

June 2013 No 70

IPBA Journal

June 2013

No 70

NEWS & LEGAL UPDATE



IPBA JOURNAL

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

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IPBA Journal

The Official Publication of the Inter-Pacific Bar Association

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Design Helen Ng

Advertising Sales

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An imprint of
LexisNexis

(a division of Reed Elsevier
(Greater China) Ltd)

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183 Queen's Road East,
Hong Kong

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ISSN 1469-6495

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Single back issues: HK\$280 (US\$36)

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The President's Message

Young-Moo Shin
President



Dear Colleagues,

It is the honour of a lifetime to have the opportunity to serve as the President of the IPBA. I will do my best to be worthy of the trust you have placed in me.

I have many people to thank, but first I want to say thank you to my predecessor, Lalit Bhasin. I thank Lalit for his tireless dedication, exemplary leadership and unwavering support. The IPBA is a stronger organisation today because of his dedication and leadership, and I am confident we will continue to grow and thrive with his support. I am deeply grateful.

I extend my thanks to all of you for entrusting me with the honour of serving as President of this wonderful organisation.

I further wish to thank all of the members of the 2013 IPBA Seoul host committee and the organising committee for their hard work that made the 23rd Annual Meeting and Conference in Seoul possible. We had record attendance of 1,369 attendees, including 821 from overseas, at this Conference. The Silent Auction at the Seoul Conference raised around US\$25,000, which was donated to the Korean Bar Association's foundation for North Korean refugee students who are studying law. I want to give my special thanks to the donors and the

participants and the members of the Silent Auction team, and in particular to Mr Mark Shklov, who guided the team with his tremendous efforts.

I think the Seoul Conference has shown how dynamic Seoul and Asia can be. Legal professionals from around the Asia-Pacific region gathered in Seoul, in defiance of the threats issued by our bellicose neighbors to the North, and shared our experiences, our challenges and our hopes for the future. We shared friendship and fellowship, good food and wine, and even K-pop entertainment. We also shared our vision for addressing the challenges – and taking advantage of the opportunities – inherent in these dynamic times.

There is an old Chinese curse: 'may you live in interesting times.' Interesting times create many challenges. Nothing is more comfortable than the status quo and nothing is more fiercely resisted than change. So this is supposed to be a curse, but I think it is really a blessing. Interesting times are dynamic times and the challenges we face are also opportunities. This has been the theme of the Seoul Conference and this theme will guide us as we move forward into another year of dynamism in Asia. Nothing is constant but change, especially in Asia, and especially during these interesting times.

I hope I can make some small contribution to the IPBA and to the legal profession more broadly, as we address the many changes which are happening around us, and of which we are a part. I hope we, as legal professionals, will embrace the dynamic and interesting times in which we live. I hope we will bravely meet the challenges and boldly create opportunities to better the lives of the less fortunate citizens of our home countries, of the Asia-Pacific region and of the world we all share.

I think we are very lucky to live in such interesting times in an interesting part of the world and we are very lucky to be in the legal profession, where we have the ability and the responsibility to make the world a better place. I believe the IPBA, through its conferences and meetings, plays an important role in the promotion of peace, friendship and cooperation around the region. I will do my best to continue this important work and I ask for your help and your support.

I am humbled by your trust in me and I look forward to serving you as President of the IPBA in the coming year. Thank you so much.

Young-Moo Shin
President

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>.





The Secretary-General's Message

Yap Wai Ming
Secretary-General



Dear IPBA Members,

IPBA Seoul 2013 was indeed dynamic! A couple of weeks prior to the IPBA Seoul 2013 Annual Meeting and Conference, North Korea declared a 'state of war' against South Korea in response to the southern peninsula's joint military exercise with the USA. Worried about the escalating war tension, some delegates had enquired if it was safe to attend the Conference. Our IPBA Seoul host committee, under the capable leadership of Dr Shin Young-Moo, swiftly reassured us that the situation in Seoul was normal and that the rhetoric from the North was not unusual save that it had grown louder under the new leadership of Pyongyang. Fortunately, there were only two cancellations and, in fact, a new attendance record was set. More than 1200 registered delegates showed up at the Seoul Conference – the highest attendance ever recorded for IPBA conferences!

On behalf of all of our delegates, we congratulate Dr Shin and his incredible team who worked tirelessly for a wonderful and enjoyable conference in Seoul. The distinguished keynote speeches and committee sessions were well attended. The welcome reception with instructive lessons on the Gangnam Style dance routine, the welcome dinner at Dramia and the K-pop gala dinner, were really memorable and coordinated par excellence.

We look forward to President Shin Young-Moo leading our organisation for the coming year. If the Dynamic Asia theme of the Seoul Conference was anything to go by, I am sure we will see a very dynamic leadership in the Gangnam Lawyer's Style!

We thank our immediate past President Lalit Bhasin for his visionary leadership over the past year. He appointed

a Strategic Long Term Planning (SLTP) committee to review the long term plans of the IPBA and contributed significant ideas which the SLTP will deliberate with a view to improving the IPBA. Alan Fujimoto, our immediate past Secretary-General will be chairing the SLTP committee.

Deputy or Co-chair?

When I was first nominated to the post of Deputy Secretary-General two years ago, the nominating committee informed me that the post was critical as it was practically a four-year term: two years as a deputy and two in the formal capacity as Secretary-General (SG). Jerry Sumida, our then SG, told me he involved his deputy SG more as a co-chair than as a deputy. Alan Fujimoto continued the 'tradition' with me. Likewise, I will carry on in the same way with Miyuki Ishiguro, the current Deputy SG who will succeed me after the Annual Meeting and Conference in Hong Kong in 2015. I was heartened that Miyuki kindly spent time and effort to attend the Auckland Mid-year Council meeting as an observer even though her term as Deputy SG was only confirmed at the recent Seoul conference.

I hope that all our committee chairs will do the same with their vice-chairs and involve them early in the preparation of the committee programmes for each annual conference. Bill Scott's committee has been way ahead in the preparation for the Vancouver conference since 2012 when he was nominated as Vice President. By now, each committee chair would have deputised a vice-chair or a co-chair to start the coordination work for the Hong Kong annual conference while he or she finalises the Vancouver programmes with Bill Scott's host committee. This two-year overlap between the chairs and co-chairs also allows for a smooth transition in succession planning which is useful in providing

leadership with a clear sense of direction, commitment and motivation.

Secretarial update

At the Officers' wrap up meeting held in Seoul, the old and new IPBA Officers shared their plans for the coming year leading to the Annual Meeting and Conference in Vancouver 2014. President-Elect Bill Scott has already lined up an exciting programme for all of us. We encourage everyone to register for the Vancouver conference to enjoy the early bird discount. You may register online at www.ipba2014.com.

We have spent considerable resources to build up our website capabilities. Jurisdictional Council Members and Committee Chairs/Vice-Chairs can use the website to communicate with members or start any discussion forum. Please visit our website at www.ipba.org to explore some of these new features. We hope that the new website features will further enhance the collaboration between our various Council members so that institutional

knowledge can be maximised. Christopher To, our former Programme Coordinator, has taken on the role as our Webmaster. Kindly let us have your feedback on how we can better improve our services to members via the website.

At our Council meeting in Seoul, our immediate past President Lalit Bhasin thanked Midori Hirano for her untiring efforts in providing Secretariat support from the day IPBA was set up 22 years ago. Midori is retiring but will continue to support IPBA even after her retirement. Midori is a stalwart of the IPBA; without her wealth of knowledge and dedication, the Secretariat would not be what it is today. She deserves a standing ovation for her contribution to our organisation and for ensuring a well-run secretariat! Thank you, Midori.

I look forward to seeing all of you in Vancouver, if not sooner during some of our regional events!

Yap Wai Ming
Secretary-General

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.

IPBA Event Calendar

Event	Location	Date
IPBA Annual Meeting and Conference		
24th Annual Meeting and Conference	Vancouver, Canada	May 8–11, 2014
25th Annual Meeting and Conference	Hong Kong	Spring 2015
IPBA Mid-Year Council Meeting		
2013 Mid-Year Council Meeting (for IPBA Council Members)	Zurich, Switzerland	October 25–27, 2013
2013 Mid-Year Council Meeting Seminar (open to the public): Bridging Cultures in Arbitration (A Special Focus on Asia and Europe)	Zurich, Switzerland	October 28, 2013
Supporting Events		
innoXcell's 3rd Annual AIPEC Summit 2013	Hong Kong	June 14, 2013
innoXcell's Asia e-Discovery Exchange 2013	Hong Kong	June 18-19, 2013
Beacon's Corruption & Compliance Asia Congress and Banking & Finance Compliance Summit	Hong Kong	June 24–27, 2013
marcus evans' Corporate Legal Risk Management and Compliance	Kuala Lumpur, Malaysia	September 9-10, 2013
ABA Section of International Law's "China—Inside and Out"	Beijing, China	September 16-17, 2013
HKIAC's 2013 ADR in Asia Conference	Hong Kong	October 23, 2013
IPBA Regional Event		
Women of Law, Women of Exception	Paris, France	June 3, 2013

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

Legal News in Brief

Singapore: Investor wins appeal against French bank

Singapore's final appeals court has thrown out a previous decision that favoured the French Bank Credit Industriel et Commercial (CIC) over Teo Wai Cheong, an individual investor, in a dispute over S\$6.4 million (US\$5 million) lost during the global financial crisis. According to *The Asian Lawyer*, Teo Wai Cheong had purchased a type of structured financial product known as an accumulator through Ng Su Ming, a private banker at the CIC branch in Singapore. In 2009, the French bank sued Teo for failing to pay the losses incurred by the 20 accumulators he bought in 2007. Teo's defence was that he never authorized the purchase of the accumulators. Two previous trials had ruled against Teo and favoured the CIC after finding that Teo had authorized the purchases. However, the Singapore Court of Appeal in late May reached a decision to instead favour Teo due to several issues that emerged since the last two trials. New evidence showed that Ng had lied to her bank and had used a personal phone rather than an office one, which cast Ng's previous testimony into doubt. The Court also criticized CIC for failing to produce this evidence in the first trial, and cited an 'object failure to make proper discovery'.

Cambodia: Bill passed criminalising genocide denial

Cambodia's National Assembly approved a bill in June making it a crime to deny that atrocities were committed by the country's Khmer Rouge regime in the 1970s, according to an Associated Press report. The proposed law will punish anyone denying that crimes were committed by the Khmer Rouge, with imprisonment of between six months and two years. The assembly passed the bill unanimously after 28 opposition members were expelled from the legislature. A committee controlled by the ruling Cambodian People's Party said opposition legislators must relinquish their seats because they had left their old parties to join a new, merged party to contest the next general election in July.

Hong Kong: UK Barrister admitted to defend criminal appeal over Bar Association's objections

A Hong Kong court has permitted a senior barrister from the United Kingdom in May this year to act on a criminal appeal despite the objections of the prosecution and the Hong Kong Bar Association, according to the website Law.com. Clare Montgomery QC of London's Matrix Chambers had tried to represent John Wong, the former head of the surgery department at the University of Hong Kong, by applying to the Hong Kong Bar. John Wong was convicted last year on two charges of public misconduct, misallocating university funds to pay for a personal servant, and helping conceal a subordinate's theft of more than \$386,000. Overseas counsel can be admitted to appear in Hong Kong on an ad hoc basis. However, the prosecution and the Hong Kong Bar Association argued against the inclusion of Montgomery, stating that the case was not complex or difficult enough to justify such an inclusion. Wong's lawyer, Graham Harris SC, argued for the inclusion of Montgomery, claiming that the case is indeed complex due to the 'unusual difficulty' of one of the charges, which was the concealment of a subordinate's theft.

Japan: Protesters call to reject amendments to the Constitution

Hundreds of protesters gathered in downtown Tokyo for a peaceful protest against Prime Minister Shinzo Abe's calls for amendments to Japan's constitution, saying it would give his government more power to "abridge civil liberties", according to an Associated Press report in early May. Supporters of amending the Constitution want to change the requirement that constitutional amendments win two-thirds approval in both houses of parliament before they are put to a national referendum. They want simple majority approvals in parliament before an amendment proceeds to a referendum. Opponents say that the proposed amendments could curtail civil liberties. Surveys show mixed opinions among Japanese to revising the constitution, with some media organizations showing a majority in favor while others show the number of those who are undecided at nearly half, with the rest divided about evenly.

IPBA 23rd Annual Meeting and Conference Seoul, Korea April 17-20, 2013

The IPBA 23rd Annual Meeting and Conference was held at the Sheraton Grande Walkerhill and W Hotel in Seoul, Korea 17-20 April 2013. Over 1200 delegates attended, taking part in the committee sessions and numerous social events. You can find more photos on the IPBA web site!



The IPBA Council meets in the days prior to the Conference, discussing business matters of the Association.



The Pre-Conference Golf Tournament was held at the Ananti Club on the outskirts of Seoul.



IPBA President-Elect Dr Young-Moo Shin addresses the delegates at the Welcome Reception.



IPBA President Lalit Bhasin and AIJA President Thierry Aballea sign an extension to the 2010 MoU, strengthening the relationship between the two associations.



Delegates learn the Gangnam Style – or is it 'Lawyer Style?' – dance at the Opening Ceremony.



A Press Conference was held to publicise the conference, featuring IPBA leaders and principal Seoul Host Committee members.



The panel in the first half of the Plenary Session, 'Hear from the CEOs'.



The panel in the second half of the Plenary Session, 'Hear from the Managing Partners'.



Since the IPBA and APEC signed a Friendship Agreement at the Kyoto/Osaka Conference in 2011, the two organisations hold a joint session at each IPBA annual conference.



Committee leaders worked hard to put together over 40 sessions such as this one by the Dispute Resolution Committee.



The 10 IPBA Scholars and a speaker from the host country of Korea taught delegates about business etiquette in their jurisdictions.



A visit to Korea is not complete without a K-pop concert!



The IPBA Silent Auction and Raffle raised approximately US\$25,000 for North Korean refugee students studying law in South Korea.



Hosted by the IPBA Japan members, the Japan Night event gets bigger and bigger every year.



The future of IPBA: Young Lawyers (and the young at heart) attend a special gathering at a local drinking establishment.



IPBA Officers discuss IPBA business of the past year at the Annual General Meeting.

IPBA Moderators' Highlights from the Conference

Hear from the Managing Partners *Chang Rok Woo, Yulchon LLC, Korea*

Special Presentation: Alan Hodgart (Hodgart Associates Ltd., United Kingdom)

Speakers: Dennis Deng (Dacheng Law Office, China), Francesco Gianni (Gianni Origoni Grippo Cappelli & Partners, Italy), Hisashi Hara (Nagashima Ohno & Tsunematsu, Japan), Kye Sung Chung (Kim & Chang, Korea), Mark Leddy (Cleary Gottlieb Steen & Hamilton LLP, USA), Michael Reynolds (President of the International Bar Association and Partner of Allen & Overy LLP, United Kingdom), Richard Briggs (Hedef & Partners, UAE)

This plenary session was by far the most interesting session in the Seoul Conference in terms of its featured topics. All speakers were managing partners, founders or key leaders of leading law firms in various countries, including the United States, United Kingdom, Italy, UAE, China, Japan and Korea. They presented their perspective as to the dynamic legal market, with a focus on Asia. This session was specially arranged by the Host Committee in light of the recent opening of the Korean legal market.

Following the introduction of Chang-Rok Woo, Founder and Chairman of Yulchon (Korea) as a moderator, Alan Hodgart presented his view on the globalisation of the legal market. Alan is one of the leading experts in this area. Michael Reynolds, the President of the International Bar Association (IBA) and Partner of Allen & Overy LLP, also presented his view on the role of the IBA in the globalised legal market. Thereafter, two topics were discussed among the panellists.

The first topic was 'Changes in client expectations and what law firms should do to meet such expectations (for example, in respect of quality, specialisation, pricing).' In particular, the panellists discussed how a multi-jurisdictional and global legal services capability is valuable in the current legal market conditions and how to effectively develop such an international capability. Mark Leddy (Managing Partner of Cleary Gottlieb Steen & Hamilton, USA), Francesco Gianni (Founding Partner of Gianni Origoni Grippo Cappelli & Partners, Italy) and Richard Briggs (Managing Partner of Hedef & Partners, UAE) presented their views on this topic as panellists.

The second topic was 'Key trends or challenges in the Asia-Pacific (AP) legal market.' The panellists discussed the distinctive characteristics of the AP market and the role and strategy of AP law firms to best serve their clients. Hisashi Hara (Chairman of Nagashima Ohno & Tsunematsu, Japan),

Dennis Deng (Head of International Practice at Dacheng Law Office, China) and Kye Sung Chung (Chair of Finance Department at Kim & Chang, Korea) presented their views on this topic as panellists.

Two main trends were observed during the session: (1) the expansion of international law firms and (2) international strategic alliances among strong domestic law firms. This session was very unique in that it provided answers to various questions often raised in the globalised (and globalising) legal market.

M&A Negotiation Trends and Practices in Pan-Pacific M&A *Wilson Chu, Partner, K&L Gates, United States*

Speakers: Anand Prasad (Trilegal, India), Florian S. Jörg (Bratschi Wiederkehr & Buob, Switzerland), Lawrence Guo (Jade & Foundtain PRC Lawyers, China), Michael Burian (Gleiss Lutz, Germany), Michael G. DeSombre (Sullivan & Cromwell, Hong Kong), Myles Seto (Deacons, Hong Kong), Suet-Fern Lee, Stamford Law Corporation, Singapore Hyeong Gun Lee, Lee & Ko, Korea

In the context of a mock all-hands meeting of counsel involved in a hypothetical multi-jurisdictional acquisition, the CBIC held a lively deep-dive into key considerations and challenges in negotiating and executing M&A cross-border deals. After background discussion of the state of US law and practice on a particular issue, the panelists compared and contrasted prevailing market practices in their jurisdictions by focusing on three basic considerations with respect to a hypothetical buyer-favorable position: (1) is the desired position enforceable; (2) is it advisable (eg, commercially practical); and (3) whether any practical work-arounds are customary and practical. Issues highlighted included: (1) disclosures in a US versus a UK style practice; (2) impact of buyer's knowledge of breached representation and warranty on buyer's indemnification rights (ie, so-called "sandbagging"); and (3) limitations on fraud liability for extra-contractual statements. As with anything involving a panel full of lawyers, the session ran out of time just half-way through the planned agenda. So hopefully the CBIC will hold a sequel to this well-received programme.

Risk Management of Ship Building and Oil Platform Contracts and Sub-Contracts by Arbitration Clauses *Timothy Elsworth, Arbitrator, United Kingdom*

Speakers: Bazul Ashhab (Oon & Bazul LLP, Singapore), Matthew Christensen (Bae Kim & Lee LLC, South Korea), Alec

Emmerson (Clyde & Co, United Arab Emirates), Dr Justus Jansen (Brödermann Jahn, Germany), Kim Jae Hwan (Lee & Ko, South Korea), Kim Sae Youn (Yulchon LLC, South Korea), Leopoldo Pagotto (Zingales & Pagotto, Brazil), Lawrence Teh (Rodyk & Davidson LLP, Singapore), Shuji Yamaguchi (Okabe & Yamaguchi, Japan)

Moderators: Kim Sae Youn (Yulchon LLC, South Korea), Timothy Elsworth (Arbitrator, United Kingdom)

The joint session of the Arbitration and Dispute Resolution and the Maritime Law Committees was a fast and furious exchange of views involving nine panellists and two moderators.

The conference theme of 'Dynamic Asia' is exemplified by the offshore industry, not least in South Korea. Five different topics covered the use and effectiveness of dispute resolution and arbitration clauses in complex ship and offshore platform construction contracts. Particular emphasis was given to the relationships between the principal/buyer, the main contractor and subcontractors, highlighting the different objectives of each and how these both interact and conflict. The speakers took the roles of the parties to debate issues ranging from the expectations of their rights and obligations to confidentiality, delays in multi-party proceedings and, of course, cost efficiency.

Spirited debate led to active participation from the floor where there was, literally, standing room only. This was a successful session and we hope that further opportunities will arise for the Committees to work together. Many thanks indeed to all involved and particularly to Eckert Brödermann who led the initiative.

Coordination of APEC and IPBA: Cross-Border Activities of Small and Medium Enterprise and Venture Business
Alexander Jampel, Baker & McKenzie, Japan

Speakers: Dr. Wimonkan Kosumas (Chair of the APEC Small and Medium Enterprise Working Group, Deputy Director-General, Office of Small and Medium Enterprises Promotion), Anangga W. Roosdiono (Managing Partner, Roosdiono & Partners, Indonesia), Yoshiaki Muto (Managing Partner, Baker & McKenzie, Japan)

This IPBA APEC Special Committee session was held to discuss the promotion of cross-border activities and the development of small and medium enterprises and venture businesses, and the role of lawyers in supporting such activities.

The session was moderated by Alexander Jampel, a partner of Baker & McKenzie in Tokyo, Japan, and member of IPBA since its inception, with speakers consisting of Dr. Wimonkan Kosumas, chair of the APEC Small and Medium Enterprise

Working Group (SMEWG), and Deputy Director-General, Office of Small and Medium Enterprises Promotion, Thailand, Anangga W Roosdiono, managing partner of Roosdiono & Partners, and a member of the Indonesian council of the ASEAN Business Advisory Council, Yoshiaki Muto, chair of the Working Group on Legal Support for Cross-Border Business of SMEs of the Japan Federation of Bar Associations.

Mr Jampel opened the session by explaining the Friendship Agreement entered into between the IPBA and APEC during the APEC Special Committee Session at the 2011 IPBA Kyoto Conference, and how Nobuo Miyake, one of the founders and past presidents of the IPBA, spearheaded the efforts to have the IPBA recognised by APEC in order to provide the members of the IPBA with opportunities to not only learn about the APEC process and developments, but also to support the process as lawyers involved in the various areas being addressed by APEC.

Dr Wimonkan spoke about the importance of SMEs, the legal barriers facing SMEs in the APEC economies and the proposed collaboration between APEC SMEWG and the IPBA. Mr Roosdiono spoke about enhancing the capability of SMEs to ensure a more progressive SME sector towards overall economic growth and the realisation of the ASEAN community. Mr Muto then spoke about a programme being implemented by the Japan Federation of Bar Associations to allow Japanese SMEs investing overseas to more easily obtain legal assistance from Japanese as well as overseas lawyers with experience, representing SMEs through bilateral arrangements with foreign bar associations.

The IPBA APEC Special Committee is currently an ad hoc committee but is striving to become a standing committee in two years. The Committee is already planning the APEC Special Session to be held at next year's annual conference in Vancouver, Canada. The Committee welcomes additional committee members, as well as any suggestions.

A New Global Currency? The Role of the RMB in Times of Global Currency Market Turmoil and Beyond
Jan Peeters, Stibbe, Brussels

Speakers: Mrs Nancy Schnabel (Attorney – Legal Function, Federal Reserve Bank of New York, United States), Mrs Rebecca Smith (Co-Head and Vice President of Issuer & Client Services, Hong Kong Exchanges and Clearing Limited, Hong Kong), Mr Tea-hwan Ree (Research Fellow, Economic Policy Department Samsung Economic Research Institute Seoul, Korea)

The Banking, Finance & Securities Committee's panel on the discussion of the renminbi as a world currency was honoured with the participation of Mrs Nancy Schnabel from

the Federal Reserve Bank of New York, Mrs Rebecca Smith of Hong Kong Exchanges and Clearing Limited and Mr Teahwan Ree of the Samsung Electronic Research Institute in Seoul. Unfortunately, Mr Ronald Beck from the European Central Bank in Frankfurt had to cancel last minute. Following an introduction of some of the economic drivers of the RMB appreciation, the panel commenced by examining some of the policy steps that have been undertaken by the Chinese authorities dating back to the beginning of the 1990s. The initiatives were limited until 2010, with Hong Kong used as a testing ground, and received a serious boost from 2010. Addressing the concerns raised by the flexibility of exchange of the rate, the panel then considered the developments in the domestic financial markets which remain strongly bank-denominated. The development of the bond market and the role of Hong Kong as the main centre for RMB denominated bond issues and foreign exchange transactions was touched upon. Bilateral swap lines, which were originally dollar based, and recent bilateral currency swaps were considered to be clear indications of the increasing use of the RMB in the central banking world. A formal reserve currency status was found to be something that was clearly within reach but would require still further important steps to be taken.

Challenges for Asian Exchanges: Competition and Structural Change

Robert Postema, Piper Alderman, Australia

Speakers: Dr Pyung Ho Shin (Executive Director, Management Strategy Division, Korea Exchange, Korea), Ms Rebecca Smith (Vice President, Co-head of Client & Issuer Services, Hong Kong Exchanges and Clearing Limited, Hong Kong), Mr Marc Iyeki (Managing Director – Asia & Middle East North Africa, NYSE Euronext, United States), Ms Natasha Xie (Qing) (Partner Jun He Law Offices, China)

The Banking, Finance & Securities Committee was privileged to have speakers from Korean Exchange (Dr Shin), Hong Kong Exchanges and Clearing Ltd (Ms Rebecca Smith) and NYSE Euronext (Mr Marc Iyeki) on the panel to provide attendees with an 'insider's' perspective on competition between securities exchanges for listing, as well as the impact on exchanges of the development of 'dark pools' and 'high frequency trading'. The Committee was also fortunate to have one of its members, Ms Natasha Xie, provide the Chinese perspective. The panel was generally agreed that issuers of debt/equity securities overwhelmingly favour listing on their home exchange, other things being equal. Drivers for listings in other markets, either in preference to or in addition to home market listings, were market specialisation (eg exchanges with a focus or reputation for technology, resources, luxury goods listings), 'liquidity' (somewhat surprisingly ahead of 'valuation'), and in some

cases 'regulatory arbitrage'. While it seems likely mainland Chinese exchanges will continue to be statistically dominant in terms of size and volumes, this will not translate into real global dominance of listings until such time as mainland Chinese exchanges are truly open to foreign investors. In the meantime, it seems New York, London and Hong Kong will continue to jostle for dominance among themselves and, in the longer term, with the Singapore and Indian exchanges. There was also general consensus among panelists that dark pools and high frequency trading had been positive for investors. While there have been criticisms of unfairness and market manipulation made by some about these developments, panelists felt that regulatory measures in place or being contemplated, would be adequate to curb some of the excesses that had led to these criticisms. In the end, what was scheduled to be a long session seemed to pass all too quickly.

The Efficient Arbitral Institution

Juliet Blanch, Weil, Gotshal & Manges, United Kingdom

Speakers: Chiann Bao (Hong Kong International Arbitration Centre, Hong Kong), Min Naing Oo (Singapore International Arbitration Centre, Singapore), Wang Jie (China International Economic and Trade Arbitration Commission, China), Sundroo Rajoo (Kuala Lumpur Regional Centre for Arbitration, Malaysia), Peter Leaver (on behalf of the London Court of International Arbitration), Suchitra Chitale (Chitale & Chitale Partners, India), Cedric Chao (DLA Piper, United States), Rashda Rana (Ground Floor Wentworth Chambers & Atkin Chambers, Australia), Byung Chol Yoon (Benjamin Hughes, Independent Arbitrator & Mediator, Korea)

Moderators: Juliet Blanch (Weil, Gotshal & Manges, United Kingdom), Mohan Pillay (Pinsent Masons MPillay LLP, Singapore)

The purpose of the session was for users and arbitrators to challenge a number of institutions as to their ability to monitor and control the process of arbitrations conducted under the auspices of each institution.

The speakers concentrated on four overall issues, namely: arbitrator quality and ethics; procedural efficiency and speed; costs; and interim measures. For each topic, one representative of an institution and one representative of a user provided a global overview of the issues each topic raised, other members of the panel then added their views and then the topic was turned over to questions from the floor. The issues and the ability of the arbitral institutions to manage these issues raised considerable debate in the three-hour session and it was clear that although there are many aspects of the procedure which are well supervised by the institutions to try to minimise cost and delay in the course

of an arbitration, there are still a number of areas where the users still feel more could be done by the institutions.

Transfer Pricing & Customs Duty

Michael Butler, Finlaysons, Australia

Speakers: David Blair (Crowell & Moring, USA), Michael Butler (Finlaysons, Australia), Andre Carvalho (Veirano Advogados, Brazil), Goh Ka Im (Shearn Delamore & Co, Malaysia), Joseph Hong (Yulchon, Korea), Ryosuke Kono (Oh-Ebashi LPC & Partners, Japan), Surabhi Singhi (Amarchand Mangaldas, India), Ruby Rose J Yusi (Accralaw, Philippines); and Samuel Zhang (Samuel Zhang & Co, Hong Kong).

Moderators: Michael Butler (Finlaysons, Australia); Jeff Snyder (Crowell & Moring LLP, Washington, DC)

This session, hosted by the Tax Law & International Trade Committees, addressed the interaction between transfer pricing and customs duty rules, and their effect on international trade flows.

Michael Butler commenced the session by providing an overview of the tension between the TP and CD rules where cross-border sales of goods take place between related parties. The tax authorities will typically be concerned to ensure prices are not artificially 'high' because this will reduce the tax on profits on subsequent sales in-country. At the same time, customs authorities will be concerned to ensure prices are not artificially 'low', because this will reduce the duty payable on importation. The practical difficulty is that tax authorities generally use OECD methodologies (increasingly profit-based) while customs focuses on transaction values and other WTO/WCO methodologies.

Joseph Hong summarised the recent Diageo case, which involved a dispute between a taxpayer, arguing it was entitled to use the 'computed value' method for calculating duty, and Korean Customs, asserting the residual methodology ('any other reasonable method') should be applied.

Ka Im Goh referred to recent examinations by the Malaysian revenue authorities of inter-company loans and intellectual property licensing arrangements for TP purposes. She also provided a helpful overview of the Nike case, which considered whether a royalty, paid in relation to the import and sale of a product, could be added to the price of goods for duty purposes.

Andre Carvalho discussed the recent high profile Cisco case, which involved a complex scheme to avoid payment of customs duty on computer hardware imported into Brazil; although Andre emphasised Cisco was not involved!

Samuel Zhang provided a comprehensive overview of the Chinese TP rules and their interaction with the customs regime.

Surabhi Singhi delivered a very useful summary of the Indian position and the conflict between the TP and customs systems. She also reviewed the jurisprudence arising out of a number of recent decisions.

Ryosuke Kono analysed a Japanese customs case that involved the sale of goods by a United States vendor (through an affiliate) to a Japanese purchaser, in which consideration was given to whether the 'first sale' rule was applicable. Under the first sale rule, importers may, in certain circumstances, use the price paid in the 'first or earlier sale' as the basis for the customs value of goods, rather than the price the importer ultimately paid for the goods.

Ruby Rose Yusi focused on the practical issues associated with importing goods into the Philippines and recent TP trends. She noted, in particular, that the TP rules in the Philippines are still new, that Advance Pricing Agreements (APAs) have not yet been tested, and that advance customs valuation arrangements are not available.

David Blair discussed the relationship in the United States between the rules applied by the Internal Revenue Service and Customs & Border Protection; examined the valuation issues arising where royalties, cost-sharing payments and/or management fees are paid to the seller (or a related party); and took the audience through the Maquiladora Ruling (PLR 9301002).

Michael Butler completed the Session by discussing the proposed change to Australia's TP rules, which, if enacted, will result in a paradigm shift from 1 July 2013 from 'price' to 'profit'. Michael also summarised the Practice Statement issued the week before the Conference on Customs Valuation Advices & Transfer Pricing.

Investment Review Issues on the Pacific Rim: Inbound Investments in Australia, the United States and Canada and Outbound Investments From China

Shigeyoshi Ezaki, Anderson Mori & Tomotsune, Japan

Speakers: Mr. Rupert Lewi (Ashurst LLP, Australia), Mr. Shawn Neylan (Stikeman Elliott LLP, Canada), Mr. Steve Harris (Baker & McKenzie LLP, United States), Ms. Janet Hui (JUN HE law Offices, China)

The panel (Rupert Lewi from Australia, Steve Harris from the United States, Shawn Neylan from Canada, and Janet Hui from China) discussed the following issues: (1) the general applicability of investment review laws and review

processes for inbound investment; (2) special considerations for state-owned enterprises (SOEs) with regard to inbound investments; and (3) national security issues dealt with under investment review laws in each jurisdiction, referring to a number of recent high profile cases, some of which involve SOEs, such as China National Offshore Oil Corporation's acquisitions of Nexen as well as Petro China's acquisition of Arrow Energy and Browse. Janet Hui also explained the Chinese government review of outbound investments to allow for a better understanding of how the Government considers such investments. Finally, the panel dealt with practical tips for handling investment review issues with respect to future transactions.

Shareholder Activism and Corporate Governance
José Cochinyan, III (Cochinyan & Peralta Law Offices)
Philippines

Speakers: Dr. Chang-Hyun Song (Shin & Kim) for Korea, Evelyn Ang (Rodyk & Davidson LLP) for Singapore, Frédéric Ruppert (De Gaulle Fleurance & Associates) for France, Thomas Meister (Walder Wyss Ltd.) for Switzerland, Kevin Liu (Liu Xiangwen) (King & Wood Malleson) for China, Matt (Takeshi) Komatsu (Mori Hamada & Masumoto, Singapore Office) for Japan, Philip TN Koh (Mah-Kamariyah & Philip Koh) for Malaysia, Peter Hong (Davies Ward Phillips & Vineberg LLP) for Canada

The session panelists of the Cross-Border Investment Committee investigated how shareholder activism affects standards of corporate governance. Korea leads the way with tightened regulation on self-dealing and prohibition on usurpation of business opportunities but has watered these down with a controversial limitation on directors' liability. In Canada, regulatory authorities with a strong rights based tradition back dissident shareholders. Singapore witnessed several instances of institutional driven shareholder activism while in Malaysia, frustration with conservative court action is matched by a long drawn out deliberation on the adequacy of legislative or regulatory tools. China, a jurisdiction where class action suits do not exist, has government remedies to regulate shareholder initiatives arising from concerns for social order while Japanese public perception against shareholder activism is colored by a disdain for aggressive and disruptive behavior. On the other side of the spectrum is Switzerland, where relatively swift and creative Swiss statutory and regulatory initiatives were matched with admirable public participation. Finally, in France, depression and anger due to the current economic situation brought forth a shareholders' revolt against issues on executive pay driven by the same profound collective moment reminiscent of the storming of Bastille. Nevertheless, amidst all this diversity, there was still room for the universal appreciation for the free shareholders' lunch.

Use (and Mis-Use) of Experts in International Construction Disputes

Keith C Phillips, Watt, Tieder, Hoffar & Fitzgerald, LLP, United States

Speakers: Kirindeep Singh (Rodyk & Davidson, LLP, Singapore), Roger ter Haar (QC, Crown Office Chambers, London, UK), John B. Tieder, Jr. (Watt, Tieder, Hoffar & Fitzgerald, LLP, McLean, VA, USA), Jae-Yun Yun (Shin & Kim, Seoul, Korea), Naresh Mahtani (Eldan Law, LLP, Singapore)

The International Construction Projects ('ICP') Committee presented a session on Friday, 19 April 2013 on the 'Use (and Mis-Use) of Experts in International Construction Disputes.' The distinguished panel was moderated by ICP Committee Chairman Keith Phillips. Kirindeep Singh of Singapore was the first speaker and discussed the importance of experts in construction disputes and when their use is appropriate. Notably, Mr Singh took second place in the IPBA Best Paper Competition at the Conference. Roger ter Haar, QC of London then followed with a presentation on the critical nature of the independence of expert witnesses in international disputes. John Tieder, from the United States, followed with a discussion of the 'hot-tubbing' of experts, in which experts from both sides of the dispute appear before a tribunal at the same time for questioning and debate. Jae-Yun Yun of Seoul, a former district judge, then discussed the unique role of experts in the Korean court system. Naresh Mahtani of Singapore ended with a presentation on expert determination, in which an appointed expert renders a decision on a disputed issue, such as technical matters. Following the presentations, there was a lengthy and lively question and answer session with the audience, during which the panel members were queried on their topics and other expert issues in construction disputes.

Case Study – A Failed Construction Project
Urs Lustenberger, Lustenberger Attorneys at Law, Switzerland

Speakers: June Junghye Yeum (Lee&Ko, Korea), Kamilah Kasim (Rajah & Tann, Singapore), Ben Nicholson (DAC Beachcroft, Singapore), Philipp Nunn (Fried Frank, Hong Kong), Carter Reid (WTHF, United States)

Under the working title 'Case Study – A Failed Construction Project' this session examined the most interesting legal issues of a failed project. Being in a country which has some of the most successful, and some of the most aggressive, construction companies of the region, we tried to interest the audience with a fallout project. The panellists (June Yeum, Kamilah Kasim, Ben Nicholson, Philipp Nunn and Carter Reid) skilfully led the audience through the issues that arose during the phases of pre-arbitration, arbitration and post-arbitration. We had a 'full house' even though we were competing with

a parallel session co-hosted by our committee and were thankful to be able to engage the audience to participate actively. In fact, the session became so lively that we all would have wanted to continue for another hour or so. My warmest thanks go to my panellists and to the audience. It was a joy to moderate such a professional group of friends; truly IPBA!

National Courts: Current and Future Trends
Denis Brock, King & Wood Mallesons, Hong Kong

Speakers: Akihiro Hironaka (Nishimura & Asahi, Japan), Mark Lin (Hogan Lovells, Hong Kong), Dhinesh Bhaskaran (Advocate and Solicitor, High Court of Malaya), Kumkum Sen (Bharucha & Partners, India), Jin Soo Han (Lee & Ko, Korea), Pradeep Pillai (Shook Lin & Bok LLP, Singapore)

Moderators: Denis Brock (King & Wood Mallesons, Hong Kong), Mohanadass Kanagasabai (Mohanadass Partnership, Malaysia)

A full house, with many attendees standing, participated in a very lively debate with, and among, the panel over a range of topics: Appointment of the judiciary: is it transparent or papal? Third Party Funding: threat or opportunity? Speed of process versus quality of result: compatible or do they undermine justice? Should 'loser pays' be sacrosanct? Contingency fees: an evil or access to justice? Interim relief: intervention or early justice? Discovery of documents: a right or benefit? Does ADR support or compete with court proceedings? Do courts 'compete' with arbitration and are they hostile to its encroachment?

The session's format adopted the style of BBC's Question Time or Any Questions and was moderated by Denis Brock and Mohan Kanagasabai in the guise of Jonathan and David Dimbleby; the panel was better behaved than a Question Time panel!

Lawyers on Boards of Companies
Priti Suri, PSA, India

Speakers: Suet-Fern Lee (Stamford Law Corporation, Singapore), Anne Durez (Senior Corporate Counsel, Total S.A.), Karen Yoo-Kyoung Choi (Compliance Officer / Legal Affairs, Pfizer Pharmaceuticals Korea Ltd.), Caroline Berube (HJM Asia Law & Co. LLC, China), Julia Dnistrianski, (Finlaysons, Australia), Jerry Burgerdorfer (Jenner & Block, United States)

The three hour joint session 'Lawyers on Boards of Companies' of the Corporate Counsel and Women Business Lawyers Committee took place on 19 April 2013. The primary focus of the session was to first, draw comparisons between practices in the United States, Europe, Asia and Australia as

to diversity on company boards, and second, to identify, discuss and advise the audience on the issues at stake when lawyers are on boards of companies. The discussions revolved around the shift from traditional boardrooms which historically comprised business and finance people, towards a greater representation of lawyers and women leading to 'globalisation' of boards. The panelists discussed the pros and cons of lawyers being on boards and if a future existed in this area. Representing private practice and in-house lawyers, they shared their stories and how their presence enhanced the value of the client or the company. The panelists also described critical qualities to be an effective board advisor and discussed the importance of gender ratio. On a lighter note, they provided insights into their tactics – tone of voice, presentation methods, jokes – to overcome overwhelming feelings which may arise from a multitude issues.

An all-women panel was thwarted by Chicago-based lawyer Jerry Burgerdorfer who, relying on real-life cases, shared his experience as an attorney advising company boards and participating as 'outside general counsel.' Suet-Fern Lee provided extremely helpful insights as a board member of Asian and French companies, while Anne Durez and Karen Yoo-Kyoung Choi brought European and Korean in-house perspectives. Caroline Berube discussed key developments in Canada and China while Julia Dnistrianski focused on Australia. The moderator, Priti Suri, explained the Indian context. With active participation by the audience, time simply flew.

Practical Developments with Domestic & Treaty General Anti-Avoidance Provisions (GAAPs) on Cross-Border Transactions
Jan Kooi, Kim & Chang, Korea

Speakers: Michael Butler (Finlaysons, Australia), Kim Maguire (Borden Ladner Gervais LLP, Canada), Peter Ni (Zhong Lun Law Firm, China), Nishith Desay (Nishith Desay Associates, India), Yushi Hegawa (Nagashima Ohno & Tsunematsu, Japan), Jay Shim (Lee & Ko, Korea), Neil Russ (Buddle Findlay, New Zealand), Show Chen (Eiger Law, Taiwan, China)

The session on 'Practical Developments with Domestic & Treaty General Anti-Avoidance Provisions (GAAPs) on Cross-Border Transactions' was moderated by Jan Kooi from Kim & Chang in Seoul. In total eight other speakers took the floor to discuss the issue from the perspective of their own country. Interestingly, but perhaps not surprisingly, some countries, like Australia, have had anti-abuse provisions in their legislation for decades and are now modernising their legislation to 'catch up' with the increasing creativity of tax planners and the new possibilities arising in a rapidly globalising world. Other countries, evidently facing the same problem, are

now implementing legislation, benefiting obviously from the experience gained by countries that have had legislation to stem perceived abusive transactions. The global trend, as evidenced by increasing case law and legislation seems, however, to overreach the original purpose of GAAPs. It is clear that governments no longer only want to stop obviously abusive aggressive tax planning. Even evasion, which basically is the use of completely legal loopholes, seems in more and more countries to be the target of attacks by tax administrations. The question is whether such issues must be dealt with by GAAPs, which are a strong overkill, or whether it would not be wiser to amend specific legislative provisions that enable evasion. There even is a new trend. Reducing tax by completely legal and not even aggressive arrangements, such as by the use of financing, IP or holding companies in tax advantageous countries-- and thus only realising a deferral of taxation, seems to be considered more and more as immoral. Soon it may be impossible to predict whether a structure like that will ultimately survive. The session was very lively and the three hours allotted did not actually suffice.

Bankruptcy in the Maritime and Shipbuilding Industry
Lynn P. Harrison 3rd, Curtis, Mallet-Prevost, Colt & Mosle LLP, United States

Speakers: Helen Tung (One Temple Avenue Chambers, United Kingdom), Andrew Rigden Green (Stephenson Harwood, Hong Kong), Myung Ahn Kim (Lee & Ko, Korea)

This panel provided participants with an in-depth look at the issues facing maritime and shipping industry debtors under insolvency regimes worldwide, focusing on the United States, Korea, China, and the European Union. The session began with an overview of the shipping industry in the current economic climate. Next, the panellists provided attendees with some of the basics of cross-border insolvencies in each of their respective jurisdictions. The remainder of the panel discussion focused on the challenges and hot-button issues surrounding this rapidly developing area of law, including complex contract issues, disputes regarding the adjudication of maritime liens, the jurisdictional uncertainty arising from the far-flung assets of maritime and worldwide dispersion of a shipping industry debtors company's assets, and how these issues affect the shipping industry as a whole. Highlights included up-to-the-minute updates on changes to the law as well as case studies showcasing some of the most common issues facing maritime debtors and possible solutions.

Real Estate Bankruptcies in Troubled Economies
Shinichiro Abe, Baker & McKenzie, Japan Moderator

Speakers: Donald L Spafford (United States), Burkard Göpfert (Gleiss Lutz, Germany), Helena Hunag (King & Wood

Mallesons, Hong Kong), Sang Goo Han (Yoon & Yang LLC, Korea)

The session began with a discussion on precedents from the US experience regarding the mortgage crisis, and was led by Donald L Spafford. Then Burkard Goepfert, our European Union panelist from Germany, explained the German economy and the distressed state of some of the European countries. The third panelist, Helena Hunag, who is from Hong Kong, talked about China's real estate market as well as how to invest in distressed real estate companies in China. Fourth was my presentation regarding the recent developments in Japanese REITs, including the booming real estate market and insolvency cases that have occurred a few years ago. The last was held by Sang Goo Han from Korea. He explained trust for security in real estate, its mechanism, and notable real estate bankruptcy cases in Korea. All presentations and discussions were informative and gained close attention from the audience present at the session.

The Changing Face of Aviation Disputes – 21st Century
Francis Xavier, Rajah & Tann LLP, Singapore

Speakers: Todd Rosencrans (Perkins Coie LLP, United States), Ravi Nath (Rajinder Narain & Co Legal LLP, India), Jin Young (Lee & Ko, Korea), Helen Tung (One Temple Avenue Chambers, United Kingdom), Gavin Wang (Jun He, China)

The IPBA panel session on 'The Changing Face of Aviation Disputes – 21st Century' was held on 19 April 2013 in Seoul, Korea. The session benefited from having an experienced and international panel. The panelists were Todd Rosencrans (Perkins Coie LLP, United States), Ravi Nath (Rajinder Narain & Co Legal LLP, India), Jin Young (Lee & Ko, Korea), Helen Tung (One Temple Avenue Chambers, United Kingdom) and Gavin Wang (Jun He, China). The session was moderated by Francis Xavier SC (Rajah & Tann LLP, Singapore). The topics discussed were wide-ranging and topical. Todd provided a United States perspective on the issues of forum non conveniens and criminalisation of product liability. Ravi talked about product liability issues and the liberalisation of the Indian aviation market. Jin presented on personal injury and death claims in the Korean courts. Helen presented on the latest developments and implications of the European Union carbon emissions trading system. Gavin provided updates on China's civil aviation laws and the impact of new civil procedural laws that are being promulgated.

The Financial Crisis – Liability and Insurance Aspects
Angus Rodger, Steptoe & Johnson, United Kingdom

Speakers: Denis Brock (King & Wood Mallesons, Hong Kong), Tunku Farik Ismail (Azim Tunku Farik & Wong, Kuala Lumpur)

The Insurance Committee session focused on the financial crisis, the types of loss which have arisen, and the ways in which insurance is used to mitigate those losses. The mood in the room was electrifying as Denis Brock of Hong Kong (King & Wood Mallesons) presented an overview of the types of insurance which are available, and how they have responded to the crisis. Tunku Farik Ismail of Malaysia (Azim, Tunku Farik & Wong) presented on liability for the mis-selling of financial products, how the law in this area is developing, and insurance aspects, to thunderous applause. This enjoyable session covered a lot of ground in an easily digested manner. We thank the organisers for the smooth arrangements and excellent venue, and look forward to meeting again in Vancouver next year.

Liberalisation of the Legal Market in Asia

Mark Stinson, Fasken Martineau DuMoulin LLP, Canada

Speakers: Charandeep Kaur (Trilegal, India), Christopher Leong (Chooi & Company, Malaysia), Francis Xavier (Rajah & Tann, Singapore), Hee-Chul Kang (Yulchon LLC, Korea), Peter Brien (Slaughter & May, Hong Kong), Yong Guk Lee (Cleary Gottlieb Steen & Hamilton LLP)

The session on 'Liberalisation of the Legal Market in Asia' highlighted the increasing pressure on domestic law firms from foreign entrants. Each panel member outlined the situation in their country and the session was moderated by Mark Stinson of Fasken Martineau DuMoulin (Canada). Charandeep Kaur of the Delhi office of Trilegal described the situation in India which represents one end of the spectrum where the legal market has not been liberalised to any significant degree, although fly-in, fly-out consultations between foreign lawyers and their clients regarding foreign law and international issues are permitted. Chris Leong, the Managing Partner of Chooi & Company and President of the Malaysian Bar, and Francis Xavier of the firm of Rajah Tann of Singapore, outlined the situation in their respective countries where liberalisation is continuing apace. Peter Brien, of Slaughter and May's Hong Kong office, provided insights on globalisation generally and emphasised the importance of each firm adopting a strategy which is right for them and their clients. The current liberalisation of the Korean legal market is one of great interest fuelled by the Free Trade Agreements between Korea and the European Union and with the United States respectively, which provide for the opening up of the Korean legal market in three stages, with the final stage of each agreement becoming reality in July 2016 for the European Union and March 2017 for the United States. At that point, as explained by Hee Chul Kang, one of the founding partners of Yulchon LLC, foreign law firms can establish joint ventures with Korean lawyers subject to some limitations, and joint venture firms can hire Korean lawyers and practice Korean law through

them. As of 15 April 2013, about 15 United States firms and four United Kingdom firms had been granted licences to practice in Korea with several applications pending. Mr Kang also commented that major Korean law firms were well prepared for the influx of foreign firms. Yong Guk Lee, the representative partner of the Cleary Gottlieb Steen & Hamilton LLP legal consultant office in Seoul described the various strategies of foreign law firms in deciding to open offices in Korea. Mr Kang and Mr Lee agreed that it was too early to tell what the ultimate effect of the foreign offices will be, but all agreed that it will be very interesting.

New challenges for Cooperation Between Europe, Asia and Africa

Anne Durez, Total SA, France

Speakers: H.E. Thomas Kozlowski (Ambassador for the European Union to the Republic of Korea), Geneviève Mouillerat (Project Director for TOTAL), Jean-Claude Beaujour (partner at Smith Violet in Paris and IPBA Regional Coordinator, Europe)

The Corporate Counsel Committee organised a session on the topic 'Economic Cooperation between Europe, Asia and Africa: Challenges and Perspectives'.

The panel was composed of H.E. Thomas Kozlowski, Ambassador for the European Union to the Republic of Korea, Geneviève Mouillerat, Project Director for the French oil company TOTAL and Jean-Claude Beaujour, partner at Smith Violet in Paris. The session was moderated by Anne Durez, Chair of the Corporate Counsel Committee.

The Ambassador reminded the audience that the European Union and South Korea are important trading partners: South Korea is the European Union's tenth largest trade partner, and the European Union is South Korea's fourth export destination after China, Japan and the United States. He outlined the perspectives of European Union-Korean commercial relations since the coming into force of the FTA in July 2011, which is the European Union's first trade deal with an Asian country. In addition to eliminating duties on nearly all trade in goods, the FTA addresses non-tariff barriers to trade. It also includes provisions on issues ranging from services and investments, competition, government procurement, intellectual property rights, transparency in regulation to sustainable development. His Excellency explained that the FTA covers many more areas in addition to custom duties, including IP rights, government procurements and service sectors. European Union exports to South Korea of products fully liberalised have increased greatly since the FTA.

Geneviève Mouillerat gave the audience an example of a successful industrial cooperation in the oil industry between

the French and Korean companies TOTAL and DSME, for the current construction of a floating production, storage and offloading unit (FPSO) in Geoje, South Korea for a total cost of nearly US\$ 2 billion. The FPSO will then be transported to Angola where oil production will start in 2014. The success of this huge project resides in the selection of contractors, engineers and suppliers and the capacity of business partners to adapt their management to their counterparts. As a businesswoman, she also mentioned that when lawyers come up it means that things are going wrong! It reminds us that we, external and inside lawyers, have to be very close to our clients' and companies' needs and expectations and be strategic partners and not only lawyers.

Jean-Claude Beaujour explained the challenges of a growing cooperation between Europe, Asia and Africa. Although for a long time the international business community has not put Africa at the top of the list of its priorities, Africa is becoming a major continent. By 2030, China, India and Africa will represent half of mankind and a huge industrial market with a growing need of natural resources and infrastructure. Although Asian and African economies, natural resources and cultures are far different, they complement each other. Africa, for instance, has very diversified natural resources, including a huge potential in agriculture and renewable energy. Lawyers will definitely continue to be part of the development of these regions of the world, whether through foreign investments or public-private partnership many African civil law countries are based on French law or even through their involvement in Corporate Social Responsibility. It is also their mission to contribute to the welfare of mankind.

Free Trade Agreements in Asia – Part of the Solution or Part of the Problem?

Paolo Vergano, Fratini Vergano, Belgium

Speakers: Amy Jackson (AmCham, Korea), Eriko Hayashi (Oh-Ebashi LPC, Japan), Marcello Calliari (TozziniFreire Advogados, Brazil), Jihn Rhi (Rhi and Partners, Korea), Lawrence Kogan (Kogan Law Group, P.C., USA), Youngjin Jung (Kim & Chang, Korea), Jaemin Lee (Hanyang University, Korea) and Corey Norton (Keller and Heckman LLP, USA).

Moderators: Jaime Castillo (Calderon y De La Sierra, Mexico), Jeff Snyder (Crowell & Moring LLP, USA), Paolo Vergano (FratiniVergano, Belgium), and Patrick Dahm (Rodyk & Davidson LLP, Singapore).

This joint session of the Intellectual Property, Cross-Border Investment and International Trade Committees discussed the development of FTAs in the Asia-Pacific region, with a focus on Korea's FTAs, through the lens of investment,

intellectual property, and trade. The FTAs that have been negotiated and implemented in and across the Asia-Pacific region have mushroomed in recent years, with FTAs increasingly addressing much more than just trade liberalisation; they include provisions on standards, technical barriers to trade, dispute settlement, competition, intellectual property rights, investment protection and several new areas of trade regulation. Korea has been at the forefront of this FTA drive, with many of its bilateral agreements having peculiar and innovative traits that make them terms of reference for ongoing and future free trade negotiations. The three panels offered critical and comparative reviews of some of these FTAs (ie, European Union-Korea, Korea-United States, Korea-China, Korea-Chile), in light of other countries' experiences, the overarching WTO framework and the needs of business, discussing ways in which lawyers can assist clients to overcome the challenges posed by FTAs and exploit the commercial opportunities.

Liquefied Natural Gas (LNG): Why Has It Become So Popular? **Jeffrey Robert Holt, Saipem Offshore Norway, Norway**

Speakers: Robert Kwauk (Blake, Cassels & Graydon, Canada), Brian Cassidy (Clifford Chance, South Korea), Douglas Codiga (Schlack Ito, United States of America), Ho Chien Mien (Allen & Gledhill, Singapore), Lewis McDonald (Herbert Smith Freehills, South Korea) and Ignatius Hwang (Squire Sanders, Singapore).

This session was designed to be an interactive discussion between the panelists and the audience, and it lived up to its billing. The moderator, Jeffrey Holt, gave a short introduction which defined LNG and then used as a guide Saipem Group's different completed projects and/or prospects in order to underscore the fact that LNG projects are either underway or are being pursued in a substantial number of countries in the world.

The panelists were each given an opportunity to answer questions or comment regarding the prominence of LNG in their own jurisdiction or in those which they are familiar with. For instance, Douglas Codiga spoke of some regulatory issues in the United States, and more particularly, the interplay between LNG and renewable energy policy in Hawaii, while Robert Kwauk gave some essential facts and figures regarding Canada, and later on China.

Ho Chien Mien and Ignatius Hwang gave an overview of the rationale behind Singapore's drive to diversify its energy source to include LNG, the new LNG regasification plant, and Singapore's ambitions to become a major trading hub for LNG.

Lewis McDonald spoke of issues in Indonesia and in Australia,

as well as touching a little bit on South Korea where he is now based. Brian Cassidy gave insight on pricing issues in LNG agreements and touched slightly on the United Kingdom and South Korea.

Certain members of the audience chimed in with questions and/or comments which the panelists kindly and thoroughly addressed. The general consensus among the attendees and panelists was that the session was very informative and educational.

And lastly, it was much appreciated by all that the session finished on time.

The Effect of Anti-Corruption Legislation, Criminal Enforcement & Administrative Sanctions On Expanding East-West Investment

Kenneth J. Stuart, Becker, Glynn, Muffly, Chassin & Hosinski LLP, United States

Speakers: Ronaldo Veirano (Verirano Advogados, Brazil), Henry Chang (Blaney McMurtry, Canada), Andrew Xu (Winners Law Firm, China), Ravi Nath (Rajinder Narain & Co., India), Akihisa Shiozaki (Nagashima Ohno & Tsunematsu, Japan), Terry Oh (Shin & Kim, Korea), Christian Wind (Bratschi Wiederkehr & Buob, Switzerland), Jonathan Warne (Nabarro, United Kingdom), Patrick Norton (Steptoe & Johnson LLP, United States)

I helped organise and moderated a CBIC programme on 'The Effect of Anti-Corruption Legislation, Criminal Enforcements & Administrative Sanctions on Expanding East-West Investment'. We had speakers from Brazil (Ronaldo Veirano), Canada (Henry Chang), China (Andrew Xu), India (Ravi Nath), Japan (Akihisa Shiozaki), Korea (Terry Oh), Switzerland (Christian Wind), the United Kingdom (Jonathan Warne) and the United States (Patrick Norton). The speakers covered legislative and enforcement developments in their respective jurisdictions. Additionally, Shin Jae Kim from Brazil covered due diligence and related matters in cross-border transactions, and Pascale Dubois, our keynote speaker, provided an overview of the World Bank's supervision and debarment of firms and individuals accused of fraud and corruption in World Bank-financed projects. The programme concluded with a robust discussion of a hypothetical involving Elsinore Pharmaceuticals Inc, its cast of corrupt executives, and the General Counsel: Hamlet.

Dealing with Foreign Ownership Constraints in Asia **Pieter de Ridder, Loyens & Loeff, Singapore**

Speakers: Dominic Hui (Ribeiro Hui, Hong Kong), Trinh Nguyen (Trinh Nguyen & Partners, Vietnam), Mee-Hyon Lee (Professor Yonsei Law School, Korea), Freddy Karyadi (Ali Budiardjo

Nugroho Reksodiputro, Indonesia), Goh Ka Im (Shearn Delamore, Malaysia), Monchai Vachirayonstien (Dherakupt International Law Office, Thailand), Raoul R. Angangco (Villaraza Cruz Marcelo & Angangco, Philippines), Aseem Chawla (MPC Legal, India), John Wilson (John Wilson Partners, Sri Lanka)

On Saturday 20 April 2013, a combined Tax Law Committee and Banking, Finance and Securities Committee presented the topic 'Dealing With Foreign Ownership Constraints In Asia.' The panel was moderated by Pieter de Ridder of Loyens & Loeff in Singapore and incoming Chair of the Tax Law Committee.

Dominic Hui of Ribeiro Hui kicked off for the panel with China, and explained the various ways in which foreign investors deal with the legal restrictions in China, which appeared to be common principles for the other countries on the panel as well. They often involve different classes of shares and a (convertible) loan given to the Chinese shareholder to capitalise the Chinese company, which is pledged as a security in favour of the foreign shareholder. Also, often seen are technical service agreements between the foreign investor and the Chinese company.

A country with few foreign investor restrictions is South Korea, which was covered by Mee-Hyon Lee, who is a law professor at Yonsei Law School in Seoul. It is pretty much a level playing field in Korea, and more attention is given to the tax incentives offered to foreign investors in order to attract investments in free trade zones and/or to attract high tech investments. Go Ka Im of Shearn Delamore discussed the situation in Malaysia. Malaysia is deregulating its foreign investment regulations. Most foreign investments are no longer subject to the 70:30 restriction. However, the distribution sector, including hyper markets, franchises, superstores, departmental stores, oil and gas, banking, insurance, the power sector and shipping are subject to foreign ownership restrictions. Another country with many foreign investor restrictions is Vietnam, discussed by Trinh Nguyen of Trinh Nguyen & Partners in Vietnam. She explained that the regulations distinguish between a red, yellow and a green list, with varying levels of restrictions for industry sectors according to the colour of the list, with red being prohibited for foreign investment (eg printing, publishing and real property) or only allowed provided they are in accordance with Vietnam's Roadmap or subject to other conditions, yellow requiring the foreign investor to have less than 50% of the ownership of the Vietnamese company and green with the majority or full ownership.

Raoul Angangco of Villaraza, Cruz, Marcelo and Angangco addressed the situation in the Philippines. He explained the country's Negative List with maximum foreign ownership

ranging from 25% to 60% of the ownership of the Philippines company (notably, *inter alia*, including natural resources, ownership of private land and operation/management of public utilities). He explained that nominee arrangements are generally allowed in the Philippines, although the country has an anti-dummy law, which has to be observed. Raoul mentioned that there is a SEC Memorandum Circular which will soon require all classes of shares issued by a Philippine corporation to comply with the nationality restrictions. Freddy Karyadi of ABNR in Jakarta discussed Indonesia and told the audience that Indonesia is moving against the general trend in Asia by tightening its foreign ownership restrictions. Many industries are restricted nowadays to a minority stake for the foreign investor. The BKPM, which is the central authority supervising most foreign investment in the country, imposes minimum capital requirements in order to establish an Indonesian company.

Aseem Chawla of MPC Legal in New Delhi discussed India. He explained the various FDI investment routes in India, the techniques to inject debt funding into the Indian company without breaching the ECB (external commercial borrowings) restrictions. Mr Chawla also discussed recent case law on taxation matters, notably the infamous Vodafone case concerning the taxation of indirect transfers of Indian company shares, and made it clear to the audience that, whilst improving, the country is still facing some challenges in order to convince foreign investors that the climate for investing in India is improving. The final speaker was John Wilson of John Wilson Partners in Colombo, who covered Sri Lanka. Whilst the country is enjoying a steady rise in trust and popularity by foreign investors and is showing healthy economic growth, Mr Wilson explained that 100% ownership is often permissible with a few exceptions, especially in the fisheries and shipping sectors, and that notably land ownership by foreigners has become subject to legal restrictions and punitive charges, such as the reintroduction of a 100% tax on land purchases.

IP/IT Challenges in the Regulatory Landscape **Michael Cartier, Walder Wyss Ltd., Switzerland**

Speakers: Daniel Lim (Joyce A. Tan & Partners, Singapore), Maryke Silalahi Nuth (Nugroho Maryke Legal Practice, Indonesia), Steven Howard (General Counsel APAC, Sony Mobile Communications, Singapore), Kim Keechang (Professor, Korea University, Korea)

Despite being one of the last sessions of the conference, the session on 'IP/IT Challenges in the Regulatory Landscape' drew a big crowd. Daniel Lim from Singapore led with an overview of the recent data protection legislation in Singapore and highlighted how such legislation affects the attractiveness of a jurisdiction for international

businesses. Steven Howard, general counsel APAC for Sony Mobile, went on to illustrate how legislation in general impacts business decisions, eg, getting a new smartphone to market in Asia. The publication of topless photos of Kate Middleton brought the audience face to face with recent privacy and data protection issues in the European Union courtesy of Maryke Nuth. The session concluded with Professor Keechang Kim from Korea University Law School traversing recent issues of Korean technology legislation ranging from registration requirements for internet users, mandated technology in the pre-smart phone era to map/location based services, and emphasising the importance of technology neutral legislation.

A Cultural Exchange with our IPBA Scholars and Friends: **Business Etiquette in a Dynamic World** **Varya Simpson, Law Offices of Varya Simpson, United States**

Speakers: Lalotoa Mulitalo (Samoa), Darya Shkittina (Russia), Gmeleen Tomboc (Philippines), Ido Shomrony (Israel), James Jung (New Zealand), Jia "Meph" Gui (China), Rojina Thapa (Nepal), Thai Trung Kien (Vietnam), Ty Srinna (Cambodia), Tin Thiri Aung (Myanmar), Jin-Ouk Kim (Korea)

The IPBA 2013 Scholars gave a spirited panel presentation at the recent Seoul Conference, the first time that our Scholars have been asked to participate as speakers. Representing the jurisdictions of Samoa, China, Vietnam, Myanmar, Cambodia, the Philippines, Israel, Nepal, Russia and New Zealand, our ten IPBA Scholars, and a guest speaker from Korea, each spoke about what made working in their culture unique and what would be useful to know for others coming there to do business. A topic that aroused great interest was a discussion about 'tea money' routinely given as part of court practice in several countries and the distinction between this custom and what might be considered as 'bribes' in other cultures. A survey of expected working hours for lawyers was also conducted with Korean law firms having the highest expectations and with all of us ready to move to New Zealand which had the most relaxed life style. We hope next year's Scholars will be able to follow suit with as stimulating a discussion!

Closing Circle: From Scholar to Co-Chair

Being a lawyer. Being an international lawyer ... Dreams of young graduates who wish to 'leave their stamp' on a legal world already so heavily populated with many talented lawyers from their own jurisdiction and from other countries.

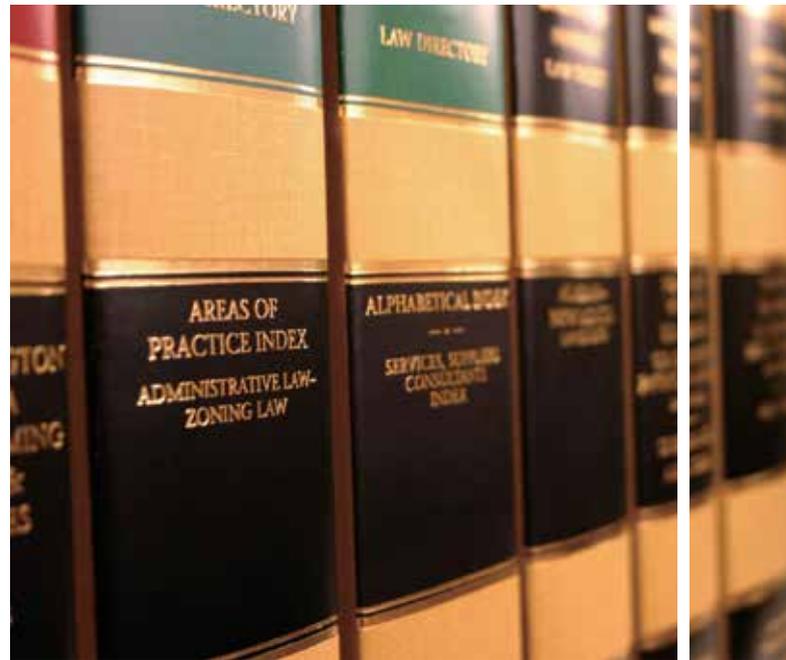
That's how I remember myself 14 years ago, having just completed my legal training and becoming a lawyer in Israel. Striving for success. Striving for recognition. Striving for knowledge. Striving for a network and mostly ... striving for clientele.

So, how to start my practice and achieve the great challenges I targeted? One thing I was sure about: hard work pays!

Joining a medium sized law firm was a great starting point – as was opening a corporate immigration department that would hopefully attract foreign companies to provide us with commercial & corporate legal work. The most beneficial part of the immigration practice was that it brought us corporate clients who were starting their businesses in Israel (or opening a branch of a foreign company in Israel).

The starting point involved hard work, late nights and research, while focusing on not compromising the quality of services provided to the firm's clientele. To attract international clientele, I published several articles in international magazines about Israeli law in general, and immigration law in particular.

And then came the IPBA. I still clearly remember the day that I saw the advertisement for the IPBA 'MS Lin Scholarship' for the Korea Conference in 2004. This, I thought, was a great opportunity to develop my international network, especially in a region that shares so many of the technological cross-border commercial relations based in the Pacific region. One thing led



to another: the article I published in a well-known international law review, together with a strong legal interest in the Pacific region, led to my selection as a scholar to travel to the Seoul Conference in 2004.

To the best of my knowledge, I was the only Israeli-based lawyer that was at the Conference. The IPBA was not really well known in Israel at that time. The conference provided me with a great opportunity to meet many lawyers from the Pacific region. It opened my mind to the region's legal practices in a way that later assisted me so much in developing my legal practice in my home country.

Boosted by my very positive impression of the IPBA, together with the motivation to spread the word to other colleagues in Israel, I have highlighted the presence of the IPBA to the Israeli bar on many occasions through articles I have published in the Israeli bar's various publications.

Raising the funds to attend the second conference was not an easy task ... but in the end I made it with the belief that it will one day pay off. And indeed I have found myself increasingly saying 'hi' to people I already knew from previous conferences. The great dinners and social events contributed much to my network. Later, I learned that persistence creates relationships of trust between the lawyers in the organisation.

Upon my return to Israel after this second conference, I suddenly started to receive calls and emails from IPBA members, asking for my opinion as a person they knew and could trust about Israeli based disputes and legal issues. One thing led to another, and I started to get more and more inbound immigration, commercial and corporate work from the IPBA's great network of talented lawyers. This benefit was received from only the second conference I attended.

During the years, I have travelled to many other IPBA conferences in Sydney, Beijing and New Delhi. The work our office has received as a result compelled our management to create a special department to deal and liaise with IPBA members regarding legal issues in Israel.

Summarising my career since joining the IPBA, I have seen great progress in my professional career and legal network. From a young associate in

a medium-sized firm, I became a named partner in the firm, having generated so much work from IPBA members.

Appreciating the great opportunity given to me by the IPBA Scholarship, I started to look for a way to be more involved where I can give back to the IPBA. As such, I was nominated as Vice-Chair of the Immigration and Labor Committee and later Vice-Chair of the Scholarship Committee. This is where I fell in love with giving other young lawyers and those of developing countries the same great opportunity I had received, hoping to bring them to the same starting point I only dreamt about when I applied for the scholarship a few years ago. What more can I ask? Together with Varya Simpson, who served as Chair of the Scholarship Committee, and other great Vice-Chairs of the Committee, we have developed an unbiased system of scholar selection and elevated the scholarship programme to include jurisdictional presentation in the course of a forum open to all IPBA

members during the conference.

This year at the Seoul Conference (2013), I was appointed as Co-Chair with my friend and colleague Varya Simpson. This is no doubt the closing of a circle: from being a scholar at the first Seoul conference, to becoming the Co-Chair of the Committee at the most recent Seoul Conference.

I am thankful to the IPBA organisation and members for the opportunities given to me. I will try my best to give the same opportunity to new scholars.

How can you help? Simply come to the IPBA Scholars Reception and the scholars' presentation session in Vancouver! That is the starting point for these great scholars and, on behalf of the Scholarship Committee, we promise to continue selecting great talented and promising young lawyers that will hopefully be a great addition to the IPBA and serve as ambassadors for the IPBA in their respective countries.



Amit Acco
Advocate, Kan-Tor & Acco, Israel

Our IPBA Scholarship Programme

Do you remember yourself as a young lawyer wondering about the path you needed to take to become known internationally? It was not easy but as an IPBA member you have reached that goal and now have a fresh opportunity every year to meet lawyers from around the world, to learn from them, and to market your skills to others who may have need of your abilities.

Lawyers in certain developing countries, and young lawyers just starting their practices, may not be so fortunate. Since 1995, the IPBA has been supporting the growth and knowledge of such lawyers by providing scholarships to our annual conferences to provide this exceptional opportunity to those who would not otherwise be able to attend.

And our Scholars are indeed special, providing evidence of their serious scholarship through publications, legal studies, and their legal work with other jurisdictions. Our 2013 Scholars in Seoul are a wonderful example of cross-border experience: a Samoan lawyer working on her PhD in law in Australia, a Russian attorney whose PhD thesis was on the laws of the economic system of China, a lawyer from Nepal with national and international publications on multi-jurisdictional topics, an attorney from the Philippines who now practises law in Japan, a Chinese lawyer with an LLM from Stockholm and admitted to practise law in California, a Vietnamese attorney with a PhD

from France, a lawyer from Myanmar who previously worked in Singapore, an attorney from Israel who has worked on many Asia-Pacific transactions, a lawyer practicing international litigation in Cambodia, and a New Zealand lawyer who has practiced law in Korea. It is indeed a small world and the IPBA would like to continue to foster the growth of the next generation of legal leaders throughout the world.

Initially funded by a generous grant from the family of Mr M.S. Lin of Taiwan, China, today we still appoint one of our scholars as an 'M.S. Lin Scholar' in honor of this founding member. Funding has changed over time, from passing a hat around at conferences, to support by the conference host committee, to our present funding by a group of lawyers from Japan in honor of the 20th anniversary of the IPBA. The IPBA is looking forward to your continued support of this valuable programme.

You can help the IPBA and our Scholars by:

1. encouraging Scholarship applications by eligible

2. candidates from your jurisdiction;
2. requesting your local bar association to publicise information about our Scholarship programme; and
3. making a personal donation toward the IPBA Scholarships together with your annual membership dues.

By taking any of these steps, you will help the IPBA give back to the Asia-Pacific region by providing lawyers in developing countries and young lawyers around the globe a wider perspective of legal issues in our world.

If you would like further information, please contact the Co-Chairs of the IPBA Scholarship Committee:
Varya Simpson
vsimpsonlaw@gmail.com
Amit Acco,
or amit@ktalegal.com



Varya Simpson
Co-Chair of the IPBA Scholarship Committee

Antitrust in the Emerging Economies of Asia: China and Indonesia

Competition law has come to receive phenomenal international attention in recent years. Consistent with this global trend, the last few years have seen countries in Asia come up with and develop their own antitrust laws and policies. This paper discusses the development and experiences of emerging markets in Asia (particularly, of China and Indonesia) in their recent adoption of antitrust regulations, as well as their reasons for doing so.

I. Introduction

Over the last decade, quite a number of countries have adopted competition laws¹ that aim to prevent anticompetitive and monopolistic practices, and facilitate efficient competitive environments. So much so, in fact, that John O. Haley, in the inaugural volume of the *Washington University Global Studies Law Review*, which dealt with antitrust law in the Asia-Pacific region, wrote: '[t]he enactment of antitrust legislation has become a global phenomenon. Antitrust law has, in effect, become the latest fashion.'² The motives to adopt these laws have varied. In some instances, rules were adopted over the course of many years in response to local pressures, in order to mend behaviours imposing social costs on societies. In other instances, rules were recommended as tools to achieve development. In yet other circumstances, they were imposed through treaties and international pressure. A number of developing countries have, in fact, adopted competition rules either in response to recommendations of international

institutions or because of various obliging treaties they signed.³ In all instances, however, there has been a shared sentiment that competition rules are essential to abolish undesirable practices that hamper progress, innovation, growth and development.⁴

Consistent with this global trend, the last few years have seen a seemingly concerted effort by the Asian countries to come up with and develop their individual antitrust laws and policies. Aside from Japan and South Korea, which have had relatively long-established and well-developed antitrust rules,⁵ the other emerging economies in Asia have been busily preoccupied in pursuing a broad range of competition-promoting policies, though their strength and range varies. In fact, up to now, there are still a number of Asian countries that are in the process of coming up with their own antitrust laws or revising and modernizing existing, outdated regulations. All have adopted some unilateral trade liberalisation policies.⁶

This paper will begin with a discussion of the wisdom (or folly) of the adoption of antitrust policies by developing or emerging economies and the benefit that such economies are expected to derive from having some sort of antitrust regulation. It will then briefly survey the antitrust policies and enactments of the largest emerging economies in Asia that have recently adopted them, namely, China and Indonesia. It will include a description of the key features of the antitrust laws that each country currently has, as well as the pressures and key influences that each country may have experienced in developing their antitrust policy. In closing, this paper will discuss the foregoing findings and come up with some insights on how the relevant Asian economies should move forward in their progress towards an effective antitrust policy.

II. The Motivation of Developing Markets to Develop Competition Laws

a. Competition and Growth



Antitrust law
has, in effect, become
the latest fashion.

Competition law has indeed come to receive phenomenal attention in recent years. The field has become incredibly vast and it has come to experience a geographical expansion – in a relatively short period of time – not seen in the case of any other branch of law. Competition law is no longer an exclusive feature of the statute book of countries in the developed world. A large number of developing countries have come to adopt some form of competition law domestically and, in an even larger number, competition law ranks very high on the national agenda.⁷ This 'high level of interest suggests competition law is widely seen as a desirable and worthwhile economic policy.'⁸

Competition policy has often been regarded as a building block of economic development. There is a consensus that competitive markets are the most effective way of organising production and distributing goods and services.⁹ There is also a growing awareness, particularly in less developed nations,

that competition can generate economic growth.¹⁰

b. Proponents of Competition Policies in Developing Countries

Numerous developing economies, including those that are currently in transition, have created, or are in the process of creating, new competition policy systems or have retooled dormant antimonopoly laws. Encouraged by multinational donors and advisory bodies such as the World Bank, the Organization for Economic Cooperation and Development (OECD), and the United Nations Conference on Trade and Development (UNCTAD),¹¹ and motivated to participate in international agreements such as the Asian Pacific Economic Cooperation, still more countries are likely to follow.¹² The strong Western orientation of these countries' competition systems results largely from firm encouragement or insistence of Western advisors and donor groups who assist their governments in drafting laws. These governments have incorporated

the main elements of Western regimes into their competition systems – including broad-based substantive comments, institutional independence for the enforcement agency, and extensive judicial involvement in the implementation of the statute – because Western advisors and donors have urged them to do so.¹³

Another factor that led to the widespread adoption process is the pressure from the World Trade Organization (WTO) and other supranational bodies, particularly the European Union. It should be clarified, however, that the developing countries did not adopt these laws due to such pressures alone. They also sincerely believed in the ideas espoused by these supranational bodies and the writings of academics about the positive relationship between adopting and/or enforcing competition law and development.¹⁴

The involvement of the WTO in the process of developing countries' competition legislation adoption is far-reaching. In some instances the WTO encouraged developing countries to adopt US or European Union¹⁵ type competition policies with allowance for time lags to be able to efficiently implement these rules. The reason why the WTO focuses on competition law adoption is the widely believed interaction between these policies and the expansion of free trade – free trade needs are next to removal and liberations of barriers, and the abolition of obstacles originating from private restraints.¹⁶ The WTO's insistence that developing countries adopt rules similar to those in more developed countries can also be explained by looking at the effects of global

anticompetitive conduct with relation to trade. If laws adopted in developing countries were fundamentally different from those in the advanced world, the ability of the West to intervene when their interests are at stake as a result of anti-competitive practices in developing countries would be limited. To overcome these negative consequences the WTO is repeatedly encouraging harmonisation of the competition legislation as a first step towards the achievement of this goal.¹⁷

It is, however, important to note that the role played by the WTO in encouraging competition law adoption in the developing world is only part of a bigger picture where many constituents are involved. It would be simplistic to assume that the WTO is the only primary driving force pressuring the adoption of these laws, especially looking at the EU treaty conditionality that initiated the adoption of these laws in many countries. The European Union has played a more active role in the competition law adoption process of developing countries where 'some argue that today the EC competition law is the dominant model of competition law in the world.'¹⁸ Treaties, such as the Accession Agreements signed by Eastern European countries to join the EU or the Euro Mediterranean Partnership Treaties signed by various non-European Mediterranean countries and the EU, obliged the signatories to adopt competition laws modeled on Articles 81 and 82 of the EC Rome Treaty.¹⁹ One of the most comprehensive studies assessing the presence of 'laws on the books' suggests that 'the impetus for adopting antitrust laws appears related to the imposed guidelines of supranational bodies, in particular the requirements of the European Union.'²⁰

Similarly, as with the case of the EU, rules, practices and theories developed in the US have also come to be "forced" on countries in developing parts of the world, often with the aid of international organizations.²¹

III. Competition Laws in Developing Laws in Developing and Emerging Economies

In an attempt to benefit from the experiences of countries preceding them in enacting competition rules, newly adopting countries passed rules modeled on the legislations of developed countries. Although this mode of adopting competition rules does not always address local needs, legal institutions or general conceptions of the rule of law, the common denominator in such adoption has been that competition rules are essential to abolish undesirable practices that hamper progress,

innovation, growth and development.²² And although the strong correlation between the effectiveness of competition policy and growth is fairly established,²³ this does not explain or justify why some countries have taken a model competition law regime of another country without careful 'local' assessment being conducted first. In the case of many if not most countries that have come to adopt competition law in recent years, however, this has been a trend, which has contributed to the enormous difficulties preventing these economies from converting their competition rules into effective enforcement tools in practice in order to deal with anticompetitive situations in their domestic economies, let alone educate their public (including local businesses) on the benefits of competition and the role of competition law. A successful competition law in the US or the EU, for example, does not necessarily mean that there will be a successful competition law regime in countries adopting or following these model regimes. Consulting the experiences of successful competition law regimes is helpful and, in many cases, absolutely crucial; indeed the usual practice of many competition officials is to consult the experience of advanced regimes – such as the EU and US regimes – on a daily basis. However, when it comes to adopting competition law domestically and designing a regime for enforcing this law, there is no substitute for a competition law growing from domestic roots.²⁴

Competition law revolves around the idea of needing to protect the process of competition, consumers and other appropriate interests in domestic markets. Sometimes, perhaps, this needs to include the idea of needing to facilitate this process in the marketplace. Given its concern with the process of competition, it is vital to appreciate that this process sits at the heart of the culture prevailing in the country or region concerned. Determining what form and scope the local competition law should have requires an understanding of the culture prevailing in the country concerned, as well as an understanding of the particular economic, social and political circumstances of that country. Without such understanding, there is bound to be a gap – if not in the actual substantive provisions of the local competition law – certainly in the enforcement of the law; this gap will only widen through a blind copying of the competition rules of certain regimes.²⁵ In addition, it is undeniable that the general level of economic development also plays a major role in a country's aptitude to enforce the diffused laws.²⁶

The reality, however, is that most developing countries adopt laws that do not address their particular conditions. "One size fit all" models of competition laws have developed that are adopted across the world.²⁷ Studies looking at competition laws on the books of many countries conclude that the laws enacted in the developing world are quite similar to those adopted in the developed countries.²⁸

One of the focal problems with this diffusion of law movement is put forward in the following quotation:

Where law develops internally through a process of trial and error, innovation and correction, and with the participation and involvement of users of the law, legal professionals and other interested parties, legal institutions tend to be highly effective. By contrast, where foreign law is imposed and legal evolution is external rather than internal, legal institutions tend to be much weaker.²⁹

The meaning of a transplanted rule does not survive the journey from one legal culture to the other since 'the deep structures of law, legal cultures, legal mentalities, legal epistemologies, and the unconsciousness of law as expressed in legal mythologies, remain historically unique and cannot be bridged.'³⁰ As many other studies dealing with developing countries and competition have pointed out, the developing world needs different laws because of different goals that these laws should address in their respective nations.³¹

Among the developing economies of the Asia-Pacific countries, explicit concern with competition policy is a relatively recent development. Countries such as Korea and Taiwan have had a long tradition of industrial policy that has at times involved the deliberate fostering by the state of selected enterprises and high levels of industrial concentration. Other countries such as Malaysia and Indonesia also have had industrial and trade policies that favored some corporations and restricted competition. The transition economies of the region have only recently begun to promote private markets in many areas and have no tradition and little law dealing specifically with competitive conduct in private markets.³²

There is thus a consensus that developing economies should aim for an antitrust law that fits the facts of their markets and responds to their conditions and needs. A law specifically designed and characterized that the

country's people will embrace it as sympathetic and legitimate rather than reject as foreign.³³

Certainly, this is not to say that attempts at standardization and convergence with international models and norms should be completely ignored. Definitely, such uniformity and standardization are important especially in antitrust enforcement where international coordination is often expected. Nonetheless, developing countries should still consider the benefits of their own perspective, as substantial convergence³⁴ may still be achieved and may occur even in the face of varying perspectives.

IV. The Antitrust Policies and Laws of China and Indonesia

a. China

It was in the mid-1980s that discussions first began in China relating to the enactment of an antitrust law that adhered to international standards. This however did not find expression in a comprehensive single piece of legislation. Prior to the enactment of the 2008 Anti-Monopoly Law (the 'Anti-Monopoly Law'), there existed in China a plethora of legislative instruments which related to competitive conduct, some general in nature, and some either practice- or sector-specific.³⁵

China's Anti-Monopoly Law went through a substantial number of drafts before finally being enacted in its current form. It is clear from the text of the Anti-Monopoly Law that while no single regime has served as a unique model for the Chinese Law, the EC regime has been more influential on the drafting of the legislation than that of the US.³⁶

Key Features

The most significant feature of the Anti-Monopoly Law is that it is a comprehensive, basic law in the antimonopoly sphere that has, for the first time in China, established an enforcement system for antimonopoly law, as well as pinned down the definition, investigative procedure, and legal liability of monopolistic conduct in a complete and systematic way. Before this law, there was no agency specifically devoted to antimonopoly law enforcement. Instead, it was the responsibility of separate sector regulatory agencies to regulate monopolistic conduct in the form of excluding and restricting competition. Thus, these regulations used to be unsystematic and incomplete. With the Anti-Monopoly Law, it will not only regulate economic monopolistic conduct like monopoly agreements, abuse of dominant market position, and



undertakings concentration that has the effect of excluding and restricting competition, but it will also regulate conduct that abuses administrative power. This law has both substantial and procedural provisions.³⁷

Influences and Pressures

Many within China advocated the adoption of a new antitrust law, although some of the arguments made in favor of the adoption of a new law were somewhat sweeping. In 1993, preparations began seriously on the new law, and a working group was set up to draft this. The group comprised officials from the State Administration for Industry and Commerce, and the State Economic and Trade Commission. A significant number of parties from outside China commented on the work undertaken, and advocated for particular approaches, and particularly for China to conform to recognizable international standards in any new law.³⁸ Wu observed that:

The principal drafters had the following goals for the [Anti-Monopoly Law]. The Chinese anti-monopoly legislation should meet the objectives of establishing a unified, open, competitive, orderly, and modern market system in China and of perfecting the socialist market economy system. It should only be based on the Chinese situation, but it should also borrow from the practical experiences and results of foreign anti-monopoly laws. The law should meet the specific requirements of China, promote the orderly development of the socialist market economy, and comply with common international practices and regulations.³⁹

The majority of those advocating change appeared to accept that a law could be drafted which took China's special circumstances into account. It was widely recognized that the prevalence of state-owned enterprises (SOEs) was a problem, but commentators were quick to point out that other economies which do successfully operate an antitrust law regime also contain within them SOEs, although not to the extent that is the case in China. It is reasonable to anticipate that the role played by SOEs will diminish over time as private enterprise grows within China, although given the continued importance of the SOEs to the State this is likely to be a slow process.⁴⁰

Although in many respects China is a vibrant economy in which private ownership of business plays a vital role, the state continues to have considerable influence on most aspects of the economy, and is more interventionist than is the case in the EC or the US. China remains a 'socialist market economy', although the most generally heard phrase is 'socialism with Chinese characteristics.'⁴¹ Article 4 of the Anti-Monopoly Law states, therefore, that:

The State constitutes and carries out competition rules which accord with the socialist market economy, perfects macro control, and advances a unified, open, competitive, and orderly market system.

Article 1 of the Anti-Monopoly Law states that:

This law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency,⁴² safeguarding the interests of consumers and social public interest, [and] promoting the healthy development of the socialist market economy.

It will be noted immediately, and there has been much comment addressing this issue, that article 1 presents a bewildering array of objectives, some of which may conflict ('enhancing economic efficiency' and 'promoting the healthy development of the socialist market economy'). There is, unfortunately, no mechanism set out in the Anti-Monopoly Law for reconciling any conflicts between attainment of these different objectives, although it is the case that some of the more specific provisions hint at particular responses to be taken.⁴³

b. Indonesia

In the late 1990s, a debate developed as to whether Indonesia was in need of detailed legislation and government policy regarding the regulation and supervision of domestic competition. On the one hand, it was argued that an open trading environment was a sufficiently powerful and yet simple way to handle monopoly. Under that view, if markets were 'contestable' the issue of high levels of concentration would not arise. Liberalization of international trade would accomplish this and there would be no need to develop another bureaucratic entity to enforce competition. The market would ensure the maintenance of competition in an open Indonesian economy.⁴⁴

Other economists suggested that some form of antimonopoly agency was needed to regulate dominant firms if they were able to exploit market power. The economists holding this view were careful to note that big doesn't necessarily mean bad and that careful analysis is needed to determine whether these dominant firms were engaged in anti-competitive or restrictive business practices. They also noted the importance of curbing anti-competitive behavior in the non-traded goods sectors where markets were not 'contestable'.⁴⁵

Influences and Pressures

It was only after the onset of the financial crisis of 1997 that the Indonesian government was forced, as part of its initial assistance agreement with the IMF, to lift policy-generated barriers to domestic competition and trade.⁴⁶ The 1997 financial crisis and the insistence of the IMF that a number of policy reforms be introduced created a dramatic change in the regulatory environment in Indonesia. The IMF bailout package of \$46 billion was extensive and covered reforms in many areas including reduction in some export taxes; elimination of Bulog⁴⁷ (other than that for rice) and the clove monopoly;⁴⁸ liberalisation of imports of many agricultural commodities including wheat, soybeans and sugar; reduction in import tariffs; removal of trade monopolies in cement, rattan and plywood; removal of local content requirements for automobiles; removal of restrictions on FDI and enforcement of extensive macroeconomic targets.⁴⁹

Furthermore, the IMF required Indonesia to pass laws that ensure fair competition.⁵⁰ This eventually led to the enactment of Law No. 5 of 1999 Concerning the Prohibition of Monopolistic Practices and Unhealthy

Business Competition (the 'Competition Law').⁵¹

Although the Competition Law of Indonesia may be seen as very similar to Western models, the lessons from the country's own legal history and culture were not lost on the drafters. The national competition law in Indonesia was drafted according to its goals and particular contexts. Its goals of competition were conceived broadly, embracing not only concerns about economic efficiency, but also issues of fairness and the relationship between the competitive process and the society in which it is embedded.⁵²

Key Features

The general purpose of Indonesia's Competition Law is similar to competition laws in other countries. It prohibits/prevents monopolistic practices and restricts mergers or acquisitions that increase market concentration as well as prohibiting exploitation by firms with market control. As with most competition laws, the letter of the law is subject to interpretation. In the Indonesian case, the objectives of the Competition Law are loosely written to allow a variety of different interpretations.⁵³

The general objectives of the Competition Law are specifically spelled out in Article 3 of the legislation, which is to improve economic efficiency and people's welfare; regulate the business climate to ensure competition in order to maintain equal opportunities for small, medium and large business firms; prevent unhealthy business competition practices; and, finally, encourage effectiveness and efficiency in business practices through fostering competition and best business practices. This Article 3 contains several different provisions and has been subject to several different interpretations. It has also been criticized that the basic thrust of the Competition Law, which should be to maintain and promote competition as a means to achieving economic efficiency, has been lost.⁵⁴

The explicit inclusion of the terms small, medium and large to describe different kinds of business enterprises creates an impression that competition and competition policy will take into special account the nature of the size of the enterprise.⁵⁵ A predisposition to protect small enterprises is certainly reasonable within the context of Indonesia and other countries. In the United States, for example, antitrust law had a pro small business orientation in the years following WW II. However a shift

in emphasis toward ensuring economic efficiency has become more evident in the United States as the forces of globalization have made more markets contestable and the ability of small firms to meet international competition has been eroded.⁵⁶

Complementary to the general protection of the rights of firms of different sizes under the Competition Law, several Articles – 4, 13, 17, 18 – suggest that the objective is to limit the growth of large firms while protecting the market share of smaller firms.⁵⁷ Furthermore, exemptions from the Law are granted to small-scale businesses and cooperatives. This framing of the Competition Law's provisions implies that there is a concern for protecting some sectors of the business community rather than promoting free competition by guaranteeing a level playing field for all firms, no matter the size.⁵⁸

Several articles of the Competition Law spell out the maximum market shares for monopolies, monopsonies, oligopolies and oligopsonies that would trigger action by the commission charged with enforcing the law, the Supervisory Commission for Business Competition ("KPPU"). Another provision prohibits the acquisition of a competitor's stock if it results in a market share of the firms together that is too large. These provisions of the Competition Law again suggest that there is an overarching concern with the size of large firms rather than whether they are involved in unfair business practices. These provisions also seem to suggest that "big is bad" based on prima facie evidence of the size of firms.⁵⁹ This feature is highly similar to the EU competition policy, which tends to view the existence of market power or dominance suspiciously.⁶⁰

V. Analysis and Conclusion

China and Indonesia appear to have heeded the advice of academics by ensuring that their competition laws not only drew from 'Western' competition law models, but also took into account the unique political features and idiosyncrasies of their societies and economies. Moreover, although Indonesia was pressured to enact its competition law by the IMF as part of a financial assistance package, Indonesia was able to formulate a competition policy that still catered to its particular societal needs and circumstances.

This may be seen as reflecting a higher level of sophistication and maturity in the development of each

of the countries' competition laws, or as merely the effect of these countries having only recently enacted their antitrust laws when much literature about competition and developing economies have already been written. Nevertheless, whatever the motivating factor, such action appears to be a movement in the right direction since one cannot argue against the premise that the unique conditions and challenges that each country faces require that its competition laws must address its local needs.

Nonetheless, despite the tweaking of their national competition laws, we still see that each country has carried features or influences that are predominantly based either on EU or US antitrust regimes. Again, this cannot be entirely avoided since there is clear wisdom in trying to study and learn from more developed laws that have been tested against more complicated situations and circumstances.

Admittedly, aside from the general statements stating that one law (or feature) is more similar to one type of antitrust regime than another, it would really be difficult to make a detailed provision-by-provision type of comparison. A more detailed comparison of national competition laws is a difficult exercise because of their many dimensions. It should be recalled that there is no agreed classification of conduct covered by competition laws; each country has its own definitions. Moreover, there are few hard facts.⁶¹

Therefore, whether these hybrid antitrust laws will be successful in promoting competition in each of the countries surveyed is still the subject of much speculation. Some fear that the adjustments made to these laws to fit local needs may have been carried out too far resulting in the law having anti-competitive effects.⁶² On the other hand, the proponents of the law counter that those adjustments were necessary to tailor the law to local needs and realities. It is still too early to say which side is correct; nevertheless, the experiences of these emerging economies are being closely watched and studied by the supporters of each view. By not merely mirroring or adhering to Western competition law models, these countries have already started out on the right footing. It will just be a matter of time before it becomes evident whether the particular competition policies that they have chosen to adopt result in their further development (or decline), or whether these will eventually end up being misused or abandoned.

Notes:

1 The terms antitrust and competition law will be used inter-changeably throughout this paper, and are intended to have the same meaning.

2 John O. Haley, *Competition Law for the Asia-Pacific Economic Cooperation Community: Designing Shoes for Many Sizes*, 1 WASH. U. GLOBAL STUD. L. REV. 1, 2 (2002).

3 Dina I. Waked, *Competition Law in the Developing World: The Why and How of Adoption and its Implications for International Competition Law*, 1 GLOBAL ANTITRUST REV. 69 (2008).

4 *Id.*

5 MAHER M. DABBAH, INTERNATIONAL AND COMPARATIVE COMPETITION LAW 392 (2010).

6 P.J. Lloyd, *Competition Policy in the Asian-Pacific Region*, 14 ASIAN-PAC. ECON. LITERATURE (ISSUE 2) 1, 2 (2002).

7 Dabbah, *supra* note 5, at 3.

8 John Preston, *Investment Climate Reform Competition Policy and Economic Development: Some Country Experiences*, Department for International Development (DFID) Case study for the World Development Report 2 (2003).

9 Yuichiro Uchida & Paul Cook, *The Effects of Competition on Technological and Trade Competitiveness: A Preliminary Examination*, 72 Centre on Regulation and Competition Working Paper Series 2 (2004).

10 DAVID J. GERBER, GLOBAL COMPETITION: LAW MARKETS, AND GLOBALIZATION vii (2010).

11 Mark R.A. Palim, *The Worldwide Growth of Competition Law: An Empirical Analysis*, 43 ANTITRUST BULL. 127 (1998).

12 William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT'L L. 403 (1997).

13 *Id.* at 407.

14 Waked, *supra* note 3, at 70.

15 Also referred to in this paper either as EU or EC.

16 Damien Geradin, *Competition Law and Regional Economic Integration: An Analysis of the Southern Mediterranean Countries*, World Bank Papers 21 (2004).

17 Waked, *supra* note 3, at 72.

18 *Id.*

19 *Id.* at 73.

20 Michael W. Nicholson, *Quantifying Antitrust Regimes*, 267 FTC Working Paper 18 (2004).

21 Dabbah, *supra* note 5, at 3.

22 Waked, *supra* note 3, at 69.

23 Mark A. Dutz & Aydin Hayri, *Does More Intense Competition Lead to Higher Growth?*, 2320 World Bank Policy Research Working Paper 1, 12 (1999).

24 Dabbah, *supra* note 5, at 3–4.

25 *Id.*

26 Waked, *supra* note 3, at 80.

27 *Id.* at 81.

28 Keith N. Hylton & Fei Deng, *Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects*, BU Univ. Working Paper Series L. & Econ. No. 06-47 (2006), available at SSRN: <http://ssrn.com/abstract=950964>.

29 Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect*, 51 AM. J. COMP. L. 163, 189 (2003).

30 Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 THE MODERN L. REV. 11, 14 (1998).

31 Waked, *supra* note 3, at 82.

32 Lloyd, *supra* note 6, at 2.

33 Eleanor M. Fox, *Economic Development, Poverty and Antitrust: the Other Path*, 13 SW. J. L. & TRADE AM. 211, 235 (2006–2007).

34 *Id.* at 214.

35 MARK FURSE, ANTITRUST LAW IN CHINA, KOREA AND VIETNAM 10 (2009).

36 *Id.* at 14.

37 Dong Ling, *Cooperation, Comity, and Competition in China*, in COOPERATION, COMITY, AND COMPETITION POLICY 121 (Andrew T. Guzman ed., 2011).

38 Furse, *supra* note 35, at 12.

39 Zhenguo Wu, *Perspectives on the Chinese Anti-Monopoly Law*, 75 ANTITRUST L. J. 73, 78 (2008).

40 Furse, *supra* note 35, at 13.

41 *Id.* at 68.

42 Xiaoye Wang notes that: "In China, what is meant by "economic efficiency" includes both allocative efficiency and productive efficiency" (Xiaoye Wang, *Highlights of China's New Anti-Monopoly Law*, 75 ANTITRUST L. J. 133, 142 (2008)).

43 Furse, *supra* note 35, at 69.

44 John Malcolm Dowling, *Competition Policy in Indonesia*, RES. COLLECTION SCH. OF ECON. (Paper No. 871) 1, 2–3 (2006), available at http://ink.library.smu.edu.sg/soe_research/871.

45 *Id.* at 3.

46 Thee Kian Wie, *Competition Policy in Indonesia and the New Anti-Monopoly and Fair Competition Law*, 38 BULL. OF INDON. ECON. STUD. (No. 3) 331, 332 (2002).

47 A government-owned company in Indonesia that deals with food distribution and price control.

48 Wie, *supra* note 46, at 332.

49 Dowling, *supra* note 44, at 3.

50 *Id.*

51 Wie, *supra* note 46, at 333.

52 Le-Thuy Tran, *Introduction to Regulation of Competition in South East Asia: A Comparative Study of Antimonopoly Laws in Vietnam and Indonesia, and Their Models*, 34 F. OF INT'L. DEV. STUD. 185, 198 (2007).

53 Dowling, *supra* note 44, at 3.

54 Dowling, *supra* note 44, at 4.

55 Wie, *supra* note 46, at 336.

56 Dowling, *supra* note 44, at 4.

57 Wie, *supra* note 46, at 336.

58 Dowling, *supra* note 44, at 4–5.

59 *Id.* at 4.

60 Gunnar Niels & Adriaan Ten Kate, *Introduction: Antitrust in the U.S. and the EU – Converging or Diverging Paths*, 49 ANTITRUST BULL. 1, 12 (2004).

61 Lloyd, *supra* note 6, at 5.

62 See, e.g., Wie, *supra* note 46, at 336 (discussing that the Indonesian competition law seems to unduly favor small businesses and thus fails to guarantee free and open competition). See also Dowling, *supra* note 44, at 5–9 (observing that there are currently no stipulations in the Indonesian competition law that prevents the future actions of Government to create new monopolies or other barriers to competition). See also Furse, *supra* note 35, at 69 (observing that the Chinese Anti-Monopoly Law's insistence in promoting the "socialist market economy" and "social public interest" have been interpreted by officials as allowing the use of the competition law as an instrument in the state's industrial policy).



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Interview with The Honourable Justice Han-Sung Cha, Minister of National Court Administration of the Supreme Court of South Korea

On Friday, April 19th, 2013, during the Annual Meeting in Seoul, Caroline Berube was given a special opportunity to interview the Honourable Justice Cha (also the Minister of National Court Administration) for the IPBA Journal. The following is a summary of their discussion.



The Honorable Justice CHA Han-sung was born in 1954 in Goryeong, North Gyeongsang province. He graduated from the Seoul National University College of Law. After passing the 17th National Judicial Examination in 1975, he began his judgeship at the Seoul Civil District Court. Justice CHA has served as a Professor of Judicial Research and Training Institute, as a Presiding judge at the Seoul High Court, as the Senior Presiding Judge of the Seoul Central District Court, Chamber of Bankruptcy, as the Chief Judge of the Cheongju District Court, and as the Vice Minister of the National Court Administration (NCA). He is currently serving as the 20th Minister of NCA (a Supreme Court Justice).

1. How has a broad judiciary experience benefited you in your role as a Supreme Court Justice?

Since I became a judge in 1980, I have been involved in various courts including civil, criminal, administrative, and bankruptcy courts as a judge. I believe that such a broad experience in many areas has expanded my scope of logical thinking and understanding and also strengthened a universal sense of justice, which are all necessary in making judgments on cases.

In addition, I have experienced in judicial policy and judicial administration as I held office in National

Court Administration as a chief of the Judicial Policy Research Office and Vice Minister of National Court Administration. I believe that the experience in judicial administration besides making judgements helped me greatly understand the parties and render considerate judgements.

2. What impact do you think the implementation of the Citizen Participation in Criminal Trials System has had on the Korean Judiciary?

The Citizen Participation in Criminal Trials System has been in force since 2008. This system helped establish the trial-priority principle more smoothly in the Korea court system. The judiciary has continuously pursued the trial-priority principle, which centers on a vivid argument made in court and a trial through evidence, than a documented evidence, including investigation records and other case-related materials. Under the system of Citizen Participation in Criminal Trials, it becomes important for prosecutors and lawyers to persuade the jury who

participates in a trial. Following this, the trial-priority principle has been realized in fact since all of the arguments and proving evidence to persuade the jury would be made in court.

In addition, the people's trust in the judicial system has increased by the people's participation in trials. By allowing people to directly watch, understand, and participate in the process of a trial, the process of a trial becomes more transparent.

3. What were the challenges and advantages of leading reform in the Credit Rehabilitation System?

Due to the aftermath of the Asian financial crisis in 1997 and the credit card debt crisis in 2003, the number of credit defaulters increased dramatically, causing a serious social problem. As serving as a Senior Presiding Judge in the Chambers of Bankruptcy of the Seoul Central District Court from the time of 2003 to 2005, I led and completed the reform of the credit rehabilitation system.

The traditional role of the court was to identify the rights of creditors and to assist in the realisation of such rights. On the other hand, the purpose of the credit rehabilitation system is rehabilitation of debtors. Thus, there arose conflict between the court's traditional role and the credit rehabilitation system. My main objective was to convince other judges to utilise the new system.

In the beginning, there was a general lack of understanding within legal circles including judges, with regard to 'fresh start,' the objective of the rehabilitation system, as well as a lack of sympathy with debtors. In addition, the media also expressed concern that the relief of debtors may cause moral hazards. However, an agreement was reached after extensive discussion and debates and social and legal circles finally accepted the changes on debtor relief.

4. The Korean Judiciary established a Patent Court as a specialised court. What are the achievements of the Korean Judiciary since the establishment of the

Patent Court, and what are the plans for the Court in the future?

The establishment of the Patent Court as a specialised court allows fast, professional and fair judicial services in the patents field. Of all patent cases, 75% are processed within six months, and 98% are processed within a year. Among all the Patent Court's cases, one third are cross-border cases.

In April 2010, the Patent Court adopted the Electronic Case Filing System (ECFS) for the first time and, as of now, more than 80% of all patent-related cases are processed promptly through the ECFS. This coming October, the Korean Patent Court, together with the United States Court of Appeals for the Federal Circuit, plans to hold a Korea-United States Intellectual Property Judicial Conference. The Patent Court will continuously keep up the efficiency and professionalism of trials.

5. What were the motivations or reasons behind development of the Judicial IT system, and the achievements so far?

Digitalising trial and litigation-related information has increased efficiency of work and dramatically renewed the transparency and fairness of litigation in South Korea. The ECFS allows access to litigation records instantly at any time and in any place, which has significantly increased the clarity of litigation procedures and greatly assisted in saving time and cost. It has also elicited a positive reaction and trust from the public about the court system. As stated earlier, 80%, very high rate of intellectual property (IP) cases are filed electronically. With regard to civil cases, more than 40% of cases are submitted electronically. We have plans to convert virtually most all of the services of the judicial system except criminal cases to paperless electronic filing within the next five years.

6. The World Bank Doing Business 2013 Report, released in October 2012, ranked Korea 2nd in the world for the topic of 'enforcing contracts' (effective commercial dispute resolution). Why do you think the Korean

Judicial System is receiving such high marks in the international community?

I am very happy with our result and believe the high marks are attributable to the following facts. First, the Judiciary strengthens its professionalism through operating various kinds of specialized panels. Second, the adoption of the ECFS has improved the clarity and efficiency of court proceedings, and finally for a reasonably inexpensive cost of litigation, we provide fast and fair court procedures and convenient execution procedures.

The Korean Judiciary will continuously resolve any inconveniences for the public, and plans to enhance the professionalism of judges by providing regular training opportunities for judges at Judicial Research & Training Institute(JRTI).

7. What is your opinion regarding the increased emphasis on alternative dispute resolution forums, particularly when addressing cross-border disputes?

I believe ADR is important for the peaceful and final settlement of disputes. The Korean Judiciary actively encourages courts to utilize the court-annexed ADR, and has established four more Court Arbitration centers, expanding the centers from five to nine different districts. Besides

the Court Arbitration centers, there are the Korean Commercial Arbitration Board, the Korean Institution of Arbitration and other various private ADR organisations. Cross-border matters go to court more often than arbitration in Korea. We've observed that this is different in other jurisdictions like Hong Kong and Singapore.

This May, the Seoul International Dispute Resolution Center (Seoul IDRC) is opening. We hope that the Seoul IDRC will play a leading role in resolving a lot of international disputes in Asian-Pacific region. We, the judiciary, will actively support for the successful operation of the Seoul IDRC.

8. What role do you see leading judicial bodies (ie the Supreme Court and National Court Administration) playing in the development of judiciary systems in other jurisdictions? Do you believe these cooperative relationships will continue to expand throughout the region?

I think the cooperation of judicial bodies based on mutual learning

is more effective than teaching. By sharing its experience and knowledge, the Korean Judiciary has positively contributed to the court systems of developing countries. Likewise, through such exchanges, we have also gained new insights into the development of our own judicial system. We have signed a memorandum of understanding with Vietnam to establish training programmes and institutes. We currently have a judge with extensive experience in civil courts undertaking a one-year programme there. We are also partnering with Peru, which sent 15 judges to Korea at the end of April for a programme. We are discussing similar initiatives with Mongolia and potentially Cambodia, Nigeria and Egypt.

Notes:

- 1 Citizen Participation in Criminal Trials (Korean Jury System)
The Korean Jury system is similar to the US Jury System in general, but some points are different.
- 1 This is held only when requested by the defendant.
- 2 The verdict by the jury is not legally binding, but only has advisory effect.
- 3 The jury makes a suggestion regarding not only guilty or innocence, but also sentencing.



Caroline Berube
Managing Partner, HJM Asia Law & Co LLC

Caroline Berube is managing partner of HJM Asia Law & Co LLC and focuses on Chinese corporate law and commercial practice. She has advised clients in various industries such as manufacturing, energy (oil, gas and mining), technology and services. Caroline is also a regular speaker at many international conferences and is an arbitrator approved by the Chinese European Arbitration Centre.

Luxembourg's 80% Tax Exemption on Intellectual Property Revenues

In order to promote Luxembourg as a key centre for IP management rights, article 50bis of the Income Tax Act provides for an 80% tax exemption on net income derived from certain IP rights and on capital gains resulting from the disposal of such IP rights (and an 80% deemed income deduction for self-developed patents). Thus, qualifying IP rights benefit from a 5.93% corporate tax (in lieu of the 29.63% standard corporate tax).

Scope of Application

The IP rights targeted by the Luxembourg tax exemption measure are copyrights on software (other copyrights are not included), domain names, patents, trademarks, designs and models acquired after 31 December 2007. Other IP rights, such as know-how, processes, formulas, copyrights on documents, music or films are excluded.

While other countries have enacted similar measures, the Luxembourg scheme appears to have a broader scope. Moreover, it is not subject to the making of any specific research investments.

Who Can Benefit From These Measures?

The new regime will apply to fully taxable resident individuals carrying on a business, corporate entities, and Luxembourg permanent establishments of non-resident companies.

The owner of the IP right may decide to use such right or to grant exclusive or non-exclusive licences to one or more licensees.

How Does the Scheme Work?

All revenues generated by the commercialisation of the relevant IP rights are covered by the scheme. It is not required that the owner of the IP right be its author,

creator, inventor or the person who initially made the filing to protect the right.

The new regime covers three different situations:

- 80% of the net income received by a Luxembourg taxpayer (individual or company) for the use of, or the granting of the right to the use of, IP rights is tax exempt. The net income is determined by the gross income less all expenses that have a direct economic relationship with this income (including the annual depreciation and any write-downs having reduced the tax base of the tax payer). Hence, this will lead to an effective tax rate of 5.93% (ie, 20% of 29.63% company tax).

All revenues qualifying as royalties under article 12(2) of the OECD model double tax treaty, may benefit from the exemption. Thus, the commentaries regarding such provisions are considered as a valid basis to determine whether the revenues may qualify as 'royalties'.

If the considered licence agreement comprises rights and/or services, the contract should be broken down to determine the portion of the revenues that effectively qualify for the exemption. The same rule

applies if the contract covers IP rights covered by the regime and IP rights that do not qualify for exemption.

- Capital gains realised on the disposal of the aforementioned IP rights will also benefit from an 80% tax exemption.

The realisation value that should be used for the determination of the disposal gain in transactions between parties must be the arm's length value. If no market value is accessible, the estimated market value of the IP right can be determined according to any frequently used method for the valuation of IP rights. A recapture regime will apply to the capital gains arising from the disposal of IP rights in order to avoid exempting a gain where the IP rights have generated losses which have been fully deducted.

- A taxpayer who has himself registered a patent which is used in connection with his own activity is entitled to an 80% tax exemption of the net income that he would have made if he had licensed the use of this right to a third party.

The net income can be defined as the fictive remuneration reduced by all expenses that have a direct economic relationship with this income including annual depreciation and any write-downs. This provision aims at promoting

research activities in Luxembourg and encouraging the protection of research and development discoveries via patent registrations.

Conditions

The application of the IP exemption regime is subject to the following conditions:

- The IP right must have been acquired or created after 1 January 2008.

For computer programmes, the date to consider is the date of the creation of the programme, that is, the date on which all works related to the creation of the new programme have been completed and the programme is fit for commercialisation. It is for the person seeking the benefit of the exemption to give evidence of such date. For patents, the date of creation of the right is the date on which the filing of the patent request is made. The same is true for trademarks and models save where the actual use of the trademark or model has started prior to the filing of the request. In such cases, the date of the initial use shall be considered. For domain names, the date to consider is the date on which the filing of the domain name is made with the relevant domain name registration office.

- Expenses, amortisation and deductions for depreciation in direct economic connection with the IP must be recorded

Luxembourg's tax exemption measures for IP rights are broader in scope than other countries.

as an asset during the first year for which the benefit of this tax regime is claimed; and

- The exemption does not apply if the considered IP right has been acquired from a directly related company. A company 'A' is considered as 'directly related' to company 'B' if:
 - A directly holds at least 10% of the share capital of B;
 - B holds at least 10% of the share capital of A;
 - At least 10% of the share capital of A and B is directly held by a third company (A and B are sister companies).

In other words, a company that receives licensing royalties, or the price for the transfer of an IP right, cannot benefit from the exemption if it has acquired such IP rights from:



the exemption independently of the level of participation held by the individual.

In conclusion, the provisions of article 50bis of the Luxembourg Income Tax Act, provide an interesting tax incentive to locate qualifying IP rights in Luxembourg.

As to the payment of dividends from the Luxembourg company to its mother company, the general rule is that a 15% withholding tax will be applied.

However, where dividends are distributed to a parent company, which is tax resident in a country which has a double tax treaty with Luxembourg, then irrespective of the withholding tax rate provided for in the tax treaty, Luxembourg domestic rules provide that, in so far as certain conditions are fulfilled, no such withholding will apply.

This is also the case where the mother company is located in the European Union and the mother-daughter directive applies.

Notes:

- 1 Section 55A Companies Act 1956
- 2 Every Listed Company needs to comply

with the provisions of the listing agreement in accordance with Section 21 of the Securities Contract Regulations Act, 1956. Non-compliance with the same would lead to delisting under Section 22A or monetary penalties under Section 23E of the said Act.

- 3 Organisation for Economic Cooperation and Development
- 4 SEBI (Substantial Acquisition of Shares & Takeover) Regulations, 2011
- 5 Clause 149 (12) of the Companies Bill, 2012
- 6 Clause 203 (1) of the Companies Bill, 2012
- 7 Clause 151 of the Companies Bill, 2012
- 8 Financial Reporting Council, London Stock Exchange
- 9 Section 92A of Income Tax Act
- 10 A metric developed by Institutional Shareholder Services (ISS) that rates publicly traded companies in terms of the quality of their corporate governance. Each public company covered by the metric is assigned a rating based on a number of factors that are considered by the ISS model. Factors used in the CGQ formula include board structure and composition, the executive and director compensation charter, and bylaw provisions
- 11 (1990) 1 All ER 568 *Caparo Industries plc v. Dickman & others*
- 12 *Corporate Governance and Corporate Political Activity: What Effect Will Citizens United Have on Shareholder Wealth?* John C. Coates IV Harvard, John M. Olin Centre for Law, Economics and Business.

- a company holding at least 10% of the share capital of the company earning the revenue (mother company);
- a company in which it holds at least 10% of the share capital (daughter company);
- a company where 10% of the capital thereof is held by a third company, and such third company holds at least 10% of the share capital of the company receiving the revenues (sister company).

When such a situation occurs, a reflection on the appropriate corporate structure might be required in order to meet this condition.

It should be noted that when a company has acquired the IP right from one of its shareholders, being an individual, the net revenues derived therefrom may benefit from



Stephan Le Goueff
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Investment Framework Agreements in China

Generally, an investment framework agreement is concluded between investors and a China Economic Development Zone at the initial stage of the investment. There exist controversies concerning the Zones' liability under such agreement, the validity thereof as well as potential legal risks arising from such agreement. This article concentrates on these disputes and discuss the contents of such agreements in detail.

Convenience and preferential investment policies continue to draw foreign investors in China to Economic Development Zones ('Zone' or 'Zones'). As a preliminary step, investors often enter into an investment framework agreement ('Investment Agreement') with the Zone's administrative committee ('Committee'). Investors value initial commitments regarding acquisition of land use rights, utilities and efficient processing of investment approvals. However, a lack of clarity about issues such as the legality of benefits contained in the Investment Agreement and liability for breach has been the cause of many headaches and disappointments. Therefore, ensuring the enforceability and validity of the terms of an Investment Agreement requires the foreign investor to investigate and document aspects such as tax, land and labour matters comprehensively and accurately.

This article raises issues to consider when entering into an Investment Agreement that is intended to lead to the establishment of a foreign-invested enterprise ('FIE') in a Zone and advises on the contents of specific clauses.

I. Contractual Party Representing the Zone

In most cases, either the Committee or the development group company under the control of the Zone ('Group Company') will serve as the counterparty to the Investment Agreement ('Zone Representative'). Ideally, investors should have both of these entities assume liability for the commitments in the Investment Agreement.

The key here is that the Zone Representative bears legal liability under the Investment Agreement. A Group Company, which has independent legal person status, is independently liable for its activities. In contrast, the more ambiguous administrative identity of the Committee puts its ability to be independently liable for certain commercial commitments into question.

The general consensus is that the Committee is not a typical governmental authority. It is classified as 'an organisation authorised by laws and regulations' to exercise social and economic administration powers within a Zone, including entering into investment agreements and assuming the related liabilities. Local legislation has supported the legal competence of the Committee, and such legislation does not appear to conflict with any mandatory laws issued by the central government.

But investors should confirm that the benefits and commitments guaranteed by the Committee in the Investment Agreement do not exceed the scope of its powers and duties as granted by applicable law. If they do, the enforceability of such benefits and commitments can be called into question. In practice, the risk of such unauthorised benefits being detected is small, so it is unlikely that the validity of the Investment Agreement will be challenged. Supervisory governmental authorities tend to promote the upholding of such commitments and urge the reconciliation of differences.

From a practical point of view, the Group Company

Preferential investment policies in China are continuing to draw foreign investors...

can not by itself constitute the Zone Representative because many contractual obligations (eg, provision of facilities, guidance and preferential treatment) can only be performed by the Committee. Likewise, the Group Company has only a limited ability to perform other obligations (eg, transfer of property rights). Therefore, it is best for both the Committee and the Group Company (if applicable) to serve as contracting parties under the Investment Agreement and for them to assume joint and several liability.

II. Contents of the Investment Agreement

This section discusses important issues that should be covered in the Investment Agreement.

1. Establishment of Company

The Zone Representative is tasked with assisting the investor with the following matters and expediting where possible:

- pre-verification of company name;
- pre-approval for environment impact (if required);
- safe production permit (if required);
- special industry permit (if required);
- approval and registration procedures;
- post-registration procedures with tax, financial and customs authorities;
- recognition of enterprise qualified as the 'encouraged' category (if applicable).

2. Tax and Foreign Exchange

a. Tax

The tax preferences enjoyed by FIEs on a nationwide basis, until about five years ago, were rendered ineffective by the unification of the corporate tax rates for FIEs and domestic companies as well as the abolishment of a policy that exempted FIEs from such tax for two years, followed by a 50% tax discount for three more years.

Zone Representatives previously attracted foreign investment by offering investors various tax preferences, even direct tax deductions or exemptions. However, the State Council and the State Administration of Taxation have promulgated legal provisions in an attempt to reign in these rather haphazard tax schemes. Thus, direct tax deductions and exemptions have been gradually eliminated. Concomitantly, other indirect preferential measures in the Zones, such as tax refunds, extending the tax preferential period and expanding the range of application of tax preferences, have been constrained.

Despite such restrictions, flexible tax preference measures are still being widely applied in many Zones. The Zones tend to use the Investment Agreement to promise tax preferences in their campaign to attract foreign investment and increase local revenue. This can take the form of a tax refund: the investors first pay taxes required by law and then the Zones refund

an agreed portion. This is characterised as a financial return or incentive. Although this is actually a disguised tax preference, if structured as part of the government budget, it can be concealed from tax authorities. Therefore, many Zones are still making use of these measures to attract foreign investment.

b. Foreign Exchange

In respect of foreign exchange, the Zones often promise in the Investment Agreement to assist foreign investors with obtaining a foreign exchange registration certificate and converting between RMB and foreign exchange (eg, in the course of profit distribution).

3. Land Use Rights and Construction

Foreign investors may either lease or purchase premises in the Zones. Foreign investors, in particular those establishing large-scale manufacturing enterprises, tend to acquire land use rights in the Zones and to construct plants or office buildings on such land.

a. Acquisition of land use rights

Foreign investors are generally granted state-owned land use rights for construction use through entering into a written land use rights grant contract with the competent land administration authorities.

In this regard, the grant of land use rights to investors by the Committee (not the competent land administration authorities) has been deemed valid by relevant judicial interpretation. Therefore, contrary stipulations should be avoided in the Investment Agreement.

The grant of land use rights is subject to mandatory procedures and the Committee can assist with the following:

- bidding and tendering, auction and listing procedures for acquisition of land use rights;
- selecting and determining design, supervision and construction companies;
- applying and obtaining planning certificates and construction permits.

A guarantee of land use rights for the investor in disregard of bidding, tendering, auction and listing procedures is invalid and unenforceable. Further, foreign investors should require that the Zone guarantee the connection of basic utilities (electricity, water, natural gas, communication) to the site of the contemplated plant.

b. Transfer of Project under Construction

Another approach is for the Group Company to acquire the land use rights, build according to the investor's requirements and then transfer the partially or wholly completed premises to the foreign investor. This so-called 'transfer of project under construction' is becoming more common.

This approach allows the Group Company to utilise its relationship with the Committee and its influence in the Zone to handle procedures for acquiring land use rights and obtain planning and construction permits and certificates. This can make things easier for the foreign investor at the front end. However, to ensure premises that meet their expectations, the investor should execute a supplemental agreement on construction standards and carefully review the general contractor contract.

Although the term 'transfer of project under construction' has not been expressly defined in Chinese law, general legal requirements set forth the following three conditions for such transfer:

- a. full payment of land use right grant fees;
- b. issuance of a land use right certificate;
- c. more than 25% of the investment for project has been made.

These conditions, in particular the last one, were first promulgated to prohibit the transfer of 'empty' land devoid of construction. In this context, investors should avoid using a clause that refers to the transfer of 'empty' land in the Investment Agreement.

4. Waste Treatment and Disposal

The Committee should guarantee the following in respect of waste treatment and disposal:

- provision of facilities sufficient for the contemplated FIE's production scale;
- convenient treatment, disposal and transportation;
- special assistance if toxic waste needs to be disposed.

5. Labour Matters and Recruitment

It is suggested not to include in the Investment Agreement any specific or uniform requirements that are offered as peculiarities of the locality for labour contracts, employee handbooks, trade unions and collective

contracts. However, the Group Company may provide samples and precedents for the investor's reference and the Committee may assist the FIE's foreign personnel with obtaining entry and exit and work permits.

6. Customs Matters and Purchase of Equipment and Materials

The Investment Agreement should state that the Committee promises to facilitate customs clearance and assist the investors and the FIE in obtaining special benefits (eg, duty free import of high-tech equipment). In addition, the Committee should agree to facilitate customs, inspection and quarantine procedures for the purchase of machinery, equipment, parts and materials from investors abroad.

7. Environmental Issues

In the case of a lease or transfer of land use rights or premises by the Group Company, the Zone Representative should guarantee to clean up the environment, surroundings and premises before they are handed over to the investors.

Further, the Investment Agreement should definitely require the Committee to indemnify the foreign investors for any environmental liabilities arising from previous use.

Summary and Further Suggestions

Based on the analysis above, suggestions on what to do and what not to do in terms of the Investment Agreement are set out below.

1. What To Do

First, the investors need to clarify the legal status of the Zone and the validity and enforceability of

the preferential treatment and conditions as well as other benefits offered by the Zone. These issues relate to who can independently assume the liabilities under the Investment Agreement and whether the guaranteed benefits and preferential treatment can be realised. Obtaining outside advisors, such as legal consultants, can be helpful for investigating the competencies of a Zone and its representatives.

Second, if obtainable through negotiations, the Investment Agreement should document that the Committee and Group Company assume joint and several liability. This can serve as a major benefit for foreign investors and the contemplated FIEs.

Third, the Investment Agreement should include warranties by the Committee and/or Group Company that cover the following:

- ability to enter into the Investment Agreement;
- authorisation to grant preferential treatment and benefits;
- that there are no defects in the title of land use rights or buildings

(if applicable);

- fulfilment of legal preconditions for real property transfer (if applicable);
- that there are no existing environmental liabilities (if applicable).

The warranty clauses should state that if such terms are breached, the foreign investors and FIE will be not be liable and will be indemnified by the Committee and/or the Group Company for any losses.

2. What To Avoid

Do not include terms in the Investment Agreement that are in clear violation of the law, including the following:

- special and illegitimate 'green lights' for handling official procedures;
- the granting of benefits (in particular, tax deductions or exemptions) unauthorised by laws and regulations;
- the evasion of compulsory procedures or conditions (eg, bidding and tendering procedures, minimum 25% investment amount for construction).



Dr Bjoern Etgen
Partner, Beiten Burkhardt

Dr Bjoern Etgen is a partner and Head of China Practice of the international law firm BEITEN BURKHARDT. He has extensive experience in matters involving foreign direct investment, Mergers & Acquisitions transactions and capital markets, and has advised on large-scale transactions in the PRC, especially the light industry, transportation and infrastructure sectors. He is Vice-Chairman of the Cross-Border Investment Committee of the IPBA.

Discover Some of Our New Officers, Council Members and Members



Miyuki Ishiguro

Deputy Secretary-General

What was your motivation to become a lawyer?

I became a lawyer with an aim to continue working for the whole of my life having regard to the real situation that has affected Japanese women.

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

Fund raising transactions for a Japanese listed company

which faced financial difficulties, involving complicated multiple equity securities issues under severe market conditions and time constraints.

What are your interests and/or hobbies?

My hobbies are travelling and trekking.

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

Nothing ? If something comes to me, I will let you know soon.

Do you have any special messages for IPBA members?

I would like to share joyful discussions and conversations with many other IPBA members and I will do my best to contribute to the sound operation of the IPBA organisation for this purpose.



Sumeet Kachwaha

Deputy Program Coordinator

What was your motivation to become a lawyer?

I graduated in English literature which (though very enjoyable) left me with limited options for worldly pursuits. Temperamentally I was not suited for employment (government or private), nor did I have the resources to get into business. A career in law looked attractive (and I have never regretted it).

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

Over a long career I have had the privilege of being associated with a diverse range of work, from pro bono representing pavement dwellers of Mumbai (who were

resisting displacement without alternate housing) before the Supreme Court of India to defending the Union Carbide Corporation in the Bhopal gas leak disaster – the largest damages case in the world at that time. As far as personal satisfaction is concerned, I feel that there is no difference whether one represents a humble individual in a modest case or a large corporation in a high-stakes matter. Personal satisfaction comes from a variety of factors including a just cause, interesting factual / legal issues, team work, out of the box thinking, and indeed sailing uncharted waters.

What are your interests and/or hobbies?

Law pretty much consumes most of my time but I have always loved and enjoyed nature walks and trekking.

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

Knowing how difficult it is to surprise lawyers I will pass this one!

Do you have any special messages for IPBA members?

I value the camaraderie and friendship here and hope you will too!



Huen Wong

Vice President

What was your motivation to become a lawyer?

Being a lawyer is a highly respected profession in my jurisdiction. My grandpa was a judicial clerk working for judges and lawyers in court. He had a dream that his son, that is my father, would be a lawyer one day. It did not happen because of the war, but my father wanted me to fulfil my grandpa's dream!

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

Reading my own name printed in the newspapers in the UK on the day the results of the bar examination were announced!

What are your interests and/or hobbies?

Music and golf.

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

I have never missed paying the IPBA annual subscriptions!

Do you have any special messages for IPBA members?

Remember your fellow members when you need help in other jurisdictions.

Members' Notes

Stephan Wilske

Stephan Wilske has published, together with Willa Obel, 'The "Corruption Objection" to Jurisdiction in Investment Arbitration – Does It Really Protect the Poor?', in *Poverty and the International Economic Legal System – Duties to the World's Poor*, Krista Nadakavukaren Schefer (ed), (Cambridge University Press, 2013) pp 177–188.

Joseph E. Ching

Joseph E. Ching has achieved the AV Preeminent Rating®, the highest possible rating from Martindale Hubbell®. Additionally, American Lawyer Media featured Mr. Ching as one of the Top Lawyers in Louisiana in its April 2013 issue. He is proud to welcome Zena H. Hovda to his team for special legal counsel.



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.org).

What is the Inter-Pacific Bar Association?

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

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

The highlight of the year for the IPBA is its annual multi-topic four-day conference. The conference has become the 'must attend event' for international lawyers 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@tga.co.jp

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@tga.co.jp 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@tga.co.jp 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

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- | | |
|---|--|
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 - 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@tga.co.jp



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