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IPBA JOURNAL

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No 50

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The President's Message



Dear Colleagues,

This year's IPBA annual conference was held in Los Angeles, California, gateway between Asia and the United States and entertainment capital of the world. The conference attracted the largest number of registrants for an IPBA

annual conference in six years, and offered an array of educational programs and social events over a period of four days in late April.

The traditional plenary session of the conference, on the morning of the first day, featured welcoming remarks by Los Angeles Mayor **Antonio Villaraigosa** and the Controller of the State of California, **John Chiang**, followed by a keynote address by **Tim Leiweke**, CEO of AEG, a giant in the field of sports and concert venues and promotions. There followed a remarkable panel discussion on a variety of strategic issues concerning Asia. Chaired by **Alexander Cappello**, Chairman and CEO of Cappello Capital Corp, the panelists included **Robert Eckert**, Chairman and CEO of Mattel, Inc; **George Lee**, an entrepreneur who founded the first company to have an exclusive license from the governments of the US and the Democratic People's Republic of Korea to conduct business between the two countries; **William Overholt**, holder of the Asia Policy Research Chair at the RAND Center for Asia Pacific Policy; **Carl Joseph Chen**, General Partner and Co-Founder of a hedge-fund that invests in Taiwan and Hong Kong companies; and **Kantathi Suphamongkhon**, the 39th Minister of Foreign Affairs of Thailand. Many attendees commented that this panel discussion was a highlight of the entire conference.

The conference offered 37 concurrent educational programs, most of them organized by IPBA committees, covering a very broad range of topics of business law relevant to the Asia-Pacific region. These included a program on Asia-Pacific antitrust law presented in cooperation with the American Bar Association's Sections of International Law and Antitrust Law, and a mock maritime mediation presented in cooperation with the International Bar Association. The educational program concluded with a corporate counsel forum presented in cooperation with the Association of Corporation Counsel, whose panelists included senior legal officers from four multinational corporations very active in the Asia-Pacific region. These and other educational programs appear to have been very well received, and were well-attended, by conference attendees.

No IPBA annual conference is complete without memorable social events, and Los Angeles offered spectacular gala dinners at the Getty Center and the Sony Studios. At those events and throughout the conference we hosted the four 2008 IPBA scholars, young lawyers

from Fiji, Indonesia, Nepal and Vietnam, respectively, who appeared to enjoy greatly their first trips to the United States and for whom we provided an educational seminar and a visit to a Los Angeles law firm. And the 2008 Annual Conference closed with the traditional IPBA Golf Tournament, at Trump National Golf Club, overlooking the Pacific Ocean.

Thanks go to the Host Committee for the 2008 Annual Conference, reflecting support from 30 major United States law firms which was critical to the success of the event. Thanks are also due the 50 Friends of the IPBA, other law firms from around the world. And the conference's many sponsors as well as bar association and media partners likewise contributed to the success of the conference. Pivotal Events, Inc, the Los Angeles-based conference organization and management firm, headed by Tracy Kwiker, performed in remarkable fashion and deserves a great deal of credit for the planning, organization and execution of the conference.

As we look ahead to the new IPBA year we can be pleased with our success over the past several years. IPBA membership is higher than it has been in years, and our committees appear to be stronger and better organized than ever, with committee leadership drawn from the ranks of leading attorneys around the Asia-Pacific region. Creation of our new Competition Law Committee and reorganization of our Legal Training and Development Committee bring the total number of our committees to 20, and the substantive programming and other projects of these committees reflect the commitment of the IPBA to its core mission as stated in the IPBA constitution, "to contribute toward the development of the legal profession in the Pacific and Asian regions", and "to contribute toward the development of the law and the legal structures" within that region. Our *IPBA Journal* has emerged as a first-class legal periodical covering developments in the law and legal practice in the Asia-Practice region. And in Los Angeles IPBA leadership committed itself to pursuing measures, including creation of an IPBA endowment, which will strengthen the IPBA overall and enhance our ability to support such endeavors as our scholarship program and the Legal Training and Development Committee.

But as far as we have come, much remains to be done. We must continue to both strengthen and expand our programming, assure the continued high quality of the *IPBA Journal*, and strive for quality and professionalism in all that we do, so as to remain the pre-eminent association of business lawyers in the Asia-Pacific region. I believe I speak for all IPBA officers in stating that we are committed to those goals, and will do what we can during the coming year to assist in that most important effort.

Gerold W Libbly
President

The Secretary-General's Message



Dear IPBA Members,

The Los Angeles Conference was a great success. With hand to heart I am pleased to proclaim that IPBA has finally stopped its drift and transformed itself.

Besides staging a high quality Conference, we are seeing growth of membership numbers and improving finances, and a new Manual is under preparation to run our Association better. Most of all, we have a new sense of confidence to meet the challenges about renewal and relevance as a bar association to serve the Pacific Rim and beyond.

One coming plan is to establish an Endowment Fund. I look forward to each of you being generous to IPBA, contributing both of your time and money.

As an organization of 20 years or so we are ready to take on more responsibility in bettering the skills of younger lawyers in those countries where there is little access to good training and exposure to good practices. In the past we have

given out help in small doses, hobbled by lack of proper funding. If our training plans are properly endowed we should be ready to do more. Without funds, and the sense of well-being that goes with it, the Association will take mincing steps from year to year, too timid to spend our money, except on the most needed services, and treating training expenses as an unaffordable luxury. It is time to rise above this.

Thank you for your support in signing up to be a member and bringing in new members and speaking enthusiastically about IPBA.

Let's look forward to this new chapter of a strong and competitive IPBA, with everyone pulling together.

Best regards,

*Arthur Loke
Secretary-General*

The IPBA 18th Annual Meeting and Conference in Los Angeles

The IPBA 18th Annual Meeting and Conference was held in Los Angeles from April 27 to April 30, 2008. Conference was closed in success with promises “See you at next year’s conference”.

Plenary Session



Mr Gao makes opening remark



Mr Libby with Mr Antonio R Villaraigosa, Mayor of the City of Los Angeles

Women Business Lawyers Receptions



Welcome Cocktail Reception



Getty Center Gala





Sony Studio Farewell Gala



With Elvis and Marilyn Monroe!



Mr Libby with Scholars
(Bibek S, Noleen K, Windri A, Dung L)

Annual General Meeting



Host Committee Firm Receptions



Publications Committee Guidelines for Publication of Articles in the IPBA Journal

The IPBA Publications Committee is soliciting quality articles for the Legal Update section of the September and December issues of the IPBA Journal. It would be appreciated if you could contact **Mr Kap-You (Kevin) Kim**, Publications Committee Chair at kyk@bkl.co.kr or **Mr Hideki Kojima**, Publications Committee Vice-Chair at kojima@kojimalaw.jp and/or forward articles by email to Kap-You (Kevin) Kim or Hideki Kojima.

Proposed themes for upcoming editions:

- International Arbitrations in Asia-Pacific (September 2008)
- Legal Market and Practices in Asia-Pacific (December 2008)

The requirements of the IPBA for the publication of an article in the 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 its members;
3. The article is not written to publicize the expertise, specialization, network offices of the writer or the firm from which the writer emanates;
4. The article is concise (2,500 to 3,000 words) and, in any event, does not exceed 3,000 words; and
5. The article is written by an IPBA member.

Representing Asian Clients in High Stakes US Jury Trials—A Conceptual Framework and Basic Considerations



Lisa M Marchese

This paper addresses some of these elemental considerations and is intended to provide a conceptual framework for practitioners who represent Asian clients in US litigation

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“[Preparation] is the be-all of good trial work. Everything else – felicity of expression, improvisational brilliance – is a satellite around the sun. Thorough preparation is that sun.”

— *Louis Nizer Newsweek, December 11, 1978*

Introduction

When it comes to trial practice, there are not short cuts to success. High risk trials are not won by the best trial lawyer in the courtroom—but rather by the lawyer who is best prepared. A successful strategy for trial preparation in a complex case is multi-faceted. When representing an Asian company or firm at trial, special considerations should be factored into the strategic plan to ensure a successful result.

We live in an ever expanding global economy. With that growth, the presence of Asian businesses

in the US marketplace has steadily increased over the last several decades. As a consequence, Asian firms have discovered that litigation is one the costs of doing business in the United States. Representing Asian clients in the American court system presents certain unique challenges ranging from client interaction, deposition and trial testimony to fact-finder bias. This paper addresses some of these elemental considerations and is intended to provide a conceptual framework for practitioners who represent Asian clients in US litigation.

The Attorney-Client Relationship

When it comes to interactions with other cultures, the American tendency has been to devalue language and cultural knowledge. On a larger scale, Americans have often mirror-imaged their own value system on other cultures. As a result, Americans have struggled to understand other cultures. This has manifested itself in American foreign and domestic policy as well as in the business world.

In the international marketplace American businesses have faced many challenges in their dealings with Asian companies. For example, most Asian cultures believe that trust is the most critical component of any business relationship. Americans, in contrast, have struggled with this concept in business and historically, have approached such relationships from the view that a deal should be closed as quickly as possible. By failing to recognize cross-cultural differences and to grasp the importance of building a foundation for mutual

respect, American companies have often lagged behind the competition in the global marketplace—particularly when doing business with Asian companies.

Like US companies, the American legal community also struggles to grasp the significance of language and cultural differences when representing Asian clients. We approach the representation as we would any other client. We assume that the substantive law and the rules of procedure apply equally to every party in a litigation. We can cite well-settled case law holding that jurors are presumed to follow the Court's instructions. And, we assume that the process of jury selection, without more, will ferret out any juror bias amongst the venire. When representing Asian firms who are parties in US litigation, however, we must do much more than rely upon our standard approach.

What are the challenges? How do we address them at the outset of the case? It is axiomatic that successful representation begins and ends with a strong and viable attorney-client relationship. From our first day of professional responsibility to our first day in practice, we are taught that we must have our client's candor and trust from the very inception of the representation. To accomplish this, we may sit down with a new client and explain the importance of candor and trust and why we need to have it from the client from day one. Quite simply, we ask for a client's candor and trust and we assume that they are given to us if we have done a good job of explaining their importance in the attorney-client relationship.

When representing Asian firms, however, we must do much more than ask for our client's candor and trust. Here, a different approach is essential. It must consist of a communication strategy that conveys an understanding of and respect for a different language and a different culture. The following elements are offered as a guide to establishing and ensuring a viable attorney-client relationship throughout the litigation.

Communication

Patience, humility, respect and sincerity are the qualities that should define our communication strategies with Asian client representatives. Further, clear and effective communication skills are essential in representing Asian firms. As referenced herein, respect plays a crucial role in gaining trust. You must endeavor to convey a respect and understanding of cross-cultural differences. Many Asian cultures, such as the Japanese, prefer clear instructions and explanations with facts and data. Do not assume that what is common sense for you is also common sense for your client.

Language may be a barrier even in

communications with a client who speaks excellent English. Do not assume that your client understands merely because he/she has a proficiency or fluency with English. The Japanese have an adage that 'the nail sticking up gets hammered down.' As a result, the tendency is for your client representative not to ask questions—particularly in a group setting. Preferred communication, therefore, should be in person or one on one where feasible. Here, it is important to be pro-active by asking questions to ensure that you have conveyed information fully and completely.

Email has become the preferred means of communication in business and legal communities throughout the world. It is far more efficient and convenient than drafting letters. When dealing with overseas clients in Asia, email is an essential means of communication. If not used with care, however, it also can be the biggest source of difficulty. In the era of electronic communication, it is all too easy to dash off an email 'updating' our client on a recent case development in between our daily multi-tasking. Here, cryptic or brief explanations and/or omitted details can cause considerable problems when they are read by our clients. Thus, great care should be taken when drafting emails to the client. They should be clear and concise. If feasible, they should be vetted internally with colleagues before being sent.

Discretion

Loyalty and confidentiality are highly respected values of many Asian cultures. In Japan, for example, the intimacy and longevity of vendor-purchaser relationships is perhaps the most difficult aspect of Japanese business for many foreign companies doing business in Japan. Business relationships after five or 10 years are considered unbreakable. Additionally, confidentiality and secrecy are the hallmarks of the Japanese business culture. In Japan, personal space is highly valued due to the densely populated areas in which they live. Thus, privacy and confidentiality are essential to the cultural value system.

In the context of the attorney-client relationship, you should demonstrate a special sensitivity to loyalty and confidentiality in all dealings with the client. Again, things that we take for granted in our culture do not necessarily translate the same way with our Asian clients. For example, it would not be well taken to request a conflict waiver from an Asian client. While generally permissible under our rules of professional conduct, such a request may be viewed as an unacceptable act of disloyalty to an Asian client.

Consensus Decision-Making

There is a strong hierarchical structure in the Asian business culture, particularly in Japan. It is important

to show greater respect to the eldest members of the client business. Negotiations, for example, begin at the executive level and continue on to mid-level managers. Most decisions, however, are the result of group deliberation. In the attorney-client relationship, you should anticipate that all key decisions likely will be the result of a consensus or group decision making process. The decision-makers may include both in-house legal counsel as well as business personnel. Therefore, it is critical that you understand the dynamics of this process with respect to your client's internal structure and organization. From the outset of the representation, you should accept that all significant client decisions will be the result of a long and deliberative group process. For that reason, it is important to determine the internal management structure of Asian companies, especially for larger companies with many internal divisions.

Trust

There is no short cut to gaining the trust of an Asian client. You must earn it by demonstrating that you are worthy of it. Here, the importance of conveying an understanding and respect for cross-cultural differences cannot be over-stated. In Japan, for example, there are three basic values that embody its culture:

Wa

This concept is the most valued tenet. Literally, "wa" means harmony. In the business culture, it is reflected in the preservation of relationships in the face of differences and the avoidance of individualism. In the context of the attorney-client relationship, for example, 'wa' may manifest itself in the client's indirect expression of 'no.'

Kao

This concept refers to "face." Face forms the foundation of one's reputation and status. 'Kao' is preserved by avoiding confrontations and direct criticisms whenever possible. In the context of the attorney-client relationship, acting in such a way that causes your client representative to lose face—*eg* criticizing a decision or recommendation, can have disastrous consequences for the viability of the relationship.

Omoiyari

This concept relates to the sense of empathy and loyalty which are valued in society and practiced in the Japanese business culture. Literally, it means "to imagine another's feelings". In the context of attorney-client, a strong relationship can only be built on trust and mutual feeling.

Preparation for Deposition and Trial Testimony

Pretrial litigation is a multi-faceted process. Written discovery, document production, motions practice and live testimony are all important devices in preparing for trial. When representing Asian clients, each has special considerations. However, preparing for deposition and trial testimony presents unique challenges. We must be able to effectively communicate our case theory through live witnesses and sworn testimony. Here, we must formulate an effective strategy to develop such testimony that reflects an understanding of language and cultural differences and accounts for the use of interpreters.

Deposition and Trial Testimony

The overall objective of witness preparation whether it be for deposition or trial is to convey a message. That message, in turn, supports the case theme and theory. To successfully convey a message, the client witness must communicate accurately and effectively. More specifically, the client witness must be able to effectively control the level of detail in his/her answers. This can only be accomplished through a methodical and focused preparation. Video-taping a mock direct and cross examination, for example, has proven to be a very effective means of witness preparation. Video review provides a very tangible means of working with your client to effectively prepare him/or her for sworn testimony. Use of interpreters should be strongly encouraged.

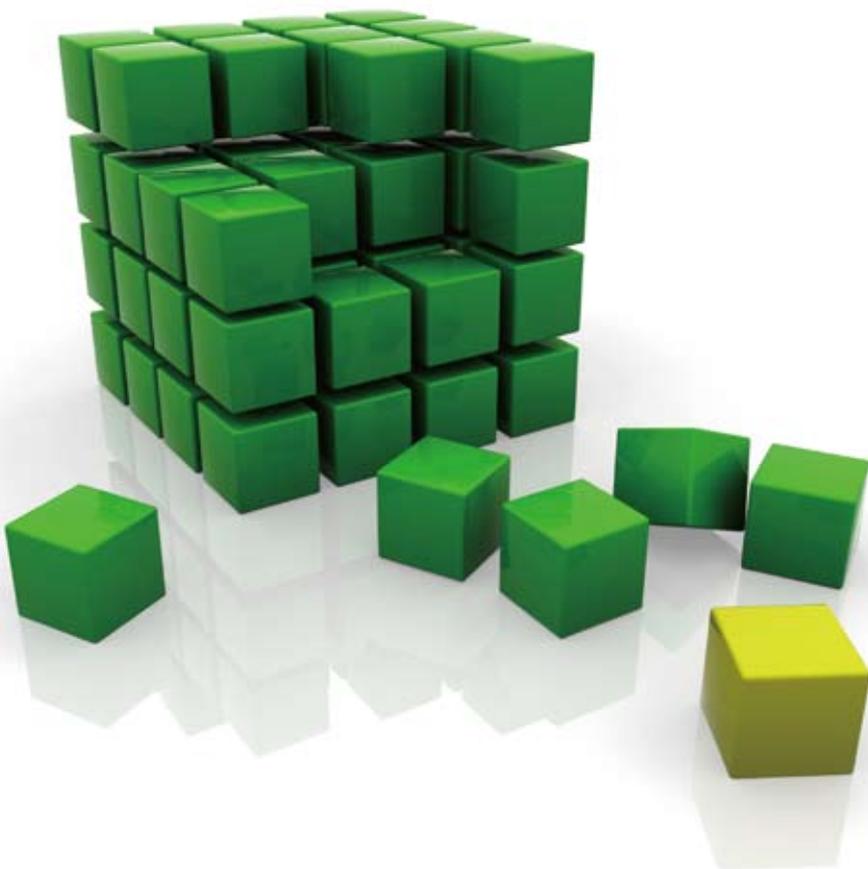


Photo by: Rafal Zdeb

(As discussed under the sub heading ‘Effective Use of Interpreters’ below).

Rule 30(b)(6) Depositions

The concept of Rule 30(b)(6) tends to be a difficult one for most Asian client representatives to grasp. Client representatives identified for given topics will tend to narrow their area of expertise. They will not typically want to expand the scope of their topic(s) into seemingly or logically related areas. As a result, you should anticipate an institutional bias that will result in the designation of multiple corporate representatives on the listed topics of a given notice. Here, it should be noted, that the legitimate use of multiple deponents to respond to a Rule 30(b)(6) notice can also provide a strategic advantage to the party against whom discovery is sought.

Effective Use of Interpreters

Finding and selecting a court-certified interpreter is merely the first step. All too often, attorneys do not realize that interpreters must prepare for depositions in order to be effective. Thus, it is advisable to provide your interpreter with key case pleadings such as the Complaint and Answer so that he/she can become familiar with the basic facts and issues in the litigation. You should also consider providing the interpreter with key documents that will be used in the deposition. This will enable the interpreter to become familiar with core terminology in the case. It also will allow the interpreter to become comfortable with document text that will be quoted from during the examination or that contains a translation.¹

You should anticipate and prepare for the following when using an interpreter for discovery depositions and/or trial testimony:

Consecutive Interpretation

Many foreign languages allow for simultaneous interpretation in a court proceeding. Given the nature of most Asian languages, however, an accurate interpretation cannot be done in such a manner. Thus, you need to anticipate that the pace of questioning and the length of the deposition will be affected by a consecutive interpretation of questions and answers. The general rule of thumb is that the length of the deposition will be about three times longer with the use of an interpreter than it would without one. This slowed pace can be very challenging for both the attorney questioning and the attorney defending the witness. Thus, use of video review to prepare your client for deposition can also serve as an effective means to prepare yourself for the pace and flow of the deposition with the presence of an interpreter.

Check Interpreter

In most depositions involving an Asian language and English, a ‘check interpreter’ is often used in addition to the lead interpreter. The check interpreter is typically provided by the party defending the deposition. When defending a client at deposition, use of a check interpreter is highly advisable. You should not assume that your opponent has retained a qualified interpreter. Here, the check interpreter can identify and raise any issues as to the accuracy of the lead interpreter’s work. This provides an important safeguard to the process.

Objections and Attorney Exchanges

Objections are a necessary part of the deposition and trial testimony process. In a case without interpreters, they can become disruptive and they can have a chilling effect on the witness if abused by an attorney or if the deponent has not been fully prepared for this dynamic. With the added layer of an interpreter, special challenges are presented. Where practical, counsel should work out an agreed procedure for making objections in advance of the deposition. With consecutive interpretation, attorneys have a tendency to make an objection while the interpreter is relating the question to the witness. As a result, the interpreter likely will have difficulty relating the objection accurately. Here, use of real-time software on a monitor has helped to address this problem. In addition, some interpreters will interpret the objection before the question. This order is problematic and likely unacceptable to opposing counsel. Thus, it is preferable to work out an agreement with counsel regarding the order of interpretation before the start of the deposition.

Attorney discussions during a deposition, while common and often necessary, also present challenges for the interpreter. Providing an accurate interpretation of counsels’ discussions often can be more difficult than interpreting the subject matter of the litigation. As a result, all efforts should be made to keep these colloquies to a minimum—and very short. In addition, it is advisable to reach agreement with opposing counsel, where feasible, on the manner and timing of the interpretation of attorney discussions during the deposition.

In summary, an overall agreement with opposing counsel before deposition discovery commences is strongly encouraged. Such agreements help ensure the accuracy of the record and they facilitate efficiencies for all parties in the litigation.

Method and Manner of Inquiry

When preparing to take a discovery deposition or conduct a direct or cross examination at trial, some special considerations are essential. Short and simple questions are the objective of any trial

lawyer. When conducting an examination through an interpreter, however, this objective takes on heightened importance. Lengthy and compound questions are difficult under normal circumstances. To an interpreter, they become a nightmare. To the fact-finder, they serve as an obstacle to the important testimony you seek to elicit.

You should speak directly to a witness when conducting an examination through an interpreter. Often, attorneys become distracted during an examination and will speak directly to the interpreter; *eg* “ask her...” or, “did he understand what I just asked him?” Use of the ‘third person’ as a means of questioning a deponent should be avoided at all costs. It is disrespectful to the witness and it impermissibly forces the interpreter into a substantive role in the examination.

During an examination at deposition or a trial, an attorney may quote from previous sworn testimony, a witness statement or a document. Here, an examining attorney should be aware of the limitations of attempting to quote from a single word, phrase or sentence. The nature of the Japanese language is illustrative of this limitation. For example, short phrases or single words do not necessarily translate verbatim from English to Japanese. Often, the interpreter must add words that are implied given the syntax of either the question or response so that an accurate interpretation can be rendered.

In summary, it is strongly advised that the examining attorney endeavor to learn about the basic characteristics of a given language as part of the preparation. Little things, such as learning the basic word order can be very helpful in grasping the essence of testimony through an interpreter. In Japanese, for example, the verb is often at the end of a sentence. Additionally, personal pronouns are not typically used, unlike English. Excessive use of pronouns in questions, therefore, can cause confusion for the witness. Thus, a basic understanding of the deponent’s native language is both invaluable and essential.

Key Considerations at Trial— Addressing Fact-Finder Bias

“If a foreign country doesn’t look like a middle class suburb of Dallas or Detroit, then obviously the natives must be dangerous as well as badly dressed...”
— *Lewis H Lapham Money & Class in America (1988)*

The express objective of jury selection is to find 12 members of the venire who can render a fair and impartial verdict that is based upon the facts and the law as provided by the trial judge. In reality, however, jurors come from all walks of

life. They bring with them their life experiences, their education, their work history, political and religious views and their socioeconomic status. The trial lawyer has the daunting task of probing bias of potential jurors within the ever diminishing time allotments of jury selection. In representing Asian businesses in US litigation, we must first acknowledge the areas of potential bias amongst the venire and be willing to pursue inquiry in those areas without reticence. When it comes to racial stereo-typing, the American jury system historically has been particularly vulnerable.

Like all other racial minorities in the United States, Asian Americans are subjected to a variety of stereotypes that have emerged from an unfortunate history of discrimination in this country. In recent history, Asian Americans have been widely celebrated as the “model minority.” Although the definition of this phrase has varied amongst commentators, it is used to refer to a non-white segment of American society that has obtained social acceptance and educational and economic affluence through hard work and a conservative value system. Asian Americans, however, were subjected to a contradictory stereotype long before receiving praise as the “model minority.” This stereotype has been referred to throughout history as the “yellow terror” or “yellow peril”, a phrase that emanates from the US immigration waive of 1800s. Many historians have documented the many cruel and unfavorable views Americans held of the early Asian immigrants. These views were also reflected in the laws of the day.

In 1882, Congress passed the Chinese Exclusion Act, a law that placed a 10 year ban on the immigration of Chinese, “lunatics” and “idiots” into the US. This legislation was renewed in succession until it was later repealed in 1943. In repealing this law, however, Congress merely allowed a quota of only 105 Chinese immigrants per year.

The internment and incarceration of over 120,000 people of Japanese ancestry during World War II is a tragic and painful chapter in American history. During this era, the United States Supreme Court upheld imposition of a curfew, the evacuation and incarceration of Japanese Americans on the basis of ‘military necessity.’²

It was some 40 years later that the federal government took any meaningful action to redress its tragic and discriminatory action. In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians. After lengthy public hearings, the Commission concluded that Executive Order 9066 [authority by which Japanese Americans were incarcerated during World War II] was not justified by any valid ‘military necessity.’ Rather, the Executive Order was rooted in racial prejudice, wartime hysteria and an overall failure of political leadership. Based upon the Commission’s

recommendations, Congress passed legislation providing for wartime reparations to those who were incarcerated and an official apology was issued by President Reagan. Despite the government's public recognition of its wrongful conduct and acceptance of responsibility, a residual undercurrent remains. Indeed, during the Congressional debate on the Commission's recommendations in the 1980s, Senator Jesse Helms from North Carolina opposed passage of the legislation, arguing instead that the Japanese Government should agree to compensate the families of those who were killed at Pearl Harbor. While clearly a minority view, Senator Helms's diatribe unfortunately represents an invidious belief held to this day by some segments of the American population. These same individuals can be called to jury duty just like anyone else in this country.

There are many recent and well-publicized jury trials that provide anecdotal evidence of juror bias against Asian Americans. In 1982, a 27 year old Chinese-American engineer was beaten to death by two white unemployed auto workers in a brawl outside of a Detroit bar. The defendants thought the victim, Vincent Chin, was Japanese and beat him to death with a baseball bat. During the fight, witnesses heard the defendants shout, "[i]t's because of you little mother f____ers that we're out of work." At trial, the jury acquitted one defendant and found the other guilty of manslaughter. At sentencing, the trial judge imposed an unusually lenient sentence of three years for the defendant found guilty of Chin's death, a decision that set off outrage in the Asian community throughout Michigan.

In 1992, a 16 year old Japanese foreign exchange student attending school in Louisiana, Yoshihiro Hattori, was shot to death while he and his American friend were on their way to a Halloween party. Hattori and his friend mistakenly knocked on the door to a home where they thought the party was being held. When a woman answered the door that the two boys did not recognize, they tried to explain that they were looking for a Halloween party. The woman became frightened and screamed for her husband to get a gun. In response, her husband came to the door and confronted Hattori, saying nothing to his American friend standing nearby. The husband pointed his gun at Hattori and ordered him to "freeze!" Hattori, who spoke English with a pronounced accent, did not understand what that term meant. Thus, he continued to approach and attempted to explain that they were looking for a Halloween party. Without hesitation, the husband shot Hattori in the chest.

Although the husband was charged with manslaughter, he was acquitted at trial based upon a claim of self-defense. Jurors found his claimed fear of death and/or imminent harm to be reasonable

despite testimony that Hattori had no weapons and appeared to be of a very small build. Nevertheless, the defendant insisted that Hattori was 'scary' and 'frightening'.³

A medical malpractice case was tried to jury verdict in Spokane County Superior Court in the State of Washington last December, 2007. In that case, the jury returned a defense verdict exonerating a local doctor from malpractice. The plaintiff's lawyer, Mark Kamitomo who is of Japanese descent, brought a motion for a new trial post verdict. Unlike typical assignments of error, Mr Kamitomo presented uncontested affidavits from two jurors about misconduct during the deliberations. In these affidavits, the jurors recounted how five other jurors mocked him during deliberations, referring to him as "Mr Kamikaze", "Mr Havacoma" and "Mr Miyagi" (a character from the movie, *The Karate Kid*).

The defense lawyer in that case, Brian Rekofke, obtained affidavits from other jurors who sat on the case in an effort to oppose plaintiff's motion for a new trial. These jurors acknowledged that the derogatory names were used in reference to Mr Kamitomo but denied that they were uttered as racial insults. Rather, these jurors claimed that the names were used to refer to Mr Kamitomo during deliberations because certain jurors were having difficulty remembering his name.

The trial judge properly granted plaintiff's motion for a new trial, noting in part that these same jurors had no difficulty pronouncing or 'bastardizing' Rekofke's "Middle European" name. Perhaps more ominous was the Court's observation from the bench when rendering his ruling, "[w]e'd hoped we'd moved beyond this, and we apparently have not. It's upsetting..."⁴

Asian companies have also experienced certain stereo-typing in US jury trials. Some legal commentators have observed that American companies enjoy a distinct home field advantage in jury trials where the opponent is an Asian—and particularly Japanese—business. In 1992, for example, Honeywell successfully sued Minolta in a patent infringement dispute and obtained a landmark \$96.3 million dollar verdict.⁵ That case often is cited by commentators, jury consultants and trial lawyers for just how powerful a home court advantage can be for an American firm involved in litigation with an Asian company.

Jury consultants around the country have developed a variety of special analytical models for Asian business clients aimed at identifying 'anti-Asian bias' in American jury pools. If the complexity of your cases warrants it, use of mock juries and focus groups run by qualified jury consultants can provide invaluable information about likely race bias in a given case. Whether you use a mock jury or not, you should in all cases give careful consideration

to the demographic make up of the venire when picking a jury. Age, education, economic status and military service are likely to yield important information on race bias with a prospective juror. To the extent that attorneys are allowed to conduct questioning during jury selection, conclusory inquiries like, “can you be fair?” should be avoided as they are not likely to reveal any useful information. Most jurors, whether biased or not, are loathe to admit that they cannot be fair in a group setting such as jury selection. Additionally, use of questionnaires with prospective jurors is highly recommended. Questionnaires provide a ‘safe’ opportunity for prospective jurors to provide confidential and substantive responses to questions involving race-based bias.

In the landmark case of *Batson v Kentucky*, the US Supreme Court held a prosecutor’s use of peremptory challenges based upon race to be constitutionally impermissible.⁶ The Court expanded the scope of *Batson* in subsequent decisions. For example, the Court later held that a criminal defendant cannot exercise peremptory challenges based upon race.⁷ The Supreme Court also has extended *Batson*’s prohibitions against race based peremptory challenges to civil litigants in

private causes of action.⁸ Most states have adopted similar “*Batson*” prohibitions with regard to the exercise of peremptory challenges in criminal and civil cases. The trial lawyer should be fully aware of the scope of *Batson* and its progeny as these types of challenges may become warranted in any given case.

Conclusion

In summary, representing Asian clients in high stakes US jury trials presents a unique set of circumstances and challenges for the trial lawyer. A successful representation requires focused preparation. The lawyer must demonstrate a knowledge of cross cultural differences and a sincere and profound respect for those differences. The lawyer must step outside of a traditional approach and examine the case from the unique perspective of the client—not the mindset of the attorney. Additionally, the attorney must be careful not to mirror image an American value system on the Asian client. Rather, the lawyer will earn the respect, candor and loyalty of the client by demonstrating knowledge of and respect for the client’s cultural value system. The conceptual framework outlined herein is offered to aid the trial lawyer in this endeavor.

Notes:

- ¹ Some attorneys use the words “interpreter” and “translator” interchangeably. In fact, the terms denote different professional activities to the Asian client representative. For example, an “interpreter” renders oral speech in one language into another. A “translator” renders written words from one language into another.
- ² See *eg*, *Korematsu v US*, 323 US 214 (1944); *Ex Parte Endo*, 323 US 282 (1944); *Hirabayashi v US*, 320 US 81 (1943); *Yasui v US*, 320 US 114 (1943).
- ³ For a discussion of the facts of the criminal case, see *Hattori v Peairs*, 662 So 2d 509 (La Ct App 1995). While the defendant was acquitted of manslaughter, it should be noted

that Hattori’s parents successfully prosecuted a wrongful death action against the defendant after the criminal case concluded.

- ⁴ “Racial Remarks Prompt New Trial: Judge Cites Jury’s Nicknames for Lawyer”, by Karen Dorn Steele, *The Spokesman Review*, January 26, 2008.
- ⁵ *Honeywell v Minolta Camera Co, Inc*, 1990 WL 66182 (DNJ May 15, 1990). The case was tried to verdict and later settled for \$127.5 million.
- ⁶ *Batson*, 476 US 79 (1986).
- ⁷ *Georgia v McCollum*, 505 US 42, 59 (1992).
- ⁸ *Edmondson v Leesville Concrete Co*, 500 US 614, 616 (1991).

Global Investment Race for Energy and Resources



This article analyzes the energy challenges faced by India and discusses the initiatives for acquiring energy resources being taken to meet growing energy demands

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Energy Sector—Overview

The two-way relationship between economic development and energy consumption has made the Indian energy sector witness a rapid growth. India's gross domestic product ("GDP") growth has hit 9.2% for the period July to September 2007, an increase over the already robust GDP rate of 8.4% during the period July to September 2006.¹ The ever growing economy of India has increased the demand for energy manifold. Presently, India is facing a tough challenge to meet the energy demands to sustain an increased GDP.

It has been estimated that if India is to deliver a sustained GDP growth rate of 8% through the coming years, it needs to increase its primary energy supply by three to four times and, its electricity generation capacity/supply by five to six times of its energy levels as compared to 2003-04. Taking the year 2003-04 as the base, India's commercial energy supply needs to grow from 5.2% to 6.1% per annum while its total primary energy supply is required to grow at 4.3% to 5.1% annually.²

Present Scenario

India is both a major energy producer as well as energy consumer. India currently ranks as the world's 11th greatest energy producer, accounting for about 2.4% of the world's total energy production and as the world's sixth greatest energy consumer, accounting for about 3.3% of the world's

total energy consumption.

Due to population growth and economic development, however, India's energy consumption has been increasing at one of the fastest rates in the world. Despite the overall increase in energy demand the level of energy production in India is still very low as compared to other developing countries.

As per Government of India ("GOI") statistics, the energy requirement of India during the year 2006-07 (up to January 2007) stood at 572,812 MU and energy availability during the said period was 519,656 MU resulting in energy shortage of 53,156 MU (9.3%).³

The energy supply position of India over the years has been as follows:

Year*	Energy Requirement (MU)	Energy Availability (MU)	Energy Shortage (MU)	Energy Shortage (%)
2000-01	507216	467400	39816	7.8
2001-02	522537	483350	39187	7.5
2002-03	545983	497890	48093	8.8
2003-04	559264	519398	39866	7.1
2004-05	591373	548115	43258	7.3
2005-06	631554	578819	52735	8.4
2006-07 (up to Jan.07)	572812	519656	53156	9.3

*Source: Annual Report 2006-07, Ministry of Power

Similarly, as per GOI statistics, the peak demand for energy in 2006-07 (up to January 2007) was recorded at 100,403 MW whereas peak demand met during the same period was 86,425 MW. Thus the peak shortage of energy stood at 13,978 MW (13.9%).⁴

The peak energy demand over the years has been as follows:

Year*	Peak Demand (MW)	Peak Met (MW)	Peak Shortage (MW)	Peak Shortage (%)
2000-01	78037	67880	10157	13.0
2001-02	78441	69189	9252	11.8
2002-03	81492	71547	9945	12.2
2003-04	84574	75066	9508	11.2
2004-05	87906	77652	10254	11.7
2005-06	93255	81792	11463	12.3
2006-07 (up to Jan.07)	100403	86425	13978	13.9

* Source: Annual Report 2006-07, Ministry of Power

The growing energy shortage concern of India has fuelled the need to acquire energy assets abroad. Over the last couple of years, the shortage of energy has led the Indian companies to explore and acquire energy assets where there are vast reserves of untapped energy sources and also explore energy reserves in India.

Key Legislations/Policies

India presently does not have an 'Integrated Energy Policy' which regulates the energy sector in India. There are diverse acts/rules/laws/regulations governing the energy sector in India. For example, for each of the core energy sectors in India such as coal, power, hydro energy, wind energy, renewable energy *etc.*, there are different sets of acts/rules/laws/regulations which govern and regulate that respective sector of energy. Some of the key legislations which govern and regulate the energy sector in India are as follows.

In the Oil & Gas sector, the key legislation regulating and governing this sector is Oilfields (Regulation and Development) Act, 1948. This Act regulates the development of oilfields and minerals oil resources in India. The Petroleum and Natural Gas Rules, 1959 regulates the grant of exploration licenses and mining leases in respect of petroleum and natural gas which belong to GOI. It also regulates the conservation and development of petroleum and natural gas in India. Whereas the Petroleum Act, 1934 and amendments thereof regulates the laws relating to the import, transport, storage, production, refining and blending of petroleum in India.

In the Coal sector, the key legislation in India is the Mines and Minerals (Regulation and Development) Act, 1957 which regulates development of mines and minerals under the control of the GOI. Coal Mines (Nationalization) Act, 1973 and amendments thereof which regulates

the acquisition and transfer of the right, title and interest of the owner in respect of the coal mines. The Coal Mines (Conservation & Development) Act, 1974 formulates regulations on conservation of coal and development of coal mines in India. While the Coal Mines (Conservation & Development) Rules, 1975 regulate the measures for conservation and development of coal mines in India.

In the Power sector, the key legislation is the Electricity Act, 2003. This Act consolidates the laws relating to generation, transmission, distribution, trading and use of electricity and formulates measures conducive to development of the electricity industry, promoting competition therein and protecting interest of consumers and supply of electricity to all parts of India.

The Energy Conservation Act, 2001 provides for the legal framework, institutional arrangement and a regulatory mechanism at the Central and State level to embark upon an energy efficiency drive in the country. The GOI has also formulated the National Electricity Policy, 2005 which aims at making all Indian household have access to electricity in the next five years and the power demand to be fully met by the year 2012.

The renewable energy sector in India is governed and regulated by Ministry of New and Renewable Energy. There are a number of rules and regulations governing this sector. The New & Renewable Source of Energy ("NRSE"), Policy 2006 *inter alia* provides for guidelines for the State Government of India for power generation from non-conventional energy sources.

India's Initiative

Energy is the key to India's economic growth. Therefore, India is pursuing all options for sustainable growth of its energy sector, which includes clean coal technologies, renewables, nuclear, end use technologies, demand side management *etc.*

India has taken initiatives to reform its policies and legislations to fulfill its present and future energy requirements. The legislations governing the core energy sectors have been amended time and again as per India's requirement. The Foreign Direct Investment ("FDI") policy of India regulating foreign investments made into India in various energy sectors has also been reviewed on continued basis and changes are notified from time to time.

The FDI policy in the energy sector has been further liberalized recently. The present FDI policy *inter alia* permits 100% FDI under the automatic route in coal and lignite mining for captive consumption by power projects, petroleum and natural gas sector (other than refining and including market study and formulation; investment/financing; setting up infrastructure for marketing in the said

sector. Recently, the requirement of compulsory divestment of up to 26% equity within five years in favour of Indian partner/public for actual trading and marketing of petroleum products has been dispensed with. Further, FDI up to 49% has been allowed with prior approval of the Foreign Investment Board of India (“FIPB”) in petroleum refining by oil public sector undertakings (“PSUs”), without involving any divestment of dilution of domestic equity in the existing PSUs. While 100% FDI is permitted in the petroleum refining sector in case of private companies. In the power sector including generation (except Atomic energy), transmission, distribution and power trading sector, 100% FDI is permitted.

India is also working towards tapping the nuclear energy and in furtherance of which the GOI is negotiating with various countries to share with India their technology in nuclear energy in order to increase the supply of energy and bridge the gap between supply and demand of energy in the country.

India has also taken the initiative to successfully encourage the PSUs to acquire equity oil/gas blocks abroad. ONGC Videsh (“OVL”), a subsidiary of Oil and Natural Gas Corporation Ltd (“ONGC”), the flagship oil exploration company of India, has so far made an investment commitment of over US\$5 billion and has presence in several countries, including Russia, Sudan, Iran, Egypt, Vietnam, Myanmar, Columbia, Libya, Syria, Nigeria, Cuba etc. Another significant development in the Oil and Gas sector is that the country is turning into a major exporter of refined petroleum products from a major product importer earlier.

In the Gas sector, major gas (Krishna-Godavri Basin) discoveries within its territories have helped India raise its domestic production. Also, efforts are made to import natural gas through trans-national pipelines (Iran, Myanmar, Turkmenistan pipeline). India has also taken initiative for exploration and production (“E&P”) of new energy blocks in India under the New Exploration Licensing Policy (“NELP”). In the present NELP VII, India has offered a total of 57 oil and gas blocks for exploration constituting of 19 blocks in deepwater, nine blocks in shallow waters and 29 blocks on onland. The new round of bidding (NELP-VII) would offer about 4,00,000 sq km of area for exploring oil and gas.

The development of the E&P sector has been significantly boosted through this policy of GOI, which brought major liberalization in the sector and opened up E&P for private and foreign investment, where 100% FDI is now allowed. NELP provides a level playing field to the private operators, Indian or Foreign, by giving them the same fiscal and contract terms as applicable to National Oil Companies

(“NOCs”) for the offered blocks.

Under NELP, so far, 49 discoveries have been made by private/joint ventures companies in 15 blocks. In the first six rounds of NELP, expected investment is of US\$8 billion. Oil and Oil-Equivalent Gas (O+OEG) in place reserve accretion under NELP is approximately 600 million metric tonnes including world class gas discovery by Reliance Industries Limited and Niko Resources in Krishna-Godavari basin.

India is also taking initiative to use biofuels as an alternative to its ever increasing need for energy. India started with the supply of ethanol-blended petrol to a few of its states and intends to supply 5% of the ethanol-blended petrol to the whole of the country. Subsequently, the percentage of ethanol mixture in petrol will be increased to 10%. India has also signed a Memorandum of Understanding (“MoU”) with Brazil in April 2002, which would facilitate the transfer of technology in the fields of blending ethanol with petrol and diesel at higher proportions. Blending with diesel, biodiesel provides a viable solution for energy. For this purpose the Ministry of Petroleum & Natural Gas has already taken initiatives in planning field trials through pilot projects.

Further, the use of biomass materials for power generation is also a vital step towards generation of power in India. India has been implementing biomass power/co-generation programme since the mid nineties and encouraging biomass power generation through fiscal incentives which are 80% depreciation in the first year and can be claimed for the equipment required for co-generation systems, 10 years tax holidays, concessional customs and excise duty exemption for machinery and components for initial setting up of projects and sales tax exemption is available in certain States. The GOI is also focusing on the generation of power from Small Hydro Power (“SHP”) plants. The SHP Programme is one of the thrust areas of power generation from renewable in the Ministry of New and Renewable Energy. It has been recognized that small hydropower projects can play a critical role in improving the overall energy scenario of the country and in particular for remote and inaccessible areas. The GOI is encouraging development of small hydro projects both in the public as well as private sector.

Energy Reserves

Sources of Energy

The sources of energy can be divided into two groups—renewable energy (energy resource that can be replenished naturally) and non-renewable energy resource (energy resource which cannot be replenished). The renewable sources of energy include solar energy which can be transformed into electricity and heat; wind energy which produces

electricity at a lower cost, geothermal energy which is generated by tapping the heat under the earth's crust and hydroelectric energy which is produced by the force of moving water.

According to the world energy report, India gets 80% energy from non-renewable energy sources *ie* from conventional fossil fuels like oil (36%), natural gas (21%) and coal (23%). India has a large coal reserve of 248 billion tones, amounting to the fourth largest proven coal reserves in the world.⁵ Coal is the most important and abundant fossil fuel in India and accounts for 55%⁶ of India's energy need. A large population of India in the rural areas depends on traditional sources of energy such as firewood, animal dung and biomass. The usage of such sources of energy is estimated at around 155 mtoe per annum or approximately 47% of total primary energy use.⁷

Thirty per cent of commercial energy requirements in India are met by petroleum products, nearly 7.5% by natural gas, and 3.5% by primary electricity. India is poorly endowed with oil assets and has to depend on crude imports to meet a major share of its needs (around 70%).⁸ According to the government statistics India's estimated crude oil reserves stand at 5.9 thousand million barrels, while the natural gas reserves are estimated at 1089.7 billion crude metres. From a mere 0.25 Million Metric Tonnes ("MMT") in 1947-48, India's crude oil production during the year 2006-2007 reached 33.37 MMT. As regards natural gas, 86.97 Million Standard Cubic Meters Per Day of natural gas was produced in the year 2006-2007, a significant rise from the negligible production in the early seventies.

Demand and Supply of Energy

In India, energy demand is increasing at the rate of 9% per annum whereas the supply of energy is not keeping pace. The present deficit of electrical energy in India is 8%.⁹ The increased power demand, depleting fossil fuel resources and growing environmental pollution have led to use of alternative sources of energy. The basic concept of alternative energy relates to issues of sustainability, renewability and pollution reduction. Accordingly, India is now concentrating on renewable energy sources like solar, wind, biomass, hydro *etc* for meeting its energy demands, of which it has huge potential.

India has around 0.4% of the world's proven reserves of crude oil and natural gas.¹⁰ As against this, the domestic crude consumption in India is estimated to be 2.8% of the world's consumption. The share of hydrocarbons in the primary commercial energy consumption of India has been increasing over the years and is presently estimated at 44.9% (36.0% for oil and 8.9% for natural gas).

The demand for oil is likely to increase further during the next two decades. The transport sector in India is the main reason for the projected increase in oil demand in India. Consequently, import dependence for oil, which is presently about 70% is also likely to increase further during the Eleventh Plan.

With the rate at which the energy demands and prices are increasing it may be impossible for India to pursue the present rate of economic development. In view of the rapid economic development, India may be forced to retard its development/ industrialization program, for want of sufficient energy reserves. Considering the scenario of the Indian industrial sector and its energy utilization efficiency, there is an urgent need to review India's manufacturing technologies and the energy management approach.

Bridging the Gap

India's rapidly growing demand for energy has increased the energy demand-supply gap. To bridge this gap, India will have to invest huge resources to create additional energy supply reserves. Accordingly, renewable energy sources offer a viable option because India has one of the highest potentials for the effective use of renewable energy. India is the world's fifth largest producer of wind power after Denmark, Germany, Spain, and the USA.¹¹ India has significant potential for generation of power from renewable energy sources like small hydro, biomass, and solar energy. India has an estimated small-hydro power ("SHP") potential of about 15,000 MW.

Other renewable energy technologies, including solar photovoltaic, solar thermal, small hydro and biomass power are also spreading in India. Greater reliance on renewable energy sources offers enormous economic, social, and environmental benefits. The enactment of the Energy Conservation Act, 2001 in India spells out the road map for India to move up the energy efficiency ladder and inculcate the approach towards energy conservation efforts. Further, to supplement the scarce resources of hydrocarbons, an initiative is being taken to implement the Ethanol Blended Petrol ("EBP") programme nationwide. To implement the programme, the Ministry of Petroleum and Natural Gas notified 20 States and four Union Territories to implement an EBP programme effective from November 1, 2006.

However, for a large country like India with its over one billion population and rapid economic growth rate, no single energy resource or technology constitutes a solution to address all issues related to availability of energy supply. Accordingly, to meet its large and growing energy needs, India has started acquiring overseas energy assets. For example, Indian companies such as ONGC, Coal India, GAIL, Reliance *etc* have acquired equity through joint

ventures in oil and coal companies in rich nations. The GOI is also pursuing strategic alliances with various countries. The recent MoU with China on this issue is an example. The GOI is also seriously exploring the nuclear option to meet its energy needs and it is looking at co-operation in this area with the nuclear suppliers' group countries.

Furthermore, in India, the GOI has taken initiatives to invite bids for E&P of oil and gas and in new coal bed methane blocks. The concept of NELP is to explore energy assets in India through public and private participation and bridge the growing gap between energy supply and demand in India. This also allows foreign investors a continuous window of exploration opportunities in India.

Recently ONGC has discovered gas in a basin near Jodhpur, Rajasthan.

Cairn India has also discovered one of the world's largest oil finds in Rajasthan, northwest India. Such discoveries of energy assets add to the depleting source of energy supply in India.

Investment Preferences

Offshore Energy Reserves

There are abundant energy resources in the world. In the oil sector, for example a quarter of the world's proven oil reserves are in Saudi Arabia, which produces over four gigabarrels (600 million tons) of oil per year (17 tons per second). Canada's proven oil reserves are estimated at 179.2 billion barrels as of 2007, placing it second only to Saudi Arabia. Over 95% of these reserves are oil sands deposits in the province of Alberta, Canada. Although Alberta contains nearly all of Canada's oil sands and about 75% of its conventional oil reserves, several other provinces and territories, especially Saskatchewan and offshore Newfoundland, have substantial oil production and reserves.

According to the *Oil and Gas Journal*, Venezuela had 77.2 billion barrels of proven conventional oil reserves as of 2007 (80 years of future production), the largest of any country in the Western Hemisphere. Although Russia holds the world's largest natural gas reserves, it has only the eighth largest oil reserves, with proven oil reserves of around 60 billion barrels as of 2007. Despite that, Russia is the world's second largest oil exporter, at times even exceeding Saudi Arabia.

In the sector of natural gas as per the *Oil & Gas Journal* (January 1, 2006), North America has the largest natural gas reserves of 276.947 trillion cubic feet while the Central & South America has a reserve of 250.838 trillion cubic feet. The Middle East countries have a reserve of 2,565.400 trillion cubic feet with Africa's reserves estimated at 490,882 trillion cubic feet and Asia at 391.645 trillion cubic feet.

The world's estimated recoverable coal reserves,

according to the International Energy Annual, 2005 (as of June 21, 2007) is estimated to be 276,342 (million short tons) for North America. While Europe is estimated to have a total recoverable coal reserves of 65,762 million short tons, Middle East's reserve being 462 million short tons.

Hence, in view of the aforesaid abundant energy resources in the world and untapped energy resources, India with its growing deficit of energy supply and the ever growing economic development, is forced to seek, explore and tap offshore energy resources. Accordingly, investing in overseas energy assets has become an important aspect of India's international diplomacy.

Target Countries

The potential countries/regions in which India may target investments for acquiring offshore energy reserves are Iceland, Algeria and Mexico. The government of Iceland plans to open the Dreki area in the Atlantic for licensing in January 2009. The region which Iceland is opening for exploration is on the Jan Mayen Ridge between Iceland and the island of Jan Mayen. The seismic and geographical studies suggest potential for producing oil and gas, as hydrocarbons have been found in the adjacent and geographically similar areas.

A record breaking 2,297 blocks or part blocks in the United Kingdom ("UK") waters are also on offer for exploration in the 25th offshore oil and gas licensing round. This record-breaking 25th round includes areas of the Continental Shelf not previously explored, and demonstrates the UK government's on-going commitment to maximizing the UK's energy resources. Similarly, Algeria has launched its latest energy exploration and production licensing round offering 15 exploration blocks. The foreign and Algeria firms are invited to apply for pre-qualification, to bid for what it called high potential oil and gas blocks.

The Mineral Management Services ("MMS") of the United States has held its first Federal Outer Continental Shelf ("OCS") oil and gas lease sale in the Chukchi Sea since 1991 on February 6, 2008. The Chukchi Sea Sale 193 area contains about 29.7 million acres offshore Alaska from north of Point Barrow to northwest of Cape Lisburne. The sale area extends from about 25 or 50 to 200 miles (40 or 80 – 322 km) offshore. The MMS estimates that the Chukchi Sea area could contain 15 billion barrels of oil (mean estimate of conventionally recoverable resources). Two sales were held in the Chukchi Sea Planning Area previously. Sale 109 was held in 1988 with 351 leases issued, and Sale 126 in 1991 with 28 leases issued. However, presently all of the leases have expired.

India has also identified countries such as Sudan, Gabon, Angola, Egypt, Chad, Equatorial Guinea,



Mozambique, Libya, Nigeria and Ivory Coast for exploring new oil blocks. Apart from Africa, the Middle East has emerged as yet another destination for investments in power projects.

Roadblocks

India's foreign policy with regard to its energy sector is that of enlightened self-interest. India is forming partnerships, though not alliances, with multiple countries. India's policy seems to be "no permanent allies, but lots of good friends." Accordingly, India is forming these relationships to serve a number of different interests, including energy security.

However, India has conflicting interests that may indeed clash in the future. While it is engaging in more aggressive oil diplomacy with a few countries, considering more acquisitions of oil and gas assets abroad, and thinking about participating in the construction (and use) of a number of pipelines. The conflicts would occur in the context of India's developing strategic relationships with a number of other countries, including the United States, that might view some of these other "energy relationships" with concern.

A good example of this clash is the proposed Iran–Pakistan–India gas pipeline, which has been

discussed for over a decade and a half. Over the last few years the proposal has taken on new momentum, but the budding US–India strategic partnership complicates any Indian decision to participate. While the United States has not asked India to choose between the pipeline and their bilateral relationship, it has made its views on the former quite clear (and offered to open wider the door to another option, *ie* nuclear energy).

India is also likely to run into conflicts of interest with the United States when considering potential energy suppliers like Myanmar, Sudan, and Venezuela. While India is loath to act under pressure, in each of these cases, before acting on its energy security imperatives, India would be required to consider its other strategic interests.

Similarly, the Iraqi government had blacklisted Reliance Industries, India's largest company, after it struck an oil deal with the Kurdish regional government without approval from Baghdad. The Iraqi government is of the view that any company/country which signs contracts with the Kurdish regional government without approval of the central government would compromise their chances of getting future opportunities in Iraq. Reliance had signed a contract with the autonomous Kurdish government for two blocks in the Northern Iraq in Kurdistan Region.

In a similar instance, India's Essar Group had agreed to give up plans of an oil refinery in Iran after the Minnesota state government said that the move could hurt the prospects of approval of the company's planned \$1.8 billion steel project in the state. Hence, in light of the international politics, relations between countries, and prevailing international policies, India has faced difficulties in acquiring offshore energy assets.

Investment Overseas

Offshore Investments

India is keenly looking abroad to meet its energy requirements. In the recent past, Indian companies have acquired abundant offshore energy assets in a number of countries. Some of the recent deals and deals in the pipeline to be concluded by Indian companies are as follows.

Recent Deals

OVL has acquired a 40% stake in the San Cristobal oilfields in the Orinoco basin, Venezuela (Latin America). Venezuelan national oil company Petroleos de Venezuela (PDVSA) would hold the remaining 60% stake. This is OVL's first investment in Latin America which is the world's fifth largest oil exporter.

Essar Exploration and Production Limited ("EEPL"), Mauritius a subsidiary of Essar Oil has been awarded offshore block in Vietnam's Song

Hong basin. Currently, Essar Oil is in the process of consolidating its upstream exploration and production activities under EEPL. Once this is completed, Essar Oil will have eight oil and gas blocks and one coal bed methane block. This includes onshore blocks in Madagascar, an offshore block in Nigeria and one shore block in Mehsana, Gujarat.

In Egypt OVL has acquired a 70% stake in the North Ramadan Block, as well as 60% stake in Block Sudan. OVL has also made an investment of \$690 million for 25% stake in the Greater Nile Oil Project ("GNOP"). While ONGC has created a subsidiary in the Netherlands, ONGC Nile Ganga BV, to manage its first producing overseas oil property. This property produces approximately 300,000 barrels per day thereby giving India about 3 million tons of crude oil annually.

OIL has acquired 100% equity shares of Sakhalin India Inc, which has a 10% participating interest in the North Hellhole Bayou Prospect in Vermillion Parish, offshore Louisiana. Whilst OVL has acquired a 55% stake in Block WA 306P, Australia.

Videocon and GSPC equally share a 40% stake in Block EPP in Australia. Further, India's Videocon Industries and Bharat Petroleum Corp ("BPCL") have jointly acquired a sizable stake in Brazilian oil exploration company EnCanBrazil—a subsidiary of Canada's Encana Corp. In Vietnam, OVL has acquired 100% rights in offshore Blocks 127 and 128. In Iran in 2002, Indian companies acquired the rights for the offshore Farsi block and signed an exploration service contract with the National Iranian Oil Company. OVL acquired a 40% stake in this block while OIL owns 20% and IOC 40%.

Further, OVL acquired full exploration rights to Block 8, Syria. OVL has also acquired a 60% stake in Block 24. While it has acquired PetroCanada's stake in 36 producing fields in Syria jointly with CNPC (the OVL-CNPC joint venture is called Himalaya Energy Syria BV).

Also, OVL has a 20% stake in the Sakhalin-1 Production Sharing Agreement and has invested \$1.77 billion in the offshore field—the single largest foreign investment by India in any overseas venture.

Tata Power Company ("TPC") has purchased 30% equity stake in two mining companies—PT Kaltim Prima Coal and PT Arutmin of Indonesia's Bumi Resources for \$1.1 billion. India's Global Steel Holding company has acquired a license to mine coal for five years from two blocks in Tete, Fatima Momade, Mozambique's for a \$116 million. In early 2007, BPCL acquired three blocks in the North Sea along with Tata Petrodyne.

Last but not the least, OVL and Hinduja group have signed a MoU for joint exploration of acquiring oil assets abroad (South Pars and Azadegan—Iran).

Deals in the Pipeline

Indian companies are all set to enter into Brazil, South America. OVL has proposed to acquire a 15% stake of Block BC-10 in Brazil from Royal Dutch Shell (which operates the project) for \$170 million. The field is expected to begin production in 2009 and has a production potential of 100,000 barrels per day. In Canada, Indian companies are looking to invest \$1 billion over the next year in oil sands.

Investment Experiences

Indian companies have had a number of setbacks in their efforts to acquire and conclude deals pertaining to acquiring energy assets abroad. Companies like OVL have drilled dry wells in Australia, Libya, and Cote d'Ivoire. They have also lost out to other companies (often Chinese) on a number of bids. In 2004, an Indian company lost Block 18 in Angola to a Chinese firm. In August 2005, OVL lost the opportunity to acquire majority stakes in two blocks in Nigeria to the Korean National Oil Company, despite a higher bid.

In August 2005, ONGC-Mittal Energy Limited ("OMEL") lost a bid to CNPC for PetroKazakhstan despite making a higher bid (\$3.6 billion vs the \$3.2 billion offered by CNPC). There was much consternation in New Delhi about the bidding process (especially when OMEL was denied an opportunity to re-bid). The reason for OMEL to have lost the bid despite having made a higher offer is the fact that China and Kazakhstan share a border, so it would be easier to export the oil. In India's case, the oil would have to be exported through Russia thus, causing India to lose the deal despite a higher bid. Similarly, in June 2006 OVL lost out to Sinopec for the producing OAO Udmurtneft fields in Russia.

Some of the Indian companies are of the view that India has lost out on the aforesaid deals because of bureaucratic red tape, one of the reasons that apparently spurred the public-private partnership between ONGC and Mittal that gained some exploration blocks in Nigeria. Further, a number of Indian companies bids are submitted without offers of aid or investment or with offers that are not so attractive in comparison to those from other countries. In Angola, for example, China promised development assistance totaling \$2 billion, whereas India offered to undertake a \$200 million rail project.

Way Forward

Indian Perspective

India is presently banking heavily on imports to meet its energy demand in order to sustain its economic development. India's dependence on imported oil should be decreased through effective oil conservation programmes and inter-fuel substitution. The public mass transport systems should be improved in every possible way to discourage

energy-intensive private modes of transport.

Further, India as a way forward, should work on increasing its coal production through mechanization. Benefaction of coal is required to be taken up and clean coal technologies including coal gasification are to be adopted. Rural energy supply should receive priority for overall improvement of India's rural economy.

The energy supply through integration of renewable energy sources in an effective manner is required to be worked upon by experts and implemented by local bodies. India should make efforts towards utilization of both conventional and non-conventional sources of energy, which are both required to be adopted for the time being, and a judicious mix of the two should be promoted.

International Scenario

India's ever-growing need for energy is quietly re-shaping its international policy and the way India operates in the world, changing relations with its neighbors, extending its reach to oil states as far flung as Sudan and Venezuela, and overcoming United States resistance to its nuclear ambitions.

India's energy ambitions have led India to undertake projects which could not be imagined a couple of years ago. A proposed pipeline to ferry natural gas from Iran across Pakistan; a new friendship with the military government in gas-rich Myanmar, formerly Burma; and budding talks with the United States to let India buy nuclear technology.

Currently, nuclear power is on the top of the agenda of India. While India covets new equipment to strengthen its feeble nuclear energy program, the United States has prohibited the sale of nuclear

technology to India since it tested a nuclear bomb in 1998. International co-operation and understanding of India's energy ambition can help to ensure India's energy quest to move at a faster pace.

Today, India imports about 70% of its oil; in another 20 years, the Indian government estimates, that figure will rise to 85%. India's demand for natural gas is also expected to grow, and most of it would have to be imported. In view of India's energy quest, it is pushing to reach out to authoritarian governments like those of Sudan and Myanmar, which the United States has sought to isolate.

Further, India has persuaded a wary Bangladesh to agree, at least in principle, to a pipeline that would ship gas from Myanmar to India. However, by far, India's most ambitious proposal is a \$4 billion, 2,600 kilometer (1,600 mile) pipeline that would ferry natural gas from Iran across Pakistan to India, though a final deal is nowhere near fruition. Pakistan would be collecting handsome transit fees from the pipeline. But, how it would ensure the facility's security across vast, restive Baluchistan Province, where disgruntled tribal armies routinely attack gas installations, remains a mystery. Further, India also aims to conclude yet another pipeline deal that would dispatch gas from Turkmenistan through Afghanistan, then into Pakistan and India. Thus, India is leaving no stone unturned to build, improve or maintain its international relations with the countries where there is a possibility of acquiring untapped energy resource.

Disclaimer: This paper should not be construed or relied upon as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only.

Notes:

- ¹ *Source:* Council for Foreign Relations.
- ² *Source:* Integrated Energy Policy-Report of the Expert Committee, Planning Commission-August 2006.
- ³ *Source:* www.Indiabuisness.nic.in (Ministry of External Affairs, Government of India).
- ⁴ *Source:* www.Indiabuisness.nic.in (Ministry of External Affairs, Government of India).
- ⁵ *Source:* Seminar conducted by Ministry of Non-conventional Energy Resources on Alternate Energy Sources, August 2005.

- ⁶ *Source:* Indian Energy Portal.
- ⁷ *Source:* India Core-Information on Infrastructure & Core Sectors.
- ⁸ *Source:* India Core-Information on Infrastructure & Core Sectors.
- ⁹ *Source:* Seminar conducted by Ministry of Non-conventional Energy Resources on Alternate Energy Sources, August 2005.
- ¹⁰ *Source:* Indian Energy Portal.
- ¹¹ *Source:* Indian Energy Portal.

Current Trends in International Licensing—2008

Sometimes Too Good To Be True



This article highlights the normal drafting considerations and key contract provisions with regard to cross-border licensing arrangements

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Introduction and Why We License

Licensing is one of the most valuable ways to develop and exploit intellectual property of all sorts. My own practice focuses on copyright and trade mark but what I have to say relates generally to patent as well. Since I usually represent licensors, I will approach this topic from that perspective. However, the licensee will typically have the same concerns—but perhaps a very different outlook.

Up to a point, exploitation of a brand enhances the value of a brand. However, if a market becomes saturated with a brand or if the brand proliferates or penetrates into too many goods or services, the brand will rapidly diminish in value until it becomes virtually worthless. Of course, production of shoddy or inferior products will invariably diminish the value of a brand.

A client with a successful product or service could very well be interested in licensing for several reasons. Here are some examples of situations you are likely to encounter:

1. Licensing may be a vehicle for expanding uses of the product or for applying the product name onto goods or services that are beyond the skill of the client. For example, a fashion designer may license the use of its name on a variety of

products including automobiles and jewelry.

2. Licensing can be used to introduce a company's products to a new geographic market. Goods and services can be produced locally at substantial savings that conform to the particular interests of the local market.
3. Licensing is frequently used to develop less costly supplies for distribution by the licensee and by the licensor at home. For example, a watch company may license its trade marks to an overseas textile manufacturer to produce garments bearing the watchmaker's logo. The garments could in turn be distributed by other licensees in diverse parts of the world.

In brief, licensing is a method whereby a client can maximize production and distribution of products. From a client's perspective, it may all sound too good to be true—someone else does all the work and royalty checks just flow back to the licensor. However as we all know, nothing is quite that simple.

Considerations Prior to Entering Into Licensing Arrangements

The very nature of licensing intellectual property or anything else of value creates a likely diminution of control by the licensor. That is, once a product or service is licensed to someone else, there is at least some level of loss of control.

Before a client enters into any type of licensing arrangement, it is important to discuss both the

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commercial and legal realities. Initially, as lawyers, we need to keep in mind that since we are frequently dealing with cross-border transactions, we need to think and consider the realities of enforcing the agreements that we create—pragmatism must prevail over legal formalism.

There are alternatives to licensing. One of our clients has decided that it will accept lower sales but will maintain absolute brand and quality control by directly producing product at high cost in the USA and shipping overseas for direct distribution through its own subsidiaries or joint ventures. The only licensing consists of distribution rights. If any product appears anywhere in the world bearing that client's trade marks that was not produced by the client, those products are counterfeits and can be dealt with under the relevant civil and criminal laws. In this case, our client has sacrificed an enormous amount of volume but has maximized income per sale and provides additional employment in the USA.

Another client in the apparel business, who still manufactures in the USA, has sought to develop markets in developing countries but has not licensed any manufacturing in Asia or Latin America. You might ask how that is possible. Simple, the client ships last year's goods, of virtually no value in the USA, to developing countries. The amounts realized are less than what a US liquidator could generate but this approach has the added benefit of keeping last year's overstock out of the chain of commerce in the USA.

As a general rule, unless the client is very large, direct manufacturing overseas through its own operations is not usually a practical alternative. Costs can spiral out of control and the difficulty of complying with local laws and customs should deter all but the biggest players.

Another reason to consider shipping goods made in Europe or USA to Asia rather than local manufacture in Asia is that with the extremely rapid growth of middle class in countries like China and India, there is a growing demand for goods manufactured in Europe and the USA. Local consumers want to see 'Made in France' on garment labels.

Intellectual Property Protection

Clients need to advise you of their intentions before they enter into licensing negotiations. I know this is wishful thinking and I will not pretend to tell you that many of my clients do this. Usually the first I hear is that the client either wants me to draft a license agreement or to review an agreement that someone else has drafted.

From a trade mark law perspective, once counsel becomes aware of any licensing arrangements, you must immediately attend to trade mark issues. Some

of the considerations include:

1. Immediately check to see that the client's home country trade marks are in good order. Does the client have registered trade marks? If so, do the existing domestic trade marks encompass the goods and services that are the subject of the proposed transaction? If not, immediately proceed to augment the domestic registrations through new applications.
2. If the domestic trade mark situation is satisfactory, then look to the country or countries that are the subject of the license. Even if goods are only being produced in another country and will all be shipped back to the home country, I strongly advise trade mark protection in the country where the licensee's activities will take place. If there is going to be overseas distribution as well as production, you must check to see the status of trade mark protection that your client already has in each jurisdiction. This is an urgent and critical undertaking before any license or distribution agreement is entered into.
3. Whether we are talking about license or distribution, you must quickly conduct trade mark searches in each affected jurisdiction. You do not want to enter into a transaction where your client's trade mark infringes someone else's pre-existing trade mark. You can proceed without such a search but recognize the peril and make sure that the contract provides appropriate clauses in the event that the brand cannot be used in the country. Better to do the searches. I have been involved in too many distribution deals where the client would not let me do the search and the next thing I knew was the panicky phone call from the client after a lawsuit was commenced by a local trade mark holder against the licensee for infringement.
4. If the searches are clear or even if no searches are done, it is absolutely critical that trade mark applications are filed by your client prior to entering into any distribution or licensing agreement. Now you may say that this can be a costly waste of time, especially if the deal falls through. But I can tell you from painful experience that your client must file applications before taking any concrete steps with a potential distributor or licensee. Why? Because in many parts of the world, most especially Latin America, distributors and licensees, even before the agreement has been signed, will invariably file applications to register your clients' trade marks in the names of the distributor! So, when you go to negotiate the license, you will discover that the licensee owns the trade marks in question. To challenge these registrations later is very difficult and the licensor may end up being forced to either make enormous payments

to recover its own name or retain the licensee for an indefinite period—both very unappealing alternatives. This can create enormous difficulties when the relationship is terminated.

5. Local domain names should also be registered by the licensor for the same reason.
6. In some countries, all license arrangements must be recorded with the local trade mark office. Failure to do so can have serious implications including the inability of the licensee to pursue infringers.
7. Quality control must be maintained—this is discussed below in key contract provisions. Without constant monitoring of licensee output, trade marks can be lost. Also poor quality goods can injure the licensor's reputation and lead to severe legal liability.

Key Contract Provisions

In addition to normal drafting considerations, I suggest that you also make sure that the following are considered in distribution and licensing arrangements:

Translations

If the parties use different languages, a translated version must be provided. Do not trust translations made by the other party. All too often translations are not translations at all but reflect wishful thinking or fundamental misunderstandings. If the agreement will be furnished in English and a second language, be sure to specify which language version controls. As a general rule, keep the agreements as short as possible. If the agreement is too complex, it will not be understood by the other party—which defeats the whole purpose of the agreement. At all costs, avoid American boilerplate; it is poorly understood in the USA and is completely unintelligible anywhere else.

Inspections

The license agreement must require that samples of all products be submitted by licensee for inspection and approval by licensor before the goods go into production and enter the distribution chain.

Without adequate quality control, the client will not only lose revenue but, even more critically, may lose all rights to the trade mark itself. A trade mark owner must act like a trade mark owner and cannot just sit back and collect royalty checks. A trade mark is supposed to be a designation of source—trade marks are a form of consumer protection. A trade mark is legally intended to tell the consumer the source of the product. If the product is being manufactured by someone other than the trade mark holder, then the trade mark holder must actively police the goods being produced; and when I say police it is not just from a royalty standpoint. No, the trade mark holder must take steps to assure that

quality is being maintained. Any license agreement must specifically provide for maintenance of quality or that agreement itself can be used to attack the validity of the trade mark.

I represent a trade mark holding company, and it is fair to say that the company devotes as much resource to monitoring licensees' product quality and service as is done to monitor correct royalty payments. Again, if the client is not prepared to maintain quality control, it should probably not engage in licensing or, one day, the licensee itself may contend that the trade mark is no longer valid!

Advertising

Every contract for the sale of goods for resale has an implied license for reasonable use of trade marks in advertising. Similarly licensing of trade marks may also have an implied right of using the trade marks in advertising the licensed products. But how far does the right of advertising extend? Can the purchaser advertise the goods on television or just on point of sale displays? The use of trade marks by the purchaser should be spelled out clearly or your client may find that the trade marks are being advertised far beyond what your client feels is reasonable. The last thing your client wants is to have its trade marks being used to help attract customers to the licensee's business where products of competitors or the licensee's house brands are being sold.

Mutuality of Terms

Although many of the items I have discussed really are concerns of the licensor, from a negotiating point of view, the terms should be presented as mutual. For example, when I draft IP warranty and indemnity terms, I always provide that IP that belongs to licensor remains the property of licensor and that which belongs to licensee, continues to belong to licensee. While this may not seem too important for smaller licensees, keep in mind that some licensees are much larger in their own country and have far more IP than the licensor.

Clear Specification of Territory

It should be a given that the licensee's territory should be clearly defined. If certain accounts are to be retained by licensor, that must be specified.

It is critical to specify that goods produced by licensee are not to be shipped out of the designated territory. I know the usual complaint from licensees—we just sell the goods, we cannot control what our customers do with them. While that is true as a general proposition, the fact is that a licensee can be compelled to stop selling to a customer once it is determined that the customer is shipping commercial quantities outside of the territory. Sometimes the so-called customer is an affiliate of the licensee.

Recently I dealt with a publisher who had a license to print and sell in France. The goods kept showing up in Belgium—someone else's territory. Licensee pled innocent. Investigation showed that it was the brother-in-law who was buying the goods in France and re-selling in Belgium.

Sub-Licensing and Manufacturing Responsibility

This can present some difficult situations. The way to avoid problems is to have your client perform due diligence and make sure that the licensee is, in fact, capable of performing without farming out the work to someone else. I have seen too many situations where the licensee has absolutely no manufacturing capacity whatsoever and is just smoke and mirrors and farms out the work to some unknown entities. When possible, specify that all manufacturing activities must be performed by the licensee; also specify that all of licensee's suppliers must be approved by licensor. This step will also buttress the strength of the trade mark.

Let me give you an example. Several years ago one of my clients sought to have wheelchairs manufactured in Vietnam. A potential licensee wanted to manufacture the wheelchairs in Vietnam and also sell them in Vietnam as well as supply them to the licensor for sale in Australia. The licensee might have been able to make bicycles but had no idea of what was involved in making products that could satisfy Australian medical appliance safety standards. When questioned, the licensee admitted that the work would be farmed out to others. From a licensor's viewpoint, this spells potential disaster. The loss of control is simply not acceptable. Urge your clients to physically view the licensee's facilities.

Intellectual Property Warranties and Indemnities

The licensee is entitled to protection if it is subject to claims of infringement by a third party occasioned by the use of the licensed IP. The licensee must be required to give prompt notice to the licensor of any claims. This type of risk can be minimized if IP rights have been secured in advance of the licensing.

Be aware that in some countries, especially in Latin America, at least 50% of all trade mark applications are opposed. The path to registration can be lengthy. Even in an unopposed situation, I have applications that have been languishing in China. In fact, many of these applications are taking longer to process in China than in the USA.

Most critically, in the event of third party infringement claims, the licensor must be permitted to terminate the license at least with respect to the IP in question. It is not at all unusual to discover that a third party has rights that were not uncovered in your due diligence. To mitigate and minimize the

damage, licensor must be able to stop production and distribution of the offending product. If licensee is injured in the process, the licensor should cover the out of pocket losses but not lost profits.

Maintenance of Liability Insurance

If the licensee is selling goods, it is essential that adequate third party liability insurance is maintained. The amount should be determined by what is customary in the local jurisdiction. Adequate cover is essential; the licensor should be a named insured on the policy. Keep in mind that even if local judgments are normally modest, the same might not be the case if one of the defendants is a major Canadian or US company.

Right of Termination

Unilateral right of termination without cause is, in my experience, the licensor's single best remedy for any unanticipated or intractable problem. Termination for cause is not a particularly practical remedy because it is subject to review by a third party. However if the licensee understands that the license may be terminated on 30 or 60 days notice, the licensor will have some real, rather than theoretical, ability to protect intellectual property.

As a practical matter, the right of termination without cause must be mutual or the licensee will be unlikely to agree. If the power is mutual, normally parties will be more willing to agree on the language.

Dispute Resolution Process

Always specify language of proceedings, forum and choice of law.

If the licensee is outside of the licensor's home country, it is advisable to select a neutral forum for dispute resolution. Entering into a license with a company in Vietnam and specifying that all disputes must be brought in the courts of New York State with New York law governing is not usually workable. The licensee might just ignore the clause and bring an action in Vietnam where the New York jurisdictional requirement might similarly be ignored.

A preferable idea if you are licensing in Asia is to select someplace like Singapore as the physical venue. It will be more comfortable to the licensee and the rule of law is very well established. As for the substantive law, keep in mind that if you specify any American state law, the CISG (United Nations Convention for the International Sale of Goods) will automatically apply as part of the governing law. As a US treaty, it is read into every state law. However it can be excluded by specific language to that effect. I have found that the CISG is quite popular among Chinese companies and China is a signatory state. However the CISG really is intended for true sale situations and may not be applicable in pure IP licensing disputes. The CISG has been ratified

by many countries and you should be aware if the substantive law specified in the license agreement automatically includes the CISG.

Most importantly, try to avoid court litigation. Non-US entities truly abhor American court proceedings. Arbitrations in Singapore or Hong Kong are routine practice for many companies. As for arbitration rules, there are a number of good international dispute resolution bodies. I suggest you consider WIPO—World Intellectual Property Organization—rules.

You can find some excellent and well-tested dispute resolution clauses on the WIPO website www.wipo.int.

Here are some of the WIPO clauses that provide for different approaches:

Expedited Arbitration

Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim shall be decided in accordance with the law of [specify jurisdiction].

Mediation Followed, in the Absence of a Settlement, by [Expedited] Arbitration

Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the WIPO Mediation Rules. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].

If, and to the extent that, any such dispute, controversy or claim has not been settled pursuant to the mediation within [60][90] days of the commencement of the mediation, it shall, upon the filing of a Request for Arbitration by either party, be referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules. Alternatively, if, before the expiration of the said period of [60][90] days, either party fails

to participate or to continue to participate in the mediation, the dispute, controversy or claim shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules. [The arbitral tribunal shall consist of [a sole arbitrator][three arbitrators].]* The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim referred to arbitration shall be decided in accordance with the law of [specify jurisdiction]. (*The WIPO Expedited Arbitration Rules provide that the arbitral tribunal shall consist of a sole arbitrator.)

Expert Determination, Binding Unless Followed by [Expedited] Arbitration

Any dispute or difference between the parties arising under, out of or relating to [describe scope of the matter referred to expert determination] under this contract and any subsequent amendments of this contract shall be referred to expert determination in accordance with the WIPO Expert Determination Rules. The language to be used in the expert determination shall be [specify language].

The determination made by the expert shall be binding upon the parties, unless within [30] days of the communication of the determination, the matter referred to expert determination is, upon the filing of a Request for Arbitration by



either party, referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules. [The arbitral tribunal shall consist of [a sole arbitrator][three arbitrators].]* The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute or difference referred to arbitration shall be decided in accordance with the law of [specify jurisdiction]. (**The WIPO Expedited Arbitration Rules provide that the arbitral tribunal shall consist of a sole arbitrator.*)

These clauses are quite complete and only require insertion of venue, language and substantive law. In most disputes, I think the Expert Determination process is a good avenue and is far more economical than formal mediation. In my experience, mediation just doubles the cost of arbitration and should be avoided. Full details and rules are available on the WIPO website.

With respect to governing law, as long as you put the venue in a mutually friendly place and specify arbitration, the substantive law, even if New York or UK, should not be an obstacle to the licensee.

An interesting alternative to traditional dispute resolution is to designate an individual expert acceptable to both parties and agree that the individual will resolve any disputes and that the decision can be enforced or reviewed by either party in arbitration. This is one of the WIPO alternatives. In moderate size disputes, this procedure can be very effective. I have used such a clause in a few instances and in at least one situation, where I was not counsel for one of the parties, both parties agreed that I was to be the final arbiter of any dispute. It actually worked quite well. There was a minor dispute, and I resolved it over the phone before any real injury had occurred.

Accounting/Policing

When a licensee, located far from the licensor, has the ability to manufacture, there is always the issue of goods passing under the licensor's radar. There is not any foolproof mechanism to control this problem.

In fact, I suspect that the largest single source of purportedly counterfeit goods may be licensees—so the goods are not really counterfeit. However if royalties are not being paid, then from the licensor's standpoint, the goods might as well be outright counterfeits.

Several years ago while visiting Naples, Italy, my wife and I found street vendors selling absolutely superb copies of name-brand luxury

leather goods. My guide in Naples advised that the quality was frequently as good as the original because some of the fashion houses have their leather goods produced in Naples or Florence where there is a long established tradition of leather craftsmanship. He also assured me that some of the goods sold by the street vendors were produced by the same houses that were under contract to the fashion houses. I suggest that if this goes on in Naples, it is undoubtedly even more common where mass produced goods like knitwear are involved.

One solution is to charge the licensee a significantly high basic fee or even a flat fee. Where there is a flat fee royalty, the licensee's production does not affect the royalty. Such arrangements are not usually practical but we used a flat fee royalty system in India and both parties were quite happy.

In more sophisticated products, the licensor can maintain control if there is an essential component that can only be sourced from the licensor—if your client is fortunate enough to have such a unique component, I suggest that it should never be licensed to anyone. A unique component keeps everyone honest.

Conclusion

I have tried to present some of the challenges in cross-border licensing arrangements. At the end of the day, it is your client's business decision and we, as lawyers, should not be obstacles to sound business decisions. However by being aware of some of the likely problems, we can better serve our clients.

Licensing presents both legal and pragmatic challenges. It is essential for the legal practitioner to recognize the limitations presented by cross-border transactions. I urge you not to use boiler plate but to compose simple and purpose built agreements.

For further reading:

Rebecca Ordish, 'Sourcing From China: Stopping the IP Leaks from Your Clients' Supply Chain' (2008) 3(1) *Journal of Intellectual Property Law and Practice* 30.

Colin Pearson and Nigel Parker, 'Post-Termination Use of Licensed Intellectual Property by Licensees' (2008) 3(5) *Journal of Intellectual Property Law and Practice* 305.

Joseph Lookofsky, *Understanding the CISG in the USA* (1995).

Bruno Zeller, *Damages Under the Convention on Contracts for the International Sale of Goods* (2005).

Islamic Finance on the Rise— Recent Developments in Europe and the Middle East



This article outlines the development of Islamic finance in Europe and the Middle East, provides an overview of Sharia compliant products and discusses legal challenges being faced

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Islamic Finance—A New Megatrend

This paper gives an outline of the development of Islamic finance in Europe and the Middle East and discusses some of the most pressing legal challenges that the Islamic finance industry faces.

Islamic finance has been an area of substantial growth over recent years and is expected to further develop and expand. Not too long ago merely a niche market, Islamic finance is now regularly mentioned as one of the current mega trends in business. Reliable figures are scarce, but the tendency does not seem to be disputed: Islamic finance is on the rise.¹ Islamic finance, moreover, is no longer confined to specific “Islamic banks”; in contrast, many international financial institutions offer specific Islamic product lines targeting Muslim customers, be it through an “Islamic window” or an Islamic banking subsidiary. Islamic finance has become a global affair and, more recently, the first wholly Islamic banks in Europe have been set up.

What Exactly is Islamic Finance?

Islamic finance normally is defined as “financing transactions conforming to Islamic law (the Sharia)”² Islamic financing transactions, in other words, are financial transactions which observe the prohibitions of the Sharia, among them, in a prominent place, the prohibition of “riba” or illicit gain.³ This prohibition is traced back to the Qur’an that states

in Verse II:275: “God hath permitted sale but prohibited riba”. Islamic jurists understand this verse to prohibit any gain which is based on the lending of money, such as fixed interest rates paid on a loan. This, at least, is the prevalent interpretation in Islamic financial circles, where Islamic banking is characterised as “interest free” banking. The prohibition of interest is the ethical and economic foundation of the Islamic finance industry. According to Islamic scholars the rationale for this prohibition is that there shall be no profit without participation in business risk. In addition, transactions are required to be “asset based”, thus restricting the circulation of debt.

Sharia compliance with transactions normally is monitored by a committee of Islamic scholars (the “Sharia Board”) which scrutinizes and approves the transactions (and, in the case of an Islamic bank, would also oversee the business of the bank in general). When the transaction has been approved by the Sharia Board, a certificate is rendered which is somewhat reminiscent of the audit of the accounts by a chartered accountant. When developing new products, the scholars’ role is crucial, as they decide on the Sharia compliance of any financial innovation.

What are the Factors Propelling the Growth of Islamic Finance?

There are different factors that all have contributed to the rapid development of Islamic finance in Europe and the Arab Middle East.⁴

First, there is a tremendous excess of liquidity in the Arab Gulf states. The financial controls introduced by the US in the aftermath of 9/11 have fostered a relocation of Arab capital, moving in particular to the new financial markets in the Arab

Gulf. Financial centres such as Dubai and Qatar have benefited from this development, as have the Middle East property markets. More recently, the stark rise of the oil price has further contributed to the accumulation of wealth, mostly in liquid funds. This trend, second, coincided with a general retraditionalization of business culture in the Middle East—with Islamic finance spearheading that trend. Many institutional investors, including some of the sovereign wealth funds (SWF), adhere to a Sharia compliant investment policy. Third, new Islamic financial products have been developed which are more sophisticated and allow offering of an Islamic product range which, in terms of coverage and conditions, is by and large comparable to a conventional product portfolio. As a result, it now has become much easier to translate an Islamic orientation into concrete financial practices. Many of the obstacles that have hindered the growth of the Islamic finance industry in the early days have been successfully alleviated.

Nevertheless, in spite of the remarkable success in the area of Islamic product development in recent years (see the discussion under the sub heading ‘Islamic Financial Products—An Overview’), there remain certain fundamental legal challenges to be tackled (see the discussion under the sub heading ‘Legal Challenges’).

Islamic Financial Products—An Overview

Over the years, the Islamic finance industry has developed a whole range of Islamic financial products. Although there are new products emerging on a continuous basis, a certain core set of Islamic financial transactions has evolved.

Murabaha Loans

Probably the most important (although, from a Sharia perspective not uncontroversial) transaction in Islamic finance is the murabaha contract (or mark-up sale). The murabaha is used for asset and real estate finance and, with some modifications, can also serve to extend a general credit facility.

Under a murabaha agreement, the bank purchases an asset designated by the customer from a supplier and then sells it to the customer on deferred terms. The sale to the customer is based on a higher price (*ie* includes a “mark-up”) which compensates the bank for effectively extending credit to the customer.

Case Study 1: Company C requires funds to acquire a new truck. C agrees with Islamic Bank IB that IB will purchase the truck from Seller S for US\$100,000. Under a second sales contract, IB sells the truck to C for a price of US\$110,000, deferred for a time period of 12 months.

In many instances one will find the mark-up to be calculated on basis of LIBOR or another index used to calculate interest rates. The bank normally excludes any liability for the quality and the timely delivery of the asset (however assigns the respective claims to the customer) and makes the payment conditions in the second sales contract unconditional (*ie* independent from the delivery of the asset). From an economic perspective, therefore, the bank extends credit to the customer. In terms of legal structure, however, the transaction is not a loan but an (albeit atypical) sales contract. Islamic scholars therefore argue that the transaction is outside the prohibition of *riba* what only prohibits the lending of money against interest.

The aforementioned basic murabaha contract very obviously does not work if the bank cannot acquire ownership in transit of the financed asset. This may be the case, for example, if the transaction serves to finance the acquisition of a UMTS license, which can only be acquired by a licensed telecom operator (and most banks would not have the relevant license). Ownership in transit of certain assets, moreover, may have adverse tax effects (such as triggering double stamp duty or real estate transfer tax). For this reason, the so-called “commodity based murabaha” has been designed, and today most transactions are structured this way: under a commodity based murabaha (Arabic “*tawarruq*”) the bank acquires traded commodities (such as precious metals) on the commodities exchange and sells the commodities on deferred terms to the customer who then (often with the assistance of the bank acting as agent) cashes the commodities in.

Case Study 2: C approaches IB in need of liquid funds in the amount of US\$100,000. C and IB agree that IB purchases platinum worth US\$100,000 from the London Metal Exchange, which IB sells to C with a mark-up on deferred terms (purchase price of US\$110,000, due in 12 months, as in Case Study 1). C sells the platinum over the London Commodities Exchange and receives US\$100,000 in liquid funds (minus eventual costs).

Such a commodity based loan comes even closer to a conventional credit agreement, as the customer obtains freely disposable funds. Instead of granting a loan in money, the bank provides the customer with commodities which the customer (normally with the assistance of the bank) turns into cash. Although the *tawarruq* structure is widely used in the Islamic finance industry, its permissibility continues to be contested from a Sharia perspective.

Ijara Asset Finance

Leasing transactions are acknowledged under Islamic

law, calling them “ijara”. In view of the difficulties one faces when structuring Sharia compliant loans, leasing, in many instances (*eg* in project finance), is a viable alternative to conventional structures. In general, Islamic law provides for considerable freedom in structuring these transactions. Leases of movables and real estate as well as leasing transactions with a purchase options or sale and lease back transactions are all permissible. More conservative Sharia scholars, nevertheless, tend to require that the bank will take some operational risk under a financial lease, be this operational risk very limited. This can conflict with conventional leasing structures, where under a financial lease the bank tends to radically exclude all and any liability attached to the underlying asset. In addition, there is a certain tendency to use leasing structures also in situations where, in conventional transactions, a normal loan structure would have been preferred (*eg* because environmental liability attaches to legal ownership of the asset).

Case Study 3: C requires funds for a new refinery plant in the Arab Gulf State A. Instead of taking out a loan, C agrees with IB on a structure, under which IB commissions construction of the plant and then leases it for a fixed term to C; at the end of the lease, C has a purchase option. IB assumes certain maintenance functions (in order to satisfy “ownership risk” requirements of the Sharia Board). Under a service contract, however, an entity affiliated with C carries out these maintenance functions on behalf of IB. As the legal owner of the plant, IB will also be at the risk of being held liable for oil spills and other contaminations pursuant to the environmental laws of State A. In order to cover that risk, IB will take out insurance coverage with an Islamic (takaful) insurance company covering these risks.⁵

The case study demonstrates that although at first sight leasing seems to be an ideal Sharia compliant structure, in detail it can raise issues both from a Sharia perspective and under applicable local law.

Islamic Funds and Sharia Compliant Wealth Management

In view of the accumulation of capital in the Arab Gulf States asset management, both for high net worth individuals and institutional investors, plays an important role in Islamic finance. Sharia compliant fund structures vary and the following is limited to discussing some key aspects.

The investment policy of any Sharia compliant fund is curtailed to such investments which are permissible according to Islamic principles. This further defines (and narrows down) the scope of

possible investments (the “investment universe”). Typically, investments in impure areas of business (such as brewing or pork processing) are excluded, in addition to investments in conventional banking and insurance (because of the prohibition of interest). With regard to equity investments, investments in companies with a high debt ratio or large amounts of cash on the balance sheet also are impermissible (arguing that under these conditions the target companies are induced to make or receive interest payments). If a fund is investing in securities, normally all types of fixed income products as well as money market instruments are excluded (with the exception of Islamic bonds, see below). Although the principles are clear, spelling out the details of the investment policy can be difficult, in particular as the medieval text books of Islamic law do not provide precise guidance regarding thresholds and permissible balance sheet positions.

Even the most careful and skilled investment manager will find it difficult to always comply with Islamic guidelines. This applies in particular if a certain investment is only partially impure (*eg* a shopping mall houses a pub which also serves alcohol) or if a permissible investment turns impermissible (*eg* a food company acquires a pork processing subsidiary or a car manufacturer engages in financial services). For this reason, most Islamic funds provide for certain thresholds for “impure” income and “illicit gains” which may be achieved by the fund. The fund, however, then is required to set these gains aside and to donate respective amounts to a charity. This process is called “purification”. Designing a purification process can be the most challenging aspects of setting up a Sharia compliant investment fund, as the procedure can raise intricate tax and regulatory issues (can the amounts donated to charity be deducted as costs from the tax bill? And what regulatory limits exist for depriving the investors of these amounts?).

Islamic Sukuk Bonds

Islamic sukuk bonds have developed into one of the most important transaction types in recent years, for two reasons: first, they allow issuers to raise capital in a Sharia compliant way in the capital market. Second, they provide a kind of fixed income investment, which makes sukuk the favourite of fund managers.

Under a sukuk structure, the originator (a government or a corporate) transfers a certain asset (*eg* part of the real estate portfolio) to an SPV under a sale and lease back transaction. The SPV pays a certain “purchase price”, which it in turn raises on the capital market through issuing certificates (Arabic “sukuk”) to investors. The certificates reflect a certain interest in the asset transferred from the originator to the SPV and entitle the holder to a respective portion

of the revenues generated by the asset. The rental payments due under the lease agreement entered into between the originator and the issuer SPV will be disbursed to the certificate holders (who would receive a regular, fixed payment comparable to the coupon of a conventional bond). At the end of the lease, the originator will redeem the underlying asset (eg the real property transferred will be transferred back to the originator) and the redemption price will be distributed among the certificate holders (what is comparable to the re-payment of a conventional bond on maturity).

Case Study 4: C wants to raise US\$50 million on the capital market. C sells its real estate portfolio for US\$50 million to a special purpose company SPV. The sales contract contains a put option pursuant to which the SPV can require C to redeem the real estate at the price of US\$50 million when five years have lapsed. In addition, C and SPV enter into a lease agreement pursuant to which SPV lets the real estate to C for an annual lease payment of US\$5 million (10% of the purchase price or principal). SPV, in turn, issues sukuk certificates in the value of US\$50 million to investors, representing a share of ownership in the underlying real estate portfolio and entitling the investors to a share of the rental income. During the five year term of the lease, SPV disburses the rental payments of annually US\$5 million to the sukuk holders. After the five years have lapsed, C purchases the real estate for US\$50 million which again are disbursed to the sukuk holders.

In spite of Islamic bonds being a true success story, the sukuk structure raises a number of Sharia issues, which have not been settled to date. First, the structure from an economic perspective is a fixed income instrument what can be seen to conflict with a conservative interpretation of the prohibition of *riba*. Second, under some structures only a right to use is transferred from the originator to the SPA (instead of full legal title) which raises the question whether such a right to use can also serve as underlying. Third, there is a scarcity of permissible assets which can be used as underlying for a sukuk transaction. Once the originator's real estate has been "used" (or in case the originator does not have any real estate) it becomes difficult to find any suitable assets. This had lead to the question of whether other assets, including receivables, can be used as underlying or whether the SPV can directly invest into the originator on basis of a silent participation. According to the majority opinion of Islamic scholars, however, trading in receivables is not permissible, as Islamic law prohibits the exchange of one debt for another. This and other issues remain to be debated and—given

there practical importance—are among the most controversial issues in Islamic finance.

Legal Challenges

Islamic financing transactions are diverse and this is not the right place to give a comprehensive overview of the legal issues they raise. However, there are certain recurrent themes, some of which will be discussed in the following.

Sharia Supervision

Sharia compliance is what makes Islamic financing transactions Islamic. Sharia compliance, as mentioned above, means the conformity with Islamic legal rules. But who determines the substance of these rules?

In order to better understand the implications of this question, a brief look at the evolution and nature of Sharia law helps. The Sharia is the set of rules which have been developed by Islamic scholars in interpreting the "primary sources" of Islamic law, the Quran and the Sunna (the collection of reports on the life of the Prophet). The Sharia is a jurists' law, developed primarily by scholars, not by the legislature, and without a supreme authority which could render an authoritative interpretation of a legal issue in question. Above the local Imam, a famous saying goes, there only is the blue sky. Islamic financial innovations, therefore, require extensive consensus building—which can be difficult, in particular considering the tight time frames in investment banking, the lack of training of many Sharia scholars in modern finance and the global nature of many big ticket Islamic transactions.

In view hereof, it does not come as a surprise that there are tendencies to "institutionalize" Sharia compliance. These attempts develop at different levels. Since the 1990s non governmental organizations, such as the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) have developed "Sharia Standards" in which they lay down certain acknowledged and widely (but not unanimously) accepted standards for Sharia compliance of certain transactions.⁶ Such Sharia standards aim at codifying best practices of the industry, thus assisting people in determining whether a certain transaction type is in accordance with Islamic law. More recently, private think tanks and consultancies such as Dar al Istithmar have been set up which are active in developing Islamic financial innovations and intend to also streamline the certification process and abstract the Sharia knowledge from the individual scholar.⁷ They offer an institutionalised process of Sharia approval with the goal to facilitate innovation and make decisions more predictable. Taking this development one step further, there are discussions whether the regulator shall also be entrusted with the task of assuring Sharia

Photo by: Andrey Volodin



compliance of products which are sold as Islamic. This may seem compelling in particular for the retail sector, where the customer cannot realistically be expected to engage in an investigation of the Sharia compliance of a product on its own. Enlarging the regulator's competencies to also extend to Sharia compliance nevertheless marks a break with the Islamic tradition insofar as a governmental authority (as apposed to the scholars) is entrusted with defining the principles of the Sharia.

Regulation: One Size Fits All?

The vast majority of Islamic financing transactions are implemented in a "secular" legal environment, meaning an environment that does not give legal effect to Islamic legal principles, at least in the area of contract and commercial law.⁸ This also applies to the jurisdictions of the Arab Middle East, only few of which continue to enforce the Islamic prohibition of *riba* or other Sharia principles. Prudential regulation is no exception, in which most jurisdictions do not make a distinction between conventional and Islamic financial institutions.

This one size fits all approach can bring material disadvantages for Islamic financial institutions. If, for example, a *murabaha* is used to finance a real estate acquisition this can trigger double real estate transfer taxes or stamp duties, as the *murabaha* involves "ownership in transit" of the bank and title to the real estate are first transferred from the seller to the bank and then from the bank to the purchaser. There are two ways to resolve this issue. In some transactions, the bank will not be registered as legal owner of the real property, with the effect that, from a property law perspective, the property will transfer directly from the seller to the buyer (instead of transferring the title from the seller to the bank, who will transfer it to the customer, the bank will assign the claim against the seller to the customer).⁹

The structure, however, remains questionable from a Sharia perspective (the requirement that the bank acquires "ownership" under a *murabaha* agreement normally is understood to require the registration as legal owner in the land register). Therefore, debate has arisen as to whether tax laws should provide for a specific exemption for *murabaha* transactions.

In view hereof, a number of Middle Eastern and European jurisdictions have made attempts to introduce certain exemptions which are designed to facilitate the implementation of Islamic financial transactions. In most cases these attempts do not aim at introducing a special regulatory system for Islamic financial institutions, but to bring about a level playing ground by exempting Islamic financial institutions from such provisions which have an (albeit unintended) discriminating effect. For example, in 2001 in the UK a working group was set up which comprises representatives from the City, government, the Muslim community and the financial regulator (the FSA). The working group studied existing barriers to Islamic finance in the UK. As a result, UK tax laws were amended in 2003 to lift double stamp duty levied on Islamic financial transactions. The pioneering approach of the UK, fuelled by the City's aspirations to become the European Islamic finance hub, has set an important precedent for the European scene which regulators in other jurisdictions are likely to follow.¹⁰

Standardization: Mastering Diversity

Banking transactions build on standardization. Investors want to compare different products, which is facilitated if the legal structures and contractual terms are similar; banks, in turn, want to assess legal risk what is more difficult if one transaction document differs from the other.

In the Islamic finance industry, standardization continues to be one of the issues to be resolved.

Islamic finance transactions are not only reviewed by Sharia boards of a diverse composition with at times contradicting views, they also are governed by different laws and are implemented in different jurisdictions. Islamic financing structures have evolved in a fragmented market which, in the early days, also lacked transparency at times. This makes standardization efforts difficult, in particular as the jurisdictions of the Arab Gulf states (with the exception of Saudi Arabia) follow the Civilian tradition, whereas many Islamic financing transactions are governed by English law. In addition, in some Middle Eastern jurisdictions legal development has been overtaken by the economic boom of the last decade—meaning that the legal system is, altogether, lagging behind legal development.

More recently, initiatives have been taken in order to remedy that situation. Most notably, the London based Loan Market Association (“LMA”), mother of the “LMA Form” and probably the most influential standardization institution in international banking, in February 2007 has issued a practice guide for Islamic financing transactions. The practice guide—although not a standard agreement—may be an important step forward towards standardizing contractual practises in certain areas of Islamic banking. It was developed by the LMA in conjunction with an international law firm with a large Islamic finance practice and seeks to provide guidance for lawyers who are drafting Sharia compliant loan documents, using the LMA model as a starting point.¹¹ The initiative of the LMA, in particular if it should be followed by a model Islamic loan agreement or if it is extended to other transaction types, may represent a major step forward in standardizing Islamic finance transactions. It however remains to be seen whether an Islamic loan document based on a conventional standard form will be accepted by the industry.¹²

Enforcement: Dealing with “Sharia Defences”

With the spread of Islamic finance across the globe, litigation increases. No longer confined to a small like-minded community, lenders default and banks sue and enforce. These cases¹³ have tabled an issue commonly referred to as “Sharia Defences”.

Debtors who had defaulted under Islamic financing agreements defended in court by invoking that the transactions at hand actually did not conform to Islamic legal principles and, therefore, are void. Having transacted with an Islamic bank in the intention to enter into a Sharia compliant agreement, they put forth, they in fact entered into an agreement which violated certain Sharia prohibitions, in particular as the agreements in fact were interest bearing loans, dressed up as Islamic transactions. From this the defendants concluded that they were not obliged to pay back the loan (or that

the court should at least release them from the interest payments). As mentioned above, due to the diversity in opinion among Islamic jurists it will in most instances be possible to find a Sharia scholar who holds a certain transaction to be contrary to Islamic law. If and to the extent a specific transaction makes reference to Islamic legal principles, be it that parties declare that they “intend to transact in accordance with the Islamic Sharia” or that they even determine the “principles of the Islamic Sharia” as the proper law of the contract, then the question arises if and to what extent a court has to apply Sharia principles to the case. The issues raised hereby are several: can the Islamic Sharia, not being a set of state enacted rules, be determined as the proper law of the contract? And, if this were the case, who was to determine the substance of Sharia rules?

In view of these ambiguities, an industry practice has emerged which aims at excluding “Sharia” defences. First, when determining the proper law of the contract, international financial institutions and many of the Islamic banks with an international reach will make reference only to a particular state law, submitting the contract to “English law” or “the laws of the UAE”, without any reference to Sharia principles.¹⁴ This means that the role of the Sharia is confined to ethical aspects of the transaction (similar to making reference to the Equator Principles or CSR Standards in a loan agreement). In addition, the borrower often is required to represent that it had the opportunity to investigate the transaction on its own from a Sharia perspective and that it will not expect the lender to take on any responsibility for the Sharia compliance of the transaction. Finally, in many agreements the right to bring a Sharia defence will be explicitly waived, and the borrower will undertake not to defend against any payment claims by inferring principles of the Islamic Sharia.

The Way Forward—Bridging the Gap

Islamic finance is one of the most intriguing and challenging areas of international financial law. The structuring of Islamic financing transactions requires aligning issues such diverse as tax efficiency and religious considerations; it means to craft modern financing agreements inspired by historic Islamic contractual forms; it depends on bringing together the perspectives of global investment banking and traditional Sharia scholarship. These tasks demand a thorough understanding of Islamic law as well as a flexible command of modern financial practices. There remains a lot to be done, be it the area of Islamic financial innovations, standardisation or regulation. The challenge lies in bridging the gap between different cultures and perspectives. It is exactly this challenge that makes the work in Islamic finance so rewarding.

Notes:

- * Dr Kilian Bälz, LL.M. presently is a fellow at Harvard Law School focussing on Islamic financial innovations. Before, he was a partner in the Frankfurt office of Gleiss Lutz, specialising in international M&A and capital market transactions with a particular focus on the Middle East and North Africa. Kilian studied law and Middle East studies at the universities of Freiburg, Berlin, Damascus, Cairo and London. He has published and lectured widely on international business transactions, Middle Eastern commercial law and Islamic finance.
- ¹ A recent study carried out by KPMG suggests assets under management according to Sharia principles to total US\$500 bn with an annual growth rate of 15 to 20%. See <http://www.us.kpmg.com/microsite/FSLibraryDotCom/docs/Growth%20and%20Diversification%20in%20Islamic%20Finance.pdf>.
- ² There are numerous introductory works on Islamic finance, eg Vogel/Hayes, *Islamic Law and Finance: Religion, Risk, and Return* (The Hague, London, Boston: Kluwer Law International, 1998).
- ³ The seminal work on the prohibition of riba is Saleh, *Unlawful gain and legitimate profit in Islamic law* (2nd ed, London/Dordrecht/Boston: Graham & Trotman, 1992). For representative Islamic perspectives see also the articles in Thomas, *Interest in Islamic Economics: Understanding Riba* (London and New York: Routledge, 2006).
- ⁴ For an intriguing discussion of the raise of the Islamic finance industry see Warde, *Islamic Finance in the Global Economy* (Edinburgh: Edinburgh University Press, 2000).
- ⁵ According to the majority of Islamic scholars, commercial insurance is not permissible, because it is deemed a kind of gambling (the insured does not know whether the event insured against will occur and thus whether the insurer will be under an obligation to pay). As a response, Islamic insurance providers have evolved, which operate as co-operative insurers (so-called takaful). Under a takaful scheme, the premiums paid by the insured are pooled in a fund and any losses arising are paid out of these funds.
- ⁶ www.aaofifi.com.
- ⁷ <http://www.daralstithmar.com>; more recently, the Dar al Istihmar team has defected to another Sharia consultancy of Brunei based BMB Group (http://www.bmbislamic.com/media_centre/index.htm).
- ⁸ Whereas in most Muslim jurisdictions family and inheritance law continues to be governed by the principles of Islamic law (however often in a codified and amended form), the law of contract, with a few exceptions (most notably Saudi Arabia) is governed by Western style principles. The jurisdictions of North Africa and the Middle East (to include the Arab Gulf states with the exception of Saudi Arabia) all have enacted civil codes which can be traced back to European models (in particular the French code civil).
- ⁹ Under alternative structures, the real estate is contributed to an SPV and the shares in the SPV are transferred. One possibility is that the real estate is contributed to an SPV which originally is co-owned by the bank and the customer, who, over time, acquires the shares initially held by the bank.
- ¹⁰ For an instructive overview of developments in the UK and the attitude of the FSA towards Islamic finance see Financial Services Authority, *Islamic Finance in the UK: Regulation and Challenges*, November 2007 (<http://www.fsa.gov.uk/pages/Library/Communication/PR/2007/121.shtml>).
- ¹¹ Also in Islamic finance, the LMA model agreements are widely used. This, in parts, can be ascribed to the fact that in some of the Arab Gulf States the market leading Islamic finance practises were set up by London City firms and London continues to be an important Islamic financial centre (with aspirations to become the European Islamic finance hub).
- ¹² Although, for a long time, the majority of Islamic financing transactions have been based on contractual documents which are derived from conventional transaction types, this approach is not uncontested. In Islamic scholarly circles, there is a lively debate on whether Islamic finance should be substantially different from conventional finance, what at times also is understood to require genuine Islamic transactions types, which are not merely based on an adaptation of conventional models. The argument that Islamic finance is not a matter of form (no clauses stipulating interest), but of substance (in particular based on co-operative modes of finance) is made forcefully eg by El-Gamal, *Islamic Finance: Law, Economics and Practice* (Cambridge etc: Cambridge University Press, 2006).
- ¹³ For a more comprehensive treatment see Bälz, "Islamic Financing Transactions in European Courts," in: Ali (ed), *Islamic Finance: Current Legal and Regulatory Issues* (Cambridge: IFP Harvard Law School, 2005) pp 61-75.
- ¹⁴ An exception is Islamic Development Bank (IDB) that often determines the Sharia as the proper law of its contracts.



IPBA SCHOLARSHIPS

The Inter-Pacific Bar Association is pleased to announce that the IPBA Scholarship Programme to enable practicing lawyers to attend the IPBA's Nineteenth Annual Meeting and Conference, to be held in Manila from April 27 to May 2, 2009 is now open for nominations.

What is the Inter-Pacific Bar Association?

The Inter-Pacific Bar Association ('IPBA') is an international association of business and commercial lawyers with a focus on the Asia-Pacific region. Members are either Asia-Pacific residents or have a strong interest in this part of the world. The IPBA was founded in April 1991 at an organizing conference held in Tokyo attended by more than 500 lawyers from throughout Asia and the Pacific. Since then, it has grown to become the pre-eminent organization in respect of law and business within Asia with a membership of over 1,700 lawyers from 68 jurisdictions around the world. Lawyers in most law firms in the Asia-Pacific region and internationally that have a cross-border practice are members of the IPBA.

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

The highlight of the year for the IPBA is its annual multi-topic four-day conference. The conference has become the 'must attend event' from international business and commercial lawyers. In addition to plenary sessions of interest to all lawyers, programs are presented by the IPBA's eighteen specialist committees. The IPBA Annual Meeting and Conference provides an opportunity for lawyers to meet their international colleagues with Asian practices and to share latest developments in cross-border practice and professional development in Asia. Previous annual conferences have been held in Tokyo (twice), Sydney (twice), Taipei, Singapore, San Francisco, Manila, Kuala Lumpur, Auckland, Bangkok, Vancouver, Hong Kong, New Delhi, Seoul, Bali, Beijing and Los Angeles. Next year the conference will be held in Manila from April 27 to May 2, 2009.

What is the IPBA Scholarships Programme :

The IPBA Scholarship Programme was originally initiated in honour of the memory of M.S. Lin of Taipei, who was one of the founders and a past President of the IPBA. Today it operates to bring to the IPBA Annual Meeting and Conference lawyers who would not otherwise be able to attend and who would both contribute to, and benefit from, attending the IPBA Annual Conference and to endorse the IPBA's interest in the development of law and practice in Asia.

Who is eligible to be an IPBA Scholar?

[1] Lawyers from Developing Countries

To be eligible, the applicants must:

- (a) be an indigenous lawyer in Vietnam, Laos, Cambodia, Myanmar, Mongolia or the Pacific Islands;
- (b) be fluent in both written and spoken English (given this is the conference language); and
- (c) currently be involved in a cross-border practice or wish to become engaged in a cross-border practice.

[2] Young Lawyers

To be eligible, the applicants must:

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

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

Applicants from multi-national firms will normally be considered only if they have a substantial part of their attendance expenses provided by their firm.

How does one apply to be an IPBA Scholar?

To apply for an IPBA Scholarship, please obtain an application form and return it to Yuko Haba at the IPBA Secretariat in Tokyo no later than **October 31, 2008**. Application forms are available either through the IPBA website (www.ipba.org) or at the IPBA Secretariat.

Please forward applications to the IPBA Secretariat at:

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

Telephone: +81-3-5786-6796
Facsimile: +81-3-5786-6778
E-mail: ipba@tga.co.jp

What happens once a candidate is selected?

The following procedures will apply after selection:

1. The Secretary-General will notify each successful applicant that he or she has been awarded an IPBA Scholarship. The notification will be provided at least two months prior to the opening of the IPBA Annual Conference. Unsuccessful candidates will also be notified.
2. Airfares and accommodation will be arranged by the Manila Conference Host Committee and/or the IPBA Secretariat after consultation with the successful applicants.
3. A liaison person will introduce each Scholar to the IPBA and generally help the Scholar to obtain the most benefit from the IPBA Annual Conference.



An Invitation to Join the Inter-Pacific Bar Association

The 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 organizing conference in Tokyo attended by more than 500 lawyers from throughout Asia and the Pacific. Since then it has grown to over 1,700 members from 68 jurisdictions, and it is now the pre-eminent organization 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 organizations 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 overleaf. All of these committees are active and have not only the chairs named, but 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 4-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, San Francisco, Manila, Kuala Lumpur, Auckland, Bangkok, Vancouver, Hong Kong, New Delhi, Seoul, Bali, and Los Angeles attracting as many as 700 lawyers plus accompanying guests.

The IPBA has organized 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 organizations in presenting conferences—for example on Trading in Securities on the Internet, held jointly with the Capital Market Forum.

The IPBA also publishes a membership directory and a quarterly *IPBA Journal*.

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	US\$195 / ¥23,000
• Three-Year Term Membership	US\$535 / ¥63,000
• Lawyers in developing countries with low income levels	US\$100 / ¥11,800
• Young Lawyers (under 30 years old)	US\$50 / ¥6,000

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

Membership renewals will be accepted until July 31.

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.

Further, in order to encourage young lawyers to join the IPBA, a Young Lawyers Membership category (age under 30 years old) with special membership dues has been established.

IPBA has established a new 3-Year Term Membership category which will come into effect from the 2001 membership year.

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 Association by submitting an application form accompanied by payment of the annual subscription of (¥50,000/US\$500) for the then 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 US\$500 / ¥50,000

Payment of Dues

Payment of dues can be made either in US dollars or Japanese yen. However, the following restrictions shall apply to payments in each currency. Your cooperation is appreciated in meeting the following conditions.

1. A US dollar check should be payable at a US bank located in the US. US dollar check payable in Japan may be returned to sender depending on charges.
2. A Japanese yen check should be payable at a Japanese bank located in Japan.
3. Japanese yen dues shall apply to all credit card payment. Please note that the amount charged will not be an equivalent amount to the US dollar dues.
4. Please do not instruct your bank to deduct telegraphic transfer handling charges from the amount of dues. Please pay related bank charges 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 Email: ipba@tga.co.jp Website: www.ipba.org

See overleaf for membership
registration form



IPBA SECRETARIAT

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

IPBA MEMBERSHIP REGISTRATION FORM

MEMBERSHIP CATEGORY AND ANNUAL DUES:

- Standard Membership.....US\$195 or ¥23,000
- Three-Year Term Membership.....US\$535 or ¥63,000
- Lawyers with low income levels in developing countries.....US\$100 or ¥11,800
- Young Lawyers (under 30 years old).....US\$ 50 or ¥ 6,000

Name: Last Name _____ First Name / Middle Name _____

Birthday: year _____ month _____ day _____ Sex: M / F

Firm Name: _____

Jurisdiction: _____

Correspondence Address: _____

Telephone: _____ Facsimile: _____

Email: _____

CHOICE OF COMMITTEES:

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

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

- US\$ Check/Bank Draft/Money Order
– payable at US banks in the US only (others may be returned to sender)
- Japanese yen ¥ Check/Bank Draft
– payable at Japanese banks in Japan only (others may be returned to sender)
- Credit Card – **Please note that Japanese yen dues shall apply to payment by credit cards.**
 VISA Master Amex (Verification Code):
Card Number: _____ Expiration Date: _____
- Bank Wire Transfer – Please make sure that remitting bank's handling charges are paid by the remitter him/herself.
to The Bank of Yokohama, Shinbashi Branch (Swift Code: HAMAJPJT)
A/C No. 1018885 (ordinary account)
Nihon Seimei Shinbashi Bldg 6F, 1-18-16 Shinbashi, Minato-ku, Tokyo 105-0004, Japan

Signature: _____ Date: _____

PLEASE RETURN THIS FORM WITH REGISTRATION FEE OR PROOF OF PAYMENT TO:

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