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IPBA JOURNAL

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The President's Message



Dear Colleagues,

After reflecting upon 2011 and my term as President, I am pleased to report on the various developments concerning the IPBA and its activities:

1. **Creation of networking opportunities, activities in various jurisdictions and development of relationships with local bar associations**

As the IPBA is increasingly being recognised as a prominent business lawyers association, we have been receiving many requests from various organisations, including journals, marketing companies and professional associations. Depending upon the nature of the requests, the officers in charge and the secretariat will review and decide whether to support or jointly work with such organisations. The officers have been trying their best to collect relevant information and referrals etc, to analyse the appropriateness of our involvement in joint activities with other organisations. Although making such decisions sometimes takes time and is difficult, the substantial increase of such requests shows the increasing recognition of the IPBA in the legal community and other industries as well.

One successful example of a joint project is the International Financial Law Review Asia M&A Forum, which is jointly hosted by the IFLR and the IPBA (and which is now in its 8th year). The next forum will be held in February, in Hong Kong. The members of the 2012 New Delhi Host Committee (headed by Lalit Bhasin with various other members, including Ravi Nath, Praveen Agarwal and Rohit Kochhar) visited Osaka on 13 October and Tokyo on 14 October, as well as Los Angeles, New York, Chicago and Toronto in the early part of November. I really appreciate the strong support shown by IPBA members in each of the relevant venues, including among others, Gerold Libby, David Laverty, Ken Stuart, Jaipat Jain, Bill Scott, Vic Arora, Masafumi

Kodama, Hiroe Toyoshima, Miyuki Ishiguro and Hisashi Hara. We are also grateful to Ken Stuart for arranging the facilities with the cooperation of the New York City Bar Association in New York.

The Host Committee also visited Seoul and Hong Kong, and will visit China and Malaysia as well. With their visits to other venues prior to their visit to Japan, the Host Committee created good opportunities to enhance the recognition of the IPBA and to further promote the IPBA's activities in the different jurisdictions.

2. **Development of relationships with international organisations**

The IPBA held a joint programme at the IBA Annual Conference in Dubai ('Asian Investment in the Middle-East') on 31 October. Upon the invitation of the IBA, the leaders of the IBA and the IPBA conducted a brief meeting in Dubai about our activities. Lalit Bhasin (President-Elect), Young-Moo Shin (Vice President) and I attended the meeting. We were informed that a special programme for leaders of international organisations will be included in the 2012 Annual Meeting and Conference programme in New Delhi and it is expected that the leaders of the IBA, the ABA, the AIJA, etc, will join that programme. I appreciate the efforts made by Lalit Bhasin and other Host Committee members in organising such a special programme to promote and develop relationships with other international organisations.

3. **Collaboration with APEC**

The APEC Summit Meeting was held in Honolulu from 9-14 November. The IPBA APEC Special Committee plans to have a special APEC session at the 2012 Delhi Annual Conference, focusing on APEC's activities in 2012 (the US year), the preparations for the 2012 APEC in Russia (including issues for Russia's participation in the WTO) and trade regulation issues (including TPP, the Trans-Pacific Partnership). APEC officials told us that APEC appreciated the active support of the IPBA, which is an important stakeholder in the Asia Pacific

region, and I hope that the collaboration with APEC will further enhance the IPBA's recognition among government officials and private sectors, and provide various incentives to our IPBA colleagues.

4. Development of scholarship activities

As the Asia Pacific region is drawing global attention, it is of vital importance for the IPBA to provide promising lawyers in developing jurisdictions with appropriate assistance and support. The Japan Association of the IPBA is preparing to activate the Japan Fund and I hope that such activities will deepen the support from our colleagues and their friends.

5. The New Delhi 2012 Annual Conference

The Host Committee members are now visiting many venues to promote the IPBA and the IPBA Annual Meeting and Conference in New Delhi, and are making the necessary preparations to make this event very successful and memorable for all of us. The next Conference will definitely be another exciting and worthwhile event for many participants expected to attend.

I do hope to see you all very soon in New Delhi.

Shiro Kuniya
President

IPBA Event Calendar

Event	Location	Date
IPBA Annual Meeting and Conference		
22nd Annual Meeting and Conference	New Delhi, India	Feb 29–Mar 2, 2012
23rd Annual Meeting and Conference	Seoul, Korea	Apr 17–21, 2013
24th Annual Meeting and Conference	Vancouver, Canada	TBD
IPBA Mid-Year Council Meeting		
2011 Mid-Year Council Meeting and Seminar	New Zealand	TBD
Supporting Events		
Asia Women in Business Law Awards	Hong Kong	Dec 8, 2011
AIJA's Outsourcing versus Restructuring	Colombo, Sri Lanka	Feb 8–10, 2012
IFLR's Asia M&A Forum	Hong Kong	Feb 22–23, 2012
ITECHLAW's 8th International Asian Conference	Bangalore, India	Feb 23–24, 2012
ABA Section of International Law's 2012 – Spring Meeting	New York, USA	Apr 17–21, 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,

As the year draws to a close, it is in our nature to reflect back on the year that has gone by and look ahead to the year that lies ahead. Another year has flown by, and 2011 turned out to be a year which will

not be easy to forget.

11 March 2011

The Host Committee for the Kyoto Annual Meeting and Conference was working hard to put the final touches on its annual conference when the Great East Japan Earthquake and Tsunami hit Northeastern Japan on 11 March 2011 causing unprecedented damage and destruction. The Host Committee and the officers of the IPBA struggled to decide whether or not to proceed with the conference which was scheduled only a month away. In the end, the 20th Anniversary Conference was held as scheduled, and despite cancellations by some registrants, the conference turned out to be an enormous success with more than 800 in attendance.

Mid-Year Meeting

The Mid-Year Council Meeting for the IPBA was held on 2-4 September 2011 in Hanoi, Vietnam. The various meetings of the leadership of the IPBA were completed with little to complicate their schedule, except for the fact that a seminar scheduled for 5 September had to be cancelled due to licensing issues that could not be resolved in time. It must be noted that the meeting was originally scheduled in Hanoi in November 2008. But another natural disaster – torrential rains that flooded Hanoi, much like the rains that ravaged Thailand this fall – forced the cancellation of the originally scheduled meeting.

In Hanoi, the Council decided to hold the Mid-Year Council Meeting for 2012 in New Zealand. Membership in New Zealand has been declining the last few years, and the IPBA hopes that the Mid-Year Council Meeting and a scheduled seminar will help to boost its membership in

New Zealand. In the shadow of the disaster in Japan, it may be easy to forget, but Christchurch in New Zealand was struck by a major earthquake in February which caused major damage and destruction.

The Annual Conference – New Delhi 2012

The New Delhi Host Committee is finalising its planning for the 2012 Annual Meeting and Conference to be held in New Delhi, India from 29 February to 3 March 2012. The topic of the conference will be *Legal Trends, Thoughts and Times*. If you have not registered for the conference yet, you are urged to do so and not miss another exciting annual conference.

Innovation

You may recall that the theme of the annual conference in Kyoto was *Innovation*. An individual who was a true innovator, Steve Jobs, the founder and former CEO of Apple Inc, passed away in October 2011. He was not an attorney, but the innovations that he brought into the world truly changed the way we live and work. More innovations will be forthcoming, and we, as attorneys, will need to keep up with innovations as we continue to be effective in the digital world.

Some of us older members can remember that when the IPBA was formed in 1991, we were still communicating by land lines on the telephone. If we were out of our office overseas, we had to find a telephone, pay the long distance charges and call another land line hundreds or thousands of miles away. The common use of cell phones and smart phones was still some time away. Now we simply pick up our iPhones or Blackberrys wherever we may be and dial, or rather touch, the numbers to call whomever we want anywhere in the world.

Faxes have now been replaced by email and pdf documents. Where we used to store document files in file cabinets, many law firms are going paperless and filing documents online. Soon cloud computing will become the norm, and we may no longer need to keep servers in our offices.

You will note that IPBA membership dues are now paid online. Paper reminders are sent as a secondary notice. The IPBA membership directory is also available exclusively online, although a few analog members have asked if hard copies

of membership directories can be printed. The registration for the annual conference in Delhi is handled online. Please go to the conference website (www.ipba2012.org/) to learn about the many programmes being offered and register for the conference – online.

Despite natural disasters and other obstacles that may come our way, the IPBA will continue on its path of innovation to continue to provide its members with benefits that will make your

membership worthwhile. We can certainly do with fewer natural disasters in 2012, and we look forward to 2012 as another fulfilling year for the IPBA.

Aloha,

Alan S Fujimoto
Secretary-General

IPBA Membership Renewals Now Being Processed

Please renew your IPBA membership for 2012! The deadline is approaching fast.

You can renew by one of the following 2 renewal methods. Please choose whichever is more convenient for you.

1. **Automatic Payment.** Please contact the IPBA Secretariat for an authorisation form.
2. **Online Membership Renewal in the Member Only section of the IPBA website:** You can log into the Member Only section from the top page of the IPBA website at <http://ipba.org>. Choose from one of three payment methods (credit card, bank wire transfer, PayPal) to renew your membership.

We will accept renewals for 2012 until 28 February 2012. Please note that you cannot attend the 22nd Annual Meeting and Conference in New Delhi, 29 February- 3 March 2012 at the special member rate unless your membership is current by the start of the conference.

Contact the IPBA Secretariat for further information about IPBA membership registration and renewal procedures.

The IPBA Secretariat

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The Honorable Michael Hwang, Chief Justice of the DIFC Courts



Caroline Berube



Dhinesh Bhaskaran

On 3 November 2011, we were given the opportunity to interview The Honourable Chief Justice of the DIFC Courts, Michael Hwang, for the *IPBA Journal*. Chief Justice Hwang is also a Senior Counsel and Chartered International Arbitrator based in Singapore.

Interviewed by Caroline Berube*
Managing Partner, HJM Asia Law & Co LLC

Interviewed by Dhinesh Bhaskaran
Partner, Shearn Delamore & Co

Q: You were initially appointed as Deputy Chief Justice of the Dubai International Financial Centre (DIFC) Courts in April 2005. What was your motivation for joining the DIFC Courts?

A: Dubai has always interested me on both a personal and professional level. I first came to Dubai to take up office as one of the trustees of the re-launched Dubai International Arbitration Centre (DIAC), so my first experience with Dubai had to do with arbitration. I had always been hugely impressed by the ambition of the country and see parallels with my home country, Singapore. In the same way that Singapore based its legal

model, to some extent, on Switzerland, Dubai has always looked to Singapore when developing its model, and therefore the Emiratis respect that a Singaporean will have something to offer to Dubai. As the only commercial court in the region, I was attracted to the challenge of being part of the establishment of a unique, world class institution and taking it forward in one of the most exciting markets and regions in the world. The fact that I can now sit here six years later and look at the strides both Dubai and the DIFC Courts have taken, and know how I have helped play a role in that, is a great source of pride.

Q: In September 2011, it was announced that the limit on employment matters that can be heard by the Small Claims Tribunal (SCT) was increased to AED200,000 from AED100,000. What was the motivation behind this increase and what impact are you expecting it to have?

* Caroline Berube is currently serving as the Vice-Chair of the Inter-Pacific Bar Association's Publications Committee.

A: Although the DIFC was conceived as a commercial centre and therefore the DIFC Courts main function is to serve businesses, there are a lot of people who work for these businesses and inevitably there are employment problems. These claims are generally not very large in value and mostly deal with termination disputes. Many of these people cannot afford professional legal fees, and this is why we created the SCT, in order to make the DIFC Courts more accessible for these people.

We constantly strive for dialogue with court users to improve their experience at the DIFC Courts and following feedback from the business and legal community, the limit for the SCT was increased to AED 200,000. Essentially, the expansion of the limits on the SCT's jurisdiction gives more options to people with employment disputes and the change follows the increase, in 2010, of the limit for non-employment cases to AED500,000 (provided both parties agree to using the SCT) and has come as one of the recent amendments to the Rules of the DIFC Courts, to further enhance the efficiency of proceedings before the DIFC Courts.

The SCT is one of the most successful elements of what we offer at the DIFC Courts and we expect interest in the service to continue. Our track record is impressive, with cases largely heard without the involvement of lawyers, and more than 90% have historically been resolved within three weeks of lodging the claim.

Q: In March 2011, the DIFC announced that it was implementing a groundbreaking, fully paperless infrastructure, in its attempts to continuously improve efficiency and as part of its commitment to operating in a sustainable manner. How challenging was it to implement this infrastructure

and is it running as efficiently as you had hoped? Do you think it is possible for other judicial systems with larger caseloads to implement a similar system?

A: It certainly was challenging! Thankfully, the new paperless infrastructure is running well and as you say, the paperless, digital storing initiative is part of our continued efforts to increase efficiencies, ensure maximum security and reduce our carbon footprint. In excess of 136,000 papers



Chief Justice Michael Hwang**

from the inception of the Courts in 2005 have been transferred to the new system and are now stored electronically. Only original pleadings and documents sealed by the Courts are maintained and stored offsite, after the case has closed. The rationale behind this project was two-fold. First, it was a move to be in line with the vision of the future, and second, there was a practical need as the DIFC Courts physically do not have the storage space to store approximately 10,000 new files every year.

The paperless project coincided with our web-based case management system initiative and

e-filing services that reduce the necessity for the Courts' users to file documents in person. As most of the judges are non-residents of Dubai, this case management system allows us to access and download the documents in preparation for an upcoming trial, without the need for a hard copy. We will also introduce an e-payment gateway which will benefit from these services as it will reduce printing costs and time spent filing documents as the DIFC Courts and the caseload continues to grow; it is estimated that electronic filing will save over 40,000 pages being printed per year.

Personally, I feel that such a system could be adopted by other judicial systems and I would certainly recommend such a move.

** The photo was taken by Laura Blake who is a freelance writer, photographer and editor with Far-Flung Travels. She was also the winner of the 2011 Photographer of the Year award at the Society of American Travel Writers Central States Writing and Photography Contest.

Q: I understand that a number of protocols and memorandums of understanding (MoUs) have been concluded between the DIFC Courts and the Dubai Courts. Can you expand on the challenges faced by the relationship between these two judicial systems?

A: There are relatively few. Collaboration has been important from the beginning. We remain committed to cooperating with other courts in the region and beyond. In 2011 alone, the DIFC Courts signed a number of MoUs with other bodies to work together towards furthering judicial excellence and innovation. There are regular meetings with judicial bodies from across the region, including Qatar and Bahrain, in an effort to work more closely together. We are thankful to Dr Ahmed bin Hazeem and his team at the Dubai Civil Courts for their support, which has been critical in our development and integration in the UAE's judicial system.

Q: Would you like to tell us more about the expansion on the DIFC Courts' jurisdiction which was publicly announced on 31 October 2011?

A: First, I would like to say that the announcement by His Highness Sheikh Mohammed is the culmination of years of hard work by everyone at the DIFC Courts and really highlights how far we have come in a relatively short space of time. The announcement is a credit to Dubai's status as both regional and international businesses hub.

Dubai's judiciary has always been at the forefront of justice in the region and beyond; and allowing businesses in Dubai (as well as) internationally to have the choice of Dubai's Arabic language or English language courts to resolve disputes reflects Dubai's commitment to choice, and to providing a world class and diverse environment to resolve commercial disputes.

The Ruler's decree opens the DIFC Courts' jurisdiction, something that the regional business community has been calling for. The courtroom doors are now open for businesses from all across the Gulf Co-operation Council region and beyond, and provide the international business community with access to the most advanced commercial court in the world.

Q: The DIFC is seen as a global financial hub. Has the current economic crisis had any effect on the DIFC Courts?

A: Arguably there has not been an area of the world completely unaffected by the global financial crisis. For a period, Dubai was the centre of a lot of speculation but remains the leading hub

in the region and it has been very much business as usual from our perspective.

There was a slight increase in the amount of cases over the last two years, but this has levelled off. The DIFC's development slowed down slightly; however, although the DIFC suffered an economic downturn, within the DIFC, it has been fairly steady in terms of growth with the companies that are already here enhancing their range of services. New companies are still joining the DIFC, with the proportional increase of Asian and Middle Eastern companies showing the most growth.

Q: The DIFC Courts are regarded as the spearhead of judicial development and reform in the region. Your predecessor, Sir Anthony Evans' tenure was characterised by a number of milestones such as the establishment of the pro bono scheme, the SCT, the urgent case handling facility, the e-case management system and the introduction of the Professional Code of Conduct. What innovative developments do you hope to achieve during your tenure as Chief Justice?

A: We have introduced numerous 'firsts' in the region such as our pro bono initiative (offering free legal advice to those in financial hardship) and I hope that during my tenure we will continue to innovate and be at the forefront of technology, transparency and efficiency. We take pride in our community-focused approach to providing reliable, accessible, efficient and fair justice, and offering exemplary service throughout the Court of First Instance, the SCT and the Court of Appeal, which has delivered world-class justice that has been recognised at the highest levels.

Q: You are responsible for one of the fastest growing legal centres in the region. What has been the most challenging and the most rewarding aspect of your role as Chief Justice so far?

A: Since the establishment of the DIFC Courts, we have strived for the highest international standards, and had many successful initiatives. One of the biggest challenges has been following on from the great work that my predecessor, Sir Anthony Evans, had done – by taking the Courts from their inception to arguably one of the leading dispute resolution centres in the world. A hugely rewarding aspect is that we have been able to maintain and grow the reputation of our Courts, ultimately leading to the recent announcement by the Ruler of Dubai. The fact that we can now be mentioned in the same breath as centres such as London and Singapore is testament to our work over the past few years; the challenge is not resting on our laurels and to continue moving forward and upward.

FDI in India's Retail Trade Sector: Opening the Floodgates



Rajas Kasbekar

The Indian Government's decision to allow conditional foreign direct investment (FDI) in India's retail trade sector is considered to be a major reform for the retail sector. This article examines the reasoning behind the Government's decision and the opposition by various stakeholders the reform has met.

Rajas Kasbekar
Partner, Little & Co

Until 2006, whenever upscale Indians saw Hollywood stars endorse designer luxury brands in international fashion magazines, they would fret over the absence of these brands in the Indian markets. To get over their disappointment, they would splurge generously on these brands on their trips overseas. But all that changed in 2006, when the Indian retail sector received an interesting makeover. In February that year, the Indian Government decided to conditionally allow FDI of up to 51% in single brand product retail trade under the Government approval route, which essentially meant that an application seeking such approval would need to be made by the prospective foreign investor to the Government and the latter would then, in its discretion, decide if such approval should be granted. The investment

could only be made after approval was granted.

The move was primarily intended to attract the generous amounts which Indians regularly spent on international brands in overseas markets. By providing Indians ample scope for such shopping in the Indian market itself, the overseas spending could now be curtailed and channelled into Indian markets. The Government also hoped that such FDI would assist in bringing in financial resources to production and marketing while encouraging increased sourcing of goods from India, and enhancing the competitiveness of Indian enterprises through access to global designs, technologies and management practices.¹

The Department of Industrial Policy and Promotion (DIPP) of the Ministry of Commerce and Industry is responsible for the formulation of the FDI policy and the promotion, approval and facilitation of FDI into the country.²

Prior to 2010, the FDI policy would be

published by DIPP by issuing 'Press Notes' which were public announcements of the DIPP's policy guidelines on various issues concerning FDI. The problem was the policy was not available in one document and had to be read by piecing together several Press Notes issued by DIPP in various issues over a period of time. In the wake of criticisms on this front, from 2010, DIPP began issuing a 'Consolidated FDI policy' which consolidates in one document all policies on FDI as are applicable in the current policy framework on FDI. The 'Consolidated FDI policy' has a sunset clause of six months with a revision published at the end of the six months.

In tune with the practice then, in February 2006, DIPP issued Press Note 3 (2006 series) which announced that the Government would allow FDI of up to 51% with prior Government approval in the retail trade of 'single brand' products. The Press Note 3 (2006 series) also provided guidelines for such FDI. Though the phrase 'single brand' was not specifically defined, the conditions provided in the guidelines shed light on the intended meaning. FDI in 'single brand' product retail trade was accordingly permitted with prior Government approval, subject to the following conditions: (a) products to be sold should be of a 'single brand' only; (b) products should be sold under the same brand internationally ie in one or more countries outside of India; (c) 'single brand' product retailing would cover only products which were branded during manufacturing. Additionally the guidelines required that: (i) the application seeking approval for FDI would specifically indicate the product or product categories which were proposed to be sold under a 'single brand'; and (ii) any addition to the product or product categories would require fresh approval from the Government.³

Accordingly, FDI in 'single brand' product retail trade essentially meant that a retail store with FDI was allowed to sell only a single brand and not multiple brands though it could sell multiple products under the single brand. Therefore, if an international brand 'X' was allowed to open a retail store with FDI in India, that store could only sell products under the 'X' brand. If it wanted to sell products under 'Y' or 'Z' brands, fresh approvals would be needed from the Government. If approval was granted, it could sell products under the 'Y' or 'Z' brand at a different store location but not in the same store, although the original store could sell multiple products under the 'X' brand. Such was the concept of 'single brand' product retail trade.

In response to its decision to allow FDI in 'single brand' product retail with prior approval, the Government received and approved a variety

of investment proposals related to retail trading of sportswear, luxury goods, apparel, fashion clothing, jewellery, handbags, life-style products, etc covering high-end items.⁴ Upmarket stores stocking international designer- branded luxury products slowly started to crop up in Indian cities.

The decision of the Government to allow FDI in 'single brand' product retail trade had its roots in the 1990s, at a time when FDI in retail trade was strictly prohibited in India. In 1995, India became a signatory to the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) which included wholesale and retail services. GATS set out a framework of legally binding rules governing the conduct of world trade in services. It was supported by a number of schedules of specific commitments undertaken by individual WTO members. These commitments bind members not to introduce more restrictive rules which could have an adverse effect on trade.⁵ It became evident that if India were to steer clear of being in breach of GATS, it could no longer keep its trade sector off limits for foreign investors and would eventually have to open up for FDI.

Reading the writing on the wall, the Indian Government in 1997 took the initiative and first permitted 100% foreign equity in cash and carry wholesale trading under the Government approval route. Subsequently, in 2006, it went one step further and allowed such investment under the automatic route.⁶ The extant FDI policy in this regard explains what comprises of the scope of cash and carry wholesale trade for investment purposes. It provides that 'cash and carry wholesale trading' means the sale of goods/merchandise to retailers, industrial, commercial, institutional or other professional business users, or to other wholesalers and related subordinated service providers.⁷ Wholesale trading would, accordingly, be sales for the purpose of trade, business and profession, as opposed to sales for the purpose of personal consumption.⁸ The yardstick to determine whether the sale is wholesale or not would be the type of customers to whom the sale is made and not the size and volume of sales.⁹ Wholesale trading would include resale and processing, and thereafter it would include sale, bulk imports with export/ex-bonded warehouse business sales and B2B e-commerce.¹⁰ The liberalisation of the trade sector thus began with the wholesale trade segment. Next to follow was retail trade in 'single brand' products. It was clear that the Indian Government was proceeding carefully and cautiously on the road ahead, and was readying itself for the plunge towards a full scale opening of the trade sector to foreign investment.

While FDI in 'single brand' product retail trade was conditionally permitted, FDI in 'multi-brand'

product retail trade continued to be prohibited. This was primarily because single brand retail trade, by its very nature, caters only to a small minority, comprising of brand conscious upscale Indians, and therefore the influx of FDI in such trade has limited implications. On the other hand, multi-brand retail trade in India caters to a mind-boggling expanse of the Indian population who shop for their daily household needs at local street bazaars, low profit family managed shops ('mom and pop' stores) or grocery/provision stores (in India called *kirana*). The size of India's retail sector is approximately US\$590 billion,¹¹ and it forms an important constituent of India's gross domestic product (GDP). Therefore, the opening of multi-brand retail to foreign investment would have far wider effects compared to 'single brand' product retail and naturally needs to be considered carefully by the Indian Government.

Considering the size of the sector and the implications involved, the subject of allowing FDI in Indian multi-brand retail trade has always evoked strong views and sentiments in India. For years, there have been intense and convincing arguments and differences of opinion between its staunch supporters on the one side, and its unrelenting critics on the other. The supporters argue, amongst other things, that India currently lacks adequate storage infrastructure, resulting in large scale wastage of perishable horticultural commodities which also creates difficulties in produce reaching wider markets. Post-harvest losses of farm produce have been estimated to be over INR1 trillion per annum, 57% of which is due to avoidable wastage, and the rest due to avoidable costs of storage and commissions.¹² To add to the woes, the retail sector also faces considerable difficulty in obtaining bank finance. Supporters argue that FDI will bring in the necessary financial resources to assist with these problems. Critics, however, are not convinced. They firmly believe that permitting FDI in such trade will pit domestic retailers, including localised small *kirana* stores, against the might of international retailing giants in a clearly unequal fight which will ultimately lead to unfair competition and their widespread closure. Since the retail sector is India's second largest employer, the exit of such domestic retailers would obviously lead to large scale unemployment. That apart, other concerns are: (a) as the manufacturing sector has not been growing fast enough, persons displaced from the retail sector would not be absorbed there; and (b) the Indian retail sector, particularly organised retail, is still underdeveloped and in a nascent stage and, therefore, it is important that the domestic retail sector is allowed to grow and consolidate first, before opening this sector to foreign investors.¹³

In an attempt to tread cautiously going forward and reach a consensus, DIPP released a discussion paper, in July 2010, on FDI in multi-brand retail trading. Through the release of such a paper, it 'sought views/suggestions backed up by facts, figures and empirical evidence' from the public with the hope to 'generate informed discussion on the subject, so as to enable the Government to take an appropriate policy decision at the appropriate time'.¹⁴

Though the discussion paper did not define the concept of 'multi-brand product retail', it was understood to mean that a multi-brand product retail outlet with FDI will be allowed to sell multiple brands in that outlet. Further, for selling such multiple brands, it will not require individual specific approvals from the Government for each and every brand it sells, unlike single brand retail.

The discussion paper cited the rationale for FDI in retail trading, which (in brief) was:¹⁵

- (a) The agriculture sector needs well-functioning markets to drive growth, employment and economic prosperity in rural areas of the country. Further, in order to provide dynamism and efficiency in the marketing system, large investments are required for the development of post-harvest and cold chain infrastructure nearer to the farmers' field. FDI in front-end retailing



is imperative to fund this investment and to derive full advantage of the value chain for the producer and consumer. Allowing FDI in front-end retail operations will enable organised retailers to generate sufficient cash to fund this investment. Investment in organised retail by domestic players will be ineffectively deployed if FDI is delayed. International retailers will bring with them technology and management know-how that will impact the retail sector through the adoption of best practices.

- (b) There is a need to ensure that issues of cost and quality relating to consumers are adequately addressed. This could be achieved through stabilising prices and reducing inflation which, in turn, could be achieved through direct buying from farmers, improving supply chain inefficiencies to lower transit losses, improved storage capabilities to control supply/demand imbalances, better quality and safety standards through farmer development and increased processing of produce.
- (c) There is a need to address issues relating to farmers, through removal of structural inefficiencies. This could be achieved through liberalised markets, with direct marketing and contract farming programmes from which farmers could profit, which provide more predictable farm gate prices, steadier incomes

and better access to evolving consumer preferences through private investors, especially the organised retail sector.

- (d) Permitting foreign investment in food based retailing is likely to ensure adequate flow of capital into the country and its productive use, in a manner likely to promote the welfare of all sections of society, particularly farmers and consumers. Opening FDI in retail could also assist in bringing in technical know-how to set up efficient supply chains which can act as models of development. It would also help bring about improvements in farmer income and agricultural growth and assist in lowering consumer prices/ inflation.
- (e) Without addressing the gaps in the value chain, organised retail will neither be profitable nor make any great difference to the economy.
- (f) Keeping in view the large requirement of funds for back-end infrastructure, there is a case for opening up the retail sector to foreign investment. At the same time, in the Indian context, there is a view that this may be more appropriately done in a calibrated manner.

The discussion paper brought to the forefront the debate that has long dominated Indian government offices, corporate boardrooms and drawing rooms: Should India permit FDI in multi-brand retail? DIPP had given a 31 July 2010 deadline for submitting comments on the paper. By then, it had received an overwhelming response from a number of stakeholders including producers, manufacturers, consumers, farmers, modern retailers and even state governments and ministries/ departments of the Government of India. An inter-ministerial committee comprising of representatives from the Ministry of Commerce and Industry, DIPP, the Finance Ministry and the Agriculture Ministry was constituted to examine the responses received and submit a report of their findings to the Government. In the report submitted in late-December 2010, the committee did not make any recommendations but analysed and summarised the responses received.

Thereafter, in July 2011, the proposal to allow FDI in multi-brand retail was reviewed by a Committee of Secretaries (CoS), a panel of bureaucrats headed by the Cabinet Secretary. CoS, in a significant move, recommended and gave an 'in principle approval' for allowing FDI of up to 51% in multi-brand retail. Of course, considering the sensitivity of the issue, the recommendation was saddled with a host of precautionary conditions such as: (a) keeping the minimum FDI at US\$100 million of which at least half would have to be in back-end infrastructure such as cold storages, soil testing labs and seed farming; and (b) the



shop format is only allowed to exist in cities with population figures of 1 million or more. This would apply to about 36 cities in India which house approximately 11.5% of the Indian population. CoS also recommended that: (a) a foreign retailer making the investment can commission a separate entity to invest in back-end support by outsourcing the task; and (b) 30 % of sales turnover will have to come from small traders, either directly or through wholesale cash and carry units. The retailers would also be required to source at least 30 % of its manufactured items in value terms from small and medium enterprises.¹⁶

Subsequently in November 2011, DIPP prepared a draft note for the Cabinet Committee on Economic Affairs, which is the final decision making body in this regard. The DIPP note was based on the recommendations of CoS. Accordingly, it contained a proposal to allow 51% FDI in multi-brand retail. Additionally, it also sought to increase the limit on single brand retail from 51% to 100%. In response to the DIPP note, the Cabinet, in late-November 2011, approved a bill in this regard which cleared the decks for foreign retailers to own a 51% stake in multi-brand retail stores and a 100% stake in single brand retail stores. Interestingly, the Cabinet's approval of such investment in multi-brand retail was met with strong protests in Parliament from opposition parties as well as some allies of the governing coalition Government who felt that the move would completely wipe out small domestic retailers leading to large scale unemployment in the country. The protests led to a deadlock in Parliament over the decision. In an attempt to ease tensions over the issue, the Government in early-December 2011 called an all-party meeting of political parties having representation in Parliament. The meeting passed a resolution to suspend the decision until a consensus is reached through consultation among various stakeholders. The Finance Minister, while announcing the suspension of the decision to the *Lok Sabha* (Lower House of Parliament) clarified that the stakeholders were political parties and Chief Ministers of States without whose involvement, the decision cannot be implemented. Currently, no timeframe has been set for the suspension to be lifted and when the decision will be implemented. However, judging by the reaction of the political parties, the road ahead may not be smooth and it remains to be seen

if the Government manages to achieve a win-win situation for all, before the next elections in 2014.

Interestingly though, FDI in multi-brand retail remains suspended, 100% FDI in single brand retail may soon be a reality. It is anticipated that the Government may, by mid-December 2011, issue a Press Note and guidelines for allowing such investment with some riders attached. If that happens, foreign investors interested in single brand retail trade may have to gear up to meet some stringent conditions that the Government is likely to prescribe in this regard. With food inflation in India currently reaching dizzying heights, the Indian Government hopes that the liberalisation of the retail trade sector will bring in a flood of FDI's from international retailing giants which will wash away the inflation woes. For now, it seems that opening the floodgates for such investment may just take a little bit longer. Whether opening these floodgates will also bring new problems for the world's 10th largest economy remains to be seen.

Notes:

- ¹ Press Note 3 (2006 series) issued by the Department of Industrial Policy and Promotion.
- ² See: dipp.nic.in/English/AboutUs/Roles.aspx.
- ³ Press Note 3 (2006 series).
- ⁴ Discussion paper on FDI in multi-brand retail trade.
- ⁵ See: commerce.nic.in/trade/international_trade_matters_service_consultation.asp.
- ⁶ Press Note 3 (1997 series) and Press Note 4 (2006 series).
- ⁷ The Consolidated FDI policy (effective from 1 October 2011).
- ⁸ *Ibid.*
- ⁹ *Ibid.*
- ¹⁰ The Consolidated FDI policy (effective from 1 April 2011).
- ¹¹ Report of the Indian Council for Research on International Economic Relations (ICRIER).
- ¹² Discussion paper of DIPP on FDI in multi-brand retail.
- ¹³ *Ibid.*
- ¹⁴ *Ibid.*
- ¹⁵ *Ibid.*
- ¹⁶ See: www.barandbench.com/brief/2/1647.

Why Should Asian Companies Worry About Brazilian Antitrust Policy?



Leopoldo Pagotto

Antitrust enforcement seems to be on the rise in many jurisdictions in which fines are escalating and extraterritoriality is reaching places far from its territory. This article summarises the current situation of extraterritorial reach in Brazilian antitrust policy with emphasis on how Asian companies are being impacted.

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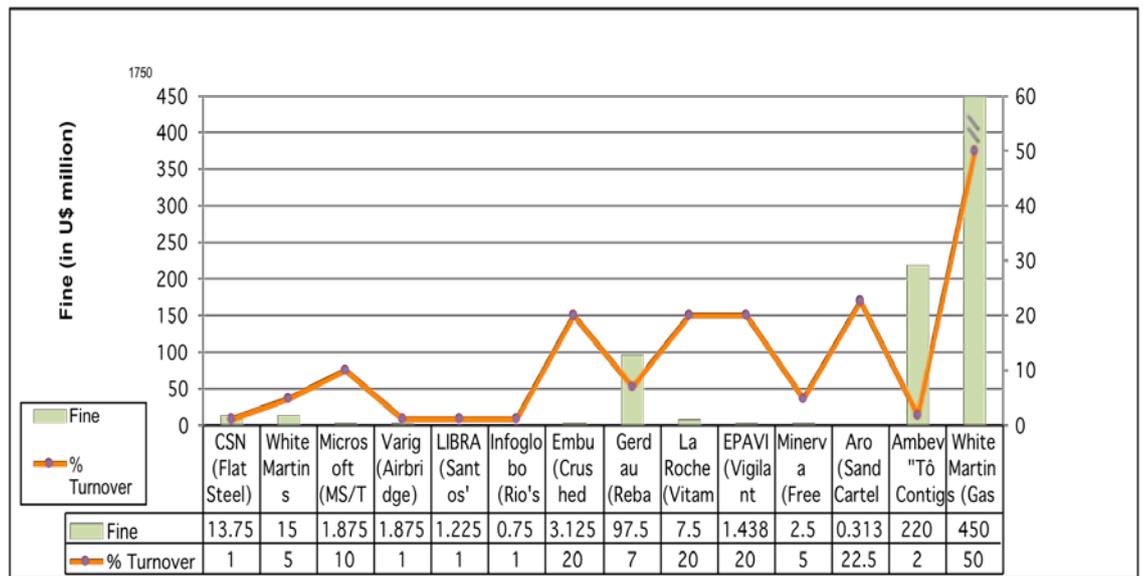
At first glance, a public policy followed by Brazil need not concern companies located in Asia – after all, Brazil is one of the farthest places one can go from Korea, China or Japan. However, times are changing and globalisation is making inroads with consequences that are still unclear to

foreign companies, especially those located in Asia.

The Brazilian Antitrust Authorities (BAAs) have been putting in a great deal of effort to fight cartels, and Brazil is fast becoming one of the key jurisdictions when it comes to antitrust enforcement. For legal entities, the fines pursuant to the Brazilian Antitrust Law range from 1% to 30% of their gross pre-tax revenue in the last financial year and this has been effectively enforced as follows:

Fines/Year	2002-05	2006-09
Fines collected (BRL\$ million)	7	8
Fines placed in collection (BRL\$ million)	40	600
No of fines placed in collection	95	400
No of collection law suits	42	440

Trends in antitrust fines in Brazil



In other words, there is a clear trend towards tougher antitrust enforcement. The graph above illustrates how the fines are escalating.

However, the great distance between Brazil and Asia does not mean there is low enforcement risk. Brazil is one of the main recipients of Asian outward investments, not only due to the size of its internal market but also due to its growth prospects. More and more Asian companies own assets in Brazil – first, the Japanese, then the Koreans and, more recently, Chinese, Taiwanese and Indian investors are investing heavily in Brazil. To sum up, these investments are subject to fines imposed by the BAAs.

In this regard, the BAAs are bringing cases against cartel agreements executed outside Brazil, which involve only foreign companies. Considering that the conduct under investigation did not occur even in part in Brazilian territory, some lawyers believe that this will prevent the application of the territorial principle governing the antitrust investigations.

However, a branch of the BAAs has already stated that their jurisdiction to analyse cartel agreements results from the combination of the extraterritorial effects and verification of the potential effects established. Moreover, for the government, ‘potential anticompetitive effects are sufficient for adverse judgment, which allows the antitrust authorities to close the investigation without thoroughly searching for actual impacts on the market’.

If such an understanding prevails, the Brazilian jurisdiction would reach Asian companies that do not operate in Brazil. Such a statement must be subject to deeper analyses, as it may lead to

endless conflicts with foreign jurisdictions which would not be of benefit to Brazilian consumers and taxpayers. It is worth remembering that the United States went through a similar discussion: in view of the various conflicts with other countries, the US Department of Justice mitigated the extension of the effects of the doctrine, requiring the existence of significant effects and the jurisdiction to be reasonably exercised.¹

The point is that every component of the legal system plays a particular function and specific role, which can be useful to and consistent with the whole system. Such a particular function and specific role is explicitly stated in section 1 of the Brazilian Antitrust Law which provides: ‘Society at-large is entrusted with the legal rights protected herein’.

As a result, the BAAs should focus on the interests of the society at-large, which can only mean the Brazilian people. This interpretation is endorsed by a recent case of the Brazilian Federal Supreme Court. However, the understanding of the BAAs is inconsistent with the purpose of section 1 for two reasons:

1. no proper analysis of the purposes of the Brazilian Antitrust Law was made; and
2. the understanding of causation is exaggerated, as all the cases brought by the BAAs consider that causation can exist in the event of indirect effects.

In relation to the first argument, the BAAs only have jurisdiction if practice (1) has been wholly or partially performed within the Brazilian territory or in the case of (2), may impact the Brazilian

territory. Most international cartels are negotiated outside of Brazil – maybe the only exceptions are the vitamins cases, which took place in the 1990s.

In turn, the second alternative, when combined with the main provision of section 1, requires the foreign company that has engaged in the practice with possible effects on the Brazilian territory to be physically established or operating in Brazil. Otherwise, there will be no effect on the national market.

Some Asian companies currently under investigation have not sold any products in Brazilian territory. Therefore, the fact that the company does not operate in Brazil cannot be deemed a negative effect, because the free initiative principle protected by the legislation grants the right to enter the relevant market, but never compels agents to operate in the Brazilian market, especially if the company is located abroad. Condemning a company for not operating in the market would be the same as replacing the free initiative by government intervention because all companies would be required to operate in Brazil by reason of law.

There must be an additional requirement of physical presence, which is implicitly included in legislation: the production effects on the domestic trade alone are insufficient. Those responsible for the violation must be present in Brazil, in accordance with the rule of effectiveness. José Carlos de Magalhães understands that ‘if the agents responsible for the unlawful practice are not present in Brazil, the Brazilian law cannot reach them, for the simple reason that they are under the jurisdiction of another State. Even if the country intends to submit such practice to its own jurisdiction, it lacks the requirement of effectiveness, which is the possibility of exercising jurisdiction on the responsible agents, which are physically located in a foreign jurisdiction’.²

All legal provisions must be reasonably construed, and the purpose thereof must always be observed. The question is: have the international cartels under investigation somehow adversely affected the interests of Brazilian society? The BAAs are offering weak arguments to defend such a position. For example, a cartel involving paint manufacturers in Taiwan could be investigated in Brazil because many of the products imported from Taiwan contain such material. Similarly, a cartel involving Japanese vehicle part manufacturers could be charged in Brazil, in view of the fact that some of the Japanese vehicles exported to Brazil contain such parts. The requirement of physical presence in Brazil is ignored.

To sum up, the BAAs understand that they have jurisdiction notwithstanding the fact that there is no reference to the company’s operations

in Brazil, nor any reference or proof that the exported products have actually been purchased in Brazilian territory.

Some of the Asian companies under investigation in Brazil are headquartered in Asia, and do not have branches, agencies, subsidiaries, establishments, agents or representatives in Brazilian territory. Likewise, these companies do not operate in the Brazilian market and have never exported any products or components thereof to Brazil, even if a wide interpretation ascribed to the term ‘operate’, which is contained in the note issued by Commissioner Pfeiffer in the merger analysis between NSK Ltd and NSK Needle Bearing Co, were to be adopted.³

“In the case at issue, one of the applicants has an office in Brazil, regularly operating in the domestic market (Lauritzen), and although the other company does not have branches, representatives or an office in the Brazilian territory, *it habitually operates in the country* (Eastwind). Therefore, I understand that a transaction carried out abroad involving companies that *operate in Brazil* and that are able to offer their services on the same routes, undeniably has the power of affecting the Brazilian territory.” (emphasis added)

Another precedent that reinforces this interpretation on the need for habitualness is the antitrust investigation against ‘Focus on Sabbatical’. In brief, this is a non-governmental organisation made up of North American and Canadian producers that was allegedly offering US\$165 to Brazilian soy producers for each hectare of land they ceased to cultivate.

According to the Antitrust investigative branch, Focus on Sabbatical’s adviser informed that he:⁴

“[...] had been hired to act as an interpreter, guide and press agent for Mr Kenneth Goudy (Plaintiff’s advertiser), that there was no employment relationship or formal representation between him and the Plaintiff, and that he had been instructed to take the first steps towards establishing the NGO in Brazil, even though these activities had been suspended.”

The institutions that were consulted confirmed that the NGO had not been established in Brazil, but that its representatives travelled frequently to the country. In view of these facts, it was concluded that ‘there is no factual possibility of performance of the conduct’.⁵ Finally, on 28 September 2005, Commissioner Delorme Prado

endorsed this opinion: visits to the country for the purpose of selling goods or starting negotiations do not represent the habitualness established in the precedents as a test to verify its jurisdiction on the matter.⁶

Indeed, repressive measures must be effective; it cannot be different. For this reason, many jurisdictions are not competent to investigate the international oil cartels – even if they have been condemned for violation of the economic order, such decision cannot be enforced because the companies are located in countries which support this practice. As explained by Paula Andrea Forgioni:⁷

“[I]f the economic agents involved have assets, distributors or representatives in

the country that condemned or prohibited the practice, the penalty shall be directed to these assets, representatives or distributors. Otherwise, this won’t be the case if the offender has no asset or connection with the country affected by the unlawful behaviour. Should this be the case, the instruments the Government may use for ensuring the effectiveness of the penalty are very limited.”

As already mentioned, there was at least one precedent applicable to the jurisdictional reach of the BAAs. During investigation of the vitamin cartel, the European Commission (EC) convicted some companies that were not convicted in the United States, and the same happened in Brazil.

Summary of the penalties imposed in the vitamin cartel case

Company	US	EC	Brazil
Aventis SA		X	X (Aventis Animal Nutrition SA)
BASF AG	X	X	X
BASF S/A			X
Bio-Products Inc			
Chinook Group Ltd	X		
Daiichi	X	X	
Degussa-Huls AG	X		
DuCoa LP	X		
Eisai Co Ltd	X	X	
F Hoffmann-La Roche	X	X	X (F Hoffmann-La Roche Ltd; and Produtos Roches Químicos e Farmacêuticos SA)
Kongo Chemical Co		X	
Lonza AG	X	X	
Merck KGaA	X	X	
Nepera Inc	X		
Reilly Industries Inc	X		
Rhône-Poulenc Animal Nutrition		X	X
Solvay Pharmaceutic		X	
Sumika Fine Chemical		X	
Sumitomo Chemical Co		X	
Takeda Chemical Ind	X	X	
Tanabe Seiyaku Co		X	



The table (on p 20) summarises the differences in convictions in the three aforementioned jurisdictions.⁸

In the global lysine conspiracy, the same has occurred in relation to Daesang Corporation and Cheil Jedang Corporation, both headquartered in South Korea. Taking into consideration that neither company operated in the Brazilian territory (not even by means of exports into Brazil), they have not been included in the investigations. In the lysine cartel, the existence of a global market for the product was clear.

Furthermore, the lack of causation further weakens the extraterritorial reach of the Brazilian jurisdiction. Causation must be understood as the connection between the damage and the action performed by a possible violator. This punishment requirement cannot be indiscriminate, especially because restriction to the defendants' assets is severe.

In the United States, causation has an extremely broad meaning whereas the Brazilian legislation requires a direct and reasonable relation between the loss and the agent responsible for such loss. It is extremely important to define whether the action performed has been essential for production of the loss, as well as the level of influence of the agent over the effect. Pursuant to the Brazilian Antitrust Law, this means to investigate the effects. The BAAs have already decided on the subject in the generic medicines cartel case, in 2005. In his dissenting opinion, Commissioner Cueva explains the basic elements of causation in a specific case:⁹

“In the case at issue, the charge seems to have been based on the assumption that by gathering outside the scope of the institutional system, the defendants would have already engaged in an illegal action, which should be, according to the Secretariat of Economic Law of the Ministry of Justice (Secretaria de Direito Econômico (SDE)), aggravated and punished for the most serious potential effect (boycott). However, the SDE has not cared to show the required causation between the defendants' action (the meeting) and the potential result thereof. Analysis of the ratio of the defendants' action and of the actual possibility of imposing conditions on distributors would be essential to establish the relevance of the conduct, but such analysis has not been carried out. Therefore, no logical and subjective pertinence has been established, which would be required to justify the imposition of administrative penalties.”

The case has been submitted to the courts and the definition of causation as established in the Brazilian law and in the opinion issued by Commissioner Cueva has prevailed.

Although the Brazilian Antitrust Law does not establish in detail how to determine causation, the legal tradition must be observed in this regard. For example, Brazilian courts have already refused the interpretation, which is usual in the United States, according to which there is causation between

smoking cigarettes and contracting cancer, so as to allow suits for damages against the tobacco industry. Other examples of ‘theories’ accepted in the United States could be listed. It should be noted that the American interpretation of causation is not usual in Continental Europe. Without basing itself on foreign interpretation, the Brazilian court decision has adopted, to the possible extent, the interpretation expressed in the opinion issued by Commissioner Cueva.

Therefore, the effects play an essential role in the establishment of the existence of causation. An effect would be linked to the following courses of actions: to carry out, to diligently do, to execute, to produce, to put into practice, to accomplish and to achieve. The accomplishment of something material as a result of the action that produced the effect is inherent to all these conceptions. Consequently, the effect must be caused by an action that resulted in some materiality – using international terminology, it is a direct effect.

For that reason, a reasonable and systematic

interpretation of section 2 of the Brazilian Antitrust Law requires the existence of direct and sensible effects and not only indirect, presumed or even imaginary effects. This is a case in which the lawmaker has failed to include something that should have been included in the law, but the absence of such element leads to such an absurd conclusion. The US antitrust law addresses this issue in the Foreign Trade Antitrust Improvements Act (FTAIA), which grants antitrust exemptions for cases where the conduct produces effects on trade ‘unless such conduct has a direct, substantial, and reasonably foreseeable effect’.

As explained above, the BAAs lack jurisdiction to enforce the antitrust policy in relation to many Asian companies, even though others should really worry about their growing activism. In spite of this conclusion, it will take many years until a final decision is reached. The BAAs are relatively new and there is a learning curve in relation to enforcement – this is a side effect of the spread of the competition culture around the world.

Notes:

- ¹ See US Department of Justice, Antitrust Enforcement Guidelines for International Operations, 1988, pp 31-2.
- ² José Carlos de Magalhães, *As leis da concorrência e a globalização: a competência extraterritorial do CADE*, São Paulo, Conjur.
- ³ Councilman Roberto Augustos Castellanos Pfeiffer, Vote on the Concentration Act # 08012.005749/2003-77 (NSK Ltd and NSK Needle Bearing Co Ltd).
- ⁴ Administrative Process # 08001.003383/2002-40; Plaintiff: Ministry of Agriculture, Livestock and Supply; Defendant: *Focus on Sabbatical*.
- ⁵ Administrative Process # 08001.003383/2002-40; Plaintiff: Ministry of Agriculture, Livestock

- and Supply; Defendant: *Focus on Sabbatical*.
- ⁶ Administrative Process # 08001.003383/2002-40; Plaintiff: Ministry of Agriculture, Livestock and Supply; Defendant: *Focus on Sabbatical*.
- ⁷ Paula Andrea FORGIONI, *Os fundamentos do antitruste*, São Paulo: RT, 1998, p 390.
- ⁸ See: europa.eu/rapid/pressReleasesAction.do?reference=IP/01/1625&format=HTML&aged=0&language=EN&guiLanguage=en; www.justice.gov/atr/public/press_releases/2000/4684.htm; and www.justice.gov/atr/public/press_releases/1999/3726.htm.
- ⁹ Administrative Process # 08012.009088/99-48. Plaintiff: SDE *ex officio*; Defendants: 21 pharmaceutical laboratories.

Disability, Employment Standards and Immigration Discrimination



Jacqueline R Bart

In Canada, where immigration and employment law intersect, there is a grey area for persons with disabilities. On one hand, Canada wants to promote the admission of the best and brightest workers, while on the other hand, the current immigration system can be viewed as systematically discriminating against persons with disabilities.

Jacqueline R Bart
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It is well understood law that Canadian employers cannot discriminate in the hiring of employees based on specific minority factors, such as race, gender and disability; in fact, federal employment equity law encourages preferential treatment in the hiring of people in these groups. However, immigration law in Canada also sets out specific medical inadmissibility criteria which function to preclude immigration by those foreign nationals who may have a disability or health condition which could cause ‘excessive demand’ on the Canadian social system. While foreign nationals do not benefit from Canadian employment equity law, there is an apparent disconnect between immigration law, which ostensibly functions to promote immigration, and the interpretation of excessive demand as something which limits the

ability of companies to hire people with disabilities, or with dependents with disabilities, irrespective of the benefits they may offer Canada.

Employment and Disability Law

Federally, two pieces of legislation directly address disability discrimination. The Canadian Human Rights Act¹ (CHRA) has long functioned to prohibit discrimination on multiple grounds. The addition of the parallel Employment Equity Act² (EEA), often referred to as the Legislated Employment Equity Program (LEEP), has served to ensure fair hiring practices amongst federally-controlled corporations and constitutionally federally regulated industries with respect to women, people with disabilities, Aboriginal peoples and visible minorities. Employment equity, coined by Justice Abella who chaired the 1984 Abella Commission which inspired the EEA, goes beyond non-discrimination and requires proactive treatment for the specified

target groups. Section 2 of the EEA states that the purpose of the legislation is:

[T]o achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment (sic) of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences.³

The EEA defines persons with disabilities as:

persons who have a long-term or recurring physical, mental, sensory, psychiatric or learning impairment and who

- (a) consider themselves to be disadvantaged in employment by reason of that impairment,
- or
- (b) believe that a employer (sic) or potential employer is likely to consider them to be disadvantaged in employment by reason of that impairment, and includes persons whose functional limitations owing to their impairment have been accommodated in their current job or workplace.⁴

LEEP is mandated to:

promote, support and enhance employment equity for the four designated groups (women, Aboriginal peoples, persons with disabilities and members of visible minorities) in federally regulated private sector employers and Crown corporations that have 100 or more employees. The goal is to ensure that participating federally regulated employers – which include more than 500 private sector employees and 30 Crown corporations, and have a combined workforce of over 730,000 employees – reflect the composition of the general labour force in Canada.⁵

In practical effect, this legislation does not apply to multiple industries, such as retail and manufacturing, as those industries do not fall under its sphere of jurisdiction. The Federal Government also administers, via Human Resources and Skills

Development Canada (HRSDC), the Federal Contractors Program⁶ (FCP), a non-legislated program designed to extend employment equity to companies in industries falling outside the legislative jurisdiction of the EEA. The FCP operates in parallel to LEEP and specifically applies to contractors. Under the FCP:

[O]rganizations that have 100 or more employees and want to bid on a federal government contract or standing offer of \$200,000 or more must first sign a Certificate of Commitment to implement employment equity. Once the contract is granted, organisations must establish an employment equity program that fulfils the Requirements. Each organisation can be subjected to compliance reviews to verify that it is meeting the criteria ... Contractors found to be in non-compliance may lose their right to bid on or receive future government contracts or standing offers valued at \$25,000 or more.⁷

The CHRA and EEA both function to ensure a fairness in hiring and employment practices; the distinct difference is that employment equity takes



it further by promoting proactive recruitment and measures to attract employees in the four target groups. The CHRA is much broader in its protections as well, going significantly beyond the four target groups of the EEA.

All provinces have a section in their human rights code, or similar legislation, which relates to employment and ensures that discrimination on the basis of disability is illegal. While no province has an EEA analogous piece of legislation, some provinces use the Abella-coined term 'employment equity' to describe their laws,⁸ while others simply refer to discrimination. In any event, employment discrimination on the basis of physical or mental disability is recognised nationally as a contravention of law.

Immigration Law

Immigration law with respect to skilled workers and work permit holders is ostensibly designed to bring the best and brightest to Canada – those who will make a positive contribution to the nation. Unfortunately, in practice, this definition does not extend to many persons with disabilities and, in effect, it turns away individuals with useful skill sets for reason of disability.

One hindrance to immigration for individuals

with a disability is the concern of the Government of Canada that a condition may cause an excessive demand on Canadian health or social services. In the previous Immigration Act,⁹ applicants for permanent residence in Canada were required to undergo a medical examination to determine if they suffered from any disease, disorder, disability or other health impairment which would signify that they were likely to be a danger to public health or public safety. The law also referenced the admission of such people as perhaps being 'reasonably ... expected to cause excessive demands on health or social services'. The Immigration and Refugee Protection Act¹⁰ removed specific reference to disability, but retained the 'excessive demand' clause.

The concept of 'excessive demand' is defined in s 1 of the Immigration and Refugee Protection Regulations¹¹ (IRPR) as:

- (a) a demand on health services or social services for which the anticipated costs would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive years immediately following the most recent medical examination required by these Regulations, unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than 10 consecutive years; or
- (b) a demand on health services or social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of an inability to provide timely services to Canadian citizens or permanent residents.

Currently, the excessive demand threshold is set at \$5143.00 per annum.¹² The IRPA states, in relation to health ground for admissibility, that:

- 38. (1) A foreign national is inadmissible on health grounds if their health condition
 - (a) is likely to be a danger to public health;
 - (b) is likely to be a danger to public safety;
 - or
 - (c) might reasonably be expected to cause excessive demand on health or social services.
- (2) Paragraph (1)(c) does not apply in the case of a foreign national who
 - (a) has been determined to be a member of the family class and to be the spouse, common-law partner or child of a sponsor within the meaning of the regulations;



- (b) has applied for a permanent resident visa as a Convention refugee or a person in similar circumstances;
- (c) is a protected person; or
- (d) is, where prescribed by the regulations, the spouse, common-law partner, child or other family member of a foreign national referred to in any of paragraphs (a) to (c).

The case of *Hilewitz v Canada*¹³ directly addressed excessive demand. In this case, a wealthy investor wanted to move to Canada with his family, including his 17 year old intellectually disabled son, Gavin. The visa officer reviewing the case refused the Hilewitz family because immigration officials determined that, due to his disability, Gavin would place 'excessive demands' on social services – in particular, on the education system. This finding was made even though Mr Hilewitz had arranged for private education for his son. The Government argued that any possibility that a person would place excessive demands on health and social services is a good enough reason to deny them entry into Canada. This case went to the Supreme Court of Canada where it was overturned, striking a blow to the legal understanding of excessive demand. While excessive demand is still considered in permanent residence cases and cases of temporary residence over six months, ability to fund required social services is now relevant to immigration determinations.

There are few exceptions to a determination that an individual is likely to cause excessive demands on health and social services.

In cases where an employer wishes to temporarily hire a foreign worker, excessive demand may or may not become an issue. In addition to permanent residence applicants, the IRPR states that the following individuals must submit to a medical examination:

30. (1) For the purposes of paragraph 16(2) (b) of the Act, the following foreign nationals are requested to submit, and must submit, to a medical examination:
- [...]
- (b) foreign nationals who are seeking to work in Canada in an occupation in which the protection of public health is essential;
 - (c) foreign nationals who
 - (i) are seeking entry into Canada or applying for renewal of their work or study permit or authorisation to remain in Canada as a temporary resident for a period in excess of six

consecutive months, including an actual or proposed period of absence from Canada of less than 14 days, and

- (ii) have resided or sojourned for a period of six consecutive months, at any time during the one-year period immediately preceding the date they sought entry or made their application, in an area that the Minister determines, after consultation with the Minister of Health, has a higher incidence of serious communicable disease than Canada;
- (d) foreign nationals who an officer, or the Immigration Division, has reasonable grounds to believe are inadmissible under subsection 38(1) of the Act.

Under this section, a foreign national who is medically inadmissible as a permanent resident may be admissible as a temporary resident with a Temporary Resident Permit (TRP). Further, temporary workers who have undergone a medical examination within the previous 12 months, before arriving at the point of entry, are not required to undergo any further medical examination, unless officers have reason to believe that the person may not be admissible for medical reasons.

Temporary foreign workers who require a medical as per Regulation 30(1)(b), or who are from a designated country where medical examinations are required and will be working for more than six months in Canada, must apply for their work permit at a visa office – whether visa-exempt or not – unless valid medical examination results are available at the time of entry.¹⁴

Regulation 198(2)(b) does not apply to foreign nationals who will be working in Canada for less than six months (and are not employed in a designated occupation for which a medical examination is required). For most employers, a six-month deadline for hiring will not be practicable, and longer work permits will be desired. A work permit will not be issued until proof is received that the medical status is acceptable. Even when work permit holders are initially exempt from obtaining a work permit, once in Canada, they will have to demonstrate that they are medically admissible to obtain a renewal.

A TRP is highly discretionary, but can be obtained in cases of merit where significant benefits to Canada are clearly present.

Legal Authority for Competing Laws

It is perhaps most interesting to consider these situations as they relate to competing laws, with

regard to how Canada balances this competition.

Canada has both federal (Immigration and Refugee Protection Act) and provincial (for example, the Ontario Human Rights Code) legislation, as well as the Canadian Charter of Rights and Freedoms. The challenges from an employer's perspective are numerous, particularly if the employer has operations in multiple provinces and is subject to different laws.

The Charter is a uniquely Canadian piece of legislation. The Charter is a bill of rights entrenched in the Constitution of Canada, which guarantees certain political rights to Canadian citizens and civil rights of everyone in Canada from the policies and actions of all levels of government. Courts, when confronted with violations of Charter rights, have struck down unconstitutional federal and provincial statutes and regulations, or parts of statutes and regulations. The core distinction between the United States' Bill of Rights and the Canadian Charter is the existence of the limitations and notwithstanding clauses. Due to the limitations clause, where a violation of a right exists, the law will not necessarily grant protection of that right. Section 33 of the Charter contains what is known as the 'Notwithstanding Clause', which allows government to override certain sections of the Charter, including fundamental freedoms, legal rights, and equality rights. While this has never been used to strike down any element of the IRPA or provincial employment law, it could be used in the future. In essence, federal and provincial areas of control are delineated by the Constitution of Canada, and in select areas, such as immigration and health, the federal and provincial governments work together – though the head of power is ascribed to one or the other. The Charter provides a way to override a determination of unconstitutionality, and could thus be used by the government to override admissibility or disability decisions made by the courts.

Both the federal and provincial levels of government have jurisdiction over employment for certain types of employers. The level of government that has jurisdiction is determined by the industry in which an employer operates. Industries that are inter-provincial by nature (aviation, telecommunications, railways) are regulated by the Federal Government. Most other industries fall under provincial jurisdiction.

Employment standards legislation in each jurisdiction sets out mandatory minimum conditions of employment, governing areas such as hours of work, equal pay for male and female employees, employee benefit plans, and severance and termination pay. In relation to disabilities, employers have a duty to accommodate disabled

employees to the point of 'undue hardship'.

An interesting example of disability is seen in alcoholism and drug dependence, which is not expressly delineated as a prohibited ground of discrimination in employment for all provinces, but which is included under mental and physical disability.¹⁵

Courts have been quite active in promoting the protection of disabled employees under human rights legislation. Employees who are addicted to drugs and alcohol are considered to be disabled. Employers are generally expected to go to considerable lengths to provide time off, modified duties and access to assistance to accommodate such employees. With respect to drug testing, courts in different provinces have issued contradictory decisions on an employer's ability to conduct pre-employment drug testing. Random drug and alcohol testing has been found to violate human rights legislation, unless the employer can show that such testing is required for safety reasons.

The Federal Government has constitutional authority over immigration; that is, in determining who is eligible to enter Canada. Provinces have been brought into the fold with various programs and provincial departments organised to promote immigration to their specific provinces. Most provinces have a Provincial Nominee Program, which results in a pre-screen for an applicant. If screened through by a province, the applicant's federal immigration application requires less documentation and is generally approved faster. The Provincial Nominee Programs, however, are designed to benefit employers and a job offer is a condition precedent to admittance in the program.

Another interesting circumstance occurs when a claim of competing rights occurs. For example, an employee may claim his rights are being infringed upon by the accommodations made with respect to a person with a disability. In these instances, though there is limited jurisprudence on competing rights claims, the Supreme Court of Canada has said:

"As this Court's decision in *Dagenais*, *supra*, makes clear, Charter rights must be examined in a contextual manner to resolve conflicts between them. Therefore, unlike s. 1 balancing, where societal interests are sometimes allowed to override Charter rights, under s. 7 rights must be defined so that they do not conflict with each other."¹⁶

This confirms that there is no hierarchy of Charter rights and, if rights do come in conflict, Charter principles require a 'reconciliation' that fully respects the importance of both sets of rights.

Conclusion

Immigration medical admissibility policies are drafted to protect the Canadian tax base, and ensure Canada does not become a medical tourist destination.

Where immigration and employment law intersect, there is a grey area for persons with disabilities. On one hand, Canada wants to promote the admission of the best and brightest workers, those who can positively impact Canada and have unique and needed skill sets to offer. On the other hand, the current immigration system can be viewed as systematically discriminating against persons with disabilities by denying admission based on negative stereotypes.

Moreover, Canadian immigration policy does not exclude immigrants with high-risk behaviours, such as heavy smokers or extreme sports

participants, but focuses on those individuals who may cause a burden on medical or social services, with little regard to the benefit they may provide to the nation.

That said, Canada needs to protect its own resources. Many medically inadmissible applicants are not skilled workers and present no benefit to Canada. It is for this reason that admissibility is regulated so highly. A foremost concern for immigration officials must be entry to those who are best able to promote Canadian growth and development, while remaining cognizant that family reunification is a principal goal of IRPA.

For employers, it is particularly difficult to hire a foreign worker with a disability, or with a dependant who has a disability, as the law is not designed to permit their admission in the long term.

Notes:

¹ Canadian Human Rights Act (RS, 1985, c H-6).

² Employment Equity Act (1995, c 44).

³ *Ibid*, s 2.

⁴ *Ibid*, s 3.

⁵ Human Resources and Skills Development Canada website; available at: www.hrsdc.gc.ca/eng/labour/equality/employment_equity/private_crown/leep.shtml.

⁶ Human Resources and Skills Development Canada website; available at: www.hrsdc.gc.ca/eng/labour/equality/fcp/index.shtml.

⁷ *Ibid*.

⁸ For example, British Columbia's Human Rights Code [RSBC 1996] Chap 210, s 13(1) states that: A person must not (a) refuse to employ or refuse to continue to employ a person, or (b) discriminate against a person regarding employment or any term or condition of employment ... because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person. Similarly, the Ontario Human Rights Code, RSO 1990, c H19, s 5(1), expressly prohibits discrimination based on

virtually the same factors.

⁹ Immigration Act 1985 s 19(1) of the states: No person shall be granted admission who is a member of any of the following classes: (a) persons who are suffering from any disease, disorder, disability or other health impairment as a result of the nature, severity or probable duration of which, in the opinion of a medical officer concurred in by at least one other medical officer ... (ii) their admission would cause or might reasonably be expected to cause excessive demands on health or social services.

¹⁰ Immigration and Refugee Protection Act 2001, c 27.

¹¹ Immigration and Refugee Protection Regulations SOR/2002-227.

¹² Operational Bulletin 063B, 29 July 2009.

¹³ 2005 CarswellNat 3234.

¹⁴ FW 1 Temporary Foreign Worker Guidelines, pp 84-6.

¹⁵ *Mishibinijima v Canada (Attorney General)* 2007 CarswellNat 251 states that alcoholism is a disability. For more information regarding prohibited grounds of discrimination in employment see Jacqueline R Bart and A Fragomen, *Canada/US Relocation Manual*, Chap 7, Appendix 7-D pp 7-111-7-112.

¹⁶ *R v Mills* [1999] 3 SCR 668 at para 21; *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 836 at para 72.

Is the Opening up of the Litigation Funding Industry Good News for Liquidators?



Vivien Chan



John Yiu

It has long been an issue for liquidators and trustees in bankruptcy to seek funding for litigation. This article seeks to explore the position of the litigation funding industry in Hong Kong following the decision of *Re Cyberworks*, and the possible impact and attention required on the part of liquidators and trustees in bankruptcy.

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A common and difficult problem faced by liquidators and trustees in bankruptcy when administering the assets of the company or the estate of the bankrupt is the lack of funding to finance the litigation. While it is a statutory duty for the liquidators and trustees to investigate into the affairs of the companies or bankrupts and to make appropriate applications for setting aside improper transactions, the claims of liquidators are often questioned and even frustrated by the defendant on the ground of maintenance and champerty in that the defendant raises queries as to the source of funding of the liquidators or

trustees in bankruptcy.

The Decision of *Re Cyberworks*

In April 2010, the long-awaited decision of *Re Cyberworks Audio Video Technology Ltd* [2010] 2 HKLRD 1137 was handed down by the Court of First Instance in Hong Kong. The Court held that as an exception to the rules on champerty and maintenance, it is lawful for liquidators to assign a cause of action vested in the company to a third party funder. Following this decision, a third party funder can fund a lawsuit in return for an option to take an assignment of that lawsuit and cause of action.

A Bright Future for Liquidators?

Whilst this is a welcome decision by the litigation funding industry, the following issues in which liquidators should pay special attention to when

entering into a litigation funding arrangement with third parties have been identified.

Issues to watch out for

Judgment of Single Judge

Re Cyberworks is a decision of the CFI, and accordingly the decision may be overruled by a higher court or a higher court may hold different views as to the propriety of a liquidator's litigation funding arrangement with third parties.

Preference Claims Assignable?

The decision in *Re Cyberworks* only allows the assignment of a cause of action to a third party funder. However, it did not rule on whether the assignment extends to a cause of action that is vested in the liquidators such as unfair preferences.

Position in Foreign Jurisdictions

Foreign jurisdictions treat this issue in different ways. In the UK, it was decided that a liquidator is prohibited from assigning proceeds recovered from a successful claim of fraudulent trading, transaction at undervalue or unfair preference.¹ In Australia, it was held that these are the general assets of the company under the administration and control of the liquidators.²

Current Position in Hong Kong

It is envisaged that judges in Hong Kong will most likely follow the UK decision. There is also no equivalent provision in Hong Kong on related laws in Australia. Therefore, we must look at whether

there are any venues that justify that the fruits recovered from preference claims can be treated as general assets of the company. At present, there is still no authority authorising the assignment of preference claims subsequent to the decision in *Re Cyberworks*.

Practical Advice to Funders and Liquidators

Care should be observed in drafting a third party financing agreement. It is still unlawful for liquidators to assign a cause of action, including the fruits of a proceeding from preference claims to a litigation funder, and liquidators should pay special attention to the wording and arrangement of the funding agreement so as to ensure the agreement is valid.

Are liquidators' Costs and Expenses Recoverable from Preference Proceeds?

Position in Foreign Jurisdictions

Again, different jurisdictions treat this issue differently. In the UK, a liquidator cannot recover his/her expenses in the winding up from the preference proceeds as these proceeds are not the property of the company. In Australia, the liquidators may sell the preference proceeds and claim the general costs and expenses of the winding up from the preference proceeds.

Position in Hong Kong

This issue is closely related to the issue of whether claims relating to preference claims and fraudulent trading are assignable by liquidators to third party



fundings. In Hong Kong, there is no equivalent provision in existing laws similar to Australia that allows the recovery of expenses and costs in the winding up from the proceeds of the lawsuits.

Practical Advice for Liquidators

At present, the only avenue available to liquidators to recover their costs and expenses relating to unfair preference claims is from the remaining estate of the company. If the remaining estate of the company is not sufficient to cover the liquidators' expenses, the liquidators can only look to the existing creditors for assistance. In the event that no creditors are willing to supply any funding, the liquidators will be barred from pursuing these claims any further due to the lack of funding. It is therefore essential for liquidators to obtain proper legal advice as to the merits of the available preference claims in order to illicit the necessary financial support from the creditors.

Imperfections of the Existing Third Party Funding Practice

Liquidators and trustees in bankruptcy are usually accountants who abide by their own code of conduct, namely the Code of Ethics for Professional Accountants. Of particular importance are those provisions ensuring the accountant's objectivity and independence from influences that

could affect his or her duty of good faith to the company in liquidation.³ If a liquidator can legally assign the fruits of a proceeding for a claim for breach of contract by a third party to the company in liquidation, it seems there are no policy reasons prohibiting a liquidator from assigning the proceeds of a preference claim to a third party.

Conclusion

Re Cyberworks marks an important step in the development of the litigation funding industry in Hong Kong, however, this is only the first step. There are crucial issues that still need to be decided, such as whether preference claims are assignable and whether liquidators can recover their costs and expenses in relation to the unfair preference type of claims. It seems that based on the existing authority, the Hong Kong courts will most likely decide these issues in a negative way and continue to close the door on third party funding for these types of preference claims.

At present, apart from the landmark decision in *Re Cyberworks*, the underdeveloped jurisprudence in this aspect does not provide for any precedents which assist the drafting of litigation funding agreements. We look forward to new cases which may provide more guidance on the various unresolved aspects relating to the litigation funding industry in Hong Kong.

Notes:

- ¹ In the United Kingdom, the court in *Oasis Merchandising Services Ltd (in Liq)* [1977] 11 All ER 1009 drew a distinction between a cause of action vested in the company at the time of commencement of the liquidation (eg breach of contract, tort, etc) and those arising after the liquidation of the company and were only recoverable by the liquidator pursuant to the statutory powers conferred on him (eg fraudulent trading, transaction at undervalue, unfair preference, etc). The former falls within the property of the company while the latter does not.
- ² *In Movitor Pty Ltd (recs and mgrs apptd) (in liq) v Sims* (1996) 136 ALR 643, the Australian court distinguished *Oasis* on the basis of slight differences of wording in s 214 of the Insolvency Act 1986 (UK) and ss 588M and 588W of Corporations Act 2001 (Cth),

and held that fruits of proceedings recovered from a successful claim of fraudulent trading, transaction at undervalue or unfair preference are general assets and properties of the company under the administration and control of the liquidators. The reasoning is that the liquidator recovered the proceeds 'as a debt due to the company' under ss 588M and 588W of Corporations Act 2001 (Cth).

- ³ Code of Ethics for Professional Accountants, Hong Kong Institute of Certified Public Accountants, issued on December 2005, particularly s 432 on 'Integrity, Objectivity and Independence' in insolvency. The section puts emphasis on the overriding importance in an accountant's integrity and objectivity in the acceptance and conduct of insolvency work as in any other area of professional life.

The First Airline Bankruptcy Case in Japan



JAL, the national carrier of Japan, filed a petition for corporate reorganisation on 19 January 2010. This article outlines how the author, as a trustee of JAL, introduced measures for JAL's smooth and swift restructuring, such as using a combination of court and government support proceedings, protecting all the trade debts and obtaining recognition orders from overseas.

Eiji Katayama

Partner, Abe, Ikubo & Katayama

Japan Airlines (JAL) was established in 1951 as a government-owned company and was fully privatised in 1987. JAL has long been considered as the national carrier of Japan but the financial situation of the company was badly affected by so-called risk events such as 9/11 and terrorism, the Iraq war, and SARS. After 2008, the oil price surge and Lehman Brother's shock demise put JAL into a financial crisis.

On 19 January 2010, after a period of financial struggle, JAL filed a petition for corporate reorganisation with the Tokyo District Court as well as a petition for support with the Enterprise Turnaround Initiative Corporation

of Japan (ETIC). The corporate reorganisation procedure is a bankruptcy court proceeding similar to the US Chapter 11 proceedings. ETIC is a corporation established by the government which offers restructuring support to certain qualifying companies. On the day of filing, the court decided to commence reorganisation of JAL and ETIC decided to support JAL. Prior to the filing, the ETIC conducted due diligence of JAL and negotiated with its major creditors to form a tentative plan, although the final plan was to be determined in the corporate reorganisation proceedings. Also, it was thought that JAL needed a huge post-commencement loan to cover running costs during the reorganisation period. Certain arrangements for the post-commencement loan were prepared prior to the filing.

The court appointed ETIC as a corporate

trustee and the author as a natural person trustee. The trade creditors were paid 100% of their pre-petition claims with the permission of the court, in order to continue performing the scheduled domestic and overseas flights. The trustees implemented some drastic business restructuring plans such as downsizing, fixed cost cutting and network restructuring as per the Outline of the Rehabilitation Plan of Japan Airlines prepared by the trustees. The employees and ex-employees agreed voluntarily to the material reduction of the pension policy.

Reorganisation Plan

The unsecured creditors were to be paid 12.5% of their pre-petition claims over 7 years, and the secured creditors were to be paid 100% over the same period. The pension policy which was reduced by the voluntary resolution as mentioned above was maintained, while the stock was 100% written off. ETIC injected ¥350 billion as fresh capital.

On the commencement date of the corporate reorganisation, the deficit, after re-evaluation of the assets, was ¥959 billion. With the capital injection and reduction of debts as well as the profit of year 2010, the total equity was projected to be ¥25 billion at the end of March 2011.

A vote on the reorganisation plan was held on 19 November 2010, and the result was as follows:¹

Secured Creditors	97~100% voted 'yes'
Unsecured Creditors	96~99% voted 'yes'

Based on the results of the votes, the Tokyo District Court confirmed the plan on 30 November 2010. Thereafter, the contents of the plan were implemented. Further, the major creditors agreed to provide a fresh loan to refinance the old debts so that JAL could repay all its debts without waiting for a period of seven years. On 28 March 2011, JAL successfully emerged from the corporate reorganisation proceedings.

Some Issues

Combination of Corporate Reorganisation Law and ETIC Support Procedure

As explained above, one of the characteristics of the JAL case is the combination of corporate reorganisation proceedings and ETIC support procedure. If ETIC had only used its support procedure, the claims, other than from banks, could not have been omitted due of the nature of ETIC

procedure. The combination with the corporate reorganisation proceedings made it possible to omit other claims such as bonds. It also gave JAL a right of rejection of executory contracts, which made the restructuring of its business easier.

On the other hand, if JAL had filed only the corporate reorganisation proceeding without ETIC procedure, it would be doubtful if any entity could inject such a large amount of capital. In this sense, JAL was fortunate enough to have ETIC, which was formed only a few months prior to the filing for the corporate reorganisation proceeding.

Further, the employees were all shocked by the bankruptcy proceedings and the realisation that circumstances had changed, and JAL was no longer indestructible. This enhanced the employees' efforts to cut costs and run the company in a more efficient manner.

Thus, the combination of the corporate reorganisation proceedings and ETIC support procedure worked very well for the rehabilitation of JAL.

Full Payment of the Trade Debts

The trade debts were not treated differently from other debts of the debtor under the Japanese Corporate Reorganisation Law (JCRL). Accordingly, under the JCRL, trade debts resulting from transactions in the ordinary course of business and transactions that were commenced immediately before the filing of the bankruptcy proceeding would be subject to cuts similar to other debts in the plan. However, by stopping the payment of trade debts for various services, for example, payment for the supply of petrol and meals in the airports, may have resulted in stopping the flights of the carrier. If flight operations were stopped, the value of the company would have been seriously damaged.

The JCRL has a provision stipulating that, if the continuation of the debtor's business would be extremely difficult because of not being able to pay the small amount of the reorganisation claim promptly, the court may approve to pay the reorganisation claim, upon a motion from the trustee, before the confirmation of the reorganisation plan.²

In the case of JAL, pursuant to this provision, the court approved the payment of trade debts (more precisely, the debts which make the continuation of the debtor's business extremely difficult without its payment). There were some other precedents, but this was the first case where such a large number of the trade creditors as well as large amount of debts in total were protected. The rationale behind this treatment was that the payment of trade debts would eventually make the repayment ratio to other creditors higher than the ratio in the case where



such payment had not been made and the value of the business would have been damaged. The word ‘small amount’ in the provision was interpreted as a comparatively small amount compared with the total debts of the debtor, following a noted academic’s interpretation.

After the JAL case, other cases have followed the similar treatment of the trade debts.

Treatment of Pension Policy

The employees and ex-employees were not the direct creditors of JAL, but rather the pension fund was a creditor of JAL. This meant that the claims from the pension fund could have been theoretically omitted by the plan. However, there is a provision in the JCRL which provides that some debts can be treated differently from others if there is a good reason for it.³

The trustees thought that because the pension policy was already materially reduced by the voluntary efforts of the employees and ex-employees, and the nature of the pension policy was originally a workers’ claim, there is a rational reason for treating the pension policy differently from other unsecured claims. Thus, the reduced pension policy claim was treated substantially as full payment.

Proceedings taken in Other Countries

The nature of the business meant that JAL had many creditors in other countries as well as within Japan. At the commencement of the case, it was crucial to maintain the flight operations in other countries. Therefore, during the preparation for filing, it was decided that the trade creditors were paid in full and, importantly, to notify the trade creditors in other countries that they would be paid in full. For this purpose, immediately after filing,

JAL announced to its worldwide trade creditors that it would pay, and more importantly, JAL had the ability to pay because of the large post-commencement loan provided by ETIC and a major creditor. This was successful and JAL retained all the scheduled flights.

At this point, full bankruptcy proceedings were no longer necessary in other countries. Rather, the trustees decided to file a petition for recognition of foreign main proceedings in the countries of JAL’s major creditors including the US, Canada, the UK and Australia.

Conclusion

Thanks to the cooperation of all parties involved, JAL’s rehabilitation was successful, although JAL, like many other Japanese companies, now needs to overcome the difficulties arising from the recent earthquake and the nuclear power station accident. In the international context, the author deeply appreciates the support provided by local counsel in many countries for preparing and carrying out this huge bankruptcy proceeding, particularly the support from US counsels who have successfully experienced Chapter 11 proceedings relating to airline companies which was most helpful.

Notes:

¹ The JAL case actually involved three companies of the JAL group and the percentage varied among the three companies. These three companies were merged into one company by the plan.

² Art 47, s 5, Latter Clause of the JCRL.

³ *Ibid*, Art 168, s 1.

Silenced by the Auction



Joyce A Tan

The author recounts her bid for an airplane ride piloted by Captain Urs Lustenberger at the Silent Auction held at the 21st Annual Meeting Conference in Kyoto.

Joyce A Tan
joycetan@joylaw.com, Singapore

When IPBA stalwarts Mark Shklov and Richard Goldstein decided to hold a silent auction at the 21st Annual Meeting and Conference in Kyoto, to raise funds for victims of the Fukushima tsunami disaster, they could not have possibly imagined its rippling effects on the lives of other IPBA stalwarts who chose to support their cause.

Shklov and Goldstein inspired an impressive array of donations for the auction which included pieces of art, sculpture, pottery and jewellery, dinners at famed restaurants around the world, rare selections of cellar reserve wines and good old chocolate bars for those long nights of deadlines when absolutely nothing else can provide comfort. Among this outpouring of generosity was a single off-the-beaten track donation, alone and distinct from the others for its demand on one's greater imagination and bravado to be taken up on an airplane ride over the Swiss Alps piloted by IPBA Committee Coordinator, Captain Urs Lustenberger.

Minutes before commencement of the final banquet when the silent auction was set to close,

Gerhard Wegen believed himself to have won the prize. I cannot confirm if it was his look of smug contentment or complacency but at least one of those was calling for a good upset. I rose to the call (as one does) and put in an eleventh-hour bid to dislodge his. The grapevine had it that my consequent smug contentment (or complacency) was enough to cause a supporter in Gerhard's corner to whisper in his ear that the auction was closing in my favour. In a dramatic race to the auction cards, Gerhard counter-attacked and trumped my bid. As soon as I heard this from loyalists in my camp, I upped Gerhard's bid and a right royal bidding war was declared (even if in the spirit of friendly competition for a worthy cause)!

Captain Lustenberger quickly saw the perfectly golden opportunity in the competition, and with the permission of the organisers and the competing bidders, extended his generosity by donating two identical prizes for both of Gerhard's bid and mine. So Shklov and Goldstein got two for the price of two, effectively enlarging the pool of donations and winning bids and enabling Gerhard and I to remain friends, all in one fell swoop.

Since the game (not the prize) drives competitive behaviour, getting onto an airplane piloted by an IPBA officer whose day job was

lawyering and whose pilot's licence was until then, mere hearsay, was never a serious proposition. The silent auction was a fund-raising exercise, not a hair-raising one.

Until serendipity sparked off a sequence of events that found me having to deliver a paper in London and a daughter asking for a trip to Europe as a graduation present, just weeks following the Kyoto silent auction, with more than a little encouragement from an adventurous daughter with time on her hands, and the convenience of being in London's new financial district in Canary Wharf, practically next to the London City Airport with the easy connection to Zurich – the hair-raising idea soon became a body-and-soul levitation experience.

And so began the journey of discovery into the life of other talents and skills of Captain Lustenberger. He was, to say the least, startling with his deft manoeuvres around hot and cold fronts, speaking of them in a language several thousand feet above legalese and sea level, as we hovered above snow-capped tops in the Swiss mountain range. All this in a Cessna Cutlass RGII aircraft called 'Grisly' which Captain Lustenberger had personally wheeled out of the hangar and pumped petrol into with the precision of an aeronautical engineer, not the self-serving

arguments of a practising lawyer.

As I sat, tucked away and ignored, in the snug back seat of good ol' Grisly intently co-piloted by Captain Lustenberger and the graduating daughter, I was silenced – not only by the glorious mountainous range we were hugging close to, but mostly by the wonderment at how busy lawyers who choose to mind more than their own business can affect the lives of others in such positive ways, at how allowing serendipity takes us along can lead to such positive outcomes, and at how IPBA has made such good friends for and of so many of us.

My mind's eye drifted through scenes of art, sculpture and pottery being displayed with the confidence of a designer's touch, gorgeous women admiring mirror reflections of jewellery that delicately adorn them, gourmet dinners in Japan and San Francisco being ingested along with camaraderie, precious bottles of wines being gifted as expressions of regard and respect and chocolate being savoured with grateful relief from a stressful day. All these, to the credit of Shklov, Goldstein and their supporters, whose joint efforts raised a total of US\$33,874 (¥2,709,915) towards IPBA's donation to the Japanese Red Cross Society for the victims of the disaster that beset our host country, just in the month before that silencing auction.



Captain Lustenberger filling up before take-off.

Discover Some of Our New Officers and Council Members



Jose Cochingyan III
Co-chair of Cross Border
Investments Committee

What was your motivation to become a lawyer?

I always loved reading books and was amazed at the power of words and how they can cause emotions and events.

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

My most memorable experience was the day I stood in front of a client's building in a large square owned by my client and faced down over 100 fully-armed soldiers complete with body armour who erupted from two large army buses. The soldiers also had one APC (armoured personnel carrier) with a mounted machine gun which, at the time, looked like a very big gun. The soldiers were there with a team of lawyers to enforce a court seizure order against my client. I was there because we were able to secure a restraining order. I was guaranteed full protection by my client's board of directors. That morning all my client's employees, including their fully-armed security force, were in the square to protect their company. There must have been more than 200 of them in the square. My client's board of directors, whose members included many prominent bankers, were also all there in full force to show their solidarity. There were also two policemen to ensure order. As I waited in the middle of the square with all these enthusiastic people, I could feel their *esprit de corps* like a giant emotional magnet that was both electrifying and energising. Suddenly, the army buses and the APC sped to one side of the square, and the soldiers and the lawyers of my opposing party seem to burst out of their vehicles. The soldiers filed up in front of me with military precision with their guns tilted at my direction, as if I was to be sentenced to death by a firing squad. At that point, I glanced behind me and suddenly realised that I was all alone in the square. All my client's employees had quietly retreated inside the building, and the two policemen were in their white undershirts as

they had stripped off the top of their uniforms. The board of directors were now all peering out of the windows of the second floor of the building. My opposing lawyers proceeded to inform me that they were there to enforce the seizure order and their team leader read out a two-page order. I informed them that I had a late court order declaring the seizure order null and void, coupled with a restraining order directed against all who illegally enforce the seizure order. With dramatic flourish I whipped out my three-page order and read it out aloud. I pronounced every word with perfect diction and appropriate emphasis to maximize the dramatic impact and import of the words I was reading. When I was done, the team leader of the opposing party informed me that he was well prepared and intended to seize the building regardless of the latest court order, to which I replied that his preparations must not have included legal research on the grounds for disbarment. It was at that exact moment that I realised the possibility of better health benefits as a cross-border transactions/investments and tax lawyer, where I could join the IPBA and where my fellow members, after reading this story, will invite me for drinks (on their expense account of course) and interrogate me to find out: (a) whether or not the above story is true; (b) what really happened in the end; (c) what I was wearing that morning; or (d) the answer to a complex tax or cross-border transactions issue. I will then assure all and sundry that I will still respect them the next morning, despite their choice of questions.

What are your interest and/or hobbies?

My wife and kids (my wife is a love interest, not a hobby), history, wine, antique books and maps, brisk morning walks, koi, bonsai, very recently orchids, and I regularly play a game that occasionally resembles golf.

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

That I can sometimes be scholarly.

Do you have any special messages for IPBA members?

The IPBA can only be as good as its members' participation and as wonderful as its members' enthusiasm.



Juan Carlos A Marquez
Chairman of the Intellectual
Property Committee

What was your motivation to become a lawyer?

I was always fascinated by people who have the gift or the skill to negotiate or advocate the position of one side or the other. This inspired me to be involved in public speaking and debate. Though I first pursued a degree in electrical engineering, I always wished to find a way to combine that background to the study of law. While working for General Motors, I met some of their in-house intellectual property attorneys, who encouraged me to pursue a law degree. The field of intellectual property law gave me the opportunity to pursue my interests in both technology and advocacy.

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

My most memorable experiences have been when I work

hand-in-hand with my clients in Asia on special projects that are important. One in particular was when I helped a Japanese corporate client negotiate a patent infringement matter against another large corporation. The negotiation lasted two years and resulted in the client receiving one of the largest monetary settlements in the company's history.

What are your interest and/or hobbies?

My interests and/or hobbies include golfing, weightlifting, fencing and computer gaming.

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

Prior to my becoming the chair of the IP committee, I was the US vice-chair since 2005.

Do you have any special messages for IPBA members?

I believe that the IPBA is an organisation that has a great deal of potential to be much greater and more prominent than it is today. I would like to see more members be inspired to participate and contribute to the organisation.

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 20 February 2012 to both **Kojima Hideki** at kojima@kojimalaw.jp and **Caroline Berube** at cberube@hymasialaw.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, specialisation, or network offices of the writer or the firm at which the writer is based;
5. The article is concise (2500 to 3000 words) and, in any event, does not exceed 3000 words; and
6. The article is written by an IPBA member.

Members' Notes

Sagar SP Singamsetty

Further to the worldwide interest on air and space law, I am pleased to inform you that my book *Contemporary Issues and Future Challenges in Air and Space Law* has been published by airandspacebooks.info. This volume highlights the progressive development of law in these fields, illustrating its evolution alongside with, and in response to, contemporary technical, scientific, economic, and social advancements and trends in both aeronautics and astronautics. Moreover, these insights demonstrate the global nature of air and space activities, and how current and future challenges require a progressive approach in the development and application of law and policy.

Lawrence A Kogan

I recently published an article, 'The US Biologics Price Competition and Innovation Act of 2009 Triggers Public Debates, Regulatory/Policy Risks, and International Trade Concerns' [2011] 6 *Kluwer Law International Global Trade & Customs Journal* with the following abstract: "The US Biologics Price Competition and Innovation Act of 2009 ('BPCIA') was enacted to promote pharmaceutical innovations while reducing the cost of healthcare. It creates an abbreviated approval pathway for generic 'biological products' demonstrated to be 'highly similar' to or 'interchangeable' with an FDA-licensed reference biological product. However, the BPCIA's grant of longer periods of (IP) marketing/data exclusivities to original biologic drugs has generated considerable post-enactment debate. Until recently, this compromised US efforts to secure congressional ratification of the KORUS-FTA and to successfully advance strong patent and marketing/data exclusivity protections at recent TPPA negotiating sessions." For further details please visit: http://vbn.aau.dk/files/57876638/Turcan_Heslop_IO_Productivity_Innovation_Technology_eJournal.pdf (for the Working Paper version of the article).

Sajid Zahid

I am a barrister-at-law from Lincoln's Inn (London) with over 36 years' experience, advising major domestic and foreign companies, and financial institutions on civil and commercial laws, national and cross-border transactions. I have acted as counsel in domestic and international arbitrations of LCIA and ICC and in litigations before the courts of Pakistan, and have contributed Pakistan chapters in the *Guide to Dispute Resolution in Asia* (published by Herbert Smith, Hong Kong) and *International Product Liability Law* (published by Aspatore Books, USA). I am a joint senior partner of Orr, Dignam & Co.

Yunchuan Jing

I am pleased to inform you that I was invited by CIETAC (the China International Economic and Trade Arbitration Commission) to attend the Chief Arbitrator Workshop at the end of November. At the workshop, I was appointed a chief arbitrator of CIETAC after working as an arbitrator for six (6) years. I am now one of the youngest chief arbitrators of CIETAC!

Benjamin Hughes

I am very grateful to the Korean Bar Association (KBA) and the Korean Commercial Arbitration Board (KCAB) for nominating me for honorary citizenship of Seoul. I became an honorary citizen of Seoul in a ceremony conducted by Mayor Park Won-Soon in October. I have been working closely with the KBA and the KCAB to establish an international dispute resolution centre in Seoul to help serve the growing needs of the legal and business communities here.

Mitsuru Claire Chino – Vice-Chair, Membership

I am on leave from Itochu Corporation (where I am corporate counsel) and have been teaching a seminar on cross-border transactions at Cornell Law School as a 'Distinguished Practitioner in Residence'. I am enjoying the friendly academic atmosphere of the law school as well as the beautiful scenery of Ithaca, New York.

Ufuk Kula

In recent years, while living in Izmir, western Turkey, I have witnessed the biological diversity in the Aegean Sea dramatically decrease. This is largely due to illegal fishing and an inadequate legal framework regulating fishing. In order to draw attention to this problem, I have begun working on a project including writing an article highlighting the required legal framework to stop this problem from persisting. As an amateur fisherman, I believe this is a very important topic affecting future generations and I would be grateful to receive your thoughts or insights on this topic at: info@kula.av.tr.

Brent Caslin

This year I am honored to serve as the Chairman of the International Law Section for the State Bar of California. Our state bar group is active, serving lawyers in California who manage international legal matters through education events, publications, receptions, and other efforts. I also continue to teach at Pepperdine University School of Law and practice law with Jenner & Block, focusing on international commercial and intellectual property disputes. Our law office has grown from two attorneys in 2009 to approximately 30 attorneys today – please stop by and say ‘hi’ if you are in Los Angeles.

John Craig – Past President

I am pleased to inform you that I have joined Davis LLP as counsel. I have 40 years of professional experience and 30 of those working with Japanese clients. Prior to joining Davis LLP, I led McMillan LLP's Japanese practice and assisted Japanese companies investing in Canada in a broad range of manufacturing and service sectors. I have spent a great deal of time in Japan, immersing in the country's culture and business practices, and have developed strong relationships within the Japanese business community, in both Japan and Canada. My practice also focuses on charities and not-for-profit organisations, financial institutions, with a cultural (book publishing) regulatory review specialty.

Daniel P Malone

I am Butzel Long's Director of Korean Client Relations and Vice Chair of its Asia Practice in Detroit, Michigan. I have represented companies from Korea and other Asian nations. I have extensive automotive and product safety litigation experience and speak frequently at international and automotive conferences. I have authored numerous articles on the global automotive industry. In 1987, I founded the Generation of Promise Program (www.generationofpromise.org) a year-long, high school leadership program aimed at broadening participants' sense of community. Twenty three years later, I continue to lead the program, which has graduated more than 1500 students.

Luong Van Trung

After four years working as general counsel and COO of Saigon Asset Management, I have joined Bross & Partners as partner since 1 September 2011. My knowledge and experience in fund formation and operation, banking and finance, contract, security and capital market, real estate and experience in working with various investors and law firms in Asia, Europe and the USA, and with local companies in various sectors will benefit the firm and its clients.

Li Haibo

It is a great honour for me to be invited to join the IPBA by President Shiro Kuniya. In my 20 years of practising law in China, I have focused on foreign direct investment into China and have had the pleasure of establishing wonderful relationships and interactions with international colleagues from many countries. In September 2011, we successfully held a joint seminar in Tianjin with Oh-Ebashi LPC & Partners on the issues of cross-border investments between China and Japan. I look forward to working with IPBA members in the future.

Lalit Bhasin – President Elect

October-November have been very hectic but fruitful months for me in my role as Chairman Host Committee IPBA 2012 New Delhi. I visited Osaka and Tokyo in mid-October, visited Dubai for the IBA Conference where the IPBA had taken a booth and thereafter proceeded to New York, Chicago, Los Angeles and Toronto. On 14th and 15th November I visited Seoul and Hong Kong respectively. Senior colleagues of the IPBA such

as Mr Ravi Nath, Mr Rohit Kochhar, Mr Praveen Agarwal and Mr Suhas Srinivasiah accompanied me to different places. At all the places without exception, the meetings which were organised to promote the IPBA and the IPBA 2012 New Delhi Conference were well attended. Special thanks to Shiro Kuniya for his presence at the meetings in Osaka and Tokyo.

Yap Wai Ming

I have acted in major M&As involving the leisure and gaming space, energy and natural resources. This year I handled many restructuring cases and I am currently supervising a handful of reverse takeovers. I serve as the chairman of the Corporate Practice Committee of the Singapore Law Society and also sit on the board of a charity hospital in Singapore. I have been recognised as one of Asia's leading lawyers in M&As by AsiaLaw Leading Lawyers. Chambers Asia described me as 'personable, practical and a great choice for getting things done'.

Tan Chuan Thye

I have had a satisfying year at Stamford Law with the highlights being four appeals in the Singapore Court of Appeal. There have also been a number of international commercial arbitrations and High Court trial hearings. The pipeline promises more hearings on a range of corporate and commercial matters, and an increasing number of insolvency disputes and restructurings. 2011 has also seen a revised *Halsbury's Laws of Singapore* credit and security publication. A highlight of the year was the Kyoto conference as it was very much a homecoming. I look forward to interacting more with old and new friends.

Sharad Kumar Puri

The Pan India Conference of IGAF Polaris, a global association of independent accounting firms, was held at New Delhi on 19-20 November 2011. I was invited to present on 'Legal Services – Are accountants effective service providers?' in the context of Shareholders' Agreement, Memorandum of Association, and Articles of Association. Perhaps I was invited because I am also a qualified chartered accountant. The audience consisted only of accountants, and I, as a practising lawyer, had to be politically correct. I answered the question with a 'Jein'!

Hanim Hamzah

As a lawyer, I am always reminded that being well-informed of the happenings of the world is very important, and this is why having a medium to connect with other lawyers from different jurisdictions is vital. Being a member of the IPBA helps me to do this and enables me to connect with other legal practitioners in various regions, both directly and indirectly, by allowing me to learn from my colleagues' experiences and keep abreast with developments in other jurisdictions.

Kenji Kawahigashi

In light of the recent media-focused incidents involving major Japanese listed companies, as a former officer of the Securities and Exchange Surveillance Commission of Japan (SESC) and also a former in-house lawyer at a major US investment bank, I have often been asked by global financial institutions and fund-related firms how I believe the SESC and the Tokyo Stock Exchange (TSE) would react. Due to certain lack of corporate governance in many of these companies, I believe that it is possible that their shares may be de-listed and the decisions of the SESC and the TSE will no doubt have a large impact on the Japanese legal framework and may lead to another corporate law reform.

Suzanne K Nusbaum

In light of the importance of the role of alternative dispute resolution, I recently moderated an American Bar Association Webinar on 18 November 2011 about 'Has Your ADR Neutral Met Their Disclosure Requirement'. The programme discussed the different ethical conflicts that may arise during arbitration and mediation, and the level of disclosure required by the arbitrator or mediator. The programme, Event Code CET1MTD, is available on audio CD-ROM.

Junichi Matsuda

I am the chairman of Matsuda & Partners. I specialise in the fields of intellectual property and M&A. In intellectual property, my aim is to fuse the dispute-solving ability and the practice ability to file an application for patent and trademark. In M&A, I try to provide my clients with quality overall advice and the best solutions for their needs, using various methods including mergers and stock acquisition. I am grateful to have the opportunity to work with colleagues in Shanghai and business partners from around the world, including India.



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: www.ipba.org

See overleaf for membership
registration form



IPBA SECRETARIAT

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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: _____

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CHOICE OF COMMITTEES (PLEASE CHOOSE UP TO THREE):

- | | |
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| <input type="checkbox"/> Aviation Law | <input type="checkbox"/> Intellectual Property |
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| <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 |
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| <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

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A/C No. 1018885 (ordinary account) Account Name: Inter-Pacific Bar Association (IPBA)
Bank Address: Nihon Seimei Shinbashi Bldg 6F, 1-18-16 Shinbashi, Minato-ku, Tokyo 105-0004, Japan

Signature: _____ Date: _____

PLEASE RETURN THIS FORM TO:

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