International Lawyer

Volume 42
Number 2 *International Legal Developments in Review: 2007*

Article 38

2008

Asia/Pacific Law Committee

Steven Austermiller

Albert Vincent Y. Chang

Manish Dhingra

Manjit Gill

William Herbert

See next page for additional authors

Asia/Pacific Law Committee*

Steven Austermiller, Albert Vincent Y. Yu Chang, Manish Dhingra, Manjit Gill, William Herbert, John Horner, Haig Oghigian, Snehal Patil, David Quigg, & Mohammad Ali Syed**

The Asia/Pacific Committee covers the Asia/Pacific region, including Afghanistan, Australia, Bangladesh, Bhutan, Brunei, Cambodia, The Cook Islands, India, Indonesia, Japan, North Korea, South Korea, Laos, Malaysia, Myanmar, Nepal, New Zealand, Pakistan, the Philippines, Singapore, Sri Lanka, Thailand, and Vietnam. This article highlights selected 2007 legal developments in Cambodia, India, Japan, Malaysia, New Zealand, Pakistan, and the Philippines.

I. Cambodia

In 2007, after years of work, the new Civil and Criminal Procedure Codes finally came into force. In addition, Cambodia recently began an important step forward by enacting

* A more detailed version of this article is available on the ABA Asia/Pacific Law Committee's homepage: http://www.abanet.org/dch/committee.cfm?com=IC810000.

** The section on Cambodia was contributed by Steven Austermiller. Steven Austermiller manages a legal reform program in Cambodia on behalf of the American Bar Association, which is funded by the U.S. Agency for International Development. The portion on the Philippines was written by Albert Vincent Y. Yu Chang (ayuchang@wnj.com). Mr. Yu Chang is an attorney with Warner Norcross & Judd LLP in Grand Rapids, Michigan and is licensed to practice in the Philippines and the State of Michigan. Manish Dhingra, the Managing Partner at the New Delhi based full-service law firm "Dhingra & Singh—Attorneys at Law," specializing in Intellectual Property Law, contributed certain sections on India. Manjit Gill, an attorney with Becker & Poliakoff, wrote the portion on Malaysia. William Herbert, an attorney who is licensed to practice law in New York and Georgia, solicited and compiled submissions for this article. He also wrote portions of the section on Japan, including the section on consumer finance laws. He may be reached at william.herbert @gmail.com. John Horner, M&A Corporate partner with the New Zealand law firm Quigg Partners, contributed to the portion on New Zealand. He may be reached at johnhorner@quiggpartners.com. Haig Oghigian FCI Arb., a partner with Baker & McKenzie in Tokyo, Japan wrote portions of the section on Japan, including Arbitration. Snehal Patil, a corporate attorney who is licensed to practice law in California, USA and in India, contributed certain sections on India, including Key Policy Changes on the Anvil in 2008. He may be reached at snehalbpatil@yahoo.com. David Quigg, M&A Corporate partner with the New Zealand law firm Quigg Partners, contributed to the portion on New Zealand. He may be reached at david quigg@quiggpartners.com. Mohammad Ali Syed, an attorney with the law firm of King and Ballow in Nashville, Tennessee, contributed the section on Pakistan. He may be reached at MSyed@kingballow.com.

its first arbitration law, and 2007 saw the opening of the Khmer Rouge war crimes tribunal—known officially as the Extraordinary Chambers of the Cambodian Courts (ECCC).

A. Code of Criminal Procedure

In 2007, the new Cambodian Code of Criminal Procedure (CCCP) was enacted. The CCCP replaced a temporary criminal law, "Provisions Dated September 10, 1992, Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period" (the "UNTAC Law"), which had been drafted by the United Nations Transitional Authority in Cambodia (UNTAC), and the more detailed, but still limited, Law on Criminal Procedure (the "LCP") adopted in 1993 by the State of Cambodia. The CCCP closely follows the French Criminal Procedure Code (the "French Model") due to the fact that the French government provided drafting assistance. Since Cambodia is a former French colony, it already had strong French influences in its legal system. The new code makes some changes and provides greater details and rationality to the framework but does not appear to radically change criminal procedure in Cambodia.[1]

Under the CCCP, police have the power to detain suspects for up to forty-eight hours (extendable to seventy-two hours in certain cases), which is twice the time under the French. After twenty-four hours, the detainee has a right to meet with a lawyer or other person for only thirty minutes.[2] Although this is a limited time period, the "other person" language is helpful since it allows greater flexibility for poor Cambodians who might choose to meet with a friend or family member instead of a lawyer. Another novel feature is the power of police to detain a witness who refuses to provide information.[3]

New defendant protections in the CCCP include: 1) the requirement that the police advise detainees of the reasons for their detention and their detention rights;[4] 2) more complete rules in connection with searches and recordation of searches;[5] and 3) more comprehensive recordation of police custody details including interrogations.[6] The CCCP also streamlines the procedure for sending cases from the prosecutor to the trial court[7] and reduces the backlog occurring at the Investigating Judge (IJ) stage by allowing the IJ to delegate most, if not all, investigative activities to judicial police officers.[8] This could be important given the inefficiencies of the current criminal procedure system. The CCCP also introduces the concept of judicial supervision, a procedure that allows for the release of the accused pending trial.[9] This may lead to a reduction of pre-trial deten-

1. The Cambodian Code of Criminal Procedure abrogates all previous criminal procedure laws. Code Criminal Procedure art. 611 (65 Official Gazette of Kingdom of Cambodia 2007) [hereinafter "CCCP"].

2. *Id.* art. 98.

3. *Id.* art. 96. This is not available under the UNTAC Regime or even under the current French Model. It is unclear whether this will lead to abuse.

4. *Id.* art. 91.

5. *Id.* art. 91 (replacing Article 38 of the LCP Law and Article 20 of the UNTAC Law).

6. *Id.* arts. 93, 97, 101, 102.

7. *Id.* arts. 47, 48.

8. *Id.* art. 183. Article 128 provides that the court clerk "cannot perform the duties of the IJ." This may be a response to a practice under the UNTAC Regime that was sometimes anecdotally reported. *See Court Watch Bulletin*, 2 Center for Social Dev. 43 (Cambodia).

9. CCCP art 223.

tions.[10] The CCCP also includes an important new requirement that an accurate record be made of all questions, answers, and statements during the IJ interrogations.[11] It further creates a new Investigation Chamber (IC) at the Appeals Court. The IC will hear a wider range of preliminary appeals than under the old regime, including appeals alleging that the IJs failed to properly exercise powers when requested by the parties or prosecutor.[12]

B. Code of Civil Procedure

On July 6, 2006, Cambodia enacted its new Civil Procedure Code (CPC). The CPC entered into force one year later in July 2007. There are a number parallels between the criminal procedure and civil procedure efforts. Like the Criminal Procedure Code, the CPC was drafted with significant foreign assistance—in this case from Japan. As a result, the new CPC closely follows the Japanese Code of Civil Procedure. In addition, the new CPC, like its criminal code cousin, also replaces an UNTAC civil procedure regime.

The CPC applies to basically all cases that are not criminal in nature. It increases court efficiency by providing for cases to be dismissed prior to adjudication if rules are not followed by the plaintiff.[13] For instance, the CPC provides for a mandatory default judgment to be entered against the plaintiff if the plaintiff fails to appear on the first day of the preparatory proceedings or the first day of the oral arguments (trial).[14] It also provides for simple, effective procedures to handle the large number of small claims cases.[15]

The Japanese drafters' Textbook on Code of Civil Procedure of Kingdom of Cambodia (the "Textbook") indicates that, at least regarding legal and factual allegations, the adversary system is adopted.[16] One result is that " [t]he court[s] shall not adjudicate matters that were not raised by the parties."[17] The Textbook indicates this will be strictly interpreted to mean that, for instance, if a party demands $10,000 in the formal submissions but proves more, it is limited to that formal demand.[18] A court cannot base its judgment on a fact not alleged by a party.[19]

The principle regarding evidence, however, is different. Although Cambodian courts are directed to primarily examine evidence offered by the parties, if that evidence is inconclusive, the court may examine evidence sua sponte.[20]

---

10. Pre-trial detention may be imposed for all crimes in which the penalty is one year or more in prison. The equivalent provision in the French Model is for crimes where the penalty is three years or more. Nouveau Code de Procedure Civile [N.C.P.C.] 143-1.

11. CCCP art. 242. This is contrary to the previous practice that allowed for mere summaries.

12. *Id.* art. 267.

13. Code Civil Procedure arts. 78, 81, 200, 202, 217-219, 55 Official Gazette of Kingdom of Cambodia 2006 [hereinafter "CPC"].

14. *Id.* art. 200.

15. *Id.* art. 223-239.

16. Textbook on Code of Civil Procedure of Kingdom of Cambodia, Book 3 ch. 2 § 1(III), at 44-45 [hereinafter "Textbook"].

17. CPC art. 182 (2).

18. Textbook, *supra* note 16, 3, ch. 2 § 1 (II) at 42.

19. CPC art. 95; Textbook, *supra* note 16, 3, ch. 2 § I (III) at 44. Obviously, this places a premium on accurate and inclusive pleading. CPC Article 84 provides for amendment of claims through the conclusion of the oral argument phase so long as it does not cause "substantial delay." CPC art. 84.

20. CPC art. 124.

One salient improvement in the civil procedure regime is the introduction of a "preparatory proceeding." This is the pretrial hearing where the parties appear with the judge to organize the claims, facts, and evidence in preparation for the oral argument.[21] This replaces the investigation procedure under the old rules, where the court determined the facts by holding ex parte interrogations of parties and witnesses without any parties present and then used this information to justify its judgment.[22] The new rules open the process up and allow for a more adversarial process to take hold by placing the burden on the parties to prove and disprove claims.

The trial is now called "oral argument."[23] The court's adjudication of cases is to be based upon evidence learned at the oral argument, where parties appear in person, sit opposite each other, and present motions, allegations, and evidence directly to the court in public.[24]

The CPC and the Commentary stress that all parties shall be heard, and the court shall always preserve the principle of "La Contradiction," whereby all opposing parties sit face to face and are provided an equal opportunity to present their legal or factual assertions.[25] Appeals are made to the Cambodian Court of Appeals in Phnom Penh. Final appeals, known as Satuk appeals, to the Cambodian Supreme Court are granted only on the grounds of a violation of the Constitution, laws, or ordinances.[26] One final welcome development is the CPC's emphasis on settlement throughout the litigation process. Article 97 provides that "[t]he court may attempt to effect a compromise settlement at any stage of the litigation."[27]

C. Law on Commercial Arbitration

In June 2006, Cambodia's first Law on Commercial Arbitration (LCA) came into force, and its impact began in 2007. Enacting the law was part of Cambodia's obligation when it joined the World Trade Organization (WTO) in 2004.[28] The new law will provide a much-needed alternative to the local Cambodian courts.[29] It will also help Cambodia attract foreign investments in its fast-growing economy.[30] The LCA largely follows the United Nations Commission on International Trade Law (UNCITRAL) Model Law on

21. *Id.* art. 103-12.

22. Textbook, *supra* note 16, 3, ch. 2 § II (II) at 50.

23. CPC art. 113-122.

24. *Id.*; Textbook, *supra* note 16, 3, ch. 2 § II (I) at 47.

25. CPC art. 3; Textbook, *supra* note 16, 3, ch. 2 § II (II) at 50.

26. CPC art. 284.

27. *Id.* art. 97.

28. Key commercial laws yet to be enacted, at the time of this writing, include the Secured Transactions Law, Commercial Leasing Law, Law on the Issuance and Trade of Non-Government Securities, Insolvency Law, Commercial Contracts Law, Competition Law, and Law Establishing a Commercial Court.

29. Anecdotal evidence shows that most international contracts identify a dispute resolution forum outside of the country due to the perceived unreliability of local courts. *Commercial Disputes and the New National Arbitration Center*, 14 Bus. Issues Bull. (Int'l Finance Corp./Mekong Private Secord Dev. Facility, Cambodia), Aug. 2007, *available at* http://www.ifc.org/ifcext/mekongpsdf.nsf/AttachmentsByTitle/BIB-14-CAM-Eng/$File/BIB-14-CAM-Eng.pdf.

30. To some extent, the legal framework is playing catch-up with Cambodia's tiger-like economic growth. The World Bank reports that Cambodia's GDP grew 13.4% in 2005 and 10.5% in 2006. *Cambodia Data Profile*, The World Bank Group (2007), http://devdata.worldbank.org/external/CPProfile.asp?PTYPE=CP&CCODE=KHM (last visited Oct. 25, 2007).

International Commercial Arbitration[31] (the "Model Law"), with a few interesting departures. As a result, Cambodia's arbitration rules are now harmonized with roughly fifty nations, including important trading partners.[32] The LCA governs only commercial disputes but that term is given the same wide interpretation in the definitions section as can be found in the Model Law.[33] However, the LCA does lack explicit language regarding arbitrability.

While LCA rules governing arbitrator composition and jurisdiction are consistent with the Model Law, the "interim measures" section follows the 1985 version of the Model Law and omits the extensive regime in the new Model Law relating to preliminary orders and recognition and enforcement of interim measures.[34] Because of this, preliminary orders and interim measures will be an uncertain area in Cambodian arbitration.

The conduct of arbitral proceedings follows the Model Law without any significant deviation—freedom to design all aspects of procedure, including location and language, but with reasonable default provisions in the absence of party agreement.[35] Applications to set aside arbitral awards must be made within thirty days instead of the Model Law's ninety-day period.[36] Recognition and enforcement follow the Model Law and the norms set forth in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in New York.[37]

---

31. UNCITRAL Model Law on International Commercial Arbitration (2006), http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_EBook.pdf.pdf (last visited Oct. 25, 2007)[hereinafter "Model Law"].

32. States that have adopted the Model Law include: Australia; Austria (2005); Azerbaijan; Bahrain; Bangladesh; Belarus; Bulgaria; Cambodia (2006); Canada; Chile; in China: Hong Kong Special Administrative Region and Macau Special Administrative Region; Croatia; Cyprus; Denmark (2005); Egypt; Germany; Greece; Guatemala; Hungary; India; Iran (Islamic Republic of); Ireland; Japan; Jordan; Kenya; Lithuania; Madagascar; Malta; Mexico; New Zealand; Nicaragua (2005); Nigeria; Norway (2004); Oman; Paraguay; Peru; the Philippines; Poland (2005); Republic of Korea; Russian Federation; Singapore; Spain; Sri Lanka; Thailand; Tunisia; Turkey (2001); Ukraine; within the United Kingdom of Great Britain and Northern Ireland: Scotland; in Bermuda, overseas territory of the United Kingdom of Great Britain and Northern Ireland; within the United States of America: California, Connecticut, Illinois, Louisiana, Oregon and Texas; Zambia; and Zimbabwe. Status: 1985-UNICITRAL Model Law on Int'l Commercial Arbitration, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited Oct. 25, 2007).

33. Article 2(i) states:

> the [t]erm "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of good [sic] or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; and carriage of goods or passenger by air, sea, rail or road.

Law on Commercial Arbitration art. 2(i) (37 Official Gazette of Kingdom of Cambodia 2006) [hereinafter "LCA"].

34. *Id.* art. 25. *See also*, Model Law, *supra* note 31, arts. 17-17(j).

35. *Id.* art. 26-35. Article 26 adds to the Model Law, stating that each party shall be given a full opportunity to present his case, "including representation by any party of his choice." This seems to underscore the freedom to choose any legal counsel.

36. *Id.* art. 44 (3). Otherwise, the LCA is consistent with the Model Law and the New York Convention.

37. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)[hereinafter the "New York Convention"].

The LCA's most significant anomaly is Chapter III, which establishes a National Arbitration Center (NAC) inside the Ministry of Commerce.[38] The NAC has potentially conflicting responsibilities as an arbitration forum and as a licensing and supervisory authority for all arbitrators in Cambodia, even those who might serve at other forums.[39]

Competition is limited—only the Chamber of Commerce and other professional associations are allowed to establish arbitration forums.[40] There is some concern about the independence of the NAC arbitrators, especially if governmental interests are at stake.

D. Khmer Rouge War Crimes Tribunal

In 2007, Cambodia's war crimes tribunal began its operations. The tribunal, officially called the Extraordinary Chambers in the Courts of Cambodia (ECCC), recently completed its internal rules and has now formally charged two suspects. The ECCC is the product of a very long process of negotiation between the Cambodian government and the international community. The ECCC was legally established in the 2001 Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, which was subsequently amended in 2004.[41]

The law and the associated UN agreements set forth a "hybrid" style of court.[42] The ECCC has a unique system whereby there are two Co-Prosecutors and two Co-Investigating Judges, one international and one Cambodian. The trial chambers consist of international and Cambodian judges but with a majority of Cambodian judges.[43] It is unclear how well deadlocks between locals and internationals will be resolved. The court is also run by a local administrator with UN oversight. Technically, this is a Cambodian court that will partly use Cambodian rules of procedure and substantive law, with international norms also serving as precedent. In 2006, the international judges and prosecutors were sworn in as court officials, and the court building was opened.

In 2007, several controversies engulfed the ECCC. First, the international and local sides could not agree on the ECCC Internal Rules (mostly relating to procedure and evidence) of the court. Another problem surfaced in 2007 when the Open Society Justice Institute alleged that there was a widespread practice of salary kickbacks among the Cambodian staff. Finally, in September 2007, there was controversy involving the UN's management of the ECCC administration.[44] In 2007, the prosecution started to formally

38. *Id.* arts. 10-17.

39. *Id.* Under Article 11, however, parties to arbitration outside of the NAC are still allowed to choose arbitrators outside the official NAC list.

40. *Id.* art. 13. These forums would only be available if one or more of the parties to the dispute were a member of that forum organization.

41. Amendments to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, 40 Official Gazette of the Kingdom of Cambodia 2004, at 2412.

42. *Id.* The UN had suggested a mixed tribunal (a "Special Tribunal") in Cambodia with a majority of international judges, but this was not acceptable to the Cambodian government.

43. A "super-majority" (majority plus one) is required for most decision making.

44. The United Nations Development Programme (UNDP) kept its own audit private for months, and when it was released in September 2007, it revealed serious problems, including poor relations between local and international staff, unqualified local hires, and insufficient translation, witness protection, and public affairs. *See,e.g.*, Erika Kinetz, *Another Delay for Justice?*, NEWSWEEK (Oct. 7, 2007) *available at* http://www.newsweek.com/id/42429 (last visited Oct. 25, 2007).

investigate and charge suspects, some thirty years after the Khmer Rouge killed over one million people, roughly one-quarter of Cambodia's population.

II. India

In 2007, India maintained robust economic growth and continued to attract significant foreign investment.[45] This section provides an overview of selected key legal and regulatory developments in India during 2007 and several significant policy proposals to watch in 2008.

A. Intellectual Property Law*

1. *Online Filing for Patents and Trademarks*

In 2007, the Indian Patent and Trademark Office[46] introduced e-filing for patents and trademark applications, thereby increasing convenience for applicants. These changes were part of an ongoing effort by the PTO to modernize the Indian intellectual property regime. On December 18, 2007, in part because of these modernizations, India was recognized as an International Searching Authority (ISA) and an International Preliminary Examining Authority (IPEA).[47]

2. *Doctrine of Well-Known Trademarks Accepted*

The Madras High Court, in a significant judgment, accepted the principle of well-known marks.[48] The court held that whether a trademark is well-known or not is a question of fact, and the principle aim of the law is to protect marks even if the unauthorized use of the mark is related to dissimilar products or services. If a substantial section of the public would believe there is a connection between both goods and services, the defendant will be liable for trademark infringement and passing-off.

3. *Indian Patent Act Section 3(d) Found Constitutional*

In a judgment that could have far reaching consequences for international pharmaceutical companies applying for patents in India, the Madras High Court ruled that Section 3(d) of the Indian Patent Act is not unconstitutional.[49] Section 3(d) is designed to prevent the practice of "ever-greening" whereby the holder of an existing patent on a product will seek to extend the length of patent protection by applying for a new patent to cover the

---

45. India emerged as the second hottest FDI destination of the world, next only to China, but ahead of Brazil, Russia, and the United States. *See* United Nations Conference on Trade and Development's World Investment Report 2007, dated October 16, 2007.

* This section were prepared by Manish Dhingra.

46. For further information about the Indian Patent and Trademark Office, see http://www.patentoffice.nic.in/.

47. Press Release, Ministry of Commerce & Industry, Indian Recognised as International Searching Authority and International Preliminary Examining Authority (Dec. 18, 2007), *available at* http://pib.nic.in/release/release.asp?relid=34113.

48. Carrefour v. V Subburaman, 2007 (35) PTC 225 (Mad).

49. *See* Novartis AG v. Union of India, (2007) 4MLJ1153 (High Court of Madras (Aug. 6, 2007)), *available at* http://www.judis.nic.in/chennai/qrydisp.asp?tfnm=11121.

discovery of an allegedly new use or property.[50] The petitioner, Novartis AG, challenged of the legality of Section 3(d) on the grounds that it: (1) violated India's international obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and (2) violated Article 14 of the Constitution of India (equal protection of the law) because it was arbitrary, illogical, and vague.

On the first issue, the court held that the Indian courts are not the proper fora for determining compliance issues because the World Trade Organization (WTO) and the TRIPS Agreements provide for a separate mechanism for determining such issues.[51] On the second issue, the court held that Article 14 can be invoked only when it is shown that in the exercise of a discretionary power there is a possibility of real and substantial discrimination and such exercise interferes with a fundamental right guaranteed by the Constitution.[52] In the case before the court, it was not shown that the Patent Controller's exercise of discretionary power would violate any of the petitioner's fundamental rights. The court further noted that Section 3(d) did not fail for vagueness because it was clear that the object of the amendment was to provide easy access to citizens in India to life saving drugs and thereby to discharge the Government's constitutional obligation of providing good health care to its citizens.[53]

B. Income Tax Law*

In a landmark judgment, the Supreme Court of India held that outsourcing services performed in India by the subsidiary of a non-Indian parent company is not per se a "permanent establishment" (PE) of the parent company in India.[54] The Court also ruled that a parent company's stewardship of the subsidiary does not establish a PE for the parent in India.[55]

Services performed by the parent company's personnel on deputation to the subsidiary company, however, do constitute a PE of the parent company in India. This judgment may affect the way foreign companies, especially outsourcing companies, plan to operate in India.

50. The Patent Act, No. 39 of 1970, India Code (1999), v.4., *available at* http://ww.wpatentoffice.nic.in/ipr/patent/patact1970-3-99.html. Section 3(d) of the Patents Act provides:

> The mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.

51. Novartis, *supra* note 49, at para. 6-8.

52. *Id.* at para. 16.

53. *Id.* at para. 19.

* This section was prepared by Manish Dhingra.

54. *See* Dir. of Income Tax v. Morgan Stanley & Co., (2007) 7 SCC 1, *available at* http://www.judis.nic.in/supremecourt/qrydisp.aspx?filename=29205.

55. *Id.*

C. Foreign Investment in India*

1. *Simplification of Foreign Investment Rules*

The plethora of laws and regulations governing foreign investment in India are often challenging for overseas investors and their advisors. To simplify the investment process, the Reserve Bank of India (RBI) has issued a Master Circular on Foreign Investment in India (the "Master Circular"), which consolidates the existing instructions issued by the RBI through A.P. (DIR Series) Circulars and Notifications under the Foreign Exchange Management Act, 1999.[56] The Master Circular provides an overview of current regulations governing foreign investment in India, the acquisition of immovable property, the establishment of branch/liaison offices, and investment in partnership firms or proprietary concerns.[57]

2. *Guidelines for Foreign Investment in Preference Shares*

On April 30, 2007, revised guidelines were issued to provide that foreign investment in the form of fully convertible preference shares would be treated as part of share capital and would be calculated as foreign equity for purposes of determining applicable sectoral caps. Other types of preference shares, namely convertible, optionally convertible, or partially convertible, would be treated as debt and would have to conform to applicable External Commercial Borrowing guidelines and caps.[58]

3. *Liberalization of Investments Through Indian Depository Receipts*

By an amendment to the Companies (Issue of Indian Depository Receipts) Rules, 2004, the Securities and Exchange Board of India (SEBI) has simplified norms for foreign investment through Indian Depository Receipts ("IDRs").[59] The amendment has increased the limit for overseas companies to raise money in India from 15 percent of its paid-up capital and free reserves to 25 percent of the post-issue number of equity shares in a financial year.[60]

The requirement that the issuer must be a profit making entity for at least five preceding years has also been relaxed to three out of five preceding years. To protect investors, SEBI will permit only issuers that have a continuous trading record or history on a stock exchange in its parent country for at least three immediately preceding years to issue IDRs, subject to compliance with applicable SEBI norms.[61]

---

* This section was prepared by Snehal Patil.

56. Reserve Bank of India, Master Circular on Foreign Investment in India, No.02/2007-08, July 2, 2007, http://rbidocs.rbi.org.in/rdocs/notification/PDFs/78358.pdf.

57. The Master Circular was issued with a sunset clause of one year. It will stand withdrawn on July 1, 2008, and will be replaced by an updated Master Circular on the subject.

58. Press Note dated April 30, 2007. Subsequently, via Press Note dated June 26, 2007, an exemption was granted from the purview of these guidelines to those institutions/corporations that had taken verifiable (i.e., public acts) and effective (i.e., binding acts) steps prior to April 30, 2007, to issue preference shares. Copies of these Press Notes are *available at* http://finmin.nic.in (last visited on November 30, 2007).

59. Notification No.GSR 480(E), July 11, 2007, http://www.mca.gov.in/ministrywebsite/dca/latestnews/companies_IDR_Rules_2004.pdf (last visited on November 30, 2007.

60. *Id.*

61. *Id.*

4. *Clarification Regarding Investments by Foreign Institutional Investors*

In October 2007, SEBI announced important policy initiatives with regard to Overseas Derivative Instruments ("ODIs") and Participatory Notes ("PNs") that are typically used by hedge funds to access the Indian capital market.[62] Effective as of October 25, 2007, FIIs and their sub-accounts will not be permitted to issue/renew ODIs with underlying as derivatives.[63] They will, however, have the option to invest in derivatives traded on recognized stock exchanges. Foreign Institutional Investors (FIIs) will also be allowed to issue PNs not linked to underlying derivatives up to 40 percent of their assets under custody ("AUC"). September 30, 2007, will be the reference date for calculating the AUC based on filings made by FIIs with their custodians as on that date. FIIs that have issued PNs not linked to underlying derivatives amounting to less than 40 percent of their AUC will be permitted to issue additional PNs at the rate of 5 percent on an incremental basis until they reach the 40 percent limit, and FIIs that have issued PNs exceeding such limit will be permitted to issue PNs only to the extent they cancel, redeem or close their existing PNs.[64]

D. Key Policy Changes on the Anvil in 2008*

1. *Rationalization of the FDI Policy*

As India continues to attract significant FDI, the government is taking steps to further rationalize and liberalize the FDI regime. The Cabinet is likely to review the FDI Policy to streamline investment procedures in a comprehensive way by giving preference to sectors that generate more economic activity and jobs.[65]

2. *Regulation of Antitrust Activities*

India's recent amendments to its competition law, set forth in the Competition (Amendment) Act, 2007 (the "Competition Act"),[66] are likely to have a significant impact on India-related mergers and acquisitions. The Competition Act now requires mandatory notification[67] to the statutory regulator, the Competition Commission of India (CCI), of certain combinations (which include mergers, acquisitions by assets or shares, and amalga-

---

62. SEBI Press Release No.286/2007, http://www.sebi.gov.in/press/2007/2007286.html (last visited on November 30, 2007).

63. To ameliorate the concerns of FIIs, a transitional period of eighteen months has been introduced for winding up of existing ODIs. Further, the renewal of existing ODIs will be permitted provided such renewal does not extend beyond the eighteen-month period.

64. The proposals regarding PNs came into effect after close of trading hours on October 25, 2007.

* This section was prepared by Snehal Patil.

65. *Cabinet to take up FDI policy review this week: Kamal Nath*, Economic Times, Nov. 26, 2007, http://timesofindia.indiatimes.com/Business/Cabinet_to_take_up_FDI_policy_review_this_week_Kamal_Na th/articleshow/2572112.cms (last visited on November 26, 2007).

66. The Competition (Amendment) Act, No. 70 at 2007; India Code (2007), v. 12. 2007 takes into account the recommendations of the Committee and discussions with various domestic and international stakeholders.

67. *Id.* at § 6. Such notification must be given within a period of thirty days from approval of the merger/amalgamation proposal by the board of directors of the parties or the execution of any agreement or other document of acquisition.

mations) that exceed the statutory thresholds in terms of assets or turnover[68] and that cause or are likely to cause an appreciable and adverse effect on competition in India. The parties to these combinations will have to wait either for CCI's approval or a period of 210 days from notification before consummating the proposed transaction.[69] At the time of writing this article, the central government was in the process of drafting implementing regulations that will shape the working of the Competition Act. It is expected that the CCI will become fully functional by mid-2008.[70]

III. Japan

A. Arbitration*

Perhaps the most significant fact over the past year in the field of international commercial arbitration in Japan is the lack of activity. No litigation was instituted on issues concerning arbitration, domestic or international; there were no amendments to the Arbitration Law;[71] and, more importantly, the number of new cases filed at the Japan Commercial Arbitration Association (JCAA) remain in the low tens.[72] The only change that happened in the past year, including the second half of 2006, is an amendment to Article 11 of JCAA Commercial Arbitration Rules, which deals with language to be used in arbitral proceedings, effective July 1, 2006. Under the previous JCAA Rules, arbitration proceedings had to be conducted in Japanese, English, or both. Now the parties can agree on any language. The tribunal will determine the language to be used in the arbitral proceedings only when the parties cannot reach an agreement. Correspondence by the parties or the arbitrator(s), however, still has to be in English or Japanese.

Why has international commercial arbitration been so moribund in Japan? Many commentators have recently stressed the need to clarify the interpretation of Article 72 of the Lawyer's Law. The question of whether anyone who is not a Japanese-qualified lawyer can serve as an arbitrator in Japan continues to create doubt and may prevent foreign parties from entering into an arbitration agreement that designates Japan as the destination of arbitration. Many commentators believe that Article 72 of the Lawyer's Law must be dealt with before international arbitration can have a significant future in Japan.

B. Consumer Finance Laws Abolish "Grey Zone" Interest*

On December 13, 2006, the Diet enacted legislation to reform the Money Lending Business Law.[73] The revision was in response to increasing criticism of lenders in the

68. *Id.* at § 5.
69. *Id.* at § 6.
70. *See Competition Law Likely by Mid-2008*, Hindu Business Line, Oct. 9, 2007, http://www.thehindubusinessline.com/2007/10/09/stories/2007100951901000.htm (last visited on November 30, 2007).

* This section was prepared by Haig Oghigian, FCI Arb. Haig Oghigian is a partner with Baker & McKenzie in Tokyo, Japan.

71. The Arbitration Law, Law No. 138 of 2003, (2007) v. 4.
72. The number of new cases filed with the JCAA is: 2002 (9), 2003 (14), 2004 (21), 2005 (11) and 2006 (11), statistics provided by the JCAA.

* This section was prepared by William Herbert. Mr. Herbert is Counsel at the Atlanta based law firm of Smith, Gambrell & Russell LLP.

73. Money Lending Business Law, Law No. 32 of 1983 (1983).

consumer finance industry, an industry that in 2006 collectively lent to 14 million people with a combined balance of 14.2 trillion yen (US$119.58 billion).[74] Consumer finance companies in Japan charged what was commonly referred to as "grey zone" interest—interest that is above the 20 percent maximum rate allowed by the Interest Rate Restriction Law of 1954 and below 29.2 percent, the maximum rate allowed by the Investment Deposit Interest Rate Law when borrowers agree in writing to borrow at interest rates above 20 percent.[75]

Most significantly, the revisions to the Money Lending Business Law capped the allowable interest for uncollateralized consumer finance loans at 20 percent and raised market entry requirements for consumer finance companies. Although the revisions capping interest rates will not come into effect until 2009, 2007 saw consumer finance companies and the rest of Japanese society preparing. For example, in late 2006, the Japanese Institute of Certified Public Accountants[76] instructed consumer finance companies to set aside reserves sufficient to refund grey zone interest payments. Several large lenders closed branches, and consolidation is expected in the industry.

IV. Malaysia

Malaysia continues working to encourage companies and individuals of varying sizes to transact business in Malaysia and to provide a stable, predictable, and workable framework for this activity to continue. The following key legal developments in 2007 are of particular note.

A. Capital Markets and Services Act of 2007

On September 28, 2007, the Capital Markets and Services Act 2007 (CMSA) came into force in Malaysia. The CMSA was passed by Malaysia's Parliament in May 2007 and consolidates prior disparate legislative acts, including the Securities Industry Act 1983, the Futures Industry Act 1993, and Part IV of the Securities Commission Act 1993.[77]

Although a full review and analysis of the CMSA is beyond the scope of this article, there are several noteworthy features and provisions of the CMSA. First, the CMSA and its implementing regulations introduce a "single licensing regime" to Malaysia. Pursuant to this regime, financial professionals and intermediaries in Malaysia will be required to hold a single "Capital Markets and Services License as opposed to multiple separate licenses," which the proponents of the CMSA acknowledge will greatly curb administrative and compliance costs to covered professionals.[78]

Second, the CMSA enlarges the scope of the Securities Commission's ("SC") ability to initiate civil and administrative actions for violations of its provisions. The SC can now

74. Yuka Hayashi, *Citigroup Sets Japan Cuts*, Wall Street Journal Online, *available at* http://online.wsj.com/article/SB116834593523671321.html.

75. *Id.*

76. Japanese Institute of Certified Public Accountants, http://www.hp.jicpa.or.jp/specialized_field/pdf/00801-003509.pdf.

77. *Capital Markets and Services Act 2007: Introduction*, *available at* http://www.sc.com.my/ENG/HTML/cmsa/cmsa_main.html

78. *Id.*

seek to recover three times the amount of the monetary gain (or loss avoided) for defined offenses of market misconduct, including market manipulation.[79]

Third, the CMSA further aims to protect investors by imposing the requirement upon capital raising activities that all such raised funds be paid into a trust account, if no prospectus was otherwise required, so that those paid-in funds can be returned to the investor if the securities are not issued or provided to the investor.[80]

Finally, the CMSA introduces new steps to protect bond holders as well, including pre-approval requirements by the SC for anyone planning to act as a trustee for a bond issuance as well as the statutory imposition of duties upon said trustees and borrowers.[81]

B. Foreign Exchange Liberalization

On March 31, 2007, Malaysia's central bank, Bank Negara Malaysia (BNM), announced a series of substantive policy changes intended to liberalize how BNM administers foreign exchange activities in Malaysia.[82] BNM has professed that these measures are intended "to enhance Malaysia's competitiveness through reducing the cost of doing business, increas[e] [the] efficiency of the regulatory delivery system, promote a progressive and competitive financial system, encourage[e] effective risk management activities while safeguarding economic and financial stability."[83]

Effective April 1, 2007, BNM introduced a series of circulars broadly intended to: (a) hasten the development of Malaysia's financial market; (b) promote investment in Malaysia by non-residents in ringgit[84]-denominated assets; and (c) facilitate the development of Malaysia's capital market and enhance overall business efficiency.[85]

1. *Development of Malaysia's Domestic Financial Market*

The circulars that took effect on April 1, 2007, impacted the domestic financial market in three main ways. First, the circulars abolished the net open position limits on licensed

79. Press Release, Securities Commission, Capital Markets and Services Act 2007 Comes into Force 28 Sept—Strengthens Capital Market and Investment Protection, http://www.sc.com.my/ENG/HTML/resources/press/pr_20070927.html; *see also Frequently Asked Questions on the Capital Market Services Act 2007 (CMSA)*, http://www.sc.com.my/ENG/HTML/cmsa/cmsa_faq.pdf (last visited Nov. 19, 2007).

80. *Frequently Asked Questions*, *supra* note 80.

81. *Id.*

82. Bank Negara Malaysia, *Liberalisation of the Foreign Exchange Administration Policies*, http://www.bnm.gov.my/index.php?ch=8&pg=14&ac=1406 [hereinafter "Liberalisation"].

83. *Id.*

84. The ringgit is the Malaysian unit of currency. At the current exchange rate, one U.S. dollar is equivalent to approximately 3.37621 Malaysian ringgits. *See* XE.com, Universal Currency Converter, http://www.xe.com/ucc/convert.cgi.

85. For a full review of each of the April 2007 circulars, *see, e.g.*, *Dealings in Gold and Foreign Currency*, KL.EC.100/6/2007/3(b); *General Payments*, KL.EC.100/6/2007/4(b); *Credit Facilities to Non-residents*, KL.EC.100/6/2007/5(b); *Foreign Currency Accounts*, KL.EC.100/6/2007(6(b); *Investment Abroad*, KL.EC.100/6/2007/7(b); *Foreign Currency Credit Facilities and Ringgit Credit Facilities from Non-Residents*, KL.EC.100/6/2007/8(b); *Labuan International Offshore Financial Centre*, KL.EC.100/6/2007/9(b); and *Approved Operational Headquarters*, KL.EC.100/6/2007/10(b), http://www.bnm.gov.my/index.php?ch=190&pg=542&ac=248tpl_id=181.

onshore banks.[86] Previously, the banks' net open position was limited to 20 percent of the bank's capital base.[87] Second, the circulars abolished the prior specific aggregate overnight limits that applied to foreign currency accounts maintained by residents at licensed onshore banks.[88] Finally, the circulars have expanded the scope of foreign currency activities where investment banks in Malaysia are permitted to engage, subject to BNM supervision of the banks' capabilities. Previously, an investment bank in Malaysia required specific approval from BNM to engage in a more limited range of foreign currency-related activities.[89]

2. *Promotion of Investment in Malaysia by Non-Residents in Ringgit Assets*

The April 2007 circulars also aimed to encourage investment in Malaysia by non-residents in ringgit-denominated assets. First, the ringgit overdraft policy that applied to non-resident stock broking companies so they could avoid ringgit asset trade settlement failures attributable to delays has been modified. Previously, for up to two working days, the stockbrokers could use up to RM 200 million of overdraft facilities in connection with the sale of shares traded on Malaysia's stock exchange, Bursa Malaysia.[90] Now, the monetary limit has been lifted on the overdraft facility access, and the right to draw on it has been extended to transactions settled through the Real Time Electronic Transfer of Funds and Securities System ("RENTAS").[91]

Second, the policy on non-residents obtaining ringgit-denominated property loans from residents to finance buying or building residential or commercial properties in Malaysia has been modified. Previously, a non-resident was limited to three such loans. Now, the numerical limit on such loans has been lifted.[92]

Third, the policy on the use of overseas branches of licensed onshore banks to settle investments in ringgit-denominated assets by non-residents has changed. Previously, these settlements had to take place in Malaysia. Now, the licensed onshore banks are permitted to appoint overseas branches to facilitate the settlement of these transactions.[93]

Finally, the circulars modify the scope of transactions in ringgit-denominated financial products by offshore banks. Previously, offshore banks could only trade for their own account. Now, they can still trade for their own account, but they can also trade on behalf of their non-resident banking customers.[94]

3. *Promoting the Development of Malaysia's Capital Markets.*

The final grouping of changes that have been implemented by BNM with its April 2007 circulars lift a number of restrictions on Malaysian resident individuals and corporations

86. Bank Negara Malaysia, ECM 10: *Foreign Currency Credit Facilities and Ringgit Credit*, Apr. 1, 2007, http://www.bnm.gov.my/view.php?ch=190&pg=595&ac=8&fname=file&dbIndex=0&ex=1208276088&md=%AF%B9%5DAr%F5X%0F%1Es%8E%2AI%8A%21%E2.

87. *Liberalisation*, *supra* note 83.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

with the object of promoting the development of more sophisticated capital markets in Malaysia and making it easier and less costly to do business in Malaysia.

First, the circulars have increased the limits on foreign currency borrowing by resident corporations from licensed onshore banks to the equivalent of RM 100 million in the aggregate on a corporate group-wide basis, double the prior limit of RM 50 million. The proceeds of these loans can further be used for domestic or offshore activities.[95] Second, residents are now permitted to hedge foreign currency loan repayments up to the full amount of their loan obligation (up from a twenty-four month limit).[96]

Third, residents have greater flexibility to invest in foreign currency assets. Previously, resident individuals could only invest in foreign currency assets up to RM 100,000 per calendar year; now, they can invest up to RM 1 million per year.[97] Similarly, resident corporations can now invest up to RM 50 million in foreign currency assets, up from a limit of RM 10 million per year.[98] The restrictions on investments in foreign currency assets by resident institutional investors have similarly been eased. Previously, resident unit trust companies, fund management companies, and insurance companies could only invest up to 30 percent of the net asset value attributable to residents; now, the limit is 50 percent.[99]

V. New Zealand*

Application of the Overseas Investment Act 2005 (the "Act") has caused the most significant increase in regulation in 2007 of merger and acquisition activity in New Zealand (directly or indirectly) affecting overseas parties. The impact of the Act is felt by any overseas person acquiring, directly or indirectly, business assets or an interest in land—including certain leases—in New Zealand. The main concern, at least for those commercial entities "doing the deals," is delay caused by the approval process if the Act applies. Applications for approval are taking at least twelve weeks, and sometimes in excess of 15 weeks, to be considered. Such delay, when New Zealand is often a miniscule part of the overall transaction, is not helpful for New Zealand, which strives to be "an easy place to do business." The lesson for overseas persons wishing to invest in New Zealand is to plan ahead and, if necessary, factor the time delay into any timetable.

A. When is Overseas Investment Office Approval Required?

Consent must be obtained from relevant government Ministers for an investment by an overseas person in significant business assets or sensitive land in New Zealand. Failure to do so may amount to an offence under the Act. An overseas person, for the purposes of the Act, includes a non-resident individual who is not a New Zealand citizen, a body corporate that is incorporated outside New Zealand, and other entities that are 25 percent

95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*

* David Quigg & John Horner are M&A Corporate partners with the New Zealand law firm Quigg Partners. They can be reached at davidquigg@quiggpartners.com and johnhorner@quiggpartners.com respectively.

or more legally or beneficially owned or controlled by such a person or persons.[100] The Act specifically refers to unincorporated joint ventures or other unincorporated entities fulfilling certain conditions and also covers trusts. The Act also includes reference to "associates" as an anti-avoidance mechanism. This definition is broad and needs to be considered in circumstances where investments are indirectly owned or controlled by an overseas person.

The Act requires consent to be obtained in respect of three general types of investment by an overseas person. The categories are: significant business assets;[101] sensitive land;[102] and fishing quota.[103] When considering the land size thresholds it is necessary to include any "associated land." Associated land is defined in Section 8 of the Act and includes adjoining land in which the overseas person, or an associate of that person, owns or controls an interest in or will, as a result of any transaction entered into or to be entered into, own or control an interest in such land.[104] An "interest" includes any legal or equitable interest. In relation to sensitive land, any acquisition of freehold estate or a lease or any other interest for a term of three years or more, including rights of renewal but excluding easements and profits a prendre, will amount to an interest for the purposes of triggering the investment in sensitive land test.[105]

The acquisition of rights or interests in securities of an entity which owns or controls (directly or indirectly) an interest in the types of land outlined above will also trigger the sensitive land test where the overseas person (either alone or together with its associates) has a 25 percent or more ownership or control interest in the entity or has an increase in an existing 25 percent or more ownership or control interest or the entity itself becomes an overseas person.[106]

Under prior legislation, offshore transactions that did not involve any direct acquisition of securities or assets in New Zealand were considered as outside the application of the overseas investment regime.[107] Though there may be some doubt on the issue, the regulator is certainly of the view that international transactions are included. The safest approach is to assume international transactions are caught and seek approval as required.

B. The Approval Process

In the event consent is required, an application for consent needs to be filed with all relevant information provided. Ensuring the application is in a format familiar to the regulator with all relevant information and no irrelevant information will avoid unnecessary delay. The information prescribed by the guidelines includes: information about the applicant and the investment or target; the rationale behind the investment; and evidence

100. Overseas Investment Act 2005 § 7, http://www.bellgully.com/resources/pdfs/overseas_investment_guide_2006_02_02.pdf
101. *Id.* at § 13.
102. *Id.* at §12. *See* Schedule 1.
103. Fisheries Act 1996 (No. 88 of 1996) § 57D, *available at* http://interim.legislation.govt.nz/libraries/contents/om_isapi.dll?clientID=80584&infobase=pal_statutes.nfo&jd=a1998-067%2fs.35&record={30880}&softpage=DOC.
104. Overseas Investment Act 2005 § 8.
105. *Id.* at § 12.
106. *Id.* at § 8.
107. Overseas Investment Act 1973.

that the investment meets criteria for consent detailed in the Act. Criteria for consent to be granted under the Act are set out separately in respect to investments in sensitive land and investments in significant business assets.[108] The criteria are broad, including the investor's business experience, character, financial commitment to New Zealand; and, in the case of sensitive land, the "benefit to New Zealand" provided by the investment.[109]

The application process involving sensitive land will typically take between three and four months. This will require settlement or completion under most transactional agreements to be conditional on approval under the Act. The regulator at present appears to be severely under-resourced, and the delay is causing considerable concern and frustration for clients wishing to proceed with transactions that trigger the Act. This can lead to a lost opportunity (where competing bidders are able to proceed with the transaction without needing approval under the Act) or increased transaction costs. The most reliable means of reducing delay is to identify the need to apply for consent under the Act and to prepare and lodge an application as early as possible in the course of considering a possible transaction.

It is typical for applicants under the Act to seek confidentiality in respect of both the fact of the application and the information contained within it. The Official Information Act of 1982 provides for the disclosure of information by Ministers and government officials where there are no good reasons for withholding it.[110] Such reasons include trade secrets and commercial confidentiality, personal privacy, and legal privilege.[111] Usually commercial sensitivity will be sufficient reason for the application to be kept confidential.[112] Once the regulator has made its determination, it will publish a public decision sheet containing details of the transaction. Where the applicant considers there are grounds under the Official Information Act to withhold all or part of such decision sheet, it will be necessary to satisfy the regulator that those grounds are valid. In the event a third party seeks further disclosure, an Ombudsman may be called upon to make a ruling.[113] Because the determinations made under the Act are made by Minsters either directly or by way of delegation, challenge of a decision is limited to judicial review of the exercise of ministerial power.[114] There are no "appeal rights" as such.

An overseas investor will run the risk of breaching the Act and commit an offense in New Zealand if it proceeds to make the investment without approval under the Act. Any person who knowingly or recklessly enters a transaction or takes any other step for the purpose of, or having the effect of, in any way, directly or indirectly, defeating, evading or circumventing the operation of the Act will also commit an offense and will be liable, in the case of an individual, to imprisonment for a term not exceeding twelve months or to a fine not exceeding NZ $300,000 or, in the case of a body corporate, to a fine not exceed-

108. Overseas Investment Act § 16, 18.

109. *Id.* at § 16.

110. Official Information Act 1982 § 5, http://gpacts.knowledge-basket.co.nz/gpacts/reprint/text/1982/an/156.html.

111. *Id.* at §§ 6, 7, 9, 10, 18, 27.

112. *Id.*

113. *Id.* at §§ 19, 28.

114. Foodstuffs (Auckland) Limited v. Progressive Enterprises Limited [2002] BCL 718 (HC) Heath J 14 June 2002 M680-SW02.

ing NZ $300,000. Civil remedies can be awarded also relating to quantifiable gains, damages, and cost of remedial action.

VI. Pakistan*

A. Pakistan Enacts Law to Curb Trade in Human Organs

Until recently, Pakistan was amongst the few countries in the world that lacked any legislation concerning tissue and organ transplantation. By enacting the Transplantation of Human Organs and Human Tissues Ordinance of 2007 (the "Ordinance"), Pakistan has finally put a law in place to regulate transplantation of human organs and put an end to their illegal trade. The passage of the Ordinance is an important achievement for this key ally of the United States in its struggle towards achieving a rational legal regime consistent with international standards as well as principles of Sharīa law followed by other Muslim countries. This section provides a brief background, a discussion of Islamic law on the subject, legislative history, and role of judiciary related to the Ordinance.

B. Background

In the recent past, Pakistan had become a hotbed of transplant tourism. This term refers to the appalling practice by which impoverished donors sell their organs to richer compatriots or patients from wealthier countries where organs for transplant purposes remain in short supply. According to World Health Organization (WHO) data from 2005,[115] 66,000 thousand kidney transplants are carried out in the world each year. Transplant tourism made up about 10 percent of global transplantation practices. According to some estimates, Pakistan's share of this illegal trade stands at approximately 1,500 organs per year provided to transplant tourists for a fee;[116] other estimates are higher.[117] A kidney would net the donor up to $2,500, sometimes less than half that amount, while recipients paid anywhere between $6,000 to $12,000.[118] Proponents of the sale of organs by poor peasants suggest that the dire financial need of the donors coupled with the urgent medical needs of willing buyers validate such transactions.

Professor Syed Anwar Naqvi of the Sind Institute of Urology and Transplantation in Karachi disagrees.[119] He states that the poverty faced by vast number of donors who are primarily bonded farm workers and the exploitative behavior of the landowners to whom they owe money impose an irresistible coercive pressure on these poor would be sellers. He adds that under such circumstances there can be no voluntary sale; rather what occurs

---

* The author wishes to acknowledge the generous assistance provided by Professor Adib-ul-Hasan Rizvi and Professor Syed Anwar Naqvi of the Sind Institute of Urology and Transplantation, Karachi, and wishes to thank Mr. Ahsan Zahir Rizvi, senior partner at the Karachi law firm of Rizvi, Isa, Afridi and Angell.

115. *WHO Proposes Global Agenda on Transplantation*, Mar. 20, 2007, http://www.who.int/mediacentre/news/releases/2007/pr12/en/index.html.

116. *Pakistan: Inward Organ Transplant Tourism Banned*, Sept. 17, 2007, http://www.imtjonline.com/zine/home/pakistan-inward-organ-transplant-tourism-banned.

117. *Asia's Organ Farms*, http://www.ijme.in/152ed52.html.

118. The Associated Press, *Poor Farmers Donate Kidneys for Money, Making Pakistan a Key Transplant Destination*, INT'L HERALD TRIBUNE ASIA PACIFIC, Nov. 11, 2006, http://www.iht.com/articles/ap/2006/11/12/asia/AS_FEA_GEN_Pakistan_Kidney_Bazaar.php.

119. Interview with author, Karachi, September 20, 2007.

is a forced sale without full access to information under duress and in vain hopes of escaping the clutches of poverty. Further, evidence shows that most of these transplants are done without regard to the actual health consequences to the donors.

C. Islawmic Law Governing Organ Transplantation

The Ordinance finally brings Pakistan in line with the rest of the Islamic world in the crucial area of organ transplantation. While encouraging acts of charity, Islamic Shariah law utilizes a risk/benefit analysis in order protect the health of donors and recipients. After initially prohibiting organ transplantation, Islamic scholars worldwide soon appreciated the abundance of safety data collected over the years. Organ transplantation, both from living and deceased donors, was declared to be consistent with Islamic principles.[120] Pakistan lagged behind other jurisdictions in adopting ethical transplant regimes and, until the passage of the Ordinance, had held on to restrictions on transplantation long since rejected by most Islamic authorities. This included a ban on deceased organ donation.

This ban was at variance with the fact that the International Conference of Islamic Jurists had already given legal sanction to organ transplantation from deceased donors. The Council of Arab Ministers of Health agreed to permit living and deceased organ transplantation as far back as 1987.[121] Lastly, in November 2006, under the auspices of the WHO, several Islamic countries, including Pakistan, agreed to oppose transplant tourism and direct their respective ministries of health to implement ethical transplant regimes.[122]

Some fear that without further vigilance, faithful implementation of the Ordinance might not be achieved, and the whole illegal trade in organs might just be sent underground, as happened in India after it adopted similar legislation some time back.[123]

VII. Republic of the Philippines

2007 was a year of contrast between robust economic indicators and politically-charged controversies in the Philippines. By the end of the first quarter, growth was a record high 6.9 percent, year-on-year; inflation was 2.6 percent, down from 8.6 percent in 2004.[124] By

120. The Islamic Code of Medical Ethics emerged from the First International Conference on Islamic Medicine at Kuwait in January 1981 and specifically permitted living and deceased organ donation.

121. A Unified Arab Draft Law on Human Organ Transplants was adopted at the twelfth session of the Council of Arab Ministers of Health, held in Khartoum, from March 14-16, 1987. Article 7 of this text states: "[t]he sale, purchase or remunerated donation of organs is prohibited, and no specialist may perform a transplant operation if he knows the organ to have been acquired by such means."

122. See World Health Organization, The State of the International Organ Trade: A Provisional Picture Based on Integration of Available Information, (last visited May 13, 2008); Middle East Society for Organ Transplant, Kuwait Statement on Cell Tissue and Organ Transplantation, Nov. 27, 2006, *available at* http://www.mesot-tx.org/congress_held.htm. Participants included: Bahrain, Iran, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen.

123. For additional information regarding the legislative and judicial history of the issue and the 2007 Ordinance, see Farhat Moazam, *Battling Kidney Trade in Pakistan: The Struggle Continues*, Center of Biomedical Ethics and Culture, Sind Institute of Urology and Transplantation, Vol. 3(1) (2007), *available at* http://www.siut.org/bioethics/newsletter.html.

124. The Jeepney Economy Revs Up, THE ECONOMIST, Aug. 17, 2007, *available at* http://www.economist.com/displayStory.cfm?story_id=9657147.

the third quarter, on September 12, 2007, the Philippine graft court had convicted a former president of the crime of plunder,[125] sentencing him to life imprisonment.[126] Merely six weeks after the guilty verdict, the sitting president granted him a pardon to the chagrin of those who had hoped that the conviction would set the stage for a clean government.[127] Meanwhile, accusations of political killings, abductions, and disappearances continued, including the celebrated abduction case of the son of a prominent journalist who, in his lifetime, was highly regarded as a press freedom fighter who helped topple the regime of Ferdinand Marcos.[128]

Amidst alleged human rights abuses and graft and corruption, legal developments in the Philippines appropriately included measures to protect individual liberties and ensure good governance. Moreover, despite distractions from political controversies (that resulted in an impeachment case being filed in the House of Representatives against incumbent President Gloria Macapagal-Arroyo[129] and a senate inquiry into the First Gentleman's alleged inappropriate involvement in a government contract),[130] the Philippine legislature managed to churn out laws that attempt to address national and domestic issues involving social welfare, natural resources, and national security.

A. Human Rights: Writ of Amparoh

The rule on the writ of amparo promulgated by the Philippine Supreme Court took effect on October 24, 2007. The "writ of amparo is a remedy available to any person whose right to life, liberty and security is violated or threatened with violation by an unlawful act or omission of a public official or employee, or of a private individual or entity."[131] The writ contemplates "extralegal killings and enforced disappearances or threats thereof,"[132] and may be enforced anywhere in the Philippines.[133] Under this rule, Philippine courts may issue judicial orders of protection, production, inspection and other relief to safeguard individual rights to life and liberty.[134] When a writ is issued and served, the respondent must, within seventy-two hours, file a verified return and any supporting affidavits that state lawful defenses showing there was no violation or threatened violation of constitutional rights and show actions taken to determine the whereabouts of the ag-

125. An Act Defining and Penalizing the Crime of Plunder, Rep. Act No. 7080, §1, 2 (1991). *available at* http://www.chanrobles.com/repblucactno7080.htm.

126. *Deposed Philippines President Given Life Sentence for Plunder*, CNN.com/Asia, Sept. 12, 2007, http://www.cnn.com/2007/WORLD/asiapcf/09/12/philippines.estrada/index.html.

127. *Estrada Pardon: Filipinos' Views*, BBC News, Nov. 2, 2007, http://news.bbc.co.uk/2/hi/asia-pacific/7074878.stm (last visited November 18, 2007).

128. Amnesty International Australia, *Impunity for Enforced Disappearances in Asia Pacific Region Must End* (Aug. 31, 2007), http://asiapacific.amnesty.org/library/Index/ENGASA010072007?open&of=ENG-2AS.

129. Christian V. Esguerra, *House Junks 2 Impeach Complaints vs Arroyo*, Philippine Daily Inquirer, Nov. 7, 2007, http://newsinfo.inquirer.net/inquirerheadlines/nation/view_article.php?article_id=99334.

130. Veronica Uy, *Mike Arroyo is "Mystery man" in NBN Deal—De Venecia Son*, Philippine Daily Inquirer, Sept. 18, 2007, http://newsinfo.inquirer.net/breakingnews/nation/view_article.php?article_id=89222.

131. Mem. No. 07-9-12, § 1 (2007), *available at* http://www.pnp.gov/ph/down/content/CHR/Writof Amparo.pdf.

132. *Id.*

133. *Id.* at § 3.

134. *Id.* at § 14.

grieved party.[135] Respondents who violate any order issued under this rule may be cited in contempt and ordered imprisoned or fined.[136]

The writ of amparo first appeared in the Mexican Constitution,[137] which to this day and under its current version provides a remedy against acts perpetrated by public authorities that violate individual guarantees.[138] It has a broader scope than the Anglo-Saxon writ of habeas corpus. While the writ of habeas corpus protects against illegal detention, the writ of amparo protects against the violation or threatened violation of human rights.[139]

B. Good Governance

1. *Anti-Red Tape Act*

On June 2, 2007, President Arroyo signed the Anti-Red Tape Act of 2007[140] ("ARTA"), a legislative measure that seeks to streamline government services. ARTA requires government departments, bureaus, offices, and instrumentalities, including government owned and controlled corporations, and local government or district units to set up service standards that detail: (i) the procedure for obtaining services; (ii) responsible persons for each step for obtaining services; (iii) the maximum time to conclude the process; (iv) documents required to be presented; (v) amount of fees, if any; and (vi) the procedure for filing complaints.[141] The heads of offices and agencies are made primarily responsible for the implementation of the ARTA.[142] For violations of ARTA, penalties imposed include suspension without pay, mandatory attendance of an orientation program, and dismissal and perpetual disqualification from public service.[143] ARTA also imposes criminal liability on fixers who facilitates speedy completion of transactions for pecuniary gain or any advantage or consideration.[144]

135. *Id.* at § 9.

136. *Id.* at § 16.

137. Asian Forum for Human Rights and Development, PAHRA Welcomes the Promulgation of Rules on the Writ of Amparo, Nov.12, 2007, http://www.forum-asia.org/index2.php?option=com_content&do_pdf=1&id=1115.

138. Constitucion Politica de los Estados Unidos Mexicanos [Const.], as amended, art. 94, *available at* http://www.ilstu.edu/class/hist263/docs1917const.html.

139. Carlos Mejorada, *The Writ of Amparo. Mexican Procedure to Protect Human Rights*, Annals of the American Academy of Political and Social Science, 107, (1946) *available at* http://links.jstor.org/sici?sici=0002-7162(194601)243%3C107%3ATWOAMP%3E2.0.CO%3B2-5.

140. An Act to Improve the Efficiency in the Delivery of Government Service to the Public by Reducing Bureaucratic Red Tape Preventing Grant and Corruption and Providing Penalties Therefor, Rep. Act. No. 9485 (2007) (Phils), *available at* http://www.senate.gov/ph/republic_acts/ra%209485.pdf.

141. *Id.* at § 6.

142. *Id.* at § 7.

143. *Id.* at § 11.

144. *Id.* at § 12.

C. Social Welfare

1. *Prohibition Against Detention of Patients*

On April 27, 2007, President Arroyo approved the passage of RA 9439.[145] RA 9439 prohibits the detention of patients who have fully or partially recovered or have been adequately attended to in hospitals and medical clinics for nonpayment of hospital bills and medical expenses.[146] Prior to release, however, the patient may be required to execute a promissory note covering the unpaid obligation, secured by either a mortgage or a guarantee of a co-maker who will be jointly and severally liable with the patient for the unpaid obligation.[147] Officers and employees of hospitals and clinics who are responsible for releasing patients and violate the provisions in RA 9439 will be punished by a fine or imprisonment or both at the court's discretion.[148]

2. *Overseas Employment Administration*

On April 10, 2007, President Arroyo approved RA 9422 which seeks to strengthen the regulatory functions of the Philippine Overseas Employment Administration (POEA) by way of amending the Migrant Workers and Overseas Filipinos Act of 1995.[149] Among the amendments is a provision that the POEA will only deploy Filipino workers to countries where the Philippines has concluded bilateral labor agreements or arrangements, provided that the countries shall guarantee to protect the rights of Filipino migrant workers and that such countries will observe international laws and standards for migrant workers.[150] As of October 2007, the Philippines has bilateral labor agreements with only thirteen out of the 197 countries hosting Filipino migrant workers, including Norway, the United Kingdom, Papua New Guinea, South Korea, Taiwan, Switzerland, Libya, Jordan, Qatar, Kuwait, Iraq, Commonwealth of the Northern Mariana Islands, and Indonesia.[151]

D. Natural Resources

1. *Oil Pollution Compensation*

On June 2, 2007, President Arroyo approved the passage of the Oil Pollution Compensation Act of 2007 ("OPCA"), which adopts and implements the provisions of two 1992 international conventions—namely the International Convention on Civil Liability for Oil Pollution Damage and the International Convention on the Establishment of an In-

145. An Act Prohibiting the Detention of Patients in Hospitals and Medical Clinics on Grounds of Nonpayment of Hospital Bills or Medical Expenses, Rep. Act. No. 9439 (Phils.). *available at* http://www.senate.gov/ph/republic_acts/ra%209439.pdf.
146. *Id.* at § 1.
147. *Id.* at § 2.
148. *Id.* at § 3.
149. An Act to Strengthen the Regulatory Functions of the Philippine Overseas Employment Administration (POEA), amending for this purpose Republic Act No. 9422 Otherwise Known as the "Migrant Workers and Overseas Filipinos Act of 1995," Rep. Act No. 9422 (Phils.) (2006), *available at* http://www.senate.gov/ph/republic_acts/ra%209422.pdf.
150. *Id.* at § 1.
151. Luis Gorgonio, *Bilateral Labor Ties with OFW Host Countries Urged*, GMANews.tv, Oct. 18, 2007, http://www.gmanews.tv/story/64939/Bilateral-labor-ties-with-OFW-host-countries-urged.

ternational Fund for Compensation for Oil Pollution Damage. OPCA imposes strict liability on owners of ships that cause pollution damage.[152] It also provides for the creation of an Oil Pollution Management Fund and requires that any person who has received more than 150,000 tons of contributing oil in a calendar year through carriage by sea shall contribute to this fund.[153] All shipowners are required to maintain insurance or financial security for oil pollution damage.[154] This act is the Philippine Congress' response to the worst oil spill in the country's history, when a tanker carrying industrial oil sank off the coast of Guimaras polluting hundreds of kilometers of beaches, mangroves, and marine reserves.[155]

E. NATIONAL SECURITY

On March 6, 2007, President Arroyo approved the Human Security Act of 2007[156] ("HSA"). HSA penalizes acts constituting terrorism and imposes a penalty of imprisonment for forty years. Under HAS, terrorism is committed by any person who commits acts previously criminalized under general criminal laws (including but not limited to piracy, mutiny in the high seas, rebellion or insurrection, coup d'etat, murder, kidnapping, arson, hijacking, piracy and robbery, and illegal and unlawful possession, manufacture, acquisition or disposition of firearms) and sows and creates a "condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand."[157] HSA provisions allow law enforcers to wiretap communications between members of judicially declared outlawed terrorist organizations[158] and to detain any person charged with or suspected of committing terrorism for three days without a judicial warrant.[159] Because of the broad powers that it confers on law enforcers, HSA has been criticized in the international community and raised fears that it may result in violations of civil liberties.[160] There have also been fears that President Arroyo may use the law to crack down on her political adversaries.[161]

152. An Act Providing for the Implementation of the Provision of the 1992 International Convention on Civil Liability for Oil Pollution Damage and the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Providing Penalties for Violations Thereof, and for other purposes, Rep. Act. No. 9483 (2007) (Phil), *available at* http://www.senate.gov.ph/republic_acts/ra%209483.pdf.

153. *Id.* at § 15.

154. *Id.* at § 12.

155. *RP to Set up Find to Tackle Oil Spills*, PHILIPPINE DAILY INQUIRER, June 4, 2007, http://www.inquirer.net/specialfeatures/visayasoilspill/view.php?db=1&article=20070604-69440.

156. An Act to Secure the State and Protect Our People from Terrorism, Rep. Act No. 9372 (2007) (Phils.), *available at* http://www.senate.gov.ph/republic_acts/ra%209372.pdf.

157. *Id.* at § 3.

158. *Id.* at § 7.

159. *Id.* at § 18.

160. UN Rights Expert Calls on Philippines to Amend or Repeal Anti-Terrorism Law, UN NEWS SERVICE, Mar. 12, 2007, http://www.un.org/apps/news/story.asp?NewsID=21827&Cr=philippine&Cr1.

161. Philippines Approves Terror Bills, BBC NEWS, Feb. 20, 2007, http://news.bbc.co.uk/2/hi/asia-pacific/6374875.stm.