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International Law Section

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In This Issue

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Dear Members and Colleagues:

Margaret Dobrowitsky

The International Law Section's fall meeting and program was held on November 16, 2011 at Ginopolis Restaurant in Farmington Hills. Special thanks to Aaron Ogletree, co-chair of the International Law Section's International Trade Committee, for a job well done in securing as guest speaker for the program Stephen P. Anway, who gave an excellent presentation focused on recent developments in investment treaty arbitration. Mr. Anway spoke on the fascinating topic of international arbitrations brought by foreign investors under bilateral and multi-lateral investment treaties, one of the fastest growing areas of public international law. Mr. Anway is a partner at the international law firm of Squire, Sanders & Dempsey (US) LLP, where he has represented, among other international clients, The Republic of Ecuador and The Czech Republic in multi-billion dollar international investment treaty arbitrations, most notably, as lead counsel for The Czech Republic in the seminal case, *Phoenix Action, Ltd. v. Czech Republic*.

On November 29th, the Section's International Trade Committee was again active, working with Wayne State University Law School and their Program for International Legal Studies on an innovative program entitled "*Bridging the Issue: A Panel Discussion on the New International Trade Crossing",* which was held at in the Spencer M. Partrich Auditorium of the Wayne State University Law School. The Section thanks its International Trade Committee members Aaron Ogletree, Sonia Salah and Lara Phillip for their tireless efforts in conceiving, organizing and implementing this event, which brought together experts from business, government and academia to examine and debate issues surrounding the proposal to build a second bridge from Detroit to Canada.

"The new bridge proposal is one of the most important international questions facing the Michigan business and legal communities," said Professor Gregory H. Fox, director of the Program for International Legal Studies at Wayne Law. *"We are thrilled to host this debate as part of our continuing program of public discussions on critical issues of international law."* John Gallagher of the *Detroit Free* Press moderated the debate between a first panel composed of Professor Robert Sedler of Wayne State Law School; Dan Stamper, President of the Detroit International Bridge Company; and Scott Hagerstrom, Director of Americans for Prosperity–Michigan and a second panel composed of Sam Danou, President of the World Trade Center Detroit/ Windsor Association; Brad Williams, Vice President of Government Relations for the Detroit Regional Chamber of Commerce, and State Representative Rashida Tlaib (D-Detroit).

Michigan International Lawyer Submission Guidelines

The *Michigan International Lawyer*, which is published three times per year by the International Law Section of the State Bar of Michigan, is Michigan's leading international law journal. Our mission is to enhance and contribute to the public's knowledge of world law and trade by publishing articles on contemporary international law topics and issues of general interest.

The Michigan International Lawyer invites unsolicited manuscripts in all areas of international interest. An author is encouraged to submit a brief bio and a photograph for publication. An article, including footnotes, should contain between 1000 and 3000 words.

Articles can be submitted for consideration in hard copy or electronic format. Manuscripts and photographs cannot be returned unless accompanied by a $5 check or money order made payable to Wayne State University Law School for shipping and handling.

The Michigan International Lawyer will consider articles by law-school students and may publish student articles as part of a regular column. A student should submit the article either through a law-school faculty member or with a law-school faculty member's recommendation.

Submissions should be forwarded to:
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Michigan International Lawyer

Publication Deadline Dates

Fall Issue
Articles due August 15

Winter Issue
Articles due December 15

Spring Issue
Articles due April 1

The Program for International Legal Studies at Wayne State Law School and the International Trade Committee of our Section conceived the debate to provide United States and Canadian trade organizations, government officials, legal and business communities, and concerned citizens with an opportunity to discuss this controversial topic in a neutral forum. The debate, which was attended by members of the news media, was the first and only event to date of which we are aware to bring together those supporting and those challenging the construction of a second bridge to provide the community with the opposing perspectives surrounding the proposed second international trade crossing from Detroit to Canada.

On Wednesday, January 25, 2012, the Section held a Council meeting at Butzel Long's downtown Detroit office and presented a program entitled "M*ulti-Jurisdictional Litigation: Some Lessons Learned*" complementing the Section's November program on international arbitration. The January program featured as guest speaker Frank E. Walwyn, a litigation partner from the Toronto law firm of WeirFoulds LLP, who was named in the 2012 Edition of *The Best Lawyers in Canada* as one of Canada's top lawyers in the area of corporate and commercial litigation. Special thanks again to Aaron Ogletree, head of our Section's International Trade Committee, for suggesting Frank E. Walwyn as a guest speaker, and to A. Reed Newland, Secretary of our Section, for his diligent efforts in coordinating the event.

Although the primary means by which the Section's officers communicate and distribute notices of meetings and programs is still through the Section's "announcement only" listserv, the Section's Linked-In group is expanding rapidly with over 100 members currently in the group and more members signing up daily thanks to the efforts of Section Council member Sonia Salah and Chair-Elect Jeff Paulsen. They will provide more details on how the Linked-In project is progressing and instructions on how to link in and participate in the group at upcoming Section meetings. If you have not received email notices of the Section's recent meetings and programs, please feel free to go to the Section's page on the State Bar of Michigan website or contact the State Bar of Michigan to sign up for the International Law Section's listserv.

I would also like to thank the Section's officers and Council members for their active participation in the Section this year. Special thanks to Jeffrey F. Paulsen, Chairperson-Elect, A. Reed Newland, Secretary, and David B. Guenther, Treasurer for their inspired ideas and continued efforts in support of the Section. I look forward to working with the Section's officers and the Council members throughout the coming year.

The International Law Section will hold additional Council meetings and programs this year in March and May, followed in September by the Section's annual meeting and program. The Section's meetings typically commence with a Council meeting at 4:30 pm followed, usually at 6:00 or 6:30 pm, by food and beverages and an interesting program. All persons interested in the Section are invited and encouraged to attend Council meetings and programs. If you have suggestions for programs or activities that you would like to be considered by the Council, I encourage you to attend the Council meeting. If you are unable to attend, please feel free to contact me, one of the Section's other officers, or any Council member with your ideas. The Section welcomes all suggestions.

I hope to see you at an upcoming Section meeting and program. In the meantime, please enjoy this issue of the *Michigan International Lawyer*.

Practicing Law in a Foreign Jurisdiction: The Roles and Restrictions of Foreign Attorneys in Japan

By Timothy J. Blanch and Daniel S. Potts

Introduction

On January 27, 2009, the Japan Federation of Bar Associations ("JFBA") issued a warning letter[1] to law firms throughout Japan, stating that all foreign attorneys were required to register and become *gaikokuho-jimu-bengoshi,* or *gaiben,* for short ("registered foreign attorneys" in English), specifically mentioning that "even if a lawyer qualified in a foreign country who has not been registered as a registered foreign lawyer is not a partner, but an associate, assistant, advisor, consultant, of counsel, or any person with another title or position, providing any service that is substantially a legal service will constitute a violation of Article 72 of the Attorney Act[2]."[3] This letter caused great concern amongst the law firms in Japan as the employment of foreign attorneys is very common with international law firms and Japanese law firms with significant international practices. In many cases, these foreign attorneys do not register as *gaiben* because of the experience, cost requirements, and burden associated with registration. Unsettling as it was, it was unclear what prompted the letter or whether the JFBA was "cracking down" on unregistered foreign attorneys in Japan and requiring blanket registration. As you can imagine, Japanese law firms were concerned about a crackdown because of their reliance on foreign associates and a partner from a United States based firm expressed his concerns that a crackdown would effectively end the hiring of associates.[4] As fears of a crackdown spread through the Japanese legal community, Shiro Yanagi, then deputy secretary general of the JFBA, later stated that the letter was more of a reminder reiterating what *gaiben* could legally do in Japan, and conversely, what non-registered foreign attorneys could not do.[5]

The above letter illustrates the tension between restrictions placed on foreign attorneys in Japan and the reality that Japan, as a major world economy, requires legal services from attorneys qualified in jurisdictions from outside the country. These competing needs place the JFBA in a difficult position as it looks to balance their interest in protecting their own qualified Japanese attorneys (known as *bengoshi* in Japanese) from a large inflow of foreign law firms and foreign attorneys looking to take advantage of the rapidly expanding Asian economies, but doing so without implementing harsh protectionist measures. One thing is clear, with Japan possessing the world's third largest economy[6] and Tokyo's status as one of the world's largest financial centers, the skill set that foreign attorneys possess is still very much in demand.

Historical Background on Laws Governing Foreign Attorneys in Japan

The presence of foreign attorneys working in Japan dates back to the Meiji era (1868 - 1912) during which Japanese lawyers would rely on foreign attorneys to assist in Japan's emergence in global affairs and business.[7] Prior to World War II, foreigners were regularly admitted to practice law to advise on commercial matters.[8] After World War II and during the Allied occupation of Japan (August 1945 to April 1952),[9] Article 7 of the newly enacted Attorney Act[10] was passed that allowed foreign attorneys to become fully admitted to practice law in Japan, which resulted in the opening of various Western style firms[11], some of which are still in existence today.[12] However, in 1955, Article 7 of the Attorney Act was repealed[13] and foreigners were barred from seeking admission to practice law or from opening law offices in Japan.[14] After Article 7's repeal, foreign attorneys frequently came to Japan, but they were usually associated with a Japanese law firm as a "trainee" working under the guidance of a *bengoshi* and were restricted in the services they could provide.[15] However, as the postwar economy expanded at a rapid pace, a new law entitled the "Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers" [16] (the "*Gaiben* Act") was passed in 1986 and came into effect on April 1, 1987 and allowed foreign attorneys to open law offices on their own.[17] This resulted in many foreign lawyers seeking *gaiben* licenses to break into the then red hot Japanese economy.[18] The aim of the *Gaiben* Act was to allow major corporations in Japan the ability to seek the advice of foreign attorneys based in Japan for their cross-border matters, rather than rely on law firms based in the United States or other markets in Asia, such as Hong Kong.[19] The *Gaiben* Act also established the current system for the registration of *gaiben* in the hopes of attracting foreign attorneys to Japan, in addition to implementing measures to regulate them.[20]

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Current Law Governing Foreign Attorneys in Japan

Under the *Gaiben* Act, *gaiben* are allowed to "provide legal services concerning the laws of the state of primary qualification at the request of a party or other person concerned, or appointment by a public agency; …"[21] In other words, a *gaiben* qualified in the State of Michigan may only provide legal advice to Japanese clients on Michigan or United States Federal law.[22] In addition, *gaiben* may also represent clients during the procedures for an international arbitration case,[23] provided the case is civil in nature, the tribunal sits in Japan, and at least one of the parties has a principal office in a foreign state.[24] Foreign attorneys, whether registered (*gaiben*) or not, are prohibited from representing clients in criminal cases,[25] the "giving of an expert opinion or other legal opinion regarding the interpretation or application of laws other than the laws of the state of primary qualification,"[26] and providing advice on Japanese law. Only *bengoshi* are allowed to represent clients in court and before the public prosecutor's office, or to counsel clients on Japanese law.[27]

In order to become a *gaiben*, the foreign attorney must (i) submit an application and obtain the approval of the Minister of Justice,[28]which can take anywhere from six months to two years before obtaining a decision, (ii) register in the Roll of Registered Foreign Lawyers administered by the JFBA[29], (iii) have been engaged in the practice of law in the applicant's home jurisdiction for a minimum of three years,[30] and (iv) show that reciprocity exists with their home jurisdiction, such that a *bengoshi* could be similarly admitted in that jurisdiction.[31] However, if the applicant works in Japan under the guidance of a *bengoshi*, a *gaiben*, or a legal professional corporation, the Minister of Justice will credit one year of such service towards the three year practice requirement.[32] In addition, *gaiben* have a duty to stay in Japan for at least 180 days per year,[33] and are required to pay monthly dues totaling approximately fifty thousand Japanese yen (JPY50,000) (or US$650.87 based on the prevailing exchange rate as of this writing) to their local bar association. A burdensome amount when compared to the annual bar dues for active Michigan attorneys, which were US$315.00 in 2010.

Currently, *gaiben* are the only foreign attorneys who are allowed to establish a law office in Japan – and this is restricted to only one office[34] – provided, amongst other things, they use the name *gaikokuho-jimu-bengoshi-jimusho* (foreign registered attorney's office) in their firm's title,[35] clearly display a sign indicating the laws of the state of primary qualification and designated laws at a place easily visible to the public,[36] and their office is established in the district of the bar association to which they belong.[37] And after a partial revision to the *Gaiben* Act in 2005, *gaiben* are now permitted to hire *bengoshi*, provided they notify the JFBA in advance of the hire.[38] In addition, a foreign attorney must be a registered *gaiben* in order to become a partner in a Japanese law firm, and only *gaiben* can apply to obtain a special attorney work visa that allows them to sponsor the work visas of others.[39] Perhaps, more importantly, *gaiben* are allowed to work and live in Japan without the need of a sponsor. As of April 1, 2011, there were a total of 359 *gaiben* in Japan,[40] with no *gaiben* claiming the State of Michigan as their state of primary qualification. The number of *gaiben* has been steadily increasing over the past ten years, with a significant increase occurring in 2010, as the number of *gaiben* in past years is shown below.[41]

2010 – 344
2009 – 290
2008 – 267
2007 – 252
2006 – 242
2005 – 236
2004 – 213
2003 – 189
2002 – 186
2001 – 150

Of the 344 *gaiben* in 2010, the most represented nationalities were as follows:

150 Americans
63 British
21 Chinese
17 Australian

Also, below are the five jurisdictions in 2010 with the highest number of *gaiben* followed by the number of *gaiben* admitted in that jurisdiction:

New York – 105
California – 49
Hawaii – 18
District of Columbia – 14
Illinois – 7

Despite the benefits of *gaiben* registration, many foreign attorneys are employed in Japan without registering as *gaiben* because of the expense involved and the fact that much of the work of foreign attorneys may be considered "behind the scenes" and a *gaiben* license may not appear necessary. However, these unregistered foreign attorneys are required to work under the direct supervision of either a *bengoshi* or *gaiben.*[42]

What Foreign Lawyers Do in Japan

The main areas of practice in Japan for foreign attorneys are (i) corporate, including mergers and acquisitions and other various cross-border transactional work, (ii) real estate, particular investments and asset management, and (iii) intellectual property. Foreign attorneys are generally employed in three ways (i) a foreign attorney at a Japanese law firm, (ii) in-house counsel at a Japanese or foreign corporation, or (iii) an attorney at a satellite office of a law firm based outside of Japan, usually from the United States or the United Kingdom. With the greatest number of foreign attorneys obtaining employment with a law firm,

whether a domestic Japanese law firm or an international law firm based outside Japan. In addition, many domestic stock corporations (*kabushiki-kaisha*), limited liability companies (*godo-kaisha*), and multinational corporations are keen on staffing foreign attorneys in their legal departments or hiring outside counsel to assist them with their international legal matters. In this regard, the largest and most prestigious law firms and corporations generally have a presence in Tokyo.

Most foreign attorneys can expect to find employment in a law firm as either a legal editor, foreign associate, or *gaiben*. While these positions are not intended to be an exhaustive list of all the legal opportunities available in Japan, they do represent the most common. In addition, even though the primary function of these positions is similar, the provision of foreign language legal services, whether it be in English, Mandarin Chinese, Spanish, French, or other languages, differences between them do exist.

A legal editor will generally receive assignments that involve the copy editing of legal documents written in their native language. Although some may consider a legal editor position as only "legal related" and staffing an attorney at this position unnecessary, there is a tremendous need for legal editors in Japan, especially ones with legal training and native English language skills. This is because English is the international language of business and many cross-border transactions between domestic Japanese corporations and foreign corporations are entered in the English language, mainly because English is frequently the only language companies from different countries have in common. At firms in Tokyo, where partners' hourly rates are similar to their counterparts in New York or London, there is a strong demand for a highly crafted work product that contains grammatically correct prose and that is easily comprehended by its recipient. Thus, legal editors ensure that the legal documents produced by Japanese law firms are of comparable quality to those in the United States or the United Kingdom.

An individual holding the position of foreign legal associate can expect to receive the same tasks as a legal editor, as well as assignments involving the drafting and negotiating of legal documents, conducting legal research primarily from the foreign associate's home jurisdiction, and other internal or paraprofessional assignments. Foreign associates may also draft memorandum on issues of Japanese law for foreign clients, under the supervision of a *bengoshi*, as well as act as an interface between the *bengoshi* and their foreign clients. In this regard, all of the work of a foreign associate must be done under the auspice or guidance of either a *gaiben* or *bengoshi*.[43] Although Japan has recently threatened to cracked down on the unauthorized practice of law, with the intention of forcing more foreign attorneys to register and become fully licensed *gaiben*, foreign associates must exercise care to ensure they do not act independently or engage in the unauthorized practice of law in Japan.

Many of the world's largest and prestigious law firms have offices in Tokyo. Most of these firms send attorneys to Japan, via a secondment, from their home country for a defined period of time, although it is possible to be hired directly into the offices of a foreign law firm in Tokyo. The primary areas of practice at these firms are mergers and acquisitions, intellectual property, and real estate. Although a large number of foreign firms with offices in Tokyo are based in the United States, there are firms from all over the world, such as the United Kingdom, Australia, and Canada, that have a presence in Japan.

Many corporations with offices in Japan seek foreign attorneys with native English language skills to assist with their cross-border agreements, licensing agreements, or other international transactions. The assignments in a corporate legal department tend to be similar to what a foreign attorney would receive at a law firm, mainly being to draft, revise, and negotiate various contracts and agreements involving the operations of the corporation. Although the assignments tend to be similar, there are differences between working in a corporation and a law firm. For example, an attorney with a Japanese corporation would become immersed in the Japanese corporate culture, which can mean later working hours and socializing with colleagues after work, usually at pubs. The types of corporations in Japan that seek foreign attorneys are large Japanese corporations, foreign corporations with subsidiaries or branch offices in Japan, or asset management corporations involved in real estate transactions by foreign investors.

Comparison with United States Rules Governing Foreign Attorneys

While it may appear that the rules governing foreign attorneys in Japan are strict, the barriers that foreign attorneys face in Japan are comparable to those that exist in many jurisdictions in the United States. There is a special status granted in 24 states, including Michigan, for attorneys admitted in foreign jurisdictions to be advisors on the law of the jurisdiction where admitted (usually referred to as "foreign legal consultants"). While some states allow these foreign legal consultants to advise on United States law with the assistance of a United States-qualified attorney, this is not true of every jurisdiction. In Michigan, a foreign-qualified attorney may be admitted without examination as a "special legal consultant" under Rule 5(E)[44] of the Rules for the Board of Law Examiners. The main requirement to be admitted as a "special legal consultant" is that the foreign attorney must have been admitted in the foreign jurisdiction, be in good standing, and engaged in the practice of law for three of the preceding five years.[45] A special legal

consultant in Michigan must maintain active membership in the State Bar of Michigan, is limited to providing advice on the law of the country where admitted, and may use the title "special legal consultant" provided that the law of the foreign country is identified.[46] Requirements that are very similar to those imposed on *gaiben* in Japan.

Practical Suggestions for Michigan Attorneys Wanting to Practice in Japan

Japan is an attractive destination for attorneys qualified in Michigan. Japanese companies are a major source of foreign investment in Michigan, especially in the automotive sector, and Tokyo is a major hub for international business and finance. In addition, Japan has established business relationships and is close in proximity to Asian countries that are currently experiencing strong economic growth, such as China, South Korea, India, and Russia. Thus, many law firms and corporations in Japan have a need for foreign attorneys to assist Japanese clients conducting business inside Japan as well as outside, in addition to foreign clients doing business within Japan.

Most foreign attorneys tend to have at least two years of prior experience from their home jurisdiction in order to satisfy the *gaiben* experience requirement and because firms in Japan prefer an attorney who possess post qualification experience. However, there are no real standards as evidenced by the diverse backgrounds amongst the foreign attorneys in Japan. As far as a particular interest in a practice area, because most of the work is focused on corporate transactional or intellectual property matters, firms and corporations tend to look for attorneys with interests in those areas of the law. Perhaps equally important is a willingness to immerse oneself into the Japanese culture. In the past, possessing strong Japanese language skills was always helpful, but was not critical, as virtually all of the work was conducted in English. Now, given the challenging global economy and employment environment, employers generally desire some level of proficiency in Japanese because of the benefits of having a bilingual foreign attorney. With the high turnover of foreign attorneys returning to their home country, positions tend to open up on a regular basis. To identify firms that are potentially hiring, the *Martindale-Hubbell Law Directory* provides a list of firms in large Japanese cities from which an interested person could contact directly. In addition, one could contact any of the numerous legal recruiting agencies in Tokyo[47] or network through the foreign attorney organizations in Japan such as the Roppongi Bar Association,[48] the Japan Law Society,[49] or the Foreign Women Lawyers' Association.[50]

Conclusion

Japan offers foreign attorneys a tremendous and exciting opportunity to work on the global stage. Living and working in Japan is a unique experience that will enhance your practice after you return to the United States or relocate to another overseas location. With the number of foreigners living in Japan, especially in Tokyo, you can build a global practice and network of attorneys from all over the world, all while learning more about the modern legal system and practice of an ancient culture.

About the Authors

Timothy J. Blanch *is a member of the Blanch Law Group, PLLC and has experience working in Tokyo, Japan as a foreign associate with the Tozai Sogo Law Office. Mr. Blanch received his B.A. from Michigan State University in 2002 and his J.D. from Michigan State University College of Law in 2005. Mr. Blanch's practice involves working as general outside counsel for domestic United States corporations and providing legal advice to international organizations. Mr. Blanch's areas of experience include international and cross-border transactions, corporate governance, finance, business formation, restructuring and dissolution matters, and domestic and cross-border litigation. Mr. Blanch is a native of Grand Rapids, Michigan and is admitted to practice in the States of Michigan and North Carolina.*

Daniel S. Potts *is a foreign associate at The Tokyo-Marunouchi Law Offices in Tokyo, Japan. Mr. Potts received his B.A. from Michigan State University in 1994 and his J.D. from the University of Minnesota in 2002. Mr. Potts's experience includes assisting both Japanese and foreign clients on various corporate matters, including construction contracts, distribution agreements, employment matters, international arbitrations, real estate investments, and project finance. Mr. Potts is a native of Grand Rapids, Michigan and is admitted to practice in the State of Washington.*

Endnotes

1 Anthony Lin, *Japanese Crack Down on Unregistered Foreign Associates*, Legal Week, Feb. 11, 2009, available at http://amlawdaily.typepad.com/amlawdaily/2009/02/in-a-move-that-has-shaken-up-the-international-legal-community-in---japan-the-countrys-umbrella-bar-group-is-making-an-is.html (last visited 21 Oct. 2011).

2 Bengoshi Hō [Attorney Act], Law No. 205 of 1949, Art. 72, available at http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=02&dn=1&x=48&y=8&co=01&ky=attorney+act&page=19 (last visited 21 Oct. 2011) [hereinafter the Attorney Act].

3 Lin, *supra* note 1.

4 *Id.*

5 Rashida Yosufzai, *Japan: No 'crackdown' on foreign lawyers, says Bar Association*, Asian Legal Business Feb. 16, 2009, available at http://asia.legalbusinessonline.com/law-firms/japan-no-crackdown-on-foreign-lawyers-says-bar-association/896/33713 (last visited 21 Oct. 2011).

6 Based on research conducted by the International Monetary Fund in 2010.

7 Terra Brockman, The Job Hunter's Guide to Japan 81 (1st ed. 1990).
8 Id.
9 John W. Dower, *Embracing Defeat: Japan in the Wake of World War II* 73 (1999).
10 Attorney Act, *supra* note 2, Art. 7.
11 Brockman, *supra* note 7at 82.
12 *See, e.g.,* Anderson Mori & Tomotsune website, available at http://www.amt-law.com/en/office2.html; Blakemore & Mitsuki website, available at http://www.blakemore.gr.jp/e_home.html (both last visited 21 Oct. 2011).
13 Attorney Act, *supra* note 2, Art. 7 (Art. 7 was repealed by an amendment to the Attorney Act in a private member's bill in the Japanese Diet).
14 Brockman, *supra* note 7 at 82.
15 *Id.* at 82-83.
16 Gaikoku Bengoshi Niyoru Horitsu Jimu no Toriatsukai Nikansuru Tokubetsu Sochi-ho [Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers], Law No. 66 of 1986, available at http://www.japaneselawtranslation.go.jp/law/detail/?id=1918&vm=04&re=02 (last visited 21 Oct. 2011)[hereinafter the *Gaiben* Act].
17 Brockman, *supra* note 7 at 83.
18 *Id.* at 84.
19 *Id.* at 84, 88.
20 *See id.* at 83-84.
21 *Gaiben* Act, *supra* note 16, at Art. 3(1).
22 *Id.* at Art. 4.
23 *Id.* at Art. 5-3.
24 *Id.* at Art. 2(xi).
25 *Id.* at Art. 3(1)(ii).
26 *Id.* at Art. 3(1)(iii).
27 *Id.* at Art. 3(1)(i).
28 *Id.* at Art. 7.
29 *Id.* at Art. 24 and 25.
30 *Id.* at Art. 10(1)(i).
31 *Id.* at Art. 10(3) (In 1994, the *Gaiben* Act was amended to remove the reciprocity requirement for foreign lawyers admitted in World Trade Organization member states).
32 *Id.* at Art. 10(2).
33 *Id.* at Art. 48.
34 *Id.* at Art. 45(5).
35 *Id.* at Art. 45(1).
36 *Id.* at Art. 46(1).
37 *Id.* at Art. 45(4).
38 *Id.* at Art. 49-3 (These revisions went into effect on Apr. 1, 2005).
39 Shutsunyūkoku Kanri Oyobi Nanmin Nintei Hō [Immigration Control and Refugee Recognition Act], Law No. 319 of 1951, available at http://www.japaneselawtranslation.go.jp/law/detail/?id=1934&vm=&re= (last visited 21 Oct. 2011).
40 *See* "Outline of the Japan Federation of Bar Associations (JFBA)", available at http://www.nichibenren.or.jp/en/about/index.html (last visited 21 Oct.2011).
41 Japan Federation of Bar Associations, White Paper on Attorneys 2010, available at http://www.nichibenren.or.jp/library/en/about/data/WhitePaper2010.pdf (last visited 1 December 2011).
42 Japan Federation of Bar Associations, Basic Rules on the Duties of Practicing Attorneys, Art. 19, available at http://www.nichibenren.or.jp/library/en/about/data/basic_rules.pdf (last visited 21 Oct. 2011).
43 *Id.*
44 BLE 5(E), available at http://www.courts.michigan.gov/supremecourt/BdofLawExaminers/CourtRules.htm (last visited 21 Oct. 2011).
45 *Id.* at 5(E)(a)(1).
46 *Id.* at 5(E)(d).
47 *See* t2tokyo website, available at http://www.talent2.com/en_jp?c=Japan>; and East West Consulting K.K. website, available at http://www.ewc.co.jp/en/ (both last visited 21 Oct. 2011).
48 *See* Roppongi Bar Association website, available at http://www.rbalaw.org/ (last visited 21 Oct. 2011).
49 *See* Japan Law Society website, available at http://www.gaiben.jp/ (last visited 21 Oct. 2011).
50 *See* Foreign Women Lawyers' Association website, available at http://fwla.net/ (last visited 21 Oct. 2011).

The Philippines as Call Center Capital of the World: Legal Issues and Pitfalls

By Albert Vincent Y. Yu Chang

Introduction

Throughout modern history, the Philippines has been known for names, events and places: Commodore George Dewey's victory in the Battle of Manila Bay against the Spanish naval force during the Spanish-American War, in World War 2, General Douglas McArthur fulfilling his promise, "I shall return!" on the shores of Leyte Gulf, the co-founding of the Association of Southeast Asian Nations (ASEAN) by the Philippines in 1967, "*Thrilla in Manila*," the boxing match between Mohammad Ali and Joe Frazier, in 1975, the peaceful revolution, now better known as "People Power," that ended the twenty-one year rule of Ferdinand and Imelda Marcos in 1986, and boxing star Manny Pacquiao, and his much-anticipated fight with Grand Rapids, Michigan native Floyd Mayweather, Jr.


Albert Vincent Y. Yu Chang

In 2010, the Philippines dislodged India as the "Call Center[1] Capital of the World.[2]" According to a report from IBM Global Services, the Philippines has surpassed India as the global leader in business process outsourcing (BPO) by estimated jobs in business support

services.[3] According to the National Association of Software and Service Companies in India, even Indian call-center companies have set up offices in the Philippines in the recent years.[4]

The IBM report attributes the trend to the Philippines' having a "similarly attractive business environment for international business support functions as India," but not "the same labor cost increases as have occurred in various Indian 'hot spots' in recent years.[5]" Among other factors going for the island nation are the country's better affinity with Western culture (particularly, American culture[6]), lack of competing industries for skilled workforce, and favorable tax incentives.[7] In addition, analysts have noted that global companies increasingly want a backup plan in case one country is hit by a natural calamity or unrest,[8] and the Philippines may well serve as a viable backup.

As North American companies consider opportunities in outsourcing, whether as a BPO service provider, as a customer or as a business enterprise in an allied industry, here is a brief overview of the Philippine legal system and legal issues and pitfalls relating to the call center and BPO industries in the Philippines.

Issues and Pitfalls

Legal System

As a former U.S. protectorate and a former Spanish colony, the Philippines has retained in its legal system certain features of the U.S. common law system and the Spanish civil law system. Following common law tradition, decisions of the Philippine Supreme Court are binding; but, as a feature of the civil law system, there are no judge-made laws and judicial decisions are limited to nullifying or interpreting laws enacted by the legislature or parts thereof.

Beyond bearing fundamental characteristics of foreign legal systems, Philippine laws have received more direct Western influences. Philippine commercial laws (such as the Corporation Code and the Negotiable Instruments Law, among many others) and remedial rules (such as the predecessor of the current Philippine Code of Civil Procedure and the Rules of Evidence) were based on or patterned after U.S. counterparts, while civil and criminal laws (such as the Revised Penal Code and the Civil Code) were based on Spanish sources. Throughout its history, the Philippine Supreme Court has cited American and Spanish legal authorities in support of its rulings.

English is one of the official languages of the Philippines. The Philippine Constitution was promulgated in English, as are most statutes, administrative regulations and judicial decisions.[9] Court proceedings are conducted mostly in English, and any use of Filipino in court requires translation to English for transcription purposes.

The country's affinity with Western culture is reflected in the legal profession in the Philippines. While no foreign law firm operates a satellite office in the Philippines due to restrictions under the Philippine Constitution,[10] many of the leading commercial law firms in the Philippines were founded by American lawyers during the American occupation or are currently staffed in part by U.S.-trained Filipino lawyers.

Corporate Structure

A foreign investor may engage in the outsourcing business in the Philippines through (i) a Philippine branch office, or (ii) a domestic Philippine corporation. The required minimum assigned capital for a foreign investor to register a branch or incorporate a corporation is two hundred thousand U.S. dollars (US $200,000.00). However, the minimum will be lower, *i.e.*, one hundred thousand U.S. dollars (US $100,000.00), if the enterprise (i) involves advanced technology, as determined by the Philippine Department of Science and Technology, or (ii) directly employs at least fifty (50) employees.[11]

Domestic market enterprises owned by Philippine nationals are not covered by the minimum capital requirement.[12] For purposes of determining compliance with the minimum capital requirement, a "Philippine national" means "a citizen of the Philippines, or a domestic partnership or association wholly owned by citizens of the Philippines, or a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines.[13]" Thus, a foreign company can have a Philippine affiliate without meeting the minimum capital requirement if its equity interest in its Philippine affiliate is not more than 40% of the shares of the corporation, with the other 60% being owned by Philippine nationals.

Investment Incentives

Analysts have noted favorable tax incentives for foreign investors in the Philippines. There are several incentive regimes under Philippine laws, including the Omnibus Investment Code[14] ("OIC"), the Special Economic Zone Act of 1995, as amended[15] ("PEZA Law"), and the Bases Conversion and Development Act of 1992[16] ("BCDA").

Registration. A foreign company must be registered with the Philippine Board of Investments ("BOI") or the Philippine Economic Zone Authority ("PEZA") to receive incentives under the OIC or the PEZA Law, respectively, and with the Subic Bay Metropolitan Authority ("SBMA") or the Clark Development Corporation ("CDC") to receive incentives under the BCDA.

Location. BOI-registered entities registered under the OIC may locate anywhere in the country; PEZA-registered entities must be located in an information technology (IT) park or economic zone registered with the PEZA; and entities seeking incentives under the BCDA Law must be located in designated economic zones, such as the Subic Bay Freeport Zone[17] or the Clark Freeport Zone.[18]

Requirements. The BOI and PEZA generally follow the investment priorities plan (IPP) of the Philippine government in determining whether a company may be entitled to incentives.

Every year, the BOI is by law required to submit to the President for approval an IPP, which, among other things, identifies specific activities and categories of economic activity where investments are to be encouraged.[19] In the IPP for 2010 ("2010 IPP"), "Business Process Outsourcing" is among the "Preferred Activities" listed. Under the 2010 IPP, "Business Process Outsourcing" covers "voice and non-voice IT-enabled services[,] including procurement and sourcing services, contact center, business/knowledge processing, software development, animation, data transcription, engineering design, and [information and communications technology] support services.[20]"

Under the 2010 IPP, a BPO company operating a contact center must have a minimum investment cost of US$2,500 per seat, which amount covers the cost of equipment (hardware and software), office furniture, building improvements and renovation, and other fixed assets, except land, building and working capital.[21] Subject to certain requirements for purposes of meeting the minimum investment cost, equipment may be leased or consigned to the BPO company.[22]

There are foreign-equity restrictions to the incentives. Unless it is export-oriented or a pioneer enterprise, the entity seeking registration and incentives under the BOI must be a citizen of the Philippines,[23] which can be a Filipino citizen or a corporation incorporated under Philippine laws of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by Philippine nationals.[24] To be considered export-oriented, a foreign-owned outsourcing company must provide services to clients outside the Philippines[25] and the export services must account for at least 70% of the company's revenues.[26] To be considered a pioneer enterprise, a foreign-owned outsourcing company must (i) introduce a major innovation in technology, or (ii) have a project cost of at least $5 million (excluding the cost of land and building) to be put up during the first year of operations.

In addition, as a general policy under the 2010 IPP, the equity of the project applied for BOI-registration is at least 25% of the project cost.

Notably, eligibility for incentives within the framework of the BCDA Law is not governed by the IPP but by regulations that are specific to the relevant economic zone.[27] For example, there are implementing rules and regulations that govern the eligibility, procedure and requirements for registration as a Subic Bay Freeport enterprise.[28]

Incentives. A BOI-registered entity will be entitled to the following incentives, among others: income tax holiday (ITH) for a period between four (4) and six (6) years, depending on the enterprise, zero-rated value added tax (VAT), tax credit on domestic capital equipment, exemption from contractor's tax, and additional deductions from taxable income equivalent to 50% of wages of skilled and unskilled workers in the direct labor force.[29]

Companies registered under the PEZA Law enjoy the same ITH incentives as a BOI-registered company; however, after the lapse of the relevant ITH period, it may receive a special tax rate of 5% of gross income, in lieu of all other national and local taxes.[30] PEZA-registered companies also enjoy other incentives, including, without limitation: zero-rated VAT on purchases for certain transactions; tax and duty free importation of capital equipment, supplies, and materials that will be used exclusively for the registered operations; and deduction from taxable income of training expenses in developing a skilled and unskilled workforce.[31] Subject to meeting pertinent requirements, a BOI-registered entity may seek to register under the PEZA Law to receive the special 5% tax rate after the expiration of the ITH period.

A duly registered company located in Subic Bay Freeport Zone or the Clark Freeport Zone will enjoy similar incentives enjoyed by PEZA-registered companies; however, it will generally not be entitled to ITH. An enterprise within the Subic Bay Freeport, for example, will pay a 5% final tax on its gross income in lieu of all national and local taxes.[32] It will also enjoy, among other incentives, tax and duty free importation of capital equipment, supplies and materials for use within Subic Bay and Clark Freeport Zones,[33] although exportation or removal of goods from the territories of these zones will be subject to customs duties and taxes.[34]

Labor and Employment

Based on current rates, salaries and wages are generally relatively lower in the Philippines. For example, median annual salary in the information technology industry in the Philippines is P409,734 (approximately, US $9,362.14) based on statistics as of September 11, 2011.[35] By comparison, in India, the median annual salary in the same industry is Rs516,690 (approximately, $10,331.84) as of September 16, 2011.[36]

However, as in the case of many developing economies, Philippine labor and employment laws are a form of social welfare laws. As a counterbalance to the lower wage rates, labor and employment laws tend to be protective of the workforce. The following are some features of Philippine labor and employment laws:

Construction in Favor of Labor. The Labor Code of the Philippines ("Labor Code") expressly states that, "[a]ll doubts in the implementation and interpretation of the provisions of this Code, including its implementing rules and regulations, shall be resolved in favor of labor.[37]" While this does not justify arbitrarily rulings against employers,

courts of law have often acted on this provision in ruling for workers where there is any doubt that leaves room for interpretation.[38]

Labor Standards. Philippine labor and employment laws impose minimum terms and conditions of employment, including, without limitation: minimum wage rates for each region set by the Regional Tripartite Wages and Productivity Board;[39] subject to exceptions, mandatory meal time of one hour;[40] overtime pay for any work done in excess of eight hours;[41] night-shift differential for work done between 10 p.m. and 6 a.m.;[42] rest period of not less than 24 consecutive hours for every six consecutive working days;[43] holiday pay (in addition to regular wages) for work on rest days and holidays;[44] paid service incentive leave for workers who have worked for at least one year;[45] and mandatory 13th month pay;[46] among others. Moreover, there are special laws that protect women workers. For example, there are restrictions that apply to nighttime work for women; they have to be given alternatives to night time work during pregnancy or a specified period before and after childbirth.[47]

Security of Tenure. Under Philippine law, regular employees are not terminable at will. Employees who have attained regular status, *i.e.*, an employee who has been engaged to perform activities which are usually necessary or desirable in the usual trade or business of the employer, or has rendered at least one year of service, are entitled to security of tenure and cannot be terminated except for just or authorized causes.[48] Just causes for dismissal include: serious misconduct or willful disobedience by the employee; gross and habitual neglect by the employee of his duties; fraud or willful breach of the trust by the employee; commission of a crime or offense by the employee against the person of his employer or any immediate member of his family or his duly authorized representative; or other analogous causes.[49] Authorized causes for dismissal include: installation of labor saving devices; redundancy; retrenchment to prevent losses; or the closing of operation of the establishment.[50] In case of illegal dismissal, employees can be ordered reinstated to the former position without loss of seniority rights and payment of back wages; and in case reinstatement is no longer possible due to strained relations, employers may be ordered to pay separation benefits in lieu of reinstatement in addition to back wages.[51]

Termination. To protect against arbitrary termination, labor and employment laws and jurisprudence impose procedural requirements for terminating an employee. Even if there exists a just or authorized cause for dismissal, an employee will be deemed illegally dismissed and the employer will be held to the same liability for dismissal without just or authorized cause if the employer failed to observe the procedural requirements. To be terminated for a just cause, an employee needs to be given due process;[52] and to terminate for an authorized cause, an employer must send prior notice of the termination to the Department of Labor.[53]

Independent Contractors. Philippine law permits the hiring of independent contracts. Business enterprises that engage the services of an independent contractor are not subject to the obligations of employers under Philippine labor and employment laws. However, Philippine law and jurisprudence strictly define "independent contractors." Under Philippine case law, the existence of an independent contractor relationship is generally established by the following criteria: "whether or not the contractor is carrying on an independent business; the nature and extent of the work; the skill required; the term and duration of the relationship; the right to assign the performance of a specified piece of work; the control and supervision of the work to another; the employer's power with respect to the hiring, firing and payment of the contractor's workers; the control of the premises; the duty to supply the premises tools, appliances, materials and labor; and the mode, manner and terms of payment."[54] Moreover, "labor-only contracting" is specifically carved out of the definition of "independent contractors." Under administrative regulations, there is "labor-only contracting" where "the contractor or subcontractor merely recruits, supplies or places workers to perform a job, work or service for a principal, and the following elements are present: (1) the contractor or subcontractor does not have substantial capital or investment to actually perform the job, work or service under its own account and responsibility; and (2) the employees recruited, supplied or placed by such contractor or subcontractor are performing activities, which are directly related to the main business of the principal.[55]

Data Privacy

As of this writing, there is no comprehensive data protection law in the Philippines. However, privacy and data security have long been recognized and enjoy some protection under various statutes. For example, the Philippine E-Commerce Act:[56] (a) imposes on any person who obtains access to electronic data messages or electronic documents or other materials an obligation not to convey to or share information with any other person; and (b) penalizes computer hacking, introduction of virus and piracy of copyright works.

Efforts are currently underway to enact a data privacy law.[57] A bill approved in the lower house of the Philippine legislature provides for broad privacy guidelines governing how electronic data should be used, shared, and stored (based in part on key principles laid out in the Asia-Pacific Economic Cooperation Privacy Framework[58]).[59] A Senate version of the bill provides for the creation of a National Privacy Commission that will make sure ICT systems in the country comply with international standards set for data pro-

tection.[60] These bills penalize certain acts, such as unauthorized processing, accessing due to negligence, improper disposal, and wrongful processing of sensitive personal information.[61]

Legal Concepts

Below is a discussion of the Philippine treatment of certain legal concepts used in contracts typically drafted by U.S. lawyers. These concepts may find application in contracts relating to call centers and BPO services.

Standard of Care. Under the Civil Code of the Philippines, "[e]very person obliged to give something is also obliged to take care of it with the proper diligence of a good father of a family, unless the law or the stipulation of the parties requires another standard of care."[62] In the context of call center operations, the employer will be answerable for damages or injuries caused by an employee's negligence to another. To avoid liability for a quasi-delict[63] (a civil law concept that is the nearest equivalent of the common law concept of "tort") committed by an employee, an employer must overcome the presumption by presenting convincing proof that he exercised the care and diligence of a good father of a family in the selection and supervision of the employee.[64] The required diligence of a good father of a family pertains not only to the selection, but also to the supervision of employees. It is not enough that the employees chosen are competent and qualified, because the employer is still required to exercise due diligence in supervising the employees.[65]

Injunctive Relief. Philippine remedial laws provide for injunctive relief. Under the Philippine Rules of Civil Procedure, "[a] preliminary injunction may be granted when it is established that: (a) the applicant is entitled to the relief demanded, and the whole or part of such relief consists in restraining the commission or continuance of the act or acts complained of, or in requiring the performance of an act or acts, either for a limited period or perpetually; (b) the commission, continuance or non-performance of the act or acts complained of during the litigation would probably work injustice to the applicant; or (c) a party, court, agency or a person is doing, threatening, or is attempting to do, or is procuring or suffering to be done, some act or acts probably in violation of the rights of the applicant respecting the subject of the action or proceeding, and tending to render the judgment ineffectual.[66]

Choice of Law. Several theories have been propounded in Philippine jurisprudence (including those from U.S. sources) in order to identify the legal system that should ultimately control.[67] The Philippine Supreme Court has noted: "Before a choice can be made, it is necessary for us to determine under what category a certain set of facts or rules falls. This process is known as "characterization," or the "doctrine of qualification." Citing U.S. case law, the Philippine Supreme Court has further stated that: "A basic policy of contract is to protect the expectation of the parties. Such party expectation is protected by giving effect to the parties' own choice of the applicable law. The choice of law must, however, bear some relationship to the parties or their transaction."[68] Thus, as it is in U.S. case law, choice of law provisions will be evaluated under Philippine law on a case-by-case basis.

Venue and Dispute Resolution. Generally, under Philippine law, the venue of an action may be changed or transferred from one venue to another by written agreement of the parties.[69] The Philippine Supreme Court has had several occasions to uphold the validity of a dispute resolution clause that provided for arbitration in a foreign country.[70]

Enforcement of Foreign Judgments. Where a judgment is rendered outside the Philippines, Philippine law recognizes a general right to enforce foreign judgments. However, "[t]here are no obligatory rules derived from treaties or conventions that require the Philippines to recognize foreign judgments."[71] Under Rule 39, Section 48 of the Philippine Rules of Court, foreign judgments may be "repelled by evidence of want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact." Under Philippine law, it is against public policy to waive causes of action against fraud and collusion.[72] Thus, these defenses could, in theory, be raised and hinder enforcement of a foreign judgment in the Philippines.

Dispute Resolution

The Philippine court system consists of the following: (a) the Supreme Court as the highest court of the land; (b) the Court of Appeals as the intermediate appellate court; (c) the special courts of the *Sandiganbayan* (which hears graft cases), Shari'a Courts and Court of Tax Appeals; and (d) the various lower courts which serve as trial courts. Labor disputes (including, without limitation, unfair labor practice cases, termination disputes, and claims for wages, rates of pay, hours of work and other employment terms, if accompanied by a claim for reinstatement) are under the jurisdiction of labor arbiters who are part of a quasi-judicial labor tribunal.[73]

There is no trial by jury in the regular courts. The judge (or the labor arbiter in case of labor disputes) determines all questions of law and fact of a case. In case of an adverse decision, a party may appeal to the pertinent appellate court or tribunal.

Philippine courts are not typically perceived to quickly resolve disputes. Nevertheless, civil and criminal procedures provide for various remedies, such as subpoenas, production of documents, provisional remedies (*e.g.*, temporary restraining orders, injunctions, prohibitions, etc.), contempt of court, enforcement of judgment, appeals, execution pending appeals, and special civil actions.[74]

In addition to litigation, Philippine law provides a framework for alternative dispute resolution. The Alternative Dispute Resolution Act ("ADRA")[75] gives

a legal framework for, and promotes the use of, alternative dispute resolution ("ADR") mechanisms in the Philippines. The ADRA provides that the parties may agree to refer one or more or all issues arising in a dispute or during its pendency to any form of ADR. ADRA identifies various other methods, such as mediation, evaluation by third persons, mini-trial, mediation-arbitration, domestic arbitration international commercial arbitration or any combination thereof.

The ADR law classifies commercial arbitration into two types, namely, international commercial arbitration and domestic arbitration. Under the ADRA, the law governing international commercial arbitration shall be the Model Law on International Commercial Arbitration ("Model Law") adopted by the United Nations Commission on International Trade Law ("UNCITRAL") on June 21, 1985. In an international commercial arbitration proceeding, a party may be represented by any person of his choice, provided that such representative, unless admitted to the practice of law in the Philippines, shall not be authorized to appear as counsel in any Philippine court or any other quasi-judicial body.

Conclusion

Given the relatively smaller size of the Philippines in terms of population, geographic area and its economy, it is quite a feat that it has dislodged India as the "Call Center Capital of the World." To be sure, the Philippines offers a compelling value proposition. Part of that value proposition is the country's legal system. Business enterprises in the Philippines are undeniably beset by inefficiency and corruption issues, among other things; however, because of the lasting influence of U.S. law, the use and facility of the English language in the Philippines, and the Westernized culture within the legal profession, Philippine laws are, relatively speaking, more easily navigable than some developing countries whose legal systems are of indigenous or less familiar origins.

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Endnotes

1 By definition, a call center is a centralized office used for the purpose of receiving and transmitting a large volume of requests by telephone. It is operated by a company to administer incoming product support or information inquiries from consumers. Outgoing calls for telemarketing, clientele, product services, and debt collection are also made from call centers.

2 *Philippines overtakes India as call centre capital,* Channel News Asia (December 6, 2010), http://www.channelnewsasia.com/stories/afp_asiapacific_business/view/1097515/1/.html .

3 *Global Location Trends Annual Report*, IBM Global Services (October 2010), *available at* ftp://public.dhe.ibm.com/common/ssi/ecm/en/gbl03012usen/GBL03012USEN.PDF.

4 Rama Lakshmi, *Indian call-center firms moving abroad*, Washington Post (October 16, 2011), http://www.washingtonpost.com/world/asia_pacific/indian-call-center-firms-moving-abroad/2011/10/08/gIQAB3RHpL_story.html.

5 Annual Report, IBM Global Services, *supra note 3.*

6 Lakshmi, *supra* note 4 ("They think like Americans … drive on the right side of the road, sing American songs, watch American boxing and play basketball.").

7 Harsimran Julka, *Philippines to turn call centre capital of world*, The Times of India (November 4, 2010), http://articles.timesofindia.indiatimes.com/2010-11-04/india-business/28261550_1_india-s-bpo-bpo-industry-bpo-exports.

8 Lakshmi, *supra* note 4.

9 In earlier years, certain laws and judicial decisions were written in Spanish. For example, the Revised Penal Code was approved by the Philippine Legislature in Spanish. According to the Philippine Supreme Court, in the construction or interpretation of the provisions of the Revised Penal Code, the Spanish text is controlling. People v. Manaba, 58 Phil. Rep. 665, 688 (S.C. October 31, 1933).

10 Under the Philippines Constitution, "[t]he practice of all professions in the Philippines shall be limited to Filipino citizens, save in cases prescribed by law." Const. (1987), Art. XII, § 14 (Phil.). Const. (1987), Art. XII, § 14 (Phil.). Under Rule 138, Section 2 of the Philippine Rules of Court, "[e]very applicant for admission as a member of the bar must be a citizen of the Philippines."

11 Foreign Investments Act of 1991, § 8, Rep. Act No. 7042, as amended, *available at* http://www.google.com/url?q=http://www.doe.gov.ph/PECR/Geothermal/pdf/FOREIGN%2520INVESTMENTS%2520ACT%2520OF%25201991.pdf&sa=U&ei=I-qeTsWQJcfJsQK04ZTdCQ&ved=0CBUQFjAB&usg=AFQjCNHLSnpAyaTWYrxLVSdYPKlc5dLUUA (last visited October 19, 2011).

12 *Id.*

13 *Id.*

14 Omnibus Investment Code, E.O. 226 (1997), *available at* http://www.doe.gov.ph/PECR/Coal/Laws&Issuances/EO226.pdf .

15 Special Economic Zone Act of 1995, Rep. Act No. 7916, as amended.

16 An Act Accelerating the Conversion of Military Reservations Into Other Productive Uses, Creating the Bases Conversion and Development Authority for the Purposes, Providing Funds Therefor, and for Other Purposes, Rep. Act. No. 7227, as amended (Phil.).

17 The Subic Bay Freeport (SBF) is located in a facility used by the U.S. Navy in Subic Bay until 1991, which has been transformed into a self-sustaining tourism, industrial, commercial, financial and investment center. Subic Bay Metropolitan Authority, http://www.sbma.com/index.php?module=pagemaster&PAGE_user_op=view_page&PAGE_id=96 (last visited October 19, 2011).

18 The Clark Freeport Zone is a redevelopment of a former airbase of the U.S. Air Force known as Clark Airbase.

19 *Id.* § 3(a); Omnibus Investment Code § 27.

20 2010 Philippine Investment Priorities Plan, available at http://www.investphilippines.gov.ph/downloads/ipp2010.pdf.

21 *d.*

22 *Id.*

23 *Id.*

24 By definition, a "Philippine national" includes a citizen of the Philippines or a domestic partnership or association wholly-owned by citizens of the Philippines; or a corporation organized under the laws of the Philippines of which at least sixty per cent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; provided, that where a corporation and its non-Filipino stockholders own stock in a registered enterprise, at least sixty per cent (60%) of the capital stock outstanding and entitled to vote of both corporations must be owned and held by the citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of both corporations must be citizens of the Philippines in order for the corporation to be considered a Philippine national. Omnibus Investment Code § 15.

25 Omnibus Investment Code § 32.

26 *Id.*

27 Rules and Regulations Implementing the Provisions Relative to the Subic Special Economic and Freeport Zone and the Subic Bay Metropolitan Authority Under Republic Act No. 7227, Otherwise Known as the "Bases Conversion and Development Act of 1992 ("SBMA Rules"), §§ 17 and 34 (November 3, 1992) (Phil.).

28 *Id.*

29 Omnibus Investment Code § 39.

30 *Id.* § 24.

31 *Id.* § 42.

32 SBMA Rules, § 57.

33 *See Id.* § 45.

34 *See Id.* § 47.

35 *Salary by Industry for Country: Philippines*, Payscale.com, http://www.payscale.com/research/PH/Country=Philippines/Salary/by_Industry (last visited September 18, 2011).

36 *Salary by Industry for Country: India*, Payscale.com, http://www.payscale.com/research/IN/Country=India/Salary/by_Industry (last visited September 18, 2011).

37 Labor Code, Art. 4, Pres. Dec. No. 442.

38 *See e.g.*, *Phil. Long Distance Co. v. National Labor Relations Comm'n*, G.R. No. 106947, (S.C. Feb. 11, 1999) (Phil.) ("Any slight doubts, however, must be resolved in favor of the workers").

39 Labor Code, Art. 99.

40 Rules to Implement the Labor Code, Book III, Rule I, § 7.

41 *Id.* § 8

42 Rules to Implement the Labor Code, Book III, Rule II, §§ 2-5.

43 Rules to Implement the Labor Code, Book III, Rule III, § 3.

44 Rules to Implement the Labor Code, Book III, Rule IV, § 3-5.

45 Rules to Implement the Labor Code, Book III, Rule V, § 2

46 Labor Code, art. 83-95.

47 An Act Allowing the Employment of Night Workers, Thereby Repealing Articles 130 and 131 of Presidential Decree Number Fourth Hundred Forty-Two, as Amended, Otherwise Known as the Labor Code of the Philippines,

Rep. Act No. 10151, § 158 (June 21, 2011) (Phil.).

48 *Id.* art. 282-284

49 *Id.* art. 282.

50 *Id.* art. 283.

51 *Id.* art. 279.

52 *Erector Advertising Sign Group, Inc. v. National Labor Relations Commission*, G.R. No. 167218, (S.C. July 2, 2010) (Phil.).

53 Labor Code, art. 283.

54 *"Brotherhood" Labor Unity Movement of the Phils. v. Zamora*, G.R. No. L-48645, (S.C. January 7, 1987), *available at* http://www.lawphil.net/judjuris/juri1987/jan1987/gr_l_48645_1987.html.

55 Philippine Department of Labor and Employment, Department Order No. 3 (2001), http://www.dole.gov.ph/fndr/bong/files/DO%2003-01.pdf (last visited October 18, 2011).

56 An Act Providing for the Recognition and Use of Electronic Commercial and Non-Commercial Transactions and Documents, Penalties for Unlawful Use Thereof and For Other Purposes, Rep. Act. No. 8792 (2000) (Phil.).

57 Data privacy bill clears final reading in house, Date Line Philippines, May 10, 2011, http://dateline.ph/2011/05/10/data-privacy-bill-clears-final-reading-in-house/ (last visited September 20, 2011).

58 *Id.*

59 House Bill No. 4115, 15th Cong. §§ 28-32 (Phil.), available at http://www.congress.gov.ph/download/billtext_15/hbt4115.pdf (last visited September 22, 2011).

60 Senate Bill 2965, 15th Congress §§ 6-8, *available at* http://www.senate.gov.ph/lisdata/1218710275!.pdf (last visited September 22, 2011).

61 *Id.* §§ 22-25

62 Civil Code, art. 1163, R.A. 386, as amended.

63 The following are elements of a quasi-delict: (a) damages suffered by the plaintiff, (b) fault or negligence of the defendant, or some other person for whose acts he must respond; and (c) the connection of cause and effect between the fault or negligence of the defendant and the damages incurred by the plaintiff. *Andamo v. Intermediate Appellate Court*, G.R. No. 74761, (S.C. November 6, 1990), *available at* http://www.lawphil.net/judjuris/

juri1990/nov1990/gr_74761_1990.html (last visited October 26, 2011).

64 *Delsan Transp. Lines, Inc. v. C & A Constr., Inc.*, G.R. No. 156034, (S.C. October 1, 2003), *available at* http://www.lawphil.net/judjuris/juri2003/oct2003/gr_156034_2003.html (last visited October 18, 2011).

65 *Id.*

66 Philippine Rules of Court, Rule 58, § 3 (Phil.).

67 *Saudi Arabian Airlines v. Court of Appeals*, G.R. No. 122191, (S.C. October 8, 1998), available at http://www.lawphil.net/judjuris/juri1998/oct1998/gr_122191_1998.html (last visited October 19, 2011).

68 *Cadalin v. Phil. Overseas Employment Admin. Adm'r*, G.R. L-104776, (S.C. December 5, 1994) (citing *Fricke v. Isbrandtsen Co., Inc.*, 151 F. Supp. 465, 467 (S.D.N.Y. 1957)).

69 *Phil. Banking Corp. v. Tensuan*, G.R. No. 104649, (S.C. February 28, 1994), *available at* http://www.lawphil.net/judjuris/juri1994/feb1994/gr_104649_1994.html (last visited October 19, 2011).

70 *See e.g.*, *Korea Tech. Co., Ltd. v. Lerma*, G.R. No. 143581, (S.C. January 7, 2008), *available at* http://www.lawphil.net/judjuris/juri2008/jan2008/gr_143581_2008.html (last visited October 19, 2011).

71 *Mijares v. Ranada*, G.R. No. 139325, (S.C. April 12, 2005), *available at* http://sc.judiciary.gov.ph/jurisprudence/2005/apr2005/139325.htm (last visited October 19, 2011).

72 *Chavez v. Phil. Comm'n on Good Gov't*, G.R. No. 130716, (S.C. December 9, 1998), *available at* http://www.lawphil.net/judjuris/juri1998/dec1998/gr_130716_1998.html (last visited October 26, 2011).

73 Labor Code, art. 217.

74 Philippine Rules of Court.

75 An Act to Institutionalize the Use of an Alternative Dispute Resolution System in the Philippines and to Establish the Office of Alternative Dispute Resolution and for Other Purposes, Rep. Act No. 9285 (2003), *available at* http://www.lawphil.net/statutes/repacts/ra2004/ra_9285_2004.html.

Joint Ventures in Brazil

By Jordana Lück

Creation of a Joint Venture in Brazil

In Brazil, a joint venture is created by an agreement between two or more parties that jointly form a new company or acquire shares or quotas of an existing company. The resulting 'joint venture company' may take the form of: the *Limitada* (Limited), the S.A., Branches or Consortia, although the most common forms are *Limitada* or S.A. (*Sociedade Anônima, or Business Corporation*) Brazilian legislation does not treat joint ventures as a type of association with a specific legal nature and form. A joint venture in Brazil does not possess a legal identity, without some independent corporate form. For legal purposes, the joint venture is an association agreement (or joint venture agreement) between the parties. This agreement establishes the basis of their association and the manner in which they intend to implement a particular project, to operate the joint venture company and to define the rights and obligations between the parties. If one of the parties assumes an obligation but does not perform it, there is no specific way to force the other party to fulfill the obligation. The contract may provide an assessment of any loss suffered as a result of the breaching of the contract, and the payment of damages to the injured party. Any such assessment of damages must be made by a judge and is generally a costly and time-consuming process. Frequently, the determination of the amount of damages is difficult since the plaintiff must establish the amount and extent of the loss. For that purpose, a 'liquidated damages clause' is commonly included in such contracts.[1]

Corporate Joint Ventures

"The main characteristic of a corporate joint venture is the intention of creating a project or a common enterprise, with the creation of a company, which takes on personal jurisdiction. In case the parties are from different countries, the country where the joint venture is taking place will be the assigned one in terms of jurisdiction, regulations, tax and etc. In Brazil, there is no legislation in regards to Joint Ventures. Therefore, the safer way to go and to protect companies is to associate them with some kind of corporate entity. The two most common types of corporate joint ventures are the *Limitada* and the S.A."[2]

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The Limitada

Decree 3.708 of January 10th of 1919, the articles of association, Law 556 of 25 June 1850, known as the Commercial Code (*Código Comercial*), and Law 6.404 of 15 December 1976 (S.A. Law) are sources of governing rules for the *Limitada*. The partners (quota-

holders) of a *Limitada* can contractually establish in the company's articles of association, the rules that reflect their intentions with respect to the operation of the *Limitada*. The *Limitada* requires a minimum of two quotaholders, individuals, resident or non-resident in Brazil, or Brazilian or foreign legal entities.[3]

"The *Limitada* corporate capital is represented by quotas, the ownership of which is specifically spelled out in the *Limitada* articles of association. Ownership is not represented by physical quota certificates, but by the articles of association. The transfer of quotas requires an amendment to the articles of association of the company, which, unless otherwise established in the articles of association, must be signed by all quotaholders and registered with the Commercial Registry (*Junta Comercial*). All quotas have the same voting rights and a nominal value. The articles of association of a *Limitada* may establish rules regarding the transfer of quotas or voting rights.

The liability of the quotaholder is limited to the amount of the company's capital. If this has been fully paid up, no quotaholder may be compelled to satisfy the obligations of the company with his own assets. However, such limitation must be stated in the articles of association. If the capital has not been fully paid up, a quotaholder may be required to complete the payment of the subscribed capital, even if such amount exceeds the value of the quotas to which he has subscribed. The quotaholders must return to the *Limitada* any dividend or value received from the company, even if the payment was authorized by the articles of association, when payment was effected against the paid-up corporate capital.

There are exceptions to the rule of liability limitation. Managing quotaholder officers, managers, or representatives are personally liable for debts resulting from acts performed in excess of their authority or in breach of the law or of the articles of association. The *Limitada* may be managed by all, some, or one quotaholder (individual or legal entity). The *Limitada* articles of association must state who will act as the managing quotaholder. If the managing quotaholder is resident abroad, the managing powers must be delegated to one or more delegate managers resident in Brazil. The managing quotaholder is liable for the acts performed by the delegate manager. The articles of association may establish that certain corporate decisions require the prior approval of the quotaholders.

Decree 3.708 does not expressly require the occurrence of quotaholders meetings. However, the articles of association may make such meetings obligatory and may establish the manner of calling such meetings and the quorum necessary for the meetings to be called to order and pass resolutions."[4] A fiscal committee is not required. The Civil Code, however, authorizes the installation of a fiscal committee (*conselho fiscal*) composed of at least three (3) members.

[T]he safer way to go and to protect companies is to associate them with some kind of corporate entity.

The S.A.

"The S.A. (*Sociedade Anônima*) is governed by the S.A. Law - Decree 6.404/76. It is a much more sophisticated form of corporate entity than the *Limitada,* and its internal structure is more rigid. The S.A. Law provides for two distinct forms of S.A., i.e., open (publicly held) and closed (closely held) companies. The open S.A. can have its shares traded on the stock market or the over-the-counter market. The closed S.A. cannot have its shares traded. There must be at least two (2) entities for an open S.A., no residency or nationality requirements apply, to incorporate and maintain an S.A. (except in the case of a closed S.A., which is subject to specific rules). For a publicly held S.A. (*Sociedade Anônima de Capital Aberto*), the corporate legislation provides more protective rules for the minority shareholders of preferred shares.[5]

The S.A. stock capital is represented by shares. The S.A. may issue ordinary and/or preferred shares, which may have a stated value or be of 'no-par value'. Shares must be nominative. The ownership and transfer of shares are recorded in books kept by the company. A transfer of shares does not require amendment to the by-laws. Preferred shares may have restrictions on the exercise of voting rights or have no voting rights. An S.A. may create various classes of ordinary or preferred shares and impose limitations on the circulation of shares in the by-laws. The incorporation of an S.A. requires that all the shares be subscribed, and a minimum of 10 per cent of the corporate capital must be paid up, in cash, through a deposit with a commercial bank. No minimum is required except to carry out certain regulated activities, i.e., banking, insurance, and trading companies.[6]

Shareholders may enter into shareholders' agreements, regulating share purchase and sale conditions, the exercise of the right of first refusal for acquisition thereof and voting rights that, if filed at the S.A. headquarters, will be binding on the S.A. and be subject to specific performance. The specific performance of a shareholders' agreement is expressly established in the S.A. Law. The by-laws of the S.A. must be registered with the Commercial Registry; however, the shareholders' agreement is not subject to such registration. If the S.A. is an open company, it is necessary to register its by-laws with the Securities and Exchange Commission (*Comissão de Valores Mobiliários*, CVM) before the registration of the by-laws with the Commercial Registry.[7]

The liability of a shareholder is limited to the issue price of the shares to which he has subscribed or which he has

acquired. The management of an S.A. may be entrusted to a board of directors (with at least three members) and to an executive committee (with at least two members), or solely to an executive committee.[8] The S.A. must be managed by at least two officers (*diretores*) who must be residents in Brazil. A board of directors (*conselho de administração*) is not compulsory, unless the S.A.: trades its shares on the stock exchange or in the over-the- counter markets; issues debentures in the market; or has authorized capital. Brazilian residence is not a requirement to assume the position of a member of the board of directors, provided that an attorney-in-fact resident in Brazil is appointed and vested with powers to receive services of process on behalf of the nonresident director. Under the law, the board of directors must have at least three (3) members, and each of them must hold at least one (1) share each.[9]

The bylaws of the S.A. must provide for a shareholders fiscal committee (*conselho fiscal*), which may be installed at a shareholders meeting. If the fiscal committee is so installed, its annual report to the shareholders must be published together with the financial statements of the S.A., except if the conditions mentioned in the following item are complied with as well as in other specific cases.[10]

Shareholders' meetings must be held annually (i.e., to approve the financial statements) within the first four (4) months after the end of the company's corporate year. Calls for meetings must be published unless all shareholders attend or are represented at the meeting. The minutes of the meetings also have to be published. Special meetings (such as those that are called to amend the bylaws) shall follow the same procedure. Balance sheets and financial statements must be published. Closely held S.A.'s (*Sociedade Anônima de Capital Fechado*) with less than twenty (20) shareholders and with a net worth of up to R$1,000,000.00 (one million Reais) are not required to publish financial statements, balance sheets, fiscal committee annual reports, and certain other information, provided that certified copies thereof are filed with the competent Commercial Registry together with the minutes of the general meeting containing the decisions thereon.[11]

Non-corporate Joint Ventures

Non-corporate joint ventures are a personal contract, with or without financial contribution from the parties, without the creation of a new company, with no personal jurisdiction. They represent an association of interests with proportional risks. This is because without a specific joint venture law, the only protections available are under the appropriate corporate laws.[12]

Incorporation

"Incorporation of a company/enterprise in Brazil requires registration with several governmental authorities. The following are the mandatory registrations:

> As a first step, the Articles of Association or By-laws must be filed with the Commercial Registry or the Civil Registry (depending on the company's objectives), in the State where the company is headquartered. Companies become corporate entities, with a legal entity status different from those of the holders of its shares or quotas, only after the Articles of Association or By-laws have been registered. However, at this stage, the company cannot operate yet.

After registration of the Articles of Incorporation, the company must be enrolled with the Legal Entities Taxpayers Registry of the Brazilian Internal Revenue Service ("CNPJ"). To become fully operational, companies involved in commercial activities must also register with State and Municipal taxpayers' registries. Companies that only render services need not to register with the State Taxpayers' Registry, except those which render transportation services.

In order to be enforceable before third parties in Brazil, all foreign documents must first be signed before a notary public in their country of origin and legalized before the Brazilian Consulate with jurisdiction. In Brazil, the foreign documents must be translated into Portuguese by a public sworn translator and registered at a Deeds and Documents Registry Office."[13]

Audits

Historically, the obligation of external audit of the financial statements by an independent auditing firm was only applicable to Brazilian publicly held S.A. corporations (*sociedade anônimas de capital aberto*). Nonetheless, after 2007, with the enactment of Law No. 11.638/07, the external audit of the financial statements by an auditor registered before the *CVM* (Brazilian Securities Exchange Commission) also became mandatory for the so called "Large Size Companies" (*Sociedades de Grande Porte*), which in general terms can be defined as those which individually or together with other companies of the same economic group, (a) owned in the previous corporate year assets whose value exceeded R$240,000,000.00; or (b) had gross revenues exceeding R$300,000,000.00.[14]

The law does not make any distinction between corporations (Sociedades *Anônimas*) and limited liability companies (*sociedades limitadas*) when it refers to Large Size Companies. Therefore, one must understand that the term Large Size Companies includes both types of companies.[15]

Taxation

"The following is a list of the Brazilian taxes a joint venture would expect pay during operations, as is the case with any corporate venture be sure to

consult with tax counsel before beginning negotiations:

- Corporate income tax — Corporate income tax is assessed on net profits during a period on an estimated or real monthly basis. The tax is imposed on taxable profits. An additional 10% is assessed on net profit in excess of R$240,000.
- Social contribution on profits (*Contribuição Social sobre o Lucro*, CSL) — The tax is assessed on net profits at 8% for non-financial institutions.
- Withheld income taxed at source (*Imposto sobre a Renda e Provento de Qualquer Natureza descontado na Fonte*, IRF) — Tax withholding is imposed on profits, income, and capital gains. The rates for income from financial applications, royalties for patents and trademarks, technical assistance, cost sharing, and know-how, income and capital gains of foreign residents, and interest is 15%. The rate for payments to unidentified beneficiaries is 35%. There is no withholding on dividends. In financing in excess of 8 years, no income tax is withheld at source. In financing obtained from countries maintaining a tax treaty with Brazil, withholding tax rates vary from 12.5% to 15% if the creditor is domiciled in Brazil.
- Tax on financial operations (*Imposto sobre Operações Financeiras*, IOF) — Assessment is based on credit and exchange operations and insurance premiums. Rates are variable by virtue of the operation.
- Program of Social Integration (*Programa de Integração Social*, PIS) — The tax is assessed on monthly gross operational revenues at a rate of 0.65 per cent.
- Contribution for financing Social Security (*Contribuiço para o Financiamento da Seguridade Social*, COFINS) — Assessment is based on monthly gross invoicing of goods and services at a rate of two per cent.
- Service Tax (*Imposto sobre Serviços*, ISS) — Assessment is based on the price of services rendered. Rates vary from municipality to municipality. The normal rate is five per cent."[16]

Settlement of disputes

In the international sphere, the Code of Civil Procedure determines that Brazilian courts are competent to solve disputes when:

- The defendant, whatever his nationality, is domiciled in Brazil;
- The obligation is to be performed in Brazil; or
- The action results from a fact that occurred or an act performed in Brazil.[17]

These rules, however, can be changed by election of forum or agreement between the parties. The rules relating to the choice of forum in Brazilian private international law are to be found in Decree-Law 4.657 of 4 September 1942, known as the Law of Introduction to the Brazilian Civil Code (*Lei de Introdução ao Código Civil*) and the Code of Civil Procedure. Brazilian courts have exclusive competence to:

- Decide actions relating to real property located in Brazil; and
- Examine and decide probate proceedings of a deceased person's Brazilian estate, even though the deceased was a foreigner and resided outside the country.[18]

Arbitration

"Under Law 9.307 of 23 September 1996, known as the Arbitration Law (*Lei de Arbitragem*), insertion of an arbitration clause (*cláusula arbitral*) in a contract means that the parties freely decided to renounce the jurisdiction of the national judicial courts in case of a dispute. The intention of the parties to introduce arbitration into the agreement will prevail. Article 18 of the Arbitration Law provides that a decision by an arbitration tribunal is not subject to judicial recourse. An arbitration award has the same binding effect as a court decision on the parties and their successors and will be regarded as an enforceable instrument of the sentence as a condemnation to the other party."[19]

Conclusion

Therefore, it is essential that the parties to a joint venture pick the correct corporate form to suit their needs. Further, it is essential to understand what exactly the tax burden will be when doing business in Brazil. However, as in many other countries joint ventures can still represent unique opportunities for the companies that decide to pursue them. It is important to note however, that this guide is just a general overview and as such should not be solely relied upon.

About the Author

Jordana Lück *is the Operations Specialist and Business Development for ARZIKA, LLC. With strength in research and records keeping, she supports the Arzika team on each project with a meticulous attention to detail. Ms. Lück focuses on bringing in new opportunities and contributing to the success of the sales team. She is the ultimate networker and connector.*

Ms. Lück's work history includes such positions as advisor to the Minister and Civil Servant to the Head Chief of the Ministry of Justice and Citizenship for the State of Paraná, Brazil. Ms. Lück was a key player in the collaboration and development of the Minister's strategies. She also developed strategies and talked to voters about political concerns and networked with politicians and all ranks of government officials while working for PMDB in the Governor's 2007 Campaign. Prior to her experience in the Brazilian Government, Ms. Lück worked for a prestigious law firm in Curitiba, Pereira Dabul that worked in conjunction with Deloitte,

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She is fluent in English and Portuguese and has been an interpreter utilizing some of these skills.

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Endnotes

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The Indian Law of Sedition and its Constitutional, International, and Comparative Law Implications

By Megan Anderson

The Indian crime of sedition, originally conceived to prevent uprisings against British rule and then maintained post-independence, continues to compromise the freedom of expression of Indians as well as contradict constitutional and international law. Currently Section 124A under the Indian Penal Code (IPC), the law provides the government broad authority to prosecute those who express governmental opposition:

> Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine[1].

The breadth of the judicial application of 124A has varied in court decisions over time, but the Indian Supreme Court definitively qualified the offense in the landmark 1962 case of *Kedar Nath Singh v. State of Bihar.*[2] There the court held that seditious speech must have the intention or effect of provoking violence.

However, despite the Supreme Court precedent on point, lower courts continue to convict individuals responsible for anti-government expression which is in no way associated with violence.[3] As was the case historically, many of those being convicted of sedition are human rights defenders who voice criticism of government action. Most recently, Dr. Binayak Sen, a prominent human rights defender, was found guilty of sedition for his alleged involvement in Naxalite[4]-affiliated activities. The conviction was a surprise to many in the international legal community, as there appeared to be both a lack of evidence of actual involvement with the group and of the requisite elements of the offense.[5] The Indian Supreme Court does not yet have appellate review authority over the substantive case, but they did have jurisdiction to overturn the lower court's denial of Sen's request for bail.[6]


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The law of sedition has been criticized both because it compromises constitutional guarantees and is inconsistent with international legal standards. Section 19(1)[7] of the Indian Constitution guarantees freedom of expression, including speech. The freedoms of 19(1) are not absolute, as Section 19(2)[8] provides the qualification that speech may be prohibited in carefully enumerated circumstances, including preserving public order. However, 19(2) has been narrowly construed by the Supreme Court.[9] The Constitution was amended to include 19(2) at the impetus of the government of Jawaharlal Nehru, the first and longest serving Prime Minister of India. Provoked by the criticism of his government, Nehru claimed that the restrictions were designed to ensure the social order of the burgeoning nation.[10] He further explained that the specifica-

tion that the restrictions on expression be "reasonable" was a safeguard against governmental abuse. However, Nehru clarified that the amendments were not an endorsement of sedition. In fact, Nehru used the amendments as an opportunity to discuss his disdain for 124A, the supposed protections from which he believed could be accomplished through better methods.[11]

Even as it continues to prosecute individuals for sedition, the Indian Government is aware of contradictions posed by the law of sedition. In response to the ongoing conflict regarding the interpretation of 124A, the 41st Indian Law Commission (ILC) Report included recommendations for curtailment to 124A.[12] Though these recommendations were never implemented, the ILC's call for such a substantial decrease in the maximum punishment demonstrates that it was advocating for the crime of sedition to be of much less significance. In light of the renewed debate regarding 124A following Dr. Sen's conviction, in April of 2011, Indian Law Minister Veerappa Moily requested that the ILC reconsider the issue of sedition once again[13]. The ILC has yet to complete its recommendations on the matter, but Minister Moily's request for such an inquiry is an indication that the Indian Government recognizes the inconsistencies in implementation as increasingly unworkable.

Beyond the constitutional implications of 124A, India is party to several international human rights treaties which include articles on the preservation of freedom of expression. Through both its domestic laws and case law history, India has explicitly and repeatedly voiced its commitment to governing in concordance with relevant international law. While municipal Indian takes precedence and international law does not have official legal standing within the Indian legal system, international law continues to play an important role. With regard to the interaction between international and domestic law, India will adhere to international law except in cases where it is in direct contradiction with national law. International law serves as an interpreter of domestic law; when Indian law is ambiguous, the courts are to interpret it consistent with relevant international. Further, international law that guarantees fundamental rights is to be used to elaborate those rights domestically.

India's constitution contains a provision under Article 51 which explicitly pledges that India will "endeavor to foster a respect for international law and treaty obligations.[14]" Though silent on the procedures of treaty-making, Article 253 makes it clear that parliament has the exclusive ability to implement treaties.[15] In cases dealing with international law, the Supreme Court has repeatedly held that unless there is an irreconcilable conflict, domestic law is to be interpreted consistently with the international law on point.[16] In *Keshavanda Bharti v. State of Kerala*, the court held that per Article 51 of the constitution, "the court must interpret language of the constitution, if not intractable, which is after all a municipal law, in light of the United Nations Charter and the solemn declaration subscribed to be India.[17]"

As it relates to fundamental rights, the Supreme Court has stated the importance of using international conventions to strengthen India's protections. "Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.[18]" In the cited opinion, in which the issue was gender equality in protection from sexual harassment, the court explained that when a right has been internationally recognized as fundamental, India should look to the accepted international standards in determining and interpreting domestic law.

In 1948 India acceded to the United Nations Universal Declaration of Human Rights (UDHR),[19] which while it is a non-binding United Nations (UN) Resolution, it an important international articulation of human rights. Article 19 of the UDHR addresses the essential nature of freedom of expression. "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers[20]." The concept of freedom of speech under UDHR is broad, and states are required to not restrict expression unless it is absolutely necessary. While not technically binding at the time of its original adoption, the UDHR has become the peremptory standard for human rights. The widening reach of 124A, particularly as demonstrated in the cases of Sen and Roy, stands in direct opposition to universally respected standard of UDHR.

Similarly, Article 19(1) of the International Covenant on Civil and Political Rights (ICCPR),[21] ratified by India in 1979, stipulates that "everyone shall have the right to hold opinions without interference[22]." Article 19(2) specifically discusses freedom of speech, and states that "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[23]"

The rights guaranteed under 19(1) and 19(2) are subject only to the limitations of 19(3), which allows restrictions to expression only when they are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.[24]" In practice, 19(3) has been construed narrowly; a strict three--part test has been developed from practice to determine if the circumstances warrant

restricting speech under 19(3). [25] In order to qualify, the restriction must:

> 1) be provided by law. This will be fulfilled only when the law is accessible and "formulated with sufficient precision to allow the citizen to regulate his own conduct[26];" b) the interference must pursue a legitimate aim. The list of aims in the various international treaties is exclusive in the sense that no other aims are considered to be legitimate as a ground for limiting freedom of expression; and c) the interference must be necessary to secure one of those aims. The word 'necessary' means that there must be a pressing social need for the restriction. The reasons given by the state to justify the restriction must be "relevant and sufficient"[27] and the restriction must be proportionate to the aim pursued.

The UN has emphasized the importance of restricting freedom of expression only as a last resort for preserving the best interests of the State, and 19(3) restrictions are therefore only appropriate after the strictest scrutiny.[28]Thus, in order to comply with this binding treaty, the Indian government is required to provide a justification for any and all restrictions of free expression, including alleged sedition. General justifications do not satisfy the requirements of 19(3); the State much demonstrate, in accordance with international standards, the necessity for the restriction and it must also justify the degree of the interference.

In conjunction with ICCPR, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) [29] provides specialized freedoms of expression to ensure scientific and creative development. The ICESCR was implemented as an augmentation to the UDHR. It was thought that in order to fully ensure the effectiveness of UDHR and ICCPR, the economic, social, and cultural rights of the citizens in the state needed to be specifically and individually guaranteed. Expression under this particular covenant is then addressed in terms of the freedom necessary to ensure the rights specifically protected by the convention.

In many cases, the Indian government fails to explain their reasoning for why a prosecution for sedition is necessary in accordance with international standards.

In addition, the International Convention on the Elimination of all forms of Racial Discrimination (CERD) [30], ratified by India in 1968, includes a section on free speech. CERD is designed to eliminate and prevent racism, and to this end, it contains a provision guaranteeing fundamental freedoms to all citizens, regardless of race, color, or ethnicity. Freedom of expression is included among those essential rights[31]. In fact, CERD specifies that in addition to freedom of expression, all people all entitled to freedom of opinion. These dual guarantees are contradicted by India's sedition law, particularly as it is used in practice.

CERD also includes a mandate for limiting speech. Per Article 4 of CERD, all states parties to the convention have the affirmative obligation to censure any expression which propagates racial discrimination. Further, states are instructed to take measures to prevent such expressions before they ever even occur. Thus, states that are party to this convention are not only able, but have the responsibility to restrict racist or discriminatory speech. These restrictions give states another reasonable and internationally condoned platform to ban expression in the best interests of the nation.

In many cases, the Indian government fails to explain their reasoning for why a prosecution for sedition is necessary in accordance with international standards. This is particularly true when the case lacks the incitement of violence made necessary by the 1962 *Singh* decision. ICCPR's Article 19 only allows limitations to freedom of expression when such restrictions are provided by law and are necessary for the respect and protection of others, or for the preservation of national security and public order. While 124A as written could be consistent with these general exceptions, it is more difficult to reconcile with the three-part test that has developed to determine if 19(3) exceptions are warranted. First, the law must be formulated with precision so as to allow the citizen to regulate their own conduct. Sedition as written under 124A and as interpreted decisions such as *Sen*, is not specifically described, and it is especially unclear what would qualify as "disaffection." Sedition as interpreted by the *Singh* decision narrows the concept of sedition by specifying that it is language that has "the pernicious tendency or intention of creating public disorder or disturbance of law and order." According to the Court, this was to be determined based on a reasonable person standard. While this may be a valuable construction from the perspective of the judiciary, it does not necessarily provide the precision necessary for a citizen to regulate determine if his or her speech is unlawful per 124A.

Also, the restrictions must pursue one of the legitimate aims enumerated in the treaty: "respect for the rights and reputations of others, and protection of national security, public order (ordre public), public health or morals.[32]" The offense as conceived by the Singh court is described similarly, as the intention to incite violence or public disturbance would, if proven, fall into one or more of the circumstances enumerated in the treaty. However, as with the first prong of the test, sedition as written in the IPC and as construed in decisions such as *Sen*, in which the *Singh* precedent is largely ignored, is too unspecific to satisfy this requirement. None

of the above aims are specified within the 124A description of the offense, and in the example of *Sen*, the Court makes no connection between the enumerated aims and their decision to limit Dr. Sen's expression. This step of the 19(3) test serves to ensure that blanket restrictions, including those that would shield the government from criticism, are not issued.

Lastly, Article 19 limits must be necessary for some social good, and must also be proportionate to the ends sought by the restriction. Section 124A includes no such provision, and court decisions like *Sen* which revert to the definition of the offense as written in the IPC, often do not explain the necessity or the proportionality of the restrictions. The offense as qualified by *Singh* would be more likely to satisfy this step of the test, as limitations preventing the incitement of violence or similar upheaval are easily conceived as within the best interests of society.

The test, which both narrows and clarifies the restrictions permissible per Article 19, establishes a high burden of proof with regard to permissible restrictions to freedom of speech Without a careful and detailed justification and explanation of the law itself and each invocation of it consistent with Article 19 standards, India's sedition legislation stands in direct contradiction to international standards and practices. India has pledged its intention to adhere to these conventions, the majority of which are binding treaties. This body of international law emphasizes from multiple angles that freedom of expression is for the citizens of party states is essential, and may only be limited when absolutely necessary. Thus, in order to operate consistently with its international obligations, India cannot continue to implement the law of sedition capriciously. Even with the *Singh* limitation, maintaining the offense of sedition is not compatible with international standards. The case law provides consistent examples of the fact that the Singh qualification is often ignored, and the law of sedition is used to repress individuals who voice criticism of the government. Further, the current international conventions provide reasonable qualifications to the freedom of expression when necessary to protect national interests. Limitations meant to ensure the safety and integrity of the party states are built into every treaty that guarantees expression.

While international law does not have any standing within the Indian legal system, it can still serve an important function. As established in *Keshavanda Bharti v. State of Kerala,* international law, in particular that from the United Nations, is to be used as a guide in interpreting domestic law [33]. The *Bharti* court held that when there is an ambiguity in domestic law, it should be interpreted in accordance with international law. International law therefore has a role to play in the Indian legal system. Sedition as described in 124A is ambiguous as a result of being overbroad, and though qualified by the Singh decision, there continues to be confusion regarding the proper interpretation. The discrepancies that exist in the interpretation of the crime of sedition demonstrate the ambiguity of the offense and the clear need for guide in its construal. International law, particularly Article 19 of the ICCPR, should then serve as an interpreter of sedition, and would restrict the offense in favor of freedom of expression.

Further, the Indian Supreme Court determined in *Viskha v. State of Rajastan* that relevant international law is to be used to expand the scope of fundamental rights.[34] Freedom of expression is widely regarded as a fundamental right, and the international treaty bodies on point should therefore serve to enhance this right in Indian domestic policy. Expanding freedom of expression would necessitate the repeal of sedition as written in 124A and as determined in cases such as *Sen*. While the Singh necessity of violence qualification provides reasonable limitations on expression, the law of sedition is still superfluous in the sense that social disturbance and the incitement of violence are prohibited by existing law.

Therefore, while it is the case that Indian law municipal law is given priority over international law, the role of international law is preserved as it pertains to sedition. Sedition legislation is demonstrably ambiguous in both its text and the discrepancies in its interpretation, and international law, per Indian Supreme court decisions on the subject, should serve an interpretative function. In addition, sedition infringes on the fundamental right of freedom of expression, and according to the Indian Supreme Court, international law should be used to enhance such rights. Sedition limits the freedom of expression in contradiction to international law on point, and should therefore be repealed.

Further, many other states party to the ICCPR have repealed their sedition laws. Most recently, in August of 2010, the Ugandan Supreme Court held that the prohibition on sedition was an unconstitutional violation of free speech [35]. Other modern examples of states abandoning sedition legislation include the United Kingdom, which abolished its law in the 2009 Coroners and Justice Act[36], and New Zealand, which similarly repealed their sedition legislation in 2007 through the Crimes (Repeal of Seditious Offenses) Act.[37]

India must follow suit and repeal 124A. As India rapidly develops, it must find a way to protect and promote personal freedoms while also maintaining the cohesion and national integrity necessary to support its political, economic, and social growth. Even without the prohibition on sedition, established ways to reasonably limit speech for the benefit of the nation remain in 19(2) of the constitution and in international instruments to which India is party.[38] The repeal of IPC 124A would indicate practical commitment to democracy while still leaving India with

many legitimate means to limit speech as necessary to protect national interests. While international law does not have binding authority in India, it has been established by the Indian Supreme Court that international treaties are to serve an interpretative function in Indian law. In cases of ambiguity and with regard to fundamental rights, Indian law is to be construed and expanded through relevant treaty bodies. Sedition is both ambiguous and an infringement on the freedom of expression, a fundamental right. It should thus be interpreted according to international standards, which prevent the limitation of freedom of expression except in very limited circumstances. Further, by acting consistently with prevailing international law on the topic of sedition, India would contribute positively to the development of international law regarding freedom of expression. In addition, ensuring the expression of its citizens could help India to preserve its economic relationships with nations that value freedom of expression as well as India's status as a burgeoning democracy.

About the Author

Megan Anderson *is currently a second-year law student at the University of Michigan Law School and a graduate of Earlham College. She completed her research on the Indian law of sedition as a student and an International Public Interest Fellow (IPILF) at Wayne State University Law School. As an IPILF, Megan worked with People's Watch, an organization in Madurai, India, during the summer of 2011 where she assisted with human rights monitoring. Prior to law school, Megan served two terms as an AmeriCorps VISTA, first with Habitat for Humanity and then with Iowa Legal Aid.*

Endnotes

1 Indian Penal Code, Pen. Code 124(a), 1860, *available at* http://www.ipc.in/.

2 *Kedar Nath Singh v. State of Bihar*, 1962 AIR 955.

3 *Sen v. Chattisgarh Government*, AIR 2010 Chh 182.

4 Naxalite is an umbrella term that refers generally to militant communist groups within India. Many recent acts of violence in India have been attributed to the Naxalites. *See generally A Spectre Haunting India*, The Economist, August 17, 2006, accessed at http://www.economist.com/node/7799247 (for an overview of the Naxalites in India); *see also* Rajat Kujur, *Naxal Movement in India: A Profile*, Institute of Peace and Conflict Studies, 2008, *available at* http://www.ipcs.org/research-paper/india/naxalite-movements-of-india-a-profile-15.html.

5 Indra Sinha, *A Plea for Binayak Sen,* The Guardian, Apr. 14, 2011, http://www.guardian.co.uk/commentisfree/libertycentral/2011/apr/14/binayak-sen-india-supreme-court-sedition

6 Rajesh Kumar Singh, *Supreme Court grants bail to Binayk Sen*, Reuters, Apr. 15, 2011, http://in.reuters.com/article/2011/04/15/idINIndia-56359820110415

7 Indian Const., 1950, available at www.*indiacode.nic.in/coiweb/welcome.html.*

8 Indian Const., 1950, available at www.*indiacode.nic.in/coiweb/welcome.html.*

9 *Sakal Papers Ltd v. Union of India,* 1962 AIR 305 (in which the Supreme Court held that 19(2) limitations to 19(1) are strictly limited those enumerated in the amendment).

10 Siddharth Narrain, *The Chilling Effect of Sedition Laws in India*, Vol. XLVI Economic and Political Weekly No. 8, 33, 37 (Feb. 19, 2011).

11 *Id.* at 35.

12 The Law Commission of India, 41st Law Commission Report, 1969, at 35, available at http://lawcommissionofindia.nic.in/1-50/Report41.pdf.

13 *Id.* at 36.

14 India Const. art. 51, § C.

15 India Const. art. 253.

16 Amal K. Ganguli, *Interface Between International and Municipal Law: Role of the Indian Judiciary*, India and International Law, 11, 28 (Bimal N. Patel, ed. 2008).

17 *Keshavanda Bharti v. State of Kerala*, (1973) A.I.R (SC) 1461 (India); *but see* ADM *Jabalpur v. Shivkant Shukla*, (1976) 2 S.C.C. (SC) 521 (India) (holding that it was permissible to suspend civil rights during national emergencies despite the fact that this would be in direct contradiction with international treaties to which India was party. However, subsequent case law has developed consistent with *Bharti*.)

18 *Viskha v. State of Rajastan*, (1997) 6 S.C.C. (SC) 241 (India).

19 Universal Declaration on Human Rights, G. A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

20 *Id*. at 19(1).

21 International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

22 *Id.* at Art. 19(1).

23 *Id*. at Art. 19 (2).

24 *Id*. at Art. 19 (3).

25 Agnes Callamard, Article 19 Executive Director, *Expert Meeting on the Links Between Article 19 & 20 of the ICCPR Freedom of Expression and Advocacy of Religious Hatred the Constitutes Incitement to Discrimination, Hostility, or Violence,* October 2—3 2008, Geneva.

26 Agnes Callamard, Article 19 Executive Director, *Expert Meeting on the Links Between Article 19 & 20 of the ICCPR Freedom of Expression and Advocacy of Religious Hatred the Constitutes Incitement to Discrimination, Hostility, or Violence,* October 2—3 2008, Geneva., at 5 (quoting Joseph Burslyn, Inc. v. Wilson, 343 U.S. 495, 504-505 (1952).

27 *Id.* at 5-6 (quoting *The Sunday Times v. United Kingdom*, 26 April 1979, App. No. 6538/74, para. 49 (European Court of Human Rights)).

28 *Id*. at 6.

29 International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

30 International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No.

14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969.

31 *Id.* at Art. 5(d)(viii).

32 Callamard, *Supra* note 25, at 4.

33 Keshavanda Bharti v. State of Kerala, (1973) A. I. R (SC) 1461 (India); *but see* ADM Jabalpur v. Shivkant Shukla, (1976) 2 S. C. C. (SC) 521 (India) (held that it was permissible to suspend civil rights during national emergencies despite the fact that this would be in direct contradiction with international treaties to which India was party. However, subsequent case law has developed consistent with *Bharti*.)

34 *Viskha v. State of Rajastan,* (1997) 6 S. C. C. (SC) 241 (India).

35 *Uganda Court Overturns Law against Sedition*, Jurist, August 25, 2010, accessed at http://jurist.org/paperchase/2010/08/uganda-court-overturns-law-against-sedition.php.

36 Coroners and Justice Act, 2009, available at: http://www.legislation.gov.uk/ukpga/2009/25/contents.

37 Crimes (Repeal of Seditious Offenses) Act 2007, available at: http://www.legislation.govt.nz/act/public/2007/0096/latest/whole.html#DLM981001.

38 Both the ICCPR, *supra note* 20, and the Convention to Eliminate all Forms of Racism (CERD), include guidelines for necessary limitations on speech).

Event Calendar:
Meetings, Seminars, & Conferences of Interest

February 1-7, 2012
2012 ABA Midyear Meeting
New Orleans, LA
http://apps.americanbar.org/intlaw/calendar/home.html

February 2, 2012
Leading Figures in International Dispute Resolution Series: A Conversation with Thomas Buergenthal
Washington, D.C,.
http://www.asil.org/activities_calendar.cfm?action=detail&rec=228

February 3, 2012
Emerging Issues in International Humanitarian Law
Santa Clara, CA
http://www.asil.org/events-il-calendar.cfm?mode=all&page=4

February 3, 2012
Our Courts and the World: Transnational Litigation and Civil Procedure
Los Angeles, CA
http://www.swlaw.edu/academics/cocurricular/journaloflaw/ljsymp_transnational

February 6- March 2, 2012
United Nations Regional Course in International Law
Addis Ababa, Ethiopia
http://www.un.org/law/rcil/

February 11, 2012
Yale Journal of International Law Conference on ICSID's Article 52 Review and Annulment Procedure
New Haven, CT
http://www.law.yale.edu/news/2012YJILconference.htm

February 14, 2012
The Impact of the Arab Spring Throughout the Middle East and Northern Africa: Building the Rule of the Law and the Role of the International Community in Domestic Conflicts
Washington, D.C.
http://www.wcl.american.edu/secle/founders/2012/20120214a.cfm

February 16, 2012
Forensic Evidence in the Fight Against Torture
Washington, D.C.
http://www.wcl.american.edu/secle/founders/2012/20120215.cfm

February 23, 2012
2012 ITechLaw Annual Asian Attorneys Conference Bangalore, India
Bangalore, India
http://www.itechlaw-india.com/

February 23, 2012
Looking to the Future - Practising Law in Ireland
Dublin, Ireland
http://www.ibanet.org/Conferences/conferences_home.aspx

February 24, 2012
The European Sovereign Debt Crisis: A Critical Assessment of the Euro and the EMU
Iowa City, IA
http://www.uiowa.edu/~tlcp/

February 27, 2012
Atala v. Chile: Same-Sex Families and the Best Interest of the Child under International Law
Washingto, D.C.
http://www.asil.org/events-il-calendar.cfm?mode=all&page=3

February 29- March 3, 2012
Inter Pacific Bar Association 22nd Annual Meeting & Conference
New Delhi, India
http://www.americanbar.org/content/dam/aba/marketing/international_law/mailer.authcheckdam.htm

March 5, 2012
Federal Court Litigation CLE Practicum
Las Vegas, NV
http://www.aila.org/content/default.aspx?docid=37665

March 5-6, 2012
17th Annual International Wealth Transfer Practice Conference
London, England
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=6D05EC86-A447-4618-ACFB-5359B6EFE33A

March 8-9, 2012
IBA International Arbitration Day
Stockholm, Sweden
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=eb8bde10-085a-4e7a-9a0b-e410249d0031

March 9-10, 2012
The Indian Story in Global Mergers and Acquisitions
Mumbai, India
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=b483b043-f77d-4eb4-95a6-a9b76407d2bc

March 12-13, 2012
13th Annual International Conference on Private Investment Funds
London, England
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=8C0D676D-41E5-43A2-8BCF-BA4E911BEFCE

March 13-14, 2012
10th Annual IBA Anti-Corruption Conference
Paris, France
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=C157AFC4-CC71-4CBF-B869-BEAB91040D8F

March 14-16, 2012
Biannual IBA Latin American Regional Forum Conference
Bogota, Colombia
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=0F2DBE69-E98D-4C34-8BEA-1FF7138700E8

March 16, 2012
AILA 2012 Chicago Chapter Midwest Regional Conference
Chicago, IL
http://www.aila.org/content/default.aspx?docid=37079

March 28, 2012
International Seminar on Consumer Litigation in Japan, China & the U.S.A.
TBA
http://www.americanbar.org/groups/international_law/events_cle.html

March 28-29, 2012
12th Annual Tax Planning Strategies - U.S. and Europe
Vienna, Austria
https://meetings.abanet.org/meeting/tax/VIENNA2012/

March 29-30, 2012
The Paradigm of Employment Law
New York, NY
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=E9650020-BD87-400A-B891-4A2F9C178133

March 30, 2012
2012 Spring CLE Conference, "U.S. Immigration Policy & Practice: The Face We Show To The World"
Washington, D.C.
http://www.aila.org/content/default.aspx?docid=32335

April 12-14, 2012
Africa and International Law: Taking Stock and Moving Forward
Albany, NY
http://www.albanylaw.edu/sub.php?navigation_id=2067

April 13, 2012
Ending Demand for Human Trafficking
Washington, D.C.
http://www.wcl.american.edu/secle/founders/2012/20120413a.cfm

April 15, 2012
The United States and its Place in the International Arbitration System of the 21st Century: Trendsetter, Outlier or One in a Crowd?
Atlanta, GA
http://arbitrateatlanta.org/events/the-united-states-and-its-place-in-the-international-arbitration-system-for-the-21st-century/

April 16-17, 2012
8th Biennial Project Finance Conference: Project finance 2012 - the pathway to the future
London, England
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=ab175a6e-f6cf-4d55-be0f-e9294bf467d8

April 17-21, 2012
2012 IBA Spring Meeting
New York, NY
http://apps.americanbar.org/intlaw/calendar/home.html

April 18-21, 2012
AILA Rome District Chapter 2012 Spring CLE Conference
Bucharest, Romania
http://www.aila.org/content/default.aspx?docid=37613

April 22-25, 2012
Biennial Conference of the Section on Energy, Environment, Natural Resources and Infrastructure Law
Santiago, Chile
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=972EEF64-F614-41DD-8A26-85EDFB7A09FC

April 26-27, 2012
4th Annual Real Estate Investments Conference: Trends, Opportunities and New Frontiers
Barcelona, Spain
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=ECFE5626-B8A3-4874-A027-5078339652C8

April 26-27, 2012
5th World Women Lawyers' Conference
London, England
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=3942bac1-12a2-4ccd-b0be-4253a441ad68

May 1, 2012
19th Congress of the International Society for Military Law and the Law of War
Quebec, Canada
http://www.soc-mil-law.org/

May 3-4, 2012
Mining Taxation and Financing: The Essential "How To" Conference
Toronto, Canada
http://www.int-bar.org/conferences/conf430/

May 4-6, 2012
IBA Legal Business Conference
Vilnius, Lituania
http://www.ibanet.org/conferences/conferences_home.aspx

May 7-8, 2012
23rd Annual Communications and Competition Conference
Lisbon, Portugal
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=84fe1e97-094e-4804-93f9-ea2bfdbc3290

May 9-11, 2012
Annual Litigation Forum: Multi-Jurisdictional Disputes: The view from inside the corporation
New York, NY
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=6D8B354A-B461-4480-8DA5-E5FFDF5F31A5

May 11, 2012
Leading Figures in International Dispute Resolution Series: A Conversation with Charles N. Brower
Washington, D.C.
http://www.asil.org/activities_calendar.cfm?action=detail&rec=233

May 16-18, 2012
Internal Corporate Investigations, 2012
San Francisco, CA
http://www.americanbar.org/calendar/2012/05/internal_corporateinvestigations2012.html

May 19-May 26, 2012
1st Humanitarian Public Law Lawyers' Conference: Lawyers in the 21st Century
Nicaragua
http://www.fsconferences.com/

May 20-22, 2012
18th Annual Global Insolvency and Restructuring Conference
Helsinki, Finland
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=4254BD07-4586-4846-B3C0-22F361D122B9

May 22-23, 2012
28th Annual IBA/IFA Joint Conference
Washington, D.C.
http://www.franchise.org/IndustrySecondary.aspx?id=50660

May 23-25, 2012
29th International Financial Law Conference
Istambul, Turkey
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=1DF470F2-EA54-440F-A6ED-2E4B103DB704

May 29-30, 2012
International Maritime Law Conference
Copenhagen, Denmark
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=85ceea7a-352d-4920-9382-4ef5eabbdf24

May 29-30, 2012
Third Biennial Technology Law Committee Conference
Amsterdam, Netherlands
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=3B06BA68-1273-4D61-ABA9-AD1547535595

May 30-31, 2012
7th Annual IBA Bar Leaders' Conference
The Hague, Netherlands
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=0e925da1-5813-4320-a9b5-73816c92e61a

May 31- June 1, 2012
Jus Post Bellum Project Launch Conference
The Hague, Netherlands
http://juspostbellum.com/resources/1/Launch%20Conference%20Call%20for%20Papers%20FINAL.pdf

June 3- 9, 2012
IGLP:The Workshop
Cambridge, MA
http://www.harvardiglp.org/iglp-the-workshop/

June 10-13, 2012
23rd Annual Conference on the Globalisation of Investment Funds
Boston, MA
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=9258E2AB-BB7E-4793-955A-B815F4980CFE

June 13-14, 2012
11th Annual International Mergers and Acquisitions Conference
New York, NY
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=78E6B5E4-4406-4BB5-B326-4DDBCB66BC27

June 14-15, 2012
IBA Antitrust Conference
Madrid, Spain
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=292F1572-8DAC-4482-BA0D-EFB3909A4202

June 13-15, 2012
5th Annual U.S. - Latin American Tax Planning Strategies Conference
TBA
http://www.americanbar.org/groups/taxation/events_cle.html

June 13-16, 2012
AILA Annual Conference
Nashville, TN
http://www.aila.org/content/default.aspx?docid=29443

June 20-22, 2012
Managing client relationships: A multi-generational approach
Munich, Germany
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=FB73FC69-8F94-4FF3-A8D0-29E66DB2E569

June 21-22, 2012
2nd Mediterranean Conference
Barcelona, Spain
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=A74465BF-9F88-4CFC-8A37-2B5D9AC1CF85

July 9, 2012
Annual International Conference on Law, Regulations and Public Policy (LRPP 2012)
Singapore
http://www.law-conference.org/

August 2-7, 2012
ABA Annual Meeting
Chicago, IL
http://www.americanbar.org/calendar/annual.html

September 14-15, 2012
16th Annual Competition Conference
Florence, Italy
http://www.ibanet.org/Article/Detail.aspx?ArticleUid=8801B724-EF43-4083-A508-3A47F4D84C27

October 16-20, 2012
2012 Fall Meeting
TBD
http://www.americanbar.org/groups/international_law/events_cle.html

Other ABA Section of International Law Events
http://www.abanet.org/intlaw/calendar/home.html

Other AILA events
http://www.aila.org/content/default.aspx?bc=1010

Other ASIL Events
http://www.asil.org/events/calendar.cfm

Other IBA Events
http://www.ibanet.org/conferences/Conferences_home.cfm

Section Council Meeting Minutes

A meeting of the Council ("Council") of the International Law Section ("Section") of the State Bar of Michigan ("State Bar" or "SBM") was held on November 16, 2011, at Ginopolis Restaurant, 27815 Middlebelt Road, Farmington Hills, MI 48334.

The following officers of the Council were present in person: Margaret A. Dobrowitsky, Chairperson; Jeffrey F. Paulsen, Chairperson-Elect; and A. Reed Newland, Secretary. The following voting members of the Council were present in person: Debra Clephane, Linda Armstrong, Gregory Fox, Eve Lerman, Aaron Ogletree, Sonia Salah and Daphne Short. Other Members of the Section also attended the meeting. Names of each of the attendees will be filed with these meeting minutes.

Call to Order

Margaret A. Dobrowitsky, Chairperson of the Section, called the meeting to order at approximately 4:30 pm.

Approval of Agenda

The Chairperson circulated an agenda for the meeting, which was approved as presented.

Introductions

At the Chairperson's request, attendees introduced themselves and described their professional affiliations and interest in international law matters.

Notice and Quorum

The Secretary presented a written notice of the meeting that was mailed or delivered to all members of the Council and to Members of the Section in accordance with the Section's Bylaws. The Secretary said that the notice will be filed with the minutes of the meeting.

Approval of Meeting Minutes

The Secretary circulated a draft of the minutes of the Council meeting held on May 18, 2011. Upon motion made and supported, the Council approved of the minutes without correction. The Secretary reported that approved minutes of the Section Council meetings are regularly posted on the Section website at www.michbar.org and that the approved minutes would also be posted to the Section website.

Plaque Presentation to Past President

The Chairperson presented a Plaque to Past Chairperson (2010-2011) Cameron DeLong for his long and dedicated service as Chairperson, Officer and Council member, and expressed her hope that he would continue to provide the Section the benefits of his experience for years to come.

Treasurer's Report

In the absence of the Treasurer, the Secretary, A. Reed Newland, presented the unaudited financial statement of the Section for the twelve months ended September 30, 2011 and the related detailed trial balance for the same period, prepared by the Finance & Administration Division of the State Bar. As of the twelve months ending September 30, 2011, the revenues of the Section were $12,410.00, and expenses for the same time period were $15,881.79, resulting in Net Income (Loss) of ($3,471.79). The Section's ending fund balance as of September 30, 2011 was $18,051.59. Mr. Newland pointed out several errors were made but corrected the same day by the SBM's Finance & Administration Division in the detailed trial balance for the same period. None of these affected the Section's financial picture as otherwise presented. Upon motion made and supported, Council approved of the financial statements. The Chairperson noted that the Section's financial statements are generally reprinted in the *Michigan International Lawyer.*

Chairperson's Report

The Chairperson introduced the Officers, Council members, Committee Chairpersons and Law Student Representatives. The Chairperson reported that she was pleased with the attendance at Section meetings this year and hoped that ILS members would continue to attend Council meetings and programs organized by the Section. She encouraged members to invite other members to also attend.

The Chairperson noted that the Executive Committee has had discussions about raising revenue by attempting to increase the number of Section members or potentially raising membership dues (currently at $30 per year) as well as discussions on how to lower current Section expenses. It was agreed that there would be further discussion at later Council meetings.

Michigan International Lawyer

Cameron DeLong reminded the members present at the meeting of the Section's publication entitled *Michigan International Lawyer* ("MIL"), and of the importance of keeping the pipeline for articles of interest flowing, primarily from the law firms, presenters, Council members and, of course, all Section members.

Committee Reports

The Chairperson invited the Section's Committee chairs to report on their activities. Aaron Ogletree, co–chair of the International Trade Committee (ITC), reported on the upcoming *International Bridge Debate* program that the Section was co-sponsoring with Wayne State Law School, to be held Tuesday, November 29, 2011. Mr. Ogletree reported on other activities of the ITC, including the presentation by Frank Walwyn of Weir Foulds on *Multi-Jurisdictional Litigation*, scheduled in conjunction with the Section's next quarterly meeting on Wednesday, January 25, 2012, @ Butzel Long's offices in downtown Detroit. The Chairperson noted that committees were free to discuss and implement programming, and that it was anticipated that the committees would request funds to support future programs that support the Section's goals. It was noted that the use of Section funds had to be approved by the Section Council or if needed the Section Executive Committee due to the timing of a funding request. It was also noted that Section committees do not have separate standing and that they operate under the auspices of the Section and the SBM.

SBM-ILS LinkedIn Group

Jeffrey Paulsen and Sonia Salah updated the Section on the establishment and growth of the Section's LinkedIn Group as a means of increasing and improving communication among Section members. Over 90 members have joined since it was organized. The Chairperson thanked both Mr. Paulsen and Ms. Salah for their continuing efforts to promote the site.

New Business

The Council and Section's members discussed several suggestions to encourage the professional development of some of the Section's younger members and encourage more people to join the Section: a Law Student Reception, a Gala event, a Career Fair and a Mentorship Program, were among the ideas mentioned. Although no specific actions were taken, the Section welcomes these initiatives and the opportunities to support them financially and encouraged the members willing to get involved to contact the Officers or Council members for more follow up. The Section also anticipates further discussions on these topics.

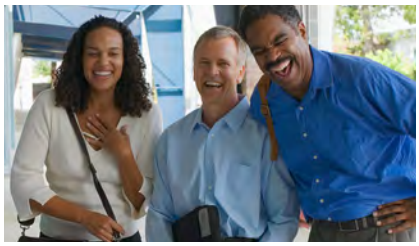
The Chairperson also invited the Section's members' ideas on ways for the Section to lower its expenses, including making the Section's newsletter electronic. Various ways to canvass the membership for ideas were discussed, and included surveying the membership to learn whether they would accept a dues increase or prefer that the Section reduce its expenses. Harvesting ideas from other Sections' experiences was also discussed, although no specific actions were taken as a Section.

Adjournment

There being no further business to come before the Council, the Chairperson adjourned the meeting.

Respectfully submitted,

A. Reed Newland, Secretary
International Law Section
State Bar of Michigan



Invite someone you know to join the fun.

Invite someone
to join the section.

Section membership forms can be found at

http://www.michbar.org/sections

Treasurer's Report

For the three months ending December 31, 2011

	Current Activity December	Year-to-date December
Revenue:		
International Law Section Dues	840.00	11,855.00
International Stud/Affil Dues	10.00	95.00
Total Revenue	850.00	11,950.00
Expenses:		
ListServ	25.00	75.00
Newsletter		1,135.22
Misc.	59.50	59.50
Total Expenses	84.50	1,269.72
Net Income	765.50	10,680.28
Beginning Fund Balance: Fund Bal-International Law Sec		18,051.59
Total Beginning Fund Balance		18,051.59
Ending Fund Balance	765.50	28,731.87

Nominations Open for Major State Bar Awards

Nominations are now open for major State Bar of Michigan awards that will be presented at the September 2012 Annual Meeting in Grand Rapids.

The **Roberts P. Hudson Award** goes to a person whose career has exemplified the highest ideals of the profession. This award is presented periodically to commend one or more lawyers for their unselfish rendering of outstanding and unique service to and on behalf of the State Bar, given generously, ungrudgingly, and in a spirit of self-sacrifice. It is awarded to that member of the State Bar of Michigan who best exemplifies that which brings honor, esteem and respect to the legal profession. The Hudson Award is the highest award conferred by the Bar.

The **Frank J. Kelley Distinguished Public Service Award** recognizes extraordinary governmental service by a Michigan attorney holding elected or appointive office. Created by the Board of Commissioners in 1998, it was first awarded to Frank J. Kelley for his record-setting tenure as Michigan's chief lawyer.

The **Champion of Justice Award** is given for extraordinary individual accomplishments or for devotion to a cause. No more than five awards are given each year to practicing lawyers and judges who have made a significant contribution to their community, state, and/or the nation.

The **Kimberly M. Cahill Bar Leadership Award** was established in memory of the 2006-07 SBM president, who passed away in January 2008. This award will be presented to a recognized local or affinity bar association, program or leader for excellence in promoting the ideal of professionalism or equal justice for all, or in responding to a compelling legal need within the community during the past year or on an ongoing basis.

The **John W. Cummiskey Pro Bono Award**, named after a Grand Rapids attorney who was dedicated to making legal services available to all, recognizes a member of the State Bar who excels in commitment to pro bono issues. This award carries with it a cash stipend to be donated to the charity of the recipient's choice.

The **John W. Reed Michigan Lawyer Legacy Award** was introduced in 2011 and is named for a longtime and beloved University of Michigan Law School professor and Wayne State University dean. This award will be presented periodically to a professor from a Michigan law school whose influence on Michigan lawyers has elevated the quality of legal practice in the state.

All SBM award nominations are due by 5 p.m. Monday, April 2, 2012.

The **Liberty Bell Award** recipient is selected from nominations made by local and special-purpose bar associations. The award is presented to a non-lawyer who has made a significant contribution to the justice system. The deadline for this award is Monday, May 14, 2012.

An awards committee co-chaired by former SBM President Nancy Diehl and SBM President-Elect Bruce Courtade reviews nominations for the Roberts P. Hudson, John W. Reed, Champion of Justice, Frank J. Kelley, Kimberly M. Cahill, and Liberty Bell awards. The SBM Pro Bono Initiative Committee reviews nominations for the Cummiskey Pro Bono award. These recommendations are then voted on by the full Board of Commissioners at its June meeting.

Last year's non-winning nominations will automatically carry over for consideration this year. Nominations should include sufficient details about the accomplishments of the nominee to allow the committees to make a judgment.

Any SBM member can nominate candidates for awards. To apply online or download application forms visit the awards and events page. Cummiskey Award nominations can be directed to Robert Mathis at rmathis@mail.michbar.org; all other nominations can be submitted to Joyce Nordeen, State Bar of Michigan, 306 Townsend St., Lansing, MI 48933 or jnordeen@mail.michbar.org. For more information call (517) 346-6373 or (800) 968-1442, or fax (517) 482-6248.

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