

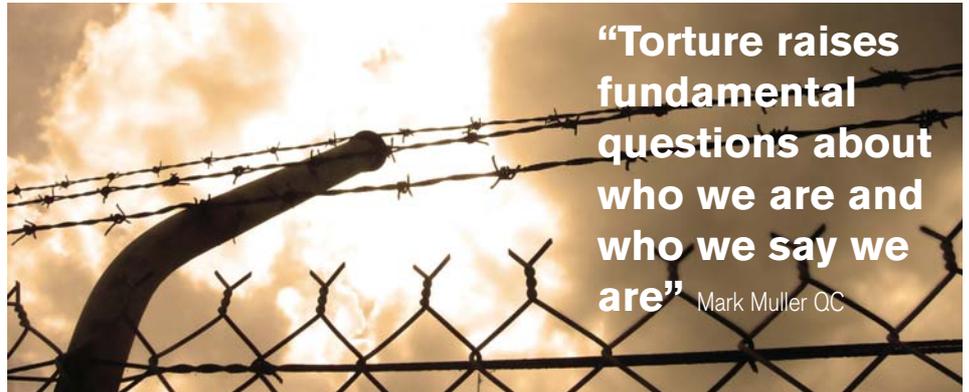
Clarity needed on torture

Though the prohibition against torture has been reaffirmed in the US and the UK, debate remains about the use of evidence obtained through so-called stress techniques.

The term derives from the stress positioning of suspects, but extends to the use of intrusive lighting, sleep deprivation and false-flag questioning (where detainees are led to believe they are being questioned by a foreign national and likely torturer). These techniques are yet to have their legal status clarified by the US Supreme Court.

The Military Commissions Act prohibits, absolutely, the use of torture evidence while the Detainee Treatment Act forbids cruel, inhumane or degrading treatment in the questioning of suspects. Despite the broad prohibition of torture, the legislation has not been tested on the precise delineation of the limitation. "The debate is about the use of lesser techniques," said Lieutenant Brian Mizer, a defence attorney with the US Navy, who prefaced his comments with the disclaimer that he spoke for himself and not his employer.

Earlier in the morning session, Mark Muller QC introduced a panel that included former CIA officer John Pavich. Muller told delegates that the so-called war on terror had called into question basic human rights standards and that there has been a reinterpretation of humanitarian law after September 11 2001.



"Torture raises fundamental questions about who we are and who we say we are" Mark Muller QC

"Torture and rendition raise fundamental questions about who we are and who we say we are," said Muller. The consensus on the absolute nature of the prohibition against torture had fallen away said Muller, with some politicians and lawyers moving to a position, post 2001, where torture can be permitted in exceptional circumstances where necessary.

Taking the podium after Muller, Timothy Otty QC made what fellow panellist Mizer later described as a strong case for the primacy of human rights and the rule of law to delegates. Otty referred to South African judge Albie Sachs's comments on the rule of law. "Once the rule-of-law membrane is broken then the tear is never enough," said Otty, quoting Sachs. The exception soon becomes the norm and that norm then becomes more

and more exceptional; 90 days detention without trial becomes 180 days, which then becomes indefinite detention. "The danger is that the dagger aimed at the enemy is plunged inwards," said Otty, again referring to Sachs.

Delegates then heard from Otty about his work on three test cases, including *Ocalan v Turkey*. In *Ocalan* the European Court became the first international tribunal to rule that the death penalty had no place in democratic society. The court in *Ocalan*, however, was considering a rendition case in which the defendant was abducted (by "English-speaking fair-haired men") from Kenya and transported to Turkey, where he was sentenced to death. Though the court ruled the death penalty illegal, Otty said the ruling set a dangerous precedent as the court did not rule the original arrest unlawful.

M&A PROTECTIONISM

No defenders left

Support for national protectionism in M&A was thin on the ground during yesterday afternoon's showcase session. Save a lone question from the floor on whether national champions truly have a detrimental affect on the economy, the running theme was clear.

Even the speaker designated to fight for protectionism, Cani Fernandez of Cuatrecasas' Brussels

office, had a proviso. "Someone had to be the bad guy," she said. "That doesn't mean that I necessarily believe the argument."

However, the panel did seem a little nervous about the future. Marco Lamandini of La Scala & Associati pointed out that although the Takeover Directive seemed to have abandoned protectionism, it actually had not.

"On first appearances, Europe was going the opposite way to the US where anti-takeover devices are prevalent," he said. "But article 12 sets out an optional regime. National implementation marked a failure in the attainment of a pan-European level playing field for takeover bids. Liberalism failed."

Fernandez followed this with a more political viewpoint: "Mr Sarkozy says that protection is not taboo anymore. If we have a few

more leaders like him at EU level, we may see changes."

Further fears were raised by Carles Esteva Mosso from the European Commission, who commented on the redrafted European Treaty: "Now competition is not seen as a major achievement of the EU," he said. "We need to put a sentinel on every hill as the Commission may not be able to intervene in the future. Hopefully lobbying will avoid this."

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Pitfalls in the Atlantic

America's financial services providers must navigate a sea of double standards to get deals done, said a panel discussion yesterday. One particular headache is the requirements for data protection.

"The US doesn't have adequate protection, yet it wants to see US qualities in other jurisdictions," said Ida Levine of Capital International. "It would be better if there was a more level playing ground." The comment came as part of Thursday's session on potential pitfalls for financial services providers.

The panel agreed that regulators on both sides of the Atlantic need to spend more time trying to harmonize adequacy requirements. At the moment, transferring customer infor-

mation from a company governed by EU data protection laws to an American one creates a large number of specific problems.

John Vasily of Debevoise & Plimpton commented that "many oddball mergers take place just so you can use the customer information without getting customer consent."

But financial service providers are not just frustrated by restrictions governing the access of American companies to consumer data. Regulations imposed by American authorities can also stall deals.

At the beginning of takeover negotiations, a target "may completely ignore what you have to say because of worries about US law and opt for a French buyer instead", said Vasily.

These concerns about the impact of American, European and local regulations on a deal were debated by a panel of four specialists. The extent of American regulation around the world was considered through a hypothetical case study of a US entity, American International Company, acquiring a foreign-owned and domiciled company, ThaiCo.

The board took the role of a fictional law firm, Smith Allen Peters & Smythe, advising AIC on a proposed takeover of either 100% of ThaiCo or 30%, with an option to buy the remaining 70% over the next three years.

A number of possible problems were discussed in turn, from issues about product advertisement on a website to the legality of bribes and corporate entertainment for government-linked directors of the target.

"A target may ignore you because of worries about US law and opt for a French buyer instead"

John Vasily of Debevoise & Plimpton



TODAY'S SCHEDULE

7:45 am - 8:45 am	Committee Breakfasts	AUDLEY
9:00 am - 10:30 am	Follow the Money: International Asset Tracing	BURLINGTON
	Managing the Antitrust Risk in International M&A Transactions	COURT SUITE
	Showcase Program: Jurisdiction over International Crimes: The Legacy of the House of Lords' Pinochet Judgments	GROSVENOR
	Cross-Border Regulation of Hedge Funds	FITZROY
10:45 am - 12:15 pm	Showcase Program: Lessons Learned From A Lifetime Of Resolving International Disputes: A Conversation With Several Prominent Arbitrators	GROSVENOR
	They Came, They Saw, They Bought: Outbound Investments by Russian, Indian, and Chinese Companies	COURT SUITE
	EU Antitrust Litigation - Mouse or Mountain?	BURLINGTON
	New Voices in International Law: Perspectives on Extraordinary Renditions	DEVONSHIRE
	Bar Admission in Multiple Jurisdictions: Advantages for Clients and Insights for Practitioners	FITZROY
	Building an International Practice	
	The Trouble With Subsidiaries: The Case of Commercial Aerospace	NORTH SUITE
12:30 pm - 2:00 pm	Luncheon with Judge Rosalyn Higgins, President of The International Court of Justice	AUDLEY
2:15 pm - 3:45 pm	Arbitrator Conflicts	BURLINGTON
	International Labor Unions and Global Corporate Campaigns	COURT SUITE
	Fighting Terrorism within the Rule of Law	FITZROY
	Culture Exports of Film, Media, Music and Art: European Union Rules on Finance, Production and Distribution of Art, Music and Film	DEVONSHIRE
	Showcase Program: Lifestyle and Life Issues for the Modern Associate	GROSVENOR
4:00 pm - 5:30 pm	Coping with Cultural Differences in International Arbitration	BURLINGTON
	Alternative Securities Markets? A Serious Challenge?	FITZROY
	Regulating the Reimbursement of Medicines: Rights of Patients and other Stakeholders	DEVONSHIRE
	Showcase Program: Celebrity and Social Responsibility	GROSVENOR
	Cross-Border Travel Traps: Protecting Client Confidences at the Frontier	COURT SUITE
5:45 pm - 6:30 pm	Closing Ceremony featuring the Rt Hon Lord Bingham of Cornhill	AUDLEY
7:00 pm - 9:00 pm	Closing Reception at Lancaster House	

Not just pretty words

Everyone, everywhere can be involved with and uphold the rule of law, according to Bill Neukom. Rachel Evans interviews the new President of the ABA

Bill Neukom is a man with a mission. He believes that he has found the weapon to conquer war, pestilence and famine. And that this weapon is the rule of law. "Law is the cornerstone of society," he says. "We cannot expect to build just viable economies, jobs, or free and fair government unless we have the rule of law."

Neukom has placed the rule of law at the heart of the agenda for his presidential year. Speaking ahead of this year's ABA International conference, Neukom was keen to emphasise his commitment to promoting the rule of law, and the importance of his World Justice Project.

The project aims to create an index of the rule of law across the world, by consulting both legal professionals and entire communities. "Rule of law is not just the rule of lawyers," says Neukom. "And justice is not solely the domain of judges; everyone is a stakeholder in maintaining justice."

Such ideals are rare and commendable. But Neukom also argues that they are realistic. Principles of collective responsibility and the supremacy of law are not pie-in-the-sky. They are a real possibility, and one that bar associations have a responsibility towards.

"Bar associations are about defending liberty and defending justice," he says. "The ABA has considerable success in moving policy decisions from our house of delegates into law. It's not just a gab-fest of lawyers; we see concrete results."

Youthful activism

Neukom is no stranger to lobbying. A veteran of bar associations, he was first drawn into these organizations in the late sixties, joining the Seattle-King County Bar Association. Neukom was part of "the greening of the bar" – a flood of young activist lawyers with a desire to make a difference in their communities.

A committed participant ever since, Neukom has held an array of positions in the ABA, starting as chair of the Young Lawyers' Division in 1977, throughout his 40 years in the profession. That this career includes acting as Microsoft's chief counsel for more than a quarter of a century (an ample workload for anyone) highlights his dedication to the ABA.

"I believe in the mission of the ABA as a means by which lawyers become better lawyers. We can, in collaboration, be a voice."

The international section is an important



"It's not just a gab-fest of lawyers; we see concrete results"

dimension to this voice. "We live in a shrinking world. ABA International makes a concerted effort to involve members from all countries and improve members' understanding of other countries," he says.

Playing the statesman

The broadened world view that ABA International offers will be an asset to Neukom's World Justice Project. The ABA has been hosting sessions for religious, educational, health and labour leaders across the globe to brainstorm about the nature of law and how different communities envisage and enforce that law.

And while Neukom is playing the statesman, a body of 18 scholars is composing papers to "join the dots", as Neukom puts it, and prove that the rule of law leads to better health systems, less corruption and more stable communities. The academics will present their conclusions at a forum in Vienna in July 2008, and contribute practical steps to help developing countries formulate their rules.

But isn't this approach faintly patronizing towards developing countries? Could it not be seen as yet another case of the West blind-leading pedalling its values?

Not according to Neukom, although he is

aware of the criticism. "We are very sensitive to local cultures and environments," he says. "And we are not exporting Western law into other parts of the world. We are trying to find common ground."

Microsoft abroad

Common ground, Neukom argues, is crucial. His World Justice Project depends upon finding it, yet it seems to be getting scarcer and scarcer.

The recent decision against Microsoft by the European Commission highlighted a growing gulf between law in America and Europe. "There seems to be a very different approach to competition law now in Europe compared to the States," agrees Neukom. "I worry that this will reduce the incentive to improve products."

Damning words from the man who was Microsoft's top lawyer for 25 years.

It is this lack of harmony that Neukom seeks to address, albeit indirectly, through talks across the world and the creation of a new index to measure the rule of law. His success will depend on the extent to which countries where the rule of law takes a different form from the West embrace the principle behind Neukom's project.

CV

American Bar Association – President, August 2007 to present

K&L Gates – partner, 2002 to present

ABA House of Delegates – Washington state delegate, 1999 to 2006. Also chaired an ABA task force examining the rule of law between 2002 and 2003

Microsoft Corporation – vice president, senior vice president and executive vice president of law and corporate affairs, 1985 to 2002

ABA Board of Governors – Secretary, 1983 to 1987

Shidler McBroom & Gates – partner, 1978 to 1985. Specialized in litigation, commercial law and non-profit organizations. Appointed lead counsel to Microsoft

ABA – Chair of Young Lawyers' Division, 1977 to 1978

Seattle-King County Bar Association – Chair of Young Lawyers' Division from 1972 to 1973. Joined his local bar association in 1968 after graduating from Stanford University with an LLB in 1967

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