

IBA GLOBAL INSIGHT

Feb/Mar 2014

**IBA interview: OECD
Secretary-General
Ángel Gurría**

**Asia: Japan's response
to a diminishing
workforce**

**USA: has the SEC's
new leader meant
tougher regulation?**



Syria: the unbearable crisis

Neighbouring states face the unsustainable pressure of millions fleeing civil war, none more so than Lebanon

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ISSN 2221-5859



the global voice of
the legal profession®

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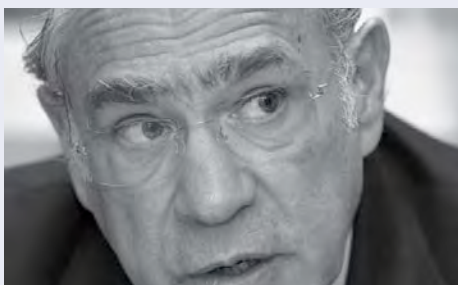
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Ángel Gurría has served as Secretary-General of the Organisation for Economic Co-operation and Development (OECD) since June 2006. Previously, he served as Mexican Secretary of Foreign Affairs and Secretary of Finance and Public Credit. In this in-depth interview with former CNN news anchor Todd Benjamin, he shares his thoughts on the emerging economies, global inequality, anti-corruption, and the ongoing relevance of the OECD in a world of shifting economic power.

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

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
advertising@int-bar.org

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Executive Director Mark Ellis

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Free to members of the International Bar Association

Subscriptions 2014
£36/\$58 (full year)
£7.50/\$12 (single issue)

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EDITORIAL AND DESIGN

Director of Content James Lewis
editor@int-bar.org
Managing Editor Rachael Johnson
Multimedia Editor Tom Maguire
Senior Content Editor Ed Green
Senior Reporter Rebecca Lowe
Content Editor Hannah Caddick

Creative Director Tim Licence
Senior Artworker Penny Newton
Creative Artworker Leonie Girard

Postmaster – send corrections to:
member@int-bar.org

ADVERTISING

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

Printed by Cambrian Printers, Wales.

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From the Editor

Three years ago the Arab uprisings brought hope to the Middle East. The overthrow of President Hosni Mubarak of Egypt ended 60 years of autocratic rule, suggesting a future in which rule of law could prevail, with fundamental rights upheld throughout the region. The cover of the April 2011 edition of *Global Insight* asked if this would be a 'bright new dawn'.

Now, in 2014, the answer is clear: it is far from being a bright new dawn. Not only is the situation in Egypt precariously unsettled, but the dangerous schism between Sunni and Shia – one that goes back to the year 632 – has been re-opened and is fuelling the ongoing fighting and bloodshed in Syria. As the forces unleashed appear to be out of anyone's control, experts predict that this schism could define the Middle East for at least the next decade.

The pressing question now is: what can be done about the refugee crisis? The cover feature of this edition (**The unbearable crisis**, page 24) shines a light on the issue. Unsustainable pressure is being placed on Syria's neighbours. The four states surrounding Syria – Iraq, Jordan, Lebanon and Turkey – are far from wealthy. Yet, while the international community has largely turned its back, Lebanon is bearing the brunt as millions flee the civil war.

Currently, those on the ground in Lebanon feel the country is alone in confronting the consequences of the crisis in Syria. Lebanon is a struggling country, with weak infrastructure, but it has permitted 100,000 Syrian children to enter its school system, instantly doubling class sizes. Public services are at breaking point, and tensions are rising.

There is clearly a need for a combined international response. Yet, to date, this remains conspicuous by its absence. The UN has called for 30,000 visa places to be made available for Syrians, allowing permanent resettlement. As this edition of *Global Insight* went to press, European Union states had only agreed to take 18,300 refugees between them, and many of these placements are merely temporary. Nevertheless, this figure does not even account for one per cent of the total number of refugees fleeing the civil war in Syria.

James Lewis



6th World Women Lawyers' Conference

8–9 May 2014

Paris Marriott Opera Ambassador, Paris, France



A conference presented by the IBA Women Lawyers' Interest Group

Following the success of the fifth World Women Lawyers' Conference, this year's event will once again bring together some of the world's leading practitioners to participate in sessions on recent legal topics and offer attendees an excellent opportunity to network and exchange experiences. The sixth award for the Outstanding International Woman Lawyer 2014 will also be presented during the event.

Topics will include:

- Leading the change – women and men who made a difference
- Leading the profession – which initiatives can successfully increase female leadership throughout the legal profession?
- How to make the most out of your network
- Leading a negotiation – what challenges do we face?
- Leading 'Generation Y' – how to inspire your younger colleagues to stay motivated and pursue their career

Who should attend?

Both male and female lawyers and in-house counsel.

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International Bar Association
4th Floor, 10 St Bride Street
London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090
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EC fines banks record sums for interest rate rigging

SCOTT APPLETON

The handing down of record fines by the European Commission at the start of December to banks involved in interest rate fixing has highlighted the substantial risks for institutions engaged in illegal behaviour. Nonetheless, banks still appear not to have learnt the lessons of earlier scandals.

Fines totalling €1.7bn (£1.4bn) were levied on institutions involved in fixing euro and Japanese yen-denominated interest rate derivatives (EIRD and YIRD respectively) based on the London interbank offered rate (Libor), the benchmark interest rate for over \$350tn of securities worldwide. The EC's fines follow earlier settlements with the UK and US authorities and the launch of criminal investigations into individual traders.

'When scandals arise it always seems to be the fault of a "rogue trader". Where was the oversight or the disincentives to prevent such behaviours happening in the first place?'

Brian Spiro

Partner, BCL Burton Copeland and
Chair of the IBA's Business
Crime Committee

'The "greed is good" ethos still seems to be alive and well,' says Robert Wardle, until 2008 Director of the UK Serious Fraud Office (SFO) and now a consultant to DLA Piper.

'Some institutions seem content to give up individuals when wrongdoing becomes public, but they cannot expect the regulators to constantly police their own businesses. A cultural change has to come from within, to communicate that the pursuit of profit – or bigger bonuses – at any cost will not be tolerated.'

Three banks were collectively fined almost €1bn by the EC for being members of a cartel fixing EIRDs between 2005 and 2008: Deutsche Bank, RBS and Société Générale. Barclays escaped a €650m fine under the EU leniency scheme for revealing the existence of the cartel, while proceedings have now also been

opened against Crédit Agricole, HSBC and JPMorgan.

In addition, fines totalling €700m were levied on banks found to be engaged in a cartel rigging YIRDs, running from 2007 to 2010: RBS, Deutsche Bank, Citigroup and JPMorgan, along with the broker RP Martin. UBS avoided a €2.5bn fine under the leniency scheme, while proceedings have now been opened against the cash broker ICAP.

The fines follow record settlements with the UK and US authorities by Barclays in July 2012 totalling \$453m, after it acknowledged the attempted manipulation of Libor and Euribor rates by traders. UBS likewise settled claims with US, UK and Swiss regulators, paying \$1.5bn in fines.

Following Barclays' revelations, responsibility for oversight of Libor has passed from the British Bankers Association to the newly-created UK Financial Conduct Authority. From January 2014 the administration of Libor will also pass to NYSE Euronext.

In addition, the UK Financial Services Act 2012 created a new offence of 'knowingly or deliberately making false or misleading statements in relation to benchmark-setting'.

Following the revelation in July 2012 of Libor rate-rigging at Barclays, both the bank's chairman and chief executive resigned. Despite the fact that, at the time, there was no proof that they were directly responsible for the rate-rigging, in resigning they did what many regarded as 'the right thing'. Since then a potentially precedent-setting action has been launched in the UK against the bank, alleging that knowledge of Libor rate-rigging reached the highest echelons of management. But will the right people be held to account after such key figures have resigned?

'We do not need people honourably falling on their swords; we need managerial responsibility,' says Brian Spiro, partner at London-based BCL Burton Copeland and Chair of the IBA's Business Crime Committee. 'When scandals arise it always seems to be the fault of a "rogue trader". Where was the oversight or the disincentives to prevent such behaviours happening in the first place?'

From a regulatory point of view it may seem relatively easy to identify a problem,



but it is much more difficult to apply a solution, he adds:

'The cost of wrongdoing can be very high, as recent settlements have shown, so the best protection remains the willingness of institutions themselves to ensure that the correct checks and balances are in place.'

In December, Lloyds Bank was fined £28m by the UK Financial Conduct Authority for bonus schemes that 'tolerated' poor sales practices of payment protection policies.

'So many of the banking sector's wounds are self-inflicted. Why is this so? Clearly not because of under-regulation, it is indicative of a more systemic and cultural issue. Excessive risk-taking may help generate market-beating profitability in the short term, but it is no way to sustain a business,' says Simon Morris, banking regulatory partner with CMS Cameron McKenna in London.

This seems to be a costly lesson to learn. Not just in terms of profitability, but also from a reputational perspective.

'In the Libor case, certain behaviours seem to have been tolerated so long as they did not become public. Where problems did arise there seems to have been relatively little analysis of the environments in which these behaviours were allowed to occur,' adds Morris.

The UK authorities do not tend to arrest people at their desks, as the US authorities are prone to do, but more individual responsibility is welcome. But there is also no doubt that the revelations around Libor and currency-rigging are damaging, not only to the institutions involved, but also to the credibility of the City itself.

For the full version of this article see tinyurl.com/rate-rigging-fines.

Nominations sought for IBA elections

All IBA elections as detailed below will take place at the IBA Annual Conference in Tokyo in October 2014. The deadline for all nominations is 15 March 2014.

For more information see tinyurl.com/IBA-elections-2014

Senior IBA and BIC Officers

We are now accepting nominations for IBA Officers (President, Vice President, Secretary General), Legal Practice Division (Chair, Vice-Chair and Secretary-Treasurer), Section on Public and Professional Interest (Chair and Secretary-Treasurer), Bar Issues Commission (Chair, two Vice-Chairs and up to seven Officers-at-Large). Successful candidates will serve a two-year term until 31 December 2016. Details of nominated candidates will be published on the IBA website.

The rules and procedures for these elections and the nominations form can be obtained from tinyurl.com/IBA-Senior-Officer-election.

LPD Council Members

Successful candidates will serve a four-year term until 31 December 2018. Details of nominated candidates will be published on the IBA website.

To download a nomination form see tinyurl.com/LPD-nomination-form.

IBA at UN corruption conference in Panama

From 25–29 November 2013, the 5th Conference of States Parties to the UN Convention against Corruption (UNCAC) took place in Panama. The IBA organised a side event, chaired by Gonzalo Guzman, head of the IBA Legal Projects team, regarding ‘The Legal Profession’s Contribution to the Global Fight against Corruption’ in the framework of the IBA, OECD and UNODC’s Anti-Corruption Strategy. The IBA also took an active role in the discussions relating to anti-corruption education and during the launch of two new anti-corruption compliance handbooks.

Read more about the conference at tinyurl.com/IBA-UNCAC-Panama.

IBA President Michael Reynolds on the exciting year ahead

2013 was an extremely rewarding year in which to represent the IBA. I had the opportunity to meet with Bar Association leaders and law firms in Thailand, Vietnam, Russia, Australia, India, Peru and many other countries to learn about the changes and challenges in their jurisdictions. I believe it is incredibly important for the IBA to make a tangible difference in legal matters and it was a particular privilege to meet Aung Sang Suu Kyi who outlined to me how she would like the IBA to help Myanmar’s legal community. I pledged that I would do that and the IBA Human Rights Institute has now been officially mandated to co-ordinate and implement a long term capacity-building programme for lawyers in Myanmar, starting with a major legal seminar in February 2014 which I will attend along with Mark Ellis.

I also set up two task forces at the start of my term of office. The IBA President’s Task Force on Climate Change Justice and Human Rights brings together experts and practitioners in environment law and human rights to address the alarming effects of climate change that most of us have witnessed in recent years. The Task Force is preparing recommendations to government and world institutions as to legal measures that could be implemented to aid in the prevention and mitigation of climate change and protect vulnerable communities. These recommendations will be showcased in Tokyo, and delegates will have the opportunity to find out more about the contribution lawyers, the judiciary and government leaders can play. The results of the Human Trafficking Presidential Task Force will also be presented in Tokyo.

The IBA has an exciting year ahead with much more online content being planned with the aim that, where jurisdictions allow, this can contribute to your CLE programme for the year. We also continue to have up-to-the-minute insight on global developments such as our interview, available online, with economist Jim O’Neill on the growing economies in Nigeria and Turkey, part of the recently defined ‘MINT’ (Mexico, Indonesia, Nigeria and Turkey) group.

Finally, as you plan ahead for 2014, I encourage you to set aside the week of 19–26 October to join us in Tokyo to take part in what has become the largest gathering of international lawyers in the world.

For more information on the 2014 IBA Annual Conference in Tokyo see tinyurl.com/IBATokyo2014.



First Anti-Corruption Strategy workshop in Nigeria

The IBA, OECD and UNODC hosted an anti-corruption workshop in Lagos, Nigeria on 11 December 2013. The workshops are part of the global organisations’ joint Anti-Corruption Strategy for the Legal Profession – a project designed to raise awareness of the risks of international corruption on legal practice and offer strategies and toolkits to enable lawyers to address those risks within their organisations. Arranged in partnership with Nigerian Institute of Advanced Legal Studies, this marks the first time these events were held in West Africa. The workshop delegates included senior lawyers from leading law firms that regularly handle business transactions with a cross-border element. Other participants included corporate in-house counsel and public interest lawyers.

Read more about the workshop at tinyurl.com/Anti-Corruption-workshop.

Access to justice: UK pushes ahead with legal aid cuts despite widespread criticism

POLLY BOTSFORD

The issue of access to justice has again been brought to the fore as the UK's Lord Chancellor and Secretary of State for Justice, Chris Grayling, stated that further spending cuts of 17.5 per cent in fees for legal aid announced in the autumn will not be delayed, despite widespread opposition.

As the next round of cuts were announced, the House of Commons Joint Committee on Human Rights (JCHR) launched an inquiry into the impact the legal aid reforms are having, and could have, on access to justice. It will report on this later this year.

The Chair of the JCHR recently urged Grayling to wait until the impact of the first round of cuts introduced in April has been assessed and for its own report on access to justice to be published before implementing further reform. But Grayling tells *Global Insight*: 'We cannot delay our plans for reform.'

The recent round of cuts triggered rallies in London in October as well as the Criminal Bar Association stating that its barristers may refuse to work if and when advocacy fee cuts are enacted – an unprecedented act of defiance. At the same time, the body representing solicitors in England and Wales, the Law Society, faces a vote of no-confidence from its members for having agreed a 'detrimental' deal with the Ministry of Justice (MoJ) to implement 17.5 per cent cuts.

The latest round of cuts follows changes in April that removed legal aid for family and civil cases. The legal community argues that there is no rationale for further cuts. Nigel Lithman QC is chair of the Criminal Bar Association and a barrister at 2 Bedford Row. He says: 'The MoJ refuses to acknowledge that the most recent figures for 2013/2014 show that legal aid has *reduced* by £50m and that (according to figures from the Legal Aid Agency and the Legal Services Commission) since 2009/2010, legal aid has fallen by over £200m so the savings have already been made.'

Grayling tells *Global Insight*: 'Existing savings are not sufficient and legal aid cannot be immune from further review... our savings and efficiencies are not being directed at legal aid alone.'

The detrimental impact on access to justice of the cuts in civil legal aid in April



Lawyers protesting against proposed cuts to legal aid outside the Houses of Parliament, London 22 May 2013. REUTERS/Suzanne Plunkett

has already been felt; there are reports of advice 'deserts' and increases in litigants in person. Tim Soutar, Chair of the IBA's Pro Bono Committee and a consultant at Clifford Chance, says: 'The reduction in the scope of legal aid has made the problem of access to justice even more urgent and lawyers working pro bono are a critical part of softening the blow.'

Criminal advocacy costs are under specific scrutiny as criminal legal aid takes up half the total legal aid budget. Reforms include reducing fees in very high cost cases by 30 per cent and proposed further reductions in the advocacy graduated fee scheme. Lithman says Grayling estimated that 'the savings they want to make in crown court advocacy is £24m. According to media reports, this is the amount G4S are offering to pay back to the Ministry of Justice for over-charging on tagging offenders.'

Criminal barristers argue that no advocates of any quality or experience will be able to sustain these kinds of cuts. Mark George QC is a barrister at Garden Court North. He says that once barristers leave 'they won't come back' and criminal advocacy for the poor will be delivered by a 'lowest-price justice system', which raises serious equality of arms concerns.

Grayling remains unconvinced, citing that he is undertaking a separate review of the provision of independent criminal advocacy – the Jeffrey Review – and that he believes 'part of the future has to include some willingness on the part of the Bar and the legal professions to adapt, innovate, and look at new ways of working.' The response from barristers

is that in that case, wouldn't it be better to wait for the outcome of that review before sweeping cuts are introduced?

The Government has also reduced the scope of prisoners' eligibility for legal aid by, it estimates, 11,000 cases per year, arguing that prisoners should rely on the internal complaints system rather than access to a lawyer. Grayling says: 'I am very clear that we should stop criminal legal aid being given for prisoners unnecessarily. The prisoner complaints system does not... require input from a lawyer.'

Opponents of the changes disagree and argue that this comes at a time of unprecedented change within prisons including budget cuts and that the complaints system is woefully inadequate, particularly where there are disputes of fact.

In its evidence to the JCHR the Howard League argued: 'Even with the help of lawyers, the complaints system has been inadequate to protect prisoners from abuse behind closed doors. The Howard League has represented children and young adults who have been subjected to unlawful punishments, physical restraints resulting in broken limbs, and moves to mental health facilities. Without legal action these would not have been remedied and the abuse would have continued.'

Laura Janes, Acting Legal Director of the Howard League, who gave evidence to the JCHR, adds: 'having appropriate legal advice in prison disciplinary cases strengthens a prisoner's sense of fairness and trust in the system which is vital if they are to be successfully rehabilitated.'

IBA remembers Nelson Mandela, Founding Honorary President of the IBAHRI



In December, the IBA joined the international community in expressing sadness at the announcement of the death of Mr Rolihlahla Dalibhunga 'Nelson' Mandela, Founding Honorary President of the International Bar Association's Human Rights Institute (IBAHRI) and international ambassador for democracy and freedom.

A qualified lawyer, Mr Mandela became the first Honorary President of the IBAHRI, established in 1995 to promote and protect human rights under a just rule of law and the right and ability of judges and lawyers to practise freely and without undue interference. After an IBA-arranged conference of African Bar leaders in South Africa where they met with President Mandela 'in splendid gardens, where the great man was in astounding form... greeting leaders from all over Africa', as Ross Harper, present at the meeting and President of the IBA at that time, said, Mr Mandela agreed to become Honorary President of the newly established entity.

To read the IBA's tribute to Nelson Mandela, see tinyurl.com/IBA-Mandela.

See pages 10–11, 'Friend, client, confidant: George Bizos on 65 years of friendship with Nelson Mandela'.

IBAHRI: looking forward to the year ahead

2013 was a tremendous year for the IBAHRI and 2014 promises to be just as busy, as the Institute continues to strengthen the reach of its activities, working to promote and protect human rights and the independence of the legal profession.

'This year, the IBAHRI will be launching an exciting new programme supporting the Myanmar legal profession' says Baroness Helena Kennedy QC, IBAHRI Co-chair. 'The IBAHRI has recruited a legal specialist to provide technical assistance to the Myanmar Bar on compliance with international standards relating to the independence of the legal profession. The IBAHRI is hosting a legal seminar in Myanmar, in February 2014, providing a platform for information sharing and discussion on the role and future of Myanmar's Bar Association.'

Among other things to expect from the IBAHRI this year are: the launch of IBAHRI fact-finding reports on Egypt and Azerbaijan – scheduled for February and April respectively; the expansion of activity in central Asia, as the IBAHRI seek funds to implement a long-term capacity building programme with the newly established Bar in Tajikistan, following significant engagement with the Tajik legal profession in 2013; and follow-up activity on the IBAHRI's Task Force report Tax Abuses, Poverty and Human Rights.

Speaking on the IBAHRI's work in 2014 so far, IBAHRI Co-Chair Sternford Moyo says: 'Already this year we have published a thematic paper on the rule of law and democracy in Afghanistan and facilitated the first in a series of trainings for judges in Tunisia on human rights in the administration of justice'. He added 'The IBAHRI thematic paper provides fascinating insight on the rule of law in the Afghan context, authored by IBAHRI Director Dr Phillip Tahmindjis AM, who has worked with the Afghani legal profession since 2004.'

The IBAHRI judicial training in Tunisia is part of a major IBAHRI programme, implemented under the auspices of the International Legal Assistance Consortium, which aims to train all judges in Tunisia by the end of 2015.

'We look forward to joining IBA members in Tokyo for the 2014 IBA Annual Conference,' says Kennedy. 'The IBAHRI will, as ever, be hosting a range of sessions on timely and contentious human rights issues relating to the legal profession.'

'Our showcase session will look at human rights in North Korea,' added Moyo. 'The Hon Michael Kirby, Chairman of the UN Commission of Inquiry on human rights violations in North Korea will be joining us for what promises to be a lively and hard-hitting session!'

Look out for our Annual Report, which will be available shortly. In the meantime, should you have any questions relating to the IBAHRI's current and future projects, or on how to become a member, please do contact the IBAHRI at hri@int-bar.org.



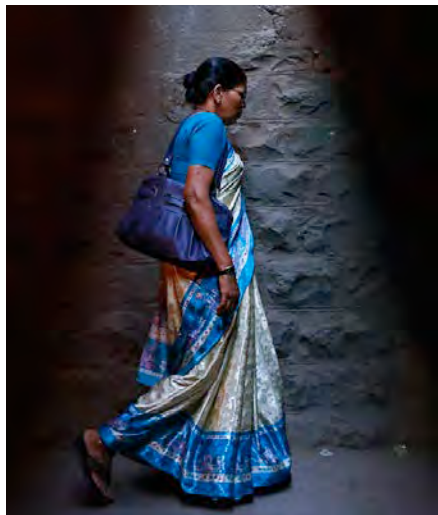
Baroness Helena Kennedy QC, IBAHRI Co-Chair



Sternford Moyo, IBAHRI Co-Chair

India: women, violence and the law – a move to end impunity

HANNAH CADDICK



1 6 December 2013 marked the anniversary of the fatal gang rape and assault on a female medical student on a bus in New Delhi, sparking public outcry throughout India and around the world.

The crime and severity of the injuries are not unusual in Delhi, India, or elsewhere in the world. Sexual violence affects one third of women globally and 'is definitely not,' as former UK Attorney General Baroness Scotland QC said at Chatham House in London in December, 'an issue peculiar to India'.

But such was the public furore, the Indian government amended the Indian Penal Code to tackle the violence against women, passing the new law just 14 weeks after the attack.

There is concern, however, that the Criminal Law (Amendment) Act 2013 has made little difference. A recent report from the United Nations and International Center for Research on Women revealed that 95 per cent of Delhi women feel unsafe in public.

Chair of the IBA Human Rights Law Working Group Ross Ashcroft is clear that 'changes in the law are insufficient to end violence against women, unless they are backed up by adequate long-term permanent institutional and social changes.' And, he says, lawyers 'need to be a part of these changes.'

Vrinda Grover, a lawyer in the Delhi High Court, independent expert for the Working Group on Human Rights

in India and the UN, and women's rights advocate, agrees with many commentators that the new law has its limitations but does believe that, 'this time round, we made a major inroad into... impunity.'

'If any public servant is charged with sexual violence no permission from the executive will be required,' explains Grover, 'they will be charged and tried in the courts.' The Amendment stipulates that rapes committed by police officers or public servants against women in their custody shall constitute a form of aggravated rape, the punishment for which increases from a minimum of seven years' imprisonment to ten (with a maximum of life).

Grover does have concerns about the gender-specific codification of sexual crimes, which means such crimes can only be committed by a man against a woman. This is due primarily to section 377 of the Indian Penal Code, dating back to 1860 and reinstated on 11 December by the Supreme Court of India, which criminalises consensual homosexual acts. According to UK charity Mankind there in 20 men in Britain experience sexual violence. International reports reveal a far higher figure – up to 80 per cent – for men in conflict zones, prisons and the armed forces. India's Penal Code leaves such male victims with no means of redress and, worse, at risk of being criminalised themselves.

Nonetheless, the Amendment's broader definitions of rape and sexual assault, and codification of new crimes including acid attacks, voyeurism and forced disrobing, are seen by campaigners such as Grover to be a vital step forward for female victims.

Procedure, police and addressing impunity

Changes have also been made to the judicial process with the establishment of fast track courts. 'The fact that they set up fast track courts in Delhi is good,' says Aparna Viswanathan, who practises in India and is former Chair of the IBA Corporate Information Governance Subcommittee. 'But these need to be

a permanent mechanism; India has set up fast track courts in the past but they didn't have the proper financing and, in the end, disappeared.'

But before a case of rape or sexual assault even reaches the court, police have to collect evidence and build a case – and this, for Viswanathan, is central to ending the culture of impunity. 'This issue begins and ends with the police. The police have to get forensic evidence – otherwise you will never convict anyone.'

Ashcroft agrees, pointing to the need for psychological services, rape crisis centres and specially trained police to deal with sexual crimes against women, all of which support and strengthen the criminal legislation.

Grover has reservations about the will of the administration to change. 'The change in law happened because the people of the country, led by the women's movement, sought that change; the change did not come because of parliamentarians.'

The public scrutiny in the Delhi gang rape case meant that proper evidence collection and investigation was undertaken. The acid test will be in other, less high-profile cases. 'The police in India are ill-trained, ill-equipped and abusive. There has to be some oversight of how the police are investigating, how they are collecting and saving evidence,' said one source.

Cultural paradigm-shift

According to the National Crime Records Bureau, the first eight months of 2013 saw a rise in the number of reports of sexual violence, suggesting that women have been galvanised by the new law and events surrounding the fatal attack on 16 December 2012.

Rape in India has been viewed as a fate worse than death such is the shame and culture of blame associated with the victim – victims are described as *zinda laash* (Hindu for 'a living corpse') – but the victim of the December 2012 assault said, 'I want to live'. 'This was a paradigm shift for us culturally,' says Grover. 'She wanted to live because she knew she had done nothing wrong.'

Human rights judicial training in Tunisia 2014



The first of ten planned judicial training sessions with Tunisian judges in 2014 took place 20–23 January in Tunis. The training is part of an ambitious IBAHRI programme, run under the auspices of the International Legal Assistance Consortium, to train all Tunisian judges in human rights and the function of judges in a democratic

society by 2015. In 2013, a total of 800 judges were trained by the IBAHRI and its partner organisation CEELI Institute. Training sessions are delivered by a team of three or four international judges, providing a platform for the exchange of professional experience between Tunisian and international justices.

Rule of law and democracy in Afghanistan

The push for democracy is often seen as coming from the West, being exploited by fundamentalists who brand democratisation itself as anti-Islamist' says a new thematic paper published by the IBAHRI.

The paper, written by Dr Phillip Tahmindjis AM, IBAHRI Director, focuses on the challenges and opportunities for democracy and the rule of law in Afghanistan, as well as the role of the legal profession in mediating these challenges. The paper addresses the complexities and fragility in a nation transitioning from conflict.

Entitled *Rule of Law, Democracy and the Legal Profession in the Afghan Context: Challenges and Opportunities*, the paper concludes that the country's fledgling democratic institutions and an under-resourced legal system must be improved. It argues that tradition is outweighing the fragility of new legislation in Afghanistan and customary legal systems still predominate in the provinces. As such, the Afghan Independent Bar Association (AIBA), which represents an increasingly organised legal profession, is playing a crucial role in progressing attitudes to the rule of law and a functioning democracy.

Dr Tahmindjis has worked with the Afghani legal profession since 2004 leading an ambitious project to establish the first AIBA. 'When the IBAHRI first arrived in Afghanistan in 2004, there wasn't even a word for "Bar Association" in the country's two main languages. The IBAHRI ran a large seminar in Kabul to discuss key issues with Afghani lawyers, such as: should a bar association exist? Who should be members? What powers would it have? We wanted the Afghani lawyers to build their own consensus

on what was needed and how the bar would operate. It was essential that this process came from them, in order to be successful,' says the IBAHRI Director.

'The rule of law is ultimately a political ideal and in Afghanistan the concepts of "law" and "democracy" are unclear and highly contested. The push for democracy is often seen as coming from the West, being exploited by fundamentalists who brand democratisation itself as anti-Islamist,' says Dr Tahmindjis. 'What we can learn from this is the necessity for international intervention in Afghanistan to take a nuanced and sophisticated approach, encouraging the building of concepts that are accepted by the populace, rather than only the "peace-builders".'

'Since [its establishment], the AIBA has made tremendous strides: it has a democratically elected executive committee, membership numbers have increased dramatically and it has started to speak out as an independent voice in

Afghanistan on controversial cases. But still, issues of consensus, communication, education and resources, together with traditional values, present real challenges to the Bar.'

Over the past decade the IBAHRI has been working in Afghanistan, supporting the establishment of the AIBA, funded by the Swedish Foreign Ministry and under the auspices of the International Legal Assistance Consortium. The IBAHRI continues to support AIBA with the placement of a legal specialist in Kabul, funded by the UK's Foreign and Commonwealth Office. As well as continuing with capacity building for the Bar, there will now be a focus on revising the Bar exam, developing legal aid initiatives and supporting a women's group to look at the particular problems faced by women in the Afghan legal system.

To read more about the AIBA see tinyurl.com/IBAHRI-AIBA.



Rohullah Qarizada, President of the AIBA speaking at the AIBA General Assembly 2011, Kabul

Friend, client, confidant: George Bizos on 65 years of friendship with Nelson Mandela

REBECCA LOWE

When George Bizos met Nelson Mandela at the University of Witwatersrand in 1948 it was, he says, a 'momentous year'. The National Party had come to power, expanding and codifying racial segregation. Anti-apartheid protests were common. At the time, Bizos – a Greek migrant who arrived in South Africa aged 13 – was a prominent activist, while Mandela was a passionate Africanist. Both were instrumental in leading campus demonstrations against the establishment.

The fellow law students swiftly became great friends. It was a relationship that was to endure for six and a half decades, until Mandela's death on 5 December 2013. Incredibly, says Bizos, over the course of that time they did not quarrel once. 'We were very special friends,' he tells *Global Insight*. 'The friendship certainly enriched my life and the life of my family. He remembered the names of our children, he wanted to know how they were getting on at school and what they wanted to do. He was that kind of friend.'

Described by Mandela as a 'wholly trusted confidant' and 'Uncle George' to his family, Bizos's name soon became inextricably linked with the civil rights movement of the 1950s and 1960s. His first big test came in 1956, when he helped represent 156 African National Congress (ANC) leaders arrested on charges of treason following the publication of the Freedom Charter. The trial lasted four years, at the end of which all were found not guilty.

However, the victory was 'pyrrhic', Bizos says. Shortly afterwards the ANC was declared illegal following the 1960 Sharpeville Massacre, in which 69 black protesters were shot and killed by police. The move prompted Mandela and fellow ANC leaders to establish *Umkhonto we Sizwe* (MK), a military movement that aimed to force the government's hand through acts of sabotage, but without loss of life.



George Bizos (L), 2004 winner of the IBA's prestigious Bernard Simons Memorial Award for the Advancement of Human Rights, Nelson Mandela (R), South Africa, 28 November 2008

In response, the government introduced laws equating sabotage with treason, and bringing in the death penalty. Pre-trial detention periods were extended indefinitely, while political activists were tortured to reveal names of anti-apartheid colleagues.

Finally, in 1963, the top leaders of the ANC were arrested at Liliesleaf Farm near Johannesburg. At the time, Mandela was already languishing in prison following a conviction for inciting workers' strikes and leaving the country without permission, and was brought into the consultation room from Robben Island 'in short trousers and boots without socks'. As leader of the MK, he was charged as 'accused number one'.

'A decision was made that the accused would not deny they were members of the MK, but say that the propaganda was false because one of the preconditions of the violence they embarked upon was that there should be very careful steps taken to avoid causing loss of life,' Bizos says. 'So they turned the tables at the plea stage. When Nelson Mandela was asked whether he pleaded guilty or

not guilty, he said that the government should be in the dock and he had done nothing morally wrong. And that would be their defence.'

By the time of the treason and Rivonia trials, Mandela had matured considerably since his student days, Bizos says. He was less defiant, more conciliatory; yet he retained his youthful vigour and drive. 'At university we were all a little more fiery than we were later in our lives, and Nelson Mandela was no exception. But from the early 1950s he was a solid, non-racialist leader [...]. He became a very mature politician who envisaged a democratic, egalitarian, non-racial society.'

Bizos too had matured. A potent legal mind and tactician, he has been credited with helping Mandela avoid the death penalty by tweaking his famous speech in the dock: he persuaded his friend to add 'if needs be' before the phrase 'it is an ideal for which I am prepared to die'. However, while Bizos concedes he did insert the clause in order to prevent Mandela being seen to embrace martyrdom, he denies it had a decisive influence on the judge. Instead, he says,

Richard Goldstone on Nelson Mandela

Richard Goldstone is a former South African Supreme Court judge renowned for his rulings that undermined the policy of apartheid. In the 1990s, he headed the influential Goldstone Commission investigations into political violence in South Africa, and in 1994 he was appointed the first Chief Prosecutor of the UN International Criminal Tribunals for the former Yugoslavia and Rwanda. He succeeded Mandela as Honorary President of the International Bar Association's Human Rights Institute in 2012 and is currently Co-Chair of the IBA's Rule of Law Action Group.

"Nelson Mandela's enduring legacy is that after three centuries of racial oppression and suffering by the majority of South Africans, reconciliation and a relatively peaceful transition to democracy was possible and has largely been achieved. The overwhelming majority of South Africans could not have imagined it. It was Nelson Mandela's leadership, based on integrity and dignity, which overcame huge odds and achieved the non-racial democracy that we enjoy in South Africa today.

For me personally, Nelson Mandela was the most impressive, dignified and inspiring person that I have ever been privileged to know. Without his support and encouragement, I would not have become involved with international justice or have been privileged to sit on the first Constitutional Court of South Africa.

The key challenge still facing South Africa is to overcome a legacy of inequality and oppression. Those inequalities are most visible in the gap between the rich and the poor. Twenty years of democracy has given rise to a growing black middle class and at the same time little improvement in the economic plight of the mass of our people.

The challenge is to convince South Africans that democratic government can deliver improved and meaningful social and economic benefits."



Professor J Ross Harper, former IBA President meets Nelson Mandela, Johannesburg, November 1995

the death sentence was avoided due to opposition from the UN – the US and UK were particularly concerned about domestic protests should it be imposed, he points out – and the predilection of Judge Quartus de Wet, who had recently erroneously sentenced a man to death and had since developed a newfound aversion to the penalty.

In his zeal for a quick conviction, prosecutor Percy Yutar also neglected to cross-examine Walter Sisulu and Govan Mbeki on their denials that the ANC and MK had adopted a policy of guerrilla warfare, Bizos says – obliging the judge to accept the defendants' testimony. 'When Bram Fischer [lead counsel] drew the attention of the judge to the fact that the evidence was not challenged, the judge said he had to accept it. I think he was looking for opportunities to avoid the death sentence.'

Instead, Mandela and his fellow accused were locked up for life. Bizos became a regular visitor to the prison, and a staunch, unwavering support for his friend. Despite the harsh conditions, Mandela never lost hope over the course of 27 years, Bizos says. And he remained ever a gentleman. On his first visit to Robben Island in August 1964, Bizos recalls the scene. 'He was surrounded by no less than eight wardens. And he said, "You know, George, I haven't been in this place for a long time, but it has led me to forget my manners. I have not yet introduced you to my guards

of honour." And he proceeded to introduce me to each one of them, first name and surname. They were embarrassed and shook my hand, but not in a proper handshake. It showed he hadn't broken his spirit.'

During Bizos's visits, the two friends often communicated through sign language and lip-reading to avoid being overheard by hidden microphones. Mandela regularly advised Bizos to 'keep his nose clean' so he could remain outside jail and defend others – including Mandela's second wife, Winnie, who he represented around 20 times and who avoided prison every time except once. 'This placed a responsibility on me,' says Bizos. 'I was instrumental in defending Winnie when she was charged, which was regularly. And he appreciated that very much. I was happy to be of service to him, a great man.'

Bizos says Mandela was always optimistic of being freed eventually. In anticipation of the 1996 Olympic Games, the two made a pact to go to Athens together to celebrate the 100th anniversary of the first Greek Olympics. 'Sadly it wasn't to be,' Bizos says ruefully. 'Nelson Mandela was released – but Athens didn't get the Olympics.'

Now, following Mandela's death, Bizos hopes the current South African leadership will use the opportunity to take stock and learn from his legacy. While many members of both government and opposition 'claim they are following his footsteps', Bizos believes 'not enough has been done'. 'I believe that they either don't know what his footsteps were or they are kidding some of us by what they are doing, and they must stop doing it,' he stresses. 'They must follow the true legacy of Nelson Mandela, which we know so well.'



Francis Neate, former IBA President meets Mandela, Johannesburg, November 1995

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Hugh Stubbs, 1946–2014



The numerous heartfelt tributes to Hugh Stubbs from former colleagues around the world – including current and past presidents of the Association and honorary life members – leave no doubt as to the measure of his contribution to the IBA, or the high regard in which he is held. He is described variously as an *éminence grise*, a great human being and, by many, as a loyal friend.

Hugh's contribution to the IBA began in earnest in the mid-1980s. Andrew Primrose, former SLP Chair (2001–2002), now an honorary life member of the IBA, worked closely with him. Both were officers in the committees of the Section on General Practice (SGP) and then the Section itself. 'Hugh was a great "doer" which was a huge asset for the SGP and the IBA,' says Primrose. 'He got things done, he prepared well, he ran

efficient, purposeful meetings and followed decisions through at times when it might have been easier not to have done.'

Primrose recalls that Hugh was a passionate believer in the worth of the SGP as a separate section and wanted to see it thrive within the IBA. As a commercial litigator, Hugh could have been an active member of the Section on Business Law (SBL) but chose to devote his energy to the success of the SGP with its emphasis on issues such as access to justice, family law, legal education and human rights. With President Ross Harper and others, Hugh assisted in the launch of the Human Rights Institute (IBAHRI), which now plays such a vital role around the world.

Hugh and Andrew Primrose negotiated over a long period the re-organisation of the SLP and SBL. At times this presented challenges, but led eventually to the present organisation of the Association. Primrose is unequivocal about the contribution Hugh Stubbs made to the Association: 'The IBA has never had such a dedicated, practical volunteer worker.'

IBA President Michael Reynolds echoes this view of Hugh's long-term and unstinting commitment. 'Throughout his professional career as a top English lawyer operating on the international scene, Hugh was wholeheartedly devoted to the IBA and he made an enormous contribution to the Association's work and progress,' says Reynolds. 'He was a highly successful officer. In particular,

he played a great role in the major restructuring of the IBA which took effect in 2004 and we all benefited from his very wise counsel and experience at the time of this crucial reform.'

Stephen Revell is an LPD representative on the IBA Management Board and was a long-time partner of Hugh's at Freshfields. He recalls that Hugh became a partner in 1977 (having joined the firm in 1972) and built a strong litigation practice, which continued until his retirement from Freshfields in 1999. Hugh was always at the forefront of things international at Freshfields including being a key member of its Hong Kong litigation practice for over four years. 'Given Hugh's extensive international connections it was no surprise that upon his retirement he became even more involved with the IBA – an involvement that I know he really enjoyed,' says Revell. 'This enjoyment stemmed not only from his continued interaction with lawyers from all around the world but also a strong sense of "giving back" to the profession that had provided him with such a fruitful career.'

'Hugh's contribution to the IBA was historic'

Jacques Buhart
Honorary life member of the IBA

Keith Baker is an honorary life member of the IBA. As a rising committee officer he soon learnt that 'you didn't mess with Hugh'. For some time, Baker says, he was in awe of Hugh. Two events changed this. Hugh offered to host a meeting of the IBA Charity Trustees at Merchant Taylor's Hall. Non-London lawyers might not be aware of the City Guilds and Livery Companies – English institutions and patrons of the arts, schools and charity. 'We were entertained by The Master – yes, it was Hugh,' says Baker.

'The hospitality was lavish and we were treated to a unique "back-stage" tour after lunch, including a view of the medieval foundations of the Hall. Truly an unforgettable experience.'

Another key event, Baker recalls, came during 2003-2004 when they were both vying with others to become Secretary-Treasurer of the new PPID, 'of course on a very gentlemanly basis'. The Nominations Committee in Washington in 2004 recommended to Council that the post be taken by Bob Stein. 'Hugh and I bumped into each other later in the evening, marking the start of a long night during which a great deal of whisky was consumed by both of us and my perception of Hugh changed forever,' says Baker. 'He continued to serve the IBA in whatever role might be beneficial to the IBA and was the first person to offer Bob Stein, a hugely successful Secretary General of the ABA but then a relative newcomer to the IBA, a crash course on how the IBA worked.'

Baker sums up his view of Hugh Stubbs' contribution and friendship: 'Hugh dedicated a massive amount of his time and his intellect to the IBA and with great vision as to how it might progress, and regardless of personal advancement or the risk to his professional career. For those who were privileged to see a different side to him, as I was, he was a great human being and a loyal friend.'

Akira Kawamura recalls Hugh's role as Secretary-General of the Bar Issues Commission (BIC), a position which he took on voluntarily for seven years. 'He laid the foundations for the great success of the BIC, which all of us now witness,' says Kawamura. 'I know what an important step it was in terms of the growth of the IBA towards the Association it is today. I had the honour of being the first BIC Chair and we need more great wisdom such as his for the continued growth of the IBA as the global voice of the legal profession.'

James Klotz is a former Chair of the BIC. He has been part of the BIC from its infancy and, in that capacity, came to know Hugh Stubbs well. 'I treasured Hugh's wise counsel, was challenged by his insights, and blessed with his friendship for more than ten years,' says Klotz. 'His role

was somewhere between *éminence grise* and "make sure they don't make a mess of it". We quickly came to rely on Hugh [...] the phrase "a gentleman and a scholar" was coined for him [...] when Hugh stepped down as its Secretary-General at the end of my term as BIC Chair, he left the BIC well established, intensely relevant, and immensely grateful for the mark he made on the organisation.'

Michael Reynolds credits Hugh Stubbs with playing a major part in making sure that the Association was set on a firm and successful financial course, in his Assistant Treasurer role

to keep his finger on the pulse from a distance or to travel consistently, and behind the scenes, Hugh contributed considerably to helping to keep the show on the road.'

Neate is clear about what made Hugh's such an invaluable contribution. 'The work of those [review] committees could not have been so successful if their members had not been willing to put aside sectarian interests and work together in the interests of the Association as a whole, an attitude typified by Hugh.'

Jacques Buhart, honorary life member of the IBA, agrees: 'Hugh's

'The IBA has never had such a dedicated, practical volunteer worker'

Andrew Primrose
Honorary life member of the IBA

between 2000 and 2004. 'He was always a delight to work with, always displaying profound wisdom in his sound advice all dispensed with great personal charm and an unfailing sense of humour. At all times, he made time to answer any question from the IBA staff or officers on the basis of his vast experience. He gave his time selflessly to the Association and pursued any task undertaken with enthusiasm, energy and a sharp eye for detail. Throughout my own career at the IBA, right from the beginning, in 1979, he always encouraged me. He was an amusing and entertaining travelling companion in many parts of the world. I personally owe him an immense debt of gratitude and I am sure that goes for many others too.'

Francis Neate is a former President and an honorary life member of the IBA. He worked closely with Hugh on IBA matters for more than 15 years. 'Hugh was always constructive, thoughtful and easy to work with,' says Neate. 'If I wanted to single out one contribution that few would know about, because Hugh did it quietly and without fuss, it was the informal but considerable assistance Hugh gave to Desmond Fernando during the latter's presidency, which coincided with Paul Hoddinott's first years as Executive Director. It was difficult for Desmond

contribution to the IBA has been historic. Without his vision and interest for the IBA as a whole, it would not have been possible to restructure the IBA from the original SBL and SGP structure. Thanks to Hugh we could make the IBA a clearer and more efficient organisation.'

Neate adds: 'I always felt him to be a good and reliable friend. It was friendships like this that, for me, made membership of the IBA so worthwhile.'

Perhaps unsurprisingly, then, the tributes to Hugh have come from far and wide. Kumar Shankardass, former President (1997-1998) and honorary life member of the IBA, based in Delhi, says: 'I recall from long ago with much admiration and respect Hugh's ready and enlightened contribution and cooperation provided to the IBA over the years.' Honorary life member of the IBA Alejandro Ogarrio of Mexico says: '[Hugh was] committed, dedicated and always generous in helping others in any possible way. It is difficult to visualize the launch of the Bar Issues Commission without his full support.'

Hugh Stubbs is remembered with great fondness by all those at the IBA who knew him and worked alongside him. Our deepest condolences go to his family. ☕

Tomas Lindholm, 1953–2014



The sad news regarding Tomas Lindholm – who served as IBA Treasurer from 2003 to 2004 – reached the IBA office in January. Tomas held many positions in the IBA and was extremely influential in its evolution. As well as serving as a Member of Council between 2001 and 2004, he was a member of both the 2003 and 2011 review committees that addressed the structure of the Association.

He was also a leader of the profession in Finland: Tomas counseled and acted for most of the top Finnish corporations. He had the vision to lead his former firm Roschier – a top Finnish-Swedish law firm to which he devoted over 25 years – to become an important player in Northern Europe. After his retirement, Tomas co-founded with his wife Carita his second firm, Lindholm Wallgren, and the development of this boutique firm was going from success to success until interrupted by his illness a year ago.

David W Rivkin, IBA Vice-President, originally worked with him when Tomas was Treasurer of the IBA and Rivkin was Treasurer of the IBA's SBL (just before its reorganisation). 'Tomas was an outstanding person who led in so many ways through his warmth, compassion, intelligence

and character,' says Rivkin. 'He understood beautifully the role of the lawyer: to provide intelligent and practical advice on which clients could rely. As a result, he led the success and expansion of his firm, Roschier, based in Helsinki, to have a global impact. In his final years, he enjoyed doing the same high-quality work with his family firm, Lindholm Wallgren. We were privileged to know

'Tomas was a visionary within the profession and a great supporter of the IBA'

Anne Ramberg
Secretary General of the Swedish Bar Association and IBA Council Member

him and to work with him, and we will miss him dearly.'

Former IBA President Fernando Peláez-Pier says of Tomas: 'We have lost an outstanding individual. Tomas had exceptional qualifications and values as a professional and human being. During all the years we knew each other and worked together, we became good friends and I always admired his capacity to listen, his constructive approach and diplomatic skills. He was a well-recognized and

respected business lawyer in Finland and beyond.

Tomas was a regular attendee of the IBA's Annual Conferences, convening panels and speaking on issues such as globalisation and the challenges it presents for core values of the legal profession; the benefits and burdens of self-regulation; and the risks and threats of corruption.

Peláez-Pier is in no doubt that Tomas Lindholm has made a lasting impact on his profession. 'Tomas is gone but his contributions to the legal profession, including his strong support to our profession's core values, will represent his legacy. The IBA loses a prominent member, who contributed to its development and consolidation as the global voice of the legal profession, as the Council representative for the Finnish Bar, as IBA Treasurer and member of its Board and Council and just as a member. During recent years, I was fortunate to have him as my Vice-Chair in the Task Force which reorganised the IBA regional activities and as my Co-Chair in the second review committee to restructure the IBA. Due to his illness he was not able to attend the presentation of our final report to the Council in Dublin.'

Anne Ramberg, Secretary-General of the Swedish Bar Association and IBA

Council Member, views Tomas as a role model within the profession. 'He was a respected lawyer and a prominent leader of Roschier. As such he was a trusted adviser to Finnish industry. As a former president of the Finnish Bar he was always loyal to the core values of the profession. Tomas was a visionary within the profession and a great supporter of the IBA. Tomas was a very good friend, and a caring father and husband. He will be sorely missed by us all.' ☘



The SEC: new leader, new era?

SEC Chairwoman Mary Jo White vowed the regulator wouldn't kowtow to the finance sector. As she approaches the end of her first year in the role, *Global Insight* assesses how she's done so far as well as current and future challenges.

SKIP KALTENHEUSER

Five years on from the nadir of the financial crisis, marked by the collapse of Lehman Brothers, US job growth is at its weakest since 2010. The bubbling stock market generates little excitement for the vast majority of Americans, whose median income – adjusted for inflation – continues to sink. A recent study by the University of California found that 95 per cent of income gains are going to the top one per cent of the population. The aftermath of the global financial crisis – with financial scandals continuing to emerge and prolonged

economic fragility – has created a pressing need to scrutinise the financial services sector significantly more closely than was the case in the early years of the 21st century. This places SEC Chairwoman Mary Jo White, formerly of Debevoise & Plimpton, well and truly in the spotlight.

There is currently some overlap between the responsibilities of the bodies which regulate the financial services sector in the US. The Securities and Exchange Commission (SEC), which is charged with tasks including investor protection

and fair markets, came under fire when the economy went into crisis in 2008. The conclusions of America's official Financial Crisis Inquiry Commission was damning: 'the SEC could have required more capital and halted risky practices at the big investment banks. It did not.'

To an extent it's unfair to criticise agencies with limited funds and resources, such as the SEC. However, there have been instances in the past where the regulators appear to have ignored warnings of wrongdoing when they were laid at its door. For example, alarm bells over Bernhard Madoff were rung for years by financial fraud investigator Harry Markopolos, before Madoff was finally discovered (see feature, page 19).

'Too big to fail' still a concern

Edward Greene is a former general counsel of the SEC and was a member of the IBA Task Force on the Financial Crisis 2009–2010. He's now senior counsel with Cleary, Gottlieb, Steen & Hamilton. Greene says the SEC faces a two-fold challenge: enforcement and surveillance. Importantly, measuring success based on cases brought, or

Critical to addressing that issue is the ability to resolve or wind down an entity without creating the havoc caused by the Lehman Brothers bankruptcy. In that regard, the single point of entry approach pioneered by the Federal Deposit Insurance Corporation, and now under active international consideration, is an important step for the SEC to take in dealing with too big to fail. By concentrating debt and equity at the holding company level, Greene believes the holding company regulator can intervene to restructure debt and equity and to oversee the sale, continuation or winding down of the financial institution and of its subsidiaries, wherever they are located. The hope is that this approach will lessen the incentive for regulators to ring fence the assets and liabilities of subsidiaries doing business in their jurisdictions.

Steve Hall, a securities specialist with Better Markets, the not-for-profit independent Wall Street watchdog, is alarmed at the pressure on Congress to cut the budget of agencies such as the SEC and the Commodity Futures Trading Corporation (CFTC), after staggering

'The SEC could have required more capital and halted risky practices at the big investment banks. It did not'

Financial Crisis Inquiry Commission

finances imposed, is not the best way to assess the SEC's effectiveness, he argues. Greene would encourage the SEC to focus on coordination with other foreign regulators, to address the challenges of conducting cross-border business in the new regulatory environment. In that regard, harmonising critical regulations with Europe remains important, says Greene, as well as coordination as to the appropriate way to regulate money market funds which, unlike bank deposits, are not insured. Greene also points to a need to determine the forms of enhanced regulation required, as both bank and non-bank financial entities are currently designated as posing systemic risk to domestic and global markets. The Financial Stability Oversight Council has designated three such entities posing enhanced risk to the US financial markets, and the Financial Stability Board has designated 29 banks and nine insurance companies posing such risks globally.

'Too big to fail' remains a key concern for the SEC and other regulators, says Greene.

responsibilities have been heaped on them. The SEC is getting \$325m less than it requested. In terms of a cost-benefit analysis, funding of regulators should be considered in the context of the overall cost of the financial crisis, which has been put at many trillions of dollars in the US alone. A regulator tasked with policing the kinds of practices that lead to such a huge cost to the nation, should probably be allocated a budget that will genuinely enable it to prevent such a catastrophe from happening again.

The SEC whistleblower programme brings in tips as to wrongdoing to be investigated. More attention needs to be paid to the extent to which funding cuts will limit its capacity to follow up these leads – an inability to act for which it may later find itself being criticised. Funding issues were underscored in mid-January when Congress took away half the \$50m the SEC had set aside for technology initiatives targeting illegal trades and accounting fraud, a vital investment to make in an era of high-speed trading and mystifying algorithms.

Dark pools of liquidity

Another worry is so-called dark pools of liquidity: large anonymous trades offered away from public exchanges through electronic trading. Their impact on the market is skirted by concealing the identities of those involved and the size of the trade, until it's filled, with prices agreed by the players in the dark pools behind closed doors, thereby limiting market transparency. These pools, with operators including Goldman Sachs, Barclays and Credit Suisse Group AG, are now significant, estimated by the Tabb Group as constituting 13 per cent of daily trading. Shah Gulani, an author with Money Morning financial newsletters, questions why the SEC isn't tougher on related matters, such as sharing confidential client trading information with dark pool trading units and manipulating prices on public exchanges to influence trades in dark pools. Gulani has written that he believes some dark pool operators are market-makers, trading for themselves based on the order flow from big customers, who think those orders are 'blind'. Greene believes we need to continue to actively monitor how much trading takes place in dark pools and its effects on the public markets, as well as the continuing impact of high frequency trading.

New leader, new era?

So, amidst these multiple challenges, has the perception of the SEC changed under the leadership of its new chair, Mary Jo White? White's been there nearly a year, and many observers retain an open mind on her leadership and see positive signs. Greene gives her very high marks; he believes that she is 'a strong, independent leader and will help the agency deal effectively with the multiple challenges it faces in an increasingly international world.'

There is some concern amongst commentators that White may not be as tough in practice as she suggests. Akshat Tewary, cofounder of the public policy group Occupy the SEC, worries that after White said the SEC wouldn't kowtow to finance sector pressure, there has been a tendency to allow smaller banks to engage and trade in riskier products. Nevertheless, Bart Naylor, a financial policy advocate for Public Citizen, sees more positive action from the SEC under White than under her predecessor, Mary Schapiro, whom he felt was intimidated by cost-benefit analysis attacks. Naylor applauds White's stated intention to make companies that settle with the SEC publicly admit guilt of wrongdoing, or face litigation. He does worry, however, that White moved too quickly on the JOBS Act - a law

intended to encourage funding of United States small businesses by easing various securities regulations — without examining alternatives. Greene feels that the JOBS Act was an executive response that did not involve the SEC in a significant way in its development and which adopted controversial ad hoc changes to how capital can be raised domestically. He would have preferred to see a special study, comparable to one done in the 1960s, as to how the markets could be improved, especially in light of the growing amounts of capital raised on a cross-

'[Mary Jo White] is a strong, independent leader and will help the agency deal effectively with the multiple challenges it faces in an increasingly international world'

Edward Greene,
Former General Counsel of the SEC
and a member of the IBA Task Force on
the Financial Crisis, 2009–2010

border basis. Greene sees basing proposed regulatory changes on such a study as preferable to the ad hoc approach taken with the JOBS Act.

In terms of its implementation of Dodd-Frank reforms, Hall notes that the SEC is lagging behind the CFTC, including in the derivatives space. Assessing the status of these reforms can be difficult, as they continue to be attacked on various fronts, including in court, where Hall says the scorecard has been mixed. Tewary is encouraged by the aim of enhancing enforcement authority under the Volcker Rule, which comes under the Dodd-Frank reforms. But, he's concerned that loopholes peppered throughout the final rule will have to be watched carefully. ☒

Skip Kaltenheuser is a freelance journalist based in Washington. He can be contacted at skip.kaltenheuser@verizon.net



Red flags flying

In 2008, former NASDAQ chairman Bernard Madoff admitted that his wealth management business was the biggest Ponzi scheme in history – having defrauded investors of \$18bn – and the shocking impact has reverberated around the finance world since. So how could it happen and who's responsible for ensuring it doesn't happen again?

BEN COOK

How safe is the money you've invested? If you ploughed it into a scheme that promised no-risk 'guaranteed returns' of more than ten per cent per year, you really should go back and check out the credentials of the organisation to which you have entrusted your cash. Why? Well, according to fraud experts, investment schemes that make such promises bear the hallmarks of a Ponzi scheme. It's virtually impossible for financial regulators to

detect every scam designed to dupe investors, so lawyers are frequently called in to clean up the mess when fraudsters are uncovered.

Ira Nishisato, a partner at Canadian firm Borden, Ladner Gervais, and Vice-Chair of the IBA's Litigation Committee, says that there are an increasing number of remedies made available by legislatures, regulators and the courts for victims of Ponzi schemes and that the onus is on lawyers to be creative in adopting a strategy that

best suits the case in question. He adds that it is also vital that when developing these strategies, lawyers work in partnership with the other interested parties. 'Ponzi schemes challenge lawyers to deploy the full range of remedies available across multiple areas of law and indeed across jurisdictions,' he says. 'Counsel must work collaboratively with trustees, regulators and other officials, to design and execute on the most effective recovery strategies – counsel need to be innovative in every case and tailor remedies to the circumstances.'

Untangling the web of deceit associated with Ponzi schemes can be fiendishly complicated, and ultimately, a host of professionals who come into contact such schemes are in danger of being held liable.

So what exactly is a Ponzi scheme? Kathy Bazoian Phelps, a partner in the Los Angeles office of Diamond McCarthy and author of two books on Ponzi schemes, defines them as a 'fraudulent arrangement in which investors are promised returns, but there is no underlying legitimate business generating the promised returns – rather, returns that are paid to earlier investors are funded by after-acquired funds from later investors'. The US Securities and Exchange Commission website says that the organisers of Ponzi schemes often solicit new investors by promising to invest funds in opportunities 'claimed to generate high returns with little or no risk'. It adds: 'In many Ponzi schemes, the fraudsters focus on attracting new money to make promised payments to earlier-stage investors to create the false appearance that investors are profiting from a legitimate business.'

A brief history lesson: Ponzi schemes are named after Charles Ponzi, an Italian conman who ran such a scheme in the US in the 1920s. In her book *Investment Ethics*, Sarah Peck explained that Ponzi got the idea for the scheme when a friend from Spain sent him a letter containing a reply coupon that cost one cent in Spain but could be redeemed for a six-cent stamp in the United States. Peck continues: 'Ponzi recognised the arbitrage opportunity. Arbitrage involves taking advantage of different prices for the same commodity in different markets. Ponzi realized he could purchase reply coupons for one cent in Spain and redeem them for a six-cent stamp in the United States and make five cents.' Ponzi seized the opportunity. He decided to offer investors a 50 per cent return in only 45 days, with the result that demand for coupons quickly outstripped supply. But this didn't stop Ponzi, who had a lavish lifestyle to fund. He stopped investing in the redemption coupons and instead paid off the early investors with funds from new investors. In the

meantime, he skimmed off some of the cash for himself – within a few months, Ponzi had more than \$20m.

Perhaps the most famous Ponzi scheme in more recent times was that dreamed up by Bernard Madoff. In what has been described as the largest such scheme in history, Madoff – who was sentenced to 150 years in prison – defrauded investors out of a total of £18bn. Other high profile Ponzi schemes include that run by Allen Stanford, who was convicted by a court in Texas in 2012 for swindling a total of \$7bn out of around 30,000 investors. Meanwhile, in 2009, Minnesota businessman Thomas Petters received a 50-year prison sentence for running a \$3.65bn Ponzi scheme.

Making the impossible possible

So how is it possible for Ponzi schemes to happen? Robert Morfee, a consultant in the litigation team at Clarke Willmott who is representing victims of a £10m Ponzi scheme run by a Scottish company called Cameron Farley, says such schemes are an 'easy fraud to commit'. He adds: 'The fundamental problem is human psychology – you have a fraudster who is a sociopath with no conscience and who can lie convincingly and convince others that they are genuine. Meanwhile, the investor is greedy and wants to think he is clever. Investors often don't believe

*'Investors
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Anti-money laundering
regulations are not adequate
and regulators are not timely or
aggressive enough'*

Dion Hayes
McGuireWoods

Ponzi schemes: lawyers in the firing line

Lawyers are often deemed to be the 'gatekeepers' of Ponzi schemes, according to Kathy Bazoian Phelps, a partner in the Los Angeles office of Diamond McCarthy, author of *Ponzi-Proof Your Investments: An Investor's Guide to Avoiding Ponzi Schemes and Other Fraudulent Scams*, and co-author of *The Ponzi Book: A Legal Resource for Unravelling Ponzi Schemes*. 'If representing the fraudster, a lawyer who did not detect and stop the fraud could become the subject of a malpractice action,' she says. 'Worse yet, if that lawyer knowingly prepared false private placement memorandum or other documentation upon which defrauded victims relied, they could become the subject of fraud or aiding and abetting allegations.' Phelps adds that lawyers may also be subject to fraudulent transfer claims for recovery of fees paid to them depending on the facts and circumstances of a case.

In addition, lawyers representing investors may also run into problems if their clients sought their opinion in the process of vetting an investment product and the lawyer failed to detect the fraud, according to Phelps. 'Lawyers must remain diligent in independently verifying the product and the information being provided to their clients by the promoter of the investment programme,' she says.

How can lawyers minimise the risk of falling victim to a Ponzi scheme?

'Some things that lawyers can and should do to best protect themselves and their clients are: call the company's auditors; review financial statements, bank statements and tax returns; ask to see the books of the company and compare the business model to the market; conduct background checks of key personnel; check with regulatory agencies to verify licences and registration of brokers and other key figures.'

they have been cheated.

They are at first disbelieving and say the police have stopped the business.'

Morfee adds that the Cameron Farley scheme was allowed to flourish because the UK's Financial Services Authority (FSA) – as it was then known – was inadequate when it came to investigating unauthorised financial advisers, though Morfee acknowledges that the regulator has 'beefed up its resources' in its new guise as the Financial Conduct Authority (FCA).

Dion Hayes, a partner at McGuireWoods who spoke at a session on Ponzi schemes at the IBA's Annual Conference in Boston, says greed on the part of investors is one of the major factors in Ponzi schemes. 'Investors are chasing high returns and they are ignoring red flags – in a good economy, people are not shocked by [promises of] high returns, while in a bad economy, people take bigger risks,' he says. Hayes adds that anti-money laundering regulations are ineffectual when it comes to eliminating the

risk of Ponzi schemes.

'Anti-money laundering regulations are not adequate and regulators are not timely or aggressive enough – there

is also a reliance on banks to enforce them, but banks have

a desire to be cooperative with good customers.' Hayes also argues

that the banks that did business with Madoff, for example, 'lent legitimacy' to

his scheme. Similarly, the orchestrators of

Ponzi schemes often seek to attach themselves to political parties to appear more legitimate, Hayes points out. He cites the examples of Madoff, who was a donor to the US Democratic Party, and Scott Rothstein – sentenced to 50 years in prison in 2010 for running a \$1.4bn Ponzi scheme – who provided funding for both the Republican and Democratic parties.

One London-based lawyer, who wishes to remain anonymous because of his role representing one of the parties involved in litigation relating to the Madoff case, says banks need to ask more questions of the individuals and businesses they are dealing with in an effort to ensure their activities are legitimate. He adds that the recent fine imposed on JP Morgan in relation to the Madoff scam should 'improve sensitivity' to this issue – the US Attorney for the Southern District of New York, Preet Bharara, imposed a fine of \$1.7bn on the investment bank in January this year for violations of the Bank Secrecy Act, a federal law that requires banks to alert authorities to suspicious activity.

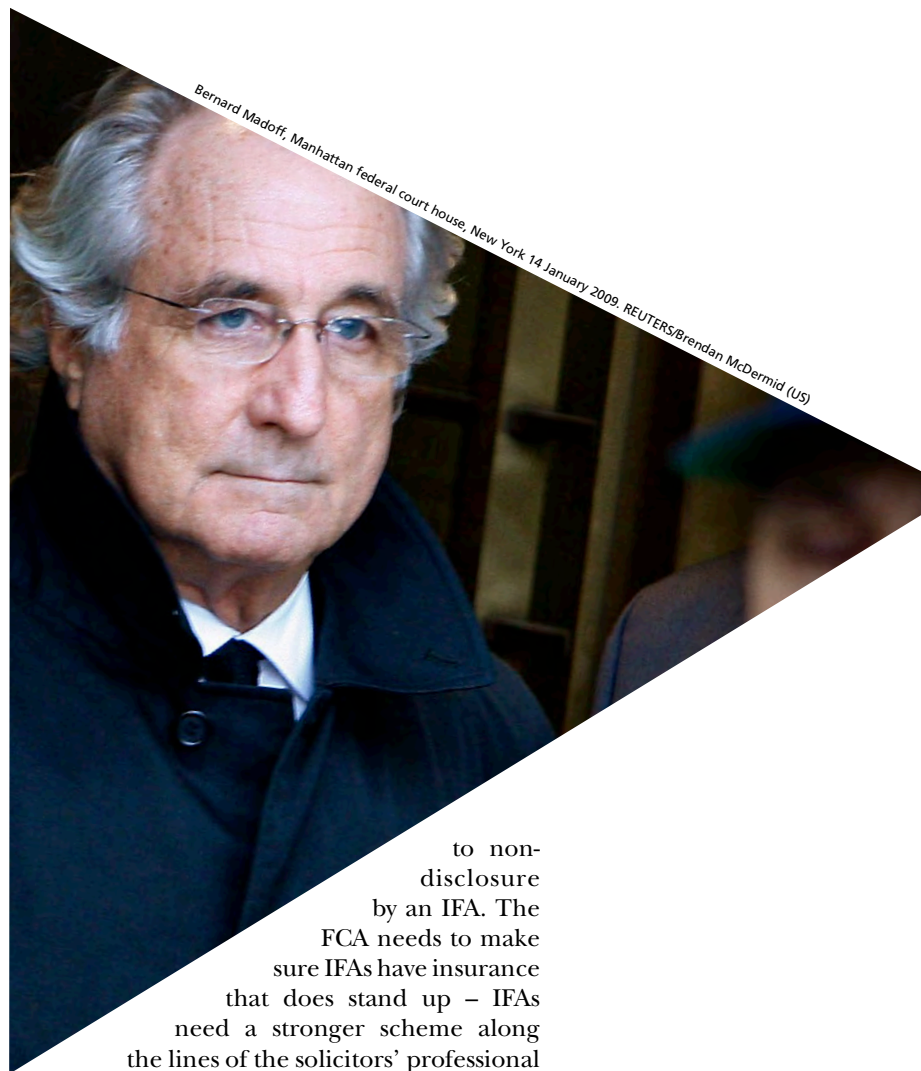
No such thing as zero risk

However, Roger Buffington, managing partner at California-based Buffington Law Firm, says fraudulent investment schemes will always be established and that it is a mistake to believe that government regulation will eradicate the problem. He adds: 'Most government regulators are lawyers who do not understand trading very well and do not understand why Ponzi schemes are often fraudulent.' Buffington says Ponzi

schemes have certain universal identifying traits such as a promise of a guaranteed return at zero risk, as well as a return of more than ten per cent per year. 'No investments have zero risk,' he says. 'Any guaranteed return is a huge red flag.' Buffington also points out that another key characteristic of Ponzi schemes is that the victims are unable to articulate what it is that the investment programme does that results in such good and risk-free returns. In addition, Buffington explains that if a Ponzi scheme organiser refuses to immediately return a large portion of an investor's money, they often say they will be able to do so imminently because other investors are going to be putting in funds. 'This is an explicit admission that investors are getting their money from newer investors – the precise definition of a Ponzi scheme.'

So, if Ponzi schemes cannot be eradicated altogether, how can the risk of investors falling victim to such a scam be minimised? Phelps, who has written a book called *Ponzi-Proof Your Investments: An Investor's Guide to Avoiding Ponzi Schemes and Other Fraudulent Scams*, says the onus is on investors to verify the credentials of the scheme. 'Investors must assume responsibility for conducting due diligence and vetting the investment products in which they choose to place their money – most frauds can be detected with the right questions and independent investigation.' Phelps argues that while governmental regulatory agencies exist for the protection of investors, it is impossible for them to be aware of every investment programme and product. 'The agencies establish licensing and registration requirements to ensure that certain standards are met, and they investigate frauds that are brought to their attention – if investors do not even check with those agencies to attempt to verify licenses, then neither the investors nor the agencies are made aware of the problem until it is too late.'

Morfee says one of the problems with fraud cases involving Ponzi schemes is that the civil courts are pretty powerless in terms of obtaining redress. 'What's lacking is sufficient opportunity for victims to inflict punishment – the civil courts are impotent against fraudsters,' he says. 'It's important the law offers compensation and deterrence – we don't prosecute fraud very well, the civil courts are not up to it, that could be looked at, the consensus is it should be dealt with in the criminal court rather than the civil court, but I don't think that is the complete answer.' Morfee also argues that the UK's Financial Conduct Authority needs to ensure independent financial advisers (IFAs) have more robust insurance policies. He says: 'Insurance policies are not always as protective as they could be – they can be avoided [by insurers], for example due



to non-disclosure by an IFA. The FCA needs to make sure IFAs have insurance that does stand up – IFAs need a stronger scheme along the lines of the solicitors' professional indemnity scheme, otherwise fraudsters can always escape via bankruptcy.'

With regard to the Cameron Farley case, Morfee – who is representing more than 300 clients who lost money as a result of the scheme – is proposing to claim back losses from two bodies that, in his opinion, let investors down, namely Gain Capital and HM Treasury. In Morfee's view, Gain Capital, a foreign exchange platform that traded in the UK through Cameron Farley, did so without being properly authorised. 'I do not believe that Gain, which knew about UK regulation, and which received millions of pounds of investors' money from Cameron Farley, ever bothered to check if Cameron Farley were authorised.' Morfee says HM Treasury also let down investors in Cameron Farley. 'The responsibilities for ensuring compliance with EU law, which regulated these matters, lies with the Treasury – it is permissible under EU law, in certain circumstances to sue the Government for not implementing or enforcing EU law.' Morfee says that the FSA visited Cameron Farley's offices in April 2007 and discovered what was going on, but failed to close the business down until September 2008. 'The FSA knew exactly what Mr Farley was doing, yet did nothing for years,' Morfee says. 'In the meantime, members of the

public had continued to 'invest' with Mr Farley and significant amounts of their money were lost.' Consequently, a claim has been issued against HM Treasury on behalf of Cameron Farley investors who lost money. Meanwhile, Gain has applied to strike out the claim against it on the grounds that the claimants are bound to lose – the judge's decision on Gain's application is expected by mid-February 2014.

A rare case of full recovery

In addition, Michael Hales, a partner at Australia-based Minter Ellison, and Co-Chair of the IBA Litigation Committee, says it is vital that, if a Ponzi investigation encompasses a number of jurisdictions, the legal teams in each jurisdiction work in tandem and coordinate any action. 'You can't have someone jumping the gun in one jurisdiction,' he says. He cites the example of freezing injunctions in, say, three jurisdictions: if a freezing injunction is obtained in one of the jurisdictions before similar injunctions are secured in the other two, the money in the remaining two jurisdictions may be removed. 'Teamwork is important – working with accountants and other professionals in jurisdictions such as the Cayman Islands and Luxembourg, where these schemes often occur – if you don't do this, you risk delaying uncovering the fraud or you risk not finding the money at all.'

Hayes says Ponzi schemes present a number of challenges and opportunities for lawyers. 'It's work intensive and involves significant investigation,' he says. Hayes adds that in addition to handling litigation, lawyers need to investigate insurance policies and possible aiders and abettors, for example banks. Another difficulty is that lawyers seeking to recover money for creditors can find themselves competing with criminal forfeiture funds in a battle to recover cash.

Potential liability 'lurks just about everywhere' in Ponzi scheme cases, according to Phelps.

In the case of the Rothstein Ponzi scheme – which was valued at \$1.4 billion – a number of parties, including lawyers, could potentially be held liable. In

August 2013, the Federal Bureau of Investigation confirmed that two lawyers – Douglas Bates, who was a partner at Law Offices of Koppel and Bates, and Christina Kitterman, who worked at Rothstein's firm Rothstein, Rosenfeldt and Adler (RRA) – had been arrested and charged with conspiracy to

commit wire fraud, in violation of Title 18, United States Code, Section 1349. Meanwhile, in April 2012, a judge ordered the Lexington Insurance Company, which provided liability insurance for RRA's accountants Berenfeld Spritzer Shechter & Sheer, to pay \$10m to Razorback Investors and an RRA trustee. Hayes says there is 'projected to be full recovery' of the losses in the Rothstein case, though he acknowledges that full recovery of losses in Ponzi cases is rare.

David de Ferrars, a partner at Taylor Wessing, who has been acting for the 'trustee in bankruptcy' of Madoff's former company since 2010, says anyone involved in a Ponzi scheme could be held liable for losses, and that could include directors of the company organising the scheme or banks that transacted funds. De Ferrars adds that, in English law, anyone who is found to have provided 'dishonest assistance' to the organisers of a Ponzi scheme, or is found to have been in 'unconscionable receipt' of funds, could be held liable for losses. Dishonest assistance refers to instances where a non-trustee becomes personally liable for breaches of trust committed by one or more trustees – liability arises where the non-trustee is an accessory to the breach of trust (whether by inducing or assisting in the breach) and has acted dishonestly. Meanwhile, unconscionable receipt means where a person receives trust property in the knowledge that the property has been passed to them in breach of trust, the recipient will be personally liable to account to the trust for the value of the property passed away.

Indeed, the finger of blame for Ponzi schemes could ultimately be pointed at any number of individuals. Phelps says: 'A varied cast of characters may also be on the hook for roles that they may have played during the duration of a Ponzi scheme. These potential targets could be individuals or entities either inside or outside of the Ponzi scheming organisation, such as: officers, directors, attorneys, auditors, sales people, and financial institutions.' She adds that there is a considerable range of offences that could be pinned on individuals involved in running Ponzi schemes. 'There are a wide variety of legal theories that can be used to seek recovery from third parties, such as breach of fiduciary duty, fraud, negligence, aiding and abetting, or securities violations, just to name a few.' But, ultimately, liability for the losses associated with a Ponzi scheme will depend on the individual circumstances of each case. Phelps says: 'Recipients of property from the Ponzi schemer have a few possible defences available to them, such as the good faith value defence, so potential liability has to be examined on a case-by-case basis.' ☒

Ben Cook is a freelance journalist. He can be contacted at ben.cook@hotmail.com

'Teamwork's important – working with other professionals in jurisdictions where these schemes often occur – if you don't, you risk not finding the money at all'

Michael Hales
Minter Ellison; Co-Chair, IBA Litigation Committee



Homeless Syrian children on a street in Beirut, 22 July 2013. The United Nations Children's Fund (UNICEF) said as many as 800,000 Syrian children are missing out on education because of the country's civil war.

REUTERS/Jamal Saidi

The unbearable crisis

The crisis in Syria is putting unsustainable pressure on its neighbours – Iraq, Jordan, Lebanon and Turkey. With public services swamped by refugees and local tensions rising, *Global Insight* reports on Lebanon, a country bearing an impossible burden.

REBECCA LOWE

Imagine if civil war broke out in Mexico and 100 million civilians were forced suddenly to flee to the US for asylum. What would the reaction be from the government and locals? Would entry be permitted? Would the newcomers be greeted with open arms and offers of refuge? Perhaps. Or perhaps the initial humanitarian impulse would turn swiftly to public resentment, and the fleeing multitudes told politely but firmly to go elsewhere – Guatemala, maybe, or Belize.

If this scenario sounds fanciful, spare a thought for the population of those countries neighbouring Syria. Since the conflict began, up to 1.3 million refugees have fled to Lebanon, swelling its population by a third. According to World Bank estimates, a further 300,000 to one million could descend on this tiny sliver of a country by the end of the year.

While the international community wrings its hands and locks its doors, Lebanon has done the opposite. The border has been kept open, while households have shown extraordinary hospitality to their beleaguered neighbours. Yet signs of strain are evident: public services at breaking point; refugees competing with their hosts for jobs and resources; social tensions rising. Meanwhile, sectarian conflicts between pro- and anti-Syrian forces continue to escalate across the country.

As hostilities intensify, refugees are particularly vulnerable to arrest and ill-treatment within a criminal justice system riddled with corruption and abuse. 'Some judges are independent, but not the judiciary,' says Chawkat Houalla, Managing Partner at Adib & Houalla Law Office, in Tripoli, Lebanon, and Advisory Board Member of the IBA's Arab Regional Forum. 'We have a lot of political intervention, even with the criminal courts. And you can feel the power of money.'

Lebanon has declined to ratify the 1951 Refugee Convention and 1967 Protocol, leaving the legal status of Syrians fleeing civil war undefined. Instead, it relies on a series of ad-hoc provisions to ensure their welfare and security – provisions that could be changed or revoked at any time.

'This is definitely the worst refugee crisis not only in the history of Lebanon, but in the history of any country of its size,' says Dominique Tohme, Head of the Legal Unit at the Office of the United Nations High Commissioner for Refugees (UNHCR). 'How long can people endure such a difficult situation? Lebanon's capacity has reached its maximum.'

A makeshift life

Tohme is not exaggerating Lebanon's plight. Between December 2012 and 2013, the number of Syrian refugees registered by UNHCR increased by 700 per cent, to around 860,000. However, the World Bank puts the real total far higher. Around 200,000–400,000 people are believed not to have registered, perhaps because they entered the country illegally or have sufficient funds to live without assistance.

Unlike Jordan and Turkey, which between them have taken on around 1.2 million Syrians, Lebanon has not established official refugee camps. Still smarting from 1948, when Palestinians arrived in droves and later contributed to the 1975–1990 civil war, the country has long enjoyed an uneasy relationship with foreign arrivals.

With its fragile factional balance of Christian, Shia and Sunni (see **timeline, page 28**), Lebanon's concerns are not misplaced. Yet without centrally organised camps, Syrians have been forced to build flimsy makeshift shelters and hunker down in any accommodation they can find. Refugees can now be found in 1,500 territories across the country, the majority in the poorest regions in the Bekaa Valley, north and south.

'Refugees are suffering a terrible life,' says Lebanese politician Nayla Moawad, widow of former Lebanese President Rene Moawad. 'But we often don't know where they are or how to find them. Already people are saying, not jokingly, if we don't die of bombs, we'll die from the lack of hygiene. It's a tragedy.'

'This is definitely the worst refugee crisis not only in the history of Lebanon, but in the history of any country of its size [...]. Lebanon's capacity has reached its maximum'

Dominique Tohme
Head of the Legal Unit, UNHCR

Around 120,000 refugees are currently believed to be living in tents without proper heating or sanitation. Through the Rene Moawad Foundation, established to uphold social justice and economic development, Moawad has been helping the UNHCR conduct a countrywide polio and tuberculosis vaccination campaign for Syrian children. But as the winter drags on, refugees are becoming harder to assist.

George Cody, Executive Director of the American Task Force for Lebanon, visited two camps in the Bekaa Valley in April 2013. What he saw shocked him. 'Sanitation was execrable,' he says. 'There was open defecation and people had scabies and boils on their faces. In the drinking water barrel we found flotsam and debris. It was terrible.'

Maximising funds

Under customary international law and global covenants on human rights and torture, every country has an obligation to uphold refugee rights. However, Lebanon has no domestic legal framework that addresses refugees. Instead, it relies on a Memorandum of Understanding with the UNHCR, which outlines how Syrians will be identified and legitimised while a long-term solution is found.

'In the absence of a clear commitment by the government to protect refugees' rights, there is still uncertainty,' says George Ghali, project officer at the Association Libanaise pour l'Education et la Formation (ALEF), a Beirut-based human rights organisation. 'We don't know when a judge might issue a deportation order. We don't know when the government might implement these decisions. The absence of a legal framework allows Syrians to be targeted and victimised, with no way to defend themselves.'

Under international law, refugees fleeing conflict zones cannot be designated illegal

immigrants. In Lebanon, however, the 15 per cent of Syrian refugees believed to have entered through unofficial crossings along the porous 130km border are vulnerable to arrest. Many more fall into illegality because they cannot afford the \$200 fee to renew their residency permits after a year. While official statistics are unavailable, ALEF estimates that around 6,000 refugees have been detained after entering the country 'illegally'. The UNHCR suspects 'a rather large number' of refugees have been arrested and released without charge, but has only been alerted to 130 cases of detention since October 2012.

There have also been reports of border officials turning back Syrians without valid IDs at the border, after which they are unable to return for a month. According to ALEF, Palestinians – who enjoy few legal rights in Lebanon – are routinely being denied entry from Syria, though UNHCR says it has no knowledge of this.

Despite these concerns, Lebanon has made it clear that no refugee is currently at risk of being deported; even those who have committed crimes. It has also declined to close its border, unlike Turkey and Jordan, and has revoked the normal visa requirements. Most impressively for a struggling country with weak infrastructure, it has permitted 100,000 Syrian children to enter its school system, instantly doubling class sizes.

'Lebanon's unwillingness to sign the Refugee Convention is unfortunate,' says UNHCR Lebanon representative Ninette Kelley. 'But their response to the Syrian situation has been

incredible. I cannot think of a single time in history when so many refugees in proportion to a country's size have been admitted freely like this.'

With few public services in Lebanon, the UN-affiliated aid agencies have their work cut out. Currently, they provide food and fuel coupons, hygiene kits, stoves and plastic sheeting. They also subsidise health services, though thousands continue to fall through the gaps. Healthcare in Lebanon is expensive even for Lebanese, and subsidies are targeted towards pregnant women, children and the elderly. Food supplies are also limited: following a reassessment in May 2013, 28 per cent of recipients were cut from the programme.

'It's a big concern because we know we'd be unable to assist a child who has cancer,' says UNHCR Lebanon spokesperson Dana Sleiman. 'If we were to cover this child, we wouldn't be maximising our funds, because for the cost of this treatment we could have covered 100 children with other healthcare needs.'

Shocked and revolted

Lebanon has called with increasing urgency for help from the international community. Yet the response has been disappointing. Wealthy neighbours Saudi Arabia and Qatar have remained quiet. European countries have seemed more inclined towards military intervention than providing asylum. Despite a UN call for 30,000 permanent visa places to be made available for Syrians, European Union states have only agreed to take 18,300 refugees for both temporary and permanent resettlement between them: less than one per cent of the total.

In Greece, refugees are not only denied entry but treated with shameless brutality. According to Amnesty International, refugees reaching the country's shores have been beaten, robbed and pushed back to sea. Since August 2012, at least 130 refugees have lost their lives attempting to reach Greece from Turkey.

Instead of taking on refugees, the international community has made cash donations. The US, EU and Kuwait have all given generously, and without them there is no doubt aid efforts would have failed. Yet the last \$1.7bn UNHCR appeal was only 51 per cent funded, and December's \$1.89bn follow-up is currently only six per cent funded. Saudi Arabia, Brazil, China and Russia have all proved particularly tight-fisted.

Julia Onslow-Cole, Head of Global Immigration at PwC and Vice-Chair of the IBA Global Employment Institute, highlights the logistical complexity of resettling large numbers of refugees, many of whom may lack ID documents or be separated from their family. But countries across the world must increase their commitment to Lebanon and its neighbours, she stresses. 'Given the scale of the crisis, it is important that there is a

'The absence of a legal framework allows Syrians to be targeted and victimised, with no way to defend themselves'

George Ghali

Project officer, Association Libanaise pour l'Education et la Formation



Some 60 Syrian refugee families sheltering at a mosque in Lebanon. UNHCR/M. Hofer/November 2013

combined international response, which involves both offering to resettle some refugees, whilst providing funds and resources to the countries most affected by this influx.'

'Lebanon feels it is alone in this crisis,' says Ghassan Moukheiber, Rapporteur of Lebanon's Parliamentary Human Rights Committee. 'Assistance is coming, but it is still way below our needs. Relief needs to address the refugees, but also the communities that are supporting them. People are living in terrible conditions. It is an unbearable situation.'

Moawad is more forthright. 'We have been flabbergasted by the lack of reaction from the international community,' she says during a phone conversation, her voice trembling with frustration. 'It is so shocking, but nobody seems to care. I am simply revolted. It is unbearable, really.'

New anger, old animosities

Unbearable is the word. According to a September 2013 World Bank report, the Syrian conflict has put Lebanon's public finances 'under severe and rapidly escalating strains, unsustainable given Lebanon's initial weak public finances'. Nearly 30 per cent of Lebanese live on less than \$4 a day, and the conflict may push a further 170,000 into poverty by the close of 2014, the report states. The total fiscal impact is estimated at \$2.6bn, with a further \$2.5bn needed to return public services to their pre-crisis levels.

Contributing to the country's woes is a growing tide of social tension. Content with far lower wages than the Lebanese, Syrians are gradually pushing their hosts out of the job market. The influx of refugees is expected to increase labour supply by between 30 and 50 per cent, doubling unemployment levels. Pay in the service and agriculture sectors has already plunged by 50 per cent, while the new wave of lower middle-class Syrians has increased competition in the retail and business sectors.

Currently, all Syrians need a work permit and are limited to a prescribed list of menial jobs, but the vast majority work freely without one. Because of this, many Lebanese have become resentful of the UN assistance given exclusively to refugees and accuse them of illicitly collecting aid while working to bolster their income. In a survey by Norwegian research foundation Fafo in May 2013, an overwhelming 98 per cent of Lebanese respondents believed the Syrians were taking jobs from locals, while nearly two-thirds believed they received unfair economic assistance. A third said the border with Syria should be closed.

'People still support the Syrians' cause, but they are nervous about the scarce economic opportunities,' says Amal Mudallali, senior scholar at the Woodrow Wilson International Center for Scholars and advisor to former Lebanese Prime Ministers Rafik Hariri and

Timeline of key events

1516–1918

Lebanon forms part of Ottoman Empire.

1920

The League of Nations grants mandate for Lebanon and Syria to France. France moves Lebanon-Syria border east of the Bekaa Valley, fomenting tensions that continue today.



Map of present-day Lebanon and bordering countries

1943

Lebanon gains independence. The National Covenant uses outdated 1932 census to distribute parliamentary seats on a ratio of six-to-five in favour of Christians, creating Muslim resentment. The president is to be a Maronite Christian, the prime minister a Sunni Muslim and the speaker of the Chamber of Deputies a Shia Muslim.

1948

110,000 Palestinian refugees enter Lebanon following Arab-Israeli war.



UN file picture: Palestinian women carrying their belongings in the Naher al-Bared refugee camp near Tripoli in northern Lebanon, 1952

1967

The Palestinian Liberation Organisation (PLO) starts using Lebanon as base for attacks on Israel.

1970

Suleiman Franjeh elected president. His friend Hafiz al-Assad seizes power in Syria.

1975

Phalangist (Christian militia) gunmen kill 27 Palestinians. Start of civil war.

1996

Israel bombs Hezbollah bases throughout Lebanon.

1991

The National Assembly orders the dissolution of all militias, except for Shia group Hezbollah. The Lebanese army defeats the PLO.

1990

The Syrian air force attacks Presidential Palace at B'abda and forces Aoun into exile, ending the civil war. Rene Moawad is elected president, but assassinated two weeks later.

1989

Parliament meets in Taif, Saudi Arabia, to endorse Charter of National Reconciliation that limits presidential powers and boosts number of Muslim MPs.

1988

Interim military government appointed under Maronite Michel Aoun in East Beirut. Prime Minister Selim el-Hoss forms Muslim rival administration in west Beirut.

1985

Israeli troops withdraw from all but a self-declared southern 'security zone'.

1982

Israel launches full-scale invasion of Lebanon. Pro-Israeli president-elect Bachir Gemayel assassinated.



Israeli troops guard Beirut airport, 1982

1976

Syrian troops enter Lebanon to restore peace and curb the PLO.

2000

Hezbollah advances and Israel withdraws.

2004

UN Security Council resolution calls for Syria to leave Lebanon. Prime Minister Rafik Hariri resigns and pro-Syrian Omar Karami appointed.

2005

Hariri assassinated, sparking huge anti-Syrian rallies. Karami's cabinet resigns. Syria withdraws its troops. Anti-Syrian alliance led by Saad Hariri wins control of parliament. Four pro-Syrian generals charged over his father Rafik's death.



Anti-Syrian protesters during a rally in Beirut on 14 March 2005

2006

34-day war between Israel and Hezbollah. Cabinet approves UN plan for a tribunal to try Hariri assassination suspects.

2008

Michel Suleiman elected president. Lebanon establishes diplomatic relations with Syria for first time. Sectarian tensions erupt when Hezbollah fighters take over west Beirut.

2009

The Special Tribunal for Lebanon opens at The Hague. The pro-Syrian generals are freed after court rules there is not enough evidence to convict them. The pro-Western 14 March alliance wins parliamentary elections and Saad Hariri forms unity government.

2014

The Special Tribunal for Lebanon begins at The Hague.

2013

Lebanese militants start crossing Syrian border to fight on both sides of war. Dozens of people killed in escalating sectarian clashes in Tripoli and south Beirut. The European Union lists Hezbollah military wing as a terrorist organisation. Senior Hezbollah commander Hassan Lakkis and former finance minister Mohamad Chatah, a critic of the Syrian regime, are both assassinated. Resignation of the government leaves the caretaker authorities lacking power and resources, allowing impunity to flourish.

2012

The Syrian conflict spills into Lebanon in clashes between Sunni militia and Alawites. Intelligence chief Wissam al-Hassan killed.



Lebanese Sunni Muslim men protest, West Bekaa, 21 May 2012, REUTERS/Shawki Haj

2011

Government collapses after Hezbollah ministers resign. Prime Minister Najib Mikati forms cabinet dominated by Hezbollah. The Special Tribunal for Lebanon issues four arrest warrants for Hezbollah members over Hariri murder. Hezbollah denies all involvement.

Saad Hariri. 'Syrians are very entrepreneurial. I'm from Bekaa and I've heard they've come to an area of about 4km and opened about 100 restaurants. It's causing a lot of tension.'

The Lebanese and Syrian communities are culturally close but divided. Inter-marriages are common, but long-term sectarian and socio-economic hostilities continue to drive a wedge between the sibling nations. For some Lebanese, the Syrian occupation after the civil war has not been forgotten – despite the fact it was the very same Syrian regime now tormenting the refugees.

'The conflict is opening up a Pandora's box of anger and racism towards the Syrians,' says Sami Atallah, Director at the Lebanese Center for Policy Studies. 'So you have two conflicting sides: the humanitarian side and the old animosities between the societies.'

While instances of violence have been minimal, officials are concerned that isolated events do not escalate. In December, a refugee settlement was burnt down following allegations that residents had sexually assaulted a disabled person, though the claims transpired to be false. In Kab Elias in the Bekaa Valley, residents commonly refer to Syrian tents as '*musta'amarat*', a term connoting illicit Israeli settlements on Palestinian land.

Meanwhile, human rights organisations have reported a rise in violent crime towards female refugees, alongside cases of prostitution, forced marriage, sex trafficking and child labour.

Lama Fakih, Syria and Lebanon researcher at Human Rights Watch (HRW), says the growth in racism means Syrians are increasingly being unfairly blamed for crimes. 'We are very concerned about non-state actor violence. It has been reported there has been an increase in

crime, and often these reports are linked in a very racist way to the presence of Syrians, prompting instances of retaliatory violence.'

Jewel of coexistence

While social tensions seethe and simmer, sectarian battles are erupting with increasing regularity in Tripoli and south Beirut. Car bombs and street fights have become common, and the death toll has reached the hundreds – including former finance minister and Syrian regime critic Mohamad Chatah, killed by a car bomb in December.

In Lebanon, around 40 per cent of the population is Christian, 36 per cent is Shia and 18 per cent Sunni. Previously, the greatest tension existed between Christians and Muslims, but over the past decade – since the 2003 Iraq War and 2005 assassination of Lebanese Prime Minister Rafik Hariri – the Muslim sects have been increasingly divided. The Syrian conflict has exacerbated such hostilities further, with Hezbollah supporting Assad, and extremist Sunni factions, including Al-Qaeda, supporting the rebels.

'Some judges are independent, but not the judiciary. We have a lot of political intervention, even with the criminal courts. And you can feel the power of money'

Chawkat Houalla

Adib & Houalla Law Office, Lebanon;
Advisory Board Member of the IBA Arab Regional Forum



Syrian refugee children play outside one of the newly erected tents at the refugee transit camp in Aarsal, Lebanon. UNHCR/M. Hofer/November 2013

While most Lebanese are moderate and unconcerned about sectarian issues, the armed elements at the periphery are increasingly setting the political agenda. 'It is a big concern,' says Moukheiber. 'We are experiencing an extension of the crisis in Syria. People are travelling back and forth with weapons for both Hezbollah and Al-Qaeda. It is a serious risk that several thousand people coming over may be armed and ready to make problems.'

'We are experiencing an extension of the crisis in Syria. People are travelling back and forth with weapons for both Hezbollah and Al-Qaeda. It is a serious risk that several thousand people coming over may be armed and ready to make problems'

Ghassan Moukheiber

Rapporteur, Lebanon's Parliamentary Human Rights Committee

Lebanon has maintained a policy of neutrality towards the Syrian conflict, but the country's delicate stability is looking increasingly precarious. Currently in a state of paralysis due to the resignation of the government in March 2013, the caretaker cabinet has proved incapable of prosecuting perpetrators on either side of the divide. Nine years after the murder of Hariri, the trial of four Hezbollah members accused of the killing started at The Hague this January, but the government has been unable to compel the powerful organisation to surrender the men – all of whom proclaim their innocence.

According to a December 2013 HRW report, the Shia Alawite community in Jabal Mohsen, Tripoli, has been the target of a series of brutal attacks over recent months. Assailants have fired mortars and rocket-propelled grenades at residents, and burnt down their businesses. Yet the government has markedly failed to hold those responsible to account, HRW states, allowing them to enjoy relative immunity from prosecution.

'Lebanon was always meant to be the jewel of coexistence, where everyone was respected and held common values,' says Moawad. 'But it has become a place of hatred. We should not allow this, because the whole world will pay the price.'

Domestic reform, global response

As violence and instability grows in Lebanon, the criminal justice system is in danger of buckling under the pressure. According to a January 2013 report by ALEF, Lebanon has cultivated a 'legal

culture in ruins'. Prisons are overcrowded to bursting point, court backlogs are interminable, detainees are regularly held for months and sometimes years without trial, military tribunals are commonplace, access to counsel is unreliable, torture is widespread – and corruption is endemic across the board.

'It's a miserable system,' says leading Lebanese lawyer and human rights activist Muhammad Mugraby. In 2009, Mugraby commenced proceedings against the EU before the European Court of Justice, claiming it had failed to use the instruments at its disposal to persuade Lebanon to respect human rights. 'The judiciary is not trusted to apply the law and is in a state of accepted corruption. There is a strong culture of impunity. There is no rule of law.'

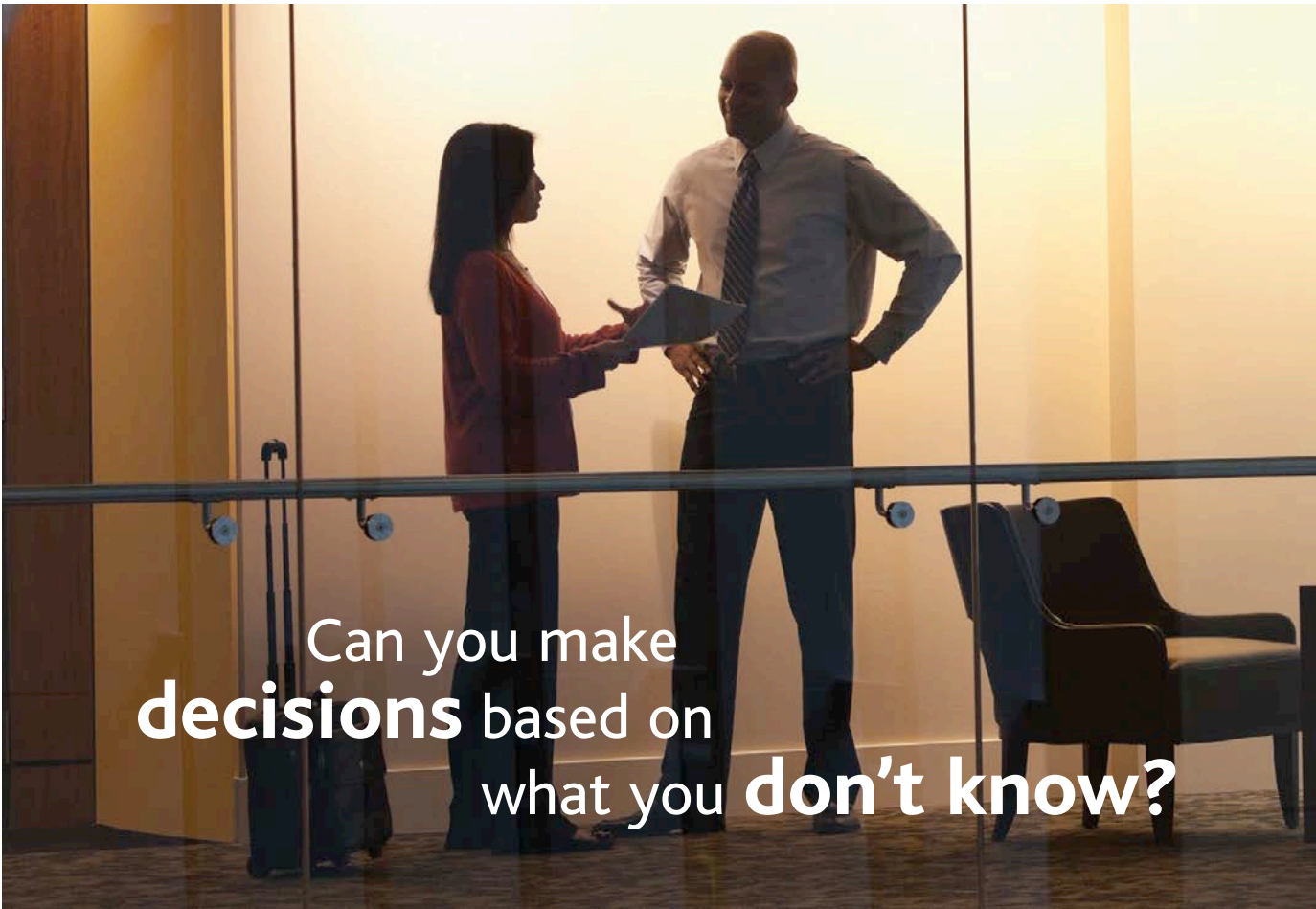
Lacking legal status, it is refugees who are most at risk of abuse within such a system. While the interim government lacks the powers to make serious reforms, some much-needed proactivity and statesmanship must be injected into its current torpor. Addressing legal loopholes would be a start, as would cracking down on the corruption scandals involving aid agencies that have deterred donors from giving more generously.

'I know that often donors are very sceptical about money being side-tracked to the wrong channels, especially in countries where corruption is rife,' says Shalini Agarwal, founding partner of UK-Indian boutique firm In Se Legal and Chair of the IBA Immigration and Nationality Law Committee. Agarwal, who lived in Lebanon during the civil war in the 1980s and 'once spent a few hours in an air raid shelter with Yasser Arafat', suggests Beirut ought to focus resources on 'increasing transparency and visibility, and encouraging more hesitant donors by showcasing what happens with the funding'.

For Atallah, Lebanon must view the refugee issue as a 'five-to-seven-year' problem, and concentrate on creating jobs and attracting capital via improvements in infrastructure and transparency. Ferid Belhaj, Director of the Middle East Department at the World Bank, agrees. Authorities should create a framework of 'resilience and sustainability', he says, including implementing economic reforms that would help bolster the effectiveness of international assistance and 'put the country on a much more sustainable path towards development'.

But ultimately, it is the international community that has both the power and responsibility, to keep Lebanon on its feet – not just with cash, but visa offers too. 'Lebanon is rendering a service to the international community as a whole,' Belhaj stresses. 'And the international community should respond in words and in kind.' ☒

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



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Population crisis: can Japan lead the way in finding a solution?

Japan's declining birthrate and ageing population have combined to produce a top-heavy society that the economy is struggling to support. *Global Insight* assesses whether the country can address the underlying issues – such as gender inequality in the workplace – and set a global precedent for change.

STEPHEN MULRENAN

A fall in birthrate means that Japan's overall population is becoming smaller. According to the country's health ministry, an estimated 1,031,000 babies were born in 2013, which was down some 6,000 from 2012. Meanwhile, 1,275,000 people died last year; 19,000 more than in 2012.

With a record net reduction of 244,000 people in 2013, the Abe administration estimates that Japan's population will fall by approximately 15 per cent, or 20 million people, by 2040. A natural consequence of this will be a top-heavy population and a diminished workforce, which is unable to support its elderly citizens. There is a need, therefore, for a boost to both the population as a whole and the workforce in particular, and it is becoming increasingly apparent that women are crucial in both these areas.

Tradition v progress: getting more women into work

Currently Japan's female workforce is underused. Goldman Sachs highlighted the seriousness of this problem in a 2010 study, which claimed that the number of people in employment in Japan could expand by 8.2 million, and its GDP could rise by 15 per cent, if the country could close its gender employment gap.

This fact has not been lost on the new administration of Prime Minister Shinzo Abe, which has, among other things, introduced subsidies for those companies that hire single mothers.

Japanese society remains very traditional, with a woman's primary role defined as *ryosaikenbo*, or 'good wife, wise mother'. Because of this, there

is little encouragement for women to remain in work after having children. For those that do, they find that *ryosaikenbo* and Japan's rigid work schedules do not easily co-exist. There is also the risk that women will find themselves being 'career tracked' onto the so-called 'office lady' route following an engagement to be married. 'Office lady' is a term used to refer to a support staff

women have found that the best way to solve the conflict between the workplace and *ryosaikenbo* is to forego having children altogether, in order to develop a genuine career. However, this only exacerbates the wider population problem.

Harmony Residence is a Tokyo-based employment agency that has helped match its registered jobseekers with over 100 companies



Employees of a foreign currency brokerage firm, Tokyo, 5 January 2009. REUTERS/Yuriko Nakao

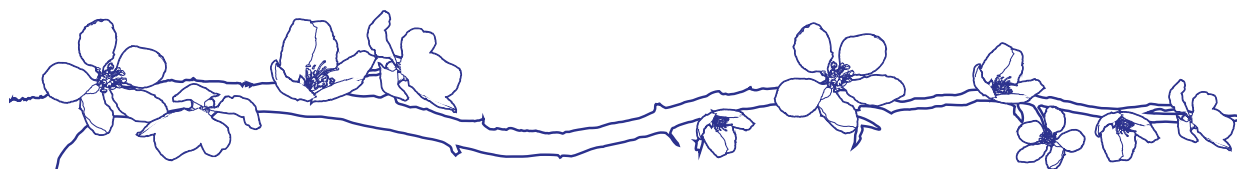
role and entails tasks such as making cups of tea, serving drinks at evening functions and general administrative and cleaning functions. For a time this was a recognised route into employment for women, with the expectation that they would leave work once they were married. However, that assumption has been challenged in recent decades as women with ambitions for a genuine career began to recognise and highlight its inequities.

According to a recent study from the think tank Center for Work-Life Policy, 'Off-Ramps and On-Ramps Japan: Keeping Talented Women on the Road to Success', 74 per cent of college-educated women in Japan voluntarily leave their jobs for six months or more to have children; more than twice the number of college-educated women in Germany or the US taking the same action. Indeed, a new generation of ambitious Japanese

since it was established in 2007. With 80 per cent of its 1,500 candidates being single mothers, the agency specialises in recruiting this particular group to management positions. One of the factors that drove Harmony's president, Makiko Fukui, to establish the agency was her own experience of giving up a career in order to get married and start a family. Fukui says that she wants to help build a society where women can work and bring up their children.

'More and more we are receiving the same response from companies: that the top ten university graduates they would like to hire are women, because they are often better qualified and more talented than their male counterparts.'

She adds: 'Companies in Japan have to work very hard to retain female talent. They have been losing them for a while and they know they have to do something about it.'



Japan takes action

The continuing absence of women from the senior levels of Japan's workforce almost seems to make redundant Abe's three stated 'arrows' of economic revival: a bold monetary policy; a flexible fiscal policy and growth-orientated structural reform. The threat is so significant that, in June 2013, Abe was quoted by *The Washington Post* as saying: 'The mission that I have imposed upon myself is to thoroughly liberate the power that women possess.'

True to his word, Abe has made a number of symbolic female appointments to key positions in the ruling Liberal Democratic Party (LDP) when he assumed power for a second time in December 2012 (Abe previously served as Prime Minister from 2006 to 2007). These include Masako Mori, a lawyer and mother of two daughters, to her first Cabinet post of Minister of State for Measures for Declining Birthrate and Consumer Affairs and Food Safety. The

encouraging women in the workplace – granting them the 'Nadeshiko Brand' logo designation in recognition of their work.

The companies were scored on two factors: firstly, offering career support for women; and secondly, supporting women in balancing work and family. From that score, METI and TSE selected and publicised the names of the 17 recipients of the brand which also demonstrated a superior financial performance.

American Chamber of Commerce in Japan (ACCJ) vice-president Vicki Beyer, who works as an in-house lawyer at a global investment bank, says: 'The Abe Government is doing what Japanese governments often do. They are working behind the scenes encouraging companies.'

In another demonstration of his commitment to the cause, Abe publicly set a government target of raising the participation of women in senior business leadership positions in the private sector to 30 per cent by 2020. Furthermore,

'Setting targets is easy but there are not that many candidates that can be senior managers [...] We should be doing more to increase the numbers of younger female leaders, and then maintain those numbers'

Akiko Sueoka
Mori Hamada & Matsumoto partner

previous incumbent of that post, Sanae Takaichi, has been appointed the first female chair of the LDP's Policy Research Council, and the former postal minister Seiko Noda has been appointed chair of the LDP's General Council, the highest decision-making body of the Party. In addition to these Cabinet appointments, Abe has ordered specific missions for several government ministries aimed at raising the profile of women in Japan.

For example, the Ministry of Economy, Trade and Industry (METI) and the Tokyo Stock Exchange (TSE) have jointly selected and publicised the names of some 70 listed companies that have demonstrated success in

an unidentified female minister is reportedly leading a government study group hosting closed meetings with the agenda of developing further 'working mother' initiatives.

Abe's various initiatives have started to attract an increasing number of column inches from the mainstream media outlets in Japan (for example, The *Nikkei* daily newspaper has a dedicated column). While this has generated some backlash, particularly from those mothers who have chosen not to work, who feel that their traditional *ryosaikenbo* role is now under attack, Abe's emphasis on economic growth seems to be the only policy that guarantees mass support these days.

Top 17 companies, by economic performance, of the 70 awarded the 'Nadeshiko Brand' in recognition of their success in promoting women in the workplace

Enterprises	Industries
Maruha Nichiro Holdings	Fisheries, agriculture & forestry
Sekisui House	Construction
Asahi Group	Food
Toray Industries	Fabricated textile products
Kao Corporation	Chemistry
Sumitomo Rubber Industries	Rubber products
Asahi Glass	Glass & clay products
Daido Steel	Iron & steel
Sumitomo Metal Mining	Non-ferrous metals
Daikin Industries	Machinery
Nissan Motor	Transportation equipment
Nikon Corporation	Precision machines
Tokyu Corporation	Land transport
KDDI Corporation	Information & communication
Toyota Tsusho Corporation	Wholesale trade
Fast Retailing	Retail trade
Sumitomo Mitsui Financial Group	Banking

Source: Ministry of Economy, Trade and Industry

All talk?

While Japan is not alone in having to confront and address challenges such as a declining birthrate, ageing population and energy and resource issues, its predicament is perhaps more extreme than in other developed countries. Abe's hope is that Japan can pioneer the resolution of such challenges, which could then present opportunities for the country to become a global leader in subsequent and connected growth sectors.

Yet although Abe's public position is that he sees the third arrow of economic revival – growth-orientated structural reform (in particular the role of women) – as the most important one for resolving these challenges, not everyone is convinced.

'Abe's third arrow is still very theoretical,' says Beyer. 'Part of the problem is that most politicians are not married to career women, so there is a lack of understanding and a lack of ideas. I don't think they get it.'

Mori Hamada & Matsumoto partner Akiko Sueoka, says that although setting targets is

helpful, not enough is being done to develop a pipeline of female managerial talent by getting women into middle management positions.

'Setting targets is easy but there are not that many candidates that can be senior managers,' she says. 'We should be doing more to increase the numbers of younger female leaders, and then maintain those numbers.'

It is perhaps with that in mind that the American Chamber of Commerce recently launched a dedicated 'Women in Business' (WIB) committee, which has resulted in a growth in its overall female membership from approximately 18 per cent to 24 per cent. The WIB committee has three purposes: to support and provide useful information for working women in Japan; to facilitate networking opportunities for working women (such as 2013's hugely successful 'Women's Summit', which attracted 300 women leaders from Japan and overseas); and to conduct advocacy work.

According to ACCJ member Fukui, who also

acts as vice-chair for advocacy, the focus of the committee in the next few months will be on utilising senior citizens to help with domestic work and childcare, which seems an innovative way of addressing the current imbalance in Japan's population.

'We have to propose something that will be beneficial for the whole society,' Fukui says. 'We need to increase the number of women going back to the workforce, but who will raise the children? Japanese women are facing this problem. We now need practical action.'

Making it work

Inadequate provision for childcare and flexible working presents a major hurdle for women in Japan who wish to return to work after having a child. Flexi-work is difficult to nurture in the country's 'morning-to-midnight' corporate culture, where the vast majority of workers routinely put in overtime. There is also a shortage of privately-run childcare facilities in Japan, which means families rely on municipal government facilities. A quirk of government childcare facilities is that the child has to take up their place at the beginning of April every year, if not they will not have a place for the entire year. This often has an adverse effect on a women's ability to use her maternity leave as intended. Mori Hamada partner Chisako Takaya says: 'The issue of childcare leave is closely linked to the availability of nurseries. The reality is that, because of the lack of nurseries, many mothers cannot find places for their children.'

In 2009, Goldman Sachs opened a childcare facility in Tokyo offering full-time, part-time and back-up programmes for children of pre-elementary school age and after-school programmes for children up to 12 years old. Since then, it reports that its average post-maternity leave time has decreased significantly.

But Beyer says that the sheer expense involved in setting up and running such facilities makes them uncommon. 'The Government should tell developers of office buildings that it will not approve their plans unless they have childcare centres in their buildings,' she says. In light of these issues, the ACCJ recently started a small study group to look at how childcare services can be expanded more quickly.

Beyer also believes that, contrary to popular belief, the traditional Japanese concept of lifetime employment, with which many of Abe's

policies chime, is actually holding Japan back. 'The Government is not doing anything to encourage a mid-career job market. It needs to introduce policies that allow companies to shed excess labour when they don't need it, and hire when they do need it. This would enable women who leave the workforce to start their families to more easily come back into meaningful jobs.'

There are some positive signs of change emerging: a number of companies in Japan, such as Itochu Corp, Marubeni, Mitsubishi Corp, Mitsui & Co, Sumitomo Corp, recently started to introduce flexible working hours. For example, Mori Hamada & Matsumoto provides a range of flexible working arrangements as well as paid maternity leave and partial reimbursement of nursery fees.

'At the ACCJ, one of the things that we're advocating is the need to engage with Japanese institutions,' says Beyer. 'Working smart is widely recognised as better than working long, but many Japanese companies have been using the wrong metric to measure what constitutes a good employee.'

For example, many companies use an evaluation system that rewards total daily output, irrespective of how productive an employee might be on an hourly basis. As a result, those promoted have been those prepared – and, crucially, able – to put in the most hours in a day.

'But, encouragingly, I do hear Japanese companies increasingly talk about working smart rather than working long,' adds Beyer.

Whether Japan's government is able to count on 'girl power' to reverse the country's economic slide will depend on Abe's ability to overcome a wide range of cultural assumptions about the role of women in society. Crucially, he will have to get corporate Japan onside, so that well-qualified women do not feel they have to choose between having a career and having a family. Equally, corporate Japan will have to do more to ensure that working women, with ambitions to marry and start a family, are not automatically shunted onto the 'office lady' career track. 'Even though companies are not allowed to "career track" women, it still happens de facto,' says Beyer. 'It will not stop until we find ways in which women can have families and keep their careers.' ❀

Stephen Mulrenan is a freelance journalist based in Hong Kong. He can be contacted at stephen@prospect-media.net





Asia:

adopting the right mindset

Lawyers should consider factors beyond the letter of the law – such as how it has previously been enforced and local culture – in order to give the best advice, adopting a unique approach to each jurisdiction.

PHIL TAYLOR

Advising on and drafting a choice of law clause as part of a contract may not be a lawyer's most exciting task, but it can have a big impact on the time and money a client spends resolving any potential dispute.

In Asia, as in any other part of the world, each party to an agreement will usually want it to be governed by the familiar law of its own home jurisdiction. But the final choice of law will depend on factors including the parties' corporate cultures, their bargaining power and what countries they come from.

A party with enough leverage will generally try to designate the law of its own country in the agreement. If the counterparty resists, a good compromise will often be the law of a third legal jurisdiction. This has led to the common sight in Asia of a cross-border contract governed by the laws of England and Wales. As Nicholas Fluck, president of the Law Society of England and Wales, comments 'English law provides the stability, predictability and clarity that business demands.'


to apply to the finance and security documents governing offshore investment vehicles; meanwhile high-yield debt transactions are more likely to be governed by New York state law, because of the history of those products. In other cases, some foreign systems of law seem to work better with local law than others. For example, New York law is often chosen for China-related aviation contracts because it shares certain good-faith principles with Chinese law (and there is no general principle of good faith in England and Wales).

Another factor is where the parties' important assets are located, as Mayer Brown partner Jason Elder explains: 'if a person had New York assets, you might decide that a New York choice of law is best.' Geography has a part to play too. Using English law can make sense in many South and Southeast Asian jurisdictions, where local legal systems are derived from English common law. But in civil law-based North Asian jurisdictions, New York or California state law seems to be more appropriate.

A question of context

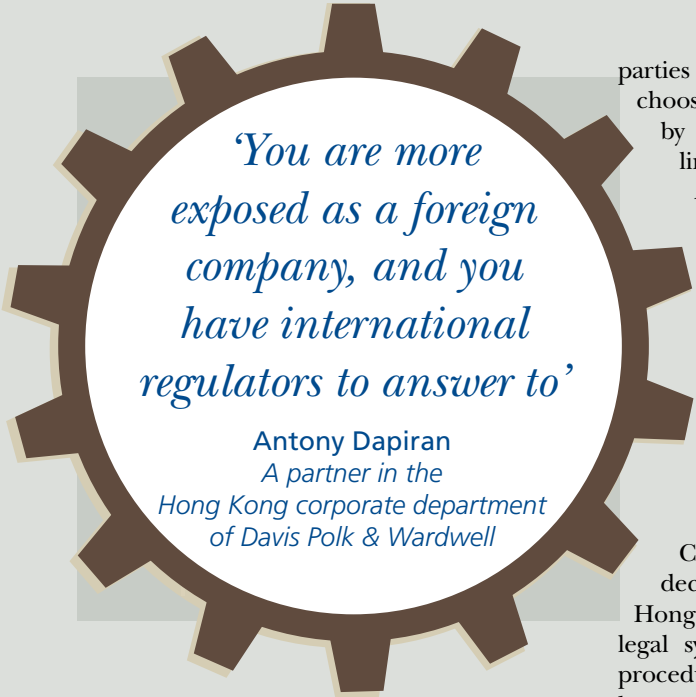
The best choice of law can, however, depend on the type of deal being done. 'One is looking for a system that can best interact with mandatory local laws and that contains the juridical concepts essential to the transaction,' says Nicholas Alexander Brown, a Pinsent Masons partner based in Hong Kong. Christopher Tahbaz, Senior Vice-Chair of the IBA Litigation Committee, and Co-Chair of Asian litigation at Debevoise & Plimpton, believes the most important consideration is 'to select governing law from a jurisdiction with a well-developed and transparent commercial jurisprudence'. Doing so 'maximises certainty of outcomes in the event of a dispute', he argues.

International banks lending money for cross-border projects will often require English law



*'In China, although
the written law can
be clear, enforcement
is rarely black
and white'*

Dan Harris
Harris & Moure



'You are more exposed as a foreign company, and you have international regulators to answer to'

Antony Dapiran
A partner in the
Hong Kong corporate department
of Davis Polk & Wardwell

Forced to go local

Some foreign investors may be forced to accept an agreement with an Asian counterparty that is governed by local law. This may be because the investor has insufficient bargaining power to get its own way, or that it decides, pragmatically, to make a concession to its Asian counterparty in order to preserve a good working relationship. This decision could cause serious problems down the line in developing jurisdictions, which suffer from a lack of legal certainty.

Merril Keane, Deputy Newsletter Officer of the IBA International Sales Committee and lawyer at Miller Nash, points out that 'some risks related to choice of law may be different in Asian countries than in other jurisdictions. When you don't have hundreds of years of practice and precedent to look at for guidance, you may not be able to predict outcomes very well'.

In countries such as Thailand and Indonesia, for example, the overarching law is often drafted vaguely, with the intention that regulatory bodies and other agencies will issue implementing regulations to fill in the gaps at a later stage. When such a system of law is applied to contracts, however, it can become difficult for an investor to know exactly what it is agreeing to, or how it can seek redress if a problem arises.

Tahbaz suggests lawyers take extra care when drafting to address this issue. 'If parties choose governing law from a jurisdiction where the law is relatively less developed, it may be important to consider using clear – and perhaps more detailed – language in the contract to describe concepts that may not be that developed under that jurisdiction's law, even if the local practice might be to have less detailed contracts', he argues.

In some situations – commonly contracts giving security over a local asset, contracts dealing with real property, or government concessions – the

parties will not have the luxury of being able to choose the governing law; local law will apply by default. Some countries have additional limitations. In China, for example, although Article 126 of the PRC Contract Law specifically allows parties to a 'foreign-related contract' to make their own choice of law to govern a related dispute, in the case of Sino-foreign joint ventures or contracts for Sino-foreign 'joint exploration and development of natural resources' in the country, the law of the PRC applies mandatorily.

Going local by choice

Choosing local law is not always a negative decision. Some Asian countries, such as Hong Kong or Singapore, have developed legal systems containing many principles and procedures, which will be familiar to foreign lawyers. In other cases, choosing foreign law may not be a sensible option. Darryl Daugherty, a Southeast Asia-based private investigator and professional researcher, gives an example. 'Given the high degree of difficulty in enforcing foreign court judgments in Thailand, it's preferable to use local law, but to do so under a detailed contract that precludes loopholes and is in full compliance with statutes and regulations,' he says.

Imposing foreign law on a more complex deal structure may not work either. 'In an [Asian] onshore structure combined with an offshore structure, it's difficult to wave a magic wand and say "Let's have English law for everything,"' says Rashed Idrees, a partner with Southeast Asian regional firm DFDL. 'Both structures will have to work together to ensure the best protection for the client.'

Choosing a foreign governing law combined with the jurisdiction of foreign courts can also lead to local enforcement problems. 'If dispute resolution is also in the Asian jurisdiction,' argues Keane, 'the law will be more familiar to courts or local arbitrators and the choice may facilitate enforcement'.

The right state of mind

The issues discussed so far reflect a particular business culture in which the written contract is king. This approach is not one which will necessarily be adopted by an Asian counterparty.

'In some parts of Asia, the significance of a contract is very different to that in the West,' says Michael Pryles, an experienced chartered arbitrator and author of the book *Dispute Resolution in Asia* (Kluwer Law International, 1998). 'In China, there is a great emphasis on the relationship between the parties, rather than a formal contract. In the West, people are very careful before they put a signature on a contract. In China, the contract is in a sense a manifestation

of the relationship between the parties.’

Voon Keat Lai, Stephenson Harwood’s Greater China managing partner, adds that a less precise contract may also be a manifestation of a civil law approach to drafting. ‘In the common law world, people tend to be more precise in defining their relationships. For this reason, contracts are generally very long and detailed. China, like many civil law countries, does not rely on long contracts. They are very much drafted along principles and spirits. For this reason, interpretation is looser and may be seen by some as being “grey.”’

These comments point to another less tangible but equally important decision that lawyers and their clients need to make: which mindset to adopt when doing business in Asia. ‘In China, although the written law can be clear, enforcement is rarely black and white,’ says law blogger and Harris & Moure attorney Dan Harris. He feels lawyers need to take a different approach in many parts of Asia to that which they might take elsewhere, in order to deal with some of the challenges that the region can pose.

Keane feels that ‘in some Asian jurisdictions parties may be less likely to seek redress in courts or through other formal dispute resolution procedures. Negotiation or mediation may be favored, or parties may attempt to renegotiate already agreed-to terms after the deal is done.’ In China this can even become part of the court process. ‘It is a regular part of every Chinese trial for the court to work to try to settle the case... there is a “settlement phase” right at the end of the trial, where the court always explores with the parties whether there is a basis for settlement, and cases often settle then,’ she observes.

In countries where the law is developing rapidly, new regulations can appear almost overnight. When this happens, experienced lawyers will look at how the authorities have enforced similar laws in the past to assess the actual risks to their client. A few years ago, for example, the Chinese government announced it was making all internet-to-internet telephony illegal. But believing that China’s public would never allow such a crackdown and therefore that it would never happen, Harris says he did not advise his clients not to talk on Skype. ‘They just threw it out there to see what would happen,’ he says. ‘[In this kind of situation] we tell them what the law is, then we talk about our experience – and often we’ll say “Give us a couple of days and we’ll try to find out what’s going on.”’

‘You can’t rely as much on the law as it’s written – that doesn’t mean you can just ignore the law. There’s a grapevine among China lawyers: you call your lawyer friends, even if you’re sure what the law is, and ask them what they’ve been hearing,’ Harris continues. ‘I’m happiest when the law and the grapevine say the same thing.’

An issue that can arise when helping a client form a company in China is whether the investor

Nothing chosen

Some contracts, whether by design or omission, contain no express choice of law at all. In these circumstances, the system of law which is eventually applied to the contract in case of a dispute can depend on a number of factors. Where a case is being tried in the European Union, the courts will apply the so-called Rome I Regulation. Having been in force since 2009, and based on a 1980 Convention, the way in which it will be applied is now relatively predictable. Outside Europe, however, parties will have to depend on the jurisprudence of the particular court in which they find themselves.

‘Most major Asian legal systems contain conflict of law rules that establish criteria by which the presumed intentions of the parties, as to which body of laws will control their contract, are to be determined objectively,’ says Pinsent Masons’ partner Nicholas Alexander Brown.

There is little other international guidance on the matter. The Draft Hague Principles on Choice of Law in International Commercial Contracts (begun in 2006 by a working group of the Hague Conference on Private International Law) do not address the case where no choice of law is made, but focus on affirming ‘the principle of party autonomy with limited exceptions’.

It may be that one of the jobs for Association of Southeast Asian Nations (Asean) nations, as they seek closer integration, is to develop an overarching principle of determination of governing law, which could provide greater legal certainty for investors across the region.

can do any kind of business in the country before the company is fully set up. Although it is technically illegal to do so, many carry out some initial scoping work in the interim period. But if they are caught, Harris says, the authorities tend to take a pragmatic approach, and the investor will rarely suffer any consequences if the authorities know that a genuine company registration is pending. Experienced lawyers will explain this precedent to their clients, clarifying that this is no guarantee as to what may happen in the future and leaving it up to them to make the final risk assessment.

Idrees' firm, DFDL, carries out a lot of its work in Cambodia, Laos and Myanmar, whose legal systems are still developing in many areas. 'We are constantly faced with decent-looking laws, but understanding, interpretation and levels of enforcement are at a very early stage with a number of them,' he says. 'Of necessity we deal with grey areas a lot, and because we've been there a long time, we are able to gauge what the local practices are going to be, how a law is to be implemented or enforced.'

'People often want to do something unprecedented or new and we are using undeveloped laws, rules and principles to help us in structuring those transactions. You have to think a lot more outside the box, and use your expertise and resources based on long and deep-seated experience in those markets.'

Greater exposure for foreign investors

Those advising in Asia also need to deal with what could be described as a goldrush mentality among some clients. That is, the assumption that it is possible to operate above the law, or under the radar, simply because the jurisdiction of choice is still in a relatively underdeveloped state, or because domestic rivals seem to get away with it. Lawyers warn that the law will eventually catch up with this kind of company.

'Clients often say "Chinese local competitors get away without complying with rules". That may be true, but if the regulators want to make a point, they will enforce the rules and often it's the foreign company that gets enforced against – you are more exposed as a foreign company, and you have international regulators to answer to,' says Antony Dapiran, a partner in the Hong Kong corporate department of Davis Polk & Wardwell.

The recent experience of GlaxoSmithKline, which at the time of writing is still under investigation for alleged bribery of doctors in China, is a prime example. It is widely acknowledged that corruption is endemic in the Chinese healthcare sector, with domestic companies playing a big part. Yet the authorities appear to have chosen to make an example of a high-profile foreign company.

Other companies may be willing to take risks in Asia that they would not take at home, based

on the notion that there may be large payoffs in the form of commercial opportunities. 'This usually doesn't materialise,' comments Stephen Pelak, a partner of Holland & Hart and a former export control enforcement and counterespionage official with the US Department of Justice. 'What most companies find is that the Chinese government is going to look after its own industry rather than make good on promises to US or European firms, simply because they were willing to provide technology.'

There are, of course, grey areas for investors in any country. But it is how lawyers work with them that can vary. In China, where legal frameworks are now relatively settled compared to other Asian jurisdictions, a lawyer's job may be to try to help a client make the most of any grey areas. In more developing jurisdictions, the lawyer is more likely to be helping the client create structures that will stand the test of time as things continue to change.

'We advise with one eye on what might happen as development occurs, and interpretation and enforcement develop. We keep an eye on ensuring clients stay within the bounds of the law at that point and where we think it might go,' says Idrees. 'It's not about seeing how we can be sneaky or get round the grey areas, but ensuring that what we do is as watertight as possible for the future.'

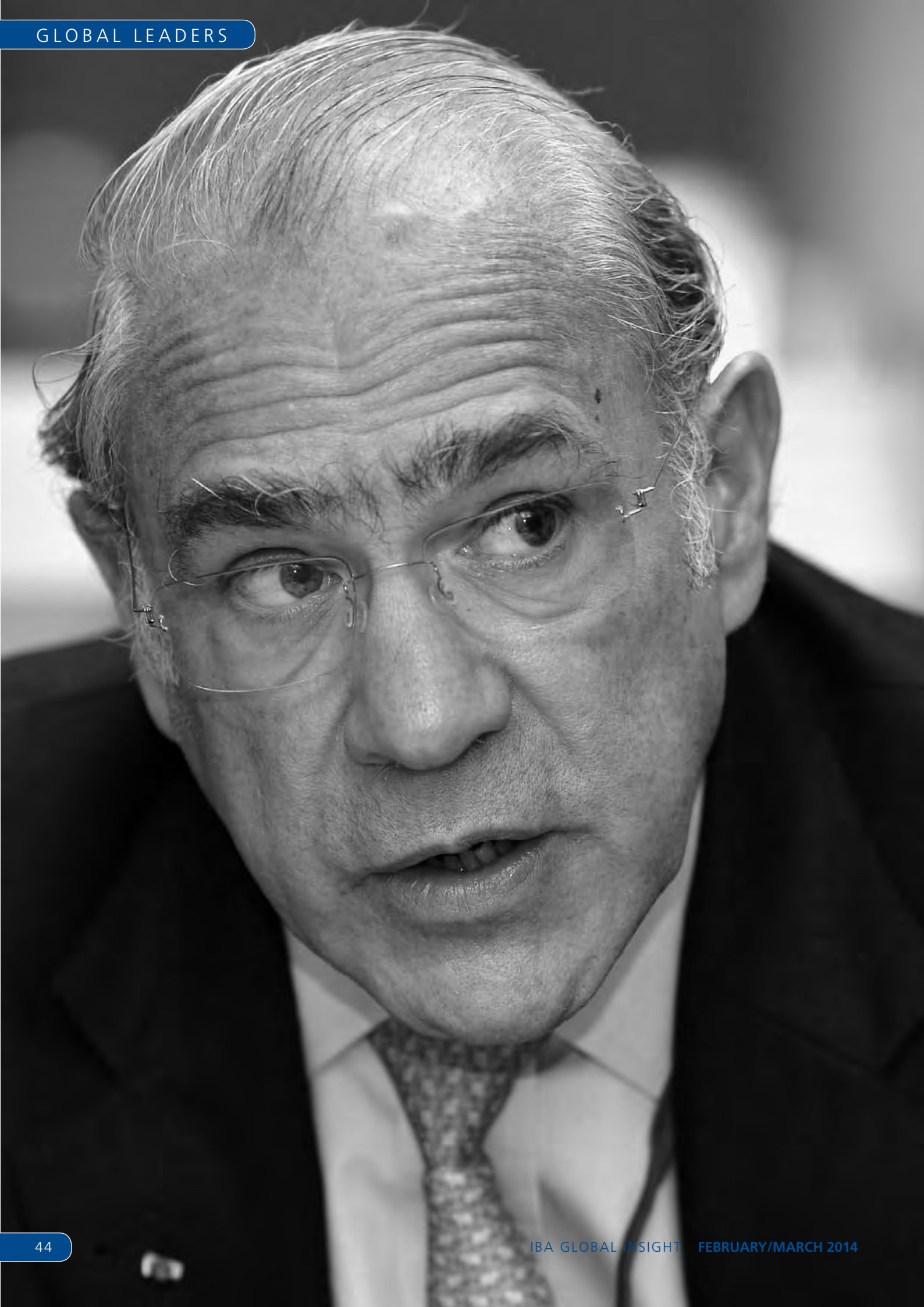
For Elder, everything points back to client service. 'The style of successful practice in Asia is different from in the US or UK, principally because you need to tailor your approach to your client to account for a wider range of cultures and levels of sophistication. It is your responsibility to try to deliver your service such that they will get the best value.'

'That's what distinguishes a good lawyer from a great lawyer in Asia – someone who understands the local [issues] enough to give advice that the client can actually understand and use. We've done our job as long as we've sufficient and practical information to make informed decisions,' he concludes. Adds Harris: 'It's wrong to act as though you're only providing strictly legal advice; you are a better lawyer if you can step on to the business turf.' It seems commercial awareness – a concept drummed into every modern day English law student and trainee lawyer – is especially important in Asia. ☒

Phil Taylor can be contacted at phil@phiine.com

*'I'm happiest when
the law and the
grapevine say the
same thing'*

Dan Harris
Harris & Moure



GLOBAL LEADERS:

Ángel Gurría

Ángel Gurría has served as Secretary-General of the Organisation for Economic Co-operation and Development (OECD) since June 2006. Previously, he served as Mexican Secretary of Foreign Affairs and Secretary of Finance and Public Credit. In this in-depth interview with former CNN news anchor Todd Benjamin, he shares his thoughts on the emerging economies, global inequality, anti-corruption, and the ongoing relevance of the OECD in a world of shifting economic power.

Todd Benjamin: I want to start with the global economy because it's a very uneven recovery. The OECD came out with new forecasts, and you've actually downgraded both those forecasts. Why have you had to reconsider?

Ángel Gurría: Well, the legacy of the crisis is very heavy and it's in four different areas. We have very low growth worldwide, very high unemployment and growing inequalities. The fourth is a great loss in the trust people have in institutions. What we also have today is that

we are typically not firing on all four cylinders. The growth of trade is about half what it should be. Investment is growing at about 1.7 per cent in the OECD, the lowest in many years. Credit in the OECD region is flat. And last but not least, who has been supporting the very little growth we've had? The emerging economies. Well, they are slowing down. China has kind of recovered its footing, but the rest of the larger emerging economies are slowing down. So the four cylinders are in first gear and we can't get them off that.

TB: Why can't we get them off first gear? Is it a failing of policy?

ÁG: It is both a combination of policy and political reasons. In the US you have a vibrant recovery, but we still leave about one to 1.5 per cent growth in the ink pot because of the so-called 'sequestration'. Now, what is at stake in the US? Well, it's governance, it's the polarisation of politics. And the result is that they had a big budget issue, they pushed it three months down the line. This is a non-economic example of why that has an effect of uncertainty on economics itself. There is a tapering of the Fed, which is also causing a lot of ripples around the world, and there are issues in Europe, which have to do with governance and leadership.



TB: You mentioned growing inequality, and this is not only an issue in developing countries, but a growing issue in the eurozone. Do you see any remedies?

ÁG: This was a problem before the crisis, but there's nothing like a good crisis to make it worse. When you have 15 million more unemployed in the OECD area alone than before the crisis, you have all the elements that are going to make those inequality numbers worse. There is also the almost proverbial 'one per cent' of the people in the financial area who are making a lot of money, whereas the bottom ten or 20 per cent are losing ground. And there's also the result of hundreds of millions coming into the labour market, from India and China and so on, depressing real wages throughout the world. We need to address this in a targeted way, with the availability of services, of education, of health services, of financial services, and also with training.

TB: Ángel, these are all well-known things, but many of these things cost money and we live in an age of austerity. Also, we live in an age where there's a lack of trust, as you pointed out, in public institutions. How can we narrow this trust gap and how can we bring about meaningful change?

ÁG: The problem, is no matter how tight your budget is, you can't say I'm going to forget about the most vulnerable people in my midst. For the first time, we're seeing youth unemployment skyrocket and long-term unemployment increase. We have never seen something like that in the US. We risk losing a whole generation. So no matter how tight the budgets, keep those elements that will allow for activation policies, for taxation incentives, for retraining incentives, and keep the dialogue between the private sector, the unions and the government.

TB: But as you're aware, the great debate in this post-financial crisis has been those between who believe that governments have cut too much in terms of austerity and those who believe they shouldn't have cut back as much. When Mexico was going through its troubles in the 90s, you were the architect of Mexico's economic stabilisation plan – which included cuts in government spending. So are you a proponent of austerity or do you think it's gone too far?

ÁG: I had to cut the budget four times in one year because the oil went down to \$10 when we were depending 40 per cent on the oil. But we ended at seven per cent because we created an element of confidence. And what is missing here is we are dealing with short-term issues, but we are not creating the medium-term context. In the case of the US, we may get the debt situation resolved, but if it is not in the context of a medium and long-term plan, including reduction of the debt, there's no credibility. And the same thing is happening in Europe.

TB: Isn't the reality that we're going to have several more years of austerity and trying to get back on track, with a real lack of leadership in terms of creative programmes to try to mitigate some of those impacts?



ÁG: But why is it that some countries are doing better than others? Why is it that Germany has less unemployment than it had before the crisis and their public finances are in relatively good shape?

TB: Because they took the pain much earlier.

ÁG: Because they took the pain much earlier; and the Swedes also took the pain much earlier; and the Mexicans took the pain much earlier, because we had our own debt problems in the '80s and '90s. But there was some pain to take and there was some adjustment to take. Let me tell you what has happened with unit labour costs: for the last 12–13 years in Europe, most of the countries have been increasing wages higher than productivity. Germany increased wages below the level of productivity. What happened? There was a 25 to 30 per cent gap in competitiveness, and remember they have the same currency and trade rules so they cannot devalue. It's a hard-won edge in productivity. And what have the others done? Spain, Italy, Ireland, Portugal, Greece; all are converging now and practically all of those countries now are in a current account surplus or in balance. So it's not that countries are not taking the necessary actions, it is that these actions take time to show a result.

TB: Let's talk about Russia for a moment because it is in the process of accession to the OECD and there's been a lot of criticism about its human rights records and corruption. It's a signatory to the Anti-bribery Convention, which has been hailed as the gold standard in terms of monitoring corruption, and yet you are allowing this country to potentially become a member of the OECD. Doesn't that undermine your credibility?

ÁG: First of all, it is the whole membership of the OECD that decided that Russia was a country with which they'd rather engage. The last chapter of Russia's accession to the OECD is the political dialogue and that will be held with the Russian authorities and with the membership, no longer with the secretariat, no longer with our committees or experts.

TB: From where it stands now, do you think they should become a member of the OECD?

ÁG: I think the transformational power of the process of joining the OECD is one of the most important elements of the accession process: the capacity of countries to use the accession process to produce changes with legislation and regulations etc, but also cultural changes. Things like corporate governance are being addressed by 22 different committees, each one of them in their own specialty. And six or seven of them have already said we're satisfied that the Russians are in the process of getting in good shape. Now, the other 15 still have to declare that, so we expect to use the better part of 2014, perhaps even part of 2015, to do just that.

TB: You say that this process can be a great

facilitator in terms of bringing about change, and yet look at the death of lawyer Sergei Magnitsky. He's believed to have been tortured in prison before he died after uncovering a massive corruption scandal at the heart of the Russian government. Doesn't this make something of a mockery of the OECD's Anti-bribery Convention?



ÁG: First of all, they're not related. The question that you mention is one being dealt with by a number of countries. The Anti-bribery Convention is fairly straightforward. It's a question of the Russian government committing to check on Russian companies that they are not trying to bribe officials in third-party countries in the pursuit of business. Now, what happens is in exchange for Russia committing to that, the British are committing to that in Russia and the Spanish are committing to that in Turkey and so on. So you create a network of commitments.

TB: This question is from Swaziland: 'Since the failed OECD attempts at establishing a multilateral agreement on investment decades ago, what specific efforts is the OECD making to bring about a similar instrument since BITs and regional investment protection agreements seem to have taken over?'

ÁG: What happens is that we have a standard. This standard, to avoid double taxation and to protect investments, is a standard that is now being used in 4,000 to 5,000 different bilateral and regional agreements. Now, we always aspire to move towards a multilateral investment agreement. We have all these multilateral agreements on the governance of multinational companies, we have all the national contact points where we check on the ethics, the transparency and even the human rights. After Rana Plaza [*factory building collapse*] in Bangladesh, all these were strengthened. We had a big conference here. Part of the result is that a number of companies got together to make sure that the standards for the buildings

in which these people work in Bangladesh and other countries are improved.

TB: [On the subject of transparency and ethics], a recent global financial integrity report estimated that developing countries lost \$5.86tr to illicit financial flows from 2001 to 2010, and that corporate tax abuses account for 80 per cent of those outflows. If those flows could be stymied, this would solve the debt crisis of these countries in one fell swoop. Why is this proving so hard to achieve?

ÁG: Well we've made a lot of progress. There are 120 countries today exchanging information. And this is because the OECD standard is information on request. We are now migrating from that to a more ambitious standard, which is automatic exchange of information on taxes. Do you know how many of those agreements we had in 2008? We had 40 and none of them worked. Now we have 1,200 that are working.



TB: Let me read to you something from a Yale professor, Thomas Pogge, Chair of the IBA Task Force on Illicit Financial Flows, Poverty and Human Rights: 'The fact that sophisticated tax planning strategies are technically legal is no longer a justification for their use. The impact of tax abuses facilitated by secrecy jurisdictions on global poverty is tremendous. The international community has not only a legal obligation but also a moral duty to ensure that states use the maximum resources available to fulfil the civil, political, economic and social rights of citizens.' I would assume you agree with him.

ÁG: Totally. But I would also underline one word he said and that is that today it is legal for those companies not to pay taxes. The problem with multinational companies is that since the League of Nations we've been so worried about avoiding double taxation that we created double non-taxation. Because nobody pays anywhere: they don't pay in the place of residence of the

company and they don't pay where they operate. We have to fix this. We have to change the laws.

TB: We've got more questions here and this one is from Michael Thompson from the UN Office for the Coordination of Humanitarian Affairs. He says, 'Following the Philippines typhoon, two major challenges for business will be: one, the relative scarcity of cash because of global finance markets and the relatively low insurance penetration in the Philippines; and two, the traditional culture of corruption that taints the Philippines.' His question is this: 'What sort of advice can public sector relief organisations and private sector businesses provide as they try to make the most of the investment and redevelopment opportunities in the Philippines, and has the OECD ever addressed these types of issues before?'

ÁG: Yes, and we don't have to wait for a typhoon to deal with corruption or the penetration of insurance products. We have a big initiative on financial education. We have a big initiative on financial consumer protection. And, of course, the first thing that you have to advise on is the protection of the public assets: schools, roads, hospitals. When they're not insured, the countries sometimes take years to rebuild.

TB: There's a lot of debate over who should pay for these tragedies, what's been known as 'climate injustice'. Should rich countries be responsible for paying for the clean-up and redevelopment of areas hit by climate change?

ÁG: Well first of all, the more prepared you are, the less the cost will be. Second, the more insured you are, the less discussion there will be about who pays for what. And last but not least, in a situation like the Philippines, I would call on everybody's support in order to help a country that is too poor to sustain these huge costs.

TB: Earlier you were talking about emerging markets and the US and Europe. We didn't talk at all about the Middle East. First of all, there are currently no members from the Middle East except Israel in the OECD. Is this something that urgently needs to be addressed?

ÁG: We have been working very actively for about ten years in the so-called OECD MENA programme on investment issues [MENA-OECD Investment Programme], on development issues and on governance issues. We're working with Morocco, Jordan and Tunisia, we're working with Egypt and Libya, we're even working with Yemen on things from education all the way to governance and anti-corruption.

TB: What impact has the Arab Spring had on your work in the region?

ÁG: We've moved from what was a more systematic medium and long-term horizon to trying to address some of the shorter-term issues, such as capacity building. But mostly trying to prepare those countries for things like governance items: education, health policies, the transition from school to work, anti-corruption, public procurement – things that they have to do regardless of which government is in charge.

TB: Two years ago, in an interview with the IBA, Nicola Bonucci, the head of your legal affairs, talked about engaging with Egypt and signing it up to the Anti-bribery Convention. Considering recent events, what is the OECD's position with regards to Egypt now?

ÁG: They may not be concerned about signing the Anti-bribery Convention in the short-term because they are otherwise engaged. We can understand that. But we are continuing to work with Egypt on small and medium enterprises, on education policies and anti-corruption policies. We are there to work with them but also to work for them. This is the most important thing, to use all the expertise and all the experience that we have, and say what can you use and can we help you put it in place?

TB: The OECD does not yet have legal instruments in human rights. Is this something that you're going to address?

ÁG: I think the members chose to have the issues of human rights dealt with by other institutions. I would say that this is very typically a UN type of issue, but also the Council of Europe sees human rights as one of the most important issues that they work with. So far the membership of the OECD has asked us to deal with economic and social issues of practically every type, and then third on environmental issues, and I would say the fourth is very much on governance issues.

TB: You mentioned the UN just a moment ago and of course the OECD is tracking the UN's Millennium Development Goals (MDGs). What do you think the chances are of reaching them by 2015?

ÁG: It is not widely known, but the MDGs were born here in the OECD, as we were discussing whether and how we could quantify the medium and long-term goals of the world in terms of development. And appropriately, I think, the UN took over. We play the supporting cast. But there are two issues now. First, we still have until 2015 to continue to deliver on the MDGs. We shouldn't

give up. Second, we have to decide whether we want to have the same kind of simplicity. The MDGs were easily understood, the targets were simple. Now we have to move to a more complex set of goals.



TB: I know you believe passionately in the work the OECD is doing, but it's not without its critics. Some people call it a toothless organisation because your recommendations aren't binding. Others point to the fact that the developed countries dominate the OECD, and how can your organisation be relevant when you don't have China or India or Brazil as members? Can you address these issues?

ÁG: In terms of developing versus developed countries, I think the fact that there's a Mexican leading the organisation speaks for itself. We're not a think-tank, we're a 'do-tank'. We deal in policies. So when a country enters into a dialogue with the OECD, whether it's a member or not, and the only thing lost is opportunities. I think those countries that have come to the OECD have adopted best practices and have done well.

We work very closely with our key partners, meaning Brazil, China, India, Indonesia, South Africa, and we mentioned Russia now wanting to join. We have Colombia. We have Costa Rica joining the organisation in the next two to three years, plus other European countries that are already developed, like Latvia and Lithuania. We have a Southeast Asia programme. We're going to open an office in Indonesia and we work closely with the other large emerging economies. So membership is not an obstacle for us cooperating with these countries. What is important is that we set the standards. ☒



This is an edited version of Angel Gurria's interview. The full version can be viewed at ibanet.org.



Living in a digital blessing

Technology has transformed how we live. With real-time global information constantly available, many of us routinely use smartphones or iPads. But, views on the merits of tech-gadgets vary.

JULIAN MATTEUCCI

Over the past couple of decades, technology has changed every aspect of modern life, both at work and at play. According to Dallas-based Louise Pentland, Executive Vice President and Chief Legal Officer at Nokia, around a third of smartphones are now used for business, whether provided by employers, or employees using their own personal devices at work. 'Our products and services have helped with the transition of work, which used to be somewhere that you went to, but is now something that you can do, whenever and wherever you choose,' she says.

Like many sectors, the legal services world – and how law is practiced – has been dramatically affected by the advances in technology. For Maurice Allen, Finance Partner in the London office of US law firm Ropes & Gray, instant 24/7 availability through smartphones, and the ability to host virtual meetings in multiple locations via Telepresence, have been positive consequences of the technological progress.

Proof of how his own working life has altered, Fernando Peláez-Pier, partner at Venezuelan law firm Hoet Peláez Castillo & Duque and former IBA President, responded to *Global Insight's* questions from his iPad the day after landing in Tokyo. 'The impact of technology in our practice has been tremendous in many respects: in our daily work, and in relations with our clients and our colleagues both within and outside the firm,' he says.

world: or curse?

Many remember how it used to be. Brussels-based Michael Reynolds, European Antitrust Law Partner at Allen & Overy and current President of the IBA, started as a lawyer in the age of the telex. 'These took ages to arrive, were very cumbersome, and all the texts used to be in capital letters – rather like a telegram.' Reynolds also remembers the first fax machine being installed in his firm's office in 1982. 'It was the size of a small house; I just don't know how we ran large law firms and bodies like the IBA with this kind of technology – but we did.'

Game changer

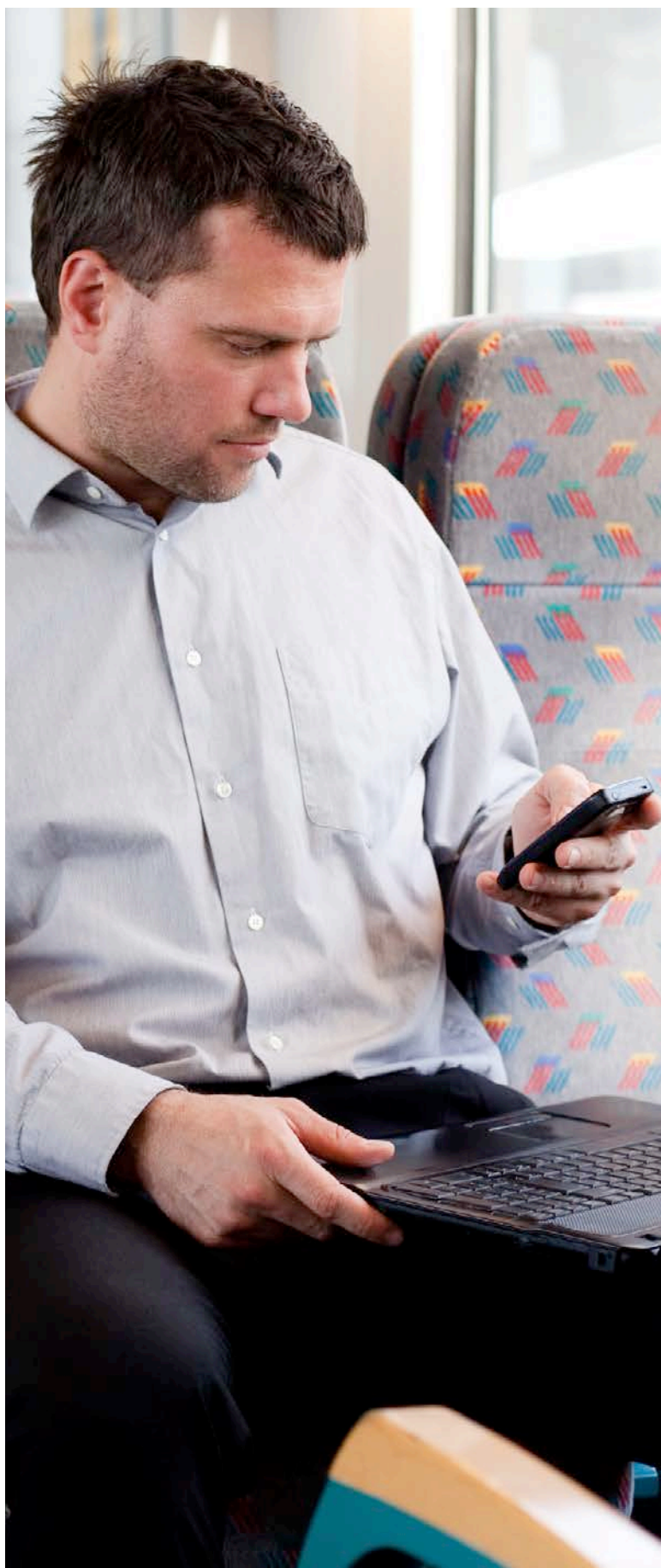
Reynolds believes that the BlackBerry smartphone has been the biggest driver of change, because its use means that one is contactable almost everywhere, at any time of day and night – except in an aeroplane, although that is about to change as well. 'On the whole, this is a good thing because it means that one gets quick decisions.'

The development of teleconferencing and video conferences has also been a huge change for the IBA. 'As we frequently have meetings with lawyers in ten or more countries on a regular basis, the ability to do this without leaving the office, or when you are travelling to far-off parts, is great.' As a result, Reynolds largely welcomes these changes. 'They have made life a lot easier,' he says.

Other positive consequences are that the advice sent through BlackBerrys tends to be more commercial and pithy, believes Ropes & Gray's Allen, while Hoet Peláez Castillo & Duque's Peláez-Pier says that technology's introduction of paperless practices is one of its greatest advancements.

Staying connected

The changes do mean, however, that lawyers have had to up their game. Technologies, especially electronic communications, have imposed important challenges on law firms in relation to quality control issues and communications with clients. They have obliged law firms to introduce



different policies to ensure that the quality of advice across the board does not drop off and that relations with clients remain solid.

Because communications are nowadays, generally, through email, clients know that their enquiries have been received immediately after being sent – whether on desktops, laptops or mobile devices. As a result, clients expect immediate replies to their requests, according to Peláez-Pier. ‘This implies that we must constantly be checking our inbox – and that is why we cannot live without mobiles such as BlackBerry, iPhone and other devices.’

Consequently, Peláez-Pier – who considers himself to be a well-organised person – has nonetheless had to learn about technology, so as to make best use of the different tools that professionals now have to communicate with, and to serve clients. In turn, this has obliged him to be even more organised.

What goes around...

Those working outside the legal profession have also seen their working lives radically altered by technology. Coming from the tech-world angle, Alex Jinivizian, Head of Enterprise Strategy at US broadband and telecommunications company, Verizon Communications, understands this better than most. Because he has a team which is distributed across the world, flexible working and access to corporate applications such as intranet, email, instant messaging and collaboration tools, are essential to the company’s collective productivity and agility.

Consequently, Jinivizian possesses multiple corporate-owned products – laptop, smartphone and tablet. ‘These devices have seamless access to the information and tools that I require to communicate – audio and web conferencing, email and shared documents – and to manage my team effectively across multiple time zones.’

Examples include expense and time sheets now being approved via email through a linked business process to an internal software system tailored to the organisations and designed to perform certain administrative tasks, such as a SAP system. In years past, this would have been a cumbersome paper-based process; but now, receipts submissions and approvals can effectively be carried out online. Verizon also actively utilises online ‘whiteboarding’ tools to collaborate on projects where collective input is required. These tools allow shared files to be viewed through an on-screen whiteboard, which can be accessed via video or data conferencing.

‘We essentially practice what we preach to our customers in our Verizon Mobile Workforce Solutions portfolio, enabling the enterprise to allow secure access from any device, often an employee’s own device, to the tools and applications required to be effective at work,’ says Jinivizian.

Global collaboration

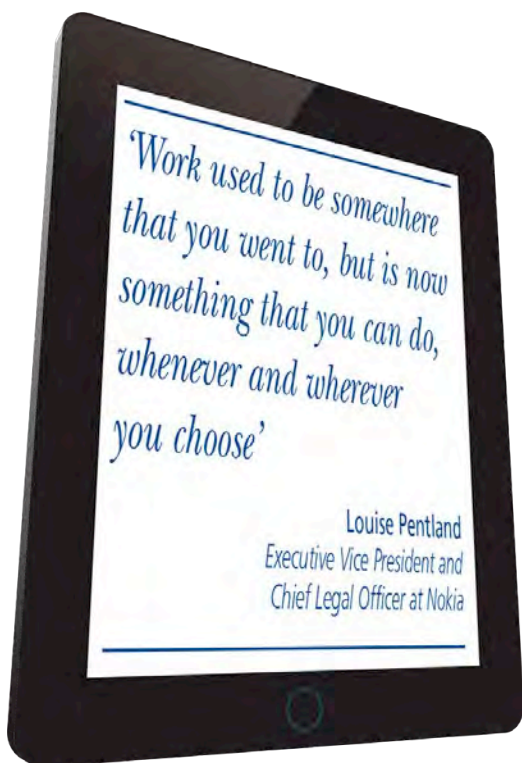
At Nokia, Pentland’s global team of more than 270 people in over 25 countries also works seamlessly. ‘Someone in our team, somewhere in the world, is working every hour of every single day of the year,’ she says.

And because Nokia’s employees spend a lot of time working collaboratively on documents, the latest Nokia Lumia Smartphones – with Microsoft Office built in – helps them to be more productive, even when they are travelling, or during breaks between meetings or court sessions.

Technology has certainly played a large part in improving Nokia’s productivity. But it has also permitted such global companies to enjoy the benefits of 24/7 working, while allowing their staff to strive for a happy work balance. ‘If you have to be on an occasional early or late call during the week, or even at the weekend, we can now accomplish much more without major disruption to our personal lives,’ says Pentland.

Under pressure

Nonetheless, the potential downside of a world in which information is endlessly accessible is the increased pressure levels on day-to-day work. For lawyers and many other professionals, it is important to manage the stress resulting from managing many matters and relations at the same time.



Working through mobile devices has invaded non-work-related time, with many feeling as though they remain physically tied to their offices. Potentially, they never clock off. While Ropes & Gray's Allen can leave the office early or go on holiday without feeling guilty, there remains an expectation that he will be available to contact on work matters during these periods of 'downtime'. He says that you are never free of the office, or shielded from clients. 'You must learn to turn them off; otherwise you end up working 24/7,' says Hoet Peláez Castillo & Duque's Peláez-Pier.

Soon there will be no escape even when up in the air or travelling by rail. Planes and underground trains are now being connected. 'It's important to be able to manage technology effectively from an individual perspective,' says Verizon's Jinivizian.

In control

On the whole, Jinivizian believes that technology's advancement has far more positives than negatives for work, while Nokia's Pentland does not believe that technology creates a downside. 'People used to worry that due to technological advances, employers would expect employees to be available 24/7. I don't see that; and as a manager of people, I don't expect that either. Technology, when properly used, puts control in the hands of the individual,' she says.

For example, Pentland always switches her phone off at night and has never understood why anyone would leave their phone on. 'But that is their choice! If you call me in the middle of my night, I won't answer.' But at the first opportune moment she will respond; it may even be the first thing Pentland does before getting out of bed.

The biggest challenge Pentland has right now is her children wanting every new gadget.

Naturally, as a parent Pentland remains anxious about the access to the internet that children have and the potential impact on their privacy. 'The peace of mind that comes from knowing that we can contact each other wherever they are is an important counter for those concerns,' she says.

Digital world

Certainly the boundary between work and non-work-related time has become blurred. According to Jinivizian, this sentiment is not unique: one of the most profound industry trends over the past few years has been the consumerisation of technology. Whereas ten years ago, corporate IT were dictating what was to be used/accessed at work, and had the newest and most compelling applications at their disposal, the tables have been turned in favour of the consumer. 'This has largely been instigated by the smartphone, tablet and application stores,' he says.

Jinivizian himself has become more of a digital consumer. Like many others, he watches and streams films over the internet; orders his shopping online and has it delivered to his door and books tickets for shows online. 'And I spend too much time looking at screens,' he says.

This would seem to be the case for a large number of professionals, who see no distinction between the toys they use for work and leisure time, and are ready to embrace any form of new technology. Because technology gives you instant information and access to practically everything you want to know and learn, it has become the norm to be attached to devices, even during downtime moments.

In recognition of this increased interest in technology amongst employees and their desire to use up-to-the-minute personal devices for work purposes, many companies have introduced 'bring your own device' (BYOD) programmes for employees. Stefan Weidert, Co-Chair of the IBA Technology Law Committee and a partner at Gleiss Lutz's Berlin office, believes that BYOD programmes have transformed employee work habits, increasing the options for flexible working arrangements.

BYOD programmes have also made the distinction between work and play harder to make, given their widespread implementation across many companies. 'Through such devices, employees can increasingly carry out their work wherever they are; quite often, employees might even feel that they are expected to do so, even during vacations,' says Weidert.

Furthermore, companies of all sizes face growing legal ramifications in relation to the need to secure their data on employees' personal devices, with employees in some cases accessing company information on devices that the company may not have access to, or which may not be secure.

'Significant privacy, security and legal challenges, costs and threats of litigation exist, and those challenges vary depending on several factors specific to the organisation, industry and the extent of its BYOD programme'

Clara-Ann Gordon
Co-Chair of the IBA Technology Law Committee
and a partner at Pestalozzi

According to Zürich-based Clara-Ann Gordon, Co-Chair of the IBA Technology Law Committee and a partner at Pestalozzi, there have been several legal challenges associated with BYOD technologies. Inadvertently, employees often use personal devices in a way that risks data loss or leakage for their company. 'Significant privacy, security and legal challenges, costs and threats of litigation exist, and those challenges vary depending on several factors specific to the organisation, industry and the extent of its BYOD programme,' says Gordon.

Gadgets also allow you to be in permanent contact, through social networks, with your family and friends – no matter where you are – as well as through applications such as FaceTime or Skype. Plus telephone calls now cost less, so communications with friends and family abroad are easier than ever before.

'It means that I can stay in touch with what matters to me outside of work and yet be available to others, as working in a global company does not mean I can only work Monday to Friday, 9-5,' says Pentland. Access to social media and the ability to share photos and video quickly with her family and friends mean that Pentland can make the most out of her personal, as well as her work, time.

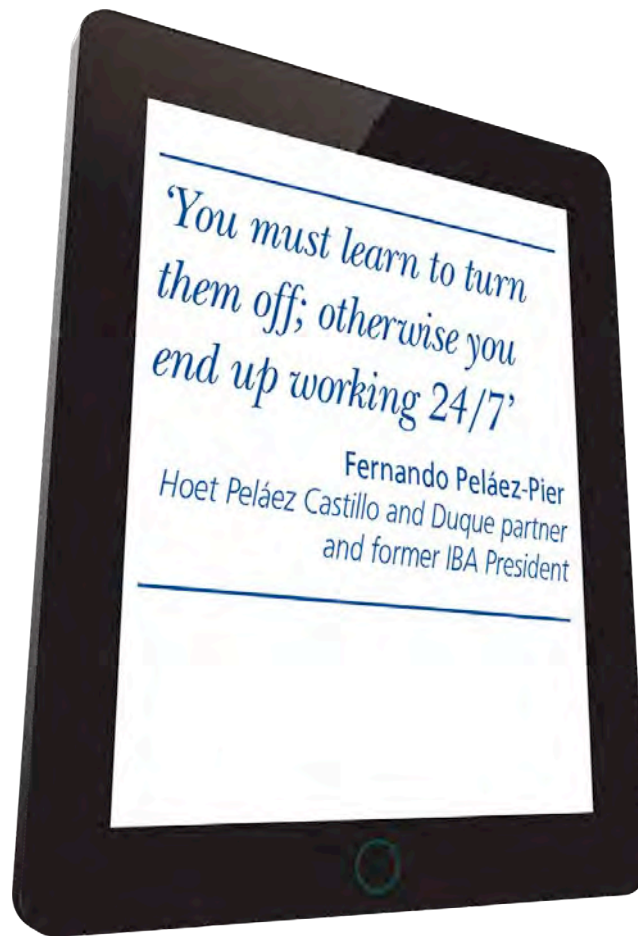
Not that every potential consumer enjoys identical levels of access to technology – a digital divide exists between users of technology in urban and rural environments that remains a major issue for businesses and consumers. There are government-sponsored plans in the UK to guarantee 2MB access to every home; but working in high-tech, Verizon's Jinivizian sees rural communities continually disadvantaged by poor internet access speeds and mobile data (3G+) availability. 'It's not a straightforward problem to solve by any means,' he says.

The good old days

Communication may now be faster and more efficient for most technology users, but there are, of course, some aspects of the past for which some professionals are nostalgic. In the legal world, Ropes & Gray's Allen believes that deadlines were more sensible, and the face-to-face meeting more efficient and ultimately cheaper for the client.

Hoet Peláez Castillo & Duque's Peláez-Pier – like Allen & Overly's Reynolds – also remembers when telex was introduced. 'This was a revolution in terms of how lawyers communicated with clients,' he says. Comparing those times with the present, where instant communications impose numerous new challenges on how the firm practises, he believes that we all used to have much more time to think!

Others long for the days when someone else would do their filing. 'I suspect I am not the



only person who feels that way,' says Nokia's Pentland, who starts each New Year with the resolution to be organised and leave each week with an empty inbox. But things get busy and quickly deteriorate, until Pentland ends up with thousands of messages in her inbox. 'I've dealt with them all, of course, but they keep stacking up until Outlook eventually tells me it is about to run out of space.'

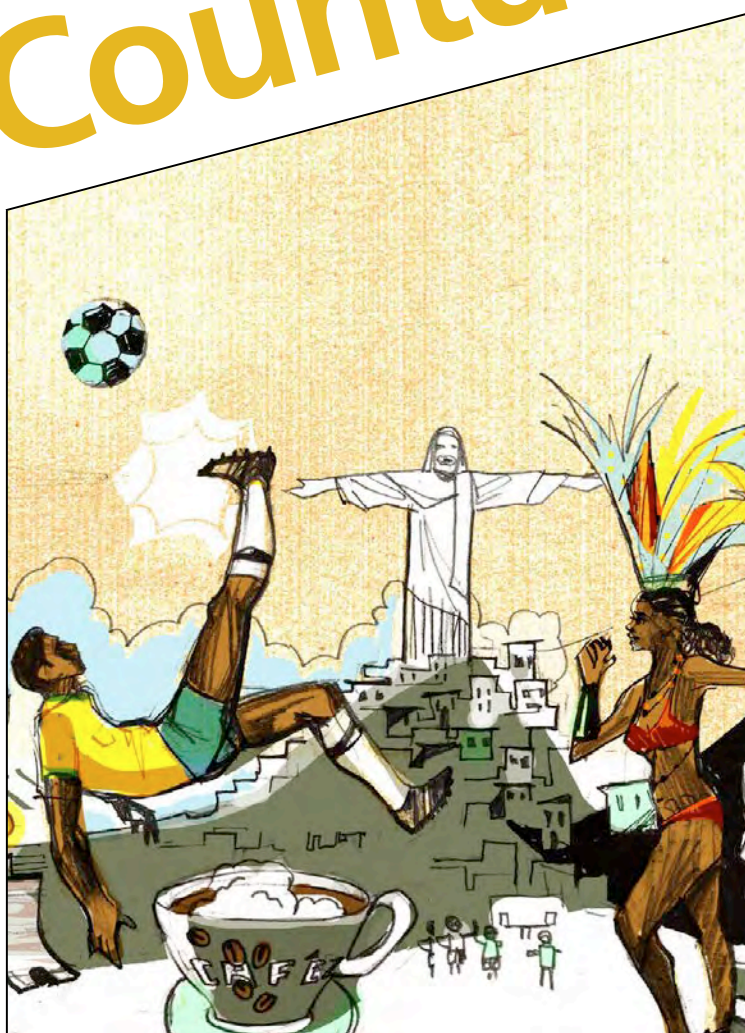
Jinivizian is also nostalgic for aspects of his non-work related life. 'I miss receiving letters from people, as I enjoy writing them; being sent photos in the post rather than over email; and receiving a phone call rather than a text.'

Blending the old with the new, Peláez-Pier has happily resigned himself to fusing one of his favourite hobbies – reading, especially Latin American literature – with technology. Peláez-Pier thought that he would never read an electronic book because it would be impossible to substitute the pleasure of reading a hard copy – the touch of a book, the highlighting of paragraphs and scribbling of notes. 'And guess what? Nowadays when I travel, it is great to bring along the books that I am reading on my iPad.' ☒

Julian Matteucci is a freelance journalist and can be contacted at julianmatteucci@gmail.com



Countdown to the



Organisers rush to finish stadiums; lawyers wrestle ambush marketing and freebie tickets.

BRIAN NICHOLSON

In just a few months, Brazil will play host to hundreds of players, thousands of journalists and possibly half-a-million tourists for what is widely recognised as the planet's greatest sporting competition, the FIFA World Cup. A few will probably be mugged, others perhaps ripped off by cabbies or call-girls, but the vast majority will surely have a wonderful time – perchance a little sunburned and hung-over, – even if their team doesn't make the final. And the world's media, having devoted much ink – as it always does before the World Cup or Olympics – to warning of impending chaos, will smoothly switch gears to discover fabulous stadiums, friendly people and, predictably, the 'party of a lifetime'.

Meanwhile, several local lawyers are limbering up for some pretty hard work, even before the 12 June kick-off.

With London bookmakers quoting local favourites Brazil, reigning champs Spain,



World Cup

perennial hopefuls England and outsiders USA at 3/1, 7/1, 33/1 and 150/1 respectively for the title among the 32 competing nations, it was probably easier to predict what will and won't happen *off* the field. By hook or by crook – a phrase that should not be taken too literally – all the stadiums will be finished, albeit a few still smelling of fresh paint. Some of the planned improvements to public transportation will be operating, others won't, and airports may be a bit of a zoo despite many last-minute terminal extensions. But hey – *paciência!* Fans will end up getting around OK. Even Manaus in the Amazon rainforest can be visited without being swallowed whole by caimans, despite what the British tabloid press would have us believe.

Yes, a few local protesters will probably take to the streets. Brazil has lavished roughly US\$3.5bn of public cash on 12 new or heavily refurbished stadiums, three times South Africa's declared outlay for the 2010 competition, and some curmudgeons argue it would have been better spent on new schools and hospitals, built to the same glittering 'FIFA standard'. But the steam appears to have gone out of last June's huge demonstrations, and serious questioning will probably come only some years hence when several stadiums sit empty.

Ambush marketing in a smartphone jungle

'Many lawyers have been busy with contracts for stadiums and other construction, and also tax matters, but the great volume of work now and going forward will be for lawyers with specialization in entertainment, sporting rights and intellectual property,' said André Zonaro Giacchetta, responsible for intellectual property at Pinheiro Neto, a 78-partner firm that is advising some official sponsors and several other companies about World Cup do's and don'ts.

FIFA allows just 20 companies described as 'Partners', 'World Cup Sponsors' and 'National

Supporters' to associate their brand with the event. But, observed Giacchetta, there are 'hundreds or even thousands of companies that are subject to certain rules and conditions designed to guarantee FIFA's exclusive rights,' as expressed in Brazil's Law 12.663 of June 2012. Dubbed the 'World Cup General Law,' this imposes restrictions through December 2014.

'Obviously it's necessary to protect the investments made by the official sponsors – the largest amount is around US\$130m for a four-year deal including one World Cup – but there are also thousands of other companies that cannot have their right to compete excessively restricted,' he said.

FIFA demands that non-sponsors shall not in any way link their name, brand or product with the Cup and always wants to interpret this restriction very widely, Giacchetta said, but this will be a particular problem in Brazil given the central role of football in the country's culture, and by extension in advertising.

The World Cup Law allows for as-yet-undefined 'commercial restriction zones' of up to two kilometres around each stadium, training centre, media centre, parking area, fan leisure area and other 'official sites', within which accredited sponsors enjoy exclusive marketing rights. 'Formally-established commerce' may continue to operate, but traditional street vendors may face problems. 'FIFA obviously tries to work with municipalities to define these restriction zones as widely as possible, to include as many competitors as possible,' Giacchetta said.

Nevertheless, he predicted that the main problem in Brazil will be ambush marketing, defined as a crime in Law 12.663 and thus paving the way for police to seize products or promotional items, while giving FIFA the right to decide whether or not a case should be pursued. And he sees social media as the new emerging battleground. 'Looking at the number of people with internet access, smartphones and tablets and comparing that with the expected TV audience, I expect on-



Labourers receive from Brazil's Sports Minister Aldo Rebelo (top R) and FIFA Secretary General Jerome Valcke (3rd R), and former national soccer players Ronaldo (L) and Bebeto (middle 2nd L), free tickets to see matches of the 2014 World Cup, during a visit to the Arena da Baixada stadium, in Curitiba, southern Brazil

line marketing to be immense in this World Cup; a qualitative difference from previous Cups. This will be the biggest challenge for FIFA and the official sponsors.'

Elsewhere in Latin America the World Cup has caused much excitement but no major spike in legal work. 'Brazil is such a big country that [clients] can obtain what they need domestically,' says Pablo Iacobelli, Co-Chair of the IBA's Latin American Regional Forum and a partner in Carey, a Santiago, Chile-based firm. But, he says, 'everybody is very excited because Chile qualified!'

Freebie tickets could be costly

One problem not expected at the event is match-fixing along the lines of scandals seen recently in Europe. The event is too high-profile; the global scrutiny too great. But some lawyers think new Brazilian anticorruption legislation that took effect January could hamper companies hoping to use World Cup hospitality to woo public officials.

'Law 12.846 is important because it introduces the concept of strict liability in Brazil,' explained lawyer Luiz Navarro, a senior counsel with Veirano Advogados, a 54-partner law firm. 'Companies could now face fines of up to 20 per cent of gross turnover if one of their executives – even without their knowledge or authorization – is proven to have given an 'undue advantage' to a public official.' Navarro was until recently Deputy Minister of State at the Office of the Comptroller General, where he coordinated Brazil's participation in the OECD Working Group on Transnational Bribery and participated actively in drafting the new law.

'Obviously it's necessary to protect the investments made by the official sponsors – the largest amount is around US\$130m for a four-year deal including one World Cup'

André Zonaro Giacchetta
Intellectual property specialist,
Pinheiro Neto, São Paulo

'Companies are asking us what they can and cannot do in terms of offering World Cup tickets to public officials, and inviting them into corporate boxes, and this has become much more problematic with the new law. Our basic advice is don't do it, at least until the government issues regulatory guidelines, and if you must, then do it very openly and be modest, skip the champagne and limos,' Navarro said. 'World Cup tickets are very expensive and companies naturally tend to give them to people that they are interested in.'

Navarro said the new law could also impact the off-books donations that have traditionally been a major source of Brazilian political campaign financing. But the presidential election is not until October, and before that there's a World Cup to win or lose. ☒

Brian Nicholson is a freelance journalist. He can be contacted at brian@minimaxeditora.com.br