

# IBA GLOBAL INSIGHT

August 2012

**Syria tragedy demands  
a reappraisal of  
diplomacy and justice**

**Assessing opportunity  
and risk in Asia's many  
emerging markets**

**Corinthian spirit  
and commercialism  
collide as Brazil seeks  
Olympics lessons**

**Women and the law:  
IBA's latest  
webcast assembles  
high-level panel**

## Europe's future

**As Asia and the Middle East thrive, a continent  
in crisis attempts to find its way**



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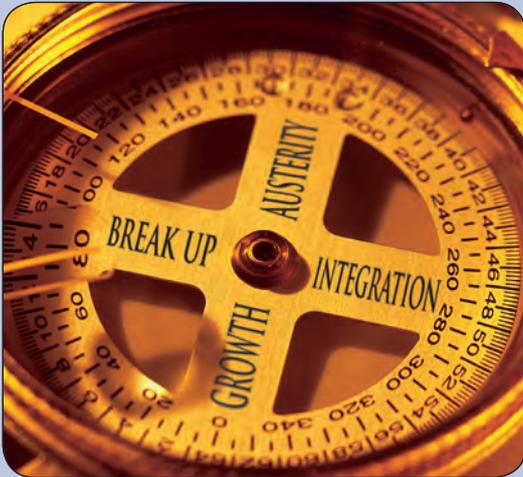
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The IBA hosted an expert panel discussion. Moderated by BBC broadcaster Fi Glover, the panel comprised four lawyers at the very top of the profession: Baroness Helena Kennedy QC, leading barrister and human rights expert; Margaret Cole, former managing director of the UK Financial Services Authority's Conduct Business Unit; Elizabeth Barrett, Slaughter and May partner and former head of litigation; and Katie Ghose, chief executive of the Electoral Reform Society and former director of the British Institute of Human Rights.



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# From the Editor



**F**our years into the global financial crisis, Europe's future looks as uncertain as ever. As this magazine goes to press, European Central Bank President Mario Draghi is the man to whom everyone is looking for answers. With Greece's apparently insoluble woes, Spain teetering on the brink, and Italy looking to be next, it's understandable that easy answers – from Draghi or anyone else – are proving elusive (see **Navigating Europe's minefield, page 16**). It seems we've been here before: *IBA Global Insight's* 'Crisis Point' cover of August 2011 asked if the sovereign debt crisis could end the euro. It still could, of course.

But, for now, the currency and the Union limps on, while economies elsewhere thrive and look to each other as more promising trading partners (see **Chasing tigers, page 26** and **After the Arab Spring, page 34**). Across Europe, calls for the ECB to bail out the next ailing economy persist, while governments pursue market-appealing policies, much to the chagrin of those having to live with the realities of those austerity measures. Our cover suggests there are simple dualities to choose from: austerity or growth, break-up or integration. It's far from being that simple, of course. Paying off unsustainable levels of debt makes sense, but so

too does pursuing growth – by releasing funds for infrastructure projects, for example – something that's now very much on the agenda. Tighter integration could be achieved, too, if one or more beleaguered state broke away.

Meanwhile, scandals and litigation suggest that the bankers' hubris that sparked the crisis has been pandemic (see **Skip Kaltenheuser's column from Washington, page 12**). What can be done about this – better regulation, criminal charges, breaking up the banks – is, by contrast with the Eurozone conundrum, relatively clear. Some such measures would show we'd learnt the lessons of decades of unsustainable excess and risk-taking, helping to guard against a future crisis, while others – such as bonus taxes and forcing banks to lend – would go some way to rectifying the fall-out from the current crisis. The likelihood of the requisite measures being implemented, however, remains bewilderingly low, as power, influence and the interests of a tiny number of individuals (perhaps, as Nobel Prize winning economist Joseph Stiglitz suggests, as few as one per cent) continue to prevail.

James Lewis

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# News

## LIBOR scandal shatters fragile trust in banks

JONATHAN WATSON

**T**here was a period of remorse and apology for banks and I think that period needs to be over,' Barclays then-Chief Executive Bob Diamond told a committee of MPs last year.

How wrong he was. The decision by US and UK authorities to fine Barclays a combined total of more than \$450m at the end of June for attempting to manipulate the London interbank offered rate (Libor) – a benchmark interest rate that is used globally to set the price of everything from credit card

fees to corporate loans – suggests that banks still have plenty to apologise for. Bob Diamond must know that now: the scandal has cost him his job.

According to UK coalition government's business secretary Vince Cable, the affair has revealed 'deeply corrupt practices' at the heart of the banking sector. He recently claimed that in considering its regulatory response, the government was facing 'a moral quagmire of almost biblical proportions'. Imposing financial penalties is not enough, as the public 'cannot understand how a corporate fine – which will be passed on to customers and shareholders – begins to address the problem,' he added.

The scandal has also dealt a major blow to the banking sector's attempts to argue against the imposition of tighter regulation in the wake of the financial crisis. 'There's no doubt that the banks are on the back foot in terms of any restrictions on regulation,' says David Greene, Senior Partner at the London law firm Edwin Coe. 'The Europeans want to impose greater oversight, and the banks are going to have a hard job arguing against that because of Libor.'

A spokesman for the EU commissioner in charge of financial regulation, Michel Barnier, said this week that the commissioner would propose new rules criminalising the

manipulation of benchmarks such as Libor. He plans to do this by amending proposed market abuse legislation – designed to crack down on insider trading and other wrongdoing – to include the direct manipulation of market indexes.

Greene is sceptical about this. 'The trouble with criminal offences is that you have to go to an extra level,' he says. 'For instance, cases have to be proven beyond all reasonable doubt, which isn't necessarily easy. If you look at the market abuse provisions in the Financial Services and Markets Act, and the FSA Handbook, they're actually quite difficult to prove in terms of criminal proceedings, whereas in the regulatory sphere it's much easier.'

Many have argued that the Libor scandal exposes deep-seated problems at the heart of banking culture. These problems are difficult to solve through regulation alone. 'You can't directly change culture through regulation,' says Roger McCormick, a visiting professor at the London School of Economics (LSE) and a member of the IBA's Financial Crisis Task Force. 'But there are things you can do to help foster a better culture and help people inside banks achieve a better understanding of what society now expects of them.'

Read the full story at [tinyurl.com/ibanews-liborscandal](http://tinyurl.com/ibanews-liborscandal).



Former Chief Executive of Barclays Bob Diamond

## Syrian Bar suspended from the IBA

At the Council meeting of the International Bar Association on 2 June 2012, the IBA Council voted unanimously that no satisfactory response had been received in response to the Council's letter to the Syrian Bar of February 2012. The IBA Council therefore voted to suspend immediately the Syrian Bar Association's membership of the IBA.

The suspension of the Bar is based on a fact-finding mission of the IBA Human Rights Institute undertaken in March 2011, which found that:

'The Syrian Bar Association and its local affiliates have failed in their "vital role" under the UN Basic Principles on the Role of Lawyers to "[protect] their members from persecution and improper restrictions and infringements."

The IBA sincerely hopes to see the Syrian Bar taking steps to support and uphold the rule of law in their country. The suspension will be reviewed at the next Council meeting at the



IBA Annual Conference in Dublin on Thursday 4 October, when the Council will consider any further correspondence received.

# Rio Earth Summit 'fluff' highlights need for public interest lawyers

POLLY BOTSFORD

The verdict given by one well known environmental campaigner on the agreement emerging from the Rio +20 Earth Summit is damning: '283 paragraphs of fluff'.

The leaders in Rio should be compared to their Victorian forefathers in the UK, who reacted to the stench of excrement that flowed into the River Thames by closing the windows and dowsing the curtains in caustic soda, hoping the problem would go away. It didn't, and Victorian parliamentarians were forced to introduce the Public Health Act in 1858 to pay for new sewerage systems.

In fact, it was with this legislation that public health law began in earnest. Since then, notions of public wellbeing have been dramatically expanded. Environmental laws are no longer a matter of protecting the public against its own pollution, but about protecting specific species and areas, and even the Earth itself.

Lawyers are changing too: ClientEarth is a public interest environmental law organisation, operating in the UK and on the continent. It is a different sort of law practice because its client is the Earth. It looks for ways to use the law to change the behaviour of government and its citizens on key environmental issues.

James Thornton, who runs ClientEarth, doesn't sound much like a lawyer: 'The environmental movement in the EU is focused on campaigning. But in campaigning you presume that [...] governments are beneficent and know what they are doing. But my view is that focusing on campaigning is an incomplete set of tools to protect the environment: the government may not be beneficent and they may not know what they are doing.'

Certainly, the Earth is a very demanding client: the organisation has grown to 50 lawyers in just four years. Yet the Earth doesn't pay any fees. Instead, the firm is funded by philanthropists, foundations and the EC. Its activities are wide ranging: getting involved in drafting new laws, teaming



up with environmental NGOs to fight cases, and raising its own issues in various fora.

This concept of the law as a political weapon is reminiscent of civil rights law in the 1960s and 1970s, and campaigning lawyers are seen as messianic, bordering on unrealistic. Yet the campaigning fervour derives from the fact that well-meaning laws are only as good as their enforcement. These lawyers might, perhaps, be surprised to find themselves in agreement with the leader who told the BBC at the Earth Summit: 'What matters now is action and implementation.' It was the UN Secretary-General, Ban Ki-moon.

Read the full article at [tinyurl.com/ibanews-riosummit](http://tinyurl.com/ibanews-riosummit).

## IBA Antitrust Committee's submission to Malaysian Competition Commission

In June 2012, the Working Group of the Antitrust Committee of the International Bar Association provided a submission to the Malaysian Competition Commission regarding its draft Guidelines on Abuse of Dominant Position, which were published for consultation in May 2012.

The Working Group commended the Malaysian Competition Commission on issuing the guidelines, but submitted that the guidelines

needed to provide clearer guidance on how the Commission will assess certain conduct. In particular, the Working Group submitted that further commentary was needed in relation to conduct of pricing above competitive levels, as the Working Group considered that such conduct will not in all circumstances amount to 'exploitative conduct'. In addition, the Working Group submitted that further detailed commentary would be helpful in explaining how the

Commission will assess practices of 'predatory pricing' and exclusive dealing, loyalty rebates, refusal to supply and sharing of essential facilities.

The submission is one of a number of projects undertaken by Antitrust Committee Working Groups in recent years. To download the Response on the Malaysian Competition Commission and read more about the Working Groups' achievements, see [tinyurl.com/iba-antitrustprojects](http://tinyurl.com/iba-antitrustprojects).

# Vultures profit from Greek tragedy

JONATHAN WATSON

The Greek economy has been in a bad state for quite some time. So when the country's caretaker government announced in May that it was making a €436m bond payment to investors who had rejected the debt restructuring deal agreed by a previous administration in March, it came as no surprise. Why make a bad situation worse by defaulting on a bond payment?

Of this payout, almost 90 per cent reportedly went to Dart Management, a secretive investment fund based in the Cayman Islands. Dart and other funds like those created by Elliott Associates are fond of buying the sovereign debt of nearly

amount. But Ian Clark, a London-based partner in the capital markets practice at White & Case, does not think the payout is necessarily an indication of how Greece will handle other holdout bonds. 'At the time of the payment there was no clear political direction in Greece and the caretaker government probably did not want to take the important decision of whether to default on sovereign debt obligations in the absence of a clearer mandate from Greek voters,' he says.

According to Hendrik Haag, a partner in the Frankfurt office of Hengeler Mueller and the Chair of the IBA Financial Crisis Task Force, investors such as Dart are simply



Greece's Finance Minister Evangelos Venizelos

bankrupt countries and then holding out against any write-down on that debt, hoping to get paid out in full. For this reason, they are often referred to as 'vulture funds'.

If they don't get paid, they sue the government for the money. Dart and Elliott are still suing Argentina in the US courts to demand full payment of bonds on which the country's government defaulted in 2002.

As it accumulated most of its Greek bonds at prices that traders estimate to be from 60 to 70 cents on the dollar, and received 100 cents on the dollar, Dart should have made a significant profit. This is especially galling for the Greek banks and other local institutions that were forced to take a 75 per cent loss on their Greek bond holdings.

Could the payout have been avoided? Many commentators suggested that it was not only unjust but also a bad strategic move, as it would encourage other bondholders to hold out for the full

being rewarded for their good judgment. They saw there was a risk that the Greek state might change the terms of notes issued under Greek law, so they invested in bonds that were governed by the laws of other jurisdictions.

'It all looks very unjust, it looks like unequal treatment, and that has made a lot of people upset,' Haag says. 'But the overall volume of bonds is small – I think three per cent or so. So I don't think that will kill them. If the Greeks still have access to money from the EU, they can repay these bonds if they want.'

It is worth noting, however, that by passing the Debt Relief (Developing Countries) Act 2010, the UK outlawed vulture fund activity, protecting Heavily Indebted Poor Countries (HIPCs) by limiting the proportion of debts owed by them that a commercial creditor can claim through the UK courts.

Read the full article at [tinyurl.com/ibanews-vulturefunds](http://tinyurl.com/ibanews-vulturefunds).

# IBA student group membership

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- two full IBA memberships for academic staff; and
- greater involvement in the IBA's mission to promote justice and the rule of law throughout the world, and to assist and guide the global legal profession.

To register as an IBA Student Group Member or for more information about the benefits available to your law school, please contact Robyn Cunningham at [robyn.cunningham@int-bar.org](mailto:robyn.cunningham@int-bar.org).

To find out more about the IBA's Student Committee, see [tinyurl.com/iba-studentmembership](http://tinyurl.com/iba-studentmembership).



## BP seeks an end to Russian adventure with TNK

When the news came last month that BP was looking to end its Russian tie-up with TNK, few people were surprised. BP has long been wracked by disputes between its Russian shareholders and this was no clearer than during the Rosneft debacle last year. In January 2011, BP and state-owned Russian energy company Rosneft shocked the world by signing a \$16bn share swap deal to jointly exploit oil and gas reserves in Russia's Arctic shelf. The deal would have made Rosneft the largest single shareholder in BP, but it was not to be.

Alfa-Access-Renova (AAR), which owns 50 per cent of TNK-BP, claimed that the terms of the share swap deal were in violation of its shareholder agreement. AAR filed a lawsuit and went on to obtain an injunction on the deal. In August 2011, Rosneft publicly announced its plans to sign a deal with BP's US rival ExxonMobil.

Since the public humiliation of the Rosneft fiasco, BP continues to be in turmoil as a result of ongoing disagreements among its shareholders. In June, BP announced its plans to sell its 50 per cent stake in TNK-BP. This came as little surprise since sources close to the oil

giant stress that TNK-BP's executive board has been locked in a stalemate position for some time.

Mikhail Fridman, one of the owners of AAR, resigned as chief executive of TNK-BP just the previous month and this was widely viewed as the beginnings of a Russian attempt to seize control of the venture. The truth is that Fridman left as it had become too risky for him to personally take decisions to run the company without guidance from the executive board.

What is the next step then? It has been widely reported that BP is once again in discussions with Rosneft, but most lawyers are sceptical. 'If BP sells its stake to Rosneft then Rosneft could take over the whole of TNK-BP, but I do not think a 50:50 joint venture between Rosneft and AAR is sustainable in the long run,' comments one Moscow-based corporate partner.

Earlier last month it was reported that Fridman himself was considering buying out BP's share for close to \$25bn, but he has since denied that any such talks have taken place.

While the search for a buyer continues, things are not getting any easier for BP,



Mikhail Fridman, resigned as Chief Executive of TNK-BP, but is reported to be considering buying BP's \$25bn stake.

notes one Moscow-based oil and gas partner. 'While the shareholder issues continue, BP will continue to have problems in getting on with projects and this was shown most recently when AAR prevented BP from getting involved in the Nord Stream project, which would have been an important move for the company.'

Read the full article at [tinyurl.com/ibanews-tnkbp](http://tinyurl.com/ibanews-tnkbp).

# Human Rights News

## Syria crisis prompts calls for UN Security Council to reassess legal obligations

REBECCA LOWE

The impasse at the UN Security Council over what action to take to prevent further civilian deaths in Syria has prompted calls for a fundamental reassessment of how countries use their veto.

The bloodshed in Syria may amount to crimes against humanity, UN High Commissioner for Human Rights Navi Pillay has announced. Since the uprising began in March 2011 around 17,000 people have died, according to the Syrian Observatory for Human Rights, based in London.

Hans Corell, former legal counsel to the UN, believes the Syrian stalemate must act as a clarion call to the permanent members of the Council – the US, UK, France, China and Russia – to reassess their legal obligations under the UN Charter to avoid severely undermining international peace efforts.

Corell, a member of the IBA's War Crimes Committee Advisory Board, alludes to a 2008 letter he wrote to

the UN, in which he describes the Council's failure to act in certain situations as 'deplorable'. He proposes that the permanent members only use their veto in situations where their most 'serious and direct' national interests are affected. 'Such steps would send a resounding signal around the globe, in particular to repressive regimes and presumptive warlords,' he writes.

Barrister Toby Cadman, former senior legal adviser to the Human Rights Chamber for Bosnia and Herzegovina, is bringing civil lawsuits against members of the Syrian government under the US Alien Torts Claim Act and Foreign Services Immunities Act for alleged torture, murder and arbitrary arrest. He believes that such efforts to ensure accountability fill a vacuum left by the Security Council.

'As an international lawyer having specialised in international crimes for more than a decade, I can safely say

that this is the worst display of human depravity I have ever experienced,' he says, adding that casualty figures could be up to four times higher than reported. 'It is with these thoughts in mind that it is difficult to understand the impotency of the Security Council.'

Read the full article at [tinyurl.com/ibanews-unnveto](http://tinyurl.com/ibanews-unnveto).



United Nations observers arrive at a hotel in Homs

## Baroness Helena Kennedy QC announced as new IBAHRI Co-Chair



The **International Bar Association's Human Rights Institute (IBAHRI)** is delighted to announce Baroness Helena Kennedy QC, as its new Co-Chair. Baroness Kennedy is a leading barrister and an expert in human rights law, civil liberties and constitutional issues. She is the first woman Co-Chair of the IBAHRI and joins existing Co-Chair Sternford Moyo, former president of the Zimbabwe Law Society, to lead the IBAHRI Council. Her appointment took effect in June and her tenure will run until 31 December 2013.

Baroness Kennedy is highly accomplished and has held many prestigious roles: she is a member of the House of Lords and chair of Justice (the British arm of the International Commission of Jurists); President of the University of London's School of Oriental and African Studies and Principal at Mansfield College, Oxford University.

In her work as a barrister at Doughty Street Chambers in London, Baroness Kennedy has acted in a number of prominent cases over the last 30 years, including the Brighton Bombing, the Michael Bettany espionage trial, the Guildford Four appeal and the bombing of the Israeli embassy. She also played a significant role in Britain in promoting equal opportunities for women at the Bar. She has lectured on human rights law, civil liberties and constitutional issues, both in Britain and internationally. The governments of Italy and France have honoured Baroness Kennedy for her work on human rights, and she has received over 30 honorary doctorates.

Baroness Kennedy recently took part in one of the IBA's webcast series, focusing on women in the law. To watch Baroness Kennedy speaking in the panel discussion, see: [tinyurl.com/ibawebcasts](http://tinyurl.com/ibawebcasts).

## Arrest of Darfur Bar Association members raises concerns

The IBAHRI is concerned by the arrest and detention of four members of the Darfur Bar Association on 1 July 2012 in Khartoum, Sudan.

The head of the Darfur Bar Association, Mohamed Abdella Al-Douma, was arrested, along with Rehab El-Fadel Sharif, Rashida Ansari and Jibril Hamid Hassabou. They were arrested by government security forces at a press conference where Mr Al-Douma was briefing journalists on the case of human rights activist Victor Bushra Gamal, who had been detained by Sudanese security forces for over one year. The Sudanese authorities have not given a reason for their arrest and detention.

IBAHRI Co-Chair Sternford Moyo commented, 'Lawyers must be free to exercise their profession without fear of arrest or harassment. The International Bar Association's Human Rights Institute finds the situation worrying, particularly as it is not the first time that such arrests and detentions of human rights lawyers by the Sudanese authorities have occurred.' He added, 'We urge the Sudanese authorities to immediately provide reasons for the arrests and to respect Sudan's international obligations, specifically those under the International Covenant on Civil and Political Rights.'

The IBAHRI encourages the Sudanese authorities to ensure that the rights of the detained lawyers be upheld, particularly their right to liberty and protection against torture and cruel, inhuman and degrading treatment, and that they be charged or promptly released.

## EU takes tough stand on Somali pirates

NEIL HODGE



Marines approach a suspected pirate skiff in the Gulf of Aden

On 15 May, the European Union (EU) took the fight to the Somali pirates' home base for the first time, destroying several of their signature fiberglass skiffs as they lay on the beach. The EU's Naval Force Somalia (EU Navfor) struck Xarardheere, a known hotspot for pirate operations, via combat helicopter. European officials said it was likely that there would be more strikes in the future. 'This is a fantastic opportunity,' said Lieutenant commander Jacqueline Sherriff, a spokeswoman for the EU's antipiracy force. 'What we want to do is make life more difficult for these guys.'

Somali pirates have hijacked hundreds of ships in the past few years and have netted hundreds of millions of dollars from the hijackings; money that they often reinvest in weapons. Recently, they have attacked ships as far away as Sri Lanka, more than 2,000 miles from home.

The overnight raid on Somali pirate bases is small but significant.

This is the first time since the EU set up its naval patrol force off Somalia in December 2008 that it has taken the fight to the pirates' home base.

Some lawyers applaud the action. Sarosh Zaiwalla, senior partner at law firm Zaiwalla & Co, says that 'piracy should be regarded in the same way as terrorism. States are well within their rights to take preemptive action against terrorists, and the same rule should be applied against pirates.'

He adds: 'International public policy dictates that action must be taken against piracy. It is therefore perfectly legal for the EU to enter a sovereign state to destroy pirate ships in order to protect its citizens and commercial interests.'

'The fact that the EU was given consent by the transitional government – even though it was not a requirement – means that the intervention into Somali territory was completely legal.'

Read the full article at [tinyurl.com/ibanews-somalipirates](http://tinyurl.com/ibanews-somalipirates).

## Illicit financial flows, poverty and human Rights

In June 2012, the IBAHRI Task Force on Illicit Financial Flows, Poverty and Human Rights held its first multi-stakeholder consultation meeting in Latin America, São Paulo, Brazil. Participants – including tax, mining and criminal lawyers, as well as regional non-governmental organisations – shared their perspectives on issues relating to the impact of tax abuses and transnational crimes on poverty and the realisation of economic and social rights in Latin America.

Presentations were made by participant stakeholders, followed by roundtable discussions chaired by Task Force members on:

- mineral taxation policies, tax planning and revenues;
- tax abuses, transfer pricing and bank secrecy;

- transnational crimes, tax evasion and corporate criminal liability; and
- the impact of tax abuse and low tax collection on poverty and human rights.

The meeting was successful, engendering fruitful discussions that will contribute to the Task Force's mandate, to contribute an innovative report analysing the links between illicit financial flows, particularly tax evasion, poverty and human rights (to be released in 2013). Further to the consultation meeting in São Paulo, the IBAHRI Task Force held a range of side meetings and consultations with stakeholders across Brazil in Rio de Janeiro, Brasilia and São Paulo.

The Task Force will hold its second multi-stakeholder consultation meeting in the Southern African Development



Community (SADC) region in August 2012. The meeting will take place during the SADC Lawyers Association General Assembly, in Swaziland, and seeks to obtain an African regional perspective on the same issues discussed in Brazil.

In addition to the consultation meeting, the IBAHRI will hold side consultations in Zimbabwe, Swaziland and South Africa.

## IBAHRI focuses on death penalty in Morocco

In July 2012 the IBAHRI held a closed consultation meeting with senior members of the Moroccan legal profession, including lawyers and bar leaders, members of the abolitionist civil society and leading French abolitionist organisation Ensemble Contre la Peine de Mort (ECPM), at the British Embassy in Rabat. The event was moderated by Shirley Pouget, programme lawyer at the IBAHRI, and participants discussed practical ways of engaging the Moroccan legal profession in becoming more proactive in efforts to abolish the death penalty.

The meeting took place ahead of the regional congress against the death penalty, which will be held 18–20 October 2012, in Rabat, organised by the ECPM in partnership with the Organisation Marocaine des Droits de l'Homme, the IBAHRI and in association with the Coalition Marocaine Contre la Peine de Mort (CMCPM). During the congress the IBAHRI will hold a seminar on the legal profession and the abolition of the death penalty.

To read more, see [tinyurl.com/IBAHRI-deathpenalty](http://tinyurl.com/IBAHRI-deathpenalty).

## Establishing international criminal courts



As part of the IBA's 7th Annual Bar Leaders Conference, the IBA International Criminal Court (ICC) Programme hosted a high-level panel discussion on the role of lawyers in establishing international criminal courts and safeguarding their legacy. The session was chaired by Akbar Khan, Director of the Legal and Constitutional Affairs Division, Commonwealth Secretariat. Expert speakers included: Courtenay Griffiths QC, lead counsel for Charles Taylor; Karim Khan QC, lead counsel for Francis Muthuara (Kenya) Abdallah Banda and Saleh Jerbo (Sudan); Mark Ellis, Executive Director of the IBA and Lorraine Smith Van-Lin, Programme Manager at the IBA ICC Programme. Panellists shared the challenges and successes in representing victims and defendants, interpreting novel legal principles and contributing to the building of the jurisprudential architecture of these courts.

The discussion is available to watch via the IBA website at [tinyurl.com/IBAnews-representingjustice](http://tinyurl.com/IBAnews-representingjustice).



## 'Til selfish gain no longer stain the banner of the free!

**As leading experts suggest the pandemic nature of 'shenanigans' at our biggest banks calls for criminal charges against top executives, reforming the system becomes an important question in the US presidential election.**

**SKIP KALTEHHEUSER**

The esteemed song 'America the Beautiful' was taken from a poem by Katharine Lee Bates. Among the abandoned original lines: 'America! America! God shed His grace on thee. 'Til selfish gain no longer stain, the banner of the free!' Those lost words owed to the Panic of 1893, when many in a suffering middle class lost savings and couldn't meet mortgage obligations amid shaky railroad financing and bank failures. Perhaps now is the time for those lines to be reconsidered. Given what experts are telling us, the runner-up question to the presidential election is if government will voice a new tune toward the finance sector and other purveyors of influence.

Charles Intriago is a former federal prosecutor, money laundering expert and founder of the Miami-based Association of Certified Financial Crime Specialists. He's extremely intrigued by Coquina Investments' successful lawsuit against TD Bank. 'Coquina wasn't a bank customer,' says Intriago, 'yet for the first time, a jury held a bank liable for aiding and abetting fraud committed by one of its customers.' The federal trial jury ruled the bank must pay \$67 million in damages, including \$35 million in punitive damages. Scott Rothstein, disbarred lawyer and the former chief executive officer of the now-defunct Rothstein Rosenfeldt Adler law firm, utilized his \$1.2 billion ponzi scheme to defraud Coquina, and TD Bank was found to have created the appearance of legitimacy and of making false statements to investors. TD Bank is appealing the decision.

Earlier, TD Bank settled with another Rothstein victim, the Razorback Group, for \$170 million. Now, says Intriago, the gate has opened to subsequent lawsuits that build upon Coquina's foundation. 'This includes a ruling for one plaintiff, Emess Capital, that it can use the Coquina case to proceed with a RICO [Racketeering Influenced and Corrupt Organizations Act] civil lawsuit. RICO provides treble damages and attorneys' fees. 'With other potential lawsuits, this could rise to hundreds of millions of dollars in exposure,' says Intriago. But he regards the greater fright to banks to be the liability precedent Coquina set.

Another case of keen interest to Intriago is *United States of America v. Carollo, Goldberg and Grimm*. The defendants worked for GE Capital,

and were convicted in May of colluding to rig bids for interest paid to municipalities that park money raised by bonds for projects such as roads, schools, and hospitals until it's fully spent. Other gold-plated firms are also alleged to be involved in schemes of fake competition. The defendants have asked the trial judge to throw out the verdict.

Municipalities seek to earn interest on their funds until the money is fully spent. The bidding process is supposed to get the most competitive rate. This is a market involving trillions of dollars, and when the bidding is rigged to keep the interest rates lower than an honest bid would reap, basis points add up. This has gone on at least for over a decade - windfalls to crooked bidders and real losses to states, counties, cities and town, many already scraping by. The perpetrators in such schemes often succeed because they are cloaked in complexity. In the bid-rigging universe, grease from illegal campaign contributions is not unknown.

As this is written, *US v Ghavami* goes to trial in federal court, a prosecution of former employees of UBS AG for bid-rigging on municipal investment contracts. Prosecutors aim to prove 'knowing and active participation' not only of UBS, but of GE, Bank of America Corp. and JPMorgan Chase & Co in the alleged fraud. Together with Wells Fargo & Co, these firms or related units have already paid over \$700 million to settle government claims.

'Having followed the way banks operate over years,' says Intriago, 'this is looking like a pandemic. When bid-rigging is added to all the shenanigans we've seen, such as Libor, HSBC, Peregrine Financial, TD Bank, and it's about time some bankers go to jail, and not just lower level officers. We've lost sight that banks operate on a public charter the citizens gave them. That licence was based in trust, it's not supposed to be a licence to steal. It should be yanked if bankers commit egregious crimes driven by contempt of law and by greed. Regulators have a whole array of weapons Congress gave them, they need to wake up and send some people to jail. Many are complicit in the worst crisis since the Depression, and they need to be held accountable. That's what cells are for, open them up and put in some manicured nails and silk socks. Don't ➔

just go after the Bernie Madoffs and Allen Stanfords who rip off the usually better heeled, go after those who've ripped off the Joe Schmo taxpayer.'

But reality intrudes, as Intriago points to the US Senate's Permanent Subcommittee on Investigations report on money laundering at HSBC, released in July: 'The last fifty pages cover systemic failures in the Office of the Comptroller of the Currency's (OCC) supervision of the bank. The report found unwarranted OCC hierarchy toleration of laxity in the bank's anti-money laundering controls, despite numerous examinations identifying potential risks.'

And it has to be discouraging to note that a decade after passage of the Sarbanes-Oxley Act, which includes a sword for jailing executives who knowingly certify false financial reports, there have been no criminal prosecutions under that Act related to the economic meltdown.

### **Influence full circle**

Not to accuse broad swaths of campaign donors of conspiracy to commit mischief, but when there's a steady political drum in Congress to cut funds for agency enforcement, one has to wonder. Consider the US Commodities Futures Trading Commission (CFTC), which revealed the long-term pattern of Barclays' sport with rates. The Obama administration seeks to beef up the CFTC, from 600 employees to 1,100. Based on what might be discovered and saved, that's likely to prove good bang for the buck. But Republicans want to cut the total to 500.

And they'd like to starve the new Consumer Financial Protection Bureau (CFPB) to death altogether. They won't even confirm agency director Richard Cordray, and are constantly seeking to end the CFPB's budgetary independence. Their fondness for the agency hasn't improved with the agency's first major action, in late July, clipping Capital One \$60 million in damages and \$150 million in refunds, for deceptive marketing and billing in pushing credit card products on poor customers who couldn't use them. What's in your wallet?

According to Eric Havian, a whistleblower specialist with the San Francisco office of Phillips & Cohen, 'the entire securities industry is extremely frightened of new whistleblower legislation portion of Dodd-Frank, and its financial incentive to expose financial fraud. The Chamber of Commerce argued it would destroy internal compliance efforts and begged the SEC to make people report internally first. But that would scare people off, and fortunately the SEC didn't go along. Many claims have been filed, but it hasn't proved disastrous for business.' The rules provide whistleblowers with a piece of the sanction action.

Hordes of lobbyists descended on government, says Havian, with goals ranging from derailing the CFTC's efforts on derivatives regulation to cutting the number of investigators in the Department of Justice. 'The easiest way to gut enforcement is to cut agency budgets,' says Havian. 'We're already in a situation where government lawyers haven't the money to travel to meetings for high profile cases.'

So, what hope for change? One might think the time is ripe, as Mitt Romney goes abroad on fundraising ventures, from UK events thrown by Barclays executives to fundraisers in Israel, with his sidekick Sheldon Adelson, the casino billionaire who says he'll spend \$100 million

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*'When bid-rigging is added to all the shenanigans we've seen, such as Libor, HSBC, Peregrine Financial, and TD Bank, it's about time some bankers go to jail.'*

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to defeat President Obama. With the Koch brothers, Adelson is a contender for Lord of the Super-PACs. He is no fan of unions, taxes or honest brokers in the Middle East. So there's little mystery as to what shots he'd help a President Romney call, or governing philosophies of people he'd like brought in to help Romney run the country.

Meanwhile, in July a ProPublica/Frontline/University of California investigative journalism venture revealed that the Department of Justice and FBI are investigating Adelson for payments allegedly made to gain project approvals in Macau. This might violate the Foreign Corrupt Practices Act. The SEC might enter the scene on the civil side. Adelson's company, Las Vegas Sands, denies any wrongdoing. The issue nevertheless begs the question as to how Adelson might advise Romney on funding and staffing those agencies. If you think Romney likes secrecy over his finances, consider the passion of his backers.

But reforms to address the influence of the 'Big Money' is not the catchiest tune in Washington. Not when five banks — JPMorgan Chase, Citigroup, Bank of America, Wells Fargo and Goldman Sachs — hold assets equal to 56 per cent of the economy. Politicians can count that eight-and-a-half trillion dollars faster than they can count votes. The gigantism of that kitty intimidates and captures Washington. Many in government are whipsawed between desire to worship at that shrine and fear of bumping into a financial house of cards.

Campaign contributors' interests cover a lot of territory and cross a lot of lines. But there are common denominators. They don't like oversight. They don't like regulation. They don't like agencies to have resources or enough personnel to do the job. They sure don't like taxes. Some enjoy pollution. Lowering the bar in one area lowers it elsewhere, in this they have common purpose. Investor interests also cross lines, as do many board members' interests.

Apologists for influence say ad nauseam that Americans spend far more on sodas than they do on campaigns. True. But it's the laser focus of politicians clamouring for funds, in tandem with the laser focus of what contributors want for their money that puts soda pop in perspective. In Washington, we've mastered the low art of the thinly disguised bribe.

Indeed, in July the Disclose Act, an already watered down attempt to reveal who's giving contributions over \$10,000 in campaign-related expenditures — yes, one could give a buck less and slip by — was successfully filibustered by Senate Republicans, many of whom used to defend disclosure as the panacea to curbing contributor influence.

Washington was broken long before the *Citizens United* case put legalized bribery on steroids and made even more murky the deep waters concealing who is giving what for what. In its wisdom, the Supreme Court had already divined that corporations were people and later, in the 1976 case *Buckley v Valeo*, that money was speech. *Citizens United* then evaporated the complicated if sometimes fanciful veneer of restrictions on amount, purpose, timing and organisation.

As Harvard law professor Lawrence Lessig testified on 24 July before the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights, the *Citizens United* decision has changed the business model of campaign funding. 'The Framers gave us a ... representative democracy...dependent upon the people alone.' That's been replaced, says Lessig, by a Congress not dependent on the people alone, but on 'the Funders'.

How concentrated are the new and improved 'Funders'? Lessig says only 0.26 per cent of Americans give over \$200 to congressional campaigns. One one-hundredth of one per cent give over \$10,000 per election cycle. Out of 310 million people, less than 200 provide 80 per cent of all Super-PAC donations.

Now, says Lessig, it isn't just the money and airtime Super-PAC's can contribute that wrangles politicians. It's the loosely veiled threat that if they don't do their masters' bidding, they'll get walloped in the final stretch of their campaign by massive attack ads

they can't possibly counter. It's a protection racket. Whatever it is that facilitates politicians leaving Washington much richer than when they came, they like to stick around.

And the game is as important at the state level, where the action is often beneath the radar, as at the federal. Consider the American Legislative Exchange Council, (ALEC), with membership including 2,000 state legislators and corporate executives. They draft model bills that call the marching tunes in one statehouse after another. 'Hands off' is a good summation of model legislation affecting all regulatory oversight. According to the Center for Media and Democracy, over 98 per cent of ALEC is funded not by the 50 bucks yearly dues of legislator members, but by sources including foundations supported by folks like the Koch family. It counts one Democrat among 104 legislators in leadership positions.

If the White House changes, Havian predicts, these efforts will ramp up, with greater success. According to the Center for Responsive Politics, for Federal level campaign donations, the finance, insurance and real estate sectors remain the biggest gorillas. Since 1989, it's given nearly three billion dollars, not including tax-exempt political non-profits that don't track donors, or sources concealed by the latest gimmickry. It's increasingly lopsided to Republicans. And it doesn't include the vast sums spent on lobbyists. Is there anyone out there unable to see the connection between what the finance sector has got away with and the ability of the Big Money to wield ever more influence? Maybe the current legal travails facing banks will bring their hubris to heel. But for how long, if they hold fast to the levers of influence?

And there are many levers, including the whisper of future careers for those making nice with the big boys. Never mind legislators making money on their version of insider trading, related to legislation before them, a practice hurriedly curbed in this election year after media coverage.

Long ago, this writer asked a top staffer of the late US Senator Alan Cranston — a senator eventually damaged by a banking influence scandal — how his boss coped with the flood of campaign cash. His deadpan reply: 'People think if they give you a lot of money, they're buying influence. But all they really buy is access.' Even attempting that distinction seems quaint now.

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# Navigating Europe's minefield

Greece's plight has highlighted the crisis in democracy, the eurozone and the financial system. The position of Europe's bigger but no less beleaguered economies looks precarious, too. *IBA Global Insight* assesses the way ahead.

SCOTT APPLETON

New Democracy's emergence as the largest single party in the Greek general election on 17 June was hailed not only as a victory for Greece's conservatives, but also for the stability of the European Union (EU) and business confidence right across the eurozone. The country's second general election in little more than a month, it was considered a test of Greece's commitment to a painful economic austerity programme, the terms of its €110bn bailout by the EU and International Monetary Fund (IMF), and ultimately its membership of the euro.

The predicted collapse of the Greek economy and a forced return to the pre-euro currency may have been avoided, but the euphoria was short-lived. Concerns over the stability of the Spanish banking system, Italian bond yields and the Cypriot economy, have raised fresh doubts about a consistent European economic recovery almost five years after the onset of the global financial downturn – uncertainty that is inevitably impacting on business confidence and strategic planning.

Anxiety over the cohesion of the eurozone, levels of sovereign debt, and a lack of liquidity

among European banks, mean that those companies that can are stockpiling cash and looking to restructure away from the most volatile European markets. There is an ongoing drive to mitigate currency risks, and for greater contingency planning, including potentially the exit of a Member State from the euro.

'In many respects there has been an enforced pause in decision-making imposed on companies – chief executives are now extremely risk averse – but we are seeing new types of investors emerging, including distressed investment and alternative capital funds, while in some sectors major developments are still occurring,' says Iñaki Gabilondo, Managing Partner of Freshfields Bruckhaus Deringer in Madrid.

The international media coverage of events in Greece, Spain and elsewhere, suggests business confidence is at a record low, but in truth the situation is not so black and white, he insists. 'Companies are certainly questioning what events across the eurozone mean for them, and many businesses are facing obvious challenges, but others are adapting to the new more uncertain environment.'

### Get out quick

Post-election, Greece may be more likely to keep the euro but it is the collective inability of European leaders and regulators to find a coherent way out of the crisis that has to date proved so unsettling for businesses. 'Parties considering transactions are going into them with their eyes open much wider, deals are taking much longer, and are vulnerable almost up until completion,' says Freek Jonkhart, Partner with Loyens & Loeff in Rotterdam and Senior Vice-Chair of the IBA's European Regional Forum. 'Businesses are also looking more closely at how their revenues are generated, and any potential liabilities or risks, and this includes trying to understand the implication of events at home and abroad.'

Businesses more than ever want to know what the options are if something goes wrong, agrees Pedro Siza Vieira, Managing Partner of Linklaters in Lisbon. 'People are looking more closely at currency risks, potential drops in asset values and payment obligations – including how an agreement might work in a non-euro situation; can things be re-negotiated, re-denominated or even negated?'

Portugal formally requested a €78bn bailout from the Troika – the EU, European Central Bank (ECB) and IMF – in April 2011, under the terms of which the government has embarked upon a major privatisation process, regulatory reform and a cost-cutting programme – all of which have impacted significantly on business confidence.

*'There has been an enforced pause in decision-making imposed on companies... but we are seeing new types of investors emerging, including distressed investment and alternative capital funds'*

Iñaki Gabilondo

Freshfields Bruckhaus Deringer, Madrid

The Memorandum of Understanding outlining the terms of the bailout included new capital adequacy rules obliging Portuguese banks to raise their core Tier 1 ratios to ten per cent by the end of 2012. As institutions have sought to rebuild their own finances there has been a virtual stop in corporate lending, as well as subtle but significant changes to the structure of the banking sector, including of foreign banks' local operations.

'Financial institutions are looking very closely at their structures in response to both the downturn and changing regulatory situation. For domestic Portuguese banks this has meant a much greater focus on redefining their core operations as well as closer management of their international liabilities. For international banks, the trend has been towards placing greater reliance – from a regulatory standpoint – on their home operations,' says Pedro Cassianos, Head of Banking and Finance at Lisbon's Vieira de Almeida.

Indicative is the firm's work advising Germany's Deutsche Bank on the conversion of its Portuguese subsidiary, Deutsche Bank Portugal, into a branch of the German parent, thus reducing its local regulatory exposure while drawing on a stronger capital base. Spain's Banco Santander has similarly written down €600m in goodwill on its Portuguese subsidiary Santander Totta.

What goes for Portugal goes for other European economies. The uncertainty surrounding the economic direction of Greece, including its membership of the euro, has seen businesses pulling back from the country. 'Greece is no longer a major consideration for most German businesses. It only accounts for around four per cent of German trade and in many respects the major banks and insurance companies have ➔

already either reduced their exposure to Greek debt, or already factored it in to their decision-making,' says Jörg Menzer, Managing Partner of Germany-based Noerr in Bucharest, and Vice-Chair of the IBA's European Regional Forum Committee.

'There is much more worry, in this respect, about what might happen in Spain or Italy, which are significantly bigger economies and trading partners. The potential impact of the structural problems in either of these will have a very much greater impact across Europe as a whole.'

### Safe as houses!

Spain is however now in the eye of the economic storm. In mid-June the government of Mariano Rajoy formally requested an EU bailout of up to €100bn to stabilise the banking sector, heavily exposed to the collapse of the country's real estate market.

'Recapitalising the banks has long been regarded as key to Spain's economic recovery. The question has been however, where will the money come from? Despite some attempts to access the capital markets they have on the whole proved insufficiently liquid, while rising regulatory demands have also brought significant challenges,' says Gabilondo at Freshfields.

Since the bursting of Spain's real estate bubble in 2008 there has been a dramatic consolidation of the country's savings banks (*cajas*), reducing numbers from 45 to around ten – mergers providing comfort in greater size and geographic diversification. A number of the largest *cajas* have also taken advantage of new rules enabling them to restructure as publicly-listed entities.

This consolidation process has been encouraged by the creation of a dedicated government fund to cover finance gaps – the Fund for the Orderly Restructuring of Banks (FROB) – and the imposition of capital adequacy demands now set at ten per cent. In January, Spain's Minister for the Economy also requested that the banks collectively set aside an additional €50bn to safeguard against rising real estate loan defaults, new rules have also since been introduced obliging institutions to divest more non-core assets – while previously banks had swapped debt for equity in debtor businesses,

now they are being forced to sell such holdings.

'The banks' difficulties are in part caused by an economic and regulatory situation that has changed so much over the last year that they simply cannot operate in the same way as before. New regulation is impacting on liquidity levels and limiting the ability of many to maintain their day-to-day operations,' says Gabilondo.

Spanish banks had until mid-June to present a definitive set of accounts setting out their

total liabilities, which were independently assessed as between €51–€62bn. This includes €19bn already pledged by the government to fill a funding gap at Bankia, the product of a 2010 merger of seven *cajas* to create the country's largest savings bank, holding the largest real estate portfolio.

Nonetheless, some insist that despite the obvious issues faced by certain institutions a distinction has to be made between

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*'Parties considering transactions are going into them with their eyes open much wider, deals are taking much longer, and are vulnerable almost up until completion'*

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Freek Jonkhart

*Loyens & Loeff, Rotterdam; Senior Vice-Chair, IBA European Regional Forum*

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perception and reality.

'There has, I think, been an over-reaction to the negative news. There was a hole in Bankia's finances but this has now been filled and the independent stress tests showed that banks require significantly less than the €100bn originally reported. Some banks do have problems but this is not an issue solely restricted to Spain,' says Juan Picón, DLA Piper's Managing Director Groups & Sectors, and Senior Partner of the firm in Spain.

Banks across Europe have faced downgrades and shown to have liabilities significantly higher than was previously presumed. 'Further issues will need to be faced but we do not now expect any more adverse surprises, which – financial speculation aside – should give the market more stability,' he adds.

### Record yields

Indeed, some suggest that the economic challenges facing Spain and other peripheral European countries are partly the result of investment decisions by others. The downturn may not be business as usual, but there is still business to be done. The yields now demanded on Spanish and Portuguese government bonds, for example, are consistently reaching record highs.

'Looking from a different perspective, there is money to be made out of a crisis of confidence. At a time when it is increasingly difficult to generate profits from equities and traditional asset classes, yields on government bonds offer good long-term returns,' says Menzer at Noerr.

It is perhaps no coincidence that the hard line taken by investors in Spanish and Italian bond auctions comes when disproportionately large amounts of debt are up for renewal. The perception of Europe from elsewhere in the world may be of a continent in economic freefall, but the downturn is presenting new, albeit different, business opportunities. Finance may be harder to come by, and investment decisions much more considered, but companies continue to plan for the long term while trying to manage short-term dips in confidence.

At the end of 2011, German automotive manufacturer Audi announced a €900m expansion of its Hungarian production facility, while in March 2012 Daimler likewise began production of its A-Class and B-Class Mercedes-Benz models at a brand new €800m facility in the country – its first Mercedes plant in Eastern Europe. 'Many industrial companies, including the luxury market, are feeling the crisis in different ways to those in other sectors. Many are sitting on relatively large cash piles and when it comes to assessing their strategic options they are finding that land is now cheaper, rents can be negotiated more aggressively, and finance is still there for the very best-rated businesses,' says Menzer at Noerr.

Major investments are also being seen in those countries perceived to be the most economically vulnerable. In late December, the Portuguese government successfully completed the sale of its 21.35 per cent stake in leading utility company EdP to China Three Gorges for €2.7bn. The tender process also saw bids from Germany's E.ON, and Brazil-based Eletrobras and Cemig.

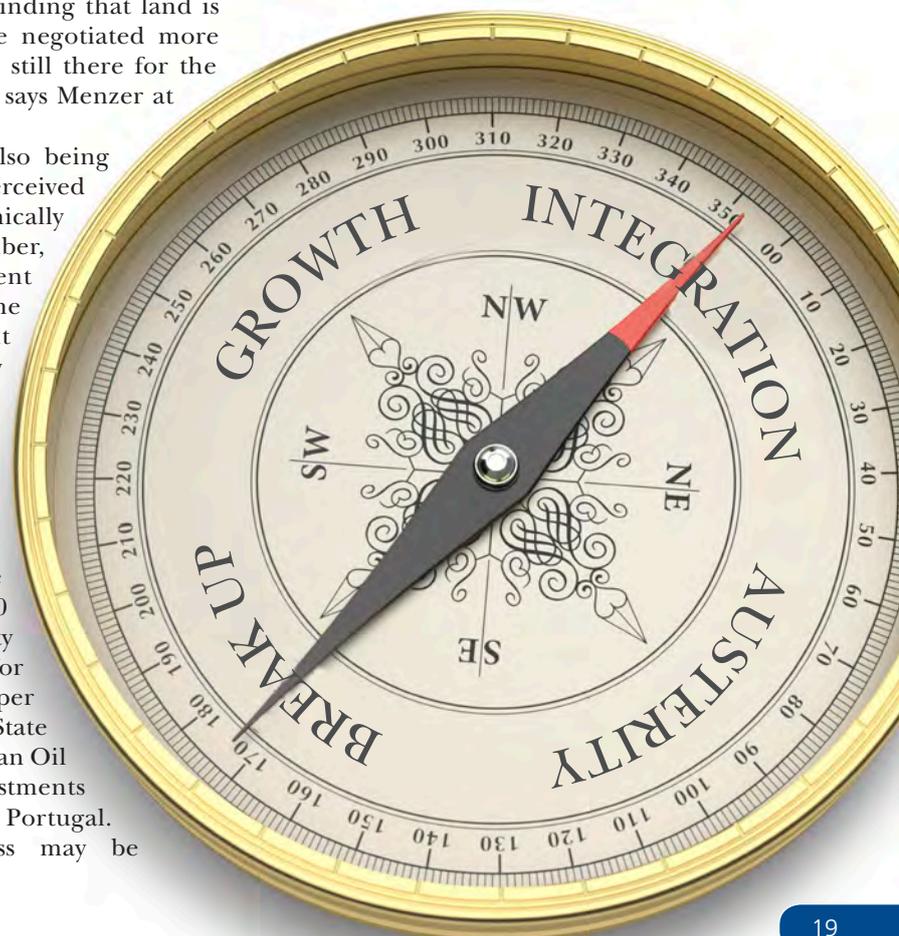
Subsequently, the government has sold a 40 per cent stake in electricity and gas distributor REN for almost €600m, with a 25 per cent share going to China State Grid and 15 per cent to Oman Oil Company – first time investments for both entities in Portugal. 'The privatisation process may be

uncomfortable for some but it is bringing new investors and new finance to Portugal. And the tenders are not just about raising money for the government, they are also safeguarding the future of the companies themselves,' says Siza Vieira at Linklaters, which advised E.ON in the EdP sale and State Grid in the REN deal.

Such sales have already raised 60 per cent of the government's projected privatisation revenues, which has yet to see the sale of major stakes in national airline TAP, its ground handling operation Ground Force, airport operator ANA; water operator Aguas de Portugal; rail freight company CP Carga, and the government's seven per cent holding in leading oil company Galp. 'The acquisitions have also brought new lines of credit that mean that both EdP and REN are now able to think strategically about the mid- and long-term opportunities both inside and outside of Europe,' says Siza Vieira.

### New momentum

When assessing the facts that reflect business confidence across Europe, more than one conclusion can inevitably be reached. 'Over the last six months, clients have raised questions about the potential outcomes in the event of a country leaving the euro, and even of the break-up of the eurozone. So people are



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**Arbitration**

**United Kingdom** - contributed by Herbert Smith LLP

**Court of Appeal rules on arbitrability of shareholders' claims**

The extent to which parties may agree to submit intra-corporate disputes - in particular claims under company legislation - to arbitration has long been uncertain. The Court of Appeal recently ruled in favour of the arbitrability of a shareholder's unfair prejudice claim brought under Section 994 of the Companies Act 2006 and has provided important guidance on the arbitrability of corporate disputes more generally.

**Author: Matthew Weiniger**

(Read article <http://www.internationallawoffice.com/?i=7FTST06>)



Matthew Weiniger

**USA** - contributed by DLA Piper US LLP

**US court rejects arbitrator bias challenge during enforcement proceedings**

The US Court of Appeals for the Second Circuit recently refused to vacate an arbitral award under the US Federal Arbitration Act where a party argued that an arbitrator had failed to disclose prior experience that rendered the arbitrator potentially biased. The decision clarifies the boundaries of arbitrator bias relating to undisclosed prior experience.

**Authors: JP Duffy, Kiran N Gore**

(Read article <http://www.internationallawoffice.com/?i=7FUZUJ9>)



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considering the possibility, and are concerned, but can you genuinely plan for a break-up? I am not sure. People want to mitigate their risks but they cannot avoid them altogether,' says Siza Vieira.

Despite the ongoing challenges facing economies like Greece, Portugal, Ireland and Spain – all of which have now received outside financial assistance – there is no benefit to any country if the eurozone breaks up. 'As Europeans we need each other, but so does the US and China. Looking ahead, I think the Greek issue will be addressed one way or another and things will begin to calm down. The major Spanish and Italian long-term bonds will also be renegotiated. Even the most aggressive investment funds want to see a return on their

vulnerable to the drop in bank lending and payment delays. 'This year will be a difficult one and we now know that no one country is immune to the crisis. The peripheral EU countries have had it bad but the major central economies, including Germany, are as dependent on us as we are on them. This shared vulnerability is what will ultimately drive demands to unfreeze the lending markets and to get business going again,' says Picón at DLA Piper.

Despite the apparent lurching from one crisis to another, Europe nonetheless remains an attractive investment destination. Foreign direct investment may have dropped since the onset of the global financial crisis, but an economic union of over 500m people, which prides itself on rule of law – whether this is in reality fully

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*'Major central economies, including Germany, are as dependent on us as we are on them. This shared vulnerability is what will ultimately drive demands to unfreeze the lending markets and to get business going again'*

Juan Picón

DLA Piper, Senior Partner Spain

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investments – they may be pricing in risk but even they do not want a default,' says Menzer.

Momentum may also be emerging towards a more cohesive response by European leaders, with vocal and consistent calls for greater fiscal and economic unity. More banks and businesses see the rationale, while bodies such as the European Banking Association are already setting the standard for national regulators. 'The major barriers remain however to overcome popular resistance, and to harmonise issues like Europe's retirement ages, while the investment funds sector is perhaps more nervous about greater regulatory interference, than say the banks. If financial integration does come it will not however happen quickly, but the acceptance of the need for it is speeding up,' adds Menzer.

National governments also recognise that more emphasis needs to be placed on encouraging new economic growth, rather than just cost-cutting.

The Spanish government has notably launched a €35bn repayment fund, backed by over 25 domestic banks, intended to help regional municipalities clear outstanding debts to suppliers. The Spanish economy, like many across Europe, remains dominated by small and medium-sized companies and it is these that have proved most

functioning or not – still makes it very attractive from a global perspective.

There may be a lack of business certainty but there is legal certainty. Governments may be reconsidering major project expenditure but there is little danger of companies being nationalised. In fact the exact opposite is true: in order to raise money governments are selling off some of their most attractive assets, bringing new investment.

The results of the Greek elections may not surmount the challenges faced by the EU, but it has given a glimpse of an alternative scenario, with a vacuum of leadership, economic direction and investment. 'The reality is that not all parts of the economy, or even all parts of the EU, can perform equally well all of the time. So companies have to adapt to the situation as they find it, reducing their expenditure and being much more cautious about new investment decisions,' concludes Jonkhart at Loyens & Loeff. 'But the argument that what is ultimately required is to focus on the long term and ride out the short-term storms remains compelling.' ☒

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## A Games of two halves

When London won the bid to host the 2012 Olympics seven years ago, everyone knew the city would be closely scrutinised across the world. *IBA Global Insight* assesses the winners and losers of London's third Olympic Games.

**REBECCA LOWE**

French aristocrat Pierre de Coubertin was renowned for two things: his formidable moustache and the founding of the International Olympic Committee (IOC) in 1894, heralding the start of the modern Olympic Games. It's believed that Coubertin came up with the idea after becoming enamoured with English public schools and their gallant approach to sport. Here it was all about the gentlemanly amateur – polite, community-spirited and basically a 'darn good egg'. Earning money from one's endeavours was simply not cricket.

Coubertin's Olympian whiskers may have endured – think of Olympic legends Mark Spitz and Daley Thompson – but the remainder of his legacy looks increasingly shaky. While global enthusiasm for the Games remains undiminished, the IOC is barely recognisable. Having originally shunned corporate sponsorship, the committee

now enjoys revenue in the billions. It has raised nearly \$5bn from international broadcasting rights and sponsorship over the past four years alone. Around 90 per cent of this gets funnelled back into sport, leaving an impressive \$500m for 'operational and administrative' costs. It's little wonder, as one leading sports lawyer who has attended several IOC bashes recounts, that £200 bottles of wine 'barely register on their radar' – though a vintage over £1,000, he stresses, may be deemed excessive.

The IOC has cleaned up its act considerably since the 1998 Salt Lake City scandal, when ten committee members were expelled or resigned for accepting bribes in exchange for votes. This is due in no small part to president Jacques Rogge, who has dedicated himself to repairing the reputation of the discredited organisation since he took office in 2001. Yet, despite these

reforms, the IOC clearly retains a rather heady appetite for indulgence. With a monopoly over the Olympic bidding process, the committee has the power to insist on whatever rights and perks it wishes from those desperate to secure the event – and it doesn't hold back. 1,800 five-star hotel rooms, a private car lane and 500 limousines complete with chauffeurs (in hats!) were just a few of the non-negotiable demands made on the 2012 host.

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*'Look at who else is hosting major sporting events: Brazil, South Africa, Russia, Qatar. We are the only old world contender, and [the Olympics is] a great opportunity to market ourselves as a centre of excellence in the organisation of massive infrastructure projects'*

Tim Jones, Freshfields.

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### Unsavoury taste

The Olympic agreement between the IOC and the host city, almost unchanged since 1996, is a truly extraordinary piece of legislation. Burges Salmon sports lawyer Mark Gay, who appears regularly before the Court of Arbitration for Sport, says that when he first read it he 'nearly fell off his chair'. Many of the demands are brand-related, with the host expected to enact powerful legislation to protect the IP rights of sponsors – and the London Olympic Games and Paralympic Games Act of 2006 did not disappoint. Described by Blackstone Chambers barrister Brian Kennelly as the 'most extensive piece of IP protection ever seen in the EU', it is viewed by many as excessively draconian. Anyone who violates its strict rules over wording and symbols, including the 81-year-old grandmother who defiantly knitted an Olympics doll to sell for £1 at a church fundraiser, risks receiving a rather threatening letter – and, if ignored, up to a £20,000 fine.

The authorities claim their enforcement of the law will be proportionate and fair. Yet paranoia begets self-censorship, which can prove just as stifling. It is true, of course, that the Olympics could not happen without the sponsors, and that the Olympics stadia remain free of promotional hoardings. It is also true that Los Angeles in 1984 revolutionised the way the Games were funded by limiting the number of sponsors and giving them exclusive rights. Before then, the events

proved a substantial drain on hosts' resources, with both Munich in 1972 and Montreal in 1976 renowned as fiscal disasters. Yet there are degrees of control, and when the ruling entity is an unaccountable billion-dollar 'non-profit' business headquartered in Lausanne, Switzerland – with the tax benefits that brings – it can leave an unsavoury taste, especially when host cities are left deep in the red. For some, the IOC, with its plump income and excessive demands, has lost its way. 'What is the IOC there for?' one top sports lawyer ponders thoughtfully, when asked. 'It's a very good question.'

Compounding the discomfort is the identity of some of the sponsors and service providers. Junk food brands McDonald's and Coca-Cola are deemed by many to be particularly un-Olympian, while others, such as Dow Chemicals and Jet Set Sports, have proved even more controversial. In 2001, Dow Chemicals bought Union Carbide Chemical Company, owners of the Bhopal pesticide plant where a gas tragedy killed tens of thousands of Indians in 1984, and has been strongly criticised for failing to clean up the site or provide adequate compensation. Though Dow claims its liabilities have been settled, and the settlements upheld by the Indian Supreme Court, both the Indian government and London Assembly have called for the company's exclusion from the Games.

Jet Set Sports was granted a contract to sell 2012 hospitality packages despite being owned by Sead Dizdarevic, who admitted handing over cash to Salt Lake City officials that was allegedly used to bribe IOC officials – none of whom were indicted – before the 2002 Games. Charges against two City officials were eventually thrown out, but not before Dizdarevic agreed to testify against them in exchange for immunity from prosecution. More recently, in February 2012, the UK television programme Channel 4 *Dispatches* showed footage of a Jet Set employee offering paid access to the Olympic lanes in an undercover sting. Jet Set said the employee gave inaccurate information and no longer works there – but the revelations did little to dispel public concerns of a Games in danger of being polarised into haves and have-nots.

### Ethics and equality

The IOC and its sponsors are not the only Olympic kingpins in town, of course; around 110 leaders have flown in to join the party, including controversial figures such as Azerbaijan's president Ilham Aliyev and Rwandan president Paul Kagame. Those on EU blacklists have not made the cut, but some believe the list should be extended to all leaders of countries that criminalise homosexuality or ban women from competing. 'This is not about politics in sport,'

says human rights lawyer Mark Stephens of Finers Stephens Innocent, stressing that the Olympic Charter vows to support equality and encourage the promotion of ethics. ‘This is about the rights attached to us by virtue of being human beings.’

While the ‘Olympic family’ is gliding through town in temperate splendour, others are forced to sweat it out on the sidelines. Fifty small businesses pooled their resources to take the Olympic Delivery Authority (ODA) – the public body responsible for the Olympic infrastructure – to court after it severely restricted roads around their warehouses with minimal consultation. Because the case could not be heard before the Olympics, and because funds were limited, they soon dropped the suit. The businesses have been in operation for up to 30 years, but now their futures are uncertain. ‘They are up against the wall,’ says Bindmans’ John Halford. ‘One has already gone out of business and a number of others almost certainly will.’

One company that almost certainly will not go out of business is G4S, the security firm that spectacularly failed in its contractual obligations to provide 10,000 guards for the Olympics. CEO Nick Buckles has much to answer for, but it cannot have helped that the government chose to inflate its requirements in December 2011 from 10,000 guards to 23,700 (of which 7,500 were to be military personnel), increasing the public cost from £282m to £553m. In a recent report, Margaret Hodge, chair of the Committee of Public Accounts, declared it was ‘staggering the original estimates were so wrong’.

There remain questions to be asked as to how G4S, which receives more than £1bn of revenue from public sector contracts, came to be in charge of Britain’s biggest peacetime security operation. It is of no small concern that three years ago G4S won a huge contract from the UK’s Ministry of Defence just weeks after employing former defence secretary John Reid as a consultant, while more recently Lincolnshire Police awarded a £200m contract to G4S soon after White & Case partner Tom Winsor, whose

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*‘This is not about politics in sport. This is about the rights attached to us by virtue of being human beings’*

Mark Stephens, Finers Stephens Innocent.

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firm was advising G4S on the deal, authored an independent report on police reform. The MoD, G4S and White & Case all stress that neither Reid nor Winsor played any role in the deals, and no direct influence has been suggested. However, complex ties between the public and private sectors abound – and it’s worth noting that G4S recently voted in its 2012 AGM to increase its influence by allowing political donations of up to £50,000. Here, as anywhere, transparency is key.

Whether the public will recoup any of the money paid to G4S is unclear, though the government has vowed to activate ‘all penalty



clauses' in the contract. How G4S responds to such demands is yet to be seen. Herbert Smith and Norton Rose, G4S's external advisers of choice, have proved predictably tight-lipped on the matter, refusing even to disclose whether they are representing the company at all.

Tim Jones from Freshfields – the Games' official provider of legal services and enviable procurer of £700m worth of contracts, ranging from IP rights and property agreements to flower provision and metal sourcing (for medals) – is also reluctant to discuss G4S. He does, however, admit that the whole debacle has proved a 'fantastic opportunity' for the UK's opposition Labour Party to create a political storm around the outsourcing of public contracts to private companies. 'The whole issue is a political hot potato, and it's an important debate to have,' he says. 'I think a lot of people feel uneasy about that sort of contracting out of police or military services.'

### Enduring legacy

What Jones is keener to talk about is legacy: of sport, of regeneration, of commerce. The first, he concedes, is 'up in the air', with nobody as yet stepping forward to take ownership. This is a serious concern – especially considering the coalition has now abandoned the former Labour government's original target to involve a million new people in sport by March 2013 (it has so far reached a meagre 109,000). Jones is more confident about regeneration: the Olympic Village has been bought by developer Qatari Diar for £557m, while housing association Triathlon Homes will invest £268 million in

1,379 affordable homes. This will leave the taxpayer around £175m out of pocket, but such investment should prevent the area from gentrifying, Jones suggests, while the new Westfield shopping centre has provided up to 10,000 much-needed jobs.

Where commerce is concerned, it is up to businesses to take the initiative, says Jones. 'Look at who else is hosting major sporting events: Brazil, South Africa, Russia, Qatar. We are the only old world contender, and it's a great opportunity to market ourselves as a centre of excellence in the organisation of massive infrastructure projects.'

Indeed, for all its corporate largesse, suspect security and questionable guest list, few can deny that the Olympics is exciting. Its governance may be flawed, but its original wholesome ethos is still very much evident in the athletes' astonishing skill and commitment – give or take the occasional inevitable doping scandal – and the passionate support of sports lovers across the world. There are also positive signs that the IOC is attempting to rein in excesses, with Rogge vowing to reduce the cost and complexity of the Games so that developing countries might stage them in the future. If he succeeds, that really would be a worthwhile legacy of which Coubertin would be proud. ☒

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See page 55 for comment and analysis on Brazil's Olympics plans.



# Chasing tigers

**The Asian powerhouses of India and China should not eclipse other emerging opportunities across the continent in Indonesia, Malaysia, Vietnam and South Korea, but there are risks as well as rewards.**

**PHIL TAYLOR**

A decade ago, the Asia story was all about China and India. But the world is now realising the potential in other parts of the region. The British Prime Minister recently completed a trade tour, which included Indonesia and Malaysia, two southeast Asian countries with GDP growth of around six per cent over the past decade. Together with Vietnam, a neighbour in the same growth league, the three countries account for more than five per cent of the world's population.

The issues for foreign investors in this region are, of course, a lot more complicated than a visiting politician would admit. Laws and regulations can appear confusing, and political, social and economic histories differ widely across the region. Take Indonesia: a military dictatorship for several decades and now the region's most populous democracy. Herbert Smith partner David Dawborn has worked in Indonesia for 20 years and is now seconded full time to domestic firm Hiswara Bunjamin & Tandjung. He says the country has managed to position itself positively in the broader Asia story.

'It's sold itself much better in the last five years than in the past, and that's enabled the message to come out more positively,' he says.

Much of this success was due initially to abundant natural resources, but Dawborn and his Singapore-based partner Maurice Burke say the boom in that area has led to strong growth in follow-on sectors such as aviation, telecoms, finance and retail. Indonesia's economy also rests on a broader and more stable base than it did when the Asian financial crisis hit in 1997.

Vietnam, meanwhile, has generally outperformed its neighbours since 2000, with GDP growth peaking at almost 8.5 per cent in 2007, the year of its accession to the World Trade Organization. Five years on, things are becoming more complex. 'It's a slightly mixed picture at the moment; there are a lot of macro-economic issues in play, which may be slightly difficult



for some investors,' says Tony Foster, managing partner of Freshfields Bruckhaus Deringer's Vietnam offices. 'Generally it's difficult to say it's a booming picture.'

Vietnam has taken significant steps to improve the framework of regulation affecting foreign investors – in 2006 and 2007 it introduced new investment, enterprise, commercial and securities laws, all aimed at unifying regulation for foreign-invested and domestic companies. A new IP law also helped improve public awareness of intellectual property issues and gave more security to investors. The Communist leadership has also pushed forward its key economic philosophy of equitisation (otherwise known as privatisation) of the country's thousands of state-owned companies. The programme appears successful in terms of the number of companies equitised, but Foster says less than ten per cent of the state's business assets by value have been handed over to private ownership, meaning a continued and significant state involvement in some areas.

The Indonesian government is also making efforts to improve vital regulations, having inherited a system which Dawborn describes as 'a façade... but no substance.' He says the government has made a genuine push over the past decade to strengthen prudential controls and the general regulation of banking. A new financial regulator, the OJK, will take over some responsibilities from Bapepam (the country's securities and exchange commission) and Bank Indonesia (the central bank) later in 2012 – a change that most analysts *IBA Global Insight* spoke with seem optimistic about. Despite these steps forward, however, the country still suffers from a relatively immature regulatory framework. 'It's a dangerous regulatory environment for foreigners; there are many mistakes parties make when they invest,' says Burke.

In nearby Malaysia, a much smaller country whose growth story has been significantly choppy than that of its two peers, recent regulatory reform and liberalisation has been sweeping. Unfortunately, says Darren Kor, a partner of Zul Rafique & Partners in Kuala Lumpur, the introduction of swathes of new laws, often announced on separate occasions by different government organs, means it is hard to keep track of the changes. In addition, foreign investors need to understand special regulations requiring a share of some investments to be held by *bumiputera* (natives including Malays); the rules of the various economic zones; and now the impact of the country's brand new competition law and regulator (see box, p 33).

Bureaucracy plagues many countries in this region. Stories of companies falling foul of red tape are widespread. 'You have to get so many

people to sign on the dotted line on the same day, it's an endless battle that requires years to do,' says Foster in Vietnam.

Tata Steel has been attempting to set up a steel plant in an economic zone in central Vietnam for several years. The company signed a memorandum of understanding in 2007, obtained a planning certificate soon afterwards, and applied for the mandatory investment licence from the provincial government in 2009. The licence had not been granted by the end of 2011, and in January 2012 the government suggested Tata move its site elsewhere. In Vietnam, issues such as this do not stem from corruption (although it exists) but are more related to what Foster calls 'the risk-reward balance' in the bureaucracy. 'The system is such that you have to get little pieces of paper for a lot of things. Officials... don't get a reward for giving out paper, but they can get punished for giving them out without full consensus among all relevant parts of the bureaucracy,' he explains.

The central government is aware of the issue

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*'You have to get so many people to sign on the dotted line on the same day, it's an endless battle'*

**Tony Foster**  
managing partner of Freshfields Bruckhaus  
Deringer's Vietnam offices

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of delays but is finding it hard to change the entrenched mindset within the bureaucracy. According to Foster, during the government's three-year 'Project 30' programme (which ended in 2010), it received recommendations from the foreign and local business communities on how to streamline close to 5,000 specific administrative procedures. The Prime Minister approved a pilot plan and gave the Ministries instructions on how to put it into practice: unfortunately some produced new rules that were worse than the old ones.

### After Suharto

In Indonesia, a more significant issue arose from the knee-jerk reaction to the end of the Suharto regime in 1998. For around 30 years, the Indonesian government was centralised in Jakarta. The system – although corrupt – was transparent in terms of lines of authority, meaning that once an investor had ☞



## Boom time in Mongolia

Mongolia is a country at a relatively early stage of development. Democratised in 1992, it now boasts a vibrant multi-party system and a free market economy that reportedly grew at 17 per cent in 2011. The country has recently begun to exploit the economic potential of its rich mineral deposits, most notably with the development of the Oyu Tolgoi copper and gold mine.

International companies are starting to take notice of Mongolia's business potential. In late June 2012, for example, Singapore's sovereign investment agency, Temasek, made a small but significant investment in Ivanhoe Mines, which itself has a majority stake in the Oyu Tolgoi project and is controlled by Rio Tinto.

Where investors go, law firms are never far behind. Over the past several months, Allens Arthur Robinson and Minter Ellison have opened offices in Ulaanbaatar. Hogan Lovells, which has had a relationship with Mongolian firm GTS Advocates for several years, made a similar move in October 2011, and recently added to its team with the relocation of corporate partner Chris Melville. 'A recurrent theme in Mongolia is of developing the legal environment to meet international standards,' Melville says. This certainly appears to be true for the country's capital markets and regulatory systems: the Mongolian Stock Exchange drew up a modernisation deal with its London counterpart in 2011, and a new securities law is reportedly in the pipeline.

Unfortunately, some legislative changes in Mongolia can be made quickly and seemingly without sufficient thought for the wider consequences. The Law on the Regulation of Foreign Investment in Business Entities Operating in Sectors of Strategic Importance (often known as the Strategic Foreign Investment Law), enacted on 17 May, has already caused some concern among foreign investors

and their legal advisers. This is in part due to the unclear drafting of the law as well as a strict yet cumbersome new approval regime, which it sets out for investments by foreign entities.

The law provides that foreign companies will need government approval for investments into 'business entities of strategic importance' in certain sectors. It also states that any investments by state-owned foreign enterprises in Mongolian companies will need government approval. 'We're seeing a large number of clients asking for advice [on the implications of the new law], which for the time being is difficult to give with precision,' says Melville. 'The general view we have is that it's not a fatal blow to foreign investment, but does impose additional hurdles.'

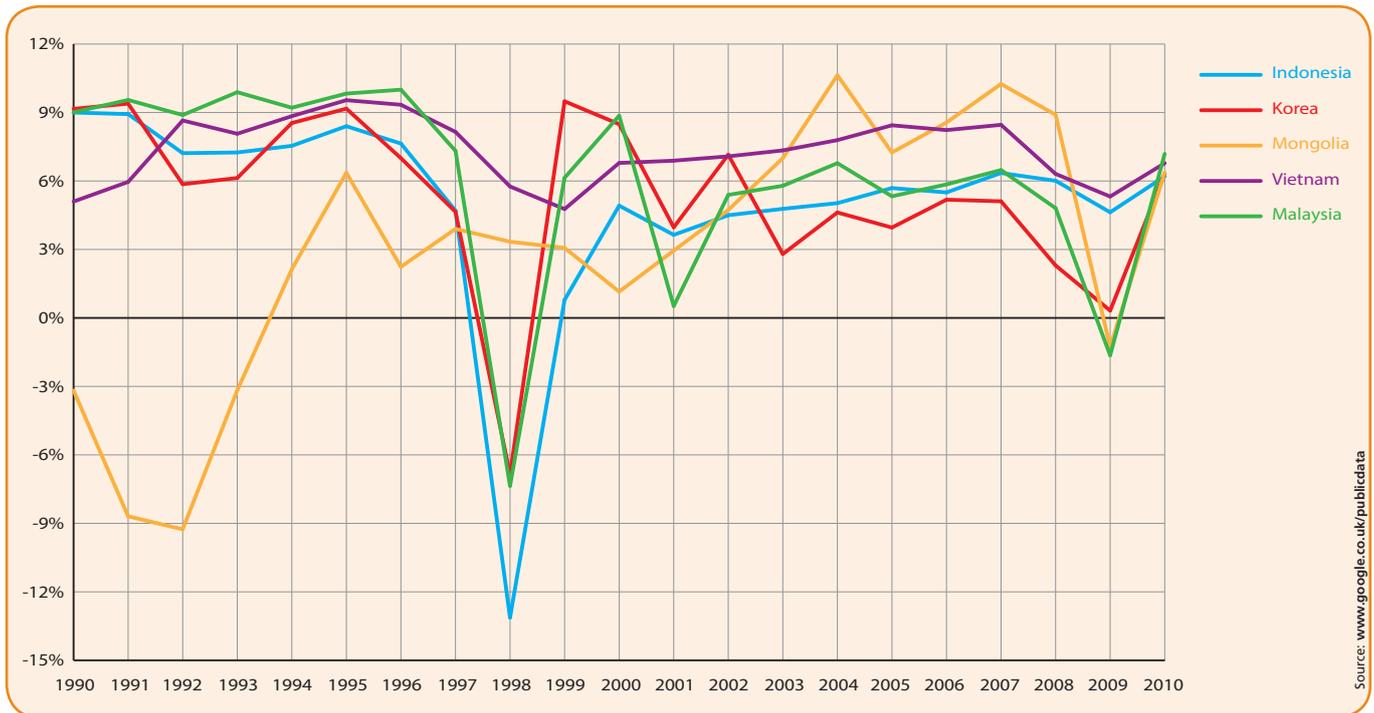
Although on paper the law will impact many non-state-owned investors, most analysts feel that the law was enacted with geopolitical aims in mind. Mongolia is keen to limit the influence of Russia and China over its natural resources, and it seems no coincidence that the law was passed soon after an attempt by Chinese state-owned enterprise Chalco (Aluminum Corp of China) to buy Ivanhoe Mines' 58 per cent stake in SouthGobi Resources, an important coal production company. The law also came in the context of the run-up to a general election, where Mongolia's treatment of its mineral resources was a hot issue.

Russell Murphy, head of US firm Harris & Moure's office in Ulaanbaatar, feels that despite the potential for the influence of politics on laws governing foreign investment, the country is firmly set on a path of growth and development. 'There's a certain inevitability to the trajectory here,' Murphy says. 'Mining investment is critical, [as is] infrastructure and construction – everyone agrees these are things that need to be done. It would be preferable to have stability and absolute certainty, but that's the nature of emerging markets.'

Perhaps unsurprisingly, Mongolia faces many challenges, not least in its legal sectors. Revisions to laws are driven in part by the country's desire to bring about rapid economic change and internationalisation; statutory drafters are drawing on foreign models as well as intense domestic scholarly considerations; and the country's commercial judicial Bench is largely untested.

On the positive side, officials appear very open to listening to the views of lobbyists, and the legal sector is also keen to improve its standards. The National Legal Institute and the government welcome international lawyers to take part in knowledge sharing events, and are happy to participate in debates on key issues. 'Mongolia is at an early stage of development towards becoming a globalised, modern economy, and it's still evolving,' summarises Murphy. 'There are few places where you can leave a footprint like you can here.'

CHART: GDP growth rates, 1990–2010:



Source: www.google.co.uk/publicdata

*'It's a dangerous regulatory environment for foreigners; there are many mistakes parties make when they invest'*

Maurice Burke  
Herbert Smith, Indonesia

secured central government approval it would be unlikely to encounter problems regionally. Almost immediately after democracy took hold, however, a considerable amount of authority was devolved to regional governments and a new hierarchy was created.

Although this was done for good reasons, local authorities were not experienced enough to handle the power they were given. This has led to challenges in some important areas for foreign investors: the power to issue vital mining licences, for example, is now in the hands of regional and local governments.

'Very often the regional government [does not display] good governance in running its actions. They issue or revoke licences as they wish,' says Daniel Ginting, Managing Partner of Ginting & Reksodiputro, based in Indonesia's capital, Jakarta. 'Although there are sets of regulations to regulate their code of conduct, there have been cases where they revoke licences without clear reasons why. This will scare investors... there's no assurance that a licence is going to stand.'

It is now much more difficult to understand who has the appropriate authority to issue a licence or solve a problem; or, as one observer puts it: 'It's no longer clear as to who I should bribe.'

Mining is a particularly problematic area. It involves significant amounts of money and this provides irresistible opportunities for local officials to take bribes and kickbacks. In this area, the central government has made moves to take back some power, with the central mining office attempting to control the issuance of mining permits that conflict and overlap. But regionalisation is unlikely ever to be fully unwound, and investors must therefore proceed with caution.

'The local authorities are looking more than ever, under the decentralised structure, to assert authority over their geographical turf – it can be a very complicated and at times treacherous place to invest, with on occasions 'flaws' in an investment structure not becoming apparent until it is too late,' says Maurice Burke.

Local interests can also derail projects in Vietnam, but the story is quite different in Malaysia. Laws regulating various industries are set at a federal level, with states generally only enforcing land law. In mining, for example, an investor will need to obtain certain approvals relating to the land from the state authority, but will generally be dealing only with the relevant federal ministries. ☺



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## South Korea open for business

Over the past two decades, growth in South Korea has closely mirrored that of Indonesia, Malaysia and Vietnam (see chart – GDP growth rates, 1990–2010). However, considerations for foreign investors are very different in what is a developed country (and a member of the G20).

South Korea recently enacted free trade agreements with the EU and US that will significantly open up the market for legal services, and several international law firms have already expressed their intention to open local offices. The market for foreign investment is also very open, with few restrictions on foreign ownership, and fair and unbiased regulators.

Unlike in some Southeast Asian nations, foreign investors broadly fall within the same legal frameworks as their domestic counterparts. The only discrimination foreign investors are likely to experience is positive. ‘Sometimes there are complaints from local companies that only foreign investors get the benefit of tax reductions or exemptions,’ says Kyu Wha Lee, a partner of Lee & Ko in Seoul.

There are, however, three areas that foreign investors may find challenging: labour laws; the presence of domestic conglomerates

(or *chaebols*); and competition law. ‘The basic rule is you need just cause to dismiss someone,’ says Lee. ‘This can be a little burdensome if dismissal is quite easy in your home country.’

The meaning of just cause has been defined by case law, and Lee says Korean courts are generally supportive of the employees’ cause. ‘It is extremely difficult to dismiss an employee; in principle you cannot dismiss someone unless they have done something atrocious,’ adds Philippe Shin, a senior foreign legal consultant with Shin & Kim. Both he and Lee add that good local labour law advice is a vital consideration for foreign investors.

The presence of powerful *chaebols* in the South Korean market may be something that confuses or worries foreign investors. The conglomerates played a big part in getting the country’s economy to where it is today, and continue to have a great influence. Shin acknowledges them as a ‘fixture of Korean life at all levels of society’ but is confident that they will not be shown favouritism in court or by local regulators. Lee feels foreign investors should not spend too much time worrying about their influence. ‘Even though *chaebols* have a huge amount of economic

power, I don’t see many cases where they have acted as a burden for foreign investors,’ he says. ‘[Their power] is regulated quite heavily these days... We can say that the government and public have a more cautious sentiment toward *chaebols*... and there are many agencies and NGOs looking at their activities.’

In the area of competition law, it is widely acknowledged that South Korea has one of the most mature regimes in the region. The Korean Fair Trade Commission (KFTC) is very active, and foreign investors will need to adjust to this as a fact of business life; of course, the presence of a strong market regulator can be seen as a comfort as well as burden: the KFTC is even-handed and does not shy away from imposing sanctions on *chaebols*, for example.

Unfortunately, this may not always stop any undesirable activity. ‘The KFTC every now and then issues corrective orders and orders *chaebols* to pay fines for infringement of the antitrust law – it happens every year, but the fact is the fines are fairly low,’ says Shin. ‘They may just see it as the cost of doing business.’

## Whispers and rumours

Apart from possible challenges at the local level, investors in the region may encounter significant issues related to national legislation. In Indonesia, it is very rare for the government to use public consultation on changes to law. This means investors can be hit with sudden and surprising changes to very significant laws. In one recent example, a government regulation issued early in 2012 has introduced a requirement for foreign investors to divest at least 20 per cent of their shares in private mining companies to Indonesian parties within the next five years, and then further shares up to at least 51 per cent within ten years. There was no prior public consultation.

‘The mining major sell-down obligation was talked about in whispers and rumours for a long time,’ says Dawborn. ‘Just imposing it out of the blue without prior consultation is not going to be conducive to a positive response.’

Although investors in Vietnam will encounter a lot of public consultation, there can still be

surprises. For example, the government has been working on a revised labour law for over four years, and created a number of channels for input from foreign and local private sectors.

‘We went through about 42 versions of the draft, then it went to the National Assembly for consideration last fall, and went back to draft number seven,’ says Burke. ‘Yesterday, I got a [new] draft... and it reincorporates lots of things that were changed.’

## Mixed reputation

Unfortunately, when things go wrong for foreign investors in this region, their problems can be exacerbated by the judiciary. It is widely acknowledged that the Indonesian courts struggle to show a level of appropriate sophistication and development. Although lawyers working there say there has been some improvement, they acknowledge that the court system is the area that has seen the least progress since the end of the Suharto regime. ‘On a ↻

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## Malaysia tackles competition

Over the past few years, there has been a dramatic rise in the use of competition law in the Asia-Pacific region. Vietnam's Competition Law took effect in July 2005, while Indonesia's competition law and regulator have been in active operation since 1999.

Being a late adopter (the Competition Act was enacted in April 2010 and took effect at the beginning of 2012) means Malaysia has been able to learn from best practice elsewhere. The Act follows a familiar framework, defining two main prohibitions: anti-competitive agreements and abuse of dominant position. There is, as yet, no system of merger review and enforcement; something which may come as a relief to companies that already have to consider filing notifications in a number of jurisdictions in the region.

Specialists agree that the law itself is sound, albeit broadly-drawn at present. Vince See, a Malaysian national who was involved in the government committee overseeing the passing of the Competition Act, and who now runs Antitrust Consulting International, says the country has long suffered from a business culture in which price fixing was prevalent in almost every market and industry, from freight forwarders to hairdressers and tyre shops. 'With the implementation and enforcement of the Act, people will need to change their business practices and contracts,' he comments.

'It's a paradigm shift in many ways,' adds Zul Rafique's Darren Kor. 'Certain practices previously accepted as industry practice may now be infringing the Act; everybody has to come to terms with it and adopt a different mindset in the way they do business.'

Although the brand new competition regulator, MyCC, is making efforts to train its staff, a big question mark remains over its ability to enforce the Act. It is still very small (at the time of writing it was hiring three new enforcement officers in order to address the fact that there are still more Commissioners than enforcers) and will take time to reach optimum capacity, given the small domestic pool on which it can draw. In the meantime, foreign and domestic businesses will be left with doubts over whether they will be captured by the law and whether they may qualify for exemptions. See says MyCC has published draft guidelines on market definition and anti-competitive agreements (with guidelines on abuse of dominance expected soon), but it is not known when these will be finalised.

Malaysia's market is still partially dominated by the involvement of state-owned or state-linked companies. According to Kor, the government has made it clear that these entities will not be exempted from the Act; however, whether a small and inexperienced agency will have the strength to deal with the influence of companies such as Petronas and Malaysia Airlines is a matter that remains open for debate.

good day, they can be ineffective, although we do see sensible decisions, and things have improved; on a bad day, there are still signs of corruption,' says Burke.

Although commercial contracts will usually include a provision for offshore arbitration (often in Singapore), this will not provide watertight protection. A common tactic used by Indonesian parties who know that arbitration proceedings are being run offshore is to launch Indonesian court action on parallel tortious grounds. 'Often we're talking about a scenario where a foreigner has committed resources to Indonesia and generated a domestic exposure

*'Very often the regional government issues or revokes licences as they wish'*

Daniel Ginting  
Ginting & Reksodiputro, Jakarta

– they are vulnerable to domestic attack,' says Burke. 'Correspondingly, the counterparties often have no exposure outside Indonesia; they have a home-ground advantage,' he says.

Here the foreign investor must choose between leaving the country or showing resolve and commitment to the formal dispute resolution process. 'Indonesian parties attacking investors through the local courts can be merely seeking a shock-and-awe result – a quick, favourable resolution,' Burke says. 'However, if you're an Indonesian corporate of finite resources and growing reputational and market aspirations, and the multinational company is an entity of significant resources and global reach, the best way for the multinational to respond to attacks of this nature is to show a high level of resolve. The multinational is often better placed to fight a war of attrition.'

Whether in Indonesia, Malaysia, Vietnam or South Korea (see box), there are obvious opportunities, and no shortage of those willing to invest in them, but it is vital to be properly prepared and be realistic about the risks. If a foreign investor is willing to work methodically through the bureaucracy, legislative and regulatory surprises, vested state and domestic interests, and possible opposition from local people, then they have a large part of the developing world at their fingertips. As Dawborn says: 'There are a lot of people who are very happy that they've made the effort.' ☒

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# After



# the Arab Spring

The Arab Spring countries have long-standing trade relations with Europe, but to stand the best chance of a swift and lasting recovery they must prioritise opportunities in the Middle East and Asia.

ANDREW WHITE

**M**any of the countries gripped by the most violent paroxysms of the Arab Spring lie on the shores of the Mediterranean Sea, their coastlines pock-marked by ports serving long-established trade links with Europe. For centuries their outlook had focused on the fortunes of France, Italy and Germany, their economies beholden to the consumers of Russia, Spain and the UK. Now, however, there is a growing acceptance that for the Arab Spring countries to stand the best chance of a swift and lasting recovery, they must realign themselves with a rebalanced world tilted away from the West, and towards the East: if 2011 was characterised

by political upheaval, then 2012 might mark the beginning of an equally dramatic economic shift.

'The Arab Spring countries had built infrastructure, trade and investment relations with Europe, but the recession in Europe makes recovery harder because their trading partners are contracting rather than growing,' says Masood Ahmed, director of the Middle East and Central Asia division of the International Monetary Fund (IMF). 'If you look at the next five or ten years the pace of growth in traditional European markets is going to be a fraction of the pace of growth in emerging markets in Asia. It's almost inevitable that links ↪

with emerging markets, and Asia in particular, are going to be the key driver of growth moving forward.'

Of the North African countries that saw regime change in the wake of the Arab Spring, Egypt conducted more trade with EU countries in 2010 than with any other bloc, amounting to 33 per cent of its overall trade. In the same year, trade with eurozone countries accounted for 80 per cent of Tunisian foreign exchange, while in Libya trade

order to tackle this problem, some 19 months after Bouazizi became a martyr to millions across the region, post-Arab Spring leaders are acutely aware of the need to create jobs in order to stave off future discontent and cement their own, hard-won power bases. The answer appears to lie in infrastructure spending, the lavishing of billions of dollars on a raft of ambitious mega-projects designed to provide young people with work while making up for decades of

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*'The Arab Spring was deeply apolitical, an eruption of Arab youth living in a flat world, being able to look out and see how everybody else was living, and understanding that they were being left behind'*

Thomas Friedman

Pulitzer Prize-winning journalist

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with the EU accounted for 70 per cent of total trade. However, since the 2008 financial crisis and subsequent Greek debt crisis, the eurozone's GDP has slumped alarmingly, and the bloc only just avoided slipping back into recession in Q1 2012. Indeed, many observers argue that the slowdown in Europe contributed to the tensions that eventually culminated in the Arab Spring. With exports across the Mediterranean sinking fast, rising unemployment and worsening long-term prospects drove people onto the streets to vent their frustrations. It is perhaps sadly appropriate that Mohammed Bouazizi, the man who inspired the region's first 'day of rage' by setting himself alight in a Tunisian market square on 17 December 2010, was himself a trader.

'At its root the Arab Spring was deeply apolitical, an eruption of Arab youth living in a flat world, being able to look out and see how everybody else was living, and understanding that they were being left behind,' says author, columnist and Pulitzer Prize-winning journalist Thomas Friedman. 'It was a raw but enormously powerful explosion of youth aspiration for openness, freedom, education and jobs, to enable them to utilise their full potential. [The Arab world] is full of young people who feel just as smart, just as capable, as others all over the world, but are deeply frustrated.'

### Job creation crisis

According to a recent study by the International Labour Organization (ILO), more than a quarter of youths in the Middle East & North Africa (MENA) region are currently unemployed. In

underinvestment by dictators more interested in palaces than power stations. And yet the nascent administrations of 2012 are unlikely to find that time is on their side, as it was in previous decades when their predecessors ruled with iron fists.

'Short-term macroeconomic instability, which is a risk now, responding to the demands of people who are a lot less patient than they were a year ago, and trying to bring investors back who are holding off and cautious, is a big challenge facing governments,' says Ahmed at the IMF. 'Many of these are themselves transition governments and consequently operating on a horizon of a few weeks or months. It's very difficult to formulate a strategy under those circumstances.'

Moreover, as they attempt to drag their respective nations into the 21st Century, the governments of Arab Spring countries are increasingly aware that they may not have the finances to deliver on promises made amid the euphoria of revolution. In May, the IMF warned that Egypt, Tunisia and other oil importers across the Arab world had almost run out of cash, and required an urgent injection of \$90bn to cope with fiscal deficits, sluggish growth, rampant unemployment and high oil prices. 'Many of the Arab oil importers have been hit by a combination of adverse external shocks, high oil prices and low growth in their domestic markets,' says Ahmed. 'Egypt and Tunisia last year contracted rather than expanded, and so there are more young people unemployed today than there were before the revolution started. And it's very difficult to be told, if you're sitting there without a job, that this is just a short-term price which must be paid.'

### The Maghreb challenge

The 75 million people of the Maghreb region – Algeria, Libya, Mauritania, Morocco and Tunisia – have always maintained far closer trade ties with their neighbours in Europe, than with the Gulf Arab states. Members of the group have also refrained from developing trade ties within North Africa: intra-regional trade currently accounts for less than two per cent of total trade in the Maghreb; far lower than other blocs. It is a scenario that must change if the five-member union is to achieve its growth potential, particularly if Europe continues to slide into recession.

‘The eurozone slowdown, along with revolutionary change throughout the Maghreb region, makes this a historic opportunity for economic integration, akin to the fall of the Berlin Wall,’ says Dr Florence Eid, CEO of London-based Arabia Monitor, which provides studies on MENA economies and financial markets. ‘The Maghreb exports to Europe everything that the Gulf imports, and yet the Gulf imports from Asia, it doesn’t import anything from the Maghreb. So the question is: Why isn’t inter-regional trade, a perennial problem in the region, higher on the agenda?’

The Maghreb currently exports less than one per cent of its total exports to the GCC, while around 70 per cent of the region’s exports are destined for the shores of Europe. In Tunisia and Morocco, for example, 75 per cent and 60 per cent respectively of exports go to Europe. The GCC, meanwhile, imports just 0.1 per cent of its goods from the two countries.

‘Over the medium- to long-term, we don’t see a way around a more vibrant growth in Morocco and Tunisia, except through the redirection of trade, particularly to the GCC countries,’ says Dr Eid. ‘The GCC imports everything Morocco and Tunisia exports, but not from Morocco and Tunisia. We find this quite singular within the MENA region, and quite an opportunity if redirected.’

‘In particular we highlight the demand from the GCC for textile and agricultural products,’ she continues. ‘The volumes produced out of Tunisia and Morocco, and the potential for production capacity growth in those two countries, is enough to service Europe at the level it will need, as well as the GCC and future GCC growth.’

Moreover, an integrated regional entity of this size would have the capacity to absorb significant investment flows from the Gulf. Today part of the reason why the Gulf doesn’t invest more significantly in other parts of the MENA region has to do with the size of investment opportunities and the depth of financial markets. There simply aren’t the deals on offer across the Maghreb, to attract the attention of moneymen from Saudi Arabia or Qatar, for example.

‘The increase in the opportunity in the Maghreb and the deepening of financial markets there, would see deeper and more sizeable investment flows from the Gulf and that would have repercussions for the economies of the Maghreb, on job creation and on political cooperation,’ suggests Dr Eid. ‘Greater integration would have significant impact within the Maghreb, but would also affect the rest of MENA, as the Maghreb becomes a viable commercial partner for the GCC, and its consumer and industrial base deepens into a market for the recycling of some of the GCC’s sovereign wealth.’

According to the World Bank, the MENA region requires around \$106bn of infrastructure spending per annum until 2020. There remains a financing gap amounting to some \$60bn, meaning that even if political will is focused on infrastructure development, spending power is lagging significantly. Even oil-producing countries such as Libya, the World Bank warns, will need to spend 11 per cent of their respective GDPs just on maintaining and developing their national infrastructure, including much-needed investment in oil extraction, refining and other activities.

‘The bank market is still in turmoil, particularly the typical European project finance lenders which are not as interested in putting much money into long-dated project finance paper as they used to be,’ says Aaron Bielenberg, a Dubai-based partner with US law firm Latham & Watkins. ‘Infrastructure assets have long tenors and long returns, and despite some of the private equity-like capital that went into that sector, these are relatively low internal rate of return (IRR) assets with long-term revenue profiles. What’s key is that governments should not be

guaranteeing everything: governments cannot afford to finance new builds in this region and globally, nor can they afford to guarantee every new piece of debt which comes out of their jurisdiction.’

Like Ahmed, Bielenberg questions whether investor confidence will be strong enough to bring foreign players back into markets that last year were synonymous with gunfire rather than growth. ‘There’s a lot of insecurity in the investment community about the status of existing constitutions, and also the direction governments will take in terms of rule of law, in terms of basic enforcement but also investment-related laws,’ he says. ‘The other key element is that there are significant portions of countries’ economies that are partially controlled by the government. The question is what governments will be doing with those sectors, whether they will privatise or not, and how they will regulate them.’

These issues are particularly relevant in the cases of Libya and Egypt, which have significant potential for infrastructure development, but where nascent administrations have yet ➔

to send clear signals as to how they're going to run developing industries, procurement, privatisation, regulation and other vital aspects of the economy. 'You need elected or non-elected stable governments that are sending clear signals about who's going to be running ministries for a sustained period of time, and what their investment policies are,' cautions Bielenberg.

In the oil-producing countries, potential investors must be reassured that legal regimes will allow them to participate safely in major hydrocarbon projects. There must be clarity regarding concessions, and equally important are the issues of foreign ownership, the ability to invest in growth companies, real estate laws and the ability to create jobs and have clear employment law regimes. 'You have to allow people to hire and fire because so many of these companies have been a part of state-run crony capitalism,' Bielenberg points out. 'Where hiring has been decided by the government or government-related entities, the labour disputes

that come up make it very difficult for some operators to function. The clarity of a legal regime isn't just related to concessions, but to the basic mechanics of running a business.'

### **Bridging the gulf**

According to Dr Nasser Saidi, chief economist at the Dubai International Financial Centre, the emirate's stock market, the opportunity to integrate the MENA region's infrastructure and logistics offering with Central Asia is one that must be taken in order to assure future growth in trade and services. Great efforts should also be taken to further strengthen intra-regional links that have been weakened or severed entirely due to decades of political and economic discord. 'Right now, [MENA] needs to focus on regional integration of infrastructure, an area where the potential is virtually untapped,' he says, adding that if greater intra-regional ties can be forged, then the fast-developing Gulf Cooperation

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*'Growth in traditional European markets is going to be a fraction of the pace of growth in emerging markets... links with emerging markets, and Asia in particular, are going to be the key driver of growth moving forward'*

Masood Ahmed  
Director, Middle East and Central Asia Division, IMF

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Council (GCC) countries are particularly well positioned to offer their war-weary neighbours an onramp to the New Silk Road running from Africa to Asia.

‘The GCC can be the network behind the network itself,’ Dr Saidi suggests. ‘They have the ability to invest in infrastructure and logistics, but more importantly we can use the GCC countries as the core for Arab economic integration. The growth is in emerging markets and in Asia, so if you want to help the countries of the Arab Spring, the best way to do that is to integrate them with the economies of the GCC, and enable them to enter the global supply chain which goes into Asia.’

The New Silk Road is not a new path, but one that is already reasonably well travelled. However, it is one upon which there is room for growth in the coming decades: China is MENA’s second largest trading partner after the US and trade from Qatar, Bahrain and Egypt alone is expected to grow above 14 per cent annually over the next five years, according to recent figures from HSBC. Moreover, China is a major investor in Africa, including heavy infrastructure investment that will transform Africa, just like Chinese infrastructure investments are currently transforming central Asia. And as the two continents are altered forever by roads and railroads, so the Middle East is perfectly placed to form strategic alliances with counterparts in Asia and Africa. Regime change must be followed by economic change, if the opportunity is to be grasped fully.

‘What drove the revolutions wasn’t that young people thought inflation was hyper, what drove the revolutions was that they didn’t have a voice, jobs, access to growth, or an equal shot at opening a small business,’ says Ahmed at the IMF. ‘It’s about the modernisation of economies, making them much more competitive internally, and educating people so that when they come out of schools and universities they are trained for the jobs and have the entrepreneurial opportunities they desire, rather than waiting for their number to come up, at which point they get a government job and security for life.’

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*‘The bank market is still in turmoil, particularly the typical European project finance lenders, which are not as interested in putting much money into long-dated project finance paper as they used to be’*

Aaron Bielenberg  
Latham & Watkins, Dubai

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‘The big medium-term challenge is not macroeconomic stability,’ he continues. ‘It’s about restructuring the business environment, on which most countries in this region fall behind compared to their competitors in other regions, about restructuring public finances so they move away from generalised public subsidies and guaranteed safety nets, and about trying to create the infrastructure base that allows both IT and traditional hardware to take off.’

It remains to be seen whether the new regimes of the Arab Spring countries are as capable of instituting economic evolution, as they were of leading street-level revolution. One thing is for sure, however: the world has changed, and those countries not integrated with the new, modern global supply chain running between Africa and Asia, will miss out on the fastest-growing opportunities in international trade. It is an invitation the sons and daughters of the Arab Spring cannot afford to ignore, lest they risk the same economic stagnation that led to the bloody demise of their predecessors. ☒

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# The anarchical society

As the death toll continues to rise in Syria, the international community is searching for a diplomatic solution. *IBA Global Insight* assesses how far diplomacy should go and where the line should be drawn between immunity and justice.

REBECCA LOWE

**M**any thousands of people have died in Syria since the uprisings began in March last year. Yet despite months of discussions, the world powers have failed to agree on a solution. The ceasefire plan sponsored by former UN Secretary-General Kofi Annan has proved an unmitigated failure, leading to his resignation, while Russia and China continue to block efforts to refer the matter to the International Criminal Court (ICC) or launch military intervention.

Without the support of Russia and China, a negotiated settlement may be the only way forward. Addressing the US Senate in February, US Secretary of State Hillary Clinton strongly hinted that compromise was inevitable. Though 'an argument could be made' for declaring President Bashar al-Assad a war criminal, she conceded that 'from long experience, that can complicate a resolution of a difficult, complex situation because it limits options to persuade leaders perhaps to step down from power'.

Clinton's words suggest a possible 'Yemen Solution', under which Assad would agree to resign in exchange for immunity from prosecution. In Yemen, hundreds were killed and injured during a year of protests against the regime's 33-year rule, until President Ali Abdullah Saleh agreed to sign an amnesty agreement with the Gulf Cooperation Council. Both the US, a Yemeni ally, and the UN Security Council supported the pact.

For some, the deal was a reasonable reaction to a growing humanitarian crisis that could easily have resulted in more instability and bloodshed. For others, it was an interim solution that failed to resolve deep grievances and paved the way for further problems in the future. 'For the Security Council, which contains ICC member states [UK and France], to endorse an amnesty agreement is worrying,' says Prince Zeid Ra'ad Zeid Al-Husseini, former (and first) President of the Assembly of States Parties at the ICC and ↻

current permanent representative of Jordan to the UN. 'Amnesties are a form of blackmail and we don't want that anymore.'

### A form of justice

Whereas a few years ago, amnesties could be haggled over by diplomats and despots like jewels in a souk, now the general consensus seems to be that they lack lasting value. Indeed, where the majority of international lawyers are concerned, the issue is clear cut.

'A norm has emerged under customary international law that prohibits the use of amnesty for the most serious human rights abuses,' says David Tolbert, President of the International Center for Transitional Justice. 'Amnesties are off the table.'

Holding leaders accountable for their actions was pioneered by the Nuremberg Trials after the Second World War, though at that time no clear principles were enshrined in international law. Since then, a series of laws and treaties, including the 1949 Geneva Convention and the 1984 Convention against Torture, have come into being to oblige states to prosecute gross human rights abuses.

In 1999, the Lomé Peace Accord in Sierra Leone proved a key turning point. Negotiated on 7 July between the warring parties in the civil war that gripped the country for almost a decade, the UN agreed to sign only on the proviso that no amnesties were granted for acts of genocide, crimes against humanity and war crimes. Shortly afterwards, the Rome Statute, which brought the ICC into being, crystallised this sentiment in black and white for its member states.

The recent Security Council endorsement of the Yemen amnesty, and suggestions by Western leaders that a similar approach could be used in Syria, have therefore caused serious concern in the international legal community. However, anyone who accepts an amnesty deal nowadays is a 'fool', Prince Zeid points out, as this 'could easily be overturned by a court or change of government'. Former Liberian President Charles Taylor was originally promised an amnesty for the war crimes he was charged with in relation to the civil war in Sierra Leone, yet was later jailed for 50 years. Bosnian Serb leader Radovan Karadžić, allegedly responsible for the 1995 Srebrenica massacre during the Bosnian War in which over 8,000 Bosnian Muslims were slaughtered, claims he was originally promised immunity – and is currently in custody at the International Criminal Tribunal for the former Yugoslavia (ICTY).

There are limits to the principle, of course. In conflicts involving vast numbers of potential perpetrators, it is generally accepted that only the worst can be tried. In such situations, truth

## The biggest threats to global peace and security today: international law experts give their views

**Lord Michael Williams of Baglan, former UN envoy for the Middle East:** 'The Middle East. You have a cluster of issues there, all of which are enormous, and there is a danger they could eventually come together. The Syrian crisis is escalating by the day, and the Israeli-Palestinian peace process is simply not there anymore; the talks are not happening. And then there is the question of Iran and the nuclear issue. The talks in Bangladesh did not go well, and if the new talks fail we could see another crisis.'

**Yves Doutriaux, member of the Conseil d'Etat and former UN Deputy Permanent Representative for France:** 'Instability triggered by dictatorships, and corrupted or weak states unable to bring services or care for their people, which would trigger civil wars, terrorism, trafficking of any kind: weapons; drugs; human beings. To prevent further deterioration, international organisations and donors should provide assistance to establish the rule of law, support civil societies and local NGOs, and train enforcement officers and judges. This kind of investment has value for money, as a fully fledged intervention has a cost that our countries are no longer ready to support.'

**Hans Corell, former Legal Counsel to the UN:** 'Lack of democracy, human rights and the rule of law; religious extremism; lack of empowerment of women; and the inability of the UN Security Council to act with authority and consistency under international law. In the longer term: climate change and its effects on the human habitat.'

**Richard Goldstone, former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda:** 'The unlawful use of military power.'

**Betty Mould-Iddrisu, former Attorney-General and justice Minister for Ghana:** 'The religious factor. What is happening in Syria and the repercussions of this, which have exploded in terms of religion throughout the Middle East, is frightening. If this is not brought under control in terms of factionalism, something very urgent must be done.'

**John Shattuck, former US Assistant Secretary-of-State for Human Rights:** 'The rapidly changing nature of conflict. Cyber-warfare, drone attacks, international terrorism, the whole nature of conflict as being conducted in failed states. These are all part of the mix of what is dangerous. I don't think one particular aspect is dangerous; I think it will be dangerous, speaking as a human rights lawyer, if we aren't able to get to grips with what crime is in the new world.'

and reconciliation commissions are sometimes used to fill the accountability vacuum, whereby lesser crimes are forgiven in order to encourage witnesses to come forward. Indeed, even the Rome Statute recognises that diplomacy can sometimes soothe the parts that justice cannot reach, with a clause allowing the UN Security Council to delay investigations for a year if any of the permanent members deem it appropriate.

Richard Goldstone, former Chief Justice of the ICTY, admits that ideals must be tempered by realism. Speaking of South Africa's Truth and Reconciliation Commission, set up to heal the wounds of apartheid, he told *IBA Global Insight* in a May 2011 interview that 'it's a form of justice, it's not complete justice'. He added: 'in an ideal society, all criminals should be investigated, prosecuted and, if found guilty, punished. That's what most victims want, but sometimes the political situation or the practical, factual situation is such that you can't do that.'

Yet South Africa's commission, generally accepted as highly successful in helping bring peace to a country riven by five decades of racial conflict, would no longer be acceptable in the current legal climate; the immunity was far

reduced sentence in return for a guilty plea. This method was used to bring former Bosnian Serb leader Biljana Plavšić to book in 2002, after she agreed to submit voluntarily to the ICTY if the eight charges levied against her for atrocities committed during the Bosnian War were reduced to one. In Colombia such bargains are already embedded in statute via its Justice and Peace Law, and it is thought that other countries may follow.

Yet plea bargains are not supported by everyone. There is a concern that innocent people could barter away their freedom through fear of a longer sentence, while guilty people could – literally – get away with murder. 'In my system [Sweden], we wouldn't even dream of engaging in plea bargains,' says Corell. 'Either a person is guilty or not guilty, and it is for the prosecutor to prove.'

An alternative to plea bargains is cooperation: somebody voluntarily submits to the court's jurisdiction and has a full trial, but their cooperation is taken into consideration at sentencing. Such tools are clearly less powerful than a promised amnesty, however, and both diplomats and lawyers may find themselves having to be increasingly creative about how to play their hand – such as promising not to trigger an ICC investigation if hostilities cease, leaving the possibility open of justice before regional or national courts.

They may also have to become more creative over timing. Now more than ever, governments and courts must be in synch in judging when action should be taken and when delayed. Arrest warrants issued in the midst of hostilities can exacerbate problems – such as in Sudan, where President Omar al-Bashir expelled dozens of human rights NGOs after being indicted by the ICC – and a mistimed approach could risk further lives.

Alvaro de Soto, former UN Special Coordinator for the Middle East Peace Process, believes delaying the referral of Libya to the ICC could have prevented weeks of bloodshed, prompting Muammar Gaddafi to cling onto power far longer than he truly intended. 'The spectrum of possible negotiated outcomes in Libya was sharply narrowed by the Security Council's astonishingly rapid decision to refer the matter to the ICC,' he says. 'There are reports that at a certain point, Gaddafi sent feelers out to London lawyers. If this is the case, it would indicate that, contrary to what was said at the time, he was actually considering a way out that might have avoided the Libyans many months of fighting.'

Others, however, are frustrated that the Security Council and ICC have failed to act as decisively in Syria as they did in Libya. Though mid-conflict warrants can cause problems, they argue, more often than not they serve to ☞

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## *'Amnesties are a form of blackmail and we don't want that anymore.'*

**Prince Zeid Ra'ad Zeid Al-Hussein**

*former President of the Assembly of States Parties at the ICC and current permanent representative of Jordan to the UN*

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too broad, far too forgiving. The commission's success may be the exception rather than the norm, but even the most committed judicial advocates admit the compromise is far from simple.

Hans Corell, former Legal Counsel to the UN, concedes that a diplomatic national solution is an option if it has broad public support. Speaking of his experience in Cambodia, where around two million people died at the hands of the Khmer Rouge regime in the 1970s, Corell recalls that the prospect of a truth and reconciliation commission was more important to people than the prosecutions. 'The Cambodia court could only try a very few people, but they wanted to know what had happened to the thousands of near and dear who disappeared under the Khmer Rouge. I think that is very human.'

### **Creative diplomacy**

So without amnesties in their armoury, what is left for diplomats pitched headfirst into battle? Plea bargains are one option: the offer of a

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weaken credibility and bolster peace-making. Jamie Shea, Deputy Assistant Secretary-General for Emerging Security Challenges at NATO, believes this was the case in the former Yugoslavia, where 161 people were eventually indicted. 'When Louise Arbour of the ICTY indicted Slobodan Milošević halfway through our campaign, it was an enormous boost to

at which they function: diplomacy tends to be quick and flexible, while justice takes time. The courts, some argue, are simply too plodding to have any tangible deterrent effect at all. After all, the ICC has had only one conviction in ten years – Congolese warlord Thomas Lubanga, sentenced to 14 years for the conscription of child soldiers during the 1999–2007 Ituri conflict in the Democratic Republic of Congo – from seven investigations, at an overall cost of nearly \$1bn.

*'In my system [Sweden], we wouldn't even dream of engaging in plea bargains. Either a person is guilty or not guilty, and it is for the prosecutor to prove.'*

**Hans Corell**  
former Legal Counsel to the UN

Yet it must be viewed from a broader perspective, says Shea, pointing out that the US is spending \$2.5bn each week in Afghanistan. 'If you spend that money and leave a mess behind you – anger, hatred, no reconciliation – everyone sees themselves as victims because there has been no accounting for the past. Like Afghanistan, you will have to go back and back and back. So money going on truth commissions, war crimes tribunals and education is in my mind money well spent.'

us in NATO. It delegitimised him vis-à-vis his own people and he was a lame duck after that.' He adds: 'If people are performing criminal acts, there is no real evidence to show that they stop simply because you delay an indictment.'

Diane Orentlicher, former Deputy for War Crimes Issues in the US Department of State, stresses that it is impossible to generalise. 'What is critically important is for diplomats to set as their goal ending atrocities, while leaving a door open to justice in dire situations where they may not be able to simultaneously end mass violence and ensure justice in the near horizon.'

#### **What price justice?**

One key reason for the disconnect between diplomacy and justice is the different speeds

The problem, it could be argued, is not international and ad hoc courts per se, but the current over-reliance on them by states with weak judicial systems. The ICC only investigates cases when states are unable or unwilling to do so themselves, and would arguably be far more efficient if more national courts could share the burden.

Indeed, strengthening domestic courts and the rule of law around the world is perhaps the best kind of diplomacy, because it is preventative, long-term and non-antagonistic. Yves Doutriaux, member of the Conseil d'Etat and former French Deputy Permanent Representative to the UN, believes that global peace and stability can only be achieved via international organisations providing ↻

assistance to support local NGOs and train enforcement officers and judges. 'This kind of investment has value for money,' he says. 'A fully fledged intervention has a cost that our countries are no longer ready to support.'

But is diplomacy up to this kind of task? For some, current diplomatic methods are seriously flawed and lack leadership. Collective mediation, whereby several intermediaries all negotiate at once with different codes and agendas, is one bone of contention. 'The problem is that peace diplomacy is no longer exclusive and many feel tempted to bask in the klieg lights: the UN, regional organisations, sub-regional bodies, individual states, NGOs,' says de Soto. 'This can lead to confusion.'

much as that unless we have a proper Council truly representative of humanity and member states, there is a risk of irrelevance.'

For some, however, reform must move beyond mere expansion. Corell has long advocated that the veto, currently bandied about with cavalier abandon, should be used only where countries' most 'serious and direct' national interests are affected. His frustration with the Council can be traced back to 1989, when he believes the West missed a golden opportunity to improve relations with the East. 'After the Berlin Wall came down, did the Western states go to Moscow and say, we have one thing in common, we must not get

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*'The spectrum of possible negotiated outcomes in Libya was sharply narrowed by the Security Council's astonishingly rapid decision to refer the matter to the ICC.'*

Alvaro de Soto

*former UN Special Coordinator for the Middle East Peace Process*

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### **Insecurity council**

For de Soto and others, the responsibility ultimately lies with the UN. The time for urgent reform at the Security Council is well past due, they say, and more permanent members should be invited to share the podium with the US, China, Russia, France and the UK. As well as assisting diplomacy, this would also further the cause of justice: currently three members of the Council – US, China and Russia – have failed to ratify the Rome Statute, yet all are able to refer cases to the ICC, and all have the power to delay investigations indefinitely. For a court dependent on credibility and state cooperation, such power imbalances are a cause for concern.

'It is a huge problem,' says Betty Mould-Iddrisu, former Attorney General and Justice Minister of Ghana. 'It's not a question of weak versus super states. It also goes to the very heart of diplomacy and how the Security Council is structured. We have a few countries with the power of veto over the rest of the world and their actions, more often than not, can't be questioned.'

Lord Williams of Baglan, former UN envoy to the Middle East, agrees. He describes the current paralysis in Syria as 'reprehensible', and stresses that it is 'vital' to make progress in the next decade. 'Otherwise there is always the risk the UN could emulate the League of Nations before the Second World War, in as

into armed conflict with one another?' Corell says. 'No. Instead they went it alone and built rocket ramps in Poland and Chechnya. It was as if the Cuban Missile Crisis had never happened.'

### **Education and tolerance**

To help fill the global leadership vacuum, President Barack Obama has proposed the establishment of an Atrocity Prevention Board to coordinate government responses to crises around the world, and ideally stop them before they take hold. Had such a body been prioritised before, some believe atrocities such as 9/11 and the Kosovo War, in which thousands of Kosovo Albanians were killed and displaced by Yugoslav forces in the 1990s, could have been prevented.

David Scheffer, who served as the first US Ambassador-at-Large for War Crimes Issues in the Clinton administration, believes such mechanisms are 'very significant'. 'Internal coordination among federal agencies is vital to any effective response to imminent or unfolding activities. It is necessary to help galvanise coordinated action with other governments and NGOs.'

'It is a good move,' concedes Doutriaux. 'But the issue is to set up a global consensus on accountability and bring the BRICS [Brazil, Russia, India, China, South Africa] in a common platform on this. They have to

be convinced that their own national interest has something to do with democratisation and respect for human rights, meaning better domestic stability that could trigger positive consequences for their exports and imports.'

Obama is clearly keen to retain a leadership role in diplomacy and peace-making around the world. The US may be learning to survive within a new era of compromise and coalition, after all, but the country still spends more on defence than the next 15 countries put together. However, with budgets diminishing, rival powers emerging and US credibility still smarting from Iraq, there are those who believe the US's days as the global policeman are numbered.

Indeed, America's continued defiance of international treaties and infringement on foreign territorial sovereignty remains a serious problem, arguably undermining efforts to encourage other countries to abide by global laws and standards. Drone strikes are a key area of concern: according to the American Civil Liberties Union, up to 4,000 people have been killed in US drone strikes since 2002 in Pakistan, Yemen and Somalia. Recently, the UN Special Rapporteur on extrajudicial killings, summary or arbitrary

executions suggested that such strikes may constitute war crimes.

John Shattuck, former assistant US Secretary of State for Human Rights, admits he is 'troubled' by the drift towards drone warfare – both from a legal and democratic standpoint. 'Democratic nations shouldn't go to war without serious consideration by the public,' he says. 'And I'm afraid the unmanned drone distant warfare is not consistent with that.'

Unless democratic nations practise what they preach, accusations of hypocrisy will inevitably continue to plague diplomatic negotiations and attempts to enforce the rule of law across the world. Within a climate of day-to-day domestic political wrangling, such long-term strategies are often arduous and thankless – but without true statesmanship, the burden on both politicians and the courts can only continue to grow. ☒

Rebecca Lowe is Senior Reporter at the IBA and can be contacted at [rebecca.lowe@int-bar.org](mailto:rebecca.lowe@int-bar.org).

The IBA is considering assembling a high-level task force to address the issues raised in this feature.

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# Women and



# the law

Earlier this year, the IBA hosted an expert panel discussion on women in the law. Moderated by BBC broadcaster Fi Glover, the panel comprised four lawyers at the very top of the profession: Baroness Helena Kennedy QC, leading barrister and human rights expert; Margaret Cole, former managing director of the UK Financial Services Authority's Conduct Business Unit; Elizabeth Barrett, Slaughter and May partner and former head of litigation; and Katie Ghose, chief executive of the Electoral Reform Society and former director of the British Institute of Human Rights.

**Fi Glover:** Let's start with a very big broad question. Helena, perhaps you can start us off. Where do you think we are in terms of gender equality in the legal profession? Is it possible to dip the litmus paper in and say 'this is it for 2012'?

**Helena Kennedy:** Doing well, but a long way still to go. I've been practising at the Bar now for almost 40 years and it's always been an issue at the forefront; some women just don't notice, whereas I have always kept a beady eye on the position of women.

When I started it was eight per cent. Now in our law schools many of them have 50 per cent women, but that's not reflected in practice at the Bar or in the solicitors' profession. Hard still for women to get to senior positions, we still only have one woman on our Supreme Court and no sign of that changing shortly, and really the percentage of women in senior positions in law firms as senior partners is still pretty poor, five per cent, not good enough.

**FG:** Elizabeth, what will help?

**Elizabeth Barrett:** Goodness me, that's a difficult question. I think self-awareness is very important. In the legal profession I think we're in a very positive position because we have something like 50 per cent men and women coming in on qualification, and I think that people need to start thinking about themselves as people rather than necessarily as men or as women and identify individual strengths and weaknesses.

**FG:** Do we need more laws? Do we need something better enshrined in law or just a better practice of the laws that we have already guiding our equality? I mean, it would seem ironic that the legal profession can't be the place where laws are interpreted to the very best of the ability of the people.

**HK:** I actually think that it's very much cultural and attitudinal and we're still having to battle with residual ideas that there are certain areas of law that are really suited best to men, and still battling with the idea that the only way of showing that you're, you know, an 'alpha performer', is to be putting in long hours – I mean ridiculously long hours – and this is a problem for men as well. But women do well until the point when they want to have children, and one of the pieces of work that was done recently about the Bar showed that when you saw a [falling away of women] it was usually in that age group of mid-to-late 30s where women were finding it very hard to do it with a family.

But the other thing was to show that in terms of sacrifices that people make, many, many more women who stay on and make a real profession at the Bar are childless, and they seem to have made an act of choice in putting career before having a family. So, it's cultural; we have to find ways of making that work better, and that of course cuts into other professions too.

**FG:** Yes. The Law Society did some interesting work certainly on the pay gap, and also in that survey the pay gap is still very poor for ➔

the legal profession. In the survey they ask for anecdotal evidence about how women had found themselves victims of sexism during their careers, and I wonder whether any of you – you don't have to tell ghastly tales here and you don't have to name names and you can attribute it to one of your colleagues if you want to, but I mean all of you have done terribly, terribly well – have you had to fight with your fists along the way; have you experienced direct sexism?

there was no sex discrimination legislation, so Chambers were very explicit, they said we don't take women, you know, they made it very clear. Then the law changed and said well, you know, you're not allowed to discriminate, and then they would say 'women, we've got one', and so they felt that they'd sort of proved that they were not discriminating by having the odd woman here and there.



*'As you all go further up the tree, do you notice that it becomes more sexist when your other female colleagues may drop away? What does that leave you feeling? More exposed, more powerful?'*

Fi Glover

**Margaret Cole:** I have. I think I had an early career experience that I can go back to, which was when I was that thing called an article clerk in a law firm many, many years ago in the early 1980s, and the firm was about to send article clerks, now trainees, abroad for the first time and I desperately wanted to do a stint abroad in Hong Kong.

When the firm chose which trainees were going they chose two male trainees, and then when I asked why, I was told that they'd have to share accommodation, and it was the first time that the firm had ventured into sending trainees abroad so they thought it was safer to send two boys the first time around.

And I was bitterly, bitterly hurt, upset, angry, and all of those things, and it sort of really enshrined an attitude at that time, so that was my personal experience of it. I'm sure I've had experiences of it subsequently but they've been less direct and obvious than that.

**FG:** And as you all go further up the tree, you know what happens to the air around you, do you notice that it becomes more sexist when your other female colleagues may kind of drop away? What does that leave you feeling? More exposed, more powerful, what?

**HK:** It's very interesting, because I think it's important to look at the things that have happened as a result of campaigning. We have to be realistic: change has taken place because of campaigning and it's been a long old battle. When I started at the Bar

And that happens in lots of fields but it certainly happened in the law, and then they would be very picky to make sure that she was not going to be a troublesome woman, that they actually would ask questions about whether you had a boyfriend or a fiancé, you know, were you planning marriage, and you immediately saw the door opening with your being shown out... if you suggested, you know, that you just might be a woman who liked men and were likely to go down that road.

And so there was a sort of sense in which they used to talk and they would say things like well, you know, we do have a woman but she's a spinster and she's committing herself to the profession, and so on, and she does family law, and so it was also about there being special areas that were fine for women, but there were areas that certainly weren't.

Now I wanted to do criminal law, I wanted a taste of blood, I liked the fight in the court and again, sometimes there were senior men who found it



*'The best argument I've heard so far for quotas is... that whether people realise it or not, they do have a tendency to choose themselves'*

Elizabeth Barrett



## Key to contributors

**FG** Fi Glover (chair) *BBC journalist and broadcaster*



Fi Glover is a multi-award winning broadcaster, writer and voice over artist. She has won a Sony Gold and a Sony Silver for her most recent show – Saturday Live on BBC Radio 4 – and won a Sony Silver Award for Broadcasting House on Radio 4. She is one of the UK's best known radio voices, and over the last 15 years in broadcasting, she has also presented a wide range of television programmes, including Rough Justice Live on Channel 4.

**HK** Baroness Helena Kennedy QC *Leading barrister and human rights expert*



Helena Kennedy is a leading barrister and an expert in human rights law, civil liberties and constitutional issues. She is a member of the Doughty Street Chambers in London and has acted in many of the most prominent cases of the last 30 years, including the Brighton Bombing, the Michael Bettany espionage trial, the Guildford Four appeal and the bombing of the Israeli embassy. She has also acted in many homicide trials with a domestic setting. She was the British member of the recent IBA Task Force on Terrorism, and in June, became the IBAHRI's new Co-Chair.

**MC** Margaret Cole *Former managing director, Financial Services Authority Conduct Business Unit (GC of PWC UK from September 2012)*



In her seven years at the FSA, Margaret helped the regulator win its first criminal convictions for insider dealing. Last year, her department recorded 11 convictions for insider dealing and fines levied totalled £66m. A further 16 individuals are awaiting trial. A solicitor with over 20 years' experience in private practice, specialising in commercial litigation with an emphasis on financial services, from 1990 to 1995, she was a partner with Stephenson Harwood, and in 1995, joined the London Office of international law firm White & Case to found and head its Dispute Resolution Department.

**EB** Elizabeth Barrett *Partner and former head of dispute resolution, Slaughter and May*



Elizabeth was head of dispute resolution from 2004 to 2008. Her practice spans a broad range of high-profile commercial litigation, investigations and contentious regulatory matters. She is often asked to provide risk management advice to clients facing novel corporate-threatening or reputational issues. Her clients include leading financial institutions, major corporates and governmental and regulatory bodies. Highlights include advising the HM Treasury on a series of high-profile instructions arising out of the financial crisis, including governmental interventions in Northern Rock, and Bradford & Bingley.

**KG** Katie Ghose *Chief executive of the Electoral Reform Society*



Katie Ghose became chief executive of the Electoral Reform Society in 2010, after five years as director of the British Institute of Human Rights. She was chair of the Yes to Fairer Votes Campaign, the campaign for a 'Yes vote' in the May 5th referendum on the alternative vote. A campaigner and barrister with a background in human rights law and immigration, she served as a commissioner on the Independent Asylum Commission from 2006-2008, where she helped to conduct the biggest ever independent review of the UK asylum system, which led to the government's commitment to get rid of the detention of children in immigration centres.



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## **Who should attend?**

Lawyers in private practice, in-house counsel, investment bankers, accountants and other professionals involved in mergers and acquisitions.



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deeply inappropriate that women should be in criminal law and doing adversarial kind of work. So a lot of it was about attitude and you had to keep eating away at it.

What's happened now is of course these things are much more subtle. They don't take the obvious form, nobody's going to say 'we don't take women' or, you know, we've got enough of them or anything like that, but you still have this problem and sometimes women buy into it;

'oh my God', but there wouldn't be 30 per cent of women who are good at...

**HK:** And women buy into this, because you hear them saying 'I wouldn't like to be appointed as a token women', as if somehow from the guys around them, there aren't plenty of mediocre men getting roles. Of course they're not going to appoint mediocre women to these things, there are plenty of brilliantly talented women out there. In fact, you might up the quality of



*For the appointment just now to the Supreme Court, when some analysis was done as to who was consulted as to the appropriate person for the appointment, 26 people were consulted: not one was a woman.'*

Baroness Helena Kennedy QC

that's one of the other problems, is that they say 'we only want to appoint on merit', as though merit were some kind of totally neutral concept and the gatekeepers weren't men. You know, for the appointment just now to the Supreme Court, when some analysis was done as to who was consulted as to the appropriate person for the appointment: 26 people were consulted: not one was a woman.

So those are the problems. Gatekeepers have to be widened, the criteria have to be set in a way that is more conducive to the lives of women, and to value the things that women are really good at, because if the guys get to decide that I'm afraid sometimes it doesn't work in women's favour. And sensible men see all this too and some of the best mentors I ever had were men who were enlightened men, but unfortunately there are still a few around who are not so enlightened.

**Katie Ghose:** Helena, I think what you say about the pipeline and talent is something that we see in law and in politics and probably in all the kind of workplaces there are, and we've got to get away from this argument that somehow if you're going to have more women or men in a profession there's going to be some sort of a merit point. I mean women and men can be equally rubbish and equally brilliant at things; we need to take the merit right out of it, and the idea that there wouldn't be enough meritorious women out there to fill the handful of judicial posts that there are in our country is a nonsense and we've got to knock this one on the head.

**FG:** Well this is the same argument, isn't it, for getting 30 per cent of boardrooms female, you know, the notion that suddenly everyone's going

some of these boards or some of these law firms or chambers or the judiciary if you actually did just open your eyes and looked for excellence in unusual places and not the same old places.

**FG:** Do you realistically have to accept that you almost do have a generation of token women, of people who just have to put it on their own shoulders: I'm going to do this, I'm going to walk into this different place and I'm going to make a lot of noise about it because then the younger generation will be able to see those people? I mean in a sense that's what all of you must accept that you're doing involuntarily.

**HK:** Role model is better than token women.

**FG:** Well, it is, but one person's role model is going to be somebody else's token woman, I mean it depends on where you are...

**HK:** I'd like to hear Elizabeth because I think Elizabeth and I come from this in a different way and I'd really be interested to hear.

**EB:** I think we probably do. In order for people to be respected they need to be valued. If we use your expression of a token woman, is the token woman going to... naturally going to encourage respect? I fear not, and that's one of the reasons why I'm concerned about the idea of departing from meritocracy, and I've listened to the interesting observations about the reference to meritocracy being a cop out, and in certain circumstances I'm sure it is; I do therefore wonder whether quotas is the right thing. The best argument I've heard so far for quotas is actually Margaret's point, which is that whether people realise it or not, they do have a tendency to choose themselves. ☒



This is an edited version of a longer interview. To view it in full go to: [www.ibanet.org](http://www.ibanet.org).



# The Life of a Start-Up: From Initial Financing to IPO/Exit

4–6 November 2012

Rosewood Sand Hill Hotel and Resort, Silicon Valley, California, USA

A conference presented by the IBA North American Regional Forum, supported by the IBA Intellectual Property and Entertainment Law Committee, the IBA Closely Held and Growing Business Enterprises Committee, the IBA Technology Law Committee and The State Bar of California International Law Section.

## Topics include:

- Challenges of start-ups with international operations
- International IP strategy
- International legal and regulatory strategies
- Hot issues for multi-jurisdictional start-ups and mature companies
- Liquidity and exit strategies

## Who should attend?

The conference will be of particular interest to private practitioners, corporate in-house counsel, venture capitalists and entrepreneurs engaged in global decision making involving international operations of growing companies investment, control, IP and regulatory issues, employment/labour issues, FCPA compliance and exit strategies.



## Rio looks to London and plans historic redevelopment

The eyes of the world are always on an Olympic city, but a group of Brazilians planned to scrutinise every aspect of the London Games with uncommon care. Rio de Janeiro, host in 2016, is seeking to use the Games to give the self-styled 'marvellous city' a transformational makeover.

**BRIAN NICHOLSON**

**T**he Olympic Games is awarded to a city, not a country, but for Brazil the 2016 Games in Rio are a matter of national pride. That means lavish federal help for a range of structural projects, a huge Brazilian presence in London budgeted at some \$25m, and an almost military-style operation to squeeze out every possible ounce of experience.

The Rio de Janeiro Local Organizing Committee (LOC) planned three types of monitors for London: Shadowers, who stick closely to their opposite number in the London Organising Committee (LOCOG); Observers, who participate in presentations and training sessions organised by the International Olympic Committee (IOC); and Self-Observers, who experience the Games as regular tourists to evaluate things like transportation, stadiums and visitor facilities from the user's point of view. Also, the Rio LOC has staff on secondment to LOCOG.

More than 140 people in 53 different areas – almost half of Rio LOC's current staff – were selected to go to London, many staying right through to the end of the Paralympic Games. All were charged with producing written and photographic reports that will be consolidated into a detailed assessment for the IOC and discussed at a November debriefing session in Rio, provisionally scheduled to last up to ten days, with the presence of members of LOCOG. Participants will include representatives of the 2014 and 2018 Winter Olympics in Sochi, Russia, and Pyeongchang, South Korea; the 2014

Summer Youth Olympics in Nanjing, China; and the 2020 Summer Olympics candidate cities of Istanbul, Tokyo, and Madrid.

'We are learning from London; we will learn from Sochi and we have the mission of passing on our knowledge to the next host cities,' said Rio LOC official José Arthur Peixoto, tasked with supervising the learning process. 'We have been in constant contact with LOCOG and our British colleagues have been exceptionally considerate.' London has given Rio documents and manuals from previous Games, and Rio must carry on the tradition. 'Olympic Games are not just the work of one city or country, they are the result of decades of interchange so that the event can develop and the Olympic Movement grows stronger,' Peixoto said.

However, the observation process is the least visible part of Brazil's presence in London. In all some \$25m is being spent, coming mainly from the Rio LOC, Rio City, Rio State and sponsors. Top of the list is Somerset House, a massive 18th and 19th century building in central London, rented by the Rio LOC and temporarily reborn as Casa Brasil (Brazil House) to showcase Rio, the 2016 Games and Brazilian culture in general. Activities include Brazilian films, music and art, plus investment and tourism promotion.

Perhaps the most noticeable absence at Casa Brasil will be any mention of the 2014 FIFA World Cup, even though Rio will be the main centre for the event with the final match played in a completely rebuilt Maracanã stadium. ➔

According to the Brazilian sports daily *Lance*, the Rio LOC refused Brazilian government requests to promote the World Cup in the same building, so the Brazilian Embassy will now stage an expo with tourist information and profiles of the 12 cities where matches will be played.

One guaranteed presence in the Casa Brasil is Rio Negócios, a municipal investment promotion agency created to leverage the huge marketing opportunity provided by the World Cup and the Olympic Games. The agency prepared a 21-day marathon of seminars and briefings and media presentations focusing on four areas of opportunity: sports, energy, audio-visual and high-tech.

Rio's Olympics and Paralympics were originally budgeted using 2008 dollars at \$2.8bn of direct cost plus \$11.6bn for stadiums, city improvements and so on. The Olympic Park in the Barra da Tijuca region will house the main events and will be developed by a consortium of three major Brazilian construction companies under a \$700m public-private partnership (PPP), installing basic infrastructure like roads and sewage for what will become a new neighbourhood of 40,000 people. The consortium is demolishing the old Nelson Piquet motor racing circuit and will use the site to build a 400-room five-star hotel, the international media centre, three event halls, the athletes' village and a housing project for displaced favela dwellers. PPP reimbursement includes the right to develop some 800,000 metres of excess public land.

Another huge project is underway close to downtown Rio. Christened Porto Maravilha (Marvellous Port) and not part of the official budget, this is using PPPs, a real estate fund, concessions and regular contracts to redevelop 50 hectares of old dockland. Some Olympic facilities will be located there.

The initial PPP specifies \$4bn to revamp basic infrastructure and provide services during the next 15 years; another will provide a 30-km light rail system looping through the old and new city centres, connecting with the downtown airport and bus, ferry and Metro (subway) stations. The area lies right next to Rio's existing overcrowded central business district, so real estate specialists predict private investment will flood into high-end commercial and residential development, hotels and shopping malls. Buildings of up to 50 stories will be allowed.

The Olympic Park and the Port are just 20 km away, as the crow flies, but can be hours apart given Rio's horrendous traffic and complicated beach-front geography wedged between sea and mountains. The answer is new Metro lines and three bus rapid transit corridors.

'All this adds up to an historic transformation of the city,' said Pedro Freitas, managing partner at the Veirano Advogados law firm, who has been involved in some PPP negotiations. With Rio 'basking in newfound self-esteem,' the immense

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*'Olympic Games are not just the work of one city or country, they are the result of decades of interchange so that the event can develop and the Olympic Movement grows stronger,'*

José Arthur Peixoto  
Rio LOC official

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public support for the World Cup and Olympics helps overcome any resistance to the projects or their public-private structuring. The legal aspects of PPPs in Brazil are essentially no different from those in other countries, Freitas said. As always, public-sector competence and economic viability are essential, but once again popular support helps ensure the necessary public funding.

Freitas said the Olympics and World Cup were not yet creating massive volumes of directly-related work for local lawyers, compared with the booming petroleum and mining sectors. Firjan, the industry federation, estimates Rio State will receive some \$105bn of public and private investments just through the 2014 World Cup. Nevertheless much is being brought forward, not only urban development and mobility but also recent 4G mobile telephony license auctions.

'Things like these might get talked about for a long time, but the World Cup and Olympics create a sense of urgency,' Freitas said. 'After 2016, it might be more difficult to undertake major structural projects.' ☒

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