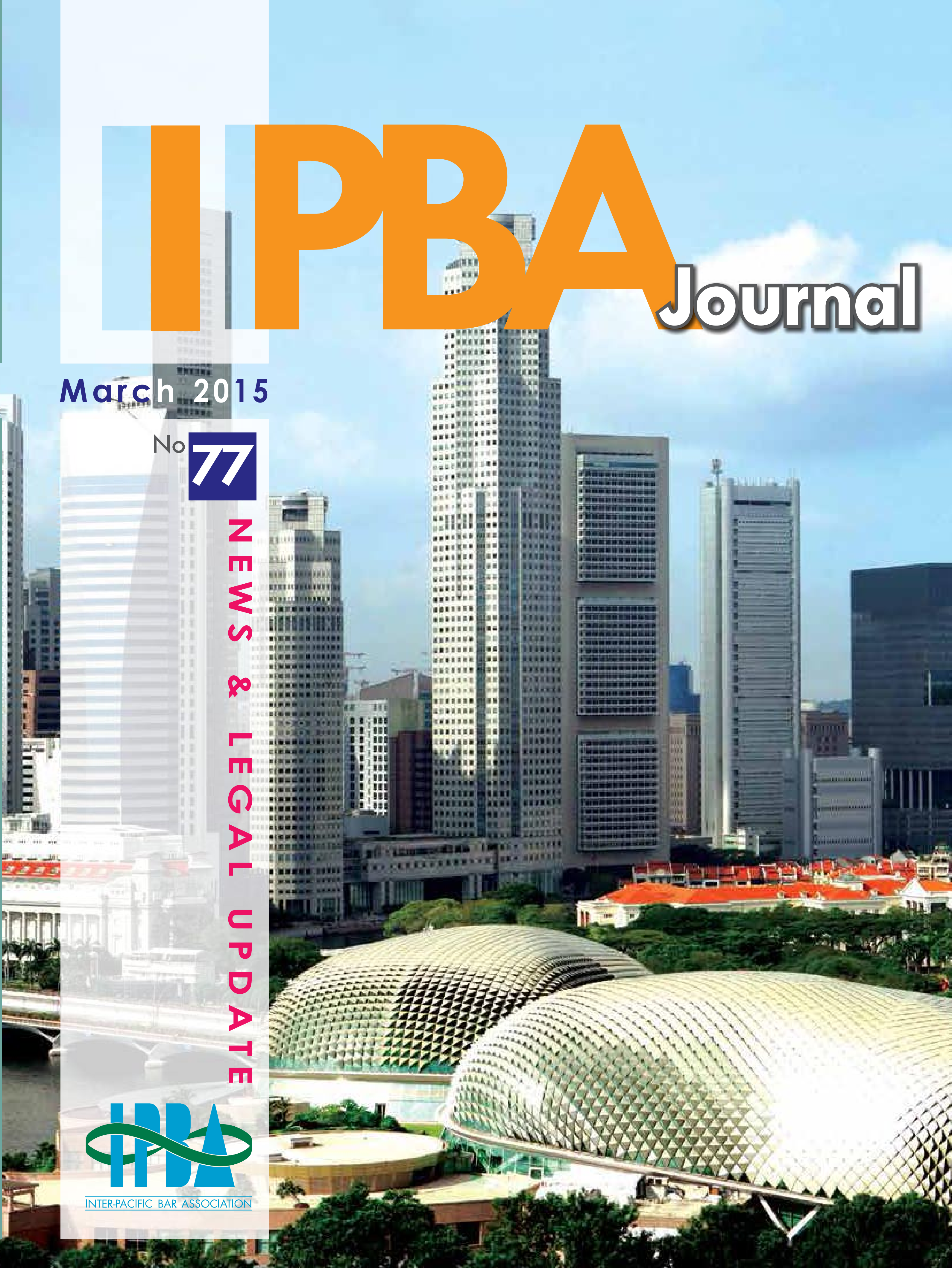

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March 2015

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The President's Message

William A. Scott
President

Dear Colleagues,

Only a few months remain until our next Annual General Meeting and Conference in Hong Kong, 6-9 May 2015. This event will mark two significant milestones in the Association's history: the IPBA's first return to Hong Kong since the memorable conference hosted by our colleagues there in 2002, and a celebration of the 25th Anniversary of the founding of the IPBA in 1991.

Under the energetic and able leadership of IPBA President-Elect, Huen Wong, this year's conference promises to be a truly outstanding event. With a theme of 'Vision for the Future' and situated in the world-class Hong Kong Convention & Exhibition Centre, the substantive programme will kick off with a keynote address by Chief Justice Ma, followed by a plenary session featuring leaders from the world of Asian finance and politics, and a full roster of Committee presentations focusing on a wide range of practice areas. On the social side, delegates and their accompanying persons will come together to enjoy horse racing during the Welcome Reception at the historic Jockey Club in Happy Valley on 6 May, sample a taste of 'Old Hong Kong' at the Cultural Evening on 7 May, and conclude on 8 May by donning black-tie or national dress for a special gala dinner at the Hong Kong Convention Centre. There will also be an extensive accompanying persons' programme and two opportunities for the golfers among us to test their skills on courses in Hong Kong and Macau. In keeping with IPBA tradition, the combination of these events will offer delegates excellent and varied opportunities to meet fellow lawyers from around the world, reconnect with old friends and make many new ones. I encourage all IPBA members to attend HK 2015.

My term as your President will end with the AGM in Hong Kong. I would therefore like to take the opportunity to look back on my involvement with the IPBA over the last 17 years. My progress to the leadership of the IPBA followed a well-trodden and rewarding path. The very first conference I attended was in Auckland in 1998 and I have been fortunate to be able to attend all subsequent conferences but two, since. More recently, I've also attended Mid-Year Council meetings in venues as widespread as London, Hanoi, Kuala Lumpur, Zurich and São Paulo/Rio de Janiero. In common with other Officers, I first became involved as a speaker for various Committee presentations, then served as the Jurisdictional Council Member for Canada for several years before stepping up and, with the support of my fellow Canadian members, volunteering to organise the Vancouver conference last year. Over the last three years, I have served in increasingly responsible Officer's positions culminating in the Presidency. Throughout, I have been unfailingly impressed by the willingness of fellow IPBA leaders to devote substantial amounts of personal time on a volunteer basis toward the success of the IPBA.

That said, the most valuable outcomes of my involvement with the Association have been the many close and enduring friendships I (and my wife) have made with other IPBA members (and their spouses) from around the world. I believe this is an aspect of membership of the IPBA which sets it apart from many other bar associations but, like so many other things in life, one needs to work at it to reap the benefits.

Turning to this year's accomplishments, we have succeeded in establishing stronger relations with a number of sister organisations, and will aim to build on these efforts in the years ahead. As members will also be aware, leadership of the IPBA will be asking the membership to approve the incorporation of the IPBA at the upcoming AGM. A good deal of time has been spent by our Constitutional Review Committee, the members of which considered very carefully the issues related to this important move in the Association's history. Consultation has been widespread and the input we have received from Council members has been very constructive. While various concerns have been raised, I believe these have been addressed in an open manner and that the proposed new Constitution fairly reflects both the current practices of the Association and good governance. I encourage members to approve the incorporation proposal.

Finally, I would like to extend a personal vote of thanks to our Secretariat for their constant support. As they have for many years, Rhonda Lundin, Yukiko Okazaki, Midori Hirano and their other colleagues at TGA Inc. work hard behind the scenes to ensure that the business of the IPBA runs efficiently on a day-to-day basis. They are also a regular source of suggestions on ways to improve membership benefits and have a proven ability to execute projects. Their contribution to the IPBA cannot be underestimated.

I look forward to welcoming you to Hong Kong in May!

William A. Scott
President

IPBA Best Paper Prize Program Guidelines
IPBA 2015 Hong Kong

1. The competition is open to all IPBA members who have registered for the IPBA Annual Meeting and Conference in Hong Kong, 6-9 May 2015.
2. Articles submitted must focus primarily on legal issues that would be of interest to business and commercial lawyers around the world.
3. The competition is open to articles of up to 4,500 words excluding footnotes and bibliography. Entries that exceed the word limitation will be disqualified.
4. All entries must be in English, original, unpublished and not submitted or accepted elsewhere at the time of submission.
5. No more than one article may be submitted by the same author. Co-authored articles will not be accepted.
6. Entries must be received by the IPBA Secretariat at ipba@ipba.org by **9 April 2015**. Late or incomplete articles will not be accepted for consideration.
7. A summary of the best paper will be published in the IPBA Journal. The paper selected to be published shall follow the IPBA's Publications Committee Guidelines, and copyright to the paper will belong to the IPBA.
8. The best paper will be selected by the Best Paper Selection Committee comprising two to three Past Presidents of the IPBA.
9. Selection of the best paper will be based on: a) creativity and depth of the legal analysis; b) thoroughness of the legal research; and c) structure and writing style.
10. The author of the best paper will be acknowledged and presented with a certificate at the IPBA Annual Meeting and Conference in Hong Kong.
11. Any inquiries regarding this Best Paper Prize Program should be sent to the IPBA Secretariat at ipba@ipba.org.
12. The Publications Committee will be responsible for the implementation of this program.

For further information, please contact **Maxine Chiang**, Chairperson of the Publications Committee: **maxinechiang@chianglee.com**

The Secretary-General's Message

Yap Wai Ming
Secretary-General

Dear IPBA Members,

How time flies! I am writing my final message as Secretary-General in this journal before my term ends at the conclusion of the Annual General Meeting in Hong Kong on 9 May 2015. It has been an exciting four-year term, including two years acting as a deputy to Alan Fujimoto. I am indeed honoured to serve as Secretary-General for this august organisation that is celebrating its silver jubilee this year.

My first involvement with the IPBA was as a speaker at a regional conference in 1995 in Jakarta. The following year in 1996, I attended my first IPBA Annual Meeting and Conference in Manila. I progressed to become the Jurisdictional Council Member for Malaysia several years later. I made many friends in the IPBA. When I moved my legal practice back from Malaysia to Singapore, it was my privilege to be requested by Mrs Lee Suet-Fern to be the chair of the organising committee for the Singapore annual conference in 2010 when she chaired the host committee.

The hosting of the Singapore IPBA Annual Conference was certainly memorable and most eventful. The conference was very successful as we managed to register more than 1,000 delegates with top world leaders such as Al Gore and Lee Kuan Yew speaking at our conference. The conference was unfortunately marred by the inadequate support of the then conference facility which was trying its best to host its first large-scale event although it had not had an operational run-in to test its facilities. The organising committee then held back some payments from the conference facility operator and a widely publicised dispute ensued. The dispute was amicably settled with favourable terms to us and we netted a tidy surplus for the IPBA as a result. We were fortunate to have set up a special purpose vehicle to run the Singapore conference and that afforded the organising committee members personal liability protection.

That event was probably the start of an introduction for my nomination as Deputy Secretary-General of the IPBA. In my initiation to this leadership role, I was indeed very grateful for the guidance of Gerald Sumida (then Secretary-General) and Alan Fujimoto (who succeeded Gerald) for promoting the 'co-chair' concept of the Secretary-General's post despite the designation of actual Officer and Deputy Officer positions. Decisions were jointly made and it allowed the deputy to participate in all decision-making processes so that when he or she assumes the actual officer position, the two years of experience as a 'co-chair' would have built up sufficient working experience to take the lead as the main position holder. I have written about this in my previous messages and I hope the tradition can be practised by all the Officer positions and Chairs of the various committees. This allows for smooth succession planning for the IPBA leadership.

I have also written about the transient nature of the officer bearers whose terms are at most four to six years at the longest (original and extended terms). New Officers come with different experience and working style. Most would not have the working knowledge of the IPBA as an institution to guide them in their decision-making processes. Invariably, Officers would rely on the Secretariat to support their role. In some previous cases, the Secretariat has had to take over as the de facto chair of certain positions when the appointed Officers did not discharge their duties. It is undeniable that our IPBA Secretariat is the central nerve system of our organisation since our founding 25 years ago. It is crucial that the Secretariat be strengthened and its continuity and succession planning be carefully planned.

I am indeed grateful that Midori Hirano, despite her retirement from TGA Inc, the company that provides secretariat support to the IPBA, has continued to provide valuable guidance and insight. Rhonda Lundin has stepped in nicely to take over from Midori as the manager fully dedicated to serving the IPBA. Rhonda has served with dedication and loyalty. I am glad that the initiatives of virtualising the Secretarial records have to a large extent been completed; it's an ongoing process as the activities of the Association continue. We are now able to access the full archives of the IPBA, and Council members can have their dedicated pages to coordinate and collaborate their activities and to file reports online. This will definitely assist in building up institutional knowledge of the IPBA and making it much easier for future incoming new Officers to take on their role efficiently and with full back up of the Secretariat records.

I am also grateful to Azeus Systems Limited for offering us a gratis use to date of their Convene Board Portal (formerly known as 'Anywhere Pad'; it is also offered exclusively to IPBA members on a trial basis) which is a marvelous electronic workspace that lets us securely access meeting materials, past and present, and provides functions for us to prepare for our Council meetings. I used it for our Council meeting in Rio de Janeiro last year. I was exceedingly pleased to learn that Woo Chang-Rok, our Jurisdictional Council Member for Korea, has become a dedicated user of the Convene Board app and he came to the Council meeting then with all his meeting materials stored on his Samsung Note mobile phone duly updated and was able to follow the discussions online. Convene Board Portal also doubled up as our virtual data storage.

I hope these efforts will assist our Council members to better discharge their duties and will further maximise the efficiency of our Secretariat.

The idea of incorporating the IPBA was in part an initiative that was born out of certain administrative issues that I have encountered when dealing with finances of the Secretariat. Alan Fujimoto and I had concluded that incorporation is inevitable in view of the current challenges that affect the Secretariat and of the potential personal exposure that Officers may have in continuing with its current unincorporated structure of the IPBA. Our interactions with other international bar associations have revealed that all of them are incorporated in some form or other in suitable jurisdictions where they operate.

These issues have been discussed at length for the past few council meetings. Incorporation of the IPBA will allow us to strengthen our corporate governance with a formal legal structure over our current unincorporated status. It will also allow us to streamline the operations of our bank accounts and make reporting to authorities much easier and more transparent. As an incorporated entity, our audit requirements will also be fully compliant with international financial reporting standards. Post incorporation, the IPBA will also be able to get directors and officers liability insurance coverage.

By the time you read this message, you would have received notice of the Annual General Meeting where one of the additional items on the agenda is to approve the incorporation of the IPBA as a company limited by guarantee to be established in Singapore. In addition, the Constitution Review Committee headed by Ravi Nath has completed its task and the proposal for a revised IPBA constitution to coincide with the requirements of incorporation will be tabled for adoption at the same meeting in Hong Kong.

Once the incorporation and the new constitution are approved by the general meeting, my work (albeit in a different capacity) will continue in the background by assisting the IPBA with the incorporation follow-up actions. Due to the legal nature of a company incorporated in Singapore, I will temporarily serve as its Singapore resident director and also act as the company secretary as this is a statutory requirement of Singapore Companies Law until such time as there is a Singapore resident director from among the new Officers of the IPBA to be appointed in future. The role of a company secretary is different from that of the Secretary-General and it will be restricted to ensuring compliance with statutory filings and records.

I hope to see all of you in Hong Kong for our 25th Anniversary of the IPBA.

All the very best!

Yap Wai Ming
Secretary-General

IPBA Upcoming Events

Event	Location	Date
IPBA Annual General Meeting and Conference		
25th Annual General Meeting and Conference	Hong Kong	May 6-9, 2015
26th Annual General Meeting and Conference	Kuala Lumpur	April 13-16, 2016
27th Annual General Meeting and Conference	Auckland, New Zealand (proposed)	April 13-16, 2017
IPBA Mid-Year Council Meeting		
2015 Mid-Year Council Meeting (Council Members only)	Dubai, UAE	October 23-25, 2015
IPBA Local and Regional Events		
IPBA "Women of Law, Women of Exception" Dinner	Paris, France	March 4, 2015
Regional Conference (in conjunction with the Mid-Year Council Meeting; open to the public)	Dubai, UAE	October 26, 2015
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Global Competition Review's "GCR Live 4th Annual Law Leaders Asia-Pacific"	Singapore	March 5-6, 2015
IFLR/IPBA Asia M&A Forum 2015	Hong Kong	March 10-11, 2015
Legal Era Conclave 2015 India Awards on Business & Law	New Delhi, India	March 12-13, 2015
Chartered Institute of Arbitrators' Centenary Year Celebration	Hong Kong	March 19-20, 2015
Kluwer Law International's "Turkey & ME: Global Competition Forum"	Istanbul, Turkey	March 25, 2015
InnoXcell's "Asia Legal & Regulatory Compliance 2015"	Hong Kong	April 14-16, 2015
Kluwer Law International's "Japan: Global Competition Forum"	Tokyo, Japan	May 21, 2015
Marcus Evans' "Cross Border Contracts & Arbitration"	Kuala Lumpur, Malaysia	May 25-26, 2015
Kluwer Law International's "Qatar: International Arbitration Summit"	Qatar	June 10, 2015
Singapore Academy of Law's "Technology Law Conference 2015: The Future of Money and Data"	Singapore	June 29-30, 2015

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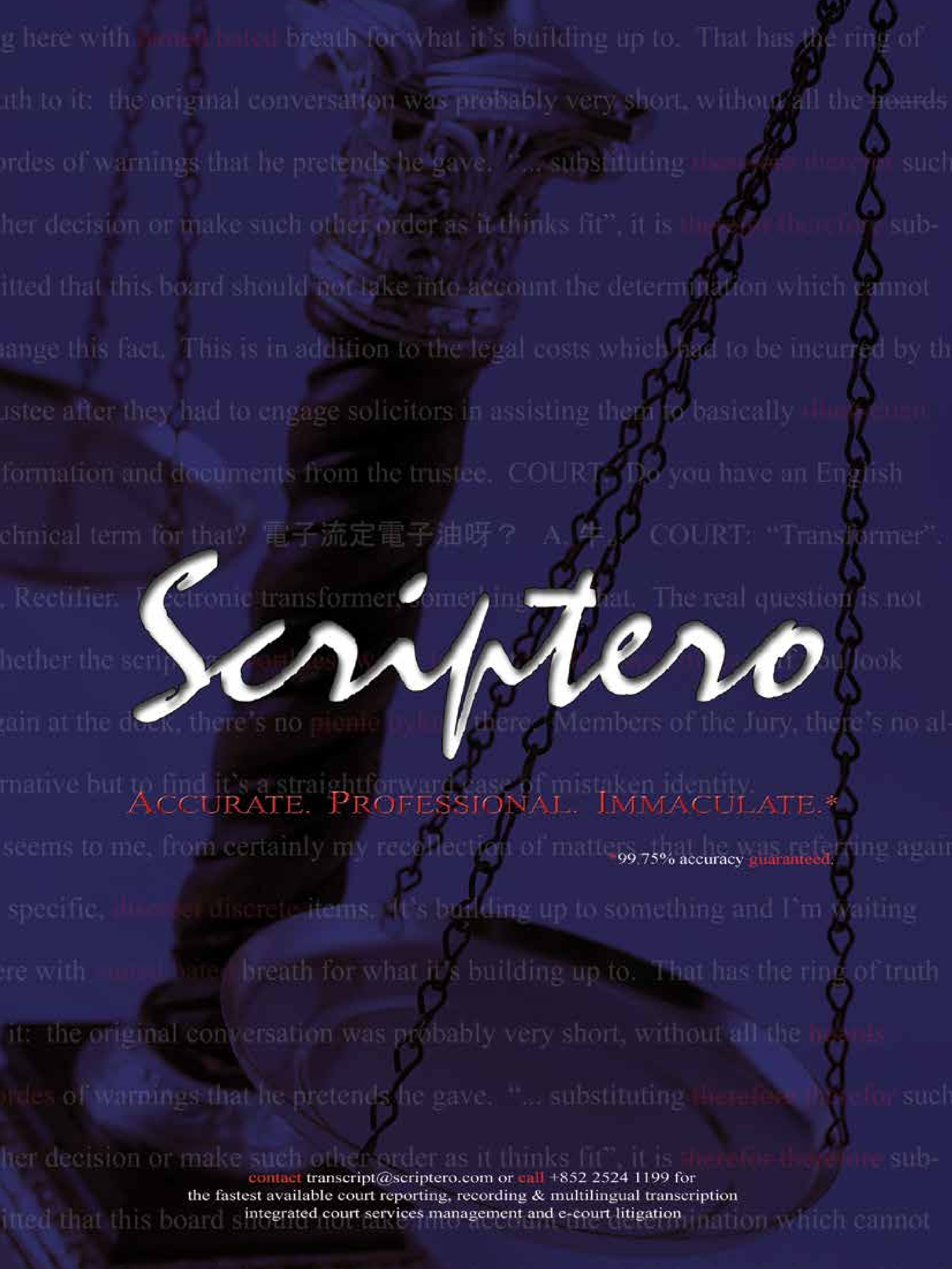
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India-ASEAN FTA in Services and Investments: Countdown to Implementation

After a lengthy five-year negotiation period, the India-ASEAN Free Trade Agreement in Services ('Services FTA') was signed at the end of 2014. If successfully implemented, the new Services FTA would work hand-in-hand with the existing India-ASEAN Free Trade Agreement in Goods ('Goods FTA') to reach the bi-lateral trade target of US$100 billion by the end of 2015. Despite being signed, the agreement is expected to come into force on 15 July 2015 after having gone through ratification by each ASEAN member country. Whilst it may seem that as the agreement stands there would be no need for any further action from the Indian camp, there exist looming hurdles for India to get over in order for the Services FTA to reach its full potential. This article[1] looks to analyse the plausible effects the Services FTA would have on the Southeast Asian region by determining who the intended beneficiaries are and the steps India and ASEAN must take to reach the ambitious trade target.

In 2009, India and the Association of Southeast Asian Nations ('ASEAN') signed and later ratified a free trade agreement relating to goods. On 1 July 2015, it appears that the long-awaited India-ASEAN FTA covering services and investments will similarly come into effect following the necessary ratification by the bloc members. Though the formal conclusion to negotiations regarding this agreement came on 20 December 2012, the signing process was one marred with deferment.[2] Despite being negotiated over the past five years and signed at the end of last year, the content of the ASEAN-India Trade Agreement in Goods (the 'Services FTA') and parallel ASEAN-India Investment Agreement[3] package is not yet in the public domain. The Services FTA with ASEAN represents the first trade pact inked by the National Democratic Alliance government despite being negotiated and readied under the previous administration.[4] Ever since entry into office, Prime Minister Narendra Modi has ordered a comprehensive review of all bilateral and multilateral trade pacts in order to develop a comprehensive model for negotiating such agreements in the future.

From the general information available thus far, the Services FTA extends to telecommunications, information technology, transportation and logistics, financial services, education, real estate, business services, health and community/social services and the 'Mode IV' free movement of natural persons and professionals. Such an agreement shows great promise in the long run, allowing for the generally accepted advantages that come with deeper integration and the harnessing of new markets, greater competition and specialisation, efficiency and freedom of movement and growth as a whole. While the deal has been completed, significant challenges still exist in getting over the line in terms of ratification by each individual member country and further negotiations into the mutual recognition agreements. Such issues are the essence of trade negotiation, with a multitude of stakeholders and domestic pressures adding uncertainty to the success or otherwise of final implementation. However, if successfully implemented within the time limit, the breadth of a new Services FTA will have far-reaching effects.

The Past

The original structure of the ASEAN-India Free Trade Agreement was contemplated to be an agreement on both goods and services, and began as the Framework Agreement on Comprehensive Economic Partnership ('FACEP') in 2003. Negotiation of the goods element of the FTA (the ASEAN-India Trade Agreement in Goods ('Goods FTA')) commenced in 2004 and was subsequently signed in 2009, coming into effect in 2010. The categories of tariff reductions per sector totalling over 4,000 product lines are to be gradually reduced between 2016 and 2019.

The negotiations of the parallel Services FTA concluded in Delhi on 20 December 2012, and is structured following an '8+1+1' model, that is, one agreement between India and Myanmar, the Lao PDR, Cambodia, Vietnam, Brunei, Singapore, Malaysia and Thailand, and two separate agreements between India and Indonesia and India and the Philippines. This model provides a deviation from positions of Free Trade Agreements ('FTA') between ASEAN and China and ASEAN and Japan, where the agreements relating to goods, services and investments with China and the comprehensive agreement with Japan were negotiated with ASEAN as a whole. Critics have often stated that by not negotiating the India-ASEAN FTA as a whole package, which encompasses trade in goods, services and investments, left India in a weaker position during the negotiations of the Services FTA.

Trade in goods and services between India and ASEAN stood at US$76 billion in 2012-13, with the aim to increase to US$100 billion by 2015[5] and then to US$220 billion by 2022.[6] In addition to the overwhelming value of the Goods FTA, this ambitious target for both goods and services together is very much contingent upon the success of the Services FTA. During the recent ASEAN-India Summit held on 12 November 2014 in Myanmar, the leaders called for the early implementation of the Services FTA in order to fully utilise the Services FTA to its full potential and reach the bilateral target of US$100 billion by the end of 2015. On another note, during the same summit, the possibility of the early completion of the Thailand–Myanmar–India Trilateral Highway was called for; this would allow for greater connectivity of the two regions on all dimensions including physical, institutional and people-to-people linkages.[7]

The position of India's and ASEAN's service exports are already established in global terms, for 2011, totalling US$137 billion[8] and US$260 billion[9] respectively. According to recent statistics, nearly 58 percent of India's GDP comes from the service sector. If integration is to occur, it is clear that the service arm needs to be a comprehensive and effective instrument in order to reinvigorate the hopes of the economy to witness a service driven period of growth after the GDP growth slump observed from 2010 onwards.

The Framework

The FACEP[10] in its present form sets out a loose structure for the terms of negotiation of the Services element of the FTA. This general scope extends to the following:

- To 'progressively liberalise trade in services on a preferential basis with substantial sectorial coverage';
- Elimination of 'substantially all discrimination' between the parties, and/or the 'prohibition of new or more discriminatory measures with respect to trade in services';
- Expansion in the 'depth and scope of liberalisation' beyond those undertaken by India and ASEAN under the GATS (General Agreement on Trade in Services, a WTO instrument); and
- 'Enhanced cooperation in services...in order to improve efficiency and competitiveness, as well as to diversify the supply and distribution of services of the respective service suppliers of the parties'.

The Intended Beneficiaries Under the Services FTA

As noted earlier, the content of the Services FTA is not yet in the public domain and as such the exact scope of merits is difficult to determine; however, particular issues of note extend to the following:

(a) **Multi-Brand Retail** – India's guarded retail sector has long been coveted by foreign investors. Indonesia and Thailand in particular have, in recent times, developed a significant presence in their own respective markets, and are both looking to expand.

(b) **Business Process Outsourcing (BPO), Software and IT Enabled Services (ITeS)** – India's dominance in Software and ITeS has continued to expand in recent times, while Business Process Outsourcing (BPO) in general and Call-Centre Services in particular have seen overwhelming success in the Philippines whereby following its ambition to become the 'Call-Centre hub of Asia' and a major provider of IT services. India's Information and Communication Technology (ICT) Services account for 65.9 percent of its total services exports, with the Philippines at 67.3 percent.[11] ICT and BPO promises to be a central and contentious point in the impending Services FTA.

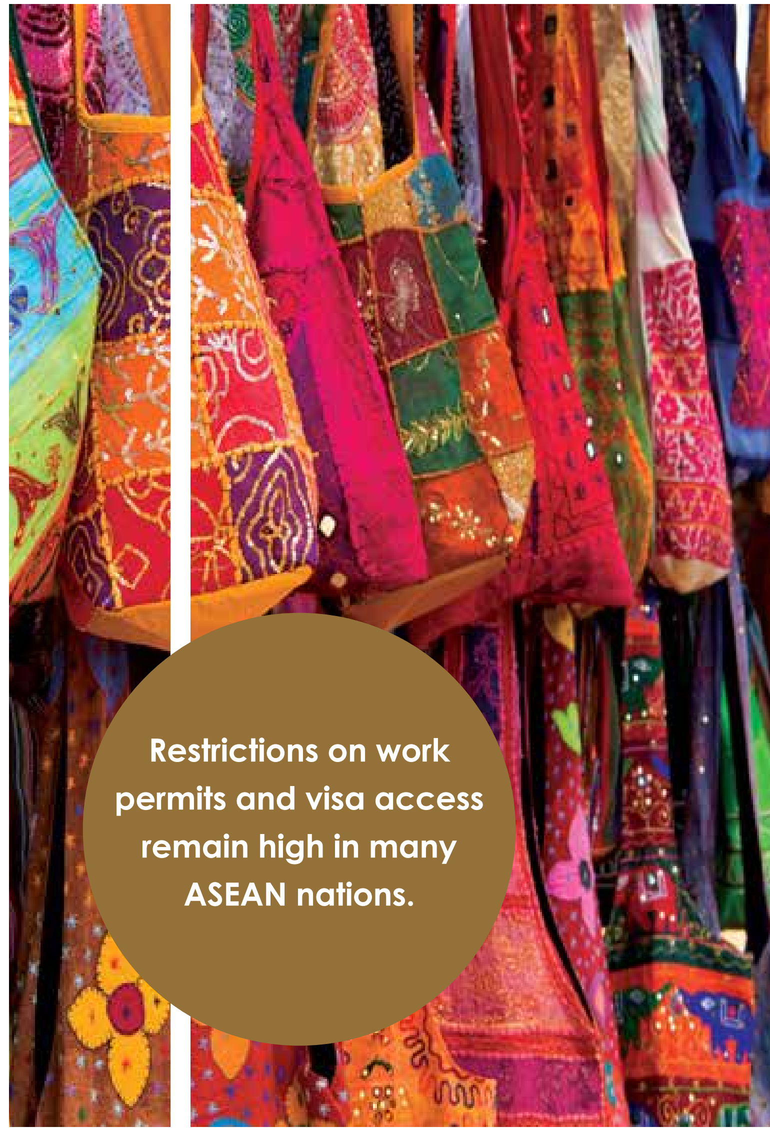
(c) **Restriction on Work Permits and Uniform Qualification Recognition** – Enabling the ease of movement for professionals, referred to as 'Mode IV' access, would provide greater flexibility in obtaining certain visas for a longer duration and for obtaining work permits. An additional feature complementing Mode IV access may be the implementation of 'Mutual Recognition Agreements' (MRAs), whereby certain professional qualifications obtained in India or in an ASEAN nation may be recognised uniformly across the region. Giving the different economic scenarios in each of the ASEAN countries and the opposition to the idea of free movement of professionals in certain ASEAN member nations, India will now be required to negotiate MRAs with each ASEAN member country individually. At present, Indian and ASEAN states require certain professional qualifications to be obtained locally for foreigners, or for certain domestically obtained licenses to be held, for example an Indian doctor wanting to practice in Thailand is required to obtain a license from the Medical Council of Thailand. There exist a number of foreseeable issues on this point which also exist in the realisation of the ASEAN Economic Community; mainly that the licensing examinations in countries like Vietnam and Thailand are all conducted in the native languages. Thus, a qualified and licensed doctor in India wanting to work in Thailand will be required to pass the licensing examinations in the Thai language. A harmonisation of qualifications and mutual recognition is desirable for free integration of professionals. Should such a harmonisation take place, India may be able to make significant inroads in health care and financial services. However, India has to act fast, especially in view of the fact that its competitors, China and Japan, are already in advance stages of their relationship with ASEAN.

Deloitte and the Federation of Indian Chambers of Commerce and Industry ('FICCI') report[12] that sectors of comparative advantage for India lie in ICT services, e-commerce, telecommunications and engineering, where the largest beneficiaries in ASEAN appear to be in construction services, shipping and transportation and logistics services. Integration of the Financial Services and Insurance Services sectors appear to provide a 'middle ground' on near equal stance. In the interim, it is projected that the growth of the ASEAN states (like the Lao PDR, Cambodia and Myanmar) is to require a greater degree of skilled labour and professionals in general terms, and that India may fill that gap, providing the means to grow the region by generating greater demand for Indian imported goods. These aside, the broader general benefits of a comparative advantage shift, unrestrained flows of capital and labour, the reduction of transaction costs, increase in competition and market efficiency all provide for the conventional notion of mutual benefit across the Southeast Asian corridor.

The Roadblocks

The Multi-Brand Retail sector in India is a long-standing and vexing issue. FDI relaxation came through in 2012, allowing for foreign holdings of up to 51 percent stake in an entity, which may be allowed or disallowed by the relevant Indian State government, rather than the Government of India (the Central Government).[13] Based on the news reports, this policy has been marred by controversy, giving rise to mass strikes which have resulted in only around half of Indian states accepting the position.[14] This lack of unity within India places limitations on the benefits that the Thai and Indonesian retailers expect to enjoy from a Services FTA via leveraging their comparative strengths in the retail industry. To compound the problem, the Indian position has the potential to regress further, as negotiations on the agreement were concluded before the election of the National Democratic Alliance led by new Prime Minister Narendra Modi (who had stated in its election manifesto prior to the election that FDI in Multi-Brand Retail would be repealed altogether); however, as of the end of 2014 speculation is mounting that the FDI policy will remain the same as under the previous United Progressive Alliance government. At the same time, Thailand and Indonesia have stated categorically that they require the unlimited ability to set up shop in India before ratification can occur. The implementation of the Services FTA may thus be a long way off.[15]

The Mode IV free movement of professionals was met with resistance from ASEAN states. The concern is that in opening the door to foreign professionals by allowing such movement in terms of visas could affect the employment of domestically trained professionals. Further concern exists over the potential for an influx of unskilled labour more generally which could lead to a raise unemployment rate in their respective countries. Restrictions on work permits and visa access remain high in many ASEAN nations, providing higher barriers in hiring foreign workers, particularly in certain sectors in Singapore.



Once the Services FTA is in effect, its success would be contingent on how long it would take to establish mutual recognition agreements with each member country. Until such time, the benefits offered to India under the Services FTA may be meagre and the five year negotiations would have been in vain.

National treatment goals in relation to hiring practices remain central to the success of the agreement. In addition to these issues, it appears that the uniform qualification recognition has been left out of the agreement, leaving individual Mutual Recognition Arrangements to be conducted on a bilateral basis between India and each ASEAN nation. It is unclear at this point what effect, if any, the Mode IV and professional recognition may have had on negotiations.

Regional Implications

The Goods FTA and the Services FTA are intended to give rise to the long awaited FACEP, with a view to create a much integrated regional market giving effect to India's 'Look East' policy, and ASEAN's ambition for expansion. India's current trade with ASEAN member countries seem to be import heavy under the Goods FTA. With the introduction of the Services FTA, it is expected that more balanced trade relations between the two regions with spawn.

Integration of Financial Services, IT services, Transport and Logistics, Education, BPO Services, Health Services, the recognition of professional qualifications and free movement of persons may provide for sweeping change. If successful, the region appears in a sense to be doing away with the dividing titles of 'South Asia' and 'Southeast Asia', but rather towards a unified region. Comparative advantages will make themselves felt as deeper integration continues, and for the present, the best case scenario for potential mutual benefit looks promising.

As part of broader initiatives for further integration such as the ongoing India-Mekong Corridor infrastructure developments, and the integration of the Regional Comprehensive Economic Partnership ('RCEP') within ASEAN's existing FTA partners of China, Japan, South Korea, Australia and New Zealand, the India-ASEAN region is poised to become a significant engine of growth in the coming decades. It is worth mentioning that many of the RCEP members are also part of the US-led Transpacific Partnership Agreement to which India is not a member; thus effective implementation of the Services FTA is necessary to mitigate any potential negative impacts caused by the RCEP.

Additionally, the Services FTA is intended to give rise to greater business opportunities for Indian investors in places where Indian FDI has been historically low. India is often criticised for its dismal investment levels in its neighbouring countries. Large Indian investors have generally stayed away from many such countries despite other powerhouses such as America, Japan and China aggressively establishing their presence.

The question now appears to be one of determining how fast the mutual recognition agreements will be negotiated with each individual member country once the Services FTA is in effect.

Notes:

1 Author was assisted by Kunal Bir Singh Sachdev, Associate, DFDL India Desk.
2 Following negotiations, it was expected that the Services FTA would be signed in August 2013 this deadline was further delayed to December 2013. The revised tentative signing date was then set to be between the 24–26 August 2014 during the ASEAN Economic Ministers meeting in Naypyidaw, Myanmar. Unfortunately India's representative, Ms. Nirmala Sitharaman, was unable to attend the meeting which has caused further delays. The deal was instead signed by circulating the text around the Member Countries and would subsequently be ratified individually.
3 This article has been more focused on the Services part of the proposed FTA.
4 http://www.rediff.com/money/report/has-asean-opened-the-floodgates-to-indians/20141010.htm (Last Accessed: 11/2/2015).
5 http://www.thehindu.com/business/Economy/india-asean-target-100-bn-bilateral-trade-by-2015/article5045229.ece (Last Accessed: 11/2/2015).
6 http://www.mea.gov.in/in-focus-article.htm?23855/Indias+Enhanced+Look+East+policy+takes+wing (Last Accessed: 11/2/2015).
7 http://www.mfa.go.th/main/en/media-center/14/51281-The-12th-ASEAN---India-Summit.html (Last Accessed: 11/2/2015).
8 WTO International Trade Statistics 2012 (summary of India's performance available at: http://www.iitrade.ac.in/kmarticle.php?topic=WTO_-_International_Trade_Statistics_for_Commercial_Services_2012_-_India_ranks_Seventh (Last Accessed: 11/2/2015).
9 http://www.asean.org/communities/asean-economic-community/category/services (Last Accessed: 11/2/2015).
10 http://www.asean.org/communities/asean-economic-community/item/framework-agreement-on-comprehensive-economic-cooperation-between-the-republic-of-india-and-the-association-of-southeast-asian-nations (Last Accessed: 11/2/2015).
11 2012 statistics, World Bank.
12 http://www.deloitte.com/assets/Dcom-India/Local%20Assets/Documents/India_ASEAN_FTA.pdf (Last Accessed: 11/2/2015).
13 http://articles.economictimes.indiatimes.com/2013-05-30/news/39629171_1_multi-brand-retail-51-cap-foreign-retailers (Last Accessed: 11/2/2015).
14 http://www.bbc.com/news/world-asia-india-15979163 (Last Accessed: 11/2/2015).
15 http://www.business-standard.com/article/economy-policy/india-asean-services-fta-in-limbo-over-retail-fdi-114041400972_1.html (Last Accessed: 8/8/2014).

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Hong Kong's New Competition Law

Hong Kong has introduced its very first cross-sector competition law, which is now in place but yet to be implemented. This article serves as an overview of the law for businesses to prepare ahead before the law comes into full implementation.

The Competition Ordinance ('Ordinance') was passed by the Hong Kong Legislative Council on 14 June 2012, bringing Hong Kong in line with other developed economies. The primary objective of the Ordinance is to deter and prohibit businesses from engaging in anti-competitive conduct through the Conduct Rules and the Merger Rule (collectively the 'Rules') set out below. The Ordinance will apply to any entity engaging in economic activity regardless of its legal status, and this will include individuals (the 'Undertakings'). Two institutions, namely, the Competition Commission ('Commission') and the Competition Tribunal ('Tribunal') were established pursuant to the Ordinance, which shall be in charge with the tasks of enforcement and adjudication respectively.

Timeline

The relevant provisions of the Ordinance concerning the establishment and operation of the Commission came into operation on 18 January 2013 and members of the Commission were appointed on 26 April 2013. Provisions relating to the Tribunal took effect on 1 August 2013. As for the rest of the Ordinance, the effective dates are yet to be announced.

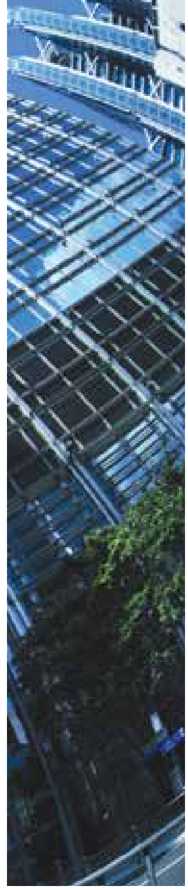
The engagement and consultation plan was published by the Commission on 26 May 2014, which is intended to consult the public and the trade on common trade practices, and to allow time to prepare for the full implementation of the Ordinance. On 9 October 2014, the Commission published a set of six draft guidelines on both procedural and substantive matters for the public and the trade to discuss, and the consultation period for submitting views and comments on the draft guidelines closed on 14 December 2014. It is expected that the Commission will soon finalise the draft guidelines and submit the same to the Legislative Council for consultation and adoption.

Three Board Prohibitions

The purpose of the Ordinance is to deter and prohibit all Undertakings from engaging in conduct that has the object or effect of preventing, restricting or distorting competition in Hong Kong. The Ordinance provides for general prohibitions in three areas of anti-competitive conduct through the First Conduct Rule, the Second Conduct Rule and the Merger Rule.

1. First Conduct Rule

The First Conduct Rule governs anti-competitive conduct involving more than one party. The First Conduct Rule prohibits any Undertakings from making or giving effect to agreements, or engaging in concerted practices or decisions with an object or effect to prevent, restrict or distort competition in Hong Kong. In other words, the First Conduct Rule only applies when Undertakings enter into certain arrangements with other market players. The First Conduct Rule also has an extra-territorial effect. Even if the whole agreement or concerted practice or any other



arrangement is concluded outside Hong Kong, the Undertakings will still be caught under the Competition Ordinance if such arrangement has the effect of preventing, restricting or distorting competition in Hong Kong.

a. Categorisation

The Ordinance specifically identifies the following conduct as 'serious anti-competitive conduct':

- fixing, maintaining, increasing or controlling the price for the supply of goods or services;
- allocating sales, territories, customers or markets for the production or supply of goods or services;
- fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services;
- bid-rigging.

For anti-competitive conduct not classified as 'serious anti-competitive conduct', it is mandatory for the Commission to issue warning notices before commencing proceedings in the Tribunal. A warning notice will in general require the contravening Undertaking to cease the contravening conduct within a certain timeframe, and not to continue/repeat afterwards, failing which the Commission may commence proceedings against the contravening Undertaking.

On the contrary, for 'serious anti-competitive conduct', the Commissioner will have the discretion whether to issue and/or publish an infringement notice (requiring the Undertaking to make a commitment to cease or discontinue any contravening acts) first, or directly commence enforcement proceedings in the Tribunal without notice.

Under the First Conduct Rule, it is possible that certain common trade practices may be regarded as practices having the effect of preventing, restricting or distorting competition. Examples include a supplier specifying the resale price of its products, participating in joint purchasing agreements, information sharing between Undertakings, etc.

b. Exclusions

Meanwhile, the First Conduct Rule clearly states that it shall not apply under the following situations:

- agreements enhancing overall economic efficiency while allowing consumers a fair share of the resulting benefit;
- an agreement is made solely for the purpose of complying with a legal requirement;
- the Undertaking is entrusted by the government with the operation of services of general economic interest;
- the agreements lead to a merger;
- the Undertakings which enter into the agreements or concerted practices have a combined turnover of not exceeding HK$200 Million, except when serious anti-competitive conduct is involved ('Agreements of Lesser Significance').

To invoke overall economic efficiency as a defence to exclude the application of the First Conduct Rule, it is insufficient for businesses to simply assert the claimed efficiencies. Instead, the businesses must show evidence of the following considering factors: (a) the claimed efficiencies, which must be objective in nature; (b) a direct causal link between the relevant agreement and the claimed efficiencies; (c) the likelihood and magnitude of the claimed efficiencies; and (d) how the efficiencies will be achieved and when they will be achieved. Further, the businesses must also show evidence that: (i) the consumer receives a fair share of the economic efficiency, (ii) the agreement and the restrictions contained thereof are reasonably necessary to attain the claimed efficiencies, and (iii) the agreement will not eliminate competition. On the other hand, the exemption of the Agreements of Lesser Significance is not applicable to serious anti-competitive conduct.

2. Second Conduct Rule

The Second Conduct Rule governs anti-competitive conduct which may involve only one party. Under the Second Conduct Rule, Undertakings that have a 'substantial degree of market power' are prohibited from abusing their power to engage in conduct that has the object or effect of preventing, restricting or distorting competition in Hong Kong. The Second Conduct Rule applies only to an Undertaking with substantial market power and which acts on its own. This rule aims at prohibiting huge Undertakings from dominating the markets through illegitimate use of their marketing power. The existence of substantial degree of market power per se and the use of it in a non-abusive manner would not render an Undertaking liable under the Second Conduct Rule.

a. Application of the Second Conduct Rule

Whether an Undertaking may be caught by the Second Conduct Rule depends largely on how 'relevant market', 'substantial degree of market power' and 'abuse' are interpreted. For the term 'relevant market', the Commission makes reference to the international practice in defining the relevant market for competition laws, which states that the practice is to analyse the relevant substitutable products and geographical boundary of the demand and supply of the products or services in issue. There is no one-size-fits-all definition and what constitutes the relevant market will be determined on a case by case basis.

In relation to 'substantial degree of market power', there is again no definition under the Ordinance. While there are cries for setting up a market share threshold during the legislative process, the Commission has decided not to include such thresholds in the draft guidelines. What constitutes substantial power would depend on the interpretation of the Ordinance, which includes a non-exhaustive list of factors, such as the market share of the Undertaking, the Undertaking's power to determine the price and barriers for competitors to enter into the relevant market. As an example, the Undertaking may be considered as having substantial market power if it does not face sufficiently effective competitive constraints in the relevant market. Usually, it will result in the ability of the Undertaking to charge a price above competitive levels, or to restrict output or quality below competitive levels, for a sustained period of time profitably.

As to 'abuse', under the laws, the conduct of an Undertaking would be considered as 'abusive' if it involves (1) predatory behaviour towards competitors, or (2) limiting production, markets and technical development to the prejudice of consumers. Some of the examples of abusive conduct as suggested by the Commission include:

- cut-throat price war, whereby the Undertaking sets prices below costs in the short run to force out competitors;
- tie in sale, whereby the sale of one product is substantially conditional on the other product, and the Undertaking makes use of this to force out competitors;
- an undertaking who controls the supply of the upstream market, using its market power and/or forces other suppliers to increase production costs of other competitors or even refuses to deal with competitors; or
- an exclusive purchase or supply obligation to squeeze out competitors.

It could be noted that one of the key considerations would be whether competition may be driven out because of the deployment of the practice or arrangement in question. In the circumstances, the Commissioner may often have the benefit of hindsight in determining the same and Undertakings with a substantial degree of market power will have to be careful in evaluating whether the practice or arrangement to be deployed may have such effect.

b. Exclusions

On the other hand, the Second Conduct Rule shall not apply to the following situations:

- conduct that is engaged in solely for the purpose of complying with a legal requirement;
- the Undertaking is entrusted by the government with the operation of services of general economic interest;
- the agreements lead to a merger; or
- the Undertaking has an annual turnover of not exceeding HK$40 Million.

The exclusions applicable to the Second Conduct Rule are almost the same as those applicable to the First Conduct Rule, except that the enhancing economic efficiency exclusion does not apply to the Second Conduct Rule.

3. The Merger Rule

The last competition rule is the Merger Rule. For the time being it only regulates telecommunications carrier licensees. The rule provides that these licensees are prohibited from carrying out a merger that has or is likely to have the effect of substantially lessening competition in Hong Kong. The rationale behind the narrow scope of this rule is that Hong Kong may not yet be ready for extensive merger control. This rule is subject to review in a few years' time.

It is pertinent to note that the Hong Kong government, its instrumentalities and statutory bodies are exempted from the Ordinance. The Chief Executive also has powers to exempt specified agreements and specified conduct from the operation of the Ordinance.

Two New Government Institutions

Two new government institutions were established pursuant to the Ordinance. Each of them is responsible for different functions, namely enforcement (by the Commission) and adjudication (by the Tribunal).

1. The Competition Commission

The Commission will be empowered with wide-ranging powers to:

- investigate suspected breaches of the law, for which the Commission will have powers to require documents to be produced and parties to answer questions; and
- issue orders including taking enforcement action. This will include the power to order the production of documents, to conduct dawn raids after obtaining a warrant from Court and to perform enforcement functions. The Commission can agree not to bring proceedings to the Tribunal or to terminate ongoing proceedings in return for commitments made by the Undertakings.

The Commission, however, does not have the power to impose sanctions.

In addition, the Commission is charged with the task of issuing guidelines as to how the Commission will interpret and give effect to the Rules, handle applications for exemptions, handle complaints, decide whether or not to conduct an investigation, among other things. Given that the Ordinance will affect effectively all businesses in Hong Kong upon full implementation and the Conduct Rules themselves are quite general without much explanation, the guidelines are extremely important in terms of assisting market players to understand the law. At this stage, the Commission has only issued the draft guidelines which are yet to be finalised.

2. The Competition Tribunal

The Tribunal shall consist of judges from the Court of First Instance. It will hear administrative cases brought by the Commission and appeals against decisions of the Commission and private actions. The Tribunal may appoint one or more specially qualified assessors to assist the Tribunal in deciding on the merits of the proceedings in the Tribunal. The power of the Tribunal is similar to that of the Court of First Instance and the Tribunal may grant the same remedies and reliefs as the Court of First Instance.

Sanction Power

A broad range of sanctions can be imposed by the Tribunal, including but not limited to, ordering a pecuniary penalty of up to 10 percent of the local turnover of the Undertaking in question for each year of violation for up to three years; granting interim injunctions; striking down or altering agreements in whole or in part; confiscating profits; making a divestiture order and an order to pay the costs of the Commission's investigation. Once the Tribunal decides that an Undertaking has contravened the Rules, the Tribunal may also issue disqualification orders against directors of the contravening Undertaking for up to five years, on the ground that the director is unfit to be concerned in the management of the contravening Undertaking. The director involved may be considered unfit if he contributed to the contravention of the Rules, or had reasonable grounds to suspect there to be contravention but took no action to stop it, or did not know but ought to have known there was a contravention of the Rules by the Undertaking.

The Ordinance does not provide for any standalone right of private action. However, there is a 'follow-on' right of action for any person who has suffered loss or damage as a result of any contravention of the Rules to pursue civil action against the contravening Undertaking after the Tribunal or a court has decided that the contravening Undertaking has indeed breached the Rules under the Ordinance.

Next Step

The consultation on the draft guidelines has now ended. The revised draft guidelines (if any comments are incorporated) will be submitted to the Legislative Council for final adoption. There is no schedule yet for when the Ordinance will come into full operation (which may be expected to be in mid-2015).

Given the wide coverage of the Ordinance, the full implementation of the same will affect all businesses in Hong Kong. It is therefore advisable for businesses to keep an eye on the issue of the respective guidelines and to review their existing operations and business practices to ensure the same are in compliance with the Ordinance.

Particularly for businesses with substantial market power, they should pay special attention in reviewing all existing operations and business practices to ensure those practices would not be regarded as abusing market power. Legal advice should be sought at an early stage and new control measures should be put in place to prevent any non-compliance with the Rules.

It may also be advisable to draw up a clear and comprehensive compliance manual and provide adequate training to all employees, particularly to those who are required to deal with suppliers, retailers and/or competitors to avoid engaging in anti-competitive conduct. Senior management should also familiarise themselves with this law as due consideration should be given thereto when making management decisions which may in some way affect competition. It is also advisable to appoint a compliance officer to oversee the compliance and act as a channel for communication (including dealing with investigations of the Commission [if any]).

As a final point of note, while the Ordinance applies to all businesses in Hong Kong, small and medium enterprises with low annual turnover may wish to confirm if any exclusions or exemptions apply before engaging in a large-scale review.

Vivien Chan

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Bank Obligations at the Execution Stage of Fixed and Floating Charge Instruments under Mauritian Laws

This article discusses how French and British Colonialism have influenced security interest laws in Mauritius. In 1715, the French visited Mauritius some years after the Dutch had left. They remained until 1810 when the British came and remained until 1968 when Mauritius became independent. It also depicts the tripartite relationship between banks, customers and the owners of the property burdened with a fixed or a floating charge.

Background

On or about 20 September 1715, the French came to Mauritius and remained there until 1810 when the British took over. At the handing over ceremony, both countries executed the '*Acte de Capitulation*', whereby the British undertook to preserve the French laws. The British stayed until 1968 when the island became independent and subsequently become a Republic in 1992.

In 1958, Mauritius experienced for the first time the coming into operation of banking business regulation, that is, Ord. No. 1 of 1958 ('Banking Ordinance'). The licensing authority or the regulator was the Financial Secretary with the then existing banks, namely Barclays DCO, Mauritius Commercial Bank and Mercantile Bank.

In 1966, under Ord. 43 the Bank of Mauritius was created with the aim of becoming the banker for the Government, and in 1971, Ord. 1 of 1958 was repealed and replaced by Act 31 of 1971 whereby the Bank of Mauritius became the licensing authority in lieu and instead of the Financial Secretary.

In 1969, the then British Governor General, Sir Leonard Williams, gave his assent to the coming into force of the 'Loans, Charges and Privileges (Authorised Bodies) Act 1969'. This enactment enabled any bank duly established in Mauritius to create fixed and floating charges in its favour as collateral security in consideration of facilities granted to borrowers. This practice, which is performed under private signature (*acte sous-seingprivé*), has been resorted to since then, that is, without the intervention of a Notary Public by way of authentic deed.

In 1971, the 'Loans, Charges and Privileges (Authorised Bodies) Act 1969' was amended and subsequently deleted and replaced by Act No. 8 of 1983. The regime of fixed and floating charges is now found under article 2202 of the Civil Code.

Fixed and floating charges cover any immovable or movable property and are designed to guarantee the repayment of indebtedness over such property. As stipulated under article 2202-8 of the Civil Code, they remain effective and preserve their ranking in respect of the relevant property for a period of 40 years as long as the whole amount of debt, together with interest, commission and accessories has not been repaid.

What is a Bank under Mauritian Laws?

A 'bank' is defined under the provisions of the Banking Act 2004. A bank shall be established and secure its banking license under the same legislation, and it also enjoys all the privileges obtained thereunder. A bank may be defined as a company which is incorporated under the Companies Act or a branch of a company incorporated abroad which is licensed to carry on any or all of the banking business as specified under the Banking Act.

What is a Customer under Mauritian Laws?

The Banking Act 2004 does not define a 'customer' as opposed to a 'bank'. However, it has been decided in the case of *Great Western Railway v London & County Banking Corporation* [1901] AC 414,[1] that in order to make a person a customer there must be either a deposit or a current account or some similar relationship. In other words, if someone in whose favour a cheque has been drawn walks into a bank to cash the cheque, this does not make that person a customer of the bank. There should be some special relationship in the form of a contract that would create duties and obligations between both parties.

In *Hervey v MCB Ltd* 1893 MR 13,[2] it was decided that the relation between a banker and depositors of money are not those between *mandant* and *mandataire* or principal and agent and appears to be sui generis.

Who may Give Property as Collateral Security by Way of a Fixed or a Floating Charge under Mauritian Laws?

Individual customers, corporate customers or guarantors are termed under the Civil Code as 'constituant'.

Banks are permitted under article 2202-2 of the Civil Code to create charges over assets in consideration of facilities granted to its customers. The provisions of that article provide the list of the bodies who are allowed to create such charges in their favour. Under article 2202-2 of the Civil Code the Government of Mauritius, any bank duly licensed under the Banking Act, all insurance companies, the Development Bank and the Cooperative Bank, the Mauritius Housing Corporation, all cooperative companies, subject to other provisions of the Code, and all national and international funding institutions as authorised by the Minister of Finance, may create fixed and floating charges. Those institutions are termed '*institutions agréées*'.

What is a Floating Charge?

Under article 2202-34 of the Civil Code, a floating charge allows a person to give security over fluctuating assets, including property acquired after the creation of the charge. It is a charge on a class of assets, present and future, which changes from time to time in the ordinary course of business. If the lender elects to take steps to enforce that charge, the lender must crystallise the floating charge into a fixed charge.

What is a Fixed Charge?

Under article 2202-16 of the Civil Code, a fixed charge allows a person (corporate or individual) to give security over fixed assets at a point in time in consideration of the amount inscribed at the office of the Conservator of Mortgages ('COM'). It is an encumbrance over an asset identified at the date of creation of the encumbrance.

It is not possible under Mauritian laws for individual creditors to create a floating or a fixed charge in his favour as this would infringe Article 2202-2 of the Civil Code as only specific institutions may create it.

It is noteworthy that both fixed and floating charges obtain their priority over the assets secured as from the time it is inscribed in the books of the COM.

By their nature, any fixed or floating charge is *'exécutoire'*, that is, there is no need to obtain prior judgment from the court should a creditor intend to seize and sell the property given in guarantee. However, before enforcing a floating charge, the latter first has to be crystallised into a fixed charge so that an inventory is drawn in order to ascertain *'l'assiette de la sureté fixe'*. Upon the creation of a floating charge, as opposed to a fixed charge, no inventory is made.

Issues Arising from the Responsibilities of the Notary Public and the Banker

Any such charge document is drafted by the bank creditor and is executed at the bank's premises between the bank officers and the owner of the property to be burdened. A Notary Public must follow the provisions under the Notaries Act when any document is executed under his care, namely *'hypothèques'*, deed of conveyance and so on, but on the other hand, there are no similar statutory obligations on the bank. While the wording of the charges are of British origin, the banking sector does not bear in mind that some of the wording has no *'raison d'etre'* for historical reasons, that is, the laws of contract in Mauritius are of French origin and were found in the Code Napoleon, which is now our civil code. Further, although the first banks in Mauritius were established during the British colonial period, charges are governed by French laws of contract despite the language in which they are drafted. The reason being that our banks started business in Mauritius during the British colonial period and all the documents are in English.

Banks have been granted the power to have fixed or floating charge documents executed within their premises.

In relation to the issue of requirements upon notaries, since 1969, banks have been granted the power to have fixed or floating charge documents executed within their premises, whereas a Notary Public, for matters of a similar nature, is subject to the stringent conditions under the Notaries Act. As both banks and notaries often deal with huge sums of money, why is there a difference in requirements and the question arises whether this has been done purposely or is it a mistake?

The Notaries Ordinance of 1942 imposed certain obligations on a Notary Public and has undergone various amendments. It ultimately became the Notaries Act 2008 under which Section 14 is headed 'subscribing notarial deeds' and reads as follows:

'Section 14. Subscribing notarial deeds

(1) Before a party or a witness is required to subscribe a notarial deed, the notary shall –

(a) ascertain that no witness to the deed is disqualified under this Act;

(b) read out the deed to the party, in the presence of the witnesses, if any;

(c) ascertain whether the party and the witnesses, if any, sufficiently understand the language in which the deed is drawn up to understand its contents;

(d) where a party or a witness does not understand the language or the contents of the deed, explain its contents to that person in a language which he understands or, if he is unable to do so, make use of the assistance of an interpreter who will explain the contents of the deed and sign it;

(e) cause the party and the witnesses, if any –
- to sign the deed and any marginal note made under section 13;
- to initial the foot of the recto of every page and every addition made under section 13;

(f) record at the end of the deed the fact that paragraphs (a) to (e) have been complied with;

(g) sign –
- the deed; and

- any addition made under section 13, and

(h) initial the foot of the recto of every page and every marginal note made under section 13.

(2) Where a party to a notarial deed is unable to sign the deed by reason of illiteracy or physical incapacity –

(a) the party shall affix his fingerprint to the deed; or

(b) there shall be two witnesses or, as the case may be, two further witnesses to the deed; and

(c) the notary shall –
- record the fact of, and the reason for, the inability of the party to sign;
- record of which particular finger a print is affixed; and
- certify that the party affixed the print to the deed in his presence and in that of the witnesses referred to in paragraph (b).

(3) Where a notary fails to comply with any provision of subsection (1) or (2), this shall render the deed voidable.'

Unfortunately, Mauritius law does not impose similar obligations on banks. It must be asked then how the courts ensure that the contents of any fixed or floating charge have been understood by the person providing security over their property—such documents are generally very lengthy with legal language. In addition, do bankers really understand or rather pretend to understand the contents of such documents before they are handed over for the borrower's signature after the latter declares they have 'read and approved' the document?

Various banks increasingly over the years have the same charge documents with more or less the same wording, save the heading and the signature parts, although the major part of the document bears no relevance to the local banking environment—they all follow the same pattern of 'copy and paste' techniques.

There have been various cases before Mauritius courts where banks have seized and sold properties subject to such charges, but to date the Supreme Court has not considered any case challenging the validity of certain clauses of fixed and floating charges. For example, under article 1154 of the Civil Code, it is stipulated that any unpaid interest may be capitalised after a period of 12 months but the charge documents make provision for a monthly capitalisation. In some cases, such as a credit card account, the contract between the bank and the customer provides for a daily capitalisation in strict contravention of the provisions of article 1154 of the Civil Code. Further, very often loans are rescheduled or 'clubbed', as per certain banks' jargon resulting in burdening properties given in guarantee for a higher amount or for other loans for which they were not designed. Article 216 of the Civil Code provides for the free disposal of the conjugal roof[3] by the owner of the premises if the spouses are married under the system of separation of goods.

There has been an effort by the Legislature to protect borrowers by enacting the Borrower Protection Act 2007. This legislation became necessary as there were too many cases of sale by levy and there was an outcry in the country. This new legislation has, notwithstanding the provisions of article 216 referred to above, enjoined all banks to ascertain that both spouses intervene in all fixed or floating charge documents whenever the conjugal roof is given in guarantee each time the loan amount does not exceed Rs two million (US$60,735).

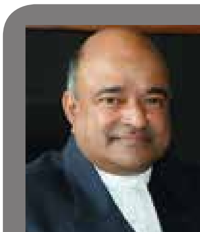
In conclusion, it is high time that Mauritius laws be amended so as to cast some obligations on banks at the execution stage of fixed and floating charge instruments so as to lessen the risk of a 'David versus Goliath' situation arising between bank and borrower, the most troublesome condition under the former law.

Notes:

1 The Republic of Mauritius still has recourse to the Privy Council.

2 1893 Mauritius Reports page 13.

3 Conjugal roof refers to where the spouses live together.



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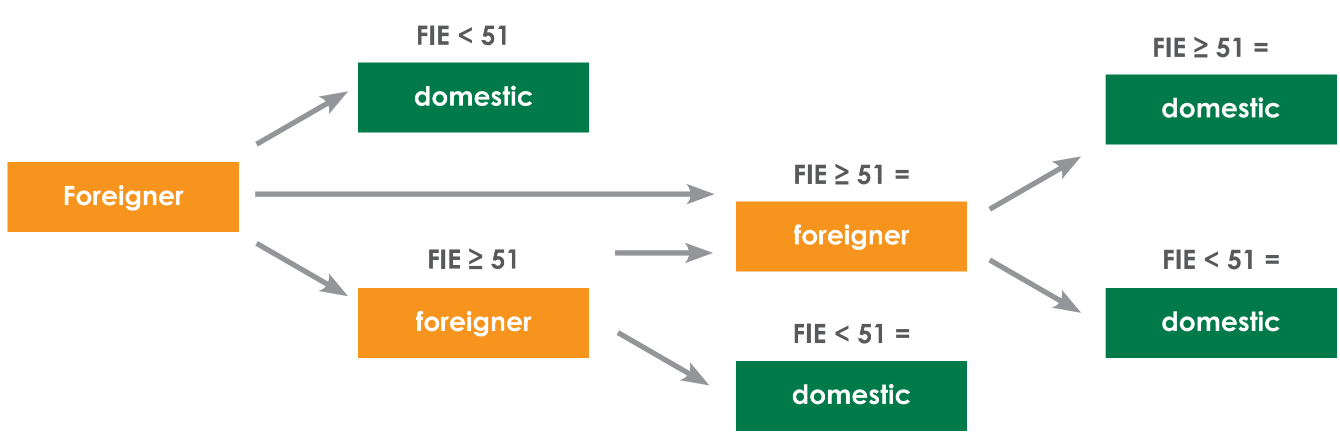
Vietnam – The Newly Enacted Investment Law and Enterprise Law Should Stimulate More Investments

The new Law on Investment ('LOI') and Law on Enterprises ('LOE') were adopted by Vietnam's National Assembly on 26 November 2014. Both laws will take effect on 1 July 2015. By that time their implementing Decrees or Circulars will also be ready. These laws aim to reduce administrative bureaucracy and mobilise more foreign and local capital into production. For the first time, the laws present a pro-investor approach, which will hopefully create a new wave of foreign investment into Vietnam. This article highlights the most important changes in these two laws, as well as the pitfalls that may hinder investments, by descending order of significance.

1. Concept of Foreign Investors Redefined – the 51 Percent Test

In the past, a foreign invested enterprise ('FIE') with foreign ownership of less than 51 percent would be treated as a foreign company even though the FIE was established in Vietnam. Under the new LOI, foreign enterprises are only those which are established abroad (foreign investor, F0 level) or if foreigners own 51 percent or more of a locally incorporated company (F1 level). Article 23 of the LOI presupposes that FIEs are treated as 'foreign enterprises' only if foreign investors own directly and/or indirectly through an FIE [owned directly by foreign investors up to 51 percent (F1 level)] at least 51 percent of the equity (F2 level). Please also see the restriction of cross-shareholding in section 15 below.

As such, a foreign investor or FIE may establish a domestic affiliate if it holds less than 51 percent equity.



This is an important principle because if an FIE is treated as a domestic investor then it would enjoy the same national treatment as a domestic investor would enjoy. Significantly, that definition also opens up the possibility that foreign investors may only need to obtain an Investment Certificate ('IC') once to establish an FIE, and then use that FIE as a holding company for many domestic companies, assuming each of those domestic companies has less than 51 percent foreign ownership (but foreign investors hold majority voting rights, see section 3 below). That structure allows joint venture groups to operate many different domestic companies in various industries, including those that were previously reserved for local Vietnamese investors.

The possibility of establishing a company without having a specific project requiring an IC would popularise the concept of a holding company, which had not yet been widely recognised in Vietnam. Moreover, under this new legal regime special purpose vehicles ('SPVs') can be established to acquire assets or projects in Vietnam without having to enter into a joint venture or acquiring shares in a local company, thereby significantly reducing transaction costs.

These key changes are expected to create a new wave of foreign investment into Vietnam, provided that the Government can rein in the bureaucracy delays and obstacles in 'conditional projects'.

2. Abolition of Investment Certificates for M&A Investments

Under Article 26 of the LOI when a foreign investor or an FIE (at least 51 percent foreign ownership) conducts an M&A transaction into conditional investment projects or, as a consequence, holds more than 51 percent equity of a target, then such M&A activity must be registered with the local department of planning and investment ('DPI') where the target is located (the so-called Registration requirement). If these conditions are absent, the M&A activity may be conducted solely under the LOE, thereby avoiding the requirement of obtaining an IC to close the M&A deal, which was the most troublesome condition under the former law.

Even when Registration is required, the registration process will be simple and straightforward and must be reviewed within 15 days from submission. This change, together with the redefinition of foreign investor in section 1 above, will greatly streamline the expected increase in M&A investments.

3. Reduction of 65 Percent Majority Vote to 51 Percent, and 75 Percent Super Majority Vote to 65 Percent

Unlike other countries, the concept of 'majority voting' under Vietnam's current LOE requires 65 percent voting rights, not 51 percent. The LOE brings Vietnam's joint stock companies ('JSC') back in line with the rest of the world (where majority voting means 51 percent and super-majority voting means 65 percent). Please also note that a shareholder holding of less than 51 percent equity could hold more than 51 percent voting rights if he/she has shares with preferential voting rights. With respect to limited liability companies ('LLC'), the default majority rule is still 65 percent 'unless otherwise provided by the Charter'. That effectively means a simple majority voting in an LLC could be as low as 50.01 percent if the charter so stipulates.

The quorum required to hold a board meeting for limited liability companies or joint stock companies will be reduced from 75 percent to 65 percent. While this change may not affect existing companies with their current charters depending on how those charters were drafted, it opens up opportunities to renegotiate the charter for the benefit of some of the shareholders, as well as allows more investors to buy shares in a company. Foreign investors will no longer be surprised when dealing with Vietnamese law.

4. Fast-track IC Issuance for Service Projects and In-Principle Approvals for Large Projects

The process to obtain an IC will be simplified for service projects, resulting in decisions within five days from submission. However, projects involving sea transportation, telecommunications, publications or the press require approval from the Prime Minister. Similarly, projects in the banking and finance and insurance sectors will require the approval in principle of the Governor of the State Bank or the Minister of Finance.

If implemented properly, many foreign investors will no longer have to prepare feasibility studies and await the opinions of numerous ministries before they can start operating in Vietnam, thereby removing one of the most burdensome hurdles in the investment process.

Most projects that use land (except building factories in industrial parks) or high-tech projects consist of two steps: obtaining in-principle approvals and IC registration. In the first step, investors must provide a feasibility study of the project, which shall be assessed by various authorities, with the time of assessment taking up to 45 days or more. Mega-projects may need to be approved by the National Assembly.

5. Both Investment Certificate (IC) and Enterprise Registration Certificate (ERC) are Required

An IC is required only for greenfield investments by foreign investors or deemed-to-be foreign investors (that is, FIE with at least 51 percent foreign ownership). After obtaining the IC, an FIE must be established by obtaining an ERC. This may seem to be more paperwork, but in fact is a positive development, because it levels the playing field between FIEs and domestic enterprises, and that many changes in the FIEs may not be required to amend the IC but only the ERC. Having an IC is also an advantage of FIEs, because it clearly states the rights of the investors and investment incentives of FIEs. The ERC and NIGERD registration (see section 7 below), which are available for FIEs, also allow the business community to track corporate data easily and enhances transparency as well as preventing fraud.

6. Loosening of the 'Ultra Vires' Doctrine and HS Code Requirements

While the LOI reduces bureaucracy in the IC registration process, the LOE reduces delay in the ERC issuance process. The business lines are no longer recorded in the ERC. In doing so, an enterprise may have as many business activities as they wish provided they are not prohibited or restricted by law. Trading and distribution companies will not need to supply thousands of HS Codes for traded products (and for products they anticipate in the future). This pre-empts the previously common complaint that licensing authorities frequently posed irrelevant questions delaying the incorporation process due to the HS Code requirements.

The relaxation of the HS Code system and the list of business activities during the ERC issuance process may lead the way to the loosening of the ultra vires doctrine– that is, an enterprise may only conduct business if the fields are listed in its ERC. This again will provide more certainty and relieve apprehensions over the legal capacity of companies who do business with each other.

7. Enterprise Registration and Notification and Some Pitfalls

The ERC application will now just take only three days from the date the application dossier is submitted, instead of five business days as before.

Even though technically an enterprise is now permitted to engage in all activities not prohibited by law, the LOE still requires the company to notify online its business activities, which in turn must not be within the list of conditional sectors. This information will be collected and made available online by the National Informative Gate of Enterprise Registration Data ('NIGERD'). In other words, while it is commonly understood that the new LOE allows enterprises, without registration, to operate in all sectors which are not prohibited and not conditional, the NIGERD online registration maintains the transparency and know-your-partner environment business community. If the enterprise wishes to change its scope of business, it will need to notify such changes to the business registration authority. Such notice might be objected within three days by the ERC business registry if the change is contrary to the law.

It is regrettable that while the process of ERC registration is simple and the list of documents to be submitted is straightforward, the ERC registration may require applicants to submit their criminal records 'if necessary'. This may obstruct the target of establishing a company within three days. The implementing decree may need to address this issue to rein in red tape.

8. Derivative Actions – A Boost for Minority Shareholders and Private Equity

Although the old LOE introduced the concept of fiduciary duty, it did not provide for an implementation mechanism to protect minority shareholders if the fiduciary duty is violated. For the first time, the new LOE introduces the concept of derivative actions, which allows shareholders holding at least one percent of the total shares to launch derivative actions against board members, directors and controllers for violating their duty to put their own interests before the company's interests and the duty not to abuse powers. The cost of derivative actions will be borne by the company. This can be considered good news for private equity funds or minority investors who currently hesitate to participate in the equitisation programs of state owned enterprises ('SOEs') because the majority shareholders are usually the Government or a relative of the SOE's incumbent managers.

Nevertheless, the reform in the LOE should go hand in hand with the reform to the Civil Procedural Code to enable derivative actions to be fully recognised in court proceedings, unless the charter allows such actions to be arbitrated.

9. Corporate Bonds – A Boost for Securitisation

The LOE now recognises the rights of companies to issue bonds. Unlike previous legislation which required the bond issuer to be 'profitable', which might not be feasible to SPVs, the new LOE only requires the bond issuer to be solvent, that is, able to pay its debts when due. This deregulation may create opportunities for more securitisation and a boost for the project bonds market, finally helping to develop a vibrant capital market in Vietnam.

10. More than One Legal Representative in a Company

Foreign investors sometimes express concerns over the concept of one 'legal representative' for a company in Vietnam, as this is the only person that can bind the acts of the company. More often than not, the dismissal of the legal representative becomes a long-term dispute among many shareholders or a third party who is surprised when the director signing the contract is actually not a legal representative. The LOE now envisions that a company may have more than one legal representative and more than one chop (stamp/seal), which aims to remove counter-productive shareholders' conflicts among local enterprises about the removal of a legal representative and bring Vietnam's LOE more in line with the rest of the world.

However, it is worth noting that the LOE does not mention clearly whether the scope of authority of each legal representative will be equal or dependent on the position held in the enterprise. In other words, the scope of authority of each legal representative should be clearly defined in the charter of the enterprise.

11. Charter Capital will be Paid-up Capital

In the past, Vietnamese authorities often measured the capacity of a company by its 'charter capital'. Taking advantage of this practice, many companies were established declaring a very high charter capital amount which was never actually paid. To counter this problem, the LOE now provides that charter capital must be the actual paid up capital, which must be fully contributed within 90 days from the company's establishment. Apart from paid up capital, there may be authorised capital, but this would not be considered as charter capital.

Any issuance of shares beyond the authorised capital amount should either comply with the process of public offerings (registration at the State Securities Commission) or private placement (notice to the business registration authority).

With respect to charter capital being paid-up capital, if a JSC company decides to repurchase its shares, the LOE requires the company to decrease the charter capital to the total face value of the repurchased shares within five days from the completion date of the repurchase. Accordingly, the definition of treasury share is not recognised. This precludes a company from investing in its own shares while it evaluates its share price.

12. Enterprises have the Right to Decide on the Form, Quantity and Content of Corporate Seals/Stamps

From 1 July 2015, Enterprises shall be permitted to freely decide the form, contents and number of corporate seals to be used, provided that the name and enterprise's registration number must be shown. Enterprises must notify the same to the National Portal on Enterprise Registration ('NPER').

Likewise, not all JSCs are required to establish a board of control. The new LOI exempts this obligation for privately held companies (less than 11 shareholders and no corporate shareholder who owns at least 50 percent total share). This rule does not apply for a one-member LLC. Not only must the company's owner appoint at least a controller, but such a controller must not be the company's employee or related person to the owner and must have a degree either in law, auditing or accounting. This requirement prevents the owner of a one member LLC using the corporate veil to his advantage.

13. More Control to State Owned Enterprises ('SOE')

The old LOE requires all SOEs must be converted into a one member LLC, but it lacked the mechanism to rein in the principal/agent conflict of interest. To target this issue, the new LOE requires the SOE to disclose more information, to organise Board of Members ('BOM') meetings more frequently and to give more power to the SOE's board of control.

The new LOE requires the SOE to implement the decisions of its supervisory agency. The resolution of the SOE's BOM might also need to be approved by the supervisory agency if its charter so requires. The chairman or CEO would be dismissed if he/she does not meet the business target in the business plan without acceptable justification. It remains to be seen how these two missions could be accomplished at the same time.

14. Social Enterprises

The LOE introduces a new concept called 'social enterprise'. This enterprise is established to solve social or environmental problems for community benefit and must use at least 51 percent of its profits to reinvest in such objectives. Unlike other enterprises, social enterprises may receive charity funds or support from non-governmental organisations or other enterprises. It is hoped that such support would be tax deductible expenses for the donors and also allow companies to establish their own social enterprises to fulfil corporate social responsibilities.

15. Restriction of Cross-Shareholding

The LOE does not allow a subsidiary to hold shares in a parent company, or a cross-shareholding between two subsidiaries of the same parent company. While this general obligation still awaits forexplanation in the implementing Decree of the LOE, this may affect a holding structure to the extent that cross-shareholding is concerned. It is unclear whether an F1 company holding shares in an F2 company (but not vice versa) would fall under this prohibition if both F1 and F2 are members of an F0 group (see the graph in section 1 above).

16. Obstacles to Changes – 'Conditional Projects' and Processing Delays

The simplification of the IC process does not benefit all foreign investors. Those foreign investors interested in 267 so-called 'conditional' projects continue to face obstacles. These 'conditional' projects are still subject to restrictions such as credit institution projects, printing projects, mining projects, or education and healthcare projects. These conditional projects often include services mentioned under the WTO roadmap. A drafting committee confirmed that such 'WTO-related' conditions will only apply to foreign enterprises and not domestic enterprises. As to retail and distribution, the restriction is extended to 'sale and purchase activities and related activities'. It is also unclear how 'conditional projects' will be controlled, and how the economic-need-test ('ENT') will fit into the new LOI.

The next step is for business societies and law firms to lobby the drafting committees to specify in the implementing Decree of LOI (due by 1 July 2015) what documents are required during the application process and prohibit the requirement of documents not expressly identified in any implementing regulations.

With respect to trading and distribution, all restrictions and conditions should be removed. In order to develop a production base, foreign investors should be allowed to test the market and distribute their goods and services freely. The restriction of foreign trade and distribution not only affects the effectiveness of the ASEAN Economy Community (to be implemented in 2015), but also harms local distributors in the long-run. A good local distributor will always seek to expand and would need capital, a variety of goods and also international co-operation.

Another bureaucratic problem is that although the law provides 45 days for authorities to consider an application and issue an IC, this time limitation is often not respected by the authorities and is not subject to any sanctioning.

17. Support from the Business Community

The reform in the LOI and LOE will create a major impact in the Vietnamese business and legal community. The revised laws will facilitate the establishment of new enterprises, especially those owned by foreign investors and reduce the costs when investors withdraw from the Vietnamese market. In addition, it will ensure the legitimate rights and interests of investors, shareholders, and other stakeholders.

If properly implemented, the amendments to these laws will remove many obstacles that enterprises have faced when operating in Vietnam. However, if the Government does not rein in problematic regulations that bureaucrats may still create such as vague or contradictory decrees, circulars or official letters, multiple challenges will continue to frustrate the business community.

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Partner, LNT & Partners

Dr Net Le heads the LNT & Partners' Arbitration practice. He is also an arbitrator at the Vietnam International Arbitration Centre (VIAC) where he has chaired or co-arbitrated more than 30 cases. Dr Le has been selected as a leading lawyer in the fields of international arbitration, project finance, and infrastructure by IFLR1000, Legal 500 and Chambers Global since 2009. In 2012, he was awarded the title of 'Lawyer of the Year' by Vietnam's Ministry of Justice.

Singapore: A Leading Dispute Resolution Hub

Singapore has recently opened two new forums for dispute resolution – the Singapore International Mediation Centre and the Singapore International Commercial Court. This article will give an overview of these two new forums, and examine how they will position Singapore to become a leading dispute resolution hub.

Rise of Asia – More Commerce, More Disputes

Over the past decade, Asia has emerged as a leading destination for international trade and investment. The region has seen an increase in the inflow of Foreign Direct Investment ('FDI') from US$315 billion in 2009 to US$407 billion in 2012, an increase of 29.2 percent,[1] which accounted for a staggering 30.1 percent of the global FDI flows for the year.[2] With the Asian economy projected to triple from US$10.71 trillion in 2010 to $34.88 trillion in 2020,[3] the Asian economic growth shows no signs of slowing.

The rise of commerce in the region has seen an increase in the number and complexity of disputes between parties,[4] and a corresponding demand for viable dispute resolution mechanisms. The growing popularity of arbitration, particularly in disputes arising from cross-border transactions, has resulted in increased caseloads in Singapore, with the Singapore International Arbitration Centre (the 'SIAC') recording an increase in its annual caseload from 99 in 2008 to 259 in 2013.[5] There has been a similar increase for regional arbitration centres, with the Hong Kong International Arbitration Centre (the 'HKIAC') recording an increase in its caseload from 272 in 2011 to 293 in 2012, and the Kuala Lumpur Regional Centre for Arbitration (the 'KLRCA') recording a corresponding growth from an average of 20 cases annually before 2011, to 156 cases in 2013.[6]

Singapore as a Leading Dispute Resolution Hub

Singapore has established itself as one of the top choices in the world for international arbitration. Singapore is the third most preferred seat of arbitration in the world after London and Geneva, and the SIAC is the fourth most preferred arbitral institution after the International Chamber of Commerce, the London Court of International Arbitration, and the International Centre for Dispute Resolution.[7]

However, if Singapore is to become a leading dispute resolution hub, it cannot afford to solely rely on the strength of its international arbitration regime. The increase in the caseloads for regional arbitration centres is a strong indication that there is stiff competition between the various arbitration centres within the region. There is also concern over international arbitration as no longer being the best option for dispute resolution, given the rising costs of arbitration and the length of arbitral proceedings. In 2006, a survey reported that almost 40 percent of in-house counsel found that international arbitration was more expensive than cross-border litigation.[8] In 2007, the number grew to 65 percent.[9] These concerns and competition have necessitated the development of alternative dispute resolution mechanisms to complement the existing framework.

To stay abreast with the rapid growth of business in the region, and cater to the evolving needs of corporate users, Singapore launched the Singapore International Mediation Centre (the 'SIMC') in 2014, followed by the Singapore International Commercial Court (the 'SICC') in 2015. With the launch of these initiatives, Singapore is poised to cement its position as the leading dispute resolution hub in the region, and among the top choices for dispute resolution globally.

If Singapore is to become a leading dispute resolution hub, it cannot afford to solely rely on the strength of its international arbitration regime.

Singapore International Commercial Court

The SICC was launched on 5 January 2015 and it is a court-based forum for international commercial parties to resolve their disputes. The SICC functions as a division of the Singapore High Court and is a part of the Supreme Court of Singapore.[10] Therefore, the SICC proceedings are governed by the Singapore Rules of Court ('Rules of Court').[11]

Jurisdiction

The SICC has the jurisdiction to hear claims that are 'international' and 'commercial' in nature, and where the parties have a jurisdiction agreement that gives the SICC jurisdiction to hear their claims.[12]

A claim would be 'international' in nature if the parties to the dispute have their place of business outside of Singapore.[13] A claim would also be international in nature if a substantial part of the obligation, or the subject matter of the dispute, is situated outside any State where the parties have their places of business.[14]

As for when a claim would be commercial in nature, a non-exhaustive list of transactions that would be commercial in nature is provided in the Rules of Court.[15] These include transactions such as the carriage of goods and passengers, distribution agreements, construction works, and the merger of companies.

The definition of 'international' and 'commercial' for the purposes of bringing a claim to the SICC is similar to the definition of 'international' and 'commercial' under the Singapore International Arbitration Act.[16]

SICC Panel of Judges

The SICC panel of judges will comprise senior members of the Singapore judiciary, and a panel of international judges from both commonwealth and civil law jurisdictions. These jurisdictions include France, Australia, Hong Kong and Austria. These international judges will be appointed to the SICC panel for a fixed period, and they will not receive tenure. So far, 11 International Judges have been appointed to the SICC panel:[17]

(1) Ms Carolyn Berger (United States of America)– Justice of the Supreme Court of Delaware, former Vice-Chancellor of the Delaware Court of Chancery.
(2) Justice Patricia Bergin (Australia) – Chief Judge of the Supreme Court of New South Wales.
(3) Mr Roger Giles QC (Australia) – Judge of the Dubai International Financial Centre Courts, former Judge of the Court of Appeal.
(4) Dr Irmgard Griss (Austria) – Deputy Member of the Austrian Constitutional Court, former President of the Austrian Supreme Court.
(5) Justice Dominique T. Hascher (France) – Judge of the Supreme Judicial Court in France.
(6) Mr Dyson Heydon AC QC (Australia) – former Judge of the High Court of Australia and the New South Wales Court of Appeal.
(7) Sir Vivian Ramsey (United Kingdom) – former Judge of the High Court (Queen's Bench Division) of England and Wales, and former Judge in charge of the Technology and Construction Court.
(8) Mr Anselmo Reyes (Hong Kong) – former Judge of the Court of First Instance in Hong Kong.
(9) The Right Honourable Sir Bernard Rix – former Lord Justice of Appeal in the Court of Appeal of England and Wales, and former Judge in charge of the Commercial Court of London.

(10) Professor Yasuhei Taniguchi (Japan) – former chairman of the Appellate Body of the World Trade Organization Dispute Settlement Body and Professor Emeritus at Kyoto University.
(11) Mr Simon Thorley QC (United Kingdom) – former Deputy High Court Judge in England and Wales, and former Deputy Chairman of the Copyright Tribunal in the UK.

Representation by Foreign Lawyers

Foreign lawyers will be able to appear as counsel in SICC proceedings as long as they are granted full registration pursuant to the Legal Profession Act and the Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014, and the case is deemed to be an 'offshore case'.

'Offshore cases' are cases that have no substantial connection with Singapore.[18] These would be cases where Singapore law is not the governing law, or the choice of Singapore law is the sole connection that case has to Singapore.[19]

Foreign lawyers who are granted full registration will be able to represent a party in SICC proceedings as well as in the Singapore Court of Appeal in any relevant appeal from the SICC proceedings.[20] They will also be able to give advice and prepare documents in relation to the SICC proceedings and in any relevant appeals.[21]

The requirements that foreign lawyers would have to satisfy in order to be granted full registration are that: (1) the foreign lawyers are duly authorised to practice in their respective jurisdictions; (2) they have at least five years' experience in advocacy before any court of tribunal; (3) they are sufficiently proficient in English; and (4) they have not been disbarred, struck off, suspended or reprimanded in their respective jurisdiction.[22]

Comparison with Arbitration

Under SICC proceedings, parties are allowed to exclude the application of any rules of evidence in Singapore law and instead elect an alternative set of rules of evidence which they may be more familiar with.[23] While the general rule is that SICC proceedings would take place in open court, parties can apply to have their proceedings conducted in a confidential manner, provided their case has no substantial connection to Singapore.[24]

Unlike arbitration, a party in SICC proceedings will have recourse to default judgments if the other party has not complied with the procedures in the Rules of Court, making it easier to deal with obstructive opposing parties. Similarly, the SICC is empowered to join third parties to proceedings without requiring the consent of the third party.[25]

Singapore International Mediation Centre

In November 2014, Singapore also launched the SIMC, a full-service mediation centre which aims to bring world class mediation services to cross-border disputants. These services include a professional appointing authority and case management services. The SIMC currently has a panel of over 60 mediators and the unique feature of the SIMC is that the curriculum vitae of the mediators describe their approach to mediation. This would allow parties to pick a mediator who not only has the requisite qualifications and experience, but also one whose approach to mediation would be aligned with the manner in which the parties would like their mediation to be carried out.

Arbitration-Mediation-Arbitration Protocol

One of the most significant innovations of the new SIMC is the Arbitration-Mediation-Arbitration Protocol (the 'AMA Protocol'). Developed in collaboration with the SIAC, the AMA Protocol is a new feature in the dispute resolution landscape which caters to the needs of parties for multi-tiered dispute resolution.

The AMA Protocol is a three-staged process that involves both arbitration and mediation. The parties are allowed to first commence arbitration by filing the Notice of Arbitration with the Registrar of the SIAC.[26] Once the parties have exchanged the Notice of Arbitration and Response to the Notice of Arbitration, and the tribunal has been appointed, the tribunal shall stay the arbitration and the parties can then proceed to mediation.[27] If there is a settlement in the mediation, an agreement will be recorded as a consent arbitral award.[28] If there is no settlement, they will revert back to arbitral proceedings for the tribunal's determination and final award.[29]

For parties who are committed to achieving settlement, the AMA Protocol offers the unique advantage of recording their settlement as an enforceable arbitration award, which allows them to save the time and costs involved in obtaining a binding judgment to enforce the settlement agreement. At the same time, should mediation fail, parties can immediately fall back on the arbitration proceedings without expending further time or costs.

Future Developments

The SIMC is also currently working towards providing differentiated mediation services.[30] These include an online dispute resolution service so that disputes can be resolved more efficiently, a deal-making service where a mediator could interface with parties who are negotiating a deal in order to avoid any potential issues that could lead to disputes, and post-merger facilitation where a mediator would be engaged to ensure that the parties cooperate fully to gain mutual benefits from the mergers and avoid any conflict.

Singapore International Mediation Institute

To further strengthen the quality and standard of mediation in Singapore, the Singapore International Mediation Institute (the 'SIMI') was launched on the same day as the SIMC. The SIMI has been established to provide mediation training and accreditation to the mediators, and raise awareness regarding mediation as a method of dispute resolution. The Institute also has a partnership with the International Mediation Institute (the 'IMI'), which develops global and professional standards for mediations.[31] Mediators who receive the highest SIMI accreditation will be eligible for the IMI Certification.

Conclusion

Given that the SICC is a very unique innovation in the dispute resolution scene, it remains to be seen how many parties will opt for this untested route as an alternative to more established options like arbitration. There are obvious concerns about the enforceability of SICC judgments as compared to arbitration awards, which have the benefit of enforcement under the New York Convention. In comparison, the SIMC will be a much easier proposition to sell to parties as it is a valuable complement to existing arbitration procedures.

Nonetheless, the combined availability of SIAC, SICC, and SIMC will cement Singapore's position as a formidable forum for dispute resolution in Asia, and would further encourage the growing practice of ensuring that Asian disputes are resolved within Asia.

Notes:

1 United Nations Conference on Trade and Development (UNCTAD) World Investment Report 2012 and 2013.
2 *Ibid.*
3 UOB Economic-Treasury Research Report – *'The Rise of Intra-Regional Trade in Asia'*. November 2012.
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5 Singapore International Arbitraion Centre, *Statistics*: http://www.siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics.
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7 The White and Case 2010 International Arbitration Survey: Choices of International Arbitration: <http://www.whitecase.com/files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf> .
8 Joseph R. Profaizer, *International Arbitration: Now Getting Longer and More Costly*, The National Law Journal, 29 July 2008.
9 9 Kate Durcan, *International Arbitration: Getting pricier, but still growing*, The Law Society Gazette, Thursday 16 October 2008.
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11 O 110 of the Singapore Rules of Court, (Cap 322, R 5, 2014 Rev Ed).
12 O 110 r 7 of the Singapore Rules of Court, (Cap 322, R 5, 2014 Rev Ed).
13 110 r 2(a) of the Singapore Rules of Court, (Cap 322, R 5, 2014 Rev Ed).
14 O 110 r 2(a) of the Singapore Rules of Court, (Cap 322, R 5, 2014 Rev Ed).
15 O 110 r 1(2)(b) of the Singapore Rules of Court, (Cap 322, R 5, 2014 Rev Ed).
16 Sec. 5, and First Schedule of the International Arbitration Act, (Cap 143A, 2002 Rev Ed).
17 Singapore International Commercial Court, Panel of judges: <http://www.sicc.gov.sg/Judges.aspx?id=30>.
18 O 110 r 1 of the Singapore Rules of Court, (Cap 322, R 5, 2014 Rev Ed).
19 O 110 r 1 of the Singapore Rules of Court, (Cap 322, R 5, 2014 Rev Ed).
20 Section 36P of the Legal Profession Act, (Cap 161, 2009 Rev Ed).
21 *Ibid*.
22 Section 5(2) of the Legal Profession (Foreign Representation in Singapore International Comemrcial Court) Rules 2014
23 O 110 r 23 Singapore Rules of Court, (Cap 322, R 5, 2014 Rev Ed).
24 O 110 r 30 read with O 110 r 1 Singapore Rules of Court, (Cap 322, R 5, 2014 Rev Ed).
25 O 110 r 9 Singapore Rules of Court, (Cap 322, R 5, 2014 Rev Ed).
26 Sec. 2 SIAC-SIMC Arb-Med-Arb Protocol .
27 Sec. 5 SIAC-SIMC Arb-Med-Arb Protocol.
28 Sec. 9 SIAC-SIMC Arb-Med-Arb Protocol.
29 Sec. 8 SIAC-SIMC Arb-Med-Arb Protocol.
30 International Commercial Mediation Working Group, *Recommendations of the Working Group to Develop Singapore into a Centre for International Commercial Arbitration* (November 2013), at [12].
31 International Mediation Institute in a nutself: <https://imimediation.org/imi-in-a-nutshell>.

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The Impact of the Foreign Investment Law of the People's Republic of China (Draft Consultation Paper)

The recent announcement of the Foreign Investment Law of the People's Republic of China (Draft Consultation Paper) attracted extensive attention at home and abroad. It reshapes the whole of China's foreign investment system and provides clear guidance for future regulation by the Chinese government in the area of foreign investment. Its significant impact is deserving of discussion and research.

Legislative Background

On 19 January 2015, China's Ministry of Commerce ('MOFCOM') published the Foreign Investment Law of the People's Republic of China (Draft Consultation Paper) ('Draft FIL') on its official website for comments. The Draft FIL has 11 chapters and 170 articles, and reshapes China's whole foreign investment system and provides transformative and different regulations from the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures, the Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures and the Law of the People's Republic of China on Foreign-funded Enterprises ('Current FIL').

With the rapid development of China's economy, the Current FIL cannot adapt to the need for overall reforms and further opening up of China. The examination and approval system established by the Current FIL is also unfavourable for stimulating market vitality and transforming government functions. Further, the organisational form and operation of enterprises stipulated in the Current FIL contains duplication and even conflicts with the Company Law of the People's Republic of China. In addition, the foreign M&A, national security review and other significant systems should be incorporated into the fundamental law of foreign investment and be further improved. Therefore, the Draft FIL has been published to deepen regime reform, broaden the opening up of China, promote foreign investment, normalise foreign regulation and to provide a more stable, transparent and predictable legal environment for foreign investment in China. The 11 chapters and 170 articles of the Draft FIL cover general provisions, definitions of foreign investors and foreign investment, access administration, a national security review, an information reporting system, investment promotion, investment protection, complaints coordination, supervision and inspection, legal liabilities and supplementary provisions.

Major Alterations and Impacts

1. Specification of Definitions of Foreign Investor and Foreign Investment

In terms of foreign investors, the Draft FIL adheres to the substance-over-form principle and introduces an 'actual control' standard to define 'foreign investor'. A domestic enterprise controlled by a foreign investor is deemed as a foreign investor while in relation to a foreign investor controlled by a Chinese investor, its investment in China will be deemed as an investment of a Chinese investor rather than a foreign investor.

The Draft FIL also stipulates that foreign investment covers greenfield investment, M&A, medium and long term financing, the acquisition of natural resources exploration and exploitation or infrastructure construction operations, franchise and property rights and other modes such as contract or trusts to control domestic enterprises or to hold the rights and interests of a domestic enterprise.

2. Access Administration Replaces Foreign Investment Approval

The Draft FIL abolishes the existing approval system of foreign investment and establishes an access administration institution in accordance with a 'list of special administration measures', which is similar to a negative list. In the future, the 'list of special administration measures' will be divided into a prohibited list and a limited list.

A foreign investor cannot invest in the areas stated in the prohibited list, which includes directly or indirectly holding shares, equity, assets or other rights and interests and voting rights.

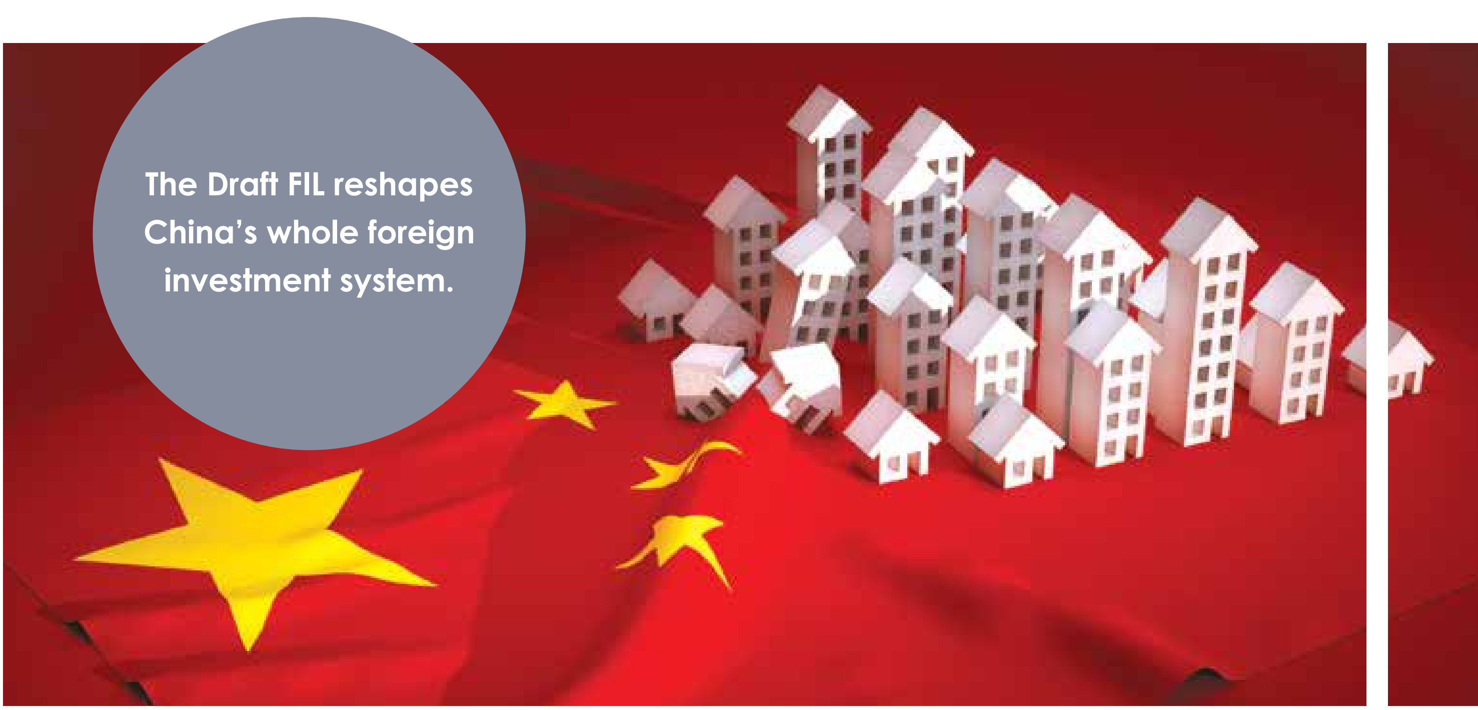
For the limited list, there are two main factors, which are the monetary standard and the investment area in restricting foreign investment. The foreign investment involved in the limited list must apply for administrative permission to the relevant authorities.

If a foreign investment is not within the 'list of special administration measures', the access administration is exempted and the information reporting obligation is solely required.

3. National Security Review

Aimed at defects such as a low level, imperfect system of national security review, the Draft FIL raises the legislative level of national security review and further improves the specific review factors and review procedures.

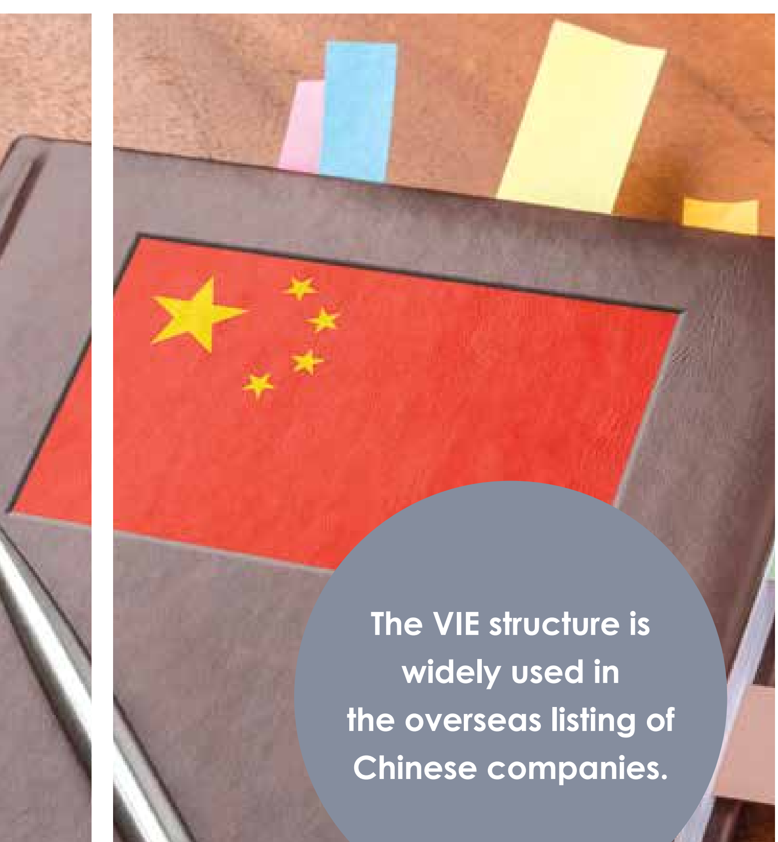
The Draft FIL stipulates that if relevant authorities of foreign investment discover national security issues in the access administration, the access review will be suspended and transferred to a joint conference for a national security review. The foreign investor may request to make an appointment for negotiation in terms of procedural issues and advanced communication.



Owing to the rise in the legislative level as national law, the judicial immunity principle is specified in the Draft FIL, which refers to the decision that the national security review may not be subject to administrative review and administrative litigation.

4. Comprehensive Information Reporting System

In order for timely, accurate and comprehensive oversight of the foreign investment situation and the operation of foreign-invested enterprises, a comprehensive information reporting system has been established. For all foreign investments, whether stated in the 'list of special administration measures' or not, there is an obligation to report the required information to the relevant authority for foreign investment. The Draft FIL states that the reporting information must be authentic, accurate and complete and false records, misrepresentations or major omissions are prohibited. The Draft FIL also stipulates strict legal responsibility in the circumstances of a failure to perform the information reporting obligation, concealing facts, making false records or misrepresentations, such as the imposition of a fine on the entities or an investigation of the responsible person or persons of the entities for criminal responsibility.



The VIE structure is widely used in the overseas listing of Chinese companies.

5. The Potential Influence on VIE Structures

'VIE' is an acronym for Variable Interest Entities and refers to achieving control of a company and financial consolidation by way of signing various agreements rather than via equity control.

The VIE structure is widely used in the overseas listing of Chinese companies to avoid the Chinese government's industry access limitations for foreign investors. The VIE structure has existed for some time and in reality helps many Chinese companies to accomplish IPO in the overseas securities market. Although the Chinese government has never taken a clear-cut stand and acquiesced to VIE, the fragility of contract control itself and uncontrollability of actual execution still cannot be avoided.

The Draft FIL introduces the concept of an actual controller from the angle of foreign investment. The Draft FIL stipulates that a domestic enterprise controlled by a foreign investor is deemed as a foreign investor while with regards to a foreign investor controlled by a Chinese investor, its investment in China will be deemed as an investment of the Chinese investor rather than the foreign investor. In addition, contractual control is also defined as a form of foreign investment. Therefore, in accordance with the stipulation of Draft FIL, under the VIE structure, if the actual controller of the domestic enterprise is still a person with Chinese nationality, such an enterprise should be deemed as an investment of the Chinese investor and the access administration and information reporting system should not be applied. The above VIE structure may be identified as legal. On the contrary, if the actual controller is a foreign investor, the domestic enterprises will be deemed as a foreign investor or foreign investment enterprise. Its operation may be identified as illegal without the access administration.

As to the impact on how to deal with a company currently already listed in an overseas securities market in the form of a VIE structure or a domestic enterprise controlled by a foreign investor, the Draft FIL does not provide a specific answer. The Draft FIL does raise some issues for public comment as follows:

(1) For a foreign investment enterprise using the VIE structure, if the enterprise declares to the foreign investment authority of the State Council that it is actually controlled by a Chinese investor, it can continue to maintain the VIE structure and carry out business activities.

(2) For a foreign investment enterprise using the VIE structure, the enterprise must apply to the foreign investment authority of the State Council for recognition that it is actually controlled by a Chinese investor. After recognition from the foreign investment authority of the State Council, it can continue to maintain the VIE structure and carry out business activities.

(3) For a foreign investment enterprise using the VIE structure, the enterprise must apply to the foreign investment authority of the State Council for access administration. The foreign investment authority of the State Council will comprehensively consider the actual controller of the foreign investment enterprise jointly with other government departments concerned with making the decision.

Thus, since the VIE structure has broad influence on relevant industries, in the future the Chinese government will treat the VIE structure with caution and make the final decision in combination with overall feedback received.

6. Other focused issues

The Draft FIL also stipulates some transition period arrangements. After the formal effectiveness of the Draft FIL, a foreign investment enterprise legally existing under the former laws and regulations can continue to operate under its original business scope, term and other conditions. However, if the alteration of business matters or investment amount reaches the standard stipulated in the 'list of special administration measures', an application for access administration is needed. Further, the Draft FIL will replace the Current FIL and the organisational form of enterprise will not be regarded as the regulation object. For effectively existing foreign investment enterprises, within three years after the effectiveness of the Draft FIL, they must alter their organisational form and institution of enterprise in accordance with the Company Law of the People's Republic of China, Partnership Enterprise Law of the People's Republic of China, Law of the People's Republic of China on Individual Proprietorship Enterprises and other laws and regulations.

Article 28 and Article 29 of the Draft FIL states that where the foreign investor conducts several investments on the same matter within two years, the investment amount shall be calculated accumulatively. The Draft FIL also stipulates the calculation method of the investment amount. Where the foreign investor directly or indirectly provides financing to its own domestic enterprise for more than one year, the financing amount shall be calculated into the investment amount. The design of this clause will effectively prevent access administration evasion.

The Draft FIL also pays attention to the relation between access administration of foreign investments, industrial and commercial registration and industry permission. It stipulates that if a foreign investor makes an investment in an area which is on the 'list of special administration measures' and the area also needs foremost industry permission, the foreign investor shall submit an industry permit when applying for access administration of the foreign investment. For an investment area without foremost industry permission, the foreign investment authority needs to seek advice from other relevant industry departments. After gaining the access administration for the foreign investment, the foreign investor can proceed with the formalities of industrial and commercial registration.

Summary

There is no doubt that the formal enactment of the Draft FIL will essentially reform the entire regulation regime of foreign investment and it will have a great impact on foreign investment in China. According to the legislative procedure of China, after seeking opinions from the public, the Draft FIL will be discussed and revised and then delivered to the Standing Committee of the People's Congress for voting. More importantly, the advent of the rules for the implementation and supporting measures, such as the definitions of 'list of special administration measures', will make the Draft FIL more practical. There is still a long way to go for formal enactment of the FIL and the establishment of a new legal system for foreign investment. With the overall reforms and further opening up of China, the innovation and breakthrough of the foreign investment regime can be expected.

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VIEs in China: Big change is coming

The Variable Interest Entity ('VIE') has so far been a widely used vehicle for foreign investment in the PRC (China). This article examines the changes that the landslide recent 2015 Draft Foreign Investment Law is bound to have on VIEs.[1]

Introduction

In the past 15 years the VIE has become a more and more popular investment instrument for foreign investors in China's restricted let alone prohibited industrial sectors. VIEs are also widely used by domestically held Chinese companies for their foreign stock exchange listing. The Supreme People's Court of China has never had to judge the validity of a VIE, but legal scholars have been in a lively debate over it for many years. The VIE has been tolerated by the Chinese regulatory authorities so far, but the recent (19 January 2015) Draft Foreign Investment Law released by the Ministry of Commerce ('MOFCOM') for public comments, will dramatically change the fate of the VIE.

Features of a VIE

Industrial sectors in China are not entirely open to foreign investors. According to the latest version (2011) of the PRC Foreign Investment Industrial Guidance Catalogue ('Catalogue'), Chinese industries in terms of foreign investment are divided into three categories: 'encouraged', 'restricted' and 'prohibited'. Foreign investors are entirely banned ('prohibited') from industries in, for example, the media sector such us the originally Chinese company SINA. The restricted category subjects the foreign investor to certain limits, mainly in the shareholding ratio: for example, 50 percent of the equity interest in a value-added telecommunication service provider, like the recently NYSE listed e-commerce company Alibaba. Finally, the encouraged catalogue is free from any restriction and is eligible for subsidy.

Essentially, the VIE is an investment method for a foreign investor to control a Chinese domestic operating company ('Opco') established by its Chinese partner, through a Wholly Foreign-owned Enterprise ('WFOE') established by a foreign (can be Hong Kong) holding company ('holding') directly or indirectly owned by the foreign investor. The VIE method relies on a series of contractual arrangements between the composition of related companies rather than an equity shareholding holding in the Opco. The contractual arrangements between the Opco, Chinese partners and WFOE include (separate) agreements on voting rights, options, asset and equity pledges and intra-group loans. Under the VIE structure, the Opco is the formal licensee of the PRC Agency for operating in a certain restricted or prohibited industry, while it is in actual fact the (foreign held) WFOE that exercises effective control over the Opco and realises most of the economic benefits derived from it. This allows, for example, a US holding to consolidate the Chinese earnings into its financial statements under US General Accepted Accounting Principles ('GAAP').

Exposures of VIE

Since the earlier mentioned Chinese company SINA listed on NASDAQ in 2000, nearly 100 Chinese companies followed its example by adopting the VIE structure for their offshore listings on the NYSE and NASDAQ. Although more and more Chinese companies felt attracted towards the VIE, the uncertainty about its legal status under Chinese law has never subsided.

The exposure partly comes from the VIE structure itself. Foreign investors must rely on contractual arrangements between the WFOE and the Opco to operate and control their Chinese business. The contractual agreements are designed to create effective controlling power to the foreign investor equal to a direct or indirect equity interest. By holding the equity interest in the Opco, foreign investors can enjoy all the shareholders' rights guaranteed by the PRC Company Act, for example, entitlement to the dividends, voting on the business policy and appointing the directors and being involved in the investment plans, and additional rights provided in the by-laws of the Opco and the shareholders' participation agreement on the Opco. Under the VIE structure, foreign investors can only indirectly exercise these rights in Opco by means of the contractual package arrangements, which by definition is weaker, allowing the Chinese partner to default under those contracts, particularly where there is a conflict of interest.

Furthermore, the validity and enforceability of the contracts in a VIE structure under Chinese law is uncertain. After all, most of the VIEs are designed to de facto circumvent the Chinese law and regulations restricting foreign ownership. Under PRC Contract Law, contracts that 'conceal illegal aim in a lawful form' shall be deemed invalid. The defaulting Chinese partner cannot be prevented from invoking this nullity.

The Chinese authorities have never officially confirmed or denied the validity of the VIE structure. Although the Chinese economy greatly benefits from the VIE foreign investments in, for example, the Internet and Telecommunication sectors, the Chinese authorities have become increasingly hesitant towards the VIE structure. Article 9 of the Provisions on Implementing a Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, published by MOFCOM on 25 August 2011, prescribes that foreign investors shall not evade security review through 'contractual control', which is mainly aimed at VIE structures. In a decision made by MOFCOM on 13 August 2012 (Decree No 49 [2012]), the first case related to VIE structure but handling an anti-trust issue, the US retail company Walmart was explicitly forbidden to use the VIE structure to provide value-added telecommunication services in China through a Chinese domestic company. Ever since, there have been more and more signs from MOFCOM that they were waiting for the proper moment to bring the VIE to a halt.

New Draft Foreign Investment Law

On 19 January 2015, MOFCOM released a Draft Foreign Investment Law ('Draft'), accompanied by an Explanatory Note inviting the public to comment, which is a commonly used legislation methodology that seldom leads to any significant amendment. When adopted, the Draft will replace the current foreign investment laws, including the Wholly Foreign-owned Enterprises Law, Sino-foreign Equity Joint Venture Law and Sino-foreign Cooperative Joint Venture Law. There is no doubt that the Draft will bring fundamental changes to China's foreign investment regulatory regime. VIE is one of these highlighted changes and the clarification of the VIE structure forms a major element.

Article 15 (foreign investment) of the Draft defines explicitly that 'foreign investment' includes 'foreign investor controlling any domestic enterprise or holding interests in any domestic enterprise by contract, trust or other means'.

According to Article 18 (control), 'control' exists if any of the following conditions are met with respect to an enterprise:

(1) Directly or indirectly holding at least 50 percent of shares, equity ownership, voting rights or other similar rights and interests of the subject enterprise;

(2) Directly or indirectly holding less than 50 percent of shares, equity ownership, voting rights or other similar rights and interests of the subject enterprise, but which falls under any of the following factors:

(a) is entitled to, directly or indirectly, appoint at least half of the members of the board of directors or a similar decision-making body of the subject enterprise;

(b) has the ability to ensure that its nominated persons can obtain at least half of the seats in the board of directors or a similar decision-making body of the subject enterprise; or

(c) holding voting rights sufficient to impose material influence on the resolution of the shareholders' meeting, the general meeting, the board of directors or other decision-making bodies of the enterprise; or

(3) Imposing decisive influence on the operation, finance, personnel or technology of the enterprise by contract, trust or other means.

Compared with current foreign investment laws, the Draft includes contractual control in the scope of 'control' and 'foreign investment' instead of only focusing on equity ownership. Consequently, a VIE foreign investment is deemed equity shareholding and the legal restrictions on foreign investment will apply accordingly.

Article 149 of the Draft regarding legal liability for circumvention behaviour emphasises this point, namely that foreign investors and foreign-invested enterprises de facto circumventing provisions of the Draft by choosing contractual routes similar to VIE will be liable to penalty, which could reach RMB one million or 10 percent of the total invested amount.

Furthermore, the Draft introduces the concept of 'actual controlling shareholder'. Under the Information Reporting Chapter of the Draft, prior to the investment or within 30 days from the date of investment, foreign investors must disclose their actual direct or indirect controlling power.

The Draft adopts a 'Negative List' practised in the Shanghai Pilot Free Trade Zone ('Shanghai FTZ') and which has proven rather successful. First released in September 2013 and revised in July 2014, the Shanghai FTZ Negative List compared with the current Catalogue significantly reduces the restricted and prohibited industries to foreign investors, mostly in the industries of manufacturing, processing, professional services, transportation, entertainment, real estate and healthcare. Such changes may be seen as 'form over substance', but the future Negative List under the Draft is expected to be even more relaxed. When the foreign investment does not fall under the Negative List, national treatment will be applied and approval from MOFCOM is no longer required.

Thus, the impact of the Draft Foreign Investment Law on VIEs and foreign investment will depend directly on the content of the Negative List, which the PRC State Council can reduce or expand by amending the restrictions on market access for foreign investment. For example, if the value-added Telecommunication service providing industry is open to foreign investment under the Negative List, then the VIE structure would be superfluous for foreign investors and there is no need for the existing VIEs to apply for 'market access approval'.

After the Draft comes into effect, the Chinese VIE-driven domestic companies must follow the market access restriction on foreign investment, which means they must end their operations in prohibited industries. For the restricted industries, such deemed foreign invested Chinese companies, shall apply for a so–called market access approval before continuing operations in restricted industries. However, according to Article 45, foreign companies controlled by Chinese investors operating in the restricted industries may be deemed as Chinese investors when applying the market access approval. However, for the prohibited industries, a foreign company held by a Chinese investor will implicitly not be deemed as Chinese.

The Draft reflects the attitude of the Chinese authority towards VIEs. At first sight, it may appear to be a lose–lose situation: the foreign investors cannot use the VIE structure as a channel to invest in China, while the Chinese government loses an instrument that attracts investment. But on second sight, it is a win–win as it creates clarity in a long time grey area of law. Foreign and Chinese parties can henceforth rely on more consistent supervision of Chinese foreign investment rules and creative solutions, in particular cases are not by definition excluded.

Dealing with existing VIEs

The Explanatory Note to the Draft provides for three possible approaches to solve the issue of how to deal with existing VIEs.

The first option: A foreign-invested enterprise under contractual control (VIE) shall file with MOFCOM, declaring with specified evidence that it is subjected to the actual control of Chinese investors. Following such filing, such foreign-invested enterprise may continue to operate under a VIE structure.

The second option: A deemed foreign-invested enterprise shall apply to MOFCOM for simple approval of its status of being controlled by Chinese investors. After obtaining such recognitions, such foreign-invested enterprise may continue to operate under a VIE structure.

The third option: A deemed foreign-invested enterprise shall apply to MOFCOM for market access approval. MOFCOM and related other Chinese authorities will decide on a case-by-case basis, taking into account various factors, including the actual controller of these foreign-invested enterprises. Detailed regulations are yet to be published by MOFCOM.

The handling of the options is a climbing scale of strictness: in the first option, the VIE automatically obtains approval upon filing, while in the second option, an active recognition or approval from MOFCOM is required, but well-founded applications are unlikely to be rejected. The third option is by far the strictest measure. The market access approval requires comprehensive documentation and the actual control of the foreign-invested enterprise is only one of the factors that MOFCOM and other Chinese authorities consider when making such decision. Other aspects such as national security, public interest and the impact on the development of the industry will also be factored-in. Under the third option, a question mark is the word 'actual controller' instead of 'controlled by Chinese investors', which may leave some room for VIEs that are under the control of foreign investors.

The Explanatory Note announces that MOFCOM will further study this issue and present proposals on how to deal with this issue after its consideration of the public comments received.

Comments to the Draft Foreign Investment Law

Compared with current foreign investment laws, the Draft is a big leap forward with its consolidation of foreign investment laws, introduction of a Negative List and an information reporting system. However, several important issues are yet unclear.

There is no definition of 'material influence' and 'decisive influence' in Article 18, the concepts of which are crucial to determine the 'actual control'. Furthermore, foreign investors imposing decisive influence solely on the technology of the Chinese domestic company through contractual arrangement may constitute 'control'. Also, it is unclear whether the Chinese domestic company that has a foreign technology licence may also be deemed foreign controlled and subjected to the market access restrictions, which seems to go too far. The multi-level circumstances under the definition of 'control' may be in conflict with each other. For example, where in an equity joint venture, the Chinese investor holds the majority equity ownership while the foreign investor has decisive influence on technology, this article does not determine which party is in actual control. Therefore, it is recommendable that MOFCOM further clarifies the definition of control by giving examples.

The timing of the promulgation of the Draft is as follows: after the period of public comment has expired, the Draft, in order to become a national statute of law, will be submitted to the State Council and the National People's Congress. No concrete deadline can be given at this stage, but it is not likely to complete by the end of 2015.

Conclusions

- Foreign investment though a VIE that circumvents market access restrictions in China will no longer be accepted by the Chinese authorities, but VIEs may still be used by foreign investors in those industries that are not subjected to restrictions or used by Chinese domestic investors for foreign listing.
- There are three options for MOFCOM's dealing with existing VIEs: filing, applying for recognition of by Chinese controlled status and applying for market access approval.
- The use of the VIE structure will overall diminish.
- The real impact of the Draft Foreign Investment Law on VIEs and foreign investment will depend on the national version of the Negative List
- The clarity and loosening-up of the market access restrictions will economise time-consuming MOFCOM approval procedures.
- All in all, the Draft will mean a major improvement for inbound foreign investment into China.

Note:

1 Special thanks for the contribution of Mr She Wei, foreign (PRC) lawyer at HIL, Amsterdam.

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Partner
HIL International Lawyers & Advisers

Specialises in international company and commercial law and conversant in tax law, focus on China. Member of the Dutch Bar Association, the Inter Pacific Bar Association (IPBA) and arbitrator in the Chinese European Arbitration Centre in Hamburg (CEAC). Frequent speaker on several international legal and business fora.

Competition Law in 2014 and Trends for 2015

The Competition Commission of Singapore ('CCS') has taken a highly pro-active stance in ensuring compliance with competition law in Singapore. It has cracked down on international cartel cases affecting competition in Singapore, and it has stepped up its enforcement activity in relation to merger control. It has established itself as a serious regulator not to be ignored; we see this trend carrying on into 2015. This, coupled with the AEC in 2015, will clearly see greater activity with ASEAN as a whole. This article provides a high-level overview of the key developments in Singapore's competition law during 2014 and discusses the likely trends looking forward into 2015. It also touches on the upcoming ASEAN Economic Community ('AEC'), which is expected to come into force this year.

Increased Enforcement Against International Cartels by the CCS

Under Section 34 of the Competition Act (the 'Act'), agreements between undertakings which have the object or effect of preventing, restricting or distorting competition in Singapore are generally prohibited. In 2014, the CCS emphasised its hard-line approach by clamping down on two international cartels with an adverse effect on competition in Singapore.

On 27 May 2014, the CCS issued an infringement decision against four Japanese ball bearings manufacturers and their Singapore subsidiaries for their infringement of section 34 of the Act (the 'Ball Bearings Case'), and imposed financial penalties totalling S$9.3 million. In the Ball Bearings Case, the CCS found that the ball bearings manufacturers had engaged in anti-competitive agreements and the unlawful exchange of information in respect of the price and sale of ball and roller bearings to aftermarket customers in Singapore.

On 11 December 2014, the CCS fined 10 freight forwarding companies a total of S$7.2 million for their infringement of section 34 of the Act (the 'Freight Forwarding Case'). According to the CCS' investigations, the offending freight forwarding companies had engaged in cartel behaviour—they had collectively fixed certain fees and surcharges and exchanged price and customer information, relating to the provision of freight forwarding services from Japan to Singapore.

These cases represent the first time that the CCS has exercised the extraterritorial reach of its enforcement powers. They signal the CCS' growing readiness to enforce the Act against foreign companies insofar as their conduct affects or restricts competition in Singapore. It is also evident that there will be more such international cartels which will be subject to investigations in Singapore.

In the Ball Bearings Case, the CCS found that the Japan parent companies agreed amongst themselves on the overall strategies for their Singapore subsidiary companies to implement, among others, a market share and profit protection initiative. In Singapore, the respective Singapore subsidiary companies discussed the overall strategies decided by the Japan parent companies, and the methods to give effect to the initiative. The CCS held that their conduct had the overall common object of restricting competition in the market for the sale of bearings to aftermarket customers in Singapore. In this case, the CCS also assessed that the liability for the conduct carried out by the Singapore companies could be imputed to their parent companies as they formed a single economic entity ('SEE'). As such, each of the Japanese companies and their Singapore subsidiaries were found to be jointly and severally liable for the infringement.

In the Freight Forwarding Case, although the offending discussions on price fixing and information exchange largely took place between the Japanese freight forwarding companies in Japan, as the target of their agreements was shipments from Japan to destinations overseas including Singapore, the CCS regarded their conduct as having as object or effect the restriction of competition within Singapore for the provision of air freight forwarding services from Japan to Singapore. The CCS found that the conduct was carried out by both the Japan and related Singapore companies, acting as a single economic entity; as such, each Japanese company and their Singapore subsidiary was found to be jointly and severally liable for the infringement. It is noteworthy that the CCS did not find any evidence suggesting that the Singapore subsidiaries knew of the anti-competitive arrangements reached by the parent companies. The CCS nevertheless imposed a financial penalty on both the parents and their respective subsidiaries on the basis that they were part of a SEE. Whilst the concept of SEE has been used in a number of jurisdictions to impute to a parent company the acts of its subsidiary over which it has control, the reverse is rather unusual. It is also a clear signal that the CCS will not hesitate to take to task a company in Singapore for the illegal acts of its parent(s) if such acts may have an effect on competition in Singapore.

Competition Compliance and Early Detection

It is believed that the CCS' enforcement against cartel activity will continue actively into 2015. Given the CCS' increased enforcement efforts, businesses must take steps to ensure compliance with the law (including educating its sales and marketing staff of what they can and cannot do) and to allow for early detection in the event of an infringement. In particular, businesses must be mindful of the CCS' strict position in relation to cartels – the CCS has warned that the fixing of only an element of a rate or the receipt of commercially sensitive information by a business from a competitor without actively distancing itself from the conduct, may be sufficient to constitute an infringement of the section 34 prohibition.

In addition, Singaporean subsidiaries of foreign-registered companies should be aware that any cartel activity being engaged in by their parent companies outside of Singapore may still be caught by the CCS, if the CCS determines that they form a single economic entity and if an anti-competitive impact is felt in Singapore.

In light of this, if a company discovers that it or its parent company is engaging in cartel activity which may potentially have an anti-competitive effect in Singapore, what are the options available to it?

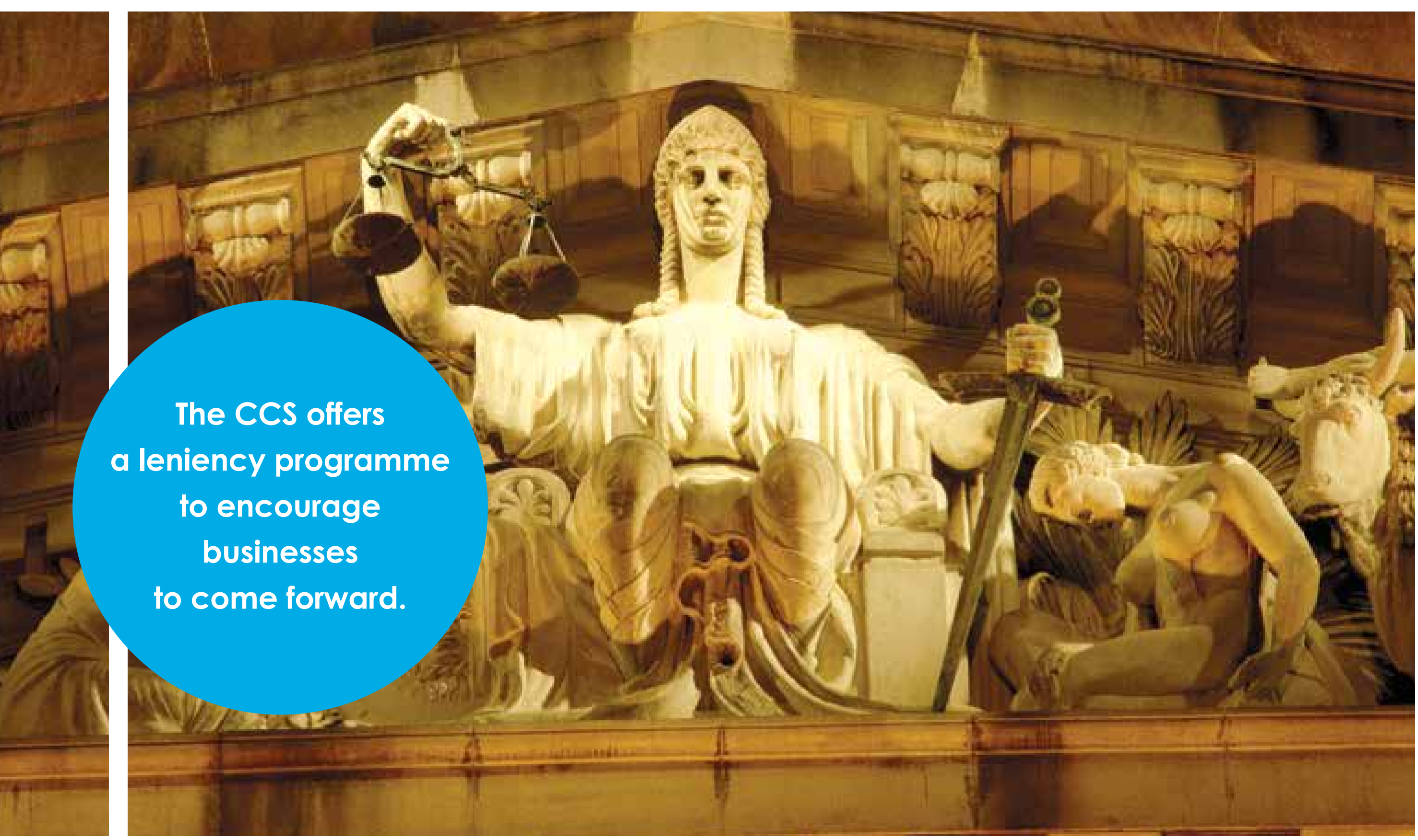
Thorough Review, Audit and Legal Advice

Whilst the immediate thinking might be that there is indeed a cartel, a careful audit and review of the facts and the business practices, as well as all relevant documents, should be called for to ascertain if indeed there have been anti-competitive agreements in place. This is a review that must be carefully undertaken, preferably with legal privilege attached. In doing this review, more than just Singapore should be considered. For example, within ASEAN, countries such as Malaysia, Indonesia and Vietnam, which all increasingly have very active competition regulators, must be considered.

Applications for Leniency

Where a real issue has been identified, then leniency becomes an option. The CCS offers a leniency programme to encourage businesses to come forward to whistle blow on cartel activities in Singapore. Under this leniency programme, whistleblowing cartel members may receive immunity from, or a reduction in the amount of, financial penalties that may be imposed on them by the CCS. An important aspect of the leniency programme is the 'First-to-the-Door' policy, which provides the first whistleblowing cartel member the benefit of full leniency from financial penalties.

An applicant for leniency must furnish sufficient evidence to support its claim of cartel activity. However, the marker system under the CCS' leniency programme allows an applicant to first notify the CCS of its involvement in a cartel, without necessarily gathering the full evidence regarding such cartel activity. In essence, the system preserves the position of the applicant in the queue, pending its ability to furnish sufficient evidence to support its application within a specified period of time.



The CCS offers a leniency programme to encourage businesses to come forward.

Application for Leniency Plus

Cartel members may also consider providing information to the CCS under the leniency plus programme. This was introduced in January 2009 to encourage cartel members under investigation to report their involvement in another cartel activity, in order to secure reduced financial penalties for the first cartel activity.

On Balance

The leniency programme has been crucial to the CCS in its investigation of cartel activities, with both the Ball Bearings Case and the Freight Forwarding Case being brought to the CCS' attention because of whistleblowing cartel members making disclosure to the CCS under the leniency programme. In both cases, the first leniency applicant enjoyed full immunity from penalties.

Businesses that become aware of any involvement in a cartel, but only after a careful audit and review have been undertaken, are encouraged to actively consider notifying the CCS and applying for leniency. In particular, cartel members should be aware that only the first leniency applicant would qualify for full immunity from financial penalties – this means that where there has been an earlier leniency applicant, the benefits from applying for leniency are markedly reduced. As such, it is important for businesses to put in place measures to facilitate early detection of anti-competitive activity (for example, through reporting requirements within the company) to increase the chances that it will be the first in queue for any leniency application.

On balance, whilst there is merit in doing a leniency application, there is risk of admission of liability. This could have an impact on follow on third party action.

Increased Merger Scrutiny by CCS

Section 54 of the Act prohibits mergers which may result in a substantial lessening of competition in any market for goods or services in Singapore. In this regard, Singapore operates a voluntary merger notification regime, whereby parties to a merger are required to self-assess and then decide to notify potentially problematic mergers to the CCS for its decision. The risk of not notifying a potentially objectionable merger is that the CCS has the power to investigate mergers on its own initiative, and to take enforcement action if it deems that a non-notified merger leads to a substantial lessening of competition.

Over the past few years, the CCS has taken a more proactive approach towards looking into non-notified mergers. It has stepped up its market surveillance and issued letters to merger parties to request for more information in relation to non-notified mergers.

This has led to a significant amount of mergers being notified to the CCS in 2014 – 10 in total, with six of these being cleared to date. The notified mergers in 2014 span a variety of industries from the cement industry to the airline industry.

Of the 10 mergers notified in 2014, two had proceeded to a Phase 2 Review: Parkway Holdings' proposed acquisition of Radlink-Asia in December 2014, and Seek Asia Investment's proposed acquisition of JobStreet Singapore in May 2014. A Phase 2 Review of a merger is conducted by the CCS if it is unable to conclude that a merger situation does not raise competition concerns, and is of the view that a more detailed examination of the merger is required.

The fact that two mergers had proceeded to Phase 2 Review in 2014 is significant when one considers that there had only been six mergers which have proceeded to a Phase 2 Review in the six years from 2007 to 2013. This is possibly indicative of a stricter approach being adopted by the CCS when assessing a merger's potential competition effect in Singapore.

Seeking Confidential Advice

Together, the CCS' increased scrutiny of non-notified mergers and possibly stricter approach during merger assessment, suggest that businesses may need to be more conservative in their self-assessment of the need to notify a proposed transaction to the CCS.

When in doubt, under the revised merger procedures which came into effect in July 2012, businesses may choose to seek the CCS' confidential advice as to whether or not a proposed merger is likely to raise competition concerns in Singapore and therefore whether a notification is advisable. To qualify for confidential advice, the merger parties must show a good faith intention to proceed with the transaction, the merger must not be in the public domain and there must be some doubt as to whether or not the merger situation raises concerns such that notification may be appropriate.

The AEC envisages the transformation of ASEAN into a single market and production base.

We would highlight that the information to be submitted to the CCS for confidential advice is almost equivalent to that required for a formal merger notification. However, for merger parties who are still in the early stages of negotiations and are genuinely uncertain as to whether their proposed transaction may raise competition concerns, this process offers significant benefits – it allows the parties to obtain guidance from the CCS within a relatively short period of 14 working days while preserving the confidentiality of the transaction.

Provision of Behavioural and Structural Commitments

Where a proposed merger is likely to be deemed as substantially lessening competition in Singapore or where it has been moved by the CCS into a Phase 2 Review, parties may wish to provide commitments to mitigate any competition concerns.

On 20 February 2014, Seek Asia Investments ('Seek Asia') notified the CCS of its intention to acquire JobStreet Singapore ('JobStreet'). The notification proceeded to a Phase 2 Review on 14 May 2014, as the CCS decided that the proposed acquisition might raise competition concerns in Singapore. In particular, the CCS found that the proposed acquisition would substantially lessen competition in the market for online recruitment advertising services in Singapore, as it would bring together the two main online recruitment advertising service providers in Singapore.

To mitigate the CCS' concerns, Seek Asia first offered certain behavioural commitments, including the commitment to maintain the current pricing of its services, capped at certain levels, for three years after the completion of the transaction. Whilst the CCS was consulting about the behavioural commitments, it surfaced that additional competition concerns could result from the recent acquisition by Seek Asia of Job Seeker Pty Ltd, an online recruitment aggregator based in Australia which owned jobs.com.sg. This acquisition had not been disclosed to the CCS in the notification process. To alleviate this additional concern, Seek Asia offered to divest the complete assets of its other business, http://www.jobs.com.sg. Following market consultations, the CCS considered that the likely adverse effects of the merger would be mitigated by these commitments and granted its conditional approval for the transaction in October 2014.

This case is significant as it marks the first time that the CCS has accepted behavioural commitments from merger parties in order to address the competition concerns arising from a merger. It also illustrates the importance of disclosing all relevant facts to the CCS when filing a notification.

Practically, this suggests that where businesses recognise the competition concerns that may arise from their proposed transaction, they should take the initiative to consider the possible commitments which they may be prepared to offer, from a commercial standpoint, to allow the merger to be cleared. In short, businesses should assess the importance of the proposed merger, and balance it against any commitments which they may be willing to offer to alleviate any potential competition concerns.

Raising of the Failing Firm Defence

On 28 November 2014, the CCS cleared the proposed acquisition of Tiger Airways Holdings Limited ('Tiger Airways') by Singapore Airlines Limited ('SIA'). This case is important as it is the first time that the CCS has cleared a merger on the basis of the failing firm defence.

Essentially, the failing firm defence allows financially distressed firms to be rescued via mergers, which would otherwise be considered as substantially lessening competition. In order for a merger to qualify for the failing firm defence in Singapore, the following three criteria must be satisfied: (1) the firm must be in such a dire situation that without the merger, the firm and its assets would exit the market in the near future; (2) the firm must be unable to satisfy its financial obligations with no serious prospects of re-organising financially; and (3) there should be an absence of other purchasers presenting a less anti-competitive option.

In this case, the CCS cleared the proposed acquisition on the basis of the failing firm defence, as it found that Tiger Airways was likely to exit its operations in the absence of the proposed acquisition. While SIA and Tiger Airways competed in the markets for the supply of international air passenger transport services on certain routes, the CCS accepted that the proposed transaction would be less detrimental to competition in Singapore as compared to the scenario where Tiger Airways were to exit its operations in the market. In particular, without the proposed acquisition of Tiger Airways by SIA, the consequent exit of Tiger Airways would cause disruptions to passengers and to the connectivity of the Singapore air hub.

While the proposed acquisition in this case did not proceed to a Phase 2 Review, any competition concerns were mitigated in view that the entity being acquired would have otherwise exited the market. The failing firm defence may hence be helpful to businesses looking to merge with financially distressed competitors, as they should consider whether it may apply to alleviate any substantial lessening of competition if a merger were to go through.

ASEAN Economic Community

An important development on the regional front for 2015 is the establishment of the AEC. The AEC envisages the transformation of ASEAN into a single market and production base, with free movement of goods, services and capital in the region. One of the key pillars of the AEC is the development of competition policy and law in the region. Competition policies and laws are considered necessary to ensure that the regional markets are kept open and to prevent anti-competitive behaviour from distorting competition in ASEAN.

In line with this, the ASEAN member states have committed in the ASEAN Economic Blueprint to the introduction of national competition policies and laws by 2015. Currently, only five member states have generic competition law legislation in place – Malaysia, Thailand, Vietnam, Indonesia, and Singapore, with the remaining countries at various stages of drafting.

Although the impending establishment of the AEC has been anticipated by businesses in this region for some time now, it is finally time for these developments to be unveiled. Businesses that are active in ASEAN and have adopted an ASEAN strategy in their business plans must therefore pay close attention to any new competition legislation that is being introduced in the region and how it would affect their business. In particular, businesses must recognise that the different ASEAN countries may adopt different approaches and thresholds under their respective competition laws – a conduct that is acceptable in one jurisdiction may be per se prohibited in another jurisdiction; a proposed merger that need not be notified in one jurisdiction may need to be notified in another jurisdiction. As such, businesses must familiarise themselves with the legislation in each country and recognise that there is no one-size-fits-all approach.

This will call for compliance programmes and training to be tweaked somewhat to suit local jurisdictions and culture. It will also call for local language training to ensure awareness is well-driven home. In so far as business activities and transactions are concerned, businesses must also ensure that competition is listed as a critical check item in a review of whether to proceed or otherwise.

Kala Anandarajah
Partner and Head, Competition & Antitrust Practice, Rajah & Tann LLP

A recognised leader, Kala Anandarajah has been involved in every major cartel/abuse investigation, merger/other notification, leniency application, dawn-raid, counselling, training and implementation of competition laws across the region. She has been cited in the Top 100 Women in Antitrust in the World by GCR and awarded the Public Service Medal, which is conferred by the President of Singapore. She is a co-author of the ASEAN Competition Laws.

IPBA New Members December 2014 – February 2015

We are pleased to introduce our new IPBA members who joined our association from December 2014 – February 2015. Please welcome them to our organisation and kindly introduce yourself at the next IPBA conference.

Australia, John Keeves *Johnson Winter & Slattery*	**India**, Rodney D. Ryder *Scriboard*
Austria, Arpad Gered *Maybach Görg Lenneis & Partner*	**India**, Gaurav Saxena *Neeraj Associates*
Brazil, Carlos Roberto Siqueira Castro *Siqueira Castro Advogados*	**India**, Ashwin Shanker *Chambers of George A Rebello*
Cambodia, Sotheaphal Pho *Bassac Law*	**India**, Disket Angmo Shunu *Agram Legal Consultants*
Canada, Matthew Kronby *Bennett Jones LLP*	**Indonesia**, Arif Abdillah Aldy *Aldy Wicaksono Pratama (ALWP)*
China, Lisa Chow *Beijing Yingke Law Firm*	**Indonesia**, Leoni Silitonga *Roosdiono & Partners*
China, Lucas Jonsson *Mannheimer Swartling Advokatbyrå AB Shanghai Representative Office*	**Japan**, Takanori Abe *Abe & Partners*
China, Gaby Smeenk *De Brauw Blackstone Westbroek N.V. Shanghai Representative Office*	**Japan**, Hironobu Akatsuka *Kojima Law Offices*
China, Jen Zhai *Beijing Yingke Law Firm*	**Japan**, Ko Hanamizu *Anderson Mori & Tomotsune*
France, Marie Danis *August & Debouzy*	**Japan**, Ayumu Iijima *Kitahama Partners*
Germany, Torsten Loercher *CMS Hasche Sigle*	**Japan**, Nae Iijima *Dojima Law Office*
Germany, Björn Otto *CMS Hasche Sigle*	**Japan**, Atsutoshi Maeda *Anderson Mori & Tomotsune*
Hong Kong, Nicholas Alexander Brown *Pinsent Masons*	**Japan**, Ryosuke Naka *Kitahama Partners*
Hong Kong, Nigel Francis *Addleshaw Goddard*	**Japan**, Megumi Nakajima *TMI Associates*
Hong Kong, Lianjun Li *Reed Smith Richards Butler*	**Japan**, Shohei Tezuka *Higashimachi LPC*
Hong Kong, Thierry Lohest *Loyens & Loeff*	**Japan**, Tomoki Yanagisawa *TMI Associates*
Hong Kong, Marco Nicolini *Chiomenti Studio Legale*	**Japan**, Yoshiyasu Yamaguchi *TMI Associates*
Hong Kong, Brett Stewien *Addleshaw Goddard*	**Korea**, Hyungjin Ahn *Lawfirm Geonwoo*
India, Vyapak Desai *Nishith Desai Associate*	**Korea**, Young Seok Lee *Yulchon LLC*
India, Shourya Mandal *Maratha & Co.*	**Korea**, Hae Sik Park *Yulchon LLC*
India, Abhishek Maratha *Maratha & Co.*	**Korea**, Jongsoo Yoon *Shin & Kim*
India, Ameet Naik *Naik Naik & Company*	**Laos**, Khamphaeng Phochanthilath *VNA Legal*

Malaysia, Hean Leng Ang
Lee Hishammuddin Allen & Gledhill

Malaysia, Dheeraj Bhar
Brijnandan Singh Bhar & Co

Malaysia, Chee Hoong Chia
Rahmat Lim & Partners

Malaysia, Khong Aik Gan
Gan Partnership

Malaysia, Kamraj Nayagam
Kadir Andri & Partners

Malaysia, Swee Kee Ng
Shearn Delamore & Co.

Malaysia, Zheng Hui (Charlie) Ng
Lee Sok Wah & Co.

Malaysia, David Chan Tong Ong
Chooi & Company

Malaysia, Min Lee Tan
Gan Partnership

Malaysia, Kai Chee Wan
Rahmat Lim & Partners

Mexico, Fernando Martinez Macedo
Correduria Publica 67 Del D.F.

Myanmar, Khin Soe Htaik

Netherlands, Elisa Van der Riet
Development Corporation Spoorzone Delft (OBS)

New Zealand, Brian Paul Keene
Brian Paul Keene QC

Philippines, Eloy Espiritu Bello IV
JG Law (Jimenez Gonzales Bello Valdez Caluya & Fernandez)

Philippines, Patricia Cristina Tan Ngochua
Romulo Mabanta Buenaventura Sayoc & De Los Angeles

Philippines, Ma. Christina Reyes
Cochingyan & Peralta Law Offices

Philippines, Danielle-Anne Rubinos
Power Sector Assets and Liabilities Management Corporation

Philippines, Mel Sumatra
Basa Delos Reyes Ybanez Macapagal & Sumatra Law Offices

Poland, Karolina Schiffter
Raczkowski & Wspólnicy

Russia, Maria Abe
ALRUD Law Firm

Singapore, Eng Kiat Kenneth Cheow
Rodyk & Davidson LLP

Singapore, Nobuo Fukui
Nagashima Ohno & Tsunematsu Singapore LLP

Singapore, Jamie Harrison
Addleshaw Goddard

Singapore, Denys Hickey
Thirty Nine Essex Street Chambers

Singapore, Warren Kim
Schaeffler (Singapore) Pte Ltd

Singapore, Shuen Ann Glenda Lee
Rodyk & Davidson LLP

Singapore, Elisabeth Leimbacher
Schellenberg Wittmer Pte Ltd

Singapore, Neil McInnes
Pinsent Masons MPillay LLP

Singapore, Ken Shimono
TMI Associates (Singapore) LLP

Spain, Brígida Galbete
Cuatrecasas, Gonçalves Pereira SL

Taiwan, Gregory A. Buxton
Winkler Partners

Taiwan, Christine Chen
Winkler Partners

Taiwan, Daniel Chen
Winkler Partners

Taiwan, Vincent Wang
Tsar & Tsai Law Firm

United Arab Emirates, Takamasa Makita
Clyde & Co LLP

United Kingdom, Ravi Aswani
Stone Chambers

United Kingdom, Tom Coates
Lewis Silkin LLP

United Kingdom, Alexander Gunning
4 Pump Court

United Kingdom, Tom Hibbert
RPC (Reynolds Porter Chamberlain LLP)

United Kingdom, Peter Leave
One Essex Court

United Kingdom, Mark Lim
Lewis Silkin LLP

United Kingdom, Iain Munro
4 Pump Court

United Kingdom, Simon Rainey QC
Quadrant Chambers

United Kingdom, Chris Ross
RPC (Reynolds Porter Chamberlain LLP)

United Kingdom, Adam Temple
4 Pump Court

United Kingdom, Jonathan Wood
RPC (Reynolds Porter Chamberlain LLP)

USA, Philip Bruner
JAMS International

USA, Seth Buckley
Carlsmith Ball LLP

USA, Chris Cloutier
King & Spalding LLP

USA, Jeffrey W. Shields
Shields Law Offices

USA, Sally Harpole
Independent Arbitrator

Vietnam, Tien Long Bui
ZICO Law Ltd.

Discover Some of Our New Officers and Council Members

Shinichiro Abe

IPBA Leadership Position:
Co-Chair of the Insolvency Committee

What was your motivation to become a lawyer?

My motivation has always been a desire to help people with their legal issues. This includes the underprivileged, who often need legal help to vindicate their rights, and companies in need of legal services.

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

I have had so many memorable experiences that it's difficult to answer this question. A few years ago I won a big case involving blue chip companies. I've also received national media attention. However, the most memorable experience for me was helping parents of elementary and junior high school students improve the safety and comfort of their school systems' environments through negotiation and litigation.

What are your interests and/or hobbies?

I love sports and reading books. I have recently taken up horse riding, which I very much enjoy.

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

I climbed Mt. Everest to an altitude of 4000 metres on horseback last autumn.

Do you have any special messages for IPBA members?

It would be an honour if I could bring greater excitement to our insolvency group and facilitate the sharing and discussion of information within the global insolvency community.

Tan Chuan Thye S.C.

IPBA Leadership Position:
Chair, Insurance Committee

What was your motivation to become a lawyer?

The choice of reading law at university was probably a cop out from having to face up to parental pressure. I thought of medicine as a nobler profession but my parents, who had both read law, thought otherwise. Mercifully, the subject was not dry bones and there was enough blood to keep me interested and eventually, the idea of being paid to find solutions did not seem to be such a bad one.

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

There have been several. There have been the usual highs of winning cases and I will stay away from those.

I once spent a day on a banana plantation with experts understanding what factors influenced crop quality. That evening, after sunset, the group drove out to dinner and went over quite a bump on a track between rows of plants that we had walked through earlier. The group leader nonchalantly said: 'Python'. He was not joking.

More recently, I was lead counsel in a *pro bono* case where the client had been sentenced at trial to death by hanging for drug trafficking. The appeal was dismissed even though I honestly thought we raised enough doubt. After the dismissal, the prosecution indicated that it would not oppose an application to have the death sentence reduced to one of life imprisonment. The client was 28 years old. He now has a chance of release before he turns 50.

What are your interest and/or hobbies?

It used to be golf. Now it is any quiet hour in the week to dream about golf. My older friends tell me it passes when the children grow up.

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

IPBA members are far too discreet to want to know about my deep dark secrets

Do you have any special messages for IPBA members?

I was fortunate enough to be introduced to the IPBA as a young lawyer and found a group of international lawyers who were non-judgmental, encouraging and welcoming. I was allowed, with very little experience, to be involved in committee work. After a period of self-induced exile, I have been welcomed back with open arms and am very glad to be among friends again. Even as the IPBA continues to improve on relevance and its role, it is the friendship and mutual encouragement, especially in the committees and the Council, that makes being a member so very worthwhile.

Lynn P. Harrison 3rd

IPBA Leadership Position:
Co-Chair of the Insolvency Committee

What was your motivation to become a lawyer?

As an undergraduate in college, I had the opportunity to study abroad in France. After completing my study abroad, I decided that I wanted to go to law school in order to pursue a career in law and foreign service. Although I originally wanted to be a diplomat, I became interested in restructuring and insolvency law during my second year at NYU School of Law. As an attorney, I have been able to incorporate my interest in international law with my restructuring and insolvency practice while working on some of the largest international cases in recent years.

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

Given my international restructuring background, the international cases that I have worked on, including Parmalat and Lehman Brothers, have been very memorable. The work that I have done for foreign clients involved in chapter 11 cases within the United States has also made practising as an attorney extremely interesting and challenging.

What are your interest and/or hobbies?

One of my interests is military history. I particularly enjoy reading books and watching documentaries to learn about military history from different countries and time periods.

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

A few years ago, I appeared on 'A Passage From Wall Street,' a weekly 25 minute special that aired in China on Phoenix TV InfoNews Channel. The weekly special discussed business opportunities for Western investors in China, new Chinese laws, and during the same period, ways for the Chinese government to enable and encourage Chinese business growth. I also lectured at six different universities across China on a variety of topics, including distressed opportunities in the United States and the best practices for international insolvency cases.

Do you have any special messages for IPBA members?

IPBA members should stay tuned to restructuring and insolvency developments throughout Asia. Over the next 12 months, I believe that we will see an increase in cross-border restructurings. Representing clients involved in restructuring requires a specific expertise and understanding of international cross-border insolvency laws. Accordingly, I think that those attorneys who have a global footprint will play a role in this increase of cross-border restructurings over the coming months.

Members' Notes

Stephan Wilske, Germany

Below are details of my most recent publications:

- The Ailing Arbitrator – Identification, Abuse and Prevention of a Potentially Dangerous Delaying and Obstruction Tool, Contemporary Asia Arbitration Journal, Vol 7, No 2, November 2014, 279-308;
- Investment Treaty Arbitration Involving Turkey and Turkish Parties in 'Arbitration in Turkey', Ali Yesilirmak/Ismail Esin (eds.), 2015, 241-263;
- Ad hoc Arbitration in Germany in 'Arbitration in Germany – The Model Law in Practice', 2nd Edn 2015, Boeckstiegel/Kroell/Nacimiento (eds.), 727-752.

In addition, I gave the following lecture:

- 21 January 2015 in Wiesbaden/Germany: Dorint Pallas Hotel, 8. Forum E-Discovery Germany-Austria-Switzerland 2015, E-Discovery and New Developments in International Arbitration.

Benjamin Hughes, Korea

I am honored to be joining the faculty of Seoul National University School of Law as Associate Professor in March 2015. I will continue to practice as an independent arbitrator and mediator in the Asia-Pacific region. I am also honored to be associated with The Arbitration Chambers in Singapore (www.arbiter.com.sg).

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 **Maxine Chiang** at maxinechiang@chianglee.com and **Leonard Yeoh** at leonard.yeoh@taypartners.com.my. 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.

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):

[ ] Anti-Corruption and the Rule of Law (Ad Hoc)
[ ] APEC (Ad Hoc)
[ ] Aviation Law
[ ] Banking, Finance and Securities
[ ] Competition Law
[ ] Corporate Counsel
[ ] Cross-Border Investment
[ ] Dispute Resolution and Arbitration
[ ] Employment and Immigration Law
[ ] Energy and Natural Resources
[ ] Environmental Law
[ ] Insolvency
[ ] Insurance
[ ] Intellectual Property
[ ] International Construction Projects
[ ] International Trade
[ ] Legal Development and Training
[ ] Legal Practice
[ ] Maritime Law
[ ] Scholarship
[ ] Tax Law
[ ] Technology and Communications
[ ] Women Business Lawyers

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

LOCAL ROOTS GLOBAL IMPACT

"The only local arbitration commission which meets or surpasses global standards" - The Economist Intelligence Unit

"Professionalism, competence and transparency" - Global Arbitration Review

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 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 will be effective as of April 1, 2015. The 2015 rules widely adopt UNCITRAL Arbitration Rules and further accept up-to-date international practice.

BAC/BIAC Growth

* From 7 cases filings in 1995 to over 24,000 cases in total by 2014
* 1500+ new filings on average per year since 2005
* 500+ international cases in total
* Parties form various jurisdictions including USA, UK, Germany, Australia, Japan, South Korea, Singapore, Hong Kong and Taiwan, etc.
* The sum in dispute of around 10 billion RMB (approx. 1.65 billion USD or 1.20 billion EUR) per year on average since 2010 with a highest claim amount of 4.2 billion RMB (Approx. 0.69 billion USD or 0.51 billion EUR) in 2011

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.