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NEWS & LEGAL UPDATE

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Publisher Paul Davis

Editor Kieran Colvert

Editorial Kiri Cowie
Julie Yao

Design Portia Le

Advertising Sales
Jennifer Luk
E: jennifer@ninehillsmedia.com
Frank Paul
E: frank@ninehillsmedia.com
T: +852 3796 3060

ninehills media

Ninehills Media Limited

Level 12, Infinitus Plaza,
199 Des Voeux Road,
Sheung Wan, Hong Kong
Tel: +852 3796 3060
Fax: +852 3020 7442
Email: enquiries@ninehillsmedia.com
Internet: www.ninehillsmedia.com

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Dhinesh Bhaskaran
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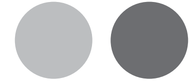


Dear Colleagues,

It is amazing how quickly time flies!

Almost a year has gone by since I assumed the Presidency at the conclusion of the 26th Annual Meeting & Conference in Kuala Lumpur last April. My time as President has been a richly rewarding experience for me, both personally and professionally. Most importantly, it has given me the opportunity to promote the objectives and interests of the IPBA in two key areas.

Firstly, I continued the efforts of my predecessors to expand the reach of the IPBA to potential younger members, and to encourage them to participate in our events. It is important that we continue to organise affordable domestic and regional events in different jurisdictions to facilitate this participation and attract new members. These events are often our first point of contact with potential members, and afford an opportunity for the IPBA to show them how they could benefit in the long term.

Secondly, I have had regular discussions with leaders of national and international bar associations, to continue strengthening our ties and increasing our profile with these organisations. In particular, I have had discussions with leaders of national bar associations from emerging economies as to the ways in which we can be of value to their members.

It is indeed challenging to maintain and grow interest in the IPBA among the international legal community, particularly in the face of the ever-increasing presence of other international organisations in the Asia-Pacific region. However, I have no doubt that interest in the IPBA will continue to be significant, as we remain the preeminent business lawyers' organisation with an Asia-Pacific focus. Indeed, when publicising the IPBA to potential members, it is heartening to note the degree of interest in our organisation, which strikes many as unique and attractive.

Moving forward, it is especially important that we maintain close contact and remain visible with national bar associations, which are key in publicising the IPBA to lawyers in their jurisdictions. The reach of national bar associations is unparalleled, and is an effective way of raising our profile and obtaining new members. It would be advantageous if as many members as possible could assist in getting bar associations in their jurisdictions to promote the IPBA. As I have previously mentioned, it is important for us to attract an even more diverse range of members to enhance the strengths of our organisation.

At the start of 2017, I had the opportunity to represent the IPBA at the following:

(1) Opening of the Legal Year events in Hong Kong on 9 January 2017 and in Putrajaya (Malaysia's administrative capital) on 12 and 13 January 2017, which were well attended by leaders of national and international bar associations. I took the opportunity to promote our organisation, particularly to representatives of national bar associations.

(2) I met the leadership of the Union Internationale des Avocats ('UIA') in Kuala Lumpur on 10 February 2017. We had a constructive discussion on ways to develop the relationship and interaction between

the two organisations, and the possibility of entering into a Memorandum of Understanding.

Lastly, I would like to extend my sincere appreciation to the Officers and Council Members, who have made my Presidency a smooth and enjoyable one. We are indeed fortunate to have such a dedicated group to lead the IPBA, and this augurs well for our future.

I look forward to seeing all of you at the Annual Meeting & Conference in Auckland, which I am certain will be a spectacular event!

Dhinesh Bhaskaran
President

IPBA Upcoming Events

Event	Location	Date
IPBA Annual General Meeting and Conference		
27th Annual General Meeting and Conference	Auckland, New Zealand	April 6-9, 2017
28th Annual General Meeting and Conference	Manila, Philippines	March 14-16, 2018
IPBA Mid-Year Regional Conference		
Forces of Change: Modernisation and a Shifting International Landscape (English and Asian Perspectives on How Legal Systems Adapt)	London, England	November 13, 2017
IPBA Events		
Investment Controls in Europe, the US, and in Asia	Düsseldorf, Germany	June 12, 2017
IPBA/Swiss Arbitration Association's "Asian-European M&A and Dispute Resolution Day: Corporate Acquisitions and Resulting Disputes"	Geneva, Switzerland	September 14, 2017
IPBA/KLRCA's "3rd Asia-PAC Arbitration Day"	Kuala Lumpur, Malaysia	September 25, 2017
Investment in the Emerging Markets – the APEC Perspective	Da Nang, Vietnam	November 6, 2017
3rd IPBA East Asia Regional Forum	Seoul, Korea	November 16-17, 2017
IPBA-supported Events		
The Law Society of Hong Kong's "The Belt and Road: A Catalyst for Connectivity, Convergence, and Collaboration"	Hong Kong	May 12, 2017
AIJA Annual Congress	Tokyo, Japan	August 28-September 1, 2017

More details can be found on our web site: http://www.ipba.org, or contact the IPBA Secretariat at ipba@ipba.org

The Secretary-General's Message

Miyuki Ishiguro
Secretary-General

Dear IPBA Members,

I extend heartfelt greetings to all of you in my final message in this Journal as Secretary-General of the IPBA. My term will expire at the conclusion of the Auckland Annual Meeting and Conference on 9 April 2017. Thanks to all the officers and other council members, as well as all IPBA members, for your support during my term.

IPBA Scholarship Program

The seeds of the IPBA Scholarship Program were planted at the Manila Conference in 1996, when the Council approved formation of the Developing Countries Program to provide lawyers from three jurisdictions (Cambodia, Laos, Vietnam; Myanmar was added the following year) the opportunity to attend our Annual Meeting and Conference without having to pay the registration fee, as well as enjoy complimentary IPBA membership.

Although there were no participants those first two years, there were ten applicants to attend the Auckland Conference in 1998; with four chosen: two from Vietnam, one from Myanmar, and one from Cambodia. The Council understood the importance of this opportunity to provide a chance for lawyers in those jurisdictions to attend our conference, and increased the budget for the next year in order to bring more lawyers to Bangkok 1999. They also added a category of "Young Lawyers" from any jurisdiction, under the age of 30.

In August of that year, the IPBA received a generous donation from J.K. Lin, the son of Past President M.S. Lin (1993-1994), Taiwan, to be used toward financing future participants of the program.

Through this donation, the M.S. Scholarship Program brought its first participants to the Annual Meeting and Conference in Bangkok in 1999. That first year, we brought 23 lawyers from various jurisdictions, and since then 4 to 15 Scholars have been chosen annually.

Over the years, a total of 166 Scholars have been selected from thousands of applicants. In addition to the above, we will welcome seven Scholars to the Conference this year, one each from Myanmar, Vietnam, Cambodia (Lawyers from Developing Countries), Russia, Hong Kong, Sri Lanka, and India (Young Lawyers, 35 and under).

Initially the program was overseen by members of a special committee, Officers and other Council members who volunteered to take the lead. In 2009 it became one of the 23 specialist committees and a Chair and Vice-Chairs were appointed by the Council. The Committee is led now by Chair Jay LeMoine, with assistance from past Chairs Varya Simpson and Tatsu Nakayama, along with Vice-Chair Hiroko Nakayama. They have their work cut out for them, as competition is getting increasingly fierce: there were over 60 applications to review this year!

The program currently provides round-trip airfare, accommodation during the conference, a conference fee waiver, and a 3-Year Term Membership in the IPBA.

The IPBA Secretariat provides support in publicising the program each year to all IPBA members and to other legal associations; gathering the applications;

congratulating all selected Scholars and informing those not chosen to keep trying; and the logistics of bringing the Scholars to the conference by budgeting the airfare and accommodations together with me. In recent years, the Scholarship Committee has been organising a half-day special event for the Scholars whereby they are taken to the local court and then have a tour and lunch at a local law firm. The Scholars are introduced to the delegates at the conference at the IPBA New Member and Scholarship Reception on the opening night.

When the funds started to run out, the IPBA leaders got creative in raising money to keep the program afloat. At some conferences, a hat was passed around and delegates threw in whatever change they had in their pockets at the time. The Secretariat also collected donations from members at the same time as their membership dues were paid. At the Kyoto/Osaka 2011 conference, a Silent Auction was held with the intent to use those proceeds to fund the Scholarship Program. However, the funds were instead donated to the Japanese Red Cross Society to help with relief efforts for The Great Tohoku Earthquake and Tsunami, which occurred just before the conference. As a result of the fund diversion, IPBA members in Japan started the Japan Fund for the purposes of maintaining the Scholarship Program. After that, the Vancouver 2014 host committee earmarked C$50,000 from the conference surplus to be used for scholarships. And now, the family of M.S. Lin has again kindly offered to donate the large sum of US$200,000 to fund the program. The IPBA will forever be grateful to all the support from individual members and all members collectively.

With the current funding available for the program, we are in a position to continue it for at least another 20 years.

IPBA Scholars by Jurisdiction

Jurisdiction	Number of Scholars	Jurisdiction	Number of Scholars
Argentina	2	Mongolia	8
Bangladesh	1	Myanmar	17
Brazil	2	Nepal	7
Cambodia	14	New Zealand	3
Canada	2	Pakistan	1
Chile	2	Palau	2
China	8	Philippines	4
Ethiopia	1	Poland	1
Fiji	6	Russia	2
Hong Kong	3	Samoa	3
India	8	Singapore	2
Indonesia	14	Sri Lanka	8
Israel	2	Tahiti	1
Korea	2	Thailand	1
Lao PDR	5	USA (Guam)	1
Malaysia	4	Vietnam	17
Mexico	2		

Friendship Agreements

As the IPBA reputation grows around the world, the association is approached more often these days by other associations with similar philosophies to band together and support each other's activities. It is not a rivalry that brings us together, but a collaboration that enhances both sides.

So far we have MOUs with the following entities:

- AIJA (Association Internationale de Jeunes Avocats) in 2010, extended twice
- APEC (Asia-Pacific Economic Cooperation) in 2011
- LAWASIA in 2014 (at the Vancouver conference in May)

In addition to global organisations, the IPBA leaders in Korea recognised a niche yet to be explored: the local bar association. As they were planning for the 1st East Asia Forum, talks began with the Korean Bar Association to support the event, and an MOU resulted; it was signed by both parties in October 2014 in Tokyo. Currently we are considering agreements with the Mongolian Bar Association and the Japan Federation of Bar Associations, and we have been approached by the Mexican Bar Association. IPBA leaders have also been invited to attend the opening of legal years in Malaysia and Hong Kong, and events in as-yet untapped jurisdictions such as Israel. The Council will consider all requests that we receive, and also proactively pursue collaborations to the benefit of the IPBA.

Farewell

I have mixed emotions as I write this final message in my capacity as Secretary-General. The past four years (two as Deputy SG, two as SG) have given me the opportunity to get to know the association on a deeper level, allowing me to develop a great appreciation for all that the Council does to keep the association moving forward. I will certainly miss personal interaction twice a year with the great members who make up the Council. The time spent in this position can be overwhelming sometimes, but as with all Council members I get more out of it in the end through the friendships made and professional growth of running an association of the caliber such as the IPBA. Although my official duties will end at the conclusion of the AGM in Auckland on 9 April, I will still be involved in the IPBA, particularly on a local level here Japan. Most of all, I have confidence in the Deputy, Caroline Berube, to take over the duties fully and with enthusiasm as she does all of her tasks. The IPBA is a living entity, and could not survive or thrive without all of you. I look forward to seeing you all at IPBA events for many years to come.

Miyuki Ishiguro
Secretary-General

Corporate Governance in India Faces a Potential Watershed Moment

Recent incidents have brought special attention to corporate governance practices in India, possibly setting off a trend towards greater corporate sophistication, shareholder awareness and professional company management. This article explores benchmarks in corporate governance set by leading Indian corporate houses and the evolving legislative and regulatory landscape making company boards more accountable to all stakeholders, with a special focus on the role of independent directors, while also taking into account lessons learned from past instances of corporate implosion.

Introduction

In an alleged coup *d'état* of sorts, the Tata Group, founded in 1968 and currently India's most valuable company, fired Cyrus Mistry, only the second non-Tata in the group's 150 year rich history to be appointed Chairman, for, among other things, not adhering to the ideals espoused by the company. He was also subsequently removed as Director from the board of Tata Sons, thus rendering this family-owned group,[1] the largest minority stakeholder at 18.75 percent, unrepresented on the board of the holding company for the first time in a decade.

Infosys, India's first globally competitive technology start-up and now its second largest IT conglomerate, known for its gold standard in corporate governance, has also been in the news recently, due to possible differences of opinion between its founders and the board. After each of the founders had their turn running the company, in 2014 the company appointed its first professional CEO, while the founders chose to resign from the board. Founded by Narayan Murthy[2] and six others in 1981, Infosys became the first in Indian corporate history to see all of its founders exit the board, allowing for the next generation professionals to take over. With India's most revered and respected companies brought under the media limelight of late, interest in corporate governance and shareholder awareness is at its peak.

Due to the predominance of promoter-dominated and family-controlled entities, wherein the powers of the majority shareholders are seldom checked, India has never held a great reputation when it comes to corporate governance. Fraudulent transactions of mass proportions going unchecked due to the lack of an effective monitoring system have led to instances such as the Satyam scandal and the recent fall from grace of one of India's most flamboyant billionaires. The West hasn't been immune to corporate breakdowns either. The infamous Enron scandal unearthed in 2001, perhaps the largest failure of corporate governance in history, sent shock waves and adversely affected thousands of shareholders and employees worldwide.

Efforts to clean up global corporate practices have intensified in recent years. Several prominent business leaders and investors, most notably Larry Fink, Chairman and CEO of BlackRock, have urged companies worldwide to focus on sustained value creation rather than maximising short-term earnings. In his 2016 letter to Chief Executives of the S&P 500 companies, as well as large European corporations, Mr Fink specifically called for increased board oversight on a company's strategy for long-term value creation, also putting out a disclaimer that BlackRock's own corporate governance team would be looking for such assurances before engaging with companies.[3]

While boards around the world are increasingly accepting the reality of having to navigate new reputational risks and intense media scrutiny, this article discusses recent events in India that have brought corporate governance practices under the scanner, while exploring legislative efforts at formulating an effective monitoring system through independent directors and making boards more accountable to their various stakeholders while also preventing future corporate implosions.

Previous Instances of Corporate Implosions

Enron's collapse was primarily attributable to many off-balance sheet transactions entered into by its key managerial personnel, in order to camouflage the company's actual performance. It was subsequently revealed that Enron's board had full knowledge of the fraudulent activities. Several corporate governance experts have questioned the independence of the board as there appeared to be blatant violation of fiduciary duties, which led to the eventual bankruptcy of the American energy company based in Houston.[4]

The scandal also led to the dissolution of Arthur Anderson, then one of the top five auditing and accounting Partnerships in the world. An unprecedented exposure of flaws in the corporate governance framework instigated the promulgation of the Sarbanes-Oxley Act, 2002, which, among other things, mandates the establishment of an independent accounting oversight board for public companies, provides for corporate and criminal fraud accountability and enhances penalties for destroying, altering, or fabricating records in federal investigations or for attempting to defraud shareholders.[5] The Sarbanes-Oxley Act, 2002 was also an inspiration for various similar concepts adopted and institutionalised by policy makers across the world, including in India.

Dubbed India's Enron, the Satyam scandal originated when the board of directors at India's fourth largest IT services firm unanimously approved a proposal to

acquire two companies owned by its then-Chairman, Ramalinga Raju, without questioning the legality or the commercial objectives of such a related party transaction.[6] Funds from Satyam were transferred to Raju's family-owned entities, whose primary area of business had nothing to do with the services offered by Satyam. Corporate India was jolted when in January 2009 Raju confessed to falsification of financial records to the tune of Rs.7800 crores (US$1.17 billion) in fictitious assets. Indian authorities arrested Raju, along with Satyam's CEO as well as two PricewaterhouseCoopers auditors.[7] Unencumbered by immediate charges and imprisonment were Satyam's independent directors, which included a Harvard Business School professor, the then-dean of the Indian School of Business and a former cabinet secretary.[8] All either resigned or were replaced by the Government, suffering substantial reputational harm and significant public scrutiny for their failure to detect such a large scale fraud.[9]

In another such incident, Mallya,[10] once hailed India's 'King of good times', fled the country a year ago with over Rs.9,000 crores (US$1.34 billion) owed to state owned banks. The former Chairman of India's largest spirits company was guilty of diverting cash from United Spirits Ltd ('USL') to fund, among other things, his loss-making Kingfisher Airlines, as well as his larger-than-life lifestyle. The airline eventually closed shop in 2012 and was declared a non performing asset by the banks. When the scandal hit the public domain, USL witnessed an exodus of independent directors.[11]

The enormity of such scams raise several questions regarding the inability of independent and highly qualified directors to identify evidently suspicious acquisitions and transactions. Fear of imprisonment, coupled with financial liabilities and reputational damage, for actions perpetuated by promoters without their knowledge, led to 935 of India's independent directors leaving the boards of Indian companies over the course of 2009, once the Satyam scandal was unearthed.[12] The erstwhile regime lacked several vital audit related provisions such as compulsory internal audit, rotation of statutory auditors and duty to report fraud. Civil and criminal liabilities attributable to independent directors were also uncertain.

Setting New Benchmarks in Corporate India

Since the appointment of its first professional CEO in 2014, Infosys has been attempting to shift to a high performance – high reward culture. While India's tech education system has produced world class CEOs such as Sundar Pichai and Satya Nadella, heading Google and Microsoft respectively, the same system hasn't produced a single company that can rival either of these two global giants. The appointments of 'Outsiders' as Chairman and CEO of two of India's largest and most celebrated companies, is in a sense a watershed moment in corporate India. As Indian companies look to become increasingly competitive in the global context, having an efficient board and a credible management becomes essential, and so does a company's ability to attract and retain the best talent.

Mistry was removed by the Tata Son's board as Chairman without any prior notice. Several statutory[13] reasons were provided for the sudden loss of confidence in Mistry. With a view to bring board room disputes to a judicial forum, Mistry filed a class action suit before the National Company Law Tribunal in Mumbai under section 241[14] of the Companies Act, 2013, alleging oppression and mismanagement of the minority stakeholders. Certain independent directors who supported Mistry were apparently removed or made to resign. The most prominent amongst them was Nusli Wadia, reputed businessman and Chairman of the Wadia Group,[15] who had been serving on the boards of Tata companies for over 30 years, which in itself questions the nature of his independence. Reasons provided for his ouster were alleged involvement in 'galvanising' independent directors, mobilising opinion, forcing disruptions and issuing statements in concert with Mistry, which were allegedly contrary to the interests of the group.[16] Wadia has refuted these allegations and filed a defamation suit against Tata Sons and eleven of its board members.[17] He has also written to the Securities and Exchange Board of India ('SEBI') claiming that several independent directors had remunerations attached to Tata Group entities and were therefore conflicted.

While Mistry's and Wadia's suits are still pending before the courts at the time of writing this article, the fact of the matter is that corporate governance in India has been brought under heightened media and public scrutiny, like never before. This might either prove to be a distraction for the top management or, in the alternative, act as a catalyst and set new benchmarks for a cleaner corporate governance landscape.

Evolution of the Regulatory Framework

The first major initiative to codify corporate governance norms in India was undertaken by the Confederation of Indian Industry in 1996, prescribing a voluntary code of best practices.[18] Subsequently, in 1999 the SEBI set up a committee under Kumar Mangalam Birla, Chairman of the Aditya Birla Group,[19] recommending that the board of directors of a company should comprise an optimum balance of executive and non-executive directors.[20] These recommendations led to the promulgation of Clause 49[21] of the Stock Exchange Listing Agreement in 2000[22] ('Clause 49') which mandated the requirement of independent directors on corporate boards, defined independence, and laid out specific duties and obligations.

In 1998, the year of the Russian 'Ruble Crisis',[23] a high-level business advisor group to the OECD, chaired by Ira M Millstein,[24] recommended four basic principles of corporate governance, being fairness, transparency, accountability and responsibility, further recommending that the OECD create a set of principles to guide governments in setting appropriate regulatory frameworks. This resulted in the creation of the highly influential OECD principles.[25] Adopting the OECD principles, Clause 49 was reviewed and improved upon by the Narayan Murthy committee,[26] set up in 2002, which also took inspiration from the work of the Cadbury Committee, set up in 1991 in the United Kingdom, and the Sarbanes-Oxley Act of the United States, inspired by the Enron scandal.[27]

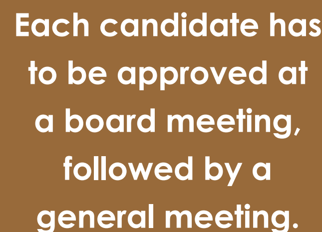
While Clause 49 defines independent directors,[28] it fails to specify procedures for their appointment and removal or whether they owe primary allegiance to minority shareholders or otherwise, allowing for dominant shareholders to exercise control over their appointment and removal, thereby undermining their independence. The Companies Bill of 2008 was therefore introduced in parliament with a view to plug the loopholes in the former regime. However, the unfolding of the Satyam scandal in 2009 forced regulators to review once again the extant regulations (including the new Companies Bill).[29] The bill was accordingly re-introduced in its final form in parliament in 2011, eventually to become the Companies Act, 2013.[30]

In 2004 the OECD principles were amended to include new first principles, emphasising that the corporate governance framework should promote transparent and efficient markets, adherence to the rule of law and clearly articulate the division of responsibilities among different supervisory, regulatory and enforcement authorities. Accordingly, and in order to remedy the lack of specificity regarding the role of independent directors, Schedule IV of the Companies Act 2013 now provides for a 'Code for Independent Directors', clarifying their functions which include: the duty to uphold integrity and probity; to act objectively; to not act in a way that would lead to the loss of independence; and to provide assistance in implementing best corporate governance practices. Furthermore, their statutory functions now include advising on matters of strategy while giving due regard to the interests of minority shareholders.

Further, the Companies Act 2013 sets forth an elaborate procedure for the appointment of independent directors wherein each candidate has to be approved at a board meeting, followed by a general meeting[31] while a nomination and remuneration committee determines the candidate's eligibility and level of compensation.[32] The notice for such general meetings must also include the company's justifications on a particular candidate's suitability for the role. The creation of a repository of data regarding persons willing to be appointed as independent directors has also been mandated.[33] To address the issue of isolation from everyday affairs of the company, the Companies Act, 2013 mandates at least

one meeting a year for independent directors, without the attendance of non-independent directors and other members of the management.[34] It further stipulates the creation of an audit committee for listed companies, comprising of a majority of independent directors and giving them greater control over the fiscal functions of the company.[35]

With the promulgation of the Companies Act 2013 and the SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015, listed companies were required to undertake mandatory evaluations of their boards of directors, including the independent directors. However, a majority of the listed entities merely ensured minimum compliance without undertaking active evaluation of their boards. Nusli Wadia's letters to the SEBI regarding direct conflicts of interest and breach of fiduciary duties of some independent directors of the Tata group[36] may have led to the recent issuance of a comprehensive guidance note,[37] which, among other things, prescribes additional criteria for independent directors and their evaluation at different levels. The guidance note also lays down specific roles for independent directors such as performance review of the Chairman and of non-independent directors, and assessing the quality, quantity and timeliness of the flow of information between the management and the board which is necessary for the board to effectively and reasonably perform their duties.



Prevailing Limitations in the Current Framework

While the initiatives taken by policy makers appear to be a genuine attempt at institutionalising good corporate governance, the reality is far from what legislators envisaged. The Companies Act 2013, has been criticised for being idealistic and overtly prescriptive and lacking attention to detail. For instance, although the nomination and remuneration committee is to oversee the appointment of independent directors, there is no definition of who qualifies as a person of integrity and experience. Since the members of this committee are also on the board of the company, this in effect means that the board itself can use its subjective understanding of integrity and experience, to appoint independent directors and decide their remuneration, therefore allowing for biased decision-making.

Also, while the Companies Act 2013 sets forth several functions and duties for independent directors, it fails to set out the hierarchy of the importance of these duties. Further, the provisions also fail to recognise the importance of a fair and separate process for the removal of independent directors, as opposed to non-independent directors. Therefore the majority shareholders and promoters still have the final word on the removal of independent directors, effectively nullifying their ability to raise any real concerns regarding company management.

The Road Ahead

Considering that 'independence' is essentially a qualitative attribute, it has made it difficult for lawmakers around the world to provide a precise legal definition for the same. While developed nations have had their share of troubles, such problems are heightened in countries such as India where, apart from formal independence from the management, independence ought to be judged on the nominee's independence from the controlling shareholders, as decisions are often made to suit the family and may not necessarily be in the best interests of the company. This is symptomatic of the deep and pervasive disease that plagues most Indian corporate houses, that is, concentrated ownership, as opposed to companies in the United Kingdom and United States, where stake holding is generally dispersed. Since corporate governance is primarily about management decision making, it is inevitable that social norms and national culture play a pivotal role, which varies from country to country.[38]

In the present environment, the SEBI undertook an analysis of the global practices in various jurisdictions in terms of regulatory requirements, best practices, internal versus external evaluations and disclosure requirements among other such relevant practices and, accordingly, issued its latest guidance note. However, the market regulator, itself acknowledges that the execution of provisions therein may vary from entity to entity and cannot be standard for all, given the diverse structures, businesses and issues related to listed Indian entities. To a certain extent, the evaluation processes would require customisation so as to suit the eccentricities of each entity. Having said that, the SEBI, at the very least, attempts to inculcate a corporate culture that encourages boards to develop moral obligations towards their stakeholders.

Although India has not witnessed significant shareholder activism as seen in developed economies of the west, recent controversies may very well be a wake-up call for shareholders, thus empowering them to actively enforce their statutory rights. This, along with instances of past corporate implosions, promise to raise awareness and bring about a sea of change in corporate governance standards in India.

Notes:

1 The Shapoorji Pallonji Group is an Indian business conglomerate operating in diverse sectors. The promoters of the group are also the largest individual shareholders in Tata Sons, the holding company of the Tata Group. The group owns two listed companies, Forbes & Co and Gokak Textiles.

2 Narayana Murthy is an Indian IT industrialist and the co-founder of Infosys, a multinational corporation providing business consulting, technology, engineering and outsourcing services. Murthy serves as an independent director on the corporate board of HSBC and has served as a director on the boards of DBS Bank, Unilever, ICICI and NDTV.

3 Jack 'Rusty' O'Kelly III and Anthony Goodman, 'Global and Regional Trends in Corporate Governance for 2017', Harvard Law School Forum on Corporate Governance for 2017, 6 January 2017, available at https://corpgov.law.harvard.edu/2017/01/06/global-and-regional-trends-in-corporate-governance-for-2017/.

4 John A Byrne, 'No Excuses for Enron's Board', *Bloomberg*, 29 July 2002. Available at https://www.bloomberg.com/news/articles/2002-07-28/commentary-no-excuses-for-enrons-board (last visited 9 February 2017).

5 The Sarbanes-Oxley Act 2002 brought about major changes to the regulation of corporate governance and financial practices in the United States. The major focus of the Act was on the establishment of a public company accounting oversight board, auditor independence, corporate responsibility, enhanced financial disclosures, analyst conflicts of interest, commission resources and authority, studies and reports, corporate and criminal fraud accountability, white collar crime penalty enhancements and corporate tax returns. Available at https://www.sec.gov/about/laws/soa2002.pdf.

6 Satyam Computer Services Limited was an Indian IT services company based in Hyderabad, India. The company was listed on the Pink Sheets, the National Stock Exchange and the Bombay Stock Exchange. It offered a range of services, including software development, system maintenance, packaged software integration and engineering design services. The Company attempted to acquire Maytas Infrastructure and Maytas Properties, founded by family members of Ramalinga Raju for $1.6 billion, despite concerns raised by independent board directors. The Chairman resigned in 2009 after confessing to the massive accounting fraud.

7 R Guha and JS Kumar, 'Satyam's Raju Brothers Jailed', *Wall Street Journal*, 10 January 2009, available at http://online.wsj.com/article/SB123157680420571007.html (last visited 9 February 2017).

8 CR Sukumar, 'Rs 4,739 cr more fraud in Satyam: CBI', *Livemint*, 25 November 2009, available at http://www.livemint.com/2009/11/25001310/Rs4739-cr-more-fraud-inSatya.html (last visited 9 February 2017); S Tibken, 'Satyam Scandal Shocks IT Sector', *Wall Street Journal*, 8 January 2009, available at http://online.wsj.com/article/SB123135583835961599.html (last visited 9 February 2017).

9 'Satyam's Independent Directors had Raised Concerns over the Deal', *Hindu Business Line*, 19 December 2008, available at http://www.thehindubusinessline.com/2008/12/19/stories/2008121951600400.htm (last visited 9 February 2017).

10 Vijay Mallya is an Indian businessman and politician and continues to serve as Chairman of UB Group, an Indian conglomerate with interests in alcoholic beverages, aviation infrastructure, real estate and fertiliser, among others. Mallya and his companies have been embroiled in financial scandals and controversies since 2012. Mallya left India on 2 March 2016. A group of 17 Indian banks are trying to collect approximately Rs9000 crore (US$1.3 billion) in loans which Mallya has allegedly routed to gain 100% or a partial stake in about 40 companies across the world. Currently the Enforcement Directorate is asking Interpol to raise an international arrest warrant against Mallya.

11 http://economictimes.indiatimes.com/articleshow/52365784.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

12 'Reputation at Stake? 340 Independent Directors Quit in 2009', BS, 14 May 2009, available at http://www.business-standard.com/india/news/reputation-atstake-340-independent-directors-quit-in-2009/08/06/61615/on (last visited 9 February 2017). Independent directors know they are not in control of happenings in the company. Post-Satyam they are apprehensive about their role and resigning from their positions, Prime Database Managing Director Prithvi Haldea said.

13 Reasons provided for Cyrus Mistry's removal: unprofessional discharge of responsibilities, lack of transparency and accountability in management practices, disregard for company interests and ideals, and misappropriation of his chairmanship for the benefit of his own companies.

14 Companies Act 2013, No 18, Act of Parliament, 2013 (India), s 241. This proviso empowers any member to make an application to the Tribunal for relief in cases of oppression and mismanagement if he feels that the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company.

15 Wadia Group is one of the oldest conglomerates of India and was worth Rs100 billion (US$1.5 billion) in 2012. It owns independent listed companies such as Bombay Dyeing and Britannia Industries.

16 'Independent director Nusli Wadia removed from Tata Steel board', *Times of India*, 22 December 2016, available at http://timesofindia.indiatimes.com/business/india-business/independent-director-nusli-wadia-removed-from-tata-steel-board/articleshow/56114163.cms (last visited 9 February 2017).

17 'Nusli Wadia sues Tata Sons, board members for defamation', *New Indian Express*, 24 December 2016, available at http://www.

newindianexpress.com/business/2016/dec/24/nusli-wadia-sues-tata-sons-board-members-for-defamation-1552612.html (last visited 9 February 2017).

18 *The Institute of Company Secretaries in India Corporate Governance* (*Modules of Best Practices*), (6th edn, 2007, 127 New Delhi, Taxmann Publications (P) Ltd).

19 The Aditya Birla Group is the third-largest Indian private sector conglomerate operating in 40 countries with more than 120,000 employees worldwide. In 2015 it had a revenue of approximately US$41 billion. It operates in sectors such as insulators, metals, cement, telecom, IT services etc. It was founded by Aditya Birla and his son Kumar Mangalam Birla took charge of the group companies after the death of his father.

20 Report of the Committee Appointed by the SEBI on Corporate Governance under the Chairmanship of Shri Kumar Mangalam Birla, available at http://www.sebi.gov.in/commreport/corpgov.html (last visited 9 February 2017).

21 Clause 49 of the Listing Agreement came into effect from 31 December 2005 and aims to improve corporate governance practices in listed companies. It has been amended from time to time subsequently in order to better regulate corporate governance.

22 Ruth V Aguilera, Chris Florackis and Hicheon Kim, 'Advancing the Corporate Governance Research Agenda', 24(3) *Corporate Governance: An International Review* (2016), 172, 180.

23 The Russian financial crisis (also called the 'Ruble crisis' or the 'Russian Flu') hit Russia on 17 August 1998. It resulted in the Russian government and the Russian Central Bank devaluing the ruble and defaulting on its debt. The crisis had severe impact on the economies of many neighboring countries.

24 Mr Millstein is currently Adjunct Professor at the Columbia Law School and Columbia Business School and was formerly the senior associate dean for corporate governance and the Theodore Nierenberg adjunct professor of Corporate Governance at the Yale School of Management. Among many distinguished positions and roles, Mr Millstein has served as Chairman of the Organisation for Economic Co-operation and Development's Business Sector Advisory Group on Corporate Governance, where he was instrumental in the development of the OECD Principles of Corporate Governance.

25 Holly J Gregory, 'International Developments in Corporate Governance', *Practical Law The Journal* (2013/2014), available at http://www.weil.com/~/media/files/pdfs/44381157_1.pdf.

26 The Committee on Corporate Governance, headed by Shri Narayana Murthy, was constituted by the SEBI to evaluate the existing corporate governance practices and to improve these practices. The key recommendations were inclusion of the whistleblower policy and strengthening the responsibilities of the audit committee.

27 S Koshy et al, 'New Directions', 7 *India Business Law Journal* (2014), 25, 28. The genesis of Clause 49 are the OECD Principles of Corporate Governance, the work of the Cadbury Committee and the Sarbanes-Oxley Act. The OECD Principles of Corporate Governance were released by the OECD Corporate Governance Committee in 1999. These principles call for a high level of transparency, accountability, board oversight and respect for the rights of shareholders and role of key stakeholders as a part of a well-functioning corporate governance system. The Committee on the Financial Aspects of Corporate Governance, chaired by Adrian Cadbury, released its report 'Financial Aspects of Corporate Governance' in 1992. The recommendations contained in it pertain to board structure and accounting systems to mitigate corporate governance risks and failures. It also includes a code of best practices based on openness, accountability and integrity for directors of all listed companies and contains methods of reporting and control.

28 Clause 49(I)(A)(iii)(a) Independent Directors: a non-executive director, who apart from receiving director's remuneration, does not have any material pecuniary relationships or transactions with the company, its promoters, its directors, its senior management or its holding company, its subsidiaries and associates which may affect independence of the director.

29 Bhandari, Bhupesh, et al *The Satyam Saga* (2009, New Delhi, Business Standard Limited).

30 A Saye Sekhar, 'Riding a tiger without knowing to get off: Raju, *The Hindu*, 8 January 2009, available at http://www.thehindu.com/todays-paper/tp-business/riding-a-tiger-without-knowing-to-get-off-raju/article370604.ece (last visited 9 February 2017).

31 Companies Act 2013, No 18, Act of Parliament, 2013 (India), s 152(2).

32 Companies Act 2013, No 18, Act of Parliament, 2013 (India), s 178.

33 Companies Act 2013, No 18, Act of Parliament, 2013 (India), s 150(1).

34 Companies Act 2013, No 18, Act of Parliament, 2013 (India), Schedule IV, Rule VII (1).

35 Companies (Meetings of Board and its powers) Rules, 2014 (India).

36 Dev Chatterjee, 'Wadia complains to Sebi about Tata group's independent directors', *BS*, 19 January 2017, available at http://www.business-standard.com/article/companies/wadia-complains-to-sebi-about-tata-group-s-independent-directors-117011801303_1.html (last visited 9 February 2017).

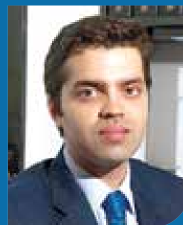
37 *SEBI Guidance Note on Board Evaluation*, 5 January 2017, available at http://www.sebi.gov.in/cms/sebi_data/attachdocs/1483607537807.pdf (last visited 9 February 2017).

38 Malhotra, Madhuri and M Thenmozhi, 'Linkages among Corporate Governance, Intellectual Capital Efficiency and Firm Performance: An Empirical Analysis from Emerging Market', *International Conference on Financial Market and Corporate Finance ICFMCF* (2016).

Vyapak Desai

Partner, Nishith Desai Associates

Vyapak Desai heads the International Litigation & Dispute Resolution Practice at Nishith Desai Associates. He has a Bachelors degree in law and a Masters degree in Commercial Laws and is a trained mediator and member of the Arbitration Committee of the International Bar Association (IBA) and the Bar Council of Maharashtra & Goa.



Siddharth Ratho

Associate, Nishith Desai Associates

Siddharth Ratho is a member of the International Litigation & Dispute Resolution Practice at Nishith Desai Associates. He has been involved in cross-border disputes, international commercial arbitrations and litigations. Siddharth completed his undergraduate studies in the United States, with a double major in International Relations and Economics, thereafter obtaining his law degree in Mumbai.

VW, Deutsche Bank and Siemens – International Compliance Challenges for German Companies

Against the background of recent corporate scandals which have been noticed globally this article focuses on the requirements of a modern compliance system in a German organisation and explains the risks of non-compliance. Further, it looks at the influence of foreign laws which have a major impact not only in Germany.

Introduction

For a long time there was a common consensus in Germany that compliance in general and corruption, competition and cartel law violations, fraud and money laundering in particular, were a problem of South America, Africa, Eastern Europe and parts of Asia. On the other hand, the image of Germany was of a country of law-abiding citizens, fair courts and pedantic, but incorruptible government officials. While this may still be true for courts and public servants, recent events in the private sector have cast doubts on this premise.

Compliance violations are not only an image issue, but can lead to serious problems for companies and members of management. In many cases, the only defence that may avoid potentially disastrous consequences is a compliance organisation that meets the requirements as determined by civil and criminal courts.

While there still is no strict obligation to have a compliance system in place, the (indirect) punishment for any negligence in that regard can be severe.

High (Personal) Risks

As far as risks of non-compliance are concerned, some relate to the company itself and others create personal liability for officers and employees.

German law does not recognise criminal offences of companies. Thus, the main issue at the company level is the avoidance of financial risks. Penalties in case of violations of mandatory laws can be heavy. Areas of particular high risk are cartel law violations, bribery payments, money laundering and social security contribution fraud (in the case of a misclassification of employees). Numerous laws, for example, those dealing with data protection, workplace security and tax and environmental duties often contain heavy administrative and punitive penalties in the case of violations. As a further consequence of a violation, a company might be excluded from (public) procurement and public projects. Penalties in foreign countries, especially in the case of United States' law infringements, can be an additional problem.

The personal liability of employees violating the law needs no further explanation. Usually such employees face prosecution and termination of employment. In the case of criminal law violations, civil damage claims are potentially unlimited.

As far as members of management are concerned (both the board and supervisory board) a criminal law conviction is rarely the issue, since usually a personal contribution cannot be proven. The civil law risk of been sued by government agencies and especially by shareholders, who try to recover the damages awarded against the company, are much more relevant.

Managers must observe the prudence of a diligent business man in all company affairs. This principle is the basis for their obligations to fully comply with all relevant laws.[1]

Necessary Elements of a Compliance Organisation

Due Diligence

The process to implement a compliance system that helps to limit risks and liabilities starts with a thorough due diligence of all rules, regulations, policies, contracts and company practices. Even if such systems already seem to be in place, it is advisable to check from time to time whether the compliance organisation must be amended or modified in order to comply with the latest legislative developments.

The resistance within an organisation against such process must not be underestimated. Many parties (for example, former managers now being members of the supervisory board, works councils, individual employees with special responsibilities in the past and present) often have no interest in changing the way things are done and/or to uncover any previous mistakes.

During the due diligence process high risk areas need to be identified and then addressed first. Sometimes this can be done unilaterally by issuing and communicating a new policy. More often contracts and existing policies need to be modified and rights of employee representatives must be observed.

Communication and Trainings

Once adequate regulations are in place these need to be communicated to all relevant employees in a way that a binding obligation is created and no mandatory laws (for example, data protection) are violated. The method of communication must also ensure that each employee has received the regulations and that such receipt is traceable and can be proven in case of dispute.

Regulations on subjects such as cartel law, money laundering, bribery, fraud etc. can be complicated. Thus it is important to explain to all employees concerned the

In the wake of the Siemens case the something extraordinary happened (at least by German standards) when Siemens took one of its former board members to court (as he did not agree to a proposed settlement) and claimed damages in the amount of €15 million. This led to a landmark decision by the Landgericht München I of 10 December 2013[2] awarding the full amount. In that decision, the court outlined the responsibilities for board members to create and monitor a compliance organisation within the company. Any failure to do so (here, for the supervisory board member, to urge the board of directors to act accordingly) leads to a personal, potentially unlimited, liability of each board member (joint and several liability) which is generally not covered by the usual D&O insurance policies. Such personal liability is not only relevant in cartel law or bribery cases, but other areas of law as well. In some areas, for example, tax and social security law, there can even be a direct liability of company officers towards investigating agencies.

Thus, board members, regardless of their nationality and place of residence, are well advised to implement a functioning compliance organisation and constantly monitor adherence to all relevant laws and regulations.

concept and its interpretation. German labour courts in the past did not regard e-learning or brochures as sufficient, they asked instead for in-person training, which allows monitoring of attendance and gives employees the opportunity to ask questions. New programmes and technical possibilities to monitor employee participation might change that view, although data protection certainly is an issue. Training sessions need to be repeated on a regular basis to ensure that newly hired employees are participating and to update the information once given in view of legislative modifications and/or recent court decisions.

Monitoring, Compliance Office and Whistleblowing

A further task for management is the careful monitoring of the practical observance of all compliance rules. In that regard, the delegation of authority is particularly important. The board is responsible to carefully select and choose those persons within the organisation that are qualified and whose personality ensures loyalty, fairness and scrutiny. A wrong selection or removal of an unqualified person may create a personal liability for the board members.[3]

The appointment of a compliance officer is not mandatory under German law (with the exception of certain sectors of the financial services industry) and thus the system has many flaws, for example, a compliance officer is not independent from the management and not protected against dismissal (unlike a data protection officer). On the other hand, there is even criminal liability for the compliance officer to carefully fulfil his/her duties.[4] Recent experience highlights that it is no solution to simply appoint a competent compliance officer and disregard resistance within the organisation.[5]

In practice, a whistleblowing system can be useful. Again, no legal frameworks exist and numerous obstacles ranging from data protection law to employee co-determination need to be observed. A major flaw is the fact that whistleblowers regularly are not rewarded for their effort—they are not even protected against dismissal—if they cannot prove the protected facts they report.[6] Therefore, any system needs to address these issues in order to make whistleblowing an effective compliance tool.

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Sanctions

While it will never be possible to detect each and every violation of laws and/or company rules in advance, it is ever more important to sanction a violation as it becomes apparent. Any leniency or neglect can seriously backfire and invalidate the whole compliance system.

Risk management is another important element. In the case of a police raid, everyone must know how to react. A wrong decision—be it being too cooperative or, on the other hand, obstruct the investigation—can make or break a case and can even create additional serious problems.

Documentation

Finally, it must be possible to immediately retrieve all relevant documents and present them to a supervisory body or court. Often documents are there but nobody knows where they are, which are outdated or recent policies and whether the collection is complete. Therefore, an IT-based system which does not depend on the knowledge of individuals, who might leave the company or are otherwise not available, is essential.

Foreign Law Influence

In a global environment and an export oriented economy like Germany, foreign laws such as the United Kingdom's Bribery Act and the United States' Foreign Corrupt Practices Act, can have a major impact. These laws contain their own requirements for an effective compliance system, which need to be viewed in addition to the German requirements.

Further, when dealing in and with other countries and partners, foreign mandatory local laws need to be observed. Employees seconded to, travelling to or from or otherwise responsible for foreign transactions, who are based in Germany (regardless of their nationality) are at risk. In order to be able to comply with mandatory foreign laws such employees need to be informed, trained, monitored and sanctioned (in case of a violation) just as local employees in those countries. Even large corporations lack the resources and hardly do training sessions for their responsible management members in Germany. Small or medium sized companies often do not even recognise the problem. Recent cases such as those involving Volkswagen and Deutsche Bank, but also Takeda and Glaxo Smith-Kline (to name but a few), show that any negligence can lead to serious consequences both for the company and its employees travelling abroad.

Thus, companies are well advised to carefully check their processes and regulations in view of foreign laws.

Conclusion

In order to avoid potentially disastrous criminal and civil law liabilities, board members of corporations are well-advised to implement a compliance system which meets the requirements of German as well as foreign authorities. Although it takes time and financial resources, a modern compliance organisation is not a luxury item for any company doing business above the local level.

This also applies to corporations from other jurisdictions doing business in Germany and to foreign board members of German companies, even if resident abroad.

Notes:

1 BGH, 03.12.2001, II ZR 308/99, DB O2, 473f.
2 LG München I, Decision of 10 December 2013, AZ 5 HKO 1387/10.
3 BGH, Dec. of 30 September, 2003, XI ZR 232/02.
4 BGH 5 StR 394/08, Dec. of 17 July, 2009.
5 The–just hired–CO of VW left the company after a year citing 'internal resistance' as reason for stepping down.
6 Transparency International states that Germany does not protect whistleblowers, on the contrary the EUHR held Germany liable for the unjustified violation of the right to free speech of a whistleblower.

Roland Falder
Partner, EMPLAWYERS PartmbB

Roland Falder is a founding partner of EMPLAWYERS, a German boutique law firm focusing solely on the representation of employers and labour and employment law. Previously he spent more than 20 years in two international law firms. He specialises in cross-border employment issues and advises clients on the establishment of international compliance systems. His other areas of expertise are pension systems and their adjustment in times of demographic and financial challenges and collective co-determination issues. He has been a member of the IPBA since 1996 and has served as Vice Chair of the employment and immigration law committee.

The New Framework for Financial Markets in Europe: A Brief Introduction to the Main Provisions of the Market Abuse Regulation 596/2014

The European market abuse system applicable until 3 July 2016 was based on the Directive dated 28 January 2003. In order to strengthen the integrity of financial markets and to provide better protection for investors, the European institutions amended this system with the Market Abuse Directive 2014/57 (the 'MAD') and the Market Abuse Regulation 596/2014 (the 'MAR'). The purpose of this article is to provide a brief introduction of the new applicable regime.

To date, the market abuse system was mainly based on the Directive dated 28 January 2003, amended in 2008. In order to strengthen the integrity of financial markets and to provide better protection for investors, the European institutions amended this system with the Market Abuse Directive 2014/57 (the 'MAD') and the Market Abuse Regulation 596/2014 (the 'MAR') of 16 April 2014, applicable since 3 July 2016.

The MAD regulates criminal punishment. Its provisions, implemented in France by law No 2016-819 dated 21 June 2016,[1] have primarily reinforced the criminal sanctions related to market abuse.

The former regime initially provided that the maximum penalties of imprisonment should be increased to four years at least in the case of insider trading or market manipulation and at least two years in the case of unlawful disclosure of inside information. The French law implemented on 21 June 2016 raised all criminal penalties regardless of the nature of the market abuse: the imprisonment sentence was increased to five years and the fine was set at €100 million.

On the other hand, the MAR replaces the Market Abuse Directive of 28 January 2003,[2] and implements up on the European financial markets (1) an extended control for the competent market authorities; (2) increased obligations related to market players; and (3) strengthened administrative measures and sanctions.

Extended Control for the Competent Market Authorities

Evolution of the Scope of the Regulation (*Article 2*)

The former market abuse system only applied for financial instruments admitted to trading on a regulated market. The MAR extended the application of these rules to financial instruments admitted to trading on multilateral trading facilities ('MTF') and to those traded on organised trading facilities ('OTF').

Evolution of the Suspicious Transaction Reporting System (*Article 16*)

The MAR incorporated the notion of suspicious orders into the Suspicious Transaction and Order Report ('STOR') concept. It has also extended the scope of the obligation to report suspicious transactions to negotiable instruments on an 'organised' MTF and related financial instruments. Finally, this obligation has been extended to market abuse (or attempts to abuse) on a negotiable instrument on a 'standard' MTF or a future OTF or on a related instrument. This obligation has also been extended to manipulation (or attempted manipulation) of a commodity spot market related to a financial instrument.

Extension of the Definition of 'Inside Information' (*Article 7*)

The MAR defined and supplemented the definition of 'inside information' where inside information concerns a process which occurs through several stages, each stage of the process as well as the overall process could be considered as an inside information, provided that the relevant step meets the criteria of such information. The ESMA[3] published an indicative list of information which can be considered as inside information.[4]

Extension of the Definition of 'Market Abuse' (*Article 8*)

The MAR changes the scope of wrongdoings. First, the definition of 'insider trading' was supplemented so that insider trading also includes the use of inside information by cancelling or amending an order concerning a financial instrument to which the information relates, when the order was placed before the person

concerned possessed the inside information. Second, the MAR provides with a further market abuse by assimilating to the use of inside information the fact that an outsider carries out a transaction on the basis of a recommendation or an incentive to buy or sell which has been sent to him by an insider, since this outsider knew or ought to have known that this recommendation or incentive was based on inside information.

Revision of the Definition of 'Market Manipulation' (*Article 12*)

The definition of 'market manipulation' has been revised. The MAR classifies several types of market manipulation.

The first category concerns the fact of entering into a transaction, placing an order to trade or any other behaviour, which gives (or is likely to give) false or misleading signals as to the supply or demand for, or price of a financial instrument, or secure (or is likely to secure) at an abnormal or artificial level, the price of a financial instrument. A second type relates to any behaviour consisting of the dissemination or spreading of false or misleading information. This category incriminates the dissemination of information through media, including the Internet, and the transmission of false information on a benchmark index. Finally, market manipulation as set out in the MAR refers to any behaviour consisting of transmitting false or misleading information or providing false or misleading inputs in relation to a benchmark where the person who made the transmission or provided the input knew, or ought to have known, that it was false or misleading, or any other behavior which manipulates the calculation of a benchmark.

Increased Obligations Related to Market Players

Increased Transparency of Accepted Market Practices ('AMP') (*Article 13*)

The MAR introduced more transparent rules for accepted market practices. 'At least three months before the accepted market practice is intended to take effect', the French market authority (the '*Autorité des marchés financiers*' or the 'AMF') shall notify the ESMA and the other competent authorities of its proposed accepted market practice[5] and provide details of the assessment carried out regarding the criteria for introducing this practice.

Then the ESMA shall issue 'an opinion to the notifying competent authority assessing the compatibility of the accepted market practice' with the MAR. This opinion will not be binding. However, if the AMF introduces a market practice contrary to the ESMA's opinion, it shall publish 'on its website within 24 hours of establishing the accepted market practice a notice setting out in full its reasons for doing so, including why the accepted market practice does not threaten market confidence'.

Finally, where a national authority considers that another national authority has introduced an AMP which does not satisfy the criteria set out by the MAR, the ESMA must assist this authority in reaching an agreement.

Introduction of Market Soundings (*Article 11*)

Market soundings are 'communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors on this transaction'. These soundings are carried out by 'disclosing market participants', which may be issuers or professionals.

The AMF had already admitted the market soundings practice based on the AMAFI's[6] professional standards on market sounding and investor testing in March 2012.

Prior to conducting a market sounding, the disclosing market participant shall determine whether the market sounding will involve disclosure of inside information. In the event that the market sounding involves the disclosure of inside information, the disclosing market participant must satisfy the MAR conditions and especially:

- obtain the consent of the person receiving the market sounding to receive inside information;
- inform the person receiving the market sounding: (1) that he is prohibited from using that information, or attempting to use that information, by acquiring or disposing of, for his own account or for the account of a third party, directly or indirectly, financial instruments to which the information relates, or by cancelling or amending an order which has already been placed concerning a financial instrument to which the information relates; and (2) that by agreeing to receive the information he is obliged to keep the information confidential.

The person concerned by the market sounding must have appropriate internal procedures in place to receive potential inside information and train staff to comply with these procedures.

It shall also ensure the recording on a durable medium, guaranteeing the accessibility and visibility of the said internal procedures.[7]

The market soundings related to inside information are considered as legitimate on the condition that disclosing market participants meet the requirements of the MAR.

Increase of Obligations Related to the Delay of Disclosure of Inside Information (*Article 17*)

Until now, an issuer could defer the disclosure of inside information in order not to undermine its legitimate interests. The MAR now requires the issuer, who has deferred this publication, to notify the competent market authority in writing of its initiative immediately after the publication and to attest how the conditions of disclosure of inside information have been respected.

The reference of this notice is provided for Article 4.3 of French law No 2016/1055 [8] dated 29 June 2016; this notice must be notified to the AMF immediately after the disclosure of inside information 'using the electronic means specified by that authority'. When the AMF decides to ask for an explanation, the MAR provides that the issuer concerned shall reply within two working days to this request.[9] Without a reply, it could be considered that the issuer cannot justify the compliance of the conditions of delay of disclosure of inside information. Consequently, this issuer would not comply with the publication requirement of Article 17.1 of the MAR.

The ESMA has published an indicative and non-exhaustive list of situations in which the immediate publication of inside information is likely to:

- affect the legitimate interests of the issuer:[10] this list contains, among other things, the case where the issuer would be conducting negotiations, where the outcome of such negotiations would likely be jeopardised by immediate public disclosure.
- mislead the public: the ESMA indicates three circumstances in which delaying the disclosure of inside information is likely to mislead the public. Among other things, is the case of inside information materially different from the previous public announcement of the issuer on the matter to which the inside information refers to.

Increase in Measures Related to Managers' Transactions (*Article 19*)

The MAR provides two mandatory measures. First, it has reduced the notification period to the national competent authority (that is, the AMF in France) for transactions of an annual amount equal to, or greater than, €5,000 realised on the securities of a listed company by a person discharging managerial responsibilities or a person closely associated with such a person—essentially a member of his family. The former regime required notifications to take place within five working days following the date of the transaction. As of now, transactions must be notified to the competent market authority within three working days of the date of the transaction. In addition, the MAR introduced a ban on these persons to operate transactions on financial instruments of the issuers to which they are related in the month preceding the publication of the annual and semi-annual reports.

It also has to be mentioned that managers can no longer enjoy the presumption of legitimacy of insider trading for a programmed trading mandate concluded or renewed as of 3 July 2016.[11]

Disclosure of Inside Information Relating to Commodity Derivatives Markets or Related Spot Markets (*Article 7*)
In accordance with Article 7, Section 5 of the MAR, the ESMA established a non-exhaustive indicative list of information reasonably expected to be disclosed or required to be disclosed in accordance with legal or regulatory provisions at the Union or national level. The ESMA also issued a list of information relating directly or indirectly to commodity derivatives.[12]

Strengthened administrative measures and sanctions

Widening of the Scope of Obstruction (*Article 30.1*)
The MAR introduced the possibility of imposing an administrative sanction or implementing measures, in the event or failure to cooperate or to undergo an investigation, inspection or a request from the supervisory services of a market authority.

Prohibition of the Exercise of Management Functions within Investment Firms (*Article 30.2*)
The MAR allowed the competent authorities to impose a temporary ban for persons discharging managerial responsibilities within an investment firm or any other natural person whose liability is incurred, to exercise management functions within investments firms. In the case of repeated infringements, this temporary ban may become permanent.

Introduction of Whistleblowing (*Article 32*)
The MAR introduced whistleblowing which allows the competent authorities to be informed of any violation of this regulation. It establishes communication channels for alerts, an adequate protection of employees (who report violations or who are accused of having committed violations) against reprisals, discrimination or other types of unfair treatment, as well as measures to protect the identity of concerned persons.

Nominative Publication of Administrative Sanctions (*Article 34*)
The former regime simply provided that the administrative measures or sanctions could be published, in a nominative or anonymous way. The MAR now requires a nominative publication of any decision imposing an administrative measure or sanction immediately after the person concerned by this decision has been informed of it. This publication must mention the type and nature of the violation and the identity of this person.

Managers can no longer enjoy the presumption of legitimacy of insider trading.

Modifications in the Determination and the Amount of Administrative Sanctions (*Article 30.2*)
The MAR has modified the amounts and criteria for the determination of administrative sanctions.

- (1) Amount of administrative sanctions:

  The MAR provides that the maximum administrative financial sanctions must be equal to, at least, three times the amount of the profits gained or losses avoided because of the infringements. If these profits or losses cannot be determined, the amount of the administrative sanction must be distinguished according to whether the author is a natural or legal person–it being specified that sanctions are more dissuasive for legal persons:

  - in case of insider trading, unlawful disclosure and market manipulation, the maximum amount must be at least €5 million for natural persons or, for legal persons, €15 million or 15 percent of their total annual sale revenues;
  - in case of violation of the rules relating to the prevention and detection of market abuse or related to the publication of inside information, the maximum amount must be at least €1 million for natural persons, or for legal persons, €2.5 million or 2 percent of their total annual sale revenues;
  - in case of violation of the rules relating to insider lists, the declaration of executive's transactions and investment and statistical recommendations, the maximum amount must be at least €500,000 for natural persons, or for legal persons, €1 million.

- (2) Criteria for fixing the administrative sanctions:

  The MAR provides for seven criteria in order to determine the amount of administrative sanctions: the gravity and duration of the violation, the degree of responsibility of the person responsible for such violation, the financial situation of the person responsible, the importance of profits gained or losses avoided and finally, the behaviour of the person responsible for the violation after the discovery of the unlawful facts.

Conclusion

It has to be mentioned that French legislation has anticipated a large part of the new rules brought by the MAD and the MAR. However, the effective application of the MAR will raise a large number of questions and situations that the ESMA will have to consider through its usual Q&A documents.

Notes:

1 Reforming systems of repression of market abuse Act: L No 2016-819 of 21 June 2016 réformant les systèmes de répression des abus de marché, JO 0144, 22 June 2016.
2 Dir. 2003/6/EC of the European Parliament and the Council of 28 January 2003 on insider trading and market manipulation (market abuse), OJEU No L 096, 12 April 2003.
3 European Securities and Markets Authority ('ESMA').
4 ESMA Guidelines 2016/1480 dated 17 January 2017.
5 Opinion on accepted market practices (French text) R. Vabres, Avis sur les pratiques de marché, JCI Banque – Crédit – Bourse, Fasc. 1514, Section 84.
6 French Financial Markets Association ('AMAFI').
7 ESMA Guidelines 2016/1477.
8 Reg. No 2016/1055 of the Commission of 29 June 2016 laying down implementing technical standards with regard to the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information in accordance with Regulation (EU) No 596/2014 of the European Parliament and of the Council, OJEU No L 173, 30 June 2016.
9 AMF, Public consultation by the AMF on the amendments to be made to the General Regulation and the 'Issuer' doctrine in relation to the implementation of the Market Abuse Regulation.
10 ESMA Guidelines 2016/1478.
11 AMF, European Market Abuse Regulation ('MAR'): the AMF accompanies the players, 1 July 2016.
12 The ESMA published its first Q&A on the Market Abuse Regulation on 27 January 2017.

Benjamin Cohu
Associate, Duhamel Blimbaum Law Firm

Benjamin Cohu is an Associate at the Duhamel Blimbaum Law Firm. He works in the Corporate Finance and Securities Department and practises in the fields of private equity, M&A and capital markets for both domestic and foreign clients. Prior to joining the firm, he gained extensive experience in the corporate field working for various law firms in France and China. He has been a member of the Paris Bar since 2013.

Corruption History Does Not Prevent Receipt of a Public Contract in Europe

In European public procurement, a tenderer's involvement in corruption traditionally served as grounds for mandatory disqualification from a contract. The main objective was to combat corruption and the preventive function of disqualification was underscored. However, from 2014, Member States, must admit a tenderer to procurement if he took measures to restore his reliability and integrity.

The European Union's legal regime for public procurement provides the concept for European single market functioning, thus requiring Member States to open government markets to foreign competition. Fundamental rules applicable in this regard derive from the Treaty of the Functioning of the European Union ('TFEU'), which enforces free movement principles and prohibits Member States from discriminating against other Member States' firms or products. The second source of regulation is procurement directives:

- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC ('Public Contract Directive');
- Directive 2014/25 of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC ('Utility Directive');
- Directive of the European Parliament and the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security.

They fully regulate award procedures to be conducted in compliance with equal treatment and fair competition rules, transparently and in line with the proportionality principle to prohibit discrimination and abuse of discretion by contracting authorities. As a result, elimination from the public procurement procedure takes place through mandatory or discretionary exclusion, which must be set forth in line with the Directives, whereby the latter significantly limit the discretion of contracting authorities to ensure fair opportunities for participation and prevent contracting authorities from concealing discrimination or favouritism.

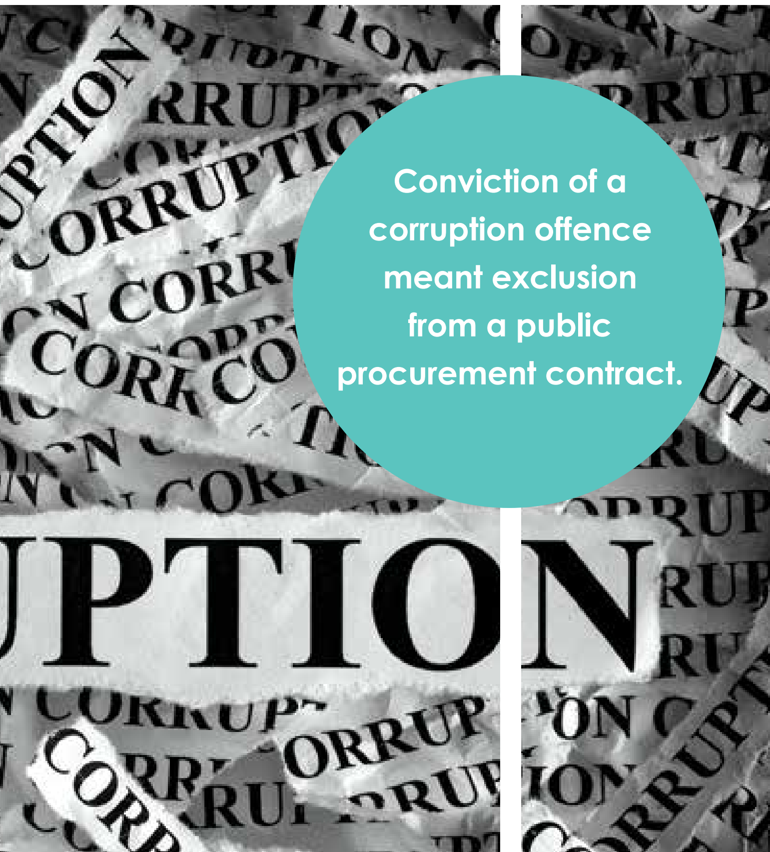
Article 57(1) of the Public Contract Directive requires a supplier convicted of corruption to be excluded from participation in a procurement procedure. On the basis of Article 80 of the Utility Directive, the same rules and exclusion grounds as provided in the Public Contract Directive apply toward procurements in the utility sector. The Public Contract Directive at first instance defines the 'corruption' notion through its reference to the Convention on the Fight Against Corruption and required involvement of officials of the European Communities or Member States of the European Union.[1] It is also defined in Article 2(1) of the Council Framework Decision 2003/568/JHA.[2] Moreover, the meaning of corruption for the purpose of determining elimination from procedure is also as defined in the national law of the contracting authority or the economic operator (Article 57(1)(b)). Therefore, any manifestation of corruption that is treated as an offence in the home country of a bidder is taken into consideration for the application of exclusion grounds under Article 57(1) of the Public Contract Directive.[3]

The requirement already existed in previous 2004 public procurement directives and its main advantage was perceived in such serious sanction, which deprives the common right to compete for a public contract, constituting an incentive to prevent recurrence of corruption.[4] Another issue was to ensure fair competition, as the bidders involved in corruption might have exercised an unfair advantage against their potential competitors resulting from corruption. The objective of disqualification was also to support the value of fair business conduct in general.

However, it has been noticed in application of the law that strict rules to eliminate bidders from a tender due to their past involvement in corruption may very often not serve proportionality and equal treatment principles, as disqualification also concerns entities who have

undertaken structural, organisational or other measures to avoid corruption in their current activities. Also, it has been noticed that disqualification from competition for public contracts simply limits competition on the government market and that such a phenomena is negative from the perspective of the public procurement legal regime and the 'value for money' principle that it supports. For all these reasons, the measure has been deemed to have an overly punitive nature and that more focus needs to be placed on creating an incentive for firms to improve their professional conduct.[5] Therefore, European public procurement rules have offered firms involved in corruption the concept of rehabilitation to defend their exclusion from public procurement proceedings. This concept is called the 'self-cleaning' process.

It is submitted that the self-cleaning defence concept was already offered under the previous 2004 public procurement directives as arising from the Treaty on the Functioning of the European Union principles such as proportionality and equal treatment.[6] Nevertheless, it was well established in only two (out of the present 28) Member States: Austria and Germany. In other Member States of the European Union, the rule for exclusion was very simple: conviction of a corruption offence meant exclusion from a public procurement contract. Therefore, tenderers could not in fact benefit from the self-cleaning defence in those Member States and the law in this respect was not harmonised on the single market.



Conviction of a corruption offence meant exclusion from a public procurement contract.

The new Public Contract Directive introduces the explicit regulation that exclusion from procurement for a past corruption offence is no longer allowed if a bidder provides evidence that its measures are sufficient to demonstrate renewed reliability (Article 57(6)). The scope of measures to be adopted and evidenced is not limited; however, they must respond to the severity and specific circumstances of a committed offence. Recitals (102) of the Public Contract Directive show that such compliance measures must aim at remedying the consequences of the offence and preventing its further occurrence. Measures may, therefore 'consist, in particular, of personnel and organisational measures such as severance of all links with persons or organisations involved in an offence, appropriate staff reorganisation, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules'. In the case of a corruption offence, a tenderer also probably needs to provide a full explanation of facts, demonstrate cooperation with law enforcement authorities, show dismissal of all persons (shareholders, executives and employees) involved in the corrupt practice, as well as redress of the damage caused. It is important to note that the self-cleaning defence must show that measures remedied a situation prior to the contract award. It is therefore insufficient for the application of Article 57(6) to prove the implementation of prospective remedy measures which will improve the situation as their application progresses. In this sense, the self-cleaning regulation is seen as retrospective.[7]

Submitted evidence is then evaluated and, pursuant to the Public Contract Directive, an individual contracting authority or other domestic authority at a central or decentralised level may make such an evaluation– domestic law will make the determination. Also, Member States determine the exact procedural and substantive conditions applicable to such assessment. In many Member States the contracting authority assesses evidence. However, domestic laws usually have no specific procedural and substantive conditions. Regulations only require that measures be sufficient to prove reliability, thus leaving the issue to the discretion of contracting authorities. In any case, if measures are deemed insufficient, reasons for this must be stated. Usual remedies are available if a tenderer does not agree with a negative decision.

Europe, specifically the central-eastern area, is a very attractive market for publicly owned projects.

The self-cleaning defence is an option for a bidder and the contracting authority will not seek any such evidence of measures undertaken to remedy corruption on its own initiative. If information appears about the conviction of a bidder for a corruption offence during a contract award procedure and the bidder does not provide relevant evidence at the same time, the contracting authority will exclude him from proceedings under general rules.

It must be underscored that public procurement rules in Europe as of 2014 provide for flexible procedures in order to promote private entity reliability and integrity by motivation to improve and prevent future misconduct rather than punishment for past offences. This regulation specifically concerns the corrupt behaviour of bidders, which can be considered a novelty given that previously one of the reasons for disqualification from public procurement proceedings due to past corruption was the intention of governments to avoid association with such illegal behaviour. Actually, the contracting authority must accept participation of a bidder, despite its illegal corruption practice, if the latter took relevant remedial measures and became reliable again. The only exception is if a bidder was excluded from public procurement contracts for a certain period because of a corruption conviction and such explicit exclusion is imposed by legally final judgment.

Europe, specifically the central-eastern area, is a very attractive market for publicly owned projects, which, with the support of European Union funds, offers an enormous opportunity for foreign contractors. Many firms, specifically from Asia, view an unfortunate experience in any corruption incident as an obstacle to compete for a public contract there. However, at present there is no doubt that European Union law promotes a remedy and rehabilitation in this regard and that any past corruption experience should no longer constitute a basis to retreat from the European public procurement market.

Notes:

1 OJ C 195, 25.6.1997, p 1.
2 Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192, 31.7.2003, p 54).
3 Article 57(1) also covers other offences such as participation in a criminal organisation, fraud, terrorism, money laundering, or child labour.
4 COM (2006)0073 – Communication of the Commission to the Council and the European Parliament: *Disqualifications arising from criminal convictions in the European Union*.
5 S Arrowsmith, HJ Priess, P Friton, 'Self-cleaning as a defence to exclusions for misconduct: an emerging concept in EC public procurement law?', PPLW 2009.
6 *Ibid*.
7 P Trepte, *Corruption and Collusion in Public Procurement*, p 30.

Mirella Lechna
Partner, Wardynski & Pratners

Mirella Lechna holds the title of Legal Adviser and is a partner at Wardynski & Pratners, responsible for the infrastructure, transport, public procurement and public/private partnership practices. She has provided legal assistance to major infrastructure projects executed by the Polish national and local authorities. She has authored legal analyses in areas such as environmental impact and M&A. Mirella Lechna has a great deal of experience in developing and implementing projects based on FIDIC contract terms. She has also been providing legal assistance on regulatory issues related to railroad infrastructure, public procurement and the natural environment in relation to the infrastructure development process.

Emirates Maritime Arbitration Centre ('EMAC'): Commencement of Operations in September 2016

Some may recall that in September 2014, based on an initiative from the maritime industry, the Government of Dubai announced the approval of the creation of the Emirates Maritime Arbitration Centre ('EMAC'), describing EMAC as 'a first-of-its-kind initiative in the Middle East [. . .] aimed at addressing and resolving maritime disputes *via* [arbitration] based on legal frameworks and [to] set maritime regulatory guidelines and standards [in order to] position the emirate as a world-class maritime hub'. This article discusses the establishment and commencement of operations of EMAC.

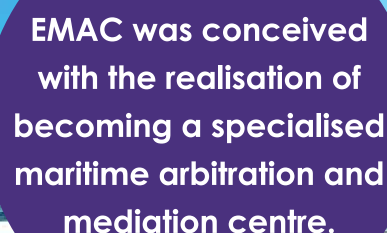
Currently, most maritime-based disputes subject to arbitration or mediation are resolved in one of the well-established alternative dispute resolution hubs such as: New York ('SMA Rules'), London ('LMAA Rules'), Singapore ('SCMA Rules') or Hong Kong ('HKIAC Rules'). The United Arab Emirates ('UAE'), as an international commercial and shipping hub, is perfectly placed to fill the vast geographical vacuum between alternative dispute resolution hubs in Europe and Asia. EMAC was conceived from the realisation of a specialised maritime arbitration and mediation centre with the intention of filling the geographic vacuum as well as to service the growing market necessities of domestic, regional and international maritime companies. As such, one of the EMAC's main objectives is to be capable of resolving international as well as domestic maritime disputes through arbitration and mediation while at the same time creating a modern centre, for example, cases will be managed online as well as online payment systems.

There have been several developments since late 2014 when EMAC formally commenced its operations on 25 September 2016.

On 20 April 2016, the UAE Vice President, Prime Minister and Ruler of Dubai, His Highness Sheikh Mohammed Bin Rashid Al Maktoum issued Dubai Decree No 14 of 2016 establishing EMAC as an independent legal entity and Dubai Decree No 16 of 2016 appointing the first Board of Trustees for EMAC. The Chairman of EMAC's Board of Trustees is Sir Anthony Colman, a former English High Court Judge of the Commercial Court from 1992 to 2007 and former Deputy Chief Justice of the DIFC Courts in Dubai from 2010-2015. The Vice Chairman and Secretary General of EMAC is Majid Obaid Bin Bashir, who is a former Legal Consultant to the Dubai Government and is a well-known arbitrator. The initial Board of Trustees has 15 trustees with a renewable three-year term. Five of the trustees are lawyers (including the co-author of this article, Richard Briggs, a long-time Dubai-based lawyer with Hadef & Partners), the remaining ten trustees represent various sectors within the UAE's diverse maritime industry.

An important step was taken on 23 June 2016 when the Trustees adopted the Arbitration Rules and Mediation Rules. That same day, the Board appointed a Secretary General and Executive Committee as well as agreed membership fees, panel fees and the criteria to admit arbitrators and mediators.

Understandably, one of the key factors parties look to in choosing an arbitration centre is the centre's rules. In this respect, EMAC's rules are based on UNCITRAL 2010 with only minor variations. EMAC's overall approach is to adopt a so-called 'light touch' to case management ensuring disputes are managed efficiently and effectively. Furthermore, parties will be able to 'fast track' the procedures, which is essential for low value claims where parties seek a speedy yet economic resolution. EMAC's Board of Trustees is currently in discussions to draft particular rules aimed specifically at speedy low cost arbitration procedures. In fact, EMAC's Arbitration Rules require the tribunal to issue a final award within 90 days after proceedings are closed, unless EMAC's Executive



Schedule 1: EMAC Administrative Arbitration Fees	
Disputed Amount	**Centre's Administrative Fees**
Up to AED 200,000/-	AED 4,000/-
From AED 200,001 up to AED 500,000/-	AED 6,000/-
From AED 500,001 up to AED 1,000,000/-	AED 8,000/-
From AED 1,000,001 up to AED 1,500,000/-	AED 10,000/-
From AED 1,500,001 up to AED 2,000,000/-	AED 12,000/-
From AED 2,000,001 up to AED 2,500,000/-	AED 14,000/-
From AED 2,500,001 up to AED 5,000,000/-	AED 16,000/-
From AED 5,000/001 up to AED 10,000,000/-	AED 18,000/-
From AED 10,000,001 up to AED 20,000,000/-	AED 21,000/-
From AED 20,000,001 up to AED 30,000,000/-	AED 24,000/-
From AED 30,000,001 up to AED 40,000,000/-	AED 27,000/-
From AED 40,000,001 up to AED 50,000,000/-	AED 30,000/-
From AED 50,000,001 up to AED 60,000,000/-	AED 33,000/-
From AED 60,000,001 up to AED 70,000,000/-	AED 35,000/-
From AED 70,000,001 up to AED 80,000,000/-	AED 40,000/-
From AED 80,000,001 up to AED 90,000,000/-	AED 45,000/-
From AED 90,000,001 up to AED 100,000,000/-	AED 50,000/-
Above AED 100,000,000/-	Maximum AED 60,000/-

Committee permits a time extension. EMAC Arbitration Rules have also included procedures for an emergency arbitrator for urgent cases. Furthermore, a party may apply to the Secretariat to appoint a temporary arbitrator in order to conduct emergency proceedings prior to the formation of the arbitral tribunal.

EMAC's Arbitration Rules provide the arbitral tribunal with extensive discretion to award costs. Generally, arbitration costs will be the responsibility of the unsuccessful party; however, the arbitral tribunal may, if it so chooses, allocate costs between the parties if it deems such allocation is reasonable in the circumstances.

An important factor for parties involved in arbitrations is the supervising court over the proceedings. Unless the parties choose otherwise, the default seat for EMAC arbitrations will be the Dubai International Financial Centre ('DIFC') with jurisdiction to the DIFC Courts.

The DIFC is a separate enclave within the Emirate of Dubai with its own common law-based legal jurisdiction. None of the civil and commercial laws of the UAE apply in the DIFC. Instead, the DIFC has its own laws, primarily based on English common law, and its own court system. The DIFC courts have provided consistent rulings and have shown a willingness to be pro-arbitration. More importantly, DIFC Court judgments are automatically enforceable in the Dubai Courts by virtue of a Memorandum of Guidance with the Dubai Courts, as well as pursuant to Dubai Law No 12 of 2004 concerning the Law on Judicial Authority. This means that where the DIFC Courts have granted recognition and enforcement of a DIFC seated arbitral award, that award can, without a review of the underlying merits of the arbitral award, be enforced in the Dubai courts, as well as the rest of the UAE's Emirates. Additionally, DIFC Court judgments are enforceable regionally through various bilateral and multilateral agreements (including via the Riyadh Treaty with countries such as Iraq and Sudan), as well as in any state that has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention').

The advantage of an EMAC arbitration seat in the DIFC is clear, it will greatly limit unmeritorious and frivolous challenges to sound arbitral awards and orders of an EMAC arbitral tribunal.

However, all too often, claimants and defendants must decide to resolve disputes not based on the law or facts of the case, but rather based on the fees payable to the arbitration centre. With the aforementioned in mind, EMAC has ensured that the costs to resolve disputes are not particularly burdensome on parties. In fact, compared to other arbitration centres, the fees are quite modest. In summary, the arbitration fees depend on the value of the claim in dispute. For example, registration fees range from AED1,000 to AED10,000 (US$272 to US$2,720) for disputes where the claim value exceeds AED100 million (US$27,211,000). Administrative fees range from AED4,000 to AED60,000 (US$1,100 to US$16,325). EMAC's Administrative Arbitration Fees can be found at the end of this article under Schedule 1. Arbitrators' fees will be on a time-spent basis instead of charging a flat fee depending on the amount in dispute.

In addition to arbitration, EMAC has separate rules governing mediation. The most interesting facet of the Mediation Rules is that, where a mediation results in settlement between the parties, the parties may choose to register the settlement in writing as an arbitral award by consent. In such circumstances, the mediator becomes an arbitrator and is not required to provide a reasoned award; rather, he/she will simply prepare an arbitral award based on the parties' settlement terms. The advantages to this are astronomical because should one party breach the terms of settlement, the non-breaching party does not have to bring breach of settlement proceedings against the breaching party but rather, is only required to enforce an arbitral award in the methods discussed above. EMAC mediation will provide a practical and economical alternative dispute resolution forum suited for domestic, regional and international parties.

Mediation fees will also be in line with the overall aim of EMAC to provide quality alternative dispute resolution in an effective and cost efficient manner. The EMAC mediation registration fee is AED1,000 (US$272). Additionally, there is an administration fee of AED4,000 (US$1,089). The mediator's fees will be determined on a time spent basis in consultation with the parties and EMAC.

Individuals and companies can apply for annual membership of EMAC online. Membership is open internationally and is not limited to individuals and companies within the UAE. Benefits of membership include discounted fees for events, publications as well as interactive connection between members.

Online application is available to those applying to be listed on the panel of arbitrators, mediators or experts. It is important to note that there will not be a separate application fee.

Annual membership fees for individuals are currently set at US$100 and US$200 for corporate memberships which permit three individual nominations per corporate registration.

Lastly, EMAC's official website is live with the URL address of www.emac.org.ae. The website includes helpful information for interested parties about the EMAC, EMAC rules and other relevant resources.

Please feel free to contact the authors of this article by email with any questions you may have.

Richard Briggs

Executive Partner, Hadef & Partners LLC

Richard Briggs is a recognised leader in commercial dispute resolution in the UAE and has practised contentious business law in the UAE for most of his career. His areas of specialisation are in the litigation and arbitration fields, particularly with reference to maritime, trade and insurance law in the United Arab Emirates and the Middle East area. He is a Practicing Solicitor of the Supreme Court of England and Wales. He is also a member of the International Bar Association.

Raymond Kisswany

Senior Associate, Hadef & Partners LLC

Raymond Kisswany is a Senior Associate in the Maritime, Transport & Trade practice of Hadef & Partners LLC in Dubai and specialises in complex commercial arbitration, litigation and mediation disputes with a focus on international trade, maritime, aviation, space, insurance, logistics and transport matters. He also has extensive experience with commodity contracts and documentary credits as well as joint ventures, shareholder and agency agreement-related disputes for various business sectors, including manufacturing, hospitality, marketing and retail clients.

IPBA New Members
December 2016 – February 2017

We are pleased to introduce our new IPBA members who joined our association from December 2016 – February 2017. Please welcome them to our organisation and kindly introduce yourself at the next IPBA conference.

Australia, Joseph Catanzariti
College of Law

Australia, Marcus Connor
Connor & Co Lawyers Pty Ltd

Australia, Junichi Horie
Advantage Partnership Lawyers

Australia, Wendy Jacobs
Russells

Australia, Bianca Trunzo
Advantage Partnership Lawyers

Brazil, Gabriel Ricardo Kuzniez
Demarest Advogados

Cambodia, Seyha Men
Khmer Law Office & Associates

Canada, Gary Matson
Remedios & Company

Chile, Diego Mu oz Higuera
Morales & Besa

China, Maria De La Concepcion Bargallo Garcia
Cuatrecasas, Goncalves Pereira

China, Yuehong (Diana) Hou
Liaoning Xianhe Law Firm

China, Rong Liu
Globe Law (Dalian) Law Firm

China, Long Ou
Jin Mao Partners

China, Jing Wang
Wang Jing & Co. Law Firm

China, Yong Xie
Jin Mao Partners

China, Tianyi Zhang
Yunnan Baqian Law Firm

France, Forrest Alogna
Darrois Villey Maillot Brochier

France, Antoine Azam-Darley
AzamDarley & Associ s

France, Yvon Dreano
JEANTET AARPI

France, Andreea Haulbert
Karl Waheed Avocats

Germany, Volker Mahnken
Mahnken CCRM

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Hong Kong, Gary Cheung
South China Financial Holdings Limited

Hong Kong, Dennis Hu
Jun He Law Office

Hong Kong, Stephen David Mau
The Hong Kong Polytechnic University

Hong Kong, Isabel Tam
Denis Chang's Chambers

Hong Kong, Siu Chung Dominic Wai
ONC Lawyers

Hong Kong, Hing Yip Eric Woo
ONC Lawyers

India, Raghav Kumar Bajaj
Khaitan & Co

India, Manas Kumar Chaudhuri
Khaitan & Co

India, Guruprasad Pal
Little & Co., Advocates

India, Ajay Raghavan
Trilegal

India, Anshul Saurastri
Krishna & Saurastri Associates LLP

Indonesia, Arif Abdillah Aldy
Aldy & Pratana Law Partnership (A&P)

Indonesia, Mochamad Kasmali
Soemadipradja & Taher

Indonesia, Yohanes Masengi
Makarim & Taira S.

Japan, Kei Akagawa
Anderson Mori & Tomotsune

Japan, Seiwa Fujiwara
Kitahama Partners

Japan, Junichi Ikeda
Nagashima Ohno & Tsunematsu

Japan, Kazuhilo Kikawa
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Anderson Mori & Tomotsune

Japan, Karl Pires
White & Case LLP

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Higashimachi, LPC

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Japan, Kiyotaka Tajima
Kitahama Partners

Japan, Yoshihiro Toji
Iwata Godo

Japan, Nobuoki Toshimitsu
Kitahama Partners

Japan, Derek Wilson
Shartsis Friese LLP

Japan, Rikisuke Yamanaka
Ushijima & Partners

Korea, Yong Whan Choi
Yulchon LLC

Korea, Hyunju Helen Pak
Shin & Kim

Korea, Jae Hyun Park
Yulchon LLC

Luxembourg, Dirk Leermakers
Buren Avocats SARL

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Azim, Tunku Farik & Wong

Malaysia, David Chan Tong Ong
Chooi & Company

Malaysia, Jalalullail Othman
Messrs Shook Lin & Bok

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Halim Hong & Quek

Malaysia, Vijayan Venugopal
Shearn Delamore & Co

Myanmar, Khin Phu Ngone Win
Rouse Myanmar Company Limited

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Cabinet D'Avocats Royanez

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New Zealand, Hak Jun Lee
Hesketh Henry

New Zealand, Ken (Yong Keun) Oh
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Pakistan, Zoya Asad Hasan
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Russin & Vecchi

Members' Notes

Stephan Wilske, Germany

Stephan Wilske, Germany, co-authored the contribution '*The Essential Qualities of an Arbitrator – What Appointing Parties Must, Should and May Like to Consider*' which was published in *Croatian Arbitration Yearbook* Vol. 23 (2016). pg101-119.

Mirella Lechna, Poland

Mirella Lechna holds the title of Legal Adviser and is a partner at Wardynski & Partners responsible for the infrastructure, transport, public procurement and public/private partnership practices. She has provided legal assistance to major infrastructure projects executed by the Polish national and local authorities. She has authored legal analyses in areas such as environmental impact and M&A. Mirella Lechna has a lot of experience in developing and implementing projects based on FIDIC contract terms. She has also been providing legal assistance on regulatory issues related to railroad infrastructure, public procurement and natural environment in relation to the infrastructure development process.

Publications Committee Guidelines for Publication of Articles in the IPBA Journal

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

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

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

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.

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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.
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- Annual Dues for Corporate Associates ¥50,000

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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.

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Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
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See overleaf for membership registration form

IPBA SECRETARIAT

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