

IBA GLOBAL

February 2011

INSIGHT

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The quest for scarce resources in the 21st century

The new polar race: BP/Rosneft and competing claims to the region's resources

Risky business: The dramatically shifting terrain in the world of political risk

Interview: Mark Pieth, the world's leading authority on international corruption

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From the Editor



Welcome to the first edition of the IBA's flagship publication, *IBA Global Insight*. The magazine has been known as *International Bar News* since its first edition in September 1947. As such, it has a long and distinguished history, of which the IBA is extremely proud.

Changing the name of the Association's flagship publication is not being done lightly. However, it recognises that the Association has itself undergone a significant transformation over the years. When the magazine was conceived over sixty years ago, the IBA was made up of member bar associations. Its constituency is now far broader.

As the IBA has developed, so too has the magazine. It is, and remains, the means of representing and harnessing the insight of the membership. It cannot, however, claim to be a news publication (particularly in the age of the internet). The great strength of the publication is the in-depth coverage in feature articles that provide insight on global issues, hard to find elsewhere.

We feel that the title *IBA Global Insight* conveys these changes effectively. We hope you agree, and continue to enjoy the publication.

The first edition gives extensive coverage to one of the IBA's notable areas of strength: energy and natural resources. The deal between BP and Rosneft makes consideration of competing claims over the North Pole's resources particularly timely ('The new polar race', page 34). 'Lands of opportunity' (page 29) assesses the fast changing area of political risk, so pertinent in the field of natural resources. In 'The ultimate price of poverty', (page 14), senior reporter, Rebecca Lowe, has crafted an in-depth and thought provoking assessment of the death penalty. And, the IBA interview (page 21), provides the insight of the world's leading authority on corruption in international business, the OECD's Professor Mark Pieth.

James Lewis



COMING SOON

IBA Global Insight will soon be available as an e-magazine to read on your Apple iPad, iTouch or iPhone. As well as making the magazine accessible from anywhere, it will also carry extra features, videos and pictures that will not be published in the printed version. The app will be available through the appstore as a free download. As soon as it is released, all current IBA members and subscribers will be sent instructions, via e-mail, on how to find and install the app and start receiving *IBA Global Insight* wherever and whenever you like. When subsequent issues are released, you will automatically be reminded to download by the appstore. For further information, please contact editor@int-bar.org or visit the website at www.ibanet.org.



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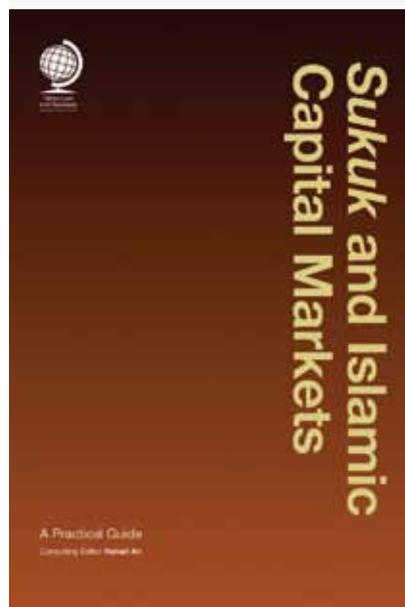
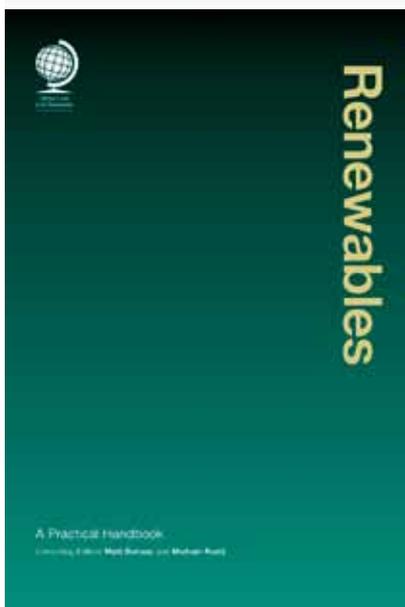
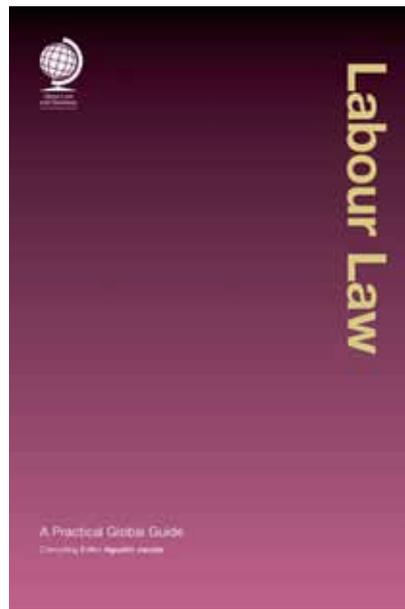
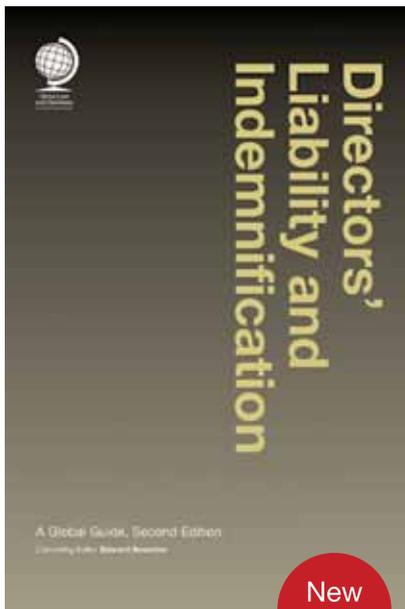
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Peace and wellbeing for the people through law

Dear IBA members and friends,

I am pleased to welcome you to a new year with the International Bar Association. My colleagues, the IBA leadership and I are enthusiastic about working closely together to advance the IBA's objectives: to create the global bar through which members, and the legal profession as a whole, may accomplish their own goals. We are determined to help all of you in servicing your clients and your societies through your professional abilities. We wish to assist you in your professional networking and development in the years to come.

The most important objective of our leadership should be to promote the rule of law throughout the world, especially in areas affected by conflict, or where the people's lives are affected by economic hardship. The poor, and those in less developed countries, have been hit hard by the financial crisis. I wish to call on lawyers throughout the world to help them.

Thus, the focus of the incoming leadership, in our two-year term, should be on raising the IBA's public profile as the defender of the rule of law, human rights and the wellbeing of the people. With this in mind, I wish to state below the President's priorities for 2011. I welcome any of your comments on them.

(1) The global profession: Great changes are taking place to the working environment of the legal profession. The most notable is the globalisation of legal services and the principles of law. The IBA, as the largest bar association in the world, is well-placed to cope with the changes effectively. Amongst other IBA initiatives, the Presidential Task Force on the Financial Crisis, pioneered by my great predecessor, should be reformulated and commissioned to assess the lawyer's responsibilities following the financial crisis.

(2) Dubai and the Middle East: For the first time in its history, the IBA has its annual conference in the Middle East this year. The IBA must focus on the promotion of the independent legal profession and the rule of law in the

region. This will, of course, be a reflection of the changes taking place in the post-financial crisis era. As legal services globalise, new and important areas are emerging. The Middle East is among these and, in turn, the contribution of the legal profession can be equally important for the people living in that region.

(3) Raising the IBA public profile: The IBA should strengthen its relationships with key international organisations, such as the UN, WTO, ICC and the World Bank. This will help to promote principles such as the rule of law, and to better achieve the IBA's missions outlined above.

(4) Growing groups within the legal profession: The influence of in-house lawyers has been growing dramatically in recent years. This applies to large corporations, governmental organisations, non-profit organisations, medical and educational institutions and so on. They are taking on increasing responsibility for ensuring that legal service providers act so as to benefit their own clients. The role of women and minority lawyers is growing, too. The IBA must enthusiastically embrace these members of the legal profession and take the issues for these groups as our agenda.

(5) Legal profession and bar associations: Bar associations and law societies are important constituents of the IBA. We should introduce more programmes relating to the issues commonly encountered by the world's bar associations and encourage more bar leaders to take part in IBA activities, including the Bar Leaders Conferences, Bar Issues Commission and IBA Council Meetings. Global regimes affecting cross-border legal practice should be another area of focus for the IBA.

I look forward to working with each of you to address these goals successfully in the coming year.

Akira Kawamura

News from the IBA



China expands Latin American oil reserves through Sinopec acquisition

China has expanded its Latin American oil reserves through the purchase of Occidental Petroleum's Argentine assets.

The US\$2.45 billion deal, by state-owned China Petroleum & Chemical Corporation – also known as Sinopec – is part of a drive by Asia's largest oil refiner to increase its overseas investments and meet growing domestic demand.

The acquisition came less than two weeks after China National Offshore Oil Corporation (CNOOC) and Argentine partner Bridas jointly bought a stake in Pan American Energy, Argentina's second-largest oil and gas producer, from BP for US\$7 billion.

In October, Sinopec clinched a US\$7.1 billion deal to buy 40 per cent of Spanish oil major Repsol's Brazilian assets. Sinopec, CNOOC and PetroChina also increased their energy investments in Venezuela to a planned US\$40 billion earlier this month following the signing of a series of agreements.

The push in Beijing to expand its overseas energy portfolio comes amid concerns over possible disruptions to the country's oil supply, with nearly half of its foreign crude coming from the Middle East. At the same time, Western oil companies are looking to sell increasingly costly oil fields to cash-rich Chinese companies, allowing them to redeploy capital in more profitable areas.

Speaking to the IBA, Norton Rose Group Chairman Stephen Parish said China was in a better position than many Western countries to buffer itself against economic difficulties in the region.

'The fact that China was not domestically impacted by the global economic crisis means that it has the ability and need to drive these resources deals in regions like South America. Given the economic pressures in Europe and the US, there is not the same demand.'

He added: 'The shift in economic power is definitely moving eastwards and all countries are looking to see what that shift means for their trade and economic ties. I believe we are going to see evolving and growing trade routes connecting China to markets other than Europe, US and Asia, which have been predominant to date.'

Read the full story and other international legal and business coverage here: tinyurl.com/GlobalInsightnews.

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IBA WTO Working Group addresses global regulation of legal profession

There is currently no centralised database or way in which a lawyer planning to practice in a foreign jurisdiction can determine whether a particular jurisdiction has adopted a full or limited licensing approach, or where the relevant jurisdiction's rules can be located. Through the considerable expertise of IBA bar

leaders, it is hoped this information gap can be narrowed. To this end the IBA's WTO Working Group has prepared a survey to obtain the information needed.

The goal of this survey is to provide a report on the current status of international legal practice and to create an accessible database that will allow lawyers to find the relevant rules in a variety of jurisdictions.

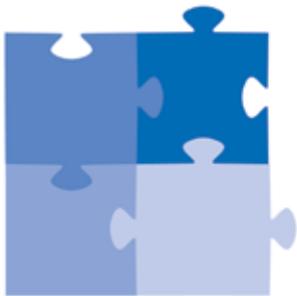
As a number of IBA resolutions have recognised, the demand for global cross-border legal services has increased. The latest report from the World Trade Organization shows that global trade in legal services has grown significantly over recent years to a value of billions of US dollars. Although the current economic crisis has adversely affected the volume of legal work, many IBA members are involved in providing cross-border legal services, either on a 'fly-in-fly-out' basis or through offices in more than one jurisdiction.

The IBA has played a leading role in providing guidance for the responsible delivery of global cross-border legal

services. Over a decade ago, in 1998, the IBA adopted a resolution that endorsed the 'Statement of General Principles for the Establishment and Regulation of Foreign Lawyers'. This resolution set out principles that countries should use, regardless of whether they had adopted a full licensing system for foreign lawyers or a limited licensing system (sometimes referred to as a foreign legal consultant scheme). In 2001, the IBA provided guidance about matters that were appropriate to consider with respect to lawyer recognition; this guidance is contained in the IBA's Standards and Criteria for Recognition of Qualifications of Lawyers 2001. In 2008, the IBA adopted a resolution that built on its earlier work and included additional principles that apply to liberalisation.

To access the survey online, go to www.surveymonkey.com/s/ibalegalservicessurvey.

If you require clarification on the content or language of the survey please contact Max Petro by e-mailing max.petro@minterellison.com.



ANTI-CORRUPTION STRATEGY FOR THE LEGAL PROFESSION

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Anti-Corruption training sessions

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 training sessions were held in November in Latin America. The first took place in Lima, Peru on 16 November, the second in Bogota, Colombia on 18 November. Fifty law firms attended in total.

These sessions, featuring international speakers from the OECD Secretariat, Mayer Brown and KPMG

LLP as well as local experts, followed the successful training sessions held in Santiago, Buenos Aires and Mexico City earlier this year. The sessions 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 involved for incurring 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.

With the initial pilot programme of Latin American countries now

complete, the IBA and its partners are looking forward to going global in 2011. Training sessions are being planned for Sao Paulo (Brazil), Caracas (Venezuela), Seoul (South Korea), Tokyo (Japan), Kuala Lumpur (Malaysia), Jakarta (Indonesia), Warsaw (Poland), Kiev (Ukraine), Istanbul (Turkey) and Tel Aviv (Israel).

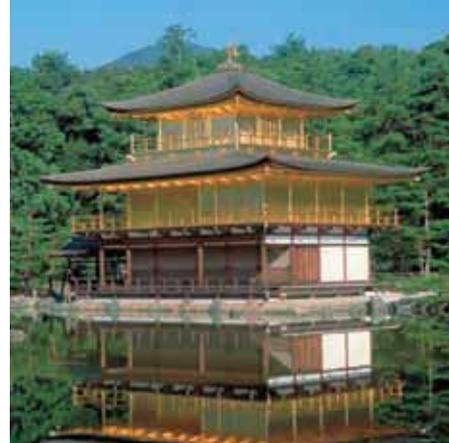
If you would like to participate in this major global initiative, please contact Gonzalo Guzman, Senior Staff Lawyer, IBA Legal Projects Team, at gonzalo.guzman@int-bar.org.

For more details, visit the Anti-Corruption Strategy website: www.anticorruptionstrategy.org.



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April 23, 2011 **Gala Dinner**

April 25, 2011 **Post-Conference Golf**



Farmida Bi: IBA profile

Norton Rose partner and Islamic finance specialist Farmida Bi is one of the most powerful British Muslim women in the country, according to the Equalities and Human Rights Commission. In January, she spoke to the IBA's Rebecca Lowe about the challenges she faced in her journey from young Pakistani immigrant to leading corporate lawyer and community leader.

A second-generation Muslim from Pakistan, Farmida Bi was expected to marry a first cousin and devote the rest of her life to her children and husband. Instead, she left home for Cambridge University and entered the world of commercial law.

In doing so, she overcame the vicious racism of 1970s Britain, distanced herself from her family and culture, and created a deep rift between her mother and aunt that never healed. She did all this, she says, because she was a 'peculiar child'.

'I think I got a lot of my values and my cultural references from literature rather than from the people around

me,' she adds. 'And I knew pretty early on that I wanted a different sort of life to the one that was being clearly mapped out for me.'

'I was determined I was going to have a different sort of life.'

The ease of Bi's integration stems partly, perhaps, from her lack of religious conviction and 'progressive values'. For her, being Muslim was simply one facet of a complicated identity, far less important than being either British or Pakistani. After the events of 9/11, however, the climate changed. 'People like George Bush' established an agenda which was asking her to walk away from her Islamic heritage, something she felt unwilling to do.

Her reaction to the 7/7 bombings in London was more visceral and intense, she says. This attack was closer to home, geographically and culturally. The people came from Pakistani backgrounds, grew up in families like hers, shared parts of her culture and identity. Amid the anger and confusion, Bi decided she needed to take a stand – and created the organisation Progressive British Muslims (PBM).

'I was really worried by the fact that after 7 July, the only sort of Muslims we saw in the media tended to be men with beards, who were not at all reflective of British Muslims that I knew – people like me, for whom their Muslim identity was important, but it wasn't all that they were. There seemed to be nobody speaking out for people like that.'

Read the full article and watch the filmed interview here: tinyurl.com/GlobalInsightnews



SEERIL launches new scholarship fund

The IBA Energy, Environment, Natural Resources and Infrastructure Law Section (SEERIL) Council is delighted to announce the creation of a new scholarship fund for advanced studies or research in the fields of energy and natural resources law. SEERIL has always been a strong supporter of academic advancement in the areas of law covered by the Section's committees. It remains unique among IBA sections in having an Academic Advisory Group, made up of some of the world's top academics, closely integrated with the Section's activities.

The new scholarships and research grants, up to a total of £18,000 a year, will be open to students at any institution where at least one member of the faculty is a SEERIL member.

Full details and rules relating to qualification can be found at tinyurl.com/energy-law-studies-2011.

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IBA Law Firm Management Committee International Mentor Programme update

In April 2009, the Law Firm Management Committee of the IBA launched its International Management Mentor Programme and website, www.lawfirmmentors.org. Since then the site has had almost 6,000 visits and well over 8,000 page views from countries ranging from Bangladesh to Italy; and Malaysia to the Ukraine. Registrations continue to

increase with the majority of visits coming from direct traffic – straight to this website address rather than via search engines or referring sites.

The programme was designed to provide small and medium sized law firms, especially those in developing countries, with the opportunity to access advice on various management issues in their practice from mentors who are experienced law firm managers, such as former managing partners and others with experience in law firm management. Mentors can volunteer online and provide their advice without compensation, other than the reimbursement of expenses.

Stephen Denyer, Chair of the Law Firm Management Committee, stated: 'With more than 3,850 members, our Committee constitutes the premier international forum for developing and sharing best practice in law firm management. Our unparalleled size and diverse membership ensures that we are uniquely well placed to provide practical assistance to those around the world who would like to benefit from the knowledge of others rather than having to re-invent the wheel themselves. Those amongst our members who volunteer

to mentor colleagues also experience the satisfaction of developing their own skills and broadening their horizons. We are very fortunate to have been able to develop such a well-regarded scheme.'

Robert Vineberg, Programme Coordinator and former Committee Chair, added: 'Two key advantages of the programme are its flexibility and low cost. We expect that most of the mentoring will take place by telephone or e-mail. The only costs are out-of-pocket expenses. This makes the programme accessible to all, whether you are a senior partner at a small firm based in Berlin or you run your own law firm in Nepal.'

Both the Law Firm Management Committee and the IBA hope that this service will continue to be a valuable resource to IBA members looking for practical advice and assistance about management issues. If you have any questions or comments with respect to the programme, please contact Robert Vineberg, Programme Coordinator at rvineberg@dwvp.com.

To learn more about the programme and to volunteer as a law firm management mentor, visit www.lawfirmmentors.org.

News from the IBAHRI



Pressing need for strong rule of law in Sudan following split

The secession of southern Sudan following 21 years of civil war seemed on the verge of becoming a reality as IBA Global Insight went to press in January.

The referendum on the split was part of a 2005 peace deal between the Christian south and Muslim north, prompted by decades of religious and ethnic conflicts in which more than 1.5 million people were killed. Final results are expected within weeks, but preliminary reports show more than 98 per cent of voters support independence.

Southern Sudan would become Africa's 54th nation on 9 July 2011 should the vote favour separation, as expected. However, it will also become one of the poorest countries on the continent. It is hoped peace will bring greater economic prosperity, but there remains a pressing need for infrastructure redevelopment and a strong rule of law.

Wrangling over precious oil reserves, it is feared, may escalate following the split, exacerbating clashes in the disputed border region of Abyei, as well as the ongoing conflict in Darfur. Sharia laws also look likely to be strengthened in the north, following pronouncements from President Omar al-Bashir that he intends to change the Constitution and clamp down on 'cultural and ethnic diversity' – one of the main reasons the south called for independence.

To assist in the Darfur peace-making process, the IBAHRI, in partnership with the Human Rights and Social Justice Research Centre at London Metropolitan University, is planning training sessions

on human rights and international criminal law for members of the Darfur Bar Association.

The IBAHRI has also intervened in the arrest and detention of Abdelrahman Mohammed Al Gasim, a human rights activist and the legal assistance coordinator of the Darfur Bar Association. Al Gasim was arrested with several other people on 30 October 2010 in Khartoum and has been detained since. The reasons for his arrest and detention have not been disclosed.

In a statement, IBAHRI Co-Chair Martin Šolc said: 'Lawyers need to be able to exercise their profession without fear of arrest or harassment.'

'The Sudanese authorities should come forward on the reasons for the arrest and release Abdelrahman Mohammed Al Gasim if there is no legal justification for keeping him in detention.'

For further coverage of the Sudan referendum and its implications for Africa see Karen MacGregor's Letter from Africa on pages 38–39.



Haiti: one year on from the earthquake

Memorial masses have been held across Haiti over the past month to commemorate the moment a year ago that the earth shook and razed Port-au-Prince to the ground.

Groups dressed in white, Haiti's traditional colour of mourning, have been praying for the estimated 230,000 victims who died in the earthquake, as well as for survivors faced with the agonising challenge of rebuilding the city.

Now, 12 months on, many of the 1.5 million displaced residents are still without homes or jobs. Despite billions of dollars of aid pledged by foreign governments and aid agencies, tarpaulin 'homes' litter the city and only a tiny proportion of the rubble has been cleared.

Yet one of the priorities for the country must be reconstructing an effective rule of law – a concern made all the more pressing by the fact that 4,500 prisoners escaped from Haiti's National Penitentiary when the earthquake hit, including many of the gang bosses who reduced the country to anarchy between 2004 and 2007.

To assist reconstruction efforts, the International Legal Assistance Consortium (ILAC) has spent the past two years developing a nationwide legal aid programme, the SYNAL (Système Nationale d'Assistance Légale). The

project now employs around 200 Haitian lawyers in 12 offices around the country, and since 2008 has handled around 8,000 cases.

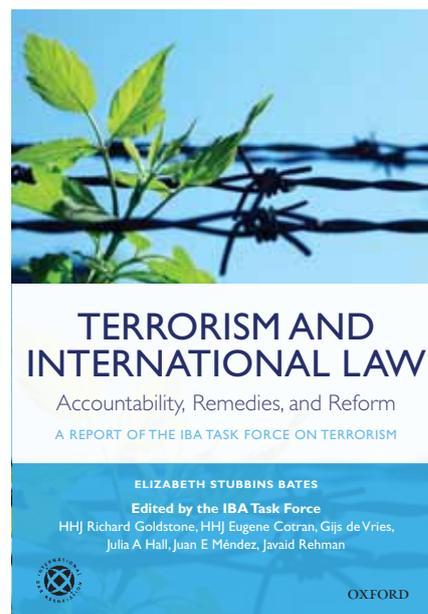
In addition to ILAC's efforts, the IBA launched an appeal to its members following the quake and raised \$65,000 to fund a law library. Together with the Bar Council of England and Wales and the Raoul Wallenberg Institute, the IBA has now formed a working group to discuss ways to put this project into action.

It is hoped the library will form part of a larger Public Law Institute, spearheaded by presidential legal advisor Me. Rene Magloire, which will focus on rebuilding the rule of law and strengthening public administration. The institute would provide specialised training for legal professionals and establish a platform for the exchange of ideas to help solve public and private sector problems.

Anyone wishing to donate money to the law library via the IBA Human Rights Institute Charitable Trust can do so by credit card or bank transfer sent to: IBA HRI Charitable Trust, BIC/Swift Code: NWBKGB2L, IBAN: GB05NWBK 56000320712146.

Bank drafts or cheques should be sent to Haiti Appeal, Accounts Dept, International Bar Association, 1 Stephen Street, London W1T 1AT, United Kingdom.

Anyone wishing to make a financial donation via another method or receive further information on the appeal, contact haitiappeal@int-bar.org.



Terrorism and International Law

The International Bar Association has published an authoritative study of terrorism edited by a group of world-famous jurists. *Terrorism and International Law: Accountability, Remedies and Reform*, by the IBAHRI Task Force on Terrorism, gives a global overview of counter-terrorism measures and offers recommendations for reform.

The book, authored by Elizabeth Stubbins Bates, Visiting Fellow at the Law Department of the London School of Economics and Political Science, analyses developments in international law and governments' responses to terrorist attacks, including the invasion of Iraq, Guantanamo Bay, extraordinary rendition, the increase of police surveillance powers and restrictions on free speech.

Alongside an examination of case law and state practice from every continent, the Task Force, led by Justice Richard Goldstone, studies the prosecution of terrorist crimes, reform in counter-terrorism, victims' rights to remedy and reparations, and the relationship between international human rights and humanitarian law.

Terrorism and International Law: Accountability, Remedies and Reform will be available for purchase later this month by filling in a form on the IBA website: www.ibanet.org. The official launch will take place in March.



Enhancing efficiency and effectiveness of ICC proceedings

Judicial proceedings of the International Criminal Court came under the spotlight at the end of 2010 when the IBA was granted an exclusive interview with President Sang-Hyun Song.

Speaking at The Hague on 30 November, the President discussed the challenges currently facing the Court, including state non co-operation, complementarity and the appointment of judges.

The interview preceded a two-hour roundtable discussion exploring the responsibilities of states and the ICC, chaired by Open Justice Society Institute founder James Goldston.



Accompanying Goldston on the panel were ICC Second Vice-President Hans-Peter Kaul, Ambassador of Ireland and ASP Facilitator on Co-operation Mary Whelan, University of Amsterdam Professor Göran Sluiter and ICC International Co-operation Adviser from the Office of the Prosecutor Olivia Swaak-Goldman.

When asked how to speed up proceedings of the Court, the President stressed that 'a great deal' was being done. 'My fellow judges are very conscious that the expeditiousness of proceedings is a priority,' he said in the interview. 'I plan to initiate lessons

learned after the completion of the first trial to identify where the procedure could be sped more.'

During his tenure as President, Judge Song said he had four objectives: 'Internally, as a young organisation, we have to establish ourselves. Judicially, we are fully functioning, but administratively we have room for improvement.

'Externally, I would like to urge states to maintain the Kampala momentum to develop the Rome Statute system further and expand its reach by strengthening its efforts to promote global ratification.

'I also want to improve not only state co-operation but develop mechanisms to deal with instances of non co-operation.

'Finally, I'd like to develop the national capacity of states to deal with the Rome Statute crimes in their own jurisdictions.'

In January, the IBA released its latest ICC monitoring report as part of the IBA ICC Monitoring and Outreach Programme. Entitled Enhancing Efficiency and Effectiveness of ICC Proceedings, the report focuses primarily on judicial and policy developments at the Court from July to November 2010 – a period when the Court came under scrutiny following the second suspension of the trial against Congolese citizen Thomas Lubanga

Dyilo, prompting criticism about the slow pace of proceedings.

The report encourages the establishment of a study group to review the Court's level of efficiency and strengthen its institutional framework. Among other issues, it examines the impact of victims' participation on the efficient conduct of judicial proceedings, the absence of subpoena powers of the ICC and the implications of the use of ad litem judges.

Watch the full interview with President Sang-Hyun Song and ICC roundtable discussion here: tinyurl.com/ICCfilm

Human rights and parliamentarians

A series of parliamentary training sessions have been launched by the IBAHRI to support the development of human rights, democracy and the rule of law across the world.



Courses have taken place in Macedonia, Uganda, Lebanon, Ukraine, Georgia and Mozambique, in partnership with the Westminster Consortium for Parliaments and Democracy (TWC), a group of organisations established to help strengthen developing parliaments. The IBAHRI has now embarked on its second round of training in each country.

The sessions cover the role of parliament in upholding the rule of law and human rights obligations, as well as examining the tools available for each parliament to incorporate human rights oversight and scrutiny into the legislative processes.

The training guidelines are currently being compiled in a handbook on the rule of law and human rights for parliamentarians and parliamentary staff, incorporating case studies from the United Kingdom and each of the TWC countries.

IBA Human Rights Award 2011

The IBA Human Rights Award recognises personal endeavour in the field of law that makes an outstanding contribution to the promotion, protection and advancement of human rights.

The IBA is currently seeking nominations for the 2011 award, which is open to both IBA members and non-members. Nominations close on 27 March 2011 and can be made via the IBA website.

For more information email hri@int-bar.org.

IN MEMORIAM



Claude Thomson, *vir bonus*

*Vir bonus, disceptandi peritus,
qui non solum scientia et omnia facultate dicendi perfectus,
sed moribus.
Quintilian, Institutiones Oratoriae (definition of a lawyer)*

In a recent book entitled *Phares* (2010), the French historian and writer Jacques Attali stresses that in the past, only a few men and women have emerged leaving a durable track in history and giving a sense to the development of the world by their philosophy, art, science or action. He relates the life of some thirty celebrities from Confucius to Hampate Ba. Such men and women have served as lighthouses in humanity, shining light to the whole universe. Attali ends: ‘notre monde a besoin de phares’.

Claude Thomson was one of these *phares*, unquestionably in the legal world, but also in the wider human society.

Claude was a prominent lawyer and a prominent arbitrator. To be a lawyer is very important. The great French jurist Georges Ripert used to say of himself ‘*ni philosophe, ni technicien, seulement juriste, qui est déjà beaucoup*’. Claude has been an undisputable leader of the world legal profession. He achieved the highest positions that any lawyer can dream about. He was President of the Canadian Bar Association and Secretary and President of the International Bar Association and, with his faith and efforts, acquired the highest level of respect by the world legal and arbitration communities.

I have heard by phone or read some of the wonderful valedictory things about Claude from his many friends: ‘Claude was a good listener, flexible and strong, a quiet and clear leader of the IBA’ (Steve Pfeiffer); ‘very transparent, honest, consensus builder, who constructively contributed to the harmonious success of the IBA’ (Francis Neate); ‘he was a most sincere and thoughtful man ... always firm

and good humoured ... No words can adequately describe his pleasing demeanour and positive thinking” (Ross Harper); ‘he epitomized all that we seek in life: leader of the bar, president of country and international bar associations, admired for his devout religious faith, a loving wife, five children and many grandchildren. We recall his skill when fly fishing! Also, a fortunate few benefited from Claude’s exceptional culinary skill’ (Tom Forbes).

The principles that guided his professional life were exemplary. When asked in an interview conducted by Jeffrey Leon what advice would he give to young counsel starting out, Claude did not hesitate before replying that it was ‘integrity’.

‘The single most important quality of a top advocate is a well-earned reputation for integrity. The reputation will help to attract clients, allow one to engage in productive and efficient dealings with other members of the profession, and perhaps most importantly, will help to pry open the sense of justice in the most closed minded judge.’

Claude was moulded according to the qualities that an American Dean (Anthony Kronman The lost lawyer) enshrined as the ideals or the ‘lawyer-statesman’ who not only seek to promote the interests of his clients within a framework of public norms whose soundness is taken for granted, but who is ‘also a public-spirited reformer who monitors this framework itself and leads others in campaigning for those repairs that are required to keep it responsible and fair’.

But above all, Claude was a good man. Quintilian, the Roman jurist of

the 2nd century, started his definition of a lawyer stating that a lawyer is predominantly a *vir bonus*, a good man. All the condolence messages I have seen mention without exception the outstanding virtue of Claude of being a good person. This is the greatest eulogy that can be made of a lawyer.

From a meeting we had in Barcelona, I noted that Claude was a firm believer in God, in family values and in justice. In a world where injustice, war and poverty ride comfortably, and in a changing profession, uncertain and vacillating about its future, we are desperately in need of beacons who think and act as Claude did, with moral advantage, high aspirations and acting with humility, faith, confidence, speaking the truth and with authority based on the respect for others.

Claude was also a good fisherman. I do not know if Christ selected his first followers from fishermen for their virtues of simplicity, patience, honest competition and fairness. Or perhaps such followers achieved and treasured such virtues because of being chosen.

*The first men that our Saviour dear
Did choose to wait upon him here,
Blest fishermen were; and fish the last
Food was, that he on earth did taste:
I therefore strive to follow those
Whom he to follow him hath chose*

(William Basse, 1653, *The Angler’s Song*)

We need lighthouses, such as Claude, that radiate intense and comforting light for the legal profession, especially its younger generations, to find the right way and bring a steady hand on the rudder to a haven of peace and justice in the world.

Ramon Mullerat OBE

The ultimate price of poverty

Hundreds, possibly thousands, of people are put to death across the world every year. The majority of these are poor. IBA Global Insight assesses the socio-economic arguments for death penalty abolition.

REBECCA LOWE

‘There are no millionaires on death row’ goes the mantra, oft-repeated among death penalty abolitionists. It sounds glib, yet across the world, from the sharia courts of Iran to the jury trials of the United States, evidence suggests the poorest are indeed paying the highest price.

Death, like life, it seems, is essentially unfair. Even hardened pragmatists, who may not flinch at depriving a brutal murderer of his life and see no conflict between human rights and state-sanctioned death, often concede that the law surrounding capital punishment is both flawed and ineffective.

In many countries the problem is not simple prejudice – though this too plays a part – but stems from the economics of the judicial system, in which the poor are reliant on the limited coffers of state aid for representation, while the rich retain the top talent for themselves.

Elsewhere, where due process is weak, those without the means to pay bribes or blood money find themselves equally powerless. It is often in these less democratic countries that the harshest drug trafficking penalties are applied, in which stigmatised young mules are sacrificed and the kingpins go free.

The US and due process

Clive Stafford Smith, founder of human rights NGO Reprieve, is clear on the matter where the US is concerned. ‘The death penalty is not for the worst criminal,’ he says, quoting fellow attorney Stephen Bright. ‘It’s for the person with the worst lawyer.’

Stafford Smith, who has saved more than 300 people from death row and last year won the IBA Human Rights Award, claims ‘it’s not that hard to persuade 12 jurors not to kill somebody’.

‘But you’ve got to do your work,’ he stresses. ‘You’ve got to be prepared and you’ve got to

know what you’re about. And, unfortunately, when you look at lawyers, the most effective, high-powered lawyers represent huge corporations. The person whose life is at stake is killed.’

Stafford Smith is far from alone in this opinion. When prompted, US criminal defence attorneys working on death row will eagerly recount tales of flawed and feckless capital trials – horror stories of innocence ignored and justice violated. Their view is skewed, of course, by the nature of their position, and often fails to reflect the many cases where the rule of law is carefully and conscientiously applied. But, considering what is at stake, many are concerned that any such cases exist at all.

One case involves Linda Carty, currently on death row in Texas for the 2001 murder of Joana Rodriguez. After what was described by Reprieve as ‘a catastrophically flawed trial’, in which an ‘utterly implausible’ defence was mounted by a lawyer with 20 death row convictions to his name – the most of any attorney in the US – the British grandmother was sentenced to death in February 2002, and is now reliant on the Pardons Board and Governor of Texas for clemency.

Indeed, the issue of capital punishment has long been under scrutiny in Texas, which was responsible for 41 of 98 nationwide executions in 2009–10. In 2002, murder defendant Calvin Jerold Burdine, whose attorney slept through parts of the trial, gained a last-minute reprieve from the Supreme Court after surviving six execution dates and losing three federal appeals. More recently, strong evidence has emerged that Cameron Todd Willingham, executed in 2004 for an arson attack that killed his three

children, may have been innocent after a series of experts attested that forensic data presented at trial had no scientific basis.

Death penalty supporter Josh Marquis, District Attorney for Astoria, Oregon, who is on the Board of Directors of the National District

often prevented from doing a good job by lack of funds.

‘The ABA has outlined the goals to shoot for, but very few states are willing to do that. To do it you would have to pay lawyers a lot more to get the requisite experience, and you’d need

‘The death penalty is not for the worst criminal, it’s for the person with the worst lawyer.’

Clive Stafford Smith

Founder of human rights NGO Reprive

Attorney Association and is the US delegate to the International Association of Prosecutors, admits that ‘there have been instances of innocent people on death row, no question about it’, but says such instances are ‘rare’. He also points out there is no conclusive evidence anyone innocent has been executed, stressing the rigorous 15–25-year appeals process designed to catch mistakes.

‘Though the conventional wisdom says the defence is threadbare, the lawyers don’t know what they are doing and the prosecution is well funded, that’s just not true,’ he says. ‘It probably was 20 years ago, but not anymore. I’ve just finished a case where the state has spent almost US\$3m on the defence, which is not tremendously unusual. I am regularly outspent ten or 20 to one.’

Marquis admits, however, that his expertise is limited to Oregon, ‘which probably spends more money than any other state’, and that ‘some states still pay a lot less than others’. Richard Dieter, Executive Director of the Death Penalty Information Center (DPIC), a non-profit, anti-death penalty website, agrees. Though the quality of representation has improved significantly in the past ten years, he says, stringent standards proposed by the American Bar Association (ABA) are yet to be adopted by the majority of the 35 retentionist states and even competent lawyers are

a team of four or five specialists for each case. These things are not always done when a public defender has ten other cases going on at the same time.’

States with relatively well-funded public defender programmes, such as Oregon and California, experience their own set of problems. Because of the high standards set for counsel, demand far outweighs supply; a recent estimate suggests that more than 100 of the 700 death row inmates in California are currently without counsel for their direct appeal.

‘If there is a problem with capital litigation, it is not during the trial itself, it is during the appeals process,’ says death penalty supporter Michael Ramos, District Attorney for San Bernardino County and President of the California District Attorneys’ Association. ‘The delay in appeals is very frustrating for everyone involved. We need to have additional resources to increase numbers of appellate attorneys, not only for defendants but for the state attorney general office, so they can handle the volume of appeals.’

Despite these problems, Marquis and Ramos are adamant that capital punishment is fair, pointing out that only one in 800 murderers receive the penalty, so it is reserved for the very worst offenders. For Ramos, the justification is simple – ‘an eye for an eye’, he feels, ‘is justice for taking someone’s life’ due to the irreparable trauma inflicted on victims’ families. For Marquis, it is a ‘cost–benefit analysis’, the prospect of due process error counterbalanced by the potential lives of innocent victims saved. Capital punishment, he believes, acts both as a general and specific deterrent, the latter meaning that the particular person convicted will never have the opportunity to kill again – as happened in the cases of Kenneth McDuff, Robert Massie and Richard Marquette.

‘If you have a system of capital punishment, there are going to be errors,’ he says. ‘But it’s a cost–benefit analysis, and it’s something we do in our societies all the time. Pharmaceutical companies are allowed to produce drugs that kill a small percentage of people. We don’t ban prescription medicines, we try to do better.’

Since 1973, the year after the death penalty was briefly ruled unconstitutional in the US, 138 people have been released from death row after evidence emerged of their ‘innocence’, according to the DPIC – though Marquis claims only five of these were exonerated by DNA. Overall, between 1976 – when the death penalty was revived – and 1995, around two in three death row inmates had their sentences overturned on appeal, according to a study by Columbia University. Proponents of the punishment cite this as evidence of the system working effectively and catching mistakes before it is too late. Others point out the trauma inflicted on both defendants and victims during the decades-long wait for their appeals to be heard.

Indeed, having a conviction – rather than sentence – overturned is extremely difficult, Dieter says. Proving the original evidence was a little shaky tends not to be enough for most appellate courts; you need something non-subjective. ‘If there is just a little doubt, they have no problem with going ahead – especially in Texas.’

Responding to Dieter’s comment, Rob Kepple, the Executive Director of the Texas Justice District and Country Attorneys Association, said: ‘After all the legal appeals are done, shouldn’t it be a challenge to get a conviction thrown out just because 15 years later an original witness now says he lied at the trial, and that another guy did it – who is usually dead?’

‘In our country, the state proves cases beyond a reasonable doubt, so by definition all lawyers agree that prosecutors will proceed if there is “just a little bit of doubt.” Remember, there are no perfect trials, only fair ones. There is no such thing as beyond all doubt.’

Kepple, Ramos and Marquis are far from alone in their opinions. In an October 2010 Gallup poll of 1,025 adults, 64 per cent of respondents said they supported the penalty compared to 29 per cent who said they opposed it. However, support dropped to 49 per cent when life without the possibility of parole was given as an option, and death penalty opponents are confident support among legislators is waning. Indeed, the number of executions across the country dropped from 98 in 1999 to 46 in 2010, and Illinois voted in January to become the 16th abolitionist state.

Amnesty International USA Chair Rick Halperin doesn’t mince his words where the death penalty is concerned: ‘Capital punishment is class warfare against the poor. It doesn’t approach anything associated with justice. It is about money, race and power.’ Halperin is avowedly on the left of the political spectrum, but such opinions are not the preserve of the liberal elite: in 2000, Illinois Governor George Ryan (Rep) commuted all death sentences to life imprisonment due to concern about the way the law was being applied, and in 1994, Republican Supreme Court Justice Harry Blackmun, who began his tenure on the court in 1970 as a staunch death penalty defender, lamented the Court’s failure to prevent ‘the biases and prejudices that infect society generally’ from influencing decisions on who should be put to death.

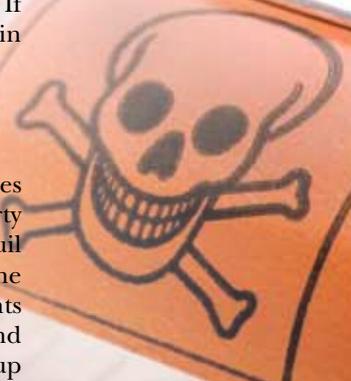
One well-documented legal bias is that against African-Americans. Since 1976, 15 white people have been put to death for killing black people, compared to 246 black people killed for murdering whites, according to the DPIC. It is statistics like this that have convinced many non-ideologues, like Michael Radelet, sociology lecturer and death penalty expert at the University of Colorado, to become vehement abolitionists.

‘The question is not how you support the death penalty in theory, but how it is actually applied,’ says Radelet. ‘If the world were a fair place, maybe it would be different. But that would be the death penalty in DisneyLand. If applied equally, it would be the only thing in the US that is.’

A world view

In almost every one of the 58 countries still retaining the death penalty, ‘poverty has the same parameters’, says Emmanouil Athanasiou, Asia Programme Officer at the International Federation for Human Rights (FIDH). ‘Rich people pay good lawyers and get good representation. Poor people end up with lawyers not even specialised in the death penalty.’

In Malaysia, nearly 90 per cent of the 300 people on death row are below the poverty line, according to lawyer and human rights



activist Charles Hector. In China, the number of annual executions is a state secret, but is reported by Amnesty International to be in the thousands. Here, subjugated groups such as unskilled workers, the minority Muslim Uighurs and the Falun Gong spiritual sect all have little means of defence if arrested on a capital charge in China – charges that cover 55 separate offences, cut down from 68 in August 2010. Sufficient money to create a workable system will never be provided, Athanasiou believes, both because the threat of death acts

occurred? After all, it may be the poorer members of society who face the severest penalties, but perhaps this is because it is these people who commit the most crimes. For many, however, this argument in itself points to a more profound social concern among oppressive states. The trend is a common one: government policies help create polarities of wealth, socio-economic tensions erupt and harsh punitive measures are unleashed against those least able to retaliate, to demonstrate that ‘order’ has been restored.

‘These men are prejudiced against because they haven’t been educated, or are suffering from psychological problems,’ says Phillips. ‘They are often refused writing materials and other means of contacting their lawyers.’

Anita Phillips
Herbert Smith

as a useful tool of repression and because the more defence lawyers who develop expertise, ‘the bigger the risk of state secrets being leaked’.

In sub-Saharan Africa, Marie-Dominique Parent, of the Penal Reform Institute (PRI), says that few countries provide workable legal aid schemes offering ‘quality defence’ for the poor. The most populous country, Nigeria, has around 600 people on death row, all of whom are believed to be without adequate counsel. According to a 2008 Amnesty International report, hundreds of these inmates – most of whom were convicted of robbery and armed robbery – were not given a fair trial, with many of their confessions made under torture.

‘The police are over-stretched and under-resourced,’ says Amnesty International’s Nigeria researcher Aster van Kregten. ‘Because of this, they rely heavily on confessions to “solve” crimes, rather than on expensive investigations.’

According to former Detective Superintendent Bob Denmark, of Lancashire Constabulary, who has worked with officers in Eastern Europe, Asia and Africa, forced confessions and police treatment of the poor is a bigger global issue than judicial discrimination. ‘The police are simply not given any other tools to work with, such as interview skills or the means to collect evidence,’ he says. ‘I think police prejudice can be so overwhelming that often whether the judiciary is prejudiced can be something of a nuance compared to that.’

Crime and oppression

But what of cases where the crime is clear-cut and no corruption of due process has

‘The Chinese regime creates the social and economic conditions that make crime inevitable,’ says sinologist and author Marie Holzman. She uses the case of Wang Bingyu as an example – a young man who killed his factory boss after he refused to pay him, despite knowing Bingyu needed the money to fund a life-saving operation for his father. ‘The Party had to execute him fast because they knew a lot of workers would follow his example, because they treat them so badly.’

It is not hard to find similar tales from across the world. Herbert Smith lawyer Anita Phillips represents death row prisoners from Trinidad, Tobago and Jamaica before the Privy Council, the highest court of appeal for Commonwealth countries, most of which still retain capital punishment. She confirms that most of her clients are poor, illiterate young men in gangs. Though there have been no executions in Trinidad and Tobago since 1999, soaring homicide rates have recently prompted the government to consider lifting the unofficial moratorium.

‘These men are prejudiced against because they haven’t been educated, or are suffering from psychological problems,’ says Phillips. ‘They are often refused writing materials and other means of contacting their lawyers.’

‘It is not uncommon for clients to meet lawyers on the first day of the trial,’ adds Saul Lehrfreund, Co-founder of the Death Penalty Project, which provides legal aid to death row prisoners in Caribbean countries. ‘There just aren’t enough funds to call medical experts or psychiatrists. Because of this, often the medically impaired are sentenced to death.’

Fortunately, many are saved in the Caribbean by a 1993 Privy Council ruling that restricted death row tenure to five years; after this

point, all sentences must be commuted to life imprisonment. Prisoners in many other countries, including the US, are not so lucky. Here, the immense cost of a death penalty case due to the lengthy appellate process – US\$3 million, compared to around US\$1 million for life imprisonment – is a valuable argument employed by abolitionists when trying to persuade policy-makers to consider their options. For them, the choice is clear: spend millions punishing people haphazardly and ineffectually or use the same money to tackle the underlying causes of social unrest.

‘Say the government is spending US\$300 million a year on the death penalty, that money could go towards more police on the streets, better lighting in crime areas, open libraries,’

Drugs and corruption

Topping the list of social ills in Vietnam is the problem of drugs. According to VCHR Vice-President Penelope Faulkner, the police and Communist Party ‘unofficially connive’ with dealers, giving immunity to those at the top of the food chain. The people caught instead are the young, poor and easily manipulated.

Vietnam is not alone. Since 1948, the number of countries with death penalties for drugs offences has rocketed from one to 32, while the number of annual executions has risen to the hundreds – or possibly even the thousands once the secret data of China, Vietnam, North Korea, Malaysia and Singapore is taken into account.

‘I’ve never seen any credible case that it acts as a deterrent. I’ve only seen aspirational cases, which, when unpicked, were actually based on somebody’s revenge theories of justice.’

Paul Lomas, partner
Freshfields

says Dieter. ‘You have to ask if this is the best use of crime fighting dollars.’

The US administration may not be actively seeking to punish its poorest, but its high crime rate and harsh penal system align it uncomfortably with countries whose nominal value systems differ markedly from its own. In Vietnam, for example, where 22 crimes are punishable by death, the regime’s rejection of long-term solutions for superficial fixes is not unfamiliar. Here, where polarities of wealth have sky-rocketed since the country opened its doors to the market economy in 1986, the death penalty is viewed more as a tool of social control than of justice.

Recently, Vo Van Ai, President of the Vietnam Committee on Human Rights (VCHR), appealed for a presidential pardon for 20-year-old student Phan Minh Man, condemned to death in July 2010 for the murder of his alcoholic father, who savagely beat his family after failing to find work. ‘The death sentence on this student should be a reminder to us all, and to you, Mr President, that Vietnam still suffers from chronic economic and social problems that plunge millions of citizens into insecurity and despair, and gives rise to innumerable tragedies,’ Ai writes. ‘It is vital that the government respond to these problems by prevention rather than repression, by protecting worker rights and providing adequate social safeguards for the unemployed.’

‘In the places where we have data, we know it is almost always poor and vulnerable people, and often foreigners, who receive the death penalty for drugs offences,’ says Human Rights Analyst Patrick Gallahue, from the International Harm Reduction Association. ‘Pablo Escobar was never swallowing drugs and crossing borders, so the idea it will act as some sort of deterrent to the highest levels of drug trafficking is some kind of fallacy.’

In Iran, occasional announcements from the authorities suggest that some cities have up to 500 death row convicts for drugs-related offences alone. In 2009, there were 172 recorded executions for perpetrators of drug crimes, all of whom were tried in Revolutionary Courts. The European Union must be more aware, says Gallahue, that when it offers support for anti-narcotics programmes overseas, it ‘takes into consideration the possibility of these programmes leading to the death penalty being enforced’.

Similar problems continue to plague Thailand, where nearly half of the current 708 death row population were convicted on drugs-related charges. Here, corruption is endemic, with the level of sentence determined on the basis of a police report sent to the prosecutor. ‘So the officers will ask the prisoner whether they want the death penalty or not,’ says Danthong Breen, Chairman of the Union for Civil Liberty, a leading human rights organisation based in Bangkok. ‘And that depends on how much you pay them.’

In Nigeria, bribes are the best hope of survival for the 750-plus people on death row, and those unable to join the cash-for-clemency scheme are left to flounder. Speaking in July 2008, Owens Wiwa, the brother of an executed Ogoni activist, said: 'From their first contact with the police, through the trial process to seeking pardon, those with the fewest resources are at a serious disadvantage in Nigeria's criminal justice system.'

'Some death row prisoners were arrested when they went to a police station because they knew a suspect or had witnessed a crime. Many said the police rounded them up and then demanded money for their release.'

Bribery among the judiciary in China is now 'worse than ever', according to Holzman. The practice gained new life in 2007, she says, when laws were brought in that required the Supreme People's Court to revise every death penalty case. 'People who pay enough to the judge can buy their life back,' says Holzman. 'But if you are poor and can't pay, you'll get it, no questions asked.'

In Muslim countries, buying one's life back is a familiar practice, but it is from the families of crime victims rather than the state. *Diyat*, or blood money, is paid to the victim's family, who then have the power to pardon or commute the perpetrator's sentence. Indeed, Article 220 of the Islamic Penal Code states that a father who kills his own child is only required to pay *diyat* and is subject to a discretionary punishment.

'If someone who is accused is rich, they can sometimes even change the accusation,' says Athanasiou. 'This is the case in every Muslim country.'

Reform or rejection?

So what hope is there of global reform – of making the death penalty a fair and equitable punishment, applied only according to the most stringent standards of due process – when so many forces collude to mire it in prejudice and corruption? For most campaigners, reform is not the issue; for them, capital punishment is an infringement of basic rights, irrespective of the crime. Yet even those who simply oppose the penalty as currently practised do not place reform high on the agenda. No government has enough resources to make the requisite changes, they argue, even should they have the will to do so.

'To convince me reform was an option, you would have to convince me that everyone had a fair trial and that the system was infallible,' says Lehrfreund. 'You would have to convince me that criminal justice was science.'

'I could probably be persuaded that the death penalty was a necessary evil if it could be proved that it would produce a safer society because its deterrent effect was so strong,' adds Freshfields partner Paul Lomas, who represents

Caribbean death row prisoners before the Privy Council. 'The problem is, I've never seen any credible case that it acts as a deterrent. I've only seen aspirational cases, which, when unpicked, were actually based on somebody's revenge theories of justice.'

'People who pay enough to the judge can buy their life back.'

China expert **Marie Holzman**

Whether worldwide abolition is on the horizon is difficult to judge. Most staunch advocates give forecasts ranging from ten to 50 years, in the hope capital punishment will soon be as much an anachronism for modern society as slavery or apartheid. Global trends seem to support this view. In 1977, only 16 countries had abolished the death penalty for all crimes; in December 2009, the figure stands at 95, and more than two-thirds of countries have abolished the penalty in law or practice, according to Amnesty International. Countries are perhaps feeling the pressure of developing international human rights standards: in 1976, Article 6 of the International Covenant on Civil and Political Rights declared the death penalty should only be imposed 'for the most serious crimes', now generally accepted to exclude drugs and economic offences, and in 2007, the UN General Assembly passed a resolution calling upon members to establish moratoriums of executions, with a view to abolition.

Yet considering how deeply embroidered the practice is in the legal and social infrastructures of so many retentionist states, many activists could be accused of a somewhat blinkered optimism. In Iran, according to the World Coalition Against the Death Penalty, at least 346 people were executed in 2008 – more than four times the number killed in 2005. And in China, most activists believe abolition is impossible while the Communist Party remains in power.

It is clear, however, that abolitionists have a passion, focus and coherence lacking from their opponents – and they will not stop fighting until their objective is achieved.

'You rarely see people actively campaigning in the street to keep the death penalty, do you?' says Athanasiou. 'Anyone who has strong enough feelings to make a stand invariably argues against it.' ☒

For information on how to get involved in pro bono work go to: www.internationalprobono.com.

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

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Czech (& Central European) Yearbook of Arbitration

The concept of arbitration as a method of dispute resolution is becoming increasingly important. Central and Eastern Europe, on which this book focuses (though not exclusively) is steeped in the Roman tradition of continental Europe, where arbitration is based on the autonomy of the parties and informal procedure. This classical approach is somewhat different from the principle on which the system of arbitration in countries with a common-law tradition is built. The CYArb project aims to help address this issue and provide a forum for comparisons of arbitration practice and doctrine in different countries, both mutually and in relation to other international practices. It sheds light on practical and academic fields in those countries in order to compare domestic approaches to arbitration and to provide a comparison with broader European and international practices.



Czech Yearbook of International Law

The Czech Yearbook of International Law, CYIL is focused on such issues as international treaties in the context of EU law, international contractual relations, protection of international human rights, international criminal law, investment protection and international arbitration. It brings together articles of professionals who offer unique insight into how these special legal issues are regulated in European legal culture and its legal connotations from both the comparative and international law perspective. The CYIL includes articles as well as book reviews, notes and information and overviews of scholarship in the field of international law, written by leading authorities from the Czech Republic, the surrounding region and the wider international legal community. Authors include academicians, attorneys, justice staff, and practitioners in the field of international law. The CYIL represents an ongoing annual review and analysis of major issues involving public and private international law, including related aspects of European and constitutional law. The integrity of this collection is ensured by the Editorial and Advisory Boards, which are composed of prominent practitioners and scholars from the local, regional and international legal communities.

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Mark Pieth

Leading the fight against corruption

Mark Pieth has chaired the OECD Working Group on Bribery in International Business Transactions for 20 years, implementing the foremost legal tool to combat corruption. He was appointed by the UN Secretary-General to investigate the corrupt Iraq Oil-for-Food programme, and advises the president of the World Bank on integrity issues. At the OECD plenary session in Paris, he spoke exclusively to James Lewis in the final live webcast of the IBA's 2010 series.

JL Some people find it hard to understand corruption. They may feel it's a victimless crime and therefore unimportant. You've devoted your life to understanding it and combating it. Why's it so important?

MP I don't believe corruption's a victimless crime. If I think of the people who want to get education, want to get health services or, well, who don't want to go hungry, they would certainly claim that they're victims if the money that should provide for these services has been stolen. There's another aspect. If you think of competitors who lost jobs because somebody bribed their way into a contract, they certainly also are victims. It's obviously difficult to say exactly who is the victim, but in the abstract we do have victims.

JL You've chaired the Anti-Bribery Committee for 20 years. What have been the main challenges and achievements during that time?

MP The major challenge is being one of the toughest instruments existing on the supply side of corruption. We focus on people who bribe and we try to ensure that they are taken to court, that the anti-bribery laws are enforced, that of course also preventive action is taken. And my most serious challenges, I would say, have been cases where countries blatantly refuse to fulfil their international obligations.

JL Are there specific countries you're thinking of that you can name?

MP Well, one case that is very well known is of course the BAE case, Saudi Arabia with the UK, but it's by far not the only one. We've had some real tugs of war with other countries. Berlusconi himself wanted to get me out of office. This is maybe more an honour than anything else.

JL Yes, you came under pressure during the BAE case when you tried to hold the UK authorities to account. Is that something you've got used to?

MP Logic. I would put it this way: in the OECD we adopt all our texts with unanimity minus one, so the country that's being evaluated has to abstain from making a statement. The only thing they can do is, actually they can stop re-electing the chairman or they can withdraw the support for the chairman, because the chairman needs to be elected by full unanimity, so...

JL I mentioned the Iraq Oil-for-Food Programme. And you were appointed by the United Nations Secretary-General to sit on a three-person investigative panel, as it were, with Paul Volcker and Justice Richard Goldstone. It was incredibly widespread, the corruption you found. Did that surprise you, or was it confirming what you already knew?

MP I must say, it was a very interesting experience overall. Yes, of course we were surprised. We found a lot of problems in the UN. I was even more surprised that the UN didn't take our suggestions so seriously. We found problems and we made suggestions how to reorganise the UN. And frankly, it's back to usual.

On the other side, we found around 2,000 companies to have been in breach of the rules. You can call it corruption, or you can call it sanctions busting.

JL Which do you call it, sanctions busting or corruption?

MP It depends who gets the money. If a private recipient takes some of the money and stashes it away in his own private bank account, that's one thing. But if it goes directly into the state coffers, the presidential divan, as it was called, and they... the state, a pariah state of course at the time, buys arms with its sovereign means, then it's very difficult to say that this is corruption, because with corruption you identify the idea that somebody is cheating on the state for private gain.

JL There was a special case here, the Iraq Oil-for-Food Programme, and it meant that there was a specific focus. And what was uncovered was 2,000 companies behaving in this way. It seems to uncover habitual activity in the corporate sector.

MP Yes, you're perfectly right. It meant everybody, if they just believed they're not



'I don't believe corruption's a victimless crime. If I think of the people who want to get education, want to get health services or, well, who don't want to go hungry, they would certainly claim that they're victims if the money that should provide for these services has been stolen.'

going to be detected, is immediately ready to bribe. Now, I don't care if it's 2,000 or 2,500 companies, next to everybody who was involved in that business was ready to pay 10 per cent extra to get a job.

JL You're saying really it revealed that it's a major problem across the corporate world. Presumably you feel that it's still a problem, or has it changed?

MP Well, obviously we hope that we're making a difference. But, I think, first of all, it's interesting, I have a list here in the OECD. It's highly confidential in the detail, but we have 250 cases running, 250 investigations running in the OECD Working Group on Bribery countries; 38 countries and 250 cases. For me, this is a sign, well, we are making a difference.

But let's be frank. There are many areas of the world where corruption is endemic and you can hardly get a job as a company without making payments. In the detail it's very different. You have small payments, for instance. So-called



We found around 2,000 companies to have been in breach of the rules.

facilitation payments are the problem in one... in some areas of the world. In other areas you're genuinely being extorted. It's a very unclear boundary between solicitation, which is clearly forbidden. You have no excuse when you react to solicitation, whereas when you're really extorted at gunpoint or so, then it's no longer bribery if you pay.

JL We've mentioned BAE already. It seems to be a very important reference point. It's back in court in the UK on Monday. What do you think we've learnt from the BAE case?

MP You know, for me, in a way the BAE case is first of all an institutional success story, that peer pressure actually works. Now, we haven't been able to actually reopen that case that had been closed by the prime minister, the attorney general and the director.

JL You mean the Al Yamamah case.

MP We haven't reopened that case, but we were able to say, well, at the bottom of that case is a problem. The laws of the UK were insufficient at the time, and the UK has changed its law, has drafted a new law, which is supposed to go into effect in April 2011. And for us, together with the UK, this is really a big success story. That's the positive side of it.

The negative side – and I'll be very frank and I'll say this in a personal capacity, not as the Chair of the Working Group, I think BAE should really turn a page next Monday, if it works, and should forget opposing further fights that are still ongoing on intermediaries, on money launderers and so on. I'm hearing that they're still fighting. This would be very awkward and would in a way mean for us we have to pick up the fight as well again.

So I think we all have a chance to say goodbye to that chapter and say, overall, the achievement really is that it's caused so many problems for a country and for a company that the lesson learnt for everybody is that you can actually, with peer pressure, motivate somebody to do something sensible, which is create a new law.

JL The BAE case has ended really, if it does end, in a plea bargain and there's quite an outcry about that. I mean, some people feel that plea bargains really stop the facts and the information relating to the allegations coming to light. What's your view on that?

MP Well, I can understand that, and again I'm speaking in a personal capacity. I have part of the documentation, which I've received through Whistleblowers. And in nearly all legal systems in the world, this would have been straightforward corruption. In the UK it was not corruption for some reason because the old law, the way it was made, did not capture that behaviour. At least it's a moot point whether it would have. And that was one reason why I think the authorities were so shy in going through with these cases.

So I understand the frustration if you have, let's say, straightforward payments back to back with the creation of jobs and obtaining a contract.

JL Some people go further. They feel that plea bargains actually compromise judges, and this is going to undermine the rule of law.

MP If I change hats and put on my hat as Professor of Criminal Procedure, I do have my doubts, of course. And I see though that with large-scale economic crime, corporate crime, we are probably at the boundary of what

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'I believe we're actually moving into a different phase now. It has to do with very active law enforcement and private sector understanding that they have to engage. The picture's very uneven.'

criminal law can really deal with. Criminal law is a very archaic instrument and is good enough for theft and street robbery and so on, but as soon as you go into really complicated matters, the traditional system of criminal law hits a boundary. And that's where, increasingly in most constituencies, people are finding ways of escape routes, the constructions are different.

In Germany, there are possibilities of leaving... you probably have heard of Mr Ackermann paying €5 million in order to end his case on Mannesmann. This was not a corruption case but it was very similar. People...

JL So it was a case of paying €5 million to make it go away, which brings us to the question, if you can pay that small amount of money, plea bargains aren't really acting as a deterrent. What level should they be at?

MP Well, there are differences. You know, in some systems plea bargains, and, for instance, in the US, it's very clear you have to own up and you are actually convicted. The British system is not so different, I understand. The problem though is what are you convicted of. If you take the BAE case in the US, one was convicted there of secondary offences going against... basically lying to authorities and book-keeping rules.

JL And in the UK it was insufficient accountancy measures.

MP Exactly. The problem would be, if it were a real straightforward conviction for bribery it would have consequences on debarment from future contracts. And that's an interesting topic in itself because debarment is perceived as a tough sanction. It's a very tough sanction, probably tougher than just paying money. But the difficulty is that the European Union has gone over the top. They are asking for mandatory debarment, which means you fight to the last drop.

JL It sounds to me as if you're saying that really, in the very difficult area of corruption and getting results and making progress, we need to be pragmatic – and that plea bargains are part of a mixture of tools that we can use as a way of making progress.

MP I don't like to do that because, coming from a continental European legal system, we're certainly not pragmatic. We're anything but pragmatic. But I do think in this area of corporate criminality and large economic crime, there's no alternative.

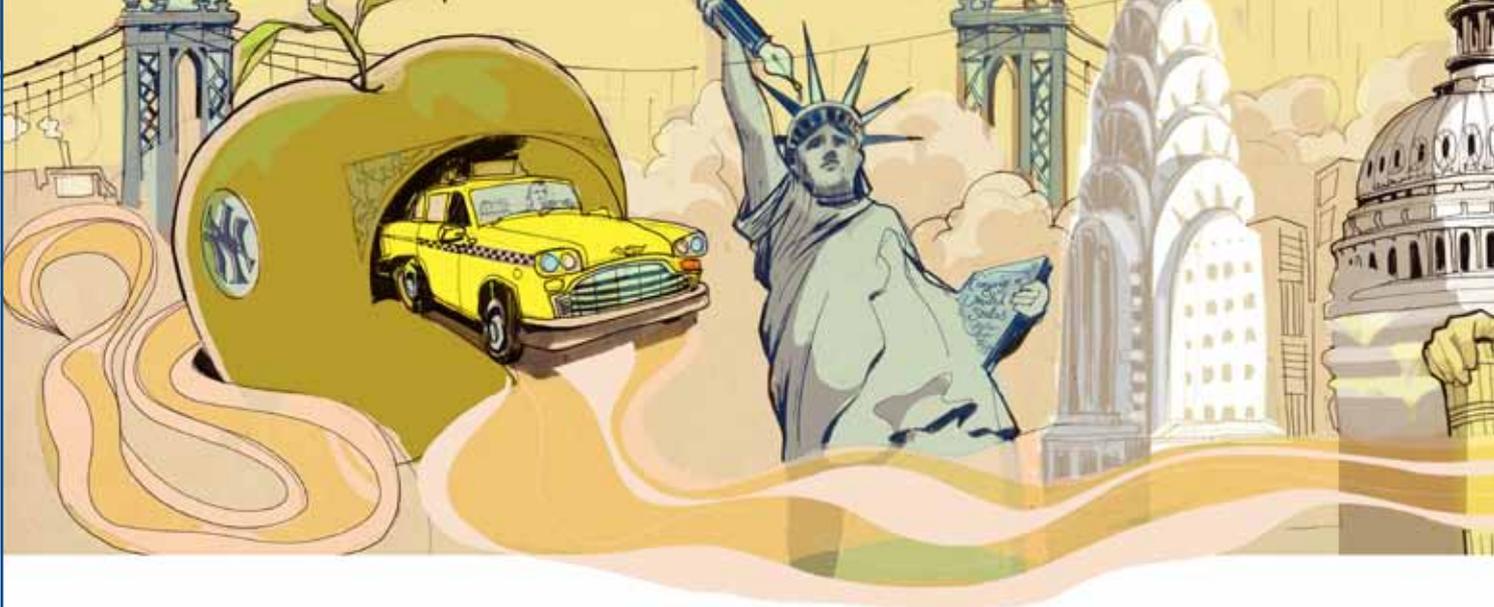
JL At the time of the tenth anniversary of the OECD Convention, you expressed some pleasure at the engagement of the government and governments generally, the public sector; but you were displeased with the lack of engagement from the private sector. Is this still a major problem?

MP I believe we're actually moving into a different phase now. It has to do with very active law enforcement and private sector understanding that they have to engage. The picture's very uneven. I've just been in Portugal last week and there was a big audience, mostly public officials, but only seven private sector people. And when I went to the airport there were three planes from Air Angola. And I understood why they wouldn't want to talk to me.

This afternoon, I'm awaiting 80 representatives of the private sector to be turning up in an hour. And the reason is the OECD has come up now in 2010, in March 2010, with – the first time actually – an instrument talking to companies rather than countries. It's a good practice guidance on what a company should be doing internally on compliance. ☒



This is an edited version of the interview. To view this and other anti-corruption content go to: www.ibanet.org.



A letter from

SKIP KALTENHEUSER

While many consider the impact of WikiLeaks' release of classified US documents on how America's government will conduct itself abroad, others focus on the domestic impact.

In 1971, Daniel Ellsberg previewed many of the issues now swirling. He released a top secret study of decisions related to the Vietnam War, known as 'The Pentagon Papers', to newspapers, with a profound impact on how that war was viewed. 'I don't see much effect on policy so far, nor do I expect much,' says Ellsberg. He does worry that 'the episode may serve as an excuse for Congress to legislate a British-type Official Secrets Act, which would cut off most classified leaks.' That wouldn't have stopped Ellsberg, who had thought the US already had one. But if one is created and it has the effect of slapping jail sentences for contempt on journalists who don't reveal their sources, 'most journalists will tell, and no source will have any assurance of anonymity.'

Another concern comes from former FBI special agent and counsel Coleen Rowley, who identified her agency's pre-9/11 failures in handling and sharing critical information. 'The government seems, almost in hysterical fashion, to be reverting to the exact same counter-productive compartmentalization and greater secrecy walls, not only vis a vis the public but also between agencies and within agencies that was the big pre 9-11 problem,' says Rowley. 'Security experts actually enjoyed a strong consensus that secrecy needed to be kept to the minimum, but that well-established concept is more or less up in smoke right now.'

Rowley wonders if a WikiLeaks operation in place prior to 9/11 might have provided a pressure valve for agents frustrated by superiors who stood in the way of getting information out, including to the general public, so others might connect the dots. 'Information sharing is good and necessary, and secrecy needs to be kept to absolute minimum,' says Rowley, citing the example of the Unabomber only being caught after his manifesto was shared with the public.

One fallout of WikiLeaks is arguably seen in an attempt at whistleblower protection legislation that initially started out with strong administrative and judicial remedies, including for national security employees. Part of the motivation was to provide better oversight mechanisms for the massive amounts of money being shovelled into intelligence and security arenas. But, as legislation that early on had broad support for protections did a cha-cha moving back and forth between House and Senate, remedies for national security whistleblowers were whittled away, and then the dance ended when Congress turned off the lights.

'The failure of Congress to enact the Whistleblower Protection Enhancement Act in 2010 left national security whistleblowers with little or no legal protection,' says Steve Kohn, of the National Whistleblowers Center in Washington, DC. 'Unlike other federal workers, national security employees were exempt from coverage under the federal Civil Service Reform/Whistleblower Protection Act originally enacted in 1978. When the House stripped national security protections from the Whistleblower Enhancement Act, national security whistleblowers were again doomed to purgatory.' Looking for an upside to Congress'



Washington

failure to pass the Enhancement Act at the end of the 2010 legislative session, Kohn sees an opportunity for advocates to make their case anew. As Congress considers enacting protections for its federal workforce, those seeking to increase protections can underscore the importance of including national security employees.

Moreover, had the compromised Enhancement Act passed in 2010, it would have been next to impossible to later obtain any protections for national security employees, observes Kohn. Advocates will now have a chance to separate the WikiLeaks scandal from the arguments for not leaving national security workers out in the cold.

'In the context of post 9/11, without question this is the most important role of whistleblowers in the national security area - making sure that critical life and death decisions, like whether to go to war in Iraq over WMD threats - are properly vetted,' says Kohn. 'Or, when you have a Patriot Act, guarding against abuses. And yet, the employees most aware of such matters are the ones with the least protection. WikiLeaks was a pretext to weaken whistleblower protections. The irony is that when protections aren't in place that allow whistleblowers a meaningful avenue to draw attention to their concerns, they are left to devices like WikiLeaks as their last resort. It's gone full circle.'

Although Defense Secretary Robert Gates eventually concluded the WikiLeaks impact on foreign policy would prove 'fairly modest,' that assessment will be closely examined for motive. In any case, the political reaction still runs the full gamut of opinion, one aspect of which is Sarah Palin's clarion call on Facebook for WikiLeaks founder Julian Assange, 'an

anti-American operative with blood on his hands,' to be hunted down like Osama Bin Laden, with an attack on the White House for 'incompetent handling of this whole fiasco'. Other views are more tempered, with a continuing undercurrent of empathy for the alleged leaker, Bradley Manning, who's spent a good deal of this saga in solitary confinement.

Perhaps the strongest point favouring lenient treatment comes from former CIA officer Ray McGovern, who was one of President Reagan's intelligence briefers and a recipient of the Intelligence Commendation Medal from George H W Bush. 'Manning, a twenty-two year old kid, was alarmed that people he rounded up for sedition turned out to be critics of Iraqi corruption,' says McGovern. 'He later had access to information he believed might save lives if it became public and speed the end of the wars in Afghanistan and Iraq. Instead of keeping his mouth shut, he stepped out on a risk for a bigger cause.'

'I had a test like that when I was in Vietnam,' says McGovern. 'I saw a cable sent on Aug. 20th, 1967 to General William Westmoreland, from his deputy, General Creighton Abrams. He noted an analysis that there were 500,000 to 600,000 Vietnamese communists under arms. This contradicted Westmoreland's contention that there weren't more than 180,000 or so. I failed the test. If I'd made that cable public, the left side of the Vietnam War Memorial might not be there.'

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



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Lands of opportunity

The drama surrounding the rescue of 33 miners in northern Chile has highlighted the great potential in the country's mining industry as well as the Latin American exploration market.

RUTH COLLINS

Latin America has long been known as a mineral rich continent. Nevertheless, periods of economic, political and social instability have discouraged foreign companies from investment. On 13 October, 33 miners were rescued after being trapped for 66 days in the collapsed San José mine in northern Chile. The story captured worldwide attention and turned what could have been a major blow for the country and its mining industry into a global success story. Both the rescue and the euphoria it provoked are telling of the great potential and interest in both Chile and the Latin American market as a whole.

On the day of the miners' rescue, the Chilean Government approved a governmental proposal to raise royalties paid by mining companies to help fund large-scale post-earthquake reconstruction projects. The earthquake, which registered 8.8 on the Richter scale, devastated the country in late February 2010 and inflicted an estimated US\$300 million worth of damage. The revised legislation, which has long been pushed for by politicians and unions, will increase royalties from 4.5 per cent to up to 14 per cent from 2018. A similar proposal was rejected earlier in the year, but President Sebastián Piñera capitalised on his increased popularity following the miners' rescue to push the bill through Congress.

Controversial measures

The move follows Australia's controversial decision in July 2010 to hike up tax on large mining companies up to 30 per cent. However, bodies such as the Organisation for Economic Co-operation and Development (OECD) argue that the tax should be extended to cover all mining companies and not just those firms

with average annual profits of over £31 million. Several mining companies operating across Australia and Chile have threatened to cancel mining projects in protest at the increased tax rates. In Chile, CEOs of some of the country's largest foreign-owned mining companies have voiced their concerns over the new legislation, arguing that it will discourage foreign investors and divert interest away from Chile to other mineral-rich countries in the region, such as neighbouring Peru.

However, aside from Chile's pragmatic proposal for the royalties, many argue that governments could use the proceeds from these increased taxes to build up reserve funds to protect against future economic downturn. Several foreign mining companies will also reap the benefits of the new legislation, which extends a number of existing tax stability agreements: 'We welcome the fact that the government's current proposals respect the tax stability agreements previously entered into with the Chilean state and also reflect temporary changes to the tax system,' Jean-Paul Luksic, chair of London-listed Chilean mining company Antofagasta PLC, said in a statement issued by the company in October.

Although the royalty increase in Chile is not mandatory, there is a certain element of social pressure placed on companies to comply with the government's proposal. There are fears that this may discourage foreign investors, however, there is no doubt that the success of the miners' rescue has done much to strengthen the image of the country's mining industry both at home and abroad. According to data collected by the World Bank, mining in Chile generated more than US\$40 billion in revenue last year, a huge 17.5 per cent of the country's overall US\$169 billion GDP. Foreign investment

committee Cinver recently released figures that show that the mining sector accounted for 82.9 per cent of the total US\$13.3 billion in approved foreign investments during the January–November 2010 period, over double that of the same period in 2009. Interest from abroad and across Latin America is clearly still growing since the rescue. In November, UK mining group Hochschild Mining entered into an option agreement with Contractual Minera Valleno, which will see the company invest over US\$9 million in the Valeriano property. In early December, Brazilian mining giant Vale announced its plans to develop a US\$140 million copper project in the country. It certainly seems that investors are jumping on the bandwagon of this success while the iron is still hot.

Major players

Latin American countries have weathered the economic recession better than most. According to data compiled by *The Economist*, Brazil is due to become the world's fifth-largest economy over the course of the next decade. While foreign direct investment was plummeting across the world in 2009, Brazil's foreign direct investment increased by 30 per cent from the previous year. The economy has been further buoyed by the successful bids to host the World Cup in 2014 and Olympic Games in 2016, thus transforming the country into a significant commercial player on the world stage. In September, it unveiled the world's largest share offering when state-run energy company Petrobras raised US\$70 billion to finance large-scale exploitation of offshore oil reserves.

Mexico was probably hardest hit during the recession, partially due to its close ties with the struggling US economy. Nonetheless, Latin America's largest trading partner has much to smile about: it has great potential for investment, enjoying no fewer than 12 Free trade agreements (FTAs) and many sources indicate that it is set to become the world's fifth largest economy by 2050.

Historically, the USA has been the largest investor in the Latin American market, but a number of other countries are also starting to sit up and take notice. UK Foreign Secretary William Hague recently hailed Latin America as 'one of the undisputed engines of the

international economy.' Over the past five years, UK exports to Brazil alone have more than doubled to over £1.7bn and the number of UK companies investing in the Brazilian market has increased by some 500 per cent.

Meanwhile, Canada has demonstrated a huge surge of interest in the mining markets across the region. In 1994, it signed the North American Free Trade Agreement (NAFTA) with Mexico and the USA and has also successfully secured separate FTAs with Chile, Colombia, Costa Rica, Panama and Peru. 70 per cent of Amazonian land is now under concession by US, Canadian or other foreign companies and Canada has one of the largest shares of the Latin American exploration market.

The BRIC partnership has also seen growing interest from China and India. According to figures compiled by the Brazilian Government, trade between Brazil and China soared from US\$6.7 billion in 2003 to US\$36.1 billion in 2009. In 2009, the China Development Bank lent US\$10 billion to Brazilian state-controlled oil company Petrobras to fund expansion plans estimated at US\$174 billion. In October 2010, Chinese state oil company Sinopec announced its plans to launch a US\$7.1 billion oil alliance between Sinopec and the Brazilian subsidiary of Spanish energy group, Repsol. China is now Brazil's leading trade partner.

China is also forging strong business ties with several other key exploration markets across the region. The Asian giant signed a FTA with Chile back in 2005 and is now Chile's largest trade partner. In March 2010, it signed a FTA with Peru and is Peru's second largest trade partner. Since China is the world's largest copper importer, it is significant that it has chosen copper-rich Chile and Peru as two key targets for outward investment over the past five years. Earlier this year, the China National Offshore Oil Corporation (CNOOC) agreed a 50 per cent joint venture with Bridas Energy Holdings, which has ongoing oil and gas projects throughout Argentina, Bolivia and Chile. Even Latin America's most challenging markets are attracting Chinese investment: the China Development Bank, which continues to show increasing interest in the region, has financed several large infrastructure projects in Venezuela over the past year.

India is fast catching up on its BRIC counterparts. In 2007, Indian conglomerate Jindal Steel & Power invested US\$2.1 billion on



developing an iron-ore mine in Bolivia. Over the past decade it has also gained prominence in the IT, pharmaceuticals and steel sectors, particularly in countries such as Argentina and Uruguay. Thirteen Indian companies have opened subsidiaries in Argentina. In 2002, Tata Consulting opened its doors in Uruguay and in 2009, Geodesic acquired Uruguayan software company Interactiveni.

Stumbling Blocks

The investment and interest from abroad is clear, but economic, legal and even political instability, remain major stumbling blocks to foreign investment in certain markets. Venezuela is a key example. Despite being one of Latin America's hotspots for oil and gas and mining exploration, President Hugo Chávez's divisive policies, particularly his policy of nationalisation, have

made it difficult for foreign investors to enter the market. Many have been discouraged through fear of being potentially drawn into tensions between Chávez and the US Government.

As a result, a number have looked elsewhere and many eyes have fallen on neighbouring Colombia. Colombia is now Latin America's fourth biggest crude oil producer. In June 2010, Colombia gained an impressive US\$1.3 billion in financing pledges from energy companies when it put more than 200 oil blocks up for auction. Yet, although its general political and legal landscape has stabilised considerably in recent years, there are still reminders of the ongoing challenges facing foreign investors in the country. Last March, five subcontractors for Tuboscope and Tecnioriente were kidnapped by FARC rebels and guerrillas also set fire to a helicopter owned by a contractor hired by Argentine company Pluspetrol. In spite of these incidents, however, foreign investment levels were estimated to reach US\$10 billion this year – US\$8 billion more than eight years ago – and show that interest from abroad is far from waning.

In a recent survey of CEOs across Latin America carried out by PricewaterhouseCoopers (PwC), Peru was revealed to be the second most attractive country for investment behind Brazil. The US–Peru free trade agreement, which came into effect in February 2009, has

helped push Peru firmly and forcibly into the global market, developing it as a veritable economic force both across the continent and further afield. Currently US investment in Peru totals US\$18bn and much of this investment is in the country's burgeoning mining and oil and gas sectors. If reigning President Alan García's estimates are to be believed, overall foreign investment in the country could

reach US\$35bn by 2015. However, one leading Peruvian economist believes that the FTA has failed to bring many tangible benefits to the Andean nation, having failed to bring in the promised wave of employment, worsened environmental conditions and exacerbated tensions between the Peruvian Government and indigenous communities. Incidents at a copper mine owned by British company Monterrico Metals in Rio Blanco in 2005, and at a road blockade in Bagua

in 2009, respectively demonstrate how easily peaceful protests can descend into widespread violence and even death.

Although exploration industries in Peru and Colombia continue to thrive, these incidents are indicative of how much work still needs to be done by both local authorities and foreign mining companies to ensure safe working conditions for employees and conditions that do not threaten the local environment or its communities. Wildcat mining is another cause for concern. According to a report by Conservation International, an estimated 16 tonnes of gold is extracted illegally in Peru every year. Countries such as Bolivia, Ecuador and Venezuela have employed their armies to crack down on the wildcat miners, but whether or not military force is employed, as long as it persists, it will do little to encourage foreign investment.

Tapping potential

Economic and legal stability are key to maintaining foreign interest and as the markets and governments across the region become more stable and resilient, it is more likely that foreign investment will keep flooding into the markets. Latin Americans are keenly aware of this and conscious of the need to create favourable conditions for foreign investors. Many local mining companies saw the

'We shouldn't lose sight of the fact that as a country we compete for investments for our mining sector. Just because you have resources doesn't guarantee investments.'

Laurence Golborne
Chilean Mining Minister

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Australian royalty controversy as a wake-up call that investment would not come just of its own accord. 'We shouldn't lose sight of the fact that as a country we compete for investments for our mining sector. Just because you have resources doesn't guarantee investments,' commented Chilean Mining Minister Laurence Golborne in June 2010. 'There are plenty of countries with mining potential and investments will go to the countries which offer the best economic conditions,' he added.

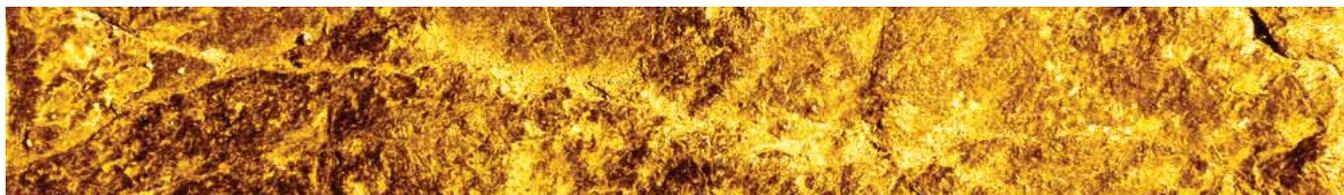
In that sense, it is particularly interesting that Chile, Peru and Colombia recently announced that they are in the initial stages of a stock market integration agreement that aims to entice both first-time investors and investors who have traditionally focused on larger markets in the region, such as Brazil and Mexico. The integration will give the tripartite alliance a combined market capitalisation of US\$537 billion and traded volume of US\$48 billion. Together this places the Andean

Chilean firm Guerrero Olivos Novoa y Errazuriz and Peruvian firm Delmar Ugarte all boast lawyers with experience across Asia. Meanwhile, Canadian firm Macleod Dixon set up operations in Caracas in 1997 and has subsequently developed relations with a law firm based in Rio de Janeiro and also opened an office in Bogotá in September 2010. These moves will certainly help encourage foreign investors. As a legal manager at a leading Toronto-based mining company commented, 'foreign investors want to work with local legal counsel who not only have the advantage of speaking their native language, but also have a bi-cultural understanding of how business works in both countries.'

Potential for investment is clear, but it is vital that foreign investors begin to recognise the potential of each individual market across the continent, not only in the exploration sector, but across a whole plethora of other industrial and creative sectors. Moreover, if investment is

'The UK wants to prioritise business relations with Latin America, but it is vital that we have a sustainable, balanced and mutually beneficial investment relationship.'

Sir Andrew Cahn
CEO of UK Trade and Investment



group in a much better position to compete with the continent's leading traders, Mexico, with a trade volume of US\$79 billion and the Brazilian behemoth, with US\$554 billion. The PwC survey indicated that Chile is considered the most economically stable country for investment in Latin America. Therefore, both the combined strength of these three economies and the multiple benefits they could offer, would undoubtedly reassure even the most hesitant of investors to enter these markets.

In keeping with the current trends, increasingly law firms throughout Latin America are employing the skills of lawyers with foreign experience, not just in the USA, but also in firms in Canada and China. Bofill Mir & Alvarez Jana Abogados and Prieto y Cía have employed Canadian-trained lawyers while Brazilian firm Tozzini Freire Advogados,

to continue, it must be 'two-way,' according to Sir Andrew Cahn, the CEO of UK Trade and Investment. For Cahn, it is paramount that the UK and other countries investing in Latin America gain from import trade as well as export trade and that UK businesses also make concerted efforts to encourage Latin American companies to invest back into the UK market. 'The UK wants to prioritise business relations with Latin America, but it is vital that we have a sustainable, balanced and mutually beneficial investment relationship.' With this approach in mind, Cahn hopes that the 'UK can return to its former glory as one of Latin America's major investors'. And right now, the timing couldn't be better. ☒

Ruth Collins is a freelance journalist and can be contacted at ruthsineadcollins@googlemail.com.

The new polar race

Countries are making competing territorial claims to the polar regions for defence, environmental protection and vast mineral resources. But such claims always prove controversial.

SCOTT APPLETON

For decades it's been contested territory and the struggle for control of the Arctic has again come to the top of the agenda, following a landmark deal between BP and Rosneft, the Russian state oil company. The US\$16 billion deal to explore the region, while cautiously welcomed by shareholders, prompted anger from environmental campaigners, who claimed the companies lacked the capacity to clean up spills.

Yet who has ultimate control of the Arctic is far from straightforward. The region, which covers one-sixth of the earth's surface and is defined as north of the Arctic Circle, is currently supervised by a UN Commission, while sovereignty of the adjacent Polar countries – Canada, Denmark (which controls Greenland), Iceland Norway, Russia, Sweden and the US — extends only to the 200-mile economic zone beyond their coasts; none of which reaches the North Pole.

But as a consequence of global warming, the Arctic ice flows that have so long defined and protected it are shrinking fast. The Arctic is the fastest warming region on earth and is on track to be ice free in the summer by 2013, says Scott G Borgerson, Visiting Fellow for Ocean Governance at the Council on Foreign

Relations, and who gave evidence before the Committee on Foreign Relations of the US Senate on Arctic issues in May 2010.

'By every measure, from huge ice shelves breaking free, to complex environmental dynamics that scientists do not fully understand, the polar ice cap is disappearing. We may be approaching a tipping point past which the melting sea ice cannot recover.'

Arctic race

But unlike the Antarctic Treaty, which came into force in 1961 and set aside Antarctica as a scientific preserve, banned territorial claims and prohibited military activities, ownership of the Arctic and ice caps remains contentious because it was never decided. In 1925, based upon the Sector Principle, Canada became the first country to unilaterally extend its boundaries, 478 miles northward, to the North Pole. In 1926, Russia set out a similar claim as since has Norway and the US.



As a result of global warming and the retreat of the once impenetrable ice sheets, the Arctic is the subject of new political, legal, social and economic claims. Despite it being predominantly ice and water, the Arctic is nonetheless up for grabs.

‘The status of certain portions of the Arctic Sea region is in dispute for various reasons. One is that under international law no country currently owns the North Pole or the region of the ocean surrounding it,’ explains Peter Appel, partner with Copenhagen’s Gorrissen Federspiel and Chair of the IBA’s Maritime

Denmark now however hopes to prove that the Lomonosov Ridge is in fact an extension of Greenland and not Russia.

‘As ice continues to retreat in the Arctic due to rising temperatures in the North Pole, nations bordering the region have begun navigating newly opened waters, enhancing their underwater maps and strengthening claims to the Arctic ocean sea bed,’ says Appel.

The UN Convention of the Law of the Sea (UNCLOS) has as a general principle that the Arctic belongs to nobody, but the past decade has seen increased posturing by governments keen to demonstrate their right to sovereignty over Arctic territories, and ability to control navigation rights.

‘There is the potential for a great deal of uncertainty, as well as for overlapping sovereignty claims among those countries that border the Arctic, with issues including the extent of their rights over the continental shelf and where territorial limits should begin and end,’ says Rae Lindsay, an international law and litigation partner with Clifford Chance in London.

Countries are making competing territorial claims to newly revealed tracts of land, on the basis of defence, environmental protection and hopeful ownership of the vast mineral resources estimated to lie below the seabed.

‘As new technological advances are increasingly able to bring previously unobtainable mineral or natural resources closer to reach, the principle of collective ownership has begun to fade. It is estimated that a quarter of the world’s oil and gas reserves

‘It is estimated that a quarter of the world’s oil and gas reserves may lie under the Arctic ice sheet’

Rae Lindsay
Clifford Chance

and Transport Law Committee.

Russia’s President Vladimir Putin notably caused surprise in 2007 when he signalled an intention to annex the entire North Pole, following Russian research that an underwater ridge – the Lomonosov Ridge – extends from its Arctic coast to the Pole. The same scientists also, for the first time, placed a flag on the seabed directly below the North Pole.



may lie under the Arctic ice sheet,' she adds.

Experts also highlight the value of Arctic fishing rights, and resources such as coal, iron, lead, copper, nickel and zinc that may lie in abundance. Discoveries in the Canadian Arctic have made Canada the third biggest exporter of diamonds in the world, despite not having previously had a significant diamond industry.

'Arctic sovereignty is a problematic concept and not at all as clear cut as it would at first appear to be. An array of economic and legal issues are being raised by the melting ice, including access to natural resources within the zone, their control and ownership,' agrees Milos Barutciski, a partner specialising in international trade and investment regulation with Bennett Jones in Toronto.

Territorial limits

State sovereignty is currently limited to an exclusive economic zone (EEZ) of 200 nautical miles adjacent to countries' coasts, and a 12-mile coastal territorial zone, but efforts are now however being made to extend territorial rights in order to clarify ownership over parts of the Arctic.

'Sovereignty remains an issue as it was never sorted out. The ice created a barrier both to survival and surveying, which was simply impossible with the original technology being used. But while the earliest Arctic explorers were unable to determine the extent of territorial demarcations, the melting ice and new technologies have enabled a greater ability to survey the seabed,' says Barutciski.

The opening up of the Arctic raises immense economic stakes, which therefore demand the creation of a legal framework that will enable ownership to be determined, say lawyers. But sovereignty can only be extended if a country can prove geologically to the UN Commission on the Limits of the Continental Shelf that the continental shelf on which it stands extends naturally into the disputed territory.

Upon ratification of UNCLOS, a country (under Article 76) has a ten-year period to make claims to an extended continental shelf which, if approved, gives it exclusive rights to resources on or below the seabed, explains Appel.

'Consequently Norway, which ratified the convention in 1996, Russia (ratified in 1997), Canada (ratified in 2003) and Denmark (ratified in 2004), have all launched projects to base claims that they have an exclusive right to certain portions of the Arctic seabed. The US has signed, but has not yet ratified UNCLOS.'

There are, however, obviously different ways of carving up the Arctic, with each country inevitably seeking to try the most favourable

method for its claim, adds Lindsay. What forms the continental shelf obviously depends on the geological evidence, but the real issue is how countries may lay claim to the underlying natural resources.

'A complication however is that while the UN Commission is the body designated to determine the scientific and technical validity of claims relating to the extent of a State's outer continental shelf, its decision is not binding unless a claimant accepts it. Where

'By every measure, from huge ice shelves breaking free, to complex environmental dynamics that scientists do not fully understand, the polar ice cap is disappearing. We may be approaching a tipping point past which the melting sea ice cannot recover.'

Scott G. Borgerson
Council on Foreign Relations

the Commission's decisions are not accepted, the only recourse would be to negotiation or, potentially, to dispute resolution mechanisms such as UNCLOS or the International Court of Justice'.

Navigational rights

Presently, Canada, Denmark, Norway, Russia and the United States all regard parts of the Arctic seas as 'national waters' (territorial waters out to 12 nautical miles) or 'internal waters'.

'Further, all countries officially regard all waters beyond the 12-mile territorial sea limit as international waters. So there are also ongoing disputes regarding rights to passage along "international seaways" – including the Northwest Passage that connects the Atlantic and Pacific,' says Appel.

In September 2008, researchers at the US National Ice Center reported that for the first time, navigable waters around the Arctic ice cap had opened up the Northwest Passage through the Canadian Arctic Archipelago and the Northern Sea Route (Northeast Passage) over Eurasia, at the same time. The Northwest Passage is the most direct route (2,100 nautical miles) connecting the North Atlantic and North Pacific.

'This route, although covered by substantial Arctic sea ice, is attractive to many since it shortens transport distances between Far East and European ports by 40 per cent. However, a key question remains whether transArctic routes can be economically attractive alternatives to global maritime trade routes that utilise the Suez and Panama canals,' notes Appel.

Canada however claims the water within its Arctic Archipelago as its own internal waters – a stance disputed by many countries, including the US.

'The 12m rule does not always apply in archipelagos, which in many cases have larger tracts of open water partially enclosed by a homogenous group of islands ruled by a single government. If these rights are not extended, who controls the zone in between? Who has the proprietary interests, and who manages them?' asks Barutciski.

Responsibilities

The melting ice also raises questions around defence and security – Canada remains in dispute with Denmark over the contested Hans Island, between Ellesmere Island (the northernmost part of Nunavut) and Greenland. To help assert its regional claims, Canada is reportedly now looking to build a new fleet of Arctic patrol ships, a new army training centre in Resolute Bay, and to refurbish an existing deepwater port at a former mining site in Nanisivik, both in Nunavut.

But in addition to strategic concerns, there are clearly also cultural and custodial issues to be considered, say lawyers. With the benefits of ownership also comes responsibility.

'The Arctic is a far more delicate ecosystem than many temperate or tropical zones as there is much less flora or fauna to fill the gap if something is removed – there is a very thin line for survival of entire ecosystems. The

custodial obligation that weighs on the Arctic is immense and it is an issue that many people believe demands a common sense approach, but backed up by a governmental response and perspective,' says Barutciski.

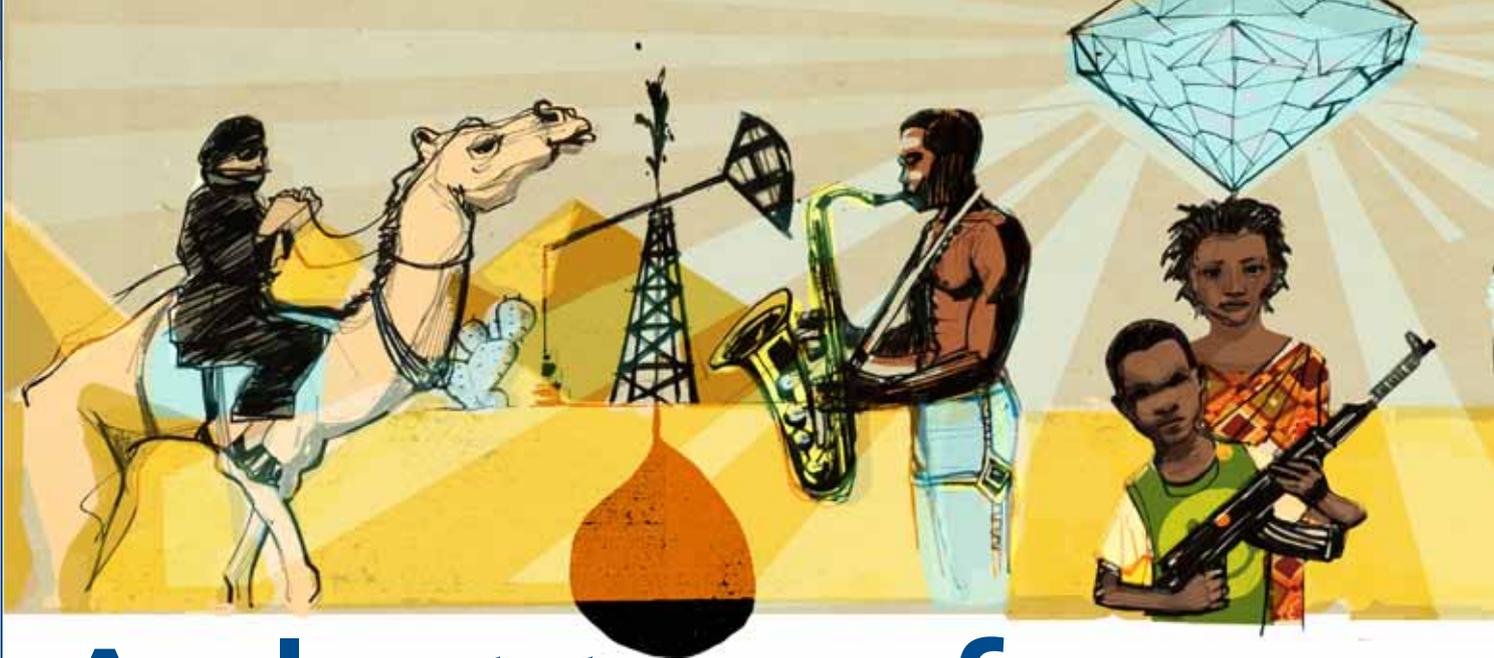
And as well as competing state ownership, indigenous people such as the Inuit of Northern Canada, who have their own reach across the Bering Straits, are also making territorial claims.

In any event, some point out that the ten-year time frame for sovereignty claims under UNCLOS may be too long. The real deadlines may come sooner – oil and gas exploration is moving at the speed of the technology, not the law-makers. Nonetheless, say lawyers, issues continue to surround the ability of companies to extract resources, the ability of countries to lay claim to them, and to earn revenues under concession-type agreements.

'The next few years will be critical in determining whether the Arctic's long-term future will be one of international harmony and the rule of law, or of a Hobbesian free-for-all with dangerous potential for conflict. This is a story still being written, with a plot full of characters who speak of multilateral cooperation but pursue their own self-interest,' says Borgerson. ☒

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A letter from

KAREN MACGREGOR

On a continent scarred by war, Sudan's 22-year north-south conflict was the longest and one of the worst, with some two million people killed and four million displaced. Ethnically and religiously divided between an Arab Muslim north and an oil-rich African Christian and animist south, Africa's biggest country is set to split in half in July after the people of South Sudan voted overwhelmingly in a referendum to forge a new independent state.

The referendum from 9-15 January was part of a Comprehensive Peace Agreement (CPA) signed in 2005 by the Sudanese government and the Sudan People's Liberation Movement, the rebels who fought the long battle for secession. There was little doubt that the southern Sudanese would vote for independence, but there remain doubts over whether peace will last – there have already been clashes along disputed parts of the border, in which dozens of people have been killed.

And there are concerns over possible repercussions for the region and continent of the first crumbling of a colonial-era boundary in Africa: Eritrea was a separate state before being federated with, and then breaking away from, Ethiopia. As Sudanese-born tycoon Mo Ibrahim wrote in Tanzania's *The Citizen* newspaper, the fault lines that divide the Sudanese 'extend from Eritrea to Nigeria. If Sudan starts to crumble, the shock waves will spread.'

Fractious neighbour the Democratic Republic of Congo is ethnically divided, and conflict there has claimed more than five million lives in recent decades. There are rebellions in Angola, Ethiopia and Senegal, and separatist movements in Algeria, Cameroon,

the Ivory Coast, Morocco, Niger, Somalia and Rwanda. Populous, oil-rich Nigeria suppressed the brief secession of its ethnic Igbo during the 1960s Biafra War but remains beset by ethnic tensions.

Hamza Hendawi, Associated Press bureau chief in Cairo, warned last month that Sudan's split could also set a 'dangerous precedent in an Arab world looking increasingly fractured along sectarian and ethnic lines. Already, there are growing secessionist sentiments, exclusive enclaves and intensifying calls for autonomy in some Arab nations such as Iraq and Yemen. In countries like Lebanon and Egypt, the fault lines are widening between ethnic and religious groups, threatening to split loyalties.'

Hendawi continued: 'The Sudan vote has sparked soul-searching about how the predominantly Arab and Sunni Muslim nations of the region have dealt with ethnic and religious minorities since independence from colonial rule in the 1950s and 1960s.' The debate has touched on issues such as the validity of borders imposed by Europeans 'and the supremacy of citizenship over sectarian and religious affiliation'. He quoted Rami Khouri of the American University of Beirut as saying Sudan raised the question: 'Is there a structural problem with other Arab countries?'

Sudan, which gained independence from Britain in 1956, has been wracked by civil wars for most of the past half century. Underscored by a history of exploitation by Arab slave traders of Africans from the south, conflict was rooted in socio-economic and political domination by Islamic-oriented militaristic northern Sudanese governments of the non-Muslim south. The first civil war ended in 1972 but devastating conflict erupted again in 1983.

After three years of talks and accords, the CPA signed in January 2005 granted the southern rebels autonomy for six years after



Africa

which a referendum for independence had to be held. Meanwhile, another conflict erupted in Darfur in the west, causing up to 400,000 deaths and two million people to be displaced. African Union and UN-operated peacekeeping operations in Darfur have struggled to keep control, and a humanitarian crisis continues today.

The southern Sudanese, however, did not let foreboding ruin their pleasure at the prospect of self-rule. According to provisional referendum figures, voters turned out strongly and nearly all said yes to independence. 'This is the outcome we expected...the results won't change much,' Chan Reec Madut, head of the independent electoral bureau, told reporters. Final results will be out this month.

South Sudan will become Africa's 54th state on 9 July, in all likelihood led by current President Salva Kiir. It will have a population of eight million people. Millions fled the civil war, many of them to north Sudan, many to other African countries and yet others abroad. An estimated 150,000 exiles returned home ahead of the referendum and the government expects half a million more back by July, raising fears of a food crisis. 'There's been a sharp spike in returnees and the pace has started to outstrip the capacity of the government and its partners to cope,' Lise Grande, chief humanitarian coordinator in the region and deputy head of the UN peacekeeping mission, told reporters. 'We are really worried.'

On 17 January observer missions released statements endorsing the referendum as largely peaceful and credible, despite concerns of fraud in some areas that counted turn-outs of more than 100 per cent. They included African Union and European Union missions, the US-based Carter Center, the Arab League and East African observers. 'I believe this is democracy at its most basic,' said Kofi Annan,

former secretary general of the United Nations, who also attended the referendum. 'I hope all parties and all of us will respect the results once they're released. The people are the ultimate authority.'

Officials in the north also declared satisfaction with the voting, to some degree allaying fears of disputes between the north and south about the outcome – a frightening prospect given Sudan's history and leadership by a president charged by the International Criminal court of genocide in Darfur. Observers had expressed concern about lack of informed discussion in the north about secession, and in the south about unity. Leaders in the south warned voters not to hold early celebrations, to avoid antagonising the north.

An African Union High Level Implementation Panel will facilitate negotiations over post-referendum issues that will include how to divide oil revenues, water resources, citizenship, assets and liabilities, currency and economic consultation, security matters, the north-south border and contestations in some areas including the disputed town of Abyei, where violence has threatened to undermine the peace process.

On balance, despite ongoing jitters about keeping the peace and international repercussions, the saga of South Sudan provided a heartening start for Africa in 2011. That the African Union countenanced a secessionist answer to the Sudanese problem at all was quite remarkable, given its previous antipathy towards the Pandora's box of post-colonial borders. If it works, Sudan could even provide a model for the resolution of seemingly intractable conflicts, and the African Union's involvement signals the growing confidence of Africa and its continental leadership to seek and implement bold solutions.

Karen MacGregor is a freelance journalist. She can be contacted at editors@iafrica.com.

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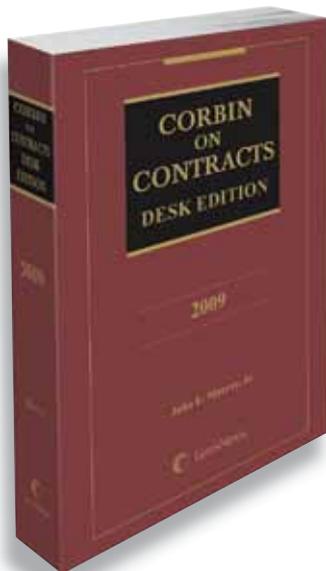
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Risky business

Political risk has always been an important consideration for the global business community, but the terrain has shifted dramatically in recent years.

NEIL HODGE

For years, businesses have faced political risks from two fronts – from direct intervention, and through government sanctions. But up until now, political risk has often been regarded as an issue for western companies setting up shop in developing or under-developed markets, rather than a problem that needed to be confronted in countries like the US or UK. How times have changed.

Now, given the spate of regulation and legislation that has been rushed into force regarding how companies should be governed, as well as the multi-billion dollar bailouts of banks on both sides of the Atlantic, executives – particularly in financial services institutions – are rating their saviours as their worst nightmare.

In the annual *Banking Banana Skins* report released in early 2010 by professional services firm PricewaterhouseCoopers (PwC) and the Centre for Financial Innovation, a thinktank, bankers in the US and Europe complained

that political interference is now the biggest risk facing the industry. Some 450 senior figures from all round the world said that the ‘politicisation’ of banks as a result of bailouts and takeovers now poses a ‘major threat’ to their financial health. It is the first time in 15 years of the study that the risk has even featured as a significant risk, let alone coming top. As David Lascelles, the editor of PwC’s survey, said: ‘It is ironic that politics should emerge as a risk when the banks had to be rescued in the first place.’

Refocusing on risk

Regulators worldwide have either quickly made changes or are in the process of reviewing how to make companies and their boards more directly accountable and how they should improve their focus on risk, oversight and compliance. The European Commission – the European Union’s (EU) executive body – is

planning a potentially wide-ranging overhaul of both financial regulation and corporate governance after launching a Green Paper on governance reform in June 2010. In the US, the Dodd-Frank Wall Street Reform and Consumer Protection Act has heralded the most sweeping overhaul of the financial system since the 1930s. According to law firm Davis Polk, the legislation requires that regulators create 243 new rules, conduct 67 studies and issue 22 periodic reports.

Unsurprisingly, those forced to comply with the new rules have not exactly welcomed them. Several bankers have publicly complained about political interference – notably the Royal Bank of Scotland’s chief executive Stephen Hester, who argued that the politicisation of RBS hampered its recovery and would harm the taxpayer by making it more difficult for the government to make a return on its investment. However, he did later say that he regretted his words.

Yet aside from direct governmental pressure in the form of ‘onerous’ regulation, increased disclosure, and greater accountability, financial services firms are finding that they can just as easily fall victim to extraterritorial laws aimed at prohibiting trade with ‘dangerous’ countries and regimes, even if the transactions take place outside of the prosecuting country. For example, last August Barclays Bank agreed to pay US\$298m to settle criminal charges that it violated US sanctions through dealings with banks in Cuba, Iran, Libya, Sudan and Myanmar (Burma). The bank was charged with violating the US’ International Emergency Economic Powers Act and the Trading with the Enemy Act as a result of US\$500m in illegal transactions from 1995 through 2006.

The Barclays case is just one in a series brought by US prosecutors against major banks. In December 2009, Credit Suisse agreed to pay US\$538m after prosecutors detailed a decades-long scheme by the Swiss bank to hide thousands of transactions on behalf of clients in Iran, Sudan, Libya and other nations. Also in 2009 in a similar case, Lloyds TSB agreed to forfeit US\$350m over charges that it faked records so clients from Iran, Sudan and elsewhere could do business in the US banking system. In March 2009, Wachovia Bank, now a unit of Wells Fargo & Co, agreed to pay US\$160m to settle US charges that it failed to stop more than US\$100m of Colombian and Mexican drug traffickers’ money being laundered through accounts at the bank.

A recent study conducted by accountants Deloitte based on a survey by the Economist Intelligence Unit titled *Facing the sanctions challenge in financial services* indicates that the increasing complexity, regulatory rigour and

inconsistent nature of global regimes are raising the bar for sanctions compliance. It also concluded that there is a lack of awareness of sanctions compliance among financial services companies that need to be addressed.

Some industries are more at risk of changing government attitudes and direct intervention than others: oil companies are an obvious example.

While financial institutions may avoid being directly involved in embargoed trade transactions, such as the sale of arms, weapons and ammunition, to overtly sanctioned targets like Al-Qaida in Afghanistan, potential violations of sanctions law in the US can be more subtle, warns Sam Eastwood, a partner in the dispute resolution practice at law firm Norton Rose in London.

‘Under certain sanctions regulations, financial institutions are prohibited from making available any funds, other financial assets or economic resources to sanctioned entities. This could conceivably include the release of money in a bank account to an account-holder or extending a loan or guarantee to a client who is linked to a sanctioned party. Major financial institutions have come under fire for failure to comply with sanctions law, he says.

Recent enforcement actions include UBS paying a US\$100m fine in 2004 for breaching US sanctions by sending funds to Cuba, Iran, Libya and Yugoslavia, and ABN AMRO Bank paying a US\$80m civil penalty in December 2005 for alleged violations of US sanctions by clearing cheques, processing wire transfers and arranging letters of credit involving Iranian and Libyan parties based on instructions and documents that originated in its Dubai and India branches, rather than in the US.

Eastwood warns that banks need to ensure they review their compliance policies, and make sure they are aware that – even if they not carrying out the transaction within the EU or the US where such measures are in force – they could still be legally bound by their laws because they have operations based there. For example, the EU applies sanctions within the framework of the Common Foreign and Security Policy and these may target governments of third countries, non-state entities or individuals. Such sanctions apply to all persons and entities doing business in the EU, including nationals of non-EU countries, and to EU nationals and

entities incorporated or constituted under the laws of an EU Member State when doing business outside the EU.

Violations and penalties

Similarly, the US Treasury's Office of Foreign Asset Control (OFAC) administers and enforces economic sanctions programmes based on laws passed by the US Government. OFAC requires all US persons to comply with its regulations, and 'US persons' is broadly defined to cover: all US citizens and permanent residents regardless of location; all persons and entities within the US; and all US incorporated entities and their foreign branches. In specific cases, 'US persons' also includes foreign subsidiaries owned or controlled by US companies and foreign persons in possession of US-origin goods. The violation of OFAC sanctions can result in substantial civil and criminal penalties,

companies need to be aware of. Another potential hazard that they have to prepare for is direct government interference in their operations, or legislation that is enacted after they have set up business there. Asia largely typifies the former, where local companies or investors need to take a majority stake in any joint venture with a non-domestic company. Take Laos as an example. According to the World Bank's recent *Doing Business Report*, having the government as a partner seems to be the accepted way of moderating discretionary government actions. The level of fairness of the regulatory system appears to largely depend on whether an investor is willing to allow the Laos Government to take an option for or an initial equity stake in the project of around ten per cent to 20 per cent.

Yet even some countries that are often regarded as developed are not immune from strict rules regarding local investment and

'It is extremely important for any foreign company investing and working in a different jurisdiction to analyse very carefully if there is a bilateral investment agreement in place to protect the company's interests and assets in case the government tries to nationalise its operations there.'

Fernando Peláez-Pier

*former IBA President, and partner
Hoet Peláez Castillo & Duque, Venezuela*

including criminal fines from US\$50,000 to US\$10,000,000 and/or imprisonment from ten to 30 years for wilful violations, and civil penalties from US\$250,000, or twice the amount of each underlying transaction, to US\$1,075,000 per breach.

Consequently, companies need to know the law and its penalties, and have robust compliance procedures in place. As Eastwood says: 'The increasingly global operations of financial institutions exposes them to the application of various overlapping, and at times inconsistent, sanctions regimes.'

'The challenge of compliance is exacerbated by a lack of clear guidelines on the implementation of such regulations and the constantly changing list of sanctioned entities and transactions. Growth in the use of sanctions and the vigour demonstrated in the level of enforcement activity means that financial institutions cannot underestimate the importance of having a robust sanctions compliance programme,' he adds.

But sanctions are just one issue that

control. Johan du Toit SC, a South African silk and member of Selborne Chambers in London, says that South Africa's black economic empowerment policy is an issue for companies setting up operations in the country.

'If a company wants to pick up a government contract or if it wants to set up an operation in South Africa then it needs to ensure that 25 per cent of the entity is owned by black South Africans. However, finding black South African investors with that kind of capital may be difficult, particularly if the business is a large one, so some companies run the risk of having black investors in name only – on paper these people have a shareholding to comply with the law, but in reality they do not.'

Du Toit also says that companies preparing to invest in South Africa need to be aware of the potential for laws to change to reflect popular attitudes, the future status of the country's mineral rights – and who owns them – being a case in point. 'Prior to 1994 mineral rights were vested with the landowner and he could deal with them as his property. However, after

2002 mining rights (as they were then called) have been vested with the government, which has ensured absolute control over how these mining rights are licensed and how companies exploit them.'

'However, in recent months some members of the African National Congress (ANC) have said that they want all mines to be nationalised. While this has not been touted as official ANC or government policy, companies should be aware that the rights they think they are buying now could be taken away from them in the near future,' he says.

Some industries are more at risk of changing government attitudes and direct intervention than others: oil companies are an obvious example. This year, Brazil has signalled that it wants to collect a much bigger chunk of the profits from the oil that it produces. The country, which produces about 2.4 million barrels of oil a day, currently requires oil companies that do business on its soil to pay around 50 per cent of their profits to the government in either royalties or corporate taxes. That's in line with the rates paid in other 'low-tax' countries like the United States and Canada. But a major new discovery off of the country's coast, estimated to contain as much as 50 billion barrels of oil and natural gas, could change all that. With this new resource in mind, Brazilian lawmakers are considering a bill that would push the effective tax rate for outside oil companies north of 80 per cent; terms similar to countries like Iraq or Norway.

The state of play

The proposed legislation would require that international energy outfits get the majority of the materials used to extract oil from Brazilian suppliers, and would give the government final say over which projects get developed. The new law would also require any oil firm operating in the country to partner with Brazil's state oil company Petrobras, which would be solely responsible for laying the infrastructure required to extract oil and ultimately overseeing all the production. International oil firms would be relegated to providing funding and technical know-how in exchange for a share in the profits.

Like Brazil, Nigeria is considering hiking its royalty rate and requiring much of the material used in construction projects to be locally made. It also wants its state oil firm to have a bigger role in projects. The proposed law has prompted one major oil firm operating in the country to call it 'a cumbersome document that lacks insight into the very basics of our industry', adding that the royalty provisions are some of the 'harshest in the world'.

Fernando Peláez-Pier, a partner at Venezuelan law firm Hoet Peláez Castillo & Duque and former IBA President, says that forcing foreign firms to subcontract parts of their operations to local firms can be a risky strategy.

'For decades, governments in emerging markets – particularly socialist or central-left governments – have tried to enable domestic companies to get a share of the wealth that foreign companies are creating when they are either exploiting mineral and oil rights and/or executing infrastructure projects within these countries', says Peláez-Pier. 'But such policies may create problems. In some jurisdictions there may be very few local companies that are capable of meeting the needs of such

Some 450 senior figures from all round the world said that the 'politicisation' of banks as a result of bailouts and takeovers now poses a 'major threat' to their financial health.

work, which means that the projects can run over schedule and budget. And the more that governments push for these concessions, the less attractive they can look to foreign companies looking to operate there.'

Peléaz-Pier also says that western companies have historically been in danger of having their local operations nationalised in Latin American countries. 'Through the years and due to sound economic and fiscal programmes, this has changed in a good number of countries within the region but in others it is still a threat,' he says. Indeed, Venezuela's leader Hugo Chávez has embarked on a course of nationalising domestic and foreign corporations, including taking control of joint venture companies involved in oil production, as part of a scheme to redistribute the wealth created from exploiting mineral rights to give to disadvantaged parts of the population and to promote social welfare programmes.

The policy has not gone down well with the oil majors, and it appears that there may be very little that they can do about it. The Venezuelan Government has just won a major legal victory following its decision in May 2007 to nationalise the country's Orinoco Oil Belt reserves so that the state has at least 60 per cent stakes in all oil projects. State participation in the Orinoco River Belt has since increased from 39 per cent to 78 per cent. Six major companies were

asked to hand over proportions of their stakes, and Chevron Corp, Total, BP PLC and Statoil negotiated deals with Venezuela to continue as minority partners.

But ExxonMobil and ConocoPhillips rejected the terms, prompting Venezuela to nationalise Exxon's 42 per cent stake of the Cerro Negro project. The government's offer of US\$750m in compensation was rejected. Instead, Exxon went to the International Centre for Settlement of Investment Disputes (ICSID), a World Bank institution that arbitrates investment disputes between member countries and individual investors, demanding that projected profits be included so that the total compensation was US\$5bn.

However, in June this year the ICSID Tribunal concluded it had no jurisdiction over the claims of Mobil Corporation. The court ruled that ExxonMobil could not make the claim on the basis of Article 22 of the Investment Law of Venezuela, and therefore there was no basis for jurisdiction.

While such moves obviously play well with part of the local population, it does little

to impress foreign companies and their investors. As a precaution, says Peláez-Pier, 'it is extremely important for any foreign company investing and working in a different jurisdiction to analyse very carefully if there is a bilateral investment agreement in place to protect the company's interests and assets in case the government tries to nationalise its operations there. Such an agreement may give the company greater protection,' he says.

In practice, however, governments usually win – or if they don't, they make the option of investing in the country so unpalatable that foreign companies simply leave. But the fact that political risk has moved from the confines of emerging markets to the developed world means that companies have less room for manoeuvre, and may simply have to comply. ☒

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

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Slow take-off

The European Company Statute was meant to make it easier for companies to operate throughout the EU. So far, only a select few have seen the appeal.

JONATHAN WATSON

In October 2010, German sporting goods group Puma announced that it was transforming itself into a ‘Societas Europaea’ (SE – see box). By opting for SE status, the company added itself to an increasingly impressive list of big names who have chosen this type of corporate structure. Utilities firm E.On, insurance firm Allianz, chemicals giant BASF, truck firm MAN, tissue maker SEA and car manufacturer Porsche have all become SEs in recent years.

Yet in corporate Europe as a whole, the SE has not proved particularly popular. According to research from the European Trade Union Institute (ETUI), there were just 654 SEs at the beginning of November 2010. Of these, only about a quarter were ‘normal’ SEs with both

employees and operations. Roughly 12 per cent had operations but no employees, while another 12 per cent were shelf companies. The others were difficult to identify solely from commercial registers.

Only in Germany has the SE made a significant impact. Of those SEs that can be identified and have employees and operations, about 80 are based in the EU’s largest Member State. The Czech Republic has about 20 – it has many more that are shelf companies – and there are a number of countries with about ten, such as Austria, France and the Netherlands. Most other countries only have two or three and then there are several countries, such as Italy, with none at all.

Europe consults

Why are so few companies choosing to become SEs? In a bid to find answers to this question, the European Commission launched a consultation last year. A discussion paper was published, comments submitted and a conference held in Brussels at the end of May. The Commission published a synthesis of the comments it had received in July and plans to issue a response to all the feedback it has received early this year.

‘One of the prerequisites for being an SE is that it has to be a company that operates across Europe, like Puma or Porsche,’ says Thomas Kaiser-Stockmann, a partner in the Berlin office of Swedish firm Mannheimer Swartling and vice-chair of the IBA’s Closely Held and Growing Business Enterprises Committee. He coordinated the IBA’s submission to the Commission’s consultation on the SE.

‘For companies like that, whose trade is conducted to a large extent in Europe, there is some appeal in creating a single legal entity,’ he says. ‘For a big corporate that is important in its domestic market but has little export activity to the rest of Europe, it makes less sense.’

In other jurisdictions, the verdict is more damning. ‘There are no advantages whatsoever for setting up an SE in Spain,’ says Enric Picanyol, a partner at Cuatrecasas Gonçalves Pereira. ‘The evidence is overwhelming: there is only one SE currently registered in Spain which was transferred from another Member State. It is a part of a well-known multinational group. Apparently it is a trading company and probably has very few employees.’

Stumbling blocks

One of the main factors holding back the SE is its complexity. In Denmark, for example, it is far more complex to form an SE than to form a national limited liability company. That’s according to Dan Moalem, partner at Moalem Weitemeyer Bendtsen, who also submitted evidence to the Commission’s consultation on the IBA’s behalf. ‘In Denmark, both public and private limited companies can be registered electronically with the Danish Commerce and Companies Agency, thus enabling the

formation and registration of a company literally within a few hours,’ he says. ‘Such an option does not exist with regard to the SE.’

A similar point is made by Mattia Colonnelli de Gasperis, who is based in Italy. ‘There is a lot of flexibility in the rules, but I’m not sure that actually makes the SE more attractive,’ he says. ‘With flexibility comes complexity, and when it comes to structuring the business, you have a lot of options and a lot of potential consequences to consider. When I look at the SE bylaws, I feel a little overwhelmed by all the options.’

Colonnelli also cites transactional costs as a barrier to setting up an SE. ‘There are relatively few professionals who know how to set up an SE in Italy, so the costs for providing this service

“In Italy you can set up your own company with €2,500”

Mattia Colonnelli de Gasperis
partner, Colonnelli de Gasperis

are very high,’ he says. ‘I had three clients who were considering turning their companies into SEs, but the transactional costs were almost three times higher than those associated with a “normal” Italian company.’

Felix Prändl, partner at Brauneis Klauser Prändl, submitted evidence to the Commission’s consultation for the IBA on Austria’s impressions of the SE. ‘Our firm did one of the first formations of a SE through a cross border merger involving a Cypriot company merging into an Austrian company,’ he says. ‘This formation proved to be burdensome, time consuming and costly for all parties involved. Numerous obstacles and legal uncertainties occurred. The overall costs of the formation of the SE were approximately five times higher than for the formation of an Austrian stock corporation. Time wise, it took more than six months to have the SE established.’

First adopted at EU level in 2001 following years of negotiations between Member States, the legislation establishing SEs came into force in October 2004. The idea was to give companies operating in more than one EU country the option of being established as a single company under Community law and so able to operate throughout the EU with one set of rules and a unified management and reporting system. Regulators believed this would be easier than complying with all the different national laws of each Member State where companies have subsidiaries.

Employee representation

Another aspect of the SE to cause concern in some jurisdictions is the degree of employee representation required. When an SE is created, there have to be negotiations on the involvement of employees with a body representing all employees of the companies concerned. If it proves impossible to negotiate an agreement then a set of standard principles applies, the exact nature of which depends on the format for worker participation in the companies concerned before the SE was set up.

This is an alien concept in many EU Member States. 'Under Italian law, there are no provisions for mandatory participation of employees in the management of the company,' says Colonnelli. 'This has been a negative driver for the incorporation of these vehicles in Italy. Usually, for cultural reasons, Italian employers are against this kind of participation. And in my experience, Italian trades unions do not like it either. They prefer to maintain their independence and remain free to criticise the management of the company – especially when the management is also the owner of the company, as is often the case in Italy.'

Anne-Sophie Cornette de Saint-Cyr, associate director at French law firm FIDAL, adds that the rules on employee involvement and the negotiating procedure are viewed as 'very burdensome and too time-consuming' in France. 'French companies are really reluctant to implement such procedures with trade unions and thus open the door to a long negotiation process,' she says.

All this forms a stark contrast to Germany, where employee participation in the management of a company is a well-established

field of labour law', whom it says 'strongly opposed' the suggestion that employee involvement was considered a problem. 'They argued that this is based on perceptions and not on real evidence,' the Commission's summary says. 'Employee involvement (in the form of information and consultation) is already well-known throughout the EU. In particular, European Works Councils are widespread, including in Member States with a low number of SEs... This group of respondents claimed that stakeholders had insufficient knowledge of the provisions regulating employee involvement.'

Capital requirements

As the capital requirements for an SE are rather high, SE status will arguably only be very appealing to a rather limited number of big and internationally focused companies, says Kaiser-Stockmann. This is one of the main reasons why there are more SEs in some countries than others. The minimum requirement for an SE is €120,000. In comparison, the nominal capital requirement for forming a private limited liability company in Denmark has recently been lowered. 'The nominal capital requirement for a public limited liability company remains DKK 500,000 (€67,200), but it is now possible to pay up to only 25 per cent of the nominal share capital at the time of formation,' says Moalem. This makes the SE rather unattractive to a lot of firms.

Colonnelli adds that in Italy, only €10,000 is needed to have a stock company. 'Also, when you incorporate an Italian company, you only need to provide 25 per cent of that sum upfront,' he says. 'So in Italy, you can set up your own company with €2,500. That makes all

'If you come from a jurisdiction where you are not used to having employee participation on the board, then the SE [Societas Europaea] might not be terribly attractive'

Thomas Kaiser-Stockmann
Mannheimer Swartling

part of business life. Most large corporations are required to allow employees to elect a certain percentage of seats on the supervisory board. 'If you come from a jurisdiction where you are not used to having employee participation on the board, then the SE might not be terribly attractive,' says Kaiser-Stockmann.

Whether the Commission will agree to do anything about this remains to be seen. In its summary of the consultation responses, it gives prominence to comments made by 'worker organisations and researchers working in the

the difference, especially in a country where 95 per cent of the corporate sector consists of small and medium sized companies (SMEs), many of which are family-run. These businesses have to be very careful about costs. Many of the SEs we have seen in other countries are bigger companies with a much higher turnover.'

The tax status of SEs has caused some concern. The SE is treated the same as any other multinational, meaning that it is subject to the tax regime of the national legislation that

applies to the company and its subsidiaries. SEs are subject to taxes and charges in all Member States where their administrative centres are situated.

This means their tax status is not perfect, as there is still no adequate harmonisation at European level. 'An SE with its registered office in Denmark will have to live with an uncertainty in regards to taxation,' says Moalem. 'As early as 2001, the Commission proposed an EC taxation scheme with the SE as the pilot project. The proposal did not make its way to regulation, but the idea of a communal tax scheme for SEs has not been rejected altogether. It is very likely that potential EC rules on SE taxation would make the SE more attractive.'

Need for change

It seems quite clear how the SE needs to change if it is to be more widely used. Any changes to the employee participation rules in particular would probably be very welcome. 'Germany's trades unions would oppose any changes to those rules, but if there could be some kind of compromise, countries like Italy, Denmark, Ireland and others might feel

more comfortable with the SE format,' Kaiser-Stockmann says.

The length of time it took for the Member States to agree on the SE in the first place – 30 years – suggests that rapid agreement on any reforms is unlikely. Kaiser-Stockmann believes that eventually, the SE will become a model for more entities. 'But this will take time, and it depends how hard the individual Member States push it,' he says. 'The Commission now has to go back to the Member States to see what reforms they can accept.'

Even if changes are made, some think the SE will only ever be a minority pursuit in some jurisdictions. 'We do not believe, all possibilities considered, that there will be a substantial market for the SE in Denmark,' says Moalem. 'Most of the private limited liability companies in Denmark are small businesses. Due to the large difference in capital requirements when comparing the SE to a Danish private limited liability company, this alone is bound to have an impact, when (not) choosing the SE.'

The ball is in the regulators' court. ☒

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Courting success

As law firms across the globe struggle to survive the fall-out from the recession, litigation lawyers are busier than ever. But will it last?

LUCY TREVELYAN

As economies around the world crawl out of recession, many companies are still dealing with the fall-out – legal disputes are up as parties seek ways to extricate themselves from deals which, although attractive in pre-slump days, became increasingly unappealing as the economic downturn deepened.

This, of course, spells good news for litigators: as other law firm departments saw workloads plummet as the recession took a grip – and have yet to see work levels return to normal in fields such as M&A and property – litigation specialists are increasingly in demand.

Indeed, a survey of senior corporate counsel revealed that 52 per cent of respondents expected an increase in legal disputes. *Fulbright's 6th Annual Litigation Trends Survey Report* – released by global law firm, Fulbright & Jaworski – canvassed 267 in-house lawyers from the US and 125 from the UK, and two-thirds of respondents (68 per cent) said the economic crisis had affected their organisation and management of litigation. The most numerous litigation cases pending in the last year were related to contracts (31 per cent), followed by employment (18 per cent), and personal injury (13 per cent).

Meanwhile, a survey released in April 2010 by The Cowen Group showed significant increases in caseloads among litigation-support professionals for the first quarter of the year, with law firms reporting an increase of 65 per cent in their new-case workloads.

Hogan Lovells partner, Patrick Sherrington, says London's Chancery, Companies, Commercial and TCC courts all show significant increases in proceedings commenced, with 2010 instructions up on 2009, and representing a significant increase on 2008.

Since the onset of the recession, Sherrington says, there has been a considerable up-tick in litigation, albeit not the instant 'boom' originally predicted.

'That might be still to come, but it's worth remaining circumspect about that even though it is true that issues that might give rise to a dispute take time to come to light, for example in investor disputes.'

In the current economic climate, he says, companies have to be cautious with their legal spend – the costs of litigating look less attractive at a time when most companies have been reviewing all their budget lines.

'This is only sensible and has probably affected not only the appetite for litigation but

also the demands made on litigators in private practice by those instructing them,' he adds.

Regulatory proceedings, he says, are more prominent – with US regulators particularly active – and there have been stand-out decisions against several major institutions in the UK recently (eg, RBS).

'We are seeing disputes where contracts have become unattractive for one party across a wide range of sectors: oil and gas; commodities; retail banking; construction; consumer goods; and more. There is also still significant offshore litigation and arbitration involving Russian interests.'

Oxana Balayan, Hogan Lovells' managing partner in Moscow, says dispute resolution is certainly one of the most dynamic and busy areas in the Russian legal market, with shareholder, property and contractual disputes all keeping her firm's litigators busy of late.

She adds, however: 'Despite several reforms undertaken by the government the legal framework for solving disputes in Russia remains ambiguous. Key problems are known as lack of recognised court practice and unreliable enforcement procedures.'

Michael L Novicoff, partner at Los Angeles-based Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP, and Co-Chair of the IBA's Litigation Committee, also reports that litigators are generally busy at present – most, more so than a year ago.

Law firm cut-backs

He says: 'In part this is simply – and happily – because our clients have themselves returned to a more stable level of economic activity, but there are structural changes occurring within the legal profession as well. Many law firms reduced their levels of hiring and staffing over the past few years, and as a result there are in many firms fewer lawyers on hand to manage the same or even an increasing volume of litigation.'

The industries that have proven to be more recession-proof, he says, are producing the most litigation. 'In addition, these economic times seem to have produced – or perhaps simply revealed – a number of sophisticated frauds, and many litigators have experienced an increase in those sorts of cases as well.'

He warns though, that most business litigation currently keeping lawyers busy concerns past, not present, economic activity, and the effects of the recession could still hit litigators – just somewhat later than their colleagues who structure transactions and thus work more in the present.

He says: 'Even in a recession, litigators will generally remain occupied for a time with

disputes related to the business of years past. Thus the effects of recession reach litigators later, but then persist longer, as fewer transactions today means fewer disputes tomorrow. At the same time, of course, recession prompts clients to be more cautious with their funds and more interested in settlement and forms of alternate dispute resolution.'

Pallavi S Shroff, lead litigation partner at Amarchand Mangaldas, New Delhi, also says litigation lawyers are 'extremely busy' at present but insists much of the work stemmed from the financial crisis, not predated it.

'Lack of uniformity in procedure generally, and specific procedural issues continue to raise some obstacles to the smooth conduct of transnational litigation.'

Allens Arthur Robinson
Peter O'Donahoo

'We saw an increase in the workload during the global financial crisis and the work continues to increase. The crisis had an impact on the business globally and this led to a number of parties relooking at joint ventures – some wanting to exit, some wanting to seek more out of it. All of this led to disputes. We also saw disputes and issues arising with respect to private equity investments prior to their being restructured.'

Commercial disputes were flavour of 2010 whether they arose from shareholders or commercial contract, she says, although there was also an emergence of litigation with regard to regulatory matters in India.

India is certainly not a popular place for litigation though, she says, 'in view of the deals that occur in the judicial system in India'.

'Procedural rules for litigation in India were revised way back in the 18th century and are really cumbersome,' she adds.

Cross-border litigation does inevitably arise in India though, she says, particularly with regard to enforcement judgments delivered overseas and bankruptcy declared overseas, enforcement of which is sought in India.

She says: 'Chief among the problems are lack of cooperation by Indian companies or individuals and who may or may not follow or cooperate in complying with the orders of foreign countries; since India has reciprocity with only few countries for enforcement of judgments, fresh proceedings can be quite cumbersome and time consuming.'

Cross-border quandary

Melbourne-based Allens Arthur Robinson partner, Peter O'Donahoo, agrees that a key problem posed by cross-border litigation is in enforcement of foreign judgments, in particular where state reciprocal agreements are not in place.

He says: 'Lack of uniformity in procedure generally, and specific procedural issues such as service out of the jurisdiction and the obtaining and hearing of evidence from foreign jurisdictions, also continue to raise some obstacles to the smooth conduct of transnational litigation.'

However, he says, increased use of, for instance, jurisdiction agreements, and the introduction of international instruments to increase procedural uniformity (eg, Australia recently acceded to the Hague Convention on Service Abroad), have assisted in overcoming some of these obstacles.

'There has also been a rise in then use of international commercial arbitration, which allows parties to circumvent such procedural issues. Increased adoption of internationally recognised standards on procedure would assist in the smooth conduct of transnational litigation,' he says.

The ongoing increase in globalisation of trade has resulted in an increase in cross-border litigation in which Australian parties are involved, he says.

'These economic times seem to have produced - or perhaps simply revealed - a number of sophisticated frauds, and many litigators have experienced an increase in those sorts of cases as well.'

Michael L Novicoff

Los Angeles-based partner and Co-Chair of the IBA's Litigation Committee

'We have seen a steady increase in standard forms of cross-border litigation, such as contractual disputes, product liability claims and insurance disputes. In recent years cross-border litigation has obviously also been impacted by the global financial crisis, which has seen an increase in, for instance, shareholder actions, and insolvency and insurance-related litigation.'

Sherrington says jurisdictional reach is increasingly important to firms involved in litigation; he describes the number of different jurisdictions in which there have been disputes

his firm has been involved in over the last few years as 'staggering'.

'To illustrate - as at the date of the merger [between Lovells and Hogan & Hartson] on 1 May 2010, we had offices in 21 jurisdictions around the world. We have already found the need to open another, in Ulaanbaatar (Mongolia). No doubt there will be more.'

The main difficulties with cross-border disputes, he says, come when there are disconnects between the ways courts in different countries deal with similar issues.

'These disconnects can be exploited by the parties. A good example is the possibility of a party using a "torpedo action" as a dilatory tactic and to circumvent a contractually agreed choice of jurisdiction. Often the two courts will take the same view of such tactics, but the time and expense of concluding that issue is usually substantial.'

This is one of the issues the EU Commission has been considering on the reform of the Brussels Regulation dealing with jurisdiction and the enforcement of judgments, he says. 'It is one of the main rules that would be usefully changed to close a loophole for international litigators.'

Worldwide enforcement regime

Also on a global level, says Novicoff, litigators will be closely monitoring the progress of the Hague Convention on Choice of Court Agreements, which would provide a relatively simple mechanism for the worldwide enforcement of foreign judgments when the parties have contractually agreed to submit their disputes to a foreign court.

He says: 'A very successful international regime like this has been applied to private arbitration awards for more than 50 years, but jurisdictions such as the US have consistently refused to extend any such procedure to foreign judicial orders. This may now be changing; the US signed this new treaty last year, but it has not yet been ratified by the US Senate and so is not yet in force in that country.'

The growth in litigation funding has also seen a number of claims with cross-border aspects filed, where otherwise they might not have been, O'Donahoo says.

Paul Nicols, an Allens Arthur Robinson partner based in Sydney, agrees. He says: 'Since the High Court's decision in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* in 2006, there are now several litigation funding companies operating in Australia. It is likely that the backing of funders has enabled more large claims to proceed, particularly class actions. The effect has been most noticeable in



the area of shareholder class actions, of which we have seen a significant number in the last few years.'

However, the growth in the litigation funding industry in Australia has not been accompanied by regulation of litigation funders, even though, as O'Donahoo says, proper regulation of funders is essential to protect the administration of justice and the plaintiffs who enter funding agreements.

He says: 'In particular, there is currently no requirement for funders to pay adverse costs orders if the funded litigation is unsuccessful. In these circumstances, successful defendants are unlikely to be able to recover their costs. Even if funders do agree to pay adverse costs orders, there is a lack of prudential regulation for funders (other than those with financial services licences) to ensure they can meet those orders. This is an issue that should be remedied.'

It should also be a requirement, he adds, that all litigation funding agreements be filed with the court at the commencement of proceedings, to ensure the terms of the agreement do not amount to an abuse of process.

Nicols says that although Australia is a popular forum for shareholder class actions, the US remains one of the most popular countries in the world in which to commence litigation.

'One of the key reasons for this is the absence of a "loser pays" rule, in contrast to the position in Australia and many other common law jurisdictions. In the US, unsuccessful plaintiffs are not usually required to pay the costs of defendants, with the result that there is little risk in bringing proceedings. Similarly, contingency fees are permitted in the US, but not in Australia.'

Novicoff wryly concedes that the US has always led the world in levels of litigation: 'it's

not necessarily our proudest claim, but one which cannot reasonably be denied', he says. 'There are many reasons for this, including the wide availability of jury trials in civil cases and ready access to contingency and other alternate fee arrangements.'

The greatest single difference between litigation rules in the US and those in force elsewhere is probably the breadth of discovery allowed in American courts, he says. 'Litigants from abroad are frequently surprised by the extent to which US procedure requires them to produce documents and testimony well in advance of any determination that a claim has even minimal merit.'

The US will always be popular with plaintiffs because its rules of civil procedure do create the possibility of larger awards than are typical elsewhere, he says.

Litigation tourism

There has, however he says, been an increase in litigation tourism: 'The UK is now such a popular destination for defamation plaintiffs that the US has enacted special legislation to bar the recognition of foreign judgments incompatible with US defamation laws.'

Although English litigation rules are bulky and complex – far more so than when they were first reformed by Lord Woolf in the late 1990s – England remains popular with multinationals, says Sherrington.

'Entities making submissions to a recent report on litigation costs in England made it clear that the English High Court provides a "Rolls Royce" service – with excellent judges providing consistent judgments in an efficient system. The rules provide a comparatively efficient and modern process that generally fits users' needs.'

'We are seeing disputes where contracts have become unattractive for one party across a wide range of sectors: oil and gas; commodities; retail banking; construction; consumer goods; and more. There is also still significant offshore litigation and arbitration involving Russian interests.'

Patrick Sherrington
Hogan Lovells

With the ever-increasing presence of large commercial operators in what are often referred to as 'emerging markets', he adds, England is likely to remain popular but arbitration and even court cases may well increase in places like Hong Kong and Singapore.

One of the greatest changes to the litigation field over the last few years, Novicoff says, has probably been technological.

'The universal use of e-mail for the most routine business communications means that there is now a vastly more complete evidentiary record of the negotiations, promises or other events giving rise to many claims. In many jurisdictions, there are now complex rules governing the maintenance and discovery of these electronic records, as well.'

Most of his firm's clients work more efficiently and effectively than they did a decade ago, and they now quite reasonably expect the same from their lawyers – and from the legal system as a whole.

'The entire profession is under pressure to deliver more efficient and less expensive

means of dispute resolution, and litigators are meeting those challenges with everything from alternative fee arrangements to greater use of mediation and arbitration,' he says.

Michael Hales, partner at Nabarro LLP, predicts that lawyers will improve their project management to try to give clients much more certainty about the timescale, cost and outcome of litigation.

To this end, he says, the IBA's Litigation Committee (of which he is Vice Chair) has tried to establish a dialogue with general counsel to identify ways in which litigators can improve their services and be more efficient.

'This was discussed at a conference in Washington recently and the dialogue will continue at a conference we are organising jointly with the IBA's corporate counsel group in Krakow next May [2011],' he adds. ☒

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*Pleased to have played a part in the success
of the 2010 IBA International Conference*

IBA filmed interviews

As part of the IBA's ongoing commitment to providing high quality content, a series of interviews was undertaken throughout 2010. This filmed content augmented the IBA's 2010 webcast series, providing access to, and insight from, leading figures at the centre of current international legal and business issues. Some of these interviews will also appear in printed form, on-line or in the magazine, while others can be accessed through the IBA website.



Shown below is a selection of recent interviews and films, please visit our website to view the full collection at: tinyurl.com/IBAFilms.



Norton Rose partner **Farmida Bi**, who was elected one of the top five most powerful British Muslim women by the Equalities and Human Rights Commission in 2009, speaks to IBA Senior Reporter Rebecca Lowe about Islamic finance and the challenges facing progressive Muslims in today's society.



ICC President **Sang-Hyun Song** spoke exclusively to the IBA about some of the biggest concerns and challenges facing the Court - including State co-operation, complementarity and accountability - as it enters its ninth year of operation.



Ambassador of Ireland for The Netherlands **Mary Whelan** - who is also the Facilitator on Co-operation for the Assembly of State Parties of the ICC - spoke to the IBA about some of the biggest challenges currently facing the Court.



Six leading M&A specialists took part in a panel discussion on the future of M&A, in Mumbai, in February 2010. The panellists were in Mumbai for the IBA's Globalisation of Mergers and Acquisitions - an Indian Perspective conference.

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