the global voice of the legal profession

Asia Pacific Regional Forum News

Newsletter of the International Bar Association Legal Practice Division

VOL 21 NO 1 APRIL 2014

TOKYO 19–24 OCTOBER 2014

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

the global voice of the legal profession®




With a population of more than 13 million, the capital of Japan and the seat of Japanese government is one of the largest metropolises in the world. A city of enormous creative and entrepreneurial energy that enjoys a long history of prosperity, Tokyo is often referred to as a 'command centre' for the global economy, along with New York and London. Not only a key business hub, Tokyo also offers an almost unlimited range of local and international culture, entertainment, dining and shopping to its visitors, making it an ideal destination for the International Bar Association's 2014 Annual Conference.

WHAT WILL TOKYO 2014 OFFER?

- The largest gathering of the international legal community in the world – a meeting place of more than 4,500 lawyers and legal professionals from around the world
- More than 180 working sessions covering all areas of practice relevant to international legal practitioners
- The opportunity to generate new business with the leading firms in the world's key cities
- A registration fee which entitles you to attend as many working sessions throughout the week as you wish
- Up to 25 hours of continuing legal education and continuing professional development
- A variety of social functions providing ample opportunity to network and see the city's key sights, and an exclusive excursion and tours programme

REGISTER BEFORE
1 AUGUST 2014 TO RECEIVE
EARLY REGISTRATION DISCOUNTS

To register, please contact: International Bar Association
4th Floor, 10 St Bride Street, London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090 Fax: +44 (0)20 7842 0091 ibaevents@int-bar.org

WWW.IBANET.ORG/CONFERENCES/TOKYO2014.ASPX

OFFICIAL CORPORATE SUPPORTERS

LexisNexis®

KPMG

IN THIS ISSUE

Contributions to this newsletter are always welcome and should be sent to Caroline Berube, cberube@hjmasialaw.com and Kwon-Hoe Kim, kkim@yoonyang.com.

Terms and Conditions for submission of articles

1. Articles for inclusion in the newsletter should be sent to the Newsletter Editors.
2. The article must be the original work of the author, must not have been previously published, and must not currently be under consideration by another journal. If it contains material which is someone else's copyright, the unrestricted permission of the copyright owner must be obtained and evidence of this submitted with the article and the material should be clearly identified and acknowledged within the text. The article shall not, to the best of the author's knowledge, contain anything which is libellous, illegal, or infringes anyone's copyright or other rights.
3. Copyright shall be assigned to the IBA and the IBA will have the exclusive right to first publication, both to reproduce and/or distribute an article (including the abstract) ourselves throughout the world in printed, electronic or any other medium, and to authorise others (including Reproduction Rights Organisations such as the Copyright Licensing Agency and the Copyright Clearance Center) to do the same. Following first publication, such publishing rights shall be non-exclusive, except that publication in another journal will require permission from and acknowledgment of the IBA. Such permission may be obtained from the Director of Content at editor@int-bar.org.
4. The rights of the author will be respected, the name of the author will always be clearly associated with the article and, except for necessary editorial changes, no substantial alteration to the article will be made without consulting the author.

International Bar Association
4th Floor, 10 St Bride Street
London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
www.ibanet.org

From the Co-Chairs

Lawrence Teh
Rodyk & Davidson, Singapore
lawrence.teh@rodyk.com

Harumichi Uchida
Mori Hamada & Matsumoto, Tokyo
harumichi.uchida@mhmjapan.com

Greetings from the officers of the IBA Asia Pacific Regional Forum (APF). We hope your year has begun well.

It has been said that the Asia Pacific region has been performing above the global economy in the last 20 years, with foreign direct investment standing currently at around US$400bn. In the next ten years, global GDP will increase by more than 70 per cent and exceed US$100tn, during which time Asian Pacific economies will triple from US$10tn to US$34tn. Two of the world's five largest economies are currently from the Asia Pacific. By 2030 the Asia Pacific will have three economies in this top five. The IBA APF was started in 1991, with Klaus Böhlhoff as a Chair and has since grown impressively, now having 2,000 members in 79 countries. Those of you who were members last year would have received the IBA Asia Pacific Regional Forum Member Survey, asking you what you thought of the APF and what you believed the APF can and should do for its members. The broad conclusions drawn from the survey are:

- Of the 163 respondents, 13.5 per cent reside outside the Asia Pacific region. There is a significant interest from Australian and Indian lawyers, with the largest number of responses – 22.7 per cent and 11 per cent, respectively.
- Nearly 50 per cent of total responses came from firms with less than 50 lawyers.
- About 22.4 per cent of respondents belong to the American Bar Association. Some 35 per cent belong only to the IBA, a similar number to those who also belong to the Inter-Pacific Bar Association or LAWASIA (33.8 per cent).
- 77 per cent would like to see more joint initiatives with other associations and over 90 per cent would like to see more joint conferences with business and industry.
- A quarter of respondents did not feel that the APF had adequate representation in the IBA.
- About 71 per cent of respondents would like to be more involved in APF activities and the newsletter.

We will work on these conclusions and towards the objective that the APF will be truly reflective, not only of the lawyers who live and work in the Asia Pacific region, but also of those who may live and work outside but have frequent matters in the region.

This year is a big year for the APF for the principal reason that the IBA Annual Conference will take place in Tokyo from 19–24 October. Upwards of 6,000 lawyers are expected to attend the conference and the conference looks set to be another record breaking annual conference for the IBA. We are also especially pleased to note that the keynote speaker at the opening ceremony of the Tokyo conference will, in principle, be the Prime Minister of Japan, Mr Shinzō Abe. At the conference, the APF will have a showcase session entitled 'The World Invests in Asia and Asia Invests in the world – Forum and Networking,' which is supported by all the regional fora of the IBA – the African Regional Forum, the Arab Regional Forum, the European Regional Forum, the Latin American Regional Forum and the North American Regional Forum. For the first time, the APF will organise it in a roundtable format to encourage interaction between members of the audience. The session is designed so that investment between Asia and each region of the world is discussion simultaneously in different groups within the session room. An audience member who arrives at the session can choose the bilateral investment group in which to participate or move from one bilateral investment group to another. The object of the session is for members of the audience to introduce themselves and their practice profile to other members of the audience and to learn about the practice profiles of others in the context of bilateral investment between Asia and a particular region in the world. If you are keen to feature your practice, learn about the practice profiles of others and thereby create a wide network of contact, we encourage you to attend and participate actively in the session.

In addition to the showcase session, the APF is also co-sponsoring an impressive number of other joint sessions. Together with the showcase session, the list of sessions can be found on page 7 of this newsletter.

All of these sessions are designed to give

you, the APF member, the opportunity and power to interact with other lawyers on a global scale and to find opportunities in the process and we encourage you to attend and participate actively these other sessions as well. As you can see, there are sessions for the transactional lawyer and also sessions for the dispute resolution lawyer, in particular the sessions organised by the APF and the Arbitration Committee under its working group, the Asia Pacific Arbitration Group. The great city of Tokyo also offers the opportunity to engage with the Japanese business community as well as the opportunity to take a break from the hustle and bustle of work to visit Tokyo and other parts of Japan for a vacation. In the coming months, the APF will be updating you in subsequent newsletters on the sessions that we have planned for you and also with information on Tokyo and beyond.

In the course of this year, the APF will also be supporting the following conferences in the region, which you might like to attend:

- IBA Law Firm Management – First Asia Conference, 20 June 2014, Singapore
- IBA APAG Training Day – Best Practices in International Arbitration, 12 September 2014, Tokyo

Finally, later this year, the APF will announce the dates and venue of its next regional conference in the spring of 2015. You can see that there are many opportunities to involve yourself in APF activities. If you would like get involved, please feel free to drop us a line letting us know how you feel you can contribute.

We wish you a happy, healthy and prosperous year ahead.

IBA ASIA PACIFIC REGIONAL FORUM SCHOLARSHIP

The Asia Pacific Regional Forum Scholarship offers the chance for young lawyers (aged under 35 at the time of the conference) the chance to attend the IBA Annual Conference. To apply, participants should complete the application form and submit an essay of at least 2,500 words on the following:

'Discuss what you believe are the 2–3 most important legal, regulatory or policy developments during the past year affecting international investment or international arbitration or cross border litigation in any country in the Asia-Pacific region generally.'

Scholarship winners will be awarded:

- Waived registration fee to the Annual Conference.
- A contribution towards travel costs to attend the Annual Conference.
- A contribution towards accommodation costs while attending the Annual Conference.
- Two year's free membership of the International Bar Association, including membership of one committee under the awarding Legal Practice Division (LPD) and one committee under the Section on Public and Professional Interest Division (SPPI).
- Waiver of the next year's Annual Conference registration fee, or, waiver of the registration fee to the next specialist conference of a chosen committee.

Terms and conditions apply; further information and full application details can be found at:
www.ibanet.org/Committees/Divisions/Tokyo15.aspx

Forum Officers

Co-Chairs

Lawrence Teh
Rodyk & Davidson, Singapore
Tel: +65 6885 3693
Fax: +65 6225 1838
lawrence.teh@rodyk.com

Harumichi Uchida
Mori Hamada & Matsumoto, Tokyo
Tel: +81 (3) 5223 7705
Fax: +81 (3) 5223 7605
harumichi.uchida@mhmjapan.com

Senior Vice-Chairs

Sunil Abraham
Zul Rafique & Partners, Kuala Lumpur
Tel: +60 (3) 6209 8281
Fax: +60 (3) 6209 8373
sunil@zulrafique.com.my

Caroline Berube
HJM Asia Law, Guangdong
Tel: +86 (20) 8121 6605
Fax: +86 (20) 8121 6505
cberube@hjmasialaw.com

Vice-Chair

Akil Hirani
Majmudar & Partners, Mumbai
Tel: +91 (22) 6123 7272
Fax: +91 (22) 6123 7252
akil@majmudarindia.com

Secretary

Ameera Ashraf
WongPartnership, Singapore
Tel: +65 6416 8113
Fax: +65 6532 5711
ameera.ashraf@wongpartnership.com

Newsletter Editor

Kwon-Hoe Kim
Yoon & Yang, Seoul
Tel: +82 (2) 6003 7566
Fax: +82 (2) 6003 7804
kkim@yoonyang.com

Website Officer

Clare Corke
Corrs Chambers Westgarth, Melbourne
clare.corke@corrs.com.au

LPD Administrator

Charlotte Evans
charlotte.evans@int-bar.org

The Asia Pacific Regional Forum is looking for a volunteer to assist with the updating of the website. Please contact Charlotte Evans at **charlotte.evans@int-bar.org** if you are interested in volunteering.

TOKYO 19–24 OCTOBER 2014
ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

the global voice of the legal profession

Asia Pacific Regional Forum's sessions

Monday 0930 – 1230

Generation Y: from junior associates to new clients

Asia Pacific Regional Forum, the Latin American Regional Forum and the Law Firm Management Committee

Compare the evolution of Generation Y in Asia and in Latin America. Yesterday's junior associates may be today's clients. While there are similarities in attitudes and values worldwide there are some subtle and not-so-subtle differences. Understanding these differences will help cross-border organisations improve their attraction and retention campaigns as well as know what 'Y' clients of new-born companies expect from law firms.

Monday 0930 – 1730

Asian enforcers roundtable

Presented by the Antitrust Committee and the Asia Pacific Regional Forum

Key enforcement agency heads in Asia will discuss the important antitrust issues in the Asia Pacific region.

Monday 1430 – 1730

Asia goes west: Asian investments in the countries of the Mediterranean Union: options and challenges

Presented by the International Sales Committee, the Arab Regional Forum and the Asia Pacific Regional Forum

Regional, legal and cultural interaction connect Asia with the Mediterranean and link traders, merchants, banks and lawyers from China, India, Japan and other Asian countries to the Mediterranean Sea, thus re-establishing commercial relations. The Union for the Mediterranean, with its 43 member states, offers interesting hubs in particular for developing trade in Europe, Asia and Africa. The session will deal with the legal challenges involved in this new trend, the different legal environments of civil and common law, and of Sharia and Confucian law, all in the context of the relevant international treaties. Selected topics will be discussed at roundtables, where legal and business professionals will discuss with the audience the most essential developments in these highly populated regions.

How do you do corporate social responsibility in Asia?

Presented by the Corporate Social Responsibility (CRS) Committee and the Asia Pacific Regional Forum

With the continued expansion of the global economy and the 'rise' of Asia, much recent activity in CSR has focused on Asia. More than ever, companies are making, buying and selling products in Asia, and these products touch every consumer in the world. Asia is also a hub for extracting and trading natural resources, with the potential for great impact on the land and local communities. Our panel of lawyers and leading company representatives will address the key legal aspects of CSR in Asia. What are Asia's prevailing legal norms of CSR? What mechanisms are available for CSR violations? And how do recent CSR initiatives from Europe and the US fit with traditional Asian notions of social responsibility?

Tuesday 0930 – 1230

Arab region: enhancing your clients' market – business establishment and working with agents, distributors, franchisees and joint venture partners

Presented by the Arab Regional Forum, the Asia Pacific Regional Forum, the Corporate and M&A Law Committee and the International Sales Committee

There are a number of routes to market in the various Middle East jurisdictions. Choices your client may consider will depend on a range of factors, including the nature of the goods and services, the extent of available investment and the territories in which business is sought. This session will explore a range of considerations, including incorporation, joint ventures, intellectual property, employment, compliance and regulation.

Continued overleaf

Tuesday 1430 – 1730

Eyes wide shut: big brands and the good life, but for whom?

Presented by the European Regional Forum, the Asia Pacific Regional Forum, the Corporate Social Responsibility Committee, the Intellectual Property and Entertainment Law Committee, the Latin American Regional Forum and the Product Law and Advertising Committee

Building global brands and the maintenance of those brands' reputation and consumer desirability are the key to success in virtually every industry. The fashion and luxury industries are firmly in the spotlight, appropriately, but so too are other industries such as automotive, electronics and food, which cannot afford to ignore what happens further back in the supply chain.

The session will discuss good and bad practices in exposed industries, including topics related to product design, supply chain, brand awareness and values, marketing strategies, responsible communication and reputation, codes of conduct and compliance, consumers ethics and local communities grievance and dispute resolution mechanisms, among others.

Speakers will be selected brand PR executives, journalists and bloggers, members of NGOs, in-house counsel, compliance officers and other experts in legal practice.

M&A in Asia: inbound and outbound challenges

Presented by the Corporate and M&A Law Committee and the Asia Pacific Regional Forum

Positive economic growth in Asia has been a driver of M&A activity in the Asia-Pacific region. In Part 1 of this session, a panel of senior M&A lawyers will examine the key issues to be considered when structuring acquisitions in the Asia-Pacific region. In Part 2 of this session, senior M&A practitioners will explore the challenges facing Asian companies when undertaking acquisitions in Europe, the US, South America and Africa.

Wednesday 0930 – 1230

Master class: using courtroom litigation to support arbitration in Asia

Presented by the Litigation Committee, the Arbitration Committee and the Asia Pacific Regional Forum

The proliferation of court-ordered remedies to support arbitration has extended across the globe, but perhaps in no region with as much prominence as in Asia. Court assistance in evidence gathering, interim measures, and now court-ordered enforcement of emergency arbitral awards have all become important litigation-based tools in support of arbitration in some of the most innovative Asian jurisdictions. But at the same time, the availability of court-ordered assistance varies widely even across Asia, especially in the cross-border context. For example, while emergency relief ordered abroad can be enforced by courts in Hong Kong, the recent *Balco* decision in India appears to have limited the availability of interim measures available from Indian courts in support of foreign arbitrations. In this master class, experts based in Asia and abroad will focus on exactly which court-ordered measures are available in key jurisdictions – and which are not – and will challenge delegates who attend to think strategically about ways to deploy these measures in support of international arbitration.

Wednesday 1430 – 1730

The world invests in Asia and Asia invests in the world – forum and networking

Presented by the Asia Pacific Regional Forum, the African Regional Forum, the Arab Regional Forum, the European Regional Forum, the Latin American Regional Forum and the North American Regional Forum

Asia has exceeded the performance of the global economy in the last 20 years. Foreign direct investment (FDI) into Asia has grown substantially and stands at about US$400bn. In the next ten years, global GDP will increase by more than 70 per cent and exceed US$100tn, during which time Asian economies will triple from US$10tn to US$34tn. Two of the world's largest five economies are currently Asian. By 2030, Asia will have three economies in the top five and the largest economy in the world will be Asian. This session, organised jointly by the Asia Pacific Regional Forum and all of the IBA's regional fora, will explore global FDI into Asia and Asia's FDI globally. It will be in a roundtable format, designed for members of the audience to project their experience of cross-border FDI into and out of Asia, and to outline their practice and profile to other members of the audience.

Cross-border deals between Asian and Latin American companies – the untold stories by both in-house and outside counsel who lived through them

Asia Pacific Regional Forum and the Latin American Regional Forum

The Latin American Regional Forum presents a session on the challenges, peculiarities, cultural differences and pitfalls of cross-border deals between Asian and Latin American companies. The panel will feature top in-house and outside counsel from different jurisdictions within those regions discussing actual transactions that they lived through and the lessons they learned in the trenches.

Making free trade agreements work for you

Presented by the International Trade and Customs Law Committee and the Asia Pacific Regional Forum

The proliferation of regional and bilateral trade agreements around the world has created another layer of laws for lawyers and their clients. Harmonisation and coordination of domestic laws in intellectual property, competition and trade, investment protection and dispute resolution present novel and continuing issues for practitioners and their clients, as well as new regional institutions and forums. The panel will present practical advice on how advocates can effectively protect client interests in a new and developing environment.

Targeting the Asian market: setting up or taking over a sales and distribution network in Asia

Presented by the International Sales Committee, the Asia Pacific Regional Forum and the Closely Held and Growing Business Enterprises Committee

Asia, in particular China and India, is the fastest growing and most-promising market for European and North American companies. Conquering the Asian market successfully will be a key condition to withstanding globalised competition. In addition, the Asian market provides industry newcomers with enormous opportunities to become local champions and achieve market shares in foreign markets they would never achieve in their home market. Consequently, this session will focus on best practices for sale and distribution in Asia. Legal experts and local industry representatives will discuss legal and practical tricks and traps connected to the establishment of a distribution network (either by way of green-field investments or joint ventures) or the takeover of existing distributors.

Thursday 0930 – 1730

Electronic games summit

Presented by the Intellectual Property, Communications and Technology Section, the Leisure Industries Section and the Asia Pacific Regional Forum

The electronic games industry has developed into one of the largest entertainment industries. Blockbuster sequel game Grand Theft Auto 5 (GTA5) has just been launched with a production budget of over US$250m and sales reaching over US$1bn within the first week. The increase of mobile gaming through social gaming, with hit games such as Candy Crush, is unprecedented and generates significant revenues. This full day section topic will feature a keynote speaker from the games industry and be divided into four blocks throughout the full day, including the protection and licensing of content (IP), advertising and rights of publicity (media), data protection and user interface (technology), as well wireless and mobile networks interplay where the trend puts electronic games as the jewel of content (communication).

Thursday 0930 – 1230

Asian investment in mining in Africa and Latin America

Presented by the Mining Law Committee, the African Regional Forum and the Asia Pacific Regional Forum

Asian investment in mining, especially in Africa and Latin America, has been steadily increasing over the last decades. Investments includes, among others, necessary large infrastructure projects such as power facilities, railways, highways, ducts, and bridges. This session will analyse the most efficient ways in which Asian investment has been structured, addressing real examples, the legal challenges that arise and how they may be successfully addressed.

China: dealing with challenges

Presented by the International Trade and Customs Law Committee, the Asia Pacific Regional Forum, the Intellectual Property and Entertainment Law Committee and the International Sales Committee

This session will discuss regulatory, business and cultural challenges related to doing business with China. Topics such as intellectual property, customs, export controls, trade, product liability, currency controls, investment, antitrust, state enterprises, arbitration and other issues will be discussed in a frank and open manner. The first half of the session will discuss in-bound investment and trade, and the second half of the session will discuss out-bound investment and trade.

New challenges in arbitration in the Asia Pacific region

Presented by the Arbitration Committee and the Asia Pacific Regional Forum

This session will consider ever more discounting and ever more creative fee arrangements, and the competition between Hong Kong and Singapore as places of arbitration:

- Regional firms v international firms
- A paucity of experienced international arbitrators?
- The rise of regional institutions

To find out more about the conference venue, sessions and social programme, and to register your interest, visit **www.ibanet.org/conferences/tokyo2014.aspx**. Further information on accommodation, tours and excursions during the conference week can also be found at the above address.

Tuesday 8 October
0930–1230

Caroline Berube
HJM Asia Law, Guangzhou
cberube@hjmasialaw.com

Getting from Point A to Point B: supply chain logistics and agreements

Report from the session presented by the IBA Asia Pacific Regional Forum and IBA International Sales Committee at the IBA Annual Conference in Boston

Session Co-Chairs
Caroline Berube *HJM Asia Law, Guangzhou*
Cynthia G Fischer *Schnader Harrison Segal & Lewis, New York NY*

Session Speakers
Dalton J Albrecht *Couzin Taylor, Toronto*
Riccardo Cajola *Cajola & Associati, Mital*
Dominic Hui *Ribeiro Hui, Hong Kong*
Horacio A López-Portillo *Vázquez Tercero & Zepeda, Mexico City*
Douglas G Smith *Soewito Suhardiman Eddymurthy Kardono (SSEK), Jakarta*

This session addressed key issues manufacturers face when dealing with supply chain and logistics at the international level. An interactive panel of lawyers and in-house counsel from Asia, Europe, North and South America shared their views and experiences on matters related to key terms in manufacturing agreements and franchise agreements such as packaging, pre-certification requirements before shipment, safety and security aspects especially when dealing with manufacturers located in developing countries, customs and entry requirements between different jurisdictions regarding various products, delivery and time of essence concepts, which is key in some industries such as in the food, fashion and toys industries. Our panellists also discussed practical ways to reduces risks, dispute resolution when time is of essence and occurring at the international level, CSR sensitivity and taxes.

The session was well attended and the speakers were very engaging. It was in a discussion format where each speaker contributed to the questions freely. The session was split into five topics: choice of manufacturer and pre-shipment issues; shipment; entry; licensing/distribution and intellectual property; and dispute resolution. Each topic had four or five questions assigned to it and each speaker shared practical cases which made the discussion very diverse due to different backgrounds. Overall, the session was a success as participants joined the lively discussion with the speakers and asked many questions during and after the session.

Tuesday 8
October 2013
1430–1730

Ann-Marie McGaughey
McKenna Long & Aldridge, Atlanta
amcgaughey@mckennalong.com

Lawrence Teh
Rodyk & Davidson, Singapore
lawrence.teh@rodyk.com

Asian investment in North America and North American investment in Asia 2013

Report from the joint session presented by the IBA North American Regional Forum and the IBA Asia Pacific Regional Forum at the IBA Annual Conference in Boston 2013

This joint session was part of a series of cross-border investment sessions undertaken by the APF in recent years, including a similar session with the IBA Arab Regional Forum during the Dubai Annual Conference and with the European Regional Forum during the Dublin Annual Conference.

Moderators
Ann-Marie McGaughey *McKenna Long & Aldridge, Atlanta*
Lawrence Teh *Rodyk & Davidson, Singapore*

Speakers
Subrata Bhattacharjee *Heenan Blaikie, Toronto*
Caroline Berube *HJM Asia Law & Co and Philip Zhang, Zhong Lun Law Firm, CITY????*
Vicente Grau *Santamarina y Steta, Mexico City*
Akil Hirani *Majmudar & Partners, Mumbai*
Kwon-Hoe Kim *Yoon & Yang, Seoul*
Fraser Mendel *Davis Wright Tremaine, Seattle*
Jing Qiu *Zhong Lun Law Firm, Shanghai*

The session was presented in an interactive format, where the panellists were given questions to answer from their perspective of inward investment into their country. The panellists were asked about the sectors or businesses in their country that were most active in investing in Asia or North America (as the case may be), what the most commonly used transaction structures were, how the global financial crisis had affected foreign investment into their countries, and of what legal and regulatory requirements, approvals and issues one had to be aware. Their advance answers were aggregated into a PowerPoint presentation and displayed at the joint session while each panellist elaborated orally on their answers.

The overall consensus was that there had been a general increase in the amount of cross-border investment between the two regions. Each jurisdiction attributed the increase to different factors, but in large part, an easing of certain regulatory requirements, particularly in India and China, seemed to contribute primarily to the steady increase in deal flow. The largest volume of investment continues to occur between the US and China. Details of the panellists answers can be found among the conference materials available on the IBA website.

Another iteration of these cross-border investment sessions will take place at the 2014 IBA Annual Conference in Tokyo where the APF will hold a session studying global investment in Asia and Asian investment globally.

'Construction': a wide playing field for lawyers

Wednesday 9 October 2013
0930–1230

Robert Bernstein
Holland & Knight, New York
rob.bernstein@hklaw.com

Report from the session presented by the IBA Asia Pacific Regional Forum supported by the IBA International Construction Projects Committee and the IBA Young Lawyers Committee at the IBA Annual Conference in Boston

Session Co-Chairs
Robert S Bernstein *Holland & Knight, New York*
Cecilia Vidigal Moneiro de Barros *Motta, Fernandes Rocha – Advogados, Rio de Janeiro*

Speakers
Wilfred Abraham *Zul Rafique & Partners, Kuala Lumpur*
Albert Bates *Duane Morris, Pittsburgh*
Phillip Capper *White & Case, London*
Ian H Bailey SC *Ground Floor Wentworth Chambers, Sydney*
Howard D Krupat *DAVIS, Toronto*

With a geographically diverse panel representing the Americas, Asia, Australia and Europe, it is not surprising that the session covered a broad range of topics. Industry fundamentals were addressed, including an overview of one of the most commonly used construction project delivery systems, which established the contractual relationships among principal project participants (owners, design professionals, contractors etc). Thereafter, there was a detailed discussion of the risks and benefits of the various project structures and delivery systems. This was followed by a practical discussion of how relevant contract provisions are typically negotiated in the real world. Experienced panellists shared details of significant prior transactions and, in some cases, the disputes that arose later. In this way attendees were provided with a glimpse into the issues that can arise on major projects, and they were given some insight into how careful lawyers can minimise risks for their clients.

With the fundamental principles covered, the session moved onto a presentation of developments that have taken place in Malaysia with respect to how both Malaysian and foreign legal professionals can seek opportunities in Malaysia. These developments generally stem from the liberalisation of the legal services as envisaged by the amendments to Malaysia's Legal Profession Act 1976. This, coupled with the rapid expansion of the construction industry in Malaysia and other developments in the legal framework, suggest that more opportunities are likely to be opened up for both Malaysian and foreign legal professionals in the years to come.

Taking another turn, the speakers focused on the younger lawyers in the audience and shared their own passion for the field. They explained the gratification that comes from being part of a team that builds something tangible, whether a sports stadium, apartment complex or power plant. That is not a pleasure available to all lawyers, many of whom never have their work result in something physical that can be seen and appreciated by non-lawyers. Similarly, the session focused on the challenges of having to conceptualise a project before it is built and anticipate the variety of circumstances that may arise in the future.

Finally, the session closed with a call to action to the lawyers attending the session from all over the globe. A challenge to improve the form contracts used by the industry was issued to the leading professionals present, along with a request that they improve communication and relations between the various countries represented. Recognising that large construction projects, particularly infrastructure projects, often involve international teams, the speakers called on the lawyers to facilitate working relationships to improve the industry overall.

The session was extremely well attended and those present showed their engagement with questions both during and after the session, thanks to the panellists being good enough to stay well after the scheduled time had elapsed.

Harumichi Uchida
Mori Hamada & Matsumoto, Tokyo
harumichi.uchida@mhmjapan.com

REPORT FROM THE IBA-JFBA JOINT CONFERENCE IN TOKYO, 12–13 NOVEMBER 2013

Cross-border legal services in the Asia region – developments and the future

Co-Chairs
Yasushi Higashizawa *Kasumigaseki Sogo Law Offices, Tokyo*
Harumichi Uchida *Mori Hamada & Matsumoto, Tokyo*

This conference was jointly organised by the IBA and the Japan Federation of Bar Associations (JFBA) and was supported by the IBA Asia Pacific Regional Forum. The IBA Annual Conference is scheduled to be held on 19–24 October 2014 in Tokyo, so this conference was intended to promote the Tokyo Annual Conference and the IBA, particularly to legal professionals in Japan and in the Asia Pacific region. Considering the critical importance of the national bar association in Japan, the JFBA was enlisted as a joint organiser. The programme of this conference was designed to give participants the sense that they had attended an IBA Annual Conference, and to have them recognise the value of attending an IBA event – namely, the opportunity to network with world – leading practitioners and of learn about recent developments in the law and the legal profession.

The sessions were divided into a plenary session on the first day and concurrent sessions on the second day. The plenary session dealt with topics including cross-border legal services in the Asia region, in particular, considerations and issues in building strategy and planning in cross-border legal services in the region and issues and solutions in operating cross-border legal services in the region.

The concurrent sessions dealt with gender perspectives in legal services, international comparison of patent litigation practice, cross-border M&A, human rights and corruption; investment, arbitration, and international competition law practice, with a focus on private litigation. The speakers and participants included prominent practitioners from around the world and the leadership members of the IBA (the President, Vice-President, Chair of the Legal Practice Division, Chair of the Bar Issues Commission, and Chair of the Public and Professional Interest Division).

The original target for participant numbers was up to 200 people. However, this target was reached as quickly as one month before the date of the conference. Ultimately, the number of registrants exceeded the target number by close to 50 people, amounting to almost 250 attendees. This result showed the strong interest of practitioners, not only based in Asia, but globally, towards legal services in the Asia region.

The success of this conference gives hope for a very successful 2014 IBA Annual Conference in Tokyo. The success was brought about by the leadership of the IBA, specifically the Asia Pacific Regional Forum and the IBA's Asia office, and the intensive involvement of Japan's strong national bar in the form of the JFBA. I believe this conference can serve as an effective model for organising future IBA conferences in the Asia Pacific region.

As reporter and Co-Chair of this conference, and a leader of the Host Committee and the project team of the JFBA for the 2014 Tokyo Conference, I welcome all members of the IBA to come to Tokyo for the Annual Conference in October this year.

IBA-KBA meeting, November 2013: are you ready to be a global player?

Julia Jiyeon Yu
Singapore International Arbitration Centre, Singapore
juliayu@siac.org.sg

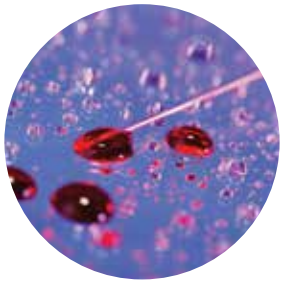
I attended the IBA-KBA conference, organised by the IBA Asia Pacific Regional Forum and IBA Young Lawyer's Committee in collaboration with the Korean Bar Association and held in Seoul last November, as one of the speakers in the session of cross-border dispute resolution. The conference was designed to provide junior lawyers in Korea with the current legal trends in the Asian Pacific region, particularly in the areas of cross-border M&A, international disputes and competition law.

Participants had ample opportunity to experience a comparative approach to current issues from the perspective of different fields of practice and to communicate with senior lawyers at the last session of the conference as part of a mentoring programme. Due to the simultaneous translation service, young Korean lawyers were able to freely ask their questions and get advice on how to develop their careers as international lawyers. The senior lawyers coming from different countries with various backgrounds shared their experience with the audience and gave quite specific tips to young practitioners.

There is no doubt that the economic powers of this world have shifted from the West to Asia, and that the roles of lawyers in this Asia Pacific region are becoming more important. Cultural difference and diverse status in the development of the legal system in this region have required lawyers of this area to be versatile in coping with various legal matters. That is why we have to constantly update our knowledge and catch up with what is going on outside of our own jurisdiction. In this sense, I think this conference was very timely and a good stimulus to Korean practitioners who are eager to get more information about global trends.

As many Korean companies have emerged as global players in international business markets, the concerns of Korean legal practitioners and in-house counsel in cross-border legal matters are growing. The old generation of Korean lawyers had been, in general, satisfied with practicing in domestic markets. However, the more Korean companies have actively expanded their business overseas, the more legal practitioners (including young lawyers) want to play a part in cross-border work. They are ready to become true international lawyers, equipped with language skills and international sense and knowledge, as they can clearly see that the legal practitioners' role is to assist their clients closely and efficiently not only in Korea but also in other jurisdictions.

In order to do so, cooperation between China, Korea, Japan and Singapore together with other countries in the Asia Pacific region is essential in order to share their best practice and ultimately, to make a norm or principle which could provide integrity within the Asia Pacific region. The IBA-KBA conference has successfully reminded us of what we should do to harmonise different levels of legal systems across the region by building a collaborative system. Looking ahead to a bright future in the Asia Pacific region, I hope we can have more forums like this for the further exchange of ideas and culture.


UP TO 8.5 CPD/CLE HOURS AVAILABLE

2nd Annual IBA World Life Sciences Conference:

Critical thinking at the law and business interface

20–22 June 2014 **The Westin Gaslamp Quarter, San Diego, USA**

A conference presented by the IBA Intellectual Property and Entertainment Law Committee, supported by the IBA Closely Held and Growing Business Enterprises Committee, the IBA Corporate Social Responsibility Committee, the IBA Healthcare and Life Sciences Law Committee, the IBA Technology Law Committee, the IBA Latin American Regional Forum and the IBA North American Regional Forum

This conference will examine the legal intellectual property regulatory and financial issues facing the pharmaceutical, biotech, medical device and medical IT industries. Panels will bring together industry, business, regulatory, financial and academic experts in their respective field of life sciences.

Sessions include:

- 5/10 Trend Panel – what are the emerging life sciences business models and what will they look like in five and 10 years from now?
- Q&A and roundtable discussion between panellists and audience
- Pacific and Indian winds in pharmaceutical sector
- Interactive discussion forums: regulation and compliance
- 30-minute snapshot: anti-corruption for the life science industry
- Litigating the Life Sciences
- Biotechnology, plant and animal patents

Who should attend?

Lawyers in private practice or in-house counsel, C-level officers, and venture capitalists having an interest in IP, regulatory and financial issues facing the pharmaceutical, biotech, healthcare, medical device and medical IT industries.

the global voice of the legal profession

London São Paulo Seoul The Hague Washington DC

4th Floor, 10 St Bride Street, London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090 Fax: +44 (0)20 7842 0091 www.ibanet.org

The new Brazilian anti-corruption law and its impact on Asian companies

BRAZIL

Leopoldo Pagotto
ZISP Law, São Paulo
pagotto@zisplaw.com.br

Marina Troncoso Esposito
ZISP Law, São Paulo
marina@zisplaw.com.br

A new anti-corruption law came into force in Brazil on 29 January 2014 (Law No 12.846/2013, the 'New Anti-Corruption Law'), imposing severe administrative fines and creating whistleblowing provisions on bribery.

At first glance, one might ask how an anti-corruption policy implemented in Brazil would raise concerns for Asian companies. After all, Brazil is one of the farthest places one can go from Asia. However, times are changing and globalisation is making inroads with consequences that are yet unclear to multinational companies – including those located in Asia.

This update focuses on four points in the New Anti-Corruption Law that deserve attention from an Asian practitioner doing business with Brazil: (i) extraterritorial reach; (ii) strict liability; (iii) fines; and (iv) whistleblowing provisions and the role of compliance.

Extraterritorial reach

Besides antitrust policy, one of the most remarkable fields of law with extraterritorial reach is anti-corruption legislation. Even though the legislation is still very new when compared to the United States, for example, it tends to follow a similar path. In this regard, the connection between Brazil and Asia becomes more evident.

The great distance between Brazil and Asia does not mean that there is low enforcement risk: from time to time, occurrences in Brazil are analysed by US courts, and can lead to severe fines to companies. Brazil is an important recipient of Asian outward investment, not only due to the size of its internal market but also due to its growth prospects.

According to the New Anti-Corruption Law, liability can be imposed on Brazilian entities and on non-Brazilian entities doing business in Brazil. It is unclear whether international companies paying bribes somewhere other than Brazil will be liable: in theory, the legislation does not exclude such a possibility, even though it seems unlikely to happen in the early days of the enforcement.

Indeed, this has been happening with regards to criminal enforcement of international bribery, which has been a crime since the late 1990s. In 2013, Brazilian Public Prosecutors reported that five cases involving only Brazilian individuals working for Brazilian companies were under investigation, but some prosecutors have already admitted their willingness to bring cases against international companies.

Strict liability

Anti-corruption legislation in Brazil can be enforced in three different spheres: political, criminal and administrative/civil.

Political enforcement is carried out by the legislative branch and it affects those involved with corrupt practices in terms of loss and restriction of political rights such as voting and the ability to stand for election. In this field, there is little interest for Asian investors, even though some special attention should be given to donations made to political campaigns, which are heavily regulated in Brazil.

In relation to criminal enforcement, independent prosecutors and courts are empowered to sanction individuals. Unlike the US, legal entities cannot be criminally prosecuted in Brazil. Criminal liability for individuals applies to 'whomever, in any way, conspires in the criminal offence, insofar as the person concerned is found guilty' (Article 29, Criminal Code). Such a provision is broadly written so that it applies to all companies' employees who were somehow involved in the corrupt practice (direct practice of crime, assistance, intellectual guidance or omission). In this regard, the New Anti-Corruption Law does not change anything; corruption has been a crime in Brazil for more than 200 years and the sanctions are quite heavy.

Crime	Legal type	Sanction
Active corruption (Article 333, Criminal Code)	To offer or promise to offer any undue advantage to a civil servant, in order to make him perform, omit and delay any mandatory duty.	From two to 12 years' imprisonment and a fine.
Passive corruption (Article 317, Criminal Code)	To ask, receive or accept a promise of any undue advantage, including for the benefit of third parties, directly or indirectly, even if prior or after taking the official position but because of the official position.	From two to 12 years' imprisonment and a fine.
Blackmailing (Article 316, Criminal Code)	To request any under advantage, including for the benefit of third parties, directly or indirectly, even if prior to or after taking the official position but because of the official position.	From two to eight years' imprisonment, and a fine.

What the New Anti-Corruption Law actually instigated was administrative and civil enforcement. Besides the increased fines, the New Anti-Corruption Law adopts a strict liability approach, meaning that liability arises for wrongful acts committed in the interests of or for the benefit of the corporation. There is no requirement that the wrongful act should have been committed by an employee of the company, so there is the risk that the company may be liable for the acts of third-party agents acting on its behalf or with its knowledge.

There is no major change in relation to what is considered illegal. The wrongful acts that may lead to liability include: (i) giving or offering a bribe to a public official; (ii) seeking to subvert a public tender process; and (iii) seeking to hinder or interfere with the work of regulators or other public bodies.

Fines

The New Anti-Corruption Law provides for fines up to 20 per cent of the entity's gross revenues for the last financial year, as well as restitution of any advantages gained through the wrongful conduct. This is a great departure from the previous legislation, in which there was virtually no fine imposed on the companies.

One disturbing aspect of the legislation is the wide range of authorities empowered to impose the fines. Besides the federal government, there are 27 state governments and more than 6,000 municipalities empowered to fine. Of course, each member of the federation will have jurisdiction over contracts paid with their own budget, even though there may be controversy when more than one member of the federation contributed to the payment.

Whistleblowing provisions and the role of compliance

Following the successful experience in antitrust policy, the New Anti-Corruption Law created a leniency program for companies that may allow the reduction of the fines imposed in the administrative sphere, but it has no implications in the criminal justice field.

Leniency may facilitate coordination with the US, since companies may consider a bi-jurisdictional leniency application, when it is the case. However, for purely domestic cases, it is disputable whether leniency will have the expected effects, since it does not benefit the natural people who committed the wrongful acts. The lack of a leniency policy in the criminal sphere may put at risk local staff, if one considers 'blowing the whistle' in the US.

The existence of internal procedures to prevent corruption (such as written policies, training programmes etc) may provide a good defence under Brazilian law. Compliance programmes are listed as one of the factors to be taken into account in assessing the quantum of penalties. In this respect, the law resembles the US approach where the corporate prosecution policies of the US Department of Justice and the Securities and Exchange Commission list the existence or absence of internal procedures as a mitigating or aggravating factor, which regulators will consider when making a charging decision.

Companies may also wish to consider seeking registration and approval of their anti-corruption programmes from the Brazilian government. A number of multinationals have already done this and such a registration may be a prima facie evidence to reduce penalties in any future proceedings besides the benefit from positive publicity. Registration is a fairly simple procedure involving completion of a questionnaire, and submission of policy documents and other materials used in the programme.

Chinese judgments disclosed

CHINA

Helen Tung

One Temple Avenue Chambers, London

helen.tung@onetempleavenue.co.uk

21 November 2013 marked a significant day for legal practitioners and academics in China. It was the day when the Supreme People's Court (SPC) of China passed the Provisions on the Online Issuance of Judgment Documents by the People's Courts.[1] It meant that from January 2014 court judgments would be published and openly available to all. The Supreme People's Court made the announcement on 27 November 2013 that all judgments made by more than 3,000 courts in China would be published.[2] According to the President of the SPC, Zhou Qiang, the aim of the publication of judgments was to enhance judicial transparency, to ensure that people were informed and could see the application of justice being done.[3]

The SPC, like other Supreme Courts around the world, handles cases that would usually be of significant interest to the public, deals with appeals from higher courts and, in this particular instance, claims that are within Chinese jurisdiction.[4] It appears that the SPC also supervises work of the local courts and special courts at every level, including the Economic Tribunal, Administrative Tribunal, Complaint and Appeal Tribunal and the Communication and Transportation Tribunal.[5] Perhaps more importantly, is that the publications would enable practitioners, academics and lay persons to better understand the application of the law and how it may affect their cases.

The judgments are published through the website **www.court.gov.cn/zgcpwsw** and the SPC aims to publish as many judgments and documents as possible. With the help of technology and media 'platforms' such as websites, a micro blog, WeChat and mobile texting (SMS),[6] the SPC has a vision to promote transparency as far afield as it can. One can appreciate that entry into Chinese courts is usually limited to lay clients and their legal representatives, therefore having courts opening up their doors electronically through recordings or spontaneous viewings is a wholesale change to their approach.

The website is very user-friendly. The relevant courts related to specific cities are in the left-hand column and on the centre-right of the page one may find a list of cases relevant to a particular city. So for instance, in relation to Beijing, on the top panel one can chose from the different courts and tiers, while judgments for different areas of law are below. With a simple click, one can easily access a judgement – provided they know the case number. The cases are listed by case number and the judgments are to the point; unlike English judgments, which may be pages and pages long, Chinese judgments cut straight to the point.

Areas in which judgments are excluded include matters that involve state secrets, personal private matters or matters involving delinquency. To ensure a level of privacy and protection to lay clients, the SPC delete personal details such as home address, bank account details, ID numbers and details considered inappropriate for public release. Generally speaking, the SPC is likely to retain real names and titles for judgments online; however, they would also safeguard vulnerable witnesses in criminal cases from having their names published. Other areas in which private details are protected include family or inheritance cases and defendants sentenced to fixed-term imprisonment of less than three years.

Having spoken to a number of Chinese lawyers over the New Year, the developments made by the SPC are very promising, particularly for practitioners working in litigation. Some would say that the trend towards referring to case law is likely to become increasingly important, while others suggest that it would enable them to better understand the Courts approach as they now have the benefit of accessing judgments when previously there was none.

The scale of this operation is impressive. If we were to look to England, not all judgments are made readily available online. There are judgments from the Supreme Court which are readily available online and also through broadcast. There are judgments from the Court of Appeal, High Court or through other courts and tribunals, however, judgments that are readily available are usually cases which have some significance in relation to an area of law and/or are of public interest. It has only been two months since the launch of this initiative and it will be interesting to see how it would affect practitioners in China and in relation to their

case preparation. Perhaps more importantly, how will public opinion view transparency in the Chinese legal system?

References

最高人民法院, 关于人民法院在互联网公布裁判文书的规定

Provisions on the Online Issuance of Judgement Documents by the People's Courts

www.chinacourt.org/article/detail/2013/11/id/1152212.shtml

Notes

1 www.chinacourt.org/article/detail/2013/11/id/1152212.shtml.
2 Case judgements to be publicised on a website (*China Court*, 11 November 2013), available at http://en.chinacourt.org/public/detail.php?id=4830
3 *Ibid.*
4 The Supreme People's Court (*People's Daily Online*, March 1998), available at http://english.peopledaily.com.cn.
5 *Ibid.*
6 Chinese courts publish judgement documents online. (*China Daily*, Xinhua, 27 November 2013), available at www.chinadaily.com.cn/china/2013-11/27/content_17136289.htm.

INDIA

Mahua Roy Chowdhury
Solomon & Roy, Mumbai
mahua@solomonandroy.com

Cricket and the doctrine of hot news: the ball is in the Delhi High Court and Supreme Court again

The doctrine of 'Hot News' was first elaborated by the United States Second Circuit in *National Basketball Association* [NBA] *vs Motorola, Inc*:[1]

'We hold that the surviving "hot-news" to cases where:

(i) a plaintiff generates or gathers information at a cost;
(ii) the information is time-sensitive;
(iii) a defendant's use of the information constitutes free-riding on the plaintiff's efforts;
(iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and
(v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.'

In India, discussion of this doctrine was initiated by the Delhi High Court in *Espn Star Sports vs Global Broadcast News Ltd & Ors*[2] in relation to dissemination of news related to cricket, India's favourite and most money-spinning sport.

Issues raised at Indian courts

The issues in discussion are:

- whether there exists copyright or any other kind of right under the common law to protect disseminating contemporaneous cricket match information in the form of ball-by-ball or minute-by-minute score updates for a premium; and
- whether the said act would constitute 'unfair competition', commercial misappropriation or unjust commercial enrichment.

The disputes[3] in recent years arose when a 'mobile distribution right' was granted by the Board of Cricket Control of India (BCCI) to Star TV in 2012 as part of the exclusive broadcasting rights and other related rights in respect of certain cricket matches, including the right to record, reproduce and broadcast these events. BCCI claimed that, as the organiser of cricketing events in India, it owned exclusive rights to the content generated during a cricket match, which it had granted to Star. The defendants were involved in providing ball-by-ball and minute-by-minute match information and alerts through live score cards, match updates and score alerts, for a premium.

The defendants argued that the rights claimed in the suit were not recognised under any law or statute. Reliance was placed upon section 16 of the Indian Copyright Act, 1957 (Statute) to claim any right other than what was provided under the statute was barred. Further to these contentions, the defendants argued that while Star and BCCI could legitimately claim broadcasting rights and copyright in the cinematograph film of the match or sound recording of the commentary, score updates and match alerts were mere 'facts' over which there cannot be any claim of exclusive rights. The score update had entered the public domain and therefore, they claimed that it could be freely used by anyone. It was also contended that Article 19(1)(a) of the Constitution of India (the 'Constitution') confers upon them the freedom to disseminate information to the public.

Justice Bhat considered primarily the followings three issues:

- preclusion of Star's claim by section 16 of the Copyright Act;
- whether the act of dissemination by defendants amounts to direct competition and unjust enrichment; and
- whether match details were in the public domain and could be provided by the defendants without any time delay and are a freedom under Article 19(1)(a) of the Constitution.

Justice Bhat rejected the arguments of the defendants that any right analogous or similar to copyrights were excluded by reason of section 16. In doing so, it was held that section 16 applies to 'work', which is defined under section 2(y) of the statute as (i) a literary, dramatic, musical, or artistic work; (ii) a cinematograph film; (iii) a sound recording. The Bhat J held that the definition is exhaustive and not inclusive, signifying the parameters of section 16. Thus, section 16 was held inapplicable to 'anything which is not a work'.

The Bhat J observed that the acts of defendants directly competes with the plaintiff, as both the plaintiff and defendants are seeking to generate revenue by way of providing contemporaneous score updates. He further said that the plaintiffs resorted to bidding of the 'mobile rights' and 'mobile activation rights' with an intention to generate revenue as all the rights related to cricket events were available on an 'a la carte' basis. Therefore, the element of direct competition clearly exists.

In relation to the third issue, that is, whether match details were in public domain and can be provided by the defendants without any time delay and are a freedom under Article 19(1)(a) of the Constitution, the court found merit in the defendants' argument that they have a fundamental right to disseminate such information as demanded by the public; however, the Court felt obligated 'to balance the right of the organizer of an event to monetize his own event as against the right of the public to receive information regarding such event.'

The court further analysed the decision in *New Delhi Television Ltd v ICC Development (International) Ltd & Anr.*[4] It observed that freedom of speech and expression are available to the press to disseminate information, but a line had to be drawn in cases where the freedom is misused. It was held that reporting of the cricketing event was quite different from providing a ball-by-ball account of the match, for a consideration, through SMS alerts. The court held that the protection of a right to freedom of speech did not extend to such activities.

The defendants appealed to the Double Bench (DB) of the Delhi High Court (the 'Court').[5] The DB ruled in favour of the defendants and held that defendants' claims were precluded by section 16 of the Copyright statute. If Parliament (Senate) had intended such rights to exist, they would have been enacted, with a suitable mechanism for their enforcement and effectuation. Thus, if Parliament had intended to give protections to facts, 'time sensitive information' or events (such as match information), there would have been conscious protection of those rights by express provisions. Based on this understanding, the DB rejected the plaintiff's claims.

The DB also noted that *International News Service v Associated Press,*[6] which propounded the 'hot news' doctrine ('he who has fairly paid the price should have the beneficial use of the property') had three dissenters and has been subject of broad judicial scepticism ever since. The Court made particular note of the US court's decisions such as *NBA*[7] and *Flyonthewall,*[8] which held that free-riding or misappropriation claims survived only if the plaintiff was able to show that the defendants were in direct competition with it in the same activity.

Creating property rights in information by judicial decision, stood to upset the statutory balance created by the legislature through the Copyright Act.

The DB further stressed upon 'narrow confines of present existence of the hot news doctrine' and held that the present avatar of 'hot news' was narrowed to injuncting time sensitive news where both the parties are 'direct competitors' and not merely where the plaintiff's primary service or product is not hot news dissemination but match organsation or broadcasting of those events. This critical aspect was absent in the present case as neither Star nor BCCI engaged themselves primarily in match news dissemination through SMS. Thus, plaintiff/respondent failed to show the Court how it had had proprietary rights over facts and information it sought to protect even for a limited duration. Thus, the Court held that plaintiffs/respondent could not claim exclusive property or other such rights irrespective of whether the object of such a third party was to publish such information for commercial gain or without any such motive.

While an appeal from the above decision is pending in the Supreme Court of India,[9] another set of cases have recently been filed in the Delhi High Court by Multi-Screen Media,[10] the Sony-owned media company that had acquired exclusive rights to the India–New Zealand TV series by preventing premier cricket websites Espn Digital, Akuate (Cricbuzz) and Radio One (online). The court has granted a preliminary injunction on 21 January 2014, restraining defendants from providing live updates, ball-by-ball updates, score cards, score updates, alerts and live/contemporaneous audio commentary or the defendants deposit US$16000 to continue the business meanwhile.

Conclusive analysis

In view of the foregoing, until the Supreme Court of India opines on this issue, the ball will keep bouncing from one court to the other, whenever a new cricket series begins in India.

To conclude I would like to highlight that in another similar case Star India[11] had contended that it does not intend to prevent the information arising from cricket matches entering the public domain. On the contrary, it has argued that it is in the interest of the game of cricket in India that the information arising from a cricket match permeates the public domain to its fullest extent. My question to such media companies is then: why do you have a policy of granting an exclusive licence to the highest bidder; why not have a policy of granting non-exclusive licences to several disseminators (who can meet a minimum threshold of price) using various platforms (internet, SMS, radio and TV) so that it can reach the masses? This is the only way to balance between the creators of the content, the broadcasters and the Indian masses.

Notes

1 105 F 3d 841 (2d Cir 1997).
2 2008(38) PTC 477(Del): MIPR 2008 (3) 257.
3 *Star India Pvt Ltd & Anr v Akuate Internet Services Pvt Ltd & Anr* MANU/DE/0644/2013.
4 FAO (OS) 460/2012.
5 *Akuate Internet Services Pvt Ltd & Anr v Star India Pvt Ltd & Anr* MANU/DE/2768/2013.
6 248 US 215; 39 S Ct 68(1918).
7 *Ibid.*
8 *Barclays Capital Inc, Merrill Lynch, Pierce, Fenner & Smith Inc & Morgan Stanley & Co Inc v Theflyonthewall.com Inc.* 650 F 3d 876.
9 SLP No 29629/2013.
10 CS(OS) 186/2014.
11 *Star India Pvt Ltd v Piyush Agarwal & Ors*; *Idea Cellular & Anr; Onmobile Global & Ors*; CS (OS) Nos 2722/2012, 3232/2012 and 2780/2012.

Foreign investment in India

INDIA

Manoj Yadav

Advocate Manoj Yadav, New Delhi

manojyadav.advocate@gmail.com

India is about more, much more, than IT and outsourcing: there are opportunities across many sectors. India is rapidly scaling up its infrastructure in order to sustain its growth, and the country's manufacturing sector is also developing quickly, with world-class companies such as Bharat Forge, Tata Motors, and Mahindra.

India's healthcare industry will grow to over £40bn in the next three years. India aims to train 500 million people, which opens up a market for British skills providers. Rising income levels among India's middle class opens up retail opportunities. The entertainment and media sector is expected to be worth £15bn by 2014 – creating a lucrative market for technology businesses with smart IP.

The Foreign Investment Promotion Board (FIPB) is a government body that offers a single window clearance for proposals on foreign direct investment (FDI) in India that are not permitted access through the automatic route.

It has a strong record of actively encouraging the flow of FDI into the country through speedy and transparent processing of applications, and providing on-line clarification. In case of ambiguity or a conflict of interpretation, the FIPB has always stepped in with an investor-friendly approach.

Furthermore, the growth potential of the road-building sector in India is tremendous, with a fast-growing economy and a rising need for world-class infrastructure for better road connectivity.

Private-sector participation is increasing with the rising trend of awarding projects on a toll and annuity basis.

The banking system is something that is central to a nation's economy; and that applies whether the banks are locally-or foreign-owned. Thus, the governance rules in the banking system have indeed been changed to accommodate the private investor (domestic and foreign) after liberalisation. FDI in the banking sector is growing its importance in India day by day.

FDI policy: the international experience

FDI is treated as an important mechanism for channelling the transfer of capital and technology, and thus perceived to be a potent factor in promoting economic growth in host countries. Moreover, multinational corporations consider FDI an important means to reorganise their production activities across borders in accordance with their corporate strategies and the competitive advantage of host countries. These considerations have been the key motivating elements in the evolution and attitude of EMEs towards investment flows from abroad in the past few decades particularly since the eighties. This section reviews the FDI policies of select countries to gather some perspective in considering 'where India stands' at this current juncture with regards to drawing FDI policy imperatives.

India's growth story

India's success story is expected to enter a new era of inclusive growth going forward. Inclusive growth is a slow and steady process, which needs focus on certain key aspects like infrastructure, accessibility to financial institutions, education, creation of jobs, etc.

Significant progress will be visible in terms of growth percolating through to larger sections of society, a factor missing from India's growth story so far. While it might take longer to experience fully inclusive growth, the next decade would definitely see India rapidly progressing towards achieving this. It is great to know that India is growing and is forecast to be the third largest economy in the next decade.

The Indian economy is booming at a rate of eight per cent – the highest ever in a decade. India has its own unique past, a very different present, and will chart her own version of the future. India is emerging as the next superpower of the world. The government of India is taking initiatives in the health sector and also needs to primarily focus on the education sector.

India has withstood the global crisis beyond what most would have expected. Even while the rest of the world has been recovering, India and China (credibility of growth is at stake) have not only bounced back but have now started to grow at a very steady and sure rate.

INDIA

Abhishek Saxena
Phoenix Legal, Delhi
abhishek.saxena@phoenixlegal.in

Pranav Srivastava
Phoenix Legal, Delhi
pranav.srivastava@phoenixlegal.in

Options attached to FDI instruments issued to foreign investors in India: policy liberalisation or more confusion?

'It is expected that this relaxation will facilitate greater FDI flows into the country' reads the press release dated 9 January 2014 issued by the Indian central bank and the regulator for foreign exchange transactions, the Reserve Bank of India (RBI) (the 'Press Release'), which communicated RBI's decision to permit use of optionality clauses in foreign direct investment (FDI) transactions. Industry seems to differ.

Optionality clauses (such as right of first refusal, call, put, tag and drag) are commonly used in investment transactions – namely private equity and venture capital and joint ventures – to regulate the transfer of shares between parties and to provide exit options to investors/shareholders either at a pre-agreed price or fair market price, and FDI transactions are no exception. Their significance has grown recently as exit from investments through an initial public offering on a stock exchange (usually a preferred option) has become increasingly challenging given the lacklustre performance of the stock markets over the last few years.

Prior to the current relaxation, RBI had not formally communicated its views on the permissibility of optionality clauses in FDI transactions. However, the general consensus seemed to be that they were permissible in the absence of a clear directive *against* the use of such options. Needless to say, optionality clauses were regularly included in agreements in respect of FDI transactions. While certain news reports and informal discussions with RBI suggested that the RBI did not favourably view put options attached to shares issued by Indian companies under the FDI route which guaranteed fixed price exits or a fixed rate of return to the foreign investor on its investment, such a view was never formally communicated by RBI. As per certain news reports, RBI's opposition to put options guaranteeing a fixed rate of return to foreign investors arose out of its concern of debt transactions being projected as FDI transactions for getting around the restrictions prescribed by the Indian external commercial borrowing (ECB) regulations, which regulate foreign lending to Indian entities. The ECB regulations are more restrictive and cap the rate of interest, restrict the use of funds and regulate the entity which can borrow and from whom the borrowing can be made.

Likewise, Indian FDI policy issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India (DIPP), has been silent on the issue of permissibility of optionality clauses in instruments issued under the FDI route. While the DIPP had amended the FDI Policy in 2011 to prohibit issue or transfer of equity shares or compulsorily convertible instruments with in-built options, the amendment was withdrawn shortly after its issue. While it was widely believed that this amendment was done at RBI's behest, its hasty withdrawal came to be construed as favouring permissibility of optionality clauses attached to instruments issued under the FDI route.

Regulator clarifying its stance – no assured returns

Recently, clarifying its stance on the issue for the first time, RBI, by its notification dated 12 November 2013 (the 'Notification'), amended the relevant regulations to specifically permit optionality clauses for equity shares and compulsorily and mandatorily convertible preference shares

or debentures issued to foreign investors through the FDI route ('FDI Instruments') provided they do not provide any option/ right to exit at an assured price. This comes as a confirmation of RBI's earlier views, reported in the media or through informal conversations with them, against enforceability of FDI Instruments guaranteeing a fixed rate of return to the foreign investors. The Press Release clearly confirms RBI's earlier views on the subject, although never communicated formally in the past, by stating that '[i]t may be recalled that till now only equity shares or compulsorily and mandatorily convertible preference shares/debentures were eligible instruments to be issued to persons resident outside India under the Foreign Direct Investment policy and these instruments were not allowed to have any optionality clause'. While RBI may term the recent change a 'relaxation', large numbers of investment documents executed prior to the current relaxation already incorporated this relaxation and, while the permissibility of options guaranteeing fixed price exits to foreign investor was arguable, use of options per se was commonly believed to be not illegal. It is the first time that the RBI has, in unequivocal terms, stated that optionality clauses per se were not permissible earlier.

The RBI also issued a circular on 9 January 2014 (the 'Circular') to all the authorised dealer banks intimating them of the change in the relevant regulations through the Notification and has therein stated that *all existing contracts will have to comply with the requirements of the Notification and the Circular* to qualify as FDI compliant. As already mentioned, these exit options were regularly included in FDI transactions in the absence of a formally communicated stance from the RBI against their permissibility. Therefore, to be compliant with the current changes, several investment agreements will have to be reopened to restructure fixed price exit mechanisms which have now been clarified by the RBI to be FDI non-compliant.

To give credit to the RBI, the Notification and the Circular have at least clarified that options attached to FDI Instruments are not restricted except for those guaranteeing a fixed return to foreign investors. Further, exit by foreign investors using option clauses can be done after a lock-in period of one year (unless sector-specific conditions require a longer lock-in period) and exit must be at a price determined by following the mechanism prescribed in the Notification and the Circular.

Adding to the confusion

While, as aforementioned, the Notification and the Circular do clarify that options attached to FDI Instruments are not prohibited except those guaranteeing a fixed rate of return to the foreign investors on exit, a mechanism for price determination in the case of exit of a foreign investor by exercise of options is what has caused the confusion.

Equity shares of unlisted companies

Under the existing Indian exchange control regulations, acquisition of equity shares of unlisted companies by foreign investors can be done at a price which is equal to or greater than the price determined as per the discounted cash flow (DCF) method which takes into account the future growth prospects of the company. However, the Notification and the Circular state that exit pursuant to the exercise of options can only be at a price not exceeding the price arrived at the basis of return on equity (RoE) (ie, profit after tax/ net worth with net worth being free reserves and paid up capital) as per the latest audited balance sheet (ie, based only on past performance). Also, the Notification or the Circular does not elaborate on the meaning of price **arrived on the basis of RoE** as per the latest audited balance sheet.

While one interpretation may be that the capital invested by the foreign investor ('Original Investment') will be paid along with the amount determined by multiplying the Original Investment with RoE derived as per the latest audited balance sheet, this interpretation may not be satisfactory for investors making long term investments (exceeding one year). For instance, a private equity investor investing INR 100m for a five-year term may be allowed to exit pursuant to the exercise of an option at a price not exceeding INR 110m (assuming RoE as per the latest audited balance sheet to be ten per cent) which would translate into an annual return of a measly two per cent.

Yet another interpretation of the Notification and the Circular can be that the Original Investment will be paid along with the amount calculated by multiplying the Original Investment with RoE derived as per the latest audited balance sheet and the number of years for which the foreign investor has held the investment. Such an interpretation can allow a reasonable level of return for the foreign investor; however,

it is possible – and likely – that the RoE will vary year on year and accordingly the foreign investor could exit in the year the performance/profitability of the company is abnormally high leading to a high RoE even though the company may not have performed in the previous years or vice versa. In such a situation, would a foreign investor be permitted to an abnormally high exit price or vice versa? This interpretation could also throw up a scenario of a negative ROE if the company has had a bad year, in which case the foreign investor would be faced with a bizarre situation of exiting with a haircut on its investment.

Another more plausible and likely interpretation can be that the Original Investment will be paid along with the amount calculated by multiplying the Original Investment with RoE for each year derived from the audited balance sheet for that year and paid for the number of years that the investment has been held. This may offer reasonable levels of returns on the Original Investment provided the company has been profitable every year of the period that the Original Investment has been held.

Equity shares of listed companies

The position under the Notification and the Circular with regard to exit by sale of equity shares of listed companies appears to be clearer than in case of sale of equity shares of unlisted companies. While the foreign investors investing in listed companies can purchase the equity shares at a price determined by the Securities and Exchange Board of India (SEBI) pricing guidelines, they can exit their investment by exercising the option at market price prevailing at the recognised stock exchanges.

Compulsorily and mandatorily convertible preference shares or debentures

Investments in compulsorily and mandatorily convertible preference shares or debentures ('Convertible FDI Instruments') of listed or unlisted companies seem like the way forward especially for financial investors. Foreign investors are required to purchase the Convertible FDI Instruments at a price determined by SEBI pricing guidelines (in case of listed companies) or at a fair value determined as per the DCF method (in case of unlisted companies). However, as per the Notification and the Circular, the exit from their investment by exercising the option can be at a price worked out *as per any internationally accepted pricing methodology* at the time of exit, duly certified by a chartered accountant or a merchant banker registered with SEBI. Subject to the discussion in the below paragraph, this indeed appears like a significant liberalisation and perhaps the best alternative for financial investors seeking to get around the lack of clarity surrounding exit by sale of equity shares of unlisted companies by exercise of options.

Do you still need to follow the pricing guidelines?

While as aforementioned, the Notification and the Circular have prescribed various pricing methods for exit by a foreign investor from FDI Instruments pursuant to exercise of options, neither the Notification nor the Circular has clarified whether, during exit pursuant to the exercise of options, parties will also have to comply with the already existing pricing guidelines prescribed for sale of FDI Instruments. For instance, in the case of equity shares of an unlisted company, if the exit price calculated on the basis of the RoE exceeds the price determined in accordance with the DCF method, whether the foreign investor will be permitted under the Notification and the Circular to receive such higher exit price.

One plausible interpretation by harmonising the already existing regulations and the amended regulations could be that the DCF method of valuation would have to be followed for determining the price in case of exit without exercise of options but if the exit is being done by exercise of options then the ROE based pricing would have to be used for determining the price at the time of exit.

Conclusion

Certainly the Notification and the Circular have clarified RBI's stance on permissibility of exit options for FDI Instruments and even though there is ambiguity in the mechanism for exit price determination especially in case of equity shares of unlisted companies, the Notification and the Circular do indeed mark a step forward for foreign investors. However, the changes made by the RBI may not out rightly be termed as 'liberalisation' or 'relaxation' of foreign exchange regulations unless a further clarification is provided on the price determination.

Put and call options in India: do these exit options really exist?

INDIA

Raj Panchmatia
Khaitan & Co, Mumbai;

Peshwan Jehangir
Khaitan & Co, Mumbai
mumbai@khaitanco.com

Nidhi Killawala
Khaitan & Co, Mumbai

The legality and enforceability of put and call option clauses ('Options') in India have long been the subject of debate. Such Options are commonly used globally, and have particular significance to both financial and strategic investors as they provide an exit to an investor within a finite period of time or on the occurrence of certain events. Often, they also provide for down-side protection for the investment. Further under the regulatory regime prevalent in India, the Securities and Exchange Board of India (SEBI) and the Reserve Bank of India (RBI) had taken views against such Options contained in investment agreements. The Companies Act 1956 also treated Options attached to shares of a public company with speculation[1] which led to considerable uncertainty in the minds of investors.

Traditionally, SEBI viewed agreements containing such Options as, inter alia, violations of the Securities Contract Regulation Act 1956 (SCRA). The SCRA – which applies to all public companies whether listed or not – was, however, recently amended by a notification dated 3 October 2013 to permit Options in investment agreements entered into after the amendment. The RBI also viewed investments with optionality clauses providing assured returns made by persons residing outside of India as 'debt' instruments rather than 'equity'. They sought that such investments follow the more stringent requirements governing foreign debt and not fall under the relatively relaxed foreign direct investment route in India. However, the RBI has, by way of a notification dated 12 November 2013, amended the existing foreign exchange management regulations to permit issuance of securities with such options to persons residing outside of India, subject to the conditions and pricing guidelines set out therein. The proviso to the recently notified section 58(2) of the Companies Act 2013 also provides legal sanctity to Options in agreements between shareholders and states that such agreements may be enforceable as a contract.

These changes have long been awaited and will hopefully help to boost foreign investments in the country. With the backdrop of these recent developments, this article seeks to provide a brief overview of the regulatory regime governing the validity of such Options and the challenges faced at the time of enforcement of such Options in India.

Background

Any restriction on the transfer of shares in public companies (including options in shares) was considered illegal under the Companies Act 1956.[2] Since Options in investment agreements restricted a person's right to transfer shares, such Options were considered illegal.

In addition, the Government of India issued a notification, dated 27 June 1961,[3] which stated contracts for 'pre-emption or similar rights' contained in, inter alia, collaboration agreements of limited companies would not fall within the ambit of SCRA.

However, eight years later in 1969, the Government issued another notification, dated 27 June 1969,[4] which provided that any contract for sale and purchase of a security other than a 'spot delivery contract' or contracts settled through stock exchanges was void. To add to the mayhem was section 20 of the SCRA, which stated that all options in securities are illegal and void. In 1995, when section 20 of the SCRA was omitted,[5] investors hoped that optionality clauses would now be permitted. However, this did not bring about the desired effect since the 1969 notification continued to remain in force. In a turn of events, the Government of India repealed the 1969 notification, thereby giving hope to investors holding such optionality clauses in India. But 'as we take one foot forward and a hundred backward', SEBI issued a notification dated 1 March 2000 on the same day, which in effect restated the repealed 1969 notification. This led to considerable debate in light of the 1961 notification and it was argued that Options are similar to pre-emption rights and therefore the provisions of SCRA should not apply in such a case.

SEBI has been reluctant to uphold and enforce Options contained in investment agreements and has viewed them, not as amounting to 'spot delivery contracts' as required under the SCRA,[6] but accordingly as derivative contracts, which under the SCRA could be carried out only on a recognised stock exchange. These views culminated in creating legal hurdles for investments in India, which was evidenced in the Cairn-Vedanta matter, where SEBI directed the parties to amend their investment agreement to delete references to any such Options.

Most recently, by a notification dated 3 October 2013 ('SEBI Circular'), SEBI permitted Options in investment agreements executed after the date of the SEBI Circular, subject to certain conditions. The SEBI Circular has clarified that it would not 'affect or validate any contract which has been entered into prior to the date of this notification'. Thus, strongly suggesting that Options contained in an agreement executed prior to that date would be invalid. As such, investors who have existing agreements containing an Option may consider executing fresh agreements to avail of the benefit of the SEBI Circular.

RBI followed suit by amending the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations 2000 to permit Options made by persons resident outside India, subject to certain pricing restrictions such as not providing any assured returns[7]. The recent moves by SEBI and RBI have been hailed as momentous and together with the notification of Section 58(2) of the Companies Act, 2013, they seem to provide the much needed clarity and certainty on the fate of optionality clauses in India.

However, much is left to be desired in light of the newly introduced and notified proviso to section 58(2) of the Companies Act 2013. This states that any contract or arrangement between two or more persons in respect of the transfer of shares will be enforceable as a contract. It appears, therefore, that this proviso lends legal sanctity to Options in public companies, which are essentially agreements for the transfer of shares between shareholders without any pricing restrictions as imposed by the SEBI Circular.

Although the regulators appear to be liberalising the market for foreign investments in India by providing some clarity, a number of loopholes continue to remain open. India is thus still a long way from the international position where parties are free to negotiate the terms and price of Options in investment agreements.

Specific performance of Options

Often investment agreements contain a clause that states that the parties agree that they would have the right to seek specific performance of the agreement in case of breach. Upon a default to honour an Option under such an agreement, parties are left with no option but to knock on the doors of a court or initiate arbitration proceedings, as the case may be. A fundamental question that often plagues such proceedings is whether the party can seek specific performance and compel the other shareholder to purchase the shares or should a claim for damages be made instead.

Section 10 of the Specific Relief Act 1963 (SRA) states that specific performance of a contract is enforceable only when inter alia, 'the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.'

The approach of the courts needs to be considered depending on who the aggrieved party is. In cases where the aggrieved party is the one to receive shares of a company for the consideration that it is willing to pay, it remains to be seen whether courts will be amenable to allow a suit for specific performance of the agreement.

The courts in India have been fairly uniform in their approach and have ruled based on whether the shares of the company in question are 'easily available in the market' as set out in Explanation (ii) (a) to section 10 of the SRA. The landmark decision in this regard is of *Jai Narain Ram Lundia v Surajmull Sagarmull*[8] wherein the Court held in a case of specific performance 'that when shares are limited in number and are not ordinarily available in the market, it is quite proper to grant a decree for specific performance of a contract for the sale of such shares'. In fact, the Supreme Court of India has, while upholding the case of *Jai Narain Ram Lundia* (as above), held in *Madhusoodhan v Kerala Kaumudi Pvt Ltd*[9] that shares of a private company could not be considered to be 'easily obtainable in the market' and thus courts could award specific performance since compensation by way of money could not have been considered adequate remedy. The courts have thus relied on the

'marketability' test to determine whether an award for specific performance should in fact be granted or not.

In the case of a public company, the Gujarat High Court, in its decision of *Mafatlal Industries v Gujarat Gas Company Limited,*[10] did not award specific performance for sale of shares of a public company since there was a regular market available for shares of that company and damages in such a case would be considered adequate remedy. Conversely, in the matter of *Brooke Bond India Limited v UB Limited,* the Bombay High Court held, albeit on different facts, that 'merely because return of earnest money deposit and interest are provided for, it is not possible, to come to the conclusion that the parties did not contemplate that the contract should not be specifically performed at the instance of either party'. Thus, investors may argue that damages are not adequate remedy since the agreement provides an assured exit for the investor, which would not be achieved in the case of payment of damages.

In cases where the aggrieved party is the Option holder under which it has the right to sell its shares to another party for consideration, in essence, the only claim it can make is to receive consideration or the monetary value for the shares. As such, courts may reason that receipt of damages or money would be adequate relief and specific performance may not be granted. Further, in a claim for damages, courts also have to consider whether any action was taken by the parties to mitigate its damages. Complications and questions as to what would happen to the shares in question if the aggrieved party receives the damages would also have to be dealt with. Often, the facts of the case may also necessitate the need to seek approval from regulatory authorities for payment of damages to a person resident outside India. The courts in India have not delved into the more nuanced questions involved in such cases and thus although the recent move by the RBI and SEBI has cleared the air to a certain extent, uncertainty persists.

In light of the judicial decisions set out above, while it appears that the courts would consider granting specific performance of agreements that require the sale of shares of a private company, it would be far more complex to enforce an agreement for the sale of the shares of a public company. However, it must be remembered that the ruling of the courts is based on the facts and circumstances of each case and thus it would be nearly impossible to jot down the fate of optionality clauses in India with absolute certainty.

Conclusion

As set out above, despite the clarity provided by the recent notification of the Companies Act 2013, the SEBI Circular and the RBI notification, there are several questions relating to enforceability of these Options in India that remain unanswered. Although certain investment agreements contain such Options, a party may not be able to successfully exercise its right under these Options due to the reasons set forth above. The question to be asked is whether these Options really serve as an exit option for the investor in such a case. Multiplicity of regulators has added to the already existing confusion and unless all the creases relating to enforceability of Options are ironed out, these Options may not be able to serve as the 'exit options' that parties intend them to be.

Notes

1 In light of s 111A of the Companies Act 1956.
2 In light of s 111A of the Companies Act 1956.
3 Government of India notification under section 28(2) of the SCRA.
4 Government of India notification under section 16 of the SCRA.
5 Omitted by the Securities Laws (Amendment) Act 1995 w e f 25 January 1995.
6 For the Supreme Court's ruling, see *Naresh K Aggarwalla and Company v CanBank Financial Services Limited and Another* (2010) 6 SCC 178.
7 RBI notification dated 12 November 2013.
8 1949 (51) BomLR 979.
9 (2004) 9 SCC 204.
10 [1999] 97 CompCas 301 (Guj).

INDIA

Souvik Ganguly
Acuity Law, Mumbai
souvik.ganguly@acuitylaw.co.in

Deep Jain
Acuity Law, Mumbai
deep.jain@acuitylaw.co.in

Shantanu Kanade
Acuity Law, Mumbai
shantanu.kanade@acuitylaw.com.in

India and Japan: an evolving alliance

Historically, India and Japan have shared a peaceful and prosperous relationship India's relation with Japan unique, and one of warmth emanating from generous gestures and sentiments; of standing by each other in times of need. This is highlighted by the fact that, in 1949, the then Prime Minister of India, Mr Jawaharlal Nehru, gifted an Indian elephant to the Ueno Zoo in Tokyo. This was during a time when the Japanese people were suffering from the aftermath of the Second World War. This gesture brought hope and happiness to the Japanese people, especially children, in that difficult period.

In India, there exists a strong admiration for Japan's post-war economic and infrastructural reconstruction which subsequently led to Japan's rapid growth. Such admiration was endorsed a generation later by the unique role that the Maruti-Suzuki alliance played in revolutionising industrial technology and management concepts in India.

This relationship has gained new impetus in the past decade owing to diplomatic and economic factors concerning both countries. The recent visits to India by the Emperor and Empress of Japan and the Japanese Prime Minister, Mr Shinzo Abe, are indicative of the evolving nature of the partnership between these two Asian democracies. Through this article, we seek to explore and analyse briefly the various means adopted by the two countries through which they seek to develop and sustain mutual cooperation in the economic sphere.

Continued exchanges between India and Japan

Annual summits have been a unique feature of India–Japan relations in the recent past. Starting with Dr Manmohan Singh's visit to Japan in December 2006, both countries have played host to the Prime Minister of the other country every alternate year. Besides the annual summits, several high-level ministerial and parliamentary exchanges have been taking place at regular intervals. There is a parallel process of business and industry in both countries taking note of the opportunities that recent economic developments in India have created for them. This has resulted in a sharp increase in exchange of business delegations.

Comprehensive Economic Partnership Agreement

The idea of a Comprehensive Economic Partnership Agreement (CEPA) was first mooted between Dr Manmohan Singh, the Prime Minister of India, and Mr Junichiro Koizumi, the then Prime Minister of Japan, in 2004. The two Prime Ministers set up a joint study group (JSG) to study the different aspects and give its recommendations on further developing economic relations between the two countries. The JSG submitted its report in 2006. The negotiations for CEPA commenced in January 2007 and concluded in September 2010. The Agreement became effective on 1 August 2011.

We understand that the CEPA aims to boost trade and investment ties between India and Japan. The CEPA is intended to work in a manner such that India will be benefited by Japanese investments and associated technology and practices. Japan, on the other hand, will be able to utilise India's emerging market and resources – in particular, human resources. The CEPA, owing to its comprehensive nature, is likely to further strengthen India–Japan economic ties to the benefit of both countries.

Expansion of currency swap arrangement

Bank of Japan (BoJ) and the Reserve Bank of India (RBI) recently concluded an agreement that expands a Bilateral Swap Arrangement (BSA) that is in force between the two countries to US$50bn from its original size of US$15bn. The agreement shall be effective until 3 December 2015. The BSA, in its original form, was signed in Basel, Switzerland, and was brought into force on 29 June 2008, enabling both countries to exchange their local currencies (ie, either Japanese yen or Indian rupee).

As per the text of the amendment, the BSA is aimed at addressing possible short-term liquidity difficulties and supplementing the existing international financial arrangements, as one of the efforts in strengthening mutual cooperation between Japan and India. The arrangement means the BoJ will accept rupees and give dollars to the RBI and similarly RBI will take yen and send dollars to the BoJ to stabilise the two nations' currencies, in a contingency. The arrangement can be put into operation in case of depletion of foreign exchange reserves or when the currencies are affected by speculation.

Overseas Development Assistance

The economic cooperation between India and Japan in the modern era dates back to 1958. The cooperation began by an Overseas Development Assistance (ODA) loan, which was the first ODA Japan had ever provided to any country. As per a report by Japan's Ministry of Foreign Affairs, the ODA loan has been the prevalent form of Japan's ODA for India, claiming approximately 99 per cent of the entire ODA. India has been the largest recipient of Japanese ODA since 2003–2004. As of March 2013, the overall commitment of ODA reached Yen 3807.763bn. As of 6 February 2013, 66 projects were under implementation with Japanese loan assistance. The loan amount committed for these projects is Yen 1640.1bn. These projects are in the sectors of power, environment and forests, urban transportation, urban water supply and sanitation, rural drinking water supply, tourism, irrigation, agriculture, shipping, railways, renewable energy and financial services.

Some of the best known projects in India which are receiving Japanese assistance are the Delhi Metro project, Delhi–Mumbai Industrial Corridor (DMIC) project, the Dedicated Freight Corridor (DFC) project and the Chennai–Bangalore Industrial Corridor (CBIC) project. These projects are expected to make far-reaching contributions toward India's economic development.

Japanese foreign direct investment (FDI) into India

India is emerging as a favoured destination in Asia for Japanese foreign direct investment (FDI). FDI statistics released by the Department of Industrial Promotion and Policy (DIPP), Ministry of Commerce and Industry, Government of India show that Japanese companies have made investments of US$15.27bn to India between April 2000 and November 2013. This accounted for 7.31 per cent of total FDI inflow into India and made Japan the fourth largest investor in India.

Moreover, the number of Japanese affiliated companies in India has grown significantly over the last five years and over 1000 Japanese companies are operating in India at present. Japanese FDI into India has mainly been in the automobile industry, electrical equipment, pharmaceuticals, trading and telecommunications sector. We understand that India's economy presents several opportunities for Japanese companies, primarily in areas such as infrastructure, manufacturing, automobiles and auto parts, power, metals, renewable energy, food processing and electronic hardware.

Meanwhile, as per **asia.nikkei.com**, the value of trade between the two countries is known to have tripled from fiscal 2005 to fiscal 2012, to US$18.5bn.

Incentives to Japan in order to encourage investment in Electronic System Design and Manufacturing (ESDM) in India

The Government of India has decided to offer a package of incentives to attract domestic and global investments into the ESDM sector within the Electronic Manufacturing Clusters (EMC) Schemes. This decision was taken following the meeting between Mr Hiromasa Yonekura, Chairman, Keidanren (Japan Business Federation) along with the top Japanese business representatives in India and Mr Anand Sharma, Minister of Commerce and Industry, Government of India.

In addition, the Government of India has also recently approved the proposal for setting up of two semi-conductor wafer fabrication manufacturing facilities in India. Mr Anand Sharma has encouraged all Japanese semi-conductor wafer fabrication manufacturers to set up facilities in India by availing the benefits and incentives being offered by the Government of India. He also laid emphasis on the strengthening of cooperation in creative industries, such as design, apparel, fashion, food, household goods, music, movies and animation, among other industries. We understand that six memorandums of understanding were recently signed between Japanese companies and Indian companies in areas such as traditional/regional products, animation, apparel/fashion, lifestyle/luxury products and food.

The path ahead

The two Prime Ministers reaffirmed the importance of the relationship between India and Japan as per the Joint Statement released by the governments of both countries on the occasion of the official visit of the Prime Minister of Japan Mr Shinzo Abe to India from 25–27 January 2014 for the annual summit. A few key points that emerge out of the Joint Statement are as follows:

(a) importance of investment for driving economic growth and job creation in their economies and ways to create enabling environments to mobilise investment and give a fillip to economic relations;

(b) introduction of Japanese technologies and expanding investment through the implementation of 'the Action Plan for India-Japan Investment Promotion' agreed between the Minister of Commerce and Industry of India and the Minister of Economy, Trade and Industry of Japan in September 2013;

(c) reaffirmation that Japan will continue its ODA at a substantial level to encourage India's efforts towards social and economic development;

(d) expansion of the Japanese Overseas Cooperation Volunteer (JOCV) scheme through the JICA sectors previously not approved by the Government of India such as craft works, sports and education, and the launch of the Senior Volunteer (SV) scheme in India;

(e) promotion of a cooperative relationship and further facilitation of trade, harmonisation of activities within international standardisation and conformity assessment through the Memorandum of Cooperation (MOC) between the Bureau of Indian Standards (BIS) and Japanese Industrial Standards Committee (JISC); and

(d) reconfirmation of the importance of cooperation for the Indian Institute of Technology, Hyderabad and the Indian Institute of Information Technology, Design and Manufacturing in Jabalpur projects.

Our thoughts

We understand that the relationship between India and Japan is progressing at a rapid pace and is likely to open up new horizons in terms of trade and investment as well as business exchanges between the two countries. We believe that investment into the Indian economy and financial assistance which is likely to flow from Japan will go a long way in helping India in realising its objective of being an economic superpower in the near future.

INDIA

Sawant Singh
Phoenix Legal, Mumbai
sawant.singh@phoenixlegal.in

Sriram Ramachandran
Phoenix Legal, Mumbai
sriram.ramachandran@phoenixlegal.in

Aditya Bhargav
Phoenix Legal, Mumbai
aditya.bhargava@phoenixlegal.in

A regulatory perspective on virtual currencies

Recently the media has been awash with various news reports and op-eds on the adoption and implication of virtual currencies, the most prominent of which is the 'Bitcoin'. In this period (???), the value of the Bitcoin reached a high of around US$1,100 in November 2013 and is now trading at reduced levels. Notably, while the Bitcoin has been around for some time now, its sudden rise to prominence in the last year has left regulators around the world struggling to play 'catch-up' in its wake.

Regulatory responses to Bitcoin

The regulatory response to Bitcoin has been mixed to negative at best. News reports indicate that, while China has restricted its banks from using Bitcoin as a currency due to concerns that include money-laundering, the New York Department of Financial Services (NYDFS) issued a notice confirming its intention for holding public hearings on the feasibility of the issuance of a 'BitLicense' – a licence for Bitcoins that would incorporate anti-money laundering protections as well as protections for consumers.

On the other hand, the European Banking Authority (EBA) appears to have taken a more cautious stance, issuing a warning in December 2013, which highlighted risks associated with 'buying, holding or trading virtual currencies such as Bitcoin'. While recognising that virtual currencies are 'unregulated digital money', the warning issued by the EBA also states that there are no specific regulatory protections that would protect consumers from losses if a platform that holds or exchanges virtual currencies goes out of business.

The Indian perspective

In a statement issued on 24 December 2013, the Reserve Bank of India (RBI) cautioned users and holders of virtual currencies including Bitcoins, on risks associated with such virtual currencies. The risks cautioned against include: there being no established network for dealing with customers' problems or disputes; lack of clarity on the legal status of platforms used to exchange virtual currencies; and the potential of virtual currencies to be used for money laundering and other illegal purposes. The RBI statement also clarified that it is currently examining the issues associated with the use of virtual currencies including from a foreign exchange and payment systems point of view.

While the RBI statement did not expressly ban virtual currencies, a Bitcoin operator in India has reportedly suspended operations pending the issuance of a regulatory framework by the RBI on the use of virtual currencies. Additionally, a Bitcoin-like virtual currency called 'Laxmicoin' (reportedly the first digital currency in India) has delayed its launch and has approached the RBI for clarity on the regulatory framework applicable to it. There are also reports of a legal challenge to the RBI statement before the Supreme Court of India.

Key issues

The advantages of virtual currencies purportedly include transfers of extremely small amounts (which may not be possible using conventional money transfer sources), secure modes of transfer, and little or no transfer fees (unlike conventional money transfer sources). Bitcoin promoters also state that as there is only a finite supply of Bitcoins, this would also avoid possible currency risks like deflation.

However, the purported ease of transfer of Bitcoins also raises issues that in the absence of regulation, Bitcoins may be used for money laundering and other illegal purposes. For instance, in October 2013, authorities in the US shut down an online marketplace which was allegedly using Bitcoins for illegal transactions. Regulators are also believed to be uncomfortable with the Bitcoin as there are fears that the (as yet) anonymous nature of its creator(s) may render the Bitcoin vulnerable to manipulation.

Interestingly, the EBA's warning also states that holding virtual currencies may have tax implications, including value added tax and capital gains tax. Presumably this is based on the view that unlike 'real' currencies, which have the backing of governments or central banks, virtual currencies do not have intrinsic value and instead derive value based on what may be reckoned as speculative transactions.

Conclusion

The proliferation of virtual currencies poses significant challenges to the regulatory framework in various countries. If virtual currencies are to be adopted on a large scale to facilitate e-commerce, there needs to be a clear regulatory framework on their use and circulation within financial systems. Such regulations would also need to take into account anti-money laundering, financial transparency, payment settlement systems requirements, and customer redressal requirements. With virtual currencies being in a very nascent phase currently, this is a space to watch for further developments.

MALAYSIA

Dheeraj Bhar

Brijnandan Singh Bhar & Co, Kuala Lumpur

dheeraj@bsbharco.com

When should blog or forum posts create liability for defamation?

A number of recent court cases have given rise to concerns about the ability of a blogger to express opinions or report news events without fear of being liable for damages in a lawsuit for defamation. Some of these lawsuits in Malaysia have captured the attention of the international community.

In a case decided in December 2013, the Malaysian Court of Appeal reinstated a defamation suit filed against a blogger who published a photograph depicting a Member of Parliament wearing the robe of a Christian priest. The High Court had ruled that the article accompanying the photograph was not defamatory because it did not refer to the Member of Parliament as an apostate but that the picture could be defamatory by raising that implication. The High Court dismissed the lawsuit because it was not satisfied that the Member of Parliament introduced the original picture published on the blog into evidence.[1] Disagreeing, the Court of Appeal ruled that the words and photograph in the article were defamatory: 'The words extend the legitimate bound of justification and fair comment.'[2]

Altering a photograph to make a point may extend beyond the boundaries of a blogger's legitimate right to criticise public officials. More troubling, however, are lawsuits that attack bloggers who make legitimate comment upon serious issues of public importance. Bloggers, like journalists, play an important role is society by stimulating debate and calling attention to legitimate public issues. This does not mean that bloggers are licensed to make irresponsible claims or to tell public lies that injure reputations, but raising public awareness of potential misconduct is not the sort of activity that should subject a blogger to liability for defamation.

What is defamation and how does it apply to bloggers?

The law of defamation requires a plaintiff to show that a defamatory statement was made, that the statement concerns the plaintiff, and that the statement was published to third parties. If the plaintiff makes that showing, the burden then shifts to the defendant to establish a 'qualified privilege' by proving that they made the statement honestly and without any indirect or improper motive. To overcome the qualified privilege, the plaintiff must prove that the statement was made with actual or express malice.[3] A recent controversial case demonstrates how defamation claims can be used as a weapon against bloggers.

A Malaysian subsidiary of Asahi Kosei Japan Co Ltd, a Japanese electronics company, sued Charles Hector after Hector criticised the company's treatment of Burmese workers on his blog. The workers had complained about unlawful wage deductions, denial of sick leave and threats of deportation, among other issues. Asahi Kosei denied responsibility for the migrant workers, contending that they were not employed directly by Asahi Kosei but were provided by an agency that outsources temporary workers. Asahi Kosei sued Hector for US$3.3m but, after a six-month trial, Hector settled the case for a payment to Asahi Kosei of only MYR 1 (US$0.30). Hector also published an apology to Asahi Kosei and paid certain court costs.[4] The defamation suit sparked concern from the international human rights community that lawsuits could be used to silence legitimate criticism of abusive practices. The Malaysian Bar Council justly called the suit 'a deplorable and coercive act.'[5]

A similar misuse of defamation law occurred in December 2010, when a blogger accused a prominent Malaysian politician of heinous crimes. The politician sued the blogger, seeking injunctive relief in the form of an order compelling the blogger to remove the accusations from his blog. In defending the action, the blogger asserted that he copied the accusation from a newspaper story. The story identified the victim of the alleged crimes but did not identify the politician as the perpetrator. The blogger did not identify the politician by name but added the

politician's photograph next to the story. The blogger also referred to documents indicating that the victim worked for the politician, that the victim's claims had been investigated by Migrant Care, that the investigation report was forwarded to the police, and that the police refused to act because the victim did not press charges. The court declined to receive the investigation report into evidence because the Migrant Care investigators were disinclined to authenticate the report by coming to Malaysia to testify. The court held that the burden of proving the truth of a defamatory accusation is on the person making the accusation and that the blogger could not prove the accusation was true, even if he believed it to be so.[6]

The court's logic is suspect: the blogger did not claim the accusation was true but merely reported that the accusation had been made. He did so by reprinting, verbatim, a newspaper story that reported the same accusation. While the blogger's addition of the politician's photograph arguably identified the politician as the person who was accused, his identity as the employer of the victim, and thus the person she accused, does not seem to be in serious dispute. Nothing in the facts recited by the court suggests that the blogger did not publish the story honestly and without indirect or improper motive.

The court's decision has a chilling effect upon bloggers who act as journalists by reporting accusations of criminal activity, particularly when bloggers are merely republishing stories that have already been circulated by news outlets. Of course, if the original newspaper story was defamatory, its republication is equally defamatory, but the court referred to no evidence suggesting that the original story was untrue. And, while the court rejected other news stories that confirmed the investigation of the politician on the ground that they were published after the blogger's story, it is difficult to see how the date of the confirming stories has any bearing on the accuracy of the blogger's report that the accusation had been made.

The court held that 'a blogger is free to publish and disseminate matters and information which is of public interest, however the information or matter must be true and accurate… not something fished out of hearsay information and without verification… Freedom of expression does not extend to freedom of publication of… accusations.' If that is true, the publication of a prosecutor's accusation made against a criminal defendant would potentially be libellous – at least if the defendant is later acquitted. Surely the public interest is served in publishing the fact that an accusation against a public figure resulted in an investigation, so long as the blogger (or reporter) does not assert or imply that the accusation is true. As another court noted, 'defendants should be given the freedom to report news in a transparent and impartial manner, with the leeway to raise queries or even call for investigations as permitted under the *Reynolds* principles.'[7] That language seems to fit the blogger's report in this case.

The elusive distinction between a blogger, a publisher and a forum

The common law of Malaysia imposes the same liability on an owner, publisher or editor of a defamatory publication that is imposed on its author or distributor.[8] But what if the 'publication' is a forum maintained for the benefit of users of a corporate website? The High Court addressed this issue in a 2010 decision.[9]

Bristol Meyers, an international pharmaceutical company, created a website to promote its products in Asia. One part of the website was a forum that permitted users to exchange opinions and information on healthcare and parenting issues. Bristol Myers' terms of use stated that the views expressed on the forum were not the views of Bristol Myers. The plaintiff sued Bristol Myers, contending that content posted to its forum was defamatory, particularly with regard to statements made in a different website to which the forum post was hyperlinked.

There was no dispute that Bristol Myers was the official service provider of the forum, but the court held that Bristol Myers was not the forum's publisher. With regard to electronic media, the distinction between a publisher and a forum provider is elusive. If Bristol Myers is not electronically publishing the forum, who is?

Even more dubious is the court's conclusion that, unlike print media, where an editor or publisher has the opportunity to review content submitted by authors prior to its publication, Bristol Myers could not control the content of its forum. Bristol Myers asserted that it offered an unmediated electronic forum in which individuals could interact with each other. Bristol Myers generally did not know what messages were posted to the forum, did not participate in the forum, and did not control, edit, verify,

endorse or censor the content that forum authors contributed. Bristol Myers did have a system in place for removal of offensive content, but that system was triggered either by a complaint by a forum user or by a routine search for offensive keywords.

It is correct – as the court observed – that this is a different system from the traditional model followed by print media; but is it fundamentally different? A newspaper could, if it chose to do so, publish letters or submissions without reading them. As the High Court noted, it does not matter whether the editor or publisher actually reads defamatory material before publishing it because the editor or publisher has had the opportunity to control the publication of the defamatory content.[10] However, the High Court drew a distinction between a print publisher and an internet forum provider like Bristol Myers because Bristol Myers exercises control over forum postings only after the content has been posted, by removing it if it receives a complaint about offensive content. The High Court concluded that after-the-fact removal of published content is not the same kind of control that a publisher of printed material exercises.

The High Court's reasoning is flawed. Bristol Myers could, if it chose to do so, assign employees to review and vet all forum submissions before publishing them on its website. It was Bristol Myers' choice to operate an unmediated, rather than a mediated, forum. It is therefore inaccurate to conclude that Bristol Myers could not have controlled the forum's content prior to its publication. Bristol Myers' terms of service expressly reserved the right to edit the content posted on its website by forum users. It therefore had the ability to control the forum's content (although likely at great expense) and could have done so by holding posts until they were reviewed and approved. It chose instead not to play the traditional role required of an editor or publisher.

The High Court distinguished three cases in which a party was found to be a publisher who did not author the defamatory content. In one, the recipient of an anonymous letter circulated the letter to others. In the second, a newspaper published a letter to the editor. In the third, a property owner was aware of a placard erected on his property that contained defamatory content and called attention to it by pointing at it. The High Court concluded that each of those cases involved 'a positive overt act' that caused the publication, while Bristol Myers engaged in no such 'positive overt act'. Yet Bristol Myers took the overt act of opening a website to users and allowing users to publish content without supervision. It seems difficult to distinguish these actions from a newspaper editor who publishes a defamatory letter without reading it. That the publication of unread content is done via computer rather a printing press makes the publication no less an overt act.

While some of the High Court's reasoning is therefore questionable, it is always difficult to expand common law principles to new technology. The conclusion reached by the High Court is correct as a matter of public policy. The choice to play a passive role as a forum provider serves an important public function. Making an auditorium available for public discussions may lead to libellous remarks that the auditorium owner does not anticipate or endorse, but there is value in creating a forum for robust public debate. Just as the auditorium owner is not held liable for choosing to play a passive role as the provider of a forum for public discussion, an internet service provider that creates a public forum performs a public service by facilitating the open exchange of opinions and ideas. The service provider who chooses to remain passive should not be penalised for performing a valuable public service. In this case, the High Court therefore reached the correct result, albeit for the wrong reason.

Notes

1 Rita Jong, 'Shah Alam MP Loses Suit to Wanita Umno Information Chief' (*The Malaysian Insider*, 12 July 2013), available at www.themalaysianinsider.com/malaysia/article/shah-alam-mp-loses-suit-to-wanita-umno-information-chief.

2 'Appeals Court Allows Shah Alam MP's Defamation Suit' (The Sun Daily, 10 December 2013), available at www.thesundaily.my/news/902350.

3 *Lee Thye @ Lee Shan Too v Daniel Siew Yong Loong* [2013] 1 LNS 514.

4 The Observatory for the Protection of Human Rights Defenders Press Release, 'Defamation case against human rights defender Charles Hector Fernandez ended with a settlement', (26 August 2011), available at www.omct.org/human-rights-defenders/urgent-interventions/malaysia/2011/08/d21400.

5 Sean Yoong, 'Company chastised for suing Malaysia rights lawyer' (BurmaNet News, 23 June 2011), available at http://ph.news.yahoo.com/company-chastised-suing-malaysia-rights-lawyer-093516145.html.

6 *Datuk Seri Utama Dr Rais Yatim v Amizudin Bin Ahmat* [2011] 1 LNS 1441.

7 *Lee Thye @ Lee Shan Too v Daniel Siew Yong Loong* [2013] 1 LNS 514.

8 *Stemlife BHD v Bristol Myers Squibb (M) Sdn Bhd & Anor* [2010] 3 CLJ 251, para 10.

9 *Ibid.*

10 *Ibid*, para 24.

Aspects of international franchising in relation to New Zealand

NEW ZEALAND

Stewart Germann

Stewart Germann
Law Office, Auckland
stewart@germann.co.nz

New Zealand is an exciting and fast developing market in relation to franchising. Considering that the population of New Zealand is about 4.6 million and there are over 350 systems, there is one system for every 12,000 people, a figure which is very high in my opinion. But why is this? The answer is because New Zealanders love brands and businesses that succeed, and franchising offers people a chance to leave the security of employment and purchase a franchised business, which should succeed provided the system is followed.

Legal position

There are no franchising-specific laws in New Zealand. However, as you would expect, there are existing laws that protect franchisees and probably the three main laws that give such protection are: the Fair Trading Act 1986, the Commerce Act 1986 and the Contractual Remedies Act 1989. These acts focus in particular on misrepresentations and restrictive trade practices. Although New Zealand does not have franchising legislation at this time, the New Zealand government may be looking to introduce some legislation this year. It is bound to be some law in relation to a mandatory disclosure regime, which follows overseas countries like Australia and the United States.

There is no mandatory disclosure regime in New Zealand but there is the Franchise Association of New Zealand (FANZ) which was formed in 1996 when New Zealand broke away from the Australian Association.

The FANZ publishes the Code of Practice and the Code of Ethics (the 'Code') and all members of it must comply with both Codes. The Code of Practice has four main aims, which are as follows:

- to encourage best practice throughout franchising;
- to provide reassurance to those entering franchising that any member displaying the logo of the FANZ is serious and has undertaken to practise in a fair and reasonable manner;
- to provide the basis of self-regulation for franchising; and
- to demonstrate to everyone the positive will within franchising to regulate itself.

The Code applies to all members including franchisors, franchisees or affiliates such as accountants, lawyers and consultants, and all prospective new members of the FANZ must agree to be bound by the Code before they can be considered for membership.

What does the Code cover?

1. **Compliance:** all members must certify that they will comply with the Code and members must renew their certificate of compliance on an annual basis.
2. **Disclosure:** a disclosure document must be provided to all prospective franchisees at least 14 days prior to signing a franchise agreement. This disclosure document must be updated at least annually and it must provide information including a company profile, details of the officers of the company, an outline of the franchise, full disclosure of any payment or commission made by a franchisor to any adviser or consultant in connection with a sale, listing of all components making up the franchise purchase, references and projections of turnover and possible profitability of the business.
3. **Certification:** the Code requires franchisors to give franchisees a copy of the Code and the franchisee must then certify that he or she has had legal advice before signing the franchise agreement.
4. **Cooling-off period:** all franchise agreements must contain a minimum seven-day period from the date of the agreement during which a franchisee may change its mind and terminate

the purchase. This is very important and the cooling off period does not apply to renewals of term or resales by franchisees.

5. **Dispute resolution:** the Code sets out a dispute resolution procedure which can be used by both franchisor and franchisee to seek a more amicable and cost-effective solution. The Code requires all members to try to settle disputes by mutual negotiation in the first instance and this process does not affect the legal rights of both parties to resort to litigation.
6. **Advisers:** all advisers must provide clients with written details of their relevant qualifications and experience and they must respect confidentiality of all information received.
7. **Code of Ethics:** all members must subscribe to the Code of Ethics which sets out the spirit in which the Code of Practice will be interpreted.

All franchisor members of the FANZ must have a Franchise Agreement which contains a dispute resolution clause and a cooling-off provision. In order to resolve disputes, mediation is the favoured method and it has a high success rate in relation to franchising disputes. However, if mediation does not work then there is always litigation which is certainly at the divorce stage of the relationship.

Definition of franchising

The definition of 'franchise' as contained in the Rules of the FANZ is as follows:

'"Franchise" means the method of conducting business under which the right to engage in the offering, selling or distributing of goods or services within New Zealand includes or is subject to at least the following features:

- the grant by a Franchisor to a Franchisee of the right to the use of a Mark, in such a manner that the business carried on by the Franchisee is or is capable of being identified by the public as being substantially associated with a Mark identifying, commonly connected with or controlled by the Franchisor; and
- the requirement that the Franchisee conducts the business or that part of the business subject to the Franchise Agreement, in accordance with the marketing, business or technical plan or system specified by the Franchisor; and
- the provision by the Franchisor of ongoing marketing, business or technical assistance during the term of the Franchise Agreement.'

Consideration should also be given to the definition of a Franchise Agreement, which 'means a contract, agreement or arrangement, whether express or implied, whether written or oral, between two or more persons by which one party to the agreement ("the Franchisor") grants, authorises or permits the other party to the agreement ("the Franchisee") the right to operate a Franchise. Any contract, agreement or arrangement which purports to be a Franchise Agreement shall be deemed to be a Franchise Agreement for the purpose of this definition, notwithstanding that it may lack any or all of the requirements or attributes referred to in the definition of "Franchise".'

International aspects

New Zealand encourages and welcomes overseas systems whose master franchise agreements or unit franchise agreements usually need some amendments.

Professional taxation advice should be obtained and New Zealand has Double Tax Agreements with numerous countries overseas, including the US, UK and Australia. These agreements generally limit the taxing rights of each country (depending on the type of income derived) as well as helping to reduce double taxation. For example, most Agreements limit the foreign country's tax on royalty payments to ten per cent. Accountants have a key role to play in relation to franchising.

Some cases

The majority of franchising litigation in New Zealand involves cases where misrepresentations have been made and it is the Contractual Remedies Act 1979 and the Fair Trading Act 1986 which greatly assist in this area. In *Cornfields Limited v Gourmet Burger Co Limited* (2000) the High Court Judge rejected a claim under the New Zealand Fair Trading Act that exclusion clauses should be upheld by saying that they had been 'overwhelmed by express assurances'. It was apparent that the franchisee was on unequal terms with the franchisor and was far less sophisticated in business affairs and less well-resourced than the franchisor.

In *Jackson v Lehmann* (2001) the franchisor had provided false promotional material to the franchisee. It was held that the projected income of the business had no factual basis and that the representations had been made both negligently and fraudulently. The plaintiffs were held to be entitled to relief under section 9 of the Contractual Remedies Act. The franchising company had not traded for several years, a fact that had not been disclosed to the franchisees and this misrepresentation by silence had created an entirely misleading picture of the franchise.

In *Newport v Coburn*, the franchisor company set up a franchise for the installation and repair of electronic accessories for cars. Newport represented that there was a heavy demand for a Wellington franchise and that customers were waiting to give it business. An employee from the franchisor company also represented that there was a heavy demand for business in order to persuade a prospective franchisee to sign the Franchise Agreement and the franchisee was supplied with fabricated turnover figures. The claims of misrepresentation were successful and the case focussed on the liability of directors and an employee for misleading statements which were made on behalf of the franchisor company.

There is considerable academic debate as to whether directors and employees can be individually liable for misleading and deceptive conduct under the Fair Trading Act 1986. The Court of Appeal upheld a finding that directors and employees can be personally liable under the Act and I agree with that position.

A case that clearly illustrates the dangers of the parties not having clear terms in their Franchise Agreement is *Video Ezy International (NZ) Limited v Cameron* in 2004. This case involved injunction proceedings by the franchisor to prevent the franchisee from carrying on a competing business after the term of the Franchise Agreement had expired and to deliver up confidential material. After considering the terms of the Franchise Agreement at some length, the judge refused to grant the injunctions. During the course of the negotiations for the original franchise agreement, the parties had made some changes to the agreement. Clause 6.3 had been amended by partly striking out the original clause and gluing over an amended part of that clause. The clause contained several references to 'the Franchised Business' and in other clauses of the agreement there were also references to the term 'Franchised Business'. That term was not defined in the agreement. Clause 6.3 had not been drafted with care and was ambiguous and the judge said that 'this contract is a muddle, as a result of 6.3. It is a muddle of the parties own making. I do not think an equitable remedy should be available taking sides in this muddle'.

Choose the party carefully

It is important to make sure that all parties are correctly described. It is quite common for a franchisor to operate under more than one company so, if that is the case, you should ensure that the company which is described as the franchisor is the one under which the franchise is operated and also that it is the company which has the rights to franchise. Where the franchise system has originated from overseas, it is important to ascertain that the franchisor named in the agreement is the company carrying on the business in New Zealand and that it has authority to do so. A 2003 case – *Electrical Holdings Limited v Contractor Success Group Limited* – illustrates the sort of issues which can arise where overseas companies are involved in the franchise system but are not parties to the franchise agreement. Contractor Success Group had been granted a master licence by a US company, Mr Electric, which is owned by the Dwyer Group. In marketing the franchise system to the franchisees, the New Zealand master franchisee used publicity material provided by the US franchisor and part of that material suggested that the franchisees would become part of a worldwide network of businesses backed by the corporate strength of the Dwyer Group, which was described as 'the world's premier service business franchisor'. The franchisees argued that they should have recourse against the Dwyer Group and on the basis that Contractor Success Group and Mr Billington who was the director and shareholder of that company acted as the agent of the Dwyer Group in making the representations on which they relied in buying their franchises. Justice Goddard found against the franchisees and refused to allow them to join the Dwyer Group as a defendant. That case illustrates the need for any franchisees and their advisors to ensure that the parties with the perceived expertise and financial power and on whose reputation they are relying in respect of the franchise system they are entering into are

parties to the agreement. If not, the strength of the franchise system may not be as good as it would have first appeared.

Confidentiality

The issue of confidentiality is very important and the confidentiality provisions of most franchise agreements are expressed to apply after expiry or termination of the franchise agreement. Failure to make such a provision could prevent the franchisor from enforcing the confidentiality provision after the expiry or termination of the agreement.

In *P5 Holdings Limited v Elisha's Well Limited*, a 2006 case in the High Court at Auckland, the court granted injunctions to prevent the defendants from using the franchisor's confidential information. Clause 33.1 of the franchise agreement contained a standard confidentiality clause which read as follows:

> 'The Franchisee acknowledges that the system is confidential and is the sole property of the Franchisor. The Franchisor shall not during this agreement or afterwards use, divulge or communicate to any person any confidential information concerning the practice, dealings, transactions or affairs of the Franchisor which may have been acquired by the Franchisee pursuant to the performance of its responsibilities under this agreement.'

The defendants had purported to terminate their franchise agreements alleging misrepresentations by the franchisor. They subsequently each set up their own businesses which largely replicated the business of the franchise system. The court accepted the franchisor's arguments that the defendants had basically appropriated the system with one or two minor changes which were not significant enough to distinguish their new businesses from the original franchised businesses.

Latest survey

The latest survey of franchising in New Zealand in 2012 yielded the following key results:

- There are approximately 446 business format franchisors in New Zealand in 2012, compared with 423 in 2010.
- It is estimated that franchised businesses contribute between $19.4bn and $21bn to the New Zealand economy.
- Franchised businesses account for just over five per cent of New Zealand small and medium-sized enterprises.
- Eighty-eight per cent are Kiwi-born enterprises.
- Most business format franchisors operate in service industries, followed closely by retail franchises.
- System growth has been static in 2011 and 2012.
- Just over half the systems report increased sales activity but a significant number experienced pressure on profit margins.
- There are fewer units operating in business format franchises (22,400 in 2012 compared to 23,600 in 2010), but employment numbers have increased (employing over 100,000 people in 2012, compared to 80,400 in 2010).
- There is increasing but still constrained use of information technology.
- A small percentage of franchises actively use sustainable business practices.

New Zealand is a sophisticated market and fairly deregulated in relation to business. The FANZ has been very successful by promoting self-regulation and high standards in franchising, and its Code of Practice is widely understood and accepted by franchisors in New Zealand. Overseas franchisors who wish to enter into New Zealand should find it relatively easy but in all cases expert local franchising law advice should be obtained.

New Zealand justice: a cloistered virtue?

NEW ZEALAND

Colin Henry

Barrister and Solicitor of the High Court of New Zealand, Auckland

chenry.barrister@xtra.co.nz

In *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322, Lord Atkin – perhaps the most conscientious jurist of his era – in delivering the judgment of the United Kingdom Privy Council made the observation that, 'Justice is not a cloistered virtue'. The case arose out of an appeal from the Supreme Court of Trinidad and Tobago, at the time a British colony, against conviction for contempt of court of the editor of a newspaper published in the island. The newspaper had, in an article entitled 'The Human Element', vigorously criticised the perceived inequality of sentences being meted out by the Trinidad and Tobago (read British, as just about all judges in the island at that time were from Britain) judiciary. His Lordship forcefully made the point, at page 335 of the judgment, that while the courts have authority to restrain and punish those who interfere with the administration of justice, or who attempt to depreciate the authority of the courts, nonetheless, 'Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as *contrary to law or the public good* [emphasis supplied], no Court could or would treat that as contempt of Court.' [Emphasis added.]

The learned Law Lord himself, in a much celebrated lone dissent in a subsequent case before the House of Lords, *Liversidge v Anderson* [1942] AC 206, equated, at page 245, the logic of his brothers on the Bench to that used by Humpty Dumpty in Lewis Carroll's *Through the Looking Glass:*

> 'I know of only one authority which might justify the suggested method of construction: "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean, neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master - that's all."' (*Through the Looking Glass*, c vi, as cited by Lord Atkin)1

There is no report of any attempt by the other Law Lords in that case, to cite Lord Atkin for contempt, or to have the English professional disciplinary body take any steps against him, despite the very obvious ridiculing of their performance of the judicial function.

It appears that the professional body charged with maintaining the standards of the legal profession in New Zealand, the New Zealand Law Society, takes an entirely different view of things from that championed by Lord Atkin. In a recent published determination, Determination No 6446,2 the Society's National Standards Committee censured a Queen's Counsel (QC) for criticising the administration and performance of the New Zealand judiciary in what the Society considers to have been other than a 'reasoned and temperate manner'. The Society imposed on Her Majesty's counsel the obligation to pay to it the amount of NZ$1,000, being, it said, the amount of costs and expenses incidental to the inquiry or investigation of the matter, and of conducting the hearing giving rise to its decision.

The Society set out, in the Determination, a number of alleged quotations from the learned QC's criticisms, including his posing the rhetorical question, in relation to the lack of judicial specialisation in New Zealand, whether a patient would content him or herself with having brain surgery performed by a gynaecologist or orthopaedist. The QC is further alleged to have written that it is fraudulent to charge hearing fees for judges who are 'so badly mismatched to the cases in hand', and that 'the law is being corrupted for want of judicial specialisation'. The Society also lists a quotation, not from the QC in question, but apparently from the headline of a newspaper article: 'New Zealanders shafted by fraudulent justice system, says top QC'.

The Society predicated its adverse determination on the grounds that the learned QC's conduct was 'unsatisfactory', in that he had contravened the provisions of the Lawyers and Conveyancers Act 2006, by failing in his obligation 'to uphold the rule of law and to facilitate the administration of justice in New Zealand'. It appears that this failure arose from the QC's criticism of the

functioning of the New Zealand judiciary in what the Law Society considers to be other than a 'reasoned and temperate manner'. Interestingly, nowhere in either the Act or the Rules on which the Society relied, does it say that any criticism of judges or of the justice system, by a lawyer, must be done in a 'reasoned and temperate manner'. It must therefore be safe to conclude that, except where criticism by a lawyer is calculated to bring a court or a judge of the court into contempt, or to lower his authority; or to obstruct or interfere with the due course of justice or the lawful process of the Courts (the generally accepted standard for contempt of court to be found) the lawyer is subject to no greater strictures on his or her expression of opinion about the judiciary or the justice system, than is the rest of New Zealand society.

In 1990, New Zealand enacted into law the New Zealand Bill of Rights Act, purportedly, as stated in its heading, 'to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights'. Section 14 of that Act affirms that, 'Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions *of any kind in any form*' [emphasis added]. It would seem, however, from the New Zealand Law Society's chastisement of the Queen's Counsel by its Determination, that whereas members of the general public have the right to hurl criticism at judges or the New Zealand justice system 'in any form', lawyers – the supposed guardians of that right as Officers of the Court – are denied equal opportunity in that respect.

In 2005, New Zealand abandoned the UK Privy Council as its final court of appeal, on the spoken and unspoken premise that, as a society, it was now sufficiently mature to administer justice within its borders without assistance from its former colonial mother. It may well be, however, that despite this, New Zealand yet regards itself as being on par with those 'small colonies consisting principally of coloured populations' in which 'the enforcement in proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of, and respect for, the Court' – words quoted in Ambard by Lord Atkin, from the judgment of the Privy Council in *McLeod v St Aubyn* [1899] A C 549, a case arising from the Caribbean island of St Vincent. Without that, it is difficult to comprehend the fetter that the New Zealand Law Society seeks to impose on lawyers who attempt to prod the administration of justice out of lethargy, indifference and/or incompetence.

The Society's adverse determination in respect of the Queen's Counsel does not represent its only sortie into the area of repression of expression by members of the Noble Estate; in another determination issued in November 2013, the Society struck off from the roll of lawyers a lawyer of Russian origin on the grounds that they had made complaints to the statutorily-appointed Judicial Conduct Commissioner about, and filed an application in respect of, a judge, that it considered baseless.

Interestingly, one of the two lay members of the Tribunal hearing the matter dissented from the majority finding that the lawyer was guilty of misconduct meriting strike-off. Yet the Tribunal, composed principally of lawyers, guardians of the right to free speech, took great pains to justify its decision on the need to protect the public, of which the lay member of the Tribunal is presumably a member!

The lawyer in question had issued a press release inviting attendance at his upcoming disciplinary hearing, in terms far less ridiculing than Lord Atkin's comparison of his brothers' logic on the Bench, to that of Humpty Dumpty in *Through the Looking Glass*. That invitation was, however, described by the Tribunal as being 'scurrilous and disrespectful of the Tribunal's processes, of members of the legal profession, judges and the Law Society'. And although doing so sub silentio, it is obvious from reading the determination that the Tribunal's view of the press release heavily, and improperly, influenced the final outcome of the hearing. According to the Tribunal, the lawyer was 'insolent', inter alia, because in his press release, he drew comparisons between the Tribunal and 'the Spanish Inquisition, a Stalinist show trial, and accused [the Tribunal] of creating an atmosphere that existed in Nazi Germany'.

In the decision that found the lawyer guilty of misconduct, the Tribunal had pronounced, at [52], that, 'Respect for the judicial office and for the integrity of the system of justice ought to be one of the most basic instincts of a lawyer'. One could be forgiven for thinking that the Tribunal members were unfamiliar with the Nuremburg Trials, in which the attempt by lawyers to seek protection behind such 'respect', for their collusion with

the Nazi rulers of Germany, was roundly dismissed. It appears also that the Tribunal is unaware of cases such as *R v Pitje* [1960] 4 S A 709, in which the Articled Clerk sent to court by the firm of Mandela and Tambo, and who refused to comply with the magistrate's order to remove himself from the table reserved for European Officers of Court, showed sufficient lack of respect for that judicial system that he earned himself a fine for contempt, a penalty upheld by the Appeal Division of the Supreme Court of South Africa. One of the justifications referred to by the South African Supreme Court, for its decision, was that the discrimination being defied by the Articled Clerk was 'of a nature sanctioned by the Legislature'.

Mention may also be made of the case of *Loving v Virginia,* 388 U S 1 (1967), in which the United States Supreme Court felt compelled to reverse a decision of the Supreme Court of West Virginia, banishing from the State a black and white couple, for having 'mongrelised' the European race by marrying across ethnic lines. But applying the standards enforced by the New Zealand Law Society, the maintenance of the 'integrity of the justice system' of Virginia that produced the case appealed to the Supreme Court, should have been one of a Virginia lawyer's 'basic instincts'.

There is little need to look outside of New Zealand itself for striking examples of behaviour by the judicial system that only mongrels at the Bar might be expected to respect. In the celebrated case of *Wi Parata v The Bishop of Wellington* [1877] 3 NZ Jur (NS) 72, no less a personage than the then Chief Justice of New Zealand, Prendergast, declaimed, with respect to New Zealand's founding document, the Treaty of Waitangi entered into 37 years earlier between the British Crown and the Maori people, had to 'be regarded as a simple nullity', this for the reason that the Maoris, 'barbarians', lived, at the time of the Treaty, in 'a territory inhabited by savages', and were therefore incapable of entering into a pact such as the treaty. In more modern times, in *R v Boateng* (1999) 5 HRNZ 450, a judge of the High Court of New Zealand accepted with equanimity, if not with explicit approval, evidence from a New Zealand Customs officer of the targeting by his service of air travellers on the basis of drug-smuggling profiles developed 'in relation to West African nationals, primarily the holders of Nigerian and Ghanan [sic] passports'.

On the international stage, New Zealand is of course very visible and audible in decrying and denouncing the repression of Officers of the Court in offending foreign jurisdictions such as Fiji and Sri Lanka. In a not-unrelated context, in 2005 a former judge of the Court of Appeal of New Zealand, returning from serving a stint on the judiciary of Tonga, spoke highly of the wisdom of the Tongan people in inviting persons from outside of Tonga to serve on the Tongan bench, because of their perception that such persons 'are independent of tribal groups vying for power and influence'. A New Zealand lawyer wrote a letter for publication to one of the organs of the New Zealand Law Society, specifically pointing out a recent experience in which a judge of the High Court of New Zealand issued procedural orders which effectively smothered the case he was prosecuting, without any indication to him or to any of the other parties who were ignorant of the fact, that one of the defendants was the judge's brother-in-law! The Law Society's organ refused to publish the letter.

On another occasion, a lawyer wrote an article for publication in The New Zealand Lawyer, a LexisNexis publication which ostensibly is independent of the New Zealand Law Society. The article, entitled 'Our Supreme Court (Jesters)', took issue with a decision of the New Zealand Supreme Court, refusing to hear an appeal against denial of trial by jury in a civil case (*Gregory v Gollan* [2009] NZSC 29.4. In support of its refusal, the Court stated, at [3], '...the matter is now covered by New Zealand legislation which makes it clear that *proceedings are to be tried by Judge alone unless the Court exercises its discretion to order trial by jury*' [emphasis added]. The New Zealand legislation to which the Court referred – the Judicature Act 1908 – makes the exact opposite clear, in the circumstances concerned in the case. Section 19A(1) of the Act provides:

(1) This section applies to civil proceedings in which the only relief claimed is payment of a debt or pecuniary damages or the recovery of chattels.

(The plaintiffs in the action had carefully ensured that their prayer for relief was strictly limited within the confines of that section's prescription.)

Section 19A(2) of the Act declares:

(2) If the debt or damages or the value of the chattels claimed in any civil proceedings to which this section applies exceeds $3,000, either party may have

> the civil proceedings tried before a Judge and a jury on giving notice to the court and to the other party, within the time and in the manner prescribed by the High Court Rules, that he *requires* the civil proceedings to be tried before a jury. [Emphasis added.]

There was no issue about the plaintiff's claim meeting the threshold requirements set out in the section. Despite providing the foregoing analysis to demonstrate the plain error of the Supreme Court, The New Zealand Lawyer refused to publish the article.

New Zealand often boasts, in its tourism promotion, that it has a human population of less than five million, but an ovine population in excess of 40 million. One is forced to wonder whether, because of the overwhelming predominance of sheep in the jurisdiction, the legal profession has succumbed to infection, by osmosis, with the attitudinal disposition for which sheep are best known.

Notes

1 Lord Atkin, *Liversidge v Anderson* [1942] AC 206, equated, at page 245.
2 New Zealand Law Society: Lawyers Complaints Service, Notice of Determination by the National Standards Committee, No 6446, available at www.lawsociety.org.nz/__data/assets/pdf_file/0009/74457/6446-Determination.pdf.
3 New Zealand Lawyers and Conveyancers Disciplinary Tribunal [2013] NZLCDT 52 LCDT 002/11, available at www.justice.govt.nz/tribunals/lawyers-and-conveyancers-disciplinary-tribunal/lcdt-decisions/lcdt-decisions/2013-files/2013-nzlcdt-52-national-standards-committee-v-orlov.
4 Available at www.courtsofnz.govt.nz/from/decisions/judgments-supreme/judgments-supreme- 2009/SC 4/2009).

POLAND

Mirella Lechna
Wardyński & Partners, Wroclaw
mirella.lechna@wardynski.com.pl

Recent verdict of Poland's Constitutional Tribunal: it does not object to a €1m court fee

Poland is now an attractive market for Asian firms. Under EU requirements, the Polish authorities must quickly develop the country's transportation network and implement environmental protection projects. But the EU is making this easier by cofinancing selected projects; in the 2014–2020 financial perspective Poland will receive €82.3bn for this purpose.

The contracts for implementation of projects of this type are awarded under the regime of the Public Procurement Law, and the contractor is selected by tender. While the tender is decided by the contracting authority (project owner), its actions are subject to review, and any participant in the tender may file an appeal with the National Appeals Chamber. The appeal procedure is quick, lasting about 15 days, and requires payment of a modest administrative fee in the maximum amount of PLN 20,000 (about €5,000). And, if the contractor disagrees with the decision of the National Appeals Chamber, it has a right to challenge it in the state court.

Expensive court challenge

But in Poland this stage of the proceeding is expensive. Since 2009, the court fee on a petition to the regional court challenging a ruling by the National Appeals Chamber has been five per cent of the value of the project covered by the procurement, up to a maximum fee of PLN 5m (about €1.25m). By comparison, in other civil cases in Poland, the maximum court fee is PLN 100,000 (about €25,000).

Introduction of such a high court fee has forced contractors to think twice about filing a challenge with the court. Indeed, the goal of the new rule in 2009 was to protect Polish courts against a flood of groundless cases. But in practice, contractors often waive the right to seek review of decisions by the National

Appeals Chamber solely because the court fee is so high.

Disappointing ruling by the Constitutional Tribunal

In 2011, the issue of the high court fee reached Poland's Constitutional Tribunal. The Tribunal heard two constitutional petitions by contractors seeking review of the issue of whether the regulation setting the court fee at five per cent of the value of the project is consistent with the Polish Constitution. They relied on several articles of the Constitution that protect the rights and freedoms of citizens and guarantee measures to do so, including the guarantee of access to the courts and consideration of a case at two instances.

The ruling was handed down on 14 January 2014. But it came as a disappointment to the public procurement community in Poland.

The Tribunal held that the Parliament has the discretion to choose the method for determining the court fees in civil cases. It also found that the mechanism for calculating the fee on a challenge to a ruling by the National Appeals Chamber does not differ from the rule for calculating the filing fee in disputes over property rights, which is defined as five per cent of the amount in dispute. Consequently, the Tribunal concluded that the percentage used for setting the court fee – which is the same percentage used for cases involving property rights – does not infringe the essence of the right of access to the courts in a public procurement case. The Tribunal also stressed that the institution of relief from court costs enables equal opportunity to initiate and participate in a judicial dispute for litigants whose financial situation would not enable them to pursue their rights if the normal rules for calculation of court fees were applied.

On the merits, the Constitutional Tribunal ruled only on the constitutionality of the court fee as a percentage fee. The Tribunal declined to rule on the issue of the maximum fee of PLN 5m because in neither of the two cases which the Tribunal was considering was the contractor actually required to pay the maximum court fee.

Thus, in the view of the Constitutional Tribunal, the rule concerning court fees in public procurement cases does not infringe the constitutional right of access to the courts, because the algorithm for calculation of the court fee accurately reflects the nature of public procurement cases, particularly the complex nature of such cases. But is that really so?

Restrictive conditions for relief from court costs

In the case of procurements that are the most important for the public interest, and the most complex projects – those well above the EU procurement thresholds – the court fee will always reach the maximum of PLN 5m.

In the Polish legal system, the rule is that there is a fee for pursuing judicial proceedings, and relief from court costs is the exception to the rule, designed to protect economically weaker parties (*in forma pauperis*). A condition for obtaining relief from court costs is the lack of adequate means to pay the fee. In the practice of the courts, application of this vague concept involves an examination of the party's financial condition based on statistical data, statements from the tax office, financial reports, bank statements and the like.

While in civil cases it may be accepted that the constitutional right of access to justice may ultimately be secured by applying the notion of filing of *in forma pauperis,* this situation will never arise in a public procurement case. This is because a bidder seeking a public contract must demonstrate economic and financial capacity adequate to the value of the procurement – that is, good financial condition, or it will be excluded from the procedure.

It should also be borne in mind that in the vast majority of cases, the financing for performing a public contract, particularly in the case of projects of high value, comes from bank loans. This means that even for a contractor that meets the conditions for economic and financial capacity, the requirement to pay a fee of PLN 5m presents a barrier to access to the court, as an additional cost in what is already an expensive process of preparing a bid and financing a complex project. And the figure of five per cent often corresponds to the profit margin calculated in the bid, to be earned out over the entire period of project implementation if the bidder manages to win the contract.

Competitor in a worse situation

Paradoxically, however, a bidder trying to decide whether to challenge a decision of the National Appeals Chamber before

the regional court is nonetheless in a more favourable situation than the entity competing with it for the contract.

The challenger has the opportunity to assess the likelihood of success of the challenge and its own financial capabilities, and on that basis take a conscious decision on filing of the challenge with the court, accepting the additional financial risk connected with the necessity to pay the high court fee.

A competitor, who initiated the appeal to the National Appeals Chamber and filed objections to the selected bid, accusing the contracting authority of errors in its evaluation, does not have this choice. In the final judgment, the regional court will award court costs pursuant to the rule of the parties' responsibility for the result of the proceeding. Thus if the court upholds the challenge and denies the original appeal, it will assess the high court fee against the competitor which filed the appeal with the National Appeals Chamber. The Polish courts take the view that the parties in dispute in this situation are the petitioner (who filed the challenge in court) and the appellant (the opponent of the challenge).

Such an unfavourable result could also happen in a situation where because of a new evaluation of the offers occurring after the issuance of the challenged ruling by the National Appeals Chamber, as of the date of the ruling by the state court the losing contractor no longer has an interest in being awarded the contract (for example, before that time it has been excluded from the procedure).

Vigilance is necessary in tenders

The current regulations in Poland concerning charging of court fees in cases before the state courts pursuant to judicial review of rulings by the National Appeals Chamber – a non-judicial body – can hardly be reconciled with a sense of fairness or the principles of public policy developed under Polish law, or with the law in force in the European Union. This is because judicial review is accessible only to a few of the wealthiest entities – violating the Remedies Directive (89/665/EEC), which requires the member states to ensure that effective review procedures are available in public procurement cases. Because the recent ruling by the Constitutional Tribunal displays an unwillingness to intervene on this issue, participants in the public procurement market in Poland await the initiative of the European Commission to ensure that Polish law complies with EU regulations in this area.

Until then, participants in tenders must exercise vigilance and take the appropriate procedural steps in due time to avoid liability for the results of a judicial proceeding if the financial situation and determination of their competitors lead to commencement of a case before the state court requiring payment of the maximum court fee.

VIETNAM

Ho Tuong Vy
Ho Dung Phan Co, Ltd,
Ho Chi Minh City
hovylegal@gmail.com

What is new over regulations on labelling tobacco packages in Vietnam?

As of 1 May 2013, new regulations on the labelling and printing of health warnings on tobacco packages under Joint Circular No 05/2013/TTLT-BYT-BCT ('Circular 05') took effect.[1] Specifically, those regulations would be imposed on tobacco packages produced or imported for consumption in Vietnam. This article sets out the general requirements for labelling tobacco packages and seeks to explore new regulations on printing of health warnings thereon.

What are general requirements for labelling?

Before the requirements for labelling tobacco packages are to be discussed, it is worth understanding the interpretation of the terms 'tobacco product' and 'tobacco

packages'. As defined in Decree 67[2] guiding for the implementation of Law 09,[3] 'tobacco product' means a product wholly or partly manufactured from tobacco ingredients and processed in the form of cigarettes, cigars, shredded tobacco used for smoking pipes, and other products used for smoking, chewing or smelling.[4] 'Tobacco packages' comprise of packages, tubes and boxes containing tobacco and circulated alongside tobacco.[5]

The question of whether electronic cigarettes (e-cigs) are considered as tobacco products and whether their packages are subject to Circular 05 are not taken into account. Nor is the interpretation of the term 'e-cigs' in the prevailing laws. As for this term, the World Health Organisation (WHO) sets forth a definition that: 'Electronic cigarettes… are devices whose function is to vaporise and deliver to the lungs of the user a chemical mixture typically composed of nicotine, propylene glycol and other chemicals, although some products claim to contain no nicotine.'[6] Given this definition, there are two possible and opposite views regarding e-cigs: some allege that e-cigs are not tobacco products under Vietnamese laws, whereas some conversely argue that they are. The former view may stem from the question of whether a chemical mixture delivered by e-cigs to the lungs of the users is wholly or partly manufactured from tobacco ingredients as required by law. By contrast, the latter view may be based on the following two arguments: first, e-cigs may be regarded as 'other products used for smoking, chewing or smelling' as one of the types of tobacco products as stated in Decree 67; and secondly, some e-cigs have the same function of 'delivering to the lungs of the users a chemical mixture… composed of nicotine… and other chemicals'[7] as conventional tobacco.[8] As a result, it is suggested that the interpretation of the term 'e-cigs' should be added in the legal system to determine whether or not e-cigs are tobacco products. If this ambiguous point is yet to be clarified, it is uncertain to seek the answer of whether or not e-cigs are subject to Circular 05 and other relevant regulations.

To the best of the author's knowledge, there are no specific provisions whatsoever guiding the import, sale and circulation of e-cigs.[9] Notwithstanding the absence of the legal instruments pertaining to e-cigs, lots of websites were flooded with public advertisements on the illegal sale of e-cigs,[10] and as such, people have sought to buy them without difficulty. The same message spread on such websites is clear that e-cigs are touted as tobacco replacements for helping users quit smoking regardless of their as-yet scientifically undetermined benefits and safety.[11] Obviously, there is a gap between the law and practice involving e-cigs. Consequently, the issues of e-cigs including but not limitation to the import, sale, circulation, label and printing of health warnings on packages should be incorporated into the legal system.

Under Circular 05, labelling tobacco packages must comply with Law 09, provisions of law on labelling goods and Circular 05.[12] Beyond this requirement, the label of tobacco must include mandatory contents, they are: (i) names of goods; (ii) name and address of organisations and individuals responsible for goods; (iii) origin of goods for the imported tobacco; (iv) quantity of goods; (v) health warnings; (vi) stamp or code number and bar code; and (vii) production and expiry dates.[13]

More importantly, the tobacco label must be written in Vietnamese, and is prohibited from using forms or containing words which may cause the misunderstanding of consumers of the nature and influence of tobacco for health such as 'low tar', 'light', 'ultra-light' or 'mild'.[14] This prohibition is also applied to the use of other similar words and phrases which make consumers confused as to the impact of tobacco to their health in a way that this kind of product has fewer influences than other products.[15] It is noteworthy that those forbidden words and phrases will be accepted for use as an exception if they have been part of a registered tobacco trademark before the effective date of Law 09.

What is new over the requirements for health warnings?

Circular 05 provides a range of new requirements for health warnings on tobacco packages.

Change of form of health warnings

Previously, the health warnings appearing on tobacco packages for consumption in Vietnam were required to be text warnings or text and picture warnings.[16] It is found through the study conducted by the Center for Researching and Supporting Community Development (CRSCD) that the text warnings were likely to appear on tobacco packages in preference to the text and picture warnings.[17]

Nonetheless, the text warnings proved less effective as they were only letters and too small, consequently seeming less impressive than other elements of the packaging.[18]

The printing of the text and picture warnings on tobacco packages are widespread globally.[19] The warnings in question may be perceived as the highest effective channel of education with the low costs.[20] Often, most of the smokers will pay more attention to this kind of warning once they take tobacco out of the pack for smoking. Additionally, the pictures of health warnings will quickly and strongly impress consumers, whether literate or illiterate, with the severe consequence of smoking to their health. The WHO ascertained that the majority of the smokers through its studies fear diseases caused by smoking while seeing the pictures of the health warnings, and more than 25 per cent of them shared their strict consideration of quitting smoking.[21]

The focus on the form of the text-and-picture health warnings, and the change of new warnings according to Circular 05, from the view of the author, is compatible with the international and Vietnamese practices and policies in protecting community health and raising the awareness of the public about this matter.[22]

Change of area of health warnings

The health warnings must cover at least 50 per cent of the front and the back of tobacco package.[23] This amendment, in the author's opinion, is appropriate based on the survey by the CRSCD. This survey showed that the former text warnings covering 30 per cent of tobacco packages were not enough to attract the attention of the participants.[24] In contrast, the participants held that the warnings in text and picture covering at least 50 per cent of the area of tobacco packages under Circular 05 would be far more effective in warning them of the consequences of smoking.[25]

Position and colour of health warnings

The warnings must be placed on the front and the back of tobacco packages, and must not be hidden or obscured by any materials, pictures or other information, save for the fixing of a tobacco stamp to packages as required by law.[26] Further, those warnings must be parallel and close to the over-fringe (hinge-lid) of tobacco packages.[27] Circular 05 also prescribes that if there are many tobacco packages, the warnings must appear on all packages.[28] In case a covering bag is fixed outside the tobacco package, the bag must be transparent and colourless so as not hide the health warnings, except for any bag that bears a registered logo preventing counterfeit or fake goods of the companies before the issuance date of this Circular.[29] In addition, warnings must be printed with four or more basic colours, and definition upon printing may not be lower than 300 dpi (dots per inch).[30]

Use of forms of health warnings

The alternate use of forms of the warnings is also a matter of the utmost importance to keep an eye on. Specifically, one of six forms of the health warnings specified in the Annex of Circular 05 must appear on each kind of tobacco product bearing a trademark.[31] Different warnings ought to appear on a variety of tobacco products bearing either the same trademark or different trademarks by a manufacturer or tobacco company.[32] If more than six kinds of tobacco products are bearing a trademark, or a manufacturer or tobacco company has more than six trademarks for its tobacco products, it is required to have six forms of the warnings appear on its products.[33] The warning appearing on each kind of tobacco product must be periodically changed every two years.[34]

In order to facilitate tobacco companies or manufacturers to comply with Circular 05 in terms of the printing of new warnings, a span of transitional months was given to them. In particular those warnings must appear on tobacco packages:

- with a soft covering bag whether produced or imported for consumption in Vietnam as of 1 May 2013, and in the case of any delay this time-limit would be extended further six months; and
- with a hard covering bag whether produced or imported for consumption in Vietnam as of 1 May 2013. In this case, the extension time permitted would not be later than ten months from that date.

Conclusion

Vietnam has been ranked amongst the top 15 countries worldwide with the highest number of smokers from a survey conducted by the Ministry of Health of Vietnam.[35] Accordingly, the percentage of the smokers aged 15 or over out of the population was 23.8 per

cent – equivalent to 15.3 million.[36] People who constantly inhale or are considerably influenced by tobacco as passive, non-smokers at home were up to 47 million.[37] It is not surprising to learn of the WHO's prediction that nearly 40,000 people die each year in Vietnam because of the diseases linked to tobacco, and that in 2030 this number could reach 70,000.[38] The issuance of Circular 05 is therefore essential and marks the first important step of a whole process to address this problem nationwide. The regulations of e-cigs, however, should be soon supplemented in the current legal instruments to safeguard community health.

Notes

1 Joint Circular No 05/2013/TTLT-BYT-BCT of the Ministry of Health and the Ministry of Industry and Trade of Vietnam dated 08 February 2013 guiding the Labelling and Printing of Health Warnings on Tobacco Packages (entered into force 1 May 2013) ('Circular 05').
2 Decree 67/2013/ND-CP dated 27 June 2013 detailing a number of articles and measures for implementation of Law on on Prevention and Control of Tobacco Harms (entered into force 15 August 2013) ('Decree 67').
3 Law on Prevention and Control of Tobacco Harms No 09/2012/QH13 adopted by the National Assembly of Vietnam on 18 June 2012 (entered into force 1 May 2013) ('Law 09').
4 Decree 67, Art 3.2. See also Law 09, Art 2.1: 'Tobacco means a product wholly or partly manufactured from tobacco ingredients and processed in the form of cigarettes, cigars, tobacco shreds, or other forms'.
5 Circular 05, Art 2.
6 See the World Health Organization (WHO) website at www.who.int.
7 *Ibid.*
8 See also Hanh Thuy 'Electronic cigarettes cause addiction and are harmful' (*Vietnamnet* 8 August 2013), available at http://vietnamnet.vn: There is the opinion that e-cigs are not tobacco products.
9 *Ibid.* See also the opinion of Nguyen Huy Quang, Director of Legal Department under the Ministry of Health of Vietnam in respect of the non-circulation of e-cigs in Vietnam. See also Official Letter No 333/TCHQ-GSQL dated 13 January 2014, available at http://luatvietnam.vn, with regards to the customs procedure for the imported e-cigs.
10 It took a few seconds to search for plenty of websites providing the sale of electronic cigarettes at http://thuocla-dientu.com, http://thuocladientu.dlink.vn, http://thuocladientuvip.com, http://www.chuyenthuocladientu.com, http://thuocladientunhapkhau.com.
11 See WHO, 'Electronic cigarettes (e-cigs) are the most common prototype of ENDS (electronic nicotine delivery systems)… The safety of ENDS has *not* been scientifically demonstrated…The efficacy of ENDS for helping people to quit smoking has not been scientifically demonstrated'. See also Hanh Thuy, 'Electronic cigarettes cause addiction and are harmful' (*Vietnamnet* 8 August 2013) http://vietnamnet.vn.
12 Circular 05, Art 3.1.
13 Circular 05, Art 3.2.
14 Circular 05, Art 3.3.
15 *Ibid.*
16 Decision No 02/2007/QD-BYT dated 15 January 2007 providing hygiene and safety of tobacco products (entered into force 2 March 2007, and annulled 1 May 2013). This Decision was superseded by Circular 05 as from 1 May 2013. See also Art 7.1.a.
17 'Warnings on tobacco packages do not threaten smokers' *Health Newspaper* http://baosuckhoe.org.
18 *Ibid.* See also 'The study conducted by the Center of Researching and Supporting Community Development with the participation of 1,200 smokers and non-smokers in three locations including Hanoi, Da Nang and Ho Chi Minh Cities showed that more than a half of the said smokers did not pay attention to the text health warnings [e.g. "Smoking causes lung cancer" or "Smoking harms human embryos and children"] appearing on tobacco packages as the warnings were only the letters and too small which led to their fewer attention on those warnings than other strongly impressive elements of the packages such as trademark, colours and pictures'.
19 Jurist Association of Vietnam, 'Printing of health warnings on tobacco packages in some countries worldwide' (25 October 2011) http://phaply.net.vn: The countries in question are Thailand, Brazil, Uruguay, Australia, Singapore and the United States.
20 *Ibid.*
21 *Ibid.*
22 Circular 05, Art 4.1.
23 Circular 05, Art 4.3.
24 Decision 02, Art 7.1.b: The health warnings must cover at least 30 per cent of the area of each main face in front of and behind the tobacco package.
25 *Ibid,* n 17.
26 Circular 05, Art 4.2.a.
27 Circular 05, Art 4.2.b.
28 Circular 05, Art 4.2.a.
29 *Ibid.*
30 Circular 05, Art 4.4.
31 Circular 05, Art 4.5.a.
32 *Ibid.*
33 *Ibid.*
34 Circular 05, Art 4.5.b.
35 Department of Health of Hanoi City 'Nearly 24 per cent of the population of Vietnam smoking tobacco' (9 July 2013) www.soyte.hanoi.gov.vn.
36 *Ibid.*
37 Hanh Chi, 'Vietnam: 47 million people constantly smoking tobacco as passive smokers' (*Education and Age* 17 June 2013) http://gdtd.vn.
38 *Ibid,* n 35.

VIETNAM

Huy Do
LNT & Partners, Ho Chi Minh City
huy.do@LNTpartners.com

Vietnam 2014 outlook: open season for foreign investors

Vietnam's WTO accession and further openness to foreign investment

Vietnam became the 150th member of the World Trade Organization (WTO) on 11 January 2007. The accession to the world's largest trade organisation seven years ago is the culmination of Vietnam's economic reforms since the mid-1980s and reflects its constant efforts over the past several decades to integrate with the global economy.

With its WTO accession, Vietnam's opportunities to trade with other WTO members were considerably enhanced. In return, Vietnam opened its economy and agreed to allow foreign investors to access and make investments in a majority of business sectors in accordance with a commitment schedule.

This year marks a new level of openness as many sectors previously off-limits and/or restricted to foreign investors are now officially available and/or allow majority foreign ownership. The combination of a more open economy and a vibrant consumer population should usher in a new wave of investments of mutual benefit for investors and Vietnam.

Vietnam's recent economic reforms and key demographics

Recent economic restructuring after the global financial crisis

In 2008, the first year after WTO admission, Vietnam witnessed a dramatic rise of 43.2 per cent in foreign investment inflows from the previous year. Unfortunately, the ensuing global financial crisis – along with internal weak economic conditions – significantly curbed foreign direct investment (FDI) inflows the following year. Interest rates and inflation soared into the high teens and the local currency (the Vietnamese Dong – VND) was unstable.

In the last few years, the government implemented a 'master plan' consisting of various economic and regulatory reforms to reduce inflation to low, single digits, manage interest rates and stabilise the Dong. While many companies did not survive this severe economic downturn, those who escaped are now in need of more capital to expand. These companies are potential targets for foreign investors who prefer to enter the market by way of mergers and acquisitions.

Dynamic demographics and recent consistent economic growth in Vietnam

Vietnam is the world's 14th most populous country, with close to 92.5 million inhabitants as at 2013. It is the eighth most populous Asian country. More than 70 per cent of its population is of working age (15–65 years), pushing Vietnam into the 'golden age' where an abundant supply of human resources acts as a catalyst for foreign investment to drive economic growth.

Along with favourable demographics, Vietnam has recently returned to consistent economic growth, increasing to 5.42 per cent in 2013 from 5.24 per cent in 2012. According to the International Monetary Fund (IMF), much of this growth can be attributed to increased foreign investment. IMF statistics indicate that Vietnam received US$11.5bn and gained another US$21.6bn pledged by foreign investors in the past year alone.

These positive metrics give credence to the cautious optimism expressed by businesses and economists that the crisis in Vietnam has ended and a new period of growth and deeper integration into the world economy is at hand.

Key markets of interest

Markets now fully open under the WTO commitments

Phased-out market openings

As part of its WTO accession in 2007, Vietnam committed to allow members from other countries more access to its economy over a seven-year phase-out schedule. Most of the remaining barriers to foreign investments under the country's WTO commitments have

been removed, effective 11 January 2014. This year marks a significant milestone where, in accordance with the committed phased-out schedule, nearly all foreign investments restrictions – for both goods and services – are lifted.

Trade in Goods

With respect to tariff reductions, Vietnam has since 2007, gradually reduced its entire tariff schedule of 10,600 different lines from an average tax rate at the time of accession of 17.4 per cent to 13.4 per cent. Vietnam has fully satisfied its commitments in terms of tariff reduction.

It is noteworthy that, although the WTO permits developing and underdeveloped countries to subsidise agriculture and non-agriculture products, Vietnam has completely removed the subsidies generally prohibited under WTO rules.

Trade in services

In its Schedule of Specific Commitments in Services, Vietnam made commitments in 11 sectors under the WTO classification, covering more than 110 sub-sectors. The WTO's non-discrimination principles, including most-favoured-nation treatment and national treatment, have been implemented.

Moreover, despite a number of difficulties faced by domestic enterprises and state administrative agencies, Vietnam has liberalised most of the sectors provided in the Schedule, notably in banking, insurance and security, telecommunications and distribution services.

In short, Vietnam has been able to timely execute economic policies and reforms to meet its commitments under the WTO. With that, what does 2014 have in store for foreign investors?

Spotlight sector for 2014: logistics

While many economic sectors are now available for non-discriminatory foreign investment, the logistics sector merits special attention. Vietnam's logistical services account for a sizeable 15–20 per cent of GDP. Yet most companies in this sector are SMEs that lack the requisite professional foundation and resources to provide satisfactory services at the international level. This sector is ripe for foreign expertise and investment.[1]

Prior to 2014, in order to provide many of these logistics-related services, foreign providers were required to set up joint ventures with Vietnamese partners, limiting foreign capital infusion to less than 51 per cent. Foreign investors can now establish majority-owned joint ventures or wholly foreign-owned companies.

In addition to removing the foreign investment limitation, foreign investors should note that Vietnam has identified logistics as a priority sector, critical to the development of a robust and efficient distribution system for the import and export, as well as for domestic transport, of goods. For example, in maritime transport services, domestic companies can only satisfy 18 per cent of total import and export needs. This unmet market demand, backed by a national policy encouraging this sector, creates a tremendous opportunity for foreign logistics companies to invest and make enormous returns.

Spotlight Sector for 2015: Hotels and Restaurants

Looking forward to next year, the hotel and restaurant sub-sector will finally be opened to foreign investment. Currently foreign investors are allowed to establish joint-ventures to supply hotel and restaurant services with majority or 100 per cent foreign capital contribution. However, these services can only be provided in conjunction with investments made in hotel construction, renovation, restoration or acquisition. Effective 11 January 2015, this condition will be removed, meaning foreign investors can directly invest in these businesses without investing in a hotel.

Special market access for Japanese companies

This year is especially noteworthy for Japanese companies. As a member of the WTO, Japan can enjoy access to Vietnam's market under WTO commitments. However, Japanese companies may also tap into special privileges afforded under a Bilateral Trade Agreement between the two countries that has been extended beyond its original end date of 2013.

Preferential treatment for Japan

Prior to Vietnam's entry into the WTO, Japan and Vietnam had entered into a Bilateral Investment Treaty to liberalise and promote

investment into Vietnam on 14 November 2003 (JVBIT). The JVBIT provides a special national treatment clause ('NT Clause'). Pursuant to the NT Clause, except in limited protected sectors like oil and gas, Japanese investors are entitled to investment conditions on par with local Vietnamese investors. No other bilateral investment treaty to which Vietnam is a party provides more favourable investment conditions to foreign investors than the JVBIT.

2014 market access under the Bilateral Investment Treaty

The JVBIT was scheduled to expire at the end of 2013. However, on 25 December 2008, the Japan–Vietnam Economic Partnership Agreement (JVEPA) was concluded, expressly incorporating the JVBIT into the JVEPA. Several official dispatches from state authorities continue to grant national treatment to Japanese companies, confirming that the NT Clause remains in force.

Vietnam should expect to welcome a substantial wave of Japanese investment in the service sectors that are now open under the WTO and JVEPA.

Positive outlook

The investment environment in Vietnam has become increasingly appealing since Vietnam's historic entry into the WTO in 2007. Bilateral and regional agreements with Japan and other countries have significantly accelerated Vietnam's integration into the global marketplace. The removal of many investment limitations, Vietnam's internal economic revival, along with the adoption of regulatory measures to stimulate growth and control inflation, have all coalesced to perhaps finally enable Vietnam to flex its sizeable population to become a significant contributor in the region.

In addition to a much more friendly and open trade regime created by these treaties, many businesses in Vietnam are still recovering from the economic turmoil created by the global financial crisis and Vietnam's own internal economic downturn pre-2012. These same businesses operate in sectors that are now open to majority or complete foreign ownership, making M&A a worthwhile option for investors looking to quickly capitalise on the convergence of these favourable conditions.

The outlook for foreign investors in Vietnam appears very promising.

Note

1 Specifically, these four business lines in the Logistics Service sector bear special mentioning:
   (i) Container Station and Depot Services in the Maritime Auxiliary Service sub-sector. These services are defined in the Schedule of Commitments as 'activities consisting in storing containers, whether in port areas or inland, with a view to their stuffing/stripping, repairing and making them available for shipments'.
   (ii) Storage and Warehouse Services in the Services Auxiliary to all Modes of Transport sub-sector.
   (iii) Freight Transport Agency Services in the Services Auxiliary to all Modes of Transport sub-sector. These services are defined as 'activities consisting of organizing and monitoring shipment operations on behalf of shippers, through the acquisition of transport and related services, preparation of documentation and provision of business information'.
   (iv) Other Services Auxiliary to all Modes of Transport sub-sector. The Schedule of Commitment lists the activities in these services to include 'bill auditing; freight brokerage services; freight inspection, weighing and sampling services; freight receiving and acceptance services; transportation document preparation services', which are provided on behalf of cargo owners.

New Member Surveys

Lim Tat
Aequitas Law, Singapore
lim.tat@aequitasllp.com

What was your motivation to become a lawyer?

Law wasn't my first passion. My earlier ambition was to become a doctor. However, my eldest brother motivated me to pursue law while I was in national service.

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

I vividly recall many of the first experiences in court: my first application for summary judgment; my first mention in open court; first trial etc. Of all the experiences that I have had as a lawyer, the most memorable have been those associated with the journey I took to start my own practice in 2008.

What are your interests and/or hobbies?

I love music (classical, jazz and pop), movies, travelling, reading, weekends and time out with family and friends, and having a good work out or run.

My interests (professionally and otherwise) are rooted in and revolve around my life pursuit to becoming a truer and better Christian: The Best is Yet to Be!

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

I love cats.

As this survey will be published in the IBA Newsletter, do you have any specific message for IBA members?

Hello to everyone! I hope to become acquainted with and contribute meaningfully in some way or other to the IBA community.

Monica Sun (孙晔)
Herbert Smith Freehills, Beijing
monica.sun@hsf.com

What was your motivation to become a lawyer?

I have always loved having a combination of expertise. Being an energy lawyer means I not only get to advice on legal compliance, I also need to be constantly innovative with strategic solutions that are in line with my clients' commercial objectives. Of course, I also have to be an expert in the energy business, involving a huge variant of natural resources, which includes oil, gas and power.

I am deeply interested in learning about the businesses of my clients, and I'm not just talking about the daily business operations, their goods and services, but also their strategies, future plans and even their history. The energy field is big story in China (and Asia Pacific) and certainly (and perhaps coincidentally) very intriguing for me.

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

Do not have one per se but the challenges I face are constant and definitely memorable. My clients have always challenged me with deals that are always different, interesting and intellectually stimulating. These deals, in a geeky way, are never boring. The fact that I must always strive to keep current to evolving developments and relevant to regulations and directives makes for personal challenges. I guess the great sense of satisfaction after being able to guide clients to a business win is what is most memorable.

My role as a lawyer has taken me to many places, especially since I'm working in a market that most energy investors have their eyes on.

What are your interests and/or hobbies?

Reading and travelling

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

Despite the business culture in China, being a local Chinese myself and a partner in a law firm, where client meetings are a huge part of what we do, I rarely drink alcoholic beverages. My clients have come to be very understanding of my preference to not drink and I've always appreciated that. My fellow team members have also been very accommodating and would take a drink for two on my behalf.

As this survey will be published in the IBA Newsletter, do you have any specific message for IBA members?

It is an exciting time to be a lawyer in Asia as local legal regimes and clients are becoming more and more sophisticated. The sheer sizes of deals, especially those in the energy sector in which I deal in, are enormous and often ground breaking. Chinese companies are expanding widely and quickly. MNCs also have great ambitions in this region, yet succeeding in Asia continues to prove challenging given the different cultures and business environments. The role of a lawyer in Asia is also vastly different to that of a western jurisdiction here there is a lot more need for lawyers to have a commercial mind and be able to advise clients and direct them throughout the process. This makes part of the enjoyment to me.



UP TO 6 CPD/CLE HOURS AVAILABLE

IBA Law Firm Management – First Asia Conference

20 June 2014 **The Fullerton Hotel, Singapore**

A conference presented by the IBA Law Firm Management Committee, supported by the IBA Asia Pacific Regional Forum, the Singapore Ministry of Law and the Law Society of Singapore

This one-day event will bring together leading speakers, and senior and managing partners from a wide variety of jurisdictions throughout Asia and beyond to discuss the latest hot topics and developments in law firm management. Split thematically into two, the conference will cover the future of Asian law firms and innovative approaches to talent management and client service. In addition to the substantive programme, the event will also host a keynote address from the Ministry of Law in Singapore.

We are delighted to confirm that our keynote session will be led by Professor David B Wilkins of Harvard Law School. Professor Wilkins will build on his presentation at the tremendously successful session 'Preparing for the Future' at the IBA Annual Conference in Boston. We suggest anyone registering for the conference who did not attend the Boston session should watch the film 'Preparing for the Future', which is available online at **www.ibanet.org/Conferences/Boston_preparingforfuture.aspx**.

Topics will include:

- Routes to growth – alliance, joint venture or merger
- Financing law firms
- Integration and leadership
- Attracting and retaining talent
- Innovation in client service

Who should attend?

Senior and managing partners and other lawyers in management, strategic advisers on governance and development, heads of the functionary departments of law firms – including human resources, public relations and marketing.