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IPBA Journal

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NEWS & LEGAL UPDATE



INTER-PACIFIC BAR ASSOCIATION

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The President's Message

William A. Scott
President



Dear Colleagues,

It is indeed an honour to provide fellow members of the IPBA with this inaugural message as your President.

The Association's 24th Annual General Meeting & Conference has come and gone and, on behalf of all the members of our Organising Committee, I hope sincerely that those who were able to attend the Conference enjoyed their time in Vancouver immensely and that every aspect of the Conference either met or exceeded expectations.

I was especially pleased with the way the substantive programme, including the keynote speech, plenary panel presentations, Host Committee sessions and many of the IPBA Committee sessions, reflected upon the Conference theme of "Sustainability in a Finite World" and, in particular, provided delegates with valuable insights into the challenges facing Canada, both in the development of its natural resource-rich but infrastructure-poor landscape and its relations with its many Asia-Pacific neighbours, as well as the role that we, as lawyers, have in addressing those challenges.

I trust that delegates and accompanying persons also enjoyed the social programme and other entertainments on offer in Vancouver. Following the excellent example of our Korean friends in Seoul in 2013 and the success of their K-pop/Gangnam Style theme, I constantly reminded our organisational team that we would not be criticised for being "too Canadian". The onslaught of Mounties, ice hockey sticks, pipe bands, poutine, maple syrup, totem poles, pancakes, grizzly bears, goalies, owls, cirque performers and other Canadian icons was the result. As we would say here: "Hope that was ok, eh?"

Looking forward, many thanks to those who took the time to complete the delegate survey that was circulated

shortly after the Conference. The information gleaned from this survey will assist our members in Hong Kong, Kuala Lumpur and beyond, to mount future conferences that respond to your preferences (ever larger venues for Young Lawyers Nights appearing to be top of the list)!

The Secretary-General's message will discuss in more detail the key strategic challenges facing the Association in the coming year, including the need to increase membership engagement and to update the Association's governance structure. These concerns are not new, but the urgency of addressing them in effective ways continues to increase.

The IPBA is the pre-eminent international association for business lawyers with an Asia-Pacific focus, but its continued good health as an organisation requires that we take steps now to broaden the membership base. The Secretary-General has outlined a number of proposed strategies to achieve this objective and I encourage all members of the IPBA to participate in and contribute to this effort.

The governance structure of the organisation is also in need of updating, in part to bring our constitution in line with current practice and to address the requirements of conducting business as an international organisation in a post-9/11 world. The IPBA's leadership has been actively exploring the various alternatives available and will be making recommendations in due course. The existing unincorporated association structure has served us well over the last 25 years, but there is now room for improvement, all the while being careful to preserve the 'Spirit of Katsuura' ethos of the Association's founders (many of whom are, happily, still with us) that makes the IPBA the unique and special organisation it is.

Finally, one of my personal goals for the coming year is to work to forge stronger ties with the many legal associations around the world, the objectives of which are complementary to those of the IPBA. In addition to raising the profile of the IPBA with the members of such associations, this will provide opportunities to cooperate with them to the mutual advantage of both. Good progress in this regard was made over the last 12 months, but there is much more to do. In Vancouver, the IPBA and LAWASIA signed an MoU to strengthen mutual

cooperation, and we also had a positive meeting with the leadership of UIA (Union Internationale des Avocats).

If you have any questions, comments or concerns regarding the IPBA, please do not hesitate to contact me at wscott@stikeman.com. My email 'door' is always open!

William A. Scott
President

IPBA Upcoming Events

Event	Location	Date
IPBA Annual Meeting and Conference		
25th Annual Meeting and Conference	Hong Kong	May 6-9, 2015
26th Annual Meeting and Conference	Kuala Lumpur	Spring 2016
IPBA Mid-Year Council Meeting		
2014 Mid-Year Council Meeting (Council Members only)	Rio de Janeiro, Brazil	September 26-28, 2014
Regional Events		
IPBA Regional Conference: "Bridging Asia and Latin America" (open to the public)	São Paulo, Brazil	September 25, 2014
IPBA Regional Conference: "Commercial Arbitration" (open to the public)	Rio de Janeiro, Brazil	September 29, 2014
Supporting Events		
Kluwer Law International's "Turkey and Middle East: International Arbitration Summit"	Istanbul, Turkey	September 3, 2014
Kluwer Law International's "2nd Korea: Global Competition Law Forum"	Seoul, Korea	September 25, 2014
HKIAC's 2014 ADR in Asia Conference "Asia at the Cutting Edge"	Hong Kong	October 16, 2014
Kluwer Law International's "Japan International Arbitration Summit"	Tokyo, Japan	October 17, 2014
ABA Section of International Law Fall Meeting	Buenos Aires, Argentina	October 21-25, 2014
Kluwer Law International's "3rd Korea International Arbitration Summit"	Seoul, Korea	November 20, 2014
Kluwer Law International's "2nd Indonesia and South East Asia: International Arbitration Summit"	Jakarta, Indonesia	December 12, 2014

More details can be found on our web site:
<http://www.ipba.org>, or contact the IPBA Secretariat at ipba@ipba.org



The Secretary-General's Message

Yap Wai Ming
Secretary-General



Dear IPBA Members,

Vancouver Conference

IPBA President Bill Scott and his host committee did a wonderful job hosting the 24th Annual General Meeting & Conference in Vancouver. The plenary sessions and all the committee programmes certainly were very well organised and lived up to the theme '*Sustainability in a Finite World*'. The gala dinner was superb, with dazzling displays of circus acts and an enchanting balancing act involving many twigs held together by the weight of a single feather, which was a great illustration of how delicate our finite world is and the balance that we need to achieve for sustainability. The evening of discovery at Telus World of Science was certainly entertaining, with many of us reliving our childhood by playing with many of the exhibits on display. Not least of all, the Young Lawyers Night was a complete sell out, which resulted in a call for a larger venue for the next conference. On behalf of the IPBA, I wish to congratulate and thank Bill and his team for a fantastic job well done and for being a wonderful host.

SLTP Report

The Strategic Long Term Planning ('SLTP') Committee presented a Report of Proposed Strategic Priorities and Recommendations to Council. The key findings are summarised here and I take the liberty of extracting the salient parts of the report for the benefit of our members:

'In each of the last six years, average membership costs per member have exceeded average membership dues. The position is likely to deteriorate in 2014. This year, in which membership numbers have so far decreased, will see the impact of the increase granted to TGA for providing secretariat services. Their fees, including the Japanese consumption tax, will total ¥27.54 million, after taking into account the

consumption tax increase from 5% to 8% from 1 April 2014. The projection of contributions to revenue from the annual conference is unlikely to assist in defraying membership costs.

There is no doubt that *membership engagement* and *governance/leadership* are the two strategic priorities. The earlier analyses and online survey findings make this abundantly clear: the findings (particularly regarding membership numbers, engagement and dissatisfaction) are consequences of the tactics (cause) that have been implemented over the recent period. The approach requires a systemic overhaul, not Band-aid solutions, if the IPBA is to be sustainable. If there is no appetite for this type of change, i.e., commitment that translates into actually doing things to engage with members, the future will most likely see a continuing downward trend in membership and finance.'

The SLTP report provided the following key strategies:

- Optimise membership attraction (and retention) by incrementally increasing membership benefits, reviewing certain aspects of current benefits, and engaging more with members at the association and jurisdictional levels.
- Encourage former members to re-join and provide an incentive for them to do so.
- Seek the support of members to participate in a 'member gets a member' campaign, again providing an incentive and/or prize draw for referring members and new members.
- Increase the number of corporate counsel and young members through specific campaigns, and to consider a new membership category for Seniors.

- Review and streamline associated organisational processes to minimise costs.
- Investigate the feasibility of presenting the regional IPBA/IFLR M&A forum or organising a similar event on another topics at more than one location in the Asia-Pacific region, to attract new members and contribute to revenue.



The IPBA Council works hard prior to every conference, meeting to discuss the business of the association.

The IPBA Council (pictured above) discussed these issues and the Secretariat has contributed useful suggestions to put some of these strategies into concrete action plans. We will be writing to the Jurisdictional Council Members ('JCM') to request that certain action plans be carried out. The JCMs are requested to achieve two key performance indexes, i.e., to host a reception in their jurisdiction or organise an activity to promote the next annual conference (in this case, the 25th Annual General Meeting & Conference in Hong Kong in 2015) and to organise, either on its own or in collaboration with other JCMs, a domestic or regional conference that will benefit the members. The programme coordinators are committed to assist each of the JCMs to achieve these two KPIs. The Secretariat will be contacting each of the JCMs to get a report on the activities and hopefully, we will have a full calendar of events that will be filled with regional activities in which our members can participate.

Incorporation of the IPBA

The Council had a lively discussion on the on-going issue of whether to incorporate the IPBA or not. A further detailed paper will be presented at the next Mid-Year Council Meeting for a decision.

Mid-Year Council Meeting – 25 to 28 September 2014

The upcoming Mid-Year Council Meeting is scheduled to start on 25 September 2014 with a regional conference '*Bridging Asia and Latin America*' in São Paulo, Brazil. This conference will focus on compliance, anti-corruption, cartel enforcements and cross-border investment. The Council meeting proper will be held in Rio de Janeiro from 26 to 28 September 2014. A full-day seminar on commercial arbitration will be held on 29 September 2014, the day after the council meetings. We encourage members to attend the conferences, which are open to the public. Council members are reminded to apply for travel visas early. We wish to thank Ronaldo Veirano and Shin Jae Khim for all the coordination of the hosting of the Mid-Year Council meetings.

Online Update

Our website will see the rollout of an upgraded version by the end of this year. There should be better features that JCMs and Committee Chairs and Vice-Chairs could use to coordinate their regional activities. In addition, as we embark on putting all our secretariat records on the cloud for better administration, we will be introducing more features and technology, which we hope will assist us in managing the Secretariat more efficiently.

25th Annual Meeting & Conference in Hong Kong – 6 to 9 May 2015

IPBA will be hosting the 25th anniversary Annual General Meeting & Conference in Hong Kong. Huen Wong, our President-Elect, will be welcoming us to this 'Fragrant Harbour' next year. Registration is available online at <http://ipba2015hk.org>.

Yap Wai Ming
Secretary-General

IPBA 24th Annual Meeting and Conference Vancouver, Canada May 8-11, 2014



The first of two Plenary Session panels, discussing "Sustainability in a Finite World".



The Chair of the Vancouver 2014 Host Committee and IPBA President-Elect William A. Scott addresses the audience at the Opening Ceremony.



The conference welcomed six IPBA Scholars from China, Vietnam, Laos, India, Argentina, and Hong Kong.



The Conference gets off to an official start with the Dropping of the Puck at the Welcome Reception.



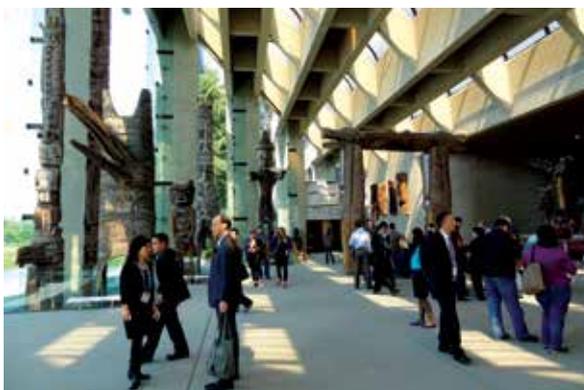
Delegates could meet with old friends and get acquainted with new ones during the lunches and coffee break times.



The committee sessions were well attended, right up until the last day.



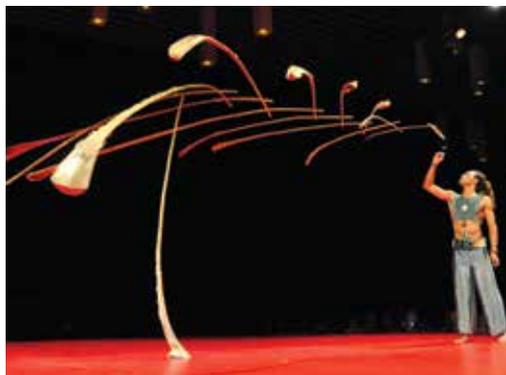
The Officers give a report of their activities at the Annual General Meeting. This is also a chance for all IPBA members to speak up and be heard by the officers.



The conference wrapped up on a cultural note with a trip to the UBC Museum of Anthropology.



The Welcome Reception had great food, free flowing drinks, a hockey goalie, a Canadian Mountie, and an oxygen bar. You had to be there!



Delegates were entertained at the Gala Dinner by live music, acrobats, and this incredible "sculpture" that is held together by the strength of one feather.



Young Lawyers' Night has a full house with young and young-at-heart.



Accompanying Persons tours included a trip to Grouse Mountain.



The pre-conference golf tournament had a good turnout with 36 players, and the weather held out just long enough to finish the round.

See more photos on the IPBA web site:
<http://ipba.org/annual-meeting-conference-photo-gallery/vancouver-2014/147/>

IPBA Moderators' Highlights from the Conference



Sustainability of Taxes: Base Erosion and Profit Shifting Neil Russ (*Buddle Findlay, New Zealand*)

This well-attended session brought together first-rate speakers from around the globe to consider the implications of BEPS, a major global tax initiative instigated by the G20 and being championed by the OECD. Prompted by public disclosures of the amount of tax paid by multinationals such as Google and Starbucks, politicians around the world have been calling for a major overhaul of international tax systems and are seeking a new era of tax harmonisation and cooperation.

The speakers explored the international policy settings which have given rise to BEPS concerns and calls for change. The OECD's 15-point action plan was then considered, as well as the progress to date and the timeline for specific actions, the political and technical reactions in particular jurisdictions, and likely prospects for meaningful and enduring change.

Session attendees were privileged to hear excellent and engaging presentations from: David Blair, Crowell & Moring, Washington DC; Yushi Hegawa, Nagashima Ohno Tsunematsu, Japan; Bijal Ajinkya, Khaitan & Co, India; Mark van Casteren, Loyens & Loeff, Netherlands; Jay Shin, Lee & Ko, South Korea; and Ian Gamble, Thorsteinssons, Canada, with additional contributions from the audience.

The BEPS project will continue to occupy a high priority in the development and implementation of tax policy worldwide for at least the next two years and it is likely that the Tax Committee will run a follow-up session at next year's conference in Hong Kong.

Judicial Cooperation Mechanisms in International Insolvency Cases Shinichiro Abe (*Baker & McKenzie, Gaikokuho Joint Enterprise, Japan*)

We discussed the COMI ('centre of main interests') issue, which involves conflicts of law between countries with regard to international companies which have filed for insolvency procedures. At the beginning of the session I gave the audience an overview of its purposes and outlined a hypothetical international insolvency case for them to consider. Chester B. Salomon from the United States then introduced the COMI concept which has been accepted by the UNCITRAL Model Law (insolvency) and related matters, as well as issues and precedents in the United States. Isabelle Smith Monnerville from France then discussed the history of COMI under European Union regulations and important case law. We also exchanged information regarding cases related to COMI with members of the audience from various jurisdictions. These presentations and discussions helped us understand the importance of the concept of COMI in various jurisdictions in addition to recent trends and cases.

Sustaining Arbitration and Cultural Approaches – New Challenges and Ideas

Mohan Pillay (*Pinsent Masons M Pillay LLP, Singapore*)

This highly interactive session on 'SUSTAINING ARBITRATION AND CULTURAL APPROACHES – NEW CHALLENGES & IDEAS' moderated by Mohan Pillay, Pinsent Masons M Pillay LLP (Singapore) examined criticisms that arbitration is becoming too expensive and drawn out. The session involved a real dialogue on the challenges facing arbitration and the ideas and proposals that can help sustain it.

The afternoon witnessed serious and thoughtful debate, with contributions from six leading common and civil law panellists – Peter Chow, Squire Sanders (Hong Kong/Singapore); Federico Godoy, Beretta Godoy (Argentina); Urs Lustenberger, Lustenberger Rechtsanwälte (Switzerland); Shanti Mogan, Shearn Delamore & Co. (Malaysia); Paul Sandosham, Clifford Chance Asia (Singapore); and Gerhard Wegen, Gleiss Lutz (Germany).

The panel discussion on four key issues was followed by an enthusiastic and engaging Q&A session with the audience, who then voted on each of the four topics as shown below:

- Civil law system arbitrations – Why do they complete much faster than common law ones & are they necessarily more efficient? [Vote- For: 45% / Against: 55%]
- Controlling costs – Should Tribunals take more control of proceedings? [Vote- For: 90% / Against: 10%]
- Fast-track arbitration – Has their time come and is there a lesson from successful statutory adjudications that complete in weeks, if not months? [Vote- For: 100% / Against: 0%]
- Witness conferencing – Does this only really work in limited circumstances? [Vote- For: 100% / Against: 0%]

Issues under the Trans-Pacific Partnership: Sustainable Intellectual Property Rights in a Trans-Pacific Partnership World

Daniel Lim (*Joyce A Tan & Partners, Singapore*)

We had an international panel that travelled the Asia-Pacific in line with the coverage of the Trans-Pacific Partnership ('TPP'). We kicked off our tour with a keynote speaker from our host country, Canada, Mark Penner (Fasken Martineau). Mark discussed how the TPP could potentially lead to an Americanisation of certain aspects of Canada's IP laws, foreboding the same for other

TPP signatories. We then moved south to hear from the United States through the brilliance and insights of Professor Raj Bhala (University of Kansas Law School). Raj raised six significant questions on the impact of the TPP that left us in deep thought, including the impact of the TPP on the poor and the new middle-class. Moving further south to Brazil we heard from the lovely Carla Junquiera (BKBG) who highlighted the potentially negative impact of impeding access to medicines and public domain works due to the proposed extensions to patent and copyright terms. We then crossed the Pacific to Japan to listen to the eloquent Hideaki Roy Umetsu (Mori, Hamada & Matsumoto). Roy enlightened us on the politics of President Obama's 'sushi meal' and the investment aspects of the TPP, emphasising the importance of the definition of 'investment' as it would include intellectual properties. We ended our survey in South Korea, delivered by the esteemed Joseph Hong (Lee & Ko). Joseph examined border enforcement provisions; the criminalisation of IP infringement; and the Investor-State Dispute Settlement mechanism – touching on the significant change it would bring to how cross-border disputes are resolved. It was left to me as a representative from one of the three founding countries of the TPP, Singapore, to raise questions for our expert panel on the unbalanced influence of interest-group lobbying and the lack of consultative transparency in decision-making. Many thanks to our co-convenor, the indefatigable Lawrence Kogan (The Kogan Law Group). Yours, Daniel Lim (Joyce A Tan & Partners).

Hostile Take-Over Bids – A Comparative Snapshot

Michael George DeSombre (*Sullivan & Cromwell LLP, Hong Kong*)

Our session on 'Hostile Transactions – A Comparative Snapshot' was a great interactive session comparing and contrasting the various elements of takeover planning, defence and implementation across eight different jurisdictions. Lee Suet Fern's explanation of how she single-handedly moved Singapore corporate law closer towards adoption of a Revlon-doctrine type obligation to seek out the best price was particularly interesting. Michael O'Bryan's discussion of the various defensive mechanisms available to US corporations was contrasted sharply by Jan Bogaert and Michael Burian with regard to European companies, and Lee Suet Fern for Code type countries, including Singapore. Peter Hong repeatedly emphasised how Canada is rather in the

middle of the spectrum and frequently looks to US law for inspiration. Soichiro Fujiwara explained how Japan and Canada's provisions regarding temporary poison pills had a lot in common while Song Chang Hyun emphasised the restrictions on defensive measures under Korea's laws, particularly in an environment where directors are often pursued criminally for violations of fiduciary duty. Through it all, Michael DeSombre, as moderator, kept the conversation flowing to allow for the contrast of the various legal regimes in a manner designed to promote understanding of the key themes.

Protecting Value in M&A Transactions **Frédéric Ruppert** (*De Gaulle Fleurance, France*)

At the time of the initial investment, a buyer (in M&A) / investor (in PE) makes an educated guesstimate of the valuation of the target company. However, there is no guarantee that the value of the company corresponds to what it is assessed to be or what it is projected to become. The panel openly discussed the various techniques available to protect the appreciation of how much the target is worth or against the random developments that impact the target and ultimately make its value deviate over time. Most of these protect buyers/investors, which makes sense as buyers take a bigger risk than sellers since they buy something that they have limited knowledge about, although some may be used by all parties, and the wording varies accordingly.

The audience got involved in the discussion early, raising real life issues and arguments to challenge the panellists' experience in dealing with these often toughly negotiated arrangements, which made for a lively and fun session.

Courts, Emergency Relief, Disclosure and Other Issues in Arbitration **Stacey Wang** (*Holland & Knight LLP, USA*)

The IPBA Dispute Resolution & Arbitration Committee conducted a three-hour interactive working session on 'Courts, Emergency Relief, Disclosure and Other Issues in Arbitration.' Stacey Wang of Holland & Knight LLP (California/USA) and Hiroyuki Tezuka of Nishimura & Asahi (Japan) led the diverse panel in a cross-jurisdictional discussion. The panellists were: Urs Weber-Stecher (Wegner & Vieli AG, Switzerland), Dr. Rene-Alexander Hirth (Luther, Germany), Ashish Kabra (Nishith Desai Associates, India/Singapore), and Edmund Wan (King & Wood Mallesons, Hong Kong). Set against a

backdrop of the 'SweetDrinks v. CocoTea' hypothetical, the panellists engaged in a lively discussion with the audience to explore the role of the courts in post and pre-award challenges to the jurisdiction of the Tribunal; court assistance by way of interim protection; anti-suit injunctions; the procedural mechanisms available to deal with emergency relief and their practical application; jurisdictional support for the arbitral process; compliance with emergency orders for relief; and cross-jurisdictional standards of disclosure in courts and arbitration. The panellists engaged audience members to contribute their experiences from other jurisdictions, such as China, Taiwan, and Malaysia.

Arbitration of Intellectual Property Disputes **Cedric C. Chao** (*DLA Piper LLP, USA*)

The Dispute Resolution & Arbitration Committee hosted a programme entitled 'Arbitration of Intellectual Property Disputes.' This panel was moderated by Cedric Chao, trial partner and co-head of the international arbitration practice of DLA Piper (San Francisco). The panellists included Eric Tuchmann, general counsel, American Arbitration Association (New York); Chiann Bao, Secretary General, Hong Kong International Arbitration Association; Robert Deane, partner of Borden Ladner & Gervais (Vancouver); Lam Ko Luen, partner of Shook Lin & Bok (Kuala Lumpur); and Wang Shengzhi, partner of Globe Law (Beijing).

The panel examined the increasing use of arbitration to resolve cross border intellectual property (IP) disputes, the concerns of IP owners regarding subjecting their IP to the arbitration process, the relative advantages and disadvantages of arbitration versus court litigation for the handling of IP disputes, the updated procedures adopted by leading arbitration centres to govern IP disputes, and recent statutory and case law developments concerning arbitration in the various jurisdictions. The panel was comprised of thought leaders in the field, providing insights from the perspectives of the arbitral institution, the advocate, and the arbitrator. A lively question and answer session followed the programme.

White Collar Crime in Cross-Border Investments? The Sustainability of Compliance **Eriko Hayashi** (*Oh-Ebashi LPC & Partners, Japan*) **Simone Nadelhofer** (*Lalive, Switzerland*)

The session began with the exciting launch of the new

ad hoc committee of Anti-Corruption and Rule of Law. The Co-Chairs of the committee, Dr Young-Moo Shin, the President of the IPBA, and Mr Gerold Libby, a past president of the IPBA, both gave impressive keynote speeches about the significance of rule of law and the important role and goals of the Committee.

Two interesting sessions followed. The first session focused on white collar crime and other regulatory offences in cross-border investments from the perspective of multinational companies. After the general introduction given by the overall moderator, Eriko Hayashi, lead panellist and moderator, Alexander Troller, introduced each of the notable panellists. Methanex's general counsel, Jeremy Chan, talked about his company's compliance policy and training programmes to promote anti-corruption, and the challenges faced by a multinational company operating around the globe in different cultural and political environments. His very comprehensive presentation became the basis for comparative comments and observations from the audience and the panellists alike. Kenneth Stewart illustrated the debate from a US perspective, and in particular, under the relevant FCPA provisions. Ryu Myond-Hyon emphasised the evolution and shift of perspectives in Korea in tackling corruption when doing business, whether in a domestic or international context. Akira Moriwaki offered very useful insights on Japan's anti-corruption laws and the practice of Japanese multinationals in this respect. Roger Best gave comments from both the UK and Hong Kong angles. Patrick Norton succinctly wrapped up the session with his thoughtful analysis of the risks typically faced by multinational companies especially in Asia.

The second session focused on white collar crime and other regulatory offences in cross-border investments from the perspective of Asia and Russia. The moderator, Eriko Hayashi, introduced the panellists, namely, Maxim Alekseyev from Russia, Jacky (Lingyun) He from China, Taek Rim Oh from Korea, Chester Toh from Singapore, and Patrick Norton from the USA. The panellists discussed various specific issues from the perspective of each jurisdiction including the types of white collar crimes that multinational companies have commonly or recently faced, enforcement trends, sanctions in case of non-compliance, and practical steps to take when a company discovers any suspicious conduct of an employee. Insightful comments and questions from Patrick Norton also contributed to the lively discussion.

Major Variations to Scope of Work: When Variations Get Too Much and Too Many Naresh Mahtani (*Eldan Law LLP, Singapore*)

One of the sessions organised by the International Construction Projects Committee, which is chaired by Keith Phillips (USA), dealt with the subject of 'MAJOR VARIATIONS TO SCOPE OF WORK: WHEN VARIATIONS GET TOO MUCH AND TOO MANY'. This is a subject which is common to many construction projects.

The Moderator, Naresh Mahtani (Singapore) warmed up the session with an introduction on some basic principles on this subject. The speakers, namely Christopher Wright (USA), Matthew Christensen (South Korea), Mustafa Motiwala (India) and Kirindeep Singh (Singapore) then dealt with several sub-topics in turn, such as the contractor's and employer's rights, the submission of variation claims, contractual consequences of changes to scope of work, and some interesting case studies of situations when variations got to be 'too much and too many' so as to result in new contracts or substantial changes to the scope of work. The session also involved an interactive discussion among the attendees on situations they had personally encountered in their own client cases and stories from their own respective jurisdictions.

Intellectual Property Rights: Searching for a Sustainable Balance Jaime Cheng (*Lee, Tsai & Partners, Taiwan*)

Speakers: Daniel Lim (Joyce A Tan & Partners), Bo Kyung Lim (Shin & Kim), Riccardo Cajola (Cajola & Associati), Jennifer A Marles (Oyen Wiggs Green & Mutala LLP)

This stand-alone session of the Intellectual Property Committee kick-started a series of other sessions of the 2014 IPBA Conference that had an IP-element and included the conference theme of sustainability. The panellists presented four topics with Daniel Lim of Joyce A Tan & Partners in Singapore starting the session with a broad overview of the origins of Intellectual Property, the linkage between IP laws to trade and investments, and tensions arising from the behaviour of IP owners. Bo Kyung Lim of Shin & Kim in Korea then discussed the claims for stronger protection of patents rights, the limits on patent protection, and compensation by patent rights owners. The third presentation, which was put together by Riccardo Cajola of Cajola &

Associati in Italy and presented by moderator Jaime Cheng, examined the right balance between adequate IP rights protection in the EU and other rights and laws, with an analysis of Article 102 of the Treaty on the Functioning of the European Union and related case law. Jennifer Marles of Oyen Wiggs Green & Mutala LLP in Canada then concluded with her insightful presentation on the unique Promise Doctrine in Canada. Following the presentations, the panellists engaged in an informative question and answer session, during which the audience and other panellists presented queries on the presentations.

Special Session: APEC and Sustainability in the Asia-Pacific Region

Shigehiko Ishimoto (*Mori Hamada & Matsumoto, Japan*)

Speakers: V Paul Lee (Canadian representative of APEC's Business Advisory Council (ABAC)), Prof Raj Bhala (University of Kansas, USA), Daniel Ying Sin Lim (Joyce A. Tan & Partners, Singapore), Yong-Jae Chang (Lee & Ko, Korea), Audrey Chen (Jun He Law Offices, China)

The session, jointly hosted by the IPBA Ad Hoc APEC Committee and the International Trade Committee, was held to discuss APEC's important role and function for sustainable development of the Asia-Pacific region's economy, and the conceivable future collaboration of APEC and the IPBA.

Mr Lee, who is also a successful entrepreneur in the IT industry, gave a lively and detailed introduction of the role and structure of ABAC, providing a good basis for discussion. Then Prof Bhala amplified the discussion on APEC's role for the region's sustainable development of the economy and cross-border trades, emphasising the importance of deliberate care for the 'new fragile middle class'. Following that, the panel discussed APEC, ABAC and the possible contribution by practising lawyers in this region, on the basis of each panel members' specialised backgrounds (Mr Lim is the chair of IP Committee, Mr Chang is ex-chair of Cross-border Investment Committee, and Ms Chen is a practitioner of China, the current host economy of APEC).

We believe that the fruitful discussion during the session has provided a good foundation for collaboration between the IPBA and APEC, which will be implemented more concretely in Hong Kong next year.

Law Firm 2.0 – The Technologically Enhanced Law Firm

Michael Cartier (*Walder Wyss Ltd., Switzerland*)

Speakers: Mihir Parikh, Nishith Desai Associates; Do Hyung Kim, Yoon & Yang LLC; Yoshimichi Makiyama, Kitamura & Makiyama

As one of the last sessions of the Conference, the 'Law Firm 2.0' panel, which was moderated by Michael Cartier from Walder Wyss, drew a crowd interested in hearing about document and knowledge management systems, new types of communication with clients, and IT challenges facing small law offices. Mihir Parikh, Nishith Desai's Director of Knowledge Management, kicked off the session with both a theoretical introduction to knowledge management and practical issues in its implementation, including the need for training in order to reap the benefits of document and knowledge management systems. Do Hyung Kim from Yoon & Yang followed up with risks and opportunities of new communication tools, with clients turning to an ever increasing array of social networking and messenger applications to interact with lawyers. In the ensuing discussion, the consensus of the panel and audience was that the identical issues were discussed when email became widespread. The session concluded with Yoshimichi Makiyama from Kitamura & Makiyama describing the process and challenges in implementing technology in a small office environment. The engaging discussion and participation of the audience showed that the use of IT in law firms remains an important topic for law firms in the 21st century.

Sustainability of Women in the Legal Profession

Carolyn Ann Knox (*Veirano Advogados, Brazil*)

The Women Business Lawyers Committee teamed up with the National Asian Pacific American Bar Association ('NAPABA') to present a panel focused on the 'Sustainability of Women in the Legal Profession', consistent with the Conference's theme of sustainability. Although the session title presented a rather daunting topic, the panel chose to look at the issue from a positive perspective and focused on what women lawyers can/should do to participate in their own success and the success of the women who follow them. The panel opened with a presentation of the hard 'facts', demonstrating that women are still at a disadvantage with regard to elevation to equity partner, participation in key firm committees including compensation and

executive committees, recognition of their role in business development activities and equality in pay. However, the panel quickly moved on to discuss personal experiences that led to success as founding partners, equity partner in a large law firm and the first female managing partner in an extremely traditional jurisdiction. The panel closed the session by providing their opinions as to how women can build successful careers in law.

Feedback from the audience:

'As I said then, it was without doubt the most interesting session (amongst a series of very interesting sessions) that I attended during the conference. I learnt a great deal which I can bring back to our office in London.'

'The fair treatment of women in the office is a serious issue and I found your presentation and the way it was treated at the meeting in Vancouver, head and shoulders above other sessions I have attended over the years (and thank you for the slides which are a great aide memoire when we come to talk about the issue here).'

Fossil Fuels to Asia – A Blessing from Canada or a Potential Nightmare?

Jason Kostyniuk (Bull, Housser & Tupper LLP, Canada)

The session was led by Jason Kostyniuk, Partner, Bull, Housser & Tupper LLP, who first reviewed Canadian fossil fuel resources and the proposed export projects for Oil/Bitumen, LNG and coal in British Columbia. The challenges to increase export capacity in British Columbia, including terminal upgrades, project development hurdles, industry sustainability and marine issues, were canvassed.

Capt Kevin Obermeyer of the Pacific Pilotage Authority explained the role pilots play in the safe navigation of ships on the west coast of Canada, and discussed a number of issues, from a marine pilotage perspective, relating to an increase in large vessel traffic in that area, due to an expected fossil fuel export boom. These issues included ship navigation and safety, pilot manning and training timelines, marine terminal review, risk assessments, and operational procedures.

Andrew Mayer of the Prince Rupert Port Authority reviewed the Port Authorities' legal mandate, jurisdiction and regulatory authority, and then discussed a number of issues, from a British Columbia port's perspective, relating

to the expected increase in tanker traffic on Canada's west coast due to fossil fuel exports, including port/terminal marine operations, security and emergency preparedness, First Nations consultation, collaboration with other port authorities, and the Prince Rupert Port Authority's preparations for growth.

Mr Kostyniuk then presented on the current anticipated measures, implemented by Transport Canada and others, designed to promote ship navigation safety and spill prevention in the coastal waters of British Columbia. He then explained Canada's spill preparedness, liability and compensation regimes, and canvassed proposed new measures to ensure Canada has a sustainable 'world class tanker safety system' to cope with the substantial increase in vessel traffic which would accompany any boom in fossil fuel exports from the British Columbia coast.

The Legal Challenges of Cloud Computing
Barunesh Chandra (August Legal, India)

The Legal Challenges of Cloud Computing (Joint Session – Technology and Communications | Legal Practice | Intellectual Property Committee conducted on 10 May 2014 under the aegis of the 24th Annual Meeting and Conference of the IPBA held in Vancouver from 8 to 11 May 2014. during the IPBA Annual Conference 2014).

As the demand for cloud computing services grows and as that segment of business expands rapidly across borders, lawyers are faced with new applications of existing laws as well as emerging new practices, regulatory guidance and (as in the case of Korea) new legislation. The session was primarily designed to examine developments from around the Asia-Pacific region with respect to legal issues arising out of cloud computing services viz. data ownership and data privacy and protection etc.

A wide range of perspectives (including those of the Regulator, in-house counsel and private legal practitioners) from various jurisdictions (including Korea, India, and Canada) were presented and as such the session was well attended.

Bradley J Freedman (Partner and Vancouver Regional Leader of the Information Technology Law Group at Borden Ladner Gervais LLP) kick started the discussions with a comprehensive presentation providing an overview of the business of cloud computing and the attendant legal

issues. Mr Freedman also discussed in detail the regulatory guidance available in connection with cloud computing services in Canada and the United States and touched upon the Australian, New Zealand, United Kingdom and the European Union regulations on the subject.

Barunesh Chandra (Partner, August Legal, India), who was also moderating the session, then spoke about the regulatory regime (or rather the lack of it) in India in respect to cloud computing services despite the stated objective of successive governments to make India a global leader in IT services.

Do Hyung Kim (Partner, Yoon & Yang LCC, South Korea) spoke next and gave a detailed presentation about the impending legislation in Korea specific to cloud computing and how it proposes to tackle the legal challenges arising out of the use and provision of cloud computing services. The proposed new legislation which is currently being debated in the Korean Legislative Assembly would perhaps make South Korea the only country in the world to have a dedicated law on the subject.

Bradley Weldon, (Senior Policy Analyst in the Office of the Information and Privacy Commissioner for British Columbia, Canada) was next and he provided very interesting insights from a Regulator's perspective about the evolving jurisprudence of data privacy and protection and specifically discussing the risks of storage of personal information outside the data owner's jurisdiction in light of the foreign laws such as the US Patriot Act.

Finally, Steven Howard (General Counsel-Asia Pacific, Sony Mobile Communication, Singapore), wrapped up the session with an insider's view of how he goes about identifying, assessing and mitigating risks while implementing a cloud computing system and the specific indemnities/representations and warranties that he would normally seek from the cloud service provider.

P3/PFI/PPP and Public Infrastructure **Fernando Hurtado de Mendoza** (*Rodrigo, Elías & Medrano Abogados, Peru*)

The 'P3/PFI/PPP and Public Infrastructure' session analysed the dynamics, socio-political impact and global evolution of public-private partnerships through experiences shared by panellists with practices in several jurisdictions. The proper allocation of risks, delivery of projects on time and strict surveillance of budgets are advantages brought by

PPP to projects under its auspice, the positive effects of which are on occasion thwarted by a lack of commitment from the public sector, inefficient planning and high coordination costs between partners. Challenges faced by PPP in the different countries under survey (Canada, France, Korea, Philippines, Spain, USA, Vietnam) reveal that socio-cultural environments influence the success or failure of PPP, a situation which the UNCITRAL is assessing in order to improve the model on an international scale.

The Asian-Canadian-Latin American Investment Triangle **José Cochingyan, III** (*Cochingyan & Peralta Law Offices, Philippines*)

With the Canadian perspective as an anchor, the session investigated complex cross border issues and political risks arising from in-bound and outbound investments cutting across Canada, Asia and Latin America. Both outbound Canadian investments and investments into Canada were discussed using the case study approach. The session was effectively a workshop with useful lessons imparted by the well-qualified cross border investment lawyers from three continents and two Canadian corporate counsel. The panel discussed, among other things, instability challenges, such as expropriation. It was concluded that regardless of contracts signed, one must always realise that governments will act based on what they consider to be practical or bend to the popular will in industries that are a large part of the Economy. In which case, one must always maintain a continuing dialogue with such governments. A corporate counsel suggested business solutions to address very difficult situations, such as proposing a joint venture with a state owned company, where one can align one's interest with the state or special purpose vehicles. Another panellist cautioned that cross border investors must keep a low profile and understand that success will put a client on the radar screen of the Government. Another corporate counsel noted that it is always important to be aware of what is significant to the state in an investment: look at the subject matter (for example: criminalised activity such as gambling), the size of the investment, the area of investment, such as resources. On the other hand, try to find out what will make the state back off. The corporate counsel urged lawyers to give practical advice: partly legal, partly cultural and partly historical.

It was also noted that in the case of smaller economies, honouring international obligations, in particular those

concerning the financial system, is crucial. On the other hand, one must keep in mind that in some emerging economies, investment laws are a work in progress and one must act accordingly. However, caution was warned against 'creative' solutions that can be illegal. The role of China as an investor was highlighted and how a happy marriage can be had with China as a source of both capital and low cost inputs and with the more economically mature jurisdictions as a source of sophisticated technology and management systems. Meanwhile, another panellist mentioned that when doing a joint venture in China, bear in mind that there are a lot of 'divorces' in China, and one must do a thorough due diligence of one's joint venture partner and always tailor one's strategy. In speaking about Chinese investments into other jurisdictions, a panellist underscored the importance of advising investors to comply with laws in the target jurisdiction and gave firm advice to be sensitive to local culture, advice that applies to all investors, regardless of origin. Finally, it was a surprise to the audience when they were informed of uncertainty injected into the Canadian investment climate by the vague definition of 'net benefit' to Canada and the increasing possibility of national security reviews.

Sustainability of the Wealth Management Industry

Michael Butler (*Finlaysons, Australia*)

The Session on 'SUSTAINABILITY OF THE WEALTH MANAGEMENT INDUSTRY', hosted by the Tax Law Committee, dealt with recent tax issues in the private banking industry.

The Session Moderator, Michael Butler (Finlaysons, Australia) commenced by summarising: (a) the history of Swiss banking secrecy; (b) the development of anstalts and stiftungen in Liechtenstein; (c) the recent efforts by the United States to locate undisclosed assets held by US citizens with Swiss banks, including UBS and Credit Suisse; (d) the January 2013 guilty plea to tax charges by Wegelin Bank in the US District Court; (e) the US Justice Department's offer in 2013 of tax amnesty to 300 Swiss banks; and (f) the February 2014 announcements by the G20 and the OECD of multilateral standards for automatic exchange of information between tax authorities. Michael also referred to the use of South Australian Perpetual Flow Through Trusts for international income and asset planning.

Following that introduction, panel members discussed the apparent substantial shift of attention and capital from Europe to Asia, especially to Singapore.

Otto-Hans Nowak (Borden Gardner Gervais, Canada) provided a comprehensive overview of the use of anstalts for high net worth individuals ('HNWIs') in global asset protection and estate planning. In particular, Otto-Hans examined: (a) the recent update to Article 26 of the OECD Model Tax Treaty re: information exchange (including examples of legitimate requests, as opposed to 'fishing expeditions'), (b) the large number of bilateral Tax Information Exchange Agreements ('TIEAs') signed by countries in the last two or three years, and (c) recent Canadian developments affecting asset protection planning, including the revocation of the five-year 'tax holiday' for new immigrants. Otto-Hans concluded by discussing his experience with wealth structuring in South-East Asia and China and the fact families are becoming more receptive to the need for holistic global estate planning.

Jan Kooi (Jan Kooi & Co, Korea) proposed an interesting case study involving an individual who was both a United States and German citizen, was living in the Netherlands, had just been divorced, and was looking for a means of protecting her wealth. The client did not wish to organise a US, UK or Channel Islands trust but wanted a structure in Asia or Switzerland. In particular, the client wished to ensure automatic passing of control to her children in case of death. The client was also concerned that the civil court in the Netherlands might agree with a claim by her ex-husband that he had been treated unfairly in the divorce settlement. Issues to be considered included: (a) withholding taxes; (b) whether it was possible to create a discretionary trust with de facto control (necessary for any decision to sell the structure) remaining with the settlor; (c) the enforceability of any court ruling in favour of the ex-husband; (d) the ability to pass control to the children on death; and (e) possible exposure to gift taxes when creating the trust. After reviewing a number of jurisdictions, Jan concluded Singapore potentially provided the client with the best outcomes.

The presentation by Mike Shikuma (Morrison & Foerster) focussed on issues facing Japanese HNWIs and the possible tax benefits of migrating to Singapore. Mike commenced by noting that Japanese income tax, gift tax and inheritance tax rates are all scheduled to rise in 2015, the scope of those taxes is expanding, and there is reduced domestic 'anonymity'. There has also been a recent increase in tax information sharing with other countries and foreign asset reporting requirements were introduced in 2013 for permanent resident taxpayers. That highlighted the benefits of emigrating given: (a) the

focus of Japanese business increasingly being offshore; (b) Japan not having a global income tax for non-resident Japanese nationals; and (c) no gift or inheritance tax being payable by non-resident nationals (except in the case of Japan-situs assets or if less than five years had passed since the taxpayer ceased to be Japanese resident). Mike also referred to the fact that Singapore had become a focal point for Japan businesses expanding in South-East Asia.

Todd Beutler (DLA Piper, Hong Kong) explained that Singapore and Hong Kong have become important centres of wealth management and are predicted to overtake Switzerland in the near future. Hong Kong is seen as the 'gateway' to China and Singapore as the gateway to South-East and Greater Asia as a result of their common law regimes, their respect for the Rule of Law, and their revised and modernised trust laws. Hong Kong had earlier that day (9 May 2014) reached consensus with the US on the substance of an Inter-Governmental Agreement ('IGA') for FATCA purposes. Singapore had reached a similar consensus with the US on 5 May 2014. China had also been having discussions with the US, and while there probably weren't too many bank accounts in China held by US citizens, there might well be a number of accounts in the US held by Chinese nationals. China has its own FBAR (Foreign Bank Account Report) requirements: Circular 642 (January 2014) requires PRC residents to report foreign financial assets and liabilities, and business/financial transactions with non-PRC parties. In addition, Circular 698 imposes an obligation to report, and in some cases pay tax on, indirect transfers of PRC enterprises. This is aimed at transactions where the offshore holding company lacks commercial substance.

Although the Session ran over time (potentially compromising the ability of the speakers and audience to attend the IPBA Gala Dinner), it was unanimously agreed this area will become extremely important for legal advisers in the Asia Pacific region. Substantial wealth in the Asia Pacific region is controlled by families and private businesses, and there is an important role for lawyers to assist in the protection, care and management of those funds and assets.

New Tools for the Non-Techie Lawyer **Mark Stinson** (*Fasken Martineau DuMoulin LLP, Canada*)

The session on 'NEW TOOLS FOR THE NON-TECHIE LAWYER' highlighted four young and dynamic panel members who provided practical advice on how to use modern

technology to increase efficiency and effectiveness in lawyers' practices. Attendees enjoyed the session and interacted with the panel as well as asked a variety of questions. The session was moderated by Mark Stinson of Fasken Martineau Dumoulin LLP (Canada). Myles Seto of Deacons (Hong Kong and Shanghai) described some of the firm-wide tools prevalent in law firms today in many countries relating to matter management and matter centricity including document management, communications, time management and invoicing software which centralises information and facilitates the sharing of information among lawyers in a law firm. Tatsu Nakayama of Miyake & Yamazaki (Tokyo) gave a wide-ranging presentation entitled 'Are New Tools Helping Us or Killing Us?' which described the pros and cons of new tools in both daily legal work (smart phones, SMS, apps, PowerPoint/Excel, Dropbox) and business development (Facebook, Twitter, Weblog, LINE and LinkedIn). Tatsu pointed out that some tools can be addictive and time-consuming and we must make sure that we use them and not be used by them. Sheryl Bartolome of Cochingyan and Peralta Law Offices (Manila) gave a presentation on tools available in smartphones including mobile dockets, activity and expense reports, and how to access interesting legal reports/summaries such as court rules and legal news. Amit Tambe of Trilegal (Mumbai) focused on social media and tools such as LinkedIn, Blog, Facebook and Twitter. The presentation included sage advice on the advantages of social media but also outlined that these tools have to be used carefully, as an ill-advised impulsive communication can go viral.

Aviation Disputes – Contractual and Damages Claims in and Outside of an Aircraft **Francis Xavier SC** (*Rajah & Tann, Singapore*)

The session was moderated by Francis Xavier SC (Rajah & Tann, Singapore) and provided an aviation update on key developments in selected jurisdictions across the globe. Todd Rosencrans (Perkins Coie, USA) outlined the US perspective on damage claims, especially in regard to emotional damages to uninjured plaintiffs in aviation accidents. Michael Soltynski (Borden Ladner Gervais, Canada) provided a broad perspective on present day aviation claims in Canada, focusing in particular on the Courts' perspective of damages in aviation claims. Finally, Ravi Nath (Rajinder Narain & Co, India) shared the Indian perspective on damages and elaborated on procedural and tactical challenges faced by litigants in the Indian subcontinent.

Characterizing Legal Privileges in Corporate Internal Investigations: A Muddling Exercise

A company's ability to resist disclosure of sensitive communications by claiming legal privilege impacts immensely on the costs and outcomes of compliance audits and regulatory investigations. This article examines the trend in judicial scrutiny of assertions of legal privilege in respect of routine compliance programmes in light of recent U.S. decisions.

The issue of characterising the nature of compliance investigations in the application of legal professional privilege (or legal privilege) has recently taken a restrictive turn, rendering privilege harder for litigants to assert in respect of investigative materials in the U.S. The U.S. District Court for the District of Columbia rejected claims that documents relating to an internal investigation conducted by defendant Kellogg Brown & Root Services, Inc. ("KBR") were legally privileged and could be withheld from discovery on March 6, 2014 in *U.S. ex. rel. Harry Barko v. Halliburton Company, et. al.*¹ This was notwithstanding the fact that KBR's in-house legal department was involved at the start and conclusion of the internal investigation.²

Compliance audits and investigations can be tremendously costly for many companies, especially those with multi-national business interests and/or those operating in industries that are subject to intense regulation.³ Often many teams of in-house and external lawyers would be involved to ensure the proper operation of compliance programmes. Protecting communications and documents from disclosure in an investigation is vital to whether or not a company can manage successfully its legal, regulatory and reputational risks. This is particularly so given the fact that communications, such as emails and instant messages, can be easily leaked, whether inadvertently or deliberately.

In common law traditions, legal privilege is a substantive ground to resist compulsory disclosures of evidence in



litigation and other contentious legal proceedings. It provides individuals and companies a high degree of control over their investigations and any potential collateral civil litigation. The overarching policy rationale of legal privilege is to encourage the seeking of legal advice on a confidential basis. The *Barko* decision not only impacts on companies subject to statutory mandates to implement compliance programmes and internal controls,⁴ but also those voluntarily implementing such programmes and controls. Voluntary establishment of compliance programmes attracts mitigatory treatment under U.S. prosecution and sentencing regimes, including the enforcement of the *Foreign Corrupt Practices Act*.⁵

This article reviews *Barko* and analyses under a comparative policy lens how the threshold issue of characterization should be resolved, not only in the U.S. but also in jurisdictions that recognize legal privilege.⁶ The article will conclude by suggesting tactics that corporations could adopt to protect their rights to legal privilege in respect of internal investigation communications and documents in light of the case law development.

Background and rulings of the *Barko* Case

The Plaintiff-Relator Harry *Barko* originally moved to compel KBR, Halliburton Company and other contractors (together, the "Defendants") to disclose documents created internally by KBR between 2004 and 2006 during a Code of Business Conduct ("COBC") investigation ("COBC Documents").⁷ The investigation correlated with Mr. *Barko*'s underlying complaint,⁸ in which he alleged that the Defendants over-charged the U.S. Government under certain war-zone construction agreements.⁹ The Defendants resisted discovery of the COBC Documents by relying on the attorney-client privilege and the work-product doctrine. They argued respectively that the investigation involved lawyers and its objective was to obtain legal advice,¹⁰ and that litigation was anticipated as KBR was addressing numerous reports of similar contractual violations in the course of the investigation.¹¹

KBR and other government contractors are required by the U.S. Federal Acquisition Regulations to implement and manage an "ongoing business ethics awareness and compliance programme" and an "internal control system."¹² Under the compliance programme administered by KBR, a breach of the COBC could be reported to KBR's legal team or conveyed as "a tip to a dedicated P.O. Box, email address, or third-party operated hotline."¹³ This report would be delivered to the COBC Director,¹⁴ who is a lawyer authorized to issue the imprimatur for investigations. Witness interviews and document reviews would be conducted by investigators, who are supervised by the COBC Director but are not themselves lawyers.¹⁵ The investigation file would be transmitted to the internal legal team when the investigation concludes. KBR would then decide whether or not to report the COBC breach to regulators, or take some other action.

The COBC Documents were found by the Court *in camera* to evidence kickbacks, bid riggings and other kinds of corruption by certain government contractors, and were ruled not legally privileged.¹⁶ The material legal issue regarding the Defendants' attorney-client privilege claim

was whether the COBC Documents were created for the purpose of obtaining legal advice, or if they were purely factual reports arising out of regular corporate functions. Whereas the former case would attract privilege, the latter would not. The Court decided on whether "the communication would not have been made 'but for' the fact that legal advice was sought",¹⁷ and ruled that the COBC Documents failed this "but for" test.

It was held that regulatory requirements to investigate allegations of fraud applied to virtually all government contractors, and KBR's compliance programme "merely implement[ed]" them.¹⁸ As such, whether or not legal advice was sought, an investigation would have been instituted in the "ordinary course of business."¹⁹ Furthermore, the investigators were not lawyers and witnesses "certainly would not have been able to infer the legal nature of the inquiry."²⁰ Witnesses were only told about the adverse business consequences should they breach confidentiality when they were interviewed, and were not informed that the aim of the interview was to obtain legal advice.²¹ The rulings by the U.S. Supreme Court in *Upjohn Co. v. U.S.* do not apply to the current case,²² as the investigation commenced without the consultation of external lawyers.²³

A document containing "mental impressions, conclusions, opinions, or legal theories" of a lawyer, or an employee or agent of a lawyer,²⁴ attracts privilege under the work-product doctrine, if it can "fairly be said to have been prepared or obtained because of the prospect of litigation".²⁵ This "because of" test requires more than a remote possibility of litigation;²⁶ it demands both a subjective belief "that litigation was a real possibility", as well as an objectively reasonable basis for that belief.²⁷ Since KBR's investigation was instituted before any relevant litigation was filed and before Mr. *Barko*'s complaint was unsealed, the Court found that these requirements were unsatisfied.

The fact that KBR's investigation was conducted "pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice" was pivotal to the judgment.²⁸ Remarkably, the Court all but dismissed the evidence that witness statements and reports generated during the investigation were labeled "attorney-client privilege" and kept highly confidential.²⁹ Astoundingly, the Court was also unconvinced by the facts that KBR was at the time facing over 1,000 other reports of similar contractual breaches, and that the investigation was requested by the

COBC Director, who is a lawyer. At the conclusion of the investigation, the investigation report was submitted to the General Counsel of KBR for review.³⁰ Notwithstanding these facts, the Court held that no request for the provision of legal advice could be evidenced because the documents themselves did not expressly contain such a request. On March 11, 2014, the Court upheld its prior ruling and denied KBR's motion for interlocutory appeal and its request to stay the disclosure order pending appeal. On March 14, 2014, KBR filed an emergency motion to stay the March 6 ruling, a petition for writ of mandamus, and a motion to seal. An oral hearing was held on May 7, 2014. The outcomes of KBR's latest motions are pending.³¹

Implications of the *Barko* Decision

Barko revisits familiar territory insofar as the well-established legal principles and tests for the applicability of legal privilege are concerned.³² The decision follows *U.S. v. ISS Marine Services, Inc.*,³³ a decision by the D.C. District Court that has factual similarities.³⁴ The Court in *ISS Marine* held that an investigation report, which was drafted by an internal auditor (who was not a lawyer), was subject to neither the attorney-client privilege nor the work-product doctrine. Although external lawyers were consulted at the outset and the conclusion of the underlying investigation, the Court deemed this as only a limited interaction. The investigation report was labeled "confidential" but not "privileged." Moreover, the audit was conducted to discharge a contractual obligation to refund overpayments. The investigation was found by the Court to have been conducted for a business purpose, which could not sustain a claim of attorney-client privilege.³⁵ Equally, the Court held that the work-product doctrine did not apply. *ISS Marine* would have investigated the matter in any event, whether litigation was anticipated or not.³⁶ The report was created primarily for a business purpose when there was no imminent litigation pending.

Essentially, the judicial view adopted in the *Barko* and *ISS Marine* decisions is that regulatory and compliance-driven investigations are "part of the ordinary course of business", and do not intuitively invoke the application of legal privileges, even though lawyers may be retained. If legal privileges were to apply in this situation, refuting evidence must be tendered to demonstrate that communications and documents were generated in the course of an investigation in order to obtain legal advice and/or were created in anticipation of litigation.³⁷ Companies should take heed, however, because the standard required of such refuting evidence is high in light of the *Barko* decision.

The COBC Documents that Mr. Barko sought to obtain and the other 1,000-plus complaints related to comparable issues. Given the severity and quantity of all the alleged violations, and their associated legal risks, there ought to have been sufficient reasons to support a reasonable inference that litigation could be anticipated, as the Defendants argued. In fact, the *Barko* litigation arose out of one such allegation. Thus, a claim of litigation privilege should have been found. Notwithstanding these facts, the *Barko* Court took the same literalist approach in denying both types of legal privileges, as discussed above. Indeed, the Court held that the COBC Documents failed to disclose an express written request for legal advice, and the COBC Documents could not have been created for obtaining legal advice. Against the Defendants' case was also the fact that KBR assessed and took steps in respect of the 1,000-plus allegations of war-zone contract breaches, albeit merely in a mechanical fashion.³⁸ Nonetheless, the *Barko* Court noted that the non-legal nature of regulatory compliance is not "a close question", as it could be overcome by robust evidence to the contrary.³⁹

In the context of regulatory and compliance-driven internal investigations, the literalist approach adopted by the *Barko* Court was unduly restrictive. In this day and age of bellicose regulatory enforcement, these investigations always necessitate legal advice. Legal privileges could have been justifiably accepted by the Court while maintaining coherence with legal precedent, given the factual matrix of *Barko*. The Supreme Court in *Upjohn* recognized that there is a "vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law, particularly since compliance with the law in this area is hardly an instinctive matter."⁴⁰ An overly stringent approach to compliance would be sophistic and deleterious. It results in disincentives (or at least the lack of incentives) for companies to establish and capitalize on effective compliance policies and programmes; to conduct internal investigations; and to take preemptive measures, especially where it is infeasible to retain more than a couple of lawyers.⁴¹

Comparative Policy Analysis

The "sufficiency problem" common to both the Defendants' attorney-client privilege and work-product doctrine claims is an ongoing conundrum for in-house counsel work-product and internal investigative communications. That is, how does the Court determine the sufficiency of purpose (i.e., to obtain legal advice or prepare for litigation) for the

creation of communications? After all, internal corporate communications are rife with mixed legal and non-legal purposes and the finding of privilege is highly fact-sensitive. It is comprehensible that, without involvement of external counsel and other clear signals of legal purpose, the Courts can be hesitant in finding an attorney-client relationship, and in accepting a claim of legal privilege in internal investigations. The question then is whether such a position is defensible as a matter of policy.

Differentiating between legal and non-legal purposes is central to the legal privilege analysis. Outside of the litigation context, distinguishing between legal and non-legal advice is rife with analytical difficulties. Certainly, companies employ in-house attorneys to enhance their access to legal advice and better manage their legal costs internally, and Anglo-American law recognizes the value of this by inter alia permitting in-house legal privilege.⁴² Legal privilege is fiercely safeguarded in the legal system, although the Courts must in each case still resolve the tension between ensuring full and frank disclosures between opponents and upholding an individual's right to argue one's best case. The underlying principles of legal privilege were established long before the proliferation of regulations and the expansion of law enforcement agencies,⁴³ although recent cases, like *Upjohn* and *ISS Marine*, have tussled to keep the applications of legal privilege relevant to contemporary legal and regulatory frameworks.

Arguably, a narrow construction of the legal versus non-legal purpose dichotomy, which could easily exclude privilege claims for internal investigative materials, threaten the efficacy of legal privilege in achieving its policy to allow sufficient preparation of one's case. Yet, there may be an equally valid counter-argument in subordinating legal privilege as a matter of policy to "out" insider information, which an opponent would otherwise find difficult to obtain in enforcing their rights. This would, in turn, enable efficient administration of justice (e.g., in whistleblower cases) where a regulatory element exists, given the public interests promoted by regulations. However, this would incentivize civil parties to free ride the compliance costs borne by companies in their efforts to protect their legal positions. In addition, civil cases predominantly concern the vindication of private rights, and a litigant's interests will seldom align truly with public interests. So, a more nuanced rationale is needed.

Legal liabilities often arise from investigations that

appear routine and innocuous in the beginning. The *Barko* decision, taken at its most extreme, creates much uncertainty ex post for companies and their compliance departments committing to investigations, as there is a judicial presumption that regulatory compliance is not a legal purpose to overcome. In any case, if the public policy function of maximum discovery were paramount, civil law jurisdictions without discovery mechanisms should be highly unviable. But, this is not the case as evidenced by the numerous functional civil law systems around the world.⁴⁴

Anglo-American style discovery is not available typically in civil law jurisdictions, and issues relating to legal privilege are not relevant to civilian systems. Legal privilege is in a sense necessitated by the safeguarding of the administration of justice in common law jurisdictions, where compulsory disclosures are permitted in evidentiary discovery processes.⁴⁵ For example, there is no concept of legal privilege in the People's Republic of China. Privileged communications made overseas are not recognized and could be compelled for disclosure in proceedings in China.⁴⁶ Nevertheless, attorney-client confidentiality is recognized, and lawyers in private practice have a duty to keep client matters secret. Separate but analogous rules apply to in-house legal and compliance personnel, whether qualified as a lawyer and not. Yet, it is unclear to what extent judicial and administrative authorities would respect this kind of confidentiality, where client materials are sought for disclosure especially when the State is a party to the proceedings. Comparable positions exist in jurisdictions with socialist legal traditions.⁴⁷

Nevertheless, given the prevalence of cross-border transactions and international businesses involving common law jurisdictions, companies and compliance departments, wherever they are based, cannot really escape from the specters of discovery and legal privilege. Indeed, certain jurisdictions (e.g., Australia and New Zealand) would recognize legal privilege in respect of attorney-client communications made in an overseas jurisdiction (whether common law or civilian), if parties sought to compel their disclosure in proceedings within those jurisdictions.⁴⁸ Moreover, due to the similarities between inquisitorial litigation proceedings of civilian litigation and regulatory investigations in common law jurisdictions, the characterization issue examined in this article has practical relevance as a matter of comparative law.

To round off the comparative law discussion, besides the issue of characterizing the purpose and context in which

communications were made, two other issues also require regular consideration in compliance investigations: (a) whether communications with in-house counsel would attract the same kind of privilege as those with external lawyers in a particular jurisdiction; and (b) whether the jurisdiction recognizes selective waivers (i.e., disclosures to a regulatory agency do not constitute a waiver of privilege in respect of subsequent litigation).⁴⁹ These issues require thorough analysis and are beyond the scope of this article, although, suffice to say; their existence enhances the prospect of legal privilege claims in the regulatory context in a particular jurisdiction. The characterization issue is only part of the picture, albeit the initial/threshold part, which ought to be considered by cross-border businesses in devising proper compliance and regulatory responses.

It is submitted that a bright-line rule is needed to encourage internal management of legal risks by companies in conducting compliance investigations, minimizing legal uncertainties about documentary disclosures in preparing one's case. Perhaps, the rule could be enshrined in legislation or other authoritative instruments. It should be clear and simple in helping to establish *a priori* entitlements to legal privilege in regulatory processes to avoid any false sense of confidence in subsequent assertions of privilege. Nonetheless, discovery is a key feature of common law systems, and there is great public interest in encouraging companies to cooperate with regulators. So, legal privilege cannot be diminished.

Thus, for example, if companies conducting an internal investigation retain external counsel who then coordinates and conducts the investigation, legal privilege should *prima facie* attach to communications created therefrom—subject to all other requisite elements of privilege being established. Some other overtly ascertainable factor could be used as well. This is a rebuttable presumption, but the party seeking disclosure has the evidentiary onus to prove the case otherwise. This rule should be supplemented by the adoption of the “dominant purpose” test in determining legal purpose for both attorney-client privilege and the work-product doctrine. A “predominant purpose” test has a causally more flexible standard to establish than the “but for” and “because of” tests, and is adopted in numerous jurisdictions already.⁵⁰

Practical Compliance Lessons

Whilst the development of a suitable legal standard might

take years at the judicial level, there are important “take-aways” from the *Barko* decision.⁵¹ Chiefly, the roles and responsibilities of lawyers in internal investigations (whether retained internally or externally) must be meaningful and substantial. At the outset, internal lawyers should be instructed to advise on the need for and extent of legal representation in respect of matters under investigation. Delicate parts of the investigation should be handled by lawyers, and non-lawyer investigators should be supervised generally by lawyers. External experts and investigators should be retained and supervised by lawyers.

Implementation of the standard investigatory practices is more important than ever, and compliance processes should be audited under stress test scenarios and practiced in “fire drills”. The provision of the “Upjohn warning” and the “Upjohn letter” (both named after the *Upjohn* decision) has become emblematic practice in investigations in the U.S. to protect the company's interest in legal privilege vis-à-vis potential third parties, including its employees who may be a witness or a target of an investigation. In *Upjohn*, the Supreme Court held that communications between the in-house counsel and employees of a company could attract legal privilege, but the company controls the privilege as the client-beneficiary of the communications.⁵² As such, Upjohn warnings should be administered to witnesses when they are interviewed by lawyers, informing them that the content of their interviews are subject to legal privilege and the duty of confidentiality, which are both held by and owed to the company.

Likewise, the provision of Upjohn letters is critical to preserving a company's legal privilege during investigations. It does so by reducing to writing the investigative purposes (e.g., to facilitate the provision of legal advice and the creation of litigation work product, and to maintain confidentiality), and by providing relevant instructions to and conferring authority on the investigators in respect of such purposes. Upjohn letters should be sent to non-lawyer investigators to empower them to act under the supervision of a lawyer, and to shroud their work product with legal privilege.⁵³ Lawyers should be assigned to monitor investigative processes and act as gatekeepers for key investigative decisions (e.g., timeline planning, witness selection, report drafting and review),⁵⁴ regardless of whether the relevant function with overall responsibilities for investigating the matter is audit, compliance or legal.

It is important to have written guidance to delineate when lawyers must be instructed and when it would simply be a good idea. Similarly, details about when litigation or enforcement proceedings could be reasonably anticipated should be set out in policies, as should events that require urgent escalation to the internal legal team and General Counsel. It may be helpful to track privileged and confidential documents in dedicated logs. Reports and other documentation generated by non-lawyers should expressly solicit legal advice in appropriate situations. Witness interviews should not be recorded in verbatim, but should include observations on demeanor and assessment of credibility. Marking documents with "subject to attorney-client privilege and the work-product doctrine" is crucial, but should not be done blindly, as over-usage and potential abuse of these markings attract judicial wariness. Overall, properly documenting the investigation is critical in the event that legal privilege is claimed but challenged subsequently.

Conclusion

The *Barko* decision illustrates the current level of judicial discomfort in respect of allowing legal privilege to apply to documents generated in connection with regulatory and compliance-driven internal investigations, in the U.S. Although it is merely a District Court judgment, it has attracted much criticism from the U.S. legal community and the Association of Corporate Counsel ("ACC"),⁵⁵ as it represents a growing trend that could prejudice many compliance programmes. In fact, the ACC was one of five *amici curiae* who filed briefs to assist the Court in deciding on the latest emergency motion in the *Barko* proceedings. For all the more reason, the decision should be noted internationally. While the legal community awaits the outcome of the *Barko* appeal, companies should revisit promptly their compliance protocols and devise assiduous tactics to defend privileged communications.

International regulatory convergence in respect of this issue is not impossible, although admittedly difficult to agree upon, given how different legal traditions posit evidentiary disclosure rules. What is needed is a bright-line rule (one form has been suggested in this article) to help Courts make consistent and justifiable decisions about the primary purpose of investigative

documents. Not an overly ambitious goal, if international guidelines such as the *Rules on the Taking of Evidence in International Arbitration* (2010) could offer any guidance. As Courts around the common law world are addressing this issue, it is an opportune time to conduct transnational discussions across legal communities to establish a consensus in addressing legal privilege in compliance investigations. This would facilitate multi-jurisdictional compliance strategies on the one hand, and reduction of regulatory arbitrage on the other.

Nonetheless, if the principles of *Barko* were followed in subsequent cases in the U.S. or in other jurisdictions, legal risks and costs of internal investigations could be exacerbated by heightened risks of compulsory disclosure of investigative discoveries. *Barko* would also provide a ground of attack for future litigants seeking discovery where the opponent is subject to regulatory duties to implement compliance programmes. Although practical processes have been highlighted above in managing such risks, the resulting trend would be disheartening for compliant corporates, who may wonder why they must keep a dog and bark themselves.

Outline of Legal Privileges in a Selection of Asia Pacific Jurisdictions ⁵⁶		
Jurisdictions	Legal Privilege	In-house Counsel
Australia	Yes#	Yes^
China, The People's Republic of China	No	No
India	Yes	No
Indonesia	Yes	Yes
Malaysia	Yes	No
New Zealand	Yes#	Yes^
Philippines	Yes	Yes
South Korea	Yes	Yes
Singapore	Yes#	Yes^
Taiwan	Yes	Yes
Thailand	Yes	Yes^
Vietnam	No	No

Denotes that the jurisdiction follows the Anglo-American model of legal privilege.

^ Denotes that the legal privilege applicable in the jurisdiction extends to foreign counsel (i.e., without license to practice local laws).

Notes:

- 1 No. 1:05-CV-1276 (D.D.C. Mar. 6, 2014) ("Mar. 6 Opinion").
- 2 KBR Defendants' Opposition to Relator's Motion to Compel at 4-5, *U.S. ex. rel. Harry Barko v. Halliburton Company, et. al.*, No. 1:05-CV-1276 (D.D.C. Mar. 6, 2014).
- 3 See, e.g., *Samuel Rubinfeld, Wal-Mart Forecasts More Than \$200M in FCPA Costs*, W.L.J. (Feb. 21, 2014).
- 4 See, e.g., *Sarbanes-Oxley Act Pub.L. §§107-204* (2002).
- 5 15 US Code §78dd-1. See D.O.J., *United States Attorneys' Manual* (2008) §§9-28.710 & 9-28.800; U.S. Sentencing Commission, *Guidelines Manual* (2013) §8C2.5(f).
- 6 See Michael B. Mukasey and Andrew J. Ceresney, *Attorney-Client Privilege and Issues for Corporate Counsel*, 246(97) N.Y.L.J. 3 (2013).
- 7 See Andrew M. Levine, Andy Y. Soh and Sebastian Ko, *U.S. District Court Limits Privilege Protections in Compliance Investigations*, 5(9) FCPA Update (Apr. 29, 2014).
- 8 The complaint was filed under the whistleblower provisions of *False Claims Act* 31 U.S.C. §§3729-3733 (2012).
- 9 Amended Complaint, *U.S. ex. rel. Harry Barko v. Halliburton Company, et. al.*, No. 1:05-CV-1276 (D.D.C. Mar. 6, 2014).
- 10 See *U.S. v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950).
- 11 Reply in Support of Plaintiff-Relator's Motion to Compel at 13-16 & 24, *U.S. ex. rel. Harry Barko v. Halliburton Company, et. al.*, No. 1:05-CV-1276 (D.D.C. Mar. 6, 2014).
- 12 48 C.F.R. §52.203-13 (2010). The regulations confirm a contractor's right to legal privilege.
- 13 Mar. 6 Opinion at 3.
- 14 KBR Defendants' Opposition to Relator's Motion to Compel, *supra* note at 2.
- 15 *Id.* at 4-5.
- 16 Mar. 6 Opinion at 2.
- 17 *Id.* at 6.
- 18 *Id.*
- 19 *Id.* at 8.
- 20 *Id.*
- 21 *Id.* at 7.
- 22 449 U.S. 383 (1981).
- 23 Mar. 6 Opinion at 5-6.
- 24 See Dennis J. Block and Nancy E. Barton, *Internal Corporate Investigations* 25-27 (Barry F. McNeil and Brad D. Brian eds., 3rd ed. 2007).
- 25 See, e.g., *U.S. v. Aldman*, 68 F.3d 1495, 1500 (2d Cir. 1995).
- 26 See Block and Barton, *supra* note at 48.
- 27 Mar. 6 Opinion at 7.
- 28 *Id.* at 5. This point was re-emphasized in Mar. 11 Opinion at 4.
- 29 KBR Defendants' Opposition to Relator's Motion to Compel, *supra* note at 4-5.
- 30 Mar. 6 Opinion at 6-7. See Mar. 11 Opinion at 3-4.
- 31 *U.S. ex. rel. Harry Barko v. Halliburton Company, et. al.*, No. 1:05-CV-1276 (D.D.C. Mar. 11, 2014) ("Mar. 11 Opinion").
- 32 See Levine, *et. al.*, *supra* note.
- 33 905 F. Supp. 2d 121 (D.D.C. 2012).
- 34 See Levine, *et. al.*, *supra* note.
- 35 *Id.* at 127-128.
- 36 *Id.* at 136-138.
- 37 See also *Allied Irish Banks plc. v. Bank of America, N.A., et. al.*, 252 F.R.D. 163, 171 (S.D.N.Y. 2008). The case concerned a rogue trading investigation and the purpose of investigative materials uncovered during a routine external audit.
- 38 Reply in Support of Plaintiff-Relator's Motion to Compel, *supra* note at 13-16.
- 39 Mar. 11 Opinion at 3.
- 40 449 U.S. 383, 392 (1981).
- 41 *Cf. In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d 789 (E.D. La. 2007).
- 42 See Block and Barton, *supra* note at 46-49.
- 43 *Id.*
- 44 See John H. Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd ed. 2007).
- 45 See Block and Barton, *supra* note at 46-49.
- 46 See Norton Rose, *Disclosure and Privilege in Asia Pacific* (2010) at <http://www.nortonrosefulbright.com/files/disclosure-and-privilege-guidepdf-28544.pdf>.
- 47 See Appendix: Outline of Legal Privilege in a Selection of Asia Pacific Jurisdictions.
- 48 See The Law Society of New South Wales, *The Practitioner's Guide to Civil Litigation* (3rd ed., 2010); Andrew Beck, *Principles of Civil Litigation* (3rd ed., 2012).
- 49 See, e.g., *In re Pacific Pictures Corp.* 2012 WL 1640627 (9th Cir. 2012).
- 50 *In re County of Erie*, 473 F.3d 413 (2d Cir. 2007), the Second Circuit applied the "predominant purpose" test. Virtually all Australian jurisdictions adopt this test. See The Law Society of New South Wales, *supra* note.
- 51 See Levine, *et. al.*, *supra* note.
- 52 449 U.S. 383, 390-391 (1981).
- 53 *Id.*
- 54 See *U.S. v. ISS Marine Services, Inc.*, 905 F. Supp. 2d 121, 127 & 138 (D.D.C. 2012).
- 55 See, e.g., Andrew Ramonas, *Whistleblower Ruling Raises Alarm Among Corporate Counsel*, *The National Law Journal* (Mar. 31, 2014).
- 56 See Norton Rose, *supra* note.

IPBA Best Paper Prize

The IPBA Best Paper Prize competition is open to all delegates at each IPBA Annual General Meeting & Conference. Submitted papers are reviewed by a panel of past IPBA presidents. The winner is ceremoniously presented with a certificate at the conference, and the winning paper is published in the IPBA Journal.



Sebastian Ko
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An associate in Debevoise & Plimpton LLP (Hong Kong office), admitted to practice in New York and in Hong Kong (non-practising). His practice focuses on high-value, complex and multi-jurisdictional commercial litigation and arbitration, and on internal investigation and regulatory enforcement matters.

Interview with the Honourable Robert J. Bauman, Chief Justice of the British Columbia Court of Appeal

On 10 May 2014, Ms Maxine Chiang, the Chair of the Publications Committee of the IPBA, had the honour of interviewing the Honourable Robert J. Bauman, Chief Justice of the British Columbia Court of Appeal, for the *IPBA Journal*. The following is an excerpt of that interview.



Mr Robert J. Bauman

Chief Justice Robert J. Bauman was appointed as a judge of the Supreme Court of British Columbia in 1996 and he was elevated to the Court of Appeal in 2008. He completed a Bachelor of Arts from the University of Western Ontario in 1971 and a Bachelor of Laws with Honours from the University of Toronto in 1974, graduating second in his class. Prior to his appointment to the bench, the Chief Justice practised law for many years, gaining a reputation for excellence in administrative and municipal law. He has been a member of the Provincial Attorney General Rules Committee, Chair of the Supreme Court Civil Law Committee, Chair of the CBA Municipal Law Section and a panellist at Continuing Legal Education conferences. Many individuals, both jurists and non-jurists, have described Chief Justice Bauman as having an outstanding mind and an unwavering sense of fairness and compassion.

1. **We know the Supreme Court of Canada struck down the anti-prostitution law last year and that decision caused a great deal of concern in Canadian society. What factors do you think judges should take into consideration when rendering a judgment? Should they consider public opinion?**

When we make decisions, we think about their impact. However, judges take an oath to decide cases in accordance with the law and not public

opinion. Thus, if the law directs a certain decision, the fact that a segment of the public will be upset with the decision is not a reason to avoid making that decision. We would not be honouring our oath if we decided cases based on how the public might react to the result. Thus, the prostitution case required the Supreme Court of Canada to consider the provisions of the Criminal Code touching on prostitution. Prostitution itself, of course, is not illegal. It is the side-effects of prostitution, such as the common

bawdy house, the living off the avails of prostitution, communicating for the purposes of prostitution that were struck down. However, they were struck down not at the whim of the judges hearing the case but because the Charter of Rights and Freedoms were infringed by those provisions. Moreover, it was found that those provisions breached sex workers' rights to security of the person under Section 7 of the Charter of Rights and Freedoms.

Yes, it was controversial, but it was also hailed in many other quarters as an appropriate decision. Judges have to make controversial decisions and that is why their independence, impartiality and their security of tenure is such an important fact. Otherwise, they would not be able to make those courageous decisions that are in accordance with the law.

I understand the controversy since judges are deciding issues of significant public policy importance in Canada. Many argue that judges, who are not elected, are not the appropriate people to be making these decisions. However, the fact is the law now requires us to be making those decisions. Interestingly, in a number of cases, Parliament has chosen not to make those decisions and instead has relied on judges to do so. It is an interesting exercise in the division of powers in our democracy between the executive, legislative and judicial branches of government.

2. What do you think about judicial specialisation as opposed to a justice with very broad areas of competence?

It is really a difficult debate to resolve. The public and the profession expect that when they have a specialised problem, the person deciding it will have pretty strong familiarity with the area of law that they are engaged in. Insolvency lawyers want a judge who is experienced in insolvency matters. That desire for specialisation in the public's mind, or at least in the practitioner's minds, clashes against reality since most judges love the fact that they have a generalised practice of law. In fact, many judges are attracted to the fact that they get a chance to hear cases from all areas of law, become experienced in those areas, learn in those areas, and have a variety of cases to adjudicate. Thus, there is a competing set of values there.

We try to ensure that our courts have people of all various legal strengths on the court so that we have the variety of strengths necessary.

3. Currently, there seems to be a greater demand for the use of alternative dispute resolution ('ADR'). What is your opinion on this emerging trend and what issues do you foresee?

In Canada and in British Columbia, the trend to alternative dispute resolution in complex commercial matters is clearly evident and it has been evident for the last 20 or 25 years. The desire of sophisticated commercial entities to resolve their disputes outside the courtroom, privately, in what they may think is a more efficient fashion, is certainly understandable. As well, alternative dispute resolution is being seen in areas of family law and in the area of small commercial transactions. It is an understandable trend, since the formal court process can be time-consuming and expensive and perhaps it is not always necessary to engage that kind of sophisticated dispute resolution infrastructure when you are dealing with certain kinds of disputes that do not call for it. Thus, as an alternative to the court process, I understand the reasons why it has gained popularity.

However, ADR does raise questions. Is it really as efficient as it is claimed to be? Is it that much more efficient than the court process? If it is, then we have to look at improving the court process to match those efficiencies. In addition, by virtue of the fact that disputes of some complexity are being decided privately, are we losing the opportunity to develop the law in the public court process? Of course, one of the primary purposes of the court process is to develop the civil law precedent so that our community and those who work in our community understand what the result will be of certain conduct that they undertake. If all disputes were decided privately and secretly then we lose the opportunity to develop the law. That is a concern.

There is a role for ADR. It is an efficient tool to use in resolving certain kinds of disputes. But as a judge, I have concerns about whether its popularity reflects the fact that our institutions, the courts – are not viable as a form of dispute resolution. To the extent that that may be so, I am very concerned.

At the same time, in British Columbia, the province is pioneering a civil dispute resolution tribunal which will not be made up of judges, will discourage the use of lawyers and will engage online techniques to resolve disputes. I understand the pressures that push towards that kind of mechanism to resolve minor disputes. However, at the same time I ask myself as a judge if is there something the courts could be doing to meet the demand for that kind of dispute resolution that would not drive people away from the courthouse door. Thus, while I see the benefits and the pressures that push us towards experimenting with other ways of resolving disputes, it concerns me as a judge that somehow the courts may be seen to have failed the public. From that perspective, I am concerned but also challenged.

The other controversial issue in ADR is the judge's role as a mediator. Various jurisdictions in Canada have experimented with judges embarking on and getting training in that role. Thus, it is in-house mediation services, in effect, offered by the court to litigants. To some extent, there are advantages to that. The parties do not have to pay for it and it engages the court in the process, thus, we are not losing the work. However, there are many judges who feel that it is not an appropriate role for judges; especially when you are caucusing with parties, going back and forth, carrying messages, asking questions or conveying offers and counteroffers, not in a judge-like role. Many of my colleagues would question whether that is an appropriate role for judges.

4. Do you think that a judge, when acting as a mediator, needs to receive additional training since the role of a mediator is very different from that of a judge?

Yes. People expect that when we get appointed as judges, we can do everything. However, we are ordinary lawyers – good lawyers – but we cannot do everything and we need training. Indeed, good mediators are trained, they are not necessarily born and simply because you are a judge means absolutely nothing as far as answering the question of whether you are a good mediator. So not all judges are mediators, nor should they be.

5. What qualities, in your opinion, are the most important to be a good judge?

In our tradition of judging, unlike some jurisdictions such as Japan where judging begins at a very young age, most of our judges have at least 20 years of experience as a lawyer. Thus, the first obvious attribute for a good judge is to have excellent legal analysis skills. However, a good judge must also have good personal qualities. For example, you have to be a good listener. Not all good lawyers are necessarily good listeners. Many good lawyers press ahead with their view of the case and that is why they are good advocates. However, being a good judge requires you to stand above the fray, to avoid the desire to get in there and make points and to just listen.

In addition, good judges must have some world experience since all sorts of people with all sorts of problems come before us. So we have to be understanding human beings and we have to have some life experience to be so. We have to be empathetic to the problems that other people have. We are privileged. We cannot assume that privilege in others. We cannot let it blind us to the reality that many of the people coming before us actually live within.

Moreover, it is extremely important for a judge to be patient. Patience is absolutely critical. Additionally, good judges have to have unquestioned integrity. There can be no ifs, ands or buts about that. Integrity is central to the job.



Maxine Chiang
Partner, Chiang & Lee Attorneys-at-Law

Ms Maxine Chiang is a partner of Chiang & Lee Attorneys-at-Law (Taiwan). She specialises in commercial transactions, Fair Trade law, corporate counselling and intellectual property rights with an emphasis on infringement and enforcement of intellectual property rights, mergers and acquisitions as well as foreign investment into Taiwan.

Interview with the Honourable James W. O'Reilly, Justice of the Federal Court of Canada

On 9 May 2014, Ms Jacqueline R. Bart, founding partner of BartLAW, Canadian Immigration Barristers and Solicitors, and Ms Maxine Chiang, the Chair of the Publications Committee of the IPBA, had the honour of interviewing the Honourable James W. O'Reilly, Judge of the Federal Court of Canada, for the *IPBA Journal*. The following is an excerpt of that interview.



Mr James W. O'Reilly

Justice James W. O'Reilly graduated from the University of Western Ontario with a Bachelor of Arts (with Honours) in 1982. He then pursued his LL.B. at Osgoode Hall Law School and his LL.M. at the University of Ottawa. Justice O'Reilly has had a diverse legal career, serving as a consultant to the Law Reform Commission of Canada, working as a legal advisor in the Department of Justice, acting as a sole practitioner specialising in legal policy and law reform, serving as the Executive Legal Officer of the Supreme Court of Canada, working as the Associate Executive Director of the National Judicial Institute and acting as the Counsel to the Collusion Investigation in London, England. Justice O'Reilly has authored many reports and publications and he has been a law professor at Carleton University, the University of Ottawa, McGill University, the University of Western Ontario and the Law Society of Upper Canada. Justice O'Reilly was appointed to the Federal Court in 2002.

1. What is the Federal Court's mandate?

A document called our Strategic Plan 2014-2019, which has only recently become publicly available, has a mission statement that mandates us to 'deliver justice and assist parties to resolve their legal disputes throughout Canada, in either official language, in

a manner that upholds the rule of law, and that is independent, impartial, equitable, accessible, responsive and efficient'.

2. How are cases assigned to the various judges? How is that determined?

The predominant model is random assignment. As cases come in, they are generally assigned to a judge who is available on the dates when the parties are available. There are some exceptions, though. For example, in the area of intellectual property, there are some judges who had a background in intellectual property before they were appointed to the bench, so they get assigned somewhat more of those cases than other judges without that background. The same would be true for maritime law, and in some cases, immigration law.

3. Basically, administrative law upholds the rule of law. Thus, the court is strengthening Canada by upholding the rule of law by ensuring that there is administrative access to justice and that the principles of fairness are met in terms of reviewing decisions of quasi-judicial entities. In that general framework of the rule of law, what is your main target in terms of reviewing these entities and what do you consider the most important and influential part of your work as a Federal Court judge in terms of upholding the rule of law?

First of all, I would not use the word 'targeting' because a court is a responsive institution. Courts do not target anything. But often people come to us seeking something specific and obviously we have to be responsive to what the litigants bring to us. I would say in that context, one of the most important roles that the Federal Court plays is ensuring that federal decision makers, to use the broadest possible term – that is, not just quasi-judicial tribunals, boards and commissions, but including ministers, ministers' delegates, and the Prime Minister himself – are respecting the legal framework within which they must operate. We are often called upon to look at the powers given to that decision maker and determine whether the decision he or she has rendered falls within the framework of that legal scheme.

Sometimes that takes us into some quite sensitive areas, areas where ministers of the Crown might feel that they need more discretion to deal with matters that come before them in a way that they think is fair and justifiable. But more than that, we have to look at whether it is actually legally authorised. That is an exercise of statutory interpretation – looking at laws and regulations that govern the actions, or the scope of action, of those decision-makers, as well as the Constitution of course, because often

these issues take you into areas where people might be putting forward rights they enjoy or feel they should be enjoying under the Charter of Rights and Freedoms.

4. In Canada, all judges are appointed by the Government. Do you think the judicial appointment system has any impact on judicial independence?

I do not think so. It has been the tradition in Canada that no matter who appoints the judge, that judge is an independent decision maker. That is not the case with the US Supreme Court. If you ask any knowledgeable person, they will be able to tell you which judge was appointed by which President and whether the President was a Democrat or a Republican. Often, US Supreme Court decisions are split along those political lines. We have never had that in Canada. Recently, because there have been so many judicial appointments in a row by this Prime Minister – five Supreme Court appointments so far and more to come – it has become fairly easy to know which ones were appointed by this Prime Minister as opposed to a previous Prime Minister. For the most part, throughout Canadian history, people would not have thought about or even reflected on who appointed the judge. But even today, as we have recently seen, the judges have decided cases independently.

5. Would you like to see any changes to this appointment system or are you satisfied with it?

There are many good things about the appointment process that applies at the federal level in Canada. The scrutiny given to candidates is fairly strict and the person's background is researched fairly extensively. There is consultation within the profession and outside the profession because the candidate has to give references both from legal and non-legal contacts. The person has to identify a large number of people they have worked with in the past so that those sources can be contacted. To my knowledge, there have been very, very few poor appointments that have resulted from that process. Thus, in terms of identifying people who are qualified to become judges, the current process is quite good.

But there is a problem with it. It is something that I have read about over the past couple of years.

The current process does not seem to result in the appointment of a sufficient number of women and visible minorities. I do not know what the problem is so I do not have any basis for placing blame on anyone. But from what I have read, this process does not yield the outcome that you would expect given the numbers of women and visible minorities practising law in Canada. That, in my view, is something worth investigating.

6. You have diverse legal experience. How have you found that this diverse legal experience has benefited you as a Federal Court judge?

I did a lot of criminal law before I was appointed. I was not practicing criminal law, but worked on criminal law policy and law reform. What you realise by doing that is that the principles and methodology you learn, no matter what area of law you were in, are applicable to other areas of law. Part of the challenge of being a judge is to draw on those areas of your knowledge and expertise and apply them to new subjects.

Having a background in other areas of law is extremely useful. Even if you are not applying them directly, you are applying the methodology – the line of thinking. When you come upon a new topic, you can do so with the comfort of knowing this has evolved out of, probably, the same or very similar principles as the area of law that you know more about. Once I get there, I know I am going to be able to figure it out because the law is logical and it has its methods of analysis – statute and precedent. You can apply all that you know about how the law is made, framed and decided. No matter what the area is, you just have to arrive at a point where you are comfortable enough to see it.

7. As a judge, what aspect have you found the most difficult and the most rewarding?

The most difficult aspect for me as a judge was to figure out why, when I went into a courtroom, everyone was looking at me. The parties and the lawyers are so focused on the judge, whereas the judge is focused on the issues. Accordingly, what I found difficult was managing the process of a hearing before me while simultaneously absorbing the evidence and the law that was being presented

to me. You can get quite difficult hearings if there are lawyers objecting to one another, or objecting to a question put to a witness, or repeatedly asking for rulings on evidentiary issues. That is all part of trial management or hearing management. Coming from an academic background, I was mainly interested in the issues, but that is not the case when you are the presiding judge. You have to not only be interested in the issues and be able to address them and try to come to what you think is the right answer for the case, but you also have to manage the room, which includes the lawyers, the parties, the witnesses, and sometimes the media if it is a high-profile case. Thus, a judge has more responsibilities than just deciding the case. A judge must move everything along, doing it in a timely way and allocating time fairly between the two sides. I found this part to be the most challenging aspect of being a judge. Now I feel I have a high level of comfort in the courtroom which I did not have when I first started.

I find the process of writing a judgment to be the most rewarding – I write decisions in a way that I hope is clear and respectful to the parties. There is a quotation that I use all the time to describe judgment writing. It comes from an English professor in the United States who has become probably the world expert on judgment writing and he has taught almost all Canadian judges at the judgment writing programme that I now help run (Professor James Raymond). I saw this the first time I took a judgment writing course: 'Novelists create a world of words and invite you to live in it; judges create a world of words and compel you to live in it.' Judges have to be careful with their words.

The process of judgment writing is very rewarding, up to the point where I sign my name, and then I move on to the next case.



Jacqueline Rose Bart
BartLAW Canadian Immigration PC

Jacqueline Rose Bart is a Certified Immigration Specialist by the Law Society of Upper Canada with over 23 years of experience in Canadian immigration law. She is the author, co-author and/or editor-in-chief of seven immigration law books, including a 3,000+ page Canada/US Relocation Treatise, updated quarterly and the president of the UIA Immigration Commission.

Investors in France Face a New Rise in Minority Shareholder Activism

Over the past few years, France has seen a marked increase in minority shareholder activism, in particular where listed companies are concerned. Several takeover bids have failed to succeed after being vigorously challenged by minority shareholders, who are using a variety of tools at their disposal to make their demands heard.

Among the instruments most frequently used by these minority shareholders in the takeover bid process, there is one in particular that seems to be gaining popularity. It is to challenge the statement of compliance issued by the regulator, the Autorité des Marchés Financiers ('AMF'), before the Paris Court of Appeals.

Pursuant to article L.621-8 of the French Monetary and Financial Code (the 'MFC'), all takeover bids are subject to the prior authorisation of the AMF, granted by way of a visa published in a statement of compliance. For the purpose of this decision, the AMF examines the intentions of the offeror and the terms (in particular the financial terms) of the bid, to determine whether they comply with the principles set out in article 231-3 of its General Regulation ('AMF GR'), i.e., the free interplay of offers and counter-offers, equal treatment and information for all holders of the securities of the persons concerned by the offer, market transparency and integrity, and fairness of transactions and competition.

The control of the AMF, however, does not extend to the relevance of the offeror's project in terms of industrial, commercial and social consequences. In particular, when reviewing the price of the bid (the element which is most likely to be disputed by minority shareholders), the AMF is limited to controlling that it was calculated in compliance with the provisions of article 231-18, 2 of the AMF GR, on the basis of 'generally accepted objective valuation



criteria'. In addition, offerors resort more and more often to having a fairness opinion delivered by an independent appraiser on the valuation of the shares of the criteria used in the calculation of the price (such intervention is mandatory when a 'squeeze-out' is contemplated at the end of the takeover bid but, pursuant to article 261-3 of the AMF GR, may also be freely decided by any offeror). Consequently, the AMF very rarely withholds its authorisation for price reasons, especially when offerors are in the position to provide extensive and consistent information on their methods of calculation.

The statement of compliance can nevertheless be challenged, though exclusively before the Paris Court of Appeals. The Court of Appeals' powers are limited to an appraisal of the AMF's decision. Accordingly, the Court of Appeals can only approve or cancel the statement of compliance, but is unable to overrule the AMF and decide itself the authorisation of a bid or the modification of certain of its terms, and in particular, of the price. Such limitation of its powers have been acknowledged by the Court of Appeals since 1989 (decision CA Paris, 1re ch., stock market section, 12 July 1989, Bastien-Vanniere c/ COB, JurisData n°1989-023420) and reiterated since (decision CA Paris, economic and financial section, 11 June 1997, Geniteau c/ Sté Lagardère, JurisData n° 1997-021370).

The combination of the limited control that the AMF can exert on the price of a bid with the restricted powers of the Court of Appeals therefore results in most instances in a rejection of the claims of minority shareholders. Nevertheless, the challenge of the statement of compliance before the Paris Court of Appeals retains one major advantage for activist minority shareholders: the considerable delay of the procedure. While the filing of a claim before the Paris Court of Appeals, which must occur within 10 days of the notification of the AMF's decision for concerned parties and of its publication for other interested parties, does not automatically suspend a takeover bid, the duration of the challenge procedure is not fixed – in practice, it takes at least six to seven months for a hearing to be held and an additional two months for the Court of Appeals to render its decision. In the meantime, the AMF's practice is to systematically suspend the bidding period. In other words, because of the length of the challenge procedure, minority shareholders hold a very strong weapon to gain time and try to increase the chances of failure of the bid, thus putting additional pressure on the offerors.

The takeover bid announced on the shares of Club Méditerranée ('Club Med'), a leading French resort operator, is the most recent illustration of this trend. In May 2013, Fosun (a Chinese conglomerate) and Axa Private Equity (now known as Ardian) announced their intention to make a friendly takeover bid on the shares of Club Med, of which they were two of the biggest shareholders. The board of Club Med voted unanimously in favour of the offer on 24 June 2013. The bid, valuing the company at EUR 557 million and offering a price of 17.50 euros per share, was approved by the AMF in a statement of compliance dated 16 July 2013. The bidding period was due to close on 30 August 2013.

However, certain minority shareholders, among which the investment fund CIMAF and several other shareholders regrouped under the French investors association ADAM, argued that the offer was made at an insufficient price and questioned the independence of the appraiser appointed to assess the offer. Accordingly, they filed a claim before the Paris Court of Appeals respectively on 24 and 26 July 2013. Their claims were rejected by the Court of Appeals in a decision dated 29 April 2014, in which it found that:

- the factual elements invoked by the minority shareholders to question the appraiser and the circumstances of its appointment were unfounded;
- the conditions of the management package offered to 400 executives were not related to their capacity as shareholders of Club Med and therefore did not breach the equality between shareholders;
- the AMF had ascertained that Club Med had complied with its recommendations concerning the disclosure of insider information through data-rooms to enable the offerors to prepare the bid; and
- nothing prevented certain managers of Club Med to take part in a concert with an offeror.

Consequently, the Court found that the AMF was justified in considering that the offer complied with the principles of equality of treatment of the shareholders, of transparency and loyalty in competition, and that the offer had been lawfully assessed.

After the decision of the Court of Appeals, the AMF set a new date of closure of the bid to 23 May 2014, i.e., nine months after its initial date of closure. In the meantime, a new shareholder, BI Invest (owned by Italian industrialist Andrea Bonomi) has progressively acquired over 10.5 percent of the shares of Club Med, thus becoming the



The rights of shareholders have mostly been increasingly reinforced under French law.

the bid. Such failure had not been anticipated by the market and, following its announcement, the share price of Theolia decreased by 23 percent.

The rights of shareholders and, in particular, those of minority shareholders have mostly been increasingly reinforced under French law, which could explain the recent rise in minority shareholder activism. In particular, according to article L.452-1 of the MFC, minority shareholders can gather together to increase their force of action, either as an association of shareholders of a single specific company or, more widely, through an investors association. Acting on behalf

main shareholder of Club Med (overtaking Fosun and Ardian's 9.5 percent stake). Concurrently, the share price of Club Med has increased to 19.10 Euros, thus exceeding the offered price. Both Andrea Bonomi and the Benetton family, who hold around two percent of the share capital and had formerly undertaken to sell its shares, have now indicated that they do not intend to back the bid. Despite these latest turns of events, Fosun and Ardian confirmed on 16 May 2014 that they would not increase the price offered. Hope for the Club Med takeover now solely resides in the fact that the success threshold is quite low (50 percent), but the risk is very much present that the company will follow the same path as fellow French company Theolia.

In 2013, Macquarie Bank launched a friendly takeover bid on the shares of Theolia, a wind energy developer and operator. With a stable shareholder, Theolia would have been able to face its substantial loss of income in 2012 and the approaching refund of certain convertible bonds with more strength and serenity. However, 152 of its minority shareholders filed a claim before criminal courts and sent a list of complaints to the AMF, which included, among others, allegations of a ridiculously low price, illicit agreements, insider dealings and conflicts of interest. While such claims were not proved to be well founded, such campaigning resulted in Macquarie's inability to raise a sufficient number of shares before the closure of

of the shareholders, these associations hold the same powers granted under the French Commercial Code (the 'FCC') to minority shareholders holding at least 5 percent of the share capital, such as the power to request the convening of a general meeting of shareholders (article L.225-103 of the FCC), the addition of resolutions to the agenda of shareholder meetings (article L.225-105 of the FCC), a management audit (article L.225-231 of the FCC), the revocation of the statutory auditors (article L.823-6 of the FCC), and they are entitled to request answers from the board on facts which may compromise the continuity of the business (article L. 225-232 of the FCC).

In addition, they can bring legal action against the management or the company before French courts. In particular, pursuant to article L.225-252 of the FCC, a derivative claim (*action ut singuli*) may be brought by shareholders when the current management has not itself brought a claim in the name of the company; in practice, these are mostly applied when invoking the liability of the management. While such claims are open to all existing shareholders, regardless of the percentage of shares they hold, minority shareholders will prefer to regroup to share costs and appoint one of them as a representative. However, derivative claims seldom hold the preference of minority shareholders as they have to carry the financial burden of the claim, including all

procedural costs, but, because they are acting in the name of the company, any proceeds are awarded to the company and not to the shareholders.

Some investors associations, such as the above-mentioned ADAM, are very often the first involved in challenging companies in matters of corporate governance and are gaining recognition for such actions. French minority shareholders have also been noted to increasingly rely on the advice of proxy advisors when examining resolutions proposed during general meetings of shareholders.

The only area where shareholder rights have been pushed back recently concerns the implementation of measures resulting in the frustration of a hostile takeover bid. Since the implementation of the Takeover Directive (EC/2004/25) in 2006, France had been one of the countries which had adopted the principle of board neutrality – no frustrating action could be taken by the management without the prior approval of the general meeting of shareholders (which, necessarily, includes the minority shareholders). Law n°2014-384 of 29 March 2014 modified article L.233-32 of the French Commercial Code and reinstated, for all takeover bids filed after

1 July 2014, the freedom for the management to decide on frustrating actions, unless such freedom is expressly restricted in the company's articles of association. Shareholders will now not be able to oppose such measures directly, but only *a posteriori* and under much stricter conditions, by way of legal action invoking the liability of the management.

With the French Government regularly adopting 'economic patriotism' measures, such as the decree of 14 May 2014 which increases the number of sectors where the prior authorisation of the Government is required for foreign investments, and the increasingly belligerent behaviour of minority shareholders, French companies may find it harder than ever to attract foreign investors.



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India Inc.'s Compliance with Anti-Bribery Laws – A status check

Anti-corruption compliance has always been a critical issue in developing countries such as India. Bribery and corruption continue to pose a significant challenge in India, which is present at all levels. Moreover, anti-bribery compliance issues have become crucial even for companies that are not yet exposed to the United States or the United Kingdom but are keen to expand globally in the future.



Introduction

Against the backdrop of a global economic slowdown, India Inc. continues to aggressively expand globally, which makes it imperative for it to be mindful of running its global operations in compliance with certain anti-corruption laws, local and/or applicable foreign laws. Also, one cannot ignore the fact that India currently ranks 94 (unchanged from last year's ranking) out of 177 countries, of the World's highly corrupt nations in the Transparency International's Corruption Perception Index. Undoubtedly, anti-corruption compliances have always been a critical issue in developing countries, including in India. Bribery and corruption are systemic failures and continue to pose a significant challenge in India, and are present all levels – i.e., political, bureaucratic, corporate and individual.

In light of this reality, the most pertinent question that relates to doing business in India is whether Indian companies are really prepared to meet compliance requirements and the challenges of obeying some of the most stringent foreign anti-bribery laws. An affirmative answer to this question may take a few more years for India to achieve. In particular, addressing the risk of corruption in India has, over the last few years, become one of the major challenges which has increased the concerns of investors around the globe.

How does India Inc. lag behind in meeting stringent norms and compliance? Some evident examples of this might be the lack of adequate training within an organisation, that there is no 'whistle-blowing' mechanism in place, that there is no compliance responsibility ownership within the organisation and so on. However, there could be instances where an Indian company may be trying to adhere to strict compliance requirements, but by

observing that a competitor is not playing by the rules, it could be a deterrent to compliance and a reason for all players to not follow the rules and compete with each other. Needless to say that the impact of following the rules and complying with the strict norms of anti-bribery laws can be fruitful in many ways, such as, it could potentially lead to better corporate governance, the reduction of reputational risks and of the costs of doing business.

The FCPA and the Bribery Act

Although corruption has been a hot issue in India, it can also be seen that the anti-corruption movement in India has recently been very prominent. Investors are treading more cautiously when deciding their investments in India. Any company which is subject to the Foreign Corrupt Practices Act 1977 ('FCPA') of the United States or the Bribery Act 2010 ('the Bribery Act') of the United Kingdom, might think twice before making the decision to do business in India.

While the FCPA was enacted over three decades ago, the United States' Department of Justice has become more aggressive with its enforcement actions only in the last few years. The principal objective of the FCPA is to prohibit companies based in the US and their employees, officers, directors and agents from paying or promising to pay bribes to foreign officials, political parties, candidates or their channels to obtain or to retain business. The anti-bribery provisions apply to issuers, domestic concerns and agents who act on behalf of issues and domestic concerns.

For an overseas company, such as an Indian company which has issued American Depository Receipts ('ADRs') that are listed on stock exchanges in the US, such company will also come under the term 'issuer' for all purposes under the FCPA. In addition to the stringent anti-bribery provisions, the FCPA also contains provisions regarding books and records (accounting) which require issuers to make and keep books, records, and accounts accurately and to fairly reflect the issuer's transactions and disposition of assets. Given these matters, it can be seen that the applicability and compliance requirements of the FCPA will be important for: (1) a US company planning to invest or acquire an Indian company; (2) an Indian subsidiary of a US company; (3) an Indian company listed on a stock exchange in the US; (4) an Indian company with its principal place of business in the US or business established in any US state; and (5) officers, employees, directors or agents of such companies.

The primary objective of the FCPA is that no US-linked entity or individual should make payments to any non-US Government officials or political candidates to obtain or retain business or secure any improper advantage. The FCPA applies even to individuals, and therefore, may trigger personal liabilities of officers, directors, executives, shareholders or employees of an Indian company. It is pertinent to note that a mere offer, promise, or authorisation to offer a bribe can suffice for a violation under the FCPA.

The United Kingdom Bribery Act, which is similar to the FCPA, but is considered to be more draconian and far reaching, applies beyond the territorial limits of the UK. The Bribery Act prohibits any person associated with a company in the UK, including its subsidiary, from bribing any person with a motive to obtain or retain business or an advantage in the conduct of business for the UK company. A foreign subsidiary of a UK company will also have to be cognisant of, and in compliance with, the Bribery Act. The applicability and compliance requirements of the Bribery Act are important for: (a) a UK-based company planning to invest in or acquire an Indian company; (b) an Indian subsidiary of a UK-based company; (c) an Indian company with its principal place of business in the UK or a business established in any region in the UK; (d) an Indian company which is listed on a UK stock exchange; and (e) a UK national employed in India and an Indian national employed in the UK.

Therefore, a foreign company looking to invest in India needs to be cognisant of the compliances required under the FCPA and the Bribery Act, given the current status of corruption issues in India and the potential ramifications of non-compliance with the foregoing anti-bribery laws. As discussed above, a parent entity can be held liable for the actions of its subsidiary (ies). Therefore, foreign investors have to be more vigilant whilst determining the pre-existence of violations of anti-bribery laws such as the FCPA and the Bribery Act.

Key Indian Legislation

The main Indian legislation in respect of corruption / bribery is the Prevention of Corruption Act 1988 ('the POCA'), which has been in force for more than two decades, but is considered to be less effective as compared to the FCPA and the Bribery Act. The POCA prohibits offering gratification (such as payments, gifts, or non-pecuniary benefits) to government officials directly or through third parties to influence official actions. The POCA focuses

primarily on the demand side of corruption, i.e., it punishes the bribe receiver. A bribe giver under the provisions of the POCA is treated as an abettor and not as the primary offender, which is the bribe receiver. The POCA targets corruption in government agencies and public sector enterprises. Another *lacuna* in the POCA is that it does not expressly provide for prosecution of corporations for an offence. Therefore, the FCPA and the Bribery Act overshadow the effect and seriousness of the Indian legislation. This evidently merits the requirement for a significant change in the Indian law. Despite the existence of penal provisions under the POCA, actual punishment for offences provided for in the POCA rarely occurs in India. The laws are not only frequently ignored by the perpetrators, but are also ignored by those who are actually responsible to penalise offenders in India. Surprisingly, the POCA does not provide for any stringent penalties for a corrupt act by an Indian citizen or an Indian company in an international business transaction, nor does it provide for any penalty for foreign companies in India. This is why the POCA often gets side-lined as compared to other foreign anti-bribery laws.

Against the backdrop of the existing and less effective POCA, India has recently witnessed significant progress by enactment of the Lokpal and Lokayuktas Act 2013 ('the Lokpal Act'), which received the President of India's assent on 1 January 2014. In this sphere, certain other bills have also been introduced and are pending before the Indian Parliament. However, the Lokpal Act is one of the most recent anti-corruption legislation in India, which provides for the establishment of the institution of Lokpal (ombudsman) to inquire into allegations of corruption against certain public functionaries and matters connected thereto.

Under the Lokpal Act, an independent body called the Lokpal will be created with extensive powers to investigate and prosecute violations of the POCA, including violations by private companies doing business in India. The Lokpal will function both nationally and locally and have power to investigate high-ranking government officials, including the Prime Minister. The Lokpal will have the power of supervision and direction over any investigation agency, including the Central Bureau of Investigation for cases referred to them by the Lokpal. By enacting the Lokpal Act, the Indian Government has paved the way for the creation of an anti-corruption agency tasked with investigating corruption by Indian public officials. The Lokpal Act does not introduce provisions directly aimed at companies operating in India, but it does appear to



signal a renewed focus on tackling corruption in India. The implementation and practical application of the Lokpal Act remains to be seen, and the primary question now is whether, unlike many preceding anti-corruption statutes, the Lokpal remains autonomous and insulated from the intricacies of Indian politics. With the Lokpal Act coming into force, every Indian company will be required to have a robust anti-corruption and ethics compliance framework.

Additionally, under the new Companies Act 2013 ('the 2013 Act'), which is set to replace the existing Companies Act 1956 ('the 1956 Act'), once the 2013 Act is fully implemented, directors are required to give an annual certification that their company has implemented internal financial controls and proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively.

Also, the pending bill to amend the POCA, i.e., the Prevention of Corruption (Amendment) Bill 2013, is set to significantly amend the POCA by introducing certain provisions, such as those prescribing fines for commercial organisations where any person associated with the organisation offers, promises or gives a financial or other advantage to a public servant intending to obtain or retain business or some advantage in the conduct of business of a commercial organisation. Some other bills which are still pending and have not been passed are the Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill 2011, which is an Indian equivalent of the FCPA. Recently, after receiving the President of India's nod on 9 May 2014, on 12 May 2014, the Whistle-blowers Protection Act 2011, which seeks to protect persons making a public interest disclosure of an act of corruption, misuse of power, or criminal offence by a public servant, was notified in the Official Gazette.

**The Lokpal Act signals
a renewed focus
on tackling corruption
in India.**

Key Points to Ponder

An investor, especially from the United States or the United Kingdom should pragmatically consider the associated corruption risks in India before committing to foreign investment there. To cope with the anti-bribery conflicts at the Indian level, Indian companies and individuals having UK or US exposure should have stringent anti-bribery compliance programmes in place with identified officers within the companies to ensure compliance by the company.

Certain important aspects of compliance programmes are the imparting of anti-bribery training for employees and agents/business partners; proper documentation of all dealings (whether direct or indirect) with government officials; proper recording and accounting of all expenditures and contractual payments made to third parties and periodic audits of such compliances, etc. For foreign investors proposing to invest in India, proper anti-bribery due diligence should be conducted prior to entering into definitive transaction/investment documents, and proper legal advice should be sought on what measures can be implemented after the investment is made in order to protect oneself. Foreign investors should be mindful of some of these issues and should properly seek protection under the investment/transaction documents/agreement by way of having proper clauses on anti-bribery compliance, adequate representations and warranties from the sellers and the target company, and covenants from the target company to refrain from any non-compliant act, etc.

Some other important points that investors should also keep in mind is to structure their deal in India in a manner in which they can minimise or avoid any potential liability due to any previous or prior actions of the target company. With respect to the functioning of a target company after the acquisition/investment, it must be ensured that proper checks and balances are incorporated in the compliance programme of the company.

Indian companies seeking to do business with companies from the United States and the United Kingdom should prepare themselves in relation to the concerns discussed here and ensure that their companies have a high standard of business conduct and ethics. The company must have in place appropriate policies for their employees regarding their conduct with public officials and penalise bribery or the use of influence. Given the importance for a US or a UK-based investor of issues under the FCPA and/or the Bribery Act, the degree of trust in the Indian seller/a target company in complying with such obligations is critical for the investor. Therefore, it is essential that Indian sellers/target companies must be aware of these issues and should comply with these requirements. Thus, the Indian private sector should prepare itself with a more robust mechanism to mitigate bribery and corruption risks.

Anti-bribery compliance issues have become crucial even for companies that are not yet exposed to the United States or the United Kingdom but are keen to expand globally in the future. An Indian company that is compliant with anti-bribery laws will be able to bargain for a better valuation and price quote when dealing with a US or a UK investor. Compliance with such laws helps in reducing issues in conducting business by having proper policies in place. Adequate compliance will also help to reduce any bottlenecks or friction relating to business conduct and the manner of performing contractual obligations between the contracting parties. All in all, no Indian company that is international in focus can afford to ignore the foregoing FCPA and Bribery Act concerns.

It may be interesting to note that many multi-national companies are still investing in India without running afoul of the relevant anti-corruption laws as these are companies which benefit from a robust compliance culture, stringent oversight protocols and resilient internal controls.



Neerav Merchant
Partner, Majmudar & Partners,
International Lawyers

Neerav Merchant is a partner in the disputes practice of Majmudar & Partners. He handles matters related to dispute resolution, arbitration, commercial disputes, IT/outourcing and licensing, employment, anti-corruption, and real property. He can be contacted at nmerchant@majmudarindia.com.

IPBA New Members

March 2014 - May 2014

We are pleased to introduce our new IPBA members who joined our association from March 2014 to May 2014. Please welcome them to our organisation and kindly introduce yourself at the next IPBA conference.

Argentina , Ramon Moyano Estudio Beccar Varela	Canada , Will Osler Bennett Jones LLP
Australia , Saddam Hossain UTS	Canada , H. Peter Swanson Bernard LLP
Australia , Steven Jerrard M+K Lawyers	Canada , Frank Turner Osler, Hoskin & Harcourt LLP
Australia , Ian David Reynolds Clayton Utz	China , Russel AydinJade & Fountain PRC Lawyers
Australia , Ben Smith Minter Ellison	China , John Andrew Crozier-Durham Tang and Partners Law Firm
Bangladesh , Rajin Ahmed Law Cornerstone	China , Jacky Lingyun He Jun He Law Offices
Brazil , Maria Fernanda Almeida Prado e Silva Mattos Filho Advogados	China , Zejun Lin Zhong Lun Law Firm
Brazil , Marcio Baptista Tozzini Freire Advogados	China , Jingtao Liu Shandong Youhua Law Firm
Canada , Michael Birch Blake, Cassels & Graydon LLP	China , Ben Qi Jin Mao Partners
Canada , Stephen Bowman Bennett Jones LLP	China , Yuxia Qiu Beijing DHH Law Firm
Canada , Keith Chatwin Stikeman Elliott LLP	China , Xinyue Shi Jun He Law Offices
Canada , Daryl Clark Blake, Cassels & Graydon LLP	China , Dihuang Song Wang Jing & Co. Beijing
Canada , Robert Deane Borden Ladner Gervais LLP	China , Zonghua Wang Youhua Law Firm
Canada , Philippe-Henri Dutheil Conseil National des Barreaux	Costa Rica , Arnoldo Ricardo Andre Lexincorp
Canada , Rocco Galati Rocco Galati Law Firm Professional Corporation	France , Marc Frilet Frilet Law Firm
Canada , Richard Pearce Vancouver Bar Association	France , Marie-Christine Peyroux Lefevre Pelletier & Associes
Canada , Jamie Scarlett Torys LLP	Germany , Martin Kolbinger CMS Hasche Sigle
Canada , Vanessa Grant Gowling Lafleur Henderson LLP	Hong Kong , Chi Chung Chau Morrison & Foerster
Canada , Don Greenfield Bennett Jones LLP	Hong Kong , Grace Cheng The Law Society of Hong Kong
Canada , Jim Harbell Stikeman Elliott LLP	Hong Kong , Stephen Hung The Law Society of Hong Kong
Canada , Jennifer Honeyman Stikeman Elliott LLP	Hong Kong , Stephen Mau The Hong Kong Polytechnic University
Canada , Peter Hong Davies Ward Phillips & Vineberg LLP	Hong Kong , Michael Lintern-Smith The Law Society of Hong Kong
Canada , David S. Jarrett Bernard LLP	Hong Kong , Melissa Pang The Law Society of Hong Kong
Canada , George Karayannides Clyde & Co Canada LLP	Hong Kong , Louise Wong B. Mak & Co.
Canada , Miranda Lam McCarthy Tetrault LLP	India , Bijal Ajinkya Khaitan & Co
Canada , Martin Masse McMillan LLP	India , Debanjan Banerjee FoxMandal & Associates
Canada , Shawn McReynolds Davies Ward Phillips & Vineberg LLP	India , Rohit Bhat
Canada , Peter Mendell Davies Ward Phillips & Vineberg LLP	India , Manas Kumar Chaudhuri Khaitan & Co LLP
Canada , Roy Millen Blake, Cassels & Graydon LLP	India , Kosturi Ghosh Trilegal
Canada , Herbert Ono McMillan LLP	India , Zakir Merchant Khaitan & Co

India , Ashish Razdan <i>Khaitan & Co</i>	Netherlands , Mark Van Casteren <i>Loyens & Loeff NV</i>
India , Malathi Srinivasan Ananth <i>Nishith Desai Associates</i>	Panama , Alexis Herrera <i>Icaza, Gonzalez-Ruiz & Aleman</i>
India , Amit Tambe <i>Trilegal</i>	Philippines , Emmanuel Buenaventura <i>Integrated Bar of the Philippines</i>
Indonesia , Reno Iskandarsyah <i>Iskandarsyah & Partners</i>	Russia , Pavel Maguta <i>Russian Federal Chamber of Lawyers</i>
Indonesia , Yudianta Medio Simbolon <i>Simbolon & Partners Law Firm</i>	Russia , Yury Pilipenko <i>Russian Federal Chamber of Lawyers</i>
Italy , Andrea Aric	Singapore , Christian Chin <i>Allen & Gledhill LLP</i>
Japan , Hideki Akiyama <i>Pillsbury Winthrop Shaw Pittman LLP</i>	Singapore , Tony Grundy <i>Mori Hamada & Matsumoto (Singapore) LLP</i>
Japan , Ken Hirano <i>Toranomon Chuo Law Firm</i>	Singapore , Sue Lynn Koo <i>DBS Bank</i>
Japan , Yunosuke Hirano <i>Kitahama Partners</i>	Singapore , Salil Rajadhyaksha <i>Rajah & Tann LLP</i>
Japan , Akihiro Hironaka <i>Nishimura & Asahi</i>	Singapore , Eunice Tan <i>Virtus Law LLP (Incorp. Arthur Loke LLP)</i>
Japan , Junko Kawai <i>Umegae Chuo Legal Profession Corporation</i>	Singapore , Abraham Vergis <i>Providence Law Asia LLC</i>
Japan , Jun Kawanami <i>Kitahama Partners</i>	Singapore , Adrian Wong <i>Nabarro LLP</i>
Japan , Imran Mohammad Khan <i>Kochhar & Co.</i>	Spain , Francisco De Paula Martinez Boluda <i>Uria Menendez</i>
Japan , Sayaka Ohashi <i>Anderson Mori & Tomotsune</i>	Sri Lanka , Ruwani Sandamali Dantanarayana <i>John Wilson Partners</i>
Japan , Yusuke Sasaki <i>Chuo Sogo Law Office, P.C.</i>	Switzerland , Andr Brunschweiler <i>LALIVE</i>
Japan , Isomi Suzuki <i>LAWASIA</i>	Switzerland , Monika McQuillen <i>Eversheds AG</i>
Japan , Seigo Takehira <i>Oh-Ebashi LPC & Partners</i>	Switzerland , Balz Patrik Gross <i>Homburger AG</i>
Japan , Yosuke Tanaka <i>Higashimachi, LPC</i>	Taiwan , Benjamin Y.C. Li <i>Lee and Li, Attorneys-at-Law</i>
Japan , Ryotaro Yamashita <i>YGLPC</i>	Taiwan , Lynn Lin <i>Tsar & Tsai Law Firm</i>
Japan , Osamu Adachi <i>Anderson Mori & Tomotsune</i>	Taiwan , Ching-Yuan Yeh <i>Titan Law</i>
Korea , Sunyoung Bang <i>Law Firm Baek-Seok</i>	Thailand , E.T. Hunt Talmage III <i>Chandler & Thong-ek Law Offices Ltd.</i>
Korea , Michael Chang <i>Shin & Kim</i>	United Kingdom , Charles Brooks <i>Multilaw</i>
Korea , Sung-Jai Choi <i>Seoul Bar Association</i>	United Kingdom , Alison Foster QC <i>Chambers of 39 Essex Street</i>
Korea , Tak-Kyun Hong <i>Shin & Kim</i>	United Kingdom , Steven Mash <i>Crowell & Moring</i>
Korea , Sae Youn Kim <i>Yulchon LLC</i>	USA , Larry (Lewis) J. Baker <i>Watt, Tieder, Hoffar & Fitzgerald, L.L.P.</i>
Korea , Samuel Lee <i>Yulchon LLC</i>	USA , Philip Berkowitz <i>Littler Mendelson P.C.</i>
Korea , Taek Rim Oh <i>Lee & Ko</i>	USA , Bob Calmes <i>Arendt & Medernach LLC, Lux. Law Firm</i>
Korea , Sangki Park <i>Yoon & Yang LLC</i>	USA , Patrick Dolye <i>Arnold & Porter, LLP</i>
Korea , Jay C.H. Shin <i>Yulchon LLC</i>	USA , Stephen L. Dreyfuss <i>Helling Lindeman Goldstein & Siegal LLP</i>
Korea , Chang-Hyun Song <i>Shin & Kim</i>	USA , Thomas Lang <i>Morgan, Lewis & Bockius LLP</i>
Korea , Chul-Whan We <i>Korean Bar Association</i>	USA , Ailan Liu <i>Keesal, Young & Logan</i>
Korea , Joonki Yi <i>Bae, Kim & Lee LLC</i>	USA , Michael O'Bryan <i>Morrison & Foerster</i>
Korea , Soongki Yi <i>Yoon & Yang LLC</i>	USA , Todd Rosencrans <i>Perkins Coie LLP</i>
Korea , Sung Jo Yun <i>Bae, Kim & Lee LLC</i>	USA , Sara Sandford <i>Garvey Schubert Barer</i>
Luxembourg , Hervé Leclercq <i>Stibbe</i>	USA , Nan Sato <i>Shimin Law Offices</i>
Mexico , Mario Jorge Yanez <i>Barrera Siquerios y Torres Landa SC</i>	USA , Carl Schulz <i>Dentons</i>

Discover Some of Our New Officers and Council Members



Anne Durez

IPBA Leadership Position:
Officer, Vice-Chair of the Membership
Committee

What was your motivation to become a lawyer?

I deeply believe that justice is of the essence for the building and well being of any community, society and company, whatever its size and location in the World. Through the rule of law, the fundamental principles of any democracy are set up – freedom, equality and solidarity – in order to allow its citizens to live in a more harmonious society. For example, in the area of international business law, the rule of law aims at conciliation between the freedom of access for companies to international markets and the necessity to correct distorted competition.

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

One of my most memorable experiences as a lawyer was to create with other business lawyers a pro bono organisation called 'Rights of Urgency' which assists the poor to assert their legal rights. As an in-house counsel, I can live fantastic experiences. Recently I visited a floating production storage and offloading ('FPSO') unit built in Korea, worth several billions of US dollars, which was then transported to Angola where it is used to produce oil in deep offshore areas. The law can bring you everywhere in the world because it is closely linked to the business.

What are your interests and/or hobbies?

Would I surprise anyone if I tell you that as a Parisian woman I am quite fond of fashion? In particular, I collect gloves of all sorts of shapes and colours. They represent my own 'brand'.

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

When I had just graduated from high school, I worked

for the biggest French National TV Channel with famous journalists. Since no one could recommend me for such a job, I decided to call the president of the Channel and I told his assistants that my call was personal. In the end I got the job for the summer! Now I realise that my step was quite bold. Quoting US and French friends who are also IPBA members – and who will recognise themselves – 'You already get the NO, so do ask to get the YES!' My thanks go to my friends who helped me to dare and act.

Do you have any special messages for IPBA members?

I have three : 1. THANK YOU! Each of you is a key link to all IPBA members, whatever your practice, nationality, location and involvement. 2. As a new vice-chair of the membership committee, I am keen to say to members: Feel free to share with the membership committee any query and suggestion you may have. 3. To each of you, 'Because the success of the IPBA rests on its members, please do try to convince another person to join the IPBA, the best Asia Pacific network for lawyers and in-house counsel!'



Dhinesh Bhaskaran

IPBA Leadership Position:
Vice-President

What was your motivation to become a lawyer?

There was no specific factor that drove me towards a law degree. I just instinctively felt that law would be something I would be interested in. Thankfully my instincts turned out to be correct!

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

Every time I win a case for a client, no matter how big or small, it reminds me of why I am in this profession. Each victory is memorable in its own way, and provides me with the motivation to continue and to strive to do even better. I particularly like winning a case when my back is against the wall, as it gives me that much more satisfaction.



Masafumi Kodama

IPBA Leadership Position:
Deputy Committee Coordinator

What was your motivation to become a lawyer?

In my university days, most of my time was devoted to running as an 800m runner at first. However, I got injured knees. I decided to set myself the challenge of passing the bar exam, and after passing the bar, I chose to become a lawyer (not a judge or a prosecutor) because I thought lawyers could choose where and with whom to work.

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

Actually, two filings of corporate reorganisation cases were the most memorable. One was Seagaia in 2002, a resort theme park in Miyazaki, Kyushu. There were lots of opposition both inside and outside the company

What are your interests and/or hobbies?

I love to travel. All my other interests and hobbies pale by comparison. Each time I travel to a destination, it opens my eyes and my mind, and makes me appreciate how truly unique and diverse we all are. I also love to read, as it takes me through experiences and to places without having to leave home.

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

If I had to give up my legal career, I would seriously consider becoming a travel consultant!

Do you have any special messages for IPBA members?

The IPBA provides more than just business networking opportunities. I have forged fantastic friendships with people from all over the world through the IPBA. Each time we meet, even if it is just once a year at the Annual Conference, we are like old friends and have a whale of a time. No other organisation provides such great business and social opportunities and experiences.

(including political intervention), but we finally managed to persuade the opposition, and found right after the filing that most of the approximately 3,000 creditors were rather thanking us. The other one was Japan Airlines in 2010. 'Never allow a flight cancellation in any part of the world' was our goal at the time of filing, and we felt so relieved by achieving that.

What are your interest and/or hobbies?

I like swimming and scuba diving. I loved to play rugby when I was young, but I can no longer run in the field.

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

Maybe it is not surprising to those who know me, but abstention from drinking brings me some disorder, seriously, such as blood from the eye or swollen feet (some of you have seen it at the Seoul Conference). On the other hand, coffee makes me sleepy.

Do you have any special messages for IPBA members?

I love the friendly atmosphere of IPBA, and would like to be of some use to maintain this virtue.



Leonard Yeoh Soon Beng

IPBA Leadership Position:
Publications Committee
Vice-Chair

What was your motivation to become a lawyer?

I possess an inherent spirit for justice and fairness and the legal profession provides that intellectual avenue for me to use my mind and energy in ways that satisfy that innate desire to achieve equitable solutions. It is also a job that is highly portable and independent in that I can start up my own practice anytime and anywhere. Generally, it is a job in which I get paid to think, talk and argue—all the things I would do as an individual anyway.

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

I have had the opportunity to set new precedents for several landmark cases in the area of employment law and dispute resolution. In one case, I helped a client win a case which resulted in a hefty payout to my client who

has since migrated and is comfortably spending her life with her family using the judgment sum she received, without having to earn a living.

What are your interests and/or hobbies?

With a brood of three children, my personal pastimes are non-existent. Instead, my time is imbued with kids' activities and whatever snippets of time I have left is used solving community issues and offering free legal advice to those who need it. Sometimes, I spend my time surveying possibilities in the real estate world. I am involved in church work, too.

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

If it surprises anyone at all, I am able to croon a tune or two and for this, I have received several invitations to perform at weddings, anniversaries and similar occasions.

Do you have any special messages for IPBA members?

Frankly, this year's theme for IPBA 'Sustainability in a Finite World' seems highly imaginative. Nevertheless, being the chosen ones in a fraternity that spans a global breadth, I am all geared up for this vocation. Bring it on!

Publications Committee Guidelines for Publication of Articles in the IPBA Journal

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

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

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

IPBA Special Mention

The IPBA would like to congratulate the Honourable Susan Glazebrook, Justice of the Supreme Court of New Zealand, on her appointment as Dame Companion of the New Zealand Order of Merit in the 2014 Queen's Birthday Honours for services to the judiciary. Justice Glazebrook was a Past President of the IPBA (1998–1999). We wish her all the best with her distinguished career.

Members' Notes

Rajin Ahmed, Bangladesh

I am a Barrister of Lincoln's Inn, United Kingdom, a practising advocate in Bangladesh and an associate at Law Cornerstone. I joined the IPBA in April, 2014 and hope to meet with its members in the future. My practice area comprises civil, criminal and corporate litigation, ADR, international trade and aviation law. I worked as a Legal Consultant in the Civil Aviation Authority of Bangladesh and acted as a member of an inter-ministerial team and drafted amendments of the Civil Aviation Authority Ordinance 1985 and Civil Aviation Rules 1984. I also recommended amendments to the Anti-terrorism Act 2013, which is integral to the aviation security of Bangladesh.

Abhishek Saxena, India

At Phoenix Legal, we are advising a number of clients on setting up non-banking financial companies ('NBFC') in India. These deals hit a road block pursuant to a recent Reserve Bank of India ('RBI') pronouncement suspending the grant of the necessary registration to NBFCs for a period of one year. However, certain categories of NBFCs have been exempted from the suspension in the public interest. The suspension is purportedly to regulate the mushrooming of NBFCs by streamlining the existing regulatory framework. We understand that the RBI hadn't anticipated the strong industry reaction to the pronouncement and may be considering relaxing rigorous implementation.

Stephan Wilske, Germany

Stephan Wilske has published the following articles:

- 'Collective Redress in Cartel Damages Actions in Europe: Light on the Horizon – Or Storm Brewing?' (with Ines Bodenstern, Alexander Fritzsche and Christian Steinle), ABA International Law News, Vol 43 No 1 (Winter 2014), pp 1, 10–13;
- 'What's New In European Arbitration?' (with Isabelle Michou and Gerold Zeiler), Dispute Resolution Journal, Vol 68 No 3, pp 89–97.

Lawrence A. Kogan, USA

Lawrence A. Kogan, Managing Principal of The Kogan Law Group, P.C., NY, co-authored an article entitled, *Trade, the Precautionary Principle and the Postmodern Regulatory Process*, which won the top 2014 Burton Award for Distinguished Legal Writing in the United States (<http://www.burtonawards.com/news-2014-law-firm-winners.html>). This article had appeared in the December 2013 issue of the European Journal of Risk Regulation ('EJRR') and is currently accessible online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2376753. Mr Kogan's co-authored article provoked the interest of a sufficiently broad audience, and consequently, it was posted during March 2014 in Belgium to the websites of the US Embassy in Brussels (<http://www.uspolicy.be/article-alert/article-alert-march-1-2014>) and the US Mission in Brussels (http://useu.usmission.gov/aa_march_2014.html) and also to the website of the European Parliamentary Research Service in Strasbourg, Luxembourg (<http://epthinktank.eu/2014/03/25/impact-of-a-potential-eu-us-fta-tt-tp-on-consumer-protection-and-food-safety/>). During April 2014, this article was referenced in a study prepared for the European Parliament Directorate General for External Policies for the Union (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2423562) (at conclusion, and fn59). Mr Kogan and his co-author will be accepting their award on 9 June 2014 in Washington D.C. at a reception to be held at the US Library of Congress (<http://www.burtonawards.com/2014event.html>).



An Invitation to Join the Scholarship Programme of Inter-Pacific Bar Association

The Inter-Pacific Bar Association (IPBA) is pleased to announce that it is accepting applications for the IPBA Scholarship Programme, to enable practicing lawyers to attend the IPBA's 25th Annual General Meeting and Conference to be held in Hong Kong, May 6-9, 2015 (<http://ipba2015hk.org>).

What is the Inter-Pacific Bar Association?

The Inter-Pacific Bar Association is an international association of business and commercial lawyers with a focus on the Asia-Pacific region. Members are either Asia-Pacific residents or have a strong interest in this part of the world. The IPBA was founded in April 1991 at an organising conference held in Tokyo attended by more than 500 lawyers from throughout Asia and the Pacific. Since then, it has grown to become the pre-eminent organisation in respect of law and business within Asia with a membership of over 1400 lawyers from 65 jurisdictions around the world. IPBA members include a large number of lawyers practising in the Asia-Pacific region and throughout the world that have a cross-border practice involving the Asia-Pacific region.

What is the Inter-Pacific Bar Association Annual Meeting and Conference?

The highlight of the year for the IPBA is its annual multi-topic four-day conference. The conference has become the 'must attend event' for international lawyers practicing in the Asia-Pacific region. In addition to plenary sessions of interest to all lawyers, programmes are presented by the IPBA's 21 specialist committees and two Ad Hoc committees. The IPBA Annual Meeting and Conference provides an opportunity for lawyers to meet their colleagues from around the world and to share the latest developments in cross-border practice and professional development in the Asia-Pacific region. Previous annual conferences have been held in Tokyo, Sydney, Taipei, Singapore, San Francisco, Manila, Kuala Lumpur, Auckland, Bangkok, Vancouver, Hong Kong, New Delhi, Seoul, Bali, Beijing, Los Angeles and Kyoto.

What is the IPBA Scholarship Programme?

The IPBA Scholarship Programme was originally established in honour of the memory of M.S. Lin of Taipei, who was one of the founders and a Past President of the IPBA. Today it operates to bring to the IPBA Annual Meeting and Conference lawyers who would not otherwise be able to attend and who would both contribute to, and benefit from attending, the IPBA Annual Conference. The Scholarship Programme is also intended to endorse the IPBA's mission to develop the law and its practice in the Asia-Pacific region. Currently, the scholarships are principally funded by The Japan Fund, established and supported by lawyers in Japan to honor IPBA's accomplishments since its founding.

During the conference, the Scholars will enjoy the opportunity to meet key members of the legal community of the Asia-Pacific region through a series of unique and prestigious receptions, lectures, workshops, and social events. Each selected Scholar will be responsible to attend the Conference in its entirety, to make a brief presentation at the Conference on a designated topic, and to provide a report of his/her experience to the IPBA after the conference. The programme aims to provide the Scholars with substantial tools and cross border knowledge to assist them in building their careers in their home country. Following the conference, the Scholars will enjoy 3 years of IPBA membership and will be invited to join a dedicated social networking forum to remain in contact with each other while developing a network with other past and future Scholars.

Who is eligible to be an IPBA Scholar?

There are two categories of lawyers who are eligible to become an IPBA Scholar:

1. Lawyers from Developing Countries
To be eligible, the applicants must:
 - a. be a citizen of and be admitted to practice in Vietnam, Laos, Cambodia, Myanmar, Mongolia, Bangladesh, or the Pacific Islands;
 - b. be fluent in both written and spoken English (given this is the conference language); and
 - c. currently maintain a cross-border practice or desire to become engaged in cross-border practice.
2. Young Lawyers
To be eligible, the applicants must:
 - a. be under 35 years of age at the time of application and have less than seven years of post-qualification experience;
 - b. be fluent in both written and spoken English (given this is the conference language);
 - c. have taken an active role in the legal profession in their respective countries;
 - d. currently maintain a cross-border practice or desire to become engaged in cross-border practice; and
 - e. have published an article in a reputable journal on a topic related to the work of one of our committees or have provided some other objective evidence of committed involvement in the profession.

Preference will be given to applicants who would be otherwise unable to attend the conference because of personal or family financial circumstances, and/or because they are working for a small firm without a budget to allow them to attend.

Applicants from multi-national firms will normally be considered only if they have a substantial part of their attendance expenses paid by their firm. Past Scholars will only be considered under extraordinary circumstances.

How to apply to become an IPBA Scholar

To apply for an IPBA Scholarship, please obtain an application form and return it to the IPBA Secretariat in Tokyo no later than **31 October 2014**. Application forms are available either through the IPBA website (www.ipba.org) or by contacting the IPBA Secretariat in Tokyo (ipba@ipba.org).

Please forward applications to:

The IPBA Secretariat
Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
Telephone: +81-3-5786-6796 Facsimile: +81-3-5786-6778 E-mail: ipba@ipba.org

What happens once a candidate is selected?

The following procedure will apply after selection:

1. IPBA will notify each successful applicant that he or she has been awarded an IPBA Scholarship. The notification will be provided at least two months prior to the start of the IPBA Annual Conference. Unsuccessful candidates will also be notified.
2. Airfare will be agreed upon, reimbursed or paid for by, and accommodation will be arranged and paid for by the IPBA Secretariat after consultation with the successful applicants.
3. A liaison appointed by the IPBA will introduce each Scholar to the IPBA and help the Scholar obtain the utmost benefit from the IPBA Annual Conference.
4. Each selected scholar will be responsible to attend all of the Conference, to make a very brief presentation at the Conference on a designated topic and to provide a report of his/her experience to the IPBA after the Conference.



An Invitation to Join the Inter-Pacific Bar Association

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

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

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

IPBA Activities

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

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

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

APEC

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

Membership

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

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

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

Membership renewals will be accepted until 31 March.

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

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

Corporate Associate

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

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

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

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

- Annual Dues for Corporate Associates ¥50,000

Payment of Dues

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

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

IPBA Secretariat

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

See overleaf for membership
registration form





IPBA SECRETARIAT

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

IPBA MEMBERSHIP REGISTRATION FORM

MEMBERSHIP CATEGORY AND ANNUAL DUES:

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

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

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

Firm Name: _____

Jurisdiction: _____

Correspondence Address: _____

Telephone: _____ Facsimile: _____

Email: _____

CHOICE OF COMMITTEES (PLEASE CHOOSE UP TO THREE):

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

I AGREE TO SHOWING MY CONTACT INFORMATION TO INTERESTED PARTIES THROUGH THE APEC WEB SITE. YES NO

METHOD OF PAYMENT (PLEASE READ EACH NOTE CAREFULLY AND CHOOSE ONE OF THE FOLLOWING METHODS):

- Credit Card
 VISA MasterCard AMEX (Verification Code: _____)
Card Number: _____ Expiration Date: _____

- Bank Wire Transfer – Bank charges of any kind should be paid by the sender.
to The Bank of Yokohama, Shinbashi Branch (SWIFT Code: HMAJJPJT)
A/C No. 1018885 (ordinary account) Account Name: Inter-Pacific Bar Association (IPBA)
Bank Address: Nihon Seimei Shinbashi Bldg 6F, 1-18-16 Shinbashi, Minato-ku, Tokyo 105-0004, Japan

Signature: _____ Date: _____

PLEASE RETURN THIS FORM TO:

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



Judicial Review in Hong Kong - 2nd Edition

A clear and comprehensive exposition of judicial review



Authors: Richard Gordon QC,
Johnny Mok SC,
Hans Mahncke,
Katherine Olley,
Swati Jhaveri,
Tim Parker

ISBN: 9789888147717

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Format: Hard cover book

 To request an inspection copy*,
please call +852 2179 7888.

*Availability based on first-come-first-served basis

About the book

Judicial Review in Hong Kong considers the rapid developments that have taken place, and offers guidance, on the practice of judicial review. Since the first edition in 2009, the last five years have seen an increase in judicial review, with the number of cases peaking in 2012 with 159 cases, compared to 102 cases just a decade earlier. This expansion in judicial review comes as judges apply the remedy to an increasing range of public bodies. In 2012 and 2013, the Court of Final Appeal heard a number of significant judicial review challenges and administrative law proceedings. All this raises new and challenging issues for those practising and deciding cases in this field.

Written by two practising members of the Bar, an English Queen's Counsel and a Hong Kong Senior Counsel, this expanded second edition also sees the contribution of Tim Parker and Kate Olley. Tim Parker is a Hong Kong counsel with a strong judicial review practice who has appeared in many of the significant constitutional review cases analysed in the book, while Kate Olley is an English barrister specialising in judicial review and who has recently qualified as a barrister in Hong Kong. As in the first edition, Swati Jhaveri has updated chapter 7 on the content of fundamental rights in Hong Kong.

Administrative law practitioners in Hong Kong live in exciting times where landmark principles are still being established and this area continues to grow.

VITAL SUPPORT FOR CRITICAL INFORMATION



Email us at sales.hk@crownrms.com

The power of memory
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