

IBA GLOBAL

December 2011

INSIGHT

Middle East Special

Author of unprecedented Bahrain report
and Egyptian presidential candidate speak
exclusively to the IBA in Dubai

Dubai 2011:
extensive coverage
of IBA's first annual
conference in the
Middle East

Egyptian
presidential
candidate ElBaradei
on hope after the
Arab Spring

Cherif Bassiouni
on Bahrain, high-
level diplomacy
and international
criminal law

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devastating
influence of the
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Contents

DECEMBER 2011 Vol 65 No 6 ISSN 2221-5859



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the legal profession®

IBA Global Insight

FEATURES: MIDDLE EAST SPECIAL EDITION



ANNUAL CONFERENCE FOCUS

18 Mohamed ElBaradei

The Nobel Peace Laureate, Egyptian Presidential candidate and seasoned diplomat – having served three terms as Director General of the International Atomic Energy Agency – addressed the IBA's first conference hosted in the Middle East in its 64-year history. He spoke of his hope for the international rule of law in light of the Arab Spring.

THE IBA INTERVIEW

23 Cherif Bassiouni

Frequently referred to as the Father of international criminal law, Mahmoud Cherif Bassiouni, led the Bahrain Independent Commission of Inquiry into events during unrest in February and March 2011. In a wide-ranging interview conducted by Al Jazeera's Nick Clark at the IBA annual conference ahead of the unprecedented report's publication, Professor Bassiouni provides unrivalled insight on this and numerous other crucial political, diplomatic and legal initiatives.



FINANCIAL CRISIS

29 Who rates the rating agencies?

The US and countries across Europe have been humbled by downgrades from the hugely powerful credit rating agencies. As markets react ruthlessly to their proclamations, and governments topple throughout the Eurozone, *IBA Global Insight* assesses their influence.



LITIGATION

39 Rolls Royce justice

At £300m, the new Rolls Building offers cutting-edge commercial dispute resolution – but at a hefty price. Is the building emblematic of the world's leading centre for legal services?



ASIA: CAPITAL MARKETS

47 The great gamble

US law firms have spent big to attract elite Hong Kong talent, but with so many firms apparently obsessed with gaining eminence in the volatile IPO segment, recouping their investments will inevitably prove arduous.



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Contents

Regulars

3 From the Editor

4 News: Annual conference focus

On the fraught diplomatic relations between the IBA, Israeli delegates and the UAE; questions of freedom of speech; and outspoken views expressed at the IBA's first annual conference in the Middle East.



IBA War Crimes Committee addresses the United Nations on international justice; the Association's continuing focus on corruption in the legal profession; and moving tributes to two former IBA Presidents.



Comment and analysis

Middle East: Eurozone crisis and MENA's Future



27 While the lights may have dimmed on Gaddafi and Berlusconi, albeit in very different ways as our Middle East correspondent Andrew White points out, the futures of their two nations, as well as the regions of which Libya and Italy are such an influential part, are very much intertwined.

USA: Land of the unfree



37 America has five percent of the world's population, but a quarter of the world's prisoners. Overcrowding undermines rehabilitation and increases recidivism, but as our Washington-based columnist reveals, efforts to reform are meeting with wealthy and powerful resistance.

Latin America: Who watches the watchers?



55 Eleana Calmon, a 67-year-old career judge, is shaking up Brazil's judiciary, speaking of 'the bandits behind the robes'. She's co-opted the assistance of everyone from Federal Police to the Finance Ministry's money laundering unit in her efforts to unveil them, not without considerable and powerful resistance, as our Brasil-based columnist Brian Nicholson reveals.

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From the Editor



The first IBA Annual Conference in the Middle East brought together a record number of over 5,000 attendees in Dubai. When planning started four years ago, it could not have been predicted that it would come in the same year as the momentous events of the Arab Spring. The timing could not have been more auspicious.

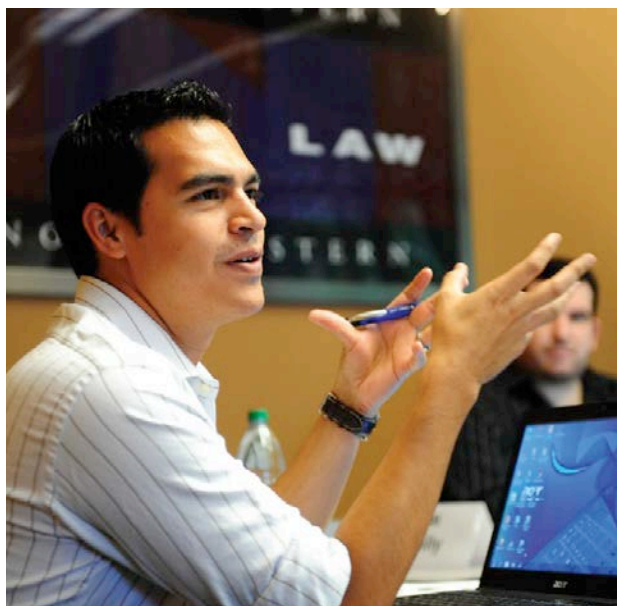
As our cover highlights, among the abundant high-level speakers (See IBA Global Insight films, page 10) were two figures able to provide unique insight from the centre of world changing events. Cherif Bassiouni has been described as the founding father of international criminal law. In a wide-ranging interview (see page 23) he explains the challenges of producing an unprecedented report commissioned by the ruler of Bahrain, King Hamad bin Isa Al Khalifa. The report was published at the end of November and found that excessive force and torture had been used by the authorities to put down the spring uprising in which 35 people died.

Mohamed ElBaradei, meanwhile, has led opposition in Egypt and has been widely touted as a potential President when election results are announced in March 2012. He spoke powerfully (see page 19) of the importance of 'the rule of law in creating the kind of society we would like to live in: a society

based on freedom and justice; a society where every human being enjoys freedom of religion, freedom of speech, freedom from fear, freedom from want'.

He outlined, too, 'the role of lawyers as a social engineer in developing that kind of society, that kind of world we all are eager to see and leave for our children and our grandchildren'. And he emphasised the need for global change to rectify inexplicable imbalances whereby we spent 12 times more on armaments than on development aid last year. But, he also focused on the changes sweeping across the MENA region. 'The key for us', he suggests, 'is to make sure that it is not going to turn into a tsunami and continue to be an Arab Spring.'

James Lewis



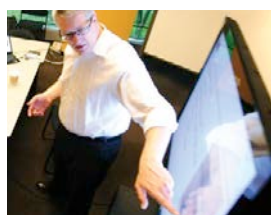
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ANNUAL CONFERENCE FOCUS



Diplomatic relations: Israeli delegates and the UAE

Greeting Alon Kaplan when he stepped off the plane at Dubai International Airport was a group of six men. They escorted him, his wife and three companions through security, where they thoroughly searched their bags and avoided stamping any passports. The visitors were then driven to a five star hotel, where they were taken to a special meeting room and informed of the conditions of their stay: they were not to go anywhere alone, they were to request authorisation for all movements, and they must try to stay together at all times – or, at most, separate into two groups.

Kaplan, managing partner at Alon Kaplan Law Firm, in Tel Aviv, was bemused by the severity of the conditions. He and his companions had flown from Israel to attend the IBA Annual Conference and were aware that there were certain conditions attached to their stay. This, however, was beyond any of their expectations. 'When we arrived we were greeted by someone from the Chamber of Commerce and they were obviously interested in doing the maximum for our comfort,' he says. 'We were given the complete red carpet treatment.'

'From the first moment we were surrounded by five or six people, and later this increased to 14 or 15. Just for five of us. I said to my wife, "Now at last I feel like a prime minister."'

The United Arab Emirates (UAE) does not officially recognise Israel as a state, and no diplomatic relations exist between the two nations. Yet the IBA had been making careful preparations to hold its conference in Dubai since 2006 and had sought guarantees that Israelis would be allowed to attend. At first they been granted their request, but after a group of alleged Mossad agents assassinated a Hamas leader in a Dubai hotel in January 2010, relations became more complex.

'When we first considered the idea of this conference in the middle east, one of the crucial guarantees was to ensure that our Israeli delegates would be permitted to come,' says IBA Executive Director Mark Ellis, speaking to IBA Global Insight. 'But after the assassination, and as we got closer to the conference, additional conditions were imposed which we felt were problematic.'

'We had concerns about whether the Israeli delegates would have freedom of movement and security, and negotiations on these and other issues involved scores of emails back and forth.'

'The interaction of the Israeli lawyers with lawyers from the Arab region was one of my highlights of the conference,' said IBA Secretary-General David Rivkin. 'Before the Management Board committed to holding the conference in Dubai, we made sure to have a written

commitment from the UAE Government that it would admit any Israeli lawyer who wished to attend, and the government met that commitment.'

Specifically, four additional conditions were imposed by the UAE on top of their original visa arrangements, two of which were deemed unacceptable to IBA management: that all delegates must arrive and depart on the same flight as a group, and that no spouses would be permitted to attend.

The authorities were acting 'in good faith', Ellis believes, to ensure the safety of the delegates – who themselves requested tougher safeguards following a warning by the Israeli National Security Agency that there was 'a real risk' to their safety in the region. Indeed, the Israeli Bar itself requested all delegates' names be removed from the programme and the list of participants, and for their hotel arrangements to be kept secret.

Following weeks of discussion, the UAE officials eventually relaxed its position on flights and spouses. However, they took no risks, and their final conditions were as restrictive as they were generous. The Israelis came as their guests and they paid for their hotel, transport and bodyguards. As many as 13 men and two women accompanied the lawyers everywhere, from their hotel rooms to the lobby, from the lobby to lavatory, and

all external phone lines in the rooms were disconnected. At lunch, the security guards – two from the Chamber of Commerce and the remainder from the security services – would sit at a separate table just beyond earshot, while in the evening they would lurk within a metre or two, ready to pounce if need be. ‘Plus, during the night two guards would sleep in the hotel corridor outside the room,’ says Kaplan. ‘It was as if the Mossad was coming to kidnap us. I have never experienced anything like it.’

For one of the lawyers, who wishes to remain anonymous, the restrictions were oppressive and frustrating. He – as is the right of any non-Israeli delegate – wished to register five companions for the conference, including his brother and girlfriend, but they were all denied visas. He is currently around US\$3,000 out of pocket due to cancellation and registration fees. ‘I felt they were very suspicious of us,’ he says, speaking to IBA Global Insight. ‘Especially because of the Hamas assassination. They made difficulties. They were very gentle and kind, but I sometimes felt imprisoned. I am not used to that.’

Mark Ellis said: ‘All of the Israeli delegates who decided not to attend the conference, for whatever reason, were given full refunds on their registration fees. Also, in this particular case, the Dubai government had information about the non-lawyer guests that made it problematic to provide visas. Considering the sensitivity of the situation, I thought the government’s concerns were reasonable.’

The Israeli delegate believes the IBA’s decision to hold the conference in Dubai was the right one, and he, along with the other Israeli attendees, is keen to stress how hospitable the security guards were. They bought the group SIM cards when their phones did not work, and they were always polite and eager to please. They even gave their new Israeli friends a gift each when they left: a picture of Dubai’s towering Burj Khalifa, the tallest building in the world.

Leviton, Sharon & Co advocate Rachel Levitan describes the trip as a ‘tremendous adventure’. ‘I am certain that the IBA was right in choosing Dubai,’ she says. ‘The IBA’s condition that all delegates from any country should be able to attend the conference shows the strength and the importance of the Association, which really can go beyond borders.’

‘While diplomatic relations is an issue

which is influenced by various political considerations, an exchange of ideas can sometimes be detached from diplomatic considerations. If our visit was even a small step towards such a situation, it was worthwhile.’

Kaplan also believes it was worthwhile (‘I will never forget the experience’), but is convinced the real security risk to the delegates was negligible. In his view, the UAE’s concerns were more political than safety-orientated, but the government was forced into ‘over-playing the security risk’ in order to justify their initial hard-line stance to the IBA.

‘I think they are more worried of the Jordanians, the Palestinians, the Iranians, than of us,’ he says. ‘Dubai has 230,000

time, in a convention of this type, Israeli delegates attending and participating openly side by side with Arab lawyers.’

Of the 13 who registered, seven have said they supported the decision to hold the conference in Dubai, while one believes it should have been held elsewhere and five were unavailable for comment. Of those who cancelled and spoke to IBA Global Insight, all cited security concerns issued by the Israeli Government as the reason for their absence.

Leviton, Sharon & Co advocate Dror Zamir, who decided to cancel, feels the IBA was wrong to go to Dubai. ‘I think the decision is problematic in view of the fact that it was very difficult for citizens

‘While diplomatic relations is an issue which is influenced by various political considerations, an exchange of ideas can sometimes be detached from diplomatic considerations. If our visit was even a small step towards such a situation, it was worthwhile.’

Rachel Levitan

Leviton, Sharon & Co advocate

citizens and 700,000 foreign workers, so the feeling is that they are under attack all the time from foreigners, not Israelis.’

Such a view, however, is ‘clearly wrong’, says Ellis, who stresses that security was as much a concern for the Israeli Government as for the UAE. ‘The facts speak for themselves,’ he says. ‘Only a year earlier there had been an assassination, and you can imagine what would happen if an Israeli was killed in Dubai.’

Indeed, Kaplan’s wife, who finalised arrangements for her will before leaving for the trip, evidently had a certain amount of anxiety about the trip – as did the nine delegates who chose to cancel their registration on the advice of the Israeli authorities.

The drop-out was regrettable, Ellis says, but he stresses it was the lawyers’ decision, and neither enforced nor encouraged by the UAE. ‘I think that, despite the conflict that exists in the region between the Israeli Government and other Arab governments, we achieved something quite remarkable.

‘We were able to facilitate for the first

from Israel to attend the conference,’ he says. ‘International conferences, in my point of view, should be held in countries that do not have limits in respect of attendance by citizens all over the world.’

Janet Levy-Pahima, partner at Herzog, Fox & Neeman, in Tel Aviv, believes the IBA was ‘right’ to hold the conference in Dubai, but says she chose not to attend because she was unaware of the extent of the security provided by the UAE. ‘I am really disappointed we did not go. I think, knowing now about the security arrangements, that we made the wrong decision and should have gone. It would have been a fantastic opportunity for us to be in Dubai.’

Iman Jamal, managing partner of Eiman Jamal & Co law office, who withdrew his registration after the visa conditions changed, agreed. ‘To be honest with you, I wish I had not cancelled my trip. I heard from my friends who travelled to Dubai that the conference was impressive.

‘I, and so many lawyers, would love to travel there.’



Censorship 'is red line we will never cross', says IBA

What is good for business is good for Dubai. Or such is the mantra of His Highness Sheikh Mohammed bin Rashid Al Maktoum, ruler of the emirate. Other ruling factions, it seems, have a different philosophy.

The IBA decided to hold its annual conference in Dubai in recognition of the growing influence of the Middle East in corporate and legal matters worldwide. The IBA had also never held its Annual Conference in the Middle East. The UAE was the obvious – indeed, the only – choice in a region beset with social and political tensions, and was touting itself as the go-to nation for tourists and multinationals alike.

For IBA Executive Director Mark Ellis it was obvious. 'At the time of our decision, the UAE was presenting itself as the gateway to the Middle East. It was on a very progressive path and was more than willing to discuss and debate controversial issues on human rights and the rule of law.'

Yet five weeks before the conference was due to begin, Ellis received a call. The conference was to be cancelled on the orders of the UAE security branch. The authorities had concerns about several sessions, which they felt were unfairly targeting the UAE and could provoke social unrest.

With Tunisia, Egypt and Libya all deposing their hereditary despots for voting rights and democratic reform, the UAE, it seems, was getting anxious. With no free press or political parties to contend with, the ruling families had enjoyed a long and prosperous reign of unsullied stability – and the concern was that a global legal association might change this in some way. Especially one with a human rights institute. 'I think

their progressive thinking was intact right up until the Arab Spring,' says Ellis. 'The dramatic changes in the region clearly altered their view about particular issues and how they would affect the region. The UAE security branch became quite paranoid about it.'

An intense bout of negotiation followed. IBA management never met the security personnel with whom they were dealing, but instead worked through a broad group of Dubai and UAE ministries. Both the IBA and the Dubai authorities were nervous. Each had a lot to lose in terms of reputation – yet the security forces, with their own independent agenda, were to be the final arbiter.

Nevertheless the IBA took a hard line, Ellis stresses, and refused to drop any sessions or speakers: 'This was an unacceptable action towards the IBA. It would be a red line we would never cross. Nor would we accept any restrictions placed on the content of the discussions.' Finally a deal was brokered: the IBA would change the titles of seven of the sessions to ensure that they meaningfully reflected the importance of international norms and values, without shying away from issues that could be sensitive, and perhaps controversial, within the region, and the conference could go ahead. 'Addressing corruption risks in the Middle East' became 'The international response and programmatic initiatives to counter corruption', while 'Recent political events in the region: are human rights relevant?' transformed into 'Human rights – are they still relevant?' The 'Death Penalty' became 'Capital Punishment.'

One session, 'Women and Islam – challenges and opportunities', was changed to 'Women and the law – challenges and opportunities', and was ultimately cancelled altogether by the

IBA's Women Lawyers' Interest Group. Committee chair Anne-Marie Hutchinson believes holding the conference in Dubai was, overall, a 'good idea' because it is a 'hub for commercialism' – but she remains frustrated by the interference.

'We made the decision because we felt the name was too dull and we thought we'd be talking to an audience of about five,' she says, speaking to IBA Global Insight. 'But we also felt we couldn't put the speakers in that position. The panel contained many women from the region and our logical conclusion, from what we were told, was that the session would be monitored, so we would have to control what was being said. It would be naïve not to believe that.'

Hutchinson eventually chose not to attend the conference as she felt it would be 'inappropriate'. 'I do a lot of work with women in the Middle East and other Islamic states and there would be women I couldn't look in the eye.'

Gabrielle Williamson, member of the IBA's management board and former chair of the WLIG, stresses that the session was postponed to a later date rather than cancelled. She adds: 'I didn't feel it was censorship from the Dubai authorities, who were very welcoming to us. It was just that the Emirates, in light of developments in the Middle East, did not want to be targeted as someplace particularly unpleasant... There was no effort to interfere with the content of the sessions or restrict speakers.' She adds: 'The decision was necessary if we wanted the conference to go ahead. It was the right decision. The IBA has to go to difficult areas and raise difficult issues; it can't just sit in America and Western Europe.'

IBA Secretary-General David Rivkin believes that 'changing the names of

the sessions was a small concession to preserve a conference that brought so many benefits to the 5,000 delegates and to the lawyers in the region.'

In an IBA survey sent to all 5,000 delegates following the conference, 80 respondents of 472 – 17 per cent – commented on the intervention by the UAE authorities. The main focus of the comments was lack of rule of law in Dubai, the IBA's willingness to 'compromise' with the authorities, the cancellation of the 'Women and Islam' session and the decision not to inform delegates of the intervention until midway through the conference.

One respondent wrote: 'I found it highly disappointing that the IBA – as the voice of the legal profession worldwide – accepted to change the title of some sessions due to political pressure. If we are to remain credible to really stand up for human rights including freedom of speech, I find it highly worrying that political pressure can have such an effect on the conference and didn't lead to more official and public statement than the email circulated by the IBA.'

Another added: 'It would have been very important for IBA to inform the participants about the events leading up to the conference so that every lawyer could have made their own decision whether under these circumstances he/she would like to attend. The importance of the rule of law and civil rights should have been stressed more publicly.'

Martin Šolc, former Co-Chair of the International Bar Association's Human Rights Institute (IBAHRI), was on the management board that originally voted in favour of Dubai. On reflection, however, he has changed his mind, believing that the IBA should save such 'reaching out' for smaller conferences and seminars. 'Holding an annual conference in countries without full freedom of speech makes the IBA vulnerable in case of any pressure from the government,' he says.

Others have been more forgiving, however, stressing that the alterations were more cosmetic than substantial. Richard Goldstone, Co-Chair of the IBA Rule of Law Action Group and former chief prosecutor of the United Nations International Criminal Tribunal for the former Yugoslavia and for Rwanda, is adamant the decision to go to Dubai was correct. 'I fully agree with the decision to hold the conference in Dubai,' he says, speaking to IBA Global Insight. 'This was the first time the IBA has held its annual conference in an Arab country and it was important to

do so at this crucial time in the history of the region.

'I obviously regret the attempted interference by the security authorities. However, in my opinion the changes of the titles of some sessions in no way changed the substance of any of the discussions and speakers were in no way censored. The freedom of speech of speakers was in no way infringed.'

Sternford Moyo, Co-Chair of the IBAHRI, the session titles of which attracted most of the authorities' concern,

circumstances could have exercised that right'. However, he believes that going ahead with the conference was the 'correct decision' and the authorities' stance amounted to 'interference' rather than censorship.

Justice Michelle May, Co-Chair of the IBA Judges' Forum and judge of the Family Court of Australia, says there 'seemed to be no restraint on the comments' made at any of sessions she attended, while John Corcoran, Co-Chair of the IBA Professional Ethics Committee,

'The changes of the titles of some sessions in no way changed the substance of any of the discussions and speakers were in no way censored. The freedom of speech of speakers was in no way infringed.'

Richard Goldstone

Co-chair, IBA Rule of Law Action Group; former chief prosecutor, United Nations International Criminal Tribunal for the former Yugoslavia

agrees. 'No organisation with as important a mandate as the IBA can achieve effectiveness by focusing its energies and presence on those countries where both the governments and the people are already knowledgeable and converted as far as observing the requirements for an effective administration of justice, the rule of law and the role of lawyers,' he says.

'The change in the description of seven titles was motivated by practical, diplomatic and necessary engagement aimed at serving what turned out to be the largest gathering of lawyers at an IBA conference.'

Moyo also defends the IBA management against charges that it should have informed delegates earlier. In the event, an email was sent out to delegates explaining what had happened on Wednesday 2 November, midway through the conference.

'An earlier alert to delegates would have led to the situation being grossly exaggerated and misunderstood,' says Moyo. 'It would have triggered unjustified alarm, despondency and cancellations to the prejudice of both the delegates, lawyers in the region and the IBA.'

For Norville Connolly, President of the Law Society of Northern Ireland, delegates should have been informed earlier, so those who 'in conscience would not have wanted to attend in the changed

believes the IBA 'should reach out to all parts of the world'.

'It cannot just visit "safe" venues if it wants to support and promote the rule of law in developing regions,' he says.

For Fady Kardous, Senior Partner at Kardous Law Office and Chair of the IBA Arab Regional Forum, 'it was about time' to hold a conference in the Arab region. He says: 'Regardless of the instability caused by the "Arab Spring" in the region recently, the Arab region was booming in terms of investments, legal reforms etc.'

Dubai was not the first annual conference to be held in a controversial region. In 2007 the IBA experienced similar problems in Singapore, largely focused on the IBA's rule of law day, but ultimately did not alter any of its programme. Indeed, the Dubai difficulties have not discouraged the Association from venturing into new challenging countries, where values regarding media freedoms and the rule of law may differ. There is already interest from Shanghai and Beijing to bid for a future conference, while cities in Russia also voiced interest.

But what if the authorities in these regions attempt to control what is said? 'It would be a non-starter,' says Ellis defiantly. 'If there were any events in which we would be censored, we wouldn't even consider the city. We would not be censored.'

Dubai uncensored: what they said at the sessions

'In many jurisdictions women face multi-layered and multi-dimensional discrimination that is embodied in economic and educational systems, and the legal framework. This discrimination [of women] in certain jurisdictions is addressed not only by men, but by women themselves who more often than not view their predicament as natural.'

Sheikha Haya

Bahraini lawyer and former President of the UN General Assembly



'At the HRI we have been very concerned about this case, its background, its apparent indication of a lack of respect for freedom of association and freedom of expression, quite apart from the procedural aspects of the case.'

Phillip Tahmindjis

IBA Human Rights Institute (HRI) Co-Director, speaking of the arrest and detention of five UAE political activists

'What are the factors on which judicial independence depend? They are: the ideological values of the state; the common law traditions of the rule of law; the International Convention on Human Rights; the courageous role played by the Bar, the civil society and independent media.'

Justice Tassaduq Hussain Jilani
Supreme Court of Pakistan



'There is not only no human rights in Syria, there is no humanity there.'

Haitham al-Maleh

Syrian political activist and founder of the Syrian Human Rights Association.

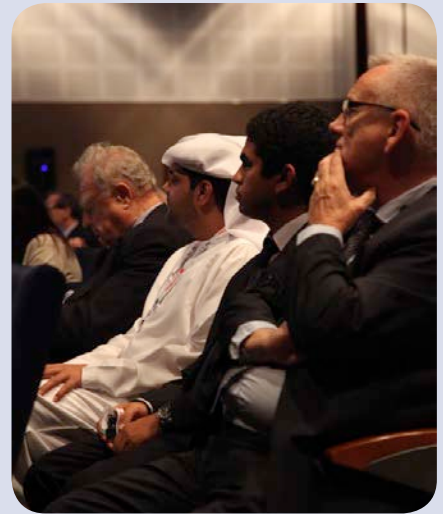
'This region is going through an Arab Spring. The key is to ensure it doesn't turn into a tsunami.'

Mohamed ElBaradei
Nobel Peace Prize Laureate and Egyptian presidential candidate.

‘The first business [in the Arab Spring] is accountability for crimes already committed. We cannot expect wounds to be healed because someone decrees we forgive and forget. Instead we must try these people with genuine effort for accountability, not vindictiveness and retaliation.’

Juan Mendez

Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.



‘The biggest impediment to peace and justice is not bad people. It is the large number of indifferent people.’

Mahmoud Cherif Bassiouni

UN war crimes expert and Chairman of the Bahrain Independent Commission of Inquiry

‘It is very easy to blame one factor or another for the inequality of women. But I think the fact of the matter is that acceptance of equality that comes from within is far more effective and powerful than that which is imposed from without.’

Rajas Kasbekar

Partner at Little & Co, India

‘Women now control over US\$20 trillion of spending worldwide. This should not be viewed as a threat, but an opportunity to further promote equality and access to justice for all [...]. Women’s increasing force has the potential to open doors of opportunity by redefining cultural, social and political norms and closing the gender gap.’

William Robinson III

President of the American Bar Association

‘It is broadly recognised that a well-functioning judicial system, including independent and impartial judges, prosecutors and lawyers with autonomy, is a crucial factor for the consolidation for a democratic order, the rule of law and ensuring the efficient protection of human rights.’

Gabriela Knaul

UN Special Rapporteur on the Independence of Judges and Lawyers

‘I believe life without parole is too severe a punishment [...]. It’s subject to the same procedural problems and miscarriages of justice as you see with the death penalty. It does not allow for the possibility of rehabilitation.’

Priya Motaparthi

researcher at Human Rights Watch, Middle East and North Africa



Global insight

As part of the IBA's on-going commitment to providing high quality content, a series of interviews was undertaken at the Association's annual conference in Dubai. This filmed content augments the IBA's growing collection of high level filmed interviews providing access to, and insight from, leading figures at the centre of current international legal and business issues. Some of these interviews will also appear in printed form, on-line or in the magazine, and can be accessed through the IBA's iTunes app and the IBA website.



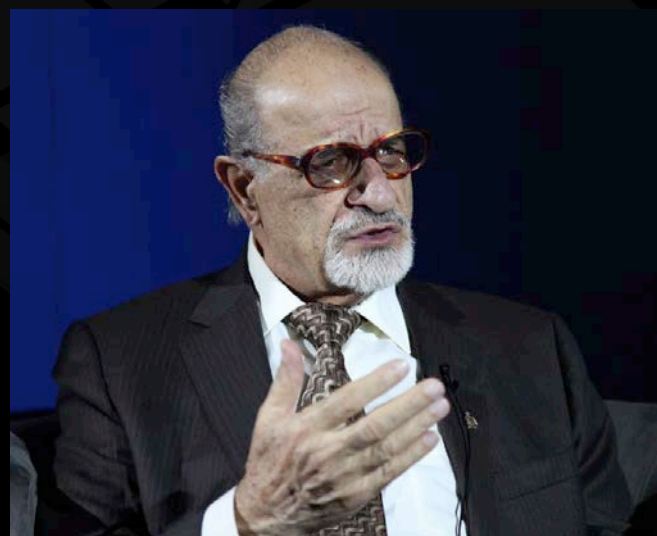
Al-Jazeera anchor Nick Clark interviews Egyptian presidential candidate, Nobel laureate and international lawyer Dr Mohamed ElBaradei for the IBA on subjects including the Arab Spring and the rule of law in the Middle East and Iraq.



IBA interview and Q&A with M Cherif Bassiouni, Chair, Bahrain Independent Commission Inquiry, often described as the founding father of international criminal law.



The IBA's Director of Content, James Lewis, interviews Gabriela Knaul, UN Special Rapporteur on the Independence of Judges and Lawyers on the challenges arising from her mandate, particularly in Iran, Russia and Syria.



IBA senior reporter, Rebecca Lowe, speaks to leading Syrian political activist and former judge Haitham al-Maleh, who founded the Syrian Human Rights Association in 2001 and has been arrested several times for speaking out against the government and abuses of the al-Assad regime.

films at ibanet.org



IBA Interview with Yuri Lyubimov, Deputy Minister of Justice for the Russian Federation on President Medvedev's focus on the Russian courts and failures of transparency in the Khodorkovsky trial.



James Lewis interviews George Freeman, New York Times Vice-President on the fight against secret government and working with Wikileaks and Julian Assange.



IBA interview with Mohammad Gawdat, Vice President of Emerging Markets at Google on key opportunities and challenges in MENA and the role of internet companies in transforming societies, economically and culturally.



David Liu leading banking and finance partner at Jun He Law Offices, Shanghai, discusses the rise of China as a global superpower and the state of the country's banking system.

Human rights groups condemn arrest of UAE activists

Five United Arab Emirates (UAE) political activists have received presidential pardons after being convicted of publicly insulting top government officials.

The men had spent eight months in detention after using a banned website to call for democratic reforms. On Sunday, 27 November, prominent blogger Ahmed Mansour was sentenced to three years in prison, while his four co-defendants received two-year jail terms.

They were released by President Sheikh Khalifa bin Zayed Al Nahyan on Monday, 28 November, on the 40th anniversary of UAE national day, following an international outcry.

The International Bar Association's Human Rights Institute (IBAHRI), Amnesty International and Human Rights Watch have repeatedly called for the release of the men since their detention in April.

According to one of the activists, economics professor Nasser Bin Gaith, the five are still determined to clear their names. During the trial, international observers said legal proceedings were 'grossly unfair' and had no basis in international law. They reported several procedural flaws in the case, including the court denying defence lawyers sufficient time to examine witnesses and review evidence.

The defence said the internet postings were critical of government policy, but not violent or inflammatory. It claimed the Arab Spring prompted the arrests as there was a six-month delay between the alleged offences and any action by the authorities.

Further concerns were raised following a spate of violent threats made against the



defence lawyers via online media. Human rights groups described the attacks as a 'vicious smear campaign'.

IBAHRI Co-Director Phillip Tahmindjis spoke out at the IBA Annual Conference in Dubai on 4 November at a controversial session dedicated to the rule of law. The session was kept secret until directly before it took place to avoid a backlash from the authorities.

Addressing to a room of over 100 lawyers, and under the watchful eye of several security agents, Tahmindjis said: 'We have been very concerned about this case, its background, its apparent indication of a lack of respect for freedom of association and freedom of expression, quite apart from the procedural aspects of the case.'

Speaking to IBA Global Insight, IBA Executive Director, Mark Ellis, said the IBA was determined to use the opportunity of being in Dubai to draw attention to the case. 'We felt that it would be inappropriate for the IBAHRI to leave Dubai without focusing on what is a very prominent human rights case in the UAE,' he said. 'Otherwise I would have felt that the IBA, and especially the HRI, would have failed in its responsibility to speak out on an issue that was clearly important to talk about.'

He added: 'In the end it was a good dialogue. UAE lawyers stood up and defended the UAE position on this, and that's good. That is what it is all about. It was a very open debate.'

The UAE comprises an alliance of seven states, each ruled by a hereditary sheikh, and political parties are banned. There have been no large street protests since unrest broke out in the Middle East last December, but 133 people signed a petition in March demanding political reforms and universal voting rights.

The UAE authorities have also recently dissolved the elected boards of directors of the Jurists' Association and the Teachers' Association, two of the few independent civil society organisations in the country.

Speaking to IBA Global Insight, the defendants' lawyer, Mohammed al-Roken, said there was no desire by citizens to overthrow the regime, but simply to enact limited democratic reforms.

'I wouldn't expect the Arab Spring in the UAE. The difference from Tunisia and Egypt is that here the Government has successfully maintained a good standard of living and succeeded on an economic and social front to deliver.'

He added: 'Nonetheless, on the political front they are very conservative and sometimes this is coupled with repression. The demands were very mild and respectful and they couldn't tolerate it. If this goes on there might be more demands.'

When approached by IBA Global Insight, the UAE authorities declined to comment.

Bahrain regime won't reform, say protesters



'If we take to heart the findings of this report, we can make this day one that will be remembered in the history of this nation.'

These were the words of King Hamad bin Isa Al Khalifa, absolute monarch of Bahrain, after hearing the findings from an independent inquiry that claimed the Bahraini authorities had used 'excessive' force and engaged in systematic torture during a crackdown on protesters earlier this year.

At least 35 people died in the February/March uprising after thousands took to the streets to demand democratic reforms.

Outlining a summary of the 500-page report by the Bahrain Independent Commission of Inquiry at King Hamad's palace in Manama, Commission chairman Mahmoud Cherif Bassiouni said many detainees were subjected to 'physical and psychological torture', including being whipped, beaten, electrocuted and threatened with rape.

He also said there was no clear evidence linking Iran to the unrest, as some Bahraini officials had claimed, and criticised the government for demolishing Shia mosques as a form of 'collective punishment'.

Of the 35 deaths that occurred between 14 February and 15 April, 19 were attributed in the report to the security forces. Two were said to be caused by other civilians and nine had unknown causes. Five victims were members of the security forces.

Responding to the findings, King Hamad promised to hold responsible officials to account and reform Bahrain's laws in line with international human rights standards. Yet he questioned the validity of the conclusions about Iran and continued to blame Tehran 'propaganda' for fuelling sectarian tensions between the Sunni ruling minority and Shia majority.

Activists in Bahrain welcomed the report, but were highly sceptical of the impact it would have on the ruling elite. Protester demands, originally limited to political reform, have now escalated, and many are calling for the king to step down to make way for a constitutional monarchy or a civilian government.

Speaking to *IBA Global Insight*, Maryam Al-Khawaja, head of foreign relations at the Bahrain Centre for Human Rights, said: 'The report documents massive systematic human rights abuses by the government. The king has said he will hold people to account, but if you look at the last ten years, he has made many promises he has never kept.'

'The government might make minor changes and hold some lower people in the security forces responsible, but everyone will probably get out on a royal pardon in a few months.'

According to Al-Khawaja, thousands of protesters poured onto the streets during the funeral of a protester killed on Wednesday, the day the report was published, chanting: 'For everyone injured and killed, Hamad, you are responsible.'

More than 1,600 people have been arrested during the protests, which have continued sporadically since February. At the peak of the unrest around 250,000 people reportedly took to the streets – around half of the native Bahraini population.

The original uprising was quashed in March when forces from the Gulf

Cooperation Council, dominated by Saudi Arabia, moved in.

Both Al-Khawaja and Nada Dhaif, one of 20 doctors allegedly tortured and sentenced at a military trial to 15 years in prison for inciting hatred against the regime, deny the uprising is sectarian. 'It was never about being Shia or Sunni, everyone was participating: rich, poor, religious and non-religious,' said Al-Khawaja. 'But the regime tried to create sectarian tension, and to an extent they were successful. Their clampdown specifically targeted Shia and the message to Sunnis was, don't get involved.'

Dhaif, who spoke to *IBA Global Insight* after being released from prison in the run-up to her appeal hearing, added: 'In order for the government to get away with what happened, they need to make it look like it is a sectarian war. But if you look closely, none of it is related to religion. There are lots of Sunni on the street as well.'

Overall the Commission received 559 complaints concerning the mistreatment of detainees following the protests, all but nine of which were from Shia Muslims. Five people reportedly died as a result of torture.

Sheikha Haya, Bahraini lawyer and former president to the United Nations General Assembly, who is cousin to the King Hamad, is adamant that Iran – a stronghold of the Shia faith – is responsible for the unrest. In an interview with *IBA Global Insight*, she said: 'We, the Bahrainis, feel that what they [the protesters] are doing for Bahrain is like what Hezbollah did for Lebanon. Recently [the protesters] started throwing oil in the road and prevented people going to work. 'If you love your country, you can protest, you have the right [...]. But there is an outside country that wants to interfere in the matters of Bahrain, and it is Iran. Everybody knows that.'

Despite reforms promised by the ruling family, protesters claim the unrest will grow. But they are reliant on a so-far indifferent international community, strongly influenced by Saudi interests. 'The Bahrain government is really susceptible to international pressure and the threat of sanctions or visa bans could go a long way,' said Al-Khawaja.

'The regime needs to know that if they do not stop their human rights abuses, there will be consequences. They need to know they are accountable.'



IBA War Crimes Committee Co-Chair Cecile Aptel speaks at the UN on 'Justice and Accountability after the Holocaust'

Cecile Aptel, Co-Chair of the IBA War Crimes Committee, spoke at a roundtable discussion at the United Nations (UN) on 9 November, focusing on the role of the judiciary in Germany under Nazi rule, and the establishment of the international justice system in the aftermath of the Second World War and the Nuremberg Trials.

The panel, comprising prominent historians and legal professionals, addressed the legal implications of the judiciary's complicity in upholding discriminatory Nazi laws that culminated in the Holocaust. The discussion then shifted to the role of states and courts today in protecting vulnerable populations, holding war criminals accountable and preserving democratic values.

Ramu Damodaran, the Deputy Director for Partnerships and Public Engagement, Outreach Division, UN Department of Public Information, moderated the discussion. The speakers were Irwin Cotler, MP and former Minister of Justice and Attorney General of Canada; Patricia Heberer a historian with the Centre for Advanced Holocaust Studies at the United States Holocaust Memorial Museum; and Karen Odaba Mosoti International Lawyer, Head of Liaison Office of the International Criminal Court to the UN.

DIAC

WELCOMES YOU TO THE IBA DUBAI

2011



- The Dubai International Arbitration Centre (DIAC) is the largest arbitration centre in the Middle East.
- DIAC registered 431 cases in 2010 and 302 cases till mid of September 2011.
- The DIAC Arbitration Rules, adopted in 2007, are widely considered to be “state of the art”.
- DIAC promotes the settlement of disputes by arbitration, as well as the development of a pool of arbitrators from different nationalities and legal backgrounds.
- DIAC is located in the heart of Dubai and offers modern facilities including meeting & hearing rooms.





**ANTI-CORRUPTION STRATEGY
FOR THE LEGAL PROFESSION**
IBA • OECD • UNODC

Anti-Corruption Strategy for the Legal Profession: recent developments

The Anti-Corruption Strategy for the Legal Profession has undergone a number of recent developments furthering its aim to generate awareness of international corruption. Along with global expansion of the anti-corruption workshops, the Strategy has also formed an expert panel to assist in the creation of an anti-corruption handbook for businesses and has progressed in the development of educational tools.

As part of the Anti-Corruption Strategy for the Legal Profession, an initiative of the IBA in cooperation with the OECD and the UNODC, two new anti-corruption workshops were held in Latin America. The first took place in Sao Paulo, Brazil on 27 September, the second in Caracas, Venezuela on 29 September. These workshops featured international speakers from the UNODC, KPMG LLP, Paul Hastings, Eni Spa and IBA, as well as local experts. The workshops have followed the global expansion of workshop sessions in 2011, which have this year been held in Seoul (South Korea), Tokyo (Japan), Kuala Lumpur (Malaysia) and Jakarta (Indonesia).

The workshops aim to generate awareness of international corruption, outlining the complexities of the schemes lawyers and law firms often become involved in and of the sanctions incurred for involvement in corruption. Participants include senior-level private practitioners of top law firms regularly involved in business transactions and senior representatives from bar associations and major law schools.

Further training sessions are being planned for 2012 in Europe, Asia and Africa. In addition to these national workshops, regional workshops will also be organised for legal professionals of Central America and the Caribbean and for Eastern Europe.

The Strategy has also formed an expert panel to consult with the World Bank, OECD and UNODC in the production of an anti-corruption handbook for small to medium sized business. The multi-stakeholder handbook will take the form of an online resource which will provide practical advice to businesses on the creation, application and implementation of effective internal controls, ethics and compliance programmes to combat bribery and corruption.

The group has submitted a first set of comments and observations to the first outline of the handbook and is preparing a second submission with case stories that will help compliance officers to understand and tackle the

challenges they face implementing programmes in their businesses.

A full list of members of the IBA members that compose the Expert Panel is available [here](#).

Development of educational tools

The Strategy is also drafting a collection of educational materials on corruption and corruption-related issues for universities and other institutions to incorporate into their undergraduate and graduate programmes. A first meeting was held in Boston in May and a second on 23–24 October in Marrakech, Morocco, in anticipation of the Conference of the States Parties of the UN Convention against Corruption.

The second semester of 2011 has also seen the completion of the second Seminar on Corporate and Professional Integrity which was held at Mexico's Universidad Panamericana in cooperation with the IBA. This seminar was aimed at students in their last year of law school and will be replicated in 2012 in the same in universities in Chile, Colombia, Italy, Sweden and Venezuela, among others.

If you would like to participate in this major global initiative, please contact Gonzalo Guzman, Head of Legal Projects, at gonzalo.guzman@int-bar.org.

For further details, visit the Anti-Corruption Strategy website at www.anticorruptionstrategy.org.

Panel discusses the independence of the judiciary and the rule of law in Syria, Venezuela and Zimbabwe at the Universal Periodic Review, Geneva

Legal experts from Syria, Zimbabwe and Venezuela discussed the independence of the judiciary and the rule of law in their respective countries at an IBAHRI side event at the UN Human Rights Council Universal Periodic Review (UPR), at the UN Palais des Nations, Geneva. The event, which took place on 7 October, provided a unique opportunity to hear the personal experiences of speakers and common issues of concern. These included the main challenges facing lawyers and judges in three vastly different contexts.

Haitham al-Maleh, who has spent several years in prison in Syria for his work as a lawyer and human rights activist, opened his speech by stating that 'the Syrian regime is a failed regime', governed by commands rather than the rule of law. Al-Maleh highlighted the recent passing of private laws, allowing intelligence services to investigate, arrest and detain civilians with impunity.

Professor Rafael Chavero, lawyer and professor of administrative and constitutional law, Universidad Central De Venezuela, highlighted the climate

of instability and fear in Venezuela's judiciary, as judges are routinely expelled from their position for landing judgements against the state. The situation has worsened with the recent case of Judge Afiuni, who was sentenced to three years in prison for releasing a political prisoner who had been held for two years in pre-trial detention.

On the topic of corruption, Sternford Moyo, former President of the Law Society of Zimbabwe and IBAHRI Co-Chair, highlighted a lack of resources and insufficient remuneration for

judges as leaving them vulnerable to bribes. In addition to this, the government routinely supplies judges with land, property, cars and plasma televisions, using funds from the Reserve Bank of Zimbabwe. Moyo

noted that land and property are given without a tenure agreement and may be taken back at any time, which could inhibit the impartiality of judges.

The IBAHRI has conducted fact-finding missions in 2011 to the three

countries which were all reviewed during the Twelfth Session of the Human Rights Council's UPR (3–14 October 2011). Mission reports are available via the IBAHRI website at www.ibanet.org/IBAHRI.aspx.

Combatting torture in Brazil

On 25 October, the IBAHRI, in partnership with the Brazilian Bar Association (*Ordem dos Advogados do Brasil*), the National Justice Council (*Conselho Nacional da Justiça*), the Ministry of Justice Secretariat for Human Rights and the Association of Public Defenders launched a training manual for judges, prosecutors, public defenders and lawyers on combatting torture in Brazil.

The manual, *Protegendo os brasileiros contra a tortura* (Protecting Brazilians from Torture), follows the 2010 IBAHRI fact-finding mission report 'One in Five', which identified significant challenges in the Brazilian criminal justice system, including pre-trial detention and torture. The manual is part of a major project implementing training sessions in six different states in Brazil and the development of legal education curricula for the use by justice institutions. Training took place in Brasília (26–27 October), and is scheduled for Sao Paulo and Fortaleza, Rio de Janeiro (30 November – 1 December), as well as Porto Alegre and Porto Velho (5–6 December).

In Memoriam:

Neil McKelvey, IBA President 1979-1980

As President of the Canadian Bar Association, I am pleased to share the many tributes of the Canadian legal profession and particularly the 37,000 members of our Association. Throughout a career that spanned more than 60 years, Neil McKelvey made a unique and exceptional contribution both to the legal profession and to his country. He was well-known across Canada, respected both for his sharp mind and his straight talk.

We were privileged to have a man of his calibre serve as our National President in 1973–74. In his memoir, Neil discussed how rewarding his time as President was. He wrote: 'It expanded my horizons beyond New Brunswick to encompass all of Canada. Joan and I made friends from east to west and from south to north, and made us realize what an expansive and wonderful country we live in.'

Neil would go on to be elected the first Canadian lawyer to become President of the International Bar Association. One subsequent IBA President, Kumar Shankardass, describes McKelvey as a distinguished President and most helpful in relation to the New Delhi conference.

Neil believed that lawyers must constantly strive to fulfil their responsibilities to society and to ensure that those without means could access the legal



system. The CBA remembers Neil with great fondness for his single-minded dedication to improving the justice system and the practice of law in Canada.

His leadership of the CBA Committee on the Appointment of Judges resulted in an advisory committee process that today works successfully both federally and provincially.

Neil was a strong believer in the value of the CBA, championing membership for all New Brunswick lawyers. He counselled many a young associate who joined his firm to get involved. And he would tell them: 'If you are going to get involved, be fully committed!'

And thankfully for us, he lived by those words. He brought his spirit, vision and leadership to our Association, vigorously

defending the independence of the legal profession, and holding steadfast to the view that it must be in a position to resist outside pressures. He lived by those beliefs as well, and to the last.

Neil lived a rich life, full of purpose, and to the very end fully committed to justice. It's an impressive legacy. To Joan and family, the Canadian Bar Association, together with the legal profession in Canada, extends our sincerest condolences. Neil will always hold a special spot in our hearts and will be remembered by all who had the special privilege of knowing him.

Trinda L Ernst, QC
President, Canadian Bar Association

In Memoriam: **Fernando Pombo – A lawyer of the world**

‘En el abogado la rectitud de la conciencia es mil veces más importante que el tesoro de los conocimientos.’

(‘In the lawyer, righteousness of conscience is a thousand times more important than the treasure of knowledge.’)

Angel Ossorio, El alma de la toga.

In the course of their lives, many lawyers question themselves about the significance of their profession and what good it contributes to society. Fernando Pombo never questioned the importance of our profession because he believed so passionately in the principle of justice and maintained a lasting belief that law has the power to summon righteousness away from wrongdoing. He lived his life this way and in doing so Fernando contributed enormously to the good of the international community and to the legal profession. Fernando was gifted with a strong educational background, intelligence, clarity of expression and professional ability. But he also possessed an impeccable moral character, constant diligence, patience, enduring energy and an immense generosity. He was honest in thoughts, words and deeds. Methodical thinking and clear speaking became his trademarks.



But this great lawyer has left us at only 68 years old – much too early – and we are now feeling this immense loss.

Fernando studied philosophy and law at the Universities of Oviedo and Complutense of Madrid (1965) and completed his legal doctorate in Geneva and Munich, Max Planck Institute (1970–1971). He completed his legal education at the University of Dundee (1978) and at the European Institute, Amsterdam (1979).

Jointly with Ignacio Gómez Acebo, who has also left us recently, Fernando founded the law firm Gómez Acebo & Pombo in the early 1970s, which soon became prosperous and world-renowned, particularly in the area of international business transactions.

Fernando belonged to a number of professional bodies and associations including the Bar Associations of Madrid, Bilbao, Seville, Valencia, Barcelona and Malaga. He was a member of the Spanish Court of Arbitration, ABA, LES, AIPPI, AEPPC, IPBA and the Chartered Institute of Arbitrators. He was a Life Fellow of the American Bar Foundation and the American Law Institute (ALI), Honorary Associate of the Mexican Bar and a visiting Professor at the Institute of International Legal Studies, Salzburg.

He received an endless number of awards including the Grand Cross of Merit for Service to the Bar (the highest honour of the profession, issued by the General Council of Spanish Lawyers) (2005), the Medal of Honor of the Bar Associations of Barcelona (2009) and Malaga (2009),

and the Prize awarded by the Club Aptissimi Law ESADE Alumni (2011).

But Fernando's most important professional achievement was undoubtedly his involvement with the IBA. Fernando gave a significant amount of time, energy and devotion to the IBA over many years where he served on the Management Board (2001–2008) and the Council (1996–2011), as well as serving as Chair of the Section on Legal Practice (1998–2000), Treasurer (2001–2002), Secretary-General (2003–2004), Vice-President (2005–2006) and finally President (biennium 2007–2008). During his IBA Presidency, Fernando focused his efforts on promoting the rule of law, and he created the Presidential Taskforce on the Rule of Law. He was also firmly behind the creation

of the IBA's distance learning and LLM programmes. A strong human rights campaigner, Fernando was an ardent supporter of the IBAHRI. He was unfailingly considerate to the staff and fulfilled his IBA roles with style and evident relish.

Fernando was also the consummate diplomat, with a remarkable ability to bring people together. He was compulsively friendly and generous, particularly as a host on social occasions. He was an indefatigable traveller, an increasingly important part of the President's job as the Association expanded in every manner and direction. Whether in Beijing, Dubai, Johannesburg, Mexico City, The Hague, New York, or Moscow, he was known by everyone. We often joked with him that he was the IBA's 'Legal Rock Star'.

Samuel Butler, the iconoclastic Victorian author, once said that 'to die completely, a person must not only forget but be forgotten, and he who is not forgotten is not dead'. We will not forget Fernando and he will live with us for a long time. His love for his family was enduring too and so was his passion for music and the sea. We are sure that God has prepared for Fernando a perpetual symphony in the most wonderful and peaceful waters.

Mark Ellis, *IBA Executive Director*

Akira Kawamura, *IBA President*

Emilio Cardenas, *Past IBA President*

Francis Neate, *Past IBA President*

Fernando Pelaez-Pier, *Past IBA President*


Ramon Mullerat, *former Co-Chair of the IBAHRI*

Paul Hoddinott, *former IBA Executive Director*

Mohamed



ElBaradei

A large audience is seated in a conference hall, facing a stage. In the foreground, a panel of speakers is seated in wooden chairs. A low wooden table in front of them holds water bottles and a small fruit basket. The audience is diverse, with many men wearing traditional Arab headdresses (ghutra and agal). The stage is lit with blue and white lights.

The Nobel Peace Laureate, Egyptian Presidential candidate and seasoned diplomat – having served three terms as Director-General of the International Atomic Energy Agency – addressed the IBA's first conference hosted in the Middle East in its 64-year history. He spoke of his hope for the international rule of law in light of the Arab Spring.

You can see that I get intimidated speaking to 5,000 lawyers! Mr Akira Kawamura, President of the IBA, it's a great honour and privilege for me to speak at the first IBA meeting in the Arab world and the timing could not be more perfect. The Arab world is going, as we have said, through the Arab Spring, a major change. That issue is the one I would like to speak to you about today. I'd like to speak about the rule of law in creating the kind of society we would like to live in: a society based on freedom and justice; a society where every human being enjoys freedom of religion, freedom of speech, freedom from fear, freedom from want. I'd like to speak to you about the role of lawyers as social engineers in developing that kind of society, that kind of world we all are eager to see and leave for our children and our grandchildren.

Ironically, we live in an increasingly globalised world. If you look at the financial imbalance – energy shortage, climate change, arms control, violence, communicable diseases – these are all issues that no one country alone can solve on its own, no matter how powerful it is. Yet our governance mechanism is lagging behind. Whether you look at the Security Council

and the United Nations, the G8, the G20, the EU, regional organisations etc, there is a dichotomy between how much we are being globalised and how much the mechanism, the governance mechanism, we have created is lagging behind our ability to move in science, technology, humanity – and that's one of the issues I'd like to touch on before I move to our region, the Middle East.

The fact that we don't have the kind of mechanism to govern on the basis of fairness, equity, justice, has led us to a world where you have three billion people – half humanity – that live on less than \$2.5 a day. We have one billion people who go to bed hungry every night. We have spending of \$1.5 trillion on armaments last year, while we spent \$120bn on financial development assistance. So we spent 12 times more on armaments than on development aid and we spent \$8bn on 16 peacekeeping operations run by the UN. In other words, we spent 200 times more on armaments than we spent on peacekeeping all over the world.

In Congo, five million people lost their lives in the last ten years. One million people lost their lives in Rwanda in 1994. In Iraq, over one million people lost their life against illegal, illegitimate war, and we haven't even counted the number of innocent Iraqi civilians who lost their lives. So was the case in Darfur. In Libya, in Syria and Yemen, innocent civilians continue to lose their lives in vain.

The rule of law goes beyond corporate law, as Peter Maynard mentioned, and is key to governance, peace and stability. If the principles underlining the rule of law – fairness, equity, justice – are not sustained everywhere, the roof, in my view, will fall on our heads in this increasingly globalised world.

A particular region, the Middle East, is going through a radical change in governance. In many countries in that region, lack of good governance is a general characteristic. Lack of good governance means absence of the rule of law, corruption, lack of political participation and often repression and, in quite a few countries, poverty, a lack of basic needs for many people, an absence of economic opportunity, an obscene gap between the rich and the poor.

This environment naturally leads to loss of hope, marginalisation, radicalisation, violence and civil war. While in some countries this has taken place, luckily, through peaceful uprising – like in Egypt and Tunisia – in others it was through violence and bloodshed, as we have seen in Libya. Yet in others – Syria and Yemen, for example – violence is still raging while the international community is wringing its hands while many innocent civilians are again losing their lives.

Despite having one of the oldest regional

organisations – the Arab League – there is a high degree of distrust and lack of co-operation among the Arab countries (only 13 per cent of imports from other countries in the region compared to over 25 per cent in inter-regional commerce in developing Asian countries).

Aside from oil exports, lack of economic development is a major issue in lack of governance here. 400 million people export – that's the Arab world – export about the same amount of goods as Switzerland with less than eight million people, if we take, of course, oil aside. There is also clearly an economic disparity. Saudi Arabia, for example, with an economy of \$440 billion is more than 14 times that of Yemen and we continue to see 750 million



'I'd like to speak about the rule of law in creating the kind of society we would like to live in: a society based on freedom and justice; a society where every human being enjoys freedom of religion, freedom of speech, freedom from fear, freedom from want.'

people in Somalia being exposed to and dying from famine.

The situation is exacerbated, in my view, by a feeling of many Arab and Muslim countries in the Middle East, not only of lack of good governance at home, but a feeling of unfair treatment and double standards by the outside world. A major regional conflict, the Arab-Israeli conflict, has been going on since 1945 and is getting from bad to worse, with a sense of injustice and humiliation on the part of the Arab and Muslim world.

9/11, the wars in Iraq and Afghanistan, Darfur – in addition to the worsening situation between the Palestinians and Israel and continuing support for ruthless dictators – naturally created an environment of distrust between the predominant Arab and Muslim Middle East and the West. This is not as people talk about 'clash of civilisation', it's clearly a conflict over down-to-earth political conflicts and economic interest.

A conflict is palpable between Iran, the Gulf States and other countries in the region, based on different ideologies, compounded by increasing distrust between different Islamic sects. Religious and sectarian tension, sometimes coupled with violence, is to be found in many of the Middle Eastern countries: Christians and Muslims in Egypt, Iraq and Lebanon; Shiite and Sunnis in Iraq, Yemen, Bahrain and Lebanon; Kurds and Arabs or Turks in Iraq, Turkey and Syria.

Clearly, the current situation is still very fluid. The region is going through, as I mentioned, what is referred to as the 'Arab Spring'. The key for us is to make sure that it is not going to

view, the role of the international community is very important. Clearly, the change has to come from within, by the people and for the people, but the international community in such a globalised world has a crucial role to advise on managing change: economic development; democracy and social justice; robust assistance for social and economic development. The role of legal services and legal assistance in areas of human rights and governance is crucial. Tension clearly exists between universal legal norms and a state sovereignty; it's still an issue that we continue to face everywhere and, as we all know, the concept of sovereignty is undergoing quite a lot of change, with the emphasis now not on the state sovereignty but on human security.

Luckily, there's a lot of attractive investment opportunities in the region, whether in tourism, industry services, communication, infrastructure; once stability is in place. You can see that here in Dubai. In a stable environment, you know, the sky is the limit but failure to manage change could lead to a major setback in the region. We should not have any doubt about that. We need to address regional conflicts, engage in serious dialogue, based on respect and universal values, to build trust.

The Palestinian conflict has to come to an end. The Syrian situation has to be settled. Yemen has to be emancipated and get the kind of political and economic systems they deserve. We need to help the Somalis from dying out of hunger, which is shameful for every one of us. Afghanistan has to come to a cohesive society. The conflict between Iran and the West has to be settled and we need again to find a way where we can live together – even with different ideologies, with different values, with different religions – because we're still one and the same human family. We definitely need a better co-operation here in the region and integration between countries of the Middle East, as well as with the rest of the world.

This is, in my view, a unique opportunity to finally establish a Middle East at peace with itself and with the world. This is a geopolitical and economic necessity in our increasingly interconnected world. We have no other option. Change in every aspect of our life is inevitable and there is no going back. The key challenge is to ensure that it is orderly and peaceful. Dialogue and meaningful engagement remains our best and only hope but, above all, we need a change of mind-set. We need to understand that we are one human family, that every one of us is each other's brother and sister. ☒

turn into a tsunami and continue to be an Arab Spring. Different processes of change are taking place in Egypt and Tunisia and one is about to start in Libya. In others – Syria and Yemen – the outcome is still unclear and violence continues.

In my view, the outcome in Egypt, where I come from, could be crucial as a role model for change and for creating a modern and moderate state based on democracy and social justice. So far, the uprising has been peaceful in nature, with heavy engagement by the youth – the catalyst for the future – and increasing reliance on social media that gets people together and makes them much more interactive as one human family. If successful, the Egypt change, revolution, could be a locomotive for change in the region through peaceful evolution and not explosion.

There are lots of challenges for change: the interaction between religion and the legal structure; the law of order or the absence of the law of order; the economic downturn that has resulted from the revolution; the dismantlement of the old structure; a weak civil society; unrealistic economic and social expectations; retribution and due process. These are some of the issues we are still facing in Egypt and I'm sure Tunisia is facing the same, and Libya will be facing the same.

So how should we go about all of this? In my



To view filmed coverage and interviews from the IBA Annual Conference in Dubai, go to: www.ibanet.org.



Cherif Bassiouni

Frequently referred to as the father of international criminal law, Mahmoud Cherif Bassiouni led the Bahrain Independent Commission of Inquiry into events during unrest in February and March 2011. In a wide-ranging interview conducted by Al Jazeera's Nick Clark at the IBA Annual Conference ahead of the unprecedented report's publication, Professor Bassiouni provides unrivalled insight on this and numerous other crucial political, diplomatic and legal initiatives.

Nick Clark: Professor Bassiouni, it's a privilege and an honour to be here on stage with you. Let's get straight to the thick of it and the Bahrain Independent Commission of Inquiry, which was due to report its findings on 30 October, a couple of days ago, but you've asked for an extension. Why is that?

Professor Bassiouni: Well, we continued to receive submissions by the government and by the private sector. In fact it was not until yesterday that we received the final submission by one of the government agencies and so it became almost impossible to catch up with the submissions – both by the government and the private sector – and to be able to meet the deadline, especially because the report will be in two languages and we need to also very carefully formulate our recommendations.

NC: So now it will be published, it will be presented, on 23 November. Is that right?

PB: It will be on 23 November. As they say in the Muslim and Arab world, 'God willing', though I'm always reminded of this 'God willing' by the story of somebody from the West who gets on a plane and travels to a Muslim country and he hears the captain say, 'We will arrive at our destination in X number of hours, God willing' and the Western traveller turns to somebody next to him, very concerned, and said, 'Do you know if there's something wrong

with the plane?' Obviously, the assumption in the Western thinking is, if you have to invoke the good Lord and hope that, God willing, you will get there, it means that there's a likelihood you won't. So I'm looking at it from the Arab side of the God willing and *Insha'Allah* is just a wishful thinking in the sense that, yes, we will reach 23 November.

NC: When the Commission was established, it was established by Royal Decree by the King of Bahrain. Were you surprised that the Commission was established and with the kind of apparent breadth of investigation that you're allowed to have?

PB: Well, for those of you who have followed the evolution of international criminal justice and what some call post-conflict justice and what others call transitional justice, the great rebirth of international criminal justice really happened in 1992 when, after a long period in the Cold War, which followed the events of post-World War II with the Nuremberg and Tokyo war crimes trials and the subsequent proceedings, conflict in the former Yugoslavia emerges and the Security Council establishes a commission to investigate.

This was a psychological breakthrough, so to speak. It broke through the Cold War era and mentality and brought the notion of international criminal justice at an



international level which applies to all, as opposed to being focused on, for example, the defeated – or focused on a victor's vengeance or a victor's justice. In the case of the former Yugoslavia, the mandate by the Security Council was to investigate all parties to the conflict, irrespective of who they were. It was very difficult to establish that commission because there were a lot of reservations and a lot of concerns that stemmed from what I call realpolitik. You know, what is the right time to do it? There was the Owen and Vance Commission trying to establish a peace agreement. Was peace to take precedence over the pursuit of justice?

I never felt those difficulties because I thought... You know, if some of you read the Bible, you'll see an extraordinary chapter called Ecclesiastes, which tells you there is a time for this and a time for that, and there is a time for everything and so, if you think of the investigative period, there is a time for investigation and you can get your evidence. You put it in the file and you wait for the right time for it to come out.

it difficult to go to the United Nations. So, having, if you will, an international fact-finding body of individual experts chosen for their competence and integrity may accomplish multiple goals.

This was quite unique on the part of the king and I should add that, before accepting the mandate, I asked for the opportunity to meet with the king, which I did, and basically gave him what I diplomatically called my 'wish list' – because that's the only way you can tell a king what you wish for, as opposed to saying, 'Yeah, these are my demands or conditions'.

NC: Have all those wishes been answered? Has the flow of this investigation run smoothly? Apparently not.

PB: The flow of the investigation ran very smoothly. We didn't have any impediments whatsoever. The government cooperated with us at all levels. We had total open-doors. I mean I can tell you, this is very unusual. We had access to every prison and every hospital in the country. Our investigators could go to any prison we wanted at any time of the day

'It seems like the veneer of human civilisation is very thin and, if you scratch that veneer, human activism comes out very fast. On the other hand, human good comes out very fast as well.'

NC: But perhaps surprising that the King of Bahrain would sanction it, given what apparently had happened.

PB: The initiative by the King of Bahrain was the first in history. There's never been a case before where a government nominated an international commission which was independent of the government, giving it the same privileges and immunities as UN staff, giving it whatever budget it asked for, segregating it, ordering all government agencies to collaborate and work with it and giving it total independence of action.

So that was an extraordinary first step and hopefully it will be the beginning of things similar because, if you think about it, there are many internal conflicts where a government may find it difficult to appoint a fact-finding body which is a national one and may also find

or night. You know, I think it's well established that, ever since we came on the scene, there wasn't a single allegation of mistreatment of a person, since we came on.

NC: I guess what I'm driving at here is... What about the press coverage, for example? There's been a great deal of spin. You've come up with various quotes, various comments, about what's happened so far. You can't talk to any great extent about any results of the Commission naturally yet but words that you have taken have been taken out of context completely, and that must have made it very difficult for you and your people who have been operating there in Bahrain.

PB: Very much so. I was caught in a dilemma of wanting to reassure the government, the general public, the opposition, international human rights organisations, the media, of what

we were doing. I thought that some element of transparency was necessary – obviously not the results – but what we are doing, what we are looking into, how we are proceeding, the volume of complaints that are coming. How do people come to us? How do we ensure people who have complaints that their privacy will be secured, that they won't be retaliated against? That needed some communication. The problem is every time I tried to make such communications, as you said, there were, you know, at least four different interpretations, two on each side. Each side would say, 'Well, this is maybe the best case scenario, interpreting what he said' and, 'This is the worst case scenario' and both of them ranged enormously with, in my opinion, a scant connection to the truth. This is also the product of a society that is very traumatised, a society in which there's a significant lack of confidence between its different components, and a society in which the narratives of each side are so diametrically different.

NC: A very interesting example is here. I've got a copy of it. The *Voice of Bahrain*, the daily news newspaper, the headline is, 'Commission head backs the death penalty verdict'. I mean that just clearly goes against everything you've always stood for.

PB: Well that's true. I was giving a radio interview on NPR in Chicago to a programme

statement supports his conviction?' and that sort of took my statement two steps beyond any logical conclusion. I said, 'Well how do you reach the conclusion that I'm supporting the court's decision that this person was the person who committed the murder?'

So it's that type of thinking in which there are so many layers to the narratives and the perceptions of people that, if you approached things from what I would call a common sense-based approach... I mean if it's black, it's black and, if it's white, it's white. That's common sense. You know, this is not Western thinking as opposed to Arab thinking or Asian thinking. It's just simply common sense. Common sense does not have much stock in Bahrain.

NC: Do you have clarity now in your head about what happened? I mean you have also been quoted as saying, 'There will be bitter pills to swallow'. For whom and what might they be?

PB: You know, in every conflict situation it is very seldom the case that things are exactly black and white. They usually start at the black and the white side but there's always a lot of grey in the middle. When you're dealing with an escalating process of political rhetoric and violence accompanying it, the process of escalation never happens without either side doing something that then gives it justification for the other side to escalate. What you look for in these situations is if the escalation went

'The initiative by the King of Bahrain was the first in history. There's never been a case before where a government nominated an international commission which was independent of the government, giving it the same privileges and immunities as UN staff.'

that I appear on quite regularly for over 20 years and the interviewer asked me, 'How come one person in the cases that were adjudicated by the military court, the National Safety Law Court, received the death penalty?' and I said, 'Well in accordance to Bahrain law that person who had intentionally killed another could receive the death penalty because that's in the Criminal Code'. So that was a purely explanatory, neutral statement and, as you said, the newspapers in Bahrain then frontlines, you know, 'Bassiouni supports the death penalty'.

It went one step further because I then, you know, decided to reach out for the opposition to explain my position because I felt that it was important to maintain a level of confidence, and they said, 'Well alright but, leave that aside, do you realise that this person who was found guilty is actually innocent and that your

beyond the normal level of escalation, whether there was excessive use of force, whether there was any abuse that took place on one side or another. All of these things are taken into account but this has to do with situations of crowd control, with violence in the street, if you have demonstration protesters. It doesn't address all of the other matters that occur as a consequence of the ripple effects of that central event. So that, if – as I know you've covered – you've had massive demonstrations at the roundabout, which everybody knows, there were ripple effects at the Salmaniya Medical Hospital. There were ripple effects subsequently in the arrests of people and so on and it's all of those ripple effects that have to be examined because the mandate of the Commission is to look at whether or not government forces acted properly, whether

they acted in accordance to international human rights law or not. So we have to look at all of those consequences.

So we've received quite a substantial number of complaints, information. We've reached out to opposition groups and to the government. We have received a great deal of information from opposition groups, as well as civil society organisations, from the government as well.

NC: And what's going to happen to all that evidence and who will have access to it afterwards?

PB: We have decided basically that the written records shall be destroyed before we leave the country. The Commission's decision is based on the fact that we truly need to ensure the privacy and the security of the people who came and testified with us, or to us. We are going to keep an electronic copy, which is going to be stored with an international organisation outside the country.

NC: You've investigated several wars: Iraq, Afghanistan and so forth. How does this one compare, from a personal point of view, in terms of the personal effort and the emotion that it takes out of you?

PB: This is probably the most taxing of them all, in one sense. One thing is certain, that every conflict is *sui generis*. Every conflict has its own characteristics. One thing, however, remains constant, which is the tragic realisation that human activism doesn't change, that you see the same type of human reactions – for lack of a better term, I would call 'evil' that would come out in a culture like the former Yugoslavia or Afghanistan or Iraq or Libya or Bahrain. It seems like the veneer of human civilisation is very thin and, if you scratch that veneer, human activism comes out very fast. On the other hand, human good comes out very fast as well and you see on the other side the number of persons who come out and do the right thing: who save, who try to save victims, who expose their lives in order to do the right thing.

So you truly see the contrast within each and every one of us of good and evil and the struggle between it, with the evil unfortunately prevailing in its public manifestations. In the Bahrain situation, fortunately the overall number of victims is a very limited one and this is a publicly-known figure so I'm not revealing anything, but we're speaking of fewer than 45 persons being killed. I leave it purposely vague, not because I don't know the number but that way I'm disclosing the actual number.

You know, this is not Yugoslavia with 200,000 people killed. This is not Rwanda with 800,000 people killed. This is not even Libya, as our Commission there has estimated 10,000 to

15,000 being killed. I say that because in Libya the area of conflict – being mostly limited to a central area, including Tripoli – is an area inhabited by about 1.5 million people, which is the population of Bahrain. So in 1.5 million people in four months, which is approximately the same period of time of the conflict in Bahrain, you have 10,000 to 15,000 people being killed, as opposed to under 45 people here. It gives you an idea of it but what it doesn't tell you is the traumatising effect of something in a given society and that varies enormously. For example, in Libya the story about one woman having been raped and four other cases reported – two of them by the BBC – immediately had an extraordinary explosive impact. People were starting to speak of mass rapes. In Libya...

NC: They were talking about Gaddafi supplying troops with Viagra to encourage systematic rape.

'When you're dealing with an escalating process of political rhetoric and violence accompanying it, the process of escalation never happens without either side doing something that then gives it justification for the other side to escalate.'

PB: Yes, which was no basis in fact, no basis in fact. You know, but the analogy with the former Yugoslavia where there was a policy of systematic rape as part of ethnic cleansing came to people's minds and it became a sensationalist issue. The point is that, even with five cases in Libya, we travelled from east to west, north to south, there wasn't a single part of Libya and a single group of people who did not refer to the rapes. Five cases had a national traumatic impact on society and so I think Bahrain is a traumatised society. You can't look at it from the perspective of the number of persons dead or the number of persons injured or tortured. You really have to look at the traumatising impact it had on society and that's going to be crucial in developing the reconciliation mechanisms for the future. ☒



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



Eurozone crisis and MENA's future

While the lights may have dimmed on Gaddafi and Berlusconi, the futures of their two nations, as well as the regions of which Libya and Italy are such an influential part, are very much intertwined.

ANDREW WHITE

Soulmates separated by the Mediterranean Sea, Muammar Gaddafi and Silvio Berlusconi were close friends and shared many beliefs. Not least the merits of surrounding oneself with pretty girls, and of the miraculous power of hair dye.

It was the late Libyan leader who introduced his counterpart to the 'bunga bunga' party, a concept so enthusiastically embraced by the Italian that it must surely rank as one of the most successful marriages of ideology in diplomatic history.

And it was Berlusconi who brought Gaddafi in from the cold, at least briefly, courting Libyan petrodollars by rolling out the red carpet and holding a string of lavish parties in his ally's honour.

Even in the face of the Arab Spring their relationship held firm, at least for a few weeks. In February, when Gaddafi's forces were reported to have killed at least 170 protestors on the streets of Benghazi and Tripoli, Berlusconi refused to condemn the violence and said that

he did not want to 'disturb' Gaddafi during the uprising in his country.

But a month later, when Berlusconi finally allowed NATO planes to use Italy as a base from which to bomb Libya, it broke Gaddafi's heart.

'I am so shocked, I feel betrayed,' said the Colonel of his friend's about-face.

The two old men would never party together again. Gaddafi was dragged from a ditch near his home town of Sirte, beaten senseless and then shot in the head. Italy's longest-serving post-war prime minister is still breathing, although in political terms his comeuppance was just as brutal, crowds belting out a rendition of the Hallelujah Chorus as 'Il Cavaliere' was sneaked out of a side door of the parliament building he had dominated for some 17 years.

The major surprise is that it wasn't a sex scandal but a debt scandal that did for the sleaze-soaked septuagenarian. But the European financial crisis, which has spiralled even further out of control since Berlusconi

quit office, could hold significant ramifications for Libya and the other nations in the Middle East and North Africa (MENA) region who are looking to rebuild their economies after the turmoil of the Arab Spring.

It has already been a dramatic, traumatic year for Libya, Egypt, Tunisia and their neighbours, and the meltdown in Europe means that things will probably get worse before they get better.

The EU is Egypt's main trade partner, and in 2010 more than 30 per cent of Egypt's exports to the world were destined for the EU's 27 Member States.

Fuels and minerals, textiles and clothing, agricultural products and transport equipment are worth good money to Egyptian industry, and yet the Eurozone crisis has battered demand for Egyptian exports as consumers in Europe tighten their belts.

Moreover, Egypt is reliant on large inflows of capital from Europe to help pay its bills; if that cash stream grinds to a halt, so might any hopes of political and therefore economic constancy.

'Egypt is reliant on foreign capital and therefore needs a stable Europe to

provide it with a stable platform to try and build recovery,' says Mark McFarland, Emerging Markets Strategist at Emirates NBD, one of the Middle East's biggest banks by assets. 'For Egypt to head off into constitutional reform, parliamentary reform and new elections at the same time as you have fires blazing all over Europe, is going to be very difficult.'

Plummeting trade and the unwillingness of European banks to extend credit could be problematic for a swathe of emerging economies in the region. Tunisia and Morocco, for example, each send around 70 per cent of their exports to Europe.

They are also the recipients of significant levels of capital inflows from the continent, or were until European banks slammed down the shutters.

'It's not difficult to imagine a scenario where banks from Brussels to Bucharest are all going bust,' warns McFarland. 'You can concoct nightmare scenarios easily which are really, really scary, and from there it makes the recovery in North Africa much more difficult.'

For major oil producers such as Libya and Algeria, the problem is of a different nature.

Unlike Egypt, Libya is unaccustomed to relying on foreign capital flows due to the decades it spent as a pariah state.

However the EU is still its chief trade partner, the destination for more than 70 per cent of the North African country's exports last year. Valued at close to US\$40bn, those exports consisted largely of petroleum and petroleum products, but it's anyone's guess as to what impact months of fierce fighting will have since had on the country's oil facilities.

There's also the issue of pricing: both Libya and Algeria, which exported more than US\$17bn worth of oil to Europe last year, are being forced to make calls on production at a time when many believe the global economy is on the verge of a second dip.

'You've already got political risk in this part of the world, and if you throw in the possibility of serious upheavals in Europe, it's very difficult for oil exporting nations to price oil into the future,' says McFarland.

'You have competing forces acting on the price of oil, political risk pushing it up and the potential for world recession pushing

it down, which creates volatility for the oil exporting nations' export basket, as well as uncertainty for the oil importers.'

After a turbulent 12 months, which has seen the tumbling of three decades-long dictators in the MENA region, the exhausted revolutionaries of Egypt, Libya and Tunisia, among others, will suffer tremendously if Europe slips into another recession.

These are nations whose economic troubles show no sign of abating, where worsening conditions could easily precipitate further unrest, and where the euphoria of revolution has given way to the widespread discontent that accompanies economic stagnation.

Both Gaddafi and Berlusconi's countries, despite the end of the two friends' influential rule, will continue to influence both of the regions in which they sit. ☒

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Egypt is reliant on large inflows of capital from Europe to help pay its bills; if that cash stream grinds to a halt, so might any hopes of political and therefore economic constancy.



Who rates the rating agencies?

The US and countries across Europe have been humbled by downgrades from the hugely powerful credit rating agencies. As markets react ruthlessly to their proclamations, and governments topple throughout the Eurozone, *IBA Global Insight* assesses their influence.

JONATHAN WATSON

In August 2011, credit rating agency Standard & Poor's (S&P) downgraded the United States' top-notch AAA credit rating for the first time ever. The company cut the long-term US rating by one notch to AA+ with a negative outlook, arguing that the deficit reduction plan passed by the US Congress did not go far enough.

The decision sent shockwaves through the world of finance and provoked an angry reaction from the US Government. John Bellows, Acting Assistant Secretary for economic policy at the US Treasury, claimed the firm's analysis contained a major mistake that led it to 'dramatically overstate projected deficits – by \$2 trillion over ten years'.

Regardless of S&P's 'mistake', Bellows said there was 'no justifiable rationale' for the

downgrade. 'There are millions of investors around the globe that trade Treasury securities,' he said. 'They assess our creditworthiness every minute of every day, and their collective judgment is that the US has the means and political will to make good on its obligations.'

Edward Greene, senior counsel at Cleary Gottlieb in New York and a member of the IBA's Task Force on the Financial Crisis, says the stinging rebuke reflects the frustrations felt by sovereign states at not getting a chance to review and dispute their rating and provide alternative evidence to be taken into account. 'This is a pretty opaque process, especially with respect to sovereign debt,' he says, primarily because it is not clear how much information rating agencies can access. 'How can they be sure about the overall economic condition of



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Greece, for example, given that no one else seems to know what it is?’

This is not an issue when the agencies are rating companies, as it is clear they have access to reported information and can hold meetings with representatives of the organisations seeking the rating. ‘With sovereigns it’s basically what’s out in the market and then it’s down to their judgment,’ says Greene. ‘In their rating of the

the task force, believes the downgrade was a mistake. ‘It’s worth noting that the other two main ratings agencies, Moody’s and Fitch, did not follow suit,’ he says. ‘The S&P downgrade seems like a misunderstanding of the real credit power of the US.’

Power and responsibility...

The US downgrade was not the first time that one of the rating agencies had annoyed a sovereign state by issuing a negative assessment of its future ability to pay down debt. When Moody’s downgraded Portugal’s debt to ‘junk’ status in July, citing concerns that the country could follow Greece in needing a second bailout, it provoked a furious reaction. Portugal’s public debt agency, the IGCP, condemned the move as superficial, arrogant and ‘based more on opinion than evidence’.

The key problem was that the reasons for Moody’s downgrade were not clear, says Lino Torgal, executive partner at Sérvulo & Associados in Portugal. ‘I respect the rating agencies and understand they have a useful role to perform,’ he says. ‘But it is not always easy to get a clear view of the grounds they use to downgrade you. There is a lack of transparency in the way they work.’

Torgal argues that the downgrade was particularly surprising as it came shortly after Portugal’s newly-elected government announced measures to strengthen financial discipline in the country. Portugal had pledged to introduce an austerity programme as part of a €78bn bailout deal agreed in May with the International Monetary Fund (IMF) and the European Union (EU).

Similarly, when Moody’s cut Spain’s rating by one notch to Aa2 in March, Spanish premier Jose Luis Zapatero dismissed the downgrade as an insult, insisting that only the Bank of Spain had the ‘information, credibility and truthfulness’ to judge the needs of Spanish lenders. Spanish officials were stunned when Moody’s issued its rating hours before the central bank was due to publish its own far more detailed analysis. ‘Moody’s don’t explain how they come up with these numbers’, lamented one source to journalists.

‘Most experts who looked into the agencies’ role during and after the financial crisis agree that the agencies carry some degree of liability for what happened’

Peder Hammarskiöld
Hammarskiöld & Co

US, S&P said they were taking into account the likely political paralysis that would prevent any kind of systemic addressing of the deficit. So they’re making judgments on political stability and political willingness to deal with certain economic problems as much as on economic conditions. It’s pretty subjective.’

Peder Hammarskiöld, senior partner at Hammarskiöld & Co and another member of

What is a credit rating agency?

Credit rating agencies exist to assess the creditworthiness of bond issuers. These can be companies or countries that borrow money by issuing IOUs known as bonds. The agencies give the borrowers a rating – expressed as a series of letters such as AAA, Ba3 or D – which tells the buyers of this debt the likelihood of getting their money back. As a result, the scores also affect the rate of return that investors are likely to charge on that borrowing. A lower score (AAA is the highest, D the lowest) makes investors more likely to demand higher rates, potentially making borrowing more difficult.

The three main rating agencies are:

- Moody’s Investor’s Service, created in 1914, headquartered in New York. Previously, in 1900, John Moody and Company began publishing ‘Moody’s Manual’, which contained basic statistics and general information about the stocks and bonds of various industries.
- Standard & Poor’s (S&P) has its origins in 1860, when Henry Poor published a history of the finances of railroads and canals in the United States as a guide for investors. S&P is headquartered in New York.
- Fitch Ratings, founded in 1913 by John Knowles Fitch, headquartered in Paris. In 1924, Fitch introduced the AAA through D rating system that has become the basis for ratings throughout the industry.

There are hosts of other agencies, but these three were the first to be acknowledged by US regulator the Securities and Exchange Commission (SEC) as Nationally Recognized Statistical Rating Organizations (NRSROs). Their combined market share is around 95 per cent.

X-rated

It's not just their ratings of sovereign states that get the credit rating agencies into trouble; their ratings of companies have also led them into controversial territory. Moody's, for example, has been accused of outright blackmail in the past. In one notorious case, the agency offered German insurer Hannover Re a 'free rating', suggesting that it might like to pay for such a service in the future. When the insurer refused, as it was already paying two other agencies for ratings, Moody's continued with the 'free ratings' but lowered its assessment of the company over time. Following a continued rejection of Moody's services, the agency lowered Hannover's debt to junk status. Investors took fright, wiping \$175m from the company's market value in a matter of hours.

The agencies have also been criticised for assuming a quasi-regulatory role, acting as an 'official' guide to creditworthiness even though they are run for profit. Conflicts of interest often arise because the rating agencies are paid by the companies issuing the securities – an arrangement that has come under fire as a disincentive for the agencies to be vigilant on behalf of investors.

Crucially, the agencies came under attack for their role in the financial crisis. The main accusation levelled against them is that they failed accurately to reflect the riskiness

'Governments simply don't like the harsh, ruthless judgment of capital markets'

Philip Wood
Allen & Overy

of complex structured products such as collateralised debt obligations (CDOs). As the financial crisis unfolded, and the assumptions underpinning rating methodologies for such instruments were shown to be overly optimistic, downgrades contributed to a pricing collapse that left the market for structured products virtually non-existent.

For instance, losses on \$340.7 million worth of CDOs issued by Credit Suisse Group added up to about \$125 million, despite being rated AAA or Aaa by all three of the main agencies. Perhaps most notoriously, they also maintained at least A ratings on AIG and Lehman Brothers right up to mid-September 2008. Lehman Brothers declared bankruptcy on 15

S&P downgrades US

When: August 2011

Downgrade: From AAA to AA+ (one notch) with negative outlook

Reason: 'The fiscal consolidation plan that Congress and the administration recently agreed to falls short of what, in our view, would be necessary to stabilize the government's medium-term debt dynamics'.
Standard & Poor's

Reaction: 'There is no justifiable rationale for downgrading the debt of the United States'.
John Bellows, acting assistant secretary for economic policy at the US Treasury

September, while the US provided AIG with its first of four multibillion-dollar bailouts the very next day.

The agencies played an important role in creating a very artificial market for structured finance instruments, says Hammar skiöld. 'Some of these instruments were so complicated that no one, even their creators, really understood the risks, and many people would not have invested if they were not rated,' he says. 'Most experts who looked into the agencies' role during and after the financial crisis agree that the agencies carry some degree of liability for what happened'.

However, he also notes that most experts also agree that investors were at fault for attaching far too much value to credit ratings without conducting any research of their own.

Inflated credit ratings were the subject of several investigations into the causes of the financial crisis. A report by the US Senate's permanent subcommittee on investigations issued in April 2011 noted that more than 90 per cent of the highest, or AAA, ratings given to mortgage-backed securities in 2006 and 2007 'were later downgraded to junk status, defaulted or withdrawn,' causing huge investor losses.

Silence is golden

The 2010 Dodd-Frank Act, one of the main US legislative responses to the crisis, sought to address the perceived deficiencies of the credit rating agencies with new governance and compliance requirements. New liability rules and penalties were created, along with the permission of certain private rights of action, restrictions on conflicts of interest, accountability for ratings procedures, required procedures and methodologies, enhanced



disclosure requirements, removal of certain references to rating agencies in various statutes, and enhanced supervision by the Securities and Exchange Commission (SEC).

There have also been attempts to impose tighter regulation on the credit rating agencies in Europe. New rules were imposed on them in the EU in 2009, and the European Commission has hinted at sweeping changes that would have a major impact, if adopted.

EU regulators reportedly intend to force issuers of financial products in Europe to change the rating agency they use on a regular basis, in a bid to open up competition and avoid conflicts of interest. The proposal states that a credit rating agency should not be in place for more than three years or for more than a year if it rates more than ten consecutive

closely associated with or holds a big stake in. Mergers between big agencies in Europe would be banned. However, the eventual impact of such reform is questionable. Between them, Moody's and S&P – both headquartered in New York – control 80 per cent of the credit ratings market.

Can't live with 'em...

Is all this regulation useful? Philip Wood, special global counsel at Allen & Overy and a member of the IBA Task Force on the Financial Crisis, thinks not. 'We need credit rating agencies,' he says. 'They obviously got it wrong on home loans, but only on home loans, and they were far from being the only people to do so. The IMF did too. Even the mighty Greenspan and

'Given the repercussions that this has, there is a real mismatch between the methodology used to reach an opinion and the effect it has on the market'

Hendrik Haag

Chair, IBA Task Force on the Financial Crisis; Hengeler Mueller

rated debt instruments of the issuer. Before being able to work with the same organisation again, agencies would have to go through a four-year 'cooling-off' period – a requirement that would deprive them of some of their more stable revenues and business relationships.

In addition, the European Securities and Markets Authority (ESMA), which began operations earlier this year as a new, improved successor to the Committee of European Securities Regulators (CESR), would be given wide-ranging powers to approve ratings, and even ban sovereign ratings in 'exceptional situations'. ESMA would be able to suspend ratings of countries undergoing bailouts so that adverse ratings are not issued at inappropriate moments'. However, the Authority would not be able to prevent agencies from outside the EU from issuing their ratings.

ESMA would also be asked to develop technical standards, to be endorsed by the European Commission, that harmonise ratings scales and the presentation of reports. New rating methodologies, or adjustments to existing models, will have to be open to consultation and submitted to the Authority for approval.

The agencies would face restrictions on their major shareholders that prevent them from investing in more than one rating agency at a time. Other measures would stop agencies rating any entity that a big shareholder is

Bernanke could not tell there was a bubble. I'm very unsympathetic to these regulatory efforts – the credit rating agencies seem to be a target picked up almost at random.'

Edmund Parker, global co-head of the derivatives and structured products practice at Mayer Brown, believes the rating agencies have had a lot of undeserved stick. 'The original idea of John Moody and Henry Poor was to write reports about companies that allow investors to form a view. All the rating agencies provide is an opinion. The problem is that regulators and investors now rely so heavily on a rating at the expense of everything else. Criticisms of rating agencies should really be directed at the value investors attach to ratings.' Indeed, so precious have ratings become that France's AAA status has become central, in many eyes, to the ability of the Eurozone to save the single currency.

As credit rating agencies consider their ratings to be opinions, they are likely to argue that enabling a regulator to suspend ratings would amount to a restriction of free speech. 'People who work at ratings agencies like to see themselves as journalists,' says Hendrik Haag, a partner in the Frankfurt office of Hengeler Mueller and the Chair of the IBA task force. 'But in many ways, this is because they don't want to be held accountable or liable for what they say. They have to recognise that the role they now have in the financial system gives them a lot of responsibility and I wish they

Moody's downgrades Portugal**When:** July 2011**Downgrade:** From Baa1 to Ba2 (four notches, to junk status)**Reason 1:** 'The growing risk that Portugal will require a second round of official financing before it can return to the private market, and the increasing possibility that private sector creditor participation will be required as a pre-condition'.**Reason 2:** 'Heightened concerns that Portugal will not be able to fully achieve the deficit reduction and debt stabilisation targets set out in its loan agreement with the European Union (EU) and International Monetary Fund (IMF) due to the formidable challenges the country is facing in reducing spending, increasing tax compliance, achieving economic growth and supporting the banking system'.

Moody's Investor's Service

Reaction: Moody's remarks 'do not provide for more clarity. They rather add another speculative element to the situation'.

José Manuel Barroso, President, European Commission

'It's a punch in the stomach'.

Pedro Passos Coelho, Prime Minister of Portugal

would be a little more open to that and become more accountable to the public about their methodology.'

Wood defends the agencies' actions during the current sovereign debt crisis. 'They are just doing their job,' he says. 'People say they are terribly mean, but that's their job. The ratings they have given countries like Greece are hardly surprising. It's usually pretty obvious why they give a particular country a particular rating. Obviously the sovereign states absolutely hate it, but the ratings don't strike me as completely wrong. Governments simply don't like the harsh, ruthless judgment of capital markets.'

According to Wood, the apparent conflict of interest whereby organisations pay for their own rating does not mean that all ratings are inherently untrustworthy. 'It's wrong to assume that people will always act wickedly,' he says. 'In any case, it would be impossible to find another model, because no one else is prepared to pay for ratings'. Hammar skiöld agrees. 'It will be difficult to get the investors to pay,' he says. 'You have a free rider problem if you do that.'

It's not wrong for credit agencies to make money either, according to Torgal. 'Profit is not the main driver for rating agencies,' he says. 'Providing information that is accurate and correct should be their main driver, and their profits flow from that. However, they should be a little bit more controlled, because if they work only for profit and they receive large fees from contracts entered into with entities that

don't have any credibility, that's not a good way for them to work.'

Most observers recognise that the agencies fulfill a vital role. 'If you look at a manager who's running a large bond fund that will have to invest a couple of million every day, it's simply not possible to use the conventional tools of investor information like prospectuses and so on to make that decision, because that person would never finish reading in a particular day,'

says Haag. 'There is a role for people who have an informed view on the creditworthiness of an issuer – for example – that's available to the outside world.'

Parker's view is that if the rating agencies weren't there, investors would still need to require a level of interest payments to compensate them for a particular creditworthiness and a regulator would still want to see a spread of investment in

assets of a certain level of credit quality. 'What would you use if you didn't use a rating?', he asks.

Clear as mud

However, concerns remain about the transparency of the agencies' methods. 'As far as I can tell, there are discussions within the agency and some are in favour of a particular rating, some are against, and there is yelling and shouting and at the end of the day you have a slight majority saying "OK we vote them down." That's not a transparent process', says Haag. 'Given the repercussions that this has, there

'The huge power of the rating agencies should be more controlled by some sort of regulation'

Lino Torgal
Sérvulo & Associados

is a real mismatch between the methodology used to reach an opinion and the effect it has on the market.'

According to Torgal, to produce a rating on a sovereign state, an agency might 'put some junior researcher on the case, who will stay in the country and research for a while, file their report without any real and substantial correspondence with anyone about what's going on, and then a short time later the agency issues the downgrade. The process often bears little relation to current reality.' Earlier this year, one EU source called it 'scandalous' that an agency had rated Greece by sending a single person to the country twice a year for half a day.

Torgal's conclusion is that the huge power of the rating agencies 'should be more controlled by some sort of regulation,' possibly under the aegis of the IMF or the World Bank. Hammarskiöld feels there should be more competition in the market for ratings. Forcing companies to rotate the agencies they use might help. 'Companies have to rotate the auditors they use, so why not rating agencies as well?', he asks.

Concerns also remain about the agencies' sense of timing. Frequently they seem to issue ratings at the worst possible time for a company or a country – the Portuguese downgrade in July is often cited in this regard – in a way that is guaranteed to inflict maximum damage on the entity being rated. 'That's part of their independence – they claim they just do it when they think they should,' says Haag. 'That's a bit short-sighted. They must appreciate the impact of what they are doing and there should be clearer rules in that regard.'

On the other hand, he adds, one has to remember that they were criticised very heavily for reacting too slowly in 2008 with regard to structured products and now they are being criticised for acting too hastily in their judgments on sovereign debt. 'It's difficult for them to get it exactly right,' Haag says. However, in a time of unprecedented market volatility, the role of the investors' opinion formers will remain under the microscope.✎

Jonathan Watson is a journalist specialising in European business, legal and regulatory developments. He can be contacted by e-mail at watsonjonathan@yahoo.co.uk.



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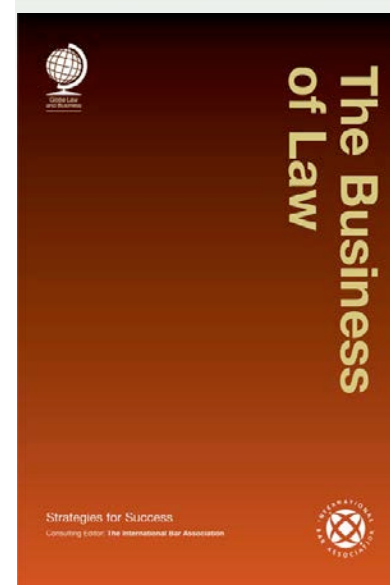
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The land of the unfree

America has five percent of the world's population, but a quarter of the world's prisoners. Overcrowding undermines rehabilitation and increases recidivism, but efforts to reform are meeting with wealthy and powerful resistance.

SKIP KALTENHEUSER

Consider that the 'land of the free' has the highest incarceration rate in the world. The US, with five percent of the world's population, incarcerates a quarter of the world's prisoners, far more than China or Russia. Several years ago, the International Association of Chiefs of Police, a sober group, called for the candidate that won the US presidency to create a national commission to 'address and solve the issues facing the law enforcement community and the criminal justice system in the 21st Century.' The IACP pointed out that there hadn't been a similar effort since President Lyndon Johnson established the Commission on Law Enforcement and Administration of Justice. That was 1965. Any objective appraisal now reveals a rusty tin man crying out for oil.

Senator James Webb, a Democrat from Virginia, had already embarked on this mission. A former Assistant Secretary of Defense and Secretary of the Navy under President Reagan, with two purple hearts from Vietnam, Webb has what it takes to make political opponents look silly when they launch the typical soft on crime accusations. Webb gained bipartisan support for his National Criminal Justice Commission

Act, which would create a bipartisan group of experts tackling an 18-month top-to-bottom review and generating recommendations for reform, aiming for fairness and reduced costs. The proposed budget, a mere \$5million dollars, approved by the Senate Judiciary Committee on January 21, 2010, with 39 bipartisan co-sponsors, passed the US House on July 28, 2010, with support by Lamar Smith, a Republican who later became chairman of the House Judiciary Committee. Despite an earlier delay over a non-related procedural issue, with the support of scores of organizations, including many law enforcement groups, it seemed a done deal.

Until October 20th of this year, when 43 Senate Republicans, including some who previously supported the bill, flocked together to block passage. The 57 supporters, including several Republicans, fell short of the 60 votes needed to overcome the filibuster. The reasoning that suddenly gripped the minds of those who banished support - the money needs to go elsewhere and the commission, by also studying state and local laws, would be an assault on states' rights. Senator Kay Bailey Hutchison, a Texas Republican, called Webb's proposal a Federal 'overreach of gigantic proportions.'

There is no starker demonstration than this vote of how dysfunctional Congressional politics has become, of how dedicated the Republicans are in derailing any Democratic initiatives. Why? There is no aspect of government more desperate for reform than criminal law.

With America's disproportionately large prison population in mind, Webb points to Japan, which in 1984 had a population half the size of America's, but imprisoned only 40,000, compared to 580,000 in the US then. By 2009, Japan's prison population had risen to 71,000, but that of the US rose to 2.4 million. About one in 31 US adults are in prison, in jail or on supervised release, with a huge alumni population. The annual costs of local, state and federal spending on corrections adds up to about \$75 billion. The frantic search for prison space in California makes the excuse from the bill's opponents - needing the commission's five million dollar cost elsewhere - a big laugh.

Conditions from prison overcrowding undermine rehabilitation, creating environments that increase recidivism, and public peril. The US Department of Justice estimates that 16% of incarcerated adults suffer mental illness, with an even higher percentage in juvenile custody. Most are not likely to improve in the bedlam of many prison environments, some housing double or more of what they were designed for.

Webb says an increasing number of those in prison, now about a third, are there for drug crimes. Nearly half of drug arrests are for marijuana. Moreover, 60% of those in state prisons for drug offenses had no history of violence or significant, if any, dealing. This diverts resources from coping with more serious drug threats, such as the violent cartels and gangs with operations infiltrating 230 or so US cities.

The ongoing toll on minority populations, with disproportionate conviction rates and higher sentences, is particularly striking. African-American men have a one in three chance of spending a year or more in prison. Imagine the impact on the fabric of minority-dominated communities.

There are multiple reasons for incarceration rates going off the charts, but one might start with the politicization of criminal law. For example, California's 'three strikes you're out' iniquity has put people away for life without parole for third offenses such as stealing a set of golf clubs, even pizza. It typifies what Webb calls 'the political logic that brought the massive shift to incarceration.'

Another factor behind the derailed bill might be the push for privatizing prisons. A non-profit group, the Justice Policy Institute, recently published a report detailing that the political action committees of private

prison companies, with a vested interest in increasing sentence length, have assisted Federal and state politicians with millions of dollars in campaign contributions, much going into Texas. Last year, the two biggest prison outfits, Corrections Corporation of America and GEO Group, exceeded \$2.9 billion in revenue.

The 'get tough' poster child used to be George W. Bush. As a Texas governor, he held the modern record on executions. He's since been eclipsed by Rick Perry, another born-again Texas governor with presidential ambitions. Both have had executions on their watch that

'Private prison companies, with a vested interest in increasing sentence length, have assisted Federal and state politicians with millions of dollars in campaign contributions. Last year, the two biggest prison outfits, Corrections Corporation of America and GEO Group, exceeded \$2.9 billion in revenue.'

gave rise to very serious doubt of guilt.

Asked for an example of necessary reform, Jack King, a spokesman for the National Association of Criminal Defense Lawyers, points to the need to address the lack of consequences for prosecutors who ignore their constitutional duty to disclose information favorable to defendants. As former NACDL president Jim Lavine put it, 'a criminal trial should not be a game.'

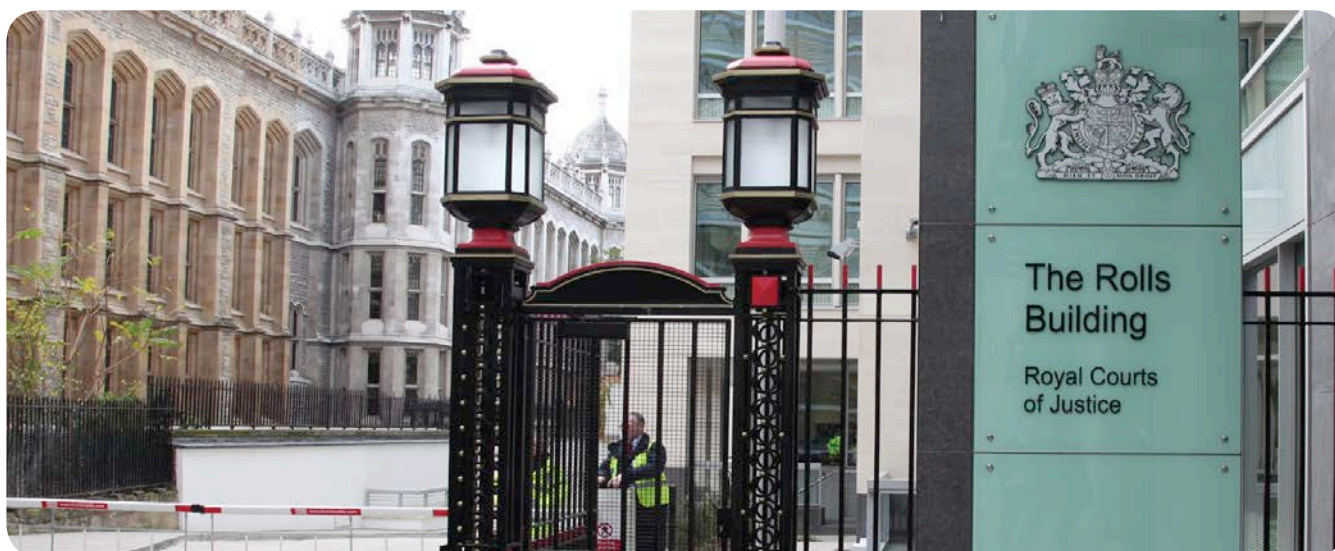
Meredith Mays Ward, with the IACP, said her group was 'extremely disappointed with the vote and will continue to fight for passage.' 'For far too long,' says Ward, 'our nation's law enforcement and criminal justice system has lacked a strategic plan that will guide an integrated public safety and homeland security effort in the years ahead.'

Webb is still committed to pushing for the commission. But he's retiring at the end of his term. It's not apparent that a dedicated advocate waits in the wings. Prisoners are not renowned for their political influence.

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



To view the IBA's interview with the UK's Secretary of State for Justice go to: www.ibanet.org



Rolls Royce justice

At £300m, the new Rolls Building offers cutting-edge commercial dispute resolution – but at a hefty price. Is the building emblematic of the world's leading centre for legal services?

NEIL HODGE

London's new £300m state-of-the-art court complex – the Rolls Building – opened its doors in October. The government wants to make the UK the world's pre-eminent destination for swiftly resolving international legal disputes, while making the country's legal services market as lucrative as its financial services sector in the process.

When the project was launched five years ago, it was claimed the Rolls Buildings would develop into 'the biggest dedicated business court in the world'. Consequently, the Ministry of Justice (MoJ) and UK Trade and Investment have been promoting British courts as the gold standard for resolving international disputes, hoping to profit from their excellence.

'The provision of modern, high-quality services for all parties will present the opportunity to market the facility at a global level in order to maintain the unrivalled work of the high court and English law,' said justice secretary, Ken Clarke. In a speech to TheCityUK in September, he added: 'The UK may no longer be able to boast that it is the workshop of the world... but the UK can be lawyer and adviser to the world.'

The UK's legal sector is already a significant earner, generating £23.1bn in 2009 – equivalent to 1.8 per cent of GDP. It contributed £3.2bn in exports, triple the level of a decade ago. Of commercial arbitration cases, 90 per cent of those handled by London law firms involve an international party, and – anecdotally –

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KluwerArbitration now includes two time-saving practice tools: a set of 5 easy-to-use question and answer **Smart Charts**, edited by Clifford Chance LLP, and a search-for-an-arbitrator tool, the **IAI Arbitrator Tool**, developed in conjunction with the International Arbitration Institute (IAI).

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The **Smart Charts** have been edited by Audley Sheppard, Clifford Chance LLP, a well-known and very highly respected arbitration partner based in London. They offer practitioners an opportunity to review a topic or procedure that is key to the practice of arbitration and gain an answer across many jurisdictions or institutions.

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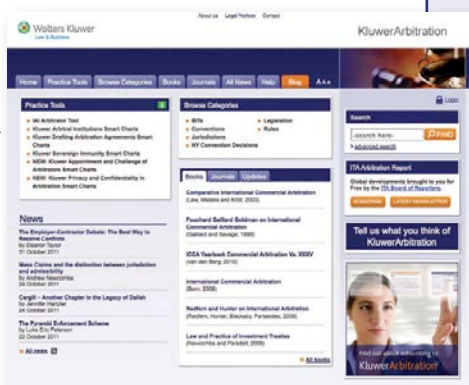
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Four out of five cases that are dealt with in the Commercial Court have one party that is based outside the UK. In half of all cases neither party is UK-based.'

Ted Greeno
Herbert Smith

they mostly come from Russia and Eastern Europe. Court 26 is currently hearing a dispute between a certain Boris Abramovich Berezovsky and a former colleague, Roman Arkadyevich Abramovich.

The Rolls Building – which brings under one roof the Chancery Division, the Admiralty and Commercial Court and the Technology and Construction Court – is the largest specialist centre for the resolution of financial, business and property litigation anywhere in the world and has judicial expertise in areas such as asset recovery, banking and financial services, company law, construction, insolvency and reconstruction, intellectual property and patents, professional liability, property, shipping, technology, and trusts. It will also be used for mediation and arbitration, both increasingly popular alternatives to the traditional confrontation and expense involved in litigation.

The curvaceous, 11-storey building in Fetter Lane, close to London's Royal Courts of Justice, contains 31 courts, including three 'super-courts' configured to accommodate big, high-value disputes, as well as four

courts configured in 'landscape' format for multiparty cases. The building also has 55 consultation rooms that clients can use – a facility sorely lacking in the old premises, according to lawyers' testimony.

The MoJ is also keen to trumpet the building's investment in cutting-edge technology, such as full Wi-Fi connectivity throughout, in-court facilities for parties to use their own IT (including electronic presentation of evidence and cabled broadband), in-court video conferencing facilities, and a new electronic filing system intended to make the facility mostly paperless.

An embarrassment of riches

St Dunstan's House, also in Fetter Lane, is the Rolls Building's predecessor, and few will mourn its passing. Facilities at St Dunstan's were 'unacceptable and an embarrassment to lawyers and their clients', according to Lord Gold, head of David Gold Associates and formerly a senior litigation partner at Herbert Smith. 'For the first time in many years, the Rolls Building will demonstrate to the clients we bring into England that we actually care about them,' he says.

Yet while lawyers praise the new facilities and the much-needed investment, most believe that it is London's long-established reputation as a leading litigation centre that will continue to attract clients rather than the new building and its mod cons.

Masood Ahmed, senior lecturer at Birmingham City University's School of Law, says that the Rolls Building's development 'recognises the well-established fact that the

Berezovsky v Abramovich

The fact that the £3.2bn (\$5bn) lawsuit between Boris Berezovsky, Russia's best-known political exile, and Roman Abramovich, owner of Chelsea football club and friend of Russian prime minister Vladimir Putin, is the first major case to be heard in the Rolls Building has exposed both its strengths and weaknesses.

The spat between two of Russia's oligarchs has attracted innumerable headlines and cemented London's status as the best place to conduct high-stakes dispute resolution. On the downside, the fact that the new venue still cannot cope with the swarm of press has suggested that the building is not as large or as fully functional as it perhaps should be.

High Court hearings opened on 3 October 2011, and the lawsuit itself began four years ago, when Berezovsky served Abramovich a writ in the Hermès shop in Sloane Street, London, reportedly saying: 'I've got a present for you.' The case largely turns on a couple of simple questions: did Abramovich force Berezovsky to sell his Russian assets at a low price, and what exactly was the business relationship between them?

Already, some eye-poppingly candid details of Russian business life have emerged, with both parties seemingly oblivious to how embarrassing such lurid allegations can appear to be. For example, Abramovich claims he paid Berezovsky \$2bn between 1995 and 2002 for his role as a 'political

godfather'. This included picking up the bill for personal expenditure on an 'exuberant scale', such as 'palaces in France; private yachts and aircraft, jewels for his girlfriend, valuable paintings at Sotheby's and so on'.

Abramovich also claims to have made a \$1.3bn payment through a company controlled by an Arab princeling: an 'artificial transaction' designed to satisfy money-laundering regulations. Berezovsky claims the payment was for his stake in Sibneft, an oil company; Abramovich denies this.

The case is set to continue for several months.

UK (in particular London) is an epicentre for business and has, for many years, been a key centre for international commercial parties to resolve their disputes’.

Ahmed also believes that the UK has the status and reputation as a safe and neutral forum for the resolution of international business disputes. Added to that, the judiciary in the UK is recognised as the very best in the world in handling and resolving some of the most complex commercial cases. ‘The Rolls Building brings together the geographical significance of the UK as a key centre for international business with the best legal minds in the world to make it a leading centre for the resolution of disputes,’ Ahmed explains.

Aside from the quality of the judiciary, clients also appreciate the enforceability of their judgments. Jeremy Cole, head of the investigations and fraud team at Hogan Lovells, says that the UK has the best armoury of interlocutory ‘weapons’ – such as freezing and search orders – anywhere in the world. ‘In an extreme case you can go to the judge in the middle of the night and get an order to freeze the defendant’s assets. This ensures that there are assets available to enforce against if at the end of the case you are successful,’ says Cole.

Katie Papworth, solicitor in the commercial disputes group at Thomas Eggar, echoes these claims, underlining the English courts’ history and extensive

jurisprudence. ‘We have good Commercial and Chancery judges coupled with a sound and robust system of law. Further, there is a substantial amount of case law relating to litigation cases in England which makes it very appealing for litigants to bring cases here, even more so if the rule of law in their own countries is unpredictable or if judges are inexperienced in handling these types of cases.’

Papworth also points out the frequency with which international companies use English law when they draw up commercial contracts with other parties. ‘English law is used a lot in commercial contracts and English jurisdiction clauses are very popular when foreign companies go into business with one another,’ she explains. ‘It can provide additional assurance for both parties, because without a jurisdiction clause from the outset it can be very difficult to seek recourse in a foreign court. Either party would need to demonstrate that England was the most appropriate forum, and should hear a case between two foreign litigants where foreign jurisdiction would normally take precedence,’ she adds.

There are other advantages, besides the judiciary. Ted Greeno, senior partner in the dispute resolution department at Herbert Smith, says that ‘as well as having experienced judges and barristers, London has a great network of expert witnesses, shorthand note-takers, translators and so on



*For the first time
in many years the
Rolls Building will
demonstrate to the
clients that we bring
into England that
we actually care
about them’.*

Lord Gold
David Gold Associates

which the city has built up over a long time. Litigants therefore have the reassurance that everything they need to conduct their case can be found in one place,' he says.

This offering is vital, considering the uniquely international character of the Commercial Court. 'Four out of five cases that are dealt with in the Commercial Court have one party that is based outside the UK. In half of all cases neither party is UK-based', Greeno explains. As a neutral forum, the UK Commercial Court has all the necessary expertise and experience to conduct complex dispute litigation cases.

Greeno also highlights how much claimants appreciate the adversarial approach, whereby both parties must disclose the documents that may favour the other party as well as the documents that support their own case. 'While this may seem counter-intuitive, claimants tend to believe that this approach ensures fairness and that a reasonable judgment is more likely as it is based on all the evidence at the judge's disposal and has been cross-examined by both parties,' says Greeno.

Rules of attraction

Some lawyers also believe that UK courts are more 'predictable' in their behaviour, which means that foreign litigants are taking less of a gamble in terms of time and costs, particularly when compared to other litigation-friendly jurisdictions like the US.

Tim Strong, partner in the financial disputes practice at Taylor Wessing, says that the US does not have a specialist commercial court for dealing with dispute litigation cases, and that its wide-ranging discovery process can slow proceedings down as both parties try to locate documents. Strong says that there are other reasons why litigants favour the UK court over the US. For one, the US uses juries in civil cases, and the UK does not; also crucial is the issue of punitive damages.

'Parties bringing a dispute to court want predictability about how the case is going to be conducted and so juries and the issue of punitive damages awards – which may bear no resemblance to the actual costs of the case – may be seen as too big a gamble. For many litigants, there is just too much to lose by bringing a dispute to a US court,' says Strong.

The coming years may see a shift in the nationalities bringing disputes to the UK. Steven Philippssohn, senior partner at PCB Litigation and a member of the IBA's Litigation Committee, suggests that in the

Jonathan Sumption QC

The *Berezovsky v Abramovich* dispute is noteworthy for other reasons. Abramovich's advocate is Jonathan Sumption QC, one of the UK's most high-profile barristers and widely regarded as one of the most brilliant legal minds in the country. He acted for the Labour government in the Hutton Inquiry, represented former Cabinet minister Stephen Byers and the UK Department for Transport in the Railtrack private shareholders' action against the British Government in 2005, and has appeared at the Supreme Court three times so far this year.

The Russian dispute is his last case before he joins the UK Supreme Court Bench – a move that was allegedly delayed so that he could act for the Russian billionaire.

His appointment in May 2011 is not without controversy. Sumption is the first barrister for 60 years to jump straight from the Bar to a seat on the UK's highest court without ever serving as a judge: it is known that an earlier application was opposed by senior judges, apparently upset that the high-earning QC – rumoured to be netting over £1m per year for the past decade – was leapfrogging less well-paid, longer-serving judges.

Sumption is also not afraid to ruffle feathers. In November he accused the European Court of Human Rights of riding roughshod over democracy, claiming that the Strasbourg judges had tried, through their rulings to set down 'a template for most aspects of human life'. He warned that the democratic 'consensus necessary to support it at this level of detail does not exist'.

His fee from Abramovich is rumoured to be around £3m.



near future the Rolls Building may see a rise in the number of Chinese parties bringing disputes to be settled in the UK.

'The Chinese Government and many of the country's largest companies have been investing heavily in infrastructure projects in emerging markets like Africa. Unfortunately, an increase in investment activity often has an impact on the amount of fraudulent activity within these contracts. As a result, we may see more disputes coming out of these kinds of deals which may mean that parties from China will seek legal redress in the UK.'

Rule Britannia

Not everyone believes that the UK's attempt to lure international litigants to London is good news. Dimitry Afanasiev, chairman of Russia's largest law firm Egorov Puginsky Afanasiev & Partners, explains: 'Currently, we have the bizarre situation whereby English law is effectively the operative law in Russian business transactions. Even purely domestic transactions are governed by foreign law even to such an extreme that when one Russian is selling a house in Russia to another Russian, that is often an offshore company transaction that is governed by English law.'

In the mid- to long term, this is bad for Russia. 'Unless Russian law is going to apply to business transactions here, Russian lawyers and judges are not going to gain the experience and sophistication', says Afanasiev. 'English courts are going to be overloaded with essentially domestic Russian disputes on matters so alien to any English judge that he or she is not going to know how to do away with the case, and there is not going to be any rule of law in Russia,' he adds.

So why do Russians take their disputes elsewhere? 'Afanasiev is clear: 'The problem with Russian law is enforcement: people are reluctant to have deals governed by Russian law because they fear having to appear before a Russian judge who could be unsophisticated and/or possibly corrupt, and I'm not sure which is the worst of those two options,' he says.

One of the ways in which the Russian Government is attempting to address this problem is through the creation of a modern, sophisticated international court of arbitration, similar to the London Court of International Arbitration, with independent and well-paid arbitrators.

'We are also helping the government to re-write the Russian Civil Code by deleting unnecessary imperative clauses that

unreasonably restrict freedom of contract,' says Afanasiev. 'It needs to be simplified and liberalised and Russia should look at other countries that have legal systems built on the same Napoleonic code – such as France, Germany and the Netherlands – and consider the possibility of following the way in which they have adapted it,' he says.

'If implemented, both initiatives are going to be a big leap forward in the development of Russian law, and a small collateral benefit for Russian law firms will be that there will be more demand for Russian lawyers,' Afanasiev adds.

Vassily Rudomino, senior partner at Alrud

'The problem with Russian law is enforcement: people are reluctant to have deals governed by Russian law because they fear having to appear before a Russian judge who could be unsophisticated and/or possibly corrupt'.

Dimitry Afanasiev
Egorov Puginsky Afanasiev & Partners

and Co-Chair of the IBA's European Regional Forum, is also clear about why Russians take their disputes to the UK. Foreign companies insist on having jurisdiction clauses in their contracts because they distrust Russian courts, which means that dispute resolution needs to take place abroad, and usually in London under English law. Furthermore, Russian businesspeople have such strong personal links with London now that it is easy to establish a link that enables them to bring a case before an English court.

But Rudomino believes that the tide is beginning to turn. 'The Moscow Commercial Court hears a lot of dispute litigation cases now and there are hardly any reports of unfair trials or corruption, which is welcome news. This is creating greater confidence in the Russian legal system and there is some evidence to suggest that Russian companies want to resolve disputes in Russia now instead of England.'

Follow the leader

Some believe that the primacy of the English courts in international disputes will force other countries to examine their legal systems, and push for appropriate reform to boost confidence. Philippsohn says that 'there is certainly a well-recognised belief that at least 60 per cent of the work

in the commercial and chancery divisions is Russian and Eastern European, and that that figure is unlikely to go down.' He adds that 'if the Russians were able to create a greater degree of confidence in their own legal systems then parties would be more comfortable litigating there. At the moment, parties feel more comfortable resolving their disputes in the English court rather than their own domestic courts.'

Timothy Dutton QC, head of Fountain Court Chambers and former chairman of the Bar Council, hopes that 'if word gets back to litigants' domestic courts that disputes have been resolved to very high standards in England then courts in other countries will want to find out why and may embark upon a process of reform'. There are already examples of this occurring. One example is Kazakhstan, where the judiciary has positively tried to adopt English process in commercial cases.

Other states have taken what they think will work from the UK system too, such as Dubai and Qatar. Both are building financial services centres that have the same type of regulatory oversight as in the UK. 'As a consequence of modelling their financial regulation and compliance on the UK system, they are also adopting a

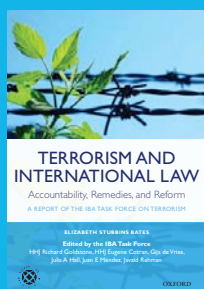
broadly English legal model', says Dutton. 'In Dubai, the former Court of Appeal judge Anthony Evans has helped to set up a court, and a local London Court of International Arbitration, so that the country has the skills and expertise to resolve local commercial disputes, while Lord Woolf has carried out similar work in Qatar,' he says.

Given the weight of professional opinion, it appears that London's status as the jurisdiction of choice for commercial disputes is only set to grow, and that the Rolls Building will enable the courts system more comfortably to deal with a burgeoning caseload. While some jurisdictions may bristle at the thought of high-profile – and high-value – cases being exported to London, practitioners both in the UK and abroad believe that regions like Russia and Asia will conduct more of their own dispute litigation cases as confidence in their own legal systems and enforcement improves. ☒

Neil Hodge is a freelance journalist specialising in legal and business issues. He can be contacted at neil@neilhodge.co.uk.



To view the IBA's interview with Russian deputy Justice Minister go to: www.ibanet.org



Terrorism and International Law: Accountability, Remedies and Reform

A Report of the IBA Task Force on Terrorism

The IBA's Task Force on International Terrorism was convened to examine the developments in international law and practice in this dynamic and often controversial area. The Task Force comprises world famous jurists and is chaired by Justice Richard Goldstone.* This book provides a global overview of counter-terrorism, including but not restricted to the US-led 'war on terror', by considering case law and examples of state practice from all continents.

*Other members: Professor Judge Eugene Cotran, Mr Gijs de Vries, Ms Julia A Hall, Mr Juan E Méndez and Professor Javald Rehman, Elizabeth Stubbins Bates (author).

Issues covered include:

- the framework of international conventions against terrorism
- international humanitarian law
- international human rights law
- the investigation and prosecution of terrorist crimes and of international crimes committed in the course of counter-terrorism
- reform in counter-terrorism
- victims' right to a remedy and reparations

The book closes with Conclusions and Recommendations from the Task Force focusing on how the international community can ensure respect for human rights and the rule of law when responding to the threat of terrorism.

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The great gamble

US law firms have spent big to attract elite Hong Kong talent, but with so many firms apparently obsessed with gaining eminence in the volatile IPO segment, recouping their investments will inevitably prove arduous.

CHRIS CROWE

In 1983, the tragic and mysterious death of John Wimbush signalled the end of one of Hong Kong's infamous property booms. It also marked the peak of an era when Hong Kong's local lawyers were among the wealthiest in the world. Some were earning in excess of HK\$20 million (just under US\$2 million) a year, this being almost 30 years ago.

Wimbush, the senior partner of Deacons, Hong Kong's leading law firm, was found dead at the bottom of his swimming pool with a manhole tied to his neck. Wimbush had been caught up in one of Hong Kong's deepest corporate scandals. The Carrian affair could rival the demise of BCCI or Enron for colour and intrigue.

Wimbush's supposed suicide note was discovered, but after a detailed inquest into his death, the jury returned an open verdict. Almost 30 years on and still there is a whiff of murder. Wimbush was the principal legal adviser to Carrian, a company that in 1981

bought what is now the Bank of America building in Hong Kong's Central district. It immediately announced the sale of the tower to two Hong Kong businessmen for a 100 per cent profit, a deal that was eventually discovered to be a complete fraud. When Hong Kong's stock market collapsed in 1983, the full-extent of the scandal was laid bare.

While Wimbush's death came at a time when Hong Kong's resident lawyers were earning millions, those huge remuneration packages appear to have returned thanks in part to a hiring spree by America's elite law firms. Chicago's Kirkland & Ellis is understood to have guaranteed a package of US\$6 million for three years to at least two of its eight newly recruited Hong Kong partners.

In 2011, with Hong Kong's capital market more effervescent than anywhere else in the world, ostentatious compensation packages have returned to the legal market.

Wall Street firms such as Simpson Thacher & Bartlett, Sullivan & Cromwell and Davis Polk & Wardell have all launched Hong Kong law practices in the last two years, by recruiting the cream of the capital markets community. Not to be outdone, Chicago's Kirkland & Ellis announced it was recruiting eight new Hong Kong-based partners in August this year.

'US firms are obsessed with China listings in the region and in the US. It is a one trick story and they are in the middle of the trick'

A long-serving Hong Kong partner at an international firm

David Patrick Eich, founder of Kirkland & Ellis's Hong Kong branch, refused to comment on the compensation offered to the new partners, but admits that the firm worked extremely hard to get its targets. 'Kirkland has a persuasive platform for standout practice leaders. It is an entrepreneurial place, there is very little bureaucracy and the firm is deeply committed to Asia,' he says.

The issue of lavishly remunerated lawyers is certainly not new in Hong Kong. Yet while Hong Kong's local lawyers got rich in the early 1980s thanks in part to the property boom and the comparative shortage of expert advisers, many current residents complain that the market has now become saturated.

Indeed, such is the clamour to gain a share of Hong Kong's apparent pipeline of initial public offerings (IPOs) – which was recently halted by the Eurozone debt crisis – that decent margins are hard to come by. For some, it makes these immense wages hard to reconcile.

The first wave

Deacons is no longer the dominant force that it was up until the mid-1980s, but it now carves a niche as the premier remaining independent firm in Hong Kong. At the time of the Carrian affair, Deacons and its closest Hong Kong rival Johnson Stokes & Master (now Mayer Brown JSM) were coming to terms with the influx of large London law firms – Slaughter and May was one of the first to arrive in 1974.

As a British colony and with a legal system that closely resembled that of the UK, London

firms were able to practise Hong Kong law overnight. As a senior partner at a leading international firm in Hong Kong recalls: 'You were brought out on Friday, sworn in on Saturday and you were working on Monday.' This automatic qualification is no longer in existence.

UK law firms were able to generate a substantial presence in Hong Kong at an astonishing rate, such that they were quickly able to achieve parity with local giants Deacons and JSM.

American firms in comparison have bided their time, largely sticking to US legal advice on an exclusive basis. But this changed noticeably in 2005, when Skadden created a Hong Kong law team with the hire of Nick Norris from Simmons & Simmons and Dominic Tsun, who had recently resigned from Linklaters. These two quickly developed a Hong Kong practice that eventually became a credible threat to Magic Circle firms that had come to dominate the market.

More recently, as the number of Hong Kong listings have surged, further US firms have recognised the need to have credible Hong Kong law practices. Christopher Wong, a new Hong Kong partner at Simpson Thacher & Bartlett, who was recruited from Freshfields Bruckhaus Deringer this year, says: 'If you look back in history to the 1980s and 1990s, US companies coming to do business with Chinese companies in those days wanted to use New York law as the governing law of transactions and Chinese companies were content to play by those rules as they were just starting to do cross-border deals. But as China has grown in stature, there was no longer a law that was the default governing law. Parties gravitated towards using Hong Kong law more and more because Hong Kong law is a very robust system of law and Chinese companies have a sense of familiarity with Hong Kong law, especially after the return of Hong Kong sovereignty to China in 1997.'



Kirkland's Eich has similar sentiments: 'The backlog of Chinese corporates looking to obtain public capital is very significant compared to other parts of the world. Our buildout in capital markets is commensurate with that opportunity.'

Eich reveals that since the firm established the Hong Kong office in 2007, he increasingly recognised that financial sponsors, such as the firms' marquee private equity clients, were looking to exit through the Hong Kong Stock Exchange. With many Chinese businesses already listed on the capital market, more and more M&A transactions were being governed by Hong Kong law.

When Kirkland worked on Bain Capital's investment in Chinese retailer Gome Electrical Appliances in 2009, Eich discovered that impressive Hong Kong lawyers were in existence and it encouraged him to think about localising the firm's presence in the former British colony. 'We were in the trench

Balancing the books

Kirkland is also entering an extraordinarily competitive market. Firms have historically found it incredibly hard to achieve respectable margins on Hong Kong IPOs and have essentially been forced to make associates work night and day to ensure that even modest profits can be realised. Some firms are even reported to be working on these deals as a loss-making exercise designed to secure longer-term client relationships.

Stock charge-out rates for an IPO were previously in the range of US\$1.6m with an additional US\$600m for drafting the prospectus. But market participants say that lower-bids became endemic in the middle of 2010. 'You are lucky if you make a 15 per cent margin,' comments a business development professional at a leading firm in Hong Kong.

Work on an average Hong Kong IPO can last between seven to nine months, with a senior

'The backlog of Chinese corporates looking to obtain public capital is very significant compared to other parts of the world. Our build out in capital markets is commensurate with that opportunity,'

David Patrick Eich

Founder of Kirkland & Ellis's Hong Kong branch

with Nick Norris in an unusual and complex transaction,' he recalls. 'He totally out performed, was fanatically methodical, worked very hard and was fun to work with. That is when the idea first crossed my mind that there were M&A lawyers operating at that level in the Hong Kong market.'

One Hong Kong partner at a UK firm is adamant that Kirkland was forced to build out its Hong Kong law practice and capital markets capabilities, because it was unable to keep a toehold on Bain Capital, its cornerstone client in Asia. As ever, with private equity sponsors always assessing the best exit strategy from an investment, a Hong Kong listing was becoming an increasingly attractive route until the Eurozone debt crisis appeared to halt the rush in mid-2011.

Indeed, one senior partner at a leading Hong Kong firm believes that these ostentatious remuneration packages would never have been offered had Kirkland realised the effects of Europe's fiscal problems on the local market – the team of eight new partners were announced in August before the true extent of the Greek sovereign debt crisis came to light.

associate and two junior associates working on the deal full-time for seven-and-a-half-hours a day, along with paralegals working on verification. The business development specialist says that a lead partner will often supervise two or three other deals at the same time.

Associate attrition has become a serious problem in recent years, with so many firms in Hong Kong developing corporate practices that are widely referred to as 'IPO sweatshops'.

This was an issue that Linklaters began to address in 2003 and 2004 following the SARS epidemic that resulted in a complete halt to the IPO pipeline.

According to Hong Kong corporate partner Chris Kelly, Linklaters recognised that its corporate department was too reliant on IPO work and that it was strangling the enthusiasm of its associates.

A review led by former head of Asia and now firm-wide managing partner Simon Davies resulted in the practice becoming much more selective about which deals to bid for. Kelly says that aim for the corporate department was to have 60 per cent to 70 per cent of the work



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being driven by M&A and no more than 40 per cent from IPOs over a five-year period. 'We are primarily an M&A franchise,' he explains. 'An IPO is an alternative exit position for many of our clients and that is just one thing that is expected of us.'

Associate attrition is now limited to in the region of five per cent, a remarkably low figure compared to many of Linklaters' competitors. 'The attrition rate is extremely modest,' Kelly says. 'One of the things that we hear is that people want to get out of the IPO sweatshop environment. Some of our competitors might have 20 IPOs on the go at one time and one associate doing all the verification across five or six IPOs. It is very efficient and it is probably getting the most out of the engine, but it is not the way to get associates to stick around.'

Other firms with an intense focus on IPOs say that it enables them to develop tight relationships with Chinese corporates in particular and investment banks, but Kelly says that IPO work is only one way of developing connections. 'Investing in client relationships can be done in a number of ways,' he explains. 'Issuers don't necessarily acknowledge the investment that you put into a deal. We can say that we will look at compliance issues across a variety of jurisdictions and they may see more value in that. For a start, not every corporate issuer turns into a good corporate client.'

This approach is rather unique with many of Linklaters' increasing number of competitors still seemingly obsessed with the IPO world.

Deacons is still very much in that camp and maintains a healthy share of mid-market deals. Corporate finance partner Ronny Chow says the firm uses a different methodology to ensure that margins are achieved and associates are retained. 'All our partners are working partners,' he explains. 'We don't have a policy of rainmaking partners and we are very hands-on on the transaction. The complaints from associates in other firms is that they don't know what to do and there is a lot of wasted time. We provide close guidance to associates and give them the right directions at the beginning,' Chow claims to achieve more than ten chargeable hours per day.

Taking on the challenge

Taking on this environment will be tough for the new cohort of ambitious US firms. Having offered such grand remuneration packages to these new partners, the firms will have to work incredibly hard to see a return on their investment.

One senior figure at an independent Hong Kong firm says that the big difference between the huge wealth that lawyers accumulated in the 1980s was that 'they got rich on the work that they had done'. He explains that today's partners are being remunerated on the assumption that they will achieve certain targets and with the market currently depressed due to the Eurozone saga, this could lead to internal crises when partners receive more than they deliver.

Needless to say, Kirkland's Eich is adamant that the firm's sizeable investment is not such a risk. He claims that since the new team was



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put in place in October, the firm is already witnessing results. 'We have been retained by nearly all the bulge-bracket banks in the last three weeks,' he states. 'Before we did this, I spent two weeks, eight hours a day, talking to dozens and dozens of bankers, and polling them on the many facets of every capital markets practice in Hong Kong.' Eich says that when it comes to Hong Kong listings, he is especially confident: 'If you have the dominant players like Dominic Tsun and Li-Chien Wong, where else are people going to go?'

Eich's confidence is not without foundation. Tsun is certainly regarded as a market leader in Hong Kong IPOs and furthermore, it has assembled a more than credible US securities practice through the hire of David Zhang, John Otoshi and Benjamin Su from Latham & Watkins. The three have led more than 35 US

IPOs by Chinese companies since 2003.

This is where the fast growing US firms have a distinct advantage.

As one senior partner at an international firm in Hong Kong comments: 'I think the English firms are going to lose market share. What these US firms have is America. The English firms just can't be classed as global if they don't have a credible US capability. The difference is that the US firms can offer two things. They are not English and the English colonial thing doesn't work in this town, and they can offer US capital markets. Chinese corporates get credibility from listing in the US and listing in Hong Kong, but can you name a Chinese state-owned enterprise that has listed in the UK?'

That said, there have been a growing number of 'going private' transactions over the last couple of years thanks to the growing weight of regulation and disclosure requirements imposed in America, a burden that many Chinese companies that are listed in the US have found hard to live with.

This may also have a marked effect on the willingness of Chinese corporates to list in the US. Last year, Simpson Thacher & Bartlett advised on 18 US IPOs by Chinese issuers, but just three in 2011.

With the slow trickle of Hong Kong IPOs – after the torrent of the first six months of 2011 – competition among the growing number of capital markets focused firms is going to be even more heated. Increased competition inevitably leads to lower charge-out rates and lower charge-out rates don't tend to mollify the anxieties of profit-conscious firms that have attracted big names with lots of money.

One long-serving Hong Kong partner at an international firm says that the writing could be on the wall: 'US firms are obsessed with China listings in the region and in the US. It is a one trick story and they are in the middle of the trick. Most of these deals are done essentially for free and what they are looking for is the follow-up work, but then the client just puts that out to tender like everything else.' It could be an expensive trick. ☒

Chris Crowe is a freelance journalist and writer. He can be contacted at chris@crowemedia.co.uk.



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Brazil Supreme Court

Who watches the watchers?

Eleana Calmon, a 67-year-old career judge, is shaking up Brazil's judiciary, speaking of 'the bandits behind the robes'. She's co-opted the assistance of everyone from Federal Police to the Finance Ministry's money laundering unit in her efforts to unveil them.

BRIAN NICHOLSON

Quis custodiet ipsos custodes? The age-old dilemma arises once again as Brazil's judiciary agonizes over a small but potentially significant step into the modern world. At the centre of the storm is an unlikely figurehead, Eliana Calmon, a 67-year-old career judge from the northeast state of Bahia who was largely unknown outside of her profession – until, that is, she told reporters in September that the Brazilian judiciary 'today has very serious problems of infiltration by bandits hidden behind the robes.'

Even though Calmon stressed that the vast majority of Brazilian judges are honest and dedicated, she propelled what might otherwise have remained a rather arcane question of legal jurisdiction into an overnight national headline, with finely phrased insults flying back and forth between lawyers and judges. Being Brazil, it soon involved pension privileges, tropical beaches and, inevitably, football.

Calmon is 'corregedora nacional', which could translate roughly as 'inspector-general of the judiciary'. The inspectorate is part of the National Council of Justice (CNJ), a body that was created via constitutional amendment in 2004 with a mandate to help modernize and moralize the judicial system. In its first half-dozen years the CNJ made occasional waves by clamping down on judicial nepotism, for example, while the inspectorate beavered away to ramp up the pressure on errant judges. But it made little real headway in its responsibility to 'conduct investigations, inspections and make corrections whenever serious or relevant facts so justify.'

At issue is jealously guarded court autonomy – or a longstanding tradition of protecting your

colleagues, depending on whose interpretation you choose.

As a federal republic with 26 states and the federal district, Brazil has a judicial system largely inherited from its Portuguese colonial rulers, then shaped by a Mussolini-inspired corporatist wave in the 1930s. There are five separate branches of justice – federal, state, military, labour and electoral – with a total of 91 courts, including the Supreme Court that handles constitutional issues. Until Congress saw fit to create the CNJ these were all self-policing, each with their own independent inspectorates to investigate – or not – allegations of corruption or other malfeasance within their ranks. These regional inspectorates still exist; the dispute concerns the circumstances under which the national inspectorate can step in. Calmon and most of her CNJ colleagues say they have a constitutional mandate to intervene whenever they see the need; many lower-level judges argue that local processes must first run their full course. And there's the rub.

Too long a shelf life

Calmon complained that her inspection visits to state courts have thrown up numerous problems, in particular with cases involving senior judges. She described 'judges not doing their duty; (disciplinary) case files at a standstill, sitting on shelves or in cupboards because nobody wants to move things forward. We have found many bad situations that the (local) inspectorates are incapable of handling, often because of misplaced staff loyalties or because the senior judges don't back up the inspectorate.' Not all regional courts were

equally bad, she said; São Paulo for example had a better investigative record but still suffered from a protective esprit de corps. Calmon also called for tougher penalties. Currently, the maximum is compulsory retirement, with pension, even for judges found guilty of selling verdicts, or diverting public funds to the local Masonic Lodge, to mention but a couple of recent cases.

The Brazilian Judges' Association (AMB) pooh-poohs all this. Association president Nelson Calandra said that isolated cases of errant judges are dealt with adequately by the local inspectorates: 'We have been doing this for a long time, and that's why we have a First World judiciary.'

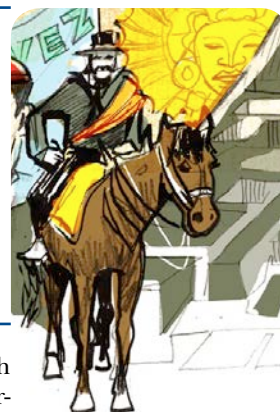
The AMB has fought the CNJ tooth and nail since it was created, lodging multiple allegations of unconstitutionality

Paying to play?

The Brazilian Bar Association (OAB) is fully behind Calmon, and she received a lengthy standing ovation at the association's 2011 National Conference. The OAB was a leading advocate for creating external control of the regional inspectorates, and OAB President Ophir Cavalcante said that if the Supreme Court rules against the CNJ or its key attributions this would represent 'a serious setback, because the CNJ has opened up the judiciary and given it transparency... This unconstitutionality motion aims to make it a black box again.'

Cavalcante rejected suggestions that allegedly errant judges were adequately investigated before the CNJ was created: 'Whenever they (regional inspectorates) received accusations against members of the judiciary, they simply shelved them, without investigating.'

'Calmon has incurred the wrath of many judges for her energetic, pro-active stance. With just a two-year term as inspector-general, she quickly sought help from federal police, the federal income tax service and the Finance Ministry's money laundering unit.'



with the Supreme Court. 'Once more, the national inspectorate casts doubt on the behaviour of Brazilian judges and usurps the competence of organs that are charged by the Constitution to investigate felonies,' Calandra said recently, after the CNJ revealed it was investigating 62 judges facing accusations of misconduct.

Perhaps even more than with her words, Calmon has incurred the wrath of many judges for her energetic, pro-active stance. With just a two-year term as inspector-general, she quickly sought help from federal police, the federal income tax service and the Finance Ministry's money laundering unit. These supply confidential information that is cross-referenced with the judges under investigation, their families and other persons who may have been used as fronts. Even though these investigations are secret, they have sparked heated arguments about the extent of the inspectorate's powers. The question will inevitably be decided by the Supreme Court, which shortly after Calmon's 'bandits' statement postponed hearing an AMB unconstitutionality motion, apparently hoping the dust might settle.

Brazil's 16,000 judges are unlikely to get much public support. They are often seen as over-privileged, earning up to US\$15,000 a month with two months' annual vacation and retiring on full pay. Major newspapers frequently criticise them for not always maintaining adequate distance from companies that could become plaintiffs or defendants in big-money cases. In November the National Association of Labour Court Judges sought over US\$100,000 of sponsorship from major public and private companies for a weekend sports tourney for 320 judges and their families at a swanky beach resort in the Northeast, while federal judges tried to negotiate a similar event at a mountain sports centre run by the Brazilian Soccer Confederation (CBF) near Rio. The problem, Calmon pointed out, is that CBF President Ricardo Teixeira faces a federal investigation for illegal enrichment and money laundering.

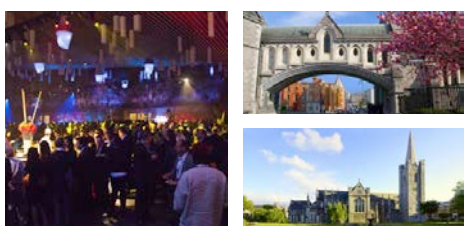
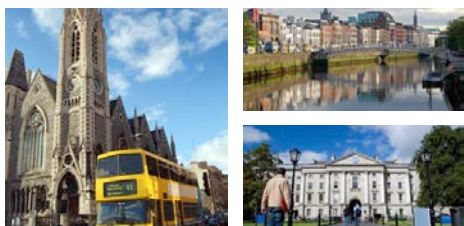
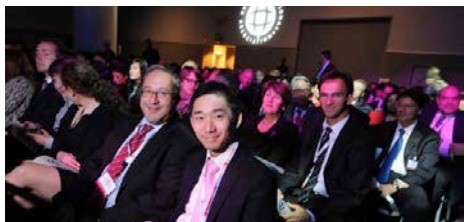
Ricardo Barretto, a founder-partner of the 50-lawyer BKBG practice in São Paulo, noted that democracy requires both the rule of law and due process, which in turn require transparency. 'The debate now started can help authorities make clear to society their determination to preserve these principles.' ☒

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



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