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IPBA JOURNAL

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The President's Message



Dear Colleagues,

Our recent 21st Annual Meeting and Conference was profoundly historic, symbolic and remarkable thanks to each of you who joined us or supported us in one way or another.

It was *historic* for it proudly marked our 20th anniversary since the birth of the IPBA in

Japan in the spring of April 1991. It was a meaningful way to acknowledge two decades of commitment and camaraderie amidst this year's beautiful spring cherry blossoms. It was also memorable for being the first major international conference to be held in Japan following the great earthquake of 11 March and the tsunami tragedy that struck the heart of northern Japan, the rippling effects of which have been felt globally and are still being grappled with today. The Silent Auction at the conference raised about US\$34,000 (about ¥2.8 million) for the Japanese Red Cross Society. We appreciate your cooperation for the donation. Our hearts remain with the victims of the tragedy.

Our conference was *symbolic* for it signified hope for the recovery and rebuilding of Japan. Thus, your attendance at the conference gave rise to a deeper meaning. It became a testament of your courage, friendship and solidarity with the Japanese people, which we sincerely admire and appreciate. Despite the withdrawal of 274 people following the 11 March tragedy, 854 people still joined us from different parts of the world with 67 accompanying persons bringing the number of attendees to 921.

We had the privilege of listening to many distinguished speakers including the US Ambassador to Japan, the Honourable Mr John Roos, whose speech was very inspiring. We filled the very same halls of the International Conference Centre where the famous Kyoto Protocol was created and enjoyed the many unique displays of Japanese art, culture and tradition. We also achieved an important milestone with

the formal launch of our innovative partnership with APEC (Asia-Pacific Economic Cooperation), which presents to us a unique opportunity to get more involved in promoting trade and cross-border investments in the Asia-Pacific region.

After 20 years, we now find ourselves in a bigger playing field with more players, ever-changing rules and higher stakes. Thus, we need innovation now more than ever in the pursuit of our many endeavours, individually, and as an organisation.

My goals as the President are to:

1. create more networking opportunities by steadily increasing IPBA membership and to ensure good attendance at the New Delhi 2012 IPBA Conference;
2. organise more activities in each jurisdiction (seminars, receptions etc) with the cooperation of members of each jurisdiction and the 2012 New Delhi Host Committee (the Kyoto/Osaka Host Committee members visited 21 cities in the world);
3. develop relationships with other international organisations, including the ABA and the AIJA;
4. develop closer relationships with the local bar association in each jurisdiction;
5. collaborate with APEC;
6. increase the number of members in the category of corporate counsel (about 100 corporate counsels attended 2011 Kyoto/Osaka Conference) and develop a closer network with corporate counsels and their organisations;
7. create more opportunities for younger generation members with support by senior generation members; and
8. further develop scholarship activities (a 'Japan Fund' established this year will assist those who need financial assistance).

I appreciate your active cooperation to achieve the goals.

Shiro Kuniya
IPBA President

The Secretary-General's Message



Dear IPBA Members,

It has now been three months since the earthquake and tsunami devastated northern Japan in March 2011. A long road to recovery still lies ahead for Japan.

On behalf of the IPBA,

I send my condolences to the people of Japan for the enormous loss of life that they suffered. I send my heartfelt wishes that Japan will recover from the devastation suffered by its people, and I am certain that the resilience, fortitude and strength of its people will carry them through this difficult time.

The first half of this year has seen additional turmoil in Asia with more natural disasters harming people and property in China, Australia, New Zealand and elsewhere. We have also seen much political turmoil all over the world.

With this backdrop, *Innovation*, the theme of the 20th Anniversary Conference of the IPBA held in Kyoto, Japan, was a most appropriate theme.

The Annual Conference

Despite the effects of the earthquake and tsunami, in April 2011, the IPBA successfully staged its 20th Anniversary meeting and conference at the historic Kyoto International Convention Centre, where the Kyoto Protocol to the United Nations Framework Convention on Climate Change was concluded and adopted in December 1997. The theme of the conference was *Innovation*, and the various committee programmes explored the legal and business implications of scientific, technological and organisational advances in all areas of human activities.

The Honorable Mr John V Roos, the United States Ambassador to Japan, spoke at the Opening Ceremony about the innovations that attorneys can consider as we move on into a new age of innovative business.

Other speakers at the Opening Ceremony included Dr Shinya Yamanaka, the renowned Japanese physician and stem cell researcher known for his discovery of iPS (Induced Pluripotent Stem Cells) and leading researcher in the creation of organs for human beings; Professor Hiroshi Matsumoto, President of Kyoto University, a

renowned space scientist; and, Mr Yasuchika Hasegawa, President and CEO of Takeda Pharmaceutical Co Ltd.

The Host Committee presented a special session in collaboration with the Asia-Pacific Economic Cooperation (APEC) in which the speakers from APEC and the IPBA identified issues concerning innovation in relation to cross-border investments and economic development. The IPBA and APEC entered into a cooperation agreement, and the database of IPBA attorneys is now available to APEC members as a resource for legal assistance in their projects.

For the first time in its history, the IPBA conducted a silent auction at its conference, auctioning off goods donated by individual members and institutions. The auctioned items included artwork, hotel stays and other goods. Initially, this auction, which was proposed and hosted by the Scholarship Committee, was intended to raise funds for IPBA scholarships for attorneys from developing countries to attend the IPBA annual conferences. But in the wake of the Eastern Japan earthquake, the IPBA decided to donate all of the proceeds of the auction to disaster relief efforts conducted by the Japanese authorities. I am happy to report that the auction raised over US\$34,000 for this effort.

Very appropriately for our 20th anniversary, at the Gala Dinner, charter members of the IPBA who have been with the organisation since its very beginning – all 139 of them – were honoured along with Past Presidents, Past Secretaries-General and others who have contributed to the growth of the IPBA over the past 20 years. We certainly look forward to inviting all of them back for our 25th anniversary.

Springtime in Kyoto is a beautiful time of year to visit this historical Japanese city, and the ambience of the location undoubtedly added to the enthusiasm of the over-800 attendees at the conference. There is no doubt that the accomplishments of the Kyoto conference added to the accomplishments made at the 2010 Singapore annual conference whose theme was 'Climate Change and Legal Practice' which explored the challenges that climate change poses for humankind.

The warm and gracious hospitality of the Kyoto Host Committee was evident in all of the details of the conference activities that included maiko dances, taiko drumming by five-year-old

drummers and Noh dances. We extend our deepest and sincerest appreciation to the Kyoto Host Committee and all the tireless volunteers who assisted them in making the conference a most memorable and successful event.

Upcoming Events

In the wake of another successful annual conference, planning is already under way for the Mid-Year Council Meeting in Hanoi, Vietnam. A Mid-Year Meeting was originally scheduled to be held in Hanoi in November 2008. But torrential rains that caused major flooding in the city led to the cancellation of that meeting. The Council decided to try again, and the meeting has been scheduled for Hanoi for 2-5 September 2011. The Host Committee is busily preparing for the meeting and an educational seminar to be held in conjunction with the meeting.

In the meantime, the New Delhi Host Committee is deep into its planning for the 2012 Annual Conference to be held in New Delhi, India from 29 February to 3 March 2012. The topic of the conference will be ‘Legal Trends, Thoughts and Times’, with the focus on what attorneys may face in these difficult times.

India and China have now assumed major roles in the world economy. China has now surpassed

Japan in terms of Gross Domestic Product and is now the second leading economy of the world. India’s economy is growing significantly. These two major economies together with Brazil and Russia comprise the BRIC group which is contributing tremendously to the global economy.

Attorneys will find this to be an opportunity to visit India to learn about the region’s economy, trade and legal issues and perhaps find opportunities there. The 2012 Annual Meeting and Conference in India will undoubtedly build upon the accomplishments of the past two conferences in Singapore and Kyoto to provide innumerable opportunities for IPBA members.

I look forward to working with the officers and council members of the IPBA and with the general membership in continuing to develop the IPBA as the premier law organisation for attorneys in the Asia-Pacific region. The IPBA will be committed to exploring the most important legal issues of our times for its members. I look forward to the exciting work and times ahead.

Aloha Nui-Loa,

*Alan S Fujimoto
Secretary-General*

IPBA Event Calendar

Event	Location	Date
IPBA Annual Meeting and Conference		
22nd Annual Meeting and Conference	New Delhi, India	Feb 29–Mar 3, 2012
23rd Annual Meeting and Conference	Seoul, Korea	TBD
IPBA Mid-Year Council Meeting and Seminar 2011		
2011 Mid-Year Council Meeting for Officers and Council Members	Hanoi, Vietnam	Sept 2–4, 2011
‘Infrastructure Projects and Public–Private Partnership (PPP) – Bridging the Gap’, Seminar in Conjunction with the Mid–Year Council Meeting (open to all IPBA Members)	Hanoi, Vietnam	Sept 5, 2011
Supporting Events		
InnoXcell e-Discovery & Data Retention	Hong Kong	Jun 21–23, 2011
InnoXcell Trade Secrets and Brand Protection Roundtables	Shanghai, China	Jul 21, 2011
InnoXcell Trade Secrets and Brand Protection Roundtables	Guangzhou, China	Jul 26, 2011
Beacon 4th Annual Anti-Corruption South & South East Asia Summit	Singapore	Sep 13–15, 2011

More details can be found on our website:

<http://www.ipba.org>, or contact the IPBA Secretariat at ipba@ipba.org.

The IPBA 21st Annual Meeting and Conference Kyoto/Osaka, 21–24 April 2011



Registration was brisk, with delegates choosing the colour of their keepsake bag made by the famous Shinzaburo Hanpu store.



President-Elect Shiro Kuniya ushers in the Conference theme of ‘Innovation’ at the Plenary Session.



A trip to Kyoto would not be complete without green tea and a traditional tea ceremony.



This year’s eight IPBA Scholars with members of the Scholarship Committee, IPBA 2011 Host Committee, and IPBA Leadership.



IPBA Officers participating in *kagamiwari*, or opening of sake barrels, at the Welcome Reception.



Delegates and accompanying persons had the rare opportunity to mingle with *geiko* and watch their dance performance at the Welcome Reception.



The IPBA and APEC signed a historic ‘Friendship Agreement’ to cement our collaborative relationship.



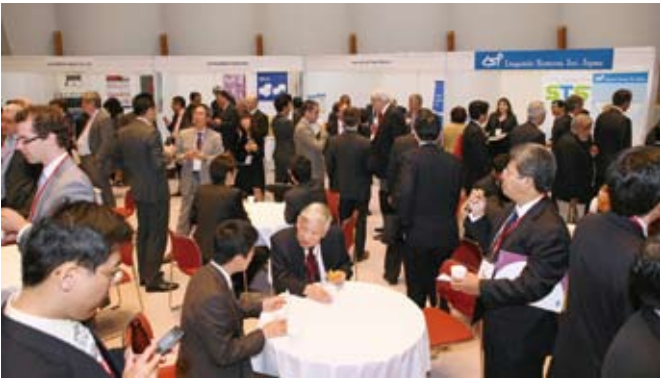
‘Innovative Regulation to Promote Innovative Environmental Technologies’.



'Anti-Corruption Legislation and Their Inter-Play in Cross-Border Businesses'.



'Innovative Due Diligence Techniques – How Can We Improve?'



Even break time was busy in the Exhibition Room.



Delegates make their way through the winding paths at Kodaiji to The Garden Oriental Kyoto on Kyoto Night.



Ninna-ji, a UNESCO World Heritage Site, was closed to all but IPBA delegates on Kyoto Night.



Bidding for items in the Silent Auction, which raised close to US\$34,000 for the Japanese Red Cross Society.



The Gala Dinner was held at the Miyako Hotel Kyoto, with a Noh performance and a programme to honour special IPBA achievements.



The Annual General Meeting was well attended, with the Officers reporting on IPBA business over the past year.

See more photos on the IPBA website at: <http://ipba.org>

The Best Paper Prize Winner

The Efficient Arbitration: Party Appointed Experts

Although essential in international arbitration, party appointed experts have rarely been used efficiently. This article highlights key reforms of arbitration rules and procedure and the use of the common law as a model, and suggests ways to optimise the use of expert witnesses.

Professor Doug Jones*

**President, Chartered Institute of Arbitrators
Partner, Clayton Utz**

The use of party appointed expert witnesses is common in international arbitration, yet lamentably the efficient use of these experts is far less common. Various rules and protocols exist to regulate this area of procedure, including the International Bar Association's Rules on the Taking of Evidence in International Arbitration (IBA Rules) and the Chartered Institute of Arbitrators Protocol for the Use of Party Appointed Expert Witnesses in International Arbitration (CI Arb Protocol). While these guidelines are useful, the proactive management of party appointed experts beyond simply adhering to these guidelines can greatly reduce the time and costs associated with arbitration.

An essential element of using party appointed expert witnesses efficiently is ensuring the independence of the experts. Only when the experts recognise that their duty is to the tribunal, and not to the party by whom they were appointed, is the expert's evidence going to be most efficiently and effectively utilised. Various procedures can be utilised by tribunals to attempt to maximise the independence of expert witnesses, and various parts of both the IBA Rules and the CI Arb Protocol are relevant to ensuring the expert remains as independent as possible.

The use of party appointed experts, and the associated challenges, is not unique to arbitration. Indeed, the use of experts has been the subject of much scrutiny in the context of domestic litigation in recent years, beginning in the UK and spreading throughout other common law countries.

The lessons learned in the courtroom are worth considering, as tribunals and parties to arbitration can consider how the courts have addressed these issues, and adapt their solutions to suit arbitration.

This article will look at these curial developments and the context in which they occurred in order to gain a complete understanding of the way the courts have handled this issue. Following this, recent changes to the IBA Rules will be examined, considering how they, along with the CI Arb Protocol, should be used to effectively regulate the efficient use of expert witnesses in international arbitration. Finally, this article provides a number of procedural suggestions of various ways in which the use of expert witnesses can be optimised for use in international arbitration, building on a basis of curial procedure, arbitral rules and guidelines, as well as the experience of experienced arbitrators and counsel.

History of Reform

In 1996, Lord Woolf in the UK produced a report that expressed concerns over the excessive costs and delay involved in litigation.¹ The report acknowledged the value of 'the full, "red-blooded" adversarial approach' but stated that this approach 'is appropriate only if questions of cost and time are put aside'.² The Woolf report identified several reasons for the lengthy delays and high costs of litigation.

One of these was the uncontrolled proliferation of expert evidence. Two problems arise from this phenomenon. First, there has been a tendency for experts to view themselves (and to be viewed) as being within the 'camp' of the party by whom they are appointed and remunerated. This gives rise to the risk that they will give partisan evidence as a 'hired

gun' which does nothing to assist either the tribunal, or indeed their 'own' party. Time and money may be wasted where opposing, partisan experts espouse extreme and vastly different opinions in an effort to support the case of the party by whom they have been retained. It may also produce injustice where an extreme but more convincingly portrayed view is preferred by an arbitrator, even though it may not be a genuine or accurate reflection of expert opinion in the relevant area.

Second, this leads to a focus on quantity of expert evidence, not quality. Parties hoping to strengthen a weak case or perhaps simply hoping to render a strong one that is impenetrable have exhibited a tendency to call multiple experts where perhaps one would have sufficed, or to call an expert where none was needed at all. This too leads to unnecessary delay and cost which may result in an unjust outcome where there is financial inequality between the parties.

As a result of these concerns, Lord Woolf proposed a number of measures for reducing the likelihood of expert bias. These measures centred around active case management by judges and full court control of how, when and by whom expert evidence is given. Fundamentally, his Lordship's reforms were based on the notion that the expert has an overriding duty to assist the court impartially and independently, and not to advocate the case of the party by whom he or she is retained.

Party Appointed Experts in International Arbitration

Overview

In international arbitration the use of party appointed experts is widespread and arbitrators are often left with the challenge of determining the accuracy and veracity of conflicting expert evidence. The issue has become more than just a common law one. Arbitrators from a civil law background, accustomed domestically to the sometimes exclusive reliance by courts on court appointed experts (for example in France) have increasingly embraced the use of party appointed experts.

Conflicting expert evidence is not of itself necessarily problematic and is a natural consequence of dealing with areas of complex, specialist knowledge. However, when this conflict arises due to the reticence of the experts to depart from the 'party line', the fundamental utility of expert evidence is called into question.

The adversarial nature of the common law tradition, and that of many international arbitrations, can account for this attitude in several ways. First, the simple fact that the expert is appointed, instructed and paid by a particular party can result in a feeling of loyalty towards that party, particularly where the expert seeks to be

appointed by that party in future disputes. Second, the confrontational cross-examination environment can put experts on the defensive and generate a fear that his or her professional credibility is at stake. This can result in a reluctance to concede that certain parts of the tendered evidence are not as concrete as may otherwise be thought. Finally, as identified by a former member of the Council of the Australian Medical Association, there is a reluctance amongst professionals to subject themselves to the rigorous process of providing independent expert evidence when

of an expert acting as a 'hired-gun' is accepted, despite lacking scientific credibility.³

The IBA Rules

Most institutional rules deal only with basic aspects of the evidence procedure, leaving the more specific procedural elements as a matter for the parties and tribunals to determine. The IBA Rules are a resource for arbitrators and parties, enabling them to conduct the evidentiary process involved in international arbitral proceedings in an efficient and economical manner. While the IBA Rules are not exhaustive,⁴ partly due to the wide scope of their intended operation, they provide a 'tried and tested' basis upon which arbitral tribunals can base their evidentiary procedure.

The reforms that followed from the Woolf Report provide the context for the amendments to the IBA Rules regarding party appointed



IPBA Past President Jim FitzSimons (right) presenting Doug Jones (left) with the Best Paper Prize which was elected at the 21st Annual Meeting and Conference in Kyoto/Osaka.

experts in 2010. Article 5 now requires the party appointed expert's report to contain a statement of independence from the parties, from their legal advisors and from the arbitral tribunal. This requirement is not as robust as that for tribunal appointed experts who must provide a statement of independence before appointment, thereby ensuring the expert's mind is focused upon his or her paramount duty to the tribunal before he or she has a chance to identify with the case of either party. Nevertheless, the revisions are a step towards establishing an assumption that party appointed experts will be independent.

Other 2010 revisions to the IBA Rules expressly provide for consultation between the tribunal and the parties at the earliest appropriate time 'with a view to agreeing on an efficient, economical and fair process for the taking of evidence'.⁵ It is stated that this should include issues such as the 'scope, timing and manner' of, among other things, 'the preparation of witness statements and expert reports'.⁶ These revisions acknowledge the importance of both expert and fact witnesses, and the importance of tailoring the process of adducing this evidence to each particular arbitration.

The CI Arb Protocol

A popular and helpful protocol for the engagement of party appointed expert witnesses is found in the CI Arb Protocol, which provides an established manner of conducting the evidence of expert witnesses.⁷ As with all procedural guidelines, heed should be taken, but not at the expense of an alternative procedure that may be more suited to the particular arbitration. The CI Arb Protocol has been developed alongside the recent common law developments in the treatment of expert witnesses, and as a result of this it reflects and draws on many of these developments. This is most evident in the emphasis it places on the independence of experts.⁸ It also requires the experts to meet before they tender their reports in order to establish areas of consensus on the relevant evidential issues.⁹

Under the CI Arb protocol, the experts must first enter a discussion for the purpose of identifying issues upon which they are to provide an opinion.¹⁰ The experts must also identify tests and analyses that need to be conducted and, where possible, reach agreement on those issues, tests and analyses, as well as the manner in which they must be conducted. The tribunal may direct the experts to prepare and exchange draft outline opinions for the purposes of these meetings. These opinions are without prejudice to the parties' positions and are privileged from production to the tribunal. Further, the content of the discussion is without prejudice to the parties' positions and must

not be communicated to the arbitral tribunal, save as outlined below.

Following the discussion, the experts must prepare and send to the parties and the tribunal a statement setting out:

- the issues upon which they agree and the agreed opinions they have reached;
- the tests/analyses that they agree need to be conducted and the agreed manner for conducting them;
- the issues upon which they disagree and a summary of their reasons for disagreement; and
- the tests/analyses in respect of which agreement has not been reached, whether they should be conducted and/or the manner in which they should be conducted, and a summary of the reasons for disagreement.

The CI Arb protocol also includes an important article that establishes the independence of party-appointed experts.¹¹ This declaration of independence follows the recommendation of the Woolf Report in requiring the expert to acknowledge that his or her duty is to the arbitral tribunal.

Limiting the Differences

In addition to ensuring the independence of experts, an essential tenet in maximising the efficiency of the arbitral process is to encourage the experts to limit the differences between themselves *prior* to giving evidence. This allows the evidentiary hearings to be conducted more quickly, and thus with less expense. It also increases the chances of settlement, as the conferral of experts with their colleagues in relation to matters of contention may lead them to revise their opinion in such a way that a party's claim no longer has the same prospects of success as originally thought.

There are several methods by which the streaming of contentious issues can be achieved, and these should be considered by arbitral tribunals and parties to an arbitration in order to achieve best practice in utilising expert evidence.

Hot-tubbing

Hot-tubbing is a positive trend in arbitration, and it is becoming increasingly common to dispose of traditional witness examination and cross-examination procedures. While there is no standardised definition of exactly what 'witness hot-tubbing' or 'witness conferencing' entails in the context of arbitration, generally they refer to degrees of the same concept, namely the process of taking evidence from witnesses in the presence of other witnesses (from both sides of the dispute)

and allowing them to engage with each other as to the accuracy of their claims. Frequently, the term ‘hot-tubbing’ is used in relation to expert witnesses and ‘conferencing’ to refer to both lay and expert witnesses, but this distinction is not universal.

Hot-tubbing and conferencing will not always be appropriate, but are especially effective in highly technical arbitrations where there are complex factual and technical issues that need to be resolved and both parties rely on evidence from a number of expert witnesses. Traditional methods of each side calling their witnesses in a linear fashion can lead to a cognitive disconnect in the arbitrators’ and counsel’s understanding of the issues. This disconnect is exacerbated in situations where there are large numbers of witnesses and it could be days before the contradictory evidence of an expert witness’ counterpart is heard. Further, it is possible that due to the highly technical nature of the evidence, opposing counsel will not be able to form fully informed questions until they have been advised by their own expert. Therefore, allowing experts to analyse and question directly the evidence of other experts ensures greater celerity of the hearing.

There are no standard guidelines or rules provided by any arbitral institution to facilitate conferencing or hot-tubbing, primarily due to the nature of the process being particularly dependent on the specifics of the matter. The CI Arb Protocol does not provide specifically for conferencing or hot-tubbing beyond granting the tribunal the power to conduct expert testimony in such a manner as to assist the tribunal to narrow the issues between the experts, and to understand and use the expert witnesses efficiently.¹² Witness conferencing and hot-tubbing can be an efficient and effective tool when used correctly, but care must be taken to ensure the proceedings are conducted in a manner that will result in the most accurate, as well as efficient, evidence. Tribunals wishing to utilise these methods of adducing expert evidence should pay heed to court guidelines such as those discussed above in ensuring that the process is undertaken as effectively as possible.

Exchange of Draft Reports

An effective way of limiting the differences between experts is to require them to exchange drafts of their reports early in the proceedings. This allows for the early clarification of contentious issues. Further, it exposes the experts to the views of their fellows, which may prompt them to consider things differently, and potentially reach consensus on some of the issues at the outset of proceedings.

The CI Arb Protocol allows for, but does not mandate, the exchanging of draft reports by

expert witnesses, when so directed by the arbitral tribunal.¹³ It is suggested that, as far as it is practical, tribunals should utilise this discretion in order to facilitate the most efficient procedure for hearing expert evidence.

Potential Areas for Reform

As has been noted, many of the measures described above are already employed in arbitration to varying degrees. However, there is room for even greater reform, and for arbitral tribunals to draw on the lessons of common law courts in order to ensure that arbitration is an effective and efficient process for all involved.

To this end, it is useful to identify a number of general areas in which reform is lacking or could be more extensive. These are examined below.

Evidence by Leave

The notion of ‘evidence by leave’ refers to the practice, adopted in some situations by certain Australian and English courts, of requiring the parties to apply for the leave of the court before expert evidence can be adduced on a given question.

Restrictions as to when leave will be required vary between jurisdictions. In England, for example, the court has a very broad power to restrict expert evidence. Part 35.4 of the English Civil Procedure Rules 1998 precludes the adducing of any expert evidence by a party, either orally or in the form of an expert’s report, without



the leave of the court. Further, an application for leave must identify the field in which the party wishes to rely upon the expert evidence, and if possible, the particular expert desired. The leave of the court to adduce the evidence, if granted, will then be confined only to the designated field. The Family Court of Australia has adopted similar provisions.¹⁴

Despite the practical advantages in terms of case management offered by far-reaching leave requirements such as those employed in England, the potential problems they pose in the context of arbitration include:

- The need for the tribunal to understand the issues sufficiently in order to make an informed decision. Where an issue is particularly technical or complex, or subject to debate within the relevant field of expertise, the restriction of expert evidence in this way may prevent the tribunal from fully understanding the issue at hand, resulting in an unjust or unsatisfactory outcome.
- The question of whether denying leave could amount to preventing a party from presenting its case, so as to prejudice the enforceability of the award under the New York Convention.¹⁵
- The requirements of the Model Law and UNCITRAL (and other institutional) Arbitration Rules that a party be given a 'full',¹⁶ 'reasonable',¹⁷ or 'sufficient'¹⁸ opportunity to present its case.

For this reason, and in the absence of applicable rules so providing, or the agreement of the parties, tribunals should be wary of denying leave for expert evidence to be adduced. Ideally, there should be a balance between the practical concerns of case flow and time management on the one hand, and enforceability on the other. Accordingly, there remains scope for some restriction, by means of the tribunal itself considering what expert evidence parties wish to adduce by way of party appointed experts, and then ruling on the character of the evidence and potentially upon the expertise itself.

Weight

The weight to be attached to the evidence of experts whose independence is compromised needs to be known and understood by the parties from the outset of the process. This serves two purposes:

- It clarifies the role and duty of the expert so that unconscious bias may be minimised; and
- it makes experts and parties aware of the risk that biased evidence will be discounted *prior* to its being adduced. As a result, the chances of impartiality are increased, as this allows (and encourages) parties to take active steps to avoid partiality at the commencement of the process.

Since a party whose expert is found to have acted partially risks little or no weight being attached to their evidence, the knowledge of what (if any) weight will be accorded to such evidence affords the opportunity for parties to strengthen their cases by ensuring that their experts are independent.

Transparency

Opinion over the desirability of such a rule regarding the exposure to disclosure of communications between lawyers and their experts in litigious proceedings, and the extent to which communications should be revealed, is divided. The Woolf report recommended that expert evidence be inadmissible unless all written instructions and a note of any oral instructions were annexed to the expert's report. This recommendation has not generally been adopted in Australia. Most Australian courts require an expert's report to include details of the instructions informing its scope, and the facts and assumptions upon which the expert's opinion is based.

The 2010 IBA Rules also include a provision in Art 5(2)(b) requiring the expert to provide a description of the instructions they have received from the parties. This ensures that the parties will not instruct the expert to behave in a manner that would adversely affect the expert's impartiality. However, this requirement needs to be carefully



considered given that the CIArb Protocol and IBA Rules are designed to operate in conjunction with one another. The CIArb Protocol provides that while instructions are not 'privileged', they should not be ordered to be disclosed by the arbitral tribunal without good cause. As such, Art 5(2)(b) of the IBA Rules should be understood to require that the description of the instructions received by the expert must always be provided, but the instructions themselves should only be requested by the arbitral tribunal when there is good cause for doing so, for example, where the expert's impartiality comes into question.

The Single Expert

There is increasing interest in international arbitration in the appointment of a single expert, either by the parties' agreement or at the tribunal's direction. This is said to bring with it benefits in terms of efficiency as well as cost-effectiveness, but this must be considered in light of the inherent disadvantages of a single expert, including the difficulties of reaching agreement upon a single expert, and the prospect that one or both of the parties will have an inadequate opportunity to present their case.

The cost benefit of appointing a single expert is obvious when considering the need to only remunerate a single expert for his or her services, as opposed to each party paying for its own expert, thereby halving the costs of hearing expert evidence. In terms of minimising delay in the process of the evidentiary hearing, the use of a single expert can have a significant impact. This is because when each party appoints their own expert, often each expert report will cover the same ground, with only minor areas of difference.

A single expert does, however, have some disadvantages. First, there is the possibility that the expert will misunderstand his or her role and make a determination on a question more suited to determination by the arbitral tribunal. Second, in some areas of expertise, there are genuinely held alternative views which will not be brought to a tribunal's attention with only one expert appointed.

Expert Teaming

In his 2010 paper presented at the International Council for Commercial Arbitration (ICCA) Conference in Rio de Janeiro, Dr Klaus Sachs introduced the concept of expert teaming.¹⁹ Briefly, expert teaming consists of parties presenting a list of desired experts to the tribunal. Each party is given the opportunity to register any conflicts of interest with the opposing party's listed experts. Taking these into account, the tribunal selects an expert from each list and appoints the two

experts jointly as an 'expert team'. Following this, the tribunal, the experts and the parties meet to establish a protocol by which the expert evidence will be adduced. The expert team will then prepare a joint report, and may be questioned by the tribunal or the parties at their discretion. The expert team will be expected to work as an independent team, and all communication with the parties or the tribunal must be disclosed to both members of the team.

This concept has many attractions. It attempts to minimise the feelings of loyalty often associated with party appointed experts who are individually instructed by the appointing party. Further, it ensures that the parties are able to have an expert of their choice utilised, as opposed to the use of a tribunal appointed expert. By having each party produce their own list of experts, each party is given significant input into the choice of experts, but without the difficulties associated with having both parties agree on the appointment of a single expert. Finally, expert teaming has cost and time benefits, in that only a single expert report is produced. This reduces the amount of work required by each expert. This also ensures that the situation does not arise whereby two conflicting reports are produced that operate from disparate assumptions as to basic facts relating to contentious issues.

Best Practice Directions

The effective use of party appointed expert witnesses requires a proactive acknowledgement on behalf of the arbitral tribunal as to the difficulties of adducing expert evidence, and communication with the parties as to the best process to be utilised. As a matter of general guidance, the tribunal should raise this issue with the parties at the earliest practical stage of the proceedings, to ensure that all the parties and the tribunal are aware of the ensuing process.

Best practice directions for the appointment and use of expert witnesses should have regard to an early identification of the areas that will require expert evidence and an appointment of the experts, with the approval of the tribunal. This will ensure that expert evidence is only heard on relevant issues. Expert evidence can be superfluous, especially in situations where the tribunal already possesses the relevant expertise. Further, it is not uncommon for the situation to arise whereby, in the process of determining the issues on which expert evidence will be produced, the parties find that the scope of their disagreement on those issues does not require the production of expert evidence.

The tribunal should then settle joint briefs to the experts within each discipline area. This brief should include directions for two types of reports

produced. First, a joint report from the experts in each area of expertise identifying areas of agreement and disagreement in response to their briefs with reasons for disagreements. Second, individual reports produced by the experts but only on areas of disagreement. This requires the experts to confer and limit the differences as far as possible. By tendering a joint report, cost and time benefits are realised, and the utility of the evidence increased, as the tribunal's attention, and that of the parties, will be focused primarily on the contentious issues.

Conclusion

The efficient use of party appointed expert witnesses is a worthy goal, and given the desire to do so, it is certainly within the grasp of any arbitral tribunal. Essentially, what is required is the proactive management of these experts, with procedural decisions made by the parties and the tribunal at the earliest possible stage of

the proceedings. The IBA Rules and the CI Arb Protocol provide a strong foundation for tribunals to build from, in tailoring the optimal procedure for each particular arbitration.

By considering recent common law developments in this area, practitioners in the area of arbitration are provided with a strong model by which arbitral procedure can be shaped. Although many of the courts' approaches and reforms have already infiltrated the arbitral process in one way or another, uniformity and structure has not yet been achieved. What is required is an assessment, across the board, of the value that recent litigious developments can bring to the use of expert witnesses in arbitration, and the establishment of a framework by which such measures can be implemented and enforced. The recent amendments to the IBA Rules goes some way to addressing this need, but more still needs to be done to ensure the efficient use of independent expert witness in international arbitration.

Notes:

- * The author gratefully acknowledges the assistance provided in the preparation of this paper by Timothy Zahara, Legal Assistant of Clayton Utz, Sydney.
- ¹ The Right Hon Lord Woolf MR, 1996, *Access to Justice: Final Report to the Lord Chancellor of the Civil Justice System in England and Wales*.
- ² *Ibid*, [13.6].
- ³ M Nothling, *Expert Evidence: The Australian Medical Association's Position*; available at: www.aija.org.au/info/expert/Nothling.pdf accessed on 4 March 2011.
- ⁴ For example, there is some question as to how they operate in regards to hearsay, see SI Strong and James J Dries, 'Witness Statements under the IBA Rules of Evidence: What to Do about Hearsay?' (2005) 21(3) *Arbitration International* 301 at 301-21.
- ⁵ IBA Rules, Art 2(1).
- ⁶ *Ibid*, Art 2(2)(a).
- ⁷ Available at: <http://www.ciarb.org/information-and-resources/practice-guidelines-and-protocols/list-of-guidelines-and-protocols/> accessed on 4 March 2011.
- ⁸ CI Arb Protocol, Art 4.
- ⁹ *Ibid*, Art 6.
- ¹⁰ *Ibid*, Art 6.

- ¹¹ *Ibid*, Art 4.
- ¹² *Ibid*, Art 7.1.
- ¹³ *Ibid*, Art 6.1.
- ¹⁴ Family Law Rules 2004 (Cth), Rule 15.51. Notably, the leave of the court is not required for single expert witnesses or where a child representative intends to tender a report or adduce evidence from a single expert witness on an issue.
- ¹⁵ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, [1975] ATS 25 (entered into force 7 June 1959).
- ¹⁶ See, for example, UNCITRAL Arbitration Rules 1976, Art 15(1); ICC Rules of Arbitration 1998, Art 15(2); Australian Centre for International Commercial Arbitration (ACICA) Arbitration Rules 2005, Art 17.1.
- ¹⁷ See, for example, LCIA Arbitration Rules 1998, Art 14.1(i).
- ¹⁸ See, for example, Rules of the Arbitration Institute of the Stockholm Chamber of Commerce 1999, Art 20(3).
- ¹⁹ Dr Klaus Sachs, 'Experts: Neutrals or Advocates. Protocol on Expert Teaming: A new approach to expert evidence' (paper presented to the International Council for Commercial Arbitration Conference, Rio de Janeiro, 2010).

Vietnam's New Public-Private Partnerships Legal Framework: A Work in Progress



Dang The Duc



Huynh Tan Loi

On 9 November 2010, Vietnam's Prime Minister issued the long-awaited Decision No 71/2010/QĐ-TTg, a pilot investment scheme based on the public-private partnership (PPP) model, in order to address the growing financing needs of infrastructure projects in Vietnam.

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Facing financing needs for important infrastructure projects, Vietnam had no other option but to drive public-private partnership (PPP) legislation forward and introduce a comprehensive framework to enable the development of such investment structures. On 9 November 2010, Vietnam's Prime Minister issued the long-awaited legal instrument for PPPs in Vietnam, Decision No 71/2010/QĐ-TTg (Decision 71), which regulates investments using the PPP model. Decision 71 took effect on 15 January 2011 and is expected to lay the foundation for PPP projects in Vietnam in the years to come.

The concept of PPP is not new under Vietnamese law. Indeed most of the infrastructure projects in Vietnam have been carried out

in accordance with the regulations set out in Government Decree No 108/2009/ND-CP (Decree 108), dated 27 November 2009, for build-operate and transfer (BOT), build-transfer-operate (BTO) and build-transfer (BT) forms of investment. However, these structures have shown their weaknesses, notably concerning the allocation of state resources.

With Decision 71, the Vietnamese Government aims to encourage investments from the private sector, both domestic and foreign, in infrastructure developments and to better address the funding requirements of such projects. Before the actual regulations are enacted, Decision 71 will be in operation for three to five years from the effective date. Some salient provisions of Decision 71 that may interest investors and lenders are discussed below.

Eligible Infrastructure Projects for PPP

To be implemented, a project must both be in an applicable sector and satisfy certain selection criteria.

Applicable sectors: regarding the applicable sectors, only nine sectors have been opened-up for the pilot PPP scheme. These include:

- roads, highway bridges and tunnels, and ferry landings for road traffic;
- railways, railway bridges and tunnels;
- traffic in urban area;
- airports, sea ports and river ports;
- clean water supply systems;
- power plants;
- health (hospitals);
- environment (waste treatment plants); and
- other projects for infrastructure development and/or provision of public services as decided by the Prime Minister.

Selection criteria: unlike Decree 108, a project to be invested in the PPP form must further meet any of the following criteria:

- the project is of great significance, large scale and urgently required for economic development in accordance with Decision No 412-TTg, dated 11 April 2007, of the Prime Minister (this Decision sets out several urgent projects including, *inter alia*, the Dau Giay-Phan Thiet expressway, the Lach Huyen sea port in Hai Phong, the T2 Noi Bai airport in Hanoi, the Vam Cong bridge, as well as Lao Cai-Hanoi-Hai Phong railway);
- the project is capable of returning investment capital to the investor from reasonable revenue collected from consumers;
- the project is capable of taking advantage of the private sector's technology, management and operations experience and effective use of financial capacity; or
- the project meets other criteria as decided by the Prime Minister.

Financial and Legal Structure of a PPP Project

Decision 71 sets out requirements regarding the allocation of financial resources to fund an eligible PPP project, and more details on corporate and contract structuring of the project are provided.

Financial structure. On basis of the total investment capital, Decision 71 and Decree 108 restrict the minimum and maximum thresholds of the financial participation of state and private investors. Such thresholds remarkably differentiate Decision 71 from Decree 108.

Regarding State contribution, 49% of the total investment capital is the maximum threshold that State capital may be contributed in a project. The 49% mentioned in Decree 108 is reduced under Decision 71 where State capital, investment incentives and relevant financial policies must, whether together or separate, constitute the state participation which may not exceed 30% of the total investment capital. Decision 71 also further clarifies that State capital must not be an equity contribution in the project company and associated with any right to receive profit distribution from the project revenue. State participation must be approved by the Prime Minister.

Regarding investor equity capital, as inferred from the maximum threshold that State participation may be, private participation must hold at least 70% of the total investment capital of the PPP project. Private participation must comprise of equity capital and loan capital. Equity capital is required to be at least 30% of private participation and accordingly, at least 21% of the total investment capital. Loan capital must be mobilised from commercial loans or other sources without State involvement including a government guarantee.

Legal aspects of a project contract. The project contract is entered into between an authorised state body and a private investor in order to cede the

Decree 108			Decision 71			
Investment capital (billion VND)	State participation	Equity capital (billion VND)	Investment capital	State participation	Equity capital (billion VND)	Loan and other capital source
≤1500		≥15%				
>1500	≤49%	≥10% for amounts above 1500 billion; and 15% for the portion under 1500 billion	any	≤30%	≥21%	≤49%

right or grant permission to invest in and operate the project works and/or to provide public services for a specified duration. The project contract will establish liabilities, obligations, rights and powers of the parties and stipulate the objectives, scope and contents of the project as well. Below are several key specific clauses that should be included in the project contract.

- Decision 71 provides that the parties may agree on the right of the lender to take over part or all of the rights and obligations of the project company in case of default under the project contract or loan agreement. After stepping in, the lender must discharge all of the relating obligations of the project company as stipulated in the project contract.
- Investors may assign all or part of their rights and obligations to any third parties after the authorised state body approval.
- Foreign law may apply for each PPP project contract and relevant agreements. However, such application must be consistent with Vietnamese law.
- The duration of the project contract must be agreed by the parties in accordance with the sector, scale and nature of the project and may be modified in the cases provided in the project contract.
- The termination clause needs scrutiny and must include the cases where the project contract may be ended (breach, expiry of duration, force majeure).
- Both the Decree and the Decision require investors to provide security for the project performance but the amount of security has been adjusted.

The purpose of the project company is to operate and implement the project. This means selecting the contractors, preparing the technical designs, supervising and managing the project works, managing and commercially operating the project facility, as well as reporting on the status of the implementation of the project.

The project company, after its establishment, will be either one party to the project contract jointly with the selected investor or it will execute an agreement with the authorised state body. A selected investor will assume and exercise the rights and discharge the obligations of the investor stated in the project contract.

Attraction of Private Investors to Co-finance a PPP project

The attractiveness of financing a PPP project is also ensured by incentives granted by Decision 71 to investors seeking to fund infrastructure PPP projects in Vietnam. Whether legal or financial, they should be taken into account.

Investment incentives. The project company is entitled to corporate income tax incentives, exemption from land use fees for the area of land allocated by the State or from land rent for the whole duration of implementation of the project. Moreover, goods imported to implement the project enjoy incentives provided in the Law on Import and Export Duties.

Right to mortgage asset. A project company will be permitted to pledge and/or mortgage assets and land use rights in accordance with the laws of Vietnam.

Foreign currency conversion. Project revenues (and other project related monies) may be converted to hard currency and remitted abroad. This

Decree 108		Decision 71	
Investment capital	Security amount	Investment capital	Security amount
≤1,500	≥2%	No threshold	≥2%

Security may be provided in the form of a bank guarantee or other forms of security for obligations prescribed in the Civil Code.

Establishment of a project company and issuance of investment certificate. With the final version of the project contract, the selected investor applies for the investment certificate in accordance with the procedures set out in Decision 71 and described below.

When the investment certificate has been issued, a joint venture project company is to be set up in accordance with the corporate structures provided under the enterprise law and in compliance with the financial requirements provided in Decision 71 mentioned above.

provision is similar to those provided in Decree 108. However, Decision 71 does not determine whether all of the revenue may be convertible or if it is only a percentage of the revenue.

PPP Project Preparation: Step by Step

Before coming into existence, a PPP project must follow numerous administrative steps:

Step 1: Project proposals. A project proposal may be initiated either by the authorised state body or by an investor. The project proposal must comprise a wide range of information including:

- proposed scale, output, location, measurements

- of the construction area, items of works and land use requirements;
- compliance of the project with the sectors and criteria for selection of projects;
- analysis and preliminary selection of technology and technical aspects; terms applicable to supply of raw materials, materials and equipment, energy, services and technical infrastructure; preliminary plan on-site clearance and re-settlement (if any); and preliminary assessment of project impact on the ecological and social environment;
- proposed schedule for construction of the works (commencement and completion, testing and commissioning the works for commercial operation); duration of operation of the works, and method of the investor for organising management and commercial operation of the facility;
- preliminary determination of all types of fees and charges for goods and services proposed to be collectible from commercial operation of the facility in accordance with current regulations;
- conditions and method for handing over and receiving the facility;
- estimated total investment capital, preliminary determination of the amount of the State participating portion and recommendations on the incentive and investment guarantee regime for the project; and
- analysis of overall effectiveness of the project including its necessity, advantages and the socio-economic efficiency of implementing it in the PPP investment form rather than in the

form of total investment with State capital, and the feasibility of raising investment capital.

Step 2: List of projects and its announcement.

The project proposals must be sent to the Prime Minister for his decision on inclusion in the list of projects. Then, the approved list of projects is announced in the Tendering Newsletter and on the website of the Ministry of Planning and Investment (MPI) and/or published on the website of other relevant ministries.

Step 3: Feasibility study report and its approval.

Projects will require a feasibility study report drawn up by consultants selected through an open tender managed by the authorised state body. The feasibility study report must include, in addition to the information contained in the project proposal, an analysis of the risks, rights and obligations of the parties.

Step 4: Selection of investors. On the basis of the approved feasibility study report, the authorised state body will formulate tender invitation documents and hold open international or domestic tendering to select the investors to implement the project. After selection, investors will have to bear certain investment preparation costs, which are not clearly defined in Decision 71. The implementing circulars should clarify this point in the future.

Step 5: Execution of project contract. Once the investor is approved, the authorised state body must negotiate, finalise and initiate a project contract with the selected investor within 30 business days.



With such a short timeline to achieve negotiation and finalisation of the project contract, up-to-date standardised documentation will be required in order to minimise all the issues that may be raised by the project. Moreover, in addition to valid documentation, a well-trained unit wholly dedicated to the PPP must be in place with comprehensive human and financial resources.

Step 6: Issuance of investment certificate and implementation of project. After completion of the project contract, the selected investor must apply for the investment licence. The application file must gather the relevant documents such as a request for issuance, an initialled project contract, a feasibility study report, as well as a joint venture agreement and a charter of the project company.

Within 45 business days from receipt of a valid file, the MPI will evaluate the application by focusing on the rights and obligations of the parties to the project contract, and schedule for the project implementation, land use requirements, environmental solutions, state contribution, investment incentives and securities provided for implementation of the project.

After issuance of the investment certificate, the investor must conduct a business registration and establish the project company.

Operation, Completion and Handover of Project Works

Operation of project works. The project company will be responsible to select contractors for consultancy, construction, and installation and more generally, contractors to implement the project. On the basis of the feasibility study report and the project contract, the project company will be in charge of formulating the technical designs.

In addition, the project company may either manage itself or hire a company to manage and monitor execution of the project works.

Completion of project works. Within six months from the date of completion of the project works, the investor must prepare a file on the finalisation of investment capital in the construction of the works.

Handover. Handover of the project works must fulfill the following conditions:

- one year before handover or within the time-limit agreed in the project contract, the investor or the project company must publish a handover notice;
- the authorised state body checks the quality and conformity of works with the project contract and prepares a list of assets to be handed over and will require the project company to undertake repairs if any;

- the project company and the investor must ensure that the handed over assets will not be used as a guarantee for discharge of any financial obligation, pledged, mortgaged or used as security for other obligations of them arising before the said handover date; and
- the project company must carry out the technology transfer, training and maintenance so as to enable normal operation of the facility (the authorised state body may either directly operate the facility or assign the investor/project company to operate and manage the facility).

Management and Commercial Operation of the Project Facility

Should the project company be in charge of the management and operation of the facility, it must ensure equal treatment between all users of products and services provided, as well as periodical maintenance and repairs of the facility during operation. The facility must be managed and operated in accordance with the provisions stated in the project contract.

Conclusion

Decision 71 is a welcome piece of legislation offering a pilot regulation for investors, the State and lenders to move on PPP investment structures in order to better develop Vietnam's infrastructure. While the Decision is a step forward for the establishment of a satisfactory PPP legal framework, guiding regulations and practical situations are eagerly awaited; thus, it is still a work in progress.

The very first projects carried out under this new pilot regulation will be considered as examples and will provide more experience to all major players in the infrastructure projects sector, consequently enabling such an investment model to develop in Vietnam. At the time of writing, according to the MPI, the ministries and local governments have proposed to the Prime Minister for approval 24 infrastructure projects to be carried out under the PPP model. These include: the Ninh Binh–Thanh Hoa Highway with investment of VND33 trillion (US\$1.6 billion); the Dau Giay–Lien Khuong Highway with investment of VND48.3 trillion (US\$2.3 billion); and the Ha Long–Mong Cai Highway with investment of VND25 trillion (US\$1.2 billion). The MPI estimated that Vietnam will need around US\$170 billion for infrastructure development during 2011–20, with the state budget and ODA sources expected to be able to cover about US\$100 billion. The remainder will come from private investors, and the PPP mechanism is expected to attract long term investment from the private sector for the country's infrastructure development.

Upcoming Amendments to the Russian Competition Law: Changes in Merger Control Regulation



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Russia's Third Antimonopoly Package includes proposed amendments that aim to increase the efficiency of the competition regulation and improve the quality of antitrust authorities' functions.

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In the summer of 2011 amendments to the Federal Law 'On Protection of Competition' and other federal laws, jointly known as the 'Third Antimonopoly Package', enhanced by the Federal Antimonopoly Service (FAS Russia) and other state bodies, are expected to be presented for consideration to the State Duma of the Russian Federation. A number of amendments concern merger control regulation.

- It is expected that the Competition Law will be applied to agreements and/or actions executed by Russian and/or foreign legal entities, if such agreements or actions have any effect on the state of competition in Russia. However, the term 'effect on the state of competition' is still not defined.
- The number of grounds for inclusion of legal entities in the group of entities is reduced; therefore, the group of persons for the purposes of the merger control will be respectively narrowed.
- The grounds for FAS Russia clearance in respect of foreign-to-foreign transactions will be more clearly formulated. In accordance with the proposed amendments, the clearance is required for:
 - the acquisition of more than 50% of the voting shares of a foreign company;
 - the acquisition of other rights, enabling the acquirer to determine the terms of business activity of a foreign company; or
 - the acquisition of the rights, enabling the acquirer to exercise the functions of the executive body of a foreign company.
- In respect of foreign companies, an additional threshold for merger control will be established. A transaction is subject to merger control by FAS Russia if shares/participation interests/rights are acquired in respect of a foreign company, which has supplied goods, services or works to Russia for an amount exceeding RUR1 billion during the year, presiding the date of execution of the transaction.
- The new requirements for the documents to be attached to the notification will be set. If the target is a foreign company, constituent documents of the target should be provided in notarised and apostilled form.

It is expected that the Third Antimonopoly Package will come into force in the autumn of 2011, so certain provisions in the Package can be changed in the course of the readings in the State Duma.

By willing to develop and to make antitrust regulation more transparent, FAS Russia is introducing the thresholds for merger control over foreign-to-foreign transactions, and it is expected that when the proposed amendments to the Competition Law come into force, only major international transactions which can objectively affect the state of the competition in Russia will be subject to state control.

Russian antitrust regulation has been substantially brought in line with the European regulation, and introduction of the Third Antimonopoly Package is aimed at the further correlation of these two regulative systems. The proposed amendments will increase the efficiency of the competition regulation and improve the quality of antitrust authorities' functions.



Post-Financial Crisis: Taking a Closer Look at China's Anti-Commercial Bribery Regulations



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As multinational corporations (MNCs) depend more and more on the Chinese market for growth, they are also increasingly exposed to compliance risks in China such as commercial bribery. Although many MNCs follow the regulations of their home countries to mitigate these risks, it is vital that they also adapt to the Chinese regulatory framework and are aware of what constitutes a bribe in China.

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In the new post-financial crisis era, countries and corporations are facing a highly competitive business environment more than ever before. For MNCs, China is in somewhat of a conundrum. On the one hand, MNCs are depending on China's fast economic recovery and dynamic economy to

mitigate decreased revenue in other markets. On the other, China is a developing economy with a legal system that is plagued by 'hidden rules' where following domestic practices may present unacceptable compliance risks for MNCs. Hence, many MNCs with Chinese operations simply follow the rules and regulations set forth by the laws of their home country¹ to mitigate these compliance risks.

However, by simply following home country laws to prevent host country² violations of commercial bribery is flawed. For example, the US Foreign Corrupt Practices Act of 1977 (FCPA) provides an affirmative defence for payment to an official that is permitted by the written law of the host country.³ However, violations of Chinese laws will be punished in China regardless of the legal status of the act in the home country. Hence, home

country laws do not provide adequate preventative measures against violations of Chinese laws that are punishable in China. Furthermore, there are differences in the jurisprudence of home country laws compared with host country laws. For example, some US government officials may allow room for negotiations, ie enforcing a lighter punishment in exchange for strengthening internal control procedures for accounting and recordkeeping. However, under Chinese laws, regulations for accounting procedures are not associated with anti-bribery provisions, thus proper accounting may not reduce the severity of a punishment. In sum, although MNCs in China need to follow home country laws such as the FCPA, compliance with Chinese laws and regulations should also be included as the MNC's foremost priority.

Highlights of Anti-Commercial Bribery Laws in China

In the Chinese legal system, anti-commercial bribery laws fall under two categories: (i) administrative regulations, such as the Anti-Unfair Competition Law and the Interim Provisions on Banning Commercial Bribery; and (ii) criminal law, such as commercial bribery crimes. According to administrative regulations, the Administration for Industry and Commerce must investigate cases of commercial bribery, and according to the circumstances, fine offenders RMB10,000 to RMB200,000 and confiscate their illicit gains. If the violation is serious enough to constitute a crime, the Public Security Bureau and the Procuratorate will conduct an investigation accordingly.

Elements of Commercial Bribery

In determining whether a particular act constitutes an offence against PRC laws and regulations under the administrative or criminal legal systems, the act must meet the legal threshold of each element of the two systems respectively. The following will briefly describe the elements for commercial bribery.

Subjective Element

Under the PRC administrative and criminal legal systems, commercial bribery requires the subjective intent of giving benefits in order to derive business opportunities and exclude competition.

In addition, under the Criminal Law, there is a fine distinction between subjective intent for bribe perpetrators and bribe recipients. The law requires the bribe perpetrator to 'seek *improper* benefits' to constitute a crime⁴ while the bribe recipient need only 'seek benefits' from the bribe perpetrator to

constitute a crime.⁵

To 'seek a benefit' is relatively easy to determine, but what constitutes the seeking of *improper* benefits under the Criminal Law? According to the latest judicial interpretations, seeking improper benefits refers to 'a party, through bribery, violate laws, regulations, rules or policy interests, or asking the other party to violate laws, regulations, rules, policies, and industry norms in order to derive benefits'.⁶ The interpretation's definition of 'seeking improper benefits' also includes acts 'in the bidding process, during government procurement and other commercial activities that are contrary to the principle of equity such as property given to relevant personnel to obtain a competitive advantage'.

Nevertheless, the legal theory and judicial practice of this concept is still controversial. It is our understanding that 'improper benefits' can be divided into at least two categories: (i) the benefit in itself is illegal or improper, for example, bribes to government officials in order to operate a casino, which under the law is illegal; and (ii) the benefit itself is legitimate but because of the bribe offering, it becomes an improper benefit, for example, during a tendering process, a qualified bidder's offering of bribes in order to derive benefits will taint the process and make the original legitimate bid improper.

When determining the subjective intent for commercial bribery, unless the perpetrator



confesses, it is often impossible to know the internal thoughts that form the intent. Therefore, in practice, evidentiary law allows for a presumption of fact. For example, under administrative law regulations, commercial bribery can be established if the bribe objectively causes or may cause distortion of competition, and if the perpetrator is presumed to have the subjective intent of offering a bribe then a confession will not be necessary.

Objective Element

Irrespective of the administrative or criminal legal systems, the objective element for commercial bribery is the exchange of certain properties for commercial opportunities. Due to the evolving nature of corruption, the laws are constantly widening the definition of 'property' in order to adapt to new and emerging forms of commercial bribery. The definition of property has expanded to include other types of property interests, such as the provision of free transportation, home decorations, gift cards, etc.⁷ It also includes various types of hidden transactions that mask an improper transfer of property interests, such as the bribe perpetrator giving the recipient a disproportional amount of dividends through co-investment vehicles or deliberate gambling losses to the recipient.⁸ Therefore, as perpetrators of commercial bribery become more innovative and sophisticated, the legal definition of 'property' is likely to expand accordingly.



Subjects of Anti-Commercial Bribery Laws

Under Chinese laws, commercial bribery perpetrators are generally restricted to commercial operators. However, there are generally no restrictions for the bribe recipients as they can be other commercial operators or government officials. Under China's Criminal Law, there are different crimes prescribed for government officials accepting bribes and non-government personnel accepting bribes.

Additionally, under the criminal law, if a unit⁹ is convicted of commercial bribery, double punishment will be enforced where the unit would be subject to a monetary fine and the direct managing persons and other persons directly responsible will be subject to criminal punishment.¹⁰ The direct managing persons generally mean those persons who made the decisions and approved, condoned, authorised or ordered the bribery.

If an act satisfied the elements mentioned above, it will constitute commercial bribery under the administrative legal system. If the circumstances are serious, the act will constitute the crimes of commercial bribery under the Criminal Law.

The Grey Areas of Commercial Bribery

Commercial Bribery and Business Gifts

China is a society based on relationships and reciprocity, and the law does not prohibit legitimate gifts between friends and family. However, some people during the course of commercial bribery, use the excuse of gift-giving as a cover for their illegal activities. Distinguishing commercial bribery from legitimate exchange of gifts requires a comprehensive analysis and balancing of the following factors: (i) the background information regarding the property exchange, such as the depth of friendship or familial relationship between the parties; (ii) the value of the exchanged property; (iii) the reason, timing and manner of the property transaction, whether the party who sends a gift requests an advantage or benefit from the position of the recipient; and (iv) whether the recipient, using the convenience of his or her position, seeks benefits from the gift provider.¹¹

Meanwhile, what lies between gifts and bribes is found in the grey area known as 'emotional investment'. An emotional investment is commonly referred to as the 'giving of money with no benefits'. Generally, accepting property in exchange for no specific benefit is not considered commercial bribery. However, if and when (at a later time) the recipient acts for the benefit of the provider, and the accumulated amount of the previous 'emotional investment' reaches a certain criminal threshold, both the provider and the recipient could quite possibly be deemed as committing the crime of

commercial bribery. This accumulated amount of emotional investment would also be used to help determine the severity of the crime(s).

Intermediaries and Commercial Bribery

In recent years, MNCs facing competitive pressures in the Chinese market have chosen to employ intermediaries for their commercial transactions. They often hire consulting firms, agencies, or so-called 'business consultants' to compete for commercial opportunities. To decrease potential legal liability, these intermediaries are often asked to sign contractual guarantees against bribery and other disclaimer documents. However, despite these methods of protection, the principal can still bear criminal liability for the acts of its agent(s). The determining factor is whether the principal knew or should have known the criminal intent of the agent. If the presumption is established, then both the principal and the agent will be jointly liable for the agent's illegal act of offering bribes.

To determine whether the principal 'knew' or should have known about the agent's illegal actions requires a comprehensive analysis of the following factors: (i) the principal's knowledge of the intermediary's past history of commercial bribery; (ii) the intermediary's accounting contains various questionable expenses; and (iii) the reasonability of intermediary's fee compared with the cost.

Strengthening Anti-Commercial Bribery Governance

Common Issues and Risks of MNCs

Based on legal practice, many MNCs with Chinese operations have weak corporate governance issues relating to commercial bribery that could be reflective of both universal global issues and China-specific concerns. The issues of concern are as follow:

- there are good risk management policies at the MNC's home jurisdiction, but there is a failure to apply effective risk management and corporate governance in China (such as the local management's failure to understand or act on the company's global policy);
- the local management awareness about anti-bribery governance is weak and is limited by theories and slogans and there is no effective control mechanism adapted specifically for the China legal and business environment;
- the control of third party intermediaries is lacking with regards to commercial bribery and inappropriate accounting;
- there is no specific administrator directly in charge of anti-commercial bribery in China,

who is dedicated to control, or internal audit of suspicious activity;

- commercial bribery is combined with other illegal activities (such as tax avoidance arrangements), causing more complications;
- after the discovery of misconduct, there is a lack of direction in action and a failure to take effective measures;
- there is a lack of understanding regarding the special problems associated with the Chinese cultural environment; and
- there is a lack of awareness regarding commercial bribery risks during the acquisition of Chinese companies which may lead to serious legal liabilities and risks after the acquisition.

In relation to the above issues, MNCs may need the cooperation of both domestic and foreign lawyers to build effective internal governance procedures with the objectives of: preventing and detecting problems in a timely manner, implementing self-correction methods for non-compliance, and appropriately seeking further guidance from regulatory authorities.

Recommended Preventative Measures

In China, a combination of legal knowledge and practical experience is needed to comply with the laws to construct a sound anti-commercial bribery governance system. Based on past experience regarding anti-commercial bribery compliance work, it is recommended that MNCs work closely with their legal counsel and Chinese lawyers in the following areas:

Determining the Legal Issues and Risk Areas of Commercial Bribery under PRC Laws

The identification of commercial bribery, especially in discrete and complex transactions, in the context of PRC laws, can be difficult and will often require the expertise of domestic lawyers. A few areas of concern are discussed.

Industry-specific issues: certain industries in China, such as construction, land-use-right transfers, property transactions, purchase and sale of medical products, materials procurement etc, are noted as high-risk sectors for commercial bribery where special considerations and analysis of industry specific factors are needed.

Employing intermediaries: involvement of intermediaries (including the assistance of professional consultants), dealings with offshore companies and transactions with private companies ultimately controlled by government officials may cause internal governance problems for the

detection of bribery. In general, the intentional collaboration between the MNC's China subsidiaries/employees and a Chinese intermediary to engage in commercial bribery is difficult for the MNC to detect and investigate.

Improper accounting issues: improper accounting dramatically increases the risk of commercial bribery. For example, under Chinese administrative regulations, 'off the books' recordkeeping is usually one of the factors to determine the existence of improper kickbacks.¹² However, there are also complex legal questions regarding 'on the books' expenses for bribes and 'off the books' records for non-bribery expenses which need to be carefully examined.

Complex commercial transactions: commercial bribes have become increasingly diverse and complex due to the varying methods of bribery. For example, transactions without a fair value, inappropriate travel or overseas training seminars, sponsoring someone's children for overseas education, hiring of relatives, granting stock options, bribery for sexual favours etc related to commercial transactions, should be carefully examined and prohibited.

Improper tax arrangements: improper tax arrangements may increase the risk of commercial bribery. For example, subsidiaries created as part of tax evasion schemes often require sales staff to provide false invoices in order to deduct taxes. Due to accepting improper supporting documents (ie tax invoices not relating to the actual activities), the company can also lose control of its internal finances and increase the risk of corporate funds flowing into commercial bribery.

An internal anti-commercial bribery control process which is tailor-made to China's special circumstance must be developed. First, in adapting to the Chinese legal environment, the MNC's China business should establish a consistent internal anti-commercial bribery control guideline. This guideline, by incorporating the latest laws and regulations, must declare forcefully its policy against commercial bribery and delineate clearly who is responsible for what, when a violation occurs. This guideline should be signed and implemented by all top management. Additionally, independent directors or independent officers appointed by shareholders must conduct independent audits, thus providing an additional layer of supervision to the management's actions.

Second, the MNC's China business should develop a series of internal control documents

and specific policy documents that implement the anti-commercial bribery guideline. The documents should cover the following issues:

- a detailed and regular industry-specific risk assessment in order to monitor high risk areas;
- periodic due diligence assessment and investigation of new/existing business partners (business partners in China may include third-party consultants, independent sales representatives or agents);
- formulation of comprehensive control on high-risk expense payments or payments to high-risk business partners. The supervision and financial control of external cash expenditures is a key control mechanism for the prevention of commercial bribery. Payments to high-risk individuals, such as government officials, employees of state-owned enterprises or high-risk business partners, must be documented and audited by both internal accounting and compliance before and after the expenditure; and
- key officers/employees and specific business partners are required to sign contracts with clauses confirming their compliance with anti-commercial bribery laws. The company can consider incorporating certain provisions of the anti-commercial bribery law as part of their contracts with the business partners.

An appropriate legal review mechanism should be combined into the internal financial control system. Outside counsel, internal counsel and financial officers must work together to approach risk control from both a financial and legal perspective. Joint cooperation can include the following:

- (a) establishing procedures for approval of high-risk contracts: for example, besides specifying special anti-commercial bribery provisions and declarations of compliance within contracts with high-risk business partners, approval of high-risk contracts should be cross-checked by different top-level managers;
- (b) documenting for high-risk market activities: for example, during the process of inviting customers to participate in a business/product promotional event, the company should document the business activities or the services provided to those customers by the company directly, or through any third-party service provider. These activities must be audited and matched against any expenditures associated with the promotional event; and
- (c) establishing procedures for approval of high-risk expenditures: the internal finance

department needs to closely supervise the pre-approval or approval of any high-risk expenditures. Internal compliance or outside legal counsel can also be involved in the process of reviewing the authenticity, legitimacy and reasonableness of the expenditure before any payment is dispensed.

Other Effective Anti-Commercial Bribery Measures

Periodic internal audits of the internal anti-commercial bribery controls are imperative. This ensures the effectiveness of the corporation's internal control system and the correction of any potential issues before they become problematic.

In addition, it should be noted that during any mergers and acquisitions, the acquirer must be aware of the target's past compliance risks and conduct vigorous commercial bribery due diligence. For instance, in the case of a share acquisition, if liability for commercial bribery is disclosed after the merger, and although the purchaser theoretically could sue the original shareholders for lack of disclosure and associated indemnification, the reality is that the acquirer might assume certain post-acquisition legal liabilities, which may seriously impact on its business operations.

Finally, periodic corporate legal training is a

key element of good internal corporate governance. The training of key corporate staff regarding anti-commercial bribery will not only strengthen legal awareness that will prevent negligent acts of commercial bribery, but also reinforce the corporate culture against commercial bribery. In this regard, experienced outside counsel with a solid anti-bribery practice can provide effective legal training to employees so they can properly abide by, and faithfully execute, the relevant corporate internal governance system.

Conclusion

With the rapid expansion of China's domestic market, many MNCs have accelerated their China operation's growth plans. Along with this growth, MNCs should also be aware of the risks that commercial bribery poses to their Chinese operations. MNCs not only need to follow the changing developments of the PRC's anti-commercial bribery laws, but also reconcile the differences between the PRC's regulations with laws from the MNC's home country. Effective corporate governance adapted to China's legal environment and the active implementation of good global corporate governance practices against commercial bribery should be the top priorities of MNCs so as to minimise the legal risks associated with commercial bribery in China.

Notes:

- * The authors would like to thank Michael Xu and Jia Yau for their comments on this article.
- ¹ The country where the MNC's headquarter is located.
- ² The host country referred to in this article is China.
- ³ 18 USC § 8dd-2(c)(1).
- ⁴ The Criminal Law of the PRC, Art 389.
- ⁵ *Ibid*, Art 385.
- ⁶ ie The Opinions on Several Issues on Application of Laws on Handling Criminal Laws Regarding Commercial Bribery (2008 Commercial Bribery Interpretations) were jointly issued by the Supreme People's Court and the Supreme People's Procuratorate on 20 November 2008.

- ⁷ 2008 Commercial Bribery Interpretations, Art 7.
- ⁸ The Opinions on Several Issues on Application of Laws on Handling Criminal Laws Regarding Accepting Bribery, jointly issued by the Supreme People's Court and the Supreme People's Procuratorate on 8 July 2007, Art 3.
- ⁹ Or in Chinese *dan wei*, which is similar to an entity or a group.
- ¹⁰ The Criminal Law of the PRC, Art 31.
- ¹¹ 2008 Commercial Bribery Interpretations, Art 10.
- ¹² See Art 5 of the Interim Provisions on Banning Commercial Bribery.

Merger Control Era Begins in India



As corporate India is gaining momentum and mergers, acquisitions and corporate restructuring are the order of the day, the Indian Government has finally given full effect to the merger control provisions. This article summarises and evaluates the recently notified ss 5 and 6 of the Indian Competition Act 2002 in an effort to assess their implications on potential M&A transactions in India.

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India enacted the Competition Act 2002 which came into effect on 1 September 2009. The Competition Act takes a new and contemporary approach in relation to competition and provides institutional support to ensure healthy and fair competition in India. The Competition Commission of India (CCI) has been established to control anti-competitive agreements and abuse of dominant position by an enterprise, and for regulating certain combinations (which will be discussed further below). The CCI has power to enquire into any agreement, abuse of dominant position or combination that have an appreciable adverse effect (AAE) on competition in the relevant Indian market.

Notification of Provisions Relating to Combination

On 4 March 2011, the Government of India, Ministry of Corporate Affairs notified the

provisions relating to 'combinations', namely ss 5 and 6 of the Competition Act, which will become effective on 1 June 2011. Pursuant to the notification of these provisions, on 11 May 2011, the CCI notified the much debated and controversial merger control regulations namely, the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations 2011 ('Combination Regulations') which will also come into effect on 1 June 2011.

Meaning of Combinations (s 5)

The term 'combination' is defined very broadly to include any acquisition of shares, voting rights, control or assets or merger or amalgamation of enterprises, where the parties to the acquisition, merger or amalgamation satisfy the prescribed monetary thresholds in relation to the size of the acquired enterprise and the combined size of the acquiring and acquired 'enterprises', with regard to the assets and turnover of such enterprises.

In terms of s 5 of the Competition Act, a

‘combination’ includes:(a) the acquisition of control, shares or voting rights or assets by a person; (b) the acquisition of control of an enterprise where the acquirer already has direct or indirect control of another engaged in identical business; and (c) a merger or amalgamation between or among enterprises; that cross the financial thresholds set out in s 5.

Thresholds

The following are prescribed thresholds for combinations:

A ‘group’ has been defined as two or more enterprises, which, directly or indirectly, is in a position to:

- a. exercise 26% or more of the voting rights in the other enterprise; or
- b. appoint more than 50%, of the members of the board of directors in the other enterprise; or
- c. control the management or affairs of the other enterprise.

However, the Government of India, Ministry

Nature of combination	Relevant person for the criteria	Criteria	In India(INR in millions)	In or outside India (US\$ in millions)
Acquisition by persons of control, shares, voting rights, or assets of other enterprise	Parties to the acquisition jointly	Assets	15,000	US\$750 (at least INR7500 in India)
		Turnover	45,000	US\$2250 (at least INR22,500 in India)
	Group to which the enterprise being acquired would belong after acquisition jointly	Assets	60,000	US\$3000 (at least INR7500 in India)
		Turnover	180,000	US\$9000 (at least INR22,500 in India)
Acquiring of control by a person of an enterprise when such person already has control over another enterprise engaged in production, distribution, trading or provision of similar, identical or substitutable goods or services	Enterprise of which control has been acquired along with the enterprise of which the acquirer already has director indirect control jointly	Assets	15,000	US\$750 (at least INR7500 in India)
		Turnover	45,000	US\$2250 (at least INR22,500 in India)
	Group to which the enterprise whose control has been acquired or is being acquired would belong after acquisition jointly	Assets	60,000	US\$3000 (at least INR7500 in India)
		Turnover	180,000	US\$9000 (at least INR22,500 in India)
Merger or amalgamation of an enterprise	Enterprise remaining after merger or created as a result of amalgamation	Assets	15,000	US\$750 (at least INR7500 in India)
		Turnover	45,000	US\$2250 (at least INR22,500 in India)
	Group to which the enterprise remaining after merger or created as a result of amalgamation would belong, after the merger or amalgamation	Assets	60,000	US\$3000 (at least INR7500 in India)
		Turnover	180,000	US\$9000 (at least INR22,500 in India)

of Corporate Affairs has, via notification dated 4 March 2011, exempted a group exercising less than 50% of voting rights in other enterprises from s 5 of the Act for a period of five years.

Regulation of Combinations (s 6)

If a merger qualifies to become a 'combination' as prescribed under s 5 of the Act, the parties to the merger will be mandatorily required to obtain the approval from the CCI which is vested with the powers of investigating under the Act for effecting such a merger. The regulation of combinations is specified under s 6 of the Act which provides that any person or enterprise, who or which proposes to enter into a combination is required to give notice to the CCI and seek its approval within 30 days of:

- a. the approval of the proposal relating to the merger or amalgamation by the board of directors of the enterprises concerned with such transaction; and
- b. the execution of any agreement or other document for acquisition of shares, voting rights or assets or acquiring of control of an enterprise that is engaged in the production, distribution or trading of similar or identical or substitutable goods or services.

The CCI upon receipt of a notice of combination is required to provide its *prima facie* opinion on the combination within a period of 30 days with the final orders to follow within 210 days of receipt of the notice of combination. In the event that an order is not provided by the CCI within a period of 210 days from the date of the notice of combination, approval is deemed to be given. The CCI in its order has the power to suggest certain modifications to a combination being proposed or has the ability to prohibit the combination altogether.

Section 6 makes void any combination that causes or is likely to cause an AAE on competition within the relevant market in India. The term 'AAE' has not been defined under the Act. However, s 20(4) of the Act states that while determining whether a combination has an AAE, the CCI will have due regard to certain factors which are merely subjective but will not provide clear determining factors as to what would constitute an AAE.

A share subscription, financing facility or any acquisition by a public financial institution, foreign institutional investor (FII), bank or venture capital fund pursuant to any loan or investment agreement, would not qualify as a combination that will be regulated by the CCI, and such transactions are therefore exempt under the Competition Act. However, a public financial institution, FII, bank

or venture capital fund will be required to notify the CCI of the details of the acquisition within seven days of completion of the acquisition.

Analysis and Impact of Combination Regulations

The procedures to be followed pursuant to s 6 of the Act are the subject matter of the recently notified Combination Regulations.

1. **Transitional arrangements:** as per reg 31, the filing requirements will only apply to transactions where the relevant board resolutions are passed for mergers and amalgamations, or binding agreements executed (for acquisition) after 1 June 2011. Therefore, all pending transactions where the parties have made final decisions, even if the combination has not been fully implemented, have been exempted from filing and notifying the CCI.
2. **Enterprise value:** the triggers of the Act relating to combinations are linked to the combined value of the turnover/asset of the acquirer and the target and not the transaction value.
3. **Exemption to small enterprises:** via its notification on 4 March 2011, the Government of India has exempted the acquisitions of small enterprises whose turnover is less than INR7.5 billion (approx US\$167 million) or whose assets value is less than INR2.5 billion (approx US\$56 million) from the definition of combination as defined under s 5 of the Act.
4. **Exemption to some transactions:** reg 4 exempts categories of combinations (listed in Sch I) that are 'ordinarily not likely to cause' an AAE on competition in India and in which case a notice under s 6 'need not be ordinarily filed'. These include for instance, the purchase of assets as investment; an acquisition of shares or voting rights not exceeding 15% of total shares and not leading to acquisition of control; the acquisition of current assets; intra group acquisitions; acquisition of shares pursuant to bonus issues or stock splits etc. However, the use of phrases 'ordinarily not likely to cause' and 'need not be ordinarily filed' indicate that notification of such transactions will be necessary where they are likely to cause an AAE on competition.
5. **Transaction nexus to India:** foreign transactions with an insignificant local nexus and effect on the market in India also 'need not normally' make a filing.

6. **Relaxation to avoid multiple filings in interconnected transactions:** reg 9(4) provides that where the ultimate intended effect of a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected or inter-dependent on each other, one or more of which may amount to a combination, a single notice covering all of these transactions may be filed by the parties to the combinations.
7. **Forms revised:** filings are ordinarily to be made in Form I. Parties have the option to file in a Form II if it deems fit. However, if a horizontal combination involves more than a 15% combined market share or a vertical combination involves more than an individual or combined 25% market share, a filing is required to be made in Form II. The CCI can also require parties filing in Form I to file a Form II.
8. **Timelines:** the combination 'stopwatch' starts ticking from the date of receipt of the notice by the CCI. The clock stops if the parties to the combination are required to file any additional information or carry out modification pursuant to the CCI's direction. The CCI will form its *prima facie* opinion within 30 days of a filing and will endeavour to pass a final order within 180 days. References to days have now been clarified to mean calendar days. The statutory time limit ie waiting period continues to remain 210 days and consequently a 180-day time period is optical in nature and not binding on the CCI. Adding the time required for the merger proceedings under the Indian Companies Act 1956 and notices to be given to the stock exchanges, in case of listed companies, the time period for giving effect to a merger proposal may stand at anything above 12-18 months. In a fast-changing market, industry or sector scenario, this may be a challenge to overcome in time to come.
9. **Prima facie opinion:** the 30-day time period for forming a *prima facie* opinion by the CCI is likely to speed up the procedure for obtaining approval in case of simple/routine transactions doing away with the need to wait for the outer limit of 210 days to expire. However, it should be noted that a '*prima facie* opinion' may be formed by the CCI solely on the basis of the information submitted by the acquirer at the time of filing the relevant forms as no hearing at this stage is prescribed. Acquirers may therefore need to weigh the pros and cons of sharing information with the CCI and the

risk that the company/acquirer may be subject to upon the regulator having access to such information.

10. **Structuring a transaction:** the structuring of a merger or an acquisition involving Indian assets will now have to be carried out more meticulously, and the parties will now have to contemplate the implications of various future scenarios. Two hundred and ten days is a long time for to wait for the deemed approval and by the time approval is granted, it is possible that the whole dynamics of the transaction, be it pricing or commercials, may change and thus affecting the viability of the transaction. Further, even if the transaction is concluded, since the terms 'acquirer' and 'acquisition' have not been defined, a subsequent acquisition through a default mechanism such as the exercise of call options/put options/enforcement of security etc may again trigger the provisions of the Act.
11. **Friction between the Act and the Takeover Code:** mergers and acquisitions of listed companies are, to date, burdened with a series of compliance and disclosure requirements prescribed by the Securities and Exchange Board of India (SEBI), the country's securities market regulator under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 1997 (Takeover Code). There is a disconnect between the Competition Act and the Takeover Code in terms of the norms and timelines provided under each of these regulations for such acquisitions. To elucidate, where a potential acquirer intends to acquire more than a 15% stake in a listed company, the Takeover Code requires such an acquirer



to make a public announcement of an open offer to the shareholders of the target company within four working days of the intention to acquire the stake as described under the Takeover Code. In the event the proposed acquisition is required to be notified under the Competition Act, the shares tendered in the open offer cannot be transferred to the acquirer and consequent payments will not be made by the acquirer to the shareholders until the combination is approved by the CCI. There is a high probability that the entire process may be delayed and the public offer may well be completed only after the expiry of the 210-day period prescribed under the Act, unless the CCI delivers orders expeditiously and well within the prescribed time frame. Such potential delay in completing the open offer process could adversely impact the shareholders on account of delayed payments as well as the acquirer who is expected to place the consideration in advance in escrow and also pay interest on any delay in payment beyond the time prescribed under the Takeover Code.

12. **Independent monitoring agencies:** where the CCI is of the opinion that the modifications proposed by it (and they are accepted by the parties to the combination) require supervision, the CCI may appoint independent agencies (ie an accounting firm, a management consultancy, a law firm, a professional organisation or an independent practitioners of repute) who/which have no conflicts of interest. These agencies must submit their report to the CCI and will be paid by the parties. This could further delay the execution of the combination transaction. Further, no parameters have been laid down as to how the independent agency may utilise its supervisory powers.

13. **Confidentiality:** the CCI is obligated under the Competition Act to maintain confidentiality. The parties to the combination requesting confidentiality are required to clearly state the reasons, justifications and implications for the business so that CCI may consider the request for confidentiality. Although, confidentiality may be claimed with respect to the sharing of information with the public, there is no such restriction for the sharing of information if it is required by other regulatory/sectoral authorities under the applicable law which may further lead to the sharing of confidential information so filed.

14. **Fertile ground for litigation:** the CCI has been given discretionary powers, should it form a *prima facie* opinion that a combination causes or is likely to cause an AAE on competition by making the information relating to the combination public. Although, it may be said that the CCI may, through this publication, gain information about its adverse effects, if any, from the market, the implications of such a publication to the target, seller and the acquirer could be dire since the competitors of the acquirer may file frivolous complaints with the CCI.

15. **Penalty:** where the parties to the combination fail to notify the CCI (in spite of the obligation to do so) and the CCI initiates its own investigation, the CCI must direct the parties to the combination to file notice in Form II. Further, the failure to notify and obtain required approval attracts penalties (up to 1% of total turnover or the assets, whichever is the higher) under the Competition Act.

Conclusion

The landscape of domestic and cross-border M&A activity in India will now see radical changes with the merger control provisions soon coming into effect. The impact of these developments will be wide-ranging and all large M&A activity will need to factor in the combination control process into their transaction timelines and costs. The onus is now on the CCI and courts to deal with the difficult task of balancing industry and consumer expectations without adversely affecting business and commercial activities in India. Where combinations involve listed companies, it is imperative that the CCI and SEBI work closely together to fill in the lacuna that presently exists in the legislation, and try to bring about much needed uniformity in the legislation to maintain a conducive environment for M&As and foreign investments in India.



UK Supreme Court Abolishes 400 Year Old Rule



Denis Brock



Edmund Wan

On considering an appeal from the High Court of Justice, by a majority of five to two, the Supreme Court recently overturned the 400 year old rule that an expert witness enjoyed immunity from any form of civil action arising from the evidence that he or she gave in the course of proceedings. This article observes the issue of whether the act of preparing a joint witness statement is one in respect of which an expert witness enjoys immunity from suit and the comparison with immunity for advocates.

Denis Brock

Partner, Mallesons Stephen Jaques

Edmund Wan

Partner, Mallesons Stephen Jaques

The Facts

The issue, which arose in the recent case of *Jones v Kaney* [2011] UKSC 13, was whether the act of preparing a joint witness statement is one in respect of which an expert witness enjoys immunity from suit. The issue arose out of a personal injuries action in which the appellant, Paul Jones, had been claiming damages for physical and psychiatric consequences arising from an accident in which he had been hit by a car.

Mr Jones suffered physical injuries, but more significantly he suffered post-traumatic stress disorder (PTSD), depression, an adjustment disorder and associated illness behaviour which manifested itself into chronic pain syndrome. As a result, a clinical psychologist, Dr Sue Kaney, was instructed on behalf of Mr Jones to act as an expert witness.

Prior to the issue of proceedings, Dr Kaney

prepared a report dated 29 July 2003, in which she expressed the view, *inter alia*, that Mr Jones was at that time suffering from PTSD. Proceedings were then issued. Liability was admitted soon after leaving only damages at issue.

Upon instructions from Mr Jones' solicitors, Dr Kaney carried out a further examination of Mr Jones and issued a second report dated 10 December 2004. This stated that Mr Jones did not have all the symptoms to warrant a diagnosis of PTSD, but was still suffering from depression and some of the symptoms of PTSD. A subsequent report prepared by Dr El-Assra, a consultant psychiatrist instructed by the defendant's insurers, expressed the view that Mr Jones was exaggerating his physical symptoms. The district judge then ordered the two experts to hold discussions and to prepare a joint statement. The discussion took place on the telephone and a joint statement was duly prepared.

The joint statement recorded agreement that Mr Jones' psychological reaction to the accident was no more than an adjustment reaction and did not reach the level of a depressive disorder of PTSD. It further stated that Dr Kaney found Mr Jones to be deceptive and deceitful in his reporting and that the

experts agreed that his behaviour was suggestive of ‘conscious mechanisms’ that raised doubts as to whether his reporting was genuine.

When asked by Mr Jones’ solicitors to explain the discrepancy between the two reports, Dr Kaney explained:

- that she had not seen the reports of the opposing expert at the time of the telephone conference;
- the joint statement, as drafted by the opposing expert, did not reflect what she had agreed in the telephone conversation, but she felt under some pressure in agreeing to it;
- her true view was that Mr Jones had been evasive rather than deceptive;
- it was her view that Mr Jones did suffer PTSD which was now resolved; and
- she was happy for Mr Jones’s solicitors to amend the joint statement.

Mr Jones’ solicitors sought to change their client’s expert witness, but the district judge would not permit this. As a consequence, Mr Jones’ solicitors felt constrained to settle the claim for significantly less than they would have achieved had Dr Kaney not signed the joint statement.

Pre-judgment State of the Law

Immunity of expert witnesses dates back over 400 years, long before the development of the modern law of negligence and, in particular, the recognition of the possibility of liability for negligent misstatement. It also well pre-dates when it became common to call experts to give evidence in proceedings.

It has been described as a matter of public interest that those who take part in a trial ie judge, jury and witnesses, are given civil immunity for their participation. The primary rationale for the immunity was a concern that an expert witness might be reluctant to give evidence contrary to his/her client’s interest, in breach of his/her duty to the court, if there was a risk that his/her testimony might lead his/her client to sue him/her. Pertinently, in case of *Stanton v Callaghan* [2000] QB 75, the Court of Appeal held that the immunity of an expert witness extended to protect him/her from liability for negligence in preparing a joint statement for use in legal proceedings.

Comparison with Immunity for Advocates

The majority likened the immunity enjoyed by expert witnesses to that enjoyed by barristers prior to its abolition by the House of Lords in 2001 on the ground that it could not longer be justified. It was found that, in common with advocates, there was no conflict between the duty that the

expert had to provide to his/her client services with reasonable skill and care, and the duty he/she owed to the court. The evidence did not suggest that the immunity was necessary to secure an adequate supply of expert witnesses, and the removal of immunity for advocates had not diminished their readiness to perform their duty, nor had there been a proliferation of vexatious claims or multiplicity of actions.

Immunities Which Remain Unaffected by the Decision

The decision does not affect an expert witness’ absolute privilege from claims in defamation nor the immunity of other witnesses in respect of litigation.

Observations

Professionals who act in the capacity of expert witnesses should be aware of the change in the law and ensure that they understand and comply with their duties of due skill and care to the client and to the court. Litigants engaging expert witnesses should take care to engage a professional who has a good reputation in his/her or field and who is experienced in acting as an expert witness.

Whilst the decision in *Jones* affords a remedy to litigants in circumstances where an expert has breached his/her duty of care to the client, litigation can be time consuming and expensive and therefore prevention is better than cure.



Discover Some of Our New Officers and Council Members



Mitsuru Claire Chino, Membership Committee Vice Chair (2011-12)

What was your motivation to become a lawyer?

I grew up in Japan and the US and I wanted to assist in cross-border transactions involving Japanese and US companies. Before joining the Itochu Corporation in 2000, as

corporate counsel, I was a partner of an international law firm and enjoyed practising in California, Hong Kong and Tokyo.

What are the most memorable experiences you have had thus far as a lawyer?

Probably by far the very first lawsuit I handled on my own in the US straight out of law school at the tender age of 25! If I had been the client, I think I would have been extremely worried about having a very young lawyer. But my client showed great confidence in me, which, in turn, encouraged and motivated me to do my best.

What are your interests and/or hobbies?

I try to be a singing lawyer. I was classically-trained and sing operatic arias. I was a finalist in the Tokyo Voice Competition (sponsored by *Kokusai Geijyutsu Renmei*) and have performed solo recitals in Tokyo (at the Sumida Triphony Hall and Tokyo Opera City) and elsewhere.

Do you have any special messages for IPBA members?

I would like to thank my dear friend Kaori Miyake, who is an active member of the IPBA. I attended an IPBA Conference for the first time several years ago and since then, I have enjoyed the network and the camaraderie, and I hope that many legal professionals will become a member of the IPBA family.



Yap Wai Ming, Deputy Secretary-General (2011-12)

What was your motivation to become a lawyer?

I am an 'accidental' lawyer. For university placements, I had applied to architecture school as my top choice and building and estate management as a second choice, but was placed

in law school which was really my third choice. Maybe it was just meant to be and my legal career was a journey that I have not looked back on since. There is no such thing as dull moment and it is always mentally stimulating.

What are the most memorable experiences you have had thus far as a lawyer?

I once represented a royal family whose luxury yacht was struck by lightning – twice. It was a total constructive loss and the insurer paid the full amount. The wreckage became a liability at the yard incurring mooring charges, and the insurer, in their policy, had disclaimed responsibility and waived its rights. We sold the wreckage for a tidy sum but the insurer claimed for the full return of the sale proceeds as a subrogated right and applied for a worldwide injunction. We went for mediation before an ex-law lord and walked away with a very good settlement after we prevailed upon them the intricate insurance clauses that worked against the insurer.

What are your interests and/or hobbies?

Taiji is my way of relaxation for many years now and I am glad that my youngest son has decided to follow me in taking up the sport.

Share with us something that IPBA members would be surprised to know about you.

I was selected as a triathlete to represent my university. These days, I am totally out of shape to do any long distance running, cycling or swimming.

Do you have any special messages for IPBA members?

The IPBA is a great organisation to make friends first and the business contacts that come naturally after that are more long-lasting than those fleeting moments of very large-scale IBA gatherings. I would encourage all members to participate in the annual conferences and its regional activities to take good advantage of this strategic alliance.

Members' Notes

Hamada Kunio

As of 1 June, I relocated to Hibiya Park Law Offices, retiring from Mori Hamada & Matsumoto. I will continue my current public interests activities such as: the *Saiban-in-Keikensha* Network (a network for those who have served as lay judges in criminal trials), the Sun-Based Economy Association, the World Justice Project and the High Senior Citizens Ratio Nations Model Project. Thus, I will live free and strong in the time here and now, which is *inochi* or life, according to my definition. My new email address is: kunio.hamada@hibiyapark.net, my direct phone number is +81 3 5532 8158 and my fax number, +81 3 5532 8800.

We welcome contributions from all IPBA members for this new section. Let us know what is new with you. It must be related to your professional and/or non-professional life as an individual but it cannot be advertising your law firm.

Mark T Shklov

Lawyers from Hawai'i have been active in the IPBA from its inception. Every year a good-sized contingent of Hawai'i lawyers makes its way to the annual conference. Hawai'i lawyers attending the IPBA annual conference this year in Kyoto were Louise Ing (Hawaii State Bar Association President), Larry Foster (former Dean, William S Richardson School of Law), Jerry Sumida (outgoing Secretary-General, IPBA), Alan Fujimoto (incoming Secretary-General, IPBA), Mark Shklov (At-Large Council Member, IPBA), Doug Codiga, Alex Jampel (Tokyo), Jeff Natori (Yokohama), Mark Murakami, Wilbur Roadhouse (Las Vegas), Steven Howard (Singapore), Harriet Lewis (Tokyo), Gary Shigemura, Ellen Carson and Go Kobayashi. The Hawai'i contingent has often half-jokingly held Hawai'i out as a separate independent jurisdiction within the IPBA. Although it is part of the United States, Hawai'i lawyers have been pleased to hear from IPBA colleagues over the years that Hawai'i seems like 'home' no matter where you come from. The Hawai'i delegation of the IPBA welcomes visits from other IPBA Members. Aloha!

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 by *19 August 2011* to both **Kojima Hideki** at kojima@kojimalaw.jp and **Caroline Berube** at cberube@hymasialaw.com. We would be grateful if you could also send a lead paragraph of approximately 50 or 60 words, giving a brief introduction to, or overview of the article's main theme and a photo with the following specifications (File Format: JPG, Resolution: 300dpi and Dimensions: 4cm(w) x 5cm(h)) 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, specialisation, 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 is written by an IPBA member.



IPBA SCHOLARSHIPS

The Inter-Pacific Bar Association (IPBA) is pleased to announce that it is accepting applications for the IPBA Scholarship Programme, to enable practising lawyers to attend the IPBA's 22nd Annual Meeting and Conference, to be held in New Delhi, India, from 29 Feb to 3 Mar 2012 (www.ipba2012.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 practising 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. 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. Our most recent annual conference in Kyoto in April 2011 attracted over 800 delegates, despite the devastating earthquake that occurred the previous month.

What is the IPBA Scholarship Programme?

The IPBA Scholarship Programme was originally established in honour of the memory of MS 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 a group of lawyers in Japan to honor IPBA's accomplishments in the 20 years since its founding.

During the conference, 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. The programme aims to provide Scholars with substantial tools and cross-border knowledge to assist them in building their careers in their home country. Following the conference, Scholars will enjoy a three-year 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:

- be a citizen of and be admitted to practice in Vietnam, Laos, Cambodia, Myanmar, Mongolia or the Pacific Islands;
- be fluent in both written and spoken English (given this is the conference language); and
- currently maintain a cross-border practice or desire to become engaged in cross-border practice.

[2] Young Lawyers

To be eligible, the applicants must:

- be under 35 years of age at the time of application and have less than five years of post-qualification experience;
- be fluent in both written and spoken English (given this is the conference language);
- have taken an active role in the legal profession in their respective countries;
- currently maintain a cross-border practice or desire to become engaged in cross-border practice; and
- 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.

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 2011**. Application forms are available either through the IPBA website (www.ipba.org) or by contacting the IPBA Secretariat in Tokyo.

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@tga.co.jp

What happens once a candidate is selected?

The following procedure will apply after selection:

- 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.
- 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.
- 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.
- Each selected scholar will be responsible to attend all of the Conference and to provide a report of his/her experience to the IPBA after the Conference.

Please provide this information to any qualified candidate. Thank You.



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 (under 30 years old)	¥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@tga.co.jp Website: www.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@tga.co.jp 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 (under 30 years old)..... ¥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 (FOR YOUR INVOLVEMENT):

- | | |
|---|--|
| <input type="checkbox"/> Aviation Law | <input type="checkbox"/> Intellectual Property |
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| <input type="checkbox"/> Cross-Border Investment | <input type="checkbox"/> Legal Practice |
| <input type="checkbox"/> Dispute Resolution and Arbitration | <input type="checkbox"/> Maritime Law |
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| <input type="checkbox"/> Insurance | |

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@tga.co.jp