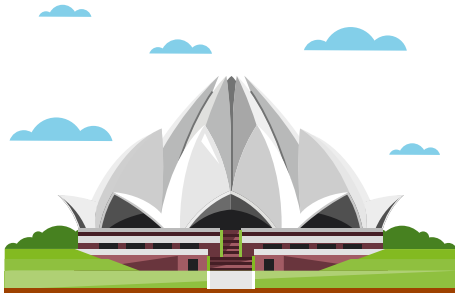
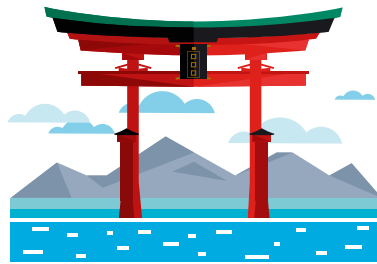


2025 1

juriste

INTERNATIONAL



DEEP
I SPECIAL ASIA
V SPÉCIAL ASIE
E ESPECIAL ASIA



Union Internationale des Avocats
International Association of Lawyers
Unión Internacional de Abogados



L'ORDRE DES AVOCATS DU BARREAU DE PARIS AU SERVICE DES AVOCATS ET DES CITOYENS AU NIVEAU NATIONAL ET INTERNATIONAL

SES MISSIONS, SON UTILITÉ

AU NIVEAU NATIONAL

- Organiser la profession
- Réguler les relations avocat-client
- Veiller au respect de la déontologie
- Favoriser l'accès au droit et à la justice
- Défendre l'État de droit
- Faciliter le quotidien des avocats

AU NIVEAU INTERNATIONAL

- Assurer la défense de la défense partout dans le monde
- Faciliter l'exercice professionnel à l'international
- Assurer le rayonnement de la place de droit et d'arbitrage de Paris
- Encourager le développement des relations entre les barreaux et les flux d'affaires
- Contribuer au renforcement de l'attractivité par le droit

PLUS D'INFORMATIONS

WWW.AVOCATPARIS.ORG / WWW.AVOCATS.PARIS

SUIVEZ-NOUS

[WWW.FACEBOOK.COM/BARREAU2PARIS](https://www.facebook.com/BARREAU2PARIS)

[WWW.TWITTER.COM/AVOCATS_PARIS](https://www.twitter.com/AVOCATS_PARIS)

[WWW.LINKEDIN.COM/COMPANY/BARREAU-DE-PARIS](https://www.linkedin.com/company/BARREAU-DE-PARIS)

[WWW.INSTAGRAM.COM/AVOCATS_PARIS](https://www.instagram.com/AVOCATS_PARIS)

[WWW.TIKTOK.COM/@AVOCATS_PARIS](https://www.tiktok.com/@AVOCATS_PARIS)

Table of Contents

Sommaire

Indice



3

President's Message | Le mot du Président | Mensaje del Presidente
Editorial | L'édito | Editorial

6

Deep Dive - Special Asia | Le dossier - Spécial Asie | El informe - Especial Asia

► [6](#) Arbitral Justice in Asia ► [9](#) LGBTQ+ and Human Rights in Japan
► [13](#) Marriage Equality in South Asia: India, Nepal and Thailand ► [15](#) Lutter pour les droits des femmes en Afghanistan : un combat à poursuivre ► [17](#) The (f)utility of Challenging North Korea's Death Penalty at the United Nations
► [21](#) A Bhutan Adventure ► [24](#) How AI is Shaping Consumer Preferences and Buying Patterns in China ► [27](#) Pratique du droit et protection des données personnelles entre Paris et Tokyo ► [31](#) Le Code civil chinois : quelle réalité ?
► [34](#) Proliferation of Free Trade Agreements in Asia: Key Learnings and Challenges ► [38](#) Foreign Investment in Nepal: Opportunities and Challenges
► [42](#) Más allá del Pacífico: los históricos y económicos entre Chile y Japón
► [46](#) Modernising the Singapore Payment Landscape ► [50](#) Guidelines for Corporate Takeovers: Potential Impact on M&A Practice in Japan
► [53](#) Comparativa de prácticas del Gobierno Corporativo en la Unión Europea y Asia ► [57](#) Cross Border Joint Ventures: Key Considerations for Inward and Outward Joint Ventures (India) ► [61](#) Enabling Development of Interoperable Voluntary Carbon Markets in the Asia-Pacific Region



64

The Wider View | Grand angle | Visión amplia

► The UN Convention on the Law of the Sea: Characteristics and implications

67

Inside the UIA | Au cœur de l'UIA | Novedades de la UIA

► UIA Congress Paris 2024



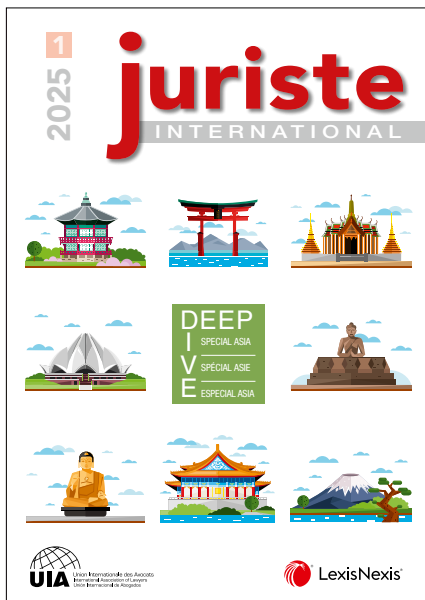
76

The Basics | Les fondamentaux | Los fundamentos

► The Impact of Sanctions against Russia at the Enforcement Stage: How to Monetize Awards against Frozen Assets in a Nutshell ► What Is Copyright?

82

Legal Spotlight | Brèves juridiques | Breves jurídicos



JURISTE INTERNATIONAL

Editorial Policy

The *Juriste International* offers robust and diverse perspectives on subjects of interest to lawyers. The views expressed herein are the views of the authors and do not necessarily imply UIA policy or editorial concurrence. Publication or dissemination of advertising or support of any product, service or organization does not constitute an endorsement.

Politique éditoriale

Juriste International offre des perspectives approfondies et diverses sur des sujets d'intérêt pour les avocats. Les opinions exprimées ici sont celles de leurs auteurs et n'impliquent pas que l'UIA et/ou le Comité éditorial, en les publiant et les diffusant, les partagent, ni les soutiennent. L'UIA n'avalise pas nécessairement le matériel publicitaire ou promotionnel de tout produit, service ou organisation publié ou diffusé par le *Juriste International*.

Política editorial

Juriste International ofrece perspectivas sólidas y diversas sobre temas de interés para los abogados. Las opiniones aquí expresadas son las de sus autores y no implican que la UIA y/o el Consejo Editorial, al publicarlas y difundirlas, las compartan o apoyen. La publicación o difusión de publicidad o soporte de cualquier producto, servicio u organización no constituye un respaldo.

Photos credit | Crédit photos | Crédito fotos

Cover © Mind Pixel – Shutterstock / P 6 © jonathandav – Shutterstock / P 10 © sasirin pamai – Shutterstock / P 18 © a katz – Shutterstock / P 19 © Saeschie Wagner – Shutterstock / P 20 © Naruedom Yaempongsa – Shutterstock / P 21, P 22, P 23 © Ian McDougall / P 22 (bottom) © ZiO_DS – Shutterstock / P 28 © nialowwa – Shutterstock / P 29 Aritra Deb – Shutterstock / P 35 © Golubovy – Shutterstock / P 39 © Summerandmidnight – Shutterstock / P 42 © hapelinium – Shutterstock / P 48 © 2p2play – shutterstock / P 49 © Timothy Roesdiah / Shutterstock / P 50 © dodotone – Shutterstock / P 52 © TexBr – Shutterstock / P 56 © metamorworks – Shutterstock / P 60 © M. Schuppich – Shutterstock / P 66 © ARIMAG – Shutterstock / P 76 © Viacheslav Lopatin – Shutterstock / P 78 © Pavel Plotnikov – Shutterstock / P 81 © Elenyska – Shutterstock / P 82 © PP Photos – Shutterstock / P 83 (Column on the left) © Longfin Media – Shutterstock – (Column on the right) © ricochet64 – Shutterstock / P 84 © Jim Lambert – Shutterstock.

JURISTE INTERNATIONAL

UIA PUBLICATION | PUBLICATION DE L'UIA | PUBLICACIÓN DE LA UIA

Publication Director | Directeur de la publication | Director de la publicación
Carlo Mastellone, Florence, Italy, c.mastellone@studiomastellone.it

Editor-in-Chief | Rédactrice en chef | Redactora jefa

Barbara Gislason, Minneapolis, MN, USA, barbara@gislasonlaw.com

Deputy Editors | Rédacteurs adjoints | Redactores adjuntos

English Language: Ashu Thakur, Mumbai, India, ashu@ataindia.co.in

French Language: Agathe Blanc, Paris, France, ablanc@ftmsavocats.com

Fannie Bruneau, Paris, France, fanniebriqueau@fcaavocat.com

Spanish Language: Jesús Granados, Marbella, Spain, jesus.granados@jglex.com

Executive Director | Directrice générale | Directora ejecutiva

Marie-Pierre Richard, Paris, France, mprichard@uianet.org

Executive Assistant | Assistante de direction | Asistentia ejecutiva

Anne-Marie Villain, Paris, France, avillain@uianet.org

Editors | Éditeurs | Editores

NORTH AMERICA | AMÉRIQUE DU NORD | AMÉRICA DEL NORTE

Pierre G. Bélanger, Ottawa, Canada, pbelange@gmail.com

Hon. Peter M. Reyes, Jr., Minneapolis, MN, USA, petermreyes@gmail.com

Rebecca Salazar, Princeton, NJ, USA, rebecca.salazar@rutgers.edu

Mira Vats-Fournier, Minneapolis, MN, USA, MVats-Fournier@Taftlaw.com

Christian Clapp, San Diego, CA, United States, christian.clapp@gmail.com

Bruce Landay, Boston, MA, United States, bruce@llslex.com

CENTRAL AND SOUTH AMERICA | AMÉRIQUE CENTRALE ET DU SUD | AMÉRICA CENTRAL Y DEL SUR

Marco Ferreira Orlandi, Sao Paulo, Brazil, marco@boccuzzi.com.br

Eugenio M. Curia, Buenos Aires, Argentina, Emcuria@yahoo.com

Joaquín Palma Cruzat, Santiago, Chile, joaquin.palma@palma.cl

Jaime Alberto Sandoval Mesa, Bogota, Colombia, jaisandoval@yahoo.com

Alan de la Torre Lobera, Mexico DF, Mexico, delatorre@quct.net

Wilfrido Fernández, Asunción, Paraguay, w.fernandez@zafer.com.py

EUROPE | EUROPA

Kato Aerts (Revenue Officer), Brussels, Belgium, kato.aerts@lydian.be

Juan Pablo Correa Delcasso, Barcelona, Spain, juanpablo.correa@laguardlegal.com

Romina Bossa Abiven (UIA IROL Liaison), Paris, France, rbossa@uianet.org

Clémence Colin, Paris, France, ccolin@jpkarsenty.com

Marine Parmentier, Paris, France, mparmentier@woogassocies.com

Marie-Alix Chaboison, Paris, France, machaboison@valta-avocats.com

Catalina De La Sota, Paris, France, cs@zimerayfinelle.com

Camille Vuillemin-Loup, Geneva, Switzerland, camille.vuillemin-loup@crsblaw.com

Marco Imperiale, Milan, Italy, marco.imperiale@betteripsum.net

Paolo Lombardi (UIA News), Torino, Italy, paolo.lombardi@ellexi.it

Riccardo Cajola, Milan, Italy, rgc@cajola.com

David Greene, London, UK, david.greene@edwincoe.com

AFRICA | AFRIQUE

Fayçal Driouche, Algiers, Algeria, cabinetdriouche@gmail.com

Nicoline Kuhsen, Yaounde, Cameroon, knicol2007@yahoo.co.uk

Olufemi Sunmonu, Lagos, Nigeria, fsunmonu@aliantlaw.ng

Aboubacar Fall, Dakar, Senegal, a.fall@aflegal.sn

Mbula E. Nzuki, Kenya, mbula@mnlegal.net

Mohamed Hassanein, Cairo, Egypt, m.hassanein@elattarlawfirm.com

Omar Bendjelloun, Rabat, Morocco, omar.bendjelloun@gmail.com

Dédé Diangienda Biku, Kinshasa, D.R. Congo, dede.biku@gmail.com

Patrick Ali, Kinshasa, D.R. Congo, patrickali201@gmail.com

ASIA | ASIE

Amanda Yang, Hefei, 18955186248@163.com

Jansy Wang, Beijing, China, wangxiujuan@anjielaw.com

Yoshihisa Hayakawa, Tokyo, Japan, haya@rikkyo.ac.jp

Jumanah Behbehani, Kuwait City, Kuwait, lawyer_jbehbehani@hotmail.com

Typesetting and Printing | Composition et impression | Composición e impresión

Sprint, Parc Industriel Euronord, 10 rue du Parc, CS 85001 Bruguères, 31151 Fenouillet Cedex

Circulation - Distribution | Tirage - Distribution | Tirada - Distribución

3 000 copies / exemplaires / ejemplares

Union Internationale des Avocats (UIA), 23 rue de la Victoire, 75009 Paris (France)

Tél. : +33 1 44 88 55 66 - Fax : +33 1 44 88 55 77 - E-mail : uiacentre@uianet.org

Site Web : www.uianet.org - ISSN : 0758-2471

Follow us





Carlo Mastellone

PRESIDENT'S MESSAGE

In face of continued violations of the Rule of law and independence of the legal profession, of international human rights and humanitarian law, growing migration and refugee crisis, poverty and modern slavery, climate change, violence against women and children, and increasing social conflict exacerbated by social media, the UIA provides lawyers with a unique opportunity. They can build bridges across legal systems and cultures, and offers them the chance to stand united for the Rule of law, to defend lawyers at risk to stand up for equal access to Justice and to face together the challenge of shaping a more peaceful, equal and inclusive world.

As part of the current strategy of the UIA, which is a stronghold of my Presidency, the UIA is pursuing actions in the four areas of Sustainability implementing the Rome Congress resolutions and the UIA internal guidelines, Dispute Prevention and Resolution (promoting a new mindset), immigration (launching a new set of Principles on the treatment and status of all migrants)), and AI (advancing the UIA Guidelines on the use of AI systems by lawyers). We also support the actions of our four special Committees: LGBTQI+, Women, NextGen and Well-being.

LE MOT DU PRÉSIDENT

Face aux violations constantes de l'État de droit et de l'indépendance de la profession juridique, des droits de l'homme internationaux et du droit humanitaire, à la crise croissante des migrations et des réfugiés, à la pauvreté et à l'esclavage moderne, au changement climatique, à la violence contre les femmes et les enfants, et aux conflits sociaux croissants exacerbés par les réseaux sociaux, l'UIA offre aux avocats l'opportunité unique de construire des ponts entre les systèmes juridiques et les cultures, et nous offre la chance de nous unir pour l'État de droit, de défendre les avocats en danger, de défendre l'égalité d'accès à la justice et de relever ensemble le défi de façonner un monde plus pacifique, plus égalitaire et plus inclusif.

Dans le cadre de la stratégie actuelle de l'UIA, qui est un point fort de ma présidence, l'UIA poursuit des actions dans les quatre domaines de la durabilité en mettant en œuvre les résolutions du Congrès de Rome et les directives internes de l'UIA, la prévention et la résolution des litiges (promotion d'un nouvel état d'esprit), l'immigration (lancement d'un nouvel ensemble de principes sur le traitement et le statut de tous les migrants), et l'IA (avancement des directives de l'UIA sur l'utilisation des systèmes d'IA par les avocats). Nous soutenons également les actions de nos quatre Comités spéciaux: LGBTQI+, Femmes, NextGen et Bien-être.

MENSAJE DEL PRESIDENTE

Frente a las continuas violaciones del Estado de Derecho y de la independencia de la profesión jurídica, de los derechos humanos internacionales y del derecho humanitario, la creciente crisis de la migración y los refugiados, la pobreza y la esclavitud moderna, el cambio climático, la violencia contra las mujeres y los niños, y el aumento de los conflictos sociales exacerbados por los medios de comunicación social, la UIA ofrece a los abogados la oportunidad única de tender puentes entre los sistemas jurídicos y las culturas, y nos ofrece la oportunidad de permanecer unidos por el Estado de Derecho, defender a los abogados en situación de riesgo, defender la igualdad de acceso a la Justicia y afrontar juntos el reto de dar forma a un mundo más pacífico, igualitario e inclusivo.

En el marco de la estrategia actual de la UIA, que es uno de los puntos fuertes de mi Presidencia, la UIA está llevando a cabo acciones en las cuatro áreas de sostenibilidad (aplicando las resoluciones del Congreso de Roma y las directrices internas de la UIA), Prevención y Resolución de Conflictos (promoviendo una nueva mentalidad), Inmigración (lanzando un nuevo conjunto de principios sobre el trato y el estatus de todos los inmigrantes) e IA (avanzando en las Directrices de la UIA sobre el uso de sistemas de IA por parte de los abogados). También apoyamos las acciones de nuestros cuatro Comités especiales: LGBTQI+, Mujeres, NextGen y Bienestar.



Barbara Gislason

EDITORIAL

While lawyers meticulously craft arguments and speeches, their effectiveness relies not only on content and quality, but also on delivery. Sound quality improves significantly if the speaker has good posture, stands with their legs apart, and has developed appropriate muscles that promote breath control, diction, and voice projection in the diaphragm and face, perhaps the latter through lip trills, cheek puffs, and tongue twisters.

When air comes into the speaker's lungs, the diaphragm pushes it up through the vocal cords in the larynx, causing them to vibrate. This vibration is affected by the length and thickness of the vocal cords – males are typically between 17-25 mm long, while females are between 11-15 mm long. Vocal cord vibrations cause sound waves to pass to throat, mouth, and nasal passages resonating chambers before they are articulated into language by the lips and tongue. An effective speaker controls pitch, volume, and rhythm, utilizing strategic pauses to positively influence how a listener extracts meaning. In contrast, a speaker who lacks voice modulation, but instead monotonously reads, imposes a cognitive load on the listener. A fast speaker, too, makes it hard for others to understand what is said.

When sound waves pass through the listener's ears, the waves are impacted by the size and shape of the listener's anatomy, such as the outer ears. They enter as frequencies called Hz. More

listeners can hear lower frequencies, typical of vowels, than higher frequencies, like the consonants "s," "h," and "f." After sound waves travel to the fluid-rich cochlea in the inner ear, nerve endings transform the vibrations into electrical impulses that move through the cranial nerve to the brain's auditory cortex. Listener comprehension can also be impacted by the speaker's accent, the use of phonetic sounds missing from the listener's native language, and the listener's linguistic background.

A speaker who has mastered their subject and presents extemporaneously can better modulate their tone and rhythm, thereby increasing the listener's interest and comprehension across languages. While lawyers presenting in a second language may instinctively prefer to read for accuracy, they often display flattened expressions and lack natural pauses, causing the listener to work harder to extract meaning.

Lawyers must move beyond scripts and engage their whole body when speaking, making eye contact, appropriate facial expressions, and gestures that support their words. Advocacy is not just about being heard; it is about ensuring that the message is understood. The spoken word is more than words, it is an instrument of influence.

L'ÉDITO

Bien que les avocats élaborent méticuleusement des arguments et des discours, leur efficacité dépend non seulement du contenu et de la qualité, mais aussi de la manière de les présenter. La qualité sonore s'améliore considérablement si le locuteur a une bonne posture, se tient les jambes écartées et a développé des muscles appropriés qui favorisent le contrôle de la respiration, la diction et la projection de la voix dans le diaphragme et le visage, et, dans ce dernier cas, à travers des trilles des lèvres, de la gymnastique faciale et des vireslangues.

Lorsque l'air entre dans les poumons du locuteur, le diaphragme le pousse à travers les cordes vocales dans le larynx, provoquant leur vibration. Cette vibration est influencée par la longueur et l'épaisseur des cordes vocales : chez les hommes, elles mesurent généralement entre 17 et 25 mm de long, tandis que chez les femmes, elles mesurent entre 11 et 15 mm de long. Les vibrations des cordes vocales font passer des ondes sonores dans la gorge, la bouche et les voies nasales, qui sont des chambres de résonance avant d'être articulées en langage par les lèvres et la langue. Un orateur efficace contrôle la hauteur, le volume et le rythme, utilisant des pauses stratégiques pour influencer positivement la manière dont un auditeur extrait le sens. En revanche, un orateur qui manque de modulation vocale et qui lit de manière monotone impose une charge cognitive à l'auditeur. Un orateur rapide rend également difficile la compréhension de ce qui est dit.

Barbara J. GISLASON • Editor-in-Chief, Juriste International, Rédactrice en chef, Juriste International, Redactora Jefe, Juriste International • barbara@gislasonlaw.com

“ Advocacy is not just about being heard; it is about ensuring that the message is understood. ”

➤ EDITORIAL

Lorsque les ondes sonores passent par les oreilles de l'auditeur, elles sont influencées par la taille et la forme de l'anatomie de l'auditeur, comme les oreilles externes. Elles entrent sous forme de fréquences appelées Hz. Un plus grand nombre d'auditeurs peut entendre des fréquences basses, typiques des voyelles, que des fréquences élevées, comme les consonnes « s », « h » et « f ». Après que les ondes sonores ont voyagé jusqu'à la cochlée riche en liquide dans l'oreille interne, les terminaisons nerveuses transforment les vibrations en impulsions électriques qui se déplacent à travers le nerf crânien vers le cortex auditif du cerveau. La compréhension de l'auditeur peut également être influencée par l'accent du locuteur, l'utilisation de sons phonétiques absents de la langue maternelle de l'auditeur, et le parcours linguistique de l'auditeur.

Un orateur qui maîtrise son sujet et présente extemporanément peut mieux moduler son ton et son rythme, ce qui accroît l'intérêt et la compréhension de l'auditeur d'une langue à l'autre. Alors que les avocats qui présentent dans une deuxième langue peuvent instinctivement préférer lire pour plus de précision, ils affichent souvent des expressions fades et manquent de pauses naturelles, ce qui oblige l'auditeur à faire plus d'efforts pour en extraire le sens.

Les avocats doivent aller au-delà des scripts et engager tout leur corps lorsqu'ils s'expriment, en établissant un contact visuel, en adoptant des expressions faciales appropriées et des gestes qui soutiennent leurs paroles. La plaidoirie ne consiste pas seulement à être entendu. Il s'agit de s'assurer que le message est compris. La parole ne se résume pas à des mots, c'est un instrument d'influence.

Aunque los abogados elaboran meticulosamente sus argumentos y discursos, su eficacia no sólo depende del contenido y la calidad, sino también de la ejecución. La calidad del sonido mejora significativamente si el orador tiene una buena postura, se coloca con las piernas separadas y ha desarrollado una musculatura adecuada que favorezca el control de la respiración, la dicción y la proyección de la voz en el diafragma y en la cara, quizá esto último mediante trinos labiales, inflados de mejillas y trabalenguas.

Cuando el aire entra en los pulmones del orador, el diafragma lo empuja hacia arriba a través de las cuerdas vocales de la laringe, haciéndolas vibrar. Esta vibración se ve afectada por la longitud y el grosor de las cuerdas vocales: en los hombres suelen medir entre 17 y 25 mm de longitud, mientras que en las mujeres miden entre 11 y 15 mm. Las vibraciones de las cuerdas vocales hacen que las ondas sonoras pasen a la garganta, la boca y las fosas nasales, cámaras resonantes antes de ser articuladas en lenguaje mediante los labios y la lengua. Un orador eficaz controla el tono, el volumen y el ritmo, utilizando pausas estratégicas para influir positivamente en cómo el oyente extrae el significado. Por el contrario, un orador que carece de modulación vocal y simplemente lee de manera monótona impone una carga cognitiva al oyente. Un orador rápido, además, dificulta que los demás entiendan lo que se dice.

Cuando las ondas sonoras atraviesan los oídos del oyente, reciben el impacto del tamaño y la forma de su

anatomía, como los oídos externos. Entran en forma de frecuencias denominadas Hz. Hay más oyentes que pueden oír frecuencias más bajas, típicas de las vocales, que frecuencias más altas, como las consonantes «s», «h» y «f». Después de que las ondas sonoras viajen hasta la cóclea del oído interno, rica en fluidos, las terminaciones nerviosas transforman las vibraciones en impulsos eléctricos que se desplazan por el nervio craneal hasta la corteza auditiva del cerebro. La comprensión del oyente también puede verse afectada por el acento del hablante, el uso de sonidos fonéticos ausentes en la lengua materna del oyente y los antecedentes lingüísticos de éste.

Un orador que domina su tema y hace una presentación extemporánea puede modular mejor su tono y ritmo, aumentando así el interés y la comprensión del oyente en todos los idiomas. Mientras que los abogados que presentan en un segundo idioma pueden preferir instintivamente leer para obtener precisión, a menudo muestran expresiones aplanadas y carecen de pausas naturales, lo que hace que el oyente tenga que esforzarse más para extraer el significado.

Los abogados deben ir más allá de los guiones e implicar todo su cuerpo al hablar, estableciendo contacto visual, adoptando expresiones faciales adecuadas y gestos que apoyen sus palabras. La abogacía no consiste únicamente en ser escuchado, sino en garantizar que el mensaje sea comprendido. La palabra hablada es más que palabras, es un instrumento de influencia.



Arbitral Justice in Asia



Kai-Chieh CHAN

➤ La justice arbitrale repose sur l'idée que l'arbitrage – mécanisme de résolution des différends convenu et géré par les parties avec une intervention minimale de l'État – permet de parvenir à une décision de justice. Avec l'augmentation des échanges commerciaux entre les pays asiatiques, ces derniers font de plus en plus confiance à la justice arbitrale par rapport à leurs homologues américains et européens. Cela se reflète dans les tendances internationales et internes, y compris une augmentation des traités d'investissement avec des clauses d'arbitrage et des réformes récentes des lois sur l'arbitrage.

➤ La justicia arbitral se funda en la idea de que se puede lograr justicia a través del arbitraje, un mecanismo de resolución de conflictos acordado y gestionado por las partes con una intervención mínima del Estado. Con el incremento del comercio entre los países asiáticos, éstos confían cada vez más en la justicia arbitral que sus homologos estadounidenses y europeos. Esto se refleja en las tendencias internacionales y nacionales, incluido el aumento de los tratados de inversión con cláusulas de arbitraje y las recientes reformas de las leyes de arbitraje.

1. Economic and Arbitral Integration in Asia

Arbitral justice means the fair and equitable resolution of disputes through an independent arbitral tribunal, separate from state courts and judges. Arbitral justice is achieved through a tribunal, which is constituted independently of the state's judicial organization. The common will of the parties involved in the dispute is the determining factor. Respect for arbitral justice does not, however, diminish state justice; rather, they work in harmony. This occurs because arbitral tribunals lack the coercive power of state apparatus. States can thus impose limits on arbitration in various aspects, notably in terms of recognition and enforcement of arbitral awards, through their legislation. In this regard, the willingness of states to offer trust in arbitral justice is a significant factor.

To what extent do Asian countries believe in arbitral justice? The issue is that the term "Asia" is a broad one, encompassing countries located east of Europe, west of the Pacific Ocean, and north of the Indian Ocean. These countries have diverse legal traditions – including common law, civil law, and Islamic law – as well as diverse cultures and historical backgrounds. Politically, these countries do not have a unified identity and do not vote or make decisions collectively, unlike countries in Africa or Europe.

However, the integration of Asia is a more economically viable proposition than a political one. This is reflected in the vision of ASEAN, ASEAN+3 and ASEAN+6. There has been a notable increase in cross-border trade and commerce among Asian countries. Globally, between 2017 and 2023, the value of goods traded grew by around 5% each year. In comparison, rates of growth were higher in ASEAN (6%), China and India (more than 7%), and Vietnam (8%).¹ The recent geopolitical conflicts and trade restrictions imposed by Western countries have arguably led to an additional increase in intra-Asian trade.

As economic integration progresses, so too does the integration of arbitral practice. In 2023, for instance, the Singapore International Arbitration Centre (SIAC) saw a significant rise in the number of cases involving parties from across the Asia-Pacific region, particularly from Australia, China, Hong Kong, Japan, and Thailand.² A similar trend can be observed at the Hong Kong International Arbitration Centre (HKIAC), where Korea and Japan emerged among the top 10 countries of origin for parties involved in HKIAC cases.³

There are some legitimate doubts as to whether all Asian countries can be considered "arbitration-friendly." Indeed, it is difficult to say that there is a highly uniform

arbitration practice. However, as will be seen below, there is a trend – one not seen in other parts of the world – which tends to trust arbitral justice.

2. Arbitral Justice in Asia in the International Arena

In recent years, there has been a growing perception of distrust in the fairness and impartiality of arbitral justice in some parts of the world. This is most evident in the context of Investor-State Dispute Settlement (ISDS). Several Latin and Central American countries (e.g., Bolivia, Venezuela, and Honduras) have withdrawn from the Convention of the International Centre for Settlement of Investment Disputes (ICSID), the framework convention for ISDS. Similarly, EU countries were asked to terminate ISDS mechanisms between themselves on the grounds that they are incompatible with EU law.

At first glance, some Asian countries are not exempted from this trend. Since 2015, India has unilaterally denounced many of its bilateral investment treaties allowing for arbitration of investment disputes. Indonesia, which has been concluding investment treaties since the 1960s, has also terminated some of them. However, this is not the whole story.

First, the conclusion of investment treaties with arbitration clauses remains strong in Asia. For example, Hong Kong has concluded seven investment treaties and free trade agreements with investment chapters since 2016. Similarly, over the past decade, Japan has concluded fifteen investment treaties, all of which allow for arbitration of investment disputes. While European countries and the United States have stalled in concluding new investment treaties, Asian countries have taken the wheel in leading and developing the next generation of arbitration mechanisms to resolve investment disputes.

Private use of arbitration is also strong: for example, when the China Development Bank provides a policy loan, disputes over the loan agreements are typically resolved not in Chinese courts but in London-seated arbitrations administered by the International Chamber of Commerce.⁴

Second, in the case of Indonesia and India, both have continued to sign investment treaties with arbitration mechanisms. The real issue is not that countries do not trust arbitral justice but rather that they would like to shape the arbitral justice they deem appropriate in each individual case. Procedurally, the arbitral justice these countries want involves greater transparency and the requirement of competence and impartiality of the arbitrator. Substantively,

There are some legitimate doubts as to whether all Asian countries can be considered "arbitration-friendly."

1. <https://www.mckinsey.com/featured-insights/future-of-asia/asia-the-epicenter-of-global-trade-shifts>.

2. https://siac.org.sg/wp-content/uploads/2024/04/SIAC_AR2023.pdf, p. 39.

3. <https://www.hkiac.org/about-us/statistics>.

4. https://docs.aiddata.org/ad4/pdfs/How_China_Lends__A_Rare_Look_into_100_Debt_Contracts_with_Foreign_Governments.pdf, p. 8.

arbitrators are now required to consider the state's regulatory power and hold foreign investors accountable for proven illegal actions. Asian countries have also embraced arbitral justice by choosing not to follow the investment court system preferred by EU member states, which abandons the arbitration mechanism altogether.

3. Arbitration in Asia on the Domestic Scene

While most Asian countries follow the United Nations Commission on International Trade Law (UNCITRAL) Model Law in their domestic legislation relating to arbitration, some countries such as Pakistan, Vietnam and Indonesia, do not. Nevertheless, several Asian countries are undertaking reforms demonstrating their confidence in arbitral justice, as illustrated by the three examples below.

- a) Several Asian countries are reforming their arbitration legislation to align domestic arbitration with international standards. Many countries, around the world have established more arbitration-friendly regimes for "international" arbitration than for "domestic" arbitration, which is subject to more procedural restraints and potential grounds for setting aside awards.

Nevertheless, several Asian countries are undertaking reforms demonstrating their confidence in arbitral justice [...].

The Revised draft Arbitration Law of China, published in November 2024, provides the same grounds for setting aside domestic and international arbitral awards (Article 77). This represents a significant departure from the current regime, where domestic arbitration, in contrast to "foreign-related" arbitration,

may be set aside on both procedural and substantive grounds, such as the arbitrator's reliance on fabricated evidence or the parties' withholding of evidence. Similarly, the Draft Pakistan Arbitration Act 2024 aligns their entire arbitration regime with the UNCITRAL Model Law. Moreover currently, in Pakistan, only foreign arbitral awards are treated in accordance with the New York Convention under the Arbitration Agreements and Foreign Arbitral Awards Act 2011.

- b) A number of Asian countries have embraced arbitral justice by defining the concept of "seat." In international arbitration, the applicable law to the arbitration agreement, procedural rules, and the court responsible for setting aside are determined by the seat freely selected by the parties. In other words, if parties from Asian countries select countries outside their home jurisdiction as the seat, which they often do by choosing a neutral seat, the court of their home jurisdiction will lose the right to decide on the setting aside of the award. Thus, by admitting the notion of seat, states are placing their trust in arbitral justice.

There is a growing trend among Asian states to adopt the concept of arbitral seat. By way of illustration, the Arbitration (Amendment) Bill 2024 of Malaysia introduces a new section 9A, which expressly provides that in the absence of an agreement between the parties as to the applicable law in relation to the arbitration agreement, the law applicable will be the law of the seat of arbitration. Similarly, China's Revised Draft Arbitration Law also introduces the notion of an arbitral seat for foreign-related arbitrations and explicitly adds that the law encourages parties to choose China as the arbitral seat (Article 84).

- c) There is a growing openness among Asian countries to recognize the role and influence of arbitral institutions. In practice, arbitral institutions perform a variety of functions beyond mere communication and day-to-day administrative matters. Instead, they frequently possess significant authority in matters pertaining to review of draft arbitral awards, appointment of arbitrators, and modification of their rules of arbitration. Some countries may be reluctant to cede such powers to arbitral institutions, preferring to reserve them for their own domestic courts. Additionally, there may be a general reluctance to embrace foreign arbitration institutions.

In Asia, there is a growing preference for entrusting arbitration institutions with the responsibility of administering arbitral justice. The draft Arbitration and Conciliation (Amendment) Bill 2024 of India, for instance, grants arbitral institutions enhanced powers previously vested with courts only. This includes the power to extend the time limit for issuing an award, to order a reduction of arbitrators' fees (where delay stems from the arbitral tribunal) and to substitute arbitrators (Section 29-A). China's Revised Draft Arbitration Law also explicitly permits foreign arbitral institutions to conduct activities in free trade zones (Article 83) which represents a significant shift from the long-standing yet controversial precedent set by the People's Supreme Court, which previously declined to recognize arbitral awards issued by foreign arbitral institutions in China.⁵

Conclusion

Asia is a diverse continent with many different cultures, laws and politics. However, they are becoming more connected through trade and politics. Asian countries treat arbitration differently from Europe and the Americas. Asians favor and have confidence in arbitral justice, both internationally and domestically and it is, therefore, to be expected that Asian countries will be at the forefront of developments in this field in a multipolar world order. ■

Kai-Chieh CHAN

Associate, Dechert
Paris, France

kaichieh.chan@sciencespo.fr

5. See <https://arbitrationblog.kluwerarbitration.com/2020/10/12/arbitrations-in-china-administered-by-foreign-institutions-no-longer-a-nomans-land-part-i/>.



LGBTQ+ and Human Rights in Japan

Masumi KONO

➤ Cet article examine le statut juridique des droits des personnes LGBTQ+ au Japon, en se concentrant sur la législation existante, les affaires judiciaires en cours et la position de la société civile. La protection juridique des personnes LGBTQ+, y compris l'inclusion sur le lieu de travail, s'est améliorée grâce à des amendements, mais des lacunes persistent dans les lois nationales. Des affaires judiciaires importantes, en particulier celles liées au mariage homosexuel et aux droits des transgenres, mettent en lumière les défis juridiques actuels et façonnent l'avenir des droits des personnes LGBTQ+ au Japon. En conclusion, bien que l'opinion publique évolue progressivement, des réformes juridiques substantielles sont encore nécessaires pour garantir la pleine reconnaissance et la protection juridiques des personnes LGBTQ+.

➤ Este documento examina la situación jurídica de los derechos de las personas LGBTQ+ en Japón, centrándose en la legislación vigente, los casos judiciales en curso y las actitudes sociales. La protección jurídica de las personas LGBTQ+, incluida la inclusión en el lugar de trabajo, ha mejorado gracias a las enmiendas, pero siguen existiendo importantes lagunas en las leyes nacionales. Los casos judiciales clave, en particular los relacionados con el matrimonio entre personas del mismo sexo y los derechos de los transexuales, ponen de relieve los desafíos legales en curso y están configurando el futuro de los derechos LGBTQ+ en Japón. En conclusión, aunque la opinión pública está cambiando gradualmente, siguen siendo necesarias reformas legales sustanciales para garantizar el pleno reconocimiento y protección de las personas LGBTQ+.

1. Introduction

In recent years, LGBTQ+ rights have become an increasingly prominent issue worldwide, with many countries striving to ensure equality and protection for LGBTQ+ individuals. Japan has made some progress in addressing LGBTQ+ issues.

This article examines the current state of LGBTQ+ legal regulations and court cases in Japan, focusing on issues such as same-sex marriage, anti-discrimination protections, and the recognition of gender identity. While Japan has taken significant steps in promoting LGBTQ+ rights, such as by local governments recognizing same-sex partnerships, there are still significant gaps in national legislation. This disparity between public attitudes and legal reforms presents unique challenges and opportunities for further advocacy.

By exploring the current legal landscape, ongoing court cases and social attitudes, this article aims to provide an overview of LGBTQ+ rights in Japan, shedding light on the progress made, the ongoing struggles, and the potential for future legal advancements.

2. The Constitution of Japan

First, we examine the Japanese Constitution as it relates to LGBTQ+ rights. In Japan, Article 13 of the Constitution guarantees respect for the individual, while Article 24 of the Constitution guarantees individual dignity and equality of both sexes in family relationships.

Article 13

- All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

Article 24

- (1) Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.
- (2) With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.

3. The Legal Landscape in Japan

A. Partnership Certification System

Same-sex marriage is still not legally recognized, as Article 24 of the Constitution defines marriage as being between “both sexes.” In 2015, a Partnership Certification System began to expand from the Shibuya and Setagaya wards in Tokyo, and now nearly 500 municipalities across Japan have implemented a Partnership Certification System. Through partnership certificates, individuals may gain rights such as accompanying a partner to the hospital, living together in public housing as a family, being named as beneficiaries for life insurance, obtaining family credit cards, or applying for family discounts. In some municipalities, it is also possible to request the disclosure of personal information about a deceased partner. However, because these partnerships are not legally recognized marriages, they do not grant inheritance rights.

Same-sex marriage is still not legally recognized, as Article 24 of the Constitution defines marriage as being between “both sexes.”

B. Amendment of Laws and Regulations

1. The Status of LGBTQ+ Rights and Issues in Japan in the Workforce.

The percentage of individuals who identify as LGBTQ+ in Japan is estimated to be from 3%¹ to 10%² of the population. In contrast, a survey conducted in May 2021 by P&G Japan, which surveyed 5,000 people from age 15 to 69 nationwide³, found that 9.7% of the overall respondents identified as LGBTQ+. Among them, nearly half, or 44.9%, reported feeling that they could not live authentically, indicating a sense of difficulty in living their lives. The survey also revealed that the most challenging community for LGBTQ+ individuals are in the “workplace.” According

The percentage of individuals who identify as LGBTQ+ in Japan is estimated to be from 3% to 10% of the population.

to a 2020 survey by the Ministry of Health, Labor, and Welfare, only about 10.9% of companies had implemented measures to create a welcoming working environment for LGBTQ+ employees.

Over 40% of large companies with more than 1,000 employees had implemented LGBTQ+-related policies. In contrast,

small and medium-sized companies with fewer than 1,000 employees had less LGBTQ+-friendly policies in place. Specifically, in companies with fewer than 99 employees, fewer than 10% had such policies.

C. Act on Equal Opportunity and Treatment between Men and Women in Employment

On 1 January 2017, the guidelines on harassment relating to pregnancy and childbirth under the “Act on Equal Opportunity and Treatment between Men and Women in Employment” were amended to include the following statement: “Sexual harassment in the workplace, regardless of the victim’s sexual orientation or gender identity, is also subject to these guidelines.” This explicitly clarified that sexual harassment includes harassment based on same-sex interactions.

D. The Model Employment Regulations

In January 2018, the Ministry of Health, Labor, and Welfare revised the model employment regulations to introduce a new provision prohibiting all forms of harassment, explicitly listing “statements or actions related to sexual orientation and gender identity” as prohibited forms of harassment.

E. Act on Comprehensively Advancing Labor Measures, and Stabilizing the Employment of Workers, and Enriching Workers’ Vocational Lives

The “Act on Comprehensively Advancing Labor Measures, and Stabilizing the Employment of Workers, and Enriching Workers’ Vocational Lives” was amended to mandate measures for preventing power harassment. Article 30-2 of the law, which requires the implementation of such measures, was enforced in large companies starting in June 2020. For small and medium-sized companies, these measures were initially a matter of effort until March 2022, but from April 2022 onwards, power-harassment-prevention measures became mandatory, similar to the requirements for large companies.



1. https://osaka-chosa.jp/files/20191108osakachosa_report.pdf

2. <https://lgbtri.co.jp/news/2410>

3. https://assets.ctfassets.net/ugm1tr5brd4w/4BOgMifu9fVeQlxGg0slq4/f241d4a0416ccfe7a041a510c273986f/20210527P_Corporate_Ally_survey.pdf

1. Act on Promoting Public Understanding of Diversity

Although there's no comprehensive anti-discrimination law, the 2023 "Act on Promoting Public Understanding of Diversity" is a step forward. It encourages the government and private institutions to foster understanding of LGBTQ+ issues. This law emphasizes respecting individuals and rejecting discrimination based on sexual orientation or gender identity. It calls on local governments and employers to raise awareness and create more inclusive environments. However, it does not yet prohibit discrimination explicitly focusing more on promoting understanding. The law will go one step further in that it does not directly prohibit LGBTQ+ discrimination but focuses on social responsibility.

Overview of the Act on Promoting Public Understanding of Diversity

- The purpose of the law is to contribute to the realisation of a society tolerant of diversity in sexual orientation and gender identity (ARTICLE 1).
- All citizens, irrespective of their sexual orientation or gender identity, shall be respected as irreplaceable individuals who equally enjoy fundamental human rights. There shall be no unjust discrimination on the grounds of sexual orientation and gender identity (ARTICLE 3, Basic Principles).
- National and local governments shall endeavour to develop and implement measures to promote understanding (ARTICLE 4 and 5).
- Employers shall endeavour to promote understanding by raising awareness among workers, improving the working environment and ensuring opportunities for consultation. School establishments shall endeavour to promote understanding by educating and enlightening children and students, improving the educational environment and ensuring opportunities for consultation, with the cooperation of families, local residents and other relevant parties (ARTICLE 6).
- The Government of Japan shall announce the implementation status of measures to promote understanding once a year. A basic plan shall be established and reviewed approximately every three years (ARTICLE 7 and 8).
- The Government shall take care to ensure that all citizens can live in peace. The Government shall formulate necessary guidelines (ARTICLE 12).

4. Court Cases About LGBTQ+ Matters

A. METI Employee Case

This case underscored the importance of protecting the rights of transgender individuals in the workplace.

Case Overview

This case involves an employee of the Ministry of Economy, Trade, and Industry (METI) whose registered sex is male but who identifies their gender identity as female. She had a diagnosis of gender-identity disorder. While working at METI, she requested to be allowed to wear female attire and use the women's restroom. After holding a briefing session in which several women expressed their opposition, METI denied her request. She subsequently filed a lawsuit challenging METI's decision.

Summary of the Judgment

The Supreme Court held that the decision was grossly unreasonable as it placed undue emphasis on considerations for staff other than the plaintiff without taking into account the specific circumstances.

Following the Supreme Court's decision, no issues have arisen as a result of the plaintiff's working in women's clothing or using the women's toilet on a floor two floors away from the office floor. No METI employee has raised a clear objection. The fact that in the approximately five years following the decision, METI has not considered conducting another investigation or reviewing the treatment that prohibited her from using the women's restroom.

In Japan, judgments declaring a law unconstitutional are extremely rare; typically, what is determined unlawful is the application of the law.

B. Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder Case

Another important court case about gender reassignment was decided in October 2023. The Japanese law had imposed strict requirements for changing one's gender on the family register, including a requirement for sterilization which was challenged. In Japan, judgments declaring a law unconstitutional are extremely rare; typically, what is determined unlawful is the application of the law. This case is also a significant precedent as it marks the 20th case since the end of World War II in which the Supreme Court has held that a statute is unconstitutional.

Requirements for changing the gender on the family register were:

1. Have been diagnosed with gender identity disorder by two or more doctor
2. Must be at least 18 years of age
3. Not currently married
4. Must not currently have any minor children
5. Have no gonads or a permanent lack of gonadal function
6. Must have an appearance that approximates the genital parts of the other sex

Summary of the Judgment

The Supreme Court held that requirement 5 above violates Article 13 of the Constitution as it is not necessary and reasonable. The Supreme Court stated that surgery to eliminate reproductive functions is a 'severe physical invasion' and, due to advances in medical science and changes in social conditions, the provision has become "excessive as a restriction." The purpose is to avoid confusion in public bathhouses, and there is justification for this objective. If surgery were deemed always necessary, it would impose an excessive constraint on individuals, forcing them to choose between undergoing surgery or renouncing a gender change, which could raise concerns of constitutional violations. It is reasonable to interpret that a state in which others do not have any significant doubts upon seeing the individual suffices. The Supreme Court has held that the appearance requirements can be met even without surgery.

C. Five Lawsuits on Same-Sex Marriage

In terms of same-sex marriage, five lawsuits have been filed across Japan. The "Freedom of Marriage for All" campaign filed all five lawsuits. The plaintiffs argued that the current prohibition of same-sex marriage violates the constitutional rights to equality and freedom of marriage. The only decision so far on the current law, which does not allow same-sex marriage, holding it to be constitutional, was made by the Osaka District Court. However, even in that decision, the district court suggested that the legislature's failure to enact laws could potentially violate Article 24, Paragraph 2 of the Constitution in the future.

Notably, the Sapporo High Court held in 2024 that the current prohibition violates both the right to marry and the right to equality. The court determined that Article 24, Paragraph 1 of the Constitution guarantees the freedom of marriage between individuals, including same-sex couples, to the same extent as it does for opposite-sex couples. Other rulings are still pending, but these cases are shaping the future of LGBTQ+ rights in Japan.

Conclusion

Where do we stand now? While courts are making progressive rulings, Japan's legislative framework for LGBTQ+ rights remain underdeveloped. Public opinion is gradually shifting, but we still have a long way to go to achieve full legal recognition and protection for LGBTQ+ individuals. ■

Masumi KONO

Partner / Attorney at Law, Alcien Law Office
Tokyo, Japan
kono@alcien.jp



**JOIN US ON
SOCIAL
NETWORKS**

juriste
INTERNATIONAL

**Stay updated with our
latest news and share
your experience with
lawyers around the world**

Our social networks are open to
all, whether UIA members or
non-members.

Linkedin



**union-
internationale-
des-avocats**

Instagram



unionintavocats

Facebook



UnionIntAvocats

UIA
23 rue de la Victoire
75009 Paris – France
Tel. : +33 1 44 88 55 66



Marriage Equality in South Asia: India, Nepal and Thailand

Kartavi SATYARTHI

✦ Marriage equality and rights of persons belonging to the LGBTQI+ community has in the recent past gained significant traction in Asia. The article throws light on regulations concerning decriminalisation of homosexuality, same sex marriages, queer rights and inclusivity in Asia with special focus on India, Nepal and Thailand.

✦ La igualdad matrimonial y los derechos de las personas pertenecientes a la comunidad LGBTQI+ han cobrado un gran impulso en Asia en los últimos años. El artículo arroja luz sobre las normativas relativas a la despenalización de la homosexualidad, los matrimonios entre personas del mismo sexo, los derechos de los queer y la inclusividad en Asia, con especial atención a India, Nepal y Tailandia.

Introduction

In November 2023, Nepal became the first South Asian country to legally recognize same-sex marriages. In September 2024, Thailand became the first South Asian country to legalize same-sex marriage through a legislation.¹ In October 2023, the Supreme Court of India held that there is no fundamental right to marry is enshrined in the Constitution of India. The minority judgment, recognised a right to form civil unions. In recent years, South Asia has been seeing conversations around marriage equality and rights of persons belonging to the LGBTQIA+ community gain significant traction. With three countries looking at significant developments in the area in just the past two years,² Asia might be going through a watershed moment in history when it comes to queer rights and inclusivity.

Developments in India: From Decriminalisation of Homosexuality to Marriage Equality

The Indian Penal Code 1860 was the colonial-era legislation defining the legal landscape relating to substantive criminal law in India.³ Under section 377 of the Code, “unnatural carnal intercourse against the order of nature” was punishable with imprisonment for life as well as a fine. This included within its ambit, homosexuality or same-sex intercourse. In a landmark judgment in 2018 (*Navtej Singh Johar v. Union of India*), a five-judge bench of the Supreme Court read down section 377 to exclude consensual sexual relations between adults, overruling an earlier two-judge bench decision which had upheld the criminalisation under section 377. The Court held that the fundamental right to privacy, read to be part of the constitution, includes individual autonomy, which in turn includes sexual orientation and sexual identity. Countries such as Singapore derive their Penal Code from the Indian Penal Code and the judgment can have significant persuasive value for these nations to make changes to their criminal laws.

In early 2023, the Supreme Court started hearing a batch of petitions arguing for a right to marry for queer individuals to be read as a component of right to equality and right to life enshrined under the Indian Constitution. On 17 October, as lakhs of people watched the pronouncement with bated breath, the Apex Court in a majority decision held against a constitutionally guaranteed fundamental right

Legislatures of States are empowered under the Indian Constitution to formulate laws relating to marriage and divorce and associated subjects such as adoption and succession.

1. <https://time.com/7024193/thailand-same-sex-marriage-2025/>

2. Taiwan passed the same-sex marriage legislation in 2019, becoming the first country in Asia to do so.

3. The Indian Penal Code has been repealed and replaced in 2024 by the Bharatiya Nyaya Sanhita, 2024.

to marry. The Court held that marriage is a right given by statute and it is the prerogative of the legislature to extend the same to couples in queer or same-sex relationships. The hearings in the case brought attention to a number of concomitant benefits that become available to individuals merely by virtue of being part of a marriage, such as the ability to adopt jointly, ability to open joint bank accounts, obtain family insurance, social security and quality for welfare entitlements under labour and employment laws, etc. Taking note of these disadvantages, the Court ordered setting up of a High Powered Committee to look into prevention of discrimination, equality and inclusion of queer individuals in the law, in line with the understanding under the *Navtej Singh Johar* case. The Committee was set up and invited suggestions and recommendations in July 2024.

Meanwhile, in November last year, the Madras High Court recommended that the Tamil Nadu government formulate a policy recognising a Deed of Familial Association to give recognition and provide protection for LGBTQIA+ couples. The Tamil Nadu government is currently in the process of coming out with a draft policy in this regard.

Legislatures of States are empowered under the Indian Constitution to formulate laws relating to marriage and divorce and associated subjects such as adoption and succession. The prompt approach of the Tamil Nadu government brings in fresh hope after the disappointment that came with the Supreme Court decision.

Marriage Equality in Nepal

While India struggles to make a case for marriage equality with its lawmakers, its quiet next-door neighbour registered its first non-heterosexual marriage in February 2024. Nepal recognised the rights of LGBTI persons to equality and non-discrimination as early as 2007 (*Sunil Babu Pant v Govt of Nepal*), being one of the first countries in Asia to do so. The first non-heterosexual marriage registration came pursuant to an interim order by the Nepal Supreme Court (*Pinky Gurung v Govt of Nepal*) directing the government to make transitional arrangements for registration of marriages of gender and sexual minorities in a separate register, while necessary amendments to the Civil Code of Nepal are being considered by the government.

However, despite being a trailblazer in recognition of rights and extension of benefits to include LGBTI persons within the folds of all things legal, there is not much development on the official legal recognition of non-heterosexual marriages through a defined statutory process. This makes it difficult for most individuals to navigate the landscape.

Thailand's Marriage Equality Act

Amendments to the Civil and Commercial Code of Thailand to realize marriage equality for queer couples

(popularly known as the Same-sex Marriage Bill) received the royal assent and was published in the Royal Gazette of Thailand on 24th September, 2024. The Act has come into effect from January 2025, extending all benefits of marriage to LGBTQIA+ couples in Thailand, including recognition and registration of marriage, adoption and inheritance.

The new Act changes the use of gendered terms for married persons such as 'husband' and 'wife' and 'man' and 'woman' to gender-neutral terms such as 'spouses' and 'party'. Accordingly, all provisions relating to marriage and the rights and obligations flowing from marriage that applied to heterosexual couples would be available to non-heterosexual couples as well. The development is being hailed as a landmark step in the direction of ensuring the rights of LGBTQIA+ persons in Asia.

Criticism of Marriage Equality

Scholars and activists across the world have often argued that marriage has developed as a patriarchal heteronormative concept that comes with its own set of baggage, which is often at odds with the relationships shared by LGBTQIA+ people. Activists from the community therefore, often argue that socio-economic and other benefits currently linked to marriage should be divorced from the idea of a state-recognised marriage. The idea of a family extends beyond the contours of marriage and atypical family formations have existed since times immemorial. Therefore, a case is often made out that while marriage equality is in itself an aspirational goal, efforts must be made to recognise family structures that may be chosen and not typical of the traditional understanding of a marital or natal family. A guru-chela relationship often found in *hijra gharanas*⁴ in India is an example of the same. By hailing marriage equality as the end goal, sections of the LGBTQIA+ community may be left out, that may not wish to or be able to fit their chosen family formation within the folds of marriage. ■

Kartavi SATYARTHI

Senior Resident Fellow, Vidhi Centre for Legal Policy

New Delhi, India

kartavi.satyarthi@vidhilegalpolicy.in

4. In the Hindi language "Hijra" (transgender) communities choose their own family and the place they live is called "gharana".



Lutter pour les droits des femmes en Afghanistan : un combat à poursuivre

Raana HABIBI

➤ This article explores the dramatic regression in women's rights in Afghanistan since August 2021. It highlights the restrictions imposed by the authorities, such as the ban on education and limited access to communication tools. As an Afghan lawyer, the author bears witness to women's suffering and calls for international legal action to support women's resistance.

➤ Este artículo explora el dramático retroceso de los derechos de las mujeres en Afganistán desde agosto de 2021. Destaca las restricciones impuestas por las autoridades, como la prohibición de la educación y el acceso limitado a las herramientas de comunicación. Como abogada afgana, la autora da testimonio del sufrimiento de las mujeres y pide una acción legal internacional para apoyar su resistencia.

Je suis Raana Habibi, une avocate ayant exercé pendant treize ans dans l'ouest de l'Afghanistan, plus précisément dans la deuxième plus grande ville commerciale du pays. Cet article est rédigé sur la base des réalités de ma société : une société patriarcale où, autrefois, nous étions tous engagés dans la défense des droits et des valeurs des femmes, dans l'espoir d'un avenir éclairé.

Cependant, cette lueur d'espoir a brutalement disparu. Nos luttes en tant que juristes, avocats, juges et procureurs se sont transformées en un désespoir profond, conséquence des politiques des puissances mondiales et du retrait précipité, irréfléchi et déconnecté des réalités des États-Unis et de leurs alliés.

Ce retrait soudain, dont le peuple afghan n'était même pas informé, a plongé le pays dans le chaos en une nuit. Les avions militaires américains ont pris leur envol, et c'est le bruit de ces décollages qui a révélé au peuple que le jeu politique en Afghanistan avait changé. Le lendemain, le Président, les responsables gouvernementaux clés et les membres du parlement ont fui le pays, laissant

l'Afghanistan sans défense face aux talibans qui se sont emparés du pouvoir sans la moindre résistance.

Ce que j'écris ici est imprégné de douleur et de souffrance. Ce sont des réalités amères, forgées par mon expérience personnelle et ma connaissance des dynamiques complexes de mon pays. Ces réalités ne peuvent être contenues dans un seul article, mais j'espère que cet écrit attirera l'attention des lecteurs sur la situation politique de l'Afghanistan avec une perspective réaliste et un soutien actif. Car l'Afghanistan est un pays qui a été ramené au Moyen-Âge où les femmes sont systématiquement éliminées de la société.

L'Afghanistan, autrefois en marche vers une ouverture sociale et juridique, est aujourd'hui le théâtre d'une régression brutale des droits fondamentaux des femmes. Depuis août 2021, les restrictions imposées par les autorités en place se sont intensifiées. Les femmes ne peuvent plus accéder à l'éducation au-delà du niveau primaire. Elles sont également exclues de nombreux secteurs professionnels et interdites de participer à la vie publique.

Plus récemment, un décret des autorités talibanes a interdit aux femmes l'usage de l'Internet et des téléphones portables, sous prétexte que ces outils seraient des sources de « corruption morale ». Cette décision, en plus d'isoler les femmes, les prive de moyens essentiels pour communiquer et accéder à l'information ou à des ressources vitales.

De plus, toutes les universités publiques, y compris celles offrant des formations cruciales comme la médecine et la sage-femme, ont été fermées aux étudiantes. Cette interdiction met en danger, non seulement, l'avenir des jeunes femmes, mais aussi la santé des patientes dans les zones rurales, où seules des professionnelles de santé peuvent offrir des soins.

L'inaction internationale face à la crise en Afghanistan envoie un signal dangereux aux régimes autoritaires du monde entier.

En tant qu'avocate ayant travaillé auprès de nombreuses victimes de violence et de discrimination, j'ai été témoin des souffrances des femmes afghanes. Cependant, leur résilience face à ces restrictions oppressives est remarquable. Malgré les obstacles, elles continuent de revendiquer leurs droits avec courage et détermination.

Chaque dossier que j'ai traité m'a rappelé l'importance du soutien international pour amplifier leur voix. Les femmes afghanes ne doivent pas être abandonnées face à ce régime oppressif. Leur résistance mérite d'être reconnue et soutenue par tous les moyens légaux possibles.

Face à cette crise sans précédent, la communauté juridique internationale a une responsabilité essentielle :

1. Dénoncer activement les violations des droits humains par le biais de publications, conférences et plaidoyers auprès des instances internationales.
2. Apporter un soutien juridique aux femmes réfugiées et déplacées, notamment pour garantir leur accès à l'asile et à des conditions de vie dignes.
3. Collaborer avec les organisations locales et les activistes sur le terrain pour renforcer les initiatives de soutien aux femmes et aux enfants.

Il est crucial de rappeler que la défense des droits humains dépasse les frontières nationales.

L'inaction internationale face à la crise en Afghanistan envoie un signal dangereux aux régimes autoritaires du monde entier. En tant que juristes, nous avons un devoir moral et professionnel de défendre ces valeurs universelles, non seulement pour les femmes afghanes, mais pour l'humanité tout entière.

La lutte pour les droits des femmes en Afghanistan est loin d'être terminée. En tant que juriste migrante, je continuerai d'utiliser ma voix et mes compétences pour plaider en faveur de celles qui sont réduites au silence. J'appelle mes confrères et consœurs à unir leurs efforts pour faire avancer la justice, même dans les circonstances les plus difficiles. Ensemble, nous pouvons et devons créer un avenir meilleur pour les femmes afghanes. ■

Raana HABIBI

Avocate Afghane

Villeneuve d'Ornon, France

rana.habibiofficial@gmail.com



CALL FOR ARTICLES

juriste
INTERNATIONAL

Juriste International invites you to become an author

Would you like to write an article in English for our magazine?

Contact

Ashu Thakur, Deputy Editor English language:
ashu@ataindia.co.in



L'équipe du Juriste International vous invite à devenir auteur

Vous souhaitez rédiger un article en français pour notre magazine ?

Contactez

Agathe Blanc et Fannie Bruneau,
Rédactrices Adjointes
langue française :
ablanc@ftmsavocats.com
fannie.bruneau@dechert.com



¡El equipo del Juriste International le invita a redactar un artículo!

¿Deseas escribir un artículo para nuestra revista?

Contacta a

Jesús Granados Sánchez
Redactor Adjunto idioma español:
jesus.granados@jglex.com



Contact UIA :

Anne-Marie Villain -
avillain@uianet.org

23 rue de la Victoire
75009 Paris – France
Tel. : +33 1 44 88 55 66



The (f)utility of Challenging North Korea's Death Penalty at the United Nations

Amy BERGQUIST

La Corée du Nord applique la peine de mort. Et des militants en faveur des droits de l'homme s'appuient sur les mécanismes des droits de l'homme des Nations Unies (ONU) pour obtenir des informations sur les nuances de la position du pays sur la peine capitale. L'examen périodique universel, en particulier, peut aider les militants à identifier les possibilités de changement, en incitant les organisations de la société civile et les États membres de l'ONU à collaborer pour formuler des recommandations créatives qui pourraient finalement permettre à la Corée du Nord de progresser vers l'abolition de la peine de mort.

Corea del Norte tiene un historial notorio en materia de pena de muerte, pero los activistas de derechos humanos pueden aprovechar los mecanismos de derechos humanos de la ONU para obtener información sobre los matices de la postura del país respecto a la pena capital. El Examen Periódico Universal, en particular, tiene el potencial de ayudar a los activistas a identificar oportunidades de cambio, impulsando a las organizaciones de la sociedad civil y a los Estados miembros de la ONU a colaborar en la formulación de recomendaciones creativas que puedan, en última instancia, abrir la puerta a que Corea del Norte avance hacia la abolición de la pena de muerte.

Since 1976, over 85 countries have abolished the death penalty, but relatively few of those countries – Bhutan, Cambodia, Hong Kong, Mongolia, Nepal, the Philippines, Timor-Leste, and several former Soviet republics – are in Asia.¹ Asia includes the world's top executing countries (China and Iran) as well as countries like Vietnam and the Democratic People's Republic of Korea (DPRK or North Korea) where the death penalty is a state secret

and therefore execution numbers are unknown. Amnesty International's global report on the death penalty in 2023 describes Asia as the region with the highest number of executions in the world.²

The Advocates for Human Rights, with the assistance of a vast network of pro bono attorneys, collaborates with other members of the World Coalition Against the Death Penalty to leverage human rights mechanisms at the United Nations (UN) to press governments to move toward abolition of the death penalty. For countries like North Korea where the Coalition does not have a member, the Advocates partners with other civil society organizations to gather information and engage in advocacy.

Last year, The Advocates partnered with the Seoul-based Transitional Justice Working Group (TJWG) to prepare a report on death penalty issues in North Korea for the UN Human Rights Council's Universal Periodic Review (UPR) mechanism.³ Reporting is complicated by the lack of transparency and the absence of independent media sources within the country. But TJWG conducts excellent monitoring of reports coming out of North Korea and has documented alarming information about the country's use of the death penalty.

The report highlighted several concerns about North Korea's death penalty practices. North Korean law does not limit the death penalty to the "most serious" crimes, as required under Article 6 of the International Covenant on Civil and Political Rights, a treaty North Korea has ratified. The UN Human Rights Committee has clarified that only intentional killings qualify as "most serious." but North Korea has disregarded its Article 6 obligations. In 2023, for example, North Korea adopted a law authorizing

1. Death Penalty Information Center, *Countries That Have Abolished the Death Penalty Since 1976* - <https://deathpenaltyinfo.org/policy-issues/international/countries-that-have-abolished-the-death-penalty-since-1976>

2. *Amnesty International Global Report: Death Sentences and Executions 2023, 2024*, at 4–5, 21–27 - <https://www.amnesty.org/en/documents/act50/7952/2024/en/>

3. World Coalition Against the Death Penalty, Transitional Justice Working Group, and The Advocates for Human Rights, *The Democratic People's Republic of Korea: Stakeholder Report for the United Nations Universal Periodic Review: The Death Penalty*, 8 Apr. 2024 - <https://www.theadvocatesforhumanrights.org/Res/TAHR%20TJWG%20WCADP%20NKorea%20DP%20UPR%20FINAL.pdf>

the death penalty for people who do not use the North Korean standard version of the Korean language.

North Korea not only has these laws on the books but also carries out executions for crimes that do not meet the “most serious” threshold. Over the past five years, authorities have executed people for distributing movies and music from South Korea, stealing penicillin, smuggling beef, possessing a Bible, violating the country’s Covid-19 quarantine, and speaking out against the government’s economic policies.

North Korean law does not limit the death penalty to the “most serious” crimes [...]

The report also provided information about executions of juvenile offenders. International human rights standards prohibit sentencing any person to death for a crime committed when they were under the age of 18, and indeed, the report notes that North Korean law exempts from the death pen-

alty people who were under 18 years of age at the time of committing the crime. But in October 2022, authorities publicly executed three teenagers who appeared to be 16 or 17 years old. Two of the children had been sentenced to death for watching and distributing South Korean movies.

As these cases suggest, there is evidence the North Korean criminal legal system fails to comply with due process and fair trial standards. The report describes systemic human rights violations, such as failure to inform people of the

reasons for their arrest, restrictions on the right to counsel, and lack of independence of lawyers and judges.

North Korea’s track record on the death penalty, coupled with its restrictions on civil society space and lack of transparency, makes the country an unconventional target for abolitionist advocacy. Even if that advocacy does not result in progress toward abolition in the near-term, it can reinforce a message of disapproval from the international community and it might provide additional insights.

The UPR, established in 2006, can provide a small window into an otherwise secretive country’s position regarding the death penalty. The UPR is a peer-review process whereby each of the 193 UN member states takes a turn as the “state under review” by its peers. During a three-hour interactive dialogue, those member states can take the floor and make recommendations to the state under review.

The state under review then must respond to each recommendation, either accepting it, rejecting it, or “noting” it – noting being a more diplomatic way of saying “thanks but no thanks” in the UN environment.

In light of North Korea’s continued use of the death penalty in violation of international human rights standards, it’s not surprising that during the first three UPR cycles authorities ultimately rejected or noted every single one of the 49 UPR recommendations the country received encouraging the country to move toward abolition. Nonetheless, it’s worth taking a closer look at the context.

In the UPR, the state under review typically elects to take several months until the next Human Rights Council





session to examine the list of recommendations and issue decisions on each one. But during the three days immediately after the interactive dialogue, some states under review respond right away to some or all of the recommendations.

This timing can signal the strength of a state's position regarding a particular issue. States that are eager to be seen as leaders on a particular issue, or states that already have plans in the works to implement particular recommendations, may accept those recommendations outright, within the three-day window. For example, in 2010 Mongolia immediately accepted all 15 recommendations it received to abolish the death penalty and ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (OP2), having announced during the interactive dialogue that its parliament was considering accession to OP2.⁴

On the other hand, some states may demonstrate hostility toward particular recommendations by rejecting them right away, rather than taking time for deliberation. In 2020, for example, Jamaica "noted" outright recommendations to ratify OP2 and consider abolishing the death penalty.⁵

During its first UPR in 2010, North Korea took this approach and rejected straight away all 9 recommendations it received concerning the death penalty, while reserving judgment about 117 recommendations on a variety of other human rights issues.

In 2014, North Korea shifted its approach. It rejected just one death penalty recommendation outright – Greece's

recommendation to "abolish the death penalty and terminate public executions." North Korea asserted that it acted swiftly to reject this and 82 other recommendations because "they seriously distorted the reality of and slandered the country driven by sinister political motivation."

During its third UPR in 2019, North Korea again rejected just one death penalty recommendation outright – a recommendation from Czechia to "prevent cases of enforced disappearance and arbitrary execution and publish data on the application of the death penalty." North Korea contended that this and dozens of other recommendations "severely distort the human rights situation of the DPRK based on false information fabricated by the hostile forces and seek ulterior political purposes."

North Korea's fourth UPR took place on 7 November 2024, and in keeping with trends from the previous two cycles, North Korea deferred decision on 16 recommendations concerning the death penalty, but it rejected outright New Zealand's recommendation to "put an immediate stop to all public executions and abolish the death penalty in all cases," Italy's recommendation to ensure "that no individual is sentenced to death for exercising his/her fundamental freedoms," and Czechia's recommendation to prevent "arbitrary and public executions, and introduce a moratorium on the use of the death penalty."

The foregoing information shows that death penalty recommendations provoking North Korea's immediate hostility include references to public executions (Czechia, Greece, New Zealand), arbitrary executions (Czechia), and application of the death penalty to the exercise of the right to free expression (Italy).

[...] Some states may demonstrate hostility toward particular recommendations by rejecting them right away, rather than taking time for deliberation.

4. Amy Bergquist, *From Advocacy to Abolition: How the Universal Periodic Review Can Shape the Trajectory of the Abolition of the Death Penalty*, 53 California Western International Law Journal, 2023, 415, 464 - <https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=2046&context=cwilj>

5. The United Nations publishes all UPR recommendations and responses by states under review on its UPR website, available at <https://www.ohchr.org/en/hr-bodies/upr>

This analysis is not merely academic. The call-and-response nature of UPR recommendations can provide human rights activists with valuable data about the nuances in a government's position on the death penalty. Other UN human rights mechanisms, such as treaty bodies, do not give the state under review a formal opportunity to respond to recommendations.

These insights can shape future advocacy. From a civil society perspective, the UPR is not only about "naming and shaming" human rights violators. One main objective of

UPR advocacy is to persuade UN member states to make relevant, actionable recommendations that the state under review will accept, and then to hold the state under review accountable for the promises it makes on the international stage so that it implements those recommendations.

Another advantage of the UPR mechanism is that the number of potential voices making recommendations is vast.

In 2021, for example, Thailand noted several UPR recommendations to restrict its use of the death penalty to the "most serious crimes" and to establish a moratorium on the death penalty with a view to working toward abolition, but it accepted Uruguay's recommendation to strengthen public awareness campaigns on the death penalty. This accepted recommendation opens the door for civil society in Thailand to initiate conversations with authorities about taking steps to build public awareness about the death penalty and its implications for human rights. The Anti Death Penalty Asia Network, another member of the World Coalition Against the Death Penalty, will certainly take advantage of this opening.

In February 2025, North Korea submitted its responses to the remaining UPR recommendations and, for the first time, accepted two recommendations concerning the death penalty. It publicly and formally declared its support for Chile's recommendation to "[r]educe the number of crimes punishable by the death penalty" and Belgium's recommendation to "[r]estrict the death penalty to crimes that meet the threshold of most serious crimes under international law." These modest commitments are cause for celebration; they may suggest a softening in the country's hard-line stance. They also open the door for monitoring and advocacy over the next five years to ensure that Pyongyang honors its promises. The diplomatic missions of Belgium and Chile, as well as other countries that are abolitionist leaders, will have an important role to play.

The abolitionist community can capitalize on this small victory. In the lead-up to the next UPR, activists can collaborate with UN member states to think creatively about additional incremental recommendations that might garner support. Knowing that public and arbitrary executions are a sensitive topic, advocates might instead push for recommendations that North Korea ensure that it follows its



own law – a law aligned with international human rights standards – prohibiting the execution of juvenile offenders.

Another advantage of the UPR mechanism is that the number of potential voices making recommendations is vast. The growing community of abolitionist UN member states was evidenced by December's record-setting vote by more than 2/3 of the General Assembly in favor of a moratorium on the death penalty. The diversity of states speaking in the interactive dialogue can result in a lengthy menu of death penalty recommendations from which the state under review can choose. And while North Korea has only recently found two small appetizers to its liking, it's possible that the next UPR will include a more substantial offering that Pyongyang can't refuse.

Critics might scoff at such a strategy, arguing that such advocacy would hardly be worth the effort. But as a peer-review process, the UPR can be a powerful tool for building momentum to transform minor commitments into lasting and meaningful change. In its first and second UPRs, for example, Zambia noted all 18 death penalty recommendations it received, but in its third UPR it accepted 9 of 22 recommendations. Just one month before its fourth interactive dialogue in January 2023, Zambia's parliament abolished the death penalty. In December 2024, it followed through on UPR commitments to accede to OP2.

The abolitionist community is not holding its collective breath waiting for North Korea to embrace democracy and the rule of law and abolish the death penalty. But it is also not abandoning the cause. Every five years, the UPR provides a fresh opportunity to read the tea leaves and gauge North Korea's openness to reform. And every five years, the UPR will inevitably give North Korea more food for thought. With the help of strategic UPR advocacy, the wave of abolition that has spread across Europe, much of Latin America, and now much of Africa will eventually reach the Asian continent. ■

Amy BERGQUIST

Associate Program Director,
International Justice Program
Minneapolis, MN, United States
abergquist@advrights.org



A Bhutan Adventure

Ian MCDUGALL

✚ Cet article présente l'expérience personnelle de l'auteur lors de sa visite au Bhoutan, pays d'Asie du Sud, situé dans l'est de l'Himalaya, enclavé entre la Chine au nord et l'Inde au sud, que l'auteur qualifie aimablement de « Suisse de l'Asie du Sud ». L'article donne un aperçu du système juridique du Bhoutan et de l'engagement de ce pays à faire progresser l'État de droit.

✚ Este artículo destaca la experiencia personal del autor durante su visita a Bután, el país del sur de Asia situado en el Himalaya oriental, sin salida al mar, entre China al norte e India al sur, al que el autor se refiere amablemente como la « Suiza del sur de Asia ». El artículo ofrece información sobre el sistema jurídico de Bután y el compromiso de este país con el avance del Estado de Derecho.

During December 2024 I was privileged to be part of a delegation, led by the Oregon Bar Association, to look into the legal profession and justice system of Bhutan. It was a visit that, of the many places I have visited in the world, I found one of the most moving experiences I have ever had.

Our hosts, the Bhutan Bar Association, treated us amazingly well and we were given the experience as honored guests in Bhutan; which I felt was a humbling privilege. We were able to meet with a wide range of members of the legal community; judges, lawyers, administrators. But the thing that amazed me most of all was the unique background and story that Bhutan has to tell.

The Country

Bhutan is a landlocked country in South Asia situated in the Eastern Himalayas between China in the north and India in the south, with the Indian state of Sikkim separating it from neighbouring Nepal. It has influences from all of those countries, especially in regions that are near to the respective borders. The impression it had on



The JSW Law School - High in the Himalayas

me, seeing those influences, made me think of it as a kind of Switzerland of South Asia. This is especially so when considering its reputation for peaceful neutrality. It has a population of about 730,000 and a territory of just under 40,000 square km. It has rich and practically uninterrupted history and customs stretching back thousand's of years. This has been helped by the fact that, as I was told on repeated occasions "we are a country that has never been invaded". That has clearly contributed to the preservation of its long traditions.



Inaugurating the Pro- Bono Unit of Bhutan Bar Association

The legal system has historical roots in the traditions of Bhutan and has been heavily influenced by English and United States Common Law during the 20th century.

One of the most remarkable aspects of Bhutan was that, until 2005 it was an absolute Monarchy under the rule of King Jigme Singye Wangchuck. At this point, the King (without any prompting or demand from anyone within Bhutan) voluntarily issued a new constitution. This transferred most of his administrative powers to the Council of Cabinet Ministers. On top of that, he insisted that constitution contain a clause allowing for impeachment of the King by a two-thirds majority of the, newly established, democratically elected National Assembly! I am not aware of another example of this happening anywhere in Human history.

The year following adoption of the democratic constitution the King abdicated in favour of his son, the current King.

I do not want to make it sound as if it is a paradise of enlightenment; it is a developing country with limited resources, but everyone I spoke to is willing to accept help to enable Bhutan's development to continue. Not least amongst them is the legal profession and the judiciary. They repeatedly spoke about their future development being entwined with strong Rule of Law. This is how they ultimately hope to attract foreign investment (more about that later).

The Legal Profession

The legal system has historical roots in the traditions of Bhutan and has been heavily influenced by English and United States Common Law during the 20th century. The country is seeking to operate a Common Law system of statutory law along with precedents of the Court. The chief justice is the administrative head of the judiciary.

It has a system of regional courts, appealing to the High Court and then to the Supreme Court. Unfortunately, there



Meeting HRH
Princess Sonam
Dechan Wangchuk

is no current electronic database of statutes and case law that allows the legal profession to place reliable information before the court. It is a recognized cause of concern and hopefully the LexisNexis Rule of Law Foundation will have a significant part to play in remedying that situation.

However, just having a statutes and precedents database is by no means the limit of their ambitions. We discussed such things as case management systems for the court, electronic publishing of judgements and many other areas of legal system development were discussed.

Bhutan & The Rule of Law

In addition to this, I (along with the delegation!) had the honour of meeting Her Royal Highness Princess Sonam Dechan Wangchuck, who is the President of the Bar Council of Bhutan and the head of the JSW Law School. We spoke for about an hour on the ambitions of Bhutan to become a leader in the region for its adherence to the Rule of Law and the development of its court system and legal profession. Her Royal Highness completed a degree at George Washington University and was therefore, fortunately for me, very familiar with LexisNexis.





The Supreme Court of Bhutan

Speaking of their ambitions for the development of Bhutan, while we met, we also spoke about Bhutan's very ambitious plans to create an entirely new city. It is intended to operate under a separate legal system of the Common Law with a focus on international trade and development. I originally thought of this as a kind of "Dubai-Style" free trade zone designed to attract foreign talent and investment. However, their ambitions for the new city go beyond that. It was described to me in the terms of the way Hong Kong was once spoken about; "one country, two systems".

They told me about the potential for that system, if it is seen to be working well, to eventually expand to cover additional areas of Bhutan. As I emphasized, this makes a properly functioning and predictable court system of crucial importance. Probably the most important aspect of the contribution that a legal system can make to the country's overall development is transparency and predictability. Without these, the country's growth will always be held back as investors, worried about protecting their investment, stay away.

Pro Bono Unit of the Bhutan Bar Council

I was given a unique and unexpected honour. I was asked to formally inaugurate the Bar Council of Bhutan's Pro Bono unit. Many of the cases that appear in the lower courts are conducted by litigants-in-person. This means limited access to legal advice, slowing down of the court process as errors have to be corrected and, of course, an uneven equality of resources when one party is represented by lawyers. This initiative also shows Bhutan's commitment to advancing the Rule of Law. ■

Ian MCDUGALL

*Executive Vice President and General Counsel,
LexisNexis
London, United States
ian.mcdougall@lexisnexis.com*



Union Internationale des Avocats
International Association of Lawyers
Unión Internacional de Abogados

2026

UIA

DIRECTORY

3,000 **UIA**
Directories
are sent to our
members in 110
countries

Do you want
to showcase you
and your law firm?
Publish an ad in
the **UIA 2025**
directory

We have
several available
options, and one
for any size
advertising budget

Don't miss this opportunity
for greater visibility!



www.uianet.org



How AI is Shaping Consumer Preferences and Buying Patterns in China

Alina QUACH

📌 La Chine est le plus grand marché de vente au détail en ligne, avec un taux d'adoption de l'IA de 65 %. Les algorithmes pilotés par l'IA ont considérablement transformé le comportement des consommateurs et la dynamique du marché. La généralisation de l'utilisation des algorithmes suscite de vives inquiétudes et a progressivement attiré l'attention des autorités chinoises qui encadrent la pratique de discrimination algorithmique des prix sur trois niveaux : la collecte des informations personnelles, les profilages des consommateurs et recommandations algorithmiques, et la tarification différenciée. Mais cette protection est-elle suffisante ?

📌 China es el mayor mercado minorista en línea, con una tasa de adopción de IA del 65%. Los algoritmos basados en IA han transformado significativamente el comportamiento de los consumidores y la dinámica del mercado. El uso generalizado de algoritmos está suscitando serias preocupaciones y ha atraído gradualmente la atención de las autoridades chinas, que están regulando la práctica de la discriminación algorítmica de precios en tres niveles: la recopilación de información personal, la elaboración de perfiles de consumidores y recomendaciones algorítmicas, y la fijación de precios diferenciales. Pero, ¿es suficiente esta protección?

Introduction

In July 2017, China released the Artificial Intelligence Development Plan (AIDP) based upon Artificial Intelligence (AI) becoming the main driving force affecting its industrial upgrading and economic growth. China's ambition is to become a world leading innovation center for AI by 2030 and projects the industry will then be valued at 1 trillion yuan (\$147 billion) a year, along with a robust legal framework and well-established ethical standards.

The use of generative AI is tremendous in China. According to a survey released in 2024, 83% of Chinese

respondents said they used generative AI. It touches various industries, including banking, insurance, healthcare, telecommunications, manufacturing, retail, and energy.¹

AI as a Social Force in China

AI-driven algorithms influence processes and thereby determine outcomes across various businesses and governmental programs, including online search rankings, news media recommendations, bank loan approvals, pricing strategies, healthcare access, insurance premiums, law enforcement, criminal justice, and social welfare. These algorithms are using new data to optimize the success of previous outputs.

In the commercial sector, AI is significantly transforming consumer behavior and market dynamics. AI is now extensively used in retail, where platforms like JD.com and Alibaba leverage it to personalize shopping experiences and enhance operational efficiency. The use of sophisticated algorithms in online markets and other high-tech industries improves business decisions and automates processes for competitive advantage, particularly in predictive analysis and business process optimization. For instance, JD.com's AI-generated content platform helps merchants create product images, marketing copies, and short videos with a single click, boosting efficiency by over 90%.

In 2023, China became the largest online retail market globally, with over a quarter of consumer goods sold online. AI is a key driver in shaping consumer interactions with sellers, with an adoption rate of 65%. While the use of algorithms is widespread and enhances efficient and personalized consumer experiences, significant concerns have been raised that will be addressed here.

1. <https://www.reuters.com/technology/artificial-intelligence/china-leads-world-adoption-generative-ai-survey-shows-2024-07-09/>

Why the Use of AI is a Growing Concern

Algorithms have the capability of predicting consumer behavior with high accuracy, enabling companies to provide personalized recommendations and customized pricing. However, this technology can also be misused for “AI-enabled price discrimination” (in Chinese, “大数据杀熟”), a controversial practice. Literally translated, it means “[using] big data [to] exploit existing [consumers].” This suggests that internet companies, through various apps and platforms, use consumer data such as financial status, shopping habits, and history to charge the user higher prices whenever possible. Many consumers believe that price discrimination is widespread in China.

A 2019 consumer report survey revealed that 88% of respondents felt that online platforms use user data to set personalized prices aimed at maximizing user payments. Additionally, nearly 60% reported experiencing this phenomenon.² Complaints about this practice are common on social networks and in the media, involving major tech companies like Alibaba, JD, and Pinduoduo.

China’s First Case on AI-Enabled Price Discrimination

In China’s first case, Ms. HU booked a hotel room based upon a preferential member price through the CTRIP app and found out later that the rack rate of the hotel for the same type of room was actually half of the member price. Ms. HU hence filed a litigation against CTRIP, claiming indemnity for CTRIP’s collection of unnecessary personal information and “big data-based price discrimination.”

The court found that CTRIP had committed price fraud, making a statement for preferential price but failing to check the hotel price and fulfill such promise, and therefore ruled in favor of Ms. HU’s claim for triple price compensation in December 2021. It should be noted that the case does not address the core question of big data-based price discrimination. It does not define the “same trading conditions” for E-commerce, what is a “legitimate marketing strategy” in setting personalized prices, or how to identify and prove whether the algorithm is discriminating between consumers based on inadmissible personal traits.

Moreover, we observe that this case does not reflect a general trend. Many other consumers’ attempts to confront the matter of “big data-based price discrimination” have failed because of the lack of evidence.

2. <https://technode.com/2019/03/28/beijing-consumers-association-price-discrimination/>

How Chinese Authorities are Tackling the Issue

Algorithmic price discrimination practices have gradually attracted national attention. The Chinese government has introduced several regulations to address the problem on three levels.

Collecting Personal Information

The Personal Information Protection Law (PIPL) Article 6 provides that “the collection of personal information shall be limited to the minimum necessary to achieve the purpose of processing and shall not be excessively collected. Article 24 additionally prohibits the unreasonable differential treatment of individuals in trading conditions and requires transparency in automated decision-making processes.

Another law, the Law on Protection of Consumer Rights and Interests (PCRI), also stresses that the collection and use of personal information of consumers shall abide by the principles of legality, rationality, and necessity, and must explicitly state the purposes, methods, and scope of collection or use of information, and be subject to the consent of consumers (Article 29).

The Notice on the Scope of Necessary Personal Information for Common Types of Mobile Internet Applications further details the content of necessary personal information for each category of service. For example, for ride-hailing services, the necessary personal information needed includes the registered user’s mobile phone number, the passenger’s pickup location and destination, and the payment time, amount, and channel for online car-hailing services.

In practice, the challenge for the consumers lies in proving that the apps/platforms have collected information beyond the necessary scope in accordance with the statutory principles. The big data, composed of users’ browsing records, consumption preferences, price range, and historical transaction information, can be illegally utilized during the use of the platform. It is difficult to provide evidence of the violation.

Consumer Profiling and Algorithmic Recommendations

Users must be informed about the use of their data for user portraits and can make efforts to refuse this use or receive personalized recommendations. In addition, users

In 2023, China became the largest online retail market globally, with over a quarter of consumer goods sold online.

Judicial practices are struggling to embrace the complex technical aspects of AI-powered technology.

can opt-out of algorithmic recommendations and must be able to manage user tags. Providers must be able to explain significant impacts on users' rights.

The Provisions on the Management of Algorithmic Recommendations in Internet Information Services regulate recommendation algorithms on various platforms. Key points include:

- **User Protection:** Service providers must prevent addictive practices and give users control over their data, including selecting or deleting user labels.
- **Content Moderation:** Providers must not manipulate information presentation and must offer users the option to disable targeted recommendations.
- **Enhanced Protection for Vulnerable Groups:** Special protections are provided for workers, consumers, and minors, including improved algorithms for work coordination.
- **Transparency and Accountability:** Providers must oversee and be responsible for algorithm security, disclosing service rules, and informing users about the provider recommendation mechanisms and their purposes.

Differential Pricing

Different regulations set the obligation for service providers to protect consumers' fair-trading rights and to avoid using algorithms to create unfair trading conditions based on consumer characteristics. However, the obligation bears several exceptions, including: (1) market entities set different trading terms according to the actual needs of trading counterparties and in compliance with the legitimate trading habits and industry practices, (2) market entities carry out promotions towards new users within a reasonable period, and (3) market entities may carry on random trades based on fair, reasonable, and non-discriminatory rules.

[...] The challenge for the consumers lies in proving that the apps/platforms have collected information beyond the necessary scope in accordance with the statutory principles.

Anti-monopoly laws and related regulations also prohibit applying differential treatment to counterparts with the same trading conditions and the exclusion or restriction of competition in the market, including using big data and algorithms to apply differential treatment.

Trends and Perspectives

Currently, qualification criteria and the legal consequences are scattered into different regulations, making the legal requirements sometimes unclear. The sanctions might be seen as insufficiently prohibitive. Judicial practices are struggling to embrace the complex technical aspects of AI-powered technology.

A draft AI law was released in March 2024. Overall, the draft favors the promotion of industrial development and aims to establish a legal framework that supports the swift growth of

the AI sector, with some user protections. It emphasizes the State's role in providing policy support, such as tax breaks, and fosters talent through university programs.

Since the release of the AIDP, several policy documents have been issued. There are indications that these initiatives will be reinforced by stricter measures, aligning with the goal of enshrining ethical standards into law in 2025. For instance, the Cyberspace Administration of China (CAC) recently introduced regulations for recommender systems, and nine ministries jointly issued a guiding opinion on algorithmic governance, with the goal of establishing a comprehensive governance framework within three years.

On 11 September 2024, the Office of the Central Cyberspace Affairs Commission announced a campaign against "several typical problems" related to the use of algorithms by internet platforms. According to the statement, the long-standing issue of "big data discrimination," where platforms use algorithms to implement differential pricing based on user characteristics such as age, occupation, and consumption level, was strictly prohibited. All internet service providers are required to conduct self-examination and rectification, with local cyberspace administrations set to carry out inspections in early 2025. Additionally, the commission has urged local authorities to promptly disclose channels for users to report algorithm-related issues.

Conclusion

The Chinese government has until now adopted a lax approach that allowed companies considerable freedom to grow and compete. However, this has been punctuated by the sudden, severe crackdowns followed by periods of relaxed restrictions. For instance, Alibaba and Tencent expanded their influence across the digital market in the 2000s, leading to higher prices and fewer choices for users, but suddenly faced crackdowns and investigations in 2020 when the government imposed significant fines for antitrust violations, including a \$2.8 billion fine on Alibaba.

China's approach to AI regulation tries to balance industrial growth with consumer protection. Recent attempts to frame ethical standards send a signal that the government will better regulate the practice of AI in the future. New AI laws and regulations, together with ethical guidelines, are expected to provide a more structured framework for managing AI's impact on society. At the same time, China seeks to find the delicate balance between legal protection for users while promoting China's race to achieve AI supremacy. ■

Alina QUACH

Avocat au Barreau de Paris

Foreign Registered Lawyer, Law Society of Hong Kong

Beijing, Hong Kong, China

Paris, France

alina.quach@asiallians.com

Pratique du droit et protection des données personnelles entre Paris et Tokyo



Olivier FACHIN



Claire STEIN



Hayata MATSUNAGA

✎ As Japan and France are the examples of two opposing approaches to customer service, a cross-cultural comparison of the practice of law between Paris and Tokyo is offered. In addition, the topic of personal data protection is addressed.

✎ Dado que Japón y Francia son el ejemplo de dos enfoques opuestos del servicio al cliente, se ofrece una comparación transcultural de la práctica del Derecho entre París y Tokio. Además, se aborda el tema de la protección de datos personales.

Introduction

Travailler sur des questions transfrontalières exige inévitablement d'être capable, non seulement de traiter les questions juridiques découlant de la nature transfrontalière elle-même, mais aussi d'être familiarisé(e)s avec les différences culturelles. La réussite de ces opérations dépend fortement de la capacité à faire face à ces contrastes.

Le Japon et la France sont le parfait exemple de deux juridictions (très ?) opposées culturellement en termes de service aux clients (I) et la protection des données personnelles est l'une des matières incontournables à laquelle est confronté l'avocat japonais travaillant pour des clients français et inversement (II). Cette analyse croisée tente de donner des clés de lecture de ces différences passionnantes.

I. Des approches culturelles différentes

A. Les règles japonaises du protocole

Les règles japonaises de protocole ne sont pas un mythe.

Il est possible de citer, par exemple, l'absence de contact physique lors de la première réunion (sauf si le client japonais propose de vous serrer la main à la française, conscient des différences culturelles), l'exigence absolue d'être à l'heure, la nécessité, même de nos jours, de prévoir des cartes de visite en format papier et un petit cadeau, ou encore de ne pas remettre son manteau avant d'avoir quitté la salle de réunion.

Ces règles implicites peuvent être facilement négligées ou ignorées par ceux qui ne les connaissent pas. Néanmoins, il ne faut pas sous-estimer le fait que le non-respect de ce protocole, qu'il soit intentionnel ou non, peut être considéré comme un manque de respect au Pays du Soleil Levant.

Le client français peut, sans que cela soit une vérité absolue, être plus tolérant en matière de protocole dès lors qu'une justification plausible permet à son avocat de l'expliquer et que la situation est un cas isolé. En effet, contrairement au Japon où l'anticipation semble beaucoup mieux gérée, l'homologue français est plus enclin à comprendre qu'un facteur extérieur a pu survenir et générer par exemple un retard de l'interlocuteur lors d'un rendez-vous.

Lorsqu'un avocat français s'efforce de respecter les codes complexes des relations professionnelles au Japon, cet ef-



L'organisation du travail des avocats japonais au sein de leurs cabinets diffère globalement peu de celle mise en place dans les structures françaises.

fort représentera un avantage indéniable pour ses clients et prospects japonais, qui se sentiront plus rassurés. Bien que ce détail puisse paraître trop méticuleux voire zélé aux yeux des clients et avocats français, la disposition des sièges dans une salle de réunion ne doit par exemple pas être laissée au hasard et être adaptée selon la configuration de la pièce : le principe est de faire asseoir le client en face de la porte de sortie. Une fois le client assis, l'avocat arrive à l'heure et donne sa carte de visite pour formaliser les présentations. Après avoir lu attentivement la carte et l'avoir placée devant lui, l'entretien peut commencer. Il est à noter que les habitants de l'archipel nippon n'attendent

pas des non-Japonais qu'ils connaissent les coutumes japonaises, surtout lorsqu'ils se déplacent en dehors du Japon. Toutefois, ce soin apporté aux interlocuteurs japonais lors d'une entrevue réalisée en France peut être un catalyseur et faire toute la différence dans le cadre d'une proposition commerciale ou d'une transaction.

Par ailleurs, s'il est possible d'avoir des échanges vifs et dynamiques avec des clients français. Il est essentiel de ne

pas interrompre les clients japonais lorsqu'ils s'expriment. Ce qui peut être perçu en France comme une rapidité d'esprit et une capacité à saisir immédiatement les enjeux peut être interprété différemment par des personnes qui préfèrent ne rien laisser au hasard. Cette approche orientée vers la précision conduit à deux différences significatives entre les clients japonais et français lors des réunions et du processus de prise de décision qui s'ensuit :

- Un nombre statistiquement plus élevé d'interrogations des clients japonais par rapport aux clients français : la répartition organisationnelle interne des pouvoirs et des responsabilités explique en partie la raison pour laquelle les clients japonais posent souvent un nombre important de questions. La prise de décision est généralement précédée par la demande d'un grand nombre d'informations ou d'explications aux fins d'obtenir l'approbation des décisionnaires. Ces formalités les incitent à se préparer à toute question potentielle qui pourrait leur être posée par la hiérarchie.
- Une phase de prise de décision plus longue pour les clients japonais qui privilégient la sécurité des engagements qu'ils s'approprient à prendre. Face à un silence prolongé, l'avocat français ne doit pas conclure hâtivement à l'échec de sa proposition, ni relancer de manière trop fréquente ou insistante. Il est important pour le praticien français de faire preuve de délicatesse en respectant le processus de prise de décision, qui peut être très différent de celui de ses clients habituels ou même des prospects acquis par le biais de recommandations. Cette spécificité pourrait être attribuée au système hiérarchique des entreprises japonaises. Typiquement, même s'il est dit moins en vogue, le principe de l'emploi permanent reste un fait dominant au Japon. Il n'est pas rare que les employés commencent leur carrière peu après avoir obtenu leur diplôme universitaire et continuent à travailler pour la même entreprise jusqu'à la retraite. Sur la base d'un système d'ancienneté, ils gravissent les échelons. En raison de ce système hiérarchique et de la répartition interne des pouvoirs et des responsabilités des clients japonais, il se peut qu'ils n'aient pas la possibilité de prendre une décision sur l'affaire à laquelle ils sont confrontés. Même s'ils sont habilités à le faire, ils peuvent estimer nécessaire, pour des raisons de diplomatie, d'en rediscuter en interne pour obtenir l'approbation explicite de leurs supérieurs. Le délai dans lequel un avocat devra fournir ses conseils est d'ailleurs parfois fixé par le client japonais en tenant compte du temps nécessaire pour suivre et mener à bien cette procédure. Tout retard dans la réponse des avocats peut d'ailleurs amener les clients japonais à travailler jusque tard dans la nuit et pendant les week-ends, ce qui peut entraîner une détérioration de la relation. En comprenant les restrictions internes et la culture d'entreprise des clients japonais, et en leur donnant suffisamment de temps pour parvenir à une conclusion, l'avocat français met plus de chances de son côté pour convaincre un client nippon de lui confier une affaire.



B. Organisation du travail des avocats japonais

L'organisation du travail des avocats japonais au sein de leurs cabinets diffère globalement peu de celle mise en place dans les structures françaises. Les principes d'accueil des clients – rigueur, méthode et ponctualité – sont tout aussi pertinents. Des instructions claires sont la base d'un travail rendu en temps et en heure et avec un soin tout particulier apporté au détail.

Cependant, les attentes peuvent orienter différemment le déroulement d'un dossier. Il en est ainsi des questions souvent nombreuses posées par les clients japonais, comme évoqué plus haut. Il en va de même des interrogations des collaborateurs japonais du cabinet, qui sont une source de richesse intellectuelle tant l'angle sous lequel le dossier est envisagé peut-être éloigné, voire aux antipodes, de ce qui est communément entendu dans l'esprit européen.

En outre, les confrères japonais sont bien conscients du fait que leurs compatriotes exigent des réponses rapides et complètes, parfois immédiates. L'avocat français peut à l'inverse être surpris de devoir justifier des raisons pour lesquelles certaines réponses juridiques peuvent rester temporairement en suspens.

II. Comparaison en matière de protection des données personnelles

La réglementation relative à la protection des données personnelles en France et au Japon est un exemple à la fois de convergence et de divergence. Voici quelques aspects qui méritent d'être soulignés, dont les sanctions en cas d'infraction qui peuvent être très différentes entre les deux juridictions.

A. Cadre législatif

Pour mémoire, est en vigueur en France le Règlement UE 2016/679 du Parlement européen et du Conseil du 27 avril 2016 relatif à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données (« RGPD »). Ce règlement complète la loi française n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés. Sans entrer dans le détail du texte européen qui est d'application directe dans le système juridique français, il convient de se rappeler que la notion même de « donnée personnelle », et donc le périmètre d'application du RGPD, est large (couvrant toute information se rapportant à une personne physique identifiée ou identifiable). Il s'applique à toute organisation, publique ou privée, qui traite des données personnelles (pour son compte ou non) dès lors qu'elle est établie dans l'Union européenne ou que son activité cible directement des résidents européens.

Au Japon, est en vigueur depuis le 30 mai 2003, la loi sur la protection des informations personnelles (個人情報保護に関する法律 ou en anglais *Act on the Protection of Personal Information*, « APPI »). La Commission de protection des informations personnelles du Japon (個人情報保護委員会 ou en anglais *Personal Information Protection Commission of Japan*, « PPC ») est chargée de vérifier le respect de l'APPI. La PPC publie des lignes directrices et questions-réponses qui complètent le texte de l'APPI. Certaines de ces lignes directrices visent à fournir des principes généraux, tandis que d'autres sont consacrées à des secteurs spécifiques, notamment la finance et les télécommunications. Il existait auparavant une

Il est essentiel de ne pas interrompre les clients japonais lorsqu'ils s'expriment.

exemption pour les entités qui traitaient les informations personnelles de maximum cinq mille personnes, mais elle a été supprimée en 2017. Depuis, l'APPI est applicable quel que soit le volume de données traitées. Alors que l'APPI impose l'obligation de prendre les mesures nécessaires et appropriées pour gérer la sécurité des données à caractère personnel, les lignes directrices publiées par la PPC énoncent une règle générale selon laquelle ces mesures doivent prendre en considération la gravité de l'atteinte aux droits et aux intérêts de la personne en cas de fuite de données à caractère personnel, et doivent être nécessaires et appropriées en fonction des risques découlant de l'échelle et de la nature de l'entreprise, de l'état du traitement des données à caractère personnel et de la nature des supports sur lesquels les données à caractère personnel sont enregistrées. Sur cette base, les lignes directrices précisent que les exigences pourraient être assouplies pour certaines petites et moyennes entreprises, en fournissant quelques exemples de mesures nécessaires et appropriées pour gérer la sécurité des données à caractère personnel.

B. Application des règles relatives à la protection des données personnelles

Le RGPD prévoit entre autres, non seulement, l'obligation pour toute entité traitant des données personnelles (qu'elle soit française ou étrangère) d'offrir aux personnes physiques dont les données sont traitées un droit d'accès (pour savoir lesquelles sont effectivement traitées) et de rectification en cas de données erronées, mais exige également que seules soient collectées les données nécessaires au travail/miission de l'entité en question. Leur durée de conservation doit être fixée selon leur durée d'utilisation et elles doivent être supprimées à l'issue de cette période.

Au Japon, l'APPI prévoit également que les entreprises qui traitent des informations personnelles doivent s'efforcer de les maintenir exactes et à jour, dans la limite de ce qui est nécessaire pour atteindre l'objectif de l'utilisation, et de supprimer les données personnelles sans délai lorsqu'elles ne sont plus nécessaires. Il convient de noter toutefois que pour la suppression des données à caractère personnel, n'est requis qu'un effort de leur part (même si l'APPI prévoit certaines circonstances dans lesquelles la suppression des données à caractère personnel est obligatoire, par exemple, lorsqu'elles ont été obtenues en violation des textes en vigueur). Par ailleurs, l'APPI s'applique de manière extraterritoriale lorsqu'une entreprise traite depuis un territoire étranger (par exemple depuis la France) les données à caractère personnel d'une personne située au Japon dans le cadre d'un bien ou d'un service fourni à une personne se trouvant sur le sol japonais.

C. Amendes et publication des sanctions

En France, le régulateur (Commission nationale de l'informatique et des libertés - CNIL) peut prononcer, en cas de manquement grave, une sanction pécuniaire jusqu'à 20 millions d'euros ou, dans le cas d'une entreprise, jusqu'à 4 %

du chiffre d'affaires annuel mondial. Ces sanctions peuvent être rendues publiques par la CNIL, créant dans ce cas un préjudice réputationnel redouté par les entreprises.

Au Japon, dans le cadre actuel de l'APPI en vigueur, il peut y avoir des sanctions pénales en cas de violation de la législation. La publication de la sanction est également possible à la discrétion du régulateur. Cependant, le montant de l'amende reste faible par rapport à celle prévue par le RGPD : un million de yens (soit un peu plus de 6.000 euros) contre les personnes physiques et cent millions de yens (soit un peu plus de 600.000 euros) contre les entreprises, et le mécanisme est sensiblement différent de celui prévu par le RGPD où le montant de l'amende dépend du chiffre d'affaires de l'entreprise. En réponse à cette situation et dans le cadre du processus de révision de l'APPI, qui doit avoir lieu tous les trois ans, une discussion est en cours sur les amendes administratives. La PPC a publié un rapport intermédiaire en juin 2024 détaillant les débats en cours sur les changements proposés à l'APPI. Ce rapport décrit quelques exemples de dispositifs juridiques étrangers de protection des données, tels que le RGPD. Il indique en outre qu'il convient de poursuivre les discussions et d'examiner si les amendes administratives doivent être introduites ou non, en tenant compte, entre autres, de la *tendance mondiale* et de l'équilibre entre la protection des intérêts personnels et la charge pesant sur les entreprises, cette question se heurtant à de fortes oppositions de la part de certains secteurs privés.

La protection des données personnelles est un sujet récurrent sur les dossiers transfrontaliers, les pratiques françaises et nipponnes étant ainsi à la fois différentes et convergentes, à l'image des cultures.

III. Conclusion

Travailler depuis la France avec des Japonais, comme travailler depuis le Japon avec des Français, est probablement l'expérience la plus riche et la plus subtile.

Pour l'avocat français qui accepterait d'appliquer les règles japonaises du protocole, comme pour l'avocat japonais qui en interpréterait les écarts avec bienveillance, s'ouvre un monde de confrères et de clients inspirant, organisé, délicat et fascinant. ■

Olivier FACHIN

Avocat associé, Komon Avocats
Paris, France
olivier.fachin@komon-avocats.fr

Claire STEIN

Avocate collaboratrice senior, Bredin Prat
Paris, France
clairestein@bredinprat.com

Hayata MATSUNAGA

Avocat collaborateur, Nagashima Ohno & Tsunematsu
Tokyo, Japon
hayata_matsunaga@noandt.com



Le Code civil chinois : quelle réalité ?

Marie GORÉ

✎ The Chinese Civil Code is designed to rationalize the law and provide legal certainty. While the work accomplished is laudable, the effectiveness of the rationalization of Chinese civil law remains an open question.

✎ El Código Civil chino pretende racionalizar la ley y proporcionar seguridad jurídica. Aunque el trabajo realizado es ingente, la eficacia de la racionalización del Derecho civil chino sigue siendo cuestionable.

Le Code civil chinois est entré en vigueur en deux temps, le 1^{er} octobre 2017, pour sa partie générale (Livre I) adoptée en mars 2017, et le 1^{er} janvier 2021 pour les autres livres adoptés le 28 mai 2020. L'heure était venue. Comme Portalis le disait déjà à propos du Code civil français : il arrive « *un moment où l'on peut se promettre de régler les choses et les hommes, avec cette sagesse qui préside aux établissements durables* ». A première vue, le juriste de la famille romano-germanique retrouve avec le Code civil chinois les constantes de toute codification, une finalité technique et une finalité politique.

Son entrée en vigueur marque incontestablement une étape dans la construction du droit en Chine et vient s'ajouter à la longue liste des codifications qui caractérisent le système romano-germanique, ou pour employer une expression plus moderne la famille de droit continental. La codification devrait ainsi mettre un terme à la construction antérieure du droit chinois caractérisée par une inflation législative chronique et surtout une expérimentation normative à de multiples facettes : réglementations intérimaires, à l'essai, selon les branches du droit, selon les zones géographiques, avec tout ce que cela comporte d'imprévisibilité pour les acteurs économiques et les investisseurs, qu'ils soient chinois ou étrangers. Pour autant sans vouloir jouer les trouble fêtes, il convient à notre sens de relativiser la portée de l'œuvre accomplie tant il semble que l'arbre cache la forêt. La règle de droit civil a apparemment gagné en exclusivité pour tout l'en-

semble du territoire chinois. A-t-elle pour autant gagné en légitimité et en effectivité ?

En premier lieu, il convient d'avoir toujours présent à l'esprit la finalité politique du Code civil chinois. Le succès d'une codification tient à une volonté politique, celle d'un homme, Napoléon en France, d'Andrés Bello au Chili, ou d'un groupe d'hommes, Xi Jinping aiguillé par les juristes chinois. Au demeurant l'histoire des différents essais de codification en Chine est étroitement associée à la succession des Dynasties souhaitant laisser leur marque. Rien ne décrit mieux le contexte politique chinois que le préambule de la Constitution chinoise : la référence au marxisme léninisme, l'absence de séparation des pouvoirs, la direction du parti communiste chinois « *caractéristique déterminante du socialisme de type chinois* »¹, les affirmations idéologiques du dirigeant du moment, intégrées au fur et à mesure à la Constitution, sont essentielles pour comprendre la conception du droit qui est privilégiée : la stabilité politique et celle de la société chinoise sont au cœur de la fonction instrumentale du droit. Le droit chinois s'inscrit dans un cadre économique strictement encadré par l'État, la coexistence d'une économie de marché et de l'idéologie communiste aux caractéristiques chinoises donnant au modèle juridique toute sa spécificité. L'ombre de l'administration chinoise et donc de l'État plane inévitablement sur le Code civil. Lequel est émaillé de règles qui surprendront un juriste occidental. On songe par exemple dans le domaine même du droit des contrats aux dispositions de l'article 511 qui sont à cet égard très révélatrices. Il y est précisé d'abord qu'en cas d'incertitude sur la qualité de la chose, de l'obligation ou de la prestation, le contrat est exécuté « *selon les standards impératifs de l'État* » ; à défaut le contrat est exécuté « *selon les standards recommandés de l'État* » (§1). S'agissant d'une incertitude sur le prix ou sur la rémunération, le contrat est en principe exécuté selon le prix du marché du lieu d'exécution, sauf à ce que « *lorsqu'il faut appliquer le prix fixé ou recommandé par*

1. Art.1 Constitution chinoise.

le gouvernement, la fixation du prix doit être conforme à ces exigences » (§2). On ajoutera ensuite l'article 534 qui dispose : « Lorsque les parties effectuent des actes attentatoires à l'intérêt de l'État ou à l'intérêt général de la société, le département chargé de la surveillance et la régulation du marché ainsi que d'autres départements administratifs doivent les surveiller conformément aux lois et règlements ». C'est dire la place de l'État même au sein de la sphère contractuelle privée. La personne morale à but lucratif doit, par exemple, accepter le contrôle du gouvernement lors de son activité (art. 86).

Toute codification a une finalité technique. L'objectif est de rationaliser le droit pour répondre à un besoin de sécurité juridique. Cette rationalisation tient à la structure même

Toute codification a une finalité technique. L'objectif est de rationaliser le droit pour répondre à un besoin de sécurité juridique.

de tout Code. Et le Code civil chinois n'échappe pas à la règle. Le plan général est d'inspiration allemande. On l'observe avec le Livre I, la partie générale, consacrée aux institutions juridiques qui transcendent toutes les branches du droit privé et trouvent application dans les matières qui font l'objet des

autres parties du Code. La même méthode se vérifie également dans chacun des livres. Là s'arrête l'analogie. Contrairement à son homologue allemand, le Code chinois débute dans un Livre II par le droit des biens et ne consacre pas de livre au droit des obligations mais au seul droit des contrats. Autre originalité : un livre est consacré aux droits de la personnalité alors que le droit allemand s'y était refusé, hormis le droit au nom.

A la lecture du Code civil chinois, l'observateur français pourra, sans grande marge d'erreur, affirmer que le droit chinois appartient à la famille de droit continental. Cela n'étonnera guère. La Chine connaissait une tradition de droit écrit. Il n'en demeurerait pas moins que les méthodes et les techniques pour élaborer des textes légaux, apparentées à la codification relevaient davantage de règles relatives à l'administration du pays, qu'au droit privé qui gagne enfin en autonomie avec le Code civil, ce qui accentue davantage encore l'appartenance au système de droit civil par opposition à la *Common Law*. Au demeurant, le droit chinois s'est autorisé les mêmes inspirations que d'autres codifications modernes. Les sources internationales – convention de Vienne sur la vente internationale de marchandise ou principes Unidroit des contrats du commerce international – ont été prises en compte, comme se vérifient des emprunts au droit français, au droit allemand, plus rarement à la *common law*, avec l'*anticipatory breach*. L'utilisation du droit comparé par les juristes chinois n'est au demeurant pas nouvelle. Mise à part la période maoïste, et ne serait-ce que par la situation géographique de la Chine, les autorités chinoises ont toujours manifesté un intérêt réel et une connaissance précise des modèles étrangers.

Pour autant, l'œuvre de rationalisation laisse circonspect si l'on observe d'abord le domaine du Code civil chinois. Non pas tant parce qu'il a pris le parti d'englober aussi bien le droit civil que le droit commercial : on y trouve pêle-mêle par exemple le crédit-bail, l'affacturage, le contrat de construction, le contrat de dépôt. C'est là le résultat de la persistance d'un courant unitaire inspiré par le Code civil suisse et soutenu déjà par Jean Escarra, conseiller législatif du Gouvernement chinois (1921-1939). Ce n'est là que le reflet une fois de plus de la diversité de la famille de droit civil au sein de laquelle on sait qu'il existe des États qui n'ont jamais connu la distinction alors que d'autres l'ont abandonnée (comme l'Argentine). Ce qui laisse sceptique c'est l'inclusion dans le Code civil chinois de règles spécifiques pour les contrats de fourniture d'eau, d'électricité, de gaz et de chauffage (art. 648), ou de contraintes et exigences pour les établissements administratifs, de la création d'obligations (art. 1254) pour l'application administrative de la loi. La responsabilité de l'administration est en quelque sorte régie par le Code civil chinois. Cela n'est rien d'autre que le signe que l'autonomie du droit privé n'est pas totalement acquise.

Cette rationalisation par le Code civil aurait dû être l'occasion de remédier à une certaine confusion des sources du droit, laquelle connaît des causes diverses. Il n'en est pourtant rien !

Il faut en premier lieu évoquer les explications judiciaires de la Cour populaire suprême, dont on sait que la loi les définit comme des « *interprétations portant sur des questions concrètes d'application des lois, qu'elles doivent être en conformité avec l'objectif de la loi, les principes de la loi et la vraie intention du législateur* ». Ces interprétations ont « *une valeur quasi normative* »², ce qui brouille un peu plus la frontière – à la supposer établie – entre le pouvoir législatif et le pouvoir judiciaire et ajoute à l'insécurité juridique en raison des contradictions souvent observées entre la loi et l'interprétation qui s'y rattache. Le Code civil chinois a certes été l'occasion de revoir tout ce stock de normes et d'opérer une clarification. Pour harmoniser les interprétations judiciaires et le Code civil, 116 interprétations judiciaires ont été abrogées, 111 ont connu une modification et 364 ont été conservées. Le code civil chinois a fait sien certaines interprétations judiciaires, notamment sur l'imprévision. Mais dès décembre 2020, soit avant l'entrée en vigueur du Code, sept interprétations judiciaires ont déjà été adoptées pour la mise en application du Code civil. C'est dire que le Code civil ne se suffit déjà plus à lui tout seul et qu'il faudra continuer avec le respect des explications de la Cour Populaire suprême.

La multiplicité des échelons normatifs est, en second lieu, une cause supplémentaire du désordre normatif de la Chine. Le droit de l'environnement en est une excellente illustration. Si dans la tradition chinoise, la correspon-

2. M. Goré et ZHENG Ai-Qing, *Le droit chinois*, Que sais-je, spéc., p. 29.

dance entre l'homme et la nature est essentielle, cette conception est dépourvue, de façon assez singulière, de toute visée écologique. Et certains vont même jusqu'à dénoncer la civilisation chinoise comme « *prédatrice de la nature, en particulier des forêts* »³. Les textes, et non des moindres, affichent pourtant le principe vert. La Constitution veille à rappeler qu'il faut « *une utilisation rationnelle des ressources naturelles* », protéger « *les plantes et les animaux rares* » (art.9), comme « *les sites et paysages d'intérêt historiques* » (art. 22).

L'État lui-même s'engage à protéger et améliorer le milieu dans lequel les gens vivent ainsi que l'environnement écologique et mène la lutte contre la pollution et les autres nuisances publiques. L'État organise et encourage la reforestation et la protection des forêts. (Art.26). La protection de l'environnement revient aussi comme une ritournelle dans le Code civil et l'on ne le regrettera pas⁴. C'est dans le Livre I, partie générale emblématique, que figure l'article 9 qui déclare que « *Les sujets de droit engagés dans les activités civiles doivent contribuer à économiser les ressources et à protéger l'environnement écologique* ». En cours d'exécution du contrat, il est exigé des parties « *d'éviter le gaspillage des ressources, la pollution environnementale ou la destruction écologique* » (art. 509 alinéa 3). Un Chapitre VII du livre VII (5 articles seulement !) est consacré à la responsabilité pour pollution et pour atteinte écologique et des dommages punitifs sont prévus en cas de pollution et d'atteinte intentionnelles à l'environnement (art 1232). S'y ajoutent des sanctions civiles et pénales pouvant conduire à l'emprisonnement du dirigeant de l'entreprise. Ce dispositif normatif est conforté par des règles procédurales : mise en place d'un tribunal spécialisé dans les litiges environnementaux au sein de la Cour Populaire Suprême, ou des tribunaux inférieurs, action judiciaire spécifique concernant les « *litiges d'intérêts publics* », comme la réparation d'une pollution environnementale.

Ces dispositions disparates ont certes le mérite d'exister mais, à cette heure, elles sonnent curieusement comme un simple affichage de principes. Demeure en effet en marge du Code civil une réglementation très disparate et sectorielle : loi sur l'eau, sur l'air, sur les milieux marins, sur la forêt, les steppes, les ressources minérales, la pêche, l'économie circulaire, les énergies renouvelables. Les études d'impact environnemental en amont d'un projet de construction ou de développement tout comme les recommandations faites aux provinces de définir des zones géographiques où toute activité économique pouvant nuire à l'environnement est interdite, laissent place au protectionnisme local et à un certain fédéralisme de fait. En réalité, l'absence de construction doctrinale d'en-

semble conduit à un désordre contraire à toute sécurité juridique et à toute efficacité de la protection recherchée.

Enfin l'accessibilité et l'intelligibilité de la norme laissent toujours à désirer en dépit de la rationalisation voulue par le Code civil. On prendra ici l'exemple topique de la responsabilité du fait des produits défectueux⁵. L'article 1260 du code civil chinois constitue les dispositions transitoires du Code lequel abroge un certain nombre de textes antérieurs, en particulier pour la question qui nous intéresse ici, la loi de la République populaire de Chine sur la responsabilité délictuelle. Elle contenait entre autres des dispositions sur les produits défectueux lesquelles ont été, partiellement seulement, intégrées dans le Code civil chinois aux articles 1202 à 1207. Mais même après l'entrée en vigueur du Code civil, les lois telles que la loi sur la qualité des produits, celle sur la sécurité alimentaire, celle sur la protection des droits des consommateurs ou celle sur la sécurité des produits agricoles demeurent applicables ce qui conduit d'abord les tribunaux à se fonder sur l'un ou l'autre texte pour traiter de la responsabilité du fait des produits défectueux, sans que l'on puisse dégager une commune position des tribunaux. Cette redondance législative soulève ensuite de fréquentes interrogations sur des conditions pourtant essentielles à la mise en œuvre de la responsabilité du fait des produits défectueux : notion de produit, causes d'exonération, nature de la responsabilité du vendeur, etc. L'indemnisation du préjudice subi par le produit lui-même a longtemps suscité des controverses doctrinales et des pratiques judiciaires opposées, même après la promulgation du Code civil chinois, jusqu'à ce que la Cour suprême publie le 25 septembre 2024 son Interprétation judiciaire [2024] no 12 par laquelle elle donne une réponse positive. Où l'on retrouve la confusion des sources du droit !

Sans doute pour reprendre Portalis, les codes des peuples se font-ils avec le temps et le Code civil chinois n'a pas encore l'âge de raison ! Il reste que l'on peut douter de voir dans le Code civil chinois, en empruntant l'heureuse expression de Carbonnier pour notre code de 1804, « *la Constitution civile de la Chine* ». ■

La multiplicité des échelons normatifs est, en second lieu, une cause supplémentaire du désordre normatif de la Chine.

Marie GORÉ

Professeur, Université Paris Panthéon - Assas
Paris, France
marie.gore@u-paris2.fr

3. C. Joachim, La protection des forêts en droit chinois et international à la lumière de nouvelles pandémies virales, Droit, Santé et Société, 2020/2, n°2, p.55 et s. spéc. p.57.

4. On trouve aussi une référence au principe vert dans les articles 286, 294, 326,346,509.

5. Xiqiao Yu, La responsabilité du fait des produits défectueux, étude comparée France-Chine, Thèse dacty, Paris Panthéon-Assas, janvier 2025.



Proliferation of Free Trade Agreements in Asia: Key Learnings and Challenges

Prajjwal KUSHWAHA

➤ Au cours des deux dernières décennies, le nombre d'accords de libre-échange (ALE) entre les pays asiatiques a fortement augmenté. À la lumière des tendances en matière de dépôts de brevets dans la région et des préoccupations relatives aux innombrables accords qui se chevauchent et conduisent à la formation d'un « bol de spaghetti », un examen des relations commerciales entre les pays asiatiques donne un aperçu des facteurs qui influencent une telle prévalence des ALE. Cette analyse se concentrera sur les impacts commerciaux des ALE, leur utilisation par les entreprises, les défis posés par les règles d'origine (RO) et les implications pour la protection et l'harmonisation de la propriété intellectuelle dans la région. Les réactions des industries et les résultats de l'enquête montrent que les ALE asiatiques atteignent leurs objectifs en améliorant l'accès au marché. Dominés par leurs industries à forte intensité de propriété intellectuelle, les pays étendent leur portée et s'imposent sur la carte mondiale du commerce numérique.

➤ En las dos últimas décadas se ha producido un fuerte incremento del número de acuerdos de libre comercio entre los países asiáticos. A la luz de las tendencias en el registro de patentes en la región y de las preocupaciones relativas a los innumerables acuerdos que se solapan y que conducen a la formación de un « cuenco asiático de fideos », una mirada a las relaciones comerciales entre los países asiáticos permite comprender los factores que influyen en la prevalencia de los ALC. Este análisis se centrará en las repercusiones comerciales de los ALC, su utilización por parte de las empresas, los retos que plantean las normas de origen y las implicaciones para la protección y armonización de la propiedad intelectual en toda la región. Los comentarios de las industrias y los resultados de las encuestas muestran que los ALC asiáticos están logrando sus objetivos al aumentar el acceso a los mercados. Dominados por sus industrias intensivas en Propiedad Intelectual, los países están ampliando su alcance y estableciéndose en el mapa global del comercio digital.

A. Introduction

Free Trade Agreements (FTAs) have become a cornerstone of international economic policy, particularly in Asia. These agreements are bilateral or multilateral treaties between countries that aim 1) to reduce or eliminate trade barriers, such as tariffs, quotas, and other restrictions, and 2) to facilitate the free flow of goods and services across borders. FTAs typically cover a wide range of trade-related issues, including market access, rules of origin, customs procedures, intellectual property rights, and dispute settlement mechanisms. In this context, concerns have been raised concerning the formation of an *Asian Noodle Bowl*. This is a metaphor used to describe the complex and often overlapping network of FTAs in Asia.¹

This situation is characterized by intersecting FTAs with varying rules and provisions, differing rules of origin (ROOs) across agreements, potential increased transaction costs for businesses, and challenges in navigating complex trade regulations. Analysis of recent FTAs would show that new provisions regulating e-commerce and digital trade are also emerging.

Initially, there were concerns that this phenomenon could impede broader regional and global integration by creating a chaotic trading environment. However, recent studies suggest that while the “noodle bowl” does present some challenges, its negative impacts may have been overstated, at least in the current stage of FTA implementation. Nonetheless, as FTAs continue to proliferate, managing its complexities remains a key consideration for policymakers and businesses in the region.²

As an IP driven economy, Asia is also witnessing an unprecedented share in global patent filings. With China at 1.64 million, Japan with 414,413 amongst the top

1. https://www.wto.org/english/res_e/publications_e/wtr11_forum_e/wtr11_10may11_e.htm

2. <https://www.adb.org/publications/asias-free-trade-agreements-how-business-responding#:~:text=This%20book%20reviews%20various%20surveys,of%20the%20multilateral%20trading%20system.>



leaders of global patent filings, and India being on the 6th position, chances of an IP noodle bowl taking shape, cannot be ruled out at this stage.³

As computer technology continues to occupy the major share among all application areas, subject matter eligibility of certain types of computer programs have been ousted in several jurisdictions, with varying applicable standards and tests.

For India, the recent approval of a Free Trade Agreement with the European Free Trade Association (EFTA) by the Swiss Senate marks a significant milestone in international trade relations. This agreement, which took 16 years to negotiate, promises to redefine economic ties between India and EFTA countries (Switzerland, Iceland, Liechtenstein, and Norway).⁴

From an IP perspective, the FTA offers several advantages. For Swiss companies, it provides non-discriminatory terms when dealing with Indian counterparts regarding patent protections. This levels the playing field and reduces operational risks in the Indian patent landscape. The agreement also streamlines opposition and disclosure processes, making it easier for foreign companies to navigate the Indian patent system.

This FTA strengthens trademark protections, particularly for marks denoting Swiss distinctiveness. It prohibits the misleading use of geographical indications like "Swiss" or "Switzerland" for goods not originating from these regions, thereby protecting the reputation and value of Swiss brands.

For India, the FTA is seen as aligning the country's IP regime with TRIPS standards (Trade-Related Aspects of Intellectual Property Rights standards), potentially enhancing its global competitiveness. The Indian government has assured that national interests in generic medicines and concerns over patent evergreening have been adequately addressed in the agreement. The FTA also brings economic benefits. EFTA has committed to increasing Foreign Direct Investment (FDI) by USD 100 billion over 15 years and generating 1 million direct jobs in India. Additionally, this FTA states will provide concessions on non-agricultural and processed agricultural products from India.

While there are concerns about potential impacts on transparency and accountability in the patent grant process, the FTA overall represents a significant opportunity for India to solidify its trade relations with European partners and potentially enhance its IP framework.

B. Trends in the Region

ASEAN (Association of Southeast Asian Nations) has positioned itself for significant economic growth through various FTAs, which offer numerous benefits to foreign investors and member countries.⁵ These FTAs are crucial for capitalizing on ASEAN's long-term potential, as the bloc is projected to become the world's fourth-largest economy by 2030, with a consumer market valued at over US\$4 trillion.

The ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA) is one of the most comprehensive FTAs, covering a population of 653 million and over US\$ 4.3 trillion in trade. This agreement aims to eliminate almost all tariffs between the participating countries by 2025. However, the parties are working on upgrading the agreement to address modern trade policy areas and remaining issues, focusing on trade in services, e-commerce, rules of origin, customs procedures, and government procurement.

The ASEAN-China Free Trade Agreement (ACFTA) has made China ASEAN's largest investor over the last decade, with total trade reaching US\$ 731 billion in 2020. The agreement has reduced tariffs on 90% of imports to zero, although implementation was staggered for different ASEAN members. In 2019, ACFTA was upgraded

For India, the recent approval of a Free Trade Agreement with the European Free Trade Association (EFTA) by the Swiss Senate marks a significant milestone in international trade relations.

3. <https://nasscom.in/knowledge-center/publications/patenting-trends-india-fostering-ip-led-digital-economy#>

4. <https://www.bilaterals.org/?swiss-senate-approves-free-trade>

5. <https://www.aseanbriefing.com/news/aseans-free-trade-agreements-an-overview/>

to simplify rules of origin, trade facilitation measures, investment procedures, and customs procedures.

The ASEAN-India Free Trade Area (AIFTA) creates opportunities for over 1.9 billion people with a combined GDP of US\$ 4.8 trillion. However, India faces challenges in this agreement, as it is treated differently from other ASEAN trade partners due to the lack of an economic agreement with the bloc. This has resulted in higher tariffs on Indian products compared to those from other ASEAN partners.

The ASEAN-Republic of Korea Free Trade Area (AKFTA) and the ASEAN-Japan Comprehensive Economic Partnership (AJCEP) have also contributed to increased trade and economic cooperation in the region. The AJCEP, in particular, has recently been amended to allow for more cross-border investments and increased transparency in regulating services.

A significant development is the Regional Comprehensive Economic Partnership (RCEP), which has become the largest FTA in history, covers roughly 30% of global GDP and 30% of the world's population. The RCEP is expected to add US\$186 billion to the global economy and increase the GDP of its members by 0.2%.

While FTAs offer numerous opportunities, they also present challenges which require careful management of rules of origin, customs procedures, and other technical aspects to ensure smooth trade facilitation. One key challenge is the need for continuous review and upgrading of agreements to address emerging issues in modern trade, such as e-commerce and digital services. Another challenge is

In an effort to streamline and harmonize patent examination processes across Southeast Asia, several countries in the region have established cooperative agreements.

ensuring equitable treatment among trading partners, as seen in the case of India's higher tariffs compared to other ASEAN partners. Additionally, as these FTAs open up various sectors to foreign investment, member countries must balance the benefits of increased foreign investment with the need to protect and develop their domestic industries.

The speed of prosecution processing is of utmost importance to innovators, specifically in the context of patentability of computer programs and AI innovations. In an effort to streamline and harmonize patent examination processes across Southeast Asia, several countries in the region have established cooperative agreements. One such initiative is the ASEAN Patent Examination Cooperation, which allows participating nations to recognize and accept each other's examination results. This collaborative approach aims to reduce duplication of efforts and accelerate the patent granting process across borders.

Complementing this regional cooperation, many Southeast Asian countries have also entered into bilateral agreements known as «patent prosecution highways» (PPHs). These

PPHs facilitate the expedited examination of patent applications by allowing patent offices to leverage the work already completed by another office. For instance, Indonesia, Thailand, and Vietnam have established PPHs with Japan. Under these arrangements, if a patent application has been granted in Japan, the applicant can request accelerated examination in any of these three countries based on the Japanese examination results.

Cambodia has taken a unique approach by implementing a special agreement to validate European patents without conducting further examinations. This arrangement potentially offers significant time and cost savings for patent applicants seeking protection in Cambodia, while also potentially attracting more European innovations to the Cambodian market.

It's important to note that while these agreements aim to expedite the examination process, they do not guarantee automatic patent approval. The patent office in each country still retains the authority to examine the application to ensure compliance with local patent laws and regulations. However, the availability of prior examination results from a trusted partner office can significantly reduce the workload and accelerate the decision-making process.

These collaborative efforts reflect a growing trend towards international cooperation in intellectual property rights protection. By reducing barriers and streamlining processes, these agreements aim to foster innovation, encourage cross-border technology transfer, and create a more attractive environment for businesses and inventors operating across Southeast Asia. As the region continues to develop as a hub for technological innovation and economic growth, such cooperative mechanisms in patent examination are likely to play an increasingly important role in supporting this progress.

C. Implications for IP Protection and Harmonization

The proliferation of FTAs in East Asia has significant implications for IP protection and harmonization across the region. As firms increasingly engage in cross-border trade under these agreements, the need for consistent and robust IP protection becomes more pressing. Future FTAs should strive for greater consistency in their IP chapters, potentially using existing agreements like the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) as a model for high-standard IP provisions.

As firms expand their operations across borders under FTAs, the need for effective cross-border IP enforcement mechanisms becomes more critical. Future FTAs should include robust provisions for IP enforcement cooperation between partner countries, including measures for combating counterfeiting and piracy.

IP lawyers should advocate for FTA provisions that promote technology transfer while maintaining strong IP protections, striking a balance that encourages innovation and knowledge sharing across borders. There is a clear need to include specialized training programs, simplified procedures for IP registration and enforcement under FTAs, and financial support for IP-related upgrades.

As digital trade becomes increasingly important, future FTAs should include comprehensive provisions addressing IP issues in the digital realm. This includes provisions on data protection, digital copyright, and enforcement of IP rights in online environments.

D. Recommendations

Governments and business associations should develop comprehensive education programs on IP aspects of FTAs, targeting small and medium-sized enterprises (SMEs). These programs should cover topics such as IP protection under different FTAs, strategies for managing IP in cross-border trade, and utilizing IP-related benefits provided by FTAs. To address the concerns about documentation and administrative burdens, governments should work towards simplifying and harmonizing IP-related procedures across FTAs. This could include developing standardized forms for IP declarations and creating centralized databases for IP registration information accessible to all FTA partner countries.

Negotiators of future FTAs should prioritize the harmonization of IP provisions across agreements to reduce complexity for businesses which could involve developing a regional model for IP chapters in FTAs that balances strong protection with flexibility for different levels of economic development. Governments should establish or strengthen institutional support mechanisms specifically focused on IP aspects of FTAs. This could include creating specialized units within IP offices to assist businesses with FTA-related IP issues and developing online resources and helpdesks for IP guidance under FTAs.

Given the regional nature of many FTAs in East Asia, countries should explore opportunities for regional cooperation on IP matters. This could include establishing a regional advisory centre on IP aspects of FTAs, similar to the proposed centre for FTAs and in general, to provide expert guidance and support to member countries and businesses.

As countries continue to negotiate and implement FTAs, they should ensure that IP considerations are fully integrated into impact assessments and monitoring mechanisms. This would help identify potential IP-related challenges and opportunities arising from FTAs and inform future policy decisions.

Given the importance of SMEs in the region's economies and their challenges in utilizing FTAs, governments should develop targeted support programs for IP-intensive SMEs. This could include financial assistance for IP protection and enforcement under FTAs, mentoring

programs pairing SMEs with larger firms experienced in managing IP across borders, and simplified procedures for SMEs to access IP-related benefits under FTAs.

E. Conclusion

While a recent, comprehensive and empirical study on FTA utilization and its benefits is not available, there are concerns pertaining to complexity, awareness, and support for SMEs. From an IP perspective, the proliferation of FTAs in the region presents both opportunities and challenges. On one hand, these agreements can provide frameworks for strengthening and harmonizing IP protection across borders, potentially increasing the value and enforceability of IP assets for businesses operating in multiple countries. FTAs can ensure faster sharing of industry best practices and quicker adoption by the related countries. On the other hand, the complexity arising from multiple agreements with varying provisions can create confusion and increase the risk of unintentional IP infringements.

The key to maximizing the benefits of FTAs while minimizing their potential drawbacks lies in targeted policy interventions. These should focus on enhancing awareness and understanding of IP provisions in FTAs, streamlining IP-related procedures, promoting harmonization of IP chapters across agreements, and providing robust institutional support, particularly for SMEs.

As Asia continues to be at the forefront of global FTA activity, it is crucial that IP considerations are fully integrated into the negotiation, implementation, and utilization of these agreements. By doing so, the region can create a trade environment that not only facilitates the flow of goods and services but also promotes innovation, protects intellectual property, and supports the growth of knowledge-based economies.

The findings of this study provide a solid foundation for future research and policy development in this area. IP development be carefully tracked as digital trade becomes increasingly prominent and new challenges emerge in the global IP landscape. By staying attuned to these developments and adapting policies accordingly, East Asian countries can ensure that their FTAs remain effective tools for promoting trade, innovation, and economic growth in the 21st century. ■

Governments should establish or strengthen institutional support mechanisms specifically focused on IP aspects of FTAs.

Prajwal KUSHWAHA

Associate – Litigation, Anand and Anand
New Delhi, India
email@anandanand.com



Foreign Investment in Nepal: Opportunities and Challenges

Saroj K GHIMIRE

La situation stratégique du Népal entre les nations les plus peuplées et les plus importantes sur le plan économique, l'Inde et la Chine, offre des opportunités substantielles pour les investissements étrangers dans des secteurs tels que l'hydroélectricité, les technologies de l'information, le tourisme et d'autres infrastructures. Le Népal a démontré son engagement à créer un environnement favorable aux investisseurs en adoptant des politiques et des lois économiques libérales depuis les années 1990, qui ont été soutenues par le développement législatif comme la loi sur l'investissement étranger et le transfert de technologie « FITTA 2019 ». La FITTA garantit le traitement national, la protection des investissements, la protection en cas de changement de loi, le rapatriement des bénéfices et des revenus et les mécanismes de règlement des différends liés aux investissements. Toutefois, des problèmes tels que la corruption, la longueur des procédures d'embauche et l'étroitesse du marché des capitaux persistent et sapent la confiance des investisseurs. C'est pourquoi, en s'attaquant à ces problèmes par le biais de réformes politiques, le Népal peut attirer les investissements étrangers afin de parvenir à une croissance et à un développement durables.

La ubicación estratégica de Nepal entre las naciones más pobladas y económicamente más importantes del mundo, India y China, ofrece oportunidades sustanciales para la inversión extranjera en sectores como la energía hidroeléctrica, tecnología de la información, el turismo y otras infraestructuras. Nepal ha demostrado su compromiso con la creación de un entorno propicio para los inversores mediante la adopción de políticas económicas y leyes liberales desde la década de 1990, que ha sido apoyada por el desarrollo legislativo como la Ley de Inversión Extranjera y Transferencia de Tecnología «FITTA 2019». La FITTA garantiza el trato nacional, la protección de las inversiones, la protección frente al cambio de legislación, la repatriación de beneficios y ganancias y los mecanismos de resolución de litigios relacionados con las inversiones. Sin embargo, persisten problemas como la corrupción, los largos procedimientos de contratación y el reducido mercado de capitales, que socavan la confianza de los inversores. Por lo tanto, abordando estas cuestiones mediante la reforma de las políticas, Nepal puede atraer la inversión extranjera para lograr un crecimiento y un desarrollo sostenibles.

Introduction

Nepal is sandwiched between two of the world's most populous and economically significant nations, India

and China, and is further surrounded by Pakistan and Bangladesh. China and India are the biggest host nations worldwide, not merely from their size and resources, but from their opportunities and investor friendly attitudes. Nepal, despite its relatively small size, has the potential for attracting foreign invest-

ment and has demonstrated a commitment towards an investor friendly environment to attract foreign investment.

Various ministries and governmental offices are committed to infusion of foreign capital to enhance economic activities within the country apart from various constitutional and legislative commitments to protect foreign investment. Nevertheless, given the growing global competition of attracting foreign investment, Nepal must address its challenges in a timely manner to ensure the retention of foreign investment for long term economic prosperity, and Nepal is committed to this goal. Nepal has always realized the importance of foreign investment to stimulate its economic development.

Legislative Development of Foreign Investment

The development of foreign investment in Nepal became possible after adaptation of an open and liberal policy

Foreign investors make investments in Nepal in a wide range of sectors [...].

to build a path for the economic development of the country. Nepal has adopted economic liberalization since the 1990s to attract foreign direct investment (FDI).

Nepal's economic reforms and liberal policy pursuits began in 1985, and the notable legislation including the Foreign Investment and Technology Transfer Act 1992, the Industrial Enterprise Act 1992, and the Privatization Act 1994 was enacted. The civil war of 1996-2006 impacted the country's economy, resulting in a decrease in foreign investment because of lack of investment security.

Part 4 of the Constitution of Nepal 2015, Directive Principles, Policies, and Obligations of the State, recognizes the importance of foreign capital and proves its commitment to attract foreign investment and technology by framing various policies, directives, and undertakings as the states responsibility. Since foreign direct investment became a vital source of capital formation, engendering advanced technology and managerial capacities, Nepal has developed a legal and institutional infrastructure. The 2019 Foreign Investment and Technology Transfer Act, 2075 (FITTA 2019), was enacted to amend and consolidate existing laws regarding foreign investment and technology transfer to make the nation's economy competitive, strong, and job-oriented by mobilizing the maximum resources possible for the country's economic prosperity.



Forms of Foreign Investment

Foreign investors make investments in Nepal in a wide range of sectors, including transportation, health and hospitals, chain restaurants and franchise businesses, education, hydropower, banking sector, art, culture, information technology, energy, tourism, mineral resource, agro-based industries, service industries, construction industries, and the movie industry. Foreign direct investment can be facilitated through different modalities, such as share investment in foreign currency, reinvestment of dividends, lease financing, investment in venture capital funds, investment in listed securities through the secondary securities market, purchase of shares or assets of local companies, and investment through technology transfer.¹

Protection of Foreign Investment

Once Nepal, as the host state, has admitted a foreign investment, it must respect a minimum standard of Customary International Law.² FITTA 2019 utilizes the World Trade Organization's Founding Principles. One of these principles, the principle of national treatment, gives other countries the same treatment as one's own nationals. It ensures that the management, maintenance, utilization, transfer, or sale of investments made by foreigners be at par with the investment made by a Nepalese person so long as the foreign investment remains in Nepal. In addition, foreign investors subject to FITTA are granted the freedom to determine the price of goods and services subject to prevailing laws. Foreign investors are not prohibited from trading, as prescribed within the limits of their industry, and are not be prohibited from repatriating profits, withdrawing investments, paying interest, or repaying principal loan amounts.

Furthermore, foreign expatriates are permitted to repatriate up to 75 percent of salaries, allowances, and other earnings.

Protection from the Change in Law

Foreign investors are guaranteed change in law protection whereby foreign investments approved pursuant to previous foreign investment laws shall be governed by the respective law and no modification to the law affecting said investment will be made without the consent of foreign investors in a manner reflecting a disadvantage under previous laws.

1. Foreign Investment and Technology Transfer Act, 2019, §2(i).

2. Rudolf Dolzer et. al., *Principles of International Investment Law* (3rd ed. 2022).

Protection Against Expropriation

As a thumb rule, foreign owned property may not be expropriated or subject to expropriation unless an expropriation is for a public purpose, without discrimination, and in accordance with applicable laws, due process, and upon paying full compensation.³ FITTA 2019 adopted these international norms, which protect foreign investors against expropriation and nationalization of the companies with which they invest.

Repatriation

Repatriation of profits and earnings generated from foreign investments are regulated but not prohibited under the legal framework of Nepal. Repatriation laws align with the Rawlsian Theory of Justice, guaranteeing that foreign investors can access the investments while ensuring

that such practices do not proportionately harm the host nation's economy. FITTA ensures repatriation of principal, profits, interest, technology transfer fees and royalties by foreign investors. Additionally, a foreign investor may repatriate the amount generated from the sale of shares, the dividend or profits received from the

investment, the principal and interest of the foreign loan, and the fee and royalty received for the technology transfer. Furthermore, foreign expatriates are permitted to repatriate up to 75 percent of salaries, allowances, and other earnings. While repatriation is fully secured, the procedural compliances are mandatory.⁴

International and Regional Agreements and Treaties Related to Trade

Kelson's theory of legal hierarchy stresses the interplay between domestic and international law while respecting a state's sovereignty which can be observed in Nepal's adherence to international agreements and parties to different international organizations. Considering this, Nepal has entered into many international organizations and agreements, thereby improving its position in global connectivity and trade relationships.

Nepal's memberships with SAARC, BIMSTEC, WTO, MIGA, UNCTAD, UNESCAP, and BRI clearly demonstrate its commitment to fostering international collaboration and trade. Nepal has signed Bilateral Investment

Promotion and Protection Agreements (BIPPAs) with France, Germany, the UK, Mauritius, and Finland to safeguard international investments. To facilitate cross-border trade and investment, Nepal has entered into Double Taxation Avoidance Agreements (DTTAs) with Austria, Bangladesh, China, India, the Republic of Korea, Mauritius, Norway, Pakistan, Qatar, Sri Lanka, and Thailand. Under the Belt and Road Initiative framework, Nepal has signed a bilateral agreement that strengthens its ties with China and fosters infrastructure development and trade connectivity.

Full Protection and Security

Foreign investors must be entitled to full protection and security as it is the accepted norm of International Investment Law. The Government of Nepal focuses on social security provisions for its workforce, thus creating a stable and regulated labour market. Which not only protects workers, but also provides a reliable environment where businesses can operate thrive.

International Mechanism for Settlement of Investment Related Disputes

Consent to arbitration by the host state, as well as by the investor, is an indispensable requirement for a tribunal's jurisdiction. Section 40 of FITTA contains provisions regarding the settlement of investment disputes between foreign investors and national investors through mutual consultations in the presence of the department. However, in failure of the same, it shall be settled in a manner mentioned in the joint venture agreement/dispute settlement agreement concluded by the parties within 45 days of the occurrence of the dispute. The concerned parties must inform the agency authorized for approving the foreign investment within 15 days of such settlement.

Likewise, the dispute could be settled through arbitration in accordance with the prevailing Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), where the arbitration must be held in Kathmandu with the application of laws of Nepal in the arbitration. However, in the presence of agreement, it shall be as per the agreement.⁵

Similarly, if no agreement has been reached, or if an agreement is reached but is deemed inappropriate, the concerned parties can enter into an agreement for the settlement of the dispute even after the dispute arises. However, it is necessary to inform the authority of the industry. This way, the law of arbitration of Nepal ensures that foreign arbitral awards are recognized and enforced in Nepal, provided that such awards are in conformity with Nepalese laws.

Instability of politics has caused delays in decision making and policy framing in relation to foreign investment.

3. Surya Prasad Subedi, *International Investment Law* 106 (4th ed. 2020).

4. Foreign Investment and Technology Transfer Act, 2019, §15.

5. Foreign Investment and Technology Transfer Act, 2019, §40.

Challenges of Foreign Investment

Political instability has been one of the major setbacks for foreign investment in Nepal. Instability of politics has caused delays in decision making and policy framing in relation to foreign investment. Since 1990, frequency in change of government and internal political power struggles have caused delays in implementing development projects that start with approval, licensing, renewal, repatriation, and many more aspects.

Corruption and Governance Concerns

According to the 2023 Corruption Perception Index released by Transparency International, Nepal ranked 108th among 180 countries, placing it in the range of “highly corrupt” countries. In the words of a World Bank official, corruption in Nepal is “endemic, institutionalized, and driven from the top.” Corruption takes many forms but is pervasive in the awarding of licenses, government procurements, and revenue management. The primary law used to combat corruption in Nepal is the 2002 Prevention of Corruption Act, 2059, which prohibits corruption and facilitates measures to ensure convenience and good conduct among the public. However, corruption and bribery in Nepal represent a barricade for high profile investors.

Lengthy Procedures for Hiring Expatriates

The Labor Act 2019 has a provision regarding hiring skilled foreign worker expatriates, but the procedure for hiring is very cumbersome and subject to procedural challenges. The governmental procedures for complying with the requirements of multiple authorities for the visa process are frustrating for foreign investors, and the limited visa facilities are one of the key challenges for foreign investment.

Agreements With Only Limited Countries

Nepal has signed DTTAs with 11 countries and BIPPAs with 6 countries, and among these, Nepal's agreements with Mauritius and India have yet to come into force. Despite the important role these agreements play in attracting foreign investment, Nepal has only made limited progress and, the process of reaching an agreement with other potential countries is notably slow, which hinders the country's ability to create a more favorable environment for foreign investors.

Small Capital Market

Diversion of FDI in Nepal allows for exchange fluctuations and inconvertibility of the current account. Frequent and unpredictable changes in the value of the Nepali currency create uncertainty for foreign investors regarding the

profitability of their investment and transfer of profit. Therefore, the issue of currency conversion and its limitations on international transactions pose challenges and increasingly hinder the repatriation of profits abroad or payment for imports by businesses. These issues create operational pain for foreign investors and lower Nepal's competitiveness as an investment destination.

Similarly, despite the provisions about indirect forms of investment in FITTA, it has still not been implemented.

There are limited opportunities for foreign portfolio

investment in Nepal due to restrictive policies and a lack of developed financial instruments. Currently, foreign investors are not permitted to participate in the NEPSE or trade shares of publicly listed Nepali companies. These rights are exclusively reserved for Nepali citizens and Non-Resident Nepali, which limits foreign engagement in Nepal's capital markets. Consequently, such portfolio investments have not brought Nepal, so far, capital growth in the market, greater liquidity, or a diversification of sources which is necessary for financing.

There are limited opportunities for foreign portfolio investment in Nepal due to restrictive policies and a lack of developed financial instruments.

Conclusion

To fill the resource gap for national growth, FDI has emerged as a crucial component of economic development globally, particularly in developing nations. Nepal began accepting FDI in 1990, after adjusting to economic liberalisation measures. The protection of foreign investment in Nepal is underpinned by legal provisions and international agreements that are meant to inspire investor confidence.

FITTA provides a strong framework for national treatment, protection against expropriation, protection against changes in laws, and dispute settlement mechanisms. This makes Nepal's adherence to international and regional trade agreements even more important for investment. Weaknesses in the protection of property rights, corruption, a very limited number of bilateral agreements, and a thin capital market remain issues. Policy reforms and improvements in governance would attract foreign investors and improve Nepal's economic development. Filling these gaps would make Nepal a more attractive, reliable, and competitive destination for FDI, which could support the process of sustainable growth and development. ■

Saroj K GHIMIRE

Ex. Com Member Lawasia

Asst. Prof. of Law Tribhuvan University Nepal

Himalayan Lawyers & Associates

Katmandu, Nepal

ibasarojghimire@gmail.com



**Juan
HURTADO TURNER**



**Joaquín
PALMA CRUZAT**

Más allá del Pacífico: los históricos y económicos entre Chile y Japón

➤ Chile and Japan, although separated by the Pacific Ocean, have built a unique relationship based on mutual respect, trade, and cooperation. Since the 2007 Economic Partnership Agreement, they have forged strong business relationships in mining, technology, renewable energy, and culture. Japan imports Chilean copper and agricultural products, while Chile receives advanced technology. This bond exemplifies how two different nations can unite to face global challenges and build a shared future.

➤ Bien que séparés par l'océan Pacifique, le Chili et le Japon ont construit une relation unique basée sur le respect mutuel, le commerce et la coopération. Depuis l'accord de partenariat économique de 2007, ils ont noué de solides relations commerciales dans les domaines de l'exploitation minière, de la technologie, des énergies renouvelables et de la culture. Le Japon importe du cuivre et des produits agricoles chiliens, tandis que le Chili reçoit des technologies de pointe. Ce lien illustre la manière dont deux nations différentes peuvent s'unir pour relever les défis mondiaux et construire un avenir commun.

En un acto que trasciende los límites del tiempo y las fronteras, la Marina Imperial de Japón honra a uno de los más grandes héroes navales de la historia: el Capitán de Fragata don Arturo Prat Chacón, quien, junto a figuras como el Almirante Horatio Nelson de Inglaterra y Heihachiro Togo de Japón, ha sido erigido como uno de los tres colosos de la guerra naval mundial. Este tributo, cargado de profundo respeto y admiración, no es solo un reconocimiento a la valentía indomable de Prat, sino también un testimonio de los lazos que unen a Chile y Japón, dos naciones cuyo

destino, aunque marcado por la distancia geográfica, ha estado entrelazado a lo largo de los siglos.

Arturo Prat, oficial de la Armada de Chile y mártir de la Guerra del Pacífico, se immortalizó en la historia en un acto de coraje sublime. En la fatídica mañana del 21 de mayo de 1879, durante el combate naval de Iquique, Prat, al mando de la corbeta *Esmeralda*, se lanzó con valentía sobre el poderoso monitor peruano *Huáscar*, en un abordaje que le costó la vida pero que selló su lugar en el panteón de los grandes héroes de la humanidad. Su sacrificio se ha convertido en un símbolo de abnegación, de patriotismo desmedido, de un amor por la patria que desafía las leyes de la naturaleza misma. Su nombre, inscrito en las más altas cumbres de la historia naval, se erige como un faro de honor, valentía y desinterés personal, atributos que no conocen fronteras y que resuenan en los corazones de todos aquellos que comprenden el verdadero significado de la lucha por lo justo y lo noble.

El homenaje de la Marina japonesa a este gigante de la historia no es un acto aislado, sino un reflejo de los valores que ambos países comparten: la nobleza de espíritu, el respeto mutuo, y el profundo lazo que une a dos naciones que, aunque separadas por la vastedad del océano Pacífico, han sabido comprenderse y apoyarse a lo largo de las décadas. Este reconocimiento subraya una relación que no se limita a la admiración por el coraje de un hombre, sino que también celebra los lazos entre dos naciones que han encontrado en el otro un socio estratégico y un aliado en los momentos más trascendentales de su historia.

Las relaciones económicas entre Chile y Japón, construidas sobre este sólido respeto mutuo, son un ejemplo vivo de lo que la cooperación internacional puede alcanzar cuando dos países deciden unir sus fuerzas. Desde sus primeros intercambios comerciales hasta las alianzas más sofisticadas en el ámbito de la tecnología, la inversión

y el comercio, ambos países han sabido aprovechar sus respectivas fortalezas para crear una asociación que no solo es mutuamente beneficiosa, sino también una fuente de inspiración para otras naciones. Chile, con su riqueza natural y sus mercados emergentes, y Japón, con su avanzada tecnología y su fortaleza económica, han tejido una red de colaboración que ha logrado trascender los intereses nacionales para contribuir al bienestar global.

A lo largo de los años, Chile y Japón han cultivado una relación que va más allá de los números y los acuerdos comerciales, convirtiéndose en un testimonio de cómo dos culturas diferentes pueden unirse para alcanzar objetivos comunes. Esta relación no solo ha fortalecido a ambos países en el plano económico, sino que también ha promovido una colaboración en áreas estratégicas, como la investigación científica, la innovación tecnológica, y el intercambio cultural. Al mirar hacia el futuro, es evidente que el vínculo entre Chile y Japón no solo es un ejemplo de cooperación exitosa, sino una de las más brillantes manifestaciones del poder transformador de la unidad y la colaboración global en un mundo cada vez más interconectado.

Historia y contexto

Aunque separados por el vasto Océano Pacífico, ambos países han sabido aprovechar sus respectivas fortalezas económicas y culturales para construir una asociación mutuamente beneficiosa. La relación entre Chile y Japón se remonta a mediados del siglo XIX, cuando ambos países comenzaron a establecer lazos diplomáticos y comerciales. Sin embargo, fue en el siglo XX cuando esta relación se consolidó, especialmente después de la Segunda Guerra Mundial, en un contexto de reconstrucción económica japonesa y de una economía chilena orientada a la exportación de recursos naturales. En 2007, la firma del Acuerdo de Asociación Económica Chile-Japón marcó un hito, facilitando el comercio y promoviendo la inversión entre ambas naciones.

Los primeros contactos

El primer contacto oficial entre Chile y Japón se remonta a la segunda mitad del siglo XIX, cuando ambos países



comenzaron a integrarse al comercio internacional tras la apertura de sus economías. En 1897, se firmó el Tratado de Amistad, Comercio y Navegación entre ambas naciones, marcando el inicio formal de sus relaciones diplomáticas y comerciales. Este tratado no solo fue uno de los primeros en vincular a Japón con un país sudamericano, sino que también estableció las bases para el flujo de bienes y personas entre ambas regiones.

El auge del comercio de materias primas

Durante el siglo XX, la relación entre Chile y Japón se consolidó a través del comercio de materias primas. Japón, en pleno proceso de industrialización tras la Restauración Meiji, buscaba recursos naturales que Chile podía ofrecer en abundancia, como cobre, salitre y hierro. En particular, el cobre chileno se convirtió en un recurso fundamental para la industria electrónica japonesa, que experimentó un auge después de la Segunda Guerra Mundial.

Por su parte, Chile comenzó a importar productos manufacturados japoneses, como maquinaria, vehículos y electrónicos, que apoyaron el desarrollo de su infraestructura y modernización. Este intercambio no solo fortalecía los lazos comerciales, sino que también permitía a ambas economías complementar sus necesidades y recursos.

Cooperación en tiempos de crisis

En las décadas posteriores a la Segunda Guerra Mundial, Japón y Chile continuaron profundizando sus relaciones económicas. Un hito destacado fue la ayuda japonesa tras el terremoto de Valdivia en 1960, uno de los más devastadores en la historia de Chile. Japón envió asistencia humanitaria y técnica, fortaleciendo los lazos entre los dos países.

Asimismo, la relación se intensificó con el ingreso de Japón como principal consumidor de productos del mar provenientes de Chile, especialmente salmón y otros recursos pesqueros. Este vínculo comercial se consolidó con la apertura del mercado japonés a productos chilenos de alta calidad.

El Acuerdo de Asociación Económica Chile-Japón

El Acuerdo de Asociación Económica (AAE) entre Chile y Japón, firmado en 2007, constituye uno de los tratados más relevantes en la relación bilateral. Este acuerdo, considerado un Tratado de Libre Comercio (TLC) amplio

A lo largo de los años, Chile y Japón han cultivado una relación que va más allá de los números y los acuerdos comerciales [...].

A pesar de los logros alcanzados, las relaciones económicas entre Chile y Japón enfrentan ciertos desafíos.

El Acuerdo de Asociación Económica (AAE) entre Chile y Japón, firmado en 2007, constituye uno de los tratados más relevantes en la relación bilateral.

y moderno, busca eliminar barreras arancelarias, fomentar la inversión y fortalecer la cooperación en diversos sectores. Gracias a este AAE, más del 90% de las exportaciones chilenas a Japón ingresan libres de aranceles, beneficiando principalmente a productos como el cobre, las frutas frescas, el vino y el salmón. Por su parte, Chile ha reducido aranceles a productos japoneses como automóviles, maquinaria y equipos tecnológicos.

El tratado también incluye capítulos dedicados a la cooperación en áreas como propiedad intelectual, servicios financieros y telecomunicaciones, lo que demues-

tra su enfoque integral. Este marco ha permitido no solo intensificar el comercio bilateral, sino también promover la transferencia tecnológica y la colaboración en temas estratégicos como la sostenibilidad y la innovación.

Comercio bilateral

Japón es uno de los principales socios comerciales de Chile, y la relación se caracteriza por una marcada complementariedad. Chile exporta principalmente productos mineros, como cobre y molibdeno, y productos agropecuarios, como frutas frescas, vinos y salmón. En 2023, las exportaciones chilenas a Japón alcanzaron un valor aproximado de 7.800 millones de dólares, con el cobre re-

presentando cerca del 60% de este monto. Las frutas frescas, especialmente las cerezas, generaron ingresos superiores a los 1.000 millones de dólares, mientras que el salmón y el vino aportaron 600 y 200 millones de dólares, respectivamente.

En términos del impacto en el PIB, las exportaciones de Chile a Japón representan aproximadamente el 3% del

producto interno bruto (PIB) chileno, destacando la importancia del mercado japonés en la economía nacional. Por otro lado, las exportaciones de Japón a Chile, aunque menores en comparación, contribuyen de manera significativa a sectores estratégicos de la economía japonesa, siendo parte de su amplia red de comercio global que equivale al 14% de su PIB.

Por otro lado, Japón exporta a Chile tecnología avanzada, maquinaria, vehículos y productos electrónicos.

El cobre juega un papel central en esta relación, ya que Japón, como una economía altamente industrializada, depende de este mineral para sus industrias tecnológicas y de manufactura. Además, el crecimiento del consumo de productos chilenos como el vino y el salmón en el mercado japonés refleja un cambio en las preferencias de los consumidores nipones hacia bienes de alta calidad provenientes de Chile.

Migración entre Chile y Japón

La migración entre Chile y Japón ha sido relativamente limitada en comparación con otras relaciones bilaterales, pero presenta aspectos interesantes. Según datos recientes, alrededor de 1.200 ciudadanos japoneses residen en Chile, muchos de ellos vinculados a actividades empresariales, diplomáticas y académicas. Por otro lado, se estima que cerca de 700 chilenos residen en Japón, principalmente trabajadores en sectores como manufactura y tecnología, así como estudiantes que buscan formación en universidades niponas.

Estos intercambios migratorios han contribuido a enriquecer la comprensión cultural y a fortalecer los lazos entre ambos países.

Inversiones y cooperación

Las inversiones japonesas en Chile se concentran en sectores clave como la minería, la energía renovable y la infraestructura. Empresas japonesas han jugado un papel significativo en el desarrollo de proyectos mineros de gran envergadura, aportando capital y tecnología avanzada. Ejemplos notables incluyen la participación de Mitsubishi Corporation y Sumitomo Corporation en proyectos de extracción de cobre, así como la inversión de Marubeni en energías renovables. Toyota y Nissan, por su parte, han tenido un impacto significativo en la industria automotriz chilena a través de la exportación de vehículos y el establecimiento de redes de distribución. También destaca la empresa Itochu, que ha invertido en diversos sectores, incluyendo minería, infraestructura y comercio de productos agroindustriales, consolidando su presencia como un actor clave en las relaciones económicas bilaterales.

Asimismo, la cooperación en energías renovables, especialmente en energía solar y geotérmica, refleja el compromiso de ambos países con la sostenibilidad y la transición energética.

En el ámbito científico y tecnológico, la colaboración bilateral también ha sido notable. Programas de intercambio académico y proyectos conjuntos de investigación han fortalecido los vínculos entre

Desafíos y oportunidades

A pesar de los logros alcanzados, las relaciones económicas entre Chile y Japón enfrentan ciertos desafíos. La volatilidad de los precios de los *commodities* y la necesidad de diversificar la matriz productiva chilena

son aspectos que podrían afectar el comercio bilateral. Asimismo, la competencia en mercados globales y la adaptación a las nuevas tendencias tecnológicas representan retos significativos.

Sin embargo, también existen numerosas oportunidades. La creciente demanda japonesa de alimentos saludables y sostenibles ofrece un nicho para que Chile amplíe su oferta exportadora. Además, la colaboración en áreas como tecnología verde, digitalización y economía del conocimiento puede abrir nuevos horizontes para ambos países.

Conclusión

Las relaciones económicas entre Chile y Japón son un ejemplo de cómo la cooperación internacional puede beneficiar a ambas partes cuando está basada en el respeto mutuo y el reconocimiento de complementariedades. En un mundo globalizado y cambiante, el fortalecimiento de estos vínculos no solo contribuirá al desarrollo de ambos países, sino que también servirá como modelo de asociación sostenible y mutuamente beneficiosa.

De este modo, la historia de las relaciones económicas entre Chile y Japón es un testimonio de cómo dos naciones con realidades geográficas y culturales tan distintas pueden construir una asociación fuerte y beneficiosa. Desde los tratados del siglo XIX hasta los acuerdos modernos, la cooperación ha sido un factor clave para superar barreras y generar oportunidades. En un mundo cada vez más interconectado, la relación entre Chile y Japón representa un modelo de cómo la historia y la economía pueden converger para crear un futuro compartido. ■

Juan HURTADO TURNER

Asociado, Palma y Compañía Abogados
Santiago, Chile
jhurtado@palma.cl

Joaquín PALMA CRUZAT

Asociado, Palma y Compañía Abogados
Santiago, Chile
joaquin.palma@palma.cl



OUVRIR LA VOIE



UN CABINET D'AFFAIRES INDÉPENDANT FRANÇAIS
RECONNU DEPUIS 100 ANS

UNE EXPERTISE ÉPROUVÉE ET L'ENGAGEMENT DE TRANSMETTRE ET DE FORMER LES ASSOCIÉS DE DEMAIN

UN CABINET INTERNATIONAL
QUI ACCOMPAGNE SES CLIENTS À TRAVERS LE MONDE

UNE CLIENTÈLE DIVERSIFIÉE NATIONALE ET INTERNATIONALE
CAC40, SBF 120, ETI, PME, START-UP...

DES HOMMES ET DES FEMMES ENGAGÉS : ACTEURS DE LA CITÉ

UN ACCOMPAGNEMENT GLOBAL DES CLIENTS
EN CONSEIL ET EN CONTENTIEUX

FULL SERVICE
en droit des affaires

+ DE **50 %**
clients internationaux

200
experts dédiés à votre réussite



11 rue Gallée
75116 Paris
+33 (0)1 45 05 80 08
info@jeantet.fr
www.jeantet.fr
in @Jeantet - avocats



Modernising the Singapore Payment Landscape

Lisa SAM

📌 Singapour supprime progressivement les chèques d'entreprise afin de moderniser son système de paiement à un moment où l'utilisation des chèques a considérablement diminué. Cet article étudie les modalités de la transition des chèques vers les méthodes de paiement numérique à Singapour, ainsi que les implications juridiques découlant de la non-applicabilité de la loi singapourienne sur les lettres de change de 1949 aux nouvelles solutions de paiement électronique. S'appuyant sur l'expérience d'autres juridictions, cet article examine également certains facteurs qui contribuent à une transition réussie vers les paiements électroniques.

📌 Singapur está eliminando progresivamente los cheques comerciales para modernizar su sistema de pagos en un momento en que el uso de cheques ha disminuido considerablemente. Este artículo examina cómo se está produciendo en Singapur la transición de los cheques a los métodos de pago digitales, así como las implicaciones jurídicas derivadas de la no aplicabilidad de la Ley de letras de cambio de Singapur de 1949 a las nuevas soluciones de pago electrónico. Basándose en la experiencia de otras jurisdicciones, este artículo también examina algunos de los factores que contribuyen al éxito de la transición a los pagos electrónicos.

I. Introduction

Aligned with its vision to be a Smart Nation that embraces technology, Singapore is gradually phasing out corporate cheques to modernise its payment landscape. The Monetary Authority of Singapore (MAS) and the Association of Banks in Singapore (ABS) have announced that all banks in Singapore will cease the issuance of new corporate chequebooks by 31 December 2025. Corporate cheques will continue to be processed until 31 December 2026 to allow businesses more time to transition to electronic payment methods.

The announcement to phase out commercial cheques follows from the MAS' finding of a drastic decline in annual cheque transaction volume by almost 70% from 61 million in 2016 to less than 19 million in 2022 while the usage of e-payment methods surged in parallel. If cheque transactions continue to decrease, the cost of cheque clearing is projected to increase from SGD0.40 in 2021 to between SGD2.00 and SGD6.00 by 2025 and banks will have to pass these costs on to their customers¹ with reducing economies of scale.

To alleviate these issues, a workgroup led by the MAS since 2021 has actively engaged businesses from the real estate, insurance and legal sectors which were identified to be highly reliant on cheques. The engagements revealed that most businesses had already adopted efficient alternative digital payment systems available in Singapore. The MAS subsequently conducted a consultation exercise in November 2022² on the proposal to eliminate corporate cheques and to assist and encourage other users of centrally cleared cheques to switch to e-payment methods (2022 MAS Consultation Paper).

In December 2024, the MAS issued another consultation paper to detail further proposals amongst others to manage the timelines for phasing out corporate cheques and implement a cost-efficient and fit-for-purpose system for retail users, in view of the greatly reduced cheque volumes (2024 MAS Consultation Paper). Importantly, unlike corporate cheques, retail cheques and cashier's orders will continue to be available beyond 2026 to facilitate transition to alternative digital payment methods, subject to further reviews.

Part II of this article examines the plans that Singapore will implement in selected sectors to overcome the barriers

1. <https://www.mas.gov.sg/news/media-releases/2023/mas-announces-end-2025-timeline-to-eliminate-corporate-cheques>

2. https://www.mas.gov.sg/-/media/mas-media-library/publications/consultations/ftig/2022/consult-paper-2-nov-22/p011_consultation-paper-on-roadmap-to-terminate-the-sgd-cts---eliminating-corporate-cheques-by-2025.pdf

to the transition from corporate cheques to e-payments. Part III of this article takes a wider comparative review of factors that contribute to the successful transition to e-payment methods, including retail cheque users.

II. Overcoming Barriers to Transition to E-Payments Methods in Singapore

While cheque usage has been decreasing significantly over the years, phasing it out completely is a complex process due to interrelated challenges which necessitates concerted efforts from both governmental and non-governmental actors to remove any legislative and regulatory barriers or industry related practices that prevent the use of e-payments.

In the feedback to the 2022 MAS Consultation Paper,³ respondents did not identify any barriers to implementation in the form of rules, regulation and legislation that impede the usage of e-payment systems in place of physical cheques by and to corporations, though some noted that cheques were commonly used in the legal sector and property conveyancing among others. Respondents had also suggested that these industry norms be reviewed to stimulate behavioural changes through incentives such as pricing alternative payment methods more competitively.

A. Legal Sector

From the legal profession's perspective, before April 2022, the Legal Profession (Solicitors' Accounts) Rules (SAR) prescribed that sums exceeding SGD5,000 could only be drawn from a client account through the issuance of hardcopy cheques with the signatures of two solicitors. As a response to the MAS' announcement to phase out all corporate cheques by 2026, the Law Society of Singapore initiated legislative amendments to rule 8(5) of the SAR to allow for the use of e-payments in relation to payment of monies from client accounts for sums exceeding SGD5,000 which could additionally be withdrawn by online digital payment means if authorised by two solicitors in alignment with any Practice Directions issued by the Council of the Law Society of Singapore.

Accordingly, on 12 April 2022, the Law Society of Singapore issued Practice Direction 3.3.11 (PD 3.3.11) to mirror the legislative amendment to allow for e-payments out of client accounts by replicating the requirement to obtain the authorisation of two solicitors. Following feedback from the Bar that it was challenging to adhere to PD 3.3.11, the Law Society of Singapore revised PD 3.3.11 to clarify the use of biometric authentication with the following requirements; (a) the user must log into

the bank's application on a smartphone using biometric authentication; (b) payments can then be authorised using such method(s) prescribed by the application after logging in; and (c) the transactions must not be conducted through the bank's website via browsers on laptops, personal computer or other devices.

B. Property Conveyancing

Cheques are a common method of payment for property-related transactions especially in Singapore, including for payments made to government agencies such as stamp duties and for public housing. In Singapore, the Bills of Exchange Act 1949 (BEA), which was derived from the English Bills of Exchange Act 1882,⁴ provides the legal framework for bills of exchange, cheques and promissory notes. Under section 47(2) of the BEA, a payee holding a dishonored cheque has an immediate right of recourse against the payor.

While cheque usage has been decreasing significantly over the years, phasing it out completely is a complex process [...].

In the 2022 MAS Consultation Paper, the MAS proposed to introduce a new e-payment solution known as the Electronic Deferred Payment (EDP) system to allow users to make post-dated e-payments. The MAS sought feedback on whether any legislative amendment was necessary to provide to the payee of an unsuccessful payment via the EDP system a statutory right of recourse against the payor, where the failure of the payment was due to insufficient funds in the payor's account.

The 2024 MAS Consultation Paper recognised that "[t]he BEA, including its accompanying body of case law, was developed over time to comprehensively address the various scenarios that arose from the use of negotiable instruments such as cheques". However, because the EDP system was not designed as an electronic cheque or bill of exchange, the BEA would not apply to the EDP system, which did not have payment instructions that were intended to be negotiable. Hence, the EDP system would be introduced in mid-2025 "without an additional legal framework akin to that for cheques". This would allow businesses to benefit from an early implementation of the EDP, while taking into account their existing options for legal recourse.

On the other hand, this means that the rich body of legal jurisprudence that was built gradually through the common law with regard to the BEA, will not be available to users of the EDP system. It will be interesting to see whether other jurisdictions transiting to e-payment solutions will face the same challenges and strike a similar balance "between innovation and appropriate legal safeguards" as noted in the 2024 MAS Consultation Paper.

3. See the MAS' Response to Feedback Received dated 28 July 2023 on the 2022 MAS Consultation Paper: <https://www.mas.gov.sg/-/media/mas-media-library/publications/consultations/ftig/2022/response-to-consultation---roadmap-to-eliminate-corporate-cheques.pdf>

4. M. J. L. Rajanayagam, "Banking and Bills of Exchange in Malaysia and Singapore", 1968, 10 Malaya Law Review 79.



Besides the above-mentioned EDP system, a variant of the EDP solution known as EDP+ will also be introduced in mid-2025. EDP+ will serve as a digital alternative to cashier's orders which are cheques issued by banks commonly used in property conveyancing transactions. Money is instantaneously withdrawn from the payor's account and held in the bank's account until the payee deposits the cashier's order. This provides greater certainty of payment as the bank safeguards the funds and prevents the cashier's orders from bouncing.

Like Singapore, Australia is embarking on the same journey to phase out cheques in the near future [...].

As noted in the 2024 MAS Consultation Paper, EDP+ is intended to address transactions that require a higher level of certainty of payment. EDP+ deducts funds immediately upon issuance, whereas funds for EDP are deducted upon presentment.

Relatedly, the Singapore Land Authority is also developing a Digital Conveyancing Portal targeted to be launched by 2026 to enable the transition to paperless conveyancing processes for private housing, public housing, commercial property and industrial property transactions to be completed online. This would also eliminate the use of physical cheques and facilitate the move towards e-payments.

III. Factors that Contribute to Successful Transition to E-Payment Methods

There has been an overall decline in cheque usage and increase in e-payment methods across the globe, even in countries which traditionally have high cheque usage such as in the United States. Though some countries have attempted to phase out cheques as payments, not

all have had success. This was the case in the United Kingdom where the Payments Council announced in 2009 that cheque usage would be eliminated in the United Kingdom by 2018. This caused significant concern and anxiety to communities which heavily relied on cheques such as the elderly, charities and small businesses. The decision was subsequently reversed in 2011 as it was unable to make significant progress in identifying and developing appropriate alternatives to cheques. Cheques have continued to be part of the United Kingdom's payments system till date, though it has transitioned to a digital form of cheques through "cheque imaging". More recently, Hong Kong and Australia have also announced plans to transit from cheques to e-payments.

Observing the practices of countries which have been successful in transitioning away from cheque usage, three factors appear to be critical in the implementation.

A. The Availability of Alternative Digital Payment Methods

Countries with progressive and enhanced digital infrastructure, coupled with positive cultural attitudes towards digital payments are more likely to encourage the switch to digital payment methods. After all, consumer preferences are shaped by behavioural habits and beliefs, such as the perception that brick-and-mortar forms of payment are "safer". Finland, Denmark and Norway are examples of countries which had the digital infrastructure to promote digital payments and have largely ceased the issuance of cheques by making alternative payment methods such as giro⁵, credit cards and debit cards widely

5. In Singapore, GIRO (General Interbank Recurring Order) is an automated electronic payment service that allows you to make recurring payments to billing organizations (BOs) directly from your bank account, eliminating the need for manual payments.

promoted and available for use. Singapore is taking a similar approach and will encourage users to switch to cheaper and more convenient methods of payments alongside the development of the EDP and EDP+ systems as mentioned above.

B. Market-Driven Forces

It has been shown that non-state actors in the financial services sector (such as banks) or the equivalent of Payment Councils (which introduced measures to limit the usage of cheques on the basis that there were alternative payment systems available) were instrumental in nudging consumers to switch to alternative payment methods. For example, it was observed in the 2022 MAS Consultation Paper that banks in the Netherlands and Norway collectively agreed to deliberately impose higher fees on cheques and, along with campaigns to market card payments and giro, which successfully led to the demise of cheques. Similarly, the Payments Council in South Africa incrementally limited the maximum value for which cheques could be issued from 2002 – from ZAR5 million to ZAR5,000, premised on the need to reduce the risks of cheque fraud. This reduction in maximum value, coupled with strong coordination and consultation efforts by the South African public agencies, helped shift consumers away from cheques to safer digital alternatives by 2020 as noted by the Payments Association of South Africa. In Singapore, all Domestically Systemically Important Banks (D-SIBs) have also started to impose charges for SGD-denominated cheques to allow banks to recover costs incurred in the provision of cheque services to encourage users to switch to alternative payment methods.

C. Financial and Digital Inclusion

Community segments that continue to rely heavily on paper-based payments in this digital age may find it challenging to use digital payment methods and may not have regular access to the Internet. These segments will require more support, as observed in the Australian Government's consultation paper in December 2023.⁶ Like Singapore, Australia is embarking on the same journey to phase out cheques in the near future and has developed a "Cheques Transition Plan" to ensure that the transition is smooth and that segments of community which rely on cheques are well supported.

Whilst motivations for the use of retail cheques will vary across jurisdictions (e.g. a lack of regular access to the Internet is not a primary driver in Singapore), issues pertaining to the affordability of devices to engage with online systems and the ability to use such devices are likely to arise in any jurisdiction. Moreover, the proliferation of scams targeting vulnerable groups such as the elderly may encourage them to use retail cheques instead. In addition, the Law Council of Australia has observed that the phasing out of retail cheques "may facilitate elder



financial abuse, as some older Australians do not have the requisite digital skills to manage their bank accounts online", leading to increased litigation relating to the misuse of a bank account. This phenomenon merits closer scrutiny in Singapore, which is studying the emerging issue of elder financial abuse.

Having arrangements in place to assure vulnerable groups that assistance is available is crucial. As noted in the 2024 MAS Consultation Paper, D-SIBs will continue to waive cheque fees for the elderly aged 60 years and above as of 31 December 2025 as the MAS recognises that this segment relies on cheques and may require more time to transition to digital payment methods. It remains to be seen whether more can be done to protect such vulnerable groups.

Though some countries have attempted to phase out cheques as payments, not all have had success.

IV. Conclusion

The Singapore experience has shown that the phasing out of corporate cheques has wide-reaching implications that cut across various industries and segments of the community and should be managed with care. Most notably, Singapore has boldly taken the step of transiting to new e-payment solutions without an additional legal framework akin to the BEA for cheques. Given the complexities of the transition process, it is understandable that Singapore has extended the original deadline to cease the processing of corporate cheques by one year, from 31 December 2025 to 31 December 2026, and allow more time for corporations to be acquainted with alternative digital payment methods. The broader transition to e-payment methods for retail cheque users is likely to entail even more challenges for vulnerable groups in society. ■

Lisa SAM

President, The Law Society of Singapore
Singapore, Singapore
president@lawsoc.org.sg

6. <https://treasury.gov.au/sites/default/files/2023-12/c2023-471331-cp.pdf>



Guidelines for Corporate Takeovers: Potential Impact on M&A Practice in Japan

Hayata MATSUNAGA

➤ En août 2023, le Ministère japonais de l'économie, du commerce et de l'industrie a publié les directives relatives aux prises de contrôle d'entreprises afin de présenter les principes et les meilleures pratiques, notamment en matière de fusions et d'acquisitions publiques. Le présent article donne un bref aperçu des directives et code de conduite adoptés pour l'examen par les directeurs et le Conseil d'administration des propositions d'acquisition.

➤ En agosto de 2023, el Ministerio de Economía, Comercio e Industria de Japón publicó las Directrices para las adquisiciones de empresas (las Directrices), que presentan principios y mejores prácticas principalmente para las fusiones y adquisiciones públicas. Este artículo ofrece una breve visión general de las Directrices y del código de conducta incluido para su revisión por parte de los directores y el consejo de administración de las empresas objetivo en relación con las propuestas de adquisición.

Introduction

In May 2005, the Ministry of Economy, Trade and Industry (METI) and the Ministry of Justice of Japan issued Guidelines Regarding Takeover Defense with a goal of drawing up fair rules of takeover defense measures. Since then, there has been a substantial change in the climate around Japanese companies. Following an upsurge in the number of Japanese companies adopting takeover defense measures in the past, it has recently continued to decline.

In March 2023, the Tokyo Stock Exchange (TSE) requested all companies listed on its Prime Market and Standard Market to take action to make management more conscious of capital costs and stock prices. In this request, the TSE expressed its concern that a price-to-book ratio (PBR) below one indicates that profitability is not sufficient to surpass capital cost, or that growth potential is not sufficiently evaluated by investors. The TSE expects companies to take fundamental measures to continuously achieve profitability exceeding capital costs and in turn realize sustainable growth.



This urges companies to consider M&A as one of their strategies to respond to the TSE's request. Furthermore, in August 2023, METI issued the Guidelines to provide principles and best practices, mainly for public M&A transactions. Among the rules put forward by the Guidelines, one of the key messages is that board of directors should sincerely consider any *bona fide* takeover offer received, even an unsolicited one. Despite soft law not being legally binding, the Guidelines are believed to have had a significant influence on the M&A practice in Japan. Since the issuance of the Guidelines, some unsolicited takeover offers have been made in Japan.

Against this background, this article seeks to provide a brief overview of the Guidelines, with a particular focus on the principles and basic perspectives provided by the Guidelines and the code of conduct for directors and board of directors confronted with an acquisition proposal.

Principles and Basic Perspectives

The Guidelines address transactions where control of listed companies is acquired through the acquisition of shares. Notably, they also cover situations where an unsolicited takeover bid is made. Firstly, the Guidelines reaffirm that establishing a fair M&A market and promoting desirable acquisitions¹ will bring about corporate growth and enhanced external discipline on management. Starting from this position, the Guidelines set forth the following three basic principles to be respected in the event of acquisition of listed companies: (i) Corporate Value and Shareholders' Common Interests; (ii) Shareholders' Intent; and (iii) Transparency.

The first principle, Corporate Value and Shareholders' Common Interests, means that whether an acquisition is desirable or not should be assessed from the perspective of whether it will secure or improve corporate value and the common interests of shareholders. The Guidelines assert that corporate value means the sum of the present values of the discounted future cash flows generated by the company. Alternatively, the Guidelines state that corporate value can be measured as the sum of shareholder value and net debt value. Assuming that this corporate value is quantifiable, the Guidelines discourage the management team of the target company from obscuring the concept of corporate value by emphasizing qualitative values, which are hard to quantify, or from using this concept to defend their positions.

The Guidelines are not intended to provide clarity on the duty of care and duty of loyalty of directors under the Companies Act of Japan. However, it is expected that acting in accordance with the best practices provided in

the Guidelines would reduce the risk of breaching the duty of care and duty of loyalty of directors under said Act.

The second principle, Shareholders' Intent, means that, for matters involving the control of the company, the reasonable intent of shareholders should be relied upon. The third principle, Transparency, is that the acquirer and target company should appropriately and actively provide information useful for shareholders to make decisions and that transparency should be ensured by both parties through compliance with laws and regulations relating to the acquisition. The idea behind these principles is that, while the shareholders' intent should be relied upon to decide fundamental matters for the company, there is typically an information asymmetry between the management teams, on the one hand, and the target company's shareholder, on the other. The Guidelines expect sufficient information to be disclosed to shareholders.² These principles and basic perspectives underpin how boards and individual directors of target companies should respond to and negotiate takeover bids, which is discussed further below.

The Guidelines address transactions where control of listed companies is acquired through the acquisition of shares.

Code of Conduct for Directors and Board of Directors

As noted above, the Guidelines include a code of conduct for target companies' directors and boards. This code describes certain stages of the acquisition process and how directors and board of directors should conduct themselves during each phase. The text acknowledges that some of the factors to be considered at each stage may overlap and should be considered seamlessly to reach a conclusion on whether a takeover bid in question ultimately enhances corporate value.

1. Upon Receipt of an Acquisition Proposal

Upon receipt of a takeover offer, the Guidelines call on managers or directors to submit or report it to the board of directors in a timely manner. Furthermore, it is anticipated that even if the takeover bid is not submitted to the board for consideration and discussion, it should at least promptly be reported to the board. This is essentially to prevent missing a potential opportunity for a desirable acquisition.

The Guidelines provide some factors that should be taken into account in considering whether a proposal should be submitted to the board of directors for consideration

1. The Guidelines define desirable acquisitions as "acquisitions that both increase corporate value and secure the interests of shareholders."

2. The Guidelines view the second and third principles as a prerequisite for the first principle.



and discussion or merely reported to the board, such as whether the proposal is specific and concrete (e.g., made in writing, not orally); identifies the acquirer (not being anonymous); and mentions the purchase price and timing of the acquisition. Moreover, according to the Guidelines, the credibility of the acquirer, including its track record, as well as its probable financial strength, may be considered.

2. Consideration by the Board of Directors

Once the takeover offer is submitted to the board of directors, the Guidelines require the board of directors to give "sincere consideration" to a "bona fide offer."³ Some factors are presented by the Guidelines requiring the board of directors to investigate whether a takeover offer is specific, with rational purpose, and feasible. Examples are

provided of takeover offers that have dubious purposes, such as offers by competitors for the purpose of obtaining confidential information. Yet, the Guidelines warn that the concept of a "bona fide offer" should not be arbitrarily interpreted for the purpose of rejecting a proposal

that could lead to enhanced corporate value. The board should compare and investigate the purchase price offered, as well as the proposed measures to improve the corporate value, against the measures that would be implemented if existing management stayed in place. This comparison should be performed from a qualitative perspective.

3. When the Board Decides on a Direction toward Reaching Agreement on an Acquisition

Once the board of directors has decided to work toward an agreement on a proposed acquisition, individual directors and the board should make reasonable efforts to ensure that the terms of the acquisition will secure the

interest of shareholders. This would include considering whether the details of the offer are appropriate to improve the corporate value. The board is advised to negotiate sincerely, aiming at an agreement that is as favourable to shareholders as possible by improving the terms and conditions of acquisition. One example of these efforts offered by the Guidelines is that of leveraging other competing proposals, if any, to force the acquirer to raise its purchase price.

In summary, the code of conduct set forth in the Guidelines seeks to create an environment where a "bona fide offer" gets "sincere consideration" and to provide guidance on how to negotiate the best terms possible for shareholders.

Conclusion

While the Guidelines include other sections that deal more thoroughly with the topics of transparency and takeover response policies and counter measures, this article has sought to provide a brief overview of the principles and basic perspectives, as well as the code of conduct for directors.

As mentioned above, the Guidelines are not legally binding: they merely aim to present principles and best practices in the context of the acquisition and control of a listed company. Nevertheless, they could have a significant influence in practice. Past guidelines published by the METI, including the "Fair M&A Guidelines" of 2019 (relating mainly to management buyouts and acquisitions of companies by their controlling shareholders), also have had some impact in practice. Similarly, the Guidelines are expected to affect how acquirers and target companies, particularly their directors and board of directors, proceed with and respond to M&A transactions in Japan. It should be closely monitored how the M&A practice in Japan will develop in response to the Guidelines. ■

Hayata MATSUNAGA

Associate, Nagashima Ohno & Tsunematsu
Tokyo, Japan
hayata_matsunaga@noandt.com

[...] the Guidelines include a code of conduct for target companies' directors and boards.

3. A "bona fide offer" is defined as "an acquisition proposal that is specific, rationale [sic] of purpose, and feasible."



**Daniel AGUIÑAGA
GALLEGOS**



**Elena OROZCO
OROZCO**

Comparativa de prácticas del Gobierno Corporativo en la Unión Europea y Asia

Corporate Governance has become a global concern gaining relevance in multiple industries and countries. The evolution of this issue in the European Union reflects the region's commitment to promote a more transparent and efficient environment. On the other hand, Asia has made considerable progress since the 1997 financial crisis, due to a combination of regulatory reforms, external influence, foreign investment and capital market development. The article conducts a comparative analysis of the corporate governance framework in both regions.

La gouvernance en entreprise est devenue une préoccupation mondiale. L'évolution de cette question dans l'Union européenne reflète l'engagement de la région à promouvoir un environnement plus transparent et plus efficace. D'autre part, l'Asie a fait des progrès considérables depuis la crise financière de 1997, grâce à une combinaison de réformes réglementaires, d'influence extérieure, d'investissements étrangers et de développement du marché des capitaux. Dans cet article, nous entreprenons une analyse comparative du cadre de la gouvernance d'entreprise dans les deux régions.

El Gobierno Corporativo es un conjunto de prácticas y principios que regulan la estructura y el funcionamiento de las empresas, con el objetivo de proteger los intereses de sus accionistas, así como garantizar la transparencia y la rendición de cuentas, además de promover el desarrollo sostenible de las mismas. Con la globalización y la internacionalización de los mercados financieros, el Gobierno Corporativo se ha convertido en una preocupación global, y ha cobrado relevancia en muchas industrias y países.

La Unión Europea (UE) ha desempeñado un papel fundamental en el desarrollo de estas prácticas de buen Gobierno Corporativo a través de diversas directrices, regulaciones y recomendaciones:

- **Desarrollo de códigos de Gobierno Corporativo:** Aunque no existe un código único a nivel de la UE, varios países europeos han adoptado códigos nacionales de Gobierno Corporativo que siguen principios similares, basados en recomendaciones de la Comisión Europea y otras organizaciones internacionales, como la OCDE. Ejemplos notables incluyen el Código de Buen Gobierno Corporativo del Reino Unido (1992), o el Informe Cadbury (1992), el cual tuvo una gran influencia en la promoción de prácticas de buen Gobierno Corporativo a nivel europeo. Dicho informe estableció principios fundamentales como la separación entre la presidencia del Consejo de Administración y la dirección ejecutiva, y la importancia de contar con comités de auditoría.
- **Directiva sobre Información no financiera (NFRD):** Iniciativa que obliga a las grandes empresas a divulgar información sobre cómo operan y gestionan los desafíos sociales y ambientales. Esta directiva busca aumentar la transparencia y fomentar la sostenibilidad corporativa.
- **Plan de Acción de Gobierno Corporativo:** La Comisión Europea lanzó un plan de acción en 2003 para modernizar el derecho de las sociedades y mejorar el Gobierno Corporativo en la UE. Este plan incluía medidas para fortalecer los derechos de los accionistas, mejorar la transparencia y reforzar la responsabilidad de los consejos de administración.
- **Directiva de transparencia:** Esta directiva exigió a las empresas cotizadas en la UE que proporcionaran información financiera y de Gobierno Corporativo de manera regular, con el objetivo de mejorar la transparencia y proteger a los inversores.

- **Directiva sobre derechos de los accionistas:** La Directiva de Derechos de los Accionistas (2007) y su revisión en 2017, fortalecieron los derechos de los accionistas, facilitando su participación en las decisiones corporativas y promoviendo una mayor responsabilidad de los consejeros.

- **Regulación sobre los Mercados de Instrumentos Financieros (MiFID II):** Esta normativa, que entró en vigor en 2018, incluye disposiciones que afectan al Gobierno Corporativo, como la gestión de conflictos de interés y la transparencia en la información proporcionada a los inversores.

Iniciativas recientes: La UE ha continuado trabajando para mejorar el Gobierno Corporativo con iniciativas como el Pacto Verde Europeo y la propuesta de Directiva

sobre la Información Corporativa en materia de Sostenibilidad (CSRD) para fomentar prácticas empresariales sostenibles y responsables.

Por otro lado, Asia también ha experimentado una evolución significativa a lo largo de las últimas décadas en materia de Gobierno Corporativo.

En Asia, las prácticas de Gobierno Corporativo pueden variar significativamente según el país.

- **Crisis financiera asiática de 1997:** Este evento marcó un punto de inflexión importante para el Gobierno Corporativo en Asia. La crisis expuso debilidades significativas en la estructura de gobernanza de muchas empresas, lo que llevó a una serie de reformas en varios países asiáticos para mejorar la transparencia, la responsabilidad y la supervisión en las empresas.

- **Reformas regulatorias:** Tras la crisis financiera, muchos países asiáticos implementaron reformas regulatorias para fortalecer el Gobierno Corporativo. Por ejemplo, Corea del Sur introdujo el «Código de Gobernanza Corporativa» en 1999, mientras que Malasia lanzó su propio código de gobernanza corporativa en 2000. Estas reformas incluyeron medidas para mejorar la transparencia financiera, la protección de los accionistas minoritarios y la independencia de los consejos.

- **Aumento de la inversión extranjera:** La creciente inversión extranjera en la región también ha impulsado mejoras en el Gobierno Corporativo. Los inversores extranjeros suelen exigir altos estándares de transparencia y responsabilidad, lo que ha llevado a muchas empresas asiáticas a adoptar mejores prácticas de gobernanza.

- **Cultura corporativa y tradiciones:** En algunos países asiáticos, las tradiciones y la cultura corporativa han influido en la forma en que se implementa el Gobierno Corporativo. Por ejemplo, en Japón, el concepto de «keiretsu» (grupos empresariales interrelacionados) ha tenido un impacto en la estructura de gobernanza de las empresas.

Lo que es un hecho, es que mucho de la evolución de la UE o de Asia, deriva de la influencia de las organizaciones internacionales como el Banco Mundial, el Fondo Monetario Internacional (FMI) y la Organización para la Cooperación y el Desarrollo Económicos (OCDE), quienes han jugado un papel crucial en la promoción y desarrollo del buen Gobierno Corporativo a nivel global. Estos organismos han proporcionado directrices y asistencia técnica para ayudar a los países a mejorar sus marcos de gobernanza corporativa.

Comparación de prácticas entre la Unión Europea y Asia

La UE propone un fuerte énfasis en la transparencia y la rendición de cuentas. Las empresas están obligadas a divulgar información financiera y no financiera, lo que incluye aspectos ambientales, sociales y de gobernanza (ASG). Las directrices de la UE se han caracterizado por fomentar la participación de los accionistas en las juntas generales y se les garantiza el derecho a votar sobre asuntos clave. La UE también se ha especializado por incluir la diversidad de género en los Consejos de Administración, equilibrando la representación de mujeres y hombres en estos órganos.

Por otro lado, en Asia, las prácticas de Gobierno Corporativo pueden variar significativamente según el país. Japón, Singapur y Hong Kong suelen destacarse por sus altos estándares, mientras que otros países están en diferentes etapas de desarrollo en esta materia. No obstante, puede haber un denominador común, son países cuyo enfoque se da en la familia y control accionario.

A continuación, presentamos un comparativo entre las prácticas de Gobierno Corporativo realizadas en la Unión Europea (UE), así como aquellas realizadas en Asia:

1. Estructura de gobernanza

El sistema de Gobierno Corporativo en la Unión Europea se caracteriza por la separación de funciones de gestión y supervisión, que se manifiesta en dos órganos distintos: el Consejo de Administración y el Comité de Vigilancia. Este modelo, implantado principalmente en países como Alemania y Francia, asegura una supervisión efectiva sobre la gestión ejecutiva y limita la posibilidad de conflictos de interés.

En algunos países como Alemania, además de la separación formal de la gestión y supervisión, se ha implementado un modelo de cogestión que permite a los empleados participar en el proceso de toma de decisiones estratégicas. Esta integración de los empleados contribuye a una gobernanza más inclusiva, socialmente responsable y equilibrada.

Por otro lado, en Asia, se han implementado modelos de gobernanza unitarios, en los que el Consejo de Administración tiene la responsabilidad tanto de la gestión como

de la supervisión. Aunque este modelo ha permitido la estabilidad y el éxito a largo plazo de las empresas, también ha sido objeto de críticas por su falta de transparencia y por concentrar demasiado poder en manos de los directivos y los accionistas mayoritarios.

Para superar estas limitaciones, Japón implementó varias reformas, como la Ley de Reforma Corporativa de 2002, que promovió la creación de comités de auditoría independientes, la incorporación de consejeros externos e independientes y una mayor transparencia en la divulgación de información financiera.

2. Composición del Consejo de Administración

La composición de los Consejos de Administración en la UE está diseñada para garantizar la independencia y evitar la concentración de poder en manos de unos pocos. La incorporación de consejeros independientes en la UE es una práctica que ha sido impulsada por las normativas europeas, con el fin de asegurar que las decisiones del Consejo reflejen una amplia perspectiva.

En el modelo asiático, el presidente de la empresa y otros directivos de alto nivel solían dominar el Consejo de Administración. Sin embargo, a medida que ha dado inicio la adopción de prácticas más internacionales, se ha incrementado la proporción de consejeros independientes dentro de los consejos. Estos consejeros no están involucrados en la gestión diaria y su función principal es proporcionar una supervisión objetiva y equilibrada.

3. Protección de minorías

En la UE la protección de minorías es amplia y bastante regulada. Mientras que, en Asia, aún existen desafíos en términos de protección de los derechos de los accionistas minoritarios. Las empresas japonesas a menudo favorecen a los accionistas mayoritarios, lo que puede llevar a una ausencia de voz en las decisiones estratégicas por parte de los accionistas minoritarios.

4. Rendición de cuentas y transparencia

La UE pone un mayor énfasis en la transparencia y divulgación de información, con regulaciones más estrictas en comparación con algunos países asiáticos. La UE ha establecido directivas estrictas que regulan la divulgación de la información financiera y de sostenibilidad. Entre ellas destacan:

- Directiva 2006/43/EC sobre auditoría, que establece normas para garantizar la independencia de los auditores y evitar conflictos de interés.
- Directiva 2017/828/UE sobre los derechos de los accionistas, que fomenta la participación activa de los accionistas en la toma de decisiones clave, como la

elección de los miembros del consejo y la aprobación de estrategias corporativas.

Por otro lado, Asia ha realizado esfuerzos significativos para mejorar la transparencia en los informes financieros y de sostenibilidad. En Japón, los Financial Instruments and Exchange Act y otras reformas han exigido a las empresas que sean más abiertas en torno a sus actividades financieras y operativas.

Aunque las directivas europeas han logrado una armonización parcial, existen diferencias significativas entre los países [...].

5. Funciones del Consejo de Administración

En la UE la separación entre la supervisión y la gestión es más pronunciada, lo que garantiza una mayor independencia en la toma de decisiones. En Asia, aunque se han tenido avances, el Consejo de Administración tradicionalmente ha tenido más poder en la gestión operativa. Sin embargo, el cambio hacia un modelo más independiente y transparente está en marcha.

Supervisión y control: Ambas regiones coinciden en la importancia de la supervisión y control de las operaciones y gestión de la empresa.

Definición de la estrategia:

Tanto en la UE como en Asia, el Consejo de Administración juega un papel crucial en la definición y aprobación de la estrategia corporativa.

Gestión de riesgos: En ambas regiones, la gestión de riesgos es una función crítica, aunque los enfoques pueden variar según las prácticas y regulaciones locales.

Nombramiento y evaluación del equipo directivo: Esta es una función compartida en ambas regiones, con un enfoque dirigido a asegurar que los líderes empresariales sean competentes y estén alineados con los objetivos estratégicos.

Cumplimiento normativo y ético: Ambas regiones enfatizan la importancia del cumplimiento normativo y los estándares éticos, aunque la UE puede tener regulaciones más homogéneas y consolidadas.

Desafíos

A pesar de la existencia de normativas estrictas, la heterogeneidad legal y cultural dentro de los países miembros de la UE presenta desafíos para la implementación uniforme de prácticas de gobernanza corporativa. Aunque las directivas europeas han logrado una armonización parcial, existen diferencias significativas

En la UE la protección de minorías es amplia y bastante regulada. Mientras que, en Asia, aún existen desafíos en términos de protección de los derechos de los accionistas minoritarios.



entre los países, lo que puede derivar en la disparidad de prácticas de gobernanza. Sin embargo, esta diversidad también permite una adaptación de las prácticas a los contextos nacionales, lo que facilita la innovación en modelos de gobernanza.

En Asia, uno de los principales desafíos es la resistencia cultural a los cambios en la gobernanza corporativa, dada su estructura empresarial tradicional y las relaciones interempresariales. Aunque las reformas representan un paso hacia la modernización, el camino hacia una gobernanza completamente transparente e inclusiva aún está en proceso. No obstante, la región se distingue por su rápida adopción de los principios de independencia de los consejeros y transparencia, acercándose más al modelo anglosajón.

Conclusiones

El Gobierno Corporativo ha evolucionado significativamente a lo largo del tiempo, adaptándose a cambios económicos, tecnológicos y sociales. Su objetivo principal sigue siendo garantizar una gestión empresarial transparente, responsable y alineada con los intereses de todos los grupos de interés. La evolución de dicha materia en la UE refleja el compromiso de la región con la promoción de un entorno empresarial más transparente, responsable y eficiente, con el objetivo de proteger a los inversores, promover la confianza en los mercados y contribuir al desarrollo sostenible de la economía europea. Por otro lado, desde la crisis financiera de 1997, Asia ha avanzado considerablemente, gracias a una combinación de reformas regulatorias, influencias externas, aumento de la inversión extranjera y desarrollo de mercados de capitales. Sin embargo, aún existen desafíos y áreas de mejora, y el progreso continúa siendo una prioridad para muchos países de la región.

La UE lidera en términos de transparencia y divulgación de información, con regulaciones estrictas que exigen informes detallados. En Asia, la transparencia varía, aunque países como Japón y Singapur están adoptando prácticas similares a las europeas. La UE tiene mecanismos robustos para proteger los derechos de los accionistas, mientras que, en Asia, aunque hay avances, la protección puede

ser menos consistente debido a la influencia de las familias controladoras y los conglomerados. La UE ha avanzado más en la promoción de la diversidad en los consejos de administración, especialmente en términos de género. Asia está comenzando a seguir esta tendencia, pero a un ritmo más lento. Ambas regiones han realizado esfuerzos significativos para mejorar el cumplimiento normativo, pero la UE cuenta con una estructura más homogénea y consolidada en comparación con la diversidad de enfoques en Asia. ■

Daniel AGUIÑAGA GALLEGOS

Socio Líder de Gobierno Corporativo

Deloitte Asesoría en Riesgo, S.C.

México, México

daguinaga@deloittemx.com

Elena OROZCO OROZCO

Gerente Senior de Gobierno Corporativo

Deloitte Asesoría en Riesgo, S.C.

México, México

eorozco@deloittemx.com

Fuentes

- International Finance Corporation, Corporate governance practices in the European Union, 2023. <https://www.ifc.org/content/dam/ifc/doc/mgrt/cg-practices-in-eu-guide.pdf>
- Financial Services Agency, Japan corporate governance forum, 2021. https://www.fsa.go.jp/en/refer/councils/japan_corporate_governance_forum/07_08.pdf
- CFA Institute, Governance policy in the European Union through an investor's lens, 2020. <https://rpc.cfainstitute.org/-/media/documents/article/position-paper/corp-gov-policy-in-european-union-through-investor-lens.pdf>
- Ministry of Economy, Trade and Industry, Guidelines for corporate governance systems, 2018. https://www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/cgs/en180928cgsguideline.pdf
- European Corporate Governance Institute, Guidelines on corporate governance for designated financial holding companies, banks, direct insurers, reinsurers and captive insurers which are incorporated in Singapore, 2021. https://www.ecgi.global/sites/default/files/codes/documents/guidelines_on_corporate_governance-9_november_2021.pdf



**Sheena
OGRA**



**Shramona
SARKAR**

Cross Border Joint Ventures: Key Considerations for Inward and Outward Joint Ventures (India)

➤ Cet article présente les aspects juridiques et réglementaires des coentreprises entrantes et sortantes avec des entités indiennes. Il met l'accent sur la documentation et les différentes structures commerciales pour les coentreprises ainsi que sur les accords de transfert de technologie. Il souligne en particulier les éléments clés à prendre en compte lors de la rédaction d'un accord de coentreprise, notamment en ce qui concerne les droits de propriété intellectuelle, les clauses de non-concurrence, les clauses restrictives, la confidentialité et la nécessité de définir clairement les contrats de travail.

➤ Este artículo destaca los aspectos jurídicos y normativos de las joint venture (colaboración empresarial) hacia el interior y hacia el exterior con sociedades indias. Destaca la documentación y las diversas estructuras empresariales para joint ventures y acuerdos de transferencia de tecnología. Destaca específicamente las consideraciones clave a la hora de redactar acuerdos de joint ventures, especialmente teniendo en cuenta los derechos de propiedad intelectual, de no competencia, los pactos restrictivos, de confidencialidad y la necesidad de contratos de trabajo claramente definidos.

Introduction

In the recent years, the world has witnessed a pandemic, armed conflict, geopolitical tensions and extreme climatic change owing to which businesses have been forced to rethink their strategies to embrace the dynamics of the evolving economies. One of the results of such shifting paradigms is the inclination of businesses to combine resources and operate for their global expansion thus

leading to an increase in popularity of cross border joint ventures (JV(s)). Cross border JVs offer an excellent opportunity for businesses across jurisdictions to expand globally as entities contribute their resources and operate together to achieve a common objective. Typically, JVs either operate as an independent legal entity or through written contractual arrangements.

In Asia, primarily JV arrangements are undertaken to explore, acquire, and utilize the local market and resources and to minimize the costs and financial risks. JVs are a popular way of doing business across Asia, giving parties a chance to infiltrate complex markets, leverage local knowledge, and share in risk and resources. Interestingly, Indian parties also view JVs as a strategic tool for business expansion and growth, both in domestic markets as well as in global markets. It is pertinent to note that in the first half of the current financial year itself, India witnessed a 26% increase in foreign direct investment.¹ Further, the outflow of funds also witnessed a major surge in India wherein in September 2024, there was a 58% increase in overseas direct investment as compared to the previous financial year, primarily in Singapore, United States of America and United Arab Emirates.²

Considering the popularity gained by JVs amongst Indians in recent years, in this article, we will delve deeper into the key aspects, statutory considerations, documentation critiques, and anticipated challenges for the formation and operation of a JV from an Indian legal perspective, particularly dissecting and highlighting the fundamentals of an inward JV, i.e., a foreign party investing and collaborating with a domestic party, and an outward JV, i.e., an Indian party investing and collaborating with a foreign party.

1. <https://www.pib.gov.in/PressReleasePage.aspx?PRID=2083683>

2. <https://dea.gov.in/overseas-direct-investment>

Regulatory Requirements

Inward Joint Ventures

In India, there is no mandatory structure which needs to be adopted for operation of a JV and the parties are free to choose their preferred structure basis their requirements. In case the parties wish to incorporate a separate legal entity,

In India, there is no mandatory structure which needs to be adopted for operation of a JV and the parties are free to choose their preferred structure basis their requirements.

they can either form a company as per the provisions of the Companies Act, 2013 or a limited liability partnership (LLP), in accordance with the Limited Liability Partnership Act, 2008. Further, parties may also choose to operate as a partnership firm in accordance with the Partnership Act, 1932 or may choose not to create a legal entity and instead operate in accordance with the terms and conditions agreed con-

tractually. However, when foreign parties intend to operate a JV entity in India, they must also ensure adherence to the requisite foreign exchange laws of India namely, the Consolidated Foreign Direct Investment (FDI) Policy, issued by the Department for Promotion of Industry and Internal Trade (DPIIT), and the Foreign Exchange Management Act, 1999 (FEMA) along with its corresponding rules and regulations framed by the Reserve Bank of India (RBI).

In the event, the parties to the JV are willing to raise funds, then a company (private or public) is the most suitable form for undertaking the same due to multiple restrictions envisaged under the foreign exchange laws for LLPs and partnership firms. For inflow of equity funds from foreign parties, the Foreign Exchange Management (Non-Debt

Instruments) Rules, 2019, enumerates the requisite rules for purchase or sale of equity instruments of an Indian company, subject to entry routes, pricing regulations, permitted sectors and sectoral caps as stipulated under the FDI policy. In case the JV intends to obtain loans from the foreign party, the parties to the JV are required to adhere to the rules and regulations stipulated under

Foreign Exchange Management (Borrowing and Lending) Regulations, 2018, Foreign Exchange Management (Guarantees) Regulations, 2000 and the Master Direction - External Commercial Borrowings, Trade Credits and Structured Obligations.

[...] A JV entity, depending on the nature of its business, shall also be required to obtain the requisite licenses and registrations as may be required for its operation.

Furthermore, in the event, the JV entity is a listed entity or any of the party forming the JV is a listed entity with any of the stock exchanges in India, then the concerned party is also mandated to disclose the JV agreement to the relevant stock exchange where its shares are listed along with undertaking all necessary compliances as required under the Securities Exchange Board of India (Listing Obligations and Disclosure Requirements), 2015. Additionally, in case the combined assets and turnover values of the parties to a JV exceeds the thresholds as provided under the Competition Act, 2002 (Competition Act) read with the requisite regulations, thereby, forming a combination that causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India, then the parties to the JV shall be required to obtain approval from the Competition Commission of India prior to the formation of the said JV.

In addition to the above, as a member of the Financial Action Task Force (FATF), India is mandated to achieve the FATF's objectives of tackling money laundering and terrorist financing. The Prevention of Money Laundering Act, 2002 (PMLA) and FEMA are the primary legislations in India to combat money laundering and terrorist financing. These legislations impose specific obligations on various entities, including JVs, to implement robust anti-money laundering and counter-terror financing measures which include maintaining proper client records and data related to financial transactions, undertaking know your customer (KYC) procedures for each of its clients and making all necessary disclosures to the enforcement agencies.

Apart from the corporate and foreign exchange compliances, a JV entity, depending on the nature of its business, shall also be required to obtain the requisite licenses and registrations as may be required for its operation. Additionally, as and when the JV entity hires resources, the said entity would also be required to adhere to applicable central and state labour regulations and undertake necessary registrations and compliances thereto, as specified under the applicable statutes such as the Shops and Establishment Act, Maternity Benefits Act etc.

Outward Joint Ventures

Indian parties willing to collaborate with the foreign parties to set up an operating entity in a foreign jurisdiction and make overseas investments are also required to adhere to the applicable foreign exchange laws, namely, the Foreign Exchange Management (Overseas Investment) Directions, 2022 (ODI Directions), Foreign Exchange Management (Overseas Investment) Rules, 2022 (ODI Rules) and Foreign Exchange Management (Overseas Investment) Regulations, 2022 (ODI Regulations). It is pertinent to note that as per the ODI Rules, an overseas direct investment may be made by an Indian entity by way of subscription or purchase of equity capital, acquisition through bidding or tender, acquisition of equity capital through rights issues or allotment of bonus shares, capitalisation through realisation of due amounts

as provided under FEMA, swap of securities, merger, demerger, amalgamation or any such arrangements in accordance with the applicable laws of India and the host country. Therefore, every Indian party willing to make overseas direct investment must ensure compliances with the abovementioned legalisations along with laws of the host jurisdiction.

Additionally, the JV entity, whether inward or outward, must also ensure compliance with the transfer pricing requirements, withholding tax requirements in view of the double taxation avoidance agreements and other necessary income tax compliances as required under the Income Tax, 1961. Further, if there is any supply of goods or services by the JV entity or amongst the JV parties, then it is important to further ensure compliances with the Goods and Services Tax Act, 2017 (both Central and State).

Documentation for Joint Ventures

Formation of a JV involves taking into consideration multiple aspects, the first and prime aspect being identification of the best partner to form a JV. This must be given utmost importance and can be suitably achieved by undertaking a thorough due diligence on the proposed partner. Upon identification of the said partner, a letter of intent may be signed by the parties which shall stipulate the preliminary terms and conditions agreed between the parties followed by execution of definitive agreements which includes the JV agreement which becomes the main contractual document governing the rights and obligations of each JV party.

For incorporated JVs, the primary documentation is the JV agreement and for contractually governed JVs, the crucial documentation would be the collaboration and strategic alliance agreement. Additionally, other crucial documents of a JV include technology transfer agreement (for transfer of technology); service agreement (for provision of services) and employment agreements of key managerial personnel (for engaging key managerial personnel).

At the outset, a JV agreement must include essential clauses such as rights and obligations of the parties regarding the day-to-day operation of the JV entity, possible impasses that may arise and plausible mechanisms to address them, scope of equity participation by local and foreign investors, including provisions for future capital issuance, financial arrangements, board composition and management structure including reserved matters with veto rights, profit distribution mechanisms, share transfer restrictions, deadlock resolution mechanisms, termination events along with their consequences, non-compete provisions, confidentiality, indemnity etc.

Similarly, for contractually governed JVs, the collaboration and strategic alliance agreement must articulate the purpose and scope of the JV clearly in order to ensure that the intent and the investments of the JV parties are aligned.

Moreover, the said agreement must also enumerate the obligations of each of the JV party, incorporate a comprehensive structure on how to allocate financial, technical, or intellectual property resources, include the division of financial commitment from each party, technical inputs, including equipment, experience, or access to infrastructure brought in by each of the parties, and the ownership, use, and licensing of intellectual property contributed by the parties or created during the tenure of the JV to ensure that the intellectual property rights are fully secured on both sides. Furthermore, it is important that the collaboration agreement contains clear terms about the resolution of conflicts, so that disputes are redressed timely, besides establishing a very effective exit strategy in the event of withdrawal of any JV party.

Moreover, where any of the parties to the JV agrees to share technology with the JV entity, it is crucial that the technology transfer agreement (TTA) executed with the JV entity captures a clear distinction regarding the control of intellectual property with the owner while providing benefits to the JV entity with restrictions. Typically, technology transfer can either be undertaken through a license arrangement or through outright sale. However, despite the nature of the arrangement, the terms of said agreement must be unambiguously captured under the TTAs and must include provisions such as detailed description of the technology, ownership of the technology (specifically clarifying before and after the transfer), restrictions on usage of technology, clear terms and conditions of such transfer, robust confidentiality and non-disclosure provisions, payments (royalties or fee consideration), etc. Similarly, where a party to the JV is providing services to the JV entity, the service agreement to be executed between the parties must also capture the requisite provisions pertaining to the scope of services being provided along with the roles and responsibilities of each party. However, in both such agreements, the commonality lies in including robust risk mitigation measures, appropriate restrictive covenants and dispute resolution mechanisms in order to secure the interests of each party.

Furthermore, structuring of the employment agreements of key managerial personnel also forms a crucial part of a JV since they have a holistic understanding of the entire JV arrangement. These individuals are often involved in the high-level decision-making process and therefore, it is important that their job descriptions, roles and responsibilities, performance expectations along with evaluation criterion are clearly laid down in their employment agreements. In addition to the above, since these individuals are privy to the know-how and confidential information of the JV, restrictive covenants

It is important that the collaboration agreement contains clear terms about the resolution of conflicts [...].



pertaining to confidentiality, non-compete and non-solicitation, and intellectual property rights must also be clearly captured in their employment agreements.

Key issues and the mitigation measures for a joint venture entity

A JV attracts numerous challenges at various levels of formation and operation however, the major issues arise particularly at two levels, namely, during the formation stage and when one of the JV partners withdraws from the arrangement.

During the formation stage of a JV in India, foreign parties may face challenges pertaining to verification and authentication processes, mandatory apostillation and notarization of documents in their home country, fulfilment of KYC checks during remittance of funds, coordination

due to time zone differences, restrictions in repatriation of funds etc. Similarly, when an Indian party is undertaking a JV outside India, they too experience issues arising with respect to complying with stringent regulatory requirements, political and economic instability, tax complications for operating in a foreign jurisdiction, issues with respect to repatriation of funds, etc. Considering

the above, it is crucial that whenever a party decides to operate a JV in any jurisdiction, professional guidance must be obtained to have an exhaustive understanding of all the procedural and legal requirements of the applicable laws.

Moreover, if one of the JV partners decides to quit the JV arrangement, due to any reason, major issues may arise such as dispute over exit rights due to ambiguous drafting of the buyout or exit mechanisms under the JV agreement, determination of the price at which the exit is to be provided to the terminating JV partner as there may be contradictions in relation to the valuation of the

JV entity, or disputes over ownership of the intellectual property rights of the JV entity.

Anticipating key challenges and integrating mitigation measures by JV partners ensure smooth working operations and long-term success of a JV. Conducting due diligence and seeking expert advice prior to formation of the JV can avoid regulatory challenges with respect to complying with local and international laws, including compliance pertaining to FDI norms, FEMA regulations, and host country requirements. JV agreements should clearly indicate objectives and governance mechanism of the JV along with comprehensively defining the roles, responsibilities, modes of decision-making processes, and mechanisms for resolving disputes. Financial conflicts can be mitigated by incorporating a few components, such as pre-agreed funding arrangements, clear resource allocation mechanisms, and valuation methodologies. In terms of termination scenarios, strong exit strategies such as buyout clauses and confidentiality agreements regarding intellectual property must be clearly stipulated in order to prevent disruption of business continuity. In case of technology transfer arrangements, it is important to build in robust mechanisms under the agreement itself with respect to ownership and usage of intellectual property rights, suitable provisions must be included for ensuring the confidentiality of data, inclusion of audit and inspection rights to avoid misuse of data, clear and unambiguous royalty payment or consideration terms must be suitably captured. Efficient planning and detailed documentation serve as vital tools to alleviate the above challenges effectively and also promote collaboration towards achieving common goals.

Conclusion

Cross-border JVs have an enormous potential to operate, particularly when innovating and expanding markets. Owing to which JVs are often favoured as a business strategy to extend global footprints however the formation and operation of a JV often attracts numerous challenges due to its' operation in the dynamic regulatory terrain. In meticulous planning, clear communication, and comprehensive drafting of agreements, cross-border JVs succeed because potential challenges and expectations can be effectively addressed. By addressing cross-border JVs with clarity, foresight, and legal diligence, businesses can harvest very large profits from numerous opportunities created, sustainable partnerships constructed, and long-term success earned in the international market. ■

Sheena OGRA

Partner, Ahlawat & Associates

New Delhi, India

sheena.ogra@ahlawatassociates.in

Shramona SARKAR

Senior Associate, Ahlawat & Associates

New Delhi, India

shramona.sarkar@ahlawatassociates.in

Anticipating key challenges and integrating mitigation measures by JV partners ensure smooth working operations and long-term success of a JV.



Enabling Development of Interoperable Voluntary Carbon Markets in the Asia-Pacific Region

Julius Caesar PARREÑAS

Les marchés volontaires du carbone (MVC) peuvent aider les économies de l'Asie-Pacifique à accélérer le processus de décarbonisation. En 2024, le Conseil consultatif des entreprises de l'APEC (ABAC) a mis en place une initiative exploratoire pour traiter les questions de l'intégrité environnementale, de l'intégrité financière et de l'interopérabilité des MVC. Il s'agit notamment d'aligner les marchés sur des normes internationales reconnues. Il s'agit également d'aider les économies émergentes à développer des écosystèmes politiques et réglementaires favorables ainsi que de connecter les informations des registres afin d'éliminer le risque de doublon.

Los mercados voluntarios de carbono (MVC) pueden ayudar a las economías de Asia-Pacífico a acelerar el proceso de descarbonización. En 2024, el Consejo Asesor Empresarial de APEC (ABAC) estableció una iniciativa exploratoria para abordar las cuestiones de integridad medioambiental, integridad financiera e interoperabilidad de los MCV. Esto incluye alinear los mercados con normas internacionales reconocidas. También implica ayudar a las economías emergentes a desarrollar ecosistemas políticos y normativos favorables, y conectar y agregar la información de los registros para eliminar el riesgo de doble contabilidad.

The Asia-Pacific Economic Cooperation ("APEC") region, with its 21 member economies taken together, is a major source of carbon emissions, accounting for 48 percent of global CO₂ emissions in 2020. Three quarters of these were generated by developing economies, while developed economies have higher per capita emissions.

¹ Most APEC member economies have committed to the

Paris Agreement with some setting targets for achieving carbon neutrality. Economies are currently using a variety of tools to manage emissions, with efficient carbon markets being one of them. Both compliance carbon markets (CCMs, also called emissions trading schemes or ETS) and voluntary carbon markets (VCMs) have huge potential for decarbonizing the economy and promoting sustainable transition through carbon pricing.

The past few years have seen a large number of activities around VCMs, with various markets and policy measures now currently in force across the region. The huge carbon emissions reductions required for the achievement of 2050 net zero targets by Asia-Pacific companies and the growth of expected cumulative residual emissions under even the most aggressive abatement strategies and the planned reductions of remaining emissions by companies are expected to create a large demand for carbon offsets that could be met through VCMs. The rapid growth of net-zero targets set by companies since the middle of the last decade has significantly driven up voluntary carbon offset retirements (especially in energy generation and avoiding deforestation) in the region at a compound annual growth rate of 26%.

However, the growth of voluntary carbon credit retirements markedly decelerated in recent years as buyer and investor confidence were shaken by various developments that cast doubt on the integrity of carbon credits. These included allegations in the media about the quality of rainforest carbon offsets by the largest certifiers, legal issues surrounding airline industry carbon neutrality claims, huge potential losses for carbon credit speculators and doubts about the emissions reducing potential of major carbon credit projects.

Thus, while there are massive potential opportunities in voluntary carbon credits, the long-term outlook is dire with demand poised to continue stagnating if buyers cannot trust the integrity of carbon credits. The likely outcome under this scenario is a low-integrity market with a huge oversupply and low prices and offset sectors needing the most financing not being able to attract buyers and investors. Ensuring the integrity of carbon credits

¹ APEC Stocktake of Carbon Pricing Initiatives, published in February 2022. Available at: https://www.apec.org/docs/default-source/publications/2022/2/apec-stocktake-of-carbon-pricing-initiatives/222_ec_apec-stocktake-of-carbon-pricing-initiatives.pdf?sfvrsn=fbedfd62_2

is an important issue for APEC, given that developing economies in the Asia-Pacific and Latin America account for more than 80 percent of total supply of companies' carbon credit retirements, while demand is concentrated in companies from North America and Europe.² A reliable carbon credit market can provide huge opportunities for financing climate mitigation projects in many developing economies in the region aligned with sustainable development priorities.

Related to concerns about integrity is the challenge to the creation of interconnected VCMs posed by the existence of multiple certification standard bodies and registries and

A reliable carbon credit market can provide huge opportunities for financing climate mitigation projects in many developing economies in the region aligned with sustainable development priorities.

hundreds of methodologies being used as the basis for issuance of carbon credits.³

The introduction by APEC member economies of various initiatives over the past few years highlights their cognizance of the need to harness the potential of carbon markets to help them overcome financing constraints to achieving their ambitious decarbonization goals. However, the diversity of starting points, maturity

stages and approaches among them poses a challenge to robust cross-border trading of carbon credits in the region.

Most trading of VCCs currently occur bilaterally or through intermediaries in the OTC market, due to various factors such as the small size of markets, lack of standardization of credits, varying levels of buyer sophistication and fragmented potential liquidity pools, among others. Financial intermediaries including investment banks, investment funds and other investors and traders buy, hold and sell carbon credits with various objectives, some buying and holding them over a longer period to gain investment returns, while others conduct short-term trades on market-price distortions or arbitrage opportunities. However, several trading platforms have emerged to provide spot and derivatives markets for VCCs within the region.

VCMs can benefit from the development of regulated exchanges, which can provide an infrastructure that would promote efficiency, price discovery, transparency, standardization and future integration of existing markets. This can facilitate broader participation in the market by different types of sellers, buyers and intermediaries with

a variety of investment horizons, which will be essential in the development of liquidity, price discovery and a healthy market. It would also stimulate the development of third-party entities that provide robust validation and measurement, reporting and verification (MRV) services, carbon crediting programs and carbon credit ratings and related data products.

The legal nature of carbon credits is important because it determines how they can be bought and traded, the type of security that may be granted, how that security may be enforced, how it will be treated in the event of insolvency, its regulatory, tax and accounting treatment, the owner's right to retire and rights in the event of cancellation by the registry provider etc. However, legal treatment of VCCs varies across jurisdictions and remains unclear in many, with a carbon credit likely to be treated as a documentary intangible under English law, a personal property right in other common law jurisdictions, as a property right, a commodity, or a financial instrument.

Concern over the need for legal certainty to enable investment and transactions related to VCCs, particularly in the context of unregulated and unsupervised markets, has led to the establishment of the UNIDROIT Project on the Legal Nature of Verified Carbon Credits (Project). The legal nature of VCCs determines issues such as their registration, issuance, transfer and retirement and affects considerations of a broader nature such as collateralization and insolvency. The Project was set up with the main objective of providing "guidance on private law issues so as to enhance confidence in VCC transactions and support the development of a well-functioning market."⁴

The Hague Conference on Private International Law (HCCH) is also separately undertaking a VCM project to assist in clarifying questions under private international law related to jurisdiction (which authorities have competency on cross-border issues), applicable law (which applies to cross-border situations), cross-border recognition and enforcement of judgments or decisions, and how relevant authorities can cooperate in dealing with cross-border situations.

Various international organizations and initiatives are working on elements that can help promote interoperability which include the ASEAN Alliance on Carbon Markets, the Climate Action Data (CAD) Trust connecting registries, the Integrity Council for the Voluntary Carbon Market (ICVCM), the Voluntary Carbon Markets Integrity Initiative (VCMI), the Science-Based Targets Initiative (SBTi) and the Partnership for Market Implementation (PMI). In addition, various industry and regulatory organizations also play important roles in efforts to develop high-integrity and interoperable which include the International Swaps and Derivatives Association (ISDA), the Asia Securities Industry and Financial Markets Association (ASIFMA) and the Institute of International Finance (IIF), the International Organization of Securities Commissions (IOSCO).

2. Based on data from publicly disclosed buyers compiled by Verra, Bloomberg NEF puts the origin of carbon offset retirements in the Asia-Pacific at 57.6% of the total and Latin America at 24.4%. Of total demand, North America accounted for 46.3% while Europe accounted for 37.4%.

3. Ben McQuhae & Co and Hong Kong Green Finance Association, *The Legal Nature of Carbon Credits*, <https://bmquhae.com/en/2023/03/15/the-legal-nature-of-carbon-credits/>

4. Ibid.

Two major challenges to the development of VCMs are (a) how climate mitigation project developers can access capital at scale; and (b) how corporates and investors can have primary market access to a long-term supply of high-integrity VCCs. This also involves a “chicken-and-egg” situation arising from the fact that high-integrity VCCs need to derive from “additional projects,” (i.e., those that would not have occurred without the incentives provided by carbon credit revenues, thus fulfilling the requirement of “additionality”), but to finance them requires an existing deep and liquid market with participation from a critical mass of a wide and diverse range of market participants.

Exchanges can help address these challenges by facilitating the listing of instruments that deploy capital at scale to finance climate mitigation projects that are recognized by the market as having high integrity. To do so, exchanges need to combine the rigor and governance of their existing market infrastructure (including standardization of traded products) with a mechanism to ensure that best practices and specific requirements relevant to VCC projects (e.g., Core Carbon Principles or methodologies recognized officially or by the market) are adopted, through their incorporation into the exchange’s admission requirements. The generation of VCCs will need to involve an ecosystem of standards and verification bodies supported by industry experts and other relevant stakeholders such as government or civil society bodies.

Financial intermediaries are playing an important role in addressing major challenges such as the lack of needed market infrastructure, lack of standardization, insufficient information, barriers to entry for buyers and sellers and lack of trust in the quality of VCCs and thereby scaling the market for VCCs, by providing ways for investors from all over the world to invest with confidence in carbon credits.

Economies in the Asia-Pacific region stand to benefit from the development of VCMs, especially as the region’s developing economies account for the bulk (the combined figure for developing Asia-Pacific and Latin America is estimated to be as much as more than 80 percent) of the total global supply of companies’ carbon credit retirements, while about half of total global demand is concentrated in buyers and investors of carbon credits from the region’s developed markets (especially North America). The significant interest of many Asian economies in VCMs is reflected in the introduction of various market initiatives in most of these jurisdictions in recent years.

The market for VCCs experienced rapid growth at the outset however, growth markedly decelerated in more recent years, reflecting several challenges to the further growth of the nascent market. These challenges may be categorized into three i.e – *environmental integrity* (affecting trust in the quality of carbon credits and the underlying projects), *financial integrity* (affecting the confidence of market participants that transactions would be completed on the agreed terms) and *interoperability* (affecting the ability to trade VCCs across jurisdictions

and achieve scale). Addressing these challenges will be necessary for VCMs to scale up and to realize their potential to benefit Asia-Pacific economies.

Drawing on conclusions from the roundtable discussions, ABAC recommended in its reports to APEC Finance Ministers and to APEC Economic Leaders “that officials collaborate with ABAC and the APFF Sustainable Finance Development Network, the private sector and relevant international organizations to explore feasible ways of developing an Asia-Pacific Network of Interoperable Voluntary Carbon Markets through a regional pathfinder initiative. As an initial step, ABAC members suggested that public and private sector representatives from interested member economies hold discussions with relevant international organizations to develop a work plan for identifying key obstacles to the cross-border trading of voluntary carbon credits among their jurisdictions and how they can be addressed.”⁵

Voluntary carbon markets have significant potential to promote the achievement of ambitious net-zero emissions targets. However, various challenges related to environmental and market integrity and interoperability need to be addressed in order for them to be able to play such a role. The international community is responding to these challenges and economies are gearing up to play their part. What is needed is an international platform that can bring these efforts together and create synergies that can enable effective coordination and collective action. Despite the absence of a centralized supranational framework in their region, Asia-Pacific economies can leverage APEC for this purpose, drawing on the framework it has created for effective collaboration among the public and private sectors and international organizations. ■

Julius Caesar PARREÑAS, Ph.D.

Managing Director, Sumitomo Mitsui Banking Corporation
Tokyo, Japan
jc.parrenas@dn.smbc.co.jp

The generation of VCCs will need to involve an ecosystem of standards and verification bodies supported by industry experts and other relevant stakeholders such as government or civil society bodies.

5. https://www2.abaconline.org/assets/2024/Letter_to_Finance_Ministers_2024.pdf



The UN Convention on the Law of the Sea: Characteristics and implications

Ophélie SOGUEL

✎ Cet article vise à donner un aperçu du droit de la mer, en mettant l'accent sur la Convention des Nations Unies sur le droit de la mer, souvent qualifiée de « Constitution pour les océans ». Il rappelle l'essence et les caractéristiques de la Convention, ainsi que son mécanisme de règlement des différends. Il souligne également les éléments absents de la Convention et qui rendent singulièrement difficile sa mise en œuvre. Enfin, nous envisageons son influence potentielle par-delà le droit de la mer.

✎ Este artículo ofrece una visión general del derecho del mar, centrándose en la Convención de las Naciones Unidas sobre el Derecho del Mar, a menudo denominada la "Constitución para los océanos". Recuerda la esencia y las características de la Convención, así como su mecanismo de solución de controversias. También se destacan los elementos que faltan en la Convención y que dificultan singularmente su aplicación. Por último, se examina su posible influencia más allá del Derecho del Mar.

The law of the sea as it stands today is largely built on its framework convention, the United Nations Convention on the Law of the Sea (UNCLOS), adopted in 1982 in Montego Bay, Jamaica. The third round of negotiations which led to the adoption of the LOSC was marked by nearly universal participation and the emergence of opposing interest groups. Notably, the Group of 77 – comprised only of developing States – reflected a new reality in international affairs in a post-colonialist context and left a clear mark on the final text of the UNCLOS. After lengthy negotiations, agreement was reached through a delicate balance of diverging State interests and the application of a consensus procedure. To this day, the UNCLOS's adoption is seen as a great success in international diplomacy. It finally entered into force on 16 November 1994. The UNCLOS succeeded the Geneva Conventions on the Law of the Sea, which had failed to reach a high level of acceptance.

1. It Is a Constitution for the Oceans

Firstly, given its comprehensive scope, the UNCLOS is commonly referred to as a "Constitution for the oceans". In its total of 320 articles and nine annexes, the LOSC reinforces as well as creates rights and obligations in all – now clearly defined – maritime zones. Altogether, the UNCLOS covers the entirety of our oceans. Moreover, parts of the UNCLOS deal with specific issues such as the protection and preservation of the marine environment (Part XII) and marine scientific research (Part XIII). The regime is truly comprehensive, as States are not allowed to make reservations or exceptions unless expressly permitted (art. 309 UNCLOS). This "package deal" succeeds in preserving a precious equilibrium in the management of our oceans by preventing States from "cherry picking".

Additionally, the UNCLOS is of a framework nature. Despite some specific parts, its provisions are broadly general. They must therefore be implemented through international cooperation or the adoption of domestic rules. Different mechanisms are used. Some articles command it expressly – such as rules giving explicit mandate to "the competent international organisation", i.e. the International Maritime Organisation (IMO). Others are general and the need for more precise rules is implicit. As a result, two implementation agreements were adopted. The 1995 United Nations Fish Stocks Agreement (UNFSA) elaborates on the conservation and management of living resources. The 2023 Agreement on Biodiversity Beyond National Jurisdiction (BBNJ Agreement) – not yet in force – addresses a variety of new challenges in relation to the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction. The LOSC also created three new institutions that operate under its umbrella: a) the International Seabed Authority (ISA), b) the International Tribunal for the Law of the Sea (ITLOS) and c) the Commission on the Limits of the Continental Shelf (CLCS).

The UNCLOS has near-universal application, given that it has been ratified by 168 States and the EU. Its application also extends beyond its State parties since a number of its

provisions reflect custom. For example, after its adoption, many States extended their territorial seas to 12 nautical miles from the coast and their fisheries jurisdiction to 200 nautical miles – which is the furthestmost limit of coastal State jurisdiction under the LOSC (art. 57 UNCLOS).

There is a presumption that every activity taking place at sea is governed by the UNCLOS. In its general provisions, the UNCLOS defines where it stands in relation to other international law instruments. For instance, agreements not expressly permitted or preserved by the UNCLOS must be compatible with it and must not “*affect the enjoyment by other States Parties of their rights or the performance of their obligations under it*” (art. 311 (2) UNCLOS). Agreements subsequent to the UNCLOS, such as the Convention on Biological Diversity (CBD), also contain relationship clauses that reinforce the generally superior position of the UNCLOS.

The UNCLOS is notably difficult to amend formally. No formal amendment has been made to this day. This does not mean that the law of the sea regime is set in stone. On the contrary, the UNCLOS is an evolutive instrument that exhibits significant flexibility. The widespread usage of “rules of reference” allows other applicable rules of international law to be incorporated within the ambit of the UNCLOS. The nature of such rules depends on the wording of the provision concerned – most need to be “internationally agreed” or “generally accepted”. Courts and tribunals have considered instruments adopted by the IMO and environmental treaties as informing obligations under the UNCLOS.¹ Additionally, non-binding obligations can become binding under the UNCLOS. UNCLOS institutions also contribute to the development of the law of the sea. For instance, the ISA is explicitly required to adopt regulations for activities related to the deep seabed beyond national jurisdiction – the Area – and proceedings before the ITLOS have developed the vague provisions on maritime delimitation contained in the UNCLOS.

2. It Is a Binding Dispute Settlement Mechanism

In addition to specific proceedings contained in other parts of the UNCLOS, Part XV LOSC contains a general mandatory mechanism of dispute settlement. This is quite extraordinary in the context of such a significant international law document. Part XV is also applicable to non-parties to the UNCLOS since other agreements, such as the UNFSA, provide that Part XV UNCLOS applies *mutatis mutandis* to disputes arising under their scope, whether the States in question are parties to the UNCLOS or not.

1. *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)* (Award), 2016, PCA 2013-19, [908]; *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)* (Advisory Opinion) [2024] ITLOS 2, [270].

First, under section 1 Part XV, States are compelled to solve their dispute by peaceful means listed in the UN Charter.²

Only where no such agreement is reached in relation to “a dispute concerning the interpretation or application of this Convention” (art. 281 UNCLOS), compulsory proceedings provided for in section 2 become applicable. Additionally, States must have not ruled out this possibility by providing for an alternative binding procedure in a pre-existing agreement. If that were the case, this alternative would apply *in lieu* (art. 282 UNCLOS).

Under section 2, either party – or parties – is entitled to unilaterally invoke the procedures contained therein. The other party is then obliged to submit to these proceedings. This obligation is subject to exceptions for disputes that are linked to important State interests, such as delimitation, security and control over some aspects of marine scientific research and fisheries management (art. 297 and 298 UNCLOS).

Proceedings are to be conducted in front of the forum chosen by the parties: a) the ITLOS, b) the International Court of Justice (ICJ), c) Annex VII arbitral tribunals or d) Annex VIII arbitral tribunals for specialised disputes. Where the parties have not chosen the same forum, the dispute may be submitted to an arbitral tribunal established according to Annex VII (art. 287 (5) UNCLOS). Decisions are final and binding (art. 296 UNCLOS).

3. It Is Not Binding on Some Major Actors

During the negotiation of the UNCLOS, certain large industrialised States – such as the USA – showed their reticence *vis-à-vis* Part XI of the UNCLOS, fearing that the settled regime would impede commercial exploitation of the deep seabed. They refused to ratify the UNCLOS as it stood. States were keen to find a solution in order to secure wider ratification. Shortly after its entry into force, the UNCLOS was amended *de facto* by the 1994 Implementation Agreement. Part XI of the UNCLOS was greatly modified, and some provisions were excluded. This allowed States such as Germany, Japan, France, Italy, the Netherlands and the United Kingdom to ratify the LOSC. The USA held its position and still refuses to ratify the UNCLOS. To date, this has had little practical significance since the USA contends that the entirety of the UNCLOS,

In its general provisions, the UNCLOS (United Nations Convention on the Law of the Sea) defines where it stands in relation to other international law instruments.

2. Most maritime boundaries have been determined through negotiated maritime agreements; see *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (Judgment), 1984, ICJ Rep 246, [89] on consent as being the basis for delimitation.



except for Part XI on the Area, has a customary character and is therefore binding on all States.

More recently, the debate on whether the USA can benefit from rights closely related to UNCLOS institutions has resurfaced. On 19 December 2023, the USA announced that it is prepared to make a submission to the CLCS in order to proceed to the delineation of its extended continental shelf, beyond 200 nautical miles. Controversially, according to the USA, the basis for such a submission is rooted in customary international law.

4. It Is Not a Panacea

One of the main weaknesses of the law of the sea is the lack of enforcement in the high seas – the water column beyond areas of national jurisdiction. In the high seas, flag States – where a ship is registered – are the only entities to have prescriptive and enforcement jurisdiction over vessels (art. 92 (1) UNCLOS). According to art. 94 UNCLOS, they must exercise jurisdiction and control over their vessels effectively.

Relying exclusively on flag State jurisdiction in the high seas has created a new category of States: “flags of convenience”. They include Panama, Liberia and the Marshall

Islands. These States have lenient rules on pollution, labour protection and taxation and their vessel registries are easy to enter. Also, they lack the willingness and/or means to ensure compliance far from their coasts. Most of the world's gross tonnage navigates under a “flag of convenience”. This widespread practice is detrimental

in ensuring the respect of community interests such as the protection and preservation of the marine environment and the protection of human rights at sea.

They [The USA] refused to ratify the UNCLOS as it stood. States were keen to find a solution in order to secure wider ratification.

High seas governance is now experiencing an important shift towards increased cooperation, resulting in a more institutionalised exercise of high seas freedoms. Indeed, the establishment of many marine protected areas, the enforcement role of regional fisheries management organisations (RFMO) and the recent adoption of the BBNJ Agreement illustrate a turning point.

5. It Could Be a Model

The UNCLOS has proven to be an overall success despite some constraints that are inherent in international law and the “commonality” of marine spaces. As mentioned previously, the UNCLOS allows for flexibility in incorporating other rules of international law – which may or may not be binding under other instruments – and subjecting them to compulsory adjudication. This allows for courts and tribunals to render binding decisions whose effect goes beyond the sole interpretation of UNCLOS provisions.

Moreover, the UNCLOS has been permissive in giving competence to the ITLOS to hand out advisory opinions. On 21 May 2024, the ITLOS delivered the first advisory opinion by an international tribunal on climate change mitigation. It took an evolutive approach in defining the obligations of States in relation to the protection and preservation of the marine environment *inter alia* by defining pollution broadly and by determining how international treaties on climate change interact with the UNCLOS. In that regard, ITLOS states that the United Nations Framework Convention on Climate Change and the Paris Agreement are relevant in interpreting obligations to regulate marine pollution from GHG emissions (art. 194 (1) UNCLOS), particularly concerning the global goal of limiting temperature rise to 1.5°C above pre-industrial levels and the timeline for emission pathways to achieve it.³ However, complying with the Paris Agreement alone does not fulfil the obligation to take “all necessary measures” under UNCLOS, as the two agreements remain separate.⁴ These evolutive conclusions of the ITLOS will have an impact on forthcoming advisory opinions from the same topic of the Inter-American Court of Human Rights and the ICJ and more broadly on the legal understanding of climate-related obligations.

Ophélie SOGUEL

*Master's Graduate, L.L.M in Law of the Sea
UiT The Arctic University of Norway
Neufchâtel, Switzerland
osoguel@gmail.com*

3. Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal) (Advisory Opinion) [2024] ITLOS 2, [222].

4. Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal) (Advisory Opinion) [2024] ITLOS 2, [223].



30 October/3 November

PARIS



Le Congrès dans la Ville lumière

Paris a accueilli pour la deuxième fois le congrès annuel de l'UIA.

La capitale française, riche de son histoire millénaire et précédée de son esprit d'accueil et de convivialité, a offert un cadre inoubliable pour cet événement.

Plus de 1000 participants ont été accueillis au Palais des Congrès, où ils ont pu assister à trois jours de travaux scientifiques de grande qualité.



Some Figures

- › Some Figures
- › More than 1,000 participants
- › 330 speakers
- › 75 countries
- › 45 working sessions
- › 30 sponsors





© UIA www.uianet.org

Acknowledgements

The UIA would like to thank Jacqueline Scott, President of the UIA, Hervé Chemouli, President of the 68th Congress, and Laurence Kiffer, President of the UIA French National Committee, for their unconditional support in the organisation and for their personal involvement in the Congress.



© UIA www.uianet.org



© UIA www.uianet.org

A very special thank you to the French institutions, especially to the Paris Bar Association, Premier Institutional Sponsor, and all the sponsors for making it possible to hold a very successful Congress!

Ceremonia inaugural

La ceremonia de apertura estuvo a cargo de Fannie Bruneau y Donald Venkatapen, dos jóvenes abogados miembros de la UIA. Siguiendo la tradición de la institución, diversas autoridades y personalidades, tanto francesas como extranjeras, dieron la bienvenida a los asistentes. Así, tomaron sucesivamente la palabra, Hervé Chemouli, Presidente del Congreso, Pierre Hoffman, Decano del Colegio de Abogados de París, Julie Couturier, Presidenta del Conseil National des Barreaux, y Jacqueline Scott, Presidenta de la UIA.

También nos honraron con su presencia Su Alteza Real la Gran Duquesa María Teresa de Luxemburgo, Mathias Fekl, ex Ministro del Interior y Presidente del Comité Francés de la Cámara de Comercio Internacional (CCI), y Santiago Villalpando, Asesor Jurídico y Director de la Oficina de Normas Internacionales y Asuntos Jurídicos de la UNESCO, quienes también pronunciaron discursos de bienvenida.

La ceremonia estuvo amenizada por la cantante Candice, que interpretó un repertorio de canciones francesas sobre París, y por los bailarines de *Streetsmile Crew*, que hicieron una demostración de *breakdance*.



© UIA www.uianet.org



© UIA www.uianet.org

UIA Awards



Claudio Coggiatti receives the prize on behalf of Alberto Pasino
© UIA www.uanet.org

Comisión del año

El premio de la Comisión del año 2024 se concedió a la comisión de derecho bancario y financiero y a su Presidenta Barbara Bandiera. Este galardón recompensa su compromiso, su trabajo activo durante todo el año y su participación activa en la organización de varios seminarios en 2024.

National Committee of the Year

The Italian National Committee, presided over by Alberto Pasino, received the 2024 Committee of the Year Award for its continuous and regular activity all year long and for the dedication of its members to increase awareness about the UIA in Italy.



© UIA www.uanet.org



© UIA www.uanet.org

Le Prix « État de droit » UIA/LexisNexis 2024 décerné à Olga Mikhaylova

Le Conseil de Présidence de l'UIA, sur proposition du Jury du Prix État de droit UIA en coopération avec LexisNexis Legal & Professional, a décidé de décerner le Prix 2024 à M^{me} Olga Olegovna Mikhaylova, M. Vadim Dmitrievich Kobzev et M. Alexey Evgenyevich Liptser, avocats de l'équipe de défense d'Alexey Navalny, figures emblématiques dans le domaine des droits de l'homme et de la défense de l'État de droit.

Leur engagement est une source d'inspiration pour tous les membres de la communauté juridique qui souhaitent s'engager dans la défense de l'État de droit dans leur propre pays.

2024 UIA/LexisNexis LegalTech Inspiration Award

UIA and LexisNexis have established an annual UIA LegalTech Inspiration Award to encourage innovation in the legal field and reward the organizations or individuals that bring new ideas to the legal world which change lawyers' outlook, practice, or working methods.

This 2024 edition rewarded Miles Legal for its project to develop and implement an IT application to ensure compliance with anti-money laundering obligations, including client identification and risk factors. This practical, easy-to-access, and user-friendly tool enables an automated generation of annual reports.



Luc Godin receives the prize on behalf of Miles Legal
© UIA www.uanet.org

Día networking

La jornada inaugural del Congreso se desarrolló en el ambiente especialmente cordial que caracteriza a la UIA. Por la mañana, el *Palais des Congrès* dio la bienvenida a los miembros de la UIA para celebrar la Asamblea General de

la asociación. La jornada continuó con los foros por lengua y por región seguidos por la ceremonia inaugural, que tuvo lugar en la prestigiosa *Maison de l'UNESCO*.



Session spéciale

Innovation et méthodologie dans l'action humanitaire

A l'initiative de Alain Grosjean, secrétaire général du *Senat International des Barreaux*, deux thématiques brûlantes de l'actualité ont été décryptées par des experts des milieux associatif et juridique : la lutte contre les violences sexuelles en zones de conflit et la protection mondiale de l'enfance. Le but de la session, dont l'invitée d'honneur fût S.A.R la Grande-Duchesse de Luxembourg, présidente de l'association *Stand Speak Rise Up !*, était de présenter les nouvelles formes d'engagements associatifs dans ces deux domaines. De nombreuses personnalités, telles que Vanessa Bousardo, vice-bâtonnière du barreau de Paris, Valérie Dupong, ancienne bâtonnière du barreau de Luxembourg, Julie Couturier, présidente du CNB et Céline Bardet, présidente de l'association *We are NOT Weapons of War*, ont présenté leurs plans d'action pour apporter des

réponses juridiques et pratiques concrètes aux victimes de violences sexuelles dans les zones de conflit. France Malépart, présidente de l'ANF, Sœur Sophie, présidente de l'Association *Compassion Asian Youth* et Khadija Al Salami, présidente de l'association *My Futur Yemen*, ont présenté la thématique des mineurs non accompagnés et de la réinsertion des jeunes en situation de difficulté. Cette session a rencontré un vif succès auprès du public et démontre encore une fois, l'implication toujours croissante de l'UIA à traiter des sujets délicats trop souvent ignorés ou banalisés et qui touchent pourtant l'essence même de La Défense des droits humains.

Alain Grosjean, coordinateur de la session spéciale (Bonn & Schmitt), Luxembourg, Luxembourg



Main Theme 1

Should and Can Artificial Intelligence be Regulated?



© UIA www.uianet.org

The **keynote speaker**, **Dr. Klára Talabér-Ritz**, Legal Advisor for the European Commission's Legal Service, drew up an overview of the European Union's recently promulgated AI Act, with an explanation of the Commission's future implementing regulations and guidance communications of a new legal ecosystem within the European Union. Secondly, she described the ways and means of the digital overhaul of the knowledge management function of the Legal Service comprised of more than 200 legal advisors, with support staff.

In addition, there were two panel discussions in which UIA lawyers were joined by guest speakers from the legal, business, and academic worlds. The **first panel**, presided over by **Professor Jean-Paul Vulliéty** (Geneva), conducted a multidisciplinary discussion concerning the effects of AI on society, leading to the need for regulation.

The **second panel**, presided over by **Pierre Kirch**, member of the Paris & Brussels bars, involved an animated discussion concerning Artificial Intelligence and litigation on two specific issues: (i) the litigation of AI disputes and (ii) the use of generative AI tools by litigators. The panel's overriding concern: what is the future of managing conflicts in the "AI Age" within not only judicial and arbitral procedures, but also through mediation processes which may emerge as a newly attractive means of conflict resolution in cases where AI systems are involved in the dispute?

As emphasized during both panels, the UIA has articulated its own official position on the use of Artificial Intelligence tools on a worldwide scale, by publication of its **Guidelines for Use of AI by Lawyers** upon the occasion of the 2024 Annual Congress.

Pierre Kirch, Main Theme Coordinator,
Paris, France



© UIA www.uianet.org

Tema principal 2

¿Son compatibles la moda y el desarrollo sostenible en un mundo globalizado?



© UIA www.uianet.org

Coordinado por Anne-Manuelle Gaillet, este tema principal brindó la oportunidad de examinar, en dos mesas redondas, las realidades y perspectivas de los retos que supone, para el sector de la moda y el lujo, la necesidad ineludible de realizar la transición hacia un modelo de desarrollo sostenible, considerando que se trata de uno de los sectores con mayor impacto medioambiental, pero también uno de los que presenta mayor potencial para el desarrollo de la una economía circular. Tras el discurso de apertura a cargo de Maria Teresa Pisani, representante

de la Comisión Económica de las Naciones Unidas para Europa (UNECE), la primera mesa redonda reunió a expertos jurídicos y a los principales actores del sector para debatir sobre temas relacionados con la circularidad, el ecodiseño y la responsabilidad ampliada del productor, planteando la ecuación de la gestión de la sobreproducción, especialmente en el sector textil, adaptándose a enfoques normativos muy diferentes de un continente a otro.

La segunda mesa redonda, moderada por Joana Whyte, se dedicó a explorar el deber de diligencia en la cadena de valor, impulsado en particular por los grupos de lujo radicados en Europa y que desde allí, quierase o no, tiene repercusiones en el sector a escala mundial. Asimismo, se trató la cuestión de la comunicación, con el cortejo de problemas que conlleva, en particular la impostura verde, un tema que dio lugar a perspectivas cruzadas por parte de los panelistas.

Los dos paneles estuvieron compuestos por ponentes de diferentes procedencias y jurisdicciones, entre ellos representantes de actores clave del sector como Kering, Dolce&Gabbana, Zalando y Etam, así como varios representantes de federaciones profesionales y colegas miembros de la UIA, a quienes la UIA expresa su más sincero agradecimiento.

Anne-Manuelle Gaillet, coordinadora del tema principal
(Castaldi Partners), Milán, Italia

International Bar Leaders' Senate



On Thursday, October 31st, the UIA Senate held two sessions of bar leaders from around the world discussing "The Contribution of the Legal Profession in Democracies: Bar Associations and Law Societies and their role in the preservation of free speech."

Spanning multiple legal jurisdictions, the bar leaders addressed the importance of free speech and freedom of expression in their respective countries and discussed both limits on free speech as well as possible threats to freedom of speech. In these challenging global times, the UIA Senate emphasized the role of bar associations – and lawyers – in protecting free speech while defining the necessary limits on speech that incites violence, fosters hatred, or promotes subversion.

The discussions allowed us to see that this reality exists everywhere, but certainly not to the same degree. This may seem worrying in some jurisdictions, but reassuring that bar associations and law societies, including the UIA, can make a positive difference.

Luc Deshaies, Vice-President of the International Bar Leaders' Senate (Gowling WLG) Montreal, Canada

Lisa Savitt, Vice-President of the International Bar Leaders' Senate (Benchmark International ADR, LLC) Vienna, Austria

Comité des femmes

El Comité de Mujeres de la UIA, presidido por Elisabeth Zakharia Sioufi (Líbano), dedicó su sesión al tema de la Inteligencia Artificial y los derechos de la mujer. Ponentes de varios países – Lina Adlouni (Kuwait), Tanja Arsic (Serbia), Céline Bardet (Francia), Ian McDougall (Reino Unido), Pasquale Orrico (Italia), Marie-Aimée Peyron (Francia), Jacqueline Scott (Estados Unidos), Massimo Sterpi (Italia) y Yonca Fatma Yücel (Turquía) – analizaron el tema antes de animar un debate general con los participantes.



UIA AI Task Force Session

The session coordinated by the UIA AI task force was divided into three parts. The first part addressed the publication of the Guidelines dedicated to lawyers using AI. These are the first AI Guidelines intended for worldwide use and have been developed by the AI task force after examining the various national AI Guidelines issued by multiple national bars associations or local organisations. This group effort has involved lawyers from several different jurisdictions based in four continents. Then, we had a panel where experts from leading legal tech providers illustrated the latest developments of AI platforms intended for lawyers and what lawyers should be paying attention to when using such platforms. Finally, the AI task force presented a global survey of all major laws, regulations, and the industry standards developed around the world, with three groups presenting respectively on Europe, the Americas, and Asia.

Massimo Sterpi, Coordinator of the AI Task Force Session (Studio legale Gianni & Origoni) Rome, Italy



Working Sessions



Informal evening



The informal evening took place at the Chapiteau Gruss, a famous Parisian venue.

The participants had the chance to attend a superb original show, both equestrian and aerial, presented by three generations of the Alexis Gruss family, followed by dinner and dancing.



Cena de gala



Un momento muy esperado del Congreso anual es la cena de gala. Este evento se celebró en los magníficos salones históricos restaurados del *Cercle de l'Union Interalliée*. Durante el cóctel de bienvenida y la clausura de la cena, el cuarteto Panam Kolectiv deleitó a todo los presentes con su música.



UIA Announces Carlo Mastellone as New President

Carlo Mastellone took office at the closing ceremony on 2 November in Paris. A UIA member since 1997 and President of Studio Legale Mastellone, he is an internationally renowned lawyer whose diverse practice includes Corporate and Commercial Law, Contract Law, Compliance, International Business and Trade Law, and Dispute Resolution Services.

In his new role, Mr. Mastellone outlined his vision for the UIA and its members, stating that "the UIA has demonstrated to me the potential to be a source of great learning, strong friendships and powerful emotions, a forum where it is possible to achieve the unbelievable and where dreams can come true. This is possible because of our collective efforts and commitment to the common objectives and values in which we all strongly believe."



© UIA www.uianet.org

Extraits du discours d'investiture de Carlo Mastellone



© UIA www.uianet.org

"We as lawyers need to be flexible and open to innovation for enhancing our institutional objectives and our values, promoting the Rule of law, the independence of the legal profession, and the respect of human rights, supporting with our international missions and initiatives our colleagues in need of assistance and protection whenever they are threatened or prevented from carrying out their defence roles – we can only commend and continue supporting the magnificent initiatives of our UIA-IROL – and improving and developing our already excellent standards in the area of continued legal education, and we need to work together considering the developments and changes of our times: conflict, climate change (caused by emissions of carbon dioxide (CO2) greenhouse gas), migration, which is caused by conflict, poverty, and climate change, the developments and the challenges relating to data protection and digitalisation, the risks of cyber security, corporate social responsibility/sustainable development, and the challenges of artificial intelligence – all these elements should amount to an opportunity to grow and create value, from our unique character and perspective of a universal, multi-lingual and multi-cultural Association."

Partenariats



Your certificate of attendance is available on the UIA website. Do not forget to fill in your user name and password in "My Space", then go to the "My documents" section to download it.



See you next year
in Guadalajara, Mexico!

**Save the date
for the UIA 69th Congress**

29 October – 2 November 2025

The Impact of Sanctions against Russia at the Enforcement Stage: How to Monetize Awards against Frozen Assets in a Nutshell



MARZIA SCHILLECI



NIKLAUS ZAUGG



➤ L'article se penche sur la longue procédure d'exécution d'une sentence arbitrale ou d'une décision de justice garantie par des avoirs gelés dans le cadre du système de sanctions américain, qui nécessite l'obtention d'une licence de l'Office of the Foreign Assets Control du département du Trésor américain, principal organisme chargé de l'administration et de l'application des sanctions économiques et commerciales des États-Unis. L'auteur établit un parallèle avec les règlements de l'UE et les lois suisses et met également en lumière les autorisations bancaires afin de maximiser les chances d'exécution des avoirs gelés.

➤ El artículo profundiza en el dilatado procedimiento para ejecutar un laudo arbitral o una orden judicial de embargo preventivo de bienes bajo el sistema de sanciones de EE.UU., que precisa la obtención de una licencia de la Oficina de Control de Activos Extranjeros del Departamento del Tesoro de EE.UU., el principal organismo que administra y aplica las sanciones económicas y comerciales de EE.UU. El autor establece un paralelismo con los reglamentos de la UE y las leyes suizas y también arroja luz sobre las autorizaciones bancarias para maximizar las posibilidades de ejecutar los activos embargados.

Enforcement is often overlooked during the early stages of arbitration proceedings. However, no party intends to go through the trouble and expense of an arbitration only to end up with an unenforceable award. From the very outset of an arbitration, claimants and their counsel should consider whether the assets of their opponents are frozen under any applicable sanctions regime. The release of frozen assets of an award debtor to satisfy an arbitral award requires a specific authorization from the competent authorities that is granted only under certain conditions (License). This article addresses the key considerations under some of the major sanctions regimes against Russia and concludes by outlining practical steps claimants can take to enhance their prospects of enforcing awards against frozen assets.

The Chances of Obtaining a License

1. In the US

In the US, a License from OFAC¹ is generally required to enforce arbitral awards against frozen assets when the award debtor has been designated on a sanctions list under the various US sanctions against Russia (US Sanctions).² Yet, in the context of the sanctions imposed by the US against Venezuela, several enforcement proceedings directed against Venezuelan state assets in the US have advanced to judgment without the need for a License.³ It remains to be seen whether OFAC will embrace such a liberal approach with respect to the Russia-related U.S. Sanctions.

OFAC has broad discretion in granting a License. It generally decides in light of US foreign policy interests and regularly in concertation with other US federal agencies. There is no publicly available guidance on how OFAC exercises its discretion in this regard, and the specific requirements for obtaining a license depend on the particular facts and circumstances of each case.⁴ OFAC's application instructions underline that *"while no explicit burden of proof exists, it is important to include detailed, accurate, and verifiable information to OFAC so that the agency can make an informed decision regarding [the] application"*.

1. OFAC stands for Office of Foreign Assets Control, an office of the US Department of the Treasury that administers and enforces US economic and trade sanctions.

2. OFAC issues both specific and general licenses. General licenses authorize activities that are otherwise prohibited under U.S. sanction regimes, without the need to apply for a specific exemption related to a particular transaction. For the U.S. sanctions against Russia, no general license exists to enforce awards against frozen assets, and therefore, a creditor must request and obtain a specific license. See *United Media Holdings, N.V. v. Forbes Medial LLC* (2017), decision available at: <https://www.courtlistener.com/docket/4357501/unit-ed-media-holdings-nv-v-forbes-media-llc/>.

3. See OFAC FAQ 808 (available at: <https://ofac.treasury.gov/faqs/search/808>).

4. Indications as to OFAC's approach may be derived from other sanctions programs: According to its guidance on Cuba's sanctions, OFAC may conduct background investigations on individuals involved in the Cuba-related business. If someone fails the review, the applicant may choose to remove them from their position. The guidance also notes that OFAC may consider past compliance with its rules and regulations. See Counterterrorism and Humanitarian Engagement Project – OFAC Licensing (2013) at 4.

Precedents rendered in relation to US Sanctions show that OFAC generally takes a positive and constructive approach in granting Licenses. For example, in *United Media Holdings, N.V. v. Forbes Medial LLC* (2017), Forbes obtained a License to enforce the restitution of a portion of prepaid royalties it had been granted in an arbitral award against frozen bank assets.⁵

2. In the EU

Art. 5(1) of the EU Regulation No. 269/2014 (EU Regulation) provides that the release of funds of a person designated in Annex 1 to the EU Regulation may be authorized by the competent authority of the Member States⁶ only if the award was rendered *before* the relevant person was designated as sanctioned. *After* the designation, a License to satisfy monetary claims against frozen funds will only be granted in respect of judicial or administrative decisions rendered or enforceable in an EU Member State. This means that the enforcement of arbitral awards rendered post-designation against frozen assets is halted indefinitely, i.e. until the freeze is lifted, whereas such enforcement of court judgments is still permitted.⁷

The reason for placing arbitral awards at a disadvantage in relation to court judgments is unclear.⁸ The practical implication is that claimants may see themselves deprived of the possibility to have a potential arbitral award enforced within a reasonable time.

3. In Switzerland

In Switzerland, Art. 15 para. 5 lit. c of the Ordinance on Measures in Connection with the Situation in Ukraine provides that a License may be granted by SECO⁹ to authorize transactions from frozen assets to satisfy claims that are subject to an "existing" decision of a court, administrative body or arbitral tribunal.¹⁰

The term "existing" is neutral in the sense that the Swiss licensing regime does not appear to differentiate between arbitral awards having been rendered before or after the designation of a party. Thus, compared to the EU Regulation, the Swiss License regime generally appears to

5. *United Media Holdings, N.V. v. Forbes Medial LLC* (2017), at p. 20. See also: Vladimir Khvalei, *Impact Of Sanctions on International Arbitration*, in Dossier of the ICC Institute of World Business Law, Overriding Mandatory Rules and Compliance in International Arbitration (2022), at 141; OFAC, *Ukraine/Russia-Related Sanctions Program*, Factsheet (2016), at 6 (available at: <https://ofac.treasury.gov/media/8741/download?inline>).

6. The competent authorities are defined in Annex II of the EU Regulation.

7. Kristin Campbell-Wilson & Natalia Petrik, *Chapter 2: Paving the Way for Justice: Arbitration and EU Sanctions Against Russia*, in *Stockholm Arbitration Yearbook* (2023), at 18 f.

8. Charles Claypoole, *Sanctions, Countermeasures, and their Impact on International Arbitration*, in *Les Cahiers de l'Arbitrage – The Paris Journal of International Arbitration* (4/2022), at 1048.

9. SECO stands for State Secretariat for Economic Affairs, which is the federal government's center of excellence for all core issues relating to economic and labor market policy.

10. Art. 15 para. 5 lit. c reads as follows: "The SECO may exceptionally authorise payments from frozen accounts, transfers of frozen assets and the release of frozen economic resources to: [...] (c) satisfy claims that are the subject of an existing decision by a court, administrative body or arbitration tribunal."



be more favorable for claimants seeking to enforce arbitral awards against the frozen assets of award debtors.

The data available so far relate to Licenses issued to avoid hardship in specific cases, such as with respect to the payment of taxes, legal fees, or humanitarian activities. Even though not specifically mentioning SECO's practice of granting Licenses to enforce arbitral awards against frozen assets, the statistics do not suggest SECO's licensing policy to be overly strict.¹¹

How to Obtain Clearance from Banks

Among other factors, banks will consider the nature of the transaction, the currency used and the scope of the activities that they are required to perform.

After obtaining a License to enforce an arbitral award against frozen assets, award creditors still have to make sure to obtain bank clearance for any related transaction. Depending on the relevant legislation and practices, banks might not be able or willing to receive payments from sanctioned accounts even in the presence of a

License. In particular, banks risk being subject to unilateral sanctions with an extraterritorial reach that are not covered by the available License.

Among other factors, banks will consider the nature of the transaction, the currency used and the scope of the activities that they are required to perform.¹² For instance, even with an EU License in place, banks may be reluctant

to process or receive payments in USD involving a party designated on a US Sanctions' list. In such cases, banks will regularly insist on obtaining formal clearance from the relevant authorities. However, if the banks are provided with all relevant documentation, these administrative burdens can usually be overcome.

How to Maximize the Chances of Enforcing Against Frozen Assets

To increase the chances of enforcing an arbitral award against a designated debtor, parties should consider developing enforcement strategies already before the conclusion of the arbitration proceedings. This may include the collaboration with asset tracing services providers and local sanctions law specialists. By carefully considering enforcement options and engaging relevant experts early in the process, parties can enhance the likelihood of successfully monetizing arbitral awards, even against frozen assets. Parties should consider these strategies, even if the opposing party is not yet designated, but is at risk of designation, or becomes designated during the arbitration process due to its ties to Russia. As we have seen in the recent times, strategic foresight and informed collaboration are ultimately crucial to navigating the complexities of Russia-related sanctions and enforcement regimes.

Marzia SCHILLECI

Senior Associate, CMS von Erlach Partners AG
Zurich, Switzerland
marzia.schilleci@cms-vep.com

Niklaus ZAUGG

Partner, CMS von Erlach Partners AG
Zurich, Switzerland
niklaus.zaugg@cms-vep.com

11. AWP, *Wert gesperrter russischer Vermögen hat abgenommen*, cash of 23 April 2024, available at: <https://www.cash.ch/news/wert-gesper-ter-russischer-vermogen-hat-abgenommen-705173>, stating that SECO has granted 325 exemptions, approving most of them.

12. Cf. ICC, *Note to parties and arbitral tribunals on ICC compliance*, (2017), at 15 seqq.

What Is Copyright?

The Basics



LEWIS D. SOROKIN



AMBER SHEPPARD

➤ Cet article donne un aperçu de la loi sur le droit d'auteur, en mettant l'accent sur son évolution aux États-Unis et son adaptation aux nouvelles technologies. La loi sur le droit d'auteur protège diverses œuvres créatives, mais exclut les œuvres sans auteur humain, telles que les contenus générés par l'intelligence artificielle ou ceux qui relèvent du domaine public. Parmi les questions d'actualité, citons les procès concernant les similitudes musicales, les droits d'auteur sur les œuvres numérisées, le statut juridique des API logicielles et les débats autour de l'utilisation par l'IA de contenus protégés par le droit d'auteur à des fins d'entraînement. L'article souligne qu'à mesure que la technologie progresse, la législation sur le droit d'auteur doit s'adapter pour protéger et encourager efficacement la créativité.

➤ Este artículo ofrece una visión general de la ley de derechos de autor, centrándose en su evolución en Estados Unidos y su adaptación a las nuevas tecnologías. La ley de derechos de autor protege diversas obras creativas, pero excluye las obras sin autoría humana, como los contenidos generados por inteligencia artificial o los contenidos de dominio público. Entre los temas de actualidad figuran los pleitos por similitudes musicales, los derechos de autor en obras digitalizadas, la situación jurídica de las API de software y los debates en torno al uso por la IA de contenidos protegidos por derechos de autor con fines de entrenamiento. El artículo señala que, a medida que avanza la tecnología, la legislación sobre derechos de autor debe adaptarse para proteger y fomentar eficazmente la creatividad.

From works of art to lines of code, copyright is a form of intellectual property that protects original works of human authorship. It is monopolistic in nature, granting authors an exclusive bundle of rights, including the rights to distribute, reproduce, perform, display, and create derivative works based on their creations.

Since its humble beginnings as a response to the invention of the printing press, copyright has always responded to advances in technology and trends in the arts. What does this mean in a time when creations are viewed and shared globally with a click of a button? Focusing on American jurisprudence, this article discusses copyright's history, principles, and how it is evolving in the digital age.

History

The world's first copyright law was Britain's Statute of Anne in 1710. In the United States, the "Promotion Clause" of the Constitution (Article I, § 8, clause 8) is the constitutional basis for Congress to enact copyright laws.

America's first comprehensive Copyright Act was enacted in 1790, granting 14-year protection to authors of books, maps, and charts. In 1831, this was amended to 28 years. With increasing globalization, 1886 saw the passage of the Berne Convention for the Protection of Literary and Artistic Works, an international treaty establishing copyright standards among member countries.

Congress later enacted the Copyright Act of 1909, expanding copyright protection to a wider range of works, including musical compositions, dramatic works, and photographs.

This set the stage for the copyright law in effect today, the Copyright Act of 1976, which significantly broadened the range of protectable works and extended the duration of protection to the life of an author plus seventy years, a change which allowed the U.S. to join the Berne Convention.

Responding to the dawn of the internet, Congress enacted the Digital Millennium Copyright Act (DMCA) in 1998. This tackled risks posed by widespread file distribution such as online piracy, while also limiting liability of online service providers.

As the internet has matured, social media has enabled a faster pace and higher volume of distribution for creators, leading to a rise in infringement cases that may not be

worth the cost of litigation. The Copyright Alternative in Small-Claims Enforcement Act of 2020 (CASE Act) addressed this by establishing the Copyright Claims Board, a small claims court for copyright disputes under a certain dollar value, where claimants are often *pro se*.

Copyright protects original works of human authorship fixed in a tangible medium of expression.

What Is Protected?

Copyright protects original works of human authorship fixed in a tangible medium of expression. Under 17 U.S.C. § 102, this includes:

- **Literary Works** (including traditional written works and computer software)
- **Musical Works** (including compositions)
- **Dramatic Works**
- **Pantomimes and Choreographic Works**
- **Pictorial, Graphic, and Sculptural Works**
- **Motion Pictures and Other Audiovisual Works**
- **Sound Recordings** (including musical and other recordings)
- **Architectural Works**

What Is Not Protected?

Once copyright in a work expires, it enters the “public domain” and is free to be used by all. Works may also enter the public domain if they fail to meet the requirement of human authorship.

- *Naruto v. Slater, et al*, 888 F.3d 418 (9th Cir. 2018): Nature photographer David Slater set the scene for a monkey named Naruto to take a selfie on his camera. In this suit brought by PETA on behalf of Naruto, the Ninth Circuit held that neither Slater nor Naruto owned copyright in the photograph.

- *Allen v. Perlmutter*, n° 1:24-cv-02665 (D. Col. filed 26 Sept. 2024): Digital artist Jason Allen used a generative artificial intelligence tool called Midjourney to assist in creating a digital art piece called “Théâtre D’opéra Spatial” for competition in the 2022 Colorado State Fair. Despite Allen giving Midjourney 624 text-based prompts to produce the final work, the U.S. Copyright Office set the policy that AI-generated works are not protectable by copyright.

Fair Use

Fair use is a common affirmative defense to copyright infringement that allows limited use of copyrighted material without permission under certain conditions. The four factors of fair use help determine if using copyrighted material is “fair use.”

1. Purpose and Character of the Use

Courts favor transformative uses that add new meaning. Nonprofit, educational, and personal uses are more likely to be fair use than commercial uses, though even commercial uses can qualify if highly transformative.

2. Nature of the Copyrighted Work

Uses of factual, published works are more likely to be fair than uses of creative or unpublished works.

3. Amount and Substantiality of the Portion Used

The less used, the more likely it is to be fair use. Using the “heart” of the work may weigh against fair use.

4. Effect of the Use on the Market

If the use harms the market or demand for the original work, it is less likely to be fair use.

No single factor is decisive; all factors are weighed together. Transformative uses for educational, critical, or commentary purposes are often seen as fair use.

Contemporary Copyright Issues

This section examines developments over the past decade, highlighting technological advancements and the arts.

“Your Song Sounds Like My Song” Lawsuits

Numerous musical artists have been sued by authors of earlier works alleging copyright infringement, with inconsistent results across cases.

- *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018): The jury found “Blurred Lines” by Robin Thicke and Pharrell Williams infringed Marvin Gaye’s “Got to Give It Up,” resulting in a \$5.3 million judgment, raising debates about protecting the “feel” and “vibe” of a song.
- *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020) (en banc): Led Zeppelin won the case over the opening riff of “Stairway to Heaven” and Spirit’s “Taurus,” with

the court concluding that similarities were based on common, unprotectable musical elements.

- *Gray v. Hudson*, 28 F.4th 87 (9th Cir. 2022): Katy Perry's initial loss for "Dark Horse" against Flame's "Joyful Noise" was overturned, as the similar ostinato, a repeating musical motif, was deemed too basic for copyright protection.
- *Tempo Music Invs., LLC v. Cyrus*, n° 2:24-cv-07612 (C.D. Cal. filed Sept. 16, 2024): Miley Cyrus is accused of copying Bruno Mars' "When I Was Your Man" in "Flowers." The outcome is pending.

Digitized Printed Works

Controlling the distribution of hard copy books is inherently different from their digital counterparts. This has led to cases exploring how copyright treats digitized works.

- *Authors Guild, Inc. v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015): Google's right to digitize books for search functionality was upheld under fair use, as the project was transformative and did not replace the original works.
- *Hachette Book Grp., Inc. v. Internet Archive*, n° 23-1260, 2024 WL 4985273 (2d Cir. Sept. 4, 2024): The Internet Archive's Controlled Digital Lending and COVID-19 pandemic National Emergency Library programs were found to infringe copyright, as digitizing and lending full books was not deemed fair use. A petition for certiorari is still possible.

Software APIs

Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021) was a milestone in software copyright, providing much-

needed clarity on how APIs, critical components that allow different software systems to communicate, can be legally used by developers. SCOTUS ultimately ruled that Google's use of Java APIs to build the Android operating system was fair use, finding that using Java APIs was transformative and essential for software interoperability.

Transformative uses for educational, critical, or commentary purposes are often seen as fair use.

AI Training and Fair Use

AI developers often use publicly available data, such as news articles, music, and images, to train their models. Whether this practice is fair use is still being litigated.

- *The New York Times Co. v. Microsoft Corp. & OpenAI, Inc.*, n° 1:23-cv-11195 (S.D.N.Y. filed Dec. 27, 2023): Examining whether using news articles for AI training without permission is fair use.
- *UMG Recordings, Inc. et al. v. Suno, Inc.*, n° 1:24-cv-11611 (D. Mass. filed June 24, 2024) and *UMG Recordings, Inc. et al. v. Uncharted Labs, Inc. d/b/a Udio*, n° 1:24-cv-04777 (S.D.N.Y. filed June 24, 2024): Investigating if using copyrighted music for AI training constitutes infringement.
- *Universal Music Publ'g Grp. v. Anthropic PBC*, n° 23-cv-01092 (M.D. Tenn. filed Feb. 15, 2024): Questioning whether scraping song lyrics to train AI models is fair use.
- *Dow Jones & Co. v. Perplexity AI, Inc.*, n° 1:24-cv-11857 (S.D.N.Y. filed Oct. 25, 2024): Considering if using copyrighted articles for retrieval-augmented generation violates copyright.

Conclusion

Copyright law has always evolved alongside technology. As this area of intellectual property continues to keep up with the latest in innovation, future generations of creators should continue to benefit from the rights it affords them in their creative works.

Lewis D. SOROKIN, Esq., AIGP
Associate Attorney, Wilftek LLC
Ardmore, PA, United States
lewis@wilftek.com

Amber SHEPPARD
Associate, Pugh Accardo
New Orleans, LA, United States
asheppard@pugh-law.com



Note: This article is a collaboration with the American Bar Association Intellectual Property Law Section Young Lawyers Action Group.

Belgium Grants Labour Rights to Sex Workers

Belgium has made a groundbreaking move by becoming the first country in the world to pass a law giving sex workers the same legal protections and benefits as employees in other professions, pursuant to the country's 2022 decision to decriminalize sex work. Beginning 1st December 2024, sex workers can enter into official employment contracts and have access to health insurance, maternity leave, sick pay leaves, pensions, unemployment support, and pensions as other employees. Crucially, the law empowers sex workers by giving them the right to refuse clients or sexual acts without fear of punishment or termination.

Employers must obtain authorization, adhere to strict safety protocols, and meet background requirements, including no prior conviction for sexual assault or human trafficking. Additionally, employers are obliged to provide clean linen, condom and hygiene products, and install emergency buttons at the workplace. While the new law does not apply to self-employed sex workers, it will prevent employers with a previous history of crimes, such as trafficking or abuse, from working in the field. Independent sex work remains permitted, but regulated third-party hiring or violation of the legal framework will be prosecuted. The law also includes comprehensive safeguards to protect workers and ensure industry standards.



Australia Bans Social Media for Children under 16 Years of Age

Australia approved a social media ban making it illegal for children under 16 years of age to access social media platforms such as Facebook, Instagram, X, Snapchat, TikTok, and others. This Online Safety Amendment (social media Minimum Age) Bill 2024 aims to protect young people from the detrimental mental health impacts of social media, especially related to cyberbullying and self-harm. The law imposes substantial fines of up to AUD 49.5 million (USD 32 million) on platforms that fail to comply. A trial to enforce the law began in January 2025, with full implementation set in a year. The law has faced significant opposition from privacy advocates, youth advocacy groups, and some tech industry representatives who argue that it could lead to data privacy concerns and isolate vulnerable youth, such as LGBTQ and migrant teenagers, from essential support networks. However, 77% of the Australian population supports the law according to the latest polls.

The practical aspects of implementation, including how age verification systems will be developed and the potential impact on digital freedoms, remain a cause of concern. Privacy advocates worry that the law could lead to increased surveillance through digital identification systems. The law no doubt positions Australia as a global leader in regulating social media use among minors, but it also has the potential to strain relationships with tech giants and international partners. The law's impact will be closely watched by other governments considering similar measures.

U.S. - Landlord Price Fixing

In the United States, a commercial revenue management software called RealPage, through its products YieldStar and its successor, AI Revenue Management, have been succeeded by the U.S. Department of Justice, together with Attorneys General from eight states, for an unlawful scheme. Competing individuals provided RealPage with non-published sensitive information regarding lease terms, including rent price, and then the software generates recommendations that decrease competition regarding apartment pricing. The Department of Justice claims that this scheme, utilizing the data trove, is able to maintain a monopoly for its software. This further enables landlords to deprive renters of the benefits of competition, contrary to the Sherman Act, a U.S. Federal Antitrust Law, by its essentially price fixing activities. The U.S. Federal Trade Commission defines price fixing as an agreement (written, verbal, or inferred from conduct) among competitors to raise, lower, maintain, or stabilize prices or price levels.

Contributors to the Legal Spotlights in this issue are: Christian Clapp, Joaquín Palma Cruzat, Barbara Gislason, Ashu Thakur, Camille Vuillemin-Loup.

France - Criminalization of Marital Rape in France

On the heels of the Dominique Pélicot scandal, French law and consent is once again facing scrutiny. The European Court of Human Rights (ECHR) found France violated Article 8 of the Convention, which safeguards the rights to privacy and family life, including sexual freedom. The violation arose from a French Court faulting a wife in divorce proceedings for her refusal to engage in sex with her husband. The ECHR asserted that courts should not interpret a refusal to engage in sexual intercourse as grounds for fault in divorce cases. It concluded that France infringed upon the wife's right of privacy and family life by upholding a matrimonial duty that disregards consensual sexual relations. ECHR's ruling underscores the critical principles of sexual freedom and the fundamental right to control one's own body. The decision puts to rest any legal inconsistencies, holding sexual freedom and consent more sacred than an antiquated marital duty. This sets a significant precedent for the criminalization of marital rape, further advancing the right to consent and autonomy within marriage.



Suisse - Requalification des relations entre chauffeurs / livreurs et plateformes de livraison

En Suisse, la relation entre Uber Eats et ses livreurs a été qualifiée de contrat de travail en 2022. Pour contourner cette qualification, Uber délègue à présent les livraisons à des entreprises comme Chaskis SA, qui fournit des livreurs en échange d'un paiement par livraison. Le Tribunal fédéral a récemment examiné si cette activité constitue une location de services nécessitant une autorisation. Il a conclu que Chaskis cède à Uber l'essentiel du pouvoir de direction sur les livreurs, une caractéristique centrale de la location de services. En effet, les livreurs utilisent l'application Uber Eats, qui contrôle leur travail en attribuant les livraisons, en estimant le temps de trajet, et en restreignant le périmètre de livraison. Le Tribunal fédéral a ainsi confirmé que Chaskis doit obtenir une autorisation préalable et a constaté la violation des obligations légales par la société.

U.S. - Executive Order Regarding World Health Organization

U.S. President Donald Trump issued an Executive Order on January 20, 2025 that the U.S. would withdraw from the World Health Organization (WHO), an agency of the United Nations (UN). U.S. member dues have ranged from \$100 - \$122 million annually over the past decade, while the U.S. contributed substantial voluntary funding. Reasons given for this action by the new administration included that WHO mishandled the Covid 19 pandemic, failed to make necessary reforms, played favorites, and that the U.S. pays WHO more than China. In addition to this Executive Order, employees of the U.S. Centers for Disease Control and Prevention were initially told to immediately cease contact and data sharing with WHO. It seems that there is a one-year notice requirement to withdraw.



Critics say that this withdrawal impacts pandemic readiness, information sharing about emerging epidemics like Zika and Ebola, outbreaks like Mpox, and resurgent dangers like malaria and measles. WHO's programs that monitor drug resistance for antibiotics and drugs used to treat diseases, including treatment for HIV and malaria, are impacted as treatment modifications and strategies are evidence based. Seasonal flu vaccines, historically based upon data from the flu surveillance network, would be compromised, thereby causing many, including the elderly, to die. The U.S. may also forfeit its respected role in public health diplomacy, as WHO programs provide life-saving water, food, and vaccines to children around the world. Economic losses for U.S. pharmaceutical companies and health tech companies will also be impacted.

U.S. - Trump Efforts to Destroy USAID

The U.S. Agency for International Development (USAID) was established in 1961 by President John F. Kennedy through an act of Congress. When President Trump recently took office, he froze foreign assistance for 90 days. As the leading humanitarian and development agency in the U.S., it has received less than 1% or \$40 billion of the U.S. Federal budget, which is \$6.75 trillion. These funds were used for development and to address poverty, disease, and other humanitarian crises worldwide. Without funds from USAID, it is estimated that AIDS deaths alone may reach 6.3 million in the next five years. It is also believed that the vacuum created by the loss of considering this agency will have other dire national security consequences this agency has long been emblematic of U.S. soft power. Surprisingly, President Donald Trump whilst speaking beside the South African President Cyril Ramaphosa during a White House visit on 22 May 2025 has called his own foreign aid cuts at USAID “devastating”!!!



The 10,000 employees who work for the agency, aware that the signs for the agency were immediately removed or painted over, the USAID website is inaccessible, and many are locked out of their computer systems (including federal payment systems), found their jobs in jeopardy. One federal judge, ruling in a lawsuit about the government’s violation of the U.S. Constitution, temporarily prevented some workers to be forced into paid leave while other legal efforts are underway.

Presidential Stop Work orders seemed at odds with waiver pronouncements that the Secretary of State say are in place. Until recently, Secretary of State Marco Rubio was a long-term USAID enthusiast. And now more than 500 metric tons of U.S. food commodities are not being distributed. Elon Musk, the richest man in the world, who U.S. President Donald Trump selected to head the U.S. Department of Government Efficiency (DOGE), has characterized USAID as a criminal organization that should die, and that the agency is a viper’s nest of radical-left Marxists. President Trump claims the agency has been run by radical lunatics. In a recent announcement, the Trump administration said it would eliminate 90% of the USAID foreign aid contracts.

Chile - Fallido intento del Gobierno chileno de comprar la casa de Salvador Allende

El fallido intento del gobierno chileno de comprar la casa de Salvador Allende para un museo generó conflictos constitucionales. La senadora Isabel Allende y la ministra Maya Fernández, copropietarias del inmueble (hija y nieta del fallecido presidente), enfrentaron cuestionamientos. Según el artículo 37 bis de la Constitución, los ministros de Estado tienen prohibido celebrar contratos con el Estado. La ministra Fernández, al ser copropietaria, habría vulnerado esta norma. Por su parte, el artículo 60 de la Constitución prohíbe a los parlamentarios celebrar contratos con el Estado, lo que inhabilita a la senadora Allende para celebrar cualquier contrato al Fisco. Estos conflictos llevaron a requerimientos ante el Tribunal Constitucional para cesar en su cargo a la Senadora Allende, la posibilidad de un *impeachment* contra la Ministra Fernández por diversas infracciones a la Constitución, y renuncias de otras autoridades.

U.S. Withdraws from the Paris Agreement

On 21 January 2025, U.S. President Donald Trump issued an Executive Order initiating the withdrawal of the United States from the Paris Agreement, citing economic concerns while prioritizing his “America First” agenda. The President said the agreement imposed disproportionate economic burdens on the United States, potentially hindering its energy, production, and broader economic goals. This decision was swiftly accompanied by an additional order to “Unleash American Energy,” signaling his priority for fossil fuel development.

The Paris Agreement, adopted in December 2015 under the United Nations Framework Convention on Climate Change (UNFCCC), seeks to combat global warming by limiting temperature increases to below 2 degrees Celsius (3.6 degrees Fahrenheit), designed to keep the rise to 1.5 Celsius (2.7 Fahrenheit) above preindustrial levels. As the world’s second largest emitter of greenhouse gases (GHGs), the U.S. had been an active participant in this global effort and had pledged to reduce net GHG emissions by 61-66% below 2005 levels by 2035.

The withdrawal by the U.S. has financial implications as it impacts the overall viability of the Paris Agreement’s objectives. The legal, economic, and geopolitical consequences of this decision will undoubtedly be scrutinized in the years to come, and mitigation and adaptation efforts in developing countries are expected to be severely impacted. The U.S. withdrawal, effective January 2026, may also signify a cessation of U.S. participation in Nationally Determined Contributions (NDCs), which require parties to submit detailed plans to achieve emissions reductions.



**Are you a Law
Student looking for:**

**BECOME A
MEMBER
FOR ONLY
€15 A YEAR!**

NETWORKS

BUILD YOUR PROFESSIONAL
NETWORK EARLY IN YOUR CAREER.

GLOBAL ENGAGEMENT

CONNECT WITH LAWYERS FROM
ALL AROUND THE WORLD.

MENTORSHIP

LEARN FROM LAWYERS WITH
DECADES OF EXPERIENCE.

LEGAL EXPOSURE

GAIN INSIGHTS AND FAMILIARITY
WITH THE LEGAL PROFESSION
BEFORE GRADUATING.

PEER CONNECTIONS

NETWORK WITH OTHER YOUNG
LAWYERS AND STUDENTS.



**Join the
UIA!**



Union Internationale des Avocats
International Association of Lawyers
Unión Internacional de Abogados

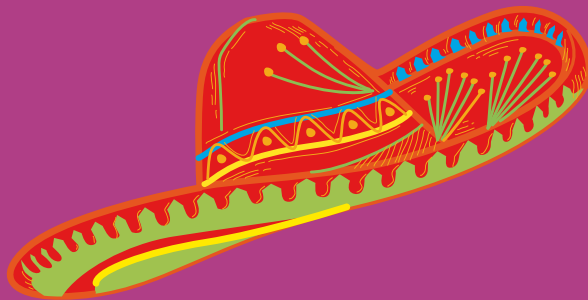
www.uianet.org

69TH UIA CONGRESS

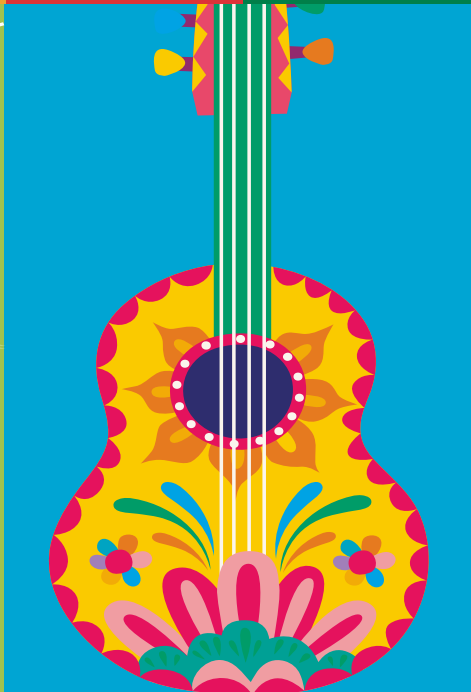
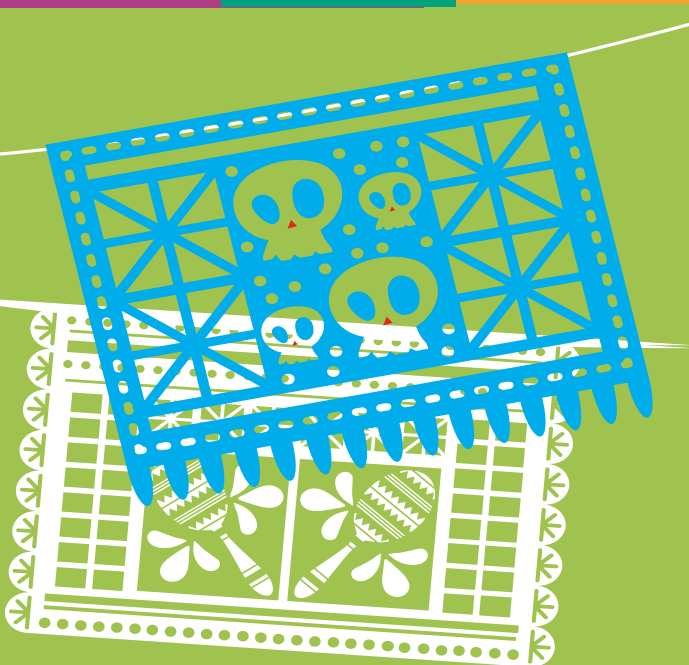
SAVE THE DATE

29 OCTOBER - 2 NOVEMBER, 2025

GUADALAJARA



GUADALAJARA
2025
UIA CONGRESS



#UIAGDL