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IN THIS ISSUE

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INTERNATIONAL ARBITRATION

Third Party Funding in International Arbitration – Recent Developments

2016 has been an eventful year for third party funding. In this article, we look back at key developments in Singapore, Hong Kong, and England.

Earlier this year, we reported on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016 in Singapore (see Lawflashes here and here, respectively). The draft Bill is now due to for a second reading in the Singapore Parliament. Similar steps to put third party funding onto a statutory footing are being taken in Hong Kong. Meanwhile, in England, where third party funding is already permitted, the English Court of Appeal handed down an important decision on indemnity costs orders against funders.

Singapore: Civil Law (Amendment) Bill 2015 and Civil Law (Third Party Funding) Regulations 2016

The first reading of the Bill took place on 7 November 2016. The Bill is due for its second reading at Parliament's next available sitting. We expect that the Bill will be passed into law and will come into effect sometime in 2017.

Hong Kong: Law Reform Commission recommends allowing third party funding in arbitration and associated proceedings

On 12 October 2016, the Hong Kong Law Reform Commission released a report recommending clarification of the law with respect to third party funding of arbitration and associated proceedings. The report recommends that traditional principles of maintenance and champerty – which preclude third party funding in litigation save for in limited circumstances – should not apply in the context of arbitration and associated proceedings under the Hong Kong Arbitration Ordinance.

The report also makes the following recommendations:

- Clear standards for third party funders operating in Hong Kong should be developed, with a 'light touch' approach to regulation to operate for an initial period of three years.
- Third party funders should be required to comply with a Code of Practice to be issued by a body authorised under the Arbitration Ordinance after a public consultation has taken place.
- The Advisory Committee on the Promotion of Arbitration should be nominated by the Secretary for Justice to be the Advisory Board to monitor third party funders and the implementation of the Code of Practice.
- Following an initial period of three years of operation of the Code of Practice, the Advisory Committee is to issue a report reviewing its operations and make recommendations to update ethical and financial standards set out in the Code of Practice.
- Consideration should be given to whether exceptions to the principles of maintenance and champerty ought to extend to mediation within

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the scope of the Hong Kong Mediation Ordinance.

- There is no need to grant arbitral tribunals the power to order security for costs against third party funders because current power to order a party to give security for costs affords adequate protection.

England & Wales: Indemnity costs awarded against third party litigation funders

In *Excalibur Ventures LLC v. Texas Keystone Inc.* [2016] EWCA Civ 1144 (*Excalibur*) (decided on 18 November 2016), the English Court of Appeal has held that in cases involving a commercial funder seeking to make a return on its investment to fund a litigant's legal costs, the commercial funder will be liable to pay the unfunded litigant's costs on an indemnity basis in the event the court orders indemnity costs against the funded litigant.

The English courts have in earlier cases drawn a distinction between 'pure funding' and 'commercial funding', the difference being that pure funders are those whose primary motivation is to allow the funded party access to justice, whereas commercial funders are those who are seeking to gain financially from the litigation. Pure funders will not ordinarily be subject to orders to pay the costs of the successful unfunded party, while commercial funders, to the extent they are the 'real parties' to the litigation, are potentially subject to such orders.

Excalibur was a case of commercial funding. The plaintiff, Excalibur Ventures, had claimed an interest in oil fields in Kurdistan said to be worth US$1.6 billion against the defendants, Texas Keystone Inc. (Texas) and Gulf Keystone Petroleum Limited and other Gulf Keystone companies (Gulf). The plaintiff would have been unable to pursue the litigation without the help of third party funding from members of The Association of Litigation Funders of England and Wales (the ALF). The funders provided £14.25 million to the plaintiff to cover lawyers' fees and £17.5 million to cover security for costs which the plaintiff was required to satisfy.

At trial, the plaintiff's claim failed on every point. In his decision, the trial judge noted that the plaintiff's claims were entirely speculative and hopeless, and he objected to the egregious manner in which the litigation was conducted by the plaintiff. For those reasons he ordered costs against the plaintiff on an indemnity basis. This meant that the £17.5 million which had been provided for security was inadequate and the trial judge thus ordered that a further £5.6 million be provided by way of security.

The question then became whether and to what extent costs could be ordered against the plaintiff's funders. The rule in *Arkin v. Borchard Lines Ltd.* [2005] 1 WLR 3055 (*Arkin*), states that funders' liability to pay the successful unfunded party's costs is capped at the funding provided by the funders. The trial judge considered that the funders' provision of sums to cover security for costs was an investment in the litigation and held that the £17.5 million so provided would count towards the cap in *Arkin*.

Recent Developments in Gambling in Asia

Exemptions from the Remote Gambling Act

Online betting has in limited circumstances become permitted in Singapore under strict conditions, subsequent to the Remote Gambling Act (the Act) coming into force in 2015 which generally bans all online gambling in Singapore. The Ministry of Home Affairs (MHA) has exempted two non-profit operators, Singapore Pools and Singapore Turf Club, from the Act.

Singapore Pools and Singapore Turf Club offer online gambling for existing games and lotteries, and launched their online services in October 2016 and November 2016 respectively. Singapore Pools has lotteries for '4D' and 'Toto', and online betting for football and Formula 1. Singapore Turf Club offers horse-race betting online. Neither operator is allowed to offer new products without prior approval and 'casino-style' games such as poker will not be available. The operators will have to implement social safeguards such as age limits and ensure that participants are not gambling on credit. The operators are also subject to regular audits and inspections.

Although exemptions have been granted to Singapore Pools and Singapore Turf Club, it is doubtful that any other operator will be granted similar exemptions. MHA has stated that the criteria and conditions for being exempted (including being a non-profit Singapore-based entity, a history of contributions to social or charitable causes in Singapore and having a good track record of compliance with Singapore's legal requirements) are very stringent and it does not expect many other operators to qualify

New Singapore casino licences

In 2007, Singapore issued a casino licence respectively to Las Vegas Sands Corp and to Genting Singapore Plc to operate one gaming resort each, namely Marina Bay Sands and Resorts World Sentosa, respectively. The exclusivity period for these licences expires in 2017 and the Singapore government is unlikely to grant new casino licences post-2017.

Mr. Lee Yi Shyan, Senior Minister of State for Trade and Industry, said in Singapore's parliament in May 2015 that Singapore currently had 'no plans' to offer additional casino licences when the moratorium on such licences expires. Instead, Singapore will focus on working with Marina Bay Sands and Resorts World Sentosa to ensure their attractions and services continue to meet the needs of Singaporeans and enhance the country's tourism appeal.

Ratings agency Fitch Ratings also commented in December 2015 that it did not expect Singapore to grant new casino licences due to a potential increase in 'problem gaming' among the local population, and the muted outlook for inbound tourism.

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GAMING AND GAMBLING

Crackdown on cross-border gambling in Asia

There has been a recent spate of crackdowns on cross-border gambling across Asia.

In November 2016, Chinese police arrested 94 members of a US$72 billion cross-border gambling ring that illegally brought more than 400 gamblers to Myanmar and Laos and involved more than 500 billion yuan. The Chinese government has also made a number of arrests accusing people of luring Chinese citizens to gamble overseas in 2016. Chinese laws prohibit casinos from advertising in mainland China. However, operators have sought to circumvent this limitation by promoting the resorts where the casinos are located. In October [2016], the Chinese authorities arrested 13 South Korean casino managers and several Chinese agents suspected of luring people from China to gamble in South Korea. The Chinese authorities also detained 17 employees of Australia' top casino operator Crown Resorts and subsequently formally arrested three of them on suspicion of having committed gambling-related offences.

In November 2016, authorities in the Philippines arrested more than 1300 Chinese nationals who were allegedly involved in illegal online gambling activities and who were also suspected to have contravened visa limitations.

In October 2016, the Inspector-General of Police of Malaysia, Tan Sri Khalid Abu Bakar, issued a public statement that even though Singapore had eased its online gambling ban, online gambling remains illegal in Malaysia and any person in Malaysia who registers with a Singapore online gambling site will be in contravention of Malaysian law. He also stated that the police are in the process of advocating stricter gambling laws.

Evidently, illegal gambling remains a problem in Asia. MHA has stated that a complete ban on remote gambling drives demand and activities underground, and may create larger incentives for criminal syndicates to target Singapore. By granting exemptions to Singapore Pools and Singapore Turf Club from the Act, MHA thus aims to reduce the allure of illegal gambling in Singapore. Notwithstanding that online gambling in Singapore via the two operators' online portals is now legal, punters should keep in mind before placing a bet overseas that online gambling nevertheless remains illegal in many other countries.

It's a Wrap – The Year in India That Was

From the Startup India campaign launched in January 2016 to substantial provisions of the Insolvency and Bankruptcy Code coming into force in December 2016, the legal landscape in India has witnessed some crucial developments this last year. In this article, we describe briefly what we consider to be some of the key legal and regulatory developments in India in 2016.

Arbitration Act

The Arbitration and Conciliation (Amendment) Act, 2015, published in the official gazette on January 1, 2016, amended the Arbitration and Conciliation Act, 1996 to introduce substantial changes. The amendment provides clarity on the jurisdiction of Indian courts with respect to foreign seated international commercial arbitration and the enforcement of foreign arbitral awards. In respect of international commercial arbitrations seated in India and domestic arbitrations, the amendment provides for, among others, a fast-track procedure for resolution of the dispute in the case of a single arbitrator, specific time limits for the conclusion of arbitration, and includes disclosure and requirements for neutrality of the arbitrator. The amendment also narrows the scope of intervention by Indian courts.

Startup India campaign

To encourage Indian entrepreneurs to conduct business in India rather than move out, the government launched the Startup India Action Plan[1] in January 2016. The plan provides various incentives to startups, which include (a) self-certification as to compliance with specified labor and environmental laws; (b) exemption from payment of income tax for three years, provided no dividend is distributed by the startup; (c) exemption from capital gains subject to certain conditions; (d) fast-track examination of patent applications; (e) setting up of a startup fund to provide funding support; and (f) industry-academia partnership and incubation for startups in India. The Startup India campaign is part of the bigger Make in India campaign launched by the government in 2014.

Competition Act – merger control thresholds

In 2011, the government had exempted transactions from pre-merger approval by the Competition Commission of India if (a) the value of assets of the target entity in India was not more than INR 250 crores (US$36.7 million);

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[1] http://startupindia.gov.in/uploads/pdf/Action%20Plan.pdf.

or (b) the turnover of the target entity in India was not more than INR 750 crores (US$110.1 million). This exemption was valid for five years from March 4, 2011 to 3 Marc 2016. On 4 March 2016, the government extended the exemption period for another five years and increased the monetary thresholds for the exemption. Based on the revised threshold, approval by the Competition Commission of India is not required if the target entity has (a) assets of not more than INR 350 crores (US$51.4 million); or (b) turnover of not more than INR 1000 crores (US$146.9 million).[2] The thresholds for determining the Commission's jurisdiction under section 5 of the Competition Act 2002 have also been increased by 100%.

Radical changes to foreign direct investment

From March to October 2016 foreign direct investment was liberalised in various sectors including insurance, single brand retail trading, defense, pharmaceutical, civil aviation, asset reconstruction companies, broadcasting carriage services, and cable networks and food products. [3] Our earlier LawFlash on these changes can be accessed here. Liberalisation of foreign direct investment in these sectors was undertaken either by relaxing the conditions for foreign investment or by increasing the sector caps on foreign investment. The Department of Industrial Policy and Promotion also issued a much awaited clarification in March 2016 on foreign direct investment in e-commerce, in which 100% foreign direct investment is permitted in the 'marketplace based model of e-commerce' and foreign direct investment is not permitted in the 'inventory based model of e-commerce'. [4] India has a thriving e-commerce sector.

Revisions to tax treaties with Mauritius, Cyprus, and Singapore

The May 2016 amendment of the India-Mauritius tax treaty established a landmark shift in the taxation regime between the two countries, from resident-based to source-based taxation. [5] Under the amendment, India has the right to tax capital gains arising from the alienation of shares acquired by a Mauritian tax resident in Indian companies on or after 1 April 2017. The amendment is seen as a step to avoid treaty abuse and to conform to the OECD's base erosion and profit shifting plan. Our earlier LawFlashes on the amendment to the tax treaty can be accessed here and here. In November 2016 India and Cyprus signed a revised agreement for the avoidance of double taxation and prevention of fiscal evasion which will replace the existing double taxation avoidance treaty between

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[2] http://www.cci.gov.in/sites/default/files/notification/SO%20673%28E%29-674%28E%29-675%28E%29.pdf.

[3] http://dipp.nic.in/English/acts_rules/Press_Notes/pn1_2016.pdf; http://dipp.nic.in/English/acts_rules/Press_Notes/pn4_2016.pdf; http://dipp.nic.in/English/acts_rules/Press_Notes/pn5_2016.pdf.

[4] http://dipp.nic.in/English/acts_rules/Press_Notes/pn3_2016.pdf

[5] Press release dated 10 May 2016 issued by the Central Board of Direct Taxes available at http://www.incometaxindia.gov.in/Lists/Press%20Releases/Attachments/468/Press-release-Indo-Mauritius-10-05-2016.pdf.

the two countries.[6] The revised tax treaty is in line with the amendments to the India-Mauritius tax treaty with respect to a shift from source-based taxation. Furthermore, Cyprus was declassified as a non-cooperative jurisdiction with retrospective effect.[7] The declassification notification issued by the government on 14 December 2016 provided for the declassification to have prospective effect from the date of the declassification notification. However, by way of a corrigendum issued on 16 December 2016 the declassification of Cyprus as a non-cooperative jurisdiction was given retrospective effect from 1 November 2013 (i.e. the date of the notification classifying Cyprus as a non-cooperative jurisdiction). Our earlier LawFlash on the revised tax treaty can be accessed here. On 30 December 2016 India and Singapore entered into a new protocol to amend the existing tax treaty between the two countries. The amendment provides for, among others, source based taxation for shares acquired on or after 1 April 2017, grandfathering of shares acquired prior to 1 April 2017 and a transition period of two years from 1 April 2017 to 31 March 2019 during which the capital gains from shares acquired during this period will be taxed at 50% of India's domestic tax rate subject to fulfilment of certain conditions. The amendments are similar to the amendments made to the India-Mauritius tax treaty. However, unlike the amendment to the India-Mauritius tax treaty, the new protocol does not contain details of a reduction in the rate of tax on interest income arising from debt investments. India is expected to revise its tax treaty with the Netherlands on similar lines as the treaties with Mauritius, Cyprus, and Singapore.

India's First National IPR Policy

The National Intellectual Property Rights (IPR) Policy[8] published in May 2016 is the first of its kind in India and recognizes the importance of intellectual property rights as an asset and an economic tool. The policy seeks to establish a conducive ecosystem for innovation and creativity, and its objectives include creating public awareness, stimulating the generation of IPRs, creating effective IPR laws, commercialisation of IPR and strengthening the enforcement and adjudicatory systems. Following the publication of the policy, India entered into three memorandums of understanding with Singapore on skill development and intellectual property. Our earlier LawFlashes on the three MoUs can be accessed here and here.

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[6] Press release dated 16 December 2016 issued by the Central Board of Direct Taxes available at http://www.incometaxindia.gov.in/Lists/Press%20Releases/Attachments/567/Notification-Completion-Internal-Procedures-Revised-Double-Taxation-Avoidance-Agreement-India-Cyprus-16-12-2016.pdf.

[7] Notification No. 119/2016 [F. No. 500/02/2015-FT & TR – III; Notification No. 114/2016 dated 14.12.2016 vide S.O. No. 4033(E).

[8] http://dipp.nic.in/English/Schemes/Intellectual_Property_Rights/National_IPR_Policy_08.08.2016.pdf.

Insolvency and Bankruptcy Code

The Insolvency and Bankruptcy Code, 2016, enacted in May 2016, consolidated the previously fragmented laws on the insolvency and bankruptcy regime in India. The Code is a landmark legislation and provides a robust framework for the time-bound resolution of insolvency and bankruptcy. Given the number of bad loans that the domestic banks are faced with, the Code has come at an opportune time. Since its enactment, certain provisions of the Code have been notified and brought into force in a phased manner. Recently, certain substantive provisions of the Code relating to the corporate insolvency resolution process have been made effective as of December 1, 2016.[9] This is the first major step in putting the Code into operation.

Company law

In June 2016, the National Company Law Tribunal and its appellate authority, the National Company Law Appellate Tribunal, were set up under the Companies Act, 2013 (2013 Act). [10] With the constitution of the two tribunals, the Company Law Board which was set up under the Companies Act, 1956 is dissolved and pending matters are to be transferred to the National Company Law Tribunal. [11] Furthermore, provisions on winding up, compromise, arrangements, and amalgamation under the 2013 Act were notified and brought into effect as of 15 December 2016. [12] Our LawFlash on this matter can be accessed here.

Goods and service tax

The 122nd Constitutional Amendment Bill for goods and service tax was enacted by both houses of Parliament and was approved by the president. The goods and service tax regime is the biggest reform in the indirect tax space in India since the liberalisation of the Indian economy. Goods and service tax aims to create a common Indian market and will subsume taxes currently levied by both the state and central governments, thereby eliminating the cascading effect of taxes. It is also expected to make the movement of goods simpler and seamless in one of the largest consumer markets in the world. The goods and service tax regime is expected to be implemented by April 2017.

Demonetisation

In a drastic move to wipe out black money in the economy and stop counterfeiting (one of the political campaign promises of the government),

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[9] http://www.mca.gov.in/Ministry/pdf/CommencementNotification_01122016.pdf.
[10] http://www.mca.gov.in/Ministry/pdf/Notification_02062016_II.pdf; http://www.mca.gov.in/Ministry/pdf/Notification_02062016_I.pdf.
[11] http://www.mca.gov.in/Ministry/pdf/Notification_02062016_III.pdf.
[12] http://www.mca.gov.in/Ministry/pdf/commencementnotif_08122016.pdf.

the government demonetized currency notes of INR 500 and INR 1000 in November 2016 and introduced new currency notes of INR 500 and INR 2000. Demonetisation has received mixed responses in India and the effects are expected to be felt well into 2017. This is not the first time in India's history that such a step has been taken, with India having seen two earlier demonetisations in 1946 and 1978. Countries such as Nigeria and Ghana have also in the past demonetised their currency.

Corporate governance

While not strictly a legal matter, the highly publicised boardroom issues faced by a leading Indian conglomerate has brought to the fore various corporate governance issues such as the role, independence, and removal of executive and independent directors. When the dust settles, clarity on corporate governance aspects and the role of independent directors in India is expected in the coming months.

The year 2016 has been an action-packed year for India and 2017 is expected to be no less.

Injunctions in Support of Foreign Proceedings – A New Back Door?

The Singapore High Court in the case of ***Trung Nguyen Group Corp v Trung Nguyen International Pte Ltd*** **[2016] SGHC 256** ("***TNG v TNI***") held that an application to stay a Singapore action in favour of foreign court proceedings confers on the court the residual jurisdiction to further grant an injunction in aid of those foreign proceedings.

In *TNG v TNI*, TNG had commenced action in Singapore against TNI and Ms. Le Hoang Diep Thao ("**Thao**"), claiming that the defendants had unlawfully conspired against TNG ("**the Conspiracy Action**"). The alleged acts of unlawful conspiracy were (1) the unauthorised and fraudulent transfer of TNG's shares in TNI to Thao, (2) the subsequent inducement of TNI to breach its contract with TNG, thereby diverting TNG's profits to the seventh defendant; and (3) the theft of TNG's seals and business registration certificates.

TNI and Thao applied to stay the Conspiracy Action on the basis that Vietnam was the natural forum to determine the claim ("**the Stay Application**").

Concurrently, three other proceedings relating to TNG and Thao were ongoing in Vietnam. Prior to the Conspiracy Action, Thao had claimed that he was entitled to shares in TNG in Vietnamese divorce proceedings between TNG's Chairman and legal representative, and Thao. After the commencement of the Conspiracy Action, Thao also brought arbitration proceedings before the Vietnam International Arbitration Centre (as well as civil proceedings) to invalidate the transfer of her shares in TNI, and civil proceedings for wrongful dismissal as TNG's Permanent Vice General Director.

The Singapore Singapore High Court agreed with TNI and Thao that Vietnam was the natural forum to resolve the Conspiracy Action and granted the Stay Application, pending the outcome of the Vietnamese proceedings.

In addition, the High Court issued an interim injunction in aid of the Vietnamese proceedings, restraining Thao from disposing of her shares in TNG. It did so on the basis that the subsistence of the underlying substantive action (due to the successful Stay Application) was per se sufficient to give rise to the court's residual jurisdiction under section 4(10) of the Civil Law Act ("**CLA**") to grant an injunction in favour of foreign court proceedings ("**the Injunction Order**"). This aspect of the court's decision in *TNG v TNI* was very brief and made only passing reference to the earlier decision in *Multi-Code Electronics Industries (M) Bhd and another v Toh Chun Toh Gordon and others* [2009] 1 SLR 1000 ("***Multi-Code Electronics Industries***"), which held that Singapore courts have the power to issue a Mareva injunction in support of foreign proceedings. No detailed analysis highlighting the reasoning behind the decision in *Multi-Code Electronics Industries* was provided.

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This proposition in *TNG v TNI*, if correct, would effectively grant litigants a back door to obtaining an injunction in aid of foreign litigation. Singapore courts generally have no power under s 4(10) CLA to grant an injunction in aid of foreign court proceedings, unless the plaintiff has an accrued cause of action against the defendant that is justiciable in a Singapore court, and the Singapore court has in personam jurisdiction over the defendant: see *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 at paras. 94 - 96, and *Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR(R) 856 at paras. 13, 15 - 18. However *TNG v TNI*'s seemingly unqualified holding (that a stayed application confers on courts the residual jurisdiction to issue an injunction in aid of foreign court proceedings) could allow litigants to procedurally commence lawsuits in Singapore in the expectation that those suits will be stayed, and then subsequently rely on the stayed actions to obtain injunctions in aid of foreign court proceedings.

The issue of whether a local court may grant an injunction in aid of foreign proceedings is not new. The longstanding debate was first raised in a well-known decision by Lord Denning in the English courts: *Siskinda (Owners of Cargo Laden on Board) and others v Distos Compania Naviera S.A.* [1977] 3 WLR 532. In that case, it was held that English courts had the inherent jurisdiction to grant Mareva injunctions in aid of Italian court proceedings. This however was rejected on appeal by the House of Lords. Subsequently, amendments were made to the Civil Jurisdiction and Judgments Act 1982 that expressly empowered English courts to issue such injunctive relief.

By contrast, Australian courts have recognised that they have an inherent jurisdiction to grant freezing orders in aid of foreign proceedings without the need for statutory reform. It was reasoned that unlike an interlocutory injunction which is granted in aid of a plaintiff's legal rights, an order for the preservation of assets is meant to prevent the frustration of a court's processes. In drawing this distinction, Australian courts thereby carved out an exception for freezing orders to ensure that future enforcement action within the Australian courts' jurisdiction would not be frustrated.

Similarly, *Multi-Code Electronics Industries* adopted the position that, despite the absence of any statutory amendment, Singapore courts have the inherent jurisdiction by virtue of s 4(10) CLA to grant an injunction in favour of foreign litigation so as to preserve the integrity of its court processes. The Singapore High Court noted that if "*[t]he court's jurisdiction under s 4(10) [CLA] would be limited only to those substantive actions actually tried before the Singapore courts and which would therefore terminate in a Singapore judgment . . . then no Mareva injunction would be possible for any Singapore action that was stayed for trial in another jurisdiction*". Implicit in this statement is the concern that when a final judgment in that foreign jurisdiction is issued, the successful litigant may face difficulties enforcing the foreign judgment against the assets of its counterparty in Singapore. However, given that *TNG v TNI* concerned an injunction against the disposal of shares as opposed to the freezing injunction issued in *Multi-Code Electronics Industries*, it is unclear if the holding in *Multi-*

Code Electronics Industries can simply be applied to the facts of *TNG v TNI* without specific consideration of how the different nature of an interlocutory injunction would mean that the court's jurisdictional basis for granting such an injunction must be found elsewhere.

That s 4(10) CLA does not confer on Singapore courts the power to issue injunctions in aid of foreign litigation is made further apparent when contrasted with the express power of Singapore courts to grant interim relief (including the granting of a Mareva injunction) in favour of both Singapore and foreign-seated international arbitrations: see Section 12A International Arbitration Act ("**IAA**"). This power was provided by amendment following the Court of Appeal decision in *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 where it was held that insofar as the source of the court's jurisdiction in the former (and now repealed) s 12(7) IAA was derived from s 4(10) CLA, the Singapore courts did not ordinarily have the power to issue interim orders, including Mareva injunctions, against the assets of a defendant in Singapore, save where the plaintiff had an accrued cause of action against the defendant that was justiciable in a Singapore court. That Parliament saw the need to specifically enact s 12A IAA to empower Singapore courts to grant interim relief in aid of foreign arbitration as an exception to s 4(10) CLA suggests that s 4(10) CLA does not confer on courts the general power to take interim measures in support of foreign proceedings.

The decision in *TNG v TNI*, that stayed actions confer on courts the residual jurisdiction to grant injunctive relief in aid of foreign litigation under s 4(10) CLA, is not easily reconciled with other decisions suggesting that, absent statutory enactment, the Singapore courts do not have the jurisdiction to issue an injunction in aid of foreign court proceedings. It remains to be seen how future decisions will reconcile these positions.

NEWS

Singapore Business Review: Lawyers Make 'Most Influential' List

Finance partner Justin Yip (SI) and CBT associates Parikhit Sarma (SI) and Arnaud Bourrut-Lacouture (SI) were recognized in Singapore Business Review's '70 most influential lawyers aged 40 and under in 2016.' The list honors Singapore lawyers ages 40 and under who specialise in family law, intellectual property, cyber, mergers and acquisitions, international, oil and gas, tort, international trade, and finance. The honorees were selected from a list of about 100 nominees based on thought leadership, influence, and success. Find the full list here.

US IP Partners Visit Shanghai, Beijing Offices

IP partners Robert Gaybrick (WA) and Yalei Sun (SV) visited our Shanghai and Beijing offices on December 9-14 after meeting with current and prospective clients in southern China. Bob and Yalei, along with CBT partners Xiaowei Ye (BE), Min Duan (BE), and Alex Wang (SH), met with several companies, including E-Town Hua Rui Investment Management, a China fund that focuses on IP-related project investments; Intel, one of the world's largest semiconductor chip makers; and Prosperity Investment, a China private-equity fund that focuses on integrated circuit boards.

Shanghai Office Welcomes Beijing Team

Our Shanghai team recently hosted several members of the Beijing office. Partners from each office discussed current inbound and outbound client matters, significant practice and business development opportunities, and how the two offices can collaborate even more closely in the future. All of the lawyers had lunch together and discussed ways to further strengthen the firm's China platform.

Partners Present at Harvard Law School Japan-US Symposium

CBT partner Satoru Murase (NY) and IM partner Chris Wells (TO) presented at Harvard Law School's Symposium on Building the Financial System of the 21st Century: An Agenda for Japan and the United States, hosted October 28-30 in Karuizawa, Japan. Attendees included US and Japanese financial officials, financial institution executives, policymakers, and academics. Satoru served as a panelist on 'Implications of the US Presidential Election Outcome for US-Japan Relations'; Chris spoke on the 'Effects, Limits, and Consequences of Monetary Policy Actions in the US and Japan'.

Chris Mizumoto Addresses Major Japanese Pharmaceutical Companies

IP partner Chris Mizumoto (TO) recently spoke at the Japan Pharmaceutical Industry Legal Affairs Association (JPILAA) in Osaka, attended by 70 executives from the country's major pharmaceutical companies. Chris spoke about the Biologics Price Competition and Innovation Act (BPCIA), discussing recent litigation involving the act and how biosimilar compounds are approved by the US Food and Drug Administration under BPCIA. The JPILAA has about 100 pharmaceutical companies as members.

NEWS

Partners Present in Tokyo on Acquisition of US Asset Managers

IM partners Ethan Johnson (MI) and Chris Wells (TO) and CBT partner Satoru Murase (NY) recently presented a seminar, 'M&A of US Asset Managers/Market Impact of Trump Administration', hosted in Tokyo. Executives from Japan's largest banks, insurance companies, asset managers, and trading firms attended the seminar. A senior investment executive for Japan Post Bank (US$2.6 trillion in investment assets) and an executive of the $1.3 trillion Government Pension Investment Fund also attended. The seminar discussed how Morgan Lewis has seen Asian investment deals with US asset managers grow, and the strong interest by Japanese corporations in the US investment/infrastructure market under the incoming Trump administration.

CBT Partners Host Visit from Roosevelt Management Director

CBT partners Mitch Dudek (SH) and Eddie Hsu (SH) recently welcomed and shared a weekend antiques roadshow tour and dinner in Shanghai with Geoff Hader, director of Roosevelt Management Co., and his wife, Dominique. Roosevelt Management is a long-standing client of our firm. The New York–based investment management company focuses on investments in, management of, and servicing of seasoned residential mortgage loans.

Adrian Tan Elected Vice President of Law Society of Singapore

Litigation partner Adrian Tan (SI) has been elected vice president of the 2017 Council of the Law Society of Singapore, the representative body for all lawyers in the country. He will serve a one-year term. Adrian was recently re-elected to the council in October in a hotly contested election, where he secured one of four spots in the senior category of the governing council among seven other candidates. As part of his duties on the council for 2016, Adrian holds the office of treasurer.

Tokyo Office Hosts Charity Drive, Holiday Party for Children's Home

Our Tokyo office recently organised a charity drive and holiday party for the children at the St. Francis Children's Home in Tokyo. This marks the 10th year that the office has sponsored the drive and party. Each year, the 50 children living at the home, ages 3 to 18, submit wishes to Santa, often for practical items (boots, sneakers, and jackets), and the Tokyo office steps in to make it happen. This year, Tokyo office members and CBT partner Satoru Murase (NY) donated money to purchase the gifts and devoted an extended lunch hour to wrapping each one.

The holiday party, hosted last month at the home, featured gingerbread cookies baked by IM of counsel Carol Tsuchida (TO) and her daughters for children to decorate. Carol and IM paralegal Naoko Kono (TO) and associate Chiho Zen (TO) baked waffles at the party, IM paralegal Hiroaki Yamaoka (TO) played Santa, and CBT partner Ben Lang (TO) and his family, CBT associate Jumpei Seto (TO), IM associate Yasuyuki Shirabe (TO), and business development and marketing manager Makiko Hata (TO) helped the children decorate the cookies, deliver gifts, and enjoy the holiday.

HEADLINE MATTERS

Kenedix Asia: Agreement to Acquire Managing Stake in AmanahRaya REIT

Morgan Lewis represented Kenedix Asia Pte. Ltd., the Singapore unit of firm client Kenedix Inc., in its announced agreement to become a joint sponsor of Malaysia-listed AmanahRaya REIT. Through its newly formed Malaysian subsidiary, KDA Capital Malaysia Sdn. Bhd., Kenedix will acquire 15% of the units of AmanahRaya REIT and 49% of the shares of AmanahRaya-REIT Managers Sdn. Bhd., the manager of AmanahRaya REIT. The agreement was announced 19 December; the value was undisclosed.

AmanahRaya is a Malaysian government-owned financial institution established in 1921. Kenedix is Japan's largest independent real estate asset management company. Morgan Lewis also advised on an acquisition financing facility for the transaction with Sumitomo Mitsui Banking Corp. Malaysia Bhd.

An elaborate signing ceremony attended by more than 200 people in Kuala Lumpur, Malaysia, featured remarks by the Malaysian finance minister and Japan's ambassador to Malaysia, highlighting the importance of this strategic transaction for the Malaysian government and Kenedix.

The team was led by CBT partners Joo Khin Ng (SI) and Bradley Edmister (NY), with assistance from CBT associate Clarence Tan (SI). CBT partner Tsugu Watanabe (TO) led the acquisition financing facility, with assistance from IM partner Tadao Horibe (TO). CBT partner Wai Ming Yap (SI) provided Malaysian law advice. CBT associate Jumpei Seto (TO) and IM associate Yasuyuki Shirabe (TO) also assisted on the transaction.

General Atlantic: S$100M Investment

Morgan Lewis recently advised General Atlantic on its S$110 million (US$77.5 million) investment in PT Mitra Adiperkasa Tbk (MAP) and PT MAP Boga Adiperkasa (MBA). The investment was effected through a subscription for a US$26.7 billion bond issued by MAP and an $54.5 billion bond issued by MBA, with options for a 29.9% share in MBA.

MAP is a leading multiformat retailer in Indonesia and is listed on the Indonesia Stock Exchange. MBA, a division of MAP, operates the Starbucks, Krispy Kreme, Cold Stone Creamery, Godiva, and PizzaExpress brands in Indonesia. General Atlantic is a leading global growth equity firm and currently has US$19.6 billion in assets under management.

The team was led by CBT partner Elizabeth Kong (SI), and assisted by IM associate Yu Kwang Lui (SI) and CBT associate Jun Meng Heng (SI).

HEADLINE MATTERS

Tikehau Investment Management: Acquisition of IREIT Global Group

Morgan Lewis advised Tikehau Investment Management in its acquisition of 80% interest in IREIT Global Group, completed on November 11. The value was not disclosed. IREIT Global Group is the manager of IREIT Global, a real estate investment trust listed in Singapore that invests in a portfolio of income-producing real estate in Europe, valued at approximately €450 million (US$476.5 million). Tikehau Investment Management is part of Tikehau Capital, a pan-European asset management firm and investment group that manages more than €9 billion (US$9.5 billion) for institutional and private investors in various asset classes, including more than €900 million (US$952.9 million) in real estate.

The team was led by CBT partner Elizabeth Kong (SI) and assisted by IM associate Si Ning Teng (SI).

HT: Victory in Suppression of Wikileaks Privileged Material

We recently secured a landmark win for Italian security technology company HT Srl in the Singapore Court of Appeal over the use of hacked material on WikiLeaks. In *HT v. Woon*, HT sued its former IT security analyst, Wee Shuo Woon. HT's servers were then hacked, and thousands of its confidential documents were dumped on WikiLeaks. Mr. Woon went through 500 gigabytes of our client's confidential data on WikiLeaks, and extracted HT's privileged communications with our firm. Mr. Woon then attempted to use that information in his affidavit.

We applied for these privileged documents to be expunged and for Mr. Woon to be barred from using them. We argued that Mr. Woon was restrained from using the material on WikiLeaks and that documents could remain confidential and privileged despite being posted on WikiLeaks. The publication of documents did not necessarily mean the confidentiality was lost; the sheer mass of data on the Internet, and on WikiLeaks, could itself be regarded as a barrier to accessibility.

In a unanimous ruling, the Singapore Court of Appeal agreed with us that although the material appeared on WikiLeaks, it did not mean that its confidential character had been lost, and that there was no waiver of privilege. The court dismissed the defendant's appeal and expunged the privileged documents and all references to them from the defendant's affidavit. To our knowledge, this is the first case to examine whether material on WikiLeaks can remain confidential and privileged.

The team was led by litigation partner Adrian Tan (SI), with assistance from litigation associates Pei Ching Ong (SI), Jean Wern Yeoh (SI), and Hari Veluri (SI).

COFFEE WITH . . .

Tsugumichi Watanabe

Tsugumichi Watanabe is the managing partner of Morgan Lewis's Tokyo office.

In US business parlance, I'm a 'deal lawyer' – that is, a transactional lawyer who represents clients trying to negotiate and complete a transaction, such as an M&A, an investment, a project financing or a securitisation. In US presentations, my opening joke line is, 'I don' t know any law, I just do deals' — but that line just evokes puzzled looks in Asia, so I've dropped it from my repertoire.

As young associates, my peers and I were taught that our job was to assist the client in achieving his/her objectives — usually getting the deal done — while always keeping the client apprised of the pros and cons, both legal and business, of the various available options.

I've worked on deals where the mix of people involved included Indonesians, Russians, Brazilians, Canadians, Algerians, Colombians, and Indians, as well as nationals from a host of other nations. Usually, I've been on the Japanese side of the table and often there were language, cultural, and corporate decision-making differences that created puzzles to be solved in the negotiation. But the most prominent characteristic of a transactional practice is that all the parties involved want to 'do a deal'. And time is always 'of the essence' because 'faster is better' (as well as because everyone knows that the lawyers charge by the hour!).

But one of my most interesting deal experiences involved not making a deal — more specifically not agreeing to terms until the time was right. I spent many months in negotiation with the other side on behalf of the client, working hard to show progress but to not come to an agreement.

A little confusing? Here's the story –

My Japanese client was negotiating a pay-out amount in connection with the termination of a commercial contract with a Middle East government entity. The representatives on the other side of the table were Arabic-speaking government officials; the client did not speak Arabic so English was the negotiation language.

Because of the circumstances leading up to the termination, the client knew it would be paying the agreed termination amount and that the termination amount itself would be affected by world commodity market prices. So the objective I had was to help the client not agree to a final payment amount until commodity prices were at the right level.

Every month or so, we would travel to the Middle East and meet for two to three days with our counterparts. While our objective was to 'not agree', we did have to make sufficient 'progress' at those meetings so that both sides could report to their

superiors that the meetings had been 'productive'. Each meeting lasted no more than four or five hours but felt like a full day in the dentist's chair. Our 'game plan', to the extent we had one, was a combination of tactics intended to demonstrate 'progress' while achieving delay:

- *We changed our position from negotiation to negotiation, and sometimes from day to day, saying that we had consulted with the head office in Japan and that the head office had nixed our prior position – sometimes this was true, sometimes it was less than true.*
- *The client representative would speak garbled English that was difficult to understand even for me, a native speaker. The Arabic speakers on the other side of the table would look to me for 'translation' of the client's comments, I would give some general version of what I thought might have been intended, and there would be discussion among all present for the next hour. (The clients did not speak perfect English, but their English was not that poor! I never did find out whether this was an intentional ploy or the result of the pressures of the situation.)*
- *We would arrive late for the start of the meeting, a very un-Japanese thing to do, our excuse being that we were getting last-minute instructions from the head office.*
- *In one meeting, I overreacted, partially intentionally, to a slightly insulting comment from the other side, and the person who made the insult walked out, ending the meeting for the day (mission accomplished!). The only downside was that the lead client negotiator had to turn up half an hour early the next morning and apologise for my rude behaviour.*
- *And, at the end of each set of meetings, we would concede on a number of less important demands (sometimes to put them back on the table at the next set of meetings).*

We had about 10 sets of meetings over 18 months. An additional wrinkle in the story was that, from the other side's perspective, as a Middle East government negotiating with a private sector party on a natural resources contract, they had the leverage (and the client knew it) and we should have been eager to acquiesce to their demands. Representing a private sector client in a weak bargaining position that knew it ultimately had to agree but was only willing to do so when the time was right was both a novel and stressful position for me as a lawyer.

Finally, the client was ready to agree. The rest was easy; the negotiations ended, with both sides feeling that they had struck a good deal for their side. Although I was only in the Middle East for a few days each month, each trip was exhausting.

What did I, as a deal lawyer, learn from the experience?

- *Trying not to agree is much more difficult, and requires just as much ingenuity, as trying to agree.*
- *Representing a client in an English-language negotiation where English is not the native language of any of the parties presents both challenges and unexpected opportunities to use novel tactics.*

- *In commercial negotiations where one of the parties is not a business player but a government entity, the negotiation can be affected by political and other non-commercial considerations and you have to be ready for the unexpected.*

While the chances are low of my working on another transaction where my instructions are to not come to an agreement, and I may never again get to employ the 'lessons learned' from this experience, it's one of the deals that I remember most fondly when thinking about my 30 years of practice as a deal lawyer.

THE LAST WORD

The Last Word is a regular segment giving you a tongue-in-cheek insight into the personalities at Morgan Lewis.

A day in Beijing

'What a beautiful morning!' When I pulled the curtains open in my bedroom, the smog was completely gone. This time the weather forecast was not wrong — the sky was blue, seldom seen in wintertime in this city. Carpe diem! I woke up earlier for the gym. After a few rounds of stretching, push-ups, and pick and lifts to Madonna's famous La Isla Bonita, I exhausted myself with a 15-minute HIIT or high-intensity interval training.

At 2:30 p.m. I was seated at a studio of Tianqiao Art Center, a well-known place for art performance by traditional Beijing artists. '33 Days after Breakup', as its name indicated, was no traditional opera. It explored different versions of losing one's love in a modern city in China where the young are pressured by skyrocketing property prices and living costs and therefore look for quick money and even quicker success. Many girls and boys were dumped by their lovers who found someone richer to marry. I had been invited by a lawyer friend who was the second leading actress in the show. Being general counsel of a local internet-based retailing business, she still managed to find time to learn and recite so many lines and attend rehearsals: what a lady!

Bar time! It is always an exciting moment sitting with a few friends at a bar at night to chat about fun stuff. A friend shared his story when he first came to China more than 10 years ago. He asked for the bill after a few beers but the waiter thought he wanted more beer, so he ended up drinking two more bottles until he found the bar manager who was able to understand the difference between 'bill' and 'beer'. Of course he got the last two for free and a special discount for the rest. That was one reason he decided to settle here. 11.00 p.m., walking out of the bar, I smelled the burning of plastic: I knew that smog had returned to the city. Like my friends, I took a face mask from my pocket and put it on before heading to my car.

Life in this city is fun and challenging. Like the legal work we practise, we learn to manage these challenges and maximise the good times we have in this city.

Good night, Beijing!

Min Duan, Partner, Beijing

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