MESSAGE FROM THE CO-EDITORS

Greetings, Ayubowan and Vanakkam!

This edition of our Newsletter tries to adopt a theme and focuses on the living and working experiences of interns and lawyers in jurisdictions in the Asia Pacific region, including China. We are hearing from people and their personal experiences. Some may ask “Oh but what is the relevance of their stories to law”. We think much can be learnt from the experiences of the contributors which we hear about in this newsletter. The law is not only pure hard law, it is equally about human interaction, communication and understanding what drives people and their different approaches.

We start out with an article by a lady who worked as a legal intern in Pakistan who was employed by an organization engaged in relief work dealing with the aftermath of the disastrous earthquake that shook the Balakot region of Pakistan.

One of your co-editors thinks that more and more disasters seem to be happening with ever increasing ferocity and terrible loss of life. Some so inclined might be inclined to believe that the prophecies of a certain Nostradamus are being played out before our very eyes. Others will say, nonsense that is just pure sensationalism, all we are witnessing is that the media now just does a more effective job of reporting and disseminating news of such tragic events.

We offer no firm arguments or conclusions on this question and leave it to our readers to decide. While we cannot predict the future with any certainty, it is the fervent hope of your co-editors, (gazing into the crystal ball), that the Spring edition of this newsletter will also have a theme – climate change, cap and trade schemes and the like – or, at the very least, an article on the positions taken up by the nations of the Asia Pacific at the recent Copenhagen Climate Change conference of December 2009.

We think this is linked to the theme of disaster; certainly unless something is done to arrest green house gas emissions, countries such as the beautiful islands of the Maldives could end up under water.

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The picture of the Maldivian Government cabinet holding a meeting underwater conveys very vividly the possible fate of low lying nations, if nothing is done.

We follow with very interesting pieces by interns in Thailand and Japan and a piece by an American lawyer working in China.

We do of course have some legal content for the instruction of our learned readers – this month a most informative piece on Electronic Transactions in the form of a comparative study and summary of E-commerce legislation in all the important countries in the Asia Pacific region; as well as an article on cross border insolvency regimes in the Asia Pacific region. Our sincere thanks and appreciation to the author of these articles who has put in a tremendous amount of work. Happy reading and please, if any of our readers would like to contribute, please submit your articles for consideration to us, your co-editors, John Wilson and Will Herbert.

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2010 FALL MEETING REPORT
By Albert Vincent Yu Chang

Miami, Florida. The Fall meeting of the ABA Section of International Law (SIL) was held on October 27-31, 2009 at the Eden Roc Resort in Miami Beach, Florida.

Special guests included: Stephen N. Zack, President-Elect of the American Bar Association, who gave opening remarks; Dr. Hernando de Soto, President of Peru’s Institute for Liberty and Democracy, who delivered an opening plenary address on the world economic crisis; Thomas A. Shannon, Jr., Assistant Secretary of State for the Western Hemisphere Affairs, who gave a luncheon address on the U.S. Foreign Policy in the Western Hemisphere; and Albert Jan Van den Berg, Professor of Law at Erasmus University and a Visiting Professor at the University of Miami School of Law.

The programs covered a broad range of areas, including business/transactional, dispute resolution, international trade, law practice management and public international law. As a function of the meeting location, a number of programs were in areas relevant to Latin America, including criminal procedure in Mexico, foreign investments in Latin America, regulation of investment in and trade with Cuba, cartel prosecution and leniency procedure in different Latin American countries, and microfinance in Latin America and the Caribbean.

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As the economic locus of the world moves to Asia, these countries must enact laws to facilitate business growth. Unlike data privacy laws, which may be viewed as an impediment to business by placing additional requirements on corporations, electronic commerce statutes tend to provide more certainty for businesses and so are found in a larger number of Asian countries. For example, India and Pakistan do not yet have comprehensive data privacy legislation but both have robust e-commerce statutes. Other Asian countries, such as Indonesia and Vietnam, have privacy protections, but only as provisions in their e-commerce laws. Corporations that do business, either physically or via the Internet, in Asia/Pacific countries need to be able to do so under these countries local e-commerce laws. Rather than having to create unique approaches to each country, corporations can operate electronically throughout much of the region and be assured of legal protections thanks to the efforts of the global and regional organizations to standardize the laws for electronic commerce, electronic signatures and electronic contracts.

The area of Internet law is a large and growing one, encompassing civil and criminal laws dealing with cybercrime, spam, data and communications privacy, content regulation, Internet service provider liability, domain names, intellectual property, jurisdiction and taxation issues. Many of these areas protect individuals in their use of the Internet. But even before the Internet became popular, companies were communicating with each other electronically over private networks to complete transactions, using techniques such as electronic data interchange to send orders and receive acknowledgments. This article will focus on those laws that directly affect electronic business transactions. It will start by weaving together the global electronic commerce, electronic signature and electronic contract model laws and conventions and compare them to current Asian domestic statutes. It will then review the current issues with e-commerce interoperability between countries.

**UNCITRAL**

The United Nations Commission on International Trade law (UNCITRAL) is a UN organization dedicated to furthering “the progressive harmonization and unification of the law of international trade.” To date, it has issued two model legislation. The first is the Model Law on Electronic Commerce (1996 amended 1998), the second the Model Law on Electronic Signatures (2001) and the third the Convention on Use of Electronic Commerce in International Contracts (2005). Together, these provide the basis for creating a minimum set of legal rules to deal with electronic transactions over the Internet and other electronic mediums.

The Model Law on Electronic Commerce is intended to overcome “legal obstacles to the use of electronic communications or uncertainty as to their legal effect or validity.” It has a core principle of functional equivalence between paper-based and electronic transactions.

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It is based on data messages, information generated, sent, received or stored by electronic or optical means. This includes both records (messages not intended for transmission to another person) and data messages of revocation and amendment. Its main provisions are:

**Legal Effect (A5):** Data messages and information incorporated by reference therein must not be denied legal effect solely because of its electronic (or optical) form.

**Writing: (A6):** Legal requirements for a writing can be met by accessible data messages.

**Signature (A7):** Legal requirements for signatures can be met by using reliable methods to identify and indicate person’s approval of information inside the data message.

**Original (A8):** Legal requirements for an original form can be met if there are reliable assurances of integrity of the data message (it remains complete and unaltered), not including any endorsement or normal changes from storing, communicating or displaying the data message.

**Retention (A10):** Legal requirements for retention can be met if the information within is accessible for later reference, retained in the original or representative format and identifies the origin and destination and dates and times.

**Formation/Performance (A11/A12):** If a data message is used in contract formation (offer and/or acceptance) or performance, the contract must not be denied validity or enforceability solely because a data message was utilized.

**Attribution (A13):** A data message sent by the originator, its agent or its information system or using an agreed-upon procedure can be attributed to the originator and the addressee can act with reliance upon such, unless he/she knew or should have known otherwise, including an error in transmission or that it is a duplicate.

**Acknowledgement (A14):** A requested acknowledgement can be in any form if not specified. When a data message is to be conditional upon receipt of an acknowledgement, it is not considered sent until an acknowledgement is received.

**Time of Dispatch and Receipt (A15):** Unless otherwise agreed, a data message’s dispatch time is when it enters an information system outside the control of the originator and its receipt time is when it enters an information system of the addressee, if designated, otherwise at data message retrieval time.

**Place of Dispatch and Receipt (A15):** A place of dispatch and receipt are the originator’s and addressee’s places of business most closely related to the underlying transaction or if none, the principal places of business.

The Model Law on Electronic Signatures is intended to enhance legal certainty in e-commerce by “the harmonization of certain rules on the legal recognition of electronic signatures on a technologically neutral basis.” This law was not intended to override local consumer protection laws. The main provisions of this e-signature model law are:

**Technology Neutrality (A3):** Any technology meeting the stated requirements must be given legal effect.
Reliability (A6/A7): When the law requires a signature of a person, an electronic signature related to a data message can be used if reliable, which is presumed if:

- The electronic signature creation data (biometric data or for PKI, the private-public key pair) is linked to the signer and no other person
- When signed, the signature creation data was under only the signer's control
- Any alteration then made to the electronic signature is detectable
- Any alteration to the information the signature relates to is detectable

Electronic signatures should be consistent with recognized international standards

Conduct of Signer (A8): A signer should use reasonable care to prevent use of signature creation data, notify the other party if this creation data has been compromised and accurately represent all information provided to a certificate provider.

Conduct of Certification Providers (A9/A10): Providers should follow its stated policies and procedures, use reasonable care to ensure accuracy and completeness of certificates during their lifecycle, provide relevant certificates information for relying parties and use trustworthy systems, procedures and people in performing its services.

Recognition of Foreign Certificates and Electronic Signatures (A12): The geographic origin of a certificate or signature or place of business of the issuer or signer should not impact their legal effectiveness, if it is reliable as determined by international standards.

The Convention on Use of Electronic Commerce in International Contracts is intended “to remove obstacles to the use of electronic communications in international contracts” for contract formation or performance between parties in different countries. Although overlapping the e-commerce model law in many respects, additional provisions include:

Exclusions (A2): It excludes contracts for personal purposes, certain well-established transactions (on regulated exchanges, foreign exchange, between banks) or allowing claims on delivery of goods or payments of money.

Legal Effect (A8): Communications related to formation or performance of a contract or a contract itself must not be denied validity solely because it is in electronic form. A party is not required to use or accept electronic communications.

Time of Dispatch and Receipt (A10): Dispatch time is when it leaves an information system under the control of the originator, unless it never leaves such a system, in which case dispatch and receipt time are the same. Receipt time is when it becomes capable of being retrieved. If no electronic address is designated, receipt time is when it comes to the attention of the addressee and is retrievable.

Invitations to Make Offers (A11): A generally accessible proposal to conclude a contract not made to a specific addressee is considered an invitation to make offers, unless otherwise indicated.

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Use of Automated Systems (A12): Contracts formed by the interaction of a person and an automated message system or two automated message systems are not denied legal effect because no person has intervened in the process.

Error in Electronic Communications (A14): When a natural person makes an input error in an automated system that does not allow for correction of the error, he/she may withdraw the portion in error, if he/she notifies the other party and gains no benefit.

Asia/Pacific e-Commerce and e-Signature Laws
Following on from these UNCITRAL model laws for e-commerce and e-signatures, countries throughout the world began to implement domestic laws using many if not most of these same provisions. In Asia, starting with Malaysia, Singapore and South Korea, governments began to implement the necessary statutes and most countries followed suit. This process is still ongoing, as the ASEAN Roadmap for e-Commerce is attempting to get all of the members of that group to implement their e-commerce laws by the end of 2008 and their e-signature laws by the end of 2009. India, one of the early adopters, has a proposed amendment to come closer in line with the model laws (e.g. moving from digital to electronic signatures and stating requirements for reliability thereof and for contract formation, which were not clearly laid out in the earlier statute). Another early adopter, South Korea, is already adding more specialized statutes, such as the Electronic Financial Transactions Act of 2008. The following table shows most of the basic e-commerce and e-signature statutes passed to date in the Asia-Pacific region (India is the only South Asian nation shown, but Pakistan, Mauritius and Sri Lanka also have such laws).

<table>
<thead>
<tr>
<th>Country</th>
<th>Domestic Statutes</th>
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<tbody>
<tr>
<td>Australia</td>
<td>Electronic Transactions Act (1999)</td>
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<tr>
<td>Hong Kong</td>
<td>Electronic Transactions Ordinance (2000 amended 2004)</td>
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<tr>
<td>India</td>
<td>Information Technology Act (2000 proposed amendment 2008)</td>
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<tr>
<td>Indonesia</td>
<td>Law on Information and Electronic Transactions (2008)</td>
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<tr>
<td>Japan</td>
<td>Law Concerning Electronic Signatures and Certification Services (2000)</td>
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<tr>
<td>(South) Korea</td>
<td>Electronic Transactions Act (1998); Digital Signature Act (1998)</td>
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<tr>
<td>Malaysia</td>
<td>Electronic Commerce Act (2006); Digital Signature Act (1997)</td>
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<tr>
<td>New Zealand</td>
<td>Electronic Transactions Act (2002)</td>
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<tr>
<td>Singapore</td>
<td>Electronic Transactions Act (1998)</td>
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<tr>
<td>Taiwan</td>
<td>Electronic Signatures Act (2001)</td>
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<td>Thailand</td>
<td>Electronic Transactions Act (2001)</td>
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<tr>
<td>Vietnam</td>
<td>Electronic Transactions and Information Law (2005)</td>
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</tbody>
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Continued on page 6
To discover the details enacted in the various local statutes, the following table maps the provisions of UN e-commerce and e-signature model laws and conventions (only the new/modified articles) against the provisions of the e-commerce and e-signature laws of Asia/Pacific countries. Where there are gaps, it does not signify that that area is not covered in some other provisions of a country's law (e.g. China's contract law covers electronic contracts and Japan's existing laws were modified to deal with many of these provisions). In addition, certain provisions are implied although not be stated (e.g. India's statute does not use the words "contract", "offer" or "acceptance" but may be implied). The numbers refer to the local statute's sections (S) or articles (A), which may be very close to the model laws' provisions or may only be similar to the model laws' provisions. In a few cases, a country's statute was passed before the final UN model law was approved but may have been influenced by it due to the openness of the UN process. This table does not attempt to list all provisions from each domestic law that may indirectly have an impact, only those from their separate or combined e-commerce (E) and e-signature (D) laws.

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<tr>
<th>UN Provisions</th>
<th>AU</th>
<th>BN</th>
<th>CN</th>
<th>HK</th>
<th>IN</th>
<th>ID</th>
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<th>SG</th>
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<th>VN</th>
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<tr>
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<td>S8</td>
<td>S6</td>
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<td>S6</td>
<td>S7</td>
<td>A7</td>
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<td>Writing</td>
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<td>S7</td>
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<td>Signature</td>
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<td>S8</td>
<td>A14</td>
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<td>E</td>
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<td>Original</td>
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<td>S18</td>
<td>A5</td>
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<td>S91</td>
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<td>Retention</td>
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<td>S12</td>
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<td>Formation</td>
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As is clear from the table, the Model Law on Electronic Commerce has been heavily implemented in Asia. To date, officially Australia, Brunei, China, Hong Kong SAR, India, Mauritius, New Zealand, Pakistan, the Philippines, Singapore, South Korea, Sri Lanka, Thailand and Vietnam have implemented some version of it, but Malaysia, Indonesia and Taiwan also passed some version of it and Japan has modified its laws to reflect those principles. While only China, Thailand and Vietnam in Asia have officially implemented the Model Law on Electronic Signatures, it is clear from the table that a much larger number of countries have passed separate e-signature laws or included these provisions in their e-commerce laws. Probably because the Convention on International e-Contracts is of recent vintage, no countries have officially implemented it. But it has been signed by China, the Philippines, South Korea, Singapore and Sri Lanka and its provisions are clearly on display in Vietnam’s and Indonesia’s laws and are likely to be so as other ASEAN countries enact new statutes. Finally, where the table shows the gaps, it is only with the assistance of local legal counsel that the impact of other domestic laws on e-commerce can be fully ascertained.

The local statutory implementations have excluded or varied some of the model law provisions and added certain other types of provisions. Many of these additions have to do with rules for and enforcement powers concerning certificate issuing authorities and ISPs, handling domain names and copyrights, resolving disputes and delving into consumer protections, including obscenity and privacy. The most common of these local e-commerce statutory provisions that add to or vary from global provisions include:

- The types of electronic information/contracts excluded from its scope and whether the exclusions are listed in the e-commerce law or elsewhere (e.g. local regulations)
- Requiring consent of the other party before use of an electronic signature
- That an electronic signature is conclusively proof or that an electronic signature is refutably presumed to be valid

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- Use of specific technologies, such as digital signatures and public key encryption
- Local security processes for determining if an electronic record or signature is to be considered secure
- Extension of electronic signatures to cover non-parties, such as witnesses
- Protections for cybercrimes, including stealing computer programs, hacking, piracy, extortion, threats, fraud, forgery, defamation and wiretapping
- That each electronic message received is separate from all other electronic messages received, unless the receiver is aware that they are not
- Whether the parties are free to vary from these laws in their agreements
- Requirements for protections of business secrets and data privacy
- Rules and organizations set up for the promotion of electronic commerce
- Presumptions that the electronic message contents is what the originator intended
- Whether the form of the contract can be mandated
- How electronic information affects the rules of admissibility (and weight) of evidence
- Differing rules for electronic transactions involving government

Cross-Border Electronic Signatures and Authentication
In addition to determining whether their e-commerce transactions will be given the appropriate legal effect in the various Asian countries, corporations need to understand whether their e-signatures and digital certificates that underlie these transactions will work across borders. When working with the certificates issued by third party issuers who may not be co-resident in the countries of both parties, legal and technical issues arise. The model law on e-signatures had recognition of foreign certificates (and electronic signatures) as one of its provisions but this has enacted by only a handful of Asian countries (as shown in the previous table). As such, there is no guaranteeing that a certificate issued in a country that recognizes only local certificate issuers, such as Malaysia, would legally recognize an electronic signature based on a certificate issued by a certificate provider in Hong Kong.

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To begin to lay the groundwork for resolving this, UNCITRAL has recently published “Promoting Confidence in Electronic Commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods” (2009). The e-signature model law required that foreign certificates should have the same legal effect as domestic ones “if it offers a substantially equivalent level of reliability.”

To do so, PKI authorities in each country could cross-recognize each other based on an agreed-upon accreditation process that looks to the standards and processes required in each country for certificate providers. This then gives some confidence to a relying party but whether to trust the foreign certificate issuer is up to the relying party. Legal harmonization is also required in the relevant standards of conduct (e.g. ordinary or professional negligence) and the liability for damages, especially for the non-contractual “relationship” between a certificate provider and a relying party.

In Asia, Australia has developed a cross-recognition scheme, mirroring the direction of APEC’s Telecommunications and Information Working Group. Under this scheme, the ability to cross-recognize requires harmonization of the trust frameworks between the PKI authorities in the two countries. Technical standards (e.g. X.509) must also be synchronized and a list of qualifying domains could exist on the PKI authorities’ website to assist a relying party’s assessment of a foreign certificate issuer. Cross-certification, on the other hand, is disfavored as being much more complex, requiring harmonization of certificate policies and practice statements, security and technology interoperability and issuer liability coverage.

Conclusion
With the Internet now widely used for doing business, knowing the global legal impact of electronic transactions is essential for multinational corporations. In Asia, while the number of countries that have implemented framework laws for electronic commerce, contracts and signatures continues to increase, there are still gaps between these local statutes and model implementations. Corporations must be aware of these differences and adjust their risk analysis for e-commerce in each country accordingly. Also, in statutory implementations and harmonization of policy/practice and technology, interoperability of digital certificates and electronic signatures between countries is still not the default. So corporations must be aware of certificate interoperability’s technical and legal impacts. Finally, while monitoring the statutory changes and inter-governmental agreements, corporate counsel must also be able to synthesize e-commerce law with other Internet legal issues, including intellectual property, consumer protections, cybercrime, content regulation, taxation and privacy.

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U.S. FOREIGN AID IN PAKISTAN: 2005 AND NOW
By Sania Khan

Introduction:
On October the 8th of 2005, a massive earthquake registering 7.6 on the Richter scale struck the northwestern region of Pakistan. The effects of the earthquake were disastrous, as it left 74,000 dead, injured 70,000 more and rendered greater than 2.8 million others homeless. Today, many of the adjacent regions are suffering from internal conflicts and humanitarian crises relating to internally displaced persons in the Swat valley. While the underlying cause of each circumstance is different, the aims and issues addressed by the relevant foreign aid packages are similar.

This article will investigate the U.S. foreign aid package Pakistan received in 2005 in comparison to that detailed in the Enhanced Partnership with Pakistan Act of 2009. The scope of the discussion of the current aid package will be further broadened to apply to the Foreign Assistance Revitalization and Accountability Act of 2009 – also called the Kerry-Lugar foreign aid reform bill – which is aimed at revitalizing the U.S. foreign aid system. As a legal intern with an American relief organization in Islamabad, Pakistan, I have acquired invaluable insight into the application of foreign aid. I intend to utilize my experience as a basis to infuse my familiarity with relief work in Pakistan throughout this essay, as I explore the many obstacles and difficulties encountered when engaging in such work.

Under the current structure of U.S. foreign aid policy, larger aid agencies typically contract project implementation out to smaller non-governmental organizations. This is often done under the greater banner of privatizing the distribution of aid – a practice that has become commonplace due to the increase in natural disasters worldwide and the greater number of players within the aid framework; most significantly, non-profit organizations, corporate international development branches and development consulting firms. While this framework has created opportunities for diverse approaches in project implementation in developing countries, it has also come with a great deal of difficulty, often manifesting itself in a lack of accountability and efficiency.

2005 Earthquake Relief structure:
The initial efforts of USAID to assist earthquake victims consisted of providing the most necessary and basic of services, such as emergency shelter, relief supplies and medical help. USAID additionally created the Earthquake Reconstruction Program (ERP), which spanned 4-years and disbursed $200 million with the long-term goal of enhancing the livelihood of people in the region. The primary facility by which the ERP attempted to accomplish this goal was by emphasizing the development of educational and medical institutions. The Program was primarily executed by USAID’s implementing partners, who operated principally in the capital region of Islamabad and in the desolate terrain of the earthquake-affected areas. These partner organizations had the most direct and significant contact with the beneficiaries of the project, and were hence delegated with the task of navigating through the administrative and logistical issues inevitably associated with the execution and oversight of the projects.

As a legal intern with an implementing partner in Pakistan, I was intimately exposed to the difficulties concerned with tasks relating to the acquisition of data and the hiring practices employed within this aid framework. As an example, being afforded the task of performing research for a proposal on female literacy, it became unnecessarily difficult to obtain crucial statistical information that should have been readily available. This was primarily because the partner organization I worked for did not have access to information and data that larger organizations possessed. Therefore, our Quetta office had to provide us with the information we sought – such as rates of female literacy in districts throughout Balochistan.

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The office proved to be very helpful and was able to retrieve the information we desired, despite external factors such as geographical difficulties associated with transportation and the unreliability of electricity. Even in doing so, however, the fact remains that the resources of the Quetta office would have been much better served in focusing on its own projects and beneficiaries in Balochistan, rather than devoting valuable time to obtaining ordinary data that surely other implementing partners or organizations had already compiled. Resources, information and statistics are critical when working in the field, and it became evident to me that foreign aid agencies would have much more access to legitimate figures than their implementing partners. Providing these resources to their implementing partners would not only assist in the collaboration between implementing partners, but would also result in efficiency and ease of statistical analysis.

In addition to this observation, I perceived the disconnect that often exists between employees of implementing partners and the beneficiaries of the project. I believe this to be in large part because of the inability of the employees and beneficiaries to effectively communicate with each other. As an intern, I served as a bridge between our organization and the beneficiaries in Balakot, the epicentre of the earthquake, by translating Urdu and remaining sensitive to the perspectives of the beneficiaries at the project site. This proved to be helpful in identifying problems with the project and moreover motivated and inspired the locals to take an active role and participate passionately in the project. There most certainly are translators readily available in the development sector, but nonetheless it is far more effective to have an employee of the organization speak the local tongue and converse directly with those being served. This difficulty in communication could be remedied if foreign aid agencies exercised their right of oversight over their implementing partners, setting forth recommendations on qualifications required for those hired to work in the field. This would ultimately ensure that the voice of the beneficiaries is heard and that they are served to the best ability of the relief agency involved.

The most basic and direct manner in which to accomplish this feat would be to implement a comprehensive human resources policy spearheaded by the relevant foreign aid agency, encompassing all parties involved in the relief work and keeping the best interest of the beneficiaries in mind.

Throughout my time in Pakistan, the USAID officers served as legitimate sources for guidance and oversight throughout the project. This niche of theirs, however, was often overshadowed by my sincere belief that their involvement could have been more effective if their organization had the institutional capacity to become more involved in providing resources beyond that of funding and guidelines for the project. I concluded my time as a relief worker in Pakistan with the sincere conviction that the use of implementing partners is truly beneficial in that it allows for smaller organizations to get involved and provides for direct contact with locals; unfortunately, I also realized that it creates greater responsibility for an already overburdened organization to shoulder and requires a larger capacity for oversight from the foreign aid agency.

New Aid Framework:
The Enhanced Partnership with Pakistan Act of 2009 (EPPA) contains the new appropriation of $7.5 billion through 2013 in non-military aid to Pakistan.4 While this legislation is given in the context of non-military aid, it is important to note that due to the current political climate and internal conflict, there are provisions in the Act which provide the Pakistani military with aid conditioned on an effective front from the Pakistani government to solve the internal conflict with the Taliban, thereby linking economic reform with military resistance. Content-wise, in comparison to the ERP, the EPPA expands aid distribution to the judicial and educational system, police reform, anticorruption efforts and economic revival in the context of utilizing Pakistani firms and organizations to implement the aid projects.5 Certainly, the broader coverage of the EPPA seeks to engage with the Pakistani people on a much more substantial level than before. Reform in all of these sectors will have a significant positive and everlasting affect on the prosperity and stability of the country.

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While the EPPA broadens the scope of aid given to Pakistan, the guidelines under which the aid will be distributed are much more stringent – as detailed in the Foreign Assistance Revitalization and Accountability Act of 2009, or the Kerry-Lugar Bill. This Act symbolizes a shift in foreign aid distribution in which transparency, coordination, and coherence in resource dissemination and project implementation are given paramount importance. Daniel Markey, a senior fellow for South Asia at the Council on Foreign Relations, has contributed to the underlying goals of this Act and suggested that more effective oversight requires USAID and the U.S. State Department to increase their size and institutional capacity. This strategy would increase manpower as well as synchronize the implementation scheme throughout USAID-run projects.

Broadly speaking, if passed, this Act would remedy the gap in oversight by re-instating USAID’s Bureau for Policy and Strategic Planning and Office for Learning, Evaluation, and Analysis in Development, greatly assisting the USAID internal administration as well as providing clarity for implementing partners within the sector. By having members of staff dedicated to managing oversight and transparency, the agency can target and solve problems in a more efficient manner. This would occur not only in the context of coordination, but also in evaluation and implementation on the ground. Clear communication between the donor agency and the partner organizations is critical for the successful execution of any project, and it is clear that this Act would address this issue by increasing the capacity of USAID. The Act would also establish the Council on Research and Evaluation of Foreign Assistance (CORE), which would be independent from any agency and would evaluate the impact and effectiveness of all U.S. foreign aid programs.

Conclusion:
Ultimately, this new aid framework addresses the misgivings of the older aid structure by giving USAID the opportunity to have more control and oversight on the ground in terms of its projects. Specifically, it provides USAID with new forums to monitor and evaluate its implementing partners in project implementation, while also enabling USAID to have more manpower to develop a human resources strategy and provide such partners with resources beyond funding. This change would affect not only Pakistan, but would have long-term implications for all countries in the Asia-Pacific region and those countries that USAID will take an interest in moving forward.

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ASIA/PACIFIC INSOLVENCY LAW – CROSS-BORDER RULES FOR CREDITOR CORPORATIONS
By Thomas Shaw

With the severity of this current economic situation still unclear, corporations are having to risk assess debtors as never before. The risks of extending credit to debtor corporations must be weighed against the urgent need to increase revenues. Creditor corporations must understand the implications when the purchaser is a foreign legal entity which may become insolvent before fully paying the amounts due. In certain Asian countries and the U.S., there is the ability to utilize the provisions of a United Nations model law implemented into local statutes to assist foreign creditor corporations. This allows for access to the debtor’s domestic bankruptcy proceedings and for recognition of rulings from the creditor corporation’s bankruptcy courts. The Asian countries of Australia, Japan, South Korea and New Zealand have all explicitly added the model law’s provisions to their domestic codes, as has the U.S. The People’s Republic of China has not explicitly adopted this model law, but now has some similar provisions while Hong Kong SAR and Singapore mirror certain model law concepts, such as not discriminating against foreign creditor claims and cooperation with other courts. Other Asian countries currently have less commonality with the model law. This article will look at what creditor corporations with an insolvent debtor in an Asian country or the U.S. must understand about the formal multi-country process to regain amounts due them. As the area of insolvency law is vast and complex, this article does not attempt a detailed analysis of insolvency laws in each Asian country, but only highlights the cross-border provisions in domestic laws that facilitate foreign creditor recovery actions.

Beyond formal insolvency proceedings, the more common and less costly approach is an informal workout scheme between the debtor and creditor(s). Given the non-confrontational nature of business dealings in Asia, this provides a viable alternative to formal proceedings. A number of international, regional and country-specific methodologies are available to assist this process. Proposed by the Asian Development Bank and endorsed by the Asian Bankers Association is a set of guidelines for informal workouts covering nineteen (19) principles and the Model Agreement to Promote Company Restructuring (2005). In addition, there is the INSOL Statement of Principles for a Global Approach to Multi-Creditor Workouts (2000) from the International Federation of Insolvency Professionals that contains eight principles covering cooperation and communication among creditors during informal workouts. Finally, the World Bank addresses this further in Principle 26 of its Principles and Guidelines for Effective Insolvency and Creditor Rights Systems (2001). This topic is not covered further here.

Guidance from UNCITRAL
The United Nations Commission on International Trade law (UNCITRAL) is a UN organization dedicated to furthering “the progressive harmonization and unification of the law of international trade.” To date, it has issued a model law, a legislative guide and a practice guide in support of cross-border insolvency legislation. The first is the Model Law on Cross-Border Insolvency (1997), the second the Legislative Guide on Insolvency Law (2004) and the third the Practice Guide on Cross-Border Insolvency Cooperation (2009). Together, these provide the basis for the basic statutory and contractual frameworks that properly allocate responsibilities and procedural rules among the countries in cross-border insolvency matters.

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The objectives of the Model Law on Cross-Border Insolvency are to provide a more effective and fair framework that may also serve to harmonize differing insolvency laws while striving for “greater legal certainty for trade and investment.” It was intended to deal with typical insolvency situations, such as voluntary or involuntary personal or corporate reorganizations, liquidations and debtor-in-possession but excludes certain types of legal entities or industries from its scope.

Its core principles involve providing foreign creditors and representatives access to courts in the country of enactment and recognition of and coordination with foreign insolvency proceedings. This applies not only to the situation of when there are foreign creditors of the insolvent domestic party, but also when the insolvent party has assets in foreign countries. The law is not meant to depend on reciprocity but is unilateral (recognizing foreign proceedings of states that have not implemented the model law’s provisions). It also only applies to single corporate debtors and not to corporate groups (e.g. parent and subsidiary). Its main substantive provisions are:

**Representative Application / Participation (A9/A10/A11/A12):** Foreign representatives, can directly apply to a domestic court, commence (before recognition) and participate in (after recognition) a domestic insolvency proceeding, without the representative or foreign assets coming under domestic court jurisdiction except regarding the application.

**Creditor Access:** (A13): Foreign creditors have the same rights to commence and participate in domestic insolvency proceeding as domestic creditors and their claims should not be ranked lower than those of similar domestic claims.

**Notice** (A14): Notice to foreign creditors should be the same as to domestic creditors and should be sent to each individually creditor, unless otherwise appropriate.

**Recognition of Foreign Proceeding:**

**Application** (A15): A foreign representative may apply to have a foreign proceeding recognized by submitting certified evidence of the foreign proceeding.

**Presumptions** (A16): That submitted documents are authentic and unless shown otherwise, the debtor’s registered office (e.g. incorporation) is its “center of main interests” (where the debtor conducts the administration of its interests on a regular, ascertainable by third parties basis) or the place of habitual residence for an individual.

**Decision to Recognize** (A6/A17/A20/A31): A foreign proceeding must be recognized if it meets the prerequisites and is not contrary to public policy, at the earliest possible time. In addition, if the proceeding takes place in the country where the debtor has its center of main interests, then it is considered a “foreign main proceeding.” This requires staying all actions, executions and transfers/encumbrances involving the debtor’s assets. Unless otherwise shown, this recognition is proof that the debtor is insolvent. If the debtor only has an “establishment” (any non-transitory place of business) there, then it is deemed a “foreign non-main proceeding.” Modification or termination of the decision is possible if the grounds are lacking or cease to exist.

**Relief that may be Granted:**

**Upon Application** (A19): Interim relief to protect assets of the debtor or interests of creditors before recognition. It cannot interfere with a foreign main proceeding.

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Upon Recognition (A21): Encompasses any appropriate relief, including staying individual actions or executions of or the right to transfer/encumber the debtor's assets, take evidence, extend or grant additional relief or entrusting administration or distribution of the debtor's assets.

Protection of Creditors (A22): In granting or denying relief or modifying or terminating such, the courts must be satisfied that the interests of creditors and other interested parties, including the debtor, are adequately protected.

Initiate Actions / Intervention (A23/A24): Foreign representatives may initiate actions to avoid acts detrimental to creditors and may intervene in proceedings involving the debtor.

Cooperation with Foreign Courts (A25-A27): Domestic courts may directly communicate with and must cooperate to the “maximum extent possible” with foreign courts and representatives, possibly utilizing any of a number of suggested appropriate means.

Commencement of Subsequent Proceedings (A28): After recognition of a foreign proceeding, a domestic proceeding is restricted to domestic assets of the debtor.

Concurrent Proceedings (A29/A30): If a domestic proceeding has already commenced, relief granted under Articles 19 or 21 must be consistent with that proceeding and Article 20 does not apply (i.e. staying all actions, executions and transfers/encumbrances involving the debtor's assets). If the domestic proceeding commences after the recognition of the foreign proceeding, relief or stays granted under Articles 19, 20 or 21 inconsistent with the domestic proceeding may be terminated or modified. If more than one foreign proceeding is ongoing that concerns the same debtor, the relief should be consistent and should be modified or terminated as appropriate to ensure it is so.

Payments in Concurrent Proceedings (A32): Partial payment to an unsecured creditor under a foreign proceeding proscribes payment for the same claim under domestic law while payments to other creditors in the same class are proportionately less than what the creditor has already received (the “hotchpotch” rule).

The Legislative Guide on Insolvency Law is intended to provide recommendations to legislatures when defining or modifying national insolvency statutes. It focuses on those aspects of the domestic insolvency laws (e.g. commencement/management/conclusion of actions, protection of assets, debtor / creditor / trustee roles and responsibilities, liquidation and reorganization) and leaves primary discussion of cross-border provisions to the model law and its accompanying enactment guide. But domestic law issues that impact cross-borders insolvency include jurisdiction over the debtor and his/her assets for insolvency purposes wherever its “center of main interests” are located. Also, domestic proceedings can be initiated where a debtor has an establishment or where assets are located but only to the extent of these assets and more likely in liquidation instead of reorganization proceedings.

It also reviews the applicable laws under a conflict of law analysis to determine two things: whether a foreign claim determined under a foreign law is valid and enforceable and if it is to be considered equivalent to domestic claims that get privileges or priorities and so receive the same treatment in insolvency proceedings under domestic law (including any exceptions). In addition, it discusses the desire for universal approach to including all of a debtor's assets in a single insolvency proceeding but faces the reality that many countries still use a territorial approach of having insolvency jurisdiction over assets or establishments within their borders.

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Finally, procedural issues such as the need to translate claims into the local language and the timing of conversion into local currencies should be addressed in domestic insolvency laws.

The Practice Guide on Cross-Border Insolvency Cooperation looks at techniques that should be used to further communications and cooperation between courts and insolvency representatives in cross-border cases. It provides further information on how Articles 25, 26 and 27 in the cross-border insolvency model law can be implemented and specifically it looks at one of the methods suggested in Article 27, the cross-border agreement. In lieu of robust domestic implementations of the model law in all countries involved, (and even when such do exist), the case-specific cross-border agreement can address all the missing important issues.

Asia/Pacific Cross-Border Insolvency Laws
While the UNCITRAL model law is the most useful method to implement cross-border insolvency provisions into domestic laws, it has not been the only source of these rules. Some Asian countries have existing insolvency laws with provisions for foreign proceedings or creditors. For countries influenced by the model law, local statutory implementations may have excluded or varied some of its provisions and added other types of provisions. In addition, some Asian countries have created cross-border rules through bilateral agreements instead of in domestic statutes, such as the one between Singapore and Malaysia. The following describes the situations in the major economies in the region plus the U.S., partitioned into those that have adopted key parts of the model law and those that have not.

### Australian countries with some or most of the cross-border insolvency model law provisions

**Australia**
For corporation debtors in insolvency, Australia utilizes chapter 5 of the Corporations Act of 2001 (and the Bankruptcy Act of 1966 for individuals). In 2008, Australia adopted the UN model law on cross-border insolvencies in toto, with very minor modifications, as the Cross-Border Insolvency Act of 2008. The modifications include requiring that a statement of all Australian insolvency proceedings involving the debtor accompany the application for recognition (Article 15) or be given to the court when it becomes known to the representative (Article 18), that if there are conflicts with these two existing Australian laws, the cross-border law prevails and that the Government can make appropriate regulations under the Act, such as the removal of the law's application from certain types of legal entities or industries and finally that receiverships and administrations are not within its current scope.

**Japan**
For insolvent corporations, Japan has a number of laws, including the Company Law (includes special liquidations of larger corporations), the Corporate Reorganization Law for larger corporations, the Civil Rehabilitation Law for debtors in possession and the Bankruptcy Law for corporations and individual liquidations. In 2000, Japan adopted the UN model law on cross-border insolvency as the Law on Recognition and Assistance of a Foreign Insolvency Proceeding. While significantly larger than the 32 articles of the model law (the domestic law has 69 articles), it in essence adopts the model law, with the following modifications. Article 17’s decision to recognize a foreign proceeding is not mandatory even if the prerequisites are met. The stays under Article 20 are not automatic but assistance orders can be issued concurrently or thereafter. Concurrent proceedings (Articles 28-30) are not recognized but only a single proceeding which is the main proceeding (either foreign or domestic) can go forward and the others must be suspended. A foreign main proceeding must also ensure that there is “no likelihood it would be detrimental to the interests of creditors in Japan” and it meets the “general interests of creditors.” Direct communications between domestic and foreign courts is not mandated (Articles 25-27) and standing of foreign representatives (Article 23) to avoid certain transfers is not explicitly stated.

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Korea
To address corporate insolvencies, the Republic of Korea had the Bankruptcy Act, the Composition Act and the Corporate Reorganization Act. These were all included into the Debtor Rehabilitation and Bankruptcy Act of 2006 (also called the Unified Insolvency Act). In chapter 5 of this new law, Korea adopted the UN cross-border insolvency model law. There are some differences from the model law. These include Article 17’s decision to recognize a foreign proceeding is not mandatory even if the prerequisites are met. The Article 20 recognition of the foreign proceeding does not automatically stay all actions, executions and transfers/encumbrances involving the debtor's assets and a separate order is necessary. Also, there is no initial categorization of foreign proceedings into main and non-main as per Article 2 but may be determined when there are multiple foreign proceedings.

China
Corporate insolvencies in China fall under the Enterprise Bankruptcy Law of 2006. Article 5 allows a debtor’s property located outside China in a local proceeding and for an application for recognition of foreign bankruptcy judgments on the debtor’s property located in China. There are a number of caveats though. The request for recognition requires either an international treaty or reciprocity. It also requires that the foreign judgment does not “violate the basic principles of the laws” of China, nor its sovereignty or security. Finally, a foreign judgment cannot “undermine the legitimate rights and interests of the creditors” within China.

Hong Kong
Hong Kong has the following laws to deal with corporate insolvencies, the Companies Ordinance, the Bankruptcy Ordinance and the Companies (Winding-up) Rules. It has not adopted the UN model law for insolvency. Instead, under its domestic laws, Hong Kong does not discriminate between domestic and foreign creditors making claims in Hong Kong proceedings. Hong Kong courts, drawing on their English common law background, do cooperate with other courts in insolvency proceedings and while the courts will recognize a foreign proceeding and representative, they will not place holds on local assets without a parallel proceeding being started in Hong Kong.

Singapore
Singapore uses the Companies Act of 1994 to deal with corporate insolvencies. It has not adopted the UN model law for insolvency. Local courts have jurisdiction over locally incorporated companies wherever their assets are located but only over the Singapore-based assets of foreign corporations registered in Singapore. With the exception of conflicts with Singapore public policy, the recognition of foreign claims and representatives is based upon the law in the country of incorporation. Money judgments can be recognized for countries in the Commonwealth under reciprocal agreements but for other countries only by starting a new action in Singapore courts. Singapore has a bilateral agreement with Malaysia that addresses personal insolvency but not corporate insolvency.

New Zealand
Corporate insolvencies are covered by the reformed Companies Act of 1993 and cross-border insolvencies by the Insolvency (Crossborder) Act of 2006, which basically implements the provisions of the UN model law into domestic law. Revisions include requiring representatives to notify debtors upon recognition or relief (Articles 17/19), the end of relief for debtors placed in statutory management and designation of proceedings if there are mutual recognition agreements.

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Asian countries with few of the cross-border insolvency model law provisions

India
Corporate insolvencies in India come under the Companies Act of 1956 and the Sick Industrial Companies (Special Provisions) Act of 1985, repealed by the Sick Industrial Companies (Special Provisions) Repeal Act of 2003 (not yet gazetted). There is no stated statutory discrimination against foreign creditor claims. Foreign proceedings against corporate assets are possible, as are foreign insolvency representatives but these require reciprocity. India has no current express provisions for cross-border insolvency. However the Government has introduced this in forthcoming legislation (not yet enacted), the Companies Bill 2009.

Indonesia
Corporate insolvencies in Indonesia are handled under the Bankruptcy Law of 1998 and then the New Bankruptcy Law in 2004. In terms of these provisions, foreign creditor claims are not treated any different from domestic creditor claims under an Indonesian proceeding. Foreign proceedings and representatives are not recognized without an appropriate treaty in place.

Malaysia
The Companies Act of 1965 makes provision for corporate insolvencies. There is no stated discrimination against foreign creditor claims. Malaysia does not recognize foreign proceedings or representatives (with the possible exception of certain corporate liquidations).

Taiwan
The Company Law and the Bankruptcy Law address corporate insolvencies. There is no stated discrimination against foreign creditor claims. Foreign proceedings and representatives are not recognized for assets located in Taiwan.

Thailand
Corporate insolvency is handled under the 1998 amendments to the Bankruptcy Act of 1940 and also under the Commercial Code. With certain requirements such as proof of reciprocity, claims of foreign creditors under bankruptcy proceedings in Thailand are possible. Foreign proceedings, representatives and assets are not recognized in Thailand.

Philippines
The Insolvency Law controls corporate insolvency. Foreign creditor claims should not be treated differently than domestic creditor claims. Foreign proceedings and representatives would not be recognized for assets located in the Philippines. The Corporate Recovery Act, which does address cross-border insolvency, has not yet been enacted into law.

United States
The UN model law was added to the U.S. Bankruptcy Code chapter 15 in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. It has a number of differences, such as exclusion of certain entities (e.g. railroads) and has other technical and American language changes, to make it fit into the current U.S. bankruptcy code and procedures. Substantively, Article 7 is revised to ensure that assistance is preceded by recognition and lists the factors for a Court to consider. Article 9 is revised to require application to the bankruptcy court first.

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Article 11’s revision gives the foreign representative the ability to file either a voluntary or involuntary case, but the voluntary case must be a foreign main proceeding. The preliminary relief under Article 19 and relief under Article 21 are subjected to additional limitations. Article 20 is revised to include the ability to use, lease or sell property or operate the debtor’s business. A foreign representative has standing in a case brought under the code under Article 23 but if it is a non-main proceeding, there are additional determinations.

Case-Specific Cross-Border Insolvency Protocols
In June, 2009, the cross-border insolvency protocol for Lehman Brothers Group of Companies was approved (In re Lehman Brothers Holdings, Inc., et al., Case No. 08-13555 (S.D.N.Y. June 17, 2009)). In lieu of appropriate cross-border rules in each country involved in multi-country insolvency, such rules can be agreed to. While a much larger case than a corporation is likely to face for a typical debtor, it is instructive to review this protocol for its cross-border implications. After the events of September 2008, around eighty Lehman subsidiaries (out of 4000) either undertook or its creditors initiated insolvency proceedings across the world, in sixteen different jurisdictions, both common law and civil law, including Asia. The official representatives spanned from liquidators, trustees, administrators, custodians to Lehman companies as debtors in possession plus a creditor’s committee was formed. To coordinate the large number of required proceedings, resolve common issues and protect creditor interests, a common framework was required. But because many of the administrators could be held personally liable if they exceeded the scope of their local statutes, several months of negotiations were required to agree on this protocol. Even though the protocol was a statement of intentions and guidelines, not a legally binding document, several administrators refused to sign it, instead looking to work informally within it. The stated aims of the protocol were: coordination, communication, information sharing, asset preservation, claims reconciliation, maximize recoveries and comity (independence of all tribunals in the various countries). While focusing on how to handle intercompany claims, it also gave the right of representatives and creditors to appear in all proceedings, tried to limit filing of the same claims to only a single proceeding and sought coordination of insolvency plans filed in each jurisdiction. Finally, the court order adopted the seventeen (17) guidelines in the American Law Institute’s Guidelines for Court-to-Court Communications in Cross-Border Cases (2003).

Conclusion
Insolvency law is much too complex to deal with in a single article, especially when discussing all of the major Asia/Pacific economies and even more complex when corporate groups are involved. In evaluating the risks involved in extending credit to foreign debtors in Asia, corporations must be able to have a clear understanding of the possibilities available to them to recover monies due them in case of insolvency of the debtor. Voluntary informal workout regimes are preferable when dealing with insolvent debtors. If those cannot be utilized, then corporations must turn to formal procedures available under the applicable jurisdictions. For Asian creditor corporations dealing with debtors in Asia or the U.S., there is not a single unified insolvency approach that works in each country. For those countries that have passed a domestic version of the UN model insolvency law, corporations have the ability to seek recognition of foreign proceedings against the debtor or pursue claims in the debtor’s domestic insolvency courts. For those countries that have not passed a version of this legislation, the process is more difficult but select provisions of the model law may be available under different domestic laws. When multi-country insolvencies involve differing (or no) model law implementations, case-specific private cross-border protocols may be used, as in the Lehman case. In addition to fully understanding how to proceed against insolvent debtors in each country where credit is extended, corporations need to set up rigorous debtor risk evaluation programs, initiate processes to continually monitor the ongoing status of their debtors’ financial condition and to determine in advance what the likely “center of main interests” would be for each debtor. Finally, the appropriate internal controls must be designed and implemented to track and follow-through when the payment of outstanding receivables begins to fall behind schedule.
INTERNING AT A JAPANESE LAW FIRM – SEEKING RECOGNITION
By Hudson P. Hamilton

I spent July of 2009 interning for a small Japanese law firm in Tokyo. The internship was arranged through Santa Clara University School of Law's summer study abroad program, and it was preceded by three weeks of intensive classes on Japanese law. My internship was fascinating in the sense that I was able to observe the day-to-day practice of law in Japan, where the legal profession is one of the most respected professions in society. It was also challenging in the sense that institutional and cultural barriers made it difficult to gain the substantive experience I had hoped for. Here is a summary of my internship experience.

Seeking Recognition
Initially, I knew my challenge was going to be earning recognition as not just a Japanese-speaking foreigner, but as a future attorney. Several factors were working against me. First and foremost, I was entering a different jurisdiction, where the barriers to entry into the legal profession are (still) much higher than the U.S., and those select few who do pass the Japanese bar exam are placed on a well-worn track of internships at law firms, prosecuting offices, and courts. In short, my internship was an exception.

Second, I was the 14th U.S. law student to intern at this office. While this meant that the office was used to having a U.S. law student around, it also meant reduced expectations, as most of my predecessors had little to no Japanese language ability. And third, it was July, typically one of the slowest months of the year as courts enter an extended summer holiday. Thus, finding substantive work was going to be difficult.

My first few weeks were mostly spent meeting with the office's lone U.S. attorney and discussing past cases, past clients, and the practice of law in Japan in general. I would accompany and observe Japanese attorneys in court appearances and client meetings whenever possible, but these turned out to be few and far between. While I thoroughly enjoyed these learning opportunities, it became clear that if I wanted to do analytical work, I was going to have to find it on my own.

Seeking Counsel
That was when I got some great advice. I was explaining my difficulties in finding substantive work to another U.S. attorney in Tokyo, and he suggested I give a talk to the Japanese attorneys in my office. Seeing me on my feet discussing legal issues in a logical, coherent way would go a long way to changing their perception of me, he said. So at the next office meeting I made my pitch: I give a talk, in English or Japanese, on any issue in U.S. law they would like to learn about, and they listen while enjoying bento lunches. The attorneys all seemed sincerely interested, and we decided my talk would be about U.S. jurisdiction issues.

Over the next week I put together a 30-minute talk explaining U.S. concepts of subject matter and personal jurisdiction, state and federal jurisdiction, as well as a brief explanation of a few major U.S. cases in civil procedure. The office elected to hear my talk in English, partly to practice their listening skills, and partly I'm sure to make things easier on me. Every lawyer in the office attended, and I enjoyed playing the part of my 1L Civil Procedure professor for a day. Q&A lasted a half-hour, and although many questions were from a practitioner's perspective to which I could only make generalizations, it was clear that the talk was a success in the sense that the lawyers now felt comfortable discussing substantive legal issues with me.

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Conclusion
I feel my internship in Japan this past summer was a success because I was able to observe the practice of law in Japan, make a contribution to the perception of U.S. law students in Japan, and make connections with many U.S. attorneys practicing in Tokyo. For any intern or attorney struggling for recognition in a foreign jurisdiction, consider offering to give your local colleagues a talk over lunch. It may help improve your image from respected foreigner to respected attorney.

Hudson Hamilton is currently pursuing his Juris Doctor degree from University of Washington School of Law and expects to graduate in June 2011. He graduated summa cum laude from the University of California, Los Angeles in 2003. Before law school he worked as a translator (Japanese/English) in Japan and China. He can be reached at hudson24@uw.edu.

SUMMER INTERNSHIP IN BANGKOK, THAILAND
By Kyung-Jin “K.J.” Lee

I worked for Seri Manop & Doyle (“SMD”), a mid-size international law firm in Bangkok, Thailand, for the summer of 2009. The internship was part of the cooperative agreement between the East Asian Legal Study Center of University of Wisconsin Law School and the Thammasat University Faculty of Law, Bangkok, Thailand. I am very grateful to the East Asian Legal Study Center, the Thammasat University Faculty of Law, and SMD for giving me this invaluable opportunity. I truly feel fortunate to have had this opportunity to work in Bangkok.

At SMD, I was able to work on interesting projects and learn about the legal issues foreign business people face when investing in emerging markets. Like other emerging market countries, Thailand has special regulations on foreign business activities in its domestic market. If investing companies or individuals fall under the statutory definition of foreign, their business activities such as purchasing real property can be restricted. Specifically, foreigners are required to obtain appropriate business licenses according to their field of business. Therefore, it is crucial for foreign investors to be fully aware of the legal restrictions attached to them. Most of my assignments were related to helping these non-Thai investors understand these legal restrictions.

I was given the opportunity to research and draft articles and memoranda regarding various issues associated with doing business in Thailand, thanks to Michael Doyle who is a U.S. attorney and partner of SMD. One of the issues I researched and wrote a legal memorandum about was the possible exit strategies that foreign businesses may take under the Thai business law and bankruptcy law. It was not only an interesting topic but also a timely one, since more foreign businesses in Thailand became interested in the winding-up or the business reorganization procedure due to the current economic condition. In addition, I also researched and drafted a newsletter article about the Thai immigration law, which is another important topic for foreign investors. Foreign investors clearly can benefit from obtaining residence status or citizenship, since they can limit or avoid the restrictions attached to foreigners under Thai law.

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The internship not only gave me the opportunity to further develop my practical legal skills but also made me think about the importance of my work as an attorney. I had an opportunity to follow a Thai attorney representing a foreign company that happened to violate one of the legal restrictions imposed on foreign businesses in Thailand. The company had to pay a huge amount of fine, which could have been easily avoided if they had a counsel who timely checked the pertinent legal restrictions. This case reminded me of a lawyer’s universal duty to provide timely and competent service to his or her client.

All the assignments were interesting but sometimes I faced difficulty during work in an unexpected way. Contrary to my initial concern, I was able to read and understand the Thai laws I was researching because most of the Thai statutes and regulations were translated in English. Nevertheless, I always had to take the time to verify what I wrote with my Thai colleagues to make sure that I understood and applied the law correctly. My understanding of Thai laws was based on my knowledge of U.S. law, so I wanted to avoid the possible misinterpretation of Thai laws. Accordingly, it was important for me to always plan ahead and try to finish assignments at least a couple of days before due date so as to have sufficient time for review. I think U.S. expatriate attorneys will often face similar necessity to verify their work with attorneys educated in the pertinent country before finalizing their work. This necessity may cause difficulty to U.S. expatriate attorneys because having an additional verification process can delay their work.

In addition to my interesting assignments, the kindness of Thai people made my internship even more memorable. Everyone at SMD was very friendly to me and eager to answer my questions about Thai culture as well as Thai law. I paid close attention to how people interact and refer to each other, such as the use of proper designations, and tried to follow their behavioral norm as much as possible. Thankfully SMD staff well perceived my effort and always found ways to incorporate me into the firm activities. SMD staff invited me to many social gatherings regardless of the language barrier that existed between us. I am very grateful to everyone at SMD for everything they have offered to me.

This internship program has been one of the most rewarding experiences I have had. I had an opportunity to apply what I have learned from University of Wisconsin Law School in an emerging international market. Moreover, I was able to see my strength and also areas to work on for my future career. What I gained in Bangkok (except for the weight I gained from irresistible Thai dishes) will stay with me for the rest of my legal career. Again, I am grateful to the East Asian Legal Study Center, the Thammasat University Faculty of Law, and SMD for giving me this invaluable opportunity.

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BRIDGING THE GAP: HELPING EAST MEET WEST TO GET BUSINESS DONE
By Aaron D. Hurvitz

"Hi, my name is Aaron Hurvitz, and I am Of Foreign Counsel for Kangxin Partners in Beijing, China," goes the typical greeting. Next comes the look of surprise, confusion, and then hesitation, before the inevitable reply from almost all our clients and colleagues, "But, you aren’t Chinese."

"No, I am not" I usually say with a smile. Then, like clockwork, exactly four seconds later I am asked the same question from each and every person I meet. “Now tell me, what exactly are you doing in China?”

What do I do in China? Well, let me begin.

I have the fortunate opportunity to see the world from two perspectives, both Chinese and Western. Now I am not going to advocate why one may be better than another, or the different perceptions both have come to know in their own right. I only sit as an observer, and take action when I need to. I work to bridge the cultural, language and business gaps between the two different worlds. And that’s exactly what they are, worlds.

So, how did I get here? Well, I am a U.S. Attorney, licensed in California and in Illinois and after completing my LL.M. in International Business and Trade Law, I hopped on the next flight to Beijing. I had spent significant time in China studying and working before I decided to actually pack up and move here, and the decision was fantastic one.

I work for Kangxin Partners, P.C., one of China’s leading intellectual property law firms. As a foreign lawyer I am unable to actually practice law in China, and just like all other foreign attorneys working in China, the extent of my practice is merely to advise and consult on Chinese and American Law. So, as Foreign Counsel I advise Kangxin’s Western clients on aspects on Chinese Intellectual Property Law. I specifically focus on how our clients should bring their new technology to China and how best to protect it, and I advise on anti-counterfeiting and enforcement strategies. On the non-legal side I participate in business negotiations, dispute resolution, and our clients’ various commercial endeavors.

All in all it’s a great job, and my position affords me the opportunity to travel the world to assist our clients.

The real joy I get from doing what I do, is to truly bridge the gap and in essence present an opportunity for both sides to see eye-to-eye on their issues. This task is often far from easy. In fact having two distinctly different sides sit across the table from one another, both trying to accomplish their own goals and implement their respective strategy, can be downright challenging.

I recently had an encounter where an Australian client was undergoing extensive negotiations with a Chinese company in attempt to finally agree on a licensing contract that had been deadlocked for six months. The Australians wanted their technology fully protected for the duration of the contract, and had no interest in ever selling their patented product.
The Chinese, on the other hand, were willing to pay royalties for a short duration but ultimately wanted to outright own the technology. This issue carried such great importance to both sides that neither party would even consider making concessions. The standoff had continued for such a long time that the deal started to fall apart and both sides were ready to walk away.

The key to solving this issue was not in the terms of the agreement or the amount of money on the table. Simply put it was a cultural misunderstanding. The Australians were fighting adamantly for the protection of their technology, and wanted more than anything to retain ownership and reap the benefits in the form of royalties, with financial incentive and gain the main factors at play. The Chinese wanted more than anything to have full use of the technology, and were willing to pay for it. They did not want to be restricted in scope and use of the technology, feeling as if such limitations contradicted their intent to maximize sales and expand their potential market.

Unfortunately, at the moment, neither side was able to see past their mandates and work toward completing the licensing agreement. The Australians decided to call it a night and head back to their hotel, and the Chinese all filed out bound for their respective homes. At the end of the meeting we all agreed to give it one more shot the following morning. I looked at my watch, and we had exactly 13 hours to find a solution. Everyone was aware of the cultural differences, but no one was willing to outright admit it.

One of our Partners called the legal counsel from the Chinese company, and I jumped in a cab to meet with our Australian clients. I finally caught up with the Australians in the lobby of their hotel and we all sat down to have a coffee. In their minds the deal was completely lost, and enthusiasm was quickly waning. Frustration was prevalent, and no one carried the motivation to really put much energy into the next morning’s meeting.

As we were finishing our coffee we identified the real issues at hand, and our clients admitted that their main goal was to maximize their financial gain from the deal, and outright ownership of the technology was second. I confided that their Chinese counterparts were solely interested in having full control of the technology, and were willing to pay for it.

Over the past few years the Chinese Government has provided loans and grants to Chinese companies in hopes of strengthening intellectual property in China. Companies are encouraged to create, develop and acquire new technology, and now have the money to do so. Although I wasn’t privy to any special information, I did know that the Chinese company involved in these negotiations had recently received one of these grants from the Government, and this no doubt led to their desire to have full control of the technology.

I excused myself for a moment so our clients could speak amongst themselves, and later I returned to smiles and the addition of a waiter furiously writing down an order for a bottle of Champagne and four glasses.

The next morning, we ultimately concluded our negotiations, and the agreement was authorized. Later, after the ink was dry, we all spoke about that invisible void that was oh so present during the negotiations. The Chinese and the Australians both openly admitted that they were so intent on achieving their own individual deal points that they failed to see the simplicity of truly getting the deal done. Both sides were so confident the other was trying to out maneuver and gain a competitive edge that the goal of authorizing a licensing agreement quickly lost its priority.

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These small cultural and business differences aren't a rarity in this practice though.

Even something as simple as an inquiry regarding enforcement of Intellectual Property Rights in China clears up wild misconceptions about infringement running rampant and being supported by the Chinese Government. Unfortunately some foreign media outlets publish stories about the Chinese Government encouraging and sometimes even financing infringement of IPR in China. I have to reassure our clients and change their entire perception about Intellectual Property in China. The Chinese Government has made significant effort to improve the Intellectual Property Laws of this country, and they are constantly seeking insight from the International Community on ways to make strong laws even stronger. There is no question in my mind that Intellectual Property in China is a priority, in fact I believe the Government considers it to be a National Priority.

Still though, clients disagree.

Just yesterday I had a conference call with a gentleman from Europe who wanted to discuss his options in attempt to deal with infringement of his clothing line. As I laid out the possible avenues we could take, he constantly interrupted me stating, “that will never work,” and at the end of every diatribe he would mutter, “why even bother, they are all in on it.” The real problem is that those living and working outside of China aren’t on the ground floor, and aren’t able to see the positive change occurring in this country every day.

They aren’t aware that the Intellectual Property Laws were drafted with the suggestion and input of several foreign Chambers of Commerce. Nor do they realize that China is becoming friendlier and more open to foreign business. Further, when I am asked about “local protectionism” in Chinese Courts by individuals like the European gentleman I mentioned above, often people refuse to accept the fact that local Chinese companies suffer from the same problem foreigners do.

It’s a continuing process here in China, and when it comes to Intellectual Property I am confident in saying that it continues to be a growing process.

If you’re not in the trenches though, I can understand the misconceptions and stereotypes. As China continues to open the door to their country and their economy, things will get better. Of this, I am confident.

I’ll still be here to bridge the gap and make two similar, but different sides see eye-to-eye though.

And I will no doubt continue smile when people ask me, “What do you do in China?”

Aaron D. Hurvitz, Of Foreign Counsel, joined Kangxin Partners, PC in 2009 and is responsible for advising Kangxin’s foreign clients on intellectual property law in China. Aaron frequently gives lectures around the world, focusing on anti-counterfeiting and IP enforcement, and he provides advice on doing business, licensing technology, and commercializing IP in China. Aaron can be contacted at ahurvitz@kangxin.com
The Asia/Pacific Committee is the focal point for activities of the Section of International Law involving the Asia/Pacific region and the countries in that region, including Afghanistan, Australia, Bangladesh, Bhutan, Brunei, Cambodia, the Cook Islands, Indonesia, Japan, North Korea, South Korea, Laos, Malaysia, Myanmar, Nepal, New Zealand, Pakistan, the Philippines, Singapore, Sri Lanka, Thailand, and Vietnam.

The committee attempts to bring together attorneys and other legal professionals who have a common interest in affairs of the region to: (i) develop awareness of common issues; (ii) serve as a sounding board for legal issues in the region; (iii) educate one another about regional legal issues; (iv) serve as a forum for attorneys who are interested in the region to meet and work together; and (v) sponsor programs on key legal issues affecting the region.

For inquiries, please feel free to contact the committee co-chairs, Mohammad A. Syed and Albert Yu Chang.