

## 612 - Expanding Your Company's Financial Services Offerings in the EU & Asia

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**Charlotte Stalin** *Partner* Simmons & Simmons

**Gregory Terry** *Chairman, South East Asia* Morgan Stanley (Singapore) Pte

#### Faculty Biographies

Nicholas Rockerfeller Chief Legal Officer Rockvest Group

#### Mark L. Shwartz

Mark L. Shwartz is the senior vice president and senior counsel at Capmark Financial Group Inc. in Horsham, Pennsylvania. Capmark is a leading international commercial real estate finance company. Mr. Shwartz's practice areas for Capmark include: mergers and acquisitions, securities, human resources, corporate governance, compliance, global facilities, and information technology.

Prior to joining Capmark, Mr. Shwartz was vice president for business development and senior counsel, manager at CA, Inc. (formerly Computer Associates International, Inc.) Previously, Mr. Shwartz was a corporate attorney at Fried, Frank, Harris, Shriver & Jacobson. Mr. Shwartz served as special assistant for international policy to the Secretary of Defense in Washington DC where, among other things, he represented the U.S. Government in numerous international negotiations. Mr. Shwartz also served as the political-military advisor to the Secretary of State's commission on security and economic assistance. Subsequently, Mr. Shwartz was the founder and principal of Transatlantic Consulting Services, advising European defense, electronics, and aerospace companies on expanding market share in North America. Mr. Shwartz was co-chair of the Practicing Law Institute's first program on India and has numerous publications on a wide range of legal, business, security, and international topics.

He holds a B.A. and M.A. from the University of Pennsylvania and has a J.D. from Columbia University.

#### Charlotte Stalin

Charlotte Stalin is a partner at Simmons & Simmons in London. She is a financial services lawyer who specialises in UK and European regulatory matters. She advises financial institutions operating in the financial sector on a wide range of regulatory matters. In her recent work she has advised EU and non-EU investment firms and banks on the provision of financial services across Europe. This work involved advising on numerous regulatory issues - ranging from licensing, marketing and selling restrictions in respect of a wide range of products (including commodity derivatives) and client types. She also advises: the EU and non-EU investment firms and banks on establishment and structuring issues across Europe; the UK and European firms on the implementation of various European directives (including the markets in financial instruments directive), in the UK and the rest of Europe; fund managers on regulatory issues relating to the distribution of regulated and unregulated funds on a global basis; and international private banks on various regulatory matters. She also counsels on general regulatory matters, including UK FSA handbook and documentation.

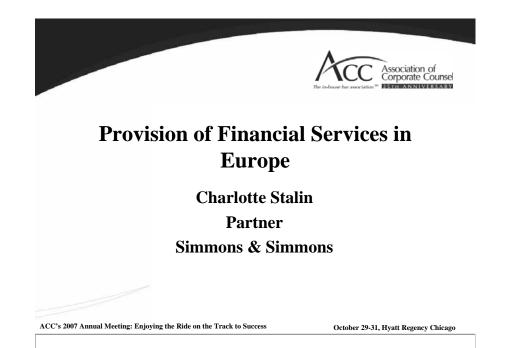
Before joining Simmons & Simmons she worked at Clifford Chance LLP.

#### Gregory Terry

Gregory James Terry is chairman, South East Asia of Morgan Stanley based in Singapore.

Prior to joining Morgan Stanley he was a partner of Lovells and head of its Asian corporate practice. Mr. Terry was CEO and managing director of Brierley Investments Limited (BIL). Mr. Terry joined BIL from Credit Suisse First Boston where he was managing director and vice chairman of the Pacific Region. In that capacity he headed the CSFB teams as joint global coordinator on Telstra 2 and the IPO of AMP. Prior to this, Mr. Terry was an executive director and chief legal counsel of Hong Kong conglomerate Jardine Matheson Limited, and a director of a number of Jardine Group companies. Mr. Terry began his career in the Australian diplomatic service, serving in Vientiane, Washington, Jakarta, and at the United Nations in New York. He served as senior adviser to cabinet in the department of the Prime Minister and cabinet, and was principal private secretary to E.G. Whitlam, Q.C., MP. Mr. Terry was also a law partner with Holding Redlich & Co. in Melbourne and with Perkins Coie in Seattle. Mr. Terry termained in Seattle as vice president and secretary of Burlington Northern Inc. Mr. Terry became a partner at Baker & McKenzie Hong Kong.

Mr. Terry has a Bachelor of Law from the University of Melbourne and a Master's from the Fletcher School of Law and Diplomacy.





#### What this talk will cover:

- Setting the scene
- Key regulatory hurdles
- Regulatory reform
- The future

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#### Setting the scene

- What do we mean by 'Europe':
  - The European Union (EU)
  - The European Economic Area (EEA)
  - The European Free Trade Association (EFTA)
  - The rest..
- 'Harmonised' financial services regulation:
  - Limited to EU & EEA
  - Deposit taking, investment services, insurance, mutual funds....
  - Not harmonised for non-EEA incorporated firms

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## Setting the scene



This presentation focused on investment services into EEA..

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#### Key regulatory hurdles

- Multiple parallel regimes:
  - Licensing requirements
  - Product restrictions
  - Marketing restrictions
  - Other restrictions e.g. consumer protection
- Firms must make sure to meet all of these!



#### Licensing requirements

- Minimum harmonisation
  - EU Directives setting minimum standard (e.g. Banking Consolidation Directive & Investment Services Directive)
  - Each state may regulate more.... & many do
- What services?
  - E.g.: Deposit taking, investment services (e.g. dealing; managing; advising; arranging deals; underwriting), provision of insurance
- What products?
  - E.g.: Deposits; lending; mortgages; investments (e.g. securities (equity/debt); funds; derivatives (futures, options, CFDs)); life policies etc.

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#### Licensing requirement

- When?
  - Solicitation/territorial application
  - Exemptions
  - Intermediation

#### How?

- Licensing process varies (EEA firm/non-EEA firm)
- EEA firm right to passport services in to all of EEA
- Non-EEA firm may be required to establish branch/subsidiary
- Consequences? May include:
  - Criminal offence (e.g. prison; fines)
  - Administrative offence (e.g. fines)
  - Contractual impact (e.g. unenforceability/void & null)

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#### **Product restrictions**

- Restrictions on offering or marketing particular products:
  - Securities
  - Funds
  - Derivatives
- Limited harmonised regimes:
  - Public offers of securities (Prospectus Directive)
  - Offering of registered mutual funds (UCITS Directives)

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#### **Product restrictions**

- Securities:
  - Wide public offer definition
  - Harmonised private placement regime, includes offers to:
    - Qualified Investors;
    - Less than 100 Qualified Investors;
    - Minimum denomination/subscription of EUR50,000
  - Ability to 'passport' prospectus



#### **Product restrictions**

- Funds:
  - Locally registered funds (e.g. UCITS):
    - "Fast track' registration process
    - Process too complicated and subject to review
  - Unregistered funds (e.g. hedge and other non-EEA funds):
    - No harmonised regime
    - General restriction/prohibition on offering
    - Some jurisdictions have private placement regimes

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#### **Product restrictions**

- Derivatives:
  - No harmonised regime
  - Generally subject to conduct of business rules
- Consequences may include:
  - Criminal offence (e.g. prison; fines)
  - Administrative offence (e.g. fines)
  - Contractual impact (e.g. unenforceability/void & null)



#### **Marketing restrictions**

- Restrictions on how to contact/market to an investor:
  - Cold calling restrictions (e.g. not to contact an investor by phone or email without invitation)
  - Specific marketing regimes (e.g. Demarchage Rules in France; Financial Promotion regime in the UK or Promotore Finanziario in Italy)
  - Language requirements (e.g. Loi Toubon in France)
- Consequences: similar to breach of licensing and product restrictions

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#### **Regulatory reform**

- Markets in Financial Instruments Directive (MiFID)
  - Into force 1 November 2007
  - Harmonises further regulation of investment services (including commodity derivatives trading)
  - Limited impact on transatlantic business (other than scope of services/products within regulation)
- Harmonisation of funds regime
- Better regulation/principles based regulation



#### The future

- Continued harmonisation
- Expansion
- Single European regulator
- Transatlantic solution

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Expanding your Company's Financial Services Offerings in South East Asia

August 2007

Greg Terry Chairman South East Asia Morgan Stanley

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#### Introduction

- No Such thing as "Asia"
- Morgan Stanley responds to 30+ regulators in 15 jurisdictions in Asia and unlike Europe every one has different regimes.
- Whilst most participate in global bodies like IOSCO and some like Hong Kong and Singapore seek to harmonize regulation with global best practices, local often protectionist, rules prevail.
- However, the trend is generally positive in terms of freer market access for financial services.

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#### **CHINA: Progress in Financial Liberalisation**

China has made substantial progress in financial liberalization since accession to WTO in 2001:

- It has removed many barriers against foreign investment in financial services. By the end of this year, foreign commercial banks can enter the market without geographical or customer restrictions.
- Securities, asset management and life insurance sectors can enter China only through joint ventures, but it is a matter of time before these conditions are eliminated.
- China has started to partially privatize its state-owned banks, starting with the landmark listing of china Construction Bank in 2005.
- It has introduced foreign investment in the domestic RMB capital markets through the Qualified Foreign Institutional Investor (QFII) program. 35 foreign institutional investors with over \$5.7 billion investment quota have been approved.
- Last year China launched the State Share Reforms, an ambitious program to convert the illiquid state ownership of 1,400 listed companies into tradeable shares within two years.

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#### **CHINA: Progress in Financial Liberalisation**

- China introduced a regulatory framework for interest rate and currency derivatives, with the promulgation of the CBRC derivatives regulation in 2004. This has continued into 2005 with the introduction of the RMB forwards market, warrants and a pilot securitization program.
- Pointing the way to future changes, China has revised the Securities and Company Laws which together will give greater flexibility in all aspects of capital contribution, use of assets, profit distribution, capital raising, securities products and services.
- China has given the National Social Security Fund and a handful of domestic asset managers and insurance companies the right to invest in offshore securities as so-called Qualified Domestic Institutional Investors (QDII).
- China's regulators are working on relaxing the separation between banking, securities and insurance by enabling the formation of financial holding companies.

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#### **CHINA: Progress in Financial Liberalisation**

- China has begun reform of the RMB exchange control mechanism.
- The RMB is fully convertible on the current account, that is, for trade in goods and services, but remains nonconvertible for capital account transactions, i.e., for both inward and outbound investments in assets.
- In July 2005, after more than a decade of strictly pegging the RMB to the U.S. dollar at an exchange rate of 8.28, the People's Bank of china announced a reevaluation of the currency to 8.11 RMB against the dollar and a reform of the exchange rate regime. China ended the US Dollar peg and announced a managed float targeting a reference basket of multiple currencies. ACC's 2007 Annual Meeting:

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#### **CHINA: Soft Constraints on Access**

- The Rule of One
- The Top Ten Principles
- Time
- Strategic Economic Dialogue myth and reality
- Congressional Initiatives
  - risk for China or risk for USA and world economy?

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#### **China Platform: Domestic License Regime**

<ul> <li>Sino-foreign</li> <li>Securities JV (ala</li> <li>BNP Paribas, Credit</li> </ul>	Division	Restricted RMB Activities	CICC	Sino-Foreign Securities JV <sup>(1)</sup>	Domestic Securities Company <sup>(2)</sup>	Bank: Domestic/JV/B ranch	Trust Investment Company <sup>(3)</sup>	Fund Mgmt Company <sup>(4)</sup>
Lyonnais) have primary underwriting	Fixed Income	Government and Financial Bond Sales &						
		Trading Corporate Bond Sales & Trading						
		Export FX Spot						
capability but not equity brokerage		Interest Rate, Currency and Credit Derivatives (excl. Futures)						
and proprietary		OTC Interest Rate Futures Trading						
		Commodity Futures						
trading	Banking	Government Bond Underwriting						
= Trust license on the		Corporate Bond Underwriting						
		A-Share Underwriting						
other hand, allows		Onshore M&A and Corporate Finance Advisory						
for proprietary	Equity	A-Share Brokerage						
trading capability		A-Share Proprietary Trading						
		OTC Equity Derivatives (excl Futures)						
		Equity Index Futures Trading						
	Credit Service:	S Credit Cards						
		Lending						
	Asset Mgmt & Wealth Mgmt	Financial Planning						
		Fund Sponsorship and Management						
		Separate Account Management						
	Funding	Issuing Financial Bonds						
		Interbank Lending and Borrowing						
		Deposit Taking						
	= 1	Not Permitted = Permitted	-	Permitted w/ Appro	val or Limitation	ns I	Indeterminate	
ACC's 2007 A	nnual Meetir	Notes 1. Sino-foreign securities JV restricts fi 2. Foreign ownership of domestic secu 3. Restrictions on leverage and funding 4. Can be owned by a bank or securiti	utities firms up g sources. Inv	to 20% ownership per f	foreign investor (2 nnot exceed 20%	5% total) of capital		



#### Hong Kong as Gateway to China

- China's financial liberalization provides great opportunities for Hong Kong to complement, support and benefit, with Hong Kong's natural strengths.
- One area of key advantage for Hong Kong that it has been building up over the past few years is its robust clearing and settlement systems for foreign exchange and bond trading. Hong Kong is establishing itself as an infrastructure center for origination, trading and settlement of trades in multicurrency financial products.
- Hong Kong is seeking to establish a multicurrency bond market to complement its efficient banking system and equity markets.

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#### Hong Kong as Gateway to China

Hong Kong has a well-developed system of corporate governance.

- Hong Kong benefits from the Common Law legal system, an independent judiciary, good ethical standards, well-developed accounting, legal and financial professional service providers following global standards of practice.
- At the government level, there is the Securities and Futures Commission and Hong Kong Monetary Authority, which regulates financial services, institutions and markets.
- There is generally a high degree of transparency, predictability and reliability when establishing a company and engaging in commercial activities in Hong Kong.

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#### Hong Kong as Gateway to China

So what does all this mean for Hong Kong's role for financial Services companies?

- Firstly, of course, it is the right place geographically. Hong Kong truly is the gateway to China.
- Secondly, many of the things China needs to achieve are already present in Hong Kong.
  - Capital markets capable of forming the capital needed for China's growth Morgan Stanley's listing of CCB demonstrated that even the biggest Chinese companies do not need to go outside their own country to raise the capital they need.
  - the rule of law and a highly sophisticated financial legal system
  - the world's freest economy and a totally open banking and financial services system.

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### Hong Kong: The Aberration

- The one aberration in the world's freest economy is with respect to Hedge Funds.
- Most Hedge Funds register in Singapore rather than Hong Kong because the Hong Kong registration requirements are onerous and time-consuming.



## Hong Kong License Status

Type of Regulated Activi	Type 1	Type 2	Type 3	Type 4	Type 5	Type 6	Type 7	Type 8	Type 9	
	Dealing in	Dealing in Future		Advising on	Advising on	Advising on	Providing	Securities Margin	Asset	
Analysis	Securities	Contracts	Foreign Exchang	Securities	Futures Contract	Corporate	Automated	Financing	Management	
			Trading			Finance	Trading Service:			
By Business Unit/ Division	y Business Unit/ Division									
F ixed Income Division	1									
( Convertible Bond\$										
F ixed Income Division (Others)	1	1								
Investment Banking Division	1					1				
(Including Corp orate Finance, M mergers, Acquisitions and Restructuring Department/Global Capital Marketsand Real E state Fund)										
Prime Brokerage	1									
Institutional Equity Division	1	1		•	*		1			
Merchant Banking (Including	1									
I investmentM management and Pri vate Equity Group)										
Private Wealth Management	+	1								
Research( Equity & Fixed Income Division)	1			1	*					
Operations Division( Derivatives)	1	1								
Operations Division (Others)	1									

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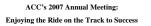
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#### **TAIWAN: Current Issues**

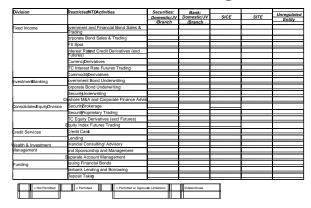
- Major opportunity for commercial banking:
  - Acquisitions
  - branches
- New Integrated Securities House License facilitates investment banking business.
- Generally open market
- The China Factor



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#### **TAIWAN Domestic License Regime**



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#### **KOREA: Current Issues**

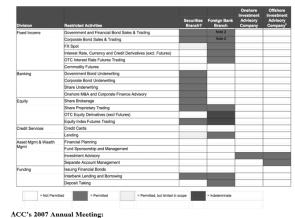
- OTC license freeze closes derivates market
- Soft barriers:
  - Onshore requirements for controllers, audit, risk management
  - Korea language systems required by Regulators.
- Potential Risk
  - the Lonestar Saga

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### **KOREA Platform: Domestic License Regime**



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#### **SINGAPORE:** Current Issues

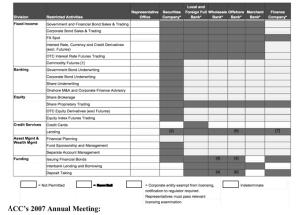
- Enhanced competitiveness vis a vis Hong Kong for non-China Asian borrowers because of practical factors:
  - Schooling
  - Costs
  - pollution
- Significantly more attractive for Hedge Funds
- Benefiting from ASEAN resurgence.

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#### SINGAPORE



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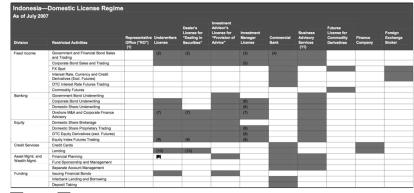


#### **INDONESIA:** Current Issues

- Judiciary and the Rule of Money versus the Rule of Law
- BA market is ignoring the risks
  - APP disclosure
- Licensing process tends to be slow and complex
- But market basically open



#### Indonesia – Domestic License Regime



= Not Permitted = Permitted Services by Holder of Corresponding L

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#### **JAPAN: Some Current Issues**

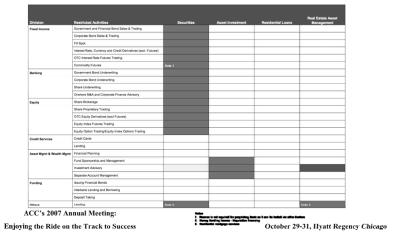
- Need to develop principles based regulatory framework.
- Hedge Funds
  - Need to change the rules to allow all facets of their business through a single legal entity.
  - Tax users aggregation of partnership interests.
  - Disclosure requirements too onerous.
- Human Resources issues

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#### JAPAN





#### **VIETNAM:** Current Issues

- Regulatory system evolving and often unclear.
- Dodge City: two types of trading
- Omnipresence of Government culture
- But, major opportunity the next Tiger



### Vietnam Platform: Domestic License Regime

Division	Restricted Activities	Representative Office	Securities Company <sup>(1)</sup>	100%- Owned Bank	Foreign Bank Branch	Finance Company	Fund Mgmt. Company <sup>(1</sup>
Fixed Income	Government and Financial Bond Sales and Trading						
	Corporate Bond Sales and Trading						
	FX Spot						
	Interest Rate, Currency and Credit Derivatives (Excl. Futures)						
	OTC Interest Rate Futures Trading						
	Commodity Futures						
Banking	Government Bond Underwriting						
	Corporate Bond Underwriting						
	Share Underwriting						
	Onshore M&A and Corporate Finance Advisory						
Equity	Share Brokerage						
	Share Proprietary Trading						
	OTC Equity Derivatives (Excl. Futures)						
	Equity Index Futures Trading						
Credit Services	Credit Cards						
	Lending						
Asset Mgmt. and Wealth Mgmt.	Financial Planning						
	Fund Sponsorship and Management						
	Separate Account Management						
Funding	Issuing Financial Bonds						
	Interbank Lending and Borrowing						
	Deposit Taking						

Indeterminate
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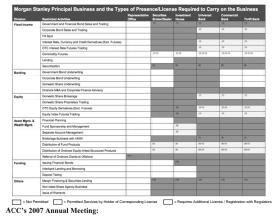


#### **PHILIPPINES:** Current Issues

- Market size why bother?
- Focus on banking and fixed income products
- Private Equity opportunities



### **Philippines – Domestic License Regime**



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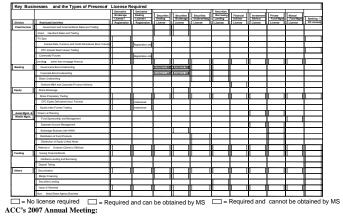


#### **THAILAND: Current Issues**

- Political instability affecting the market
- But substantial potential for financial resources
- License regimen theory open
- In practice, approvals may not be forthcoming
- Current focus is on structured products, simple derivatives and fixed income generally. No ECM and limited M&A activity.



#### **Thailand – Domestic License Regime**



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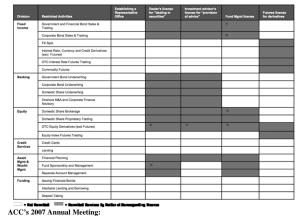


#### **MALAYSIA:** Current Issues

- Bumi Putera rules limit establishment of financial services businesses.
- Growing interest in Islamic Finance opportunities
- Strength of the local big banks.



#### Malaysia — Domestic License Regime



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#### **INDIA: Some Current Issues**

- Basically, open and welcoming
- Banking License
  - Geography
  - business mix
- Interplay to achieve a similar mix
  - NBFC
  - Primary Dealer
  - Merchant Bank
  - Securities Broker
- SEBI and the regulatory culture

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### India Domestic License Regime

Division	Activity	License / Membership	Regulator	Comment
41-51	Real Surface, o	ام المناحد مي زيما المار مكمناية 111		
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## Practical Approaches for INDIA

October 2007

Mark L. Shwartz Senior Vice President & Senior Counsel Capmark Finance Inc.

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## Disclaimer

Observations and comments do not necessarily reflect the view of any individual person or company

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#### **1. India's Economic and Geo-Political Potential– More Real Than Hype**

- No shortage of statistics, data and other metrics
- Some hyperbole and exaggerations
- Pay-off may be longer-term than projected (case-by-case)
- But, in the end, more real than hype



# 2. We Don't Always Speak the Same Language

- The meaning of "Done"
- Optional punctuation
- Writing numbers (Lakhs and Crores)
- IST vs. Time is of the Essence
- Standards for legal drafting and precision
- Is a Deal a Deal?

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#### 3. Inconsistent Enforcement of Laws and Contracts

- Vague, ambiguous and conflicting laws and regulations
- Subjective interpretations (political, personal) of regulations, convoluted tax structure, judicial opinions, *inter alia*
- Competing authorities/tension within and between Central, State and Municipal agencies
   All levels of Government and Bureaucracy
- Exceedingly slow (and costly) dispute/conflict resolution
  - Challenge: availability and veracity of documents
- American vs. Indian view of contracts differ (binding vs. baseline for renegotiation)

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#### 4. Marketing is No Substitute for Actual Experience

- Limited number of US lawyers have actual legal or business experience in/with India
- Indian lawyers tend to be less specialized than US clients are accustomed
- Be wary of lawyers building a "specialized *practice* area" appealing to business endeavors in India e.g., "We have an India/FDI/Outsourcing group"
  - · Generalized experience
  - Problem-solving "philosophies
  - "Can do; anything is possible" attitudes
  - Pedestrian analysis

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#### 5. Engage In-House Corporate Counsel

- Legal Expertise Is No Substitute for Understanding of Client's Business (and vice versa)-- especially true in India, whether:
  - conducting business
  - complying with law/regulations or
  - providing legal services
- Local Counsel: local law, advice and work-product
- In-House Corporate Counsel: bridge communications between business goals/requirements and local practice, using US counsel as needed
  - Enormous legal and operational cost-savings
  - Functionally replaceable by business manager + Outside Counsel and/or In-House Local Counsel. Cost-effective?
- US Counsel: align local work-product with client demands/expectations; monitor/enforce quality ACC's 2007 Annual Meeting:

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#### 6. Confidentiality & Conflicts

- Perspectives on proprietary information
- Communicate clearly and firmly the need for confidentiality
- Double-check business conflicts as well as legal conflicts

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#### 7. Triangulate Local Advice and Advisors

- Pose same question to and request information from multiple sources
- Statutory and regulatory ambiguities can be inescapable; but not always
- Consider relationship between local advisors, governmental authorities and competitors
- Like US law firms and advisors, Indian firms/advisors consider future business and growth

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#### 8. People Matter(s)

- Legal requirements vs. customary practices
- Cultural differences (US vs. India) especially keen in employment matters
  - Brand matters
  - Responsibility and Title vs. Compensation
  - Loyalty
  - Parental and family considerations
- Retention and Turnover Challenges
- Middle management
- Work Ethic vs. Holidays, Natural Disasters, Infrastructural Disruptions and Family Obligations
- Opportunities to train and work in US ACC's 2007 Annual Meeting:

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#### 9. Pay Attention to Quality Control

- Establish standards and measures of success; confirm common understanding
- Business operations, management, line workers/staff and legal services
- Records Management
- Communications
- Execution
- Follow-up

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#### 10. Gratifying Success Will Come

- India's elite are smart, dedicated, talented and frustrating
- Key ingredients:

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- Long-term perspective
- Committed but flexible strategy
- Fully engaged corporate-level management, including in-house counsel
- Patience and Firmness
- When frustrations and setbacks exceed expectations and rewards, remember . . .

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