

IPBA Journal

December 2017

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NEWS & LEGAL UPDATE



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The President's Message

Denis McNamara
President



Dear Colleagues,

This is the second message I have had the privilege to pen since becoming President of IPBA in April this year.

More than half my term as President has already passed; how quickly the time has gone!

The first half has been most rewarding, involving a tremendous amount of travel during which time I met new people and shared experiences with the Presidents of other legal associations, and culminating with the Mid-Year Council Meeting of the IPBA in London in November, beautifully hosted by IPBA Jurisdictional Council Member for the UK, Jonathan Warne.

In addition to hosting the council meeting and the various meetings that are always conducted in connection with the full council meeting, Jonathan organised a very topical and successful seminar also held at the offices of CMS.

On behalf of the full council I would certainly like to extend IPBA's grateful appreciation to Jonathan and his partners at CMS Cameron McKenna Nabarro Olswang LLP (CMS) for their support of the weekend's events.

There have been a number of achievements with long-term effects for IPBA during the first half of my term. These include the following:

- (1) The signing of a Memorandum of Understanding with the Japan Federation of Bar Associations (JFBA). This was signed by me on behalf of IPBA, and JFBA President Kazuhiro Nakamoto in Tokyo at the time of the LawAsia Conference.
- (2) The finalising of a cooperation and facilitation agreement with the College of Law of Australia and New Zealand (College of Law) for a co-branded applied LLM degree. The management of this lies entirely at the hands of the College of Law and there are no continuing obligations on the part of

IPBA as an entity, although the College of Law may approach individual committees and members to assist with curriculum preparation and the like. Any such approaches will be directly between the individual concerned and the College of Law.

- (4) The College of Law has also undertaken to ensure that all LLM candidates become members of IPBA by paying the membership fees for candidates whilst they are students.
- (5) The signing of an extension to the Memorandum of Understanding with AIJA (International Association of Young Lawyers). The original MOU was signed in 2010, and this is the third extension. IPBA and AIJA have enjoyed a close and cordial relationship for a number of years and both organisations see this continuing into the future.
- (6) The approval by the IPBA Council at the London meeting of the establishment of an *ad hoc* young members' committee under the chairmanship of Anne Durez. This committee is open to members age 40 and under, and will be entitled the 'Next Generation' Committee. There has already been strong interest from young IPBA members.
- (7) The hosting of a greater number of very successful Regional Conferences, including the IPBA's first Regional Conference in Vietnam that coincided with Vietnam's APEC year meetings. Other conferences held by the IPBA are already in their third year, including the Asia-PAC Arbitration Day in Kuala Lumpur and the East Asia Forum held in Seoul.

It is timely to record the process by which new committees may be established. There are currently 24 IPBA committees (23 regular, and one *ad hoc*) and there is no cap to the number of committees that might exist. The concern is that they all function and fulfil the needs of members or groups of members. Any member may

promote a new committee establishment. It is desirable that there first be a group committed to the success of a proposed new committee and the proposers should prepare a submission that includes a mission statement for consideration by the Officers. As a matter of courtesy, it should also be discussed with the Directors first. If approved by the Officers the submission will be put formally to the full Council for its approval and then the committee will be given 'ad hoc' status until experience has shown that it should be a permanent committee.

I have also had the privilege of representing IPBA at the following events:

- (1) The 110th Anniversary Dinner of the Hong Kong Law Society in Hong Kong;
- (2) POLA (Presidents of Law Associations in Asia) in Sri Lanka;
- (3) The ABA (American Bar Association) Conference in New York; and
- (4) The LawAsia conference in Tokyo.

In addition, IPBA has been represented at the opening of the legal year in London by UK Jurisdictional Council Member Jonathan Warne, the opening of the legal year in Paris by IPBA Officer Anne Durez, and at the UIA (Union Internationale des Avocats) in Toronto by Past President Bill Scott.

President-Elect Perry Pe, together with Jose Cochingyan and myself, were able to meet with the IBA President and Vice President during the course of the IBA conference in Sydney.

It seems that each year there are more organisations and events that request the attendance of the IPBA President or a representative.

On my travels there are several questions that I am constantly asked.

These include:

1. Why does the IPBA have Council meetings in Europe?

The answer is quite simple: although IPBA members are definitely focused on doing business law in the Asia-Pacific area, IPBA membership comes from more than 60 different jurisdictions and it enjoys a strong membership in a number of European countries, particularly Germany, Switzerland, the United Kingdom and France. Members from these countries are all doing, or are interested in, business in the Asia-Pacific. One way of keeping in contact with our members in Europe is to have the Mid-Year Council meeting there on a reasonably regular basis.

2. Does IPBA compete with other organisations such as IBA, LawAsia, and the like?

In my opinion we do not compete. Many of our members are also members of other international legal associations.

One thing that sets us apart from other organisations is the fact that IPBA is entirely focused on business law and the Asia-Pacific area, and makes no claim to being the voice of the legal profession either in that area or elsewhere. In fact, in accordance with the Katsuura principles (the principles agreed upon by the steering committee when IPBA was founded) and its constitution, IPBA cannot engage in political activity.

Another is that IPBA does not intend to become a large organisation; its target membership is around 2,000. Attendance at the Annual Conferences ranges from 800 to 1,100, with more than 50% of attendees being people who have been to multiple conferences. This creates a good 'family and friends atmosphere' at each conference.

Also, IPBA membership is open to individuals only, and IPBA does not regard itself as having the authority to speak on behalf of its members on any issues.

3. How does IPBA keep its annual fees so low?

One answer is that the Tokyo-based permanent Secretariat is 'lean and mean' comprising only two people. Another is that the IPBA is a 'bottom-up' organisation where the committee leadership manages the activities of their committees on a voluntary basis. Each committee works closely with the Annual Conference hosts on programmes to be included in the Annual Conference. Good programmes mean good attendance; good attendance means a good financial surplus. Income derived from membership fees, therefore, is added to any surplus generated from the Annual Conference, helping to keep membership fees at a very reasonable level.

Finally, a reminder that the next Conference will be held in Manila in March 2018. Work is well advanced on a good programme. Members are reminded that putting together a conference is a lot of work and cooperation is called for by all. We appreciate your cooperation in not organising events that compete with the programme or arranging sponsors who may compete with the official sponsors arranged by the Conference arrangers without first consulting and getting approval. The Conference web site is <https://www.ipba2018.com/>.

Denis McNamara
President



The Secretary-General's Message

Caroline Berube
Secretary-General



Dear IPBA Members,

Being the Secretary-General of the IPBA is very exciting given the dynamism of its members and even more so of the council members and officers. I am privileged to be part of this very active group. Let me tell you why I am continually thrilled to play a role within this organisation and why you should appreciate our association and play a role, too.

Being in private practice myself, running a law firm and also being a mom of three amazing kids, I have to 're-create' myself constantly and come up with new ideas. I thought I would explain the success of the IPBA by defining each letter of our acronym 'IPBA' as a different way to keep the attention of our readers! This issue will only describe the first two letters and I will carry on in the next issue sharing my views on the last two letters.

'I' for 'Innovative'. As an association competing with many others, we do have to constantly give value to our members. To do so, we have to find new ways to involve our members and remain on top of our game by providing constant up-to-date legal insights during our conferences, in our written articles, etc.

We constantly look for new ideas and bring on board council members who have shown over the years concrete involvement within the IPBA by attending activities, coming up with new ideas and leading initiatives.

We had a few new events in the last quarter. One was held in Geneva on 14 September and covered issues pertaining to the increase in M&A transactions by Asian companies in Europe and was entitled 'Asian-European M&A and Dispute Resolution Day: Corporate Acquisitions and Resulting Disputes'. It attracted about 50 lawyers

coming from various countries, making it well attended and a big success.

Another 'first' event happened in early November. It was the first time IPBA was holding an event in Vietnam, Ho Chi Minh to be exact, and also the first time we held it around the big APEC week. 'Promoting Investment among APEC Economies' attracted local lawyers and provided amazing exposure for the IPBA in the legal and business community at large.

Our IPBA Mid-Year Council Meeting gathered a nice group of about 65 out of 75 officers and council members. It is a very important and crucial meeting as it gives each of us the opportunity to reconnect since the last annual meeting and plan ahead the coming year.

Our mid-year meeting was also a huge success given the regional conference held the day after the mid-year conference. The innovative topic of the regional conference was 'Forces of change: modernisation and a shifting international landscape. English and Asian perspectives on how legal systems adapt' and was attended by about 150 people including IPBA members but also individuals from the legal community in England and elsewhere. It was a great opportunity for networking besides gaining insightful knowledge on topics like how technology is affecting the way lawyers work, how English law is evolving, and opportunities through China's One Belt, One Road initiative.

A lot of organisation and planning go into organising these events and I must thank all the individuals involved behind the scenes.

A few 'innovative' decisions were also taken during the mid-year meeting.

One of the decisions was that our next mid-year meeting will be held in Bangkok and Chiang Mai, Thailand in early November 2018 and will be organised by our Thai contingent. It promises to be a good meeting in Chiang Mai before all officers and council members fly to Bangkok for the regional conference and networking event. This is a great opportunity for the IPBA to interact closely with the Thai legal community and attract new members there while exchanging with other IPBA members and business individuals.

Another decision was to have a new committee called the 'Next Generation Committee', with lawyers 40 years of age and under eligible to join. This is a new initiative and I have no doubt it will have a big impact on the future of the IPBA and its members. It will be led the first year by our very dedicated Membership Committee Chair, Anne Durez, to get the attention and the energy it needs to have a good kick off.

We finally signed a co-branding agreement with the College of Law Australia and New Zealand. This comes after internal lengthy discussions about this cooperation but I am convinced that this is a very positive cooperation. It is a wonderful and new opportunity to share resources with each other and provide exposure and visibility to our respective communities. I sincerely hope this brings the success both organisations envision from this collaboration and I will certainly make every possible efforts myself to make it happen.

'P' for 'Personable'. IPBA members have this reputation of being friendly, sociable and enjoying talking to each other. The fact that we are a smaller organisation than others may be one of the reasons we consider ourselves like a big IPBA family which includes amazing, smart and kind people.

Given our 'personable' characteristic as an association, we renewed, during our mid-year meeting, our Memorandum of Understanding with AIJA, looking forward to make concrete actions given our synergy. AIJA is an international association of young lawyers (below 45!) and they wish to increase their Asia connection and knowledge, while the IPBA is looking to grow its membership with diverse and young lawyers. We believe it is a good synergy and hope both associations will interact more with each other and participate in concrete ways in events organised by each other.

With many professionals relying on technology more and more, the subject of whether a hard copy of the IPBA Journal sometimes arises among the IPBA officers and council. We took the decision this time to keep the IPBA Journal in its printed version for various reasons, one of them being that the IPBA Journal is a good selling point for our young members wishing to contribute with an article, as it gives them visibility in the legal community. We will also add a few sections to the journal like latest updates of our members and also featuring new members to get them known to our community. Again, in the spirit of sharing the personal and professional achievements of our IPBA community through our personable and 'human' publication. I hope you will find time to contribute.

I wish everyone a wonderful holiday season and a great start of 2018, the Year of the Dog, and I look forward to see many of you at the Manila Annual Conference in March 2018.

Caroline Berube
Secretary-General



IPBA Regional Conference, London, Keynote Address

Modern Information Technology—When (and How) will it Revolutionise Civil Procedure?

Michael Briggs, Lord Briggs of Westbourne, became a Justice of The Supreme Court of England and Wales in October 2017. Lord Briggs grew up around Portsmouth and Plymouth, following his naval officer father between ships, before spending his later childhood in West Sussex. He attended Charterhouse and Magdalen College, Oxford. A keen sailor and the first lawyer in his family, he practised in commercial and chancery work before being appointed to the High Court in 2006. He was the judge in charge of the extensive Lehman insolvency litigation from 2009 to 2013. Lord Briggs was appointed as a Lord Justice of Appeal in 2013. He was the judge in charge of the Chancery Modernisation Review in 2013 and led the Civil Courts Structure Review in 2015 to 2016. In January 2016 he was appointed Deputy Head of Civil Justice.



Lord Michael Briggs

Where We Are Now—An English (and Welsh) Study

Almost regardless of value at risk, civil litigation must be conducted in accordance with a complex and ever-lengthening set of rules, the Civil Procedure Rules ('CPR'). Although only 20 years old, they were (unthinkingly) devised in a cultural atmosphere stretching back over 100 years, with the following features:

- All communication was by paper (hand delivered or posted) or face-to-face, by voice, in court or over counters.
- Until at least 1945, the difficulties of creating, transmitting and copying documents kept the paper aspects of the process (disclosure, bundling, statements, written argument, etc.) within reasonably proportionate bounds. Even law reports were few, and using them meant carrying whole books to court, sometimes in suitcases, usually on trollies.
- But the advent of the word processor, the photocopier and the email, together with the explosion in law reporting, allowed paper to transform itself from a useful although cumbersome servant to a tyrannical master. Despite valiant attempts (such as limiting disclosure and requirements to cite only leading authorities), procedural rules lamentably failed to keep the paper monster under control.
- These early stages of the IT revolution only made matters worse, because the same advances (particularly word processing and emails) increased the sheer amount of written words used in our business and personal lives, by orders of magnitude.
- Underlying these unwelcome technical developments was the ancient reality that civil litigation was originally the preserve of the propertied classes rather than of the man (or still less woman) in the street. Using an expensive highly

trained lawyer for every step in the process of civil litigation was the almost invariable norm. Litigants in person were rare and usually unwelcome aspect, partially minimised by the originally generous provision of Legal Aid, now almost completely removed in the civil context.

The Woolf reforms, which introduced the CPR, tried to update civil procedure by using more modern language and by introducing the Overriding Objective but, apart from introducing a more flexible approach to discovery, re-named disclosure, the CPR did not really face up to the basic problems posed by mushrooming paper. Furthermore, they quickly fell foul of the problem that every perceived need for amendment was met with an extra rule or practice direction, like a software patch, so that the rules just got longer and longer, and harder to read, learn and understand, even by lawyers, including judges. I spent a significant part of my time in the Court of Appeal trying to decide what they meant.

Finally the Jackson reforms (alongside a much needed new approach to budgeting and managing costs) actually introduced compliance with the rules as an end in itself, as part of an amended Overriding Objective.

The result of all this is that our civil procedure makes the pursuit of small and even moderate claims disproportionately expensive and denies access to justice for the pursuit or defence of such claims to all but the very rich, large businesses, those with litigation insurance and those with an unusually high tolerance (or appetite) for risk. Very few now have Legal Aid.

Much of the disproportionality arises from the fact that the rules were (understandably) made by lawyers for use by lawyers. The need for detailed compliance means that, to conduct civil litigation with a real prospect of success (which requires, among other things, not falling foul of the rules), the litigant has to employ a lawyer to handle every part of the case, on a start to finish retainer which is likely to run up costs greater than the amount originally at stake, if the case is about value at risk of, say, less than £50,000. Even if the lay litigant had the time to read the rules, he/she would be most unlikely to understand them.

Attempts have been made to provide special provision for very small claims, but not in a way which makes reading and understanding the rules unnecessary. There

is some recent, modest, special provision for litigants in person but again not one which means the rules can be ignored by them. The last time I read the Chancery Guide it still said that everyone was expected to know the Rules.

The Arrival of New IT

I have thus far described IT (in the form of photocopiers, word processors and emails) as the villain of the piece. But some new forms of IT have already arrived, which may at least be described as neutral, so far as procedural reform and access to justice is concerned. Let me briefly mention four types:

- First, e-filing. After a series of false starts, during which millions of pounds of taxpayers money were wasted, e-filing has at last gained a foothold, in the newly re-badged Business and Property Courts at the Rolls Building, where it has recently become compulsory for professionally represented parties, and from which it will soon spread to the Business and Property courts in the main regional trial centres and then into the civil courts in the Royal Courts of Justice. This permits (and now requires) cases to be issued online and procedural documents to be filed online. It certainly streamlines the process of starting proceedings and lodging documents, but the underlying software is not designed to facilitate paperless trials and only replaces paper for the simplest and most straightforward case management work.
- Second, Secure Data Transfer ('SDT'). This is a system of direct electronic communication between bulk litigants and the court, much valued by for example utilities having to issue large numbers of small claims for enforcement of debts. The cost of the software at the issuer's end is large, but well worth it. SDT sends bulk cases to the County Court's bulk centre at Northampton. It enables undefended cases to go quickly to default judgment, but for any defended case everything is copied onto paper and the case then continues in the usual time-honoured way.
- Third, Money Claims Online ('MCOL') and Possession Claims Online ('PCOL'). These are simple, first generation online systems for starting cases in the County Court. MCOL has been around for about 10 years and PCOL for half that time. PCOL

is of course for landlords (and mainly large entities) while MCOL does offer an online service to ordinary private litigants and has been quite widely used by brave and enterprising litigants in person. But neither of them offer any real change from the traditional procedure, in defended cases. Again, everything eventually ends up on paper and the Rules apply in the usual way. MCOL in particular just offers the claimant user a rather small box on a blank screen on which to try and plead their case in the usual way.

- Fourth, the Supreme Court has for some time used e-bundles at hearings, and laptops in court. But few justices or advocates use it exclusively (Lady Hale is an honourable exception) and the parallel paper path is still mandatory in all cases, and the only path for obtaining permission to appeal.

The common feature of all these modest advances in IT in the civil courts is that they do nothing to bring about any real change, let alone revolution, in civil procedure. All operate under, and are regulated by, the CPR (or the Supreme Court rules) with minimal adaption in the form of Practice Directions.

The Origins of the Coming Revolution

The first strands in the thinking that new IT makes a revolution in civil procedure both necessary and possible (apart from the growing general unpopularity of the CPR) came in two ground breaking reports:

- 'Online Dispute Resolution for Low Value Civil Claims' ('the ODR Report'), submitted to the Civil Justice Council and to the Master of the Rolls by the ODR Advisory Group chaired by Professor Richard Susskind, in February 2015
- 'Justice in an Age of Austerity' published by Justice, in April 2015.

Both of them fastened onto the fact that modern IT offered the opportunity to re-think civil procedure from first principles, free from the tyranny of paper and from the stranglehold of procedure rules designed by, and for, lawyers rather than court users.

Some say (wrongly) that my Civil Courts Structure Review, carried out in the 12 months from July 2015 was also a source of inspiration. All I did was to subject the

ideas in the earlier reports to judicial scrutiny, to intense public and legal professional consultation and, once persuaded of their potential, to recommend them to anyone who would listen, as hard as I could. By then the process of revolution had already started, as I shall shortly describe.

Another important origin was the pioneering work in British Columbia which (under the authority of far-sighted primary legislation) produced their Civil Resolution Tribunal, a system of small claims adjudication which had its soft launch in mid-2016.

The Revolutionary Foundations

The coming revolution stands on two parallel foundations:

- First (in time, though not in logic) is the HMCTS Reform Programme. This major project, backed by over £800 million of taxpayer funding and fully supported by Government and the judiciary, has the design and implementation of modern IT in the courts as one of its two main objectives. It began in 2015 and is expected to run until at least 2023. HMCTS is supported in its work by engagement groups and working parties of judges, legal professionals and representatives of the pro bono community, who monitor and assist the process at every stage.
- Second in time (though first in logic) is primary legislation, in the form of the Courts Bill. Its predecessor, the Prisons and Courts Bill, had reached the Committee stage earlier this year when it was killed off by the last General Election, but its reintroduction (minus the prisons part) was announced in the Queen's speech, although is yet to happen. Critical for present purposes is the setting up with Parliamentary authority, of an entirely new (and much smaller) Online Rules Committee, insulated from the guardians of the CPR (and from its lawyerish culture) and charged with an entire re-think of civil, family and tribunal procedures for use in an online environment. Meanwhile (because of the delay in legislation) I set up a shadow Online Procedure Advisory Group last February to begin the blue sky thinking, dominated by those in the pro bono advisory and IT world, rather than by practising lawyers or judges, though they are represented as well.

So, What is This Revolution?

HMCTS is going about the introduction of New IT (at least in the Civil sphere) in two complementary ways:

- For all larger claims above a value at risk line, currently set at £25,000, the plan is to digitise the current procedure without radical or revolutionary change. The courts will be freed from the tyranny of paper by moving written communications online and some oral communication from face-to-face onto video and telephone, but the CPR will continue to govern and the expectation is that the value at risk will normally justify the continuing full retainer of lawyers, as at present, but saving the taxpayer and the court-user time and expense by streamlining communications, and by departing from the current default assumption that everything has to be done face-to-face, in a physical courtroom, located where the paper file is stored.
 - For money claims under £25,000, New IT will revolutionise civil procedure, by the introduction of an Online Solutions Court designed to be accessible and navigable with minimal assistance from lawyers. Specifically:
 - Issue and response to claims will be online, not on paper (not revolutionary, apart from the eventual abandonment of service of documents).
 - There will be a process of automated online triage whereby successive online screens (in the nature of decision trees) will help the lay litigants (on both sides) articulate their case in a way with which the court can get to grips, without having to use legal jargon, and to upload their key documents and evidence. Triage will produce a court e-file which will enable a judicially trained and supervised Case Officer (also authorised by the Courts Bill) to choose the most appropriate form of dispute resolution for each case. These two developments lie at the heart of the revolution.
 - IT will provide new, quicker, cheaper forms of alternative dispute resolution, such as blind bidding, and asynchronous (chat line) online dispute resolution, with or without an intermediary. These will, together with forms of trial online, by video or where appropriate face-to-face, be among the resolution options offered to the parties by the Case Officer. Others will be telephone or face-to-face mediation and judicial early neutral evaluation, as in the family courts for financial disputes. Some but not all will be provided by the court service. Others will be private, but vetted and approved.
 - The new online process will remove the need for litigants to read, learn and understand complicated procedure rules, or employ lawyers to do so, by embedding a new, simple procedure (laid down by the Online Rule Committee) in the online screens, with instructions and help boxes at every stage. This is the other main plank in the revolution.
 - New IT will provide for judicial determination of cases on e-documents, or by video, ending the expensive default assumption that everything has to be resolved face-to-face, but (and this is very important) preserving it where appropriate.
 - Paperless trials will at last break the tyranny of paper in the cases which need to go to trial, where everything currently has to happen in the building where the physical file is stored.
 - New IT will provide for streamlined modes of enforcement of judgments by online process.
- The making available of the benefits of this revolution to all potential court users still depends on the roll-out of more reliable fast broadband across the country than is presently available and creates the difficulty that many in the community are still challenged in the use of computers. This is not to be met by the long term preservation of a parallel paper path (which would be inefficient and would fail to pass to the users the benefits that IT can now deliver). Rather it is to be met in two ways:
- By focusing software design on the smart phone and the tablet, rather than just the lap-top or desk-top computer. Smart phones and tablets are much more widely used and understood than traditional computers, even among the poorest and most vulnerable.

- By taxpayer funded (not just pro bono) online, telephone and importantly face-to-face assistance. This programme is called Assisted Digital and is already in its trial stage.

The revolution is not intended to replace lawyers, even in small to moderate value claims. Rather it is intended to focus their skills and experience where it adds most value, in the provision of early bespoke advice on the merits and in the provision of skilled advocacy at trials. But it will entail the unbundling of legal professional services by solicitors and more direct access services by the Bar.

Finally the revolution will have to be accompanied by new ways of ensuring that civil justice continues to be done openly and transparently. Only yesterday, at the Dubai Legal Forum, we were reminded (by a delegate from India) of how the British tradition of judging in a public place under public scrutiny reinforces the rule of law all round the world. This is a priceless asset, which must be preserved, even if more judging takes place online or on video or telephone, than before. Modern IT is already playing its part. Supreme Court hearings are now routinely live streamed around the world on the internet. I participated last week in one of the first Privy Council appeals conducted simultaneously in London and the Caribbean (Trinidad) by live video.

Where Will This Revolution Take Us and When?

The design of the Online Solutions Court is already progressing and the first building bricks, temporally transplanted into the County Court for the purpose, are already being tested on a few selected real live cases, with encouraging results.

All being well, enough bricks will have been made in the next two years to soft launch the Online Solutions Court as a separate and distinct court in a minimum viable state, with its own new procedure, but the design and building won't stop then.

Similar new processes are being designed for online divorce, online probate and for some of the Tribunals.

After that, all depends on how well it works, and on how much court users like it. This first stage is confined to money claims (including damages) below a deliberately cautious ceiling of £25,000. Many types of claim, such as personal injury and possession will initially be excluded

(either because they have their own quite modern IT, such as PCOL and the Road Traffic Accident Portal, or because a face-to-face encounter with the judge is thought necessary, as in residential possession claims). But this cautious limitation of the project is not set in stone, and certainly not intended to be permanent. You just have to start somewhere and preferably where revolution is needed most.

What Does This Mean For You?

For the short- and probably medium-term, in England and Wales the new online court and the traditional but digitised court will carry on side-by-side. For those (probably most) of you who litigate higher value disputes, the new IT will bring evolution rather than revolution. This is partly because the disproportion between value at risk and cost is less crippling in such cases, though we all know that it can still be striking, even where the value at risk is (say) £25 million and more. The CPR is not dead yet, but the writing is on the wall.

For those of you with a focus outside the United Kingdom, my message is that new technology knows no national boundaries, and that the problems of expense and delay which affect civil litigation are not peculiar to this country. Yesterday I was talking in Qatar to senior judicial and other legal delegates from all round the Pacific: People's Republic of China, Hong Kong, Indonesia, Kazakhstan, Iran, Malaysia, India, New Zealand, about this very subject. It affects us all, and we need to cooperate in bringing this revolution to bear wherever necessary to preserve and enhance the rule of law.



Leonard Yeoh
Partner of Tay & Partners

Leonard Yeoh has substantial trial, appellate and arbitration experience and has litigated at all levels of the Malaysian and Singaporean court hierarchy. He represents leading Malaysian companies and multinational companies in domestic and international arbitrations. He has been consistently rated and ranked as Malaysia's pre-eminent dispute resolution and employment lawyer by Chambers Asia, the Asia-Pacific Legal 500, Asialaw Leading Lawyers, The Guide to the World's Leading Labour and Employment Lawyers, The International Who's Who of Management Employment Lawyers and Asian Legal Business (ALB). He has been nominated as one of the Disputes Stars at the Asia-Pacific Dispute Resolution Awards in Hong Kong for consecutive years.

The College of Law of Australia and New Zealand

On 12 November 2017, following the IPBA Mid-Year Council Meeting in London, The College of Law of Australia and New Zealand (COL) and the IPBA signed a collaboration agreement to offer a co-branded Master of Laws (Applied Law) programme focused on ASEAN+6 cross-border practice - the COL-IPBA ASEAN+6 LLM.

A primary purpose of the agreement is to facilitate collaboration between the IPBA and COL in a shared commitment to develop and grow IPBA membership and to develop and grow a co-branded LLM (Applied Law) programme to meet the needs of lawyers doing business within the ASEAN+6 region.

COL CEO and Principal, Mr Neville Carter, who was present in London for the signing, has welcomed the collaboration between the two organisations:

'As the preeminent organisation of business and commercial lawyers doing business in the Asia-Pacific region, the IPBA is our obvious partner as we seek to develop this new jurisdictional stream within our successful Master of Laws (Applied Law) programme.

'The College prides itself on having strong relationships with national and state-based lawyer organisations in all the jurisdictions in which we work. These relationships help us to develop and deliver programmes that align with the needs of practising professionals in nine jurisdictions in Australia, New Zealand and Malaysia – and in two new jurisdictions (Singapore and Vietnam) to be developed in 2018.



'We chose ASEAN as the focus of this new programme because of its growing importance as a regional economic group. If ASEAN were a country, it would be ranked 7th in the world's economy and its strong economic growth will rank it 4th by 2050. ASEAN is also a strategically located bridge between Australasia and the rest of Asia.

'The College aspires to build strong relationships between Australia and New Zealand and the rest of Asia, and we share the IPBA's aspiration of bringing together lawyers from around the world with an interest in international business law in the Asia-Pacific region.'

The IPBA President, Mr Denis McNamara, also welcomed the agreement as 'a fantastic opportunity for the IPBA to grow its young membership numbers and to help promote the organisation throughout the Asia-Pacific region'.



Addressing the attendees are, from left to right: IPBA President Denis McNamara; College of Law CEO Neville Carter; IPBA President-Elect Perry Pe.

What is the College of Law?

COL is a postgraduate school of professional practice for lawyers in Australia and New Zealand. COL's mission is to enhance the careers of legal professionals across Australasia and its region through the delivery of innovative, practice-focused legal education and training.

A few facts...

- COL was founded in 1974 by the Law Society of New South Wales to meet its education and training needs.
- COL is a not-for-profit company with a governance structure that reflects its alignment with the practising legal profession.
- COL is self-accrediting authority recognised by Australia's Tertiary Education Quality Standards Agency (TEQSA).
- COL has produced more than 60,000 graduates since 1974.
- COL is the largest provider of postgraduate legal education in Australia and New Zealand.
- COL has nearly 7,000 students enrolled in postgraduate programmes each year.
- COL has over 450 staff in Australia, New Zealand and South East Asia.
- COL offers four types of programmes to develop the careers of legal professionals:
 - Activate your career – Practical legal training programmes,
 - Enhance your career – Professional development programmes,
 - Master your career – Postgraduate applied law programmes, and
 - Own your career – Legal business management programmes.
- COL has campuses in Sydney (where COL is headquartered), Adelaide, Auckland, Brisbane, Melbourne, Perth, and Wellington and support offices in Kuala Lumpur and Singapore.





What is the COL-IPBA ASEAN+6 LLM?

The College of Law – Inter-Pacific Bar Association Master of Laws (Applied Law) in ASEAN+6 Legal Practice focuses on cross-border legal practice within the ASEAN+6 Free Trade region (ASEAN plus Australia-New Zealand, China, India, Japan and Korea). As with all COL LLM programmes, the COL-IPBA ASEAN+6 LLM is developed for practitioners, by practitioners, and is practice focussed. It focuses on developing technical and practical proficiency through innovative online learning methods. The programme will help students acquire the knowledge and skills they need to be a specialist practitioner, and become more professional, effective and practical as they advance their career.



The subjects are being developed by experienced cross-border practitioners – many of whom are IPBA members. The programme would suit practitioners involved in or interested in learning about carrying out cross-border commercial transactions within the ASEAN+6 region. The first subjects will be available in February 2018, the first of four intakes (May, August, and November) offered each year.

Please contact Peter Tritt, Director (Asia Pacific) at ptritt@collaw.edu.au for further information or visit us at www.collaw.com.

These photos were taken at a networking event hosted by COL in Sydney on 10 October 2017.

IPBA Mid-Year Council Meeting and Regional Conference in London



The IPBA Mid-Year Council Meetings took place in London this year over the weekend of 10-12 November 2017, with the inaugural regional conference on Monday 13 November 2017. The Council meetings kicked off on Friday with the Nominating Committee Meeting, followed by Officers of the IPBA attending an inaugural meeting with leaders (and our new friends) of the Bar Council of England and Wales.

The weekend's festivities then began in earnest with a champagne reception and welcome dinner hosted at CMS' offices on Friday evening. Good fun and embraces were had by all, as Council members took the opportunity to catch up with each other's news and to discuss the coming weekend.

The meetings on Saturday began with the Officers strategising plans for the next few months and reports by each Officer on activities in their specific area of responsibility since Auckland. In the afternoon, the Membership Leaders discussed new initiatives to benefit all IPBA members, and the Committee Chairs and Co-Chairs ironed out details of the committee sessions coming up in Manila. On Saturday night, the Council members and their partners enjoyed dinner in the Crypt

of The Bleeding Heart restaurant, set to the beautiful music of a talented pianist and the atmospheric elegance of the Crypt below St Etheldreda's Church in the centre of London. St Etheldreda's is one of London's hidden gems, a beautiful and historic building and the oldest Roman Catholic Church in England. St Etheldreda's is situated just off Bleeding Heart Yard, a stunning cobbled courtyard in the Farringdon area of the City. Over dinner, we all wondered at the legend that the courtyard's name commemorates the murder of Lady Elizabeth Hatton, the second wife of Sir William Hatton (whose family formerly owned the area around Hatton Garden – London's famous jewellery quarter). It is said that her body was found there on 27 January 1646, 'torn limb from limb, but with her heart still pumping blood.' Scary stuff!

Sunday's meetings were far less fear-inducing. The Council Meeting focused on the Officers' reports and approval of the Council for upcoming council position nominations. Officers of the IPBA then met with Xavier Costa Arnau and Wiebe de Vries of AIJA to renew the mutual friendship between the organisations and sign the third extension of our Memorandum of Understanding.



Monday's regional conference was widely attended by lawyers and contacts from all over the world, attracting around 150 guests. The conference was entitled '*Forces of change: modernisation and a shifting international landscape. English and Asian perspectives on how legal systems adapt*'. Lord Briggs of Westbourne opened the conference with a keynote speech on modern IT and his views on when/how it would revolutionise civil procedure. A lively and thought-provoking panel discussion followed, on the topic of whether legal technology leads to faster and fairer results, among Clive Gringas (CMS), Rebecca Sabben-Clare (7King Bench Walk) and Dr Pavel Klimov (Chair of the Law Society's Technology and Reference Group), moderated by the Conference Chair, Jonathan Warne (CMS).

After a coffee break, Sarah Gabriel (Peters & Peters) moderated a conversation about ancillary relief in international disputes based on presentations from the speakers: Philip Marshall QC (Serle Court) on WFO ancillary asset disclosure, Richard Millett QC (Essex Court) about lessons learnt from the *Ras Al Khaimah* case, and Yash Kulkarni spoke to his experience of anti-suit injunctions.



The conference broke for lunch, providing a welcome opportunity for attendees to network and catch up with their colleagues and new friends. After lunch, President-Elect Perry Pe gave an exciting (video-related!) insight into the Annual Conference to be held in Manila on 14-16 March 2018.

As part of the next panel discussion, Jurisdictional Council Member for China, Jack Li, presented his expert views on and insights into the headline-grabbing Chinese Belt and Road Initiative which were then considered with fellow speakers Caroline Berube (HJM Asia Law & Co LLC) and Katie McDougall (Norton Rose Fulbright) and moderator Alexander Gunning QC (4 Pump Court).

The conference concluded with a fascinating panel discussion on the topic of international fraud, led by speakers Neil Swift (Peters & Peters), Amanda Pinto QC (33 Chancery Lane) and Roger Best (Clifford Chance), with moderator Chris Warren-Smith (Morgan Lewis) presiding.

During the afternoon, Officers also met with the Law Society of England and Wales to discuss ways the organisations can work together.





Following some closing remarks and 'thank you's' from Jonathan Warne and President Denis McNamara, the conference attendees enjoyed well-earned drinks into the early evening, hosted by CMS.



We would like to thank all those IPBA members and officers who travelled to attend the event in London and made it such an enjoyable and successful event. We would also like to extend special thanks to sponsors CMS Cameron McKenna Nabarro Olswang LLP, Smith & Williamson, The Bar Council, Peters & Peters, and 7KBW for their generous support.

IPBA Upcoming Events

Event	Location	Date
IPBA Annual Meeting and Conferences		
28th Annual Meeting and Conference 'Fostering Seamless Cooperation in ASEAN and Beyond'	Manila, Philippines	March 14-16, 2018
29th Annual Meeting and Conference	Singapore	April 24-28, 2019
IPBA Mid-Year Council Meeting & Regional Conferences		
2018 Mid-Year Council Meeting (IPBA Council Members Only)	Chiang Mai, Thailand	November 2-4, 2018
Regional Conference, topic TBA	Bangkok, Thailand	November 5, 2018
IPBA-supported Events		
IFLR Asia M&A Forum	Hong Kong	February 28-March 1, 2018

More details can be found on our web site:
<http://www.ipba.org>, or contact the IPBA Secretariat at ipba@ipba.org

Asian-European M&A and Dispute Resolution Day — Corporate Acquisitions and Resulting Disputes, Geneva, Switzerland



On 14 September 2017, the Dispute Resolution and Arbitration Committee of the IPBA, supported by the Corporate Counsel, International Trade, Cross-Border Investment as well as the Banking, Finance and Securities Committee, organised a very successful conference in Geneva, Switzerland, in conjunction with the Swiss Arbitration Association ('ASA'). The Conference was triggered by a well-noted increase of M&A transactions by Asian—predominantly Chinese—companies in Europe, and particularly in Switzerland. From the top 10 Swiss M&A transactions in 2016, two (20%) involved successful Chinese bidders (Syngenta and Gategroup). Furthermore, ChemChina's takeover of Syngenta was the largest foreign acquisition by a Chinese company in world history and it is expected that the M&A activity of Asian companies in Europe will increase in the years to come. Along with this, dispute resolution in the M&A area is also expected to grow.

Accordingly, the Conference was divided into a morning part, devoted to the transaction side and an afternoon session, devoted to dispute resolution:



seasoned dispute resolution specialists discussed, in an Arbitration Roundtable, specific issues of the arbitration process and gave useful advice as to relevant aspects of drafting arbitration clauses. The following speakers, in addition to the

already mentioned panel members, participated in the Roundtable: Dorothee Ruckteschler, Germany; Jonathan Wood, Singapore and UK, Justyna Szpara, Poland, Desai Vyapak, India, José Rosell, Denmark, Mel Schwing, Australia and USA and, last but not least, Michael Cartier (our IPBA Webmaster), who also created a wonderful website for this local event (www.mergers-acquisitions-asia-europe.com). The website will remain accessible for approximately another 10 months and much additional information about the Conference may be gained therefrom and downloaded (for example, all PPT slides of presentations and the CVs of panel members). The Roundtable and the morning sessions soon triggered heated debates within the panels and among conference delegates. Time really flew by too quickly.

The Conference was attended by more than 50 speakers and delegates, and thanks to the generous sponsorship of three law firms (SchellenbergWittmer, Walder Wyss and MME Legal), it also generated a modest profit that will be split equally between the organising Associations, ASA and the IPBA. Special gratitude is extended to Alex McLin, ASA's Executive Director, Geneva and his team, who performed the main work for the Conference behind the scenes. Also the IPBA staff were instrumental in the great success of the event. Thanks to all of you.

After a short introduction by Elliott Geisinger (President of ASA) and Bernhard Meyer (JCM Switzerland), the first Panel, moderated by Gerhard Wegen (At-Large Council Member Europe), Germany, set the stage for Asian-European cross-border M&A transactions in general. André Brunschweiler, Switzerland, diagnosed the cultural differences in cross-border transactions. Lidong Pan, China, and Jan Bogaert, Hong Kong and Belgium, then dealt with the regulatory framework of Asian-European M&A transactions and financing questions.

The second Panel, moderated by Jingzhou Tao, China, then dealt with typical pitfalls in Asian-European deals. Nicola Lafont, France, began with pre-acquisition considerations and the tender process. Junichi Ikeda, Japan, then addressed typical negotiation traps and Ben Qi, China, rightfully pointed out the relevance and often underestimated difficulties of the post-acquisition integration phase.





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The Brazilian Aviation Industry

The aviation industry has great prominence in Brazil and, in particular, the civil aviation industry is important as it links remote areas to the major cities in the country. The dependence on this system, along with the country's policy to enhance the industry, makes the aviation sector an excellent area for investment. In recent years, Brazil's aviation market has grown considerably, despite the various difficulties it has gone through. In fact, the Brazilian aviation industry is the largest in the southern hemisphere and it seems that it will keep its ranking if the Brazilian government becomes more aware of the investments and changes that need to be made in this field.



Introduction to Brazil's Aviation Industry

In Brazil, air transportation has historically been affordable strictly for the country's higher income segment, resulting in a comparatively low level of air travel. However, air transportation in Brazil has the potential to increase significantly, as it offers a viable, convenient and affordable alternative to other modes of transport, especially by bus and car. This is because long-distance travel alternatives are limited in Brazil, given that there is no interstate rail system and road infrastructure is poor, especially in more sparsely populated regions.



Brazil is the fourth largest market in the world for domestic passengers and is expected to reach 122.4 million domestic passengers in 2017, an increase of 33.7 million passengers from 88.7 million in 2016, according to the International Air Transport Association ('IATA').

According to Brazilian authorities, there were 90.0 million domestic enplanements and 6.0 million international enplanements by Brazilian airlines in 2013, for a total population of approximately 201 million.

The recent growth in the Brazilian middle class led to significantly increased demand for international air travel by Brazilians. As air transportation has become more affordable, Brazilians are allocating a larger portion of their disposable income to international travel. The number of domestic revenue enplanements in Brazil increased from 43.2 million in 2006 to 88.7 million in 2016.

Legal Overview

Under the Brazilian Federal Constitution, air transportation is a public service. It is therefore subject to extensive governmental regulation and monitoring by several federal agencies and entities.

In general, the sector is regulated by the Brazilian Aeronautical Code, which covers air service concessions; airport infrastructure and operations; flight safety; airline certification; leasing, taking security, disposal, registration and licensing of aircraft; crew training; inspection and control of airlines; public and private air carrier services; civil liability; and penalties for infringement.

For decades, the Brazilian aviation industry was exclusively state owned and regulated in accordance with domestic law, independently from leading international conventions relating to worldwide commercial air transportation activities signed and ratified and customers' needs.

Hosting the 2014 Soccer World Cup and the 2016 Olympic Games triggered a new consciousness from the Federal authorities, opening up the way to a new era in the aviation industry in Brazil, with a fresh will to improve the current legislation and modernise airports infrastructure.

The National Civil Aviation Policy (*Política Nacional de Aviação Civil*), which was adopted in 2009, sets out the main governmental guidelines and policies that apply to the Brazilian civil aviation system. This Policy encourages all regulatory bodies to issue regulations on strategic matters such as safety, competition, environmental and consumer issues, and to inspect, review and evaluate the activities of all operating companies.

Under this Policy, the Brazilian Civil Aviation Council ('CONAC'), appears to be the advisory body to the President of Brazil with authority to establish national civil aviation policies, to be adopted and enforced by the Aeronautics High Command and other regulatory bodies, establishing main guidelines relating to (1) the representation of Brazil in conventions, treaties and other activities related to international air transportation; (2) airport infrastructure; (3) provision of funds to airlines and airports to further strategic, economic or tourism interests; (4) coordination of civil aviation; and (5) granting of air routes, concessions and permissions for commercial air transportation services, etc.

The Ministry of Transportation, Ports and Civil Aviation supervises civil aviation services and activities in Brazil and is responsible for issuing governmental policies for the sector and for the oversight of the Civil Aviation National Agency ('ANAC') and Brazilian Company for the Airport Infrastructure ('INFRAERO').

Under this new Policy, in 2011 the National Commission of Airport Authorities ('CONAERO') was also created, with the role of coordinating the activities of the different entities and public agencies with respect to airport efficiency and safety. On the other hand, the Department of Airspace Control ('DECEA') is responsible for planning, administrating and controlling activities related to airspace, aeronautical telecommunications and technology, as well as military aviation.

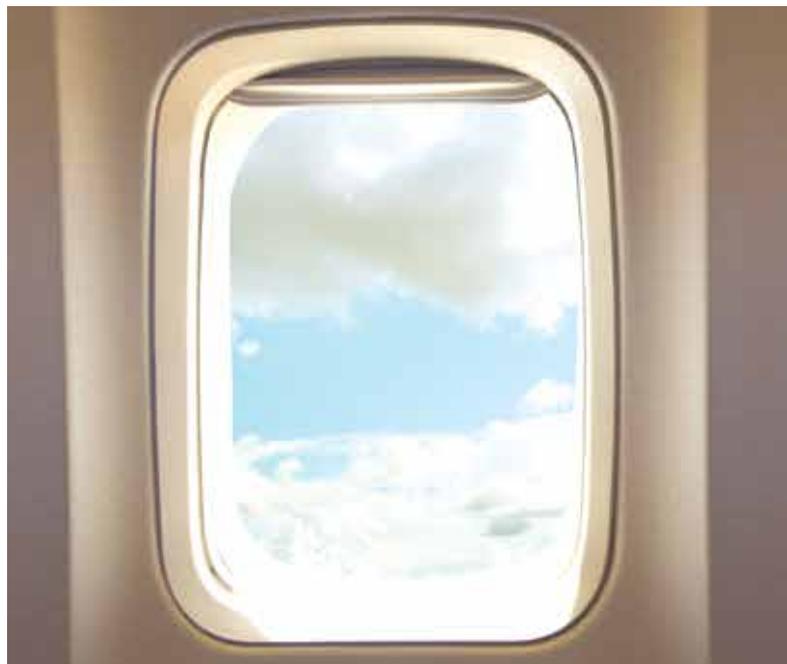
The applicable legal framework was redesigned recently to create the new National Civil Aviation Policy and the Brazilian Supreme Court's new ruling on the supremacy of international conventions over domestic law has shaken up the aviation industry landscape in Brazil.

General Conditions Applicable For Air Transportation

Activities of Brazilian Aviation Sector

The Brazilian Aviation sector is divided into three types of activities:

- (1) **Airlines transportation:** Airlines registered in Brazil carry more than 88.7 million passengers and more than 900 thousand tonnes of air freight per year, from and within Brazil;
- (2) **Ground-based infrastructure:** Airlines need ground-based infrastructure to operate. This type of



infrastructure includes Brazilian airports facilities that directly attend passengers' needs, such as baggage handling, ticketing, retail and catering outlets. Some services, often less visible, such as air navigation and air regulation, as well as the local activities of freight integrators, are provided off-site; and

- (3) **Aerospace manufacturing** that builds and maintains aircraft systems, airframes, and engines.

ANAC

The aviation system and airports infrastructure traditionally owned and regulated by the Federal Government, have gone through structural and deep changes. In this regard, Law No.11.182 created the ANAC, an independent governmental agency with a fully independent structure, which is henceforth responsible, in principle, for (1) guiding, planning, stimulating and supporting the activities of public and private civil aviation; and (2) regulating economic issues affecting Brazilian air transportation and airport infrastructure activities.

ANAC is in charge of economic regulation in regards to monitoring and intervening in the market, aiming to foster competition and improve the services in the sector. This agency is also responsible for technical regulation, with the purpose of regulating the industry, providing



Flight tickets price should decrease, boosting competition among airlines and reviving the air transportation industry.

safety to airline operations and ensuring compliance with all the staff training requirements.

Additionally, ANAC is also in charge of conducting all negotiations with foreign governments and running a pre-analysis of potential international agreements. Ensuing ANAC's analysis, agreements are sent to the National Congress to be analysed and ratified. After being ratified, those conventions need to be signed by the Office of Foreign Affairs in order to become effective in Brazil.

ANAC's Resolution and Brazilian Aeronautical Code

Recently, ANAC's Resolution No. 400/2016 was passed. According to ANAC's objectives to modernise the Brazilian aviation industry and make it more efficient and competitive, this Resolution redesigned certain general conditions for air transport and established new rules applicable to passengers' rights and duties, both aligned with international regulations.

The main changes and greatest impacts of this Resolution are, among others: (1) the airline carrier will no longer be forced to provide a free baggage allowance on domestic or international flights; (2) the time for airlines to return lost baggage and compensate customers is reduced; (3) passengers are allowed to cancel flight tickets up to 24 hours after purchase, without penalty/charge; (4) airline carriers are no longer

allowed to cancel return tickets on domestic flights when a departure ticket is cancelled; and (5) the extra charge integrated into the price no longer exists.

Initially, these new rules may cause a significant financial impact on airline companies, incurring extra operating expenses such as training staff and making funds available in order to implement these new measures. However, extra costs will tend to decrease over time as the companies incorporate the Resolution in their operating fees.

On the other hand, flight tickets price should decrease, boosting competition among airlines and reviving the air transportation industry. Furthermore, the Resolution should help decrease the amount of legal claims, for it ensures costs predictability and clarifies customers' rights and duties, in accordance with the international standards in force.

These changes are likely to attract new investments, which should contribute to the country's economic recovery and provide more security and profitability. Under the current legislation, at least 80% of the voting stock of a company that holds a concession to provide scheduled air transportation services in Brazil must be held directly or indirectly by Brazilian citizens and the company must be managed exclusively by Brazilian citizens.

The Brazilian Aeronautical Code also imposes restrictions on transfers of the shares of companies that hold concessions to provide scheduled air transportation services, including the following: (a) all voting shares must be nominative; (b) no non-voting shares may be converted into voting shares; (c) prior approval of the Brazilian aviation authorities is required for any transfer of shares (regardless of the nationality, corporate status or structure of the transferee) if the transfer relates to more than 2% of the airline's share capital stock, would result in a change of control of the airline, or would cause the transferee to hold more than 10% of the airline's share capital stock; (d) the airline must file a detailed shareholder chart with ANAC every six months, including a list of shareholders and a list of all share transfers effected in the preceding six months; and (e) based on its review of the airline's shareholder chart, ANAC may require that any further transfer of shares be subject to its prior approval. These restrictions apply not only to companies that hold concessions to provide scheduled air transportation services, but also to their direct and indirect shareholders.

Licensing of Operations

All aviation services and related operations in Brazil require ANAC's prior authorisation. Following the provisions of international conventions, such as the Chicago Convention and the Geneva Convention, Brazilian regulations require specific licensing for all air transportation activities, including domestic and international scheduled and non-scheduled air transportation, air taxi, maintenance, repair and overhaul services. Licences are only granted after the applicable documental and technical analysis has been made.

Foreign Airline Companies

In order to provide air transportation services in Brazil, a foreign airline company is required, first, to be designated by the government of its home country to operate in Brazil. After that, the airline must obtain from ANAC an authorisation to set up the foreign branch locally and, thereafter, an authorisation to operate. ANAC's authorisation to operate requires submitting flight and route plans and other operational and technical information.

ANAC's objectives to modernise the Brazilian aviation industry and comply with international standards is giving a head start to the field. In this respect, it is possible to

hope that the Brazilian Parliament will amend this rule and allow participation by foreign companies of up to 100% of the voting stock, aligning Brazil's legislation with the world trend. Nevertheless, knowing this rule is a key contribution to the growth of the aviation market and despite frequent discussion of the subject by the Brazilian Minister of Transportation, Ports and Civil Aviation, to date efforts to amend the Brazilian Aeronautical Code in this regard have been unsuccessful.

The Brazilian Airports Structure

Under the Brazilian Constitution, the Federal government is responsible for air transportation and airport infrastructure, as a public service, and may provide these services directly or by way of concessions or authorisations to third parties. As a stated controlled infrastructure, modernisation and services improvement were not a priority.

In the latest Global Competitiveness Report (2015-2016), Brazil ranked 113 out of 144 countries in terms of *Airport Infrastructure*, evidencing the need for substantial additional airport infrastructure investment in the country.

Brazil currently has more than 2,400 private and public airfields. Airlines that operate regularly scheduled flights primarily use public airport infrastructure, with 98% of total passenger traffic passing through a network consisting of 65 airports.

INFRAERO is responsible for the operational matters of 60 of those airports. A number of smaller regional airports in Brazil are under the control of state or municipal governments and managed by local governmental entities. INFRAERO is the state-controlled airport operator responsible for managing, operating and controlling all government-operated federal airports (that is, those whose operations have not been transferred to private parties by way of concessions), including safety, operational conditions and infrastructure.

In recognition of significant opportunities to improve the quality of this infrastructure, the Brazilian government has become conscious of the need to improve existing infrastructure in order to keep attracting tourists, entrepreneurs and investors. Brazil has been investing heavily in a growing network of airport and Air Traffic Control ('ATC') facilities, but federal government indebtedness and a corruption scandal has diverted attention away from main infrastructure projects.

Thereupon, the Government leveraged the Brazilian aviation market thanks to its decision to carry out a comprehensive plan of airport privatisation of the country's main airports, responding to an in-depth analysis which verified that the Brazilian aviation industry and the demand for aviation-related services have been increasing exponentially over the last few years.

This implemented program grants concessions following public bids for the operation of certain airports in Brazil. For instance, concessions for the international airports of São Paulo (Guarulhos and Viracopos) and Brasília were granted to private parties following a public bid in 2012. Also, in 2013, Belo Horizonte (Confins International Airport) in the state of Minas Gerais and Rio de Janeiro (Galeão International Airport) were also privatised by way of concessions. The concessions for these airports have terms of between 20 to 30 years.

Of the 60 Brazilian airports managed directly or indirectly by INFRAERO, 17 airports are currently receiving infrastructure investments and upgrades. The airport upgrade plan does not require contributions or investments by Brazilian airlines and is not expected to involve increases in landing fees or passenger taxes on air travel.

ANAC has been involved in a series of discussions and attempts to change and improve the rules applicable to air transport in order to promote a higher quality of services through a more efficient air traffic control and a modernised airport infrastructure, allowing airline companies to provide better services to their customers.

ANAC has enacted, in 2014, Resolution No. 338, which sets forth new procedures for the distribution of slots in airports operating at full capacity. Under this Resolution, airports operating at full capacity are deemed by ANAC 'coordinated airports'. This Resolution increases the participation of airlines that operate routes in regional airports.

Also, airlines and service providers may lease areas within federal, state or municipal airports, such as hangars and check-in counters, subject to concessions or authorisations granted by the authority that operates the airport—which may be INFRAERO, the state, the municipality or a private concession holder, as the case may be. No public bid is required for leases of spaces within airports, although INFRAERO may conduct a public bidding process if there is more than one applicant.



Brazil currently has more than 2,400 private and public airfields.

In other cases, the use may be granted by a simple authorisation or permission issued by the authority that operates the airport. In the case of airports operated by private entities, the use of concession areas is subject to a commercial agreement between the airline and the airport operator.

Brazilian airports have been improving in terms of infrastructure as well as management. As an example, issues associated with domestic or international flights departures delays, baggage loss or damage, among others, have considerably decreased.

Generally, airports infrastructure modernisation still needs to be strengthened in order to allow airline companies to better operate in Brazil and provide full potential services to their customers. However, crucial improvements can be seen.

Applicable Legislation On Air Transportation Contracts in Brazil

Despite the fact that Brazil has signed and ratified the leading international conventions relating to worldwide

commercial air transportation activities (such as the Warsaw, Chicago and Montreal Conventions), Brazilian courts routinely do not recognise the exclusive remedy provided by such conventions. Local courts also do not always observe the limitations on the quantum and the kinds of damages that may be claimed under the Montreal Convention. In addition to awarding passengers actual or consequential damages, Brazilian courts commonly grant plaintiffs the 'moral', punitive or exemplary damages that the Convention expressly excludes from its scope.

Such deliberate exclusion of international standards would make foreign airline companies overly liable for damages caused to customers, often linked to airports infrastructure or inconsistent domestic rules.

The International aviation conventions were a significant step towards unifying the rules governing air transportation services worldwide, providing unified standards relating to airline companies liability and allowing for a consistent international development of the industry.

Publications Committee Guidelines for Publication of Articles in the IPBA Journal

Please note that the IPBA Publication Committee has moved away from a theme-based publication. Hence, for the next issues, we are pleased to accept articles on interesting legal topics and new legal developments that are happening in your jurisdiction. Please send your article to both **Leonard Yeoh** at leonard.yeoh@taypartners.com.my and **John Wilson** at advice@srilankalaw.com. We would be grateful if you could also send (1) a lead paragraph of approximately 50 or 60 words, giving a brief introduction to, or an overview of the article's main theme, (2) a photo with the following specifications (File Format: JPG or TIFF, Resolution: 300dpi and Dimensions: 4cm(w) x 5cm(h)), and (3) your biography of approximately 30 to 50 words together with your article.

The requirements for publication of an article in the *IPBA Journal* are as follows:

1. The article has not been previously published in any journal or publication;
2. The article is of good quality both in terms of technical input and topical interest for IPBA members;
3. The article is not written to publicise the expertise, specialization, or network offices of the writer or the firm at which the writer is based;
4. The article is concise (2500 to 3000 words) and, in any event, does not exceed 3000 words; and
5. The article must be written in English, and the author must ensure that it meets international business standards.
6. The article is written by an IPBA member. Co-authors must also be IPBA members.

Recently, the Brazilian Supreme Court finally ruled out the choice of inferior courts to apply domestic law over international conventions, stating that the Warsaw and Montreal Conventions should prevail when it comes to international air transport related to legal claims.

This new ruling clarifies two important issues: liability and the time limit to file claims. According to the Warsaw and Montreal Conventions, flight delay, baggage damage or loss and overbooking shall be compensated up to a maximum amount, regardless of the conditions in which the damage occurred. In contrast, the Brazilian Consumer Protection Code does not provide for such a limit. In the past, customers only had to prove the damage suffered. Such situation is now overruled.

Previously, pursuant to the Consumer Protection Code, consumers could file a claim up to five years from the date of awareness of the fact that caused damage. From now on, according to the provisions of the aforementioned conventions, claims can be filed within two years from the date of arrival at destination, from the date on which the aircraft should have arrived at destination or from the date of transport interruption.

According to the Brazilian Civil Code, transportation services agreements should be taken into consideration, when their content does not contravene the Civil Code's established rules. This applies to transportation services agreements resulting from rules established by international treaties and conventions. ANAC itself always provided for the application of the Warsaw Convention in controversies related to lost baggages.

The Brazilian Supreme Court's recent ruling allows for air transport in Brazil to better comply with international standards, decreasing uncertainties for foreign airlines regarding the applicable rules and gaining their trust and will to further invest in the country's aviation market.

Conclusion

In conclusion, the new general conditions stated in ANAC's Resolution opened the way for Brazil to align with the international standards provided for by the Montreal and Warsaw Conventions, even though government intervention and internal bureaucracies, which often slow down the process of aviation industry growth, still need to be fully eliminated.

Airports privatisation helped in modernising an infrastructure that was old and did not attend to modern customers' needs. Foreign investments should continue to be stimulated through domestic legislation and court rulings' being in full compliance with the existing international conventions, in order to ensure the development and growth of the aviation industry in Brazil and to boost the country's economy.

Brazil's size requires people to use planes as their main method of inter-state transport. In recent years, aviation has become one of the fastest growing means of transportation, which reflects its relevance to the country's economy. Higher demand generated greater competition between companies in the industry, a larger choice of routes for consumers and, as a result, greater business opportunities in various industries, including tourism.

The government has recognised the importance of aviation in terms of the country's economic growth and has been increasing investments to refurbish, modernise and expand domestic airports. Brazil's deep restructuring of its aviation industry has started. ANAC has laid the foundations for the future development of this high-priority industry. Still, the government, the legislative branch and the courts need to follow the lead and consolidate the internationalisation of an industry traditionally subject to exaggerated protectionism.



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Mr Kuznietz concentrates his practice on Corporate and M&A, Aviation and Maritime Law. He is Co-Head of the Ibero-American Practice at Demarest Advogados. He graduated in Law from both Universidad Nacional de Córdoba in Argentina (1994) and Universidade de São Paulo in Brazil (2006). He also earned an LL.M. at the University of Pennsylvania Law School, USA (1997). Kuznietz was a senior Associate at the Law Firm Marval, O'Farrell & Mairal, Argentina. He is Vice President of the Argentina-Brazil Chamber of Commerce and a member of Inter-Pacific Bar Association and International Bar Association. He was recommended by Chambers & Partners Latin America, Legal 500, Latin Lawyer 250 and Análise Advocacia.

The Uniform Rapid Suspension System Procedure— A Right Protection Mechanism in the Expanded Domain Name Landscape



In recent years, the domain name space has expanded drastically by the introduction of over 1,200 new extensions, such as .online, .shop, .bike, .wine and many more (the new generic top-level domains or shortly 'new gTLDs'). The new gTLD registrations are rapidly growing: in September 2017 it reached over 23 million domains registered. While many trademark owners considered the new gTLDs as an opportunity to enhance their digital brand identity, others were skeptical and expressed serious concerns, perceiving the expansion programme as a threat to their intellectual property rights. Together with the launch of the new extensions, new right protection mechanisms ('RPMs') were created. One of these is the Uniform Rapid Suspension System ('URS'), a kind of interim measure, which leads to the take down of an infringing domain name in 21 days.



Introduction of New Generic Top-Level Domains

In 2013, the Internet Corporation for Assigned Names and Numbers ('ICANN'), a California-based not-for-profit public benefit corporation responsible for the technical management of the Internet's global Domain Name System, commenced the introduction into the root of nearly 1,300 new extensions, the so-called new generic top-level domains or new gTLDs (for example, .web, .shop, .london, .solutions, .lawyer, .loan, .audi, etc. as well as extensions with non-Latin characters such as .在线 – online in Chinese, .みんな everyone in Japanese, etc.—the full list of the delegated strings is available on ICANN's website at <https://newgtlds.icann.org/en/program-status/delegated-strings>) in order to increase competition and choice in the domain name space.

Registrations

As of the first quarter of 2017 there were approximately 330.6 million domain name registrations across all top-level domains (including generic top-level domains, also called legacy domains—for example, .com, .org, .net; country-code top-level domains—for example, .cn, .de, .uk, .ru; and the new generic top-level domains— .xyz, .top, .club), of which new gTLD registrations represent 7.7 percent (25.4 million) of the total registrations.

Registrations of new gTLDs are constantly, with some peaks up and down, increasing, but only the next few years might tell us how successful they are. Currently, many of them are not actively used. Before their launch in 2013, while many trademark owners considered the new gTLDs as an opportunity to enhance their digital brand identity, others were sceptical and expressed serious concerns, perceiving the expansion programme as a threat to their intellectual property rights. Thus, numerous right protection mechanisms ('RPMs') were created within the new gTLD programme (Trademark Clearinghouse's sunrise and trademark notification services, Uniform Rapid Suspension System, Post-Delegation Dispute Resolution Procedure, etc.). According to the International Trademark Association's ('INTA') survey (INTA new gTLD cost impact survey) new gTLD registrations by brand owners were overwhelmingly made for defensive purposes, to prevent someone else from registering, and the programme has increased the overall brand protection costs with Internet monitoring and diversion actions. However, they considered that RPMs were helpful to mitigate risks of abusive registrations.

Increase of Cybersquatting Cases Driven By New gTLDs

Statistics show that in recent years the number of domain name disputes has increased due to the introduction of the new gTLDs. In its press release of March 2017, the World Intellectual Property Organization ('WIPO') stated that cybersquatting disputes related to new gTLDs rose to 16% of its 2016 caseload. The total number of the WIPO's domain disputes hit a record high with 3,036 cases involving 5,374 domain names, an increase of 10% over 2015. The top 10 gTLDs involved in disputes were: .com (3135), .xyz (321), .net (272), .top (153), .org (129), .info (83), .club (55), .online (46), .biz (29), .vip (27), which means that five of the top ten disputed domain name extensions were new gTLDs.

Options in the Case of Abusive Registrations

The options that trademark owners have in the case of abusive new gTLD registrations will be considered in detail. In order to avoid lengthy, cost-consuming and complicated cross-border litigation, they might choose between two expedited ADR proceedings administered by ICANN-approved dispute resolution providers and decided by experienced arbitrators listed by such providers. The first proceeding is a dispute under the Uniform Domain Name Dispute Resolution Policy ('UDRP'),

established in 1999 by ICANN, to which all domain name registrants must agree to be bound when registering a domain name. The second option is the Uniform Rapid Suspension System ('URS') procedure.

The Uniform Rapid Suspension System ('URS') Procedure

The URS was implemented within the new gTLD programme in 2013 and it is a lower-cost, faster path to relief for rights holders experiencing clear-cut cases of trademark infringement caused by the registrations. The URS is not intended to replace the UDRP, but to complement it. Indeed, they have separate procedures with distinct timelines and remedies. The UDRP is designed to result in the transfer or the cancellation of the abusive domain name, while the URS results in the temporary suspension (take down) of the domain name for the remaining registration period.

Applicability

While the UDRP applies to all generic top-level domain (legacy TLDs, the new gTLDs and a large number of country-code TLDs), the URS currently applies to all new generic TLDs, to certain legacy TLDs (.pro, .xxx, .cat, .jobs, .travel, .mobi, .museum) and to certain country code TLDs (for example, .pw). The applicability of URS to other not-new gTLDs is expanding, little by little. Some legacy registries have adopted URS as RPM upon renewal of their contracts with ICANN.

Remedy

As mentioned earlier, the only remedy available in the URS is the suspension of the domain name until its expiry, extendable for an additional year on the request of the successful complainant for a fee. What does the suspension of the domain name exactly mean? Further to the proceeding, if the arbitrator (Examiner) decides in favour of the Complainant, the decision will be immediately implemented and the domain name will not resolve to the original website, but will redirect to an informational website of the dispute resolution provider. The ownership of the domain name will remain with the original registrant until the expiry date and the Whois database will continue to show the original domain holder as registrant, but the nameservers will be substituted with nameservers of the dispute resolution provider to enable the redirection.

After the expiry of the registration period (or the expiry of the extended suspension period if requested by the

Complainant) the registrant will lose the domain name's ownership and it will return to be available for registration by anyone, comprising the trademark owner or third parties. Currently there is no provision for a pre-emption right to obtain the registration of the domain name by the trademark owner, but it might, for example, attempt a backorder of the domain name in order to secure the registration for its own first. Otherwise, after the URS proceeding, the trademark owner might introduce a UDRP dispute or negotiate with the registrant to obtain the transfer of the domain name.

Reasons to Choose the URS

The reasons to opt for the URS instead of, or before introducing, the UDRP are the following:

- (1) Necessity of a quick solution—rapidity: the duration of the dispute is approximately 21 days and the decision of the Examiner is implemented within 24 hours of its issuance. The UDRP lasts around 45–80



days and sometimes the implementation of the decision takes more time than the dispute itself (according to the rules, the registrar shall implement the decision elapsed 10 business days from the notification of the decision by the dispute provider).

- (2) Lower costs: the administrative fees of a URS dispute involving one domain name is approximately USD375, while in a UDRP, the Complainant has to pay around USD1,300–1,500 (different dispute resolution providers have different fee structures).
- (3) No need to have the domain name in the domain name portfolio: many trademark owners have an extensive domain name portfolio with hundreds or thousands of domain names which implies huge maintenance and renewal costs and most of them are not used nor redirected, hence, not creating any value other than preventing unauthorised use by third parties.

Grounds of URS Complaint

To establish standing in the URS proceeding, the complainant has to prove the holding of a valid nationally or regionally (for example, EUTM) registered or court validated or statute or treaty protected word mark which is in current use. Thus, trademark applications, unregistered registered trademarks, trade names or other distinctive signs do not qualify as registered marks under the URS. Concerning the Rules' wording 'word mark', in the absence of a consistent definition throughout different trademark laws globally, the URS jurisprudence has interpreted the term 'word mark' in different ways. Some panels rejected disputes where complainants based their Complaint on pure device (stylised word elements) or on composite marks (consisting in word and figurative elements as well); however, according to the majority view of URS panels, the use of the words 'word mark' in the URS Rules does not specifically exclude trademarks which combine word and graphical elements, provided that the word element is clear, sufficiently distinct and separate from the graphical element (see the decisions in cases MFSD 369B0FE1 dpd. solutions; NAF FA1604001672049 sanofi.xin).

As proof of use of the mark, the Complainant shall submit a declaration or a specimen of current use (brochure or catalogue of products or services, screenshot of the website, packaging, etc.) or the Trademark Clearinghouse's Signed Mark Data file related to the mark if the trademark is included in the TMCH.

To obtain suspension of the domain name the Complainant must establish the following three elements: (1) the domain name is identical or confusingly similar to the Complainant's mark; (2) the registrant has no legitimate right or interest to the domain name; and (3) the domain name was registered and is being used in bad faith.

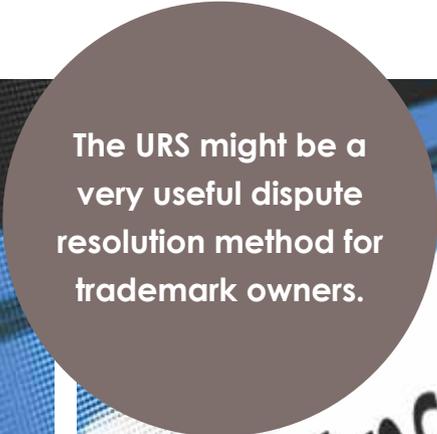
In the URS proceeding, the strict burden of proof lies with the Complainant who has to submit clear and convincing evidence on the three elements of the claim. Thus, no genuine issue of material fact may exist in the URS dispute. In the case of open questions of fact, the parties may consider UDRP or a court proceeding. Since no amendment to the Complaint is possible, all documentary evidence is to be filed with the Complaint. URS is to be initiated if no other proceeding (for example, UDRP or court proceeding) is pending concerning the disputed domain name.



Procedure

Further to the online submission of the Complaint, the same is reviewed by the dispute resolution provider. If the Complaint is administratively compliant, the Registry Operator responsible for the management of the disputed extension locks the domain name to prevent all changes by the registrant to the domain name and to the website to which it resolves.

Upon locking of the domain name, the domain name registrant is notified about the Complaint and has 14 calendar days to submit a Response. If no Response is filed, the dispute proceeds to default. The dispute resolution provider notifies the parties about the default of the Respondent and the case proceeds to examination for review on the merits of claim by the Examiner appointed by the dispute resolution provider. There is no discovery or hearing and the Examiner issues his or her decision within three business days from the beginning of the examination and, however, not later than five days after the Response is filed. Either party shall have a right to seek an appeal of the Determination with a limited right to introduce new evidence (for a fee). The average duration of the proceeding is 21 days and, in case of an appeal, an additional 21 days.



The URS might be a very useful dispute resolution method for trademark owners.

Language of the Proceeding

The Complaint is to be submitted in English, independently from the language of the registration agreement. The Registrant might submit the Response in English or in the predominant language spoken in its country resulting from the Whois database. The Examiner appointed to the dispute shall be fluent in English and in the language of the Response and will determine, in its sole discretion, the appropriate language for the issuance of the decision. If no Response is filed (default proceeding), English will be the language of the Examiner's decision.

New gTLDs' Impact on the UDRP Case Law

The new gTLDs have had a considerable impact on the UDRP case law as well. With reference to the first element (identity or confusing similarity), Panels agree that the top-level domain is viewed as a standard technical registration requirement and as such is disregarded under the identity and confusing similarity test. This practice is applied irrespective of the particular TLD including new gTLDs (for example, .online, .shop, .site, etc.). Where the applicable TLD and the second-level domain (the part before the dot) in combination contain the relevant trademark, Panels may consider the domain name in its entirety, the text on both sides of the dot, for the purposes of addressing identity or confusing similarity (see for example the decisions in cases WIPO 2016-2036 swarov.ski; WIPO D2016-2465 tyre.plus).

The TLD may be relevant to the panel assessment of the second (lack of rights and legitimate interest) and the third (registration and use in bad faith) elements. Based always on the review of the facts of each case, TLD may corroborate the bona fide use of the domain name (see for example the decision in case WIPO D2014-2159 figaro.club). When the TLD is descriptive of or relates to goods or services associated with the Complainant and its mark, it may be indicia of the bad faith registration or use (see the decision in case CAC 101085 lefigaro.news).

Conclusions

As of the end of August 2017, approximately 800 URS disputes were decided. ICANN has authorised three dispute resolution providers so far: National Arbitration Forum (now Forum), Asian Domain Name Dispute Resolution Centre and MFSD IP Dispute Resolution Center. Dispute numbers are far lower for URS than those of UDRP, but such difference is attributable, on one hand, to the differences between the two proceedings,

in particular the applicability, the scope and the remedy provided for by the two rule sets and, on the other hand, to the fact that, due to the vast number of new extensions available for registration (more than 1,220), most of the cybersquatting cases involve domains registered under various strings in which the second-level domain (the part before the dot) is identical to the Complainants' trademarks. Therefore, Complainants prefer having the domain name corresponding to their mark in their domain name portfolio instead of having them suspended without the possibility to own, control, use or transfer such domains. Notwithstanding certain limitations mentioned above, the URS might be a very useful dispute resolution method for trademark owners who are in search of an imminent solution against the phenomenon of cybersquatting. The same could be comparable to the interim measures available under numerous jurisdictions in court proceedings.

Within the ICANN, a Working Group has been established, which is currently reviewing the efficiency of all right protection mechanisms in all gTLDs (including

the URS and the UDRP, which has not been significantly modified since 1999) and it may formulate proposals to improve the available proceedings. Following closely such policy development process and providing inputs will be of interest to all stakeholders of the Internet community.



Ivett Paulovics
Senior Associate, FASANO Avvocati

Ivett Paulovics has been admitted to practice law in Italy and Hungary. She has been a lawyer in Milan at FASANO Avvocati since 2009, a UDRP Domain Dispute Panelist at the Czech Arbitration Court since 2016, and is a URS Domain Dispute Case Manager at the MFSD IP Dispute Resolution Center, a Member of ICANN's Review of all Rights Protection Mechanisms in all gTLDs Policy Development Working Group, previously an .it Domain Dispute Panelist, a member and arbitrator listed at the IPBA. Her areas of practice include Intellectual Property and Internet Law, Alternative Dispute Resolution, Art and Cultural Heritage Law, Fashion Law and International Trade and Investments.

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Legal and Economic Aspects of Chinese 'One Belt One Road' Investments Into Europe Via the Netherlands

The Chinese Belt and Road Initiative focusing on trade and investment from China into Europe is bound to inspire Chinese investors and their legal counsel to scrutinise EU competition and harmonisation law in combination with corporate and tax law of the EU and the respective EU member states.



Introduction

In October 2017, President Xi Jinping in his opening speech at the 19th Congress of the Communist Party of China highlighted the ambitious plans of the People's Republic of China ('PRC' or 'China') to expand its new Silk Road to Europe, also named as 'One Belt One Road', abbreviated to 'OBOR'.

A command of the competition law and harmonisation law of the European Union ('EEC law') is vital for attorneys advising Chinese investors in regard to their European inbound investments in capital markets, private companies and real estate. EEC law is extensive and detailed, even for lawyers specialised in this domain. This article describes the macro-economic and legal backdrop against which Chinese investments should be perceived, from a Dutch/EU perspective.

Economic Data

To start with, the economic parameters of trade and investment flows between the PRC and the EU, as reported by the EU's statistical bureau Eurostat (<http://ec.europa.eu/eurostat>) for the calendar year 2015, as reported on 12 June 2016, are summarised below.

Imports from the PRC to the EU totalled €350.5 billion, and the breakdown of this figure was as follows: primary goods €8.1 billion (of which food/drink was 4.8, raw materials 2.9 and energy 0.4), manufactured goods €341 billion (chemicals 12, machinery and vehicles 176, other manufacturers 149) and others €1.3 billion.

Exports from the EU to the PRC totalled €170 billion, resulting in an overall trade deficit (for the EU) of €180.5 or approximately 50%.

The ranking of EU countries for China ('CN') imports into Europe was: Germany €69 billion, The Netherlands ('NL') €66 billion (primarily due to its trans-shipment function towards the European hinterland), UK €55 billion, France €28 billion and Italy €27 billion.

The Chinese Ministry of Commerce for the period January to September 2016 (www.countryreport.mofcom.gov.cn) reported a combined export and import volume NL/CN totalling \$57.7 billion, a decrease of 4.6% compared to 2015. Exports from NL to CN during this period were \$8.33 billion, with an increase of 12%. Imports from CN to NL were \$49.35 billion, a decrease of 6.9%. The trade deficit was \$41.01 billion, a decrease of 10%.

Goods exported to China are mainly: electronics, food, drink, tobacco and watches. Imports into EU from China consist of a wide range of manufactured and raw materials. The major competitors in Europe of China are Germany, United States and Japan. China stays competitive in labour-intensive sectors such as furniture, toys and textiles.

Many leading and mid-sized Chinese corporations have located their European headquarters, marketing and sales forces, customer care centers and assembly and repair activities centres in NL due to its geographical, logistical and organisational gateway function to the heart of Europe. Rotterdam is the largest container seaport in the EU and Schiphol airport ranks number 3 in the EU (2016).

Sectors such as electronics, automotive and aviation are heavily represented by Chinese investments. In the Dutch high tech industry, outbound investment from NL to the PRC focuses on environmental techniques, food processing and agriculture techniques. The main motivating factor behind such investments is 'technology transfer' sought by Chinese companies, rather than market expansion.

NL ranks number 3 (2015) on the European index of Gross National Product, the most prominent indicator of prosperity and wealth.

The Dutch Government, within the parameters of EU legislation actively promotes and encourages research and development through expansive subsidies and tax credits.

Market Access to Investment

There is no EU agency that generally supervises, let alone approves, foreign direct investment ('FDI') from outside the EU, but each EU member state is allowed to operate an approval system as long as it does not distort the intra-EU community free flow of capital. The Dutch typically scrutinise FDI in the domains of national security, sea and airport infrastructure, nuclear energy, military equipment and IT/telecommunications and also in all domains all goods originating from the United Nations and OECD blacklisted countries.

NL pursues a completely non-discriminative treatment of FDI shareholding in Dutch companies and allows the appointment of non-residents of NL and non-Dutch

nationals to the management or supervisory board of directors, capital contribution and repayment, cross-border debt borrowing and lending and for repatriation of dividend (profit), royalties and management fees.

All public procurement of goods and services by the government in each EU Member State must undergo a EU-wide public tender published in the EU journals, although only above certain thresholds, for example, for supplies under defence contracts to the central government of each member state—the EU threshold (in the year 2016) for defence was €135,000, for non-defence €209,000, for works contracts in general €5,225,000, for water, energy, transport and postal services €418,000. So most of the significant public procurement is tendered.

Foreign Exchange Control

Several EU countries have some form of foreign exchange control on inbound investment or trade payments. NL only requires reporting, for purely statistical purposes, to the Dutch Central Bank ('DNB') of transactions in excess of €25,000.

Also, it should be noted that the 2005 EU Directive 2005/60/EF on Anti-Money Laundering requires all financial service providers (including attorneys) to report so called 'unusual transactions' to the domestic Financial Intelligence Unit ('FIU') agencies.

Competition Law

European competition policy under the EU Treaty on the Functioning of the European Union ('TFEU') is a vital part of the EU internal market aiming at the optimal allocation of production means and locations, lowest price-setting and free flow of goods and services within the entire EU internal market. EU competition legislation and case law (from the European Court of Justice) originating from the 1950s forms a comprehensive set of rules that restrict the abuse of a dominant position of companies by limiting concentration and establishes a level playing field among the market participants by prohibiting state aid, import tariff and non-tariff barriers, cartels and price fixing.

Dutch domestic competition law is greatly inspired by EU law and is, to a great extent, replaced by it, above EU thresholds including merger control for a €5,000 million (combined) turnover worldwide and a turnover of €250 million EU wide.

Competition law is excluded (the so called 'de-minimis' threshold) in the event of less than 10% of the total relevant market share and if less than eight companies are involved with a combined annual turnover not exceeding €5.5 million (for supply of goods) or €1.1 million in all other cases.



Several EU countries have some form of foreign exchange control on inbound investment or trade payments.

Forms of Investment

FDI can vary from a non-capital cooperation to shareholders' equity investment. The 'light' versions are commercial agency (1986 EU Directive 86/653/EC) implemented in national law, for example, regulating goodwill compensation at termination and, second, distributorship which falls under the EU Vertical Restraints Regulation regarding interstate restrictions such as price fixing. Few EU member states (including Belgium, not NL) have national legislation on distributorship protecting the distributor when terminated.

The 'heavy' versions of FDI are the branch (a non-independent part of the foreign 'parent') and the incorporated limited liability companies ('Ltd.'s', in NL 'Besloten Vennootschap', abbreviated to 'BV') which are harmonised under several EU Directives, allowing member states within limits to create their own versions, such as the Dutch 'Flex BV' introduced in 2010 with innovative options like non-voting and non-profit shares and a minimum paid-up equity of €0.01.

The Dutch public company ('NV') alternative is not suitable for most FDI. Establishment of a BV must be done by a deed executed by a civil law notary, a specialised lawyer. No approval for incorporation is required from the Dutch State.

In NL there is no legal entity version for FDI similar to the Chinese Wholly Foreign Owned Enterprise ('WFOE') and the Sino-Foreign Equity Joint venture ('SFEJV').

The corporate data is lodged with the Commercial Register which is publicly accessible through www.kvk.nl.

Finance Rules

The Dutch Financial Services Act appoints DNB to license and supervise all financial institutions (such as banks) and the Autoriteit Financiële Markten ('AFM') for the monitoring of capital markets.

EU 'passports' from the European Central Bank ('ECB') in Frankfurt simplify obtaining branches of financial institutions in each EU member state.

Investment funds comprise two versions under the 2011 EU Directive 2011/61: Undertakings for the Collective Investment in Transferable Securities ('UCITS') and Alternative Investment Fund Managers ('AIFM').

In NL, public offerings of shares are prospectus-free if offered to no more than 150 natural or legal persons or if the nominal value per share is below €100,000.

Mergers and Acquisitions (M&A)

The popular alternative to a green field investment is the acquisition of a going concern or the statutory merger of the shares or the assets of two existing companies, abbreviated to 'M&A'. A cross-border statutory merger with a non-EU company is not permitted. So, a PRC company is not eligible for a merger, unless it first creates an EU subsidiary as its EU merger vehicle.

The process of an acquisition of shares (or assets) is in line with international standards, such as non-disclosure agreements, letters of intent, memoranda of understanding, due diligence, share purchase agreements and share transfer agreements (only by notarial deed) and escrow of purchase price. Dutch documents are typically far more brief than Anglo-American style documents.

Real Estate

In NL there are no nationality or residence based restrictions in regard to ownership of real estate. Transfer of property is solely by notarial deed. The public land registry can be relied upon as to ownership entitlement.

Tax

EU tax rules and regulations have a substantial effect on domestic tax legislation which however retains its sovereignty regarding the tax rates and the sorts of taxes (mainly Corporation tax, Income tax, Inheritance tax). Value Added tax (VAT) is however harmonised within the EU due to frequent inter-state transactions, but the rates differ per country.

In NL there are special regimes for foreigners, for example 30 percentage points reduction of Income tax, and bonded warehousing for customs and VAT. Corporate tax is 20 to 25% (for profits above €400,000). Dividend withholding tax (15%) is lowered to a 5% source tax in the treaty CN/NL but can be lowered even to 0% by interposing a Dutch cooperative. The source tax between NL and Hong Kong is 0%. However, the government may abolish the dividend tax altogether as of 1 January 2018, both for foreign and domestic shareholdings.



Immigration

For work and a stay of longer than three months, a stay permit 'Machtiging Voorlopig Verblijf' ('MVV') must be applied for from the Dutch embassy in Beijing, the consulates in Shanghai, Guangzhou, Chongqing and a number of dedicated agencies in second-tier cities in China. For work, the most popular method is to obtain a MVV, the so-called 'highly-skilled' or 'Knowledge Migrant' ('KM') procedure. The KM employee must hold a Dutch employment contract for an indefinite period at a gross monthly salary of at least €3,170 for ages below 30, €4,342 above the age of 30 and €2,272 if graduated in NL. The employer must obtain a KM sponsor licence from the Dutch Immigration Authority ('IND'), if it has existed less than 18 months or has less than 50 staff. The employer must draw up a business plan. One-time KM sponsor licence costs for an unlimited number of KM workers are €5,276 or €2,638 for a start-up company.

The 2013 Modern Migration Policy Regulation ('MoMi') of IND simplifies residence procedures into one single application.

A 'golden visa' is available for wealthy migrants with a personal capital of over €1,250,000 in cash or who have invested in their own company or in real estate or in qualified investment funds.

Labour Law

NL labour law is comprehensive and changes fairly often reflecting labour market conditions, new notions of cooperation within trade and industry and the general state of the economy.

Summary

The Netherlands is an obvious intermediate or final destination for OBOR investments from China, due to its logistical position in Western Europe and historic economic ties with China.

Becoming familiar with EU and Dutch law, albeit through professional lawyers, is crucial for Chinese OBOR investors.



Bart Kasteleijn Lawyer, Wintertaling Lawyers & Civil Law Notaries

Bart Kasteleijn specialises in international corporate law: transactions, corporate restructuring and financing, acting for a broad range of multinational corporates worldwide with a focus on the USA, UK and China. Bart was born and partly raised in Hong Kong and studied civil law at the University of Utrecht. He joined the international business law section of Wintertaling as an associate partner in June 2017. He is a frequent speaker at international legal and business fora and a lecturer at several universities. He is chairman of the China Table of the Royal Industrial Club (KIGC) in Amsterdam and a member of the Advisory Board of the Dutch Chinese Chamber of Commerce (DCCC). Bart is on the arbitrator's list and is a member of the Nomination Board of the Chinese European Arbitration Centre in Hamburg (CEAC). He is a member of the Dutch & Amsterdam Bar Association (NovA), the Bar Association of Amsterdam (OvAA) and of the Inter-Pacific Bar Association (IPBA).

IPBA New Members

September – November 2017

We are pleased to introduce our new IPBA members who joined our association from September – November 2017. Please welcome them to our organisation and kindly introduce yourself at the next IPBA conference.

Australia , Oliver Gayner <i>IMF Bentham Ltd</i>	India , Rohit Bhat <i>Chambers of Rohit Bhat</i>
Bangladesh , Shahwar Nizam <i>DFDL Bangladesh</i>	India , Rupin Chopra <i>S.S.Rana & Co.</i>
China , Ning Fei <i>Beijing Huizhong Law Firm</i>	India , Vishnu Jerome <i>Jerome Merchant + Partners</i>
China , Junlu Jiang <i>King & Wood Mallesons</i>	India , Kshama Loya <i>Nishith Desai Associates</i>
China , Sufang Li <i>Guangdong Kindom Law Firm</i>	India , Rajat Mishra
China , Wei (Tracy) Xiang <i>Jiangsu YiYou TianYuan Law Firm</i>	India , Susmit Pushkar <i>Khaitan & Co</i>
China , Sheng Zhang <i>Reiz Law Firm</i>	India , Ankur Sangal <i>Khaitan & Co</i>
France , Thierry Aballea <i>Ewen Law</i>	India , Arjun Sheoran <i>Vaakya Legal</i>
Germany , Johannes Dietze <i>Anwaltskanzlei Johannes Dietze</i>	India , Velayudhan Shyamohan <i>KMNP Law</i>
Germany , Hermann Knott <i>Andersen Tax & Legal</i>	India , Sameer Sibal <i>Jerome Merchant + Partners</i>
Germany , Benjamin Lissner <i>CMS Germany</i>	India , Murtaza Somjee <i>Jerome Merchant + Partners</i>
Hong Kong , Paulo Fohlin <i>Advokatfirman Odebjer Fohlin</i>	Indonesia , Ignatius Andy <i>Ignatius Andy Law Offices</i>
Hong Kong , Ju Ping Paul Teo <i>Baker & McKenzie</i>	Indonesia , Andris SH MH <i>Law Office Andris & Partners</i>
Hong Kong , Yong Kai Wong <i>CITIC Capital Holdings Limited</i>	Indonesia , Joko Suroso <i>Rakhmat Suroso Advocates</i>

Italy , Edoardo Enrico Artese <i>AC Legal</i>	Switzerland , Daniel Eisele <i>Niederer Kraft & Frey AG</i>
Italy , Vincenzo D'Antoni <i>R & P Legal</i>	Switzerland , Beda Kaufmann <i>B r & Karrer</i>
Italy , Claudio Maurizio Elestici <i>R & P Legal</i>	Switzerland , Christoph Neeracher <i>B r & Karrer AG</i>
Italy , Marco Nicolini <i>Chiomenti Studio Legale</i>	Switzerland , Robert Rom <i>rir arbitration, Dr. Robert L. Rom, FCI Arb, Dipl. Int. Arb.</i>
Japan , Seitaro Hashimoto <i>Fukuoka Nishi Law Firm</i>	Switzerland , Philippe Seiler <i>B r & Karrer</i>
Korea , Stuart Andrew Burrell <i>Stephenson Harwood LLP Foreign Consultant Office</i>	Thailand , Jonathan Blaine <i>DFDL Mekong (Thailand) Ltd.</i>
Korea , Daehee Lee <i>Stephenson Harwood</i>	United Kingdom , Martin Polaine <i>Amicus Legal Consultants</i>
Myanmar , William Ronald Parks Jr. <i>SMPP Legal Myanmar Co., Ltd.</i>	USA , Thomas Allen <i>Pillsbury Winthrop Shaw Pittman</i>
Philippines , Jannet Cruz Regalado <i>Pilipinas Shell Petroleum Corporation</i>	USA , Victor Nezu <i>The Law Offices of Victor A. Nezu, P.C.</i>
Singapore , Tom Glasgow <i>IMF Bentham Pte Ltd.</i>	USA , Katharine Nohr <i>Law Offices of Katharine M. Nohr, LLC; Nohr Sports Risk Management, LLC</i>
Singapore , Andrew John Pullen <i>Fountain Court Chambers</i>	Vietnam , Dai Thang Huynh <i>DFDL Vietnam Law Company Limited</i>
Switzerland , Raphael Annasohn <i>B r & Karrer AG</i>	

CORRECTION: The e-mail address of IPBA member Catriel Agustin Marqués, Argentina, was incorrectly noted in the printed Membership Directory. It should be: cam@marqueslaw.com.ar

Members' Note

Stephan Wilske, Germany

Stephan Wilske co-authored the contribution 'BREXIT, Trump and Other Political Earthquakes: What Are the Effects on Asian Businesses and Dispute Resolution?' published in the *Korean Arbitration Review*, 8th Issue. This article is based on a speech he gave at the 21st SIDRC Lecture Series (together with Lars Markert) at the Seoul International Dispute Resolution Centre on 22 February 2017. Stephan gave a further speech on 'The

Duty of Arbitral Institutions to Preserve the Integrity of Arbitral Proceedings' at the 2017 Taipei International Conference on Arbitration and Mediation on 28 August 2017. Moreover, he spoke about 'Does International Arbitration Still Dwell in an Ethical No Man's Land? – Some Hope!' at the 25th Anniversary of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry in Kyiv on 14 September 2017.



An Invitation to Join the Inter-Pacific Bar Association

The Inter-Pacific Bar Association (IPBA) is an international association of business and commercial lawyers who reside or have an interest in the Asian and Pacific region. The IPBA has its roots in the region, having been established in April 1991 at an organising conference in Tokyo attended by more than 500 lawyers from throughout Asia and the Pacific. Since then it has grown to over 1400 members from 65 jurisdictions, and it is now the pre-eminent organisation in the region for business and commercial lawyers.

The growth of the IPBA has been spurred by the tremendous growth of the Asian economies. As companies throughout the region become part of the global economy they require additional assistance from lawyers in their home country and from lawyers throughout the region. One goal of the IPBA is to help lawyers stay abreast of developments that affect their clients. Another is to provide an opportunity for business and commercial lawyers throughout the region to network with other lawyers of similar interests and fields of practice.

Supported by major bar associations, law societies and other organisations throughout Asia and the Pacific, the IPBA is playing a significant role in fostering ties among members of the legal profession with an interest in the region.

IPBA Activities

The breadth of the IPBA's activities is demonstrated by the number of specialist committees: 23. Each committee focuses on different aspects of business law, indicating the scope of expertise and experience among our membership as well as the variety of topics at our seminars and conferences. All IPBA members are welcome to join up to three committees, with the chance to become a committee leader and have a hand in driving the programmes put on by the IPBA.

The highlight of the year is our Annual Meeting and Conference, a four-day event held each spring. Past conferences have been held at least once, sometimes twice, in Tokyo, Osaka, Sydney, Taipei, Singapore, San Francisco, Los Angeles, Manila, Kuala Lumpur, Auckland, Bangkok, Vancouver, Hong Kong, New Delhi, Seoul, Bali, and Beijing. Conferences in recent years have attracted over 1,000 delegates and accompanying guests. In addition to the Annual Conference, the IPBA holds in various jurisdictions seminars and conferences on issues such as Arbitration, Dispute Resolution, M&A, and Cross-Border Investment. Check the IPBA web site (ipba@ipba.org) for the latest information on events in your area.

IPBA members also receive our quarterly IPBA Journal, with the opportunity to write articles for publication. In addition, access to the online and annual printed Membership Directory ensures that you can search for and stay connected with other IPBA members throughout the world.

APEC

APEC and the IPBA are joining forces in a collaborative effort to enhance the development of international trade and investments through more open and efficient legal services and cross-border practices in the Asia-Pacific Region. Joint programmes, introduction of conference speakers, and IPBA member lawyer contact information promoted to APEC are just some of the planned mutual benefits.

Membership

Membership in the Association is open to all qualified lawyers who are in good standing and who live in, or who are interested in, the Asia-Pacific region.

- | | |
|--|---------|
| • Standard Membership | ¥23,000 |
| • Three-Year Term Membership | ¥63,000 |
| • Corporate Counsel | ¥11,800 |
| • Young Lawyers (35 years old and under) | ¥6000 |

Annual dues cover the period of one calendar year starting from January 1 and ending on December 31. Those who join the Association before 31 August will be registered as a member for the current year. Those who join the Association after 1 September will be registered as a member for the rest of the current year and for the following year.

Membership renewals will be accepted until 31 March.

Selection of membership category is entirely up to each individual. If the membership category is not specified in the registration form, standard annual dues will be charged by the Secretariat.

There will be no refund of dues for cancellation of all membership categories during the effective term, nor will other persons be allowed to take over the membership for the remaining period.

Corporate Associate

Any corporation may become a Corporate Associate of the IPBA by submitting an application form accompanied by payment of the annual subscription of (¥50,000) for the current year.

The name of the Corporate Associate shall be listed in the membership directory.

A Corporate Associate may designate one employee ('Associate Member'), who may take part in any Annual Conference, committee or other programmes with the same rights and privileges as a Member, except that the Associate Member has no voting rights at Annual or Special Meetings, and may not assume the position of Council Member or Chairperson of a Committee.

A Corporate Associate may have any number of its employees attend any activities of the Association at the member rates.

- Annual Dues for Corporate Associates ¥50,000

Payment of Dues

The following restrictions shall apply to payments. Your cooperation is appreciated in meeting the following conditions.

1. Payment by credit card and bank wire transfer are accepted.
2. Please make sure that related bank charges are paid by the remitter, in addition to the dues.

IPBA Secretariat

Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
Tel: 81-3-5786-6796 Fax: 81-3-5786-6778 E-Mail: ipba@ipba.org Website: ipba.org

See overleaf for membership
registration form





IPBA SECRETARIAT

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Tel: +81-3-5786-6796 Fax: +81-3-5786-6778 Email: ipba@ipba.org Website: www.ipba.org

IPBA MEMBERSHIP REGISTRATION FORM

MEMBERSHIP CATEGORY AND ANNUAL DUES:

- Standard Membership ¥23,000
- Three-Year Term Membership ¥63,000
- Corporate Counsel ¥11,800
- Young Lawyers (35 years old and under) ¥6,000

Name: _____ Last Name _____ First Name / Middle Name _____

Date of Birth: year _____ month _____ date _____ Gender: _____ M / F

Firm Name: _____

Jurisdiction: _____

Correspondence Address: _____

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CHOICE OF COMMITTEES (PLEASE CHOOSE UP TO THREE):

- | | |
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| <input type="checkbox"/> Insolvency | <input type="checkbox"/> NEW! Ad Hoc Next Generation (40 and under) |

I AGREE TO SHOWING MY CONTACT INFORMATION TO INTERESTED PARTIES THROUGH THE APEC WEB SITE. YES NO
METHOD OF PAYMENT (PLEASE READ EACH NOTE CAREFULLY AND CHOOSE ONE OF THE FOLLOWING METHODS):

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 VISA MasterCard AMEX (Verification Code: _____)
Card Number: _____ Expiration Date: _____

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Bank Address: 12 Marina Boulevard, DBS Asia Central, Marina Bay Financial Centre Tower 3,
Singapore 018982
Account Number: 0003-027922-01-0 Account Name: INTER-PACIFIC BAR ASSOCIATION
Account Holder Address: 10 Collyer Quay #27-00 Ocean Financial Centre, Singapore 049315

Signature: _____ Date: _____

PLEASE RETURN THIS FORM TO:

The IPBA Secretariat, Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
Tel: +81-3-5786-6796 Fax: +81-3-5786-6778 Email: ipba@ipba.org



Maybe it's the setting. Maybe it's the design, the build, the interior. Maybe it's the gourmet chef, or the attentive yet discreet staff who cater to your every need. Maybe it's the spa, the gym, the cinema room. Maybe it's your own private helipad, helicopter and pilot ready to take you up into the pristine snowy wilderness

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