

IBA GLOBAL INSIGHT

Oct/Nov 2015

Libya's uneven path to
post-revolutionary justice

Singapore: fifty years
of rule of law

Funding crowds move
into the mainstream



LOCAL ROOTS GLOBAL IMPACT

"The only local arbitration commission which meets or surpasses global standards" - The Economist Intelligence Unit

"Professionalism, competence and transparency" - Global Arbitration Review



BIAC

Beijing Arbitration Commission
Beijing International Arbitration Center

Tel: +86 10 6566 9856

Fax: +86 10 6566 8078

Email: bjac@bjac.org.cn

Address: 16/F, China Merchants Tower,
No. 118 Jian Guo Road,
Chaoyang District, Beijing 100022, China



Hearing Room

BAC/BIAC Profile

The Beijing Arbitration Commission (BAC), also known as the Beijing International Arbitration Center (BIAC), was established in 1995 as a non-governmental arbitration institution, and became the first self-funded Chinese arbitration institution in 1999. It provides institutional support as an independent and neutral venue for the conduct of domestic and international arbitration and ADR proceedings. It is operated by a Secretariat headed by its Secretary General under the supervision of its Committee. The BAC Arbitration Rules 2015 were unveiled on December 4, 2014, and came into force on April 1, 2015. The 2015 rules widely adopt UNCITRAL Arbitration Rules and further accept up-to-date international practice.

BAC/BIAC Growth

- From 7 cases filings in 1995 to over 24,000 cases in total by 2014
- 1500+ new filings on average per year since 2005
- 600+ international cases in total
- Parties from various jurisdictions including USA, UK, Germany, Australia, Japan, South Korea, Singapore, Hong Kong and Taiwan, etc.
- The sum in dispute of around 11.1 billion RMB (approx. 1.8 billion USD or 1.7 billion EUR) per year on average since 2010 with a highest claim amount of 5 billion RMB (Approx. 0.81 billion USD or 0.77 billion EUR) in 2015

Recommended BAC/BIAC Model Clause:

All disputes arising from or in connection with this contract shall be submitted to Beijing Arbitration Commission / Beijing International Arbitration Center for arbitration in accordance with its rules of arbitration in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.



Contents



IBA GLOBAL INSIGHT

OCTOBER/NOVEMBER 2015

Vol 69 No 5 ISSN 2221-5859



EDITORIAL 3

ON THE COVER

Libya's uneven path to post-revolutionary justice

The trial of Gaddafi's son and 36 regime-era officials presented the country with an historic opportunity for transitional justice. Instead, it provoked further divisions in a country already torn apart by civil conflict.

39



28

Levelling the legal playing field

Assessing what lawyers can do to help states meet international development commitments



44

Singapore: fifty years of rule of law

Lee Kuan Yew died earlier this year, just before his country marked its 50th year of independence

ALTERNATIVE FINANCE

Funding crowds move into the finance mainstream

16

'Getting the regulation right is a crucial factor...'

GLOBAL LEADERS

David Morley
Senior Partner, Allen & Overy

22

'Non-lawyers can invest in law firms. That's feeding innovation.'

Contents

NEWS ANALYSIS

LEGAL AND BUSINESS 4

Banking scandals: Libor conviction a 'watershed moment' in the battle for cultural reform; IBA North America office hosts panel discussion on FIFA; Debt defaults: Puerto Rico faces 'Sisyphean task'



HUMAN RIGHTS 8

Refugee crisis: serious concerns over legality of responses; Human rights: can the UK go it alone; Justice versus corruption in Cambodia; Legality of UK drone attack in Syria hinges on evidence



13 Global: Time to confront cyber crime

Big business is increasingly vulnerable to cyber-attack and the legal profession is no exception. Lawyers must do more to confront the threat as a core business risk in order to neutralise it.

35 Middle East: Egypt's new law that undermines the rule of law

The country's new law, which brings intimidating limits to free speech, is in danger of handing terrorists the very victory they seek.

51 Asia: Going beyond convention

Islamic finance is increasingly viewed as an ethical alternative to established banking, especially since the financial crisis. Malaysia is seen as a role model, but can it maintain its position as the sector expands?

COMMENT AND ANALYSIS

The content of *IBA Global Insight* is written by independent journalists and does not represent the views of the International Bar Association.

IBA LEADERSHIP

President David W Rivkin
Vice-President Martin Šolc
Secretary-General Horacio Bernardes-Neto
Executive Director Mark Ellis

ADVERTISING

Head of Advertising and Sponsorship
Andrew Webster-Dunn
advertising@int-bar.org

Printed by Pensord, Wales

EDITORIAL AND DESIGN

Director of Content James Lewis
Managing Editor Rachael Johnson
Multimedia Editor Tom Maguire
Multimedia Journalist Ruth Green
Senior Content Editor Ed Green
Content Editor Isobel Souster
Junior Content Editor Sophie Phythian
Creative Director Tim Licence
Senior Artworker Penny Newton
Creative Artworker Leonie Girard

SUBSCRIPTIONS

Free to IBA members
Subscriptions 2015
£36/\$54 (full year)
£7.50/\$11 (single issue)
Please order from the
International Bar Association:
subscriptions@int-bar.org
Send postal corrections to:
member@int-bar.org



Total average net
circulation – 25,405
Jan–Jun 2014

International Bar Association

4th Floor, 10 St Bride Street
London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
www.ibanet.org
editor@int-bar.org

© International Bar Association 2015
All rights reserved. No part of this publication may be reproduced or transmitted in any form or any means, or stored in any retrieval system of any nature without the prior written permission of the copyright holder. Application for permission should be made to the Director of Content at the IBA address.

On the cover: Libyan rebel

Editorial

The cover feature of this edition ('Libya's uneven path to post-revolutionary justice', page 39) is written by one of the few journalists to report from Tripoli on the trial of Colonel Muammar Gaddafi's son and 36 regime-era officials. Even as the country was descending into chaos – after Libya's population became the latest to join the Arab Spring sweeping the region in 2011 – hopes remained high of a successful state with robust legal, democratic and economic institutions. But, as the report from *Global Insight's* correspondent powerfully conveys, the potentially historic opportunity for transitional justice is in danger of being squandered.



Iraq, Syria and the ensuing refugee crisis continue to dominate international media coverage (see 'Refugee crisis: serious concerns over legality of responses', page eight, and 'Legality of UK drone attack in Syria hinges on evidence', page 11). However, troubling coverage is increasingly serving as a reminder that Libya is in a state of meltdown. Live discussions focus on the need for increased cooperation along Egypt's long, exposed Libyan border and Tunisia has begun building a security wall along its own 104-mile-long border with Libya.

As highlighted in the June/July edition of *Global Insight*, ISIS has been recruiting in Africa, and Libya is at the core of the problem. In April, a video showed 29 Ethiopians being executed in Libya. Gunmen who trained with ISIS in Libya were involved in the murder of 20 foreign tourists, at a Tunis museum in March, and 38 more tourists, most of them British, at a seaside resort in Tunisia in June.

Meanwhile, armed trafficking gangs are taking full advantage of the chaos in Libya, exacerbating the ever-growing refugee crisis engulfing Europe. All this is concentrating minds on what can and should be done across the Middle East, and particularly the role of multi-lateral institutions such as the UN and NATO. The discussions taking place at major sessions at the IBA Annual Conference in Vienna – the IBAHRI showcase on the UN Security Council and human rights, and the 'Conversation with...' the former Secretary-General of NATO, Anders Fogh Rasmussen, for example – could not be more timely, and will be featured on the IBA website and in the next edition of *Global Insight*.

James Lewis

ONLINE

This month's online highlights:

- Cambodia: corruption in the judiciary 'endemic'
- South China Sea dispute to be assessed by Hague Arbitration tribunal
- Southeast Asia boat crisis highlights failures of Myanmar rule of law



IN FILM

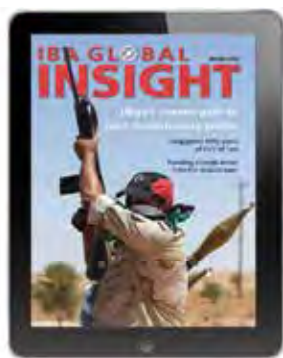
This month's film highlights:

- Webcast interview with Allen & Overy Senior Partner, David Morley
- *Myanmar: the long road to reform* – documentary investigating Myanmar constitution, business and human rights after decades of military dictatorship



- José Ugaz, Chair of Transparency International, on the FIFA scandal, corruption and accountability

ON THE MOVE



New! IBA *Global Insight* podcasts. This new stream of content allows you to access IBA interviews in shorter audio format, from your office, at home or on the move. Available from the IBA website and iTunes.

The *Global Insight* app has moved to a new, improved platform. Details of how to access the app can be found on the IBA website at www.ibanet.org.



Banking scandals: Libor conviction a 'watershed moment' in the battle for cultural reform

JONATHAN WATSON

Tom Hayes is the first person to be charged and stand trial in the UK as a result of the Serious Fraud Office's (SFO) ongoing criminal investigation into the manipulation of the London Interbank Offered Rate (Libor). A jury found the former UBS and Citigroup derivatives trader guilty of eight counts of conspiracy to defraud, and in August he was sentenced to a total of 14 years in prison for manipulating Libor, a benchmark interest rate that is used globally to set the price of everything from credit card fees to corporate loans.

The verdict was a big success for the SFO, which has been heavily criticised recently, particularly after its investigation of the Tchenguiz brothers collapsed. It has many active Libor investigations related to this case, with two trials due to start soon. The agency is also looking into the manipulation of foreign exchange markets.

'High standards of probity are to be expected of those who operate in the banking system, whether they are bankers involved in dealing with deposits and the lending of money or traders in an investment banking context,' said Mr Justice Cooke of the Queen's Bench Division, when sentencing Hayes. 'What this case has shown is the absence of that integrity which ought to characterise banking.'



The apparent lack of moral standards in banking is something the sector has been attempting to deal with for several years. Mark Carney, the Governor of the Bank of England, recently claimed that banking was making good progress in cleaning up its act. 'The age of irresponsibility is over,' he said.

Eoin O'Shea, a partner at Reed Smith in London and an officer of the IBA Anti-Corruption Committee, describes the conviction of Hayes as a 'watershed moment'. The high profile of the trial and the heavy sentence 'mean that a

clear message is going to the dealing rooms and the C-suites [boardrooms] of the City of London: fraud is fraud,' he says. 'Financial professionals don't get special treatment.'

The prosecution had a very strong case. Hayes was blatant about what he was doing; there was a very clear paper trail; and he effectively gave a confession to the SFO, which he then tried to withdraw before deciding to plead not guilty.

'Some of those who work in financial services seem to take the attitude that they can play any system to their advantage,' says O'Shea. 'Mr Hayes does not seem to have realised that you can't do that with the judicial system.' In time he could become a case study of how an accused should not behave, both before and after they are accused.

The question now is whether people in banking have woken up to the fact that there will be consequences for sailing too close to the wind. 'There will always be those who try to push the boundaries,' says Stephen Powell, a partner at Slaughter and May and former Co-Chair of the IBA Banking Law Committee, 'but the penalties for going too far have been made abundantly clear and that is obviously a good thing.'

Many still feel that the most troubling aspect of the case is that Hayes could only have rigged Libor for so long if his bosses either failed to supervise

him properly or preferred to ignore his antics. Worryingly, Hayes claimed in his defence that he was only doing what others were doing and that as long as the money kept rolling in, his managers were happy.

'You are unlikely to be able to pin this kind of thing on more senior people,' says Powell. 'You are usually trying to claim they are at fault for having allowed misconduct to take place. While that is serious, it's a different level of seriousness than doing something fraudulent or criminal. The senior

person might have failed to manage their team as well as they should have done, but that's not something criminal law needs to get involved in.'

O'Shea is uncomfortable with what he sees as a 'knee-jerk reaction' of arguing that when something goes wrong with the system, or the incentives in the system, someone automatically has to go to prison. 'There will be lots of cases where there may have been conduct that the regulator doesn't approve of and big fines have been imposed,' he says. 'They don't necessarily read through to criminal conduct.'

“What this case has shown is the absence of that integrity which ought to characterise banking

Mr Justice Cooke
Queen's Bench Division

Greater transparency should help to ensure better behaviour in future. The reason that Hayes was able to get away with what he did for so long was that he was operating in an obscure field. 'Libor setting was not specifically regulated at the time; it was just one of those little bits of machinery underneath the financial system that nobody paid much attention to,' says O'Shea. 'It was pretty unglamorous and uninteresting. That provided an opportunity for manipulation, which would not have been there in a more closely examined and transparent process.'

While banking culture is now changing for the better, future scandals cannot be ruled out. 'People have short memories,' Powell says. 'Although I am fairly confident that no one is doing this sort of thing now, once the case is a few years old, and we move into a different environment, you may well see things slipping back. Sadly, these kinds of things happen every decade or two.'

Jonathan Watson is a freelance journalist and can be contacted at jonathan.watson@yahoo.co.uk

IBA North America office hosts panel discussion on FIFA



As part of its Business and Human Rights series, the IBA North America office organised a panel discussion on the corruption and human rights issues that have dogged FIFA in recent years, with particular emphasis on the recent criminal case.

Moderated by the IBA North America Director, Michael Maya, the panellists included: Motoko Aizawa, Managing Director, at the Institute for Human Rights and Business; Shruti Shah, Vice-President, Programs and Operations, at Transparency International; and Alexandra Wrage, President at TRACE. The event attracted considerable interest and was attended by representatives from law firms, human rights organisations, NGOs and government.

Once a revered governing body of football, FIFA has been embroiled in a spate of corruption scandals in recent years. With the US Department of Justice's recent indictment of 14 high ranking FIFA officials and marketing executives, FIFA's already shaky reputation has hit an all-time low.

The discussion first focused on the recent corruption scandal and criminal case, including the legal and jurisdictional complexities involved. One of the driving forces behind

the 47-count indictment is the Racketeer Influenced and Corrupt Organizations Act (RICO),



a long-standing US statute that is well suited to cases involving multiple criminal acts committed by multiple actors in numerous countries. In the case of FIFA, money laundering, wire fraud, conspiracy and bribery in multiple countries have been a feature of the body's modus operandi for decades.

The floor was then given to Wrage, who spoke about her pro bono service on FIFA's Independent Governance Committee. She resigned when she realised it was clear that FIFA was not serious about the Committee's proposals for reform. These included: appointing truly independent members to the executive committee; transparency regarding salaries and bonuses; enforceable term limits for high-ranking officials; independent, centralised integrity checks; and clear financial limits on gifts.

Complementing Wrage's analysis, a description of Transparency International's recommendations for reforming FIFA followed. Transparency International has called for reform and greater transparency, including through its partnership with New FIFA Now, a campaign that calls on the worldwide football community, particularly FIFA sponsors, to act with integrity and to pressure FIFA into implementing various reforms.

Read the full report of the panel discussion at tinyurl.com/IBAFIFA.

IBA launches Corporate Membership scheme



The IBA has created a new class of membership tailored to the needs of legal teams within leading international organisations. It will allow general counsel and their teams to take advantage of all the benefits available to members. We are delighted to announce that major international companies and financial institutions, including ABB Switzerland, BG Energy Holdings, General Electric, GlaxoSmithKline, Hess Corporation, Novartis, Occidental Petroleum, Shell and UBS, have already joined the scheme.

To find out more about IBA Corporate Membership on the IBA's membership webpage, see tinyurl.com/JoinTheIBA.

IBA membership offer

IBA membership – now over 55,000 individuals and 195 bar associations and law societies – continues to grow. Membership of the IBA opens a world of possibilities for success in the legal profession. The majority of our members are proud to report that as many as half of their international contacts have been established through IBA connections. For the remainder of 2015, the IBA is offering new members 16 months' membership for the same price as the annual fee.

To benefit from this offer, simply join the IBA via tinyurl.com/JoinTheIBA.

Debt defaults: Puerto Rico faces 'Sisyphean task'

RUTH GREEN

Until recently, few would have been likely to draw comparisons between Puerto Rico and Greece, the debt-ridden country that has become Europe's economic Achilles heel.

But the US commonwealth burst onto the international agenda at the beginning of August as it struggled to make a \$58m debt payment, marking the island's first-ever bond default. Although the writing was on the wall for some time, the news suddenly caused some commentators to ask: is Puerto Rico America's Greece?

First, it's worth examining Puerto Rico's complex relationship with the US: although the island nation is self-governing and has control over its internal affairs, as an overseas US territory, Washington effectively holds the purse strings.

US corporations operating on the island have historically benefited from tax breaks, particularly since 1976 when the US Congress amended the tax code so any profits linked to Puerto Rico were exempt from tax. By the mid-1990s, this was costing the US economy too much money and the policy was phased out, plunging the island's economy into a depression by 2006.

As a US territory, Puerto Rico is prohibited from brokering its own trade agreements with other countries, making it wholly reliant on the American economy, which meant it suffered another blow when the global financial crisis hit the US financial markets in 2008. Adding further fuel to the fire, Congress also granted Puerto Rico the unusual authority to issue municipal bonds that are not subject to federal, state or local taxation regardless of where the bondholders themselves reside – a factor that undoubtedly contributed to the island's spiralling debt problem.

Although some parallels can be drawn with Greece, Luis Fortuño, a partner at Steptoe & Johnson in Washington, DC and former governor of Puerto Rico, believes there are several key differences. 'Greece is an independent country whereas Puerto Rico is a US territory under the US Constitution subject to the full power and authority of the US Congress,' he says. 'Secondly, Greece as such can avail itself of the European Central Bank, the EU and the International Monetary Fund – Puerto Rico cannot. Thirdly, in terms of the size of the debt vis-à-vis the size of the economy, the size of Puerto Rico's debt is much less than that of Greece.'

Fortuño also stresses the need to

comprehend the sheer legal complexity of the island's debt debacle. 'First of all it's imperative to understand that when we talk about Puerto Rico's debt we have to talk about 18 different types of credits, each one of them with different legal structures,' he says.

“Greece is an independent country whereas Puerto Rico is a US territory under the US Constitution... Greece can avail itself of the European Central Bank, the EU and the International Monetary Fund – Puerto Rico cannot

Luis Fortuño

Former Governor of Puerto Rico

'One of them specifically – the general obligation bonds – are protected by the Constitution, which states clearly that the bondholders must be paid before any other payments are made out of the general fund. In some instances some of the other credits are guaranteed by the Commonwealth... and on top of all of this some of the bonds are guaranteed by insurers, so that's another legal dimension to it.'

Marcos Rodriguez-Ema, an adviser at the San Juan-based private economic development group Predco and former President of the Government Development Bank for Puerto Rico, agrees the situation differs from Greece's or even Argentina's debt woes. 'I don't think whatever happens to Puerto Rico generates a financial issue as important as what is going on in Greece or Argentina,' he says. 'It is a contained issue and the problem is really for each particular bondholder to fight for their rights.'

Indeed, Gregor Baer, who co-chairs the IBA Insolvency Section, says that, although the exact context of Puerto Rico's default has been unusual, insolvency issues on a sub-national level are becoming increasingly commonplace worldwide.

'While the Puerto Rico debt default arose in a unique legislative context, we have seen defaults and the threat of insolvency facing sub-national governmental units in other federal systems as well,' he says. 'For example, it was reported last spring

that the Austrian province of Kärnten [Carinthia] was facing a financial crisis and possible insolvency when €10.2bn in provincial bond guarantees in favour of Heta Resolution AG came due – an amount greatly exceeding the province's annual budget.'

Detroit is the other debt situation that has also drawn most comparisons. However, as Puerto Rico is not a state, it cannot seek US Chapter 9 bankruptcy protection as Detroit famously did in July 2013.

The island's policymakers have made moves to try and change this though. On 28 June last year, Governor Alejandro Garcia Padilla signed into law a de facto bankruptcy regime for state-owned enterprises. Although a judge in the US District Court in Puerto Rico declared the law 'unconstitutional' in February and the decision was upheld in a US appeals court in July, the Puerto Rican government is now calling on the US Supreme Court for the right to restructure its debt.

While both Fortuño and Rodriguez-Ema suggest the chances of Congress passing the law are slim, Fortuño says if it is passed, the legal framework must be suitably robust. 'I am concerned that a Chapter 9 authorisation would be nearly a carte blanche to act irresponsibly given what I have seen over the past few months. Even though the lawyer in me has supported that legal framework, the practical person in me thinks there needs to be some parameters here and how you define those parameters so that the state will not act irresponsibly is still up in the air.'

In the meantime, the pressure is on for Puerto Rican policymakers to present a debt restructuring plan by the end of August. When Detroit filed for bankruptcy in 2013 it had racked up \$18bn in debt, making it the largest municipal bankruptcy in US history. By contrast, Puerto Rico is currently carrying an estimated \$70bn in debt and counting.

Richard Ravitch, who advised on Detroit's bankruptcy and helped draft the restructuring package that rescued New York City from the brink of financial collapse in 1975, recently described Puerto Rico's debt situation as a 'Sisyphean task'. Although its debt-to-GDP ratio is much better than Greece's – 70 per cent compared with 174 per cent – restructuring deal or no deal, Puerto Rico's government will certainly have its work cut out.

Major anti-corruption conference: a fresh look at preventing corruption



On 28 August, Jane Ellis, Director of the IBA Legal Projects Team, facilitated the Reflections on Corruption conference in Sydney. Rather than focusing on the wording of the anti-bribery laws and the importance of compliance programmes, participants sought to understand why corruption occurs, despite the existence of such rigorous programmes.

Several key messages emerged. First, anti-bribery laws are necessary, but not sufficient to address corruption. Secondly, anti-corruption agencies need a clear remit to ensure there is no ambiguity as to their function. Thirdly, there remains – across many organisations – a significant disconnect between what the organisation’s code of ethics states and the conduct of some senior managers. Finally, there is a need for greater understanding of how people who seem to have a strong moral core in their personal life, can justify engaging in illegal or inappropriate conduct in their professional life.

The keynote address – ‘The Seduction of Corruption’ – was given by Professor J Patrick Dobel, the John and Marguerite Corbally Professor in Public Service at the University of Washington. Dobel

explored, among other things, the moral and psychological tensions a person, who may consider themselves morally sound, experiences when engaging in corrupt conduct and how that person then rationalises such conduct.

Panels covered the role of anti-corruption agencies, the root causes of corruption, ethics and institutions, as well as money and political influence. There were also two break-out sessions, one exploring corruption, cultural dimensions and emerging markets, the other, hosted by Robert Wyld, Co-Chair of the IBA Anti-Corruption Committee, focused on the integrity of the Commonwealth Government.

For information on the IBA’s anti-corruption strategy for the legal profession, visit anticorruptionstrategy.org

New podcast service of IBA content launched

The IBA has launched a new podcast service. This new stream of content will enhance our multimedia offering by allowing you to access IBA interviews in audio format, from your office, at home or on the move.

Podcasts will be shorter in length than filmed interviews, allowing you to get to the heart of the issue quickly.

The latest podcast focuses on Syria and the role of the UN, with views from Navi Pillay, Bernard Kouchner and Mark Malloch Brown on the impact that a lack of intervention has had in Syria and what ought to be done. In a separate podcast, senior figures from Global Witness and Transparency International discuss the role of shell companies in corruption, in light of the FIFA scandal.

The podcasts can be listened to via Apple iTunes or the IBA website at tinyurl.com/IBAPodcasts.

Women Business Lawyers Initiative event in Jordan



The IBA Initiative for Women Business Lawyers was established at the request of female commercial lawyers based in Dubai with aspirations to increase their knowledge of international commercial law, and to enhance their awareness of global standards and trends in commercial practice.

Following the success of the inaugural programme, the IBA has made the decision to offer this initiative to jurisdictions both in the Middle East and Africa with the support of the IBA Arab Regional Forum, the IBA African Regional Forum, the IBA Women Lawyers Interest Group and the IBA Crimes Against Women Subcommittee of the Criminal Law Committee.

The latest edition of the Women Business Lawyers Initiative – its second event in the Middle East – took place in Amman, Jordan, on 7 September. The event was attended by over 150 delegates, and hosted in partnership with the Arab International Women’s Forum and the Arab Women’s Legal Network. High-profile speakers discussed challenges and opportunities for Jordanian women in the legal profession.

A summary film of the event can be viewed at tinyurl.com/IBAWomenLawyersJordan.

Refugee crisis: serious concerns over legality of responses

RUTH GREEN

Prolonged conflicts and human rights abuses in Syria, Libya and parts of sub-Saharan Africa have resulted in mass migration that has overwhelmed many European countries.

Tensions heightened in mid-September after Hungary pushed through harsh new anti-immigration laws, declared a state of emergency in six of its seven regions, and Hungarian police fired tear gas and water cannons to force migrants back from the Hungarian-Serbian border. Although at the time of writing, several EU meetings were due to take place amid calls for a unified solution to the crisis, the lawfulness of responses from Hungary and other countries has already been called into question.

Máté Szabó, Director of Programmes at the Hungarian Civil Liberties Union, says that, under Hungary's new anti-immigration laws, anyone found trespassing the country's borders risks imprisonment and even deportation.

'Those who come through the fence are... arrested and prosecuted for committing a newly codified criminal offence: illegal border crossing', he says. 'The first offender has been sentenced to immediate deportation from the country after an 80-minute trial. If he tries to enter Hungary again, he will be imprisoned.'

Szabó says Hungary's new law may even contravene international refugee laws: 'The Hungarian State is violating Article 31 of the 1951 Convention relating to the Status of Refugees by punishing refugees for illegal border crossing before making a decision on their asylum claims.'

Baroness Helena Kennedy, Chair of the IBAHRI Council, says the government's use of force also breaks international humanitarian law. 'I am appalled by the conduct of Hungary's government. The decision to use tear gas and force against people fleeing war is a breach of humanitarian law.'

The clashes in Hungary have also focused attention on weaknesses in the Schengen Area's principle of free movement, which was introduced in the mid-1990s.

Although imposing temporary border controls is neither illegal nor unprecedented in Europe today, Gunther Mäevers, Chair of the IBA Immigration and Nationality Law Committee, says there must be a good reason for doing so.

'This is something that people tend to overlook, but, in the Schengen Borders Code, every Member State has the right to re-implement border controls, but only if it's in the public interest or something is in danger,' he says.



Police secure a part of a platform as migrants wait to board a train at the station in Tovarnik, Croatia, September 2015.

“The Hungarian State is violating Article 31 of the 1951 Convention relating to the Status of Refugees by punishing refugees for illegal border crossing before making a decision on their asylum claims

Máté Szabó

Director of Programmes, Hungarian Civil Liberties Union

Hungary isn't the only country that has faced criticism for its actions. Both Germany and the Czech Republic said they would process asylum applications from Syrian refugees directly, before quickly backtracking when they became overwhelmed by scores of migrants attempting to cross their borders.

Hans Corell, Co-Chair of the IBAHRI Council, says these rapid U-turns in policy highlight the severity of the crisis. 'It is obvious that introducing border controls within the EU is sending a very serious signal to people in Europe, making people realise that there is really a crisis,' he says.

Reports that Slovakia, Bulgaria and Poland are refusing to accept non-Christian refugees are also extremely concerning and, if confirmed, would violate international laws, he says.

'Discrimination on the basis of religion is prohibited not only under European law, but also under international human rights and refugee law,' says Corell.

Dublin rules

One related issue is the Dublin III Regulation, which requires refugees to seek asylum in the first European country in which they set foot. The rules also state that if someone illegally crosses the border into another country they will be returned to the country in which

they originally claimed asylum. Both rules have compounded the situation, says Baroness Kennedy.

'I think the Dublin Regulations have contributed to the crisis because the formulation that requires people to apply

for asylum at their first point of entry into Europe is punitive,' she says.

European border management agency Frontex detected more than 500,000 migrants at EU external borders in the first eight months of 2015. This dwarfs the 280,000 detected at EU borders throughout the whole of 2014.

As Mäevers suggests, the escalating crisis is proof that the Dublin system is no longer working for Europe.

'Most of these people – asylum seekers or refugees for economic reasons – should normally be sent back home to the country of entry or if they come from a "safe state", to the country of origin,' he says. 'That system seems not to be functioning and that's why at the EU level there are talks ongoing to seek a compromise with regard to caps and quotas.'

Jelle Kroes, Senior Vice-Chair of IBA Immigration and Nationality Law Committee, says a longer term solution is urgently required.

'All of these countries have their own experience of refugees and now all of a sudden they seem to look at them as an irritating bug that must be solved with a couple of meetings at EU level. This is something that we've needed to look at for a number of years and we need to think outside of the box.'

Human rights: can the UK go it alone?

Human rights law is currently approaching a crossroads in the United Kingdom. The government plans to supersede the existing Human Rights Act, curtailing the influence the European Court of Human Rights (ECtHR) over British courts, has prompted a debate regarding the country's relationship with the ECtHR and the European Convention on Human Rights.

For its 20th Anniversary Speaker Session in September 2015, the IBAHRI invited prominent speakers to answer the question, 'Human rights: can we go it alone?' and explore whether institutions such as the ECtHR are an essential part of human rights protection in the UK and around the world.

Sir Keir Starmer QC MP, the UK's former Director of Public Prosecutions, spoke passionately for the importance of human rights regional mechanisms and cited the need for supra-national bodies to ensure that universal human rights are not left to the whims of national governments. He reminded the audience that the European Convention on Human Rights was born out of the ashes of the Second World War when the Council of Europe sought to ensure that history would not repeat itself and there would be established mechanisms by which governments could be held accountable.

Martin Howe QC, who advised on the UK government's plans to



Martin Howe QC at the IBAHRI's 20th Anniversary Speaker Session

replace the Human Rights Act with new legislation, made strong ripostes to Starmer's statements. He argued that the courts in Strasbourg were moving away from their original mandate and increasingly making judgments in areas outside their remit, such as in the case of whether prisoners in the UK should be allowed the vote. He used countries such as Australia, New Zealand, Canada and the United States as

examples where national courts are the ultimate arbiters of human rights cases and pointed in particular to the recent judgment by the US Supreme Court on same-sex marriage equality to illustrate his point.

The IBA filmed the proceedings which can be viewed on the IBA website at ibanet.org

Justice versus corruption in Cambodia

The IBAHRI released its report, *Justice versus corruption: Challenges to the independence of the judiciary in Cambodia*, at a press conference in Phnom Penh on 17 September. The report followed the convening of a high-profile delegation to visit Phnom Penh, Cambodia in April, to undertake an in-depth examination of the Cambodian judiciary's situation.

The visit came about in light of three controversial new laws passed earlier this year. At the time, the IBAHRI warned that these laws would have a

negative impact on the independence of the judiciary, and result in an excessive transfer of power from the judiciary to the executive.

The report highlights the extent of corrupt influence – both political and financial – exerted over the judiciary in Cambodia, and of its impact on human rights cases. In the report, the IBAHRI calls on the Cambodian government to take immediate steps to prevent, both in law and practice, political pressure being placed on the judiciary by the authorities, and to address the corruption endemic

in the Cambodian legal system.

While the delegation expressed concern at the current state of legal institutions in Cambodia, the report is also optimistic, stating that 'there is every reason to believe that, with the right support, Cambodia's judges and lawyers can begin to play a positive role in protecting individual rights and delivering justice to ordinary Cambodians'.

To find out more and read the full report, visit tinyurl.com/o9yz2tu.

Iranian lawyer Abdolfattah Soltani remains in detention



Iranian lawyer and former IBA Human Rights Award winner Abdolfattah Soltani was sentenced to 13 years in prison in September 2012. To mark his three years in detention, the IBAHRI issued a statement calling for his immediate release and expressing concern at the deteriorating health of Mr Soltani and the conditions in Evin Prison, where he is currently held.

At the time of his detention, the UN Working Group on Arbitrary Detention declared that the deprivation of liberty of Soltani is arbitrary and in violation of several articles of the International Covenant on Civil and Political Rights, and called on the Iranian government to release Soltani immediately with the provision of adequate compensation.

Soltani has provided pro bono legal counsel to human rights defenders and co-founded the Defenders of Human Rights Centre (DHRC) with Nobel Peace Prize laureate, Ms Shirin Ebadi. This has resulted in harassment and persistent persecution from the Iranian government, and in September 2011 an indictment was raised against him for accepting an 'illegal prize', namely the Nuremberg International Human Rights Award. In 2012, the IBA recognised his courage and commitment to the rule of law and human rights in Iran by awarding him the IBA Human Rights Award.

Lawyers vote ahead of Myanmar's general election



As Myanmar prepares for its first general election since the introduction of a civilian government in 2011, another vote, which takes place at the end of September, signals a further step towards free and fair democratic elections in Myanmar.

In July of this year, the IBAHRI concluded a series of 15 two-day workshops aimed at helping lawyers to prepare for the forthcoming elections of Myanmar's first ever independent national professional organisation of lawyers, the Independent Lawyers' Association of Myanmar (ILAM).

IBA Executive Director Mark Ellis, who visited Myanmar in 2014, said: 'With Myanmar currently preparing for parliamentary elections that are due to take place shortly after the ILAM elections, lawyers have an important role to play as leaders in this democratic process. The ILAM's elections will demonstrate that the legal profession in Myanmar stands for accountability and justice. At this crucial time in Myanmar's transition to democracy, the elections are a significant step towards renewing the public's trust in their justice system.'

An IBAHRI programme, set up in 2013, established a consensus among lawyers across Myanmar that there was a need for an independent body to represent the legal profession nationally. The programme then brought together a national steering committee of lawyers to design the ILAM. Since the endorsement of a draft constitution by the steering committee in March 2015, more than 250 lawyers and civil society representatives have taken part in IBAHRI workshops held in every state and region across the country. Participants learned about the key democratic elements of the election cycle and applied this knowledge to plan elections for the ILAM's federally composed governing body.

IBAHRI TO HOST

20TH ANNIVERSARY GALA DINNER



International Bar Association's
Human Rights Institute
1995-2015 • 20TH ANNIVERSARY

To mark its 20th Anniversary, the IBAHRI is hosting a black-tie gala dinner at Lord's Cricket Ground, London on Tuesday 1 December at 1900. All proceeds from the event will go towards ensuring the IBAHRI can continue to work with the global legal community.

Join legal colleagues at this prestigious venue in support of the IBAHRI's work protecting human rights and the rule of law, and advocating for the independence of legal professionals around the world.

A table for ten costs £2,500 + VAT. Half a table for five is £1,350 + VAT. Table packages include: drinks reception in the Lord's Cricket Ground museum; presentation by a prominent human rights speaker; a three-course dinner with wine and coffee; and auction prizes to be won.



Legality of UK drone attack in Syria hinges on evidence

RUTH GREEN

The revelation that the UK government sanctioned the killing of two British jihadists and another Islamic State fighter in Raqqa, Syria, on 21 August has polarised opinion and raised countless legal questions.

Although the US faces ongoing criticism over unmanned drone attacks in Pakistan, Yemen and Somalia, this incident marks the first time that a British drone aircraft had been used to kill enemy targets in a territory where UK Armed Forces are not currently directly involved in combat operations.

Prime Minister David Cameron told the House of Commons he was advised by the Attorney-General, Jeremy Wright QC, that there was a 'clear legal basis' for the attack in Syria and that it was 'entirely lawful'.

Many human rights groups have questioned the soundness of this advice. Clive Baldwin, a senior legal adviser at Human Rights Watch, condemned the handling of the matter and Rights Watch UK has already initiated legal proceedings to try and force the UK government to reveal details of the legal advice behind the attack.

However, Stephen Kay QC, a barrister at 9 Bedford Row and Co-Chair of the IBA War Crimes Committee, says this decision will not have been made lightly. 'The Attorney-General takes advice from a large number of advisers on this specialist area of law, so it is considered advice,' he says.

There have been further assertions – by David Cameron and the Defence Secretary – that the strike was a 'perfectly legal act of self-defence', and the government acted on intelligence which indicated the targeted individuals were plotting a series of attacks on UK soil.

Yet, Justice Richard Goldstone, Honorary President of the IBAHRI, says it is difficult to justify such claims without revealing the evidence that supports them. 'From what the UK Prime Minister said, the Attorney-General advised the attack was sanctioned according to Article 51 of the UN Charter on self-defence, but that would only apply if some attack was 'imminent' and there was no other way of avoiding it,' he says.

Goldstone's comments echo the findings of a recent report by the Open Society Justice Initiative, *Death by Drone: Civilian Harm Caused by US Targeted Killings in Yemen*, which concluded that under international human rights law 'the use of lethal force is legal only if it is strictly necessary and proportionate, required to protect life, and there is no other means, such as capture or other forms of non-lethal incapacitation, of preventing that threat to life.'

Although both Goldstone and Kay agree the use of drones or other automated weapons in warfare is not unlawful in itself, a 2013 report by

date the UK Parliament has only authorised strikes in Iraq.

Nonetheless, Goldstone says it will be important for the government to justify its actions were lawful. 'I think people in England have been calling on the government to disclose the facts on which it relied for the claim of self-defence and even if there are good security reasons for not making it public then at least to give the information to the relevant committee of the House of Commons,' he says. 'If the self-defence claim is without merit then, of course, the killings would be quite unlawful.'

“If the self-defence claim is without merit then, of course, the killings would be quite unlawful

Richard Goldstone
Honorary IBAHRI President

Ben Emmerson QC, the UN Special Rapporteur on counter-terrorism and human rights, said their use outside military conflict areas would 'rarely be lawful... because only in the most exceptional of circumstances would it be permissible under international human rights law for killing to be the whole or primary objective of an operation'.

While Goldstone notes that pre-emptive self-defence is not covered by Article 51, he says there could be a legal argument for it. 'Pre-emptive self-defence is not referred to in Article 51, but it seems that there is general agreement in the international community that pre-emptive self-defence is recognised in international law and it must be – you don't have to wait for a nuclear bomb to land in London before you take action to stop it. If it's pre-emptive self-defence then the evidence would have to be very strong, not only of imminence, but also of no alternative method of dealing with the threat.'

Although there is no law requiring the government to consult parliament, some argue that the government should have sought parliamentary approval for the military action since the House of Commons specifically voted against air strikes on Syria in 2013, and to

Kay believes the UN's responsibility to protect principle plays a key role in the legal justification behind international military intervention. 'The whole development of the principle of the responsibility to protect has got rather lost in this debate, but it was the reason that we went into Kosovo. It's complex whether that is a feature of customary international law, however, that is the doctrine that is out there and that is the doctrine that applies to Syria.'

Kay continues, 'The youths have deliberately put themselves beyond the reach of the rule of law and law enforcement agencies and there is a right to protection for the civilian population within the region over which they have de facto control. As the state that is supposed to have the responsibility to protect the civilians cannot exercise that duty, another state may take over the responsibility.'

For Goldstone, however, the UK's actions may potentially have contravened the rule of law. 'Clearly the rule of law is fundamental to democracy and it's fundamental to appropriate international conduct. If the British or American governments are acting beyond the law then obviously this would be a very serious violation of the rule of law.'



IBA 2016 18–23 SEPTEMBER WASHINGTON DC

The 2016 IBA Annual Conference will be held in Washington DC, home to the federal government of the USA and the three branches of US government – Congress, the President and the Supreme Court. Washington DC is also an important centre for international organisations and is home to the International Monetary Fund and the World Bank. As well as being the political centre of the USA, Washington DC is home to some spectacular museums and iconic monuments clustered around the National Mall.

Washington DC will give the 2016 IBA Annual Conference the perfect blend of opportunities for business, cultural exploration and to develop a unique set of new contacts. This mix makes Washington DC an ideal location for the world's leading conference for international lawyers.

WHAT WILL WASHINGTON DC 2016 OFFER YOU?

- Access to the world's best networking and business development event for lawyers – with over **6,000** lawyers and legal professionals attending from around the world
- Up-to-date knowledge of the key developments in your area of the law – with nearly **200** working sessions covering all areas of practice
- The opportunity to generate new business with the leading firms from around the globe
- Up to **25** hours of continuing legal education and continuing professional development
- A variety of social functions providing ample opportunity to network and see the city's famous sights



TO REGISTER YOUR INTEREST:

Visit: www.ibanet.org/Form/IBA2016Washington.aspx

Email: ibamarketing@int-bar.org

OFFICIAL CORPORATE SUPPORTER





Time to confront cyber crime

Big business is increasingly vulnerable to cyber-attack and the legal profession is no exception. Lawyers must do more to confront the threat as a core business risk in order to neutralise it.

EDUARDO REYES

All lawyers, whether working in-house or in private practice, have struggled to appreciate fully the threat presented by poor cybersecurity. Historically, it has been treated as fairly minor: businesses wanted the information technology (IT) department to keep malware out of the system, and it was easy to spot a hoax email.

There was a lack of concrete examples of what the threat looked like. The situation has now changed, and the time for indifference is over. The people I contacted before writing this column were specific about the nature of the threat posed to counsel and their clients – and about the consequences.

The key threats are: direct financial loss; loss of client data; a regulatory compliance danger; the loss of privilege, or privileged information; and a breach of the legal regulator's professional rules.

As Schillings' Delivery Director of Cyber & Information Security, David Prince, says: 'Cybersecurity is not just a technical issue. It is a business issue that requires the attention of everyone in order to be managed effectively.'

“ Ultimately, a good data breach response is a practised response

David Prince

*Delivery Director of Cyber & Information Security,
Schillings*

While diverse technical knowledge is required to implement the relevant safeguards, 'these safeguards are ineffective if in-house lawyers do not at least understand what controls are in place and the purpose they serve,' Prince adds.

The advice from legal regulators does not really help, not least because it fails to take account of how organisations need to work in the modern world. In the United Kingdom, as elsewhere, the legal regulator's rules are designed to protect money held for clients and commercial confidentiality. Hence the reminder from the UK Solicitors Regulation Authority (SRA) that: 'Cyber crime... presents a risk to Outcome 4.1, which requires that law firms "keep the affairs of clients confidential unless disclosure is required or permitted by law or the client consents"'. The SRA notes that 'responsibility to manage this risk is also aligned by Principle 8, which states: "run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles"'.

The position is comparable with many other jurisdictions. The New York State Bar Association has similar rules on protecting confidential information (rule 1.6) and client funds (rule 1.15). Even in jurisdictions where lawyer regulation is less clearly defined, such as Greece and many former USSR states, a financial services regulator may apply relevant rules.

Risk management is a defining aspect of any in-house role, yet it is a new concept

for private practice. The SRA's guidance on cybercrime is based on insights largely gained from the private practice model, and is therefore unhelpful in the in-house context.

For example, a modern business derives extra value from the flexibility of its workforce – people have a 'bring your own device' (BYOD) approach, are on social media, access systems remotely, and a long-hours culture, quite reasonably expect to manage aspects of their personal lives from work.

In the process of this way of working, some of the borders crossed are social – others are technical and commercial. Take the example of someone who is a friend and a work contact, which is common in professional circles. Start to email them from a smartphone, and with the device now pre-empting their full email address based on the two or more accounts you run from your phone, it is pretty easy to enter a personal email address instead of a work address. Work conversations can switch between two accounts and two systems. If this happens, do you separate the conversation cleanly in your head? Of course not.

The IBA Technology Law Committee estimates that the challenge of responding to cybercrime has led businesses to place the problem in a box marked 'too difficult' for too long. 'Risks that can arise from IT security-related incidents were either ignored or neglected,' says Stefan Weidert, Co-Chair of the IBA Technology Law Committee and a partner at Gleiss Lutz. 'However, in the last few years, the importance of IT security has become more and more relevant, especially in public sector projects. It is to be expected that IT security standards will develop or even will be required by law'.

When assessing the risk posed by cybercrime, in-house and commercial lawyers must also consider the risk of action by financial regulators such as the United States Securities and Exchange Commission (SEC), which works closely with the US Department of Justice. For any business – or its in-house lawyers – that's something of a perfect storm.

As magic circle firm Freshfields Bruckhaus Derringer warns clients: 'Knowledge of a cyber attack may be regarded as inside information that meets the "reasonable investor" test (ie, information likely to inform investment decisions). The SEC... has issued guidance on when a company should disclose an incident, and has threatened enforcement action for failures to report.'

Most recently, Freshfields notes, the SEC announced a programme of inspections

covering the cybersecurity measures in place at various regulated firms.

So, for those working in-house, but subject to rules designed for private practice, how is one to behave and respond? Unfortunately, the legal regulators are still ‘learning’ about the role of the in-house lawyer, and what it entails. Models of how to respond need to be borrowed from elsewhere. Banks are regularly ‘stress-tested’ by conducting financial crisis roleplay scenarios: all businesses need to do the same for a possible IT crisis. As Prince explains: ‘Ultimately, a good data breach response is a practised response.’

As with other areas where in-house needs to dovetail with the rest of the business, lawyers cannot work in isolation. They must spend time with colleagues in business-critical roles, learning their language and business practices. It’s no good taking comfort from a policy that assumes BYOD or home-working does not happen, when in fact it does.

Think of the casual interchange of information between banks revealed by the LIBOR rigging scandals, then ask why legal

and compliance departments were caught off guard. Arguably, those charged with risk management simply did not know how their less careful colleagues worked. In future, where risk managers are lawyers, they may be disciplined by their own regulator for such an omission.

As ever, the basics apply, but they need to be applied with cybersecurity in mind. I hope I’ll be excused for suggesting a checklist as a series of posed questions (see box below). Answering such questions would take any in-house legal department a long way towards preserving commercial value and minimising regulatory risk for the business.

As Weidert concludes, for these reasons, and many others besides, ‘IT security and the implementation of in-house reporting standards should be at the top of the agenda for every company dealing with confidential information’. ☒

Eduardo Reyes is Features Editor of *The Law Society Gazette* and a former editor of *In-House Lawyer Magazine*

Are your cybercrime defences up to scratch?

- Does the business’ cybersecurity policy reflect actual business practice?
- Are the cybersecure policies consistent with the business’ other policies?
- Would compliance checks on the use and security of the IT system and devices meet the standards expected by relevant regulators?
- Is encryption adequately understood and applied?
- Is access to business-critical and privileged information adequately limited?
- How is the sharing of patents, contracts and privileged advice controlled? Does it meet the standards set out by our regulators and in the business’ policies?
- How recently were answers to these questions reviewed?
- Do all law firms that the client deals with have adequate safeguards in place?



Funding crowds move into the finance mainstream



Crowdfunding has exploded from its small-scale origins to become a major player. Its fundraising platforms are beginning to attract interest from institutional investors, making the need for effective and consistent regulation greater than ever.

SCOTT APPLETON

In 2014, crowdfunding raised \$16.26bn, an increase of 167 per cent from \$6.1bn the previous year. This year, the amount raised is predicted to double again to \$34.4bn, according to research by Massolution, which tracks data from 1,250 crowdfunding platforms around the world. Growth on this scale suggests that it is already a misnomer to call crowdfunding 'alternative finance', as it moves rapidly into the investment mainstream.

Investment confidence

Crowdfunding may have begun in the United States, but the rest of the world is playing catch up and, as the sector expands, new regulatory and business challenges are emerging for its platforms, investors and users. The mainstream perception of crowdfunding remains strongly influenced by the success of donor-led platforms such as Kickstarter, through which investors commit small sums to help artists or entrepreneurs realise specific projects. But the fastest growing sectors are now equity crowdfunding and crowdlending.

Equity crowdfunding allows investors to acquire a share of a business, and has seen global fundraising volumes up 182 per cent in 2014 to \$1.1bn, according to Massolution. Crowdlending involves platforms providing or facilitating loans to individuals and businesses, and its fundraising volumes are up 223 per cent to \$11.08bn.

Outside the US, Europe is one of the fastest growing crowdfunding markets; UK-based platforms alone are estimated to have raised close to £2bn in 2014. It is no coincidence that after the US, the UK's regulatory authorities have embraced the sector the readiest: a fifth of all UK equity deals are now completed via crowdfunding.

“ [The] level of attractiveness may in part depend on the regulatory regimes that are ultimately established for crowdfunding. Getting the regulation right is a crucial factor

John Elias

*Fasken Martin DuMoulin in Toronto;
North American Forum Liaison Officer,
IBA Banking Law Committee*

‘In the UK, crowdfunding platforms have worked closely with the authorities to create a very pragmatic regulatory framework, which has been instrumental in creating growth in the sector,’ says Karen Kerrigan, Legal and Finance Director at UK-based equity crowdfunding platform Seedrs. ‘The UK Crowdfunding Association also has a clear code of conduct and the result of all this is greater credibility, which helps ensure that investors and users have confidence in the crowdfunding model.’

Confidence is vital if such platforms are to raise the volumes of capital they increasingly require. To date, however, individual or retail investors have driven much of the sector's growth, making small investments in businesses, or providing the capital for peer-to-peer loans.

‘The equity model we utilise at Seedrs involves aggregating the sums successfully raised for any one business, and investing on a nominee basis,’ says Kerrigan. ‘This means that rather than individual investors holding a very small stake in a business, Seedrs holds a larger shareholding on their behalf and is able to play a more active role. It also enables Seedrs to achieve professional investment terms such as pre-emption and tag-along rights, which help to protect the value of the investment.’

Higher risks

Alongside the growing army of armchair investors associated with crowdfunding, new funds dedicated to making investments in crowdfunded businesses are emerging, as well as dedicated crowdlending funds.

UK-based Crowdcube was among the first European equity funds to be launched. Its venture fund is managed by Strathtay Ventures, through which parties invest a minimum of £2,500, albeit with an initial set-up fee of 1.5 per cent and an annual management fee of 2.5 per cent. Zopa, the UK's largest peer-to-peer lender, has similarly launched Safeguard, a fund held in trust that is able to repay investors if borrowers are unable to repay their loan. In addition, small SME-focused investment funds are now increasingly visible on crowdfunding platforms seeking to raise finance themselves, creating a virtuous investment cycle.

Despite the growth of the sector, crowdfunding is not without clear risks. The UK Financial Conduct Authority (FCA) has notably split the market into two broad segments: those investments that usually do not need authorisation, and those that do.



Donation-based investments, pre-payment or rewards-based crowdfunding and exempt activities, where investments are made via statutorily exempt instruments, generally do not require approval. Loan-based and investment-based (equity or debt) crowdfunding, on the other hand, does require FCA authorisation.

‘The FCA’s premise is that, with some models, a 100 per cent capital loss is more likely than not,’ says Kirstene Baillie, Head of Financial Services and Funds at Fieldfisher in London, and an IBA Investment Funds Committee member. ‘So they take the view that any crowdfunding investment tends to involve higher risks than that which applies to more traditional investments and deposits, and their approach to regulating the market reflects this. The FCA’s approach also relies as much on following the spirit of the provisions as the wording of the regulation.’

Cautionary principles of equity crowdfunding

Under the FCA rules, equity crowdfunding via UK platforms does not constitute a public offer, so it is exempt from certain disclosure or prospectus requirements. In any event, fundraising does not often exceed the £5m threshold necessary to produce a prospectus. In contrast, a more restrictive approach has been taken by regulators elsewhere in Europe.

Ernst & Young recently identified Germany as Europe’s start-up capital, with €1.9bn invested in new businesses in the first half of 2015. However, the country’s Federal Financial Supervisory Authority (BaFin) has been reluctant to adapt traditional debt and equity fundraising regulations to the crowdfunding era.

‘Germany, unlike the US or the UK, has no dedicated crowd-investing law, although the federal government is planning on passing such a law,’ says Thomas Kaiser-Stockmann, partner at tkslegal in Berlin and Chair of the IBA Closely Held and Growing Business Enterprises Committee. ‘Businesses seeking to raise crowdfunding have had to adopt established legal structures to facilitate such investments – using preference loans or structures like mutual partnerships. This may suit individual investors, but these are not structures that are obviously attractive to more sophisticated investors, so in Germany we have not yet seen the growth of dedicated investment funds. What equity crowdfunding there is, is still dominated by retail investors.’

In Denmark too the authorities have preferred to regulate equity crowdfunding and crowdlending through the existing

securities and finance rules. ‘The regulator’s decision surprised some who were anticipating if not a dedicated regime, at least some forms of exemption from the established frameworks,’ says Tobias Linde, partner at Gorrissen Federspiel in Copenhagen. ‘The result has been that a number of equity platforms that operate across the Nordic region have had to rethink their models when it comes to Denmark. In order to facilitate the loans, the traditional crowdlending models will require either a banking licence, which is simply not an option, or a licence as a money transfer institution, which is much more flexible to operate under – careful consideration of the model is needed to create a workable structure.’

Elsewhere in Europe the form that crowdfunding regulation should take is still being debated. The European Commission may have expressed a desire to analyse the effectiveness of national regulation, but there is little likelihood of a consensual approach being adopted across the European Union in the near future. Consequently, Europe will remain a regulatory patchwork.

Lawyers in Poland report significant interest in the potential of equity crowdfunding and crowdlending among SMEs, following some high-profile donor crowdfunding successes: crowdfunding, for example, financed ice skater Zbigniew Bródka’s appearance at the Sochi Winter Olympics (a feat incidentally mirrored by the Jamaican bobsled team). Despite this, dedicated regulation is still a long way off. ‘Public offerings in Poland are still regulated by the 1933 Public Collections of Money Act’, says Ewa Butkiewicz, counsel with Wardynski & Partners in Warsaw, and Senior Vice-Chair of the IBA Banking Law Committee. ‘We see a strong desire to explore the potential of crowdfunding, but we are not seeing much transparency from the authorities as regards the regulatory direction they will likely take... So we do not yet see a sufficiently certain commercial environment to encourage more sophisticated investment players to enter the crowdfunding market.’

New approaches

Despite these regulatory challenges, crowdfunding platforms continue to emerge across the EU. In those markets where platforms are unable to facilitate loans, their models are evolving to act as intermediaries, partnering with banks and other deposit-holding institutions to undertake the lending.

Such a strategy has been adopted by German-based crowdlender, Zencap, which launched in 2014 and has already expanded

to the Netherlands and Spain. The online lender is also considering its options in other European markets.

‘There is no doubting the demand for what we offer, but we have had to adapt our approach in response to the regulatory realities that we encounter in each market,’ says Zencap’s co-founder Matthias Knecht. ‘The German regulator, BaFin, has taken a very particular approach, which does not necessarily echo that of other regulators across Europe that have taken a much more facilitative approach to the crowdfunding market.’

According to Knecht, Zencap is able to conduct a more rigorous risk assessment, make lending decisions more quickly, offer more flexible terms, and has a default rate of less than one per cent, which is much lower than the banks in the markets in which it operates. In Germany, Zencap collaborates with a partner bank with regards to the payout process of the loans it makes.

Knecht also notes new challenges in keeping up with business demand, which is prompting Zencap to explore new approaches to fundraising. ‘Since 2014 we have received more than €200m in loan requests and issued almost €30m,’ he says. ‘What has become very apparent, besides the massive demand for finance from SMEs, is the strong interest among institutional investors in accessing the types of businesses [present] in the countries in which we operate – we offer a class of asset, such as the German “*Mittelstand*”, that has previously been out of reach to most.’

In the UK, such an approach is already proving successful. Early 2014 saw Zopa secure £15m from London-based hedge fund Arrowgrass Capital Partners in an early example of investor interest in the sector.

That investment built on earlier investments in the platform by Augmentum Capital and Bessemer Venture Partners. This summer also saw Zopa announce that it had passed the £1bn lending mark – up 114 per cent on 2014 – and agree a tie-up with new UK bank Metro Bank. Metro Bank will begin to offer loans through Zopa’s platform, extending both the site’s capital pool and Metro Bank’s customer reach.

Similarly, Funding Circle, among the UK’s longest-established crowdlending platforms, recently announced a \$150m equity capital injection from Blackrock, Russia’s DST Global and Singapore’s Temasek, to help expand its US operations. The platform has now raised \$273m in equity funding, with existing investors including: Index Ventures, Accel Partners, Union Square Ventures and Ribbit Capital.

New markets, new models

Nascent regulation in Canada has also raised challenges that limit the attraction of equity crowdfunding for accredited investors. Ontario is taking a lead, currently finalising Canada’s first dedicated crowdfunding legislation. ‘With the limited amount of crowdfunding regulation that has been established to date, crowdfunding platforms targeting Canada have had to be very careful about the nature and scope of their operations,’ says John Elias, banking and finance partner with Fasken

Martineau DuMoulin in Toronto and the IBA Banking Law Committee’s North American Forum Liaison Officer.



One issue for crowdfunding platforms in Canada has been to avoid falling under the country's pooled investment funds regulation, which applies to managed investment funds. 'As in the US, Canada has an investment scheme for sophisticated, "accredited" investors, but this is not perceived to offer the requisite safety net for less sophisticated investors, so here as elsewhere crowdfunding platforms are having to adapt their models to operate in Canada,' says Tracy Hooey, a securities partner at Fasken Martineau DuMoulin.

However, regulatory uncertainty is unlikely to prevent the emergence of new crowdfunding models that are attractive to professional investors. It may be that investors in one market begin to take advantage of opportunities in other markets.

Harvey Cohen, Chair of the International Business Practice Group of Dinsmore & Shohl in Cincinnati, and Senior Vice-Chair of the IBA Closely Held and Growing Business Enterprises Committee, says that there is already a growing flow of non-US businesses looking to raise finance via US-based equity and lending platforms.

'The Jumpstart Our Business Startups (JOBS) Act, which came into force in 2013, effectively opened crowdfunding up to the mainstream, since when we have seen the number of platforms and pool of investors expand enormously,' Cohen says. 'Consequently, the US is now perceived internationally as a place where businesses of all sizes can find deep pockets and where

crowdfunding is less of an alternative option and instead increasingly a preferred option by many businesses for fundraising.'

Fellow Dinsmore & Shohl corporate partner Brian Close agrees, noting that in the US, 80 per cent of business financing has traditionally come from sources other than the banks, which is almost the direct opposite to the situation in Europe.

“ In some instances we are seeing companies sidestep the banks completely because the crowds and capital pools are sufficiently deep to cater for their needs

Brian Close
Dinsmore & Shohl

'The result is that in the US institutional investors already see crowdfunding as one of a number of potential investment channels,' says Close. 'We are seeing the diversification of the sector, including moving well away from start-ups to include areas such as real estate, where we now see groups of investors pooling funds for specific property trades. In some instances we are seeing companies sidestep the banks completely because the crowds and capital pools are sufficiently deep to cater for their needs.'

There is no doubting that crowdfunding platforms are here to stay. The issue of investment security is also increasingly tied up in the equity terms or finance rates available to businesses, with riskier bets generating higher returns.

The focus of larger investment funds remains, for the time being at least, on securing equity in the most successful platforms, while financial institutions are keen to extend their own loan books to the platforms' users. Even donor-led Kickstarter received early backing from angel investors, as well as venture capital fund Union Square Ventures.

'Some large investment funds may well see crowdfunding platforms as attractive investments,' says Elias. 'But their level of attractiveness may in part depend on the regulatory regimes that are ultimately established for crowdfunding. Getting the regulation right is a crucial factor.' ☒

Scott Appleton is a freelance journalist and can be contacted at scott@954consulting.com





GLOBAL LEADERS

David Morley

David Morley is Senior Partner at Allen & Overy. In a recent interview with Todd Benjamin he discussed the firm's approach to international expansion, changes in the market for legal services, and the continuing impact of the financial crisis.

Todd Benjamin: In your latest fiscal year, you had \$2bn in revenue – that's up some four per cent – and profit per equity partner was just under \$2m. You had particularly strong performances in London, the UAE and Luxembourg and standout growth for dispute resolution. The firm is ranked number one for global cross-border M&A. What does this tell you?

David Morley: We've built a platform that has served us well in terms of the current economic conditions. We have the largest global network of any of our major competitors. Cross-border M&A [and] dispute resolution at the highest level have gone global in a major way. Times are good for firms like us that are positioned to look after major corporate clients in event-driven business.

TB: What do you think is driving M&A activity right now?

DM: M&A is well known [for being] very cyclical, so this is not going to last forever. The rebound in economic confidence in the US and the UK is one factor. There's a lot of cheap money out there at the moment. Interest rates are still at record lows, corporates can raise funds at historically low levels. People [are] looking for growth, [which] is hard to come by.

TB: Are you optimistic for the future?

DM: I'm actually fairly optimistic, hopefully realistically, about the immediate future, over the next 12 to 18 months, for our firm. I think the M&A cycle has got a way to go. We are seeing increased economic confidence... The US economy has definitely come roaring back. The UK economy's doing pretty well. I think Europe will start to bounce back pretty soon. Financial markets are still buoyant. For us, at this stage of

the cycle there's still a lot of very big-ticket dispute resolution.

TB: What makes you optimistic about Europe?

DM: When you look at the underlying economies of Europe – Germany and France – there are some very strong businesses there. We've found throughout the last seven years that our operations in a lot of those countries have done extremely well.

TB: As Senior Partner, when you're thinking strategically, looking at the vision for the firm, is it driven more by what you assume the economic conditions will be, or what certain activity will be regardless of the economic conditions?

DM: We have tried to build a model in which we can thrive, not irrespective of economic conditions, but in most economic conditions. Law firms like ours tend to have a bit of a natural hedge when things turn. We tend to do well either when economies are doing really well or they're doing really badly. Where I think we do less well is when [we] 're wallowing in the middle.

TB: Because when economies are bad there may be more dispute resolution?

DM: More restructurings, more bankruptcies, more messes that need to be sorted out, more investigations, more refinancing.

TB: You've [recently] added a bonus pool to your global pool, [to] pay your partners out of. Why did you make this move?

DM: Because we wanted to [be] in a position where we could compete in the market for the very best talent. The market for the best

legal talent has changed over the last ten years, quite dramatically. It's largely been driven by the US firms, who moved away from the so-called lockstep model of compensation probably 15 or 20 years ago towards a more performance-orientated compensation system. Our system is still a lockstep. We believe in that, and we want to preserve it, but we recognise that we need flexibility to be able to attract and retain the very best people on terms that are competitive with the market.

“ In the UK... non-lawyers can invest in law firms. That's feeding innovation. It's bringing people into the law, who don't think like lawyers. They think like businesspeople

TB: Who judges [who] gets a larger bonus... out of this special pool? Is this causing any tension within the partnership, and who arbitrates? Do you have a certain set of criteria?

DM: You've got to have a group of partners who are responsible for making that judgement. We deliberately don't have specific criteria for that because the roles are too complicated, too different, too varied. To try and pin it down to a defined set of criteria would only lead to more problems. It has to be exceptional, and you know it when you see it.

TB: Why are you keeping the lockstep model? Does it really reward the best?

DM: Yes. You have to stand back and see that most law firms' compensation systems will fit somewhere on a spectrum. At one extreme you've got so-called 'pure lockstep', where you're just paid by seniority, and at the other extreme you've got a pure merit-based, or so-called 'eat what you kill' system. Most firms are somewhere in the middle. We believe the lockstep encourages a culture of collaboration, which is very important to our model. It's absolutely fundamental to the way we think about ourselves as a firm and the way that we serve our clients. Like all remuneration systems, it's not perfect. It has its flaws, and we're adapting to the market.

TB: How can you develop a system that rewards collaboration?

DM: I've been with the firm 35 years and it's always been part of our DNA that we work together. We'd never have a star system based on individuals being paid a lot more than other individuals. Our strength comes from our ability to work together to best serve clients, particularly across borders and practice areas. We can demonstrate conclusively that the more countries and practice groups that are involved, the more profitable the work. Our compensation system is designed to reinforce that idea.

TB: In this past year you've opened offices in Barcelona, Johannesburg and Toronto, and recently confirmed the intention to open in South Korea. Why those particular offices at this time, and which other markets potentially look attractive to you?

DM: Over the last seven years or so, A&O has undergone a rapid global expansion. We now have 46 offices in 32 countries. We're reaching a stage where we don't need to grow that much more, and certainly not at the pace of the last seven years. We're consolidating what we've got now. For us, the priority is a combination of client need, or where there's a perceived client need, and where we perceive we can get the best talent. South Africa is a good example: we opened in Johannesburg because we could hire the very best finance lawyer in South Africa there. Otherwise we wouldn't have opened there. We're looking for the very best local people and combining that with our global platform: that's our model.

“ It's pretty clear now that relaxing the regulatory environment for banks wasn't such a great idea

TB: Are you disappointed with what's going on with some of the emerging markets right now? Obviously, you're playing the long game.

DM: Very much so. I think if you were to invest on the basis that you have to get instant results, then you would be disappointed. Our very first office outside London was our Dubai office, which opened in 1978. The fact that we opened that office when we did

is one of the reasons why we are now the leading international firm in the Middle East, because we've been there a long time. We're embedded; we know the business community and we're part of it. Our experience is that the earlier you start in a market, the better it is later on. We're lucky that we've got a patient partnership who are prepared to invest, and who really believe that long term, part of your role as a partner is to leave the place in a better shape than you found it.

TB: You're well known for your banking expertise and your firm also represents a lot of banks. Since the financial crisis, how has that practice changed?

DM: There have been some quite dramatic changes; there's been a huge amount of work in lots of areas, particularly regulatory, which has become a huge growth industry, and in regulatory investigations. When you stand back you can see that the role that banks play in the financial marketplace has shrunk, and they have been shedding activities. One of the trends that we've seen very clearly is an enormous rise in the so-called alternative credit providers. Some people call it shadow banking. A lot of players who've come into the markets to provide funds are not traditional banks. We have very deliberately focused on expanding our client base amongst those players because that's a long-term trend.

TB: If you and I were sitting here five, ten years from now, would the banking landscape look radically different?

DM: Yes, I think [it's] likely to be focused on a smaller number of core activities. We see a high volume of capital markets deals, and we noticed a couple of years ago that the top ten banks were no longer providing the majority of [those] deals. In the largest deals, you've still got the usual players, but the smaller deals are now being populated by all sorts of other players. The market is atomised, [which has been] encouraged by regulators, because they want more competition and [because] they've constrained the activities of the banks. Whether in the long run that's going to be a good thing or not is hard to say.

TB: Do you think regulation has gone far enough?

DM: At the general level, it probably has gone far enough. Some would say it's gone too far. Most people would conclude that the banks have got to grips with this new environment and are learning to live with it in a way that is much better than before.

TB: There's a lot of scepticism about banks, given what happened and the consequences. Do you think banking culture is truly changing?

DM: From my experience, I would say there has been a shift in mindset, attitude and culture. In general – and I might not have said this three or four years ago – my experience is that bankers have understood that the world has changed, and what is expected of them has changed.

TB: Is that being driven by recognising a moral compass or by the huge fines they're paying for wrongdoing?

“ We've seen... an enormous rise in the so-called alternative credit providers... We have very deliberately focused on expanding our client base amongst those players because that's a long-term trend

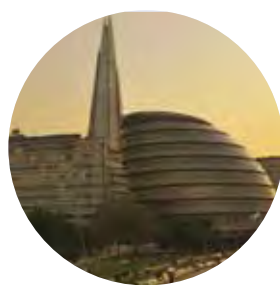
DM: It's probably a combination of those things. It takes a long time to change culture and to change mindsets and attitudes.

TB: Why do you think we got to this place where people were trying to manipulate the system?

DM: I think there are a combination of reasons. It's pretty clear now that relaxing the regulatory environment for banks wasn't such a great idea. You could possibly argue that allowing investment banks and commercial banks to become one wasn't such a great idea. There's definitely something in the compensation structures that incentivised the wrong behaviours. And, yes, I think that banks did lose sight a bit of their ultimate purpose in society.

TB: You've been thinking a lot about the way that the legal services market is changing. How are you responding?

DM: We believe that the legal industry is going through a period of profound change. There are a lot of forces bearing down on the industry, which are affecting many other industries, those of our clients. For centuries, the legal industry has been relatively insulated from these forces,



Third-Party Funding and International Arbitration: a 360 degree perspective

3 December 2015

Sofitel, London, England

A conference presented by the IBA Arbitration Committee, supported by the IBA European Regional Forum

Topics include:

- It's more than you think: the diversification of litigation finance related products
- Perceived difficulties surrounding third-party funding
- The regulation (or not) of third-party funding in international arbitration
- Security for costs: should it be automatic in cases where there is funding?
- Confidentiality and privilege: do claimants waive privilege when discussing the case with third-party funders? An analysis of best practices
- What makes a good case for funding and how to adapt funding products to claimants' needs?

Who should attend?

Lawyers in private practice, lawyers in government and public bodies, in-house counsels, SME executives involved in international business activities, and academics.

HEADLINE CONFERENCE SPONSORS



REGISTER YOUR INTEREST TO ATTEND NOW AT WWW.IBANET.ORG/CONFERENCES/CONF658.ASPX



the global voice of
the legal profession

London

São Paulo

Seoul

The Hague

Washington DC

4th Floor, 10 St Bride Street, London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090 Fax: +44 (0)20 7842 0091 www.ibanet.org

and we think that's changing. For example, the impact of technology, globalisation, the regulatory environment. In the UK, the regulatory environment has now changed so non-lawyers can invest in law firms. That's feeding innovation. It's bringing people into the law, who don't think like lawyers. They think like businesspeople, and they've got new ideas about how legal services should be delivered. There's also much more competition than we've ever seen before, and that's only going to increase. The impact of competition is that if you're not prepared to be flexible, to adapt to what the clients are saying they want, the clients can always go somewhere else.

“ We've got a patient partnership who are prepared to invest, who really believe that part of your role as a partner is to leave the place in a better shape than you found it

I'm very bullish about the long-term future for smart lawyers: there's always going to be a need for them. Why? Because the complexity of the world is accelerating at a faster rate than the more routine work that lawyers have traditionally done, which is becoming commoditised. What clients are insisting on is different ways of delivering those legal services: they want more choices. In the past they had only two options: they go to a traditional law firm or they do the work in-house. Now there's a much broader range of legal services providers who can offer a range of different services.

There's a so-called disaggregation of work going on. The very high-end strategic work might come to us, where the more routine work might go to a legal services provider in India. That's happening across the world. That's a long-term trend that's not going to go away.

Our approach is to adopt a kind of hybrid business model. We have the traditional law firm at the core, but we are also experimenting with a number of other ways to deliver legal services. It's all centred on the deployment of technology, resourcing and expertise, and delivering that in a way that is designed to

produce better solutions for our clients. We've invested in several changes to our business model. We now provide online services where the clients pay a subscription for highly specialist online services, where they can essentially find the answer they want to their particularly complex areas of business. That's growing at more than 30 per cent a year: it's a very profitable business, and we're in the process of scaling that up.

About three years ago we opened in Belfast. We had nobody in Belfast three years ago, now we have 400 people. We've moved our back office there and we re-engineered our processes so that we could become more operationally efficient. We have a team of paralegals there who've become really expert at processing so-called routine work. A lot of law firms are a little bit snobby about that, they say 'we only do high-end work', which I think is not true in most cases. In most cases you're doing a mixture of high-end and not so high-end work, in reality. We've found a way to be much more efficient at how we do the not-so-high-end part of the larger deal.

TB: Do you think that contract lawyers are another growing area, not only for you but in terms of the choices individuals who go into the law make?

DM: Yes. If you stand back and look at the traditional law firm model, it's very inflexible. It doesn't really work for anybody, actually. It's inflexible for the law firm, because you've either got too many people or you haven't got enough. It can be inflexible for individuals. It's a one-dimensional career track, typically, which is particularly tough on women in the law and one of the reasons why there are not enough women partners in larger law firms.

It doesn't really work for clients either because it's inflexible. What we see is [an opportunity to] change that model. We've built a business called Peer Point, and we now have 80 lawyers in that business who work flexibly. Some of them want to work nine months a year and then spend three months surfing. Some of them want to look after families. We use them to deal with the peaks in demand that we get in our own business, and we are increasingly offering their services to clients to deal with their own resourcing issues. ☒



This is an abridged version of a longer interview, which you can view in full on the IBA website at: tinyurl.com/dmorleyIBA

Levelling the legal



Louise Nyiranolozzi holds a jerry can of clean water in Buporo camp, North Kivu in eastern Democratic Republic of Congo. Credit: Eleanor Farmer

playing field

There's a growing realisation that addressing fundamental rule of law issues such as access to justice is essential not only for international development, but for security, too. *Global Insight* assesses what lawyers can do to help states meet their international commitments.

RUTH GREEN

Access to justice is often regarded as a predicament confined to the poor. But, as cuts to legal aid start to bite from Australia to the UK, never has the issue – and its implications for citizens in general – been more firmly placed under the international

spotlight. The debate over access to justice has become all the more pressing as the United Nations prepares to ratify its new Sustainable Development Goals (SDGs) to replace the Millennium Development Goals (MDGs), which expire this year.

Indeed, current IBAHRI Co-Chair and former Legal Counsel of the UN, Hans Corell, emphasised this theme in the June/July edition of *Global Insight*. ‘There is,’ he said, ‘one goal that should be further elaborated and expanded: namely, goal 16 on access to justice for all. Among the actions mentioned in connection with this goal are promoting the rule of law at the national and international levels, and reducing corruption and bribery in all their forms. These elements are overarching and of a much broader character than “access to justice for all”. Goal 16 should therefore, in my view, be reformulated, bringing in the need for international peace and security, democracy and the rule of law. These components are absolutely necessary for implementing all the other SDGs.’

Access to justice is now viewed as increasingly important for both developing and developed nations, according to Julinda Beqiraj, Research Fellow in the Rule of Law at the Bingham Centre. ‘In the UK for instance this means that the issue of access to justice is not just something that the UK government will have to promote in the context of development and aid, but also a goal and target to be ensured at domestic level,’ she says. ‘There is momentum now for these issues – access to justice and the rule of law – to be discussed because of the broader international commitments undertaken by states at UN level with regard to the agenda for development.’

Joss Saunders, General Counsel at Oxfam, agrees that the emphasis within the SDGs on access to justice is an encouraging step. ‘The MDGs didn’t say anything about law or about justice, it was much more about social and economic indicators,’ he says. ‘But if you actually look at the SDGs there are six

underlying principles and the UN Secretary General has been really clear that justice is one of the fundamental principles necessary in order to achieve the goal by 2030 of eradicating extreme poverty. So it’s really embedded in the framework of what will replace the MDGs.’

Alison Hannah, executive director of Penal Reform International (PRI), the London-based NGO focused on penal and criminal justice reform worldwide, says the references to legal aid in the SDGs also have global significance. ‘They take into account the fact that not all countries can provide lawyers, but they do make it very clear that it’s a state responsibility to provide legal aid,’ she says. ‘Not only do they underline the obligation on states to provide legal aid but they also set out the different models and the different ways that legal aid can be provided, so that countries that can’t afford to provide lawyers aren’t off the hook.’

Education and empowerment

A survey conducted last year by the Bingham Centre, aided by funding from the IBA Public and Professional Interest Division and Special Projects Fund, sought to do just that by identifying both obstacles and opportunities available in the justice systems of different countries. Beqiraj, who coordinated the research and co-authored a report based on the survey’s findings alongside the Centre’s Deputy Director, Lawrence McNamara, says that they aimed to identify societal and cultural barriers, institutional barriers and other obstacles that impede access to justice in certain jurisdictions. Armed with this information, she hopes countries can replicate successful policies employed in other jurisdictions. ‘It’s important to know what the

Bridging the gap

Gaining access to justice isn’t just the preserve of lawyers. Penal Reform International (PRI) proved this back in May 2000 when it launched a paralegal initiative in Malawi to improve conditions in the country’s notoriously overcrowded prisons. Eight paralegals were tasked with working collaboratively with Malawi’s Ministry of Justice and the Prison Service across four of the country’s main prisons.

Alison Hannah, executive director at PRI, says that, although the initiative was primarily geared towards reducing the number of inmates in each prison, it also helped inform prisoners both about their legal rights and legal processes. ‘Our aim was to try and reduce the pre-trial population, thereby reducing overcrowding and improving conditions inside the prison,’ she says. ‘It was also a very

good way of trying to make sure that people who would otherwise get no representation do get the ability to understand what is happening and are able to influence what will happen in court rather than just be a bystander.’

After flying out to Malawi to watch the paralegals at work, Hannah was particularly struck by their innovative approach to educating prisoners on basic legal principles, including the

main barriers are in other jurisdictions and whether solutions adopted in those systems can be applied, circulated or transplanted to other jurisdictions,' she says.

The role of the legal profession and the culture of a given country were important factors. 'It might be that in certain jurisdictions provision of pro bono is not something that is considered important,' she says. 'In other words, it's not something that lawyers do there normally as it's not part of the system or the culture. So, in those cases, it is either

aid services by paralegals and by other organisations, such as legal aid clinics in universities. These are models that might be employed in other jurisdictions that share the same problems.' (For more on the work of *paralegals*, see box)

Lucy Scott-Moncrieff, Co-Chair of the IBA Access to Justice and Legal Aid Committee, which commissioned the report, says it was a challenge to come up with questions that would elicit the best responses. 'What we wanted to do when we were working out what questions to ask was to try and not be Western-centric. First of all we had to define "access to justice", which we defined as people having access to the rights given to them by their own country.

'We then had to look at all the different ways that people could be prevented from exercising their rights – cultural, corruption, education, lack of resources, distance and so on – and ask questions to try and tease that out so different jurisdictions would be able to find something there that they would recognise and also be able to describe the ways that they'd been able to overcome those different barriers.'

Although the 60 responses across 26 countries revealed a range of issues, Beqiraj said there were several points of consensus. 'What emerged was that the legal profession has the potential to provide and enforce solutions by playing both an advocacy role and raising awareness of legal rights.

'Survey findings point out that in those countries where legal resources are limited, broadening the legal standing criteria might be one of the solutions because justice is provided for a broader number of individuals, but, of course, this is not a model that can always be employed.'

“ The Sustainable Development Goals take into account the fact that not all countries can provide lawyers, but they do make it very clear that it's a state responsibility to provide legal aid

Alison Hannah

Executive Director, Penal Reform International

the idea of pro bono that can be instilled in the legal profession or other solutions can be promoted by the government. 'For instance, paralegals, through legal education and legal empowerment generally provide other solutions that might instead be employed in other jurisdictions that do not necessarily have this problem.

'With fewer resources available for free legal assistance, Beqiraj continues, 'states must promote mechanisms capable of maximising the resources available: these include, for example, promoting the provision of legal

nuances between legal terms such as manslaughter and homicide, as well as the practicalities of what to expect in the courtroom. 'It was a very interesting opportunity to see how non-lawyers can play a very important part in making people who have no understanding at all of the criminal justice system cope and deal with it, how to act and how to try and manage their own cases.'

Through role playing and an interactive game, the paralegals also helped prisoners gain a better understanding of the trial process. More generally, Hannah says they were able to help prisoners resolve a fundamental problem that often waylays many defendants in developing nations – transport.

'[The paralegals] would work with the prison administrators to try and make sure that people that were meant to go to court were actually able to go

to court,' she says. 'They could also sometimes identify to the prosecutors where there were gaps, where it was obvious that there should have been people being interviewed.'

By 2003, 28 paralegals were working in 13 prisons across Malawi, helping to secure the release of more than 1,350 prisoners. PRI has also carried out similar successful programmes in countries such as Benin, Burundi and Rwanda.

The resulting report, *International Access to Justice: Barriers and Solutions*, was published in October last year. Building on its success, a second survey was commissioned by the IBA Access to Justice and Legal Aid Committee and conducted by the Bingham Centre earlier this year. This time, the focus will be on legal aid issues for people accused of violent crimes and, where applicable, redress mechanisms for victims of violent crimes. The findings are expected to be published in October.

Individuals against corporations and governments

Although barriers to accessing justice vary from jurisdiction to jurisdiction, there's no denying that links with poverty and disadvantaged groups are increasingly keenly felt.

Axel Filges, a partner in Taylor Wessing's Hamburg office and Co-Chair of the IBA Access to Justice and Legal Aid Committee, says that in Germany access to justice is an obligation for the state and for lawyers. Those unable to afford legal representation and court fees can choose a lawyer, present their case to the responsible state authorities in the 16 counties of Germany and, after having checked this, the state authorities provide the claimant with a letter in which *Prozesskostenhilfe* (legal aid) or *Beratungshilfe* (legal assistance) is granted. 'The other column of the system,' says Filges, 'is that the 165,000 lawyers in Germany are obliged to work in this system with lower fees than they normally can ask for. So both – the state and the lawyers – are upholding the system of guaranteeing access to justice for the poor.'

Justice Michael Kirby, Vice-Chair of the IBAHRI, says although people's views on access to justice may vary, in Australia the justice system has been particularly unkind to indigenous people in recent years. 'Because justice is often aimed at promoting harmony within society, and keeping a balance between the rights of individuals and the claims of corporations and governments, perspectives on justice will often be radically different,' he says. 'Certainly, [the Australian] legal system has been unjust to the indigenous people – Australian Aboriginals and Torres Strait Islanders. It originally denied them rights to their own traditional land on the basis that they were nomadic. It now sees about a quarter of the prison population coming from indigenous people, even though they represent only 2 per cent of the population. This is totally unacceptable and no one could deny that it involves a serious injustice that we need to address and reverse.'

PRI's Hannah agrees that indigenous populations are often most disadvantaged in the justice system. 'Indigenous people

everywhere are always imprisoned at a much greater rate,' she says. 'In Australia and in Canada [this happens] because they're usually much poorer, have much less education, are not so well serviced with legal aid or health provisions and usually have drug and alcohol dependency issues, which often go with being marginalised and poor.'

“ There is one Sustainable Development Goal that should be further elaborated and expanded: namely, goal 16 on access to justice for all

Hans Corell

IBAHRI Co-Chair and former
Legal Counsel of the UN

As Hannah points out, health risks also pose a further barrier to justice in developing nations given the propensity for prisoners to spend lengthy periods in pre-trial detention. 'In some cases, even being held awaiting trial is effectively a death sentence because the rate of disease is so high,' she says. 'If you go to an overcrowded prison in a developing country, the range of illnesses and disease that you can get simply by being in prison can be fatal. This, of course, is not true in most developed countries.'

Lawyers Against Poverty

Poverty continues to be a major stumbling block to accessing justice and, ultimately, a person's prospects of receiving a fair trial. In June, Oxfam launched an initiative that aims to remove some of the barriers facing poor and disadvantaged groups – Lawyers Against Poverty. The initiative was the brainchild of Oxfam's Joss Saunders, who identified a gap in the market for lawyers to tackle poverty head on. 'Although there was a movement in lawyers for human rights, there doesn't seem to have been a movement for lawyers to tackle issues of poverty,' he says. 'There are lots of lawyers working on it of course, but this was about bringing it all together and working out how we address this huge challenge of inequality and poverty.'

The concept is a simple one: lawyers pay a monthly donation to join the scheme and this goes directly into a dedicated Justice Fund. All members will then be automatically entitled to volunteer to work on particular legal projects

and have a say on which projects the fund supports. In keeping with the initiative's overall ethos, the scheme operates under a 'pay what you can' model with no minimum donation required and for every pound donated, 93 pence is spent on vital legal programmes. Just seven pence goes towards covering the cost of fundraising and administration.

Practising lawyers, as well as law students and trainees, are all welcome to join and just under 100 lawyers have signed up to the scheme so far. Saunders hopes the initiative will build on Oxfam's track record of utilising legal skills to fight poverty, adding that pro bono efforts to date have just not been enough. 'We've been involved in a number of similar initiatives over the past ten years, including the creation of A4ID – Advocates for International Development – which emerged in 2005 after the tsunami. We developed a legal initiative for lawyers to actually do something about poverty and the Millennium Development Goals and the form it ended up taking was pro bono.'

Saunders recognises that A4ID and other pro bono schemes such as TrustLaw Connect, the International Senior Lawyers Project, PILnet and i-Probono have produced encouraging results. He believes, however, that pro bono is a necessary, but not sufficient, response by lawyers to tackling poverty. 'We felt over the past few years that, although pro bono can do a lot, more needs to be done,' he explains. 'What we're trying to do is to get lawyers

engaged in those issues of law and poverty in a very constructive way that actually looks at what are the kinds of problems in the world that have either law as part of the cause or as part of the solution. And can we look at it and use our professional skills and legal training to address some of those topics.'

Twinning is one aspect that Saunders is particularly keen on as he thinks both sides will benefit. 'We think that part of it is opening yourself up to different experiences and learning from different situations,' he says. 'I spent some time working in Uganda as a teacher at a government high school and, although I felt I got far more than I gave, I think twinning is a similar principle – both twins, one in a developing country and one in a developed country, have as much to learn from each other. It's not just about one giving information to the other, it's about sharing experiences and developing together. I think this makes us better lawyers as well.'

Vulnerable groups worldwide

Even in many rich, developed nations there is still a long way to go before those most in need understand legal processes and what their legal rights are, says PRI's Hannah. 'The astonishing thing is how universal the concepts of the problems are, but obviously the context can be very different,' she says. 'There are people in the States even, who are charged,



Lucky Machoka draws water from an open communal well at Mukuru informal settlement in Nairobi, Kenya. Credit: Sam Tarling

brought to court and sentenced to enormously long sentences without having a clue of how the justice system works.’

For Scott-Moncrieff, although access to justice for all may seem ultimately unattainable, it must remain a universal goal. ‘We have to do our best to increase access to justice so that the ideal situation is that we have laws that are applied fairly and that everyone knows how to go about challenging them if they’re not,’ she says. ‘Across the world that’s a huge task. It’s like ending world poverty – it’s such a huge target, but you know what you’re aiming for and that’s what we should be aiming for.’

Several countries are making concerted efforts to raise public awareness of their justice system and relevant legal rights. In South Africa, for example, the Department of Justice and Constitutional Development and the South African Women Lawyers Association have established an ‘Access to Justice Week’ each year in a bid to provide free legal advice and assistance to those in need, particularly targeting people in rural areas.

Elsewhere developed nations such as Australia already host an annual Law Week to increase public understanding of the law and its role in society. However, Justice Kirby says lawyers across the world must stay focused on the goal of helping to create a fairer legal playing field for all. ‘Lawyers have to be concerned with what the justice in question says and what steps are taken in the society to listen to the voices of minorities and to adopt procedures and institutions of law reform,’ he says.

“ We felt over the past few years that, although pro bono can do a lot, more needs to be done

Joss Saunders
General Counsel, Oxfam

Although Germany ranks fifth out of 102 countries in the ‘access to civil justice’ category in the Rule of Law Index 2015, earlier this year the country’s Federal Bar organised a two-day international conference entitled ‘Access to Justice – a lawyer’s issue’. Attended by people from all over the world, Filges says there is a strong understanding that more can still be done to improve access to justice in the country.



Children use a tap stand in Buporo camp, North Kivu in eastern Democratic Republic of Congo.
Credit: Eleanor Farmer

‘Many relevant groups within the society, whether the church, social institutions/ political institutions, politicians and the bars, are trying to improve our system – especially in realising the fact that we do not know how long the state funding for the costs will work as it has done over decades,’ he says.

Ultimately, Filges stresses that it is not just up to the legal profession worldwide to improve access to justice. ‘There are so many countries in which the state only holds the lawyers responsible for guaranteeing access to justice just to save money,’ he says. ‘For example, in Russia the system puts a lot of pressure on our profession with [the] argument that the state only has to organise courts and is not responsible for the financial aspects of access to justice for the poor.’

Kirby also warns that, in the era of legal aid cuts, countries the world over need to continue to work on making legal procedures more efficient.

‘When I was setting out as a legal practitioner in the 1960s, criminal and civil trials were much shorter than they are today. To some extent this was because of the lack of legal representation for persons accused of criminal offences and other vulnerable groups. But we do need to be more efficient in the public resolution of serious disputes, civil and criminal. Courts are pricing themselves out of the market. It will be a great tragedy if courts and even tribunals are effectively unavailable to ordinary citizens because the legal costs are too high and the legal aid is non-existent.’

Ruth Green is Multimedia Journalist at the IBA and can be contacted at ruth.green@int-bar.org



A protester shouts at police as they stand guard during a protest against the military council outside Egypt's parliament in Cairo.

Egypt's new law that undermines the rule of law

The country's new law, which brings intimidating limits to free speech, is in danger of handing terrorists the very victory they seek.

EMAD MEKAY, CAIRO

In late August, two young people in Alexandria were arrested and put on trial. Their crime? 'Running an inciteful Facebook page'. In the same month, two other youths were detained in Sohag, upper Egypt. On this occasion, incriminatingly, the authorities found a router and flash drive in their possession. In both cases, the news was widely reported by state-run media and Law No 94/2015, just signed by Egypt's strongman President Abdel Fattah el-Sisi on 16 August, was used.

Even before its passage, the new law created controversy, despite intimidating limits on free speech. Critics contend that the law gives the Sisi regime unprecedented, sweeping powers, while dramatically muzzling liberties and rights. Sisi's supporters cheer it as a long-awaited step in a series of drastic measures taken to quell unrest.

After it came into force, human rights groups, which are mostly rooted in the country's secular left, were never more certain: the law was the final nail in the coffin of the country's

short-lived democratic life. ‘This law has turned 90 million Egyptians into terrorism suspects overnight,’ says veteran human rights advocate Gamal Eid, executive director of the Arabic Network for Human Rights Information. ‘It will curb liberties for all Egyptians. Any criticism, opposition or action not to official liking is now automatically considered an act of terrorism.’

“ One of the prime goals of terrorist organisations is to destroy the rule of law. To destroy it from within is giving terrorists a victory, which they should be denied

Justice Richard Goldstone
Honorary President, IBAHRI

International observers say the law joins the arsenal of bills that curtail freedoms, legal and constitutional protections adopted since Sisi, a US-trained army general, ousted Mohamed Morsi, the country’s first-ever elected president two years ago. ‘The new Egyptian security laws add little to the powers that have been exercised by the Sisi regime since it took power in 2013,’ says Justice Richard Goldstone, Honorary President of the IBAHRI. ‘There has been an absence of the rule of law and in particular severe restrictions on the freedoms of speech, assembly and the media.’

Yet many articles in the new law were exceptionally disturbing for legal experts. Primarily, the law grants clear legal protection, and far more psychological comfort, for the military and police officers who use lethal force or commit human rights violations. Article 8 of the law unequivocally shields uniformed officers from accountability, experts note. ‘What the law means is that all official violations and atrocities will now be covered with a legal mantle,’ Eid says.

The Egyptian Foreign Ministry countered that the law offers only a ‘legitimate self-defence’ mechanism. Spokesman Ahmed Abu Zeid says lethal force is ‘limited by the principles of necessity and proportionality under Article 8’.

Law No 94 is also faulted on other grounds. It liberally encourages the death penalty as a sentence more than at any time before in Egyptian law. Capital punishment can be used in at least 12 instances under the law. Mohammed

El-Shabrawy, a lawyer and columnist for the online Islamist opposition site El-Shaab says: ‘The law uses elastic language in contradiction with international standards of drafting laws, which often seek constraining language... This law therefore can be used to penalise even thoughts and ideas.’

Critics hold the law was born prematurely without much public discussion, in the absence of an elected parliament and with help from the squeamish media, which is largely co-opted by the wealthy ruling elites who back the military, even though it intimidates the few independent media outlets under the crime of ‘reporting false news’.

The country’s Press Syndicate, which technically represents local journalists, the majority of whom work for state-owned publications, initially put up a shy resistance, but quickly buckled under pressure. The law, however, was amended to replace the initial two-year prison sentence with a hefty fine for journalists who report inaccurate news.

Now, Article 35 of the law states that a journalist can be fined up to \$63,000 – a large sum for a country with an individual annual average income of \$3,300 – or suspension altogether from practising journalism for one year, an effective way to shelve the few remaining awkward reporters for a while.

Journalists are expected to stick to the narrative given by the only government department responsible for providing information on terrorist attacks, namely the Ministry of Defence. The ruling military were furious that recent reports showed high military casualties in Sinai where they are battling a poorly armed, but budding, insurgency.

“ It will curb liberties for all Egyptians. Any criticism, opposition or action not to official liking is now automatically considered an act of terrorism

Gamal Eid
Executive Director, Arabic Network for
Human Rights Information

The law also sets up special court circuits to expedite adjudicating cases that are deemed terrorism-related. The law replaces the two-year ceiling on pre-trial detention with limitless imprisonment.

Despite the uproar from independent lawyers and civil liberties advocates, the law appears to have attracted mundane condemnation from the international community, particularly Western countries that give the Egyptian military significant amounts of aid. The US State Department, for example, gingerly said it feared the law would undermine rights, but was far less assertive than in similar cases – a gesture interpreted by some in Cairo as being closer to an approving nod than a serious rebuke.

Egypt's Foreign Ministry was quick to note that Washington had a similar legal precedent under its own laws passed after the 9/11 attacks. Foreign Ministry spokesman Abu Zeid tweeted that Egypt was facing 'an unprecedented wave of terrorism and violence', saying 'the law was adopted after comparative studies with international counter-terrorism legislation' and

that it is in line with the UN's resolution 1373 of 2001, which the US helped pass after the 9/11 terrorist attacks.

'Of course, states must protect themselves from terrorist attacks and their security forces must be appropriately armed to do so. Those protections do not require enforced secrecy about government actions and should certainly not grant immunity to security officials for unlawful actions taken by them,' says Goldstone. 'One of the prime goals of terrorist organisations is to destroy the rule of law. To destroy it from within is giving terrorists a victory, which they should be denied.'

Emad Mekay is a freelance journalist. He can be contacted at emekay@stanford.edu

The International Bar Association's Human Rights Institute

The International Bar Association's Human Rights Institute (IBAHRI), established in 1995, works to promote and protect human rights and the independence of the legal profession worldwide. The IBAHRI undertakes training for lawyers and judges, capacity building programmes with bar associations and law societies, and conducts high-level fact-finding missions and trial observations. The IBAHRI liaises closely with international and regional human rights organisations, producing news releases and publications to highlight issues of concern to worldwide media.



the global voice of
the legal profession®



All IBAHRI activities are funded by grants and individual donations.

To help support our projects, become a member for just £40 a year – less than £4 a month.

Visit www.ibanet.org/IBAHRI.aspx for more information, and click **join** to become a member. Alternatively, email us at hri@int-bar.org.

To read more on IBAHRI activities, download the IBAHRI Annual Report 2014 at <http://tinyurl.com/IBAHRI-AnnualReport2014>.



Our work around the world

■ Work carried out in 2014 ■ Work carried out prior to 2014



www.ibanet.org/IBAHRI.aspx



@IBAHRI



/IBAhumanrights



Escuela de Gobierno y
Transformación Pública
Tecnológico de Monterrey



The New Era of Taxation:

The keys to providing legal advice on tax law at the cutting edge of a rapidly changing world

3–4 December 2015 Escuela de Gobierno y Transformación Pública del Tecnológico de Monterrey, Mexico

A conference presented by the IBA Taxes Committee, supported by the IBA Latin American Regional Forum

Topics include:

- Base erosion and profit shifting (BEPS) developments
- Double tax treaties in Latin America
- M&A recent trends
- Tax controversy for multinationals and special problems of representing multinationals
- Alternative dispute resolution methods
- Transparency and assistance in tax matters

Who should attend?

International tax lawyers, economists, corporate, finance and banking lawyers, accountants and bankers

UP TO 13 CPD/CLE HOURS AVAILABLE



the global voice of
the legal profession

London

São Paulo

Seoul

The Hague

Washington DC

Rua Helena 170, 14º andar, São Paulo, SP 04552-050, Brasil
Tel: +55 (11) 3046 3321 Fax: +55 (11) 3046 3324 latin.conferences@int-bar.org www.ibanet.org



Saif al-Islam Gaddafi, son of late Libyan leader Muammar Gaddafi, attends a hearing behind bars in a courtroom in Zintan on 25 May 2014.

Libya's uneven path to post-revolutionary justice

The trial of Colonel Gaddafi's son and 36 regime-era officials presented the country with an historic opportunity for transitional justice. Instead, it provoked further divisions in a country already torn apart by civil conflict.

TOM WESTCOTT, TRIPOLI

On 28 July, after over a year of protracted hearings, interrupted by civil conflict in Tripoli, nine men were sentenced to death by firing squad for war crimes. Among these were the former head of intelligence, Abdullah Senussi, regime-era prime ministers Al-Baghdadi al-Mahmoudi and Abu Zaid Dorda, and son of the late Libyan leader, Saif al-Islam Gaddafi.

The most publicised, yet least meaningful, verdict was the death penalty handed to Saif. Given *in absentia*, he would have to be handed over to the Tripoli-based authorities to stand trial

again in person for the sentence to be carried out. In the four years since his capture, Saif has been held in the mountain town of Zintan, which has been locked in a year-long conflict with the powers controlling Tripoli. Widely expected to take over power from his father, Saif has become a prize in the country's unravelling, and there is no indication that Zintan will hand him over, either to Tripoli or to the International Criminal Court (ICC), which still has an outstanding demand for Saif to face charges of crimes against humanity.

He has never been present in court, although

a 2014 amendment to Libyan law enabled him to face prosecution via video-link appearances to the courtroom from Zintan. In one of only four appearances, he said: ‘God is my lawyer.’ The counsel for another defendant says that the court assigned Saif a public lawyer, who only attended proceedings a handful of times. ‘Saif denied everything and said he didn’t recognise the court, so no witnesses were called and no defence was given,’ he says, speaking on condition of anonymity.

These video-link appearances petered out when fighting erupted between rival armed groups in the Libyan capital in July 2014, since when Saif has not been seen in public.

The fight for Tripoli

After Libya’s 2011 uprising, armed groups from Zintan and Misrata, Libya’s third city, both of which included many revolutionary fighters, took responsibility for providing some security in Tripoli. Mounting tensions exploded in a battle for control over Tripoli International Airport, which was decimated in the ensuing fighting. Forces from Zintan were expelled from the capital and the Misrata groups took control, sparking a deep and lasting fissure between the two sides, which have fought one another since on several front-lines in western Libya.

The fight for Tripoli pushed out Libya’s internationally recognised government to the east of the country where it continues to sit, and a rival government was established in the capital. Although lacking any official recognition, the Tripoli-based government has a substantial amount of control over the country’s institutions, most of which are headquartered in the capital. Under this governing body, the trial of Saif and the regime-era officials recommenced at the Tripoli Appeals Court.

‘Libya has only one General Prosecution and all parts of Libya are under its authority,’ says the Tripoli-based Head of Investigations for the General Prosecutor’s Office, Sadiq Al-Sour. However, the official government in the east rejected the trial, with its Ministry of Justice stating that no fair judgment could be reached while the capital was controlled by ‘illegitimate militias’.

Proceedings against the 37 men continued, however, culminating in the July verdicts. With the trials already heavily criticised by international human rights organisations, the decision to proceed with the case outside the jurisdiction of the internationally recognised government provoked further concern.

‘Libya’s conflict has brought the country’s institutions, including the judiciary and criminal justice system, to near-collapse, with many courts, prosecutors’ offices and criminal investigation divisions suspending their activities because

of worsening security conditions and attacks targeting judges, lawyers, and prosecutors,’ says Human Rights Watch. ‘The ability of the Supreme Court, which sits in Tripoli, to afford impartial remedy is also threatened by current divisions and deteriorating security conditions.’

“ We believe that the effectiveness of legal representation was severely diminished by the volatile security situation in Libya

Mark Ellis
Executive Director, IBA

Richard Goldstone, Honorary President of the IBAHRI, has voiced concerns about the conditions in which defence counsel and witnesses could be protected and perform their duties. ‘There are serious allegations of a denial of fair trial rights of the defendants,’ he says. ‘This is especially of concern in cases such as the present one where some of the defendants have been sentenced to death. There should be a full reconsideration of the proceedings by the Supreme Court of Libya.’

Human Rights Watch have released a long list of concerns about the trial, some of which have been echoed by Amnesty International and the UN. Mark Ellis, Executive Director of the IBA, however, stresses that ‘the issues relating to the effectiveness and fairness of the proceedings must be assessed within the context of post-revolutionary justice, keeping in mind the limitations on the Libyan justice system in the circumstances’.

He says that reports indicated that the judges had appeared to be impartial and had made a conscious effort to uphold the principle of equality of arms, as well as attempting to ensure that the rights of defendants are safeguarded where possible. ‘On the basis of the available evidence, we have concluded that genuine efforts in trying to ensure due process were made on behalf of the judges and defence lawyers in the current case, despite the numerous difficulties associated with the proceedings,’ Ellis says. He adds, however, that despite ‘notable efforts’ made by judges and lawyers during the proceedings, these remained insufficient to ensure that the defendants received a fair trial.

Volatility and intimidation

‘We believe that the effectiveness of legal representation was severely diminished by the volatile security situation in Libya, as well as other factors such as the general lack of access to evidence, the frequent absence of certain lawyers from the proceedings, the lack of time and suitable facilities, and the possibility that lawyers were intimidated,’ he says.

Defence lawyers experienced problems throughout the trials, particularly when representing high-profile defendants. Senussi originally had five lawyers, but one, a Tunisian, was unable to continue due to problems with paperwork authorising her to defend her client. According to a Tripoli-based legal source, two others withdrew because they were afraid. He adds that lawyers representing Dorda also stood down after being threatened.

Lawyers can face intimidation in Libya, where some security is provided by untrained armed personnel and the proliferation of weapons means that many ordinary civilians have access to firearms. 'I'm not scared of the court, but I am scared of the militias here, who have no respect for human life,' says another defence lawyer, who experienced intimidation when working on other cases. Although he wasn't threatened while working on this case, he says the trial was not impartial and described the sentencing of his client to a long prison term as a 'crazy verdict' that he would appeal.

“ I'm not scared of the court, but I am scared of the militias here, who have no respect for human life

Libyan defence lawyer

Lawyers also complained that witnesses were restricted to two per defendant. 'Dorda said he needed at least nine defence witnesses, one for every accusation, but the court refused and would only allow two,' says Ibrahim Aboisha, one of Senussi's lawyers. 'There were no prosecution witnesses brought to the stand at all and the

evidence relied on what the General Prosecutor presented, but, without witnesses, it is difficult to guarantee that this was accurate,' he says.

Al-Sour says that all defence witnesses were able to give testimonies without any need for protection, but adds that in total only around 20 witnesses had given evidence for the 37 men.

Other issues voiced by lawyers and human rights organisations have related to conditions in the Hadba Prison facility, which also houses the purpose-built Tripoli Appeals Court where the men have been tried. Aboisha was concerned by the ongoing detention of his client Senussi in solitary confinement. 'Since the beginning of the trial he has been held in solitary confinement,' he says, pointing out that assurances by the General Prosecutor's Office that Senussi would be moved were not followed through. One guard explained this was because he was on suicide watch, but keeping someone in solitary confinement for no apparent reason for over a year, Aboisha says, was tantamount to punishment in itself.

Private meetings between defendants and either lawyers or human rights organisations were also impossible, with prison guards present throughout all meetings, according to legal sources and the UN, which tried to visit a number of detainees in October 2014.

Al-Sour insists that defendants were not put under any duress during investigations. 'I guarantee all investigations were made by the General Prosecution Office and not under any duress – either emotional, physical or financial,' he says.

Prisoners become prison guards

Despite this assurance, a shadow of doubt hangs over the treatment of those held in the Hadba Prison facility after a video showing the



International Bar Association Conferences 2015–2016



4 NOVEMBER 2015 JAKARTA, INDONESIA

Asia Pacific Arbitration Group Training Day – Best Practices in International Arbitration

12 NOVEMBER 2015 MOSCOW, RUSSIA

7th Annual Mergers and Acquisitions in Russia and CIS Conference

12 NOVEMBER 2015 LONDON, ENGLAND

Private Equity Transactions Symposium

13 NOVEMBER 2015 SÃO PAULO, BRAZIL

Celebrating Magna Carta and the Rule of Law

14–15 NOVEMBER 2015 LONDON, ENGLAND

IBA-ELSA Law Students' Conference 2015

18–20 NOVEMBER 2015
LIVINGSTONE, ZAMBIA

Building on the Foundations for a Successful Future: Economic Development and the Rule of Law in Africa

18–20 NOVEMBER 2015 LONDON, ENGLAND

7th Biennial Global Immigration Conference

19–20 NOVEMBER 2015
SEOUL, SOUTH KOREA

Mergers & Acquisitions in the Technology Sector: Current Asian and International Trends

3 DECEMBER 2015 LONDON, ENGLAND

Third Party Funding and International Arbitration: a 360 degree perspective

3–4 DECEMBER 2015 MEXICO CITY, MEXICO

The New Era of Taxation: The keys to providing legal advice on tax law in a rapidly changing world

4 DECEMBER 2015 MOSCOW, RUSSIA

9th Annual Law Firm Management Conference

4 DECEMBER 2015 PARIS, FRANCE

The Rise of Ethics and Transparency in Mediation and ADR: Fighting Corruption and Abuses Through New Means

5 DECEMBER 2015 NEW DELHI, INDIA

Magna Carta 800th Anniversary – Foundation of Democracy and the New Trends of Dispute Resolution in India

27–29 JANUARY 2016 MEXICO CITY, MEXICO

Mexico's Energy Reform: The Bidding Has Begun

30–31 JANUARY 2016
THE PEACE PALACE, THE HAGUE

Legal Challenges of Modern Warfare

3–5 FEBRUARY 2016 TOKYO, JAPAN

IBA/ABA International Cartel Workshop

8–9 FEBRUARY 2016 LONDON, ENGLAND

5th Annual IBA Taxation Conference

11–12 FEBRUARY 2016 PARIS, FRANCE

4th IBA European Corporate and Private M&A Conference

17–19 FEBRUARY 2016
ADELAIDE, AUSTRALIA

Innovation in Legal Practice

29 FEBRUARY – 1 MARCH 2016
LONDON, ENGLAND

21st Annual International Wealth Transfer Practice Law Conference

4 MARCH 2016 SHANGHAI, CHINA

19th Annual International Arbitration Day

6–8 MARCH 2016 LONDON, ENGLAND

17th Annual International Conference on Private Investment Funds

9–11 MARCH 2016 RIO DE JANEIRO, BRAZIL

Biennial Latin American Regional Forum Conference

10–11 MARCH 2016 SINGAPORE

2nd Asia-based International Financial Law Conference

7–8 APRIL 2016 BERLIN, GERMANY

7th World Women Lawyers' Conference

14–15 APRIL 2016 COPENHAGEN, DENMARK

8th Annual Real Estate Investment Conference

14–15 APRIL 2016 MEXICO CITY, MEXICO

IBA Annual Employment and Discrimination Law Conference

17–20 APRIL 2016 NEW YORK, USA

Biennial Conference of the Section on Energy, Environment, Natural Resources and Infrastructure Law

27–29 APRIL 2016 SAN FRANCISCO, USA

IBA Annual Litigation Forum 2016

11–13 MAY 2016 PANAMA CITY, PANAMA

19th Annual IBA Transnational Crime Conference

16–17 MAY 2016 MEXICO CITY, MEXICO

12th IBA Competition Mid-Year Conference

mistreatment of another of Gaddafi's sons, Saadi, who is also being held in the prison, was leaked on the internet. The nine-minute video showed Saadi being blindfolded, slapped, beaten on the soles of his feet and forced to listen to an unknown man being beaten in an adjacent room. 'In my opinion, prison staff have had an effect, not on the court, but on the defendants and lawyers,' says another defence lawyer, speaking on condition of anonymity. 'Many of the guards and the head of the prison were held in Abu Salim prison under the old regime. Is it right that the prisoner then becomes the prison guard? A lot of factors could affect his ability to do his job, including a desire for revenge.'

The General Prosecutor's Office has insisted that the defendants' rights were met and Al-Sour listed examples of this, including access to case files and visits by family members and doctors. However, the reality for lawyers trying to put together the defence for their clients has not

difficult for reporters and observers to perform their duties, which in turn led to limited and inconsistent information about the proceedings,' says Ellis. 'In light of the available evidence, we have concluded that the hearings in question have failed to meet international standards in many respects.'

International concerns and condemnation of the verdict have been largely ignored by the Tripoli government. The verdicts passed on 32 men, after four were released and charges dropped against a fifth, who was declared mentally unfit to stand trial, have been handed to the Supreme Court in Tripoli and lawyers are preparing their appeals, which are expected to be heard on 29 September.

If the appeals are rejected, the Supreme Court will be responsible for setting a date of execution for the eight condemned men held in Tripoli. Images circulated on social media websites, showing those facing the death penalty dressed in red outfits, believed to have been released by Hadba Prison, have given an aura of inevitability to the death sentences. However, Aboisha dismisses them as meaningless. 'These have no importance because the final ruling has not been made by the Supreme Court,' he says.

Working with two other lawyers, Aboisha says the basis of the wide-ranging appeal he is preparing for his two clients will question the very law under which the men have been tried. 'The prosecution and ruling was based on a new law made by the National Transitional Council [the first post-revolutionary governing body] after the revolution, in 2012,' he explained. 'From the first day of law college, I was taught that a client shouldn't be prosecuted under a new law, but should be judged under the laws of the time during which the alleged offence was committed.'

The IBAHRI has recommended that all countries take steps to abolish the death penalty. In the context of these Libya trials, it has expressed particular concern about whether the death penalty should be carried out. 'In view of the irreversible nature of the death penalty, the proceedings in capital cases must scrupulously observe international standards safeguarding the right to a fair trial, and this has not occurred in the current proceedings,' says Ellis. 'Given the various issues surrounding the trial proceedings, such as the lack of access to counsel, the lack of evidence and available facilities, as well as the limited right to appeal, there are serious concerns as to whether the death sentences can be carried out in this context.' ❌

Tom Westcott is a freelance journalist based in Tripoli and can be contacted at tomwestcott@me.com

“ There are serious allegations of a denial of fair trial rights... especially of concern in cases such as the present one where some of the defendants have been sentenced to death

Richard Goldstone
Honorary President, IBAHRI

always been straightforward. Aboisha explains that, in his experience, there was disparity in prison guards' behaviour depending on which of his two clients he was visiting. 'For Abdulhamid Amar Oheida [an official who worked under Senussi], everything goes smoothly and they let me enter and see him without difficulty, but it is completely different with Senussi,' he says. 'I can't access him immediately, I always have to wait – usually for more than one hour – and the guards stop me for any small thing, a paper, a pen, anything.' He adds that such experiences had made it difficult for lawyers to do their job as effectively as they would have liked.

Lawyers, international observers (who stopped attending the trial in person after the fighting in Tripoli saw most embassies and international organisations leave Libya) and journalists have reported ongoing difficulties with the prison authorities, including restricted or no access to the court, occasional arrest and questioning, and being treated with hostility and suspicion.

'The publicity issue was one of the biggest concerns surrounding the proceedings, as the lack of access to the hearings made it very

A video tribute to former prime minister Lee Kuan Yew is played during a Golden Jubilee celebration parade in Singapore in August 2015.



Singapore: fifty y



Years of rule of law

Singapore's Lee Kuan Yew died earlier this year, just before his country marked its 50th year of independence. His legacy may be an enigma in the West, but remains an exemplar for some in the region.

ABBY SEIFF

Very early on the morning of 29 March, the crowds started gathering. Dressed in black, dressed in white, clutching flowers and water bottles and handkerchiefs, tens of thousands lined Singapore's scrubbed streets. Arrayed under the eaves of the city-state's glittering skyscrapers, some chatted quietly among themselves, a few wept openly. As rain began to fall, still the crowds grew. Wet and shivering, the mourners somberly waited until at last the funeral procession passed and they could pay their final respects to Singapore's founding father, Lee Kuan Yew.

Lee passed away on 22 March 2015, at the age of 91. His death fell just months before the 50th anniversary of Singapore's founding – a fitting coincidence, observers noted, for the man who created the unlikely monolith. Under Lee's thorough and at times ruthless care, the small 'backwater' had turned into

an Asian powerhouse. Its citizens enjoy one of the highest GDPs per capita in the world, its officials are leaders throughout Southeast Asia, and hundreds of thousands from neighbouring nations flock there for a chance to receive the crumbs. As people paid their respects over the course of the week of mourning, the primary expression was one of thanks for the opportunities his rule had afforded.

'We salute him for what Singapore is today,' read a note left in a book of condolences at the Singapore High Commission in Kuala Lumpur.

Not everyone, however, could offer such simple statements. Behind closed doors, many Singaporeans expressed conflicted feelings about Lee's legacy. Others did so more openly. On social media and in blog posts, commentators discussed racism and propaganda. Some urged a more nuanced view, while a few simply revelled in Lee's

death. In a YouTube video posted on 27 March that quickly went viral, a bemused-looking teenager shouted at his countrymen: ‘Lee Kuan Yew is dead! Finally! Why hasn’t anyone said: ‘f—k yeah, the guy is dead?’

Four days after uploading the video, 16-year-old Amos Yee was charged with wounding religious feelings, disseminating obscene material and intentional harassment. His video, which included derogatory commentary about Christians and his fellow Singaporeans, as well as Lee, was hardly artful. But in spite of the rankling presentation, the teenager made numerous salient points about the failures of his country and the case became an immediate cause *célèbre* for rights groups.

‘The arrest of a young blogger for comments made in a video highlights the restrictive environment in which Singaporean journalists are forced to work,’ said Bob Dietz, the Asia Programme Coordinator of the Committee to Protect Journalists, in an alert posted after Yee’s arrest. ‘We call on authorities to release Amos Yee immediately and to undertake reform of Singapore’s outdated laws restricting the media.’

Fifty years after its independence, Singapore has yet to decide if such reformation is necessary. Indeed, it has proved an awkward counterpoint to Western insistence that healthy growth and democracy go hand in hand. Its population enjoys a per capita income of nearly \$80,000, economic growth is steady, and – perhaps more remarkably – the country regularly performs highly on rankings of happiness and well-being. According to Gallup polls, its population is the ‘happiest’ in Asia, while it is the only non-European country to crack the top ten in a study on ‘well-being’ by the Boston Consulting Group.

Its successes may well have come because of, not despite, an insistence on doing away with Western concepts of individual freedom. ‘I believe that what a country needs to develop is discipline more than democracy,’ Lee said in an oft-quoted 1992 speech. ‘The exuberance of democracy leads to undisciplined and disorderly conditions which are inimical to development. The ultimate test of the value of a political system is whether it helps that society to establish conditions which improve the standard of living for the majority of its people plus enabling the maximum of personal freedoms compatible with the freedoms of others in society.’

A powerful half-century

Fifty years ago, few could have predicted that Singapore would become the powerhouse it is today. On 9 August 1965, an emotional



Teen blogger Amos Yee leaves with his parents after his sentencing from the State Court, 6 July 2015.

Lee Kuan Yew announced to his country that they were separating from the Federation of Malaysia just two years after the merger. The decision followed communal tensions and months of race riots, exacerbated by political and economic disparities.

Economic and trade ties were to remain, but the move left a singularly unmoored and struggling Singapore.

‘For me it is a moment of anguish because all my life... you see, the whole of my adult life... I have believed in merger and the unity of these two territories,’ reads a transcript from Singapore’s National Archive of Lee’s 9 August press conference. ‘You know, it’s a people, connected by geography, economics, and ties of kinship... Would you mind if we stop for a while’.

According to the transcript, the recording was stopped to allow Lee to ‘regain his composure.’

The emotion was surely warranted. Apart from the upset of the failed merger, at the time of the split, Singapore faced high rates of unemployment, labour unrest, and a per capita income of \$320. Just 670 square kilometres at the time, the nation had promising ports, but no natural resources – even its water came from Malaysia.

Over the next few years, the government rolled out a series of deliberate action plans: investing tens of millions of dollars in industry and attracting foreign investment, improving schooling, providing mass public housing and developing infrastructure.

In the meantime, the government also doubled down on its judiciary, investing significantly in its legal system, practitioners and legislation. Singapore’s parliamentary system can be traced back to the days of British colonial rule, but much of its law is enshrined in policies put into effect in 1959 when it became self-governed.

Quickly, rule of law became a cornerstone of the Singaporean success story. The number

of lawyers jumped from 235 in 1965 to around 5000 today; courts proliferated and the nation's law schools strove to turn out highly accomplished attorneys.

'Rule of law has played a tremendous role in the development of Singapore for the past 50 years,' said a spokesman for the Law Society

“ We do not claim that our system is perfect, or that it works for everyone. But we do say that it has worked well for us, in our circumstances

K Shanmugam
Singapore's Minister for Law

of Singapore, an IBA member organisation. 'It provides a framework that is transparent and promotes certainty in the law, which gives foreign investors confidence. It enables a predictable and reliable legal system to be established and in turn, the legal system has been a key enabler for the country's tremendous growth over the past few decades. It provides good governance which is extremely intolerant of corruption, and a fair and efficient justice system. The application of the rule of law, despite occasional criticisms of its "thinness", has been the foundation of Singapore's success.'

In a lengthy speech delivered in January at the Opening of the Legal Year 2015, Singapore's Attorney-General V K Rajah highlighted the massive changes visible after half a century of independence. 'Fifty years is a short span of time for the life of a nation, and also for the development of a legal system. But, in 50 years, Singapore has managed to create a legal environment that is, and should be, the envy of the emerging economies of the world. And we can be deservedly proud: Singapore has been ranked seventh least corrupt nation in the world, tenth overall in the world in the World Justice Project's Rule of Law Index, which measures how the rule of law is experienced by ordinary people, and second in the World Economic Forum's Global Competitiveness Index,' he said.

Singapore's focus on rule of law has had evident practical impacts. As the Attorney-General pointed out in his speech, an emphasis on criminal justice has made Singapore one of the safest countries in the world.

In the years after independence, the judiciary placed specific emphasis on rooting out corruption – even within the highest ranks. Unusual for a developing country, those measures continue to this day.

A favourable and protective financial law, including a promising arbitration centre and dedicated commercial court, has seen flourishing international investment. Singapore's residency laws, meanwhile, have allowed for millions of skilled foreign workers to contribute to the economy. Lastly, Singapore quickly established itself as a deft regional leader, helping to establish many of the international laws and frameworks governing Southeast Asia today.

'Singapore is committed to the Rule of Law,' wrote Minister of Foreign Affairs and Minister for Law K Shanmugam in a 2012 paper published in the *Singapore Journal of Legal Studies*. 'It is the foundation of our society and a key ingredient of our success. We recognise the universality of its principles, but also stress that their application must be adapted to each society. We accept that exceptions to the Rule of Law must be closely scrutinised and strictly justified. We do not claim that our system is perfect, or that it works for everyone. But we do say that it has worked well for us, in our circumstances.'

Exceptions to the rule

Indeed, it has for the most part worked very well for Singapore in its circumstances. There are exceptions, however, as Shanmugam concedes.

'Many question whether these [successes] are indicators of a healthy democracy free from oppression and authoritarianism, or whether they are merely symbolic trappings that mask deeper problems,' pointed out Lawyers Rights Watch in a 2007 briefing paper on rule of law and judicial independence in Singapore.

While law has been an effective tool for protecting against crime and corruption, it has also been used – time and again – to combat critics. Post-independence, the draconian Internal Security Act was wielded as an effective tool for quashing dissent. Enacted in 1960, the law was installed to combat the threat of communism and resulted in the arrests of scores of political prisoners. A number of them were detained for more than 20 years without charge for alleged links to communism, while others were released only after signing false confessions. Today, the law remains virtually unchanged, though the intended targets are now 'terrorists'. According to watchdog Freedom House, the ISA 'allows warrantless searches and arrests to preserve national security, order, and the public interest... Suspects can be detained without charge or trial for an unlimited number of two-year periods'.

Unsurprisingly, human rights observers and critics have repeatedly called for the

law's repeal. Their pressure has been to little avail. After a group of 16 older Singaporeans who had been held for more than 100 years collectively without trial urged its abolition in 2011, the government made it clear there was no such possibility.

'Singapore is a small country that can be buffeted by the many powerful forces and influences that intersect here. A broad range of threats can undermine Singapore's security,' local media reported Home Affairs Minister Teo Chee Hean as saying.

Less draconian, but no less effective, has been the use of criminal defamation and related laws. Yee, the 16 year old whose uncouth rant shocked Singapore was found guilty on charges of electronically transmitting obscene imagery and wounding religious feelings. While he was bailed multiple times and sentenced to just four weeks in prison, more thoughtful and nuanced critics have not been so lucky. Newspapers including the *International Herald Tribune* and *Financial Times* have been sued for implying nepotism, and bloggers have faced trial for criticising government financial policy.

According to the IBA's Executive Director Mark Ellis, the IBA itself faced a similarly confrontational approach when it hosted its first Rule of Law day at the 2007 Annual Conference in Singapore. The authorities initially attempted to impose extremely restrictive limits on any sort of discussion or criticism. Only when threatened with the potential for an embarrassing cancellation of the event did the government acquiesce and allow it to go ahead uncensored.

'Singapore should immediately abolish defamation as a criminal offence,' said the IBAHRI in its 2008 report, *Prosperity versus individual rights? Human rights, democracy and the rule of law in Singapore*, 'and should abolish heavy sanctions for defamation offences; prohibit public officials from instituting criminal defamation; and review the existing defences to ensure they are in line with international standards.'

The report continues: '[T]he slim likelihood of the successful defence of an action, combined with the extraordinarily high damages awarded in defamation cases involving PAP [the ruling People's Action Party] officials sheds doubt on the independence of the judiciary in these cases.'

Little has changed in the seven years since the IBAHRI report was issued. In spite of calls by the UN Special Rapporteur, among others, to abolish criminal defamation, the law remains in force and a powerful tool to silence critics. In partnership with laws targeting bloggers and the media, the government has ensured a long-standing chilling effect. Protests – be they

written or physical – are rare and outspoken criticism is scarce. Local media of every ilk is run by those with government ties, while the internet (including personal Facebook pages) is heavily policed.

'In addition to strict defamation and press laws, the government's demonstrated willingness to respond vigorously to what it considered personal attacks on officials led journalists and editors to moderate or limit what was published,' the US State Department noted in its last Singaporean rights report. 'The constitution provides for freedom of speech and freedom of expression but imposes official restrictions on these rights, and the government significantly restricted freedom of speech and of the press with regard to criticism of the government.'

Outside the realm of free speech, Singapore has come under criticism for its archaic anti-gay laws. Australian jurist and IBAHRI Vice-Chair Michael Kirby said that the colonial-era criminalising of sex between men 'reflects poorly on the capacity of Singapore to modernise laws that are clearly out of date and that serve only to oppress minorities'.

He says: 'It is astonishing that as such a progressive society, that embraces the cutting edge of science, Singapore has not been able to shake off the primitive colonial laws against sexual minorities (LGBTI) inherited from Britain.'

“ Suspects can be detained without charge or trial for an unlimited number of two-year periods

Freedom House

For Singapore's vast pool of foreign migrant workers, the law can prove similarly wanting. The country has perhaps the highest reliance on foreign labour in the region, with about 40 per cent of its labour force made up of non-Singaporeans. For expatriate white-collar workers, Singapore is startlingly manageable. Laws regulating high-earning professionals make for a seamless work permit, residency and visa process. Regional 'migrant workers', however, who earn as little as \$300 a month, are afforded few such protections. For those working as construction workers, maids, salespeople and the like, requirements for permits are onerous and open to abuse. For instance, domestic workers, of whom there are more than 200,000 working in Singapore, didn't receive a government-legislated weekly 'off day' until 2012. Employers frequently

break laws governing treatment of foreign workers, but prosecutions are rare. Employers even have the right to unilaterally cancel a worker's permit, putting workers in a precarious position should the employer make unlawful demands. When employees do bring suit against their employer – for non-payment, for physical abuse, for dangerous work conditions – the former are often barred from seeking work while a case is pending. Even if one is likely to win, the prospect of going one or two years without work is an impossible sacrifice for most migrant workers.

'The kinds of rights we're advocating aren't any more than that given to any Singaporeans. We're not asking for extra rights,' said Tam Peck Hoon, an advocacy head at the protection group Humanitarian Organization for Migrant Economics.

Regional leader, in more ways than one

In spite of the risks, migrants from the Philippines, Indonesia, Malaysia, Thailand and Myanmar continue to flock to Singapore in droves. The country remains many people's best shot at pulling themselves out of poverty. In a region with severe economic imbalance, it is not unusual to meet Filipinos with university degrees working as maids in Singapore.

While individuals attempt to use the country to bootstrap a better future, their governments have turned to Singapore in varying degrees for inspiration.

Sunil Abraham, a partner at Cecil Abraham & Partners in Kuala Lumpur and a Co-Chair of the IBA Asia Pacific Regional Forum, notes that Singapore's judicial infrastructure 'is something that its neighbours do pay heed to'.

'In this regard, speaking as a practitioner, the decision to revise the Rules of Court in Malaysia and adopt a new set of Rules of Court in 2012 that is very much akin to the Rules of Court in Singapore is an example of this. The same applies to how the Malaysian courts have approached arbitration related matters.

'Singapore by far is the most advanced legal jurisdiction in Southeast Asia,' he continues. 'The neighbouring countries have a lot to do to match the good and innovative work being done by the authorities and the judiciary in Singapore.'

Apart from the legal system, other aspects of Singapore's success have proved enticing models for regional leaders.

'The passing of Mr Lee Kuan Yew is a great loss not only to Singapore, but to the ASEAN community as a whole. His thinking, and his contribution to Singapore's development will always be a source of encouragement for future generations,' wrote Vietnam's Prime Minister

Nguyen Tan Dung in a message of condolence that echoed that of many of his peers.

As a number of officials noted during the mourning period, Singapore has played regional leader, both formally and informally, for decades. It is a founding member of the Association of Southeast Asian Nations (ASEAN), and has long had an active role in the UN. Its neighbours have taken on aspects of the Singaporean story. Many Southeast Asian leaders profess a debt of gratitude to Lee for his model. Yet, none have managed to emulate it because of the sporadic way they incorporate elements of the Singaporean prototype.

“ In 50 years, Singapore has managed to create a legal environment that is, and should be, the envy of the emerging economies of the world

V K Rajah
Singapore's Attorney-General

Lee's concept of 'Asian values' has been a particular hit among Southeast Asia's strongmen when brushing aside criticisms of human rights violations. In justifying things like Malaysia's Internal Security Act (borne of the same origins as Singapore's) or Cambodia's long-serving leaders, officials are fond of arguing that Western critics fail to understand the needs of Asian citizens. Less popular a concept to follow has been Lee's ruthless treatment of corruption or significant investment in social services. Unsurprisingly, this manner of picking and choosing has seen no nation replicate the Singapore model.

Looking forward

In the last decade, under the tenure of Prime Minister Lee Hsien Loong, Lee's elder son, some of Singapore's grand successes have unraveled. A huge influx of foreign residents has led to rising tensions, and inequality among Singaporeans has grown. When I visited in March, shortly after Lee's death, a taxi driver complained that the younger Lee's economic policies had made middle-class life harder than ever. Another pointed at a lorry having difficulty backing up and sneered: 'Chinese drivers. They're everywhere now.'

Guiding Singapore over the past 50 years, Lee proved that, ultimately, a successful economy

that includes most of the population can preclude dissatisfactions coming to the surface. What happens when those successes diminish, however, may prove to be Singapore's challenge in the coming decades.

Following in Singapore's footsteps?

When it comes to rule of law, Singapore's neighbours do not come close. Some, like Cambodia, have remarkably well-crafted legislation that is routinely undermined by a far-from-independent judiciary. Others, like Malaysia and Thailand, routinely employ controversial legislation to silence critics. Farther afield, emerging nations like Myanmar are trying their own hand at the balance between Western demands and local needs.

Cambodia

In January, Cambodia's strongman Prime Minister Hun Sen celebrated his 30th year in power. While Hun Sen boasts about being the longest-serving democratically-elected leader, his 'wins' have been cemented over the years by ballot-rigging, impropriety and brute force.

The country routinely receives low marks in rankings of human rights, judicial independence and the rule of law. In June, Cambodia was ranked 99th out of 102 nations in the World Justice Project's Rule of Law Index (Singapore was ninth).

The current state of rule of law in Cambodia is a combination of fate and force. In the 1970s, the Khmer Rouge destroyed the nation's institutions and exterminated most of the educated class. After 1979, only a handful of lawyers, judges and bureaucrats with the knowledge of how to build a functioning legal system remained. International standards of law came into place only after civil war ended in 1991 with the signing of the Paris Peace Agreement. The UN Transitional Authority in Cambodia, which governed the country from 1992 to 1993 left a legacy of strong laws and a small army of foreign governance consultants.

Such efforts, however, have had little impact on the judiciary itself. Like all arms of the Cambodian government, it is run on a patronage system and is highly malleable. Courts are routinely used to harass political opponents and activists, protect the wealthy and powerful, and create a chilling effect on the general populace. Cambodia's ruling party, meanwhile, is fond of ramming through controversial legislation pushed by those in power. These range from approval for highly destructive dam projects, to laws eroding judicial independence, to curbs on civil society.

Malaysia

Fifty years after dissolving the merger, Malaysia has seen few of Singapore's successes. An inability or unwillingness to root out corruption has led to economic stagnation and scant popular faith in the government.

In instituting corrosive legislation, officials have done little to curry favour. Like Singapore, Malaysian officials have been fond of using the law to their advantage. Both the Sedition Act and the Internal Security Act have colonial-era roots, and both have been a popular way to silence critics in the name of rooting out enemies (initially communists, more recently terrorists).

“ The exuberance of democracy leads to undisciplined and disorderly conditions which are inimical to development

Lee Kuan Yew

While Malaysia's British-modeled legislature contains a vibrant opposition, it is also very much seen as a rubber stamp for the executive. In that role, it has pushed through a variety of controversial legislation. In April, lawmakers passed a highly criticised Prevention of Terrorism Act, which strips suspects of the most basic rights to be charged or to have access to a lawyer. The same month, they passed even tougher penalties for the Sedition Act.

With such laws at their fingertips, courts are routinely used as a political tool. Over the years, hundreds of what foreign governments deem political prisoners have been held without trial under the Internal Security Act and Sedition Act, while others have faced farcical hearings. Most famous among these is opposition leader Anwar Ibrahim, who in February was sentenced to five years on sodomy charges by the highest court. A perennial thorn in the government's side, Anwar had previously been acquitted on the charge – which dates back to 2008 – and had served six years on a separate sodomy charge, which was also eventually thrown out. When his daughter, who is also an opposition lawmaker, criticised the trial and questioned the independence of the judiciary, she was briefly imprisoned on sedition charges.

Rights groups and foreign governments have criticised such convictions and long pushed for an overhaul of the laws, but Malaysian leaders have shown little interest in following suit. ☒

Abby Seiff is a freelance journalist and can be contacted at aseiff@gmail.com



Going beyond convention

Islamic finance is increasingly viewed as an ethical alternative to established banking, especially since the financial crisis. Malaysia is seen as a role model, but can it maintain its position as the sector expands?

STEPHEN MULRENAN

Global Islamic banking assets achieved an annual growth rate of approximately 17 per cent between 2009 and 2013, according to a December 2014 report by Ernst & Young. This figure was double that of the growth rate for conventional banking assets, and could not have been achieved without increasing interest from beyond the Muslim community.

Islamic finance is founded on Sharia law and based on five key principles: a belief in divine guidance; the prohibition of interest; the prohibition of *haram* – or forbidden – investments; the encouragement of risk sharing; and financing based on real assets. Equity, therefore, is favoured over the kinds of intangible debt so closely associated with the financial crisis.

From its origins as an alternative finance system developed for Muslims in the 1970s, the sector has diversified to incorporate fields such as Islamic insurance and capital markets. The most important financial instrument of the latter is the *sukuk* bond structure, which complies with Sharia law because it derives its return from the performance of the asset, rather than from interest.

The preferred hub

Approximately 80 per cent of Islamic banking is focused on the Southeast Asian and Gulf markets of Indonesia, Malaysia, Qatar, Saudi Arabia, Turkey and the United Arab Emirates.

Malaysia is by far the largest *sukuk* centre, accounting for more than 50 per cent of total global issuance. This segment of its economy has certainly benefited from the post-2008 admiration for ethical banking. However, the sustainability of Islamic finance in the country is well manifested: it previously survived and overcame the Asian financial crisis of the late 1990s.

Malaysia issued the world's first sovereign *sukuk* in 2001 and its clear and transparent legal framework has attracted the likes of the International Finance Corp, the Asian Development Bank, the Islamic Development Bank and a host of Japanese companies.

While cities such as Hong Kong, Singapore, Istanbul, London and New York have all attempted to consolidate their positions as international financial centres by jumping on the *sukuk*

bandwagon, they all refer to Malaysia as the role model for Islamic finance. 'Everybody is trying to find their own niche and position themselves as the preferred destination,' says Madzlan Hussain, Kuala Lumpur-based Zaid Ibrahim & Co partner and head of Islamic financial services. 'I feel that the competition is healthy.'

The challenge in Malaysia is maintaining human capital needs. 'Our talent is pinched by other centres,' says Hussain. 'The brain drain is not at an alarming rate, but we have a need for more Sharia scholars and the industry needs to find new ways to allow talent to develop.'

One initiative designed to develop not just qualified and experienced Sharia scholars in Malaysia, but also more Islamic asset managers, bankers and lawyers, is the establishment of the International Centre for Education in Islamic Finance in Kuala Lumpur. To date it remains the only university in the world dedicated to Islamic finance.

Despite concern that it is losing talent, Hussain argues that because 'Malaysia has a small economy, its market can only absorb so much. We therefore need to internationalise our Islamic finance sector by exporting our institutions.'

This arguably began back in 2008, when Maybank, the country's largest bank, acquired Bank Internasional Indonesia and converted it into an Islamic bank. Since then, Malaysian companies Khazanah and Axiata have issued sukuk in Chinese RMB, while Bank of Tokyo-Mitsubishi issued the first Yen-denominated sukuk as recently as September last year.

While accompanying a trade delegation from Malaysia's central bank to Australia, Zaid Ibrahim & Co partners noted the tremendous interest in Islamic finance and Sharia-compliant advisory services as a means of helping to finance major infrastructure projects. The firm subsequently opened offices in Sydney and Melbourne towards the end of 2009.

Although Islamic finance is still very much a nascent industry in Australia, its government is hoping that the sector can help reinforce its carefully crafted image as an Asian financial hub – particularly as the country has a larger Muslim population than some other Asian nations, notably Japan and Hong Kong.

Islamic finance practitioners also point to the Malaysian government's drive over the last few years to position Kuala Lumpur as an Islamic finance hub. This investment has included a ream of incentives for potential issuers – such as neutralising the tax treatment of Islamic finance transactions and reducing the stamp duty on refinancings – to ensure that it competes with conventional financing. 'The government allows companies issuing *sukuk* to recover documentation costs, such as the legal fees, printing costs and prospectus distribution,' says Hussain.

Malaysia has also licensed foreign Islamic banks in a bid to encourage information sharing. Although its recent initiative to allow five foreign law firms to practise local law (restricted to Islamic finance transactions) was not fully embraced, it is indicative of the country's determination to remain the Islamic finance hub of choice.

Criticism and challenges

There has been some criticism of Islamic finance. For example, that its products comply only with the letter of Sharia law, rather than with the true spirit and intent of the Koran. In particular, critics argue that conventional bankers have reverse-engineered a number of existing financial products into Sharia-compliant ones, and that the modern Islamic finance industry is full of such compromises.

'Part of the ethical argument with Islamic finance is that the financiers should share the risk by investing in the financing itself,' says Alan Rodgers, Dubai Head of Banking and Finance at Hadeef & Partners and Chair of the IBA Islamic Finance Subcommittee. 'But when I look at the structures and risks that the Islamic financiers take, to some extent they do take risks... but in other cases I'm not sure that they [do].'

Islamic finance faces a unique set of challenges. Perhaps the most significant is the lack of binding global standards. 'The problem you have with Islamic finance is that it is very much legislated by scholars and Islamic boards attached to particular financial institutions in different parts of the world,' says Rodgers. 'This sometimes leads to a lack of uniformity of philosophical views and of agreement on documentation.' In an effort to provide some harmonisation, the Bahrain-based Accounting and Auditing Organization for Islamic Financial Institutions has published Sharia standards, which Rodgers says 'are followed by a number of scholars in my jurisdiction'.

Dubai-based Morgan Lewis & Bockius Managing Partner and Young Lawyers' Liaison Officer for the IBA Arab Regional Forum Ayman Khaleq says the biggest challenge facing the Islamic finance industry is the need for more products. 'We need to ensure that Islamic investors have available to them a similar product base to what a conventional investor has access to, while taking into account the differences between the two.'

And new products, he adds, will require innovation to be encouraged and Sharia scholars to be involved directly. 'The industry can achieve a lot simply by focusing on innovation, transparency and adopting best practices in governance issues.' In encouraging the kind of innovation and academic excellence Khaleq emphasises, Malaysia may be well on its way to securing its position as role model for the sector. ☒

Stephen Mulrenan is Managing Editor of *Compliance Insider* at Compliance Publishing Group. He can be contacted at stephen.mulrenan@complianceinsider.com

KPMG Forensic^(SM) aims to provide lawyers and their clients with the tools and services they need to keep on top of the major risks they face.

As trusted advisers to some of the world's leading enterprises, KPMG's Forensic network of 3,000 multidisciplinary professionals helps clients discover the facts underlying concerns about fraud and misconduct, and help in assessing and mitigating the vulnerabilities to such activities. KPMG member firms can assist organizations and their legal teams to achieve the highest level of integrity and reduce the adverse financial, reputational or operational impact of litigation by lending our expertise to the avoidance and resolution of disputes.

Operating as a global network, we offer robust, practical advice in the following areas:

- Regulatory Enforcement & Compliance
- Dispute Advisory Services, including litigation and arbitration support
- Investigations
- Forensic Technology
- eDiscovery
- Fraud Risk Management
- Corporate Intelligence
- Economics and Regulation Advice
- Post-Acquisition Disputes
- Major Projects Advisory

kpmg.com

KPMG
cutting through complexity

© 2015 KPMG International Cooperative (“KPMG International”), KPMG International provides no client services and is a Swiss entity with which the independent member firms of the KPMG network are affiliated. All rights reserved.
The KPMG name, logo and “cutting through complexity” are registered trademarks or trademarks of KPMG International.

Differences Matter.

Lex Mundi member firms are vetted and chosen for individual market expertise.

Market insight makes all the difference.

When it comes to law, every market is different.

When you come to a Lex Mundi member firm, we know the differences that matter.

Lex Mundi — the law firms that know your markets.*

LexMundi
World Ready

Lex Mundi is the world's leading network of independent law firms with in-depth experience in 100+ countries worldwide.

* The 160 selected member firms of Lex Mundi include: Chiomenti Studio Legale • Gide Loyrette Nouel A.A.R.P.I. • Noerr LLP • Uria Menéndez • Bowman Gilfillan • Amarchand & Mangaldas & Suresh A. Shroff & Co. • Clayton Utz • JunHe • Nishimura & Asahi • Demarest Advogados • Alston & Bird LLP • Baker Botts L.L.P. • Faegre Baker Daniels LLP • McGuireWoods LLP • Morrison & Foerster LLP

Search our full listing of Lex Mundi Member Firms at:
www.lexmundi.com/lexsearch2

