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NEWS & LEGAL UPDATE



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

Sustainability in a Finite World

We look forward to welcoming you to Vancouver, a dynamic, beautiful and multicultural city set in one of the world's most spectacular natural environments.

As a key North American gateway to the Asia-Pacific region, Vancouver offers direct air access from most Asian business centres. The Conference will be held in the waterfront Vancouver Convention Centre (VCC), one of the finest conference facilities in the world. Delegates will have their choice of several excellent hotels immediately adjacent to the VCC.



The Conference will feature outstanding plenary and Committee programmes focussed on the Conference theme, as well as social and accompanying person programmes, golf and pre- and post- conference tours highlighting the best of Canada.

We invite you to take advantage of the Super Early Bird conference registration facility available at the IPBA's 23rd Annual Meeting and Conference in Seoul, April 17th-20th, 2013. You will also be able to register online on the Vancouver IPBA 2014 website (www.ipba2014.com) following its launch in April.

Conference Secretariat: MCI Canada
Email: ipbainfo@mci-group.com

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The President's Message

Lalit Bhasin
President



Dear Colleagues,

We will meet in Seoul.

My tenure as the President of the IPBA will end on 20 April 2013 in Seoul, Korea. The year of Presidency coincides with my 50 years in the legal profession – I started as a lawyer in 1962.

I had a hectic period as the Chair of the Host Committee for the Annual Meeting and Conference in New Delhi, and I visited Singapore, Osaka, Tokyo, Beijing, Shanghai, Seoul, Hong Kong, Dubai, New York, Chicago, Los Angeles and Toronto to promote the IPBA and the New Delhi Conference. During my tenure as the President, I visited Auckland, Melbourne, Sydney, New York, Washington, Dubai, Singapore and Paris. These visits did promote the IPBA and the Seoul Conference. Within India, considerable promotion for Seoul has also been done.

During my term as the President of the IPBA, we had a Regional Conference in Paris on "Corporate Social Responsibility and Fair Competition: A Comparative Approach between Europe and Asia" which was very successful thanks to the efforts of Jean-Claude Beaujoir, Anne Durez and Patrick Vovan. Two other events of great significance were:

- (i) a conference in Tokyo on "Competition Laws in the Asia and Pacific Region" organised by Harumichi Uchida and the Japan Competition Law Forum; and
- (ii) a conference in Hong Kong on "Latest Trends in Project Finance and Procurement of Construction Projects" organised by Christopher To and Allan Leung.

Past President Ravi Nath, a committed leader of the IPBA, was extremely helpful and he personally participated in various events in India and in the Paris Regional Conference.

The most visible face among IPBA officers was that of Caroline Berube. I saw her in New Delhi for an event and thereafter in Paris as well – a dedicated leader of the IPBA.

As against 15 events in 2010 and 23 events in 2011, the IPBA supported 24 events in 2012 with two to three still in the pipeline. The membership stands at 1,430.

I have been informed by the Secretariat that the financial standing has considerably improved after the New Delhi Conference and I am

sure it would be further strengthened after the Seoul Conference.

Through interaction and personal meetings, we maintained good relations with the leaders of IBA, UIA, AIJA, LawAsia, and bar associations of several countries. International leadership will be well represented in Seoul as well.

I received full support from the officers at the IPBA, particularly from Alan Fujimoto and Yap Wai Ming. The two gentlemen possess a great quality – clarity. In their safe hands, nothing can go wrong. Christopher To and Allan Leung were of great help in fixing the venue for 2015 and for the Seoul Conference. So have been Ado Ko and Sylvette Tankiang as the Committee Coordinators. Caroline and Maxine Chiang are doing wonderful jobs in the Publications Committee.

I reiterate what I said in the Auckland Meeting that the Membership Committee (presently under Suresh Divyanathan), the Publications Committee, the Program Coordinators and Committee Coordinators are "the backbone of IPBA".

IPBA is fortunate to have an excellent and efficient Secretariat – so prompt,

so thorough and so committed. Midori, Rhonda and Yukiko – the three gracious and charming ladies, form the Secretariat of IPBA. Under the guidance of Alan Fujimoto and Yap Wai Ming, the IPBA is bound to become more strong and visible.

One new initiative I introduced in the Auckland Mid-Year Council Meeting was to invite comments/suggestions/observations/questions from all Council Members after the items in the agenda were over and before concluding the Meeting. This resulted in good interaction and useful inputs have been received as evident from the minutes of the Auckland Meeting.

I would strongly recommend to my esteemed successors to encourage this interaction.

The help and guidance from the Past Presidents has enabled me to develop a vision for the IPBA. I particularly refer to Shiro Kuniya and Suet-Fern Lee. They are amazing people – always lending a helping hand in terms of guidance and giving constructive suggestions.

My vision is to make the IPBA a stronger and more vibrant organisation. Below are my views:

- a) We are venue-centric. The Presidents and other officers below are selected/elected based on the venues for the Annual Meetings and Conferences. The venues should be de-linked from the Presidents. Many outstanding leaders get left out because of the venues.
- b) Committees should be encouraged to promote more activities and local programs. Twenty-five per cent of the profits of the Annual Meetings and Conferences should be earmarked to subsidise local and regional events.
- c) There is a need for Officers to meet at least once at the Headquarters in Tokyo. Many issues remain pending as the Officers only meet during the Annual Meeting or the Mid-Year Council Meeting.
- d) There should at least be two Regional Conferences in different regions and the responsibility should vest with the President and the Vice President as the President-Elect would be occupied with the arrangements for the Annual Meeting.

- e) There are no assigned roles for the President, the Vice President and the Immediate Past President. I found that I was very busy as President-Elect but I had no role at all as President except to approve some co-sponsored events (which is only a procedural formality) and to preside over the Mid-Year Council Meeting. Practically, the President starts fading away as soon as he is so elected.

I have set up a Strategic Long-Term Planning Committee (duly approved by the Council) consisting of Secretary-General Alan Fujimoto, Deputy Secretary-General Wai Ming Yap; Membership Committee Chair Suresh Divyanathan; Past President Suet-Fern Lee, and past Secretary-General Gerald Sumida to look into the aforesaid, among other issues, so that the IPBA may grow from strength to strength.

The Annual Meeting and Conference in Seoul and Vancouver would also add to the IPBA's strength. The Host Committee of President-Elect Dr. Young-Moo Shin has ensured a memorable conference. We wish him and his team all success. And we have to start looking beyond Seoul to Vancouver. William Scott, the Vice President and Chair of the Host Committee in Vancouver has already taken giant strides to give us a GREAT EVENT. The Vancouver Conference will find answers to various issues on Sustainability as set out by the Host Committee and I quote one of those issues:

“Sustainability of Legal Services. As lawyers, we practice in a business environment in which our clients are demanding increasingly efficient ways of work. They want better value for their money. Legal futurists such as Richard Susskind say that this is leading to the commoditization of legal services. How do we reconcile this trend with our desire to provide carefully thought-out, bespoke services to clients? Are responses such as legal outsourcing fulfilling their roles in the manner we initially thought they would? What is happening with the outsourcing of legal services worldwide? How are new business models for law firms impacting the delivery of legal services?”

Let us all join hands to make Seoul and Vancouver the biggest success stories of the IPBA, to be followed by Hong Kong in 2015.

Lalit Bhasin
President



The Secretary-General's Message

Alan S Fujimoto
Secretary-General



Dear IPBA Members,

"A journey of a thousand miles must begin with a single step." So stated Lao Tzu, the Chinese philosopher from the 7th century B.C.

My first step with the IPBA seems so long ago that it seems like ancient history. Along the way, I have had the opportunity to serve as At-Large Council Member, Deputy Membership Chair, Membership Chair, Deputy Secretary-General and now Secretary-General. As I step down as Secretary-General at the end of the Annual Meeting and Conference in Seoul in April this year, I can reflect on my years with the IPBA with special fondness.

In the early years, the organization started by Nosei Miyake and his fellow founders had its growing pains trying to decide where it should head. Slowly, but surely, the IPBA began to gain its stature among international bar associations. Today, we can say without hesitation that the IPBA is the foremost Asia-Pacific lawyers association in the world.

The IPBA started a Legal Training and Development Committee to assist various jurisdictions in the development and training of its young attorneys. Some of the committee's activities have slowed down over the past few years, but with our enthusiastic members, we are sure that this committee will continue to make contributions to the IPBA.

We have a Scholarship Committee that is actively involved in selecting young attorneys and attorneys from developing jurisdictions who may attend our conferences at minimum cost or at no cost. We owe tremendous gratitude to the family of the late M.S. Lin, a Past President of the IPBA, who initially funded the scholarships, and

to our members from Japan, who are now funding the scholarship program.

Mark Shklov and Richard Goldstein, among others, deserve much credit for starting a silent auction at our Annual Meeting and Conference in Kyoto in 2011. This new tradition will be continued at our Annual Meeting and Conference in Seoul. The proceeds of the auction will be used to assist young North Korean refugees to gain an education. Perhaps someday, some of them will become members of the IPBA.

The breadth and scope of the annual conferences have also expanded over the years. In 2010, we gathered more than 1,000 registrants for the first time in Singapore, where Al Gore, who won the Nobel Peace Prize in 2007, was a keynote speaker. In 2011, Dr. Shinya Yamanaka, who later won the Nobel Prize in Medicine in 2012, was a keynote speaker at the Annual Meeting and Conference in Kyoto.

We have also developed a working relationship with APEC, and an APEC-related program is a regular part of our annual conferences. APEC members now have access to a list of IPBA members should they need legal assistance in a particular jurisdiction.

So far this year, the IPBA has already hosted a number of major programs. On 25-26 January, 2013, our President, Lalit Bhasin, spearheaded a Regional Conference in Paris on the topic of "Corporate Social Responsibility and Fair Competition Between Companies: a Comparative Approach Between Europe and Asia." In February, the IPBA hosted its annual IFLR Asia M&A Forum in Hong Kong. More programs will be hosted and co-hosted by the IPBA which will fill our calendar in 2013.

With these programs in schedule, this year will fly by very quickly, as has my two-year term as your Secretary-General.

The generation of attorneys that has helped create the IPBA is slowly retreating away from the limelight. Newer members are coming to the forefront. The baton for my office will be passed on to a younger generation of IPBA members as will other officer, council and committee positions. In a couple of years, the first female Secretary-General will be appointed.

Although I will be stepping down as Secretary-General, my journey will not be quite over. I reported in the last *IPBA Journal* that the IPBA Council authorized the appointment of a Presidential Ad Hoc Committee to review the strategic plans of the IPBA, which was established in 2006. I have been asked to head the

committee to offer an updated plan for the IPBA. To that end, I will be working hard with some old friends to set forth a roadmap for the direction that the IPBA will take in the next decade. I look forward to my continuing journey with my friends, and I certainly hope to make many more new friends as I continue on my IPBA journey.

I look forward to seeing many of you at the Annual Meeting and Conference in Seoul this year . . . in Vancouver in 2014 . . . and elsewhere as we move forward together on our journey of a thousand miles.

Aloha and Mahalo,

Alan S Fujimoto
Secretary-General

IPBA Event Calendar

| Event | Location | Date |
|---|------------------------|---------------------|
| IPBA Annual Meeting and Conference | | |
| 23rd Annual Meeting and Conference | Seoul, Korea | April 17–20, 2013 |
| 24th Annual Meeting and Conference | Vancouver, Canada | May 8–11, 2014 |
| IPBA Mid-Year Council Meeting | | |
| 2013 Mid-Year Council Meeting (for IPBA Council Members) | Zurich, Switzerland | October 25–28, 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 | | |
| Kluwer Law's Dubai International Arbitration Summit | Dubai, UAE | March 20, 2013 |
| ABA International's Annual Spring Meeting 2013 | Washington, DC, USA | April 23–27, 2013 |
| Marcus Evans' Litigation Asia Summit | Kuala Lumpur, Malaysia | May 19–20, 2013 |
| innoXcell's 2nd 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 Summit | Hong Kong | June 24–27, 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

India: Government still able to pass reforms, say Ministers

The abrupt departure of an important ally of the Indian coalition government fueled speculation that it would not be able to pass a series of reform acts in parliament, however, government ministers say the legislation will still go ahead, according to a Reuters report on March 20. The previous day, the Dravida Munnetra Kazhagam political party's withdrawal rattled the country's three stock markets, which were concerned the move would render Prime Minister Manmohan Singh unable to pass reforms needed for the economy to recover from its worst slump in 10 years. The government intends to introduce a raft of bills to restore investor confidence and avert a ratings downgrade, including opening India's insurance and pension sectors to foreign investors and making land buying easier for industry. Parliamentary Affairs Minister Kamal Nath and Finance Minister P. Chidambaram said on March 20 the minority government would have enough support in parliament to pass the legislation.

Singapore: Bankruptcy and insolvency regime under the microscope

Singapore's bankruptcy and insolvency laws and procedures will undergo a review by the Ministry of Law in 2013, says Minister K Shanmugam, according to a Channel News Asia report on March 8. While speaking at the Committee of Supply debate for the Law Ministry's budget allocations in Singapore's parliament on March 8, Shanmugam was questioned by members of parliament on whether the Ministry would consider a regime to discharge certain types of bankruptcies, such as dealing with those whom had been declared bankrupt due to business failure and unsecured consumer credit. The Minister responded that he believes there is merit in this proposal.

Japan: Courts push Prime Minister on electoral reform

Japanese courts are increasing the pressure on Prime Minister Shinzo Abe's government to reform the country's electoral system or potentially face having last year's general election results invalidated, according to a Financial Times report on March 26. Six regional high courts will make rulings on cases that have been brought by constitutional activists who are against an electoral system that gives voters in sparsely populated districts disproportionate power. The courts may follow the lead taken by the Hiroshima high court, which on March 25 became the first Japanese court to declare the parliamentary election results should be discarded. However, the Hiroshima high court said its ruling, which applies to two local electoral districts, would not take effect for seven months, giving the Abe government time to appeal to Japan's Supreme Court, or proceed with electoral reforms, or both.

The Philippines: Court stops contraceptives law

The Supreme Court of The Philippines temporarily stopped a law being implemented in March this year that would provide state funding for contraceptives to the country's population, according to an Associated Press report on March 20. The Responsible Parenthood Law was passed late last year despite opposition from the Roman Catholic Church, the dominant religious organisation in The Philippines. Petitioners against the law argued its legality on several grounds, including that it offends religious beliefs and promotes abortion, which is illegal in that country. In a vote on 10 separate petitions, 15 of the 20 Supreme Court justices voted in favour of halting the implementation of the law until June 18, when both sides will argue their cases before the court. The law would have required government centres to provide free and universal access to nearly all contraceptives.

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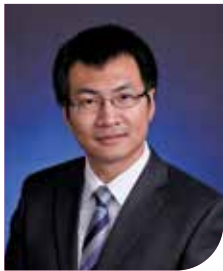


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IPBA Scholars 2013

The IPBA Scholarship Committee had a very difficult time choosing Scholars to attend the 23rd Annual Meeting and Conference in Seoul. Out of almost 60 applicants from nearly 30 different jurisdictions, the 10 Scholars below were chosen. Be sure to seek them out at the conference and give them a warm welcome to the IPBA!



Meph Jia Gui
Beijing, China

Meph is an Of-Counsel at Global Law Office, and specialises in intellectual property law. He is admitted to practise in China and the State of California, USA. He is an arbitrator of the Arbitration and Mediation Center of the World Intellectual Property Organization.



Gmeleen Tomboc
Manila, Philippines (currently in Tokyo, Japan)

Gmeleen worked for three years in Manila as a corporate lawyer specialising in M&A, business process outsourcing and mining. After taking her LLM at Harvard and passing the New York Bar, she

moved to Tokyo, where she is now involved in giving legal advice to Japanese clients in their acquisitions around Asia.



Darya Shkittina
Moscow, Russia

Darya graduated from Moscow State University with honours from the Faculty of Law in 2006, and in 2011 took a degree of PhD in Law to research 'Constitutional Basis of Economical System of China'. Currently, Darya is a practising

lawyer in different fields of law including commercial and corporate law, M&A, real estate, intellectual property, compliance, etc and works for one of the leading Russian law firms ALRUD. Darya performs in musical theater and enjoys horseback riding.



Ido Shomrony
Tel Aviv, Israel

Ido is a member of Shibolet & Co, one of the Israel's leading and most recognised commercial and corporate law firms, in the high-tech and venture capital practice (ranked Top Tier by Legal 500). He practises corporate law, M&A

transactions, technology, venture capital and commercial law, with a strong emphasis on multi-national cross border transactions. He is a graduate (LLB Cum Laude) of the Interdisciplinary Center in Herzliyah Law School.



Rojina Thapa
Kathmandu, Nepal

Rojina is currently working as an associate lawyer at S.S Legal Private Limited and also teaching Business Law at Nova International College, International American University, Nepal.



Lalotoa Mulitalo
Samoa (currently
Queensland, Australia)

Lalotoa is in the final stages of a PhD Law at the University of Queensland under an Australian Leadership Award (ALA). Before this she was Parliamentary Counsel for the Government of Samoa, and intends

to return to 'drafting laws' for Samoa and the Pacific region after completing her PhD.



Thai Trung Kien
Ho Chi Minh City, Vietnam

Kien has a PhD in Law from France, and currently is an associate of Bross & Partners, one of the leading Vietnamese law firms. Kien has over nine years of experience in legal practice in the areas of civil and commercial contracts, real estate,

construction, finance, insurance and dispute resolution and litigation. He is pleased to attend to activities of the Conference!



Tin Thiri Aung
Yangon, Myanmar

Specialising in intellectual property, Tin Thiri Aung has been practising in the field of IP for over five years. She credits her mother, who has three decades of experience in the legal field, as having given her an advantage when she decided

to take up IP as her main practice. As an avid sailor, she likes to take her dinghy out on Inya Lake in Yangon for leisurely sails on weekends.



TY Srinna
Phnom Penh, Cambodia

Srinna completed an LLM at Pannasastra University in international law, criminal law and business law. She was admitted to the Bar Association of the Kingdom of Cambodia in 2007, and has since been working at Asia Pacific

International Law Firm, Pana Asean Law Office, Legal Aid of Cambodia, Kelvin Chia Partnership – Phnom Penh Office (Singapore-owned law firm) and Khmer Law Office. Since 2009, she has also represented Civil Parties before the Extraordinary Chambers in the Courts of Cambodia; the courts are backed by the United Nations. She likes traveling both domestically and internationally, and socialising with others. As a Cambodian lawyer, Srinna speaks Khmer as mother tongue and English as a second language.



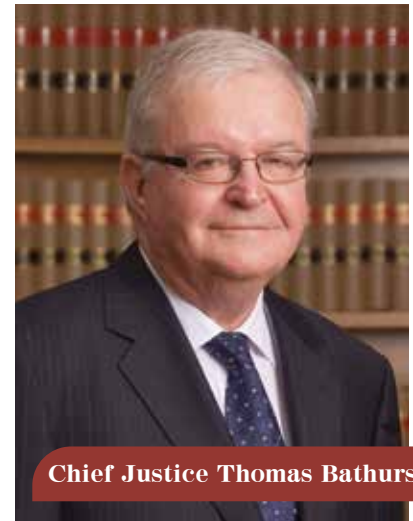
James Jung
Auckland, New Zealand

James earned his BA, LLB, MA (Hons) and LLM (Hons) degrees from the University of Auckland. He is currently a Barrister and Solicitor of the High Court of New Zealand and a Legal Practitioner of the Supreme Court of New South Wales, Australia.

As a Solicitor at the Financial Markets Authority (FMA) in New Zealand, he is involved in regulatory oversight and monitoring of trustees, financial qualifying entities, brokers, financial service providers, auditors, superannuation, fund managers, futures dealers, secondary markets, clearing houses and registered exchanges. Other areas of interest and specialisation include anti-money laundering supervision, regulation of low-ball offers and investors' education.

Interview with The Honorable Chief Justice Thomas Bathurst, Supreme Court of New South Wales

While in Sydney last year, Caroline Berube was given the opportunity to interview the Honorable Chief Justice Thomas Bathurst for the *IPBA Journal*. The following is a condensed version of the conversation that was held on Tuesday, December 18th, 2012.



Chief Justice Thomas Bathurst

Thomas Frederick Bathurst was appointed Chief Justice of New South Wales on 1 June 2011. Graduating with degrees in Arts and Law from the University of Sydney in 1971, he went on to practise as a solicitor in 1972. He was admitted as a barrister in 1977, specialising in corporate law and litigation and was appointed Queen's Counsel in 1987. His considerable experience in corporate law saw his appointment as a member of the Australian Government's Takeovers Panel (2006-2011). Prior to his appointment to the bench, the Chief Justice served as President of both the Australian Bar Association (2008-2010) and the New South Wales Bar Association (2009-2011), the Executive Committee of which he has been a member since 2002.

1. During your appointment speech you mentioned that as a solicitor you were "hopeless", but that it helped prepare you for your future practice. What initially attracted you to becoming a lawyer and why do you feel you found your calling as a barrister and now as Chief Justice?

The regulation of society always interested me as a student, particularly the corporate areas of legal work. I had an instinctive feeling that my interest in the law would lead me to the bar. Getting a job with routine tasks didn't interest me very much. I was attracted to the idea of building a sound knowledge of the law. The legal profession also provided an opportunity to interact more with clients. My aim was actually to go to the bar in order to make a decent living and

eventually retire as a barrister. My goal was not to become a judge. I had done some litigation work in the pursuit of my legal career when the opportunity to move to the bench came. In my view, many individuals take jurisdictional appointments for the wrong reasons. I've learned that in this field of work, it's important to stay connected with reality, the real issues, and to maintain rich interaction with people.

2. You are only the fifth Chief Justice to be elevated directly from the role of barrister to Chief Justice. How do you think this will benefit your work as Chief Justice?

Being appointed directly from the bar, the advantage of coming straight from the legal profession is that you have experience working with the community. Having legal experience from the other side of the court is a benefit to your jurisdictional work because you gain an invaluable perspective, a fresh outlook. It allows you to sympathize with people and the problems they face.

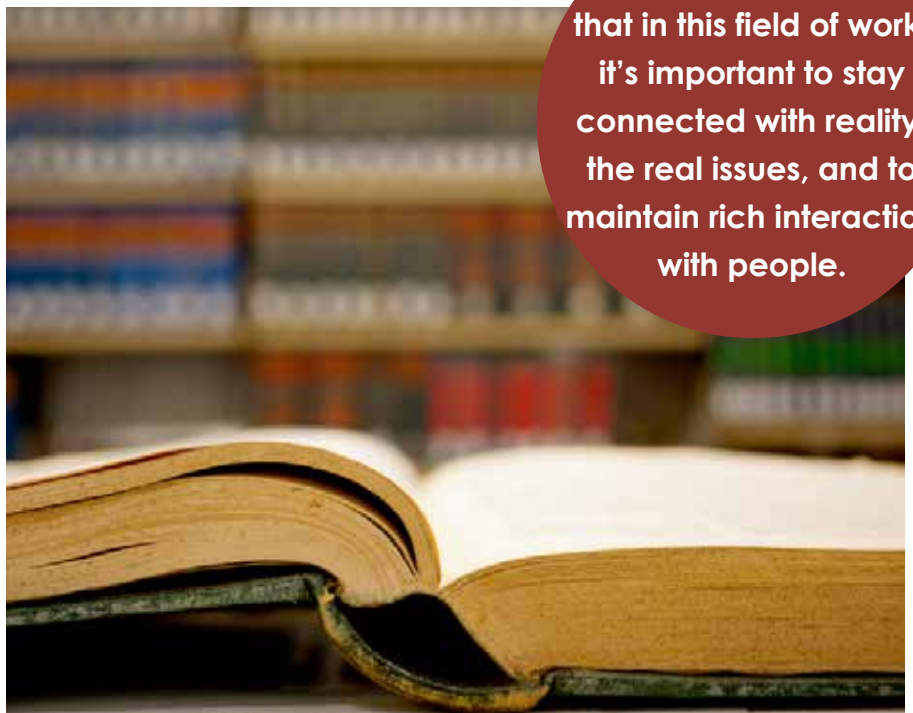
3. During your time as President of the New South Wales Bar, you declared that one of your priorities was to make the justice system more accessible, which you helped to do by attending legal education events in rural and remote areas. How do you plan to continue to work towards this priority with your new role as Chief Justice?

As Chief Justice, I've tried to maintain a focus on the real issues in cases. I plan to keep encouraging a culture of cooperation between the bench and private practitioners. We always need to ask how much discovery is required. It's doubly important that justice must be accessible, especially to mid-level income earners. I believe there isn't enough legal aid in this jurisdiction. As Chief Justice, I want to simplify the court procedures and would like to see more practitioners accept this simplification. The court system can always be more efficient. Too often, I find that resources are wasted on small issues. I've stressed before that accessibility need to be improved – having a community that is involved in the legal system. I would like to ensure provisions for will access

and early advice, especially for family cases.

Moving forward, we need to maintain contact with the Law Society and the Bar Association through various avenues, such as interest groups, gatherings and informal meetings so that the legal community can tell us more about what the current issues they face.

4. You have also mentioned that you want to make the best use of technology in the courts, and have noted that technology presents a challenge as well as an opportunity in the courtroom. What particular challenges and opportunities do you see for using technology in international cases?



I've learned that in this field of work, it's important to stay connected with reality, the real issues, and to maintain rich interaction with people.

I don't think technology in the courtroom brings challenges *per se*. In my swearing-in speech, I mentioned that technology helps us review a lot of materials in a very short period of time. However, we must exercise caution as access to various types of information can be dangerous at different levels of authority. Through technological advances, courts benefit from quick access to data and strong information. International matters no longer need judges to be sent overseas. Administrative resources and services are alleviated. For example, notices of injunction can now be sent by e-mail. Electronic filing is also progressing. Pretrial procedures can be done electronically without a need for meetings in person.

5. What is your opinion of the increased emphasis on alternative dispute resolution, including mediation, and what issues to you see with this emerging trend?

Mediation is an accepted part of the court process and I believe it's likely to continue. Practitioners ought to be conscious of the benefit of mediation as it is up to judges to decide to settle the case. It shouldn't be used as a vehicle to deny access to justice court. I believe the use of

arbitration will also increase. This brings two advantages. The first concerns enforcement. There is a problem with the way courts should interfere with awards. The high court takes a conservative approach and it can be difficult to get enforcement. The second concerns privacy, which is attractive to a lot of people. I resort to alternative dispute resolution depending on the quality of the process offered by arbitrators. Overall, I'm happy with the process of enforcement.

6. You have a reputation for always being respectful and polite with fellow practitioners, clients, and witnesses. What are your thoughts on the importance of professional ethics and respect in the legal practice?

I believe it's vital to maintain an ethical standard. If you conduct yourself in a polite and respectful manner you're more likely to get the best from practitioners. Like witnesses, if they feel comfortable with you they are more likely to cooperate and share information. A basic level of courtesy towards peers is important. It would be ideal to have a situation where you have a fair hearing, even if you lose in court.

7. What aspect of your role have you found most difficult and what aspect have you found to be most rewarding?

I would say the most difficult aspect was the administrative side of the work as a Chief Justice. At the bar you practice alone; there's no need to deal with bureaucracy and there's no need to manage people. In court, you get used to a great deal of more administrative work. It has been challenging – it took me almost a year to get used to it. The most rewarding aspect would be serving as the public face of the court, being able to show to the public that judges work their best to produce their best. It's also rewarding work to convince the community that we can produce fair results.



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.

Corporate Social Responsibility and Fair Competition between Companies: A Comparative Approach between Europe and Asia

Corporate social responsibility (CSR) is generally construed as a concept whereby companies integrate social, environmental and economic concerns into their business operations, decision-making and interactions with stakeholders.

In a context of globalisation, more and more companies all over the world comply with CSR norms and apply CSR standards. They are increasingly building the concept of CSR directly into their strategies in response to the perception of globalisation as a threat, the poor image of multinational corporations, the growing number and legitimacy of NGOs, the strong emergence of socially responsible investment and the new demand for products that enable consumers to demonstrate citizenship and responsibility through their purchase decisions. In other words, companies are aware of their duty to protect the interests of the wide range of their stakeholders including employees, local authorities and local communities, service providers, consumers, shareholders, new investors, NGOs and public opinion.

A Seminar organised by the IPBA took place in Paris on January 25, 2013 in the presence of Asian and European lawyers, in-house counsels, CSR experts and diplomats to share their views about how CSR standards are applied by European and Asian companies and whether CSR encourages fair competition between them.¹

In order to be accepted by companies, wherever they operate, CSR norms and standards are necessarily

the result of an international cooperation (I). CSR encourages the creation of new business models offering both business benefits to companies and a positive contribution to society (II).

I CSR and International Standards

A. A Clear Commitment of the International Community to Promote CSR

International Principles and Guidelines

Guidance is provided by internationally recognised principles, in particular :

- The OECD Guidelines for Multinational Enterprises updated in 2011. They consist of recommendations issued by the governments of OECD member countries to multinational corporations concerning various areas such as the respect for human rights, the fight against corruption and the concern for environmental impacts of companies' operations;
- The International Labour Organization's (ILO) Declaration on Fundamental Principles and Rights at Work (1998);
- The United Nations Global Compact (UNGC) launched in 2000. It asks companies to embrace, support and enact, within their sphere of influence,



a set of 10 principles or core values in the areas of human rights, labour, the environment and anti-corruption. However, the Global Compact is based solely on a voluntary commitment by signatory companies and the fact that there is no real mechanism of supervision or sanction has drawn a great deal of criticism from NGOs. The UNGC gathers more than 10,000 UNGC participants, including over 7,000 businesses in 145 countries around the world. If a company does not communicate on its improvement actions each year it may be excluded from the UNGC;

- The United Nations Guiding Principles on Business and Human Rights (2011). They provide an authoritative global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. While they do not by themselves constitute a legally binding document, the Guiding Principles elaborate on the implications of existing standards and practices for states and businesses and include points covered variously in international and domestic law. States have a duty to protect human rights and companies a duty to respect them;
- The Global Reporting Initiative (GRI) provides a comprehensive sustainability reporting framework

that sets out principles and indicators and that is widely used by companies around the world to measure their economic, environmental, social and governance sustainability performance;

- The United Nations Convention against corruption entered into force on 14 December 2005.

ISO 26000 Guidance Standard

Following five years of negotiations at an international level involving varied stakeholders from 90 developed, emerging and developing countries, the ISO 26000 guidance standard² was launched. It gives an extended and largely accepted definition of CSR, based on the above mentioned international principles and guidelines. ISO 26000 defines CSR more broadly as the responsibility of an organisation for the impacts of its decisions and activities on society and the environment, through transparency and ethical behavior that:

- Contributes to sustainable development, including health and welfare society;
- Takes into account the expectation of stakeholders including consumers;
- Is in compliance with applicable law and consistent with international norms of behavior, ethics and human rights – as opposed to respectful of local laws only;
- Is integrated through the organisation and practiced in its relationships (concept of 'sphere of influence').

The 26000 standard is intended to be useful to all types of organisations and is expected to set the norm for Social Responsibility in the time to come.

Europe

Europe too is very concerned about CSR and endeavors to encourage the awareness and development of public policies to promote CSR in less advanced countries such as Central and Eastern European ones through the implementation of CSR practices in many business areas. In 2011, the European Commission published a compendium of public CSR policies in the EU which gives an overview of public policies on CSR in the 27 EU Member States and the European Union. Europe aims at becoming a center of excellence for CSR to encourage

the competitiveness and sustainability of companies as well as the market economy.

Local Legislation

Some countries have decided to create a legal framework for CSR. Such laws either aim to regulate the quality of corporate disclosures regarding their social and environmental policies or require companies to spend a certain percentage of their profits for CSR activities.³



Lalit Bhasin chairs the dinner at the French Senate.

B. The Necessity to Accompany the Application of CSR Standards in Developing Countries

Obstacles to the Application of International Standards

First, most international standards are not requirements and therefore are not mandatory for companies. As an example, ISO 26000 cannot be certified unlike some other well-known ISO standards. For this reason there is a strong concern that national standard bodies may develop local specificities for certification with a risk that different criteria be applied depending on the countries concerned.



Ravi Nath moderates the session "Are there CSR international standards?"

Second, the possible non-application of these standards and/or absence of compliance with them do not result in any legal or judiciary sanction. However, the increasing power of public opinions and stakeholders all over the world is a strong incitement for companies to respect these international standards, in particular with the use of social media which can quickly spoil the reputation of a company or relay consumers' complaints.

Third, all companies do not focus on the same CSR issues. In particular, in most emerging countries big companies are in a process of globalisation and must therefore develop high standards whereas it will probably take longer for SMEs, which often compose the informal sector (in India for example), to reach the same CSR standards. Whereas China is especially concerned by environmental issues, India focuses on the fight against corruption.



Anne Durez moderates the session "CSR and fair competition" with Carole Xueref, General Counsel at Essilor; Patrick d'Humieres, President of the CST Management Institute; Elisabeth Laville, President of Utopies; Gabriela Merla, Mexican lawyer; and Simone Gambuto, Italian lawyer.

Solutions: Private and Public Initiatives

The implementation of good business and social practices in emerging countries, both by foreign and big domestic companies, may be a good way to incite a growing number of SMEs to follow the example. Voluntary commitments through companies' guidelines and charts may even be more efficient than laws which may be sometimes premature.

In addition to that, States or local authorities encourage CSR through various ways. In China for example, several local authorities have chosen transparency through the publication of lists of companies deemed to have



Speakers and guests enjoyed lunch near the High Court of France.

infringed environmental regulations (Local Office for the protection of the environment in Guangdong) or have established CSR evaluation criteria (Pudong). In other countries public-private partnerships are encouraged and companies incited to develop R&D programs.

● II CSR and Fair Competition

CSR may be seen either as a constraint or an opportunity for companies to innovate and create stimulating competition between them.

A. The Emergence of New Business Models

Developing countries are relatively dynamic in a context of worldwide economic crisis. Although nearly four billion people still live on US\$5 or US\$6 per day, a new middle class is emerging, asking for access to energy and consumption goods. And it is in such countries that CSR issues are all the more important because a balance needs to be found between growth and industrialization on one hand, and the protection of people on the other hand.

In this context, companies have to develop new



Panelists L to R: Anne Durez, Ravi Nath, Yvon Martin, Lalit Bhasin, and Jean-Claude Beaujour.

business and consumption models based on CSR being seen as a leverage for business. CSR can give a competitive edge and stimulate innovation and creativity, provide a transverse view on strategic issues and help foster motivation. Big companies working with local communities and small local companies obviously have to innovate. How to allow people in developing countries to have access to cheap energy and to feed them? By creating new products of high quality, working with local micro-companies, investing in education and moving from a traditional top down corporate-subsidary management to a more local one.

CSR may even be construed in a similar way as the Indian



Patrick Vovan, Lalit Bhasin, and Guest on their way to dinner.

*Jugaad*⁴, also named frugal innovation, which sounds very much like a CSR program: seeking opportunity in adversity, doing more with less, thinking and acting flexibly, keeping it simple, including the margin and following one's heart.

Some CSR experts now talk about a new CSR revolution (CSR 20.0") that will go beyond risk management so as to seize the potential for innovation and brand differentiation brought by sustainability when it is placed at the heart of the business model.

Small and Medium Size Enterprises

SMEs are key actors of CSR although they often believe that they are not concerned by CSR which would, according to them, rather be a matter for bigger companies. However a company, whatever its size, which is committed in CSR issues and includes it in its business strategy at a board level, will attract more clients having a similar set of values and at the end of the day will increase their profitability. A quick return on investment is indeed the key target for all companies, in

particular for SMEs which cannot afford to wait too long before their investment generates profit.

For that purpose, SMEs need to get the support of their shareholders, their clients and the norm. First, their shareholders such as private equity funds which have set up CSR charts both for themselves and the companies they invest in. Second, their clients which can favor suppliers with advanced policies in their tenders. Third, the norm which should evolve in a predictable manner so that it will provide a competitive advantage to those companies having anticipated it.

B. The Creation of Value for Companies

CSR creates value for shareholders by developing the company's activity and performance over the long term and communicating the performance in a transparent manner.

CSR reporting is booming worldwide and a guideline making CSR reporting mandatory within the EU is even looming. Companies communicate on their CSR strategy through extra financial reports, either as legally mandatory or on a voluntary basis. In France, the 'Nouvelles Régulations Economiques' law (NRE) enacted in 2001 is the first law in the world requiring publicly listed corporations to publish annual information on the manner in which they are addressing the social and environmental consequences of their operations. This information must be audited by independent third parties whose opinions will be conveyed to shareholders' meetings. In Asia, the stock exchanges in Shanghai, Shenzhen and Hong Kong have even created CSR indices.

Whereas financial reporting tells much about a company's past and present performance, extra financial reporting tells much about the company's future performance and ability to adapt to new demands and new business environments. These reports are carefully analyzed by notation agencies to select those companies which are considered to have the best practices. CSR is seen as a new way to enhance productivity, cut actual and potential costs, mitigate risks, create revenue growth by breaking through new markets and designing better products, secure the 'licence to operate' of a company. In other words, a good CSR strategy has a positive impact on the reputation of a company and attractiveness of its products. In addition to that, all categories of investors, in particular socially responsible investors, increasingly track CSR performance.

It is likely that in the future only companies that make sustainability a strategic goal, rethinking their business models as well as their products, technologies and brand promise, will achieve competitive advantage.

Conclusion

CSR is the best approach for including the biggest range of companies in the globalised economy, and helping them to compete fairly. Lawyers and in-house counsels will definitely have to play an important part in this challenge.

Notes:

- 1 Panelists : IPBA President Lalit BHASIN; former IPBA President Ravi NATH; Yvon Martinet, Vice-chair of the Paris Bar; Jean-Claude BEAUJOUR, IPBA Regional Coordinator, Europe and Attorney at law Smith Violet Paris; Iohann LE FRAPPER, Vice-President and General Counsel Networks Group at ALCATEL LUCENT; Michael CARTIER - Attorney at law Walder Wyss's Switzerland; Linna LI, Attorney at law Zhong Lun's London; Yvon RAZAFINDRATANDRA, Attorney at law Paris; Serge WOLTHALTER, Attorney at law Paris; Michel DOUCIN, French Ambassador for CSR and bioethics; Nguyen CANH CUONG, Minister from the Vietnamese Embassy to France; Tri THARIAT, Minister from the Indonesia Embassy to France; Jean-Joseph BOILLOT, President of Euro India Economic and Business, Caroline BERUBE, Attorney at law HJM Asia Law; Catherine DUNAND, member of French company boards; Catherine

CSR reporting is booming worldwide and a guideline making CSR reporting mandatory within the EU is even looming.



ROUX, Chair of the in-house corporate counsel committee of the Association of French corporate counsel; Xavier DRAGO, Director of Sustainable Development at Air Liquide, Patrick d'HUMIERES, President of the CSR Management Institute, Carole XUEREFF, Director for legal affairs and group development ESSILOR, Gabriela MERLA, Attorney at law Smith Violet Paris, Elisabeth LAVILLE, President of Utopies, Simone GAMBUTO, Attorney at law Macchi di Cellere Gangemi Italy.

- 2 http://www.iso.org/iso/fr/discovering_iso_26000.pdf.
- 3 In Belgium, a law was enacted in 2002 to organize the award of a social label to products that comply with the eight fundamental conventions of the ILO.
 - In the UK, the Companies Act passed in 2006 obliges listed companies to report on the way they address environmental and social issues.
 - In Italy the legislator issued the 'legality rating' (2012) pursuant to which the National Antitrust Authority must assess the legality rating of the company applicant in light of its compliance with CSR principles, antitrust law, criminal

records of its management, the 'antimafia' certificate, and so on. If the applicant obtains the rating 'stars' (from one to three) by the Antitrust Authority, it ought to be preferred in competition for public financing by public institution and/or bodies.

- In India the 2011 Companies Bill seeks to make CSR spending compulsory for companies that meet certain criteria and spend 2 per cent of their average net profit for CSR activities. Should companies not meet the CSR norms they would incur penalty (<http://www.thehindu.com/business/companies/new-companies-bill-mandates-csr-spending/article4217872.ece>).
 - In China the 2005 Company Law requires companies to 'undertake social responsibility' in the course of conducting business.
- 4 *Jugaad* is a Punjabi term widely used in India and by people of Indian origin around the world. It is a term applied to a creative or innovative idea providing a quick, alternative way of solving or fixing a problem. *Jugaad* literally means an improvised arrangement or work-around, which has to be used because of lack of resources.



Anne Durez
Senior Legal Counsel, Chair Corporate Counsel
Committee IPBA

Anne Durez has practiced as an Attorney for 15 years in US and UK firms, mainly in litigation and arbitration. In 2006 she joined the corporate legal department of the Total energy group as senior legal counsel. Anne is a member of AFJE (French Corporate Counsel Association) and FCE (Executive Business Women). She is the author of various publications on management issues for the legal profession.

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.

Uranium Mining Set to Lift Off

As more and more countries look to uranium as a power source, it is becoming an increasingly valuable commodity. Mining uranium is likely to increase globally and Latin America is a source that should not be ignored. This article will look at the potential for uranium mining in Latin America, with a particular focus on Argentina. It will first consider the international market generally, then it will move onto the Argentine market and finally, it will consider the legal framework for uranium mining in Argentina.

Historically,

the Asia-Pacific has been the major source of uranium mining worldwide. Canada and Australia have been the largest producers of uranium behind only Kazakhstan. Indeed, Australia's production may now increase due to recent announcements from the Western Australian and Queensland governments lifting bans on uranium mining and a move away from the three uranium mines policy at a national level.¹ As more and more countries look to uranium as a power source, it is becoming an increasingly valuable commodity. Mining uranium is likely to increase globally and Latin America is a source that should not be ignored.

This article will look at the potential for uranium mining in Latin America, with a particular focus on Argentina. It will first consider the international market generally, then it will move onto the Argentine market and finally, it will consider the legal framework for uranium mining in Argentina.



The Market

Uranium exploration and exploitation are being expedited in Latin America as investors look to capitalize on deposits worth billions of dollars. Recent discoveries made in Argentina, Colombia and Peru will likely come online in the next five to 10 years.² In the last decade, these countries, together with Brazil, have experienced somewhat of a mining boom. This has been brought about by government policies which are favorable to investment in the expanding economies in the region. In Argentina alone, the sector has increased by over 400% in that time.³ With the second largest uranium reserves in Latin America, behind only Brazil, Argentina certainly has the potential to increase its mining production even further.⁴

Demand for uranium is growing internationally and particularly in the Asia Pacific. There are currently 435 operating nuclear reactors worldwide and 61 under construction.⁵ According to the World Nuclear Association, the global consumption of uranium in 2012 was 69,000 tons. Given that Japan has 54 nuclear power plants, the re-opening of many of those plants will have a significant impact on the global demand for uranium. China also recently lifted suspensions on nuclear power plants to implement a new nuclear safety plan following the Japanese tsunami.⁶ With the development of nuclear power in India and Korea, combined with the decisions of the Japanese and Chinese governments to reactivate nuclear power plants, there will undoubtedly be increased demand for uranium in the region from 2013 onward.

In addition to strong international demand, miners also have a ready-made market in Latin America. Nuclear power plants are in operation in Argentina, Brazil and Mexico. Brazil is the only one of those three that is uranium self-sufficient.⁷ Argentina, for instance, imports the

majority of its uranium from Canada as it waits to see the returns from its major uranium deposits.⁸ With the price of uranium likely to increase together with demand, the impetus for Latin American governments, whether consumers or not, to get on board is strong.

There is also the factor of expertise to operate nuclear power plants. Obviously, it is not possible for a state to decide from one day to the next that they want to construct nuclear power plants and expect to do so with only local companies, who may not have the requisite expertise. We have seen across the world there are many instances of companies, typically based in states that have a longer history of nuclear power, being involved in the construction and operation of plants in other states. An example of this in the region was the use of an Argentine company as the prime contractor, undertaking the design, procurement, installation and supervision of the commissioning and performance demonstration of the OPAL reactor in Sydney, Australia.⁹ This willingness of states to use external consultants in order to augment local capabilities is essential to the safe implementation of world class facilities globally.

● Uranium Mining in Argentina

Although Argentina has been operating nuclear power plants for decades, Argentina has largely imported to fulfill its uranium requirements. This is now starting to change. In August 2006, the Minister of Federal Planning, Public Investment and Services, Julio de Vido, announced the government's decision to reactivate Argentina's nuclear program.¹⁰ This led to the creation of the 2010-2019 ten-year plan, which, relevantly, had as its roots the following objectives:¹¹

- The technological contribution to power generation through nuclear energy.
- Ensuring uranium reserves to power Argentine nuclear power plants.
- Becoming a nuclear power plant designer country.

At its core, this represented a fundamental shift in government policy toward the active promotion of nuclear energy and, implicitly, uranium mining.



Argentina is not only one of the few countries in the world with high prospects in uranium, it is also one of the few places where this mineral can be freely extracted by the private sector, with comparatively limited governmental interference. In the 1950s, following the earliest developments in nuclear research and technology, Argentina started the exploitation of uranium mineral deposits. Between 1952 and 1996, 5,600 tons of uranium ore were extracted and used to produce 2,500 tons of uranium concentrate.¹² This was mined from eight different mining-industrial facilities distributed across the country, but mainly in Mendoza, Córdoba, Salta, Chubut, San Luis and La Rioja. Almost 90% of uranium ore was mined through open-pits and processed by means of heap-leach methods and, although the majority of uranium was mined by federal government agencies, private parties participated with a 10% share of the production and rendering services as contractors for the government.

In the late 1980s and early 1990s, the low international price of uranium, together with the negative impact of Chernobyl's incident, led to a significant reduction of local nuclear activity. As a consequence of this, most of the uranium mining industrial facilities were closed and mining exploration and development was suspended. However, the policy was officially reverted in 2003 and the Federal Government announced a newly created Nuclear Development Plan that led to the reactivation of public and private nuclear development activities.¹³

Today, uranium reserves in Argentina have been estimated at approximately 10,400 metric tons.¹⁴ However, the Federal Commission of Atomic Energy has reported uranium reserve estimations of almost 120,000 metric tons.¹⁵ These reserves are enough to cover the fuel needs of the existing nuclear reactors in Argentina for a 30-year term and the potential needs of the planned and on-going nuclear energy generation expansions. Given the potential reserves and following international trends, Argentine uranium prospecting and exploration has increased significantly in recent years. Currently, there are more than 15 private companies developing uranium mining projects.¹⁶ Argentine President Cristina Fernández also reactivated one of the two largest uranium reserves in Argentina – the 'Cerro Solo' deposit in the province of Chubut. At the same time that production was potentially increased, internal demand has also grown with the endorsement of the extended life of the Embalse nuclear power plant, located in the province of Córdoba, and the inauguration of the Carem 25, Atucha II and Atucha III nuclear power plants.¹⁷

● The Legal Framework for Uranium Mining in Argentina

From the 1950s until the early 1990s, the extraction of uranium was highly regulated and subject to almost absolute control by the Federal Government, because of its strategic uses for energy generation and defense. This policy was revised during the 1990s, which was a period of deregulation and liberalization in Argentina. Following changes in the 1990s, Argentine mining really started to gain traction internationally and gained the attention that would be expected of a country with such substantial mineral resources.

The Former Legal Framework

Uranium was included in the first category of minerals, which are the most valuable and commonly mined minerals, of the National Mining Code in 1954.¹⁸ The first uranium mining activities were carried out in secret by the Federal Government through the National Commission of Atomic Energy (in Spanish, 'CNEA'), which was created in 1950.

The former uranium mining program,¹⁹ governed by Law No. 22,477, basically provided that uranium deposits, mines and production could only be sold to the Federal Government. During this period, concession to private parties of uranium mining exploration and exploitation permits was allowed under strict supervision of the CNEA. Additionally, any uranium mineral discovery by any party was subject to CNEA's right to reserve the mineral deposit unexploited or even expropriate the mining concessions derived from the discovery. During this period, the Federal Government, through CNEA and military agencies such as Dirección General de Fabricaciones Militares, conducted intensive research and development of uranium mining activities.

The Current Mining Framework

At the beginning of the 1990s, following the Latin-American regional trend intended to capture foreign investment in mining exploration, uranium mining was almost completely deregulated. The former uranium program was replaced by means of Law No. 24,498 which introduced amendments to the National Mining Code allowing private investors to obtain concessions for uranium mines and conduct mining activities

almost under the same regulations applicable to metals.

Argentina is a federal state organised in 24 jurisdictions, 23 provinces and the City of Buenos Aires. Each province has its own mining authority which can be organised either through an administrative or a judicial body. The general provisions for concession and extraction of minerals set forth the National Mining Code are applicable to uranium and applied by provincial mining authorities. The National Mining Code is applicable in all of Argentina and provides a degree of uniformity in the requirements across the provinces. Notwithstanding that uranium mining has been substantially deregulated and given similar treatment to other metals and minerals, uranium mining continues to have some unique requirements, which deal with both environmental and strategic concerns. According to Chapter XI of the National Mining Code, the extraction of uranium is subject to the following special regulations:

(a) *Special environmental requirements.* Mining uranium requires the filing of a special environmental recovery plan for the natural areas affected with the hazardous wastes.²⁰ This filing should be submitted to and approved by the environmental mining authority in the province where a given project is developed.²¹

(b) *Preservation of liquid or solid tails and hazardous wastes.* This should be performed according to international security prescriptions provided and controlled by the Nuclear Regulatory Agency.²² Additionally, the Mining Code

states that the referred wastes cannot be reused or transferred without the authorization of both the provincial mining authority corresponding and the Nuclear Regulatory Agency.²³

(c) *Filing information reports.* If required to do so by provincial mining authorities or the Nuclear Regulatory Agency, reports in connection with mineral reserves and production issues must be prepared and filed for statistical and production control purposes.²⁴

(d) *Right of first refusal in favor of the Federal Government.* Subject to market terms and conditions, the Federal Government, through the Nuclear Regulatory Agency, has a right of first refusal to purchase locally produced uranium.²⁵

(e) *Controlled exports.* The export of locally produced uranium is subject to the requirement of prior authorization by the Nuclear Regulatory Agency that will consider for granting or rejecting the authorization the guarantee of local supplying and the intended destination of the exports in accordance to commitments under international nuclear treaties which Argentina is a party to.²⁶

Failing to comply with any of the above mentioned clauses may give rise to the application of penalties foreseen in Sections 207 to 210 of the Mining Code, such as: (i) fines; (ii) temporary or permanent decommissioning of the facilities; (iii) license revocations. Failing to comply with the right of first refusal in favor of the Federal Government may lead to the application of a penalty or fine ranging between 20% and 50% of the value of the minerals commercialized.

● **Additional Requirements Surrounding Nuclear Programs**

Additionally, for national security reasons, the activities associated with uranium mining and processing were also included in the National Program of Nuclear Activities, created by Law No. 24,804. Therefore, uranium mining activities require special authorizations and permits to be issued by the Nuclear Regulatory Agency.²⁷ The most important permits and authorizations to legally conduct uranium exploitation activities in Argentina are:

(a) Facility construction license. This license should be obtained before commencing the construction of any uranium mining processing facilities and, prior to such request, the interested party must provide the Nuclear Regulatory Agency with technical documentation and information to evaluate and assess radiological security of the facility during its construction.

(b) Mining uranium facility operation license. Likewise, in order to attain the authorization to operate a uranium mining processing facility, the interested party must file technical documentation and information necessary to evaluate and assess radiological security of the uranium mining facility during the production stage of the project.

The request of any of the licenses and permissions necessary for conducting uranium mining activities entails assuming (i) the liabilities that may result from the improper use of the licensed activities; and (ii) the responsibility of complying with all license and security requirements. Finally, it is noted that the personnel responsible for the management of radioactive or hazardous materials or waste within the mining facilities must be registered and obtain personal authorizations from the Nuclear Regulatory Agency.

Conclusion

There is undoubtedly great potential for uranium mining and the nuclear industry generally in Argentina. As existing nuclear power plants are being expanded and new ones are being opened, there exists a ready-made market for miners. Currently, Argentina has to import in order to meet its demand for uranium. As a country that has uranium reserves, there is a clear opportunity to bridge this gap. With increasing global demand for uranium, now would seem to be an opportune moment to enter the market.

Notes:

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- 18 Law No. 14,328, published in the Official Gazette on October 13, 1954.
- 19 Governed by Law No. 22,477, published in the Official Gazette on December 28, 1956.
- 20 Federal Mining Code, Section 207.
- 21 The provincial mining environmental divisions (Unidad de Gestión Ambiental Minera - UGAM) are in charge of the reception, evaluation, approval and/or rejection of the duly environmental impact reports.
- 22 As a consequence of deregulation process, executive powers over uranium mining activities were transferred from CNEA to the Nuclear Regulatory Agency, such transference and creation of the later agency was ruled by Federal Law No. 24,804.
- 23 Federal Mining Code, Section 207.
- 24 Federal Mining Code, Section 208.
- 25 Federal Mining Code, Section 209.
- 26 Federal Mining Code, Section 210.
- 27 As set forth by Resolution No. 23/1999 of Nuclear Regulatory Agency, all licenses and permits issued by the are subject to an annual payment of a license fee collected by such agency which is calculated by means of a formula that considers the estimated number of hours required for the inspection.



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Reform of Third Party Rights in Hong Kong Contracts



The Bill represents a fundamental reform to the principles of contract law...

Hong Kong's Department of Justice released a draft of the Contracts (Rights of Third Parties) Bill 2013 (the 'Bill') on 31 October 2012. The Bill proposes to reform the doctrine of privity by allowing third parties to enforce rights under a contract in certain circumstances.

The Current Law

Under the existing doctrine of privity of contract, as a general rule a person cannot acquire or enforce rights under a contract to which he or she is not a party. This rule raises problems and leads to unfairness because it frustrates contracts where the parties clearly intend to confer enforceable rights upon non-parties.

The Proposed Changes

The Bill proposes to remedy this problem by providing a comprehensive and simple framework for enforcing third party rights. Yet the Bill does not abolish the doctrine of privity; rather it creates a wide-ranging exception to the general rule that a third party cannot acquire rights under a contract.

The exception arises where the contract expressly or impliedly confers a benefit upon a third party, and the parties show a clear intention to allow the third party to enforce that benefit. In such cases,

the third party will be able to enforce the benefit conferred upon them under the contract.

Importantly, parties who wish to adhere to the existing law will still be able to do so, even after the Bill is introduced, because parties can contract-out of the proposed statutory provisions by expressly excluding their application in the contract.

The Impact on Hong Kong Law

Similar reforms to the privity doctrine have already been introduced in other common law jurisdictions such as England and Wales, Singapore

and New Zealand. The experience from these jurisdictions indicates that the reform is not likely to lead to an increase in uncertainty or litigation. This is because the industries affected most by the reform, in particular the construction and insurance sector, can simply exclude the statutory provisions from their contracts. As such, although the Bill represents a fundamental reform to the principles of contract law, the practical reality of dealing with contracts is likely to remain largely the same.

The Bill is still under consultation and the Ordinance is not expected to enter into force until late 2013 or early 2014.



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New Offences Related to Trade Descriptions in Hong Kong – Future Enforcement Directions

Hong Kong has introduced amendments to its trade descriptions laws, which will go into force at a date to be determined in mid-2013. The amendments widen the range of offences that traders may commit, and provide greater consumer protection against unfair trading, misleading advertising and aggressive sales tactics. Draft guidelines have also been issued by the relevant authorities to indicate which activities may be caught under the new law and how it will be enforced.

The Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance (the 'Amendment Ordinance') will come into force in around mid-2013. Key changes of the Amendment Ordinance include widening of the definition of 'trade description' to prohibit false trade descriptions to services; previously, the trade description was only applicable to goods. The Amendment Ordinance also introduces new unfair trade practices and enforcement mechanisms.

The Draft Enforcement Guidelines (the 'Guidelines'), jointly issued by the Customs & Excise Department and the Communications Authority (either of them known as the 'Enforcement Agency'), shed light on what activities may be caught under the new law and how enforcement measures will be taken. The Guidelines are not to be regarded as laws or subsidiary regulations. The consultation period ended on 17 March 2013.

● New Offences

The Amendment Ordinance sets out a number of new offences, which will apply to trades with end consumers, i.e. business-to-business trading is not covered. The offences shall apply even if the end consumer is not in Hong Kong, and will thus be applicable to online trades where the trader is in Hong Kong or where Hong Kong is

the trader's usual place of business.

Services rendered by certain registered professionals such as lawyers or doctors, are specifically excluded.

I. Misleading Omissions

According to the Amendment Ordinance, it would be an offence if the trader:

- omits or hides material information;
- provides material information in a manner that is unclear, unintelligible, ambiguous or untimely; or
- fails to identify its commercial intent, unless this is already apparent from the context, and as a result it causes, or is likely to cause, the average consumer to make a decision that the consumer would not have made otherwise.

'Material information' is defined broadly and includes any information that the average consumer needs to make an informed decision on whether to conduct the transaction or not, taking into account the context. The standard of an average consumer is an objective one, taking into account the material characteristics of such an average consumer, who is reasonably well informed, observant and circumspect. As concisely suggested by


the Guidelines, 'the average consumer is not ill-informed, ignorant or reckless'.

In most circumstances, the unit price, and features or restrictions on the products are likely to be regarded as material information. Related information such as the duration of contract or after-sales services may also be considered as material. The Amendment Ordinance provides a list of information regarded as material if the commercial practice in question is an 'invitation to purchase'. This term is broadly defined as 'a commercial communication that indicates characteristics of the product and its price in a way appropriate to medium used for that communication and therefore enables the consumer to make a purchase'. Therefore, this term includes advertisements showing the price and the goods or services on any printed matters, Internet or other media.

According to the Amendment Ordinance, material information in context where the commercial practice in question is an 'invitation to purchase' includes:

- the main characteristics of the products;
- the identity and address of the trader;
- the price or any additional freight, delivery or postal charges (or the manner in which they are calculated); and
- the right to withdraw or cancel the transaction.

Therefore, omitting the above information or if it is not provided timely may be an offence. Nowadays, traders use Quick Response Codes (QR codes) in advertisements, and product information can only be obtained through a QR code reader on smart phones. The Guidelines suggest that the trader in such context may have committed the offence.



The offences shall apply even if the end consumer is not in Hong Kong, and will thus be applicable to online trades...

Usually, material information of goods or services should be communicated to the consumer before he or she makes the transactional decision. For example, for a trader operating a car park, the parking fee should be displayed clearly at the entrance of the car park.

In relation to failure to identify the trader's commercial intent, an example provided by the Guidelines is that a trader, or his/her agent or employee, disguises himself or herself as a consumer and posts comments using pseudonyms in online discussion forums or in social media groups to promote sales or denigrate competitors.

II. Aggressive Commercial Practices

According to the Amendment Ordinance, a commercial practice is aggressive if it impairs significantly, or is likely to impair significantly, the average consumers' freedom of choice or conduct through harassment, coercion or undue influence, and as a result causes or is likely to cause the consumer to make a transactional decision.

The Guidelines explains that 'undue influence' in this context means an 'exploitation of a position of power in relation to a consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly impairs the consumer's ability to make an informed decision'. Position of power may arise due to possession of consumer's property (for example, credit cards) at the time the consumer makes the transactional decision. This may be the case where the trader further promotes his or her other products when the consumer has provided credit card for payment for the products the consumer has previously decided to buy. It will be an offence if the trader refuses to return the credit card unless the consumer agrees to buy the other goods or services.

Further, in deciding whether a commercial practice uses harassment, coercion or undue influence, the Amendment Ordinance provides a list of factors to be considered, including its timing, location, nature or persistence, or any onerous non-contractual barrier imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate the contract or to switch to another product or another trader.

As suggested by the Guidelines, salespersons refusing to leave the flat of an elderly person and pressing that person to sign on a service provision contract when the elderly person has already expressed disinterest in the services, or any requirement that the contract termination form be submitted to the trader – for example, to a remote location in person during office hours – may be regarded as aggressive commercial practices.

III. Bait Advertising

The Amendment Ordinance prohibits any advertising for goods or services at a specified price if there are no reasonable grounds for believing that the trader will be able to offer reasonable quantities of the goods or services at that price for a reasonable period, taking into account the nature of the market and the nature of the advertisement in question. It is also an offence if the trader fails to offer those products for supply at that price, for a period that is, and in quantities that are, reasonable, taking into account the similar considerations as above.

The concepts of 'reasonable quantities' and 'reasonable period' are to be decided in light of the nature of the market and nature of advertisement in question. The nature of the market is to be examined with reference to both the supply and demand of the goods or service in question. Unforeseeable factors affecting the demand or supply side will also be taken into account when determining what is reasonable in the context. That said, before putting up an advertisement, the trader should review their previous sales trends and assess if the size of the stock in hand is sufficient to meet a reasonably expected demand. As suggested by the Guidelines, disclaimers like 'while stocks last' will unlikely be sufficient to protect traders from committing bait advertising. As to the nature of the advertisement, it is related to the size of readership of the advertisement, which may affect the demand of the products. Generally speaking, television commercials are expected to have a wider reach than advertisements placed in the store.

However, it would be a defence for the trader if it provides to the consumer information of the quantities and period for the products to be sold at a specified price, even if the quantities or period is unreasonable. Further, evidence showing that the trader has procured

a third party to supply additional stock of the specific products or their equivalent to meet the demand at the advertised price within a reasonable time is another defence available to the trader.

IV. Bait and Switch

According to the Amendment Ordinance, a trader shall not, upon having made an invitation to purchase a product at a specified price, with the intention of promoting a different product:

- refuse to show or demonstrate the product;
- refuse to take orders for the product or deliver it within a reasonable time; or
- show or demonstrate a defective sample for the product.

However, to establish the offence, it must be shown that the trader has the intention of promoting a different product at the time the invitation to purchase is made. However, such an intention is not easy to prove.

V. Wrongly Accepting Payment

According to the Amendment Ordinance, it would be an offence if the trader wrongly accepts payment for a product if at the time of that acceptance:

- the trader intends not to supply the product;
- the trader intends to supply a product that is materially different from the product in respect of which the payment is accepted; or
- there are no reasonable grounds for believing that the trader will be able to supply the product within the period specified by the trader at or before the acceptance of payment or within a reasonable period if such a period is not so specified.

To establish the offence, it must be proved that there exists the above trader's intention or the lack of reasonable grounds at the time the payment is accepted. Such an intention may be induced from any supply constraints known to or can be expected by the trader at the time of accepting the payment.

However, it is a plausible defence if the trader can show that he or she had checked with the supplier to ensure sufficient availability of the products in question, or that he or she had offered to supply additional stock or procure a third person to supply the additional stock of the specified product or the equivalent to meet his or her obligations. Further, it is a defence if a full refund is made within a reasonable period after the specified period of supply or, in lack of it, any reasonable period.



● Sanction and Enforcement

A trader who commits any of the above offences is subject to criminal sanctions, with the maximum penalty of HK\$500,000 and imprisonment for five years.

In case the trader is a body corporate, apart from the trader, certain classes of persons of the trader may also incur personal liability if it can be proved that the offence has been committed with their consent or connivance or was attributable to their neglect. Those persons include the director, company secretary, principal officer or manager of the trader.

Apart from the criminal sanction, the Amendment Ordinance also introduces the court's power to award compensation to the consumer for financial loss resulting from the offence.

● New Enforcement Measures

The Guidelines provides details of the enforcement mechanism newly introduced by the Amendment Ordinance, namely undertakings and injunctions.

I. Undertakings

An undertaking is a commitment provided by the trader not to continue, repeat or engage in the conduct of commercial practice which the Enforcement Agency believes that the trader has engaged, is engaging or is likely to engage, in conduct that constitutes an offence under the Amendment Ordinance. However, a trader cannot be compelled to give such undertaking. Once the undertaking is accepted, criminal proceedings relating to that subject matter may not be brought or continued.

The Guidelines provide a list of elements that the trader should include in the undertaking. The elements include:

- an acknowledgement of or admission from a trader that he or she has engaged, is engaging or is likely to engage in the conduct in question;
- a positive commitment by the trader to cease the conduct and not to repeat it or engage in similar conduct;
- details of corrective actions to be taken by the trader; and
- an acknowledgement by the trader that the Enforcement Agency may cause the undertaking be published in any form.

The Guidelines suggest that the validity of such undertaking not be shorter than two years.

That said, even if the trader gives undertaking, acceptance of the same is subject to written consent of the Secretary for Justice, having regarded to all the relevant circumstances. The acceptance can be withdrawn if there are reasonable grounds for believing that there has been a material change of circumstances or the trader has breached the terms of undertaking, and so on. To ensure compliance of the undertaking, the Enforcement Agency may inspect the business premises of the trader.

II. Injunctions

The Enforcement Agency may apply to District Court or Court of First Instance for an order that the trader not continue, repeat or engage in contravening conducts. The Court may also grant an interim injunction pending the determination of the application for the injunction if it thinks fit.

● Conclusion

By providing a detailed explanation of the new laws and examples of infringing activities, the Guidelines help the traders understand the standard that is expected from them in relation to the provision of trade description. As mentioned at the beginning of this article, the consultation period for the Guidelines ended in March this year. Traders should therefore keep an eye out for the finalized Guidelines in the near future.



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A Review of Corporate Governance Issues As Incorporated in India's Latest Companies Bill, 2012

The stock markets in India went into a sulk after witnessing a series of securities scams. This article reviews whether the present Companies Bill, 2012, addresses the corporate governance issues from an Indian perspective.

“A little more than 20 years ago the Iron Curtain fell and the totalitarian rule in Eastern Europe and the Soviet Empire came to an end. The particular relevance of all this for governance is that, as a result of transition to greater democracy in the world alongside globalisation in production, trade and capital market activities, the boards of many major corporations now exercise power second only to that of elected government, and indeed, in excess of that available to the governments of many smaller countries. And the autonomy of even the major sovereigns has been eroded in many areas by globalisation.”

Sir David Walker, 25 June 2010, Cambridge Judge Business School

Corporate Governance in India adopts a rule-based approach and failure to comply with rules will result in severe penalties and loss of liberty. The establishment of the Securities Fraud and Investigation Office (SFIO) to investigate and to bring real culprits to book in cases of securities fraud is one such step that the Ministry of Corporate Affairs (MCA) of the Government of India has taken in recent years to regulate the stock market. As discussed hereinafter the new Companies Bill, 2012 is also an attempt to strengthen Corporate Governance in Indian jurisdiction, to revive investor's confidence in the

stock market and to corporatise management of Indian Companies.

The law relating to the governance of companies in India was provided primarily under the (Indian) Companies Act, 1956 (the Act). In terms of the Act, the Securities and Exchange Board of India (the SEBI) has been empowered to administer certain provisions of the Act concerning the issue and transfer of securities and non-payment of dividend in relation to Listed Companies.¹ Further, under the provisions of the SEBI Act, 1992, the SEBI has notified a host of rules and regulations governing the business and activities of Listed Companies. The SEBI is also empowered under Sections 11 and 11A of the SEBI Act to prescribe the conditions of listing. In pursuance of these provisions, every company is required to enter into a listing agreement with the concerned stock exchange (Listing Agreement) before having its securities listed thereat and is obligated to the mandatory provisions set out therein².

While Listed Companies in India were complying with the then existing provisions of the Act and the regulations notified by the SEBI, in 1992 a securities scam to the tune of INR 80 billion was alleged to have been committed by Late Mr. Harshad Mehta which

left corporate India perplexed. To protect the recently liberalised Indian economy from the shackles of any such further mishap, in May 1999, a committee on Corporate Governance was formed under the hegemony of Mr. Kumaramanglam Birla to recommend measures to promote and raise the standards of Corporate Governance in Indian companies. Based on the recommendation of the above committee, the SEBI introduced Clause 49 in the Listing Agreement (Clause 49, see below).

However, by 2002, India Incorporation witnessed another securities scam conducted through the manipulation of stock prices of various Listed Companies. This scam was masterminded by Mr. Ketan Parekh. Consequently, the SEBI immediately appointed another committee under the chairmanship of Mr. N.R. Narayana Murthy to further improve the standards of Corporate Governance for Listed Companies in India. Based on the recommendations of the Narayan Murthy committee report, the SEBI amended Clause 49 of the Listing Agreement. The revised Clause 49 incorporated certain principles based on the UK Corporate Governance Code, the Sarbanes Oxley Act (SOX) and OECD³ Principles of Corporate Governance. At present, Clause 49 adopts two principles: the approach of 'Comply or Explain' as enshrined in the UK Corporate Governance Code and the rule-based approach of SOX prevalent in the United States of America.

Significantly, Clause 49 stipulates provisions relating to the composition and size of the board of directors (the Board), role and duties of

audit committee, management of subsidiaries, disclosures by the Board and committees thereof to shareholders, certifications of business documents and reports by key managerial personnel and annual compliance certificate. Apart from the above mandatory provisions, Clause 49 also embodies certain non-mandatory provisions such as those relating to the constitution of a remuneration committee, half yearly results, development of directors, peer evaluation of Board members and a whistle blower policy.

A Listed Company has to disclose in detail in their annual reports whether they have complied with the requirements of Clause 49 or not. Listed Companies are also required to submit a quarterly compliance report on Corporate Governance to the stock exchanges within 15 days from the close of every quarter.

These reports are certified by the

compliance officer or the chief executive officer of the Listed Company.

Apart from Clause 49, there are certain other clauses in the Listing Agreement which protect the minority shareholders and mandate proper disclosures. These clauses relate to disclosure of shareholding pattern, maintenance of minimum public shareholding (25%), disclosure and publication of periodical results, disclosure of price-sensitive information and disclosure and open offer requirements under the takeover code⁴.

In 2008, the MCA issued the first draft of the Companies Bill, 2008 for superseding the Act. A revised draft of the bill was issued in 2009. However, in the year 2009, India faced the fall of Satyam Computer Services which awakened the Indian sub-continent to the lack of an existing regulatory mechanism to ensure due Corporate Governance.

The fall of Satyam Computer Services awakened the Indian sub-continent to the lack of an existing regulatory mechanism...



Apparently, the auditors failed to detect fraud in the Company due to provision of inaccurate and unreliable information by the company. In response, in 2009, MCA issued voluntary guidelines in relation to Corporate Governance and introduced further amendments to the Companies Bill through a series of modifications. Finally, the amended Companies Bill, 2011 was presented to the lower house of the Indian parliament in the year 2011. It was passed by the lower house in the year 2012 in its present form (the Bill). It is likely that the Bill would soon receive approval from the upper house and replace the Act to become the law of the land.

The Bill has introduced substantial changes in relation to the existing Corporate Governance practices such as the following:

- i. The term 'Independent Directors' is clearly defined and the scope the definition is wider than the existing definition of 'Independent Directors' as stated in the existing Clause 49.
- ii. The Independent Directors are other than the managing director, full-time director and a nominee director. The purpose is to clarify that the nominee directors (who usually represent financial institutional investors) are not Independent Director;
- iii. The Independent Director should not be an employee or proprietor or a partner of a firm of auditors, company secretaries, legal and consulting firm;
- iv. Every Independent Director shall give a declaration that he meets the criteria of independence at the time when he is appointed to the Board;
- v. The Independent Director has to abide by the code prescribed by the Companies Act, 2012 in Schedule IV;
- vi. The term of Independent Director shall be five years and he shall be eligible for re-appointment for another five years;
- vii. An Independent Director shall not be liable unless the acts of omission have occurred with his knowledge attributable through board process and with his consent and connivance or where he has not acted diligently.⁵
- viii. An individual shall not be appointed or reappointed as the chairperson of the company, in pursuance of the article of the company, as well as the managing director or chief executive officer of the company at the same time.⁶ This provision borrows the principles of separation of power of chairman and chief executive officer from the UK Corporate Governance Code, 2012;
- ix. Performance evaluation of Independent Directors shall be done by the entire Board;
- x. Role and Functions of Audit Committee are spelt out more elaborately;
- xi. The Board of a Listed Company is required to set up a Nomination and Remuneration Committee and a Stakeholder Relationship Committee;
- xii. The directors' report shall include a statement in relation to risk management;
- xiii. The Audit Committee shall also report on internal financial controls and risk management;
- xiv. Every company shall establish a vigil mechanism for directors and employees to report genuine concerns in such manner as prescribed;
- xv. A listed company shall have a director that should represent small shareholders⁷;
- xvi. A formal letter should form part of the disclosure to shareholders at the time of ratification of his/ her appointment or re-appointment to the Board;
- xvii. The Independent Directors shall disclose reasons for their resignation from the Board;
- xviii. The Audit Committee is empowered to approve related party transactions, scrutinise inter corporate deposits, loans and investments and value undertakings or assets of the company;
- xix. The Bill provides that shareholders can bring a class action suit in case they have an apprehension that the Board is not performing appropriately or



is not performing in the interest of the company. The cost of such suit shall be reimbursed from the Investor Education and Protection Fund of MCA;

- xx. The Bill proposes to establish a National Financial Reporting Authority. The objective of National Financial Reporting Authority shall be to prosecute auditors found to be liable for professional misconduct;
- xxi. Prescribed companies shall necessarily spend on Corporate Social Responsibility (the CSR). The activities that are part of the CSR are prescribed by the Bill.

The SEBI has appointed a committee to take note of the provisions that Companies Bill, 2012 has incorporated in addition to the guidelines in relation to Corporate

Governance and suggest revisions to the provisions of Clause 49 of the Listing Agreement. The committee has rendered its report and has suggested that the provisions stated in the Companies Bill, 2012 that are not part of Clause 49 of the Listing Agreement should be incorporated in Clause 49 of the Listing Agreement. The committee has suggested that the following provisions may be added to Clause 49:

- i. It is proposed that the procedure for e-voting may be introduced on agenda items where voting by shareholders is permitted through postal ballot;
- ii. The company should take approval in case any subsidiary of a listed company is divested;
- iii. Any Related Party Transaction should be disclosed immediately and on a continuous basis;
- iv. It is proposed that the rights granted to private equity investors and financial institutions such as 'drag along rights' and 'tag along rights' and the right to give affirmative votes and to receive selective information and appoint nominee directors on the Board are oppressive to the minority. Therefore, it should be examined whether a Listed Company should be permitted to have such rights in favour of selective shareholders;
- v. As FRC⁸ has proposed to reinstate a provision that the company should have a relationship agreement with the controlling shareholder, similar provisions should be made part of the Listing Agreement.
- vi. The role of Institutional Investors is proposed to be enhanced and it would be obligatory upon the Institutional Investors to disclose internal policies on voting in annual general meetings of Listed Companies.

Review:

The above shows that the principles of Corporate Governance of United Kingdom, the United States and the Principles applied by OECD Countries are followed. We have the following observations in respect of the issues relating to Corporate Governance set out in the Companies Bill, 2012:

- i. The number of small shareholders that invest in Listed Companies or have invested in Listed Companies is quite large. Also, to revive the investor confidence in the market it is necessary that small shareholders are encouraged. This is possible if they could participate in the Annual General Meetings (AGM). These small shareholders cannot participate in an AGM as the location where the Listed Companies call meetings may be in quite far off places. Enabling them to vote through the internet could resolve this problem. The other issue is that at the AGM and at other forums such as Board Meetings, small shareholders should be able to nominate one Independent Director to represent their cause. The facility to cast a postal ballot at an AGM without being physically present is restricted to only few resolutions, whereas voting through the internet would be a better alternative.
- ii. Another category that should be heard and encouraged is employees. An employee is a key stakeholder of the company. Even though he may not invest, he works for the company and at times for a paltry



compensation. At times employees may be permitted to participate as shareholders through an employee stock options scheme, but this may not be the case for every company. There has to be an Independent Director who represents the interest of employees on the Board of the Company.

- iii. As the UK Corporate Governance Code uses a 'comply or explain' methodology, similar principles could be used in case of Private Companies which are not listed but are of substantial size. The principles of Corporate Governance should be utilised not only to boost investor confidence but to help companies to effectively manage their operations. It is an accepted principle that

the economy of a country is dependent on mid-size corporations and if these mid-size corporations do well, the economy as a whole shall benefit.

- iv. The definition under the Bill in relation to 'related party' should be brought in line with the definition of 'Associated Enterprise'⁹ under the Indian Income Tax Act, 1961. The scope of the present definition of related party is not wide enough to take into consideration existing ground realities. The present definition of related party does not take into consideration events such as:
 - a. The provision of loans by one company to another, which is equivalent to the substantial value of the total

assets of the company;

- b. One company extends guarantees to another, which is not less than 10% of the total borrowing of the other company;
- c. The manufacture or processing of goods or articles or business carried out by one Company is wholly dependent on the use of intellectual property rights or any other business or commercial rights of which the other company is the owner or in respect of which the other company has exclusive rights;
- v. Further, a related party of a Listed Company should be under an obligation to follow the Corporate Governance rules as stipulated under the Bill. Similar obligations should be placed on the subsidiaries of Listed Companies;
- vi. It should be mandatory for a Listed Company to achieve a certain rating in respect of Corporate Governance Quotient¹⁰ as this would help a Listed Company to achieve certain necessary compliances, which would result in its growth. The legislation in relation to credit rating agencies should be amended in such a manner that the credit rating agencies should be accountable in case their rating and information are not genuine or are fabricated. The House of Lords in Caparo's Case¹¹ had held that an auditor is under a 'duty of care' even though he does not have a privity of contract with the retail or small investor to disclose true financial information. The House of Lord further held that to determine whether the auditors



have diligently performed a 'duty of care', three tests should be applied. These tests are foreseeability, proximity and fairness. It is suggested the bill may require credit rating agencies to confirm to such 'duty of care'.

- vii. Investment in an Indian company is not a good financial decision as Indian companies are dissuaded to declare dividends as before distribution of dividends of at least 50% (33% on business income + 17% Dividend Distribution Tax) of the profit goes into the government's pocket. A small shareholder still could make some money if he holds the share for at least a year and within that year, the stock of the company has risen dramatically, which, however, is not the case in the current market situation. To overcome this, the Government should remove Dividend Distribution Tax and provide a reduced rate of taxation in case a Listed Company is eager to declare profits and distribute dividends to its shareholders.
- viii. The present Companies Bill, 2012 incorporates provisions introduced after the recent experience in relation to Satyam Scam. However, the changes are still brought without any evidence of empirical study. It is advised that an empirical study of at least the top 500 Listed Companies in India should be carried out on a regular basis and the revisions to the Corporate Governance regulations should happen more regularly.
- ix. It is to be noted that at present, India is in a situation where political organisations heavily depend upon corporate houses

for funds. These funds are used for conducting their activities and for expenses at the time of election. We still have to see a profit and loss account that provides the detail of such expenditure by a company. Further, such expenditure should require the consent of shareholders and a declaration from the person who has made the payment that the amount paid is meant to fund political activity. The correlation of a company relates to weak Corporate Governance and negatively correlates to the company's value. The companies that engage in political activity generate lower value for their shareholders relative to the value of the assets they control.¹²

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.



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Free Speech Thrives in India Despite Restrictions

Freedom of speech and expressions has always been fundamental to the working of any democracy. The concept of freedom of speech and expressions had its origin in British India and has since percolated in the Indian constitution. This article examines the journey of freedom of speech and expressions in India and how the courts have played an active role in protecting the same.

Freedom of speech and expression is enshrined in nearly all Constitutions of the world with hardly any exceptions. The concept of freedom of speech and expression first gained prominence when the founder of journalism in India, James Augustus Hicky, an Irishman, was deported in the 1790s for daring to expose venal dealings of the then Chief Justice of India, Sir Elijah Impey, and the then Governor General of India, Warren Hastings.

From 1790 to 2013, the concept of freedom of speech and expression has undergone a marked transmutation from being a highly restricted commodity to one where the Indian media thrives despite competition from overseas. Today, the print and electronic media can boast of having exposed at least a few hundred scandals involving top dignitaries of the state because press freedom is protected under the umbrella of Art 19 (1)(a) of the Indian Constitution.

A fortiori, when the members of the Constituent Assembly who sat down to draft the Constitution between 1946 and 1950 were seized of this cherished right, they enacted Draft Art 13 which later metamorphosed into Art 19 (1)(a). It is this Article which guarantees the fundamental right of freedom of speech and expression to all Indian citizens.

It is trite to reiterate that without this cherished right, other rights such as freedom of trade and freedom of religion do not have much significance because all



Freedom of speech and expression is alive and thriving in India although there are incursions into this cherished freedom...

these rights are so interwoven and interconnected with each other that incursions into one affects others. This is the reason why the writ courts in India have protected this cherished right from deprecations by the state.

Although democracy is undoubtedly the most suitable form of government today, it has its drawbacks. Pithily put, democracy is the howl of the majority where majoritarianism prevails. This sometimes proves detrimental to free thinkers and minority groups who expostulate and expatiate on topics such as religion and culture which the majorities see as inimical to their interests.

However, despite these deprecations, freedom of speech and expression is alive and thriving in India although there are incursions into this cherished freedom by political parties and other organs of the state. Freedom of speech and expression in India is seen as a leading light, which is sought to be emulated by other Asian countries such as China, Malaysia, Afghanistan, Nepal, Pakistan and Myanmar which do not permit freedom of speech to the extent that India does.

A posteriori, democracy and liberalism are not concentric circles where one is synonymous with the other. Liberalism is a Western concept where ideas which the majority may not find acceptable are still permitted. This degenerates into permissiveness in some Western democracies while in Asia, from where several world religions have their roots, permissiveness is not tolerated. Hence, India has struck a model to permit freedom of speech and expression to its citizens but at the same time it does not permit permissiveness which it sees as inimical to the survival of the Indian union.

● Genesis

The right to free speech has its roots in ancient India where the revered Rig Veda, which is the oldest among the four ancient texts of the Hindus, stated unequivocally: *Let noble thoughts come to us from every side*. This by itself shows that freedom of speech was not unknown in ancient India. However, when the British began to rule India, they introduced the Western concept of formal education and with it, the concept of freedom of speech and expression. Tragically, the concept of freedom of the press, which is explicitly mentioned in the US Constitution, was absent for the simple reason that the British did not have a written Constitution.

The British concept of freedom of speech and its concomitant right of the press to publish freely and disseminate ideas without prior restraint is not laudatory for the simple reason that as far back as 1534, a Royal Proclamation required pre-publication licensing. Restrictive measures were also initiated by the Tudor and Stuart monarchs so that censorship came to be applied more to political criticism than religious heresy.

John Milton, in his classic, *Areopagitica*, which was published in 1644, attacked the licensing law and urged Parliament to suppress objectionable and offensive material only after it was published. Milton's objections have been encrypted down the ages as the bulwark of press freedom in all countries.

It is this concept of freedom of speech that was transmuted into the Indian ethos because most of those who comprised the drafting committee were British-educated lawyers including Jawaharlal Nehru, Babasaheb Ambedkar and Sardar Vallabhai Patel. When some intrepid members of the drafting committee suggested that freedom of the press should be unequivocally mentioned, this suggestion was shot down by the British-educated caucus.

As a result, the right to freedom of speech and expression which found its way into Article 19 (1)(a) was a watered-down version which was restricted by what was known as 'reasonable restrictions'. In retrospect, these reasonable restrictions have proved beneficial to the state because attempts to dismember it by wanton speeches and comments which support insurgency and other unpalatable ideas do not find acceptance in India.

● Case Law

Soon after the Indian Constitution was enacted on 26 January 1950, the court was called upon in *Brij Bhushan v State of Delhi* (AIR 1950 SC 129) to balance the right to freedom of speech and expression against the state's need for pre-censorship of what it deemed as unpalatable ideas. The Supreme Court came to the rescue of the media by declaring the provision under which pre-censorship was clamped as unconstitutional.

In *Virendra v State of Punjab* AIR 1957 SC 896, the Supreme Court upheld pre-censorship only for a limited period and the right of representation to the government against such restraint under the Punjab Special Powers (Press) Act, 1956. In the very same judgment, another provision which imposed

pre-censorship without any time limit was struck down as unconstitutional.

However, in 1967, a piquant situation arose in the Bombay High Court, one of the three oldest constitutional courts in India, when press reporters were prevented from taking down notes in open court because a witness said his business interests would be adversely affected if they were allowed to publish his testimony. In an unprecedented order, the late Justice VM Tarkunde, who later emerged as a champion of human rights, orally prohibited newspaper reporters from taking down notes and publishing the proceedings.

The affected journalists challenged this oral order before the Supreme Court under Art 32 of the Indian Constitution on the ground that in open court, a judge could not orally direct the media not to publish a part of any proceedings or the proceedings at all. However, this challenge was dismissed by the Indian Supreme Court on a technicality thereby indirectly upholding the order of the single judge who prohibited the media from reporting proceedings held in open court on the ground that the witness' business interests would be prejudiced.

This judgment of the Indian Supreme Court delivered in 1967 was reiterated once again in *Mohammed Shahabuddin v State of Bihar* (2010) 4 SCC 653 reaffirming the position that the open justice principle widely recognized in the Western democracies did not find absolute acceptance in India.

The underlying rationale that a court could prohibit newspaper reporters from publishing the deposition of a

witness in open court on the ground that it was expedient in the interests of justice appears fallacious because in countries such as the US, court proceedings can even be televised.

In the US, pursuant to the First Amendment guarantee, witnesses who depose in open court cannot petition the court to prohibit publication of their depositions. Hence, the principle that courts can prohibit the media from publishing proceedings held in open court needs to be reconsidered because today India enjoys the reputation of being the largest democracy in the world.

However, setting the *ratio decidendi* in the *Mirajkar* case aside, the Indian Supreme Court has undoubtedly played a stellar role in protecting freedom of speech and expression. This becomes obvious when one scrutinizes a catena of decisions which have come up before divergent benches of the apex court over the decades.

Two notable cases are worth discussing in the development of the concept of press freedom. In *KA Abbas v Union of India* AIR 1971 SC 481, the Supreme Court upheld prior restraint on exhibition of motion pictures by imposing the condition that the Government set up a corrective machinery and an independent tribunal, and also a reasonable time limit within which the decision had to be taken by the censoring authorities.

Seventeen years later in *Reliance Petrochemicals Ltd v Proprietors of Indian Express Newspapers Bombay Pvt Ltd* AIR 1990 SC 190, the Supreme Court formulated a test that any preventive injunction

against the media must be based on reasonable grounds to keep the administration of justice unsullied. An injunction taken out by Reliance Petrochemicals against Indian Express was lifted only after the debenture issue was closed.

The very validity of the debentures was being debated in court and so the Bombay High Court granted an injunction against the *Indian Express*, restraining it from publishing any articles on the validity of the debenture issue until the entire imbroglio was finally decided by the high court.

The *Indian Express* challenged this gag order in the Indian Supreme Court which did not set aside the injunction. As a result, the doctrine of prior restraint or pre-publication censorship was upheld by the court by relying on the doctrine formulated by the US Supreme Court of clear and present danger which was propounded by Justice Oliver Wendell Holmes in 1919.

This doctrine states:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that the United States has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right. (*emphasis added*)

It is rather ironical that the Indian Supreme Court opted to uphold this doctrine which was formulated in a democracy with a different system of governance. Common law or case law develops over an extended period of time due to facts which metamorphose and change over indeterminate time periods. It is an aphorism that in India, statutory law overrides case law which can be made only by the judiciary, an organ of the state which is not accountable to the public.

Be that as it may, the Indian Supreme Court again pronounced in *R Rajagopal v State of Tamil Nadu* (1994) 6 SCC 632 that the state could not impose prior restraint on the publication of the autobiography of a prisoner awaiting a death sentence. In this case, a prisoner known euphemistically as Auto Shankar who was sentenced to death for raping and murdering six girls, wrote a 300-page autobiography for publication in a local newspaper *Nakheeran*.

This autobiography publicized his links with top government dignitaries who tortured him to retract permission to publish his autobiography.

When the Tamil Nadu government sought to prevent publication of the serialized autobiography, *Nakheeran* challenged it in the Indian Supreme Court which laid down that public bodies could not maintain a defamation suit nor could the state prevent the publication of the autobiography.

It can be seen that the Indian Supreme Court made a significant departure from its earlier position on pre-publication censorship. It is true that still today, judge-made law states that all civil courts can prevent

the media from publishing court proceedings. However, in the above case, the Supreme Court did come to the rescue of the media by stating that the state could not prevent publication of defamatory material against its top dignitaries who were consorting with a depraved criminal and later did nothing to assist him.

In *S Khushboo v Kanniammal* AIR 2010 SC 3196, a Tamil film actress had to face the ignominy of defending her views after a large number of criminal complaints were filed against her for voicing unorthodox views about pre-marital sex and virginity. Almost all the complaints were filed by office-bearers of a political party in Tamil Nadu. The Supreme Court observed that no *prima facie* case had been made out, thereby quashing the innumerable criminal complaints for defamation of Tamil women lodged by these activists.

As a result, the Supreme Court indirectly upheld the right to express unorthodox views on matters such as pre-marital sex and virginity on which most of the Indian population hold orthodox views.

● Conclusion

India has a robust and vibrant media which has continuously been exposing the misdeeds of those who wield power. The fundamental right

of freedom of speech and expression is guaranteed by Art 19 (1)(a) of the Constitution and this noble right has been vindicated time-and-again by the Supreme Court in a catena of decisions.

The soul of the Constitution is Art 32 which gives the right to an aggrieved party to directly approach the Supreme Court when fundamental rights are violated so that appropriate relief may be given. The Indian Supreme Court has lived up to the trust reposed in it by the people of India by repeatedly striking down transgressions by the state on fundamental rights including that of freedom of speech and expression.

As compared to other Asian nations and countries of the Middle East such as China, Malaysia, Pakistan, Thailand, Nepal, Myanmar, and countries which comprise the Gulf Cooperation Council (GCC) group, India has a robust media which thrives on doing exposés of nepotism and corruption in the higher echelons of government.

The freedom of the Indian media has minimal restrictions which are necessary in the interests of preserving the sovereignty and integrity of India, secularism, public order, decency and morality and security of the state. The media has to function within these fixed parameters.



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The Conflict of the Doctrine of Lexarbitri with That of Stare Decisis: Bhatia International Ruling's Domination of the Indian Judiciary in International Arbitration

A perverse interpretation of the law by the highest court in *Bhatia International v Bulk Trading SA* effectively distorted the basic purpose of the Arbitration Act 1996, which was aimed at minimizing judicial intervention of the courts in the arbitral process. This article examines how the Indian Judiciary assumed the interventionist role which was to last for some 10 years before it was overruled thereby restoring faith in the Indian legal process.

All contracts which provide for arbitration and contain a foreign element, involve three relevant systems of law, which are: the law governing the substantive contract, that is the proper law of the contract; the law governing the agreement to arbitrate, which is the proper law of the arbitration; and the law governing the conduct of the arbitration proceedings, which is the curial law. Where the curial law is not specifically provided for, it is usually that of the country in whose jurisdiction in which the arbitration takes place, which is referred to as the seat of arbitration. All practitioners who have become experts in this area of practice have cut our teeth on these protocols. There is substantial case law, of various jurisdictions, particularly under common law, on whether a contract provides for all of the above laws, and if not so provided, how the arbitration agreement must be addressed.

The Indian Arbitration Act 1996, ('the Act') is based on the UNCITRAL Model Law 1985 on International

Commercial Arbitration, which serves well as a model for legislation on domestic arbitration as well. The Act seeks to consolidate and govern the law relating to domestic and international commercial arbitration, and enforcement of foreign arbitral award. Pausing here for a moment, it should be clarified at the outset that the term 'international commercial arbitration' has a totally different connotation under the Act.

The Act which was introduced by way of three successive ordinances, before coming into effect, was clearly a priority as India being a signatory to the World Trade Organization (WTO) needed to have an effective dispute resolution mechanism in place at the earliest. The Act was intended to provide party autonomy in arbitrability of disputes, reduction in intervention of courts, enhanced jurisdiction of arbitral tribunals, autonomy in conduct of arbitration proceedings and the reduction of recourse against arbitral awards. The Act is divided into two parts, of which Part I deals with domestic arbitrations, while Part II is limited to the

enforcement of foreign arbitrations awards by the Indian courts under the New York and Geneva Conventions. More specifically, Section 45 of the Act which deals with the New York Convention provides for the power of the judicial authority being the Indian Supreme Court to refer the parties to arbitration, the only instance where the Act permits intervention in case of foreign arbitration.

However, Indian courts did not take long to assume the interventionist approach. When, in the case of *Konkan Railways v Rani Construction Pvt. Ltd*¹ the Supreme Court had held that the order of Chief Justice or his designate under Section 11(9) of Part I of the Act in nominating an arbitrator is not an adjudicatory order. In 2006, *Konkan Railways* was overruled by the Supreme Court in the case of *SBP Ltd. v Patel Engineering*² wherein it was held by the court that the power exercised by the Chief Justice of High Court or Chief Justice of India under Section 11 of the Act is not an administrative power, but a judicial power. The purpose of Section 11(9) of Part I is the same as that of Section 45 of Part II. *Patel Engineering* establishes the point where the process of judicial intervention had its genesis.

Around the same time as *Konkan Railways*, a three-member Bench of the Supreme Court, made its historic pronouncement in the controversial ruling of *Bhatia International vs. Bulk Trading SA*³, where the issue before the Supreme Court was whether under Section 9 of Part I of the Act, the domestic court could grant interim relief in cases of foreign arbitrations held outside India.

It was held by the court that Section 2(2) of Part I of the Act did not provide that Part I will apply 'only' where the place of arbitration is India. It was held that Parts I and II of the Act must be construed harmoniously and that Part I could be applied to foreign arbitrations as there was no absolute prohibition. Section 2(2) of Part I of the Act is based on Article 1(2) of the Model Law, which applies 'only' if the place of arbitration is in the territory of the state, subject to exceptions; the purpose of the Act was not centered around the inclusion or otherwise. The precedent of the *Bhatia International* ruling led to multiple interventions in foreign arbitrations by the Indian courts in total disregard of the main objectives of the enactment – being minimization of the supervisory role of the courts in the arbitral process. Thus, the scope of Part I of the Act was extended to foreign arbitrations. The court chose to overlook the fact that the definition of 'International Commercial Arbitration' was not synonymous with foreign arbitrations, and therefore, the benefit of interim relief could not be extended to foreign arbitrations by any stretch of interpretation. And for the next 10 years the Supreme Court continued to reaffirm the *Bhatia International* precedent in various situations.

In *Venture Global v Satyam Computers Ltd*⁴, the Supreme Court further extended the ambit of judicial intervention. Here the issue before the court was whether Indian courts had jurisdiction under Part I of Arbitration and Conciliation Act, 1996 to set aside foreign awards, and whether an aggrieved party was entitled to challenge any foreign award which was passed outside India in terms of Section 34 of the Indian Arbitration Act, which falls under Part I. The Supreme Court relied on the precedent of *Bhatia International* to hold that the 'public policy' provision in Part I of the 1996 Act, applies also to foreign awards. It may be noted that public policy is separately defined in Section 48 of Part II under conditions for enforcement of foreign awards. This

The precedent of the *Bhatia International* ruling led to multiple interventions in foreign arbitrations by the Indian courts...



conflicted with Part II provisions, as nowhere is it envisaged that a foreign award could be set aside by domestic courts.

In *INDTEL Technical Services Pvt Ltd v WS Atkins*⁵ the issue before the court was whether it could be approached under the provisions of Part I of the Indian Arbitration Act, 1996, when Part II also provided for such a similar direction from the same court. However, Part I was nonetheless applied to the appointment of the arbitrator, even with there being a clear demarcation provided in the Act. Foreign arbitration was given the treatment under Section 11(9) of Part I as the honourable judge held the precedent of *Bhatia International* to be binding, and as the nominee of the Chief Justice sitting on his own; he concluded that he was bound by the precedent. These repeated judicial rulings created much concern about the interventionist approach of the Indian courts, and the disregard for the rule of law.

The first perceptible winds of change in the approach of Indian judiciary came in 2010 in the case of *Dozco India P Ltd v Doosan Infracore Co Ltd*⁶, where the Supreme Court relied on the exclusion referred to in *Bhatia International*. By that time, all smart lawyers had figured out how to draft the arbitration agreement to avoid the unwarranted implications of the *Bhatia International* case.

In *Videocon Industries Limited v Union of India* (2011)⁷, the court relied on *Dozco India* to clarify the difference between 'seat' and 'place' where the arbitration proceedings are held. Meanwhile, parties had been approaching courts on the basis of the venue in which arbitration proceedings were being held, and

the courts were also entertaining such instances. This could be due to the fact that the term 'place' was used instead of 'seat' in the Act.

The court held in *Videocon* there is only one 'seat' of arbitration which is the place chosen by or on behalf of the parties, and designated in the arbitration agreement or in the terms of reference or the minutes of proceedings. However, this did not preclude the arbitral tribunal to hold all of its meetings at the place of arbitration, given the character of international commercial arbitrations involving people of multiple jurisdictions. In these circumstances, it is not unusual for an arbitral tribunal to hold meetings or even hearings in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties and their witnesses. Furthermore, each move of the arbitral tribunal will not mean that the seat of the arbitration changes. The seat of the arbitration always remains the place initially agreed by the parties. The Supreme Court also held that if the parties had agreed to be governed by any law other than Indian law in cases of foreign arbitrations, then that law would prevail, and the provisions of the Act could not be invoked in questioning the arbitration proceedings or the award. Clearly, there were winds of change in the judicial thinking.

Finally, a Constitutional Bench was set up to address the implications of *Bhatia International* and the other judgments. In September 2012, in the case of *Bharat Aluminum Co v Kaiser Technical Services* (2012), a five-member Constitutional Bench overruled *Bhatia International* and *Venture Global*, and considered the real intention of the legislature

while drafting the 1996 Act in light of the UNCITRAL Model Law. The court held that the exclusion of the word 'only' in Section 2(2) of the Indian Arbitration Act could not be construed as an instance of *casus omissus*. The court also considered whether s 2(7) of the Act alters the proposition that Part I applies only where the 'seat' or 'place' of the arbitration is in India. Section 2(7) does not alter the proposition that Part I applies only where the seat or place of arbitration is in India. It would, therefore, follow that if the arbitration agreement indeed provides for a seat/place of arbitration outside India, then Part II of the Act would apply, and Indian courts would not have the power to exercise supervisory jurisdiction over the arbitration proceedings or awards. The court further held that the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention and giving effect to it. It is not for the judges to invent 'fancy ambiguities' as an excuse for failing to give effect to its plain meaning, because they themselves consider that the consequences of doing so would be inexpedient. As regards to the non-inclusion of the word 'only' in s 1(2) of the Model Law this cannot be the reason, when the Act is very clear in making the demarcation between Part I and Part II.

Due regard was given by the Supreme Court on the issue, as to whether Indian courts can grant interim relief in cases where the seat of arbitration is outside India, as this question was the core of the case and had raised the debate. It was essential for the court to consider both aspects and provide satisfactory reasoning in its decision

on this issue, i.e. if the court was to uphold that power of Indian courts and had the power to grant interim relief in case of arbitrations where the seat was outside India, it would contradict its own decision on the applicability of Part I to foreign arbitrations; whereas if it were to restrain the domestic courts from entertaining the arbitrations where the seat is outside India, it would leave the aggrieved without any effective remedy. In due consideration it was held by the court that Section 9 as provided in Part I of the Arbitration Act, 1996, could not under any interpretation be granted a special status to apply to foreign arbitrations. Thus, on a logical and schematic construction of the Arbitration Act, 1996, it was concluded that Indian courts did not have the power to grant interim measures when the seat of arbitration is outside India. The Supreme Court has clarified and settled the law as regards the intervention of Indian courts in foreign arbitration and has upheld the doctrine of minimum intervention of courts in arbitration, which is the underlying objective of the Act.

The Supreme Court has carefully balanced the legal significance and consequences of the arbitral seat on one hand and, due consideration of the arbitration agreement between the disputing parties on the other. The court has recognized the needs of international commercial arbitration and also the complexities involved in permitting jurisdiction to two courts, to exercise jurisdiction on the same subject matter. On the other hand, the court acknowledges that there probably exists a requirement for a provision analogous to Section 9 for foreign arbitrations, but that is an issue for the legislature to address.

There is a sense of disappointment that the judgment in *Bharat Aluminum* only has prospective effect and applies to arbitration agreements executed after 6 September 2012. While it is true that existing arbitration agreements will not benefit from the change in the law, I wonder whether there are any such arbitration agreements, post-*Bhatia* which does not deal with or address the implications arising out of the case. Selective or total exclusion of Part I was always crafted with great care. And older contracts would not require such exclusion.

In any event in case of retrospectivity, the practical difficulties that would have been encountered are mind boggling, creating more contention than resolution. One only needs to recall how in the last year there was an absurd proposal in the Annual Budget to introduce provisions in tax law retrospectively post-*Vodafone (Vodafone International Holdings B.V. v. Union of India (UOI) and Anr.)*⁸ in order to defeat the judgment. Retrospectivity would have led to complete chaos with awards being unraveled, claims and receipts being reversed and raising tax issues galore. In this context as well, the court's approach has been pragmatic. Retrospective effect is normally not given except in the rarest of rare cases, as being the prerogative of the legislature than that of the Judiciary, except where a bad law has to be struck down, or a perverse ruling, even if well intended, can defeat the purpose of the law.

Notes:

- 1 (AIR2002SC778, MANU/SC/0053/2002)
- 2 ([[2005] 8 SCC 618])
- 3 (2002) (AIR2002SECTIONC1432, MANU/SECTIONC/0185/2002)
- 4 (2008) (AIR2008SC1061, MANU/SC/0333/2008)
- 5 (2009) (AIR2009SC1132, MANU/SC/3778/2008)
- 6 (2011) ((SC Suppl)2011(2)CHN9, MANU/SC/0812/2010)
- 7 (AIR2011SC2040, MANU/SC/0598/2011)
- 8 {[2012]107CLA63(SC), MANU/SC/0051/2012}



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Kumkum Sen is now a partner in Bharucha & Partners in charge of their Delhi Office. A litigator who specializes in domestic and international arbitrations and mediation, Kumkum also appears before the Supreme Court of India, various High Courts and quasi-judicial bodies. Equally adept in transactions, Kumkum has handled several M&As, including that of listed companies. She has also advised various multi-nationals on their start-up ventures and continuing operations with regards to all aspects of their legal requirements.

How Do Financial Services Fit within The Laws of Mauritius?

In Mauritius, non-banking financial activities are regulated by the Financial Services Commission, whereas the Bank of Mauritius cares for the banking sector. The reader will find how financial services have increasingly and rigorously evolved within a hybrid system of laws after Mauritius has been both a former French and British colony respectively.

It is not easy to define the legal framework for the financial services sector in Mauritius, given that its financial services law is not codified as obtained for the civil code, code de procédure civile or the code de commerce. In other words, it is not found in a book. The laws relating to financial services are scattered in various enactments and, fortunately, the expert knows how to perform some 'gymnastique légale' and where to turn to find them.

There are various ways to address that issue but in his attempt, the author has elected a 'question and answer form'.

Financial services need to be defined first and we shall then see what the applicable local legislations are.

What are Financial Services?

Financial services are services that are offered by financial institutions, which deal with the management of money and other factors that relate to the flow of money

in an economy. They refer to facilities such as savings accounts, leasing, money transfers, checking accounts, stockbroking and insurance, among others. These are offered by banks, credit unions, stock brokerage firms, and insurance firms, among others. Financial services are many, wide and varied, hence many institutions or organisations are involved in offering them. Other well-known financial services include debt resolution, private equity, and intermediation venture capital conglomerates, as well as both private and public equity. Financial services in general relate to all those issues which affect the circulation of money and how they interrelate.

The Financial Services Act 2007 provides the following definition of financial services: assets management, credit finance, custodian services (non-CIS), distribution of financial products, factoring, leasing, occupational pension schemes, pension fund administrators, pension scheme management, retirement benefits schemes, superannuation funds, registrar and transfer agents,



Strict rules apply
in respect of
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of banking. The licensing authority or the regulator was the Financial Secretary with the then existing banks, namely: Barclays Bank D.C.O.; Mauritius Commercial Bank Limited; and Mercantile Bank Limited. It was in 1966, under Ordinance 43, that the Bank of Mauritius was created with the aim of becoming the banker of the government. In 1971, Ordinance 1 of 1958 was repealed and replaced by Act 31 of 1971, whereby the Central Bank became the Licensing Authority in lieu and stead of the Financial Secretary. The Bank of Mauritius Act 2004 and the Banking Act 2004 regulating the banking sector were enacted in October 2004. The Bank of Mauritius Act 2004 governs the Central Bank principally whereas the Banking Act 2004 governs the banking business in general. The Banking Act has primarily merged the global business sector and the domestic sector by abolishing the two types of banking licences: category 1 banking licence and category 2 banking licence, which were allocated to banks in the domestic and global business sector respectively. The one banking licence now applies to both sectors. Strict rules apply in respect of confidentiality where our Supreme Court has 'un droit de regard' and the opening of accounts with the KYC requirements.

treasury management, and such other financial business activity as may be specified in the Financial Services Commission (FSC) Rules.

In Mauritius, financial services are divided into two main areas namely: a) the banking business and b) the non-banking business, with their respective regulatory bodies. This is contrary to England where the Financial Services Authority, since 1998, controls both sectors.

● **The Banking Business**

Classical banking services may be summed up as follows: applying for a credit card, purchasing a traveler's cheque, cashing a cheque, checking an account balance, depositing money, exchanging

money, filling out a withdrawal slip, opening a current account, opening a savings account, ordering a cheque, paying off a loan, paying bills online, renting a safety deposit box, reviewing your bank statement, taking out a loan, talking with a bank teller, talking with the bank manager, transferring money, using a debit card, withdrawing money, drawing up a letter of credit.

● **The Regulatory Framework for Banking Business**

In 1958, Mauritius experienced, for the first time, the coming into operation of a banking business regulator. The Bank of Mauritius did not exist yet. Ordinance 1 of 1958, 'The Banking Ordinance', came into operation to regulate the business

● **The Non-banking Business**

Non-banking businesses are those that have nothing to do with banking. Stock brokerage firms and insurance firms fall within their ambit. We have the global business activities which

fall under new legislative framework. Category 1 Global Business Licence and Category 2 Global Business Licence are available for entities intending to conduct global business activities. We have Global Business Corporation 1, which is qualified to take protection of the double tax treaties to which Mauritius is a party if it comes within the definition of a resident under the taxation laws. The fields are as follows: aircraft financing and leasing; asset management; consultancy services; employment services; information and communication technologies; insurance; licensing and franchising; logistics and/or marketing; operational headquarters; pension



funds; shipping and shipping Management; trading; any other activity as may be approved by the Commission. There is also the Global Business Corporation 2 which is carried on by a private company that is incorporated or registered under the Companies Act 2001. It does not conduct business with persons resident in Mauritius nor conduct any dealings in Mauritius currency and it holds a Category 2 Global Business Licence. It is exempt from the provisions of the Income Tax Act and is declared as a non-resident for tax purposes.

● **The Regulatory Framework of The Non-banking Business**

In 1992, under Act 18, the Mauritius Offshore Business Activities Act came into operation and thus provided for the establishment of the Mauritius Offshore Business Activities Authority to regulate offshore business activities from within Mauritius and for the issue of offshore certificates and to provide for other ancillary or incidental matters. Under the Financial Services Development Act 2001 (FSDA), the Financial Services Commission was instituted, thus doing away with the Mauritius Offshore Business Activities Authority. In 2007, the FSDA was repealed and replaced by the Financial Services Act, which has however kept the Financial Services Commission as the regulatory authority for all non-banking activities. Stringent rules and regulations are provided to better regulate that sector.

● **What are The Applicable Legislations for Financial Services in Mauritius?**

'Un voyage dans le temps' will assist the expert in replying to the above question.

One should not lose sight of the everlasting contribution of our former rulers, i.e. the French up to 1810 with the 'Acte de Capitulation' and the British up to the independence of Mauritius in 1968. What follows is a demonstration that financial services with evolving concepts have always existed over the island.

● **French Period**

The French era has contributed as follows: several articles of the Civil Code in respect of the identity of the customers; Article 1326 in respect of the mention to be inserted on all unilateral obligations whereby the sum due or quantity to be delivered should be written in words and figures; Article 2015 whereby any person standing as guarantor should expressly declare his capacity as such, Article 2173 on 'les hypothèques judiciaires', i.e. judicial mortgage in favor of a creditor although where no judgment was yet delivered in its favor; 'caution réelle and caution personnelle', i.e. real guarantee and personal guarantee; Article 2202-6 Anatocisme ('capitalisation d' intérêts') whereby all accrued interest may be capitalised in respect of a loan for which the reimbursement exceeds three years; 'Lecautionnement', i.e. personal guarantees in general to secure the repayment of a debt; 'Le droit de suite', i.e. the right of the creditor to follow the property in whoever's hands it is found; 'Le nantissement', i.e. pledge over movable property with or without dispossession of same; 'Le bénéfice de division et le bénéfice de discussion', in cases where there are several debtors/guarantors, any of the latter may move that the indebtedness be divided among them or may move that the other debtors/guarantors

be sued first; 'La solidarité' or 'conjointement et solidairement', i.e. jointly and *in solido* which removes the benefits of 'Le bénéfice de division et le bénéfice de discussion'; the principles of imputation of payments articles 1253 and 1256 of the civil code.

● British Period

Subsequently the British have brought the laws in relation to promissory note, The Bills of Exchange Act; Ordinance 1 of 1936 for the purpose of granting long-term loans for the agricultural workers; Ordinance No 39 of 1939 lien on Motor Vehicles Act through its various amendments until its incorporation into Book 3, Title 17 Chapter 1 section 2(1) of the civil code, more precisely in articles 2100-2111; The Savings Bank Ordinance 1950 for the purpose of transferring the control of the Government Savings Bank to the Postmaster General; Ordinance 24 of 1951, the Exchange Control Ordinance to confer powers and impose duties and restrictions in relation to gold, currency, payment, securities, debts and the import-export, transfer and settlement of property, and for purposes connected with the matters aforesaid; Ordinance 1 of 1958 The Banking Ordinance to regulate the business of banking; Ordinance 43 of 1959, The Insurance Ordinance making provision for the carrying on of insurance business in the Colony, the Registrar of Insurance was created; Ordinance 30 of 1959, The Moneylenders Ordinance making provisions in relation to money lending and for purposes connected therewith. This Ordinance was designed for the Cooperative Society, banks, insurance companies, pawnbrokers and those having a moneylender's license. Ordinance 34 of 1963, The Development Bank of

Mauritius Ordinance with the aim of facilitating the industrial, agricultural and economic development of the Colony; the creation of the Bank of Mauritius, as above referred.

● Evolution of Our Legislations to Better Cater for New Concepts in Financial Services

Over the years, Mauritius has experienced new concepts of financial services and the local legislations have evolved towards a more stringent and regulated environment. The activities over our International Financial Center are definitely, to a large extent, influenced by what goes on over the Asian International Financial Centers, such as Hong Kong and Singapore. The Republic of Mauritius has not missed the least opportunity to intervene and caused the required legislations to be enacted to pave the way for a secured financial services environment. The implantation of the Global Board of Trade (GBOT) has tremendously changed our securities environment and it is evolving within a sphere as provided for by the Securities Act 2005.

The local enactments, among others, commonly resorted to in financial services, are mainly as follows: Bank of Mauritius Act 2004; Banking Act 2004; Business Facilitation (Misc. Provisions) Act; Civil Code; Code de Commerce; Companies Act; Employment Rights Act; Finance Act; Financial Intelligence and Anti-Money Laundering Act (FIAMLA); Financial Services Act; Insurance Act 2005; Limited Partnerships Act; Patents, Industrial Designs & Trademarks Act; Prevention of Corruption Act; Protected Cell Companies Act; Securities Act 2005; Securities (Central Depository, Clearing and Settlement) Act; and the Trusts Act.

It is as well worth noting the contribution of our Supreme Court, which very often intervenes by way of case law. In a recent judgment delivered by Her Ladyship Mrs A.F. Chui Yew Cheong in the case of *M&A Aluminium Centre Ltd v The Mauritius Commercial Bank Ltd 2009 SCJ*¹ 52, the Supreme Court, when referring to Section 40 (1) under the Banking Act 1988 headed 'Identity of customers', held that in looking at the identity of a customer a bank has the added duty to look at the credibility as well as the identity of that customer. The word 'credibility' does not exist in the Act of Parliament, but Her Ladyship sitting as Judge of the Supreme Court has created it.

Note:

¹ SCJ means Supreme Court Judgment number 52 of 2009.



Siv Potayya Founder, Wortels Lexus

Siv Potayya graduated from Aix-En-Provence University and was admitted to the Mauritian Bar in 1991. He worked at the Mauritius Commercial Bank and founded Wortels Lexus in June 2010 after 13 years with a previous partner. The drafting of various banking documents led him to writing several books. The most recent, published in 2008, being 'Guide to Decisions of the Supreme Court of Mauritius affecting Banking (1861-2007)', with a foreword by the Chief Justice of Mauritius.

Seven Shades of Grey: Necessary Due Diligence for an International Company Purchasing a US Construction Company

The article provides a general overview of the selection of the Due Diligence Team and seven specific issues that should be considered by an international company in performing the necessary due diligence associated with the purchase of a US construction company. The issues are discussed from the perspective of how they could impact the valuation of the company and the expected gain of market share.

Mergers and acquisitions are on the increase. Just since January 1, 2013, several major deals have been announced, such as H.J. Heinz being purchased by Brazilian investors and Berkshire Hathaway, US Airways' merger with American Airlines, and Liberty Global's acquisition of Virgin Media, to name a few. While none of these deals involved the acquisition of a construction company, history tells us that construction and engineering companies of the United States have been, and likely will continue to be, acquisition targets for foreign companies.

However, the acquisition of a US construction company presents some unique issues that differ from other acquisitions that foreign companies should consider and factor into their decision-making process. The purpose of this article is to identify and discuss a few of those issues and highlight potential nuances associated with more typical due diligence issues arising out of the process of investigating and acquiring a US construction company.



While the items and topics addressed below do not guarantee a problem-free acquisition with no potential for buyer's remorse, consideration of the issues should help limit the potential for unexpected problems arising after the deal is closed when the problems of the acquired company become the responsibility of the new foreign owner.

● **Basic Acquisition Concepts – Motive and Due Dilligence**

Before addressing some of the specific areas of concern associated with acquiring a US construction company, it is beneficial to have a basic understanding of the potential motives behind an acquisition and the standard practice of assembling a team to perform the necessary due diligence investigation into the target company.

Naturally, there are several strategic reasons that could cause a non-US

company to consider purchasing a US construction company. Two of the most common examples of strategic reasons would include the desire to break into the US construction market and the desire to expand into a new field of construction (commercial, industrial or heavy highway). Such a purchase allows the acquiring company immediate access to one or many markets, depending on the market share of the targeted US construction company and the type of work it performs. This type of acquisition may also improve the purchasing company's core competence, increase market power, and provide access to complimentary resources, to name just a few of the potential benefits.

Considering that the motive for an acquisition will often involve gaining a share in a new or different field of construction, the prudent company (whether foreign or domestic) will assemble a team of professionals to conduct the necessary due diligence related to the purchase of the target company. The best practice in selecting the Due Diligence Team is for the acquiring company to go outside its own staff because the target company's business will often involve a different market. This is recommended to help ensure that the Due Diligence Team has the proper expertise and/or knowledge about the new market to appropriately evaluate the potential risks and rewards so that an accurate valuation of the target company can be created.

Although the line-up of Due Diligence Team members may vary depending upon the specialization of the acquisition, certain key team members are almost always

involved. For example, standard practice is that the acquiring company's Team will include an accountant and an appraiser to review the financial information and assets for the purpose of assisting in the determination of whether the purchase price is reasonable. In addition, a real estate professional should be involved in the transaction if any real property is owned by the target company. Finally, counsel for the acquiring company is also typically part of the Due Diligence Team.

As referenced above, however, it is prudent to include at least one specialized person on the Due Diligence Team who has experience in the field of business being acquired when venturing into a new or different field of construction. This member can be critical in advising the Team on industry customs and practices that might be missed by an outsider to the business. Moreover, this person can be critical in identifying the grey areas that will require deeper analysis.

● **Getting into The Grey Areas**

When the Due Diligence Team has been assembled and charged with looking into the acquisition of an US construction company, the Team for the foreign purchaser must be prepared to dig into the dark corners of the target company. The investigation process is necessary to help uncover the potential problems that may not be readily apparent at first glance given the differences in how companies are run in the US and the types of problems/risks that US construction companies can face in particular industries. The required quest into the target company goes



well beyond the balance sheets and determination of the overall corporate financial health that is on the surface of any due diligence investigation. The foreign purchaser must understand details that are deeper than the mere nature of the business itself. The following is a list of key grey areas that should be explored and fully understood before the purchase is finalized.

1. Union Labour Agreements

Many areas in the US support construction companies that are Open Shops and hire non-union labour. But, for those geographic areas in which the labour unions continue to have a stronghold, understanding the local Labour Agreements that a company has signed onto can be critical to understanding the growth and adaptation potential of the target company. The wages under a Master Labour Agreement could make the target company less competitive in the long term depending upon the remaining duration of the Labour Agreement. While the Labour Agreement remains in place, the ability to adapt and make significant company changes could be limited. Research into these agreements and the specific terms of all such Labour Agreement for all areas in which the target company works can be critical in understanding the future prospects of the target and the constraints with which the foreign company might not be familiar.

2. Percent Complete for Projects

When purchasing an active construction company, it is almost guaranteed that the target company will have several projects

in various stages of completion. Understanding how much money has been billed to, and paid by, the project owner is very important in determining the value of the company and the risks associated with taking over those projects. For example, if a project is front-end loaded so that the invoiced percent complete is significantly more than the actual percent complete, then the acquiring company could be stuck making up the differential at the conclusion of the project. Front-end loading is a practice that can be used to increase current revenues and thus, for some, the attractiveness and perceived worth of the target company. However, if the revenue has not truly been earned in terms of completed work, then the cost to complete the project by the acquiring company would likely exceed the amount still owed by the project owner. Under this scenario, the cost of the remaining work on a project(s) would actually surpass the revenue to be earned. A prudent purchaser will dig into the stated per cent complete versus actual per cent complete on all such existing contracts and use its own people to determine if it is buying into projects of which the cost to complete is going to exceed the remaining earnings.

3. Knowing and Understanding the Estimating Process

Construction companies often have their own estimating processes and formulas that they believe give them a competitive advantage. While the components and estimating processes often look the same, nuances exist and must be fully understood and vetted to

properly determine the risks of newly awarded or recently commenced projects. As strange as it may seem to an attorney or an accountant, estimating is a process that tends to be deeply personal to each construction company and is often considered proprietary or a trade secret. While many sophisticated construction companies utilize pre-packaged estimating software, they often customize it to meet the company's needs and culture.

For example, production costs for self-performed work are often developed through tracking historical information collected on projects with similar structural or architectural components. The cost per cubic yard for the placement of concrete in column formwork that is utilized in an estimate for future self-performed work may be developed from the analysis of the cost per cubic yard for the placement of concrete in column formwork on four similar projects that have been completed. How these production rates were developed (which includes how the prior projects used in the development of the production rates were selected – random or specifically chosen based on common attributes) is important to consider and understand when valuing the company and the overall worth assigned to the backlog of work. Expressed another way, if the production rates for all self-performed work are not the result of proper analysis, then those rates will likely not be accurate and could result in actual costs that exceed the estimated costs. This differential is typically not recoverable from an owner in a lump sum contract unless

the owner's actions caused the differential. Accordingly, the strength of the target company's current backlog may not be as black and white as the target company would like the acquiring company to believe.

Similarly, if the target company is currently engaging in the construction of unique buildings or in sectors (building, highway, institutional, manufacturing, etc.) with which there is no historical perspective, the purchasing company should consider whether a full-blown audit of some of those projects is appropriate. In some cases, the only way the acquiring company can gain any comfort in whether these unique projects are more likely to drag down or add to the company's future profits is to perform such an audit.

4. Revenue Claimed Against Change Orders

The practice of claiming revenue for anticipated owner-initiated Change Orders is a process that, while perhaps not a new concept to all foreign companies, can differ wildly amongst construction companies. To begin with, Change Orders are a common component of every construction project. And, unfortunately, in the US, disputes over the amounts owed for owner-initiated changes tend to happen more often than contractors would like. Such disputes are harder to resolve, and the value of the changes harder to quantify, when the contractor and owner have very different ideas of what the original contract included versus what portion of the scope in the owner-initiated change falls outside the original contract. Further, even when the scope or magnitude of the change is agreed upon, final resolution can be difficult to reach because of fundamentally different ideas between the owner and the contractor about the value of the added or deleted work and its impact (if any) on the project duration. If the scope of an owner-initiated change causes an increase in the project duration, the result can be additional direct costs for the changed work.

Despite the inherent uncertainties over the values of owner-initiated changes, it is not uncommon for construction companies to treat the anticipated value of the changes as expected revenue in the form of an

adjustment to the remaining contract balance on a project. The purchasing company's Due Diligence Team should closely evaluate all outstanding changes, the contractor's pricing of those changes, the history of the changes, and the status of negotiations with the owner for payment for changed work on the project. If there is a large, pending, owner-initiated Change Order for which the owner has refused to pay and resolution has been delayed, the purchasing company should evaluate the risk that the amount requested will not be paid by the owner. Taking the time to probe these issues, and removing such sums from expected revenue numbers if warranted, can alter the overall valuation of the target company to the benefit of the acquiring entity.

In the US, disputes over the amounts owed for owner-initiated changes tend to happen more often than contractors would like.



5. Revenue Claimed Against Claims

Similar to claiming owner-initiated changes as revenue, some US contractors also include the value of pending claims against an owner in their reported revenue or adjusted contract amounts. Like expected revenues on pending Change Orders, treating claims as revenue and identifying the true value (if any) is a slippery process. When considering claims, however, the legal hurdles to recovery and the costs of pursuing the claim must be considered in addition to accurately determining the claim's merit and value. Such expenditures are unlikely to be considered by the target company as a future expense against the expected claim revenue.

Further, excessive reliance on yearly financial statement audit letters subject to the Financial Accounting Standards sent by the target company's legal counsel to the auditors is dangerous. Such letters rarely give black and white answers and instead tend to provide grey statements about the recoverability of claims when the letters are properly reviewed and analysed. Specifically, statements as to the value of pending claims (or the value of threatened claims) are more often than not based on numerous caveats (they are written by attorneys after all) and rarely if ever address the most important question: collectability. At the end of the day, to recognize revenue on a claim, a company must be able to collect on the judgment or award. The Due Diligence Team should give careful consideration to this issue when determining how much,



if any, revenue on pending claims should be included in the valuation and pricing of the target company. Outside claims litigation counsel and outside consultants can be a valuable asset for this due diligence task.

6. Exposure to Unstated Claims

The pending or threatened claims by owners and subcontractors are often easy to identify. Using the same process discussed for affirmative claims above, the Due Diligence Team can analyse and quantify the likely risk associated with these known claims. What is more difficult (and sometimes impossible) to predict and quantify is the ability of lower tier parties to bring claims on bonds or the ability of subcontractors to come back years after project completion to pursue claims for additional compensation. On public works projects (and for some private projects), the requirement of a payment bond can expose

the target company to claims from lower tier subcontractors for which no direct contract exists. The same dilemma exists for labourers and trust funds for union employees.

The potential for these claims exists despite indication of full payment to the first-tier subcontractor. If appropriate releases have not been obtained, the acquiring company could be surprised by a subsequent bond claim. For this reason, it is important to discuss and consider how such unstated claims will be dealt with and what responsibility is being assumed for apparently completed projects that still have liability tails associated with required bonds.

In addition, if the target company is or has been engaged in significant public works projects, the Due Diligence Team should be aware that public owners in some states are not subject to the applicable



or bonuses may be important to their happiness. If the purchasing company intends to convert a target company away from employee ownership, for example, this could have a significant effect on the retention of key owners/employees who have made valuable contributions to the past success of the target company. The loss of key personnel can not only undermine the overall foundation of the target company, but can also resonate with project owners so that the perceived advantages to be achieved by the company purchase in terms of gaining market share are eroded. Typically, this problem is more likely to develop with a mid-size regional construction company that is employee owned and has established deep connection with the local players in the market. Loss of such key owners (who have now become employees) can result in the anticipated market share dwindling, undermining the original motive for the purchase.

While the above issues only represent a handful of the pitfalls that must be probed when acquiring a US construction company, they all demonstrate that the key to any successful due diligence review will depend on the willingness and ability of the Due Diligence Team to go deeper than they might otherwise think is necessary and question the assumptions and practices of the target company that serve as the foundation of the target's revenue and backlog of work. Understanding the goal of the acquisition, accepting that industry norms and practices can vary from country to country (and in the US by geographical regions) and looking to outside people to fill out the roles on the Due Diligence Team can make the difference between long-term satisfaction with an acquisition or a bad case of buyer's remorse.

statute of limitations or statute of repose. While this is a state by state issue, for those states in which it is applicable, the ability for an owner to come back more than ten years after construction to pursue claims for defects or breach is a risk that must be factored in when setting the reasonable purchase price. Further, it places an emphasis on examining the past insurance policies for the target company and gaining an adequate comfort level with the amount of insurance coverage available per occurrence and the remaining available aggregate limits.

7. Key Employee Retention

Employees can be compensated in many different ways. To some employees, the weekly or bi-weekly paycheck is enough to keep them happy. To others, the amount of deferred compensation offered by a company in the form of stock, S-units, 401k deposits, profit-sharing,



Christopher Wright
Managing Partner, Seattle Office
Watt, Tieder, Hoffar & Fitzgerald

Chris is a 15-year trial attorney whose practice focuses on the construction industry. Chris' top priority is easing the burden of litigation by making his clients' problems his own. Chris has worked on both public and private projects for a variety of clients, including designers, contractors and both public and private owners, and has been involved with everything from contract formation thru dispute resolution.

The Role of Counsel in the New World of Digital, Independent Film Production and Distribution

Growing international film distribution networks, the increasing number of cross-border co-productions, and complicated tax incentive schemes are just some of the important features of today's film financing and distribution. These and many others are opening up a plethora of new opportunities for counsel to guide their filmmaking clients.

The global film financing and distribution landscape keeps shifting, as do many other industries in this fast-paced increasingly digital world. But, through it all, consumption of filmed content has flourished, growing steadily due to the multiplication of viewing platforms and distribution channels, and a worldwide hunger for popular entertainment. Even through the recent financial downturn that stalled many sectors of the global economy, the film industry has consistently reported record revenues and continued expansion.

Digital exploitation has blown holes in some of the citadels of traditional distribution, but has also provided unexpected opportunities by offering a host of brand new distribution channels. Films big and small are finding audiences around the world as never before. The truism 'Content is King' has never been more true.

Worldwide box office revenues for 2006 were just under US\$25 billion, while recorded revenues for 2010 totaled more than \$30 billion, with the strongest



measured growth occurring in the international film market. Box office revenues in the United States increased by 15% in the period from 2006 to 2010; meanwhile, international revenues grew by 25%.

The 2011-15 PricewaterhouseCoopers Entertainment and Media Outlook projects:

- Filmed Entertainment will grow from \$36.8 billion in 2011 to \$45.7 billion in 2015.
- Video-on-demand spending will pass pay-per-view in 2011 and reach \$4.7 billion in 2015, a 9.8% compound annual increase from \$2.9 billion in 2010.
- From 2011-15, aggregate Entertainment and Media global spending will rise to \$1.9 trillion in 2015, a 5.7% compound annual advance driven by economic growth.



The most opportune entry into global film financing lies in US independent cinema and in international co-productions.

It is clear that the global film industry is large and growing. But where are the opportunities for investors to carve their niche in this highly competitive, lucrative industry? Film production and attendant financing is full of fun but also risk and therefore it is vital that counsel be involved not only for the purposes of lining up funding, but also to oversee development and production, to determine the content's proper distribution outlets, to ensure its intelligent marketing, and to engineer proper financial recoupment mechanisms including the agreements that spell out timing and repayment terms for the investors.

Given today's landscape, the most opportune entry into global film financing lies in US independent cinema and in international co-productions. Throughout the world, even here in the United States, there are film tax incentives and rebates that can underwrite as much as 30%, sometimes 40%, of the film's budget, significantly leveraging up the recoupment position of private investors.

Here again, counsel is needed to navigate through and reap the rewards of existing international co-production treaties and tax incentives and to provide guidance through the maze of Canadian and American federal,

regional, state and city tax rebates that are currently available.

● International Strategy

Europe has a well-established set of country-by-country incentives and co-production treaties that provide hundreds of millions of dollars each year to qualified projects. Similar subsidies exist in South Africa, New Zealand, Australia, and parts of the Caribbean.

In Asia, the vibrant film industries of South Korea, Hong Kong and India have been recently joined and, in fact, eclipsed by the meteoric growth of the Chinese film industry.

- China's film industry box office has grown from \$138 million in 2003 to \$1.56 billion in 2010, driving major US companies, like Relativity and Legendary Pictures, to sign joint venture deals with Chinese conglomerates
- Avatar grossed \$200 million in China
- Chinese film audiences are growing at a rate of 60% every year
- China adds three new multiplexes every day
- Within five years, China film grosses are expected to equal those of the US film market
- 'Foreign' films are limited to 20 per year, but co-productions circumvent those quotas¹

Co-production with China is one of the most exciting investment opportunities on the global stage. Today, major Chinese conglomerates like Fantawild, CTC, IDG, SMG, SAIF partners, Huayi Brothers Media Group and others are actively seeking relationships outside China to grow their production and distribution pipelines, and satisfy the rampant demand for content on the mainland. What is particularly interesting is the challenge of crafting content that plays not only to Chinese audiences, but to the worldwide market as well. That is the 'win-win'.

● US Strategy

The studios have a virtual lock on big-budget action and special-effects driven blockbusters and sequels. But there is plenty of room for the production of lower-budget specialty films or genre movies, even for the production of films on a 'micro budget'. Digital filmmaking and social media have revamped the playing field, driving production and distribution costs downward, and permitting small films to find their audiences and, in some cases, go head to head with the studio goliaths.

Classic cases of little films that scored huge ROIs include:

| Film | Year | Budget (US\$) | Box Office | ROI |
|--------------------------------|------|---------------|---------------|---------|
| <i>The Blair Witch Project</i> | 1999 | \$22,000 | \$248 million | +11,000 |
| <i>Paranormal Activity</i> | 2009 | \$15,000 | \$150 million | +10,000 |
| <i>Once</i> | 2007 | \$150,000 | \$20 million | +1,330 |
| <i>Napoleon Dynamite</i> | 2004 | \$400,000 | \$45 million | +1,120 |
| <i>Clerks</i> | 1999 | \$27,000 | \$248 million | +1,180 |
| <i>The Brothers McMullen</i> | 1995 | \$25,000 | \$32 million | +400 |
| <i>El Mariachi</i> | 1992 | \$25,000 | \$10 million | +285 |
| <i>Slacker</i> | 1991 | \$22,000 | \$1 million | +45 |

Changes in technology have facilitated indie productions, such as the move away from expensive 35mm cameras to the Red Digital cameras used to great effect in *The Social Network*, and now (as with *Newlyweds*) to such inexpensive (\$2400) digital cameras as the Canon Marc 70, which the Calgary, Canada film production company Anjou uses. Similarly, whereas films used to be edited on \$40,000 desk-sized console Avid machines, now a MacBook, equipped with Final Cut Pro, can achieve virtually the same effects. Thus, filmmaking is accessible to smaller players as never before.

The Screen Actors' Guild (SAG) has formally recognised the growth and importance of independent film by sanctioning micro-budget and modified micro-budget certification. This policy allows SAG union actors to be employed at much less than their normal rates without being penalised.

According to Tom Bower, a member of the board of SAG and founder of SAGindie: "When we started the policy around 2000, 75% of Film Festival films were non-union. Today, because of these new more flexible SAG guidelines, including the 'Ultra Low-Budget' contract for films under \$200,000, 90% of film festival films are now union films."

Independent films made in the United States can take many forms, varying in budget, locale, casting and so on. For films over \$1 million, it may be preferable to create an offering circular that is filed with the Securities and Exchange Commission (SEC) in each of the states where you intend to raise financing. For smaller (even micro-budget) films, a template for investment such as the following may be sufficient also is available; contact beatken@aitkenberlin.com.

In this domain also, counsel is indispensable to vet the various state and city tax rebate regulations and Federal programs, such as ss 181 and 199 of

the American Jobs Creation Act (HR 4520). Familiarity with these statutes, combined with thoroughgoing knowledge of SAG low-budget contracts, help minimize risk and maximize return on investment.

● **Distribution & Marketing**

Whether making specialty films in the US or international co-productions in Europe or in China, the distribution of this content is critical to seeing revenue from the finished film. According to KC Schulberg, a film producer:

In 1990, I had just graduated up through the production ranks, having worked on over 20 indie films, to cut my teeth producing Rebecca Miller's (wife of Daniel Day Lewis and daughter of Arthur Miller) first film, *Florence*, starring Oscar-winner Marcia Gay Harden. We finally completed the film, which was really pretty good. But then, I had no idea what to do with it. I wish I knew then what I know now. The film business is actually a vast vertically integrated industry. Just because you know how to physically make a film, does not mean you know



how to distribute, market or achieve revenue from it. After years running the marketing at movie and miniseries giant, Hallmark Entertainment, and at the international specialty film company, Pandora Cinema, I am now much more comfortable placing films in the international marketplace, tracking their release and maximizing their revenue potential.

We are presently traversing an interesting phase in the evolution of international film marketing and distribution. The web and internet provide all-important, and increasingly effective, tools for the promotion of films big and small. Netflix and smaller cable channels are now taking films that previously had no chance at distribution of any kind. There has been a genuine shift away from theatrical distribution as being the bulk of the source of revenues towards online media such as Netflix, iTunes and so on; (for example, Ed Burns' film *The Newlyweds*, was reportedly made for \$9000, and made hundreds of thousands of dollars on iTunes).

At the same time, traditional methods for launching a specialised film are still in place and have not changed that measurably over the last 15 years. Often, the best way to get a specialised film or international co-production 'on the map' is to gain a coveted spot (and hopefully prizes) at one of the world's premiere film festivals.

Yes, you can *and must* build grass roots internet support for the property even while the film is in preparation and production, but the fastest way to jump-start your promotion and position your film for

worldwide release is through festival exposure. Solid relationships with leading festivals – including Cannes, Berlin, Rotterdam, Sundance, Tribeca and Locarno, to name a few – are vital to getting the film the correct exposure for a successful worldwide launch. Beyond personal relationships with festivals and festival directors, anyone who wishes to position a film for international release must also be familiar with the scores of international sales companies, whose job it is to sell the film around the world. Mr Schulberg added:

Just this week, I placed a film my sister co-produced, *Exposed* by filmmaker Beth B, with an international sales company based in Paris, called Wide Distribution. The film had gained a precious slot in the Panorama section of the Official Berlin Film Festival, but needed an international sales company to capitalize on that festival exposure, maximize potential revenue and sell the film into the international marketplace. The film is now well on its way and should easily return its original investment and some profit to its investors.

Here again, proper counsel, born of years of experience is vital to selecting the right launch strategy and distribution partner for the finished film (or slate of films).

Note:

- 1 More information can be found at:
<http://factsanddetails.com/china.php?itemid=241catid=7subcatid=42>.



Bruce Aitken
Partner, Aitken Berlin LLP

Bruce Aitken is a partner in the above international commercial and homeland security (HLS) law firm. Since 2004, he has served on the Board of World Business Review and he co-anchored its HLS shows with former Gens. Alexander Haig and Norman Schwarzkopf from 2005-2009. His film company, Cinephile Productions, has helped produce such indie films as the award winning *After Fall*, *Winter*, the current online comedy, *Life Coach*, and the recently wrapped *Sebastian* with Oscar Nominees Eric Roberts, Cathy Moriarity and Robert Vaughn, and now K.C. Schulberg's film, *A Dream Last Night*.
Cell: 1-202-468-0968.

Key Changes to Indirect Investment in Vietnam by Foreign Investors

Paving the way for development of the Vietnamese securities market in the lead up to 2020, the Government and the Ministry of Finance recently issued several legal documents implementing changes to the Securities Law. This article highlights some of the key points in Circular No 213/2012/TT-BTC of which foreign investors should be aware.



The legal framework for indirect investment by foreigners in Vietnam still needs to be updated and improved...

Vietnam and the differences that arise when making an indirect investment in non-public companies and public companies. For the purposes of this article, 'indirect investment' means a form of investment by way of purchase of shares, share certificates, bonds, other valuable papers or a securities investment fund and by way of intermediary financial institutions, whereby foreigners do not participate directly in the management of the investment activity', and where 'direct investment' by foreigners in Vietnam is excluded.

● Governing Law

Different specific legal documents apply differently to indirect investment by foreigners in public and non-public companies. In general, if the investment is made in non-public companies (including both joint stock and limited liability companies), it is governed by Decision No 88/2009/QD-TTg dated 18 June 2009, of the Prime Minister ('Decision 88'), who issues the regulations on capital contribution, share purchase by foreigners in Vietnamese companies. Investment made in public companies (including listed and non-listed joint stock companies and excluding all limited

In an attempt to implement a strategy for the development of Vietnam's securities market for 2011-20, attached to Decision No252/QD-TTg, 1 March 2012, of the Prime Minister, numerous legal documents implementing the Securities Law 2006 and its 2010 amendment have been introduced by the Government and the Ministry of Finance (MoF). They include the most recently introduced Circular No 213/2012/TT-BTC, 6 December 2012, of MoF ('Circular 213'), which guides the procedures foreign investors should adhere to in the Vietnamese securities market. Circular 213 became effective on 15 February 2013 and replaces Decision No 121/2008/QD-BTC, dated 24 December 2008, of MoF ('Decision 121') on the same topic.

This article addresses some of the key highlights in Circular 213 that foreign investors should be aware, particularly in relation to their indirect investment in

liability companies) are currently governed by Decision 121 and Circular 213.

● **Investment Vehicle**

In general, foreigners are free to select the most appropriate vehicle for their indirect investment in Vietnam. However, with respect to investment by foreigners in non-public companies, it seems that the investment must be made directly by foreigners themselves, in accordance with Decision 88, which is silent on indirect investment by foreigners through fund managers, securities companies or transaction representatives appointed by them in Vietnam. With respect to investment in public companies, though Decision 121 is unclear on this point, it is clear under Circular 213 that foreigners can invest either directly by themselves or indirectly through fund managers, securities companies or transaction representatives appointed by them in Vietnam.

● **Investment Capital Account**

In general, an investment capital account (CCA) is required for any new foreign investor when he or she first enters Vietnam. In principle, the CCA opening must be in compliance with the Ordinance on Foreign Exchange Control, adopted by the Standing Committee of the National Assembly, on 13 December 2005 (the 'FX Ordinance'), and Decree No160/2006/ND-CP dated 28 December 2006 ('Decree 160'), which guides the implementation of the FX Ordinance.

However, in practice, the opening of the CCA is made in compliance with Circular No 03/2004/TT-NHNN, dated 25 May 2004, of the State Bank of Vietnam (SBV) ('Circular 03'), which provides guidance

on foreign exchange control in relation to the share purchase and capital contribution by foreigners in Vietnamese companies. As far as the author understands, Circular 03 originally provided the legal basis for foreigners opening the CCA for their indirect investment in non-public companies in Vietnam, while Decision No1550/2004/QD-NHNN dated 6 December 2004, of the Governor of the SBV ('Decision 1550'), on foreign exchange control in relation to the sale and purchase by foreigners of securities on stock transaction centres (now stock exchanges), provided the legal basis for foreigners opening the CCA for their indirect investment in public companies and other securities on the stock exchanges. However, because the validity of Decision 1550 was repealed by the SBV, on 20 October 2012, under Circular No25/2012/TT-NHNN, dated 6 September 2012, of the SBV ('Circular 25/2012'), on the abolishment of a number of legal documents recently issued by the Governor of the SBV, the author assumes that Circular 03 will continue serving as the legal basis for reference by foreigners, in practice, when opening their CCA for indirect investment, regardless of whether their investment is made in public or non-public companies. Circular 213 seems to reflect this change.

● **Investment Capital Account Registration**

Generally, before 14 October 2011, any CCA immediately after its opening must be registered by foreigners with the SBV, in accordance with relevant legal documents, including Circular 03 and Decision 1550. However, after 14 October 2011, the effective date of Circular No 25/2011/TT-NHNN, dated 31 August 2011, of the SBV ('Circular 25/2011'), in which the SBV simplified some administrative procedures within

the state management competence, foreigners were no longer required to register the CCA with the SBV. Circular 213 is silent on requiring foreigners to register the CCA with the SBV.

● **Securities Trading Code**

With respect to investment in non-public companies, Decision 88 is silent on requiring foreigners to apply for a securities trading code (STC) from the Vietnam Securities Depository (VSD). Because of that, the author assumes that an STC is no longer required by law if foreigners invest in buying shares or capital contributions in non-public companies. With respect to investment in public companies, although Decision 121 is unclear on this point, it is clear under Circular 213 that foreigners are required to apply for an STC before making their investment directly by themselves in public companies. It is worthwhile to note that an STC is not required if foreigners make their investment indirectly through fund managers, and that when compared with Decision 121, Circular 213 provides further support to foreigners in relation to their application for an STC. Instead of insisting on valid legalization of all relevant legal documents at the start of the application for an STC as required under Decision 121, which was quite tedious for foreigners when investing in Vietnam, Circular 213 provides that foreigners may submit certified copies of their legal documents for an STC at the start of the application or arrange to submit the required legalizations to the VSD within nine months of the application.

● **Securities Trading and Depository Accounts**

With respect to investment in non-public companies, there is no requirement for either a securities trading account (STA) or a securities

depository account (SDA) under Decision 88. Because of that, the author assumes that the law requires neither account if foreigners invest in buying shares or capital contributions in non-public companies. With respect to investments in public companies, it seems that both Decision 121 and Circular 213 require an STA and an SDA when foreigners invest in public companies.

● Reporting

Generally, foreign investors are required to report to the business registrars or licensing authorities where there is any change of their major shareholder status (i.e. where there is a change of over 5% of the charter capital) in joint stock companies, in accordance with the Law on Enterprises, regardless of whether they are public or non-public companies. With respect to investments in non-public companies, there is no requirement of such reporting by foreign investors to any other authorities under Decision 88. With respect to investments in public companies, it is clear that under both Decision 121 and Circular 213 foreign investors and other relevant parties (including fund managers, securities companies, custodian banks, securities depository centre, stock exchanges) are required to report on their investment activities in Vietnam to the State Securities Commission (SSC). Reports must be made in the appropriate form in accordance with Decision 121 and Circular 213.

The introduction of Circular 213 has provided some much needed clarifications for indirect investment by foreigners in Vietnam. However, there are still uncertainties in the legal framework that need to be considered:

Foreign Investor Definition

The definition of what is meant by 'foreign investor' should be considered because legal documents define the term in various ways. This creates, in practice, a lot of confusion not only to foreign investors but also relevant authorities when dealing with issues arising out of indirect investment by foreigners, particularly where there is change in the nature of the company, i.e. from non-public into a public company and vice versa. According to Decision 88 (Art 2.1.b), 'foreign investor' includes an organization established and operating in Vietnam, *having over 49% foreign capital contribution*; however, according to Circular 213 (Art 2.6.c), 'foreign investor' includes an organization established and operating in accordance with the laws of Vietnam, *having 100% foreign capital contribution*. In addition, under Decree No102/2010/ND-CP (Decree 102), dated 1 October 2010, of the Government, which guides the implementation of the Law on Enterprises, pursuant to Arts 11.3 and 11.4, an enterprise established in Vietnam with foreign ownership of *49% or lower* of its charter capital will be subject to business and investment conditions similar to those of Vietnamese investors, but if foreign ownership *exceeds 49%* of its charter capital, it will be subject to business and investment conditions to those of foreign investors.

Foreign Exchange Control

Next, foreign exchange control should be considered because CCAs of different nature provided in legal documents are still in existence. This creates, in practice, a lot of confusion not only to foreign investors but also relevant authorities when dealing with foreign exchange issues arising out of foreign investments, particularly in cases where a foreigner invests in different types of companies in Vietnam (including non-public and public companies, with or without foreign invested capital, the law of which was originally established under the former foreign investment laws, before 1 July 2006 and the Law on Investment, from 1 July 2006). In principle, all foreign exchange issues must be in compliance with the FX Ordinance and Decree 160. However, in the author's view, the current legal framework is not sufficient and clear enough to deal with the historical differences in nature of the CCAs as provided by Circular 03, Decision 1550 and Circular No 04/2001/TT-NHNN, dated 18 May 2001, of the SBV ('Circular 04'), which guides the foreign exchange control in relation to foreign invested companies and foreign parties to business cooperation contracts.

● Conclusion

Although some clarifications are provided by the amendments as highlighted above, the legal framework for indirect investment by foreigners in Vietnam still needs to be updated and improved in its consistency to provide better support to foreign investors.



Luu Tien Ngoc
Partner, Vision & Associates

Ngoc is a partner of Vision & Associates with 18 years of legal advisory and business consulting experience. His particular strengths are in the fields of foreign direct investment, corporate/M&As, banking and finance, securities/capital market, private equity, and technology, media and telecommunications. Ngoc is also active in several development projects carried out in Vietnam that are funded and supervised by donors.

Discover Some of Our New Officers, Council Members and Members



Tunmika Sarakoses

Attorney-at-Law, Navinlaw

What was your motivation to become a lawyer?

My motivation to become a lawyer was the enjoyment of dealing with people and helping to resolve their problems. The legal profession is one that requires very logical thought processes to fully understand and interpret complex problems in order to achieve the best possible outcome for a client. I believe that lawyers play a very important role in all aspects of people's personal and business lives by encouraging prosperity and helping to find an acceptable resolution for any problems that may arise.

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

I had a meeting with one of my Japanese clients and throughout the meeting he tried to speak in Thai while I answered in English. It was fun but a bit difficult understanding each other so we eventually decided just to speak English.

What are your interests and/or hobbies?

I prefer doing something relaxing like drawing and painting. I have found that this is the best way for me to concentrate and relax.

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

I love dogs very much. If I was not lawyer today, then I might have become a veterinarian.

Do you have any special messages for IPBA members?

I look forward to participating in the Seoul 2013 IPBA Conference. It will certainly provide a great opportunity for me to learn about various legal aspects and develop friendships with other members.



Richard Hsu

Partner
Liu & Partners Attorneys-at-Law

What was your motivation to become a lawyer?

I have been motivated to play a key role as the professional advising cross-border transactions from my undergraduate days. That was also the reason I have been looking for every opportunity to obtain international exposure and experiences.

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

In the year of 2012, I worked with a team to accomplish two mergers and one joint venture project with the aggregate amount of US\$160 million. I also worked for a firm in Japan as visiting lawyer in 2010.

What are your interest and/or hobbies?

I am interested in various investments and I love cooking, travel and playing baseball.

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

I am taking professional cooking classes and dream about opening a restaurant of my own upon retirement.



Laura Feldman

Registered Foreign Lawyer
(Barrister – England and Wales)
King and Wood Mallesons

What was your motivation to become a lawyer?

A thirst for knowledge of law; a subject which appeared to impinge upon every area of one's life.



Shin Jae Kim

IPBA Leadership Position: At-Large
Council Member of Inter-Pacific
Bar Association

What was your motivation to become a lawyer?

I left South Korea with my family in 1976 when I was a nine-year-old. According to my parents, I had no problems adjusting to a new culture with a different language and multiple races. While growing up I learned to cherish the fact that I was living in a country like Brazil. But, at the same time, I wanted to keep my Korean roots alive and pursue a career that might contribute to the strengthening of the relationship between both countries. I believe that a lawyer could play such a role. As lawyers, we can affect society. I have more than 22 years in the profession: I started my practice assisting Korean immigrants with small businesses in Brazil, and today I am very pleased to be an important connector for Korean companies investing in Brazil and also advisor for the Brazilian government in the matters related to Korea.

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

There are many memorable experiences in my professional life. I believe that we have to celebrate every solution, settlement and successful closing. Our success is translated into a reputation built over the years and the collection of positive experiences or our way of facing the difficult times. For lawyers, the most rewarding experience

What are your interests and/or hobbies?

Academic writing, trekking and country walks, long-distance running, reading historical fiction, cycling, swimming, alumni events, and coaching the OU and KCL Moot Teams.

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

I used to play semi-professional football for Watford Ladies Football Club, and won the Cadbury Schweppes Young Graphic Designer of the Year Award.

should be when clients return to them with new cases and when you feel that your advice matters, in addition to being recommended by clients to other parties. Recently, it has been especially rewarding for me to assist the installation of an automotive plant and witness the creation of thousands of jobs after four years of intensive work on drafting incentive policies, and the negotiation of incentive packages with a local government.

What are your interests and/or hobbies?

Currently, my focus is my nine-year-old daughter. All my free time has been devoted to her and my husband. I hope this year I can resume my golf lessons.

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

This year, we are celebrating the 50th anniversary of Korean immigration in Brazil, and one of Brazil's Samba Schools has honoured the occasion. Although I have been in Brazil for almost 40 years, I had never participated in a Carnival parade. Thus, taking this special opportunity I decided to be part of this celebration with my husband – a Korean-American who was also an immigrant in Brazil. Together with 4,200 school members, we walked through the "Sambodromo" wearing beautiful costumes especially made for the occasion. This was certainly a surprise even for me.

Do you have any special messages for IPBA members?

In a globalised economy, it is essential that a good lawyer can count on a reliable network of lawyers in many jurisdictions. I have been a member of IPBA for more than 10 years. IPBA is an organization lead by a dynamic leadership that gathers experienced lawyers from many jurisdictions. This is an organization where you meet new colleagues, make friends and do business with people that you know and you meet.

Members' Notes

Charles Goldsmith

Our boutique, United States immigration law firm, based in New York City, is pleased to announce Brian A. Weiss and Matthew D. Goldsmith have become partners. Brian was recently honored as a 2011 and 2012 New York Metro Super Lawyer, Rising Star List. Matthew's sister, who is also a partner in the firm, Tara J. Goldsmith, has been lecturing frequently on US immigration law at Columbia, NYU, Queens College, Pace and Fordham Universities.

Our senior partner, Charles M. Goldsmith was selected as a 2012 New York Metro Super Lawyer and our managing partner, Herbert A. Weiss, continues to spend countless hours as the President and Secretary of two prominent charitable organisations.

Mitsuru (Claire) Chino

On April 1, 2013, IPBA Membership Committee Vice-Chair Mitsuru (Claire) Chino will become Executive Officer of Itochu Corporation, Japan. She is the first woman, as well as the youngest person, to be appointed to this position in a major trading firm. At the same time, she will be promoted to General Manager of the Legal Division. Having received her law degree at Cornell Law School in the United States, she worked at an international law firm before returning to Japan to join Itochu in 2000. But don't let her gentle demeanor fool you: she is known as a 'Tough Cookie'.

Dimple Chainani

LawQuest took on three partners at its Mumbai office on January 2013, adding expertise in Intellectual Property (IP), Litigation, Corporate and Property Law. Pooja Dutta heads the IP team while Vijay Yadav heads the Corporate team. They both have LL.M degrees; one from the George Washington University, USA, and the other from the Franklin Pierce Law Center, USA, respectively. Vinu Pandey has an LL.M degree from the Mumbai University and heads the Litigation team. He is presently enrolled in the Mumbai University Ph.D. Program focusing on 'Trade Related Aspects of Intellectual Property'.

Krisshan Singhania

The article on Freedom of Speech and Expression in this issue, contributed by Krishan Singhania, examines the scope and extent of this cherished fundamental right in India. The right to freedom of speech and expression is enshrined in Article 19 (1) (a) of the Indian Constitution, which comprises Part III. This Part III, which ranges between Articles 12 and 32, enshrine the fundamental rights of the Indian Constitution, which is its very soul and is inalienable.

Krishan Singhania heads the Mumbai office of Singhania & Co., a frontline law firm of advocates and solicitors, which specializes in transactional advice to foreign conglomerates and infrastructural projects. He has over 25 years experience in this area.

Stephan Wilske

Stephan Wilske has published 'Collective Action in Investment Arbitration to Enforce Small Claims – Justice to the Deprived or Death Knell for the System of Investor-State Arbitration?' in *Contemporary Asia Arbitration Journal*, Vol. 5 (November 2012), No. 2, pp. 165-203. It is also available at <http://ssrn.com/abstract=2192005>.

Takashi Tokushige

Dear Members, my name is Takashi Tokushige and I am a lawyer at the Sukegawa Law Office in Tokyo, Japan. I write this note to reach out to the IPBA community. I am interested in learning more about aspects of law as it pertains to Intellectual Property. I would particularly enjoy speaking with members about any prominent World IP news that has recently developed. Please do not hesitate to contact me at tokutaka0@gmail.com. Thank you!

Mark Shklov

The Hawaii State Bar Association (HSBA) will be led this year by Craig P. Wagnild, who will serve as president for the organisation throughout 2013. Wagnild is a real estate, corporate, and business attorney at Bays Lung Rose & Holma, a construction and real estate firm he has been with for the past 15 years.

Last year, Wagnild served as president-elect for the HSBA. He previously was treasurer for the HSBA for two consecutive years, simultaneously serving on various standing and ad hoc committees for the Bar. Wagnild is additionally a former treasurer and chairperson for the International Law Section and Business Law Section. During his time as HSBA treasurer, Wagnild played a key role in the formation of the HSBA's Leadership Institute program, which provides leadership development to young attorneys interested in expanding their talents and services to the Bar and the community at large.

During his tenure as president, one of Wagnild's main objectives is to reach out and better inform the Hawaii community about the important role that attorneys play in protecting the rights and interests of all people, preserving the freedoms we enjoy, ensuring access to justice for all members of our society, providing a fair and level playing field for our citizens to resolve their disputes, and promoting the rule of law.

'I want to change the way our community views our profession, and that is a process that will not be completed in one year,' Wagnild said. 'Lawyers are our fathers and mothers, sons and daughters, aunts and uncles, friends and neighbors. They enter this profession with the values, enthusiasm and dedication that they would bring to any occupation they pursued, but they chose to work in the field of law to better our Hawaii and to help others.'

Wagnild said that lawyers often defend the defenseless through their work.

'Lawyers help those without a voice to have one,' he said. 'They prosecute and administer the laws that our society relies upon. Lawyers care about people and how the law regulates, protects and helps them. Lawyers work hard to help others, and that is at the heart of what we do. We help others solve problems. We do it even when a case or client is unpopular. We do it even when doing so makes us unpopular.'

Wagnild said a significant way Hawaii attorneys give back to the community is through pro bono work. 'Very few are aware that annually Hawaii attorneys collectively donate around 200,000 hours of unpaid time to help others, and that is just the reported pro bono hours – the equivalent of 100 Hawaii attorneys working full-time all year doing nothing but free legal work for those who cannot afford a lawyer.'



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.

- | | |
|--|---------|
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| • Three-Year Term Membership | ¥63,000 |
| • Corporate Counsel | ¥11,800 |
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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

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Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
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See overleaf for membership
registration form





IPBA SECRETARIAT

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