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Message From the Chair

Growing the International Law Section

It is with great honor that I address you as chair of the International Law Section of The Florida Bar.

CARLOS F. OSORIO

For those of you who do not know me, I have been involved in the ILS for close to ten years, during which time I have learned very much about the inner workings of our section and have come to know many of you. I have served on many ILS committees. I have chaired the iLaw (formerly ILAC, ILAT) and have mentored it. I have chaired the Legislative Committee and have testified in Tallahassee regarding several bills, some of which were hostile to the practice of international law. I have done my share of heavy fundraising for the section. I have tried to build fellowship between litigators and transactional attorneys in our section, and have also tried my best to reach out to leaders in our communities across the state. I also obtained a certification in international law in order to be exposed to as many international practice areas as possible.

As I assume the leadership of our section, I do so with humility, recognizing the great work of prior chairs and knowing that even better chairs will follow me. It is my duty this year to steer this ship, and I will do so with pride as I focus on the great contributions our section makes to the practice of international law in Florida and across the nation.

Several of you have asked me what my "vision" is for this year and how I plan to grow our section. To be brief, and to answer the question, this year I expect to: increase our section's membership; increase sponsorship; attract more non-litigators to the section and build stronger relationships with other Florida Bar sections such as the Business Law Section, Tax Section, and ADR Section, as well the ABA Section of International Law, the AAA/ICDR, and JAMS; publish a premier print law quarterly (the *ILQ*); strengthen relations with local law schools; attract more members from outside of South Florida; have more events outside of South Florida, including events abroad, such as a conference in India (November 2018) that is in the works, a non-touristic trip to Cuba that is also in the works, and a potential conference in Panama in spring 2019. I expect to raise awareness of human rights issues that lawyers face in different parts of the world, such as Cuba, Nicaragua, and Venezuela. I also expect to have a spectacular iLaw conference on 22 February 2019 at the JW Marriott Marquis Miami; and lastly, I expect our section to be handed over to our incoming chair, Clarissa Rodriguez, better and stronger for her year of service.

The International Law Section of The Florida Bar is a family, and we should be proud of our place in the Bar. I encourage you all to participate, to take pride in our section, and to communicate with me and my leadership team about all the great ideas or even concerns you may have. My email is *cosorio@osorioint.com*, and my phone number is (305) 900-4103.

Carlos F. Osorio
Chair
International Law Section of The Florida Bar
Osorio Internacional PA

From the Editors . . .

RAFAEL R. RIBIERO

GASTON P. FERNANDEZ

Approximately eight years ago, under the leadership of Ed Mullins, the International Law Section of The Florida Bar published an *International Law Quarterly* dedicated to China. The "Special China Issue" was the first *ILQ* to focus on an Asian country, and it was a success—contributors tackled diverse topics from international arbitration, to product liability, to digital censorship. For many of our readers, the Special China Issue was their first exposure to international law topics relating to China, and that *ILQ* indisputably increased our readers' knowledge about the challenges, opportunities, and cutting edge legal issues relating to the Middle Kingdom.

In the intervening eight years, the importance of Asia, including China, has grown: according to 2017 data provided by the U.S. Department of Commerce, nine of the United States' top thirty trade partners are from Asia: China (3), Japan (4), South Korea (7), Hong Kong (9), Singapore (13), Taiwan (14), India (15), Malaysia (23), and Thailand (26). Apart from the commercial impact that the region has had on the United States, we also learned, according to a September 2018 survey by the U.S. Census Bureau, that our country's newest immigrants are most likely to come from Asia, with Chinese and Indian residents making up the largest and second-largest portions of America's Asian population. Asian influence is also increasingly seen in U.S. popular culture, with crossover viral music hits such as *Gangnam Style*, increasingly common cameo appearances from Chinese actors in Hollywood blockbusters, and feature films such as *Crazy Rich Asians*, which is on the cusp of grossing over $150 million in domestic box office sales and spent several weeks at the top of the charts. From almost every perspective, the influence of Asia and Asian culture will continue to grow; as international law practitioners, we must become more knowledgeable about the region.

Picking up where we left off in 2010, in this Fall 2018 *ILQ*, we are excited to feature articles addressing important legal topics for the region, and are honored to have contributions from authors who participated in the 2010 Special China Issue, such as Al Lindsay and Mikki Canton.

Former ILS chair and former *ILQ* editor-in-chief **Al Lindsay** starts us off with a fascinating look into South Korea's meteoric rise from a war-torn country into a technological, economic, and cultural powerhouse. Leveraging the national motto—*Let's work hard*—South Korea is now the world's eleventh largest economy, and Al's article provides us with insight into the country's political, economic, social, and cultural life.

Speaking of rich Asians, ILS chair-elect **Clarissa Rodriguez** and **Laura Reich** next provide us with a discussion of the region's appetite for luxury items, art, and antiquities from Europe, which has brought with it problematic collateral effects such as inflation of art prices, propagation of forgeries, and money laundering schemes involving art.

Neha Dagley, who chairs the ILS's India Subcommittee, follows with a discussion of India's transformation into a leading start-up ecosystem. Continuing with a discussion of issues relating to India, **Susanne Leon**, chair of the ILS's Asia Committee, discusses the impact of India's industrialization and economic expansion on practitioners in the United States, and particularly in South Florida.

Mikki Canton presents us with an essay regarding China's One Belt, One Road Initiative, and why the verdict is still out as to whether China will be an unstoppable driving force for global change.

From the Editors, continued

Rounding out the features section of the Fall 2018 *ILQ* is **Takashi Yokoyama**, who gives us an overview of the challenges and opportunities that Japan faces in its quest to become the region's go-to seat for international arbitrations.

Regular *ILQ* contributor **Larry Rifkin** provides us with another helpful update regarding the H1-B visa and impact of the Trump administration's policies on pending H1-B petitions.

Finally, **Scott Silverman** focuses on the changes to the 2017 collective bargaining agreement between a prominent cruise line and various seafarer unions, which will impact South Florida's practitioners who deal with maritime and admiralty law.

We also would like our new and returning contributors to the World Roundup: **Omar Ibrahem** (Middle East), **Laura Reich** and **Clarissa Rodriguez** (North America), **Yana Manotas Mityaeva** (Russia), **Mariana Matos** (Latin America), and **Megan E. Campos** (Western Europe).

We hope you will find the Fall 2018 *ILQ* informative, and we look forward to your contributions to the next edition.

Sincerely,

Rafael R. Ribeiro—Editor-in-Chief
Gaston P. Fernandez—Guest Editor

South Korea: Sixty-Five Years of Working Harder

By Alvin F. Lindsay, Miami

My wife told me on the way to the airport that I was about to get really far outside my comfort zone. She was right.

Never having been to Asia, much less Seoul, and without knowing a word of Korean, I was embarking on an eight-day trip to explore this place that has become such a powerful international economic force in everything from television sets to construction mega-projects. As the trip progressed, I not only became more comfortable in my new environment, but grew to respect immensely South Korea's industrious people and culture. Thus, I present the following brief impressions and some general background about this country that already factors as an increasingly important player in the world of international law.

Big Growth in a Short Time

Although Korea's history reaches back thousands of years, South Korea is only sixty-five years old, having been born out of the 1953 armistice that ceased hostilities in the Korean War and split the peninsula into North and South along the demilitarized zone (DMZ). The country has built itself mightily since then.

Just southwest of the DMZ, Seoul is a large metropolis, and South Korea's political, economic, social, and cultural center. The substantial Hangang River runs through the city, bifurcating it into the northern part, where much of the culture and history lie, and the southern part, known for its business district, which includes headquarters of the leading K-pop music companies and something of a major cosmetic-surgery industry that apparently has many Asians "vacationing" there.

It can be difficult, however, to recognize Seoul's borders—the buildings seem to continue forever, with little distinction between neighboring cities like Incheon (where the airport is and where MacArthur made his famous amphibious landing at the Battle of Inchon). Taken together, in a country noted for a population density more than ten times the global average, the greater Seoul-Incheon megaplex is home to more than 24 million people—almost half the entire country's population—and one sees nothing that was not built in the past sixty years, if not much more recently.

One of Seoul's gleaming shopping malls

Gleaming high-rise buildings cover the landscape for miles and make those of Miami seem humble in comparison. In the tony Gangnam district—made famous in Psy's monster hit—*Gangnam Style*, buildings are often works of art and can come wrapped in high-definition televisions. Immaculate shopping malls stretch for miles underground. Complexes of eight or more massive, identical condo-skyscraper projects are common. Indeed, with the exception of Seoul's Blue House (the presidential mansion), I did not see one single-family residence during my entire visit. Everyone seems to live in small but pricey apartments with views that can include intermittent smog, which some claim is a Chinese export.

South Korea, continued

Nightlife in Seoul's Gangnam district

As I read during my thirteen-hour flight, South Korea's traditional national motto is *Let's work hard*. And they do. According to labor statistics, South Koreans put in 240 more work hours per year than do Americans, amounting to the equivalent of an extra month in eight-hour workdays.

This work ethic has led South Korea to become the world's eleventh largest economy by nominal GDP, and a global leader in the industrial and technological sectors, being the world's fifth largest exporter and eighth largest importer. Its export-driven economy primarily focuses production on electronics, automobiles, ships, machinery, petrochemicals, and robotics. South Korea is also a world-class exporter of construction services, presumably having learned this by building itself.

When a generation ago, it was Japan that seemingly owned the electronics and automotive industries, today companies like LG, Samsung, Hyundai, Kia, and Daewoo dominate. Like the *keiritsu*, or Japanese sets of companies with interlocking business relationships that dominated the Japanese economy for the second half of the twentieth century, South Korea has the *chaebol* (pronounced "jay BOL"), large groups of interconnected companies that are usually dominated by a wealthy family, and characteristically have strong ties with government agencies. Although the *chaebol* may have common ownership at the very top of the organizational chart, their companies operate independently of each other. An executive with Samsung Engineering, for example, might want to make it clear to you that they don't do electronics. This independence reaches the point where it is not uncommon for *chaebol* members actually to sue one another.

Government and Legal System

The government's structure is dictated by the Constitution of the Republic of Korea, first passed in 1948 and revised several times since. The country has always had a presidential system with an independent chief executive, although South Korea experienced a series of military dictatorships from the 1960's up until the 1980's. Since then, a successful democracy has developed with three branches of government: executive, legislative, and judicial.

Executive Branch

The head of the government is the president, who is elected for only one term of five years. The highest member of the national assembly is the president, followed by the prime minister and then the seventeen ministers who are appointed by the president and report to the prime minister. The executive and legislative branches operate primarily at the national level, although various ministries in the executive branch also carry out local functions.

Legislative Branch

The Legislature consists of a national assembly that has 300 members, 244 of whom are elected from the various constituencies and 56 elected through proportional representation. The members of the national assembly serve for a term of four years. The national assembly's primary functions are to pass and amend laws, to audit

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Reversing the Silk Road: The Rapid Rise of the Art Market in Asia and Its Implications

By Clarissa A. Rodriguez and Laura M. Reich, Miami

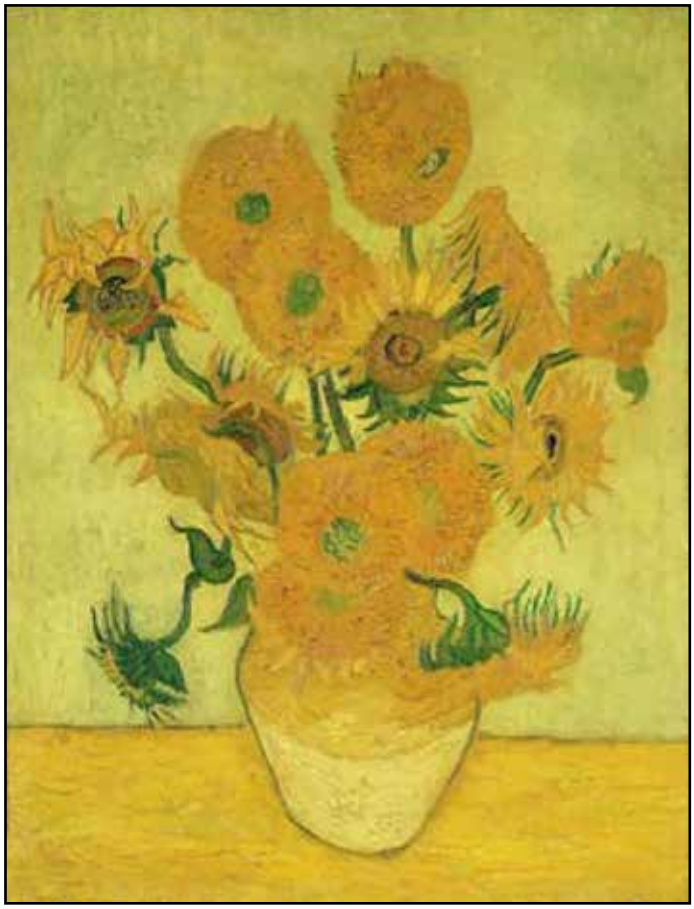
The great ancient trade route between the East and the West—popularly known as the Silk Road—was central to the exchange of luxury and cultural goods for many centuries. The Silk Road carried Eastern items like spices, silks, and works of art from Asia and the Middle East to waiting wealthy European buyers. In modern times, new classes of ultra-rich Asians have "reversed" the Silk Road of antiquity, eagerly purchasing luxury items, art, and antiquities from Europe. In so doing, they have catapulted new markets—Hong Kong, Singapore, Dubai, among others—into the forefront of the art world. And without doubt, the rapid rise of new markets has brought with it a bevy of legal issues including inflated art prices, the propagation of forgeries, and elaborate money-laundering schemes using art.

Rise of Asian Markets

In 1990, Japan was the top art buying nation in Asia and the world's largest importer of art with a 30% share of global imports by value—a market share greater than either the United Kingdom or the United States.[1] Scholars refer to Japan's financial dominance from 1986 to 1992 as the "bubble period," and during that time, many of the world's most highly valued paintings were bought by Japanese investors.[2]

At a 1987 auction in London, a mystery buyer paid nearly US$40 million for Vincent van Gogh's *Sunflowers*. The buyer was eventually revealed as the Japanese insurance company Yasuda Fire and Marine Insurance, which purchased the famous painting as a 100th birthday present to itself.[3] In 1990, Japanese buyers purchased more than US$4 billion in art, including half the Impressionist art put up for sale, including works by Van Gogh and Renoir.[4]

With the benefit of hindsight, the accelerated appreciation of land and a superheated Japanese economy stimulated investor demands for both Japanese stocks and international art during the bubble period.[5] When the crash came in late 1991, art sales worldwide slumped by 65%.[6]



Vincent van Gogh's Sunflowers, 1888
Part of the permanent collection of the Sompo Japan Nipponkoa Museum of Art

While Japanese businesses may have started the art buying trend in Asia, there was only one Asian billionaire by 2006, and wealthy individuals are a driver of fine art sales.[7] At that time, China accounted for only 2% of global art imports, and India accounted for only 3%, casting doubts on the region's ability to grow its markets.[8] China slowly surpassed India as its middle class grew and accumulated wealth while India's wealth stayed primarily with the country's top income earners only.[9] Indeed, China's burgeoning middle class and upper

Reversing the Silk Road, continued

class catapulted China's buying power in art markets from 2% to 9% by 2016.[10]

UBS and PricewaterhouseCoopers analyzed the data of 1,550 billionaires worldwide in 2016 and found that, for the first time, there were more billionaires in Asia than in the United States. The number of Chinese billionaires rose by 25% to 637, compared with 537 U.S. billionaires and only 342 European billionaires.[11] In 2017, Asia accounted for 32% of the world's wealth, which has fueled stronger buying power in both the regional and the global art markets.[12] Not only are Asian economies the fastest growing in the world, but they also are expected to continue their extraordinary growth over the next ten years at twice the rate of the European Union and other Western nations.[13] If current tastes and recent purchases are any indication, then the global art market expects Asians to continue buying phenomenal amounts of international "blue chip" artwork, contemporary art, and classical Chinese master works.

Appealing to an Asian Palate

In 2017, when Leonardo da Vinci's *Salvator Mundi* broke records by selling for US$450.3 million, the art world assumed the buyer was Chinese. In fact, the purchaser was Middle Eastern, buying the work for display at the Louvre Abu Dhabi. But given the multiple Asian buyers feverishly bidding for the masterpiece and the preference of the Chinese for old and modern masters, it was entirely reasonable to presume a Chinese buyer. According to Art Market 2018, a study by Art Basel and UBS, China is the world's second largest consumer of art (after the United

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India's Remarkable Start-Up Ecosystem

By Neha S. Dagley, Miami

During the past ten years, India has experienced a transformation fueled by start-ups in a diverse range of sectors, from lifestyle to fintech. India is not only a top emerging market, but is a leading start-up ecosystem. The impact of start-ups has been so remarkable that even Bollywood was compelled to capture the spirit of entrepreneurship that is quickly sweeping the nation. While there have been many films on the subject, one has managed to capture the hearts and minds of Indian entrepreneurs worldwide, *Rocket Singh: Salesman of the Year*.

Scene from Rocket Singh: Salesman of the Year

Harpreet Singh Bedi a/k/a Rocket Singh becomes a salesman at a computer assembly and service company. Harpreet is not a good student and comes from a humble economic background. He starts the new job with a willingness to work hard and make an honest living to support his grandfather. But after getting a taste of office politics and a lack of integrity in his superiors, he finds himself secretly creating his own company, Rocket Sales Corporation. The driving force behind Rocket Sales is not financial targets or numbers; it is customer service and honesty in business practices. Harpreet recruits other employees who are underappreciated, all from vastly different socioeconomic backgrounds. The movie follows the journey of this young entrepreneur, who in the end rises above it all and proves everyone wrong. It is this unbeatable spirit[1] of Harpreet and his teammates (and even their villain-like boss) that is no different from the tens of thousands of young entrepreneurs creating an enormous start-up ecosystem in India.

Introduction

Government Reforms and the Startup India Scheme

The 72nd Independence Day of India, celebrated 15 August 2018, marked the three-year anniversary of Prime Minister Narendra Modi's Startup India initiative. This initiative, combined with several external market factors, has created an ideal ecosystem with massive potential. In Prime Minister Modi's 2015 Independence Day address to the nation, he enthusiastically conveyed these words to the nation:

> भाईयों-बहनों, इकीसवीं सदी में देश को आगे बढ़ाने में हमारी युवा शक्ति का महत्व है और आज मैं घोषति करना चाहता हूं। पूरे वशि्व की तुलना में हमें आगे बढ़ना है तो हमारे युवकों को हमें प्रोत्साहति करना होगा, उनको अवसर देना होगा। हमारे युवक नए उद्योगकार कैसे बने, हमारे युवक, नए उत्पादक कैसे बने, पूरे देश में इन नए उद्यमयिों के द्वारा एक स्टार्टअप का पूरा नेटवर्क कैसे खड़ा हो? हदिुस्तान का कोई जलिा, हनि्दुस्तान का कोई ब्लॉक ऐसा न हो जहां आने वाले दनिों में नए स्टार्टअप शुरु न हुए हों। [. . .] भाईयों और बहनों इस स्टार्टअप को मुझे बल देना है और इसलएि मेरा संकल्प है आने वाले दनिों में स्टार्टअप इंडयिा और देश के भवषि्य के लयि स्टैंड अप इंडयिा! स्टार्टअप इंडयिा! [. . .]
>
> Brothers and sisters, it is important to empower the youth to take the country forward in the twenty-first century and today, I want to declare that if we want to move ahead in comparison to the rest of the world, we have to encourage our youth, we have to provide them with opportunities. How can our youth become new entrepreneurs, how can our youth become new producers, how can a complete network of start-ups by these new entrepreneurs be set up in the whole country? There should not be any district, any block in India, where there is not a start-up initiated in the coming days . . . Brothers and sisters, I have to provide strength to start-ups and, therefore, I resolve that in the

Start-Up Ecosystem, continued

coming days "Startup India" and "Standup India" will be there for the future of the country . . . Standup India! Startup India! [. . .][2]

Photo: iStock.com

Although the start-up scene has been evolving over the last ten years, it was only within the last few years that the government of India introduced and executed several fast-paced reforms[3] to transform the Indian economy and enable the masses:

Digital India	Digital India is an initiative launched in July 2015 by the government of India to ensure that government services are made available to citizens electronically by improving online infrastructure and increasing internet connectivity.
Startup India	Startup India is an action plan aimed at promoting start-ups.
Smart Cities	The government of India has a vision of developing 100 smart cities as satellite towns for larger cities and modernizing existing cities with a capital outlay of US$7 billion.
Skill India	Skill India is a campaign launched by Prime Minister Modi on 15 July 2015 with an aim to train more than 400 million Indian citizens in different skills by 2020.
Atal Mission for Rejuvenation and Urban Transformation (AMRUT)	In a determined effort to recast urban landscape and to make urban centers more livable and inclusive, the government of India launched the AMRUT initiative with a capital outlay of US$7.9 billion.
Pradhan Mantri Jan-Dhan Yojna (PMJDY)	The objective of Pradhan Mantri Jan-Dhan Yojna is to ensure access by weaker societal sections and low-income groups to various financial services such as a basic savings account, need-based credit, a remittances facility, insurance, and pension.

A start-up under the governmental scheme is defined by the Ministry of Commerce and Industry (Department of Industrial Policy and Promotion or DIPP) as follows:[4]

> An entity shall be considered as a start-up:
>
> (i) Up to a period of seven years from the date of incorporation/registration, if it is incorporated as a private limited company (as defined in the Companies Act, 2013) or registered as a partnership firm (registered under section 59 of the Partnership Act, 1932) or a limited liability partnership (under the Limited Liability Partnership Act, 2008) in India [. . .].
>
> (ii) Where turnover of the entity for any of the financial years since incorporation/registration has not exceeded Rs. 25 crore.[5]
>
> (iii) The entity is working towards innovation, development, or improvement of products or processes or services, or if it is a scalable business model with a high potential of employment generation or wealth creation. Provided that an entity formed by splitting up or reconstruction of an existing business shall not be considered a start-up.

An entity can become recognized as a start-up by submitting an online application through a mobile application or a portal setup by DIPP. The application must be accompanied by a copy of the certificate of incorporation or registration and a "write-up about the nature of business highlighting how it is working towards innovation, development, or improvement of

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The Good, the Bad, and India
The New Frontier for U.S. Lawyers

By Susanne Leone, Miami

Introducing India

In my experience, not much is known about India in South Florida. India is about a 20-hour flight from Miami. Its culture, so different from our own, was built on strong family values, religious beliefs, and tradition. But what do we actually know here in South Florida about India? When we think of India, do we think of Bollywood, Indian food, the Taj Mahal, and slums? Maybe.

dMz/302images/pixabay

The vast majority may not realize India's potential and the opportunities that are waiting for us to engage in one of the world's fastest-growing emerging markets.

India is the biggest country in South Asia and the fastest-growing large economy in the world. As of 18 August 2018, India's population is 1,355,915,092.[1] This is equivalent to 17.74% of the world's population and ranks India second after China.[2] The median age is 27 years[3] compared 37.9 years in the United States[4] and 37 years in China.[5] India's GDP in 2017 was US$2.61 trillion.[6]

India's major industries include steel, transportation equipment, machinery, textiles, information technology, chemicals, food processing, petroleum, telecommunication, cement, mining, and pharmaceuticals.[7]

India is ready for industrialization, and it is ambitious in its desire to grow. India's young population, its low dependency on welfare, and its work force will boost India's future economy over the next two decades.

We can elaborate on statistics and demographic data about India, but what does that mean for us lawyers here in the United States, and especially in South Florida? How can we benefit from India's growth? To understand the potential of the Indian market, we first need insight into India's current developments and challenges. This article reveals some key points I discovered during several visits to India, working with Indian lawyers and clients, and being part of the Indian community.

India's new business-friendly environment

In anticipation of a growth in business, many companies invest in India. More than 100 Fortune 500 companies have their presence in India.[8] The amendment to the Foreign Direct Investment (FDI) policy of 2017 issued on 23 January 2018 included changes that relaxed FDI regulations of various sectors, including the air transport, construction development, and single brand retail trading (SBRT) sectors.[9]

Following the trend of major U.S. companies moving to India under the country's new, attractive FDI policy, Walmart paid US$16 billion this year to buy the e-commerce company Flipkart with the goal of competing with Amazon in India. Previously, Walmart was held back by local regulations in India. According to Walmart CEO Doug McMillon, "India is one of the most attractive retail markets in the world, given its size and growth rate, and our investment is an opportunity to partner with the company that is leading the transformation of e-commerce in the market."[10] India also got Apple CEO Tim Cook's attention. India is the third largest smartphone market in the world, one in which Apple aims to increase its market share,

The Good, the Bad, and India, continued

expecting an immense future demand from a growing middle class.[11] Apple's efforts so far have paid off. Apple could increase its revenue in India in the first quarter of 2018 by 20%.[12] Google showed interest in the emerging market in India three years ago. In 2015, Google expanded and set up its biggest campus outside the United States, in Hyderabad.[13]

With many U.S. companies expanding their business to India, the demand for U.S. lawyers to help clients and Indian law firms navigate the process has increased. A strong network between Indian and U.S. lawyers is needed for investments, merger and acquisition transactions, project development and financing, tax planning, intellectual property right concerns, and other general strategic corporate guidance.

Real Estate

According to the 2018 International Business Trend, statistics for commercial real estate from the International Association of Realtors, India ranked number seven for international commercial transactions.[14] Asia in general ranked second in the category of international commercial buyers with 28%, after European buyers with 29%.[15] The interesting part for Florida attorneys is that Florida ranked first when it comes to the destination of these real estate purchases. The attraction for Indian buyers includes affordable prices, cultural diversity, and of course the weather, which is similar to the climate in most parts of India.

According to the 2017 Profile of International Activity in U.S. Residential Real Estate, China remained the top origin of foreign buyers, but India ranked fifth with $7.8 billion.[16] Also in the residential sector, Florida ranked first in destination nationwide, accounting for 22% of property purchases.[17]

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China's One Belt, One Road Initiative Is the New Silk Road

By Mikki Canton, Miami

Great Wall at Mutianyu, extending into the clouds
photo by Gaston Fernandez

Introduction

There lies a sleeping giant. Let him sleep! For when he wakes up, he will move the earth.

China, the Middle Kingdom. Eccentric, strong-willed, profound, relentless, calculating. Referred to as both a giant and a lion throughout history, deep in slumber as the world turned, it has finally awakened to a complex global order filled with challenges and waves of uncertainty in an ever-changing landscape.

Through good and bad times, China's history taught it when to lie low, lick its wounds, and patiently wait. No question, the hungry lion is wide awake. Wounded in the past but never defeated. The colossal giant believes it is unstoppable. China is reclaiming the legacy of its ancestors, keenly mindful that its history is the best teacher, that it indeed repeats itself. It goes forth having fortified itself, basking again in success never thought possible; vigilant, immensely determined, confident, and strategically positioned with no expectation of failure. Once again China is weaving a rich global tapestry, the New Silk Road, transforming itself into the epicenter of the globe. Exactly as it has always believed itself to be, the Middle Kingdom.

China, the Middle Kingdom

The more things change, the more they stay the same.

China's reign as a grand empire proved not to be eternal. Yet as far back as its history takes us, it has been referred to as *Zhōngguó*, the Middle Kingdom. This name first appeared around the sixth century B.C. during the Zhou

New Silk Road, continued

dynasty, whose people believed that they and their vast kingdom were the center of all civilization, a privileged bestowed spot under the heavens. The Middle Kingdom lay at the center of the earth, also earning China the name the Central Country, where it all began, where all led to and went from.

Through the centuries this divine, inspired belief did not wane. It defined China and was a source of pride and solidarity. At different stages of history, the Middle Kingdom referred to individual geographical regions and progressed to being one collective region made up of many ethnic and multicultural groups. Eventually the Middle Kingdom encompassed every known corner of the nation as one unified territory.

Today the name Middle Kingdom embodies more than just the lands within China's geographical boundaries. It symbolizes the ambition of China and its people, its pride in belonging to one nation, where everything starts and where everything ends; the center of today's civilization. That has always been China's inspiration and surely why, today, we are witness to its New Silk Road.

The Silk Road

There was one, then there were two, and now there are three. But all belong to China.

Two millennia ago, under the Han dynasty, one of the most powerful dynasties in China's history and lasting for over 400 years, the size of the empire's territory was close to what it is today. Even back then, China envisioned connecting itself to the rest of the world, Central Asia, and the Mediterranean region, through its economy. Certain in its belief that indeed it was the geographical center of the world, caravans of traders and adventurers seeking fortunes embarked on journeys spreading the word of China's bounty, creating new economies and enriching the Middle Kingdom along the way.

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Arbitration in Japan: Next Chapter

By Takashi Yokoyama, Miami

Tokyo, Japan
yellowmagics9/pixabay.com

Among developed countries in Asia, international arbitration organizations seated in Japan, including the Japan Commercial Arbitration Association (JCAA), have the lowest number of cases, which puts Japan within the ranks of developing countries in international arbitration rather than a global top-three economy. In contrast, the Hong Kong International Arbitration Centre (HKIAC) and the Singapore International Arbitration Centre (SIAC) have established positions as more preferable arbitration institutions in Asia. In the area of international arbitration, it is often said that a vibrant community dependent on international arbitration reflects vibrant international business. This truly expresses the situations in Hong Kong and Singapore, but does not entirely apply to Japan. This paper posits that Japan's government, corporate world, and legal societies should unite in taking steps to enhance international arbitration or mediation usage in Japan.

This article examines the recent climate in Japan compared to Hong Kong and Singapore when it comes to international arbitration. Then, we will consider what is currently missing in Japan.

Daybreak of Arbitration in Japan

Before the Japanese Arbitration Law took effect on 1 March 2004, some recurring issues and flaws about Japanese arbitration were widely cited by Charles Ragan in his criticism[1] of Japan's arbitration mechanisms. From his own bizarre experience in Japan, he extensively reported to international arbitration communities Japan's antiquated arbitration mechanisms, including extremely sluggish progress, inappropriate interference of arbitrators, limited choice of arbitrators, lack of impartiality and independence, absence of language policy, and prohibition on foreign representation.

Due to the tireless efforts of many prominent experts, however, the new arbitration law was enacted in 2004. It was based on the 1985 UNCITRAL Model Law of International Commercial Arbitration, and at the same time, JCAA—the most prominent arbitration institution in Japan—amended its rules to align with the new law. Some experts report that a number of established or updated provisions, including prompt hearing procedures, respect of decision-making by parties, right to determine number of arbitrators, impartiality and independence, choice of language, and admission of foreign representation in practice sufficiently solved and covered the issues and flaws listed above.[2]

In addition, JCAA made further amendments, which took effect on 1 February 2014, to conform to modern arbitration trends. These developments are Multiple

Arbitration in Japan, continued

Claims in a Single Arbitration, Interim Measures of Protection and Emergency Arbitrator, and Mediation Combined with Arbitration, following the UNCITRAL Arbitration Rules of 2010.[3] These efforts to establish effective legal instruments for international dispute settlement appear to eliminate obstacles to Japan's eventually becoming a leading regional international arbitration center like other major centers.

Despite a great wave of amendments and modifications in laws and rules to reform international arbitration in Japan, we still face a harsh reality. As can be seen in the table at the end of this article, the number of international arbitrations in JCAA remains stagnant with an extremely low rate of cases filed, even after the new law was enforced in 2004, as compared to the ever-rising rate of cases filed in major international dispute settlement organizations in other developed countries. Particularly, among developed regions in Asia, HKIAC and SIAC cases have dramatically increased over the period shown. In contrast, the International Chamber of Commerce (ICC) reports five or fewer international arbitration cases seated in Japan each year during the past ten years. While a reformed arbitration law and institutional rules appeared to be in place in Japan for cross-border companies, some required elements for regional centers were still missing.

Growing Regional Arbitration Center

Why wasn't Japan selected as a regional arbitration center? The authors of the 2018 International Arbitration Survey: The Evolution of International Arbitration[4] (Survey) by Queen Mary University of London and the law firm White & Case LLP revealed that certain tendencies and features make particular arbitral seats and institutions preferable to others.

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H-1B Processing: Navigating Troubled Waters in These Turbulent Times

By Larry S. Rifkin, Miami

U.S. Citizenship and Immigration Services

The H-1B nonimmigrant classification, one of the principal temporary work visas for foreign nationals with a bachelor's degree or its equivalent or higher, is a vehicle through which U.S. employers may hire foreign workers on a temporary basis. The H-1B visa category is for noncitizens who will work in the United States in a specialty occupation, perform services of exceptional merit and ability relating to a Department of Defense (DOD) cooperative research and development project, or work as a fashion model of distinguished merit and ability.[1] For H-1B purposes, a specialty occupation is defined as one that requires at a minimum the attainment of a bachelor's degree, or its equivalent, in a specific field for entry into the position.[2]

The H-1B program, under which the U.S. government admits 85,000 foreign workers annually, many of them in the high-tech, industrial, medical, and science fields, has come under intense scrutiny by the Trump administration in the past 15 months as a part of the "Put America First" messaging that dominated Trump's campaign. Simply put, the Trump administration is making it more difficult for skilled foreigners to work in the United States by creating legal obstacles for practitioners in this field. This article discusses the impact of policy memoranda, President Trump's Executive Order "Buy American and Hire American," and the rise of the U.S. Citizenship and Immigration Services' (USCIS) burdensome Requests for Evidence for pending petitions, as well as legal strategies for overcoming them and challenging the government's issues with the H-1B program.

Rescission of USCIS's Memorandum on Computer-Related Occupations

On 31 March 2017, USCIS issued a new Policy Memorandum, which rescinded the 22 December 2000 memorandum titled "Guidance Memo on H-1B Computer Related Positions."[3] In doing so, USCIS heightened the burden for companies submitting H-1B petitions on behalf of foreign workers in computer-related positions. Historically, petitioners could rely on the *Occupational Outlook Handbook—the government's principal source of career guidance*—to prove that a degree in computer science is *normally* required for a position, as USCIS regularly used the same source to review the duties and educational requirements for the wide variety of occupations that it addressed.[4] In this recent memorandum, USCIS has clarified its position that petitioners must provide additional evidence to establish

that the particular position is a specialty occupation as defined by 8 CFR 214.2(h)(4)(ii) for computer programmers.[5] USCIS also stated that most entry-level positions within the computer programmer occupation are not specialty occupations.[6]

This change is relevant because, according to the "Characteristics of H-1B Specialty Occupation Workers" annual report for fiscal year 2017, prepared by USCIS, 69.8% of the 344,255 H-1B applications received by the agency from 1 October 2016 to 30 September 2017 were for computer-related occupations.[7] The rescission of its prior policy memorandum was an example of the Trump administration's restrictive approach to even legal immigration in the H-1B visa context. While it is not impossible to establish that a computer-related occupation qualifies as a specialty occupation for H-1B purposes, the process is much more burdensome now.

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President Trump's Executive Order

On 18 April 2017, President Donald Trump issued Executive Order 13788, titled "Buy American and Hire American."[8] Executive Order 13788 was published in the Federal Register (FR) on 21 April 2017.[9] The purpose of the "Buy American and Hire American" Executive Order was to create higher wages and employment rates for U.S. workers and to protect their economic interests by rigorously enforcing and administering our country's immigration laws.[10] More specifically, section (5)(b) of the order reads:

> (b) In order to promote the proper functioning of the H-1B visa program, the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.[11]

On the date he signed the order, President Trump told supporters that H-1B visas "should include only the most skilled and highest-paid applicants and should never, ever be used to replace American workers."[12] He also stated that the order was a means to end the "theft of American prosperity" caused by the H-1B program, which he believed had been brought on by low-wage immigrant labor.[13]

By directing the U.S. Department of Homeland Security (DHS) to devise policies to limit the issuance of H-1B visas to only the most skilled or highest paid petition beneficiaries, the Trump administration is again restricting a venue of legal immigration into the United States. Major tech companies, universities, and hospitals contend that the H-1B program allows them to fill highly specialized jobs for which there are sometimes few qualified Americans.[14] "Microsoft, Amazon, Google, Apple, Intel, Oracle and Facebook were heavy users of H-1B visas in 2016," according to USCIS data.[15]

H-1B Processing, continued

Impact of Executive Order – Increase of USCIS's Requests for Evidence

One of the ways that the Trump administration is effectuating the reforms called for in the "Buy American and Hire American" Executive Order is by setting up roadblocks in the H-1B visa program by increasing the number of Requests for Evidence (RFE) for H-1B petitions it issues. These RFEs can cause delays and/or denials of H-1B visa petitions. USCIS reviews H-1B visa petitions to determine whether the job qualifies as a specialty occupation, and whether the beneficiary of the H-1B petition is qualified to perform the job duties required by the specialty occupation.[16] When USCIS challenges that a prima facie case for eligibility of the benefit has not been met, USCIS may issue a Request for Evidence to the petitioner, allowing the petitioner to submit additional evidence to demonstrate that the foreign national qualifies for the benefit requested by a preponderance of the evidence. Petitioners are normally allowed eighty-four days to respond to the RFE before USCIS makes a final decision on the case.[17]

According to data obtained by Thomson Reuters, between 1 January 2017 and 31 August 2017, USCIS issued 85,000 RFEs on H-1B petitions, which was "a 45 percent increase over the same period last year."[18] Yet the total number of H-1B petitions rose by less than 3% in the same period.[19] Since the issuance of President Trump's Executive Order on "Buy American and Hire American," immigration attorneys nationwide have reported a spike in RFEs from USCIS questioning whether an H-1B position assigned the lowest possible wage could qualify as a specialty occupation.[20] Immigration attorneys have also "reported a spike in RFEs and denials relating to the classification of a position as a specialty occupation, in situations where USCIS had previously approved visa petitions for similar positions, and when the agency had previously approved a petition for the same individual working in the same position for the same employer."[21]

The issuance of these RFEs grinds the adjudication process to a halt and causes significant delays for companies that need their prospective employee's services immediately, or who need a current H-1B employee to continue working in that status. The RFEs, often consisting of multiple pages, are also burdensome, complex, and sometimes lacking in common sense, thereby creating additional expense for the petitioner and the foreign national beneficiary in retaining legal counsel for the additional work in drafting a legal memorandum in response.

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Common Issues in USCIS's Requests for Evidence

Level 1 Wages – Entry Level

A common issue raised in USCIS's RFEs in the H-1B context in the last fifteen months is with regard to the use of Level 1 wages. The RFEs claim that a Level 1 wage is not appropriate for a specialty occupation given the complexity of the

job duties and/or that the position is not a specialty occupation because the Level 1 wage indicates that the position is entry level.

When applying for H-1B classification, employers must attest to the Department of Labor (DOL) that they will pay wages to the H-1B nonimmigrant workers that are at least equal to the actual wage paid by the employer to other workers with similar experience and qualifications for the job in question, or the prevailing wage for the occupation in the area of intended employment, whichever is greater.[22] For purposes of establishing the prevailing wage, Congress mandated that government wage surveys set forth at least four wage levels.[23] The DOL Prevailing Wage Determination Policy Guidance provides step-by-step procedures and worksheets to guide employers through the correct mathematical calculation to arrive at the appropriate wage level (Levels 1-4) for a position.[24] More specifically, DOL states:

> All prevailing wage determinations shall start with an entry level wage and progress to a wage that is commensurate with that of a qualified, experienced, or fully competent worker only after considering the experience, education, and skill requirements of an employer's job description (opportunity).[25]

Practitioners should utilize the following strategies in responding to USCIS's RFEs with regard to Level 1 wages. When USCIS claims that a Level 1 wage is inappropriate given the complexity of the job duties, practitioners should direct the USCIS adjudicator to the statutory language and argue that DOL's analysis of the relevant factors for determining a prevailing wage and the corresponding wage level are "the nature of the job offer, the area of intended employment, and jobs duties for workers that are similarly employed."[26] There is no analysis in the statute with regard to the complexity of the job duties for the position offered, only with the requirements for the position (experience, education, and skills) and the geographical area. Thus, wage levels are not an appropriate indicator of the complexity of the job duties to determine whether the position qualifies as a specialty occupation. Furthermore, DOL's four-tier wage system was intended to determine wage structures, not determine whether a position qualifies as a specialty occupation for H-1B purposes.

Practitioners should also argue that USCIS adjudicators cannot blindly rely on wage levels to determine if a profession qualifies as a specialty occupation. For some positions, such as doctors, lawyers, engineers, and other professional occupations, underlying degrees (bachelor's, master's, etc.) and many years of study in the specialty are the minimum requirements for entry into these professions. For example, an attorney who recently graduated from law school and passed the Bar exam, but without much professional experience, most likely would be paid a Level 1 entry-level wage. That fact is irrelevant, however, in determining whether the duties of an attorney qualify as a specialty occupation. On the other hand, a plumber could be paid a Level 4 wage, the highest wage possible, yet no one would argue that a plumber is a specialty occupation requiring, at a minimum, a bachelor's degree in a specific field. Thus, practitioners should argue in their responses that some occupations are inherently specialty occupations, regardless of wage levels.

As practitioners, we must question the implicit argument advanced by USCIS in these RFE challenges—that specialty occupations cannot be entry level—as according to USCIS, young doctors and engineers, for instance, who may not have work experience but have spent years learning technical skills, do not qualify for H-1B purposes. It is our duty to educate USCIS adjudicators that reliance on the wage level system for H-1B purposes is erroneous in determining whether a profession with a bachelor's degree in a specific field is a specialty occupation.

Specialty Occupation

The other common issue raised by USCIS adjudicators during the recent deluge of H-1B RFEs is to question whether any position qualifies as a specialty occupation for H-1B purposes. USCIS adjudicators will normally state in the RFE that the position offered does not require a bachelor's degree in a *specific* field, but rather multiple

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Big Changes Ahead in Royal Caribbean International Maritime Arbitrations

By Scott J. Silverman, Miami

Attending conferences is sometimes a chore and other times a pleasure. Motivations for attending can differ. Sometimes it's for obtaining continuing legal education hours, sometimes it's for networking, and on occasion it's just for the fun. Sometimes it's a combination of all three. Regardless of the motivation, I've always walked away at the end knowing more than I did when I registered. The sixth annual Arbitration and Investment Summit held in Nassau, Commonwealth of the Bahamas, on 29 January 2018, was no exception. This article is the result of what I learned during the conference, and I wanted to pass it on to you.

In 2005, the Eleventh Circuit Court of Appeals ruled in *Bautista v. Star Cruises*, 396 F. 3d 1289 (11th Cir. 2005), that injured seafarers and the representatives of deceased seafarers could be compelled into arbitration with the ship owner pursuant to an agreed upon arbitration clause. With this ruling, arbitration quickly became the cruise lines' preferred means of conflict resolution. *Bautista* reversed the cruise lines' dependence on courts and juries to settle their disputes with their crewmembers and instead opted to rely fully on international arbitration. Since that time, seafarer disputes have seen more arbitration rooms than courtrooms.

Though the cruise lines preferred international arbitration, they lacked the unilateral power to compel their crewmembers into arbitration unless they had an underlying agreement to do so. Agreement came in the form of negotiated collective bargaining agreements (CBA) with the Norwegian Seafarers' Union, which represents approximately 100,000 members. The CBAs addressed working hour rules, pay, repatriation, compassionate leave, and fair treatment policies, among

Sixth annual Arbitration and Investment Summit, 29 January 2018, Nassau, Commonwealth of the Bahamas
Photo by Scott J. Silverman, FCIArb

other things. They also addressed alternative dispute resolution. Note, however, that not all of the major cruise lines are unionized. When seafarers are not part of a union, they typically will agree to an arbitration clause as part of their sign-on agreement.

As with most long-term relationships between employers and employee unions, their CBAs are valid for an agreed upon period of time and are thereafter renegotiated. The cruise lines and their employee seafarers are no different, and as new problems and challenges arise, CBAs evolve to meet those challenges through the give and take of negotiations. This has been the case in the cruise line industry, and especially with respect to provisions related to dispute resolution and international arbitration.

The focus of this article is to bring attention to significant changes to the 2017 CBA between Royal Caribbean Cruises Ltd. and the Norwegian Seafarers' Union on behalf of itself and the Associated Marine Officers' and Seamen's Union of the Philippines, for marine officers, deck and engine ratings and riding crew, and hotel personnel serving on cruise vessels under the Royal Caribbean International brand, effective 1 July 2017—changes that will impact South Florida's lawyers and their clients.

International Arbitration's Impact

The decision in *Bautista* and its progeny significantly impacted South Florida's plaintiff and defense firms. International cases that otherwise would have been filed in state court with a demand for a jury trial were now submitted to arbitration administrators such as JAMS and the International Centre for Dispute Resolution (ICDR) for final hearings. Instead of presenting their positions to a judge or a jury, they now argued before a sole or tripartite arbitration panel. Instead of litigating cases, lawyers found themselves arbitrating disputes while discerning and navigating the differences and nuances between both procedures.

To demonstrate empirically the lasting impact of *Bautista*, one need go no further than reviewing the number of complaints filed against the cruise lines in the Eleventh Judicial Circuit over time. When *Bautista* was decided in 2005, plaintiffs that year had filed 311 new cases in the civil division of the circuit court against the three largest cruise lines (Royal Caribbean, Carnival, and Norwegian and their affiliated brands). In the vast majority of those cases, foreign seafarers sought damages for personal injuries. By 2017, that number had dwindled to just 65 new cases. None of those cases involved foreign seafarers who were subject to an arbitration clause.

Ch-Ch-Changes to the Clause

The 2017 CBA between Royal Caribbean and the Norwegian Seafarer's Union commenced on 1 July 2017 and remains in effect through 20 June 2020. It holds significant changes from predecessor CBAs with respect to alternative dispute resolution and international arbitration between the ship owner and its seafarer employees.

South Florida will likely lose to its genteel neighbor to the southeast—the Commonwealth of the Bahamas—many of the arbitrations that most likely would have been held in Miami. The CBA will also likely play a part in helping the Bahamas achieve its long sought after goal of establishing it as the Caribbean's premier arbitration hub, but all may not be lost for South Florida's arbitration community.

There Is a Sanity Clause—Conciliation and Mediation

Article 34C of the 2017 CBA is entitled "Conciliation Conference." Unlike prior CBAs, the new CBA makes the completion of a conciliation conference a condition precedent before either party can initiate an arbitration. The provision states, in pertinent part, "[h]owever, it is understood that the Conciliation Conference is [a] mandatory step before any party can initiate an arbitration and either party may refuse to arbitrate until the mandatory conciliation process is completed." This provision is a broad departure from prior CBAs, which did not envision the role of conciliation or mediation as a means of alternative dispute resolution.

The incorporation of a conciliation conference presents an opportunity for the ship owner and its employee to discuss and resolve the potential claim before it devolves into a formal and time-consuming adversarial process. While article 34C does not require the seafarer to attend the conference *in person*, it does require him or her to exercise the option of attending *in person*, through Skype/internet, video, or telephone. If it is impossible for the seafarer to attend due to a medical incapacity, or if there are geographical limitations on telephone or internet connections, the seafarer may be excused from participation. If the seafarer is represented, the article provides, ". . . the representative will attend the conference with the Owners/Company."

Though the conciliation clause foresees a discussion between the seafarer and the ship owner, either party is entitled to employ the services of a neutral mediator to "assist in facilitating a settlement/agreement." The opposing party cannot object to the use of a mediator, but both parties must attempt to agree on the person who will be the neutral mediator.

Article 34C also describes the process for selecting the mediator. It states, "The parties must agree to the identity of the mediator, and if the parties cannot agree, then each party shall write the names of three proposed mediators and all the proposed names will be placed in a hat or bowl, and in the presence of all parties or their representatives, one name will be randomly selected from the submitted names." And who pays for the mediator? Article 34C states, ". . . the requesting party shall pay the costs of the mediator."

So that neither party goes into the conciliation conference "cold," Article 34C imposes a duty upon the seafarer and the ship owner alike, upon request, mutually to produce information relevant to the dispute. The discoverable information includes any master's hearing reports, written statements by the seafarer taken by the cruise line, medical records, and personnel files.

The benefit of the conciliation conference/mediation is that it starts the negotiation process between the parties early and before expenses and fees on both sides get out of hand. Theoretically, the seafarer will receive a personal settlement offer from the cruise line much sooner than he or she would during the course of the arbitration, after vast sums have been expended. Also, there is the possibility that the cruise line might offer the seafarer a new employment contract should the seafarer desire to continue employment with the ship owner upon expiration of the current employment contract. At present, once there is a settlement between the cruise line and the employee, there is little or no prospect of a future employer/employee relationship.

The conciliation clause evolved from experience in litigation and arbitration, and recognition of the importance of getting the parties communicating early in the process. It will be interesting to know whether it works for both the cruise line and the seafarer. In any event, an arbitration will not be allowed to commence until a conciliation conference has taken place.

Governing Rules

The 2017 CBA defaults to the American Arbitration Association's ICDR as the administrator of the arbitration so long as it is "in accordance with its Employment Rules, as amended with agreement of the parties . . . " Article 35 (6). This appointment is not exclusive, because the CBA provides that another administrator "as agreed by the Owners/Company and the Union when stated in a fully executed Protocol" can be used.

No Direct Prohibition Against Class Actions

When the U.S. Supreme Court, in *AT&T v. Concepcion*, 563 U.S. 333 (2011), upheld an arbitration clause containing a prohibition against class actions, many employers around the nation demanded their transactional lawyers insert a similar arbitrations clause into their employment contracts. After all, most employers do not relish the thought of being a defendant or a respondent in a class action.

Though the 2017 CBA does not directly ban class actions, it has arguably achieved that end. Article

Big Changes Ahead, continued

35 (7), which states, "All arbitrations must be brought by or on behalf of Seafarers in their own names, and not on behalf of others on an unnamed basis, but similar claims asserted on behalf of individual Seafarers may be grouped in one arbitration."

It appears that so long as numerous seafarers are willing to use their proper names and have similar claims, they can be "grouped" into a single arbitration. "Unnamed" claimants, however, are precluded from proceeding.

There Is a Time Limit

In the past, various CBAs between the Norwegian Seafarers' Union and other cruise lines had incorporated a statute of limitations. The appearance of a statute of limitations was never permanently incorporated into those CBAs, however. It appeared in some and not in others, even though the same cruise line might have been involved.

The 2017 CBA between Royal Caribbean Cruises Ltd. and the Norwegian Seafarers' Union contains, for the first time, a statute of limitations requiring the seafarer to commence the arbitration within a specified time or be barred from bringing the claim. The statute of limitations is set at three years for personal injury or death claims, and two years for all other claims. If the claims are not brought within the specified time frames, they "will not be recognized and will be time-barred." Article 35 (2) provides:

> All arbitrations must be commenced within two (2) years from the date of the occurrence giving rise to the grievance or dispute, or the date the Seafarer knew or should have known of the occurrence giving rise to the grievance or dispute, except for claims for personal injury or death, which must be commenced within three (3)

Matthew Barra/pexels

Big Changes Ahead, continued

> years from the date of the occurrence giving rise to the injury or death or the date the Seafarer knew or should have known of the occurrence giving rise to the grievance or dispute.

Taking into account the new mandatory conciliation provision in the CBA, there may be a question as to when the arbitration actually commences for purposes of the statute of limitations. Is it upon a request for a conciliation conference? Is it when a demand for arbitration is filed with the entity administering the arbitration? Is it when the conciliation conference begins or ends? Is it when a party asserts its rights for relevant information prior to the commencement of the conciliation conference?

RonnyK/pixabay

Both the cruise line and the seafarer are cautioned about the possible dangers that may befall them when the statute of limitations becomes an issue. There do not appear to be any provisions in the clause that allow for the tolling of the statute. Article 34C states, in part, "Prior to the initiation of any arbitration procedure outlined in the next section, the Union and the Owners/Company shall confer to resolve any disputes." This provision suggests that the conciliation process is separate and apart from the commencement of the arbitration as discussed in Article 35(2), and therefore participation in it may not stop the running of the statute of limitations.

A New and Predictable Seat of Arbitration

In the world of international arbitration, there are numerous provisions in an arbitration clause that directly impact the manner in which the arbitration will proceed. One provision may select the language that will be used during the proceedings. Other provisions may specify the rules to be applied, the number of arbitrators, or even the breadth of permissible discovery. It is generally agreed that the most important clause is the one that defines the seat of the arbitration.

The seat of arbitration is a country chosen by the parties to the contract. The selected country is important because it is that country's laws that govern the arbitration's procedural issues as well as the enforcement or lack thereof of an arbitration award. While other countries, under the 1958 New York Convention, may choose to recognize and enforce an international award under the terms of the convention, they lack the authority to modify or nullify the award, which can only be done in the country selected by the parties to be the seat of the arbitration.

If a court needs to intervene during the arbitrable proceedings, it will be a court in the country of the seat of arbitration. For example, if a subpoena needs to be enforced, it will be by a court in the seat of arbitration. While the seat of arbitration and the arbitration's venue in a contract may be the same, they can be continents away. For example, if the seat of arbitration is in the Commonwealth of the Bahamas, but the venue for the arbitration is in Miami, if there is a problem with discovery or an award is sought to be vacated or confirmed, court intervention likely will be sought in the Bahamas and not from a Florida court.

Big Changes Ahead, continued

The 2017 CBA diverges from prior CBAs between Royal Caribbean and the Norwegian Seafarer's Union. In past CBAs, the seat of arbitration was determined by the citizenship of the seafarer. Therefore, if the seafarer was from Peru, the seat of arbitration was in Peru. While this was theoretically beneficial to the seafarer, because court intervention would take place in his or her home country, there is no direct proof anyone ever benefited from its selection. Notwithstanding, the selection process could conceivably present an administrative nightmare for the cruise line.

With the cruise line employing seafarers with citizenships from around the world, under past CBAs, the ship owner could be forced to seek redress or to respond to disputes in courts located in myriad countries. Instead of disputes being consolidated for management purposes, the cruise line had to rely upon an array of lawyers spread out across the world to address legal issues when they arose during an arbitration. While this was a potential management problem for the cruise line, it was also a potential problem for seafarers and their attorneys, who could be forced to expend large sums of money to retain counsel in faraway countries to address legal matters in jurisdictions applying unfamiliar foreign laws.

The 2017 CBA resolved these issues in a way that likely will be administratively beneficial to the cruise line and the seafarer. Article 35 (3) of the new CBA provides, "Subject to the exception noted in Section 4 [Filipino Seafarers governed by the Standard Philippines Overseas Employment Administration Contract of Employment], the seat of any arbitration . . . for the final hearing of any arbitration shall take place in the Flag State of the vessel or in any location agreed by the Owners/Company and the Union or the representative of the Seafarer." Since Royal Caribbean's vessels are flagged in the Commonwealth of the Bahamas, absent an agreement of the parties to the arbitration, the seat of arbitration will be in the Bahamas. As a side note, Royal Caribbean's Celebrity branded ships are flagged in Malta, and under a separate CBA, the seat of arbitration involving those ships and the seafarers serving on them will be in Malta.

No longer will the seafarer's country of citizenship determine the seat of arbitration. The seat of arbitration now defaults to the Commonwealth of the Bahamas unless there is an agreement between the parties to the contrary.

A New Venue—Say Goodbye to the Good Ole USA

In an international arbitration, venue is distinguishable from the seat of arbitration. Venue is the physical location where the arbitration will take place. In past CBAs between the Norwegian Seafarers' Union and Royal Caribbean and other cruise lines, various venues were chosen to include Nassau, Commonwealth of the Bahamas; Montevideo, Uruguay; Italy; Monte Carlo; London; Manila, Philippines; or some other country.

The 2017 CBA has both the seat of arbitration and the venue for the final hearing as the Commonwealth of the Bahamas. Notably, the CBA makes no mention of the venue for hearings other than the final hearing. Presumably, dispositive motions, motions related to discovery, and the like can take place at a location determined by the arbitrator or agreed to by the parties.

The selection of the Bahamas as the default venue is significant because it is likely to transfer final hearings that traditionally have been held in the United States to another country. At present, it is unclear whether the cruise line will use attorneys from the United States to continue to defend it or whether it will retain defense counsel from the Bahamas. As for attorneys representing seafarers, they will need to research Bahamian law to see if they are authorized by law to provide representation for their clients in the Bahamas without first becoming authorized to practice law within that jurisdiction.

There is also a question of whether the 2017 CBA contemplates the use of Bahamian arbitrators over those in the United States. Likewise, depending upon how the parties implement the CBA, it could adversely affect South Florida arbitrators.

All Things Bahamas—Substantive Law

The 2017 CBA provides that the substantive law to be applied will be determined by the Flag State of the vessel. In the contract, Royal Caribbean's vessels are flagged in the Commonwealth of the Bahamas. Accordingly, the substantive law to be applied during the arbitration, with respect to Royal Caribbean vessels, is the law of the Bahamas. Article 35 (3) provides, in pertinent part,

> The laws of the Flag State shall govern over any dispute in arbitration without regard to any conflict of law principles, and the parties to the Agreement recognize that the law of the Flag State will apply to all disputes notwithstanding and without regard to any provision of Flag State law that may be construed to preclude the application of Flag State law to non-resident Seafarers.

While past CBAs have provided for the application of Bahamian law, they have also agreed to use the laws of other nations, including Norway. In the past, it was common for the cruise lines and seafarers to orally stipulate to the application of United States maritime law, even though it was in contravention of the CBA. It is unclear whether they will continue to do so, especially in light of the current terms of the clause.

Discovery Depositions: Keep Your Powder Dry

The 2017 CBA added a new section related to discovery borne largely out of Fed.R.Civ.P Rule 26 that requires initial disclosure between parties. To the extent the CBA does not specifically address discovery and procedure, the ICDR Employment Rules of the American Arbitration Association will govern. The new CBA is the first time Royal Caribbean and the Norwegian Seafarers' Union have agreed to limitations on discovery depositions. While other cruise lines and the union have limited depositions in the past, this is the first time Royal Caribbean and the Norwegian Seafarers' Union have done so.

The new provision limits the number and duration of depositions, but makes allowances for additional depositions upon a showing of "good cause" to the arbitrator. Article 35 (9) provides, in apposite part,

> "The parties shall have the right in arbitration to conduct depositions under oath of parties and witnesses, however depositions shall be limited to a maximum of three (3) per party and to a maximum of seven (7) hours in duration each. Additional depositions may be scheduled only with good cause shown and require an Order by the arbitrator."

No Need to *Ask* the Seafarer to Submit to an Examination

The 2017 CBA broke new ground with respect to an injured seafarer's examination by the ship owner. The new CBA ensures that the ship owner has a right to examine and verify the claimant's injuries or damages. The examination is required to occur in the venue of the final hearing. Though the CBA does not mention a country by name, it will likely be the Bahamas since Royal Caribbean's ships are flagged there and the ship's flag determines the venue of the arbitration for the final hearing. Notably, no lawyers or representatives from either party may attend the examination. Article 35 (9) provides, in apposite part:

> The parties are entitled to medical examinations to verify any injuries or damages claimed, or to rebut any defenses. Such medical examinations shall occur in the venue of the final arbitration hearing. To maintain the impartiality of the examination, neither party's attorney, agent, nor representative shall be present during the Owner's/Company's examination.

No Surprises . . . Please

Many international arbitration scheduling orders require the parties to the arbitration to exchange documents they intend to introduce at the final hearing. The 2017 CBA removes this issue from the purview of the panel and by its terms requires the parties to exchange the documentation on their own. Article 35 (9) provides, "The parties will exchange documentation to be relied upon at the final arbitration hearing in accordance with the ICDR procedures." The provision does not specify a precise time when the exchange is to take place. Neither do the applicable ICDR rules. Presumably, the timing will be left to the panel's discretion.

Big Changes Ahead, continued

Courts, Keep Out!

The doctrine of *kompetenz-kompetenz* reigns supreme in international arbitrations. Translated into English, the words simply mean *competence-competence*. The principle of kompetenz-kompetenz imbues the arbitrable tribunal with the authority to rule on matters related to its own jurisdiction.

The 2017 CBA has not only apparently taken the competence doctrine and incorporated it into the arbitration clause, it has expanded it. The terms of Article 35 (14) give the tribunal exclusive authority over the agreement to the exclusion of other courts, and give the panel the power to impose both legal and equitable remedies. Article 35 (14) states:

> The arbitrator, and not any federal, state or local court or agency shall have the exclusive authority to resolve any disputes relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable and as to choice of law. The arbitrator shall also have the power to provide any remedies necessary to address the dispute such as, but not limited to, damages, specific performance, and injunctive relief.

Should there be a disagreement between the ship owner and the union as to the interpretation of the CBA, under Article 35 it is left to the panel to decide—and no one else. In short, it is abundantly clear that Royal Caribbean and the Norwegian Seafarers' Union prefer to keep the courts from interfering with the arbitrable proceedings.

Keeping the Union Apprised

When the seafarer is represented by his or her own counsel, the 2017 CBA imposes a duty on the ship owner to keep the Norwegian Seafarers' Union abreast of the grievance or dispute and its outcome, so long as the union was involved in the "grievance process or the arbitration involves a core principle of the Agreement" Article 35 (13).

Final Thoughts

In 2017, Royal Caribbean Cruises Ltd. and the Norwegian Seafarers' Union entered into an expansive and progressive CBA. Through conciliation and possibly mediation, it created an opportunity for the ship owner to reach an early settlement with the seafarer while avoiding the expense and time associated with an ongoing arbitration. At the same time, the seafarer is now afforded an opportunity to converse with the ship owner to obtain an early settlement of his or her claim.

Of utmost importance, the parties to the CBA have consciously decided to make their arbitrations Bahamian centric and away from the United States. This is borne out by the CBA's terms. The flag under which the ships are registered determine the seat of arbitration, venue, and substantive law. Royal Caribbean's ships are flown under the flag of the Commonwealth of the Bahamas.

The new CBA also sets forth the right of the ship owner to have an allegedly injured seafarer examined without the need of an order from the arbitrator. It also incorporates a provision that mandates the exchange of documents that the parties will rely upon at the final hearing.

The 2017 CBA is an experiment that will likely last for at least the next three years. The impact on the legal communities in both the Bahamas and South Florida will be determined as new cases begin to flow through the proverbial pipeline. The extent of the impact has yet to be felt. Lawyers should be on the lookout!

Scott J. Silverman *is a retired judge from the Miami-Dade Circuit Court. He is a highly respected mediator and arbitrator with JAMS in Miami, Florida. He is one of just twenty-six mediators to be rated by Chambers and Partners in its 2018 U.S. Guide.*

WORLD ROUNDUP

MIDDLE EAST

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UAE introduces new arbitration law.

On 3 May 2018, the United Arab Emirates (UAE) enacted a new arbitration law (Federal Law No. 6 of 2018). The new arbitration law replaces the UAE's 1992 arbitration law. While it is in line with the UNCITRAL Model Law on International Commercial Arbitration, it does vary some. One of the more notable takeaways is that unless the parties agree otherwise, the default language of the proceedings is Arabic. The new arbitration law also sets time-strict post-award time limits. For instance, a UAE court has sixty days to order the enforcement of the final award if it does not find any grounds to set aside or nullify it. In addition, any annulment preceding must be commenced within thirty days of the final award. Legal experts are optimistic that the new arbitration law will maintain the UAE as the Middle East's go-to international arbitration hub.

Regulators seek uniform framework regarding cryptocurrency across the GCC.

In August 2018, the Kingdom of Saudi Arabia cautioned its citizens that transactions and investments using cryptocurrency are prohibited in the Kingdom. Other member states of the Gulf Cooperation Council (GCC) have not imposed similar bans. This development has led GCC regulators to come together to try to work out a uniform framework regarding cryptocurrencies across the GCC.

Morocco faces ICSID claim from U.S.-based Carlyle Group.

In 2015, Morocco seized the SAMIR (Société Anonyme Marocaine de l'Industrie du Raffinage) oil refinery in Morocco after it charged the company US$1.35 billion in unpaid taxes, which the company could not pay. Tanks within the oil refinery stored US$600 million of crude oil and refined petroleum products that belonged to the Carlyle Group. After the seizure, the Carlyle Group attempted to recover its oil and petroleum products to no avail. In August 2018, after failed negotiations with Morocco, the Carlyle Group initiated an arbitration for more than US$400 million in the International Center for Settlement of Investment Disputes (ICSID). This is the second ICSID claim Morocco is facing related to the SAMIR oil refinery.

Ride-hailing services encounter difficulty in the Middle East.

Ride-hailing services in the Middle East like Uber and Careem (Uber's main rival in the Middle East) are facing regulatory issues in various Middle East jurisdictions. Earlier this year, an Egyptian court suspended both Uber's and Careem's Egyptian operations. That suspension was overturned on appeal. Similarly, in April 2018, a Jordanian court suspended Careem's services because it did not have the proper licenses. That decision is on appeal.

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NORTH AMERICA

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Canada joins trade deal with United States and Mexico.

What's going on in our own backyard? Following the announcement in late August that the United States and Mexico were close to concluding a bilateral trade deal, Canada's top trade negotiator, Canadian Foreign Minister Chrystia Freeland, joined her Mexican and U.S. counterparts in Washington in an attempt to include Canada in the reworked agreement. The new trilateral treaty—the United States-Mexico-Canada Agreement (USMCA)—replaces and mostly preserves the 24-year-old NAFTA. The USMCA does not, however, end the steel or aluminum tariffs imposed by the United States on Canada and Mexico. The new deal is subject to review every six years. Expect Canada and Mexico to prioritize and expand their trade relationships with the rest of the world in response.

Federal courts are not available to aliens in actions against foreign corporations.

In *Jesner et al. v. Arab Bank, PLC*, the U.S. Supreme Court held that the federal courts are not available to aliens in actions against foreign corporations. In a 5-4 opinion, with Justice Anthony Kennedy writing for the majority, the Court affirmed the Second Circuit's dismissal and holding that aliens cannot bring suit under the Alien Tort Statute (ATS) against foreign corporations in U.S. federal district court. Petitioners sought recovery under the ATS for deaths caused in part by Arab Bank's willingness to accept donations, maintain accounts, and transfer funds on behalf of and to known terrorist groups. The dissent criticized the majority opinion for "absolv[ing] corporations from responsibility under the ATS for conscience-shocking behavior" and in effect immunizing corporations.

White House eliminates cybersecurity coordinator from NSC.

The White House in mid-May eliminated the position of cybersecurity coordinator on the National Security Council. This post was considered central to developing U.S. policy to defend against increasingly sophisticated digital attacks and the use of offensive cyber weapons. An NSA memorandum said the job was no longer necessary because cybersecurity issues were already a "core function" of the president's national security team.

UN passes resolution on child soldiers.

On 9 July 2018, the UN Security Council, based in NYC, passed a resolution on children in armed conflict condemning all violations of international law regarding recruitment of child soldiers to armed conflict, as well as all violence, abductions, and attacks against children. The Council referenced the important work of the Special Representative on Children and Armed Conflict and called on "all parties to armed conflict to allow and facilitate safe, timely and unhindered humanitarian access . . ."

Laura M. Reich and Clarissa A. Rodriguez *are the founding shareholders of Reich Rodriguez PA. The firm specializes in commercial litigation, international arbitration, and alternative dispute resolution. Reich Rodriguez's practice areas include art law disputes with an emphasis in recovery and restitution of stolen and looted art, with a focus on European art and art of the Americas.*

RUSSIA

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Recent case demonstrates the long arm of Russia and the BVI.

On 19 July 2018, the British Virgin Islands (BVI) High Court issued a decision in *Magnum Investment Trading Corporation v. the Attorney General of the BVI*,[1] which involved a request for information by the Russian Federation under the Criminal Justice (International Cooperation) Act to gather evidence into alleged criminal conduct in Russia.

Magnum Investment Trading Corporation and Niteroi Limited, the claimants in this case, are both BVI-registered companies that indirectly own shares in a Russian company, OJSC Togliaytiazot (ToAZ), one of the most successful mineral fertilizer production companies in Russia.

The Russian Authority, namely the Investigative Committee of the Russian Federation, by a letter of request, sought assistance from the BVI attorney general in obtaining evidence in aid of criminal investigations taking place in the Russian Federation involving the offense of swindling. The Investigative Committee of the Russian Federation in its request for assistance indicated that the Russian Authority was investigating a criminal case against certain individuals, namely Makhlai Vladimir Nikoloayevich, Makhlai Sergei Vladimirovch, Korolev Evgeniy Anataloyveich, Andreas Zivi, and Beat Reprecht, for allegedly stealing products from ToAZ valued at approximately US$3 million by "deception and abuse of confidence" over the period of 1 January 2008 to 3 December 2011.

Using his powers under the Criminal Justice (International Cooperation) Act, the BVI attorney general caused a search warrant to be issued by the magistrate for the search of the companies' registered agent's premises and the seizure of the companies' confidential records for transmission to Russia.

The claimant companies objected to the seizure of their confidential documents and to such documentation being transmitted to Russia. The claimants produced substantial evidence to show that the requests from Russia had been issued for improper purposes and formed part of an unlawful campaign by Russian entities and authorities against them and connected entities.

The claimants asserted that the Russian authorities had subjected them to various corporate raids, corruptly exploiting criminal, regulatory, and international mutual assistance regimes. The claimants claimed the purpose

of these raids was to place pressure on the entities as a means of obtaining control over each of them. The claimants further asserted that actions like these are not new to the Russian authorities. The claimants cited various examples of Russia's misuse of the mutual legal assistance process, including the Russian government's pursuit of Yukos, formerly Russia's largest oil company.

The BVI attorney general did not take these assertions into account, as he believed the Criminal Justice (International Cooperation) Act contemplated an automatic transmission of the documents once he obtained them pursuant to the request. While the documents obtained were in the course of transmission, the claimants successfully applied for an interim injunction to stop the delivery of the documents to Russia while they sought judicial review of the attorney general's decision to apply for the search warrant, the magistrate's decision to issue the warrant, and the attorney general's decision to transmit the documents to Russia.

The BVI High Court issued a decision in favor of the claimant quashing all three of the challenged decisions. The court rejected the BVI attorney general's argument that (1) the Criminal Justice (International Cooperation) Act contemplated an automatic transmission of the documents once he obtained them pursuant to the request; (2) he was accordingly entitled to ignore the claimants' representations regarding the improper purpose of the request; and (3) he had no duty to investigate those representations before complying with the request. In giving its reasons, the court held, among other things, that the attorney general failed to fully investigate the allegations and evidence produced by the claimants, which may present compelling reasons why a request should not be processed, and in doing so, the attorney general failed to take into account relevant considerations.

As a result, the court ordered the BVI attorney general to reconsider his decision to transmit the documents to Russia, taking into account the representations by the claimants.

Yana Manotas Mityaeva *is an attorney focused on real estate and business law. A native Russian speaker and fluent in English, she has experience in assisting multinationals with their real estate and corporate holdings, private asset protection, and estate planning across borders. She is president of the Russian-American Bar Association of Florida.*

Endnote

1 *Magnum Investment Trading Corporation v. the Attorney General of the BVI*, retrieved from https://www.eccourts.org/magnum-investment-trading-corporation-v-the-attorney-general-of-the-british-virgin-islands/.

SOUTH AMERICA

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Latin American countries pass laws on corruption, data protection.

Latin America countries are working to strengthen their laws and regulations to prevent, detect, and remediate corruption, as well as to address other relevant topics such as protecting the personal data of their citizens. In 2018, both Argentina and Peru enacted laws in relation to corporate criminal liability for corruption offenses, and Brazil passed laws with respect to data protection.

The Argentine Law on Corporate Criminal Liability entered into effect on 1 March 2018. The legislation imposes criminal liability on corporations for national and transnational bribery, unjust enrichment of public officials, influence peddling, and other offenses. Companies can be held liable for bribery and other irregularities carried out in the company's name, benefit, or interest or with the company's legal entities' interference, directly or indirectly. In addition, legal entities can also be held liable if the company approves activities of third parties that initially were unauthorized.

The new law also imposes successor liability on parent companies in the case of mergers, acquisitions, and other corporate restructuring. The law specifies situations in which a company can be excused from criminal liability, including self-reporting misconduct to public authorities, and foresees the possibility of collaboration agreements between the public prosecutor's office and legal entities.

Peru's Legislative Decree 1352, modifying Peruvian Law 30424, went into force on 1 January 2018. It imposes administrative liability on legal entities for the crimes of active bribery of public officials and of active transnational bribery, when it is committed in their name or for them and on the company's behalf. Such liability does not interfere with, and it is independent from, the individual agent's liability. The law allows for situations in which the legal entity can mitigate its responsibility by self-reporting misconduct prior to a formal internal investigation.

According to the Peruvian law, legal entities are not held liable if the individual who committed the wrongdoing acted on his or her behalf, for his or her exclusive benefit, and without providing any kind of advantage or benefit for the company. Participation in a compliance program, known in Peru as the Prevention Model, prior to the commitment of an offense can exempt a legal entity from administrative liability. If the compliance program is implemented after the misconduct is committed, it

will be considered a mitigating factor. In addition, the law imposes autonomous liability for certain crimes of bribery and money laundering; however, unless parent companies specifically consent or authorize individuals to engage in corruption or money laundering, parent companies are not liable for penalties under the autonomous liability provisions of the Decree.

The Brazilian Senate approved the Data Protection Bill of Law (PLC No. 53/2018), also known in Portuguese as *Projeto de Lei Geral de Proteção de Dados* or the LGPD, on 10 July 2018. The LGPD institutes rules for the use of personal data by private entities, the public sector, and individuals in Brazil. Prior to enacting the LGPD, Brazil's standards for protecting data were less stringent than those used by the United States and certain European countries.

The LGPD has many similarities to the most recent European legislation on data protection, the General Data Protection Regulation (GDPR). The LGPD has significantly transformed the data protection system in Brazil and institutes detailed rules for the collection, use, processing, and storage of an individual's personal data. To access such data, the entity making the request will be required to state the purpose for the data collection and obtain clear, unequivocal, and previous consent from the data subjects. The majority of Brazilian industry sectors will be largely affected by the LGPD because it limits companies to collecting only essential personal data of customers, that is, the information necessary for the development of their businesses. As a result, personal data that has no use for a company in conducting its business shall no longer be collected. The president of Brazil sanctioned the final draft of the LGPD (Law 13,709/2018) on 14 August 2018, after vetoing certain provisions, citing the public interest and the possible unconstitutionality of some of the articles of the law. The LGPD was published in the Brazilian Official Gazette on 15 August 2018, and the new law will become effective eighteen months from publication.

The 2018 G20 Leaders' Summit will take place in Buenos Aires, Argentina.

Another relevant development in Latin America relates to the leading forum of the world's major economies, the Group of Twenty (G20), which pursues the development of global policies to address the challenges humanity faces. Created in 1999, the G20 comprises nineteen countries: Argentina, Australia, Brazil, Canada, China, Germany, France, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, the United Kingdom, and the United States, as well as the European Union. Other countries and organizations were invited to participate as guests in the 2018 G20. Argentina has proposed three priority topics for the 2018 G20: the future of work, infrastructure for development, and a sustainable food future. Other important topics include prioritizing anticorruption action plans and promoting transparency to help combat cross-border corruption. Hosting the G20 in a Latin American country is an important development. It provides the opportunity to bring a Latin American perspective to the G20, one of the most important international forums that collaborate on the global economy.

Mariana Matos *focuses her practice on internal corporate investigations, advising clients on compliance matters, and commercial litigation (with expertise in representing clients in the airline sector). She obtained her law degree from the Pontifícia Universidade Católica – PUC (São Paulo) and a specialization course in compliance from the Fundação Getúlio Vargas – FGV (São Paulo). In 2017, she attended a summer session about the American legal system at Yale University, and she completed a specialization course in Brazilian civil procedure at PUC (São Paulo).*

WESTERN EUROPE

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EU's General Data Protection Regulation Can Apply to Non-EU Companies.

Could your law firm or your clients be affected by the European Union's General Data Protection Regulation (GDPR), with which companies collecting consumer data on European Union (EU) citizens must comply (effective 25 May 2018)? The European Parliament adopted the GDPR in April 2016 to replace an outdated data protection directive from 1995, long before the internet became the business hub it is today. A response to the public's rising concern over privacy, the GDPR requires businesses to protect the personal data of EU citizens for transactions occurring within EU member states. It also regulates the exportation of personal data outside the EU. The provisions of the GDPR are the same for all EU member states, and the standards that companies must meet are high and will require a large investment to adhere to them.

A company that stores or processes personal information about EU citizens in the EU states must comply with the GDPR even if it has no physical presence in the EU. The GDPR affects corporations that do business in the

EU and companies that market their products over the web to EU consumers, encompassing a large geographic scope. In summary, Article 3 of the GDPR states that if a company collects personal data or marketing information of an EU consumer while that person is physically present in the EU, then the GDPR applies. This seems like a very broad requirement and that all companies outside the EU with a simple web presence could be affected by this law.

This is where the specific requirements of the GDPR come into play. An EU data subject, as the GDPR refers to consumers, coming across a U.S. company's website in a Google search does not expose that small company to the GDPR requirements. To be required to comply with the GDPR, a company without a physical presence in the EU must *target* its marketing to a data subject in the EU. What does targeted marketing mean? Marketing in the language of an EU country, specific language targeted at EU consumers, and having a domain suffix that can be reached with a suffix from an EU country, such as .nl or .es, all constitute specific marketing to EU consumers. Non-EU-based hospitality, travel, and software companies could be subject to the GDPR. Basically, any company that has identified a market in Europe and has localized web content will be subject to the GDPR.

What does it mean specifically to be subject to the GDPR, and what are the consequences of not complying? Any company subject to the GDPR must inform consumers of their rights under the GDPR and obtain explicit consumer consent to collect their data. Data includes basic identity information such as name, address, and ID numbers. It also includes web data such as location and IP address, health data, biometric data, ethnic or sexual orientation data, and even political opinions. For example, if a California-based company is looking to collect email addresses through its website, it must, at the very least, have a check box without a default "X" in it with clear language about what it will be doing with these email addresses. If a company sells a product, it must also explain and obtain consent regarding each type of processing done with the EU data subject's personal data, such as email promotions or sharing with third-party affiliates.

Once the data is collected, companies must protect it according to the GDPR rules. For those that are already following existing data security standards, this should not be a problem; however, the seventy-two-hour breach notification rule will certainly require companies to step up their game. Exposure of email data that contains sensitive medical or financial data would require notification to the EU regulator within seventy-two hours. Where there is a risk to fundamental property and privacy risks, the data subjects themselves must be notified.

The GDPR says that companies must provide a "reasonable" level of protection for personal data but does not define what constitutes reasonable. This will give the GDPR governing body leeway to assess fines for data breaches and noncompliance with the regulations. There is still some question about how the EU regulators will enforce these actions against companies without an EU presence; however, hefty fines have been imposed on those that violate the GDPR. Failure to report a breach to regulators within seventy-two hours of the occurrence carries first-tier fines of 2% of global revenue.

In light of these new rules, third-party and customer contracts will need to be revised as well. The GDPR places equal liability on data controllers (the organization owning the data) and data processors (an outside organization that manages data for the data controller). If the third-party processor is not in compliance with the GDPR, then the data controller is not in compliance either. Third-party processors of data will also need to adhere to the rules for reporting breaches. Existing contracts with these third-parties should spell out responsibilities and define consistent processes for how data is managed and protected. Responsibility to make sure that third-party vendors are complying with the GDPR and processing data accordingly will fall on companies' procurement departments.

Client contracts, whether online clicks or more formal agreements, must also be revised. This will require a rather large undertaking by the technology departments to understand how the data is stored and processed and to agree on a compliance process for reporting. Once the company understands how the data flows, it can then memorialize a client's consent to this flow of data in contract form.

Megan E. Campos *is a member of the international tax practice of Aballi Milne Kalil, located in Miami, Florida, where she specializes in assisting high-net-worth families with cross-border matters related to tax, succession planning, and multijurisdictional business and corporate matters. She has significant experience with the Foreign Account Tax Compliance Act (FATCA) and the Common Reporting Standard (CRS). Megan is fluent in Spanish and Portuguese.*

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SECTION SCENE

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This year, because of the proximity in time of the ILS Retreat to The Florida Bar Annual Convention, the section held its annual meeting during the retreat. As seen in this sampling of photos from the event, a great time was had by all.

SECTION SCENE

South Korea, from page 9

the national budget and procedures of administration, to ratify treaties, and to approve state appointments. The Legislature also has impeachment power.

Judicial Branch

For the lawyers in this audience, I'll give some extra detail on the judicial branch. South Korea has a civil-law legal system that places its constitution and statutes as primary and controlling sources of law.

The judicial branch operates at both the national and local levels. It is made up of the Supreme Court, the Constitutional Court, the High Courts, the District Courts, the Patent Court, the Family Court, and the Administrative Court.

The District Courts, the High Courts, and the Supreme Court form the basic three-tier system, but notably the independent and specialized Constitutional Court has jurisdiction over constitutional review of statutes, constitutional complaints, competence disputes between governmental entities, impeachment of high governmental officials, and dissolution of political parties. A decision of the Constitutional Court cannot be appealed and binds all state agencies and local governments.

As the principal court of last resort, the Supreme Court hears appeals against judgments or rulings rendered by the High Courts, the Patent Court, and the appellate panels of the District Courts or the Family Courts in civil, criminal, administrative, patent, and domestic-relations cases.

The president appoints the chief justice with consent of the National Assembly. Other judges are appointed by the president but upon the suggestion of the chief justice. Although all nine justices of the Constitutional Court are appointed by the president, three must be elected by the National Assembly and three designated by the chief justice.

Judges serve terms of six years, and all must pass two years of judicial training in the judicial training institute. The Supreme Court heads the judiciary and is the final court of appeal, except for matters concerning constitutional review and impeachment.

The High Courts have jurisdiction over civil cases involving an amount in controversy over 200 million Korean won (approximately US$177,000) and criminal cases

South Korea, continued

involving potential sentences of death or substantial imprisonment. High Courts hear appeals from judgments, rulings, or orders rendered either by a panel of three judges of District Courts or the Family Courts, or by the Administrative Court. The jurisdiction of High Courts is exercised by panels of three judges. The High Courts can uphold, reverse, or remand the judgment of the lower court based on both its own fact-finding and legal interpretation while the Supreme Court can do so only through legal analysis and interpretation.

District Courts have jurisdiction over appeals from judgments rendered by a single judge of the District Court, a branch court, or a Municipal Court. This appellate jurisdiction is exercised by appellate panels of three judges.

The cases for which the jury system is available are limited to capital crimes such as murder, rape, and robbery, in which defendants have the option of going to a judge or a jury. In addition to deciding whether or not the defendant is guilty, a jury can offer its opinion about the sentence of the case, although this opinion is nonbinding on the judge.

Currently, there are approximately 100 municipal courts across the nation with jurisdiction over minor civil cases where the amount in controversy does not exceed 20 million Korean won (approximately US$17,700) and misdemeanor cases in which the courts may impose penal detention or a fine not exceeding 200,000 Korean won (approximately US$177).

Culture

Allow me to address some of what I found to be the most notable aspects of South Korea's cultural identity.

South Korea is one of the world's leading countries in literacy, as well as in math and science, with one of the world's most highly educated labor forces. And working hard begins in school. An average South Korean child's life revolves around education, as pressure to succeed academically is ingrained from an early age. Education holds the promise of cultural status and provides a gateway to the middle class.

The author at the High Court for the Seoul district of South Korea

Although there seems to be many Koreans who speak English, most of those I met learned by spending a year or more being educated in the United States. I met a number of lawyers who had their LLM degree and still maintain their New York bar membership. That said, it is important to note that most Koreans do *not* speak English, so if you travel to Korea, you will probably want to carry around little cards with the address of where you are going if you expect to communicate with the taxi driver.

Although graduating from one of the country's four top universities is prestigious and leads to successful careers, I repeatedly heard that it is actually the *high school* one attends that is most important. Relationships developed among peers during the three years at the country's best high schools last a lifetime and often result in important business connections and career advancement. So I'm told.

South Korea, continued

Customers ordering from kiosks at a McDonald's in Seoul

Importantly, one's "peers" are generally determined almost exclusively by those who are the same age. Age, by the way, is measured differently than in the United States. In a practice started in China and used by other East Asian countries, in South Korea people are "1 year old" at birth, and everyone gets a year older on New Year's Day. So, someone's Korean age is one or two years more than a Western counterpart born on the same day. Yes, someone born on December 30 will turn 2 years old just two days later. While people of the same age treat each other as equals, even a relatively minor age difference calls for cultural indications of respect to be bestowed upon the elder by the younger.

Those indications of respect are everywhere, with bowing, of course, being most well-known. An almost imperceptible bow of the head might suffice for a brief hallway encounter (especially with an underling), but if you need to apologize for something to the boss, I hear that only a repentant, waist-deep, forty-five-degree-angle bow will suffice.

I had read about the business-card thing, but it is hard to overemphasize its importance. First, do *not* forget your business cards. Next time I will have some made with my name and address in Korean on one side, but fortunately I always had a pocket full of cards ready for the high-holy business-card exchange ceremony. Second, *never* give or accept a business card using anything other than both hands; doing otherwise is very disrespectful. Third, as most of us have already heard, you must then read the giver's card—savoring it with all the interest one might show for a fine wine. Finally, remember that in Korea, first names are last. The leader of North Korea, Kim Jong-un, is President Kim. Only his friends call him Jong-un. These are little things, but Koreans take respect very seriously, and after acclimating, it does begin to feel appropriate.

Indicators of respect are also part of dining out with Koreans. They say that because of the Korean working day, with its long hours and extreme formality, Koreans will only get to know and trust you over a good meal. Of course, this good meal will likely involve quantities

Koreans enjoy relaxed dinners after formal, stress-filled days.

South Korea, continued

of *soju*, which is like a weak (30%) vodka, as well as the nation's rice-wine product, *makgeolli*, which has an unfortunate milky/slimy viscosity at first, but grows on you. The important thing to remember in these "business" drinking ceremonies is: *Never* pour your own glass. Pour for others only and allow them to do so for you. I also understand that you are supposed to look and drink away from the elder with you, but I never personally witnessed that subtlety, as I was mostly with contemporaries. I hope.

An obvious crevasse of cultural difference between our countries is that in South Korea, everything is spotless. From the busiest streets to crowded stores, there is no litter, grime, or dirt . . . anywhere. Everything is immaculate. I noted with interest a young cashier at a lunch place who seemed to see something strange. He came out from behind the register, picked up the smallest scrap of paper on the floor ten feet away, and then went back to his station. I was impressed with that level of detail and effort, and saddened by the comparison with my own national culture.

I never learned whether the roots of Asian bowing grew from religion, but it is worth noting that South Korea is an interesting religious amalgam. More than half of the South Korean population declare themselves not to be affiliated with any religious organization. For those who are, Christianity is South Korea's largest organized religion, accounting for more than half of all South Korean religious adherents. Of the approximately 13.5 million Christians in South Korea, about two-thirds of them belong to Protestant churches, and the rest are Roman Catholic. Other religions include Korean shamanism (also known as Sindo or Muism), the native religion of the Koreans, Buddhism, Islam, and various indigenous religions including Korean Confucianism. But all the people I met who discussed religion in any way, interestingly, indicated a Christian background.

Korea, of course, also has some distinctions in the world of sport. The martial art Taekwondo originated in Korea, for which Koreans seem appropriately proud. Although soccer is popular, everyone I met was talking baseball. Apparently, the main league's teams are owned by the *chaebol* companies. Thus, you have the Kia Tigers, the Samsung Lions, and the LG Twins. The games are supposed to be major social events with substantial crowd participation. Next time, I'm going.

One iconoclastic sporting thing I did do was go to Seoul's Olympic Park. In 1988, South Korea hosted the Summer Olympics in Seoul (if you're old, think Carl Lewis and Florence Griffith Joyner), and the Olympic Park remains one of the great parks in the city. Although many of the original venues remain, the park—one of many throughout Seoul—is tranquil in nature and a great place for a walk or a jog.

The Peace Gate: Entrance to Seoul's Olympic Park

Current U.S. Relations and Political Climate

Since the Korean War when U.S. forces defended against the invasion by North Korea, South Korea and the United States have maintained a close relationship that is still palpable. U.S. service personnel easily enjoy liberty throughout the Insadong entertainment district, and the U.S. military base in the middle of northern Seoul is an established norm. Although it is said that Koreans never truly accept foreigners as one of their own, they certainly showed every courtesy and, yes, respect, to this U.S. visitor.

Today, the United States is South Korea's second largest trading partner, after only China. On 12 October 2011, the U.S. Congress passed a long-stalled trade

South Korea, continued

agreement with South Korea known as the Republic of Korea-United States Free Trade Agreement (KORUS FTA). It went into effect on 15 March 2012. In March 2018, the two countries announced that they had reached an agreement in principle on the renegotiation of this FTA. Obviously, this is all part of a larger dance involving both the United States and North Korea.

The DMZ looking into North Korea. Although it looks peaceful, there are about two million landmines planted in this two-kilometer-wide strip of land.

But with respect to North Korea, one thing is clear: the South believes reunification should and will happen. The analogy one repeatedly hears is that of East and West Germany and their eventual and complete rapprochement. This is what Korean (at least South Korean) schoolchildren learn from the cradle. Thus, I was incredibly lucky to be there during the historic meetings between President Moon and President Kim held at the storied Joint Security Area (JSA) at the DMZ. Clearly, everyone in Seoul was jubilant at the mere fact of this meeting. I can only hope further progress is made for lasting peace in this part of the world with such extraordinary and unlimited potential.

All photos courtesy of Alvin F. Lindsay

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Leonardo da Vinci's Salvator Mundi
Courtesy of Christie's Images Ltd. 2017

States), accounting for 21% of the total worldwide sales amounting to US$63.7 billion.[14]

According to Georgina Adam, author of *Big Bucks: The Explosion of the Art Market in the Twenty-First Century*, buying art used to be a niche trade in the United States and Europe. Now, buying art has become part of the global luxury and fashion industry, and international celebrities compete for art by "brand name" artists."[15] Art need not be extremely old to be popular. For example, in 2015 the painting *Nu couché* (1917-18) by Amedeo Clemente Modigliani sold to Chinese billionaire Liu Yiqian for US$170.4 million at Christie's. In 2017, Japanese billionaire Yusaka Maezawa bought a Jean-Michel Basquiat, *Untitled* (1982) for US$110.5 million at Sotheby's, expanding the possible range of Asian taste for art.

Japanese buyer Yusaku Maezawa poses with his purchase of Basquiat's Untitled (1982).
Photo from Instagram account yusaku2020

But the classics remain popular. In 2017, Rebecca Wei, president of Christie's Asia successfully secured Vincent van Gogh's *Laboureur dans un Champ* (1889) at a Christie's auction for a Hong Kong-based collector. Ms. Wei also secured an 1884 Renoir portrait for US$8.2 million and a 1970 Marc Chagall painting for $1.6 million for the collector, who spent US$91 million on three works of art in one night.

Van Gogh's 1889 Laboureur dans un champ
Source: Christie's

Ms. Wei states that successful Chinese entrepreneurs between the ages of 40 and 60 are generally attracted to artwork valued at US$10 million and above.[16] More specifically, Chinese collectors, and Asian collectors generally, are after the rare classics known as international "blue chip" art.

Blue chip art is any art expected to reliably increase in economic value regardless of the general economic conditions.[17] Art need not be old to be blue chip—works by Pablo Picasso, Andy Warhol, Mark Rothko, Tracey Amin, and Anish Kapoor are all examples of blue chip art. Even in an economic downturn, blue chip art will sell at top dollar because these pieces remain coveted and thus often sell at incredible prices at auction. Indeed, Postwar and Contemporary art is also reliable in the art market.

Postwar and Contemporary art refers loosely to works created after 1945. Last year, only twenty-five artists were responsible for half of all Postwar and Contemporary art auction sales.[18] According to Artnet Analytics, a database for art prices for more than 12 million auction houses, through the 1980's, collectors concentrated on purchasing new and Contemporary art. Because of a lack of supply, however, when a piece of blue chip Contemporary art goes up for auction, the ultra-wealthy bidders drive up the price to win it. After the economic crisis of 2008, investors and collectors shifted to traditional masters with more reliable resale value.[19] The shift can also be credited to rise of ultra-high net-worth individuals (a/k/a UHNWI's) from Asia, Eastern Europe, and the Gulf region and their preference for more classical art and well-known artists.

The Asian Market for Home-Grown Works

Another consequence of UHNWI's from Asia consuming art is the expansion of the Asian art market itself. According to Artnet and the China Association of Auctioneers, the market for Chinese art, antiques, and antiquities is growing steadily in Asia, with major auction houses shifting inventory to Hong Kong. In 2017, 78% of the works categorized as Asian art was sold in the Pan-Asian region—up from 66% in 2011.[20] The *China Daily* reported impressive sales like the purchase of landscapes by Qi for US$171 million in December 2017. Asians are rapidly buying artwork by Qi Baishi, Xu Beihong, and Zhang Daqian. In fact, according to Artprice.com, a French database for art market information, in 2017, Zhang Daquin generated US$31 million more in auction sales than Pablo Picasso.[21] This primarily reflects the appetite of Chinese buyers for Contemporary works in ink, and works that evoke the traditional culture of China.[22]

When the painting *Family Life* by Vietnamese artist Le Pho sold for US$1.2 million at auction in Sotheby's in 2017, the sale was the first Vietnamese painting ever to cross the million-dollar mark in the international market. This sale was generally considered to signal the maturity of Vietnamese art and the Vietnamese art market.

Le Pho's Family Life

Inflated Prices, Money Laundering, and Forgeries

With the rise of ultra-wealthy Asians acquiring art, with blue chip art in high demand, and with Chinese art in particular gaining worldwide prominence (in addition to setting trends and dictating taste), the Asian world is treating art like an asset. And like any international asset being bought, sold, and traded, there are classic legal issues, like inflated art prices, the mass proliferation of forgeries and fakes, and the opportunity for international money laundering.

Reversing the Silk Road, continued

While auction houses delight in a bidding war and hope to secure the highest possible sales prices, for observers and critics there are major concerns over art's "commodification" and value only in terms of dollars.[23] For example, in 2013, Christie's sold US$691 million in Postwar and Contemporary art. Christie's also set the record for the most expensive work by a living artist, selling a Jeff Koons sculpture, *Balloon Dog*, for US$58.4 million.[24] Every year since, however, Christie's and other major auction houses have continued to break their own records. The possible effect, according to the analysts, is that art is becoming more of an asset class or luxury brand, like equities or fashion and less about the actual art.[25] Whether that is a desirable or acceptable effect is an individual value judgment.

Artprice.com reports that the Contemporary art market is extremely sensitive to "prestige news," particularly if it involves major art dealers who are today the creators of artists' pricing powers.[26] The auction sector is highly concentrated by value, with the top five houses (Christie's, Sotheby's, Poly Auction, China Guardian, Heritage Auctions) accounting for around half of global market sales by value and the top ten accounting for over 60%.[27] The effect of inflation includes threats to the art market's consolidation around promoting the work of very few artists, and homogenizing tastes around successful artists and those selling their works. As the focus of publicity shifts to galleries and artists at the superstar level, the art market also appears increasingly out of reach for new buyers who feel they can only take part if they gain access to this top tier and its multimillion-dollar price structure.[28] In Asia, low average incomes mean that for many consumers and other emerging markets, purchases of luxury products including art are still out of their reach entirely, resulting in a relatively thin market of buyers.[29]

The result is a burgeoning black market of copies, fakes, and forgeries.[30] Indeed, some of the biggest problems facing the art from Asia include: the lack of an orthodox and robust art system with curators, art consultants, wealthy domestic buyers, and art investment funds; the questionable ability of audiences and buyers to evaluate artwork; and fake, forged, and copied works.[31]

There is a strong cultural element regarding copying artwork as well. Specifically, copies are meant to pay tribute and may interpret the original. In Asia, copies may be equally valuable if they have a relationship to the original. Forgeries or fakes, on the other hand, are made to deceive buyers.[32] For example, when there was a demand for artwork by Bùi Xuân Phái, a Vietnamese painter famous for the paintings of Hanoi Old Quarter, Asian buyers rushed to purchase his work regardless of whether the pieces they purchased were authentic or fake.

Bùi Xuân Phái's Nong Thon (Countryside)

Moreover, in Vietnam, Vietnamese artists are not highly protected by legal documentation and practices, which results in the frequent violation of intellectual property rights and the artists' reliance on foreign dealers to make ends meet.[33] Amateur artists and professional forgers do not hesitate to copy and plagiarize artwork when auction houses keep selling the paintings. In struggling economies, investors are more interested in generating immediate income than in maintaining the enduring value of authentic artwork.[34]

Art also makes for an attractive instrument to hide illicit assets, experts say, because the transactions are often private, prices are speculative, and an item can easily be smuggled to evade authorities who, even when they inspect the piece, frequently do not know its value. As Georgina Adam outlines in her book *Dark Side of the Boom: The Excess of the Art Market in the Twenty-First*

Century, collectors and their agents have continually found creative ways to use their art holdings to defer paying taxes, including the establishment of private museums and foundations storing artworks in offshore freeports, where they can be exchanged without incurring customs duties or VAT, and loopholes in the tax code such as "like-kind" exchanges.[35]

Two very prominent cases illustrating money laundering through art are the *Ferreira* and *Razak* cases. In 2007, U.S. federal investigators found someone attempting to smuggle a Jean-Michel Basquiat painting, titled *Hannibal*, through New York's Kennedy Airport. The painting was appraised at US$8 million, but the bill of lading listed the value as only US$100. The painting was part of a 12,000-piece art collection purchased by Brazilian financier Edmar Cid Ferriera using embezzled funds from Banco Santos in Brazil.[36] Before his arrest, Ferreira and his wife smuggled more than US$30 million of art out of Brazil.

Ferreira owned a Panamanian company called Broadening-Info Enterprises that purchased *Hannibal* for US$1 million in 2004. Broadening-Info Enterprises then sold the painting for US$5 million to a company owned by Ferreira's wife. On its way to New York in 2007, however, with a listed value of only US$100, U.S. customs documents were not required. When caught, Broadening-Info Enterprises claimed it had no intent to smuggle the painting, despite the gross inaccurate valuation of the piece.[37] Ferreira was sentenced in São Paulo to 21 years' imprisonment for crimes against the national financial system and money laundering.

In the *Razak* case, according to the U.S. Department of Justice, Malaysian Prime Minister Najib Razak diverted more than US$3 billion from the Malaysian sovereign wealth fund and used US$1 billion of the siphoned funds to buy real estate in California as well as paintings by Basquiat, Rothko, and Van Gogh.[38] Razak oversaw 1Malaysia Development Berhad (1MDB), a government investment fund with the mission of encouraging economic development and investment in Malaysia. As early as 2015, however, allegations arose relating to the use of funds. Investigations revealed billions of dollars were missing from the funds. With the help of the infamous Panama Papers, investigators focused on more than US$700 million in deposits to Razak's personal accounts using agencies, banks, and companies linked to 1MDB.

Through associates, Razak disguised the true nature of the funds. The primary individual responsible for laundering the embezzled funds was Jho Low. Jho Low is a financier who established offshore shell companies, mislabeled transactions as gifts, and purchased art and real estate to disguise the origins of the funds. The *Razak* case generated publicity because Low used some of the funds to produce the *Wolf of Wall Street* film.[39]

When China implemented regulations to restrict the flow of capital out of the country, wealthy individuals turned to the art market to evade the restrictions.[40] Chinese laws prohibit individuals from moving more than US$50,000 out of China in one calendar year; however, individuals can sell their art in another country at a higher price and retain the profits in the foreign currency. Wealthy individuals can also enlist the assistance of an associate who sells the work at an inflated price, retains a portion of the proceeds, and deposits the remaining amount in an offshore bank account. Either method makes the funds appear legitimate to the Chinese authorities, which, of course, is the ultimate intent of the transaction. The subjectivity of art in terms of how it acquires value, how it is appreciated, and how it moves between treasure and asset makes it extremely difficult to regulate.

While inflated art prices, forgeries, and money laundering have long been problems in the art world, the rapid rise of Asian art markets has amplified these issues and brought them to the legal forefront. Governments, banks, and auction houses must collaborate to offer better provenance and authentication resources as well as provide due diligence resources and transparency in their processes. For example, blockchain technology is being used in art to create safe and secure certificates for digital art.[41] Auction houses are implementing more robust "Know Your Client" programs for due diligence purposes, and financial institutions are focusing on higher-risk jurisdictions for potential art-related crimes. They

Reversing the Silk Road, continued

are also using higher scrutiny for "politically exposed persons." Indeed, while opportunity to use art for criminal purposes is significant, these same legal issues present opportunities for innovative technology and international cooperation and collaboration.


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products or processes or services, or its scalability in terms of employment generation or wealth creation."

Components of the Startup India Scheme

The government of India has put into place several incentives, resources, and policies to facilitate the success of the Startup India scheme:

(1) Launch of an online hub, known as the Startup India Hub, that provides resources and resolves inquiries from entrepreneurs, and facilitates connections and networking.[6]

(2) Simpler and low-cost entry processes for new businesses that qualify as start-ups, including self-certification.

(3) Ease of compliance norms to reduce certain regulatory requirements that would otherwise burden newly formed start-ups.

(4) Tax exemption policies, including an income tax exemption for three consecutive tax years out of a block of seven years[7] from the year of incorporation. This exemption applies to (a) start-ups incorporated on or after 1 April 2016 but before 1 April 2019; (b) start-ups with a total turnover of less than INR 25 crores (approximately US$3.6 million) in any previous years beginning on or after 1 April 2016 and ending 31 March 2021; (c) start-ups that hold a certificate of eligible business from the Inter-Ministerial Board of Certification as notified in the Official Gazette by the Central Government.[8]

Start-Up Ecosystem, continued

(5) Additional tax incentives are provided under the government scheme,[9] including (a) certain tax exemptions on capital gains up to INR 50 lakhs arising out of transfer of long-term capital assets invested in a fund notified by Central Government;[10] and (b) certain tax exemptions from capital gains tax arising out of a sale of residential property if the amount of net consideration is invested in equity shares of an eligible start-up.[11]

(6) Introduction of an online learning environment and a four-week learning program providing a program syllabus in Hindi and English, addressing topics pertaining to ideation; financial, business, and legal planning; and fundraising.

(7) Quicker exit policies allowing start-ups to wind up their business entities within a period of 90 days from the date of application (as compared to a 180-day period).[12]

(8) Intellectual property protection benefits, including (a) fast-tracking the process of patent filing and acquisition; (b) up to 80% rebate in patent fees and free legal assistance; and (c) a 50% rebate in trademark filing fees.[13]

(9) Providing funding support through a "Fund of Funds for Start-ups (FFS)" in the amount of INR 10,000 crore (approximately USD $1.4 billion); FFS is not designed to invest directly in start-ups, but will participate in the capital of Alternative Investment Funds (AIF) registered with the Securities and Exchange Board of India.[14]

(10) Establishment of Technology Business Incubators and Start-up Centres to propel innovation through augmentation of incubation and research and development efforts.

The new regulations and scheme also include certain proposals with impact on outbound overseas expansion and inbound investments, allowing for streamlining of overseas investment operations for start-up enterprises:

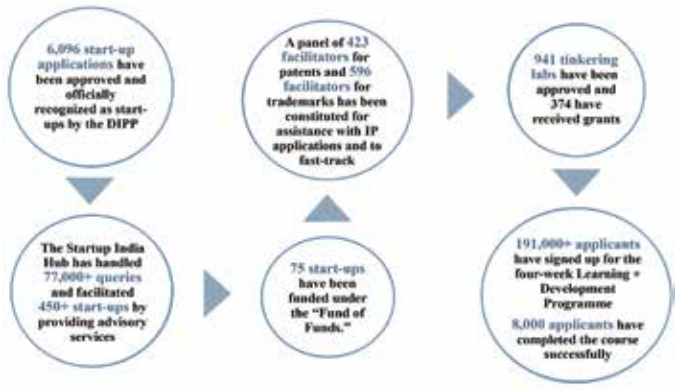
(1) Any Foreign Venture Capital Investor (FVCI) that has obtained registration under the Securities and Exchange Board of India, Regulations, 2000 will not require approval from the Reserve Bank of India and can invest in "equity or equity linked instrument or debt instrument issued by an Indian 'start-up' irrespective of the sector in which the start-up is engaged."[15]

(2) Permitting start-up enterprises to access loans under an "External Commercial Borrowings (ECB)" framework.[16]

(3) Permitting Indian start-ups having an overseas subsidiary to (a) open a foreign currency account with a bank outside India for the purpose of crediting to the account the foreign exchange earnings out of exports/sales made by the start-up or its overseas subsidiary; and (b) credit their Exchange Earners Foreign Currency (EEFC) account for any payments received in foreign exchange by an Indian start-up arising out of sales/export by start-up or its subsidiary.[17]

Achievement Focus: Startup India Scheme

As of January 2018[18]

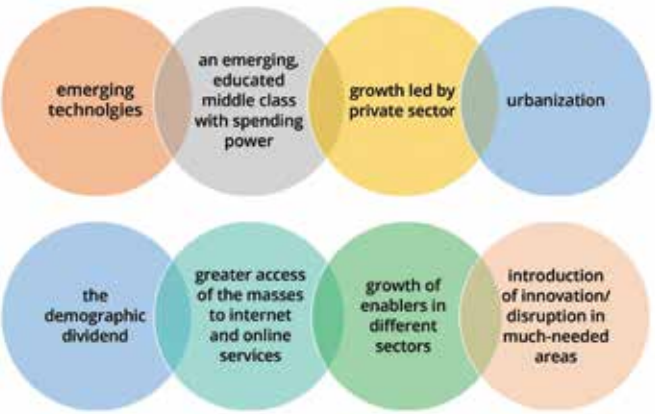


Challenges, Opportunities, and Achievements

As with any emerging market trend, the start-up ecosystem in India presents its own set of opportunities, challenges, and achievements. Opportunities arise from governmental policies and programs, growth led by private sectors, and market factors. Challenges are presented, in part, due to infrastructure deficiencies, lack of adequate seed-stage funding, the inability to

Start-Up Ecosystem, continued

afford highly skilled talent, insufficient mentorship, not enough access to capital, slow execution or growth, the nature and diversity of the Indian consumer market, and difficulty in accessing the market. Achievements have certainly been made by various entities, including Flipkart (Amazon's strongest competitor in India), Ola Cabs (Uber India's competitor), Paytm (e-commerce payment system), and Zomato (restaurant search and discovery service). In addition to a strong governmental push, the various growth drivers are identified below:



➢ **Emerging technologies:** Emerging technology trends that will continue to impact and drive start-up growth in India include artificial intelligence, blockchain, and Internet of Things or IoT. India is projected to be a leader in IoT (a term used to refer to internet devices that can connect and exchange data). IoT has application in numerous sectors: retail, energy, telecom, health care, transportation, logistics, etc. Everyday examples of IoT include wearables, connected cars, and connected home devices. Given the current transformation of consumer, government, and business landscapes in India, there exists a vested interest in development and integration of IoT.

➢ **Educated middle class with spending power:** The emerging middle class creates an enormous market for goods, services, and technology solutions. Not only is this segment of the population educated, it has developed a notable appetite for brands and the ability to spend (or even splurge) on consumer products and services.

➢ **Growth led by private sector:** Private sector participation and leadership is a critical component of the start-up ecosystem. Corporate houses have made contributions, as part of a Corporate Social Responsibility requirement under the Company Act, by supporting recognized incubators. Additionally, multinationals have created start-up accelerator programs; for example, Microsoft Accelerator runs a program in Bengaluru, India, and Paypal incubator has a location in Chennai.[19]

➢ **Urbanization:** Urbanization is inevitable, and it is estimated that by 2025, India will have sixty-nine cities with a population of more than one million each.[20] Urbanization is a driver for growth as well as a catalyst for a problem that will require transformative solutions.

➢ **The demographic dividend:**[21] "India is among a handful of South Asian countries that sits on a demographic gold mine. India has a median population age of 27.3 years compared to that of 35 years for China and around 47 years for Japan. It is estimated that India has around 390 million millennials and about 440 million in the Gen-Z cohort. About 12 million people are added to the working age population every year. Demographic growth is significant as it is intrinsically linked to economic growth and therefore, cannot be ignored."[22]

➢ **Greater access of the masses to internet and online services:** 730 million is the projected number of internet users in India by 2020,[23] with the number of online shoppers projected to be 175 million.[24] The number of smartphone and mobile device users is growing rapidly, with more than 300 million smartphone users in 2018.[25]

➢ **Growth of enablers in different sectors:** Examples of e-commerce enablers in India include logistics firms, IT infrastructure firms, and fintech/payment gateway firms.

➢ **Introduction of innovation and disruption in much-needed areas:** India's start-ups have encountered several problems on their road to success; however, these problems have created opportunities for those who can leverage technology to present innovative solutions.

Start-Up Ecosystem, continued

Chhatrapati Shivaji Maharaj Terminus (formerly Victoria Terminus), an iconic railway station in Mumbai, functions as the headquarters of the Central Railway.
Photo: iStock.com

Achievement Focus: UrbanClap (private sector)

UrbanClap is one of India's fastest growing start-ups. It is a mobile marketplace for local services and provides professional services (plumbers, electricians, carpenters, cleaning) and in-home personal services (beauty, spa, fitness). Presently, UrbanClap covers eight Indian cities: Delhi-NCR, Mumbai, Kolkata, Pune, Ahmedabad, Chennai, Hyderabad, and Bangalore. According to the statistics on UrbanClap's website, it has more than 100,000 trusted professionals and 3 million customers.[26] The company was founded by Abhiraj Bhal, Varun Khaitan, and Raghav Chandra in December 2014.[27] Through their personal experiences, these entrepreneurs came upon the realization that it was extremely cumbersome to hire a reliable local service professional.[28] Thus, they created UrbanClap as a solution and created a technology platform to execute it. The company grew quickly, and by December 2015, Ratan Tata, the former chairman of Tata Sons Ltd., had invested an undisclosed amount.[29] By staying focused in the hyperlocal services industry, UrbanClap has become a segment leader and continues to be successful.

Conclusion

Although the Startup India scheme has been subject to scrutiny and criticism, there is no denying it will be a major contributor to India's evolving start-up ecosystem. Government reform of various policies is essential to ease the burden on new start-ups and to provide them with the flexibility to grow beyond borders and to attract foreign investors. Government support is critical to create a truly inclusive start-up environment that reaches the masses, uplifts them, and gives them access to funding, infrastructure, and technology. It is equally important for the private sector to continue to shape high-level research, development, and growth strategies while creating much-needed opportunity. The changes to come will be strong drivers for further growth and opportunities. In leveraging the change, the potential for realizing opportunities via innovation and monetization of ideas is immense. A clear example on point is the vast potential for technology firms to create products and services designed to enable start-ups in navigating the legal landscape, business processes, and risk management methods. The path ahead is a solid one—a perfect balance of not-so-perfect factors are coming together for start-ups in India.

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Start-Up Ecosystem, continued

in 2016, Ms. Dagley focused on commercial and civil litigation for twelve years, representing a wide array of clients in disputes concerning contracts, business organizations, business torts, and real estate. Neha is a native of Mumbai, India, and is fluent in Hindi and Gujarati.

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The reasons for Indians to invest in U.S. real estate are a relatively slow-moving domestic market in India and the stability and security of the U.S. economy. Additionally, diversification is one of the most important factors of long-term financial success and for minimizing risks of loss. Besides that, Indian families are also beginning to buy more and more real estate abroad, instead of in India, to set the future for their children. For most middle-class families, the need is clear early on to settle their children abroad instead of in India. Challenges faced in India (discussed later in this article) and the extremely competitive environment are fueling these decisions. More than 186,000 students from India come to the United States every year.[18] India is the second largest country of origin for international students in the United States; its student number has doubled in the last ten years.[19] Many Indian families plan ahead.

Immigration: H1-B Visa

Although the United States and India have had good relations since President Trump came into office, and although India has been a strategic partner for the United States in Asia, recent immigration-related announcements of the Trump administration have disrupted things. The H1-B visa was one of the most popular visa categories for Indians. Almost 70% of H1-B's were awarded to Indians.[20] Currently, the United States under President Trump is trying to discourage Indian IT workers from coming into the United States. Some months ago, the Trump administration announced its intention to rescind work authorization for H-4 visa holders. The H-4 visa is issued to dependents of H1 visa holders. This decision would affect thousands of Indian spouses who accompany their partners who enter the United States on an H1-B visa. The Trump administration deferred its decision from February 2018 to June 2018. It is now August, but the Trump administration still has not decided on the matter.

Silicon Valley is flooded with Indian tech workers. Indian companies such as Tata Consultancy Services, Infosys, and Wipro send thousands of Indian tech workers to their companies in Silicon Valley.

Indians are worried, especially the spouses (mainly women who followed their husbands to the United States), that they may no longer be able to work. In addition, the H1-B visa holders themselves are worried they will need to leave the United States while waiting for their green cards. Immigration attorneys are needed to change their visa status, to bring families and spouses together, to find alternative visa options, and to fight against deportation. Besides that, with Indian companies sending thousands of Indians to the United States, Indian companies may not comply with U.S. laws and wage standards. Infosys was alleged to discriminate intentionally against workers who were not from South Asia and settled for US$34 million in 2013 after a federal investigation into allegations that it bypassed immigration laws to bring thousands of low-paid workers into the United States.[21]

One may argue this policy will lead to more Americans being employed, but does America have enough skilled, educated workers to grow the U.S. economy? If the United States makes it harder for companies to hire Indians, will those companies need to move to India or other countries overseas? Is that the reason for President Trump postponing his proposed rulemaking on the H-4 visa?

H1-B visas were the basis for building the careers of many successful Indians. U.S. companies rely on Indians in high-level executive positions. For example, Sundar Pichair has been the CEO of Google since 2015. Hired first in 2004 as an engineer, he managed to work his way up to CEO in just 11 years. Microsoft has employed an Indian American CEO, Satya Narayana Nadella, since 2014. Both Pichair and Nadella started their U.S. careers on H1-B visas.

Immigration: EB-5 and Other Visas

The Chinese have been doing it for years, and now it is time for wealthy Indians to invest in the United States and "buy" their green cards through the EB-5 investor visa. Under the EB-5 investor program, foreign investors and their spouses and unmarried children under age 21 are eligible to achieve expedited permanent residence

status in the United States with a minimum investment of US$500,000 in a designated regional center. Chinese applications are declining due to a ten-year backlog and increased scrutiny for moving funds out of China.[22] India has become the third largest country of EB-5 visa investors.[23] It is important for lawyers to reach out to the Indian market and to educate Indians about the EB-5 visa. The vast majority of Indians, until recently, were not familiar with U.S. laws and the possibility of obtaining a green card through the EB-5 investor program. Because the program is still quite new for Indians, a backlog is not a concern and an EB-5 visa is a fast way to obtain residency in the United States.

Additionally, because of a lack of education on U.S. immigration laws, most Indians do not know that they may qualify for an intracompany transfer through one of the L1 visa categories or may gain entry to the United States by changing their citizenship to an E-2 visa treaty country.

Now that India is eager to explore new possibilities, we need to spread the word and connect India to Florida, especially Miami. Florida is the third largest state in the country. Compared to other big cities in the United States, Miami is a growing city with affordable prices and a high quality of life with its beaches, climate, and cultural diversity. Miami has opportunities to offer everyone to make a difference and to attract more foreign investors. For example, Indians who engage in business with South America may prefer to establish a base in South Florida for safety reasons, for ease of doing business, for a greater right to privacy, and for a higher standard in the protection of intellectual property rights. Legal guidance is needed as Indians investigate the possibilities of establishing and managing a business in Florida.

Asset and Estate Planning

Many Indians decide to settle in the United States after exploring the Western Hemisphere. With more than 186,000 Indian students coming every year from India to the United States, increasing work-related transfers, and more Indians pursuing international travel, the United States has become an attractive foreign destination. For this reason and others, marriages between Indians and U.S. citizens have increased. Not only are U.S. resident Indians marrying Indian citizens, but increased exposure to Western culture and a change in tradition have made Indians more open to accepting a multicultural/multiracial marriage. Just several years ago, most Indian families would have considered it unacceptable to marry a non-Indian and/or someone outside their religion. Things are changing, and with these changes comes the need for legal advice.

Even after settling in the United States, Indian residents' ties to India continue to exist. Parents, grandparents, and other close relatives and their family assets remain in India. Legal issues involving spouses with different nationalities, such as divorce, alimony, and custody disputes, are increasing. Additionally, the awareness of and the need for estate planning have increased in India in the last few years. During international estate planning, Indian lawyers need U.S. legal advice on how to tailor their estate planning documents in accordance with U.S. law when a cross-border family is involved. Family assets must be well protected and potential U.S. tax liabilities considered.

Contract Disputes

Contract disputes are on the rise due to rising cross-border transactions between the United States and India. According to a 2017 report by the European Commission, the United States ranked second after the EU as a trade partner for India's exports with a value of US$40.7 million, constituting 15.6% of India's worldwide exports to the United States.[24] The United States ranked third, after China and the EU, for imports with a value of US$21.3 million.[25]

Due to India's emerging economy, India's government is funding and pushing toward industrialization and improving railways, roads, and power plants. India has the largest railway system in Asia and the fourth largest in the world. It is expected that the railway system will grow in the next five years to become the third largest in the world.[26]

Indians like taking the train. In addition to being a cheap travel method, the train offers convenience, allowing riders to avoid high traffic congestion, bad road conditions, and insufficient infrastructure. Although India is trying to give local companies preference to grow India's economy, most construction and consulting contracts are outsourced to foreign companies. One example is Hill International Inc., a Philadelphia-based construction consulting company that increased its presence in India this year. Hill International Inc. just secured two major rail and metro contracts in India with a combined value of US$4 billion.

Besides producing revenue, these contracts lead to an immense amount of work for international lawyers. Multiple transactions lead to conflicts and disputes. Breaches of contract stemming from buyers receiving nonconforming goods or sellers receiving partial or nonpayment are just some of the most common issues arising in that context.

Challenges Faced in India

India presents itself as a country of growth and opportunities for investors, but despite these opportunities, the challenges faced in India cannot be ignored. These challenges have slowed down India's performance in the past but are being addressed passionately and proactively by India's current government under Prime Minister Narendra Modi. He aims to attract more foreign investors to India, to outperform China, and to comply with Western standards.

Protection of Intellectual Property Rights

India is one of the world's most challenging major economies with respect to protection and enforcement of intellectual property rights. Intellectual property rights protection is critical for sustaining India's growth. India is listed on the priority watch list of the United States Trade Representative's (USTR) Special 301 Report for 2017, which lists trading partners with harmful records on protection, enforcement, or market access for U.S. innovators and creators.[27] The USTR based its report pursuant to Section 182 of the Trade Act of 1974, as amended, and reviewed more than 100 countries. Eleven countries including India were placed on the priority watch list.[28]

The reason India was placed on the priority watch list is that according to the USTR, India did not show sufficient measurable improvements to its intellectual property framework in recent years.[29] This applied in particular with regard to U.S. holders of patents and copyrights, trade secrets, and law enforcement.[30]

India's government has started several initiatives to strengthen the protection of intellectual property rights in India. The objectives include creating public awareness of the importance of the protection of intellectual rights, having a strong and effective legal framework in place, and strengthening enforcement thereof.[31]

To create awareness, the government has held in association with industry partnerships nineteen intellectual property rights shows in eighteen states and has started an intellectual property awareness program in forty-nine schools in conjunction with the International Trademark Association.[32] Social media campaigns, special programs for start-up businesses, and training for judges and police officers are just some of the initiatives by India's government.[33]

India's government also wants to clear the backlog in patent examinations from five to seven years to only eighteen months.[34] With regard to trademark examinations, India was able clear the backlog and to reduce pendency for trademark examinations from thirteen months to one month.[35]

Bribery and Corruption

Another major challenge for India is bribery and corruption. India has enacted several anticorruption laws. The Prevention and Corruption Act of 1988 (PCA) is one example. The PCA criminalizes the receipt of illegal gratification by public servants and payment of such gratification by another person. The definition of *public servant* is broad and includes government officials as well as employees of banks from the public and private sectors.[36] By expanding the meaning of a public servant to include an employee of a private bank, India is trying to strengthen enforcement of anticorruption laws and to expand them to the private sector.

Devanath/pixabay

With the establishment of the Foreign Contribution Regulation Act, 2010, India is prohibiting the acceptance and utilization of foreign contribution or hospitality from foreign sources for any activities detrimental to the national interest by persons including (1) members of the legislature; (2) candidates for elections; (3) columnists, reporters, editors, owners, or printers of registered newspapers; (4) judges; and (5) several others.[37] Foreign sources include those from foreign companies, foreign trusts, foreign citizens, and foreign governments.[38]

The Companies Act, 2013, is another governing law to prevent corporate fraud and to enforce corporate compliance. With the Companies Act, 2013, the Indian government granted legal status to an organization called the Serious Fraud Investigation Office (SFIO), first established in 2003.[39] The SFIO is a multidisciplinary organization under the Ministry of Corporate Affairs with experts to prosecute white-collar crimes and frauds under the Companies Act.[40] In 2017, directors of the SFIO were granted the power to make arrests. The SFIO made its first arrest, since it was set up fifteen years ago, on 9 August 2018. The SFIO arrested Naarej Sanghal, managing director of Bhushan Steel Ltd., alleging he diverted loans and siphoned off funds exceeding US$290 million, by using more than eighty companies.[41] Bhushan Steel, based in New Delhi, was India's largest manufacturer of auto grade steel, but it went bankrupt due to bad loans. Tata Steel Ltd. acquired the company in May 2018.

It is hoped that India's anticorruption laws will make a positive difference in the future, but U.S. companies already in India have disadvantages when transacting business. While payments offered to officials to hurdle bureaucracy are common in India, U.S. companies face legal liabilities for doing so under the U.S. Foreign Corrupt Practices Act of 1977. India's businesses are built on connections and relationships rather than on purely professional dealings. Understanding this is crucial for a U.S. company to succeed in India. U.S. companies need legal advice on how to manage the risks of doing business in India and to comply with U.S. law.

India's Cash Economy

India's unreported wealth due to so-called black money is an additional challenge to doing business in India and is a concern of the Indian government with regard to terror funding, cash-based corruption, and tax evasion, among other crimes. While Indian companies may transact business with large amounts of unreported cash, a U.S. business in India is not permitted to do so.

India recently tried to tackle this issue. Prime Minister Narendra Modi took the first step on 8 November 2016—demonetization overnight. Conversations with Indian colleagues and friends revealed that demonetization hit everyone hard, business owners, middle-class families, and India's economy in general. But what exactly happened?

India is a cash economy, and digital transactions in general are still a very small part of daily economic life. When Prime Minister Modi changed, without notice, the 500 and 1000 Rupee notes on 8 November 2016, the Indian people were forced to go to the Reserve Bank of India and exchange their money. Otherwise, they wouldn't be able to use it anymore. A cash shortage was the result, and the economy slowed down drastically in 2017 following the demonetization.[42] According to the latest reports and conversations with colleagues in India, however, the cash flow is back to what it was before demonetization.

The currency exchange helped to change the mindset of India's business leaders. Concerned about another cash shortage and other actions by India's government that could lead to a slowdown of the economy due to cash-based transactions, India's business leaders are now keen to comply with international standards and to support further use of digital transactions.

Furthermore, India's government enacted a reform to prevent undisclosed foreign funds with the Black Money (Undisclosed Foreign Income & Assets) and Imposition of Tax Act, 2015. Many Indians channeled their unreported cash abroad to evade the payment of tax. The Act penalizes undisclosed foreign assets[43] and willful attempts to evade tax.[44]

Slow Pace of India's Judicial System

An additional challenge affecting the legal system in India is a delay in justice caused by an extremely slow court system. According to the government of India, there are 10,000 court cases that have been pending in 24 high courts for more than 10 years.[45] India ranks 164th among 190 countries on enforcing contracts.[46] It takes an average of 1,445 days—close to four years—to resolve a commercial dispute.[47]

This slow judicial pace is one of the main reasons why arbitration is a point of focus in India and of broad and current interest. By amending the Arbitration and Conciliation Act of 1996 in 2015, India tried to encourage arbitration to speed up the judicial system through the alternative dispute resolution mechanism, to make it cost effective, and to conform with international standards. Among other adjustments, the amendment introduced a time limit for making an arbitral award to twelve months.[48] The time period can be extended if the parties consent for another six months.[49] The amendment also introduced a fast-track procedure in which the arbitral tribunal will only decide upon written pleadings and documents. The parties will not have an oral hearing unless the arbitral tribunal considers it to be necessary.[50] The arbitral award in this procedure shall be awarded within six months.[51]

Another reason for India's government to support the arbitration practice is the desire to make India a seat of international arbitration and to attract more foreign investors by gaining their confidence in India's arbitral system.

Law firms and dispute resolution centers in the United States have already responded to India's new trend of using arbitration, forming India practice groups and specific India task forces to train their lawyers and to accommodate this new demand.

Environmental Issues

Not only does India face legal and economic challenges, but also environmental challenges caused by poverty, extreme weather conditions, and a booming population.

Air pollution is one of the major health concerns for India. New Delhi is still one of the most polluted cities, if not the most polluted city in the world. Anyone who ever visited India also knows that India has its additional challenges with public health, hygiene, and waste. Chemicals, garbage, untreated industrial waste, and sewage flow daily into India's rivers, which are also used

for bathing and as a source for drinking water.

Pictures of blue dogs in Mumbai went viral last year in August. The fur of the dogs turned a bright blue due to air and water pollution close to a manufacturing plant outside Mumbai. After this incident, authorities in Mumbai shut down the manufacturing plant that was accused of dumping untreated industrial waste and dyes into the river.

The Indian government has taken several initiatives to improve India's environmental quality. Prime Minister Narendra Modi launched on 2 October 2014 an initiative called Swachh Bharat Abhiyan or the Clean India Mission. Politicians, film stars, and citizens took brooms and started cleaning the cities. India wants to give Gandhi "something" on his 150th birthday next year (2 October 2019), as the prime minister said to the *Washington Post*.[52] Another initiative was a US$3 billion plan in 2015 to clean up India's holy river Ganges. The initial plan was to finish the project in 2018. Although only a fraction of the money allocated to the project has been spent and the project is behind schedule, Modi is in favor of the project and is asking the states to speed up the process.[53]

Concerning air pollution, the final comprehensive action plan for air pollution control in the national Capital Territory of Delhi and National Capital Region, from 5 April 2017, addresses air pollution in India's capital city and nearby regions. This plan directs several government agencies to take action on air pollution. Included in the plan are actions to reduce emissions by vehicles and the introduction of battery-operated cars.[54] Additionally, enforcing laws against visibly polluting vehicles, diverting truck traffic, and improving the reliability and the availability of public transportation are some of the action points directed to several government agencies for implementation.[55]

Conclusion

Florida has the potential to build a strong, mutual relationship with India. Kiran Patel, an Indian-American entrepreneur from Tampa who made his wealth by buying and selling health care products, is just one example of someone who believed in the potential of the relationship between South Florida and India. Patel donated US$200 million to Nova Southeastern University (NSU) in 2017. It was the largest donation ever made by an Indian-American to a U.S. institution.[56] With that donation, NSU will create medical colleges in Florida and in India. Kiran Patel and NSU's goal is to have students from Florida get practical experience in India and for Indian students to spend time in Florida. At the same time, the goal is to train students in India at a lower cost but with U.S. educational standards.

India still has a long journey ahead, but making efforts in India now is an investment in the future. We can create an impact by being part of the still early stages of the world's fastest-growing large economy and taking a chance now in this largely unchartered territory rather than competing later when everyone else does. By reactivating the Asia Committee and organizing a symposium this year in India, The Florida Bar International Law Section is on the right path to supporting India's growth.

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New Silk Road, from page 17

Years later, during the fifteenth century and most associated with the tales of Marco Polo and the Middle Ages, the Ming dynasty followed suit with a maritime Silk Road, which included "spice routes" connecting China to the Red Sea traversing the Indian Ocean and the Arabian Sea.

Thus, caravans of humanity, by land and by sea, ventured into territories both promising and unknown at once, creating a new era of cultural exchange, trade, and commerce unlike anything ever imagined. The Silk Road, named years later given its trade in China's unique silk treasure, was China's first glimpse into the world that lay beyond its familiar territories. As such it marked the grand opening of China's doors to the world and its first attempt, unintended perhaps from its initial, more limited vision, to connect the East and the West.

The Silk Road advanced through the years bringing China, its treasures, its skills, and its people to the attention of the great European powers that were fighting among themselves to conquer the world. Yet as all grand empires inevitably do, China fell victim to internal political fighting among powerful warlords, corruption, greed, acrimony, its people fleeing upheaval, and the inability of its ruling dynasty to sustain power. All of this led to China's return to isolation by weaving its own network of provinces and limiting its outside engagement with regional east and southern Asian countries.

Not one to give up, years later China continued its dance with the West only to be thrust into an era China named its Century of Humiliation. Foreign powers were permitted to obtain concessions from China, which stripped China of its sovereignty and national identity. The Opium Wars launched by the British in 1839 severely weakened China. The West succeeded in bringing to an end a powerful and rising power, and with that brush of defeat came the last flicker of China's rising star as the grand doors that China had opened to the world were shut for many years to come.

The Road Back: The New Silk Road

Keep a low profile and bide your time.

After its bruising and shaming at the hands of the West, China's shattered dreams, national pride, and grand vision were not forgotten, and lessons were learned. Its history is rich with instances when, underestimated by skeptics, China defied expectations of failure. Through its New Silk Road, known as the One Belt, One Road Initiative or the Belt and Road, China has shown its commitment to put its power and wealth in motion to propel what is to be its journey back to being the Center of the World: where all begins and connects the earth, the seas, and the skies.

The corruption and compliance that doomed China's prior efforts at becoming a ruling giant are lessons not unique to China. What is unique to China is how it came back from the turmoil that drove it to near indifference to the outside world. This resurgence from a significant period of isolation appears to have energized its quest to solidify its prominence on the world stage. Having strengthened its internal focus and relevance at home, China has methodically stepped out of its Asia-centric comfort zone to strategically seize soft-power opportunities in almost every region of the world.

China's President Xi Jinping is building upon his predecessor's legacy and has shifted from a focus on growing China's internal economy to creating a sphere of influence through his brainchild, the Belt and Road Initiative. This is China's grand world vision, its New Silk Road.

Infrastructure Diplomacy or Ingenious Colonialism?

A civilized lion is still a lion to its core.

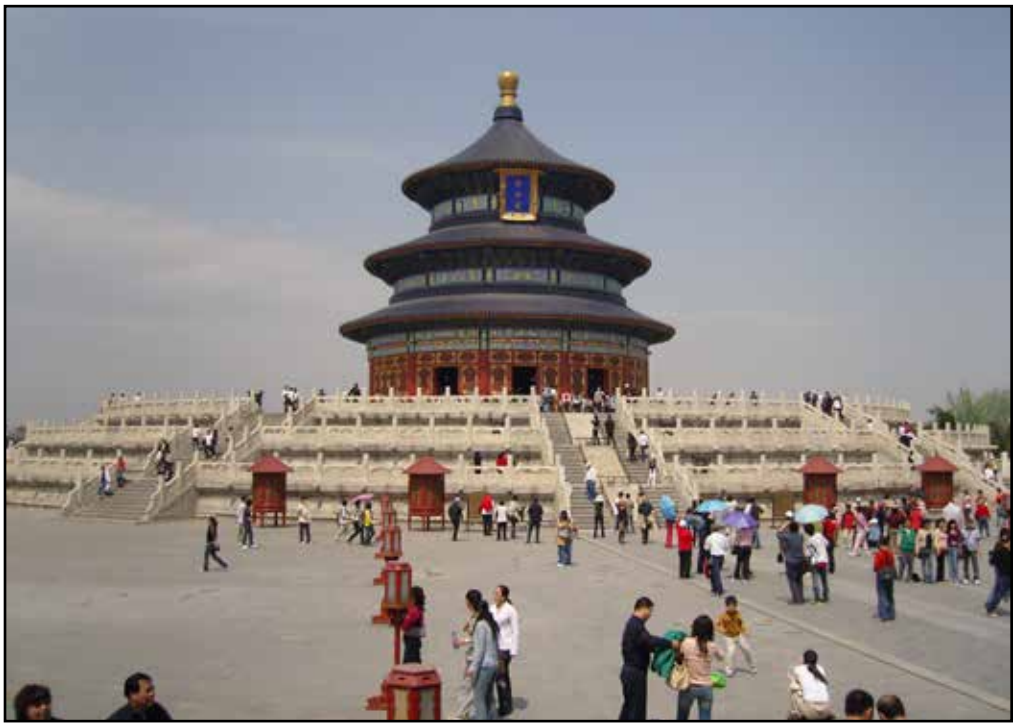
China faces a tough audience. Its reputation as an authoritarian ruler now led by what some call the "Emperor for Life" stands in the way of its soft-power benevolence. Only China can turn its skeptics into believers of the articulated good-neighbor mission of Beijing's One Belt, One Road or China's New Silk Road.

To those who welcome this new initiative with great expectations, it is marvelous, inspiring hope of bringing prosperity, directly and indirectly, to all nations involved and breathtaking in its scope. To others who view it

New Silk Road, continued

with suspicion and skepticism, it is a public relations folly, greedy colonialism, and a nefarious power grab. At this point it is premature to judge China. Strategic partnerships with other governments, which are mutually beneficial to economic development and global trade and in maintaining the countries' independence and sovereignty, are not mutually exclusive.

In 2013, President Xi announced the Silk Road Economic Belt (SREB). Modeled after China's ancient Silk Road, this Eurasian overland trading network links China and Europe. In addition to the SREB, President Xi added a seaborne trading component and named it the 21st Century Maritime Silk Road Economic Belt. Together they make up the New Silk Road, which is also known as the One Belt, One Road Initiative. Connectivity is the defining word for this endeavor. This ambitious plan focuses on providing a solution to address the lack of infrastructure in developing countries, which do not have the financial wherewithal, infrastructure building capabilities, strong governance, and success in economic development and trade.



Jade Buddha Temple, Anshan, China
photo by Gaston Fernandez

If this initiative is successful in stimulating Eurasia's growth, even if only moderately, it will create a geopolitical block made up of two-thirds of the world's population. By connecting regions, it seeks to lower poverty rates in poor, underdeveloped countries and to empower their local governments where infrastructure projects are under construction and in the long term. At present, the scope of One Belt, One Road encompasses two-thirds of the world's land mass and approximately 4.5 billion people in more than sixty-five countries, with an anticipated investment of US$4 trillion to US$7 trillion. Projects that will connect China, Asia, Africa, and Europe include a network of pipelines, highways, high-speed railways, fiber optic lines, data centers, power plants and transnational high-voltage power lines, airports, deep-water ports, and other means of connectivity across the oceans and continents.

At the same time, this massive initiative has been structured to ensure that approximately 80% of the planned 900 projects are contracted to Chinese firms. This, in turn, will address China's slowing economy by creating new consumer markets for its services and goods.

It is indisputable that China's economic engine has brought change for the better of its people; however, it continues to struggle with its western and inland regions, which lack access to other countries and are landlocked. The people living in those regions are generally untouched by China's new wealth and growth opportunities. It is because of this that China seeks connectivity both in and out of China through its New

Silk Road. Therefore, it is obvious that under the One Belt, One Road strategy, those in and out of China stand to gain, though arguably not equally or in the short term.

Case in point, the One Belt, One Road Initiative covers over 65% of the world's energy reserves. Infrastructure investments that China is financing in that area serve its pressing energy needs, while having a stake in those energy projects contributes to building economic bonds and winning allies, not only in the developing countries the initiative sponsors but with major powers through every region in the world.

Though touted as a solution to address Eurasia's infrastructure gap, it goes well beyond that targeted goal. The One Belt, One Road Initiative is both a foreign and economic policy driver for China and its ambitious strategy for the twenty-first century and beyond.

The Good, the Bad, the Unknown

A peaceful and harmonious lending hand or buying the world?

China's New Silk Road is not totally a new strategy conceived by President Xi to promote economic development in Eurasia. Connectivity plans have previously been proposed by Russia, the ASEAN Economic Community, and the South Asian Association for Economic Cooperation. Many of the components of the One Belt, One Road plan build in existing projects and infrastructure designed and executed years ago, and include long-term plans focusing on infrastructure in underdeveloped western China and Asia, which are now part of China's all-encompassing effort.

China's interest in its flagship initiative may not only be a good-neighbor effort to connect regions. There is no country in the world to rival China's financing capacity or the governmental will to get this done and at the same time to increase demand for Chinese capacity such as its construction and engineering capabilities, materials, equipment, technology, and ancillary professional services. This while fortifying its banking institutions and state-owned enterprises and internationalizing the Chinese currency Renminbi as a vehicle to raise capital in global financial centers.

Land routes begin in regions in inner and more isolated China and run to Southern Europe via The Netherlands. The sea route connects Shanghai through its port via India and Africa, ultimately ending in Venice, Italy. Such breadth and depth are nothing short of mindboggling as well as unsettling if one begins to imagine the long-term geopolitical and military outcomes that might result if China were to intend anything other than harmonious connectivity to benefit the whole world.

Critics of President Xi contend that the plans for both sea and land routes are poorly thought out, and some projects have little or no possibility of ever being built. Others claim that the One Belt, One Road is simply a well-packaged marketing and public relations campaign to help China at the expense of its partners and poor nations, whose infrastructure projects being built and managed by primarily Chinese companies will wind up costing those countries billions due to one-sided, unfair agreements benefitting China.

Given that, to date, sixty-five countries, some with strong governance, have signed cooperative agreements with China to execute projects, it is doubtful that China will be given free rein to do as it pleases at those countries' expense. While Pakistan, Malaysia, Cambodia, and others have been called out as suffering from one-sided, troubled infrastructure relationships, it is too soon to tell how their concerns will be resolved. China has expressed its desire to reach consensus on problematic projects, and its position thus far has been conciliatory. It is understandable that developing partner relationships need time and efforts to be made in mutual cooperation.

Titans and Paupers

Big money behind a daunting task

China has fully mobilized in support of the New Silk Road and has raised this grand undertaking to a platform akin to its national strategy. It aims to achieve its global geopolitical ambitions and to assist in providing for the needs of its governmental and private sectors. The

highest levels of China's financial, military, government, and professional services and expertise have been mobilized to advance the One Belt, One Road.

Chinese officials were charged with developing the Asian Infrastructure Investment Bank, the Silk Road Fund, and the New Development Fund with an initial registered capital of US$240 billion to offer loans to developing countries that contract with Chinese enterprises for major infrastructure projects.

The Asian Infrastructure Investment Bank (AIIB), based in Beijing, began operations in January 2016 and at present has eighty-seven approved members (regional, which include China, Australia, Russia, Israel, Korea, Hong Kong, India, Singapore, United Arab Emirates, Saudi Arabia; and nonregional, which include United Kingdom, France, Spain, Germany, Italy, Portugal, Sweden, Switzerland, Canada). The AIIB is a multilateral development bank whose mission is to improve social and economic outcomes in Asia and beyond. China is the largest shareholder followed by India, Russia, Germany, and many other significant standing countries. The United States is not a member. The AIIB's authorized capital is in excess of US$100 billion.

The Silk Road Fund (SRF), domiciled in Beijing, was established in 2014. It was funded by the State Administration of Foreign Exchange, the Chinese Investment Corporation, the Export-Import Bank of China, and the China Development Bank. The SRF formally began to operate early in 2015 to acquire equity stakes in infrastructure, resource development, and industrial cooperation ventures in New Silk Road corridor countries. It has actively invested billions of dollars in projects thus far, and President Xi has pledged additional billions of dollars to the fund. The New Development Bank (NDB), headquartered in Shanghai, was established in 2014 by the BRICS countries (Brazil, Russia, India, China, South Africa). Operations began in 2016, and BRICS member country projects have been financed in the amount of US$2 billion. Under its structure, a percentage of NDB funds are eligible to be approved to finance New Silk Road projects.

The Beginning of a New World

Good neighbors, no fences

In March 2015, China's National Development and Reform Commission issued its "Vision and Actions on Jointly Building the Silk Road Economic Belt and 21st Century Maritime Silk Road." This document officially outlined the framework, key areas of cooperation, and implementation mechanisms as applied to the Belt and Road Initiative. As such, it includes aspirational economic corridors as well as actual ones where approved, and financed infrastructure projects are in process. It basically focuses on connecting Asia, Europe, and Africa along five routes.

First, through its series of economic corridors, the Silk Road Economic Belt networks link China to Europe through Central Asia and Russia, connect China with the Middle East through Central Asia, and brings together China, Southeast Asia, South Asia, and the Indian Ocean. It is made up of mainly overland projects.

Second, the 21st Century Maritime Silk Road is made up of corridors consisting of mainly seaborne projects that link Chinese ports with Europe through the South China Sea and Indian Ocean, and connect China with the South Pacific Ocean through the South China Sea. All of the economic corridors (land) and routes (sea) originate in China. They, and the corresponding countries and regions, are as follows:

The Silk Road Economic Belt Corridors

- New Eurasian Land Bridge Economic Corridor (Xinjiang-Kazakhstan-Russia)
- China-Mongolia-Russia Economic Corridor
- China-Central Asia-West Asia Economic Corridor
- China-Pakistan Economic Corridor
- Bangladesh-China-India-Myanmar Economic Corridor
- China-Indochina Peninsula Economic Corridor
- India-Nepal-China Economic Corridor

The 21st Century Maritime Silk Road Routes

- China-South China Sea-Indian Ocean-Middle East
- China-South China Sea-Indian Ocean-Red Sea-Europe
- China-South China Sea-Indian Ocean-East Africa

Conclusion

If at first you don't succeed, try try try again.

Who could have imagined that China would own more miles of high-speed rail than the rest of the world combined? That's an astounding statement given that this feat has been accomplished by a country that a decade ago did not have one single high-speed rail train operating. Who is to say that China, with its tenacity, ambition, financial prowess, and more than enough people to provide services and labor at all levels, cannot accomplish what is almost unimaginable? China, the Middle Kingdom, is a superpower that has risen in an extraordinarily short time. Even if, as some critics state, only a fraction of the many projects that China's central government claims to be developing is real, we are witness to its level of unmistakable global authority in infrastructure and financing capability.

Entire economies depend on China doing well. The success it achieves will dictate how much other countries, and not just disadvantaged and poorly developed ones, will continue to be sustained by China in the short term as well as in years to come. It is no wonder, then, that countries all over the world have contributed millions of their own funds to be partners with China in an initiative that may shape a new world order led by a Eurasian-African continent. Enter the New Silk Road, China's Belt and Road Initiative, a proposed global framework that spans continents. Should it succeed, there will be fewer geographical boundaries; more cultural, social, and economic integration; less poverty; shared economic development; and greater connectivity. On the other hand, it has the potential for colonialism, for dominance by great powers over smaller, poorer, financially and militarily dependent nations. At its worst, it could lead to military domination and nuclear war.

If nothing else, this initiative could be the fall of China as a great power should it overextend itself financially, create infighting at high levels of the Community Party, lose the support of its people, and make the same mistakes of decades and centuries past.

Yet it does not have to be this way. Together, partner countries that are financially as well as politically invested must ensure that proposed or ongoing projects that financially burden those very same countries they seek to help are vetted fairly, and cancelled when necessary, in a spirit of mutual understanding. Projects that serve no real purpose in fulfilling the mission of the Belt and Road Initiative, that pose international security

Temple of Heaven, Beijing, China
photo by Gaston Fernandez

New Silk Road, continued

risks, and that were entered into with corrupt intent by former or present governments must be seriously reconsidered. Given the number of infrastructure projects in so many countries with their own legal systems, uniform dispute resolution and legal remedies must be implemented.

If China and its Belt and Road partners work together to integrate their vision with one another, execution of the plan will be successful, albeit not without missteps or slips given that these partnerships must develop over time. China, as the architect and undisputed dominant force behind the Belt and Road, has a heavy burden to bear in order to navigate rough waters with civility, diplomacy, and fair dealing. True or false, like it or not, it behooves China to be mindful of the specter of colonialism that lurks over its vision of the New Silk Road, as does the perception that countries that become dependent on Beijing's largesse will fall into its debt, with devastating consequences.

Yet, regardless of criticisms, constructive or not, the New Silk Road is undoubtedly filled with promise and benefits that will alter the world order. In fact, it already has to a degree by virtue of all the attention it is attracting and the sizable sums of money committed to ongoing projects. At least it is making people take a serious look at the New Silk Road, China's Belt and Road, and think about how and if it impacts them.

Whether it can be an unstoppable driving force for global change, as envisioned, is yet to be seen by those following the Lion and the Giant as they travel on the New Silk Road.

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Arbitration in Japan, from page 19

Osaka, Japan
mkitina4/pixabay.com

For instance, Chart 6 of the Survey found that Hong Kong and Singapore among arbitral institutions in Asian countries are two of the most highly esteemed and preferred seats for arbitration, next to large districts like London and Paris. Chart 8 of the Survey also illustrated that these selections were based on at least twelve cited factors,[5] the most important of which is "General reputation and recognition of the seat." Likewise, Chart 12 of the Survey showed that these standards and metrics were the same yardsticks applied to evaluating perceived effectiveness of SIAC and HKIAC, which ranked third and fourth, respectively, following ICC and the London Court of International Arbitration. This ranking was based on a scale with at least sixteen factors,[6] in Chart 13, the top of which was "General reputation and recognition of the institution."

To earn a higher reputation and wider recognition, an arbitral seat or institution must modernize its legal systems and infrastructures. For example, Singapore officially launched the Singapore International Mediation Centre (SIMC) in November 2014 and the Singapore International Commercial Court launched in January 2015 to offer additional transnational commercial alternative dispute resolution (ADR) mechanisms as further inducements for foreign investors. Moreover, the government of Singapore funded Maxwell Chambers, an integrated alternative dispute resolution complex. It is clear that these new dispute settlement assets enhanced Singapore's global recognition and reputation.

An example of the Hong Kong government's support of international arbitration is allowing HKIAC to lease the 38th floor of the prestigious Exchange Square for the sum of HK$1 per annum.[7] This shows the government's priority for promoting international arbitration because this location places the dispute settlement facility within the premises of the Hong Kong Station, thus facilitating the arrival of foreign arbitration users directly from Hong Kong International Airport.

Singapore's assets and Hong Kong's accessibility serve as role models for Japan to enhance its general recognition and reputation in international arbitration.

Arbitration Climate in Japan

What causes international arbitration in Japan to remain stagnant when compared to the mainstream in Asian regions? While cultural or political aspects such as a lack of advocacy for the Japanese corporate world or Japan's inherent dispute-averse tradition may offer some answers,[8] a hearing facility in Japan, one of the key factors for successfully establishing international arbitration (see Chart 8 of the Survey), was obviously missing.

On 1 May 2018, the Japan International Dispute Resolution Centre, operating a hearing facility in Osaka, Japan (JIDRC-Osaka), was finally established to boost international arbitration in Japan. As a first

Arbitration in Japan, continued

facility for a hearing of international arbitration or other dispute settlement in Japan, JIDRC-Osaka offers users, practitioners, and arbitrators modern hearing technology for presentation or education, such as three conference rooms with microphones and four booths for simultaneous interpretation in different languages.[9] Osaka is historically a center of business and the second largest metropolitan area in Japan, and for international arbitration visitors it is accessible to Kansai International Airport via a seventy-minute direct rapid train ride.

A hearing facility in Tokyo (JIDRC-Tokyo) is being planned amid discussions with the cabinet, governmental agencies, bar associations, and the association of arbitrators in Japan. JCAA has not owned sufficient hearing facilities thus far, and JIDRC-Tokyo needs governmental budgetary support. It has been reported that JIDRC-Tokyo is going to open in early 2019 near the 2020 Tokyo Olympics district on the waterfront, targeting to offer sports arbitration or other dispute settlement services for claims alleged by Olympians in Tokyo.

In addition, the Japan International Mediation Centre (JIMC) plans to open at Doshisha University in Kyoto. Being a traditional symbolic city, the harmonious norm in Kyoto is anticipated to have psychologically favorable impacts on parties and to facilitate amicable settlements in international mediation. To operate the center, JIMC and SIMC entered into a memorandum of understanding that SIMC will comprehensively provide software mediation infrastructures such as international mediation rules, mediator panels, training programs for mediators, and seminars on international mediation so that JIMC can efficiently establish its own panel of mediators in international mediation.[10] Similarly, the facility will equip mediation users with modern hardware mediation infrastructure including large conference rooms and simultaneous interpretation booths.

The International Arbitration Center in Tokyo (IACT), a permanent arbitration body in the area of intellectual property, will open as early as September 2019. While SIAC and HKIAC mainly deal with maritime transactions, IACT specializes in patent infringement disputes, which have not been sufficiently addressed in Asia. At the beginning, this dispute settlement body plans to

The Japan International Dispute Resolution Center, Osaka
japantimes.co.jp/KYODO

nominate approximately twenty experts for the panel of arbitrators to include Randall Rader, former chief judge of the United States Court of Appeals for the Federal Circuit and a prominent scholar of patent and intellectual property law; Ryuichi Shitara, former chief judge of the Intellectual Property High Court; and other experts from Europe, China, and South Korea.[11] Generally, intellectual property litigation requires large investments of time and money to resolve them; however, the IACT is designing its institutional rules and other soft infrastructure with key aspects of intellectual property in mind so that each case can be settled within one year.

Modernization of Arbitration in Japan

The development of dispute settlement infrastructures in Japan could inspire one to dream of making the locale an attractive venue as Asia's premier dispute resolution hub. This author, however, humbly offers that there is still a great gap between developed regional centers and Japan. To modernize arbitration in Japan, several steps should be taken.

First, Japanese experts and practitioners should promote the new settlement bodies of JIDRC, JIMC, and IACT to domestic and overseas clients by comparing the advantages of accessibility or assets with those of SIAC and HKIAC, including the geographical advantages of Japan as a trans-Pacific entrance to Asia and as a third arbitration forum available for parties, for example, between Chinese companies and European and American companies.

Second, while the Liberal Democratic Party officially announced to prioritize the establishment of Asia's regional arbitration center in Japan,[12] the Abe administration has not sufficiently established this priority in policy.[13] Japan's government should place more value on making Tokyo a viable venue for international arbitration, just as the governments of Hong Kong and Singapore have done in their countries. The JIDRC-Tokyo should be located in more accessible venues, such as the HKIAC in Hong Kong, or be fully integrated with arbitration, mediation, and other resolution utilities in attractive dispute settlement forums such as Maxwell Chamber in Singapore.

Third, academic institutions and law schools in Japan should eagerly engage in a training curriculum for advocacy in international arbitration, such as an international moot court program like the Willem C. Vis International Commercial Arbitration Moot. To further promote Japan as an arbitral venue, they should seek to host large moot competitions, such as the FDI International Arbitration Moot that the University of Miami will host in 2019. Also, JCAA and the new settlement bodies should establish an internship or externship program for international trainees in other regional arbitration centers or for corporate legal practitioners who have no litigation experience in order to interest them in international arbitration careers in Japan, collaborating with experts at the Japan Association of Arbitrators, the Chartered Institute of Arbitrations (CIArb), and other law schools or institutions outside their jurisdiction.

Fourth, Japanese experts and practitioners should advocate with Japanese corporate legal departments and management to incorporate arbitration or mediation clauses into their business agreements that refer to JCAA and the new settlement bodies. Arbitration experts should also build strong relationships with Japanese corporate legal departments so that management will be able to confidently choose a dispute settlement forum in Japan for international disputes. Furthermore, JCAA and the new settlement bodies should standardize model arbitration or mediation clauses in which the seat is Japan under JCAA; otherwise, ICC, SIAC, HKIAC, or other rules as well as ad hoc arbitrations.

As a final note, aside from Japan's low participation in bilateral investment treaties and free trade agreements among developed Asian countries, there are only six cases in which Japanese companies resorted to investment arbitration through the Investor-State Dispute Settlement of the International Centre for Settlement of Investment Disputes (ICSID). Most recently, Itochu, a Japanese trading company, launched investment arbitration against Spain under the Energy Charter Treaty.[14] Caseloads in Japan are not yet sufficient compared with other developed countries. The Comprehensive and Progressive

Agreement for Trans-Pacific Partnership (signed 8 March 2018) and the EU-Japan Economic Partnership Agreement (signed 17 July 2018) provide good opportunities for Japanese investors to initiate international investment arbitration. Japanese experts should persistently delve beneath the surface of potential investment disputes on behalf of Japanese investors.

Conclusion

Throughout the ongoing dynamics in international arbitration across the East-Asian region, especially during the last decade and a half, Japan has rarely been selected an arbitration forum for international business contracts, not only between overseas parties, but also between a Japanese company and a foreign counterparty. Recent innovations in Japan, however, could change this. For example, Florida multinational corporations, such as Bacardi-Martini, that own subsidiaries or affiliates in Japan should be able to review their arbitration clauses in model standard agreements to determine whether they can employ JCAA as the rules and Japan as the arbitral forum at the time of their negotiation with their subsidiaries or affiliates in Japan and with other companies.

Japanese companies are not yet fully aware of the potential Japan has for becoming a center for international arbitration. Advocacy should continue, as the next chapter of the dream of international arbitration in Japan has just barely begun.

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TABLE: NEW ARBITRATION CASES RECEIVED

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
AAA	580	586	621	703	836	888	994	996	1,165	1,052	1,063	1,050
CIETAC	979* (427)	981* (442)	1,118* (429)	1,230 (548)	1,482 (559)	1,352 (418)	1,435 (470)	1,060 (331)	1,256 (375)	1,610 (387)	1,968	2,183
HKIAC	**281***	**394***	**448***	**602***	**746* (309)**	**624* (175)**	**502* (179)**	**456* (199)**	**463* (195)**	**477* (252)**	**520* (271)**	**460* (262)**
ICC	521	593	599	663	817	793	796	759	767	791	801	966
JCAA	**11**	**11**	**15**	**17**	**19**	**25**	**22**	**15**	**26**	**14**	**21**	**16**
LCIA	118	133	137	221	285	267	237	277	301	296	326	303
SIAC	**74* (45)**	**90* (65)**	**86* (70)**	**99* (71)**	**160* (114)**	**198* (140)**	**188***	**235***	**259***	**222***	**271***	**343***
SCC	100	141	170	176	216	197	199	177	203	183	181	199

*Figures show the combined total number of domestic and international cases filed for arbitration. The figures in parentheses indicate the number of international arbitration cases included in the total figure.

Legend:
AAA: American Arbitration Association/International Centre for Dispute Resolution
CIETAC: China International Economic and Trade Arbitration Commission
LCIA: London Court of International Arbitration
SCC: Arbitration Institute of the Stockholm Chamber of Commerce

Arbitration in Japan, continued

Endnotes

1 Charles R. Regan, Arbitration in Japan: Caveat Foreign Drafter and Other Lessons, the Southwestern Legal Foundation Private Investments Abroad (1990).

2 Peter Godwin, *Japanese Arbitration in the wake of the 2004 reforms: time to recognise the end of the Ragan myth*, JCAA Newsletter, No.21, November 2008. pp. 1-4.

3 The Japan Commercial Arbitration Association, *The Key Points of the 2014 Amendment to the Commercial Arbitration Rules*, JCAA Newsletter, No.31, March 2014. pp. 1-12.

4 White and Case. 2018 International Arbitration Survey: The Evolution of International Arbitration. Retrieved 10 Aug. 2018, from http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).pdf.

5 Chart 8 of the Survey shows that (1) "General reputation and recognition of the seat," (2) "Neutrality and impartiality of the local legal system," (3) "National arbitration law," (4) "Track record in enforcing agreements to arbitrate and arbitral awards," (5) "Location of people (e.g., your organisation or client's employees, legal and other advisors, experts, accountants, secretaries and hearing staff)," (6) "Availability of specialist lawyers at the seat," (7) "Location and quality of hearing facilities," (8) "Cost," (9) "Language," (10) "Location of the arbitral institution chosen for the arbitration," (11) "Familiarity with local culture" and "(12) "other."

6 Chart 13 of the Survey shows that (1) "General reputation and recognition of the institution," (2) "High level of administration (including efficiency, pro-activeness, facilities, quality of staff)," (3) "Previous experience of the institution," (4) "Neutrality/'internationalism,'" (5) "Access to wide pool of high quality arbitrators," (6) "Overall cost of service," (7) "Global presence/ability to administer arbitrations worldwide," (8) "Free choice of arbitrators (i.e., no exclusive institutional list)" and (9) "Regional presence/knowledge," (10) "Scrutiny of award by institution," (11) "Expertise in certain types of cases," (12) "Early procedural management conference," (13) "Method of remunerating arbitrators (ad valorem)," (14) "Transparency of arbitrator challenge decisions," (15) "Method of remunerating arbitrators (per hour)" and (16) "Other."

7 Japan Association of Arbitrators. "ICSID条約第１３条に基づく仲裁人及び調停人の指名に向けた調査・分析に関する 委託調査報告書" (Survey of Nomination of Arbitrator and Mediator Based on the Provisions of Article 13, the ICSID Treaty), retrieved from http://www.meti.go.jp/meti_lib/report/2014fy/E004267.pdf, p.19.

8 It must be noted that, aside from JCAA, the Japan Federation of Bar Associations established an ADR center in 2001 to urge parties in domestic disputes to use appropriate resolution depending on conditions and complications. There were 1,097 cases in 2016, but almost all were resolved by amicable settlement or mediation, and only 4 were rendered by arbitral award. This author believes this indicates distinct Japanese attitudes toward disputes that reflect Japan's conventional national culture to maintain harmonious relationships. Japan Federation of Bar Associations, "仲裁ADR統計年数（全国版）2016年度（平成28年度）版"(Domestic ADR Statistical Yearbook in Japan in 2016), retrieved from http://www.nichibenren.or.jp/library/ja/legal_aid/consultation/data/statistical_yearbook2016.pdf.

9 Japan International Dispute Resolution Centre, retrieved 20 Aug. 2018, from http://www.idrc.jp/.

10 Haruo Okada, Japan Association of Arbitrators, "Japan International Mediation Center in Kyoto (JIMC-Kyoto)," 1 June 2018. Retrieved 20 Aug. 2018, from http://arbitrators.jp/wp-content/uploads/JIMC-Kyoto-en.pdf.

11 As of 20 August 2018, the IACT nominates 19 arbitrators in 7 regions: Randall R. Rader, Sue Robinson, Gerald Rosen, and Theodore Essex in United States; Xiuping Ou, Zhipei Jiang, Xiangyun Kong, Lihong Duan and Dr. Yuan Hao in China; Annabelle Bennett in Australia; Seongsoo Park in Korea; Ryuichi Shitara, Toshiaki Iimura, Ryoichi Mimura, and Misao Shimizu in Japan; Sir Robin Jacob, Rian Kalden, and Fidelma Macken in Europe; and Liliane Roriz in South America. *See* https://www.iactokyo.com/.

12 Liberal Democratic Party, Policy Making Committee, "司法外交の新機軸," 1 June 2017, available only in Japanese from https://jimin.ncss.nifty.com/pdf/news/policy/135089_1.pdf.

13 The Cabinet in Japan, Basic Policy on Economic and Fiscal Management and Reform 2017, 9 June 2017, provisional translation cited from http://www5.cao.go.jp/keizai-shimon/kaigi/cabinet/2017/2017_basicpolicies_en.pdf.

14 Itochu Corporation v. Kingdom of Spain, ICSID. Case No. ARB/18/25, Pending (tribunal recently constituted). Retrieved 20 Feb. 2018 from https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?caseno=ARB/18/25.

H-1B Processing, from page 23

disciplines can qualify for the position. Despite the nonsensical nature of some of these RFEs, practitioners must realize that these delays are meant to thwart the process and discourage filings of H-1B petitions.

In this setting, practitioners need to follow the regulations and prove that one or more of the following holds true in order for the position to qualify as a specialty occupation:

(1) A bachelor's degree or higher is normally required for the position;

(2) The degree requirement is normal to the employer for the position;

(3) A degree requirement is normal to the industry, or the position is so complex or unique that the duties could be performed only by a degree holder; or

(4) The nature of the duties for the particular position is so highly specialized and complex that the knowledge required is usually associated with the attainment of a bachelor's or higher degree.[27]

Practitioners can establish one or more of these prongs by submitting job postings or advertisements for the position, as well as copies of the degrees of other individuals performing the job with the employer in similar positions. Practitioners may also submit expert opinions from professionals in the requested field or industry-related professional associations attesting that a degree is a normal requirement for the position or that the duties are so complex and specialized that a bachelor's degree in a specific field is required. Achieving favorable results for our clients is still a viable option with the proper preparation and legal arguments.

Combating Fraud and Abuse in the H-1B Visa Program

On 22 February 2018, USCIS launched the Combating Fraud and Abuse in the H-1B Visa Program measure, aimed at uncovering employers that abuse the H-1B visa program, which may negatively affect U.S. workers, decreasing wages and opportunities as these employers import more foreign workers.[28] The policy language in the initiative harkens back to President Trump's policy reasons of protecting American workers for the "Buy American and Hire American" Executive Order: "Yet, too many American workers who are as qualified, willing, and deserving to work in these fields have been ignored or unfairly disadvantaged."[29]

The initiative establishes an email address dedicated to receiving information from employees about suspected H-1B fraud or abuse, protection of H-1B employees who report suspected H-1B abuse and fraud, and the expansion of random administrative site visits to ensure that employers and foreign workers are complying with requirements of the H-1B nonimmigrant classification.[30]

H-1B Petitions and Third-Party Worksites

On 22 February 2018, USCIS also published a new memorandum titled "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites."[31] This memorandum superseded two previous ones, and USCIS will now require employers to include additional information and documentation in H-1B petitions outlining the work done at third-party worksites and showing that the employer-employee relationship between the petitioner and the H-1B beneficiary will continue to exist.[32] The guidance also requires petitioning employers to provide documents including the company's work product, statements of work, letters from each end-client company, and contracts.[33] Additionally, the memorandum reiterates the regulatory requirement for the petitioner to provide itineraries that include the dates and locations of the services to be provided.[34] Practitioners should be prepared for increased scrutiny from USCIS on H-1B petitions for employees working at third-party worksites in establishing that the employer will maintain an employer-employee relationship with the applicant for the duration of the requested validity period.

Conclusion

Under the Trump administration, it is clear that USCIS, via policy memoranda, presidential executive order, fraud prevention initiatives, and a spike in RFEs, is

H-1B Processing, continued

attempting to discourage H-1B applications. The government's strategy appears to be working, as the number of H-1B visa applications received by USCIS has dropped for the second consecutive year.[35] Despite the government's crackdown and restrictive approach, with increased awareness of current policies, persistence, and the proper legal strategies, the H-1B visa can remain a valid option for practitioners and their clients.

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Endnotes

1 8 C.F.R. § 214.2(h)(4)(iii)(A) (2018).

2 *Id.*

3 U.S. Citizenship and Immigration Services (2017). *Policy Memorandum 602-0142*, *available at* https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H-1BComputerRelatedPositionsRecission.pdf.

4 *Id.*

5 *Id.*

6 *Id.*

7 U.S. Citizenship and Immigration Services (9 Apr. 2018). *Characteristics of H-1B Specialty Workers*, *available at* https://www.uscis.gov/sites/default/files/reports-studies/Characteristics-of-Specialty-Occupation-Workers-H-1B-Fiscal-Year-2017.pdf.

8 Exec. Order No. 13788, 82 Fed. Reg. 18837 (21 Apr. 2017), *available at* https://www.whitehouse.gov/presidential-actions/presidential-executive-order-buy-american-hire-american/.

9 *Id*.

10 U.S. Citizenship and Immigration Services. *Buy American, Hire American: Putting American Workers First*, *available at* https://www.uscis.gov/legal-resources/buy-american-hire-american-putting-american-workers-first (last visited 28 Aug. 2018).

11 82 Fed. Reg. 18837.

12 Glenn Thrush, et. al., *Trump Signs Order That Could Lead to Curbs on Foreign Workers*, N.Y. Times, 2017 Apr. 18, *available at* https://www.nytimes.com/2017/04/18/us/politics/executive-order-hire-buy-american-h1b-visa-trump.html.

13 *Id.*

14 Yeganeh Torbati, *Intense scrutiny of H-1B visa applications making it more difficult for skilled foreigners to work in US*, Thomson Reuters via Sify.com (20 Sept. 2017), *available at* http://www.sify.com/finance/intense-scrutiny-of-h-1b-visa-applications-making-it-more-difficult-for-skilled-foreigners-to-work-in-us-news-economy-rjuleEagbbjaf.html.

15 *Id.*

16 8 C.F.R. § 214.2(h)(4)(i)(B)(2) (2018).

17 U.S. Citizenship and Immigration Services (7 July 2011). *Policy Memorandum 602-0040*, *available at* https://www.uscis.gov/sites/default/files/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/change-timeframes-rfe.pdf.

18 *See* Yeganeh Torbati, *Intense scrutiny of H-1B visa applications making it more difficult for skilled foreigners to work in US,* Thomson Reuters (20 Sept. 2017) *available at* https://www.reuters.com/article/us-usa-immigration-employment-insight/trump-administration-red-tape-tangles-up-visas-for-skilled-foreigners-data-shows-idUSKCN1BV0G8.

19 *Id.*

20 *See* American Immigration Lawyers Association's (AILA) Complaint for Declaratory and Injunctive Relief dated 11 June 2018 in *AILA v. USCIS, available at* https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/lawsuit_demands_uscis_comply_with_foia_requests_regarding_h1-b_adjudications_complaint.pdf.

21 *Id.*

22 U.S. Department of Labor, Wage and Hour Division, *H-1B Program*, *available at* https://www.dol.gov/whd/immigration/h1b.htm (last visited 28 Aug. 2018).

23 INA § 212(p)(4).

24 Employment and Training Administration, *Prevailing Wage Determination Policy Guidance* (rev. Nov. 2009) at 14-16.

25 *Id.* at 3.

26 20 CFR § 656.40 (2018).

27 8 CFR § 214.2(h)(4)(iii)(A) (2018).

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29 *Id.*

30 *Id.*

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33 *Id.*

34 *Id.*

35 *See* Sara Ashley O'Brien, *H-1B visa applications are down again*, CNN, 12 Apr. 2018, *available at* https://money.cnn.com/2018/04/12/technology/h-1b-visa-applications-2018/index.html.

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