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NEWS & LEGAL UPDATE

INTER-PACIFIC BAR ASSOCIATION

IPBA 2019 Singapore Gala Dinner Guest-of-Honour:

Chief Justice SUNDARESH MENON

IPBA 2019 Singapore is honoured to have Singapore's Chief Justice Sundaresh Menon as our Guest-of-Honour at our Gala Dinner on 25 April 2019

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Publisher Paul Davis

Editor Kieran Colvert

Editorial Kiri Cowie
Julie Yao

Design Ester Wensing

Advertising Sales
Jennifer Luk
E: jennifer@ninehillsmedia.com
Frank Paul
E: frank@ninehillsmedia.com
T: +852 3796 3060

ninehills media

Ninehills Media Limited

Level 12, Infinitus Plaza,
199 Des Voeux Road,
Sheung Wan, Hong Kong
Tel: +852 3796 3060
Fax: +852 3020 7442
Email: enquiries@ninehillsmedia.com
Internet: www.ninehillsmedia.com

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The President's Message

Perry Pe
President

Dear Reader,

It has been a whirlwind since my last message: I estimate that I've travelled around 35,000 kilometers to IPBA events or to represent the IPBA at other association events. As the IPBA gets more exposure around the globe, the more events our leaders get invited to. The following are just some of the highlights of IPBA activities from the past three months.

Events I Attended

From 30 September to 3 October, I was in London to attend the annual conference of Law Society of England and Wales. I attended the Bar Leaders' Symposium and the Opening of the Legal Year of the Law Society of England and Wales to represent IPBA. The IPBA has been developing a strong relationship with the Law Society ever since our Mid-Year Council Meeting was held in London in 2017. In turn, Law Society leadership attended our Regional Conference on Arbitration in Bangkok in November, and the IPBA is starting to organise Women's Roundtables based on their model of these successful discussion groups. We are sure to continue and strengthen this relationship in the years to come.

From 7 to 12 October, I went to Rome for the International Bar Association's Annual Conference. While there, I attended several functions of IPBA member law firms. The highlight was the joint hosting of a cocktail event to introduce the IPBA to members of the Commonwealth of Independent States (CIS) countries, hosted by by IPBA and the law firm of Chiomenti. Thanks go to Sara Marchetta and her team at Chiomenti, including their chairman Francesco Tedeschini. Also in attendance were Gerhard Wegen, IPBA At-Large Council Member for Europe, and Jose Cochingyan III, IPBA Program Coordinator.

From 2 to 4 November I attended our IPBA Mid-Year Council Meeting in Chiang Mai, Thailand. This was followed by a two-day Regional Conference on Arbitration in Bangkok. The Council meetings and Day 1 of the Regional Conference were hosted by Dej-Udom & Associates, the law firm of our Past President Dej-Udom Krairit. The second day of the Regional Conference was organized by the Thailand Arbitration Center (THAC) and the IPBA, in particular the hard-working leaders of the Dispute Resolution & Arbitration Committee. The success would not have been possible without the leadership of the JCM for Thailand, Punjaporn Kosolkitiwong, and her very able team of young associates.

I then flew to Tokyo to attend a very special event on 21 November: the French National Bar Council asked the IPBA to help introduce 100 lawyers to Japanese lawyers during their visit to Osaka and Tokyo. Eriko Hayashi kindly organised a half-day seminar and lunch event in Tokyo, hosted at the offices of Mori Hamada & Matsumoto and a nearby restaurant. Frédéric Ruppert led the organisation of the seminar on the French side, gathering speakers and acting as moderator.

Events Other IPBA Leaders Attended

In September, two Regional Conferences were held across the globe from each other: on 20 September in LA, 'Doing Business with Asia: Developments in Trade, IP, Investment and Dispute Settlement' brought together speakers and delegates from around the world, including IPBA Officers Jose Cochingyan and Varya Simpson. Organised by JCM for the USA, Jeffrey Snyder; Membership Committee Vice-Chair Corey Norton; and IPBA Regional Coordinator for North America, Michael Chu. On 27-29 September, 'LatAm Legal Views

on Investment, Trade, Compliance & International Dispute Resolution' was held in Santiago, Chile, which included an evening of cocktails, golf, and a visit to a vineyard. This was organized by a team led by At-Large Council Member for Latin America, Rafael Vergara and Environmental Law Committee Chair, Alberto Cardemil.

The 4th East Asia Regional Conference was held on 8 November in Seoul. This was organized by our Korean IPBA Members led by the JCM for Korea, Jihn U Rhi. The first half of the conference focused on 'Current trends in cryptocurrency and blockchain-related issues', while the second half featured 'Key developments in the legal sector in ASEAN+6/Cross-border transactions under ASEAN+6 laws'. Among the attendees were James Jung, Chair of the IPBA Legal Development and Training Committee.

On 22 November, the IPBA held a European Regional Conference in Brussels organised by Jan Peeters of Stibbe, on the topic of 'International Commercial Courts in Various European Jurisdictions & in Singapore'.

JCM for India Atul Dua and Chair of the Aviation and Aerospace Committee Atul Sharma attended the Indian National Bar Association's 7th Annual International Conference on Law & Policy Issues titled '69th Constitution Day' on 26 and 27 November in New Delhi.

From 29 November to 2 December, the IPBA was invited to attend the Opening of the Legal Year of the Paris Bar (or the Rentrée). IPBA Webmaster Michael Cartier represented the IPBA at this event.

Other Activities of Note

The IPBA was invited by APEC to attend the ABAC (or the APEC Business Advisory Council) Meeting in Papua, New Guinea on 15-17 November; the 100th Anniversary celebration of the Lithuanian Bar Association on 7 December; and the 45th Anniversary of the Kosovo Bar Association on 21-23 December. While neither I nor any IPBA Officers could attend, these invitations are indicative of IPBA's growing reputation around the world.

Networking and relationships are important in any business, and IPBA members are respected for having connections that exceed expectation. Due to our close relationship with the American Bar Association Section of International Law Section (ABA-SIL), the IPBA was requested by the Chair to invite the US Ambassador to the Philippines Sung Yung Kim to be the principal speaker to their conference on technology held last October in Seoul. Ambassador Kim was a member of the organising committee for the peace talks in Singapore between North Korea's President Kim Jong Un and United States' President Donald Trump. Unfortunately, he could not make it to the conference, but this sort of request for an introduction to a government official shows that IPBA members have influence, with high-level contacts in many fields.

Future Events

2019 will start out with a bang: on 10 to 11 January, I hope to attend the Opening of the Legal Year in Malaysia, and on 14 January, I will be attending the Opening of Legal Year 2019 of the Law Society of Hong Kong. There is a chance that I will be invited to other events during the final few months of my term, which ends at the closing of the AGM in Singapore, and I will gladly be prepared to add to my frequent flyer miles on behalf of the IPBA.

Perry Pe
President

The Secretary-General's Message

Caroline Berube
Secretary-General

The fall has been busy for the IPBA! Our officers and council members show a lot of dynamism!

We had a wonderful September Journal issue demonstrating the interest of our members in arbitration. The Publications Committee Chair, John Wilson, decided to revert to a topic-based journal edition, which was a huge success. For the first time in many years, I needed to approve an additional budget for the September issue as we had so many good articles which John wanted to publish.

Our Committee Coordinator, Jose Cochingyan, was also busy travelling the globe to organise IPBA regional conferences in the United States (California), Europe (Belgium) and Latin America (Chile). Each event attracted lots of attendees, giving positive exposure to the IPBA.

We also had our Mid-Year Meeting in Chiang Mai organised by the law firm Dej-Udom & Associates Ltd. The managing partner of the firm, Mr Dej-Udom Krairit, was our former IPBA President from 1999–2000. We had three days of council meetings, starting with the Nomination Committee on 2 November planning the succession and appointment of officers and council members. We tried to bring diversity and have individuals appointed from different parts of the world, meeting gender as well as expertise requirements. The terms of these new officers and council members will start after the Singapore Annual Conference to be held 25–27 April 2019.

On day two we had our Officers' Meeting, which lasted for more than four hours, covering different items including a post-mortem of the past conference held in Manila this year. We had a great summary by our current President, Perry Pe, regarding attendees, budget, topics, etc. This discussion is always fruitful as we discuss lessons learned regarding the sessions' format, attendees, duration, cost and best practices for the next conferences. We also discussed budgeting for a revamp of our IPBA website. An Instagram account was created on the spot by the Webmaster, Michael Cartier, to attract the younger IT-savvy lawyers (unlike me!).

During our Officers' Meeting we also discussed the Singapore conference with President-Elect Francis Xavier. The Conference will be great, nearly a decade after the last conference was held in Singapore. It will be a great condensed format with amazing keynote speakers in beautiful venues.

We then had our Chairs of the 24 committees and the Membership Leaders in two groups discussing activities in different jurisdictions, the format of upcoming committee sessions and speaker selection for the Singapore Annual Conference. These sessions are always very useful to exchange ideas bringing new concepts and were led as such by their respective officers. There was a lot of interaction and brainstorming to bring positive change to the IPBA! I wish to thank our Officers for leading these meetings.

The meetings were followed by a two-day arbitration conference in Bangkok, each day with more than 100 attendees. It was a huge success and very well organised. The topics were appreciated by all attendees and we received very positive feedback.

Soon after the Mid-Year Meeting and Bangkok event, we had a conference in Seoul entitled '4th IPBA East Asia Regional Forum' on 8 November 2018. Again, it is an annual event hosted by Rhi & Partners, Lee & Ko and other firms with support from the Korean Bar Association. It has been a great success over the years and I wish to thank the organising committee for holding another wonderful IPBA event.

From the Secretariat side, working with Rhonda and Yukiko—an amazing strong, hard-working and dedicated team—we have been busy dealing with different administrative tasks such as:

- finalising the opening of bank accounts in Singapore for the scholarship fund and for our operations;
- organising credit card payments applications to facilitate payment directly to the bank in Singapore;
- revising budgets;
- dealing with the auditors to meet various deadlines;
- modifying our financial statements to make sure all accounts are in US Dollars and Japanese Yen for easier assessment of our financial situation;
- deciding to segregate the Scholarship Fund from our operations funds in the financial statement for accuracy purposes; and
- working on the conference manual to make it easier and more practical to use for the next officers and chairs/vice-chairs of the IPBA and to assist them in performing their role, a tool which will be used as guidelines for them.

Busy as we can be!

Please be on the lookout in 2019 for interesting activities in the first quarter of the year!

Caroline Berube
Secretary-General

Publications Committee Guidelines for Publication of Articles in the IPBA Journal

We are pleased to accept articles on interesting legal topics and new legal developments that are happening in your jurisdiction. From time to time, issues of the Journal will be themed. Please send: (1) your article to both **John Wilson** at advice@srilankalaw.com and **Priti Suri** at p.suri@psalegal.com; (2) a lead paragraph of approximately 50 or 60 words, giving a brief introduction to, or an overview of the article's main theme; (3) a photo with the following specifications (File Format: JPG or TIFF, Resolution: 300dpi and Dimensions: 4cm(w) x 5cm(h)); and (4) your biography of approximately 30 to 50 words.

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 (with British English spelling), 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.
7. Contributors must agree to and abide by the copyright guidelines of the IPBA.

Message to the Reader

John Wilson
Chair – Publications Committee, IPBA

Dear Reader,

Welcome to the December issue of the IPBA Journal.

Continuing with the thematic approach which I have adopted for the IPBA Journal, having regard to the increasing impacts of actions and policies of the current administration of the United States and in particular its President, Mr Donald Trump, it appeared to me to be appropriate to have a main focus on international trade. This issue also examines FDI issues in the new context.

I have been fortunate to secure contributions from two longstanding members of the International Trade Committee of the IPBA and I thank Mr Jeffrey Snyder and Mr Jesse Goldman for their well-written, informative and insightful articles respectively on "US-China Trade Controls, Sanctions and DisTrumption" and "2018 Retrospective: A Look Back on the Year in AsiaPacific Trade Developments".

The main theme for the December issue of the Journal ties in well with the topics covered at a recent regional meeting of the IPBA which was held on 20 September in Los Angeles. The programme of that event included presentations by Mr Snyder and by Mr Goldman.

Descriptions of the programme in Los Angeles and accompanying social activities along with photographs are included on pages 10 to 12 of this issue of the Journal. Such regional events are important for the visibility and membership growth of the IPBA and readers of the Journal are encouraged to attend such events whenever they can. Please refer to the IPBA website for updated event information.

A description of a joint event of the IPBA and the French National Bar Council can be found on page 14 and a description of the recent Mid-Year Council Meeting and Regional Conference can be read on page 15.

The first article in the December issue of the Journal is a continuation of the lead article in the September issue by Justice Beazley and examines the question of whether or not the Hague Convention is a game changer.

This second part of Justice Beazley's interesting article contains her conclusions on this question, which was discussed at the Manila conference and which Justice Beazley refers to as the 'Manila debate'. I am sure that readers who read part one of the article will have been eagerly awaiting part two and its conclusions.

President Trump's policies have far-reaching impacts, not only on international trade but also on investment flows into the US as well as China.

Therefore, I have selected for publication an interesting article by Denis Unkovic which examines other changes to, and tightening of, the rules governing foreign investment in the US. We also have an article by Ngosong Fonkem and Mirella Lechna highlighting the need for western nations to develop a coherent strategy to engage with Chinese FDI.

Last but not least, this issue of the Journal also contains an interesting account by Professor Eckart Brödermann on Unidroit's rules for international contracts—one possible pathway for lawyers advising in regard to international trade matters.

As reported by me to the Council of the IPBA at the Mid-Year Council Meeting in Chiang Mai, the Publications Committee is considering changes to the copyright guidelines of the Journal. A careful study of the available options is being carried out and the officers and Council will be appraised of the findings

of the Publications Committee during the course of the next Annual Meeting which will be held in Singapore.

In closing this message, I take this opportunity to wish the readers of the Journal all the best for 2019. Please continue to support the Journal by submitting articles to us for consideration for publication.

The next edition of the journal in March 2019 is planned to have a theme or focus on employment issues and cross-border employment issues.

John Wilson
Chair – Publications Committee, IPBA

IPBA Upcoming Events

Event	Location	Date
IPBA Annual Meeting and Conferences		
29th Annual Meeting and Conference: Technology, Business & Law - Global Perspectives	Singapore	April 25-27, 2019
30th Annual Meeting and Conference	Shanghai, China	Spring 2020
IPBA Mid-Year Council Meeting & Regional Conferences		
2019 Mid-Year Council Meeting (IPBA Council Members Only)	Milan, Italy	October 11-13, 2019
Regional Conference: topic TBA (open to the public)	Milan, Italy	October 14, 2019
IPBA Events		
IPBA Mid-East Regional Conference	Dubai, UAE	January 24, 2019
IFLR/IPBA Asia M&A Forum	Hong Kong	March 6-7, 2019
IPBA 2nd Mekong Regional Forum	Yangon, Myanmar	Spring 2019
IPBA-supported Events		
DUXES Anti-corruption Compliance Asia-Pacific Summit 2018	Hong Kong	December 1, 2018
Wolters Kluwer's Indonesia and SE Asia: 6th Annual International Arbitration, Compliance and Competition Law Summit - Beijing	Beijing, China	December 6, 2018
More details can be found on our web site: http://www.ipba.org, or contact the IPBA Secretariat at ipba@ipba.org		

Report on IPBA Regional Conference in Los Angeles, California, USA on 20 September 2018

On 20 September 2018, the IPBA held its Los Angeles Regional Conference entitled *Doing Business with Asia: Developments in Trade, IP, Investment and Dispute Settlement*. The event was held at a downtown conference facility at 515 South Flower Street, Los Angeles, California, 90071. The event was held from 12:30 pm to approximately 7:00 pm.

The planning committee for the event included Jeff Snyder (Crowell & Moring), Corey Norton (Thai Union Group PCL) and Michael Chu (McDermott Will & Emery). Jeff Snyder led the way in managing the planning and the Los Angeles office of his law firm Crowell & Moring generously donated excellent facilities, food and refreshment for the event. There was no charge for attendees at the event or the reception.

The conference began with guest registration and a casual lunch at 12:30 pm, followed by informal networking among the attendees. Of the over 40 registered attendees, several hailed from the Philippines, India, Europe, Hong Kong, China, Myanmar, Vietnam, Sri Lanka and various cities within the United States.

After welcoming remarks from Crowell & Moring's office managing partner, Jen Romano, the program began with introductory presentations from various IPBA leaders including Gerry Libby (former IPBA President), Jose Cochingyan III (IPBA Council, Program Coordinator), Jack Li (IPBA Vice President), Varya Simpson (IPBA Deputy Webmaster) and Ngosong Fonkem (IPBA Next Generation Committee). The overall theme to the presentations was to encourage the audience's involvement in the IPBA by extolling the benefits of being a member and coming to IPBA meetings.

Next, the Keynote speaker Wylie Strout, General Counsel of Laserfiche, presented a speech discussing her day-to-day work with issues in the Asia-Pacific region and how organisations like the IPBA can be helpful in connecting attorneys together from those regions. This in turn widens the range of services that are available to in-house counsel.

The program then proceeded to five substantive panel presentations. The presentations, including their subject matter and speakers, are summarised as follows as taken from the agenda of the meeting:

2:00 **Disputes!** Recent considerations in navigating arbitration. Panelists will discuss recent bilateral investment treaty decisions of interest, jurisdictional issues, and trends in dispute resolution as they impact doing business in Asia.

Robert Rhoda, IPBA Dispute Resolution and Arbitration Committee Co-Chair (Bird & Bird, Hong Kong)

Kshama Loya (Nishith Desai Associates, Mumbai)

Prof. Robert E Lutz, Paul E Treusch, Distinguished Professor of International Legal Studies (Southwestern Law School, Los Angeles)

Imam Hossain, Head of Chamber, Investment & Development-Consultancy/Litigation/Arbitration (IDCLA) (Bangladesh)

3:00 **Foreign investment** – Localised pitfalls and strategies and regulatory approaches and thresholds for foreign investment review, regulation, approval. Focus on both China and elsewhere in Asia.

José Cochingyan III, IPBA Program Coordinator (Managing Partner, Cochingyan & Partners Law Offices, Manila)

Jack Li, Vice-President, IPBA (Founding Partner Jin Mao Partners, Shanghai)

Taisuke Kimoto, Partner (Pillsbury, Los Angeles)

3:45 **New concerns in Intellectual Property** – Protecting yourself in China and other key markets through trademarks and the International Trade Commission.

Michael Chu, IPBA Regional Coordinator – North America (McDermott Will & Emery, Chicago)

Candice Kim, Partner (Greenberg Traurig, Los Angeles)

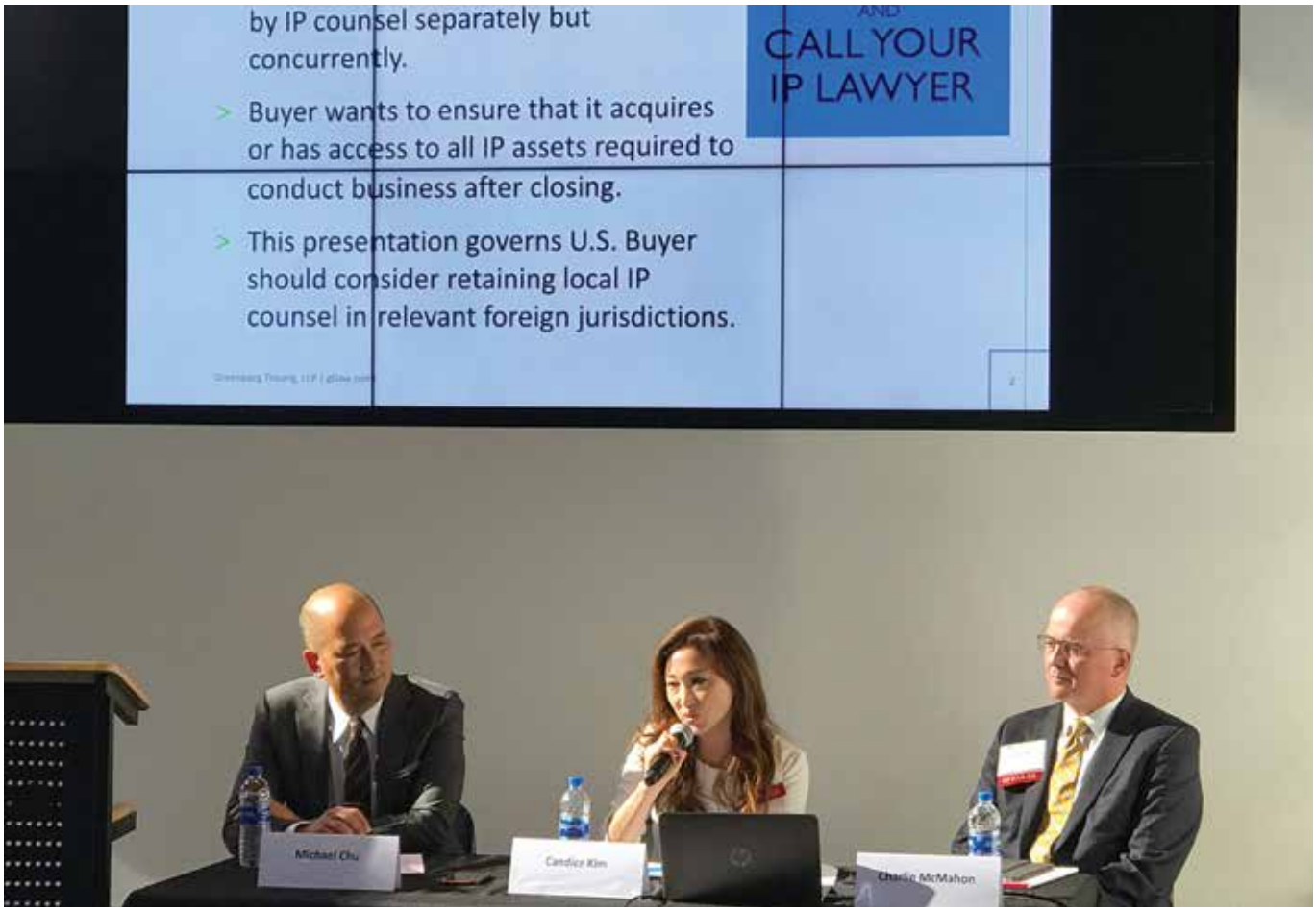
Charles McMahon, Partner (McDermott Will & Emery, Chicago)

4:30 **Identifying and fighting corruption** – Experiences from local and regional counsel; Panelists will use case studies and discuss the web of interrelated statutes in the US and elsewhere that extend the reach of anti-corruption legislation into Asia and elsewhere.

Neerav Merchant, Partner (Majmudar & Partners, Mumbai)

Derek Hahn, Partner (Crowell & Moring, Los Angeles)

Jean Chow-Callam, Senior Managing Director, Forensic & Litigation (FTI Consulting Global, Los Angeles)



5:15 **Trading under Trump** — Is it all about new restrictions and lost opportunities? Panelists will canvass the use of measures (232, remedies), trade policies and negotiations, and non-tariff measures (e.g. CSR, labor standards, anti-slavery, currency manipulation).

Jesse Goldman, Co-Chair, IPBA International Trade Committee (Borden Ladner Gervais LLP, Toronto)

Corey Norton, Vice-Chair, IPBA Membership Committee (Group Counsel for Responsible Sourcing at Thai Union Group PCL, Washington, D.C.)

Jeff Snyder, IPBA Jurisdictional Council Member, United States (Crowell & Moring, Washington, DC and Brussels)

The sessions were followed by a Question and Answer session and then a reception at 6:30pm. Many guests stayed quite late and the conference planners, speakers and some other guests got together for dinner at a local restaurant, sponsored for the most part by Crowell.

Overall, the planning committee believes that the conference was a great success and exceeded all expectations in terms of innovative content, attendance and promotion of the IPBA to new members. Many IPBA materials and publications were handed out, along with membership applications and invitations to the annual conference.

Jeff Snyder, Michael Chu, Corey Norton,
2018 Los Angeles IPBA Regional Conference Chairs

Japan Members Welcome 100 French Lawyers

The IPBA and the French National Bar Council ('Conseil National des Barreaux' or 'CNB') held a joint event in Tokyo on 21 November 2018, in relation to the '100 lawyers in Japan' project conducted by CNB.

IPBA President Perry Pe and Vice-President Jack Li—as well as many Japanese members including past President Shiro Kuniya, JCM for Japan Kenichi Masuda, Membership Committee Chair Tatsu Nakayama—attended the event. In the joint seminar moderated by Eriko Hayashi and Frédéric Ruppert, Co–Chairs of the Cross-border Investment Committee of the IPBA, panellists from both the IPBA and the CNB introduced, compared and discussed the legal system and business culture of both regions as well as the importance and perspectives of EU–Japan and France–Japan business relations. Following the seminar, a lunch reception was held at a nearby restaurant and all French and Japanese participants enjoyed the valuable networking opportunity. French attendees were also able to experience firsthand the warmth and camaraderie so uniquely distinctive of the IPBA. Several of the participants have now joined the IPBA, and many others have expressed genuine interest in becoming members of the IPBA.

Special thanks for the great assistance of Mori Hamada & Matsumoto, which sponsored the event and offered its offices to host the seminar. Yuto Matsumura, Managing Partner, not only participated as a panelist, but also surprised the audience with his mastery of the French language, and Shigehiko Ishimoto, Chair of the APEC Committee, coordinated the event.

IPBA Mid-Year Council Meeting and Regional Conference 2018 Chiang Mai and Bangkok, Thailand

The IPBA held its Mid-Year Council Meeting between 2 and 4 November in Chiang Mai, Thailand. Over the course of three days, the IPBA Council members discussed matters including past and future annual conferences, web site and social media, publications, membership, committee leadership, programs, and financial issues. The meetings were followed by a two-day Regional Conference on Arbitration in Bangkok on 5 and 6 November. The Council Meetings and Day 1 of the Regional Conference were generously supported by the law firm of Dej-Udom & Associates and IPBA Past President Dej-Udom Krairit. Day 2 of the Regional Conference was hosted by the Thailand Arbitration Center (THAC). Thanks to the hard work of the IPBA Dispute Resolution & Arbitration Committee in putting together the programs, each day of the Conference drew close to 100 delegates.

Is the Hague Convention on Choice of Court Agreements a Game Changer? (Part Two)

On 1 October 2015, the *Convention on Choice of Court Agreements*, commonly referred to as the Hague Convention, entered into force. In Part One of this article, the historical background to the Hague Convention was explained, as well as some of the key benefits of the Convention. This part of the article considers some of the key limitations of the Convention.

The Hague, The Netherlands

The Limited Scope of the Hague Convention

The original, more ambitious, objective of the Hague Conference was to create a comprehensive global agreement on jurisdiction and the recognition and enforcement of foreign judgments. However, due to conceptual differences between the states as to the notion of jurisdiction, what materialised was a Convention limited to exclusive choice of court agreements. It is therefore unsurprising that the Conference has been characterised as the '[e]lephant [that] gave birth to a mouse',[49] a description that the opposing team pounced on with delight.

On the one hand, it may be said that 'any multilateral instrument in the area of jurisdiction and judgments is preferable to the predominantly unilateralist status quo'.[50] The affirmative team stressed throughout the Manila debate that one should not lose sight of the fact that there was no international legal framework for the recognition and enforcement of choice of court agreements and foreign judgments prior to the Hague Convention.

However, as the former Deputy Secretary General of the Hague Conference has said, its 'scope is limited and it may be a case of death by a thousand exemptions'.[51] Several exemptions were examined during the course of the Manila debate.

The First Exemption: Exclusivity

The Hague Convention only applies to exclusive choice of court agreements.[52] At first blush, this appears to limit the scope of the Convention quite significantly. However, two features of the Convention deserve highlighting.

First, article 3(b), which has been considered to be one of the most significant features of the Convention,[53] provides that a choice of court agreement shall be deemed to be exclusive unless the parties have expressly provided otherwise.[54] This creates a presumption of exclusivity which, in effect, will broaden the range of choice of court agreements captured by the Convention.[55]

Given that the question of whether a choice of court agreement is exclusive is one that is 'fraught with difficulty'[56] in multiple jurisdictions,[57] article 3(b) will reduce the considerable time and expense that is often dedicated to litigation over whether a choice of court agreement is exclusive.[58] This will dispense with a substantial amount of satellite litigation, which is a barrier to international trade and commerce.

Second, article 22 provides that a state may declare that it will recognise and enforce the judgments of a court designated in a non-exclusive choice of court agreement. This clause addresses the 'commercial reality … that a significant number of industries rely on non-exclusive choice of court agreements'.[59]

No state thus far has made a declaration pursuant to article 22. Accordingly, the commercial reality referred to above creates cause for concern. Among other key industry sectors, the financial sector tends not to enter into exclusive choice of court agreements—international loan agreements, for example, are almost always subject to non-exclusive choice of court clauses.

It was, of course, expedient for the Hague Conference to exclude non-exclusive choice of court agreements under the Hague Convention, which would have required consideration of the issue of parallel proceedings and rules of priority. However, by restricting the scope of the Convention, the Hague Conference limited the Convention's potential to be a game changer.

The Second Exemption: Subject Matter

The Hague Convention only applies to agreements concluded in civil or commercial matters, which is defined to exclude consumer and employment contracts.[60] This exclusion is of little consequence, given that the Convention is aimed at promoting international trade and investment.[61] In any event, it is arguable that it strikes the appropriate balance between, on the one hand, respecting party autonomy and achieving certainty, and, on the other hand, maintaining fairness between the parties. Giving priority to party 'autonomy' in respect of consumer and employment contracts, which typically involve an imbalance of bargaining power, would be contrary to the public interest. Indeed, it has been suggested that the exclusion is too narrow and should extend to small businesses.[62]

However, article 2(2) excludes 16 further subject matters from the ambit of the Convention, some of which are far reaching. For example, the Convention excludes a number of important commercial and maritime matters, including the carriage of passengers and goods,[63] claims in tort for damage to tangible property that do not arise from a contractual relationship,[64] all anti-trust and

competition matters,[65] and a wide range of intellectual property matters.[66]

The opposing team made the point that many of the matters excluded under the Hague Convention may be arbitrated pursuant to the New York Convention. This is subject only to a state declaring that the New York Convention only applies to differences arising out of legal relationships which are considered to be commercial under the national law of the state making the declaration.[67]

The Third Exemption: Declarations

The Hague Convention permits states to make a number of declarations. While it is true that allowing states to do so provides the flexibility required to encourage participation (which, as discussed above, is integral to the long-term success of the Convention),[68] if the circumstances in which a declaration may be made are not carefully circumscribed, the integrity of the Convention may be undermined.

Although article 5(2) provides that the chosen court shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another state,[69] this certainty may be eroded by article 19. Article 19 provides that:

> A State may declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.

Cases that are 'wholly foreign' may therefore be excluded. However, this may not accord with the wishes of the parties, who may want to choose a forum with which neither they, nor the subject matter of the dispute, have any connection in order to reap the benefits of neutrality, one of the major selling points of arbitration. For example, the Singapore International Commercial Court aspires to be a neutral forum for the resolution of international commercial disputes, whether or not the transactions are substantively connected to Singapore. Article 19 could therefore be seen as an unnecessary protection by a state of its judicial system from the perceived burden of providing parties with a forum for dispute resolution and may be explicable as one of the compromises made to protect state sovereignty during the course of the Convention's long gestation period. On the other hand, it is arguably appropriate that, both as a matter of policy and having regard to limited resources, a court should only be concerned with matters that have a connection with its jurisdiction and not merely be available to parties who have contractually pre-determined that that particular court in that particular jurisdiction is the appropriate forum in which to resolve any dispute that might arise during the course of the commercial relationship. Although the opposing team scored this matter highly in favour of their argument, questions of sovereignty and the proper administration of justice do not always bear an identifiable price tag.

A similar declaration is permitted under article 20, with respect to the enforcement of foreign judgments. Article 20 provides that:

> A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State.

Perhaps most problematically, a state is permitted to extend the list of excluded subject matters contained in article 16

Article 20 was introduced to address what would be, in practice, an 'anomalous situation'.[70] However, it suffers from the same problems as article 19, as discussed above.

Perhaps most problematically, a state is permitted to extend the list of excluded subject matters contained in article 16. Article 21 provides that:

> Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.[71]

This article has been labelled a 'Trojan horse',[72] capable of seriously damaging the utility of the Convention.[73] Ideally, article 21 should be exercised sparingly. It has


Gate of The Peace Palace, seat of the International Court of Justice, The Hague

been suggested that the article prescribes adequate safeguards,[74] by requiring a state to have a '**strong** interest' in not applying the Convention to a '**clearly and precisely** defined' matter, and ensure that its declaration is 'no broader than necessary'. At present, only the European Union member states have made declarations in accordance with article 21, excluding the application of the Convention to certain insurance contracts.

The Fourth Exemption: Grounds for Refusing Enforcement

The Hague Convention contains a number of grounds upon which a court may refuse to enforce a choice of court agreement or a foreign judgment, the broadest of which allows a court to do so where it would lead to 'manifest injustice',[75] where it would be 'manifestly contrary to the public policy of the State of the court seised',[76] or where it would be 'manifestly incompatible with the public policy of the requested State'.[77]

By way of comparison, no such ground for refusal exists under the New York Convention in respect of the enforcement of arbitration agreements. The opportunity for parties to use the public policy ground under the Hague Convention as a 'loophole'[78] to reach a convenient result, and avoid the application of a choice of court agreement, is obvious, as is the unpredictability inherent in the availability of this particular loophole.

With respect to the enforcement of foreign judgments, however, any criticisms of the public policy ground for refusal may equally be levelled against the New York Convention, which contains a similar exception in respect of the enforcement of arbitral awards. This exception has not undermined the New York Convention's success, and there is no reason to think that courts will not adopt a pro-enforcement approach as they have done in respect of the New York Convention.

Another ground upon which a court may refuse to enforce a choice of court agreement, which was raised during the Manila debate, is article 6(a), which provides that a court other than the chosen court must suspend or dismiss proceedings to which an exclusive choice

of court agreement applies unless the agreement is null and void under the law of the state of the chosen court. This is likely to promote certainty because, whichever court is seized of the matter (in potential breach of a choice of court agreement), the validity of the agreement will be determined in accordance with the law of the state of the chosen court. Equally, however, article 6(a) may lead to lengthy and costly disputes as to the validity of a choice of court agreement. This is because the court seized may be required to apply foreign law, which must be proved on the basis of expert evidence in many jurisdictions. Nonetheless, even in the sphere of international commercial arbitration, there are occasionally disputes over which law ought to govern the validity or scope of an arbitration agreement.

Article 7 provides that interim measures of protection are not governed by the Hague Convention

The Fifth Exemption: Interim Measures

Article 7 provides that interim measures of protection are not governed by the Hague Convention.[79] This limits the utility of the Convention to a significant degree. Interim measures, such as injunctions and orders for the production of evidence, can make or break a case. Their exclusion is curious given that such measures are likely to support the efficacy of a choice of court agreement.

On the other hand, the New York Convention has been widely interpreted to apply only to substantive awards on the merits, and not to interim measures of protection or to procedural orders. Even the UNCITRAL Model Law on International Commercial Arbitration did not contain any provision to compel judicial recognition of an arbitral tribunal's interim or procedural orders until its amendment in 1996 and, even then, these amendments have not been universally adopted.

The Sixth Exemption: Damages

Under the Hague Convention, a judgment may be partially re-litigated, which undermines the finality that is otherwise promised. Article 11(1) provides:

> Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.

This gives rise to the possibility that the court in which enforcement is sought may determine that the damages awarded in the judgment are so excessive that they do not compensate the claimant for actual loss or harm, thereby providing a basis for the partial non-enforcement of the judgment. It is undeniable that, in almost all cases, money matters. That a court may, in certain circumstances, second guess a damages award is thus problematic. However, the enforcement of an arbitral award suffers from the same challenges in circumstances where punitive damages are awarded.

There is also scope, if the courts do not exercise caution, to read article 11(1) widely and thus increase the chances of re-litigation. For example, the place of restitutionary damages, which are not awarded to compensate for loss, but rather to remove the defaulting party's gain, is unclear.

Conclusion

The issue of the enforceability of choice of court agreements and foreign judgments remains a matter of priority. The Hague Conference resumed its work on the Judgments Project in 2012, and in November last year, a Special Commission of the Hague Conference produced a draft convention concerning the recognition and enforcement of foreign judgments in respect of civil and commercial matters.[80] Many states may be more interested in this more comprehensive Convention, which may impede uptake of the Hague Convention. However, it would be desirable for states to ratify the Hague Convention as an interim solution.

The rise of international commercial courts—with the Netherlands most recently joining London, Singapore and Dubai, to list a few of the existing international courts—provides further impetus for ensuring the universal treatment of foreign judgments. Calls to establish such courts in other jurisdictions have been made,[81] and represent a vote of confidence in litigation as a viable and desirable dispute resolution mechanism. As the enforcement of international commercial court judgments depends on states' existing mechanisms for enforcement, the Hague Convention, or perhaps more effectively, a convention of broader scope, such as that contemplated by the ongoing work of the Hague

Conference, will support the establishment and efficacy of such courts.[82]

In 2016, the Chief Justice of Singapore described the transformation of the global marketplace from that of 'riotous fairs and bazaars'[83] to 'a metaphysical global interface for the exchange of goods and services'.[84] In this context, it is critical that the mechanisms for international commercial dispute resolution, the demand for which will only increase, keep pace through the development of a coherent and harmonious underlying legal infrastructure. The Hague Convention has the potential to do just this. Whether it will, however, depends on whether it continues to gain traction. The affirmative team stressed that those who see arbitration as the natural world order will need to broaden their horizons and understand that there is a place for both arbitration and litigation. The opposing team suggested that it may be too little too late for the Hague Convention to have any meaningful impact.

Notes

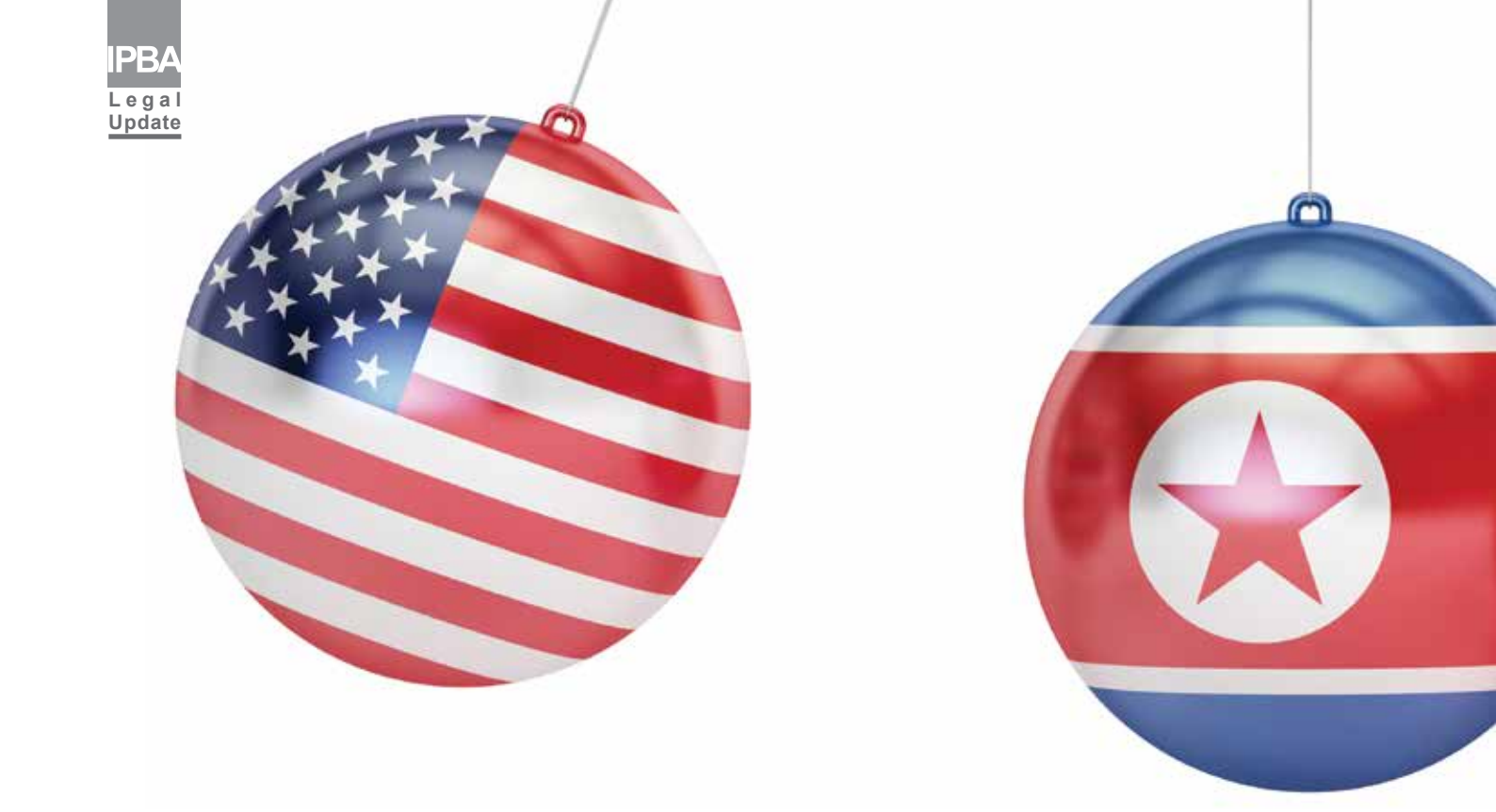
[49] Talpis and Krnjevic, n 20 above, 4.
[50] Garnett, n 20 above, 169.
[51] Matthew H Adler and Michele Crimaldi Zarychta, 'The Hague Convention on Choice of Court Agreements: The United States Joins the Judgment Enforcement Band' (2006) 27 *Northwestern Journal of International Law and Business* 1, 37.
[52] Hague Convention, article 1(1).
[53] See e.g. Nanda, n 21 above, 787; Michael Douglas, 'Will Australia Accede to the Hague Convention on Choice of Court Agreements' (2017) 17 *Macquarie Law Journal* 148, 150–1.
[54] Hague Convention, article 3(b).
[55] Brooke Adele Marshall and Mary Keyes, 'Australia's Accession to the *Hague Convention on Choice of Court Agreements*' (2017) 41 *Melbourne University Law Review* 246, 275.
[56] Nanda, n 21 above, 779.
[57] In the Australian context, see e.g. *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association Ltd* (1997) 41 NSWLR 117.
[58] Douglas, n 53 above, 151; Nanda, n 21 above, 787; Marshall and Keyes, n 55 above, 275.
[59] Talpis and Krnjevic, n 20 above, 13.
[60] Hague Convention, articles 1(1), 2(1).
[61] *Ibid*, preamble.
[62] See e.g. Spigelman, n 46 above, 326.
[63] Hague Convention, articles 2(2)(f)–(g).
[64] *Ibid,* article 2(2)(k).
[65] *Ibid,* article 2(2)(h).
[66] *Ibid,* articles 2(2)(n)–(o).
[67] New York Convention, article 1(3). Of the 157 states parties to the New York Convention, 49 states have made such a declaration.
[68] Beaumont, n 37 above, 150, 153.
[69] Hague Convention, article 5(2).
[70] Nanda, n 21 above, 777.
[71] See also the Hague Convention, article 10.
[72] Garnett, n 20 above, 176.
[73] *Ibid*.
[74] Nanda, n 21 above, 780.
[75] Hague Convention, article 6(c).
[76] *Ibid,* article 6(c).
[77] *Ibid,* article 9(e).
[78] *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR 535, 555 [89] (Foster J).
[79] Hague Convention, article 7.
[80] Special Commission on the Recognition and Enforcement of Foreign Judgments, 'November 2017 Draft Convention' (Draft Convention, Hague Conference on Private International Law, 13–17 November 2017).
[81] Warren and Croft, n 35 above; Tracy Albin, 'The Dispute Resolution Lag in Australia: The Time to Be Aggressive is Now' (2017) 28 *Australian Dispute Resolution Journal* 149, 153–4.
[82] Warren and Croft, n 35 above.
[83] The Hon Chief Justice Sundaresh Menon, 'Doing Business Across Asia: Legal Convergence in an Asian Century' (Speech delivered at Singapore Academy of Law's International Conference, Singapore, 21 January 2016).
[84] *Ibid*.

I wish to express my thanks to my Tipstaff, Alice Zhou, for her research and assistance in the preparation of this paper.

The Hon Justice M J Beazley AO
President of the New South Wales Court of Appeal, Australia

The Hon Justice Margaret Beazley AO attended the Sydney Law School graduating with Honours in Law in 1974 and was admitted to the New South Wales Bar on 14 March 1975. She was appointed Queens Counsel in 1989. In 1993, she was appointed as a judge of the Federal Court of Australia, the first woman to sit exclusively in that Court. In 1996 her Honour was the first woman appointed to the New South Wales Court of Appeal and in March 2013 was appointed President of the Court of Appeal. She is Chairperson of the NSW Chapter of the Australian Institute of Administrative Law, Patron of the Toongabbie Legal Centre, President of the Arts Law Centre of Australia and a member of the Expert Reference Group for the Australian Human Rights Commission's project on human rights and technology.

Her Honour was made an Officer in the Order of Australia in the Queen's Birthday Honours List on 12 June 2006 for service to the judiciary and the law, particularly through contributions to professional and ethical standards and to the advancement of women in the legal profession and the community. In May 2008 her Honour was awarded Doctor of Laws honoris causa (Hon LLD) by the University of Sydney. In 2012, she was named as one of the inaugural *Australian Financial Review/ Westpac 100 Women of Influence.*



US Trade Controls, Sanctions and 'DisTrumption'

Sanctions are not tariffs, but are as disruptive to trade. Compliance is more challenging and important for business, especially in Asia. US rules on Iran, Russia, North Korea, and others are explored from this perspective.

The US-China trade war had captured so much of the international trade business news lately that President Trump's other trade initiatives have received less attention. Called sanctions—such as sanctions on Iran or Russia—they have an impact on international business far beyond the borders of the targeted country. And just as there are unintended consequences of the US trade war on China, there are unintended consequences when trade controls are applied, as they have been under Trump. Specifically, these unintended consequences have disrupted supply chains throughout Asia, an issue of importance for IPBA members and their clients. In some important ways the escalating and often more serious actions taken against Russia and Iran are more consequential than those against China. Regardless of whether such sanctions are effective at changing the behaviour of the target country, they are a new reality for international business because they are viewed as an alternative to military action.

The term 'trade controls' generally refers to a subset of US law that seeks to extend US foreign policy concerns through legal restrictions on both US and non-US parties. From the earliest days of the United States,[1] the US Treasury Department's Office of Foreign Assets Control ('OFAC') and its predecessors have employed trade controls, such as asset blocking and freezing, prohibitions on transactions with targeted countries, entities and parties. According to OFAC:

> The Treasury Department has a long history of dealing with sanctions. Dating back prior to the War of 1812, Secretary of the Treasury Gallatin administered sanctions imposed against Great Britain for the harassment of American sailors. During the Civil War, Congress approved a law which prohibited transactions with the Confederacy, called for the forfeiture of goods involved in such transactions, and provided a licensing regime under rules and regulations administered by Treasury.

These tools have evolved over the years and have become very effective, reaching their current complex form in the Iran and Russia programs. Nonetheless, the impact of these sanctions is felt far beyond these countries and their bluntness and strength often chill otherwise lawful transactions. Hence, knowing how the tools are used can make a significant difference for global business. If you understand the operation and scope of the OFAC rules, you not only avoid inadvertent mistakes (which can be very serious) but enjoy a distinct competitive advantage in securing business that others might shy away from.

April and May of 2018 were big months for US trade controls. In April, OFAC designated selected Russian oligarchs and their business empires and in May the President announced that he would withdraw from the Iran nuclear deal. Both actions set into motion a full range of diplomatic and international policy debates. Behind the scenes, business has scrambled to avoid violating the US laws and maintain business where lawful. Compliance has been complex and costly. And the story is not yet over; it is still being written. This will no doubt make some of this article obsolete, but the lessons learned from both initiatives are examples of the deployment of trade controls at their most highly developed and most sophisticated forms. They offer examples of how the United States employs such tools and suggest how they will be used in the future. Let's turn below to a closer look at both.

Iran—Sanctions are Coming[2]

On 8 May 2018, the American President announced that he would withdraw the United States from the Joint Comprehensive Plan of Action, or JCPOA, a complex multi-party agreement with Iran. This action was not a surprise; it was a promise made during the presidential campaign.[3] The JCPOA included elaborate 'snap back' provisions, primarily aimed at violations by Iran, under which those sanctions relaxed as part of the JCPOA would 'snap back' into force. Despite widespread acknowledgement that Iran was in compliance with the terms of the JCPOA and over objections of other parties to the JCPOA, the US withdrawal would trigger the 'snap back' of the US sanctions which, for the most part, were so-called 'secondary sanctions', imposed not on US parties, but extraterritorially on non-US parties. To mitigate the dramatic impact of the 'snap back', the

United States staged the reimposition of sanctions, with some delayed by 90 days, others by 180 days. Both have now expired and the sanctions have been reimposed in full, and then some.[4]

Perhaps the dollar value of the international trade disruption from sanctions is not as significant as that from the section 301 tariffs that are being imposed on imports from China; it is the snap back of the secondary sanctions on Iran has had a significant impact on companies in Asia. Unlike smaller economies that are sanctioned, such as Cuba, Iran's economic clout extends further. The disruption of Asia trade occasioned by this move is significant, and although not completely unexpected, it is no less disruptive. The 'new' or reimposed US sanctions on Iran include a virtual embargo on all trade and business by US persons. With some minor exceptions, this portion of the controls on trade and business were never really relaxed. The real meat of the snap back is the secondary sanctions, as described in this OFAC summary:[5]

…

> To implement the President's direction, the Departments of State and of the Treasury will take steps necessary to establish a 90-day and a 180-day wind-down period for activities involving Iran that were consistent with the US sanctions relief provided for under the JCPOA. …
>
> **1.2. Which sanctions will be reimposed after the 90-day wind-down period ending on August 6, 2018?**
>
> After the 90-day wind-down period ends on August 6, 2018, the US government will reimpose the following sanctions that were lifted pursuant to the JCPOA, including sanctions on associated services related to the activities below:
>
> i. Sanctions on the purchase or acquisition of US dollar banknotes by the Government of Iran;
>
> ii. Sanctions on Iran's trade in gold or precious metals;
>
> iii. Sanctions on the direct or indirect sale, supply, or transfer to or from Iran of graphite, raw, or semi-finished metals such as aluminium and steel, coal, and software for integrating industrial processes;
>
> iv. Sanctions on significant transactions related to the purchase or sale of Iranian rials, or the maintenance of significant funds or accounts outside the territory of Iran denominated in the Iranian rial;
>
> v. Sanctions on the purchase, subscription to, or facilitation of the issuance of Iranian sovereign debt; and
>
> vi. Sanctions on Iran's automotive sector.
>
> …
>
> **1.3. Which sanctions will be reimposed after the 180-day wind-down period ending on November 4, 2018?**
>
> Following the 180-day wind-down period ending on November 4, 2018, the US government will reimpose the following sanctions that were lifted pursuant to the JCPOA, including sanctions on associated services related to the activities below:
>
> i. Sanctions on Iran's port operators, and shipping and shipbuilding sectors, including on the Islamic Republic of Iran Shipping Lines (IRISL), South Shipping Line Iran, or their affiliates;
>
> ii. Sanctions on petroleum-related transactions with, among others, the National Iranian Oil Company (NIOC), Naftiran Intertrade Company (NICO), and National Iranian Tanker Company (NITC), including the purchase of petroleum, petroleum products, or petrochemical products from Iran;
>
> iii. Sanctions on transactions by foreign financial institutions with the Central Bank of Iran and designated Iranian financial institutions under Section 1245 of the National Defense Authorization Act for Fiscal Year 2012 (NDAA);
>
> iv. Sanctions on the provision of specialized financial messaging services to the Central

Bank of Iran and Iranian financial institutions described in Section 104(c)(2)(E)(ii) of the Comprehensive Iran Sanctions and Divestment Act of 2010 (CISADA);

v. Sanctions on the provision of underwriting services, insurance, or reinsurance; and

vi. Sanctions on Iran's energy sector.

The cumulative extraterritorial effect of these sanctions is yet to be felt; it will no doubt intensify the US-Iran divide, but also the growing divide between the United States and many allies in Asia.

Russia—Leadership 'Bromance' Masks Truly Harsh Sanctions

Unlike Iran, Russia is not embargoed by the United States. Transactions with Russia, the Government, or related entities are generally permissible. Nonetheless, the trade controls that apply to Russia are the most complicated and commercially relevant of the US sanctions programs, because they include overlapping export, blocking, geographic and sectoral sanctions:

- list-based programs
- geographic-based restrictions (Crimea)
- export controls—military, dual use and sectoral
- sectoral sanctions

Then, on 6 April 2018, under the authority of the Countering America's Adversaries Through Sanctions Act, or CAATSA, OFAC designated:

- 7 Russian oligarchs
- 12 Entities owned or controlled by the 7 oligarchs
- 17 Senior Russian Government officials
- 2 Russian State-Owned entities

And to all/any entity 50-percent or more owned by Specially Designated Nationals ('SDNs'). This is considered to be the most commercially significant set of designations ever. The 2018 designations are having an impact on most major supply chains outside of Russia.

> 'The Russian government engages in a range of malign activity around the globe, including continuing to occupy Crimea and instigate violence in eastern Ukraine, supplying the Assad regime with material and weaponry as they bomb their own civilians, attempting to subvert Western democracies, and malicious cyber activities. Russian oligarchs and elites who profit from this corrupt system will no longer be insulated from the consequences of their government's destabilizing activities.' ... Today's action targets a number of the individuals ... who benefit from the Putin regime and play a key role in advancing Russia's malign activities.[6]

At the time of writing this article, OFAC has extended the so-called 'wind down' General Licenses ('GLs') to allow for additional time for negotiation over the possible separation of the oligarchs from the companies, which could then be de-designated. These delayed sanctions, which allow certain transactions but not others, have nonetheless created turmoil in certain international markets. Designations are having a major impact on the US and non-US markets, including transactions otherwise outside the US jurisdiction. The impact is significant because of the commercial empires these oligarchs have built. Companies like Rusal and others have huge global businesses. To exit those relationships has created disruption in many industries, including aluminium, auto parts and so on.

Export Control Reform

As part of a larger set of initiatives, including investment and a concern about access to United States high technology, including by entities from China, Congress enacted changes to the Committee on Foreign Investment in the United States ('CFIUS')[7] and the Export Administration Act as pieces of the National Defense Authorization Act for the fiscal year 2019. Part of the

motivation for the Export Control Reform Act ('ECRA') was a sense that so called 'emerging and foundational' technologies need to be controlled. ECRA authorises the Commerce Department's Bureau of Industry and Security ('BIS') to identify and consider controls on such technologies. ECRA did not identify them, but it created an interagency review process that also includes the Departments of Defense, Energy and State. Some have observed that so-called 'emerging and foundational' technologies include autonomous vehicles and isadvanced driving assistance systems, 5G, hydrogen and fuel cells and biotechnology, as well as robotics, artificial intelligence and machine learning. A fuller list might include:

- artificial intelligence and machine learning
- augmented reality
- automated machine tools
- additive manufacturing (3-D printing)
- autonomous vehicles
- advanced battery technology
- 'big data'
- biotechnology
- gene editing
- high-temperature superconducting technology
- hydrogen and fuel cells
- integrated circuits, semiconductors, and microelectronics
- intelligent mobile terminals
- nanotechnology
- robotics

Concerns in Congress have arisen that current controls do not cover some of these new and emerging technologies. Some have been reviewed before; the danger of others may depend on how they are used. Some see this as another 'redefinition' of 'national security' as a pretext for protectionism. Depending on how this is implemented, it could have a significant negative impact on the use of US-based research and development.

Observations and Conclusion

Many observers have suggested that the United States is overplaying its hand in using trade controls.[8] Extensive use of sanctions—as opposed to other means such as diplomatic cooperation, multilateral institutional efforts and others—may undermine the very power the United States seeks to wield, including growing use of non-dollar currencies. As we witness the epitome of sophisticated sanctions, we may also be witnessing the beginning of the end of the effectiveness of such sanctions. In the meantime, US trade controls will continue to exert a disproportionate effect on international business and compliance will remain a priority.

Notes

[1] https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#basic: 'OFAC itself was formally created in December 1950, following the entry of China into the Korean War, when President Truman declared a national emergency and blocked all Chinese and North Korean assets subject to U.S. jurisdiction'

[2] As of this writing, the US sanctions on Iran have been re-imposed in the midst of, even for this administration, inflammatory rhetoric. This subtitle refers to the unprecedented use of social media 'memes' to communicate among countries. See https://www.dailymail.co.uk/news/article-6350751/Iranian-General-defiantly-answers-Trumps-Game-Thrones-inspired-meme.html.

[3] See https://www.reuters.com/article/us-usa-election-trump-iran/trump-election-puts-iran-nuclear-deal-on-shaky-ground-idUSKBN13427E.

[4] https://www.treasury.gov/resource-center/sanctions/Programs/pages/iran.aspx.

[5] https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_winddown_faqs.pdf.

[6] https://home.treasury.gov/news/press-releases/sm0338.

[7] Although very important and integral to understanding current US policy, a discussion of these changes to CFIUS in the Foreign Investment Risk Review Modernization Act ('FIRRMA') is beyond the scope of this article. These subjects are taken up in another article in this Issue of the IPBA Journal authored by Denis Unkovic.

[8] Lew & Nephew, The Use and Misuse of Economic Statecraft—How Washington Is Abusing Its Financial Might, Foreign Affairs, Volume 97, Number 6, November/December 2018.

Jeffrey L. Snyder
Crowell & Moring LLP, Washington, DC

Jeff serves as the IPBA Jurisdictional Council Member for the United States.

Jeffrey L. Snyder is a partner in Crowell & Moring, LLP's International Trade Group in the Washington, D.C. and Brussels offices. Jeff advises on import and export laws and has focused on emerging issues in international trade regulation, including transatlantic, multijurisdictional compliance, global compliance issues, and new technologies, such as cloud and blockchain. Jeff is a frequent speaker on international trade issues, is ranked and recognized as a leading international trade lawyer and has also been consistently recognized by *The International Who's Who of Business Lawyers* for his work in trade & customs. Jeff serves at the Jurisdictional Council Member (USA) for the Inter-Pacific Bar Association and remains a member of the Advisory Committee. He is also the General Editor of the Kluwer Law International publication, the *Global Trade and Customs Journal*.

2018 Retrospective: A Look Back on the Year in Asia-Pacific Trade Developments

The past year has been eventful for international trade. A climate of disruption and resulting uncertainty has dominated the landscape amid some major developments in trade policy and international relations. In 2018, the Asia-Pacific region saw the release of the text for a new United States-Mexico-Canada Agreement ('USMCA'), the intensification of a global 'steel war' kicked-off by US tariffs on steel and aluminium, early signs of progress on much-needed World Trade Organization ('WTO') reform and the coming into force of the Comprehensive and Progressive Trans-Pacific Partnership ('CPTPP'), among others. It is worthwhile to have a closer look at some of the key developments and what they could mean for international trade in 2019 and beyond.

'NAFTA 2.0': A Blueprint for Future US Bilateral Trade Negotiations?

In September 2018, after 13 months of high-pressure negotiations, Canada, Mexico and the US agreed to the text of the new USMCA. The USMCA was negotiated to replace NAFTA—a pillar of North American economic and trade relations for more than two decades—and is currently scheduled to come into force on 1 January 2020. However, the results of the recent midterm elections in the US, with Democrats gaining the majority of seats in the US House of Representatives, makes the ratification of the USMCA uncertain. The new Democratic majority must determine if the agreement is in the best interests of Americans or, viewed another way, if it is worth giving the Trump administration a major win on international trade. These new considerations may result in delays or even changes to the text of the USMCA, but it is still expected that it will come into force as scheduled at the beginning of 2020.

Assuming the USMCA comes into force as drafted, the text contains some important changes from NAFTA:

- *Sunset*: The 'sunset' clause that was a key US demand during negotiations has been watered down to provide that the USMCA will terminate after 16 years (not five as the US had demanded). Reviews will occur every six years, during which the effective period can be extended for another 16 years.

- *Non-Market Country FTAs*: If a party to the USMCA intends to engage in free trade agreement ('FTA') negotiations with a 'non-market country', it must give three months' notice to the other parties. The entry into an FTA with a non-market country will allow the other parties to terminate the USMCA on six months' notice and replace the USMCA with a bilateral agreement. This has been reported as a way for the US to restrict Canada or Mexico from entering into an FTA with China. However, as a practical matter, the USMCA already contains a provision allowing any party to leave the USMCA on six months' notice in any event, so the actual effect of this provision is arguably quite limited and more of a political statement than a substantive one.

- *Investment*: Investor-state dispute settlement ('ISDS') claims against Canada and by Canadian investors will no longer be available three years after the USMCA enters into force or for investments not existing as of its entry into force. Considering that Canada has faced numerous claims by US investors, including some successful ones, but Canadian investors have never had a successful claim against the United States, this change has been seen as mostly benefitting Canada. Canadian investors will continue to have access to ISDS against Mexico, and *vice versa*, under the CPTPP.

- *Autos*: The USMCA has significantly altered the North American content requirements for passenger vehicles, light trucks and heavy trucks to be certified as originating. Passenger vehicles and light trucks will now require 75 percent North American content and heavy trucks will require 70 percent North American content. North American content requirements under NAFTA were 62.5 percent for both cars and light trucks. The USMCA also requires vehicle producers to source 70 percent of their steel and aluminium purchases from North America, a requirement that does not exist in NAFTA. A further new requirement in the USMCA is for certain vehicle manufacturing expenditures to be 'high-wage', meaning expenditures at facilities that pay at least US$16/hour. For certain passenger vehicle expenditures, 40 percent must be high-wage, while for light and heavy trucks 45 percent of expenditures must be high wage.

- *Intellectual Property*: The USMCA requires Canada to make a number of significant changes to its intellectual property laws, including by increasing data protection for biologic drugs from eight years to ten years and increasing copyright protection by 20 years, from the author's life plus 50 years to the author's life plus 70 years.

- *Section 232 Side Letter*: In side letters, the US, Mexico and Canada set out their understanding on the application of US Section 232 'national security' measures on Canadian and Mexican vehicles and automotive parts. The US agreed that if additional tariffs are imposed on automotive imports, the US will exempt from those tariffs all light trucks coming from Canada and Mexico as well as 2.6 million passenger vehicles from each of Canada and Mexico. The US will also exempt from additional tariffs US$32.4 billion in parts from Canada and US$108 billion in parts from Mexico. It is unclear how these quotas

will be allocated among automotive producers or even who will be responsible for determining the allocations. Further, whether the passenger vehicle quota will be sufficient in the future remains to be seen. If the US imposes Section 232 tariffs on other vehicle-producing countries like the EU or if the threat of tariffs remain for an extended period of time, Canadian and Mexican exports could rise towards the quota limits.

- *Section 232 Process Side Letter*: A second set of letters provides for a 60-day 'cooling off' period before any US Section 232 actions will apply to imports from Canada or Mexico and provides that Canada and Mexico have the right to take trade retaliation if the US takes a Section 232 action that is 'inconsistent with' NAFTA, the USMCA or the WTO Agreement. However, because the US has insisted that those agreements give it full discretion to use Section 232, the retaliatory right may itself be subject to dispute.

- *Labour*: Under NAFTA, labour rules were dealt with in a side letter but the USMCA contains a new labour chapter with more stringent labour protections. An annex to that chapter on Mexican worker representation in collective bargaining requires Mexico to adopt new legislation for the 'effective recognition of the right to collective bargaining' by 1 January 2019 (one year prior to the scheduled coming into force of the agreement) and states that entry into force of the USMCA may be delayed until such legislation becomes effective.

- *Digital Trade*: The USMCA now includes rules to ensure data can be transferred cross-border and to minimise limits on where data can be stored.

There has been considerable discussion about these provisions and US officials have communicated that the USMCA represents a 'playbook' for the Trump administration's approach to modern trade deals. The US will certainly seek variations of the new provisions when negotiating FTAs with other countries, particularly with respect to non-market country FTAs, Section 232 tariffs and IP and labour protections.

US Section 232 Investigation Into Uranium

In January 2018, two US uranium producers petitioned the Commerce Department for relief under Section 232

from imports of uranium, particularly from state-owned enterprises ('SOEs') in Russia, Kazakhstan, Uzbekistan and China. The petitioners allege that without strict quotas and buy-American requirements, the US will be unable to source domestically mined uranium for nuclear warheads, the armed forces and energy production, putting US national security at risk. Specifically, they have requested that 25 percent of the US market be reserved for US sourced uranium. This is not the first time such an investigation request has been made. During the Cold War, the Department of Energy, citing similar concerns, requested a Section 232 investigation, which was conducted by the Commerce Department in 1989. That investigation concluded that uranium imports did not pose a national security threat and no action was taken. The petitioners in the current case have argued that the domestic uranium industry has dramatically deteriorated since the first investigation, necessitating action.

The Commerce Department initiated the investigation in July and the comment period closed in September. Although the complainants targeted SOEs, the relief sought would be felt broadly across the global industry. This prompted governments and companies from allied countries, such as global Canadian uranium giant Cameco, which has significant US operations, to make submissions to the Commerce Department opposing the petitioner's requests. The outcome of this investigation remains uncertain. The Commerce Department is due to report in April 2019.

US to Step Up Its Bilateral Free Trade Negotiation Efforts

The US has in the past year pursued a 'divide and conquer' approach to free trade talks, remaining committed to President Trump's stated preference for bilateral rather than multilateral agreements as a way to maximise the benefit of leverage of a large economy to the US. This approach played a part in tense USMCA negotiations when the US and Mexico agreed on a preliminary text after weeks of negotiations without Canadian representatives at the table, placing pressure on Canada to come to an agreement quickly.

The US approach has seen some additional success with the announcement of the successful early renegotiation of the US-Korea Free Trade Agreement ('KORUS'), which was signed by President Trump and South Korean President Moon Jae-in on 24 September 2018. KORUS, which first came into force in 2012, was not significantly altered and the updates mostly amount to changes affecting automobile exports from each country. In conjunction with the updated KORUS, the US announced that it was exempting Korea from its section 232 tariffs on steel in exchange for Korea's acceptance of a quota limiting its steel exports to 30 percent less than the average annual levels for the past three years, a significant concession.

In October, the US announced (via notification to Congress as required under Trade Promotion Authority fast-track rules) its intent to engage in bilateral FTA discussions with Japan, the EU and the UK. The US may begin formal negotiations 90 days after notification to Congress and must lay out its negotiating objectives 30 days before negotiations begin (negotiations with the UK would begin following the completion of Brexit and would be subject to the final structure of the deal between the UK and EU). In addition to those notifications, the US recently announced that trade and investment discussions with Ecuador would resume, nine years after talks broke off amidst tense diplomatic relations between the two countries.

With respect to Japan, President Shinzo Abe first announced in September that Japan would agree to bilateral trade talks. Formal negotiations are expected to begin in January. These bilateral talks represent a marked departure from Japan's prior insistence on a multilateral deal and in particular its attempts to have the US reenter the Trans-Pacific Partnership.

Japan-Korea-China FTA

Global trade disputes have ratcheted up enthusiasm for an FTA between Japan, South Korea and China. FTA talks between these nations have progressed slowly through 12 rounds since 2012. Recent actions by the United States, that is, renegotiating KORUS and imposing tariffs on billions of dollars of Chinese-origin goods, may accelerate an agreement coming to fruition. Japan, Korea and China will be connected by way of the Regional Comprehensive Economic Partnership ('RCEP') when it comes into force, but an agreement between these three nations, on their own terms, may help to further dismantle barriers to trade, especially in China.

Global Steel Wars

President Trump's March of 2018 imposition of tariffs on steel and aluminium imports into the US was the final trigger setting off a global steel war that had been

brewing over disruptions arising from global steel overcapacity. Countries around the globe, including the Asia-Pacific region, are responding with countermeasures, safeguards and other trade remedies not only on steel, but also on a wide range of other goods. This section surveys the current landscape of steel protectionist measures and how it is affecting Asian-Pacific trade.

After the initial US 232 tariff exemptions expired, Canada and Mexico responded with countermeasures covering approximately CA$16.6 billion and US$3 billion respectively of US exports of steel, aluminium and agricultural goods, as well as specific consumer goods aimed at the home districts of key US lawmakers. The EU also implemented retaliatory tariffs on US$3.4 billion of US-origin goods.

Others in the Asia-Pacific region negotiated long-term exemptions from US tariffs. South Korea, Argentina, Australia and Brazil negotiated long-term exemptions largely by agreeing to US import quotas on steel. In the case of South Korea, long-term exemptions came at a hefty price—a 30 percent reduction in steel exports to the US based on the past three years' average. The US tariffs have had knock-on effects across the Asia-Pacific with allegations of excess steel, once headed for the US, being diverted into neighbouring countries, particularly into India, raising trade tensions regionally.

In addition to countermeasures, countries are seeking additional recourse through the use of safeguard measures. Safeguards are emergency measures in the form of tariffs, quotas or both, intended to address serious injury or the threat of serious injury caused by an unforeseen increase in imports of fairly traded goods. Safeguards are already in place for certain steel products imported into India, Indonesia, Malaysia, Thailand, Vietnam and the Philippines. In 2018, Canada, the EU, the Eurasian Economic Union[1], the Arab States of the Gulf[2], among others, initiated safeguard inquiries. Canada and the EU implemented immediate provisional measures. The WTO rules governing safeguards carefully limit when they are permitted and hold members imposing them to a very high standard to demonstrate that they are justified. A recent WTO panel report in a dispute between India and Japan over India's imposition of a safeguard measure on steel products reinforced this high standard.[3]

The global steel war is a symptom of the underlying issue of global overcapacity which places pressure on steel-producing industries around the world. The most recent data suggests that global overcapacity, that is, the gap between global production and global capacity, is around 561 mmt. The global steel war is expected to continue throughout 2019 as overcapacity remains fairly stable while economic deceleration continues in key economies like the US and China. The Asia-Pacific region, including North America, is home to the vast majority of steel production globally and will remain at the centre of the conflict.

WTO Reform

Even before Donald Trump's election, the WTO found itself in troubled waters, unable to make progress on long-standing issues. The retrenchment of global trade now underway has created a sense of urgency for reform efforts. Increasingly, governments from across Asia-Pacific are participating in these reform efforts. This section outlines the issues facing the WTO, the

reform efforts underway and offers our insight into future ramifications for the Asia-Pacific region.

The list of issues facing the WTO is long, seeming to grow each year as negotiations drag on with few apparent reform successes. The top reform issues include:

1. *Market-distorting government support channelled through state-owned enterprises*: SOEs continue to be decisive economic actors in many economies. Supports grants by SOEs are currently only captured in narrow circumstances under the concept of 'public body' under the WTO Subsidies and Countervailing Measures ('SCM') Agreement.

2. *Developed/developing country distinctions*: any country may declare itself as a developing country, thus entitling it to all special and differential treatment afforded to developing countries under WTO Agreements and any new preferential treatment subsequently negotiated. A number of significant Asia-Pacific countries continue to identify as developing, such as China and India.

3. *Notification and transparency*: many WTO members remain frustrated by the lack of proper notification and transparency of potentially trade distorting domestic measures. Without proper notification of domestic measures, members are unable to determine if WTO rules are being respected. As a case in point, since 2011 the US has made nearly 500 counter-notifications under the SCM Agreement regarding apparent Chinese subsidy programs covering a wide range of industrial and consumer products from steel to fish to textiles. A further 90 WTO members have made no subsidy notifications whatsoever.

4. *Blockage of Appellate Body appointments by the US*: for the past year, the US has continued to block the appointment of new members to the WTO Appellate Body, arguing that the Body's rulings have impermissibly created new obligations not present in the text of the WTO agreements. Appointments are made on consensus giving the US (and any other country) veto power. By December 2019 there will be fewer than three members left, the minimum required for the Body to hear appeals.

However, reform efforts are underway. In September, Canada convened a meeting of reform-minded WTO members in Geneva to begin discussions on reform issues, while the EU released a concept paper proposing its solutions to key reform issues. The Geneva meeting was followed by a Ministerial in October that included key Asia-Pacific partners Australia, Chile, Japan, South Korea, Mexico, New Zealand and Singapore, as well as Brazil, the EU, Kenya, Norway and Switzerland. Notably, the US and China were not invited to participate. The 13-member joint communique highlighted each of the four issues noted above, acknowledging that the current situation is unsustainable and committing to reform. The coalition of reformers plans to meet again in December 2019.

ASEAN Trade Reform

ASEAN is seeking trading opportunities around the globe to combat protectionist measures in the West. It is focused on updating its trade relationships with current trading partners and expanding its trade network around the globe. ASEAN currently has five free trade agreements in place and negotiations are almost complete in the RCEP.

RCEP is a proposed FTA with Australia, China, Japan, India, South Korea and New Zealand. This agreement will be the first FTA to connect India and China. The RCEP will likely be signed in 2019 when elections in Indonesia, Thailand and India push negotiations to their conclusion.

ASEAN entered into its first FTA with China (2002), followed by framework agreements with India and Japan (2003), Korea (2004) and finally its first multi-

country FTA with Australia and New Zealand, which entered into force between 2010 and 2012 ('AANZFTA'). The AANZFTA is subject to a general review every five years. The last review occurred in 2017 and targeted rules of origin, customs procedures, services, investment, e-commerce, competition (consumer protection) and government procurement. Trade officials are tasked with implementing recommendations to the targeted area in the first six months of 2019.

In 2017, ASEAN commenced exploratory discussions with Canada to examine the potential for a Canada-ASEAN FTA. In 2018, Canada launched a consultation for comprehensive trade negotiations with ASEAN. Canada wants to determine how to proceed with an ASEAN FTA and how to best improve market access and legal certainty and transparency.

CPTPP Comes Into Force on 30 December 2018

After the US withdrawal from the Trans-Pacific Partnership in 2017, the remaining 11 signatories undertook a process to ensure the agreement would continue. Those negotiations led to the conclusion of a new agreement, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ('CPTPP'), which was signed by the 11 states in Santiago, Chile in March 2018.

The CPTPP enters into force on 30 December 2018 following the ratification by six of its 11 signatories: Australia, Canada, Japan, Mexico, New Zealand and Singapore. On 25 October 2018, Canada's CPTPP implementing legislation, An Act to implement the Comprehensive and Progressive Agreement for Trans-Pacific Partnership between Canada, Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam, received royal assent. International Trade Diversification Minister Jim Carr notified the CPTPP depositary that Canada completed its ratification procedures; Australia followed on 31 October 2018, becoming the sixth signatory to ratify, which paved the way for the CPTPP to enter into force 60 days later.

Vietnam became the seventh signatory to ratify the CPTPP on 14 November 2018, meaning it too becomes a state party on 30 December 2018. The CPTPP will enter into force for the remaining signatories—Brunei, Chile, Malaysia and Peru—once those states ratify the agreement.

With the agreement entering into force on 30 December 2018, state parties will benefit from an accelerated tariff-reduction timeline: the first round of tariff reductions will take place upon the CPTPP entering into force, while the 'Year 2' tariff reductions will occur on 1 January of the second year in which the agreement is in force, which is two days later on 1 January 2019. The only exception to this is Japan, whose Year 2 and all subsequent scheduled tariff reductions, come into effect each 1 April.

Not all provisions of the CPTPP will enter into force on 30 December 2018. The agreement concluding the CPTPP included an annex that suspended the entry into force of certain TPP provisions until a point that the CPTPP parties choose to end that suspension. Suspended provisions extend across the CPTPP chapters and include:

- express shipments in the Customs Administration and Trade Facilitation chapter;
- coverage in the investment chapter and the availability to bring an arbitration claim in relation to investment agreements and investment authorisations;
- the incorporation of the minimum standard of treatment into the Financial Services chapter; and
- various other provisions, including in relation to telecommunications, government procurement and intellectual property.

While the CPTPP currently has 11 signatories, several other states have expressed interest in potentially joining the pact, including Colombia, South Korea, Taiwan and Thailand. Reports have also circulated that the UK is exploring the possibility of joining the agreement, a move supported by Japanese Prime Minister Shinzo Abe.

Based on its current make-up of 11 states, the CPTPP trading bloc has a population of 495 million and a combined GDP of CA$13.5 trillion.

Developing Trade and Investment Issues in the Asia-Pacific Region

China's Belt and Road Initiative, which as of October 2017 is written into the Chinese Community Party Constitution, continues advancing as states and institutions around the world monitor its development. The scope of the Belt and Road Initiative is so broad, and its ambition so large, that questions about whether or not it can secure the needed funding are still being raised five years into its official mandate. This is in addition to some immediate practical challenges discussed below.

At present it remains difficult to measure whether the Belt and Road Initiative is improving trade along its corridor. The first wave of projects are still mostly under construction. These projects include new infrastructure networks and facilities (ports, roads, etc.) that are meant to lessen physical barriers to trade. While the physical infrastructure continues to be built, China is laying the foundation to clear goods across borders more easily. In January 2018, China released a 'Belt and Road Customs Clearance Co-operation Action Plan (2018–2020)'. The action plan is aimed at facilitating customs coordination between Belt and Road Initiative countries, including establishing an information exchange and sharing platform for participating customs authorities.

Despite construction progress, challenges to investments have emerged among some of the recipient states. Most notably, in July 2018 Malaysia's new government placed US$22 billion worth of projects on hold. The Government's concerns centred on the terms of the contracts, which critics said were not negotiated or agreed to in a transparent manner. The new government also took issue with requirements to use Chinese labour, which it claimed diminished the benefit to the local economy. In another instance, Kenya Railways announced an investigation into the treatment of Kenyan employees during the construction of a Chinese-funded Mombasa-Nairobi rail line. In Pakistan, there is concern that China's investments in the city of Gwadar, an isolated outpost from an economic perspective, may be more about Chinese military ambitions than economic ones.

Concerns also exist over the amount of debt being incurred by states receiving Chinese investment through Belt and Road Initiative projects. Forty percent of Myanmar's external debt is to China and Sri Lanka, which was facing the prospect of US$11 billion per year in interest payments to China, chose to negotiate a debt-for-equity deal granting control over the Hambantota port to a Chinese company as a result of its debt commitments.

These early experiences with the Belt and Road Initiative suggest that recipients of investment may begin to see that that investment comes with more strings attached than originally thought, prompting some to suggest that the cost/benefit analysis for some Belt and Road projects needs to be recalibrated.

Conclusion

While global uncertainty has been a theme of the past year, positive developments like the coming into force of the CPTPP, nearing the end of negotiations on RCEP and the release of the USMCA text will mean opportunities for increased trade in the Asia-Pacific region. Global trade disputes will likely continue to intensify, placing increased pressure on WTO members and other international coalitions to successfully implement reform measures to ensure the global rules-based trade order remains relevant and effective.

Notes

[1] EEC membership includes Armenia, Belarus, Kazakhstan, the Kyrgyz Republic and the Russian Federation. Note that Belarus is not a member of the WTO.
[2] Arab States of the Gulf membership includes Bahrain, Iraq, Kuwait, Oman, Qatar, Saudi Arabia and the UAE.
[3] India — Certain Measures on Imports of Iron and Steel Products (DS518).

Jesse Goldman
Partner, Borden, Ladner, Gervais LLP

Jesse Goldman practises in the areas of international trade, investment, customs and commodity taxation. He advises clients on all matters relating to Canadian and international trade law, including trade remedies, NAFTA and WTO matters, customs compliance, cross-border commodity tax, and regulatory issues.

Investing in America Just Got Tougher

Since the mid-1980s, the United States government has systematically reviewed and sometimes rejected inbound investment transactions which may pose a threat to US national security interests. The US Congress recently passed the Foreign Investment Risk Review Modernization Act of 2018 ('FIRRMA'). This article explains why, because of FIRRMA, the US government review process and criteria will become a bigger challenge in the future for non-US investors.

Introduction

Things just got tougher for those interested in investing in America. Why? The Foreign Investment Risk Review Modernization Act of 2018 ('FIRRMA') was signed into law on 13 August 2018, with the full support of the Trump Administration. FIRRMA promises to make foreign investments in the United States far more challenging than before. This article explains what to expect as a result.

Background

It is hard to recall a time when the prospects for foreign direct investment in the United States has been a hotter topic. As many countries around the world are facing lower rates of economic growth, the US economy is growing faster than it has for decades. No one knows if this is a temporary aberration or a long-term trend. Nevertheless, a booming economy has sparked worldwide interest in investment opportunities in America.

At the same time, the Trump Administration is aggressively imposing high tariffs on China and other traditional trading partners of the United States in the Western Hemisphere and throughout Europe. These tariffs, along with ongoing threats of more tariffs from the Trump Administration, worry many who fear escalating trade wars over the next several years. No one really knows for certain whether trade wars are inevitable, but the anxiety is palpable.

Because of these two developments, America now finds itself a preferred destination for foreign investors. Some of these investors are seeking to take advantage of opportunities in the rapidly growing US economy; others see investing in the US as a way to circumvent tariffs and other imposed trade barriers.

The Exon-Florio Act, the Foreign Investment and National Security Act and the Committee on Foreign Investment in the United States

Prior to the passage of FIRRMA in August 2018, there were three key laws and regulations which foreign investors needed to understand and comply with:

1. the Exon Florio Act of 1988;
2. the Foreign Investment and National Security Act; and
3. the activities of the Committee on Foreign Investment in the United States.

The Exon-Florio Act of 1988

The Exon-Florio Act of 1988 ('Exon-Florio') was enacted in the mid-1980s in response to growing fears in the US Congress concerning acquisitions of significant American businesses and real estate by Japanese multinationals and other foreign companies. To put it simply, Exon-Florio allows the President to halt a proposed purchase or reverse a completed transaction between an American entity and a foreign investor if: (1) credible evidence exists that the transaction would negatively impact US national security; and (2) there are no steps the President can recommend to minimise those effects. As a result of Exon-Florio, foreign investors must analyse in advance the potential national security implications of any proposed project in the US before making a public announcement.

The Foreign Investment and National Security Act

Exon-Florio was significantly strengthened following the 11 September 2001 terrorist attacks on New York City and Washington, D.C. The Foreign Investment and National Security Act ('FINSA') imposed more comprehensive scrutiny on all kinds of foreign direct investment ('FDI') in the United States. Under FINSA, FDI transactions involving 'critical infrastructure' in the US were to receive rigorous governmental review. For example, the 2006 purchase by Dubai Ports World ('DP World') of British-owned Peninsular and Oriental Steam Navigation Company gave DP World control over many key ports in the US, including Philadelphia, Miami, New Orleans, New York, Newark and Baltimore. The task for regulators was to decide whether permitting foreign companies to control American ports posed such a national security risk that the US government should intercede to block the deal.

FINSA obligates the US government's Executive Branch to report to the US Congress if and how national security interests may be harmed by FDI transactions. When a possible transaction involves a legal entity controlled or owned by a foreign government, FINSA mandates a formal examination of the proposed deal. Beginning with Exon-Florio and continuing through to the present day, the Committee on Foreign Investment in the United States is the arm of the US government charged with conducting such reviews.

The Committee on Foreign Investment in the United States

The Committee on Foreign Investment in the United States ('CFIUS') is a high-level US government inter-agency task force which has the authority to oversee

FINSA obligates the US government's Executive Branch to report to the US Congress if and how national security interests may be harmed by FDI transactions

proposed foreign investments in the United States. CFIUS is composed of official representatives from the Departments of Homeland Security, Justice, Defense, Treasury, Commerce, State and Energy, along with members of the Office of US Trade Representatives and the Office of Science & Technology Policy. CFIUS monitors transactions both large and small that have the potential to impact national security interests. Through the President, CFIUS has the power to approve or disapprove a proposed FDI transaction or even reverse a completed deal if it is found to be contrary to US policy or critical to national security.

The CFIUS Review Process

The legal standard CFIUS applies to proposed transactions involves (1) a foreign entity that is (2) possibly acquiring control of an American business that (3) possesses products, services or intellectual property that are (4) important to US national security or critical to US infrastructure. The definition of a foreign entity is 'any foreign national, foreign government, foreign entity, or any other entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity'. It is important to note that CFIUS only reviews transactions involving *existing* businesses. It does not apply to Greenfield investments where a foreign party is starting a business from the ground up. However, the definitions of 'national security' and 'critical infrastructure' are not well defined and are extremely broad and subjective.

When considering an investment in the United States, and knowing a CFIUS review is part of the process, foreign investors choose between two options:

Option One: Advance Notice to CFIUS. The foreign investor agrees to submit to CFIUS in advance the details of its intention to make a particular FDI in the United States. The foreign investor at this time discloses to CFIUS the nature, purpose, scope and expected closing date of the transaction. The assets to be acquired must be adequately described and the investor must disclose information about itself, including a description of its business activities and any ties to foreign government agencies.

Option Two: No Advance Notice to CFIUS. If a foreign government is not directly involved, a foreign investor can decide to proceed without advising CFIUS in advance. The risk of choosing this option is the possibility that CFIUS will later review and reject the deal after it is complete; there is no time limitation on CFIUS' ability to review a concluded transaction.

Before a transaction closes, however, there is a specific timeframe within which CFIUS must act. The vast majority of transactions for which CFIUS is given advance notice for review are cleared within 30 days[1]. If the proposed transaction clears, it has 'safe harbor' protection, meaning the CFIUS decision is final and cannot be reversed (unless, of course, the investor misrepresented information or

acted fraudulently). Once a proposed FDI project is sent to the President, the President has 15 days to review the transaction and reach a final decision. Presidential decisions are not subject to judicial review.

When CFIUS determines that a proposed FDI transaction will result in foreign ownership or control of an American business that will have negative national security implications, the foreign investor can request the opportunity to work with the US government to complete the transaction to the mutual satisfaction of both parties. If successful, CFIUS and the parties execute a 'mitigation agreement' outlining the changes necessary to satisfy any concerns regarding national security. CFIUS frequently requires mitigation agreements in the form of board resolutions, security control agreements, special security agreements, proxy agreements, and/or voting trust agreements. Once a mitigation agreement is approved and the transaction is completed, CFIUS has the authority to continue monitoring ongoing compliance with the agreement.

On 13 August 2018, President Trump signed into law the Foreign Investment Risk Review Modernization Act of 2018

Recent Examples of CFIUS and FDI

In the closing days of the Obama Administration, CFIUS ruled against a proposed merger by Royal Philips NV (the Dutch electronics giant) as it tried to sell a controlling stake in its automotive and LED business to GO Scale Capital, an investment fund owned by Oak Investment Partners and GSR Ventures of China. CFIUS reviewed the transaction and did not approve the deal. As a result, Philips cancelled the proposed sale. In December 2016, Philips announced it would sell the same unit to a non-Chinese entity for less than half the amount of the earlier deal.

The Texas-based company MoneyGram International Inc is another example. When Ant Financial, a Chinese electronic payments company, expressed its desire to purchase MoneyGram, the Trump Administration through CFIUS objected to China's acquisition of American know-how in the emerging field of electronic payments. Ant Financial is owned by one of China's most famous businessmen, Jack Ma, who is the Executive Chairman of Alibaba Group. CFIUS determined this acquisition could potentially harm America's national interests and refused to approve the deal.

In September 2017, President Trump issued an Executive Order blocking the purchase of Lattice Semiconductor Corp for US$1.3 billion. The intended purchaser was a Chinese-backed private equity firm by the name of Canyon Bridge Capital Partners, Inc. This was the second potential Chinese acquisition in the US semiconductor industry halted during President Trump's term.

Finally, a very large scale CFIUS decision received global media attention when President Trump ordered the end of takeover talks between Qualcomm and Broadcom. Qualcomm and Broadcom of Singapore were rival chip makers and Broadcom wanted to acquire Qualcomm. CFIUS intervened in the discussions at an early stage and its ultimate rejection prevented the deal from going forward.

The Foreign Investment Risk Review Modernization Act

Purpose

On 13 August 2018, President Trump signed into law the Foreign Investment Risk Review Modernization Act of 2018 ('FIRRMA'), which significantly expands the role CFIUS will play when reviewing foreign investments in the United States in the future. A primary focus of this new law is to prevent the theft of trade secrets and intellectual property of American companies as well as keep foreign companies from investing in or purchasing assets near US military bases. FIRRMA strengthens and expands the CFIUS review process and will likely make it more difficult for foreign companies to successfully invest in the United States if US national security interests are potentially at risk.

Implications of FIRRMA

With FIRRMA now signed into law, the hurdles facing foreign investors just got higher. As with all new laws, the act of implementation requires the drafting of rules and regulations, which will take at least six months to a year. For this reason, it is not possible to specifically outline all the ways FIRRMA will impact FDI in the United States. However, there are clear signs of what to expect.

Point One: Before the passage of FIRRMA, and unless the acquirer was a foreign government or government-controlled entity, CFIUS review was voluntary. It was up to the investor to decide whether or not to file for CFIUS

review depending on the transaction. However, FIRRMA, as it amends CFIUS, requires 'mandatory declarations' when a foreign person or government has a 'substantial interest' in an American business. This means we can expect a large uptick in filings with CFIUS as the scope of what it regulates has expanded.

Point Two: CFIUS in the past focused solely on FDI that might potentially have 'control' over sensitive assets in the United States. Now under FIRRMA, if an asset involves critical technologies or infrastructures crucial to US national security, then you should expect CFIUS oversight and interest, even though the foreign investor may not fully control the asset. This change will encourage more filings by foreign investors who will demand certainty prior to closing a deal that it will not be later challenged by the US government.

Point Three: Real estate acquisitions will come under the purview of CFIUS and FIRRMA when a foreign investor attempts to buy or lease real estate in the United States which is in close proximity to an airport, seaport or US military facility. This restriction will not, however, apply to a single housing unit purchase.

Point Four: The Trump Administration and some in the US Congress are concerned about the impact of Chinese investors who are purchasing American assets and technology companies. Congress feels it is vital to more closely track these investments. FIRRMA requires two years after it takes effect that the Secretary of Commerce submit reports to the US Congress on investments in America by Chinese entities. These reports will contain wide-ranging data on the size of Chinese investments, the companies and technologies targeted by Chinese investors and the effects on the US economy.

Point Five: One surprising aspect of expanding the scope of CFIUS review relates to the protection of personal information of US individuals. Now that the EU's *General Data Protection Regulation* ('GDPR') is gaining worldwide attention, safeguarding the confidentiality of individual information has become a big issue in the United States. CFIUS is given the authority to closely examine transactions where the American target asset is entrusted with personal data of US citizens. This will have a direct impact on US companies engaged in the healthcare and financial industries, both of which deal with significant amounts of personal data.

Point Six: Aside from an increased number of filings, the timeline for initial CFIUS review of a proposed transaction is extended from 30 to 45 days, and you can likewise expect the Presidential review period to expand to longer than 15 days. Also, the CFIUS filing fees will be significantly higher than in the past. Under FIRRMA there is a US$300,000 maximum. While for larger transactions this higher fee may not be a major concern, it will certainly affect smaller deals.

Conclusion

The role of CFIUS in the review of FDI transactions in the United States has been strengthened and expanded by FIRRMA. It is now a permanent and required step for investors. While it may be January 2019 or later before the new regulations of FIRRMA are approved and in place, the CFIUS review process has already become more complex and costly. The best advice for any foreign investor considering an investment in America is to be aware of CFIUS early in the process so as to minimise prolonged and expensive bureaucratic delays.

Notes

[1] With the recent passage of FIRRMA, the previous 30-day timeframe for CFIUS review has been extended to 45 days.

Denis Unkovic
Partner, Meyer, Unkovic & Scott LLP

Dennis Unkovic is a twenty-year IPBA member with Meyer, Unkovic & Scott LLP in Pittsburgh, Pennsylvania, USA. He has extensive experience in handling M&A deals and a broad range of inbound and outbound foreign investment transactions. His most recent book *Asia Ascending* was published in October 2018.

Chinese Investment in the West: A Threat, Opportunity or a Must?

There is a noticeable increase in debate among western scholars and business communities regarding China's increasing influence in the West and global South. With the Trump Administration's focus on strict enforcement of US trade laws against China, and a growing trend among western nations' hardening of their use of national security justifications as a litmus test for Chinese investments, questions have arisen: how ought the West engage with China? Ngosong Fonkem and Mirella Lechna aim to contribute to the ongoing debate, namely that China's increasing influence in the West need not be viewed as a threat, but rather an opportunity for the West to self-reflect and develop a coherent strategy to meaningfully engage with it.

Introduction

At the recent 2018 Inter-Pacific Bar Association Annual Meeting and Conference in Manila, a Brazilian trade lawyer, Ronaldo Veirano, commented during a panel session entitled 'Chinese Investment in the Western Hemisphere' that 'when China invests in the West, it has its policy, strategy, and plan. However, receiving states simply do not know what they want from China'.[1]

Veirano's statements echo the ongoing sentiments in most western capitals regarding China's increasing influence in the West, specifically its implementation of a series of state-run strategic industrial initiatives[2] that aim to provide alternatives to western influence around the world[3] and increase discussions among western scholars regarding whether or not China's rapid rise may lead to what these scholars call the 'Thucydides' trap'.[4] With the Trump Administration's focus on strict enforcement of US trade laws against China,[5] and with the growing trend among western nations' hardening of their use of national security justifications as a litmus test for Chinese investments,[6] the debate has reanimated; that is, how ought the West engage with China? Should the objective be to balance its bilateral trade or seek something akin to structural reforms of the Chinese economy, or something else? Considering these facts, this article aims to contribute to the ongoing dialog, namely that China's increasing assertiveness in the West need not be viewed as a threat, but rather as an opportunity for the West to self-reflect and develop a coherent strategy to meaningfully engage with China.

Historical Perspective: Planned Versus Unplanned Economies

The starting point in this analysis begins with the structures that gave rise to the current tensions between western nations and China. About half a century ago, the argument among economics scholars centred on contrasting communist planned economies under a one-party rule as in China and the then Soviet Union, and unplanned economies under a free and democratic system like the United States and Western European nations.[7] However, in recent years a hybrid system under one-party rule has emerged in China as it has embraced capitalist policies,[8] culminating in its accession to the World Trade Organization ('WTO') in 2001. These economic reforms have produced economic successes that have propelled China from a poor, mostly agrarian nation to the second largest economy in the world, based on GDP growth as of 2018. Furthermore, if this trend continues, China's economy will overtake the United States' economy by 2029.[9]

As a result of this rapid economic growth, China has steadily expanded its influence around the world, courting nations in the East, West and global South with enticing economic packages and infrastructure projects[10] through development programs like its Belt and Road Initiative ('BRI').[11] This increased assertiveness has further been boosted in part by the United States pulling out of international agreements like the Trans-Pacific Partnership ('TPP') in 2017 and its increasingly inward policy focus, creating an opportunity for China to fill the global leadership void.

EU Protects Sectors of Strategic Importance and Requests Reciprocity

Chinese investment is not only limited to its state-led infrastructure programs like its BRI, but also its state-owned enterprises ('SoEs'). While the US has regulations such as the Committee on Foreign Investment in the United States ('CFIUS') that regulate foreign investment in critical sectors in the US, no equivalent barrier exists in the European Union ('EU') as one of its core fundamental principles is freedom of investment. In the last two years, many European nations have enacted legislation that provide EU countries with the authorities to monitor and scrutinise foreign investments in crucial industries on public order and safety grounds.[12] Although these legislations restrict foreign capital, they do not distinguish between the national origin of the investor. As a result, EU and Chinese capital are scrutinised in the same manner. The European Parliament recently proposed legislation that specifically restricts foreign investments from outside the EU in strategic sectors: power, transportation, and telecommunications.[13] This initiative arose out of the realities that while non-EU-based companies have full freedoms to invest in the EU single market, and at times even receive state aid from EU member states, EU-based firms do not have the same level of market access in third countries. This considerably limits their investment options. Specifically regarding the Sino-European relationship, because EU-based contractors are restricted in China, the European Commission has demanded reciprocal access based on principles outlined in both the EU-China investment treaty, which has been under negotiation since 2013[14] and the Government Procurement Agreement ('GPA'), which China has been negotiating accession to it for over a decade.[15] These new EU legislations aim to

effectively level the playing field by remedying this observed imbalance.

Trump Tariffs, Sanctions and Other Trade Action

Whereas the EU has sought to counter China's influence through domestic legislation, the US under the Trump Administration, on the other hand, appears to have engaged China through a series of trade actions.[16] Based on a series of decisions taken since coming into office, the US's foreign policy strategy under the Trump Administration can be reasonably described as both unpredictable and contradictory. As a result, it is reasonable to view the US's imposition of trade actions against China as random reactions rather than part of a concerted foreign policy strategy. Although, these recent trade actions, based on some senior US officials' statements, appear to be a subtle and selective approach to counter China's economic challenge,[17] they do not signal a grand concerted strategy against China for many reasons. First, in addition to China, punitive tariffs and threats have been directed against other United States trading partners.[18] Second, Trump's unilateral rejection of the Paris Climate Change Accord, pulling out of the Iran nuclear deal and the United Nations Human Rights Council, issuing of threats to sanction International Criminal Court judges and personal attacks on foreign leaders who have traditionally been staunch allies, have fostered a perception that the US is indifferent to vital western interests and have led these leaders to begin reshaping alliances, bypassing the United States.[19] Based on these facts, it appears that the US recent actions have alienated many allies, many of whom are needed to collaborate strategically to engage with China as these trading partners are not only top destinations for Chinese exports,[20] but also share common interests with the US.[21]

The scale of Chinese investments in the West will undoubtedly increase as programs such as its Belt and Road Initiative ('BRI') mature

How Ought the West Engage With China?

There is indeed a noticeable approach to investments between China and Western countries. Chinese-based firms have specific goals, plans and are disciplined in their pursuit of those objectives. On the other hand, it appears that the US does not have a strategic plan on how to engage with China and Europe is yet to guarantee European businesses access to the Chinese market. It follows that the West needs to develop a coherent and concerted strategy to meaningfully engage with China. That strategy should be based on its common shared interests.

Some of the common interests shared by western nations, which form the fundamental building blocks of their economic systems and that have enabled them to achieve extended periods of economic success, are adherence to a set of rule-based principles that are enshrined in the United Nations Charter.[22] Foremost among these principles are rules, norms and institutions that encourage cooperation and peaceful resolution of conflicts. At a time when the assumptions holding these principles are strained, facilitated by factors such as the emergence of the China Model, it is crucial that the West in conjunction with its allies, all of whom share these common interests, work in concert to uphold the rules-based system by continuously taking those actions that reaffirm the importance of these principles as it manages emerging realities. This solution is not new: it was first proposed in a 2015 Chatham House paper that identified three interconnected problems that need to be fixed for the system to survive given its current challenges. Specifically, the paper argued that 'for a system based on rules to be effective, these rules must be visibly observed by their principal and most powerful advocates'.[23] Thus, instead of the US, the West's chief advocate, pursuing a strategy predicated on unilateral tariffs and other trade actions, systemic legal solutions are needed. These legal solutions should be based on mechanisms and institutions built into the system such as the World Trade Organization ('WTO') and other rule-based institutions.

The scale of Chinese investments in the West will undoubtedly increase as programs such as its Belt and Road Initiative ('BRI') mature, and China is not likely to reverse course as its state-led programs are structural and appear to be successful. However, collective action based on reciprocity and rule-based principles is needed to reinforce the West's continuous belief in the system.

Notes

[1] https://ipba.org/events-calendar/ipba-annual-meeting-conference/11/332/ipba-annual-meeting-and-conference-in-manila-2018.html.

[2] Ting Shi, 'Xi Plans to Turn China Into a Leading Global Power by 2050', Bloomberg (17 October 2017), available at https://www.bloomberg.com/news/articles/2017-10-17/xi-to-put-his-stamp-on-chinese-history-at-congress-party-opening.
[3] 'China Has a Vastly Ambitious Plan to Connect the World', Economist (July 2018), available at https://www.economist.com/briefing/2018/07/26/china-has-a-vastly-ambitious-plan-to-connect-the-world; Council on Foreign Relations, 'Is 'Made in China 2025' a Threat to Global Trade?' (August 2018), available at https://www.cfr.org/backgrounder/made-china-2025-threat-global-trade.
[4] 'The Thucydides trap', a term coined by an American political scientist, Graham T Allison in his book, Destined for War: Can America and China Escape Thucydides's Trap? and named after the fifth century Athenian historian Thucydides, is the idea that the rise of a new power as a competitor to an existing superpower is likely to lead to the escalation of political tensions and war. Allison based his conclusion on the study of 15 historical cases since 1500 in which the dominance of an established power was challenged by a rising new power—war resulted in 11 of the 15 cases as the rising power caused fear in the ranks of the established power.
[5] A Ana Swanson, 'Trump Administration Goes after China Over Intellectual Property, Advanced Technology.', The Washington Post (2017), available at https://www.washingtonpost.com/news/wonk/wp/2017/08/14/trump-administration-goes-after-china-over-intellectual-property-advanced-technology/?utm_term=.60e765cbf8a9.
[6] Liz Aldeman, 'Its Eye on China, Britain Pushes Back on Foreign Takeovers, available at https://www.nytimes.com/2018/07/24/business/uk-china-takeovers-national-security.html; and see Janosch Deckler and Florian Eder, 'Gloves Off in Fight for German Finance Ministry', available at https://www.politico.eu/article/germany-finance-minister-gloves-off-in-fight/.
[7] In its simplest form, a planned economy is a system where the governments and not private enterprises manage the country's economy. Specifically, the government central planners determine what goods and services will be produced, the amount of goods and services produced and at what cost to the consumer. On the other hand, unplanned economies stem from direct democracies where government is important but largely takes a limited approach to commerce, allowing companies to make their own decisions on how to best handle their businesses.
[8] Joshua Kurlantzick, 'Why the "China Model"' Isn't Going Away', The Atlantic (21 March 2013), available at https://www.theatlantic.com/china/archive/2013/03/why-the-china-model-isnt-going-away/274237/. The 'China model' is shorthand for economic liberalisation without political liberalisation. Its builds on earlier, state-centred Asian models of development such as in South Korea and Taiwan, while taking uniquely Chinese steps designed to ensure that the Communist Party remains central to economic and political policy-making. Further, China has created highly favourable environments for foreign investment but maintains a high degree of control over the economy, ensuring that the government controls strategic industries, picks corporate winners, determines investments by state funds and pushes the banking sector to support national champion firms. In short, the China model sees commerce as a means to promote national interests.
[9] Malcolm Scott and Cedric Sam. 'Here's How Fast China's Economy Is Catching Up to the U.S.', Bloomberg (updated 2018), available at https://www.bloomberg.com/graphics/2016-us-vs-china-economy/.
[10] 'China Has a Vastly Ambitious Plan to Connect the World The Economist (July 2018), available at https://www.economist.com/briefing/2018/07/26/china-has-a-vastly-ambitious-plan-to-connect-the-world.
[11] On March 2015, the Chinese government issued the Vision and Action on Jointly Building Silk Road Economic Belt and 21st Century Maritime Silk Road, which is an initiative aiming at strengthening exchanges and cooperation and drive the 'five connectivity (policy coordination, infrastructure connectivity, unimpeded trade, financial integration and people-to-people bond') among countries along the Belt and Road ('Belt and Road' Unimpeded Trade Senior Seminar 2018).
[12] See n 6 above.
[13] European Commision, 'State of the Union 2017 — Trade Package: European Commission Proposes Framework for Screening of Foreign Direct Investments' (14 September 2017), available at http://europa.eu/rapid/press-release_IP-17-3183_en.htm.
[14] http://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-eu-china-investment-agreement.
[15] https://www.amfori.org/sites/default/files/CEPS%20-%20EU-China%20agreement%20-%20Summary.pdf.
[16] 'Trump's Trade War Timeline: An Up-to-Date Guide', available at https://piie.com/blogs/trade-investment-policy-watch/trump-trade-war-china-date-guide
[17] Peter Navarro, 'Trump's Tarrifs are a Defense Against China's Aggression', WSJ (20 June 2018), available at https://www.wsj.com/articles/trumps-tariffs-are-a-defense-against-chinas-aggression-1529533046.
[18] Blanket steel and aluminum tariffs under Section 232 of the Tariff Act have also been levied against Japan, the European Union and Canada.
[19] France and Germany have reiterated calls for Europe to reduce its military and financial dependence on the US: see https://euobserver.com/foreign/142668. German foreign minister Heiko Maas argues that Europe should create 'payment channels that are independent of the United States' to shelter European companies from US sanctions and thereby prevent Washington from wrecking the Iran nuclear deal. Channeling the bitter trans-Atlantic debates over the Iraq War, he declared that Europe must 'form a counterweight when the U.S. crosses the line.' See https://www.reuters.com/article/us-iran-nuclear-germany/germany-urges-eu-payment-system-without-us-to-save-iran-deal-idUSKCN1L61KW.
[20] http://www.worldstopexports.com/chinas-top-import-partners/.
[21] In December 2017, the US, the EU and Japan had pledged to combat Chinese excess capacity in industries such as steel, as well as policies that force foreign companies to transfer valuable technology: see https://www.scmp.com/news/china/diplomacy-defence/article/2122506/us-ramps-pressure-china-rejecting-market-economy-status.
[22] http://www.un.org/en/sections/un-charter/un-charter-full-text/.
[23] The Royal Institute of International Affairs 2015, 'Challenges to the Rules-Based International Order', The London Conference (2015), available at https://www.chathamhouse.org/sites/default/files/London%20Conference%202015%20-%20Background%20Papers.pdf.

Ngosong Fonkem (JD.MBA. LLM.BA)

Senior Advisor, Addison-Clifton LLC

Ngosong Fonkem is Senior Advisor at Addison-Clifton LLC. He currently assists companies with day-to-day compliance with US trade laws and related audits, investigations and civil enforcement proceedings, and doing business in Asia. He is Vice-chair of the 'Next Generation' Committee of the IPBA. In 2018 he was nominated to serve as an industry sector advisor within the US Trade Representative's Industry Sector Technical Advisory Committee (ITAC) on 'Customs and Trade Facilitation'.

Mirella Lechna (LL.M.)

Partner, Wardyński i Wspólnicy sp.k.

Mirella Lechna is a partner at Wardyński & Partners, heading the Infrastructure, Transport and Public Procurement and Public-Private Partnership practices. She advises Asian clients on public procurement law, PPP transactions, FIDIC contracts, infrastructure and transport projects and environmental matters. She is also active in development and promotion of best practices as a member of the Public Procurement Council at Polish Confederation Lewiatan; and is founding member of the Polish Public Procurement Law Association.

Managing the Future of International Contracting—A Tool for All IPBA Lawyers

In this article, the author describes the UNIDROIT Principles of International Commercial Contracts (2016) as a modern tool for drafting and negotiating international contracts. They are particularly useful for contracts in Asia and/or in the context of the Belt and Road Initiative. They provide a robust system of default rules including compromises between civil and common law. The author has had positive experiences with the UNCITRAL recommended UNIDROIT Principles in his daily practice since 2001 and has found that they can reduce cost and risk exposure of clients.

Introduction

Based on over 15 years of experience with the UNIDROIT Principles of International Commercial Contracts and two years of writing an article-by-article commentary,[1] in this article the author will summarise the reasons why all IPBA lawyers should know about the UNIDROIT Principles as a tool for modern contracting.

Release of the Fourth Edition of the UNIDROIT Principles in 2017 Provided a Disruptive Tool for Lawyers Acting in a Global World

In May 2017, the Council of the intergovernmental organisation UNIDROIT– with 63 member states worldwide – published the fourth edition 2016 of the UNIDROIT Principles of International Commercial Contracts ('UNIDROIT Principles').[2] With this addition to the UNIDROIT Principles and the Official Comments on long-term contracts, the set of 211 principles contained in the UNIDROIT Principles is now complete. The future of international contracting has begun.

The United Nations Commission on International Trade Law ('UNCITRAL') has already endorsed the use of earlier versions of the UNIDROIT Principles twice, in 2007 and 2012, as 'appropriate, for their intended purpose'.[3] At the IPBA this development has gone unnoticed. We have not yet discussed the UNIDROIT Principles in any detail at our conferences, but it is worth concentrating on this

new instrument for international contract negotiations and drafting.

The UNIDROIT Principles have great power. They provide a quasi-disruptive tool to international contract making. They are disruptive because they require from lawyers, trained to think in national state law categories, to think out of their box. The UNIDROIT Principles are not state law, but rules of law which function nonetheless, reducing costs (by avoiding otherwise necessary diligent research of foreign state law) and reducing risks (of agreeing to a foreign state law).

This article will analyse why this is the case. It will first demonstrate the need of having such a neutral solution for contract drafting before demonstrating why the UNIDROIT Principles function in practice.

The Need for Having a Neutral Solution

Introduction: The Use of One's 'Own' Law Does Not Always Function

As a matter of human nature, many of us may think that the law which we studied—often for many years and by taking many exams—is best suited for the contracts of our clients. In a domestic context, this is true. Most companies have organised their businesses around the law of the jurisdictions in which they act. As we all know, matters become more complex when it comes to international trade or business. The UNIDROIT principles help to reduce the complexity of international contracting. It may not always be possible to reach an agreement with commercial co-contracting partners on the basis of our 'own' law. We need a 'Plan B', which is best served by a neutral legal regime.[4]

The Offer of the UNIDROIT Principles as a Neutral and Global Compromise

It is on such occasions as described above that the UNIDROIT Principles can step in. They constitute 'restatement'[5] of global commercial law, developed from thorough comparative legal research by several working groups over a period of circa 35 years since 1980.

A total of over 150 experts from all regions of the world have contributed to the principles, always led by Professor Michael Joachim Bonell (Italy) as chair of the working group. He began the project on the basis of experience obtained as part of the Italian delegation during the negotiations of the Convention on the International Sale of Goods ('CISG'), which to a large extent has served as a source of law to the UNIDROIT Principles for matters which are also covered by the CISG. Compared to the CISG, the UNIDROIT Principles cover more topics, namely the general contract law including, for example, general provisions, formation of contract and authority of agents, validity, interpretation, content, third party rights and conditions, performance and non-performance, set-off, assignment of rights, transfer of obligations, assignment of contracts, limitation periods and plurality of obligors and of obligees. Compared to national laws, the UNIDROIT Principles cover many subjects which national laws usually do not cover, for example, foreign-currency set-off or time zone management.

The author was witness to the making of the 2010 Edition for several years, as an official observer of the working group of UNIDROIT; work that shaped the UNIDROIT Principles. At the time the author participated for the Outer Space Committee of the International Bar Association ('IBA'). Usually, a professor of law would act as *rapporteur* for a chapter or a sub-chapter and present the results during one-week-long workshops at UNIDROIT in Rome where the results would be presented for discussion. Both the proposals for black letter rules and for illustrations in the official comments were discussed.[6] The *rapporteur*

would then take home the comments all documented in a verbatim protocol and continue researching and drafting. In addition, the drafting committee, as an inner circle, would meet in mid-year meetings, for example, at the Max Planck Institute for Comparative and Private International Law in Hamburg, Germany. As a result, an extremely high level of comparative legal quality could be reached. Often, the UNIDROIT Principles provide a real *restatement of the common ground* between the various law systems around the globe. Where such common ground could not be found, a decision was made after intense discussions; sometimes leaning in one direction or the other or constituting a compromise which bridges between common and civil law systems. On occasion, a new creative way, particularly appropriate for international contracts, was conceived. An example is the provisions on hardship which entitle to renegotiation in case of a fundamental change of the basis of the contract.

The Need for the UNIDROIT Principles in Asia and for the Belt and Road Initiative

With regard to Asian jurisdictions at the core of the global organisation IPBA, such common ground is important, as it provides compromises with negotiated default rules where otherwise common ground is lacking. This can be particularly helpful for contracts in the 'Belt and Road Initiative'[8] since Chinese contract law as of 1999 is based on the principle of risk allocation by spheres of the contracting parties, as can also be found in both the CISG and the UNIDROIT Principles, both having served as inspiration for the Chinese legislature.[9]

The Use of the UNIDROIT Principles Functions in Practice

International Contracts Within the Frame Set by Party Autonomy and Mandatory Law

When shaping international contracts, a lawyer always must cope with both the contractual regime (which it can determine to some extent) and mandatory law often calling for its application without respect of any contractual regime. It is within this frame that the contracting lawyer must navigate. In connection with the UNIDROIT Principles, it is worth noting three aspects as set out below.

(1) Party Autonomy as the Source for the Application of the UNIDROIT Principles.

The UNIDROIT Principles themselves become an expression of party autonomy if they are chosen by the parties based on the applicable private international law and/or arbitration regime which provides the rooting in a state law by permitting the choice of rules of law such as the UNIDROIT Principles. Most arbitration regimes will accept the choice of rules of law such as the UNIDROIT Principles. Sometimes the applicable private international law permits only to choose a state law; in these cases, it is possible to at least incorporate the UNIDROIT Principles by reference in to the contract, (see (3) below in detail).

(2) Using Party Autonomy to Adapt and Supplement the UNIDROIT Principles

In their rules, the UNIDROIT Principles repeatedly emphasise the principle of party autonomy. If your client wishes to regulate any given point in a certain way, it can be negotiated. The parties are free to alter and supplement the principles as long as this does not intervene with a universally accepted minimal standard of fair dealing and good faith.[10] In their contracts, the parties can allocate specific risks and/or agree on limitation of liability clauses. They can also adapt the starting point of the UNIDROIT Principles whereby each party is responsible for its own sphere, except for force majeure[11] or as otherwise provided by an exemption clause.[12]

(3) Limits of Mandatory Law

Pursuant to Article 1.4 of the UNIDROIT Principles, nothing in the Principles shall restrict the application of mandatory law.[13] The range of mandatory law will depend on the applicable private international law system. In combination with an arbitration clause and an arbitration regime accepting the choice of rules of law, the applicable mandatory state law will usually be limited to *'internationally' binding mandatory law*.

Some private international law regimes, as applicable before state courts (such as the private international law in the member states of the European Union) will accept, according to their letter, only 'state law' as the applicable contract regime. Yet, the consequences of such wording of private international law is limited. For commercial contracts, most laws around the globe do respect party autonomy. A choice of the UNIDROIT Principles clause are to be interpreted as an incorporation of the UNIDROIT Principles into the contract which is otherwise (and officially) governed by the state law. Due to such incorporation into the contract, this state law will give effect to the UNIDROIT Principles subject only to the limits of the mandatory state law, which, in this setting, will include *domestic mandatory law*. Therefore, from a company perspective, the furthest reaching reduction of applicable mandatory state law is obtained by combining a choice of UNIDROIT Principles clause with an arbitration clause. This combination has the further advantage, that the company can enjoy the advantages of arbitration, such as an increased level of confidentiality and the right to appoint an arbitrator (if so wished under the chosen arbitration regime) or to be able to shape the dispute settlement procedure itself.[14]

The value of the UNIDROIT Principles lies in the fair and balanced set of default rules

The UNIDROIT Principles Default Rules Reduce Risks and Costs

The value of the UNIDROIT Principles lies in the *fair and balanced set of default rules*. They cover all those issues on which the parties will have neither the time and the budget nor the resources to concentrate on, in an ordinary contract negotiation.[15] In a normal contract situation, there is usually not enough time to research all imaginable contractual aspects. This is true at least if one wishes to reduce a contract to an acceptable and manageable size and dimension. If the applicable law is the law, which one has studied for many years, one knows the rules which apply if ever a dispute arises including all the side issues not explicitly covered in the contract. If one must agree on a law from another state (that is, the jurisdiction of the contracting partner or a neutral law of a third country), a risk arises, as one will seldom invest the level of detailed research to discover and to assess all consequences. Even commercial clients, not trained in law, have a *duty to assess the risks* as a matter of due care in their business. Agreeing on a strange law without the proper research has nothing to do with risk assessment, it is rather like gambling.

In contrast, by agreeing on the UNIDROIT Principles, this risk is drastically reduced. To the extent that there is a common core between the different (civil and common) law systems, one can rely on the fact that such a common core will have been detected, found and restated in the UNIDROIT Principles. To the extent that there is no such common core, one can trust in the quality of comparative legal research in negotiating over the circa 30 years of the making of the UNIDROIT Principles. Thereby, it becomes essentially *less risky and more economic* to rely on the UNIDROIT Principles as opposed to agreeing on any so-called neutral state law.

Examples

The author personally first agreed on a choice of the UNIDROIT Principles in 2001 during an international multi-million arbitration in the satellite business in Switzerland in the context of an unclear choice of law clause.[16] He made the same experience again in 2017 in a Chinese-German arbitration.[17] The claim was based on the CISG and Chinese law. The German respondent proposed to apply the UNIDROIT Principles with regard to the rule in Article 35 of the Arbitration Rules of the Chinese European Arbitration Centre ('CEAC') in Hamburg which explicitly provides for the possibility to choose the UNIDROIT Principles.[18] The author's client accepted that offer to avoid the proof of Chinese law in an arbitration in Europe, in that case also with regard to the vicinity of Chinese civil law to the UNIDROIT Principles.

Over the years, the author has concluded contracts, both on behalf of common and civil law clients, in

various contexts: inter-Asian, Asian-African, European-Asian, European-European, European-Anguilla West Indies. For example, with the support of a Korean lawyer, he has used them once for a contract relating to the investment of a Philippine company in a Korean company or in contracts relating to worldwide distribution of products out of the Philippines. He has used the UNIDROIT Principles for both small and large contracts. In a multi-million defence contract, acting on behalf of the German contractor, his client offered sub-contracts either on the basis of German law or on the basis of the UNIDROIT Principles to over 80 sub-contractors from multiple jurisdictions, which worked out very well. The author has used the UNIDRIOT Principles in the context of trade, M&A, investment and cooperation agreements. They are manageable in combination with all kinds of laws. They are always neutral, and provide reliable default rules. The specifics are always subject to detailed contract stipulations. However, somehow it was only during the writing of the article-by-article commentary, virtually on a daily basis for roughly two years, that the author recognised the brilliance of this instrument in the depth and quality of the compromises which it attains for the issues covered in 211 Principles. Why not use that wisdom as the starting point for our clients, at least whenever we cannot succeed to impose our own state law? This is particularly helpful in Asia, where business often crosses borders between jurisdictions with civil or common law regimes.

Notes

[1] Brödermann, UNIDROIT Principles of International Commercial Contracts, An Article-by-Article Commentary (2018, Wolters Kluwer), 433 pages (''UNIDROIT Principles Commentary'').

[2] See the Unidroit Principles overview, available at www.unidroit.org/unidroit-principles-2016/unidroit-principles-2016-over, including 'Official Comments' which supplement the black-letter rules.

[3] Vogenauer/Michaels Preamble I no 120 (with a full citation of the UN instrument in note 346); Brödermann, UNIDROIT Principles Commentary, n 1 above, Introduction, no 2, p 1.

[4] On some occasions, the UNIDROIT Principles may even be better than our own law. Thus, the author is using the UNIDROIT Principles for all contracts with foreign clients even if it was possible to impose German law as a German lawyer engaged by a foreign client. The reasons for so acting are detailed and go beyond the scope of this article. However, see Brödermann, UNIDROIT Principles Commentary, n 1 above, Art 1.4, no 4, pp 25–26.

[5] Bonell, 'The Law Governing International Commercial Contracts: Hard Law vs Soft Law, A Hague Lecture 2017', to be published in the Hague Academy Collected Courses (2018), edited by the Hague Academy of International Law, at Section II; and Bonell, 'The Law Governing International Commercial Contracts and the Actual Role of the UNIDROIT Principles', Uniform Law Review, 2018, p. 15, 20 et seq.

[6] The Official Comments are available in English and French at the website www.unidroit.org.

[7] Brödermann, UNIDROIT Principles Commentary, n 1 above, Art 6.2.1, no 1, p 176 and following.

[8] Mo, Shijian, 'The UNIDROIT Principles of International Commercial Contracts in Chinese Judicial Practice', in Eppur si muove, The Age of Uniform Law–Essays in honour of Michael Joachim Bonell, to celebrate his 70th birthday, edited by UNIDROIT (2016), vol II, p 1542, 1553; Brödermann, UNIDROIT Principles Commentary, n 1 above, Introduction, no 4, p 2.

[9] Over the years, national laws have been inspired by previous versions of the UNIDROIT Principles, see e.g. Vogenauer/Michaels, Preamble I no 164 with reference to Zhang in note 546 arguing that 47.3% of the general part of Chinese contract law was influenced by the UNIDROIT Principles; Brödermann, UNIDROIT Principles Commentary, n 1 above, Introduction, no 19 at note 57, p 9.

[10] Brödermann, UNIDROIT Principles Commentary, n 1 above, Art 1.5, no 2, pp 27-28, Art 1.7, no 1-2, pp 30–31.

[11] UNIDROIT Principles, Art 7.1.7.

[12] Vogenauer/Mckendrick Art 7.4.1 no 6; Brödermann, UNIDROIT Principles Commentary, n 1 above, Art 7.1.6, no 2-3, p 197.

[13] Official Comments of UNIDROIT Principles, Art 1.4, no 1, p 11.

[14] It should be noted in this context that the different scope of mandatory law depending on whether an arbitration tribunal or a state court becomes competent will diminish as private international laws will be changing in the future. The model law created by the Hague Principles of International Law, (www.hcch.net/upload/wop/gap2014pd06rev_en.pdf) explicitly provide also for the possibility to choose rules of law such as the UNIDROIT Principles; Brödermann, UNIDROIT Principles Commentary, n 1 above, Preamble, no 4, p 14, no 6, p 15.

[15] E.g. the UNIDROIT Principles provide in Art 7.3.5 (1) a 'middle ground' for effects of termination, see Brödermann, UNIDROIT Principles Commentary, n 1 above, Art 7.3.5, no 1, pp 229–230.

[16] Brödermann, Unif Law Rev 2011, 589, 591–591; Brödermann, UNIDROIT Principles Commentary, n 1 above, Ch 7, Section 4, Introduction Remarks, no 2, pp 236–237.

[17] Brödermann, UNIDROIT Principles Commentary, n 1 above, Introduction, no 19, p 9.

[18] See www.ceac-arbitration.com and Brödermann, 'The Chinese European Arbitration Centre – An Introduction to the CEAC Hamburg Arbitration Rules', J. Int. Arb. (2013), pp 303–327.

Eckart Brödermann
Partner, Brödermann Jahn RA GmbH

Eckart Brödermann, Founding partner, Brödermann Jahn RA GmbH, Hamburg (Germany), Bar Approved Specialist for International Business Law (Hamburg), Arbitrator, Professor of Law at the University of Hamburg, LL.M. (Harvard), Maître en Droit (Paris V), Fellow of the Chartered Institute of Arbitrators, Attorney at Law (New York), Author of *UNIDROIT Principles of International Commercial Contracts, An Article-by-Article Commentary* (Wolters Kluwer, 2018)

IPBA New Members
September – November 2018

We are pleased to introduce our new IPBA members who joined our association from Septmember 2018 – November 2018. Please welcome them to our organisation and kindly introduce yourself at the next IPBA conference.

Canada, Kevin Keyes *Borden Ladner Gervais LLP*	**Germany**, Jürgen Hartung *Oppenhoff & Partner mbB*
Chile, Jose Antonio Cuadra *Villarroel, Lecaros, Aste y Baraona*	**India**, Sahil Kanuga *Nishith Desai Associates*
Chile, Felipe Hubner *UHC Abogados*	**India**, Ananya Kumar *J. Sagar Associates*
Chile, Filipe Larrain *Claro & Cia.*	**India**, Nitin Wadhwa *Wadhwa Law Offices*
China, Xiangyong Chen *Wang Jing & Co.*	**Italy**, Vittorio De Luca *De Luca & Partners*
China, Yi Dai *Wang Jing & Co.*	**Japan**, Mihiro Koeda *Nishimura & Asahi*
China, Guoson Fu *Guanddong Xiengyue Law Firm*	**Japan**, Takafumi Mise *Higashimachi, LPC*
China, Carlo Geremia *Nctm Sudio Legale*	**Japan,** Yusuke Takamiya *Mori Hamada & Matsumoto*
China, Yong Wang *Zhong Lun Law Firm*	**Japan**, Takahiko Yamada *Anderson Mori & Tomotsune*
Costa Rica, Mauricio Salas *BLP*	**Macau**, Eduardo Buisson Loureiro *AAM – Macau Lawyers Association*
Fiji, Emily King *Munro Leys*	**Netherlands**, Xian Kong *AKD N.V.*
Fiji, Theresa Sukhdeo-dabuli *Fiji Airways*	**New Zealand**, Anna Cho *Hesketh Henry*
France, Forrest Alogna *Darrois Villey Maillot Brochier*	**Philippines**, Bertrand Hans B. Cagayan *Romulo Mabanta Buenaventura Sayoc & De Los Angeles*
France, Céline Aymé-Wauthier *Darrois Villey Maillot Brochier*	**Philippines**, Kingjohn Ericson Malabanan Echiverri *First Ching Food Resource Corporation*
France, Immad Haouas *Blanchin Law Firm*	**Philippines**, Jay Masangcay *Masangcay Law Office*
French Polynesia, Leo Peuillot *Leo Peuillot*	**Russia**, Dmitry Afanasiev *Egorov Puginsky Afanasiev & Partners*

Russia, Victoria Burkovskaya *Egorov Puginsky Afanasiev & Partners*	**Taiwan**, Shaoteng (Charles) Chang *Chien Yeh Law Offices*
Russia, Dmitry Dyakin *Egorov Puginsky Afanasiev & Partners*	**Taiwan**, Yen Hsun (Justin) Chen *Chien Yeh Law Offices*
Russia, Oleg Leonov *Egorov Puginsky Afanasiev & Partners*	**Taiwan**, Pai Chiang Chu *Lee and Li, Attorneys-at-Law*
Russia, Anna Numerova *Egorov Puginsky Afanasiev & Partners*	**Ukraine**, Oksana Ilchenko *Egorov Puginsky Afanasiev & Partners*
Russia, Dmitry Ivanovich Stepanov *Egorov Puginsky Afanasiev & Partners*	**UK**, Philip Beer *Burges Salmon LLP*
Russia, Robin Wittering *Egorov Puginsky Afanasiev & Partners*	**UK**, Paul Hayes QC *39 Essex Chambers*
Russia, Vyacheslav Yugai *Egorov Puginsky Afanasiev & Partners*	**UK**, David Hopkins *39 Essex Chambers*
Russia, Ilona Zekely *Egorov Puginsky Afanasiev & Partners*	**UK**, *James Miller* *RPC LLP*
Saint Kitts & Nevis, Jennifer Harding-Marlin *JH Marlin*	**UK**, Leigh-Ann Mulcahy QC *Fountain Court Chambers*
Singapore, Akshay Kishore *CMS Cameron McKenna Nabarro Olswang (Singapore) LLP*	**USA**, Robert L. Brown *Lynch, Cox, Gilman & Goodman, P.S.C.*
Singapore, Gavin Margetson *Bryan Cave Leighton Paisner LLP*	**USA**, Santiago Gatica *Freshfields Bruckhaus Deringer US LLP*
Singapore, Boon Tat Yeo *Pinsent Masons MPillay LLP*	**USA**, Charles McMahon *McDermott Will & Emery*
Switzerland, Thomas Rohner *Pestalozzi*	**USA**, Richard Mosher *Dentons*
Switzerland, Niels Schindler *DGE Partners*	**USA**, Cody Wood *Dentons US LLP*
Thailand, Anthony Hoglund *Amadeus Asia Ltd.*	**Vietnam**, Oan Cao *Phuoc & Partners*

Members' Notes

Helen Tung, Japan

Helen Tung is currently an Emergent Technologies Expert Advisor on Space Applications and Global Navigation Systems/ MINEVA Fellow at the EU-Japan Centre in Tokyo. She is working on EU-Japan NewSpace startups and is interested to hear from stakeholders and particularly NewSpace startups. More information can be found here: https://newspace2060.wordpress.com/2018/11/23/exploring-eu-japan-newspace-collaboration/

Members' Q&A

Jennifer Harding-Marlin
JH Marlin, St. Kitts & Nevis

What was your motivation to become a lawyer?
An interest in medical ethics that developed while doing a degree in Health Sciences led me to pursue a law degree at McGill University. While at law school, I took a variety of courses and really enjoyed all business law-related classes. This led me to an international career in the Caribbean. So far it has been an enjoyable career as a Canadian and St. Kitts & Nevis attorney working in the Caribbean.

What are the most memorable experiences you have thus far as a lawyer?
There have been many memorable experiences working in law so it would be hard to pinpoint just one. A recent memorable experience would be helping a Syrian family through the process of obtaining St. Kitts & Nevis Citizenship. Obtaining a second passport will allow them to have access to over 150 countries and live a more free and global lifestyle.

What are your interests and/or hobbies?
Some of my passions include sports, travelling, science and business. I have visited over 60 countries and when I am not travelling I always try to find the time to swim in the ocean.

Share with us something that the IPBA members would be surprised to know about you.
I am a competitive swimmer and am training for the upcoming 2020 Olympics in Tokyo.

Do you have any specific message for IPBA members?
I look forward to connecting with IPBA members from all around the world. Feel free to get in contact and let's change the world together.

Caroline Marshall

Pinsent Masons LLP, UK

What was your motivation to become a lawyer?
I have always valued fairness, so joining a career that has the pursuit of justice as a core principle appealed to me. I always admired that people saw lawyers as those to consult in times of crisis—it's a privilege to be in such a position of trust.

What are the most memorable experiences you have thus far as a lawyer?
For me, one of the most memorable experiences has been giving legal advice to a client in person for the first time. Seeing how your work can reassure someone and have a direct, positive impact on their business is incredibly motivationing. My career is in its early stages, but I imagine this is something that will stay with me for a long time.

What are your interests and/or hobbies?
I like watching baseball, going to the theatre and reading. I recently moved offices within my firm and started a book club as a way to get to know more people.

Share with us something that the IPBA members would be surprised to know about you.
In 2015, I was the recipient of the Thomas Blake Glover Aberdeen Standard Investments scholarship. This gave me the opportunity to study Japanese at university in Tokyo and to complete an internship with TMI Associates. This was a wonderful opportunity to represent Scotland and create professional links with Japanese commercial lawyers. I still study Japanese in my spare time and hope to utilise this by pursuing cross-border practice in the future.

Do you have any special messages for IPBA members?
Thank you for welcoming junior lawyers into your community. By providing support through programmes like the IPBA scholarships, you really encourage us to broaden our horizons.

Nathaniel Rowe

King & Spalding LLP, Singapore

What was your motivation to become a lawyer?
At root, I suspect it was a mixture of blind ignorance and a failure of imagination. I saw a mountain and wanted to climb it.

Before becoming a lawyer, I worked as an advertising and brand consultant, and then as a management consultant. Compared to these fields, in law I perceived the promise of serious and substantive work and a lifelong of learning.

What are the most memorable experiences you have thus far as a lawyer?
Without a doubt, it would have to be all those back-to-back 6 a.m. finishes …

Probably the first few years of practise working with Skadden, Arps in Tokyo and being inducted into the Skadden hard-charging way of doing deals. As an Australian lawyer (later qualified in New York), I will never forget my first day at Skadden when a senior lawyer entered my room, rolled up his sleeves, and said 'So, you want to be a US lawyer?' It has been 10 years since then, and I am still not sure I know the answer to his rhetorical question. As Popeye says, 'I yam what I yam'.

What are your interests and/or hobbies?
Anything on or in water: swimming, surfing, stand-up paddle boarding, scuba diving, sailing. On dry-ish land, I also enjoy making sandcastles with my three young kids.

Share with us something that the IPBA members would be surprised to know about you.
My great-great grandmother used to ride horses with Kate Kelly, the younger sister of famous Australian outlaw Ned Kelly.

Do you have any special messages for IPBA members?
Work hard and be nice to people.

Alfredo Taullard
Hughes & Hughes, Uruguay

What was your motivation to become a lawyer?
I have always loved to read and was particularly passionate about human conduct and problem solving. But what tilted the scale was finding a strong role model in my aunt, who's a judge. She shared her passion for justice and taught me (without noticing probably) the importance of the law and relevance that a fair and independent judiciary has for a society. I discovered quickly that my life should be with the legal profession.

What are the most memorable experiences you have had thus far as a lawyer?
The moment I will always remember clearly is when I had my first case: the challenge of gaining the trust of a client who saw an unexperienced young lawyer, the anxiety while the judge read the judgment and, finally, the experience of telling the client that we had won (after a first instance negative judgment). This was 15 years ago; the manager of that client was from Italy and she still visits when she comes to Uruguay and we have come to know each other´s families!

What are your interests and/or hobbies?
Well … I'm Uruguayan, so I love football (a passion I share with my family, especially my kids) and in general enjoy sports, which are part of my weekly routine and help me manage stress and stay healthy.

I also love travelling with my family. I think travelling is much more than taking a break from a routine. It is also about challenging yourself, learning, expanding your perspectives, building and strengthening bonds with the people that travel with you, and also about appreciating your life and what you have at home.

I'm also a Rotarian and through the activities we do with this organization, I feel I am contributing to endowing a better country to our children, which I think is also an very important part of our role as lawyers and professionals in general. That exact purpose pushed me to accept positions on the boards of the Uruguayan Bar Association and Lideco (the oldest Business Chamber of Uruguay), which have opened the door to different challenges.

Share with us something that IPBA members would be surprised to know about you.
I was probably the first Uruguayan lawyer to obtain an Asia-Pacific PG degree and still one of a few that has one. At the time, it was hard to convince the board of my firm to sponsor a master's programme outside the US or UK. However, the experience proved to be outstanding and extremely rewarding. As a result of my experience, I founded the Chamber of Commerce of Uruguay and Australia and two years ago was honoured by the Australian Government with the appointment as Honorary Consul for Uruguay. So, I also have a more diplomatic-oriented hat that I wear some hours a week which I enjoy a lot.

Do you have any special messages for IPBA members?
As a Uruguayan lawyer I can say that Latin America and Asia connections are recent in historical terms. However, it is evident that there are many opportunities waiting to be developed. We just need to strengthen the person-to-person relationships and mutual knowledge. Because of its manageable number of members and their quality, the IPBA is the perfect forum to achieve this. I look forward to meet fellow members and learn from them in Singapore!

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

Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
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IPBA MEMBERSHIP REGISTRATION FORM

Membership Category and Annual Dues:

[ ] Standard Membership ¥23,000
[ ] Three-Year Term Membership ¥63,000
[ ] Corporate Counsel ¥11,800
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Name:_____Last Name_____First Name / Middle Name _____

Date of Birth: year _____month_____date_____Gender: _____ M / F

Firm Name: _____

Jurisdiction: _____

Correspondence Address: _____

_____

Telephone:_____Facsimile: _____

Email: _____

Choice of Committees (please choose up to three):

[ ] Anti-Corruption and the Rule of Law
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[ ] Aviation and Aerospace
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[ ] Energy and Natural Resources
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[ ] Insolvency
[ ] Insurance
[ ] Intellectual Property
[ ] International Construction Projects
[ ] International Trade
[ ] Legal Development and Training
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[ ] Maritime Law
[ ] Scholarship
[ ] Tax Law
[ ] Technology, Media & Telecommunications
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[ ] **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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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: 9 Battery Road #15-01, MYP Centre, Singapore 049910

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

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By bringing together the best legal minds in the region, we change the game in delivering legal services across South East Asia

With over 600 lawyers in leading local law firms across ten countries, we've created the first unified, coherent, and authentically Asian legal services offering throughout the region.

Individually, each firm offers the highest standards of service to locally based clients. Collectively, we have the capacity to handle the most complex regional and cross-border transactions and to provide seamlessly excellent legal counsel across the region.

Rajah & Tann is a sponsor for IPBA 2019 Singapore.

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