

IPBA Journal

September 2013

No **71**

NEWS & LEGAL UPDATE



INTER-PACIFIC BAR ASSOCIATION





Inter-Pacific Bar Association
24th Annual Meeting and Conference
May 8th-11th, 2014, Vancouver Canada

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in a Finite World*

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www.ipba2014.com

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Conference Secretariat: MCI Canada

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The President's Message

Young-Moo Shin
President



Dear Colleagues,

It's hard to believe that several months have already passed since we saw you in Seoul for the 23rd Annual Meeting and Conference. We now look forward to the next major IPBA events: the Mid-Year Council Meeting and Regional Conference in Zurich, Switzerland (25–28 October 2013) and the 24th Annual Meeting and Conference in Vancouver, Canada (8–11 May 2014).

While the IPBA annual conference is the primary 'must-attend' event of the year for business lawyers and business leaders in the Asia-Pacific Region, the Regional Conference associated with the Mid-Year Council Meeting is becoming a prominent event in its own right. This year, the host committee in Zurich has arranged four panels of speakers from around the world to present 'Bridging Cultures in Arbitration — A Special Focus on Asia and Europe', to be held on 28 October. This event is open to everyone, so we welcome you, your colleagues, and your business associates.

The 24th Annual Meeting and Conference in Vancouver is already taking shape under the capable leadership of the IPBA President-Elect, William Scott, and planning for the high-quality sessions that are the mainstay of our conferences is well underway by the IPBA Committees. Be sure to register soon to take

advantage of the Early Bird registration rates.

Each year we see an increase in the number of organisations contacting the IPBA to collaborate on events or projects in the region. The IPBA vets all requests and enters into agreements with like-minded associations to provide enhanced benefits to IPBA members. Most recently, the IPBA entered into an agreement with Practical Law Company, which is providing free of charge to IPBA members their online multi-jurisdictional, multi-topic guides for lawyers researching information in jurisdictions not their own. Check the 'Member Only' section of the IPBA website to find the link, or contact the IPBA Secretariat to find out how to access the guides.

IPBA also has firm, long-term relationships with organisations that aim to improve laws globally. In April, an IPBA member from New York, Chester Salomon, represented the IPBA at a UNCITRAL Working Session on International Trade Law; it is the third time that Chester has represented the IPBA. In July, past IPBA President Jerry Libby represented the IPBA at the Rule of Law Summit at The Hague, which was held in conjunction with the World Justice Forum IV under the auspices of the World Justice Project. The Summit

itself focused on advancing the rule of law. Past IPBA Presidents Lee Suet-Fern and Kunio Hamada also participated in events at The Hague. Jerry is the General Counsel and Secretary of the World Justice Project, while Suet-Fern is a Director of the Board. Kunio is an Honorary Chair, sharing this responsibility with global luminaries such as Madeleine Albright, Jimmy Carter, Colin Powell, Mary Robinson and Desmond Tutu. We can say with confidence that IPBA members have a hand in shaping law on the international stage.

An organisation is only as good as the people in it, and based on the members that comprise the IPBA I have no doubt that we are *the* preeminent bar association with a focus on the Asia-Pacific Region. This does not mean that the IPBA is pretentious; it is quite the opposite. The level of familiarity and camaraderie that our members enjoy with each other is unparalleled for an organisation that has a global reach like ours. Invite others to share in our conviviality by joining the IPBA, either through registration for the Vancouver Conference at the non-member rate with the option to become a member, or by contacting the IPBA Secretariat at ipba@ipba.org. With the kind support of all IPBA members, we will continue to flourish for many years to come.

Young-Moo Shin
President



The Secretary-General's Message

Yap Wai Ming
Secretary-General



Dear IPBA Members,

Greetings from Singapore!

In our last IPBA Journal, I wrote about the necessity of treating the deputy of an IPBA officer as a co-chair so there is at least a grace period of two years where the deputy is kept in the communication loop for all the decision-making processes and can also be involved in succession planning. This is important because the tenure of officers is limited to only two years and having a co-chair position extends that to four years, which should provide sufficient time for a better transfer of institutional knowledge of the organisation and ensure consistent decision-making processes.

This same principle should apply to committee chairs and their respective vice-chairs. Unfortunately, our IPBA Constitution does not provide for automatic succession of the vice-chair to assume the position of chair of the committee. In fact, most committees have many vice-chairs with no clear successor for assuming the chair position. In some committees, there are co-chairs. The reason often cited is that the title of 'vice-chair' provides some form of recognition and it helps incentivise members to come forward and assume leadership positions in the various committees. Over the last two council meetings, we have actively encouraged committees to nominate a vice-chair to start programme planning for the annual conference two years ahead and to work with the Vice President's host committee, the Programme Coordinator and his Deputy. This allows for a two-year cycle of conference planning and it mitigates the time crunch for succeeding host committees in the selection of topics or speakers. This is probably the best that we can do when we do not have a large membership base to support a larger secretariat that could take on a bigger role in organising conferences.

I would like to report that the Strategic Long Term Planning (SLTP) Committee has started work. Alan Fujimoto put out a tender to nine candidates for a facilitator to assist the SLTP in its work. We are pleased to announce that Kathleen Singleton of Eliquent Business Consulting, Australia, who had previously assisted with the first SLTP Committee in 2005-2006, has been selected as the facilitator. With the assistance of Eliquent Business Consulting, the SLTP Committee hopes to come up with a business strategy for the IPBA before the Vancouver Conference.

The secretariat has also been exploring cloud computing. This was largely prompted by the often repetitive work required to retrieve physical historical records which new officers need to request from the secretariat. Having a searchable database with proper indexing of our archives (that includes prior council decisions and resolutions) will provide administrative convenience at a very reasonable cost. Historical records and secretarial minutes are in the process of being digitised for cloud storage. Hopefully, 'going cloud' will help our new officers come up to speed faster on the functioning of the IPBA and help to consolidate institutional knowledge.

Council members will be meeting from 25-27 October 2013 in Zurich, Switzerland for our Mid-Year Council Meeting. This will be followed by an IPBA Regional Conference on 28 October entitled: *'Bridging Cultures in Arbitration — A Special Focus on Asia and Europe'*. You may register for the conference at www.arbitration.asia. I hope to see some of you soon in Zurich.

Yap Wai Ming
Secretary-General

IPBA Upcoming Events for IPBA Journal, September 2013 Issue

Event	Location	Date
IPBA Annual Meeting and Conference		
24th Annual Meeting and Conference	Vancouver, Canada	8-11 May 2014
25th Annual Meeting and Conference	Hong Kong	TBD
IPBA Mid-Year Council Meeting		
2013 Mid-Year Council Meeting (Council Members only)	Zurich, Switzerland	25-27 October 2013
IPBA Regional Event		
IPBA Regional Conference: "Bridging Cultures in Arbitration - A Special Focus on Asia and Europe"	Zurich, Switzerland	28 October 2013
Supporting Events		
marcus evans' Corporate Legal Risk Management and Compliance	Kuala Lumpur, Malaysia	9-10 September 2013
ABA Section of International Law's "China—Inside and Out"	Beijing, China	16-17 September 2013
Beacon Events' "Corruption & Compliance South & SE Asia Summit"	Singapore	17-19 September 2013
IBC's "TP Minds Asia-Pacific Transfer Pricing Summit 2013"	Singapore	25-26 September 2013
HKIAC's "ADR in Asia Conference"	Hong Kong	23 October 2013
Asia Women in Business Law Awards 2013	Hong Kong	20 November 2013

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

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 **Caroline Berube** at cberube@hjmasialaw.com and **Maxine Chiang** at maxinechiang@leetsai.com. 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, 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 is written by an IPBA member. Co-authors must also be IPBA members.

IPBA REGIONAL CONFERENCE



Bridging Cultures in Arbitration – A Special Focus on Asia and Europe

Managing and reconciling diverse cultural expectations in an arbitration case is a true challenge that every international arbitration practitioner should be aware of.

This multi-cultural conference, organized by the IPBA and major Asian and European arbitration institutions, has a truly global reach. **Four culturally mixed panels (Pre-Arbitral Issues, Arbitration in Progress (Procedural Aspects), Mediation and Settlement Practices, The Deliberation and Award Writing)** will help you to sharpen your mind for this particular aspect of international commercial arbitration.

Date/Time: Monday, October 28, 2013, 09.00 – 17.15

Venue: Marriott Hotel, Zurich, Switzerland

Registration Fee (including Lunch, Beverages and Conference Material)

Standard Registration Fee: CHF 380 or JPY 40'500

IPBA Member: CHF 320 or JPY 34'000

Young Lawyer under 35 years: CHF 250 or JPY 26'500

For more details and registration form, visit the IPBA web site: <http://ipba.org>
or the conference web site: <http://www.arbitration.asia/downloads/>



Interview with The Honorable Mao-Zong Huang, Grand Justice of the Constitutional Court, Judicial Yuan of Taiwan

On 8 July 2013, Maxine Chiang, the Vice-Chair of the Publications Committee of the IPBA, with assistance from Nicole Lee, Corporate Counsel for Dell Taiwan, was honoured with an opportunity to interview the Honourable Grand Justice Huang for the IPBA Journal. Below is a summary of the interview:



Grand Justice Mao-Zong HUANG

Grand Justice Huang received a Doctor of Law degree from Tübingen University, Germany. He was an Associate Professor at the College of Law of the National Taiwan University from 1975 to 1982. He then became a full professor from 1982 to 2008, upon which he received a lifetime tenure from the National Taiwan University as a Distinguished Chair Professor. He also served on the Fair Trade Commission of the Executive Yuan of Taiwan prior to his appointment as Grand Justice.

- We understand that the main role of the Grand Justice is to oversee the implementation of laws and regulations to protect fundamental rights under the Constitution through interpreting the Constitution. In your view, how have Grand Justices contributed to the protection of fundamental rights in Taiwan, and what have they achieved so far?**

The most common issues with respect to the violation of fundamental rights are violations of personal freedom, the freedom of speech, and property rights.

In relation to the protection of personal freedom in Taiwan, this generally revolves around the

applicability of the judicial discretion principle (*Richtervorbehalt*), the legislative discretion principle (*Gesetzesvorbehalt*) and the proportionality principle (*Verhältnismäßigkeit*). After Martial Law was lifted, the protection of human rights in the Constitution has gradually coalesced into a common understanding among the public, thanks to the work of people in many fields over the past few decades. Through Constitutional Interpretations (opinions), the Grand Justices have declared as unconstitutional many laws implemented during the period of Martial Law that are incompatible with a modern constitutional democracy, such as the Act Governing Punishment of Police Offences, the Anti-Gangster Act, certain provisions related to arrest and detention in the Criminal Procedures Act, and compulsory labour, protective or corrective measures of rehabilitation. Such declarations of unconstitutionality have also led to implementation within the relevant criminal procedures and substantive laws to a degree of protection that is in line with the judicial discretion

principle, the legislative discretion principle and the proportionality principle, as required under the Constitution.

Freedom of speech is a fundamental right that is highly relevant to political issues. Substantial results have been achieved through social evolution and the interpretation of the Constitution in the few decades since the lifting of Martial Law. However, there are still certain pending issues, such as the restrictions in the Mass Gathering and Protests Act on the right of assembly under the Constitution, and the protection of commercial speech, which are still awaiting a public consensus or understanding on such matters.

As for the protection of property rights, the most controversial issues in recent years include compensation for land expropriation (eminent domain), urban renewal procedures and compulsory demolition/eviction, as well as taxes. The dispute in terms of land expropriation is mainly focused on whether the compensation is adequate, and the setting of the compensation method. For urban renewal, the issue involves a conflict between the protection of land ownership and the right of residence guaranteed under the Constitution and implementation of the public interest. Although the Constitutional Court has held that, with respect to urban renewal procedures and the required proportion in agreement, such provisions are, in law, not consistent with individual property rights and the right of residence guaranteed under the Constitution and have thus been interpreted as unconstitutional. More discussion is still required on the protection of fundamental rights so as to form a public consensus.

The main points in examining taxation laws lie in compliance with constitutional rights of the legal bases for collecting taxes (legislative discretion principle, the principle of administration according to the law) as well as the ability-to-pay taxation principle. While there is fundamentally a consensus on the legal bases for the collection of taxes, in practice, issues arise. Taking an administrative order made under the colour of law as an example, the law should clearly provide that it has properly mandated the contents of

the administrative order; however, for administrative orders dealing with only secondary matters, such as minor details and technicalities, the above does not apply. However, there is no consensus on what is meant by 'minor details' and 'technicalities', and how these should be substantively implemented. The ability-to-pay principle of taxation originates from taxation based on the actual activities of the taxpayer (economic substance principle), which means that the restrictions imposed by the taxation law on the constitutional right of work, survival and property must be compliance with the proportionality principle. For example, the Constitutional Court has declared as unconstitutional the former compulsory practice of combining a married couple's non-wage income, and the rules on the calculation of taxes owed by separated couples. However, there is still much work to be done with regards to the application of the ability-to-pay taxation principle to all taxation laws and regulations.

2. Do you have any particular personal expectations or vision with respect to the position of Grand Justice?

Other than the aforementioned implementation of protection of fundamental rights, I would like to promote the growth of the economic system through the constitutional interpretation of laws and regulations in the sphere of economics and finance. Economic and financial laws and regulations are critical to the direction of social economic activities and the development of economic activity. As such, I would personally like to see the constitutional interpretation of economic and financial laws contribute, even just in a small way, to the improvement of the economic and legal environment in Taiwan and the promotion of the growth of economic activities.

3. You were a university professor and a commissioner of the Fair Trade Commission prior to your appointment as a Grand Justice. What beliefs or convictions did you hold during your time in academia, government administration and the judiciary?

My passion for working in the legal field stems from an ideal of upholding social justice. However, to achieve

fairness and justice requires meticulous standards and implementation. I have come to fully realise that advances in society cannot be done alone, a consensus must be built and the goals achieved through the efforts of many. In building that consensus, besides the patience to wait for the right opportunity, there must be an emphasis on rational dialectic as well as dialectic approaches to form a basis for effective dialogue and reliable understanding. My belief in legal education is thus based on developing a strong foundation in law so that through such legal education and research, an ethos based on fairness and justice may spread in society.

During my time with the Fair Trade Commission, I was gratified to be able to have an immediate effect reflected in the fair results in individual cases, as well as their gradual effect in terms of the understanding of and compliance with the Fair Trade Act in the relevant industries. Especially in cases where foreign enterprises questioned the Taiwanese Fair Trade Act, I would allow them to explain what kind of competitive behaviours were permitted under the competition laws in their home countries so that I could discern whether there is a difference in treatment between the foreign enterprise's competitive behaviour in Taiwan and that applicable overseas. This helped to ensure that competition in Taiwan is compliant with the principle of fairness regardless of whether the competition is domestic or abroad.

I also see my job to interpret the Constitution as a very important part of the rule of law. Through interpretation of the Constitution, it can be ensured not only that constitutional principles are being implemented into individual laws or regulations but also that the substantive meaning of a constitutional regime is being imparted into the relevant laws in each field. In addition, this would significantly influence the direction of legislation. Therefore, I fully appreciate the duties and responsibilities of this position.

4. Given your busy and stressful work, how do you balance work with everyday life?

I am very interested in people and things, and I like to explore different fields in the conviction that there must be a profound rule behind all things. I can start from a subtle beginning and engage in a quest to understand by following the thread, so to speak, which is a process that I never get tired of. In my free time, I often find myself studying traditional Chinese medicine and Buddhist philosophy. The immense depth and breadth of these subjects continue to draw me in. I also love listening to and meeting people during my travels to find out their stories. For recreation, my favourite exercise is swimming. Regardless of the season, I swim one kilometre every morning. This exercise allows me to relax in the midst of the daily hustle.

5. What words or encouragement do you have for young people?

It is not easy to attain your life's goals. You should try to set goals early so that the 'you in the present' is aligned with the 'you of tomorrow'. You will thus use the resources available to you more effectively, and you would also have more opportunities to reach your goals. The difficult things in life are not actually hard; the difference between success and failure is in the heart.



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Franchising a Foreign Business Model in China

Franchising is growing rapidly in China, and overseas companies are increasingly using this model to tap the Mainland's vast consumer market. This article provides a general introduction to the concept of franchising in China. It sets out the main features of the applicable Chinese legislation, addresses various implementation features, franchisor requirements, and the protection of Intellectual Property. It also places the concept of franchising against that of retail chains and licensing.

Legislation

Over the years, franchising has become increasingly popular with international brands when targeting the Chinese consumer. According to the Chinese Ministry of Commerce, franchising has undergone rapid development in China as a new mode of circulation and has become an effective method for expanding the business scale.¹

The PRC is one of the 33 countries worldwide explicitly regulating franchising. Chinese legislation introduced this legal concept in 1997 with the implementation of the 'Administrative Procedures for Commercial Franchising.' This regulation was updated in 2005 by the promulgation of the 'Circular of the Ministry of Commerce on Enhancing the Administration over Franchise Businesses', now also specifically addressing foreign investors.² Today, PRC franchise law is much clearer by virtue of new legislation: 'Administrative Regulations on Commercial Franchising' (2007) Administrative Measures for the Record Filing of Commercial Franchises' (2011) and 'Measures for the Administration of Information Disclosure of Commercial Franchises' (2012).³

Franchising Structures

Before the introduction of the abovementioned legislation, franchises in China generally took the form of

a Sino-Foreign Joint Venture between a foreign company and its domestic Chinese partner company. Familiar examples are KFC, McDonald's, Pizza Hut, Starbucks and Walmart. However, the new legislation broadens the scope by allowing the franchisor to be either a subsidiary – including a foreign invested enterprise or FIE such as a Wholly Foreign Owned Enterprise ('WFOE') or a Joint Venture – or a foreign company without establishing a domestic enterprise within the PRC, the so-called 'cross-border franchising'. However, it does carry certain risks such as the local absence of the franchisor that can lead to a lack of monitoring and control of the franchisee. The first option, through the use of a FIE, can be an ideal way to build and manage a franchise network in China. Having local presence and staff will enhance the management's avail of business resources, the supervision of the uniform business format of the franchise and the brand awareness which all contribute to future expansion of the franchise network. Moreover, this structure in certain instances may be advisable from a tax perspective.

Franchisor Requirements

Chinese legislation, as is common in other countries, focuses on the protection of franchisees rather than franchisors. A franchisee is hardly required to satisfy any requirements, whereas a number of restrictions and obligations are imposed on the franchisor. Some

of these requirements are addressed below. PRC law in this respect applies non-discriminatory to domestic and foreign franchisees.

The franchisor must have operated at least two directly managed franchises (either in China or abroad), for more than one year. This is also known as the 'two and one' rule: run at least two shops during at least one year.

The franchisor also has an extensive information disclosure obligation towards each prospective franchisee. It needs to provide a sample of a template franchise agreement; commercial and legal information on its own business, its business resources, including its registered Intellectual Property ('IP'): trade mark, trade name, designs, images, in short: 'brand' and its IP protection method, its investment and budget plan, and its business model for franchisees. Failure to disclose such information, or the dissemination of inaccurate information, will furnish the franchisee legal grounds to terminate the franchise agreement, prevent further operation of the franchisees' outlets and to claim damages from the franchisor.

Franchise Agreement

The franchise agreement forms the heart of a franchise and provides the basis of the cooperation between the franchisor and the franchisee, including: clauses on the content of the franchise, the franchise term and fee; operation guidance (franchise manual), technical support or other business training courses; quality, standard and warranty of the products or services; advertisement and marketing of the products or services; after sales and product liability; assistance for third party IP infringement; and liability for breach of contract.

The agreement moreover needs to provide a 'calm-down' period, during which the franchisee is entitled to unilaterally terminate the agreement without giving any reason.

Also, the PRC authorities may suggest amendments of the content of the franchise agreement and underlying rules and regulations, which the franchisor is wise to follow up on.



Protection of Intellectual Property

Franchising in China is a common source of 'IP' rights infringements. Before entering the Chinese market, franchisors must be cautious. They should ensure that their IP is established under Chinese law, and that the franchise agreement contains clear clauses on how their brand name, logo, design and trade secrets such as production techniques and marketing methods should be applied. Above all, the franchisor must subject any breach of these clauses by the franchisee to penalties and immediate cancellation of the franchise.

Franchising versus Retail Chain Stores

Internationally well-known brands wanting to implement their business model in the Chinese market are confronted with the choice between franchising and setting up one or multiple retail chain stores. It is generally believed that in most circumstances franchising is the best way forward. The reasons can vary. Franchising would avoid the opening of multiple retail stores all over

Franchising allows foreign companies to roll out their franchise in the Chinese market rapidly at lower operative cost.



the country, which can be quite strenuous. Moreover, it avoids having to invest and bear the liability of running a chain of stores. The franchisee is also believed to have a greater incentive than a direct employee of a chain store because he or she has a direct own stake in the business.

Finally, and most importantly, compared to establishing retail chain stores franchising allows foreign companies to roll out their franchise in the Chinese market rapidly at lower operative cost.

On the other hand, a foreign franchise in China has its typical hurdles, such as the monitoring by the PRC authorities and ensuring discipline within the franchise network.

Franchising versus Licensing

One way to avoid the hurdles involved with franchising would be to opt for a licensing structure. This allows the foreign company to contractually licence its IP to a

Chinese party. The licence agreement has to be filed with the Chinese authorities at the conclusion of the agreement. The rights and obligations laid out by law for the two respective parties to the agreement are relatively balanced, if not more inclined to the owner of the IP (i.e., the licensor). Therefore, compared to franchising, the foreign party will, in this structure, be subject to more favourable applicable legislation, less government control, and will not have to comply with the 'two and one' rule and the disclosure obligations as in a franchise.

It should, however, be noted that the foreign company will, compared to the franchise model, have limited control over the use of its IP and no supervision whatsoever over management of the licensor. Therefore, if there is an intention to be active in the local management and have control of the key business elements – such as brand building, marketing campaign, supply and resourcing, staff training and finance compliance, the setting up of a franchise would be the preferred option.

Notes:

- 1 Preamble to the Circular of the Ministry of Commerce on Enhancing the Administration over Franchise Businesses, see endnote 3.
- 2 Promulgation date: 03-10-2005. Promulgator: Ministry of Commerce.
- 3 Administrative Regulations on Commercial Franchising, Order of the State Council [2007] No. 485



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Class Action Waivers in Arbitration Clauses: A Growing Trend?

Arbitration and class actions are both meant to improve dispute resolution efficiency, but now the former is being used to eliminate the latter. To prevent class actions from being brought against them, corporations are increasingly inserting arbitration clauses with class action waivers into contracts. This article looks at how this practice arose in the United States, its treatment under US law – and recent decisions in the United States and Canada that suggest it is here to stay.

Courts and commentators have long praised arbitration for its flexibility and, correspondingly, its efficiency in resolving disputes between parties. By operating on the basis of consent and allowing parties to adjust the procedures and mechanisms for the adjudication of their disputes as they see fit, arbitration has often been seen as an improvement on litigation. However, the recent decision of the United States Supreme Court in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. – 133 S. Ct. 2304 (2013), presents a different side to arbitration. It suggests that parties, especially those with bargaining power, can use arbitration to bar class and collective treatment of their disputes – and thereby prevent cost-effective adjudication of their disputes. To understand how this counterintuitive result occurred and why it is such an important development for corporations, it is necessary to understand both the workings of US class action law and its interplay with arbitration.

In the United States, class actions are procedurally available in both state and federal courts. The requirements for a class action in the US federal court system are set by Rule 23 of the US Federal Rules of Civil Procedure, specifically:

1. the class is so numerous that joinder of all members is impracticable;
2. there are questions of law or fact common to the class;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. the representative parties will fairly and adequately protect the interests of the class.¹

As these requirements demonstrate, class actions are designed for situations where the sheer number of claimants with common claims, defences, and questions of law and fact make mass adjudication in one, representative lawsuit, sensible.

The paradigmatic class action involves a mass tort, such as an airplane crash, where the questions of liability and harm among all of the people affected, i.e., the airplane passengers in the case of a plane crash, are clearly the same. Class actions have been used in other sorts of litigation, however, including product liability, antitrust, securities, and employment claims. In these latter types of class actions, the outcome of the litigation often hinges on whether a class gets certified, as they involve individual actions that, by themselves, would not be worth the expense of bringing. Thus, if a court finds that class treatment is not appropriate and does not certify a class, the plaintiffs will often withdraw their claims or settle them for a pittance, because it would not be cost effective for them to continue pursuing the litigation.

Some would argue that this is not necessarily an unfair or undesirable result. While class actions can promote



the efficient use of judicial resources and ensure that corporate defendants cannot systematically cheat individuals out of even small amounts of money, as with any efficiency measure, there are those who take advantage of it. Correspondingly, courts in the United States are rife with class actions that seem to benefit no one but the attorneys involved.

In a typical scenario, an attorney files a class action against a deep-pocketed corporate defendant on behalf of clients he or she recruited in a jurisdiction carefully chosen for its tendency to grant class certification. After the class is certified, the attorney then uses the threat of potentially billions of dollars in class liability to extort a settlement from the company. That settlement bestows a large fee award on the attorney – but provides little compensation to class members for the supposed harm other than 'coupons' to use the offending product or service again at a discount. It was to prevent such forum shopping and 'coupon settlements,' and to keep more class actions in federal court, that the US Congress passed the Class Action Fairness Act of 2005. Still, corporations have continued to search for ways to avoid the threat of class actions.

One approach has been to insert language into contracts with consumers and employees barring any sort of collective or class action from being brought based on claims arising under the contract. Obviously, such language is easiest to include when corporations

have bargaining power and can force the other party to acquiesce to such provisions in so-called 'contracts of adhesion.' But the courts and legislatures of various US states have found such contracts to be offensive and unconscionable. As a result, class action waivers in contracts of adhesion are unenforceable in many jurisdictions. Hence, corporations have turned to arbitration clauses to solve their class action problem.

The Federal Arbitration Act ('FAA') was signed into law by US President Calvin Coolidge on February 12, 1925. As the US Supreme Court has noted, 'passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.'² The key part of the statute for effectuating this goal is Section 2 of the FAA, which provides:

A written provision in any maritime transaction or contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.³

Accordingly, any reason for suggesting an arbitration agreement should not be enforced other than one that existed 'at law or in equity for the revocation of any contract' is pre-empted by the FAA. Put simply, the FAA 'establishes that, as a matter of federal law, any doubts

concerning the scope of arbitrable issues should be resolved in favor of arbitration.¹⁴

US Supreme Court cases have repeatedly reaffirmed this pro-arbitration stance. In *Dean Whitter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985), the Court held that arbitrable claims subject to an arbitration agreement must be arbitrated – even when non-arbitrable claims arose out of the same transaction and ‘the result would be the possibly inefficient maintenance of separate proceedings in different forums.’¹⁵ Then, in *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), the Court held that not only contractual claims, but also statutory claims, arising under a contractual agreement governed by an arbitration clause should be arbitrated. Finally, in the context of class actions, the Court has recently held that an arbitrator’s ruling that an arbitration clause allows for class arbitration of claims must be respected and heeded, so long as it is based upon an interpretation of the contract, whether it be right or wrong, and not simply on policy considerations.⁶

The bugaboo has been the situation where an arbitration agreement prohibits collective or class arbitration. As aforementioned, many courts and legislatures in the United States have found class action waivers in contracts of adhesion to be unenforceable. If the waiver is contained within an arbitration clause, however, it is protected by the preemptive authority of the FAA. That was what the US Supreme Court decided in *AT&T Mobility LLC v. Concepcion*, 563 U.S. – , 131 S. Ct. 1740 (2011).

AT&T Mobility involved a mobile phone sales contract that contained an arbitration clause requiring all claims to be brought in the parties’ ‘individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.’¹⁷ Notwithstanding this clause, the plaintiffs filed a class action suit in federal court in California against AT&T, alleging that the company made misrepresentations in its advertising that the phones would be free when, in fact, purchasers had to pay sales tax on the phones’ retail value. When AT&T moved to stay the suit and compel arbitration, the district court denied the motion on account of the California Supreme Court decision in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Ca. 2005), which held that class action waivers in arbitration agreements of contracts of adhesion were unconscionable and thus unenforceable. The US Court of Appeals for the Ninth Circuit affirmed that decision.

On appeal, the US Supreme Court reversed the decision of the Ninth Circuit Court of Appeals. It found that ‘the *Discover Bank* rule’ was not a basis ‘at law or in equity for the revocation of any contract’ and thus not a valid exception under Section 2 of the FAA for enforcing an arbitration agreement. Indeed, the fact that the *Discover Bank* rule allowed parties to a consumer contract to demand class arbitration – even where it was prohibited by agreement – conflicted with ‘[t]he “principal purpose” of the FAA ... to “ensure that private arbitration agreements are enforced according to their terms”.’¹⁸ As the Court explained, class arbitration is inconsistent with the FAA ‘to the extent it is manufactured ... rather than consensual.’¹⁹ Instead, the terms of an arbitration agreement should be followed, as the FAA ‘requires courts to honor parties’ expectations.’¹⁰

AT&T Mobility seemed to eliminate the possibility that, absent a common law defence such as duress or fraud, a class action waiver in an arbitration clause would not be enforced. If there was any doubt, however, the US Supreme Court’s decision this past summer in *American Express Co. v. Italian Colors Restaurant*, *supra*, removed it. At issue in this more recent case were class action waivers in the arbitration clauses of the contracts American Express had with its merchant clients. Some of these merchants brought a class action against American Express under US antitrust laws for supposedly



using its monopoly power in the charge card market to force them to accept higher credit card rates. American Express moved to compel individual arbitration, and the district court granted its motion.

On appeal, however, the US Court of Appeals for the Second Circuit reversed the decision. The plaintiffs had submitted expert testimony that the maximum amount of damages that any representative plaintiff could claim was \$12,850, or \$38,549 when trebled under US antitrust law, but it would cost any plaintiff hundreds of thousands of dollars, if not millions, to prove the antitrust claims.¹¹ Relying on dicta from *Mitsubishi*, the court of appeals asserted that '[a]rbitration is... recognized as an effective vehicle for vindicating statutory rights... only "so long as the prospective litigant may effectively vindicate its statutory cause of action in the arbitral forum"'.¹² Feeling that the class action waiver barred 'effective vindication' of the plaintiff's federal statutory rights, the court of appeals held the arbitration clause to be unenforceable.

The Supreme Court disagreed, and in an opinion by Justice Scalia, once again reiterated that 'courts must "rigorously enforce" arbitration agreements according to their terms.'¹³ Noting both that 'the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim,'¹⁴ and that rule 23 does not 'establish an entitlement to class proceedings for

the vindication of statutory rights,'¹⁵ the Court found that there was 'no contrary congressional command' requiring rejection of the FAA's mandate.¹⁶ Moreover, unlike the scenario where an arbitration agreement barred parties from bringing a specific statutory claim, the case was not one where the plaintiffs could not assert their causes of action at all. It just might be too costly. As the Court explained, 'the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.'¹⁷

While the Court's definitive stance is sure to elicit praise from arbitration practitioners as a reaffirmation of the notion that the terms of an arbitration agreement should be enforced, the real impact of the decision was revealed by Justice Kagan in her dissent. She, of course, disagreed with the notion that the class action waiver would still allow effective vindication of the merchants' rights under US antitrust laws in light of how cost-prohibitive individual arbitration would be. In making her arguments, however, she also highlighted other aspects of the arbitration agreement that made it onerous:

As the Court makes clear, the contract expressly prohibits class arbitration. But that is only part of the problem. The agreement also disallows any kind of joinder or consolidation of claims or parties. And more: Its confidentiality provision prevents Italian Colors from informally arranging with other merchants to produce a common expert report. And still more: The agreement precludes any shifting of costs to Amex, even if Italian Colors prevails. And beyond all that: Amex refused to enter into any stipulations that would obviate or mitigate the need for the economic analysis. In short, the agreement as applied in this case cuts off not just class arbitration, but any avenue for sharing, shifting, or shrinking necessary costs.¹⁸

As Justice Kagan illustrated, the Court's decision in *American Express* meant that corporations can now load FAA-protected arbitration clauses with all sorts of stipulations, including class action waivers, which will make it difficult logistically and financially for parties to initiate claims against them.

In effect, while arbitration has long been praised as a streamlined form of dispute adjudication, corporations can now use it to eliminate certain dispute resolution



The Court's decision in *American Express* meant that corporations can now load FAA-protected arbitration clauses with all sorts of stipulations.

efficiencies – such as class actions – and thereby make it *harder* for claimants to obtain relief. This is not purely an American phenomenon. Earlier this year, in *Murphy v. Amway Canada Corp.*, [2013] F.C. 38 (Can.), the Federal Court of Appeal in Canada upheld the use of a class action waiver in an arbitration agreement. In that case, the plaintiff brought a class action against Amway Corporation, claiming that it was withholding compensation information from its distributors and operating a pyramid scheme in violation of the Canadian Competition Act. Amway moved to compel individual arbitration in accordance with the plaintiff's registration agreement, which contained an arbitration clause with a class action waiver. The court granted the motion, and the Federal Court of Appeal upheld that decision.

Relying on language from the Supreme Court of Canada in *Seidel v. Telus Communications Inc.*, [2011] 1 S.C.R. 531, 2011 SCC 15, and using logic that would be strikingly similar to the US Supreme Court's decision in *American Express*, the Federal Court of Appeal held that the terms of an arbitration agreement should be honoured, unless there is express statutory language prohibiting or excluding one of those terms from being enforced. In *Seidel*, the Supreme Court of Canada found that there was language to that effect in Section 172 of the British Columbia Consumer Protection Act, but the Federal Court of Appeal in *Murphy* found no such language in the Competition Act. Therefore, the class action waiver in the arbitration agreement of the parties' contract needed to be enforced.

It would be imprudent to make generalisations based on just two jurisdictions, but for now at least, courts in common law countries seem to be inclined to respect class action waivers in arbitration agreements unless there is an express legislative mandate to the contrary. The outcomes in the next few jurisdictions that tackle this issue will be telling. Australia, for example, arguably has a more plaintiff-friendly environment for class actions than the United States or Canada. Might Australian companies follow the lead of those in the United States and Canada and turn to arbitration agreements containing class action waivers as a way to protect themselves?

In the end, no matter what jurisdiction tackles this issue next, and however it is decided, it is clear that business is becoming increasingly international and corporations should be wary of needlessly exposing themselves to

liability in other jurisdictions. Accordingly, even in those countries that do not have class action mechanisms or in which class actions do not pose a large domestic threat, attorneys would be well-advised to counsel their corporate clients on incorporating arbitration agreements with class action waivers into their international contracts. There is little harm in adding such provisions – but they could potentially serve a great benefit by protecting the companies from class liability elsewhere.

Notes:

- 1 Fed.R. Civ. P. 23(a).
- 2 *Dean Whitter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985).
- 3 9 U.S.C. section 2.
- 4 *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).
- 5 470 U.S. at 163.
- 6 Compare *Oxford Health Plans LLC v. Sutter*, 569 U.S. – (2013) (arbitrator's decision allowing class arbitration based on his interpretation of arbitration clause enforced), with *Stolt-Nielsen S. A. v. Animal Feeds Int'l Corp.*, 559 U. S. 662 (2010) (arbitrator's policy-based decision allowing class arbitration vacated).
- 7 *AT&T Mobility* (slip. op. at 1).
- 8 *Id.* at 9-10.
- 9 *Id.* at 13.
- 10 *Id.* at 17.
- 11 See *In re Am. Express Merchs.' Litig.*, 667 F.3d 204, 217-18 (2d Cir. 2012).
- 12 *Id.* at 214 (quoting 473 U.S. at 632) (emphasis in original removed).
- 13 *Am. Express* (slip. op. at 3) (quoting *Dean Witter Reynolds*, 470 U. S. at 221).
- 14 *Id.* at 4.
- 15 *Id.* at 5.
- 16 *Ibid.*
- 17 *Id.* at 7 (emphasis in original).
- 18 *Id.* (Kagan, J., dissenting) (slip. op. at 7-8).



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Chinese Arbitration Bodies Resort to 'UDI'

This article considers the ongoing dispute in China between CIETAC Beijing and its former sub-commissions in Shanghai and Shenzhen and CIETAC's former sub-commissions' apparent 'unilateral declaration of independence' (and some rather confusing acronyms). It provides useful advice for parties considering, or engaged in, arbitration to minimise their exposure to the risks which these developments raise. An interpretation by the Supreme People's Court is expected soon which it is hoped will provide much-welcomed guidance.

Readers will be aware that the China International Economic and Trade Arbitration Commission (CIETAC) is China's oldest and best known institutional arbitration body. It is the preferred venue for the arbitration of foreign-related disputes in China.

CIETAC's standing is comparable to other major permanent international arbitration centres, such as the Hong Kong International Arbitration Centre, the London Court of International Arbitration, the Singapore International Arbitration Centre and the ICC International Court of Arbitration.

Established in 1956 (then known as the Foreign Trade Arbitration Commission), CIETAC has more than 50 years of experience in administering international and domestic arbitrations. According to its website, CIETAC accepted almost 20,000 'Foreign-Related and Domestic' cases during the years 1985 to 2012 inclusive.

With the exponential increase in recent years in foreign direct investment into China (arising out of China's 'Reform and Opening up'), the presence of a reputable, independent and impartial international arbitration body on the Mainland has undoubtedly been of immense reassurance to Chinese and foreign counterparties alike. CIETAC is headquartered in Beijing (CIETAC Beijing)



and has (or had) sub-commissions in the important commercial centres of Shenzhen (known as the CIETAC South China sub-commission), Shanghai, Tianjin and Chongqing.

This article is concerned with the ongoing dispute between, on the one hand, CIETAC Beijing and, on the other, SHIAC (the new Shanghai International Arbitration Center) and SCIA (the new Shenzhen Court of International Arbitration). SHIAC and SCIA evolved out

of CIETAC's sub-commissions in Shanghai and Shenzhen respectively, having declared 'unilateral independence' last year; a strategy not seen in 'international affairs' for many years.

As well as exploring some of the background to the dispute, this article aims to provide some general guidance on how parties can minimise the risks arising out of this dispute pending Interpretation by the Supreme People's Court in China.

Background to the Dispute

The origins of the dispute go back to 2011/2012 when CIETAC adopted its new Arbitration Rules ('the 2012 Rules'). The 2012 Rules came into force on 1 May 2012 and replaced the then existing Rules, which had been in place since 1 May 2005 ('the 2005 Rules').

One of the changes brought in by the 2012 Rules (and that which has proven to be the most controversial) was the provision that all cases submitted to CIETAC would be administered by CIETAC Beijing, unless the parties specifically provided in their written agreement for one of CIETAC's sub-commissions to *administer* the arbitration. So, for example, if an arbitration agreement provides only for the dispute to be submitted to CIETAC (and is silent as to the place of hearing) or provides for the dispute to be submitted to CIETAC and for the place of hearing to be in, say, Shanghai or Shenzhen, in both cases the arbitration would be *administered* by CIETAC Beijing. In order for one of CIETAC's sub-commissions to administer the arbitration, the written arbitration agreement would have to specify that the arbitration be administered under the auspices of the relevant sub-commission.

This represents a departure from the practice under the 2005 Rules, where the sub-commissions enjoyed significantly more independence and autonomy and under which arbitrations would routinely be administered by the sub-commission with the 'closest connection' to the dispute. For example, any dispute submitted to CIETAC pursuant to an arbitration agreement which referred to the place of hearing being Shenzhen would almost certainly be administered by CIETAC's South China sub-commission. It is worth noting that, in practice, most arbitration agreements simply provide that any dispute should be referred to CIETAC, without stipulating where the arbitration should be administered. Under the 2012 Rules, a dispute arising out of such an agreement would be administered by CIETAC Beijing.



To put it mildly, CIETAC's Shanghai and South China sub-commissions were not happy with this aspect of the 2012 Rules and refused to apply them. In addition to general concerns about party autonomy, these sub-commissions were also, no doubt, concerned with the effect this new provision would have on their own autonomy and independence from CIETAC Beijing and with the loss in revenue which would result from more arbitrations being 'diverted' by default to CIETAC Beijing.

During the course of April to December 2012, CIETAC Beijing, on the one hand, and CIETAC's Shanghai and South China sub-commissions, on the other, tried to outmanoeuvre one another. A selective summary of the events which transpired during this period is as follows:

- On 16 April 2012, some two weeks before the coming into force of the 2012 Rules, CIETAC's Shanghai sub-commission announced its change of name to Shanghai International Economic and Trade Arbitration Commission (SIETAC) but also that it would concurrently go by the official name of Shanghai International Arbitration Center (SHIAC). It also declared that, with effect from 1 May 2012, it would administer its own arbitration rules and use its own panel of arbitrators and that (in addition to accepting cases referred to SIETAC/SHIAC), 'it

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will continue to accept cases upon agreements between parties to arbitrate by China International Economic and Trade Arbitration Commission Shanghai Commission/Branch/Sub-Commission'. The sub-commission had, in effect, made a unilateral declaration of independence (UDI).

- CIETAC Beijing issued a statement in response on 1 May 2012, claiming that the actions of the Shanghai sub-commission 'have violated the Arbitration Law of China and the relevant regulations of the State Council as well as CIETAC's Articles of Association, causing confusion in the domestic and international arbitration communities and seriously affecting parties' exercise of their arbitration rights' and stating that all such actions were 'null and void'.
- On 16 June 2012, CIETAC's South China sub-commission changed its name to the Shenzhen Court of International Arbitration (SCIA) and announced that it would continue to apply the 2005 Rules and continue to use CIETAC Beijing's panel of arbitrators until it established its own rules and panel of arbitrators. It too declared UDI.
- On 1 August 2012, CIETAC Beijing announced that, with immediate effect, it had suspended its authorisation to CIETAC's Shanghai and South China sub-commissions 'for accepting and administering arbitration cases'. It also declared that, where parties

have agreed to submit disputes to either of these sub-commissions, such disputes should, instead, be submitted to CIETAC Beijing for administering, although the seat and place of hearing for such arbitrations would, unless the parties agreed otherwise, be in Shanghai or Shenzhen as the case may be.

- On 4 August 2012, SHIAC and SCIA issued a joint statement through which they:
 1. declared that they have always been independent arbitration institutions;
 2. explained their objection to the 2012 Rules (which they said 'violated the principle of party autonomy and damaged the legitimate rights and interests of the parties in order to achieve [CIETAC Beijing's] self-centred interest');
 3. disputed CIETAC Beijing's ability to authorise or suspend the authorisation of its sub-commissions; and
 4. declared that they would 'continue to accept and manage arbitration cases as agreed upon by the parties.'
- On 22 October 2012, SCIA was formally renamed South China International Economic Trade Arbitration Commission (SCIETAC), although it concurrently goes by the name SCIA.
- On 1 December 2012, SCIA's own Rules came into force and its own panel of arbitrators was adopted.
- On 31 December 2012, CIETAC Beijing published an announcement, which stated (among other things) that '[a]uthorization to the CIETAC Shanghai Sub-Commission and the CIETAC South China Sub-Commission for accepting and administering arbitration cases is hereby terminated.'

Risks and Implications

Parties proposing to arbitrate in China, through CIETAC, SHIAC or SCIA, or entering into written agreements to arbitrate or who have already entered into such agreements, face some very real concerns.

Invalidity of the Arbitration Agreement

Article 18 of China's Arbitration Law provides that where 'an agreement for arbitration fails to specify or specify clearly matters concerning arbitration or the choice of arbitration commission', the arbitration agreement is 'invalid', unless the parties are able to conclude a supplementary agreement.

It is easy to see how the recent declarations of independence by SHIAC and SCIA could lead to confusion and ambiguity as to what exactly the parties to an arbitration agreement intended, particularly where an agreement entered into before May 2012 provides for CIETAC arbitration, with the place of hearing in Shanghai or Shenzhen. Did the parties intend that disputes be submitted to the successor institutions of CIETAC's Shanghai and South China sub-commissions (if, in fact, this is what SHIAC and SCIA are) or to CIETAC Beijing?

A party wishing to avoid arbitration and who might prefer to litigate in the courts, for tactical reasons, could well challenge the validity of such an arbitration agreement.

Jurisdiction Challenges

At present, there is a real risk that:

- The respondent to an arbitration submitted to either SHIAC or SCIA may challenge the jurisdiction of the relevant institution, where the agreement to arbitrate provided for CIETAC arbitration with the Shanghai or South China sub-commissions as the responsible institution or Shanghai or Shenzhen as the place of hearing.
- One party to an arbitration agreement might submit a dispute to CIETAC Beijing, while the other submits the same dispute to either SHIAC or SCIA. Now that CIETAC Beijing has purported to suspend the authorisation of its former sub-commissions in Shanghai and Shenzhen, it will accept disputes even where the arbitration agreement specifically provides for arbitration under the auspices of CIETAC's Shanghai or South China (i.e., Shenzhen) sub-commissions.

Competing arbitrations and, particularly, competing arbitral awards should naturally be avoided at all costs.

Challenges to Enforcement

CIETAC arbitration awards have generally received widespread recognition in the courts of China and overseas, as a result of CIETAC's reputation and China being a 'New York Convention' signatory. It is not clear whether arbitral awards arising out of SHIAC or SCIA will receive the same degree of recognition over the long term. Much will depend on whether the local courts in Shanghai and Shenzhen recognise orders and awards arising out of arbitrations conducted by SHIAC or SCIA. So far, the signals coming of the courts in China have been mixed.

A provincial court in Suzhou (in Jiangsu, an eastern coastal province of China, just north of Shanghai) has in May of this year refused to enforce an arbitral award made on 7 December 2012 by SHIAC. The parties in dispute had agreed to submit to CIETAC, with Shanghai as the 'place of arbitration'. According to the usual practice, CIETAC's Shanghai sub-commission accepted the dispute in July 2010.

Subsequent to this (and as explored earlier), CIETAC's Shanghai sub-commission declared independence in April 2012 and became SHIAC; that is, after the arbitration in question had commenced but before the award was made.

The Suzhou court decided that, while CIETAC's Shanghai sub-commission had jurisdiction over the dispute when it was submitted to arbitration, its subsequent change in status to SHIAC meant that the new body was no longer the agreed arbitration forum. Therefore, SHIAC did not have jurisdiction over the arbitration by the time the award was handed down. Accordingly, the 'losing' party was successfully able to resist enforcement of the award in Suzhou; its local base and, presumably, where it had assets.

Contrast this with the decision in November 2012 of a Shenzhen court, which took a different route and found that CIETAC South China (Shenzhen) should be taken to be SCIA (the new body to have evolved out of CIETAC's South China sub-commission).

In another recent case, the parties had agreed to submit their dispute to arbitration before CIETAC's Shanghai sub-commission. However, by the time the dispute was due to be heard, CIETAC had purported to suspend its Shanghai sub-commission. Therefore, the claimant sought to submit the dispute to the Dalian Maritime Court, Liaoning province. The defendant objected to the court's jurisdiction; again, illustrating the sorts of problems that can arise as to the appropriate disputes venue. The Dalian Maritime Court refused to entertain the case, even though CIETAC's Shanghai sub-commission had been suspended, thereby affirming (in effect) the parties' agreement to arbitrate. That decision was upheld on appeal to the Liaoning Provincial Higher People's Court, in June 2013.

These decisions from Suzhou, Shenzhen and Dalian are, in all likelihood, the frontrunners among other arbitration

disputes which, while commenced before SHIAC and SCIA (the previous CIETAC sub-commissions) declared independence, have yet to result in awards.

Given that there is no formal system of case law precedent in China, one can expect more conflicting local court decisions. An element of 'home advantage' in some provincial courts is not to be unexpected; for example, depending on whether recognition of a 'CIETAC' arbitral award of one of the new arbitration bodies assists a local party in enforcing or resisting enforcement in China.

What Can Parties Do When Faced With These Developments?

Contracting parties who wish to submit disputes to arbitration in China (whether under the auspices of CIETAC, SHIAC or SCIA) would be well advised to take steps to minimise their exposure to the types of risks explored above. Those steps will depend on whether the parties have already entered into an arbitration agreement or whether they have already submitted a dispute to arbitration.

Where Parties Propose Entering into an Arbitration Agreement

For now, logic suggests that parties should proceed as follows:

- If they wish to continue using CIETAC, they should

- expressly choose CIETAC Beijing in their agreements to arbitrate and review their terms and conditions of doing business accordingly. The place of hearing can still be Shanghai or Shenzhen.
- If they choose to submit disputes to the newly independent SHIAC or SCIA, any agreement to arbitrate should expressly refer to the name of the relevant organisation, that is, 'Shanghai International Economic and Trade Arbitration Commission/Shanghai International Arbitration Center' or 'South China International Economic and Trade Arbitration Commission/Shenzhen Court of International Arbitration'.
- They should not refer to 'CIETAC Shanghai sub-commission' or 'CIETAC South China Sub-Commission'.

Where there is an Existing Arbitration Agreement, Which Specifies One of CIETAC's Shanghai or South China Sub-commissions

Where an existing arbitration agreement specifies 'CIETAC Shanghai sub-commission' or 'CIETAC South China sub-commission', the parties can seek to avoid subsequent jurisdiction and/or enforcement issues by amending their existing agreement so that it makes clear and expressly provides for:

- the institution, i.e., CIETAC Beijing, SHIAC or SCIA;
- the rules which will be applied, e.g., CIETAC's 2012 Rules, CIETAC's 2005 Rules or the rules of any other



One can expect more conflicting local court decisions.

- institution including those of SHIAC or SCIA; and
- the Panel of Arbitrators, eg, CIETAC Beijing's or, those of any other institution, including those of SHIAC or SCIA.

Of course, the scope to amend or negotiate existing arbitration agreements (which could normally be reflected in a simple supplemental agreement) will be limited, particularly where a dispute has already arisen. Parties should, therefore, be reviewing their arbitration agreements now and taking steps to negotiate any required amendments well before any dispute rears its head.

Where a Dispute Has Arisen and Has Already Been Submitted to SHIAC or SCIA

Parties, whose existing arbitration agreement specified 'CIETAC Shanghai sub-commission' or 'CIETAC South China sub-commission', may already be engaged in proceedings being administered by SHIAC or SCIA.

The reason for this might be either that they commenced arbitration proceedings before CIETAC's Shanghai or South China sub-commissions declared independence or because they submitted their dispute to SHIAC or SCIA ('post-independence') in the knowledge that both bodies will continue to accept arbitrations where the parties had previously agreed to submit to CIETAC's Shanghai or South China sub-commissions.

Either way, there is a real risk that the parties will face difficulty enforcing an arbitral award. If the claimant wishes to proceed with the SHIAC or SCIA arbitration, it should invite the respondent to agree in writing that it submits to the jurisdiction of the relevant institution.

If the claimant wishes to submit the dispute to CIETAC instead (whether because the respondent refuses to confirm that it agrees to proceed with the SHIAC or SCIA proceedings or because the claimant wishes to exercise an abundance of caution), it can withdraw its request for arbitration and re-file its case with CIETAC. Things get complicated, however, where there is a counterclaim on foot and the respondent refuses to withdraw and re-submit to CIETAC. In such circumstances, there is likely to be satellite court litigation on the subject of jurisdiction.

Where a Dispute Has Arisen But Has Not Yet Been Submitted to Arbitration

Difficulties arise where an existing arbitration agreement

specified 'CIETAC Shanghai sub-commission' or 'CIETAC South China sub-commission' but the parties cannot agree on whether the dispute should be submitted to SHIAC/SCIA or CIETAC.

In this situation, the respondent is likely (if it is to its tactical advantage) to challenge the jurisdiction of whichever institution to which the claimant chooses to submit.

This is another scenario where recourse to the courts may be necessary and provides a stark reminder as to why it is crucial to review and amend (where necessary) arbitration agreements as soon as possible and well before any dispute occurs.

Interpretation by the Supreme People's Court

Fortunately, an end to this protracted saga does finally appear to be in sight.

The Supreme People's Court is in the process of drafting a Judicial Interpretation, which will address the issues which have been discussed in this article. It is expected that the Interpretation will clarify the jurisdiction of SHIAC and SCIA and the nature and validity of their independence.

The Interpretation, which it is hoped will be promulgated sooner rather than later, should provide welcome guidance for commercial parties who are subject to existing CIETAC arbitration agreements and/or who are considering referring a dispute to arbitration in China.

In the meantime, parties should consider (in conjunction with their legal advisors) taking steps of the nature discussed in this article.



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Exchange of Information in Tax Matters between Switzerland and India or 'Do the Tax Authorities Hold the Key to Swiss Bank Accounts'?

India and Switzerland recently signed a protocol to the existing double tax treaty that allows for the exchange of information on tax evaders between the two countries, considered a must for obtaining details on unaccounted funds kept by Indians in Swiss banks. The present contribution aims at providing an overview of the new rules and the conditions to be met for an exchange of information from a Swiss perspective.

'Banking secrecy remains intact.' These were the often quoted words of the Swiss Finance Minister in the spring of 2009 following the handover of the names and account information of hundreds of US taxpayers holding secret accounts with UBS in Switzerland. Since then, the Swiss banking secrecy system has been under steady and increasing international pressure to soften its standards for the exchange of information in tax matters. At the same time, court proceedings have been filed abroad against holders of Swiss accounts based on data stolen by former employees of Swiss banks. The tax probes started by the Indian Government to track undisclosed overseas accounts allegedly held by almost 700 Indian citizens with the Swiss branch of HSBC are a well-known example. The Indian Government received such information, which included account numbers, names and addresses as given in the passports of the account holders, from the French Government which in turn received it from a former HSBC employee.

These recent developments have reshaped the Swiss banking secrecy system and given rise to several legislative changes, implementing Switzerland's new policy towards exchange of information in tax matters.

In March 2009, Switzerland adopted the OECD standard on the exchange of information, as set out in the OECD Model Tax Convention, and withdrew its reservation to Article 26. The OECD Model Tax Convention provides, inter alia, for a system of administrative assistance among tax authorities of the signatory countries. It does not apply to individual cases but is merely a model text that can be used as a basis for double tax agreements ('DTA') as negotiated and signed by the relevant countries.

Since March 2009, Switzerland (re-)negotiated more than 40 DTAs with administrative assistance clauses in accordance with internationally applicable standards. It is in this context that Switzerland and India on August 30th, 2010 signed a protocol to amend their existing DTA ('CH-IN DTA').

Indian News Agencies commented widely on this development, highlighting new possibilities for obtaining information on bank accounts of Indian citizens or corporations in Switzerland. The development came at a time when the Indian Government was under increasing pressure from opposition parties and the Indian Supreme Court to reveal the names of individuals with black money overseas. Data from the Swiss National Bank

shows that the total deposits of Indian individuals and companies in Swiss banks stood at about USD 2.5 billion at the end of 2010.

The present contribution aims at providing an overview of the main changes shaping administrative assistance proceedings triggered by a request for information from Indian tax authorities in Switzerland under the new rules.

Background Information

The amended CH-IN DTA came into force on 7 October 2011. Based on the new rules, Switzerland shall not only provide information to India in cases of serious crimes (such as fraud, money laundering, corruption, etc.) in the course of mutual legal assistance proceedings in criminal matters, but also in cases of simple tax evasion under the CH-IN DTA. This includes, e.g., cases where taxpayers merely omit to declare funds ultimately held on a Swiss bank account or where the exchange of information is foreseeably relevant for taxation in India. The former requirement that the offender had used false documents or particular structures aiming at hiding the real beneficial owner is no longer valid.

Administrative Assistance Procedure

Letter of Request

Switzerland does not automatically disclose information about Swiss accounts but will only consider a request if the Swiss Federal Tax Administration (the 'SFTA') receives a letter of request from the 'Central Government in the Department of Revenue' in India, which is the Ministry of Finance of India (the 'MFI').

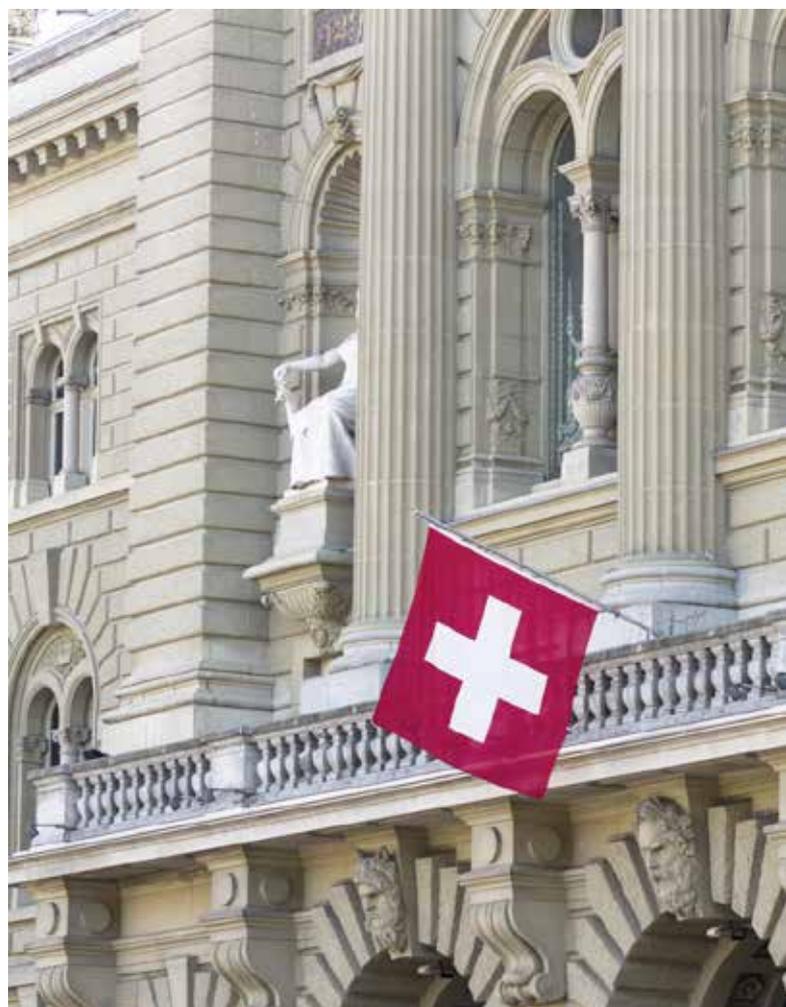
For the request to be admitted, the following conditions must be met:

1. The person/entity targeted by the request must be identified; such identification may be provided by other means than by indicating the name and address of the person concerned, e.g., by indicating an account number. Furthermore, since recently and under certain conditions, 'group requests' are admissible (see the Group Requests section below).
2. The information holder, i.e., any person believed to be in possession of the requested information (e.g., banks, trustees, fiduciaries, company directors etc.), is to be identified in the request to the extent possible.
3. Tax investigations must be under way in India and the requested information must be sought for the purpose of such tax investigation.

4. The investigation must concern the Indian income tax (including any surcharge thereon) according to article 2 of the DTA. No information may be requested by India from Switzerland in relation to other taxes, e.g., the Indian wealth tax or VAT. By contrast, capital gains tax is deemed to be income tax, and, hence, is covered by the DTA.
5. The requested information must be 'foreseeably relevant' to the Indian tax administration and the recovery of income tax. Whether the information, once provided, actually proves to be relevant is of no importance.

No Protection For Banking Secrecy

The CH-IN DTA explicitly states that the requested state may not decline to supply information solely because the information is held by a bank, any other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to beneficial ownership interests. In other words, the request for information may be addressed both to a Swiss bank and to Swiss trustees or company directors. In all these cases, the affected taxpayer is no longer protected by Swiss banking secrecy.



By contrast, Switzerland may decline to disclose information relating to trade secrets, confidential communications between attorneys, solicitors or other admitted legal representatives acting in such capacity and their clients to the extent that the communications are protected from disclosure under domestic law. Switzerland has very stringent rules regarding attorney-client privilege. Swiss authorities will therefore not order a lawyer to disclose information related to him in the course of his representation of the client.

No Retroactivity?

As a rule, according to Swiss practice regarding international treaties, new clauses relating to the exchange of information have no retroactive effect or application. Accordingly, requests for information filed after the entry into force of the new rules can only relate to information regarding tax periods after the date of entry into force of the revised treaty text.

As to the CH-IN DTA, its amended article 26 provides for the exchange of information between the Swiss Authorities and the Government of India with respect to information that relates to any fiscal year beginning on or after the 1st day of January 2011.

Switzerland has very stringent rules regarding attorney-client privilege.

According to section 3 of the Indian Income Tax Act 1961, the term 'fiscal year' (which is also referred to as 'previous year') means the financial year immediately preceding the assessment year. 'Assessment year' means the period of twelve months commencing on the 1st day of April every year (Indian Income Tax Act section 2). Therefore, under Indian tax laws the first fiscal year after 1 January 2011 is 1 April 2011 to 31 March 2012, the first relevant assessment year for the CH-IN DTA being the year 2012-13. Hence, any income earned/deposited on a bank account opened and closed on or before 31 March 2011 cannot be taxed in the fiscal year 2011-12 (i.e., 1 April 2011 to 31 March 2012) or any subsequent year but can only be taxed by way of re-opening and re-assessing the past assessment years, subject to applicable time limitations. Accordingly, the newly amended DTA should not be applicable on accounts or information pertaining to the period prior to 31 March 2011, as the same cannot be taxed as income of the previous/financial year 2011-12 or any subsequent year. However, this question has not yet been decided by Swiss courts and their interpretation of article 26 of the CH-IN DTA remains to be seen.

Group Requests

Switzerland interprets the DTA so that identification of the person under investigation may be provided by means other than by indicating the name and address of the person concerned, which again opens the door to so-called 'group requests'.

In practical terms, it is possible that in the future the SFTA will have to search for bank accounts opened by that person in all Swiss banks, a practice constantly refused in the past by Switzerland.

As an alternative, if the name of the information holder, e.g., a bank, is known to the Indian tax authorities, the latter may ask for information regarding certain Indian tax payers identified on the basis of a 'pattern of behaviour'. The description of the 'pattern of behaviour' of a person should give rise to the assumption that taxpayers whose behaviour corresponds to this pattern have not complied with their statutory obligations. However, it must be shown that the information holder (e.g., a bank) has significantly contributed to such taxpayers' behaviour, which must be non-compliant with Indian tax legislation.

By way of an example, and with reference to a decision of the Swiss Federal Administrative Court (the 'SFAC') of 5 April 2012 (A-737/2012), the United States IRS described



the 'pattern of behaviour' of US taxpayers – without indicating any individual names – who presumably held bank accounts with Credit Swiss in Switzerland, in terms of a failure by the beneficial owners of the accounts stated on the bank documents (such as Form 'A') to declare their bank accounts to the United States IRS, or where there was a discrepancy between the beneficial owner named on Form 'A' and on the form 'W-8BEN'.

Offshore Structures

A crucial issue is whether the Indian tax authorities will gain access to information on direct or indirect ownership kept in bank records, particularly the so-called Bank Form 'A' (stating the 'beneficial owner').

The exchange of information pursuant to double taxation treaties is a relatively new area in Switzerland where there is still little case law. However, there has been litigation in the context of requests filed by the US tax authorities against certain US clients of UBS and there are numerous precedents of the SFAC which is the only and last instance of appeal against decisions of the SFTA to disclose information based on a DTA. Although specific rules were applicable in the UBS matter, these decisions show the trend in the treatment of offshore structures such as Liechtenstein foundations or trusts when examining a request for information on the beneficial owners of such structures by foreign tax authorities.

For the purposes of a request for information, offshore structures will be assessed by Swiss authorities on the basis of the economic reality ('substance over form'), i.e., the decisive factor is whether and to what extent the person under investigation was able to continue to control and have a power of disposition over the account assets and revenue.

Swiss courts may be more favourable towards alleged 'beneficial owners' of discretionary trusts, i.e., without any entitlement to fixed income or capital of a trust, than to beneficial owners with a fixed interest under a trust document, e.g., a right to receive annual income from the trust assets.

Based on the information received from the information holder, the SFTA will decide on the eligibility for administrative assistance. In the case of eligibility for administrative assistance, the SFTA will rule in a final decision against the account holder that the information shall be disclosed.

Illegally Obtained Data

At present, Switzerland does not admit requests for assistance if the information on which the request is based was 'stolen'. The new Swiss statute on the provision of administrative assistance which entered into force on 1 February 2013 explicitly states that a request will not be entertained if based on information that was obtained by acts that are punishable under Swiss law, such as the illegal acquisition of data ('fruit of the poisonous tree' doctrine).

Notably, in 2009 a former employee of HSBC Geneva stole client data that was handed over to French authorities and further passed on to the Indian Government. Also, stolen Swiss bank data that was contained in several CDs purchased by German authorities was passed on to other countries. Based on such experiences, the Swiss legislator has excluded the exchange of information in cases where the foreign request is based on information obtained from stolen bank data.

Therefore, for the time being, Switzerland will not admit a request for information from Indian tax authorities relating to information on HSBC accounts obtained through the stolen data. However, and not least because of pressure from India, the Swiss Government recently announced Switzerland's willingness in the future to cooperate with foreign tax authorities seeking administrative assistance on Swiss account holders identified using data obtained passively through other governments, while maintaining the policy of non-cooperation in circumstances where the stolen bank data in question had been purchased by the government issuing the request. The Swiss Government's proposal still needs to be approved by Parliament.

Examination of Request By SFTA/Rights of the Concerned Person

If, after preliminary examination, the request from the Indian authorities is considered admissible by Switzerland, the SFTA will issue an order to disclose the requested information ('disclosure order') requesting the information holder, typically a bank or wealth manager, to submit the information/account documentation to the SFTA. The information holder will have no right to appeal against this order and will have to provide the information requested.

The bank or other information holder must inform the relevant account holder, the beneficial owner and

possibly also any authorised representative of the account (a 'concerned person') of the administrative assistance procedure. If the account holder or the beneficial owner is domiciled outside Switzerland, he/she may appoint an agent, e.g., a lawyer admitted in Switzerland, to receive notifications in Switzerland, concerning the request filed by the requesting state to Switzerland and inform the SFTA of the appointment of his/her agent. If the concerned person cannot be contacted or fails to appoint an agent in Switzerland, the SFTA may notify the concerned person through publication in the Swiss Federal Gazette or through other appropriate means.

The concerned person is entitled to examine the files sent to the SFTA by the information holder and to participate in the procedure by making objections in writing (supported by evidence) to the SFTA already at the stage of the disclosure order. However, the deadline to make such objections is relatively short (not exceeding 30 days) and may not be extended. Switzerland is considering a change to its legislation such that in the future, the taxpayer will no longer be heard in the case of an exchange of information (no tipping off).

On the basis of the file received from the information holder and the possible objections lodged by the concerned person, the SFTA will decide whether the information and supporting documentary evidence (such as account documents) shall be transmitted to the requesting state and to what extent.

Appeal

An appeal may be lodged with the SFAC against the decision of the SFTA within 30 days (non-extendable) after its receipt by the relevant person. Again, Switzerland is considering a change to its legislation for such appeal to be abolished.

In the case of an appeal, the SFAC will render a final decision as to whether the information is to be transmitted at all and to what extent, as the case may be. A further appeal against the decision of the SFAC may be lodged before the Federal Supreme Court in limited cases only.

As a rule, the appeal has a suspensive effect, meaning that no information will be handed over to the requesting state before the final decision comes into force.

In the appeal, various arguments can be used, including:

- the information requested is not foreseeably relevant for the tax investigation in India of the person concerned;
- the information requested falls outside the scope of the DTA (e.g., the tax investigation concerns taxes other than income tax);
- the information is requested for a tax period prior to the entry into effect of the DTA and is therefore contrary to the principle of non-retroactivity;
- the person under investigation is not the effective 'beneficial owner' of the funds of the structure;
- the request is not sufficiently specified but rather a fishing expedition;
- the request contains obvious errors, contradictions or omissions;





- the decision of the SFTA is granting more information than actually sought by the requesting state;
- information on third parties who are manifestly not involved in the subject matter is at stake; and
- the request is based on illegally obtained data.

Transmission

Once the final decision or the decision of the SFAC on appeal has entered into force, the information will be transmitted to the requesting state.

As a rule, the information transmitted under a DTA may be used by the foreign tax authorities not only for the taxation procedure but also for other purposes (for example in criminal tax proceedings), subject to consent by the requested state.

Conclusion

Switzerland pursues a 'white money' policy, i.e., a policy of welcoming only tax declared assets and income. The Swiss Federal Government aims to prevent banks and other financial intermediaries from harbouring and managing assets not disclosed to tax authorities having jurisdiction over the relevant foreign client by making financial institutions introduce enhanced due diligence requirements. It is envisaged that financial intermediaries must request a self-declaration from clients on the fulfilment of their tax obligations. The Swiss Federal Government has instructed the Federal Department of

Finance to submit a corresponding consultation draft in the course of 2013.

These developments will enhance legal certainty and should strengthen the reputation of Switzerland as a financial centre. Yet, numerous uncertainties remain which will call for judicial decisions. The best option available to each taxpayer will essentially depend on each individual's circumstances, having particular regard to the period during which the bank account has been open, the origin of the funds and the fluctuation of the funds since their deposit. Legal guidance will be crucial to navigate in such uncharted waters.



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General Solicitation and Advertising Is Now Permitted For US Securities Offerings

Among the significant changes to the United States' existing securities law effected by the Jumpstart Our Business Startups Act, which became law on 5 April 2012, was the elimination of the prohibition on using general solicitation and advertising in private offerings of securities. On 10 July 2013, the SEC finally adopted rules implementing these provisions.

On 5 April 2012, President Barack Obama signed the Jumpstart Our Business Startups Act (the 'JOBS Act'), which significantly changed existing laws and procedures involved in raising new capital in the United States.

Of particular relevance to non-US companies (foreign private issuers or 'FPIs') were the changes brought about by the JOBS Act which allowed for enhanced opportunities for FPIs to raise capital through private debt and equity offerings under Rule 506 of Regulation D and Rule 144A of the Securities Act of 1933, as amended (the 'Securities Act')¹.

Upon effectiveness of the amendments to Regulation D and Rule 144A on 23 September 2013, issuers of securities in a private offering under Rule 506 of Regulation D and the seller of securities in a Rule 144A offering will be permitted to engage in general solicitation and advertising, so long as all purchasers in a Regulation D offering are 'accredited investors' and the seller of securities in a Rule 144A offering has taken 'reasonable steps' to ensure that all purchasers are 'qualified institutional buyers' ('QIBs'). This change in the law, providing an alternative to a traditional Rule 506 private offering conducted without general solicitation or advertising, represents a significant departure from long-established requirements in private placements under US securities laws.

General solicitation and advertising includes, among other things, newspaper ads, television and radio broadcast pitches, outdoor billboards and use of the internet. The current ban on these activities in private placement transactions, of course hampers an issuer's ability to reach the widest universe of potential investors and imposes considerable costs in carrying out capital raising transactions via the internal and external vigilance procedures required to ensure compliance with the previously-effective rules. It should be noted that these changes also may increase the risk of investor



fraud claims, to the extent that general solicitation and advertising communications are not prepared with the same rigour and discipline as the 'private' communications used in current practice.

Rule 506 of Regulation D

Under the amendments to Regulation D, which pertain only to offerings of securities sold pursuant to Rule 506, issuers may use general solicitation and general advertising to offer their debt and equity securities provided that:

1. the issuer takes 'reasonable steps to verify' that each of the purchasers of the securities is an accredited investor; and
2. all purchasers are accredited investors, or the issuer reasonably believes that all purchasers are accredited investors, at the time of sale of the securities.

Thus, for the first time the SEC has stated that securities may be offered to persons other than accredited investors pursuant to a Rule 506 offering, provided that the issuer reasonably believes that all purchasers are accredited investors. Yet the SEC also has increased the burden on issuers to confirm the accredited status of investors.

In the amended Rule 506, the SEC provides examples of the 'reasonable steps' required to be taken by an issuer of securities to verify that a purchaser is an accredited investor. None of these steps are mandatory or exclusive; rather they act as 'safe harbours' for issuers. With respect to an individual investor, the steps that may be taken to determine if that purchaser is an accredited investor on the basis of *income* include reviewing any Internal Revenue Service form that reports the purchaser's income for the two most recent years, such as a Form W-2, a Form 1099 or a copy of a filed Form 1040, and obtaining a written representation from the purchaser that he or she has a reasonable expectation of reaching the income level necessary to qualify as an accredited investor during the current year. For a purchaser who is accredited on the basis of *net worth*, steps that may be taken include reviewing, with respect to assets, bank statements, brokerage statements and other statements of securities holdings, certificates of deposit, tax assessments and appraisal reports issued by independent third parties. With respect to liabilities, the issuer could review a consumer report from at least one of the nationwide consumer reporting agencies.

An additional or alternative form of verification set forth in the rule could involve obtaining a written confirmation from a registered broker-dealer, an investment adviser registered with the SEC, an attorney licensed and in good standing in the jurisdiction in which he or she is admitted to practice, or a certified public accountant duly registered and in good standing under the laws of the place of his or her residence or principal office, in each case that such person or entity has taken reasonable steps to verify that the purchaser is an accredited investor within the prior three months and has determined that such purchaser is an accredited investor.

As noted, the SEC has emphasised that these are non-exclusive verification methods and that an issuer is not required to use any of these methods. Rather, an issuer of securities can apply the reasonableness standard directly to the specific facts and circumstances presented by the offering and the investors.

Rule 144A

Rule 144A has been amended to permit 'offers' to be made to persons who are not QIBs. Accordingly, upon effectiveness of the amendment, general solicitation and advertising may be used in connection with an offering of securities that qualifies for exemption from registration because it is conducted pursuant to Rule 144A. However, the exemption for such Rule 144A offerings is conditioned on the securities being sold only to QIBs, or to purchasers that the seller and any person acting on its behalf reasonably believes are QIBs. Unlike the amendments to Rule 506, the amendment to Rule 144A does not include any standards or guidelines to be used by the seller or any person acting on its behalf in determining whether the seller reasonably believes that a purchaser is a QIB.

Regulation S

Regulation S provides a safe harbour for offers and sales of securities which are made outside of the United States. To qualify for the Regulation S exemption from registration, the securities must be sold in an offshore transaction and there can be no directed selling efforts in the US. In this regard, a directed selling effort includes any activity undertaken for the purpose of, or that could be reasonably be expected to have the effect of, conditioning the market in the US for any of the securities offered offshore in reliance on Regulation S.

In its Release adopting the aforesaid Rule amendments, the SEC stated that offerings under Regulation S would

Sellers of securities through Rule 506 Regulation D or Rule 144A are now permitted to advertise or generally solicit buyers.

not be integrated with concurrent domestic unregistered offerings under Rule 506 or Rule 144A in which general advertising or solicitation occurred. Thus, a US private offering under Rule 506 or Rule 144A in which, for example, an advertisement in a publication with a general circulation in the US was made, would not disqualify a concurrent offshore offering being made by the issuer in reliance on Regulation S.

Conclusion

As previously described, an issuer of securities, including an FPI offering, selling its debt or equity securities in a Rule 506 Regulation D or Rule 144A offering is now permitted to engage in general solicitation and advertising with respect to its offering, provided all of the purchasers in the Rule 506 Regulation D offering are accredited investors and the issuer has taken reasonable steps to verify that the purchasers are accredited investors, and provided that all purchasers in the Rule 144A offering are reasonably believed by the seller and any person acting for it to be QIBs.

The existing provisions of Rule 506 as a separate exemption from registration under the Securities Act are not affected by the final rule. Accordingly, issuers conducting Rule 506 offerings without the use of general solicitation or advertising can continue to conduct their securities offerings in the same manner as previously conducted and are not subject to the new verification requirements.

Notes:

- Under the Securities Act, an offer to sell securities must either be registered with the SEC or meet an exemption from registration. Regulation D contains three rules providing exemptions from the registration requirements, including Rule 506 which permits an issuer to raise an unlimited amount of money if it sells only to 'accredited investors' (generally defined to include institutional investors and individual investors with a net worth exceeding US\$1 million (exclusive of the equity in such person's primary residence), or an individual income of more than US\$200,000 per year, or a joint income with their spouse of more than US\$300,000, in each of the last two years and an expectation to reasonably maintain the same level of income in the current year) and no more than 35 other purchasers. Rule 144A provides a registration exemption for private re-sales to certain large institutional investors by a broker or dealer who acquired restricted securities from an issuer. Rule 144A has been the principal exemption from registration relied on by FPI's when accessing the US capital markets.



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Invest In America – But Don't Ignore National Security

Foreign investment in the United States is rising rapidly. China, for example, has invested over US\$25 billion since 2000. One factor of critical importance is how U.S. laws based on protecting U.S. national security interests can influence investment decisions. This article discusses the key issues foreign investors need to address before proceeding with a foreign direct investment (FDI) deal in America.

On 29 May 2013, Shuanghui International Holdings of Shanghai announced a proposed takeover of Smithfield Foods for approximately US\$4.72 billion. Smithfield Foods, one of America's largest producers of pork and other meat products, is anxious for the deal to go through. If the deal closes, it will be the largest acquisition to date of an American company by a Chinese enterprise. The major hurdle which exists for Shuanghui is whether the U.S. government will move to either block or modify the terms of the project based on national security concerns. At the time of this article going to press, a U.S. governmental review of the proposed deal is underway.

As a general rule, the United States is open to foreign investors who are seeking to acquire American companies and businesses. Foreign entities from China alone have invested more than US\$25 billion in the U.S. since 2000. There are, however, certain U.S. laws that can limit or completely block where foreign investors may target acquisitions in the U.S. These laws can restrict investments by foreign entities in American industries such as airlines, transportation, infrastructure, ports, defense, media, telecommunications, nuclear energy and agriculture.

Aside from these sectors, national security is a high-level priority for U.S. government officials when reviewing foreign investments. The laws described in this article exist so that the U.S. government has the authority to

review potential deals between American and foreign companies and to determine whether any aspect(s) of a deal pose threats or risks to national security interests. Even in those deals where the possibility of a national security issue is not immediately obvious, foreign investors and their counsel need to be aware of these possible barriers and plan accordingly.

Background

Between 1985 and 1992, Japan's economy was booming. At that time, many pundits predicted that Japan would emerge as the "#1" economy in the world within a decade. The prospect of Japanese economic dominance sparked anxiety within the U.S. Congress and among some industries fearing that Japan would acquire and then control American companies possessing technologies vital to U.S. national security interests. Things came to a head when the Japanese company Fujitsu attempted to purchase Fairchild Semiconductor (which at the time was owned by the French conglomerate Schlumberger), then the largest semiconductor manufacturer in the United States. Former President Reagan's Administration acted swiftly, and in 1988 the U.S. Congress passed a new law to regulate foreign investment based on national security issues. This new law, *The Exon-Florio Act of 1988*, permits the President to closely monitor potential FDI in the U.S. as well as projects and joint ventures with American companies doing business worldwide.

The Exon-Florio Act of 1988

Exon-Florio was enacted in reaction to growing concerns surrounding acquisitions of American businesses by Japanese and other foreign companies. In short, *Exon-Florio* allows the President to either halt a proposed purchase or even reverse a completed transaction between an American company and a foreign entity if (1) credible evidence exists that the transaction would negatively affect U.S. national security; and (2) there are no steps the President could take to minimize those effects. As a result of *Exon-Florio*, foreign investors need to analyze the potential national security implications of their proposed project in the U.S. before making any public announcement.

The Foreign Investment and National Security Act (FINSA)

Exon-Florio was further strengthened following the 11 September 2001 terrorist attacks in New York City and Washington, D.C. A new law entitled *The Foreign Investment and National Security Act (FINSA)* forced even more comprehensive scrutiny of FDI in the United States. Under FINSA, proposed FDI transactions involving "critical infrastructure" in the U.S. receive more rigorous reviews. For example, in 2006 the purchase by Dubai Ports World (DP World) of the British-owned Peninsular and Oriental Steam Navigation Company gave DP World control over many facilities in the U.S., including ports in Philadelphia, Miami, New Orleans, New York, Newark and Baltimore. Here, the question was whether allowing foreign companies to control American ports posed such a national security risk that the U.S. government should intercede.

FINSA requires the Executive Branch of the U.S. government to annually report to the U.S. Congress when and how national security interests may be affected by FDI. Where a FDI transaction involves an entity which is controlled or owned by a foreign government, FINSA mandates an examination of the proposed deal. Beginning with *Exon-Florio* and continuing through to the present day, the section of the U.S. government charged with conducting such reviews is called *The Committee on Foreign Investment in the United States (CFIUS)*.

The Committee on Foreign Investment in the United States (CFIUS)

CFIUS is an inter-agency task force of the U.S. government which draws on key individuals from throughout the

government and gives them the authority to oversee proposed foreign investments in the United States. CFIUS is composed of representatives from the Departments of Homeland Security, Justice, Defense, Treasury, Commerce, State and Energy, along with members of the Office of U.S. Trade Representatives and the Office of Science & Technology Policy. CFIUS monitors transactions both large and small that may potentially have an impact on U.S. national security. CFIUS has the authority to approve or disapprove a proposed FDI transaction or to completely reverse a completed deal if it is found to be against U.S. policy or critical to national security interests.



The CFIUS Review Process

The legal standard CFIUS review applies to proposed transactions involving (1) a foreign entity that is (2) possibly acquiring control of an American business that (3) possesses products, services or intellectual property that are (4) important to U.S. national security or critical to U.S. infrastructure. The definition of a “foreign entity” is “any foreign national, foreign government, foreign entity, or any other entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity.” It is important to note that CFIUS reviews transactions involving *existing* businesses. It does not apply to “Greenfield” investments where a foreign party is going to actually start a business from the ground-up. However, the definitions of “national security” and “critical infrastructure” are not well defined and are extremely broad.

When looking to acquire an existing American business, foreign investors have basically two options:

Option One: Advance Notice to CFIUS. The foreign investor can agree to submit to CFIUS in advance the details of its intention to make a particular FDI. The foreign investor should at this time disclose to CFIUS the

nature, purpose, scope and expected closing date of the transaction. The assets to be acquired must be adequately described and the investor should disclose information about itself, including a description of its business activities and any ties to foreign government agencies.

Option Two: No Advance Notice to CFIUS. If a foreign government is not directly involved, a foreign investor can decide to proceed with a FDI without advising CFIUS in advance. The danger of this option is the possibility that CFIUS will later review and reject the deal after it is complete; there is no time limitation on CFIUS’ ability to review a completed transaction.

Before a transaction closes, though, there is a specific timeframe in which CFIUS can act. The vast majority of transactions in which CFIUS is given advance notice for review are cleared within thirty days. If the proposed transaction clears, it has “safe harbor” protection, meaning that the CFIUS decision is final and cannot be reversed (unless, of course, the investor misrepresented information or acted fraudulently). If after thirty days it is still unclear whether the transaction should be approved, then CFIUS can take an additional forty-five days to either

The definitions of “national security” and “critical infrastructure” are not well defined.

(1) unanimously clear the transaction; or (2) submit its recommendation to the President. Once a proposed FDI project is sent to the President, the President has fifteen days to review the transaction and reach a final decision. Presidential decisions are not subject to judicial review.

If CFIUS determines that a transaction will result in foreign ownership or control of an American business and will have possible negative national security implications, the foreign investor may work with the U.S. government to nonetheless complete the transaction. If successful, CFIUS and the parties will execute a "mitigation agreement" instituting the changes necessary to satisfy national security concerns. CFIUS frequently requires mitigation agreements in the form of board resolutions, security control agreements, special security agreements, proxy agreements, and/or voting trust agreements. Once a mitigation agreement is approved and the transaction is completed, CFIUS has the authority to continue monitoring ongoing compliance with the agreement.

Examples of CFIUS Reviews of Foreign Direct Investment

Perhaps the best way to understand how CFIUS works is to look at recent examples of transactions which have undergone review. One of the best known transactions occurred in 2005 when China's CNOOC made an offer to buy Unocal (Union Oil Company of California, which is now owned by Chevron Corporation). Some members of the U.S. government thought it was dangerous that CNOOC, as a Chinese government entity (or at least a partially-controlled entity), wanted to purchase access to U.S. natural resources, in this case oil. This high-profile proposed transaction caused great concern within the U.S. Congress, and ultimately CNOOC abandoned its bid.

During the same year, Lenovo (a Chinese computer hardware manufacturer) was successful in acquiring IBM's personal computer business, despite widespread congressional concerns about a Chinese company purchasing the famous American computer company. The deal closed after some minor changes to the original deal were resolved. Lenovo's willingness to compromise on certain security measures greatly aided the completion of the US\$1.25 billion deal.

Another Chinese company, Huawei Technologies, attempted to conclude two separate deals that came under CFIUS review. In the first, Huawei partnered with Bain Capital in 2008 and announced its plans to purchase

3Com Corporation, a telecommunications and network infrastructure firm. Huawei submitted the proposed deal to CFIUS in advance. After some review, members of the U.S. Congress and CFIUS expressed reservations about the transaction. The parties then entered into the mitigation stage, where CFIUS and Huawei met to discuss making changes to the basic proposal which would alleviate any U.S. national security concerns. The 3Com deal was eventually abandoned after the parties failed to reach a mitigation agreement acceptable to CFIUS. (Later, Hewlett-Packard bought out 3Com.)

In a second transaction, Huawei in 2010 decided not to notify CFIUS in advance of its intended acquisition of a small American computer software company called 3Leaf. Once CFIUS learned of the completed deal, it analysed the transaction and concluded that it posed a national security threat. Huawei voluntarily agreed to divest the acquired assets in 2011. The lesson here is that Huawei should have (as it did in the 3Com deal) disclosed the acquisition to CFIUS before it was finalized. Foreign investors need to be aware that CFIUS retains the right to go back and review a transaction, even after it has closed, if it feels U.S. national security issues could be impacted. There seem to be very few cases in which voluntary disclosure is not in the best interests of the parties.

Eighteen months ago a small Chinese company, Ralls Corp., acquired wind farms in the state of Oregon. While at first wind farms would not appear to pose much of a national security risk, the deal eventually attracted the attention of CFIUS because the wind farms were located in restricted air space used by a U.S. Navy base. This transaction was not cleared by CFIUS prior to finalization, and President Obama ultimately ordered Ralls to divest itself of the wind farms. Again, the lesson here is that it is best to disclose an intended investment in advance rather than run the risk of the deal being unwound later at much greater expense.

Going back to the example used at the beginning of this article, the Smithfield Foods and Shuanghui International Holdings deal is an interesting case in point. From public information sources, it appears both parties have decided to seek CFIUS approval before finalizing the transaction. In July 2013, the president of Smithfield Foods testified before the U.S. Congress. I predict that the deal will ultimately be approved by CFIUS because it is difficult to contemplate how the foreign acquisition of a meat

production plant could threaten “critical infrastructure” or have national security implications. Nevertheless, as with all foreign investments in the United States, the key is whether the U.S. Congress will assert national security objections and block a transaction in order to protect domestic interests.

Key Lessons for Foreign Investors in the United States

Lesson One: Any FDI, even if it does not on the surface appear to involve critical infrastructure or national security, may nevertheless contain facets which might impact US national security interests. The Ralls transaction exemplifies why it is essential to notify CFIUS in advance. The benefits of notifying CFIUS far outweigh any minor inconvenience. Advance notice allows CFIUS to request additional time if needed (seventy-five days as opposed to thirty), and more importantly provides an opportunity for CFIUS to become familiar with all aspects of the deal. In addition, advance notice helps protect investors from wasting time and money pursuing business ventures that would be ultimately blocked by CFIUS.

Lesson Two: If a foreign government is minimally involved or owns a significant share of an acquiring company, CFIUS must be notified and involved before the transaction is closed. Counsel should closely monitor the ownership history of potential investors and determine whether there is any possibility of foreign government involvement which would trigger a CFIUS review.

Lesson Three: When an FDI deal is proposed by a private (non-government) foreign entity, there are two options: (1) voluntarily disclose the potential acquisition in advance and request CFIUS approval; or (2) proceed in the hope that the transaction is not found to be objectionable later. In most cases, advance disclosure is preferable because there are very few acquisitions, regardless of their size, that will not come to the attention of U.S. government representatives in the ordinary course of business. Notifying CFIUS in advance can help avoid embarrassing publicity for all parties if the transaction is denied.

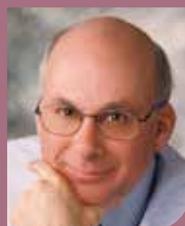
Lesson Four: “Greenfield” investments are not under the purview of CFIUS. Nevertheless, even if CFIUS has no authority to act, when an investment involves a key technology within the United States, foreign investors need to understand that another sector of the U.S.

government (i.e., the U.S. Congress) may still possibly investigate.

Lesson Five: When going through the disclosure process with CFIUS, foreign investors are well advised to volunteer as much information as possible to clear any hurdles that might be raised by government objections. Failure to provide adequate information can delay the process and open up the possibility of a transaction being reversed if any fraud or misrepresentation of facts is detected during the process.

Lesson Six: Sometimes a foreign investment that begins with a simple national security review can grow into a major political issue. It is always recommended that the foreign entity perform an in-depth analysis well in advance of all possible implications of its investment, particularly if it is in a critical area of the U.S. economy.

Lesson Seven: A foreign investor's ability to compromise may determine whether the deal goes through or is completely blocked. The modern trend suggests that mitigation agreements help to salvage deals that would otherwise be blocked. Post 9/11, it is essential that foreign investors are willing to make concessions that serve the national security interests of the United States.



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UNCITRAL Forty-Third Session of Working Group V (Insolvency Law) at United Nations, 15-19 April 2013

For almost 20 years, UNCITRAL has analysed international insolvency laws and practice in an effort to reconcile, enhance and harmonise the laws of international trading companies. The report below describes the most recent meeting in April 2013 of Working Group V of the United Nations Commission on International Trade Law ('UNCITRAL') at the United Nations in New York.

Delegates from trading countries, bar groups and other non-government organisations attended the Session. The Inter-Pacific Bar Association had been invited to the Session and the undersigned received credentials to attend and observe.

The Session was positive because of the extensive preparation and drafting involved before the Session began.

The purpose of the Session was to study further the center of main interests (COMI) of enterprises, factors relevant to its determination, and issues of jurisdiction and recognition; and liability of directors and officers of enterprises in insolvency proceedings or in the 'zone of insolvency.' These subjects also were addressed at the Forty-First Session of Working Group V in April and May 2012.

Historically, domestic and international law failed to keep pace with the increasing number and complexity of cross-border insolvencies, resulting in inadequate and uncoordinated approaches that have (1) hampered the rescue of troubled businesses; (2) bogged down the administration of cross-border insolvencies; (3) impeded the protection and maximisation of the value of assets of the insolvent debtor; (4) rendered unpredictable the application of the existing laws; (5) created obstacles to

Historically, domestic and international law failed to keep pace with the increasing number and complexity of cross-border insolvencies.



reaching basic economic and social goals of insolvency proceedings; (6) perpetuated a lack of transparency of the process; and (7) resulted in a paucity of clear rules on recognition of the rights and priorities of treatment of creditors and application of laws to cross-border issues. The problems were exacerbated where reorganisation was the goal of the insolvency proceeding. Unpredictability in law and practice and the associated cost and delay have affected capital flows and cross-border investment.

The seminal Commission insolvency achievement was the Model Law on Cross-Border Insolvency (the 'Model Law') adopted by the United Nations in 1997 and enacted by the United States Congress in 2005 in substantially the form proposed.

The principal features of the Model Law include (a) providing a foreign representative administering an insolvency proceeding to the courts of an enacting state to allow the courts of the enacting state to determine what coordination among jurisdictions is warranted, (b) determining when a foreign insolvency proceeding should be accorded 'recognition' and the consequences of recognition, (c) establishing simplified procedures for recognition, (d) providing a transparent regime for foreign creditors to participate in an insolvency proceeding, (e) permitting courts and insolvency representatives to cooperate more effectively with foreign courts and foreign representatives, and (f) establishing rules for coordination in concurrent insolvency proceedings. In short, the Model Law was designed to assist countries to equip their insolvency laws with a modern, harmonised legislative framework.

The 2013 Session concentrated on interpretation and application of selected concepts of the Model Law and responsibility and liability of directors, officers and other responsible persons in the period approaching insolvency. As to the latter, the focus was not intended to cover areas of criminal liability or to deal with core areas of company law.

The text of the Model Law focuses on four key elements upon which international agreement was possible:

- i. access to local courts for representatives of foreign insolvency proceedings and for creditors, and authorisation for representatives of local proceedings to seek assistance elsewhere;
- ii. recognition of certain orders issued by foreign courts;

- iii. relief to assist foreign proceedings; and
- iv. cooperation among the courts of states where the debtor's assets are located and coordination of concurrent proceedings.

One of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign proceedings that would avoid time-consuming legalisation or other processes and provide certainty with respect to the decision to recognise. The Model Law is not intended to accord recognition to all foreign insolvency proceedings. Insolvency proceedings contemplate a collective proceeding for purposes of liquidation or reorganisation under the control or supervision of the court where a foreign representative has been appointed.

A foreign proceeding may be either a main proceeding or a non-main proceeding. A main proceeding arises where the debtor had its COMI at the date of the commencement of the foreign proceeding. In principle, the main proceeding is expected to have primary responsibility for managing the insolvency of the debtor regardless of the number of states in which the debtor has assets and creditors. COMI is not defined in the Model Law, but is based on a presumption that it is the registered office or, in the case of an individual, the 'habitual residence' of the debtor.

In determining COMI, beyond the presumption of the registered office, additional factors are taken into consideration. Those factors include: the location of the debtor's books and records; the location where financing was organised or authorised, or from where the cash management system was run; the location in which the debtor's principal assets or operations were found; the location of the debtor's primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or the law governing the main contracts of the company; the location from which purchasing and sale policy, staff, accounts payable systems were managed; the location from which supply contracts were organised; the location from which the reorganisation of the debtor was being conducted; the jurisdiction whose law would apply to most disputes; the location in which the debtor was subject to supervision or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.

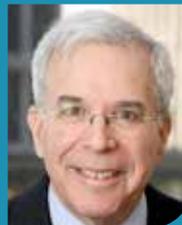


The Model Law also empowers courts to cooperate with each other and to communicate directly with each other.

As with COMI, the Model Law does not define the term 'insolvency.' Yet insolvency refers to various types of collective proceedings commenced with respect to debtors who are in severe financial distress or insolvent.

The Session and the Report of Working Group V also focused on a director's obligation in the period approaching insolvency. The obligations arrive when the enterprise faces imminent insolvency or insolvency becomes unavoidable. The aim of imposing such obligations, which would become enforceable once an insolvency proceeding is commenced, is to protect the legitimate interests of creditors or other stakeholders and to encourage timely action to minimise the effects of financial distress experienced by the enterprise. The board of directors has an important role in addressing these issues. Generally the board is comprised of individuals who have an ownership interest in the enterprise and individuals who work for the company, such as

managing its business operations, or are connected to its shareholders ('inside directors'), along with individuals who are independent and are often chosen as a result of their experience and business acumen ('independent directors'). As independent directors may not have access to information to the same extent that is known or available to inside directors or third parties, their legal responsibility may vary from that of an inside director.



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How Social Responsibility of Companies is Implemented in India

On receiving the President's assent in August this year, India's new Companies Bill will be passed into law, replacing regulations that have governed the country's corporate entities for almost six decades.

Many features of the Companies Bill, which will supersede the Companies Law 1956, have been hotly debated and among them the requirement that companies with a net worth of Rs 500 crore or more, or revenue equalling or exceeding Rs 1,000 crore, or earns at least Rs five crore during the past three financial years must spend at least 2% of their average net profits from the three preceding years on corporate social responsibility (CSR) initiatives. This would make India the first country in the world to legally require corporations spend on social welfare.

Around the world, opinions have been strongly divided among business circles, government and the public about the efficacy and the viability of instituting CSR, and it certainly has been the subject of much lobbying from all sides for many years.

In India, there are many questions still remaining about this new law: How will it be implemented? Will the requirements be sufficient and effective? Are there more efficient and effective ways to induce corporations to fulfil their social responsibilities than putting it into law?

First of all, it must be considered that the implementation of CSR may be different according to the different economic sectors and the size of the companies involved.

Here, we examine the possible limits of a law, and what possible solutions we might expect, whether induced by legal means or others.

I. The implementation of CSR depending on the economic sectors and the size of companies:

a) The historical background of CSR:

Let us recall that India's corporate sector has a long



track record in donating generously to support the lower social-economic groups in its society. This dates back to the development of industry after India gained independence in 1947.

To be generous towards poor people is a behaviour Indian companies have practiced since a long time, since the emergence of Indian industry, and then when companies become stronger when they were struggling for their independence. (For more information on this, consult the PhD thesis of Dr. Damien Krichewsky of the Max Planck Institute for the Study of Societies, entitled: 'Corporate Social Responsibility in French multinational companies in India.')

It should be noted that before this new law is adopted, there are plenty of examples of good practice in CSR being undertaken in India. Without the law to compel, there is already a 'soft law' or 'implied law' in place where political pressure and social expectations about what is good corporate behaviour and practices is in place, which has not required a legal compulsion to be applied for these to be adopted.

What also should be recognised is that a fair law is one in which everyone must abide and respect. All actors should shoulder the same burden of compliance. In this light, it seems important to recognise that in India, as elsewhere, companies are being compelled to follow the global trend towards increasing profits and cutting costs in order to survive. Therefore, it should be noted that by adopting a legal obligation to perform CSR activities will initially mean a reduction in corporate profits, and the possibility that Indian companies' international competitiveness may be impaired.

b) A glimpse of a few practical cases:

As a preliminary step, we should distinguish in India contrasting roles that small and medium-size enterprises (SMEs) and big companies play.

The website of the Food and Agriculture Organization of the United Nations (Fao.org) quotes two famous Indian University teachers who say in the paper industry, some large companies such as Ballarpur Industries and Star Papers try to comply with regulations and norms, while thousands of small wood factories would not because the costs of compliance are too high.

c) The distinction between local laws and federal laws:

The goals of these two categories of laws are often

different. Local law in India is rather open and permissive; the intent of local government is usually to attract local or foreign investment.

This contrasts at times with federal law in India, which is not always closely observed by local states. While a federal law may be well written, it may encounter significant hurdles at the state level – the so-called 'red tape' of bureaucracy, and corruption.

What does CSR mean?

The purpose of 'CSR' (or 'RSC' in French) is to attempt to preserve harmonious connections between commercial companies (whether they are Indian companies or subsidiaries of foreign companies) and all their various stakeholders (the States, local entities, shareholders, clients and suppliers, staff members, the community, and so on).

Sustainable development is key to CSR. The fao.org website states the following CSR goals: to preserve the environment; respect the local populations; observe local authorities; abide by the laws; struggle against injustice; implement good practices; struggle against corruption; and stay aware of the staff welfare (particularly women and young children).

Here are some concrete examples of CSR in action from the internet services, telecom, beverages, leather goods sectors:

a) Internet services:

STERIA, an internet services company, was recently awarded by the Bombay Stock Exchange and NASSCOM Foundation for the quality of its educational programmes that it has implemented in India.

More precisely, the reasons why STERIA won such an award is worthwhile being examined. In 2010, STERIA was awarded the Nasscom social innovation distinction honours for its efforts in bridging the "digital gap". It was concerned with helping 46,000 children attend school in a very poor rural zone, quotes a website. It assisted by lending them – for free – computer centers and libraries, as well as developing software and helping teach school lessons.

STERIA is also one of many companies that make efforts to alleviate the HIV epidemic. It provides vaccinations for free and organises workshops to educate children on the

steps that can be taken to prevent the spread of the HIV disease.

Francois Enaud, the chief executive of STERIA, says that the company's philanthropic activities would not have been possible without the support of its clients' contributions and support. His acknowledgement points to the fact that most companies' CSR activities rely on the cooperation of their partners and stakeholders.

b) Telecommunications

British Telecom (BT), which has been active in India for a very long time, imposes standards to its suppliers that include CSR aspects.

According to an article about BT, "a true policy should be sourcing with dignity, sustainability". Furthermore, CSR should be reinforced with audits on its implementation.

In 2004, the telecommunications company concluded in a report that it should adopt 12 recommendations towards responsible outsourcing of its suppliers.

c) Steel:

Imposing CSR activities on a specific company, if it is not equalled by other companies in its field, may reduce its competitiveness substantially.

This dilemma is being faced by TATA Steel, a leader for many years in Indian CSR, which is currently having to reduce costs in order to preserve its competitiveness in the market. It has recently reduced its social budget from 15% to 6% of its net profits. This is a worrying trend if CSR activities are to remain useful to society.

The Government is aware of these problems: before the new Companies Bill was voted on, First Minister Manmohan Singh said: 'If those who are the most welfare do not act in a more socially responsible way, our growth might be threatened, our political society might become anarchy, and the social gap might grow more and more.'

In the same trend, in October 2008, the Department in charge of Companies confirmed that direction and set up a voluntary Code of Behaviour to be adopted at the national level.

d) Soda beverages:

Another side to CSR is acting in way that does not

hurt a company's reputation. A case in point is when a prominent multinational soda beverages company operating in India allegedly caused environmental damage when its factory in Kerala, in the town of Plachimada, allowed cadmium to seep into the local ground waters. A protest by the local community ensued, and the Government allegedly sued the company for US\$48 million for the environmental damage.

e) Leather factories:

There is also, among other factors, the aspect of health in CSR which must be taken into account. In many Indian colouring factories for leather, fur and skins of animals, sanitary conditions are often very low in these premises, and the incidence of cancers in their workers is uncommonly high. Experience in such cases has shown that outside criticism may not be sufficient for companies to improve their practices, and that it has required lawsuits initiated by non-governmental global organisations against a multinational company to take care of its corporate social responsibilities.

f) Car equipment:

The car equipment sector is another example of implementation of CSR. Legal action was taken against the project of building a factory in Tamil Nadu. The alleged legal ground was in violation of the OECD Guidelines and Principles for the alleged destruction of 450 hectares of forests and damage to the water supply for an entire zone. In this example, we see that not only is the law important, internationally-ratified guidelines can also have an effect.



This leads us to the question of the necessity and limits of each solution, whether by the law or others.

II) What solutions can we expect? Is a law necessary or are there other ways?

Law is not necessarily the best way to implement CSR. Rather than an inefficient law, it seems more realistic to implement good business and social practices; to expand 'soft law'.

The context of the actual law voted:

The website Novethic.fr quotes: "since February 2011, a proposal draft has been issued by the Finance Commission of Houses and is actually in discussion"; it has been voted since and remains to be implemented in each region.

The goal would be to affect a policy that if a company earns an annual turnover exceeding 161 million euros, then 2% of its profits should be directed towards CSR activities.

This is a good goal towards CSR, it may not be sufficient. Other incentives seem important.

It matters to impose contractual clauses to partners; to check their implementation and sanction if necessary those who do not respect such dispositions.

This illustrates the limits to a true and fair competition. The rules are so binding as a matter of fact, that it is difficult

to implement an authentic politics in the field of CSR. The informal economy weights heavy, syndicates play a small role, corruption is well known, minimum wages are unknown, and we see illegal work of young children and women.

However, companies should understand that their conception of social ethics is at stake and is a condition of their economical survival. One should try to impose that conception. And public opinions push more and more in that way.

Conclusion

India is quite aware of the questions surrounding CSR, and has raised important debates on this topic in recent years. But India cannot solve these questions alone. A lot remains to be done, in India and in the world; it is a global problem.

The way forward is to find the best method for inducing good practices among corporations. A law is not always the best solution; the so-called "soft law" could prove to be equally, if not more so, effective depending on the circumstances of the particular industry and country in question.

Reporting back on the results that are obtained in the field of CSR after the new law goes into effect in India will be necessary. And should the goals not be obtained, moral and economic sanctions should be drawn.

As a matter of fact, a lack of respect for companies' social obligations and responsibilities is a critical subject, particularly in India, where violent revolts by the people in protest against corporate misbehaviour are not uncommon.

Law is not necessarily the best way to implement CSR.



Serge Worthalter
Member of Paris Bar

Serge Worthalter specialises in Counsel and litigation, international contracts, negotiation and drafting of English and French, and bankruptcy. He is a French member of eak.de, the network of European lawyers covering most of European Union with members in the most prominent towns in Germany.

Discover Some of Our New Officers, Council Members and Members



Daniel Lim Ying Sin

Co-Chair, Intellectual Property
Committee

What was your motivation to become a lawyer?

Several things stand out, the earliest being the most important. An early memory has to do with the names that my parents named my brothers and me, as each related to a vocation. My name is Daniel, which means 'God is my Judge' ... you should get the idea. Perhaps names carry a certain power because there were many decision points, but this was always a guiding constant. Growing up, there was a television programme about studying law, *The Paper Chase*, and it sparked an interest, apart from my name, that is. Then I also found that I was a credible debater, and good with language and rules, so I suppose there were some basic tools in my repertoire. Still, it was not a 'done deal' because I had one foot in advertising, but when the offer to study law came, my course was set.

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

I will mention three during the course of my career. As a very young lawyer, I argued a point at the highest court, a panel of three judges, which was that a published court rule that was followed for years was *ultra vires* the law. It turned out well when I was right.

Mid-career, I conducted a cross-examination where dates became important. There was a video submitted by the witness who said that the video was made on a certain date. My junior had carefully gone through the video, so during cross-examination we screened the video and paused it at the right moment. There was a freeze-frame, less than a second so the human eye cannot see it normally ... showing a later date stamp. There was stunned silence.

Last year, I was asked by my co-counsel, at the very last minute, meaning 45 minutes before the hearing, to conduct a cross-examination of a panel of five expert witnesses, covering two areas of technical expertise. Not something to take on every day!

What are your interests and/or hobbies?

Hiking and trekking. My wife and I plan to do year-long walks when we retire. I also have a collection of books, graphic novels (i.e., comics), movies and television shows – all waiting for my retirement.

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

The day of the Welcome Reception at the Seoul Conference, I woke up early and trekked up a mountain. Mt Baekundae is 836 metres high. The clear view of Seoul was fantastic. There was no taxi at the finishing point, and even though no one spoke English, the kind citizens put me on various buses and trains in time for the reception!

Do you have any special messages for IPBA members?

The IPBA is a good place where great memories and warm friendships are forged.



Michael Cartier

Chair, Technology and
Communications Committee

What was your motivation to become a lawyer?

Growing up and living in a number of countries (Norway, Holland, Oman, Egypt, Gabon, Japan, Switzerland) I have met people from many different cultures and backgrounds. This gave me an international outlook and an interest in understanding people and their customs. Later with my high school offering degrees only in 'Latin' or 'Law and Economics' the choice was almost made for me and carried through into law school. Now as a lawyer practising international arbitration, I continue to meet people from across the world and what I like most in my work is understanding one's counterpart, be it the client, opponent or arbitrator, and getting them to understand you.

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

As a junior lawyer, who had been mostly drafting legal sections in a large arbitration case, I was unexpectedly and on short notice asked by co-counsel to do a large part of the oral closing arguments in an ongoing hearing. Needless to say, preparing and making the arguments was very intense, in particular as I was going up against a barrister.

We won the arbitration and the enforcement of the award culminated in a leading case before the Swiss Supreme Court, which for the first time had to decide whether arbitral awards in English need to be translated into an official Swiss language in order to be enforced under the New York Convention. The Swiss Supreme Court followed my reasoning and relaxed the translation requirements.

What are your interests and/or hobbies?

At the annual IPBA conferences you will often see me with my camera on the outings or social events. Japan, India and South Korea have been fantastic places for photography.



Natsuki Taira

Young Lawyer

What was your motivation to become a lawyer?

My first motivation to become a lawyer was John Grisham novels. Being Japanese and growing up outside of Japan as a child, I have always had a special interest in international affairs and global issues such as environmental issues. After I returned to Japan, I came to know that there were still very few lawyers who practice law in the international field in Japan. This is when I gradually started to consider establishing my career as an 'international' lawyer.

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

Meeting fellow members at IPBA!

What are your interests and/or hobbies?

I enjoy travelling and getting to know the people and the culture of other countries. My other hobbies (at the moment) are playing tennis, surfing, yoga, and learning Spanish.

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

I recently became 'friends' through Facebook with a girl in Japan who has the exact same first and last name as me with the same Chinese characters (this is very rare in Japan), and who is now studying in law school to become a lawyer.

Do you have any special messages for IPBA members?

I hope to attend all future IPBA conferences to catch up with old friends and meet new ones every year!



Colin Ong

Managing Partner, Dr. Colin Ong
Legal Services, Brunei

What was your motivation to become a lawyer?

Since my earliest memories of childhood, I have always been interested in solving problems and was always told that I spoke too much. I guess that one thing led to another and it was a natural progression for me to have drifted into the legal profession.

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

I am often appointed as arbitrator or instructed to act as lead or co-lead counsel in large quantum arbitrations across eight countries. As a result of having to travel every two weeks, one gets to meet many people and the opportunity to create friendships with people of different cultures and different thinking. I started out over twenty years ago as a common law lawyer and academic but my thinking has over the last ten years also morphed into that of a civil law lawyer. I find it fascinating that in spite of globalisation and programmes initiated by bodies like the IPBA and IBA to harmonise practices, there is still a gulf of difference in the deep-seated thinking and approach of lawyers from civil and common law jurisdictions. I am glad to see that there have been great strides made by international law bodies in putting to rest some of these differences and closing some gaps between the different legal systems. However, I believe much more needs to be done particularly in the area of international arbitration to continue teaching lawyers from both systems of law to understand and respect each other more.

As far as practice experiences as a lawyer is concerned, one of my most memorable cases took place a few years ago. I had been asked by a major energy company to take over as lead counsel to assist a leading International law firm in negotiating the settlement of the defence of an energy arbitration dispute just under US\$50 million.

Eventually, negotiations failed and I was left holding the defence. There were three different applicable laws coming into play in the arbitration which needed delicate balance. We eventually counterclaimed for several hundred million dollars more than the amount of the claim and eventually won the case for the ecstatic client who had prepared to make payment for the claim before we took over the case.

What are your interest and/or hobbies?

As I travel a lot and make almost 20 trips a year on arbitration matters for the last decade, family time is very precious for me. I always look forward to spending quality time with my children whenever I am home and inevitably their ever changing hobbies also become my hobbies. I also enjoy cooking for friends and spending quality time with them as a form of relaxation. I support charities for disabled children and helped to set up the first 'children with special needs' home in Brunei. I also enjoy teaching as visiting professor in several countries and find academic research very relaxing and stimulating.

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

I almost gave up being a lawyer to be a full-time chess player in my early years as a lawyer. I was so addicted to playing chess that I had to make a promise to myself not to touch a chess board again and have kept that promise for 17 years.

Do you have any special messages for IPBA members?

I hope to be able to contribute and make a difference to the IPBA and very much look forward to making new friends and to participate in interesting conferences.

Members' Notes

Joseph E. Ching

On 26 June 2013, the US Supreme Court reached a decision in the case of *Windsor v United States*, effectively striking down section 3 of the 1996 Defense of Marriage Act (DOMA) which denied federal benefits to same-sex couples who are legally married in the states in which they reside. President Barack Obama has instructed all federal agencies to adapt their policies accordingly to reflect the outcome of the DOMA decision and ensure the provision of federal benefits to all same-sex couples in the US. Included in these federal benefits is the right to equal treatment as couples in immigration proceedings. On 1 July, Secretary of Homeland Security Janet Napolitano announced that the US Citizenship and Immigration Services would begin considering visa petitions for same-sex spouses in the same manner as petitions for opposite-sex spouses. In August, Secretary of State John Kerry indicated in his remarks at the US Embassy in London that the Department of State will honor the same policy in reviewing visa applications. Many stand to benefit from the DOMA decision, including the international employees and students of corporate, academic and research establishments in the US. These individuals that apply for work or student visas can now file petitions to bring their same-sex spouses with them.

Larry Foster

On Friday, 19 April 2013, as part of IPBA's 23rd Annual Meeting and Conference in Seoul, the IPBA Legal Development and Training Committee took five IPBA members to the law school at Kyunghee University. The members were: Lawrence Foster (USA), Eriko Hayashi (Japan), Jason Jiao (Philippines), Varya Simpson (USA), and Natasha Xie (PRC). The members met with the law students at the University to encourage them to consider careers in international business law. The students asked a number of questions and were very appreciative of the lawyers taking the time to meet with them. The purpose of the visit was to promote the long-term sustainability of IPBA. Similar arrangements are being made for Vancouver.

Corey L. Norton

The United States has published final rules that will ease the restrictions on many products that are exported to Asia. The main benefits for Asian companies will likely be in the areas of aerospace, telecommunications and diverse electronics. Many transactions with the United States should now flow more easily and some new transactions will be possible where burdensome licensing was previously required. The new rules begin going into effect this October.

Lawrence A. Kogan

The Kogan Law Group, P.C. prepared a WTO analysis of the Draft Hong Kong Code of Marketing and Quality of Formula Milk and Related Products, and Food Products for Infants & Young Children ('Draft HK Code') that was published by LexisNexis. The Draft HK Code imposes prohibitions and restrictions on the contents of informational/educational materials, product containers and labels, and promotional/advertising activities, and encumbers the use of trademarks in such media. The analysis explains how these impositions adversely affect international trade in foreign branded infant formula and complementary foods products, and thus violate the WTO SPS, TBT and TRIPS Agreements. See: <http://www.lexisnexis.com/legalnewsroom/international-law/b/international-law-blog/archive/2013/08/05/lawrence-kogan-on-hong-kong-39-s-draft-infant-formula-amp-complementary-foods-marketing-code-violates-wto-law-part-1-of-3.aspx>.



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 practising lawyers to attend the IPBA's Twenty-Fourth Annual Meeting and Conference, to be held in Vancouver, Canada, 8–11 May 2014 (www.ipba2014.com).

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 practising 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. 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. Our most recent annual conference in Seoul in April 2013 attracted over 1,200 delegates.

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 a group of lawyers in Japan to honour IPBA's accomplishments in the 20 years 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 three 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 practise 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 2013**. Application forms are available either through the IPBA website (www.ipba.org) or by contacting the IPBA Secretariat in Tokyo.

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

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: _____)
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- Bank Wire Transfer – Bank charges of any kind should be paid by the sender.
 - to The Bank of Yokohama, Shinbashi Branch (SWIFT Code: HAMAJPJT)
 - 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

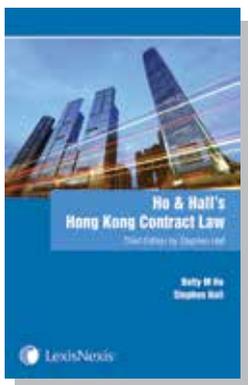
Signature: _____ Date: _____

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



Ho & Hall's Hong Kong Contract Law
- 3rd Edition by Stephen Hall
Revision to a Hong Kong Classic



Authors: Betty M Ho, Stephen Hall
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About the Book

Hong Kong has been institutionally separated from the United Kingdom for less than two decades. As recently as 25 years ago, it would have been difficult to perceive any appreciable emergence of a distinctly local Hong Kong common law. There were, however, some relatively early signs that the Crown Colony's common law was adapting to Hong Kong conditions to better serve the local community. Professor Betty M Ho skilfully identified many of these earlier developments.

Last published in 1994, Betty Ho's immensely popular contract law title has been extensively revised and expanded, with a focus on Hong Kong developments which has been updated by Professor Stephen Hall of The Chinese University of Hong Kong.

This comprehensive, skilfully written and self-contained volume on contract law in Hong Kong has been updated with the latest developments, including a significant addition of new cases to aid practitioners. It also sets out the basic principles of contract law and provides practical examples of contract law at work, balanced with theory and policy insofar as it aids understanding.

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