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Asia Pacific Regional Forum News

Newsletter of the International Bar Association Legal Practice Division

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INTERNATIONAL BAR ASSOCIATION CONFERENCES

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IBA-JFBA Joint Conference

Cross Border Legal Services in the Asia Region – Developments and the Future

12–13 November 2013 **International House of Japan, Tokyo, Japan**

A conference co-presented by the IBA and the Japan Federation of Bar Associations (JFBA), supported by the IBA Asia Pacific Regional Forum

This conference aims to look into the current status and the future vision of cross-border legal issues, amid the rapid expansion of investments, transactions and movements of human resources in recent years in Asia Pacific, boosted by the economic development in Asia. Held as a pre-event for the 2014 IBA Annual Conference in Tokyo, this conference also aims to give legal professionals in the Asia region an understanding of the value and advantage of the IBA, as the largest association of legal professionals, in gaining access to essential legal expertise, excellent networking opportunities and a strong foundation for various activities.

Who should attend?

Legal professionals from all regions including Japan and the Asia Pacific, international corporations, academics and government officials with interest in any type of cross-border activities.

Topics include:

- Cross-border legal services: developments and the future of cross-border legal services in Asia
- Impact of integrating gender perspective to legal practice: what we have achieved, now and beyond
- International comparison of patent litigation practices
- Cross-border M&A: investment into Asia, investment from Asia
- Human rights and corruption: responsible business in conflict affected or weak governance areas
- The differences between investment and commercial arbitration: 'much ado about nothing' or 'more than meets the eye'?
- International antitrust/competition law practice, with a focus on developments in private litigation and the role of attorneys in private practice now and in the future

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Contributions to this newsletter are always welcome and should be sent to Caroline Berube, **cberube@hjmasialaw.com**

This newsletter is intended to provide general information regarding recent developments in the Asia Pacific region. The views expressed in this publication are those of the contributors, and not necessarily those of the International Bar Association.

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From the Co-Chairs

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Dear Members of the IBA Asia Pacific Regional Forum,

We are pleased to announce that the Arbitration Committee and the Asia Pacific Regional Forum of the IBA have decided to cooperate to create a new joint practice group composed of arbitration practitioners, arbitrators, judges and scholars based in the Asia Pacific region.

This initiative is inspired by the IBA's policy to reinforce permanent cooperation and exchanges between its specialist committees and the regional fora.

The aim is to create an avenue for discussion of issues that are of interest to arbitration practitioners based in the Asia Pacific region. The other aim is to develop the reach of the IBA amongst the region's arbitration communities, by encouraging practitioners in the region to participate in the events and activities of the IBA Arbitration Committee and at actively promoting the use of the IBA's rules and guidelines.

The IBA Asia Pacific Arbitration Group will be a special practice group, but with no formal status within the IBA, and will be jointly organised by the Arbitration Committee and the Asia Pacific Regional Forum. It will gather at least once a year in the region, in conjunction with another IBA event of interest to arbitration practitioners.

The Arbitration Committee intends to hold the inaugural meeting of the Asia Pacific Arbitration Group on the occasion of the upcoming conference in Sydney, Australia that is organised by the IBA Arbitration Committee, ACICA and Business Law Section of the Law Council of Australia on 5 December 2013 on 'Key Issues in International Arbitration in the Asia Pacific Region'.

Membership in the Asia Pacific Arbitration Group is open to all members of the IBA.

Applicants will only need to practice in the field of international arbitration and to be established in one of the countries that fall within the Asia Pacific Region. A limited number of prominent arbitration practitioners, arbitrators, judges and scholars from outside the region will also be invited to participate in the Group's works.

The Group will be initially Co-Chaired by Eun Young Park, Vice-President of the IBA Arbitration Committee, and Sunil Abraham, Senior Vice-Chair of the Asia Pacific Regional Forum and Asia Pacific Liaison Officer of the IBA Arbitration Committee.

With the rise in the number of arbitrations as well as the increasing attractiveness of arbitral institutions in the Asia Pacific Region, the creation of the Asia Pacific Arbitration Group is timely. The Arbitration Committee and the Asia Pacific Regional Forum of the IBA sincerely hope that arbitration practitioners in the region will actively participate in this new forum.

We look forward to cooperating with all of you in this new and promising project of the IBA.

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

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Asia Pacific Regional Forum's sessions

Monday 0930 – 1230

We can handle the truth! A global update from a cradle of Liberty, on how governments limit speech and expression

Presented by the North American Regional Forum, supported by the African Regional Forum, the Arab Regional Forum, the Asia Pacific Regional Forum, the European Regional Forum, the Latin American Regional Forum and the Media Law Committeee

As far back as the Boston Tea Party, the United States has had a history of very broadly protecting the free expression of ideas. Many consider US-style freedom of speech an outlier that permits holocaust denials and neo-Nazis to march in the streets of Jewish neighborhoods. In a rapidly changing world where communications instantly cross borders and can offend the citizens of other countries, even inciting them to violence, is it appropriate for the United States to reconsider its broad protection of free speech? For example, Canada, its neighbour to the North, doesn't permit a citizen the 'free speech' to deny the existence of the Holocaust. France does not permit eBay to sell Nazi paraphernalia. Google substantially altered its search engine capability in its Chinese version, ostensibly to address China's national security concerns. Russia recently jailed pop stars who were critical of Vladimir Putin and has since amended its definition of high treason to include moves against Russia's territorial and state integrity and includes consultative assistance to a foreign state or an international organisation.

This session, supported by all of the IBA Regional Fora, will address 'expression' regimes globally to address how countries in other fora approach 'free speech' with limitations deemed appropriate for their regions.

The session will approach the subject in two formats. The first part will have leaders in the subject matter in the different regions discuss the varying approaches of jurisdictions within their region to limit 'free speech' based on concerns which include the need to protect the reputation and privacy of citizens, to protect against speech which is contrary to accepted 'truth' and to protect against threats to national security. This portion of the session is expected to make full use of video examples, email and Twitter posts, and search engine results, ranging from the 'Pussy Riot' videos that led Russia to bring charges against band members, to the rogue video produced in the US that mocked Mohamed and led to riots against US interests in the Middle East.

After concluding the first part of the session, after the break, the last third of the session will follow on from a very successful North American Regional Forum session in Dublin, in which the attendees broke up into separate tables, with panellists joining different tables to lead debate on a mock resolution that each table will be called upon to adopt, adopt with amendments or reject. Young lawyers will be the rapporteurs for each table and will report at the end of the session on what each of the tables had concluded in that regard.

Tuesday 0930 – 1230

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

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

This session will address key issues which manufacturers face on an international level when dealing with the supply chain and logistics in delivery of their products to the ultimate consumer. An interactive panel of lawyers and in-house counsel will share their views and experiences on key terms in manufacturing agreements and terms and conditions of sale including packaging and pre-certification requirements before shipment. We will address safety and security aspects especially when dealing with manufacturers located in developing countries, as well as customs and entry requirements in different jurisdictions. We will discuss special issues such as delivery and time of the essence requirements which are key in certain industries such as food, fashion and toys. Our panellists will also discuss practical ways to reduce risk, dispute resolution at the international level, CSR sensitivity and taxes. The moderators will facilitate an interactive discussion by inviting the attendees to share their experiences, answering their questions and posing questions for discussion.

Tuesday 1430 – 1730

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

Presented by the Asia Pacific Regional Forum and the North American Regional Forum

This panel will discuss current developments affecting investments and trading activities from Asia into North America, and investments and trading activities from North America into Asia. The panel will address the types of transactions that are being done, structures commonly seen, and issues dealt with by practitioners who advise clients in these areas. A focus of the discussion will be on the activities of Asian State-owned enterprises and the foreign investment review and other restrictions they face when investing in North America.

Wednesday 0930 – 1230

Construction – a wide playing field for lawyers

Presented by the Asia Pacific Regional Forum, the International Constructions Project Committee and the Young Lawyers' Committee

Construction law is a relatively young, highly specialised area of legal practice, one in which it is vital that lawyers new to the field have a strong grasp of both legal doctrine and technical understanding in order to ensure that lawyer and client speak the same language.

Construction law is intrinsically functional and pragmatic – architects, engineers and lawyers each bring their own knowledge and perspective to the table – and the lawyer failing to recognise this will likely cause friction and even fundamental problems. As construction law is not purely about 'legal' matters as such, but also often requires a need for understanding technical terms, engineering failures or design flaws on the part of the lawyer, what better way to learn and gather understanding than from more experienced colleagues and even clients?

This session will discuss what benefits experienced lawyers and those new to international construction law can glean from each other in this complex and fast-developing area of the law.

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

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

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The energetic and prosperous city of Boston is renowned for its cultural facilities, world-class educational establishments, and its place at the forefront of American history. As New England's social and commercial hub, home to a number of major national and international businesses, and one of the oldest operational sea ports in the western hemisphere, Boston is a fitting and inspiring setting for the International Bar Association's 2013 Annual Conference.

WHAT WILL BOSTON 2013 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
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- A registration fee which entitles you to attend as many working sessions throughout the week as you wish
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- A variety of social functions providing ample opportunity to network and see the city's key sights, and an exclusive excursion and tours programme

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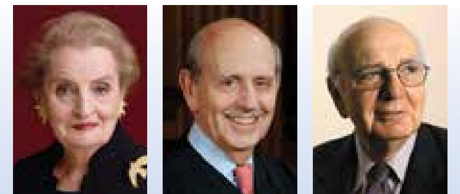

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Foreign investment in Australia's agriculture sector – recent developments

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In Australia, some sections of the community have recently raised concerns about whether foreign acquisitions of Australian agriculture assets, particularly by foreign state-owned enterprises, are consistent with Australia's national interest. These voices have called for stricter regulatory oversight of foreign investment in Australia.

The federal government, however, has made its position very clear in its *Australia in the Asian Century* White Paper,[1] released in October 2012. It says that: 'Maintaining Australia's reputation as an attractive place to invest is crucial to our future. We will ensure that Australia remains open for investment from across the region and the globe.'

The Government's commitment to foreign investment in the *Australia in the Asian Century* White Paper is reinforced by its recently released White Paper on Australia's *National Food Plan*.[2]

This article discusses how foreign investment is vital to the future viability of Australia's food and agriculture sector, particularly in light of the Government's stated aims of developing parts of the country into a regional 'food bowl'. It then examines how investments in the agriculture sector are regulated by Australia's foreign investment regime and comments on the approach the Foreign Investment Review Board (FIRB) has taken in its review of several recent high-profile agribusiness transactions.

Importance of foreign investment in Australian agribusiness

The *Australia in the Asian Century* and *National Food Plan* White Papers estimate that Australia today has the capacity to produce enough food to feed approximately 60 million people. Additional investment to boost productivity and efficiency in Australia's agriculture infrastructure should see this capacity rise even further. Australia is therefore in a strong position to contribute to global food security and at the same time earn significant export income. In particular, Australia's comparative advantage in producing key growth commodities such as beef, grains, dairy and sugar leaves it well placed to capitalise on the projected increase in global food demand by 35 per cent by 2025,[3] and the inexorable shift towards higher value, more protein-intensive diets as the global middle class expands to an estimated 4.9 billion people by 2030.[4]

Yet Australia also relies heavily on foreign investment to contribute to its domestic food security and overall prosperity by providing additional capital for investment and supporting growth in jobs, incomes, infrastructure and productive capacity – often in rural areas. The *National Food Plan* White Paper cites a 2012 Port Jackson Partners study that asserts that, between now and 2050, Australia's food industry will require up to an additional AU$1tn in capital to increase its size, productivity and competitiveness in the global market. Much of this will need to be supplemented by foreign investment to make up for the shortfall in domestic capital being allocated to the sector.

Foreign investment in Australian agriculture – the regulatory position

Australia's foreign investment regime is set out in the Foreign Acquisitions and Takeovers Act 1975 (Cth) and the Government's foreign investment policy. It distinguishes between foreign government investors and their related entities, on the one hand, and private investors, on the other.

All foreign governments and their related entities must notify and obtain approval from the FIRB to proceed with proposals to acquire an interest in *any* Australian land or to make a 'direct' investment, this being a ten per cent or greater interest, in shares or assets, or where the investment can be used to exert influence or control in any business or corporation.

Private foreign investors are not required to notify the FIRB in order to acquire an

interest in Australian 'rural land', this being land used exclusively for primary production. Notification, however, is generally required for acquisitions of Australian 'urban land', this being any land that is not used *wholly and exclusively* for primary production. In respect of Australian urban land that is developed commercial real estate, a private foreign investor is only required to obtain FIRB approval where the interest sought to be acquired is valued at AU$54m or more unless they are a US or New Zealand investor (where a AU$1,078m threshold applies) or the real estate is heritage listed (where a AU$5m threshold applies). These monetary thresholds are generally indexed and updated annually.

Generally, for private foreign investors acquiring an interest in an Australian business or corporation, FIRB approval is only required where the interest acquired is greater than 15 per cent and where the imputed market value or gross assets of the business or corporation exceeds AU$248m (other than for US or NZ investors, in which case a AU$1,078m threshold applies).

Where an application is made to the FIRB, a 'national interest' test is applied in determining whether to approve the foreign investment proposal. The Treasurer, acting on the advice of the FIRB, may allow the proposal to proceed with or without conditions, or reject the proposal outright if considered contrary to the 'national interest'. While the 'national interest' is assessed on a case-by-case basis, the Government's approach generally is that it will consider the impact of the proposed investment on national security, competition, other government policies, the economy and the community, and the character of the investor.

In response to community concern, the Government recently sought to clarify the application of the 'national interest' test in relation to agriculture. Where a foreign investment proposal involves agriculture, the FIRB will now also consider the impact of the proposal on the quality and availability of Australia's agricultural resources (including water), land access and use, agricultural production and productivity, Australia's capacity to remain a reliable supplier of agricultural produce (both to the Australian community and its trading partners), biodiversity and employment and prosperity in Australia's local and regional communities.

The application of the 'national interest' test is a hot topic in Australia and is currently under review by the Senate Committee on Rural and Regional Affairs. In particular, the Committee is examining how the test has been applied to purchases of Australian agricultural assets by foreign companies and sovereign wealth funds in the past 12 months and what the role of Government is playing in upholding this test. The Committee is due to report its findings in late June 2013.

Other measures that show that the Government is alive to community concerns over foreign investment include proposals to fund ongoing 'Agricultural Land and Water Ownership' surveys by the Australian Bureau of Statistics and to establish a national foreign ownership register for agricultural land. The register is intended to record the size and location of foreign agricultural landholdings in Australia, although a specific timeframe for when it will become operational has not yet been set. However, the overall level of foreign investment in Australian agriculture is low – a mere 0.8 per cent of total FIRB approvals for foreign direct investment in 2010–2011 was in agriculture, and a further 1.4 per cent in food, beverage and tobacco businesses.[5] According to a 2012 report by the Government's Bureau of Agricultural and Resource Economics, as of 31 December 2010, one per cent of Australian agricultural businesses and 11.3 per cent of Australian agricultural land was wholly or partly foreign owned.[6] These statistics suggest that some of the community's concerns may be overstated.

Conditional approval of foreign investment

To date, the Treasurer has demonstrated a commercially sensible approach to his assessment of foreign investment proposals and has not publicly rejected any investment in an Australian agribusiness. Outright public rejections have been extremely rare, with the only two M&A transactions not being approved by the Treasurer being Shell's bid for Woodside Petroleum in 2001, and the Singapore Stock Exchange's bid for the ASX, the film which owns the Australian Stock Exchange in 2011.

Nevertheless, the Treasurer may at times approve foreign investments on a conditional basis. Recent examples of conditions to FIRB approval include a minimum number of Australian directors being appointed to the target company's board, the target company being required to maintain Australian production and employment and trade on

an arm's-length basis and the investor being required to sell down some of its interests in the target company within a prescribed timeframe. These types of conditions are designed to ensure that the target company operates primarily as a commercial entity with a profit-maximising motive. They are also aimed at ensuring the target company maintains its nexus with Australia in a manner beneficial to the country's overall national interest.

Cubbie Station acquisition

One of the most recent high-profile transactions in Australia's agriculture sector that received FIRB approval was the acquisition in late 2012 by the consortium led by private Chinese investor Shandong RuYi Scientific & Technological Co Ltd ('RuYi') of Cubbie Station, the major asset of Cubbie Group. Cubbie Station, located in south-west Queensland, is Australia's largest irrigated property and produces about five per cent of the nation's total cotton crop. RuYi would initially have an 80 per cent interest in Cubbie Station with Australian wool broker Lempriere acquiring the remaining 20 per cent.

RuYi required FIRB approval as it would acquire control of Cubbie Station, the value of which exceeded the then review threshold of AU$244m. While FIRB ultimately approved the acquisition, the process was not without controversy, with certain stakeholders voicing their opposition to the deal. Much of the criticism was directed towards the disposal of one of Australia's largest and most comprehensive water licences to overseas investors. This criticism, however, needs to be put into context – the Cubbie Group had been in administration since 2009 and no Australian buyer had emerged to acquire its assets during this time.

The FIRB's decision in approving the acquisition was nevertheless a sensible one, as the Australian national interest was protected by conditions, including requiring all cotton to be sold on arm's-length terms in line with international benchmarks, one-third of the board to be Australian independent directors and one director to be appointed by Lempriere, as well as the retention of existing employees. In addition, to allay concerns about the sale of the Cubbie Station water licence, RuYi was required by the FIRB to investigate the improvement of water usage across Cubbie Station and sell any surplus water allocations in Australia's national water market.

However, the FIRB also required RuYi to sell down its interest in Cubbie Station from 80 per cent to 51 per cent to an independent third party within three years and investigate the possibility of publicly listing Cubbie Station to achieve this sell-down. These sell-down conditions are not new – in 2009, Yancoal was required to give a similar undertaking in respect of its acquisition of Felix Resources. In the authors' experience, however, a sell-down condition effectively makes the foreign acquirer a distressed seller and puts it in a poor position when later negotiating the partial sale of its stake. In the RuYi transaction it is difficult to see why this condition was necessary given that the Treasurer was presumably otherwise satisfied with the control implications of RuYi acquiring an 80 per cent interest. Put another way, RuYi will have the same amount of control whether it has 80 per cent or 51 per cent of Cubbie Station (through its three directors on the board). Accordingly, the only practical effect of the sell-down condition is a value transfer from RuYi to the incoming investor.

Ord river irrigation scheme in WA

It is interesting to note that the lease in November 2012 by the Western Australian State Government of 13,400 hectares of land to Shanghai Zhongfu Group, a private Chinese company, for large-scale sugar production in the Ord river region in Western Australia, did not require FIRB approval. This is because of a provision in the legislation that exempts interests in land acquired from state or federal governments from the FIRB's review. In the absence of this carve-out, it could be expected that the FIRB would place some conditions on this investment, as it did in the RuYi transaction, such as maximising the efficient use of water, to ensure the national interest was protected. This transaction, along with government initiatives to fund the development of critical infrastructure in northern Australia, reflects the Government's drive to encourage more foreign capital into developing the region as a future 'food bowl' for emerging markets.

GrainCorp in play

The most significant decision the FIRB may need to make this year in the agriculture sector is whether to approve an acquisition of

GrainCorp, Australia's last major listed grains processor, by Illinois-based Archer Daniels Midland (ADM). ADM's takeover bid to acquire GrainCorp for A$3.4bn follows in the footsteps of other foreign takeovers of major listed Australian grains players in recent years – such as Viterra's acquisition of ABB Grain in 2009 and Agrium's acquisition of AWB in 2010. It also reflects the rapid consolidation of the grains industry globally, as recently seen in Glencore's takeover of Viterra. Australia's need for foreign capital to develop its food and agricultural industries suggests ADM's takeover bid should be recommended for approval by the FIRB provided that an ADM-owned GrainCorp continues to operate as a commercial entity with profit maximisation as its dominant purpose.

GrainCorp owns an extensive network of wheat storage, receival and port terminal handling infrastructure, some of which is currently subject to a statutory access regime enabling it to be used by third parties. Ongoing access to use the bulk grain port handling facilities is of particular concern to Australian grain growers as GrainCorp controls 280 grain storage sites and seven out of the eight grain export terminals on the eastern seaboard of Australia.

Producer groups such as the (New South Wales) Farmers and the Victorian Farmers Federation have voiced concerns that an ADM-controlled GrainCorp could potentially compromise access by third party rivals to GrainCorp's vital port and grain storage infrastructure and allow ADM to introduce a 'closed-loop' trading system popular in the United States whereby grain exporters buy into their own bulk handling network and export products from it to the exclusion of other traders.

There have been calls for the Treasurer to impose conditions on any approval of the transaction requiring the divestiture of certain of its grain storage and port terminals or ADM giving a guarantee that GrainCorp's existing port and storage infrastructure will remain subject to a third party access regime.

Those public concerns, together with the ability of the current statutory access regime to adapt to the potential change in the ownership of GrainCorp, are likely to be considered as part of the FIRB's assessment and recommendation to the Treasurer.

Concluding remarks

The FIRB's approval of the RuYi transaction and the sentiments outlined in the *Australia in the Asian Century* and *National Food Plan* White Papers show that the Government understands the importance of foreign investment in the agricultural sector. As the GrainCorp bid shows, Australia can continue to expect more investment in the sector.

Notwithstanding the complexity of Australia's foreign investment screening regime, FIRB approval should not be a significant hurdle for most foreign private entities investing in the Australian agricultural sector. The FIRB has up until now demonstrated an investment-friendly track record in approving the vast majority of foreign investment proposals it has received. Where the FIRB has concerns about an investment proposal, it has generally imposed conditions on its approval to protect the national interest.

This favourable investment climate can be expected to continue in at least the short term. However, with the Senate Committee on Rural and Regional Affairs due to report on its findings soon and a general election scheduled for 14 September 2013, there could well be some changes to Australia's foreign investment regime in the months ahead.

Notes

1 http://asiancentury.dpmc.gov.au/white-paper.
2 www.daff.gov.au/nationalfoodplan/home.
3 *Australia in the Asian Century* White Paper, case study, available at http://asiancentury.dpmc.gov.au/white-paper/case-study/asias-demand-for-food-is-surging.
4 *National Food Plan* White Paper, 22.
5 *National Food Plan* Green Paper (published July 2012), 73.
6 Australian Government Department of Agriculture, Fisheries and Forestry, *Foreign investment and Australian agriculture*, November 2011, 2.

Traps for offshore players: notes from Australia – Asia Pacific oil and gas projects

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A failure to identify Australian employment and industrial relations laws accurately has caused some companies to face unexpected costs and potential compliance issues, when providing services to major offshore oil and gas projects.

A couple of recent cases have highlighted the confusion in the maritime industry as to when Australian laws will apply to offshore persons on moving workplaces as part of any offshore oil and gas project, and when they won't. Even when Australian laws are applicable, there still appears to be confusion in the industry over which commonwealth or state/territory laws apply. Identifying the location and purpose of the journey of the vessel workplace is critical in determining which state or federal workers, employment and injury compensation law applies.

The *Rahman*[1] decision of the Commonwealth Administrative Appeals Tribunal (the 'Tribunal') held that the Western Australian (WA) state workers compensation laws applied to a worker on a vessel working in WA state waters (near Barrow Island) even though the injury occurred when the vessel was outside WA waters she had steamed there to avoid cyclonic conditions. The common perception in the industry until that time was that most seafarers were in fact covered by industrial law enterprise agreements (EAs), which attempted to impose the Commonwealth workers' compensation scheme known as SeaCare, and had presumed to be covered by the Commonwealth scheme. EAs are industrial agreements that are negotiated and registered under the Fair Work Act 2009 (Cth) and registered by Fair Work Australia.

The Tribunal considered and applied the Navigation Act 1912 (Cth), the state of Western Australia Workers Compensation and Injury Management Act 1981 (WA) (WCIM Act) and the Seafarers Rehabilitation Compensation Act 1992 (Cth) (Seafarers Act) to reach its conclusion. It also considered the Fair Work Act 2009, the Legislative Instruments Act 2003 (Cth) and the Freedom of Information Act 1982 (Cth) and the Australian Constitution.

It did not consider (or have the jurisdiction to consider) whether there were any compliance issues with respect to the EA under the Fair Work Act 2009 (Cth).

The liability for workers' compensation cover for workers on ships (and other moving workplaces such as dredges, mobile resource units, some rigs, etc) is one for which a cost already exists as part of the cost of engaging a worker so, on the face of it, these responsibilities shouldn't contribute to additional project costs. However, if companies failed to insure under the appropriate workers' compensation regime (by relying on federal instead of the relevant state regime for instance) they may face additional costs for any successful injury claims. In addition, the costs of some EAs have been premised on the misunderstanding of the applicable workers' compensation regime, potentially leaving companies open to uninsured claims, or a greater gap between agreed wage rates and recoverable compensation. It is worth noting that the Australian Constitution provides the framework for managing conflicts between state and federal laws. Section 109 provides that the federal law applies 'to the extent of any inconsistency'.[2]

The decision in the *Allseas* case[3] centred on an analysis of constitutional legal issues, and the nexus of the worker to Australia. The Federal Court ultimately held that foreign workers on this pipelaying vessel owned by Allseas (a Swiss company) were not subject to Australian laws by virtue of insufficient physical connection to Australia. The workers were on the vessel in the Gorgon and Jantz gas fields of the Northwest of Western Australia and outside the Australian seabed.[4] The finding turned on the Court's application of the Migration Act 1958 (Cth) and interpretation of 'migration zone;[5]

together with an analysis of whether the workers and vessel physically 'touched' Australia through pipes and pipeline joints entering the Migration Zone. These workers therefore were not legally obliged to be paid at the rates of other Australian workers, or under EAs negotiated and registered under the Fair Work Act, or obliged to obtain any Australian work visa.

How far can one go in performing services for an offshore project, without touching Australia and falling subject to its laws? This is a question being considered by all offshore project proponents, as the answer will affect both the choice, and cost, of foreign or Australian labour, including wages and potential injury compensation components.

Project proponents for gas projects such as Ichthys in the Browse Basin offshore Western Australia in the Timor Sea (with an LNG plant planned for Darwin Northern Territory[6]) must be looking closely at the implications of the *Allseas* decision, and (FLNG) (floating liquified natural gas operations) are being considered by some oil and gas majors, in order to take advantage of more favourable foreign legislative and wage cost regimes, or to minimise the connection to Australian laws. Will anchoring outside Australian territorial waters be sufficient to avoid the reach of Australian employment laws? Even where the project for which the services are performed is for oil and gas being recovered from a field in which production rights are granted by Australia?

In summary then, offshore Australia project owners and service providers would be wise to consider local legal advice to identify accurately the applicability of Australian employment and industrial relations laws to avoid unexpected costs and potential compliance issues.

Notes

1 *Rahman v OMS* [2013] AATA57, decision of Deputy Commissioner Handley, 4 February 2013, Sydney.
2 Section 109 of the federal Australian Constitution states: 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'
3 *Allseas Construction SA v Minister for Immigration and Citizenship* [2010] FCA 529.
4 Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth).
5 Migration Act 1958 (Cth), s 5.
6 www.inpex.com.au/projects/ichthys-project.aspx.

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Caught between the SEC and Chinese state-secrecy laws: China-based affiliates of major US accounting firms under fire

On 4 August 1994, Shandong Huaneng Power Development Co Ltd became the first PRC enterprise to list its securities (in the form of American Depository Receipts or ADRs) directly on a US stock exchange (the New York Stock Exchange (NYSE)).[1] Ever since then, the number of Chinese companies seeking to raise finance via a US listing has grown steadily, reaching a crescendo in 2010 but slowing since that year as Chinese investors have begun to leave the US markets, 'fed up with slumping share prices, prickly regulators or aggressive short sellers'.[2] In 2002, right in the middle of the story of the rise and now (it seems) decline of Chinese equities on US exchanges, the US Congress adopted the Sarbanes-Oxley Act, in response to major US accounting fraud scandals that led to the collapse of Enron and WorldCom and the disgraced exit of Arthur Andersen from the accounting world.

One important outcome of the Sarbanes-Oxley reforms was the establishment of the US Public Company Accounting Oversight Board (PCAOB or 'the Board') – a private

sector board charged with overseeing public accounting firms that perform audits of US issuers. All accounting firms that prepare audit reports on US listed issuers must register with the PCAOB, and the PCAOB is also charged with conducting investigations, bringing disciplinary proceedings and imposing sanctions in relation to audits of US listed companies.[3]

Especially during the early years, accounting firms were major beneficiaries of the Sarbanes-Oxley reforms as companies everywhere sought to bring themselves into compliance with the new rules governing accounting standards and internal control systems. By mid-2004, Chinese firms listed or planning to list in the US raced to comply with the new accounting regulations by the end-of-financial-year deadline (31 December for most Chinese firms).[4] It was in the same year that Deloitte Touche Tohmatsu opened its tenth office in China and announced that it would spend US$150m to expand its China business over the next five years to cope with the growing demand for its services.[5]

More recently, however, the risks inherent when US accounting firms enter the lucrative Chinese market have become clearer. On 3 December 2012, the US Securities and Exchange Commission (SEC) initiated administrative proceedings against Chinese affiliates of the 'big four' accounting firms,[6] accusing them of refusing to produce audit documents related to an SEC investigation of alleged accounting fraud against US investors.[7] The SEC order notes that Sarbanes-Oxley directs foreign public accounting firms to 'produce the audit work papers' to the agency on request, and that a 'willful refusal to comply' is a violation of the law.[8] The order also requires an administrative law judge to determine appropriate sanctions against the accounting firms by the end of September 2013.[9]

The accounting firms called for regulators to negotiate a solution, noting that US and Chinese laws are in conflict. On the US side, the PCAOB website makes the position clear for accounting firms conducting audits of foreign company clients:

> 'As a practical matter[…] a firm must choose whether (1) to satisfy itself in advance that the non-US client will provide an necessary consent if and when the Board demands documents or information concerning the client, (2) to proceed without such assurance and take a risk that it may later have to choose between providing information without the client's consent or facing a Board sanction for failing to provide the information, or (3) to decline the audit engagement.'[10]

On the Chinese side, accounting firms conducting audits of US-listed Chinese companies have been precluded by Chinese regulations, including Chinese state secrecy laws, from selecting option (1); and have been too keen to compete for business to select option (3); and so are now feeling the consequences of having chosen option (2). The view is that the Chinese authorities, overly sensitive about a perceived impingement on Chinese national sovereignty, have refused to cooperate by allowing the accounting firms, based in Beijing and Shanghai, to hand over documents to US regulators. Instead, the Chinese authorities have insisted that the US regulators should rely on the work of Chinese regulators.[11] Many US-listed Chinese firms are state-controlled and, especially for those involved in 'strategic industries' such as telecommunications, financial services and energy, the Chinese are reluctant to allow access to audit work papers, taking the position that such papers are 'state-secrets' because of the sensitive information that may be contained within them.[12]

In 2011, the SEC initiated administrative proceedings against Shanghai-based Deloitte Touche Tohmatsu CPA Ltd in an attempt to force the turnover of documents related to an investigation into China's Longtop Financial Technologies Ltd.[13] Then, in July 2012, the SEC sought a six-month deferral of the action, citing ongoing talks with Chinese regulators on cross-border cooperation.[14]

The PCAOB has reached cross-border cooperation agreements with other major economies that allow US inspections of foreign auditors of US-listed companies, but all these seem to have been with countries that are close allies of the US, and only since 2007. The PCAOB website lists only 14 countries where cooperative arrangements have been entered into, beginning with Australia (2007), followed by Singapore in 2008, the UK, Switzerland, Norway, Japan, Israel, Taiwan, Netherlands and Dubai in 2011 and Germany and Spain in 2012.[15] South Korea and Canada are also on the list, though no dates are given.[16] So the US record of being able to reach cooperative agreements with securities and accounting regulators in less-developed and less familiar countries is

not, perhaps, as good as some would like to have it seem.

Yet the US is not the only jurisdiction where securities markets have been opened to Chinese firms only for regulators to find themselves thwarted at the border. Ever since the first Chinese firm (Tsingtao Brewery) was listed on the Hong Kong Stock Exchange in 1993, Hong Kong's securities regulator has been forced to effectively write off many investigations that involve a mainland element because it has been unable to gather evidence or gain access to suspects across the border.[17] Similar difficulties have been faced by authorities in Singapore, where the number of listed Chinese firms grew rapidly to exceed 100 by early 2006. The approach of the Singaporean authorities has been to organise corporate governance training courses in Mandarin in Singapore, Beijing and Shenzhen.[18]

The effect of the SEC's most recent move remains to be seen. It could result in financial penalties and discourage accounting firms from working with certain Chinese companies. The SEC might ultimately suspend the Chinese-based firms' right to practise for US purposes – a sanction that could in turn mean that their US-listed client companies might have to de-list while other US-listed Chinese firms have an incentive to sell out and de-list. Or (and this is the least likely to occur) there could be a breakthrough in the larger negotiations between national regulatory authorities on both sides.

In 2012, a significant step forward in establishing cooperative linkages came when Chinese authorities agreed to allow PCAOB inspectors to observe Chinese authorities' own audit inspections. By November 2012, US officials had completed a round of observations in China of inspections of auditors by that country's regulators, with talks expected by year end between Chinese and US officials on access to audit documents.[19] Those talks appear to have reached a stalemate, evidenced in the current 'conflict of laws' litigation against the China-based affiliates of the world's largest accounting firms.

One thing that might assist in reaching a breakthrough would be for both sides to recognise a distinction between good-quality, well-established Chinese firms, often already listed on one of China's two exchanges (Shanghai or Shenzhen), which have undergone a rigorous IPO process in the US, on the one hand, and Chinese firms that have entered the US market via a reverse-takeover or backdoor listing.[20] In the case of the former, the US authorities could take the position that a primary function of US securities law is to ensure that investors are advised of all risks, including all omissions in information provided. So long as investors are aware that the audit papers of domestic Chinese firms may not be available to the SEC, then they can take this information into account when making their investment decisions.[21] In the case of the latter group of companies, Chinese authorities could recognise the legitimate interests of US investors and the authorities that protect their interests in seeking reassurance that a particular company actually has the operations, assets and cash-flow that it says it does, and that these things do exist where they are said to exist. They could recognise that it is also in China's interests to prevent such scandals as the collapse of Sino-Forest, which filed for bankruptcy in Canada shortly after allegations of fraud were made against it by Canadian authorities.[22]

Notes

1 Mark S Bergman, Richard S Borisoff and Nicholas C Howson, 'First Direct Listing for Chinese Company in New York' (1994) 13 Int'l Fin L Rev 41, see http://scholarship.law.berkeley.edu/facpubs/1872.

2 Neil Gough, 'Chinese Companies Head for the Exit' *New York Times* (20 December 2012). See also Stephen D Simpson, 'Chinese Companies Are Leaving US Markets' 28 August 2012, www.investopedia.com/financial-edge/0812/chinese-companies-are-leaving-u.s.-markets.aspx. Noting that in 2010 there were 42 Chinese initial public offerings (IPOs) in the US, but just three in the first half of 2012. At the same time, there were only three de-listings in 2010, but by 2012 the figure had risen to 23 de-listings in the first eight months of that year.

3 Ethiopis Tafara, 'Speech by SEC Staff: US Perspective on Accountancy Regulation and Reforms', Annual Conference of the Institute of Chartered Accountants in England and Wales, London, 8 July 2003, see www.sec.gov/news/speech/spch070803et.htm. See also PCAOB, 'Frequently Asked Questions Regarding Issues Relating to Non-US Accounting Firms', 20 July 2012, see http://pcaobus.org/Registration/Information.

4 Enoch Yiu, 'China firms rush to meet US accounting standards' *South China Morning Post* (4 October 2004).

5 *Ibid.*

6 The 'Big Four' accounting firms refers to Ernst & Young, KPMG, Deloitte Touche Tohmatsu and PricewaterhouseCoopers (PwC).

7 Securities and Exchange Commission, Administrative Proceeding File No 3-15116, *In the Matter of BDO China Dahua CPA Co Ltd; Ernst & Young Hua Ming LLP; KPMG Huazhen (Special General Partnership); Deloitte Touche Tohmatsu Certified Public Accountants Ltd; PricewaterhouseCoopers Zhong Tian CPAs Limited*: Order Instituting Administrative Proceedings Pursuant to Rule 102(e)(1)(iii) of the Commission's Rules of Practice and Notice of Hearing, 3 December 2012.

8 *Ibid* paras 19–20.
9 *Ibid* Pt IV.
10 PCAOB, 'Frequently Asked Questions Regarding Issues Relating to Non-US Accounting Firms', 20 July 2012, Question 4, see http://pcaobus.org/Registration/Information/Pages/Non_US_Registration_FAQ.aspx.
11 Reuters in Washington and Singapore, 'US regulators charge Chinese affiliates of top accountants' *South China Morning Post* (5 December 2012).
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14 Reuters in Washington and Singapore, 'US regulators charge Chinese affiliates of top accountants' *South China Morning Post* (5 December 2012).
15 PCAOB, 'Cooperation with Non-US Regulators', see http://pcaobus.org/International/Pages/Regulatory/Cooperation.aspx.
16 *Ibid.*
17 Jane Moir, 'HK watchdog loses at border' *South China Morning Post* (26 August 2004).
18 Xinhua, '103 Chinese firms listed in Singapore' *China Daily* (26 May 2006).
19 Dena Aubin, 'Exclusive: US sees talks with China on corporate audits', Business and Financial News, Breaking US & International News Reuters.com (8 November 2012), see www.reuters.com/article/2012/11/08/us-usa-audit-china-idUSBRE8A71DR20121108.
20 Steve Dickinson, 'Thinking Clearly About Chinese Companies Listed On US Stock Exchanges. Or, if A Tree Falls In A Sino-Forest…', by Dan Harris on 1 July 2011, China Law Blog (Harris & Moure, pllc), see www.chinalawblog.com/2011/07/thinking_clearly_about_chinese_companies_listed_on_us_stock_exchanges.html.
21 Junheng Li, note 12 above.
22 Vanessa Lu, 'Sino-Forest probe continues though company may no defend itself at OSC hearing' *The Star* (12 July 2012), see www.thestar.com/business/article/1225411–sino-forest-probe-sifting-through-millions-of-documents-mostly-in-chinese. For discussion see also Steve Dickinson, note 20 above.

A new era in the China-Latin America trade relationship

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In the last few decades, the business relationship between Latin America and China has been mainly concentrated in commodities. Is this situation going to remain unchanged in the long run?

Since China's 'reform and opening up' process started in 1978 with Deng Xiaoping, rapid urbanisation and the necessity to build new infrastructure leading to a great demand for natural resources from Latin America has developed. China has one-fifth of the world's population, around a half of its pork and cement, a third of the steel, around a quarter of its aluminium and produces less than one-fifth of the copper it needs.

Even though its needs in terms of natural resources may not change in the near future, in the last few years we have witnessed a more complex economic relationship between China and Latin America. In this regard, the demand for added-value products has experienced rapid growth owing to an increase in the Chinese middle class, higher incomes and more sophisticated tastes. For instance, several Chinese companies have started demanding a huge quantity of agribusiness products such as coffee from Colombia, dairy products from Argentina, fruit and wine from Chile and fishery products from Peru, among others. On the other hand, foreign direct investment (FDI) from China to Latin America has entered a new phase of development. Chinese state-owned enterprises (SOEs) and private companies have started different projects in the energy sector (attaching special importance to wind and solar projects), such as Negrete Park in Chile operated by the Chinese company Goldwin and the Irish company Mainstream and the operations of State Grid in Brazil; the telecoms operations of Huawei and ZTE in the whole region; banking transactions such as the acquisition of the Standard Bank of Argentina by the Industrial and Commercial Bank of China (ICBC); infrastructure and transport

projects; the financing role of the Chinese Development Bank and the Chinese Export-Import Bank; educational programmes established between Chinese and Latin American institutions; scientific cooperation, such as the nuclear power agreement with Argentina and the astronomy centre in Chile; and manufacture and sales in the automotive industry, among others.

Owing to the fast development of the Chinese middle class (in 2010 it accounted for just six per cent of the Chinese population), expected to increase 750 per cent by 2020, reaching 51 per cent (around 400 million) of the urban population, increased demand in consumer products in China (and services) can be expected in the near future.

In this regard, and besides the opportunities for Chinese direct investment in Latin America, there are several industries that have great potential in the import/export relationship (besides commodities) such as retail (according to the Chinese National Bureau of Statistics, China has an annual growth rate of 17.1 per cent in this sector); education; agribusiness (China accounts for around one-fifth of the world's population, but has just seven per cent of the cultivable land); health (the private insurance market grew by 27 per cent between 2000 and 2009); tourism (in 2011 more than 57 million Chinese travelled abroad, spending approximately US$55m); and luxury products (it is expected that China will account for about 20 per cent of the world's market by 2015), among others.

Since the Chinese middle class is likely to keep growing, it is expected that the per capita expenditure will increase as well. In addition, and owing to the global financial crisis that started in 2008 and the relative slowdown the Chinese economy has experienced in the first months of 2013, the Chinese Communist Party has stated that it will reinforce measures to replace the current manufacture/investment system with a more internal consumption-base one.

After the 'reform and opening up' policy was adopted, China became, in effect, the world's factory, offering huge quantities of goods and cheap labour costs to multinational companies. However, this situation has rapidly changed.

Between 1980 and 2012, Chinese GDP per capita (purchasing power parity – PPP) grew from approximately US$530 to US$8,500, labour regulations have increased in 2011, the urban population surpassed the rural population (accounting for an estimated rate of 51 per cent) and Chinese citizens have become more educated and sophisticated. Additionally, the global crisis has greatly affected the investment-based model.

Therefore, China is experiencing a shift to a more consumption and service-driven economy, and this situation may favour demand for Latin American services (and consumer goods) relating to the financial markets, hotels and catering, architecture and construction, consulting and legal work, mining and environment, and transport and tourism, among others. In addition, the signing of free trade agreements (FTAs) with Latin American countries (currently with Chile, Peru and Costa Rica) has been an effective way to boost the export of services to China.

China has become a very attractive market for the Latin American services trade, ranking fourth as an importer of services in 2009 (according to the WTO, China imported US$158bn of services in 2009), considering that in 1985 its global ranking was 33rd.

However, in order to build an effective financial and services bridge between Latin America and China, there are some key pending issues.

The first is the need to adopt measures to help the internationalisation of the Chinese currency, renminbi (RMB). China owns about US$2.6tn of international reserves (27 per cent of the world's total), so it has a powerful argument to increase the use of its own currency worldwide. Hence, it is necessary to increase the number of transactions and investments made in RMB. In this regard, Argentina – following the trend of other countries such as Brazil, England, Japan and the US – has entered into a swap agreement with China for 70 billion yuan, in order to pay for Chinese imports.

On the other hand, Latin American countries should consider new sources of financing such as the Chinese Development Bank, the Chinese Exim Bank and the ICBC, which, since 2005, has provided loan commitments upwards of US$75bn to Latin American countries. Chinese bank loan commitments of US$37bn in 2010 were more than those of the World Bank, Inter-American Development Bank and United States Export-Import Bank combined for that year.

Latin American countries should include Chinese payment mechanisms with their current options, following the initiative of Procesos MC in Peru, which adopted the

UnionPay system (China's biggest bank card supplier) for its more than 55,000 stores in the country; Latin America should establish different kinds of alliances with Chinese enterprises, governmental institutions and local law firms; should create tax incentives for certain investment sectors (ie, the non-conventional renewable energy industry); among several measures that could be adopted.

Although China may continue to demand a huge quantity of commodities from Latin America, it is likely that the relationship will be accompanied by more Chinese direct investment in the region and more diversified trade.

Lessons from India's Competition Commission's cartel decisions

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The Indian antitrust watchdog, the Competition Commission of India (CCI), has been rather aggressive in investigating cartel cases. The CCI has received complaints in rapid succession on cartelisation in various industries, including air cargo, ethanol, soda ash, cement and tyres. Not surprisingly, the CCI's decision to impose fines of approximately US$1.2bn on ten major cement manufacturers (the 'cement decision') has attracted intense scrutiny and every detail of the decision is likely to be litigated all the way up to the Supreme Court of India. In the furore surrounding the cement decision, two of the CCI's more recent decisions, in the tyre and soda ash cartel cases, have gone relatively unnoticed. Nevertheless, these decisions provide useful insights into the CCI's approach to cartel cases, particularly when contrasted with the basis for the cement decision.

In many ways, the mechanics of the cement, tyre and soda ash industries are quite similar. The manufacturers in all three industries are organised under trade associations. The products are relatively homogenous in nature. The competition dynamic across all three may arguably be characterised as oligopolistic. Information on production capacities of key players is readily available. It's relatively easy to gauge market shares of key players as well as the demand for their products. One could argue that all three industries display the classic conditions that make them prone to cartelisation. Yet, there is a difference in the CCI's approach to claims of cartelisation in each of these industries, with a finding of guilt in the cement decision and the complete dismissal of all allegations against the tyre and soda ash manufacturers.

In all three cases, the CCI could not adduce direct evidence of an agreement or understanding to fix prices, limit supply or share markets, that is, the quintessential 'smoking gun'. Naturally, the defendants employed the classic argument that similarity in prices, dispatch and capacity utilisation, if any, were merely a reflection of the unique competitive conditions in the market, an argument that only worked in the tyre and soda ash cases.

The completely different values attributed by the CCI to largely similar arguments lay in the CCI's perception of how the industry associations in each of the three sectors operated. While all three industry associations met frequently and collected data on prices, production, capacity utilisation and dispatch, it was only the Cement Manufacturers Association of India (CMAI) that collected and shared the information *among* its members. On the other hand, the tyre and soda ash trade associations collected information on market trends and made them publically available. Moreover, the CCI found two specific instances of price increases by cement manufacturers

immediately after CMAI meetings. Relying on this evidence alone, the CCI held that price parallelism in the cement sector was a result of collusion and not merely a reflection of competitive conditions unique to the Indian cement market.

Implicit in the cement decision, the CCI recognised that price parallelism may, in and of itself, not be sufficient for a positive finding on collusion. Rather, price parallelism when accompanied by additional evidence such as meetings among competitors and exchange of commercially sensitive information could lead to an inference of collusion.

Thereafter, in its decision in the tyre case, the CCI expressly recognised this principle. In its decision, the CCI acknowledged that the industry structure was of the kind that may promote collusion, being oligopolistic and highly concentrated. However, it drew a distinction between price parallelism arising out of the interdependence of the firms' strategic choices and that stemming from purely concerted action. Accordingly, mere price parallelism was held to be inadequate to establish an allegation of cartelisation in the Indian tyre industry.

Another key reason why the cement manufacturers were unable to convince the CCI of their innocence was their inability to establish, with the help of documentary evidence, the mechanism for determining prices. Had the cement manufacturers been able to show how each of them determined their prices, based on individual assessments of demand and supply in the market, the CCI's decision may have been different. In the soda ash inquiry, which followed the cement decision, each manufacturer provided the CCI with evidence on their mechanism for price determination, in the form of internal documents and correspondence. The CCI relied on their explanations on the respective price mechanisms to arrive at a finding that there was no cartel.

The CCI's approach in the three cartel cases is certainly helpful in providing clarity to companies doing business in India. While the message that cartelisation will attract significant penalties is loud and clear, it is comforting to see that the CCI is unlikely to wield the sword unless similarity in prices is accompanied by evidence on information exchange and meetings among competitors.

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Foreign direct investment in India: a legal charade

Importance of FDI for the Indian economy

Like many developing nations, India needs foreign direct investment (FDI) for its economic growth, and recognises its importance. The latest Indian FDI policy (FDI policy) states that 'It is the intent and objective of the Government of India to attract and promote foreign direct investment in order to supplement domestic capital, technology and skills, for accelerated economic growth'. From April 2000 to March 2013, India received over US$290bn as cumulative FDI inflows.[1]

In line with its recognition of the importance of FDI in the Indian economy, the Government has taken initiatives progressively to liberalise FDI and has permitted 100 per cent FDI in most sectors and industries under the automatic route (ie, where there is no requirement for prior approval from the Reserve Bank of India (RBI) or the Government). Restrictions in other sectors are in the nature of:

- complete prohibitions (such as in the lottery business, gambling and betting, chit funds, atomic energy etc);
- specified limits up to which foreign investment is permitted (such as 26 per cent in the insurance sector and 74 per cent in the telecoms sector);
- government approval requirement; and
- certain limitations and other conditions in respect of foreign investments, which vary from sector to sector.

These restrictions are imposed in sectors that are deemed sensitive owing to security or policy considerations.

Political and legal certainty – bedrock of investors' confidence

Political and legal certainty and predictability are key factors in the choice of investment destination. All countries that seek to attract FDI make efforts to develop a stable business environment including a certain and predictable legal and regulatory regime.

FDI policy also states that 'The Government has put in place a policy framework on Foreign Direct Investment, which is transparent, predictable and easily comprehensible'. While the claim in FDI policy may not be completely accurate, the Government at least appears to recognise the importance of legal certainty in attracting FDI.

Legal framework for FDI in India

FDI in India is regulated by the Foreign Exchange Management Act 1999 (FEMA), read with the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations 2000 (the 'FEMA Regulations') and FDI policy. Apart from the above, the RBI releases various circulars, notifications and directions, which also regulate FDI in India.

FEMA is the principal Indian statute for the regulation of foreign exchange transactions. The RBI is empowered under FEMA to make rules and regulations and grant general and specific permissions pertaining to certain categories of foreign exchange transactions. The RBI has issued the FEMA Regulations to regulate the sale/purchase of securities of an Indian company by a foreign investor, including in FDI transactions.

FDI policy is issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India (DIPP), in the form of press notes and press releases, which are consolidated annually. As per the Government of India Allocation of Business Rules 1961, the DIPP is allocated the subject 'Direct foreign and non-resident investment in industrial and service projects, excluding functions entrusted to the Ministry of Overseas Indian Affairs', and is therefore empowered to make policy pronouncements on FDI. However, FDI policy is only a policy pronouncement by the Government and is not legally binding until the RBI notifies these as amendments to the FEMA Regulations.

Certainty in legal framework – a travesty

As discussed above, while the Government seems to recognise the importance of legal certainty and claims to have addressed the issue, it appears to be having difficulties 'walking the talk'.

FDI policy and FEMA Regulations

The DIPP issues/amends FDI policy by issuing press notes and press releases. The latest FDI policy states that press notes or press releases issued by the DIPP are required to be notified by the RBI as amendments to the FEMA Regulations. However, these notifications by the RBI are to take effect from the date of issue of underlying press notes or press releases by the DIPP. The latest FDI policy further states that in case of any conflict between FDI policy and the relevant FEMA notifications, the latter will prevail.

Contrary to FDI policy, which states that in case of any conflict, the relevant FEMA notifications will prevail, the FEMA Regulations appear to incorporate the entire FDI policy by specific reference. The FEMA Regulations state that an Indian company may issue shares and convertible debentures to a person resident outside India, in accordance with the entry routes specified in the FEMA Regulations and FDI policy.

In view of the above, it is not clear whether the amendments to the FDI policy take effect from the date of press notes or press releases issued by the DIPP or their notification by the RBI. In the past, there have been instances when FDI policy was amended by the DIPP by issuing press notes or press releases and the same were not notified by the RBI as amendments to the FEMA Regulations. In practice, the RBI took note of these changes and allowed FDI transactions based on these changes without notifying the press notes or press releases and amending the FEMA Regulations.

Recent public interest litigation

This issue was recently brought up in a public interest litigation (PIL) filed before the Supreme Court of India (the 'Supreme Court') for quashing of certain amendments to FDI policy pertaining to liberalisation of FDI in multi-brand retail trading, single brand product retailing, air transport services, broadcasting carriage services and power exchanges. FDI policy was amended by the DIPP by issuing press notes and the petitioner had sought quashing of the press

notes, inter alia, on the ground that the FEMA Regulations were not amended to include the press notes. Interestingly, while arguing for the Government, the Attorney-General of India (the senior-most lawyer to the Government) had admitted that the Government had erred as the RBI had not effected any change in the FEMA Regulations since 2008 despite several changes in FDI policy. In this particular instance as well, consistent with its practice, the RBI had taken note of the changes in FDI policy and had even issued a circular intimating the changes in FDI policy to authorised dealers of foreign exchange, but had not taken steps to amend the FEMA Regulations.

Certain news reports[2] suggest that while hearing the PIL, the judges of the Supreme Court had observed that the FEMA Regulations should be amended by the RBI before the FDI policy is given a legal shape and implemented. However, interestingly, the Supreme Court refused to stay the implementation of the amendment of the FDI policy on the basis that it suffered merely a 'curable' irregularity and directed the RBI to amend the FEMA Regulations. In fact, the Supreme Court also refused to stay the meeting of the Government, which was proposed to be held to consider 50 proposals including proposals under the amended FDI policy.

It must be noted that once the RBI had amended the FEMA Regulations and provided a copy thereof to the Supreme Court, the Supreme Court dismissed the PIL. However, the Supreme Court did not record the above observations (as stated in news reports) in its final order.[3] Therefore, it is still unclear whether the change in FDI policy is effective soon after the DIPP comes out with a press note or press release or when the RBI notifies the same by amending the FEMA Regulations.

Conclusion and way forward

The Government regulates FDI from both the industrial policy and foreign exchange perspective. However, this has led to a multiplicity of regulations/policies and therefore uncertainty in the legal framework. Also, while in this article we have only discussed uncertainty in legal framework, owing to multiplicity of regulators/authorities for FDI, there have been instances where authorities have been at loggerheads in their interpretation of certain regulations/policies. For instance, the RBI has taken a view that exit options (such as call or put options) attached to instruments issued by Indian companies under the FDI route are not permitted. Although the DIPP had amended FDI policy in line with the RBI's view on exit options, the amendment was soon withdrawn by the DIPP. While the withdrawal can be construed to mean the DIPP's acceptance of exit options attached to instruments issued under the FDI route, anecdotally, the RBI continues to be opposed to such exit options.

As a way forward, the Government should consider reforms in the legal framework for FDI by developing a single regulation governing FDI from both industrial policy and foreign exchange perspectives and authorising a single authority (which in the authors' view could be the RBI) to regulate all aspects of FDI. If not, the least that is required is for the DIPP and the RBI to consult jointly and issue notifications in order to avoid uncertainties.

Notes

1 Factsheet on Foreign Direct Investment, March 2013; published by Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India.

2 http://articles.timesofindia.indiatimes.com/2012-10-16/india/34498145_1_new-fdi-fdi-in-various-sectors-foreign-direct-investments; http://zeenews.india.com/business/news/economy/sc-refuses-to-stay-fdi-in-retail-asks-rbi-to-amend-regulation_62395.html; http://news.oneindia.in/2012/10/ 15/rbi-must-amend-fema-regulations-on-fdi-in-retail-sc-1084435.html accessed 3 June 2013.

3 *Manohar Lal Sharma v Union of India and Another* (2013) (6) SCALE 776.

A personal reflection on anti-corruption initiatives in Indonesia

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Fighting corruption in Indonesia

Over the last decade, Indonesia has undertaken many important initiatives to tackle bribery and corruption. The Government, regulatory agencies and courts all use a range of laws to target domestic corruption. The Indonesian public are demanding greater accountability from political and business leaders. The press regularly publicises stories involving political and commercial corruption.

So is Indonesia as corrupt as Western public perception believes it to be?

On 24 and 25 April 2013, the IBA hosted its first anti-corruption conference in Asia in Jakarta in conjunction with PERADI, the Indonesian Bar Association. In attendance were many senior representatives of the Indonesian Government, its legal and administrative agencies, a range of prosecutors from across Southeast Asia and many private lawyers, forensic investigators and academics who all have a passion to stamp out corruption.

The keynote address was delivered by His Excellency Prof Dr Boediono, Vice-President of the Republic of Indonesia and – on the day – Acting President of Indonesia. The Vice-President gave an impassioned speech highlighting the importance of anti-corruption initiatives in Indonesia, building on the base created over the last ten to 15 years. The Vice-President acknowledged that while Indonesia had taken great strides in its fight against graft and corruption, more was required. He described corruption as a 'malignant cell in society', which, unless checked, could reverse what had already been achieved.

The Vice Minister of Law, Denny Indrayana, took the Conference delegates through some of the achievements in Indonesian society. These include:

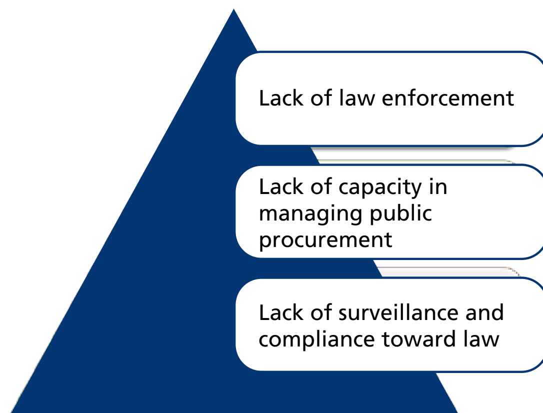
- a growing sense of national democracy;
- better and more effective anti-corruption regulation;
- more robust anti-corruption institutions;
- an increasing vocal and free press, including independent organisations such as Indonesia Corruption Watch and International Transparency Indonesia; and
- more active public participation in national issues.

The Vice Minister and Amien Sunaryadi, a founding Commissioner of the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi* (KPK)) and now a senior partner at Ernst & Young, referred to the important commitment to targeting corruption reflected in Presidential Regulation No 55/2012 on a National Strategy in Combating Corruption. Figures from the KPK and the Indonesian Financial Transaction Reports and Analysis Centre (or PPATK) illustrate a much higher incidence of reporting of improper public and commercial conduct than was the case a decade ago.

In his conference address, the distinguished Professor Erman Rajagukguk from *Universitas Indonesia* (the University of Indonesia) noted that:

> 'The law can effectively function if it is being supported by legal apparatus and society's legal culture. The society's legal culture depends on sub-culture. This sub-culture is influenced by, among others, economic factors, one's position and interests, including political interest. Corruption practices cannot be prevented without the improvement of economic and political system as a sub-culture. Any regulation that is intended to prevent corruption will not be implemented properly without the improvement of this sub-culture.'

The importance of combating corruption was identified by a leading private lawyer, Todung Mulya Lubis (of Lubis Santosa & Maramis). While discussing the issue of corruption in procurement contracts, Mr Todung identified three critical features that allowed corruption to flourish in the world of procurement contracts. The same is likely to apply across society.



It is as much a social and political challenge for Indonesia to combat corruption as it is a legal challenge.

What is domestic 'corruption' in Indonesia?

It is easy to try and define corruption or a bribe by reference to the offer or promise, the giving or the receipt of some benefit of value in circumstances where the benefit is not otherwise legitimately due to the person offering or the person receiving the benefit.

But what does it mean to ordinary people?

The United Nations Office on Drugs and Crime (UNODC) in Indonesia presented material at the Conference that demonstrated how endemic the concept of 'gift-giving' is within Indonesia. Monica Tanuhandaru from the Jakarta office of the UNODC spoke on an anti-corruption survey conducted between 1 and 31 October 2012 in 33 provinces, 170 districts/cities (49 cities and 121 counties) with a sample of 10,000 households, securing an overall response rate of 89 per cent. Some of the survey findings make for disturbing reading:

- 56.67 per cent stated that a teacher or headmaster had requested extra payments;
- 41.47 per cent stated that an officer of a village or district had requested extra payments;
- 61.54 per cent stated that officers of courts or the judiciary had requested extra payments;
- 76.22 per cent stated that they did not know if it was or was not acceptable to give money or goods during a recruitment process to secure a public or private job; and
- 69.42 per cent stated that they did not know if it was or was not acceptable to give money to the police for payment of a fine without a receipt.

Understanding what corruption means to the ordinary citizen is crucial. All those who took part in the survey understood that it was wrong to pay a bribe, but of the many local payments made within a community, most were not regarded as wrong and many ordinary people did not know whether what they did was wrong – they simply followed the local custom.

Progress of Indonesia's war against bribery and corruption

Over the last decade, Indonesia has enacted a raft of civil and criminal laws to target domestic corruption. While it has yet to ratify the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('the OECD Convention') and target, for example, foreign bribery by its citizens, its current legal system has demonstrated remarkable resilience in prosecuting domestic graft and corruption.

While anti-corruption laws have existed for many decades, they were brought up to date in 2001 by the Anti-Corruption Law (Law No 20/2001 dated 21 November 2001). To complement the enforcement of the Anti-Corruption Law, the KPK was created in 2002 (Law No 30/2002 dated 27 December 2002) and corruption prosecutions are to be undertaken by the Corruption Court (Law No 46/2009 dated 29 October 2009).

A range of other laws have been enacted to deal with money laundering, mutual legal assistance between sovereign countries, the protection of witnesses, the establishment of the PPATK, laws targeting terrorism and the ratification of two United Nations treaties: the Convention Against Organised Crime, ratified by Law No 5/29009, and the Convention Against Corruption, ratified through the Law on UNCAC Ratification.

Prosecution record of enforcing corruption law in Indonesia

When compared to many Asia-Pacific countries, Indonesia has a vigorous record of prosecuting domestic corruption offences. Figures supplied at the Conference by Jan S Maringka of the Indonesian Attorney-General's department show that:

- from 2005 to 2012, the Attorney-General, the Indonesian police and the KPK investigated nearly 14,000 corruption cases; and
- approximately US$116bn has been recovered by the Special Task Force on Asset Recovery.

While Indonesia, like many other countries in the Asia-Pacific region, has a less than active record in targeting its own citizens who are involved in foreign bribery outside their own country, it has not shied away from extraditing foreign nationals to face justice for economic crimes in other countries. In a similar vein, Australia has a rich history of investigating and prosecuting domestic corruption offences but, as yet, there has been only one foreign bribery prosecution. In Japan there are only two cases in which foreign bribery has resulted in prosecutions. Clearly, there is room for improvement in this area in many countries.

Corruption and foreign investors

Challenges remain for foreign investors coming into Indonesia as to how they should behave. When foreign investors are subject to the jurisdiction of the US Foreign Corrupt Practices Act 1977 or the UK Bribery Act 2010, they cannot simply act 'according to local custom' if that means paying a bribe or benefit to secure or retain a commercial benefit. Obligations of ethical behaviour fall on commercial investors and that obligation must coexist with the commercial imperative of 'getting the deal done'.

All sectors within society must be involved and committed to combating corruption. This includes all Indonesian citizens and foreign businesses doing business in Indonesia.

Initiatives for future reforms – ethical champions

Vice-President Boediono called for all sections of Indonesian society to combat corruption, saying that what was required was ethical leadership or moral champions to resist the temptations of corruption in order to encourage others to have the moral courage to say 'no' to improper or corrupting benefits. This must involve all of society and those outside Indonesia who value their own reputation and a continuing sense of a vibrant democracy in Indonesia.

There are several areas where important initiatives can occur. These include:

- improving bilateral and multilateral treaties with neighbouring countries to promote more efficient mutual legal assistance between nations;
- ratification of the OECD Convention and implementation of foreign bribery laws in Indonesia;
- criminalising bribery in the private sector, following the UK Bribery Act;
- targeting the proceeds of crime, profits and commercial benefits that corrupting parties and officials obtain from improper and illegal conduct by civil seizure and forfeiture orders under a scheme that does not require a conviction (based, for example, on the Australian Proceeds of Crime Act 2002 (Cth)); and
- devoting sufficient resources to encourage, over time, a change in cultural behaviour so that extra payments, gifts or bribes come to be seen as improper, unacceptable and not to be encouraged.

Changing tide for the future

Indonesia has numerous laws that tackle domestic corruption. It has created a dedicated agency in the KPK to target graft and corruption. The challenge remains to build on these developments and not, in the words of the Vice-President, let the gains made slip away. That would be to the detriment of the Indonesian people and all countries in the Asia-Pacific region.

Ethical behaviour is about acting with a moral compass, knowing right from wrong and being prepared, when asked to 'dance with the devil', to ask yourself – is it the right thing to do? Indonesians are increasingly asking this question of their government, their politicians, regulators, public officials and private entrepreneurs. Where they are found wanting, public outcries are heard and individuals are prosecuted. Indonesia may have some way to go to rid itself of the perception of a corrupt society (and on that point, many countries face similar challenges), but it has come a very long way along the road towards achieving this goal in a remarkably short time.

Notes

* Vice-Chair, IBA Anti-Corruption Committee; Co-Chair, IBA Anti-Corruption Conference, Jakarta, April 2013.

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Court raises the bar for terminating employment in Indonesia

In June 2012, the Indonesian Constitutional Court issued a decision that may have a far-reaching impact on employers in Indonesia who wish, owing to economic circumstances or market conditions, to downsize or rationalise their labour force. The knock-on effects of that ruling are only now beginning to be appreciated.

Terminating employment has never been an easy or straightforward process in Indonesia. The employment law regime – largely governed by Law No 13 of 2003 on Manpower (the 'Manpower Law'), as amended by Constitutional Court decision No 012/PUU-I/2003 of 28 October 2004 – is decidedly complex. Labour laws and regulations change frequently, and while the creation of a relatively new Labour Court has improved the reporting of important decisions, it has also resulted in some inconsistent decisions.

The notion of termination on notice or pay in lieu of notice does not apply in Indonesia. The US concept of employment at will is similarly unheard of. Even where a valid reason exists under the Manpower Law for an employer to terminate a contract, Labour Court approval of each termination is required in the absence of a so-called mutual termination agreement in writing between the employer and the subject employee.

In addition, the Indonesian Constitution enshrines every Indonesian citizen's basic entitlement to employment. Article 42D of the Constitution specifically acknowledges, along with a number of other basic legal principles, that '[E]very person shall have the right to work and to receive fair and proper remuneration and treatment in employment'.

Causes for termination

The Manpower Law does, however, stipulate permissible causes for termination. These include 'ordinary' cause such as breach by an employee of his or her employment contract, company regulation or collective labour agreement on due warning and 'serious' cause including theft, providing false information to the employer, dangerous or immoral conduct or similar behaviour. The Manpower Law previously expressly permitted termination for such 'serious' cause without a court order. Note that since that provision was struck down by the Constitutional Court, employers are well advised to include termination for serious cause with approval of the Labour Court in their employment documentation. An employee can also be dismissed in the event of his or her resignation, death or on the employee reaching retirement age.

The Manpower Law also recognises certain economic imperatives. An employer is entitled to dismiss an individual employee in the event of the bankruptcy of the employer or on a change of status, merger or consolidation of the employer.

A similar entitlement to terminate exists under Article 164(3) of the Manpower Law where a company is closed down for reasons of efficiency (ie, without two consecutive years of financial losses) or due to two consecutive years of financial losses or *force majeure*. The Article goes on to stipulate higher termination benefits for termination for reasons of efficiency without such financial losses.

For many years, employers in Indonesia have relied on Article 164(3) to justify downsizing a part of the workforce for reasons of efficiency, whereas Article 164(3) expressly contemplates the closing of the company as the triggering event. There is no other provision of the Manpower Law that expressly permits downsizing the workforce for reasons of efficiency.

Constitutional Court ruling

It was in this context that in early 2011 a group of petitioners who had been dismissed

ostensibly on the basis of Article 164(3) went to the Constitutional Court (the 'Court') to contest their terminations as contravening their constitutional rights (Case No 19/PUU-IX/2011). Importantly, in this case the employer entity closed its plant, terminated the employment of all its employees and then reopened the plant.

In reviewing the case, the Court was obliged to weigh the rights of employers under the Manpower Law directly against the right to work enshrined in the Constitution. The Court handed down its decision on 20 June 2012. In addressing the issues, the Court made a number of significant findings. First, it established that the inclusion of the word 'efficiency' in Article 164(3) could not, in and of itself, be interpreted as the basis or right for a company to terminate employment in Indonesia. The desire of an employer to make labour costs more efficient through the reduction of the workforce is not a proper legal basis for termination in Indonesia.

The Court continued in this vein and noted that the termination of the employment of any worker is the very last resort of an employer after making other efforts to achieve efficiency in the operations of its business. The Court offered a series of very practical alternatives that any employer must consider prior to reducing its staff via termination. These options include:

- reducing wages and benefits of upper-level workers (specifically at the manager and director level);
- reducing the number of shifts;
- limiting or eliminating overtime work;
- reducing work hours;
- reducing the number of work days;
- granting extended temporary leave to workers;
- not granting contract extensions to those contract workers whose contracts have expired; and
- granting early retirement and pensions to those who qualify.

The Court concluded this reasoning by restating that the goal of achieving efficiency could not form the sole basis of employee terminations.

Finally, and perhaps more importantly, the Constitutional Court addressed the meaning of Article 164(3) directly. In a move to remove any uncertainty or ambiguity in the Article, the Court stated that the provisions could only be invoked where the employer company in question needed, in fact, to be permanently closed down. Temporary or threatened closure of the employer was not sufficient to allow an employer the termination rights specified in the Article. In the view of the Court, any contrary interpretation would be inconsistent with the Constitution.

Conclusion

The Constitutional Court's ruling in the case is particularly poignant when considering any acquisition or foreign direct investment where the intent of the investing party is to achieve efficiencies through the investment. It also underscores the need for planning and good counsel before taking steps to reduce the employee complement of any business in Indonesia.

A critical review of the death penalty decision of the Korean Constitutional Court

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Judicial review examined in the light of an application for leave for extension of time in Malaysia

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This article analyses the judgment handed down by the Federal Court in *Wong Kin Hoong and Another (suing for themselves and on behalf all of the occupants of Kampung Bukit Koman Raub Pahang) v Ketua Pengarah Jabatan Alam Sekitar and Another*[1] (the '*Wong Kin Hoong* case').

Background

Raub Australian Gold Mine Sdn Bhd (RAGM) was granted mining rights, under a lease, in order to process old gold mine tailing. At the material time, RAGM was in the midst of building a carbon-in-leach plant ('CIL plant') near Kampung Bukit Koman, Raub. On 13 January 1997, the Director General of the Department of Environment approved an environmental impact assessment (EIA) report submitted by RAGM (the 'first decision').

The appellants, in the Federal Court, are the residents of Bukit Koman and members of the community who were campaigning against the construction of the CIL plant (the 'appellants'). They alleged that the EIA was not in compliance with section 34A of the Environmental Quality Act 1974 (EQA). This prompted the appellants to apply to the first respondent for RAGM to submit a detailed EIA of the CIL plant. On 21 February 2008, the first respondent informed the appellants that the EIA had been approved on 13 January 1997 (the 'second decision').

Brief facts at the High Court

The appellants thereafter applied to the High Court on 21 March 2008, for leave to commence an application for judicial review, inter alia, an order to quash the first decision, and to declare that the second decision of the first respondent was unfair, unreasonable, against the principles of natural justice and in violation of their human rights. Furthermore, the appellants applied for an extension of time for the leave application in respect of the first

decision since the said application was filed beyond the specified timeframe of 40 days under Order 53 rule 3 of the Rules of the High Court 1980[2] (RHC). The High Court dismissed the application on the grounds of inordinate delay, owing to the application being filed more than 11 years from the first decision, and one year after the decision was communicated to the appellants. The High Court further held that the delay in filing the application goes to jurisdiction, and therefore the merits of the case need not be considered in hearing the application for an extension of time.

Court of Appeal

The appellants thereafter appealed to the Court of Appeal, which unanimously affirmed the decision of the High Court.

Federal Court

Following the decision of the Court of Appeal, the appellants appealed to the Federal Court. The Federal Court granted leave to the appellants to determine a sole question of law:

> 'Having regard to the decisions of the Supreme Court in *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower* [1983] 2 MLJ 54, and *Ravindran v Malaysian Examinations Council* [1984] 1 MLJ 168 and the Court of Appeal in *Tang Kwor Ham v Pengurusan Danaharta Nasional* [2006] 1 CLJ 927 whether a Court is required to consider the merits of an application for leave to commence judicial review made under Order 53 rule 3 of the Rules of the High Court 1980 when determining an application for an extension of time to file the said leave application?'

Malik Imtiaz, on behalf of the appellants, argued that the amendment made to Order 53 rule 3(6) of the RHC 1980 in effect allows the court to consider the merits of the application, for an extension of time for leave to file an application for judicial review in light of the decision of *Tang Kwor Ham and Others v Pengurusan Danaharta Nasional and Others*[3] (the '*Tang Kwor Ham* case'). Thus, he submitted that the question posed should be answered in the affirmative, and that the earlier two cases of *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower*[4] (the '*Mersing Omnibus* case') and *Ravindran v Malaysian Examinations Council*[5] (the '*Ravindran* case'), which were decided before the amendments, were no longer good law. These two cases precluded the Court from considering the merits of the case, in an application for extension of time for leave to commence judicial review.

Tan Sri Dato' Cecil W M Abraham submitted on behalf of RAGM that the amendments made to Order 53 of the RHC 1980, were, inter alia, to extend the time limit within which an applicant may file an application for leave. The amendments did not state that merits should be considered in considering an application for extension of time. Therefore, the position adopted by the Supreme Court in the *Mersing Omnibus* case and the *Ravindran* case was still good law. In addition, reliance on the decision of the *Tang Kwor Ham* case was misconceived as the principal issue there was the right to secure injunctive relief, and did not concern the issue of extension of time.

Counsel for RAGM also submitted that the appellants in the course of the proceedings referred to and relied on the cases of *R v Secretary of State for Trade and Industry, ex parte Greenpeace*[6] (the '*Greenpeace* case') and *R v Secretary of State of Education and Science and another ex parte Threapleton*[7] (the '*Threapleton* case') in support of their argument. In the *Greenpeace* case, an application was made by Greenpeace to apply for judicial review in order to protect the environment. This application was made against the decision of the Secretary of State to grant licences to companies, with regard to the exploration and search for oil in the North Sea (Ocean Atlantic). The appellants' reliance on this case was misplaced, as the law relating to judicial review in England is not in tandem with that in Malaysia, in that issues of delay are dealt with at the preliminary hearing and not together with issues of merit, which are heard at the substantive hearing.

In the *Threapleton* case, an application for review was made relating to a decision made by a local education authority in regard to a merger of two schools. This case had no relevance to the facts of the appeal before the Federal Court in the *Wong Kin Hoong* case as it did not relate to any issue of delay regarding the time limit to apply for judicial review.

The Federal Court with respect in its judgment did not discuss or elaborate on the law relating to the *Greenpeace* and *Threapleton* cases, in order to draw a distinction in the application of the law on the relevant issues raised in this appeal between the law in England and that in Malaysia.

Analysis of the findings of the Federal Court

The Federal Court reiterated that the procedure of judicial review under Order 53 of the RHC 1980[8] is a two-stage process whereby the first stage concerns the leave application, while the second stage concerns the hearing of the substantive application argument on its merits, should leave be granted. Order 53 rule 1A of the RHC 1980 governed the procedure for leave for judicial review prior to the amendment in 2000 but was later replaced with Order 53 rule 3(6) of the RHC 1980.[9] The effect of such amendments was to increase the time limit for the filing of leave applications from six weeks to 40 days. The later provision was adopted in the Rules of Court 2012 where the timeframe was further extended from 40 days to three months.

The court can grant an extension of time if there is a good reason to do so. However, whether the court should grant such an extension is an exercise of judicial discretion. The Federal Court also held that the appellate court will rarely intervene in the lower court's exercise of judicial discretion, unless the discretion in principle was wrongly exercised.

The approach adopted by the Malaysian courts on the issue of delay has been consistent – see *President House Sdn Bhd v Datuk Bandar Kuala Lumpur and Another (Crest Trading Sdn Bhd as Intervener)*,[10] *Arrow Vista Sdn Bhd v Dato' Bandar Kuala Lumpur*[11] and *Azizan Bin Osman and 4 Others v Kerajaan Negeri Kedah and Others.*[12]

The case of *Tang Kwor Ham* was relied on heavily by the appellants. This judgment of Gopal Sri Ram JCA (as he was then) was reversed on appeal, and rightfully so. In short, His Lordship stated that it was not improper for a judge to use his discretion to hear full arguments on merit in an application for leave for extension of time. His Lordship fell into grave error on this matter first because the issue in the *Tang Kwor Ham* case was related to securing an injunction against Danaharta by way of judicial review. Secondly, His Lordship made no reference to the *Mersing Omnibus* case and the *Ravindran* case, which were both Federal Court judgments. Under the doctrine of *stare decisis*, His Lordship was bound to follow the *ratio decidendi* of the two judgments. Justice Gopal Sri Ram himself, in recognising the importance of conforming with the doctrine of *stare decisis*, said in *Periasamy s/o Sinnappen v Public Prosecutor*:[13]

> 'Lastly, the learned appellate judge did not sufficiently address his mind to the decision in *Khoo Hi Chiang*. We find the cavalier fashion in which he approached the judgment of a five-member bench of the Supreme Court in a case which was an authority binding upon him to be quite appalling. We are convinced that the learned appellate judge ought not to have brushed it aside as he did.'

The Federal Court held that the contention of counsel for the appellants in urging the Court to adopt the decision of the Court of Appeal in the *Tang Kwor Ham* case was without merits, as the principal issue in that case was to secure an injunction against Danaharta by way of judicial review. Furthermore, the Federal Court in the *Tang Kwor Ham* case reversed the majority judgment of the Court of Appeal. The proposition of law expounded by Justice Gopal Sri Ram in the Court of Appeal decision of the *Tang Kwor Ham* case was held to be *obiter* and reflected an incorrect proposition of law.

The Federal Court further stated that the principle in both the *Mersing Omnibus* and the *Ravindran* cases was good law, although the cases were decided under the old Order 53 rule 1A of the RHC 1980. The Court also held that the principle in relation to an application of extension of time to file an application for judicial review remained the same.

Comparative view of the position in Malaysia and the UK

The law relating to an application for extension of time in applying for judicial review in the UK is a two-part test. It is provided for in section 31(6) of the Supreme Court Act 1981 (the '1981 Act') and Order 53 Rule 4 of the Rules of the Supreme Court (RSC), now Part 54.4 of the Civil Procedure Rules (CPR).

The position discussed above in the *Wong Kin Hoong* case differs from that in the UK. This is because applications for judicial review in the UK have to be considered with reference to section 31(6) of the 1981 Act.

The practice in the UK is for the courts generally to grant leave if there are good grounds to do so and then to have the question of merits and extension of time dealt with at the substantive hearing.

The jurisdiction of the courts in the UK that deals with an application for extension

of time is a two-part test. The likelihood of a court granting an extension of time is based on good reasons and a credible explanation for the delay.

In Malaysia, premised on case law as provided for in the decisions of the Federal Court in the *Mersing Omnibus* and *Ravindran* cases, the issue of delay goes to jurisdiction as opposed to the merits. If an application for extension of time is granted, the parties are not permitted to raise the same issue of delay at the substantive hearing. The arguments at the substantive hearing are confined to the merits of an application for judicial review.

Comparatively, based on the case law in the UK, the issue of delay is a matter to be determined at the substantive hearing. The granting of leave for judicial review under Order 53 Rule 4 of the RSC, now Part 54.4 of the CPR, at the ex parte stage, does not determine once and for all the question of delay. This is owing to the requirements of section 31(6) of the 1981 Act. The current position in the UK is that it is for the court to exercise its discretion to defer the question of delay and whether an extension is appropriate at the substantive hearing. This marks a significant difference between the English position and the Malaysian position. Such a difference is because of the enactment of the new CPR 1998 and the incorporation of European law principles into the said rules, which are not prevalent in the Malaysian Rules of Court 2012. In addition, a defendant who wishes to allege that delay is a bar to the claim must therefore raise that issue in the acknowledgment of service and, if appropriate, may need to file written evidence to deal with the matter. Under the former Order 53 of the RSC, the situation in England was for the court commonly to direct that a paper application be converted to an oral hearing to make representations on the issue of delay.

Moreover, in the UK under Part 54.5 of the CPR, which relates to the time limit for the filing of a claim for judicial review, the test laid for promptness has been left open by the House of Lords as to whether the 'promptness' test satisfies the requirement of European law and the European Convention on Human Rights as per *R v Hammersmith and Fulham LBC ex parte Burkett*.[14] Again, such legislation is absent in Malaysia.

Conclusion

The decision in the *Wong Kin Hoong* case reiterates the law as laid down by *Mersing Omnibus* and *Ravindran*, which affirmed that the court will not consider the merits of a case at the application for leave stage. This decision has important implications for the future of applications for judicial review in Malaysia and marks a difference in the approach of the Malaysian courts to that of the English courts to an extent.

Notes

1 [2013] MLJU 412.
2 Now Order 53 rule 3 of the Rules of Court 2012.
3 [2006] 1 CLJ 927.
4 [1983] 2 MLJ 54.
5 [1984] 1 MLJ 168.
6 *The Times*, 19 January 2000; [1998] Env LR 415.
7 Queen's Bench Division, 10 March 1998.
8 Now Order 53 of the Rules of Court 2012.
9 Now Order 53 rule 3 of the Rules of Court 2012.
10 [1995] 3 AMR 2350 at 2356.
11 [1998] 3 AMR 2703.
12 [2009] 5 AMR 177.
13 [1996] 2 MLJ 557 at 582.
14 [2002] 1 WLR 1593.

Doing business in Sri Lanka

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Overview

- Official name of the country – Democratic Socialist Republic of Sri Lanka.
- Population – 20.9m.
- Sri Lanka is an island in the Indian Ocean (previously called Ceylon). It has an area of 65,610km^2 (including 2,905km^2 of inland waters). It is about 28km off the south-eastern coast of India.
- Official languages – Sinhala and Tamil.
- Link/business language – English.
- Administrative capital – Sri Jayewardenepura, Kotte.
- Commercial capital – Colombo.
- Currency – Sri Lanka rupees (SLR).
- GDP at current market price – US$59.2bn.
- GDP per capita – US$2,836.
- GDP growth rate – 8.3 per cent.
- Inflation rate – 6.9 per cent.
- Literacy rate – 91.9 per cent.

Forms of business undertakings

Three types of business undertaking exist in Sri Lanka: proprietorships; partnerships; and companies. The law of partnership in Sri Lanka is English law, subject to certain provisions contained in the Partnership Ordinance. Companies are governed by the Companies Act No 7 of 2007.

Overseas company

A company incorporated outside Sri Lanka can establish a place of business in Sri Lanka and register its branch in Sri Lanka under the provisions of Part XVIII of the Companies Act subject to stipulations made under the Exchange Control Act.

Foreign investment and its restriction

Foreign investment is permitted in all sectors of the economy except in the following activities, which are reserved for the citizens of Sri Lanka:

- money lending;
- pawn broking;
- retail trade with a capital investment of less than US$1m;
- coastal fishing; and
- provision of security services including security management, assessment and consulting to individuals or private organisations.

In certain areas foreign investment is restricted to 40 per cent or such other percentage stipulated by the Board of Investment of Sri Lanka or the Controller of Exchange.

It was announced on 13 June 2013 that the Government of Sri Lanka plans to ban foreign investments into steel, cement, the retail trade, small-scale agriculture and beauty care products. At the same time the Government wants to promote foreign investments into the assembling of vehicles, refining petroleum products and making boats for the export market.

Protection of foreign investment

Foreign investment is guaranteed protection by Article 157 of the Constitution of the Republic of Sri Lanka.

Tax incentives for investments

Corporate tax incentives are available for new enterprises and tax incentives are given to undertakings for fishing or producing agricultural seeds or planting materials with no minimum investment threshold. Small-scale enterprises, medium-scale enterprises, large-scale enterprises and strategic import replacement enterprises are granted tax incentives depending on the minimum investment threshold stipulated for the respective category.

Likewise project expansions for existing enterprises including small-, medium- and large-scale enterprises and strategic import replacement enterprises are also granted tax incentives having regard to the minimum investment threshold.

Strategic development projects

A project declared as a ‘strategic development project’ under the provisions of the Strategic Development Projects Act No 14 of 2008, which is in the national interests and which is likely to bring economic and social benefit

to the country and likely to change the landscape of the country, will be eligible for full or partial exemptions from the following taxes on a case-by-case basis:

- Inland Revenue Act No 10 of 2006;
- Value Added Tax Act No 14 of 2002;
- Finance Act No 5 of 2005;
- Excise (Special Provisions) Act No 13 of 1989;
- Economic Service Charge Act No 13 of 2006;
- Customs Ordinance Chapter 235;
- Nation Building Tax Act No 9 of 2009;
- Ports and Airports Development Levy Act No 18 of 2011;
- cess on importation of raw materials, during the project implementation period, in cases where the required raw materials are not available in Sri Lanka for the required quantity.

A special process has to be followed to declare a project as a strategic development project by Parliament as provided for in the Strategic Development Projects Act.

Exemptions from import duty

Exemptions from import duty, exchange control, customs duty, value added tax and ports and airports development levies are also available depending on the nature of the projects.

Securities investment account

The securities investment account (SIA) is a vehicle through which foreigners can invest in the equity of Sri Lankan companies. An SIA can only be credited with inward remittances or transfers from a non-resident foreign currency account or from an offshore unit of a bank and converted into Sri Lanka rupees at the prevailing rate of exchange. Funds in this account may be utilised for all payments related to share transactions such as brokers' fees, bank charges and expenses in Sri Lanka of the account holder subject to certain limits.

Laws of property and contracts

Roman-Dutch law is the foundation of the law of property, but it has been amended by legislation and local customs.

Sri Lanka, being a multiracial and multilingual country, has legal systems that reflect the customs of the various communities that make up Sri Lankan society. As in other legal systems the conventions, customs, sanctions and main concepts of law, though not concretely formulated, have over the passage of years been established, especially with judicial pronouncements made from time to time.

The personal laws that govern the various sections of the community are Kandyan, Thesawalamai and Muslim law. Persons not governed by any of these three personal laws are governed by the Roman-Dutch law, which is the common law of the country. However, the impact of the common law system derived from English law has had a much greater influence on the laws of Sri Lanka than the Roman tradition. Yet, the Roman-Dutch law remains the residuary or common law of Sri Lanka. The constitutional and administrative law of Sri Lanka derives predominantly from the Anglo-American system while its commercial law is almost wholly based on the principles of English commercial law.

Restriction on foreign ownership of land

If a foreigner wishes to purchase a property he will have to pay tax at the rate of 100 per cent; the purpose of this tax obviously being to discourage foreigners from acquiring property in Sri Lanka. However, there are certain qualifications to this rule.

The Government proposes to enact legislation to prohibit the acquisition by foreigners of ownership land in Sri Lanka and, pending enactment of the new legislation, transfer of such ownership of land to foreigners is not allowed by administrative arrangement.

Labour laws

The principal laws that regulate the various aspects of the employer-employee relationship include the Shop and Office Employees (Regulation of Employment and Remuneration) Act, the Factories Ordinance, the Industrial Disputes Act and the Termination of Employment of Workmen (Special Provisions) Act.

Conclusion

This article has endeavoured briefly to set out the relevant legal aspects of doing business in Sri Lanka. Needless to say, it is only a summary and anyone who wishes to commence business should seek professional guidance.

APF new members corner

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What was your motivation to become a lawyer?

To be able to get involved in creating justice – and also the way of thinking fascinated me.

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

Pro bono work experiences, some of which involved visiting homeless peoples' shelters and soup kitchens; to listen to their life stories and to be able to make a difference with only small contributions. Further pro bono work in the animal rights context was always very satisfying. Currently, it is the in-house work I am involved in and the interaction with various countries and cultures in the context of my advisory work.

What are your interests and/or hobbies?

Yoga, animals and human rights.

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

I am currently doing my yoga teacher training.

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