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NEWS & LEGAL UPDATE



INTER-PACIFIC BAR ASSOCIATION





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The President's Message

Dhinesh Bhaskaran
President



Dear Colleagues,

When I promote the IPBA to non-members, I often have at the back of my mind Mark Shklov's article on 'The Spirit of Katsuura' (accessible on the IPBA website).

In his article Mark states that, at its inception, 'the primary purpose of the organization was to provide a forum for lawyers to get together, exchange views and make friends'. This statement ties in neatly with one of the express objectives of the IPBA, as enshrined in our Constitution, namely to provide members with opportunities to 'meet and exchange ideas with other lawyers who live in, or are interested in' the Asia-Pacific region.

The question I inevitably get asked is whether these ideals and objectives are practical in this day and age where one often talks of the 'business of law' as opposed to the 'practice of law'. My answer is always a resounding 'yes'!

It is not a mistake or anomaly that the IPBA has not only survived, but flourished, for more than a quarter of a century, notwithstanding its simple philosophy. Something about this philosophy works well, thus confirming the accuracy of the vision and the foresight of the founding members.

This philosophy taps into a fundamental human element in each and every one of us as lawyers. Lawyers are generally, by nature, sociable creatures (even more so when you are an IPBA member!). Take a lawyer's mind off business for a moment, and interest him or her in the person he or she is talking to, and a perfunctory greeting can turn into an hour-long conversation, a life-long friendship or a rewarding business relationship.

I say this not as a theoretical concept, but having experienced this repeatedly at IPBA events, and in speaking to many IPBA friends who have had similar experiences. I believe in broadening one's horizons and perspectives in this ever-changing world, resulting in more balanced personal and professional viewpoints. The IPBA has given me unparalleled opportunities to do this.

These then are key aspects of the message which we need to communicate to those who are not familiar with the IPBA, so that they understand what the organisation has to offer.

Moving on, in my capacity as President I represented the IPBA at two important events recently.

- (1) I attended the 27th Summit of the Presidents of Law Associations in Asia ('POLA') in Ulaanbaatar, Mongolia from 20 to 23 July 2016. The Summit was attended by leaders of bar associations from Australia, China, Hong Kong, India, Indonesia, Japan, Malaysia, Mongolia, New Zealand, South Korea and Taiwan, as well as the Presidents of the International Bar Association and Lawasia. Among the areas discussed were constitutional review, mining and human rights, legal empowerment initiatives, and *pro bono* work. In my discussions with members of the Mongolian Bar, I noted their interest in wanting to participate in an international organisation like the IPBA, so as to obtain greater exposure on the international stage. The Officers will explore this issue moving forward to see how we can facilitate greater participation from members of the Mongolian Bar as well as other national bar associations.

(2) I attended the 54th Congress of the International Association of Young Lawyers ('AIJA') in Munich from 23 to 27 August 2016. The IPBA and AIJA have a Memorandum of Understanding to explore areas of mutual cooperation and benefit. Tatsu Nakayama (Membership Committee Vice-Chair), John Wilson (Publications Committee Vice-Chair) and I had a constructive discussion with the AIJA leadership on possible ways to progress the relationship and interaction between the two organisations. The Officers will discuss this matter

further at the Mid-Year Council Meeting in Brussels in October.

At both these events, it was heartening to note the recognition given to the IPBA as an international organisation. The IPBA leadership will continue to participate in events of this nature to reinforce the IPBA's role and relevance in the larger international legal community.

Dhinesh Bhaskaran
President

Publications Committee Guidelines for Publication of Articles in the IPBA Journal

Please note that the IPBA Publication Committee has moved away from a theme-based publication. Hence, for the next issues, we are pleased to accept articles on interesting legal topics and new legal developments that are happening in your jurisdiction. Please send your article to both **Leonard Yeoh** at leonard.yeoh@taypartners.com.my and **John Wilson** at advice@srilankalaw.com. We would be grateful if you could also send (1) a lead paragraph of approximately 50 or 60 words, giving a brief introduction to, or an overview of the article's main theme, (2) a photo with the following specifications (File Format: JPG or TIFF, Resolution: 300dpi and Dimensions: 4cm(w) x 5cm(h)), and (3) your biography of approximately 30 to 50 words together with your article.

The requirements for publication of an article in the *IPBA Journal* are as follows:

1. The article has not been previously published in any journal or publication;
2. The article is of good quality both in terms of technical input and topical interest for IPBA members;
3. The article is not written to publicise the expertise, specialization, or network offices of the writer or the firm at which the writer is based;
4. The article is concise (2500 to 3000 words) and, in any event, does not exceed 3000 words; and
5. The article must be written in English, and the author must ensure that it meets international business standards.
6. The article is written by an IPBA member. Co-authors must also be IPBA members.



The Secretary-General's Message

Miyuki Ishiguro
Secretary-General



Dear IPBA Members,

Although it is not always apparent to the general membership, the IPBA Officers are busy throughout the year discussing issues to ensure the smooth and efficient operation of the Association. For the most part, we adhere to the basic founding principles set forth when the IPBA was established in 1991, but we also realise that sometimes there is a need to change our strategy in order to keep up with the needs of our members and stay ahead of trends that affect the legal world as a whole and the IPBA in particular.

Membership

A recent major topic of discussion relates to the IPBA membership categories. Over the years, the IPBA has had a varied combination of membership categories, but we have always maintained the philosophy of offering membership to qualified individual lawyers only and not to law firms or other organisations. Currently, there are four individual membership categories: Standard, 3-Year Term, Corporate Counsel, and Young Lawyers.

The Corporate Counsel category was established in 2010 at the Council Meeting in Singapore with the intent of attracting in-house counsel to join the IPBA and attend the Annual Meeting and Conference at affordable rates. At JPY11,800, the annual membership fee is approximately half of the standard membership fee of JPY23,000. The annual conference fees for Corporate Counsel are also approximately half of the standard registration fees. We currently have 44 Corporate Counsel members.

Since the category was established, it has sometimes been misinterpreted to include those who work in other areas of law but are not practising lawyers and do not fit the Standard Membership category, that is, judges, retired

lawyers or academics. We appreciate the enthusiasm of these persons in wanting to be a part of the IPBA, but in order to be fair to those who are indeed in-house counsel, we have set a policy to keep to this restriction. If one exception is made, then we must accept all requests, and this will ultimately dilute the original idea of this category. The parameters of our other membership categories are also monitored and maintained. For example, Young Lawyers must be 35 years of age or younger during the entire membership year.

That is not to say that we won't consider in the future a new membership category that includes a wider range of those involved in the legal field. That is still up for discussion and we will keep you informed if a new category is established.

As noted above, the IPBA's founding members stressed the importance of allowing only individuals to join the Association in order to prevent any one law firm from dominating the IPBA. The only membership category that allows any kind of group to be a part of the association is the Corporate Associate category, which was established to cover corporations that are not law firms and that have employees who are trained in law but are not practising lawyers or in-house counsel. The IPBA had over 20 such members at its peak, now it has only two.

The Officers are discussing relaxing the parameters of the Corporate Associate category to include law firms or bar associations in some capacity, without going against the founding principles in the Spirit of Katsuura. We have already made MoUs with other international and local bar associations and membership consideration with a limited scope of member benefits could be included in such agreements.

On the topic of MoUs, the IPBA has an agreement of mutual cooperation and collaboration with the AIJA, International Association of Young Lawyers, the members of which are 45 years of age or younger. The IPBA realises the importance of bringing in young members to revitalise the Association as senior members retire or move on to other endeavours. The AIJA, in turn, realises that when their members reach a certain age they must move on and the IPBA is a great fit for the next step in terms of committee practice areas, regional and local events, annual conferences and philosophy. Our MoU is on its second renewal and we look forward to a continued good relationship for many years to come.



We currently have 147 Young Lawyer members, a 10-member increase since last year at this time. As 20 becomes the new 30, 30 the new 40, and 40 the new 50, we welcome all 'young' members to become active in building a new foundation for a vibrant association. The Membership Committee is also analysing ways to bring in more young members such as holding 'Young Lawyers Night' events at the Annual Meeting and Conference. 'Young of age' or 'young at heart', these events have attracted a large crowd each time.

IPBA Activities

We hope you have received the e-mail notice sent out by the Secretariat that a Special General Meeting will be held by teleconference on Friday, 18 November 2016 at 16:00 (Japan time). The purpose of this Special General Meeting is for IPBA members to approve the audited financial accounts. A quorum for approval is reached when members from at least five jurisdictions are present. Because attendance must be taken, please contact the IPBA Secretariat (ipba@ipba.org) if you plan to take part in the teleconference.

The Mid-Year Council Meeting in Brussels will take place from 7-10 October 2016, with the IPBA Council members meeting on 7, 8 and 9 October. A Regional seminar is planned for 10 October and everyone is welcome to join this. The topic is: 'Government's role and regulatory tools in cross-border transactions between Asia-Pacific and Europe'. Beginning at 9:00am, this full-day conference features speakers from Asia, Europe, and North America and covers issues such as working with policies of emerging economies; outbound transactions in the 'One Belt One Road' initiative; global antitrust developments; foreign investment and government scrutiny; and case studies of landmark cases to learn how certain strategies worked in real life. Please join us for this exciting event!

Miyuki Ishiguro
Secretary-General

IPBA Upcoming Events

Event	Location	Date
IPBA Annual General Meeting and Conference		
27th Annual General Meeting and Conference	Auckland, New Zealand	April 6-9, 2017
28th Annual General Meeting and Conference	Manila, Philippines	Spring, 2018
IPBA Mid-Year Council Meeting & Regional Conference		
2016 IPBA Mid-Year Council Meetings (for IPBA Council Members only)	Brussels, Belgium	October 7-9, 2016
IPBA Regional Conference, "Government's Role and Regulatory Tools in Cross-Border Transactions Between Asia Pacific and Europe" (open to the public)	Brussels, Belgium	October 10, 2016
IPBA Local and Regional Events		
2nd IPBA Asia Pac Arbitration Day	Kuala Lumpur, Malaysia	September 8, 2016
2nd Annual East Asia Forum	Seoul, Korea	November 10-11, 2016
Save the date: IPBA Compliance Seminar	Paris, France	November 28, 2016
IPBA-supported Events		
Asian Legal Business' "Japan Corporate Compliance & Governance Forum"	Tokyo, Japan	September 27, 2016
Kluwer Law International's "Indonesia and SE Asia: 4th Annual International Arbitration Summit"	Indonesia	September 29, 2016
ALB "Philippine Law Awards (PLA 2016)"	Manila, Philippines	October 14, 2016
Global Competition Review's "GCR Live 2nd Annual Hong Kong: Focus on China Conference"	Hong Kong	October 18, 2016
ABA Section of International Law's Fall Meeting	Tokyo, Japan	October 18-22, 2016
Kluwer Law International's Japan: 3rd Annual International Arbitration Summit	Japan	October 20, 2016
marcus evans' "Corporate Counsel Asia Summit"	Kuala Lumpur, Malaysia	October 24-25, 2016
ALB's "ALB In-House Legal Summit 2016"	Tokyo, Japan	October 25, 2016
American Conference Institute's "5th Asia Pacific Summit on Anti-Corruption, Corporate Compliance and Risk Management"	Singapore	November 15-16, 2016
Kluwer Law International's Beijing: 2nd Annual Global Competition Forum	Beijing, China	November 16, 2016
Kluwer Law International's Beijing: 2nd Annual International Summit	Beijing, China	November 17, 2016
Kluwer Law International's "Hong Kong: 6th Annual International Arbitration Summit"	Hong Kong	November 24, 2016
Kluwer Law International's Indonesia and SE Asia: 4th Annual International Arbitration Summit	Indonesia	December 7, 2016
Kluwer Law International's "Turkey & ME: 3rd Annual International Arbitration Summit"	Turkey & ME	December 14, 2016

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The Vietnamese Real Estate Market — Which Risk Factors Should Not be Underestimated

Vietnam's real estate market is witnessing almost a full recovery. As an emerging and developing market, the risk factors are still unfolding but generally profits are grossly overestimated when investing in the real estate market in Vietnam. This article highlights the most globally recognised problematic factors affecting investment decisions in Vietnam's real estate market.



Vietnam Outlook

In the 2000s, Vietnam's growth rate averaged 6.4 percent per year and began to slow following the global financial and economic crisis. GDP had slightly recovered and had reached up to 6.3 percent during the first half of 2015.¹ Vietnam's GDP is expected to be 6.6 percent in 2016.²

The Socio-Economic Development Strategy ('SEDS') 2011-2020 places structural reforms on the list of the most primary work to be done, which covers environmental sustainability, social equity and emerging issues of macroeconomic stability. In addition to focusing on the following areas: (1) promoting human resources/skills development; (2) improving market institutions; and (3) infrastructure development, a recent draft of the Socio-Economic Development Plan ('SEDP') 2016-2020 recognises 'the challenges and opportunities associated with further deepening of economic integration since almost all tariff lines will be zero by 2020 and emphasizes the proactive integration and macroeconomic stability as other important objectives of the next five years.'

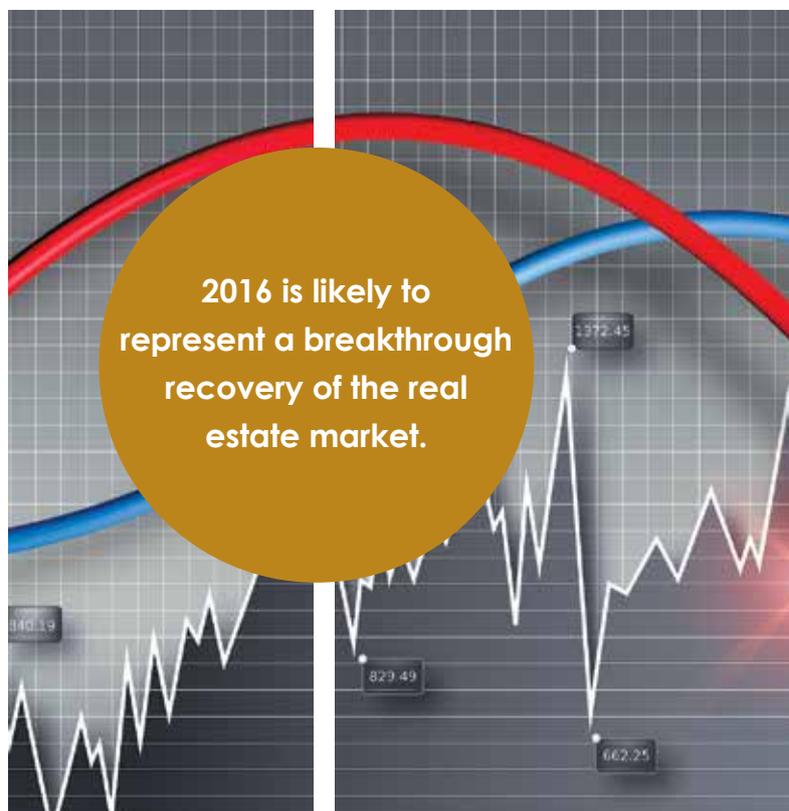
As Vietnam is ranked second in terms of foreign direct investment ('FDI') into Asia,³ an ever-increasing FDI is expected to accrue in most areas, especially textiles, construction, banking, high technology and real estate.⁴ In the First Quarter of 2016, the total of newly registered investment capital reached a peak of US\$4.026 billion, equivalent to an increase of 119.1 percent compared to the First Quarter of 2015. The real estate sector is positioned as number two, the total newly registered investment capital is worth US\$239.78 million, accounting for 6 percent of the total newly registered investment capital.⁵ However, investors have persevered with ongoing difficulties and challenges. According to the Global Competitiveness Report 2015-2016,⁶ the most problematic factors in respect of doing business in Vietnam (a developing economy) are as follows: policy instability; government bureaucracy; corruption; and access to finance. These problematic factors pose a likely risky for foreign investors who are investing in the real estate sector in Vietnam.

Global Financial Crisis

The Central Institute for Economic Management (CIEM) Report shows that the Global Financial Crisis adversely affected Vietnam in a variety of economic sectors.⁷ Taking the real estate sector as an example, in 2008 the real estate market was frozen, the price of real estate

decreased by 40 percent, and real estate enterprises could not sell their products, incurring a high interest rate because of the tightening of monetary policies.⁸ According to the Vietnam Real Estate Association ('VNREA'), before the Crisis in 2006-2007, house prices were at sky-high levels of up to US\$5,000 per square metre for central city flats, but, these underwent a price reduction of 40 percent. In addition, many ongoing projects were forced to come to a halt.⁹ However, since 2014 the real estate market has recovered strongly.¹⁰ The year 2016 is likely to represent a breakthrough recovery of the real estate market.¹¹ Vietnam (together with Indonesia and the Philippines), is one of the fastest growing countries in the world and is outperforming other countries and is on the way to further expansion. For instance, retail leasing in 2015 was driven by expansion of local and foreign brands in food and beverage, fashion and supermarkets. Retail sales are indicative of double digit growth.¹² In general, efficient measures have been taken to cope with global crises by deploying micro-economic policies: imposing stricter banking regulations and government bail outs have been conducted to rescue the real estate market. New rules were brought in during 2015 which opened up property markets to foreign buyers.

As an emerging market, the health of the world economy is likely to have a direct impact on the Vietnam market. Therefore, in forming a joint venture company, global crises should be considered events of default or changed circumstances in the joint venture agreement.



Policy Instability

According to the Global Competitiveness Report 2015-2016,¹³ the general competitiveness index of Vietnam has improved (it moved up from 68 to 56) compared to the report of 2014-2015. Nonetheless, policy instability is still ranked as the second most problematic factor for doing business in Vietnam. Investing in real estate projects requires a lot of capital and a well-prepared and advanced investment plan, which is mainly based on long-term and stable government policies. Issuing policies that have not been considered thoroughly might lead to confusion and mistrust of project developers.

The issue is that in funding a project, project developers need to obtain a mortgage over their project from a bank. However, notary offices have refused to notarise mortgage agreements entered into between banks and project developers (for residential housing projects) due to a lack of detailed guidance from the related government bodies.¹⁴

Since March 2016, the State Bank of Vietnam ('SBV') has sought public opinions on a new draft to amend and supplement Circular No 36/2014/TT-NHNN ('Draft Amended Circular 36') pursuant to which Draft Amended Circular 36 is intended to reduce the maximum rate for short-term loans to medium-term and long-term loans from 60 percent to 40 percent and classify real property into a property group which indicates a risk factor of 250 percent instead of 150 percent. This Draft Amended Circular 36 has attracted attention from customers, real estate

companies, and credit organisations. The Ho Chi Minh City Real Estate Association of ('HOREA') has said that the real estate market of Vietnam mainly depends on bank loan and deposits from customers. Therefore, if the Draft Amended Circular 36 should be made into law, the real estate market might be negatively affected.¹⁵ Nonetheless, the SBV has confirmed that Draft Amended Circular 36 would not be able to reduce credits accrued to the real estate market.¹⁶ In the eyes of the public, contrasting point of views on the impact of Draft Amended Circular 36 is far from over. Draft Amended Circular 36 is still in the consultation process before it is officially adopted by the SBV. On 27 May 2016, the Draft Amended Circular was made into law (namely Circular 06/2016/TT-NHNN), which has received positive responses from the market and credit organizations by applying less restrictive provisions as set out in the Draft Amended Circular.

Mr Alex Crane, General Director of Cushman & Wakefield Vietnam, has said that in order for the real estate market to develop firmly, policies must be consistent and stable and adhere to global standards.¹⁷ Mr Vo Sy Nhan, General Director of Gaw NP Capital, has said that it is his opinion that policies related to every development stage of the real estate market must be rigidly assured so as not to cause significant shock, other than allowing the market to be absorbed gradually. During the Prime Minister's talk on 29 April 2016 in Ho Chi Minh City, the HOREA suggested shifting the passing of Draft Amended Circular 36 to 2017.¹⁸

It is advisable that making short-term investments can mitigate the risk of policy instability. Furthermore, since the laws of Vietnam may not cover or predict actual situations in life, project developers should pay close attention to market situations which might lead the government to change related policies. In addition, while drafting up sale and purchase agreements or joint venture agreements, changes in policies/law could be narrowly defined as a *force majeure* event.

Government Bureaucracy

Bureaucracy is positioned as the second most problematic factor¹⁹ among other factors, which is regarded as the contributing factor to the diminishing competitiveness of Vietnam. According to Cushman & Wakefield, the degree of bureaucracy is a lot poorer (two points out of five points).²⁰ It may take the form of inconsistencies of the legal framework and non-transparent administrative process.



For example, land pricing usually causes projects to fail because the legal framework on land pricing is not clear, which has brought about confusion where applicable. Project developers are unable to pre-estimate land pricing when making investment decisions in Vietnam. In general, land prices are determined on the basis of market prices. In fact, it is a struggle to understand the methodologies used to measure land pricing and to go through the multiple steps taken by the authorities. In addition, the authorities reserve the right to re-determine the prices when the calculated price is different from the land use right assignment prices in normal market conditions. It is imperative that determination of land prices be conducted transparently and consistently in a timely manner.

Foreign buyers are allowed to enter the market but the law lacks implementing provisions. According to Article 159.2(b) of the Law on Residential Housing ('LRH'), foreign individuals and organisations are only prohibited from purchasing houses in national defence and security areas. To date, there has been no further guidance on how national defence and security areas have been defined.

The regulations for investment, planning, project approval and land-related procedures on real estate investment projects are complicated and time consuming. In the case of real estate projects in which States allocate or lease out land without public auction or tendering, the foreign investor is required to convert the land use purpose and they must obtain an in-principle investment decision before obtaining the investment registration certificate. In fact, the process of obtaining the in-principle investment decision is not as straightforward as expected due to involvement of many ministries and a lack of sufficient understanding and experience in dealing with property regulations.

The law-making process should also be more efficient and timely to cope with real life situations without having recourse to interpretations of administrative bodies. Lack of workable provisions of law creates more social costs and mistrust for investors.

Since there is a close connection between bureaucracy and corruption,²¹ project developers must understand the practice and mitigate those risks the best way possible by (i) involving the local partner in dealing with these difficulties; (2) seeking local counsel's advice before taking action; and (3) counting on business forums (VNREA, HOREA, Vietnam Business Forum, etc.) to follow up and raise concerns.

Corruption

According to Transparency International,²² Vietnam is positioned in the ranking of 'highly corrupt'. More specifically, corruption in land management became a phenomenon and part of the customs in Vietnam.²³ According to the Land Management Report, corruption takes place in the whole process from land acquisition and land allocation by project developers.²⁴

During the process of land-use/urban plans being formulated, revised and approved by the land



It is imperative that determination of land prices be conducted transparently and consistently in a timely manner.

department for commercial plans, investors may have to pay state officials a share of the rents/profit obtained by increasing land value through conversion to other purposes. The unequal access to information on land-use planning among investors may lead to illegal payments by investors to officials in charge of land use/urban planning in exchange for information privileges.

Regulatory actions should be taken to mitigate corruption practices by making administrative formalities and processes as transparent as possible; enhancing anti-money laundering regulations and foreign exchange control; applying foreign corrupt practice acts and anti-corruption practices which are recognised and recommended globally.

In the meantime, project developers must understand the local practices and mitigate those risks the best way possible by investing in clean raw land owned by local partners via M&A activities; involving the local partner in dealing with these difficulties; seeking local counsel's advice before taking action; and counting on business forums to follow up and raise concerns.

Money Policy/Access to Finance

Access to finance is considered one of the most problematic factors for doing business in Vietnam.²⁵ In other words, Vietnam has limited channels for raising capital, especially in the real estate market.²⁶ Most sources of capital and funding of real estate projects comes from banks and customers' deposits.²⁷ Other fund-raising channels such as real estate investment funds, securitisation, etc. do not exist.²⁸ Recently, as discussed above, the SBV has tended to tighten the lending regulation of banks by issuing the Draft Amended Circular 36 to seek public opinion. Any stricter lending regulations imposed on banks is likely to affect the health of the real estate market. On the other hand, interest rates are expected to rise in 2016 which may prevent the real estate market from fully recovering as it has been doing since 2008.²⁹ In February 2016, the savings rate was increased up to 8 percent/year applicable to a 12-month period. It is therefore very risky for the real estate market to mainly depend on such a source of capital.

Under Articles 48.2 and 74.2 of the Law on Enterprise 2014, investors are required to contribute capital within 90 days from the date of issuance of the enterprise registration certificate, regardless of the fact that the implementation

of the project may be conducted beyond this fixed period of time. In certain circumstances, such a high amount of capital contributed may not be needed at the beginning of the project, for instance in large scale projects such as township developments and infrastructure projects. Thus, project developers must tailor a source of funding which helps to strike a balance between capital contribution and the funding needed to operate the project.

In the context of tax management, real estate enterprises are faced with inconsistencies and unfairness. In general, all types of enterprises are allowed accounting offsetting to determine profits and corporate tax obligations except for real estate enterprises. In other words, real estate enterprises must apply a separate offsetting system. For instance, an enterprise entitled to profits generated from other business sectors can offset losses in its real estate business. Conversely, it is not allowed to use profits generated from its real estate business to offset losses in other business sectors.

Even though access to finance is problematic in Vietnam, a positive sign can be seen. As the 30VND trillion bailout was absorbed,³⁰ new bailout packages have been taken into account to keep the real estate market on track. Project developers need to diversify the source of capital available. For instance, investing in social residential housing can gain more incentives. In the transaction with customers, it is advisable to insert a provision providing that in case the banking regulations change and banks are unable to lend money to the customer, the project developer may have to continue to provide a loan to the customer and become a secured creditor.

Given the fact that local partners have easier access to finance, the selection of a local partner for participation in a joint venture can serve to mitigate many financial risks.

Oil Prices

Oil prices have gone down, almost reaching their lowest since the peak of 2009.³¹ As a result of failure to reach agreement in Doha on 17 April 2016, the world's oil industry has continued to be in crisis.³² Vietnam is an oil exporting country which accounts for 2 percent of GDP. In calculating the Consumer Price Index ('CPI'), the price of oil is one of the fundamental factors, thereby making oil prices a contributing factor in the health of economy

of Vietnam.³³ Recently, to facilitate a better investment environment and resolve the source of crude oil processed in Vietnam by foreign-invested oil companies, the State has allowed a foreign invested-company to distribute petroleum across the country. Once oil prices go up, primary products for basic needs eventually are affected. Project developers should pay attention to the fluctuation of oil prices in valuing/assessing construction materials in construction contracts with contractors since projects take years to complete. Furthermore, it is advisable that fluctuation of oil prices can be an indicator affecting CPI used to amend/modify the rent in office lease agreements.

Concluding Remarks

As an 'infant industry', the Vietnam real estate market remains highly competitive among multinational institutional investors with a high return on investment. The level of these risk factors are not always predictable. It is therefore best to enter the market with a deep knowledge about the practices of the local market and an advance exit strategy. However, with the complexity of the land law mechanisms and unstable policies, unlike foreign project developers, local project developers still take the lead in directing the market orientation.

Notes:

- 1 See World Bank, *Vietnam Country Profile*, available at <http://www.worldbank.org/en/country/vietnam>.
- 2 See CBRE Research, *2016 Vietnam Real Estate Market Outlook*, p 6.
- 3 See *ibid*, p 5.
- 4 See *ibid*.
- 5 See, Foreign Investment Agency–Ministry of Planning and Investment, *Foreign Direct Investment in First Quarter of 2016*. Available at <http://fia.mpi.gov.vn/tinbai/4577/Tinh-hinh-thu-hut-dau-tu-truc-tiep-nuocngoai-Quy-I-nam-2016>.
- 6 *The Global Competitiveness Report 2015-2016*, p 20, available at http://www3.weforum.org/docs/gcr/2015-2016/Global_Competitiveness_Report_2015-2016.pdf.
- 7 See Central Institute for Economic Management (CIEM), 'Report on Financial Crisis, Depreciation of the World's Economy and Active Responses of Vietnam' ('CIEM Report'), p 23.
- 8 See Asia-Pacific Rural and Agricultural Credit Association, 'The Impact of the Global Financial Crisis on Vietnamese Economy', available at http://www.apraca.org/news_list_detail2.php?idmulti_content=14&page_name=.
- 9 See Ray Forrest and Ngai Ming Yip (eds), *Housing Market and the Global Financial Crisis: the Uneven Impact on Households*, (2011, Edward Elgar Publishing), p 176.
- 10 See CBRE Research, n 2 above, p 6.
- 11 See Knight Frank, *The Wealth Report 2016*, pp 44, 45, available at <http://content.knightfrank.com/research/83/documents/en/wealth-report-2016-3579.pdf>.
- 12 See Cushman & Wakefield, *Emerging and Frontier Market–Assessing Risk & Opportunity 2015*, p 10.
- 13 See *The Global Competitiveness Report 2015-2016*, n 6 above.
- 14 See 'Ho Chi Minh City, High Supply but Static Demand for Residential Housing', *The Saigontimes* (27 April 2016), available at <http://www.thesaigontimes.vn/145656/TPHCM-Cung-can-ho-tang-manh-cau-chung-lai.html>.
- 15 See, 'The HOREA is asking the Prime Minister to rescue the real estate market' (29 April 2016), available at <http://kinhdoanh.vnexpress.net/tin-tuc/bat-dong-san/hiep-hoi-bat-dong-san-tp-hcm-cau-cuu-thu-tuong-3395610.html>.
- 16 See 'Amending Circular 36 does not diminish capital for real estate' (Vneconomy , 8 March 2016), available at <http://vneconomy.vn/bat-dong-san/sua-thong-tu-36-khong-giam-tin-dung-cho-bat-dong-san-20160308092026400.htm>.
- 17 See 'Attractive 2016 real estate market but a worry of policy instability' (Cafef, 10 March 2016), available at <http://cafef.vn/bat-dong-san/bat-dong-san-2016-hap-dan-nhung-lo-chinh-sach-khong-on-dinh-20160310105938599.chn>.
- 18 See n 15 above.
- 19 See *The Global Competitiveness Report 2015-2016*, n 6 above, p 20.
- 20 See Cushman & Wakefield, n 12 above, p 46.
- 21 See Selcuk Akcay, 'Corruption, Democracy and Bureaucracy Empirical Evidence from Developing Countries', p 206.
- 22 See *Corruption Perception Index 2015*, available at <http://www.transparency.org/cpi2015#downloads>.
- 23 See 'Possibilities of Corruption in Land Management' (Custom Newspaper, 20 January 2016), available at <http://www.baohaiquan.vn/Pages/Nhung-nguy-co-tham-nhung-trong-linh-vuc-dat-dai.aspx>.
- 24 See the Embassy of Denmark, the World Bank and the Embassy of Sweden, 'Assessing Risk Factors for Corruption in Land Management' ('Land Management Report'), p 7.
- 25 See *The Global Competitiveness Report 2015-2016*, n 6 above, p 20.
- 26 See SN Jehan, Thanh Nga Luong, 'Vietnam's Real Estate Market: Can it Sail through the Capital Puzzle', p 97.
- 27 See 'Ho Chi Minh City, high supply but static demand for residential housing' (the Saigontimes, 27 April 2016), available at <http://www.thesaigontimes.vn/145656/TPHCM-Cung-can-ho-tang-manh-cau-chung-lai.html>.
- 28 SN Jehan, n 26 above, p 97.
- 29 CBRE Research, n 2 above, p 30.
- 30 See 'Ho Chi Minh City, High Supply but Static Demand for Residential Housing', n 14 above.
- 31 See 'Oil Prices What is behind the Drop? Simple Economic' (New York Times, 18 April 2016), available at http://www.nytimes.com/interactive/2016/business/energy-environment/oil-prices.html?_r=0.
- 32 See 'Top Oil Countries Fail to Reach Deal on Production Freeze' (CNN, 18 April 2016), available at <http://money.cnn.com/2016/04/17/investing/oil-doha-opeac-producers/>.
- 33 See 'How Will Falling Oil Prices Affect Vietnam in 2015' (The Diplomat, 23 December 2014), available at <http://thediplomat.com/2014/12/how-will-falling-oil-prices-affect-vietnam-in-2015/>.

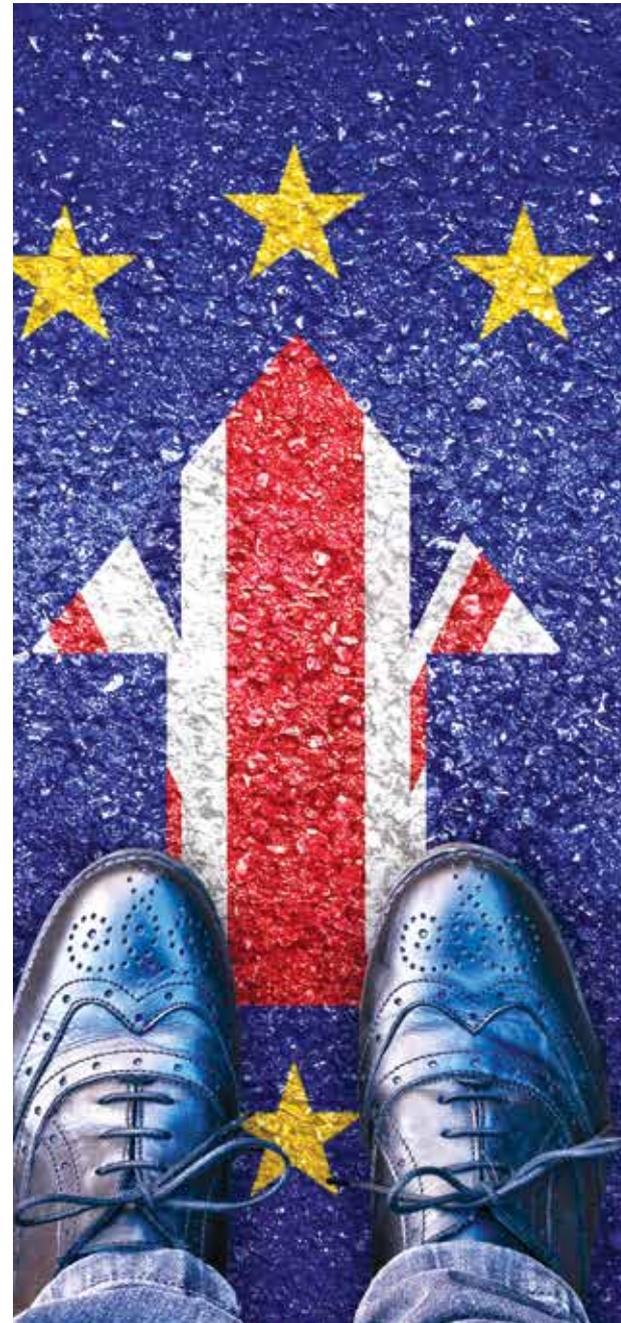


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Dealing with Brexit: EU-Compliant Corporate and Tax Planning for the Future

Brexit marks the beginning of a new era of uncertainty regarding the exact consequences of this decision on corporate entities which are based or have a significant presence in the United Kingdom, and on financial or commercial contractual arrangements which are subject to English law. It would seem logical for the UK government to pass legislation deeming any existing directly effective EU laws to continue to take effect in the UK, rather than no longer applying European Union laws and regulations and starting again. The authors would like to emphasise that currently quite a lot of uncertainty exists since the impact can only be fully assessed after the negotiation between the EU and the UK has been finalised in the following months or years. In this article the authors only outline some areas of concern that currently exist from a Dutch and Luxembourg legal and tax point of view.



Corporate Structures

A number of cross-border mechanisms and transactional structures rely on European regulations and/or mutual recognition which may no longer apply post-Brexit.

Currently, Dutch and Luxembourg limited liability companies may, for instance, enter into a cross-border merger with a UK limited liability company. Following Brexit, cross-border mergers involving UK companies may no longer be possible as the EU Cross-Border Merger Directive¹ will no longer apply to UK companies. Similarly, the conversion of a Luxembourg/Dutch limited liability company into a legal entity organised under the laws of another EU Member State is currently legally possible. Following Brexit, the conversion into a UK legal entity, and vice versa, may no longer be possible. On the other side, the Luxembourg national law generally authorises cross-border mergers with non-EU countries and migration outside Luxembourg provided that the national laws governing the foreign company do not prohibit such change. Following Brexit, a merger with a UK company or conversion should in principle still be feasible; however, the tax neutrality currently provided under certain conditions may no longer be possible.

From a Dutch perspective it is noteworthy that the Dutch Act on Companies Formally Registered Abroad² does not apply to companies incorporated and registered in another Member State. This Act, which is intended to counteract abuse and applies to legal entities incorporated in a different jurisdiction but which have no real connection with their country of incorporation and conduct their business only in or

from the Netherlands, equates such corporations with Dutch corporations and makes them subject to Dutch corporate law, particularly as regards requirements relating to registration, annual reporting and the potential liability of its officers. Following Brexit, this Act may become applicable to UK legal entities currently used to conduct business activities in or from the Netherlands.

M&A Transactions

Postponed or Abandoned Transactions

Volatility in financial markets following the Brexit vote and uncertainty as to the post-Brexit landscape may lead to parties avoiding entering into transactions in the aftermath of the UK's vote to leave the EU. Furthermore, the Brexit vote may very well have a dampening effect on M&A activity between the EU and the UK, impacting on the confidence of parties to enter into transactions and generally resulting in a reduction in business activity, at least in the short term. All in all, the wide-range uncertainties may well lead to transactions being postponed or abandoned at least in the form foreseen before the Brexit decision, whereby parties will be looking for alternative solutions.

Merger Control

As regards Merger Control, the EU operates a 'one-stop-shop' control regime for transactions that would otherwise have to be notified for clearance in a number of individual EU countries. Post-Brexit, the UK would no longer be a jurisdiction within that one-stop-shop regime. This will likely entail more transactions being notified and investigated by the UK's Competition and Markets Authority ('CMA'), in addition to the National Competition Authority of a specific EU member state or the European Commission.

Following Brexit,
cross-border
mergers involving UK
companies may no
longer be possible.



As cross-border European rights, including financial services passports, European patents and free movement of employment and services across borders may no longer apply subsequent to Brexit, this will likely lead to interested purchasers or investors having to perform a more detailed due diligence into any prospective UK target and this will require increased risk analysis planning.

Financial Transactions

All companies with business operations in the EU which are involved with a UK-based lender or are a party to an English law

governed financial arrangement will need to consider the (potential) effects of Brexit on their operations in general and on their financial position and credit facilities in particular. The typical Loan Market Association-based ('LMA') financial documentation has not yet been revised to reflect potential implications of Brexit, which could have an impact on various key LMA provisions.

A selection of these legal aspects would include the following:

- (1) **Choice of law and courts:** parties may want to reconsider the market practice choice for the laws and courts of England in LMA and International Swaps and Derivatives Association ('ISDA') documentation with respect to new documentation in view of uncertainties relating to recognition and enforcement.
- (2) **Illegality provisions:** parties need to be aware that upon termination of the UK's EU membership, UK-based lenders can no longer rely on EU passporting to access the EU market. Member State banking licenses should then be in place to avoid illegality.
- (3) **Covenants:** Brexit could trigger market volatility affecting a borrower's ability to comply with financial covenants or even payment obligations. Borrowers should also pay attention to the market disruption clause in this respect.
- (4) **Events of Default:** hypothetically, Brexit could in certain scenarios trigger a material adverse event. This will, among other things, depend on the interpretation of this clause under the applicable law and jurisdiction.

Currently, UK-based banks (and other financial services firms) can conduct business in any EU Member State without any separate authorisation by such EU Member State, provided that they comply with EU legislation relating to, for instance, capital requirements and liquidity. This can be done through a local branch or directly. Once Brexit becomes effective, UK-based banks can no longer rely on passporting and will need to obtain banking licenses in each EU Member State in which services are provided.

Tax

Brexit will possibly lead to the following tax hurdles:³

- Brexit will in principle lead to the end of the applicability of various EU Directives to UK companies, such as the Parent-Subsidiary Directive,⁴ the Interest and Royalty Directive⁵ and the Merger Directive.⁶
- Structures with a UK parent and subsidiaries in other Member States (or vice versa), could be subject to double taxation in respect of dividends unless a tax treaty eliminates this burden.
- Similarly, interest and royalties paid by and to UK companies are unlikely to be governed by the EU Interest and Royalty Directive⁷ resulting in increased withholding taxes save for reductions resulting from tax treaties.

Brexit is expected to lead to more complexities and to an increased administrative burden for multinationals active both in the UK and in the EU, particularly in the area of VAT and customs duties. Potentially, an increase of costs may occur, depending on the terms and conditions of the trade agreements to be entered into between the EU and the UK, replacing the current EU regime of freedom of movement for goods, services, capital and labour. As is the case for supply of goods and services between the Member States, supply of these from the UK to EU Member States will generally be exempt from VAT and duties. Once the UK is no longer part of the EU, this freedom is in principle no longer available except if specific agreements thereon are reached.

UK-based companies benefit from various free trade agreements entered into between the EU and non-EU countries. Some of these international agreements may, for the time being, offer limited protection against higher customs tariffs and duties. After Brexit, UK-based companies will in principle lose access to these agreements and will have to rely on separate agreements to be concluded by the UK.

After Brexit, EU-based companies can no longer rely on the protection of the Transfer Pricing Arbitration Convention in the case of transfer pricing issues in relation to the UK and vice versa. The more general mutual agreement procedure under the tax treaties between the UK and the Netherlands and the UK and Luxembourg remains available if the mismatch concerns parties in these countries.

It may also be relevant to realise that upon Brexit, tax consolidations with UK companies may no longer be possible.

Employment

Brexit will in principle lead to a cessation of the freedom of movement of employees between Member States of the EU and as a result it may become more cumbersome for UK-based companies to attract non-UK employees, who would need to obtain residence and work permits. Throughout the EU, nationals of all Member States have the right to work for EU-based entities and such right will in principle no longer exist in so far as the UK, post-Brexit, is concerned. An exit from the EU may also mean that the EU regulations relating to social security coverage and benefits would no longer apply. For instance, internationally mobile employees working on a temporary basis in the UK (or vice versa) would no longer be able to rely on the EU social security rules and coverage.

Litigation

EU legislation currently sets out the rules which a court within the EU would apply to decide which law governs relevant contractual or non-contractual obligations or which court has jurisdiction to hear a dispute between parties. EU legislation also provides for mutual recognition of judgments of the courts of a Member State throughout the EU. Brexit causes uncertainty on the outcome of litigation as the courts of the EU and the UK would no longer automatically have to follow such procedures for mutual recognition and enforcement of their respective courts. Furthermore, the status of current EU Court of Justice case law within the UK becomes uncertain. The UK could of course enter into new bilateral or multilateral agreements concerning the recognition and enforcement of judgments, for instance by becoming party to the 2007 Lugano Convention.⁸ In the absence of such agreements, the recognition and enforcement of UK judgments will depend on the national provisions of the separate EU Member States applicable to judgments of third states, which may require a national exequatur or even new proceedings. Needless to say, this is not an appealing prospect for parties litigating in the United Kingdom on cross-border disputes given the additional costs and time involved to procure recognition and enforcement of the judgement in EU Member States.

It should be noted that the recognition and enforcement of arbitral awards rendered by arbitral tribunals such as the London Court of International Arbitration is not affected by the Brexit vote, as such recognition and enforcement in EU Members States is not based on EU Regulations, but on the 1958 New York Convention.⁹

Competition and Public Procurement

Competition

The most obvious effect of Brexit on competition law is that cases involving abuse of dominance and mergers will need to be separately reviewed by the UK's Competition and Markets Authority ('CMA'). This will result in legal uncertainty through the increased risk of conflicting decisions. It will also place additional costs on businesses, not just because of higher legal fees but also because of duplication of fines and procedures. In particular, in merger cases a separate filing will have to be made in the UK, if the transaction meets the thresholds. Large mergers are currently only reviewed by the EU.

Following the UK's exit from the EU, important competition legislation such as the Vertical Agreements Block Exemption Regulation,¹⁰ which effectively sets the parameters for the relationship between suppliers and distributors, for example, as regards exclusivity, resale prices and online sales, will no longer have direct effect. This will cause profound uncertainty. In particular, distribution systems that are compliant with EU laws—for example, selective distribution—must be revised and be differentiated depending on market shares and the future UK rules. The Commission will also no longer have the power to carry out dawn raids in the UK adding to the unlevel playing field between UK and European businesses that Brexit undoubtedly will create.

EU competition law will of course continue to apply to agreements or conduct of UK businesses that have an effect within the EU, in the same way as it applies to US or Japanese companies.

Public Procurement

Brexit is unlikely to result in a complete prohibition on UK suppliers bidding for public contracts in the EU or EU suppliers bidding for UK contracts. Under the GPA, signatories must keep access to public contracts and concessions. However, if post-Brexit the UK government would give preferential treatment to UK-based companies, this could cause the EU to take steps to restrict access for UK firms bidding for contracts within the EU.

In any case, the public procurement rules outside the scope of the public procurement Directives 2013/23, 2014/24 and 2014/25 (for example, the transparency principle and the principle of mutual recognition) will no longer be applicable since they are directly based on the TFEU.

Most importantly, the rules on public procurement will no longer be the same, although the transposition of the 2014 directives is likely to be accomplished before Brexit.

Transport and Energy

Contract Terms

After Brexit the UK might still have access in some form to the single market and transport legislation, but the degree of access would clearly depend on the type of exit scenario.

Brexit will not impede the right of British shipping companies to carry goods to or from EU ports. Being part of the EU offers UK companies access to a single European market, with no taxes or duties payable on goods moving across internal EU borders and the benefit of legislation intended to promote the single market, such as the right of EU Member States to offer maritime transport services across the EU. The question remains which rights will remain in place for UK companies and to what extent they might be well advised to opt for another Member State company structure.

The primary regulations governing safety at sea and environmental issues are contained in international conventions: SOLAS¹¹ (in relation to safety at sea) and MARPOL¹² (in relation to environmental issues). UK shipping companies would still need to observe and operate within this international regulatory framework regardless of a Brexit of any sort. The EU has also provided regulation in some of these areas and if the UK were to remain in the EEA,¹³ Annex XIII (which sets out which EU shipping and other transport legislation) would apply to UK shipping companies. It is conceivable that even in other post-Brexit models, UK shipping companies would still have to comply with some EU maritime policy by virtue of trading to, and using ports within, the EU.

Whilst the EU ETS does not currently apply to the shipping industry, the EU has introduced regulation 2015/757, which creates an EU-wide legal framework for the monitoring, reporting and verification of CO2 emissions from maritime transport. This is part of a three-step strategy:

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- (1) monitoring, reporting and verification of CO₂ emissions from large ships using EU ports;
- (2) greenhouse gas reduction targets for the maritime transport sector; and,
- (3) further measures, including market-based measures, in the medium to long term.

Many shipping contracts (for example, voyage and time charters) provide for trading to certain countries or geographical regions. After Brexit, there may be uncertainty as to whether a contract signed pre-Brexit (which contains such a clause) which refers to the EU will continue to include the UK. If existing contracts are drafted in a way that presumes the existence of an EU containing the UK, or makes a reference to the EU without specifically defining what that is, such contracts may give rise to disputes as to the meaning of the contract. In case an existing contract is renewed, it should be taken into account that the court would likely apply the definition of EU as at the time the (renewed) contract is entered into; this might be different from the original or intended definition. The impact of Brexit on any related contracts will need to be assessed, including those intended to be on 'back-to-back' terms, in which relevant clauses may not be similarly defined.

Parties currently negotiating long-term contracts should consider which particular impacts of Brexit might affect their agreement sufficiently to merit including a *force majeure* clause and identify these clearly in the clause. For example, Brexit might result in significant changes to the current customs/excise system. Parties may decide that they require the right to terminate the contract if, as a consequence of Brexit, customs duties, taxes or excise payable under the contract should exceed a particular specified percentage of their current rate.

Notes:

- 1 Directive 2005/56/EC.
- 2 'Wet op de formeel buitenlandse vennootschappen'.
- 3 Please note that this does not constitute an exhaustive list.
- 4 Directive 2011/96/EC.
- 5 Directive 2003/49/EC.
- 6 Council Directive 2009/133/EC.
- 7 Directive 2003/49/EC.
- 8 Council Decision 2007/712/EC of 15 October 2007.
- 9 The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.
- 10 Commission Regulation (EU) No 330/2010.

- 11 International Convention for the Safety of Life at Sea (SOLAS), 1974.
- 12 International Convention for the Prevention of Pollution from Ships (MARPOL), 1973.
- 13 The Agreement on the European Economic Area, 1 January 1994.



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European Union's Free Trade Agreements: Overview and Prospect Examples of Korea, Canada and USA



The recent Free Trade Agreements ('FTAs') negotiated between the European Union with Korea, Canada and the United States of America illustrate a major evolution in the role that these FTAs could play in a globalised economy. Countries want to abolish tariff barriers, but at the same time protect their economy. Non-tariff barriers and the Investor-State Dispute Settlement Tribunal are key legal elements included in those FTAs.

Introduction – EU was Founded on FTAs

Some of the 'Founding Fathers' of the European Union were lawyers. This probably explains why they used law as a tool, first to secure the peace in Europe and to enhance the European economy benefits. The EU was founded on an economic basis in 1957 with the European Economic Community ('EEC'). The 1960s was a decade of rising economic strength and the EU countries decided to stop charging custom duties: the founding acts of the EU were Fair Trade Agreements. Nowadays, the EU's trade policy is becoming more ambitious than ever, with its ongoing negotiation with the USA on the Transatlantic Trade and Investment Partnership ('TTIP') which reached the thirteenth round of talks on 25 to 29 April 2016. However, public opinion seems to be alarmed by the prospect of such an agreement, both in the member States of the EU, especially in France, and in the USA, fearing there might be a race to the bottom in agricultural, social and health regulations. Aware of these concerns, the EU is trying to make the talks as transparent as possible by publishing the negotiating texts and factsheets, while aiming to sign the final agreement before the end of this year.¹

Enlarging the market opportunities beyond European borders has been the EU's core strategy in foreign trade policy for two decades. After creating strong bonds with some countries in development, such as Mexico, the CARIFORUM States, Cameroon, Madagascar, Mauritius, the Seychelles and Zimbabwe through the Economic Partnership Agreements in the 2000s, the EU made a change of course by looking for partners with an equivalent level of development. It was in this framework that the EU signed its first 'New Generation Free Trade Agreement (FTA)' with the Republic of Korea on 6 October

2010, entered into force on 1 July 2011. It was indeed a highly ambitious treaty, with a large scope of liberalisation and a fast removal of most of the tariff and non-tariff barriers to trade. The next major step was made by the Comprehensive Economic Trade Agreement ('CETA') with Canada; the negotiation ended in 2014 and the legal review of the agreement ended on 29 February 2016. The text is waiting to be ratified by the EU Parliament.

These are the key trade agreements for the EU, worth a deeper insight not only from the legal point of view but also in terms of their economic benefits. Moreover, if the customs duties, mostly removed by these agreements without difficulty, are not the main issue anymore, there are still some challenges in the matter of non-tariff barriers ('NTB') to trade. The latter consist of all sorts of measures and acts such as legislation or technical regulations which could possibly prevent foreign exporters from penetrating the market.

Thus, the current issue for the EU and its trade partners is resolving the question of how to lift efficiently those NTB, often constitutive of a grey area challenging to define. This requires, of course, a sustainable dialogue between the parties to the Agreement but economic actors should also be given clear information on these matters.

EU-Korea FTA: Achievements and Remaining Challenges

As article 12.2 of the EU-Korea FTA provides, the parties to the FTA, conscious of 'the impact which their respective regulatory environment may have on trade between them', agreed to 'pursue an efficient and predictable regulatory environment for economic operators'. In other terms, the goal of the FTA consists of creating a beneficial environment for trade by abolishing various kinds of barriers to trade.

At the fifth year since its entry into force, the EU-Korea FTA appears to be a fine success for both sides. It became a model for the EU's following FTA negotiations with other partners all over the world. Nevertheless, there is still more to be done, especially in the matter of deleting NTB.

A Large Scope of Liberalisation of the Trade in Goods and Services

Since its negotiation, the EU-Korea FTA was presented as a deep and comprehensive trade agreement, implying a progressive but fast removal of all the customs duties



**The EU-Korea FTA
appears to be a fine
success for both sides.**

on the trade of goods and services. It also provides for investments in services and industrial sectors, a stronger protection of intellectual property (that is, geographical indications) and improvements in competition rules. Globally speaking, this bilateral agreement went further than the General Agreement on Tariffs and Trade ('GATT') and General Agreement on Trade in Services ('GATS') of the World Trade Organization ('WTO'), setting up consequently a considerable free trade zone among the EU and its member States including France, and Korea.

Such liberalisation was necessary, provided that the trade balance between the EU and Korea was unprofitable for the first EU countries. Indeed, according to the statistics from the Directorate General for Trade of the European Commission, about 68 percent of Korean exports entered the EU market duty free, whereas only 15 percent of the EU exports benefitted from the same treatment.²

Article 2.3 of the FTA provides a large definition of customs duty which includes 'any duty or charge of any kind imposed on, or in connection with, the importation of a good, including any form of surtax or surcharge imposed on, or in connection with, such importation'. Article 2.5 and the following articles establish the elimination of the customs duties, pursuing a progressive schedule, to make almost the entire importation and exportation duty-free within five years. On 1 July 2016 practically all of the



duties were abolished, except for a limited number of agricultural products.

In addition, the customs procedures should comply with some general principles such as efficiency and transparency, provided in Chapter VI on trade facilitation. The aim is to prevent the administrative measures from forming a burden for exports and imports of the goods. Thus, all the procedures related to customs must be simplified and predictable.

Strong Economic Impacts: Regulation of the Asymmetric Trade Balance

Some analyses show that the announcement of the conclusion of a FTA between Korea and the EU was enough to increase the trade exchange in both parties by mitigating the political uncertainty and creating a favourable atmosphere for trade. Furthermore, they consider that the FTA enhanced the probability to export by 10 percent.³ It would mean that the agreement produced some positive results in trade even before its entry into force.

One of the major advantages that the EU took from the FTA with Korea is undoubtedly the rebalancing of the trade flows between the two partners. The statistics are highly instructive: EU trade flows which always had been negative started to find balance after the entering

into force of the FTA in 2011 (about -3.8 billion euros, compared to -11.6 billion euros in 2010), to become positive in 2013 (4 billion euros), which means only one year and a half after the partial liberalisation from July 2011.⁴

From Korea's point of view, this surplus could be seen as an undesired outcome of the FTA. However, the current situation is partially due to the decrease in demand in the European market since the financial crisis in 2012. The analysts consider that without the FTA, the negative impact of the crisis on Korean exports to Europe could have been more important.⁵

Considering all these facts, the FTA has finally been beneficial for both Korea and the EU. This Agreement, meaning the legal formalisation of a negotiation, is the best example of what could be the role of law: a tool to enhance the global economy benefits and at the same time meet the primary function of law, that is, to secure such benefits.

Elimination of the NTB: Remaining Challenges

The removal of the NTB consists mainly in harmonising the technical standards whose difference from a country to another represents a significant obstacle to trade. Both parties of the FTA agreed on several key points in reducing the technical barriers: the reference to international standards (ISO, CEI, UIT) in the sector of consumer electronics; a common definition of pharmaceutical products; and the mutual recognition of the standards in motor vehicles. Especially the latter allowed the European market to open widely to Korean companies in the sector.

In order to go further on these questions which require important technical studies, the Agreement also set up seven specialised committees, seven working groups and an Intellectual Properties Dialogue. These structures led to permanent discussions between the parties to the FTA on future regulatory developments and implications.

Drawing lessons from the experience in the FTA with Korea, the EU and its member States moved on to the next stage, looking for even more ambitious FTAs with the world's biggest economic powers, that is, Canada and the USA. Concerning Canada, the negotiation is concluded, waiting to be signed this year, with the entry into force expected for 2017.

CETA: A Larger Scope of Liberalisation with an Optimisation of Certifying Procedures

Introduction

The FTA which will tie commercial relations between the EU and Canada is called the Comprehensive Economic Trade Agreement ('CETA'). The name reveals the philosophy of the Agreement, in the same vein as the EU-Korea FTA, emphasising the need to pursue deep commercial relations.

But the negotiators are expecting more from the CETA. Cecilia Malmström, European Commissioner for Trade, and Chrystia Freeland, Minister of International Trade of Canada, declared together that 'CETA represents the new standard of progressive trade agreements'.⁶ Indeed, the EU and Canada set up the elimination of most of the tariff lines in trade in goods and enlarged the opportunities for trade in services by opening public procurement to EU operators in more favourable conditions than what was offered by the North

American Free Trade Agreement ('NAFTA') concluded between Canada, the USA and Mexico that came into effect on 1 January

Canada will be EU's most important trade partner with which it signed a FTA.

1994. It is a comprehensive agreement which liberalises a considerable amount of goods for trade and protects the foreign investment between the parties by establishing a dispute settlement mechanism ensuring a non-discriminatory treatment among investors.

Eventually, the main target of the CETA was to enable European companies to enter the first market within the world, that is, the North American market. Starting with Canada, on the basis of the successful EU-Korea FTA, this was the first necessary step for the EU before negotiating and finalising the TTIP with the USA.

Going Further in the Elimination of Customs Duties

The majority of tariffs will be eliminated on the first day the Agreement enters into force, except for some sensitive categories of products which will be progressively eliminated or reduced.

The CETA provides that 100 percent of the industrial tariff lines will be fully eliminated and 99.6 percent of them upon entry into force in Canada and 99.4 percent in the EU. It means that most industrial products will be duty-free immediately when the FTA becomes binding. According to the expectations, EU exporters would save on average 470 million euros per year and Canadian exporters about 158 million euros.⁷

Agricultural products will also benefit from the immediate liberalisation upon the entry into force and it concerns 90.9 percent of all the agricultural tariff lines in the Canadian market and 92.2 percent on the European side. The two parties to the Agreement also agreed on the prohibition of all forms of export subsidies to fully liberalised products. However, some quotas are specified for sensitive agricultural products such as dairy, beef, pork, sweet corn and common wheat.⁸

Elimination of NTBs by Conformity Assessment

Built on the main provisions of the WTO Agreement on Technical Barriers to Trade, the CETA hopes to strengthen the implementation bodies in charge of certification and accreditation.



Thanks to the recognition of conformity assessment between Canada and the EU, which will be subject to a future protocol, both parties will be allowed to certify their own exports according to the other's technical regulations. This undoubtedly encourages exports by preventing double testing and, thus, the extra costs which are constitutive of considerable obstacles to trade for small- and medium-sized companies. The latter can then expect to benefit from the CETA to enlarge their markets across the Atlantic.

Although being an efficient way of optimisation, the conformity assessment somehow caused concern in public opinion, fearing a race to the bottom in standards. However, the negotiators believed in the convergence of the standards from both sides and emphasised the fact that the differences in regulation can result in 5 to 20 percent of charges to export, due to doubled procedures, translations of certifications and other numerous customs formalities. The main idea is optimising the procedures and not dismantling the whole security standards existing respectively in both parties to the Agreement.

Investor-State Dispute Settlement (ISDS) Mechanism

Finding a balance between protecting foreign investors' rights and the State's sovereignty in regulating general welfare is a delicate issue. Aware of the need to provide investors with a stronger protection in this matter, the EU introduced some important innovations, while preserving the State's prerogatives.

The new institutional structure for the tribunal in charge of ISDS is one of these innovations. Under the CETA, the investment dispute settlement will not be dealt by a tribunal appointed *ad hoc*. There will be a permanent tribunal with appellate mechanism (article 8.27 of the final text not yet come into effect) with open hearings and the publication of all the submitted documents. This shows the negotiators' will to set up a fair dispute settlement for investors, while being transparent and acceptable for the State and the public.

With entry into force of the CETA, Canada will be EU's most important trade partner with which it signed a FTA. The issues that this Agreement implies are significant. The successful experience from the EU-Korea FTA enlightens its prospect, thus the economic forecasts are optimistic. Could this dynamism go furthermore, with the conclusion

of the TTIP by the end of this year, as expected? Although being in the same vein as the two FTAs reviewed by this article, the TTIP is subject to more criticisms and scepticism, which do not make negotiations easier. One thing is certain: this is the EU's next major challenge to overcome in its foreign trade policy. The outcome of the negotiations is eagerly awaited.

On April 2016, France, a major funding member of the EU, announced that it is not willing to support the negotiations of the TTIP anymore. Initially the French President brought his full support to achieve a successful negotiation of the TTIP. Now, the French government and the public opinion fear the unbalanced and unfavourable outcomes of the TTIP, more than its expected benefits for the European and French economies. More specifically, the issues are concentrated on the following business sectors: agricultural products with the fear of the liberalisation of GMOs in French and European markets and foreign direct investment with its ISDS mechanism, blamed for the lack of transparency.

If the FTAs imply mostly economic issues and benefits, or at least expectations, in a global worldwide economy, they also are the legal reflection of something bigger than short term business expectations in order that the EU not be excluded from the mundialisation. EU countries want to take an active part in this mundialisation. If the challenge looks economic at first, it is however a political one. The political issues between 28 European countries of major importance and third party countries among also the top 15 countries in the world, cannot be resolved easily and within a short period of time. Those FTAs have to reflect all of these issues and anticipations of our future world. Like any agreement, FTAs shall be balanced and renegotiated on regular basis to evolve and remain adapted to the objectives of the parties.

Dealing at this level, with such major countries, is a big challenge. Governments and public opinion cannot expect more than what the law can offer: a framework and a tool for negotiation that should not hide the targets of the parties to an agreement.

International business lawyers like us have a role to play in these FTA negotiations and implementation. Legal issues such as NTB (the provisions under Chapter 4 of the EU-Korea FTA and Chapter 4 of the CETA), intellectual property (Chapter 10 of the EU-Korea FTA and Chapter



20 of the CETA covering a large array of rights such as copyright and related rights, trademark rights, rights in geographical indications etc), arbitration in the matter of investment (in particular Chapter 8 of the CETA), procedures, provided in the FTAs, are our knowledge, our work, our tools and we should know better than anyone else how to use them and make them also meaningful for non-legal people, companies, and governments to achieve each other's goals.

Notes:

- 1 From the statement by M Ignacio García Bercero, EU Chief Negotiator for TTIP, in the Conclusion of the 13th TTIP negotiation round on 29 April 2016, available at http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154480.pdf.
- 2 Csilla Lakatos and Lars Nilsson, 'The EU-Korea Free trade Agreement: Anticipation, Trade Policy Uncertainty and Impact', Chief Economist and Trade Analysis Unit, European Commission's Directorate General for Trade.
- 3 *Ibid.*
- 4 European Commission's communication, 'European Union, Trade in Goods with South Korea', 26 April 2016, available at http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113448.pdf.
- 5 European Commission's Annual Report COM(2015) 139 final, 26 March 2015.
- 6 See <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1483>.
- 7 European Commission, 'CETA-Summary of the Final Negotiating Results', available at http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf.
- 8 *Ibid.*



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GST: A Good and Systematic Transformation of India

Given the smooth passage of the Constitution Amendment Bill for Goods and Services Tax ('GST') before the Parliament as well as the State Assemblies, the Government of India is committed to replace all the indirect taxes levied on goods and services by the Centre and States and implement GST by April 2017. This new tax regime is set to bring about a significant change in doing business in India.



Introduction

The 122nd Constitutional Amendment Bill was finally cleared by both Houses of Parliament in the first week of August. This finally paves the way for the implementation of the much anticipated Goods and Services Tax ('GST') regime in India, teeing off one of the most noteworthy economic reforms in the country since 1991.

GST is an indirect tax that brings together most of the taxes that are imposed on all goods and services (except a few) under a single banner. Essentially, GST is one indirect tax for the whole nation, one which will make India a unified common market. Over 160 countries across the world have a value added tax ('VAT') or a GST. The two terms are often used interchangeably but the difference in India's case was that the VAT system only applied to goods and not services.

GST is a single tax on the supply of goods and services right from the manufacturer to the consumer. Under this regime, credits of input taxes paid at each stage would be available at subsequent stages of value addition thereby making GST essentially a value added tax at each stage. The final consumer of goods and services will thus only bear the GST charged by the last dealer in the supply

chain, with set off benefits available to all the preceding stakeholders in the value chain. This is in stark contrast to the current system, where different taxes (both State and Central) are levied separately on goods and services.

Current Scenario

Currently, India has a VAT system at both Central and State levels, however, the said mechanism only extends set-off benefits against Central Excise Duty and Service Tax paid up to the level of production. The VAT system does not extend to value addition by distributive stages below the stage of manufacturing. Currently, our manufacturers cannot claim set-off against Central taxes like Additional Excise Duty and Surcharge.

Likewise, State VAT's only cover sales. The seller can claim credit only against VAT paid on previous purchases. The VAT also does not subsume a host of other taxes like luxury tax, octroi, entertainment tax, etc.

Once GST comes into effect, all Central and State level taxes and levies on all goods and services will be subsumed with an integrated tax having mainly two components: (1) Central Goods and Services Tax ('CGST'); and (2) State Goods and Services Tax ('SGST').

How would GST be administered in India?

Keeping in mind the federal structure of India. Both the Centre and States would simultaneously levy tax across the value chain. Tax would be levied on every supply of goods and services. The Centre would levy and collect CGST and States would levy and collect SGST on all transactions within the State. The input tax credit of CGST would be available for discharging the liability on the output at each stage. Similarly, the credit of SGST paid on inputs would be allowed for paying off the SGST on the output. No cross utilisation of credit would be permitted under the system.

The prices of commodities are expected to come down in the long run as dealers pass on the benefits of reduced tax incidents to consumers by slashing the prices of goods and services. Being a consumption-based tax, dual GST (CGST and SGST) will result in better revenue collection for States with higher consumption of goods and services. For a better understanding, a comparative table reflecting the long-term benefits of GST (assuming CGST at 12 percent and SGST 8 percent) vis à vis the existing tax regime is shown on the next page:



Tax would be levied
on every supply of
goods and services.

(A) Goods – Producer to Wholesaler	Under VAT (Rs.)	Under GST (Rs.)
Cost of Production	100000/-	100000/-
Add: Producer's Margin of Profit	20000/-	20000/-
Producer's Basic Price	120000/-	120000/-
Add: Central Excise Duty @ 8%	8000/-	NIL
Add: Service Tax @ 10% on Transportation & Job Work paid	4000/-	NIL (Included in GST)
Add: Value Added Tax @ 12.5%	16500/-	NIL
Add: Central GST @ 12%	NIL	14400/-
Add: Value Added Tax @ 8%	NIL	9600/-
Total Price	148500/-	144000/-
(B) Goods – Wholesaler to Retailer	Under VAT (Rs.)	Under GST (Rs.)
Cost of Goods to Wholesaler	132000/-	120000/-
Add: Profit Margin @ 10%	13200/-	12000/-
Total	145200/-	132000/-
Add: VAT @ 12.5%	1650/-	NIL
Add: Central GST @ 12%	NIL	1440/-
Add: State GST @ 8%	NIL	960/-
(C) Goods – Retailer to Final Consumer	Under VAT (Rs.)	Under GST (Rs.)
Cost of Goods to Retailer	145200/-	132000/-
Add: Profit Margin @ 20%	29040/-	26400/-
Total	174240/-	158400/-
Add: VAT @ 12.5 %	3630/-	NIL
Add: Central GST @ 12%	NIL	3120/-
Add: State GST @ 8%	NIL	2112/-
Total Final Price to Consumer	177870/-	163632/-
Tax Component in Final Price	21780/-	31632/-
Final Price Ex-Taxes	156090/-	132000/-



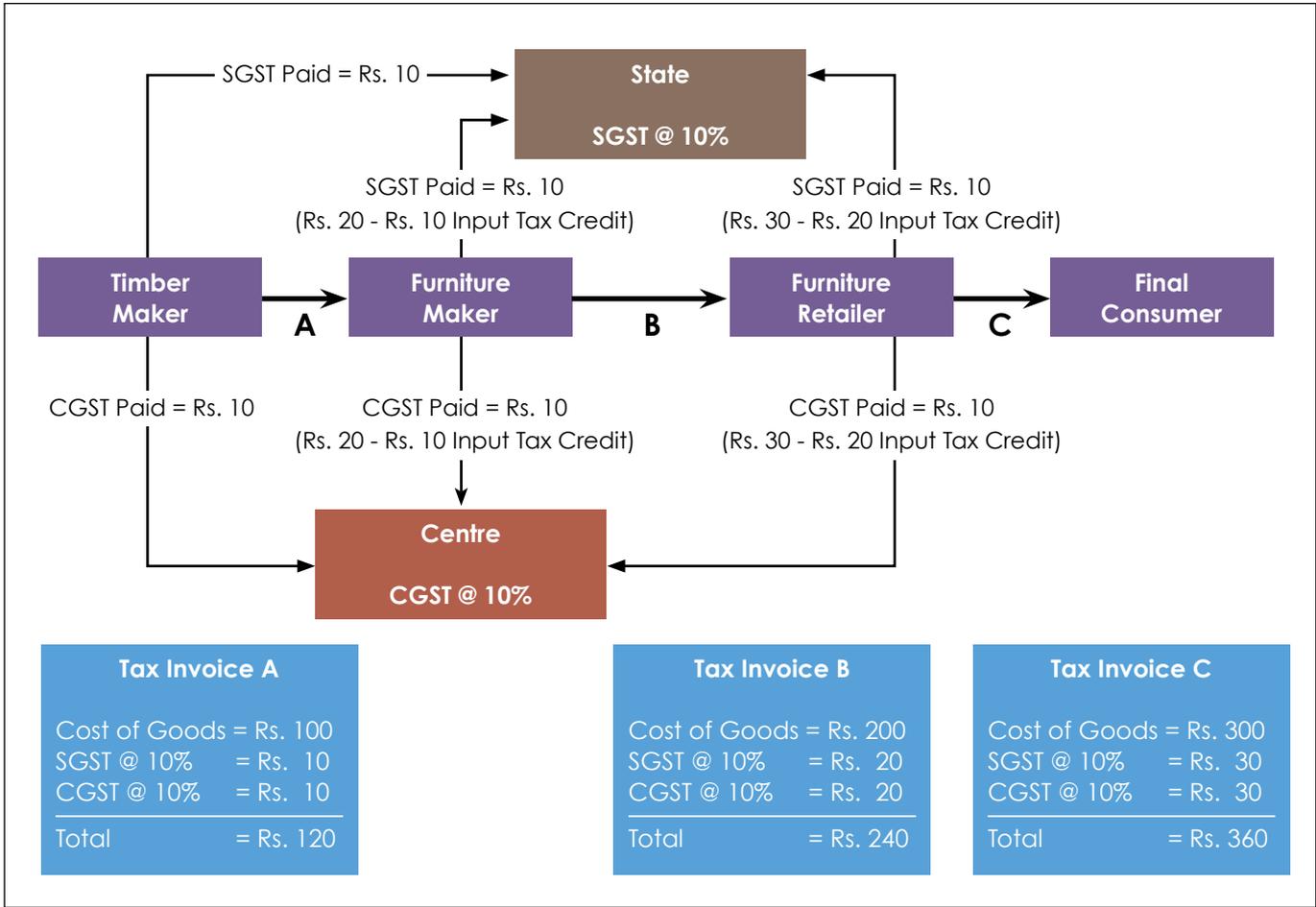
All GST on the final product would accrue to the consuming State.

It is evident from the above example that due to multiplicity of taxes and due to non-availability of a tax credit across the board, the final price of the consumer under the current regime is much higher, which is not only due to the tax component(s) but also due to the cascading effect of taxes.

Intra-State Administration

SGST and CGST would be simultaneously levied on every supply of goods and services except certain goods like alcohol for personal consumption, crude oil, etc., and also those transactions which fall below the prescribed threshold limit for levy of GST. Further, both would be levied on the same price or value unlike State VAT, which is levied on the value of goods inclusive of Central Excise. For better understanding, a diagrammatic representation is shown below:

Dual GST within State: Working Example



Source: Ministry of Finance, Government of India

Inter-State Administration

In the case of inter-State transactions, the Centre would levy and collect the Integrated Goods and Services Tax ('IGST') on all inter-State supplies of goods and services under Article 269A(1) of the Constitution of India. The IGST would roughly be the sum of the CGST and SGST.

Procedure:

First, the inter-State seller would pay IGST on the sale of his goods to the Central government after adjusting the credit of IGST, CGST and SGST on his purchases (in that order).

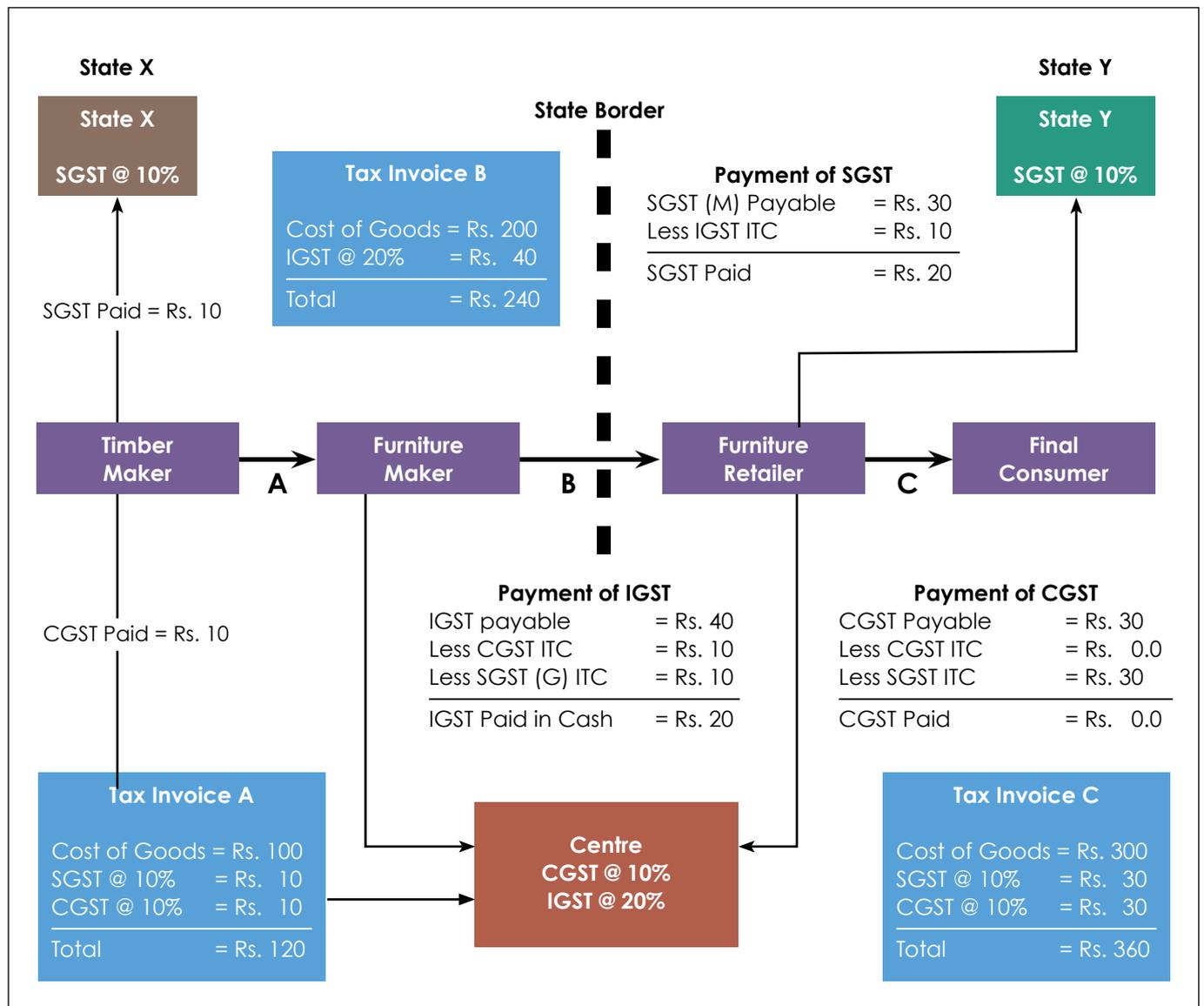
Second, the exporting State would transfer to the Centre the credit of SGST used in its payment of IGST.

Third, the importing State will claim credit of IGST while discharging its output tax liability (CGST+SGST). The Centre will then transfer to the importing State the credit of IGST used in the payment of SGST.

Lastly, since GST is a destination based tax, all GST on the final product would accrue to the consuming State.

A diagrammatic representation is shown below:

IGST Model: Working Example



Source: Ministry of Finance, Government of India

Subsumption of Taxes

At the central level, GST will subsume the following taxes:

- (1) Central Excise Duty;
- (2) Additional Excise Duty;
- (3) Service Tax;
- (4) Additional Customs Duty, that is, Countervailing Duty;
- (5) Special Additional Duty of Customs.

At the state level, GST will subsume the following taxes:

- (a) State VAT/Sales Tax;
- (b) Entertainment Tax;
- (c) Octroi and Entry Tax;
- (d) Purchase Tax;
- (e) Luxury Tax;
- (f) Taxes on Lottery/Betting/Gambling.

Benefits of GST

For Business and Industry

Easy Compliance: A completely digitalized system would be the foundation of GST in India. All taxpayer services like registration, returns and payments would be

A completely digitalized system would be the foundation of GST in India.

available online, which would make compliance easy and transparent.

Uniformity of Tax Structures and Rates: GST would make doing business in India tax neutral, irrespective of the choice of place of doing business.

Removal of Cascading: A system of seamless tax credits throughout the value chain and across the State boundaries would ensure that there is minimal cascading of taxes.

Better Competition: Reduction in transactions costs would eventually lead to better competition for trade and industry.



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For the Government

Administration: Multiple indirect taxes at central and state levels would be replaced by a unified GST, thereby making it easier to administer.

Controlling Leakage: GST would result in better compliance due to a robust IT infrastructure. The inbuilt mechanism of GST would incentivise compliance by traders thereby improving the tax to GDP ratio in the country.

Revenue Efficiency: GST is expected to decrease the cost of collection of taxes by the government, thereby leading to a higher revenue efficiency.

For the Consumer

Single and transparent tax proportionate to the value of goods and services: Currently, the value of goods and services in India is laden with many hidden taxes. Under GST there would only one tax from the manufacturer to the consumer, leading to transparency of taxes to be paid by the consumer.

Relief in Tax burden: Due to efficiency gains and prevention of leakages, the overall tax burden on most commodities is set to come down considerably.

Red Flags

Impact on Revenue States

GST, being consumption-based and not an origin-based tax, means that the tax would be collected by the States where the goods are actually consumed and not where they are produced. This may lead to heavy losses for the producing States. To mitigate the potential damage, Parliament is considering incorporating a provision to compensate the producing States for the first five years from the official enactment of the GST regime.

Inflation

The cap on GST to be levied is expected to be between

17 percent to 20 percent as opposed to 14 percent to 16 percent which is considered apposite for emerging economies. According to statisticians this may lead to inflation anywhere between 1 percent to 2 percent, which poses the risk of nullifying some of the benefits proposed to be introduced by GST.

Conclusion

Having already been unanimously ratified by both Houses of Parliament, the Bill, being a constitutional amendment, has further been approved by more than half of the State assemblies by a minimum of two-thirds majority of members present and voting and is now ready to get the final assent of the President. This would be followed by the formation of the GST Council within sixty days from the date the Bill is notified. The Council would be assigned the task of framing the GST laws, by-laws and rules for both the Centre and the States.

The Government, under the aegis of its flagship program of 'ease of doing business in India', has set a target date of 1 April, 2017 for the rollout of GST.

Developing a common Indian market and reducing the cascading effect of taxes along with the cost of goods and services, GST is set to become a game-changing reform for the Indian economy. GST is set to have a far-reaching impact on all aspects of business operations in the country including, but not limited to the pricing of products and services, supply chain optimisation, IT, and accounting, and tax compliance systems, thereby leading to a complete overhaul of the current indirect taxation regime in India.



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The Evolution of the Court of Arbitration for Sport

● ● A creation of the International Olympic Committee, the Court of Arbitration for Sport has evolved to become the preeminent dispute resolution body in world sport. Its role in the recent Rio Olympic Games highlights not only the growing importance of the CAS, but also its increasing independence from the IOC.

Introduction

In November 2015, the Council of the International Association of Athletics Federations ('IAAF') voted to ban the All-Russian Athletic Federation ('ARAF') as an IAAF member, after the World Anti-Doping Agency ('WADA') issued a report revealing that Russian athletes had colluded with the ARAF and Russian anti-doping authorities to use performance-enhancing drugs without fear of being caught.¹ When the IAAF subsequently concluded in June 2016 that the ARAF's successor, that is, the Russian Athletics Federation, had not met the criteria the IAAF had set for readmission, it meant that the Russian track and field athletes would be banned from the Olympic Games this past summer in Rio de Janeiro ('Rio Games')²—so long as the Court of Arbitration for Sport ('CAS') upheld the ban. The CAS did ultimately uphold that ban in July, but its role in the process, as well as its subsequent review of the decisions of other International Sports Federations ('IFs') and the International Olympic Committee ('IOC') on other Russian athletes' participation in the Rio Games put that organisation in the spotlight and made many ask, 'What is the CAS, and how did it become so powerful?' The answer is as controversial as it is insightful.



What is the CAS?

Ostensibly labelled a 'court', the CAS is, in fact, a private arbitral institution created by the IOC in 1983 to eliminate fragmentation and state court interference in international sports dispute resolution.³ Based in Lausanne, Switzerland, the CAS originally had three roles: to resolve disputes referred to it through arbitration; to hear appeals from other sports-related bodies; and to provide non-binding advisory opinions.⁴ Its role as an advisory body has been modified and access to it has been restricted, but the CAS has added a mediation function.⁵ Thus, the vast majority of disputes that currently come before the CAS are active ones.

Disputes heard by the CAS can cover a wide range of topics, including commercial matters, disciplinary actions and selection for Olympic Games. Commercial disputes typically appear before the CAS as matters of first instance where the parties have chosen the CAS as the forum for adjudicating their dispute.⁶ Little information is publicly available about these disputes as they are kept confidential, unless parties or the CAS Ordinary Arbitration Division President determines otherwise.⁷ In that manner, they are very similar to non-sports-related commercial arbitration.



Arbitrations related to disciplinary actions or Olympic participation are different. They come before the CAS as appeals from the decisions of sporting tribunals,⁸ one example being Maria Sharapova's appeal to the CAS of her two-year ban by an independent tribunal appointed by the International Tennis Federation for using meldonium.⁹ In its appellate role, the CAS is not required to give any deference to prior decisions.¹⁰ This *de novo* review does not lead to as many reversals as one might expect, in part because of a unique feature of CAS appeals. Unlike awards by most other arbitral bodies, those of the CAS Appeals Division are public unless the parties agree otherwise.¹¹ Because sporting bodies like WADA will not consent to such confidentiality, a body of law, or *lex sportiva*, has developed that tribunals can follow.

Even though the CAS now has regional offices in New York and Sydney,¹² the seat of any CAS arbitration is, by rule, in Lausanne,¹³ so CAS decisions can only be set aside by the Swiss Federal Tribunal.¹⁴ Consistent with its general approach to arbitral awards, the Swiss Federal Tribunal will not revisit the merits of CAS decisions and will only overturn awards on very limited grounds, such as lack of jurisdiction, procedural unfairness or incompatibility with Swiss public policy.¹⁵ Not surprisingly, very few CAS awards are set aside, further entrenching the position of the CAS as the final word in international sporting disputes.

IOC Influence on the CAS

Because the IOC created the CAS, the relationship between the two has often been viewed with suspicion. Particularly in its early stages, the CAS was seen as too dependent on, and thus subject to influence by, the IOC. Prior to 1994, CAS arbitrators were appointed in equal proportions by the IOC, IFs, National Olympic Committees ('NOCs'), and the IOC President.¹⁶ Furthermore, the CAS initially relied solely on the IOC for funding and its administration, the CAS Statute could be modified by a two-thirds vote of the IOC Session, and the IOC President was *ex officio* the President of the CAS.¹⁷ Athletes therefore faced the possibility of appealing against an IOC decision to a tribunal of arbitrators appointed and supported by the IOC.

The undue influence the IOC had over the CAS was raised by a German equestrian in *Gundel v Fédération Equestre Internationale*, a 1993 appeal to the Swiss Federal Tribunal of a drug-related suspension that had been reduced, but ultimately upheld, by the CAS.¹⁸ The Swiss Federal Tribunal

enforced the CAS award, but it indicated *in dicta* that its decision may have been different had the IOC been a party to the dispute.¹⁹ Responding to this wake-up call, the International Council of Arbitration for Sport ('ICAS') was established in 1994 at the International Conference of Law and Sport in Paris to govern the CAS.²⁰

Theoretically designed to give CAS independence from the IOC, ICAS consists of 20 members, all of whom the CAS/ICAS Statute requires to be 'experienced jurists'.²¹ The IOC, IFs and NOCs all elect four members apiece.²² Those members appoint four more members 'with a view to safeguarding the interests of athletes'.²³ Then, the final four members are picked by the first 16 'from among personalities independent of the bodies designating the other members of the ICAS'.²⁴ Those 20 jurists have the authority, *inter alia*, to amend the Code of Sports-Related Arbitration and establish the list of CAS arbitrators.²⁵

Whether the CAS is now independent from the IOC is debatable. Obviously, the way in which members are elected means that the IOC, which has influence over the IFs and NOCs, will be able to exert influence over the election of the final eight members of the ICAS.²⁶ In addition, the man who served as the President of the ICAS from its start in 1994 until his death in 2007 was Keba Mbaye, a former IOC Vice-President²⁷ and the IOC also continues to provide a large portion of the budget for the CAS, either directly or indirectly.²⁸ Not surprisingly, athletes worry that they face an uphill battle when they seek to challenge the IOC or IFs before the CAS.

The Growth of the CAS

Notwithstanding questions about the impartiality of the CAS, its influence on sports dispute resolution has continued to grow. The number of cases submitted to the CAS has increased nearly every year.²⁹ While only 75 requests for CAS arbitration were submitted in 2000,³⁰ 503 were submitted last year³¹—and 306 were submitted in the first half of 2016 alone.³² The CAS has also become the *de facto* lead organisation for international sports disputes. For example, state parties to the World Anti-Doping Code have agreed the CAS will serve as the appellate body for all disputes to which the Code applied.³³

However, critics have charged that the CAS has obtained its status through the unfair use of contracts

of adhesion.³⁴ Like any other arbitral institution, the CAS will not have jurisdiction over a dispute unless the parties have expressly agreed to arbitrate it under CAS rules. In practice, this alleged consent comes in the form of an arbitration clause in a contract that an athlete must sign as a condition of participation in a sport or an event. In effect, athletes are forced into a Hobson's choice: agree to arbitrate any disputes before a body heavily controlled by the IOC and IFs or forego competing. Indeed, all of the competitors in Rio de Janeiro were forced to agree to the exclusive jurisdiction of the CAS as a condition of their participation in the Summer Games.³⁵

The power imbalance that results from these contracts of adhesion received attention this past summer when the German Federal Court issued its ruling in the long-running dispute between speed skater Claudia Pechstein and the International Skating Union ('ISU'). Pechstein had received a two-year ban from competing in 2009 after she failed a drug test and, after CAS upheld the ban³⁶ and the Swiss Federal Tribunal twice refused to set aside the CAS award,³⁷ missed the 2010 Winter Olympics in Vancouver. She then sued the ISU in the German courts for her loss of revenue, claiming that the ISU had abused its monopolistic position in speed skating to force her into a CAS arbitration agreement.

The Munich District Court found that Pechstein had not willingly consented to CAS arbitration, but it upheld the CAS award and dismissed Pechstein's suit because she had not raised her jurisdictional challenge before the arbitral tribunal. The Court of Appeals disagreed, finding the arbitration agreement to be invalid and allowing her claims to go forward.³⁸ However, on appeal the German Federal Court ruled in favour of the ISU.³⁹ Notably, it did find in its 7 June 2016 judgment that the ISU had a monopoly on the organisation of international speed skating events,⁴⁰ but it held that the ISU had not abused its power by requiring speed skaters to enter into CAS arbitration agreements.⁴¹ The Federal Court found the CAS to be a legitimate tribunal and that there was no structural imbalance within the CAS that skewed decisions against athletes, especially in the context of fighting doping where athletes and associations should have similar interests.⁴² In addition, any concerns about bias within the CAS were mitigated by the large panel of arbitrators, the ability to remove partial arbitrators and the availability of recourse to the Swiss Federal Tribunal.⁴³

The CAS at the Olympic Games

In light of its origins with the IOC, it is not surprising that the CAS plays a particularly special role at the Olympic Games. Beginning with the Atlanta Summer Games in 1996, the CAS has established an ad hoc Division ('AHD') at each Olympic Games to provide swift resolution of any disputes that arise during the Games.⁴⁴ Subsequently, the AHD has also operated at other events, like the Commonwealth Games, FIFA World Cup and the UEFA Football Championships.⁴⁵

The AHD was again instituted this past summer in Rio de Janeiro. Led by Co-Presidents Michael Lenard of the United States and Ellen Gracie Northfleet of Brazil, the Rio AHD consisted of 12 arbitrators, all of whom were expected to be on call throughout the Games and available to hear matters on short notice and during unsociable hours.⁴⁶ Indeed, the rules of the AHD required both for it to constitute tribunals, typically of three arbitrators but sometimes consisting of a sole arbitrator,⁴⁷ and for a decision to be rendered within 24 hours of an application.⁴⁸ The AHD had jurisdiction over any disputes arising either during the Games or in the 10 days prior to the Opening Ceremony,⁴⁹ with the first matter referred to it being an unsuccessful 30 July 2016 challenge by two Russian swimmers to rulings by the IOC and the International Swimming Federation that they were ineligible to compete in the Games.⁵⁰

In addition to the AHD, the Rio Games also saw the advent of a new CAS anti-doping Division ('ADD'). At prior Games, first instance decisions on doping matters had been made by the IOC, but it chose to designate that power to the ADD to ensure that doping analysis and rulings would be more independent.⁵¹ Led by President Carole Malinvaud of France and Deputy President Ivo Eusebio of Switzerland,⁵² the ADD only consisted of six arbitrators,⁵³ but it followed essentially the same procedures as the AHD, including the requirement to issue awards within 24 hours of an application.⁵⁴ Awards by the ADD could be appealed to the AHD or the CAS if the AHD was not still in operation.⁵⁵ The ADD also was given jurisdiction over subsequent retesting of samples collected during the Games and is based in Lausanne for this purpose after the Games have concluded.⁵⁶

The CAS in Rio: Demonstrating Independence

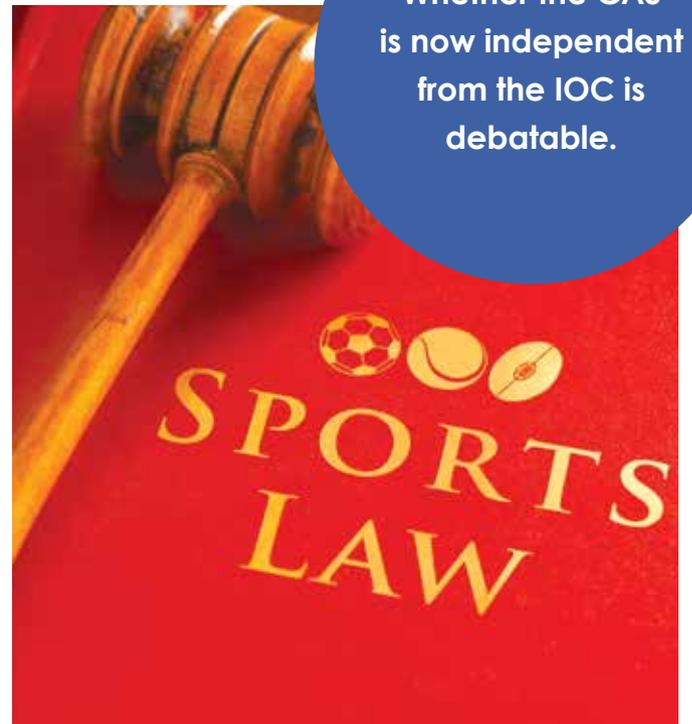
The Rio Games were momentous for the CAS for many reasons. As noted above, these Games were the first

for the CAS ADD. This new division of the CAS ended up dealing with seven separate doping cases during the Rio Games.⁵⁷ Furthermore, while the ADD was making its debut, the CAS AHD adjudicated a record number of matters.⁵⁸ In total, it resolved 28 separate matters during the Rio Games, shattering the previous record of 15 set during the Sydney Games in 2000.⁵⁹ To be fair though, 16 of those 28 cases related to the eligibility of Russian athletes following the 24 July 2016 decision of the IOC Executive Board ('EB') on that issue.⁶⁰

Indeed, the most significant development in relation to the CAS during the Rio Games related to its review of that EB decision. Pressured by IOC stakeholders in light of the WADA report showing systematic doping by Russian athletes in concert with Russian officials, the EB was forced to consider whether any Russian athletes should be allowed to participate in the Rio de Janeiro Olympic Games. Unlike the International Paralympic Committee, which would later choose to ban all Russian athletes from the Rio de Janeiro Paralympic Games,⁶¹ the IOC ultimately adopted a piecemeal approach to the inclusion of Russian athletes in the Rio de Janeiro Olympic Games.

The EB decision provided in the pertinent part:

Whether the CAS is now independent from the IOC is debatable.





2. Entry will be accepted by the IOC only if an athlete is able to provide evidence to the full satisfaction of his or her [IF] in relation to the following criteria:
 - The IFs, when establishing their pool of eligible Russian athletes, apply the World Anti-Doping Code and other principles agreed by the Olympic Summit (21 June 2016).
 - The absence of a positive national anti-doping test cannot be considered sufficient by the IFs.
 - The IFs should carry out an individual analysis of each athlete's anti-doping record, taking into account only reliable adequate international tests, and the specificities of the athlete's sport and its rules, in order to ensure a level playing field.
 - The IFs examine the information contained in the IP Report, and for such purpose seek from WADA the names of athletes and National Federations (NFs) implicated. Nobody implicated, be it an athlete, an official, or an NF, may be accepted for entry or accreditation for the Olympic Games.
 - The IFs will also have to apply their respective rules in relation to the sanctioning of entire NFs.
 3. The [Rio De Janeiro Olympic Committee] is not allowed to enter any athlete for the Olympic Games Rio 2016 who has ever been sanctioned for doping, even if he or she has served the sanction.
 4. The IOC will accept an entry by the [Rio De Janeiro Olympic Committee] only if the athlete's IF is satisfied that the evidence provided meets conditions 2 and 3 above and if it is upheld by an expert from the CAS list of arbitrators appointed by an ICAS Member, independent from any sports organisation involved in the Olympic Games Rio 2016.⁶²
- Two Russian rowers, Anastasia Karabelshikova and Ivan Podshivalov, subsequently challenged the EB decision after they were barred by their IF, that is, the World Rowing Federation ('FISA'), from participating in the Rio Games for no reason other than they had been previously suspended for doping.⁶³ Karabelshikova and Podshivalov complained that Paragraph 3 of the EB decision was 'in breach of the legal principle *ne bis in idem* (no one shall be sanctioned twice because of the same offence), sometimes referred to as "double jeopardy"'.⁶⁴
- Exhibiting independence from the IOC, the CAS agreed with the athletes. It found that the IOC had 'wide powers of rulemaking' as a Swiss association, but that 'the rights of natural justice should be respected'.⁶⁵ Paragraph 3 of the EB decision offended those rights:

Paragraph 3 ... contains simple, unqualified and absolute criterion. Any athlete that has been convicted of a prior [doping violation] is not allowed by the IOC to be entered for the Rio Games. What strikes the panel is that there is no recourse for such an athlete, no criteria that considers the promotion by the athlete of clean athletics (as the IAAF consider by way of an example) or any other criteria at all. The panel struggles to reconcile this paragraph with the stated aim to provide the athletes with an opportunity to rebut the presumption of guilt and to recognise the right to natural justice.⁶⁶

Accordingly, the CAS ordered FISA to reconsider the eligibility of Karabelshikova and Podshivalov to compete in the Rio Games without taking into consideration their past doping violations.⁶⁷ (In other words, FISA should only consider the criteria in paragraph 2 of the EB decision).⁶⁸ Only one other athlete had their CAS appeal upheld due to the unenforceability of paragraph 3 of the EB decision,⁶⁹ but the willingness of the tribunal to buck both the IOC and public opinion (as many athletes had expressed an opinion that previously suspended competitors should have been banned from competing in the Rio Games)⁷⁰ should not be undervalued.

Conclusion

The summer of 2016 may end up being seen as a milestone for the CAS. The Pechstein decision issued by the German Supreme Court buttressed its status as a legitimate arbitral body for the adjudication of sporting disputes. Moreover, the Rio Games represented a high point for usage of the CAS's special divisions, that is, the ADD and AHD. Finally and arguably most importantly, the impartiality the CAS demonstrated in reviewing the EB decision suggests that it may have evolved from its roots as an IOC creation and is now truly an independent arbiter of sporting disputes. Whether that is indeed the case will have to be seen, but what is undeniable after this past summer is the growing importance of the CAS in sports dispute resolution—and the sporting world as a whole.

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- Antonio Rigozzi, Dominique Sprumont, and Yann Hafner (eds.), *Citius, Altius, Fortius* (2012, Helbing Lichtenhahn) p 440; Darren Kane, 'Twenty Years On: An Evaluation of the Court of Arbitration for Sport' in Ian S Blackshaw, Robert CR Siekmann and Janwillem Soek (eds), *The Court of Arbitration for Sport 1984-2004* (2006, TMC Asser) p 456.
- 4 CAS, *Statutes of the Bodies Working for the Settlement of Sports-Related Disputes* (2013), available at http://www.tas-cas.org/fileadmin/user_upload/Code20201320corrections20finales20_en_.pdf, S12.
- 5 *History of the CAS*, n 3 above.
- 6 CAS, *Code of Sports-Related Arbitration (in force as from 1 January 2016)*, R27, available at http://www.tas-cas.org/fileadmin/user_upload/Code_2016_final_en_.pdf.
- 7 *Ibid* R43.
- 8 *Ibid* R47.
- 9 CAS, 'Maria Sharapova Files an Appeal at the Court of Arbitration for Sport (CAS)' (14 June 2016), available at http://www.tas-cas.org/fileadmin/user_upload/Media_Release_140616.pdf.
- 10 2016 CAS Code, n 6 above, R57.
- 11 *Ibid* R59.
- 12 CAS, *Frequently Asked Questions* (2016), available at <http://www.tas-cas.org/en/general-information/frequently-asked-questions.html>.
- 13 2016 CAS Code, n 6 above, R28.
- 14 See Gary B Born, *International Commercial Arbitration* (2nd edn, 2014, Wolters Kluwer), vol 3, 2905 ('An award may also be 'annulled' (alternatively termed 'set aside' or 'vacated'), but virtually always only by a court in the arbitral seat.').
- 15 *Frequently Asked Questions*, n 12 above.
- 16 Kane, n 3 above, p 457.
- 17 *Ibid* p 458.
- 18 *History of the CAS*, n 3 above; see also Richard H McLaren, 'Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror,' (2010) 20 *Marquette Sports Law Review* 305, 307; Kane, n 3 above, pp 458-59.
- 19 *History of the CAS*, n 3 above; see also McLaren, n 18 above, p 307.
- 20 *History of the CAS*, n 3 above; see also Kane, n 3 above, p 459.
- 21 CAS, *Statutes of the Bodies Working for the Settlement of Sports-Related Disputes* (2016), available at http://www.tas-cas.org/fileadmin/user_upload/Code_2016_final_en_.pdf, S12.
- 22 *Ibid*.
- 23 *Ibid*.
- 24 *Ibid*.
- 25 *Ibid* 56.
- 26 Kane, n 3 above, p 461.
- 27 Jean-Loup Chappelet and Brenda Kubler-Mabbott, *The International Olympic Committee and the Olympic System: The Governance of World Sport* (2008, Routledge), p 130.
- 28 *Ibid*.
- 29 CAS, *Statistics* (2013), available at http://www.tas-cas.org/fileadmin/user_upload/CAS_Statistics_2013.pdf.
- 30 *Ibid*.
- 31 CAS, 'The Court of Arbitration for Sport (CAS) Has Opened Its Two Temporary Offices to Resolve Legal Disputes and Doping Cases on the Site of the Rio 2016 Olympic Games' (26 July 2016), available at http://www.tas-cas.org/fileadmin/user_upload/Media_Release_CAS_Rio_ENG.pdf.
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- 34 Melissa R Bitting, 'Mandatory, Binding Arbitration for Olympic Athletes: Is the Process Better or Worse for 'Job Security'' (1998) 25 *Florida State University Law Review* 655, 669-72.
- 35 See 'Conditions of Participation—National Olympic Committee', [5], available at http://athletics.com.au/Portals/56/High%20Performance/Documents/OG/Portal/Rio%202016_Conditions%20of%20

- Participation_National%20Olympic%20Committee.pdf ('I agree that any dispute or claim arising in connection with my participation at the 2016 Games, not resolved after exhaustion of the legal remedies established by my NOC, the International Federation governing my sport, Rio 2016 and the IOC, shall be submitted exclusively to the Court of Arbitration for Sport ('CAS') for final and binding arbitration in accordance with the Arbitration Rules for the Olympic Games, and the Code of Sports-related Arbitration. The seat of arbitration shall be in Lausanne, Switzerland and the language of the procedure English. The decisions of the CAS shall be final, binding and non-appealable, subject to the appeal to the Swiss Federal Court. I hereby waive my right to institute any claim, arbitration or litigation, or seek any other form of relief, in any other court or tribunal.')
- 36 *Pechstein v DOSB (Award)* (2010) OG 10/004, available at <http://jurisprudence.tas-cas.org/Shared%20Documents/OG%2010-004.pdf>; *P v ISU (Award)* (2009) CAS 2009/A/1912 <<http://jurisprudence.tas-cas.org/Shared%20Documents/1912,%201913.pdf>.
- 37 *Pechstein v ISU*, Case 4A_144/2010 (28 September 2010), translation available at <http://www.swissarbitrationdecisions.com/sites/default/files/28%20septembre%202010%204A%20144%202010.pdf>; *Pechstein v ISU*, Case 4A_612/2009 (10 February 2010), translation available at <http://www.swissarbitrationdecisions.com/sites/default/files/10%20fevrier%202010%204A%20612%202009.pdf>.
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- 39 German Federal Court, KZR 6/15 (7 June 2016), translation available at http://www.tas-cas.org/fileadmin/user_upload/Pechstein__ISU__translation_ENG_final.pdf.
- 40 *Ibid* [45].
- 41 *Ibid* [46].
- 42 *Ibid* [23]-[39].
- 43 *Ibid* [62].
- 44 *History of the CAS*, n 3 above.
- 45 *Ibid*.
- 46 CAS, 'The Court of Arbitration for Sport (CAS) Has Opened Its Two Temporary Offices to Resolve Legal Disputes and Doping Cases on the Site of the Rio 2016 Olympic Games' (26 July 2016), available at http://www.tas-cas.org/fileadmin/user_upload/Media_Release_CAS_Rio_ENG.pdf.
- 47 CAS, *Arbitration Rules for the Olympic Games*, art 11, available at http://www.tas-cas.org/fileadmin/user_upload/CAS_Arbitration_Rules_Olympic_Games__EN_.pdf.
- 48 *Ibid* art 18.
- 49 *Ibid* art 1.
- 50 CAS, 'The First Cases Have Arrived at the Court of Arbitration for Sport (CAS) in Rio' (31 July 2016), available at http://www.tas-cas.org/fileadmin/user_upload/Media_Release__English__1.pdf.
- 51 IOC, 'IOC Makes Doping Results Management and Sanctioning Independent,' 1 March 2016, available at <https://www.olympic.org/news/ioc-makes-doping-results-management-and-sanctioning-independent>.
- 52 CAS, 'The Court of Arbitration for Sport (CAS) Has Opened Its Two Temporary Offices to Resolve Legal Disputes and Doping Cases on the Site of the Rio 2016 Olympic Games' (26 July 2016), available at http://www.tas-cas.org/fileadmin/user_upload/Media_Release_CAS_Rio_ENG.pdf.
- 53 *Ibid*.
- 54 CAS, 'Arbitration Rules Applicable to the CAS Anti-Doping Division', art 18, available at http://www.tas-cas.org/fileadmin/user_upload/Arbitration_Rules_for_the_Anti-doping_Division__final_.pdf.
- 55 *Ibid* art 21.
- 56 *Ibid* art 1.
- 57 CAS, 'Last Decision Issued by the Anti-Doping Division of the Court of Arbitration for Sport' (21 August 2016), available at http://www.tas-cas.org/fileadmin/user_upload/Media_Release_CAS_ADD__English__21_August.pdf.
- 58 CAS, 'The CAS Ad Hoc Division in Rio Closes with a Total of 28 Procedures Registered' (21 August 2016), available at http://www.tas-cas.org/fileadmin/user_upload/Media_Release__English__Salimi_final.pdf.
- 59 *Ibid*.
- 60 *Ibid*.
- 61 IPC, 'The IPC Suspends the Russian Paralympic Committee with Immediate Effect' (7 August 2016), available at <https://www.paralympic.org/news/ipc-suspends-russian-paralympic-committee-immediate-effect>.
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- 63 *Karabelshikova v World Rowing Federation (Award)* (2016) CAS OG 16/13, available at http://www.tas-cas.org/fileadmin/user_upload/Media_Release__English__Salimi_final.pdf.
- 64 *Ibid* [7.1].
- 65 *Ibid* [7.18].
- 66 *Ibid* [7.17].
- 67 *Ibid* [7.26].
- 68 *Ibid*.
- 69 *Ifimova v ROC (Award)* (2016) CAS OG 16/04, available at http://www.tas-cas.org/fileadmin/user_upload/FINAL_AWARD_OG_16-04.pdf.
- 70 See e.g., Owen Gibson and Shaun Walker, 'IOC's Response to Russia Doping Scandal Nothing More Than a Confused Mess', *The Guardian* (London), 9 August 2016.



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Law Graduate, Corrs Chambers
Westgarth

A graduate of the University of Melbourne, Chris recently joined Corrs' Melbourne office. He worked in the sports betting industry before law school and regularly writes on sports integrity matters.

IPBA New Members June – August 2016

We are pleased to introduce our new IPBA members who joined our association from June – August 2016. Please welcome them to our organisation and kindly introduce yourself at the next IPBA conference.

China , Wen Wei Gu <i>Jin Mao P.R.C.Lawyers</i>	Netherlands , Yan Yang <i>AKD lawyers</i>
Hong Kong , Albert So <i>Hong Kong Mediation and Arbitration Centre</i>	New Zealand , Claire Mansell <i>Martelli McKegg</i>
India , Sanjeev Sharma <i>Luthra & Luthra Law Offices</i>	New Zealand , Michael McCarthy <i>Lowndes</i>
India , Monika Singh <i>August Legal</i>	Philippines , Leopoldo Aquino <i>Aquino & Aquino Law Office</i>
Malaysia , Sadir Al Kherdaji <i>Cham Consultancy LLC</i>	United Arab Emirates , Abdalla Alzari <i>United Advocates</i>
New Caledonia , Cameron Diver <i>The Pacific Community (SPC)</i>	Vietnam , Binh Tran <i>LNT & Partners</i>

Members' Notes

Stephan Wilske, Germany

Stephan Wilske presented a paper entitled 'Linguistic and Language Issues in International Arbitration—Problems, Pitfalls and Paranoia' at the Taipei International

Conference on Arbitration and Mediation (29-30 August 2016 in Taipei) which will be published in the next issue of the Contemporary Asia Arbitration Journal.

Bui Tien Long, Vietnam

Through earning a Master of Law (LL.M) at Transnational Law and Business University in Seoul, Korea (TLBU), and being a Scholar of the IPBA, Bui Tien Long has extended his knowledge of international law and cross-border transactions. In addition to his law practice, Mr Bui has

written about International Public Procurement, the Vietnam Chapter published in 2014 by Thomson Reuters. He has also actively participated in writing tax law articles with an Australia tax lecturer.



An Invitation to Join the Scholarship Programme of Inter-Pacific Bar Association

The Inter-Pacific Bar Association ('IPBA') is pleased to announce that it is accepting applications for the IPBA Scholarship Programme to enable practising lawyers to attend the IPBA's 27th Annual General Meeting and Conference to be held in Auckland, New Zealand, 6-9 April 2017.

What is the IPBA?

The 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 organising conference held in Tokyo attended by more than 500 lawyers from throughout Asia and the Pacific. Since then, it has grown to become the pre-eminent organisation in respect of law and business within Asia with a membership of over 1500 lawyers from 65 jurisdictions around the world. IPBA members include a large number of lawyers practising in the Asia-Pacific region and throughout the world that have a cross-border practice involving the Asia-Pacific region.

What is the IPBA Annual Meeting and Conference?

The highlight of the year for the IPBA is its annual multi-topic four-day conference. The conference has become the 'must attend event' for international lawyers practising in the Asia-Pacific region. In addition to plenary sessions of interest to all lawyers, programmes are presented by the IPBA's 22 specialist committees and one Ad Hoc committee. The IPBA Annual Meeting and Conference provides an opportunity for lawyers to meet their colleagues from around the world and to share the latest developments in cross-border practice and professional development in the Asia-Pacific region. Previous annual conferences have been held in Tokyo, Sydney, Taipei, Singapore, San Francisco, Manila, Kuala Lumpur, Auckland, Bangkok, Vancouver, Hong Kong, New Delhi, Seoul, Bali, Beijing, Los Angeles and Kyoto.

What is the IPBA Scholarship Programme?

The IPBA Scholarship Programme was originally established in honour of the memory of M.S. Lin of Taipei, who was one of the founders and a Past President of the IPBA. Today it operates to bring to the IPBA Annual Meeting and Conference lawyers who would not otherwise be able to attend and who would both contribute to, and benefit from attending, the IPBA Annual Conference. The Scholarship Programme is also intended to endorse the IPBA's mission to develop the law and its practice in the Asia-Pacific region. Currently, the scholarships are principally funded by The Japan Fund, established and supported by lawyers in Japan to honour IPBA's accomplishments since its founding, and the Host Committee of the Annual Meeting and Conference in Vancouver, Canada, 2014.

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

Who is eligible to be an IPBA Scholar?

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

1. Lawyers from Developing Countries
To be eligible, the applicants must:
 - a. be a citizen of and be admitted to practice in Vietnam, Laos, Cambodia, Myanmar, Mongolia, Bangladesh or the Pacific Islands;
 - b. be fluent in both written and spoken English (the conference language); and
 - c. currently maintain a cross-border practice or desire to become engaged in cross border practice.
2. Young Lawyers
To be eligible, the applicants must:
 - a. be under 35 years of age at the time of application and have less than seven years of post-qualification experience;
 - b. be fluent in both written and spoken English (given this is the conference language);
 - c. have taken an active role in the legal profession in their respective countries;
 - d. currently maintain a cross-border practice or desire to become engaged in cross border practice; and
 - e. have published an article in a reputable journal on a topic related to the work of one of our committees or have provided some other objective evidence of committed involvement in the profession.
 - f. of our committees or have provided some other objective evidence of committed involvement in the profession.

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

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

How to apply to become an IPBA Scholar

To apply for an IPBA Scholarship, please obtain an application form and return it to the IPBA Secretariat in Tokyo no later than **31 October 2016**. Application forms are available either through the IPBA website (ipba.org) or by contacting the IPBA Secretariat in Tokyo (ipba@ipba.org).

Please forward applications to:

The IPBA Secretariat

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

Telephone: +81-3-5786-6796 Facsimile: +81-3-5786-6778 E-mail: ipba@ipba.org

What happens once a candidate is selected?

The following procedure will apply after selection:

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



An Invitation to Join the Inter-Pacific Bar Association

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

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

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

IPBA Activities

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

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

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

APEC

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

Membership

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

- | | |
|--|---------|
| • Standard Membership | ¥23,000 |
| • Three-Year Term Membership | ¥63,000 |
| • Corporate Counsel | ¥11,800 |
| • Young Lawyers (35 years old and under) | ¥6000 |

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

Membership renewals will be accepted until 31 March.

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

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

Corporate Associate

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

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

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

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

- Annual Dues for Corporate Associates ¥50,000

Payment of Dues

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

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

IPBA Secretariat

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

See overleaf for membership
registration form





IPBA SECRETARIAT

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

IPBA MEMBERSHIP REGISTRATION FORM

MEMBERSHIP CATEGORY AND ANNUAL DUES:

- Standard Membership ¥23,000
- Three-Year Term Membership ¥63,000
- Corporate Counsel ¥11,800
- Young Lawyers (35 years old and under) ¥6,000

Name: _____ Last Name _____ First Name / Middle Name _____

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

Firm Name: _____

Jurisdiction: _____

Correspondence Address: _____

Telephone: _____ Facsimile: _____

Email: _____

CHOICE OF COMMITTEES (PLEASE CHOOSE UP TO THREE):

- | | |
|---|---|
| <input type="checkbox"/> Anti-Corruption and the Rule of Law (Ad Hoc) | <input type="checkbox"/> Insurance |
| <input type="checkbox"/> APEC | <input type="checkbox"/> Intellectual Property |
| <input type="checkbox"/> Aviation Law | <input type="checkbox"/> International Construction Projects |
| <input type="checkbox"/> Banking, Finance and Securities | <input type="checkbox"/> International Trade |
| <input type="checkbox"/> Competition Law | <input type="checkbox"/> Legal Development and Training |
| <input type="checkbox"/> Corporate Counsel | <input type="checkbox"/> Legal Practice |
| <input type="checkbox"/> Cross-Border Investment | <input type="checkbox"/> Maritime Law |
| <input type="checkbox"/> Dispute Resolution and Arbitration | <input type="checkbox"/> Scholarship |
| <input type="checkbox"/> Employment and Immigration Law | <input type="checkbox"/> Tax Law |
| <input type="checkbox"/> Energy and Natural Resources | <input type="checkbox"/> Technology, Media & Telecommunications |
| <input type="checkbox"/> Environmental Law | <input type="checkbox"/> Women Business Lawyers |
| <input type="checkbox"/> Insolvency | |

I AGREE TO SHOWING MY CONTACT INFORMATION TO INTERESTED PARTIES THROUGH THE APEC WEB SITE. YES NO
METHOD OF PAYMENT (PLEASE READ EACH NOTE CAREFULLY AND CHOOSE ONE OF THE FOLLOWING METHODS):

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

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

Signature: _____ Date: _____

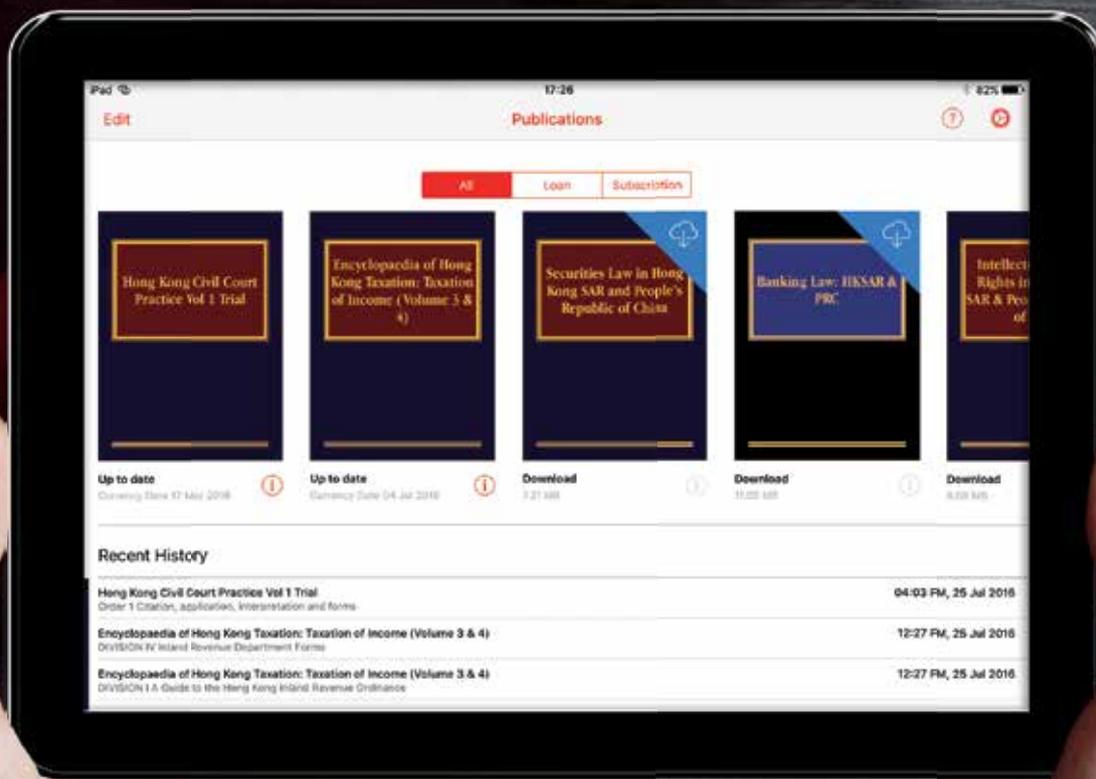
PLEASE RETURN THIS FORM TO:

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

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"The runner up for the up-and-coming regional arbitral institution of the year (2014)" - Global Arbitration Review



BAC/BIAC Profile

The Beijing Arbitration Commission (BAC), also known as the Beijing International Arbitration Center (BIAC), was established in 1995 as a non-governmental arbitration institution, and became the first self-funded Chinese arbitration institution in 1999. It provides institutional support as an independent and neutral venue for the conduct of domestic and international arbitration and ADR proceedings. It is operated by a Secretariat headed by its Secretary General under the supervision of its Committee. The BAC/BIAC Arbitration Rules 2015 were unveiled on December 4, 2014, and came into force on April 1, 2015. The 2015 rules widely adopt UNCITRAL Arbitration Rules and further accept up-to-date international practice.

BIAC

Beijing Arbitration Commission
Beijing International Arbitration Center

Tel: +86 10 6566 9856

Fax: +86 10 6566 8078

Email: bjac@bjac.org.cn

Address: 16/F, China Merchants Tower,
No. 118 Jian Guo Road,
Chaoyang District, Beijing 100022, China



Hearing Room

BAC/BIAC Growth

- From 7 cases filings in 1995 to over 27,000 case in total by 2015
- 1500+ new filings on average per year since 2005
- 600+ international cases in total
- Parties from various jurisdictions including USA, UK, Germany, Australia, Japan, South Korea, Singapore, Hong Kong and Taiwan, etc.
- The sum in dispute of around 17.6 billion RMB (approx. 2.68 billion USD or 2.46 billion EUR) per year on average since 2011 with a highest claim amount of 10 billion RMB (Approx. 1.52 billion USD or 1.4 billion EUR) in 2015

Recommended BAC/BIAC Model Clause:

All disputes arising from or in connection with this contract shall be submitted to Beijing Arbitration Commission / Beijing International Arbitration Center for arbitration in accordance with its rules of arbitration in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.