



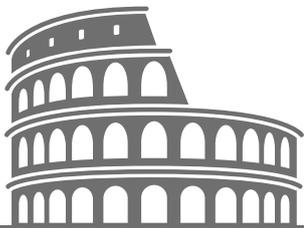
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# Banking Law News

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ROMA CONVENTION CENTER-LA NUVOLA

# IBA 2018



## ROME 7-12 OCTOBER

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION



The 2018 IBA Annual Conference will be held in Rome, the Eternal City. Founded nearly 3,000 years ago, the city is renowned for its ancient ruins, classical architecture, renaissance palazzos and baroque fountains. Rome is a vibrant, cosmopolitan city and will provide an elegant backdrop for the IBA Annual Conference.



Modern Rome is a major international business destination. It is the seat of the Italian government and the economy is dominated by services, IT, aerospace, defence and telecommunications companies, research, tourism, construction and banking. The city hosts the head offices of the vast majority of major Italian companies, as well as the headquarters of three of the world's 100 largest companies, Enel, Eni and Telecom Italia.



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## IN THIS ISSUE

<b>From the Co-Chairs</b>	<b>4</b>
<b>Committee Officers</b>	<b>5</b>
<b>IBA Annual Conference Rome, 7–12 October 2018: Our Committee's Sessions</b>	<b>7</b>
<b>Conference report</b>	
Cross-border aspects of legal opinions in financial transactions	<b>9</b>
<b>Features</b>	
Fintech innovation: combating money laundering and the financing of terrorism	<b>11</b>
Why resolving Islamic finance disputes through international arbitration makes sense	<b>14</b>
Agility or redundancy: regulatory relevance in the age of distributed ledger technology	<b>17</b>
Initial coin offerings in Switzerland – towards a regulated legal and tax environment	<b>23</b>
Claims arising from the current handling of cum/cum trades by the German tax authority	<b>26</b>
Russia: a review of new measures aimed at preventing the insolvency of credit organisations	<b>29</b>
Securitisation in India – recent trends and challenges	<b>31</b>
Italian Court of Cassation solves conflict on supervening usury	<b>33</b>
Ukraine: recent developments fostering cross-border lending	<b>35</b>
Macau payment services updates in 2018: legal implications	<b>36</b>
Is a 'demand for payment' a sine qua non condition under Mauritian banking law?	<b>37</b>
Zambia: newly enacted netting legislation permits enforceability of the ISDA master agreement	<b>40</b>

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# From the Co-Chairs

**W**elcome to the May issue of the Banking Law Committee newsletter, edited by our Publications Officer, Philippe Dupont, from Arendt & Medernach SA, Luxembourg, supported by Anne Bodley, member of the Banking Law Committee. As usual the newsletter has been published to coincide with the start of the IBA International Financial Law Conference, taking place in Amsterdam from 30 May to 1 June. The conference, now in its 35th year, is jointly organised by the IBA Banking Law and Securities Law Committees.

The conference offers the opportunity to share our experiences of the law as it relates to the functioning of financial institutions and systems, as well as the capital markets. This opportunity has proven exceptionally valuable given the constantly changing situation in the global economy and the consequences of the radical development of new technology. In responding to these changes, financial markets and institutions create new products and new forms of communicating with clients, whereas legislators create new legal frameworks for their functioning and ensured security of client interests.

We lawyers have never lacked subjects for discussion at our annual meetings since the first financial law conference in London in 1984. We have met in various cities throughout Europe, which has allowed us to become acquainted with the specific nature of local financial markets and interesting personalities from the financial world operating there. Irrespective of conference location, we discuss legal issues that are vital to practically the entire financial universe.

The committee held a discussion at the IBA Annual Conference in Sydney last October, entitled 'Cross-border aspects of legal opinions in financial transactions.' This is always a relevant topic, to which we regularly return. At a session entitled 'Project financing of renewable energy' we addressed the topical issue of renewable energy. A panel discussion with the provocative title, 'Banks and financial technology: will banks become back-offices for Fintech companies?', was summed up in the daily conference bulletin as 'Fintech

friend not foe.'

The idea of an annual finance law conference has taken firm root in Asia. The 3rd IBA Asia-based International Financial Law Conference took place in Hong Kong on 8–9 March 2018. Some of the articles in this newsletter report on what was a very successful conference.

The programme of the 35th International Financial Law Conference in Amsterdam promises to be very interesting. Sessions sponsored by the Banking Law Committee will be dedicated to: 'Bail-inable bonds and recent experience'; 'Art finance', as well as responses to the question, 'Need to know about insolvency?' The Securities Law Committee will deliberate on: 'Practical aspects of the new EU prospectus regulation'; 'The art of the accelerated book build', and 'Returning cash to shareholders'. Two joint sessions will discuss issues relating to inter-creditor agreements and MIFID 2 and reverse solicitation.

The conference will be preceded by a session for young lawyers entitled, 'Live long and prosper: skills young lawyers need in order to prosper in an age of technology disruption.' We hope that young lawyers will join our committee and bring new ideas for our further activity, while more experienced new members share their knowledge.

Dirk Bliesener from Hengeller Mueller, Frankfurt has been appointed to the newly-created position of Membership Officer. In this position he is able to outline our committee's activities to new members.

The second newly-created position in the committee is Special Projects Officer; Hannes Vallikivi from Derling, Tallinn has been appointed to this position. Work on Special Projects is also now strongly supported (and financed) by the IBA, which should be an additional incentive to the committee to start such projects. We encourage the submission of bold ideas.

The International Financial Law Conference in Amsterdam will, as always, be an excellent venue for networking and the hospitable organising committee will facilitate an attractive social event programme.

We invite you to Amsterdam!

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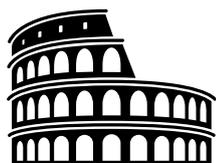
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# IBA 2018



ROME 7–12 OCTOBER

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

## Banking Law Committee's sessions

Monday 1115 – 1230

### Industry-funded ombudsman: good business and smart justice?

*Presented by the Access to Justice and Legal Aid Committee, the Banking Law Committee, the Communications Law Committee, the Consumer Litigation Committee and the Insurance Committee*

This session will examine whether industry-funded ombudsmen can enhance access to justice by dealing with claims against a business that would be inappropriate for traditional dispute resolution methods, while being an efficient way for a business to finalise otherwise costly complaints. What are the safeguards required? Do they suit every jurisdiction?

Tuesday 1615 – 1730

### The role of FinTech, lending and international organisations in delivering aid in humanitarian crises

*Presented by the Banking Law Committee*

Humanitarian institutions are increasingly using finance technology and new funding mechanisms to deliver aid to crisis regions. This requires close cooperation between various stakeholders in the financial markets, including banks, mobile network providers and payment transfer providers as well as innovative credit risk mitigation and funding mechanisms. This session will explore the intersection between the law and practice of finance and humanitarian aid as well as the successes, failures and challenges that projects in this field have had.

Wednesday 1115 – 1230

### Corporate governance for African business: the role of lawyers on a continent of small and medium-sized enterprises (SMEs)

*Presented by the African Regional Forum, the Banking Law Committee and the Financial Services Section*

The African private sector is overwhelmingly made up of small and medium-sized enterprises (SMEs) who often don't seek legal services until it is too late. They too are subject to national, regional and even international corporate governance regulations, which they are often unaware of importance of international regulations – for example, United Kingdom Bribery Act, United States Foreign and Corrupt Practices Act, and their implications for African business, supporting boards and so on will be discussed in this session.

Wednesday 1615 – 1730

### Motion picture finance

*Presented by the Banking Law Committee*

At the crossroads of artistic creation and capital-intensive industry, motion picture is affected by a rapidly evolving environment in production, postproduction and distribution, as well as renewed competition, stakeholders and risks patterns that fastly impact its financing models. The panel will raise the curtain on motion picture funding, with experts from several geographical areas who will share their experience and provide feedback from typical cases.

Thursday 1115 – 1230

### Impact of international economic sanctions to the mining sector and how to manage risks

*Presented by the Mining Law Committee, the Banking Law Committee, the Criminal Law Committee, the International Trade and Customs Law Committee and the Litigation Committee*

Economic sanction regimes, particularly those promulgated from the United Nations, European Union and United States, can have a significant impact on the exploration and production activities of mining firms and related service providers. Depending on the particular sanctions programme, prohibitions may range to a comprehensive embargo on all trade with a country or government, including state-owned enterprises, to more targeted restrictions that penalise dealings with certain persons (ie, individuals, entities or vessels), which could be customers, suppliers, service providers, subcontractors, employees, operators or other business partners. Sanctions can affect offshore conduct, and penalties or other liabilities that may be imposed can contribute to negative financial conditions and reputational damage. This session will review existing sanction programmes of the principal sanctioning authorities (UN, EU and US) and explore how the risks created by those programmes can be most effectively managed.

Continued overleaf 

## Thursday 1115 – 1230

### **The good, the bad and the ugly: Who's who in transactions in distressed financial assets? The originator, the investor and the regulator's perspective**

*Presented by the Banking Law Committee and the Creditors' Rights Subcommittee*

The NPL market is booming. Although the positive trend of the global economy is having an undoubted positive effect, divestitures by originators are, at least in some jurisdictions, the primary driver of the decrease of NPL ratio in the originator banks' balance sheet, securitisation being one of the most commonly used tools for such divestitures. New challenges are posed by a number of variables, including the increasing interest of investors in the so-called 'unlikely to pay' distressed assets, the new skills which servicers are requested to deploy in the management of this assets class and in extracting value from NPLs generally, regulatory changes and the introduction of IFRS 9. This session will explore the approach of originators, investors and their servicers, and the regulators approach to such demanding developments.

## Thursday 1615 – 1730

### **Trends and perspectives of international arbitration in disputes involving financial institutions**

*Presented by the Banking Law Committee and the Arbitration Committee*

While the evolution of the financial industry and its relations with counterparties has modified the disputes pattern in recent years, the historical perception in the financial industry that arbitration is unsuitable for disputes involving financial institutions has been challenged.

The session will review the reasons for the change and discuss feedback from experience in key business lines and expert subject matter where arbitration is already used. It will consider the specific procedural needs of the financial industry, the impact of market associations, such as the International Swaps and Derivatives Association (ISDA) and the Loan Market Association (LMA), proposing standard arbitration clauses and the role of specialist arbitration centres. Going further, it will explore the potential for growth through the adaptation of arbitration rules and education of financial institution staff.

## Friday 0930 – 1045

### **Whose second life is it anyway? Personal information and financial services**

*Presented by the Financial Services Section, the Banking Law Committee, the Capital Markets Forum, the Insurance Committee, the Investment Funds Committee and the Securities Law Committee*

The panel will consider the collection of personal information (both mandatory and voluntary) and the use of that personal information by financial institutions across the range of services they provide. This will include the transfer of personal information from traditional financial institutions to FinTech companies.



All programme information is correct at time of print.

To find out more about the conference venue, sessions and social programme, and to register, visit [www.ibanet.org/Conferences/Rome2018.aspx](http://www.ibanet.org/Conferences/Rome2018.aspx).

Further information on accommodation and excursions during the conference week can also be found at the above address.

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# Ukraine: recent developments fostering cross-border lending

**H**istorically, Ukraine has been known for its tight currency controls regime and a complex jurisdiction for cross-border transactions. As the National Bank of Ukraine (NBU) introduced additional temporary measures to support the local currency (UAH) in 2014, currency restrictions became even harsher. Specifically, in relation to foreign currency (FX) cross-border loans extended by foreign lenders, the NBU prohibited local borrowers from making early repayments. Coming on top of existing mandatory NBU loan registration requirements and limitations on payments for the use of loans by reference to the maximum interest rates of the NBU (the MIR limitation), the early repayment prohibition significantly impeded the ability of Ukrainian borrowers to attract new money FX loans from abroad.

## Move towards currency control liberalisation

In tandem with signs of recovery in Ukraine's economy and UAH stabilisation during 2016 and 2017, the NBU has been gradually softening currency control restrictions and improving regulations relating to cross-border FX loans.

The NBU has lifted the early repayment prohibition in respect of cross-border FX loans that are:

- refinanced by FX loans with longer maturity;
- provided to Ukrainian banks;
- insured or guaranteed by foreign export credit agencies;
- provided by any foreign bank;
- extended or guaranteed by international financial institutions (eg, EBRD or IFC);
- extended, guaranteed or insured by any foreign state through its respective agencies;
- extended by a foreign lender with a foreign bank, international financial institution or foreign state among its shareholders, etc.

Given the breadth of exceptions from the early repayment prohibition, essentially the ban remains in place for cross-border FX loans between mere corporates, while

for many foreign banks willing to lend to borrowers in Ukraine, this prohibition is no longer an obstacle.

In addition, the NBU has made a number of changes to streamline the existing registration procedure for cross-border FX loans. Specifically, it has allowed foreign lenders to initiate registration with the NBU of a change to lenders under cross-border FX loans. Previously, registration of such changes could only be initiated by the local borrower and foreign lenders had to rely on the borrower's cooperation (as a result, loan transfer transactions in default scenarios were quite problematic in the past).

Furthermore, the NBU also revisited the MIR limitation regulations and specifically excluded the premiums of export credit agencies from MIR limitation. This move facilitated ECA-backed financings to Ukrainian borrowers.

The NBU has now totally cancelled the mandatory NBU registration requirement in relation to cross-border loans provided by international financial institutions. Coupled with cancellation of the requirement to obtain an individual licence from the NBU for payments under suretyships relating to such cross-border loans, this development is a very positive step by the regulator and should further boost financing from international financial institutions.

## Enhanced security instruments

Ukraine has recently enhanced the position of pledgees under pledges over bank accounts. The law now generally prohibits a pledgor and its servicing bank from terminating or amending the underlying bank account agreement without the pledgee's consent. Additionally, the parties may agree on a minimum account balance, in which case the pledgor as account holder may not initiate transactions resulting in the balance of the secured account falling below the minimum agreed amount. This novelty should make pledges over bank accounts much more reliable security mechanisms in future.

In addition, the concept of escrow accounts has been implemented in Ukraine. Essentially, this helps to balance the rights and interests of all parties, while relying on the services of a trusted bank acting as escrow agent. Similar to how such accounts operate in more developed jurisdictions, in Ukraine these accounts will be helpful in dealing with counterparty risk in all types of M&A and secured lending transactions.

Furthermore, a number of recent changes to Ukraine's energy laws and regulations

should boost new money financing into this sector. By way of illustration, Ukraine has now implemented a long-awaited bankable power purchase agreement (PPA) for energy produced from renewables, allowing financiers to take security over receivables under the PPA.

Finally, it is worth mentioning that Ukraine has also reformed its judiciary and currently undergoes major reforms in other areas, which should have a positive impact on the flow of new investments into the country.

# Macau payment services updates in 2018: legal implications

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## Introduction

The financial system in the former Portuguese territory of Macau – since 1999 the Macau Special Administrative Region – was put in place around a quarter of a century ago when the Financial System Act (RJSF) came into force and remained largely unchanged until 2017 – well after the 1999 transfer of sovereignty over Macau to the People's Republic of China.

Despite several challenges in the past three years – some attributing its causes to instability in the global financial markets and to China's capital controls – the economy of Macau has blossomed in the past decade compared to other economies over the same period. As drivers of any economy, the banking and financial services industry has also played a significant role in the economic expansion of Macau. The industry has been steadily growing since the area's handover. Acting within the legal and financial framework of Macau, the banking and financial services industry has been conventional. However, in late 2016 and throughout 2017 a series of actions taken in relation to payment services reignited debate in the legal/financial framework of Macau.

Unlike some critics who have labelled the functioning legal and financial framework as a legal impediment to financial innovation and change, the authors would suggest that

the following actions described could mean innovation in the industry, thanks to Articles 1/b) and 15/d) of the RJSF regarding other credit institutions and to Articles 1/a) and 118 of the RJSF regarding other financial institutions.

## Recent actions

In November 2016, the public company limited by shares GPAP Macau, SA was authorised specifically to provide payment services in relation to bank cards (original text *prestação de serviços de pagamento adquirentes de cartões bancários*) under Articles 1/a) and 118 of the RJSF regarding other financial institutions.

More recently, in July 2017, the public company limited by shares Uepay Macau Sociedade Anónima was authorised specifically for the provision of payment services via the internet and by mobile phone (original text *prestação de serviços de pagamento através de internet e telemóvel*) also under Articles 1/a) and 118 of the RJSF regarding other financial institutions.

## Legal implications

Under the RJSF, payment services fall into the specific category of financial services that can only be provided by 'those financial