has, over the past few years, understood that the Commission has been empowered to impose substantial penalties which can definitely dilute a large portion of its profit and thereby force it to take the law far more seriously before it is too late.

Notes:

1 WP No 490 of 2003 (*Brahm Dutt v Union of India and Others*).
2 Raghavan Committee.
3 Section 36 (1) of the Act.
4 Section 5 provides the financial thresholds.
5 Parties will have to apply for approval in prescribed form(s) with the prescribed filing fee.
6 Jet-Etihad combination matter.
7 A USD $1.2 billion fine was imposed upon 11 cement companies, The matter is currently under appeal.
8 The Tesco and Thomas Cook cases.

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Publications Committee Guidelines for Publication of Articles in the IPBA Journal

Please note that the IPBA Publication Committee has moved away from a theme-based publication. Hence, for the next issues, we are pleased to accept articles on interesting legal topics and new legal developments that are happening in your jurisdiction. Please send your article to both **Maxine Chiang** at maxinechiang@chianglee.com and **Leonard Yeoh** at leonard.yeoh@taypartners.com.my. We would be grateful if you could also send (1) a lead paragraph of approximately 50 or 60 words, giving a brief introduction to, or an overview of the article's main theme, (2) a photo with the following specifications (File Format: JPG or TIFF, Resolution: 300dpi and Dimensions: 4cm(w) x 5cm(h)), and (3) your biography of approximately 30 to 50 words together with your article.

The requirements for publication of an article in the *IPBA Journal* are as follows:

1. The article has not been previously published in any journal or publication;
2. The article is of good quality both in terms of technical input and topical interest for IPBA members;
3. The article is not written to publicise the expertise, specialization, or network offices of the writer or the firm at which the writer is based;
4. The article is concise (2500 to 3000 words) and, in any event, does not exceed 3000 words; and
5. The article must be written in English, and the author must ensure that it meets international business standards.
6. The article is written by an IPBA member. Co-authors must also be IPBA members.

PRC Corporate and M&A Legal Developments – Yearly Roundup (2013-2014)

This article provides a snapshot of significant changes in the corporate and M&A laws in mainland China from 2013 to 2014. The new Chinese central government is striving to reform corporate laws, securities laws, foreign investment policies and strengthen legal enforcement for slower yet sustainable economic development in China.

After three decades of rapid growth, China has become the second largest economy in terms of GDP. However, economic development has come at a heavy price, with China facing certain structural problems, and serious social and economic issues, such as an ever widening gap between the rich and the poor, a need for new economic driving forces in the wake of a major export slowdown, and excessive infrastructure investments. The new central government has launched some important social and economic measures to tackle many of these key issues, and to push the economy forward towards a more sustainable development. We summarise in this short essay several significant legal developments in mergers and acquisitions and foreign direct investment in China.

Launch of Shanghai (Pilot) Free Trade Zone by the State Council

On 29 September 2013, the Chinese Government formally established the China (Shanghai) Pilot Free Trade Zone ('FTZ') in Shanghai. Pursuant to a collection of rules and regulations issued by the Standing Committee of the National People's Congress, the State Council and the State Administration of Industry and Commerce, the following policies have been implemented in the FTZ:

- The Shanghai Municipal People's Government issued the Negative List for foreign investment on 29 September 2013. With the exception of industries listed in the Negative List, examination and approval for foreign investment projects involving any otherwise permitted industries are exempt from foreign investment approval, requiring instead to be filed for record with the relevant governmental authorities.

- Additional investment fields have been opened up for foreign investors. In the FTZ, foreign investment in service sectors enjoy liberalised policies. For instance, foreign-funded professional health and medical insurance institutions, foreign-funded credit investigation companies, Sino-foreign equity joint ventures for talent intermediary services, Sino-foreign contractual education and training institutions and other service industries may now be established by foreign investors. Foreign investors may also establish wholly foreign-owned enterprises engaged in international ship management, entertainment venues and medical institutions.

A policy drive of the State Council behind the backdrop of the FTZ is to test a drastic regulatory reform of streamlining and liberalising regulatory approval requirements in China. Traditionally, such approval requirements have been numerous and burdensome on enterprises. If this experiment proves successful, it is possible that the State Council may adopt the regulatory reform (including the Negative List rule) in other provinces and localities in the future. However, this pilot program is still in its infancy, and there is a long way to go before we will know the result.

Reform of Equity Capital Contribution Rules for Company Incorporation

The equity capital contribution rules under the Company Law have been extensively liberalised by the top Chinese legislative branch. On 28 December 2013, the Standing Committee of the National People's Congress issued the amended Company Law of the People's Republic of China ('the Company Law'). These changes have been further implemented by the State Council and the competent company registration authority.

The main changes of the Company Law are as follows:

- Minimum company equity capital contribution requirements for incorporation of a company have been removed.
- Actual subscribed capital contributions into the company no longer need to be registered with the registration authority.
- The stipulation about the percentage of the equity capital of a company to be made in cash has been removed.
- The time period during which the shareholders shall fully pay in their equity capital has been removed. Now, shareholders may record in the company's articles of association their independently agreed respective amounts of subscribed capital contributions, the method and period of contribution, etc.

Additionally, these changes now also apply to foreign-invested enterprises in China through a Notice issued by the Ministry of Commerce dated 17 June 2014. Pursuant to that Notice, Chinese legal requirements or restrictions applied to foreign-invested companies in respect of initial capital contribution, the percentage of the equity capital which must be contributed in cash, the contribution period and the minimum amount of the equity capital have also been removed. It is no longer necessary to examine the actual contribution of the subscribed registered capital. However, the limit on the ratio between the registered capital and the total investment of a foreign-invested enterprise still applies.

However, there are still 27 special industries in which the previous registration capital contribution and verification requirements still apply. These include, for instance, commercial banks, securities houses, insurance, insurance brokerage, financial assets management companies, trust companies, finance lease, auto finance, consumer finance companies, and joint stock companies incorporated by public placements.

A policy drive of the State Council is to test drastic regulatory reform of approval requirements in China.

In addition, the State Council also decided to abolish the annual 'enterprise inspection system' previously applied to all enterprises in China for many years, and instead has adopted an annual report disclosure system. This will greatly reduce the information collection and disclosure burden of PRC enterprises.

Reform of Chinese Securities Law

The Chinese securities regulatory authority, China Securities Regulatory Commission ('CSRC'), imposed a moratorium on initial public offerings ('IPOs') in October 2012, subject to further reforms by the Chinese authorities. The CSRC issued Opinions on Further Promoting the Reform of the System of Initial Public Offerings on 30 November 2013, aiming at reforming the system of IPOs. The reforms include making underwriters and controlling shareholders responsible for false statements in a prospectus. After a suspension of more than a year, CSRC reopened the IPO market at the beginning of 2014.

The State Council has initiated several important guiding policies in the securities market which are yet to be implemented by the CSRC:

- The approval requirement for a significant assets purchase, disposal or restructuring by a listed company will be removed, and such transactions will be subject to less stringent advance vetting by the CSRC. It is foreseen that the CSRC will implement these changes in the second half of 2014. However, a backdoor listing in the form of assets restructuring will be still examined by the CSRC as rigorously as a normal IPO project.
- The IPO approval system which has been enforced for two decades is to be abolished and replaced by an IPO registration system in the next few years. The CSRC will likely take a gradual approach in implementing this fundamental reform over the next few years.

Chinese Government Strengthened Enforcement of Administrative Regulations

Chinese authorities strengthened the investigation into and punishment of commercial corruption, the giving and receiving of bribes, and monopolistic behaviour starting from 2012. Last year, GlaxoSmithKline ('GSK'), a United Kingdom based drug maker was put under investigation in China for suspicion of accepting cash rake-offs and paying bribes to officials and doctors to boost sales and prices of its drugs in China. Some senior executives from GlaxoSmithKline (China) Investment Co Ltd were investigated for suspected bribery and tax-related violations.

Additionally, in January 2013, the National Development and Reform Commission ('NDRC') penalised Samsung, LG and four Taiwanese firms – Chi Mei Optoelectronics, AU Optronics, Chunghwa Picture Tubes and HannStar Display – with fines totalling 350 million yuan for fixing the prices of LCD screens during the period from 2001 to 2006.

This indicates that all market players in China, regardless of foreign invested companies or domestic enterprises, must pay closer attention to compliance to reduce risks, especially for foreign investors. Companies may take action such as enhancing internal training, strengthening internal reporting systems and adopting internal compliance audits and investigations to effectively cope with compliance risks.

This also means that a purchaser in an M&A transaction must investigate and assess the compliance-related risks and contingent liabilities with much more prudence and care. A purchaser should aim to learn to the greatest extent possible any historical non-compliance business activities in the target market before seeking price adjustment or other pre- or post-closing remedial measures. In some cases, if a non-compliance activity is severe enough, the purchaser may need to consider abandoning the deal.

Significant Changes of Policies and Regulations Regarding Outbound Investment Approval

The Chinese central government has also liberalised the outbound investment approval requirement in the recent past. The State Council issued the Catalogue of Investment Projects Subject to Government Verification and Approval (2013 Version) ('the Catalogue') in November 2013. Pursuant to the Catalogue, outbound investment projects in which the amount of Chinese investment reaches or exceeds US$1 billion, or which involves sensitive countries and regions or sensitive industries, shall be subject to additional verification and approval by the NDRC. Other than the foregoing projects, overseas investment projects by an enterprise directly administered under the Chinese central government, and projects invested by a provincial-level or local enterprise with a proposed investment amount of more than US$300 million but less than US$1 billion must be reported to NDRC to complete a record-filing procedure.

NDRC has already issued rules to implement the foregoing change in April 2014. The Ministry of Commerce of China ('MOFCOM') is likely to amend its rules with respect to outbound investment approval later in 2014.

This policy and legal change will greatly reduce approval barriers for Chinese investors going abroad, and facilitate Chinese outbound investment transactions.

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IPBA Seminar: Mergers & Acquisitions

Amsterdam, the Netherlands

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November 21, 2014

Arena Towers Holiday Inn 4* - Hoogoorddreef 66 1101 BE Amsterdam

IPBA is organizing a one-day M&A Seminar of the IPBA in Amsterdam on 21 November, not only for private and in-house lawyers but also for M&A consultants, accountants, tax advisers, and of course clients.

Theme: Mergers & Acquisitions

A panel of experts from Luxembourg, France, China, Hong Kong and the Netherlands will present a moot case study of a Chinese SOE acquiring a Dutch SME and its European subsidiaries. A European Group with diverse business interests and multiple subsidiaries in Europe is the target of a takeover by a Mainland Chinese conglomerate backed by Hong Kong / Asian funding. An international panel of in-house and external legal counsel chaired by Bart Kasteleijn will exchange views interactively with the floor, based on a moot case study.

See the IPBA web site (http://ipba.org) for detailed registration information.

Eligible for 4 hours Post-academic education (Dutch)

Schedule:

Thursday, November 20th

Evening (optional): early arrivals drinks and dinner at the hotel and conference venue*

Friday, November 21st

10.00 - 18:00	Seminar
18.00 -	Optional dinner and entertainment, city centre Amsterdam

The conference fee is € 130 for IPBA members and € 160 for non-IPBA members (ex VAT, not applicable to non-Dutch and refundable by Dutch attendees). This price includes the full day conference room fully equipped with audio / video and tea / coffee at the breaks and a lavish buffet lunch.

*The cost of the optional three-course dinner the preceding Thursday at the hotel/conference venue is €49.50 per person, including drinks.

Registrations and payments are to be made before October 15th 2014. A receipted invoice will be sent to all delegates, with the proof of attendance, after the event has taken place. All bookings are considered binding on receipt of payment.

Accommodation price: € 155,- p.p.p.n including breakfast and WiFi, excluding 5.5% municipal tax (no VAT). This special rate is valid for the Friday as well as the weekend for people who would like to come early and/or stay longer.

Organized by the IPBA Banking, Finance & Securities Committee; the Cross-Border Investment Committee; Ad Hoc Anti-corruption & Rule of Law Committee; the Energy & Natural Resources Committee.

The Companies Act 2013 – A Debt Capital Markets Perspective

This article discusses the recent overhaul of the legal framework governing debt capital markets in India. The Companies Act, 2013 has been enacted which replaces the six-decades-old Companies Act, 1956. The Companies Act, 2013 has introduced concepts such as listed companies and brought about certain key amendments to private placements. The article discusses the impact of such key amendments on the debt capital markets in India.

The Government of India's attempt to replace the six-decades-old Companies Act, 1956 ('1956 Act') finally came to fruition with the notification of the Companies Act 2013 ('2013 Act') in the Official Gazette on 30 August, 2013. A major part of the 2013 Act has since then been notified in a piecemeal manner and now only 187 sections out of 470 sections remain to be notified. Provisions with respect to the incorporation of companies, appointment of directors, share capital and debentures, public offer and private placement, meetings of the board and members have been notified, whereas provisions pertaining to mergers and amalgamations, winding-up, etc., are yet to be notified.

One of the sweeping changes brought about by the 2013 Act is the codification of norms on securities issued on a private placement basis ('Private Placement Norms'). The term 'private placement' was not defined under the 1956 Act. Section 67(3) of the 1956 Act, implicitly dealt with private placement, by stipulating, that an offer/invitation would not be regarded as a public offer: (1) unless made to 50 persons or more; or (2) if the offer/invitation was made available for subscription or purchase to only those receiving the same or it was a domestic concern of the issuer. Therefore, the market practice under the 1956 Act was to demonstrate compliance with section 67(3). This was sought to be done by serially numbering the offer documents and ensuring that the application money was received only from those persons to whom the offer documents were sent. It may be noted that section 67(3) referred only to 'shares and debentures' compared to the reference to 'securities'under the 2013 Act.

The Private Placement Norms have introduced certain stringent provisions. These provisions are equally applicable to securities not sought to be listed. The proverbial straw that broke the camel's back was the Sahara fiasco. In that case, Sahara India Real Estate Corporation Limited and Sahara Housing Investment Corporation Limited (collectively 'Sahara Entities') issued unsecured optionally fully-convertible debentures ('OFCDs') amounting to approximately INR 20,000 crores[1] to more than two crore investors. The capital markets regulator, the Securities and Exchange Board of India ('SEBI'), stumbled upon this while reviewing an unrelated offer document. The SEBI then issued a show cause notice alleging that the issuance of OFDS was a public issue and therefore, the issuance should have complied with the provisions of the 1956 Act and the rules and regulations framed by the SEBI ('SEBI Regulations') in respect of public offering. The Sahara Entities replied to the show cause notice stating that the SEBI had no jurisdiction in the matter, primarily on two grounds. First, the OFCDs were 'hybrid' securities and thus outside the ambit of the SEBI. Second, the OFCDs were issued on a private placement basis. The matter ultimately reached the Supreme Court of India ('SC'). The SC rejected the contention of the Sahara Entities and arrived at a conclusion that the two companies had issued securities to the public under the garb of private placement. It further held that this was done to bypass the various laws and regulations in relation to public offering. Accordingly, it directed the Sahara Entities to refund the amount collected from the investors with interest. Pursuant to the above, the SEBI directed a freeze on all bank accounts of the Sahara Entities and attached several properties including equity stakes in other group firms owned by the Sahara Entities.

The 2013 Act makes it mandatory for companies to comply with the Private Placement Norms for any issuance of securities (listed or unlisted) to a select group of persons (not being a public offer) through issue of a private placement offer letter. Accordingly, now even a company making an unlisted issue of securities is required to make various disclosures specified in the private placement offer letter. Such disclosures include disclosures with respect to remuneration of directors, financials of the company, borrowing and defaults thereon, changes in the corporate structuring, litigation against the promoters etc. Earlier, similar disclosures were required to be made for a listed issue under the SEBI Regulations and no such disclosure was required for an unlisted issue. In order to regulate the unlisted issue of securities (even though on a private placement basis) and to bring about greater transparency and accountability, the legislature has removed such distinction under the 2013 Act.

The Private Placement Norms restrict a company from making an offer/invitation to 200 persons in a financial year. For this purpose, qualified institutional buyers and employees who have been offered securities under an employee stock option scheme are to be excluded. The details of the persons to whom the private placement offer letter shall be circulated is required to be recorded by the issuer prior to its circulation. It is further required to be filed with the Registrar of Companies within 30 days of such circulation. A company is also prohibited from using any media, marketing or advertising material including the use of distribution channels or agents to inform the public at large about such offers. Section 67(3) of the 1956 Act required an offer/invitation to be made available for subscription or purchase to only those receiving it. Issuers would take advantage of the said provision by wantonly distributing offer documents (either directly or through agents/distributors) to thousands of investors, although subscription would ultimately be obtained from less than 50 persons. In order to regulate such activities, the 2013 Act has not only limited the number of invitees but restricted usage of marketing in any manner whatsoever.

The Private Placement Norms prohibit any offer or invitation to fresh securities unless allotments under any previous offer have been completed. The intention behind such provision seems to be to restrict frequent issuers of debt instruments from issuing such securities without completion of allotment under an earlier issue. However, the implication of using the terminology 'security' in the section has resulted in an interpretation that companies shall not make an offer of debt securities unless allotments of any another kind of security such as equity shares or preference shares have been completed or vice versa.

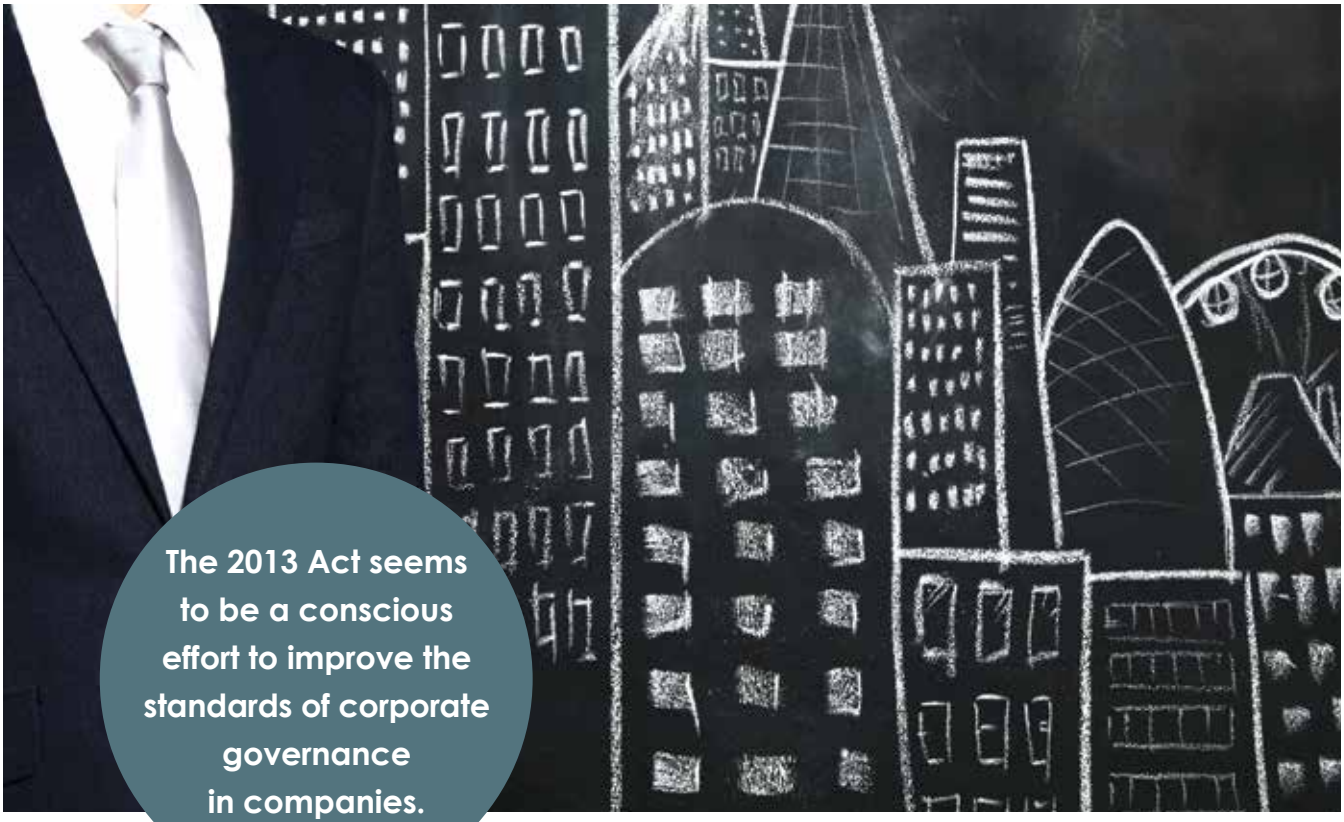
Apart from codifying norms on private placement, the 2013 Act has brought about amendments with respect to the provisions to debentures as well. The 2013 Act has widened the ambit of a debenture by stipulating that 'any instrument of a company evidencing a debt' shall be considered a debenture. This has raised concerns whether commercial papers or certificates of deposits (governed by the regulations framed by the Reserve Bank of India) shall now be considered as debentures. If yes,

then their issuance would also require compliance with the provisions of the 2013 Act and the SEBI Regulations for the issue of debt instruments. Further, the rules with respect to the issue of secured debentures under the 2013 Act ('Debenture Rules') stipulate that the security for debentures shall be created, inter alia, over 'specific movable property' of the company, 'not being in the nature of pledge'. Although there is no mandatory requirement for companies to issue debentures that are secured, the said provision has raised queries as to whether share backed debentures would be considered as secured debentures for the purpose of 2013 Act. The Debenture Rules have also raised a concern as to whether security over future receivables of a company would be considered as valid security under the 2013 Act. This is a typical form of collateral provided by many issuers (especially non banking financial companies registered with the Reserve Bank of India).

The 2013 Act has incorporated the provisions with respect to acceptance of deposits as provided under the 1956 Act ('Deposit Rules'). The 2013 Act requires a company accepting deposits to comply with the provisions of the Deposit Rules. Such provisions include procurement of credit rating, appointment of a trustee, obtaining deposit insurance and setting up of a deposit redemption reserve account in which 15 per cent of the amount of its deposits maturing during a financial year and the next financial year is required to be deposited. One interesting provision under the Deposit Rules is that the term 'deposit' now includes 'any amount received by the company, whether in the form of instalments or otherwise, from a person with promise or offer to give returns, in cash or in kind, on completion of the period specified in the promise or offer, or earlier, accounted for in any manner whatsoever'. The Deposit Rules excludes amounts received as an advance in connection with consideration for property under an agreement or arrangement. Accordingly, from a plain reading of the provisions it appears that amounts collected by a collective investment scheme with a promise to give returns (not being consideration or an advance for the purchase of property) may fall within the ambit of a deposit and require compliance with the Deposit Rules.

Another notable amendment brought about by the 2013 Act is with respect to the change in the concept of a 'listed' company. The earlier notion of a listed company being restricted to a public limited company whose only 'equity' shares are listed on the stock exchange has been done away with by the 2013 Act. Under the 2013 Act, 'listed company' has been defined very widely. This is defined as 'any company whose securities are listed on the stock exchange'. Accordingly, a private limited company whose equity shares are not listed on the stock exchange and whose debentures are listed on the stock exchange shall now fall within the ambit of a listed company. The 2013 Act stipulates various compliances for a listed company. A listed company is required to (1) appoint at least one woman director on its board; (2) appoint at least one third of its directors as independent directors; and (3) provide an option to its small shareholders (i.e., shareholders holding shares of nominal value of not more than INR20,000 or such other sum as may be prescribed) to appoint a director. Further, a listed company is required to constitute various committees, such as an audit committee and a nomination and remuneration committee. Additionally, a listed company is mandatorily required to provide an option to its shareholders to vote at a general meeting by electronic means. The 2013 Act lays down a rather cumbersome procedure for voting by electronic means which includes the requirement to provide a notice in English and a regional newspaper. The long drawn out procedure of e-voting may act as a hindrance to companies that require the consent of their shareholders on an urgent basis. In order to ensure greater corporate governance, which has been a key object of the 2013 Act, the legislature has incorporated these provisions in the extant company law. However, though laudable an object, its applicability seems prudent for companies having a large or diversified shareholding as a means of greater flexibility, transparency and accountability. On the other hand, the applicability of such provisions seems rather onerous to closely held private limited companies merely because their debt instruments are listed on the stock exchange. It would be burdensome for such companies to constitute various committees, appoint independent directors and incur expenses in setting up an e-voting platform for providing a voting facility to effectively two shareholders.

With the change in significant provisions of the company law in India, it is equally essential to align the other extant laws. Therefore, in April 2014, the SEBI has amended its equity listing agreement ('Equity Listing Agreement') which contains provisions with respect to a whistle blower policy, constitution of committees, appointment of woman directors and independent directors, similar



The 2013 Act seems to be a conscious effort to improve the standards of corporate governance in companies.

to the 2013 Act. The SEBI has also proposed new norms for listing in light of the concept of 'listed' companies under the 2013 Act ('Listing Regulations'). With the change in the definition of a listed company under the 2013 Act, there was considerable uncertainty in the market in India as to whether a company whose securities other than equity shares are listed on the stock exchange, would be treated as a 'listed' company for the purpose of company law but not so for the purpose of the securities law as the SEBI Regulations still envisage a company whose only equity shares are listed on the stock exchange to be a listed company. In order to avoid such disharmony between the extant laws in India, the SEBI has recently proposed the introduction of the Listing Regulations to bring about uniform listing norms for various types of securities which includes equity shares, preference shares and non convertible debentures. The Listing Regulations once notified, would, inter alia, rescind the Equity Listing Agreement, listing agreement for Indian depository receipts, listing agreement for non-convertible debt securities, and listing agreement for non-convertible redeemable preference shares, and so on.

The 2013 Act seems to be a conscious effort on the part of the legislature to improve the standards of corporate governance in companies. It has laid down heavy penalties for non-compliance, which even includes personal liability in some cases. Its enactment is heavily influenced by recent corporate frauds in India. That perhaps is the biggest problem – viewing all issuers as fraudsters and stipulating norms accordingly.

Notes:

1 One crore = 10,000,000 rupees.

H Jayesh
Co-Founder & Senior Partner, Juris Corp

H Jayesh has extensive transactional experience in inbound and outbound foreign investment, private equity transactions, M&A, JVs, FDI, acquisition financing, sponsor financing, restructuring, and so on. He is recognised among clients and peers as a market-leading practitioner in financial services and corporate laws.

International Business Law and National Culture – A Natural Marriage

When we talk about international business law, we often forget the importance of local culture in business transactions between foreign companies. Knowing the legal rules is essential for lawyers, but having knowledge of multicultural issues that can arise in a social business setting is a key to providing efficient advice to our clients. This article discusses the bounds between law and culture in France, Canada and Korea.

Introduction

"International law is for states not only a set of rules but also a common language."
Boutros Boutros-Ghali, former General Secretary of the United Nations.

The example of the diffusion of French law worldwide through the civil code of 1804, alongside the interest of people in French culture and language, demonstrates how law and culture are intimately connected.

The nineteenth century was the heyday of French civil law. During this time, almost all its neighbouring countries adopted French law. During the period of colonisation, the French civil code was widespread in French-speaking countries, in Africa, in the West Indies, in Asia, in the Middle East and also in Latin America.

French civil law seems to be what France exported best back in the nineteenth century. The supreme economical, geopolitical and cultural power of France during this time could be an explanation. Colonising a significant part of the world by imposing its language, culture and institutions provoked France's legal system's inevitable expansion. This was accomplished either by force during colonisation or willingly by other countries, such as Romania, accepting the benefit of French juridical experiences.

The question is: why are we talking about French civil law exportation in a paper dedicated to current legal questions for international business lawyers?

The French Civil Code of 1804 was followed by the publication of another Napoleon's code in 1807: the Commercial Code. French contract law arose from the Civil Code. Nevertheless, trade and contracts are eternal allies. Contracts are the written form of interpersonal relationships; therefore, intercultural issues are to be taken into account, especially for international trade.

So what is the situation 200 years later? In a world shaped by emerging countries named here as 'BRICS' (for Brazil, Russia, India, China, South Africa) and old European economies such as France, what are the links between the law, especially business law, and culture and what kind of influence do they have on this new world order?

First, we will review the various existing legal systems in the world. Second, we will illustrate how a personal legal experience in three very different countries shows the link between law and culture. Third, we will distinguish four steps in the legal business process where law and culture are bound.

The Classification of Legal Systems

Lawyers and jurists who are reading this paper will forgive the delving into basic notions of law. A 'legal system' creates structures and these structures and modes of operation are attached to the application of legal rules. Therefore, it embraces judicial and non-judicial systems. To explain more precisely our point, let us consider the existing legal systems in the world. The legal systems of the world are classified commonly as:

- Romano-Germanic law (civil law);
- Common Law;
- Customary law;
- Religious law.

French Civil Law drew its roots from Roman law and contains a complete set of rules codified by legislators, applied and interpreted by judges. Judicial decisions do not have legal force, although decisions of supreme courts profoundly influence lower courts. In theory, only a legal act defines judicial decisions.

Common law from England is adopted by many countries and was spread worldwide, particularly by English colonisation between the nineteenth and twentieth centuries. This law is essentially based on case law decided by courts, albeit they have to comply with laws passed by Parliament.

Custom as an overriding source of law only exists in a few countries. In most Asian and African countries, custom has become a residual source of law alongside civil law. On the other hand, there are areas where custom remains dominant. Particularly, in *lex mercatoria* international business law, a set of customary rules have framed contractual relationships between traders in Europe since the Middle Ages.

Our description of these systems is voluntarily simplified. Global inspiration and influences between legal systems have meant that many mixed systems have emerged.

The impact of cultural references such as history and the usual modes of reasoning are important for the construction of national legal systems. More precisely, French Cartesianism, Anglo-Saxon pragmatism and North Asian Confucianism have indeed affected the construction and diffusion of legal systems.

Custom as an overriding source of law only exists in a few countries.

Yet such a definition of 'legal system' does not seem to show clearly the impact or the link between law and culture. The strong connection between law and culture is discernable particularly through international trade.

Cultural and Legal Experiences in Europe, America and Asia.

To introduce our opinion, let us adopt the definition of 'Culture' provided by Oxford Dictionaries as being: 'The arts and other manifestations of human intellectual achievement regarded collectively; the attitudes and behavior characteristic of a particular social group'.

Comparison between South Korea and France

I was lucky enough to work as a chief legal officer within a Korean company and as a lawyer in South Korea. On the face of it, South Korea and France appear to be completely dissimilar: they are separated geographically, have different religious traditions and use completely different languages. Despite these patent differences, when I arrived in South Korea as a European lawyer, I was astonished to discover that our legal systems do have common roots: South Korea adopted civil law from Japan at the beginning of the twenthieth century, when Japan was inspired by the German civil law system close to our French one. Thereby, I found strong connections and similarities between Korean and French contract, labour, commercial and corporate laws. For example, similarities between 'Sociétés Anonymes', 'Société A Responsabilité Limitée' (French corporations legal form) and 'Chusik Hoesa', 'Yuhan Hoesa' (Korean corporations legal form) were obvious.

As far as labour law is concerned, my French national and international clients share the same opinion: French labour law is too protective of employees, too complex, too expensive and adverse for businesses. Korean labour law is also protective of employees. The notion of 'dismissal for a just cause' in Korea is approximately the same as the notion of 'dismissal for real and serious grounds' in France. Trade unions hold an opponent position and the regulations are also similar in the two countries.

What are the reasons for this similarity between Korean and French labour law? Different cultural reasons lead to the same results. In France there is sort of a 'culture of opposition' and a 'sense of equality' which means constant defence of employees against employers. Inherited from the revolution of 1789, trade unions were powerful and contributed to the creation of a protective labour law towards employees.

In Korea, there is a completely different reason: the Confucianism culture valorised the group instead of the individual, therefore trade unions contributed, as in France, to the development of a labour law shaped for employees. In addition, the protective management of Korean companies led managers to control and protect employees under their supervision. There is a strict sense of hierarchy leading to conflicts and powerful Unions as well.

Canadian Experience

Strong connections between France and Canada date from the time of French colonisation after the arrival of Jacques Cartier in 1534 in Quebec, where I am proud to have succeeded at the Bar exam. The Napoleon Civil Code was adopted and amended by the people of Quebec in 1866. However, Quebec's legal system is today a mixed system of common and civil law.

In the litigation field, there is a combination of common law rules, being an adversarial system, and also civil law rules with an inquisitorial, contradictory procedure where judges take the lead in trials.

The notion of liability is omnipresent in common law and the amount given for losses can be extremely high depending on the parties. Whereas, in civilian traditions, judges are trusted to interpret contracts and are entitled to diminish the amount of contractual penalty. The amount of damages is usually much lower and the liability of a party is determined primarily by the law, and accessorily by a contract. The contract is used as final reference by the judge after looking at the legal provisions, case law and business practices, not in the first place.

There is probably a religious and a cultural reason behind this fact. France and Quebec are Christian countries and civil law was also derived from canon law made by the Catholic Church authorities. The relationship with money is far less inhibited in Catholicism than in other religions. This probably impacts the award and amount of contractual penalties between parties in the case of litigation.

What are the Cultural and Legal Bounds During the Business Legal Process?

My personal experiences lead me to identify four main steps in the legal process where law and culture are deeply connected.

Legal Methodology

The way legal studies are organised has a remarkable effect on the methodology that legalists use to build a legal system and to practice their profession.

In France, law enrolment in university occurs after a high school diploma is obtained. It takes five years in university and a year and a half of bar school for students to be eligible to become lawyers. In law school, students acquire significant reasoning skills and tend to use Cartesian logic based on thesis–antithesis–synthesis. The sagacity of critical thinking of philosophers of the Age of Enlightenment is the bedrock of French legal reasoning. French lawyers always use the same process: we take a look at what the codes provide, then eventually we check the jurisprudence to examine the interpretation of the law given by judges. The written legal norm adopted by the French Parliament illustrating democracy and the place where critical thinking expresses itself, is the major source of law.

One of the biggest differences in comparing Quebec to France is the federal system and the common law. Canadian provinces are the expression of the combination of civil law and English common law traditions. This mixed legal system subjoined to federalism leads, in my opinion, to the open-minded thinking of Quebec's jurists and lawyers, and openness to new legal concepts and the fact they are accustomed to thinking on different levels. They shall look at the federal and provincial legal rules and, then use the common law and the civil law reasoning and jurisprudence. Quebec's lawyers treat written law and jurisprudence almost equally. Their law has become an innovative inter-mixture of evolutionary concepts neatly selected for their relevance.

Recourse to a Lawyer

In Korea, lawyers have an important status and a high social recognition arising from their triumph of surviving the long and drastic selection of law schools. Due to this high social status, the Korean SME's executives think that Korean lawyers are unaccessible and unaffordable for them. Moreover, due to their culture of compromise, Korean people tend to solve their problems amicably first, so that neither party loses face. Then, litigation in Korea is not so common or such a threat, compared to the United States where you can obtain a huge amount of damages as a victim.

French businesses are familiar with free and effective public services, together with highly qualified judges and properly working institutions. Thus, French SMEs culturally, psychologically and financially are reluctant to pay for legal counsel. Some courts do not require the presence of a lawyer, such as the commercial court. Big businesses have their own legal departments and choose their outside counsel according to severe criteria. In France, where a win-lose culture dominates, conflict before the courts is the normal way, even if arbitration procedures for commercial matters are frequently used and mediation between companies is developing.

As for Canada, it seems that it is much more natural for business people to use a lawyer as in the US. Lawyers accept work on a success-fee basis and are considered as genuine partners of businesses. There is a high level of professionalism and a rigourous deontology, contributing to the lawyer's credibly and legitimacy.

Contracts Negotiation

What could be more tinged with individual and national culture than the negotiation of an international commercial contract?

What could be more tinged with individual and national culture than negotiating an international commercial contract?

In my opinion, Anglo-Saxon negotiators seem to be very professional and pragmatic by initially indicating their expectations, especially when it comes to financial aspects. They consider law as a tool for their commercial interests and lawyers as an essential binomial. Legal risks are perfectly integrated into their business culture. Lawyers are necessary counsellors, and pre-contractual stages are very developed and mastered by lawyers frequently drafting the Non-Disclosure Agreement, Memorandum Of Understanding and Letter Of Intent.

This professionalism is not yet always developed by French corporate clients. A significant evolution has occurred in the past decade, but NDAs, MOUs and LOIs are not yet used enough. Even if we place much more importance on preliminary contracts than before to settle confidential negotiations, we are still more attached to classic legal mechanisms, such as civil liability provided in our civil code, for a violation of confidentiality or the sudden breach of a business relationship.

Also, French negotiators focus on the outcome of negotiations after which the contract springs and forecast the intervention of judges in the case of litigation, instead of avoiding this by carefully negotiating every provision and specifying the conditions in which the contract will be executed.

In Korea, Confucianism has a strong impact on contract negotiations: the parties should take time to build a personal relationship between them and try to put the other contracting party in an agreeable atmosphere to negotiate. Contract negotiations vary depending on the position of buyer or seller, client or provider. If the Korean partner is the client, he is in a strong position to impose strict requirements during the negotiation. If he is a provider, he will do his best to please his client and to lead negotiations in pleasant surroundings, in order to improve his chances. On the flip side, if the Western partner does not take the initiative to propose a NDA, a MOU or a LOI, Koreans will rarely propose them and tend to rely on confidence between both parties instead of written engagements.

Contract Drafting.

In a civil law system, the law is a conceptual system founded on general principles and concepts which are interpreted by judges. Therefore, our contracts are usually more synthesised than common law contracts and require a judge's intervention in case of dispute. Germany illustrates best this way of thinking: summary is the key.

Also, the preamble of the contract contains a description of the contract's purpose and the processes leading to the agreement. Its legal force can be substantial, especially when it comes to a judge to interpret the intent of the parties to the agreement. Moreover, written clauses have consequential value, unlike promises. A specific right written into the contract cannot be overridden due to an inexplicit external legal fact. Also, parties prefer to leave some unsolved issues during the contract drafting to the judge.

Common law contracts do not usually have such detailed preambles as in the civil law contracts but judges do a literal interpretation of every word of each relevant clause.

These contract writers provide definitions to clarify terms that are used and to improve the contract's management. Efficiency and pragmatism are key competencies. Therefore, contracts are usually detailed and comprehensive. Also, the parties' behaviour can serve as a basis for excluding a clause. This is what waiver's are for: it is a clause providing for the conditions under which the rights in the contract can be given up.

In Korea, it is difficult to systematise a specific contract writing method. While it is true that it is a country of civil law tradition, it is equally true that American business practices have strong influences due to historical ties with the US. Many Korean lawyers were trained in the US and are familiar with its common law legal culture.

More than in drafting of contract clauses, where it is difficult to identify civil law from common law, it really is the relationship to the contract that is different. The contract is seen as a framework apt to evolve, to build trust between parties, rather than as an intangible document. Therefore, promises are as fundamental as keeping a good relationship based on trust with the other party. The Confucianism culture can be deeply felt in Korean business and legal practices.

Conclusion

Behind companies, there are women and men, with their own language and cultural references that seem, at first glance, far removed from national and international legal systems.

With its expansion during the nineteenth century, French civil law lived well. Nowadays, civil law, embellished by history and culture, continues to serve as a model for states. For example the African States which are strongly inspired by our civil law principles, established in 1993 the Organization for the Harmonization of Business Law in Africa ('OHADA') that includes 17 African states. Its objective is to facilitate trade and investment, ensuring legal and judicial security of business activities. OHADA law is thus used to contribute to economic development and create a large integrated market transforming Africa into a 'development pole'.

Whereas, Europe first created an economic community market in 1957, gradually adding legal principles leading to an European Union legal system that is every day becoming more developed, the founders of the OHADA have made the opposite choice by aligning states' regulations to economically develop the entire continent. These tremendous OHADA economic objectives are achieved by a tool that comes first: a set of common legal rules and system.

We could also mention UNIDROIT; a useful set of harmonised norms in the field of international trade relations, whose purpose is to modernise, harmonise and coordinate commercial law between states and develop uniform law instruments, principles and rules.

Whether it is OHADA, the European Union or UNIDROIT, one of the major languages these organisations work with is French. Let us remember that language is the main vehicle of culture. Language is prominent in our legal science especially when it comes to legal qualification of facts. By choosing French as a working language, it is the French legal culture which is still used as a reference in these organisations and in the enactment of international regulations.

It appears clear that we cannot separate a legal system from its history and cultural roots. As Boutros Boutros-Ghali said, 'Let's make the twenty-first century the century of a more harmonised world order in which "law becomes a common language" and culture, a bridge between Asia, America, Europe, Oceania and Africa.'

It may be interesting to note that many multi-national companies are still investing in India without running afoul of the relevant anti-corruption laws as these are companies which benefit from a robust compliance culture, stringent oversight protocols and resilient internal controls.

Cecile Dekeuwer
Partner, D2K Avocats Law Firm
Lawyer of the French and Canadian bar (ongoing), former lawyer in South Korea.

Cecile Dekeuwer has legal qualifications and experience in France, Korea and Canada. Her main fields of intervention are corporate law, M&A, commercial law, contracts and litigation. She is a former head of legal departments of several multinational companies. She is the founder of the law firm 'D2K Avocats', the group of multicultural lawyers 'Lex in IT', and the European Economic Interest Grouping '4E' (Europe Energy Efficiency Expertise).

IPBA New Members
June 2014 – August 2014

We are pleased to introduce our new IPBA members who joined our association from June-August 2014. Please welcome them to our organisation and kindly introduce yourself at the next IPBA conference.

Australia, Jessica Pengelly *Finlaysons*	**Malaysia**, Ngosong Fonkem *Multimedia University*
Canada, Sharon Kour *McCarthy Tetrault LLP*	**Malaysia**, Patricia Kim Lee Toh *Wong Beh & Toh*
China, Hong (Julie) Cheng *Jun He Law Offices*	**Malaysia**, Maidzuara Mohammed *Raja, Darryl & Loh*
China, Eric Fei Ji *Fangben Law Office*	**Malaysia**, Syed Naqiz Shahabuddin *Naqiz & Partners*
China, Winston Chunqing Jin *Fangben Law Office*	**Malaysia**, Wai Leong (Steven) Wong *Azim, Tunku Farik & Wong*
China, Moxi Zhang *Jin Mao PRC Lawyers*	**Pakistan**, Tayyab Raza *TMT Law Services*
Hong Kong, Yong Kai Wong *CITIC Capital Holdings Limited*	**UK**, Chloe Bakshi *Steptoe & Johnson*
India, Amitava Majumdar *Bose & Mitra & Co*	**UK**, Roderick Cordara *Essex Court Chambers*
India, Atul Sharma *Link Legal India Law Services*	**UK**, Tom Dane *Nabarro LLP*
India, Ashok Dharma *MMTC*	**UK**, Keith Oliver *Peters & Peters*
India, Veerasureshkumar Veerappan *TMI Associates*	**USA**, Tripp Haston *Bradley Arant Boult Cummings LLP*
Indonesia, Rusmaini Lenggogeni *Soewito Suhardiman Eddymurthy Kardono (SSEK)*	**USA**, Gerald Murphy *Crowell & Moring LLP*
Indonesia, Denny Rahmansyah *Soewito Suhardiman Eddymurthy Kardono (SSEK)*	**USA**, Joseph O´Neil *Lavin O´Neil*
Japan, Tomoki Debari *Anderson Mori & Tomotsune*	**Vietnam**, Hoang Chuong Le *Le & Tran Attorneys at Law & Tax Advisors*
Japan, Jinnosuke Matsumoto *Miyakezaka Sogo Law Offices*	

Discover Some of Our New Officers and Council Members

Francis Xavier SC

IPBA Leadership Position:
Jurisdictional Council Member,
representing Singapore

What was your motivation to become a lawyer?
I grew up wanting to be a doctor. Just before my A-Level exams, I spent a month in the ICU ward of a hospital with a fractured backbone and realised that it was not for me. I then discovered a love for the logic of the law – a space that gives free rein to fresh thinking and creative uses for old (and some new) doctrines.

What are the most memorable experiences you have had thus far as a lawyer?
Exhuming a corpse for an insurance claim, defending murderers, rapists and cartel traffickers when I was a younger lawyer. Interesting aviation failure cases; intractable treaty disputes and big business battles definitely add panache to one's life.

What are your interests and/or hobbies?
The great wild spaces in the world. Percussion. Alpine and volcanic ascents. The roar of a single seated race car.

Share with us something that IPBA members would be surprised to know about you.
That I speak Tamil? Or that my best pet choice is an anaconda? (Will settle for a Burmese python though!)

Do you have any special messages for IPBA members?
The IPBA is a great forum especially for younger members to develop a vibrant global network for themselves and their firm. The delegate size is optimal for building deep connections.

Jonathan Warne

IPBA Leadership Position:
Jurisdictional Council Member for the UK

What was your motivation to become a lawyer?
I cannot recall precisely but it's fair to say that I have always enjoyed winning an argument. This might explain why I became a litigator.

What are the most memorable experiences you have had thus far as a lawyer?
I have been very fortunate to work with some great lawyers and for some fantastic clients. Having entered the profession in the late 80's I have experienced both economic upturn and downturn. For litigators some of the best cases arise out of adverse economic conditions. I have enjoyed success in some of the most complex cross border cases in the last 25 years, including arising from the collapse of the Robert Maxwell publishing empire in the early 1990's to the most recent global banking crisis. All of these cases have been memorable, but they contrast sharply with a personal injury case I was involved in at the beginning of my career. Having been asked by my supervisor at the time to attend a site inspection at one of the London Underground stations I found myself in the unenviable position of being cross examined in court on photographs I had taken of bird droppings deposited on the platform. This was quite an eye opener and not something I want to repeat!

What are your interests and/or hobbies?
When I was younger I was a competitive swimmer and I have retained a strong interest in water-based activities, including skiing (the frozen kind). In recent years, I have taken up beekeeping with my wife, producing honey which our four children adore.

Share with us something that IPBA members would be surprised to know about you.
I enjoy a challenge and outdoor interests. Over the years we have renovated various houses including landscaping the gardens. I have always enjoyed and been quite good at building dry and wet stone walls. In passing we were doing some research into our family tree and we discovered that in the 1700 and 1800's some of my ancestors were stone masons. Perhaps therefore if I hadn't trained to be a lawyer, stone masonry would have been an alternative vocation.

Do you have any special messages for IPBA members?
The IPBA is a great organisation combining a vibrant professional programme with a genuinely friendly atmosphere. As Jurisdictional Committee Member for the UK, I am keen to see the number of UK members increase. I will be attending the mid-year conference in Rio and the annual conference in Hong Kong and look forward to meeting more of you in person at these events.

Wilson Chu

IPBA Leadership Position:
Regional Coordinator, North & Central America

What was your motivation to become a lawyer?
I was a finance major in college when it dawned on me that making boat loans for the rest of my life was unappealing. So I went to law school with the idea of eventually going into the world of business and finance. I landed as a corporate associate in a law firm and haven't been able to escape since.

What are the most memorable experiences you have had thus far as a lawyer?
On the way to a meeting in São Paolo, I was robbed at gunpoint in the middle of a busy CBD surrounded by bustling lunch-goers. Living the dream of an international M&A lawyer …

What are your interests and/or hobbies?
Tennis, golf, and being the family valet on travels with my wife and daughter, in reverse order of course.

Share with us something that IPBA members would be surprised to know about you.
I luckily inherited an anything-is-possible attitude from my hopelessly idealistic mother, who as a 44-year-old widow in Hong Kong, took her six children, ranging in age from 14 to four years (me) and with only $200 in her purse, to the United States to give us an education in the 'Land of Opportunity'. She continues to beat the odds and prove the naysayers wrong, an outlook on life that I enjoy as well. We'll celebrate her 96th birthday in October.

Do you have any special messages for IPBA members?
The IPBA is unmatched in mixing 'fun' and 'friends' with 'business' and 'opportunity.' The IPBA's unique *esprit de corps* reflects the personality of founders like Nosei Miyake, who fundamentally knew that fun was serious business. So my advice to new members and young lawyers: jump in with both feet!

IPBA Special Mention

The IPBA would like to congratulate our colleague from New Zealand, Mr Dennis McNamara, on his receipt of the Order of the Aztec Eagle (*Orden Mexicana del Aguila Azteca in Spanish*) – the highest decoration awarded to foreigners in Mexico – for his outstanding performance in promoting culture and tourism between Mexico and New Zealand. Mr McNamara served several terms on the Council of the IPBA as JCM of New Zealand.

Members' Notes

Tripp Haston, USA

I am a Barrister of Lincoln's Inn, United Kingdom, a practising advocate in Bangladesh and an associate at Law Cornerstone. I joined the IPBA in April, 2014 and hope to meet with its members in the future. My practice area comprises civil, criminal and corporate litigation, ADR, international trade and aviation law. I worked as a Legal Consultant in the Civil Aviation Authority of Bangladesh and acted as a member of an inter-ministerial team and drafted amendments of the Civil Aviation Authority Ordinance 1985 and Civil Aviation Rules 1984. I also recommended amendments to the Anti-terrorism Act 2013, which is integral to the aviation security of Bangladesh.

Stephan Wilske, Germany

Stephan Wilske has published the following articles:

- 'What's New In European Arbitration?' (with Isabelle Michou, Todd Fox and Gerold Zeiler), Dispute Resolution Journal, Vol 68 No 4 (2013), pp 101-108 and Vol 69 No 1 (2014), pp 89-97.
- 'The Use of Diplomatic Channels to Combat State Interference and Guerrilla Tactics in International Arbitrations' (with Lars Markert), TDM, Vol 11 Issue 3, June 2014.
- 'Pathological Designation of a Non-Existent Korean Arbitration Institution: A Trip to Jurisdictional No Man's Land' (with Sarah Kimberly Hughes and Alyson Joy Akoka), Korean Arbitration Review (forthcoming).

In addition, he has given the following lectures:

- 31 March 2014 in London: Queen Mary University of London, ICC Institute of World Business Law, The 29th Annual Colloquium of Arbitrators on 'The Role of Experts in International Arbitration', speech on 'Tribunal Experts'.

Stephan Wilske has also given a speech at the International Conference on Arbitration and Mediation in Taipei on 30 August 2014 on 'The Ailing Arbitrator – Identification, Abuse and Prevention of a Potentially Dangerous Delaying and Obstruction Tool'.

An Invitation to Join the Scholarship Programme of Inter-Pacific Bar Association

The Inter-Pacific Bar Association (IPBA) is pleased to announce that it is accepting applications for the IPBA Scholarship Programme, to enable practicing lawyers to attend the IPBA's 25th Annual General Meeting and Conference to be held in Hong Kong, May 6-9, 2015 (http://ipba2015hk.org).

What is the Inter-Pacific Bar Association?

The Inter-Pacific Bar Association is an international association of business and commercial lawyers with a focus on the Asia-Pacific region. Members are either Asia-Pacific residents or have a strong interest in this part of the world. The IPBA was founded in April 1991 at an organising conference held in Tokyo attended by more than 500 lawyers from throughout Asia and the Pacific. Since then, it has grown to become the pre-eminent organisation in respect of law and business within Asia with a membership of over 1400 lawyers from 65 jurisdictions around the world. IPBA members include a large number of lawyers practising in the Asia-Pacific region and throughout the world that have a cross-border practice involving the Asia-Pacific region.

What is the Inter-Pacific Bar Association Annual Meeting and Conference?

The highlight of the year for the IPBA is its annual multi-topic four-day conference. The conference has become the 'must attend event' for international lawyers practicing in the Asia-Pacific region. In addition to plenary sessions of interest to all lawyers, programmes are presented by the IPBA's 21 specialist committees and two Ad Hoc committees. The IPBA Annual Meeting and Conference provides an opportunity for lawyers to meet their colleagues from around the world and to share the latest developments in cross-border practice and professional development in the Asia-Pacific region. Previous annual conferences have been held in Tokyo, Sydney, Taipei, Singapore, San Francisco, Manila, Kuala Lumpur, Auckland, Bangkok, Vancouver, Hong Kong, New Delhi, Seoul, Bali, Beijing, Los Angeles and Kyoto.

What is the IPBA Scholarship Programme?

The IPBA Scholarship Programme was originally established in honour of the memory of M.S. Lin of Taipei, who was one of the founders and a Past President of the IPBA. Today it operates to bring to the IPBA Annual Meeting and Conference lawyers who would not otherwise be able to attend and who would both contribute to, and benefit from attending, the IPBA Annual Conference. The Scholarship Programme is also intended to endorse the IPBA's mission to develop the law and its practice in the Asia-Pacific region. Currently, the scholarships are principally funded by The Japan Fund, established and supported by lawyers in Japan to honor IPBA's accomplishments since its founding.

During the conference, the Scholars will enjoy the opportunity to meet key members of the legal community of the Asia-Pacific region through a series of unique and prestigious receptions, lectures, workshops, and social events. Each selected Scholar will be responsible to attend the Conference in its entirety, to make a brief presentation at the Conference on a designated topic, and to provide a report of his/her experience to the IPBA after the conference. The programme aims to provide the Scholars with substantial tools and cross border knowledge to assist them in building their careers in their home country. Following the conference, the Scholars will enjoy 3 years of IPBA membership and will be invited to join a dedicated social networking forum to remain in contact with each other while developing a network with other past and future Scholars.

Who is eligible to be an IPBA Scholar?

There are two categories of lawyers who are eligible to become an IPBA Scholar:

1. Lawyers from Developing Countries
   To be eligible, the applicants must:
   a. be a citizen of and be admitted to practice in Vietnam, Laos, Cambodia, Myanmar, Mongolia, Bangladesh, or the Pacific Islands;
   b. be fluent in both written and spoken English (given this is the conference language); and
   c. currently maintain a cross-border practice or desire to become engaged in cross-border practice.

2. Young Lawyers
   To be eligible, the applicants must:
   a. be under 35 years of age at the time of application and have less than seven years of post-qualification experience;
   b. be fluent in both written and spoken English (given this is the conference language);
   c. have taken an active role in the legal profession in their respective countries;
   d. currently maintain a cross-border practice or desire to become engaged in cross-border practice; and
   e. have published an article in a reputable journal on a topic related to the work of one of our committees or have provided some other objective evidence of committed involvement in the profession.

Preference will be given to applicants who would be otherwise unable to attend the conference because of personal or family financial circumstances, and/or because they are working for a small firm without a budget to allow them to attend.

Applicants from multi-national firms will normally be considered only if they have a substantial part of their attendance expenses paid by their firm. Past Scholars will only be considered under extraordinary circumstances.

How to apply to become an IPBA Scholar

To apply for an IPBA Scholarship, please obtain an application form and return it to the IPBA Secretariat in Tokyo no later than **31 October 2014**. Application forms are available either through the IPBA website (www.ipba.org) or by contacting the IPBA Secretariat in Tokyo (ipba@ipba.org).

Please forward applications to:
The IPBA Secretariat
Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
Telephone: +81-3-5786-6796 Facsimile: +81-3-5786-6778 E-mail: ipba@ipba.org

What happens once a candidate is selected?

The following procedure will apply after selection:

1. IPBA will notify each successful applicant that he or she has been awarded an IPBA Scholarship. The notification will be provided at least two months prior to the start of the IPBA Annual Conference. Unsuccessful candidates will also be notified.
2. Airfare will be agreed upon, reimbursed or paid for by, and accommodation will be arranged and paid for by the IPBA Secretariat after consultation with the successful applicants.
3. A liaison appointed by the IPBA will introduce each Scholar to the IPBA and help the Scholar obtain the utmost benefit from the IPBA Annual Conference.
4. Each selected scholar will be responsible to attend all of the Conference, to make a very brief presentation at the Conference on a designated topic and to provide a report of his/her experience to the IPBA after the Conference.

An Invitation to Join the Inter-Pacific Bar Association

The Inter-Pacific Bar Association (IPBA) is an international association of business and commercial lawyers who reside or have an interest in the Asian and Pacific region. The IPBA has its roots in the region, having been established in April 1991 at an organising conference in Tokyo attended by more than 500 lawyers from throughout Asia and the Pacific. Since then it has grown to over 1400 members from 65 jurisdictions, and it is now the pre-eminent organisation in the region for business and commercial lawyers.

The growth of the IPBA has been spurred by the tremendous growth of the Asian economies. As companies throughout the region become part of the global economy they require additional assistance from lawyers in their home country and from lawyers throughout the region. One goal of the IPBA is to help lawyers stay abreast of developments that affect their clients. Another is to provide an opportunity for business and commercial lawyers throughout the region to network with other lawyers of similar interests and fields of practice.

Supported by major bar associations, law societies and other organisations throughout Asia and the Pacific, the IPBA is playing a significant role in fostering ties among members of the legal profession with an interest in the region.

IPBA Activities

The breadth of the IPBA's activities is demonstrated by the number of specialist committees. All of these committees are active and have not only the chairs named, but also a significant number of vice-chairs to assist in the planning and implementation of the various committee activities. The highlight of the year for the IPBA is its annual multi-topic four-day conference, usually held in the first week of May each year. Previous annual conferences have been held in Tokyo (twice), Sydney (twice), Taipei, Singapore (twice), San Francisco, Manila, Kuala Lumpur, Auckland, Bangkok, Vancouver, Hong Kong, New Delhi, Seoul, Bali and Beijing attracting as many as 1000 lawyers plus accompanying guests.

The IPBA has organised regional conferences and seminars on subjects such as Practical Aspects of Intellectual Property Protection in Asia (in five cities in Europe and North America respectively) and Asian Infrastructure Development and Finance (in Singapore). The IPBA has also cooperated with other legal organisations in presenting conferences – for example, on Trading in Securities on the Internet, held jointly with the Capital Market Forum.

IPBA members also receive our quarterly IPBA Journal, with the opportunity to write articles for publication. In addition, access to the online membership directory ensures that you can search for and stay connected with other IPBA members throughout the world.

APEC

APEC and the IPBA are joining forces in a collaborative effort to enhance the development of international trade and investments through more open and efficient legal services and cross-border practices in the Asia-Pacific Region. Joint programmes, introduction of conference speakers, and IPBA member lawyer contact information promoted to APEC are just some of the planned mutual benefits.

Membership

Membership in the Association is open to all qualified lawyers who are in good standing and who live in, or who are interested in, the Asia-Pacific region.

- Standard Membership ¥23,000
- Three-Year Term Membership ¥63,000
- Corporate Counsel ¥11,800
- Young Lawyers (35 years old and under) ¥6000

Annual dues cover the period of one calendar year starting from January 1 and ending on December 31. Those who join the Association before 31 August will be registered as a member for the current year. Those who join the Association after 1 September will be registered as a member for the rest of the current year and for the following year.
Membership renewals will be accepted until 31 March.

Selection of membership category is entirely up to each individual. If the membership category is not specified in the registration form, standard annual dues will be charged by the Secretariat.

There will be no refund of dues for cancellation of all membership categories during the effective term, nor will other persons be allowed to take over the membership for the remaining period.

Corporate Associate

Any corporation may become a Corporate Associate of the IPBA by submitting an application form accompanied by payment of the annual subscription of (¥50,000) for the current year.
The name of the Corporate Associate shall be listed in the membership directory.
A Corporate Associate may designate one employee ('Associate Member'), who may take part in any Annual Conference, committee or other programmes with the same rights and privileges as a Member, except that the Associate Member has no voting rights at Annual or Special Meetings, and may not assume the position of Council Member or Chairperson of a Committee.
A Corporate Associate may have any number of its employees attend any activities of the Association at the member rates.

- Annual Dues for Corporate Associates ¥50,000

Payment of Dues

The following restrictions shall apply to payments. Your cooperation is appreciated in meeting the following conditions.

1. Payment by credit card and bank wire transfer are accepted.
2. Please make sure that related bank charges are paid by the remitter, in addition to the dues.

IPBA Secretariat

Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
Tel: 81-3-5786-6796 Fax: 81-3-5786-6778 E-Mail: ipba@ipba.org Website: ipba.org

See overleaf for membership registration form

IPBA SECRETARIAT

Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
Tel: +81-3-5786-6796 Fax: +81-3-5786-6778 Email: ipba@ipba.org Website: www.ipba.org

IPBA MEMBERSHIP REGISTRATION FORM

Membership Category and Annual Dues:

[ ] Standard Membership ¥23,000
[ ] Three-Year Term Membership ¥63,000
[ ] Corporate Counsel ¥11,800
[ ] Young Lawyers (35 years old and under) ¥6,000

Name:_____ Last Name _____ First Name / Middle Name

Date of Birth: year _____ month _____ date _____ Gender: M / F

Firm Name: _____

Jurisdiction: _____

Correspondence Address: _____

_____

Telephone:_____ Facsimile: _____

Email: _____

Choice of Committees (please choose up to three):

[ ] Anti-Corruption and the Rule of Law (Ad Hoc)
[ ] APEC (Ad Hoc)
[ ] Aviation Law
[ ] Banking, Finance and Securities
[ ] Competition Law
[ ] Corporate Counsel
[ ] Cross-Border Investment
[ ] Dispute Resolution and Arbitration
[ ] Employment and Immigration Law
[ ] Energy and Natural Resources
[ ] Environmental Law
[ ] Insolvency
[ ] Insurance
[ ] Intellectual Property
[ ] International Construction Projects
[ ] International Trade
[ ] Legal Development and Training
[ ] Legal Practice
[ ] Maritime Law
[ ] Scholarship
[ ] Tax Law
[ ] Technology and Communications
[ ] Women Business Lawyers

I agree to showing my contact information to interested parties through the APEC web site. YES NO

Method of Payment (Please read each note carefully and choose one of the following methods):

[ ] Credit Card
[ ] VISA [ ] MasterCard [ ] AMEX (Verification Code:_____)
Card Number:_____ Expiration Date:_____

[ ] Bank Wire Transfer – Bank charges of any kind should be paid by the sender.
to The Bank of Yokohama, Shinbashi Branch (SWIFT Code: HAMAJPJT)
A/C No. 1018885 (ordinary account) Account Name: Inter-Pacific Bar Association (IPBA)
Bank Address: Nihon Seimei Shinbashi Bldg 6F, 1-18-16 Shinbashi, Minato-ku, Tokyo 105-0004, Japan

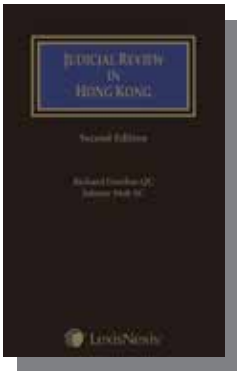
Signature:_____ Date: _____

PLEASE RETURN THIS FORM TO:

The IPBA Secretariat, Inter-Pacific Bar Association
Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
Tel: +81-3-5786-6796 Fax: +81-3-5786-6778 Email: ipba@ipba.org

Judicial Review in Hong Kong - 2nd Edition

A clear and comprehensive exposition of judicial review



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About the book

Judicial Review in Hong Kong considers the rapid developments that have taken place, and offers guidance, on the practice of judicial review. Since the first edition in 2009, the last five years have seen an increase in judicial review with the number of cases peaking in 2012 with 159 cases, compared to 102 cases just a decade earlier. This expansion in judicial review comes as judges apply the remedy to an increasing range of public bodies. In 2012 and 2013, the Court of Final Appeal heard a number of significant judicial review challenges and administrative law proceedings. All this raises new and challenging issues for those practising and deciding cases in this field.

Written by two practising members of the Bar, an English Queen's Counsel and a Hong Kong Senior Counsel, this expanded second edition also sees the contribution of Tim Parker and Kate Olley. Tim Parker is a Hong Kong counsel with a strong judicial review practice who has appeared in many of the significant constitutional review cases analysed in the book, while Kate Olley is an English barrister specialising in judicial review and who has recently qualified as a barrister in Hong Kong. As in the first edition, Swati Jhaveri has updated chapter 7 on the content of fundamental rights in Hong Kong.

Administrative law practitioners in Hong Kong live in exciting times where landmark principles are still being established and this area continues to grow.

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