IBA GLOBAL INSIGHT

April 2012

View from the top

Slaughter and May's Senior Partner discusses the financial crisis, the eurozone and the IBA Group Member Summit

Despite corporate scandals and economic collapse the executive pay debate continues

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Assessing the lack of women at the top and attempts to redress the balance

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Legislating to create the next Enron

Under the guise of easing the path to an IPO – up to a value of $1billion – the Jumpstart Our Business Startups Act diminishes established transparency requirements, including some aimed at ensuring companies aren't cooking the books.

SKIP KALTENHEUSER

When Greg Smith, a Wall Street master of the universe, used the *New York Times* to tell Goldman Sachs its ethics had withered, so they could take his job and…, he set financial and media worlds atwitter. Reacting in the *Washington Post*, William Cohan, author of *Money and Power: How Goldman Sachs Came to Rule the World*, reminded us that the firm's nefarious history even includes a ponzi scheme in the '20s and, in 1970, selling Penn Central commercial paper Goldman held to its clients, neglecting to inform them the imperiled railroad was firmly tied to the tracks. That was before the firm became so influential it salted governments with Goldman alums, including US Treasury Secretaries like Robert Rubin, an architect of financial deregulation. Point is, by now it shouldn't shock anyone, even in Washington, that many in the finance sector happily push their interests before their clients'. But recent government maneuvers reveal a lack of willingness to face this head on.

As *IBA Global Insight* went to press at the end of March, the US Senate passed the JOBS Act, 73-26, which already sailed through the US House, 390-23, with strong White House support. We saw similar warm bipartisanship when so-called patent reform, the America Invents Act, flew through, also touted as a jobs bill and a boon to small business. This seems the ticket to ride, as the election nears. The next time hands are held across the aisle on behalf of such laudable purpose, it should signal danger.

The 'Jumpstart Our Business Startups Act' gained plaudits for its expressed goal of easing financing for new businesses, including from 'crowdfunding' – picking up smaller investments from many investors, made possible by the internet. When capital formation is particularly challenging, it's hard to argue against ideas for making investing more democratic and accessible, not just the territory of the better off. And who isn't a fan of the wisdom of crowds, like those investing fortunes in Dutch tulips in 1637?

Despite the fizzle of most startups, many are keen on crowdfunding's potential. Senator Jeff Merkley, (D, Oregon), managed an amendment increasing protections for crowdfunding investors. For example, the House version doesn't prevent companies from hiring people to anonymously promote stock online or elsewhere, opening the door to 'pump and dump' schemes like those of the 1990s. The Senate version requires paid promoters to disclose they are paid in each communication.

Under the House version, investors can invest the lesser of $10,000 or ten per cent of their annual income in an individual company, without limit on the number of companies. The Senate puts in limits including a total of an individual's aggregate investments across all crowdfunded companies in a given year, with amounts scaled by income. In another wild flight of House fancy, companies can raise up to a million dollars without disclosing financial or other critical information, like shareholder rights, to potential investors. The Senate requires basic disclosures. The Senate also addresses other onerous House omissions, such as the lack of oversight of a website intermediary, and even lack of any intermediary.

> *'The so-called "JOBS Act" will lower accounting standards and transparency in our markets, which I suspect may result in fewer IPOs, higher costs of capital for businesses, and fewer jobs'*
>
> **Carl Levin**
> *chair of the Senate's Permanent Subcommittee on Investigations,*

Despite getting his amendments through the Senate, Merkley joined those voting against the overall bill. The JOBS Act is one of those multi-headed hydras conjured for dual purpose. Those guarding the gilded caves of the big money are shooting every angle to hobble finance reform efforts like Dodd-Frank.

Under the guise of easing the path to an IPO, established transparency requirements, including some aimed at making sure companies aren't cooking the books, are diminished. Another Senate amendment sought to tame the most egregious hamstringing, but although a majority supported it, the Republican minority successfully filibustered an amendment vote and ended debate.

The Act creates a category of 'emerging growth companies' lessening financial disclosure requirements for those heading toward IPOs. If you're thinking small business, know that these have annual revenue of up to $1billion, which would have included the vast majority of companies that recently went public and those that might do so in the future.

Requirements curbing conflicts of interest regarding research on companies, put in place when the dot-com bubble popped in the late 1990s, are among protections the Act weakens. Moreover, companies can mass-advertise their stock offerings, from roadside billboards and late-night TV to cold calls and senior centres.

Loopholes allow large companies to fudge the number of shareholders – brokerage houses can be shareholder of record for unknown numbers of shareholders – avoiding triggering SEC disclosure and transparency requirements. Banks, of any size, can avoid SEC regulation if they have fewer than 1,200 shareholders.

As chair of the Senate's Permanent Subcommittee on Investigations, Carl Levin (D Michigan) understands business environments with asymmetric information that coax fraud and abuse. 'The so-called "JOBS Act" will lower accounting standards and transparency in our markets, which I suspect may result in fewer IPOs, higher costs of capital for businesses, and fewer jobs,' says Levin.

Why might the Act prove counterproductive? Congressional staffers studying the bill point out that if private companies with unlimited shareholders can avoid IPOs that bring SEC regulation, they can still trade on secondary markets as private companies. The rules and resources for the SEC to wade through that swamp are lacking.

And if the public again loses confidence in a fair shake in the investment casino, it'll flee. SEC chairman Mary Shapiro warned of the Act's potential for confidence-shattering fraud, to no avail.

The blind rush to dump regulation to garner investment steamrolled through despite evidence from scholars of entrepreneurship, like Amar Bhidé, author of *The Origin and Evolution of New Businesses*, that public stock offerings and venture capital are rarely important funding sources for new companies.

How could such a flawed bill zoom through? It coincides with the frantic chase for campaign funding as elections near. After the healthcare industry, the greatest largesse comes from the finance sector. So, thin odds for a veto from the White House, even one likely to be overridden.

The true cost of campaign money from Wall Street? Priceless.

Skip Kaltenheuser is a freelance journalist and writer. He can be contacted at **skip.kaltenheuser@verizon.net**.

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The great pay debate

Over the past decade, executive pay in the US and UK has rocketed in relation to that of average workers, despite major corporate scandals and global financial collapse. Yet leading figures in the business world continue to resist change.

REBECCA LOWE

When Jack Welch was CEO of General Electric (GE), he had use of an $80,000 per month Manhattan apartment, court-side seats to the New York Knicks and Wimbledon, use of a corporate jet, box seats at Red Sox and Yankees baseball games, and country club membership. But that was nothing. When he retired in 2001, he was given a total payout of nearly half a billion dollars: over 10,000 times the amount the average US worker makes a year. Should he feel so inclined, Welch could buy 2,500 typical American houses or 800 Caribbean islands with his pay-off package alone.

It is, in short, a lot of money. But Welch is not the only one enjoying such corporate munificence. According to a recent survey from market research company GMI, 21 American CEOs walked away with 'golden parachutes' worth over $100million each between 2000 and 2010, mostly made up from equity, pensions and other deferred pay. One had only been employed for nine months. Three hadn't even left.

And it is not just pay-off payments where the billboard statistics are to be found. A *Wall Street Journal* study found that incentive pay for the CEOs of 50 major US companies jumped

30 per cent in 2010, while average workers' compensation increased by just 2.1 per cent. In the UK, average estimated total CEO pay in FTSE 100 companies was £4.9 million in 2010: 233 times median earnings.

The question is, are such huge figures justified? Yes, cry the conservatives, the fund managers, the Wall St traders – if performance is good. That is the price you pay for a flourishing market of executive talent. When Welch became CEO in 1981, GE was worth around $14bn; 20 years later it was worth nearly $500bn. You could argue he was underpaid.

But no, cry the liberals, the teachers, the beleaguered public sector workers with their pay freezes. Such levels of pay are an outrage, especially in a time of austerity. These fat cats need to be trimmed down to size. Such largesse for so few is detrimental to business and to society. The gulf between the rich and poor cannot be allowed to expand any further.

Whichever side you're on, there's clearly a debate to be had. Yet as politicians and legislators strive to placate a disenchanted public, it has become increasingly unclear precisely what problem they need to address. Are execs paid too much per se or simply those who fail to perform? And if the latter, whose judgment of that performance counts? Investors, who come in every shape and size? The board? The company? Customers? Is this a societal problem or a corporate one? Is it governments' responsibility or businesses'? And will any new policies make a tangible difference anyway?

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>
> Jesse Fried
> *Harvard law professor*

How US and UK law has developed

1934:	1993:	2002:	2002:
US Securities and Exchange Commission (SEC) formed and rules shareholder proposals on executive pay should be included in proxy reports and voted on at annual meetings.	US Congress puts a $1 million cap on the tax deductibility of salaries, many CEO salaries shift to just under $1 million and compensatory elements soar.	UK Directors' Remuneration Report Regulations introduce requirement to release all details of pay in annual accounts.	Sarbanes-Oxley Act (SOX) passed in US after major corporate scandals. It contains new regulations increasing disclosure requirements, tightening internal controls, and bolstering civil and criminal penalties for misreporting. Among its rules are claw back provisions for executive pay in the event of a required restatement and finding of misconduct.

'You can come up with all sorts of reasons why these initiatives don't work, but no-one will stop doing them because everyone is convinced there is a serious problem,' says Cambridge law professor Brian Cheffins, who stopped writing on the subject years ago due to frustration at its intractability.

Ratchet job

To solve the problem of executive pay – if indeed there is one – it is useful to understand how we got into this situation in the first place. One concern is 'ratcheting'. Companies seeking the best CEO may pay above the norm to get that person and this swiftly becomes the new average.

Where execs might once have simply been plucked from company ranks, now the pool is global. And as multinationals grow, so does potential profit: if a marginally better CEO can make just one per cent more than his or her competitor, it could add billions to the revenue stream – a bargain by any account.

The companies are not only competing against each other in the public marketplace, however; they are also competing against the more lucrative world of private equity and hedge funds. One might think the job satisfaction of working for a company such as Apple or Microsoft might give them better bargaining power, but it seems the supply and demand ratio does not work in their favour.

'People tend to say, is it worth it to pay this person a thousand times more than another?' says Marc Trevino, co-managing partner of Sullivan & Cromwell's executive compensation and benefits practice group. 'But that is not normally how we think of paying for things. We normally think about it with respect to how much would someone else pay for it?'

'Companies don't normally pay more for leases or assets, they act in an economically sound way,' adds Clifford Chance partner Alistair Woodland. 'If they can get it cheaper, they get it cheaper. So it's a slightly odd idea that has taken hold that execs have some kind of hold over their companies to the point that they are getting paid more than they are due.'

Yet this is exactly what has happened, according to some. Boards, they claim, are far from independent and have every incentive to ratchet up pay beyond what the market might demand. This is especially the case in the US, where boards tend to be more powerful and the majority of CEOs double as chairmen. 'People don't get onto corporate boards and stay there unless the CEO likes them,' says Harvard law professor Jesse Fried. 'Directors typically show up on the board with some connection to the exec, and over time the exec can find various ways of influencing these people. The shareholders get to vote on the nominations, but it is very unusual for there to be a challenge.'

If nothing else, directors on the remuneration committee clearly have a personal investment in the company. They are involved in its management and embroiled in its business goals and objectives. 'When you are a non-exec director in a publicly traded company and you are advising on strategy, you are buying into the company,' says Cheffins. 'Do you want to be associated with a loser, dud company?'

Others, however, disagree. 'In my experience, remuneration committees generally do their jobs as independent stewards and aren't cowtowing to the board,' says Joseph Yaffe, Skadden west coast head of the executive compensation and benefits group. 'Especially when they face the prospect of getting voted off the board if the company isn't doing well.'

Investor power

To tighten the link between pay and performance, recent initiatives in both the US and UK have focused on increasing shareholder power. The 2010 Dodd Frank Act brought in 'say on pay' in the US, which gave investors an advisory vote on executive pay, while the UK is now debating exchanging its advisory vote for a binding one.

At first glance, giving shareholders a direct line of sight to boards seems an obvious solution to lack of director accountability and cronyism.

2006:	2006:	2007:
UK Companies Act mandates advisory vote on director pay at annual accounts meeting, states a shareholder resolution is necessary to approve a director's contract lasting more than a two-year term and places restrictions on golden parachutes.	Options backdating is identified at more than 130 US companies, leading to the firing or resignation of more than 50 top executives and directors.	Credit crunch hits after banks lose billions following widespread defaults on mortgages underpinning complex financial instruments wrongly assessed by the rating agencies.

Yet since say on pay was introduced in the UK in 2006, executive compensation has soared and only 18 awards packages have been rejected. Similarly, last year in the US – where shareholders are generally considered more apathetic – only two per cent of pay packages were voted down. Shareholders, it seems, are not too concerned about harnessing pay, or not inclined, or perhaps simply not able, to do too much about it. 'Will shareholders actually want to exercise their right to vote given the consequences are potentially dire?' asks Woodland. 'After all, you are talking about people who have a vested interest in the financial success of the company. They are not necessarily going to want to damage it in that way.'

For some, in fact, shareholders are part of the problem, concerned with short-term interests over the long-term welfare of the company. Herbert Smith partner Mark Ife points out that the number of trades on the London Stock Exchange far outweighs anything else in Europe. 'Hedge funds investing in a stock market are looking for a short-term gain. Trying to involve that kind of investor in the long-term business interests of the company is not going to happen.'

Business in society

For former GE general counsel and vice president Ben Heineman, institutional investors should be taken out of the pay equation altogether. Steve Jobs, he points out, never cared about shareholders, but merely about creating a good product – and now his company is worth $340bn. 'There is no such thing as a shareholder,' Heineman says. 'They come in many different shapes and sizes, and all have different objectives. Most are very narrow minded and tend to be worried about their return. But we are really looking at corporations to have long-term sustainable growth and make great products in a way that is efficient and benefits society. Then share price will take care of itself.'

According to Heineman, pressure from institutional investors for stock price increases, alongside stock-based compensation for executives, has led to accounting manipulation, cutting of ethical and legal corners, and ultimately to the financial crisis. Instead of focusing solely on the bottom line, companies should broaden their horizons to encompass risk management and 'integrity': the ethical standards that bind the company, beyond what the law requires. 'If we have learnt anything, it is that we have to focus not only on the business of business, but the role of business in society,' he says.

Deborah Hargreaves, chair of the UK's High Pay Commission, has a similar idea. 'Everything seems tied to total shareholder return, whereas a company has a lot of other responsibilities and ways of measuring good performance. We want to look into seeing if we can quantify some of those, such as employee engagement levels, environmental sustainability, that kind of thing.'

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> *Herbert Smith*

Others are alert to the danger that 'integrity' may be too nebulous to be meaningful, and emphasise that it is best judged through the prism of long-term financial incentives. 'We've discovered that the only thing that makes logical sense in terms of looking at those harder to measure kinds of objectives is to make sure you design programmes that tie a good amount of executive compensation to the long-term success of the company,' says Larry Cagney, chair of Debevoise & Plimpton's executive

How US and UK law has developed *(continued)*

Feb/Mar 2008:	Sep 2008:	Oct 2008:
Northern Rock bailed out by the UK Government. US investment bank Bear Stearns collapses and is taken over by JP Morgan.	Mortgage insurers Fannie Mae and Freddie Mac taken over by the US Government. Investment bank Lehman Brothers files for the largest bankruptcy in US history. Troubled Assets Relief Program (TARP) launched, aiming to use $700bn of taxpayer assets to stabilise markets.	UK Government bails out Royal Bank of Scotland (RBS), Halifax Bank of Scotland (HBOS) and Lloyds TSB.

compensation and employee benefits group. He nevertheless remains sceptical: 'Should you really be encouraging people to make these social investments even if it is not the most economical thing to do?'

Yet finding an effective compensation package that rewards long-term performance is no easy task. Stock options, popular in the nineties when they had no accounting costs, have now lost many fans, accused of encouraging stock price manipulation and short-termism. They have also proved one of the least effective ways of stymying growth in executive pay, with execs demanding greater returns to compensate for increased pay insecurity, and therefore enjoying windfalls when the stock price increases.

The problem of evaluating pay for performance packages can perhaps be attributed to the difficulty of evaluating performance itself. With such a volatile stock market and diversity of stakeholder expectation, measuring value is far from straightforward. After all, Jack Welch may have overseen a rapid increase of GE's stock price from 1995 to 2001, but one could argue the company was merely rising with the market tide. And whether his fondness for business acquisitions – an effective way to 'manage' earnings – and an aggressive hire-and-fire strategy that saw the worst performing employees sacked on a regular basis, amounted to truly 'good' performance is perhaps open to question.

'Designing a compensation package that rewards true sustainable performance is not that simple,' says New York University business law professor Fabrizio Ferri. 'We need to make sure we are paying for value creation and not just reflecting stock prices due to some temporary phenomenon or exploiting some inefficiency in the market.' The emphasis needs to be taking the long view and encouraging sustainable growth rather than short term profiteering that destablises companies, markets and societies.

Leaders and the led

Shareholder power and sustainable pay packages are part of the picture. Increased board diversity is another important factor. The UK Government is currently debating the possibility of having a broader range of people on the remuneration committee, such as public servants, lawyers, academics and those who have not previously been directors.

However, a proposal to go one step further and include employees looks unlikely to become policy, with critics believing that employees would have vested interests of their own and lack the necessary knowledge to make decisions, while unfairly diluting the influence of shareholders.

Supporters of the policy believe employee reps would motivate the workforce, help to

2010:	2010:	2011:
US Dodd-Frank Act signed into law, establishing advisory say-on-pay votes at all public companies. It extends claw back provisions beyond 'misconduct' limits set by SOX and requires reporting by all public companies on top-to-median employee pay ratios.	UK Corporate Governance Code revised (formerly the Combined Code), placing a greater emphasis on the role of the chairman, the role of the board in risk oversight, and the need for non-execs to play a key role on appointment, termination and remuneration of execs, which should promote the long-term success of the company. Recommends increased shareholder rights and annual election of directors.	UK Business Secretary Vince Cable proposes reforms to executive pay legislation, including a binding vote on pay by shareholders, and a single sum denoting the total pay of each executive, increased employee engagement and improved board diversity. The proposals also recommend altering the UK Corporate Governance Code to allow for the claw back of executive pay.

diversify the board and add a much-needed outsider perspective on remuneration issues. 'They would need a data source, but I think most employees are very sensible and wouldn't just try to undermine the boss,' says Hargreaves. 'The employee rep can be there to remind them that the workforce has had a pay freeze that year. I think it would be a useful voice of common sense.'

'I think the idea of having employee reps would somehow be a hand on the tiller is somewhat naive,' counters Anna Rentoul, partner at Simmons & Simmons. 'Employees will doubtless have their own agenda that doesn't necessarily align with the long-term success of the company.' Of course, all stakeholders have different views of what constitutes success. And in places like Austria and Germany, workers have long sat on remuneration committees.

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While there may be opposition to worker representation on boards, the UK is planning to require companies to disclose how employees have been consulted and their earnings taken into account when structuring pay. In fact, several companies, such as Whole Foods, already have such systems in place. 'Because of the yawning gap between the leaders and the led, employee morale is suffering, talented performers' loyalty is evaporating, and strategy and execution is suffering at American companies,' Whole Foods CEO John Mackey wrote in a 2009 *Harvard Business Review* article. Due to engagement with employees, the company's ratio of top to bottom pay is only 19:1, he claims – and it has never lost a top exec to a competitor.

Pay, at what price?

Considering the effort and expense that politicians, businesses and the public have invested in the great executive pay debate, one might assume all are agreed that a degree of reform is necessary. Yet for many, the link between executive pay and the financial crisis is far from proven. And even if it were, why the whole of the corporate world should pay for the excesses of the banking industry is far from clear.

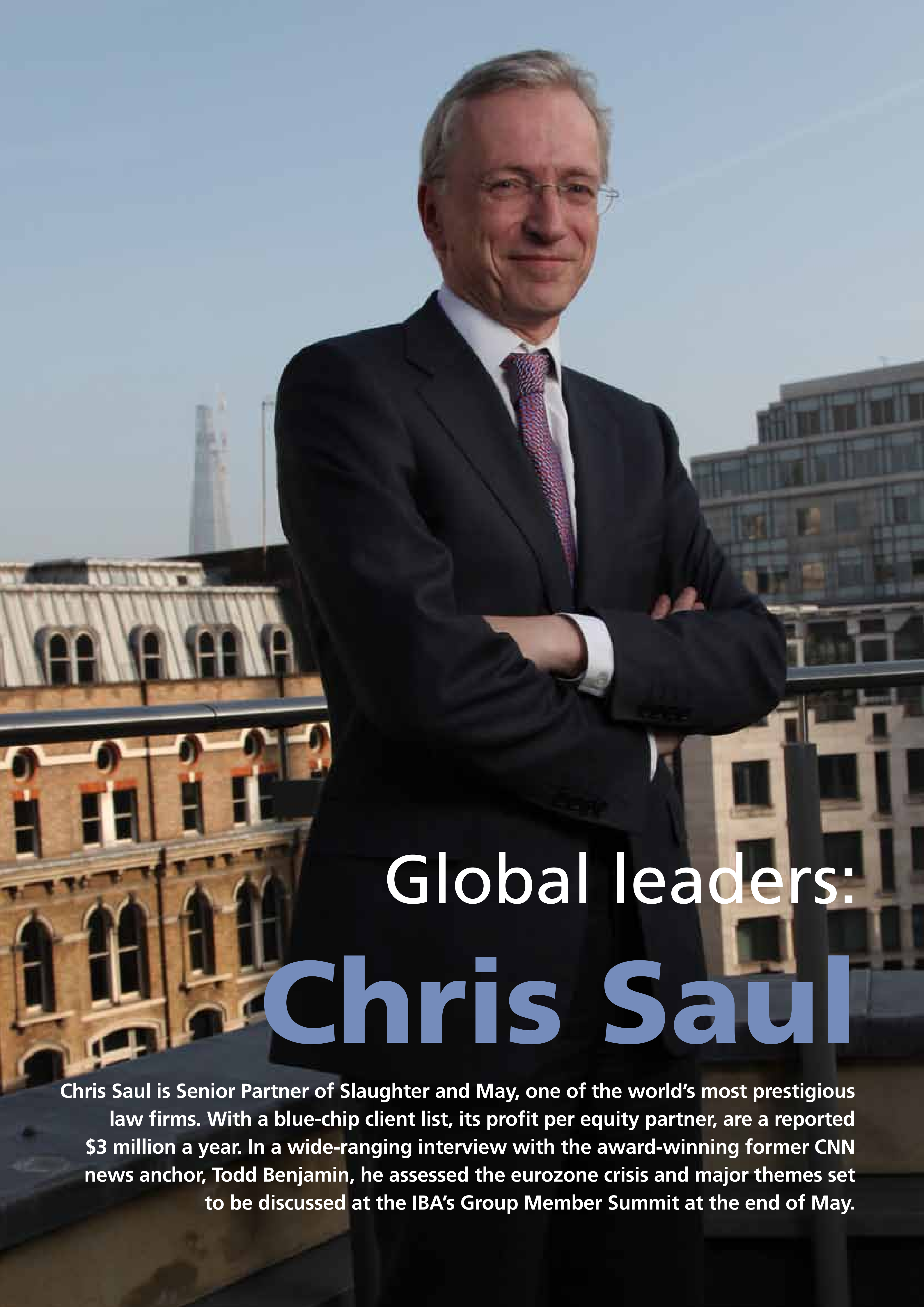
Yet there remain pockets of staunch resistance. Ira Kay, managing partner at compensation consultancy Pay Governance, for example, a quarter of whose clients have revenues over $10bn. He feels any suggestion that bankers took excessive risks because their pay was not sufficiently linked to performance is 'completely idiotic'. 'The Lehman employees lost $10bn, the Bear Stearns employees lost $10bn, the AIG employees lost tens of billions of dollars,' he says. 'To say they weren't aligned with the shareholders is preposterous.'

Such figures are understandably keen to point the finger at elected politicians and governments. 'I don't think the story has ever fully been told about the role US politicians had in forcing companies to make bad loans,' says Steven Hall, managing director of executive compensation consultants Steven Hall & Partners. 'The idea was that every American should be able to own a home and they wanted banks to be putting programmes in place to make that happen. There was a lot of pressure.'

These pockets of resistance are also keen to ensure a speedy return to business as usual and balk at the idea of improved regulation (See article: 'Dodd-Frank "puts a Grand Canyon between the US and the rest of the world"' on page 5 of our news section). 'What we have to bear in mind is that we only hear about payments for failure where a company fails and someone has received money. But it is a very small minority of circumstances,' suggests Paul McCarthy, partner at Allen & Overy, We must be careful here of not stifling the entrepreneurial culture by overburdening it with restrictions.'

Whatever one's perspective, it is clear the executive pay debate strikes at the very heart of societal values. It is a question of fairness and, as such, is one of the fundamental issues to be resolved in a civilised society. For those who wish to narrow the divide between the fat cats and the rest, wholesale changes to corporate culture and regulation are essential. For those concerned by payment for failure – well, watch this space. Failure, unfortunately, looks unlikely to be eradicated anytime soon. And as Skadden's Yaffe points out: 'As long as we have rules, there are going to be people who come up with creative ways to break them. And that is a story that is as long as the history of the world.'

Rebecca Lowe is Senior Reporter at the IBA and can be contacted at **rebecca.lowe@int-bar.org**.



Global leaders: Chris Saul

Chris Saul is Senior Partner of Slaughter and May, one of the world's most prestigious law firms. With a blue-chip client list, its profit per equity partner, are a reported $3 million a year. In a wide-ranging interview with the award-winning former CNN news anchor, Todd Benjamin, he assessed the eurozone crisis and major themes set to be discussed at the IBA's Group Member Summit at the end of May.

'I think the critical point is: can Greece really deliver growth for its citizens if it's in the euro, or is that just too expensive a currency, and do they need to go back to the drachma or another currency in order to stimulate exports? That's the big question.'

Todd Benjamin: You are in a unique position, because of this client list you have, not only here in the UK, but through your associate firms in Europe you have some of the biggest companies in Europe. So, I want to start with the fault line in the global economy right now, which of course is the eurozone.

Chris Saul: We are seeing, as you say, a fault line at the moment. A lot of our clients have found the developing climate to be quite taxing for them, so, as we see, markets have been volatile, debt and equity markets slow, so the impact for them has been reduced deal flow. On the wider question of, where goes the Eurozone, I think we're at a very interesting stage; we've just had the Greek deal done, and the real issue is: is it problem solved? Where do we go next? What happens?

TB: Well, you've raised a lot of questions, so let's start with the Greek deal. There has just been a major restructuring which will save Greece, about €100 billion a year, but if you look at where the new bonds are trading, investors are saying that this is not sustainable, that they'll have to come back for yet another restructuring. Would you agree with the market's assessment on that?

CS: I would, because as you've been saying, effectively there's been a 70 per cent haircut for the bondholders, and there's a built in further haircut in the nature of the instruments that they've taken, so it's more than 70 per cent in reality, and yet you've still got 120 per cent debt to GDP ratio within Greece. And therefore, to be honest, it seems hard to think that that has sorted it out for Greece, so I would agree with the market's assessment that at some stage there will need to be more therapy, if you like.

TB: Do you think then, that it was wise to take the action they did to bail out Greece? Are we just, in a sense, postponing the inevitable here, in terms of another default?

CS: It's a good question. I think there's a balance here between, if you like, further stabilising the euro ship, or facing up to something that may be inevitable. And I can absolutely understand why politicians and policy-makers say that what we need is a period of stability to allow Greece really to get things rather calmer, and if further attention is required in due course, then fine; but there is a knock-on feeling of greater stability in the euro zone that is, if you like, worth the investment in Greece for the moment.

TB: But, what we're doing here is just buying time, isn't it?

CS: Yes, we are, in reality, because I think the critical point is: can Greece really deliver growth for its citizens if it's in the euro, or is that just too expensive a currency and do they need to go back to the drachma or another currency in order to stimulate exports? That's the big question.

TB: In a sense the leaders of the EU have tried to put a Band-Aid on a very deep wound, but have yet to address the critical issues that are growth and competitiveness. And it's not only in Greece, it's in Italy, it's in Spain, it's in Portugal. So, how do you restore that growth and competitiveness when you don't have a devaluation tool, such as using your currency?

CS: The policy driver seems to be through the Long Term Refinancing Operation by the European Central Bank and the greater liquidity that's been pushed into the system, so $1 trillion of loans, effectively, to European banks. This has enabled them to buy sovereign debt in, for example, Italy and Spain. The notion must be that that provides a motor for reestablishment of those big economies, and gives them a chance to pause, rebuild growth, and I think that that is a sustainable model, to be honest. So, we've seen yields go down in Italy and Spain, so that the market would seem to say that what this is doing is putting more life into the system. I heard the Deutsche Bank economist at the end of last year, who said that it was only just more than 50-50 that we continue with a broader euro. So, only just less than 50-50 that actually, we might lose Spain and Italy. I suspect that that sentiment would have changed rather materially now, not only because of the lending that the ECB has made, but also, I think this is an important point, because the US has shown real signs of recovery, and its ability to pass some of that good feeling as well as economic beneficence into the euro area. And, more than sentiment, I think this might create the right kind of motor for growth in places like Spain and Italy.

Big party, huge hangover

TB: Looking at responses to the financial crisis: new regulatory requirements are that we have to set aside more capital and so forth; do you think that regulators have it right in terms of where that bar should be? Will it be enough to prevent another financial crisis? I realise this is a delicate area because you represent a lot of the banks, but you're also someone who has a, you know, a legal viewpoint as well.

'I think that a reappraisal of regulatory priorities and the correct level of capital was necessary and appropriate, because we had a big party, there was then a huge hangover, and we need to reboot the system.'

CS: Yes; to be honest, I think that inevitably and appropriately there was going to be a regulatory reset and that just in terms of assuring customers of banks and in fact, the taxpayer that banks were functioning efficiently... I think that a reappraisal of regulatory priorities and the correct level of capital was necessary and appropriate, because we had a big party, there was then a huge hangover, and we need to reboot the system. So, I think it's entirely appropriate that there needs to be a big reassessment. Have the regulators got it right? That's a hugely tough point. I think the most difficult thing, really, is bringing all of the regulatory strands together, and the challenges that our clients are finding at the moment is that they've got European regulation, UK regulation, US regulation, and so making all of those dovetail in a way that still allows them to deliver their business profitably and well, is, I think, quite a significant challenge, and we're right in the middle, you know, of that mix, because a lot is resolving itself. Sorry, not a complete answer, but I think directionally, wholly understandable, but it's this big challenge of bringing things together.

TB: And if you had to look forward, let's say two to four years from now, what do you think the end result will be, as we kind of, try and fit these strands together?

CS: Well, I think that it will be, you know, clearly a much more regulated environment, clearly an environment that is calling for more capital controls. I think what we will see is, and I think this is going to be good, you know, a clearer view of what banks are doing, allowing better regulation. And I think, for example, in the UK we've got the Vickers report, which is suggesting a split between retail banking and investment banking; that is clearly something that has been approved of by the Government. So, we're going to move in that direction. So, my hope is that, looking forward, say, four years, there will be greater clarity of the relevant buckets, the relevant different risk profiles of buckets within financial institutions, and how they interact, which will mean greater robustness of financial institutions, and that of course, in turn, is better for customers and investors.

View from the top

TB: At the end of May, the IBA is having its Group Members Leadership Summit, hosted by Slaughter and May this year, exploring several different themes. One of them is marriage, cohabitation, or staying single. What we're talking about here, of course, is mergers within the legal community. Your thoughts on that – the trends that will be happening?

CS: What we are going to see, what we are seeing, is greater consolidation in our industry. So, some firms are clearly taking the view that the challenges that they face, mean that they should combine, they should get married. And in making that decision, they've clearly decided that the potential benefits outweigh the disadvantages; such as conflicts. You can't act for both Unilever and Proctor & Gamble, so you may lose clients through conflicts, cultural dislocation, management distraction, potential splintering of people and losing of high earners. So, they are taking the view that the economies of scale of being bigger outweigh, if you like, the potential advantages. So, that's an argument for marriage. The argument for staying single, which as you'll understand, that's our preference, is that you don't take those risks, and what it enables you to continue doing in these difficult times, is delivering absolutely top quality advice, jurisdiction by jurisdiction, and giving clients flexibility to choose the best firm per jurisdiction. Because clients who are really smart want the best advice, know that the world is not flat, and that they know that they need certain people in certain jurisdictions.

TB: One of the other topics that's going to be discussed at the Group Members Leadership Summit is the impact of the new world order on the international legal services market. Your initial thoughts?

CS: [The] focus there is Asia: I think that people are saying so; the BRICs, you know, what does that mean? And that is a good question, and again, quite a lot of law firm consolidation these days is focused on Asia. So, the topic for debate is Asia, Brazil, Russia, India, how best do you service those economies and how best do you gain competitive edge in those economies. And that brings you back, if you like, to the model that you're pursuing; what's going to give you competitive advantage. And from our perspective we believe that our model is going to give us something that is not only different – not to be underestimated, you know, something that is clearly distinguishable in the marketplace is valuable – but that's clearly somewhat superficial. The more fundamental point is that it delivers genuine high (we would say higher) quality service to clients who are looking at Asia and Brazil and Russia.

TB: I don't ask this in a pejorative way, but if you're dealing with a firm in one of those countries, either because it's the model you've chosen, or by default, because you're not allowed to have your own firm there due to regulatory reasons within that country, how do you ensure you have the best partners on the ground?

CS: Number one, we know the firms very well, so in all of the jurisdictions around the world, we know the firms extremely well. So, take India, take Korea, take Singapore, take China: we know the five or six lawyers who we have particular experience of, and particular faith in. So, if a treasured client comes to me and says, Chris, we've got a particular deal that's going to involve India and Korea, I absolutely know who to pick the phone up to in India and in Korea. And also, one benefit of our structure is that we never take each other for granted. Each firm, in some sense, is a client of the other, so there's no sense that, you know, you're just doing it because another firm in the network's asked you. You know you've got to deliver, and we have to deliver for the firm in Korea, for the firm in India, and they have to deliver for us. So, it's a mixture of knowing exactly who to have on the team, so we work very hard on knowing these firms, so that we can say to our client, we need X, and then making sure that, you know, and we would then front the deal, and we would run the team, and we...and that works very well because we know each other.

TB: The common assumption is that the, you know, the economic landscape is shifting towards Asia, and that certainly has been true if you look at GDP growth from the last ten years, half of it's come from China and India. You only have three offices abroad, as I mentioned a moment ago; one in Brussels, obviously, because the EU is there, then one in Hong Kong, and one in Beijing – both focused, obviously, very much on China. And yet the assumption is that China will become, at some point, the hegemonic nation. Much was made about Japan in the 1980s that it would become eventually the number one country, and of course it's had two lost decades. You're investing a lot in that region; what makes you so confident that China will continue to grow reasonably well and be a fertile ground for firms like your own, and what could go wrong?

CS: What could go wrong? Well, let's start there; I think what could go wrong is this: We've seen growth's expectations slip to

7.5 per cent for this year in China; that had quite a ripple effect on the markets, and there is clearly some danger that that may, if you like, reverse snowball, and so that will be a trend, and people will lose faith somewhat. The other challenge that China is likely to face is succession; so, they have a new prime minister next year, and a new president, I think, is next year, isn't it, when President Hu retires? So, number one query: can they sustain economic growth? Number two: managing succession; number three: as a society, will it evolve, and will elements of society there say, we actually want more voting say. So, the challenges, I think, are not insignificant challenges, and leading analysts have some doubts about whether all of that is stable. My view, for what it's worth, is that there will be some, you know, there will be some protests, and there'll also be challenges along the way, and I think that there will need to be some changes in the parliamentary structure, but I think that they will manage to sustain growth.

TB: And Russia?

CS: Russia, I think will face some challenges over the coming years; obviously very dependent on particularly gas, oil and gas, and therefore quite a material need to diversify. Demographics are a real worry, I think, in Russia, you know, with male

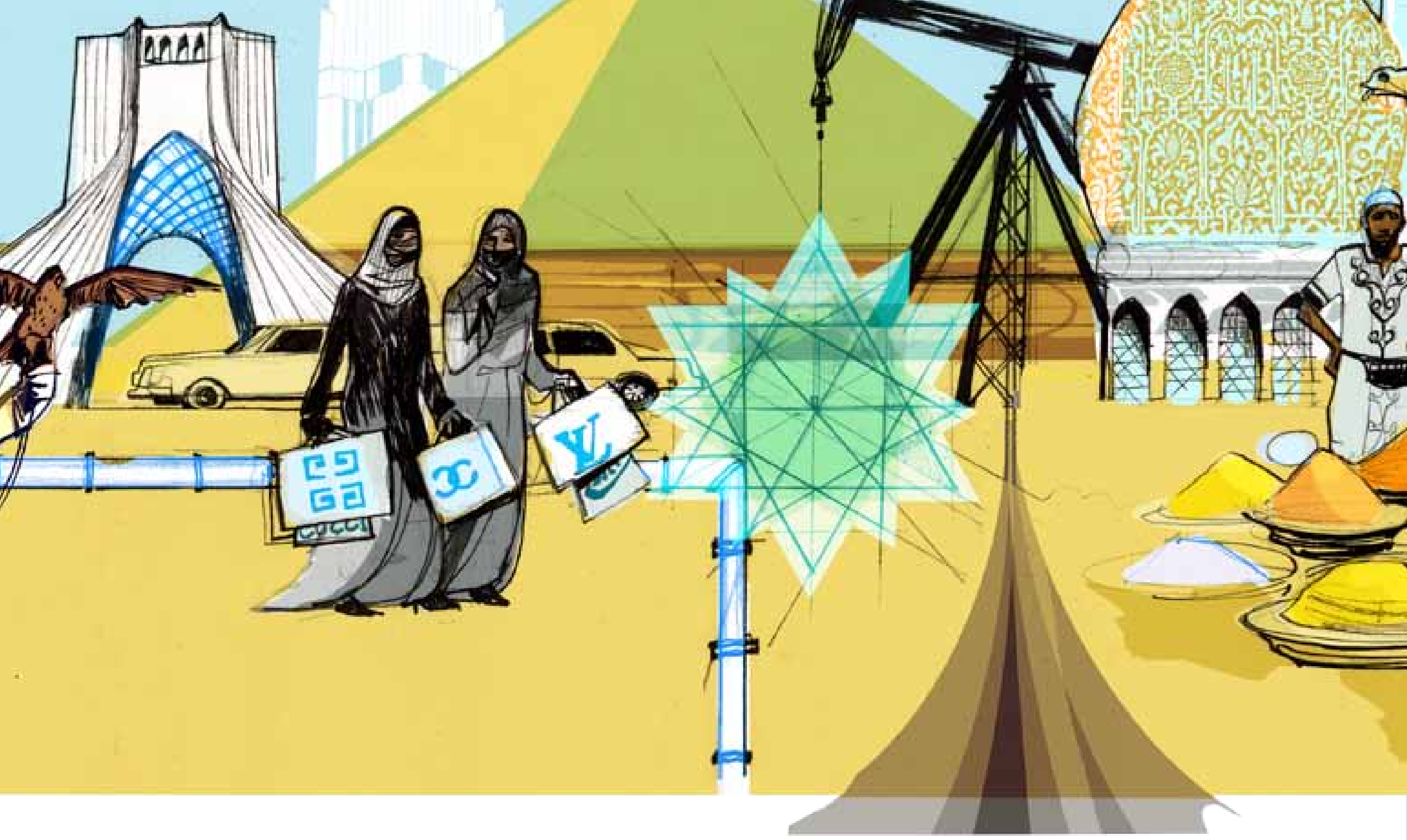
'If a treasured client comes to me and says, Chris, we've got a particular deal that's going to involve India and Korea, I absolutely know who to pick the phone up to in India and in Korea.'

life expectancy now, I think 59. So, and if you look at the HSBC 2050 study, their projections are, that by 2050 the Russian GDP has not grown, has certainly not passed some of the European jurisdictions' GDP. So, I think some, you know, some reshaping in Russia is going to be called for.

TB: Because of the type of model you have, not having an office on the ground has not been a barrier for you, and you're confident you can get the local knowledge and expertise and lawyers who know how to navigate the complexity of those various environments that operate there. But in terms of the general proposition, where certain countries, you know, be it Korea or India, do not allow foreign lawyers to practise; your thoughts?

CS: Absolutely, Korea, as you may know, is just beginning to admit law firms, actually, and so there will be an interim period where they are allowed to practise their own local law, and then they move to Korean law. India, I think it's further off. My thoughts are actually that this will go a lot like Japan, and what we saw in Japan was that that was liberalised and overseas firms are... have been allowed to practise. But what we have also seen is that ultimately they have not managed to match the prominence of the Japanese firms, and there are four very prominent Japanese firms. My expectation is that we'll see something similar in markets like Korea and India, so you will have incursions by global firms, but you will have a very strong local Bar as well.

This is an edited version of a longer interview. To view it in full go to: **www.ibanet.org**.



Qatar's coming of age as a regional powerbroker

Qatar is increasingly adopting a leadership role among Arab states, not just through its astonishing investment, but by bringing its influence and diplomacy to bear in Afghanistan, Libya, Sudan and Syria.

ANDREW WHITE

Scattered across a small thumb of land jutting into the Arabian Gulf, the population of Qatar is equivalent in size to that of the city of Coventry – though its 300,000 citizens enjoy a rather higher standard of living than their peers in England's Midlands. According to the CIA World Factbook, the per capita income in Qatar is the world's highest at $102,700, and the Gulf nation also boasts the world's lowest unemployment rate at 0.4 per cent. This wealth is generated almost entirely by Qatar's enormous hydrocarbon reserves, the proceeds from which are channelled through the Qatar Investment Authority (QIA), a sovereign wealth fund worth around $85bn according to recent estimates, and which has displayed a new-found aggression in recent years.

QIA's prime objective is to diversify Qatar's future revenue streams, minimising the risk of over-reliance on energy prices and intertwining the country's future with that of international markets. To that end, Qatar's acquisition of prime London real estate has been relentless since the city emerged as Europe's most active commercial property market at the start of the global financial crisis. It has helped, too, that the British pound has dropped more than 20 per cent since 2007, and in the last few years Qatar has seized the opportunity to pick up square miles of concrete, glass and steel: now on Qatar's books are iconic addresses including Harrods department store, the Shard of Glass building, Chelsea Barracks, the former US embassy in Grosvenor Square, and even a share in the city's Olympic Village. In January this year, QIA agreed to buy the Canary Wharf headquarters of Credit Suisse, Switzerland's second-biggest bank, for around $520m; QIA also holds a 27.7 per cent stake in Songbird, the majority owner of Canary Wharf Group. 'It was like someone had fired a starting gun,' recalls one London-based real estate broker with high-level Qatari clients, of the moment at which the shopping started. 'There were rumours of big deals being done with Middle East money, but to be frank nobody had really given the Qataris much thought up to that point. Then all of a sudden the [Qatari] Government was spending a fortune on big-ticket real estate. They have kept us busy ever since.'

Real estate isn't the only sector into which the Qatari Government has ploughed cash in recent years, and nor is London the only destination for big spenders from Doha. QIA holds significant stakes in Barclays Bank, the

London Stock Exchange, and J Sainsbury, among other UK institutions; it also boasts shareholdings in Credit Suisse, Volkswagen, Porsche, Vinci SA, Veolia, and the German rail network, and in March this year upped its stake in French media-to-aerospace conglomerate Lagardère to 12.8 per cent, boosting its position as the largest shareholder in a company that has a market cap of around $4bn. And, of course, Qatar has made a splash in the sports world by winning the right to host the 2022 football World Cup, and buying French football club Paris Saint-Germain. '[The Qataris] are less defensive than the Saudis, and they don't come over with the arrogance of the old Dubai crowd,' says one London-based financier who declined to be named for fear of offending other sovereign clients. 'If they see an asset they want they will chase it, but they won't pay over the odds and they are very aware that it is a buyer's market right now. They are welcomed across Europe.'

About the one thing the Qataris will pay extra for, is discretion. Gulf sovereign spending has long been an opaque endeavour – benevolent dictatorships are not natural champions of transparency – and the brashness with which Dubai went about its business in the early part of the century, was even then considered distasteful by some of the emirate's Gulf neighbours. Gulf rulers don't need their peoples to know how much of the country's hydrocarbon wealth they are spending on overseas *objets*. Nor do they brag about any bargains they might pick up on their travels: taking advantage of another market's misfortune is one thing, but crowing about it afterwards is to risk poisoning both political and public sentiment abroad.

This sensitivity to how it is perceived by foreign powers also reflects the earnestness with which Qatar is carving a new role for itself on the international stage: the Gulf state is establishing itself as the golden boy of Middle East mediation. Once best known for founding and funding the Al-Jazeera satellite network, the Arab world's answer to CNN, Qatar's ruling family has emerged as a significant regional powerbroker during recent rounds of the internecine conflicts that dog the Middle East. Qatar is a close ally of the US, and is home to one of the largest American air bases in the Gulf. At the same time, it maintains close ties with groups including Hezbollah, Hamas and Fatah; the latter two organisations signed a ceasefire deal in Doha in early February this year. And, last year, a Doha peace forum concluded with the signing of the Darfur Peace Agreement, which brought to an end an eight-year conflict between the Sudanese Government and the rebel Liberation and Justice Movement.

Qatar was the first Arab country to recognise the National Transitional Council as the legitimate Government of Libya, and supplied ground and air support to the international effort to displace Gaddafi, as well as corralling the Arab League into doing the same. The Gulf state flew at least 18 cargo planes packed with assault rifles, rocket-propelled grenade launchers and other small arms, as well as military uniforms and vehicles, into rebel strongholds between April 2011 and the fall of Tripoli; it is estimated that Qatar, in total, provided Libyan rebels with tens of millions of dollars in aid, military training, and more than 20,000 tonnes of weapons. Qatar has since persuaded the Arab League to suspend Syria from its membership, going further than its peers by calling for military intervention against Bashar Al-Assad. And Qatar is also home to the 'political office' of the Taliban, where talks between Afghanistan's past and present administrations have taken place under the watchful eye of the US, and prisoners being held at Guantánamo Bay have agreed to be transferred to Doha as part of a peace plan between America and the Islamist political group. Whether the talks will progress is uncertain – the Taliban in mid-March walked away from negotiations citing US intransigence – but whatever the outcome, Qatar looks set to play a vital long-term role not just in the boardrooms of global multinationals, but in the high-stakes world of Middle East diplomacy.

'This sensitivity to how it is perceived by foreign powers also reflects the earnestness with which Qatar is carving a new role for itself on the international stage: the Gulf state is establishing itself as the golden boy of Middle East mediation.'

Andrew White is a freelance writer and former editor of *Arabian Business* magazine. He is based in Dubai and can be contacted at **mrblanc@gmail.com**.

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Trading places

Ten years after China's accession to the WTO, and with Russia soon to follow suit, the tensions in international trade are becoming increasingly exposed.

CHRIS CROWE

In February, China ordered its airlines not to adhere to the European Union's new carbon emissions tax regime. Fitch, the ratings agency, warned that this could result in yet another severe global trade dispute. Despite China's accession to the World Trade Organization (WTO) ten years ago, tensions could hardly be higher.

China's former communist confrère, Russia, is also due to join the trade body later this year after years of strenuous negotiations. With another powerful member of the BRIC grouping about to enter the WTO, questions arise as to where the power lies in the global trade environment.

Multilateral trade has never been more prevalent. There are 157 members of the WTO, with Russia, Samoa, Vanuatu and Montenegro also approved for accession in the near future. Yet with economic power spread across the major blocs of the USA, European Union and China, and with so many other powerful nations and economies having varying trade ambitions, the picture has never been more complicated. The days of the US setting the global economic agenda, and every other nation falling into line, are long gone.

Former Ambassador Hugo Paemen, a senior adviser on EU, international trade and regulatory affairs at Hogan Lovells in Brussels, suggests that the General Agreement on Tariffs and Trade (GATT), which was replaced by the WTO in 1995, was able to achieve more in policy terms than its successor. This was because a small number of members were able to wield power and effectively influence the rest. From its inception in 1946 until its demise in 1995, the USA and the large European economies were the GATT's most authoritative powerbrokers. Today's climate, with the economic might of China and other fast-developing economies, means that the US and Europe can no longer sway global opinion as they had previously.

'Multilateralism has become so difficult, because we have become so many. There was a time when the US was the uncontested leader of economic relations and then the Europeans came on board, but these days it has become very difficult', Paemen laments. 'Since the mid-1990s, globalisation has accelerated and this has taken some people by surprise', he adds. Paemen served as the Head of the European Commission's Washington Delegation between 1995 and 1999, and prior to that as the Commission's Deputy Director-General for External Relations from 1987 until 1995.

A clear illustration of the challenges facing the WTO is the apparent failure of its Doha Development Agenda (DDA) to achieve results. The DDA has been running since 2001 with the aim of assisting poor nations by dealing with trade barriers and subsidies in farming. As yet, no concrete agreements have been reached. Edwin Vermulst, a founding partner and trade specialist at Brussels-based law firm VVGB, says: 'It has become extremely complicated because there are so many WTO members and very powerful members like China, India and Brazil. The DDA negotiating round has got nowhere in ten years'.

It raises questions over the wisdom of China's entry into the WTO in December of 2001, and Russia's imminent accession this year. The sheer number of trade disputes involving China might lead some to suggest that its WTO membership is meaningless. Not so, says Paemen, who suggests that it would always be more preferable to have China inside the club than outside. Despite the volume of trade disputes involving China, it has adhered to many WTO judgments, including those that have gone against it.

Miriam Gonzalez, the head of EU Trade and Government Affairs at Dechert, suggests that China's WTO membership remains valuable. 'China is an active member of the WTO and that gives a lot of comfort, at the end of the day, for an investor. There is a mechanism that is well tested for redress and that counts for a lot', she adds. China's enthusiastic use of the WTO's dispute resolution mechanism, she suggests, bolsters its case to be regarded as a responsible member of the trade community. 'It was not so long ago that China became part of the multilateral trade community. It takes some time to come to understand what all the rules mean', she explains. 'It is a perfectly natural process that economic powers have to go through. As it was a member of the WTO later than most other major economies, there were always going to be disputes'.

An incredible achievement

There is a sense that China made so many commitments to liberalise and open its economy as part of its efforts to become a WTO member that it was always going to struggle to live up to expectations. Its accession in 2001 was the culmination of some 15 years of intense negotiations. Spencer Griffith, an international trade partner at Akin Gump Strauss Hauer & Feld, who splits his time between Beijing and Washington, DC, also believes that the mere fact of China's accession to the WTO was an incredible achievement in itself. 'China paid a domestic political price when it joined the WTO. They have to tell people in China that as a result of WTO membership they can't do certain things anymore because WTO rules do not allow you to do it', he explains.

Despite China frequently being the defendant in proceedings brought by other economies over issues such as dumping and state subsidies, it too has had occasion to flex its muscles through the WTO dispute resolution process. In 2002, just months after it gained WTO membership, it was involved in a major challenge to US steel product safeguards. The then US President, George W Bush, had imposed additional tariffs on steel imports and in 2003, he was forced to repeal the duties after the WTO ruled that they were illegal. Olivier Prost, Partner at Gide Loyrette Nouel in Brussels, advised the Chinese Government on the case. He says that 'China is becoming a strong user of the [dispute resolution] instrument that has been used for a number of years by the EU'.

The global financial crisis (GFC) and the subsequent eurozone crisis are also expected to lead to a spike in trade disputes. With more European companies struggling in the wake of the economic downturn, many are seeking to protect their businesses by addressing what they perceive to be unfair competition from China and other developing economies.

'With some European companies not doing so well and with demand drying up, this is a fertile breeding ground for bringing trade cases', Vermulst explains. Gonzalez questions whether there has been a significant rise in trade disputes, but admits that more attention is being paid to the tensions between the traditional East and West, and the developing and developed nations. 'There is much more publicity given to these disputes compared to before 2008', she says. 'Trade disputes make it into the headlines more than before and disputes involving China are generally a bigger deal for everybody', she

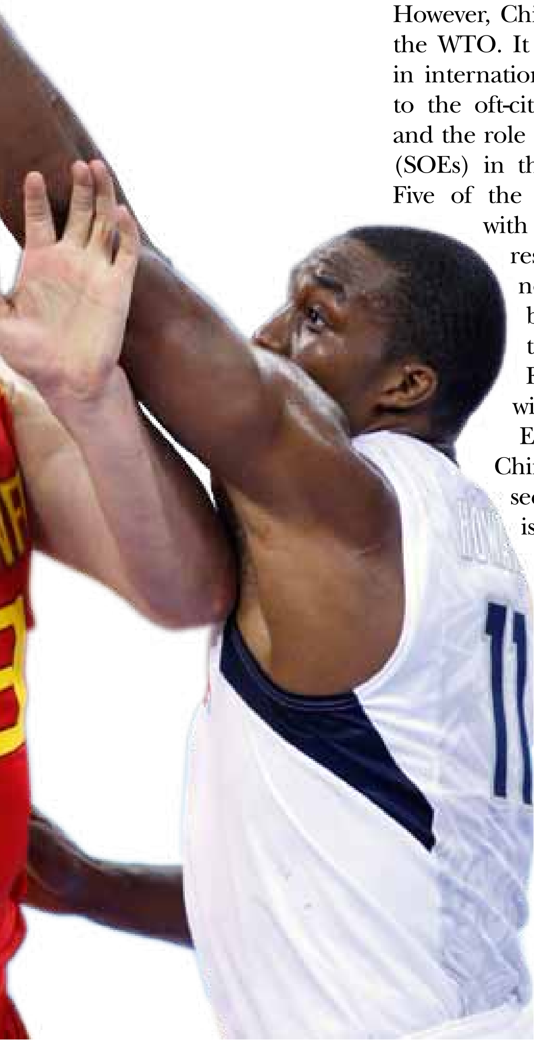
'China is still essentially a state-run economy and companies are still heavily subsidised. There have been many cases where the Chinese were selling products at roughly the same price that Europeans can buy the raw materials on the open market'

Georg Berrisch
Covington & Burling

adds, and explains that the volume of WTO cases is always kept in check by the demands on the plaintiff. 'With the WTO system, it does take a long time to get through the process. You need quite a lot of appetite to go through that'. Numerous disputes are still settled through bilateral negotiations or by methods outside of the formal WTO procedure.

Playing the bad guy

However, China still dominates the caseload at the WTO. It is continually cast as the bad guy in international trade circles, and this is down to the oft-cited suspicions about state control and the role of Chinese state-owned enterprises (SOEs) in the domestic and global economy. Five of the 20 most recent disputes lodged with the WTO involve China as the respondent. The developed world is not yet comfortable with what might be termed as 'Red Capitalism', the title of a book by Carl E Walter and Fraser J T Howie, which was met with glowing reviews worldwide.



Even so, Vermulst contends that China has a growing and vibrant private sector and that in any case, Europe is certainly not immune from the influence of the state on domestic economic affairs. For decades, France has pursued a policy of supporting national champions. Indeed following the GFC many of Europe's leading financial institutions have come under state ownership.

There may be a whiff of hypocrisy in the air when pointing to China's state ownership and alleged widespread state subsidies, but Georg Berrisch, Partner in the Brussels office of Covington & Burling, suggests that there is a clear distinction between the economies of China and those of the EU. 'You cannot compare China with a country in Europe where we do have state-owned companies, but where the overall economy is not state-controlled', he explains.

Subsidies appear to be at the heart of many European complaints, with Chinese manufacturers apparently having access to heavily discounted raw materials. 'China is still essentially a state-run economy and companies are still heavily subsidised. There have been many cases where the Chinese were selling products at roughly the same price that Europeans can buy the raw materials on the open market', Berrisch says.

Even so, many regard China's efforts to align itself with WTO rules and Western values on global trade as something to admire. 'I think when we look at where the Chinese have come from as an economy that was completely state-controlled ten years ago, it has gone through a significant amount of reform', explains Gérard Depayre, a senior trade adviser at Gide Loyrette Nouel and former EU negotiator, who was heavily involved in China's accession to WTO membership.

Unstoppable force

Just as the world has failed to produce a collective regulatory response to the GFC, there is still limited consensus on worldwide trade policies, despite the efforts of the WTO. The European Union, for instance, is the only economic bloc that appears to have a defined policy on state aid, according to Prost: 'The EU has strict control of state aid, but you don't have the same in China, Russia or other countries. There is an asymmetry which exists and this inevitably creates tensions'.

Beyond China's recent stance in relation to the EU's charges on airline carbon emissions, China's infamous indigenous innovation programme has also created friction. The policy was launched in 2006 and is aimed at moving China into higher-value manufacturing, especially the higher-end technology bracket. Part of the programme requires those seeking access to China's market to transfer technologies, intellectual property and research and development laboratories to China itself. This has been cast in the West as blatant protectionism.

The US International Trade Commission has also launched an investigation into China's solar panel industry that is alleged to be improperly subsidised. The case has overlapped with the scandal surrounding US President Barack Obama's $535m stimulus package for solar panel manufacturer Solyndra as part of a programme to boost alternative energy growth. In 2011, the company filed for Chapter 11 bankruptcy, highlighting the challenging conditions that US manufacturers are facing in light of Chinese

competition. 'China has the advantage of huge economies of scale so that it can ramp up production in a certain field and sell huge quantities, both domestically and for export', Edwin Vermulst emphasises.

It appears that China's success has merely unsettled the economic equilibrium that has existed for decades, with the USA and Europe leading global trade policy. The volume of trade that China engages in may well explain its status as the frequent defendant in trade disputes. Negative perceptions aside, many believe that it has achieved a great deal in the ten years of its WTO membership and that it should remain an integral cog in the organisation. 'Some people were concerned that China might politicise the WTO process. But China is acting as a responsible member of the WTO and has talented people working in the area, contributing to the evolution of the WTO rules', Griffiths maintains. 'China is participating in WTO dispute resolution and has complied with many rulings that were adverse to it'.

'It has become extremely complicated because there are so many WTO members and very powerful members like China, India and Brazil. The DDA negotiating round has got nowhere in ten years'

Edwin Vermulst
Founding Partner, VVGB

For the traditional economic powers, the advancement of China and other developing nations in the world is just something that must be accepted, but it does not help the aim of building consensus in trade organisations such as the WTO. 'Globalisation has changed the world', Paemen says. 'There is a dichotomy between global integration of the world economy and an absence of global rules or governance, or a common understanding on how to deal with certain issues', he adds. With Russia's imminent WTO accession, this common understanding looks to be even further out of reach.

The Russian enigma

Russia was approved for WTO status in December 2011, making it the last major economy to join the trade organisation. Having applied for membership way back in 1993, its accession marks the longest-ever negotiations undertaken to achieve WTO status. The final obstacle came in the shape of a veto by Georgia, which had been at war with Russia in 2008. A deal was finally brokered between the nations in Switzerland last year.

Russia's WTO accession marks an important milestone in its efforts to further integrate with the global economy. After years of relative isolation and reliance on its energy riches, Russia appears to have undertaken a volte-face, and is now enthusiastically attempting to ingratiate itself with the rest of the world. 'I think that the Russian Government has recognised, following the economic crisis, that the country is so interconnected with the global economy that it can't afford to ignore the rest of the world', comments Laura Brank, the Head of Dechert's Russia practice.

President-elect Vladimir Putin's increasingly conciliatory tone towards the West is an illustration of Russia's efforts to do business with the wider world. Having become the most precarious member of the much-vaunted BRIC grouping, with international investors having real concerns about corruption and unpredictability, WTO accession is expected to provide some comfort and stability. 'One of the toughest issues in Russia', Brank explains, 'has been the barrier created by customs regulations, and having customs rules aligned with the WTO rules will help enormously in easing the process of importing products into Russia'.

Berrisch says that Russia's WTO accession will be enormously important, both economically and politically. 'Tariffs will go down and it will have the effect of strengthening those in Russia who want a more liberal approach', he says. 'They now have the argument to change laws in a certain manner; otherwise [Russia] could be in contravention of its WTO commitment'.

Alexander Bychkov, a Partner at Baker & McKenzie in Moscow, believes that this is vital for Russia's global appeal. 'WTO membership will not resolve all the issues in the eyes of foreign investors, but accession will definitely improve the situation. The WTO provides a definite and well-known set of rules. The Russian enigma is largely based on the unpredictability of Russian regulations and their official interpretation', he explains. 'With WTO accession, Russian powers will have to respect those internationally accepted game rules which will increase predictability and clarity of the local Russian business environment and allow to better protect interests of the investors'. Such a development can only benefit the Russian business community.

Chris Crowe is a freelance journalist. He can be contacted by e-mail at **chris@crowemedia.co.uk**.

Web of discontent

The question of who can publish content belonging to others online has been dominated by fierce litigation and ineffective legislation. The latest ruling in Luxembourg suggests that the saga may finally be reaching its conclusion.

ARTHUR PIPER

In November 2011, the European Court of Justice (ECJ) ruled that a group of Belgian creative artists had no grounds to prevent the internet service provider (ISP) Scarlet Extended from allowing what they saw as the illegal sharing of their copyrighted works. The artists, represented by the royalty-collecting agency the Belgium Society of Authors, Composers and Editors (Sabam), had been arguing since 2004 that ISPs should not permit free file-sharing across their networks, because it would inevitably lead to copyright infringement and loss of income.

'Such behaviour prevents the authors from decently living from their work and jeopardises the continuity of the Belgian cultural legacy', according to Christophe Depreter, Sabam's general manager. Although the ISP was not creating the content, users could utilise the network's technology to find and download pirated material. Because of the fragmented nature of the internet, where files can be shared from many locations at once, the ISP was the most obvious target for an injunction.

The ISP, Scarlet Extended, which was trading under the name Tiscali in 2004, argued that it was not responsible for content shared on its servers. But Sabam insisted that the ISP should pay for and permanently establish technology that could monitor, filter and identify content, and block any illegal file-sharing. Only by enacting such wide-ranging measures, it argued, could the rights of artists be ensured.

The court initially ruled in the artists' favour in 2007, but Scarlet sought redress at the Court of Appeal in Brussels. In January 2010, that court asked the ECJ for advice on some preliminary questions before it could make its ruling. Most

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importantly, it wanted to know, could a national judge impose a preventative filtering system on an ISP under European Community law? If it could, ISPs would be forced to play a decisive role in the fight against pirated material on the internet.

Pedro Cruz Villalón, the Advocate General, responded to these questions in April 2011. He said that a national court could not impose an injunction requiring ISPs to install such a filtering system. Not surprisingly, perhaps, the ECJ followed this advice and ruled in favour of Scarlet Extended in the subsequent hearing in November 2011.

'Any attempt to make the legal framework suitable is opposed by the content industry. Licensing is pre-historic, digital rights management complex and cross-border access to TV content is very difficult'

Joe McNamee
European Digital Rights

An injunction too far

The details of the ruling are important because they have implications not just for European law, but also for the debate over file-sharing and the rights that it may infringe. It was immediately hailed as a victory for human rights by civil society pressure groups, such as European Digital Rights (EDRI) in Belgium. And it was equally seen as a landmark ruling that established the rights of ISPs to be free from the burden of monitoring and regulating content that passes through their technologies. But artists were left feeling that the courts, in this instance, had done little to protect their intellectual property and livelihoods.

The main legal problem with the injunction that Sabam had requested was that it was too comprehensive. It wanted Scarlet to check all electronic communications that passed over its networks, although its main target was the peer-to-peer traffic that underpins file-sharing. If granted, the injunction would have applied to all of Scarlet's customers, be carried out at the ISP's expense – and be indefinite.

The court ruled that such a broad injunction imposed as a monitoring exercise went against Article 15.1 of the E-Commerce Directive, which explicitly forbids ISPs to carry out general monitoring on the information carried over their networks. In doing so, it rejected Sabam's argument that the monitoring was directed at peer-to-peer traffic only and said that the scope of the injunction was too wide to fall under the ISP's obligation to prevent copyright infringements under Article 18 of the same directive.

Because of the nature of information on the internet, the Advocate General had said that the injunction should also be considered in the light of European human rights law, as enshrined in the EU's Charter of Fundamental Rights. Not only was there intellectual property to consider, and the rights of ISPs to run their businesses, but also the broader issues of freedom of speech and information, he said.

In his ruling, and drawing on the language used by the European Court of Human Rights, Cruz Villalón said that the law should be 'formulated with sufficient precision... to foresee... the consequences which a given action may entail'. He referred to a surprisingly low-tech case that had been brought to that court where chief prison officers in Turkey had the power to intercept and retain prisoner correspondence that they thought was 'embarrassing'. In that case, and in the ECJ's ruling on Sabam, those powers were thought to be too vague in scope and clarity.

'Sabam's injunction went too far', says Ruth Hoy, a Partner in DLA Piper's Intellectual Property and Technology Group in London. 'It crossed the line because it went for something that was not proportionate to the problem'. Hoy says that while the ECJ accepts in principle that in the right case, and using the right tools, intermediaries (such as ISPs) can help in the fight against copyright piracy, the case is also 'a reminder that rights owners need to be sensible in what they are asking ISPs to do'.

Balancing fundamental rights

What the ECJ was seeking to achieve was a balance between the rights of the three parties to the dispute: the rights of individuals to access information and have their data privacy protected; the freedom of ISPs to run their businesses; and intellectual property rights. In fact, the ECJ said that there was nothing in the EU legal framework or in EU case law '...to suggest that copyright is not inviolable and must for that reason be absolutely protected'. In other words, copyright does not have the kind of absolute protection that would give it priority over other rights. Courts and national governments are bound under EU law to respect a fair balance of all rights.

The case is one of the first to test the practical implications of an injunction relating to intellectual property under the 2004 Enforcement Directive, says Joe McNamee, a director at EDRI, the civil rights pressure group. And it is also one of the first to be taken since the Charter on Fundamental Rights, which contained a specific article on intellectual property, came into force in 2009.

'The Charter said that property is a fundamental human right that has to be protected', he says, 'but it did not clarify how that was supposed to fit in with the social rights of individuals more broadly. This ruling is important because it begins to address how those narrow rights should be weighed against the social rights', McNamee explains. 'The case rules that injunctions that are enacted without specific and high-level safeguards lead to restrictions on human rights'.

Organisations such as EDRI are concerned about the case in the wider context of keeping the structure of the internet free from monopoly interests. One concern is that large ISPs could narrow the range of services on offer to stifle competition and promote their own commercial offerings. For McNamee, the Scarlet-Sabam ruling could also act as a check against aggressive, anti-competitive action by large corporations.

'There are an incredible number of proposals to create an environment in which ISPs voluntarily undertake restrictions to the services they offer', he says. 'Do we want ISPs making a decision of what is permissible on the internet?'

Original pirate material

Lawyers agree that the Scarlet-Sabam case has been important in setting out limits imposed on rights-holders' ability to ask ISPs to restrict their services. But the Motion Picture Association's (MPA) successful case against Newzbin, a website accused of hosting illegal material, highlights the extent to which intermediaries may be forced to police content on the internet in future.

Newzbin was a members-only Usenet group that indexed content online, which subscribers to the site could download for a fee. According to the MPA, 'the court found that the UK-based company engages in copyright infringement even though the protected content does not reside directly on its website. Rather Newzbin provides links to unauthorised copies of copyright works [such as movies and commercial software] and has a substantial business based on copyright infringement'.

The MPA said that the case showed that websites that provided users with pirated material would in future be liable for their actions, even though the websites did not host the content directly. That was true enough, but the website closed and within a couple of weeks an entirely new entity sprang up in a different legal jurisdiction – Newzbin2. It used the same URL, but had different owners, was located in Sweden and the domain name was registered to a company in the Seychelles. Fresh legal proceedings were practically impossible.

Undeterred, MPA went after the ISPs in the UK, most prominently BT and Sky. It invoked Section 97a of the 1988 Copyright, Designs and Patents Act, as amended by the Copyright and Related Rights Regulations 2003. In July 2011, the MPA successfully argued that the injunction against BT as a service provider was valid under Section 97a, because BT had knowledge of another person using its service to infringe copyright. BT welcomed the decision, saying that it showed that court orders were a necessary step that rights-holders had to take in order to have a site taken offline.

Rébecca Ilott-Rollason, a solicitor in the communications group at Ashurst in London, says that the Sabam and *Fox v BT* (Newzbin2) cases were distinguishable as each was heavily reliant on its facts.

'In Newzbin2 the injunction sought was clear and precise. It sought to block access to a particular website where illegal downloading occurred on a large scale', she explains. In contrast, 'the order sought in the Sabam case would have involved the monitoring of all customer communications, both incoming and outgoing, whether infringing or not'. She says that BT already has filtering software in place – Cleanfeed, which it uses to combat the sexual exploitation of children online. That made the injunction against it technically feasible and not excessively costly. Scarlet Extended, on the other hand, would have had to install new equipment to comply with the injunction sought by Sabam, at considerable expense, and for an unlimited period.

The legislative framework

Most European legislation is now dated when it comes to policing the internet, and Scarlet-Sabam and other court cases have thrown into doubt the effectiveness of laws passing through national parliaments.

The UK's Digital Economy Act has been held up by judicial review in the High Court because the wide-ranging measures it proposes on file-sharing may be incompatible with the UK's Human Rights Act. Section 17, for instance, proposes comprehensive web-blocking measures similar to those sought by Sabam against Scarlet Extended, which now seem unlikely to be tenable in the context of European law.

On the other hand, the European Union is working to set out the framework for how national laws could be harmonised to take account of the way that consumers and businesses actually use the internet. In 2011, the European Parliament's directorate for Internal Policies published '*Consumer behaviour in a digital environment*', which recommends action both in harmonising copyright legislation, with the aim of 'creating a more integrated European Digital Single Market' and 'improving legal access to digital content in order to reduce consumers' incentives to access content illegally'.

In January 2012, the European Commission published its paper, *'A coherent framework for building trust in the Digital Single Market for e-commerce and online services*'. It promises to make it easier for intermediaries to take action on illegal content without recourse to the courts. 'The mechanisms to stop abuse and illegal information must therefore be made more efficient, within a framework which guarantees legal certainty, the proportionality of the rules governing businesses and respect for fundamental rights', it concludes.

'These cases seem to suggest that technical solutions such as filters could be imposed on ISPs, provided that they do not require active observation of all electronic communications conducted across the ISP's network, apply indiscriminately to all customers of an affected ISP and are not complicated and permanent', she says. Otherwise, she explains, such measures may contravene the E-Commerce Directive and the Directive on Enforcement of Intellectual Property Rights, as well as the rights of an ISP's customers to have their personal data protected and the freedom to send and receive information.

'Where the ISP itself is not to blame, an injunction is becoming a means to stop access to a website, advertiser, or service in order to prevent future infringements of copyright… We will see this type of case being brought much more'

Professor Tobias Cohen Jehoram
De Brauw Blackstone Westbroek

'Whether filters are already in place and employed by the ISP for a different purpose will be a relevant factor and if they are not, the costs of installing filters may be borne by ISPs under certain circumstances, but only if they are fair, proportionate and not excessive', she adds.

The judge specifically took these arguments into consideration in his ruling, saying that because the technological fix was very specific and cost-effective, the injunction did not breach Article 10 of the European Convention on Human Rights.

While the case sets an important legal precedent, practical problems with enforcement remain. For example, the BBC reported in November 2011 that Newzbin2 had offered its customers software to bypass Cleanfeed, a fix that had been downloaded by 94 per cent of the site's users. And while Sky has also blocked content from the site following a second High Court injunction, Talk Talk and Virgin have refused to follow suit unless they are issued with similar orders.

Winning the battle, losing the war

In January 2012, a Dutch court ordered two ISPs in the Netherlands to block customers from accessing the Swedish file-sharing site The Pirate Bay, which has been the target of numerous court challenges since it set up in 2003. The Hague District Court ruled that Ziggo and XS4ALL must block the site due to copyright infringements. The anti-piracy group the Brien foundation, which represents the Dutch recording industry, brought the case, in the wake of a 2010 Swedish appeals court ruling against The Pirate Bay's creators – Peter Sunde, Gottfrid Svartholm Warg, Fredrik Neij, and Carl Lundström – upholding convictions handed down in 2009 for illegal file-sharing.

Professor Tobias Cohen Jehoram, Partner at De Brauw Blackstone Westbroek in Amsterdam, says that in the future, rights-holders are increasingly likely to take the route of going after specific sites and services. 'Where the ISP itself is not to blame, an injunction is becoming a means to stop access to a website, advertiser or service in order to prevent future infringements of copyright. We will see this type of case being brought much more'.

In addition, developments in national and European law aimed at bringing the legal framework up to date are expected both to deal with the growth of new types of intermediaries, such as social networking sites, and to re-examine the rights of those whose intellectual property is under threat. However, some feel that the music industry itself has to shoulder some of the blame for not innovating quickly enough in a world that increasingly demands a quota of free content.

'Take the music industry at the broader level', says McNamee, 'and any attempt to make the legal framework suitable is opposed by the content industry. Licensing is prehistoric, digital rights management complex and cross-border access to TV content is very difficult'.

He says that in commercial radio, for example, many online radio stations cannot be completely sure that they are not breaking the law in some jurisdiction where their content can be accessed. This compares unfavourably, he believes, with the computer gaming industry, where shareware has been common for over ten years.

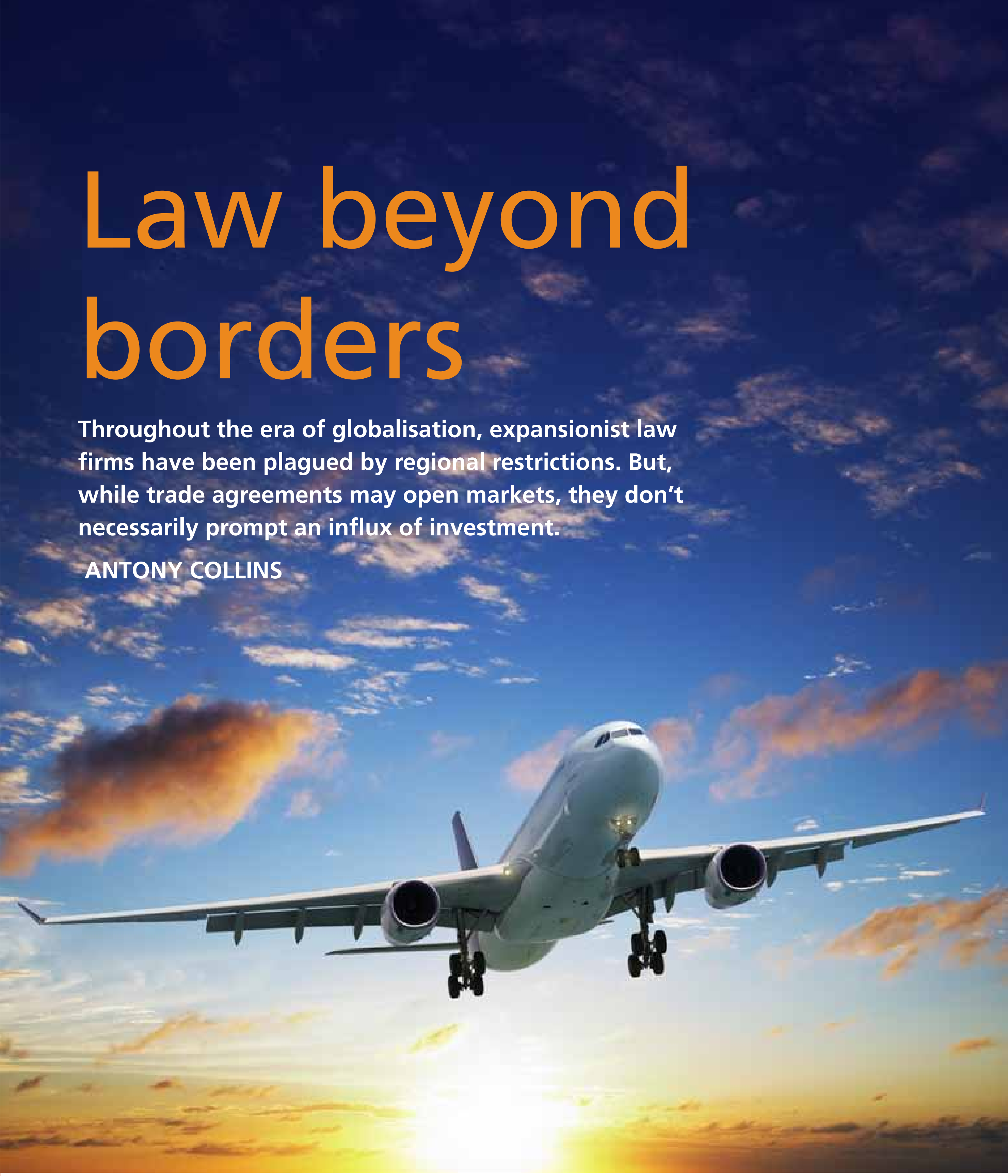
Most agree that this type of confrontation has to come to an end if the ongoing merry-go-round of court battles and injunctions is to stop. Spotify's recent agreement to share its online music content through Virgin's TiVo service is just one initiative that suggests a possible way forward. But exactly how the conflicting interests at play in the online music industry are balanced will decide the outcome of the next battle in the ongoing struggle surrounding the right to publish material on the internet.

Arthur Piper is a freelance journalist. He can be contacted at **arthurpiper@mac.com**.

Law beyond borders

Throughout the era of globalisation, expansionist law firms have been plagued by regional restrictions. But, while trade agreements may open markets, they don't necessarily prompt an influx of investment.

ANTONY COLLINS



The days when European lawyers lobbied against foreign firms entering their home jurisdiction – to be rebutted with cries of protectionism – seem a distant memory. In reality, the era was not that long ago. Nevertheless, when the European Commission announced it would assess the free movement of lawyers last year, it was not met with a cascade of concern.

Two Directives – the Lawyers' Services Directive 1977 and the Lawyers' Establishment Directive 1998 – took the different legal professions and their regional rules and superimposed concise pan-Continental practice rights. For the first time, there was a single set of broad rules that each country had to comply with, irrespective of the myriad of previous procedures.

There was a rear-guard action from some countries, such as France, which was accused of attempting to derail the process with threats of a veto, but the last decade has seen an acceptance of the practice rights. The closest thing to protectionism is the odd rumble from a Bar official encouraging the use of domestic firms over international entrants. 'European Union lawyers are now to all intents and purposes free to practise in any EU Member State,' says Jonathan Goldsmith, the Brussels-based secretary-general at the CCBE (Council of Bars and Law Societies of Europe). 'In fact, it is actually easier for EU lawyers to practise in different EU countries than it is for US lawyers to practise in different states.'

The only notable spat in recent years was in Bulgaria – a new EU entrant – in mid-2008. The Supreme Administrative Court fined UK firm CMS Cameron McKenna and Austrian trio CMS Reich-Rohrwig Hainz, Cerha Hempel Spiegelfeld Hlawati and DLA Piper Weiss-Tessbach for alleged unfair competition practices. The case centred on complaints from a collection of local firms about the interpretation of the Bulgarian Bar Act, specifically that international firms had to register as commercial enterprises, which meant restrictions on practising law so they could not operate under their brand names or qualify in local law.

This contravenes the Establishment Directive so, as an EU Member since 2007, Bulgaria found itself under pressure from the EU and soon changed the rules to comply with the Directive, underscoring how trade rules trump local restrictions. Indeed, EU ascendancy – and adherence to the Directives – would give the likes of Turkey and Serbia little choice but to open their legal markets. At present, both either do not recognise international lawyers or do not allow international firms entry unless they are teamed up with local lawyers.

EU Directives are just one form of international trade treaty that can ease restrictive jurisdictions. Non-EU firms wanting to enter Europe are free to do so under the WTO's General Agreement on Trade in Services (GATS) provisions. As with the Directives, the EU position was negotiated by the Union rather than individual countries so each jurisdiction had to adapt their local market to fit the new regime. WTO provisions assisted Russia in its revamp of foreign lawyer governance in anticipation of accession to the organisation. The last major hurdle – the banning of foreign specialists to domestic courts – was removed in 2011.

China, meanwhile, joined the WTO a decade ago and has gradually eased access. International practices can open locally but can offer their home and international law advice. They must turn to Chinese firms for local law matters. Foreign firms cannot merge or form a joint venture with Chinese outfits but can hire local lawyers, although they must sacrifice their practising certificate if they do.

China's WTO agreements are even surpassed by a bilateral trade pact; the Closer Economic Partnership Arrangement (CEPA) with Hong Kong. CEPA went live in 2006 and allows permanent residents in Hong Kong who do not hold a foreign passport, whether solicitors or barristers, to practise Chinese law. Hong Kong firms can also form alliances with mainland practices.

'A relatively large number of the young talented Japanese lawyers have joined the international firms to expand the scope of the practices. The international law firms are functioning as the skills transfer vehicles through the transactions and the local partnership.'

Akira Kawamura
IBA President; Anderson Mōri & Tomotsune

Access all areas

Trade agreements may open markets but they do not always prompt an influx of investment. Russell Coleman, senior counsel at Temple Chambers and former chairman of the Hong Kong Bar Association, points out that few barristers have taken advantage of CEPA because the work permitted is quite limited. 'There may also be some limitation from language, where many Hong Kong barristers may feel they do not have, or yet have, sufficient Mandarin proficiency and the profession is inherently "local" and conservative, and it may not be a natural step for individuals to consider a geographical extension for practice as a barrister, so there would not likely be any headlong rush to this anyway,' he adds.

Trade agreements are also no guarantee of market access. Jurisdictions like South Korea, Malaysia, Brazil and India may be international economic engines but still have tough restrictions on foreign lawyers. In the case of Brazil, it prohibits foreign lawyers from practising in firms that have local lawyers or offer Brazilian advice. In theory, foreign firms can form associations but this is currently being reviewed after the São Paulo Bar Association last year stated that such agreements contravened local regulations. If the national Bar concurs, all legal associations could be forced to disband.

The regime is even harsher in India: foreign lawyers are not permitted to establish a representative office. Meng Meng Wong, president of The Law Society of Singapore and founder of Wong Partnership, says that the loosening up of practice rules in such countries is inevitable but each country has its own priorities and fears, so each jurisdiction will have to 'find the formula' that best suits its needs.

The form book, however, shows that leading local firms in liberalised legal centres have flourished if they rise to the challenge of international entrants. Firms Gide Loyrette Nouel, Bonelli Erede Papallardo and Garrigues have thrived. More recently, Japanese and Singaporean firms have not been swamped after changes to their local regimes to allow foreign firms greater access (see box). 'Lawyers are often anxious that foreign firms will take away business and so some jurisdictions have put tough restrictions on international entrants,' Goldsmith says. 'My experience of countries that have allowed foreign law firms access, though, is that they have helped develop the local market.'

India is already a hub for outsourcing, including some high-level legal services, so Indian firms can offer strong competition in terms of price and quality. Brazilian leaders Pinheiro Neto Advogados, Souza Cescon, Barrien & Flesch, Barbosa Müssnich & Aragão and Machado Meyer Sendacz & Opice are large, sharp and currently enjoy a dominant position in the transaction market. 'I am convinced that Brazilian lawyers, and good, professionally-managed Brazilian firms, would benefit from opening up the market,' says Luis Riesgo, partner-in-charge of Jones Day's São Paulo office and chair of the firm's Latin America practice. 'Now the Brazilian firms are strong, and opening the market would likely result in a scenario similar to Spain, where you have the international firms with highly reputed local teams but you have also the top Spanish firms at the top of all rankings.'

Joint adventures

Japan and Singapore are two powerful economies that had a long-running ban on international firms practising local law directly. Part of this was down to the profession, which is highly regulated with a tough admission process, but also concern that international firms would take clients and talent. So, as a first step, they brought in joint venture (JV) models.

In both instances, JVs allowed foreign firms to enter a separately-registered practice that could undertake local law matters. The system, despite being more complicated than setting up as a foreign firm, proved popular and many international firms entered into JVs. Indeed, the success of JVs has been cited as central to getting Japan to end the system in 2005 and allow foreign firms full access.

Akira Kawamura, IBA President, claims that the law was structured very practically and could be taken as a leading model of this sort of regulation in many jurisdictions, which then opened the markets. Any reforms should be introduced 'cautiously and intellectually', he concludes, 'a kind of JV system among the foreign lawyers and the Japanese introduced by the foreign law firms seems very successful and very well used by the major international law firms. In these ten years, the presence of those cross-border JVs in the Japanese market became remarkable.'

Singapore followed suit in 2008, with the launch of the Qualifying Foreign Law Practice (QFLP) licences to six international firms: Allen & Overy; Clifford Chance; Herbert Smith; Latham & Watkins; Norton Rose; and White & Case. They were awarded five-year licences to practise local law freely.

Meng Meng Wong, president of The Law Society of Singapore and founder of Wong Partnership, says he has not received any complaints about the QLFP during these early stages, so believes it is working well. Even so, he stresses that JVs may not always be the best option to start with in all cases.

'The main problem with a JV is that the local partner as a matter of good faith will have to introduce its foreign partner to all its local clients,' Wong remarks. 'When that happens, the local law firm would have lost its best bargaining chip. It would have been better for it to use that bargaining chip right from the start for a different deal.'

He continues that different law firms have different needs, so a JV arrangement may be best for some firms. 'There cannot be a one-size-fits-all approach,' he concludes.

Rule of law firms

Richard Turnor from London-based firm Maurice Turnor Gardner, who was one of the central figures at Allen & Overy when it converted to a UK limited liability partnership, stresses that legal regulation is just 'part of the picture'. If law firms are granted full practice rights in Brazil or India, it is by no means a case of simply setting up shop and reaping the benefits. An international firm has to make sure that its structure complies with the applicable systems everywhere, which sometimes means establishing different entities in different jurisdictions because otherwise an entity would be regulated by more than one system, sometimes with conflicting requirements.

'For instance, there was a specific rule that partners in a legal entity in Luxembourg could not share profits with partners based in Hong Kong,' Mr Turnor adds. 'Firms also have to take into account international tax: if all partners shared the profits from every jurisdiction, every partner would probably have to submit tax returns in multiple countries, which could be very onerous. Another factor is liability protection; some countries allow lawyers to practise with limited liability and others do not.'

Vassily Rudomino, a senior partner in ALRUD and Co-Chair of the European Regional Forum at the IBA, gives the example of the Russian Bar, which imposes certain restrictions on practising advocates (those who are admitted to Bar) but the Bar membership is not obligatory for lawyers. In addition, current regulation of legal entities, established by the Advocates Act, restricts advocate employment, profit distribution and company management. The majority of law firms in Russia are organised as a joint stock company or a limited liability company – not as firms per se – and their lawyers normally do not have the status of advocate. 'These problems are apparent to the Ministry of Justice, the Russian Bar and local practitioners, and various options of a reform are proposed and discussed,' Mr Rudomino says, speaking before the presidential elections in March, which he and other experts felt needed to be completed before reform was a possibility.

Market liberalisation goes beyond simply the right to practise, to the entire spectrum of business issues. This is especially relevant in emerging markets, where the legal and business regimes are still developing. Liberalisation and adjusting to new regulations does not occur overnight. Those markets with strict rules on foreign firms will eventually have to relent and the local bar associations will be vital in that process. The legal profession can be slow to adapt but it is also the only services sector that – by dint of the different legal regimes in different countries – remains governed by international boundaries.

'The main problem with a JV is that the local partner as a matter of good faith will have to introduce his foreign partner to all his local clients. When that happens, the local law firm would have lost his best bargaining chip.'

Meng Meng Wong
President, Law Society of Singapore; founder, Wong Partnership.

What is clear though, is that when foreign firms are allowed to challenge for talent and mandates, it has been proven to increase competition and service levels. This ultimately benefits clients and the market as a whole. 'A relatively large number of the young talented Japanese lawyers have joined the international firms to expand the scope of the practices and been learning the highly developed skills of international or commercial transactions,' says Akira Kawamura, a partner at Anderson Mōri & Tomotsune and President of the International Bar Association. 'The international law firms are functioning as the skills transfer vehicles through the transactions and the local partnership.'

The business of law, after all, is as much about quality as it is geography.

Antony Collins is a freelance journalist. He can be contacted at **antony.collins@blueyonder.co.uk**.

A woman's lot

Despite the number of women entering the legal profession, there remain few at the top and discrimination is rife, but private and public initiatives are addressing the issue.

DIANA BENTLEY

Over 40 years ago, Germaine Greer, Betty Friedan and others dramatically challenged the discrimination women were enduring. They ignited vehement debate on fundamental assumptions about women and their place in society. Now, with the benefit of more enlightened attitudes and anti-discrimination laws, the lot of women has improved. Nevertheless, there's a renewed – and some would say overdue – focus on women, as institutions and professional bodies take stock of diversity and the hurdles women still face in their careers.

Early last year, in England, Lord Davies' report 'Women on Boards', urged listed companies in the FTSE 100 to increase the proportion of female directors on their boards to 25 per cent by 2015. One year on, figures show a modest increase, with Board Watch reporting that the percentage of female board directors of FTSE 100 companies has risen modestly: from 12.5 per cent in 2010 to 15 per cent. In March 2012, an EU Commission report showed that only limited progress has been made towards increasing the number of women on company boards one year after the EU Justice Commissioner called for credible self-regulatory measures. Now a new public consultation has been launched by the Commission, seeking views on possible action at EU level – including legislative measures – to redress the boardroom gender imbalance. The Commission will take a decision on further action later this year.

The legal profession has cause for some soul-searching, too. The October 2010 report on the position of women, and black and minority ethnic (BME) solicitors, undertaken for the Legal Services Board (LSB) in England was telling. It found that major obstacles to diversity in the legal profession, including bias, were preventing women and BME lawyers from furthering their careers.

As a result of the study and a consultation on the subject, the LSB has recently asked regulators of the profession to develop plans to require law firms to publish diversity data. It is expected that firms will have to start reporting by the end of this year in a move the LSB expects to be 'transformative'.

Meanwhile, last October the National Association of Women Lawyers (NAWL) in the United States released its latest National Survey on Retention and Promotion of Women in Law Firms. It tracks the progress of women in the nation's largest 200 firms and presents similarly sobering data to the LSB report of 2010.

Many firms – often large corporate firms – have initiated diversity programmes designed to aid women's advancement. Much of the stimulus for this appears to be the kind of statistics cited in both studies. The LSB study indicates that while the number of women entering legal education and joining firms has increased substantially in the last 20 years, the number of women partners remains stalled at notably low levels and that there is also evidence to suggest that women and BME solicitors leave the profession in disproportionately large numbers. One recent survey of top 50 law firms in England and Wales revealed that while 60 per cent of newly qualified lawyers were women, less than one in six law firm partners are women. Among the 'magic circle' firms, women constituted 14.5 per cent of the partnerships.

NAWL's survey reveals that the number of women in the highest levels of US firms has hardly changed since 2006 (just 15 per cent of equity partners). As Roberta D Liebenberg, a partner of Philadelphia's Fine Kaplan and Black and the former Chair of the American Bar Association's Commission on Women in the Profession points out: 'At this rate there'll be equal numbers of men and women equity partners in US firms around 2086. I want to see much more progress in my lifetime.'

Gender and race bias

The LSB study confirms however, that the disparity between high levels of recruitment of women lawyers and low partnership percentages is not a simple conundrum. The assumption has been, it notes, that once women had access to legal education and the profession, they would advance on merit. Yet labour markets do not always operate entirely rationally and are subject to gender and race bias. The LSB study found that the profession's structure and culture impede women's advancement. Principal investigator in the LSB study, Hilary Sommerlad, Professor of SocioLegal Studies at Leicester School of Law, comments: 'The profession is very varied yet the pattern in firms tends to be the same. Although increasing numbers of women and other "outsiders" become partners today, many continue to be locked into the profession's less prestigious specialisms and lower status positions and many leave the profession altogether. Our study, and research by other academics, suggests that the primary problem is anachronistic assumptions about women. It's often assumed that they will have children and this will reduce their commitment to their careers. Our study suggests however, that it is rather that women are positioned differently. As well as being channelled into certain specialisms and sectors, they tend to be less likely to be mentored and to be given the sort of prestige work that enhances people's careers. So although women have been in the profession in large numbers for over 20 years, attitudes towards them remain in general very traditional.'

Global HR Director at Freshfields Bruckhaus Deringer, Kevin Hogarth agrees: 'Clients naturally expect their work to be done quickly, which makes it difficult for lawyers – especially those with primary child care responsibilities – to balance their professional and personal lives. People also have unconscious ideas about what leaders should look like and there's been a dearth of different role models for women. The legal profession is still dominated by men at senior levels, which can set the tone for a firm's culture: it's complicated.'

The experience of Monica Burch, Senior Partner of Addleshaw Goddard in London, bears this out. When Burch joined the firm there were no women's lavatories on the partners' floor. 'That spoke volumes,' she says. Undaunted, Burch rose through the profession and now heads the firm's consumer practice, and IP litigation practice, is a non-executive director of Channel 4, and was appointed a Recorder in 2010. She's also had three children along the way. 'You have to ensure that people don't make assumptions about you,' she says.

'There's no Indian old boys' network that discriminates against women. There's great social pressure here for people to marry and huge pressure on women to have children and to be primarily responsible for raising them.'

Charandeep Kaur
Trilegal; IBA Women's Interest Group

Liebenberg too believes that unconscious bias plays a key role. 'Women are held to higher standards in assignments, evaluation and partnership opportunities and it's the same in other professions and institutions. When men are said to be thoughtful, women are said to be tentative. Aggression is applauded in men, disliked in women. When they return to work after having children, women are often seen as less committed, but such assumptions are unwarranted.'

NAWL's survey notes that the more complex structure of US firms disadvantages women. Firms often include associates, partners and counsel but also contract lawyers (provided by agencies), and staff lawyers (employees not on the partnership track) and many women work as contract and staff lawyers, whose opportunities are limited and who cannot influence management. Women also fare worse in multi-tiered firms, where more women partners are on fixed remuneration schemes and don't share in profits. Even women equity partners earned 86 per cent of the compensation enjoyed by male peers.

Not the old boys' network

The challenges for women vary between cultures but are often similar. Charandeep Kaur is one of two women partners in the 17-partner Indian

firm Trilegal and an IBA Women's Interest Group committee member. She insists Indian firms are meritocracies. 'I'd say that there's no Indian old boys' network that discriminates against women,' she says. Rather, she ascribes the loss of women in the profession mainly to the 'usual joke' of the three 'Ms' in India: marriage, motherhood and mothers-in-law. 'There's great social pressure here for people to marry and huge pressure on women to have children and to be primarily responsible for raising them.' Her own mother-in-law's help she attests, enabled her to return to work three months after the birth of her child, but many women want more time off, she says.

In Germany recently, levels of recruitment of female lawyers in commercial firms has reportedly dropped. Maria Wolleh is a partner in the Berlin office of Swedish firm Mannheimer Swartling and Senior Vice-Chair of the Women Lawyers' Interest Group. 'This may reflect the fact that younger women lawyers in Germany want to achieve a better work/life balance,' she says.

Throughout Germany, Wolleh says, many women leave before having children. 'There are few role models and many women are pessimistic about their chances. Germany is very traditional and women are usually expected to look after the children. However there are regional differences; Berlin for example has a longer tradition of child care facilities, making it easier for women to continue their careers.'

Beatriz Araújo is a London-based partner and member of the Global Executive Committee of Baker & McKenzie, where 21 per cent of the global partnership is female. She notes that women often seem to do better in Asia and Latin America, which may be due to the fact that more affordable child care and family support is more embedded in the culture. In the UK and US now she says, the trend is for women to take longer maternity breaks. 'Generally speaking, maternity leave is still a challenge for the profession. Women are taking longer maternity leaves often when they're close to partnership, when lawyers are expected to be building their specialist expertise and client base. Because of the commitment needed to progress to the next level and the need to rebuild your client base and catch up with legal changes, you have to really want to come back.'

Management is another issue. The NAWL survey shows that 11 per cent of firms have no women members of governing committees, while most firms had only one or two women members. Only 5 epr cent had female managing partners, a figure which is unchanged since 2006. Almost 50 per cent counted no women among their top ten rainmakers. Liebenberg believes the status quo is unlikely to change until women reach a critical mass in partnerships and management. 'Otherwise, attitudes and policies won't change and gender stereotyping will remain. We know that having three or more women on corporate boards results in more women becoming managers. I think that in order to see meaningful change, we need to have women comprise approximately one-third of firm partners and management committee members.'

Don't behave like men

Freshfields Bruckhaus Deringer is one example of a firm confronting the issue. While male and female trainees have been recruited in almost equal numbers over the last decade, only 18 per cent of partners in the London office and 12 per cent of women in the global firm are women. Like others, the firm is taking positive action to redress the balance, earning a place as one of three law firms on The Times Top 50 Employers for Women list alongside Addleshaw Goddard and Hogan Lovells. But Freshfield's Kevin Hogarth stresses that the task is not straightforward. 'Why women leave firms or think they don't have choices is a complex issue so there's no one silver bullet solution. We've had to think about what happens and our stereotypical expectations of how men and women behave.'

A range of programmes to help women manage and develop their careers have been introduced in the firm, similar to initiatives adopted by other progressive firms. These include the Strategic Excellence Programme, launched to give women more input into how they can overcome career barriers. 'We don't want to tell women to behave like men but help them with things like networking and profile raising,' advises Hogarth. Partners have coaching on helping women with their career development and enabling them to be good role models. Everyone has unconscious bias training. 'There are women's groups in Italy and Germany and the Hong Kong office is considering similar programmes, but you must be sensitive to other cultures,' says Hogarth. Freshfields has no targets for women partners. 'We think it will take five to ten years for these initiatives to work. But we don't think that targets aren't right for us,' Hogarth says.

Addleshaw Goddard also offers a range of support for women and has a target of 25 per cent women partners by 2014. 'This is an aspirational target, not a quota, but it focuses the mind on what has to be done, which is positive,' says Burch. The firm clearly now has a highly impressive role model. 'I ran for senior partner and was open about the fact that I would continue if elected with my flexible working arrangements,' Burch reports.

Other big firms are focused on change too. Clifford Chance – which has a partnership made of 14 per cent women globally - has an aspirational target of 30 per cent, which it says is a 'long-term aim and management focus'. Its Management Committee and Partnership

Selection Group have bias awareness training. ten years ago, Baker & McKenzie introduced a part-time policy for partners and the firm is offering business development skills training for women. 'Women are good client managers, but can lack confidence and the networks needed for business development,' says Araújo. This can be challenging, since many client boards are still male dominated. Araújo is one of a number of women who have served on the firm's Global Executive Committee, and more women are being brought into management groups. 'Often women are more pragmatic,' she insists. Araújo agrees with Liebenberg's view that more women in the partnership and management should change the paradigm. 'Women then have more mentors and role models,' she says. In time too, she believes, different types of working arrangements will be much more acceptable.

Indian firm Trilegal offers three months, maternity leave, although it's not obliged to do so, and supports women by offering alternative career paths when they return to work after having children, like precedent management and business development. Senior lawyers can be 'Counsel' rather than partners, for lesser remuneration. 'We're also very serious about offering work/life balance. All lawyers have laptops and internet access at home,' says Kaur.

Institutions are helping, too. Liebenberg reports that the ABA Women's Commission produces a Fair Measure Guide on how law firms and other employers can conduct gender neutral evaluations of their lawyers and the IBA's Women's Interest Group addresses career issues in its conferences. 'The exchange of experiences and empowerment from learning and from successful role models is one important aspect of the Group,' says Wolleh.

The bottom line

A critical view of such measures is that they are ideologically motivated. But is there a real business case for including more women at the top? 'There is a business case for having more women partners but another argument is that there is a case for doing nothing. Every year a group of highly qualified people will be competing for partnership and you can't reward them all. The sad truth is that it's very useful for firms to have a steady influx of dedicated, meticulous staff who can support the partnership,' Sommerlad cautions.

And will women get the blame if women's networks and similar developments fail to deliver results? 'An issue with some of these initiatives is that they load a lot of responsibility onto women,' comments Burch.

But in addition to such considerations, some women partners point to the real need for the improvement in women's lot. 'Recruitment and training costs are high. It's a poor return on our talent if we have few women partners,' says Freshfield's Hogarth. Addleshaw Goddard's Burch agrees: 'Selecting partners from a narrow pool doesn't serve the clients and therefore our business well.'

And increasingly, clients notice the numbers. The 2004 'Call to Action' of Chief Legal Officers in the USA signalled their expectations about diversity policies in their legal advisers. Araújo notes that clients are asking for diversity statistics and expect to see diverse teams in pitches. Female students applying for work may well consider women's status in firms, so female partnership levels are relevant to attracting talent. 'Diverse teams are more robust and creative,' she insists. Liedenberg points to US research that suggests that the collective intelligence of groups rises when they include women.

Institutional policies are now relevant too. In England and Wales, the Legal Services Commission made the operation of equality and diversity programmes in firms a requirement of obtaining a legal aid franchise. Now in other arenas, some women lawyers are more visible. Baker & McKenzie is proud of the fact that Christine Lagarde, the first woman chair of Baker & McKenzie, is now Managing Director of the IMF – and that's one role model of which we can all take note.

'Although increasing numbers of women and other "outsiders" become partners today, many continue to be locked into the profession's less prestigious specialisms and lower status positions and many leave the profession altogether.'

Hilary Sommerlad
Professor of SocioLegal Studies, Leicester School of Law

Diana Bentley is a former practising lawyer and is now a journalist, writer and public relations adviser based in London. She can be contacted by e-mail at **dianab@dircon.co.uk**.

The latest IBA Global Employment Institute survey, which assesses strategic trends in national laws and multinationals' policies on work-life balance, can be viewed here: **tinyurl.com/IBAGEIreport**

A lesson not yet learned

The Fukushima disaster was a shock and a tragedy. Now, one year on, it's time for a careful assessment of what happened and how to avoid anything like it happening again.

SATOKO KOGURE

A system of irresponsibility – this is what political scientist Masao Maruyama called the pre-war imperialism that led Japan to the disastrous Second World War. Maruyama described the pre-war Japanese social structure and mentality that escalated militarism as absence of subjective sense of responsibility, whereby every act was perceived as part of righteous imperialism. After the war, the top military officials at the Tokyo War Crimes Trials did not fully understand their accountability, much less the Japanese public, who became the victims of militarism and two atomic bombs.

Over the year since Japan was hit by the huge tsunami and the ensuing crisis at Fukushima Daiichi nuclear power plant, this system of irresponsibility has arisen again. The question of who is responsible for the disaster in Fukushima, which is assessed as level seven (the highest on the international scale), was made even more obscure amid the clear smoke of radiation. Tokyo Electric Power Co (TEPCO), which owns Fukushima Daiichi plant, has attempted to escape accountability by suggesting the huge tsunami was 'beyond estimation', while the Japanese prosecutors seem uninterested in pursuing TEPCO. Critical questions remain unanswered: was there enough risk management to avoid the severe accident at the plant, as well as the massive exposure of the local residents to unnecessary amounts of radiation? And, if not, who is accountable for the failure?

'It's very incomprehensible and strange,' says Hiroyuki Kawai, a Tokyo-based attorney who has been involved in anti-nuclear power trials for years. Kawai questions the prosecutors' inaction against TEPCO, comparing it to the past prompt prosecutions of big companies such as the recent one against Japanese camera-maker Olympus and its former executives. Kawai assumes the reason for the silence of prosecutors over TEPCO is that nuclear policy has been developed under government auspices. As such, the Government, which is to supervise the risky nuclear power plants, shares part of the blame.

Concerned about this apparent absence of responsibility for the crisis, in March, a group of shareholders of TEPCO launched a legal case against the company's 27 executives who held senior posts at the company from 2002. The charge is that TEPCO failed to heed government warnings over the risks posed by earthquakes, and failed to take sufficient measures to protect the plant. It seems obvious that TEPCO has resorted to the Act on Compensation for Nuclear Damage, which absolves a nuclear operator of responsibility for damages caused by 'an exceptionally massive disaster'. However, last summer, government-led investigation team found that TEPCO estimated a possible tsunami could be over 15 metres in 2008 (the tsunami that hit Fukushima last year was 14–15 metres) but did not take sufficient measures. These would have cost hundreds of millions of dollars. This is one of a series of findings that indicate human error by TEPCO before, during and after the accident.

The plaintiffs are seeking record damages of $67 billion from TEPCO executives for the victims of the disaster. Ultimately, though, it is not about money but 'social responsibility', says Kawai, who represents the plaintiffs. 'Without holding individuals responsible, it won't be possible to correct the system of "collective irresponsibility" in the nuclear industry,' he says.

It is not only TEPCO that is facing blame for the worldwide catastrophe. The Director General of the International Atomic Energy Agency(IAEA) Yukiya Amano recently criticised the Japanese Government's failure. He described this failure to effectively supervise TEPCO as one of the most serious 'human errors', contributing to an escalation of the crisis.

'Human errors' made by the Government have gradually been revealed throughout the year. As Amano also pointed out in the interview by Kyodo News that there were problems with the Government's decision-making and the way it released information at the early stages. The most controversial error concerns its evacuation directive and risk communication to prevent radioactive contamination of the population. It was later revealed that the Government had not released the data from SPEEDI (System for the Prediction of Environmental Emergency Dose Information), which showed the direction of the radiation plume during the first days. This resulted in the unnecessary contamination of the locals who evacuated in the same direction of the plume. Through the scandalous reports this year that the Government had not made records of the emergency meetings in which they discussed the response to the nuclear disaster, it emerged that the Government calculated a week after the tsunami that meltdown had already occurred at the No 1, No 2 and No 3 reactors of Daiichi plant. But it took two months for the Government to admit to the occurrence and, in the meantime, it kept announcing that 'there is no immediate danger to your health' in order to avoid panic.

What is more pressing now than focusing on the Government's errors is holding it responsible for the ongoing suffering of residents of, and evacuees from, Fukushima. The radioactive contamination of the land and ocean around the plant still continues, and it makes it impossible for some 160,000 Fukushima residents staying in shelters around the country to go home. The health check of the people who could have been exposed to a certain level of radiation has not been conducted thoroughly, partly because the people are scattered around the country. Support for those in shelters has been slow and minimal, with little hope of going home to resume their lives based on fishery and farming. Complaints from the locals even indicate serious human rights violations, such as 50 deaths of hospital patients during evacuation, suicides over the Fukushima crisis and discrimination against Fukushima people. In February, the Japan Federation of Bar Associations called on the Government to extend inclusive humanitarian assistance to the Fukushima people, demonstrating its duty under the Inter-Agency Standing Committee (IASC) Operational Guidelines on Human Rights and Natural Disasters(2006).

What responsibility lies with the public for the disaster? How did the only country that suffered the atomic bombs and the country that is well known for its earthquake risks accept 54 nuclear reactors on its soil? These questions are critical while the Government is trying to resume the remaining nuclear power plants.

The public has targeted TEPCO, Japanese politicians, nuclear experts and the media, which has promoted the myth of safe nuclear plants for the past 50 years. The question of whether the public accepted the myth has not been widely addressed. There is a growing anti-nuclear power movement among the public but it remains somewhat peripheral, with people fearing a loss of energy supply or a hike in prices. Behind the scenes, there are moves in some areas of Japan to reject radioactive rubble from Fukushima, while Fukushima residents feel abandoned by their own state(in fact, the consumers of Fukushima Daiichi plant are not the residents of Fukushima, but the residents of the Kanto region around Tokyo).

What is different now from post-war Japan is that the battle is not yet over. Nuclear fuel requires continued cooling, even after a plant is shut down or it melts down, releasing radiation. There is no reasonable process for decontamination, which needs countless workers amid radioactivity – reportedly many of those hired are likely to be Fukushima locals. Whether the country will consider its responsibility for such realities, now and in the future, or become instead a collective victim of the 'unexpected disaster', remains to be seen.

Satoko Kogure is a freelance journalist based in Japan and can be contacted at: **skogure@hotmail.co.jp**.

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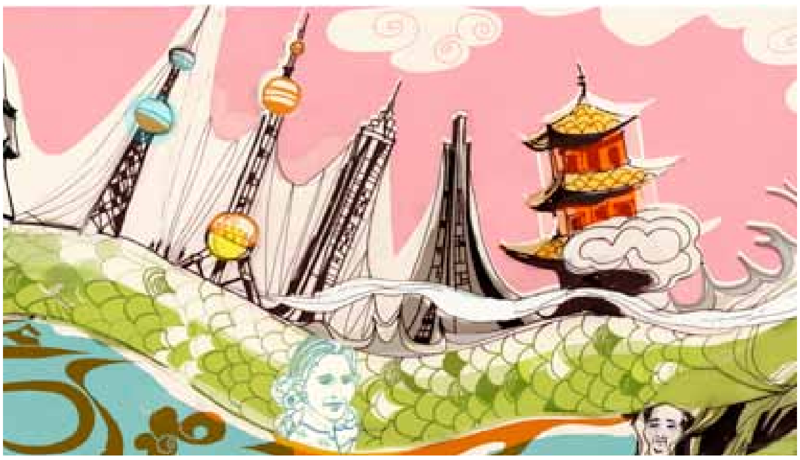

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