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Asia Pacific Regional Forum News

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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

To register your interest, please contact: International Bar Association
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IN THIS ISSUE

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Join the IBA Annual Conference in Tokyo this October

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The IBA Annual Conference in Tokyo, is approaching. This conference is particularly important to IBA members from the Asia-Pacific region, or who are providing or considering providing legal services in the area.

This Tokyo conference is the first IBA Annual Conference to be held in Japan, and the first in the region since the Singapore Annual Conference in 2007.

The officers of the Asia Pacific Regional Forum (APF), members of the Host Committee and members of the national bars – particularly the Japan Federation of Bar Associations (JFBA) – have been working hard to ensure that the Annual Conference is attractive and meaningful to those who practice in the region and those who are interested in emerging Asian legal markets and the establishment of the rule of law in developing countries in Asia.

As Co-Chair of the APF, Vice-Chair of the Host Committee and Chair of the JFBA Steering Committee, I would like to express my sincere welcome to all IBA members and other participants who will join us in Tokyo for the Conference. To them, I introduce below some of the unique and interesting Asian features of the Tokyo Conference.

As you may know, the APF's showcase session is: 'The world invests in Asia and Asia invests in the world – forum and networking' on Wednesday 22 October. The format of the joint session is new and exciting, and the first occasion on which the IBA regional fora will gather together to encourage cross-regional profiling and networking, during the session and beyond. This session is recommended for delegates with an international outlook, keen on developing contacts in cross-border investment work. The APF is also co-sponsoring 15 other sessions with other Committees and regional fora. You can find details of these sessions on page seven of this newsletter.

I am confident that these sessions will be informative and substantive in all areas including business law, bar issues, public interest matters and human rights. The APF and the JFBA/Host Committee have assisted in formulating the programme to include legal issues and topics prevailing in the region, and to feature prominent speakers from throughout the region.

In addition, the APF has been working to sponsor or co-organise many of the sessions to ensure that such sessions will be attractive and informative from the perspective of the region. I believe that all the participants will learn a great deal about the legal issues and developments in the region.

For example, the APF will be supporting the Antitrust Law Committee's roundtable programme: 'Asian enforcers round table', in cooperation with the East Asia Top Level Meeting of enforcers in East Asia and the Japan Fair Trade Commission on Monday 20 October. Antitrust law was originally a Western law. However, many Asian countries are enacting or strengthening the enforcement of their respective antitrust laws. Participants will be able to hear the views of top-level enforcers of competition agencies in the region, as well as share lunch and talk with such enforcers during a full day session: Experiencing this programme will give a vivid picture of enforcement of new laws in Asia, to not only competition lawyers but also business lawyers.

The JFBA has played a key role as the national bar of the host country. In Japan, all lawyers are obliged to be a member of both a local national bar and the JFBA. The JFBA has strong power over lawyers and represents the voice of all lawyers in Japan. The JFBA is highly regarded as an organisation that actively protects human rights and serves the public interest. Legal reform and the resolution of professional interest issues are primarily dealt with by the JFBA. The JFBA formed a Steering Committee in 2012, well in advance of the Tokyo Conference.

The percentage of lawyers who are engaged in international business law or cross-border transactions is very small in Japan; most legal services are provided domestically. Further, English is not a language commonly used in Japan. The JFBA, however, recognised the importance of international activities and regarded the

IBA Annual Conference as a key opportunity for further internationalisation of legal professionals in Japan. With the support of the JFBA leadership, the Steering Committee has promoted the IBA and its Tokyo Annual Conference through a joint seminar with the IBA in November 2013, a series of seminars for JFBA members, promotion of the IBA Tokyo Conference to executive officers of the JFBA, and by other means.

In order to encourage registration by local lawyers and lawyers from around the world, the Steering Committee contacted the leadership members of various sections and committees to recommend topics and appropriate local speakers, so that participants may expect to learn the subjects concerning Asia and Japan by coming to Tokyo.

One way in which the JFBA encouraged participation from within Japan was to establish a scholarship for young lawyers, through which up to 100 young lawyers will be offered financial assistance to register for the conference. The JFBA also distributed a summary of the IBA Annual Conference preliminary programme in Japanese to members of the JFBA and launched a website specifically designed to promote the Conference, something of which we are very proud (**www.nichibenren.or.jp/IBA-Tokyo2014.html**).

Outside the JFBA members, the Host Committee and the IBA are working on a special programme to encourage and support registration by in-house counsel of companies in Japan. Because of restrictions on the number of qualified, that is, licensed, lawyers admitted to practice, the vast majority of in-house counsel of corporations in Japan are not qualified lawyers or members of the JFBA. However, they are powerful and lead corporate practices. The active participation of in-house counsel is expected to raise the quality of the sessions. Furthermore, participation of in-house counsel will enhance networking opportunities both for in-house counsel and lawyers.

I am now confident in stating that all the participants will be able to benefit from attending the IBA Annual Conference in Tokyo by learning about recent legal developments in the region and will be able to build networks of lawyers, including in-house counsel, that span this region and the rest of the world.

As a representative of the host country, I would like to extend our very warmest welcome to all participants. Our welcome will start with the Opening Ceremony, featuring a keynote speech by the Prime Minister followed by a welcome reception, and then the Monday reception hosted by the JFBA and the Host Committee at the JFBA building and the adjacent restaurant in the park.

I also hope that all of the participants will also be able to enjoy the Marunouchi area, Tokyo's central business district, as well as the rest of Tokyo and Japan.

Articles written by the core members of the Steering Committee follow this article and introduce recent legal issues and developments in Japan, as well as what is probably the most important knowledge for your visit – 'How to enjoy Tokyo'.

We look forward to seeing you all in October.

2014 IBA Annual Conference

Japan Federation of Bar Associations (JFBA) Reception & Host Committee Reception

Monday 20 October 2014
6:00 PM–8:00PM

Venue

JFBA reception Bengoshi-Kaikan

1-1-3 Kasumigaseki, Chiyoda-ku, Tokyo 100-0013

Host Committee reception Matsumotoro

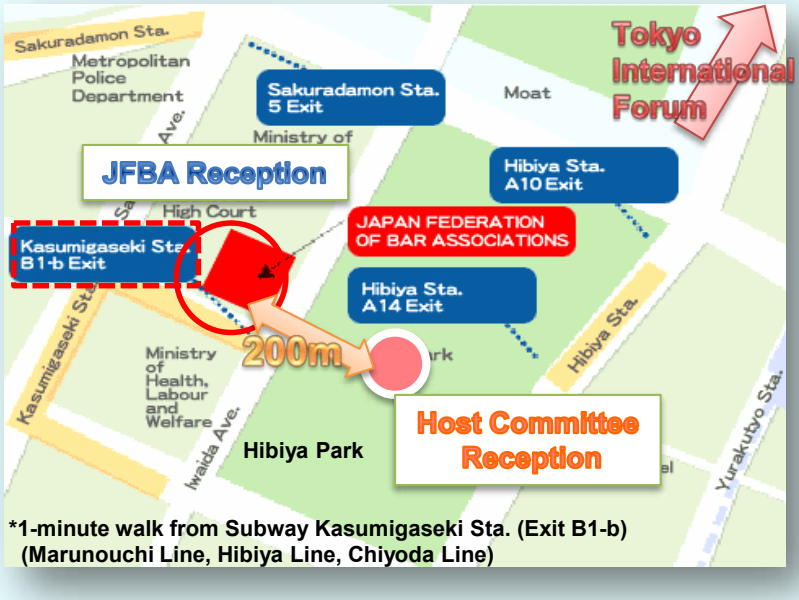
1-2 Hibiya Park, Chiyoda-ku, Tokyo 100-0012

Bengoshi-Kaikan and Matsumotoro are conveniently located near Tokyo International Forum (within 15-minute walking distance).

Receptions are open to all participants and their accompanying persons of the 2014 IBA Annual Conference.

We welcome all of you.

*Further information on the IBA Annual Conference 2014 in Tokyo can be found at www.ibanet.org/Conferences/Tokyo2014.aspx



*1-minute walk from Subway Kasumigaseki Sta. (Exit B1-b) (Marunouchi Line, Hibiya Line, Chiyoda Line)

JFBA Japan Federation of Bar Associations

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IBA ASIA PACIFIC REGIONAL FORUM SCHOLARSHIP

The 2014 scholarship winners are Isabel Tam and Katherine Jonckheere, who both receive:

- 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.

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 must an application form and submit an essay of at least 2,500 words. This year's essay topic was:

> *'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.'*

Read the winning essays on pages 45–49 of this newsletter.

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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

The 5 'Rs' of Generation Y: Relation, Referral, Reach, Relevance, Reputation. How far are legal firms from meeting these standards? 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

Leading agency officials from 18 jurisdictions including Australia, China, Japan and Singapore, and from new agencies such as Hong Kong, will speak about the recent development of enforcement in each jurisdiction and cooperation among the enforcers in the 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 (CSR) 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' reputations 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 practice 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 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 0930 – 1230

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 practice for sales 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. Block buster sequel game Grant Theft Auto 5 (GTA5) was launched with a production budget of over USD 250m and sales reaching over USD 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. The electronic games industry has become more sophisticated; companies fight for its gamers with different resources: attractive characters, user-generated content, splashy marketing campaigns and licensed products. Just as Hollywood studios invest time and money into blockbuster, video game companies are committing resources to games that are ever more expensive and complex. As the games get more complex, and rely on outside sources for inspiration (books, films, sports, athletes etc), lawsuits alleging copyright infringement and breach of contract are increasing. This full day section topic will bring together speakers from the game companies and lawyers to explore the latest business trends and legal challenges for an industry which is expected to be worth US$100bn by 2017.

Thursday 0930 – 1230

Asian investment in mining in Africa and Latin America

Presented by the Mining Law Committee, the African Regional Forum, the Asia Pacific Regional Forum and the Latin American 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 will discuss out-bound investment and trade.

Thursday 1430 – 1730

New challenges in arbitration in the Asia Pacific region

Presented by the Arbitration Committee and the Asia Pacific Regional Forum

Part one: Harmonising arbitration laws in the Asia Pacific region

The aim of this session is to review the status of harmonisation of arbitration laws in the Asia Pacific region. Our distinguished and diverse group of panellists will explore: (i) the need for reliable and consistent treatment of arbitration in the region; (ii) how to achieve these desired goals; and (iii) the ramifications and alternative strategies if the Model Law is not adopted throughout the region.

Part two: Can and should international arbitration practices be harmonised?

The panellists of this session will review the status of current practices in various jurisdictions, identifying both consistencies and differences among local practice across the region and discussing the need of a more uniform approach. In particular, they will examine ethical standards among practitioners in the region, especially regarding fair and civil conduct; conflicts policies; party representation; witness preparation and interface; the role and treatment of expert witnesses; as well as means of controlling time and cost. The panellists will then report on the status of efforts to harmonise such practices; examine how widespread acceptance of the IBA rules and guidelines in the region can benefit international arbitration in the region; and ways and means to achieve such goals by promoting the IBA rules and guidelines in the Asia Pacific Region.

To find out more about the conference venue, sessions and social programme visit **www.ibanet.org/conferences/tokyo2014.aspx**.

Autumn in Tokyo

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October is one of the best seasons in Tokyo. The sky is clearer and the weather temperate. And, of course, we have plenty places of interest. You may have the opportunity to enjoy yourself from time to time between the busy days of the IBA Annual Conference in Tokyo, so here is some introductory information – provided with the assistance of The Tokyo Convention & Visitors Bureau (TCVB).

There are more than 100,000 restaurants in Tokyo, and the city is also home to the most Michelin stars in the world. The quality and variety of world cuisines and authentic Japanese dishes can make your visit an unforgettable experience. You will also see a great mix of modernity and tradition in Tokyo. Asakusa Senso-ji Temple, Meiji Shrine and the Imperial Palace represent Tokyo's 400-year history, along with new icon TOKYO SKYTREE, the world's tallest free-standing broadcasting tower. To sample the variety Tokyo has to offer, wander through the city to see cutting-edge technology, or connect with authentic Japanese culture through a flower arrangement.

Now I will take you there, in your imagination.

Central zone

At the heart of Tokyo is the central zone: the nation's business and financial hub. Preserved historic sites built since the capital was moved from Kyoto to Edo in the 17th century remain alongside modern boutiques, restaurants, and 20th and 21st century landmarks, hotels and mixed-use skyscrapers. The IBA Annual Conference will be held at the very center of this zone, Tokyo Marunouchi, just a few minutes' walk from Tokyo station and the Imperial Palace. The conference venue has good access to prominent areas for shopping and dining, such as Ginza, Akasaka and Roppongi. For waterfront lovers, Daiba and Odaiba give you magnificent views over Tokyo Bay.

East zone

The east zone offers the first glimpse of Tokyo as you travel from Narita International Airport into town. On the outskirts is Kasai Rinkai Park and Tokyo Disneyland/Tokyo DisneySea. Here you can also find Tokyo's oldest and newest landmarks: Asakusa's Senso-ji temple and TOKYO SKYTREE, respectively, and the national museums and the oldest zoo.

West zone

So much happens along the avenues of the west zone that influence the nation's lifestyle choices. You will have a lot of fun in the busy streets of Shinjuku and Shibuya. There is a high concentration of trendsetting boutiques and restaurants, upscale residences and young tech-savvy consumers. The forested Meiji Jingu Shrine and Shibuya's most-photographed pedestrian crossing reflect the dynamic duality of Tokyo. IBA Law Rocks concerts will roar in the deep centre of Shibuya.

North zone

Furthest inland is the north zone, anchored by Ikebukuro, whose main train station houses towering department stores, each covering multiple city blocks. The nearby Sunshine City complex includes a large aquarium, and the Tokyo Dome for Japan's number one baseball team also serves as the country's largest concert venue.

South zone

The south zone has always been the first choice in Tokyo for accommodation; in the 1600s to travellers that crossed Nihombashi bridge, and today for travellers who can connect directly to the 24-hour Haneda Airport. Choice entertainment includes the Ohi Horse Race Track and Shinagawa 20m-deep aquarium and dolphin show.

If these delights are not enough to persuade you, visit www.gotokyo.org/en/index.html to find out more. Tokyo always welcomes you!

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Japanese lawyers and bar associations

About lawyers and bar associations in Japan

The Japan Federation of Bar Associations (JFBA), founded in 1949, is an autonomous body comprised of the 52 bar associations in Japan, their individual members and legal professional corporations.

The Japanese Attorney Act gives lawyers exclusive rights to provide legal services unless explicitly stated to the contrary. In addition to prohibiting unqualified persons from providing legal services, the law also defines unauthorised practice of law as a criminal activity. With this exclusive right to provide legal services, attorneys therefore also assume an obligation to adequately represent and serve their clients: the people in Japan.

The Attorney Act in Japan also defines the mission of lawyers as the protection of fundamental human rights and the realisation of social justice. The shape of Japanese lawyers' lapel pins is a sunflower with a set of scales positioned at its centre. The sunflower symbolises justice and liberty, and the scales symbolise fairness and equality.

To become qualified to practice as a lawyer, judge or prosecutor in Japan, one must complete a law school curriculum, pass a bar examination and complete a one-year apprenticeship at the Legal Training and Research Institute of the Supreme Court. The new system that requires graduation from law schools as a qualification for the bar examination started in April 2004. Under the old system, which was revised in 2010, anyone could take the bar examination. In 2011, Japan also instituted another system under which candidates would be able to sit for the bar examination by passing a preliminary test even if they have not completed law school. Lawyers, judges and public prosecutors

receive the same basic education and training, making it possible for judges and prosecutors to become attorneys. Japanese citizenship is not required to qualify as a lawyer.

Once qualified, candidates must register with the JFBA in order to practice law. In addition to becoming members of the JFBA, lawyers must also join the local bar association where their practices are located and they come under the supervision of both organisations. Over 60 per cent of all law offices in Japan are still run by solo practitioners, but urban areas are seeing an increase in the number of joint offices of several lawyers, and more than half of all lawyers in Japan now belong to such joint offices. More recently, large legal offices with 400 or more lawyers on staff have also emerged.

Self-governance of lawyers

The JFBA and the local bar associations have a high degree of self-governance: they are empowered to examine the qualifications of and take disciplinary action against attorneys, and the activities of attorneys and their regulations do not fall under the supervision of the courts, public prosecutors or administrative institutions. Bar associations differ from other professional associations in that they are not governed by a regulatory agency and, from a financial perspective, are operated entirely from dues and other revenues collected from members. Self-governance is essential to maintaining the independence of the legal profession because the legal services provided by lawyers may at times require them to oppose the authority of the state. Bar associations are therefore specifically responsible for: (1) screening and registering qualified attorneys; and (2) providing supervision and, when necessary, disciplinary measures for lawyers. In addition, membership in bar associations is mandatory and unregistered lawyers are not allowed to practice law.

JFBA's activities to improve the legal system and judicial reform

Since its inception, the JFBA has conducted research and studies on a wide range of legal systems. It has also formulated opinions and issued recommendations to the government on taking necessary measures to improve legal systems, which include civil, criminal law, procedural, civil execution, bankruptcy,

arbitration, detention, administrative, anti-monopoly and labour law. The research and study of legal systems are ordinarily undertaken by committees comprised of members with a high degree of interest and expertise in the areas concerned.

In 1990, the JFBA issued 11 'declarations on judicial reform' as part of its goal to achieve 'justice for the people', in which the justice system is more familiar and accessible to its users: the general public. The Japanese government established the Justice System Reform Council, which issued recommendations calling for fundamental reforms in 2001. The reforms articulated in the recommendations aimed to ensure that the rule of law would prevail throughout society. The recommendations intended to reinforce judicial functions which protect people's rights and maintain and develop the law. Furthermore, they pursued the transition from 'small-scale justice' to 'large-scale justice' by improving institutional bases for making them easier to use, enhancing human resources to legal professionals who support people's lives, and advancing participation of citizens in justice in order to establish democratic bases for the judicial system.

The JFBA's steps to realise such reforms include enhancement of access to the judicial system, such as the fundamental reform of the civil legal aid system, reform of the civil justice system to make it more user-friendly and to enhance the rights of parties, reform of the administrative litigation system, reform of the criminal justice system including electronic recording of interrogations, improvement of the professional legal training and education system, reform of the judge system including promotion of appointment of lawyers as judges, and expansion of areas of activities for lawyers.

One of the significant reforms is access to justice and establishment of the Japan Legal Support Center, under the basic principle of 'creating a society where necessary information and services for legal solutions of disputes are universally available throughout Japan', which commenced operation in October 2006 and is engaged in various activities to expand access to legal services, mainly involving legal aid for civil and criminal cases.

As for criminal justice, the saiban-in ('lay judge') system began in May 2009 under which, as a rule, six lay judges will be chosen to serve alongside three professional judges in examining cases involving certain serious crimes. Lay judges participate in criminal trials, determine facts, and decide sentences with an authority equivalent to that of professional judges. Other improvements on the criminal justice system have been implemented, such as the significant expansion of the scope of the court-appointed attorney system for suspects, enhancement of the disclosure of evidence, and realisation of active trials by enhancing oral argument and direct participation.

Regarding the population of legal professionals, the Justice System Reform Council proposed in its recommendations to expand the area of activities and to increase the population of legal professionals, through organisation of a new professional legal training and education system centring on graduate-level law schools and by increasing the number of successful bar examination applicants, in order to ensure the rule of law penetrates every corner of society. In response to the proposal, the government has increased the number of legal professionals, with the total number rising from 17,000 in 1991 to 35,000 in 2014.

However, the progress in the foundation of the system, such as expansion of the civil legal aid service, has been slow, and we cannot claim that there has been a large increase in the need for legal services. Moreover, while a significant increase in judges and public prosecutors was intended, the increase did not parallel the increase in the number of successful bar examination applicants, and only the number of lawyers has grown dramatically. In addition, the expansion of the areas of activities for legal professionals has not made progress. The JFBA has, therefore, requested stronger commitments from relevant organisations, and announced an opinion on 18 March 2009 stating that the population of legal professionals should be decided through a careful and strict determination of the number of successful bar examination applicants (the current figure for which is 2,000 to 2,100 per year).

In addition, various other reforms are being implemented, including reforms of the administrative litigation system such as enlargement of standing for litigation and reforms of the intellectual property system such as the establishment of the Intellectual Property High Court.

At the IBA Annual Conference in Tokyo

At the IBA Annual Conference in Tokyo, lawyers involved in these judicial reforms may be interested in two showcase sessions: the IBA Bar Issues Commission (BIC) showcase 'Change and opportunity: the challenge of administering justice in shifting legal environments' held on the afternoon of Wednesday 22 October; and the IBA Section on Public and Professional Interest (SPPI) showcase: 'Access to justice and what we actually mean by it' on the morning of Thursday 23 October.

As to continuing legal education, the session 'Rokujuu no tenarai: it is never too late to learn' will be presented by the BIC and Academic and Professional Development Committee.

Lawyers specialised in intellectual property may be interested in the IP Litigation related session, with a focus on the patent litigation in relation to (free, reasonable, and nondiscriminatory) FRAND declarations and standard essential patents (SEPs), on Tuesday at a court room of the Intellectual Property High Court, as organised by the IBA IP and Entertainment Law Committee and Litigation Committee, supported by the JFBA. An IP High Court judge will participate as a speaker and a short (about 15–20 minutes) guided tour of the IP High Court of Japan will be held just before the session.

We look forward to seeing lawyers from all over the world in October in Tokyo.

Global on the inside and out

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I am regularly challenged by in-house and outside counsel peers to explain the difference between my title as 'Global General Counsel' and the more common nomenclature, 'General Counsel'. It is a fair question because the General Counsel at any large, international Asian company bears responsibility for an international legal team, transactions and disputes outside the company's home jurisdiction. Faced with the necessity to explain, I've developed a rationale that the 'global' in my title subtly reflects a sense of urgency to establish a global mindset to address evolving legal and business challenges faced by a globalising business.

For many in-house departments, the need to address these challenges is real and urgent. The nature of legal challenges that counsels face when advising global businesses is decreasingly 'bilateral' and increasingly 'multi lateral'. With various cultural, political and linguistic facets, in-house counsels face a matrix of challenges. For example, in a single financial transaction, it is increasingly common to engage with investor, financial and legal firms all headquartered in different countries and staffed by multi cultural talent recruited regionally or globally. Even in strategic deals between relatively traditional and conservative manufacturing companies, more than in the past, lawyers will find the need to deal effectively with multi cultural business teams, investors, customers and supply chain stakeholders, and with related activities to which multiple legal jurisdictions apply.

Not too long ago, general counsel in Asia could reasonably manage the challenges of international matters by delegating discreet matters to overseas legal departments or outside counsel coupled with oversight by headquarters legal staff. Some Asian legal departments traditionally hired native English-speaking lawyers typically from a common law jurisdiction as temporary contracted in-house advisors, or sent home-grown talent overseas to learn common law practices and legal English under an LL.M. programme. For global companies now facing challenges at ever-accelerating paces, these traditional, bilateral solutions, are only band-aids and unlikely to meet the demands of a globally active business and the related risks, which require real change from in-house and outside counsel to manage effectively.

In this dynamic environment, in-house departments and law firms should be hiring and nurturing lawyers who are not only effective in their own jurisdictions and subjects of expertise, but who are also

effective on unknown terrain, where there is no internal compass or roadmap to rely upon. Substantively, these lawyers should understand basic comparative law principles, basic differences between common and civil law, common traits of law in developing markets, and commonly encountered extra territoriality principles of anti-bribery laws, economic sanctions, antitrust laws, export controls, and so on. Intellectually, they should be open-minded and curious about differences encountered when confronting new jurisdictions, legal and business cultures. Most important, they must have the skills and institutional support to leverage and exploit this environment in a creative manner to empower business objectives. For many in-house departments in and outside Asia, building a headquarters' team to deliver on the above will be extremely challenging.

Along with the challenges of going global, a legal department has a precious opportunity to utilise the collective capabilities of diverse contributors, and an obligation to bring it all together in real time into a single voice to empower a global business. Unfortunately vendors seem to be slow to offer practical and affordable technical solutions to really empower in-house departments to go global, and companies seem to be slow to adopt what is available. There are also practical, mobility challenges on the human resources side of getting the right person in the right place. Regardless of the challenges, a legal function must find ways to keep up with clients.

One way companies are doing this is by stretching resources across jurisdictions to make global use of local talents. For example, once country-specific general counsels in leading Asia markets are often now tasked with acting as regional general counsels. Corporate departments may also be looking more at leveraging internally from the global company group to tap into the diversity of its skills and experience, and to prepare for global issues in advance by proactively developing global response teams.

When it comes to outside counsel, while many global firms and global consortiums of firms have made significant efforts to develop marketing of 'global' legal services, few have invested as much in developing truly global counsel capabilities in a manner that is effective and efficient. As a global in-house counsel, I would like to see outside counsel deliver better value through activities such as the following:

When advising on multi-jurisdictional events (global transactions, global crisis, etc), develop efficient methods to proactively provide global issue-spotting and efficiently manage delivery of the solutions for multiple jurisdictions.

Fully deliver the collective wisdom of your firm's global experience by effectively transplanting skills and strategies across jurisdictions; for example, by adopting state-of-the-art licensing techniques from Silicon Valley for a domestic Asia transaction, by adapting a creative European deal structure for an Asian investment, by utilising visual United States litigation technology to make a strong evidentiary hearing in an Asian court or arbitration hearing, and so on.

Know your value, strengths and weaknesses in a specific transaction or jurisdiction – and be honest with your client about when to go local; for example, if you have a political or cultural issue requiring local expertise and reputation or a matter that can be more efficiently handled by local counsel, let your client know. Be globally-minded and locally effective.

Deliver creative value by thinking outside the box and delivering not only legal advice but suggestions for effective business and cultural solutions to resolve problems in a global deal.

Be a team builder by offering your clients efficient and effective tools to develop and maintain better global, in-house teams who can effectively and efficiently use your resources to obtain excellent legal services from you at a reasonable price.

Finally, *develop your own global team* because your clients would like to see that you are investing in what is important to us. Spend less on fancy brochures; put greater effort into developing lawyers having the global lawyer's ability to synthesise the diverse talent and experience of the firm to solve our global problems in real time.

About the author: Andrew Thorson is the Global General Counsel of Nissan Motor Company, headquartered in Yokohama, Japan. Nissan's HQ legal department consists of Japanese and foreign legal specialists, including attorneys licensed in five countries who are tied through working teams with colleagues around the globe. Together, they service global operations with 245,000 employees in more than 160 countries, and a diverse executive team in which 49 of the top 100 positions are held by foreign nationals from around the world.

Guide to Tokyo

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Tokyo is one of the world's most vibrant cities and a growing business hub, therefore it was an obvious choice to host the next IBA Annual Conference. There are many attractive places to visit and restaurants to eat at in the city. The official Tokyo travel guide, Go Tokyo, is available on the Tokyo Convention & Visitors Bureau website at **www.gotokyo.org**, and provides full information about Tokyo's attractions including shopping, art, architecture, courses, transportation, festivals and events. Below we have compiled some specific recommendations provided to us by friends, colleagues and other members of APF. The IBA APF Committee looks forward to seeing you in Tokyo!

Places to eat

Kurosawa, Nagatacho (Japanese restaurant)

The restaurant is themed after a famous Japanese film director, Akira Kurosawa, and the atmosphere of the restaurant will remind you of his movies, a venue any film fanatic must experience.

Address: 2-7-9 Nagata-cho, Chiyoda-ku, Tokyo
Telephone: +81 3 3580 9638
Nearest station: Chiyoda/Marunouchi line, Kokkai-gijido-mae station
Website: www.9638.net (Japanese language only)
Opening hours: Mon–Fri 1130–1500, 1700–2300; Sat 1200–2200; closed Sun

Gonpachi restaurant

This restaurant is famous for a couple reasons. First, Quentin Tarantino was inspired by the restaurant's Edo-style awnings and lanterns so much that he recreated the space in the film Kill Bill. Secondly, George Bush was a customer of the restaurant when Prime Minister Koizumi took him to dine there.

Address: 1F, 2F, 1-13-11, Nishi-Azabu, Minato-ku, Tokyo
Telephone: +81 3 5771 0170
Nearest station: Hibiya/Oedo line, Roppongi station
Website: www.gonpachi.jp/nishiazabu/?lang=en
Opening hours: Open daily 1130–2330, lunch is between 1130 and 1500

Yuian, Izakaya restaurant

The outstanding izakaya is located on the 52nd floor of an office building in Shinjuku. The interior is sleek and sophisticated, with floor-to-ceiling views of the twinkling cityscape below. The food is also surprising, good value à la carte options include three colored tofu and Yuba spring rolls of chicken breast fillet and cheese. Window seat reservations are essential.

Address: 52F Shinjuku Sumitomo Bldg, 2-6-1 Nishi-Shinjuku, Tokyo
Telephone: +81 3 3342 5671
Nearest station: Oedo line, Tochomae station
Website: www.bento.com/rev/0685.html
Opening hours: Open daily 1700–2230

Popeye

With over 70 beers on tap Popeye in Ryogoku, Sumida Ward, is a great location for a beer lover. Most of the beers are micro-brewed by tiny producers around Japan, though some are imported from Europe and the United States.

Address: 2-18-7 Ryogoku, Sumida-ku, Tokyo
Telephone: +81 3 3663 2120
Nearest station: Ryogoku
Website: www.40beersontap.com
Opening hours: Open Mon–Sat 1700–2330 (closed Sunday)

Bar High Five

This bar is famous for its variety of cocktails ranging from Japanese classics to fruit cocktails.

Address: NO 26 Polestar Bldg 4F, 7-2-14 Ginza Chuo-ku, Tokyo
Telephone: +81 3 3571 5815
Nearest station: Tokyo Metro Hibiya station or Tokyo Metro Ginza station
Website: http://barhighfive.com/
Opening hours: Mon–Sat 1800– 0200

Attractions

Tokyo Sky Tree

Tokyo Sky Tree is an engineering marvel, the tallest free-standing broadcasting tower in the world at 634m tall, this newly built tower is a must visit with for an amazing view of Tokyo. The panorama is spectacular and the 450m observation deck beneath the digital broadcasting antennas features a circular glass corridor for vertiginous thrills, while the lower deck houses restaurants and cafes. The surrounding Sky Tree Town has more dining options and shops, as well as an aquarium.

Address: 1 Oshiage, Sumida-ku, Tokyo
Telephone: +81 3 5302 3470
Nearest stations: Tokyo Skytree station, Oshiage station (Skytree), Asakusa station, and Kinshicho station
Website: www.tokyo-skytree.jp/en/
Opening hours: Observation deck is open from 0800–2200

Senso-ji, Asakusa Kannon Temple

Built in 645, it is Tokyo's oldest, most colorful and popular Buddhist temple. The legend says that in the year 628, two brothers fished a statue of Kannon, the goddess of mercy, out of the Sumida River, and even though they put the statue back into the river, it always returned to them, therefore they built her this beautiful temple. The street leading to the temple is full of pretty shops for traditional objects and souvenirs.

Address: 2-3-1 Asakusa, Taito-ku
Telephone: +81 3 3842 0181
Station: Ginza line, Asakusa station, exit 1
Website: www.senso-ji.jp/about/index_e.html
Opening hours: From dawn to dusk

Tokyo National Museum

Considered the Louvre of Japan, the Tokyo National Museum's grand buildings hold the world's largest collection of Japanese art. The building dates from 1939 and is in the imperial style, which fuses Western and Japanese architectural motifs.

Address: 13-9 Ueno-koen, Taito-ku, Tokyo
Telephone: +81 3 822 1111
Nearest station: JR Yamanote line to Ueno, exit Ueno-Koen
Website: www.tnm.jp/?lang=en
Opening hours: Tue–Thu 0930–1700; Fri 0930–2000; Sat–Sun 0930–1800

Day trips

Kamakura, Old capital

An hour from Tokyo, Kamakura was Japan's first feudal capital, between 1185 and 1333, and its glory days coincided with the spread of populist Buddhism in Japan. This legacy is reflected in the area's high concentration of stunning temples. The town has a laid-back, earthy feel complete with organic restaurants and summer beach shacks – which can be added to sunrise meditation and hillside hikes as reasons to visit.

Website: http://en.kamakura-info.jp/
Getting there: Yokosuka line trains run to Kamakura from Tokyo (56 minutes)

Mount Fuji

Of all the iconic images of Japan, Mount Fuji is the most recognisable. Admiration for the mountain appears in Japan's earliest recorded literature, dating from the 8th century. Back then the now dormant volcano was prone to spewing smoke, making it all the more revered.

Website: www.jnto.go.jp/eng/location/regional/shizuoka/fujisan_shizuoka.html
Getting there: Daily direct buses (2.5 hours) run from Shinjuku bus terminal to the Kawaguchi-ko 5th station. For details call +81 03 5376 2217

Nikko Area

Nikko lies at the foot of Mt. Nyoho in the western part of Tochigi, and it is known as the home of the Futarasan Shrine, the Tosho-gu Shrine and Rinno-ji Temple. It is also home to the Nikko-suginamiki-kaido (Nikko Japanese Cedar-Lined Road) which has been designated as a natural monument, and it is included as part of the Nikko National Park.

Nikko structures and the surrounding forest areas are registered as a UNESCO World Heritage site and an important cultural property where nature and buildings are united.

Website: www.jnto.go.jp/eng/location/regional/tochigi/nikkou.html
Getting there: from Asakusa Station in Tokyo to Tobu-Nikko Station (Limited Express train on the Tobu Isesaki-Nikko-Kinugawa Line, about 2 hours)

Challenges for human rights in Asia Pacific region

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Yes, we face many of challenges to human rights in the Asia Pacific region. Each state has the problems and lawyers are struggling for individual remedies, as well as for public good. Social justice, or rule of law, is also the driving power for lawyers. In the IBA sphere, these issues are often transnational in nature. Here, I would like to introduce briefly two subjects, which will be discussed and addressed at sessions of the Annual Conference at Tokyo.

How lawyers should address past and recent atrocities

The first subject is how lawyers should address past and recent atrocities, in other words gross violation of human rights. More than half a century ago, the Japanese military invaded and occupied a vast region of the Asia Pacific. The invasion and occupation brought with it large-scale human rights violations including massacres, sexual slavery ('Comfort Women') and forced labour. Since 1990, just after the end of the Cold War, there has been an outburst of claims and lawsuits against the Japanese government and various corporations in Japanese courts. Tens of cases and hundreds of plaintiffs emerged, most of whom came from states other than Japan. Hundreds of Japanese lawyers represented plaintiffs pro bono, covering many areas, particularly international, of law. Are individual foreign claims against a state to be quashed by peace treaties between states? Is the individual entitled to initiate enforceable claims directly under international law? And if so, how? Until the mid-2000s, the Supreme Court of Japan closed doors to those foreign plaintiffs. However, it was not the end of the story. Now those plaintiffs filed another lawsuit in their own courts. Until recent, the Korean courts ruled for them and one Chinese court allowed the case to go forward. How to address the past wrongs in national courts and what lawyers can corporate transnationally for the aim are getting more urgent challenges.

At the same time, systems of international justice to address atrocities are becoming more popular in international criminal law venues. In the Asia Pacific region we have experiences with the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Panels for Serious Crimes – Timor Leste (SPSC), not to mention the post-Second World War International Military Tribunals for Far East (IMTFE). For the pursuit of similar aims, the International Criminal Court (ICC) was established in The Hague in 2003, as a treaty-based, permanent and independent criminal justice institution. The ICC has jurisdiction over the most serious crimes of international concern (crimes of genocide, crimes against humanities and war crimes) when a state is unwilling or genuinely unable to carry out the investigation or prosecution. The ICC has initiated 28 cases in eight situations, predominantly in Africa, and it is becoming the world court for dealing with gross violations of human rights. Is the Asia Pacific region already a part of this? It is hard to say because only limited states are members of the treaty for the ICC (the Rome Statute) and, what is worse, very few lawyers are aware of, or involved in, it in the region. What lawyers could do for international justice still remains unanswered.

Business and human rights

The second subject, business and human rights, was discussed in the IBA-JFBA joint conference in November 2013 and will be covered more extensively at sessions at the upcoming IBA Annual Conference in Tokyo.

It has become evident that, since the 1990s, more and more corporations are operating globally and choose their domicile (home state) and places of operation (host states) based on where they will receive the greatest benefits. What is also evident is that they are increasingly blamed for the adverse impact they have on human rights, not only directly through their own practices but also through supply chains and local authorities, with whom corporations are regarded as complicit.

Corporations often face the dilemma that human rights policies of their own or their home states are inconsistent with or prohibited by local law and policies of host states. Business operates globally, but public governance is fragmented, and there is no consistent law or guideline which business can rely on. This is called 'governance gaps'.

There were two main approaches to governance gaps. The first is a treaty approach in which human rights advocates have suggested that a new treaty be introduced to directly regulate business activities with international law. Strongly opposing this course of action, business has supported the other voluntary approach whereby individual corporations or business associations have their own corporate social responsibility (CSR) policies. As neither approach was successful or reliable, the United Nations Human Rights Council (then, the Human Rights Commission) gave a mandate to John Ruggie, Special Representative for Human Rights and Business of the UN Secretary General in 2005, to address the issues.

After Ruggie's extensive work and with the cooperation of states, business and civil societies, he clarified that the Corporate Responsibility to Respect Human Rights exists independently from the State Duty to Protect, and that victims' Access to Remedy should be provided not only by states but also by business (the 'Ruggie Framework'). Based on this framework, Ruggie developed 'The Guiding Principles for Business and Human Rights' (the 'Guiding Principles'), which carries, among others, standards for human rights due diligence and non-judicial grievance mechanisms. The Guiding Principles, endorsed unanimously by the UN Human Rights Council in 2011, has spread vigorously and been incorporated into official texts of the Organisation for Economic Co-operation and Development (OECD), the International Finance Corporation (IFC), the European Union, the International Organization for Standardization (ISO), the Association of South-East Asian Nations (ASEAN) and many national governments, business associations, individual companies, as well as civil society and workers organisations. Thus, both business and civil societies now have common understandings on what business and human rights actually means, that is, the Guiding Principles.

The next step for lawyers is to incorporate these ideas into their practices, either for business or for human rights.

CHINA

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MOFCOM provides more practical guidance for merger control in China

On 6 June 2014, the Ministry of Commerce (MOFCOM) released the new version of Guidance on Notification of Undertakings' Concentration (the 'New Guidance') to replace the old one promulgated on 5 January 2009. This amendment cites some provisions of the Anti-Monopoly Law (AML), the Rules of the State Council on Notification Thresholds of Undertakings' Concentrations (the 'Notification Thresholds Rules') and MOFCOM's Measures for Notification of Undertakings' Concentrations (the 'Notification Measures'), and expands to include 30 articles in total from the original 12 articles. Apart from restatements, the New Guidance also provides some important interpretation and practical guidance, which help shed light on the entire procedure of notification.

Interpretation of 'control'

Control is a key concept to determine whether a transaction constitutes a concentration of undertakings or not under the AML. Neither the AML nor its implementing rules clarify what 'control' means. MOFCOM has

proclaimed on many occasions that the term of 'control' is so crucial, MOFCOM itself has no right to determine how it shall be interpreted for the purpose of implementing the AML. The New Guidance, however, is the first time MOFCOM intends to explain what 'control' means in its written document. It is understood that the New Guidance, different from the implementing rules such as Notification Measures, is not a legally binding document and only provides 'guidance' on antitrust notifications.

The New Guidance quotes the definition of 'undertaking's concentration' provided in Article 20 of the AML, which depends largely on determining the 'control' (or decisive influence) of another undertaking. However, what 'control' refers to has never been defined in other laws or relevant regulations or any written documents of MOFCOM.[1] The New Guidance says that 'control' includes single control and joint control, and should be based on multiple legal and factual considerations. The concentration agreements and the undertakings' Articles of Association are key considerations, but not the only ones; other factors include shareholding structure, voting system, appointment of directors, supervisors and executives, and so on, as detailed in the guidance.

The New Guidance also makes explicit for the first time whether notification obligation applies to a joint venture (JV). The establishment of a JV should be notified if and only if at least two undertakings jointly control the JV.

Calculation of turnover

The New Guidance quotes the turnover thresholds stipulated in the Notification Thresholds Rules and some calculating rules in the Notification Measures, while making supplements at the same time. For instance, the New Guidance restates that 'China-wide' refers to the buyer's location within China, but further indicates that it includes the inward export from overseas to China but excludes the outward export from China to overseas. And 'worldwide' turnover should also include the turnover in China.

Some calculation methods are also provided in the New Guidance. Generally speaking, MOFCOM follows the practice of its counterpart in the EU to determine how turnover should be calculated in different situations.

In terms of affiliated undertakings, restating that turnover flowing inside the same group company doesn't count, the New Guidance further excludes the turnover of any company which has been sold or out of control in the preceding financial year. In addition, if an undertaking concerned is controlled by two or more other undertakings, the turnover of all the controllers is to be calculated.

The New Guidance also details the circumstance where an undertaking sells part of its businesses, including selling certain assets or selling shares in a target company. The notification Measures stated that under such circumstances, only the turnover of the sold part is calculated from the seller's side, meaning that other uninvolved parts are excluded from the turnover calculation. However, the New Guidance adds the premise that it is the way only if the seller no longer controls the sold part after the transaction. To conclude, the interpretation of 'control' is also of great importance for calculating turnover thresholds.

Pre-notification consultation

The New Guidance details the procedure of consulting MOFCOM prior to a notification. It indicates in the first place that notifying parties have the right, but not the obligation, to consult and MOFCOM would provide guiding comments on their concerns. The application for consulting should include: information of the transaction and the parties, issues to be consulted, consulting participants, suggested time slot, and contact information. The issues to be consulted may range from whether the transaction needs to be notified to the notification materials to be submitted to whether the transaction could be classified as 'streamlined case', as well as other legal, factual and procedural problems.

Notifying parties and timing

The New Guidance acknowledges that there can be two or more parties who bear the obligation to notify the transaction. In this case, they can jointly appoint one of them to handle the notification specifically. However, such appointment doesn't exempt other parties from notifying obligations. If the appointed party fails to fulfil its obligation, others can be equally liable.

Regarding timing, notification is due before the implementing transaction, but after signing agreements, which include the Tender Offer Report in the case of a public offer to acquire a listed company.

Notifying procedures and materials

The New Guidance also elaborates specific procedures for notification. First, the New Guidance makes it an obligation to use the client software for Notification Form of Merger Review of Undertakings' Concentration, which was released by MOFCOM on 22 October 2013 and took effect on 28 October 2013.[2] Secondly, notifying parties are also obliged to update MOFCOM with any significant change of the transaction during the course of notification. If the change is substantive, another separate notification is required. Furthermore, the guidance also provides circumstances where parties can withdraw their notification, including when the transaction is later found to fall out of notification scope, when there's a substantive change leading to a new notification, or when the transaction is dropped.

As for the materials to submit, MOFCOM has the discretion to determine whether they are complete, as always. However, under the New Guidance, some materials are no longer compulsory but voluntary, such as opinions of local government and competent authorities, various reports used to support concentration agreements, for instance, the feasibility analysis report and due diligence report. Such practice is consistent with stipulations in the Notification Measures. Translation requirements are also specified in the New Guidance. A Chinese version of all the materials are required but can be briefed if the original is too lengthy.

For those transactions that do not meet the notification threshold, the parties could decide on their own discretion whether to notify them or not. MOFCOM will accept and review such notifications if the authority thinks it is necessary to do so.

Concluding observations

To sum up, the introduction of the New Guidance does provide useful practical guidance for the merger control regime in China and is welcomed by the antitrust community. In particular, the interpretation of a number of key terms pertain to merger filings in China, such as 'control' and 'calculation of turnover' has definitely addressed the main concerns and does provide significant clarification for undertakings. Looking forward, MOFCOM will also benefit from issuing the New Guidance in light of its merger review practice becoming more certain and transparent.

Notes

1 In Mar 2009, MOFCOM had included an article to interpret what 'control' is in its draft *Measures for Notification of Undertakings' Concentrations*, but this article was removed in the final version.

2 The Software was further upgraded in April 2014 to cover the streamlined notifications.

CHINA

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The arrival of Chinese product liability litigation

The last edition of IBA Asia Pacific Regional Forum News (Vol 21 No 1, April 2014) featured an article on court judgments in China, which suggested that 'November 2013 marked a significant day for legal practitioners and academics in China', noting that 'the Supreme People's Court (SPC) of China passed the Provisions on the Online Issuance of Judgment Documents by the People's Courts.'[1] In an effort to promote judicial transparency, this new law provides that judgments made by more than 3,000 Chinese courts will be published and openly available to the public.[2] The SPC intends to publish as many judgments as possible, issued through the website **www.court.gov.cn/zgcpwsw**.[3] What remains of great interest is China's recognition of foreign judgments, and whether the SPC will recognise and publish foreign judgments – which are expected to increase in view of the expanding Chinese economy and flow of goods, services, investment and people to other markets and jurisdictions, including the United States and Europe.

In light of mounting surveillance on the Chinese judicial system, China is amending key product regulation laws. On 31 March 2014, China's State Council promulgated the substantially amended the regulation on medical devices – Medical Device Supervision and Administration Regulation (Medical Device Regulation (MDR) – effective 1 June 2014.[4] The MDR is the cornerstone of China's medical device regulatory system; it is currently the highest level of medical device legislation in the country.[5] The MDR's definition of medical devices still turns on the product's purpose, but the definition has expanded to include new categories of products such as 'instrument, apparatus, appliance, in vitro reagent and calibrator, material and other similar or related article, including the necessary software, which are intended… for the purpose of life support or maintenance… or to collect information for diagnosis or treatment utilizing human sample testing.'[6]

Over the past year, the China Food and Drug Administration (CFDA) has sought to streamline the device classification process. For example, the revised MDR better specifies classification mechanisms by evaluating the device's intended purpose, structure, methods of use, and other relevant factors when assessing risk.[7] The CDFA currently classifies devices pursuant to three risk-based categories.[8] Each category has different procedures and rules for manufacturing, distribution and post-market administration.[9]

Extensive clarifications and modifications have also been made in clinical trials of new devices. Class I devices (for which safety can be guaranteed through routine administration) do not require clinical testing prior to registration, whereas Class II devices (for which further control is needed to guarantee safety) and Class III devices (which are implanted into the human body or used for life support, and are therefore strictly controlled) must undergo successful clinical trials before registration and marketing.[10] The revised MDR also maintains that the CFDA will publish a catalogue of high-risk Class III devices, which aims to provide more standardised guidance.[11]

These two major developments in China – expansion of how judgments are published and how products are increasingly monitored – will have significant consequences for business in China and litigation in foreign courts. As a result of these developments aimed at greater product regulation and transparency, increased litigation may be anticipated with regard to product regulation and liability, and with regard to securing and enforcing judgments in China and abroad. For instance, the Chinese government's 2010 enactment of the Tort Liability Law that followed more than a decade of ignoring product liability indicates that China is now attending to product liability – primarily a response to international incidents involving defective Chinese products that attracted the global spotlight.[12]

Significantly, in 2011, the United States Court of Appeals for the Ninth Circuit affirmed the lower court decision in *Hubei Gezhouba Sanlian Indus Co v Robinson Helicopter Co*, which recognised the judgment of the High People's Court of Hubei Province of China (the 'Hubei High Court') in favour of Hubei Gezhouba Sanlian Indus Co ('Sanlian') and Hubei Pinghu Cruise Co, Ltd ('Pinghu') against Robinson Helicopter Co ('Robinson'), a Californian corporation.[13] The Ninth Circuit Court of Appeals affirmed the money judgment under the Uniform Foreign Money-Judgments Recognition Act (UFMJRA).[14] The decision marked the first ever US appellate ruling to enforce a Chinese court judgment in the US[15] This may be an important precedent in the further recognition of Chinese judgments in the court of the US. Consequently, out of principles of reciprocity and comity in international relations and international law, it may be reasonably anticipated that US judgments will progressively gain recognition in Chinese courts.[16] If Chinese courts provide reciprocal treatment of judgments, product liability lawyers will observe a shift in 'business as usual', with an increase in the enforcement of foreign judgments in the US and China.

Observers are also carefully watching several cases working through the courts that involve Chinese-manufactured products with Chinese defendants. Among the cases is a nationally coordinated lawsuit in the US concerning allegedly defective Chinese drywall building products; *In re Chinese-Manufactured Drywall Products Liability Litigation* is currently coordinated by the Judicial Panel of Multidistrict Litigation (MDL) in the Eastern District of Louisiana.[17] Considering the economic benefits of manufacturing goods in China, product liability claims involving Chinese manufactured goods will persist and likely increase. As the flow of products from China multiplies, regulation and product liability litigation will almost certainly witness

a commensurate increase. As Chinese courts have now acquired adequate power to enforce their own domestic awards, and as China's tort liability laws continue to evolve, Chinese companies with overseas operations cannot deny that product liability laws abroad are pertinent to them now. China understands that, in order to continue on their current economic trajectory, their business environment needs to comport with the frameworks of other business environments in which they deal. For every lawyer or business involved in manufacturing or distribution of products in the US, attention to regulation and product liability laws will increasingly become part of business and investment.

Notes

* The author thanks Jodie Koo for assistance with this article

1 Helen Tung, 'Chinese Judgments Disclosed', *IBA Asia Pacific Regional Forum News*, Vol 18 No 1 (April 2014), 18.

2 'Case judgments to be publicized on website' (China Court, 27 November 2013), available at http://en.chinacourt.org/public/detail.php?id=4830. This and all other URLs throughout this newsletter last accessed 16 July 2014 unless otherwise noted.

3 *Ibid*, n 1.

4 Mingham Ji, 'China's Legislative Affairs Office of the State Council Extends Comment Period for Proposed Rules Implementing the Revised Medical Device Regulation' (Inside Medical Devices, 24 May 2014), available at www.insidemedicaldevices.com/2014/05/21/chinas-legislative-affairs-office-of-the-state-council-extends-comment-period-for-proposed-rules-implementing-the-revised-medical-device-regulation/.

5 *Ibid.*

6 China Food and Drug Administration, Regulations for the Supervision and Administration of Medical Devices, available at http://eng.sfda.gov.cn/WS03/CL0767/61641.html.

7 *Ibid.*

8 *Ibid.*

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 Tort Law of the People's Republic of China, Procedural Law (10 January 2010), available at www.procedurallaw.cn/english/law/201001/t20100110_300173.html.

13 *Hubei Gezhouba Sanlian Indus Co v Robinson Helicopter Co*, 425 F App'x 580, 581 (9th Cir 2011).

14 Cal Code Civ Proc ss 1713–1713.8 (2005).

15 Ariel Ye and Ge Yan, The Hubei Gezhouba Sanlian Case: Enforcement of a Chinese Monetary Judgment in the United States, *China Law Insight* (23 March 2012), available at www.chinalawinsight.com/2012/03/articles/dispute-resolution/the-hubei-gezhouba-sanlian-case-enforcement-of-a-chinese-monetary-judgment-in-the-united-states.

16 Ariel Ye, Ge Yan and Yang Weuiguo, 'First Landmark Decision in Obtaining Recognition and Enforcement of a PRC Court Judgment in the US', *China Bulletin* (King & Wood, January 2010), available at www.kingandwood.com/article.aspx?id=First-Landmark-Decision-in-Obtaining-Recognition-and-Enforcement-of-APRC-Court-Judgment-in-the-US&language=en.

17 United States District Court Eastern District of Louisiana, '*Description of MDL 2047: In re Chinese-Manufactured Drywall Products Liability Litigation*', available at www.laed.uscourts.gov/Drywall/Introduction.htm.

Hong Kong domiciled funds: trustee liability

HONG KONG

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Following the implementation of legislation updating the Trustee Ordinance in December 2013, the Securities and Futures Commission (SFC) issued a circular on 17 April 2014 to clarify the application of the revised Trustee Ordinance to trustees of SFC-authorised funds constituted as Hong Kong unit trusts.[1]

Section 41O of the Trustee Ordinance provides that a trustee is not liable for any act or omission of an agent, nominee or custodian acting for the trust if the trustee has discharged the statutory duty of care applicable to the trustee imposed under the Trustee Ordinance.

In the circular, the SFC has confirmed that authorised fund trustees are subject to the requirements concerning trustee/custodian liability as set out in the SFC's Code on Unit Trusts and Mutual Funds, notwithstanding any provisions in the revised Trustee Ordinance. This confirmation is in line with the article on this topic in our newsletter of November 2013.[2]

In order to 'put it beyond doubt' that section 41O of the Trustee Ordinance shall not operate to affect the application of the code requirements, the SFC requires that:

1. new Hong Kong domiciled funds seeking SFC authorisation will include provisions confirming and clarifying the position in the trust deed;
2. trustees of existing SFC-authorised Hong Kong unit trust funds shall, by 16 May 2014, either (a) confirm in writing to the SFC that, for so long as the fund is SFC-authorised, they will not seek to rely on section 41O of the Trustee Ordinance; or (b) furnish a legal opinion acceptable to the SFC confirming the position as in 1 above;
3. the trust deeds of existing SFC-authorised Hong Kong funds shall be amended to include clarifying provisions as soon as reasonably practicable, and shall then be filed with the SFC.

Notes

1 Securities and Futures Commission, Circular to Management Companies and Trustees of SFC-authorized Hong Kong domiciled funds, 17 April 2014, available at www.sfc.hk/edistributionWeb/gateway/EN/circular/doc?refNo=14EC22.

2 Deacons, Financial Services Newsletter, Iss 8 of 2013, (November 2013) available at www.deacons.com.hk/eng/knowledge/knowledge_564.htm.

India simplifies foreign portfolio investment

INDIA

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Foreign portfolio investment in India was permitted through multiple routes overseen by various regulators and complicated by the presence of overlapping policies. These impediments made it difficult and puzzling for a foreign investor to access the Indian capital market. To simplify the entry procedure and remove the cobweb of various classification of the investment, Securities and Exchange Board of India (SEBI) formed the Committee on Rationalisation of Investment Routes and Monitoring of Foreign Portfolio Investments (the 'Committee') in December 2012, under the Chairmanship of Shri K M Chandrasekhar.[1]

On the basis of the recommendations of the Committee in June 2013, SEBI has recently notified Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014 (the 'FPI Regulations')[2], which repeals the existing SEBI (Foreign Institutional Investors) Regulations, 1995 (the 'FII Regulations')[3].

The FPI Regulations have introduced following key changes:

Single investor class

The FPI Regulations have harmonised the multiple categories of foreign portfolio investors such as foreign institutional investors (FIIs), sub-accounts and qualified foreign investors (QFIs) into a new single investor class termed 'foreign portfolio investor' (FPI).

Simplifying the Procedure

Simplified entry norms

Eligible FPIs now need to register with Designated Depository Participants (DDPs) authorised by SEBI and not with SEBI or qualified Depository Participants as was the case with FII and QFIs respectively. The DDPs have the obligation to perform necessary due diligence and ensure Know Your Customer norms (KYC), before registration of FPI.

Eligibility norms[4]

SEBI has simplified the procedures and prescribed uniform registration and other norms for entry of foreign portfolio investors. Any investor can get registered as FPI if they are a resident in a country whose securities market regulator is a signatory to:

- International Organization of Securities Commission's Multilateral Memorandum of Understanding (Appendix A Signatories); or
- bilateral Memorandum of Understanding with SEBI.

If a bank wants to be registered as an FPI, it should be resident of a country whose central bank is a member of the Bank for International Settlement (BIS).

However, the person resident in a country listed in the public statements issued by the Financial Action Task Force (FATF) with respect to high risk and non-cooperative jurisdictions cannot register as an FPI.[5]

Risk-based classification for KYC

FPI Regulations adopt a risk-based approach to KYC to make it easier for foreign investors, such as central banks, sovereign wealth funds, university funds pension funds and to invest in India.

S No	Category	Risk	Includes	Examples
1	Category I	Low	Government and government-related entities	Foreign central banks, sovereign wealth funds, multilateral organisations
2	Category II	Moderate	Appropriately regulated persons	Banks, asset management companies, investment managers, portfolio managers
			Appropriately regulated broad-based funds	Mutual funds, investment trusts, insurance and reinsurance companies
			Unregulated broad-based funds but having an appropriately regulated investment manager	
			University funds and pension funds	
			University-related endowments already registered with SEBI	
3	Category III	High	All other FPIs not eligible to be included in the above two categories	Endowments, charitable societies, foundations, corporate bodies, trusts, individuals and family offices

FPIs are categorised into three categories:[6]
DDPs would adopt KYC norms based on the above classification.

Changing the perspective

Broad-based fund definition modified

The FPI Regulations have modified the definition of broad-based criteria for funds as prescribed in the erstwhile FII Regulations as below.

- Exemption available to institutional investors has been done away with, therefore, any broad-based fund shall have minimum of 20 investors even if there is an institutional investor.
- Both direct and underlying investors (ie, investors of entities that are set up for the sole purpose of pooling funds and making investments) shall be considered for the purpose of computing the number of investors in a fund.[7]

Investment limits

A single FPI or an investor group can now purchase below ten percent of the total issued capital of a company as against the earlier norm of not to exceed ten per cent of the share capital.[8]

Ultimate beneficial owners

Multiple FPI entities, having the same set of ultimate beneficial owner(s) investing through them, shall be treated as part of the same investor group and the investment limits of all such entities shall be clubbed at the investment limit as applicable to a single FPI.[9]

Offshore derivative instruments

The Regulations allow offshore derivative instruments (ODIs) to be issued only to persons regulated by an appropriate foreign regulatory authority and after compliance with KYC norms. SEBI appears to be encouraging the format of direct participation for broad-based FPIs. The class of eligible entities issuing ODIs has also been widened. However, Regulations have prohibited Category III FPIs and unregulated broad-based funds under Category II FPIs to issue, subscribe and otherwise deal in ODIs.[10]

Opaque structure exemption

FPI Regulations have explained that applicant shall not be regarded as having an 'opaque structure' if:

- the applicant is regulated in its home jurisdiction;
- each fund or sub-fund in the applicant satisfies the broad-based criteria; and
- the applicant gives an undertaking to provide information regarding its beneficial owners upon SEBI's request.[11]

Conclusion

A harmonised regime with a unified market entry process for all foreign portfolio investors not only provides a unified market entry for foreign portfolio investors but also retains the ability of government/regulatory authorities to incentivise or restrict the end use of foreign capital. It will reduce the overall complexity and multiplicity of regulations governing inbound investments, and thus, will infuse the efficiency and increased capital inflows into India.

Notes

1 Securities and Exchange Board of India, *Report of the Committee on Rationalisation of Investment Routes and Monitoring of Foreign Portfolio Investments*, (12 June 2013) available at www.sebi.gov.in/cms/sebi_data/attachdocs/1372854491698.pdf.
2 Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations (2014) notified on 7 January 2014.
3 Securities and Exchange Board of India (Foreign Institutional Investors) Regulations (1995) notified on 14 November 1995.
4 Regulation 4 of FPI Regulations (2014).
5 See FATF Public Statement for the List of High-Risk and Non-Cooperative Jurisdictions, (18 October 2013), available at www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/documents/fatf-public-statement-oct-2013.html.
6 Regulation 5 of FPI Regulations, 2014.
7 See Regulation 5 of FPI Regulations (2014) and Regulation 6 of FII Regulations (1995).
8 See Regulation 21(7) of FPI Regulation (2014) and Regulation 15(5) of Securities and Exchange Board of India (Foreign Institutional Investors) Regulations (1995).
9 Regulation 23 of FPI Regulations, 2014.
10 *Ibid*, Regulation 22.
11 *Ibid*, Regulation 32.

INDIA

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Liquidated damages

Liquidated damages are an area of law that seems to mystify many legal scholars. In 1854, a New York Court of Appeals judge remarked that even the 'ablest judges have declared that they felt themselves embarrassed in ascertaining the principle on which the decisions… were founded.' This comment has remained strikingly valid. Simply stated, the courts continue to apply vague and confusing principles in the area of liquidated damages. Historically, this area of the law developed from equity, which granted relief against the harshness of penal bonds. A penal bond was a form of assurance whereby an individual would bind himself to pay a definite sum of money in the event he failed to perform another primary obligation. The equitable principle granting relief against such bonds later was adopted by courts of law and remains today as the foundation for the rule that penalties are void and unenforceable. However, courts later began to realise that, in certain situations where the actual damages could not be readily ascertained, promises to pay a stipulated sum in the event of a breach of contract were a valid alternative to the uncertainty of a jury's award. This distinction formed the basis for the differentiation between penalties and liquidated damages clauses.[1]

Definition, meaning and concept

Generally, contracts that involve the exchange of money or the promise of performance have a liquidated damages stipulation. The purpose of this stipulation is to establish a predetermined sum that must be paid if a party fails to perform as promised.

Damages can be liquidated in a contract only if: (1) the injury is either 'uncertain' or 'difficult to quantify'; (2) the amount is reasonable and considers the actual or anticipated harm caused by the contract breach, the difficulty of proving the loss, and the difficulty of finding another, adequate remedy; and (3) the damages are structured to function as damages, not as a penalty. If these criteria are not met, a liquidated damages clause will be void.[2]

'Liquidated damages' means that it shall be taken as the sum that the parties have by the contract assessed as damages to be paid whatever may be the actual damage. The parties to the contract may agree at the time of contracting that, in the event of breach, the party in default should pay a stipulated sum of money to the other, or may agree that, in the event of breach by one party, any amount paid by them to the other shall be forfeited. It is a genuine 'pre-estimate of damages' likely to flow from the breach.[3] The purpose of inserting liquidated damages clause is only to ensure that the contractor shall execute the work with due diligence and in a workmanlike manner and strive to complete the whole work as given in the contract within the stipulated time.

It must be remembered that the stipulation with regard to liquidated damages is not at all aimed to provide revenue to the employer. It is thus, desirable that recourse to imposition of liquidated damages should be taken only in extreme cases. It must be understood that by realising the amount of liquidated damages, the employer is not only reducing the working capacity of the contractor but is also running the risk of bringing the work to a complete halt. Many legal and financial complications can and do arise consequently. In many cases the time fixed by the contract ceases to be applicable on account of some act or default of the employer or his architect or engineer. A provision is, therefore, generally inserted in order to avoid such acts or defaults destroying the right to liquidated damages, by which the architect or engineer is empowered to grant an extension of time on the happening of certain specified events, and the contractor is bound, when such an extension of time has been properly granted to complete within the extended time. This has the effect of substituting for the time fixed by the contract a new date from which the liquidated damages are to run. Such a new date can only be substituted for the original time, under such a power, where the extension is given under the circumstances and on the happening of the events expressly provided by the contract.[4]

Indian panorama

The principle of requiring payments to represent damages rather than penalties goes back to the equity courts, where its purpose was to protect parties from making unconscionable bargains or overreaching their boundaries. The Indian Contract Act 1872 provides a basic structure of the law of contract in India, its enforcement, various provisions regarding non-performance and the breach of contract. Sections 73 and 74 of the Indian Contract Act, 1872, are the relevant applicable laws.

Parties entering into a contract had to take safeguards to build in the relevant clause containing the applicable laws (that is, sections 73 and 74 of the Indian Contract Act 1872) by properly indicating the liquidated damages in the eventuality of breach/violation of the contract by either side, to ensure smooth conduct of the terms and conditions as contained in the agreement rather than approach a court of law at a subsequent date to determine a penalty for the breach or violation of any of the conditions contained in the agreement. Thus, in India, a stipulation to delay damages would act as an upper limit on the damages recoverable by the claimant for breach and the court has the discretion to reduce (but not increase beyond the amount stipulated in the contract) the damages; though the expression 'reasonable compensation' implies that this discretion is to be exercised with care.

The Supreme Court of India, in *Fateh Chand v Bal Kishan Das*,[5] called section 74 the provision cutting through the maze of rules evolved by English courts over a period of time to distinguish between what is considered a genuine pre-determination of damages and what is penalty and, therefore, not enforceable.

In *Maula Bux v Union of India Air*,[6] the Supreme Court repelled the contention that quantified amounts spelt out in a contract for supply of potatoes to the central government, were, in the circumstances of the case, genuine pre-determination of what the damages were likely to be and held that such conditions were unenforceable penalties. The court also noted that that the central government did not make any effort to establish the quantum of damage suffered by it.

Moreover, in the case of *Oil And Natural Gas Corporation Ltd v Saw Pipes Ltd*[7] the court summarised that the terms of a contract must be taken into consideration if the terms stipulating the liquidated damages in case of the breach of the contract are clear and unambiguous unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty. In every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract. In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.

Universal attitude

Position in the United Kingdom

In recent years, liquidated damages clauses have attracted significant media coverage in the UK in relation to unfair bank and credit card charges. The reason for this has been the unwillingness of the English courts to enforce a liquidated damages clause if the sum stipulated to be paid upon breach is excessive or punitive – this could result in such a clause being regarded as a penalty clause and therefore unenforceable under English law.[8]

Position in France

French law treats penalty and liquidated damages clauses in a different manner. The amount contractually due under a penalty clause may be increased, or reduced, by the judge when it is 'obviously excessive or ridiculously low'. The judge may, by their own motion, decrease or increase the agreed penalty. In practice, judges rarely award a penalty which would be greater than five per cent of the contract price. The judge would determine the penalty awarded on the basis of the actual loss suffered. The enforceability of a liquidated damages clause depends on the nature of the damage that occurred. If it merits the legal qualification of 'decennial liability' damage, the liquidated damages clause would be deemed void. If this is not the case, it would be enforced, provided there is not a breach of an essential condition under the contract (*Chronopost* case), an intentional default or gross misconduct, or evidence of fraud.

Position in Spain

Articles 1152 and 1154 of the Spanish Civil Code, state that, in the event of breach of contract by delay, penalty shall replace contractual damages and payment of interest and the judge can modify the penalty in accordance with the performance of principal obligation. Therefore, contractual damages for delay are not just payments on account. However, the courts may adjust contractual damages.

Position in Jordan

Article 364 of the Civil Code states that upon an application by either party, the court can alter any fixed amount of liquidated damages for delay, in order to determine the actual damages suffered by that party.

Position in UAE

Article 390 of the Civil Code allows the contractor or the employer to vary the liquidated damages so as to fully reflect the actual loss. Further, the party seeking the alteration bears the burden of demonstrating the actual loss suffered and its variance from the liquidated damages as set out in the contract. As per Article 290, if the victim contributed to the damage or increased damage, the court may reduce the liability or award no damages.

Position in Germany

Under section 343 BGB of the German Civil Code, an unreasonably high penalty cannot be applied in case of delay, and the actual damages would be one of the factors to take into account for extent of such penalty. It depends on facts and circumstances of each case whether section 343 BGB can be applied by analogy to liquidated damages for delay.

Epilogue

Invocation of a liquidated damages clause should be taken by the employer as recourse only in such cases where there can be no two opinions that the contractor does not have the capacity to do the work – nor will he be able to complete the work within a reasonable time after the time stated in the contract expires. Any action taken in a hurry would land the employer in trouble. Some amount of restraint in proceeding against the contractor must be exercised. The contractor may have genuine problems which he could not have foreseen with reasonable diligence at the time of entering into the contract. If the employer takes into consideration the fact that it does not pay the contractor to delay execution of work, then he has to investigate why a delay is occurring. The employer must endeavour to find solutions rather than saying that it is not his problem, since the aimed objective of the employer is to get the work completed rather than enter into any legal or financial complications.[9]

Liquidated damages clauses possess several contractual advantages too. First, they establish some predictability involving costs, so that parties can balance the cost of anticipated performance against the cost of a breach. In this way liquidated damages serve as a source of limited insurance for both parties. Secondly, the parties each have the opportunity to settle on a sum that is mutually agreeable, rather than leaving that decision up to the courts and adding the costs of time and legal fees.[10]

Therefore, the far-flung axioms laid down in the concept of liquidated damages can be said to be held steadfast when they come in the way of courts, ignoring the scepticism the concept has carried for a very long time. Liquidated damages and the hefty weight of monetary justice it carries, rests on the shoulders of each judge dealing with it and needs serious lucidity, as the provisions and its intrinsic principle are indispensable.

Notes

1 *Cotheal v Talmage*, 9 N Y 551, 553 (1854), J Calamari and J Perillo, The Law Of Contracts, s 232 (1970).
2 See http://legal-dictionary.thefreedictionary.com/Liquidated+damages.
3 See www.legalserviceindia.com/article/l269-liquidated-damages.html.
4 P C Markanda, 'Liquidated Damages – Applicability and Enforceability', (Indian Council of Arbitration), available at www.icaindia.co.in/icanet/quterli/jan-march2001/ica_jan2.htm.
5 *Fateh Chand v Balkishan Das*, AIR (1963) SC 1405.
6 *Maula Bux v Union of India*, AIR (1970) SC 1955.
7 *ONGC v Saw Pipe Ltd*, AIR (2003) SC 2629.
8 See www.steptoe.com/publications-6445.html.
9 *Ibid*, n4.
10 See www.lawteacher.net/business-law/essays/liquidated-damages.php.

New Indian law heightens employers' obligations to prevent sexual harassment in the workplace

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In the recent past, several disturbing, highly publicised incidents of violence and sexual offenses against women have taken place in India. The Indian government has responded by, among other things, instituting a comprehensive statutory program to prohibit sexual harassment in the workplace. While many aspects of the statute are familiar concepts in the United States, Europe and other jurisdictions with strong sexual harassment laws, the new law contains a number of innovative provisions and represents a far-reaching shift for employers in India.

Until very recently, sexual offences against women were governed by only a few sections of the Indian Penal Code, 1860 (IPC), in addition to the 1997 Supreme Court of India judgment of *Vishaka and Others v State of Rajasthan and Others* (the 'Vishaka Case'), which conclusively set out guidelines for prevention of sexual harassment at the workplace. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (the 'Act') and the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 (the 'Rules') codifies, to a great extent, the guidelines established by the Supreme Court in the Vishaka Case and implements new provisions to protect women from sexual harassment at the workplace.

All employers in India are now required to take steps to prevent sexual harassment in the workplace, including implementing an anti-sexual harassment policy, establishing an Internal Complaints Committee to investigate any allegations of sexual harassment at the workplace, organising workshops and awareness programmes, providing necessary facilities to the internal committee, and helping female employee file a police complaint.

Some of the key provisions of the new law have been set out below as part of the discussion.

Key provisions and definitions

In general, the Act prohibits sexual harassment at the workplace. The Act defines 'sexual harassment' to include any of the following unwelcome acts or behaviours:

- physical contact and advances;
- a demand or request for sexual favours;
- making sexually coloured remarks;
- showing pornography; or
- any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.

The Act also identifies certain circumstances which, if occurring in conjunction with sexual harassment as defined in the Act, would be significant evidence that an offence has been committed. The circumstances are:

- implied or explicit promise of preferential treatment in employment;
- implied or explicit threat of detrimental treatment in employment;
- implied or explicit threat about present or future employment status;
- interference with work or creating an intimidating or offensive or hostile work environment; or
- humiliating treatment likely to affect one's health or safety.

The sweeping breadth of new protections provided by the Act is exemplified by some of its key definitions, which go beyond the parameters of the traditional employment relationship. For example, an 'Aggrieved Woman' entitled to seek redress under the Act is a woman of any age, whether employed or not, who claims to have been subjected to any act of sexual harassment. Thus, the employer's obligations are not restricted to only its female employees but instead extend to all women who may be subjected to sexual harassment at its workplace.

Similarly, an 'employee' is defined as a person employed at a workplace for any work on a regular, temporary, ad hoc or daily wage basis, either directly or through an agent, including a contractor, with or without the knowledge of the principal employer, whether for remuneration or not, working on a voluntary basis or otherwise, whether the terms of employment are express or implied. The definition includes co-workers, contract workers, probationers, trainees, apprentices, or persons called by any other such name.

Finally, the Act defines 'workplace' to include not only the usual place of employment but any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey.

Investigation of complaints

In one of its most innovative aspects, the Act requires that all employers of a workplace having more than ten employees set up an internal committee to investigate allegations of harassment.

The internal committee must include:

- a presiding officer who shall be a woman employed at a senior level at the workplace;
- not fewer than two members preferably committed to the cause of women or who have had experience in social work or have legal knowledge; and
- one member from a non-governmental organisation or association committed to the cause of women or a person familiar with the issues relating to sexual harassment.

In addition, as per the Act, at least half the aforementioned members of the internal committee are required to be women. The presiding officer and other members of the internal committee are to hold office as members of the internal committee for a period to be specified by the employer, not to exceed three years. The member from a non-governmental organisation or association committed to the cause of women or person familiar with issues relating to sexual harassment should be paid a fee or allowance as specified by the Rules for participation in the proceedings of the internal committee.

During the pendency of an inquiry under the Act and on a written request made by an aggrieved woman, the internal committee may recommend to the employer certain interim measures that could be taken for the protection of the aggrieved woman until the matter is resolved. The interim relief that may be granted includes:

- transfer of the aggrieved woman or respondent to any other workplace;
- grant of leave to the aggrieved woman up to a period of three months (such leave is in addition to the paid leave that the aggrieved woman is entitled to under other applicable laws); and
- restraining the respondent from reporting on the work performance of the Aggrieved Woman or writing confidential reports and assigning the same to another person.

Remedial measures to be taken by the employer

After the completion of an inquiry under the Act, the internal committee has to provide a report of its findings to the employer within a period of ten days. The report should also be made available to the Aggrieved Woman and respondent.

In cases where the internal committee concludes that the allegation against the respondent has not been proved, it is required to make a recommendation to the employer that no action should be taken. However, in cases where the internal committee concludes that the allegation against the respondent has been proven, it is required to make a recommendation to the employer to take action in the manner prescribed by the Rules. The Rules provide for measures such as requiring the respondent to provide a written apology, warning the respondent, reprimand or censure or the respondent, withholding of promotion, withholding of pay rise or increments, termination of service of the respondent or requiring the respondent to undergo a counseling session or carry out community service and payment of compensation to the claimant. In cases where compensation to the claimant is recommended, the internal committee may propose that the employer deduct from the salary or wages of the respondent such sum as it considers appropriate to be paid to the Aggrieved Woman or her legal heirs.

The Act requires the employer to act upon the recommendation within 60 days of its receipt from the internal committee. The Aggrieved Woman or respondent, if aggrieved by the recommendations made by the Internal committee or their non-implementation by the employer, may appeal to the authority prescribed by the Rules within a period of 90 days of the recommendations.

Other duties of the employer

Additional duties imposed on the employer under the Act include:

1. to provide a safe working environment at the workplace, which includes safety from other persons at the workplace;
2. to display, at any conspicuous place in the workplace, the penal consequences of sexual harassment and the order constituting the internal committee under the Act;
3. to promulgate policies, organise workshops and awareness programs at regular intervals for informing employees of the provisions of the Act and conduct orientation programmes for the members of the internal committee in the manner prescribed by the Rules;
4. to provide necessary facilities to the internal committee for dealing with complaints and conducting inquiries;
5. to assist in securing the attendance of the respondent and other witnesses before the internal committee;
6. to make all relevant information available to the internal committee in relation to a complaint under the Act;
7. to provide assistance to the Aggrieved Woman if she chooses to file a complaint in relation to the offense under the IPC or any other law;
8. to initiate action under the IPC or any other law against the respondent, or if the aggrieved woman so desires, in cases where the respondent is not an employee, in the workplace at which the incident of sexual harassment took place;
9. to treat sexual harassment as misconduct under the service rules and initiate commensurate action for the same; and
10. to monitor the timely submission of reports by the internal committee.

The internal committee is required to submit an annual report to the employer in a form prescribed by the Rules. In addition, the employer is required to include details of the number of cases filed under the Act and their disposal in an annual report to or in a disclosure to the District Officer (an authority under the Act).

Penalties for non-compliance

The Act clearly sets out that non-compliance with its provisions is punishable with a fine of INR 50,000 in the first instance. While repeated violations are likely to result in higher financial penalties, the Act also provides the power to the government to cancel an employer's license or registration to do business in India in cases of repeated violations, at the government's own sole discretion. It is fairly obvious that, although the financial penalties are not significant in nature in the context of medium and large employers, the government's power to cancel business licenses for repeated violations goes a long way in ensuring that the provisions of the Act are satisfactorily complied, in form and spirit, by employers of all sizes and sectors.

* * *

The Act marks an important milestone in the path toward eliminating sexual harassment at the workplace in India. While many of the requirements of the new law parallel policies which most multinationals have already implemented globally, the unique approach India has adopted in its broad definition of responsible parties, its process for investigation of complaints, and its assessment of compensation directly against individuals merits special attention from global employers operating in India.

JAPAN

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Legal consultations in tsunami affected areas

I have been to towns in north-eastern Japan devastated by the March 2011 tsunami to provide free legal consultations for people living in these disaster areas. Many members of the Japan Federation of Bar Associations (JFBA) located in the north-eastern region, and other regions, have made such volunteer efforts for those affected by the tsunami and Fukushima nuclear disaster.

If you make a reservation and take a Japan Rail (JR) Tohoku Shinkansen at 07:56 at Tokyo station, which is 10 minutes' walk from the IBA Annual Conference venue, you would reach Ichi-noseki station at 10:08. I usually rent a car just in front of Ichi-noseki station, but you can take local bus (10:40 at Ichi-noseki to Ofunato, arriving at 13:00).

By a car, the first stop after almost an hours' ride is Rikuzentakata. Carter Hall, who was a Harvard Law School student and worked with me last summer, wrote of the city:

> 'Situated in a wide, verdant costal valley, this small city saw most of its structures reduced to massive piles of rubble by the tsunami, images of which were relayed across Japan and around the world. Today, most of Rikuzentakata's social and economic life occurs in clusters of temporary structures several kilometers inland of the old city center. Fleets of construction vehicles have cleared away most of the rubble, leaving an eerie landscape in place of the iconic scenes of destruction at the valley floor. Weeds sprout from hundreds of empty lots, the beeping of heavy machinery and ocean breeze the only sounds that break the silence.'

Thirty minutes' ride would take us to Ofunato-city. Dream Net Ofunato, a local NGO, and Human Rights Now, a Tokyo-based NGO, have been providing free legal consultations in Sanriku Railways Sakari station. Most issues are commonplace problems not immediately traceable to the tsunami, but the attendant stress of such problems is compounded for people living in a disaster area.

Hall wrote last summer:

> 'Although most of the actual debris has been cleared from these towns, reminders of the tsunami's destructive power dot the landscape. In a small coastal hamlet north of central Ofunato, a 20-feet-high concrete barrier lies in partial ruin—some sections flattened and shattered, others contorted into unnatural angles. In Rikuzentakata, only one of the 70-thousand pine trees that once crowded its scenic shorefront remains. Dubbed the "lone miracle pine," the townspeople have adopted it as a symbol of their hope and resilience. Of course, it is the people themselves who provide the greatest testament to their spirit in the face of disaster. Whether the employees at the station in Ofunato or the residents of a temporary housing camp in Kesennuma to south, the locals showed a pervasive, quiet resolve to rebuild and recover, and remarkably little self-pity. To have seen with my own eyes the scene of almost unimaginable disaster and hear with my own ears the words of hope and humor of the people who experienced it is an experience I will not soon forget.'

The situations have not improved much since then, although daily life continues and something is changing. I always enjoy an excellent tempura rice bowl lunch in a small eight-seater restaurant in the temporary mall, and an excellent sea food dinner at a tsunami-affected but rebuilt restaurant very near to a hotel in Ofunato.

Legal reform of corporate governance of Japanese companies

JAPAN

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On 20 June 2014, Japanese Diet approved the substantial amendments to the Japan's Companies Act relating to the Corporate Governance of Japanese Companies. The amendments are expected to be in full force and effect sometime in 2015.

One of the major amendments to the Companies Act on corporate governance is to introduce the requirement of an explanation by the annual general meeting (AGM) Chair, of a 'reason that appointment of an outside director is not adequate' at every AGM to the shareholders if any such company: (1) does not appoint any outside director as of the end of the then last fiscal year; (2) has either a paid-in capital of ¥500m or more or an outstanding debt of ¥20bn or more; and (3) is under the continuous statutory obligation to file an annual and other securities reports on its shares under Japanese securities regulations. This shall mean almost all of Japan's listed companies shall be under such new requirements from 2015, except for certain small listed companies, such as those listed on emerging markets of 'Mothers', having the paid-in capital of less than ¥500m (if any).

This new requirement is based on the idea of corporate governance rule overseas of 'comply or explain'. This means that any Japanese company shall either appoint the outside director or explain to its shareholders the reason why not. Accordingly, if any of the large listed companies have appointed at least one outside director at the end of the last fiscal year, then no such explanation is needed at the AGM. Also, the substance of such explanation requirement was uniquely worded as 'reason that appointment of outside director is not adequate', as was invented during the course of discussions of the reform of the basic structure of the Companies Act at the Advisory Committee at Ministry of Justice; the discussion of reform lasted more than two years from April 2010. You might imagine how the management of a listed company can properly explain a reason that the 'appointment of (at least one) outside director is not adequate'. The Advisory Committee carefully drafted and intelligently produced such wording to softly induce the listed companies to appoint at least one outside director. The Tokyo Stock Exchange (TSE) announced on 17 June 2014 that 74.2 per cent of the 1,813 TSE first section listed Japanese companies have appointed at least one outside director based on the information as of 16 June 2014, showing an 11.9 per cent increase when compared with the situation as of August 2013. The TSE also said that 64.4 per cent of all 3,408 listed Japanese companies have appointed at least one outside director at the same time. The 354 companies, out of such 3,408 companies, newly introduced outside directors after August 2013.

The amendment to the Companies Act also introduces the shareholders' approval process if a board of directors of a public Japanese company intends to issue new shares with a result of change of control over a majority of the outstanding shares.

Under the current Japanese law, a board of directors of a public Japanese company is allowed to issue new shares by way of a public offering or a third-party allotment to certain specified investor(s) as the board thinks fit, provided the issue price of the shares is adequate and up to the ceiling of the number of authorised shares permitted in the Articles of Incorporation – the constitutional document. However, the number of authorised shares may be up to four times that of the currently outstanding shares, and the third-party allotment of shares may result in a change of control by the board, rather than the shareholders' approval at the shareholders' meeting. The Companies Act will no longer permit any such change of control without theresolution of the shareholders' meeting, given that any such change of control should be the power of shareholders, but not that of the board or management.

As another item of such amendments to the Companies Act, the derivative action was reformed so as to be effective as against a subsidiary of a holding company. The current rights of the shareholders of the derivative action can be exercised as against the directors or auditors of the relevant company in which the shareholder holds the shares directly. In the case of a Japanese holding company holding 100 per cent subsidiaries, the rights of a derivative action can be exercised by the direct shareholder of such subsidiary, meaning the holding/parent company only, but not the shareholders of the holding company. The amendment to the Companies Act newly introduced the 'multilayer' derivative action in Japan – although certain requirements are imposed. Any shareholder holding at least one per cent shares of the holding company of a 100 per cent subsidiary, which is a limited liability company ('KK' in Japan) can firstly request such 100 per cent subsidiary to commence a legal action to claim to its directors, auditors and so on of such subsidiary for their wrongdoing and compensate the damages to such subsidiary; and if no legal action is commenced by such subsidiary, then the above shareholder having at least one per cent shares of the holding company by itself can commence the legal action on behalf of the subsidiary against such directors, auditors and so on. This is intended to contribute the corporate governance of the Japanese group of companies on a consolidated basis. There are 290 pure holding companies in Japan as of March 2013, in aggregate, having ¥2,490bn of business profits and nearly 20,000 full time employees, according to the Ministry of Economy, Trade and Industry of Japan (METI).

Another item of amendments is the shareholders' approval process of sale by the parent company of the majority interests in its subsidiary to a third party. This means that any Japanese company holding the majority shares of its subsidiary must obtain the shareholders' approval if the book value of such subsidiary is 20 per cent or more of the total assets of the parent company and the sale of such shares results in holding less than the majority of shares in such subsidiary.

The next question is how such reform and amendment can effectively improve the corporate governance of Japanese companies and how the lawyers can assist better corporate governance. This may not be limited to the Japanese market and Japanese lawyers, but may be relevant to overseas markets and non-Japanese lawyers. For example, Japanese listed companies held cash in an aggregate amount of ¥75tn as an historical high, which in total made acquisition and capital injections/investment in overseas companies of ¥3.5tn during the six months ending June 2014. The largest in this year was the acquisition by Suntory, a liquor and food group company, of Beam Inc, another liquor company in the United States in the amount of ¥1.67tn.

The corporate governance of Japanese companies is also important and may affect the legal industry of lawyers all over the world.

First, the shareholders should be protected properly under applicable laws and, accordingly, lawyers may be interested in the sessions of 'Shareholder activism: a growing global trend' or 'Corporate governance: proxy advisors and executive compensation' as organised and administered by the IBA Corporate and M&A Law Committee and to be held on 20 October 2014 at the IBA Annual Conference in Tokyo. Secondly, one might be interested in the session of 'Trends in corporate governance' as organised by the IBA Securities Law Committee/ Corporate Governance Subcommittee for 23 October 2014 at the Tokyo Conference. A lawyer specialised in white-collar crime may be interested in the session of 'Global update on anti-corruption enforcement and legislation', organised by the IBA Anti-Corruption Committee for 22 October; litigation lawyers, in the session of 'Recent trends in liabilities of officers and directors of private and public corporations, organised by the IBA Negligence and Damages and Corporate and M&A Committees for 23 October. Finally, the session 'How do you do corporate social responsibility in Asia?' on 20 October may provide you with an idea of how you could advise a company doing business in Asia from the point of view of proper corporate governance.

The world is not flat, but it is getting smaller and smaller. Lawyers have more opportunities to work sophisticatedly on corporate governance and corporate social responsibility in the world, and Tokyo welcomes all lawyers participating in the IBA Annual Conference in 2014.

Open justice in the 21st century

NEW ZEALAND

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> 'Justice is not a cloistered virtue'
> Lord Atkin, in *Ambard v A-G for Trinidad and Tobago* [1936] AC 322, 335 (UKPC)

Open courts historically

Courts in all major common law jurisdictions, including Australia and New Zealand in the Pacific, extol the benefits of openness of the court system. Openness is said to tend to minimise partiality, corruption and incompetence, thereby enhancing public confidence in the judicial system, and protecting against abuse. The New Zealand Ministry of Justice website describes the benefits of openness of the courts thus:

> 'The openness of the system, including the public nature of the courts and the freedom to comment on the particular outcomes of any dispute resolution process, is a feature which is intended to foster robust Judicial decision-making, and enhance citizen's confidence that the process is impartial, thorough, accessible, and provides timely results.'

Daniel Stepniak, at the time a lecturer in Law at the University of Western Australia, observed, however, that such encomia have a hollow ring, when measured against contemporary reality:

> 'It is often said that the judiciary is the arm of government that is most accountable because it conducts its hearings in open courtrooms and delivers detailed reasons for its decisions. This argument, however, loses any persuasiveness when we consider that few people are able to attend and observe proceedings; that even judges and lawyers have difficulty understanding judicial opinions; and that the vast majority of the population gain their information from television, which is hampered in its coverage of court proceedings because it is rarely permitted to record and broadcast the visual content that viewers expect.'

If court openness confers the alleged benefits, then there appears to be a positive duty to translate the panegyrics into reality by ensuring true openness.

Open court proceedings would have meant nothing in past centuries, if, while its virtues were being sung, no space was provided in courts for the public to observe those proceedings. Sir Edward Coke points out in his Institutes the inappropriateness of holding court proceedings in a judge's chambers. It could not be persuasively argued that government, responsible for provision of courtroom facilities, had no positive duty to ensure accommodation for the public within those courtrooms. But whereas historically the duty to make courts open may have been satisfied by the provision of physical space in the courtroom, in the face of modern realities, such openness has become openness in name only. Stepniak says, '…the level and nature of currently permitted openness is not such as would permit the public scrutiny required by the principle of open justice.'

Given the fairly obvious fact that in modern times the provision of courtroom space, by itself, gives little meaning to the principle of open justice, those responsible for the justice system must have a positive duty to explore and adopt means that actualise the principle in today's context. Lord Justice Cullen said, writing on 'The Judge and the Public' in the *Scots Law Times*, 'Public access to the courts will not, of course, have much meaning if it is not fully effective.'

Are modern courts really public?

While the presence of media reporters in the courts may fill some of the modern gap in court openness, media coverage of court proceedings is recognised to be sporadic. Such intermittent media coverage could be considered satisfactory if the public benefit of such reporting was its entertainment value. But selective media coverage, while providing limited actualisation of the principle of open courts, may generate other significant concerns about substantive justice. One of the arguments accepted in the 1960s against the use of television cameras in courts in the United States, was that television coverage of cases which the media considered sufficiently sensational to excite its interest could itself be a source of prejudice causing injustice, at least in the case of a criminal accused. This concern would diminish if, instead of the media having to seek leave to broadcast proceedings it considers sufficiently

newsworthy, *all* court proceedings were routinely available on broadcast to the public. Such broadcasts, if readily available, would go far toward restoration of the public nature of court proceedings, with resultant dividends for public confidence in the judicial system.

The values to be served by public availability of the processes taking place in the courts are far more fundamental to society than the provision of entertainment. Courts are public institutions. They exist to serve public needs. It stands to reason that, like other public institutions, the public in a democracy should be able to assess the extent to which they fulfil their public role. The US Supreme Court declared in 1979, in *Gannett Co v dePasquale*, that '…judicial proceedings… are without question events of legitimate concern to the public.' Indeed, such information is 'of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.'

Writing about the Michigan Courts' efforts at developing a 'virtual courthouse', Lucille Ponte (professor at Florida Coastal School of Law) notes that, 'Generally, the public's right to know is grounded in the desire to supervise the conduct and activities of the judicial branch rather than a desire to learn about the personal information of parties and witnesses.' It is difficult, if not impossible, for the public to judge whether or not the public business conducted in the courts is being satisfactorily or properly conducted, if that business is not realistically available to the public, while it is being conducted.

Other public institutions have already taken the initiative to broadcast their activities to the public. New Zealand parliamentary proceedings are now broadcast live on television. That initiative represents an acknowledgement that Parliament's business is public business. The Australian Parliament has taken a much more forthright step to make its proceedings available to the public by broadcasting proceedings live on the internet. Roger Stepniak suggests that '… it is… important to consider whether confidence in and respect for the judicial system may not be undermined by courts being the last public institution to resist the type of transparency that the public is accustomed to with other public institutions.' A similar concern was articulated almost 30 years ago in the US in the California case of *United States v Cianfrani*,[1] where the court said:

> 'Secret hearings – though they be scrupulously fair in reality – are suspect by nature. Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view.'

In an age in which people, by virtue of the demands of modern life, do not have the time to attend and observe court proceedings in person, such proceedings may, for all practical purposes be said to be occurring in secret.

Opening the courts to the public

It might be argued that the business of Parliament takes place in one location, thus lending itself to easy capture and broadcast by cameras. The business of the courts, on the other hand, takes place in the many courtrooms spread all across a country. The live broadcast of those proceedings therefore presents a significantly more complex logistical challenge than does broadcasting of proceedings in Parliament. Fortunately, modern technology has gone beyond television cameras, to provide a relatively easy and economical means of broadcasting court proceedings simultaneously from many locations, through internet broadcasting.

Most courts in Australia and New Zealand now record their proceedings. The Ministry of Justice, in response to a 2004 Law Commission Report, *Delivering Justice for All*, has said that 'The Government has committed funding to increase the use of digital audio technology (DAT) to improve evidence recording and contemporaneous transcription.' If such recording is limited to the recording of evidence, it will ignore much that takes place in a court that can have significant if not decisive impact on court processes and outcomes.

In a newspaper article some time ago, a New Zealand lawyer complained about the negative impact judicial facial expressions and gestures can exert on juries. Such expressions and gestures are not captured on sound recordings. Neither do such recordings capture statements made by judges outside of the course of witness testimony in a proceeding. A continuous recording system would capture all that is said during the course of a proceeding, and, if the recording includes video, all that is done.

Given the apparent commitment of

governments to the provision of digital audio recording equipment in courtrooms, and given the present state of audio-visual technology, it suggests that no significantly greater extension of that commitment would be required to provide audio-visual, as opposed to audio only, recording equipment. Similarly, given the current widespread use of the internet by governments, it suggests that it would be entirely feasible for court proceedings that are video recorded to be simultaneously broadcast on the worldwide web.

Stepniak notes that, 'Internet technology and its utilisation by courts worldwide has provided an acceptable means for courts, reluctant to permit television cameras to record and broadcast proceedings, to make audio-visual recordings of proceedings available to the public.' This is already being done in courts in several other jurisdictions. Web broadcasts of court proceedings are available from, for example, the state courts of Indiana, the New Jersey Supreme Court and the Federal Court of Australia, although in the last case only as archive footage. Since 1995, Canadian courts have permitted the broadcast of all their proceedings by CPAC, a political television channel.

Concerns about simultaneous broadcasting of court proceedings

A number of concerns/objections may be raised in connection with the worldwide broadcast of court proceedings via the internet. These include:

- concerns about privacy;
- the potential effect on participants in the proceeding, in particular, witnesses;
- detraction from the dignity of courtroom proceedings; and
- the fostering in the minds of the public, of misperception about such proceedings.

It has long been recognised and acknowledged in the English-speaking legal universe that the imperative that curial proceedings be open to the public must take precedence over concerns about the feelings of parties about, and/or their reactions to, the public nature of court hearings. In the 1913 House of Lords case of *Scott v Scott*, Earl Loreburn said:

> 'The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses… but all this is tolerated and endured, because it is felt that in public trial is to found [sic], on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.'

It may be contended that there is a major qualitative difference between the degree of publicity a party faces by participating in court proceedings at which members of the public are present, and participating in proceedings which are made available for the entire world to see. While that may be true, if, in principle, the value of public proceedings overrides the values that would accord privacy to litigants, then the proceedings should be open. And if the effective means of making those proceedings truly open is to make them available to the world on the internet, then the degree of difference in publication becomes largely irrelevant in the determination whether or not proceedings should be broadcast. If the contrary proposition were accepted, it would mean that no proceedings should ever be broadcast, unless the parties explicitly consent to such publication. That is not the present position.

The time has come for modern courts in the Pacific region to make a serious effort to truly open their 'doors' to the public, by utilising economically available technology to publicise their proceedings, rather than wait, in vain, for members of the public to abandon the workplace to come to the courtroom.

Note

1 *United States v Cianfrani*, 573 F 2d 835, 851 (CA3 1978).

SINGAPORE

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Potential short selling reporting obligations in Singapore

In February, the Monetary Authority of Singapore (MAS) and the Singapore Exchange Limited (SGX) jointly issued a consultation paper proposing, among other things, short position reporting requirements (the 'Joint Proposal').[1] The Joint Proposal followed the conclusion of an 'extensive review' by both organisations of the Singaporean securities market.[2] That review was undertaken after 'unusual trading activities' in three companies listed on the SGX Mainboard. The conclusion of the joint review was that the market's regulatory structure 'continues to facilitate fair, orderly and transparent trading'.[3] Roughly contemporaneously with the MAS/SGX review, the International Monetary Fund (IMF) concluded its own review of Singapore's securities market. At the conclusion of that undertaking, the IMF team determined that Singapore's securities market generally complies with international standards, including the market structure and other regulatory standards established by the International Organization of Securities Commissions (IOSCO).

Through these reviews, the MAS and SGX identified the following three conceptual areas in which regulatory structures could be enhanced:

- 'Measures to promote orderly trading and responsible investing;
- Enhancements to improve transparency of market intervention measures; and
- Framework to strengthen the process for admitting new listings and enforcing against listing rule breaches.'[4]

Within the scope of the first conceptual enhancement referenced above, the MAS and SGX have proposed the introduction of a new short selling reporting regime. If enacted, this regime would 'complement' the short selling marking requirement which was introduced in March 2013, by which market-participants must ensure that orders which partly or wholly involve short sales are marked as 'short' before submission to the SGX. The MAS and SGX asked market participants to provide their views on the Joint Proposal by 2 May 2014. That deadline has now passed, and market participants' responses and feedback are currently under review by the MAS and SGX.

The short-selling proposal

Short selling involves the sale of securities that the seller does not own at the time that the sale order is placed. A short seller may believe that the price of shares in a listed company will decline, or may seek to hedge the risk of an economic long position in the same security or in a related security. In any case, to deliver the security to the purchaser, the short seller often borrows the security, typically from a broker-dealer or institutional investor. The short seller later 'closes out' the position by purchasing equivalent securities on the open market, or by using an equivalent security it already owns, and returning the security to the lender. If the short seller 'covers' the short position by purchasing the relevant shares in the market at a price below the sale price (that is, because the price of the security has declined), then the short sale results in a profit. If, on the other hand, the price of the security has increased after the seller sold the shares short, then the cost of covering the short position results in a loss for the trader.

Regulators in numerous jurisdictions allow short selling, principally on the grounds that the practice aids in 'price discovery' in trading the securities of listed companies, and adds liquidity in the market. In the Joint Proposal, the MAS and SGX note that without short selling, the prices of listed company shares 'could be systematically biased upwards,' as market prices arguably would reflect only 'positive or neutral views' of the shares.[5] For this and related reasons, the MAS and SGX make clear that, consistent with IOSCO policy standards, they have no intention of prohibiting short selling, and instead have proposed the short selling reporting regime only to 'further improve transparency' in trading of listed company shares.[6]

The objective of the regime is to provide relevant short position information promptly to the relevant regulatory bodies, and, under certain circumstances, to other market participants. Each of the recipients of the information would potentially benefit from this regime: regulators would have a more accurate and timely view of significant short positions in listed companies; and market participants would have access to additional information with which to analyse market sentiment regarding particular issuers. Importantly, the objective of the proposed short selling reporting regime is not necessarily to address the risks of market disruptions from short selling. As the Joint Proposal states, those types of risks are addressed through other regulatory mechanisms. For example, as aforementioned, the 'marking regime' introduced last year requires market participants to mark as 'short' any order that in whole or in part involves shorting the securities of a company listed on the SGX. Another risk-mitigation mechanism is the SGX's 'buying-in' procedure, through which the Central Depository (Pte) Limited, a centralised counterparty, engages in one or more open-market purchases of shares to be delivered on behalf of short sellers who fail to make delivery of those shares; the costs and expenses from the 'buy-in' transaction(s) are assessed against the defaulted short sellers.

The Joint Proposal has two parts. Under the first part, a short seller would be required to report to the MAS and SGX any 'net short position': (1) equal to or greater than 0.05 per cent of the issued shares of a company listed on the SGX Mainboard or Catalist (focused on growth companies); or (2) with a market value of at least S$100,000, whichever is lower. The term 'net short position' would mean, in the case of (3), the difference between the total number of shares held long and the total number of shares of the same security held short; and in the case of (b), the total Singapore dollar value of the relevant long position(s) minus the total Singapore dollar value of the short position(s) in the same security. In calculating the 'net short position', the first part of the Joint Proposal would require market participants to take into account any positions in derivative securities which could be converted into shares of the relevant listed company, or which could require that the market participant deliver such shares. The information reported to the MAS and SGX under the first part of the Joint Proposal would be aggregated with short selling information reported by other market participants, and published by the agencies once a week without identifying the market participants who reported the information.

The second part of the Joint Proposal is an alternative reporting requirement. Under the second part, a market participant who holds a net short position exceeding 0.5 per cent of a listed company's shares would be required to report its position to the MAS and SGX. The market participant would also be required to report any increase or decrease of 0.1 per cent or more in the market participant's position. The initial report by the market participant, and any subsequent report of any change of 0.1 per cent of more in that position, would be required no later than two days after the date of the relevant trade (ie, T+2). The MAS and SGX have proposed that the information reported under the second part of the Joint Proposal, including the identity of the short position holder and the extent of the person's holdings, would be published 'on an ongoing basis.'[7]

At present, it is not clear what penalties failure to comply with these reporting requirements would incur. The MAS and SGX are authorised to pursue enforcement of their respective regulations, and presumably they would be authorised to impose a civil penalty and pursue other remedies against market participants who do not comply with the final version of the short selling reporting regime. It is also possible that the final version of the short selling reporting regime will clarify, or expand, the regulators' enforcement authority.

There are several substantial differences between the Joint Proposal and short selling reporting requirements in the United States and the European Union. In the US, there is no direct requirement for a market participant to report short positions comparable to either of the alternatives proposed by the MAS and SGX. Instead, brokers and dealers in the US are required to report short transactions to the relevant regulatory organisations, which then aggregate and publicly report 'short interest' data.[8] However, under Rule 200(g) of Regulation SHO, US market participants must mark orders as 'long', 'short' or 'short exempt', similar to the short position marking requirements introduced by Singapore in 2013.

The EU's short selling regulation (SSR) took effect in November 2012.[9] The SSR

introduced three requirements applicable to firms and individuals trading relevant securities in markets subject to the jurisdiction of an EU Member State regulator: (1) notification to the relevant regulator and, in certain cases, public disclosure of net short positions in shares admitted to trading on a venue in the EU (eg, the London Stock Exchange); (2) restrictions on entering into uncovered short sales involving listed equity securities; and (3) restrictions on entering into uncovered trades in credit default swaps related to debt instruments issued by a sovereign EU member state government. With respect to trading listed equities, the threshold to report short positions to the relevant regulator is 0.2 per cent, and hence higher in the EU harmonisation law than the comparable alternative proposal in Singapore. But the SSR's additional requirement to report publicly short positions in listed equity securities is similar to that established under the Joint Proposal: 0.5 per cent. In fact, the MAS and SGX acknowledged in the Joint Proposal that they considered the EU's 'two-tiered' reporting thresholds, but are presently considering only whether to adopt a single short selling reporting requirement (as between the two proposed) for Singapore.[10]

Next steps for market participants

As aforementioned, the MAS and SGX sought the views of market-participants on the proposed short selling reporting regime. More specifically, the MAS and SGX asked, in a relatively open-ended manner, for market-participants to provide their opinions on 'the proposal to introduce short positions reporting to complement the current short-selling marking regime.'[11] In a more pointed form, the MAS and SGX asked market participants to opine on the 'pros and cons' of each of the 'two proposed reporting options'. In addition, the MAS and SGX stated in the Joint Proposal that they may seek further information from market-participants based on the regulators' analysis of the comments and opinions they received by the 2 May deadline. Accordingly, there may be further consultations before publication of a final version of the short selling reporting regime. It is also possible, on the other hand, that the MAS and SGX will incorporate the substance of market participants' responses and publish a modified short position reporting requirement, or simply elect to implement one of the two options in the form in which it was proposed in February. In any case, market participants, particularly investment managers registered with the US Securities and Exchange Commission that trade securities of companies listed in Singapore, should be prepared to develop processes (or direct that the relevant external vendors to whom trade-reporting, recordkeeping and other systems have been outsourced develop processes) to report timely and accurately to the MAS and SGX the information required under the final version of any rule(s) that comprise the short selling reporting regime.

Notes

1 Monetary Authority of Singapore and Singapore Exchange Limited, 'Review of Securities Market Structure and Practices', P001-2014 (February 2014), available at www.mas.gov.sg/~/media/MAS/News%20and%20Publications/Consultation%20Papers/Review%20of%20Securities%20Market%20Structure%20and%20Practices.pdf.
2 *Ibid* at 1.
3 *Ibid* at s 1.2.
4 *Ibid* at s 1.4.
5 *Ibid* at s 4.1.
6 *Ibid* at s 4.5.
7 *Ibid* at 4.6(b).
8 Note that under US Securities and Exchange Commission Rule 200(g) of Regulation SHO, US market-participants must mark orders as 'long', 'short' or 'short exempt', similar to the short position marking requirements introduced by Singapore in 2013.
9 EU Regulation No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:086:0001:0024:en:PDF.
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The need for change in Thailand

THAILAND

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Thailand, still one of the strongest and most resilient economies in Southeast Asia, is largely considered an investment-friendly jurisdiction. But as always, there is no reward without risk.

The recent *coup d'état* in Thailand is the latest chapter in a series of dramatic power shifts and divisive protests which have riveted the nation over the past decade. Nicknamed 'Teflon Thailand' for its remarkable ability to prosper notwithstanding political unrest and natural disasters, many view the current situation in Thailand differently and fear long-term damage to a country already contending with slowing growth and outflows of foreign capital from its fragile financial markets. The Bank of Thailand revised down its 2014 growth forecast as growth slowed significantly in the final quarter of 2013 and even more drastically in the first quarter of 2014. It remains to be seen whether the recent *coup d'état* will spur reforms that could trigger an economic turnaround.

Even prior to the recent political protests there was a need for Thailand to take action to stay competitive in the Southeast Asian market, especially in light of the emergence of other attractive investment destinations in the region such as Indonesia, Myanmar, Vietnam and the Philippines. The recent political turmoil has added further pressure on Thailand to remain attractive to foreign investment. Among the many changes that could alleviate this situation, Thailand should ramp up its anti-corruption efforts and streamline its dispute resolution processes in order to maintain its regional competitiveness.

With potentially massive penalties under the United States Foreign Corrupt Practices (FCPA) and United Kingdom Bribery Acts in constant view, multinational companies frequently cite corruption as one of their biggest concerns about doing business in Thailand. The Corruption Perceptions Index (CPI) ranks countries according to their perceived levels of public sector corruption. With number one being the least corrupt, the 2013 CPI places Thailand at number 102 out of 177 countries. In other words, Thailand is perceived as the 75th most corrupt country in the world. Worse yet, Thailand seems headed in the wrong direction: in 2012, it was ranked less corrupt at 88; and in 2011, it had an even better ranking of 80. Surin Pitsuwan, former Thai foreign minister and Association of Southeast Asian Nations (ASEAN) secretary-general, estimated that the cost of corruption adds a prohibitive 30–35 per cent to any investment in Thailand. Moreover, by having to deal with corrupt officials on a regular basis, multinational businesses operating in Thailand face reputational and legal risks and an unfair business environment.

The penalties under Thai law imposed on corrupt officials are severe, but enforcement has been extremely weak. There needs to be increased vigilance in Thailand against those who demand bribes or engage in other corrupt activities. Many are hopeful that, with new governance in Thailand, continued support from the private sector, as well as the upcoming creation of an integrated ASEAN Economic Community (AEC), which has collectively identified combating corruption as one of its top priorities, corrupt business practices in Thailand will be investigated more aggressively and prosecuted with a sense of urgency. As evident from the recent protests, there is strong public opinion in Thailand on the issue of corruption.

To maintain its competitiveness, Thailand also needs to address the nation's protracted and cumbersome dispute resolution processes in order to stimulate greater foreign investment. Litigation and arbitration in Thailand can be awkward and unpredictable as compared with other jurisdictions and an exasperating experience for multinational corporates.

In contrast to jurisdictions in which there is a clear impetus to deal with litigation efficiently and effectively, the accepted status quo is that cases may take years to resolve in the Thai courts. And while arbitration in Thailand has advanced and improved over the last 25 years, it still remains inefficient compared with other jurisdictions. For example, it takes an average of three to five years for arbitral awards to be delivered and enforced in Thailand, compared with an average of just one year in other jurisdictions. Since arbitration in Thailand is not isolated from the civil court system, delay is inevitable whenever the court is requested to make any decision. Moreover, once an arbitral award is obtained, it is not

as easily enforced in Thailand as elsewhere. Furthermore, Thailand has not ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Not surprisingly, there has been widespread discontent over the years with respect to Thailand's dispute resolution processes from international businesses. Jason Fry, previously the secretary general of the International Chamber of Commerce Court of Arbitration, has drawn attention to Thailand's lengthy arbitration process and the need to reduce barriers to arbitration to encourage foreign direct investment. Many have also been frustrated by the Cabinet decision in 2009 that all contracts between the public and private sectors – save for one limited exception – should not provide for disputes to be decided by arbitration.

The long-term effects of the unrest on Thailand's economy remain to be seen. In the meantime, with the impending creation of an integrated AEC, Thailand will be further scrutinised by investors unless it can stabilise politically, curtail systemic corrupt business practices and improve dispute resolution processes for multinational companies.

IBA APF Annual Conference Scholarship: Winning Essays

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International arbitration in Singapore: the path forward

This essay addresses two important developments affecting international arbitration in Singapore. One is the loosening of historical restrictions on maintenance and champerty laws in other common law jurisdictions, paving the way for a potential overhaul in third-party funding of arbitration. The second discusses how the sovereign city-state's plans to establish an international commercial court will impact the world of international dispute resolution and fit in with the Singapore International Arbitration Centre's role as the state's premier arbitration institution.

Introduction

Singapore has made significant strides on the international arbitration scene over the past few years. With 259 new cases handled in 2013, the Singapore International Arbitration Centre (SIAC) now easily rivals all the major international arbitration institutions.[1] Singapore is now the fourth most preferred arbitral institution behind the International Commercial Court (ICC), the London Court of International Arbitration (LCIA) and the American Arbitration Association's International Centre for Dispute Resolution, and the most used seat for ICC arbitrations in Asia.[2] The Singapore government has continually made sure that the hub for international trade and commerce is on the cutting edge of arbitration worldwide, most recently by spearheading the roll-out of emergency arbitration across Asia. SIAC has already received dozens of applications for emergency relief since amendments allowing for emergency arbitration have been included in the institution's procedural rules and the latest version of the Singapore International Arbitration Act.[3] Throw in a highly supportive judiciary and a neutral, corruption-free and pro-business environment, and the modern city-state uniquely situated at the heart of Southeast Asia has everything to become the world's leading venue for arbitration.

The Singapore government is far from finished with building up the country's reputation as a prime destination for parties seeking effective resolve for their business disputes. Relying on the state's judiciary's strong reputation, the Ministry of Law in the past year unveiled novel plans to establish a Singapore International Commercial Court (SICC) as a division of the Singapore High Court.[4] Alongside the international court a Singapore International Mediation Centre (SIMC) is also planned to be established. The Singapore Minister of Law said that '[w]hile you have arbitration and you have mediation, I think litigation in an international court

is a necessary product that I think people are going to need in Asia' and mentions as an example the London commercial courts where over 90 percent of litigants is international.[5] To set up a truly international court for commercial disputes nonetheless goes further than this example. The idea is nothing if not novel.

In spite of this innovative thinking, the topic of third-party funding in legal proceedings – the practice where someone who is not a party to the dispute pays for the costs of litigation in exchange for a share of the potential damages award – has remained controversial in Singapore. This is largely due to the preservation of the traditional common law restrictions champerty and maintenance, which bar a third party without a legitimate pre-existing commercial interest in the dispute[6] from funding it or receiving a share of the proceeds. In the same vein, Singapore lawyers are expressly precluded by the rules of professional responsibility from working on a contingency fee basis.[7] Entering into funding arrangements with a third party unrelated to the dispute or with an attorney handling the dispute on contingency is therefore presently still not permitted under Singapore law.

A recent press article broadly depicts Singapore as 'the canary in globalization's gold mine'.[8] This is certainly true of international dispute resolution; by allowing third-party funding in international arbitration and the establishment of a new International Court, the Singaporean industrious leadership can once more demonstrate its effectiveness.

The Singapore International Commercial Court

A New International Court

The highly anticipated SICC would consist of panel of eminent international judges and aim to be a neutral forum for any international commercial transactional dispute – connected to Singapore or not. If the dispute actually not connected to Singapore, foreign counsel would also be allowed to come in and litigate the case. This would open up significant opportunities for international lawyers in the region.

More importantly, the new International Court could draw clientele away from other prominent dispute resolution venues like Hong Kong or London, potentially taking up an increasing amount of complex, multi-party and multi-jurisdictional commercial disputes.

What about SIAC?

The SICC Committee Report details three categories of cases to be accepted by the SICC: first, where parties to a dispute have consented; secondly, where the dispute arises from a contract containing a forum selection clause appointing SICC; and thirdly, where the case is within the jurisdiction of the Singapore High Court and the Chief Justice decides to transfer it to the SICC. On its face the court's tasks seem to significantly overlap with the Singapore International Arbitration Centre. The SICC Committee however points out in its Report the gaps in Singapore dispute resolution a new international court could fill:

> 'Arbitration has thus far been the primary means of international commercial dispute resolution within the region, but its increasing currency has highlighted weaknesses that litigation in an international court is better placed to address the coercive jurisdiction of a court may be necessary in a multiple party dispute; the subject matter of the dispute may not be amenable to arbitration (such as special torts arising from contract, international intellectual property or trust disputes);…'[9]

For intellectual property disputes at least, the Ministry of Law has nonetheless stated that it will work together with (SIAC) to establish a panel of top international IP arbitrators in order to turn Singapore into an IP dispute resolution hub.[10] In what ways exactly the SICC will steer clear of SIAC waters therefore yet remains to be seen, but the joinder of parties is undeniably a great benefit to have in international dispute resolution. As a 'High Court', the SICC would have the power to join third parties even without their consent.[11] The default rule of transparency of proceedings would also bring about a coherent body of case law that is now lacking in international commercial arbitration.[12]

A greater distinction between the SICC and SIAC will likely be situated in the realm of appeals. As it is drawn up, judgments of the SICC would be subject to review by the Singapore Court of Appeal. Parties may nonetheless exclude appeals review as a whole or limit its scope.[13] This distinction may however still be a consideration for parties when deciding between international

arbitration, which per default does not include any sort of appeals procedure, and litigation before the SICC. Contrary to SIAC awards, the SICC Committee Report also suggests that ICC judgments would not be included in the scope of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[14] Instead enforcement must follow from reciprocal enforcement provisions as it would for any other judgment stemming from the Singapore Supreme Court. Multilateral and bilateral government agreements as well as 'court to court arrangements' would therefore have to be concluded or existing agreements amended.[15] Even though the Singapore government has in the past shown its overwhelming support and industriousness when it comes to international arbitration, enforceability of judgments of the SICC would still appear to present the main hurdle in the International Court's success.

Third-party funding

Public policy concerns

Maintenance and champtery laws are mainly based on public policy concerns. The Singapore Court of Appeal has stated in this regard that a champertous agreement offends public policy 'because of its tendency to pervert the due course of justice'.[16] The fear exists that by allowing third party funding the number of frivolous proceedings will increase. Other frequently cited concerns have to do with possible conflicts of interest, confidentiality, inappropriate involvement and potential abuse by the third-party funder, and the ethical questions raised by the practice of trading legal claims as financial instruments.

In anticipation of the 2012 amendments made to the International Arbitration Act, the Singapore Ministry of Law issued a public consultation paper soliciting views, among other, on whether a carve-out for third party funding would be appropriate in the context of international arbitration proceedings.[17] The paper also included a number of proposals in order to minimise potential abuses and ensure that third parties do not provide funding for unmeritorious claims. Although third-party funding was not included in the draft bill, the Singapore government has certainly demonstrated willingness to continue the discussion on this topic within the framework of international arbitration.

Third-party funding in other jurisdictions

Meanwhile, most other common law jurisdictions have loosened historical restrictions. In England and Wales, the practice of third-party funding for litigation and arbitration proceedings is generally permissible. In 2011, a voluntary code of conduct was also introduced in which third-party funders pledge to, among other things, not attempt to take control of the proceedings, have adequate financial resources and only terminate a funding arrangement under specific circumstances.[18] The English Court of Appeal in its landmark 2005 case of Arkin v Borchard Line explicitly cited access to justice as a public policy reason to allow third-party litigation funding and distinguished such a permissible funding arrangement from one that 'falls foul of the policy considerations that render an agreement champertous.'[19]

Since the 2013 so-called 'Jackson Reforms', English lawyers are also permitted by law to enter into contingency fee agreements with their clients given certain limitations.[20] In the elaborate 2010 Jackson Review of Civil Litigation Costs preceding the legislative reform, Lord Justice Jackson, when listing the benefits of third-party litigation funding, concluded that there is no proof that such funding increases the number of frivolous or vexatious claims. On the contrary: '[t]hird party funding tends to filter out unmeritorious cases, because funders will not take on the risk of such cases.'[21]

Third-party litigation funding is also generally accepted in Australia, Canada and the US. While the issue is still being debated in Hong Kong, the judiciary has cited 'access to justice' considerations in determining whether or not a third party funding agreement contravenes the common law prohibition on maintenance and champerty.[22] Although contingency fee arrangements are prohibited in many civil law countries because of professional responsibility rules, most of these jurisdictions will still either consider the practice of third party litigation funding legitimate or have no clear rules against it. Correspondingly, third-party funding of legal proceedings has expanded rapidly in both common and civil law countries in recent years.

The future of third party funding in Singapore

The Singapore Court of Appeal in a recent judgment also acknowledged the trend towards accepting funding agreements in light of public policy considerations related mainly to access to justice.[23] Nonetheless, the Court pointed out that it is for the legislator to decide on possible future alterations to the law.[24] Although stated specifically in the context of contingency fee agreements, this view might be indicative that general reform on third party funding in Singapore will have to come through regulatory changes rather than the courts.

The Singapore government can certainly turn to other jurisdictions for guidance in this area, and seemingly has already started this reflection process in the context of international arbitration, when it introduced the draft for the latest amendments to the International Arbitration Act.[25] It is true that international arbitration in particular is a suitable area for allowing third party funding. While the typically high-value claims involved will attract funding, the beneficiaries of this funding will oftentimes be somewhat smaller businesses that depend heavily on recuperating these claims. In this scenario, a vulnerable company would be put in a stronger position vis-à-vis a larger opponent – adding an economic component to the traditionally social argument of enhancing access to justice. International arbitration moreover lends itself especially well to a more flexible approach because of its private nature and the basic principle of party autonomy.

Conclusion: the path forward

One clear way forward for Singapore is to amend the International Arbitration Act as to allow third-party funding, while of course making sure that the necessary safeguards in terms of public policy are in place (either by keeping oversight or in the first instance by leaving the area up to self-regulation following the example of England and Wales). In the alternative, the Singapore courts could still intervene by making a clear statement that third-party funding arrangements will not be declared champertous and unenforceable given compliance with certain well-defined standards.

Either way, allowing third-party funding would fortify Singapore's place as a frontrunner in the highly competitive field of international commercial dispute resolution as will the creation of a Singapore International Commercial Court, provided that the latter fulfil a role complimentary to SIAC and succeed at increasing Singapore's general attractiveness as a world-class dispute resolution hub. As pointed out by K Shanmugam, the Singapore Minister for Law: '…if the product can be set up properly, it can fill a huge lacuna that now exists in this region.'[26]

Notes

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14 330 UNTS 38.
15 SICC Committee Report, 29 paras. 46-48.
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[2010] at [117], available at: http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf.
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23 Law Society of Singapore v Kurubalan s/o Manickam Rengaraju [2013] SGHC 135, at [46].
24 *Ibid.*
25 Public Consultation on Proposed Amendments to the International Arbitration Act and Proposed Enactment of the Foreign Limitation Periods Act, 20 October 2011, available at: http://www.mlaw.gov.sg/content/dam/minlaw/corp/assets/documents/linkclickf651.pdf.
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IBA APF Annual Conference Scholarship: Winning Essays

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The advent of competition law and third-party funding for arbitration in Hong Kong

The two most important developments in Hong Kong during the past year concern legal reform in the area of third-party funding for arbitration and the introduction of competition law. Both developments are propelled by developments in the Asia Pacific region generally. The advent of a cross-sector competition law in Hong Kong, one of the last major developed economies operating on a hugely international level to do so, is set to influence cross-border litigation and international investment, and finally catches up with other regional economies (such as Singapore, Malaysia and the People's Republic of China) in putting in place a regime. At the same time, reform in the arbitration regime, in the form of rules for third party funding for arbitration is set to introduce a new type of participant in dispute resolution – funders investing in the arbitral outcome, and introduce new challenges for the delicate balance of regulations and ethics between the participants in international arbitration.

The new Competition Ordinance

With the introduction of the Competition Ordinance,[1] Hong Kong is said to be 'the last of the major developed economies to adopt a comprehensive competition law.'[2] The new legislation regulates across sectors and industries, has extra-territorial application, and provides for contravention of competition rules to be the basis of private rights of action and to be raised as defences. As an international hub for all types of international investment, the new law will affect international investment and cross-border litigation. The provisions for the establishment and operation of a Competition Commission (responsible for the investigation and enforcement of anti-competitive conduct)[3] and a Competition Tribunal (an adjudicative forum in which penalties for breaches of the Ordinance can be imposed)[4] came into effect in 2013. The substantive provisions are expected to be operational in 2015.

Scope of application

The Competition Ordinance broadly speaking creates three prohibitions:[5]

1. making or giving effect to agreements, concerted practices and, in the case of associations, decisions, that have as their object or effect the prevention, restriction or distortion of competition in Hong Kong (known as the 'First Conduct Rule') (Competition Ordinance, section 6);
2. unilateral abuses of market power that are engaged in with the object or effect of preventing, restricting or distorting competition in Hong Kong (the 'Second Conduct Rule') (section 21); and
3. mergers by telecommunications carriers that have, or are likely to have, the effect of substantially lessening competition in Hong Kong (the 'Merger Rule') (Schedule 7 sections 3 and 4).

The First Conduct Rule and the Second Conduct Rule have broad application, applying to all undertakings (the definition and implication of which is discussed further below) in *all* sectors. The Merger Rule applies only to holders of telecommunications licences and therefore there is currently no across-the-board merger rule that would apply to M&A activity in all sectors. In this aspect of narrow application, the Competition Ordinance has made a sharp departure from other developed economies, nearly all of which contain a general merger control regime.[6]

By way of example, just across the border, the People's Republic of China has a cross-sector merger rule containing a merger notification regulation that is 'notoriously detailed and often vexing'.[7] The narrow application of the Merger Rule may broaden after a few years; the Hong Kong Administration has indicated that, as it builds up more experience and expertise, it will be in a better position to assess whether cross-sector merger provisions are necessary.[8]

Once it becomes operational, the Merger Rule will replace the current telecommunications merger control regime in section 7P of the Telecommunications Ordinance[9] (which is administered by the Communications Authority).[10] The Ordinance will therefore exclusively govern the domain of competition law in Hong Kong, precluding the making of claims about anti-competitive conduct or anti-competitive mergers through any other means.[11]

The Ordinance has extremely broad application to all types of entities. The Ordinance applies to 'undertakings', defined as meaning 'any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity, and includes a natural person engaged in economic activity.' Such a definition covers sole traders, small- and medium-sized enterprises, partnerships, limited companies, and even some charities and trade associations.[12] Statutory bodies may be exempted from the competition rules under sections 3 and 5. A large number of statutory bodies, over 570 bodies of which many are controversially said to carry out "decidedly commercial activities", have received exemption from the Competition Ordinance.[13]

Hong Kong's investment opportunities have always had an extremely international facet to them. The Competition Ordinance takes into account the fact that anti-competitive conduct and mergers taking place abroad or involving foreign entities may also impact Hong Kong's economy, expressly setting out application to conduct 'even if… outside Hong Kong'. Sections 8 and 23 provide that the First Conduct Rule and the Second Conduct Rule apply to conduct having the object or effect of preventing, restricting, or distorting competition in Hong Kong regardless of where in the world the conduct is engaged in, or where in the world the participating parties are located. Along the same lines, the Merger Rule applies even to those that take place (or have arrangements that take place) outside Hong Kong. For investors, this means that there is therefore no simple avoidance of the Competition Ordinance provisions based on purely territorial location.

Practical implications of the new regime

Commentators note that the Ordinance is competent to target business practices that have been very common in Hong Kong, being agreements that:

> '(a) fix, maintain, increase or control the price for the supply of goods or services; (b) allocate sales, territories, customers or markets for the production or supply of goods or services; (c) fix, maintain, control, prevent, limit or eliminate the production or supply of goods or services; or (d) that constitute bid-rigging. Businesses of all sizes in Hong Kong use these types of commercial agreements very often.'[14]

It will therefore be a shock to international investment in Hong Kong, which has been used to operating in a relatively laissez-faire environment.

Investors will have to evaluate their compliance with the new legislation, and while investors may have had experience with competition legislation in other jurisdictions, it will of course be necessary to understand and adapt to the specific demands of the legislation in Hong Kong, which has drawn elements from a variety of sources, including the regimes of Australian, European and United States. Investors will feel an impact on the cost of doing business, being the increased need to hire legal and compliance experts to ensure contracts and business operations do not breach the law, and the law will 'have a real impact on the way businesses make pricing decisions, and

even the extent to which they can share information with competitors.'[15]

Besides looking after their client's compliance, lawyers themselves might need to evaluate their practices and ensure compliance. Two examples cited recently by commentators on this issue include: (1) that in the US, where the Supreme Court in *Goldfarb v Virginia State Bar*, 421 US 773 (1975) held that a minimum recommended fee schedule for legal services published by the State Bar (which regulated the state's legal profession) for certain transactions constituted a contravention of competition laws; and (2) that in England, where due to competition law scrutiny, the English Solicitor Regulation Authority abolished the national minimum trainee solicitor wage effective January 2014.[16]

Implications for private party proceedings

While the Competition Ordinance does not provide for a stand-alone private right of action, 'follow-on' actions are allowed in that where there has been a determination of a contravention of a competition rule (or the Competition Commission accepts an admission of a contravention), a person who has suffered loss or damage as a result of the contravention may bring a 'follow-on' action to the Competition Tribunal under the Ordinance. Further, the Competition Ordinance has implications for general civil dispute resolution proceedings: a defendant can raise the contravention of competition rules as a defence, relying on the 'illegality' of a provision to resist contractual enforcement.[17]

Third Party Funding for Arbitration: finding the delicate balance

Third-party funding (TPF) for arbitration occurs where there is a contractual agreement between a third party, the funder and a claimant seeking to pursue a cause of action, where the cause of action is to be resolved through arbitration. The contract commonly provides that the funder will pay for the costs of the action in return for a percentage of the award should the action succeed.[18]

The institution of steps in the past year to reform TPF for arbitration is set to create major change in Hong Kong dispute resolution across all sectors. In June 2013, the Law Reform Commission of Hong Kong set up a sub-committee to review TPF for arbitration in Hong Kong, for the purposes of considering reform and to make such recommendations for reform as appropriate. At the Ceremonial Opening of the Legal Year on 13 January 2014, the Secretary for Justice in his speech indicated that reform in the area of TPF for arbitration was part and parcel of keeping up with the fast-changing needs of this day and age – 'As our society evolves, our laws have to change so as to meet the changing needs of our society.'[19] Reform in this area is set to change, not just arbitration, but litigation patterns. As recognised by the Law Reform Commission, TPF arrangements are usually motivated by a lack of financial resources but may be used to mitigate costs and manage the risk of either litigation or arbitration.[20] As such, this will potentially have huge repercussions on the legal services industry.

Hong Kong is in an interesting but conflicting place and time to move forward on the issue of TPF for arbitration. On the one hand, it is eager to capture the arbitration market in Asia Pacific and establish itself as a market leader, now more so than ever: the 2014 Policy Agenda of the Chief Executive set out plans for 'a study on… the challenges and opportunities that Hong Kong faces as a regional centre for international arbitration in the Asia Pacific' and established 'an advisory committee to advise on and co-ordinate the development and promotion of Hong Kong as an international arbitration centre in the Asia Pacific region.'[21] In promoting itself as an arbitration hub, it has capitalised on its common law traditions and well-developed legal services industry, its status as a Special Administrative Region with economic and geopolitical proximity to the People's Republic of China, and its strong international financial industry. Prior to the question of TPF reform, Hong Kong has already been carrying out major overhauls to increase its attractiveness as the seat of arbitration. In June 2011, Hong Kong introduced a new Arbitration Ordinance [22] (replacing the previous Arbitration Ordinance that had been enacted in 1963).[23] The hopes and intention pinned upon this new Ordinance is clear: it has been described by commentators as launching a 'new era' that 'is set to ensure that Hong Kong will maintain, and is likely surpass, its current prominence as an international arbitration hub'.[24] The Hong Kong International Arbitration Centre then

unveiled new arbitration rules in 2013.[25] Introducing clear rules of play for TPF will therefore be the icing on cake for the revamped arbitral regime. On the other hand, in the traditional arena of dispute resolution, court proceedings, Hong Kong has staunchly guarded against TPF and endorsed the underlying rationale behind the longstanding rule. Maintenance and champerty continue to be criminal offences under local law and are prosecuted as such.[26]

The state of the law on the permissibility of TPF in dispute resolution

TPF in dispute resolution generally falls foul of the offences of champerty and maintenance, but exclusions have been carved out in specific areas of law, most significantly being that of liquidation. The recent case of *Po Yuen (To's) Machine Factory Ltd*[27] confirmed that TPF is allowed in the context of liquidation, holding that the liquidators of a company in liquidation could enter into a litigation funding arrangement with a third party and that funding could take the form of contingency fee arrangement with the third party. The question now is whether arbitration is also excluded.

A major part of the answer lies in the need to continually ensure Hong Kong's attractiveness as an international arbitration venue, a factor that has been recognised by the Hong Kong judiciary in the past. In the High Court case of *Cannonway Consultants Limited v Kenworth Engineering Ltd*,[28] Kaplan J ruled that the offence of champerty did not extend to arbitration, stating that those offences if applied to TPF for arbitration would 'make Hong Kong a less desirable venue for international arbitration',[29] and taking into account legislative trends with tended to diminish the role of courts in arbitration proceedings and embrace the UNCITRAL Model Law approach of full party autonomy.[30] The Court of Final Appeal then came to consider this issue in *Unrh v Seeberger & Anor*,[31] deciding that the Hong Kong courts would not strike down an arbitration agreement where the arbitration was to take place in a jurisdiction that did not recognise champerty in the first place (the Netherlands, in that case), on the basis that it was inappropriate to impose Hong Kong public policy in such cases. However, the Court of Final Appeal crucially and expressly left open the question of whether the offences applied to an agreement to arbitrate where the arbitration would take place in Hong Kong.[32]

Issues in setting the boundaries of TPF for arbitration

Legal reform in this area will clarify the boundaries of TPF for arbitration. With the certainty of boundaries, the risks to third party funders interested in investing in arbitral outcomes will enter the dispute resolution market and change the landscape of arbitration in Hong Kong. Such boundaries will have to balance competing concerns. These include access to justice, a claimant's control or negotiating power, and regulatory and sector-specific issues.

On the one hand, a more liberal framework will arguably increase access to justice allowing under-resourced claimants (but for whom legal aid is not necessarily available for litigation, and certainly not available for arbitration), the chance to pursue their claims. On the other hand, attention must be paid as to how far the third-party funder might be able to influence or control the negotiating position of the claimant, such as whether to accept a settlement. The third party funder's interest, being profit maximisation, is not necessarily aligned with the claimant's interest in dispute resolution. Other regulatory and sector-specific issues arise when considering the suitability of TPF in arbitrations concerning consumers, class actions and financial institutions. Regulation of third party funders themselves is another question, given that the funders will not be bound by the professional ethics of the legal profession, yet have influence, control and a vested interest as a new type of participant in the dispute resolution process.

Consideration of TPF for arbitration in other jurisdictions

Hong Kong is not alone in grappling with these problems, and will be looking to other jurisdictions – especially those in the Asia Pacific region – to learn from their experience and to ensure that Hong Kong's reform is coherent in the wider international context.

Regimes allowing TPF in arbitration in other Asia Pacific jurisdictions are either

still emerging or have yet to emerge. Like Hong Kong, the position in Singapore generally prohibits TPF in litigation (there also being the offences of maintenance and champerty),[33] but unlike Hong Kong it has clarified and firmly stated that the prohibition *does* apply to arbitration. The Singaporean Court of Appeal in the case of *Otech Pakistan Pvt Ltd v Clough Engineering Ltd*[34] decided that champerty applies to any procedure chosen for the resolution of a claim, *including international arbitration*. The underlying rationale was that all dispute resolution procedures should be subject to the same public policy rules: 'In our judgment, it would be artificial to differentiate between litigation and arbitration proceedings and say that champerty applies to the one because it is conducted in a public forum and not to the other because it is conducted in private'.[35]

Interestingly, the Singaporean Court made reference to the Hong Kong case of *Cannonway Consultants Limited v Kenworth Engineering Ltd*[36] and the ruling there that the law of champerty did not extend to arbitration, but the Singaporean Court rejected the *Cannonway* conclusion, reasoning that 'the purity of justice and the interests of vulnerable litigants are as important in such proceedings as they are in litigation.'[37]The Court in Otech Pakistan ultimately concluded that the 'the principles behind the doctrine of champerty are general principles and must apply to whatever mode of proceedings is chosen for the resolution of a claim.'[38]

Unlike Hong Kong, Singapore is unlikely to revise the situation through reform. While the Ministry of Law did, in its review of the International Arbitration Act seek 'views on whether third party funding would be appropriate in the context of international arbitration'[39] and suggest parameters of an exception for TPF in international arbitration,[40] such suggestions did not come to fruition. Singapore's draft International Arbitration (Amendment) Bill, and the subsequent legislation ultimately enacted as the International Arbitration (Amendment) Act 2012 did not contain any amendments allowing TPF.[41] Still, those suggested parameters will still be of reference value to Hong Kong.

In South Korea, as recently as September 2013, the 'possibility of introducing third party funding into Korea' was considered at the conference on arbitration held by the International Association of Korean Lawyers.[42] The basis on which it develops its decision, though, is very different: Korea allows contingency fees in litigation;[43] there is no prohibition against the use of third-party funding in litigation, or the sharing of the risks or proceeds of litigation, except that a lawyer is prohibited from becoming an assignee of any right in dispute.[44]

Looking beyond the Asia Pacific region and to the US, the market for TPF for arbitration there has existed for a sufficiently long period of time to be of important referential value to Hong Kong. In the US experience, disputes can occur between funder and claimant arising after the final award or settlement, mostly arising out of settlements to which the funder was not privy or was not involved in deciding the method of calculation of payment, for example whether the claimant should have deducted legal expenses before disbursing the contingent-fee share.[45] Other issues that have arisen in the US context include the question of funder's access to legal analysis prepared by counsel and repercussion in privilege and discovery rules,[46] and the issue of whether funding agreements need to be disclosed.[47] All these questions will also have to be addressed in the Hong Kong arbitration context.

New opportunities for lawyers

Upon implementation of the reform, the dispute resolution market must be prepared for the entrance of third party funders and be prepared to adapt accordingly. As mentioned above, third-party funders will allow claimants a chance to pursue their claim through arbitration where they did not otherwise have the opportunity to do so. Lawyers will have to safeguard their professional ethics and ensure they do not infringe the prohibition on maintenance and champerty, whilst grasping the chance to come to fruitful arrangements with funded claimants or even the third-party funders themselves.

Conclusion

To conclude, the advent of a comprehensive competition law in Hong Kong will have large implications as various entities will have to ensure compliance in a broad range of commercial activities. The prohibition on anti-competitive conduct also has

implications for private party actions, although not to the extent that it creates a standalone private right of action. At the same time, reform in arbitration is imminent to clearly set out the rules of play for third party funders to fund claimants in Hong Kong arbitrations. Third party funders represent new opportunities in the arbitration industry. However, given the plethora of concerns in funding arrangements, the participants will have to be aware of the delicate regulatory and ethical issues involved.

Notes

1 The Laws of Hong Kong (Cap 619).
2 Competition Ordinance (Cap 619), Sweet and Maxwell (2013), p 3.
3 Part 9 of the Ordinance.
4 Part 10 of the Ordinance.
5 Succinctly summarised in Competition Ordinance (Cap 619), Sweet and Maxwell (2013), p 1.
6 Competition Ordinance (Cap 619), Sweet and Maxwell (2013), p 15.
7 Martin Dajani, 'Finally, the Competition Ordinance… what's next?', *The Hong Kong Lawyer*, August 2012.
8 Competition Ordinance (Cap 619), Sweet and Maxwell (2013), p 24.
9 The Laws of Hong Kong, Cap 109.
10 Competition Ordinance (Cap 619), Sweet and Maxwell (2013), p 15.
11 Competition Ordinance (Cap 619), Sweet and Maxwell (2013), p 1.
12 Mark Williams, 'The New Competition Ordinance – Headache or Opportunity?', *The Hong Kong Lawyer*, November 2013.
13 *Ibid*, n 7.
14 *Ibid*, n 12.
15 Ashley Lee, 'Hong Kong's new competition law explained' (26 June 2012) International Financial Law Review, available at www.iflr.com/Article/3051726/Hong-Kongs-new-competition- law-explained.html, accessed on 20 May 2014.
16 See Martin Dajani, 'Finally, the Competition Ordinance… what's next?", 2012; although regard must be had to the different situation in Hong Kong, particularly the exemptions described above for statutory bodies, including those which regulate the legal profession in Hong Kong.
17 Competition Ordinance (Cap 619), Sweet and Maxwell (2013), p 44.
18 'Current Projects: Third Party Funding for Arbitration', 2 May 2014, The Law Reform Commission, available at www.hkreform.gov.hk/en/projects/3rdpartyfunding.htm, accessed on 20 May 2014.
19 'Press Release: SJ's speech at Ceremonial Opening of the Legal Year 2014', 13 Jan 2014, www.info.gov.hk/gia/general/201401/13/P201401130513.htm, accessed on 20 May 2014.
20 *Ibid*, n 18.
21 'Chapter 1, Policy address, Economic Development, Preamble', available at www.policyaddress.gov.hk/2014/eng/pdf/Agenda_Ch1.pdf, p.4, accessed on 20 May 2014.
22 The Laws of Hong Kong, Cap 609.
23 The Laws of Hong Kong, Cap 431.
24 *Arbitration in Hong Kong – A Practical Guide*, 2nd edn, p 15.
25 'Arbitration Rule: HKIAC Administered Arbitration Rules 2013', available at www.hkiac.org/en/arbitration/arbitration-rules-guidelines/hkiac-administered-arbitration-rules-2013, accessed on 20 May 2014.
26 Interestingly, though, there are comments from the Court of Final Appeal suggesting scope for reform here too. Per Ribeiro PJ in *Winnie Lo v HKSAR* (2012) 15 HKCFAR 16 (a case in which a solicitor was convicted for 'conspiracy to maintain' and a recovery agent for 'conspiracy to champer'; the solicitor was sentenced to 15 months' imprisonment), '...I wish to raise for consideration the question whether and to what extent criminal liability for maintenance should be retained in Hong Kong... It is in my view a fit topic to be referred to the Law Reform Commission.'
27 [2012] 2 HKLRD 752.
28 [1995] 2 HKLR 475.
29 [1995] 2 HKLR 475 at 487.
30 [1995] 2 HKLR 475 at 484.
31 (2007) 10 HKCFAR 31.
32 At para 123: '*I leave open the question whether maintenance and champerty apply to agreements concerning arbitrations taking place in Hong Kong since it does not arise in the present case.*'
33 Ministry of Law, Review of the International Arbitration Act Proposals for Public Consultation, (2011). Contingency fees are illegal, see Alvin Yeo SC & Swee Yen Koh, 'Singapore in Third-Party Funding: Snapshots from around the Globe', 7 Issue 1, 6 Issue 5, Global Arbitration Review, 5 March 2012.
34 [2007] 1 SLR (R) 989.
35 Lisa Bench Nieuwald and Victoria Shannon, *Third Party Funding in International Arbitration* (2012), p 236, s 12.02 [K] and [2007] 1 SLR (R) 989 at 38.
36 [1995] 1 HKC 179.
37 [2007] 1 SLR (R) 989 at 36.
38 [2007] 1 SLR (R) 989 at 38, adopting the reasoning of *Scott V C in Bevan Ashford v Geoff Yeandle (Contractors) Ltd* [1999] Ch 239 at 249 in coming to its conclusions.
39 Ministry of Law, *Review of the International Arbitration Act Proposals for Public Consultation*, (2011) at 7.
40 *Ibid*. The parameter included restrictions: (a) by category, value of claim and eligibility of sponsor, with the intention of limiting TPF to high value commercial arbitrations; (b) allowing adverse costs/security for costs orders against funders, to ensure that defendants are not prejudiced by a lack of recourse in claims brought by funded parties, possibly coupled with a requirement that third-party funders maintain a minimum capital requirement, so that they are able to pay costs awarded against them; and (c) requiring parties to disclose funding agreements.
41 The document setting out the feedback from the public consultation did not mention the responses to TPF. See Responses to feedback received from the public consultation on proposed amendments to the International Arbitration Act and the New Foreign Limitation Periods Act, available at www.mlaw.gov.sg/content/dam/minlaw/corp/assets/documents/linkclick34ed.pdf and International Arbitration (Amendment) Bill Ministry of Law's responses to public feedback received, available at www.mlaw.gov.sg/content/dam/minlaw/corp/assets/documents/linkclick1e3a.pdf, both accessed on 20 May 2014.
42 'Strategic Considerations and Recent Developments in International Arbitration', available at http://2013iakl.net/mobile/pdf/[3B_All]%20ADR_Strategic_Considerations_and_Recent_Developments_in_International_Arbitration.pdf, accessed on 2 January 2014, p 9.

43 TPF p 233, s12.02 [H] citing Jae Won Kim, The Ideal and the Reality of the Korean Legal Profession, 2(1) Asian-Pacific Law & Policy Journal 63 (2001).
44 Benjamin Hughes, Seungmin Lee and Suh-Young Claire Shin, 'Litigation and enforcement in South Korea: overview", Practical Law, available at http://us.practicallaw.com/8-381-3681, accessed on 20 May 2014.
45 *Ibid,* n 33, at 31, on the 2008 IP case Altitude Nines v DeepNines: the funder Altitude sued the claimant DeepNines, based on the argument that the claimant should not.
46 Scherer, Maxi and Goldsmith, Aren and Flechet, Camille, Third Party Funding in International Arbitration in Europe: Part 1 – Funders' Perspectives (1 February 2012).
47 *Ibid,* 207, 218; using the example of *Fuchs and Kardassopoulos v Georgia* as the disclosure of TPF agreement leading to frivolous defenses.

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New Member Surveys

What was your motivation to become a lawyer?

Becoming a lawyer gave me a great opportunity to contribute to the justice and legal system of Vietnam, update legal changes, impose myself, work with various colleagues around the world under high pressure and interesting challenges and earn enough money to support my family.

Additionally, I have an eye for detail, am confident at problem solving and I believe my capacity would be best improved through dispute resolution – in either amicable negotiations out of court or more strongly fought disputes in court.

I pursued my career in the field of maritime law and I am currently head of an experienced team of lawyers in Vietnam, dealing with a wide range of marine casualties from collisions, which may result in the arrest of a ship, main engine breakdowns, groundings and salvage, wreck removal and pollution claims, general average, as well as other incidents. My team and I also regularly advise leading Protection and Indemnity (P&I) Clubs, Hall and Maclunery (H&M) underwriters and their members in relation to charterparty, bill of lading, general average and insurance coverage issues arising out of maritime disputes.

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

Three interesting cases:

- To protect a foreign shipowner when the ship called to a Conventional Buoy Mooring system and nine of the ten mooring lines had been broken due to the large tidal range. Fortunately, the only remaining line had the ship and all crew safely onboard and a serious incident was prevented.
- I was appointed to attend four offshore platforms and a floating production, storage and offloading (FPSO) system to investigate an incident onboard the FPSO caused by technical conflicts between the systems installed on the platforms and on the FPSO. The difficulties were that many documents onboard the four platforms were only written in Russian.
- To obtain a Letter of Undertaking (LoU) issued by an insurer (A) incorporated and operating Vietnam in order to release a ship on the same day when she was arrested. The most interesting part is the insurer was established in the form of a joint venture company where the arresting party had been supported by a local insurer (B) who contributed a 50 per cent share to the A insurer and the arrested party had been supported by a foreign insurer (C) who contributed a 50 per cent share of insurer A. The trouble is B has not agreed with C on any amicable solution, and therefore, A has followed C's instruction to issue a LoU to release the ship against B's actions.

What are your interests and/or hobbies?

My interest is travelling for the sense of adventure that comes with the experience. Travelling has opened my eyes to different landscapes, cultures and cuisines, and expands my ideas of how things work.

Another thing I love to do is read books. Books open my imagination and teach me things, as well as take me to places I could never otherwise go.

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

When I'm not being a maritime lawyer, you will find I am a travel-lover and cultural interpreter, who is willing to assist you to discover Vietnam whenever you have a chance to travel or take a business trip to Vietnam.

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

I am a vibrant, people-focused man that respects my peers and recognise the talent and dedication of other IBA members. I would love and be proud to become a new member of the International Bar Association which is well known for its justice, compassion and integrity.

Gabriela Figueiras

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What was your motivation to become a lawyer?

Several factors drove me to the law profession. First, I have always been fascinated by reading all kinds of books, and also my ability to write and argue very fluently. The law profession seemed to me as an opportunity to use my skills in a challenging way. Secondly, the dynamic nature of the career was also an important factor of attraction, not to mention the opportunity to work in different places and countries, which was one of my goals. Finally, I believed – and still do – that the law profession would grant me a broad and complete superior education, offering me different and several opportunities of work.

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

The most memorable experience for me is whenever I am able to gain a new client's trust. Usually new clients arrive sceptical, serious and concerned. I simple love to see when they start to feel comfortable, and keep coming back and referring new clients. That is one of the biggest signs of recognition of good work and it makes me feel very pleased and motivated. The opportunity to solve serious problems for clients and making their lives better is also extremely rewarding.

What are your interests and/or hobbies?

Besides reading, I love traveling and experiencing different cultures. I am pretty passionate about history and art, and I also enjoy cooking and watching TV series and films – especially those with a political or legal plot. Besides being a lawyer, I intend to teach at some point in my career.

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

I became the responsible partner for the international law area of the biggest law firm in the northeast of Brazil at 26. I am fluent in three different languages and, since the age of 21, have travelled to the US and China several times as a legal interpreter, performing simultaneous translations of programmes in foreign universities.

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

I am just really glad to be part of this select group of global lawyers, and I hope to have the opportunity to participate soon in one of the IBA well-known events.

Briana Olson

Lao Law and Consultancy Group, Vientiane

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What was your motivation to become a lawyer?

I wanted to pursue a career that was both valuable and intellectually rewarding. The legal profession seemed to offer a multifaceted, dynamic work environment where analytical and problem-solving skills are valued and crucial to professional success.

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

During law school I worked in the Prisoners' Rights Clinic where I handled a parole release hearing for an inmate serving a life sentence at a correctional facility in the United States. The work was challenging, demanding and emotionally draining, but also incredibly rewarding. After months of intensive interviews, legal research, factual investigation, parole plan preparation and hearing preparation, my client received parole subject to a one-year step down to a lower security prison. The experience really put in perspective the impact that our work as lawyers can have on an individual life, and the importance of pro-bono and not-for-profit legal services for those who cannot afford legal fees.

What are your interests and/or hobbies?

I enjoy reading (particularly historical fiction and suspense novels), swimming, travelling, learning languages and spending time with family and close friends. Interests include: environmental issues, world-politics and animal welfare.

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

I grew up in Wisconsin, US, but have spent over two-and-a-half years living, studying and working in various parts of India. As a result, I am near fluent in Hindi and Urdu.

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

I am excited to be a part of the IBA community and am interested to learn more about other members' experiences working in the international legal arena.

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