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# The President's Message

**Francis Xavier**
**President**

Dear friends,

It's hard to believe that another year is almost at a close and that we are on the cusp of the second decade of the twenty-first century.

The IPBA has been in existence for almost 30 years, but 2019 has been a year of many firsts: the IPBA East Asia Forum held in Beijing (in Seoul in previous years); the IPBA Arbitration Day held in Osaka (in Kuala Lumpur previously); and the Mid-Year Council Meeting and Regional Conference held in Milan.

Also, another very important first was the release of the IPBA Guidelines on Privilege and Attorney Secrecy in International Arbitration. For the past five years, many diligent members have been working behind the scenes to develop the Guidelines, initiated at the Mid-Year Council Meeting in Rio De Janeiro in 2014. This collaborative effort was led by Eckart Brödermann, Bernhard Meyer and myself, and entailed countless hours by members of a steering committee representing both common law and civil law jurisdictions and a resource committee that prepared materials and the first drafts of the Guidelines. The committees led in-person discussions at several annual conferences (Auckland 2017, Manila 2018 and Singapore 2019), which drew many members who offered their perspectives, advice and experience. The Guidelines were published in November and distributed for the very first time at the IPBA 5th Arbitration Day held in Osaka (attended by 120 delegates).

Our Mid-Year Council Meeting and Regional Conference in Milan was hosted by Riccardo Cajola of Cajola & Associati and Sara Marchetta of Chiomenti. The Regional Conference was entitled 'The Evolution of Protectionism: Circulation of Investment, Goods and Services, People and Judgments' and was supported by the Milan Bar Association.

Some changes to the normal structure of the internal meetings were introduced in Milan by the Secretary General to ensure that time was well spent and productive; indeed, fruitful discussions were held on many important topics that we are facing.

I am happy to announce that our membership has now reached the highest number in years (more than 1,700) with new jurisdictions gaining enough members to allow them to elect a JCM.

I have formed a Constitution Reform Committee, ably chaired by PP Perry Pe and Corey Norton, with Yong-Jae Chang, Tatsu Nakayama, PP Denis McNamara, PP Dhinesh Bhaskaran, Jan Peeters and Priti Suri as members. The Committee will look at key issues facing our organisation and reviewing how our constitution should be modified to meet those challenges. I look forward to sharing the views of this seminal committee in due course.

Also in Milan, the IPBA committed to making a donation to the International Association of Women Judges, as a contribution to its scholarship program to bring two female judges from the Asia Pacific region to its Biannual Conference which will be held in Auckland, New Zealand in May 2020. This augurs well for spreading our impact and fostering diversity.

Wishing you every success in the year ahead!

**Francis Xavier**
**President**

# The Secretary-General's Message

**Michael Burian**
**Secretary-General**

Dear IPBA Members,

The last months have been busy for the IPBA. We are happy to see our officers and council members devoting a lot of their time and efforts to our organisation.

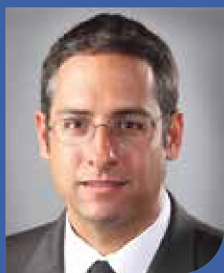
And, even after so many years, there is always something new at the IPBA with the IPBA hosting some new events during the last few months. Our Mid-Year Council Meeting and Regional Conference was held in Milan for the first time from 11 to 14 October 2019. We were grateful for the support of the Milan Bar Association and, most of all, our wonderful hosts Sara Marchetta and Riccardo Cajola. The first three days of the conference consisted of council-related meetings for council members only. These are very important as they give us the opportunity to reconnect and update each other since the last annual meeting and also, by gathering a good number of council members together, to plan for the upcoming year and collect new ideas.

During the Regional Conference, which was held on 14 October 2019 and was open to the public, we were delighted to hear interesting discussions with reference to the conference theme 'The Evolution of Protectionism: Circulation of Investment, Goods and Services, People and Judgments'. It was a great opportunity for networking and getting to know new colleagues. Besides the positive social aspect, we were able to gain insightful knowledge on topics that are currently often discussed in Europe such as Brexit, the Chinese acquisition spree around the world and the 'review' by the US of its position regarding several international treaties and trade policies. We were able to hear an exchange of views on these issues from the voices of lawyers practising in different areas; not only in M&A, but also immigration law, trade law and finance. Our mid-year meeting was also a huge success in regards to the council member conference as well as the public one. As such an event is not possible without a lot of organisational work, we must thank each and everyone involved behind the scenes.

Only a few weeks after our Mid-Year Council Meeting and Regional Conference we were again able to obtain a special venue for the first time for our 5th IPBA Arbitration Day: The Nakanoshima National Government Building in Osaka, Japan. The conference was held from 13 to 14 November 2019 together with the Japan International Dispute Resolution Center and was kindly supported by Westlaw Japan. Topics ranged from 'International Arbitration seated in Japan over Expedited Procedures' to 'Third Party Funding'. All in all, there was a very good mixture of subjects and the audience was able to obtain good insight thanks to the in-depth knowledge of the speakers. There were over 120 delegates at this well-received event.

We want to remind you again of our upcoming conferences next year, some of which you can already register for online, for example, the IPBA Annual Meeting and Conference 2020 in Shanghai (www.ipba2020.com). The theme of the conference will be 'Rethinking Global Rules—Opportunities and Challenges for the Legal Industry'. The conference sessions will focus on the opportunities and challenges faced by the legal profession in a new era, cooperation between Chinese and foreign lawyers under the 'Belt and Road' initiative, as well as channels for resolving international finance, investment and trade disputes. This is again a 'first-time' event for the IPBA, as no IPBA conference has been held before in Shanghai. It is also a 'first-time' event for Shanghai, which has never before hosted an international legal association annual conference. This is an historic opportunity that should not be missed!

**Michael Burian**
**Secretary-General**



# Message to the Reader

**John Wilson**
**Chair – Publications Committee, IPBA**

Dear Reader,

Welcome to the December issue of the IPBA Journal.

The topic I have chosen for this month's issue of the Journal is Intellectual Property. It is a practice area that is ever evolving and increasingly important for clients.

In October, the IPBA Mid-Year Council Meeting took place in Milan, following on from which there was a one day seminar open to the public on the theme: 'The Evolution of Protectionism: Circulation of Investment, Goods and Services, People and Judgments'. The plenary address was delivered by Mr Alessandro Rivera and he has kindly agreed to it being published in the Journal. The full text of Mr Rivera's speech may be read on pages 10 to 15. Various panel discussions were held with the first discussion being lead by Prof. Giulio Napolitano of Chiomenti on the subject of 'Circulation of investments'. Secondly, Riccardo Cajola of Cajola & Associates opened the panel discussion on the 'Circulation of Goods and Services', followed by the third panel moderator, Massimo Audisio (CRINT–International Affairs Commission, Milan Bar Association) which deal with the subject 'Circulation of People'. The forth panel moderator, Stefania Bariatti, Chiomenti of Counsel, covered the subject of 'Circulation of Judgments and Investigations'.

In this issue, I am really pleased to have had some very interesting contributions relating to IP, a subject which is very close to my heart, from various perspectives and countries. The cover page visual shows a lightbulb enclosing a depiction of the human brain which signifies the human intellect, the source of IP. The lightbulb was invented by Thomas Edison who was granted a patent in 1879 for his truly transformative and fundamentally important invention.

In this issue, we publish an article received from Jose Eduardo T. Genilo's. This article examines 'The inevitable intersection of the Philippine's Competition and Intellectual Property Law'. Jose provides a brief outline of the Philippine competition and intellectual property laws covering anti-competitive agreements, abuse of dominant positions, anti-competitive mergers and acquisitions, the recognition and treatment of IP rights, limitations on IP rights, and the intersection between Philippine IP and competition laws.

Another interesting article, submitted by Taras Kyslyy, looks at the situation in China and the Ukraine in regard to the allowing of court reviews of domain name disputes. He outlines the three elements to consider in order to succeeding with a complaint filed at the UDRP. Firstly, the claimant needs to prove that a trademark is identical or similar, and then establish if the respondent lacks rights to or legitimate interests in the disputed domain name. Thirdly, the complainant must prove that the disputed domain name was registered and is being used by the respondent in bad faith. Normally 'passive holding' or non-use of a domain name does not prevent a finding of bad faith.

Maxim Alekseyev takes a look at 'Legal regulations of image rights and business reputation in Russia' and how the globalization processes and intensive development of communications and media become a very sensitive issue. Maxim sets out the pitfalls that could so easily lead to troublesome infringement court battles.

Lidong Pan's article examines recent developments of compensation for trademark infringement and unfair competition.

The theme of the next issue of the IPBA Journal, (which will be the last Journal under my purview), has not yet being decided. If any of the committees are interested, please contact me. I hope that I can count on the enthusiastic IPBA members for their continued contributions. Please note though that only articles written by IPBA members can be considered for publication. If you wish to submit an article for consideration, please forward your articles to me by no later than 16 March 2020.  hould you not be an IPBA Member and wish to join, please send me an email and we will be glad to sign you up!

Before I close, I'd like to express my appreciation to Frédéric Serra, Chair of the IP Committee and the leadership of the IP Committee for assistance with the sourcing of articles for this issue of the Journal. I am also pleased to announce that the Publication Committee has renegotiated our contract with our current publisher. I met with Paul Davis of Ninehills Media in Hong Kong and we had fruitful discussions which have resulted in certain new arrangements made in order to keep publication costs as low as possible.

I would like to wish all our readers a happy, healthy & prosperous 2020!

**John Wilson**
**Chair – Publications Committee of the IPBA**

## IPBA Upcoming Events

| Event | Location | Date |
|---|---|---|
| **IPBA Annual Meeting and Conferences** | | |
| 30th Annual Meeting and Conference | Shanghai, China | October 18-21, 2020 |
| 31st Annual Meeting and Conference | Tokyo, Japan | April 21-24, 2021 |
| **IPBA Mid-Year Council Meeting & Regional Conferences** | | |
| 2020 Mid-Year Council Meeting (IPBA Council Members Only) | Jakarta, Indonesia | June 6-7, 2020 |
| Regional Conference (topic TBA; open to the public) | Jakarta, Indonesia | June 8, 2020 |
| **IPBA Events** | | |
| IFLR/IPBA Asia M&A Forum 2020 | Macau | June 17-18, 2020 |
| More details can be found on our web site: http://www.ipba.org, or contact the IPBA Secretariat at ipba@ipba.org | | |

# IPBA Mid-Year Conference — The Evolution of Protectionism: Circulation of Investments, Goods and Services, People and Judgments

The IPBA Mid-Year Conference took place in Milan at the Fondazione Forense on 14 October 2019 with the strong support of the IPBA's Cross-Border Investment Committee and Women Business Lawyers Committee. The Council and the Committees' members had met during the previous weekend, hosted by Chiomenti in its Milan office.

On the morning of 14 October, after receiving the greetings of IPBA President-Elect, Li Zhiqiang, who noted that the Association currently has more than 1,300 members from over 65 jurisdictions worldwide and that the next Annual Conference is to be held in Shanghai in 2020, the first panel on 'Circulation of Investments' began. The keynote speaker was Alessandro Rivera, Chief of the Treasury Department at the Ministry of Finance, who introduced the conference topics and pointed out how protectionism does not facilitate the circulation of investments. Following this, the speakers listed below took the floor for the first panel which was moderated by Prof Giulio Napolitano, Chiomenti of Counsel.

Shin Jae Kim from TozziniFreire explained that Brazil is particularly open towards foreign investors and she illustrated how since 2018 the procedure to obtain authorisation to invest in Brazil has become very simple and straightforward. She also noted how the Brazilian government, headed by Bolsonaro, has virtually abolished all restrictions towards foreign investments.

Nini Halim from HHR Lawyers in Jakarta explained that since 2009 there has been no need for authorisation for foreign investors in Indonesia, all the more so as a computerised authorisation system is being implemented, thus accelerating the investment process for foreigners.

In comparison, Henry Shi from JunHe explained that foreign investors in China are still subject to a series of authorisations that must be requested from the central government, which require quite a long time. Moreover, since the government aims to keep the currency under control, international transactions are not always finalised within a day. There is a move to simplify the authorisation procedure, but at present this is directed more at exports rather than imports, although the intention is to change this.

Michael Burian from Gleiss Lutz in Germany, explained that in his country some fields of national interest are barred to foreign investors. However, except for such cases, there are no particular restrictions towards foreign investors.

In conclusion, Gianni Roj (Giovanelli e Associati of Counsel) talked about Italy and how the bureaucracy and taxation procedures often restrain foreign investors, but he pointed out that investments can be made in the particular field of culture and he also mentioned the relevant bonuses provided for by the so-called 'Franceschini Law'.

After that, the second panel on 'Circulation of Goods and Services' took place. The moderator of this panel was Riccardo Cajola of Cajola & Associati who illustrated how protectionism in trading favours domestic companies but has negative effects on end-users in the long term.

By sharing his practical experience from the business sector, Marco del Monaco, Tax General Counsel of Ferrero Group for the Asiapac and Mea regions, illustrated that in Asian countries there is often a dis-alignment between the customs agency and the tax authorities with reference to the classification of certain products, which implies difficulties for the economic operator who, most of the time, has to negotiate directly with such authorities to better identify the classification of the product to be imported.

Jan Peeters from Sitbbe explained that Belgium is encouraging foreign investments by the reform of its company law, a lower corporate tax rate and the institution of the International Tribunal on Business of Bruxelles. The strategic position of Belgium for both the European and the Asiatic markets was underlined, although he pointed out that 'protectionism' could cause trade wars in the long run.

In conclusion, Mirella Lechna from Wardinsky in Poland illustrated the impact of the public procurement market in Europe by pointing out that a single market for European public procurement can encourage the freedom of movement of people and capital avoiding protectionism costs, thus favouring free access to all.

The third panel, which took place in the afternoon, was about 'Circulation of People'. The moderator of this panel was Massimo Audisio (CRINT–International Affairs Commission at the Milan Bar Association), who pointed out that protectionism can also alter the market, penalising competitors and limiting, de facto, the freedom of movement and establishment.

Melva Valdez from JC Law in Manila explained that in the Philippines there are no particular restrictions on immigration, although some kind of protectionism aimed at protecting local workers exists. There are also special residence permits aimed at encouraging foreign investors who intend to settle in the Philippines.

Pan Lidong (Adjunct Professor, Sun Yat-sen University) clarified that in China there are three types of residence permits classified as Elite, Professional and Mixed. In China, an employment contract is necessary to obtain the residence permit, which cannot last more than five years. Lastly, a worker living in China for more than 183 days during the year is considered as a resident. Some kind of protectionism exists for certain jobs which are barred to foreigners.

Yong-Jae Chang from Lee & Ko pointed out that Korea is open towards foreign workers and family reunification policies exist. First of all, an employment contract is necessary and then the residence permit can be requested.

Frédérique David from Smith D'Oria in Paris explained that in France there is freedom of movement and establishment for all European citizens, without any particular formality needed. As far as non-EU citizens are concerned, a series of bilateral agreements regulate such matters in compliance with the French mandatory rules.

In conclusion, Anne Durez (Compliance Officer, Group Legal Department, Total) focused her attention on how multinational companies encourage the movement of people and how the respect of workers' rights, notwithstanding different legislations, must be guaranteed at all levels.

After this, the fourth and final panel took place related to 'Circulation of Judgments and Investigations'. The moderator of this panel was Stefania Bariatti (Of Counsel, Chiomenti), who illustrated the importance of the acknowledgment of decisions outside the country where they were taken.

With reference to the situation in Hong Kong, Olivia Kung from Wellington Legal explained that there are different treaties for the acknowledgment of decisions issued in Hong Kong which must be final and binding and respect formal requirements. As for the cooperation for investigations, Hong Kong has entered into cooperation agreements with 183 countries since 2018.

As far as Singapore is concerned, Laurence Wong (Singapore International Commercial Court) talked about the necessity of developing a mutual acknowledgment of decisions as a result of the increase of investments in the country. Singapore has entered into various agreements, such as the Hague Convention on arbitral procedure and treaties with most of the countries of the South-Pacific area as well as Mexico, Ukraine and Montenegro. There is a principle of reciprocity with Japan and court-to-court agreements are also in force with that country.

By providing examples of practical cases, Simon Davis, President of the Law Society England and Wales, pointed out the importance of globalisation of services especially in consideration of globalisation of investments.

To conclude the work of the conference, Fabio Londero, Director Legal Affairs at Danieli Group dealing with the steel industry, took the floor underlying the hardship in trading with certain countries due to some kind of protectionism which covers not only investments but also the administration of justice and he pointed out that globalisation must be accompanied by a change of the political and legal framework of those countries that at present are not prepared to do business at a global level.

# The Evolution of Protectionism: Circulation of Investment, Goods and Services, People and Judgments by Alessandro Rivera Director General of the Treasury

## Speaking Notes from Inter-Pacific Bar Association Mid-Year Regional Conference, Milan, 14 October 2019

Ladies and Gentlemen,

It is a pleasure to be here today, and I would like to thank the organizers for the opportunity to talk about this important topic, which is particularly timely given the current juncture. As keynote speaker, it is my duty to set the stage for today's thematic panel discussions. And in doing so I will try to provide you with some considerations on the evolution of protectionism, its macroeconomic implications and possible policy responses, with the view, hopefully, of being of some inspiration for the purpose of this conference.

As the title of this meeting reminds us, we are clearly interested in understanding how the current wave of protectionism, in its multiple dimensions, will evolve over the next months, and how it may affect our societies and economies. However, any discussion about the future must begin with a clear understanding of the past.

### A brief history recap

Being the second Monday of October, today is Columbus Day in the United States, a day that remembers Christopher Columbus's arrival to the Americas, more exactly on October 12, 1492, more than five hundred years ago. While there is evidence that he was not the first European to sail across the Atlantic, many scholars usually refer to this date as to identify when globalization began for real.

Since then, global interchanges have steadily accelerated; from the colonial model, based on pure exploitation of the territories owned by the European empires, to the establishment of global supply chains, enhanced by the advances in science and technology, from the steamship to the industrial revolution. This acceleration of globalization continued up to the 1900s, when it was stopped by some long-lasting setbacks, such as dictatorships and the outbreak of two world wars.

But the story of global integration was not over. Indeed, the end of the World War II marked a new beginning for the global economy, which shifted into a multilateral trade system that promoted free trade among sovereign nations.

The formation of the Bretton Woods system, including the IMF and the World Bank in 1944; the creation of the

UN system in 1945; and the establishment of the General Agreement on Tariffs and Trade in 1947 were all signs of a new era, as they all served to rebuild the networks, stabilize the global order, and increase the interchanges.

In the same period, also the European project took shape on the idea of using trade agreements as tools to prevent war between countries that had been fighting for centuries.

Clearly, this phase of the globalization process occurred in two separate tracks, as the Iron Curtain divided the world into two spheres of influence.

But as of 1989, when the Berlin Wall fell, globalization changed gear and became a truly global phenomenon and an all-conquering force. Indeed, in 1994, the newly created World Trade Organization encouraged all nations to enter into free-trade agreements, and in 2001, even China, which for the most part of the 20th century had been excluded from the world economy, became a WTO member.

## The golden age of globalization

Up to the outbreak of the global financial crisis, globalization lived its golden age: in the twenty years between 1990 and 2008, total trade in goods and services increased from 39 to 61 per cent of world GDP. It was a time of extraordinary optimism, and as professor Andrew Rose from the University of California Berkeley said "*no idea was more widely accepted than that protectionism was an evil to be fought any time and any place*".

An unprecedented extent of prosperity across the world was expected:

- the set up of a global framework of trade rules based on non-discrimination, transparency, and binding and enforceable commitments would have benefitted all countries and individuals;
- through the impact of technological diffusion and global integration on productivity, raising living standards were allowing many emerging economies becoming major economic players and winning their share of the growing pie; and
- companies could expand operations overseas on the basis of the greater assurance provided by bilateral investment treaties, aimed at protecting foreign investors against any form of expropriation.

## Has Globalisation Gone Too Far?

But the 'win-win' story did not last long, and over time the benefits of globalization have been repeatedly and openly called into question, and criticized from different perspectives.

First, the global great convergence coincided with a great divergence within countries: while global inequality fell markedly, within countries inequality increased in most of the economies, regardless of the indicator selected (i.e. income, wealth, employment opportunities and social mobility).

Indeed, combined with the disruptive, yet positive, role of technological progress, trade integration is considered by the empirical evidence as one of the dominant drivers of the declining labour's share, notably for lower- and middle-skill groups in AEs, contributing to worsened income distribution and polarization within countries. Some groups of workers—particularly those employed in manufacturing industries that are less able to compete and whose skills have become less relevant—bore the burden of the adjustment process, while governments failed to enact policies to compensate them.

In turn, this uneven distribution of the welfare gains has nurtured skepticism toward globalization and the existing multilateral system, that appeared not well-equipped to handle the challenges posed by the intense transformation of the world economy. An outstanding example was provided by the WTO stalemate, as the rounds of negotiations launched in 2001 were quietly buried in 2015, due to insurmountable disagreements among advanced economies and the rising emerging countries.

Against this background, since the mid-2000s public support for globalization has deteriorated, with political platforms in both advanced and emerging-market economies increasingly emphasizing policies stressing national sovereignty, rejecting multilateralism, and seeking economic nationalism.

According to a recent study undertaken by the Peterson Institute for International Economics[1]:

In emerging-market economies, the largest preference shifts were toward industrial policies favoring specific sectors, macroeconomic populism, and industrial concentration.

In advanced economies, the biggest shifts were toward restrictions on immigration and trade, and toward macroeconomic populism; and Brexit is a facet of this phenomenon, as citizens have put into question the principles of freedom of movement and of economic integration in Europe.

## The new face of protectionism in the 21st century

Following the dramatic collapse of international trade in the wake of the financial crisis in 2007-08, there was a common fear that governments may respond to domestic economic challenges by increasing customs tariffs and other trade barriers to protect their economies.

Nevertheless, one of the unrecognized triumphs of the post-crisis period was the ability of major economies, and in particular of the G20, to resist protectionism, and promote stronger cooperation in international trade policies under the shelter of the WTO. This admirable example of self-discipline helped world trade to recover its pre-crisis level two years after the crisis hit, and avoid the mistakes of the Great Depression period in 1930s.

However, a deeper analysis shows how the trade policy landscape has undergone a significant transformation over the last decade. Indeed, over the past years tariffs have been replaced by many other trade policy instruments that have been increasingly used to protect domestic markets from international competition.

The latest empirical analysis[2] illustrates the increasing relevance of the so-called non-tariff barriers (NTBs), that incorporate a variety of measures, including import controls, state aid and subsidies, as well as public procurement and localisation policies. Unlike tariffs, which are transparent and accessible via each countries' customs authority, NTBs are often much more hidden and therefore hard to assess.

Since 2009, only 20 per cent of all implemented protectionist interventions could be attributed to an increase in tariffs. In contrast, NTBs accounted for on average 55 per cent of the implemented protectionist interventions, reaching 61 per cent in 2016. What is worse, many of these barriers have been introduced by G7 and G20 countries, as the OECD has shown in its regular updates on the status of global trade.

Ironically, while the world was becoming more multipolar, unilateralism gained appeal. Protectionist instincts have grown since the financial crisis, well before the well-known recent events.

Protectionism has always been around; it just took a different shape.

## Protectionism, at a different level

That brings us to today. We are now facing a rise in protectionism that is not only evident, but also striking in its scale, in a way that it raises concerns on whether it may become the new normal for the economic landscape for many years.

Morale was already very low in in 2017, when President Trump announced the US withdrawal from the Trans-Pacific Partnership negotiations and the Paris Climate Agreement, while the WTO hit a new low when its Ministerial conference in Buenos Aires ended without the traditional declaration.

Things took a dramatic turn for much worse in 2018, which will probably be remembered as one of the worst years for global trade governance. Emblematic was the unsuccessful outcome of the G7 Summit in Canada in June, which exposed the differences within the membership, especially on trade and climate. Similarly, the G20 steered the discussion toward the lowest common denominator on the most disputed issues, as to achieve a weak consensus among the members.

Month after month, we have witnessed a tit-for-tat protectionism, characterized by withdrawals from multilateral agreements and tariff threats and hikes that have triggered a series of retaliatory and counter-retaliatory measures from different sides. More in detail, the US Administration has started implementing concrete actions over the past one and a half years; tariffs were first introduced in January 2018. Tensions have then escalated with China and somewhat eased with the EU and with Canada and Mexico.

Retaliation was fast and came soon after. When we look at actual figures, retaliatory responses by Europe covers

a total of 0.04 percent of US industrial value added, whereas Chinese tariffs affect 7.5 percent of the US (combined sectors) value added. Between December 2018 and April 2019, G20 countries made ample recourse to trade-distorting measures, twice as many when compared to same period one year before.

Despite the positive signs coming from the sidelines of the G20 summit last December, 2019 has erupted again in a blaze of threats and tariff skirmishes. And the scenario has been worsened by the WTO's worst crisis since entering into force in 1995, as its negotiating and dispute-settlement arms now at risk of total paralysis.

## Could protectionism be the right answer?

In sum, protectionism is the leitmotif of the current economic juncture. But protectionism can be harmful for the global economy, as we will see in a moment.

Rising protectionism can affect economic activity through different channels. First, the trade channel of transmission: higher import duties increase trade costs, which, in turn, affect both the quantity and the price of internationally traded goods. Second, higher trade costs can affect financial flows. Lastly, the final impact of protectionism on growth and global trade depends on the extent to which countries retaliate and to whether the trade tensions are confined to a small number of countries.

Rising protectionism implies higher trade costs for all countries, which in turn will alter the optimal allocation of resources. In our current world, global value chains (GVCs) have become increasingly complex and fragmented, and this feature is likely to amplify the impact of tariffs on trade and activity as a whole. Production is still highly fragmented across borders - goods cross borders several times along the production process.

This deep interconnection across countries is highly valuable, in that it integrates less favorite countries into global production processes (and markets) to which they did not have access before. This, in turn, favours their growth and is beneficial to all since it hinges on the concept of comparative advantages, so dear to the economic literature and to all of us.

But goods crossing borders several times—as in GVCs—are likely to be accumulating costs due to a cascading effect. This will translate into higher production costs and will in turn lead to lower demand and investment, thus dragging on growth.

Among the many negative effects of higher trade tariffs, there is, also, what we know as 'diversion' whereby higher trade costs are avoided by shifting to other market sources, thus making production less efficient. The same holds true for GVCs. When trade diversion takes place, production in GVCs is made less efficient if a country tries to self-produce parts that were imported before the imposition of tariffs.

Rising protectionism also affects sentiment more broadly. Firms are taking a 'wait-and-see' approach thus putting off their investment decisions, which negatively weighs on the economy as a whole.

These effects are compounded by the rising uncertainty surrounding the current policy actions—all economies are adversely affected by the rising uncertainty. Uncertainty plays a major role in the current juncture, and, coupled with financial stress, could also amplify the impact on economic activity stemming from rising protectionism.

## The macroeconomic implications of rising protectionism

A study by the OECD3 observes that the tariffs introduced by the US and China have already started to exert a negative impact on growth and inflation. More in detail the OECD claims that:

*The US-China measures could reduce global GDP growth by between 0.3-0.4 percentage points in 2020 and 0.2-0.3 percentage points in 2021.*

On the contrary, global prospects would be enhanced if trade barriers were rolled back. A study realized at the ECB4 seeks to gauge the medium-term and long-term effects of an escalation of trade tensions. The simulations—a trade war in which the US raises tariff and non-tariff barriers on imports from all partners by 10% and countries retaliate symmetrically—suggest that further trade frictions might exert a significant impact on US activity, which would be compounded by rising financial stress and a drop in confidence.

In the euro area, notwithstanding some possible gains arising from trade diversion, the spillovers linked to the global deterioration in confidence are likely to outweigh any other gain.

Global trade and activity might fall by more than 2.5 and 1 per cent respectively through the combined effect of trade and financial distress. Longer-term effects are likely to be even more pronounced. All this points again to the need to avoid any further escalation of trade tensions, let alone of a trade war. We should not disregard the risk that a vicious circle materializes, where slower trade growth encourages further trade restrictions.

Trade barriers not only are detrimental to growth, but they also lead to an appreciation of the currency imposing them as the economic literature, together with empirical evidence, suggests. The ongoing US-China trade dispute has in fact an appreciating effect on the dollar, which tends to also affect other currencies, notably the euro. As the Nobel-winning prize professor Stiglitz correctly observes, this makes the case for a competitive devaluation—which is exactly what President Trump is accusing the Chinese authorities of doing.

The ongoing tensions are also likely to have a significant impact on longer-term trade relations in the international arena. A study by the IMF 5 claims there might be a risk that the US and China engage in 'a managed trade agreement', whereby China is required to purchase more goods from the US and/or imposes export restrictions with the aim of reducing its large current account surplus vis-à-vis the US, but without addressing the underlying issue of eliminating trade and investment barriers.

This line of reasoning again bodes well for arguing that trade tensions need to be tackled within the framework of the WTO rules, in a non-discriminatory manner and based on market fundamentals.

## Better communication and better-targeted policies

This is the diagnosis. What course of action might we take?

I strongly believe multilateral negotiations and the WTO should be revamped as a first best option to overcome the current stall in trade integration, and Europe should play its part in advancing along these lines. Multilateralism is the only answer to tackle the unwelcome consequences of openness—in case they take place—and it is key for us, as multilateral players to put again at the centre of the political stage those institutions built to address those issues. Trade can be a key driver of growth provided it is fair and equitable for all.

At the same time, globalization and higher trade interconnection need to be well managed. They will have consequences on some domestic sectors—those more exposed to external competition—and, in turn, might lead to rising inequalities, as it has already happened, both within and across countries. They may alter the distribution of incomes within groups and countries, which has given rise to the current surge in trade barriers.

It will be key, now that disillusionment towards trade integration has come to the fore, that its negative impact on two key dimensions—social and distributional—are properly addressed by targeted policies. Those might include, for example, redistributive policies and/or adequate re-training or vocational measures aimed at displaced workers. Active labour market policies might be relaunched together with reductions in barriers to occupational and geographical mobility. Tax and transfer policies might also be made more effective by better targeting transfers to those households more severely hit by greater trade integration.

We need also to work on communication. One of the main culprits of the recent surge in anti-globalization groups and protectionism has been the failure by policy makers to communicate properly and to address the side effects of trade openness. What we have learnt should help us create a new story telling, with which we accurately stress the merits of greater international trade.

Policymakers should emphasize that greater international openness allows countries to specialize in the production of goods where they enjoy a comparative advantage, while at the same time it gives access to a greater variety of consumption goods. Trade openness has given rise to higher income per capita leading to higher productivity and helping to reduce poverty globally.

We should reiterate that the most appropriate policy response does not lie in trade protectionism—which spurs retaliatory responses and a rise in uncertainty, which *per se* will reduce international growth, as we have seen earlier today. What is clear now is that we cannot disregard the demand, stemming from the global world out there, for an increased protection of those domestic sectors that have been more negatively affected by trade openness, while, at the same time, not pulling back from greater trade integration.

The current rise in protectionism has taught us an important lesson. Gains and losses from any given policy action must be well understood and communicated, first; second, they need an effective and timely policy action so that benefits are more widespread. The political costs of no action, as we have witnessed of late, are likely to outweigh the benefits.

Ladies and Gentlemen, let me conclude, by again thanking the organizers for holding such an interesting meeting, and, of course, all of you for your participation.

## Notes

[1] de Bolle, M. and Zettelmeyer, J., Measuring the Rise of Economic Nationalism (August 23, 2019). Peterson Institute for International Economics Working Paper No. 19-15.
[2] Kinzius, L, A Sandkamp and E Yalcin (2019), "Trade protection and the role of non-tariff barriers," Review of World Economics, forthcoming.
[3] OECD Interim Economic Outlook, 19 September 2019.
[4] The economic implications of rising protectionism: a euro area and global perspetive, V. Gunnella and L. Quaglietti, ECB Economic Bulletin, 3/2019.
[5] Trade wars and Trade deals: estimated effects using a multi-sector model, C. Caceres, D. a. Cerdeiro and R. c. Mano, IMF WP/19/143 June 2019.

## 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.

# IPBA Mid-Year Council Meeting and Regional Conference Photos

## 11-14 October 2019



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# Recent Development of Compensation for Trademark Infringement and Unfair Competition: Discussion of the Leading Cases on the Biggest Claim in China

The traditional Chinese herbal tea companies with the two most well-known trademarks Wanglaoji (WLJ) and Jiaduobao (JDB) have been engaged in several disputes over nearly a decade, reflecting the development of compensations for infringement of intellectual property, in particular, the development of the Chinese trademark law and Anti-Unfair Competition law.

## Compensation for Trademark Infringement Under the PRC Trademark Law and Anti-Unfair Competition Law

In most of the intellectual property disputes in China, the biggest problem claimants face is how to determine and prove their losses and damages. In China, the court may take the following approaches outlined below to determine compensation.

### Compensation for Infringement Under the PRC Trademark Law Revised in 2019

Article 63 of the Trademark Law offers three approaches to determine the amount of damages for infringement. The actual loss suffered by the right holder as a result of the infringement will be the first choice. If it is difficult to determine the actual loss, the amount of damages may be determined according to the profits gained therefrom by the infringer. When neither the losses of the right holder nor the profits gained by the infringing party can be determined, the amount of damages may be reasonably determined in reference to the reasonable trademark licence fee.

For an infringer who maliciously infringes upon another party's exclusive right to use a trademark and the nature of the infringement is particularly serious, the amount of damages may be determined as not less than one time but not more than five times the amount that is determined according to the aforesaid methods. The amount of damages shall include the reasonable expenses paid by the right holder for stopping the infringing act.

Article 63 also allows the court, for the purpose of determining the amount of damages, to order the infringer to submit account books and materials related to the infringement, when the right holder has exhausted their efforts in discharging the obligation of burden of proof but the related books and materials are mainly controlled by the infringer. If the amount of damages can still not be determined with the above approaches, the court shall render a judgment awarding damages in an amount not more than RMB5,000,000 based on the circumstances of the infringing acts.

### Compensation for Loss and Damage Under the PRC Anti-Unfair Competition Law Revised in 2019

The above approaches are also adopted by the Anti-Unfair Competition Law issued and implemented in 2019. Article 17 of the Law states that if an infringer violates the provisions of the Law and causes damage to others, he/she shall bear civil liability according to law. If the legitimate rights and interests of a claimant are damaged by unfair competition, he/she may file a lawsuit in the court. The amount of compensation for a claimant who has been harmed by unfair competition is determined according to the actual loss suffered due to the infringement. If the actual loss is difficult to calculate, it shall be determined according to the profits obtained by the infringer for the infringement. Where an infringer maliciously infringes trade secrets, and in the case of serious acts, the amount of damages may be determined as not less than one time but not more than five times the amount that is determined according to the aforesaid methods. The amount of compensation shall also include the reasonable expenses paid by the claimant to stop the infringement.

If the infringer violates the provisions of Articles 6 and 9 of the Law, and the actual loss suffered by the right holder due to the infringement and the profits obtained by the infringer due to the infringement are difficult to determine, the court shall render a judgment awarding damages in an amount not more than RMB5,000,000 based on the circumstances of the infringing acts.

The leading cases on the biggest claim, JDB v WLJ, discussed below, more or less show how the courts in China determine the losses and damages of trademark infringement and unfair competition cases.

## History and Background of the So-called 'IP War' of JDB v WLJ

The IP war between the two leading herbal tea makers in China, the state-owned Guangzhou Pharmaceutical Holdings Limited ('GPHL') and Hong Kong-based Jiaduobao Drink & Food Co ('JDB'), dates back to 1995 when GPHL licensed its herbal tea trademark Wang Lao Ji ('WLJ') to JDB. The two companies agreed to an extension until 2020, which was handled by a former vice-chairman of GPHL who was later convicted of taking bribes from JDB.

GPHL subsequently filed a complaint with the China International Economic and Trade Arbitration Commission to invalidate the licence agreement. The Commission ruled in May 2012 that the extended licence to 2020 was invalid and it ordered JDB to stop using the WLJ trademark, so JDB began using a red can bearing the Jiaduobao name. Later, GPHL launched its own herbal tea in red cans, similar in look to the red-canned JDB herbal tea. The advertising slogan was almost identical to JDB and simply replaced the product name with Wanglaoji (also 'WLJ'). JDB tried many advertisements to clarify the difference between these two kinds of herbal tea. Such 'imitation' soon became the trigger of the IP war between these two herbal tea makers.

## Dispute Between JDB and WLJ About Well-Known Product-specific Packaging Decoration

To clarify the differences and to stop the other party from using the red can herbal tea, both GPHL and JDB filed a lawsuit against the other.

### First Instance Judgment and Rationale

In 2013, the first instance judgment of the product-specific packaging decoration case between GPHL and JDB was rendered by the Guangdong Higher People's Court. The Court was of the opinion that, as both parties failed to provide their business profits from the counterfeits during the period involved, according to the audit report issued by the accounting firm, the JDB company, from December 2011 to 2014, gained total profits of RMB151,916,769.24. The court supported GPHL's RMB150,000,000 claim for compensation because the amount requested was within the range of profit gained by JDB.

The Court ruled that: (1) JDB should stop the infringement, such as stopping the use, production and sale of packaging decorations or products the same or similar to the packaging decoration of the well-known product WLJ red can herbal tea; (2) JDB should compensate GPHL for economic losses of RMB150,000,000 and the reasonable rights protection costs of RMB265,210; and (3) JDB should publish a statement in the Southern Daily, Guangzhou Daily and People Daily to eliminate the negative impact on GPHL. JDB appealed against the judgment of the first instance.

### Appeal Judgment and Rationale

In 2015, the second instance judgment was rendered by the Supreme People's Court holding that the well-known commodity in this case was Red Can WLJ Herbal Tea and that the 'yellow Chinese characters Wang Lao Ji, the red background, the patterns and its arrangement combination as a whole' on the Red Can WLJ Herbal Tea was considered a well-known, product-specific packaging decoration. Both parties had played an active role in the formation and development of the well-known packaging decoration in dispute. Therefore, the product-specific packaging decoration rights in dispute could be enjoyed jointly by GPHL and JDB under the premise of adhering to the principle of integrity and credit, respecting consumers' perceptions and without harming the legitimate rights and interests of others.

In the reasoning of the second instance judgment, the Court's opinion was that the IP system was set up to safeguard and stimulate innovation. The act of creating and accumulating social wealth by workers in the form of honest labour and the integrity management shall be protected by law. Judicial protection of IP rights should be committed to maintaining market order, fair competition, a dynamic market environment and should provide the public with clear legal expectations. IP disputes often arise from complex historic and realistic backgrounds and the division and balance of rights and interests are often intertwined. To handle such disputes, first, the court should fully consider and respect the historical causes of the dispute, the current situation of use, the perception of consumers and many other factors, maintain the principle of integrity, credit and genuineness of facts and strictly follow the guidelines of the law so as to resolve the dispute fairly and reasonably.

Based on the above principles, the Supreme Court confirmed that the two parties could jointly enjoy the well-known, product-specific packaging decoration rights in dispute without prejudice to the legitimate interests of others. Both GPHL and JDB had made positive contributions to the goodwill of the brand WLJ. While effectively enhancing the visibility of the companies, they had both gained huge profits. However, after the termination of the trademark use relationship of WLJ, the IP disputes between the two parties continued and the amount involved was huge, which caused great concern for the public and may also have damaged social perception towards the enterprises. In this regard, the Court said that the two parties should, in the spirit of mutual understanding and reasonable avoidance, perform the judgments in good faith, uphold the social responsibilities of enterprises, cherish their business outcome, respect the trust from consumers, strive to make a bigger, stronger national brand and provide consumers with better products with integrity, trustworthiness, and standardised market behaviours.

## Dispute between JDB and WLJ over Infringement of Trademark Rights

In 2014, GPHL filed a lawsuit in the Guangdong Higher People's Court against six JDB companies for trademark infringement.

### First Instance Judgment and Rationale

In the first instance judgment, the Guangdong Higher People's Court held that Guangdong JDB Drink & Food Co Ltd, Zhejiang JDB Drinks Co Ltd, JDB (China) Drinks Co Ltd, Fujian JDB Drinks Co Ltd, Hangzhou JDB Drinks Co Ltd. and Wuhan JDB Drinks Co Ltd should jointly compensate GPHL for economic losses and reasonable rights protection costs totalling RMB1,440,557,200 while GPHL's other claims were not supported.

The Guangdong Higher People's Court believed that by expressly requesting to calculate the compensation based on the six JDB companies' infringement profits and submitting the Special Analysis Report, relevant news reports and other evidence, in the absence of the relevant profit data held by JDB, GPHL had fulfilled its burden of proof within the scope of its capacity.

However, JDB not only failed to fulfil its burden of proof, but repeatedly refused to submit financial books on unreasonable grounds, which constituted an obstruction of the evidence and should bear corresponding legal responsibilities in accordance with the law. Therefore, the Guangdong Higher People's Court had determined the amount of compensation with reference to the claim of GPHL and the evidence provided by GPHL. Considering the faults of both parties, the Court held that the amount of compensation in this case should be half of the total profits gained by the six JDB companies during the period of the infringement, namely RMB1.45 billion (50 percent of RMB2.9 billion).

### Appeal Judgment and Rationale

In 2018 the Supreme Court ruled on JDB's appeal. The ruling stated that the court of first instance held that, on the basis of the Special Analysis Report provided by GPHL, the net profit of the six JDB companies for the period from 2 May 2010 to 19 May 2012 amounted to RMB2,930,155,500 and determined the amount of compensation in the case accordingly. The Special Analysis Report was important evidence for the court of first instance to determine the amount of compensation, but the Court noted that, in the conclusion section, the Special Analysis Report made a number of reservations to the Analysis results, clearly indicating the absence of a large amount of basic financial data and the lack of a qualification certificate and the signature of the relevant personnel who produced the Analysis report. Therefore, the Special Analysis Report had major flaws in both content and form and thus could not be used as the basis for determining the facts of the case. The court of first instance had improperly accepted the Special Analysis Report and the Court hereby corrected it.

To sum up, the court of first instance should, on the basis of the litigation claims made by GPHL, in accordance with the provisions of Article 52 of the Trademark Law and in light of the evidence of the whole case, re-examine the nature of the infringement act in dispute and the related legal liability issues to make a comprehensive review of the determination. Thus, the ruling of the Supreme Court revoked the first instance judgment and remanded the case to the Guangdong Higher People's Court for a new trial.

### The Advertisement Cases: False Publicity Dispute between WLJ and JDB in Various Courts and the Final Judgments

Guangdong JDB, JDB (China) and Wuhan JDB released advertising slogans such as 'the leading red can herbal tea that has the highest national sales has now changed its name to JDB' and 'seven out of ten cans of herbal tea sold in China are JDB's' since 2012. This led to GPHL and WLJ Health's dissatisfaction who took it to the courts.

#### First Instance Judgment and Rationale of False Publicity Dispute Between GPHL and Guangdong JDB

For the false publicity dispute between GPHL and Guangdong JDB in the Guangdong courts, the first instance judgment was given in 2012, in which the Guangzhou Intermediate Court believed that the advertising slogans mentioned above constituted false publicity. The false publicity had infringed the rights and interests of GPHL, which was also a herbal tea manufacturer, disrupted the market order and constituted unfair competition.

As for the compensation amount, GPHL did not provide any evidence to support its economic losses or the profits gained by JDB from infringement, instead it chose to claim RMB10,000,000 compensation based on not the entire, but part of the advertising expenses (RMB19,580,754.17) spent to eliminate the negative effects of JDB's false publicity. The Guangzhou Intermediate Court believed that the expense claimed by GPHL was supported by invoices and other evidence, which showed that the payer was GPHL or its wholly owned subsidiary WLJ Health. Considering that GPHL's WLJ herbal tea was created by GPHL, manufactured by WLJ Health, regardless of whether the specific payer was any of the above companies, such advertising cost was reasonably incurred to offset the negative effects of the above-mentioned false publicity of JDB, the Court supported GPHL's claim of RMB10,000,000.

Both GPHL and Guangdong JDB appealed and the second instance judgment was rendered in 2014 by the Guangdong Higher People's Court, which believed that, to the public, the advertising slogans 'the leading red can herbal tea that has the highest national sales' and 'the original red can WLJ' referred not solely to JDB's herbal tea but more to the WLJ trademark. Therefore, the information conveyed to the consumer by the slogan in dispute would obviously mislead the public that the WLJ trademark had been abandoned or died out, resulting in damage to the trademark holders of WLJ. Moreover, the slogans may also cause the misunderstanding that WLJ was replaced by JDB, damaging the goodwill of WLJ herbal tea.

As for compensation, the Guangdong Higher People's Court considered that the corresponding advertisements made by GPHL to eliminate the negative effects of JDB's false publicity were safe-haven measures taken to stop the spread of the negative effects and were also reasonable and necessary remedial measures to protect its rights. Therefore, GPHL's act of claiming part of the advertising expenses RMB10,000,000 was a free disposal of its legitimate rights and were therefore supported. Guangdong JDB applied for retrial against this judgment.

#### Retrial and Final Judgment and Rationale Between GPHL and Guangdong JDB

In 2017, the Supreme Court ruled on the retrial. The Court believed that, first of all, Guangdong JDB's description and publicity of the slogan 'the leading red can herbal tea that has the highest national sales has now changed its name to JDB' was true and objective. The description 'the leading red can herbal tea that has the highest national sales' in the first half of the slogan was consistent with the statistical conclusions, which was not false but explicitly orientated. After the trademark licence agreement was invalidated, Guangdong JDB began to produce red can herbal tea with the trademark 'JDB', so the second half of the slogan 'has now changed its name to JDB' was also an objective and factual description. Therefore, the description and publicity of the slogan 'the original red can WLJ changed its name to JDB herbal tea' was also true and objective. Second, the slogan in dispute was actually an exercise of the obligation to inform, informing the public that the trademark of the previous WLJ red can herbal tea was now changed to JDB. Therefore, there was no possibility that the slogan in dispute would lead to public hastening and false buy.

In addition, although Guangdong JDB's use of the slogan in dispute occupied part of the goodwill of the WLJ trademark, the goodwill of the WLJ trademark was gained largely due to the contribution of Guangdong JDB and its affiliates, so this occupation had certain rationality. After GPHL recovered the trademark, it authorised WLJ Health to produce WLJ herbal tea. Consumers would not misunderstand that the WLJ trademark had been discontinued or no longer used. Therefore, GPHL's licensed production had benefited from the great goodwill of the WLJ trademark and the slogan in dispute would not let the WLJ herbal tea produced by WLJ Health lose its original popularity and goodwill. Guangdong JDB's use of the slogan in dispute did not constitute unfair competition.

Because Guangdong JDB's publicity did not constitute unfair competition of false publicity, GPHL's claims for ordering Guangdong JDB to compensate for losses, reasonable expenses and to issue a statement in the Guangzhou Daily and People's Online to eliminate the influence were rejected. The Supreme Court ruled to overrule the civil judgments of the first instance and second instance and reject the claims of GPHL.

**First and Second Instance Judgment and Rationale of False Publicity Dispute between WLJ Health (Guangzhou) and JDB (China)**

The false publicity case between WLJ Health (Guangzhou) and JDB (China) was the first trial in the Chongqing Fifth Intermediate Court, which held that the use of the wording 'changed its name to' in the advertising slogan in dispute may lead to misunderstanding. The misunderstanding could influence consumers' judgment and their purchase decisions and the manufactures and operators of the JDB herbal tea had thus obtained competitive advantages and benefits, which violated the principle of good faith and were unfair competition acts of false publicity.

As for the compensation amount, given the fact that the plaintiff did not provide evidence to prove the specific damages caused by the defendant's false publicity nor the profit gained by the defendant via false publicity, the court determined that the damages for all and any losses caused by the unfair competition shall be based on the method of determining the damages for infringement on the exclusive right to use a registered trademark and ruled that the defendant JDB (China) shall compensate the plaintiff WLJ Health Company for economic losses and reasonable expenses in the sum of RMB400,000. The second instance court upheld this judgment.

**After GPHL recovered the trademark, it authorised WLJ Health to produce WLJ herbal tea.**

**Retrial and Final Judgment between WLJ Health (Guangzhou) and JDB (China)**

The Supreme Court, in the retrial judgment of the WLJ Health (Guangzhou) and JDB (China) case, believed that, first of all, JDB China's description and publicity of the slogan was true and objective, was actually an exercise of the obligation to inform, that is, informing the public that the trademark of the previous WLJ red can herbal tea was now changed to JDB. Therefore, there was no possibility that the slogan in dispute would lead to public hastening and false buy.

In addition, although JDB China's use of the slogan in dispute occupied part of the goodwill of the WLJ trademark, the goodwill of the WLJ trademark was gained largely due to the contribution of JDB China and its affiliates, so this occupation had certain rationality. After GPHL recovered the trademark, it authorised WLJ Health to produce WLJ herbal tea. Consumers would not misunderstand that the WLJ trademark had been discontinued or no longer used. Therefore, GPHL's licensed production had benefited from the great goodwill of WLJ trademark and the slogan in dispute would not let herbal tea produced by WLJ Health lose its original popularity and goodwill. JDB China's use of the slogan in dispute did not constitute unfair competition.

Because JDB China's publicity did not constitute unfair competition or false publicity, WLJ Health's claims for ordering JDB China to compensate for losses, reasonable expenses and to issue a statement in the Chongqing Daily to eliminate the influence, etc were rejected. The Supreme Court ruled to overrule the civil judgments of the first instance and second instance and rejected the claims of WLJ Health.

**First and Second Instance Judgment and Rationale of False Publicity Dispute Between WLJ Health (Guangzhou) and Wuhan JDB**

In 2015, the Changsha Intermediate Court, in the false publicity dispute between WLJ Health (Guangzhou) and Wuhan JDB, held that the advertising slogan 'the red can herbal tea that has the highest national sales—JDB' was false publicity because it conveyed the message that the red can herbal tea that had the highest national sales was named JDB, while, in fact, according to the investigation, the red can herbal tea that had the highest national sales was WLJ other than JDB.

As for the amount of compensation, the Court supported the two plaintiffs' compensation claims for their advertising expenses totalling RMB9,022,978.70 because it was necessary and feasible to clarify the false publicity of Wuhan JDB by publishing advertisements and the two plaintiffs had also provided relevant evidence, including the relevant contracts, advertising fee bills and other evidence that confirmed their effort to eliminate the negative effect of the false publicity.

The two parties appealed to the Hunan Higher People's court and the amount of compensation was reduced to RMB6,000,000 in the second instance judgment.

**Retrial and Final Judgment between WLJ Health (Guangzhou) and Wuhan JDB**

The Supreme Court's rationale in the other false publicity dispute between GPHL and JDB was also adopted in the case between WLJ Health (Guangzhou) and Wuhan JDB. For the slogan 'the leading red can herbal tea that has the highest national sales—JDB', the Supreme Court believed that this slogan oriented to the JDB red can herbal tea produced by Wuhan JDB after May 2012, but the statistics submitted by it, which contained the data of WLJ herbal tea produced before this date, could not truly and comprehensively reflect the actual sales of JDB red can herbal tea. Therefore, the slogan, which failed to objectively and accurately express objective facts, was false publicity and could easily cause misunderstandings of general consumers and harm the interests of other competitors so, therefore, it constituted unfair competition.

Also, for the slogan 'seven out of ten cans of herbal tea sold in China are JDB's', the Supreme Court believed that the data source reports of the slogan did not directly lead to the conclusion that the sales volume of the JDB in the herbal tea market reached 70 percent. Second, the statistics in the report included the WLJ red can herbal tea produced by Wuhan JDB before November 2011, the red can herbal tea with WLJ on one side while JDB on the other side of its can produced between November 2011 to May 2012, as well as the red can herbal tea produced by Wuhan JDB after May 2012. Therefore, the description of the market share in the slogan did not match the quantity source indicated by it. The slogan, which was one-sided and ambiguous, would probably mislead the public to make choices not favourable to competitors in the market and constituted false publicity.

Since the two slogans in dispute used by Wuhan JDB constituted false publicity, the Supreme Court concluded that Wuhan JDB shall compensate the economic losses and reasonable expenses in the sum of RMB1,000,000 and stop using and selling the red can herbal tea printed with these two advertising slogans.

**Conclusion**

In these three false publicity disputes, JDB lost in all the first and second instance trials and needed to pay GPHL nearly RMB20,000,000 in total as compensation. But the Supreme Court overruled the first and second instance judgments in three cases and rejected GPHL's claims. Only in the final judgment of the WLJ Health (Guangzhou) and Wuhan JDB case, JDB was ordered to pay GPHL RMB1,000,000 as compensation. Therefore, more or less, JDB's advertisements regarding its products were upheld in these three false publicity disputes cases with GPHL.

**False Publicity Dispute between Guangdong JDB and GPHL over the Slogan 'afraid to suffer excessive internal heat then drink WLJ'**

**First Instance Judgment and Rationale**

In 2013, the Guangzhou Intermediate People's Court gave its first instance judgment in the case of GPHL suing Guangdong JDB for false publicity by using the well-known slogan 'afraid to suffer excessive internal heat then drink WLJ'. The Court held that the direct beneficiary of the slogan 'afraid to suffer excessive internal heat then drink WLJ' was the owner of the brand WLJ and the product image established by the slogan was also an integral part of the image of the brand WLJ. As the owner of the WLJ trademark, GPHL had legitimate interests in the slogan, which was an integral part of the trademark image.

After stopping usage of the WLJ trademark and the aforesaid slogan, JDB's alternative usage of the slogan 'afraid to suffer excessive internal heat then drink JDB', which made consumers doubtful and let consumers believe that WLJ and JDB were affiliated companies or with some other relationship, had improperly increased the competitive advantage of JDB products and damaged the legitimate interests of GPHL and thus constituted unfair competition.

Regarding the compensation, the Guangzhou Intermediate People's Court, in consideration of the market value of the slogan in dispute and the market share of JDB's products, the launching scope of the slogan 'afraid to suffer excessive internal heat then drink JDB', the advertisements produced by GPHL to clarify the facts and other facts, supported GPHL's claim for compensation in the sum of RMB5,000,000. JDB appealed against the first instance judgment.

**Appeal and Final Judgment**

In the second instance judgment rendered by the Guangdong Higher People's Court in 2016, the Court held that the slogan 'afraid to suffer excessive internal heat then drink WLJ' and the advertising expression 'afraid to suffer excessive internal heat then drink XXX' were neither registered trademarks nor the distinctiveness for identification of the source of the goods independent of the WLJ trademark. The wording 'afraid to suffer excessive internal heat' was a description of the function of herbal tea products and decreasing internal heat was the common function and selling point of all herbal tea products and did not form the second meaning directly orienting to the WLJ herbal tea. The wording 'afraid to suffer internal heat then drink' seen by the consumers in any occasion other than the advertisement of WLJ herbal tea did not have the function of identifying the source of the products.

In addition, under the circumstances that the expression 'afraid to suffer excessive internal heat' lacked distinctiveness and was a publicity function of the product's efficacy description, the alleged slogan 'afraid to suffer excessive internal heat then drink JDB' was obviously different from the expression 'afraid to suffer excessive internal heat then drink WLJ' and was sufficient to enable consumers to identify that the products they wanted to advertise were JDB herbal tea and would not cause market confusion and did not constitute a transfer of the goodwill of the WLJ trademark.

Moreover, the slogan 'afraid to suffer excessive internal heat then drink XXX' was created and used by JDB. Under the circumstance that the trademark licence relationship between JDB and GPHL's WLJ trademark was terminated and JDB had produced herbal tea products with the trademark JDB, JDB's alternative usage of the advertising slogan 'afraid to suffer excessive internal heat then drink XXX' on its herbal tea products was neither illegitimate nor violated any principle of good faith or recognised business ethics.

Under the circumstances that the alleged slogan of JDB would not cause confusion among consumers and thus would not enable JDB to improperly gain competitive advantage and not cause damage to the legitimate rights and interests of GPHL, the advertising behaviour of JDB did not constitute unfair competition. The Guangdong Higher Court revoked the first-instance judgment and rejected all the claims of GPHL.

## Summary

So far, JDB has won in the final judgment of the packaging decoration and false publicity disputes and also achieved an initial victory in the trademark dispute as the case, for which the original compensation amount is RMB2.93 billion, has been remanded for a retrial.

Although the legal disputes between GPHL and JDB have not come to an end, the long-lasting Chinese herbal tea war reflects the development of the Chinese IP law system. From the recent Supreme Court's judgment, except for the infringement issue, when determining the compensation for IP infringement, the court not only focuses on the authenticity and validity of the evidence proving the losses and damages suffered, but there are several basic principles being followed in determining the compensation amount. The actual loss suffered by the right holder, profits gained therefrom by the infringer and the multiples of the trademark for licence fees are still the main foundation of determining the compensation amount, but the court is taking parties' obstruction to the evidence and contribution to the brand into account, which is historical progress to allow the Chinese IP law system to better encourage and protect intellectual property rights.

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# The Inevitable Intersection of the Philippines' Competition and Intellectual Property Laws

## Introduction

Philippine competition policies recognise the efficiency of market competition as a mechanism for allocating goods and services.[1] On the other hand, Philippine intellectual property laws recognise an intellectual property rights holder's ('IPR holder') exclusive rights, which practically allows them to monopolise the use of their intellectual property within a fixed period of time. Although having a purpose seemingly distinct from each other, these two laws will eventually intersect. This article discusses how these laws anticipate this eventual intersection.

## Philippine Competition Laws

As far back as 1925, the Philippines had laws which prohibited monopolies and acts resulting in restraint of trade. Act No 3247, or the Act to Prohibit Monopolies and Combinations in Restraint of Trade, penalised three acts:

- making and engaging in agreements in restraint of trade or commerce or intended to prevent free competition in the market;[2]
- monopolising or attempting to monopolise any part of trade or commerce;[3] and
- every combination, conspiracy, trust, agreement or contract intended to restrain lawful trade or free competition in lawful trade or commerce or to increase the market price of any article or articles imported or intended to be imported into the Philippines.[4]
- The Revised Penal Code (Act No 367) ('RPC') of 22 June 1957 incorporated the same provisions in the Revised Penal Code.[5] In addition, the RPC increased the penalty for these aforementioned acts involving prime necessities. It was only in 2015, when the current Philippine Competition Act came into force, that there was an updated, focused and comprehensive anti-competition policy.

## The Philippine Competition Act

### Purpose of Enactment

The Philippine Competition Act (Republic Act No 10667) ('PCA') was enacted on 21 July 2015. It is the 'primary competition policy of the Philippines for promoting and protecting the competitive market'[6]. The PCA was enacted pursuant to the constitutional goal for the national economy to, among other things, attain a more equitable distribution of opportunities, income and wealth and a mandate for the State to regulate or prohibit monopolies when the public interest so requires.[7] The PCA also seeks to prevent economic concentration which will control production, distribution, trade or industry that will unduly stifle competition, lessen, manipulate or constrict the discipline of free markets and penalises all forms of anti-competitive agreements, abuse of dominant position and anti-competitive mergers and acquisitions,with the objective of protecting consumer welfare and advancing domestic and international trade and economic development.[8] In this regard, the PCA prohibits anti-competitive agreements, abuse of dominant position and anti-competitive mergers and acquisitions.

### Anti-Competitive Agreements

The PCA identifies three types of agreements that are considered anti-competitive: those that are prohibited in themselves; horizontal agreements that seek to substantially prevent, restrict or lessen competition; and any other agreement which has the object or effect of substantially preventing, restricting or lessening competition. Specifically, the law prohibits the following agreements: [9]

1. agreements, between or among competitors, which are per se prohibited:
   a. restricting competition as to price or components thereof or other terms of trade;
   b. fixing price at an auction or in any form of bidding including cover bidding, bid suppression, bid rotation and market allocation and other analogous practices of bid manipulation;

2. agreements, between or among competitors which substantially prevent, restrict or lessen competition:
   a. setting, limiting, or controlling production, markets, technical development, or investment;
   b. dividing or sharing the market, whether by volume of sales or purchases, territory, type of goods or services, buyers or sellers or any other means;

3. agreements other than those specified in (1) and (2) above which substantially prevent, restrict or lessen competition, provided that those which contribute to improving the production or distribution of goods and services or to promoting technical or economic

progress, while allowing consumers a fair share of the resulting benefits, may not necessarily be deemed a violation of the PCA.

**Abuse of Dominant Position**

One who is considered to be in a 'dominant position' in the relevant market is prohibited by the PCA from abusing that position by engaging in conduct that would substantially prevent, restrict or lessen competition. Examples of abuse of dominant position under the PCA are: selling below cost to drive out competitors from the relevant market; imposing barriers to prevent entry and/or growth of competitors; requiring the fulfilment of conditions and carrying out of acts which have no relation or connection to the obligation or provisions of the licensing agreement; limiting production to the prejudice of consumers; and other similar acts.[10]

**Anti-Competitive Mergers and Acquisitions**

Merger or acquisition agreements that substantially prevent, restrict or lessen competition in the relevant market or in the market for goods or services, as may be determined by the Philippine Competition Commission, shall be prohibited.[11] For this purpose, the Commission is empowered to review merger and acquisition agreements, with certain agreements requiring a mandatory notification by the parties, depending on the transaction value.[12]

## Intellectual Property Law

**Introduction**

Intellectual property rights in the Philippines have enjoyed legal protection for more than a century. Copyright laws have been in place, through the Spanish Law on Intellectual Property, since 1879 and patent protection, although it is unclear as to when it was formally enacted, likewise adhered to Spanish laws.[13] The first unified intellectual property law was enacted in 1924 as Act No. 3141. Intellectual property laws then were continuously amended and updated up to its current form.

The current law on the matter, Republic Act No 8293 or the Intellectual Property Code of the Philippines ('IP Code'), was enacted in light of the Philippine Constitution's mandate for the State to protect and secure the exclusive rights of scientists, inventors, artists and other gifted citizens to their intellectual property creations. The IP Code is also a recognition that an effective intellectual property system is important to local development. Thus, the provisions of the IP Code, similar to the provisions of the intellectual property laws before it, are in place to protect and secure exclusive rights over intellectual property.[14] These exclusive rights include the right to exclude others from using patents, trademarks or copyright which remain exclusive to the holder of the intellectual property rights within the period allowed by the IP Code.

**Recognition and Treatment of Intellectual Property Rights by the Philippine Competition Act**

The PCA expressly recognises intellectual property rights. An example is seen where the following abuse of dominant position is qualified by an exemption: 'imposing restrictions on the lease or contract for sale or trade of goods or services concerning where, to whom, or in what forms goods or services may be sold or traded, such as fixing prices, giving preferential discounts or rebate upon such price, or imposing conditions not to deal with competing entities, where the object or effect of the restrictions is to prevent, restrict or lessen competition substantially'. However, such acts would not be considered as an abuse of dominant position if what is involved are 'agreements protecting intellectual property rights, confidential information, or trade secrets'.[15]

Another instance where the PCA recognises intellectual property rights is where the law deems allowable the acquisition of market share through the exercise of intellectual property rights, to wit: [16]

> The Commission shall not consider the acquiring, maintaining and increasing of market share through legitimate means not substantially preventing, restricting, or lessening competition in the market such as but not limited to having superior skills, rendering superior service, producing or distributing quality products, having business acumen, and the enjoyment and use of protected intellectual property rights as violative of this Act.

**Limitations on Intellectual Property Rights**

While Philippine intellectual property law allows exclusive rights over intellectual property, the law likewise recognises the social function of intellectual property and thus also promotes the diffusion of knowledge developed or innovated by IPR holders.[17] In order to do so, the IP Code ensures that intellectual property will eventually be accessible to the public who may then freely utilise them.

However, prior to the expiration of the exclusive rights, an IPR holder may allow others to use their intellectual


property rights through licensing, which is covered by sections 87 and 88 of the IP Code, which are implemented through the Philippine Intellectual Property Office's rules on voluntary licensing. These laws and implementing rules impose prohibited provisions and mandatory provisions in a licensing agreement.

Prohibited clauses are those deemed *prima facie* to have an adverse effect on competition and trade. Among the prohibited provisions are those which require licensees to acquire capital goods from a specific source or permanently employ personnel chosen by the licensor, those which prevent the licensee from engaging in research to adapt the IP creation to local conditions or actually adapting or innovating on the IP creation to suit local conditions, and other similar anti-competitive clauses, among others.[18]

While the prohibited clauses for licensing agreements focus on the licensing of intellectual property rights, these clauses closely resemble, or at least complement, provisions under the PCA. For example, section 15(b) of the PCA considers the act of making a transaction subject to the acceptance by the other party of obligations which have no connection to the agreement as an abuse of dominant position. Similarly, section 87.7 of the IP Code considers as anti-competitive, and thus prohibited, provisions which require the licensee to pay for royalties for patents which are not used.

Section 87 may be deemed a manifestation of the IP Code's acknowledgment of the social function of IP rights and the need to promote knowledge for the public good. In this regard, section 87 prefaces its prohibitions with 'the following provisions shall be deemed *prima facie* to have an adverse effect on competition and trade' as the rationale for the prohibition of the enumerated prohibitions. These prohibited clauses are:

- 87.1: those which impose upon the licensee the obligation to acquire from a specific source capital goods, intermediate products, raw materials and other technologies or of permanently employing personnel indicated by the licensor;

- 87.2: those pursuant to which the licensor reserves the right to fix the sale or resale prices of the products manufactured on the basis of the licence;

- 87.3: those that contain restrictions regarding the volume and structure of production;

- 87.4: those that prohibit the use of competitive technologies in a non-exclusive technology transfer agreement;

- 87.5: those that establish a full or partial purchase option in favour of the licensor;

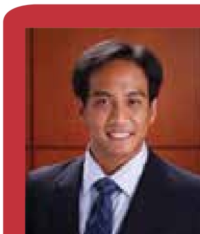
- 87.6: those that obligate the licensee to transfer for free to the licensor the inventions or improvements that may be obtained through the use of the licensed technology;
- 87.7: those that require payment of royalties to the owners of patents for patents which are not used;
- 87.8: those that prohibit the licensee from exporting the licensed product unless justified for the protection of the legitimate interest of the licensor, such as exports to countries where exclusive licences to manufacture and/or distribute the licensed product(s) have already been granted;
- 87.9: those which restrict the use of the technology supplied after the expiration of the technology transfer arrangement, except in cases of early termination of the technology transfer arrangement due to reason(s) attributable to the licensee;
- 87.10: those which require payments for patents and other industrial property rights after their expiration, termination arrangement;
- 87.11: those which require that the technology recipient shall not contest the validity of any of the patents of the technology supplier;
- 87.12: those which restrict the research and development activities of the licensee designed to absorb and adapt the transferred technology to local conditions or to initiate research and development programs in connection with new products, processes or equipment;
- 87.13: those which prevent the licensee from adapting the imported technology to local conditions or introducing innovation to it, as long as it does not impair the quality standards prescribed by the licensor;
- 87.14: those which exempt the licensor for liability for non-fulfilment of his responsibilities under the technology transfer arrangement and/or liability arising from third party suits brought about by the use of the licensed product or the licensed technology; and
- 87.15: other clauses with equivalent effects.

## The Intersection Between Philippine Intellectual Property and Competition Laws

From the foregoing discussion, it can be seen that while the IP Code was enacted more than a decade before the Philippine Competition Act, it already recognised anti-competitive principles through its prohibited clauses under section 87. With the fairly recent enactment of the Philippine Competition Act, where intellectual property rights are reciprocally recognised, it will be interesting to see how courts, the Philippine Intellectual Property Office and the Philippine Competition Commission will harmonise these two laws and how it will affect stakeholders.

## Notes

[1] Philippine Competition Act, s 2.
[2] Act to Prohibit Monopolies and Combinations in Restraint of Trade (Act No 3247), s 1.
[3] Ibid, s 2.
[4] Ibid, s 3.
[5] Revised Penal Code, Art 186.
[6] Philippine Competition Commission, Philippine Competition Law (R.A. 10667), available at https://phcc.gov.ph/philippine-competition-law-r-10667/ (last visited 10 November 2019).
[7] Philippine Competition Act, s 2(2).
[8] Ibid, s 2(b) and (c).
[9] Ibid, s 14.
[10] The complete enumeration of acts considered as Abuse of Dominant Position may be found in ibid, s 15.
[11] Ibid, s 20.
[12] Ibid, s 19.
[13] See https://www.ipophil.gov.ph/news/the-intellectual-property-system-a-brief-history/.
[14] IP Code, s 2.
[15] Ibid.
[16] Philippine Competition Act, s 27.
[17] Ibid.
[18] The Prohibited Clauses for Technology Transfer Arrangements may be found under the IP Code, s 87.



**Jose Eduardo T Genilo**

**DFDL (Thailand)**

Jose Eduardo T Genilo, BSIE, JD, LL.M is a partner in ACCRA Law, Philippines, working extensively in all aspects of IP law. He is an IPO-PHIL Qualified Patent Agent and is a sought-after resource speaker on IP and cyber law. He also lectures on civil and remedial laws.

# China and Ukraine Allow Out of Court Review of Domain Disputes


## Introduction

This year two more countries joined the Uniform Domain Name Dispute Resolution Procedure ('UDRP'), namely China and Ukraine. The UDRP provides for out-of-court review of disputes involving conflicts between domain names and intellectual property rights. China and Ukraine made it available for their country code top-level domains .cn, .中国 and .ua respectively. The disputes review is administered by the World Intellectual Property Organization ('WIPO') headquartered in Geneva, Switzerland and allows for getting disputes resolved as quickly as about three months for as low as US$1,500. This article explores the specific features and benefits of the UDRP.

## Three Elements to Consider for Complaint

In order to succeed with its complaint within the UDRP the complainant must prove three elements as further detailed below.

### 1. Identical/Similar

First of all, the complainant shall prove that the disputed domain name is identical or confusingly similar to a trademark or service mark ('trademark') in which the complainant has rights. Respective trademarks include registered marks as well as unregistered (common law) marks. A pending trademark application by itself would not prove relevant trademark rights.

In order to establish whether a trademark and disputed domain name are similar, normally a side-by-side comparison of its textual components is applied. Similarity is usually confirmed if, for instance, the domain name incorporates the entirety of the trademark.

### 2. Lack of Rights/Legitimate Interests

As a second element it should be established that the respondent lacks rights or legitimate interest in the disputed domain name. In principle, the UDRP provides for a single round of pleadings without discovery. Thus, it could be quite difficult for the complainant to prove the required lack, since relevant information is usually within the possession of the respondent. For this reason, where a complainant establishes *prima facie* that the respondent has no rights or legitimate interest in the disputed domain name, the burden of proof shifts to the respondent.

Then the respondent has non-exclusive guidance of arguments to prove its position, which may include as follows:

- the respondent used (or made demonstrable preparations to use) the disputed domain name for the bona fide offering of goods or services before any notice of the dispute;
- the respondent is commonly known by the disputed domain name, even though having no rights in the respective trademark; or
- the respondent is making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the complainant's trademark.

There are special rules to allow use by distributors of domain names, which include the complainant's trademark. For this purpose, the respondent must satisfy all the conditions as follows:

- it must actually offer the respective complainant's trademarked goods at the disputed domain name;
- no other goods shall be offered at the disputed domain name;
- the site at the disputed domain name shall clearly explain the relationship between the trademark holder and the distributor; and
- the respondent should not be trying to 'corner the market' in domain names that reflect the trademark.

### 3. Bad Faith Registration/Use

As a third element, the complainant must prove that the disputed domain name was registered and is being used by the respondent in bad faith. To prove the bad faith registration, the complainant may demonstrate that at the time of the registration of the disputed domain name the respondent knew, or at least should have known, about the existence of the complainant's trademark.

The UDRP has a significant advantage of reasonable timing for dispute review compared to conventional courts.

Also, in order to support the bad faith argument, the complainant may provide evidence that the respondent has registered the domain name to attract, for commercial gain, Internet users to its website by creating a likelihood of confusion with the complainant's mark. Normally 'passive holding' or non-use of a domain name does not prevent a finding of bad faith.

## Beneficial Aspects of the UDRP

### High Speed

The UDRP has a significant advantage of reasonable timing for dispute review compared to conventional courts. An average review of a domain dispute under the UDRP administered by the WIPO takes about three months. This starts with filing the complaint and ends with transfer or cancellation of the domain name, if granted. The main stages of the dispute review are as follows: filing complaint → getting respondent's response → appointing panel → issuing decision → implementing the decision.

### Low Cost

There is a fixed price of US$1,500 for a domain dispute covering one to five domain names, which covers the vast majority of disputes.

### Instant Enforcement

Unlike in court disputes where enforcement of a final decision may take another round of efforts and costs, not to mention time delays, the UDRP procedure provides for implementation of the decision by the registrar of the disputed domain name 10 business days after it was informed of the decision by the WIPO.

**Predictability**

The outcome of the UDRP application is very stable and predictable due to several factors. While reviewing the dispute, the views of previous panels are taken into account to avoid contradictions with already established approaches. The panels' approaches are summarised by the WIPO in its Overview of WIPO Panel Views on Selected UDRP Questions and is gradually updated, with its third addition currently available. Also, the WIPO has its own pool of panelists available for domain dispute reviews. The panelists are esteemed and highly qualified lawyers representing various jurisdictions with a relevant professional background. All in all, these provide for stable and predictable decisions of domain disputes under the UDRP.

However, it should be noted that application to the UDRP in combination with the relevant panels' views issued over the last 20 years requires the parties are represented by skilled counsel experienced in domain dispute matters.

## Tailoring for Particular Jurisdictions

Although the UDRP provisions are quite universal, some jurisdictions may have local circumstances (for example, legal, language, etc.) requiring tailoring of the UDRP respectively. In such a case, variation of the UDRP is adopted with roughly 50 percent of countries that apply a UDRP variation.

Both China and Ukraine, who recently joined the club, chose variation of the UDRP. While variation for Ukraine provides for only one difference regarding the bad faith element (bad faith registration or use must be proved), China introduced more differences compared to the UDRP.

In particular, the most relevant differences for China include:

- the procedure is applied to the domain names that have been registered for less than three years;
- in addition to trademarks, also any 'name' in which the complainant has civil rights or interests counts;
- either registration or use of the disputed domain name in bad faith suffices; and
- the language of the proceeding is Chinese, unless otherwise agreed by the parties or determined by the panel.

## Conclusion

The first UDRP case in Ukraine was initiated by a Chinese company, which succeeded in obtaining a decision of transfer of a disputed domain name. As regards UDRP disputes in China, as of November 2019 five disputes had been resolved since the launch of the procedure in August 2019.

The UDRP procedure has proved to be the most efficient and preferable way for resolving domain disputes and it keeps spreading over new groups of domain names making the life of a compliant business easier.


**Taras Kyslyy**

**Partner at Arzinger, Panelist at the WIPO**

Taras Kyslyy has an intellectual property practice and is a TMT Partner at Arzinger, Attorney-at-law, UDRP and Dispute Resolution Arbitrator at ccTLD .UA under the UA-DRP procedure of the International WIPO Arbitration and Mediation Center (Geneva, Switzerland). Taras has over 19 years of experience in the field of intellectual property. His competence covers all aspects of IPR protection (litigation, protection from unfair competition, counterfeiting and piracy, alternative dispute resolution, IPR portfolio management etc.) as well as e-commerce, data protection and legal support for clients in the fields of media, telecommunications and technology.

# Legal Regulation of Image Rights and Business Reputation in Russia

In this article, we review the legal regulation of image rights and business reputation, including the legal remedies for their infringement, in Russia. Besides the statutory regulations, the article contains references to some applicable court rulings/decisions and recent interesting examples of protection of image rights and business reputation.

## Introduction

Nowadays, due to the globalisation processes and intensive development of telecommunications and media, the legal issues concerning image rights have become very important and sensitive. Individuals post photographs and videos with their images on the Internet including online social networking services such as Facebook and Instagram; companies publish and use the images of celebrities and influencers in their advertising campaigns; singers and other entertainers use stage names that become popular and pivotal for their visibility and success. At some point, to a greater or lesser degree, all of them face issues concerning image rights. In addition, individuals and companies all over the world face reputational risks due to defamation and other unfair and intrusive actions of their competitors, ill-wishers and the 'yellow press' that frequently publishes sensational or eye-catching news without due verification.

Thus, we would like to review in this article the regulation of image rights and business reputation from the Russian law perspective, including the review of some applicable court rulings/decisions and recent interesting examples of protection of image rights and business reputation.

## Legal Regulation of Image Rights

According to Russian law,[1] a person's image, including photographs, video recordings or artworks wherein he/she is depicted, can be published and used by another person or legal entity only with that person's consent, except for some cases provided for by law.

These are called 'image rights'. They are inalienable and protected by the law along with other inalienable rights, such as honour, dignity, business reputation, privacy, etc. Exceptions to this rule (that is, the cases when a person's consent is not required) are as follows:[2]

1. an image is used in state, social or other public interests;

2. an image has been obtained during a shoot in places with free access or at public events (meetings, congresses, conferences, concerts, shows, sports competitions and similar events), except for cases when such an image is the main object of use; or

3. a person has been paid for modelling.

In all other cases, it is required that a person's consent is obtained to publish and use his/her image. A consent, as a type of a contract, can be provided orally, in writing or by means of actions implied by conduct, unless otherwise provided for by law.[3] Actions implied by conduct are such actions that evidence a person's will to make a contract, that is, to provide consent.[4]

A consent should contain particular conditions setting out a procedure and limits of publication and use of an image (for example, the terms of the consent, scope of use of an image).[5] If a consent has been given orally or by means of actions implied by conduct, such consent covers the use of an image to the extent and for the purposes that are clear from the situation in which it has been given.[6]

A person may revoke a consent at any time.[7] In that case, a person or a legal entity that obtained the consent may demand compensation for damages incurred by such revocation.[8] After a person's death, his/her image can be used only upon the consent to be given by his/her children and surviving spouse; in their absence, upon the consent of his/her parents;[9] and in the case of their death or absence, there is no need for any consent.[10]

It is noteworthy that under some other legal acts,[11] the image rights are defined in a very broad sense and include the rights on commercial use of a name (including first name, surname, patronymic name, pseudonym and/or nickname), likeness, appearance and other aspects of personal identity (*inter alia*, autograph). The issues on legal protection of such aspects of the image rights are described in the section below.

In the case of infringement of a person's image rights, he/she has the right:

a. to claim monetary compensation for moral harm;[12]

b. to claim removal from circulation and destruction (without any compensation) of material carriers containing his/her image;[13]

c. to claim removal of his/her image from the Internet, as well as suppression or prohibition of its further distribution on the Internet.[14]

The respective claims shall be filed in the court. A claimant shall prove the fact of publication and use of his/her image by a defendant, while a defendant shall prove the legitimacy of such publication and use.[15]

Moral harm means moral or physical suffering caused by actions or inaction (i) infringing a person's inalienable rights (also referred to as intangible benefits, for example, life, health, personal dignity, goodwill, privacy, personal and family secrets); (ii) violating a person's non-proprietary rights (the right to use his/her own name, copyright etc); or (iii) violating a person's proprietary rights.[16] The amount of compensation for moral harm is determined by the court based on the degree of the defendant's guilt and other noteworthy circumstances, such as the degree of physical and moral suffering related to the individual characteristics of a claimant.[17]

Further, it should be noted that some celebrities protect the elements of their image rights in a broad sense (in particular stage names) by registering them as trade (service) marks ('trademarks'). For example, between 2007 to 2009, a famous Russian singer Viktor Belan (known under the stage name 'Dima Bilan') changed his real name to his stage name and registered two trademarks with respect to it with the Russian Patent Office[18] in order to acquire the right to use his popular stage name despite the claim of the production company Star Productions LLC. That approach is also widely used by music production companies. For example, the music label Black Star LLC registered several trademarks with respect to the image rights (stage names) of the singers whom it promoted, such as: Egor Kreed,[19] L'one[20] and Kristina Si[21]. After the termination of contracts with the singers, the music label had reserved the rights to the respective trademarks containing the singers' stage names. As for Egor Kreed, the trademarks containing his stage name were assigned to him under the respective alienation agreements as an exception from common practice. As an additional example, the globally famous Russian model Irina Shayk (real name Irina Shaykhlislamova) has a trademark with respect to her stage name registered by her sister.[22] Thus, the practice of protection of image rights by means of registration of trademarks is widely used by various celebrities and music production companies.

## Legal Regulation of Business Reputation

A person's honour, dignity and business reputation are no less important than his/her image rights. Under Russian laws,[23] a person has the right to protect his/her honour, dignity and business reputation. In this regard, he/she may claim in court a refutation of information discrediting his/her honour, dignity or business reputation ('defamatory information') on the condition that it has not been proven that such information is true.

In the case of defamation, a person may protect his/her business reputation by the following means:

1. to claim publication of a refutation, as well as a reply with respect to defamatory information.[24] The refutation should be done in the same way as the respective defamatory information has been disseminated or in another similar way.

2. to claim deletion of defamatory information (*inter alia*, from the Internet).[25]

3. to claim monetary compensation for moral harm caused by dissemination of defamatory information.[26] The definition of moral harm and the principles on determination of compensation amount are described above.

4. to claim monetary compensation of damages incurred by dissemination of defamatory information.[27]

The respective legal remedies, except for compensation for moral harm, can be used by legal entities.[28] Legal entities may not demand compensation for moral harm, but they may demand compensation of damages caused by dissemination of defamatory information.

The courts settle claims on protection of business reputation provided that it is proven that the information concerning business reputation is: (a) defamatory; (b) has been really disseminated; and (c) is not true.[29] The first two conditions shall be proven by a claimant, while a defendant shall prove that the information is true.[30]

It is noteworthy that for dispute resolution of defamation, the Russian courts take into consideration international legal acts and conventions, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms.[31] In addition, they also take into consideration the practice of the European Court of Human Rights, for example, the judgments in the cases of OOO 'Vesti' and Ukhov v Russia (2013), 'Novaya


Recent court practice on defamation shows that publicly known people are more and more eager to defend their rights in court.

Gazeta' and Borodyanskiy v Russia (2013), Andrushko v Russia (2010), Bezymyannyy v Russia (2010), Fedchenko v Russia (2010), Dyundin v Russia (2008), Zakharov v Russia (2006) and Grinberg v Russia (2006).[32]

Recent court practice on defamation shows that publicly known people are more and more eager to defend their rights in court. In September 2019 for instance, Oleg Deripaska, a prominent Russian businessperson, filed a claim for protection of his business reputation with a Russian Court against defamatory information concerning his political and business affairs disseminated by Telegraph Media Group Limited ('Telegraph'), Times Newspapers Limited ('Times') and the Nation Company LLC ('Nation'). The business person asked the Court to declare the information untrue and defamatory and to oblige the respective media to delete the information from their websites and to publish the business person's refutation against such information. The defendants' representatives did not appear in the Court. The Court came to the conclusion that the published information contained statements of facts in an assertive form (instead of subjective evaluation) without sufficient evidence, which discredited the business person's business reputation and was satisfied with the claim.[33] It should be noted that if the claimed information contains subjective evaluation (opinion) instead of statements of fact, it would be harder to prove its defamatory nature. However, in such a case, a defendant would have to prove that the respective information was his/her subjective evaluation (opinion) which did not contain statements of facts. As of 21 November 2019, the Telegraph and the Times have not deleted the information from their websites, while the respective article on the Nation's website cannot be found (perhaps it has been deleted).

In Russia, it has been judicially held that although freedom of speech and mass media are guaranteed and protected by laws and court practice, they can be restricted in certain cases set out by the laws and as required in a democratic society.[34] This principle results from the similar principle set out in the Convention for the Protection of Human Rights and Fundamental Freedoms with respect to the freedom of expression.[35] Thus, the right to judicial protection of honour, dignity and business reputation from defamation is considered as a constraint on the freedom of speech and mass media that is required in cases of abuse of such freedoms.[36] Therefore, when solving such disputes, the courts shall ensure a balance between citizens' rights of protection of their honour, dignity and business reputation, on the one side, and other rights and freedoms guaranteed by the Constitution, including the freedom of speech and mass media, on the other side.[37]

Further, it should be noted that sometimes individuals use, as an alternative option for protection of their business reputation, the so-called right to be forgotten. According to Russian law,[38] an individual has the right to file a request to an Internet search engine (Google or Yandex for example) for disabling access to the links with information about him/her. This right can be exercised solely by an individual with respect to his/her personal data and other information related to him/her. It may also be used in cases when it is necessary to execute a court decision on blockage of illegally distributed or placed information. An individual has the right to send such a request in one of the following cases: (i) the information is disseminated in violation of Russian laws; (ii) the information is false/ inaccurate; or (iii) the information becomes unimportant/ irrelevant for the individual due to subsequent events/ actions of the individual. A search engine examines the request with clarifications and within 10 days disables the URL(s) or refuses the request. An individual can appeal refusal to the court in order to force the search engine to disable the URL(s).

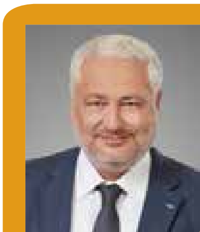
## Conclusion

Before publication and commercial use of an individual's image, one should check carefully and ensure the respective legal grounds for such actions. It should be taken into account that the individual's image rights, in a broad sense, include, along with an image itself, a name, stage name and other aspects of personal identity of such an individual. It is better to give due consideration to image rights, otherwise their infringement may lead to troublesome court proceedings and reputational risks for companies.

Additionally, an individual's business reputation also requires a careful approach. Before dissemination of information about an individual, one should check the accuracy of such information and whether there is a risk that it can be found to be defamatory.

## Notes

[1] Civil Code of the Russian Federation (Part One) No 51-FZ dated 30 November 1994 (the 'Civil Code'), Art 152.1(1).
[2] Ibid.
[3] Civil Code, Art 153; Ruling of the Plenary Assembly of the Supreme Court of the Russian Federation No 25 'On Application by Courts of Some Provisions of Section I of Part One of the Civil Code of the Russian Federation' dated 23 June 2015 ('Ruling No 25'), Cl 45.
[4] Civil Code, Art 158(2).
[5] Ruling No 25, Cl 47.
[6] Ibid.
[7] Ruling No 25, Cl 49.
[8] Ibid.
[9] Civil Code, Art 152.1(1).
[10] Ruling No 25, Cl 49.
[11] Methodic Guidelines on Directions of Improvement of Legal Regulation of Intellectual Property Rights (Including Copyright and Neighboring Rights) in the Area of Physical Culture and Sports approved by the Letter of the Ministry of Sports of the Russian Federation No. ПН-05-10/5493 dated 27 July 2017, Chapter II, Cl 4(3) and Chapter III, Cl 1(5).
[12] Civil Code, Art 151.
[13] Civil Code, Art 152.1(2).
[14] Civil Code, Art 152.1(3).
[15] Ruling No 25, Cl 48.
16 Ruling of the Plenary Assembly of the Supreme Court of the Russian Federation No 10 'Some Issues of Application of Legislation on Compensation for Moral Harm' dated 20 December 1994, Cl 2.
17 Civil Code, Art 151.
18 See http://www1.fips.ru/fips_servl/fips_servlet?DB=RUTM&DocNumber=389697; http://www1.fips.ru/fips_servl/fips_servlet?DB=RUTM&DocNumber=337438.
19 See http://www1.fips.ru/iiss/document.xhtml?faces-redirect=true&id=2aa7e778b4a65957f60cf346dffafd31; http://www1.fips.ru/iiss/document.xhtml?faces-redirect=true&id=fb5579f1e8ac6dee9ac2912d84344790; http://www1.fips.ru/iiss/document.xhtml?faces-redirect=true&id=86cb11c1eb7bd4729b73d85358f1ebe1.
20 See http://www1.fips.ru/iiss/document.xhtml?faces-redirect=true&id=8aa9f959b0fbe6c422ca5582c4cd0a4e.
21 See http://www1.fips.ru/iiss/document.xhtml?faces-redirect=true&id=a1c8d3af737e4784bc1a95cf91c59d90; http://www1.fips.ru/iiss/document.xhtml?faces-redirect=true&id=02f57ab56fb78c7b17ecea126439ed01.
22 See http://www1.fips.ru/iiss/document.xhtml?faces-redirect=true&id=cf5b06e5a63d0e36e4469e4ee9076d00.
23 Constitution of the Russian Federation dated 12 December 1993 (the 'Constitution'), Arts 21, 23; Civil Code, Art 152(1).
24 Civil Code, Art 152(1), (2).
25 Civil Code, Art 152(4) and (5).
26 Civil Code, Art 152(9).
27 Ibid.
28 Civil Code, Art 152(11).
29 Review of the Court Practice Regarding the Cases on Protection of Honor, Dignity and Business Reputation approved by the Presidium of the Supreme Court of the Russian Federation on 16 March 2016.
30 Ibid.
31 Ibid.
32 Ibid.
33 Decision of the Arbitrazh (Commercial) Court of the Krasnodar Territory dated 25 October 2019 regarding the case No A32-43312/2019.
34 Constitution; Ruling of the Plenary Assembly of the Supreme Court of the Russian Federation No. 16 'On the Practice of Application of the Law on Mass Media by Courts' dated 15 June 2010, Art 29.
35 Convention for the Protection of Human Rights and Fundamental Freedoms, Art 10.
36 Ruling of the Plenary Assembly of the Supreme Court of the Russian Federation No 3 'On the Court Practice Regarding the Cases on Protection of Honor and Dignity of Citizens, as well as Business Reputation of Citizens and Legal Entities' dated 24 February 2005.
37 Ibid.
38 Federal Law No 149-FZ 'On Information, Information Technologies and Protection of Information' dated 27 July 2006, Art 10.3.



**Maxim Alekseyev**

**Partner, ALRUD**

Maxim Alekseyev is a co-founder and Senior Partner of ALRUD, head of ALRUD Private Clients and Tax practices. Maxim specializes in advising corporate and private clients on intellectual property matters, international trading matters, regulatory and economic developments, domestic and international tax planning, strategic M&A, onshore and offshore business structures, risk management, good governance and contentious investigations.

# IPBA New Members
# September to December 2019

We are pleased to introduce our new IPBA members who joined our association from September to December 2019. Please welcome them to our organisation and kindly introduce yourself at the next IPBA conference.

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|---|---|
| **Canada,** Shawn McReynolds<br>*Davies Ward Phillips & Vineberg LLP* | **Indonesia**, Giffy Pardede<br>*Ali Budiardjo Nugroho Reksodiputro (ABNR)* |
| **China**, Yuchun Cang<br>*Chang Tsi & Partners* | **Italy**, Alberto De Luca<br>*De Luca & Partners* |
| **China**, Jianwei (Jerry)<br>*Fang Zhong Lun Law Firm* | **Italy**, Francesca Ricci<br>*Ughi e Nunziante Studio Legale* |
| **China**, Miao Huang<br>*Beijing Dacheng Law Offices, LLP* | **Japan**, Kanji Abe<br>*Earth & Law Firm* |
| **China**, Kejian Ma<br>*Law Firm of Chenggong, Shandong* | **Japan**, *Anne-Marie Doernenburg*<br>Nishimura & Asahi |
| **China**, Xiaoyun Ma<br>*King & Wood Mallesons* | **Japan**, Etsuko Hara<br>*Anderson Mori & Tomotsune* |
| **China**, WeiJiang Wang<br>*Shanghai Orient Law Firm* | **Japan**, Peter Harris<br>*Clifford Chance* |
| **France**, Jacques Buhart<br>*McDermott Will & Emery* | **Japan**, Seitaro Hashimoto<br>*Fukuoka Nishi Law Firm* |
| **Germany**, Christian Fingerhut<br>*CURTIS* | **Japan**, Miyako Ikuta<br>*Kitahama Partners* |
| **Germany**, Jan Tibor Lelley<br>*Buse Heberer Fromm* | **Japan**, Hiroko Nihei<br>*The Japan Commercial Arbitration Association* |
| **Germany,** Florian Wolff<br>*GÖRG Partnerschaft von Rechtsanwälten mbB* | **Japan**, Yasuhiko Tanabe<br>*Tanabe and Partners* |
| **India**, Nudra B. Abdul-Majeed<br>*Pakistan Centre for Law and Society* | **Korea**, Young Seok (YS) Lee<br>*RosettaLegal* |
| **India**, Alipak Banerjee<br>*Nishith Desai Associates* | **Korea**, Hyung Keun Lee<br>*Yulchon LLC* |
| **India**, Himanshu Maratkar<br>*Marat Gogia* | **Korea**, David William Mac Arthur<br>*Bae, Kim & Lee LLC* |
| **India**, Kannadiputhur Suresh<br>*KS Suresh* | **Malaysia**, Eu Jin Ong<br>*Lee Hishammuddin Allen & Gledhill* |
| **India**, Shivika Upadhyay<br>*Kochhar & Co.* | **Mauritius**, Joy Ramphul<br>*ADR Arbitration Chambers (Mauritius - Dubai)* |

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|---|---|
| **Netherlands**, Paula Kemp<br>*BANNING N.V.* | **Taiwan**, Kuo Ming Chuang<br>*Iustitia Law Firm* |
| **Netherlands**, Xinwen Ruan<br>*Everaert Advocaten Immigration Lawyers* | **Taiwan**, Kai-Fang Lin<br>*Lee and Li, Attorneys-at-Law* |
| **Peru**, Frank Boyle<br>*Estudio Muñiz* | **Ukraine**, Taras Kyslyy<br>*Arzinger* |
| **Peru**, Alejandra Verdera<br>*Alejandra Verdera* | **United Arab Emirates,** Preety Singh<br>*KBH Kaanuun* |
| **Philippines**, Marcelino Michael<br>*Atanante Gargantiel Ilagan & Atanante Law* | **United Kingdom**, Leigh-Ann Mulcahy QC<br>*Fountain Court Chambers* |
| **Philippines**, Jonah Mark<br>*Avila Avila Law Office* | **United States**, George Doub<br>*International Registries, Inc.* |
| **Russia**, Timur Akhundov<br>*ALRUD Law Firm* | **United States**, David Hoppe<br>*Gamma Law* |
| **Russia**, Ilya Nikiforov<br>*Egorov Puginsky Afanasiev & Partners* | **United States**, Insung Kim<br>*Goulston & Storrs* |
| **Russia**, *Boris Ostroukhov*<br>*ALRUD Law Firm* | **United States**, Na Lan<br>*Damon Key Leong Kupchak Hastert* |
| **Russia**, Andrey Zharskiy<br>*ALRUD Law Firm* | **United States**, *Yvonne Lu*<br>*MHP Law Firm* |
| **Singapore,** Patrick Tian Huat Ee<br>*Kennedys Legal Solutions Pte Ltd* | **Vietman**, Long Bui<br>*DIMAC Law Firm* |
| **Singapore**, Joanna Poh<br>*JLex LLC* | **Vietman**, Nhat Minh Ngo<br>*BLawyers Vietnam* |
| **Singapore**, Joseph Tan<br>*JLex LLC* | **Vietman**, Giang Nguyen<br>*Tilleke & Gibbins* |
| **Sri Lanka**, Pavithra Navarathne-Rupasinha<br>*F. J. & G. de Saram* | |

# Members' Notes

## Lidong Pan, PR China

Mr Pan is the Managing Partner of Reiz Law Firm, Attorney at Law in the PRC and New York. He specialises in providing professional legal services for multinational companies and foreign invested companies in the PRC, with extensive experience in IP, M&A, corporate issues and dispute resolution. Mr Pan was elected as Co-Chair of the IP Committee of the IPBA in October 2019 and is an Adjunct Professor of the Law School of Sun Yat-sen University, an Arbitrator/Mediator, Legal Counsel of the Consulate of ROK/Singapore/Philippines and a distinguished IP and dispute resolution lawyer listed by the PRC Ministry of Justice.

## Naresh Mahtani, Singapore

Naresh Mahtani (an IPBA member, formerly at Eldan Law LLC and ATMD Bird & Bird) has since February 2019 been in continuing practice at Adelphi Law Chambers LLC in Singapore, involved mainly in tribunal work as an arbitrator, adjudicator and mediator and advisor on dispute resolution issues, primarily in the construction industry. Details can be obtained at www.adelphi-law.com and he can be contacted at naresh@adelphi-law.com.

## Priti Suri, India

Priti Suri, Vice-Chair of the IPBA Publications Committee, has been recognised as one of the top 100 lawyers in India by India Business Law Journal. She is one of the few woman lawyers who have made it to the list for the fourth consecutive year since 2016. Priti is a founder and managing partner of PSA, a business law firm in Delhi, India. She has over 33 years' experience over three continents and has been advising domestic and international clients across the globe on the full range of cross-border M&A transactions, joint ventures and restructurings. She counsels on anti-corruption, corporate governance, CSR, ethics and employment, and works closely with senior management on varied matters, including the full range of operational issues and related dispute resolution.

Priti was the first Asian to receive the 'Mayre Rasmussen Award' for the Advancement of Women in International Law by the American Bar Association in its 18-year history. She is also a director on the Board of the International Technology Law Association.

## Giffy Pardede, Indonesia

Mr Giffy Pardede, who was made a partner at ABNR in Indonesia in 2018, is a key member of the Firm's project finance, mergers and acquisitions (M&A), foreign direct investment (FDI) and real estate practices, advising clients across a wide range of industries, including oil & gas / natural resources, financial services, manufacturing, consumer goods, pharmaceuticals and healthcare, power and renewables, automotive, plantations and agriculture, and tourism and hospitality. He was recently named 'Indonesian Young Lawyer of the Year' at the 2019 Asian Legal Business (ALB) Indonesia Law Awards, and is recognised by IFLR 1000 as a 'Notable Practitioner' for banking, corporate and M&A.

# Members' Notes

## Francis Xavier, Singapore

On becoming CIArb's President in 2020, our President Francis Xavier, SC, PBM, C.Arb FCIArb shared the message below to all CIArb members commenting on the year ahead:

A fresh decade has begun. As the Institute turns 105, we face challenges from within and without.

**Within**

We are undergoing a fundamental shift in key staffing at Bloomsburg Square. In particular, after about 7 years of sterling leadership and dedicated service, Director General Anthony Abrahams is due to retire in the middle of the year. His successor (yet to be identified) will have big shoes to fill. Our immense gratitude to Anthony for having led the Institute to where it is today. Staffing changes have also occurred at the various departments. We need to ensure that the pith and marrow of staffing in the Institute is ably filled.

**Without**

Today, the embrace of the global business and legal community of ADR is overwhelming. Arbitration is omnipresent. With the advent of the Singapore Mediation Convention several months ago, the popularity of mediation is poised to rise to stellar heights. We are in the money, in the sense that the business of the Institute is at the core of global trade and commerce. It behoves us to reflect carefully on how we should collectively lead at the frontiers of ADR.

**Representation**

Given our stature and reach, do we truly represent the major global constituents? The Sri Lankan branch has recently been launched and efforts are underway to form a Russian chapter. In particular, the Institute's representation in North Asia and South America needs to be reviewed.

**Thought leadership**

The numerous guidelines that we have issued in the past (constituting guidance on a range of subjects from jurisdictional challenges to witness conferencing), the trainings that we conduct worldwide and the regional conferences we have led amplify and exemplify our role.

The time has come for us to have a bi-annual global conference as a permanent fixture on our calendar. We are pleased to announce that our very first global conference will be held in Singapore in November 2021. More details will be released soon.

Leadership renewal, representation and global thought leadership are the three central themes to work on.

INTER-PACIFIC BAR ASSOCIATION

# 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

INTER-PACIFIC BAR ASSOCIATION

# 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 Website: www.ipba.org

## IPBA MEMBERSHIP REGISTRATION FORM

**MEMBERSHIP CATEGORY AND ANNUAL DUES:**

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

Name:__________ Last Name __________ First Name / Middle Name __________

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

Firm Name: __________

Jurisdiction: __________

Correspondence Address: __________

__________

Telephone:__________ Facsimile: __________

Email: __________

**CHOICE OF COMMITTEES (PLEASE CHOOSE UP TO THREE):**

[ ] Anti-Corruption and the Rule of Law
[ ] APEC
[ ] Aviation and Aerospace
[ ] Banking, Finance and Securities
[ ] Competition Law
[ ] Corporate Counsel
[ ] Cross-Border Investment
[ ] Dispute Resolution and Arbitration
[ ] Employment and Immigration Law
[ ] Energy and Natural Resources
[ ] Environmental Law
[ ] Insolvency
[ ] Insurance
[ ] Intellectual Property
[ ] International Construction Projects
[ ] International Trade
[ ] Legal Development and Training
[ ] Legal Practice
[ ] Maritime Law
[ ] Scholarship
[ ] Tax Law
[ ] Technology, Media & Telecommunications
[ ] Women Business Lawyers
[ ] **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):**

[ ] Credit Card
[ ] VISA [ ] MasterCard [ ] AMEX (Verification Code:__________ )
Card Number:__________ Expiration Date:__________

[ ] Bank Wire Transfer – Bank charges of any kind should be paid by the sender.
to DBS Bank Limited, MBFC Branch (SWIFT Code: DBSSSGSG)
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**

# Mergers and Acquisitions Practice in the ASEAN+6 Region

As M&A activity in the ASEAN region continues to increase, there has never been a more important time for practitioners across the region to ensure they, and their teams are fully equipped to take on more complex and bigger cross-border deals.

## Master the skills required to engage in cross-border practice

Mergers and Acquisitions Practice in the ASEAN+6 Region is a subject offered as part of the LLM Cross-border Legal Practice Program. Advancing your knowledge towards specialised and integrated understandings about mergers and acquisitions (M&A) in ASEAN+6 contexts, it examines good operating practices and considers key issues when planning and executing cross-border M&A deals.

The subject will cover:

- analysis of the interaction of diverse legal cultures in detail
- planning M&A
- managing due diligence
- sale and purchase agreements
- M&A risk management
- acquisition of assets
- acquisition of shares
- private equity, and
- competition law and public M&A

This subject is delivered online and will include readings, videos and self-paced activities where you will receive individual feedback to help develop your skills in this area.

## About your lecturer – Raphael Tay

Raphael Tay is a partner at Lee Hishammuddin Allen & Gledhill in Kuala Lumpur. Having been in practice for over 30 years, he has extensive local and international experience in various areas notably Corporate and Commercial, Mergers and Acquisitions, and Information and Technology Law. He has advised on various international projects, including a share sale transaction in GHL Systems Berhad to London-based private equity fund Actis Stark, named by The Edge Malaysia as the best M&A Deal of 2017.

The College of Law is the leading provider of innovative practice-based legal education and training to enhance the careers of practising professionals across Australasia.

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