

IBA GLOBAL

April 2011

INSIGHT

Bright new dawn?

Striving for rule of law in Africa and the Middle East

Arab awakening:
Widespread popular uprisings suggest epoch-making change

Elusive panacea:
The global challenges of establishing lasting rule of law

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From the Editor

As this edition of *IBA Global Insight* went to press at the end of March, events across North Africa and the Middle East moved at a remarkable pace. Uprisings that began in Tunisia in January – following the self-immolation of a market trader – quickly engulfed the whole region, ending 40 years of autocratic rule by President Hosni Mubarak of Egypt – in many ways a linchpin of the Arab world. This and subsequent developments in Bahrain, the involvement of Saudi Arabia, and the chaos unleashed in Libya suggest anything's possible.

Is this a bright new dawn for those seeking the fundamental rights that can only be delivered by establishing the rule of law, neglected for too long in favour of stability? Extended features (Arab awakening page 14 and Rule of Law: an elusive panacea page 21), provide some answers to the question on our cover. The column from Washington (page 12) assesses the fraught position of President Obama and an already embattled America. Our inaugural column from the Middle East (page 18), meanwhile, analyses the impact on business in the region.

Amidst the turbulence, one contributor to this edition suggested the challenge of effectively covering events was 'equivalent to taking a perfectly still photo of a runaway freight train'. Nevertheless, the edition as a whole presents the authoritative insight of leading figures in the international legal and business community, providing in-depth analysis of this unique moment in history. A common theme of many of the articles in the pages that follow is the interplay of idealism, pragmatism, and outright realpolitik, never more clearly in evidence than times like these. Which of these prevails is likely to dictate the brightness of the dawn.

James Lewis



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SUBSCRIPTIONS

Free to members of the International Bar Association

Subscriptions 2011:

£110/\$176 (full year) £20/\$35 (single issue)

Please order from the International Bar Association
at subscriptions@int-bar.org

ADVERTISING

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advertising@int-bar.org



Printed by Cambrian Printers, Wales.

Postmaster – send corrections to:
International Bar News

C/O Mercury Airfreight International Ltd
2323 Randolph Avenue, Avenel, NJ 07001
(US Mailing Agent)

Periodicals postage paid at Rahway, NJ, USA

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News from the IBA



As stock markets fall in the Middle East, what price democracy?

Long-term confidence in the Middle East and North Africa remains high despite unrest and tumbling share prices, say local lawyers – but opinions are divided over the true economic impact of democratic reform.

For some, free elections and a strong rule of law equate to long-term economic growth and investment opportunity. For others, stability is the key to steady transaction flow – and calls for democracy a potential distraction.

‘In the long term, I don’t think it is a good idea to buy stability at the expense of the rule of law, which I think is what may have been happening in some of these jurisdictions,’ says Jay Fortin, head of Al Tamimi & Company’s Qatar office. ‘Any time you create artificial stability by supporting a regime that doesn’t respect individual rights and fundamental property rights, in the long run that is not a good idea.’

The long-term foreign currency credit ratings of Egypt, Tunisia, Libya, Bahrain, Jordan, Oman and Lebanon have all suffered since unrest spread across the region. Fitch downgraded Tunisia’s rating to BBB- from BBB on 2 March due to continued concerns about political uncertainty. On 10 March, however, Standard & Poor’s removed Egypt from review for a downgrade of its BB rating, citing improved prospects for political transition.

In a blog on 11 March, Mark Mobius, Executive Chairman of Templeton Emerging Marketing Group, was

adamant economic growth in the Middle East could recover and improve in the long-term ‘if governments implement the right policies’.

Mobius’ trust has no investments in the region, but the \$1.1bn Templeton Emerging Frontier Markets Fund, which Mobius also runs, had 6.9 per cent of its assets invested in Egypt at the end of January. A further 7.1 per cent was invested in Qatar, 7.4 per cent in Saudi Arabia and six per cent in the United Arab Emirates – though nothing in Libya.

Mobius writes: ‘Increased freedom, increased democracy and decreased corruption are possible developments as a result of the political upheaval in the region, and these potential outcomes will indeed be positive. For these economies to truly thrive, the opportunities for small business growth and entrepreneurialism must be improved.’

Yet not all are convinced by the investment potential of freedom and accountability. Campbell Steedman, Norton Rose Senior Partner in the Middle East, admits that ‘change brings opportunity, because there is always someone looking to invest in that process of change’, but believes that stability takes priority.

‘In a market such as this, I think rule of law, from an investment perspective, has been historically overlooked if there is stability,’ he says. ‘Of the two, stability gives investors greater confidence than change. Though frequent change may improve the law slightly, it may be a destabilising factor for investors because they base their investment on predictability.’

Read the full article on the IBA website: <http://tinyurl.com/IBA-middle-east-commerce>.



IBA to open Asia office in Seoul

The IBA is delighted to announce the opening of a new regional office in Seoul, South Korea. The office is due to open by the end of this year, and will be in addition to the regional offices in Latin America and the Middle East, in São Paulo, Brazil, and Dubai, United Arab Emirates.

The IBA’s administrative office is in London, United Kingdom. The Hague, The Netherlands, and Johannesburg, South Africa, are home to the IBA’s specialist centres: the International Criminal Court Monitoring and Outreach Programme and the Southern Africa Litigation Centre.

Akira Kawamura, IBA President, said: ‘I am delighted that the IBA is opening an office in Seoul. This action is consistent with our philosophy, as the global voice of the legal profession, to bring together law experts on a regional and global basis. The new IBA Asia Office will be an important addition to our existing international offices and will fortify our commitment to the legal profession in the region.’

IBA Middle East Office: ‘Bringing Women Lawyers Together’

The life of a lawyer involves many challenges. This is especially true for women lawyers, who often have to cope with a demanding professional life, while also facing the uphill struggle for parity with male colleagues.

The IBA Middle East Office is planning to offer a series of events for women in the law over the

coming months, as part of a new ‘Bringing Women Lawyers Together’ series. The first of these was held on 20 March 2011 at the Al Majlis, Capitol Club, DIFC, Dubai, UAE. The lunchtime discussion was led by Luma Saqqaf, founder of Choice Life Coaching and a former partner and global head of Islamic finance at Linklaters in Dubai.

I am a regular reader of the Newsletters; they are very relevant and allow me to stay current with global developments. The quality is high and I appreciate the global reach of the Newsletters.



Kaisa Olkkonen
Vice President Legal
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Competition

China - contributed by Grandall Legal Group

SAIC regulations signal greater anti-monopoly enforcement

Following regulations from the National Development and Reform Commission, the State Administration for Industry and Commerce (SAIC) has issued regulations on prohibiting monopoly agreements, abuse of market dominance and abuse of power by administrative organisations to restrict competition. The SAIC's new regulations promise an eventful year for anti-monopoly enforcement in China.

Author: Zhan Hao

(Read article <http://www.internationalawoffice.com/?i=7EY4WJZ>)



Zhan Hao

USA - contributed by Hogan Lovells US LLP

Antitrust case leads to order enforcing criminal subpoenas

A recent Ninth Circuit decision confirmed that the risks associated with bringing foreign-originating evidence into the United States – even for what is believed to be a limited purpose – are very real and could result in that evidence being subpoenaed for use in a criminal investigation.

Authors: Megan Dixon, Janet L. McDavid, Peter S. Spivack

(Read article <http://www.internationalawoffice.com/?i=7EY4WKY>)



Megan Dixon

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Mark Stephens, lawyer of WikiLeaks' founder Julian Assange, on media ethics and extradition

Julian Assange is a journalist committed to the truth, who has been unfairly portrayed by the media and unjustly smeared by a political conspiracy between the American and Swedish authorities, according to his lawyer, Mark Stephens.

Speaking to the IBA on 1 February, days before his client's extradition hearing, Stephens referred to the Swedish investigation into rape allegations against his client as a 'persecution'. He also claimed the Swedish authorities had struck a deal with the Americans for Assange's extradition.

Assange lost the case and has been ordered to return to Sweden to face questioning on the allegations. He is appealing the ruling.

Stephens stressed that his previous comment: 'a honey-trap has been sprung', made after the accusations first came to light, was not designed to cast doubt on the women's stories.

'What it was and what most sensible people looking at this believe it is, is a holding charge,' he told the IBA. 'We have heard from Sweden and Washington that a deal has been cut between the Swedes and the

Americans that, in the event he goes to Sweden, they will apply for his extradition to America and Sweden will drop the allegations of rape.

'It is a very worrying situation if a back-door deal is being done that we are not seeing here, that is not being revealed to the British courts.'

When asked what evidence he had for this supposition, Stephens said it was 'widely known and widely discussed' in the legal-diplomatic community in Sweden before Christmas.

Despite Stephens' fears regarding extradition, he was adamant that Assange would be safe from prosecution in the United States because he had 'broken no law'.

'He is a journalist, somebody who is the conveyor of information. He wasn't the leaker or the hacker. He didn't procure the information. For years newspapers have had anonymous drop boxes where you put brown envelopes. In the modern era what happens is journalists receive CDs full of data. We're in an era of data journalism.'

Read the full article on the IBA website: tinyurl.com/IBA-mark-stephens.

Major IBA projects



Major LPD and PPID activities and projects undertaken or initiated over the last 12 months can now be viewed on the IBA website (www.ibanet.org). Examples include:

- anti-corruption training for senior-level private practitioners of top law firms;
- the Corporate and M&A Law Committee's production of a squeeze-out guide;
- the Insurance Committee's comparative study of the legal and regulatory methodologies and practical requirements applicable to the transfer of insurance;
- the Mining Law Committee's work on the Model Mining Development Agreement (MMDA);
- the Anti-Money Laundering Legislation Implementation Group's launching of a website at www.antimoneylaundering.org;
- the establishment of the IBA Student Committee; and
- the publication of books on banking, international franchising and mediation.

The list will be expanded during 2011 to continue to reflect the broad spectrum of work with which the IBA is involved. The projects can be viewed on the following pages of the IBA website:

- Legal Practice Division – tinyurl.com/LPDHighlights2010
- Public and Professional Interest Division – tinyurl.com/PPIDHighlights2010
- Task Forces and Action Groups – tinyurl.com/TFAGHighlights2010



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Editors:
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Human rights news



Security Council refers Libya to International Criminal Court

The Prosecutor of the International Criminal Court has opened an investigation into alleged crimes against humanity in Libya following a United Nations Security Council resolution.

Resolution 1970, adopted on 26 February, imposes an arms embargo on Libya and calls for the freezing of the assets of six members of the Gaddafi family. It also calls for a travel ban on the family and other senior officials of the regime, and asks member states to provide humanitarian assistance to the Libyan population.

The Prosecutor has listed a number of incidents that allegedly occurred in Libya since 15 February, as well as individuals who appear to have authority over the security forces. These include Muammar Gaddafi and his inner circle, several Libyan high officials and the minister of foreign affairs.

Mark Ellis, Executive Director of the IBA, said: 'The referral by the UN Security Council represents another milestone for international justice, ensuring that accountability trumps impunity for the most egregious international crimes.'

The Libyan uprising against Gaddafi's 42-year-rule began in

January, after unrest in Tunisia and Egypt spread throughout Northern Africa and the Middle East. Since 15 February, news reports have confirmed an escalating level of violence throughout the country. On 2 March, the Libyan League for Human Rights estimated there had been 6,000 casualties from the clashes.

This is the second time in the ICC's history that the Security Council has used its power under the Charter of the UN and ICC Statute to refer a situation to the Court. It is the first time such a referral has been decided unanimously and with such swiftness.

Crimes against humanity is one of four crimes falling under the jurisdiction of the Court. The Prosecutor is not bound by the Security Council referral and could redefine or expand the charges to war crimes, crimes of aggression and/or genocide.

The Prosecutor has indicated he expects to be able to request an arrest warrant within a few months.



Violent protests in Tunisia put rule of law centre stage

Unemployed Tunisian Mohamed Bouazizi died in hospital on 4 January, having set himself on fire 18 days earlier after police confiscated the vegetable stall from which he had eked a living. Bouazizi was the only victim of his act of desperation, but it sparked a conflagration that quickly led to the flight of the country's president, Zine al-Abidine Ben Ali. The rest of the world was taken almost wholly by surprise.

Ben Ali's regime had received the tacit blessing of Western countries because while they knew it to be brutal

and oppressive, it also met some of their criteria for respectability. Human Rights Watch senior researcher Eric Goldstein in Tunis told the IBA: 'For them the important thing was that in some key respects, Tunisia delivered. It appeared stable. It was secular. The economy was strong. It helped to tackle illegal immigration and drugs trafficking. Women had a high standing in society. Tunisia did nothing to fan the flames in the Israel-Palestine dispute. It made all the right noises about fighting terrorism.'

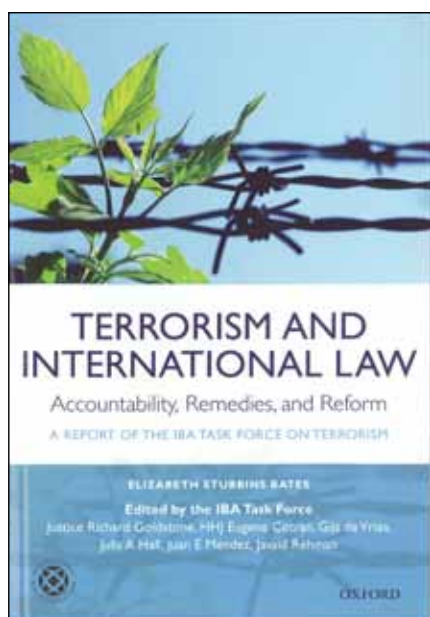
In purely economic terms, Tunisia was and is considerably richer than its neighbours, with higher rates of employment and living standards, despite not possessing oil.

France, the US and the UK did little or nothing to upset the country's carefully nurtured image as a laid-back 'fun-in-the-sun' destination for holidaymakers. Those same governments, however, received regular reports from human rights organisations detailing the use of torture, harassment of dissidents and a stifling of the media that saw the country ranked only marginally above Libya regarding press freedom.

According to Goldstein, typical targets were secular critics, including members of opposition parties, journalists, trade unions, student leaders and judges who spoke out against government attempts at influencing the outcome of court proceedings. Also under attack were those suspected of Islamist sympathies, regardless of whether they had planned or were planning acts of violence. An anti-terrorism law passed in 2003 has been heavily criticised for the broad and vague definition of terrorism at its heart.

In June 2010, a report published by the Index on Freedom of Expression Exchange detailed how the Tunisian Association of Magistrates fought hard to maintain the independence of the judiciary against a campaign of intimidation by the ministry of justice. Typically, critics of the government within the judiciary were either sacked or jailed, or relocated to remote places far from the capital, in a manner reminiscent of the exile of intellectuals during China's Cultural Revolution.

Read the full article on the IBA website: tinyurl.com/IBA-tunisia



Terrorism and International Law: New York launch

The IBA's leading book on terrorism, *Terrorism and International Law: Accountability, Remedies and Reform*, was officially launched with a high level panel discussion in New York on 23 March.

The IBA and the Open Society Justice Initiative (OSJI) jointly organised the event, which was attended by Justice Richard Goldstone, first Chief Prosecutor of the United Nations International Criminal Tribunal for the former Yugoslavia, and Juan Méndez, UN Special Rapporteur on Torture and Co-Chair of the IBAHRI.

Other attendees included Jonathan Fanton, Chair of Human Rights Watch, David Tolbert, President of the International Centre for Transitional Justice, Jim Goldston, Executive Director of OSJI, and Julia Hall, Senior Counsel of Counter-Terrorism at Amnesty International.

The report, edited by the IBA Task Force on Terrorism, a group of world famous jurists, gives a global overview of counter-terrorism measures and offers recommendations for reform. It is available for purchase from the IBA online shop: www.int-bar.org/shop.

The event was filmed and the webcast can be viewed at: tinyurl.com/IBAterrorismwebcast.



Concern over missing lawyers in China

Three human rights lawyers have gone missing in China, allegedly taken away by Chinese police. Tang Jitian, Jiang Tianyong and Teng Biao disappeared in February following a meeting about the continued detention of blind civil rights activist Chen Guangcheng. Their homes were also searched and their computers, DVDs, books and photographs were seized.

The IBAHRI wrote to the Chinese authorities on 10 March to express concern over the disappearances. It also issued a public statement to attract media attention during March's annual meeting of the National People's Congress, the only legislative house in the People's Republic of China. The statement urged the Government to release the three lawyers and to cease its persecution of human rights lawyers.

The situation of lawyers in China is becoming of increasing concern. Only a small minority of lawyers have become involved with civil and political rights or broader public interest cases, and they are increasingly the targets of intimidation and abuse. Lawyers are also subject to strict influence from the

Ministry of Justice, especially through the annual licence renewal system. Sternford Moyo, IBAHRI Co-Chair, said: 'To have disputes heard and determined by an independent judiciary in a fair trial is a fundamental right of world citizens and crucial to safeguarding a just rule of law. The ability of lawyers to practise freely, without fear of harassment or undue persecution, is vital to the fulfilment of this right.'

Catherine Baber, Deputy Director of the Asia-Pacific Programme, Amnesty International, said: 'The situation for Chinese lawyers – especially those who take on "sensitive" cases, such as those involving Falun Gong practitioners, forced evictions, or "house" churches – is growing worse. In fact, as we note in an upcoming Amnesty International report, 2010 marked one of the darkest years for the legal profession in China since the country embarked on legal reforms in the late 1970s. And we fear worse may yet come.'

'Amnesty International is shocked the country's leaders show so little respect for the rule of law, even though they have promised to build a more modern and just legal system. Lawyers around the world should continue to speak out in defence of their Chinese counterparts who suffer from harassment, illegal detention, and torture. Amnesty International continues to call on the Chinese government to end the persecution of human rights defenders including lawyers and honour its pledge to build a country that respects the rule of law.'

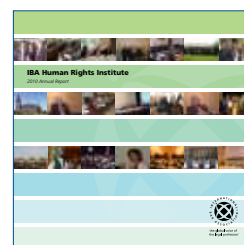
Annual Report

The IBAHRI has released its 2010 Annual Report, marking the 15th year of the organisation. The 60-page report provides an overview of all projects, programmes and publications of the IBAHRI over the past year. It also outlines recent IBAHRI initiatives designed to assist the enforcement of human rights, a just rule of law and the independence of the judiciary across the globe.

Juan Méndez, IBAHRI Co-Chair and UN Special Rapporteur on Torture, said: '2010 was a remarkable year for the IBAHRI. Its work was expanded to new countries and the scope of projects widened. These achievements have been made possible by the expertise and support of our partners.'

'We are extremely fortunate to work with others who share our visions and help us achieve our objectives in respect to human rights and the rule of law, through building capacity, lobbying for change and providing a platform to discuss issues of international concern.'

Read the report here: tinyurl.com/IBA-annualreport2010.





awareness of the importance of continuing legal education. The high level of attendance to the international criminal law workshop and the dynamic participation of all lawyers present show the message has been well received. Members of the Lubumbashi Bar are keen to maintain their skills and keep learning.'

Participant Lorraine Om'ndus Nyota said: 'The most interesting part of the course was the presentation on the call for African women lawyers, by Mr Esteban Peralta from the ICC registry. This campaign has raised the spirits of many women lawyers, but many are discouraged when they see the conditions of access to the Court because they are still new to the Bar. It would be interesting to organise access for all levels, even for women lawyers who for example have two or three years' experience, not only those who just have five or ten years'.'

The IBAHRI also partnered with the Human Rights and Social Justice Research Centre (HRSJ) at London Metropolitan University for a training course on human rights and international criminal law for members of the Darfur Bar Association in Geneva. The week-long event, from 28 February to 7 March, proved popular, and participants had the opportunity to attend the 16th Session of the UN Human Rights Council.

Legal training: DR Congo and The Sudan

The IBAHRI has forged partnerships to provide legal training across the world, focusing primarily on human rights and international criminal law.

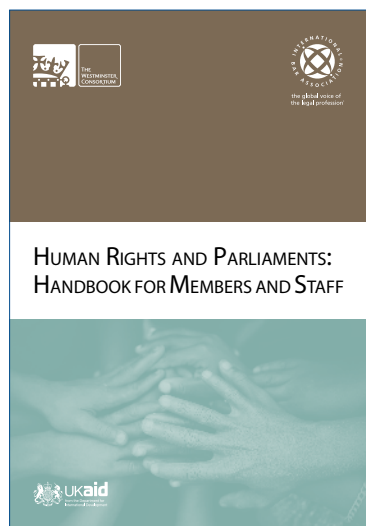
Alongside the Lubumbashi Bar, the IBAHRI presented a workshop on international criminal law in Lubumbashi, Democratic Republic of Congo, on 24 and 25 February. The event, attended by over 100 lawyers, offered participants the opportunity to hear from international criminal law experts and to put their newly-acquired

knowledge to the test through group exercises.

A variety of topics were covered during the workshop, including defence issues, the latest developments before the International Criminal Court, complementarity and modes of criminal responsibility.

Marie-Pierre Oliver, Senior Programme Lawyer from the IBAHRI, said: 'The IBA legal specialist has worked relentlessly during the past eight months to raise lawyers'

Global parliamentary handbook : Westminster launch



The Westminster Consortium for Parliaments and Democracy (TWC) joined forces with the IBAHRI on 29–30 March to bring together members, parliamentary officials and local partners from Georgia, Lebanon, Mozambique, the UK, Uganda and Ukraine for a two-day workshop on human rights and the role of parliaments across the globe.

This rare opportunity to unite partners and members from a diverse global community marked the release of the seminal IBA/TWC *Handbook on Human Rights and Parliaments*.

The IBA, as part of TWC, has conducted a series of training courses for parliaments in Georgia, Lebanon,

Mozambique, Uganda and Ukraine over the past few years. The inaugural handbook, incorporating case studies from the UK and each of the TWC countries, is designed to assist further parliamentary strengthening work in the future.

Fiona Wilson, IBAHRI Co-Director, said: 'Governments play a vital role in upholding the rule of law and safeguarding human rights, and the two day event provided a unique opportunity for members and officials from each of the participating countries to share expertise and to discuss key human rights issues, challenges and aspirations for parliamentarians and parliamentary staff.'



A letter from

SKIP KALTENHEUSER

President Obama's 2009 speech in Cairo put him on history's lucky right side when relatively non-violent revolutions in Tunisia and Egypt arrived. True, warnings that straw was piled too high on Egypt's overloaded camels should have been heeded earlier, and initial White House reactions might have been more acute. But soon, the right notes were hit. History looked promising.

Then, fickle fate fire-hosed the region, toppling regimes both hostile and friendly. A malicious mad hatter, the King of Kings of Africa, entered the party. As we go to press, Gaddafi pushes his luck, under fire from Western powers backed, amazingly, by the Arab League, shelving the endless Washington discourse on Muslim reaction to US involvement. Even better, action is spearheaded by former colonialist powers Britain and France, each quite capable of handling Gaddafi forces strung out along Libya's long coastal road.

That's the cover the Obama administration needs to avoid backlash from the perception of a US-engineered intervention as Gaddafi shocks a world fed up with his shockers. The Obama Administration, via Secretary of State Clinton – flipping her initially wary position – and Ambassador to the UN Susan Rice, have worked fervently behind the scenes to get Arab nations on board, as well as UN backing. An overworked US military and Defense Secretary Gates were understandably wary of walking into more Middle East quicksand, but now the US is not shackled to Libya's end game. Moreover, gone is the issue of losing the entirely home-grown image of reform movements. If you're Libyan resistance and Gaddafi's mercenaries are coming to blow your head off, do you really worry about branding?

Early on, critiques of Obama suggested he abandoned steadfast ally Mubarak to unknown consequence. Then critiques shifted, typical of Senator Lindsey Graham, (R-SC): if Obama doesn't act decisively he will own Gaddafi's 2011 actions. Imagine that, it's all up to Captain America again, and our bad whatever happens. The setup was, if Gaddafi prevails and exacts a bloody revenge, critiques of Obama will pile on, fair or not. The Republican National Committee sent out press releases citing Obama's lukewarm support for a NFZ as a leadership failure. Such drumbeats were echoed in a Washington Post/NBC poll showing Republicans outscoring the President on leadership, 46 to 39.

Try your luck assessing the national psyche. A precarious economic recovery walks through foggy wars in Iraq and Afghanistan, with two thirds of Americans saying the latter isn't worth it. Bewildering tragedy in Japan proves our fragility against nature, and how our technologies can betray us. Politics look broken, big money's edge grows as the middle class wobbles, and Wall Street gets away with mayhem. In short, America's psyche is maxed out. Not the underpinnings for bold moves.

We've also been spoon-fed regional stereotypes for years until we see entire populations as monolithic. Conditioned by dealing with the Taliban – perhaps the most ignorant club on the planet – and Al Qaeda – one of the craziest and most vicious – we are ill-prepared to embrace the nuances of a very complex region.

Consider Congressman Peter King, who warned of 'an enemy living among us' and stated 85 per cent of the leaders of American mosques hold extremist views. And Muslims, says King, do not work with law enforcement. Never mind that 40 per cent of thwarted domestic extremist plots were blocked with the help of Muslims. The new chair of the House Committee on



Washington

Homeland Security, King recently conducted hearings on the radicalisation of Muslim Americans, promising more to come.

It's still a minefield throughout the region. Bahrain and particularly Yemen's brutality against protesters make them dicey friends. There is fear of Egypt backsliding, with recent unsettling reports of peaceful demonstrators arrested and tortured by the army. Egyptian-American Dina Guirguis, a fellow with the Washington Institute for Near East Policy, worries about a quickly scheduled vote on a controversial constitutional referendum that includes banning those with dual citizenship or with non-Egyptian spouses from running for president, ensuring the status quo. Voting should be delayed, as should eventual votes for parliament and president, says Guirguis, until better preparation for clean elections, and better voter awareness. A top priority – push quickly for civilian control of the army.

Egypt is the most influential nation in the region and the best balance against Iranian hegemony, says Guirguis. Get reforms right, as 'stability comes from the consent of the governed'.

Washington's fears about US help backfiring later are misplaced, says Aly Abu Zakouk. A former Libyan professor who came to the US after being arrested and tortured in 1976, he co-founded the National Front for the Salvation of Libya and now operates **LibyaForum.org**. Despite Gaddafi's comeback, his days are numbered, says Zakouk. Western nations risk a great regional disillusionment with them if they fail to speed Gaddafi's departure before he spills more blood. 'Keep Western troops off the ground,' says Zakouk. 'Knock back Gaddafi's air advantage and weapons edge. Provide the resistance with weaponry and supplies, paid for out of frozen Libyan assets. Libyans are very

educated, both men and women. Their priority is moving their lives forward, not religious extremism or Iranian-style government. To gain freedom, which is so dear, a high price is paid to gain it. Libyans aren't looking to betray those who support their exit from a brutal regime. We have the means for our own nation-building.'

Washington politics are never more cynical than when the peace process comes up. 'Tone-deaf' was redefined when Israeli Defense Minister Ehud Barak described recent events as 'a historic earthquake...a movement in the right direction, quite inspired', after which he sought an additional \$20 billion in US security assistance, and Israel approved building hundreds of new homes in West Bank settlements. Whatever support that gets in Congress, it's not apt to win the hearts and minds of cash-strapped Americans weary of Middle East intrigue and having to do budget triage on teachers.

'There's no issue more intrinsic to winning or losing hearts and minds than unequivocal US pressure for a fair deal between Israel and Palestinians,' says Professor Joshua Landis, Director of the Center for Middle East Studies at the University of Oklahoma. Moreover, Landis believes this the opportunity to defuse much of the tension with Syria by brokering back the whole Golan, Syria's prime concern. This would also undercut the reason for Syrian support of Hamas and Hizbullah.

Serendipity's wild cards remain in play throughout. If they break favourably, President Obama may be back on the lucky side of history. Maybe we all will.

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Is a revolution in the rule of law spreading across the Middle East, or is history destined to repeat itself?

REBECCA LOWE

Amr Abdallah al-Bahari was arrested by the Egyptian military on 26 February for assaulting a soldier and breaking curfew in Tahrir Square. Three days later he was secretly convicted in a military court, and his family have accused soldiers of beating him and refusing him access to legal counsel. According to Human Rights Watch, his lawyer only discovered his conviction while inspecting records at a military courthouse the following day.

Al-Bahari is one of dozens of civilians to have been convicted by military courts in Egypt since the Supreme Council of the Armed Forces (SCAF) took control of the country on 11 February. Many have been arrested at demonstrations and accused of weapons offences and curfew transgressions. Yet military courts fail to meet global standards of fair trials, as decreed by the International Covenant on Civil and Political Rights, and human rights groups are demanding they cease operating immediately.

The army's use of military tribunals is just one reason why doubts remain over its true loyalties following the resignation of President Hosni Mubarak. Despite paying lip service to democratisation and due process, SCAF's motives are clouded by ambiguity. For some, it is a stable force of change committed to the people, on whom it has never raised its guns; for others, its perceived empathy is little more than a cunning diplomatic game.

Friend or foe?

Mahmoud Cherif Bassiouni, professor of law at DePaul University College of Law in Chicago, is clear on the matter. 'I don't think we are going to see any significant reforms,' he says. 'I am not just suspicious of it, I am totally convinced of it. The changes under way in the Constitution are merely cosmetic, just a charade. There are no substantial changes in which one could say democracy would be ushered in.'

For Bassiouni, the main concern is the military industrial complex, which comprises ten to 20 per cent of the Egyptian economy. This sector is not only beyond civilian control, he says, but is 'secret, not taxed, and its undisclosed profits are distributed by the military establishment as the senior leadership sees fit'.

'The military derived enormous benefit from the political establishment, so it was in a sense a compromise,' he adds. 'The military told the politicians that they would run the military industries and use the profits as they saw fit, and they would let the politicians run the show.'

According to Bassiouni, outstanding loans of private banks to members of the corrupt former regime could amount to as much as US\$1 trillion – something the military, as complicit players in the market, would be keen to cover up. 'The Central Bank has not disclosed how many of these loans it has guaranteed,' he says, but when that becomes known, 'it could lead to the economic collapse of the country'.

Bassiouni is not alone in his scepticism. Maha Azzam, Associate Fellow at Chatham House, has voiced severe concerns about the role of the military since it assumed power. Speaking at the London School of Economics and Political Science (LSE) on 24 February, she said: 'Much has changed, but much is still in place. The military is there and business interests are still entrenched. The military has tentacles throughout society, in business and in politics.'

George Joffe, research fellow at the Centre of International Studies, Cambridge University, agrees. 'I don't have faith in the military. It

amend the Articles deemed to be the biggest hurdles to democracy and the rule of law. These included the means to elect the president, the limiting of presidential term limits (to two terms of four years), judicial supervision of elections, the primacy of the courts over parliament to decide on members' eligibility, the repeal of emergency laws, the president's use of military justice, and the process by which parliament and the president can amend the Constitution.

Following a series of debates, the public voted through the changes in a referendum on 19 March, by 77.2 per cent to 22.8 per cent.

For some, amending rather than abolishing the Constitution, to allow for a swift transfer of power in six months, was the most pragmatic solution. Beginning the drafting process from scratch, they argued, would have taken at least another year, held up elections and been vastly more complicated.

'The general attitude is that people want elections six months from now so we can have a new president for Egypt,' says Dr Hani Sarie-Eldin, Managing Partner of Egyptian law firm Sarie-Eldin and Partners. 'This is why everyone has accepted the necessary amendments rather than a full new Constitution.'

Speaking via web-link from Cairo at the Frontline Club in London, on 16 February, Egyptian political commentator and Booker Prize nominated novelist Ahdaf Soueif was less convinced. She described the committee, which came under criticism for having no women and being too close to the former regime, as 'very much open to question'.

Soueif said: 'There are several opinions about this. A lot of us believe constitutional reform should not be carried out now under the auspices of the army, a government that is a remnant of the old regime. It should be put on ice until we have an interim cabinet born of the revolution: a properly selected founding council of at least 40 people who can work on it.'

Yet Soueif stressed the military had refused twice to fire on protesters in 1977 and 1985, and was 'the best option so far'. 'There is no point saying we don't trust them. They are there, and there is no reason immediately not to trust them.'

For Bassiouni, however, there is every reason. Quick elections, he argues, means limited time for opposition parties to organise themselves and a sure-fire win for the old regime – disguised, of course, in new, progressive clothing. The new government will be 'non-corrupt and clean', but not the democratic power the people are demanding.

'When you look at Egypt you really have to put your Machiavellian hat on,' he says. 'In six months you will probably have six to ten new parties and five or six presidential candidates.

'The legislative activity that is taking place is critical because Egypt...was the inspiration for most Arab laws.'

Nasser Ali Khasawneh
Khasawneh & Associates

is made up of people from the old regime, the great and the good. They are people who [are] known to have had investment in the old regime.'

Yet Joffe admits the battle lines are not yet clear. 'In Egypt, there is an enormous determination to make this work, among a very wide range of civil society,' he adds. 'They are not going to give in easily to the military – and the military know it.'

Constitutional reform

On 13 February, the army suspended the 1971 Constitution and established a committee to

They will split the opposition votes, and in the meantime the regime will put on a face-lift and win by default.'

Speaking at the LSE on 24 February, Fawaz Gerges, professor of Middle Eastern politics and international relations at the LSE, supported Bassiouni's view. 'In Egypt, the opposition is extremely weak,' he said. 'The label they have is "paper parties". I don't believe the country is ready for elections in six months. You need to prepare the country, you need to begin the process of forming a productive economic base, you need to institutionalise the base between the government and the military. This has taken Eastern Europe more than two decades.'

Evidence of the military's lack of desire for genuine democratic reform can already be seen, Bassiouni says, in the actions of Prosecutor-General Abdel-Megid Mahmoud, who was originally appointed by the regime and remains in place now. Mahmoud has ordered the arrest of the Minister of the Interior on corruption charges – but, Bassiouni points out, has avoided mention of torture, and failed to indict major figures such as former Speaker of the House Fathi Sorour, President of the Senate Safwat el Sherif or the former president's chief of staff, Zakaria Azmi.

Whatever the true nature of the military's intent, it is generally agreed that the consequences of its actions will be profound; not confined to the country, but reverberating across the Arab peninsula. Despite huge pressures on the independence of the judiciary by the Ministry of Justice, which controlled appointments and evaluated judicial practice, the country has long been seen as a role model in the region for legislative justice.

'The legislative activity that is taking place is critical because Egypt, as a legal system and body of substantive laws, was the inspiration for most Arab laws stretching back to the early part of the 20th century,' says Nasser Ali Khasawneh, Managing Partner at Khasawneh & Associates, in Dubai. 'Egyptian jurists were critical to the development of Arab laws and Egyptian experts were used in many countries to work on their constitutions.'

Reema Ali, Managing Partner at Ali & Partners, in Libya, agrees. 'I believe that Egypt is the beacon in the Middle East in terms of legislation, law and systems, and I think it will set the tone for the rest of the region,' she says. 'I see its influence everywhere.'

Beacon of hope

Yet, of all the Arab states, it is perhaps Tunisia – the country that first inspired the waves of revolt still surging through the region now – that acts

as the most powerful beacon when it comes to legal reform. Here, where the first constitution of the Arab world was drafted in 1860, 'the fight for the rule of law is the most significant thing,' according to Fathi Kemicha, Managing Director of Kemicha Legal Consulting, in Tunisia.

'The people are fighting to recover the independence of the rule of law,' he adds. 'We have a Bar of more than a century old and the rule of law is a known thing here. We wanted the transition to be legalistic.'

Joffe agrees: 'The idea of constitutionalism has been a constant theme of Tunisian life, so there was a sense of respect for the law, even during the rule of Ben Ali. And the judiciary

As stock markets fall amidst popular uprisings, what price democracy?

Long-term confidence in the Middle East and North Africa remains high despite unrest and tumbling share prices, say local lawyers. But, opinions are divided over the true economic impact of democratic reform. For some, free elections and a strong rule of law equate to long-term economic growth and investment opportunity. For others, stability is the key to steady transaction flow – and calls for democracy a potential distraction.

'In the long term, I don't think it's a good idea to buy stability at the expense of the rule of law, which I think is what may have been happening in some of these jurisdictions,' says Jay Fortin, head of Al Tamimi & Company's Qatar office. 'Any time you create artificial stability by supporting a regime that doesn't respect individual rights and fundamental property rights, in the long run that is not a good idea.'

Reema Ali, Managing Partner at Ali & Partners, based in Libya, agrees. 'None of the countries had governmental institutions that functioned properly, which impacts all business transactions. This is a turning point, where people are determined to have transparent government agencies that will actually streamline things.'

Doing business in Libya under Muammar Gaddafi, Ali adds, has always been particularly difficult. 'The uncertainty is very high – though the rewards are high too, which is why people went there. There has been too much government and no governing, and those who matter do not hold proper portfolios or positions, so you end up tackling one layer of bureaucracy after another, and are never sure what is going to happen.'

The long-term foreign currency credit ratings of countries throughout the region have suffered since unrest spread across the region. Fitch downgraded Tunisia's rating to BBB- from BBB in March due to continued concerns about political uncertainty. On 10 March, however, Standard & Poor's removed Egypt from review for a downgrade of its BB rating, citing improved prospects for political transition.

Campbell Steedman, Norton Rose Senior Partner in the Middle East, admits that 'change brings opportunity, because there is always someone looking to invest in that process of change', but believes stability takes priority.

'In a market like this, I think rule of law, from an investment perspective, has been historically overlooked if there is stability,' he says. 'Of the two, stability gives investors greater confidence than change. Though frequent change may improve the law slightly, it may be a destabilising factor for investors because they base their investment on predictability.'

He draws comparisons with Eastern Europe after the fall of Communism. 'I saw the whole change there and the way in which investors' confidence went into Ukraine and Bulgaria and everywhere else,' says Steedman, who worked in the region from 1990 to 2005. 'And people would say the legal system is still not perfect, the judiciary is not independent, but it didn't stop investors coming in. They factored it into their risk profile, but they would still invest.'

'It's the 1989 for the region. In 1989 it was a dramatic change to the world, not just to Europe.'

Samer Sultan
Sultans Law

was relatively independent, though subject to the same pressures as Egypt and great abuse of the legal system through decrees passed by the National Assembly or the president.'

In Tunisia, hopes are high that significant legal and political reform can be achieved. Here, lawyers are leading the charge, having fought valiantly against the autocratic rule of Zine al-Abidine Ben Ali for the past 23 years.

'Lawyers were the only opposition in the country,' says Kemicha. 'They were repressed and went to jail, but the only place you could have free elections was in the Bar. We don't have very big law firms, so lawyers were disconnected from the business people and it was harder to put pressure on them. For decades it was a big fight.'

Tunisia's interim authority, headed by Prime Minister Beji Caid Sebsi, have now named a new government and disbanded the feared state security apparatus, notorious for human rights abuses. The cabinet, none of whom served in previous governments under Ben Ali, will remain in place until 24 July, when a national constituent assembly is to be elected.

In addition to rewriting the 1959 Constitution, the assembly will be tasked with drafting a fresh electoral law and press legislation, and selecting a viable political system for the country, whether parliamentary or presidential.

Adly Bellagha, Managing Director at Adly Bellagha & Associates, has faith in the process. 'There has been a big debate over whether we should amend the Constitution now or leave it to a future government, and there is a fear that if we stick to it we will get another president with too much power,' he says. 'But we have to hope we elect the right person and we have to listen to the experts. If we amend it now we might make mistakes. It's not an easy thing to do.'

Tunisia, Bellagha stresses, is very different from Egypt. 'Here, we want to change everything – the whole regime, the Constitution, everything. In Egypt, Mubarak went, but everything else stayed the same.'

Politics or law?

Yet Bellagha is less convinced by the three commissions established to oversee legal and political reform: one to investigate violence

during the riots, headed by Tawfik Bouderbala, former president of the Tunisian Human Rights League; one to investigate corruption, headed by Abdelfattah Amor, a special rapporteur for the former UN Human Rights Committee; and one to investigate political reform, headed by Iyadh Ben Achour, a prominent scholar of constitutional law.

'We want free commissions, really independent ones, but these were the promise of the former president and a continuation of the last system,' says Bellagha. 'Why do we need them? This should be a matter for the courts. You need a judge, not a commission.'

Kemicha agrees: 'The three commissions are very much questioned, and there are people who are saying they are not representative of the people and they are working with the government on imposing pre-conceived answers. So there is a lack of trust in the system.'

'The mistrust is worst for the corruption issue as this was announced the day before Ben Ali left, as one of his concessions. The commission president has already received around 3,000 claims of corruption, but there is a concern these cases might hide the bigger ones. We want judges to investigate, not politicians. Otherwise they will protect their friends and perpetuate the same kinds of problems.'

A new world era

Yet despite reservations about the legal and political processes under way in the two North African nations, overall optimism for the future remains high. Democracy may yet be a distant hope, but there is a spirit and momentum to the reform movement across the region that is unprecedented.

'Egypt has changed dramatically,' says Sarie-Eldin. 'Most people are very happy and expecting more. The whole face of the country has changed and it will not go back.'

'I think every country in the Middle East will be affected by this, including Iran, including Saudi Arabia. The entire region will have a different attitude and appetite for democracy and more transparent laws. Everything is changing.'

Samer Sultan, Managing Partner at Sultans Law in Syria, where the regime is yet to weaken its firm grip on power, is equally buoyant. 'It's the 1989 for the region,' he says. 'In 1989 it was a dramatic change to the world, not just to Europe. Now the Arab world has been left behind to reform their countries into democracies, so it is a new era for the world – and maybe a very good one.'

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A letter from t

ANDREW WHITE

Like so many across the Middle East, Sydney Fernandes hasn't slept soundly in a good couple of months. A senior manager at Kuwait-based logistics giant Agility, the Indian was on constant call when violent unrest gripped Egypt, finally toppling its leader after three decades of dictatorship. Today he is first contact for Agility's Tripoli office, shuttered by its 26 staff as they try to ride out the death rattle of another totalitarian regime.

'We all fear for their safety, and we've heard hardly anything since the conflict began,' Fernandes says. 'E-mails have mostly been down, and communication has been very sporadic.'

'We've been pursuing humanitarian channels and talking to non-governmental organisations, but on our own all we can do is make sure our people stay at home. If the UN, the US and some of Libya's neighbours have been unable to stop the violence, then what can one company do?'

Fernandes is as well placed as anyone to assess the toll taken on Middle East trade by the widespread bloodshed of 2011. Agility employs more than 8,000 staff across 14 different countries in the Middle East and Africa, and has offices in other trouble spots including Tunisia, Bahrain and Oman. And it has watched helplessly as a series of springtime revolutions have swept from the Mediterranean to the Red Sea and even the Arabian Gulf; violence erupting in countries that had been presumed politically stable.

When Tunisian dictator Al-Abidine Ben Ali was ousted in January, residents of the six-nation Gulf Cooperation Council (GCC)

could never have anticipated that such scenes could be repeated on the streets of Riyadh, Dubai or Abu Dhabi. Since then, civilian deaths in Bahrain and Oman have stunned GCC nationals accustomed to the largely benevolent hereditary rule of oil-rich sheikhs. After security forces opened fire on protestors in the centre of Bahraini capital Manama, Pearl Square has become as symbolic to dissenters on the tiny island, as Tahrir Square is to Egyptians.

In North Africa, meanwhile, Fernandes highlights a significant difference between circumstances in Egypt, where the country's military refused to intervene on Hosni Mubarak's behalf, and Libya, where Colonel Muammar Gaddafi has unleashed the full fury of the army and air force on his own people.

'In Egypt you had governance, a fully-fledged army, a parliament in place and a culture that could lead to a caretaker government,' he notes. 'While there was no succession plan, or at least no plan for succession outside the [Mubarak] family, Egypt had a hierarchy.'

'Libya is on a completely different level, it's the complete opposite. The power is in one man's hands and there are no ministers with any kind of power. It's chaos.'

His fears are echoed by Agility's share price, down almost 40 per cent in the first two months of the year, and while Fernandes naturally will have more pressing concerns than the stock ticker, this decline is illustrative of desperate times on regional bourses. Standard & Poor's pan-Arab composite of 15 MENA stock indexes dropped more than nine per cent in the first two months of 2011. Moreover, the major losses weren't limited solely to markets in countries that have seen violence on the streets. If the uprisings have



he Middle East

proved contagious, they're nothing compared to the speed with which peripheral stock markets have caught the bug.

Bourses in Tunis and Cairo have tumbled significantly, but the largest share market in the Middle East, the Saudi stock exchange, lost more than 16 per cent of its value in the first two months of the year. Dubai, which by end-2010 was looking as though it had recovered some of its poise after the Dubai World debacle, dropped almost 13 per cent in the same period. Kuwait, meanwhile, crashed almost ten per cent in January and February.

These markets are paying the price for their own immaturity, as well as that of their investors. While established bourses in New York and London are dominated by international institutional players – the so-called 'smart money', which is traditionally traded on fundamentals – Middle East markets are home to an abundance of retail investors. The locals are driven more by sentiment than brass tacks, and the recent political instability has sent them running scared, selling as they go.

As a consequence, markets don't appear to have recognised the return of high oil prices, which will bring significant revenues to oil-producing countries and are likely to impact positively on their growing economies in the months and years ahead. According to Kate Dourian, Middle East Editor for Platts, the loss of production due to the current turmoil represents the 'biggest shock to the system since the Iraqi invasion of Kuwait in 1990'; economists and policy-makers in the US and Europe have openly discussed the threat of US\$200 oil.

But while they may be making money hand-over-iron-fist, the rulers of oil-rich Arab states aren't celebrating just now. Alongside the

prospect of US\$200 oil comes the queasy possibility that they will be next to face the opprobrium of their people. 'These are scary times for the oil producers,' says Dourian. 'Facebook "days of rage" are being called in Algeria, Yemen and Oman, and so you've got all kinds of energy-producing countries at risk. The loss of another producer would push the system to the limit.'

With this in mind, everyone's eyes are trained firmly on Saudi, Iran and Algeria. The former has attempted to appease would-be rebels even before they take to the streets, with 86-year-old King Abdullah announcing a US\$22bn benefits package for lower and middle income Saudis. In Tehran and Algiers, however, bloody recent protests suggest that the Rubicon has already been passed.

Back at Agility, Fernandes confirms that his company has contingency plans in place for Saudi and Oman, as well as other Arab states, should the popular uprisings spread further. While he won't be drawn on details, he admits the company is braced for an indeterminate period of instability, and the financial implications that entails.

'The unrest will be reflected in our February numbers, and there will certainly be an impact on our first quarter figures, as there will be with every company in the region,' he admits. 'We're all just scratching our heads, as we try to work out what's going to come next.'

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Rule of Law: an elusive panacea

The BRIC and Middle East economies increasingly command respect on the global stage, yet rule of law remains elusive. As the Arab world's popular uprisings suggest epoch-making change, *IBA Global Insight* assesses the challenges of building lasting and effective rule of law.

FRANK RICHARDSON

If the December sentencing of jailed Russian oil tycoon Mikhail Khodorkovsky to six more years in prison wasn't enough to highlight the increasingly central place of the rule of law in world affairs, 'the Arab awakening', coming hard on its heels, certainly has. The self-immolation of Mohamed Bouazizi in Tunisia, after police seized the vegetable stall from which he earned a meagre living, has ignited uprisings in Tunisia, Egypt, Bahrain, Libya and numerous other Arab states. They derive, in large part, from decades of being denied the rule of law and frustration among populations over official corruption, human rights abuses and economic mismanagement.

Such pressures forced 82-year-old President Mubarak of Egypt to step down on 11 February, after 30 years in power (**See box: Egypt – two-and-a-half millennia under hegemony**). Despite his pretensions to democracy, he'd amended his country's constitution with the aim of emasculating any real opposition. Mubarak had repeatedly extended the state of emergency, cracked down harshly on demonstrators and defied judges who were calling for the judiciary to operate independently. Indeed, the IBA's Human Rights Institute (IBAHRI) carried out training for Egyptian judges in 2007 and 2008, based on the principles outlined by the UN International Bar Covenant on Civil and Political Rights (ICCPR).

In reference to recent events in Egypt and beyond, Justice Richard Goldstone, Co-Chair

of the IBA Rule of Law Action Group, says, 'The Rule of Law Action Group [is] dedicated to advancing the rule of law.' He adds: 'There is a natural yearning in most people on all continents for freedom and equality. Nowhere has this been demonstrated more dramatically and impressively than in recent weeks in Tunisia and Egypt. The aftershocks of those democratic movements are still reverberating around the Middle East. They should be welcomed, nurtured and supported by all peace-loving people.'

However, there are widespread concerns that the toppling of Mubarak could lead to a domino effect similar to Eastern Europe in 1989 with the end of the Soviet Union and the Warsaw Pact. This could upset current regional stability and bring about the rise of fundamentalist Islamic groups. Indeed, Silvan Shalom, Vice Prime Minister of Israel, overtly opposes the establishment of democracy in Egypt, on the basis that it 'could have dire consequences'.

The US and UK justified its invasion of Iraq in 2003, on the basis that it would help confer liberty on an oppressed people. Unlike in Egypt, the change was not domestically driven and the death toll has been immense. The US military had a rule of law building programme which involved dispatching US judicial experts, with little knowledge of Iraqi culture and even less experience in the Arab world, to advise on the hasty reconstruction of an Iraqi

legal system that lay in ruins. Responding to the abject failure of the rule of law that followed, US observers concluded, with classic understatement, that a far greater emphasis on strengthening the rule of law should have preceded the nation-rebuilding project.

This was despite the UN General Assembly acknowledging in 1993 that the rule of law was critical to both the upholding of human rights and peace-building, and later duly incorporating rule of law programming into its peace-building missions in Kosovo, East Timor, Haiti, Liberia, Afghanistan, Ivory Coast, Burundi, the Democratic Republic of the Congo and Sudan. Further emphasis was added in 2008, when the Commission on Legal Empowerment of the Poor – ‘the first global initiative to focus specifically on the link between exclusion, poverty and law,’ and backed by more than 20 world leaders, including Madeleine Albright and Hernando de Soto – highlighted the strong relationship between poverty and the rule of law. It boldly claimed that the only way to eliminate poverty was by creating a framework of laws and institutions that provide real protection and opportunity for everyone. Despite an apparent global consensus on the importance of the rule of law, it remains cripplingly elusive to those living in poverty. Some four billion people are estimated to be living in regimes that lack rule of law.

The enormity of the task

Today there is considerable enthusiasm, even missionary zeal, on the part of political leaders in various parts of the world for building the rule of law. This passion has been fuelled by globalisation, but has yet to achieve lasting results. Despite the best of intentions, copious amounts of money and, seemingly, the best advice available, rule of law building by prominent players in the field – such as the World Bank, the IMF, the regional banks and USAID – has seldom produced stable democracy, long-term economic growth and the rule of law.

In post-conflict situations such as Iraq, the precarious task of reinstating law and order on the ground begins on the toppling of a government or the signing of a peace treaty. Aware of the dire need and, following a visit to Iraq by the International Legal Assistance

Consortium (ILAC) in 2003, the IBAHRI commenced a series of programmes in 2004, providing training in international human rights and international humanitarian law for over 800 Iraqi judges, prosecutors and defence lawyers. At the time, Mark Ellis, IBA Executive Director, emphasised that: ‘a stable and independent legal system is fundamental to the entire process of rebuilding the Iraqi nation.’ The legal training in international humanitarian law was attended by judges and prosecutors who could well be involved in the conduct of trials relating to crimes against humanity, war crimes and genocide in Iraq’s criminal courts.

‘There is a natural yearning in most people on all continents for freedom and equality. Nowhere has this been demonstrated more dramatically and impressively than in recent weeks in Tunisia and Egypt’

Justice Richard Goldstone

Co-Chair of the IBA Rule of Law Action Group.

Nevertheless, success is far from guaranteed. On average, 39 per cent of states emerging from conflict return to conflict in the first five years, another 32 per cent return to conflict in the following five years, according to the World Bank Report, ‘Rule of Law Reform in Post Conflict Countries – operational initiatives and lessons learnt’. In the aftermath of war, the courts, prisons, judges, police, legal community, parliament and the media are all likely to have been compromised or be in disarray. Undisciplined and disgruntled armed militias or army units may be roaming the country subjecting a still traumatised population to their will through violence or the threat of it. The task of taking the country from a culture of violence and impunity, to one of societal healing, accountability and redress for serious crimes and human rights violations should not be underestimated. The greatest opposition comes from those who have thrived under the previous regime and fear both losing their privileged position and being made accountable for deeds that, in a society in which the rule of law prevails, would be considered criminal.

As in present-day Iraq, the US’s Law and Development effort of the 1960s and early 1970s aimed to reform the judicial and legal systems of various developing countries. It, too, was deemed a failure, even by its main supporters, on the grounds that local ownership of the projects was absent, it was focused on

the formal legal system to the detriment of traditional and informal mechanisms and was premised on the belief that the American legal system could be transplanted into developing countries.

Although law reform in developing countries has evolved, it is clear that it still remains a long way from anything approaching an exact science. Too many leaders in the former Soviet Union, Latin America, sub-Saharan Africa

Timeline: Egypt – two-and-a-half millennia under hegemony

343 BC: defeat of King Nectanebo II by the Persians brings an end to the native, Pharaoh dynasty and subjects Egypt to Greek, Roman, Byzantine, Muslim, Mamluk and Ottoman suzerainty.

1798: following French invasion, Muhammad Ali, commander of the Albanian regiment and a moderniser, establishes a dynasty that rules until the revolution in 1952.

1869: The Suez Canal, completed in cooperation with the French, later becomes a millstone round the neck of the dynasty, fomenting unrest due to onerous taxes to pay off debt to European banks.

1875: sale of Egypt's share in the Suez Canal to the British sees the presence of British and French controllers in the Egyptian Government.

1882: British and French bombardment of Alexandria and interference stirs nationalist sentiment, propelling Ahmad Urabi to head of a nationalist-dominated ministry committed to democratic reforms.

1919: Nationalist movement strengthened, leading to the revolution against British occupation.

1922: Britain unilaterally declares Egypt's independence and a constitution and parliamentary system of government come into being.

1940s: the Muslim Brotherhood – a social and political movement with welfare-state-like projects – has more than 2 million members and is an opposition force.

1952: Continued British meddling results in the revolution and a military coup, with General Muhammad Naguib becoming the first President of the Egyptian Republic.

1954: Gamal Abdel Nasser, considered the real architect of the 1952 revolution, forces Naguib to resign.

1956: Nasser assumes presidential office, whereupon the Muslim Brotherhood deploys its military wing. By nationalising the Suez Canal, Nasser triggers a military invasion by Britain. Opposed by the Americans, the invasion turns into a debacle for the British.

1970: Three years after the disastrous Six Day War with Israel, Nasser dies and is succeeded by Anwar Sadat. All political opposition is violently crushed and the country comes under a new hegemony, from the US.

1973: October War against Israel in which the Israelis triumph militarily, strengthens Sadat's political position.

1979: Peace treaty includes Israel's withdrawal from Sinai.

1981: Sadat is succeeded by Hosni Mubarak. Autocratic rule is 'legitimised' by single-candidate presidential elections, drawing on Emergency Laws, applied almost continuously since 1967. Mubarak has since been among the West's key allies in the region, with US\$1.3 billion US annual funding for the military.

2005: Mubarak appears to make concessions to 'freedom and democracy' by ordering the enactment of pluralistic election laws, but, severely restricts the participation of popular politicians.

2007: Draconian changes to the constitution are steam-rollered through, prohibiting religious involvement in politics; proposing the replacement of the Emergency Laws with anti-terrorism laws; ending election monitoring by the judiciary; giving the president the right to dissolve parliament and further increasing police powers.

2011: Triggered by unemployment, poverty and corruption, widespread and apparently leaderless protest, stoked by the internet, erupts against Mubarak's regime. Despite dogged determination to hang onto power, he is finally toppled on 11 February. The military, seen by many as the people's army, takes over governance of the country, with the Supreme Council of the Armed Forces promising to build a free, democratic country, to hold parliamentary elections in September. This could bring to an end 2,500 years of foreign hegemony.

and much of the rest of the developing world are willing to pay lip-service to the rule of law, before lapsing back into dispensing with it when it becomes a threat to their grip on power. As a consequence, it is not just Iraq that is being convulsed as attempts are made to cajole and coax societies out of tyranny exerted through the rule *by* law to adopting the rule *of* law, something altogether different.

Many espouse the imperative to spread and effect the rule of law. But, lack of consensus on how best to tackle this daunting and complex challenge has often been compounded by disagreement as to both the role the rule of law plays in promoting development and what, exactly, it entails. In an attempt to fill this void the IBA adopted the following definition in 2009: 'An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are all fundamental principles of the rule of law. Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process, are all unacceptable. The rule of law is the foundation of a civilised society. It establishes a transparent process accessible and equal to all. It ensures adherence to principles that both liberate and protect'. Mark Ellis points out that the term 'the rule of law' is often misused and that, to regain its meaning, there needs to be a paradigm shift to take it 'beyond the formal definition'. He says, 'A country that fails to protect non-derogable rights within the human rights framework cannot be designated as a country upholding the rule of law. This actually sharpens the definition of what it means to be a country based on the rule of law.'

Not the preserve of the West

Its current vogue may give the impression that the general concept of the rule of law is exclusively modern. However, it was as early

as the 4th century BCE (before common era) that Plato enthused: 'if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state'. Nor is the concept in any way exclusively European. In the third century BCE, one of Chinese philosopher Han Fei Zi's three principles of governance was that laws, as opposed to rulers, should rule. Despite our current perceptions of countries, like Iraq, with majority Islamic populations, prior to the 12th century not even the caliph was deemed to be above Islamic law. Professor David Mednicoff of the University of Massachusetts Amherst explains. 'Due to the influence of Islamic legal ideals and development, the rule of law exists as a political touchstone in Arab societies in a manner similar to its status in the United

'Due to the influence of Islamic legal ideals and development, the rule of law exists as a political touchstone in Arab societies in a manner similar to its status in the United States'

Professor David Mednicoff
University of Massachusetts Amherst

States.' There are, of course, vast cultural and legal differences between Islamic law and Western secular systems, with the former predicated on God ruling directly through the medium of the Qur'an.

In recognising these different legal traditions, Mark Ellis considers a formal conception of the rule of law may be difficult to embrace in the Middle East. 'Nevertheless, there is much common ground,' he says. 'The rule of law is about the pre-eminence of concepts and principles that transcend different cultures and legal systems, and there are scholars who consider the foundation for this is already there in the Middle East. On the other hand, there are some human rights principles that can be viewed as derogable and more flexible. This is important, because it allows countries to look at certain issues based on its own cultural differences and background.' Even within Europe there are significant practical differences between the common and civil law traditions. Such differences need to be acknowledged and understood to better appreciate how the rule of law takes effect, so as to avoid vain attempts to transplant legal systems into inappropriate environments.

Indeed, judicial systems in developing countries may be little more than that: a culturally inappropriate transplant from a former imperial power that was aimed at keeping the native population in check.

Russia: Mikhail Khodorkovsky

The IBAHRI is the only organisation to have had a full-time observer based in Moscow attending all sessions in the second trial of Mikhail Khodorkovsky. After months of hearings, proceedings completed on 2 November 2010 and the judgment was given at the end of December: Khodorkovsky was convicted. The IBAHRI report will be released after the completion of appeal proceedings in 2011.

Mikhail Khodorkovsky was the founder and former Chief Executive of Yukos Oil Company. He was convicted in 2005, under controversial circumstances, of fraud and tax evasion and was sentenced to eight years in prison. He served several years in the Krasnokamensk prison camp in Chita, Eastern Siberia. In February 2007, he was charged with embezzlement and money laundering. He was then moved to Moscow's Matrosskaya Tishina prison for the duration of the second trial and he remains in detention. Proceedings were completed in November 2010 after 20 months of evidence, testimony and arguments.

Where one country has been dominated by another, its legal system inevitably reflects this. Thus, rather than the rule of law, it is often a system of rule by law that is bequeathed to states on gaining their independence. This is the case throughout Africa and the former Warsaw Pact. In the Democratic Republic of Congo, for example, Patrice Lumumba, the country's first legally elected prime minister, advocated the full revision of the colonial legal system and its laws, stating in his Independence Day speech,

'We [the Congolese people] have had our lands despoiled under the terms of what was supposedly the law of the land but was only a recognition of the right of the strongest... We are [now] going to see to it that the soil of our country really benefits its children. We are going to review all the old laws and make new ones that will be just and noble.'

A few weeks later he was deposed and murdered.

Moving from systemic rule by law imposed by a foreign power, to rule of law, domestically driven, is a tall order, fraught with challenges. The power vacuum left when a foreign power withdraws will often be filled by an aspiring elite that collaborated with the former imperial master. Such a coterie will be anxious to maintain a position of privilege, not only to continue to enjoy life in the manner to which it has become accustomed, but also to cover its back. President Alexander Grigoryevich Lukashenko of Belarus is a former officer in the Russian army and the only deputy of the Belarusian parliament who voted against ratification of the December 1991 agreement dissolving the Soviet Union. Lukashenko ensures his re-election by appointing his supporters as voting station staff and election monitors. Lukashenko has a counterpart in Central Asia: President Nursultan Abishuly Nazarbayev of Kazakhstan, a former Chairman of the Council of Ministers and First Secretary of the Communist Party of Kazakhstan during the Soviet era. Where throwing off the yoke of

a foreign power has been effected by a war of independence as, for example, happened in Indonesia, the kudos, stature and resources acquired by the country's military, coupled in some cases with naive faith in benevolent dictators, is likely to even further entrench rule by law, making the transition to the rule of law that much harder.

Professor Barry R Weingast of Stanford University, believes that understanding how societies bring violence under control is key to success in establishing rule of law. In 'natural societies' that have historically been the most common social order, violence is curbed by a finely balanced mollification of powerful individuals and factions through the granting of rights and privileges, even if this favouritism does hinder long-term development. In marked contrast to this are 'open access orders' of the modern developed world. These appear to control dissent, opposition and violence through competitive open access to organisations and institutions, founded on a more meritocratic and egalitarian theory of justice, conducive to adaptability and economic growth.

The finely balanced peace of natural societies – built on grace and favour, personality cults, the divine right to rule and so on – is personal in nature. Open access orders are far more inclusive and impersonal. This makes for greater societal stability, contrasting with the volatility of natural societies, which are more easily convulsed by climatic shocks, demographic and technological change, military intervention and so on, and may lead to a descent into armed conflict, as seen in the former Yugoslavia, Rwanda, Somalia, Chad, Iraq, Mozambique and Sudan. Mature natural states, such as modern day India, Brazil, Argentina and Mexico, on the other hand, have a far more developed meritocratic private sector, have a greater resilience to change and tend to generate more wealth.

Putting down dissent

Emerging economies, such as Mexico, Indonesia and Russia – with their judiciaries, general elections, political parties and markets – appear to be open access orders, but lack inclusiveness, competition and perpetuity. The last of these is the aspect of the rule of law that is critical, but often neglected, and without which there can be no certainty of the law, no equality before the law and no absence of arbitrary abuse. The inability to bind successor regimes to the rules and institutions that currently prevail is, says Weingast, ‘a fundamental barrier to establishing the rule of law. No matter how attractive are today’s institutions or rights, they are no good in the longterm if tomorrow’s regime can alter them at will. This issue is intimately tied to the issue of creating a perpetually lived state, a state whose characteristics and institutions do not depend on the identity of leaders or dominant coalition’.

Perpetuity is a fundamental issue in Russia. Wanting Russia to join the Council of Europe, former President Vladimir Putin – who came to office in 2000 – initiated some important and positive changes to Russia’s criminal procedure. Yet, as early as 2005, the IBA expressed its concern about the Russian Government’s power over judicial appointments and other issues of judicial independence. Moreover, emboldened by his country’s gas and oil bonanza and responding to the demands of his military campaign in Chechnya, prior to elections in 2007/2008, Putin cracked down on civil society, freedom of the press and what he regarded as troubling individuals, such as Mikhail Khodorkovsky (see box). Russian reporters writing about Chechnya, organised crime, state officials and big business have been killed, while hundreds of others were indicted on various criminal charges. Russia’s current president, Dmitri Medvedev, a former law professor, who also pledged his commitment to the rule of law appears, nevertheless, to be restricting openness in much the same vein. Just as the Russian ministry of justice prepares more far-reaching proposals for judicial reform, public information on the activities of the courts has been so severely restricted, court reporters now complain that an essential anti-corruption element in the system has been removed.

Targeting the judiciary in natural states is nothing new, as was evidenced by the likes of former President Pervez Musharraf in Pakistan, whose refusal to bow to judicial authority in 2007 led to the removal of some 60 per cent of the country’s judges. Similarly, when, in June, 1975, Justice Jagmohan Lal Sinha of the

Allahabad High Court in India, nullified Prime Minister Indira Gandhi’s election victory because of irregularities and banned her from standing in an election for six years, she responded by declaring a State of Emergency, which continued until March 1977.

Mature natural states such as Argentina, Brazil, Chile, Indonesia and India appear to foster the rule of law. But, beneath the veneers it is perfectly possible that constitutions are being subverted, corruption is rampant, government abuse is pervasive and civic rights – such as freedom of speech and the press that help reinforce the rule of law – are undermined. In Indonesia, for example, the police force is seen as the country’s most corrupt agency, a reputation that has only been compounded by its recent battle with the Corruption Eradication Committee, in which it is alleged the police force fabricated evidence as it jockeyed for power and impunity. Accordingly, democratic control of both the police and the military is one precondition that is vital in making the transition to an open access order and the rule of law. It is not at all unusual in such countries for the judiciary, police force and public prosecution service to have been in thrall to an autocratic natural state regime, such that concepts of equality before the law and serving the public are so entirely alien that corruption compromises principles of justice where political intervention once did.

In Africa, octogenarian presidents appear blasé about subverting the constitutions of their natural states – former president Hosni Mubarak of Egypt, having been just one example. Another is President Wade of Senegal who, although having backed an amendment to his country’s constitution restricting a president’s tenure to just two terms has, nevertheless, expressed his intention to run for a third presidential term in 2012, when he will be 86, and during which he is likely to continue to groom one of his children to succeed him. In his bid to hang onto power, he has also conferred on himself the right to dissolve parliament, had a former prime minister arrested, jailed journalists and is increasing his control over state media. Similarly, after 23 years in power, President Robert Mugabe of Zimbabwe, probably the most infamous of the octogenarians, has attempted to legitimise his three-decade grip on power through elections; but these are reportedly subject to vote-rigging and extreme violence.

Not amenable to the rule of law

Reformers ‘seek to transplant a subset of open access institutions into natural states without understanding why natural states systematically

differ from open access orders'. As a result, suggests Weingast, not only do the reforms fail because of the absence of perpetuity, but also, because the dismantling of the natural state's systems for accommodating conflicting factions is seen as a serious threat to the peace, it heightens resistance to reform. Weingast concludes that the transplanting of rights, rules and institutions from open access orders into natural states is unlikely to work while the basic structure of the latter remains unaltered. A transitional period of structural change must be undertaken. 'Although natural states have existed for 10,000 years, only a little over two dozen states have succeeded in this transformation, with most clustered in Europe', says Weingast. However, more optimistically, Justice Goldstone says, 'Apart from the traditional democracies of the western hemisphere there are a number of developing nations that have joined their 'club'. In Africa they include, South Africa, Botswana and Ghana and there is a good prospect that Egypt under a new constitution about to be fashioned will also be numbered among them.'

The World Bank has acknowledged the challenges of establishing rule of law programmes, and suggested solutions. Lack of expertise to bring about legal change in developing and post-conflict countries, compounded by an inadequate evaluation of programmes, is one of the reasons the Bank cites. Progress is also hampered by an emphasis on the provision of, what often turn out to be empty institutional shells lacking the personnel with integrity and values who are able to understand and enforce legislation, while upholding rights. Because it can take considerable time to train judges and build judicial capacity, the easier and more tangible option of constructing buildings and equipping becomes the focus for donors. Programmes need to address pressing issues that are most likely to reap results, such as why judges continue to be corrupt, inconsistent and biased.

Holistic engagement

However, the World Bank suggests that the most likely way to generate solutions is through holistic engagement. Establishing rule of law requires deep societal changes, but these can only be effected if the population comprehends them, assents to them, and is instrumental in implementing them. For this reason, the technically driven approach of lawyers who aspire to mimic Western systems is deemed

unlikely to succeed, particularly where the local social dynamics are ignored. Political pressure for reform from local players imbued with certain ethics and beliefs in their role in society is viewed as essential if reform is to be effective and sustainable. Thus, key stakeholders, such as NGOs, the business and legal community – indeed, civil society in general – as well as the authorities, must be seen to embrace the outcomes sought. Such thinking informed the IBAHRI's approach to establishing an independent bar association in Afghanistan. Phillip Tahmindjis, Co-Director of the IBAHRI, explains that: 'Creating a sustainable bar association in Afghanistan has been a matter of winning hearts and minds and ensuring local ownership of the project through consultation with and input from lawyers, NGOs and government departments. It is important that it is not seen as foreign.'

Likewise, particularly with the Arab world in a state of flux, the process of designing a new constitution should be seen as an opportunity to negotiate divisive issues and bring factions together to determine a future vision for the state. An inclusive and participatory national dialogue of this type adds legitimacy and local ownership and is more likely to result in a democratic constitution. The role of the media in this process, through consensus building, facilitating dialogue changing expectations and norms, and making public the abuses of those in power, can go a long way to helping to reinforce the rule of law. Key to societal transformations of this type is time, commitment and inclusivity, as well as a thorough understanding of and sensitivity to the history, culture and social dynamics of the country concerned. The quick, top-down, externally-imposed fix can never be a viable option. ☒

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A letter from

BRIAN NICHOLSON

Life presents lawyers with many challenges, not least of them concentrating on matters such as dispute resolution, import-export facilitation and public tender regulations while just yards away on Copacabana Beach, thousands of sun-worshippers reach for the comfort of ice-cold beer.

Even worse for the 180 participants in the IBA Latin American Regional Forum conference in February, looking at business opportunities and the legal framework for the 2014 FIFA World Cup football competition and the 2016 Olympic Games, was the omnipresent pressure of time. These major events may be three or even five years off, but the clock is ticking. And while speed is of the essence, there can be no trade-off between doing things fast and doing them right.

Brazil will host the World Cup in 12 cities nationwide, from the Amazon forest and Pantanal wetlands to the economic powerhouse of São Paulo. The Olympics will be essentially a Rio de Janeiro showcase. New stadiums, highways, hotels and airports will cost tens of billions of dollars, creating huge investment and business opportunities.

'People tend to get fixated on the question of venues, but equally important is having good airports to handle the anticipated crowds, good roads, high speed rail and so on,' said Mark Lane of London-based Pinsent Masons, who co-chaired a panel on 'Procurement and Construction'.

Sports facilities and some urban improvements will be largely financed and contracted by the government, either directly or indirectly, while many major infrastructure projects will involve concessions or public-

private partnerships. Several participants at the Rio conference expressed concern about the potential for legal and regulatory delays. Federal legislators have admitted as much.

'Everyone knows that the Public Tenders Law (Lei de Licitações) as it currently stands will delay projects for the Olympic Park in Rio and for the airports that will serve the Olympics and the World Cup,' Paulo Teixeira, congressional leader of the governing Workers' Party (PT) said in a debate this year. Government sources said new legislation was in the pipeline.

Mexican lawyer Roberto Hernández García of Comad SC, a speaker at the Rio event, noted that there was 'still a question mark about how the Brazilian Government will handle the procurement and construction of these major projects for the Olympics, considering the current regulations and the importance of timely completion'.

Conference Co-Chair Gilberto Giusti of Pinheiro Neto Advogados in São Paulo said one part of the solution was for authorities to act with maximum transparency at every step, from publication of tender details through to speedy announcement of the results: 'All hiring and contracting must be done in public view, with very clear rules and criteria, so that any irregularity can be quickly spotted.'

Nobody was suggesting that legal safeguards should be reduced, Giusti said. The Accounts Court, the Public Attorney's Office and established investigative systems must continue to operate. World Cup and Olympics contracts cannot be exempt, but wheels must turn faster if everything is to be ready on time.

Speed can also be achieved through enhanced dispute resolution. Giusti noted that major contracts for the London Olympics are monitored by a Dispute Resolution Board, meaning that any problems can be spotted and



Latin America

resolved at an early stage. In Brazil, projects can stop for months or even years as a result of contractual arguments or legal challenges to tenders. 'This is a challenge we face here,' Giusti acknowledged.

David W Rivkin of Debevoise & Plimpton, a New York firm, spoke on 'Sports Arbitration'. 'The most important point to come out of our panel is that each Olympic city has found a way to structure its contracts and dispute resolution mechanisms in a manner that avoided disputes and allowed constructions to be completed on time,' Rivkin said. 'I fully expect Rio will be able to accomplish the same thing.'

Some participants pointed to an additional source of potential delay in the perceived lack of clarity about the division of competencies between federal, state and municipal governments. A case study presented to the conference concerning a multi-billion dollar private industrial investment in Rio illustrated the potential for difficulties, particularly in the area of environmental licensing.

While the focus of the two-day conference was the World Cup and the Olympics, many of the problems discussed were matters that Brazil needs to address anyway, regardless of these major events. Reliable energy is essential for flood-lit Olympic Opening Ceremonies and World Cup football matches that will be televised around the world, but it's just as necessary for a competitive economy. 'Brazil's challenge today is to ensure that current energy policies and regulations can attract enough investment and financing to guarantee supply for the world class sport events and for the next decades,' said Colombian lawyer Jaime Herrera of Posse Herrera & Ruiz.

Slow customs clearance is another ongoing problem that is dragged into the spotlight by the World Cup and Olympics. 'Substantial

importations will be necessary for the World Cup and Olympic Games,' said Gustavo Brigagão of Ulhôa Canto Rezende & Guerra, a Rio-based office. Brazil has pledged tax-free importation for items directly related to both events, but 'this is not equivalent to hassle-free importation,' Brigagão said. 'I believe special procedures should be put in place for the events.'

Various panels touched on the question of legacy. Rio lawyer José Antonio Fichtner of Andrade & Fichtner noted that a major lasting benefit could lie in ensuring projects are sustainable: 'Construction must be environmentally friendly,' he said, 'so that present and future generations can have their quality of life improved, and not worsened, by the Games.' And Hendrik Haag, a finance lawyer with Hengeler Mueller of Frankfurt and another event co-chair, noted that apart from some football stadiums, virtually all sports facilities required public financing, given the difficulty in ensuring profitable use after the events. Nevertheless, the vast amount of general infrastructure would create 'permanent value' for the host cities.

'Rio de Janeiro seems to have taken account of every possible aspect of the project, everyone was very impressed and I don't think anyone had serious worries that Brazil will fail to live up to its commitments,' said Haag, while local lawyer Daniela Ribeiro Dávila of Vieira Rezende Barbosa & Guerreiro pointed to another asset: 'The enormous support and involvement of the Rio population.'

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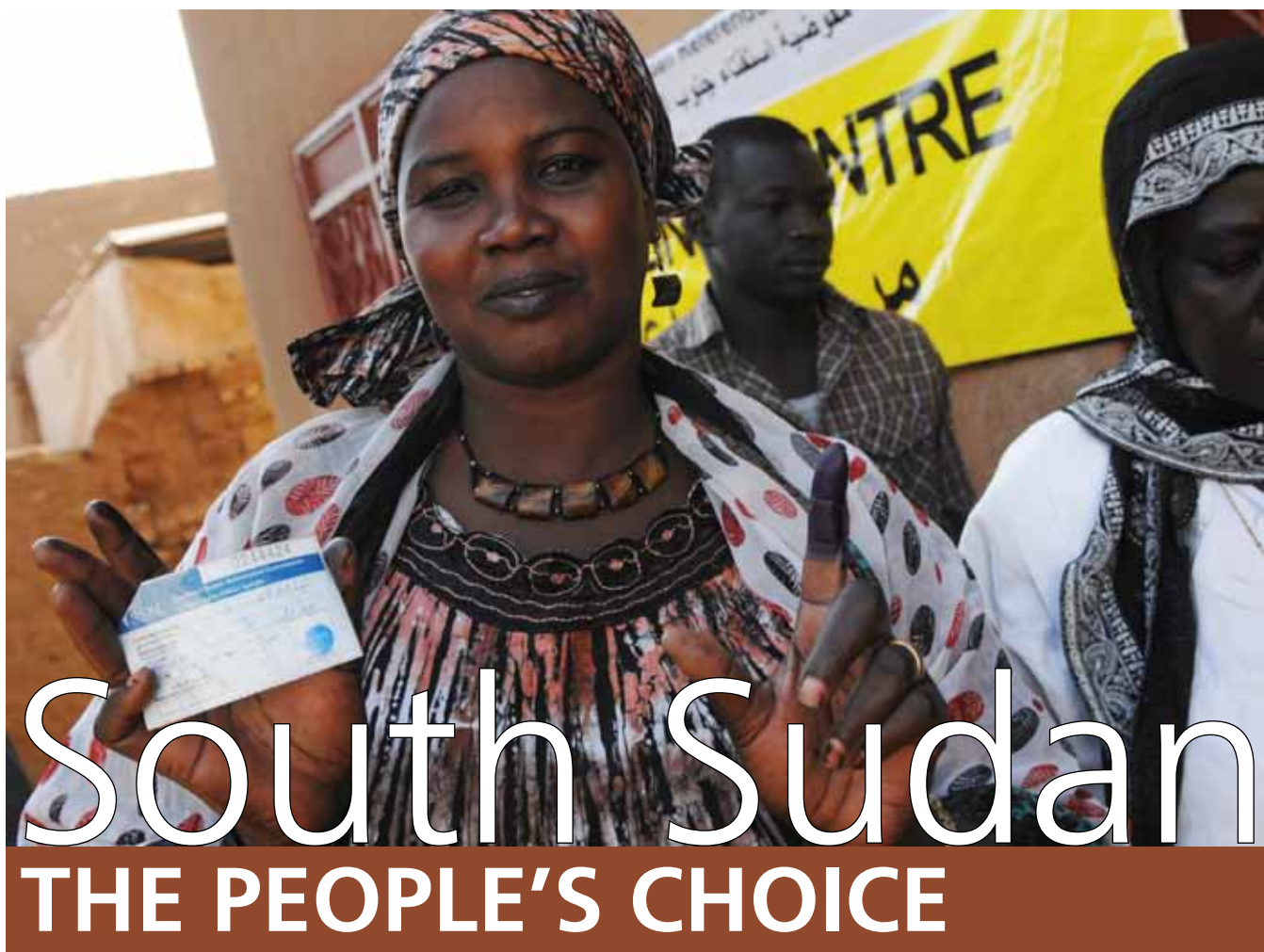


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South Sudan

THE PEOPLE'S CHOICE

The inhabitants of South Sudan have voted overwhelmingly for secession – but the new entrant to the community of nations must overcome a number of challenges, logistical and political.

TOM BLASS

A 98 per cent favourable vote is the kind of result that is typically regarded with some scepticism – justifiably. But in the case of the January 9th referendum in South Sudan, such a result is entirely credible. The Southern Sudanese are tired of being shoe-horned into a single nation with neighbours with whom they have often been at war, and with whom they have been at odds since before the creation of the country.

It's been a long time getting here – six years since the signing of the Comprehensive Peace Agreement signed in Khartoum – and some Sudan watchers, made shy of optimism by a history of u-turns, were doubtful that the day would ever come.

There is jubilation in Juba. And surprising calm in Khartoum. Preliminary indicators suggest that President Al-Bashir, president of what is still a unified Sudan, has to all intents given his blessing to an event that he describes as the people's choice. But there are huge challenges to overcome before this

newest entrant to the community of nations can consider itself a strong and viable country. South Sudan may be united in its celebrations, but it occupies an area that is not only vast geographically, but ethnically and politically highly complex.

Much of the reporting of the referendum has focused – rightly – on South Sudan's need for infrastructural development if first steps at nation-building are to be successful. The oft-quoted fact that there is less than 60 kilometres of paved road in the South is true; as it is that it will be impossible for the new country to realise its potential as an oil producer without massive investment in pipelines, refineries and drilling equipment. The need for institutions of governance is no less urgent – with some Sudan observers suggesting that without a marked change of direction there is every possibility that the new South Sudan will degenerate into what one frequent visitor described as, 'a nasty little police state.'

Rule of law the victim

But reports from Juba and the wider region paint a mixed picture: at its most positive, of a proto-nation struggling against the odds to realise a dream of pluralist civil governance.

Daniel Bekele, Africa director of the campaigning institution Human Rights Watch (HRW), told *IBA Global Insight* that he was concerned that the institutions of the rule of law were only starting to emerge and that it was not yet clear that Southern Sudan would yet be capable of governing itself in such a way that respected the rights of its citizens. He said the organisation had uncovered a 'growing culture of impunity', particularly in relation to the actions of its soldiers. Recent reports by HRW have highlighted abuses including land-grabs, the use of 'excessive force during military operations and while disarming civilians,' and most worryingly, attempts at the suppression of an opposition party – the SPLM-Democratic Change. And it predicts that underlying issues around land ownership – for example, between Shilluk and Dinka peoples – may yet translate into political, even violent disputes. HRW has also documented sexual violence within the new Southern Sudanese police force, and a culture of unaccountability among young police recruits, manifest in arbitrary acts of violence and intimidation.

These kinds of report surfaced well before the referendum. In 2010, for example, a major study on South Sudan conducted by the London School of Economics (LSE) found that

neither the Southern Sudanese government (Government of South Sudan – GoSS), nor the numerous aid agencies in the country, had actually achieved what they had set out to do during the interim period between the signing of the Comprehensive Peace Agreement in 2005 and the (then imminent) referendum. Rather, they found that 'accountable government structures on all levels, reliable service delivery, civic education, security and a coordinated effort among development agencies remain elusive goals'.

An underlying concern, it argued, was the tendency to blame violence either on interference in Southern Sudanese affairs by the Khartoum government, or on 'tribal hatred', noting: 'The "tribal" label is applied to anything from family disputes, clashes within sub-clans of the same tribe, to attacks by criminal gangs or marauding former soldiers. But as an explanation for violence, the term is meaningless, particularly as violence is as often intra-tribal as it is inter-tribal.' Intense political competition, resource disputes and 'an absence of institutions with the capacity to control violence', were, the report concluded, more plausible explanations for Southern Sudanese woes.

Arguably, that analysis might be flavoured by an academic distaste for 'ethnic' explanations – the report does go on to explore a number of areas where disputes are at least cast locally in tribal terms. Either way, five years is a short time in which to expect the organs of government

Abyei: contested territory, potential tinderbox

A key feature of the Comprehensive Peace Agreement was that it provided a mechanism for the determination of the status of Abyei, an oil-rich province more or less centrally located between 'North' and 'South'. Under a protocol signed in 2004, it was agreed that the population of Abyei would be permitted to vote on whether it regarded itself as part of the North or the South. And it established a Commission tasked with determining the boundaries (most critically, the Northern boundary) of Abyei province.

Historically, Abyei was always regarded as a 'difficult' province

by colonial administrators. Remote and sparsely populated, two main groups, the Misseriya Arabs and the Ngok Dinka overlapped in Abyei, and conflict between the two – including cattle raids – were regular occurrences.

Under the Abyei Protocol it was agreed that the mechanism for deciding the boundaries of Abyei should be a commission (the Abyei Boundary Commission, 'ABC') – consisting of representatives of both North and South, alongside a panel of independent experts appointed by the main sponsors of the peace process. On the face of it, their shared task was straightforward,

being to determine modern-day Abyei as constituting 'the territory of the nine Ngok Dinka chiefdoms transferred from the province of Bahr al-Ghazal to that of [the province of] Kordofan in 1905.'

Much hinged on the ability of the Commission to discern the administrative boundaries imposed by the British administrators in the early years of colonial rule – and, importantly, on whether or not those administrators intended the Bahr al-Ghazal river to have served as an administrative boundary. Efforts, however, were hampered by an absence of satisfactory records – and also by the evident confusion

to develop – especially given the region’s size, ethnic and political complexity, the physical and psychological legacy of war, poverty and lack of infrastructure. And the capacity for change possessed by the ruling Sudanese People’s Liberation Movement/Army (SPLM/A) – which dominates the Government of South Sudan (GoSS) has been questioned by Sudan watchers long before it was certain that the referendum would indeed take place.

Stephen Chan, professor of International Relations at the School of Oriental and African Studies in London, says that he shares the concerns of others who have spent time in South Sudan that the SPLM/A will find the transition from being a militarised liberation army, to being a democratic party in the context of democratic civilian government, a difficult one to make.

Not everyone in the region sees the SPLM’s current leader Salva Kiir, as the right person to lead this transition, he points out: ‘There are a number of ‘young Turks’ in South Sudan who are dissatisfied with Kiir; they feel that he has served his purpose as a liberation commander

but that it is time for a new leader,’ he told the IBA, adding that the short-term success of the government would depend on the composition of the first cabinet, and its inclusion of

new, possibly more technocratic elements. (Chan observes that the SPLM could do worse than to follow Robert Mugabe’s lead in 1980: ie, appointing younger politicians, many of whom had acquired skills and credentials in the West, to key positions.)

Tim Flatman, an associate of the London-based Foreign Policy Centre, who has returned from a three-and-a-half month fact-finding mission

to South Sudan, is convinced that there are positive signs that the Southern Sudanese possess both an instinct for pluralism and a genuine will to create a democratic nation in the South. And, he said, there was evidence that the political engagement demanded of the region by the process of the referendum had actually enhanced that aspiration.

He recalled, for example, that in Upper Nile Province (one of the most ethnically and hence politically complex of the South Sudanese provinces), in the campaigning month ahead of the referendum – the SPLM had visited villages expressly with the purpose of informing residents that campaigners for Sudanese unity should be heard out courteously, and that it was not the SPLM’s wish to prevent that message being heard. ‘My very strong impression,’ he told *IBA Global Insight*, ‘was that the SPLM understood that a free and fair referendum was the best guarantee of the referendum actually being successful’, ie that rigging the vote would be counterproductive.

Civil society the key to democracy

Flatman observed another interesting, and otherwise little-documented by-product of the referendum process. As a condition of the Comprehensive Peace Agreement (CPA) under the auspices of which the referendum took place, the SPLM was not allowed to campaign for separation until one month before it was held. The consequence, says Flatman, being that the SPLM allowed civil society organisations, including youth and women’s groups – which previously had only existed as social networks – as well as campaign

‘The South cannot sell its oil without piping it through North Sudan to Port Sudan on the Red Sea and hence to the international markets.’

Stephen Chan

School of Oriental and African Studies

in 1905 regarding the river’s identity and location.

In the absence of agreement between the Sudanese representatives, the decision of the international experts was to be final and binding. In the event however, the ABC’s findings were not accepted by the Government of Sudan, which thanked the Commission for its ‘recommendations’ but rejected them, arguing that the Commission had ‘exceeded its mandate’.

The parties agreed to resort to arbitration, and in September 2009, a panel of the Permanent Court of International Arbitration (PCIA)

gave a decision regarding the Abyei boundaries that was described by both parties as ‘a victory’. But the PCIA award has not drawn a line under Abyei; the North appears to be reneging on its pledge to honour the award. Fighting broke out in the region shortly after the referendum, and SPLM and GoSS have yet to agree on who, exactly, is entitled to vote on the question of whether Abyei belongs to North and South – a situation complicated by the contested histories of land use and ownership by Misseriya and Ngok Dinka respectively. Mediation efforts led by President Obama’s special envoy Scott Gration has yet to bear fruit.

groups specifically set up for the referendum, to campaign for separation in their own ways.

'Many of these are now looking at their possible political role and will begin campaigning on issues that involve them, such as unemployment, corruption, lack of transparency, as soon as separation is implemented. It might be a "happy accident", ie an unintended consequence of the conditions of the referendum, but I think it could represent a significant if small step toward civil society,' he says.

Flatman's thoughts bear out the recognition within the public international law community that democracy and civil society generally fail if imposed – especially by third parties. Co-Chair of the IBA Rule of Law Action Group, Justice Richard Goldstone, points out that, 'The greatest challenges faced by a nascent country are to make its people feel engaged in the process of nation-building. They should be consulted as effectively as possible and be given a sense of ownership in the new organs of state.'

But some observers have argued that, not only is the South not yet ready for multiparty elections, holding them now would only consolidate single party rule. One, who did not want to be quoted as saying so, pointed out that 'at the moment, the tendency would be merely to vote along ethnic lines. But also there is no competent political force which can actually offer the SPLM competition'. In that observer's view, a more sustainable path to democracy would be for rival parties to emerge out of possible splits in the SPLM, and out of the continuing development of civil society generally. 'Civil society is the sphere in which democracy opens up,' he argued.

South Sudan is still five months away from formally declaring its constitutional independence. Before that happens, GoSS negotiators must settle some outstanding issues with their counterparts from Khartoum. It is generally hoped that mutual fear of a reversion to conflict is sufficient to ensure these negotiations will succeed. But nonetheless there is unsettled business.

South Sudan needs infrastructure, and it needs revenues if it is to realise any ambitions of becoming a fully functioning and self-sufficient state. A potential deal breaker between North and South is the sharing of Sudan's oil wealth.

Currently, North and South share revenues from Sudanese oil '50–50'. This is an arrangement that Steve Chan regards as reasonable. 'The South cannot sell its oil without piping it through North Sudan to Port Sudan on the Red Sea and hence to the international markets. Any prospect of other routes out of the South is a long way off. If well

advised, the South will settle for a prolongation of the current revenue-sharing arrangement – which also reflects the original investments made in the oilfields by Khartoum.'

But as of mid-February, GoSS has said that it was ruling out revenue-sharing per se, and that it would prefer to proceed on the basis that it pays a transit fee for shipping the oil through the North. In financial terms, it may yet amount to very much the same, but the critical distinction being that, as the SPLM Secretary General has said, the notion of 'sharing' the oil wealth is inappropriate given that in July, North and South will be separate sovereign states, and not two halves of one whole.

'The greatest challenges faced by a nascent country are to make its people feel engaged in the process of nation-building.'

Justice Richard Goldstone
Co-Chair of the IBA Rule of Law Action Group

The need to share

Face-saving may also have a part to play in GoSS's attitude. Another thorny issue remains the allocation of Sudan's US\$34 billion debt burden. According to Flatman, the higher echelons within the SPLM are quite willing to compromise on the debt issue, but, 'it's a very hard sell to the people. The popular view is that it represents money that was used by the North to wage war on the South, and that debt-sharing would in effect mean the South was paying for the [past] extermination of its own people. Some say that as a "bribe for peace" it's just too high... all the more reason for the international community to explore the possibility of debt forgiveness'.

But perhaps the most contentious issue remains the demarcation of the actual border. While the British administration effectively treated Sudan as two separate countries (Arab, Muslim North, and Black, Christian/animist South), they failed to demarcate a boundary that subsequent history has hardened politically, even if it remains topographically, and in parts ethnically, elusive – and it is known that both sides have been scouring archives in London, Khartoum and elsewhere in their efforts to find any kind of cartographical representation of an actual boundary made before 1956 – the year of Sudanese independence.

Even putting to one side the vexed issue of the Abyei dispute (see box), North-South

The CPA – the route to a long lasting peace?

The Comprehensive Peace Agreement (CPA) refers to a series of agreements culminating in a final agreement signed in 2005 between President Omar Al-Bashir and John Garang (leader of the SPLM until his death in 2008). It was intended to end Sudan's second major civil war since the country's independence from the United Kingdom in 1956, and originally bound the two parties into a partnership intended to work for a 'united, New Sudan'.

It is sometimes forgotten that the SPLM has not always advocated secession. Indeed, Garang was originally an advocate for a united Sudan (and fought mini-conflicts with pro-secessionist political factions in the South) before concluding that the Southern people's best interests would be best served in an independent state.

Important stages preceding the January 2005 agreement included the signing of the Machakos Protocol, signed in Machakos, Kenya, in 2002, which established the broad principles that underpinned the subsequent stage of the process. Further landmarks included protocols on power-sharing, wealth-sharing, and for the attempted resolution of localised (but damaging) conflicts in Blue Nile Province, Abyei and South Kordofan.

So far it has proved to be a remarkably successful process, although the road to the referendum has not always been smooth.

Under the CPA, SPLM politicians enjoyed ministerial positions in the Government of Sudan in Khartoum while also serving in the Juba-based Government of South Sudan (GoSS).

In 2007, Southern Sudanese MPs withdrew from the power-sharing agreement on the grounds that the soldiers from the North were occupying oil fields in the South – and because of the government's failure to implement the Abyei Protocol. The soldiers left the oilfields in the South in January 2008; the Abyei issue, however, remains complicated and not entirely resolved (some believe it remains potent enough to drag the two sides back into war).

It is highly unlikely that the CPA would have been possible without the sponsorship and participation of the international community – in addition, of course, to the involvement and political will of the two sides themselves. The most active forum has been the Assessment and Evaluation Commission (AEC), which includes representatives from both the Sudanese sides, and in addition Italy, the United States, the United Kingdom, Norway and the Netherlands, and is chaired by former UK diplomat, Sir Derek Plumbly. The African Union, United Nations, European Union and the Arab League participate as observers.

Identities are not as distinct as even the 98 per cent referendum vote would suggest. The LSE report for one revealed pockets of uncertainty: in some areas, for example, the population is Muslim and culturally and linguistically Arabic. In others, the movement of people across boundaries is such that ownership of land is always in flux, and must be couched in terms reflecting the use to which it is being put at any given time.

But there is a consensus that all these outstanding issues are solvable, especially given the mutual reluctance to resume conflict. ('Having had a peek at some of the material that's available to both sides,' said one recent returnee from Sudan, 'I can categorically say that it wouldn't be in either side's interest to start fighting again!') On the other hand,

levels of mistrust remain high – as do the number of flashpoints. Worryingly, one 2010 survey revealed that a majority of respondents in the South expected war with the North to resume at some point in the future – and that many also foresaw civil war in the South. The challenge of all parties – the two new nations themselves and the international sponsors of the Peace Agreement – will be to confound those predictions. ☒

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BP's Russian roulette

The beleaguered oil company has come out fighting. But a deal with the Russian Government-owned Rosneft was always going to prove controversial.

RUTH COLLINS

In January, BP and state-owned Russian energy company Rosneft shocked the world by signing a US\$16bn share swap deal. The two companies intend to jointly exploit oil and gas reserves in Russia's Arctic shelf and make Rosneft the largest single shareholder in BP. The deal, which will also see BP increase its holdings in the former assets of Yukos oil company, occurred only a matter of weeks after Yukos' former CEO, Mikhail Khodorkovsky, was sentenced to a further six years in prison.

A stark reminder of BP's recent past also came shortly after, when the company reported a loss of US\$4.9bn – mainly due to US\$40.9bn for charges relating to the Gulf of Mexico oil spill – making 2010 its first year of losses for 20 years. The tie-up therefore not only raises many questions about the viability of a British – Russian exploration operation, but also poses questions about the future of BP and the oil and gas industry as a whole.

Why Russia? Why Rosneft?

On 20 April 2010, an explosion at the Deepwater Horizon oil rig in the Gulf of Mexico killed 11 people and unleashed an estimated 170 million gallons of oil into the Gulf. President Barack Obama placed a six-month moratorium on offshore drilling in the Gulf, which has yet to be lifted, largely due to delays in securing permits from the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), the body now in charge of overseeing offshore drilling. There has been considerable criticism from environmental campaigners and the US Government that the company has moved on too soon after the spill. Although it is not altogether unexpected that BP has looked elsewhere says Michael Dulaney, a partner at Perth office of Johnson Winter & Slattery and Senior Vice-Chair of the IBA Oil and Gas Law Committee. 'The US has put

restrictions on offshore drilling, so naturally companies have had to look further afield,' says Dulaney. 'So it isn't surprising that BP has turned its attention to Russia. After all, BP has major business in the north of Europe and it's trying to mend fences there, as well as in the US and in Canada.'

Rosneft is Russia's largest oil producer, with estimated proved reserves of 22.9bn barrels of oil equivalent and seven refineries with an aggregate production of 985,000 barrels a day. This, combined with the fact that many experts estimate that the Arctic shelf may hold up to seven per cent of the world's explored oil reserves and 30 per cent of its gas

sued everyone that we think is responsible and we learn more every day.' A recent report by the National Oil Commission found that BP, Transocean, Halliburton and regulators are all liable for nine key mistakes that are believed to have increased risks that contributed to the oil spill.

Some US politicians have expressed concerns that the tie-up between BP and Rosneft may make it more complicated for individuals and companies in the fishing industry to obtain compensation. Serna, however, is confident that this will not affect his clients: 'I think it is reassuring that BP still has the money to buy Rosneft shares,' he says.

'BP has major business in the north of Europe and it's trying to mend fences there, as well as in the US and in Canada'

Michael Dulaney

Senior Vice-Chair of the IBA Oil and Gas Law Committee.

reserves, makes Rosneft an extremely attractive corporate partner. In the share swap deal BP is due to gain access to some 48,263 square miles of unexplored basins in the South Kara Sea. In a reversal of BP's fortunes, in February Rosneft announced a 64 per cent rise in annual profit for 2010.

Deepwater Horizon

As reported in the August 2010 issue of *International Bar News*, the legal implications of the 87-day oil spill are long and complex and there are many pending settlements and ongoing claims. Enrique Serna of Serna & Associates in San Antonio, Texas, knows this all too well.

Serna & Associates is the only US law firm that is actively pursuing claims relating to the oil spill on behalf of foreign governmental entities. Serna is currently representing the three Mexican states, Veracruz, Tamaulipas, Quintana Roo, who are suing BP and several other companies for alleged losses stemming from the spill. Mexican-born Serna benefits from a bilingual and bicultural background as well as prior experience of representing Mexican states, corporations and citizens in the US for over 17 years. Just under a year since the spill, he highlights the on going need to 'fine tune liability and long-term damages' and acquire the necessary compensation for his clients. 'BP obviously wasn't the only company involved,' he notes. 'The MDL shows that there are other entities that must share responsibility for this disaster. These states have

'It's understandable that the company wants to move on and I wouldn't think that my clients have any reason to worry now that it has signed this deal. Whatever happens with the Rosneft tie-up, we hope that BP does not forget the environmental disaster that they are leaving behind in the Gulf of Mexico and we hope that they learn from it. The Arctic Ocean is a very delicate part of our world's eco system and that seems to be their next move.'

Environmental Impact

The deal has also understandably upset environmentalists and Greenpeace was quick to voice its criticism. In a statement to the media, Ivan Blokov, Campaign Director of Greenpeace Russia, highlighted what's at stake: 'Given that in 2009 alone, Rosneft had 12,000 pipeline breaks, 7,526 of which resulted in oil leaks, it would be an understatement to say we are concerned about these two companies operating together in the Arctic.'

In one sense, however, it seems that the spill in the Gulf has acted as a wake up call for BP. In November 2010, Wytch Farm in the UK, BP's largest onshore oil field in Western Europe, was closed for maintenance following the discovery of a leak in the Dorset-based pipeline. In response to the Wytch Farm closure, a BP spokesman told a British newspaper, 'Because of what happened last year, anything that looks like there could be a pipeline integrity issue means we are being extra careful.' In January this year, the Aleyska pipeline on Alaska's North Slope, which is half-owned by BP, was

FACTBOX: BP IN RUSSIA

1997:	BP pays US\$571m to acquire a ten per cent stake in SIDANKO, Russia's fifth largest oil company at the time.
1998:	BP and Rosneft form joint venture Elvari NefteGaz, to explore for oil and gas off the coast of the island of Sakhalin in the North Pacific.
2003:	BP establishes its Russian joint venture, TNK-BP, following a merger between TNK, SIDANKO and Onako and a number of BP's Russian oil assets.
July 2007:	TNK-BP agrees to sell Gazprom its majority interests in the Kovykta gas field in Siberia.
February 2008:	BP decides to close its offices in Sakhalin after the company fails to make significant discoveries there.
March 2008:	Russian police raid the offices premises of BP and TNK-BP in Moscow.
July 2008:	TNK-BP's Russian shareholders AAR threaten BP with legal action.
July 2008:	Russian authorities refuse to renew TNK-BP CEO Bob Dudley's visa and he is forced to flee the country.
January 2009:	BP relinquishes TNK-BP board authority to the AAR group.
October 2010:	Rosneft becomes a joint owner with BP in four Ruhr Oel refineries in Germany that have a combined capacity of 1.04 million barrels per day.
January 2011:	BP announces US\$16bn share swap with Russia's state-owned oil group Rosneft.
January 2011:	TNK-BP claims that the current terms of the share swap deal are in violation of its shareholder agreements, which requires BP to carry out all projects in Russia and the Ukraine through TNK-BP. An injunction is imposed on the deal by London's High Court following AAR's lawsuit.

also shut down after a leak was discovered at a pump station.

However, Charlie Kronik, Greenpeace spokesperson in the UK, stresses that as well as the potential impact on the environment, the deal also points to greater problems in today's energy sector. 'We feel very strongly that energy security is a growing problem,' he comments. 'It is increasing demand for mobility and with rising oil prices, the markets are very volatile.'

The unstable nature of the oil markets was shown earlier this year as the political situation in Egypt grew increasingly precarious. At the end of January the protests pushed oil prices to over US\$100 for the first time in over two years. They then dropped back down to US\$85.52 on 11 February when President Hosni Mubarak resigned and left the country.

Kronik firmly believes that the tie-up is 'not just significant in terms of BP's recent history, but also highlights both the economic and environmental risks of being dependent on oil and gas companies, as well as posing questions about our future energy security.'

US hyperbole or Bolshoi Petroleum

The US reaction was predictably full of hyperbolic rhetoric. Following the announcement, one US congressman even mockingly dubbed the company 'Bolshoi Petroleum' to highlight its shifting allegiance towards Russia.

At the beginning of February, BP announced its plans to sell two US refineries, the Carson refinery in California and the Texas City refinery, which had its own disaster in 2005, when an explosion killed 15 employees and injured a further 170 people. These closures will also affect other parts of the company's business across California, Arizona and Nevada and are due to reduce BP's refining capacity in the US by 50 per cent by the end of 2012.

Many in the US have interpreted these moves as BP turning its back on its responsibilities in the Gulf and as a marked indication that it is no longer interested in exploring oil reserves in the US. At the time of writing, the moratorium still stands and the US is understandably preoccupied with contending with rising oil prices and the ongoing need to boost domestic energy production. The fact that BP announced its first year of losses for over two decades earlier this year is another key factor in highlighting the great deal of commercial sense behind the BP-Rosneft tie-up.

Peter Leon, a partner at Webber Wentzel in Johannesburg and Co-Chair of the IBA Mining Law Committee, says, 'There is no denying that the exploration opportunities for BP with Rosneft in the Arctic Sea are huge, whereas right now in the US, they are very limited. For BP, I think this is more about making the most of an excellent commercial opportunity and exploring what could potentially be an extremely rich area.'

As well as the US refinery closures, BP has also announced plans to restructure its business to make up for charges related to the spill. The company has already sold interests in Argentina, Colombia, Egypt, North America, Venezuela and Vietnam. In February, it announced its plans to sell stakes in gas fields in the southern North Sea and the Dimlington gas terminal and sell its controlling interest in the Wytch Farm oilfield by the end of 2011.

Befriending the Kremlin

There has been much speculation over the nature of the deal, which is due to see Rosneft gain five per cent of BP and BP gain a 10.8 per cent stake in Rosneft. In spite of reservations over BP's decision to join forces with a Kremlin-owned company and the issues this may raise, there is no doubting the value of combining local knowledge and language skills with foreign know-how and experience. 'The share swap is a way of mitigating risk,' says Dulaney. 'A foreign oil company like BP needs a Russian partner to assist with internal mobilisation. Equally Rosneft has no home-grown experience in this area, so it is giving up its reserves in exchange for BP's experience. So in terms of commercial and technical value, it is an extremely mutually beneficial arrangement.'

Russia's poor safety track record in the energy sector also concerns environmentalists and industry specialists. In 1994, a 19-year-old ruptured Komi pipeline spilled around 84 million gallons of oil into the Kolva River in the Arctic. Coal mine explosions have dominated the last two decades. In May 2010, poor safety standards led to two methane explosions at a coal mine in Rospodskaya, Siberia, which killed over 70 miners and injured many more. Both disasters highlight the drastic need to update ageing infrastructure.

In 2010, cuts to infrastructure were considered a major contributing factor to the wildfires that blazed across Russia, killing over 50 people in their wake. However, in spite of concerns over safety standards, it is possible that the tie-up will give Rosneft and the

Russian Government the necessary funds to improve infrastructure and safety procedures for offshore oil drilling. 'There have been a lot of oil and gas leaks in Russia due to antiquated equipment,' says Dulaney. 'Therefore, by signing a deal with BP, this will hopefully help mitigate the risks and make Rosneft's exploration in the Arctic much safer and more efficient.'

Old friends or foes

The share swap has seen a setback, however, having been put on hold while a dispute with Russian investors in TNK-BP is resolved through arbitration. TNK-BP is Russia's third largest oil producer and was created from the merger of BP's Russian and Ukrainian operations with those of the Alfa-Access-Renova (AAR) consortium. At the end of January AAR claimed that the current terms of the share swap deal are in violation of its shareholder agreements, which requires BP to carry out all projects in Russia and the Ukraine through

TNK-BP. Skadden Arps Slate Meagher & Flom represented AAR and successfully obtained an injunction on the deal in London's High Court. Linklaters advised BP on the transactional side of the deal and is also representing the oil giant in the dispute. Rosneft is not involved in the arbitration proceedings but is being advised by Freshfields.

The dispute does not seem to have fazed BP though and at the time of writing,

the arbitration tribunal had extended the injunction blocking the deal. The injunction marks a certain element of déjà vu, however, given Bob Dudley's history with TNK. A former CEO of TNK, Dudley became embroiled in a shareholder dispute and was forced to leave Russia in July 2008 when the authorities refused to renew his visa.

The boat was also rocked a matter of weeks later when Rosneft announced its plans to undertake joint operations in the Black Sea with BP's US rival ExxonMobil. This may have fuelled sceptics' arguments over the Russian company's transparency. However, BP will not have stepped into the tie-up blindly according to Leon: 'The Gulf aside, BP is an astute

'We hope BP doesn't forget the environmental disaster they're leaving behind in the Gulf of Mexico and that they learn from it. The Arctic Ocean's a very delicate part of our world's eco-system,'

Enrique Serna
Serna & Associates

operation and it will not be naive about the risks of falling prey to Russian politics,' he stresses. It is perhaps more likely that, buoyed by its successful tie-up with BP, Rosneft became eager to strike a deal with another of global oil giant. Certainly, Russia's deputy prime minister and Rosneft chairman Igor Sechin described the decision as part and parcel of Rosneft's 'increasingly integrated and global' approach.

At the time of writing, TNK-BP and BP are in talks over a possible resolution to the dispute. In response to the injunction, Bob Dudley told reporters in London: 'We were always intending to offer them [TNK] the opportunities, and there may be some resolution that may be financial, it may be a strategic change of direction in TNK-BP, this will resolve itself in time.'

Whatever the result of the injunction, it is unlikely that this is the last we have heard of BP and Rosneft joining forces. In spite of losses over the past year, BP's decision to embark upon a partnership with Rosneft is indicative of a new phase in BP's development. 'We are refocusing BP so that we can increase our investment in its future; investing in reducing risk, in exploration, in new projects, in emerging economies, and in new strategic partnerships,' added Dudley. In 2010 and 2011, the company entered into agreements and obtained licences to gain access to a range of locations, including Australia, Brazil, the South China Sea, Indonesia, Azerbaijan and the UK. For the meantime anyway, it seems there is little stopping BP. ☒

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One country, two systems

IBA Global Insight assesses Hong Kong's proposed changes to corporate governance rules and how they fit with the approach in mainland China.

PHIL TAYLOR

Whether you view it as China's most developed city, a former British colony, or an outpost of common law thinking, Hong Kong relies on mainland China for its success – and always has done. The People's Republic of China (the 'PRC') is a vast trading zone, a ready-made source of low-cost labour, a wealth of business opportunities waiting to happen, and now the provider of a stream of companies wanting to float on Hong Kong's stock exchange.

Like any listed companies, those originating in the PRC have to abide by the rules and guidance on corporate governance set by Hong Kong Exchanges and Clearing (the 'HKEx'), the operator and regulator of the territory's securities and derivatives markets. And in turn, HKEx has to bear in mind the characteristics of PRC-based listed companies, which form the foundation of the exchange (those companies being in the majority by market capitalisation), while also keeping its global players and local founder-owned companies happy.

Add to this the fact that Hong Kong is a common law jurisdiction that is being drawn into the ever-closer embrace of its civil law motherland and you have a classic example of Deng Xiaoping's famous solution to the delicacies of the 1997 handover: 'one country, two systems'.

HKEx faced no easy task, therefore, when it decided to review the Code on Corporate Governance Practices (introduced in 2005) and amendments to the Rules Governing the Listing of Securities. Its corporate governance subcommittee unusually carried out two rounds of so-called soft consultation before producing a 68-page public consultation paper in December 2010.

The paper is not groundbreaking at first glance, or even after a second read. One partner of a prominent firm reportedly 'almost fell asleep reading it'. But with careful thought it is clear that HKEx had to approach its review very carefully to decide how to balance the needs of Hong Kong and the PRC.

Cooperation over harmonisation

The more pragmatic practitioner, for example, would see significant harmonisation of regulations between Hong Kong and the mainland as the way forward. DLA Piper Corporate Partner Jeffrey Mak points out that some of his typical clients – large PRC corporations that are dual-listed in Hong Kong and on the mainland – face a heavy compliance burden.

'For such clients, you have to consider the implications of any amendments to the rules from a regional or Greater China perspective,' Mak says. 'I would like to have more consistent requirements. If you have a transaction in the region, any inconsistency is a headache to the managers of the deal.'

Mak says that a group company listing across the US would expect to encounter harmonised rules across the various exchanges, and the same should be true when listing in Hong Kong and Shanghai. The counter-argument is again rooted in 'one country, two systems'. Hong Kong is undisputedly a part of China but is also widely advertised as operating an independent legal system until at least 2047. The territory is therefore keen to preserve a degree of independence to attract overseas business – after all, it has several neighbours whose stars are also rising.

‘Hong Kong must not be seen to be dropping its standards – it’s always aware of, for example, Singapore pressing its case,’ says Alan Ewins, a partner at Allen & Overy. ‘Hong Kong is keen to be viewed as maintaining its standards internationally.’

As an illustration of how easy it is for Hong Kong’s reputation to be damaged, even by unfounded fears, look to December 2010 when HKEx decided to accept mainland accounting and auditing standards, and audits carried out by mainland audit firms, for Chinese companies listed in Hong Kong. Despite the fact that other exchanges, including London and New York, already had similar arrangements in place, some sections of the local and overseas media were thrown into an uproar. HKEx was forced to release a statement defending its decision amid accusations that the move was made to get more business from the mainland, and that some of Hong Kong’s regulatory power had been given up.

Although the political wisdom of a true harmonisation of rules could be argued ad infinitum, it is undeniable that such a merger would be impractical, as Lynn Yang, a partner at Norton Rose in Shanghai, highlights.

‘Although you can align the major concepts, they can’t exactly mirror each other,’ she says, adding that even the mainland’s Shanghai and Shenzhen exchanges have slightly different listing rules.

HKEx’s approach to finding a balance appears to be to ensure the corporate governance rules stay faithful to their common law background. For the regulator, tying in to the PRC’s rules on corporate governance was important but could only go so far.

‘Harmonisation as such is not a goal – I prefer to think of dovetailing,’ says Mark Dickens, Head of Listing at HKEx. ‘We shouldn’t have rules that pull in opposing directions – we’re trying to present an international standard of disclosure and we also have to accommodate non-state-owned, non-PRC companies.’

According to Dickens, there was also a balance to be struck between hard-and-fast rules and general guidance.

‘100 per cent PRC companies love bright-line rules, as most emerging market companies do,’ he says. ‘The problem is that doesn’t create a

culture which fills the gaps the regulator hadn’t thought of.’

To that end, the HKEx committee evidently made some reference to PRC rules when researching the consultation paper, but concentrated more on the common law world, in particular the codes in the UK and Australia.

Who’s doing the chasing?

It is common to encounter a presumption that the PRC lags behind Hong Kong in many areas, and, while in some respects this may be true, many specialists say there has in fact been a great improvement in quality.

‘There’s a clear acknowledgment that PRC standards have moved up in recent times – the proof of that particular pudding is in the

significant increase in listings of PRC companies in Hong Kong,’ says Ewins.

And in terms of rules on corporate governance, some even claim that mainland China leads the region.

‘The PRC is quite advanced, and it seems Hong Kong is catching up,’ says Mak. ‘There was a time when [mainland] China was regarded as

less modernised and sophisticated in terms of corporate governance matters, but now the PRC rules are more advanced in some aspects.’

This progress has come out of China’s new and deeper engagement in the international process and the fact that, as something of a late adopter, China has had the opportunity to build on what has worked best elsewhere. Even proponents of China’s leadership in this area admit, though, that the practical implementation of some rules may not be so clear cut.

‘In terms of what’s on paper, that’s all very well, but the crucial thing is how it’s supervised and enforced,’ Ewins says. ‘You can have fantastic rules, but if they are not overseen properly, that can be a problem. The two aspects need to work in tandem.’

The regulator responsible for doing this is the China Securities Regulatory Commission (the ‘CSRC’), which is relatively sophisticated when it comes to making rules, but is not yet able to be as proactive as its peers overseas.

‘It does have a team to look into compliance issues, but it prioritises its work for major

‘Hong Kong must not be seen to be dropping its standards – it’s always aware of, for example, Singapore pressing its case’

Alan Ewins
Allen & Overy

problems, not minor ones... it can only focus on the key issues first,' says Yang.

The CSRC recently issued a report comparing China's national governance practices with the OECD's principles of corporate governance, and concluded that the PRC is generally in line with international standards. In terms of implementation, however, it is of course the issuer's management team who bear much of the responsibility, and Herbert Smith partner Tom Chau says that mainland Chinese companies are increasingly seeing the value of corporate governance, too.

'PRC companies now believe good corporate governance could help improve investor relations and is accordingly good for pushing up the share price,' he says.

Meanwhile, Yang points out that compliance can depend on the type of company concerned. 'Companies such as CNOOC, Sinopec and China Life have a large compliance team,' she says. 'But for medium or small non-state-owned listed companies, we need some time for them to pick up the learning curve on this.'

The independents

The use of independent non-executive directors ('INEDs') makes an interesting study. Their use is, as Mak puts it, 'one of the fundamental principles of good corporate governance for listed companies'. Understandably, then, the HKEx consultation paper dedicates a significant amount of space to dealing with the role of INEDs. It also focuses on regulating so-called professional non-execs who take on a large number of positions, and are directors in the loosest sense of the word. The consultation paper cites 'market concerns' that some individuals may have taken on too many directorships, resulting in a reduced ability to devote sufficient time and energy to their duties, and reports disciplinary cases in which 'an obvious lack of attention given by INEDs

to their duties was a contributing factor to the non-compliance with the [listing rules] by the issuer'.

The solution on the mainland (in the CSRC's 2001 'Guidelines for Establishing Independent Directors System in Listed Companies') has been to impose a limit of five INED positions on an individual, as well as a rule that independent non-execs 'shall have enough time and energy to perform the duties of the independent directors effectively'. Admittedly, this rule is vague and probably unenforceable, and the Guidelines do not make any reference to a penalty for INEDs' non-performance.

'It is somehow difficult to assess whether a particular INED has enough time and energy,' says Chau, who points out that the five-position limit can itself act as an assurance of an independent director's commitment to his or her duties. According to him, the mainland regulator also relies heavily on INEDs' personal declarations of any current positions that they hold, although it has the power to reprimand both the individual and the listed company if a false declaration is later discovered. The reprimand will have an effect on other listed companies in which the errant director holds a position, as they too must announce the reprimand. It is in an INED's own interest to make honest declarations if he or she wants to get other positions later.

The Hong Kong consultation paper recommends that a listed company's nomination committee should 'regularly review the time required by a director to perform his responsibilities to the issuer and whether he is spending sufficient time as required'.

'In theory, this is a reasonable check and balance,' comments Ewins. 'It's important that the activities of the committee are sufficiently and robustly pursued (ie vetted by the board as a whole or by internal auditing) to ensure that the reviews are indeed reasonably frequently and robustly carried out.'

Summary of the 2010 consultation paper

HKEx published its consultation paper on review of the Code on Corporate Governance Practices on 17 December 2010, with a deadline for replies of 18 March 2011.

The paper proposes upgrades of some existing, non-binding 'provisions' to mandatory rules, which issuers must follow. Certain 'best practices' have been upgraded to provisions. It also includes measures to:

- improve transparency by bolstering requirements for disclosure and communication with stakeholders;
- enhance the quality of directors and company secretaries by requiring training;
- require greater involvement in issuers' board committees by INEDs;
- recognise company secretaries' contribution to corporate governance and define their role and function; and
- place emphasis on the leadership role of the chairman of the board in corporate governance matters.

Source: Hong Kong Exchanges and Clearing news release

HKEx also takes the view that putting a strict limit on the number of INED positions an individual may hold is akin to an unfair penalty. As Ewins explains it, 'if there's a particularly energetic and insightful individual able to cope with the stresses of multiple directorships, then surely that shouldn't be snookered?' Consequently, HKEx simply recommends that independent non-execs 'must take an active interest in the issuer's affairs, obtain a general understanding of its business and follow up anything untoward that comes to their attention'.

'We thought the emphasis should be on time, energies and commitments – taking a qualitative approach rather than a numerical one,' says Dickens. 'If you have the right skillset and manage your time and energy well, then being on a number of boards is an advantage not a handicap. The minute you start using more prescriptive language, you take the INEDs away from what they're meant to do,' he explains.

Dickens adds that the solution proposed by HKEx is a composite of the equivalent UK and Australian codes as well as information drawn from publications issued by the Hong Kong's Companies Registry and Institute of Directors. He also points out that the proposed language is stronger than in the UK. The regulator also

believes that increasing the number of INEDs will promote better corporate governance and proposes to introduce a rule that INEDs should constitute one-third of an issuer's board.

It is clear also that HKEx intends to increase the burden on listed companies themselves. The consultation paper proposes that companies set up a mandatory remuneration committee (staffed mostly by INEDs), suggests the strengthening of guidance on the nomination and audit committees, and recommends an optional new corporate governance committee. The regulator also wants to increase the emphasis on a chairman's role and responsibility in leading issuers' corporate governance efforts. Practitioners do not see this increased load as unreasonable, however.

'It's formalising international developments in many respects,' says Ewins. '[The proposals] do create a burden, but they also formalise a set of best practice type issues and requirements. They are putting a structure in place to ensure as far as possible that companies do things that they should in fact be doing in the first place.'

In the end, perhaps this is what is most important. Striving for the goal of harmonisation may have to wait until 2047. ☒

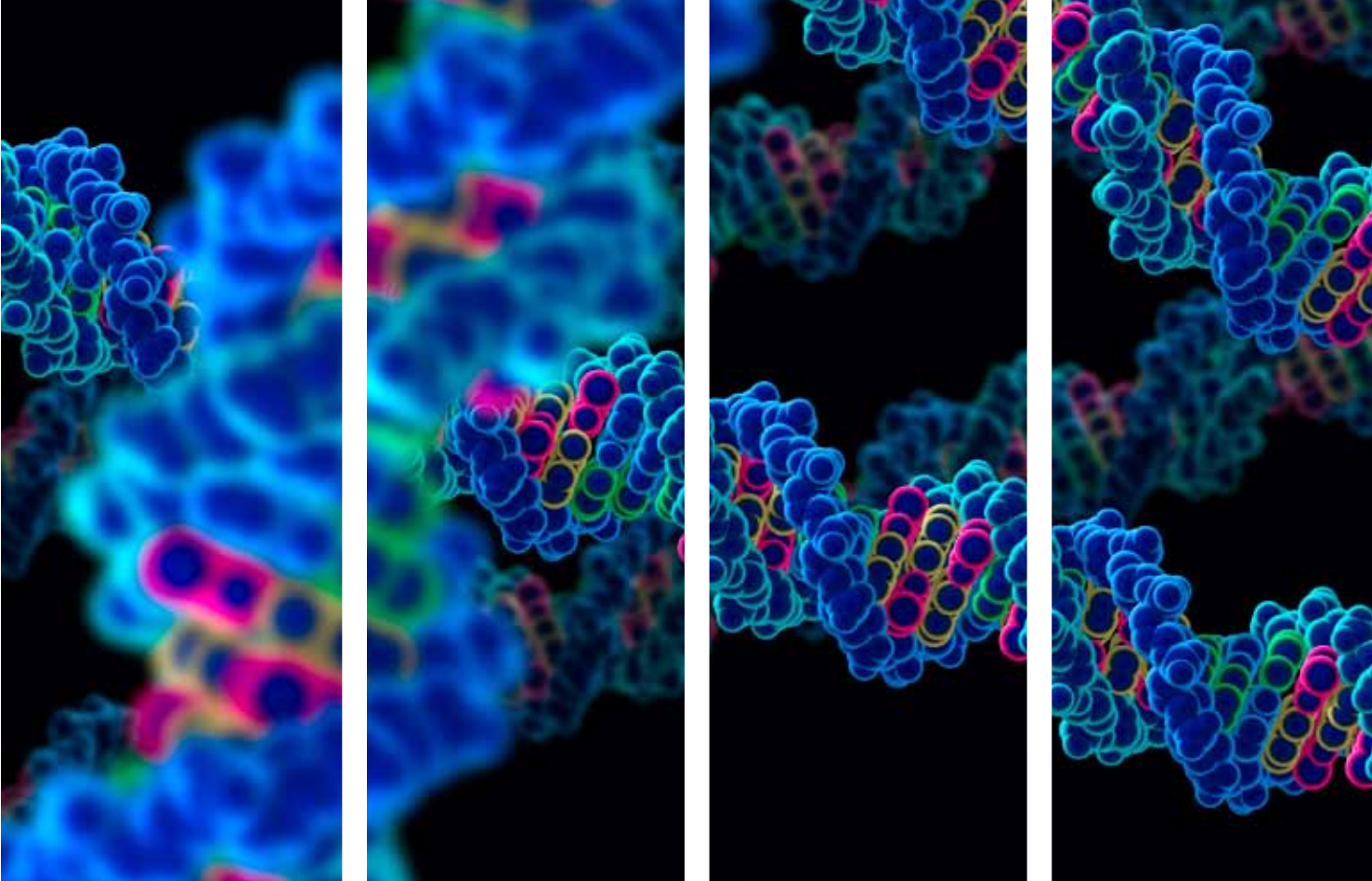
Phil Taylor is a UK-based freelance writer and editor. He can be contacted at phil@phiine.com

HKEx: History and vital statistics

HKEx operates a securities and a derivatives market in Hong Kong as well as the clearing houses for those markets. It is now one of the world's largest exchange owners based on market capitalisation.

1891	Association of Stockbrokers, Hong Kong's first formal securities market, established
1914	Association renamed Hong Kong Stock Exchange
1947	Stock market re-established after World War II
1969	Far East Exchange set up
1971	Kam Ngan Stock Exchange set up
1972	Kowloon Stock Exchange set up
1976	Hong Kong Commodity Exchange established, mainly trading cotton, sugar, soybean and gold futures
1980	Stock Exchange of Hong Kong Limited (SEHK) incorporated
1985	Hong Kong Commodity Exchange changes name to Hong Kong Futures Exchange (HKFE)
1986	Four stock exchanges cease trading and computer-assisted trading begins on SEHK; HKFE launches HIS Futures product
1989	Hong Kong Securities Clearing Company Limited incorporated
1992	Central clearing and settlement system begins operation
March 2000	HKEx created as holding company by merger of the SEHK, HKFE and Hong Kong Securities Clearing Company
June 2000	HKEx listed on the stock exchange

Source: Hong Kong Exchanges and Clearing website



Who owns human nature?

Last year, a New York judge ruled that the biotechnology industry could not patent genes. **IBA Global Insight** assesses what it could mean for companies and scientists.

ARTHUR PIPER

Human rights campaigners have long disputed the idea that companies that isolate genes can patent them. A successful challenge mounted in the US is at odds with European law, which explicitly says such genes can be patented. The recent judgment – *Association for Molecular Pathology v US Patent and Trademark Office* – goes against almost 30 years of legal practice and is expected to have wide-ranging ramifications in the industry, if it is upheld on appeal. ‘This is the first strike back against patents on human genes,’ says Julian Cockbain, a partner at the UK patents and trademark attorneys Dehns. ‘While the case has not reached a final conclusion, it is a real wake up call for folk wanting to patent naturally-occurring material.’ The case is likely to go all the way to the Supreme Court, with initial appeals being heard imminently.

Harmful mutations

The closely-followed case involves patent claims filed by the pioneering US biotechnology business Myriad Genetics, which offers cancer diagnostic tests based on two genes for which it holds patents. The genes, which were originally isolated in 1994, are known as Breast Cancer 1 and Breast Cancer 2, or BRCA1 and BRCA2. The company’s diagnostic cancer test searches for potentially harmful mutations in a woman’s genes by comparing its patented gene sequences with hers. In doing so, the analysis provides an assessment of her risk of ovarian and breast cancer.

Myriad’s product is highly successful and has become a standard procedure for identifying women with hereditary breast and ovarian cancer. The problem is that each test costs

about US\$3,000 and every sample has to pass through Myriad's laboratories for analysis. Campaigners, including women's groups and the estimated 150,000 geneticists, pathologists and laboratory professionals who backed the suit against the company, complain that Myriad's practices are unnecessarily restrictive. They say that patients with poor medical cover could be denied treatment. That is because a company that owns a patent on an identified and isolated gene has an exclusive right to use it, license its use and control any diagnostic process based on the gene. So, a company that owns such a patent can potentially prevent the development of alternative tests related to its gene for the life of the patent – typically between 15 to 20 years.

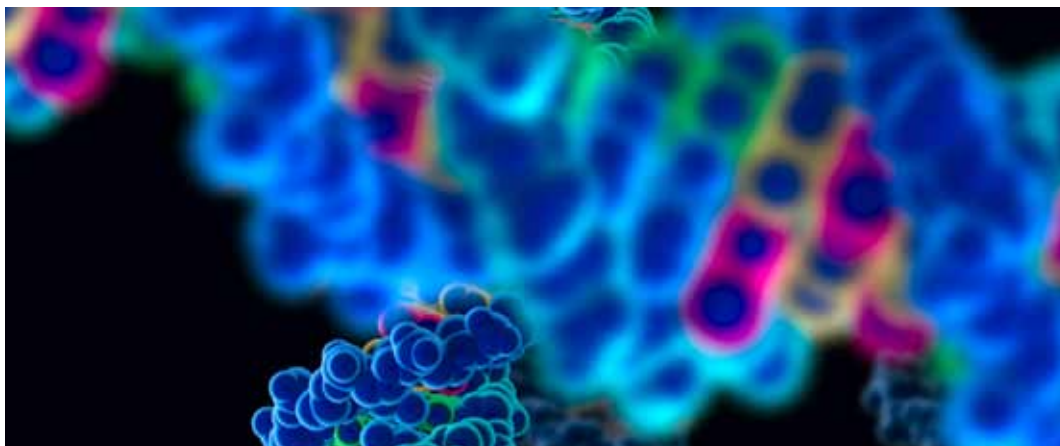
Standard assumptions

In the court case, Myriad argued that its claims to the patents rested on two points of law contained in s101 of the Patent Act. First, in its

use in Myriad's test: 'The preservation of [the] defining characteristic of DNA in its native and isolated forms mandates the conclusion that the challenged composition claims are directed to unpatentable products of nature,' he said. This conclusion was inevitable, he continued, because part of what makes DNA unique is that it embodies information: a gene is more than a chemical.

'This aspect of the ruling has pulled the rug from under Myriad's feet,' says Gareth Morgan, a UK partner at the law firm DLA Piper. He continues by saying that there is no basis in law for an application because natural products are not patentable. In October 2010, the United States Government filed a brief to the Federal Circuit backing Sweet's judgment on this issue.

If that were not enough, Judge Sweet also rejected Myriad's second claim under s101 of the Patent Act – that its processes in the diagnostic test were patentable. The claim was based on the 'machine or transformation test,' which is meant to distinguish between abstract



so-called 'composition of matter' claim, it said that the fact a DNA sequence had been isolated made it patentable subject matter. The gene, they argued, had been 'substantially separated from other cellular components that naturally accompany a native human sequence,' including proteins and other bodily materials. This follows the standard assumption in the biotechnology sector, which holds that since purification separates the essential chemical make-up of the gene, the purer material that emerges from the process is different in kind to the natural chemical from which it is derived. As a result, lawyers argued that isolation is a sufficient first step towards obtaining a patent for a gene. Other criteria include standards of novelty, utility and its potential for subsequent use in inventions.

Judge Sweet rejected this long-standing assumption in his ruling by saying that DNA found in nature was no different 'in kind' from the material that had been isolated for

ideas and patentable methods. Judge Sweet ruled that because the diagnostic test simply compared two gene sequences to see if there were any differences, or mutations, between them, it involved no more than the abstract mental process of comparison. Nor was the process tied to any particular machine and did not bring about any tangible transformation, he ruled. That would be the case, he said, even if the gene material itself were patentable subject matter.

This aspect of Judge Sweet's ruling will be reassessed when the case eventually comes before the Court of Appeals for the Federal Circuit. The US Supreme Court has subsequently ruled in *Bilski v Kappos* that courts may have become too restrictive in their interpretation of the 'machine or transformation test' and that they should not use it as the only way to define whether processes are patentable under s101. Its ruling cited the earlier precedent of *Parker v Flook* to suggest that lower courts needed to use



‘This is the first strike back against patents on human genes. While the case has not reached a final conclusion, it is a real wake up call for folk wanting to patent naturally-occurring material’

Julian Cockbain
Dehns

that test along with other possible methods for deciding on the patentability of processes in future – although it did not specify what those methods might be.

Judge Sweet’s summary judgment in favour of the plaintiffs is a rare win in such cases and means that there are no disputed issues of fact that the trial had to resolve, as well as finding in favour of the plaintiffs on any undisputed facts. In addition, Cockbain says, the judges who hear the case on appeal will have to think very carefully about their ruling: ‘Judge Sweet has written an opinion based heavily on Supreme Court precedent, rather than on that set by the Court of Appeals,’ he says. ‘It’s rather as though he is daring the Court of Appeals to defy the Supreme Court.’ The appeal judges will not be able to simply apply their own precedents to the case, which have been very pro-patent in the past, he says.

Favouring complexity

If the ruling stands, it is likely to affect those companies offering diagnostic tests, or, more technically speaking, medical methods that depend on patenting the analyte, which are the gene sequences BRCA1 and BRCA2 in the Myriad case. ‘Sweet’s judgment mainly affects companies based on patents that are dominated by analytes,’ says Cockbain. ‘Companies that have developed new tests on the way to discovering the analyte should be better placed.’

Businesses in the biotechnology sector are now expected to move away from filing patent claims based solely on isolated DNA sequences and favour instead those involving more complicated processes, says Richard Jarvis, partner at Australian firm Davies Collison Cave, and a former Chair of the IBA’s Intellectual Property and Entertainment Law Committee.

Although the ruling will not be retrospective, it has opened up the possibility that similar patents could be more open to challenge, a fact that has not escaped the notice of campaigners in Australia. In June 2010, the organisation Cancer Voices Australia and breast cancer sufferer Yvonne D’Arcy launched a Federal Court action against four biotechnology firms, including Myriad Genetics and Genetic Technologies, that sought to revoke at least one of Myriad’s patents. The challenge came at a time when the Australian Senate’s Community Affairs Committee was conducting an enquiry into the impact of granting patents on ‘human and microbial genes and non-coding sequences, proteins, and their derivatives, including those materials used in isolated form.’ The case is still ongoing and Jarvis says that the Committee is likely to consider the Myriad ruling in the US when making its independent assessment of the issue.

Unhappy patient groups

Elsewhere, scientists have been getting into hot water with unhappy patient groups. In April 2010, for example, 41 members of the Native American tribe the Havasupai won US\$700,000 in compensation from Arizona State University in Tempe, because they claimed it had used their DNA samples in ways they had not agreed upon.

While the university settled out of court, the case highlights the increasing difficulty of securing valid consent from participants in the burgeoning number of projects investigating human genetics and genomics. It is standard practice for scientists to obtain informed consent from subjects at the beginning of such studies and to make sure that they understand and agree to the purposes of the research and the risks it might entail. Consent forms are not generally regarded as legal contracts, but their content is governed by federal or national regulations and they form the bedrock of medical ethics in all human-based research.

The problem in the Havasupai case was that the participants said that they had consented to having their blood stored and agreed that it could be used for investigating the high levels of diabetes that existed among the tribe. But the researchers later used the samples to look into the tribe’s ancestry and at levels

of schizophrenia among the group – taboo subjects that greatly angered the participants.

Michelle Mello, Professor of Law and Public Health at the Harvard School of Public Health, says that many early studies had asked participants to agree to a wide and often poorly-specified use of their samples to avoid having to ask the donors for permission to use the material for each new study. ‘Such blanket permissions can lead to trouble down the line because people don’t think of uses to which the samples may be put,’ she says.

Since cutting the link between the genetic data and the identity of the donors would often invalidate research findings because the two data sets are intrinsically linked – genes react to their environment – the challenge for scientists in the light of the Havasupai case is to devise more robust consent protocols with different levels of privacy and identification.

One alternative is to give participants a range of options to consent to, says Mello. For example, people may agree that their samples can be used to test physical health, but not to investigate mental health. Researchers also need to be more careful about potential cultural pressures. ‘They need to take time to speak to the leaders and find out where the sensitivities might be so that they can deal with them upfront,’ she says.

Unrestricted access

Dan Vorhaus, an attorney at the North Carolina office of the law firm Robinson Bradshaw and Hinson, is more sceptical about the level of consent that can now be obtained from members of the public where researchers are offering donor privacy. He says that because scientists are often working with complete genomes and detailed environmental information, it may not be possible to guarantee that data will remain anonymous. ‘If the information is going to be out there, it might be identifiable,’ Vorhaus says. ‘If researchers are saying that all the information is private and always will be, I’m not sure that is entirely honest any longer.’

Vorhaus has been advising the Personal Genome Project (PGP) on an alternative ‘open-consent’ model, where no promises of anonymity, privacy or confidentiality are made. Volunteers must agree to allow unrestricted

access to their genetic data and to any subsequent findings based upon it. The project aims to gather the genetic material of 100,000 people and make it widely available over the internet.

The method of obtaining informed consent developed by PGP involves passing an initial exam, which is why the first participants were

all educated to at least master’s level in genetics. The project also makes sure that they understand the nature of the likely risk of providing data to a project that would run for 50 years – a time during which it may not be feasible to understand all of the possible ways their information might be used because of advances in science and technology. Early

participants include such luminaries as the Harvard psychologist Steven Pinker, but as the programme rolls out and more people enter their details onto the database, Vorhaus expects the question of informed consent to become more problematic.

‘If at the first level we feel that people don’t have sufficient knowledge of the research,’ he says, ‘if they don’t have an understanding of the risks, they may not be able to participate’. The result being that research data becomes less representative of society and sample sizes are too restricted for them to be useful. The PGP model can do no more than offer an alternative in an area surprisingly short on good ideas. But if one thing can be learnt from the case against Myriad Genetics, it is that the solution to the problem will develop as our understanding of the relationship between the gene and human nature continues to evolve. And the question of who owns the right to use and make money from that knowledge promises to remain a contentious one. ☒

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



‘If researchers are saying that all the information is private and always will be, I’m not sure that is entirely honest any longer’

Dan Vorhaus

Robinson Bradshaw and Hinson



Navigating the data minefield

The dynamic nature of information technology in the 21st century presents enormous challenges. As the global legal profession is using the latest IT to its full advantage, the risks are greater than ever.

NICOLA LAVER

ACS:Law is being investigated by the UK's Information Commissioner's Office (the 'ICO') over allegations of breaches of data protection laws after a list of thousands of alleged web pirates, who it said illegally shared adult films, appeared on the internet. The firm had been instructed by companies such as Sky Broadband to claim compensation from the individuals on their behalf.

This well-publicised, disastrous state of affairs in which ACS:Law found itself in Autumn 2010 helped bring the risks attached to data

storage to the fore. All businesses, even the most visible and well-policed organisations, can inadvertently be at risk of breaching data protection laws. In January, for example, the UK's House of Lords said a database used by the Serious Organised Crime Agency 'does not comply fully' with the Data Protection Act 1998 (the 'DPA') or the Human Rights Act because too many organisations could access it.

An ICO spokesperson says: 'For the last financial year the ICO received 33,234 individual requests for advice and complaints

under the Data Protection Act. Of these, over 9,000 cases were considered as potentially breaching the Act. Of the complaints received in the last financial year, 1.25 per cent were complaints about solicitors or barristers. The ICO has issued four monetary penalties so far, however it is only where we come across a case that meets the necessary criteria we will issue a penalty. So far no law firms have received a monetary penalty. However, this does not mean that organisations from this sector will not do so in the future if we find the criteria to have been met.'

But the risks exist for law firms worldwide. Fabrizio Cugia di Sant'Orsola, partner at Rome-based law firm Cugia Cuomo & Associati is Vice-Chair of the IBA's Communications Law Committee. He warns that most law firms make use of several internet-based IT facilities that represent a 'continual menace of data leaking'. He says: 'Applicable regulation should focus on this, providing a security framework which is, at the same time, viable for the operators, in terms of costs and overall impact on the professional service, and reassuring for clients.' He points out that intellectual and industrial property law, IT law, corporate law and criminal law are the most at risk areas of practice.

Chilling freedoms

In the United States there is no comprehensive law on data protection and privacy issues comparative to the UK's DPA. Lisa Sotto, of New York firm Hunton & Williams, explains that there is a 'patchwork quilt' of privacy requirements with well over 100 state privacy laws and about 12 federal privacy laws. She says: 'A comprehensive federal law will likely be on the agenda for the next session of Congress. In the present lame duck session, there were two bills presented that would have imposed a more comprehensive standard than is currently in place.' But she says that with a financial privacy law and health privacy law already in place, a law that would regulate privacy on an omnibus scale and replace those laws is 'unlikely'.

Sotto adds: 'The proposals will likely focus on online behavioural advertising, which has been a hot-button issue in the US for a couple of years.' She says this issue has become well-known to lawmakers and is ripe for legislation.

The question is whether there is a real need for comprehensive data protection in the States. Edward McNicholas, a partner at Washington law firm Sidley Austin is clearly doubtful and says it may actually be the opposite of what is needed in terms of advancing technologies. He explains: 'New technologies will have profound impacts on our sense of personal autonomy,

'The approaches of the EU and the US to privacy and data protection could not be more different and the US needs to eradicate this divergence in approach'

Daradjeet Jagpal
Harper Macleod

social boundaries, and privacy – both for the better and the worse. In this environment there is a risk that a comprehensive privacy law could lead to incentives that diminish innovation on the internet and unnecessarily chill the freedom of speech.'

McNicholas continues: 'The uncertain promise and peril of future technologies suggests that we should move cautiously and in a manner that responds to specific issues in specific sectors. Indeed, the common law method of creating rules not by grand administrative announcement but rather by the thoughtful accumulation of reflections on a multitude of specific cases may produce a superior result here.'

Europe has just celebrated 'European Privacy Day', 30 years after the Council of Europe signed the first regional convention on privacy and data protection, which the EU justice commissioner has described as the 'backbone of privacy laws in Europe'. EU legislation has followed including, notably, the EU Data Protection Directive, which is designed to protect the privacy and protection of all personal data collected on EU citizens – particularly as it relates to processing, using or exchanging such data. Under the Directive, unless a country's data protection laws are deemed by the EC to be adequate, extra restrictions are placed on transferring any personal data or allowing it to be processed in that country.

The Directive takes into account the key elements of Article 8 of the European Convention on Human Rights (ECHR) in relation to the individual's rights of privacy and requires that personal data should not be transferred to a country or territory outside the European Economic Area (EEA) unless that country or territory provides for an adequate level of data protection. In February 2011, for instance, Israel was formally added

UK regulatory powers

Under the DPA, if you hold and process information about your clients, employees or suppliers you must:

- only collect what you need for a specific purpose;
- keep it secure;
- ensure it is relevant and up to date;
- hold as much as you need only for as long as needed; and
- allow the individual concerned to see it on request.

The ICO, based in the UK, is an independent official body responsible for administering the provisions of the DPA and the Freedom of Information Act 2000. Firms guilty of breaching the DPA can be fined up to £500,000 by the ICO. According to the ICO, in January 2011, 80 per cent of people were concerned about the safety of their personal details that were online.

US

No comprehensive data protection legislation exists in the United States.

A sectoral approach, with a mix of legislation, regulation and self-regulation, is used in the absence of comprehensive legislation.

The US is a signatory to the 1981 OECD Guidelines, but has not implemented them domestically.

In 2000, the US Department of Commerce developed the Safe Harbour Program (SHP) in consultation with the European Commission, which offers a method by which US organisations can comply with the Directive.

Under the SHP, where US businesses in receipt of EU citizens' personal data undertake to comply with the SHP, then the US recipient business in question can be considered as providing 'adequate safeguards' for the protection of EU citizens' personal data in terms of the EU Data Protection Directive. The business is therefore entitled to have the relevant personal data transferred to it.

The SHP has not, says Daradjeet Jaqpal, been used as much as was initially anticipated. He says: 'Businesses have instead been more content to rely on data protection clauses in commercial agreements in the form approved by the European Commission, and subsequently adopted by national data protection regulators across the EU.'

European Union/US Cooperation

A possible police and judicial cooperation agreement between the European Parliament (EP) and the US is under consideration.

At the EP's Civil Liberties Committee hearing in October 2010 an EP representative said the Americans 'will have to be as flexible as possible, because we shall not be easy partners'.

The agreement, as currently envisaged by the Commission, will guarantee a certain number of basic rights for those whose data is gathered to enable them to take legal action, in Europe or the USA, against abuses of these rights. A key issue is recognition that EU citizens possess the same rights as Americans under the Privacy Act.

to the roster of seven countries whose data protection laws are considered by the EC to be adequate for companies there to receive and process personal data from companies in the European Union.

Unsurprisingly, breaches of data protection still occur in European jurisdictions. For instance, last year the Spanish Data Protection Agency levied a €30,001 fine on a Spanish law firm for sending e-mail spam.

Simmering tensions

The lack of a comprehensive law in the US has created simmering tensions between the US and Europe. But this is being tackled proactively with the EC and the US attempting to overcome their differences with a proposed police and judicial cooperation privacy agreement, which, says the EC, will guarantee a certain number of basic rights for those whose data is gathered, enabling them to take legal action in Europe or the US against abuses of those rights.

Daradjeet Jagpal, an IT lawyer at Scottish firm Harper Macleod, believes a single, bilateral arrangement that consolidates the existing, and sometimes divergent, framework is overdue. He says the US is widely recognised as offering one of the lowest levels of privacy and data protection globally. 'The approaches of the EU and the US to privacy and data protection could not,' he adds, 'be more different and the US needs to eradicate this divergence in approach. The US needs to have stronger levels of binding data protection standards.'

McNicholas says the proposed agreement 'may' work in the US: 'Common ground certainly exists between Europe and the US that should allow agreements on enforceable privacy rights. Indeed, the US regime has placed far more emphasis on the enforcement of rights for some time, such as through the availability of class actions and significant fines for information security breaches.'

McNicholas continues: 'That being said, the fundamental US cultural, legal and social significance of the freedoms of speech and association will need to be taken into account in any effort to guarantee privacy rights. Rights to privacy often involve not merely allowing people to choose not to disclose information. Rights to privacy can also involve using the coercive power of governmental authorities to restrict the way companies and people use information that they already possess. Any workable solution must grapple with this basic tension. Any approach that considers privacy to be the only basic right at issue cannot lead us to a workable solution.'

However, the jurisdictional reach and varying legal regimes involved means a workable agreement could be tricky and Cugia says there are grounds for scepticism. He explains: 'Personal data protection boosts the rank of fundamental human rights within the European framework, whereas no comparable explicit constitutional right exists in the US. These different philosophies cannot be integrated into one unified and coherent data protection system without a "less is best" result being the probable outcome. I believe that the agreement will contain a minimum set of rules and rights and a long list of exceptions to personal data protection.'

Cugia continues: 'Presently, the workability of the proposed data processing agreement cannot be effectively assessed. Much will depend on how the US will concretely implement the objectives set forth in the future instrument and on how such implementation will impact the freedom US authorities have enjoyed until today in dealing with the terrorism issue. The EU, for instance, intends that the agreement applies to any existing (such as the "Passenger Name Record" and "Terrorist Finance Tracking Program") and future EU/US agreements that regulate transfers and processing of personal data when cooperating on criminal matters. What if the proposed agreement would somehow be capable of impairing and limiting the effects of the TFTP?'

Also, Cugia warns that the US could 'call a halt and rethink everything from scratch'.

Unpopular clients

McNicholas says law firms in the US share strong traditions of extensive professional regulation to ensure confidentiality. Also, state bar associations have examined each new technology, from mobile phones to cloud computing, to ensure clients' private information remains secure. But he adds: 'That being said, US law firms possess significant, valuable personal and confidential information, and they often represent clients who may be unpopular with certain groups.'

'It will be important for law firms to remain at the forefront of efforts to protect themselves and their clients' information from cyber security threats, including so-called advanced persistent threats (APTs), so that the internet attacks and alleged information leakage involving ACS:Law remain a rare event.' APTs are major and sophisticated, long-term and specifically targeted cyber security attacks aimed at stealing confidential data from governments and businesses. A key feature of APTs is their malevolent ability to move by

stealth from one compromised host to another without detection.

Sotto says law firms in the US appear to be 'behind the curve' in considering privacy and data security in their own backyards. She adds: 'While there is a handful of firms in the US that understand their obligations pursuant to global data privacy and security requirements, I suspect that many do not have a strong sense of the rules and are, for example, transferring EU data to the US without having a data transfer mechanism in place to legally accomplish such a transfer. Law firms have strong confidentiality obligations, so I suspect many US lawyers think that these obligations suffice.'

Cugia warns that the risk for law firms and lawyers in Europe with respect to data protection issues is 'most real'. He explains: 'At the very base of our profession lies a sense of confidence and confidentiality. Professionals are committed to a most stringent obligation

For the last financial year the ICO received 33,234 individual requests for advice and complaints under the Data Protection Act.'

ICO Spokesperson

to adequately secure the data they process and specific data protection laws apply to this effect. In Italy, for example, the national authority for data protection issued a detailed resolution on the declination of general Italian data protection laws when applying to lawyers and law firms.' Cugia continues: 'On the one side, the privacy of clients is thereby ensured by a number of practical measures, mostly pertaining to paper documents and files. On the other side, the procedures for the gathering of express consent to data processing and retention by professionals have been materially simplified, with a view to streamlining the activity.'

During the last IBA Conference in Vancouver, a significant number of working sessions focused on privacy issues. Cugia says: 'In the near future, most enterprises will be able to have full and effortless access to a vast number of consumers' preferences, likings, whereabouts and commercial habits. This is fact. Now the question is if – and to what extent – this massive gathering of data should and could be limited, regulated or remedied?'

'The remote-processing of data (often, personal data) on virtual-servers, both

dedicated and user-operated also represents a material risk for operators (in terms of liability) and users. All data moving on the internet is capable of being monitored, at some point or the other, and data encryption has more and more proved to be a quantitative remedy to a qualitative problem.'

Cugia continues: 'Lawyers can play a significant role in defining best practices, at this peculiar point in time, when regulators are still one step behind the most recent IT developments. The IBA is seriously interpreting its role in this sense and committees are working to divulge knowledge and create awareness for its members to offer a more valuable service to both sides of the table, operators and users.'

In the UK, the ICO says it regularly provides advice and guidance for organisations to ensure they remain compliant with both the DPA and

relevant regulations. It says: 'Organisations should not only have the right policies in place, for example around the encryption of portable storage devices, but also make sure that these policies and accompanying procedures are regularly monitored to ensure they are being effectively carried out by their staff. Any policies and procedures introduced to guard against potential data breaches should also be regularly reviewed and updated to ensure they successfully meet the requirements of the DPA as well as the changing nature of the organisation itself.'

McNicholas warns: 'We should remain mindful that we are still in the infancy of the information age and it will take great foresight to craft legislation that can protect both innovation and privacy. That being said, some of the proposed more general privacy bills on Capitol Hill are trying to address these concerns and it is possible that the right legislation here could be helpful, as some of the leading technology companies have indicated.'

McNicholas concludes: 'But this will be unlikely to result in an omnibus, European-style data protection law.' Whatever the nature of future US legislation, and a final EU/US bilateral agreement, the fact remains that law firms must continue to be alert to the data protection risks of running their business – or face the consequences, both financial and to their reputations. ☒

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IBA filmed interviews

As part of its ongoing commitment to providing high quality content, the IBA has filmed a diverse range of interviews. This filmed content augments the IBA's webcast series, providing access to, and insight from, leading figures at the centre of current international legal and business issues. Some of these interviews will also appear in printed form, online or in the magazine, and can be accessed through the IBA website.



Shown below is a selection of recent interviews and films.

Visit our website to view the full collection at: tinyurl.com/IBAfilms.



Webcast interview with Professor Mark Pieth, December 2010 – Anti-corruption

The IBA hosted a live webcast interview and Q&A session with Professor Mark Pieth, Chair of the OECD Working Group on Bribery in International Business Transactions. Professor Pieth was a compelling choice for the interview as the IBA develops its Anti-Corruption Strategy for the Legal Profession alongside the OECD and the UN Office on Drugs and Crime.



IBA interview with Mark Stephens, lawyer for Julian Assange

Leading media lawyer Mark Stephens, who represents WikiLeaks founder Julian Assange, speaks to the IBA about the legal challenges surrounding the groundbreaking whistleblowing website and the sexual assault allegations made against his client in Sweden. Assange appeared at an extradition hearing on 7 and 8 February, where it was decided that he should return to the country to face questioning, though he intends to appeal the decision.



Interview with Fu Hualing, November 2010

Professor Fu Hualing, a top academic from the University of Hong Kong's Faculty of Law, speaks to Rebecca Lowe about the struggle for constitutional reform, human rights and freedom of expression in China.



IBA Interview with Open Society Justice Initiative Founder James Goldston, November 2010

James Goldston, founding Executive Director of the Open Society Justice Initiative – an organisation that promotes rights-based law reform and the development of legal capacity worldwide – spoke to IBA Senior Reporter Rebecca Lowe about some of the biggest challenges currently facing the ICC.

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