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NEWS & LEGAL UPDATE



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The President's Message

Huen Wong
President



Dear Colleagues,

A year has gone by very quickly so that I am writing the final message in my capacity as President. Just like all of you, I am holding a number of public appointments both domestically and internationally. I also belong to a myriad of associations with all their meetings, conferences, seminars, newsletters, membership dues to be paid ... sometimes it is hard to keep them straight; especially on top of our 'day jobs'. Just being a member requires commitment of our time, energy and financial resources, and if you are elected to or appointed to a position of leadership, that commitment increases significantly.

I joined the IPBA in 1996, so this year marks 20 years as a member. Over the years, I have joined and left other professional associations, but I have remained with the IPBA throughout. At first, the IPBA was appealing because my senior partner, who was also a member, encouraged me to do so. He advised me that I should get to know more people and look for opportunities for professional and personal growth through participation in the annual conferences. Now I remain with the IPBA because it has already become my family and a brotherhood and sisterhood that has been established and sustained over the years.

Flash forward 20 years, and my term as President ends at the conclusion of the Annual General Meeting in Kuala Lumpur on 16 April 2016. The IPBA is certainly a different association than it was in the 1990s but I can say with confidence that we have stayed true to our principles of being a democratic association that welcomes all commercial lawyers from all jurisdictions. We have thus far tried reasonably successfully to stay clear of political issues both within and outside of our respective jurisdictions and concentrated more on matters which bring benefit to our profession and our membership.

With all my other commitments, being a leader of the IPBA was not on my agenda when asked to host the IPBA's 25th Annual Meeting and Conference in Hong Kong. I had never held a position on the IPBA Council before, although I had served as Vice-Chair of the Cross-Border Investment Committee in 2000–2002. This was a big landmark for the IPBA, too, being our twenty-fifth anniversary, so the pressure was on to hold an event second to none. Challenge accepted! As any competent businessperson knows, surrounding yourself with the right people makes all the difference in the effectiveness of your leadership and I was confident that I could find the right people with the same commitment as I had. Not that we should surround ourselves with 'Yes Men'; we cannot grow and learn if everyone agrees with us all the time. The host committee and organising committee worked well together through the added difficulty of putting together an event with the support of a PCO that was inconsistent at best. We hope those of you who attended appreciated our challenges and enjoyed the conference as much as the host committee did. I would like to take this opportunity to extend special thanks to our many subcommittees which were mainly composed of young lawyers. After all these years, one has learned a hard fact: you may challenge a lot of things in life but you can never beat the youth. They are good!

We were all younger 20 years ago, as was the IPBA. Any entity that does not grow and change with the times becomes stagnant and eventually dies out. The IPBA has gone through ups and downs, of course, be it fluctuating membership numbers, political issues that affect our activities, natural phenomena that disrupted our conferences and meetings, and controversial issues that have divided our leaders. All of these experiences add to the wisdom of our association, while each

change of leadership brings in a fresh perspective on how that wisdom can be developed and nurtured to grow the IPBA. To our general members, it could appear that we do not change on the outside, but we certainly do on the inside. We experienced a big change during my presidency by becoming an incorporated entity. This brings with it more responsibility for the association to be accountable to various governmental agencies, but also eases the burden that individual council members were at risk of bearing on a personal level. This reminds me to salute all my predecessors and other officers who have served the IPBA so well throughout the years. Without their dedication and commitment, as well as the amount of time they sacrificed to guide the development of the organisation, the IPBA would not have achieved the renowned global reputation that it enjoys today.

I am grateful for the confidence that you have all had in me to fulfil my duties over the past year. I am not disappearing yet, as I will continue to serve on the Nominating Committee, having a part in choosing future IPBA leaders. It is with confidence that I hand over the reins to President-Elect Dhinesh Bhaskaran of Malaysia. The theme of the upcoming conference is 'Diverse Challenges,

Global Solutions'. This perfectly describes the atmosphere we face as international lawyers on a daily basis: while there are issues in our own jurisdictions, we must approach them with a world vision, knowing that whatever decision is made locally will impact other jurisdictions, too. That is how much the world is connected now.

That idea carries into Auckland 2017 with the annual conference theme of 'Connectivity & Convergence'. On a macro level, the world is certainly more digitally connected than ever before, and converging in a not always harmonic way. As convergence occurs, conflict can occur. That is why international lawyers such as ourselves are needed! On a micro level, our members are connected through the IPBA, and converge at the Annual Conference.

Join us in both Kuala Lumpur and Auckland! I will surely be there.

Huen Wong
President





The Secretary-General's Message

Miyuki Ishiguro
Secretary-General



Dear IPBA Members,

As busy lawyers who concentrate our valuable time on serving our clients in the best way possible, we must be very selective about how we spend the little spare time that we have. Joining a legal association is one of those choices, and the reasons for joining are many: you are required to join by regulations in your jurisdiction; your firm encourages it; there are good networking opportunities; the organisation has high name recognition value; it is a chance to further your career; you earn CPD/CLE points at the seminars and conferences. With the myriad choices of organisations that ask us for our precious time and money, getting a high rate of return on our investment is paramount to making the right choices.

It is safe to assume that many of you have joined the IPBA because you find that the rate of return is high. Tangible benefits such as this journal and our annual printed membership directory are easily apparent, but the not-so-easily measured intangible benefits have more value. The friendships formed, the memories shared, the knowledge gained—each of these is held not in our hands, but in our minds and hearts.

Unfortunately, no association can survive on camaraderie and good will alone. At a minimum, the membership dues collected annually should cover the annual running cost of the IPBA, but right now we are below that threshold and must rely on the surplus from the annual conferences and other activities organised by our members to make up the difference. In the year 1996, we peaked at 2006 members, dropping to a low of 1239 in 2009. Fluctuations over the years have brought us to our current 1500 members, which almost equals our average over the existence of the IPBA. In order to reach a point where we can operate on membership dues alone, we must reach 1800 members.

In order to keep more members with us for a long time, and also attract new ones, the JCMs, At-Large Council Members, Regional Coordinators, and Committee leaders were given two KPIs at the IPBA Council Meeting in Vancouver in the spring of 2014:

- (1) To have at least one local or regional activity per year.
- (2) To hold an event in conjunction with the promotional tour of the upcoming conference host committee.

These Membership Leaders are the main activators of these events, relying on general members to help support the effort.

We have seen an increase in the number of locally or regionally produced events in the following jurisdictions:

Japan

IPBA Japan has a large and tightly knit group of members, and they have built their own structure with committees forming the administration base, each tasked with specific duties. Throughout the year, several activities are held, including a New Year Gathering and General Meeting; cocktail events; public relations activities; an annual golf outing. They also host the Japan Night event at the Annual Meeting and Conference, which has turned from an intimate gathering into 'the' extracurricular activity to attend. Japan has a JCM who handles primarily Tokyo, and an At-Large Council Member who oversees activities in Osaka and Kansai. Most of the activities are conducted in Japanese, and they also have a web site in Japanese.

Korea

In October 2014, the IPBA signed an MOU with the Korean Bar Association to support each others' activities. The first

major event organised by JCM Chang-Rok Woo and Membership Committee Chair Yong-Jae Chang, the 'IPBA 1st East Asia Regional Forum', was held 16-17 September 2015, was supported by the KBA. supported by the KBA. The name of the event indicates that the members intend to make it an annual event.

France

Our activators in France include Membership Committee Vice-Chair Anne Durez, JCM Patrick Vovan and Regional Coordinator for Europe Jean-Claude Beaujour. For the past several years they have worked together to hold an annual women's event and an annual dinner at the French Senate.

Hawaii, USA

Hawaii members, led by Regional Coordinator for Hawaii and the Pacific Islands Mark Shklov, often get together. They are also planning to hold a joint event with members from Vietnam.

Hong Kong

An annual Construction Conference has been held for the past three years, organised by Webmaster Christopher To with the support of the Construction Industry Council of Hong Kong. This event provides IPBA with a small surplus from the registration fees, an initiative we encourage for all jurisdictions when holding events.

The second KPI was for JCMs to organise activities in conjunction with a visit by the upcoming conference host committee leaders. Since last fall, President-Elect Dhinesh Bhaskaran has visited London, Paris, Tokyo, Osaka, Singapore, Taipei, Hong Kong, New Delhi and Mumbai; and Siva Kumar Kanagasai of the organising committee visited Vancouver and Toronto. The JCMs in each jurisdiction arranged for social gatherings such as lunches, dinners, and cocktails, or educational seminars on infrastructure and arbitration. Through these visits, the number of conference registrants jumped from 300 at the end of last year to over 660 as of this writing. Having the chance to meet with the President-Elect and hear firsthand about the details of the annual conference goes a long way to encourage members to come to the conference and also is a draw for potential new members to see what the IPBA is all about.

The JCMs are encouraged to continue these activities

and in the future the IPBA hopes to subsidise the events as much as possible.

This is not to take away from the importance played by the IPBA Committees in helping our membership increase efforts. Strong leadership in each of the 23 Committees (22 regular and one Ad Hoc) is imperative in order to develop quality programs for the IPBA. Enthusiastic Chairs and Co-Chairs are the backbone of each committee, and this in turn holds up the IPBA. The committee sessions held at the Annual Meeting and Conference are the main priority of the committee leaders. In Kuala Lumpur there are 58 sessions planned, which means that the large and active committees have several sessions. What makes a good session? Organisation, topic relevance, and above all, good speakers. If you are interested in becoming a speaker at any of the future conferences, be sure to contact the committee leaders, found on the IPBA web site.

Committees have also organised the following events in 2014 and 2015:

The Dispute Resolution & Arbitration Committee

Led by Co-Chairs Mohan Pillay and Juliet Blanch, the first 'IPBA Asia-Pac Arbitration Day' was held in conjunction with the Kuala Lumpur Regional Center for Arbitration on 15 September 2015. Past Committee Chair Mohan Kanagasabai (currently the JCM for Malaysia) and Vice-Chair Shanti Mogan also worked hard to organise the event. Arbitration is a huge topic among our members and the committee boasts one third of the IPBA are on the committee as one of their three committee choices. Other jurisdictions have also expressed an interest in holding their own IPBA Arbitration Day, and we encourage this!

APEC

Members participated in the APEC meetings in Manila, St Petersburg and elsewhere around the world, and also attend regular meeting with the APEC team at the Japan Ministry of Foreign Affairs.

Committee Chair Shiro Kuniya is leading this effort. The IPBA was the first organisation with which APEC had signed an MoU, at our Kyoto/Osaka Conference in 2011.

Banking, Finance & Securities; Energy & Natural Resources; Cross-Border Investment and the Ad Hoc Anti-Corruption and the Rule of Law Committees

These committees banded together to hold a mergers and acquisitions workshop on 21 November 2014 in Amsterdam. This enthusiasm and cooperation could be the start of establishing a new jurisdiction of Benelux and we look forward to seeing what Jeffrey Robert Holt, Bart Kasteleijn, and Jan Peeters have in store for the near future.

These are all great activities and there is much more that can be accomplished! All committees are encouraged to work together with the JCMs and other leaders to organise seminars, mini conferences, cocktails, golf or other sporting events, and the like in the name of the IPBA. We also hope to be able to subsidise such efforts.

I've focused here on the number of members we need in order to keep our association alive, but the IPBA has

always had a philosophy of quality over quantity. When an organisation becomes large there is a tendency to become less personal. At the IPBA, each of you had a Membership ID number assigned when you first joined; this number is used to sign up at the discounted rates for IPBA events such as our upcoming Annual Conference in Kuala Lumpur. However, you will never be just a number to us! We remember our members by name and we also recognise many of your friendly faces at our annual conferences and other IPBA events. No matter how many members we have, we will always remember your name.

Miyuki Ishiguro
Secretary-General

IPBA Upcoming Events		
Event	Location	Date
IPBA Annual General Meeting and Conference		
26th Annual General Meeting and Conference	Kuala Lumpur, Malaysia	April 13-16, 2016
27th Annual General Meeting and Conference	Auckland, New Zealand	April 6-9, 2017
IPBA Mid-Year Council Meeting & Regional Conference		
2015 Mid-Year Council Meeting and Regional Conference	Brussels, Belgium	October 7-10, 2016
IPBA Joint Events		
IFLR/IPBA Asia M&A Forum	Hong Kong	March 2-3, 2016
IPBA-supported Events		
InnoXcell's "APAC Symposium Australia Series"	Sydney, Australia	March 3, 2016
Kluwer Law International's "India: 1st Annual International Arbitration Summit"	Mumbai, India	March 31, 2016
Kluwer Law International's "Hong Kong: 5th Annual Global Competition Forum"	Hong Kong	April 21, 2016
Kluwer Law International's "Qatar: 2nd Annual International Arbitration Summit"	Qatar, UAE	May 18, 2016
Duxes' "8th Anti-Corruption Compliance in China Summit 2016"	Beijing, China	May 26-27, 2016
<p>More details can be found on our web site: http://www.ipba.org, or contact the IPBA Secretariat at ipba@ipba.org</p>		



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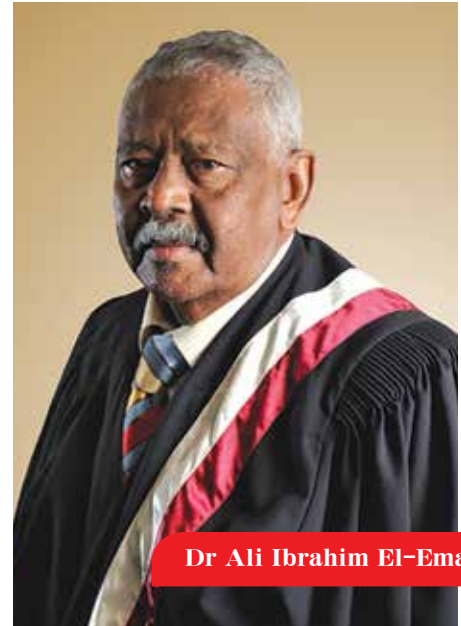
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Interview with the Honourable Dr Ali Ibrahim El-Emam, Chief Justice of the Dubai Court of Cassation

On 25 October 2015, the Publications Committee of the IPBA, with assistance from Mr Richard Briggs, the IPBA Regional Coordinator for the Middle East, and Mr Omar Alshaikh of Hadeef & Partners, was honoured with an opportunity to conduct an interview with the Honourable Dr Ali Ibrahim El-Emam, Chief Justice of the Dubai Court of Cassation. The following is an excerpt of that interview.



Dr Ali Ibrahim El-Emam

Dr Ali is a former Sudanese Judge who has been a Justice at the Dubai Court of Cassation since the Court's formation in 1988. His formal title now is Chief Justice (sometimes called President) of the Dubai Court of Cassation (Dubai Supreme Court). Dr Ali is also a member of the Dubai Judicial Council under the Chairmanship of HH Sheikh Maktoum bin Mohammed Al Maktoum, Deputy Ruler of Dubai.

1. **It is noted that Dubai courts will set up an Arabic language registry to register wills for non-Muslims in Dubai, similar to that of the Dubai International Financial Centre (DIFC) Wills and Probate Registry. What are the features, functions and goals of the new system and how will such system impact non-Muslims in Dubai?**

From the outset let me make it clear that the draft of the inheritance and wills law of non-Muslims has not

yet been passed. Awaiting its enactment, I believe that it will provide the Dubai community with an important legal service, that is, the registration and execution of the wills of non-Muslims.

The proposed law is very comprehensive. It includes all aspects pertaining to the probate of wills and inheritance of non-Muslims and resolves problems and questions arising therefrom. The aim of the drafted scheme is to enact provisions regarding



the making of wills, the interpretation thereof, the devolution of the property and the administration of the estate of the deceased person. The proposed registry will be to a great extent similar to that of the DIFC Wills and Probate Registry. This deals with wills that are within the boundaries of the jurisdiction of the Dubai courts.

- 2. We understand that Dubai has expanded the DIFC Courts' jurisdiction on 31 October 2011, which allows any parties to use the DIFC Court to resolve commercial disputes. Can you tell us how the courts in the two systems cooperate with each other? Is there any challenge faced in the relationship between the two judicial systems?**

To my knowledge, each of the two courts has its jurisdiction and they work in cooperation within the boundaries of their jurisdictions in harmony with each other. So far no challenge has been faced with regards to the relationship between the two judicial systems.

- 3. In Abu Dhabi, Dubai and Ras Al Khaimah (RAK), the Courts of Cassation are the highest legal authorities, while in other emirates, cases appealed beyond the Court of Appeal are heard by the Federal Supreme Court. What is your suggestion on avoidance of the conflicting interpretation of laws made by these highest legal authorities that occur from time to time when setting judicial precedents?**

I suggest that a conference attended by the Chief Justices and heads of the circuits of the four courts be held annually in order to consider the conflicting

interpretation of the laws, wills and probate registry and to have one consistent opinion with regard to any irreconcilable precedent or decision.

- 4. What do you consider the most important and influential part of your work in terms of making Dubai and the UAE the best place to live and invest in the world?**

Making the community feel and see that justice is done.

- 5. What has been the most challenging and the most rewarding aspect of your role as the Head of the Cassation Court in Dubai so far?**

The challenging roles for me are:

- (1) the disposition of pending cases; and
- (2) to improve the quality of the decisions of cases in the three courts, viz the Court of First Instance, Court of Appeal and the Cassation Court.



Leonard Yeoh
Partner of Tay & Partners

Leonard Yeoh has substantial trial, appellate and arbitration experience and has litigated at all levels of the Malaysian and Singaporean court hierarchy. He represents leading Malaysian companies and multinational companies in domestic and international arbitrations. He has been involved in various landmark cases often acting as counsel in those cases.

Corporate Governance Enquiry Litigation in the Enterprise Court of the Netherlands¹

Of the various options available for corporate litigation² in the Netherlands, the Enquiry proceeding (*Enquête*) in the Enterprise Court ('EC') (*Ondernemingskamer*) of the Amsterdam Court of Appeal owes its popularity to its cost and time efficiency. This article will focus on the Enquiry proceeding and then consider the comparable alternatives available in Dutch courts, including forced-exit, nullification of a company resolution, squeeze-out, shareholders' minority interest lawsuits and damage claims.

Enquiry Proceedings

Dutch legislators have assigned to the EC, a specialised division of the Amsterdam Appellate Court, exclusive nationwide jurisdiction over intra-company controversies relating to corporate governance and commercial policy issues between the stakeholders of a company. The only criterion for admission to the EC is if 'there are sufficient grounds for doubt about whether the company is pursuing a proper policy or a proper course of affairs' (Article 2:344 of the Dutch Civil Code ('DCC'), the Dutch Company Code). The abbreviated definition normally employed to describe this is 'mismanagement', and for the actors, 'mismanagers'.

The main aim of the EC is the restoration of obstructed or deadlocked relationships between the stakeholders of a company, namely between the shareholders and the managing and supervisory board ('Board') which can be either one or two tiers.

In 1994, legislators reinforced the EC with provision of the facility of administering temporary reorganisational measures to preserve the continuity of a company under Enquiry, at each stage.³



Any qualified
stakeholder, . . .
through an attorney
at law can
petition the EC.

1. Access

Any qualified stakeholder, stating concisely the presumption of mismanagement in a company, through an attorney at law can petition the EC to order an Enquiry, provided proper pre-notification was given to the Board, voicing rejection of, or at least dissatisfaction with, the course of affairs within the company and the Board's failure to remedy this properly (Article 2:349 of the DCC).

Qualified stakeholders are shareholders (or depositary receipts of shares) of either at least 10 percent of the issued share capital or of shares/depositary receipts with a nominal value of at least €225,000 (or less if prescribed in the articles of association). Other eligible petitioners for Enquiry proceedings are labour unions (this occurs only very occasionally), the Public Prosecutor (this happens even more seldom), the company itself (read the Board, which avails itself of this option when there is a stalemate with the shareholders, which happens regularly) or the trustee/official receiver in a bankruptcy (this occurs more and more in complicated insolvencies, allowing sworn witness statements in a court setting).

2. First Phase

The Enquiry proceedings consist of two phases, both having one or more sessions with the involved parties at the EC.

The first phase addresses the preliminary question whether the Board has conducted a reasonable degree of proper conduct in managing the company. If the EC has sufficient reason to believe there has been mismanagement, it will appoint one or more investigators to look into the actual functioning of the company. Investigators are either lawyers or accountants who are granted exclusive access to a company's records and the right to interrogate the Board, lower management, staff and employees of the company.⁴ They submit a report with their findings to the registry (*griffie*) of the Court.

3. Second Phase

The EC, after having perused the report, determines whether mismanagement has occurred and, if so, it can impose the following final measures:⁵ (1) the suspension or nullification of a resolution of the management board, the shareholders' meeting or any other corporate body; (2) the suspension or removal of one or more managing or supervisory directors; (3) the temporary appointment of one or more managing supervisory directors; (4) a temporary deviation from such provisions of the articles of association; (5) the temporary transfer of shares to a trustee; and (6) the dissolution of the company. The EC is not by any means required to take any measures, it may also deem that the conclusion of mismanagement is correct or at least satisfactory.⁶

There is only one tier of appeal, that is, cassation (appeal) with the Supreme Court which only judges matters of law, proper procedure and legal reasoning.

4. Interim Measures

Each of the two phases referred to above allow the parties to submit a petition to the Court to impose immediate interim measures (*onmiddellijke voorzieningen*) at its discretion. These interim measures are meant to be an instant and temporary interference with the current state of affairs in the company in order to avoid irreparable harm to the company and its stakeholders, such as (1) removing a shareholder's voting right; (2) parking or transferring these voting rights to the Supervisory Board or to an outside expert; (2) discharging the Board directors; (3) replacing the Board with new members; (4) empowering the Board with special rights; (5) adding experts or consultants to the company; and (6) partly invalidating the articles of association or adding new articles or paragraphs to it. These measures are temporarily in force either during the first phase or during the entire Enquiry proceedings, as the EC determines.



5. Costs

By definition, initially the legal costs of the entire Enquiry proceedings are borne by the company submitted to Enquiry, irrespective of who the claimant is and who the probable originator of the mismanagement is. In the final judgement the EC can order the originator of the mismanagement to compensate the legal costs.⁷

6. Damage Claims

The EC does not have the competence to award damages due by the mismanager in favour of the claimant that has initiated the Enquiry.

However, the claimant can use the EC judgment as a fact-finding precursor for a lawsuit before the District Court. This will alleviate the claimant's burden of substantiation and evidence and will also be less costly for the claimant.

The District Court is free to adopt or ignore the facts put forward before the EC, but in practice it will usually make use of those facts that may even be deemed full evidence right away. Therefore, such judgment often results in a pre-court settlement without ever becoming a full-fledged damages suit before the District Court.

Alternative Law Suits


There are a number of alternative law suits that are open to the claimant in corporate (governance) disputes which will now be discussed below.

1. Statutory Dispute Clauses

The company's articles of association (by-laws) may contain a special clause for settling disputes between contesting shareholders. This will usually be in some form of arbitration or binding advice (*bindend advies*). However, this can never deprive a stakeholder from petitioning Enquiry proceedings at the EC.

2. Injunctive Relief/Summary Proceedings

The widely used, easily and quickly accessible summary proceedings aimed at injunctive relief (*Kort geding*) before the president of each District Court are also open to deal with corporate governance issues. Damages claims are not entertained in summary proceedings except for advances on future damage claims in clear-cut circumstances. However, in relation to an Enquiry in combination with interim measures by a specialised court, the EC is generally deemed superior, especially in more complex matters which such cases typically tend to be.



There are a number of alternative law suits that are open to the claimant.

3. Resolution Nullification

The District Court can, upon the request of an interested party, also nullify any resolution of the company's Board or its other organs in the event of contradiction with either the law or the articles of association when the resolution is not fair and reasonable.⁸

4. Forced-exit Regulation

An alternative option for resolving disputes between contesting shareholders is the so-called forced-exit regulation (*Geschillenregelung*)⁹ which facilitates a shareholder in either demanding a buy-out or, conversely, a buy-in by a co-shareholder who through his misconduct jeopardises the continuation of the company.¹⁰ The threshold for access to this special lawsuit is the ownership of at least one third of the issued share capital.¹¹ The District Court will determine the buy-out or buy-in price in its judgment based on the fair market value price, possibly by factoring in the distressed status of the company due to contesting shareholders. Parties may also opt to combine a claim for forced transfer of shares or forced-exit with a request for interim measures, which will be heard by the Court within a relatively short timespan, optionally combining the statutory shareholders dispute settlement proceedings with summary proceedings as set out in point 3 above. The EC is the sole nationwide appellate court for forced-exit proceedings, with only one instance appeal (namely cassation) to the Supreme Court.

Although the exit regulation allows a broader range of disputes, and the immediate effect of a judgment despite appeal was introduced in 2007, it in practice doesn't live up to its theoretical superiority and is seldom utilised in legal practice because Enquiry proceedings are deemed quicker and more efficient and the EC more specialised. Also, Enquiry has one less instance of appeal.

5. Squeeze-out Proceedings

A 95 percent or more shareholder in a company can sue the 5 percent or less minority shareholder(s) before the EC for a forced surrender of their shares to the 95 percent majority shareholder at a fair market value (Article 2:201a of the DCC). This type of lawsuit is atypical in this respect because it can be utilised entirely apart from any controversy—the majority shareholder is always entitled to buy-out the minority. Dutch legislator has allocated the exclusive nationwide jurisdiction in relation to squeeze-

outs to the EC due to its corporate know-how. Enquiry proceedings can be initiated by shareholders and by the company itself.

Detailed Remarks to Enquiry Proceedings

Finally, there are some issues relating to Enquiry proceedings that deserve brief attention, which are discussed below.

1. Group Enquiries

Prior to 2000, the common view of the EC was that a petition from one or more shareholders must relate to the company in which the petitioner directly holds shares.¹² In 2000, the EC ruled that shareholders of a parent company may request Enquiry proceedings against their own wholly owned subsidiaries.¹³ The Supreme Court followed suit in 2005 when it ruled in the *Landis* case¹⁴ that shareholders of a parent company may request Enquiry proceedings against its subsidiaries provided these are wholly owned by the parent company or at least under its controlling power.¹⁵ The shareholders in the bankrupt *Landis Group N.V.* successfully argued that the economic reality of its three wholly owned, centrally controlled subsidiaries, all active in software development and maintenance—*Landis Group International B.V.*, *Landis Group B.V.* and *Detron Group B.V.*—justified a concern-wide group Enquiry,¹⁶ although the mismanagement in the subsidiaries was not readily apparent.¹⁷ It was felt that the interests of the subsidiaries converged with the interests of the parent company and should therefore be subjected to a group enquiry.

2. Foreign Entities

The scope of enquiry proceedings is limited to entities that have been incorporated pursuant to Dutch law (Article 2:344 of the Dutch Civil Code). The *Citadel* case¹⁸ concerned an entity with a registered seat in England and incorporated under UK law, but the actual seat (*siège reel*) was situated in the Netherlands. Business operations (hotel software development) were concentrated in the Netherlands. The EC ruled that Enquiry proceedings are not available in respect foreign-established entities with a registered seat abroad.¹⁹ The fact that business is conducted via a branch office in the Netherlands does not change this. However, in the *TESN* case the EC did leave the door ajar for shareholders of a foreign parent company seeking to acquire information about the ongoing affairs of their Dutch subsidiaries, because exceptions to the rule should be possible,²⁰ particularly if the economic reality so requires.

3. Foreign Parent

In the *Chinese Workers* case,²¹ the Supreme Court held that a Dutch shareholder of a Hong Kong holding company, Chinnede Ltd., wholly owning a Dutch subsidiary in the personnel secondment industry, Chinese Workers B.V., could be included in the Enquiry into the Chinese Workers B.V.²² Chinnede had two shareholders who owned 50 percent of the shares and sat on the Board. One of the shareholders asked the EC for an Enquiry into Chinese Workers B.V. without availing himself of the Group Enquiry as in the *Landis* case (see above), but basing his request on the notion that the petitioner had an economic interest in Chinese Workers B.V., albeit indirectly through Chinnede in Hong Kong. The EC and the Supreme Court upheld, seemingly circumventing Article 2:344, paragraph 5 of the DCC, that Enquiry proceedings were allowed into Chinese Workers B.V. due to the economic reality that all of the actual business took place in the Netherlands within Chinese Workers B.V.²³

Notably, Chinnede was deemed a passive holding company whose quarrelling shareholders mainly voted by proxy in the parent that did not exert any actual power over Chinese Workers B.V.'s activities and management and the group revenue being generated solely in Chinese Workers B.V. By contrast, in the above-mentioned *TESN* case the business operations of the parent company and its wholly owned subsidiaries were primarily conducted abroad.

4. Duty of Care Towards Minority

The EC gradually has imposed a special duty of care on the Board in order to protect the interests of minority shareholders.²⁴ If a majority shareholder holds the position of director as well, then he has a special duty of care to avoid a conflict of interest with the majority shareholder.²⁵ The EC can appoint a director to safeguard the minority interests.²⁶

5. Refusal to Declare Dividends

A recurring central theme before the EC is a majority shareholder frustrating distribution of dividends while the minority shareholder wants to declare dividends.²⁷ The EC concluded that majority shareholders are not allowed to retain profits year after year and add them to the company's reserves without good reason and if this is detrimental to a minority.²⁸ The reverse can also occur if the minority has fair reasons, for example, from a tax point of view, to avoid declaration of dividends.

6. Access to Enquiry When Squeeze-out Below 10 Percent

The EC in the *Amtrada* case²⁹ has adjusted the access to Enquiry for minority shareholders that were diluted below the 10 percent threshold by the issue of new capital (needed for the survival of the company) without pre-emption rights. Here, the shareholder group Boschhuizen whose shareholding had dropped from 14 percent to 4 percent was awarded access to an Enquiry despite the shareholding being lower than 10 percent.³⁰

Conclusions

- Enquiry proceedings have become the most popular route for worried shareholders or wedged stakeholders in a distressed company to have it investigated by financial and legal experts.
- In particular, the EC's expertise in corporate governance and its competency to impose interim measures up front has contributed to the popularity of the Enquiry route.
- The fact that the legal costs are borne by the investigated company also reduces the hesitation to ask the EC for an Enquiry.
- Minority shareholders wedged between a majority shareholder aligned with management can count on special protection from the EC.
- The mere announcement of an Enquiry tends to trigger pre-court settlement negotiations.
- Alternatively, the parties count upon the active compelling force of the EC to bring the parties to a common ground.
- The EC has gradually stretched its scope of competency with support from the Supreme Court.
- Alternative law suits have generally proven to be less effective and more expensive than Enquiry proceedings, but not in every situation.

Notes:

- 1 The author thanks Judy Hsieh, junior associate at HIL for her contribution to this article. The article is based on the law and jurisprudence valid as at 15 February 2016.
- 2 'Corporate litigation' is defined here as dispute resolution of intra-company controversies with regard to capital and the corporate governance division between shareholders and management.
- 3 M van Hooijdonk & P Eijssvoogel, *Litigation in the Netherlands. Civil Procedure, Arbitration and Administrative Litigation*, Deventer: Kluwer, 2012, p 75.
- 4 *Ibid* p 83.
- 5 DCC, Art 2:356.
- 6 *Ibid*, para 4.1.
- 7 L Timmerman and A Doorman, 'Rights of Minority Shareholders in The Netherlands', para 5.1, available at <<http://www.ejcl.org/64/art64-12>>.

- 8 DCC, Arts 2:14 and 2:15.
 9 DCC, Art 2:335(1).
 10 P van Schilfgaarde, *Van de BV en de NV*, Deventer: Kluwer, 2006, p 321.
 11 DCC, Art 2:336(1).
 12 PGFA Geerts, *Enkele formele aspecten van het enquêterecht*, Deventer: Kluwer, 2004, p 124.
 13 EC 27 April 2000, *JOR* 2000, 127 (Bot/Bot Bouw Groep), with notes from Van den Ingh.
 14 Dutch Supreme Court 4 February 2005, *NJ* 2005, 127 (Landis).
 15 *Ibid* para 3.3.5.
 16 *Ibid* para 2.9; EC 30 October 2003, *JVR* 2003, 773.
 17 EC 30 October 2003, *JVR* 2003, 773, para 3.18; Dutch Supreme Court 4 February 2005, *NJ* 2005, 127, para 3.3.5.
 18 EC 16 July 2004, *ARO* 2004, 96, para 2.2 (Citadel B.V.).
 19 *Ibid*, para 3.5.
 20 Dutch Supreme Court 8 April 2011, www.rechtspraak.nl 2011, ECLI:NL:HR:2011:BP4943, para 3.2.2 (TESN).
 21 Dutch Supreme Court 29 March 2013, www.rechtspraak.nl 2013, ECLI:NL:HR:2013:BY7833, para 3.1 (Chinese Workers).
 22 Dutch Supreme Court 29 March 2013, www.rechtspraak.nl 2013, ECLI:NL:HR:2013:BY7833, paragraph 3.6 (Chinese Workers).
 23 *Ibid* para 3.6.
 24 DCC, Art 2:8; EC 18 January 2001, *JRV* 2001, 221 (VIBA).
 25 EC 17 December 2007, *ARO* 2008, 10, para 3.4 (De Hasker Appelhof Holding B.V.).
 26 *Ibid*, para 3.14.
 27 SM Bartman & AFM Dorresteyn, *Van het concern*, Deventer: Kluwer, 2009, p 119.
 28 EC 6 June 2011, *ARO* 2011, 94, para 3.10 (Synpact); Dutch Supreme Court 9 July 1990, *NJ* 1991, 51, para 4.
 29 EC 14 February 2011, *RO* 2011, 35, para 3.10 (Amtrada).
 30 *Ibid*, para 3.10.



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Ease of Doing Business in India for Foreign Investors Through an Effective Dispute Resolution Mechanism

This article provides an insight into the legislative changes brought in recently by the government of India for improvement in the dispute resolution mechanism and analyses its likely impact upon the interest of investors and attraction of more foreign investment in the country against the backdrop of the 'ease of doing business in India'.

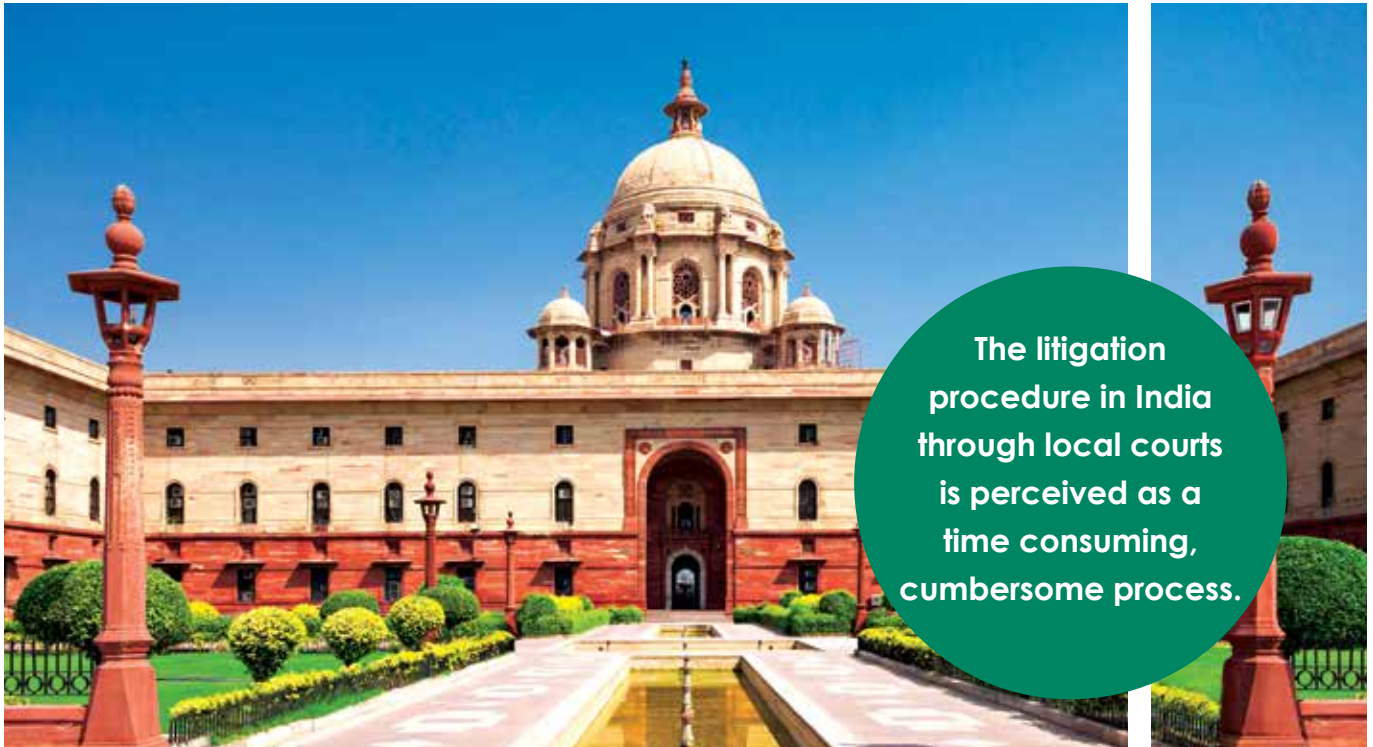
Introduction

Enforcement of contracts through an effective dispute resolution mechanism plays a significant role in determining the ease of doing business in any country. The time, cost and quality of the judicial process are the primary parameters for categorising a dispute resolution mechanism as operative. Presently, as per the World Bank's report on 'Doing Business' across the world, India is ranked at 130, out of the total 189 countries in the list. More pertinently, India's rank in the category of 'Enforcement of Contracts' is 178 out of 189 countries, which clearly reflects the unsatisfactory dispute resolution system as an impediment in conduct and the running of business in India.¹ It has been noted by the Law Commission of India in its 246th Report dated August 2014, while suggesting measures to improve India's worldwide ranking in 'ease of doing business', that the quality of judicial process in India has led to India's low ranking as far as enforcing contracts is concerned.²

The litigation procedure in India through local courts is perceived as a time consuming, cumbersome process and therefore, it has been seen that foreign investors are more inclined towards arbitration as a method of dispute resolution. Hence, taking a cue from the popularity of

arbitration centres in Singapore, Hong Kong and London among investors across the world, the Indian Government has in the recent past made serious attempts towards regulating the process of alternate dispute resolution in India by amending various existing acts and introducing new legislation aimed at easing the conduct of business in India for foreign investors and also setting up arbitration centres.

One of the foremost steps taken in this direction is the Arbitration and Conciliation (Amendment) Act, 2015, which amended various provisions of the Arbitration and Conciliation Act, 1996, thereby making the dispute resolution procedure in India pro-international arbitration and in turn pro-investor friendly. The amended Arbitration and Conciliation Act, 1996 ('Arbitration Act') provides for strict timelines for disposal of matters as well as ensures independence and impartiality in appointment of arbitrators through express provisions and guidelines. The phenomenal amendments to the arbitration law should largely address the prevalent malaise in the system of dispute resolution and repose investor confidence in the conduct of arbitration in India. Additionally, other alternate dispute resolution mechanisms in the form of mutual agreement procedure clauses in double-taxation avoidance agreements and investor-state dispute



The litigation procedure in India through local courts is perceived as a time consuming, cumbersome process.

settlement clauses as proposed under the new model Bilateral Investment Treaty released in December 2015, have been hailed as providing speedier, cost-effective solutions to disputes and improved enforcement of awards and decrees.

Some of the major legislative changes brought about recently in tune with improving the commercial dispute resolution scenario are discussed below.

The High Court to be the Principal Court of Jurisdiction for International Commercial Arbitrations

The amendment to section 2(1)(e) of the Arbitration Act in sub clause (ii) provides that the term 'Court', for international commercial arbitration matters, would imply the High Court, having jurisdiction to decide upon the subject matter of such arbitration, as if the same had been the subject matter of a suit or appeal before it. Thus, this amendment ousts the jurisdiction of principal civil courts having original jurisdiction in a district, for international commercial arbitration disputes and resolves the issue of conflict of jurisdiction for foreign-seated arbitrations,³ to the extent the provisions of Part I of the Arbitration Act are applicable to such arbitrations.⁴

Applicability of Sections 9, 27, 37(1)(a) and 37(3) to International Commercial Arbitrations

Pursuant to the landmark decision of the Supreme Court in the case of *Bharat Aluminum Co v Kaiser Aluminum & Co*,⁵ it was established that the provisions of Part I of the Arbitration Act are not applicable to foreign-seated arbitrations. This decision upheld the international principle of seat of arbitration being the centre of gravity of arbitration and was a step in the right direction to ensure that there is minimum judicial intervention in foreign-seated arbitrations. However, unintentionally, by virtue of this judgment provisions that may be pertinent even for international commercial arbitrations with the seat of arbitration outside India, stated in Part I of the Arbitration Act, namely provisions pertaining to interim relief and court assistance in taking evidence, were also excluded from the ambit of international commercial arbitrations with the seat of arbitration outside India.

For instance, it was observed by the Law Commission of India while suggesting amendments to the Arbitration Act, that in a scenario where the assets forming part of the subject matter dispute in a foreign-seated arbitration are situated in India, then, if an interim order in respect of the same is passed by a foreign court, the same will not be directly enforceable in India by way of an

execution petition considering that the Civil Procedure Code 1908 only provides for the enforcement of 'judgments' and 'decrees' issued by the foreign courts. Hence, to do away with such road blocks and to further pave the way for effective remedies in international commercial arbitrations, this issue was rectified by way of an amendment to section 2(2) of the Arbitration Act whereby a proviso was added to the section expressly providing that, subject to a contract to the contrary, the provisions of section 9 (interim measures by court), section 27 (court assistance in taking evidence) and section 37(1) (a) and 37(3) (appealable orders) of the Arbitration Act will be applicable to international commercial arbitrations which have their seat of arbitration outside India.

Enhanced Role of Institutionalised Arbitrations

The multiple advantages of institutional arbitrations over *ad hoc* arbitrations are well recognised and undisputed given the expertise available and professional assistance in the conduct of the arbitral proceedings as well as the provision of quality arbitrators to choose from. Despite such distinct advantages, institutional arbitration could not achieve popularity in India owing to the lack of

support from regulatory authorities. Apart from an expeditious conduct of arbitration, institutional arbitration also appreciably generates revenue and expands the economy of the nation. Whilst the institutions in London, Singapore and Hong Kong have gained a momentous reputation around the world, the institutions set up in India have not yet been able to break through with foreign investors in particular.

However, legislators have taken due note of this in the past and accordingly amendments have been made to the Arbitration Act whereby the Act has expressly provided for and recognised the appointment of institutions for conducting an arbitration.⁶ Furthermore, the government is providing funds for the establishment of more arbitration centres within the country with a view to providing quality rules for the conduct of arbitrations in tune with international principles and practices, at a much more reasonable charge compared to the institutional arbitration centres in the United Kingdom, Singapore and Hong Kong. Notably, the state government of Maharashtra has recently made an announcement that it is to set up India's first international arbitration centre in Mumbai in the near future, as part of the 'Make in India' initiative.⁷ This initiative on the part of legislators and the government to encourage the culture of institutionalised arbitration in India will go a long way to address the woes associated with the arbitration process in the country.



Institutional arbitration could not achieve popularity in India owing to the lack of support from regulatory authorities.

Enactment of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act 2015 (Commercial Courts Act 2015)

As a means to ensure speedy delivery of justice in commercial matters to encourage economic activity and investment in the country, Parliament enacted the Commercial Courts Act 2015 (which is effective from 23 October 2015) for setting up specialised commercial benches within the High Courts that have ordinary civil jurisdiction and setting up commercial courts at a District level to exclusively deal with commercial disputes. Section 10(1) of the Commercial Courts Act 2015 expressly extends the jurisdiction in respect of applications and appeals in international commercial arbitration matters to the Commercial Division benches in the High Court. This legislation goes a long way to ensure that the roadblocks of delay in the judicial system are done away with as it provides for specific timelines of six months to one year for disposing of matters.

Further, an important aspect of the Commercial Courts Act 2015 is that a duty has been cast upon the respective state government to first provide adequate infrastructure for the conduct of commercial courts or commercial division benches within the High Court of its territory and second, to provide necessary facilities for the training of the judges appointed to the said commercial courts or commercial division benches of the High Court. Additionally, the Commercial Courts Act 2015 is read with the amended provisions of the Civil Procedure Code 1908 (as applicable to commercial disputes), contained in the Schedule of the Act which lays down the procedure for the conduct of trials and provides a discretion to the court to impose costs on a losing party in consideration of factors such as the conduct of that party or whether the party had made a frivolous counterclaim leading to delay in the disposal of the case and various other such considerations in order to discourage frivolous litigation instituted with vexatious intentions. This legislation, if implemented appropriately, will remarkably improve the standard and quality of the judicial process of India.

Dispute Resolution Through Mutually Agreed Procedure Under Double Taxation Avoidance Agreements

It is widely acknowledged that one of the most troubling causes of lack of investor confidence is escalating tax litigation leading to uncertainty in doing business in India. Despite a pro-investor approach of the Indian courts in tax disputes, as evident from the landmark judgment given in favour of corporate giant Vodafone,⁸ due to the prolonged, tedious and expensive nature of litigation in India, foreign investors are largely deterred from making investments in India.

Apart from bringing policy changes in revenue laws, the government has time and again churned out various new mechanisms in terms of establishing special forums like the Settlement Commission, Authority for Advance Rulings, Dispute Resolution Panel and Advance Pricing Agreements to provide better solutions for tax disputes and avoid protracted litigation thereof. However, none of the aforementioned mechanisms have proved to be effective for resolving tax disputes in an expedited and cost effective manner in the recent past. Therefore, the government has resorted to alternate dispute resolution through negotiation, conciliation and arbitration for a speedy and effective disposal of tax disputes with foreign investors. In this direction, a Framework Agreement was signed with the Revenue Authorities of the USA in

January 2015 to resolve tax disputes as per the Mutual Agreement Procedure ('MAP') provision contained in the India-USA Double Taxation Avoidance Convention ('DTAC'). The agreement seeks to resolve about 200 past transfer pricing disputes between the two countries in the Information Technology (Software Development) Services [ITS] and Information Technology enabled Services [ITeS] segments.⁹

The MAP provision in tax treaties allows designated representatives (being the 'competent authorities') from the governments of the contracting states to interact with each other with the intent to resolve international tax disputes involving cases of double taxation (juridical and economic) as well as inconsistencies in the interpretation and application of the treaty/convention.¹⁰ As per this scheme, the taxpayer may approach the competent authority of his country to invoke the MAP procedure with the competent authorities of the concerned country with which the dispute has arisen. Accordingly, the said competent authorities of both the countries negotiate to resolve the dispute that has arisen through a mutual agreement. However, the decision reached by the competent authorities is not binding on the taxpayer and he may choose to litigate as per the local remedies available.¹¹ Rule 44(H)(1) of the Income Tax Rules recognises the MAP procedure and provides that the resolution arrived at through the mutual agreement procedure will be made effective within a period of 90 days from the date of receipt of the same in writing and upon the acceptance of the taxpayer to comply with it and withdraw the suit/appeal pending adjudication in respect of that matter (if any).

The government has already settled over a 100 tax disputes under this agreement, within a short span of one year by resorting to the Mutually Agreed Procedure clause and it is expected that the remaining 100 tax disputes would also be resolved by the end of this financial year. Further, the Central Board of Direct Taxes is also negotiating with other countries like Japan and the United Kingdom, to similarly put an end to transfer pricing disputes through the mechanism of Mutual Agreement Procedure.

Enforcement of Bilateral Investment Treaties

While the abovementioned legislative changes are likely to boost investor confidence in the judicial process of India and improve the reputation of India on the global map for ease of doing business, there still

persists unrest among foreign investors when it comes to enforcement of Bilateral Investment Treaties. It is noted that recently a new model Bilateral Investment Treaty ('BIT') in replacement of the existing model BIT of 2003, has been released providing appropriate structures to strike a balance between an investor's rights and the government's obligations.¹² Further, the dispute resolution clause contained in the new model BIT, provides for an Investor State Dispute Settlement mechanism entailing that the investor must exhaust the local remedies of the contracting state where the dispute has arisen, before resorting to international arbitration. Such a condition to exhaust local remedies before commencing with arbitration, takes away the 'investor-friendly' element of the BIT and notably points towards a 'host-friendly' outlook. The reason for imposing such a condition appears to emanate from the adverse award given against India in the case of *White Industries Australia Limited v Republic of India*¹³ wherein heavy costs were imposed on India for violating the Most Favoured Nation clause in the India-Australia BIT. Pursuant to this decision, foreign investors appreciably recognised the effectiveness of international investment arbitration process for redressing their grievances and it appeared that international investment arbitration is likely to gain momentum with investors in cross-border transactions with India. However, the defensive approach adopted under the new model BIT of India, especially with regard to the dispute resolution mechanism, might lead to an undesirable wave amongst foreign investors.

Conclusion

In view of the foregoing, the silver lining appears to be the setting up of specialised commercial divisions within High Courts and commercial courts in districts for adjudicating commercial disputes, including investor disputes arising out of a BIT, in a timely and cost effective manner. Furthermore, in relation to tax disputes, while it is commendable that India has emerged as one of the best exponents for resolving tax disputes through the Mutual Agreement Procedure mechanism, yet the non binding nature of such resolutions on the taxpayer creates trepidation about the entire system. Therefore, it is highly recommended that the decisions of the competent authorities be binding on the taxpayer in the interests of time and cost involved.

While the recent amendments to existing laws and promulgation of new enactments has considerably improved the dispute resolution mechanism in the

interest of investors and looks to be favourable to attract more foreign investment in the country, the litmus test is essentially the effective implementation of these regulations by the administrative and judicial authorities of India. If the legislation is implemented appropriately, India will possibly feature as a hub for foreign investment and the conduct of global business, given the stabilised and effective economic policies of India.

Notes:

- 1 See <<http://www.doingbusiness.org/rankings>> (last accessed on 15 February 2016).
- 2 Law Commission of India, *Amendments to the Arbitration and Conciliation Act, 1996*, Report No 246, published on 5 August 2014, p 8.
- 3 *Ibid* p 38.
- 4 *Ibid* p 37.
- 5 (2012) 9 SCC 552.
- 6 See the Arbitration and Conciliation Act 1996 (as amended in 2015), s 11.
- 7 Shubhangi Khapre, 'Mumbai Set to Get India's First International Arbitration Centre', *The Indian Express* (7 February 2016).
- 8 *Vodafone International Holdings BV v Union of India* (2012) 6 SCC 613.
- 9 Press Information Bureau, Government of India, Ministry of Finance, 'Resolution of More Than 100 Cases of Transfer Pricing Disputes with USA Under MAP', published on 28 January 2016 and available at <<http://pib.nic.in/newsite/PrintRelease.aspx?relid=135867>> (last accessed on 6 February 2016).
- 10 OEECD, *Manual on Effective Mutual Agreement Procedures*, February 2007 version, available at <<http://www.oecd.org/ctp/38061910.pdf>> ((last accessed on 6 February 2016).
- 11 John Hobster and Ganesh Raj, 'Mutual Agreement Procedure (MAP) for Navigating the Tax Tangle', *The Economic Times* (18 November, 2015).
- 12 Press Information Bureau, Government of India, *Model Text for the Indian Bilateral Investment Treaty*, published on 16 December 2015 and available at <<http://pib.nic.in/newsite/PrintRelease.aspx?relid=133411>> (last accessed on 6 February 2016).
- 13 Final Award, 30 November 2011.



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Significant Evolution of Investment Protection in the European Union Multilateral Investment Arbitration Treaties

The Treaty of Lisbon, entered into force in 2009, restructured the European Union. It includes a provision establishing that bilateral investment treaties entered into between European state members and third countries shall be replaced gradually by multilateral investment treaties entered into by the European Union itself to bind all member states. This article focuses on this important change in treaty arbitration.



Significant Evolution of Investment Protection in the European Union

The Treaty of Lisbon, which was signed in December 2007 and entered into force on 1 December 2009, implemented a reform of the Treaty of Rome and the Treaty of Maastricht as well as the Treaty on the Functioning of the European Union ('TFEU'). Article 207(1) of the latter provides now for the exclusive competence of the European Union ('EU') to negotiate and enter into agreements with third countries (non-member states) with regard to foreign investments and their protection in the host countries.

For a number of decades, all member states signed hundreds of bilateral investment treaties ('BITs') which, *inter alia*, have included provisions on investment protection agreed with other states. According to the United Nations Conference on Trade and Development ('UNCTAD'), about 3,000 BITs currently exist all over the world.

Under the TFEU, BITs that have been entered into with EU member states up to the present time shall be gradually replaced by multilateral investment agreements ('MIAs') between the EU itself and third countries.

Former BITs shall remain in force until their replacement by MIAs. Member states are not allowed to enter into new BITs since 2009 onwards. With this new policy, the EU aims to eliminate differences among member states and create fairer and more equitable competitive conditions among them.

Both MIAs and BITs, in what concern protection of investments, usually contain provisions covering:

- (1) the following:
 - a prohibition of expropriation or nationalisation without adequate compensation;
 - the investor's right to fair and equitable treatment;
 - a prohibition of discriminatory measures;
 - the right to repatriate investment-related funds;
 - most favoured nation treatment clauses; and
- (2) provisions concerning consent given by the party states to solve any disputes usually by arbitration relating to investments after a cooling-off period during which the parties shall try to solve the dispute amicably.

There are some multilateral treaties with a large scope, such as the one provided for in the 1965 Washington Convention which, under the auspices of the World Bank, instituted the International Centre for Settlement of Investment Disputes ('ICSID'). Another is the Energy Charter Party signed in Lisbon in 1994 on which further comments will be made here below.

The EU-Canada Trade Agreement ('CETA') signed on 26 September 2014 and the EU-Singapore Agreement with a similar purpose and initialled on 17 October 2014, are good examples of these large scope trade agreements that contain investment protection provisions. The North American Free Trade Agreement ('NAFTA') is also included in the kind of multilateral agreement regarding similar purposes, among others, as well as the Trans-Pacific Partnership ('TPP') between the USA and several Asian countries. This will hopefully be the case with the Transatlantic Trade and Investment Partnership ('TTIP') under negotiation between the EU and the USA.

However, in CETA, it has clearly separated treaty claims from contractual claims. Only treaty claims are subject to dispute settlement under the mechanism of the agreement. Contractual claims involving the investor-state are matters out of the CETA dispute settlement system and shall be solved either by local courts of the state concerned or by arbitration.

As a matter of fact, the umbrella clauses¹ regime was not included in this international agreement following a traditional position of Canada against umbrella clauses. It has been said that multinational corporations frequently used BITs or multilateral treaties, not only to benefit from umbrella clauses, but also to avoid local courts despite existing and functioning under the rule of law in democratic countries.

These new concepts of treaty investment protection and dispute settlement are clearly influencing the negotiations of TTIP. The EU Commission, under pressure of the European Parliament recommendations, has recently sustained the position of creating a permanent international court constituted by judges acting in public hearings, which includes an appellate mechanism, to solve disputes between states and investors. However, this is an issue still to be discussed and agreed between the parties (that is, the EU and the USA).

In order to implement the TFEU as amended by the Treaty of Lisbon, the EU Regulation No 912/2014 of the Parliament and Council, dated 23 July 2014, establishes the allocation of financial responsibility for breach of an MIA as follows:

- (a) if the breach is ascribed to the EU responsibility, financial responsibility belongs to the EU;
- (b) if the breach is ascribed to a member state, the latter shall be financially responsible;
- (c) finally, the EU shall also be financially responsible if unlawful treatment to the investor under the MIA results from any demands provided for in any EU laws or regulations.

It is a well-known fact that the major difficulties in the implementation of foreign investment protection provisions result from uncertainties or poor clarification of concepts such as 'investment', 'investor', 'fair and equitable treatment', 'adequate compensation' etc., as well as a certain lack of transparency in the contents of arbitration files and awards. These negative aspects have led several countries in South America to denounce certain treaties.

Another difficulty in the negotiation and drafting of this type of treaty as well as in arbitrating disputes is the lack of a clear orientation in the treaties on the correct equilibrium between the regulatory and management sovereignty power of the host state ('regulatory chill'), on one hand, and the need of investment protection given to the investors, on the other.

With a view to acquiring better knowledge of the importance of these kinds of treaties and in accordance with the UNCTAD, a total of 568 investment arbitration files were pending between 1987 and 2013. Large amounts of compensation were adjudicated. The most recent example is the Yukos case in which the Russian Federation was found liable to pay 40 thousand million USD to investors in Yukos company. During that 26-year period, 43 percent of cases were decided in favour of the state party, 34 percent in favour of the investor and 26 percent were settled amicably.

Moreover, independence of arbitrators is a classic issue because an arbitrator has either been appointed by the same party in too large a number of successive occasions,

which may denote a lack of the arbitrator's independence, or because an arbitrator in a treaty arbitration should not act as counsel in any other arbitration file. An arbitrator in treaty arbitration should always be—in accordance with this position—the arbitrator and neither the counsel in some disputes (whatever the dispute) nor the arbitrator in any other dispute.

Multilateral Investment Arbitration Treaties

The Energy Charter Treaty ('Energy Charter'), also signed in Lisbon in 1994, is one of most important of its kind. It is open for signature to every country in the world and now comprises 53 member states.

This treaty deals with trade of energy products, transmission and international circulation of energy, technical and scientific matters, investment protection abroad and, what is particularly relevant to the subject matter of this article, the ways of settling international energy disputes.

A further treaty which shall be mentioned here is the International Energy Charter signed in The Hague in 2015. It is a recap of the 1994 Lisbon Energy Charter Treaty. As in the case of the former, it deals with the definition of common principles relating to the efficiency of the energy markets, promotion and trade of energetic products and cooperation between state members regarding development of energy policies and environmental protection. Its main purpose in particular is to highlight the universal principle of access to energy and the importance of renewable energy sources.

Unlike the ICSID Convention, the Energy Charter did not create any settlement of dispute system of its own, but only provides some dispute resolution means as an the option for the parties. Even though the Energy Charter does not provide for arbitration to be the only way to settle disputes, it is clear that arbitration has been by far the most commonly used system in international dispute resolution systems.

The Energy Charter does not exclude the possibility for parties to choose the courts of law of the host country but they have the choice between ICSID arbitration (provided that the host state and the home state of the investor are both members of the ICSID Convention) and *ad hoc* arbitration under the UNCITRAL rules or arbitration under the Stockholm Chamber of Commerce Rules ('SCC').

According to the Energy Charter website, arbitration files in accordance with the charter have been conducted in 53 percent of the cases under the ICSID, 20 percent under the SCC Rules and 27 percent under the UNCITRAL Rules in a total of 51 cases.

The 'fork-in-the-road' process is not allowed. That is say, once one of the means of dispute resolution is chosen, it may not be ignored and replaced by another.

Energy cases in arbitration in accordance with article 26 of the Energy Charter have increased in the last three years from 36 to 68. This is partially due to the so-called 'solar claims' against Spain and the Czech Republic. These result from governmental decisions to reduce tariffs that consumers pay thereby affecting the interests of producers ('feed-in tariffs').

The great success of the Energy Charter, when appointing arbitration as the means to settle disputes, derives from the easy enforcement of arbitral awards under the New York Convention. Whenever the ICSID Convention is applied, recognition of a foreign arbitral award is dispensed with because member states that have signed this convention are under the obligation to accomplish arbitral awards as such. However, the Energy Charter contains several provisions, among which are charges, enforcement of awards and other procedural matters.

The nature and extension of the concept of 'investment' has been under discussion. An application of funds for a project, for instance, a factory, a ship, a large distribution unit, etc. is clearly included in the concept of 'investment'. But some commentators and case law have accepted that a debt concerning the supply of a considerable amount of spare parts for a nuclear power plant should be considered to be an investment.

Most arbitration files on energy disputes have involved European countries either as host state or investors. It is therefore important to know the main features of arbitration in Europe as a seat of an arbitral tribunal. Some of the most important arbitration institutions (the ICC, LCIA, SCC, Permanent Court of Arbitration in The Hague, Swiss arbitration institutions, etc.) are located in Europe and consequently there are also a large and significant number of arbitral awards, case law on arbitration matters, legal authorities, arbitration books, etc.

Several main aspects are to be taken into account:

1. EC Regulation No 593/2008 of the Parliament and Council (also known by Rome Regulation I)

This is mandatorily applicable to all EU member states, except Denmark. It relates to conflict of law rules and other provisions of international private law concerning the law applicable to contractual obligations.

An important and recent judgment of the EU Court of Justice adjudicated in the *Unamar* case emphasised the priority of the freedom of contract principle on the choice of law of overriding mandatory domestic rules of state members provided that the legislator of each member state has not expressly said that such overriding mandatory rules relate to the protection of crucial economic, political or social interests. For further developments, see the article on the *Unamar* case published on page 32 et seq of No 79 September 2015 of the IPBA Journal.

2. Administration Law Arbitration

Arbitration on administrative law matters has been increasingly implemented in EU member states whether on administrative contract disputes or even some administrative acts practiced by administrative authorities (governmental agencies and municipal ones).

Arbitrability requisite in this case only requires that the dispute should involve patrimonial interests or non-patrimonial ones provided that this is allowed in order to solve the dispute by agreement (*transactio*).

3. Public Policy Concept

Most EU state members follow the restrictive concept of public policy, that is, the international public policy of each state under a restrictive concept. Among all mandatory rules of a given country, this restrictive concept relates only to the very few legal matters that a country's legal system *vis-à-vis* the law applied in a foreign arbitration award or judgment may not accept at all because they infringe upon their fundamental values of economic, political or social order.

In systems that follow the monist doctrine, the same restrictive concept is applied to both the annulment of awards adjudicated in domestic arbitration and recognition and enforcement of foreign awards. There are a number of member states that follow this monist doctrine.

4. 1958 New York Convention

All EU member states have ratified the NY Convention on recognition of arbitration agreements and foreign awards.

5. 1961 Geneva Convention

Basically on the same subject as the NY Convention with a few differences in details. As to this particularity, it is important to recall that under section 7 of the NY Convention, application of this convention is residual which means that any other convention applicable or internal legal provisions which are more favourable to the recognition of arbitration agreements or foreign arbitration awards should be applied in lieu of the NY Convention.

6. ICSID Convention (1965 Washington Convention)

Practically all EU member states have ratified this convention.

7. UNCITRAL Model Law

Several EU member states countries have followed this Model Law when drafting their own arbitration laws.

8. UNIDROIT Rules

It is quite common for various UNIDROIT Rules to be applied as 'soft law rules' in Europe. They contain, *inter alia*, both general principles of law and *lex mercatoria* rules.

9. The 1980 UN Convention on Contracts for the International Sale of Goods (also known as the Vienna Convention on International Sale of Goods)

This UN Convention is also applied by many, though not all, EU member states.

Conclusions

The Treaty of Lisbon established the exclusive competence of the EU to negotiate and enter into, in its own name, agreements on international investments with third countries and on their protection against illegal or unfair measures by host states and their authorities government, municipalities, etc.

The Energy Charter is the most important multilateral treaty on energy, including protection of investments.

The Energy Charter does not provide its own dispute resolution system, but it considers two areas of dispute:

(1) one that concerns disputes resulting from investment transactions; and (2) another that deals with disputes between the member states themselves.

The Energy Charter provides for a three-month period for the parties to try to resolve the dispute amicably ('cool-off period'). Beyond this stage, either the investment contract provides for any arbitration agreement or then the parties shall follow arbitration as agreed. However, if the parties have not agreed to solve disputes through arbitration, the host country courts of law shall bear jurisdiction.

More recent energy disputes involve the so-called solar claims due to 'feed-in-tariffs'.

It is increasingly probable that the UNCITRAL Arbitration Rules will be chosen to rule arbitration files in energy disputes.

Note:

- 1 An umbrella clause is a measure generally adopted in Bilateral Investment Treaties ('BITs') under the anglo-saxonic matrix (roughly equivalent in civil law system to *pacta sunt servanda* principle). An umbrella clause enlarges the obligation of states in investment operations to accomplish, not only a treaty investment, but also any contract or other obligations provided for in local laws or regulations in view of protecting a treaty investment.



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Investment in Canadian Oil and Gas: Time to Look Again?

While the Canadian energy space is facing challenges posed by commodity price declines, other challenges can be managed. Foreign investment rules in practice are not a significant barrier. Other issues, such as pipeline approvals, climate change regulation and royalty rates, are developing towards a form of resolution that we expect will result in greater market access and a more certain footing for the industry.



Introduction

In October 2015, Suncor Energy Inc, a leading Canadian integrated energy company, launched an unsolicited offer to acquire Canadian Oil Sands Limited ('COS'). More than three months after its initial offer, with the continued deterioration in crude oil prices, Suncor had to only slightly increase its initial offer of 0.25 Suncor shares for each COS share to 0.28 Suncor shares for each COS share to reach an agreement with COS to support Suncor's offer, for a total aggregate transaction value of approximately C\$6.6 billion.¹ No 'white knight' had emerged for COS with a competing offer.

At the moment, there is relatively little competition in Canada for oil and gas assets. We believe that it is timely to look at investment opportunities in the sector. While the industry currently faces some challenges, such as a lack of access to export markets beyond the United States, there are also significant opportunities.

Buyers of Canadian assets need not worry about country risk. It is one of the very few jurisdictions in the world with extensive oil and gas reserves and production² where foreign investors historically have been a welcome and significant part of the Canadian energy scene, enjoying a long history of stable democratic government, rule of law, sophisticated industry infrastructure, experienced management teams and a highly skilled workforce.



Transaction Structures

Oil and gas transactions in Canada may be freely negotiated between buyer and seller, and may take many forms. Unlike other jurisdictions where the interests that may be acquired by foreign investors are limited to contractual rights such as production share contracts, foreign investors may acquire direct interests in Canadian resource properties and a variety of other interests. The particular structure can be flexibly adapted to the intended business objectives of the parties as well as tax, foreign investment and other considerations.

Typical ways in which investors might access the Canadian oil and gas sector include:

- acquisitions of the shares of publicly traded or private resource and service companies
- acquisitions of interests in assets or in joint ventures
- acquisitions of royalty interests
- acquisition of a production right or net profits interest
- investment in debt securities
- participation in the restructuring of distressed resource and service companies through contribution of new capital
- formation of joint ventures or strategic alliances
- licensing of technology

If the transaction structure involves a non-Canadian investor acquiring control of a business in Canada, the Investment Canada Act ('ICA') may apply and pre-closing approval may be required. A summary of the foreign investment considerations follows.³

Foreign Investment Review

Canada's foreign investment review process receives an unwarranted degree of attention in international investment circles in relation to the actual impact of the process on foreign investment into Canada. In practice, the ICA applies to a very few, very large transactions and in the near future will apply to even fewer transactions. For the year ended 31 March 2015, excluding national security reviews, only 15 applications were reviewed and approved. In comparison, 524 other investments in 2014-2015 involving an acquisition of control were merely notifiable.⁴ Only one transaction (outside of the national security sphere) has been disapproved under the ICA. That case, involving BHP Billiton's bid for Potash Corp, occurred over five years ago under very different political and market circumstances. In addition, to the knowledge of the authors, no investment in the Canadian oil and gas sector ultimately has been turned down on national security grounds.

Effective 24 April 2015, the monetary threshold for review and approval changed from 'book value' to 'enterprise value.' As a result, certain transactions that were previously subject to review will no longer be reviewable. This is likely to be the case where the former threshold, which was based on book value of assets, no longer accurately reflects the market capitalisation or fair market value of a target company due to diminished commodity prices.

More specifically, the new threshold for determining whether net benefit review under the ICA is required for acquisitions or dispositions by entities owned by nationals of a World Trade Organization member state is C\$600 million based on the enterprise value of the target business, rather than the former threshold based on the book value of the assets of the target business. The enterprise value threshold will increase to C\$800 million in 2017 and then to C\$1 billion in 2019, after which it will be indexed annually. However, a state-owned enterprise ('SOE') investor is still subject to review based on the book value of assets of the Canadian business which was C\$369 million in 2015 (expected to increase to \$375 million for 2016).⁵

Proposed increases to the review threshold are also contemplated under new trade agreements. If the Canada-European Union Comprehensive Economic and Trade Agreement ('CETA') or the Trans-Pacific Partnership ('TPP') trade agreement comes into force within the next year or so, eligible investors will only be subject to investment review at a threshold of C\$1.5 billion—almost double the threshold that would otherwise apply (C\$800 million in 2017).

Even if the target business crosses the ICA review threshold, no approval is required for:

- a minority investment
- an acquisition of non-voting securities
- an acquisition of a pure exploration property
- typical acquisitions of undivided interests in assets
- financing transactions and acquisitions of debt securities

A new federal government was elected in October 2015. The new government appears open to expanding trade relationships and encouraging foreign investment. Prime Minister Justin Trudeau raised the topic of a Canada-China free trade agreement with President Xi Jinping at the G-20 summit in Turkey in November 2015. There is some expectation that the ICA policies that require SOEs to demonstrate transparency and commercial orientation, while all but prohibiting them from acquiring control of oil sands businesses, may be relaxed somewhat in view of the current stresses on the Canadian energy industry.

Access to Market

A significant concern of foreign investors has been the ability to access markets outside of Canada and the United States via pipeline to tidewaters. After President Barack Obama's decision to deny a permit to Keystone XL (which would have enhanced Canadian access to the US Gulf Coast), this project appears stalled until after the 2016 US elections. Enbridge, the proponent of Northern Gateway (providing access to the Canadian west coast) is still responding to the conditions for approval of the Joint Review Panel of the National Energy Board ('NEB') and the Canadian Environmental Assessment Agency.

However, momentum seems to be building instead for the Energy East pipeline, a 4,600-kilometre pipeline sponsored by TransCanada Corporation that will transport



about 1.1 million barrels of oil per day from Alberta and Saskatchewan to the refineries of Eastern Canada and a marine terminal in New Brunswick.⁶ Energy East is supported by the new federal government and by many of the provincial governments, including Alberta and Ontario. Although some Quebec municipalities have announced opposition to Energy East, the provincial government has not formally opposed the project, but rather set out various conditions for the project to proceed, 'which include more extensive consultations with First Nations and a positive economic impact on Quebec.'⁷

A hearing before the NEB is currently underway regarding the proposed twinning of the Trans Mountain pipeline which moves oil from northern Alberta to British Columbia on the Pacific coast. Trans Mountain, sponsored by Kinder Morgan, is proposing an expansion of this existing 1,150 km pipeline that would increase the nominal capacity of the system from 300,000 barrels per day to 890,000 barrels per day. While it has been reported that the British Columbia government opposes this project, in fact in a submission to the NEB it set forth a number of conditions on environmental, fiscal and aboriginal matters that the pipeline proponents should have to meet in order to obtain approval.⁸



The new government appears open to expanding trade relationships and encouraging foreign investment.

In an effort to respond to environmentally-driven criticisms of the approval process, the federal government announced at the end of January 2016 that it will analyse greenhouse gas emissions that would result from approving pipeline projects, and the federal cabinet would make the final decision on whether to approve a project. The process will also include greater public and indigenous consultations on projects.⁹ Although Energy East and the Trans Mountain expansion will not have to restart their approval processes, this layer of additional scrutiny will undoubtedly add some additional months to the approval process. It seems some delay may be the price to pay for ultimate approval.

Aside from proposed new Canadian pipelines, some US pipelines have been reversed and expanded so as to more effectively transport Canadian crude oil to markets in the US. For example, the Seaway Pipeline, 50/50 joint venture between Enterprise Products Partners LP, the operator, and Enbridge Inc, is a 500-mile pipeline between Cushing, Oklahoma and the Freeport, Texas area which was reversed to flow from north to south in 2012, increased in capacity from 150,000 barrels per day to 400,000 barrels per day and then twinned to 850,000 barrels per day following completion in July 2014.¹⁰

Canadian natural gas currently is exported only to the US and there is no shortage of pipeline capacity, particularly in view of increased US production of natural gas from shale deposits. Instead, new markets for seaborne exports are being considered. Twenty liquefied natural gas ('LNG') projects are in various stages of development. Eighteen of them have NEB export licenses but none has yet made a final investment decision (FID). The B.C. government has set a goal of having three LNG facilities in operation by 2020.¹¹ Of course, this will depend on whether investors make FIDs in view of the current low prices for LNG and increased global competition.

Climate Change

Alberta is home to most of Canada's oil and gas industry. The climate change plan announced in November 2015 by the new provincial Alberta government provides some certainty about the rules going forward, and is supported by many in the energy industry who recognise that Canada has no choice but to move toward a more carbon neutral economy in light of the commitments made at the Paris climate change conference in 2015.

The Alberta plan is still under development, but in broad strokes it involves four key areas:

- phasing out coal-generated electricity and developing more renewable energy
- implementing a new carbon price on greenhouse gas pollution
- a legislated oil sands emission limit
- employing a new methane emission reduction plan¹²

After the plan was announced, the leading industry association, the Canadian Association of Petroleum Producers ('CAPP') commented that 'Alberta's Climate Leadership Plan provides direction that will allow the oil and natural gas industry to grow, further enhance its environmental performance through technological innovation, and is expected to improve market access to allow Canadian oil to reach more markets.'¹³ In effect, the industry now understands that governments must address climate change issues, and that in turn this is a necessary component of achieving market access.

Royalty Rates

In late January 2016 the Alberta government announced a new royalty regime which will be effective 1 January 2017. This announcement ends the uncertainty that had existed while the Royalty Review Advisory Panel was deliberating on this issue. In brief, the new regime contains the following features:¹⁴

- emulates a revenue-minus-cost or 'RMC' standard that uses the average industry drilling costs rather than individual well or project costs
 - if companies can reduce their costs below the industry average they will pay less royalty
 - royalty payments will decrease for mature wells once production levels drop significantly
- harmonised across crude oil, liquids and natural gas to remove distortions
- calibrated to a depth and length drilling and completion cost allowance each year
- flat rate of 5 percent until revenue equals cost allowance
- applies to new wells only; current wells grandfathered for 10 years

The new royalty regime has been well received by CAPP, which commented that it is 'principle-based and provides a foundation to build the predictability industry needs for future investment.'¹⁵

The government is also developing a value-added natural gas strategy for Alberta. As part of this strategy, the government announced a new Petrochemicals Diversification Program which 'will offer up to C\$500 million in royalty credits over 10 years to select facilities through a competitive application process.'¹⁶ The government would like to accelerate the development and commercialisation of partial upgrading and alternative value-creation technologies for bitumen. Specifically in regards to oil sands, the new regime does not change the royalty structure or rates for oil sands projects. There will be improved disclosure of royalty information for these projects and increased transparency of allowable costs.

Conclusion

While the Canadian energy space is facing challenges posed by commodity price declines, other challenges



The government is also developing a value-added natural gas strategy for Alberta.

can be managed. Foreign investment rules in practice are not a significant barrier. Other issues, such as pipeline approvals, climate change regulation and royalty rates, are developing towards a form of resolution that we expect will result in greater market access and a more certain footing for the industry.

Notes:

- 1 See 'Suncor Energy and Canadian Oil Sands Reach Agreement to Support Acquisition', 18 January 2016, available at <http://www.suncor.com/en/newsroom/5441.aspx?id=2017518>. COS holds a 36.74 percent interest in the Syncrude project, the largest producer of light, sweet synthetic oil from Canada's oil sands. Suncor already owns a 12 percent interest in Syncrude.
- 2 Canada has the third largest oil reserves after Saudi Arabia and Venezuela. These reserves are more significant when considered in context, as they represent over half of the world's oil reserves that are open for investment to the private sector. Canada is the fourth largest producer of oil in the world and the fifth largest producer of natural gas in the world. See National Energy Board, *Canada's Energy Future 2016* (January 2016), Table 2.1, available at <http://www.neb-one.gc.ca/nrg/ntgrtd/ftr/2016/index-eng.html>.
- 3 For a detailed review of the foreign investment issues, see A Avery, P Glossop and P Olexiuk, 'Foreign Investment in Canada's Oil and Gas Sector: New and Emerging Challenges,' (2013) 51:2 Alberta L Rev 343.
- 4 Annual report on the *Investment Canada Act* for fiscal year 2014-15, available at http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk81183.html.
- 5 See Investment Review Division notice, available
- 6 See <http://www.energyeastpipeline.com/support-for-energy-east-is-growing-across-canada/>.
- 7 See 'TransCanada tries to win over Quebec on Energy East pipeline', CBC News, 3 February 2015, available at <http://www.cbc.ca/news/canada/montreal/transcanada-energy-east-oderre-heurtel-1.3432290>.
- 8 See 'Trans Mountain Pipeline Expansion not Supported by B.C. Government', CBC News, 11 January 2016, available at <http://www.cbc.ca/news/canada/british-columbia/transmountain-b-c-government-kindermorgan-1.3398689>.
- 9 See John Paul Tasker, 'Pipeline Projects to Face New Environmental Regulations', CBC news, available at <http://www.cbc.ca/news/politics/environmental-regulations-pipelines-1.3422129>.
- 10 See <http://seawaypipeline.com/>.
- 11 See <http://engage.gov.bc.ca/Inginbc/Lng-projects/>.
- 12 Alberta government, Climate Leadership, available at <http://www.alberta.ca/climate-leadership-plan.cfm>.
- 13 See 'AB Climate Strategy Expected to Help Build More Market Access', Canadian Association of Petroleum Producers, 22 November 2015, available at <http://www.capp.ca/media/news-releases/ab-climate-strategy-expected-to-help-build-more-market-access>.
- 14 For details, see <http://www.alberta.ca/royalties-overview.cfm> and the Royalty Review Advisory Panel report at <http://www.energy.alberta.ca/Org/pdfs/RoyaltyReportJan2016.pdf>.
- 15 See 'Royalty Report Sets Stage to Review Alberta's Competitiveness: CAPP,' Canadian Association of Petroleum Producers, 29 January 2016, available at <http://www.capp.ca/media/news-releases/royalty-report-sets-stage-to-review-albertas-competitiveness-capp>.
- 16 See Jeff Lewis, 'Alberta unveils incentives for petrochemicals sector', *The Globe and Mail*, 1 February 2016 and the Alberta government's announcement on 1 February 2016 'New Petrochemicals

Diversification Program to Attract Investment, Jobs' available at <https://soundcloud.com/your-alberta/new-petrochemicals-diversification-program-to-attract-investment-jobs-feb-1-2016>. at http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00050.html



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Impact of Social Media on the Brand and How to Manage It

Just about everyone talks about social media these days – it is very important and is being used extensively in franchising. Franchisors must have a social media policy in place and they must monitor social media on a daily basis, for otherwise their brands could be destroyed while they are sleeping!

Franchisors who embark on international franchising have to monitor and handle the impact of social media on their brands on a daily basis as a brand can be destroyed overnight. Facebook is a useful tool but it can be very damaging to any brand and something can go up overnight which has a major impact. How do you deal with it?

The term 'social media' is often defined to mean the following:

Web-based and mobile technologies used to turn communication into interactive dialogue including magazines, internet forums, weblogs, social blogs, microblogging, wikis, podcasts, photographs or pictures, video, rating and social bookmarking; for example, Google, Facebook, Twitter, LinkedIn, Wikipedia, YouTube or other social media site for the time being.

A typical clause in a franchise agreement might read as follows:

The franchisee acknowledges that in relation to the business and the franchisor's intellectual property it will act with care when using any social media and it shall always do its utmost to look after the best interests of the franchisor and anything to be published, circulated, transmitted or disseminated in any way by or through social media shall be subject to the franchisor's prior written approval.



Consideration should be given to many factors including the need for a franchisor to manage, update and control the content of all electronic communication which includes all websites and social media. In the online world, the lines between public and private and personal and professional are blurred. By identifying themselves as an employee of your business, your staff are creating perceptions in the minds of customers and the public at large.

It is important to have a social media policy in place which should include the following:

- (1) Staff are personally responsible for the content they publish on blogs, wikis or any other form of user-generated media. Be mindful that what you publish will be public for a long time so you must protect your privacy.
- (2) Avoid posting work issues or frustrations in public forums. If franchisees have any concerns in this area, then the franchisor should deal with them privately.
- (3) If franchisees or their staff publish content to any website outside the place of the franchise and it has something to do with the franchise, then a disclaimer must be used which might read as follows:
 - (4) Always ask permission to publish or report on conversations that are meant to be private or internal in relation to the franchise system.
 - (5) Don't provide confidential or other proprietary information to third parties.
 - (6) Always respect and adhere to copyright, privacy, fair use and other information disclosure laws.
 - (7) Never quote or reference customers, principals or suppliers without their approval and when you do make a reference, link it back to the source.
 - (8) Always respect your audience and don't use words that can be construed as racist or discriminatory. Also you should not engage in any conduct that would not be acceptable to the franchisor and always show proper consideration for the privacy of others and for topics that may be considered objectionable or inflammatory, such as politics and religion.
 - (9) Be aware of your association with your place of employment in online social networks. If you identify yourself as an employee, then ensure that your profile and related content are professional and consistent with how you wish to present yourselves to colleagues and customers.

The postings on this site are my own and do not necessarily represent my employer's positions, strategies or opinions.

When blogging, try to add value and beware that the franchise brand is best represented by people associated with it and that what you publish will reflect on that brand. Most franchise systems are utilising social media not only for branding and communication purposes but also franchisee recruiting. Despite the increased activity and budget allocation focused on social media, only a small percentage of franchisors who utilise social media to attract franchise buyers can actually attribute franchise sales directly back to their social media efforts.

Franchising lawyers should draft social media clauses very carefully, and lawyers should be aware of the social media strategy of franchisor customers. Most franchisors allocate specific funds to cover social media. Franchisors should be aware that all social media postings have the potential to impact the brand, both positively and negatively, so all social media content and posts should be frequently checked and updated.





Recent data shows that social marketing is not replacing traditional media.

When comparing options such as Facebook, LinkedIn and other social media sites, franchisors need to recognise that social media which consumers use is likely to be different than social media that franchise prospects will use. While many people may look to social media for deals and discounts, in the area of franchise sales it is mainly used as a first stop on the way to the franchisor's website. Recent data shows that social marketing is not replacing traditional media but rather enhancing it. Franchise industry surveys show a relatively low percentage of franchise sales can actually be attributed to social media which cannot be relied upon alone and should instead be blended with a variety of other media options. Usually franchisors will allow franchisees to establish their own local social media sites rather than having one central site for the brand. However, even with policies in place, franchisors need to continually monitor a franchisee's use of social media much like they would any other form of local marketing.

Powill, who is the chief brand strategist for No Limit Media Consulting, has listed 25 things to avoid when using social media for franchise development, which are as follows:

- Don't over expect.
- Lack of response on consumer-facing footprints.
- Overlooking LinkedIn groups.
- Not using Facebook tabs to communicate with leads.
- Using Twitter.
- Failing to place press releases on social channels.
- Not understanding SEO as it relates to social media.
- Overlooking your personal footprint.
- Forgetting to google alert your brand.
- Not monitoring your footprint and being blindsided by not knowing what your prospects see.
- Forgetting about Facebook analytics.
- Not thinking differently with consumer footprints.
- Overlooking Facebook advertising.
- Not merchandising media coverage.
- Not creating social policy for franchisees.
- Not merchandising existing franchisees.
- Forgetting the value of positive brand movements.
- Not performing due diligence on prospects.
- Allowing an intern or non-educated employee to run your campaign.
- Not educating your marketing team about the value consumers have on your development campaign.
- Forgetting about applications on Facebook.
- Not following your competition.
- Talking at your end user as opposed to with your end user.
- Not evolving your sales process to include social media.
- Believing everything you are told or have read.

Technology is finding its way into many of the matters we deal with. Some of the terms you may come across include the following; Bit v Byte; Deepweb and Darknet; Distributed Denial of Service Attack ('DdoS'); domain name; internet of things ('IOT') and Voice Over Internet Protocol ('VOIP').

In the recent Australian case of *Seafolly v Madden*, social media and brand damage are discussed. In this case the owner of a small swimwear business posted on her Facebook page a number of extracts from the Seafolly catalogue of the Seafolly designs with the question: 'The most sincere form of flattery?' and the equivalent names for her designs. The owner also contacted various media outlets and the story quickly spread. Seafolly sued the owner, Madden, for misleading and deceptive conduct in breach of the Australian consumer law. Madden maintained that her comments were personal in nature and not business-related but the Court disagreed and found Madden

liable for misleading and deceptive conduct. Because Madden posted comments on her Facebook page there was also brand damage. Social media poses a significant reputational risk to companies and negative online content can go viral very quickly. Just as the author said earlier, it is crucial for every franchisor to have policies and procedures in place to deal with any attack on its brand.

The manuals of a franchisor should also cover social media and they may prescribe what should happen on a day to day basis. The danger of ignoring social media is that while you are sleeping your brand could be destroyed.

Examples of recent negative comments on social media include the following:

Burger King

'... Unfortunately my old favourite, the tendercrisp, thoroughly disappointed. The flavours I so fondly remember were replaced with synthetic chicken flavouring and soggy bun. I will not be visiting a Burger King again, you need to rethink your burger experience in this highly competitive market.'

'Worse place to come and eat! Came in last Friday with my partner. Walk in and first thing I notice is how dirty the place is. Customer service was very poor and when I requested for one of the tables to be cleaned down so that my partner and our friends could sit down to eat, we received attitude! ...'

BurgerFuel

'Had the worst experience at Burgerfuel Ponsonby. The burger I ordered had a raw patty. On complaining to the manager he took the complaint down on a piece of paper and said would pass it down to head office. He said the reason for it is high staff turnover and the staff are still learning to make burgers. It has been over 6 weeks and I have not heard from burgerfuel head office. Please refund my money now.'

'Burger Fuel Takanini will still screw it up either fire them or get someone in there to train them again with what should be in your burgers.'

KFC

'KFC are just money grubbers. They do not care about people or staff. New Zealand do not go to a KFC on Christmas day.'

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'It looks so good, but often it isn't well made I've found, ingredients just slapped on and falling to one side, drenched in whatever sauce, especially bbq woah take it ez!'

Pizza Hut

'I had Pizza Hut on the weekend, it was the Mega Deal I think, I must say the quality has dropped from what it used to be - the chips were so blah, the garlic bread was dry and gross and the pizzas were overrated, I'm never buying pizza hut again.'

'Last week placed order for 2 x deal. Order was 4 x pizza and 4 x sides. Delivery was incomplete, and took over an hour for the balance of the order to be delivered after me ringing the store to find out what was happening. When the rest of the order finally did arrive was only offered a (small) strawberry moose. Was told the driver went straight home after our delivery. Very bad service that day.'

Starbucks

'Once again Starbucks gets my order completely wrong and when I point it out to them all I get is a blank look. Definitely the last time I visit Starbucks.'

'They never seem to make a nice coffee, staff aren't that great and you don't use Glen free soy so that makes it taste even worse.'

McDonald's

'Terrible service. The girl who served us today didn't have a name tag, didn't look at us, was short with everyone and also never once used her manners. Worst of all her top said crew trainer. ...does that mean you will have a crew of rude people soon. Also I ate my whole meal before my mate got his 6 mcnuggets.'

'Repeatedly let down. Dangerously poor experiences one after the other. Embarrassing establishment for the franchise. Staff lack people skills.'

As can be seen from the examples above, people are quick to complain when they have a bad experience. All of the examples involve fast food but there are many other examples in the retail and service areas.

Social media, including networking sites like Facebook, Twitter and LinkedIn, has increasingly become an HR issue around the world. While such online tools have created

opportunities for employees to connect with other people and share information and ideas, both within and outside the organisation, they also pose a number of risks to the business. The issue of who has ownership of professional social media accounts has emerged, particularly who gets to keep them when the employment relationship ends. There have been several cases in the USA where ownership of such accounts has been in dispute. In one case involving a tech review company called PhoneDog, the employee gathered 17,000 followers while tweeting on behalf of the company. When the tweeter left, he changed the Twitter handle to his own name (removing the PhoneDog part) and thus took the followers with him.

In conclusion, social media in the twenty first century is a powerful tool to be used by franchisors in making the brand more well known and by obtaining direct and time feedback from franchisees and members of the public. From a legal point of view, it must be carefully monitored and franchisors should have a dedicated person on the team to monitor and control social media on a daily basis. Negative comments can destroy the brand and dealing promptly with customer complaints is essential.

It is often said that social media and websites have developed faster than the laws of many countries. Privacy laws are catching up but franchising lawyers should always be proactive in ensuring that their franchisor clients do not take social media lightly, and that clauses in franchise agreements are both robust and unequivocal in relation to the use and control of social media.



Stewart Germann
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Stewart Germann is New Zealand's leading franchising lawyer with over 35 years experience and is one of only two New Zealand lawyers included in the International Who's Who of Franchise Lawyers. Stewart Germann Law Office ('SGL') is New Zealand's longest established specialist franchising law firm and SGL clients include many well-known national and international franchise brands.

Standardisation and Development of China's Internet Finance Industry by Learning from Foreign Experience

This article discusses the development of the internet finance industry in China, and, combined with the advanced experience in the field of internet finance of foreign countries including Britain, Canada and America, the article attempts to give some advice and enlightenment in this area.

Overview

Internet finance takes advantage of internet technology and information and communication technology to implement capital financing, payments, investment and information intermediary services. Internet finance has been growing extensively for the past two years and has become a rising industry in China.

The mainstay of internet finance involves two aspects: (1) traditional financing institutions (banks, securities companies, insurance companies, funds, trusts and consumer finance companies, etc. and (2) internet enterprises. China should encourage traditional financing institutions and internet enterprises to cooperate intensively with each other in order to complement the advantages of each.

Typical Models of Internet Finance

1. P2P

P2P, namely 'peer-to-peer' or 'person-to-person', refers to a method of financing that enables individuals to borrow or lend money through qualified internet platforms ('third-party companies') which work as intermediary agents and charge an intermediary fee. Under the current financial and social environment of China, the main models of internet loans include the traditional

model, assignment of credit model, guarantee model and the O2O model (which combines online to offline commerce).

2. Crowdfunding

Crowdfunding, namely public funding or mass funding, refers to a form of group-buying. Project funds will be raised from netizens via the Internet on which fundraising projects are released. Crowdfunding takes advantage of the propagation characteristics of the Internet and SNS, which allows small businesses and individuals to exhibit their originalities to gain attention and support so as to obtain financial aid. Currently, crowdfunding financing contains four patterns: creditor's right crowdfunding, stock crowdfunding, encourage-based crowdfunding and donate-based crowdfunding.

3. Big Data Finance

Big data finance refers to a new way of data resources serving internet finance institutions by analysing real-time gathered-unstructured data and supplying all-dimensional processed data results. For example, financial institutions and financial service platforms conduct market analysis reports by processing consumers' transaction behaviours and purchasing habits data to improve the predictability and feasibility

of marketing strategies. Currently, the operation patterns of big data finance service platforms can be classified as: (1) the platform model (represented by Alibaba and Microcredit); and (2) the supply chain finance model (represented by Jingdong.com and Suning.com).

4. Third-Party Payment

Third-Party payment refers to a payment method whereby a non-financial institution works as a payment intermediary agent of the payee and payer. The operation patterns of third-party payment enterprises can be divided into two categories. First, independent third-party payment: the third-party payment platform is completely independent of an e-commerce website and has no function of guarantee. The platform only provides the solution of payment for users (represented by 99bill and Payease). Second, dependent third-party payment: the third-party payment platform is supported by B2X, C2C e-commerce websites and provides the function of guarantee. The platform works as an escrow account in which money transfer will be authorised by both the seller and buyer (represented by Alipay and Tenpay).

5. The Portal of Internet Finance

The portal of internet finance makes use of the Internet to provide the third-party platform with the sale of financial products. The core pattern is 'search+price comparison', and the platform lists each financial institution's products with vertical price comparison information for users to make a selection. Currently, the portal of internet finance includes financial management, insurance and P2P (represented by Rong360.com, 91jinrong.com, Haodai.com, Yinhang.com and Licai.com).

Legal Risks Research for Internet Finance

1. Potential Civil Risk for Internet Finance

A. Existing Hidden Danger for Electronic Contracts and Electronic Signatures

Electronic contracts ('e-contract') and electronic signatures ('e-signature') have been widely used in internet finance on the condition that user-parties conclude the contract with the internet advantages of convenience and efficiency. However, the legal risks and defects of e-contracts cannot be ignored. First, electronic data is intangible material and is prone to be wiped out in the case of improper operation. Second, difficulty arises if duplicates or image files are missing or data is tampered with.

B. Information Security Risk: Personal Private Information May Be Divulged Easily

In order to ensure the authenticity of users, internet finance platforms have to collect a great deal of personal private information such as name, age, address, date of birth, identification number, etc. to make sure that their database is complete enough so that transactions will be legally authorised. However, the divulgence of personal private information happens occasionally if sufficient security protection measures are not taken by platforms.

C. Imperfect Credit Rating System May Trigger the Risk of Default

In the course of a matchmaking transaction, the evaluation of the borrower's credit is mainly based on the certificate of identity, certificate of assets and history payment reports which are supplied by borrowers. Therefore, the accuracy of the evaluation is like to be compromised because these materials are easily forged and because these materials cannot reflect the full scale of information on borrowers. The default risk of a borrower is most likely to occur if the financing is in the form of creditor's rights

D. Potential Risk of Massive Precipitation Funds

The third-party platform plays a leading role in the flow



of funds in the course of internet finance. The retention of precipitation funds in the third-party platform ranges from two days to several weeks. A consequence of the imperfection of valid guarantee and supervision, massive precipitation funds will cause an increase of the risk index and of fund misappropriation. Moreover, lack of effective capital liquidity management will trigger payment risk.

E. Potential Risk of Usury

A high interest rate is the main reason for network loans gaining popularity. If the interest rate of a network loan has to be within the range of the interest rate prescribed by law, lending from the Internet will not be an option for some investors in the first instance because as the rate of return of internet finance is much higher than that of other channels of investment, this is what makes network loans increasingly common and popular.

2. Potential Administrative Risk

Chinese authorities have issued the Guiding Opinion on Promoting Healthy Development of Internet Finance ('Guiding Opinion'). In the Guiding Opinion internet finance is categorised as: (1) internet payment; (2) network loans; (3) equity-based crowdfunding; (4) internet fund sales; (5) internet insurance; (6) internet trusts and internet consumer finance.

A. Internet Payment

Internet payment is supervised by the People's Bank of China, which requires that the internet payment operation of banking financial institutions and third-party payment institutions shall abide by the stipulations of existing laws and regulations. Third-party payment institutions should cooperate with other institutions and shall explicate each other's rights and obligations and establish a risk isolation system and customer rights' protection. In addition, service information shall be fully disclosed to clients and the nature and function of the payment intermediary service shall not be exaggerated.

B. Network Loans

Network loans are supervised by the China Banking Regulatory Commission which requires network loan platforms to provide intermediary services such as supplying interaction, matchmaking and credit assessment, etc. to investors and financiers. Individual network loan institutions shall explicitly state the nature of the service provided and directly provide information services to lending and borrowing parties and shall not supply value-added services and commit illegal fund-raising.

C. Crowdfunding

Crowdfunding is supervised by the China Securities Regulatory Commission. Crowdfunding financing operates through the equity-based crowdfunding intermediary institution platform (internet websites or other similar electronic media). The equity-based crowdfunding intermediary institution shall disclose the enterprise business model, operation management, financial affairs and uses of funds, etc., to investors. Further, qualified investors for driblet investment shall have the ability to bear the risk and shall fully understand the risk of equity-based crowdfunding involved.

D. Internet Fund Sales

Internet fund sales are supervised by the China Securities Regulatory Commission which requires fund managers to take precautions against mismatching in the course of resource allocation and liquidity risk. Internet fund sale institutions and their co-op institutions shall provide clients with comprehensive, authentic and accurate calculation formulae and key influencing factors of revenue.



The legal risks
and defects of
e-contracts cannot
be ignored.

E. Internet Insurance

Internet insurance is supervised by the China Insurance Regulatory Commission which requires professional internet insurance companies to persevere in providing insurance services for internet-based economic activity. Insurance companies shall establish a management system for their e-commerce subsidiaries and such subsidiaries shall also set up a necessary firewall.

F. Internet Trusts and Internet Consumer Finance

Internet trusts and internet consumer finance are supervised by the China Banking Regulatory Commission which requires the trust company that operates the business of sale of products and other trust activities through the Internet to abide by the supervision regulation of qualified investor, etc. The trust company shall prevent selling products to clients whose risk tolerance is lower than the estimated level.

3. Criminal Legal Risk Research for Internet Finance

A. Ambiguity of Institution Positioning and Existing Issue of Suspected Illegal Soliciting of Deposits from the Public

Existing laws and regulations have not given a definite position for the nature of internet financial institutions and internet enterprises. In particular, the activities of P2P network loan platforms have not been regulated. A slight shift of the patterns of operation of products on such platforms is very likely to 'overstep the boundary' and enter into the legal grey zone, and even to touch the legal base line. In the pattern of crowdfunding there is a suspicion of illegal fundraising if the crowdfunding platform, without a specific project within which to invest, gathers funds from public investors.

B. Fiction of Information and Creation of False Items – Suspicion of Fraudulent Fundraising

Based on the current laws and regulations, the key elements of the crime of fraudulent fundraising are 'with the intention of illegal possession' and 'by means of defraud'. At present, several P2P network loan platform operators release false interest loan information to raise funds and adopt Ponzi schemes to manage capital chains in the short term.

C. Unable to Track the Source of Funds and Risk of Money Laundering

It is hard to examine the legality of the source of funds under current internet finance circumstances. Since the P2P platform only provides intermediary services and does

not directly participate in lending activities, the platform will not take responsibility for money laundering. However, if the platform participates in money laundering during its services, it shall bear the corresponding criminal legal liability.

D. The Platform is Suspected of Being Involved in Illegal fundraising

On 25 March 2014, according to Article 4 of the Opinions of the Supreme People's Court, the Supreme People's Procurator and the Ministry of Public Security on Several Issues concerning the Application of Law in the Handling of Illegal fundraising Criminal Cases:

Whoever assists in any other's illegal absorption of funds from the general public, and charges agency fees, kickbacks, rebates, commissions, royalties or any other expense, which constitutes the joint offence of illegal fundraising, shall be subject to criminal liability in accordance with law.

This is a high-tension financial threshold that has been set for intermediary platforms and third-party payment institutions, namely that if fundraising parties are suspected of being involved in illegal fundraising such as the 'crime of illegal soliciting deposits from the public offense' and the 'crime of fundraising defraud', etc. the platforms are very likely to be deemed as 'accomplices' and bear criminal responsibility.

Standardisation and Development of China's Internet Finance by Learning from Foreign Experience

1. British Experience

A. Overview

On 6 March 2014, the United Kingdom Financial Conduct Authority ('FCA') issued its regulatory approach to crowdfunding over the Internet and the promotion of non-readily realisable securities by other media, PS14/4 ('Crowdfunding Supervision Rule'). The Crowdfunding Supervision Rule was officially implemented on 1 April 2014.

The Crowdfunding Supervision Rule divides the crowdfunding that needs to be included under the regulation into two categories: P2P debit and credit-based crowdfunding and crowdfunding based on investment. Different regulatory standards were also developed accordingly. Companies engaged in the

above two types of businesses need to obtain the authorisation of the FCA. Donation crowdfunding, prepaid or product categories are not within the scope of the regulatory authority and FCA authorisation is not required.

B. Establishment of Registration System

In the United Kingdom, whether the P2P network loan or equity-based crowdfunding is supervised by the FCA or not, investors' investment in the crowdfunded companies is not within the scope of the financial services compensation plan, which means that investors invest at their own risk. It is suggested China learn the management experience from the inter-bank market dealers association, the securities investment funds industry association for the inter-bank bonds market and private equity funds to establish a self-registration system for P2P and the crowdfunding industry so as to standardise the process and lay the foundation for industry management.

C. Establishment of a Perfect Information Disclosure Mechanism

It is suggested that reference be made to the FCA regulations so that an information disclosure system for P2P and crowdfunding institutions is established to ensure the authenticity and accuracy of the information and fresh information to be available for the public.

D. Introduction of the Concept of Qualified Investors

Due to the low success rate of business, qualified investors who meet certain conditions and are with certain levels of risk tolerance will be good participants to carry out P2P network finance.

2. Canadian Experience

The financial supervision in Canada is mainly implemented at the provincial level. In general, Canada has a more stringent regulatory approach to the Internet, which is involved in the grey area of the traditional financial laws and regulations. In May 2015, six provinces, including the province of BC, approved the new regulations for the development of internet banking. The regulations provide exemption for a venture company to raise public activities, allowing start-up companies each year to raise C\$500,000 from the public but in a single raise funds of no more than C\$250,000 and a personal single investment amount of no more than C\$1,500.

3. American Experience

A. Jumpstart Our Business Start-ups Act

The United States passed the Jumpstart Our Business Startups Act ('JOBS Act') to encourage funding of small businesses by easing certain requirements of American securities laws as discussed further below.

B. Opening of Equity-Based Crowdfunding

The JOBS Act specifies that crowdfunding platforms which meet the conditions below are able to conduct equity financing without registration on the Securities and Exchange Commission ('SEC'): (1) agents registering on the SEC act as intermediaries; (2) less than US\$1 million is raised through an internet crowdfunding platform per year; (3) investors who earn less than US\$100,000 are not allowed to invest more than US\$2,000 or more than 5 percent of their annual income in the last 12 months, and investors who earn more than US\$100,000 in the last 12 months, are able to invest 10 percent of their income, up to US\$100,000.

C. Protecting the Interests of Investors

To protect the interests of investors, the JOBS Act specifies four conditions: (1) a record has to be put on the the SEC and information about the stipulation has to be disclosed to investors and intermediaries; (2) promoting financing through advertising is prohibitive; (c) restrictions on fund raisers compensation for promoters has been set; (4) an annual report on the operation status and the financial situation of a company has to be submitted to the SEC and investors. Meanwhile, the JOBS Act constrains the financing platform in the aspects of business entry, self-regulation, capital transfer, risk disclosure, fraud prevention and consumer protection.

Suggestions for the Development of the Internet Finance Industry in China

1. Improvement of Supervision Quality and Efficiency

A. Three Important Relationships

Internet financial enterprises need to make greater efforts to handle the three relationships: (1) between management and innovation; (2) between precautions against risk and development of the industry; and (3) between separated supervision and mixed operations. These are discussed below.

B. Relationship Between Management and Innovation

At present, internet finance has a limited influence over



the finance market. Over-regulating will thus frustrate the development of the finance market. Hence, the supervision of the rising market should concentrate on the new situations and new problems arising in the course of business innovation.

C. Relationship Between Precautions Against Risk and Development of the Industry

It is common that companies pay more attention to business development rather than on precautions against risk. Companies expand business aggressively to pursue a short-term benefit, but they ignore compliance management.

D. Relationship Between Separated Supervision and Mixed Operations

The finance industry in China adopts the pattern of separated supervision, which played a significant role in the stable development of the financial industry. However, in terms of the operation of internet finance companies, the tendency of mixed operations has been increasingly obvious. Therefore, the duty to supervise and to regulate should be explicated and separated.

2. Improvement of Industry Supervision Measures

A. Explicating the Legal Status of Internet Finance Institutions and Supervision Duties

Explicating the nature and legal status of internet finance institutions will provide such institutions with a clear set of standards to follow. In addition, it is necessary to establish a supervision mechanism for the internet

finance market. Local government and other authorities should coordinate with each other to exercise their management and supervision function.

B. Construction Admittance and Withdrawal System

Designing pre-market access requirements such as the standard for registered capital, operation rules and internal controls through administrative permit management plays a significant role in restriction of a business entity's scope and the prevention of blind development of internet finance platforms. Meanwhile, establishing a well-functioning withdrawal system can realise the 'survival of the fittest' in the internet finance market.

C. Boost Internet Finance Statistical Monitoring and Supervision on Anti-Money Laundering and Social Credit System

It is a must for the development of internet finance to strengthen the monitoring of funds flow of internet finance platforms and to intensify the supervision over loan interest rates and anti-money laundering activities. Furthermore, striving to develop a personal credit evaluation service will resolve the asymmetry of information in the course of the development of internet finance.

D. Enhancing Education on Finance Consumer Protection and Penalising Wrongdoers

It is necessary to enhance education for internet finance market participants to arouse their awareness of financial and legal risks and risk prevention consciousness. Penalising wrongdoers strictly through prescribed by laws and regulations will strengthen the standardisation of internet finance.



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Investment to Vietnam 2016 – Why Now?

2016 will be an important year for Vietnam as to whether it will become a major recipient of capital migration from China or will let the opportunity go to other ASEAN countries. This article argues that Vietnam has been prepared for this opportunity—from legal reforms, infrastructure upgrades and the growth of the domestic market—and that this is now the time for bold investment into Vietnam.



Introduction

Vietnam is one of the largest recipients of official development assistance ('ODA') from Japan, as well as one of the most popular destinations for Japanese and Korean foreign investors. After the first wave of investments in 2011-2013,¹ Vietnam now faces competition from Indonesia, the Philippines and Myanmar after its democratic reforms. Meanwhile, China is reforming its Foreign Investment Law and streamlining the procedures for foreign investment, opening the Asia Infrastructure Investment Bank ('AIIB') and launching 'One Belt, One Road'.² Might foreign investors refocus on Vietnam again?

Almost one year ago, at the Spring Economic Forum at Nghe An, Vietnam in April 2015, the Japan External Trade Organization ('JETRO') issued a survey from over 400 Japanese investors in Vietnam, which revealed that their main concern is the lack of transparency within the law, followed by an underdeveloped support industry.³ Meanwhile, Bloomberg recently called Vietnam 'Asia's next economic tiger', supported by the potential of its low labour cost, young population and sizable local market.⁴ Vietnam is now the United States' largest trading partner in the ASEAN region. However, while Vietnam is already among the top eight trading partners of Korea, it is ranked as Japan's fourteenth largest, below Malaysia and Thailand.⁵

Following the XII Communist Party Congress and the step down of Prime Minister Nguyen Tan Dung, foreign investors may have concern that conservative leaders might affect foreign investment. The question now is what the Vietnamese government has done to address foreign investors' concerns and how such investors can overcome the difficulties in Vietnam to take advantage of the economic potential stated by Bloomberg. This article addresses the recent changes that will have positive impacts in Vietnam and provides a strong message that now is the time to accelerate investment to Vietnam.

Foreign Direct Investment—New Law on Investment and Law on Enterprise

In 2013 Vietnam amended its Constitution and now officially recognises that the private sector has an equal role in the economy as does the public sector. Many laws have been revised or restated to reflect this principle, most notably the Law on Investment ('LOI') and the Law on Enterprise ('LOE'). Both laws became effective from 1 July 2015, and decrees implementing those laws are underway.

As for the LOI, the most important change in the law is the definition of 'foreign investor' or what is deemed to be a foreign investor and the process of approving M&A transactions. In the past, companies that held directly or indirectly more than 49 percent of total capital by foreign investors might be deemed foreign investors. Now only enterprises held directly by foreign investors ('F0') with at least 51 percent of the total capital, or held by a company/ies ('F1') where foreign investors directly hold at least 51 percent of total capital are deemed to be foreign investors. In other words, foreign investors may establish a local holding company of various structures, to hold the majority of a Vietnamese operating company, whilst at the same time avoid triggering the conditions of investment that are applicable to foreign investors. This 'form over substance' approach of Vietnam is different from the 'substance over form' approach that China utilises to control offshore held companies and offshore M&A transactions.

In the past, foreign investors have had to obtain an Investment Certificate ('IC')—now referred to as an Investment Registration Certificate ('IRC')—as a closing condition for an M&A transaction. The new law stipulates that only registration at the company registrar (normally the local Department of Planning and Investment ('DPI'))

is required for foreign investors or those deemed to be foreign investors. The registrar will issue an approval for the M&A within 15 days from filing (even before signing a sale and purchase agreement (SPA)). This reform is to catch up with China's recent streamlining of investment procedures.

As for the application process, Vietnam will introduce a national portal, in which information on the IRC application, as well as the conditions under which it can be made online. Mega projects or projects using public land or natural resources will have to obtain principle approval ('PA') before applying for the IRC, meaning the application process can last from 30 to 90 days. However, other projects will be issued with the IC within 15 working days. There are 29 areas that belong to a 'restrictive list' of investment where internal approval from the relevant ministries should be sought, including distribution and logistics services, but those restrictions have been subject to criticism from investors and are expected to be relaxed before 1 July 2015. The IRC is now issued by a local industrial zones authority ('IZA') or the DPI instead of the People's Committee, significantly reducing the time frame of IC issuance. The DPI/IZA responsibilities are now only to review the documents and not due diligence of investors. The new Decree 118/2015/ND-CP implementing the LOE also highlighted two important principles to reduce red tape: (1) if the licensing authority has to request an opinion from a related authority, and the later failed to reply within two weeks, then it is deemed to not object to the investment; and (2) the licensing authority may only ask the applicant to supplement documents once. It is expected that with straightforward conditions in the application dossier, the DPI shall refrain from asking relevant authorities before issuing the IC.

Moreover, between Vietnam and Japan there is an Initiative for Investment, effective from 2003, in which Japanese investors may be granted national treatment for areas that are restricted for foreign investors.⁶ This initiative, if used, will open the Vietnamese market to many more Japanese investors.

As for the LOE, there have been reforms made to the corporate governance provisions. The simple majority required to pass a shareholders' meeting in a Joint Stock Company ('JSC') has been reduced to 51 percent from 65 percent and the simple majority in a members' council meeting of a Limited Liability Company ('LLC') can be stipulated in the Charter (that is, as low as 50.1 percent

if the Charter so decides). This allows Japanese investors more power to control a company when pursuing M&A or a joint venture with a local partner.

Having said this, foreign investors in certain special sectors, such as banking, finance, securities and insurance, would still be subject to restrictions and special legal provisions and the rule of *lex specialis derogat* (special laws prevail over general laws) still applies.

Portfolio Investment–State Owned Enterprises Equitisation Program

Along with promoting FDI, the government has pushed forward an equitisation program for State Owned Enterprises ('SOEs'), with the ambition of selling at least US\$3.5 billion of assets in over 180 SOEs in 2016. The attractions of SOEs are the land they control and, due to their status, their market value has not had the opportunity to be fully realised. Many SOEs are now on the list, including Vietnam Airlines, Vinatex (textile corporation) and the Saigon Beer Company. In the past, the strategic partners must acquire shares at a discount through the initial public offering ('IPO'). Now strategic partners may negotiate directly with the SOEs and their owners to an agreed price. Moreover, newly equitised SOEs will be listed immediately after an IPO event, instantly providing further market-led value appreciation opportunities for foreign investors. It is also widely expected that the 49 percent ownership capacity for foreign investors with respect to listed and public companies will be relaxed. The remaining issue will be to obtain transparent information from the Ministry of Finance and the State Capital Investment Corporation ('SCIC') to participate in this process.⁷ The equitisation process is an alternative approach to Vietnamese SOE's compared to those of China, which have mainly focused on restructuring in the SOE management.

Most interesting of all is the equitisation process in Vietnam. This time over 200 major SOEs will be privatised, including very profitable companies such as Vinamilk, or national flagship companies such as Vietnam Airlines, VinaSteel, or PetroVietnam. The government has just recently approved Vinamilk to be fully privatised (so far it is owned 20 percent by Fraser & Neaves, an investment arm of ThaiBev) and for All Nippon Airways to own 20 percent of Vietnam Airlines. Since 2011, 15 percent of the shares of Vietcombank have been sold to Mizuho, and BTMU bought 20 percent of the shares of Vietinbank. This trend shows that privatisation will continue.

Private Public Partnership

With a total public debt of over 60 percent of GDP, Vietnam is now considering alternative funding sources for infrastructure works in the form of private public partnership ('PPP'). To put it simply, this means private investors will develop an infrastructure project and the funds shall be paid by the public later, either as money, land or by concession (for example, toll roads or power purchases). The most common forms of PPP are build-operate-transfer ('BOT'), build-transfer ('BT'), build-transfer-operate ('BTO'), build-transfer-lease ('BTL'), build-lease-transfer ('BLT') and operate-manage ('OM'). The new PPP decree now allows for PPP investment not only in technical infrastructure, but also social infrastructure such as schools, hospitals, stadiums, as well as in industry and agriculture.

In the past, Japanese construction companies have participated in 'Japanese PPP', that is, infrastructure works funded through Japanese Official Development Assistance ('ODA'), but now with the new PPP decree, Japanese investors may consider direct PPP opportunities. The investors may propose a PPP potential process for tender. If the tender is won (or exempted), the IRC for the project will be issued, and the PPP contract will be signed. This might discourage foreigners to prepare a proposal or to submit a tender bond of 1 to 3 percent of the contract bid price. The key advantage of a PPP contract is that foreign investors may receive payment from the public or will receive a concession for stable or monopoly cashflow. But the lack of government guarantee may be seen as an issue, where ODA support from the Japan International Cooperation Agency ('JICA') to the PPP program would be necessary.

Decree 15/2015/ND-CP on PPP investments addressed those concerns. Nowadays the scope of PPP is enlarged from technical infrastructure to also include social infrastructure (hospitals, schools, parks, sports or entertainment centres) as well as industrial projects having an important role. In order to be enlisted in a PPP project, either the proposed project must be planned by the government or proposed by the investors and approved by the government. The investors must have their feasibility study approved, win a tender (if there is more than one investor interested in the project) and be awarded the project. The investor and the government—usually a project management unit ('PMU')—then negotiate the terms and conditions of the PPP contract, initiate it before an IRC is issued and the PPP company



**Vietnam joins
the ASEAN Economic
Community ('AEC')
this year.**

is established. The PPP contract is then signed between the PPP company and the investor. The success of many roads PPP, two power PPPs and a number of PPP projects under negotiation show that this may be a solution to develop infrastructure in the future to replace ODA. The challenge of government guarantee still exists in Vietnam, as it does in other countries. The solution for this challenge, is to follow build operate transfer ('BOT') in road or 'pay as you go' projects and increase the creditworthiness of the buyer of the services (such as the water distribution company or Electricity of Vietnam). When government guarantee is unavoidable, it is necessary to negotiate with ODA fund providers, such as the JICA or JBIC, to provide a loan to the government to back up the guarantee. This will also reassure the government before it can issue a guarantee. It takes time to transfer from ODA to PPP and the government would understand that a hybrid approach should be necessary in the interim period.

ASEAN Economic Community and Trans-Pacific Partnership Agreement

Vietnam joins the ASEAN Economic Community ('AEC') this year, under which 97 percent of the total lines of tariffs will be removed. Vietnam still reserves control over some aspects, mainly steel, sugar and automobiles, but ultimately by 2018 the tariffs will be reduced to zero. While Vietnam has clear competitive advantages in electronics, textiles and footwear, as well as agriculture and aqua products, the AEC creates a major challenge to the Vietnamese automobile industries. Vietnam has

called foreign investors, particularly Japanese investors, to invest in Vietnam as a regional hub to serve a market of 600 million people, however Japanese investors have raised concerns on the lack of a developed support industry. In response, the law amending the Tax Law has been introduced, where alternatively from in China, new incentives in Vietnam will be available. Under this new law there will be concession rates of 10 percent for 15 years (or 30 years for special cases, please see below), a four-year tax holiday, and a nine-year tax reduction (50 percent) for:

- Prioritised new projects on support industries such as high-tech projects, textiles and garments, leather and footwear, electronics, IT, automobile assembly and mechanical manufacturing currently unavailable domestically up to EU standards.
- Mega Projects: new investment manufacturing projects (except minerals or SST manufacturing products) having investment capital over approximately US\$550 million, producing products technology qualified (under hi-tech law or science and technology law) in which the disbursement plan is less than five years for the date of the Investment Certificate ('IC').

The time for enjoying tax incentives (a concession rate of 10 percent, not including a tax holiday and tax reduction) for these projects—among other projects listed in Article 13.1 of the Corporation Income Tax Law ('CIT Law')—is 15 years, with an exception of up to 30 years for specially encouraged high-tech projects or Mega Projects that have an investment capital of approximately US\$1 billion, or that employ at least 6000 workers, or technical infrastructure projects. The extension has been granted by the Prime Minister.

In the past, marketing and promotional expenses have been subject to a maximum cap over the total expenses, in order for those expenses to be tax deductible. Law 71 abolishes this cap, which will create a large impact on the future recognition of expenses and tax planning. All reforms are as a result of pressure from the AEC and liberalising the local market, stating that laws have to be reformed to encourage investors to stay in Vietnam.

Vietnam's Economic Prospectus and After the Twelfth Party Congress

There has been a concern recently about the Twelfth Communist Party and as to whether Vietnam will keep

on the reform track after PM Nguyen Tan Dung, a reformist, stepped down.⁸ The answer is positive. Vietnam just recently after the Congress approved 100 percent privatisation of Vinamilk and the General Secretary appointed two reform leaders to become the head of the Party in Hanoi and Ho Chi Minh City. This shows a strong message that economic reform will go hand in hand with anti-corruption campaigns. The policy difference within the Party, perhaps, is over the national security concern in the delicate relationship regarding the East Sea dispute. However, everybody understands that a peaceful East Sea is crucial to the common wealth of the whole of East Asia. The government of Vietnam also wants peace to protect and promote foreign investment. Therefore, a reduction of corruption would be good news for peace and prosperity.

There was also some concern about a North versus South mentality in Vietnam, for example, this is the first time when the head of the Party of Ho Chi Minh City was from the North. This concern perhaps stemmed from a colonial mentality when the French had '*divide et impere*' (divided and ruled) Vietnam into the South, the Central and the North with different governments and different stereotypes for each region. In fact, the rotation of leaders (North to South and vice versa) has been a tradition of Vietnam for hundreds of years to prevent secularism and cronyism. In the end, people are judged by their capacity rather than by where they come from. For that purpose, the Twelfth Congress is an important step forward toward the stability of Vietnam.

The GDP of Vietnam has now reached almost US\$200 billion, exports were US\$162 billion. Among these over US\$116 billion was from foreign direct investment ('FDI'). Although the Twelfth Congress continues to stress the importance of SOEs, the fact is that FDI stands at 70 percent of Vietnam's total exports.⁹ That has meant that all of Vietnam's policies have promoted FDI and the whole economy of Vietnam is based on FDI. When Vietnam becomes a member of the EU-ASEAN FTA, Trans Pacific Partnership Agreement ('TPP') and AEC, it is certain that the country will continue to grow as an export-oriented country and it will promote foreign investment.

Vietnam is an important destination for Japanese, Korean and Taiwanese investors, not just because of competitive labour costs and a sizable, young domestic market, but also encouraged by recent tax incentives as well as the

reduction of bureaucratic red tape and opportunities in the privatisation/equitisation program. It is important for reasons of economic security. With China declaring the Asia Infrastructure Investment Bank ('AIIB') and the One Belt, One Road program, the US, Japan, Korea and Taiwan might also need to create its own economic belt with countries that are along its strategic lines of transportation. Vietnam is on the shores of the East Sea (or South China Sea) and its prosperity is important to the stability of ASEAN and East Asia. Its location as the centre of East Asia, going north to Korea and China and south to Thailand, Malaysia, Singapore, Indonesia and further afield to Australia, would provide foreign investors with an important network of strategic economic partnerships in one of the most dynamic regions in the world.

Notes:

- 1 <http://www.vietnambreakingnews.com/2013/01/japanese-companies-optimistic-about-vietnams-economy/>.
- 2 http://www.cliffordchance.com/briefings/2015/02/china_proposes_newforeigninvestmentlaw.html.
- 3 <http://www.vietmaz.com/2015/04/experts-vietnam-less-attractive-to-foreign-investors/>.
- 4 <http://www.bloomberg.com/news/articles/2015-03-22/asia-s-about-to-spawn-a-new-tiger-economy-good-morning-vietnam>.
- 5 <https://atlas.media.mit.edu/en/profile/country/jpn/>.
- 6 This national treatment principle does not apply to the distribution sector.
- 7 <http://www.bloomberg.com/news/articles/2014-11-13/vietnam-airlines-ipo-fails-to-lure-foreigners-after-6-year-wait>.
- 8 See <http://asia.nikkei.com/magazine/20160204-THE-MINUS-TOUCH/Politics-Economy/Phuong-Nguyen-Vietnam-s-surprising-party-congress-delivers-unsurprising-results>.
- 9 See <http://english.vietnamnet.vn/fms/business/150455/fdi-enterprises--contribution-to-vn-exports-much-higher-than-domestic-firms--is-it-sad-.html>.



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IPBA New Members

December 2015 – February 2016

We are pleased to introduce our new IPBA members who joined our association from December 2015 – February 2016. Please welcome them to our organisation and kindly introduce yourself at the next IPBA conference.

Australia , Benjamin Smith <i>Minter Ellison</i>	India , Pallavi Shroff <i>Shardul Amarchand Mangaldas & Co.</i>
Cambodia , Martin Desautels <i>DFDL Mekong (Cambodia) Co., Ltd.</i>	India , Swati Sinha <i>Fox Mandal</i>
Cambodia , Yuko Nagata <i>TMI Associates</i>	Indonesia , Hanim Hamzah <i>Roosdiono & Partners</i>
Canada , Millie Chan <i>Borden Ladner Gervais LLP</i>	Italy , Naoko Konishi <i>Pavia e Ansaldo Law Firm</i>
Canada , Casey Halladay <i>McMillan LLP</i>	Italy , Claudio Perrella <i>Studio Legale LS Lexjus Sinacta</i>
China , Kai (Raymond) Wu <i>GFE Law Office</i>	Japan , Yusaku Akasaki <i>Chuo Sogo Law Office, P.C.</i>
Colombia , Tivisay Mejia Valle	Japan , Aoi Inoue <i>Anderson Mori & Tomotsune</i>
Denmark , Ronnie Kandler <i>Kromann Reumert</i>	Japan , Takashi Isono <i>Kitahama Partners</i>
Finland , Satu Kouvalainen <i>Law Office Lakituki Ltd</i>	Japan , Koichi Kida <i>Oh-Ebashi LPC & Partners</i>
France , Flore Poloni <i>August & Debouzy</i>	Japan , Jennifer Jill Lim <i>Mori Hamada & Matsumoto</i>
Hong Kong , Tatiana Polevshchikova <i>ICC International Court of Arbitration</i>	Japan , Yukio Maruyama <i>Matsuda & Partners</i>
Hong Kong , Robert Jan van Lie Peters <i>Loyens & Loeff</i>	Japan , Ken Masuyama <i>Yodoyabashi & Yamagami</i>
Hong Kong , Ing Loong Yang <i>Latham & Watkins</i>	Japan , Koji Masuda <i>Miyake & Yamazaki</i>
India , Sampath Kumar <i>Trilegal</i>	Japan , Dai Mizui <i>Yodoyabashi & Yamagami</i>
India , Sangeeta Mandal <i>Fox Mandal</i>	Japan , Hiroaki Mizuno <i>Toyota Tsusho</i>
India , Shimantika Mandal <i>Fox Mandal</i>	Japan , Yuko Nitta <i>Utsunomiya Chuo Attorneys at Law</i>
India , Mustafa Motiwala <i>Clasis Law</i>	Japan , Kohei Murakawa <i>Squire Patton Boggs</i>
India , Vikas Saraswat <i>Saraswat & Co., Advocates & IP Attorneys</i>	Japan , Megumi Otsubo <i>Meilin International Law Firm</i>

Japan , Shinya Takizawa <i>Anderson Mori & Tomotsune</i>	Singapore , Shuling Joycelyn Lin <i>Shook Lin & Bok LLP</i>
Japan , Yasutomo Wakiyama <i>Higashimachi LPC</i>	Singapore , Goh Seow Hui <i>Bird & Bird ATMD</i>
Japan , Sosei Yamasaki <i>Higuchi & Partners, LPC</i>	Singapore , Lionel Tan <i>Rajah & Tann Singapore LLP</i>
Korea , John K. Min <i>Lee International IP & Law Group</i>	Singapore , Tadashi Yamamoto <i>Nagashima Ohno & Tsunematsu</i>
Malaysia , Brijnandan Singh Bhar <i>Brijnandan Singh Bhar & Co</i>	Singapore , Rebecca Yeo <i>Tan Lee & Partners</i>
Malaysia , Karen Kaur <i>Shook Lin & Bok</i>	Sri Lanka , Shridhari Sathies <i>John Wilson Partners</i>
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Mexico , Jorge Vega <i>Basham, Ringe y Correa, S.C.</i>	Thailand , Monchai Vachirayonstien <i>Dherakupt International Law Office Ltd.</i>
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Netherlands , Erwin Rademakers <i>AKD</i>	United Kingdom , Anthony Abrahams <i>CI Arb</i>
New Zealand , Stuart Hutchinson <i>Simpson Grierson</i>	United Kingdom , Jonathan Ashley-Norman <i>Chambers of Alexander Cameron QC</i>
New Zealand , Dermot Michael Ross <i>Dermot Ross & Co.</i>	United Kingdom , Neil Swift <i>Peters & Peters</i>
Pakistan , Umair Vadria <i>Hussain & Haider Barristers-At-Law & Corporate Legal Consultants</i>	USA , DaShawn Hayes <i>The Hayes Law Firm, PLC</i>
Peru , Guilherme Auler <i>Forsyth Abogados</i>	Vietnam , Vu Anh Kieu <i>Le Nguyen Law Office</i>
Philippines , Sandhya Marie Castro <i>Romulo Mabanta Buenaventura Sayoc & Delos Angeles</i>	Vietnam , Youngdae Kim <i>Bross & Partners</i>
Philippines , Anna Cristina Collantes <i>Romulo Law Office</i>	Vietnam , Michael K. Lee <i>Tilleke & Gibbins Consultants Limited in Ho Chi Minh City</i>
Portugal , William Smithson <i>SRS Advogados</i>	Vietnam , Vinh Quoc Nguyen <i>Tilleke & Gibbins Consultants Limited in Ho Chi Minh City</i>
Russia , Pavel Karpunin <i>Capital Legal Services</i>	Vietnam , Thang Nguyen Tat <i>Aliat Legal</i>
Singapore , Steven Dewhurst <i>DAC Beachcroft LLP</i>	Vietnam , Le Xuan Thao <i>T&T Invenmark Co., Ltd.</i>
Singapore , Camilla Godman <i>Chartered Institute of Arbitrators</i>	Vietnam , Tuan Giang Tran <i>Generali Vietnam Life Insurance Limited Liability Company</i>
Singapore , Kevin Kwek <i>Kennedys Legal Solutions</i>	

Discover Some of Our New Officers and Council Members



Sandra McCandless

IPBA Leadership Position:
Chair, Employment and Immigration
Committee

What was your motivation to become a lawyer?

When I was in high school, it was very unusual for a woman to become an attorney. I am a member of the first generation of women who went to law school in large numbers. From a young age, I intended to be 'different': to leave my local community in Boston, Massachusetts, to move to California, to pass the California bar, to become a lawyer, and ultimately to have the impact which our profession allows us to make. As I had expected, being a lawyer has provided me with an exciting career, a window to the world, an ability to travel, and the opportunity to learn about a wide variety of other cultures.

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

Being a lawyer has enabled me to have many

experiences which would not have been available to me in another career. Every representation is memorable in its own way. Through my work, I have travelled extensively in the United States and throughout the world. One of the many aspects of being a lawyer that I enjoy is the opportunity to learn about other cultures while representing global companies.

What are your interests and/or hobbies?

Spending time with my granddaughter, travel, theatre, reading.

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

I spent a three-month sabbatical from my firm as a crew member on the SS Norway cruise ship. I served as Assistant Stage Manager in the theatre troupe and performed all of the functions expected of a staff member on a cruise ship, from greeting arriving passengers to facilitating lifeboat drills.

Do you have any special messages for IPBA members?

I appreciate the friendship and hospitality extended to us by the representatives of the host countries in which our meetings are held.



Shawn Neylan

IPBA Leadership Position:
Co-Chair, Competition Law Committee

What was your motivation to become a lawyer?

Lawyering ran in my family. My father and grandfather were both lawyers. My great-grandfather on my mother's side was a Newfoundland lawyer and judge who also

wrote the *History of Newfoundland* which is still well regarded. He held court in Newfoundland outports once a year, walking up the coast and then catching a passing ship back to St John's. Although I obtained a B.Sc. in environmental science, I could only resist my father's encouragement to study law for so long. He was right that it is a great profession.

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

One of the most interesting cases I was involved in as a young litigator was representing several hundred fishermen who had allegedly blockaded an Alaska state

ferry at dock in the Canadian port of Prince Rupert in a protest over a fishing dispute. This was a high profile case that got a lot of press where the story line was that my fishermen clients had in fact blockaded the ferry. I found some old English Admiralty Court cases in the library (back then we had books) that stood for the proposition that a ship leaving berth had the right of way only when it sent the appropriate signal to vessels in its path. Our position was that the Alaska ferry captain had never sounded his horn, called out on the radio or even stepped out on his bow to ask the fishing boats that were in front of his bow to give way. There was thus clearly no blockade as this could only occur if he had asked for and been refused passage. This case settled before I was able to argue this point before a judge.

What are your interests and/or hobbies?

Alpine skiing is my main sport. It's always relaxing to get into the mountains with my wife and friends and it also gives me a good reason to keep up with the training

year round. I also read history; currently my reading list is focused on the French Revolution and Republican Rome.

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

I spent a summer during my university years staking and mining a placer gold claim in the Cariboo's in British Columbia. My partners and I found very little gold but had some memorable adventures including actually or very nearly getting struck by lightning (we were working in the river and the lightning bolt may have hit a heavy metal pry bar one of us was holding), having a bear run through our camp and visiting the legendary Jack of Clubs beer parlour in the Wells Hotel.

Do you have any special messages for IPBA members?

I would suggest that members reach out to the leaders of committees that are of interest. Committee chairs are always glad to hear from people with new ideas and energy.



Hiroe Toyoshima
IPBA Leadership Position:
At-Large Council Member for Osaka

What was your motivation to become a lawyer?

Unfortunately it is not a funny story. It was an interest and curiosity I had about studying laws and cases. I didn't have any idea to become a lawyer and intended instead to become a public officer. But the more I studied laws and cases at university, the more I loved and enjoyed studying them. After long consideration, I eventually decided to try the bar exam because I was interested in the bar exam itself and in becoming a lawyer who can deal with real laws and cases as a career. I had an extremely difficult time while studying for the bar exam, but I am very happy to have become a lawyer.

What are your interests and/or hobbies?

I love going to art museums. Especially I love impressionistic paintings and modern scene paintings.

Michel Delacroix is one of my most favourite modern painters. I sometimes enjoy creating an illustration by myself. I am not a good singer, but I love operatic music. Shinobu Sato and Maki Mori are my most favourite opera singers. Libraries and postal offices are lovely places for me. I have a relaxing time there. The court is also my favourite place. I try to go to local courts while travelling in the world.

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

I am shy outside of my own territory. The fact is that I am a talkative person in Japanese and a singing lover at home, and I love a joke in Osaka and feel very happy if I can make someone laugh.

Do you have any special messages for IPBA members?

I have a dream today. I have a dream that one day during a council meeting I will be able to make good suggestions or comments on every topic. I have a dream that one day in a committee session in a conference, I will be able to be a good contributor who makes informative presentations or asks influential questions to speakers... Please wait and see me in the long term. Let's be ambitious!

Members' Note

Stephan Wilske, Germany

Stephan Wilske presented a paper entitled 'The Essential Qualities of an Arbitrator – What Appointing Parties Must, Should and May Like to Consider' at the Croatian

Arbitration Days (2-4 December 2015 in Zagreb) which will be published in the next issue of the Croatian Arbitration Yearbook.

Helen Tung, Australia

Adopting the values of the United Nations' campaign UNITE, UNICEF and UNWOMEN, Violence Free Families ('VFF') provides innovative behavioural programs to end violence.

Inspired by Music For Life International and Alan Rushbridger, Helen aims to play 20 minutes a day for the next three months, raising \$8000.

Supporting VVF's work, Helen is raising funds by competing in the Tenth Yokohama International Music Competition as an amateur pianist in August 2016.

Support Helen to eliminate violence through music at <https://chuffed.org/project/eliminating-violence-through-music>.

Publications Committee Guidelines for Publication of Articles in the IPBA Journal

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

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

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



An Invitation to Join the Inter-Pacific Bar Association

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

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

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

IPBA Activities

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

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

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

APEC

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

Membership

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

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

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

Membership renewals will be accepted until 31 March.

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

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

Corporate Associate

Any corporation may become a Corporate Associate of the IPBA by submitting an application form accompanied by payment of the annual subscription of (¥50,000) for the current year.

The name of the Corporate Associate shall be listed in the membership directory.

A Corporate Associate may designate one employee ('Associate Member'), who may take part in any Annual Conference, committee or other programmes with the same rights and privileges as a Member, except that the Associate Member has no voting rights at Annual or Special Meetings, and may not assume the position of Council Member or Chairperson of a Committee.

A Corporate Associate may have any number of its employees attend any activities of the Association at the member rates.

- Annual Dues for Corporate Associates ¥50,000

Payment of Dues

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

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

IPBA Secretariat

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

See overleaf for membership
registration form





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LOCAL ROOTS GLOBAL IMPACT

"The only local arbitration commission which meets or surpasses global standards" - The Economist Intelligence Unit
"The runner up for the up-and-coming regional arbitral institution of the year (2014)" - Global Arbitration Review



BAC/BIAC Profile

The Beijing Arbitration Commission (BAC), also known as the Beijing International Arbitration Center (BIAC), was established in 1995 as a non-governmental arbitration institution, and became the first self-funded Chinese arbitration institution in 1999. It provides institutional support as an independent and neutral venue for the conduct of domestic and international arbitration and ADR proceedings. It is operated by a Secretariat headed by its Secretary General under the supervision of its Committee. The BAC/BIAC Arbitration Rules 2015 were unveiled on December 4, 2014, and came into force on April 1, 2015. The 2015 rules widely adopt UNCITRAL Arbitration Rules and further accept up-to-date international practice.

BIAC

Beijing Arbitration Commission
Beijing International Arbitration Center

Tel: +86 10 6566 9856

Fax: +86 10 6566 8078

Email: bjac@bjac.org.cn

Address: 16/F, China Merchants Tower,
No. 118 Jian Guo Road,
Chaoyang District, Beijing 100022, China

BAC/BIAC Growth

- From 7 cases filings in 1995 to over 27,000 case in total by 2015
- 1500+ new filings on average per year since 2005
- 600+ international cases in total
- Parties from various jurisdictions including USA, UK, Germany, Australia, Japan, South Korea, Singapore, Hong Kong and Taiwan, etc.
- The sum in dispute of around 17.6 billion RMB (approx. 2.68 billion USD or 2.46 billion EUR) per year on average since 2011 with a highest claim amount of 10 billion RMB (Approx. 1.52 billion USD or 1.4 billion EUR) in 2015



Hearing Room

Recommended BAC/BIAC Model Clause:

All disputes arising from or in connection with this contract shall be submitted to Beijing Arbitration Commission / Beijing International Arbitration Center for arbitration in accordance with its rules of arbitration in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.



IPBA SECRETARIAT

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IPBA MEMBERSHIP REGISTRATION FORM

MEMBERSHIP CATEGORY AND ANNUAL DUES:

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

Name: _____ Last Name _____ First Name / Middle Name _____

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

Firm Name: _____

Jurisdiction: _____

Correspondence Address: _____

Telephone: _____ Facsimile: _____

Email: _____

CHOICE OF COMMITTEES (PLEASE CHOOSE UP TO THREE):

- | | |
|---|---|
| <input type="checkbox"/> Anti-Corruption and the Rule of Law (Ad Hoc) | <input type="checkbox"/> Insurance |
| <input type="checkbox"/> APEC | <input type="checkbox"/> Intellectual Property |
| <input type="checkbox"/> Aviation Law | <input type="checkbox"/> International Construction Projects |
| <input type="checkbox"/> Banking, Finance and Securities | <input type="checkbox"/> International Trade |
| <input type="checkbox"/> Competition Law | <input type="checkbox"/> Legal Development and Training |
| <input type="checkbox"/> Corporate Counsel | <input type="checkbox"/> Legal Practice |
| <input type="checkbox"/> Cross-Border Investment | <input type="checkbox"/> Maritime Law |
| <input type="checkbox"/> Dispute Resolution and Arbitration | <input type="checkbox"/> Scholarship |
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| <input type="checkbox"/> Insolvency | |

I AGREE TO SHOWING MY CONTACT INFORMATION TO INTERESTED PARTIES THROUGH THE APEC WEB SITE. YES NO
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A/C No. 1018885 (ordinary account) Account Name: Inter-Pacific Bar Association (IPBA)
Bank Address: Nihon Seimei Shinbashi Bldg 6F, 1-18-16 Shinbashi, Minato-ku, Tokyo 105-0004, Japan

Signature: _____ Date: _____

PLEASE RETURN THIS FORM TO:

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