<u>รายงานสรุปการประชุมประจำภูมิภาคเอเชียแปซิฟิกครั้งที่ ๖ (๖th Asia Pacific Regional Forum) ของสมาคมเนติบัณฑิตยสภาระหว่างประเทศ (International Bar Association)</u>

เมื่อวันที่ ๒๗ กุมภาพันธ์ถึง ๑ มีนาคม ๒๕๖๒ ณ กรุงโตเกียว ประเทศญี่ปุ่น นางเมทินี ชโลธร เลขาธิการเนติบัณฑิตยสภาและนางสาวปณตพร ชโลธร อนุกรรมการฝ่ายต่างประเทศเป็นตัวแทนเนติบัณฑิตยสภาในการเข้าร่วมประชุมวิชาการทางกฎหมายที่จัดขึ้นทุกๆ ๒ ปีของสมาคมเนติบัณฑิตยสภาระหว่างประเทศ โดยเป็นการประชุมประจำภูมิภาคเอเชียแปซิฟิคในหัวข้อการประชุมเอเชียหนึ่งเดียวหรือ Unified Asia

เนติบัณฑิตยสภาเป็นสมาชิกประเภทองค์กรของสมาคมเนติบัณฑิตยสภาระหว่างประเทศมาหลายปี การเข้าเป็นสมาชิกมีวัตถุประสงค์เพื่อแลกเปลี่ยนความรู้ทางวิชาการ ให้ความช่วยเหลือด้านบุคลากรทางการศึกษาและพัฒนาองค์ความรู้สำหรับผู้ประกอบวิชาชีพกฎหมายและให้เนติบัณฑิตยสภามีความเป็นสากลมากยิ่งขึ้น

สำหรับการประชุมในครั้งนี้จัดขึ้นที่โรงแรมนิว โอตานิ โดยมีผู้เข้าร่วมประชุมจากทั่วโลกมากกว่า ๒๐๐ คน การประชุมแบ่งเป็น ๒ วัน ในแต่ละวันจะจัดการบรรยายในหัวข้อต่างๆที่เป็นที่สนใจในขณะนี้ ผู้บรรยายจะเป็นผู้เชี่ยวชาญในสาขาต่างๆที่ได้รับเชิญจากสมาคม ผู้เข้าร่วมประชุมจะเลือกเข้าฟังการบรรยายในหัวข้อที่ตนสนใจเป็นพิเศษ เนื่องจากการบรรยายในบางหัวข้อจะจัดขึ้นพร้อมกัน การประชุมครั้งที่ ๖ มีหัวข้อที่น่าสนใจดังต่อไปนี้

๑. เราควรใช้อนุญาโตตุลาการหรือการไกล่เกลี่ย และควรเลือกที่ใด

๒. สถานการณ์สกุลเงินคริปโตในปัจจุบัน

๓. การควบรวมกิจการในเอเชีย

๔. กฎหมายต่อต้านการผูกขาดในเอเชีย

๕. การประกอบธุรกิจโดยคำนึงถึงหลักสิทธิมนุษยชน

๖. กฎหมายล้มละลายและฟื้นฟูกิจการ

๗. การว่าความในปัจจุบันกับเทคโนโลยี AI

๘. ผลกระทบของการค้าเสรีของโลกแบบใหม่ต่อทวีปเอเชีย

๙. ความร่วมมือระหว่างทนายความและสำนักงานทนายความกับเนติบัณฑิตยสภาในประเทศต่างๆ

๑๐. Bully และการลวนลามทางเพศในวงการนักกฎหมาย

๑๑. สัญญาชะลอฟ้องในฐานะเครื่องมือต่อรองของบริษัทในเอเชียแปซิฟิค

๑๒. ดินแดนปลอดภาษียังมีความสำคัญอยู่หรือไม่

ผู้จัดทำจะขอรายงานแต่ละหัวข้อเป็นภาษาอังกฤษตามที่มีการบรรยายในแต่ละหัวข้อดังนี้

Shall we arbitrate or mediate, and where?

Arbitration and mediation have long been an important dispute resolution mechanism for a variety of international business disputes. A number of Asia-Pacific jurisdictions are very active in promoting international arbitration and mediation. Further, some jurisdictions also promote " international commercial court". Although Japan has not traditionally been viewed as a significant proponent of international arbitration and mediation, this is quickly changing. In June ๒๐๑๗, the Japanese Government published its policy to develop a foundation to activate international arbitration. In February ๒๐๑๘, the Japan International Dispute Resolution Centre, or JIDRC, was incorporated, which began operating their state-of-the-art permanent arbitration facilities in Osaka in May ๒๐๑๘. The JIDRC plans to launch similar facilities in Tokyo by March ๒๐๒๐. Additionally, the Japan International Mediation Centre-Kyoto, or JIMC-Kyoto, became available to the global mediation Community in September ๒๐๑๘

In light of recent developments in various Asia-Pacific jurisdictions, the panel discussed the strategic considerations to be paid in adjudicating international business disputes, including the right choice of seat and venue for litigation, arbitration and/or mediation.

International commercial arbitration is attracting growing attention from businesses, lawyers and governments alike. In response, and in order to better compete with other arbitral institutions around the world, the JCAA (Japan Commercial Arbitration Association) has stepped forward and taken the initiative to make Japan one of the best forums for arbitration, using all possible means to accomplish this goal. To achieve this objective, the most straightforward path for the JCAA is to provide optimal arbitration rules that suit the current and potential needs of businesses. Realistically speaking, different businesses have a variety of different needs with regard to dispute resolution, depending on various factors: some are willing to pay more money to have their disputes determined by experienced and well-respected arbitrators; some wish to have their disputes resolved smoothly without procedural difficulties as far as possible; while again others would like to have their disputes settled in a predictable way at a reasonable cost. In keeping all such business needs in mind, the JCAA amended its two existing sets of arbitration rules and created one set of new rules.

The JCAA administers the following three sets of arbitration rules, all of which came into force on ๑ January ๒๐๑๙:

ν UNCITRAL Arbitration Rules: The JCAA provides the highest quality dispute resolution services in accordance with arbitration conducted under the world-standard rules by internationally recognized arbitrators.

ν Commercial Arbitration Rules: Through refining its existing rules, the JCAA provides smooth dispute resolution in accordance with its procedural rules, which provide greater depth and detail when compared to other institutions.

ν Interactive Arbitration Rules: The JCAA provides more predictable, faster dispute resolution in accordance with the rules and provisions on communication from the arbitral tribunal to the parties and with a system of fixed remuneration for arbitrators.

Three sets of rules came into effect on January ๑, ๒๐๑๙. Since one of these rules is applies to the JCAA arbitral proceedings, rules on the application of these rules are indispensable. The general principle is that business people and lawyers should explicitly designate one of the three sets of rules when drafting their arbitration agreement.

The detailed rules of application are as follows:

(i) The amended Commercial Arbitration Rules shall apply to cases submitted after ๑ January ๒๐๑๙, even if an arbitration agreement entered into before ๓๑ December ๒๐๑๘ designates a previous version of these rules. The UNCITRAL Arbitration Rules with the amended JCAA Administrative Rules shall apply to cases submitted after ๑ January ๒๐๑๙, even if an arbitration agreement entered before ๓๑ December ๒๐๑๘ designates a previous version. ๑๖

(ii) Where an arbitration agreement, irrespective of the date of conclusion thereof, provides for JCAA arbitration without specifying the applicable rules, the amended Commercial Arbitration Rules shall apply.

(iii) Any arbitral proceedings commenced prior to ๓๑ December ๒๐๑๘ shall continue to be conducted pursuant to the former Commercial Arbitration Rules or UNCITRAL Arbitration Rules, respectively. However, subsequent proceedings may, upon agreement of the parties made after ๑ January ๒๐๑๙, be conducted pursuant to the relevant set of amended rules. Where such an agreement between the parties is made, arbitral proceedings that have already been conducted pursuant to the former rules shall remain valid.

(iv) The Interactive Arbitration Rules shall apply when these rules are designated in the arbitration agreement. In addition, when all parties agree in writing to arbitration conducted under the Interactive Arbitration Rules and notify the JCAA of such agreement before the confirmation or appointment of any arbitrator by the JCAA, then the Rules apply, even if no such designation was made in the arbitration agreement.

Future Plans

(i) The JCAA will inform businesses and lawyers, domestically and internationally, of their respective characteristics which respond to all the needs of businesses, and will promote the adoption of arbitration agreements designating one of these sets of JCAA arbitration rules.

(ii) From ๒๐๑๙ onward, the JCAA will start amending its International Commercial Mediation Rules to respond to the needs of businesses and then promote them extensively.

(iii) The JCAA will also undertake market research to determinate whether any need is found for reasonable and expedited proceedings to determine the price, rate or other relevant amount in certain transactions. For instance, it often takes time to determine the price of the target business unit in an M&A transaction. In such a case, it is necessary to figure out, for example, what kind of procedure the parties expect, who will serve as evaluator, and how much should be paid to him

or her. Once the JCAA is ๑๗ satisfied of the existence of market demand, it will provide businesses with such a service.

(iv) The JCAA will continue to develop and sincerely provide new services expected by the business community.

Cryptocurrency at the crossroads

The Fourth Industrial Revolution is under way. The next ๒๐ years will be a time of upheaval. Old patterns of human endeavour and commerce will vanish as new technologies and business models such as artificial intelligence, super-connectivity, Internet of Things, new energy, gig economy – take over. This session will focus on blockchain technology and cryptocurrency, potentially the gearbox for much of the "New Order".

Will cryptocurrency turn out to be paradigm-shifting? Our panel will survey the regulatory and policy landscape for cryptocurrency and crypto trading around the region, with comparison to the United States and European Union. Among the patterns and trends to be covered, we will consider crypto transactional structuring in the context of general securities regulation, and look at the impact of Anti-Money Laundering rules and other banking constraints. Aspects will include cross-jurisdictional trading, tax issues, and controversies surrounding Initial Coin Offerings.

The panel surveyed the regulatory and policy landscape for cryptocurrency and crypto trading around the Asia Pacific region, with comparison to the United States and the European Union, including Switzerland. Among the patterns and trends to be covered, the panel considered crypto transactional structuring in the context of general securities regulation and looked at the impact of Anti-Money Laundering rules and other banking constraints. Further aspects addressed were cross-jurisdictional trading, tax issues, and controversies surrounding Initial Coin Offerings.

One interesting aspect of the fast-growing cryptocurrency market is the fluidity of the terms used to describe the different products that fall within its ambit. While the various forms of what are broadly known as "cryptocurrencies" are similar in that they are primarily based on the same type of decentralized technology known as blockchain with inherent encryption, the terminology used to describe them varies greatly from one jurisdiction to another. Some of the terms used by countries to reference cryptocurrency include: digital currency (Argentina,

Thailand, and Australia), virtual commodity (Canada, China, Taiwan), crypto-token (Germany), payment token (Switzerland), cyber currency (Italy and Lebanon), electronic currency (Colombia and Lebanon), and virtual asset (Honduras and Mexico).

One of the most common actions identified across the surveyed jurisdictions is government-issued notices about the pitfalls of investing in the cryptocurrency markets. Such warnings, mostly issued by central banks, are largely designed to educate the citizenry about the difference between actual currencies, which are issued and guaranteed by the state, and cryptocurrencies, which are not. Most government warnings note the added risk resulting from the high volatility associated with cryptocurrencies and the fact that many of the organizations that facilitate such transactions are unregulated. Most also note that citizens who invest in cryptocurrencies do so at their own personal risk and that no legal recourse is available to them in the event of loss.

Many of the warnings issued by various countries also note the opportunities that cryptocurrencies create for illegal activities, such as money laundering and terrorism. Some of the countries surveyed go beyond simply warning the public and have expanded their laws on money laundering, counterterrorism, and organized crimes to include cryptocurrency markets, and require banks and other financial institutions that facilitate such markets to conduct all the due diligence requirements imposed under such laws. For instance, Australia, Canada, and the Isle of Man recently enacted laws to bring cryptocurrency transactions and institutions that facilitate them under the ambit of money laundering and counter-terrorist financing laws.

Some jurisdictions have gone even further and imposed restrictions on investments in cryptocurrencies, the extent of which varies from one jurisdiction to another. Some (Algeria, Bolivia, Morocco, Nepal, Pakistan, and Vietnam) ban any and all activities involving cryptocurrencies. Qatar and Bahrain have a slightly different approach in that they bar their citizens from engaging in any kind of activities involving cryptocurrencies locally, but allow citizens to do so outside their borders. There are also countries that, while not banning their citizens from investing in cryptocurrencies, impose indirect restrictions by barring financial

institutions within their borders from facilitating transactions involving cryptocurrencies (Bangladesh, Iran, Thailand, Lithuania, Lesotho, China, and Colombia).

A limited number of the countries surveyed regulate initial coin offerings (ICOs) , which use cryptocurrencies as a mechanism to raise funds. Of the jurisdictions that address ICOs, some (mainly China, Macau, and Pakistan) ban them altogether, while most tend to focus on regulating them. In most of these latter instances, the regulation of ICOs and the relevant regulatory institutions vary depending on how an ICO is categorized. For instance, in New Zealand, particular obligations may apply depending on whether the token offered is categorized as a debt security, equity security, managed investment product, or derivative. Similarly, in the Netherlands, the rules applicable to a specific ICO depend on whether the token offered is considered a security or a unit in a collective investment, an assessment made on a case-by-case basis.

Can litigation keep pace with the rise of machines?

Steeped in tradition, lawyers have long been stereotyped as resistant to technology adoption, but this is no longer holding true. Advances in artificial intelligence (AI) are challenging lawyers to re-examine not only how the law should address ethical and legal questions posed by AI adoption, but also the practice of law.

Litigation can be a long and expensive legal process for businesses, investors and law firms. Some litigators feel an investment in AI will allow lawyers to focus on complex, higher-value work. Others question the value of the benefits and returns offered by nascent AI technologies. This panel discussed the different ways in which AI is currently applied in litigation and how technology can streamline litigation processes. At a more philosophical level, the panel discussed significant legal questions relating to 'decisions' made by AI-powered software, including those of tort liability and of criminal guilt. For example, if AI is controlling a driverless car and someone is killed in an accident, who will be legally liable?

Some of the key issues the panel discussed include:

• Are AI and other technologies making their presence felt in the courtroom? How far can the adoption of AI and technology in the courtroom conceivably extend?

• Are there steps parties may take at the outset of a dispute – or even before one surfaces – to incorporate technology into their preparations? How can a powerful AI tool share / provide relevant information relating to the litigation more quickly and in a cost efficient manner to the other side and court?

• What are the pros and cons of introducing a greater degree of automation into litigation proceedings?

• How can technology assist with the collection of evidence, coping with large volumes of data from multiple sources, and controlling related costs? Can AI improve the efficiency of the discovery process in litigation? Conversely, what are the risks of adopting AI in discovery?

• Will AI be a differentiator for litigation practitioners / law firms? Or will AI replace lawyers? How real is the possibility of AI ‘judges’? Will greater use of AI and technology shape the future of litigation? Are they set to alter the litigation process in any fundamental ways?

Various pre-litigation tools :

• The avoidance of litigation: online dispute resolution (e.g. Immediation, SmartSettle etc)

• The decision to litigate: pre-suit information (e.g. LexMachina)

• The make-up of the team: data analytics of hiring (e.g. Make-Buy Analysis)

• The organisation of the case: legal case management and collaboration software (e.g. CaseMap)

• The reviewing of data: e-discovery (e.g. Ringtail, Case Logistix)

• The management of data: redaction tools (e.g. XLerator)

• The filing of the case: e-filing (e.g. Redcrest, Hangzhou Internet Court)

Category of ODR Systems and main players

Information systems: Provision of information that parties can use to resolve their dispute = Scenario Builder, Notgoodenough.org

Document management for negotiation: Facilitators working online and/or offline with parties making use of formal structured document management tools to help them create their contract = Negoisst

eNegotiation (or automated mediation) systems: Sophisticated optimisation algorithms to generate optimal solutions for complex problems= Family_Winner, Inspire, SmartSettle

Customised for negotiation or mediation of a particular dispute type: Automated negotiation with structured forms = eBay, UPI, SquareTrade

General virtual mediation rooms: Human mediators working online with parties making use of mediums such as email, instant messengers, telephone and discussion forums= ECODIR, Mediation Room, Square Trade, Immediation

Arbitration systems: Human arbitrators working online with parties making use of mediums such as email, instant messengers, telephone and discussion forums = Word & Bond, Immediation

Deferred Prosecution Agreements: a game changer for corporates in Asia Pacific and beyond

This session explored the evolution of Deferred Prosecution Agreements (DPAs) and their increasingly important role in resolving cases of alleged corporate criminal misconduct.

The United States authorities have long deployed DPAs to resolve corporate criminal enforcement actions under the Foreign Corrupt Practices Act, whose broad extra-territorial reach captures the activities of multinationals operating in Asia. The United Kingdom authorities have followed suit, with four DPAs already entered into under their Bribery Act; another long-arm statute which also enables the UK authorities to potentially pursue multinationals' operating in Asia. The UK Serious Fraud Office's mammoth DPA with Rolls-Royce in January ๒๐๑๗ is regarded as a watershed moment in UK anti-corruption enforcement. France has also introduced DPAs, announcing it's first in December ๒๐๑๗.

Legislation is presently before the Australian parliament that contemplates DPAs being added to the toolbox of Australian prosecutors. In Asia, following the high-profile case in December ๒๐๑๗ involving Keppel Corp, Singapore introduced DPAs in early ๒๐๑๘ for corporate corruption and money laundering cases.

The panel discussed key aspects of the various DPA regimes, mainly the Australian one, with case studies, assess their merits and shortfalls, and consider what the future holds for resolving corporate criminal misconduct in the region.

<u>Australia's Commonwealth Deferred Prosecution Agreement (DPA) Scheme</u>

<u>Why have a DPA scheme?</u>

Serious commercial crime is complex and covert. Self-reporting is consistent with directors' ethical/legal obligations and in the public interest. Will corporations self-report serious corporate crime? Are the incentives and certainty enough for corporations? Is the scheme transparent enough, so corporations are held accountable?

Legal basis

Primary Bill – Crimes Legislation Amendment (Combatting Corporate Crime) Bill ๒๐๑๗ and Amendments to the Director of Public Prosecutions Act ๑๙๘๓ (Cth)

Discretion of the Commonwealth Director of Public Prosecutions (CDPP) whether to trigger negotiations for a DPA (section ๙ (๖G))

DPA does not involve the court system – no indictment is presented or filed and the Court plays no supervisory role. CDPP cannot agree to sentence (fines and/or imprisonment) under Australia's criminal law. Judges cannot under The Australian Constitution administer a DPA, as a judge can only exercise judicial power as reviewing a DPA does not constitute the exercise of judicial power.

Applicable offences

Anti-Money Laundering and Counter-Terrorism Financing Act ๒๐๐๖ (Cth)

Autonomous Sanctions Act ๒๐๑๑ (Cth); Breach of Australian sanctions and false/misleading statements re sanctions

Charter of the United Nations Act ๑๙๔๕ (Cth) ; Breach of UN sanctions and false/misleading statements re sanctions

Corporations Act ๒๐๐๑ (Cth) ; Market manipulation, false trading and market rigging, false/misleading statements, inducing persons to deal, dishonest conduct, trading in insider information, falsification of books of account

Criminal Code Act ๑๙๙๕ (Cth) ; Theft, obtaining financial advantage, dishonesty, corruption, forgery, anti- money laundering, misuse of financial information, false/reckless use of accounting documents

Negotiating a DPA

It is the CDPP's discretion whether to negotiate and if so, whether to offer a DPA.

CDPP must apply a two- step test under the Prosecution Policy of the Commonwealth (see https://www.cdpp.gov.au/prosecution-process/prosecution-policy)

- Whether there are reasonable prospects of obtaining a conviction on the available admissible evidence; and

- Whether a prosecution is in the public interest

The CDPP has issued Guidelines on the exercise of the statutory discretion and the factors to take into account.

(see https://www.cdpp.gov.au/publications/best-practice-guideline-self-reporting-foreign-bribery-andrelated-offending)

Negotiations with the Australian Federal Police (AFP) are non-binding, it is for the AFP and CDPP to assess any proposal for a DPA to be approved only by the CDPP.

Cooperation with authorities

Cooperation and exchange of information is protected from disclosure (not admissible in any legal proceedings). The AFP will undertake an independent examination of evidence (not relying on corporation's findings). Corporation will be expected to provide "full and frank disclosure" of the relevant conduct. Full access to all documents, including any reports by external/internal lawyers. Full access to all potential witnesses. Investigation Cooperation Agreement between AFP and corporation is a framework to assess extent of corporation's cooperation

Contents of a DPA

DPA Mandatory Terms

Statement of facts, Duration of DPA and last day it will be in force, Donation Requirements to be fulfilled, Forfeiture of likely benefits of an offence, Amount of financial penalty payable to the Commonwealth, Circumstances constituting a

“material contravention” of the DPA, Consent to a prosecution without committal where there has been a material contravention

DPA Non-Mandatory Terms

Compensation Terms, Donation of monies to charity or third party, Forfeiture of likely benefits of an offence, Implementation of a compliance program or policies, Consent to a prosecution without committal where there has been a material contravention, Consequences of a breach

Approval of a DPA

The Courts are not involved in the approval process. The Minister appoints an “approving officer” (former State or Federal Judge) for a & yr term. CDPP must give approving officer: the DPA and a written statement that the CDPP is satisfied that: there are reasonable grounds to believe an offence(s) have been committed and the DPA is in the public interest

The approving officer must approve or not approve the DPA. The approving officer must be satisfied: the terms of the DPA are in the interests of justice; and the terms of the DPA are fair, reasonable and proportionate

If approved, the CDPP may publish the DPA or a version of the DPA if

- There is no threat to public safety

- There is no prejudice to ongoing investigations or prosecutions

- There is no prejudice to the fair trial of a person;

- Publication would be contrary to a court order

Tax Havens: Is there a case for their continued existence?

The global crackdown on tax avoidance and money laundering at both individual and corporate levels have brought about a substantial increase in disclosure in the financial world. Our panelists debated on the growing tension between the global move towards transparency and the shroud of secrecy over tax havens. Offshore accounts and shell companies – they may sound questionable, but these are all legal methods for companies and individuals to lower their tax liabilities. However, at what cost? This session critically examined, among others, the continued justification of maintaining tax havens at the cost of billions in tax losses to nations who would have otherwise been entitled to the tax and implications of the Organisation for Economic Cooperation and Development's Base Erosion and Profit Shifting measures on such tax havens.

From the perspective of tax haven users, the reasons for utilizing tax havens can be classified as (i) moderate, (ii) aggressive and (iii) proactive. The "aggressive" ones may possibly be extinguished by disclosure obligations and other tactics but the moderate ones and proactive ones are expected to survive.

Purpose for utilizing tax havens

Moderate- Avoid international or corporate-individual double taxation and SPCs to issue financial products

Note: The Japanese tax system has been very restrictive in allowing pass-through treatment. Thus, tax havens are often attractive for the purpose of structuring financial products.

Aggressive - "Tax evasion" or technical shifting of income

Note: Boundary between "(impermissible) tax evasion" and "(permissible) tax planning" is not clear. Still, simple concealment of income and assets may not survive the disclosure obligations, while "lawful" tax planning to avoid Japanese CFC taxation is not very difficult especially in respect of investment income.

Proactive- Substantial shifting of administrative or operational functions to some tax havens (e.g., Singapore and HK for Japan)

If we take a negative position on the proactive use of tax havens, the suggested argument (i.e., SMEs are victims of tax havens) may be true for Japan. But, if not, the argument seems to be emotional because:

λ simple concealment may have been and may continue to be made in respect of estate tax but its budgetary impact would be very small (only ๒ or ๓% of tax revenues);

λ emigration of individuals to SG in order to take advantage of the lower marginal tax rate (๒๐% vs ๔๕%) is sometimes reported, but its direct effects would be negligible compared to the tremendous amount of Japanese government deficits;

λ functions allocated by non- Japanese multinationals to Japanese subsidiaries or branches have been reduced; this phenomenon, of course, reduces national production as well as national income (this phenomenon by itself is very serious for the Japanese economy);

λ what seems to be more serious is how to secure equal footing competition (if non-Japanese multinationals can enjoy lower effective tax rates, other companies face competitive difficulties); this feature should not be a result of tax havens;

λ if one argues that aggressive tax planning is a product of a combination of treaty shopping, tax havens and other various factors, that may be true.