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IPBA NEWS AND LEGAL UPDATE



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IPBA JOURNAL

The Official Publication of the Inter-Pacific Bar Association

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The President's Message



Dear Colleagues,

In this issue, my friend Mark Shklov has written an article entitled, 'A Good Name', which explains how the name Inter-Pacific Bar Association came about. He writes:

"The question was raised whether the new organization would be a 'regional' or 'business' related organization. 'Regional' was defined as 'representative of the region' and 'business' was defined as 'those who do business in the region'. It was felt that the new organization would be business-related and, therefore, would not be exclusive to the region."

It is clear that the reasoning and rationale was the organization should be 'business-related' and would not be 'exclusive to the region'.

It is therefore time to think beyond the Pacific Region. The region has become so important and significant that other regions beyond the realm of the Pacific have started to take a deep and keen interest, due to economic development and the great potential this region has to offer to the world at large to promote further growth.

I have therefore embarked upon a mission to promote the IPBA in geographical areas where it is not very strong – for instance, in Europe, the UK, the Middle East, the east coast of North America, Latin America and Africa. I want to establish relationships with bar associations and lawyers organizations to make their membership aware of the IPBA and its activities. This can be done by having jointly sponsored events in different jurisdictions.

I am aware that there are some in the IPBA who are of the view that having interaction with like-minded organizations would dilute the importance of the IPBA. I do not subscribe to this view. I am also keen to strengthen our ties with APEC.

In this age and with the fast changing scenario of monumental developments taking place in global economic relations where there is so much interdependence, we have to look beyond the

Pacific – we have to look at the world as a whole.

Cross-border transactions are on the increase – with attendant problems like regulatory challenges, employment issues, taxation and financing structures, and what works and what does not work in Free Trade Agreements. Resolution of trade secret disputes is another area of concern particularly in Asian countries, as well as bankruptcy and insolvency procedures.

These are some of the issues that we as lawyers have to deal with. China, India and Vietnam are witnessing big investments from non-Pacific Region countries and are in turn taking over large conglomerates all over the world. We, as the IPBA, also have to adopt a global approach as this would be our inherent strength. We cannot remain in our shell.

Let the winds of change blow; I assure you that we cannot be swept off our feet which are planted firmly on ground. We must think beyond the Pacific while retaining our own identity. As Mark Shklov puts it beautifully: "A good name – a good reputation. Our greatest assets." Let us continue to build on this.

Seoul Annual Meeting and Conference

Seoul is the 'soul' of Asia. As you are aware, the next IPBA Annual Meeting and Conference will be held in Seoul, Korea from 17 to 21 April 2013.

The Host Committee has been promoting the Conference in a big way. It has chosen one of the best locations in Seoul for the Conference. An excellent social programme is also being organized for the delegates and accompanying persons. The Committee Chairs are working on the programme for their respective Committees.

Due to tireless efforts of the Host Committee led by the President-Elect Dr Young-Moo Shin, the Seoul Conference will provide an excellent opportunity to promote your work and add to your knowledge of contemporaneous legal developments from around the world by exchange of ideas with hundreds of delegates from different jurisdictions whilst enjoying the social programme, and the sights and scenes of Seoul.

I hope to see all of you in Seoul.

Auckland Mid-Year Council Meeting

The Council is the IPBA's think tank. Important policy decisions are made covering future and reviewing past activities, the financial position, the

membership and what the IPBA has to offer to its members. I look forward to seeing those of you who are Council members and also those who are entitled to attend the Mid-Year Council Meeting from 2 to 5 November in Auckland, New Zealand where we will enjoy the beauty, the weather and serenity of the city.

We are planning to have a Regional Conference in Paris mid-January 2013. Mr Jean-Claude

Beaujour is the dynamic coordinator. More details will follow.

In the meantime, my best wishes to you, your families and your office staff for great, healthy and prosperous times ahead!

Lalit Bhasin
President

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 5–8, 2014
IPBA Mid-Year Council Meeting		
2012 Mid-Year Council Meeting and Seminar	Auckland, New Zealand	November 2–5, 2012
Regional Events		
“Latest Trend in Project Financing and Procurement of Construction Projects”	Hong Kong	October 30, 2012
JCLF & IPBA Joint Conference: “Competition Laws in the Asia and Pacific Region: The Strengthening of Competition Law Enforcement in the Asia Pacific Region and Responses by Corporations in the Region – Trends and Development with a Particular Focus on Merger Regulations and Cartel Enforcement”	Tokyo, Japan	November 9, 2012
Supporting Events		
Marcus Evans’ Corporate Legal Risk Management	Kuala Lumpur, Malaysia	September 5–6, 2012
Legal Week’s Corporate Counsel Forum	Hong Kong	September 18, 2012
Beacon’s Corruption & Compliance South & SE Asia Summit	Singapore	September 18–20, 2012
innoXcell’s Asia Counsel-to-Counsel Exchange	Hong Kong	September 19–20, 2012
International Malaysia Law Conference	Kuala Lumpur, Malaysia	September 26–28, 2012
ABA Section of International Law’s Fall Meeting 2012	Miami Beach, Florida, USA	October 16–20, 2012
HKIAC’s ADR in Asia Conference	Hong Kong	October 17, 2012
LegalEra’s 2nd Legal Enclave 2012	Singapore	November 19–20, 2012
Beacon’s Anti-Corruption China Summit	Beijing, China	December 4–6, 2012

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

The Secretary-General's Message



Dear IPBA Members,

TS Eliot, the English poet, once wrote: "The Naming of Cats is a difficult matter..." I am sure that the naming of our organization over 20 years ago by a group of attorneys was certainly more difficult

than naming a cat.

Our organization is called the 'Inter-Pacific Bar Association'. The name may conjure up images of the Pacific Ocean and a ring of countries bordering the Pacific Ocean, with its attorneys united in an association to better the legal needs of fellow attorneys in the Pacific Rim region. But our organization is more than the Pacific Rim. Our website states: "The Inter-Pacific Bar Association (IPBA) is an international association of business and commercial lawyers who live in, or otherwise have a strong interest in, the Asia-Pacific Region."

On a personal note, I was born and raised in Japan, completed college in Hawaii and received my law degree in California. I have literally crossed the Pacific Ocean and am currently practising law in Hawaii where I advise international clients on Inter-Pacific transactions. Attorneys like me and others from the Pacific Rim countries certainly fit the bill for attorneys who live in the region. But the IPBA is more than just attorneys from such countries.

Based on our latest membership information, 11% of our membership is from European countries – far removed from the Pacific. Germany, France, Switzerland and the United Kingdom have always been well-represented in the IPBA. Our European members certainly do not live in the region. They would fall in the category of attorneys that 'have a strong interest in the Asia-Pacific Region'.

When our founding members organized the IPBA, they were well aware of the tremendous growth in the economies of East Asia. They also saw the tremendous possibilities in the developing economies of China, India and other Asian countries. Our founding members felt that an Asian-oriented bar organization should, however, not restrict its focus and membership on Asian attorneys, and should unite attorneys

with a common interest in the Asia-Pacific into one organization. To be a true Inter-Pacific organization, the membership should not be restricted to attorneys living and practising in Asia or the Pacific Rim. The key should not be where the attorneys were residing but where the interests of the attorneys and their clients were.

Mark Shklov, one of the founding members of the IPBA, who was involved in the deliberations leading up to the naming of the organization, authored an article in this issue of the IPBA Journal that sets forth the difficulties the Steering Committee faced in naming the organization (see 'A Good Name' by Mark Shklov at page 18).

I understand the Steering Committee did not consider the names 'Quaxo' or 'Bombalurina' as Eliot did. After much deliberation, the organizers settled upon Inter-Pacific Bar Association as the name of our organization. The final name of our organization certainly was and is an apt one.

More than 20 years since our formation, the IPBA continues with its mission of uniting lawyers with a strong interest in the Asia-Pacific Region without excluding attorneys who do not reside in the region so long as they have an interest in the region. A large number of our members are from Asia. But we have members from all over the world. In addition to our European members, we have 3% of our membership from Latin and South American countries. We have six members from Africa and the Middle East, and the United Arab Emirates is represented by nine members. We have also had members from the Caribbean islands although currently our only Caribbean member is an attorney from Jamaica.

Because of the strong interest in the region from attorneys in these far-flung areas, the IPBA has held Mid-Year Council Meetings (which do not have Constitutional restrictions as to the venue) in Paris (2002), London (2006) and Stuttgart (2010). Switzerland is proposing to host another meeting soon. The IPBA has held a Mid-Year Meeting in Santiago, Chile in 2004. 'Road shows' with a series of seminars have been held in Europe and South America in the past. Our President, Mr Lalit Bhasin, is planning a regional conference in Europe in 2013. A very successful IPBA Women's Dinner was held in Paris on 13 June at the French Senate located in the beautiful Jardin du Luxembourg with a standing room only crowd of 50 women corporate counsel, general counsels and lawyers who listened

to a talk by Ms Suet-Fern Lee, our Past President.

One area where we wish to increase our membership is the mid-Pacific region. We have in excess of 20 members from Hawaii and Guam. But membership from the Pacific Island nations has been few and far between. The IPBA wishes to expand its reach into these Pacific Island nations to be able to represent the Pacific as a true Inter-Pacific organization. Hopefully, our Mid-Year Meeting and seminar in Auckland, New Zealand in November will help in spurring interest from attorneys in the Pacific Islands.

In the meantime, we will continue to extend our warm welcome to our friends from all across

the globe that have an interest in the Asia-Pacific Region as we continue to strive to remain the premier Asia-Pacific law organization in the world. You may wish to remind a friend or colleague from whichever part of the world they reside or work in of what they are missing and urge them to become a member of the IPBA. We wish to continue to make our Inter-Pacific relationship a global one unimpeded by artificial borders.

Aloha,

Alan S Fujimoto
Secretary-General

Publications Committee Guidelines for Publication of Articles in the IPBA Journal

Please note that the IPBA Publication Committee has moved away from a theme-based publication. Hence, for the next issues, we are pleased to accept articles on interesting legal topics and new legal developments that are happening in your jurisdiction. Please send your article by *16 November, 2012* to both **Caroline Berube** at cberube@hymasialaw.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 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.



Dear IPBA Member:

The Inter-Pacific Bar Association (IPBA) will again be holding a Silent Auction fundraising event to benefit a worthy cause at the IPBA's Annual Meeting and Conference to be held in Seoul, Korea from 17-20 April 2013.

Funds are raised at the Silent Auction through competitive bidding for items that are donated by IPBA Members, clients, and friends. The IPBA held a Silent Auction fundraiser in April 2011 at the IPBA's Annual Meeting and Conference in Kyoto/Osaka, Japan. Many IPBA Members donated items that were auctioned at the Kyoto Silent Auction and took part in the bidding that resulted in substantial funds which were contributed to the Japanese Red Cross to assist earthquake and tsunami victims following the devastating March 2011 tragedy in Northern Japan.

The funds raised by the Silent Auction at the Seoul Annual Meeting will be used, first, to provide scholarships for North Korean refugee students attending law school in South Korea, to cover their school and living expenses, and second, to provide scholarships for other North Korean refugee students attending college and university in South Korea.

According to information obtained from South Korean government agencies, every year approximately 2000 people leave North Korea and become refugees in the South, and at present more than 1000 North Korean refugee students are enrolled in college or universities in South Korea. These students have left their families and homes in order to seek a better life. Most of these young people never had the opportunity to study in colleges or universities. However, many have had to give up their studies due to financial hardship.

The Silent Auction Committee hopes to raise funds to help these young people in their educational endeavours. Perhaps this assistance will make a difference to these students, Korea and its future, and our global society.

Please donate an auction item to the IPBA Silent Auction. By donating an item, you'll be making a contribution that will help the IPBA provide support to this worthy cause. Additionally, you'll benefit from exposure of your firm or company's name in materials provided to those who attend the IPBA Annual Conference. Donors will be well publicized and your donation will be on display during the event. Donations will be accepted until 1 April 2013. Please contact the IPBA Secretariat at ipba@ipba.org to receive a donation form or for any questions regarding the Silent Auction.

The Judicial Interpretation on Private Antitrust Litigation in China



China has released the long-awaited judicial interpretation on private antitrust litigation. This article highlights the provisions of the new judicial interpretation and its impact on the development of private antitrust litigation in China.

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On 8 May 2012, the PRC Supreme People's Court (SPC) released the long-awaited Provisions on Certain Issues Concerning the Application of Law in Hearing Cases Involving Civil Disputes Arising out of Monopolistic Behaviours (the 'Judicial Interpretation'), which came into force on 1 June 2012. As the first interpretation on private antitrust litigation, it provides useful guidance on the following important issues, including: without limitations qualification of the plaintiff; the jurisdiction; the burden of proof; the use of experts; civil liabilities; and the statute of limitations. This article examines the Judicial Interpretation and its impact on the development of private antitrust litigation in China.

Background

When China's Anti-monopoly Law (AML) came into force on 1 August 2008, the SPC began its work to address the various legal issues arising from private antitrust litigation. After conducting internal in-depth research and holding various seminars, on 25 April 2011, the SPC finally published a consultation draft of the Judicial Interpretation (the 'Draft Judicial Interpretation'). After a period of extensive consultation, on 3 May 2012, the SPC issued the Judicial Interpretation, which contains 16 provisions covering the main subjects of private antitrust litigation in China.

The Judicial Interpretation

Qualification of the Plaintiff

According to Art 1 of the Judicial Interpretation, any natural person, legal person or other organization which suffers harm as a result of any

monopolistic conduct, or is involved in any dispute over the violation of the AML by any contract or articles of association of any industry association, may initiate civil litigation in a court. This implies that antitrust litigation could be initiated based on a contractual dispute or tort damage where there is no such contractual relation between the parties. According to the Judicial Interpretation and current practice, eligible plaintiffs may include undertakings and consumers who have transacted with the alleged infringer of the AML, as well as the competitors, potential competitors or indirect consumers who have no transactional relationship with the enterprise.

Jurisdiction

Jurisdiction by Forum Level

Pursuant to Art 3 of the Judicial Interpretation, the following courts will be acting as the forum at first instance of the private antitrust litigation:

- Intermediate People's Courts in 22 provincial capital cities: Harbin, Changchun, Shenyang, Shijiazhuang, Lanzhou, Xining, Xi'an, Zhengzhou, Jinan, Taiyuan, Hefei, Wuhan, Changsha, Nanjing, Chengdu, Guiyang, Kunming, Hangzhou, Nanchang, Guangzhou, Fuzhou, Haikou;
- Intermediate People's Courts in five autonomous regions' capital cities: Urumqi, Hohhot, Yinchuan, Nanning, Lhasa;
- Intermediate People's Courts in four municipalities: Beijing, Shanghai, Tianjin, Chongqing;
- Intermediate People's Courts in five cities under separate state planning: Dalian, Qingdao, Ningbo, Xiamen, Shenzhen; and
- other people's courts designated by the SPC.

Territorial Jurisdiction

Article 4 of the Judicial Interpretation stipulates that the territorial jurisdiction over tort claims of private antitrust litigation must be determined pursuant to the jurisdiction provisions of Art 29 of the PRC Civil Procedure Law and relevant judicial interpretations regarding torts. The territorial jurisdiction over contract claims of private antitrust litigation must be determined in accordance with the jurisdiction provisions of Art 24 of the PRC Civil Procedure Law and relevant judicial interpretations regarding contract disputes.

Jurisdiction Referral

According to Art 5 of the Judicial Interpretation, during the hearing of the civil disputes, where the original cause of action does not relate to the AML and if the court determines the defence in

connection with or the counterclaim relies upon the AML, the court which does not have jurisdiction for private antitrust litigation must refer the case to a competent court with that type of jurisdiction.

Burden of Proof

In the last three years, most of the plaintiffs have had a rather low success rate in the private antitrust litigation due to the difficulty in obtaining sufficient evidence to prove monopolistic behaviour or abuse of market dominant position of the defendant. In order to address this kind of difficulties, the Judicial Interpretation sets out the following provisions:

Horizontal Monopoly Agreement

Article 8 of the Judicial Interpretation states that if an alleged monopolistic act involves a monopolistic agreement as specified in any of items (1) to (5) of the first paragraph of Art 13¹ of the AML, the defendant must bear the burden of proving that the agreement in question does not have the effect of eliminating or restricting competition. Thus, this provision has the effect of presuming the illegality of the typical horizontal monopoly agreements, namely the core cartel in matured antitrust jurisdictions, such as the EU and the US.

Abuse of Market Dominant Position

Under the Judicial Interpretation, with regard to



abuse of market dominant position, the plaintiff must bear the burden of proof in respect of: (i) the defendant holding a market dominant position in the defined relevant market; and (ii) the defendant has abused the aforesaid market dominance. If the defendant argues that its activities are legitimate, it bears the burden of proving such legitimacy.

Furthermore, according to the Judicial Interpretation, the plaintiff is not required to establish market dominance of the defendant under the following circumstances: (i) Art 9 of the Judicial Interpretation provides, where the alleged monopolistic conduct is an abuse of dominant market position by a public utility or any other operator that has a dominant position pursuant to the law, the people's court may, in light of the market structure and the specific circumstances of competition, determine that the defendant has a dominant position in the relevant market, unless such a determination is overturned by contrary evidence; and (ii) according to Art 10 of the Judicial Interpretation, the plaintiff may submit the information released by the defendant as proof of its dominant positions in the relevant market. The people's court may also determine the defendant's dominant market position if the information can demonstrate the defendant's dominant position in the relevant market, unless the defendant has sufficient evidence to prove otherwise.



The Use of Experts

Under Art 12 of the Judicial Interpretation, a party may apply to the people's court for having one or two persons with relevant specialized knowledge to provide an explanation of a specialized issue in the case. Moreover, Art 12 of the Judicial Interpretation sets out that a party may apply to the people's court to appoint a professional firm or a professional, to conduct a market survey or produce an economic analysis report on a specialized issue in the case. Upon the consent of the people's court, the parties may determine the professional firm or professional through consultations, otherwise the people's court will make the designation.

Compared with the Draft Judicial Interpretation, the Judicial Interpretation expands the scope of expert witnesses without limiting the experts on the backgrounds of the economy and industry. By expanding this, the SPC has intentionally reduced the parties' difficulty in discharging their burden of proof on specialized issues. In fact, in *Qihoo 360 v Tencent*, both parties applied for persons with professional knowledge to assist the hearing in the people's court.

Civil Liabilities

Article 14 of the Judicial Interpretation stipulates that if the defendant, in carrying out the monopolistic act, caused the plaintiff to incur a loss, the people's court may, based on the claims of the plaintiff and the facts that are ascertained, order the defendant, in accordance with the law, to bear civil liability by halting the harm, compensating for the losses, etc. Further, similar to civil cases concerning intellectual property infringement, the people's court may include any reasonable expenses incurred by the plaintiff in its attempt to investigate and stop the monopolistic conduct within the scope of the compensation. This provision, to some extent, alleviates the plaintiff's burden on litigation costs.

Statute of Limitations

The statute of limitations for private antitrust disputes is two years, starting from when the plaintiff knows or ought to have known of the monopolistic conduct. The two-year limitation period is consistent with most tort and contract claims under the PRC Civil Procedure Law. This two-year period can be suspended under certain circumstances. Under Art 16 of Judicial Interpretation, if a plaintiff reports the alleged monopolistic act to the Anti-Monopoly Enforcement Authority (AMEA), the limitation of actions will be suspended from the date on which the report is filed. If AMEA determines after its investigation that a monopolistic act has been constituted, the limitation of actions will be

re-calculated and start from the date on which the plaintiff knows or ought to have known that the handling decision by AMEA found that a monopolistic act had been constituted and became legally effective.

Interaction Between Investigations by AMEA and Private Antitrust Litigation

According to Art 2 of the Judicial Interpretation, a plaintiff may bring a stand-alone private antitrust action before a competent people's court without completion of the investigation by AMEA.

A plaintiff may also elect to initiate a private antitrust proceeding upon the effectiveness of a decision by AMEA.

Outstanding Issues

Although the Judicial Interpretation has addressed certain important matters concerning private antitrust litigation in China, there are still some outstanding issues that need to be clarified in the future. First, the Judicial Interpretation is silent in relation to the calculation of the damages incurred by the plaintiff. Second, in terms of the burden of proof for the resale price maintenance (RPM) in vertical agreements, it is uncertain whether the plaintiff has the burden of proving the RPM's effect of restricting or eliminating competition. Third, although the Judicial Interpretation allows a 'stand-alone action' and a 'follow-up action', it does not clarify whether the people's court must accept the lawsuit where an antitrust investigation has been initiated, but no decision is rendered, or the decision has not yet come into force. It is understood that, in such cases, the court has the discretion as to whether to accept the lawsuit.

Impact on the Development of Private Antitrust Litigation in China

With the introduction of the Judicial Interpretation, it is expected that the private antitrust litigation will develop as follows:

1. consumers who have standing will use the AML and the Judicial Interpretation to protect their legitimate interests;
2. enterprises will consider strategically adopting private antitrust litigation to resolve commercial disputes in relation to its competitors or upstream and downstream trading partners;
3. in other civil cases, such as contract disputes and IP infringement, defendants might raise the argument that the plaintiffs conducted monopolistic behaviour, both from the procedural and substantive aspects;
4. with the increasing number of private antitrust litigation, the outstanding issues mentioned

above will be resolved gradually, such as judicial review on decisions by AMEA during court hearings, and the calculation of damages suffered by plaintiffs; and

5. in addition to the current types of private antitrust litigation, such as monopoly agreements and abuse of market dominant position, other types of cases will arise, including without limitations the violation of the AML due to the exercise of intellectual property rights, and the invalidity of contracts or articles of trade associations resulting from the contravention of the AML.

Conclusion

The Judicial Interpretation provides important guidance on private antitrust litigation. The promulgation of the Judicial Interpretation is a sign that the SPC is trying to alleviate the plaintiff's burden of proof that was particularly onerous in civil law suits under the AML. Although private enforcement of the AML remains in its infancy, with the effectiveness of the Judicial Interpretation, private actions will be clearly on the rise and decisions by the people's courts in private antitrust cases may be more reasoned, and are likely to have considerable influence in the application and enforcement of the AML. Thus, the Judicial Interpretation will definitely play an active role in shaping the landscape of the private enforcement of the AML in China.

Note:

- ¹ Article 13 of the AML provides: Business operators that are in competition with each other are prohibited from reaching the following types of monopoly agreements: (1) agreements that fix or change the prices of goods; (2) agreements that limit the quantity of goods produced or sold; (3) agreements that divide up the sales market or raw materials procurement market; (4) agreements that restrict the purchase of new technology or new equipment or that restrict the development of new technology or new products; (5) agreements for the joint boycotting of trade; and (6) other types of monopoly agreements as determined by the State Council's Anti-Monopoly Law Enforcement Authorities.

For the purposes of this Law, the term 'Monopoly Agreement' means an agreement, decision or other concerted act that eliminates or restricts competition.

How Europe Promotes Women to Company Boards



The presence of women in the corporate boardroom is a sign of good governance which has a direct impact on the results of the companies. However, the lack of women in top business positions is reflected in the figures. This article looks at how the European Union is increasing women's presence and promoting greater gender equality on company boards. A draft directive imposing a 40% female quota by 2020 will be submitted to the European Parliament in October 2012.

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For those who consider that the United Nations,¹ the OECD, the World Bank, companies around the world, head hunters and even politicians are doing more to encourage women to get into the top echelons of business, the glass ceiling perhaps is now a thing of the past.

Despite the recent progress, however, there is still a disparity between men and women holding top positions in company boardrooms. There are of course some famous examples of women in top positions such as Christine Lagarde, Managing Director of the IMF; Anne Lauvergeon, former CEO of the French nuclear company Areva; and in politics, Angela Merkel,² Catherine Ashton and Viviane Reding, among others. Even the government of François Hollande is equally composed of 17 men and 17 women, and for the second time, two French women, Christiane Taubira and Christiane Feral-Schuhl

are respectively Minister of Justice and Chair of the Paris Bar. However, these examples should not preclude the need to nurture top female talents as they climb the corporate ladder.

The boardroom is where strategic decisions are made, governance applied and risks overseen. This is the reason why it is so important that company boards reflect effective gender diversity. In this respect, women are considered to be more sensitive to human issues, more idealistic to bring calm and objectivity.³ Moreover, because women traditionally control a major part of consumer spending they can contribute to market share gains through the creation of products and services that respond better to consumers' needs.

The presence of women in the boardroom is also an issue of good governance which has a direct impact on the results of the companies. In this respect, various studies have shown the positive impact of stronger female representation at companies that perform better with strong female representation at board and top management levels.⁴

Lastly, a gender-balanced board is more likely to pay attention to managing and controlling risk.

The lack of women in top business positions are reflected in the figures: women are underrepresented on corporate boards. In Europe, they represent on average 13.7% of the largest publicly-listed European companies' executive boards⁵ and the number of women CEOs in 600 of the most important listed European companies struggles to reach beyond 20.⁶

By comparison, the situation is not much different outside of Europe. The USA, Australia and Canada have just over 12 % of women serving as board directors. In most Asian countries, the percentage is below 10.⁷

Today, women are actively claiming for more gender equality, not because they believe that they deserve it as women but because they want to contribute to better decision making in the interest of the company, its customers and shareholders.

In this respect, the focus on Europe is interesting for two reasons: first, because Europe has traditionally promoted gender equality and wants to continue to take the lead in the promotion of women in company boards; second, because of the diversity of culture among the 27 European countries the different approaches, namely the coercive and voluntary, can be examined.

I. The Reassertion of the Gender Equality Principle in the EU

Gender equality: a Fundamental European Right

Equality between women and men is one of the European Union's founding values. It dates back to 1957 when the principle of equal pay for equal work became part of the Treaty of Rome. When the new Treaty on European Union (TEU) came into force in 2009, equality between men and women was upgraded to the status of a 'fundamental value'⁸ and became an objective.⁹ Article 21 of the EU's Charter of Fundamental Rights also provides for equality between men and women and prohibits sex discrimination in all fields. The EU and Member States must proactively take due account of the gender equality objective when adopting and implementing their policies.

A. Main EU Gender Equality Policies

For several decades European legislation has promoted gender equality in economic and social areas. The main European directives adopted concern equal pay for women and men for the same work and work of equal value;¹⁰ equal treatment in employment and vocational training;¹¹ promotion and working conditions; equal treatment in social security; protection of workers in cases of pregnancy and maternity; specific rights for parental leave for fathers and mothers; and

protection against direct and indirect discrimination based on sex as well as against sexual harassment. EU legislation also establishes a requirement to have bodies for the promotion of equality between women and men in every Member State.

One of the objectives to which priority is given to EU action programmes is an equitable distribution of women and men in the decision making process. The European Commission has also begun to review its own organization and internal workings. An equal opportunities group has been appointed, whose task is to ensure that gender equality issues are taken into account throughout the Commission, on every level and in every field. In 1998, the Council of Ministers adopted new regulations in order to place more women in senior posts in EU institutions.

The EU's achievements in fostering equality between women and men have helped to change the lives of many European citizens for the better. Some encouraging trends include the increased number of women in the labour market and their progress in securing better education and training.

B. The Remaining Obstacles

European policies that have been adopted for several decades have been implemented with more or less positive results. The most illustrative example concerns equal pay; although it is fully reflected in the legislation of the 27 EU Member States, the gender pay gap remains at the top of the EU policy agenda. To raise awareness of the huge



pay gap that exists between women and men (where women are earning around 17 % less than men), the first European Equal Pay Day (EPPD) was created in 2011 to encourage action to close the gap.

Today, good intent and policies are not enough. The elimination of stereotypes is one of the EU's priorities because the entrance of new Member States with different historical, cultural and political approaches over the years does not facilitate the harmonious implementation of European legislation, even if the latter is based on commonly accepted principles and fundamental rights.

New mechanisms need to be put in place in order to facilitate effective gender equality. For this purpose, a European independent agency was created in 2006, the European Institute for Gender Equality (EIGE), to contribute to the promotion of gender equality. EIGE runs studies in view of creating a reliable database on gender issues and developing methodological tools for the integration of the gender dimension in all policy areas. EIGE is expected to have a significant impact on efficient policy making within the next few years.

II. EU Measures in Favour of Gender Equality in Company Boards

Many gender gaps remain: women are still overrepresented in lower paid sectors and underrepresented in decision making positions, including of course company boards. The most

obvious reason is that choosing leaders remains a subjective decision with subjective criteria. Doors will not automatically open because women are competent, experienced and talented. Because human structures tend to choose their peers, company boards still remain quite uniform and mostly composed of men who will choose other men to succeed to them.

It appears that the solution to increase women's presence in company boards is two-fold: first, it comes from the States' policies which have introduced quotas to impose a certain percentage of women to the boardroom; second, it comes from voluntary initiatives of companies and women.

A. *The Coercive Approach: the Quota Legislation*

The ongoing disparity between the proportion of female and male board members is a rising concern for legislators in EU Member States. An increasing number of countries – not only in Europe – have introduced legislation, or are at various stages of requiring a female quota to sit on boards of directors of publicly-listed companies. The legitimacy of quotas is probably a topic for debate because everyone agrees that when it comes to the selection of a new board member the only criterion should be the best qualified person. However, it cannot be denied that quotas are an efficient way of boosting the number of women in the boardroom.

A report by the Deloitte Global Centre for Corporate Governance (November 2011) 'Women in the boardroom: A global perspective', examines the legislative efforts in this area across 12 countries and compares the current percentage of women on boards around the world.

i. Countries With Quota Legislation

Northern European countries are generally leaders on the topic. Norway was the first European country to introduce board female quotas in 2005,¹² and this was recently followed by Belgium,¹³ France¹⁴ and Italy. And the results are there: since 2003, the share of women on boards has risen from 8.5 % to 13.7%. Of course, positive results from quota legislation may only be produced if they are accompanied by sanctions such as those found in Norway, France, Belgium and Italy, where noncompliant members' appointments may be cancelled. In Norway, the ultimate consequence for noncompliance may even be dissolution of the company!

ii. Other Countries

Some European countries such as the Netherlands and Spain have adopted quota legislation without sanctions. Other countries such as Germany,¹⁵ Ireland, Greece, Estonia, Portugal, Luxembourg and Hungary are still reluctant to impose quotas.



iii. European Quotas: a Topic for Debate

In 2010, the European Commission set up a new 'Strategy for Equality between Men and Women' representing the European Commission's work programme for the period 2010-15. It announced that it was considering using 'targeted initiatives to get more women into top jobs in decision making'.

Viviane Reding, the EU Commissioner for Justice, Fundamental Rights and Citizenship, has long campaigned for major changes in European boardrooms and asked European companies to self regulate on the issue. In 2011, Mrs Reding called on all EU publicly-listed companies to sign the 'Women on the Board Pledge for Europe' and to take voluntary steps to increase the representation of women on boards to 30% by 2015 and to 40% by 2020.

Frustrated that her call to European companies have not yielded stronger results, Mrs Reding initiated a consultation in March 2012 with governments, trade unions, companies and civil groups on whether there should be European quotas for women in the boardroom and what sanctions could be used against companies failing to meet gender targets. "Personally, I am not a great fan of quotas," Mrs Reding said. "However I like the results they bring. Quotas open the way to equality and they break through the glass ceiling."¹⁶ Mrs Reding is supported by public opinion that is largely in favour of European quotas.¹⁷

A draft directive imposing a 40 % female quota by 2020 on the board of European public-listed companies will be submitted to European Parliament in October 2012. The topic is therefore very much alive. Indeed Mrs Reding considers that bridging the gap is an economic necessity for Europe to compete effectively in the 21st century.

B. The Voluntary Approach

In addition to coercive legislation, voluntary steps coming both from companies and women will contribute to the promotion of gender diversity in company boards. Such a liberal approach relying on voluntary corporate commitment originates from the USA and Canada.

The UK example is quite interesting because it shows encouraging results with a collaborative approach relying on cooperative measures across a range of public and private sector stakeholder groups¹⁸ including the head hunting firms which launched a voluntary code on diversity in 2011. Yet the EU's interference on the composition of boards is heavily criticized in the UK where it is said that quotas are needless and potentially damaging.

i. Governance Codes and Charters

An increasing number of European countries,

such as Germany, Austria, Finland, Denmark and Poland have adopted governance codes containing recommendations to encourage gender diversity on company boards.¹⁹ Some of them even require that noncompliant companies disclose the results and reasons for noncompliance in their annual report. In the Netherlands, the charter 'Talent to the top' requires companies to establish targets, measure their achievement and report annually.

ii. Mentoring

Europe is also involved in the training of future female leaders and members of executive and company boards. In France, the 'BoardWomen Partners' (BWP) programme aims to develop a better gender balance in the boardrooms of large companies throughout Europe. It is based on the commitment of CEOs and Chairmen of Boards of Directors of large French companies (CAC40, SBF120 and equivalent) who are convinced that a better gender balance will help improve the administration and performance of their businesses.

Women are mentored by CEOs and Board Chairmen in view of them taking on top level administrative positions in large corporations within the next two to three years.²⁰ As of 1 August 2012, the programme comprises of 30 Chairmen and 43 mentees.

iii. Training

Women also need to do some training before taking a seat on company boards. As Suet Fern Lee, member of the boards of AXA and SANOFI recently explained in front of a panel composed of top female lawyers and corporate counsel at the French Senate,²¹ women have to be very active in professional topics outside of their own and receive training in areas such as auditing, management of risks, business strategy and sustainable development – all areas which are essential to company boards.

iv. Networking

Women have become aware that they can more often than not be their worst enemies in the work place when it comes to self-promotion. Even though they build their network less spontaneously than men do, they understand that networking brings them self-confidence, provides a great opportunity to get informed on best practices and other people's opinion on subjects, and is, above all, an excellent way of meeting possible mentors. Yet, women must bear in mind that to be efficient, a network needs to be diverse, and personal involvement in relationships is crucial.

As a matter of fact, young European women and students are greatly involved in actions for the

promotion of gender equality, showing that the issue is of utmost importance for their future.

Conclusion

In spite of recent progress in several European countries, gender diversity on corporate boards remains an important challenge for all EU Member States. A common European legislation imposing quotas would be efficient for several reasons: first, it would accelerate the positive trend inside companies; second, it would probably diminish the risks that companies with cross-border activities

encounter such as conflicting rules in different European countries and in this respect, companies need legal certainty; third, it would improve companies' performance and hence contribute to the EU's growth and competitiveness. Stakeholders who care about sustainable development and governance should also take an interest in gender diversity. Some voices have arisen and spoken of the 'Power of three – one woman is a token, two is a presence and three is a voice'. Women undoubtedly represent a real power in all leadership positions for the benefit of companies and themselves.

Notes:

- ¹ The Women's Empowerment Principles are a set of principles for business offering guidance on how to empower women in the workplace, marketplace and community. Rather than being prescriptive or a new initiative to which business is asked to subscribe, the Women's Empowerment Principles seek to point the way to best practice by elaborating the gender dimension of good corporate citizenship, the UN Global Compact and business' role in sustainable development.
- ² According to the Forbes List of the World's 100 Most Powerful Women, Angela Merkel ranks first and Christine Lagarde ranks eighth. Six American women, one Brazilian and one Indian are in the top 10; see: www.forbes.com/power-women/.
- ³ Avivah Wittenberg-Cox and Alison Maitland Eyrolles, *Womenomics* (Paris, 2008).
- ⁴ *Women Matter: gender diversity, a corporate performance driver* (McKinsey & Company, 2007).
- ⁵ European Commission, Women in economic decision-making in the EU: 2012 Progress report (2012); see: http://ec.europa.eu/justice/gender-equality/files/women-on-boards_en.pdf.
- ⁶ European Commission database on women and men in the decision-making (January 2012); see: <http://www.db-decision.de/>.
- ⁷ In the US, over 15% of women are serving on Fortune 500 company boards; in Australia, women comprise 12.5% of board directors on ASX 200 companies; in Canada, 12.9 % of women are serving on listed companies; in China, 8.5 %; in Hong Kong, 9.4 %; in Singapore, 7.3 %; and in India, 4.8 %: see Deloitte Global Centre for Corporate Governance (November 2011) 'Women in the boardroom: A global perspective' (hereinafter, Deloitte's Report).

⁸ TEU, Art 2.

⁹ *Ibid*, Art 3.

¹⁰ Council Directive of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (75/117/EEC) stipulates equal pay for equal work and work of equal value.

¹¹ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

¹² Nearly 32% of women are serving on largest ASA company boards: Deloitte's Report.

¹³ The Belgian law on gender diversity (with a minimum of one-third male directors and one-third female directors) was published on 14 September 2011.

¹⁴ The Law Coppé-Zimmermann passed on 27 January 2011 imposes at least 20% of women in company boards and supervisory boards of listed companies by 2014 and 40% by 2017. Over 20% of women are now serving on CAC 40 listed companies.

¹⁵ 8.2 % of women are serving on a sample of over 600 listed companies: Deloitte's Report.

¹⁶ EU Press Release (Brussels, 5 March 2012).

¹⁷ A poll conducted by TNS Opinion & Social in September 2011 showed that 75% of respondents favour legislation to balance gender representation in company boards.

¹⁸ 14% of FTSE 100 board directorship is held by women: Deloitte's Report.

¹⁹ European Corporate Governance Institute; see: www.ecgi.org.

²⁰ See: www.diafora-leadership.com.

²¹ IPBA Conference, Paris, French Senate (13 June 2012).

A Good Name



Mark Shklov, a founding member of the IPBA, recalls how the good name of the ‘Inter-Pacific Bar Association’ came about.

Mark Shklov
Managing Partner, Mark T Shklov AAL LLLC

I have heard the same thing many times from many different lawyers. It’s probably an ‘old saying’ – and there is probably a similar ‘old saying’ in all the different countries of the world – ‘my good name and my good reputation are my greatest assets’.

In the Spring of 1990, the search for a good name was one of the goals of a small group of lawyers who had gathered in the Japan countryside, intent on establishing a new bar association that would focus on the Asia-Pacific Region.

On the weekend of 24-25 March 1990, when the ‘Steering Committee for the Formation of a Pacific and Asian Bar Association’ (SC), as we called ourselves at this preliminary meeting, got together in Katsuura, Japan, we realized that we would need a good descriptive name for our new organization.

There were nine of us. We met at Nosei Miyake’s vacation home in Katsuura, which is in Chiba Prefecture ... green and leafy ... far from Tokyo’s concrete formality. We slept on tatami mats, a few in each room, much like college roommates. This was the proper atmosphere for candour and the beginning of our journey.

We agreed that one of our first steps in this

process would be the selection of an acceptable formal name of the yet-to-be formed organization. The SC considered the names of other legal associations in the Asia-Pacific Region. We reviewed the names of each of the already established lawyers’ organizations, what the names stood for and meant to those lawyers practising in the Region, and what each stood for based on their own publicity and promotion, as well as the reputation of each. We believed that it was critical to differentiate ourselves from the other organizations, but also to choose something familiar in order to attract membership.

I was delegated to be the Secretary of the SC. My Meeting Minutes of that first get-together relate:

“At this point the SC discussed the name of the new organization. Names included Pan Pacific Bar Association, Pan Pacific Lawyers Association, Pacific Bar Association, Far East Lawyers Association, East-West Lawyers Association, Pacific and Asian Bar Association, and Pacific Asian Bar Association. The necessity to distinguish the new organization ... was stressed by the SC. The name should be identifiable with the region and the lawyers working in it but should not be so close to ... (another organization) as to cause confusion.”

After much discussion, we thought we had reached a decision. My Meeting Minutes indicate that, at the end of the Meeting in Katsuura, we had agreed:

“The name of the new bar organization will be Pacific & Asian Bar Association and will be used on all communications.”

However, this decision was immediately reconsidered at our next SC Meeting, which was held in Tokyo, Japan on 12-13 May 1990. By that time the size of the SC had almost doubled, from nine to 17. It was important and valuable to get more input on this issue from many others who would be the foundation of our entity. One of the first items of business raised at this Meeting was, again, the selection of a name. Apparently, many of the members of the SC had been thinking about this in the interim since our last meeting. We were not entirely satisfied with the decision reached at Katsuura. All were open to discussion. All were patient. We knew this was an important decision to be made. My Meeting Minutes indicated that as soon as we opened this Meeting:

“It was confirmed that the name of the new organization to be formed has not yet been selected, and the selection of a name would be one of the primary goals of this SC Meeting.”

Later, during the first day of that Meeting, the name of our new entity was discussed in more detail. The SC spent much time going over different names and at some point we all decided to let the matter sit overnight so that we could think about it and make a final decision the next day. The discussion went as follows:

“The SC considered the name of the new organization. It was felt that the word ‘Pacific’ should be used in the name because of its broad definition and that the word ‘Asia’ need not be used because it may be a limiting term. Discussions of several names consumed a great deal of the SC’s deliberations: ‘Inter-Pacific Legal Forum’ was suggested and discussed. The question was raised whether the new organization would be a ‘regional’ or ‘business’ related organization. ‘Regional’ was defined as ‘representative of the region’ and ‘business’ was defined as ‘those who do business in the region’. It was felt that the new organization would be business-related

HELLO
my name is



and, therefore, would not be exclusive to the region.

The name ‘Inter-Pacific Bar Association’ was suggested. There was an issue raised about the acceptability of the word ‘Bar Association’ with Japanese membership because of the rigid purpose of ‘bar associations’ in Japan. The SC agreed that the new organization did not want to be perceived as a rigid organization but more as an opportunity for individual lawyers to get together. The discussion was temporarily tabled for all members to contemplate.”

Perhaps we had ‘talked’ the issue to exhaustion at that point on that day and each of us needed and wanted the time to turn the matter over in our minds. We were all friends and we wanted to reach a harmonious consensus based upon our fellowship and friendship, and community of thought.

The next day, 25 March 1990, given the time to think and contemplate all that had been raised and discussed, the decision seemed to come very easily, and unanimously, as indicated in my simple final entry on the subject:

“It was unanimously agreed, after much discussion and comparison of various names, that the name of the new organization would be the ‘Inter-Pacific Bar Association’ (IPBA).”

A good name. A good reputation. Our greatest asset.

Overview of the Malaysian Competition Act 2010



Malaysia's Competition Act 2010, which came into force on 1 January 2012, prohibits anti-competitive agreements and abuse of dominant position. This article highlights the application of the Act and the powers of the Malaysian Competition Commission to enforce its provisions.

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Malaysia's generic competition legislation, the Competition Act 2010 (Act 712) (the 'Act') came into force on 1 January 2012. The Act prohibits anti-competitive agreements and abuse of dominant position, but it does not regulate mergers and acquisitions. The Act also empowers the Malaysian Competition Commission (MyCC) the regulatory body tasked with the enforcement of the Act and to issue and publish guidelines (the 'Guidelines'). Four Guidelines have been issued by the MyCC, in relation to anti-competitive agreements (the 'Guidelines on Chapter 1 Prohibition'), abuse of dominance (the 'Guidelines on Chapter 2 Prohibition'), market definition and the process for complaints.

The Act also establishes the Competition Appeal Tribunal (CAT), which comprises members appointed by the Prime Minister. CAT has exclusive jurisdiction to hear appeals against any appealable decision or direction made by the MyCC in relation to any findings of infringement under the Act.

The Act gives the Minister in charge of the Domestic Trade and Consumers Affairs (the

'Minister') powers to make regulations as may be necessary or expedient for giving full effect to the provisions of the Act.

The Competition Commission Act was passed in June 2010 and came into force on 1 January 2010, and empowers the MyCC to implement and enforce provisions of the Act.

Application of the Act

The Act applies to 'enterprises' which is defined under the Act as 'any entity carrying on commercial activities relating to goods or services'. The commercial activities do not include:

- (a) any activity, directly or indirectly, in the exercise of governmental authority – whilst there is no definition of such activities, the Act applies in principle to government-linked companies and statutory bodies;
- (b) any activity conducted based on the principle of solidarity; and
- (c) any purchase of goods or services not for the purposes of offering goods and services as part of an economic activity – it follows that entities or persons that purchase goods or services for their own use and do not intend to re-sell such goods or services will not be caught by the Act.

The Act does not apply to any commercial

activity regulated under the Communications and Multimedia Act 1998 (Act 588) and the Energy Commission Act 2001 (Act 610).

The Second Schedule of the Act provides that the Act does not apply to certain specified matters:

- (a) agreements or conduct engaged in order to comply with a legislative requirement – it appears that statutory bodies or government-linked companies carrying out commercial activities would not be exempted;
- (b) collective bargaining activities or collective agreements in respect of employment terms and conditions and which are negotiated or concluded between parties which include both employers and employees, or organizations established to represent the interests of employers or employees; and
- (c) an enterprise entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibitions would obstruct the performance, in law or in fact, of the particular tasks assigned to that enterprise.

Prohibition (s 4)

Agreement Between Enterprises

The prohibition of anti-competitive agreements is stipulated in s 4(1) of the Act, which provides that:

“A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.”

The s 4 prohibition applies to agreements, which are defined under the Act as ‘any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, and includes a decision by an association and concerted practices’.

The prohibition applies to any kind of arrangement between enterprises, oral or written, formal or informal. Section 4 also applies to decisions by associations and to concerted practices. The concerted practice is defined under the Act as ‘any form of coordination between enterprises with the object or effect to influence the behaviour of one or more enterprises in the market or disclose the course of conduct which an enterprise has decided to adopt or is contemplating to adopt in a market, in circumstances where such disclosure would not have been made under normal conditions of competition’.

The Act provides that a parent and subsidiary shall be regarded as part of a single enterprise

where the subsidiary does not enjoy real autonomy in determining its course of action in the market. Therefore, agreements between a parent and a wholly-owned subsidiary will generally not be prohibited under s 4.

Horizontal and Vertical Agreements

Section 4 expressly refers to both horizontal and vertical agreements. Horizontal agreements are agreements between competitors. Vertical agreements are those between enterprises at a different level of production or distribution chain, such as agreements between a manufacturer and a wholesaler or between a wholesaler and a retailer. Agreements in relation to intellectual property rights are not excluded from the definition of vertical agreements and do not enjoy any specific treatment.

Section 4 applies to agreements having the ‘object or effect’ of significantly affecting competition. This means that an agreement will be caught under the Act if it has the object of significantly affecting competition, even though such agreement in fact has no significant effect on competition or that the agreement was not implemented. An agreement will also be caught if it has the effect of significantly affecting competition, notwithstanding that the agreement did not have the object to harm competition.

In the Guidelines on Chapter 1 Prohibition, the MyCC states that agreements between competitors with an aggregate market share of less than 20% will generally not be viewed as having a ‘significant’ effect on competition. Therefore, those agreements will not violate the Act.

Notwithstanding the safe harbour provision set out above, certain horizontal agreements are per se anti-competitive:

- (a) fixing, directly or indirectly, a purchase or selling price or any other trading conditions;
- (b) sharing market or sources of supply;
- (c) limiting or controlling production, market outlets or market access, technical or technological development or investment; and
- (d) bid-rigging.

The Guidelines on Chapter 1 Prohibition are not clear if the safe harbour or the concept of *de minimis* has any application in respect of horizontal agreements set out above.

Agreements between enterprises in a vertical relationship are prohibited under the Act if they result in a significant prevention, restriction or distortion of competition in the relevant market.

The Guidelines on Chapter 1 Prohibition provide that agreements between enterprises each having below 25% market share will generally

not have a significant effect on competition and, therefore, not prohibited. The Guidelines on Chapter 1 Prohibition provides a safe harbour for non-price related vertical restraints at para 3.17:

“Anti-competitive *non-price vertical agreements* may not be considered to have a ‘significant’ anti-competitive effect if the individual market share of the seller or buyer does not exceed 25% of their relevant market ...” (emphasis added)

However, given the wording of para 3.17, it is not clear whether this safe harbour will similarly apply to price related vertical restraints, in particular, resale price maintenance (RPM), the imposition by a manufacturer/supplier on its distributors of a minimum, a fixed or a maximum resale price. Further, the Guidelines on Chapter 1 Prohibition, also state that: “[I]n general, the MyCC will take a strong stance against minimum RPM and find it anti-competitive. Any other form of RPM including maximum pricing or recommended retail pricing which serves as a focal point for downstream collusion would also be deemed as anti-competitive.”

Individual/Block Exemptions/Notifications
Agreements may be exempted from the s 4 prohibition either through an individual exemption or a block exemption granted by the MyCC if the following cumulative conditions are met:

- (a) there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;
- (b) the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;
- (c) the detrimental effect of the agreement on competition is proportionate to the benefits provided; and
- (d) the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.

There is no requirement under the Act for an agreement or conduct that may infringe the Act to be notified to the MyCC. Malaysia’s competition regime is based on the self-assessment by enterprises of their agreements or conduct as to whether these are permitted by the Act.

It is important to note that the Act does not expressly provide for immunity to enterprises that have applied for exemptions from the MyCC and

the Guidelines are also silent on this issue. This is unfortunate as it may deter enterprises with genuine uncertainties on their agreements from seeking guidance from the MyCC. Further, enterprises may be reluctant to enter into agreements, which may result in overall benefits envisaged by s 4 of the Act, before obtaining an exemption by the MyCC, which could considerably slow down good business initiatives.

Prohibition (s 10)

Section 10 of the Act states that: “[a]n enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services”.

The Act does not prohibit dominance itself, it is only the abuse of a dominant position which is prohibited. Section 10 prohibition applies if:

- (a) the enterprise concerned is in a dominant position (in Malaysia or any part of Malaysia); and
- (b) the dominant enterprise abuses its dominance.

Dominant Position

Under the Act, an enterprise is in a dominant position where it possesses enough market power to adjust prices, output or trading terms without effective constraints from actual or potential competitors. In this connection, the Act clarifies that the fact that market share held by an enterprise



is below or above a particular level is not in itself conclusive of dominance.

The Guidelines on Chapter 2 Prohibition provides that a market share of 60% is likely to indicate dominance, although this will depend on a number of other factors that would include the characteristics of the market both from a supply and demand perspective, entry barriers, number and size of competitors, size of the customers etc.

Abuse of a Dominant Position

Broadly, s 10 prohibits any conduct by a dominant enterprise, which prevents 'efficient' competitors from remaining in, expanding or entering the market by *inter alia*: (i) directly or indirectly imposing unfair purchase or selling price or other unfair trading condition on any supplier or customer; (ii) limiting or controlling production, market outlets or market access, technical or technological development, or investment to the prejudice of consumers; and (iii) refusing to supply to a particular enterprise or group or category of enterprises.

A dominant enterprise is not prohibited 'from taking any step which has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor'. In this respect, the Guidelines on Chapter 2 Prohibition provides (non-exhaustive) examples:

(a) refusing to sell to a buyer who has not paid for past purchases;

- (b) refusing to grant access to a dominant enterprise's infrastructure that is already being used to capacity;
- (c) offering a loyalty rebate that is related to the reduced costs of supplying a particular customer; or
- (d) meeting a competitor's price even though the price may be below cost (in the short term).

The onus of proof justifying conduct that would otherwise be found to be an abuse is on the enterprise claiming justification.

Investigation and Enforcement

Powers

The MyCC may conduct any investigation if it has reason to suspect that any enterprise has infringed or is infringing any prohibition, or any person has committed or is committing an offence under the Act. The MyCC is currently investigating the Cameron Highlands floriculturist association (the 'Association') for price-fixing of flowers sold to distributors and wholesalers in Malaysia.

The MyCC initiated the investigation when the president of the Association made a news statement in March 2012 that its members have agreed to increase the price by 10%. The MyCC will issue the decision soon.

Under Part III of the Act, the MyCC has wide investigating powers. An investigating MyCC officer has the powers of a police officer in relation to police investigation in seizable cases as provided under the Malaysian Criminal Procedure Code (Act 593).

The MyCC may, in writing, require any person whom it believes to be acquainted with the facts and circumstances of a case to produce documents or information. The term 'document' is widely defined and include, *inter alia*, hard and soft copies of documents, visual or sound recordings, tapes and discs.

It should be noted that the power of the MyCC to seize and retain possession of the original documents differs from authorities in other jurisdictions where only copies are retained by authorities. The retention of original documents by the MyCC may, potentially, have an adverse impact on the continuation of business during an investigation and give rise to various administrative and logistical problems in particular the handling, preservation and return of those documents.

Protection of Confidential Information

Confidential information is defined under the Act as 'trade, business or industrial information that belongs to any person that has economic value and is not generally available to or known by others'. The confidential information obtained pursuant to



any provision under the Act cannot be disclosed subject to s 21(2) of the Act which provides that disclosure of information may be made, *inter alia*, if the disclosure is made with the consent of the person from whom the information was obtained, the disclosure is necessary for the performance of the functions or powers of the MyCC or the disclosure is made with the authorization of the MyCC to any competition authority of another country in connection with a request by that country's competition authority for assistance.

Privileged Communication

The Act does not require production or disclosure of any communication between a professional legal adviser and his/her client and such communication would be protected from disclosure in accordance with s 126 of the Malaysian Evidence Act 1950 (Act 56). The privileged communication does not extend to communication made by in-house counsels.

Market Review

The MyCC may, on its own initiative or upon the request of the Minister, conduct a review into any market in order to determine whether any feature or combination of features of the market prevents, restricts or distorts competition in the market.

Finding of Infringement and Penalties

Enterprises

Under s 40 of the Act, if the MyCC determines that there is an infringement, it has the power to require the infringement to cease immediately. It may specify steps, which are required to be taken by the infringing enterprise, to bring the infringement to an end.

The MyCC may impose financial penalties not exceeding 10% of the infringing enterprise's worldwide turnover for the period of the infringement.

Notwithstanding any findings of an infringement, the MyCC has the power to accept from the enterprises, which are being investigated, undertakings to do or to refrain from doing anything that the MyCC considers appropriate and the MyCC will close the investigation without imposing a penalty.

A body corporate that commits other offences under the Act may be liable to a fine not exceeding MYR5 million and for a second or subsequent offence to a fine not exceeding MYR10 million.

Individuals

There is no personal liability under the Act for infringing s 4 or s 10 prohibitions. However, individuals who commit an offence under the Act

may be personally liable and face imprisonment for a term not exceeding five years and/or fine not exceeding MYR1 million (or both); for a second or subsequent offence, imprisonment for a term not exceeding five years and/or fine not exceeding MYR2 million (or both).

Private Action

Section 64 of the Act states that any person who suffers loss or damage directly as a result of an infringement of s 4 or s 10 prohibitions (regardless of whether such person dealt directly or indirectly with the enterprise) has a right of action for relief in civil proceedings against any enterprise which is or which, at the material time, been a party to such infringement. Private actions must be brought in a court of law in Malaysia.

Leniency

Section 41 of the Act provides that there will be a leniency regime with a reduction of up to a maximum of 100% of any penalties which would otherwise have been imposed in case of violation of the s 4 prohibition only.

Only an enterprise which has admitted its involvement in an anticompetitive agreement and provides information or other form of cooperation to the MyCC which significantly assisted or is likely to significantly assist, in the identification or investigation of any finding of an infringement or any prohibition by any other enterprises may benefit from leniency. The leniency regime may permit different percentages in the reduction of a fine provided, if:

- (a) the enterprise was the first to bring the suspected infringement to the MyCC; and
- (b) the stage of the investigation at which an involvement in the infringement was admitted; or any information or other cooperation was provided.

Conclusion

Admittedly, the Act is new; therefore, it remains to be seen how the MyCC would administer and enforce the Act, and so far it has been encouraging with the investigation against the Association. The MyCC has also undertaken a market review on the broiler market. Although there are issues in the Guidelines such as the issue on safe harbour that still requires clarity, it is hoped that these issues will be revisited by the MyCC and clarified, and more importantly to ensure that the competition law, which is meant to regulate the competitive process, does not unnecessarily interfere with businesses and/or enterprises, which do not significantly prevent, restrict or distort competition.

Selecting a Dispute Resolution Venue in Laos



Where can a foreign investor go to find a fair process that produces an enforceable judgment or award in Laos? This article examines and compares the options available open to foreign investors should they find themselves in need of dispute resolution.

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For those souls brave enough to venture into Laos as foreign investors, one of the most pressing questions – at least contractually – is that of dispute resolution. Where can a foreign investor go to find a fair process that produces an enforceable judgment or award? The short answer, unfortunately for Laos, is nowhere. There is no good option. But not all foreign investors have the foresight and risk aversion to take such a shortcoming into account before dropping their money into a country. So for those who do take the plunge, what is the least bad option for dispute resolution in Laos?

Laos law severely limits the options available to investors. In the Law on Contracts and Torts, parties to a contract are allowed dispute resolution by three options, the first of which is a village mediation unit.¹ For foreign investors, however, the village mediation unit is not truly an option. Such low level mediation is reserved for ‘small disputes or disputes which are not of high value’.² Village chiefs, who conduct village mediation, also tend to avoid disputes involving foreigners, State-owned enterprises, or very large sums of money.³ Eliminating the village mediation unit as an option, then, leaves two choices: the Office of Economic Dispute Resolution (OEDR) and the People’s Courts.

The Law on Investment Promotion offers its own constellation of options, but in doing so creates a strict hierarchy of dispute resolution procedures that must be conducted in a certain order. First, the parties to an investment dispute must attempt mediation.⁴ There is no stricture on where this mediation must take place, but it is the legislated first step. Second, the parties must attend administrative dispute resolution at either the Ministry of Commerce or the Ministry of Planning and Investment, depending on the nature of their investment.⁵ Any judgment or award issued during this exercise will not be enforceable under law. Compliance is strictly voluntary. It is nothing more than a nod to the Laos preference for peaceful resolution of disputes. Third, after humouring the relevant ministry, and assuming there was no satisfactory resolution reached, the parties must submit the dispute to the OEDR for mediation or arbitration.⁶ This progression can be interrupted, or completely circumvented, if one of the parties finds that ‘the conflict resolution from concerned authorities is not fair or the investment is damaged’. If such is the case, the party can go straight to court.⁷

On its face, this progression of dispute resolution procedures does not allow for the parties to instigate arbitration or court proceedings outside the territory of Laos. There is, however, an interpreting document that was issued by the National Assembly Standing Committee in 2005.⁸

This interpretation allows for the parties to go to foreign arbitration and have that arbitration recognized under Laos law. The applicability of this interpretation is questionable, however, as it applies to the previous iteration of the law, the Law on the Promotion of Foreign Investment, rather than the new Law on Investment Promotion. There is negligible difference between the language used in both versions of the law as relates to dispute resolution, though, and as there has not been a more up to date interpretation issued to address the change in the law, under Laos law, the original interpretation is treated as still in force. The interpretation ‘confirms the validity and enforceability in Laos of the foreign arbitration clauses in international contracts, including those to which the Government is a party’.⁹ Applying this interpretation means that foreign arbitration is indeed an option for the resolution of investment disputes involving foreign investors.

The third law that contains relevant provisions for resolution of disputes is the Law on Resolution of Economic Disputes wherein there’s a completely different conception of what options are available to the investor. Governing ‘economic disputes’, a concept which it defines as ‘conflicts which take...place in relation to production and business operations between organizations and other organizations, organizations and individuals, and individuals and other individuals, both domestic and foreign’, the Law on Resolution of Economic Disputes is the only place in which the contractual intent of the parties receives any shrift.¹⁰ In addition to mediation and arbitration, economic disputes are to be resolved by ‘rules for the resolution of economic disputes selected by the parties to the dispute in accordance with agreements and treaties which the Lao PDR has signed or is a party to’.¹¹ Here we have the closest thing to an allowance for dispute resolution procedures other than those included in the legislation, though even this falls short of explicitly granting the parties a free choice in the matter. The language of the Law on Resolution of Economic Disputes only allows the parties to select the ‘rules’ and not the venue or jurisdiction. It also unclear whether such selection is according to agreements between the parties or agreement to which Laos has acceded as an actor on the international stage. This clause can be interpreted to allow for the parties’ choice of dispute resolution procedures, but in reality it is highly flawed and may allow the courts to disqualify any dispute resolution other than those that are explicitly legislated in Laos law.

If, *arguendo*, this provision really can be interpreted to allow for resolution of economic disputes by the choice of the parties, then there are three options which must be considered.

First, an ad hoc arbitral tribunal constituted within Laos. This can be discarded out of hand as there is no legal provision allowing for anything of the sort, nor are there enough personnel to make this a serious option, even if it was allowed. Second, foreign courts. Again, this can be discarded quickly as Laos is not a signatory to the Hague Convention on Foreign Judgments in Civil and Commercial Matters and the few bilateral judicial assistance treaties which Laos has signed stop short of outright recognition of foreign judgments. That leaves the third option under the Law on Resolution of Economic Disputes, foreign arbitration.

While allowed under the Law on Investment Promotion, it is more than likely not allowed under the Law on Resolution of Economic Disputes. While the allocation of dispute resolution to a foreign arbitration centre is common practice in drafted contracts in Laos, the lack of legislative permission supporting this form of dispute resolution creates a tear in the space-time continuum.¹² It is feasible that a foreign investor who has contracted for foreign arbitration may convince the domestic party to participate in that arbitration, but any arbitral award obtained must be recognized and enforced by the Laos authorities, and therein lies the paradox. Any foreign arbitral award must be reviewed by the OEDR for compliance with international treaty and Laos law.¹³ Assuming the foreign investor is a citizen of a nation that is signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, they must still clear the requirement of compliance with Laos law. And because Laos law does not explicitly allow for the resolution of disputes by foreign arbitration, the very fact of the foreign arbitration can be used to deny recognition of the award.¹⁴ The vague and uncertain language



in the Law on Resolution of Economic Disputes is not enough to survive the interpretative gyrations of a Laos official who has the choice between helping out a fellow countryman or assisting a *falang*.¹⁵ Thus, while the idea of foreign arbitration is reassuring to foreign investors, it is in fact a null option.¹⁶

After eliminating a non-legislated dispute resolution forum selected by the parties, there remain only the local Laos venues. The choices, then, become severely restricted and unattractive: while the ministry level administrative dispute resolution is an opportunity to make nice, it does not offer the possibility of an enforceable award or judgment. The only place left to go to obtain a judgment one can take to the police is the OEDR and the People's Courts. With all other options eliminated, the question becomes which one will provide a fair decision making process that will result in justice for the parties involved.

The OEDR is a department level entity within the Ministry of Justice.¹⁷ The pool of mediators and arbitrators are selected from interested professionals within the community with at least five years of experience in their chosen profession.¹⁸ While the mediators have had ample opportunity to gain experience mediating cases, the arbitrators have not. The OEDR has performed only a handful of arbitrations in its existence affording very few arbitrators the chance to actually conduct an arbitration.¹⁹ Arbitrators are not completely unprepared, however, they do undergo a three-month training programme offered by the Ministry of Justice.²⁰ When the parties select personnel for their dispute resolution, the OEDR presents them with a list from which each party appoints one individual. These two individuals then select the third.²¹ Once selected,

mediators and arbitrators may be disqualified if they are related to one of the parties or have 'an interest in or a dispute with one of the parties'.²²

Both mediators or arbitrators at the OEDR are presented with a difficult challenge; for they have little guidance in conducting either a mediation or an arbitration, for once the OEDR accepts a case, and the dispute is before either a mediator or an arbitral tribunal, there are practically no rules governing the procedure itself. Procedural and substantive decisions are left entirely to the discretion of the mediator or the arbitral tribunal. There are no rules for mediations and the only rules for arbitrations are in relation to the gathering of evidence and the appropriate format for the written award.²³ Dispute resolution before the OEDR Resolution therefore becomes a little more predictable than a mediation before a village chief. Without a set of rules by which to mediate or arbitrate, the process is left to the good intentions of the OEDR's personnel, a fickle judgment at best, a prejudiced one at worst. It is conceivable, then, that a dispute brought before the OEDR will result in an unbiased and fair award. It is far from guaranteed, however, and does not provide the consistent fairness that foreign investors like to see in their dispute resolution options.

In a 2006 report prepared by USAID, the courts in Laos were 'perceived as slow and not very competent' though they were not 'perceived as irremediably corrupt'.²⁴ The primary reasons given by interviewees for avoiding the courts were time, expense and uncertainty.²⁵ Courts are handicapped by the Government's failure to promulgate decrees, regulations and notices in anything resembling a systematic way. There is no central database of laws and both judges and lawyers are left to discover the law from a patchwork of decrees that may or may not be available for review. As such, judges do not have access to all of the law and are unable to base their decisions on a full understanding of it.²⁶ There have not even been any regulations issued to govern the procedure for commercial cases. While judges are law school graduates with at least three years of experience, and have received training at the State-sponsored Judges Training Centre, they are rarely instructed in the procedures and issues specific to large commercial cases.²⁷ Courts are also plagued by a lack of independence. Their decisions are subject to oversight by the Public Prosecutor and review by the National Assembly.²⁸ According to the USAID report, 'there is wide agreement that cases involving highly controversial or political matters, or ones involving large amounts of money, can expect to be influenced, either directly or indirectly, by Government or Party forces'.²⁹ This lack of capabilities and lack of independence create an environment in which cases progress as fast as frozen sea slugs, the predictability



of the court's decisions approaches zero, and the whim of the Government takes precedence over the facts of the case.

That leaves foreign arbitration. In order for a non-Laos arbitration award to be recognized and enforced in Laos it must be based on an international treaty or convention to which Laos is a signatory and it must be certified by the People's Courts.³⁰ Laos is a member to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the 'New York Convention').³¹ International awards made in a country that is a member of the New York Convention should meet the treaty requirement. Before a foreign award can be certified by the People's Courts it must first be submitted to the OEDR for review. The OEDR will review the award to ensure it falls within the scope of relevant international treaties and to ensure that it is consistent with the laws of the Laos PDR. If the award is compliant with these two criteria, then the OEDR will call the parties together and recommend implementation. If the OEDR finds that the award does not conform to these two criteria, the OEDR will reject the arbitration award with a list of reasons.³² If, however, the OEDR finds that the arbitral award satisfies the legal criteria, it will forward the award for certification to the People's Courts.

Upon clearance by the OEDR, the parties have 15 days from the date of the award to voluntarily 'implement the results'.³³ If one of the parties refuses to voluntarily comply with the arbitration award, the party that is disadvantaged by the non-compliance may petition the People's Court for a final judgment.³⁴ The People's Court has 30 days to issue a final judgment on the award. The court is to limit its review to verification of the proper procedure and compliance with 'laws and regulations pertaining to stability, peace and social order'. If the court finds that the award was in compliance then the court is to issue a decision confirming the award. This confirmation is enforceable and non-appealable except in two circumstances. First, the confirmation of the court was a confirmation of the wrong settlement. Second, the confirmation is inconsistent with either the settlement agreement between the parties or the arbitral award. If the court finds that the arbitral award is contrary to law or procedure, the court will refuse confirmation.³⁵

Like so many other countries in the region, then, foreign arbitration in Laos is not the panacea that some may think. While an award issued by a foreign arbitral tribunal might be rendered according to the appropriate laws and in effect fair, it must still be brought before the local administration for certification. In the case of

Laos, this process requires not only a certification by the courts, but by the OEDR. This two-step process exposes a fair award to all of the problems and issues that plague both the courts and the OEDR. In addition, there has been no attempt made to enforce a foreign arbitral award in Laos. And though it is theoretically possible to do so, there is no evidence that in practice the organs of the Laos state will actually recognize and enforce such an award. The benefits of a foreign arbitral award, then, are counterbalanced by the disadvantages of recognition and enforcement.

It is a sorry state indeed, then, that faces the foreign investor who is unfortunate enough to be in need of dispute resolution in Laos. Of the raft of theoretical possible venues that should present themselves, only three provide a legal and practical option for the foreign investor. The domestic options, the OEDR and the People's Courts, are staffed with inadequately trained personnel with limited experience implementing poorly legislated procedures. Corruption, impropriety, incompetence and inexperience all create a situation where the progress is glacial and the outcome uncertain. The courts are additionally burdened by prosecutorial oversight and review by the National Assembly. And neither the courts nor the OEDR can claim independence from the Government as both are organs of the Ministry of Justice whose livelihoods are either directly dependent upon, or indirectly influenced by the Government.³⁶ Neither the OEDR or the People's Courts are good options, then, for dispute resolution.

Neither, though, is foreign arbitration. A foreign arbitral award may be the closest thing to justice that a foreign investor can get in Laos, but regardless of the fairness and unprejudiced outcome at the foreign arbitral tribunal, he must still bring that award back to Laos for enforcement. This is in itself an unproven process and will likely subject a positive award into an unenforceable piece of paper sitting on some clerk's desk in Vientiane. The best hope, then, is for the foreign investor to ensure that the local partner has reachable assets outside of Laos. Otherwise, the foreign investor opens himself up to considerable risk in investing money in Laos as there is no guaranteed method to obtain a fair and enforceable resolution of a dispute with a Laos national. There are no good options for dispute resolution in Laos, and until this problem is addressed by the Government of Laos, it will continue to discourage foreign investment in the country. Investors need a guarantee that their investment will be protected and until Laos provides a venue in which investors can seek an impartial enforcement of their contractual rights, Laos will not see too many more quality foreign investors.

Notes:

- ¹ Law on Contracts and Torts, No 01/NA, dated 8 December 2008, Art 101.
- ² Law on Civil Procedures, No 02/NA, dated 17 May 2004, Art 79.
- ³ Southeast Asia Commercial Law & Institutional Reform and Trade Diagnostics-Laos (SEA-CLIR), Final Report, United States Agency for International Development (November 2006), p 27; available at: www.bizclir.com/galleries/country-assessments/Laos.pdf.
- ⁴ Law on Civil Procedures, Art 79.
- ⁵ *Ibid*, Art 80.
- ⁶ *Ibid*, Art 81.
- ⁷ *Ibid*, Art 82. It is unclear what will happen if the parties are in the middle of a mediation or arbitration before the OEDR. Judging from experience and Art 19 of the Law on Resolution of Economic Disputes (see below), however, makes it is likely that should one of the parties feel that they are no longer being served by the OEDR their choice to go to court will be respected and the arbitration or mediation will be abandoned.
- ⁸ Interpretation, No 62/SC, issued in May 2005 by the National Assembly Standing Committee.
- ⁹ Souche, Audrey, Viengsavanh Phanthaly and L-Martin Desautels, 'Arbitration in Laos' draft copy in author's possession. Final draft published in Michael Moser (ed), *Arbitration in Asia* (2nd edn, Juris Publishing Inc 2008).
- ¹⁰ Law on Resolution of Economic Disputes, No 02/NA, dated 19 May 2005, Art 2.
- ¹¹ *Ibid*, Art 3.
- ¹² Siri Sayavong, 'Laos' in Andreas Respondek (ed) *Asia Arbitration Guide* (2nd edn, Respondek & Fan 2011), p 111.
- ¹³ Law on Resolution of Economic Disputes, Art 41.
- ¹⁴ This failure in Laos law should be compared with the law in Vietnam which makes explicit allowance for foreign arbitration in cases involving foreign investors.
- ¹⁵ This phenomenon applies anytime a government official or judge is faced with a choice between a foreigner and a national. It is also complicated by family relationships, governmental influence, and other informal relationships. For someone who is connected to the interlinking web of a developing country's politics, there are many factors which might influence the outcome of a decision against a foreigner.
- ¹⁶ This is only true in cases where the foreign arbitral award is to be enforced in Laos. If the Laos party has discoverable assets outside of Laos, a foreign arbitral award may be used to attach those assets. This is the route taken by the foreign investor in *Thai-Lao Lignite (Thailand) Co v Government of the Lao People's Democratic Republic* who are now seeking to attach assets of the Laos Government in France.
- ¹⁷ Law on Resolution of Economic Disputes, Art 11.
- ¹⁸ *Ibid*, Arts 16-17.
- ¹⁹ From discussions with the vice president of the Laos Bar Association.
- ²⁰ SEA-CLIR 65.
- ²¹ Law on Resolution of Economic Disputes, Arts 21, 27.
- ²² *Ibid*, Arts 22 and 28.
- ²³ *Ibid*, Arts 29-35.
- ²⁴ SEA-CLIR, 26.
- ²⁵ *Ibid*.
- ²⁶ *Ibid*, 60.
- ²⁷ *Ibid*, 62, 64.
- ²⁸ *Ibid*, 61; Law on People's Courts, No 05/PSA, dated 21 October 2003, Art 14; Law on Civil Procedure, Art 37.
- ²⁹ SEA-CLIR, 65.
- ³⁰ Law on Judgment Enforcement, No 03/NA, dated 15 May 2004, Art 4.10.
- ³¹ UNCITRAL, Status at: www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.
- ³² Law on Judgment Enforcement, Art 41.
- ³³ *Ibid*, Art 38.
- ³⁴ *Ibid*, Art 39.
- ³⁵ *Ibid*, Art 40.
- ³⁶ While mediators and arbitrators may not receive their paychecks directly from the Government, their livelihoods can still be taken away by Government fiat. Because of the nature of Laos' one party government, and the degree to which the Government retains authority over the populace, if a mediator or arbitrator takes an action contrary to the will of the Government – or those men in power at the time – then the Government can eliminate job opportunities, revoke practising certificates, or otherwise create a situation in which the individual is unable to make a living.

Recent Korean Supreme Court Decision on Enforcement of Foreign Judgment



The Korean Supreme Court recently interpreted the provisions of the Code of Civil Procedure (CCP) in relation to enforcement of foreign judgments. This article examines the relevant provisions of the CCP for enforcement of foreign judgments in Korea and the implications arising from the Supreme Court's decisions on recognition and enforcement of such judgments.

Woo Young Choi
Partner, Hwang Mok Park PC

Korea is not a party to any bilateral or multinational treaties for the reciprocal recognition and enforcement of foreign judgments. It has not signed the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, and thus this Convention has no application in enforcement proceedings in Korean courts. However, since 1973, Korea has been a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and its courts have been generous in recognizing and enforcing foreign judgments based on the principle of reciprocity.

The Korean Code of Civil Procedure (CCP) provides for conditions that must be met in order to enforce a foreign judgment within the territory of Korea, and such procedure is uniformly applied to any foreign judgments for the purpose of recognition and enforcement in all Korean courts.

In interpreting the relevant provisions of the CCP, regarding the terms of enforcement of foreign judgment, the Korean Supreme Court recently delivered noteworthy decisions on damages claims filed by the victims of forced labour during the Japanese colonial period on 24 May 2012. Although these cases may give rise to political and historical debates between the two nations, the legal theory and rationale on the enforcement issue explored in the decisions are worthy of review, irrespective of the political implications. We will first examine the relevant provisions of the CCP for enforcement of foreign judgments in Korea, and then review and discuss the notable Supreme Court decisions.

Code of Civil Procedure

The CCP is the primary source of law for recognizing foreign judgments in the Korean jurisdiction, and court precedents can be supplementary sources of law in specific cases. Article 217 of the CCP provides that a judgment concluded by a foreign court can be regarded as effective if the following conditions are met:

- the international jurisdiction of the foreign court is recognized according to the principle of international jurisdiction under Korean law and decrees or treaties;
- the legitimate service of process was made to the defendant;
- the recognition of a foreign judgment is not against good morality or public policy in Korea; and
- the reciprocal guarantee is secured.

In short, the CCP lists four conditions that must be satisfied before recognizing a foreign judgment as effective in Korean jurisdiction: (i) the existence of international jurisdiction of the foreign judgment; (ii) service of process; (iii) public policy; and (iv) a reciprocal guarantee. The basic requirement is that the foreign judgment must be final and conclusive, and exhausting all avenues of appeal before the foreign court. However, there is no requirement under the CCP that a foreign court must have subject-matter jurisdiction over the dispute, although the lack of subject-matter jurisdiction may be related to the requirement of public policy in some cases.

A foreign judgment, if it satisfies all of the above conditions, can be regarded as effective under Korean law. However, in order to enforce such foreign judgment in Korea, a party should seek an execution judgment of the foreign judgment from a competent Korean court. As to the enforcement of foreign judgments, the Code of Civil Execution (CCE) provides that a compulsory enforcement of a foreign judgment can proceed after the legitimacy of such foreign judgment is declared in an execution judgment issued by a Korean court. Further, the CCE provides that an execution judgment of a foreign judgment can be issued if the foreign judgment is not proven to be final and conclusive, and the foreign judgment fails to meet the conditions set forth in Art 217 of the CCP.

The Korean court will first review if a foreign judgment has international jurisdiction of its own authority even without an affirmative defence being raised by a defendant. If a foreign judgment is found to be lacking, ie the international jurisdiction as pursuant to the above principle, the Korean court will dismiss the enforcement proceeding without further review of other remaining issues. The international jurisdiction of the foreign court should be recognized according to the principle of international jurisdiction under Korean law and decrees or treaties. As long as the territorial jurisdiction of a foreign judgment can be recognized pursuant to the CCP and foreign proceedings to be conducted by the foreign court are not against the general principle of law in

Korea, the international jurisdiction of the foreign court can be recognized.

Reciprocity is a mandatory consideration in recognition of a foreign judgment. The Korean courts have so far recognized reciprocity with Japan, the State of Texas, the State of California, the State of Washington, China and Canada, while denying a reciprocal guarantee against Australia.

Foreign proceedings where a judgment was entered must not infringe upon the basic principles or court proceedings as set forth in the CCP.

This is an issue of violation of procedural public policy. If the independence of a foreign court is not secured or if an opportunity of proper defence is not granted to a defendant by the foreign court, the procedural public policy is said to be violated and the enforcement of such foreign judgment will be denied by a Korean court. However, minor discrepancies in court proceedings, omission of legal reasoning in the opinion or jury trial are not regarded as violations of procedural public policy. Thus, a failure to open pre-trial discovery procedure will be regarded as a minor discrepancy not affecting the enforceability of the foreign judgment.

The CCP requires that the recognition of a foreign judgment is not against good morality or public policy in Korea. The Korean court will examine the public policy issue in the enforcement proceedings. One example, regarding the issue of public policy, was when a Korean court recognized 50% of the excessive monetary compensation awarded by a foreign judgment based on public policy grounds. Another issue is whether the Korean court will recognize a foreign judgment awarding punitive damages, and the prevailing opinion is negative based on public policy grounds.

Supreme Court Decisions (2009Da22549 and 2009Da68620)

In 2009Da22549 and 2009Da68620, the Supreme Court reversed the lower courts' decisions that dismissed the Korean plaintiffs' claims for damages and unpaid wages against Japanese companies for exploitation of forced labour.¹ The plaintiffs were Koreans who were forced to work at the Japanese-owned factories under Japanese law during the Japanese colonial period, but were not paid proper wages and physically abused. These plaintiffs first filed suits against Japanese companies with the Japanese courts, which were finally dismissed by Japan's highest court. Thereafter, the plaintiffs filed suits against the Japanese companies with Korean courts to seek compensation for wrongful acts and unpaid wages.

The lower courts dismissed the plaintiffs' claims based on several legal grounds, one of which was that because the final and conclusive

decisions of the Japanese courts in similar suits can be acknowledged to have legal effect in Korea under the principle of *res judicata*, Korean courts cannot issue a judgment that contradicts with the Japanese court judgments. As such, the lower courts reviewed the Japanese court judgments from the perspective of Korean statutory laws and determined that the recognition of Japanese court judgments was not against the public policy of Korea.²

However, the Korean Supreme Court reversed the finding of the lower court on the issue of recognition of foreign judgment based on the following reasons:

“Article 217, Item 3 of the CCP provides that the recognition of the effect of a conclusive judgment issued by a foreign court is not against Korea’s good morality or public policy, as one of the conditions of recognition of a foreign judgment. In this regard, whether admitting the effect of a foreign judgment, that is, recognizing a foreign judgment is against Korea’s good morality or public policy should be determined in view of the influence that the recognition of foreign judgment could bring on the fundamental moral belief and social order to be protected by the Korean law at the time of such determination. In doing so, the court should review not only the tenor of the judgment, but also the grounds for decision and the consequence of such recognition of the foreign judgment altogether.

In view of several provisions of the Korean Constitution, Japanese occupation of the Korean Peninsula during the Japanese colonial period was illegal from the normative perspective, and any legal relations resulting from such illegal occupation which cannot be reconciled with the Korean Constitution must not be allowed as valid. Since the reasoning behind the Japanese judgment directly conflicts with the Korean Constitution’s fundamental core value that the compulsory mobilization during Japanese occupation period was per se illegal, the consequence of recognizing this Japanese judgment is clearly violating Korea’s good morality or public policy. Thus, the court must not recognize the effect of the Japanese judgment.”

The Supreme Court focused on the ‘Korean Constitution’s fundamental core value’ as the ground for public policy and opined that the

Japanese colonial occupation of the Korean Peninsula was illegal and not compatible with the Korean Constitution. Hence, it refused to recognize the Japanese decisions issued by Japanese courts in cases with similar legal issues while the lower courts followed the narrow interpretation in recognizing the Japanese decisions purely from a legal perspective.

In defining the concept and scope of ‘public policy’ as one of the conditions for recognizing a foreign judgment, two views are discussed among scholars. The first is that a foreign judgment should be recognized and enforced if it is consistent with ‘Korea’s fundamental principle’ drawn from the laws and regulations of Korea; the second is that a foreign judgment must be consistent not only with the laws and regulations of Korea, but also with ‘Korea’s fundamental ethical creed and social rules’. In view of the reasons explored in the above decisions, the Supreme Court could be interpreted to have followed the second and broader view.

On the other hand, on the role of ‘public policy’, the scholarly view is that ‘public policy’ could act as a defensive tool to protect the Korean legal system by refusing recognition of foreign judgments violating the basic moral belief or the fundamental notion of value and justice in Korea. The notion of ‘public policy’ in this provision is interpreted as ‘international public policy’ or ‘transnational public policy’ as distinguished from the meaning of ‘public policy’ set forth in Art 103



of the Korean Civil Code. The latter is sometimes referred to as ‘internal or domestic public policy’ or ‘national public policy’.

The Supreme Court precedents held that in determining application of the public policy provision in recognition and enforcement of foreign arbitral awards, the court must consider not only the domestic circumstances but also the stability of international transactional systems and that the scope of this notion must be narrowly interpreted.³ In view of the established legal theory associated with the definition or scope of ‘public policy’ under Supreme Court precedents, the position of the Supreme Court decisions in the above cases is regarded as not having followed the legal theory established in the precedents.

First, the Supreme Court could be viewed as putting more emphasis on Korea’s Constitution or laws than on the stability of international legal systems. In other words, the Supreme Court did not give the same weight on domestic or national value and international or transnational value. Although the Supreme Court may have provided some relief to the victims who suffered from Japan’s forceful occupation by relying on the fundamental value of the Korean Constitution, the Supreme Court could be criticized to have failed in respect of international legal stability or system.

Second, the Supreme Court may also be criticized as having confused legal matters with political and/or historical issues. While the

Supreme Court decisions attempted to present the grounds for refusing to recognize the Japanese judgments by relying on the catch-all provision of ‘public policy’ or ‘Constitutional value’, the lower court distinguished the legal matters from the political and/or historical perspective. The Busan High Court stated in its decision that since the Japanese court judgments applied the statute of limitations similar to that under Korean law, and that the claims for damages due to tort of forceful mobilization or violation of safety regulations could be acknowledged, the Japanese Court judgment shall be recognized in Korea.⁴ In this regard, the Supreme Court should have articulated and presented better logical theory in supporting its decisions.

Conclusion

The Korean courts have been generous in recognition and enforcement of foreign judgments as well as foreign arbitral awards based on the principle of reciprocity and the international standard. However, the recent Supreme Court decisions provided an unprecedented guideline for the interpretation and application of a ‘public policy’ condition in recognition and enforcement of foreign judgments. Although these cases involved delicate political and historical features arising from the Japanese colonial occupation of the Korean Peninsula, the legal theory and rationale explored in the decisions may become a precedent in deciding issues of recognition and enforcement of foreign judgments based on the ‘public policy’ provision.

Notes:

- ¹ The Seoul High Court 2008Na49129 decision delivered on 16 July 2009; the Busan High Court 2007Na4288 decision delivered on 3 February 2009.
- ² The Busan High Court opined in its decision that recognition of the Japanese Court decision selected Japanese law as the governing law, and decided that the statute of limitations had expired and did not contradict with the spirit of Korea’s Constitution.
- ³ The Supreme Court 89Daka20252 decision delivered on 10 April 1990; the 93Da53054 decision delivered on 14 February 1995; and the 2001Da20134 decision delivered on 11 April 2003.
- ⁴ The Busan High Court 2007Na4288 decision.



Carbon Tax



Australia has introduced Clean Energy Legislation that aims to reduce carbon pollution generated by businesses by charging the largest polluters in the country with a carbon tax. This article briefly looks at who will be liable to pay the tax and the effect on costs.

Robin Lonergan
Partner, Tress Cox Lawyers

The Clean Energy Legislation came into effect on 1 July 2012. The legislation was introduced to reduce carbon pollution generated by businesses by putting a price on carbon to be paid by the largest polluters. A company which operates a facility generating over 25,000 tonnes of carbon dioxide emissions (CO_e) each year will be liable to pay the tax. A list of the liable entities is published by the Clean Energy Regulator. These entities include some councils, energy producers, various collieries, steel producers and cement producers among others.

In addition, the carbon farming initiative allows farmers and other land managers to earn carbon credits by storing carbon or reducing greenhouse gas emissions on the land. These credits, known as Australian Carbon Credit Units, can be sold to people in businesses wishing to off-set their emissions. The structure is a *cap and trade* under



which liable entities are required to report on their emissions and to surrender a carbon permit for each tonne of CO₂-e pollution they produce.

It is estimated that by imposing the tax on the around 500 largest polluters, the carbon price mechanism will cover approximately 60% of Australia's emissions.

For the first three years, the permit price for emissions will be fixed (and indexed annually), but after the first three years, the cap and trade scheme will apply where the total volume of permits will be capped and the permits will be tradeable so the price will fluctuate.

Many businesses already report on carbon pollution through the National Greenhouse and Energy Reporting Scheme (NGERs). This system will continue under the new arrangements. The liable entity is liable for the pollution created through its own operations, emissions from transport fuels and also emissions embodied in natural gas supplied to a third party who is a liable entity.

There is therefore an increase in the cost to the

liable entities and those entities are likely to pass through that cost to their customers. There is no statutory right to pass through the carbon tax and therefore the supplier only has a right to increase costs if the contract allows it or by negotiation. In many cases, the supplier will have no contractual right but will use its market power to increase prices. The difficulty then arises for the customer over whether the customer has the ability to pass on those increased costs to its customers and ultimately to the consumers.

The Australian Competition and Consumer Commission (ACCC) has indicated that a supplier who passes on costs on the basis of the carbon tax needs to be able to justify that statement. In most cases, it will be difficult for a supplier to clearly identify that a cost has been incurred because of the carbon tax – in most cases, price increases will include a number of components, one of which is the carbon tax. In many cases, prices will increase by the change in the Consumer Price Index (CPI). Economists estimate that the CPI will increase by less than 1% because of the carbon tax.



Discover Some of Our New Officers and Council Members



Anne Durez
Corporate Counsel Committee Chair

What was your motivation to become a lawyer?

I have always been fascinated by law and justice, which are the basis of all societies. As a litigator I have tried to contribute to the defence of truth.

Now as a corporate counsel I am

concerned by companies' governance in a globalized world, which is quite close to a sort of universal justice. Somehow idealistic but all lawyers share common dreams!

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

In a few hours time, I travelled from the 33rd floor of Total Tower in Paris to a South African coal mine near Johannesburg and down to a few hundred metres

underground! I changed my silk dress into a uniform, helmet and boots. A woman among so many men, what else can I dream about?

What are your interest and/or hobbies?

I love going to the theatre; lawyers like playing roles!

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

My brief life as a journalist. When I was younger I was involved in the production of the most popular evening TV news programme on a national channel called France 2. I learnt how to report, interview and tell stories. When I think about it, I might have become a journalist and I would have never been interviewed for the IPBA Journal!

Do you have any special messages for IPBA members?

Let's join together in Seoul to learn, share and actively participate in a wonderful international event!

Competition Laws in the Asia and Pacific Region

The Strengthening of Competition Law Enforcement in the Asia Pacific Region and Responses by Corporations in the Region-- Trends and Development With a Particular Focus on Merger Regulations and Cartel Enforcement

A joint program by IPBA and the Japan Competition Law Forum (JCLF)

Date/Time: November 9, 2012

10:00 – 18:30 Seminar

18:30 - Reception

Venue: The Tokyo Chamber of Commerce and Industry Hall (Tohsho Hall)



This all-day program is divided into five sessions, exploring anti-monopoly law, competition law, cartel law and compliance issues, and M&A antitrust law. Lunch is included, with a reception following the sessions. Or, please join for just the reception.

Speakers include respected lawyers, government figures, and corporate executives from around the Asia Pacific Region and beyond.

Registration

Early Bird Registration (Seminar + Reception) ¥18,000 by September 20, 2012

Regular Registration Fee (Seminar + Reception) : ¥20,000

Special Fee for Academics (Seminar + Reception) : ¥10,000

Reception Only : ¥10,000

For more details and a registration form, visit the IPBA web site: <http://ipba.org>

Members' Notes

Lawrence A Kogan

The EU REACH chemicals regulatory management system has had widespread effects on international trade in bulk chemicals and other products containing chemicals, notwithstanding EU commitments to ensure REACH's consistency with international trade rules overseen by the World Trade organization (WTO), to which the EU member states are parties. Indeed, REACH has triggered concerns from EU trading partners ever since it was first introduced, and uncertainties remain concerning whether REACH, as implemented, meets the demands of international trade law. Three recently issued WTO tribunal decisions interpreting the Technical Barriers to Trade (TBT) Agreement have reaffirmed WTO Members' sovereign right to regulate for the protection of human health and the environment at their chosen level of protection. But governments may not freely employ technical regulations in a discriminatory manner or as unnecessary obstacles to trade. For further details see: www.neurope.eu/article/does-reach-have-chilling-effect-trade-and-investment.

Pasero Abogados

It is my great pleasure to inform fellow members of the IPBA that in 2012 Pasero Abogados SC marks its 20th Anniversary. During this time we have achieved and accomplished our goals by fulfilling our objectives and commitment to providing quality service and professionalism when performing our jobs; we would have not been able to achieve this without our friends and clients. We reiterate our gratitude and commitment to continue serving professionally, and with the highest quality standards.

Bithika Anand

It was a pleasure to be a part of the IFLR India Awards 2012 held on the 5 July at the Trident Mumbai. It has been a little over two years since I started Legal League Consulting and it was an honour for me to hand out the final two awards at the ceremony for the Best Indian Law Firm and the Best International Law Firm which were won by Amarchand & Mangaldas & Suresh A Shroff & Co and Allen & Overy respectively.

Leopoldo Pagotto

The Governor of the Brazilian State of São Paulo, Mr Geraldo Alckmin, has appointed Leopoldo Pagotto as a member of the Ethics Commission on 7 August 2012. Following his tenure, Leopoldo Pagotto will be assisting with the consolidation of the anti-corruption legislation as well as with the formulation of proposals to streamline the institutional framework in the fight against corruption – incidentally, his PhD dissertation is about anticorruption in Brazil. Leopoldo Pagotto will continue to practice as a business lawyer in Brazil.

IPBA Special Mention



The IPBA would like to congratulate The Honourable Justice Susan Glazebrook, Past IPBA President (1998-99), on her appointment as a Judge of the Supreme Court of New Zealand. We wish her all the best in this new chapter of her illustrious career!



IPBA SCHOLARSHIPS

The Inter-Pacific Bar Association (IPBA) is pleased to announce that it is accepting applications for the IPBA Scholarship Programme, to enable practicing lawyers to attend the IPBA's Twenty-Third Annual Meeting and Conference, to be held in Seoul, Korea, 17-20 April 2012 (www.ipba2013.org).

What is the Inter-Pacific Bar Association?

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

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

The highlight of the year for the IPBA is its annual multi-topic four-day conference. The conference has become the 'must attend event' for international lawyers practicing in the Asia-Pacific region. In addition to plenary sessions of interest to all lawyers, programs are presented by the IPBA's 21 specialist committees. The IPBA Annual Meeting and Conference provides an opportunity for lawyers to meet their colleagues from around the world and to share the latest developments in cross-border practice and professional development in the Asia-Pacific region. Previous annual conferences have been held in Tokyo, Sydney, Taipei, Singapore, San Francisco, Manila, Kuala Lumpur, Auckland, Bangkok, Vancouver, Hong Kong, New Delhi, Seoul, Bali, Beijing, Los Angeles and Kyoto. Our most recent annual conference in New Delhi in February/March 2012 attracted over 900 delegates.

What is the IPBA Scholarship Programme?

The IPBA Scholarship Programme was originally established in honour of the memory of M S Lin of Taipei, who was one of the founders and a Past President of the IPBA. Today it operates to bring to the IPBA Annual Meeting and Conference lawyers who would not otherwise be able to attend and who would both contribute to, and benefit from attending, the IPBA Annual Conference. The Scholarship Programme is also intended to endorse the IPBA's mission to develop the law and its practice in the Asia-Pacific region. Currently, the scholarships are principally funded by a group of lawyers in Japan to honor IPBA's accomplishments in the 20 years since its founding.

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

Who is eligible to be an IPBA Scholar?

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

[1] Lawyers from Developing Countries

To be eligible, the applicants must:

- be a citizen of and be admitted to practice in Vietnam, Laos, Cambodia, Myanmar, Mongolia or the Pacific Islands;
- be fluent in both written and spoken English (given this is the conference language); and
- currently maintain a cross-border practice or desire to become engaged in cross-border practice.

[2] Young Lawyers

To be eligible, the applicants must:

- be under 35 years of age at the time of application and have less than five years of post-qualification experience;
- be fluent in both written and spoken English (given this is the conference language);
- have taken an active role in the legal profession in their respective countries;
- currently maintain a cross-border practice or desire to become engaged in cross-border practice; and
- have published an article in a reputable journal on a topic related to the work of one of our committees or have provided some other objective evidence of committed involvement in the profession.

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

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

How to apply to become an IPBA Scholar?

To apply for an IPBA Scholarship, please obtain an application form and return it to the IPBA Secretariat in Tokyo no later than **31 October 2012**. Application forms are available either through the IPBA website (www.ipba.org) or by contacting the IPBA Secretariat in Tokyo.

Please forward applications to:

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

What happens once a candidate is selected?

The following procedure will apply after selection:

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

Please provide this information to any qualified candidate. Thank You.



An Invitation to Join the Inter-Pacific Bar Association

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

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

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

IPBA Activities

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

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

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

APEC

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

Membership

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

- | | |
|--------------------------------------|---------|
| • Standard Membership | ¥23,000 |
| • Three-Year Term Membership | ¥63,000 |
| • Corporate Counsel | ¥11,800 |
| • Young Lawyers (under 30 years old) | ¥6000 |

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

Membership renewals will be accepted until 31 March.

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

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

Corporate Associate

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

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

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

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

- | | |
|--|---------|
| • Annual Dues for Corporate Associates | ¥50,000 |
|--|---------|

Payment of Dues

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

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

IPBA Secretariat

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

See overleaf for membership
registration form



IPBA SECRETARIAT

Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
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IPBA MEMBERSHIP REGISTRATION FORM

MEMBERSHIP CATEGORY AND ANNUAL DUES:

- Standard Membership..... ¥23,000
- Three-Year Term Membership..... ¥63,000
- Corporate Counsel ¥11,800
- Young Lawyers (under 30 years old)..... ¥6,000

Name: Last Name _____ First Name / Middle Name _____

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

Firm Name: _____

Jurisdiction: _____

Correspondence Address: _____

Telephone: _____ Facsimile: _____

Email: _____

CHOICE OF COMMITTEES (PLEASE CHOOSE UP TO THREE):

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

I agree to showing my contact information to interested parties through the APEC web site. YES NO

METHOD OF PAYMENT (Please read each note carefully and choose one of the following methods):

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

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

Signature: _____ Date: _____

PLEASE RETURN THIS FORM TO:

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