

# IPBA Journal

September 2015

No **79**

NEWS & LEGAL UPDATE



INTER-PACIFIC BAR ASSOCIATION

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# IPBA Journal

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## The President's Message

**Huen Wong**  
President



Dear Colleagues,

I recently attended the ABA Annual Meeting held in Chicago in early August. I was invited to participate in a couple of round-table discussions including one organised by the UK Counsel General in Chicago on 'The Future of the International Bar' and a 'Distinguished Guest Breakfast' to discuss 'Current Challenges to the Practice of Law As We Know It'. Both events were very well attended. From the many presentations made by fellow practitioners from different jurisdictions, it was clear that they all shared the same concern about their respective legal professions: whether our legal profession is really in decline. Firstly, it is universally true that legal education programmes, seminars and conferences are getting more expensive. A lot of legal practitioners are seeking alternative legal educational and training programmes such as webinars or in-house training. This may dampen the feeling of a legal fraternity and diminish camaraderie. Another concern is the fact that law firms tend to merge into institutions with hundreds or even thousands of lawyers, resulting in the tendency towards lawyer estrangement and loss of individual character among firms.

The question 'How big is enough?' is a common refrain. Will there still be provincial and high-street firms in the next decade? There is also talk of virtual or cyber law firms. A lot of fellow practitioners are also wondering whether our practice areas are constantly shrinking. It is an undeniable fact that legal advice is no longer provided only by lawyers. Many other professionals or paralegals now compete with us in providing legal service in various areas. In some jurisdictions, potential clients are seeking legal assistance

from non-lawyers, believing that they are efficient and less expensive. Of course, another major challenge comes from the accounting firms that have been stealthily building up their legal service divisions in recent years.

Despite all these challenges and concerns, we all left the event very confident that the legal profession will continue to thrive. The law is the concern of the lawyer. The law is not just a business; it is a system of rules, social order and justice. As the common law jurisdictions celebrate the 800th Anniversary of the Magna Carta, it is time we took stock of what the legal profession has achieved thus far and how we can ensure its continued success in gaining the trust and respect of the people who require access to justice. Lawyers will always uphold the rule of law.

### **Legal Trends in Hong Kong: Champerty/Maintenance as an Offence**

Some members may not be aware that conditional fees and contingency fees are not available in Hong Kong as an alternative funding for litigation. As a matter of fact, the offences of champerty and maintenance, whether sued as torts or prosecuted as a criminal offence, are part of the law in Hong Kong. Champerty is known to lay persons as 'buying into someone else's lawsuit'. Maintenance is the 'support of litigation by a stranger without just cause'. For the common law offences of champerty and maintenance, the Hong Kong courts take the matter seriously: they state that such offences should be condemned as 'the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses'.

Notwithstanding the above, in recent times, seemingly and at least in non-personal injury cases, the courts in Hong Kong have become quite prepared to take a more liberal approach to the matter, by way of exceptions to the traditional prohibition of champertous agreements. In the Court of Final Appeal judgment in *Siegfried Unruh v Seeberger* [2007], the Court said: 'It is . . . obvious that [the] access to justice category is not static. The development of policies and measures to promote such access is likely to enlarge the category and to result in further shrinkage in the scope of maintenance and champerty.'

There have also been views of some members of the general public that the offences of champerty and maintenance should be considered in a more liberal manner and that funding for litigation should be reviewed. In fact, the offences of champerty and maintenance have mostly been abolished by statute in other common law jurisdictions like Australia and England.

### **Litigation Funding for Hong Kong?**

The above developments in Hong Kong lead to another important issue: litigation funding. The Law Society of Hong Kong is aware that litigation funding is available in some jurisdictions. In a recent seminar in Hong Kong,

a third party funding company in the UK explained that they had been funding, mainly for claimants, the following types of claims in England and Wales and in some common law jurisdictions:

- (i) Competition claims – both cartel and abuse of dominant position claims
- (ii) Breach of contract – property disputes, procurement contracts, investment management disputes
- (iii) Arbitrations
- (iv) Insolvency claims
- (v) Intellectual property and patents – damages claims for infringement of patent, breach of development agreements around patent for medical device
- (vi) Breach of fiduciary duty & breach of trust – for negligent administration of trusts
- (vii) Tax tribunal claims

To thoroughly consider the above issues, the Hong Kong Law Society has convened a working party to study the issues. The working party will learn about litigation funding from other jurisdictions. I have suggested that they should consider approaching some members of the IPBA in their study in order to share their experience in this area.



### **Other Legal Conferences**

I am planning to attend more legal conferences during my term as the representative of the IPBA. I have just attended the AIJA Congress in London. I am planning to attend the Korea IPBA Seminar in Seoul; the 'East Asia Regional Forum: Continued Challenges & Opportunities of Pan Asia'; the POLA Conference in Goa, India; the IBA Annual Conference in Vienna, Austria; the IPBA Mid-Year Conference in Dubai; 'Arbitration at the Crossroads: Middle East, Africa, and Asia'; and the UIA Congress in Valencia, Spain.

Talking about AIJA, it had been decided that the MOU entered into between AIJA and IPBA in 2010 would be extended once again for another two years, i.e., until September 2017. One change to the MOU is that there will now be a reciprocal waiver of the annual conference registration fee for the presidents of the two bodies, enhancing the goodwill between the two associations and making it easier for the leaders to attend each other's conference. As mentioned above, I have just attended the AIJA Congress in London in early September. On that occasion, I met with the President and other leaders of AIJA and signed the extension of the MOU.

### **IPBA Incorporation**

I am pleased to report that on 25 June 2015, the IPBA became an incorporated entity in Singapore.

Spearheaded by past Secretary-General Yap Wai Ming, the incorporation was studied, discussed and discussed again over the course of two years by the IPBA Officers, Council, and the IPBA Constitution Review Committee, with feedback sought from all IPBA members prior to the finalisation of the new Constitution and incorporation filing. Jurisdictions such as the United States, England, Japan, Hong Kong and Singapore were at first considered, with tax implications, banking regulations and the physical location of the Secretariat being the most important factors in determining the best jurisdiction for the IPBA.

The field was narrowed down to Hong Kong and Singapore, with Singapore ultimately chosen as the most logistically feasible jurisdiction that met all of the IPBA's

requirements. Throughout the entire process, the officers and council were careful not to stray from the principles of the Spirit of Katsuura (new members may wish to visit the IPBA website for details and background of the Spirit of Katsuura). While the IPBA's structure may need to change with the times, and change with our growth, the basic Spirit that has kept the association thriving for the past 25 years must never be broken. We would like to thank all participants in this endeavour, including general members who provided their feedback, in helping us make the incorporation go so smoothly. As of this writing, our current Secretary-General, Miyuki Ishiguro, is working to set up the daily operational functions such as liability insurance for the officers, the accounting and audit systems based on Singapore and international accounting standards, and a bank account in Singapore. More news of this is forthcoming .

### **New Leadership**

Lastly, I would like to appeal to all members who would like to be considered, or to recommend others, to play a more active role in the IPBA to come forward. The Nominating Committee has just finished choosing nominees for leadership positions to start after the Kuala Lumpur Conference. The search is ongoing for future years, however, as they are always looking for members who are keen to serve the IPBA on committees by sharing their knowledge and experience and thus promoting any particular practice area, or as jurisdictional and regional membership representatives to help promote the IPBA and support current members. Those who are interested, please contact the appropriate leader of the area in which you are interested by referring to the Leadership list on pages 2-3 of this Journal.

**Huen Wong**  
President



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# The Secretary-General's Message

**Miyuki Ishiguro**  
Secretary-General



Dear IPBA Members,

My term as Secretary-General began last May, and although I have not seen most of you in person since then, IPBA members are always on my mind.

The IPBA Officers meet with other Council members twice a year only, but we are in constant contact with each other to support IPBA objectives for the benefit of our members. The IPBA Council members are also IPBA members, after all!

Past Secretary-General Yap Wai Ming and I are finalizing the necessary documentation and logistics related to the incorporation of the IPBA in Singapore, which was accomplished on June 25th this year.

It was necessary to amend the IPBA Constitution to comply with regulations related to the incorporation. To ensure fairness and transparency, every member was given the opportunity to comment on the amendments, and some members did so. We thank everyone who submitted their comments and suggestions.

The new Constitution is available on the IPBA web site, and we encourage you to take a look at it. Major changes to the Constitution include the following. Please note that the articles are not quoted, but are paraphrased only. Please refer to the IPBA Constitution for the articles in their entirety.

## **1. Article III. Limited by Guarantee.**

In case the association is dissolved, members are to contribute up to maximum one Singapore Dollar towards any debts or liabilities of the association.

After celebrating our 25th Anniversary Annual Conference in Hong Kong this year, we do not intend to dissolve the IPBA in the near or distant future. With the kind support of all members, we plan to continue the association for many, many more years.

## **2. Article IV. Application of Funds and Property.**

Although the IPBA has never been a profit-making entity, it is now specified in the Constitution that the Association will be a non-profit entity, and no member will ever receive any funds from the association. This includes Officers and other Council members.

## **3. Article VIII. Registered Office.**

The Registered Office is in Singapore or as the Officers determine from time to time. The Secretariat remains in Tokyo, as also stated in the Constitution.

## **4. Article XI. Officers and Deputy Officers.**

Nothing has changed in regards to the Officers or Council members, but now the following are also considered Directors of the Association: the President, President-Elect, Vice President, and Secretary-General. If none of them is a resident of Singapore, a resident of Singapore is appointed as "Resident Director". The Officers can change the Resident Director or extend his/her term, and the Resident Director has no individual authority but acts as directed by the Officers. Currently, the Resident Director is Yap Wai Ming. When current Deputy Secretary-General Caroline Berube becomes the Secretary-General in 2017, as a resident of Singapore she fulfills this requirement so a Resident Director is not needed.

**5. Article XII. The Council.**

- a. A "Jurisdiction" now means "one with an autonomous and distinctive legal system, or such other economic groups as Council may decide." This expands the scope of interpretation as to the nature of a Jurisdiction for purposes of the IPBA membership. As an example, regions such as Benelux now could possibly elect a jurisdictional leader with a collective sum of 25 members among Belgium, the Netherlands, and Luxembourg. Countries that have several territories with differing legal systems could also be considered as separate Jurisdictions in the IPBA. This gives us more flexibility in terms of representation and leadership, which in turn can strengthen the IPBA's structure to support our members.
- b. Since IPBA was established, Committee leadership consisted of one Chair and one or more Vice-Chairs (although the latter are not Council members, they are considered leaders). In recent years, however, several committees have added a Co-Chair to their structure due to their size and scope of activities. The Constitution now allows committee leadership to include Co-Chairs, with each committee having one collective vote. This brings the Constitution in line with common practice.

The above points are notable amendments to the Constitution, but the philosophy of the IPBA in the Spirit of Katsuura has not and will never change. Other improvements to the association through this incorporation initiative include the following:

- 1. The Association, Directors, and Officers are now protected from liability by a D&O insurance policy, in the highly unlikely event that some person or entity brings action against the IPBA.
- 2. A bank account can be opened in Singapore with the appropriate officer as signatory. Previously, officers whose terms had ended were signatories of the bank accounts, so this will ensure that an officer holding a current position will be in charge of the bank account.

All of the changes will mean a stronger structure to support our members.

The IPBA will still continue to provide quality programs such as our Annual Meeting and Conference, which will next be held in Kuala Lumpur April 13-16, 2016. In September, our committee and jurisdiction leaders took the initiative to hold three local or regional programs: the 4th annual IPBA-CIC Construction Conference in Hong Kong on September 10th; the KLRCA/IPBA Asia-Pac Arbitration Day in Kuala Lumpur on September 14th; and the IPBA 1st East Asia Regional Forum in Seoul on September 16-17th. If you would like to organize an IPBA event in your own jurisdiction, please don't hesitate to contact your local jurisdictional or regional leader.

Regional Coordinator for the Middle East, Richard Briggs, and his team are working hard to prepare for our Mid-Year Council Meeting in Dubai, taking place October 23rd-26th. The first three days are devoted to internal meetings of the IPBA Officers and Council members, while a regional seminar on arbitration, "Arbitration at the Crossroads: The Middle East, Africa, and Asia" will be held on Monday, October 26th. This seminar is open to the public, so please be sure to join us, and invite your colleagues and business associates, too.

I look forward to seeing many of you very soon.

**Miyuki Ishiguro**  
Secretary-General

## IPBA Upcoming Events

Event	Location	Date
<b>IPBA Annual General Meeting and Conference</b>		
26th Annual General Meeting and Conference	Kuala Lumpur, Malaysia	April 13-16, 2016
27th Annual General Meeting and Conference	Auckland, New Zealand	April 5-9, 2017
<b>IPBA Mid-Year Council Meeting</b>		
2015 Mid-Year Council Meeting (Council Members only)	Dubai, UAE	October 23-25, 2015
<b>IPBA Local and Regional Events</b>		
IPBA-CIC Construction Conference 2015: "Impact of Changing Statutory Regimes on the Construction Industry"	Hong Kong	September 10, 2015
IPBA Asia-Pac Arbitration Day (Hosted jointly with the Kuala Lumpur Regional Centre for Arbitration)	Kuala Lumpur, Malaysia	September 14, 2015
IPBA East Asia Regional Forum: Continued Challenges & Opportunities of Pan Asia	Seoul, Korea	September 16-17, 2015
IPBA Mid-Year Regional Conference: "Arbitration at the Crossroads: Middle East, Africa and Asia"	Dubai, UAE	October 26, 2015
<b>IPBA-supported Events</b>		
CIArb Singapore Branch's "The Age of Innovation: Addressing the Perils and Promises of Arbitration"	Singapore	September 3-4, 2015
4th Asia Pro Bono Conference & Legal Ethics Forum	Mandalay, Myanmar	September 3-6, 2015
Kluwer Law International's "Turkey & ME: 2nd Annual Arbitration Summit"	Istanbul, Turkey	September 9, 2015
IFLR's "IFLR India M&A Forum 2015"	Mumbai, India	September 10, 2015
Kluwer Law International's "5th Annual Global Competition Forum"	Hong Kong	September 23, 2015
Asialaw's "Asia-Pacific Dispute Resolution Summit 2015"	Hong Kong	September 24, 2015
Kluwer Law International's "2nd Annual International Arbitration Summit"	Tokyo, Japan	October 20, 2015
ABA Section of International Law's 2015 Fall Meeting	Montreal, Canada	October 20-24, 2015
InnoXcell's "Asia Symposium (IAS 2015)"	Shanghai, China	October 29, 2015
Duxes's "Global Anti-Corruption Compliance Summit 2015"	New York, USA	November 5-6, 2015
Duxes's "Global Anti-Corruption Compliance EMEA Summit 2015"	Dubai, UAE	November 11-12, 2015
Kluwer Law International's "4th Annual International Arbitration Summit"	Seoul, Korea	November 12, 2015
Duxes's "Global Anti-Corruption Compliance Asia-Pacific Summit 2015"	Hong Kong	December 9-11, 2015
Kluwer Law International's "3rd Annual International Arbitration Summit"	Jakarta, Indonesia	December 10, 2015
InnoXcell's "APAC Symposium Australia Series"	Sydney, Australia	March 3, 2016

More details can be found on our web site:  
<http://www.ipba.org>, or contact the IPBA Secretariat at [ipba@ipba.org](mailto:ipba@ipba.org)

# Evolution of Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Compliance Culture in Nepal

Taking into consideration the grievous nature of money laundering and terrorist financing, the international community has come together to combat this menace. Nepal too has joined this global campaign and has gradually been making meaningful contribution from its end.

## Background

Simply put, money laundering usually refers to an act of disguising the origins of illicit money and giving it an appearance of having originated from a legitimate source. It provides an apparent legitimate cover for the proceeds of criminal activities. Money laundering and terrorist financing have emerged as a burning global issue. Financial globalisation and the advancement of technology has further eased its growth as a transnational malady. In recent years, government and regulatory authorities around the world have become aware of its increasing ramifications that undermine social and economic prosperity. As a result, the international community has expressed solidarity in respect of anti-money laundering and combating the financing of terrorism ('AML/CFT').

## Money Laundering and Terrorist Financing in Nepal

The Asset (Money) Laundering Prevention Act 2008 ('the Act') and Asset (Money) Laundering Prevention Regulation 2009 ('the Regulation') are the key legal instruments with extraterritorial application prohibiting money laundering and terrorist financing in Nepal. Under the Act, the converting and transferring of property that is the proceeds of crime for the purpose of concealing or disguising the illicit origin of the property or to assist any person involved in the offence to evade the legal

consequences; concealing or disguising or changing the true nature, source, location, disposition, movement or ownership of such property; and acquiring, using, possessing such property; and conspiring, aiding, abetting, facilitating, counselling, attempting, associating with or participating in any of the aforementioned acts, constitutes the offence of money laundering.



Similarly, providing or collecting property or funds to be used to carry out a terrorist act, or by a terrorist or a terrorist organisation, or an attempt to commit such act; providing or conspiring to provide material support or resources in order to carry out a terrorist act or to any terrorist or terrorist organisation; participating as an accomplice in, organising or directing others to commit or to contribute or promote a group which commits any of the aforementioned acts, constitutes the offence of terrorist financing. Further, even if the terrorist act does not actually occur or is not attempted; property or funds are not actually used to commit or in the attempt of a terrorist act; whether such property or fund is linked or not to a specific terrorist act; whether the terrorist act or intended terrorist act does occur or will occur in the same State or territory or somewhere else; whether the terrorist or terrorist organisation is or is not located in the same State or territory where the terrorist act is intended to or occurs, then these circumstances in relation to any of the aforementioned acts is also punishable as an offence of terrorist financing.

### Financial Action Task Force Standards

The Financial Action Task Force ('FATF'), an inter-governmental policy-making body, was formed in 1989 with the objective of fighting against money laundering and terrorist financing. The FATF issued 40 Recommendations in 1990 for improving national legal systems, enhancing the role of the financial system and strengthening international cooperation to combat money laundering. Timely changes were made to these Recommendations. In the aftermath of the '9/11 attack' the FATF issued nine Special Recommendations on Terrorist Financing to combat the financing of terrorism.

In 2012, the FATF unified the 40 Recommendations and 9 Special Recommendations and 40 revised Recommendations called the 'International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation' were issued setting out the framework of measures which countries should implement in order to combat money laundering and terrorist financing, as well as the financing of the proliferation of weapons of mass destruction.

Nepal embarked on its journey towards AML/CFT in 2002 by becoming a member of the Asia/Pacific Group on Money Laundering ('APG'), an associate member of the FATF. Having obtained membership of the APG, Nepal has expressed its commitment to fully comply with international AML/CFT standards.

### Evaluation of Nepal

After joining the APG in 2002, Nepal was first evaluated in 2005. This mutual evaluation detected significant deficiencies in the legal and regulatory framework of Nepal. Nepal did not fully comply with the 40+9 Recommendations of the FATF. A second evaluation was carried out in 2010. That evaluation was also based on the FATF 40+9 Recommendations. Progress was observed compared to the previous evaluation, nevertheless deficiencies persisted in certain areas, including but not limited to, the narrow range of predicate offences, criminalisation of terrorist financing, absence of a legal framework related to mutual legal assistance and ineffective implementation of the Extradition Act.

In 2010, Nepal made a high-level commitment to the FATF regarding legislation and an anti-money laundering institutional framework and continued taking steps towards improving its AML/CFT regime, but more vigorously this time. Nepal's progress in establishing such a substantial legal and regulatory framework in June 2014 resulted finally in it no longer being subject to the FATF's monitoring process under the on-going global AML/CFT compliance process.



## Legal Framework

To date, two amendments, the first in 2011 and the second in 2014, have been made to the Asset (Money) Laundering Prevention Act 2008 in order to make it more compliant with the FATF standards. Similarly, Parliament has enacted the Mutual Legal Assistance Act 2014; Extradition Act 2014; Organized Crimes Prevention Act 2014; and the Proceeds of Crime (Confiscating, Seizing and Freezing) Act 2014. Nepal has also adopted the National Strategy and Action Plan for Combating Money Laundering and Financing of Terrorism 2011–2016 which documents the national objective as to the enhancement of the capacity to control money laundering and the financing of terrorism.

## Institutional Infrastructure

### 1. Department of Money Laundering Investigation

To make investigation more robust, the Department of Money Laundering Investigation ('DMLI') was established in 2011. The DMLI is entrusted with the responsibility to investigate and inquire into offences of money laundering and terrorist financing. Prior to the formation of the DMLI, the Department of Revenue Investigation was designated as the provisional money laundering

investigation agency of the country. The Department started functioning separately from 2011 to carry out investigations under the Asset (Money) Laundering Prevention Act 2008. It can exchange information related to its investigations with foreign counterparts and is also empowered to conduct joint investigations of money laundering and terrorist financing with foreign counterparts carrying out functions of a similar nature.

### 2. Financial Information Unit

The Financial Information Unit ('FIU') has been established in the Nepal Rastra Bank (Central Bank of Nepal) as a functionally independent and autonomous body to receive information as to suspicious transactions, threshold transactions, and other information related to money laundering or terrorist financing and then report it to the DMLI for investigation. This central agency also cooperates with foreign financial information units or foreign counterparts that perform similar functions and exchanges information on the basis of reciprocity.

### 3. National Coordination Committee

The National Coordination Committee ('NCC'), comprising key ministries and state agencies of Nepal, was formed in 2008 to smoothen coordination between concerned inter-related entities with regard to anti-money laundering and combating the financing of terrorism. The NCC has been vested with the responsibility of formulating policy for the prevention of offences of money laundering and terrorist financing including the management and mitigation of the risks as well as recommending to the Government for the implementation of the standards and policies developed by international organisations of which Nepal is a member. In addition to implementing the decisions of the Government of Nepal, it also instructs the concerned agencies and monitors compliance with such instructions.

## International Treaty Obligations

International efforts to curb money laundering and terrorist financing calls for stringent global standards and as a result international instruments and standards are in place. Nepal has acceded to international treaty obligations as it is a party to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988; International Convention for the Suppression of the Financing of Terrorism 1999; United Nations Convention against Transnational Organized Crime 2000; and the United Nations Convention against Corruption 2003. On a regional



level, it is party to the SAARC Regional Convention on Suppression of Terrorism 1987 and the Additional Protocol 2004. Additionally, Nepal has upheld the UN Security Council Resolution 1373.

### Investigation Process and Status

The DMLI initiates a preliminary inquiry on the complaint related to the offence of money laundering or terrorist financing filed by the person having knowledge of it or filed by the Department itself or based on the report of the FIU. An investigation officer is then appointed if it found reasonable to investigate a case based on the preliminary inquiry. If required, a joint investigation team can also be formed with other concerned agencies. The investigation officer may freeze or seize the property or instrumentality suspected of being associated with the offence.

After completion of the investigation, the DMLI submits a dossier of evidence to the concerned government attorney for it to be decided whether or not to file a case. If the latter gives the go ahead, then the Department files the case in the Special Court of Nepal which has the jurisdiction to hear cases related to money laundering and terrorist financing. A decision of the Special Court of Nepal can be appealed against to the Supreme Court of Nepal pursuant to the Special Court Act 2002.

The maximum penalty prescribed under the Asset (Money) Laundering Prevention Act 2008 in the case of money laundering is a fine of two times the proceeds and 10 years of imprisonment, and in the case of terrorist financing, it is a fine of five times the proceeds if it is apparent or ten million Nepali Rupees if the proceeds are not apparent and 20 years of imprisonment. Any property or instrumentality associated with the offence can be confiscated upon conviction.

The major predicate offences in Nepal are human trafficking; trafficking narcotic drugs and psychotropic substances; arms and ammunition trafficking; corruption and bribery; tax evasion; gold smuggling and counterfeiting coin and currency. These crimes fall under the list of predicate offences defined under section 2(ad) of the Asset (Money) Laundering Prevention Act 2008, and are punishable.

As of May 2015, records of the DMLI show that a total of 628 complaints with an allegation of money laundering had been filed with the Department since its inception.

Out of the total complaints, investigation has already been completed in 150 cases while investigation in 478 cases is still underway. Twenty-nine cases have been taken to court. Out of these, the Court has already given a verdict in 21 cases. The Department has lost three cases and thus has appealed. Property and instrumentality associated with the offence has been confiscated in other cases. On the basis of complaints registered at the DMLI, it is evident that there are no cases on terrorist financing in Nepal so far.

### Up-coming Assessment

The upcoming evaluation of Nepal by the APG will be conducted in 2017/18. Unlike the last evaluation of 2010, which was primarily based on technical (legal and institutional) aspects, this will be based on technical as well as effectiveness assessment of the jurisdiction. Effectiveness evaluation has been a serious challenge not only to Nepal but also to other member countries around the world.

### Conclusion

Membership of relevant international organisations, ratification of the major UN conventions, enactments of instrumental legislation, implementation of national strategy and establishment of major institutional infrastructure indicates Nepal's commitment towards a robust AML/CFT regime. It now needs to strive for outcome-based effective implementation of these fundamentals.



**Rojina Thapa**  
In-house Counsel  
Office of the Investment Board

Rojina Thapa works full-time as In-house Counsel for the Office of the Investment Board, Government of Nepal and is a part-time lecturer of business law with Platinum Management College, Pokhara University, Nepal. She is also a founder member of Nyaya Yukti Research and Resource Center.



# Amendment of the Act on Protection of Personal Information in Japan

This article illustrates some important points in relation to the amendment of the Act on Protection of Personal Information in Japan. One important change concerns the substantial parts of the Act that apply to a foreign individual or entity who obtains the personal information of a person in Japan to which the foreign individual or entity provides goods or services, and how that personal information is handled in a foreign country.



**More** than 10 years have passed since the Act on Protection of Personal Information<sup>1</sup> (Act No. 57 of 30 May 2003) (the 'Current Act') was enacted on 30 May 2003 and fully enforced on 1 April 2005. The amendment of the Current Act is required to address changes to date including (1) the need for utilisation of so-called 'big-data' due to developments in information technology; (2) requests for strengthening the protection of individual privacy; and (3) the globalisation of privacy and information securities. With that in mind, the amendment bill of the Current Act (the 'Amendment Act') was enacted on September 3, 2015.

The important points concerning foreign enterprises are explained in this article as foreign enterprises that conduct business in Japan or with Japanese companies will be affected.

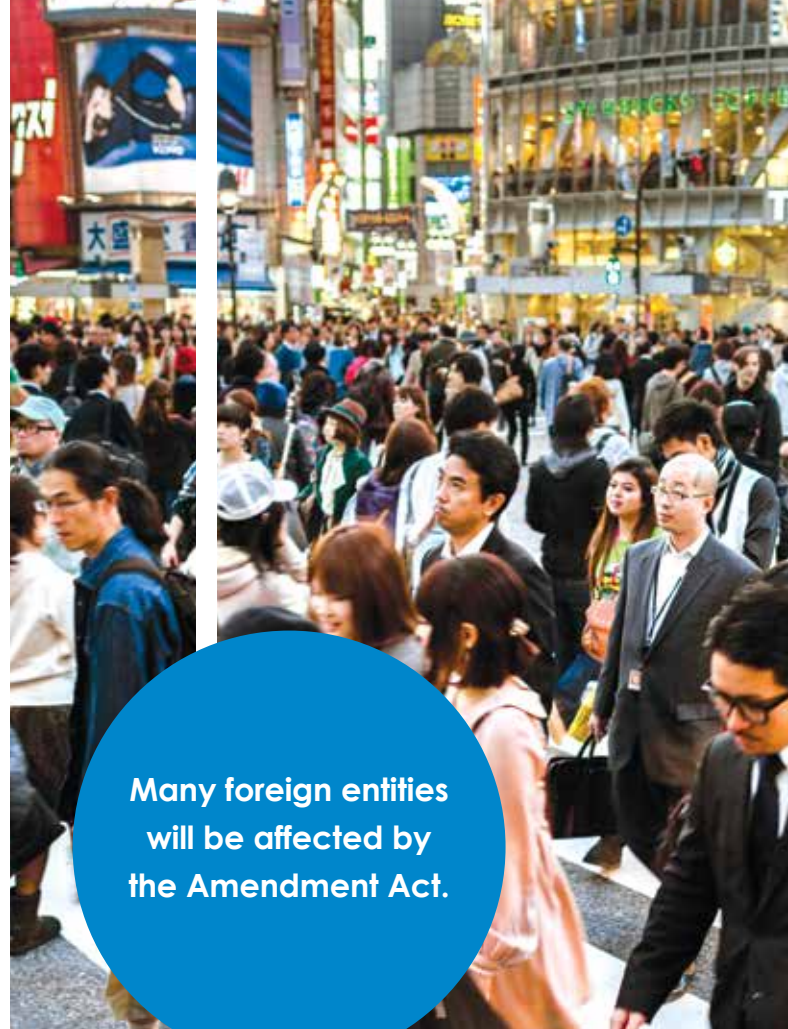
## Globalisation of Personal Data Protection

### 1. Extra-territorial Application

The Current Act is not interpreted as applying to a person or entity who handles personal information (the definition of this term is explained below) outside of Japan. However, the substantial part of the Amendment Act will apply to said person or entity when said person or entity, in relation to the provision of goods or services to a person in Japan, obtains personal information and then handles said personal information or anonymisation-processed information (the definition of this term is explained below) that is generated by using said personal information in a foreign country.

- specifying the purpose of use of personal information
- notice of the purpose of use of personal information at the time of acquisition thereof
- limitation of use of personal information within the scope of the purpose specified when personal information is obtained
- proper acquisition of personal information
- maintenance of the accuracy of personal data<sup>2</sup>
- security control measures of personal data
- supervision of employees and third parties who are entrusted to handle personal data
- restriction of provision of personal data to a third party
- handling of anonymisation-processed information

It is not clear at this moment in a case where a foreign entity obtains, through its website, the personal



Many foreign entities will be affected by the Amendment Act.

information of a person in Japan written in a language other than Japanese, whether that entity is deemed to be obtaining personal information in relation to the provision of goods or services to a person in Japan. It is assumed that such cases are not covered by the Amendment Act, but if the Amendment Act does apply to such cases, many foreign entities will be affected by the Amendment Act.

### 2. Regulations on Providing 'Personal Data' to a Third Party in a Foreign Country

Under the Current Act, no different regulations apply to providing personal data to a third party, regardless of whether said third party is located in Japan or in a foreign country. Under the Amendment Act, to protect individual privacy, when a business operator handling personal information provides personal data to a third party who is in a foreign country, a business operator handling personal information shall obtain the prior consent of the concerned person (Article 24 of the Amendment Act). When personal data is provided to a person or entity in a foreign country, the Personal Information Protection Commission (the 'Commission')<sup>3</sup>



specifies in the Commission's rules that in a country that has a system for protection of personal information whose standard is equivalent to that of Japan or to a third party who establishes a system that conforms with standards prescribed by the Commission's rules, prior consent on providing personal information to a third party in a foreign country is not required. Please note that prior consent on providing personal data to a third party is required (Article 23 of the Amendment Act) even when prior consent on providing personal data to a third party in a foreign country is not required in the above two cases.

Please also be aware of which countries are listed by the Commission as meeting the above standards. When a foreign company in a country not listed in said rules enters into an agreement regarding the handling of personal data, a system will be required for handling personal data that conforms to the standards set forth by the Commission. Also, regardless of where a company is located, it will have to enter into an agreement that is compliant with the Amendment Act to trade with Japanese business operators.

### 3. Providing Information to Foreign Enforcement Authorities

The Commission may provide information to foreign authorities that enforce the law equivalent to that of Japan, when information helps such foreign authorities execute their duties (equivalent to that of the Commission) (Article 78 of the Amendment Act). In that situation, appropriate measures should be taken that such information may not be used for a purpose other than execution of their duties or for a criminal investigation, etc., without the Commission's consent.

#### Clarifying the Definition of 'Personal Information'

The term 'personal information' as used in the Current Act is defined as 'information about a living individual which can identify the specific individual (including such information as will allow easy reference to other information and will thereby enable the identification of the specific individual)' (Article 2 of the Current Act).

The Amendment Act clarifies that personal information includes codes which identify individuals (Article 2, Paragraph 1, Item 2 of the Amendment Act). A cabinet order will set forth codes which fall under the following categories:

- (1) characters, numbers, symbols or other codes which are converted from physical characteristics of an individual for the use of a computer and which can identify that specific individual; and
- (2) characters, numbers, symbols or other codes which are allocated in relation to the use of services provided to an individual or purchase of goods sold to an individual or written or electromagnetically recorded in a card or other document issued to an individual and which is allocated, written or recorded differently to each user, purchaser or individual who receives the document and can identify that specific user or purchaser, or individual (Article 2, Paragraph 2 of the Amendment Act).

It is expected that examples of (1) includes fingerprint data and face recognition data and examples of (2) includes passport numbers and drivers licence numbers.<sup>4</sup>

## Utilisation of Personal Information

### 1. Anonymisation-processed Information

A business operator handling personal information shall not, except in certain cases prescribed by the Current Act, provide personal data to a third party without obtaining the prior consent of the person (Article 23, Paragraph 1 of the Current Act). In the Amendment Act, anonymisation-processed information may be provided to a third party without obtaining the prior consent of the person since anonymisation-processed information is not personal information.

Anonymisation-processed information means information regarding an individual created from processing personal information so that the specified individual's identity cannot be determined and so that the original information cannot be restored (Article 2, Paragraph 9 of the Amendment Act).

In order to create Anonymisation-processed information, personal information should be processed according to the standard necessary for preventing the identification of the specified individuals and the restoration of the original information set forth by the Commission's rules (Article 36, Paragraph 1 of the Amendment Act). It is not crystal clear from the language of the article who cannot identify the specified individual or restore the original information. The Commission's rules are expected to clarify this point.

When a business operator creates anonymisation-processed information, the business operator should (1) take necessary and appropriate measures for the prevention of leakage of information, such as the descriptions deleted and the methods of the process in accordance with the Commission's rules; and (2) disclose pieces of information regarding an individual contained in anonymisation-processed information (Article 36, Paragraph 2, 3 of the Amendment Act).

In addition, when a business operator handles anonymisation-processed information, it shall not compare the anonymisation-processed information with other information to identify the individual whose personal information is used for processing anonymisation-processed information (Article 36, Paragraph 5 of the Amendment Act).

Also, when a business operator handling personal information creates anonymisation-processed

information, the business operator shall endeavour to take by themselves the necessary and appropriate measures for controlling the security of anonymisation-processed information, and the necessary measures for the processing of complaints about the creation or other treatment of anonymisation-processed information and other necessary measures for ensuring the proper handling of anonymisation-processed information, and shall also endeavour to publicly announce the contents of the concerned measures (Article 36, Paragraph 6 of the Amendment Act).

Please note that the abovementioned obligations apply to cases where a business operator creates and handles anonymisation-processed information for the purpose of providing anonymisation-processed information and for internal use only.

When a business operator handling anonymisation-processed information provides anonymisation-processed information to a third party, it has to publish that it is intending to do so in accordance with the rules of the Commission and clearly indicate to said party that the information provided is anonymisation-processed information (Article 36, Paragraph 4).

### 2. Change of Purpose

A business operator handling personal information shall not change the purpose of the use of personal information beyond the scope which is reasonably considered as being the purpose of use after the change is 'duly' related to that before the change (Article 15, Paragraph 2 of the Current Act). The Amendment Act deletes 'duly' from the said Article, so that it is expected that the change of the purpose of use of personal information will be widely allowed. However, it is unclear how much effect this change has at this moment since there is no applicable example. The Commission is expected to produce guidelines on this point.

## Protection of Personal Information

### 1. New Restrictions on Handling 'Sensitive information'

A business operator handling personal information must not obtain sensitive information without obtaining the prior consent of the person subject to certain exceptions such as situations required by laws (Article 17, Paragraph 2 of the Amendment Act).

'Sensitive information' means personal information which includes race, creed, social status, medical records, criminal records, records that a person suffered damage because of crimes, or other descriptions which are set forth by a Cabinet Order to be handled with great caution preventing disadvantage including discrimination and prejudice against an individual (Article 2, Paragraph 3 of the Amendment Act).

Sensitive information cannot be provided to a third party through an opt-out provision (Article 23, Paragraph 2 of the Amendment Act).

## 2. Obligation to Confirm and Record the Provision of Personal Information to a Third Party

When a business operator handling personal information provides personal data to a third party, it must record the date and name of the party to which personal data is provided and other information set forth by the rules of the Commission except for the cases stipulated by law (Article 25, Paragraph 1 of the Amendment Act). When personal data is provided to a third party in Japan, the

provision of personal data associated with a business transfer, in a case where personal information is entrusted to a third party within the scope of the purpose of use, etc., then the said obligation does not apply, but when personal data is provided to a third party in a foreign state, said obligation applies.

The record shall be retained for the period set forth in the Commission's rules from the date of creation (Paragraph 2 of said Article).

The article regarding the recording obligation of receiving personal data is also newly established (Article 26 of the Amendment Act), but this obligation does not apply to a person or entity in a foreign country (Article 75).

## 3. Notification and Disclosure of Opt-out

Under the Current Act, with respect to personal data intended to be provided to a third party, where a business operator handling personal information agrees to discontinue, at the request of a person, the provision of such personal data that will lead to the identification of



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the person, and where the business operator, in advance, notifies the person of the matters listed in the following items or puts those matters in a readily accessible condition for the person, the business operator may provide such personal data to a third party (called 'opt-out'):

- (1) the fact that the provision to a third party is the purpose of use;
- (2) the items of the personal data to be provided to a third party;
- (3) the means of provision to a third party;
- (4) the fact that the provision of such personal data as will lead to the identification of the person to a third party will be discontinued at the request of the person (Article 23, Paragraph 2 of the Current Act).

The Amendment Act excludes 'sensitive information' from the object of the opt-out. Also the Amendment Act requires the business operator to notify the above information to the individual in accordance with the rules of the Commission and to notify the Commission (Article 23, Paragraph 2 of the Amendment Act). The Commission will publish what was notified by a business operator (Paragraph 4 of said Article).

#### 4. New Establishment of Crime of Providing Personal Information for the Purpose of Obtaining Wrongful Gain

A person being, or having been, engaged in the business of handling a personal information database, who provides or misappropriates the database for the purpose of obtaining a wrongful gain by that person or a third party is punishable by imprisonment with labour of not more than one year or by a fine of not more than 500,000 yen (Article 83 of the Amendment Act). If the representative of an entity commits the above crime in relation to its business, the entity is also punished by a fine of not more than 500,000 yen (Article 87 of the Amendment Act).

#### 5. Removal of Exemption for Business Operator Handling not more than 5,000 Pieces of Personal Information

The Current Act does not apply to a business operator who handles not more than 5,000 pieces of personal information (Article 2, Paragraph 3, Item 5 of the Current Act, Article 2 of the Order for enforcement of the Act on the Protection of Personal Information), but the Amendment Act will remove such exemption.

## Conclusion

It is important for business operators in foreign countries to be careful in relation to the Amendment Act because it will apply to them. The Amendment Act will be enforced within two years from its enactment, so there is not much time to establish a system to comply with the Act considering that there are many items to be set forth by a Cabinet Order or Commission Rules, which have not at this moment been established. It is recommended that enterprises which handle personal information review their operations and standards for handling personal information and start establishing a system and rules to comply with the Amendment Act. The European Union will adopt new data protection regulations in the near future and many countries established and will establish their own personal information protection legislation, so efforts are being made to address the globalisation of personal information protection. Now, enterprises that operate globally should start to research the actions taken by countries where they operate and establish a system and rules to comply with them.

## Notes:

- 1 The translation (tentative) of the Current Act is available at <http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=01&dn=1&y=%E5%80%8B%E4%BA%BA&ic=03&x=0&y=0&ky=&page=3>.
- 2 'Personal data' in the Current Act means personal information constituting an assembly of information systematically arranged in such a way that specific personal information can be retrieved by a computer or other means (this is defined as 'personal database').
- 3 The Commission is newly established by the Amendment Act as an external organisation under the Cabinet Office which takes charge of affairs such as supervision of the handling of personal information, etc., and establishing guidelines.
- 4 National Strategy Office of Information and Communications Technology, Cabinet Secretariat, Government of JAPAN, *Outline of the Institutional Revision for Utilization of Personal Data* [http://japan.kantei.go.jp/policy/it/2015\\_outlineirpsnldata\\_r8.pdf](http://japan.kantei.go.jp/policy/it/2015_outlineirpsnldata_r8.pdf).



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# Cape Town Convention: The Indian Perspective

This article draws attention to the Indian Aviation industry and the current challenges for its operators, particularly the lessors of aircrafts and financiers. It further details the default remedial measures available to the lessor as per the Convention read with the Protocol, Aircraft Act and Aircraft Rules.

The Indian civil aviation industry is on a high growth trajectory with a size of around US\$16 billion. With a vision of becoming the third largest aviation market by 2020 – it is expected to be the largest by 2030. India has therefore been a favoured market for foreign investment with FDI inflows in air transport (including air freight) during April 2000 to January 2015 standing at a whopping US\$562.65 million, as per data

released by the Department of Industrial Policy and Promotion ('DIPP'). However, the picture is not as rosy as it seems. With foreign investors and international organisations looking at the Indian Aviation Industry as the next gold mine, there are certain legislative issues, which are at loggerheads with the commercial aspects and security of foreign investment in the aviation industry in India.





**The Convention and the Protocol compete with the municipal laws of India.**

The law of registration, operation and deregistration and export of aircraft objects leased out by foreign entities to Indian airline operators is governed by, apart from the local laws in India embodied in the Aircraft Act 1934 ('the Act') read with the Aircraft Rules 1937 ('the Rules'), the Convention on International Interests in Mobile Equipment ('the Convention') and an associated Protocol to the Convention on International Interests in Mobile Equipment on matters specific to Aircraft Equipment ('the Protocol'), as ratified and acceded to by India in terms of Article 39(1)(a) of the Protocol being registrable under Article 40 therein.

The Indian Aviation Industry has recently been facing a precarious condition wherein the rights and interests of lessors of aircraft objects are in conflict with those of the statutory authorities and national entities in India. The situation warrants deep consideration for devising a balanced mechanism to equate, validate and expedite the monetary/financial interests of entities placed at the national level such as the dues of the Airports Authority of India ('AAI') or the workmen of an Indian Airline Operator being regulated and protected by the local or municipal laws of India vis-à-vis the dues of an international lessor being regulated and protected by the Convention and the Protocol. In the current regulatory and legal framework, the Convention and the Protocol compete with the municipal laws of India in so far as recognition and protection of such rights are concerned, despite the expressly laid down provisions to synchronise the same, but with gaps. As such, the Convention read with the Protocol and the Aircraft Act along with the Aircraft Rules warrant analysis.

The Convention provides for protection of five different categories of interests in India including non-consensual rights or interests arising under Indian laws such as those of the AAI, being the regulatory authority for the airline industry in India, and the airline employees. Such non-consensual rights or interests, even though unregistered, are given priority over interests equivalent to a registered international interest like the financial interest of an international lessor of an aircraft object. Such priority has been created by the Government of India under Article 39 of the Convention and registrable under Article 40 of the Protocol to the Convention.

The aviation industry in India works on the model of lease of aircraft by foreign entities to airline operators in India for a negotiated fee under the lease agreements which stipulate the various terms and conditions of the lease setting out the commercial aspects of the deal. On the execution of the Lease Agreement, the aircraft objects, being the subject matter of the deal, are registered by the Ministry of Civil Aviation in the Indian Aviation Register and a Certificate of Registration is issued to the lessee or the airline operator to be carried in original in the aircraft object at all times. Along with the Lease Agreement, the Indian airline operator also issues an Irrevocable Deregistration and Export Request Authorization ('IDERA') to the lessor of the aircraft object which is an unconditional and certain authority conferred on the lessor to seek deregistration and export of the aircraft objects on occurrence of an 'event of default' in terms of the Lease Agreement, which event of default includes, but is not limited to, the payment of lease rentals for the aircraft object as stipulated in the Lease Agreement.



The epicentre of the entire discussion revolves around the default remedies available to the lessors of the aircraft objects. The standard default remedies provided by the Convention to a lessor/creditor/chargee under a security agreement are: (1) to take possession or control of the aircraft; (2) to sell or grant a lease of the aircraft; (3) to collect or receive the income or profits arising from the management or use of the aircraft; and (4) to procure the de-registration, export and physical transfer of the aircraft from the territory in which it is situated. The Convention provides that the above remedies may be exercised by the creditor without a court order provided that the debtor has so agreed. Recourse to the aforesaid remedies may, however, be curtailed by way of a declaration made by a Contracting State to the effect that such remedies may only be exercised with leave of the court, which is not the case with India. The aforesaid remedies, especially procuring the de-registration, export and physical transfer of the aircraft from the territory in which it is situated, is a belatedly raised question in the courts of law in India wherein the law in India has not been well settled to date requiring detailed introspection and consequent amendment in municipal or state laws, which certainly prevail over the Convention, wherever being contrary to the same.

In India, the Convention and the Protocol have been brought into sharp focus and academic review due to defaults committed by Kingfisher Airlines. The same having been dealt with by the courts in India have brought to the fore a Pandora's box when it comes to the infirmities of the local or municipal or state laws with the Convention and the Protocol, specifically with respect to the reliefs of deregistration of aircraft objects from the Indian Civil Aviation Register and re-export of such deregistered aircraft objects as mentioned in Article IX(1) of the Protocol. Such remedies are in addition to the remedies of taking over the possession or control of the aircraft objects or selling or granting lease thereto or collection and receipt of any income or profits arising from their management or use, as laid down in Article 8 of Chapter III of the Convention. With the legal recourse taken by the lessors of aircraft objects in India recently, the reliefs of deregistration and re-export of aircraft objects under Article IX(1) of the Convention have received utmost significance in view of the declaration made by the Government of India while adopting the Convention under Article 39(1)(a) and registrable under Article 40 of the Protocol to the Convention.



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Non-consensual rights or interests shall have priority over even a registered international interest.



India has, by way of its aforesaid declaration, recognised that rights of a certain class of lien holders (referred to as non-consensual rights or interests therein) such as (a) airline employees with respect to unpaid wages; (b) AAI w.r.t. taxes and other unpaid charges; and (c) repairers of aircraft objects w.r.t. services performed on aircraft objects and value added to them shall have priority over a registered international interest including the lessors of the aircrafts. Further, a conjoint reading of the Convention, the Protocol and the declaration made by the Government of India leads to the unambiguous conclusion that the aforesaid non-consensual rights or interests shall have priority over even a registered international interest by necessary implication. As such, the corollary that follows from the above is that prior written consent of all holders of 'non-consensual right or interest' is to be obtained by a creditor under Article IX(2) of the Protocol to the Convention while seeking reliefs under Article IX(1) therein. It is a settled legal position that the provisions of an international convention or treaty shall not be read in isolation but in conjunction with the declarations made therein and the municipal laws of the consenting state therein, which laws have primacy over the provisions of such convention/treaty in case of any inconsistency between the two.

The lessors of the aircraft objects have recently argued to the contrary in courts in India and have pleaded that

the reliefs as mentioned in Article IX(1) of the Convention are a matter of right and need to be granted by the Directorate General of Civil Aviation merely on termination of the lease agreements with the lessees as under Rule 30(6)(iv) or when it is inexpedient in the public interest that the aircraft should remain registered in India under Rule 30(6)(vii) of the Rules. The Ministry of Civil Aviation has, thereafter, inserted sub-rule 7 in Rule 30 of the Rules vide Aircraft (Third Amendment) Rules 2015 wherein it was obligated (use of the word 'shall') to cancel registration of aircraft objects on an application from the lessor accompanied with a copy of the IDERA and a certificate that all Registered Interests ranking in priority have been discharged or the holders of such interest have consented to the deregistration and export. However, the export of the deregistered aircraft objects has still not been catered to by the afore-said amendment, as a result whereof proposals to further amend the municipal/state laws are being made by entities like the Federation of Indian Airlines ('FIA') and the Aviation Working Group ('AWG') to the Ministry of Civil Aviation to finally resolve such issues. Such amendments include the insertion of clause 32-A in the Rules wherein the rights of the lien holders, such as the AAI, the airline workers and the repairers of an aircraft object adding value to it, have been proposed to be restricted to the term 'arising since the time of a declared default.' This in turn takes into account the claims only with respect to the

declared date of default which might be manipulated to defeat the rights of the state to recover its statutory dues from the lessee thereby causing immense loss to the state exchequer. The same shall also render the proviso to the amended Rule 30(7) inconsequential.

The FIA and the AWG have further proposed an amendment to Rule 30(7) of the Rules with time-bound obligation of the Directorate General of Civil Aviation ('the DGCA') to deregister and export the aircraft objects within a period of 3 working days in terms of DGCA's current Standard of Services document. In consonance thereof, Clause 9A is sought to be inserted in the Civil Aviation Requirements Section 2 – Airworthiness Series F Part I ('the CAR') wherein the Central Government shall be obligated to take action in its power to facilitate the export and physical transfer of the aircraft and any related aircraft object (including a spare engine) within a period of five working days subject to compliance with applicable safety laws and regulations relating to that aircraft operation. The same, however, shall not affect the rights of the lien holders as proposed to be labelled as a Preferred Cape Town Right. The aforesaid proposed amendment contemplates a separate application for export of aircraft objects whereas no such provision finds place in the CAR or the Rules. Further, the time frame of five working days for deregistration and export simultaneously shall not be a feasible time frame to ascertain the liens or the 'Preferred Cape Town Right' as sought to be inserted and take appropriate action, if at all, for arrest or detention of the aircraft object.

While the Convention and the Protocol are advantageous to aircraft financiers as they seek to protect the parties' title and security interests in aircraft and engines by, inter alia, bringing speed, certainty and cost savings to the process of repossession (and otherwise realising value from) aircraft and engines on an insolvency or other default, such benefits for financiers will result in reduced finance costs to airlines thereby benefitting the contacting states too. The same is indicative from the final order and judgment dated 19 March 2015 of the Honourable Delhi High Court in the matter of *AWAS 39423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anr (W.P.(C)) No.871 of 2015*), wherein the lessors of aircrafts to an Indian Airline – SpiceJet Limited – claimed reliefs of deregistration and export of their aircrafts from India on account of payment defaults under the Lease Agreements. Although

the said judgment was pronounced after the insertion of Rule 30(7) in the Rules, the same is a point of challenge in various counts since it has failed to recognise some gaps between the municipal laws of India and the Convention read with the Protocol. While the High Court recognised that the interests of lien holders under Article 39(1)(a) of the Convention need not be registered to have primacy over a registered international interest, it adverted to Article 40 of the Convention in arriving at the conclusion that such liens require registration for being efficacious due to the use of the word 'prior to the time of declared default'. The High Court further held that the remedies available under Article 39(1) (a) of the Convention shall be governed by the Municipal Law in India and not by the Convention. The High Court declined to recognise the liens of the DGCA and the airline workers since such liens were not recognised under the municipal laws in India. While it cannot be safely concluded that the aforesaid judgment of the Single Judge of the Honourable Delhi High court is settled law, infirmities in the aforesaid judgment do point out the inconsistencies and the still existing gaps in the municipal laws which are sought to be amended vis-à-vis the Convention and the Protocol.

India has realised that it is imperative for its local laws to be in sync with the provisions of the Cape Town Convention and the Protocol, confirming the views of the Honourable Supreme Court of India in the matter of *Gramophone Company v Birendra Pandey AIR 1984 SC 667*, wherein then Honourable Apex Court held that: 'The comity of Nations requires that Rules of international law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament.'

However, balancing its international obligations with its internal interests shall be a much accomplished but awaited task for India.



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# Benefits and Risks for Creditors in French Court-assisted Pre-insolvency Remedies

The aim and policy of French insolvency law is the preservation of jobs and the ongoing business. Pre-insolvency remedies provide valuable tools for business recovery and the avoidance of insolvency, and creditors can gain by actively cooperating in the court-assisted process of negotiation of voluntary agreements.

As a result of its primary objectives – business rescue and saving jobs – French insolvency practice has been focusing on prevention rather than cure since the mid-1980s, with significant results. Whilst 90 percent of insolvency procedures end up in liquidation, 70 percent of pre-insolvency action results in business turnaround.

The legislator has followed suit with a succession of reforms between 1994 and 2014,<sup>1</sup> all aiming to preserve jobs and ongoing businesses without undue hardship for creditors, inasmuch as possible. French insolvency law is not overly creditor friendly, even if the last reform of 2014 has brought about notable change for the better for creditors.



## Early Credit Warnings

These are placed under the remit of the president of each commercial court (there are 134 in France, affording a widespread network). The president has inquisitorial rights to summon the management of companies heading for cash issues. The summons and hearings are confidential and no publication is made, in order to prevent a creditor run which could be fatal. The president of the commercial court's remit is advisory only until the business is technically insolvent (the French test for insolvency is when readily liquid assets cannot cover immediately payable liabilities). The advice of the president

of the commercial court includes monitoring interviews, recommendations for audits and indications as to how to start court-assisted creditor negotiations. The president's information comes from (i) the commercial court's registrar office which doubles as the registry of companies, hence it is in charge of the public information on the accounting and creditworthiness of companies, (ii) statutory auditors (10 percent of French companies have one), who have an obligation to notify the president of the commercial court of any event putting their charge's continuation of activity at risk; (iii) workers' representatives, who also have the right to warn the president of the commercial court; and finally (iv) the debtor himself, who can spontaneously apply for the assistance of the president of the commercial court.

These early warning systems, because they remain entirely confidential and do not result in any publication of the debtor's cash issues to any third parties, serve to encourage the use of the efficient preventive procedures available under French law. These principally aim to promote court-assisted 'voluntary' creditors' agreements by defining guidelines and providing court-appointed *ad hoc* negotiators with effective tools of persuasion (i.e., stays of individual remedies and moratoriums), under the scrutiny and supervision of the court. It is also designed as an increased incentive for the management of ailing companies to apply for court protection *before* they are illiquid, for improved efficiency. This policy is based on the finding that the sooner economic difficulties are addressed, the better the chances of recovery are. Conversely, any management that has delayed filing for insolvency and declined to use pre-insolvency remedies faces serious sanctions, such as being held jointly liable for all or part of the debts of the company.

The rationale for such sanctions is that the management has the responsibility (by law) to file for insolvency so that it is liable for damages to third parties for trading when insolvent.

It is of note that creditors, who are admissible to apply for a declaration of insolvency of their debtor, are not allowed to initiate pre-insolvency remedies. They must be invited by the court or the debtor to participate.

Conversely, the commercial court has lost its power to open an insolvency procedure of its own volition as a result of the 2014 reform, which is an additional incentive and reassurance for debtors to use the pre-insolvency remedies by applying to the president of the commercial court since they are now certain that applying will not result in an unwanted insolvency judgment at the initiative of the court.



## Court Assistance to CVAs in France

Creditor security is highly improved within organised court-assisted preventive procedures. In effect, while a court procedure is not a condition of validity for creditors' voluntary agreements ('CVAs') in France, and many debt renegotiations and informal workouts happen away from court, out-of-court workouts, whether made with or without the assistance of an independent insolvency practitioner, provide little if any security at all to creditors with respect to, in particular, the accuracy of the accounts presented by the debtor, the percentage of creditors and/or debt covered by the agreement, the equal treatment of creditors, and the risk of rescission in the context of a subsequent insolvency procedure with an obligation to refund the amounts received pursuant to an out-of-court CVA.

The basic requirement for eligibility for court-assisted preventive procedures is timeliness: the company's insolvency must not date back more than 45 days. Stating the obvious, preventive measures are available as a way to prevent insolvency and not as a solution to it.

The French test of insolvency is a cash test, known as 'cessation of payments' ('*cessation des paiements*'), which is the state where readily liquid assets cannot cover immediately payable liabilities. Preventive measures must be taken in sufficient time before that moment, i.e., in cases where the company is going through difficulties of various kinds (legal, economic or financial) or has needs which cannot be covered by financing corresponding to the company's capabilities (Article L611-3 and L611-4 of the French Code of Commerce). The measures allow for a court-assisted contractual resolution of the difficulties of the company involving all the relevant parties, while leaving the conduct of business in the hands of the management.

Two degrees of assistance are available: *ad hoc* mandate and conciliation.

### Minimal Court Assistance: Ad Hoc Mandate

This remedy is akin to mediation. It is an entirely flexible procedure. An *ad hoc mandataire* is basically a court-appointed consultant and in practice the court appoints the practitioner chosen by the ailing company's management, with the mission determined by the latter with a view to resolving its economic difficulties. The practitioner's fees must be determined in advance and the company may at all times request the termination of the mandate.

It is much used in practice but its legal framework is only one substantive article of the Code of Commerce (Article L.611-3) and six implementing procedural articles (R611-18 to 21 and R611-7 to R611-50 on fees). French law does not interfere with what ensures the success of the *ad hoc* mandate, i.e., its total informality and the latitude the commercial courts enjoy in defining the conditions and time of appointment, the role and authority of the *ad hoc* appointee, and the organisation of the mandate.

The procedural initiative belongs to the debtor and, in practice, the principal creditors are informed in advance, if not involved in the process from the outset. In effect, as the '*mandataire ad hoc*' has no power of coercion and acts, in fact, only as a mediator, the success of the process is dependent on the early involvement of creditors.

The benefits of the *ad hoc* mandate are:

- an opportunity to prepare a restructuring on a confidential basis (no publication),
- a framework for negotiation and renegotiation with creditors and/or contractual counterparts, as the case may be,
- better leverage in the negotiation with the workforce,
- additional preparation time for the next step such as safeguard or reorganisation (the latter being reserved for technically illiquid companies),
- a reinforcement for the officers of the company with better preservation of their personal liability, thereby allowing them to concentrate on a recovery plan more effectively, and
- time out for the shareholders to prepare an optimal disposition of assets.

The downside is the attached cost of court procedure, attorney fees and the fees of the *ad hoc mandataire*. Such cost can be substantially minimised by producing the bulk of the documentation in-house.

### Maximum Court Assistance: Conciliation

The conciliation procedure is organised by Article L611-4 to L611-10 of the Code of Commerce. The initiative of the conciliation procedure belongs solely to the debtor, who may unilaterally apply for the appointment of a conciliator by the president of the commercial court. However, both the conciliator and the *ad hoc mandataire* shall sign a statement of independence when starting their mission and must act in the interest of

all the parties throughout the entire procedure. Moreover, the appointment of the conciliator is now subject to prior approval of the fee conditions by the debtor.

The request to appoint a conciliator must normally be duly documented. Originally, the mission of the conciliator was only to secure the negotiation and the finding of an agreement with the creditors. The conciliator is only an auxiliary and the management of the ailing company remains fully empowered and in charge of the company's affairs. However, the new French law on insolvency expands the mission of the conciliator to make it an essential element. Now, at the request of the debtor and after consultation with the creditors, the conciliator has the power to organise partial or total sale of assets which will be concluded in later proceedings. This new mission is useful to anticipate sale of the assets when required.

While the CVA negotiation process remains contractual and informal in essence, allowing for maximum flexibility in the consultations between the conciliator and the creditors, which consultations remain basically voluntary and are expressly covered by legal privilege, a degree of coercion is granted to the conciliator who can discipline creditors and provide a respite to the debtor by applying for a court-ordered stay of individual remedies and payments.

Conversely, the conciliator's mandate and the stay of individual remedies cannot exceed three months, with a possible one-month extension.

The individual or collective CVAs reached under the auspices of a court-appointed conciliator can be given the authority and effect of enforceable court decisions through the process of '*homologation*', a form of court authentication. Moreover, when an agreement has been concluded with some of the creditors, the judge who appointed the conciliator will then be able to postpone the payment of a debt that was not included in the agreement subject to invitation of the creditor to the conciliation. A newly created procedural organ will also be in charge of verifying the implementation of the agreement concluded during the conciliation.

## Efficiency and Pragmatism

### Efficiency

Preventive measures allow for an outside evaluation of a company's business and difficulties. While the

management continues to take care of day-to-day business, an independent third party (conciliator or *mandataire ad hoc*) can determine the true state of the company, as the case may be with the assistance of an expert ('*expert en diagnostic d'entreprise*'), and bring the principal creditors together for consultations.

As creditors know that they may not gain by breaking ranks, because the alternative solution (i.e., insolvency proceedings) is dissuasive even if they hold security, they generally concur in the proceedings.

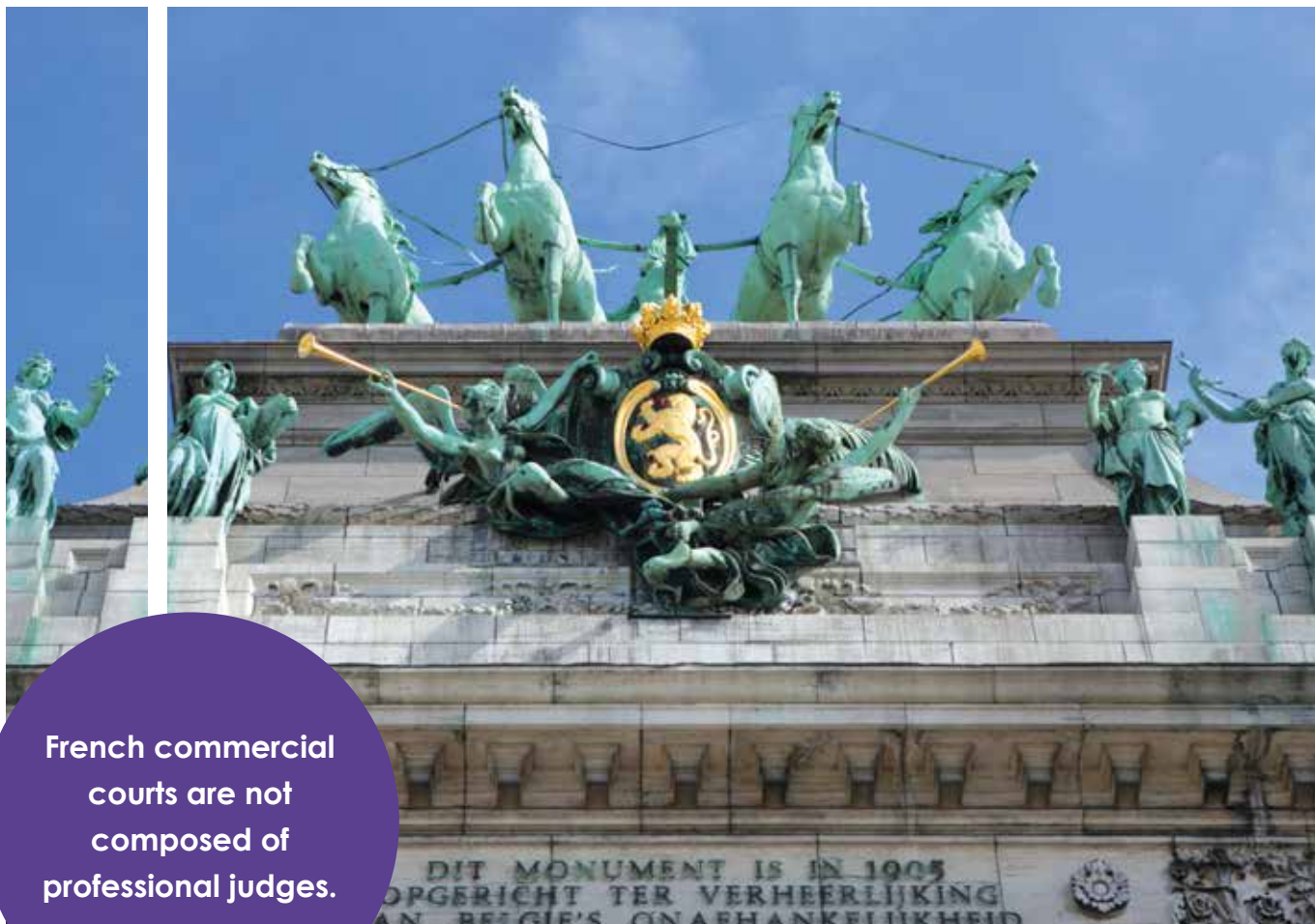
Recovery prospects for creditors are notably improved if the business can be rescued before it is insolvent, since they will over time receive a better return if the company survives as an ongoing concern rather than in a liquidation where, in most cases, leasing, retention of title and debt factoring leave very few assets available for payment of creditors, even those with super priority rights (employees) or preferential rights such as the Treasury.

Furthermore, recalcitrant creditors can sometimes be brought around by a warning that the president of the commercial court will make use of his discretionary power to decree a moratorium for a maximum duration of 24 months under Article 1244-1 of the Civil Code, as well as a reduction of contractual interest rates during that period to the minimum legal interest rate.

### One Step Further: Pre-packs and Safeguards

The 2014 reform created a new so-called 'accelerated safeguard' procedure which is available to debtors who have negotiated a pre-packed plan ensuring the survival of their business by way of a conciliation procedure. After the conciliation agreement is reached, the conciliator can be appointed as administrator in this accelerated safeguard and facilitate the completion of the business reorganisation. The accelerated safeguard will have effects against all creditors and not only those involved in the conciliation. To be eligible for the accelerated safeguard, the business must have designated external auditors and reach some thresholds or must have filed consolidated accounts. Moreover, in opposition to regular safeguard proceedings, there is no requirement that the debtor be solvent when requesting the opening of the accelerated safeguard.

The safeguard itself (Article L620-1 and subsequent of the Commercial Code) is another organised pre-insolvency remedy often being used in succession to an *ad hoc*



French commercial courts are not composed of professional judges.

mandate and followed by a conciliation, no efforts being spared to avoid the declaration of insolvency. It was first introduced in 2005 and includes a special banking creditor specific variety.

### Pragmatism

The intervention of an independent go-between often helps the parties to adopt a more realistic view of a company's difficulties, since companies themselves often have an over-optimistic view of their future prospects, and apprehensive creditors an overly pessimistic view.

Preventive procedures also allow for unequal treatment of unequal creditors. In other words, different categories of creditors can receive different treatment, according to the nature and size of their claims as well as their own financial standing, which is a sound means of avoiding the domino effect of chains of insolvency.

In addition, all forms and combinations of arrangements are possible, from rescheduling to payment holidays, with or without waiver of claim to part of the principal or interest, and with or without security.

Finally, the law does not provide for a minimum proportion of consenting creditors for a CVA to be valid. The test is one of reason, i.e., the percentage that will be necessary for the survival of the company as forecast in its business recovery plan.

### Creditors' Risks

As recovery in the context of economic turbulence cannot be 'roses all the way', several risks must be highlighted.

French commercial courts are not composed of professional judges. Commercial judges are elected from and by the businesspeople and small merchants



within the jurisdiction. As a result, while major jurisdictions such as Paris have the human and financial resources to institute insolvency prevention task forces, the availability of sufficiently trained personnel can be an issue in less sizeable courts. For example, while the Paris Commercial Court can boast more than 40 judges in its task force and a success rate of more than 70 percent in prevention procedures, the national rate of success is less than 10 percent. Moreover, the local network effect may lead a court to overlook the fact that a debtor's application for a preventive procedure is submitted late, all the more so when the debtor is a prominent employer in the region. However, in smaller courts the presidential position is often held by a retired business-wise person who generally has the knowledge, authority and competence to wield the pre-insolvency remedies efficiently.

The bending of the law is facilitated by the public prosecutor's absence from prevention procedures where, curiously unlike in insolvency procedures, his involvement is not legally required to guarantee good practice and fair dealing. Creditors should therefore be particularly vigilant and should not entirely rely on a court appointee to examine the sincerity and accuracy of a debtor's accounting and business plan. They must form their own view and cooperate with the court appointee in order to extract the relevant information from the debtor.

The result is that, although a share of the burden of handling the creditors is taken off the shoulders of company management, preventive procedures remain very demanding in terms of management time at a stage at which it is crucial that managers concentrate on the creation and maintenance of future value for the performance of the intended creditor agreement.

Thus, a delicate balance must be struck between the legitimate requests of the court appointee and of the creditors on the one hand, and the preservation of the ongoing business on the other, in a process where neither the circulation of forecasts, business plans and other information, nor the convening of creditors' meetings and the conclusion of a collective agreement, are mandatory. In fact, confidential individual negotiations with individual creditors can create a lack of transparency which can lead to unequal treatment of equals, irrespective of the best efforts of the conciliator or *mandataire ad hoc* due to the very tight time schedule for the outcome of the procedure.

Another downside is the difficulty of providing security for an un-syndicated group of creditors with various terms and interests, all the more so as floating charges are not available under French law.

It is of note that ameliorations have been brought to the creditors' situation over the last decade. A new money privilege was created for creditors who made money available to the debtor after the formal approval of the agreement by the Court. Article L611-11 of the Commercial Code extends the new money privilege to all creditors that made money available to the debtor during the conciliation proceedings prior to formal approval of the agreement.

### Conclusion

As credit and confidence are necessary elements of cross-border trade, the prevention remedies grown out of the practice of the courts and endorsed by the legislator have proved sufficiently effective to make it worth creditors' while to invest the time and effort required in such procedures when their French debtor undergoes difficulties. French law on insolvency is becoming increasingly creditor friendly. Foreign creditors should also be aware of the wealth of information on French businesses which is publicly available on electronic databases, in order to make their own early warning verifications and thus improve the chances of being safe rather than sorry.

### Note:

- 1 Law 94-475 of 10 June 1994; Law 2005-845 of 26 July 2005; Ordinance 2008-1345 of 18 December 2008; Law 2010-1249 of 22 October 2010; Ordinance 2014-326 of 12 March 2014. Avocat associée, Avocat associée,



**Isabelle Smith Monnerville**  
Avocat Associée  
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Isabelle Smith Monnerville is a member of the Paris Bar and founder of the Paris law firm SMITH D'ORIA. She is experienced in the protection of creditors' rights and the negotiation of creditor voluntary agreements in the context of French insolvencies.

# Goodwill Indemnity vis-à-vis the Judgment of the European Union Court of Justice Issued in the Unamar Case

The judgment of the European Union Court of Justice issued in the Unamar case dated 17 October 2013 gave a restrictive interpretation to Article 7 of the Rome Convention (convention on the law applicable to contractual obligations) dated 19 June 1980, and by extension to article 9 of the Rome I Regulation, which replaced that convention, and understood, in essence, that *loi de police* or overriding mandatory rule may only be qualified as such if it is aimed at protecting crucial interests of political, social or economic nature of the state concerned.

The highest courts of several European Union member states have held that a distributor and a franchisee are entitled, under certain conditions, to claim goodwill indemnity or compensation for damage from a principal or a franchisor upon termination of their contracts.

This conclusion derives, by analogy, from a similar legal treatment granted in favour of self-employed commercial agents by Directive no. 86/653/EEC which primarily aimed at harmonizing legislation of EU member states.

The Portuguese Supreme Court, for instance, has hitherto upheld the extension of a goodwill indemnity in benefit of the franchisee in cases where the franchisor, not only grants the 'franchise package', but also supplies the franchisee with products or services manufactured or performed by the franchisor, that is to say, when in a similar situation of a principal vis-à-vis a distributor.

Even though there is no doubt that this jurisprudence as to franchise contract is still not sufficiently stabilised in most European Union countries, it is of great importance to report here the recent jurisprudence issued by the European Union Court of Justice in the Unamar case, dated 17 October 2013, due to the impact that it may have on goodwill indemnity or compensation for damage in general, i.e., in the commercial agency, distribution and franchise contracts entered into EU resident parties.

Unamar was a shipping agent of a Bulgarian ship owner. Both EU member states, Belgium and Bulgaria, had correctly implemented Directive no. 86/653 EEC. Upon termination of the commercial agency agreement between them, Unamar claimed payment of goodwill indemnity and compensation for damage from the Bulgarian counter-party and filed an action in the Belgian courts to make effective its right.



The Bulgarian party opposed the claim by stating that Unamar had misled an arbitration clause agreed between them which provided for arbitration in Bulgaria in case of any conflict related to the agency agreement and that, in addition, the parties had also agreed that Bulgarian law would be applied.

Unamar held, by its turn, that Belgian law was the one to be applicable to the contract with regard to goodwill indemnity and compensation for damage and that Belgian courts should hear the case due to the existence of a *loi de police* or overriding mandatory rule in force in Belgium and, in accordance with this law, Belgian courts should have necessarily jurisdiction to make effective the application of Belgian substantive law.

The case was referred to the European Union Court of Justice, (EUCJ) by the Belgian Court of Cassation in order to get its view on the nature and effective application of the Belgian laws to the case under EU law having in

mind that the parties had expressly agreed otherwise, i.e., that Bulgarian law, and arbitration in Bulgaria, should be followed.

EUCJ decided, on 17 October 2013, that an overriding mandatory rule or a *loi de police* is recognized in EU law, but it may not infringe other important EU laws as in the case of the parties' freedom of choice, in particular their right to agree on the law to be applied in a contract and the jurisdiction to solve disputes.

Also, a *loi de police* should only be accepted as an overriding mandatory rule if it means that, under article 9 (1) of Regulation Rome 1 no. 593/2008, is crucial for the political, social or economic interests of the member state. Therefore, it is up to national legislators to decide if the interests of a commercial agent and its claim to goodwill indemnity is or is not of crucial interest to the political, social or economic organisation of the country concerned.

Several European countries, such as Belgium, have published laws providing that its domestic law should always be applicable on termination of contract and respective consequences and should prevail over any foreign law chosen by the parties.

A further example, to help to understand clearly the kind of *loi de police* or overriding mandatory rule that is in question: Portuguese law (Decree-law no. 178/86, dated 3 July) on self-employed commercial agency contract (which has been extended by case law and analogy to the distribution contract and the franchise contract under certain conditions as mentioned above) provides for that Portuguese law must be applied to the termination of contract whatever the law chosen by the parties (*lex contractus*), unless where the law chosen by the parties is more favourable to the agent than the Portuguese one. Only in this case the latter law should be applied.

Considerations to the favourability of a legal regime for the agent under Portuguese law include (1) his right to goodwill indemnity (2) provided that the following cumulative conditions are met a) he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits, after termination of contract from the business with such customers b) payment of this goodwill indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers.

Portuguese law states that goodwill indemnity should not exceed an amount equal to a commission of one year based on the average of the last five years or less if the duration of contract is shorter.

Also that goodwill indemnity shall not be due if the termination of contract is attributable to agent's fault or if the contract was assigned, under agreement with the principal, to a third party.

There is no legal provision in Portuguese law about the exclusive jurisdiction of domestic courts to hear any conflict of the kind, but it has been sustained that such exclusive jurisdiction is a condition of making effective application of Portuguese substantive law.

The origin of this legal understanding derives, on one hand, from articles 17 to 19 of Directive no. 86/653 EEC,

(which basically are described about the contents of Portuguese law above mentioned which implemented the regime of that Directive) and, on that other hand, from article 7(2) of the Rome Convention, then in force, on the law applicable to obligations in the EU member state, dated 19 June 1980, which reads:

'Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.'

Later, this article of the Convention was replaced by article 9 of Rome Regulation no. 593/2008, also known as Rome I Regulation, which reads in its number 1:

'Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.'

As said before, this statutory regime may also be applied to the distributor and franchisee by analogy in accordance with significant case law of some EU member states. They are rules that have been qualified as *lois de police* or overriding mandatory rules.

However, the EUCJ judgment in the Unamar case pointed out that those overriding mandatory rules or *lois de police*, although allowed by EU law, cannot set aside other important EU laws, such as freedom of choice which is a principle of EU law, more particularly expressed in article 3 (1) of Rome Convention, dated 19 June 1980, or article 3 of Rome I Regulation (EC) no. 593/2008, dated 17 June 2008, which allow all parties the freedom to choose by agreement a specific law or jurisdiction to govern a contract and conflicts.

The EUCJ also emphasized that the courts of a member state, in construing the relevant laws, shall decide if goodwill indemnity of a commercial agent is of crucial political, social or economic interests within their own legal systems.

It was also highlighted that this jurisprudence and legal provisions of articles 17 to 19 of Directive no. 86/653/EEC, as well as article 7 (2) of the Rome Convention and

article 9 of Rome I Regulation are applicable in the case of laws chosen by the parties of a non-member country in confrontation with *lois de police* or overriding mandatory rules of a member state, provided that the activity of a commercial agent and, if any, of a franchisee or distributor, is performed exclusively or predominantly in a EU member state territory in order to keep equal competitive conditions in the market.

As a first conclusion, it is now to be seen in the future on how the principles contained in the Court of Justice judgment of the Unamar case will be applied in practice by the legislators and jurisprudence of each member state given that it was made clear by the Court of Justice that remains the consideration of member states' legislators and courts, in construing the law, whether it is or is not of crucial political, social or economic interest for the state concerned.

And, of course, in the centre of the question, if the interests of a commercial agent (or, if any, a franchisee or distributor) can be of a so significant high value to be qualified as of a crucial political, social or economic interest in any given country having in mind particularly that such a right is renounceable by the commercial agent's decision.

A last question needs to be mentioned here concerns another case heard by the Court of Justice in the so-called 'Ingmar judgment', dated 9 November 2000. Ingmar was a shipping agent representing a US ship-owner called Eaton Leonard Technologies Inc.

The parties entered into a commercial agency contract electing the State of California law to govern it which did not grant any goodwill indemnity or compensation to the commercial agent upon termination of contract.

The Court of Justice decided that a commercial agent carrying out activity in an EU member state is protected, where goodwill indemnity and compensation for damages are concerned, by Directive no. 86/653/EEC, in particular by articles 17 to 19 upon termination of contract. Article 19 is clear in saying that the parties may not derogate from them to the detriment of the commercial agent, even when the principal is established in a non-member country. It added that parties, in such circumstances, cannot evade those protective legal articles by the simple expedient of a choice of law clause.

Given this, it is important to know how the jurisprudence of the Court of Justice in the Ingmar case is or is not compatible with the Unamar case judgment.

Apparently, the Ingmar judgment grants full priority to the *lois de police* or overriding mandatory rules of articles 17 to 19 of Directive no. 86/653/EEC over any law providing otherwise whether of a member state or not.

But, from the jurisprudence in the Unamar judgment it may be concluded that *lois de police* should only override mandatory rules if the legislator of a UE member state country in transposing those articles of Directive no. 86/653/EEC into national law has said to be crucial for the political, social or economic interests of the member state concerned the protection as such of commercial agents (and by analogy, we should have always take it into consideration, to distributors and franchisees) in accordance with article 9 (1) of Rome I Regulation.

Finally, in order for the law of a member state to apply those provisions of the Directive prevailing over the laws of another EU member state which have also applied same Directive, it is required that the laws of the former state have implemented the Directive going beyond the minimum regime provided by the Directive.

In conclusion, the judgment of the Unamar case gave a restrictive interpretation of articles 17 to 19 of the Directive vis-à-vis other important EU rules such as the principle of freedom of choice contained before in article 7 (1) of the Rome Convention and now in article 9 (1) of Rome I Regulation which was considered a pillar of these statutory instruments.



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# Dispute Resolution Mechanisms within China's Free Trade Zones

China's Free Trade Zones (FTZs) aim to establish international-level FTZs that are convenient for investment and trade, with effective regulations and a standard legal environment, and act as test fields for promoting reform and improving the level of open economy in China. In the wake of Shanghai, the successive opening up of Tianjin, Guangdong and Fujian FTZs will have a radiating effect within China. In order to play their roles fully, these FTZs must continue to pursue reform and drive the development of the Chinese economy by providing a dispute resolution environment that is more adapted to the international market for foreign and domestic investors. The improvement of litigation, arbitration and other dispute resolution mechanisms, as well as adherence to international conventions, are important factors for the healthy development of China's FTZs in the long term, marking them as areas with advanced international standards, which will provide powerful judicial safeguards for them after the expansion.



On 29 September 2013, the China (Shanghai) Pilot FTZ was formally established. After more than a year of operation, it was formally expanded. On 24 March 2015, the CPC (Communist Party of China) Central Committee Political Bureau convened a conference to deliberate the overall scheme of creating FTZs in Guangdong, Tianjin and Fujian, as well as the further reform and opening-up of the Shanghai FTZ. This would mean a new stage in FTZ construction, a new round of high-level rollouts, and steady progress in pilot reforms with greater range.

Once China's FTZs are all operating, there will be an increasing number of international and foreign-related dispute cases. The convenience of trade and investment in FTZs and various opening-up policies will substantially increase the volume of business in international investment and trade, and foreign-related commercial disputes will inevitably shoot up as well. By improving

dispute resolution mechanisms and acting in line with international conventions, China's FTZs will be able to develop healthily in the long term, showing themselves to be at an advanced level on the international stage, which will provide powerful judicial safeguards for them. The legal environment is an important guarantee for businessmen and investors looking to be successful in the FTZs; litigation and arbitration are the main approaches to disputes here, so adapting to any new situations and solving problems swiftly will be vital.

## Litigation – The Traditional Method for Dispute Resolution

### 1. Shanghai FTZ

After the establishment of the Shanghai FTZ, the Shanghai High People's Court issued the '*Opinions on the service of Shanghai People's Court for the safeguard of Shanghai FTZ*', which specifies the need to strengthen the establishment of trial organs in the FTZ; continue



research on and carry out the concentrated jurisdiction mechanisms of investment, trade, finance, intellectual property and other cases related to the FTZ; and ensure the fair, professional and effective solution of any disputes.

On 5 November 2013, the Court of FTZ of the Shanghai Pudong New Area People's Court was formally established. As the designated tribunal of the Shanghai Pudong New Area People's Court, the Court of FTZ will accept commerce, finance, intellectual property and real-estate cases related to the FTZ that come within the Shanghai Pudong New Area People's Court's jurisdiction, and its scope for accepting cases will be adjusted according to the realistic construction and operation of the FTZ. Judgments and verdicts of the Court of FTZ can be considered to be those of the Shanghai Pudong New Area People's Court; second trials will be governed by the Shanghai No.1 Intermediate People's Court.

With the expansion of the Shanghai FTZ, on 27 April 2015 the Shanghai Pudong New Area People's Court adjusted the scope of accepting cases for the Court of FTZ, and will now accept and try two types of cases which shall be governed by the Shanghai Pudong New Area People's Court. One type of case involves investment, trade, finance and other commercial cases and civil, criminal and administrative cases in the intellectual property area related to the Shanghai FTZ, while the other type involves civil and commercial cases and civil, criminal and administrative cases in the intellectual property area related to the open economy of the Shanghai Pudong New Area.

In 2014, the Shanghai No.1 Intermediate People's Court also formulated '*The scheme on provision of judicial safeguard for China (Shanghai) FTZ*' and set up a specialist central collegial panel which hears the second trials and significant first trial cases related to the Shanghai FTZ. The same year, the Shanghai No.1 Intermediate People's Court issued '*The trial guidelines on cases related to China (Shanghai) FTZ (for trial implementation)*', which provides guided thinking for the acceptance, trial, judgment and execution of various cases brought during the construction of the Shanghai FTZ. It used a foreign 'Executor System' for reference to introduce 'select law firms and other institutions to be responsible for the implementation of auxiliary affairs of execution cases in the FTZ', and it also specified that 'The jurors of the specialised collegial panel should be



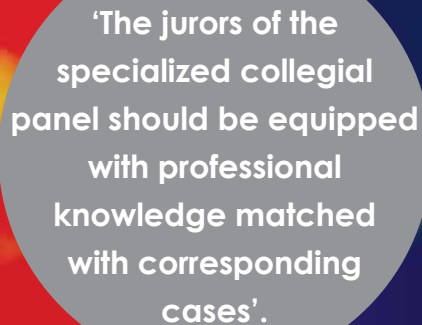
equipped with professional knowledge matched with corresponding cases', in order to promote a high quality of trial for pioneer FTZ cases.

## 2. Tianjin FTZ

Keeping up with the pace set by Shanghai, the Tianjin High People's Court issued its own '*Opinions on the service of Tianjin People's Court for the safeguard of China (Tianjin) FTZ*' comprising 22 articles. It emphasises the need to set up a specialised legal/trial organ in the Tianjin FTZ, develop it with the help of consultations and discussions with experts, and create mechanisms and working rules in litigation in the areas of maritime, intellectual property, finance, etc. It suggests that experts should be established as jurors in the system, that Chinese and foreign experts can broaden the channel by finding out foreign laws for useful reference, and that a positive role can be played in the promotion of public procedure, the guarantee of fairness in judgment, enhancement of judicial credibility and other aspects.

Given that the area of the Tianjin FTZ is within the jurisdiction of the Tianjin No.2 Intermediate People's Court, following the judicial practice of the Shanghai court, Tianjin No.2 Intermediate People's Court issued the '*Trial guidelines on cases related to China (Tianjin) FTZ*' comprising 26 articles. It stipulates that a specialised trial organ should be established for any cases related





'The jurors of the specialized collegial panel should be equipped with professional knowledge matched with corresponding cases'.

to the Tianjin FTZ, and that a centralised method be adopted to conduct civil and commercial case trials related to the Tianjin FTZ. It also specifies the scope of cases related to the Tianjin FTZ, and that the specialised collegial panel of Tianjin No.2 Intermediate People's Court is responsible for hearing civil appeals whose first trial was conducted in Tianjin Binhai New Area Free Trade Zone Court, as well as those first trial cases which it accepts directly. The latter will include cases where:

- the place of contract performance and the location of the infringing act were in the FTZ,
- one party is the legal person/ organisation registered in the FTZ,
- special stipulations in the law, regulations or policies are related to the FTZ, or
- the case is considered to be suitable to be heard by the court's specialised collegial panel.

### 3. Guangdong FTZ

Also using the experience of Shanghai as a reference, the local People's Courts in three areas of the Guangdong FTZ all created supporting measures in succession. First Guangdong Qianhai People's Court and Nansha People's Court issued various opinions, and now the Hengqin People's Court will select jurors from Macau to highlight the FTZ's strategic positioning and deep collaboration between Guangzhou, Hong

Kong and Macau. In addition, at the same time that the Hengqin area of the Guangdong FTZ was inaugurated, an intellectual property circuit court of Hengqin was established to hear intellectual property cases related to the Guangdong FTZ, and this will be governed by the Zhuhai Intermediate People's Court.

### 4. Fujian FTZ

Although the Court of Fujian FTZ has not yet been established, relevant preparatory measures have been taken. Four intellectual property courts will be set up in the Fujian FTZ, while Xiamen Intermediate People's Court has issued several opinions to provide services for FTZ construction.

## Arbitration – A Gradually and Widely Accepted Dispute Resolution Approach

### 1. Shanghai FTZ

On 22 October 2013, the Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Center or SHIAC) 'China (Shanghai) FTZ Court of Arbitration' was formally established. On 26 November 2013, the first hearing of the China (Shanghai) FTZ Court of Arbitration was conducted in the Shanghai FTZ.

On 1 May 2014, the SHIAC's 'China (Shanghai) FTZ Arbitration Rules' (the 'Arbitration Rules') formally came into effect. These so-called 'nearly acting on international convention' Arbitration Rules improve the 'Interim Measures'; add an 'Emergency Tribunal System'; establish an 'opening-up system for the panel of arbitrators'; refine the 'consolidation of arbitrations', 'joinder of other parties under the same arbitration agreement' and 'joinder of third parties'; introduce an 'award ex aequo et bono' system, etc.

Just a few days later, on 4 May 2014, the judicial review institution of arbitration cases of the SHIAC, the Shanghai No.2 Intermediate People's Court, issued 'Several Opinions on the Judicial Review and Execution of Arbitration Cases Regarding the Application of China (Shanghai) Pilot FTZ Arbitration Rules', which opens up a 'green channel' specifically for cases related to the Arbitration Rules, and provides a powerful judicial safeguard for the creative measures of the Arbitration Rules. So far, the Shanghai FTZ has established an FTZ arbitration institution, an FTZ arbitration rule and a judicial review opinion on the FTZ arbitration rule, creating a trinity of FTZ arbitration mechanisms.

## 2. Tianjin FTZ

According to the 'Opinions on the service of Tianjin People's Court for the safeguard of Tianjin FTZ', it should support the role of arbitration in dispute resolution, focus on the new rules of the Tianjin FTZ, issue corresponding opinions and safeguard the innovation of the arbitration system.

In addition, in supporting the creation of a legalised and internationalised business environment in the Tianjin FTZ, the China International Economic and Trade Arbitration Commission and China Maritime Arbitration Commission are proposing to establish an arbitration centre in the Tianjin FTZ.

## 3. Guangdong FTZ

Located in the Hengqin New Area of Zhuhai, the Zhuhai International Court of Arbitration recently issued arbitration rules, created a panel of arbitrators and established a 'pre-trial meeting' and 'expert consultation meeting' system, which strengthens the capacity to deal with complicated parties or contracts and serves the Hengqin New Area of the Guangdong FTZ.

## 4. Fujian FTZ

On 6 June 2015, the Xiamen International Commercial Court of Arbitration and the Xiamen International Commercial Mediation Center were formally inaugurated to support arbitration of dispute resolution in the Fujian FTZ.

With the constant expansion in the FTZ, business entities in the FTZ will confront more professional and international legal disputes involving cross-border investment and financing, international trade, etc. Professionals with better international levels of knowledge are essential for dispute resolution and judicial safeguarding. The characteristics of arbitration are effectiveness, confidentiality, autonomy of will, and the convenience of recognition and enforcement internationally, so the parties in foreign-related civil and commercial activities tend to choose arbitration for dispute resolution; it is independent, unofficial, uses English as the arbitration language, and is composed of many arbitrators experienced not only in law but also in different industries.

As an international professional commercial dispute resolution mechanism, arbitration has played an important role in the process of rule of law in the FTZs.

Arbitration institutions from the Shanghai, Tianjin, Fujian and Guangdong FTZs have recently established the China FTZ Arbitration Alliance in Qianhai, Shenzhen. The Arbitration Alliance was jointly launched by the Shanghai International Economic and Trade Arbitration Commission, Tianjin Arbitration Commission, Fuzhou Arbitration Commission, Shenzhen Court of International Arbitration, Zhuhai Arbitration Commission and Nansha International Arbitration Centre. The Arbitration Alliance is favorable towards gathering high-quality resources for arbitration in the FTZs and forming cooperation and communication mechanisms for arbitration institutions throughout China's FTZs, as well as promoting professional and international levels of arbitration service in the FTZs.

## Summary

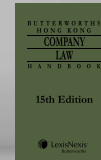
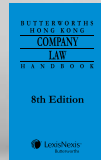
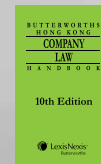
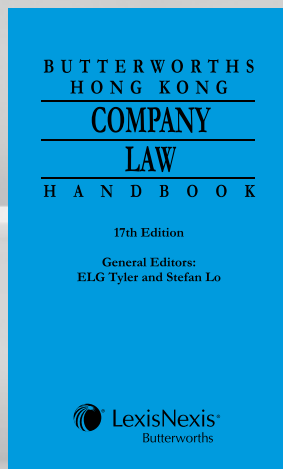
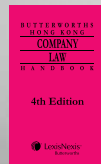
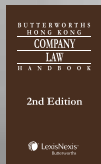
The establishment of professionalised and high-level litigation as a dispute resolution mechanism is a crucial guarantee for the positive operation of China's FTZs. Legal justice is the last defence of social justice, and its realisation must be guaranteed by professionalism and authority. Arbitration is another type of dispute resolution mechanism which is being widely adopted by different countries and international economic organisations in the investment and trade area. The professionalisation and internationalisation of dispute resolution mechanisms in China's FTZs and the improvement of diversified dispute resolution mechanisms such as litigation and arbitration that fall in line with international convention will provide powerful judicial safeguards for the legalised and internationalised business environments of the FTZs. This will result in more foreign investors being attracted and joining the FTZs in the future.



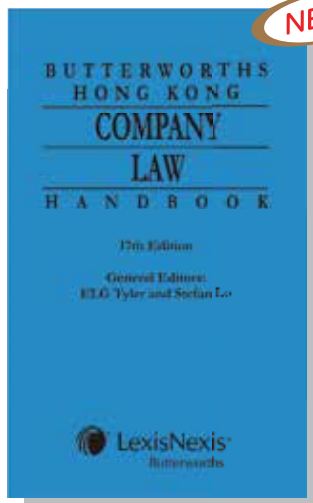
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Li Zhiqiang is a Councillor of the International Bar Association (IBA), Vice Chairman of the Legal Practice Committee of the IPBA, a member of the Financing & Securities Committee for the All China Lawyers Association, a member of the Legal Consultant Group for Shanghai Securities Association, and an arbitrator for CIETAC. He has written or compiled more than 20 books, and was identified by an international legal grading agency as one of Asia's 'Leading Commercial Lawyers' for nine successive years from 2003.

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*Lakiasiaintoimisto Lakituki Ltd*

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*David L. Kreider, International Arbitrator*

**Taiwan**, Eric Chang  
*Infoshare Technology Law Office, Kaohsiung Branch*

**Taiwan**, Greg Harris  
*Lee and Li*

**United Kingdom**, Paul Darling  
*Keating Chambers*



# Discover Some of Our New Officers and Council Members



**Edgar Chen**

Jurisdictional Council Member for Taiwan

## What was your motivation to become a lawyer?

Laws and their enforcement, while somewhat alien to the general public, are indispensable for the rule of law in a democratic state. I hope my legal service will help people to understand the law and facilitate its enforcement in a fashion beneficial to both citizens and society.

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

The hearty appreciation and timid smiles I sensed from the clients of my pro bono work when the case went satisfactorily and as anticipated; these are precious experiences I will not forget.

## What are your interests and/or hobbies?

Photography, reading, classical music and travelling.

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

Like many lawyers I am quite busy, but I would never miss a friend's message. I wish to prevail for the client in a dispute but will always pay respect to any peers involved. Profit is important but less so than honesty and fairness. The country where I am from, Taiwan, is small but I would like you all to know that it is full of joy and hospitality when you come.

## Do you have any special messages for IPBA members?

A law student will become more informative and creative if he has the opportunity to find solutions in different jurisdictions other than his own. Developing friendships is also important. The IPBA is a wonderful treasure for those law students who are brave enough to venture out and explore.



**Kirindeep Singh**

Chair, International Construction Projects Committee

## What was your motivation to become a lawyer?

That is a funny story. I come from a traditional, high-achieving Indian family, so when I was choosing a career there were only three family 'approved' options – doctor, lawyer or engineer. I had aspirations to become a doctor

but unfortunately my aptitude for science wasn't the greatest, plus my passing interest in politics and a degree in political science were soon deflated with remarks like, 'What, you're going into politics?' Hence I was left with law! That's not the only reason I chose law though (although admittedly it was a push factor). I always excelled at debates (even in school), public speaking and analytical and critical writing. Advocacy (the idea of fighting and proving your case) really appealed to me.

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

During my 17 years in the business I have had quite a number of memorable experiences as a lawyer. These

include my first ever trial (the nerves, excitement and anticipation, butterflies in my stomach in the preceding days and during the whole process . . . it was a really exhilarating experience); my first appearance before the Court of Appeal (now that trumped even my first trial experience!); and of course that grateful smile and relief on some of my clients' faces when they discovered that they had succeeded and justice had been served.

#### **What are your interests and/or hobbies?**

I love sports and am a big sports fan - football, hockey, rugby, cricket, tennis, etc. - you name it! In my younger days I used to play a lot of hockey and soccer. I still play soccer from time to time and I love watching the English Premier League matches on TV. My favourite team is Everton and I have been supporting them since I was 10 years old. Other interests and hobbies include watching movies (including Bollywood flicks with my wife) and I enjoy a good novel too.

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

Well I think there are a couple of things that might surprise IPBA members about me. One is that I am a fitness fanatic. I visit the gym at least 3-4 times a week during weekdays and on the weekends I go jogging and swimming or play soccer or tennis. If I don't exercise then I don't feel good. Also, I am a very active member of my local church. I am an ordained Elder, I lead the praise and worship services in my church (yes, I sing!), preach sometimes and also hold a Master's and Doctorate degree in theology.

#### **Do you have any special messages for IPBA members?**

Come and support the sessions held by the International Construction Projects Committee! I know its construction, but it's really interesting. Trust me! The IPBA is great because of the great camaraderie amongst its members. Thanks for making that possible and let's keep it that way.

## 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.

## Members' Notes

### Stephan Wilske, Germany

Stephan Wilske co-authored the contribution '*Arbitration Guerrilla Tactics and Minimum Ethical Standards in International Arbitration – Light on the Horizon or a Sisyphean Exercise?*' to Prof. Jerzy Rajski's Liber Amicorum, which was presented in Warsaw on 29 May

2015. He also co-edited the Liber Amicorum '*Global Wisdom on Business Transactions, International Law and Dispute Resolution*' for IPBA member and long-time IPBA Council Member Gerhard Wegen, which was presented in Stuttgart on 13 March 2015.

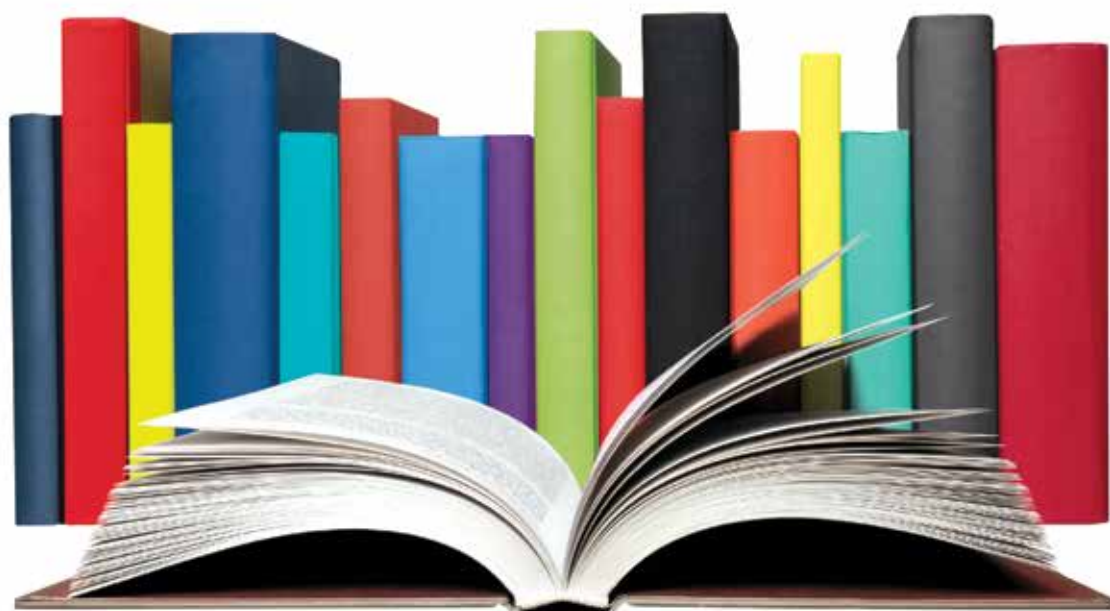
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### Suresh Divyanathan, Singapore

On 9th August 2015, our former IPBA Membership Committee Chair, Suresh Divyanathan, received the Commendation Medal (Military) at Singapore's National Day Awards. The award, which is conferred by the President of Singapore, recognises individuals who have made significant contributions to public service. Suresh, who holds the rank of Lieutenant-Colonel, is awarded for exceptional service to the Singapore Armed Forces.

In addition to this prestigious award, Suresh has this year been lauded for dedication to his legal practice in the following publications:

- *Benchmark Asia-Pacific*: Local Dispute Star.
- *Chambers Asia Pacific*: Recommended Individual for Arbitration in Singapore.
- *Legal Media Group's Rising Stars – Expert Guides*: Recommended Individual for Commercial Arbitration.





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

The Inter-Pacific Bar Association (IPBA) is pleased to announce that it is accepting applications for the IPBA Scholarship Programme, to enable practicing lawyers to attend the IPBA's 26th Annual General Meeting and Conference to be held in Kuala Lumpur, Malaysia, April 13-16, 2016.

## What is the Inter-Pacific Bar Association?

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

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

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

## What is the IPBA Scholarship Programme?

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

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

## Who is eligible to be an IPBA Scholar?

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

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

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

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

## How to apply to become an IPBA Scholar

To apply for an IPBA Scholarship, please obtain an application form and return it to the IPBA Secretariat in Tokyo no later than **31 October 2015**. Application forms are available either through the IPBA website ([ipba.org](http://ipba.org)) or by contacting the IPBA Secretariat in Tokyo ([ipba@ipba.org](mailto:ipba@ipba.org)).

Please forward applications to:  
The IPBA Secretariat  
Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan  
Telephone: +81-3-5786-6796 Facsimile: +81-3-5786-6778 E-mail: [ipba@ipba.org](mailto:ipba@ipba.org)

## What happens once a candidate is selected?

The following procedure will apply after selection:

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





# 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](mailto:ipba@ipba.org) Website: [ipba.org](http://ipba.org)

See overleaf for membership  
registration form





# IPBA SECRETARIAT

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

## IPBA MEMBERSHIP REGISTRATION FORM

### MEMBERSHIP CATEGORY AND ANNUAL DUES:

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

Name: \_\_\_\_\_ Last Name \_\_\_\_\_ First Name / Middle Name \_\_\_\_\_

Date of Birth: year \_\_\_\_\_ month \_\_\_\_\_ date \_\_\_\_\_ Gender: M / F

Firm Name: \_\_\_\_\_

Jurisdiction: \_\_\_\_\_

Correspondence Address: \_\_\_\_\_

\_\_\_\_\_

Telephone: \_\_\_\_\_ Facsimile: \_\_\_\_\_

Email: \_\_\_\_\_

### CHOICE OF COMMITTEES (PLEASE CHOOSE UP TO THREE):

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

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

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

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

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

### PLEASE RETURN THIS FORM TO:

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

# VITAL SUPPORT FOR CRITICAL INFORMATION



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**CROWN**   
RECORDS MANAGEMENT

# 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



## BAC/BIAC Profile

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

# BIAC

Beijing Arbitration Commission  
Beijing International Arbitration Center

Tel: +86 10 6566 9856

Fax: +86 10 6566 8078

Email: [bjac@bjac.org.cn](mailto:bjac@bjac.org.cn)

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



Hearing Room

## BAC/BIAC Growth

- From 7 cases filings in 1995 to over 24,000 cases in total by 2014
- 1500+ new filings on average per year since 2005
- 600+ international cases in total
- Parties from various jurisdictions including USA, UK, Germany, Australia, Japan, South Korea, Singapore, Hong Kong and Taiwan, etc.
- The sum in dispute of around 11.1 billion RMB (approx. 1.8 billion USD or 1.7 billion EUR) per year on average since 2010 with a highest claim amount of 10 billion RMB (Approx. 1.62 billion USD or 1.48 billion EUR) in 2015

## Recommended BAC/BIAC Model Clause:

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