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# IBA Daily News

Dubai Conference 2011

Tuesday, November 1

## We must help Syria

**H**aitham al-Maleh, Syria's leading human rights activist issued a stark plea to delegates yesterday. "Syria needs your help. We don't know how we can help our own people now," he said.

Maleh's speech came on the same day as 35 pro-democracy protesters were killed across Syria. During an emotional Human Rights Institute (HRI) showcase session: 'Human rights – are they still relevant?', the former judge and lawyer described the atrocities committed by various dictatorships since 1953, and his efforts to promote human rights.

"There is not only no human rights in Syria, there is no humanity there," said Maleh, who has been imprisoned several times since the 1960s, by both Bashar al-Assad's regime and his father, Hafez al-Assad.

### "You cannot imagine the degree of torture"

Maleh described the measures lawyers had taken in the battle for human rights in the country, following a meeting in 1978, during Assad's regime. "We decided consciously to push for human rights within the Syrian Bar Association. We pushed the government. It did nothing," he said.

In 1982 Hafez al-Assad responded to an insurrection in Hama by sending a paramilitary force to kill between 10,000 and 20,000 civilians, including children, women and the elderly. Maleh broke down while describing some of the atrocities committed that year, including serial rape, thrice-weekly hangings and the arrest of 100,000 prisoners. "You cannot imagine the degree of torture," he said.

These atrocities were enabled by the 1963 emergency rule, which gives security forces sweeping powers of arrest and detention. These powers continue today. According to Amnesty International, the government may be guilty of crimes against humanity based on "witness accounts of deaths in custody, torture and arbitrary detention", during the crackdown against the 2011 uprising.

Elsewhere in the session, speakers outlined how lawyers could play a role in building human rights frameworks, especially in Egypt and Tunisia following the Arab spring.

"The first business is accountability for crimes already committed," said Juan Mendez, UN special rapporteur on torture and IBA Human Rights Institute co-chair. "We cannot expect wounds to be healed because someone decrees that we forgive and forget," he added. "Instead, we must try these people with genuine effort for accountability not vindictiveness and retaliation," he said.

Méndez added that rules for freedom of expression and assembly should be immediately introduced in new constitutions. With regards to torture, Méndez also believed that new limits to pre-trial detention should be enacted, as well as access to a lawyer for defendants and the right to be examined by doctors immediately after being brought into custody.

Beginning the session, Dr Phillip Tahmindjis IBAHRI co-director outlined key results from the fact-finding mission undertaken by the IBA's HRI this year. The institute visited Egypt, Syria, Zimbabwe and Venezuela.

Although Tahmindjis cautioned that the findings were skewed by being gathered from four countries with notoriously poor human rights records, the results were worrying.

All four of the countries visited were signatories to relevant human rights treaties in their regions. But the treaties were simply being ignored.

"This argument that political stability means necessarily compromising human rights is totally fallacious," said Tahmindjis. This belief, he added, causes an egregious lack of separation of powers between the judiciary and the government. "And then political interferences with the judiciary spreads like a cancer into the police and security services," he added.

The findings were certainly worrying. In Venezuela, 50% of judges are appointed on a provisional basis. "This has a

huge impact on impartiality," said Tahmindjis. He also cited the case of judge Maria Afuni in the country. Afuni was locked up in 2009 after President Hugo Chavez accused her of corruption for freeing a banker accused of breaking currency controls.

Afuni was forced to share cells with inmates she had previously sent to jail. "She was subject to death threats and attacks," said Tahmindjis. Even more worryingly, Chavez argued that her case should be used as an example for other judges.

In Zimbabwe, amongst atrocities committed under President Mugabe's regime, the HRI found particular human rights violations related to mineral extraction – specifically diamonds. In Marange, an area of widespread, small-scale diamond production many tenants are forced off their land in order to clear space for the extractions. It is also alleged that security forces have a torture camp in the Marange diamond fields. Methods include severe beatings, sexual assault and dog mauling according to alleged victims.

Earlier in the session, Méndez argued that human rights needed to be observed equally amongst insurgents. "I know demonstrators in the Arab spring have not always been peaceful, but regardless of our views on the legitimacy of violent protest, armed insurgents must respect human rights to civilians."



Maleh: "we pushed the government. It did nothing."

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## SOCIAL MEDIA

# State privacy in the Wikileaks era

“We can agree on one thing: we all believe secrets are necessary.

Where we will disagree – often quite vehemently – is the extent of the right to secrecy of a government or a state.”

The comment by panelist Mark Stephens, former counsel to Julian Assange, founder of Wikileaks, set the tone of Monday afternoon’s showcase session ‘The legal aspects on the use of social media and control over the flow of information’.

The proliferation of social media and so-called citizen journalism, Wikileaks being the prime example, has called into question how different governments are reacting to these new information flows.

The public’s unspoken agreement with the state – allowing its secrets to serve and protect the public – is being tempered by the amount of classified information streaming through new technologies.

“One has to recognise that new technology is really the cause of the topic of discussion,” said Justice Richard Goldstone, citing the News of the World phone hacking scandal and the Abu Ghraib prison photos. He urged lawyers to consider the “whole new world” of privacy issues.

However some believe existing laws can work with journalistic traditions to maintain the required standards. “I believe the laws don’t have to change,” said panelist and assistant general counsel of The New York Times, George Freeman. The question, he said, is whether journalists have the discipline to withstand the prerogatives of the new technology, such as speed and information volume, by filtering and editing as they always have.

This bore the question of the extent Julian Assange’s Wikileaks can be categorised as journalism, and benefit from journalistic defences. Stephens described Assange as a new breed of journalist, likening (to the objections of his fellow panelists) Wikileaks’ verification and other pre-publication processes to that of conventional media.

“The idea of a citizen journalist kind of makes my stomach churn,

as I imagine most here wouldn’t consider sharing their briefs with citizen lawyers,” said panelist Sean Evers of Gulf Intelligence.

But despite the many attempts, to date Wikileaks has not been prosecuted in any countries. It manifests the jurisdictional challenges posed by a stateless organisation which is essentially run by up to 1000 people, anonymously.

“You could skip up the Strand with an injunction in your hand to get an injunction against Julian Assange, but would it have any effect outside England and Wales? The answer is obviously no,” said Stephens.

The emergence of Wikileaks and questions surrounding its legal protections has created action at national government level. “I can’t imagine there are many countries where legislation isn’t being considered in the aftermath of these events,” said Justice Goldstone. But he added that this is an area where the international bar has an interest.

The broad solution, according to Goldstone, is to find ways to criminalise the willful invasion of private communications, whether government or private, but subject to a public interest exception.

The reaction from governments from around the world, however, has been very mixed. The US never sought court orders to stop the proliferation of consolidated information published on Wikileaks.

Instead the State department sent, and then made public, a letter to Wikileaks saying it had violated national law. These “strange tactics”, as described by Justice Goldstone, resulted in Wikileaks’ third party contractors voluntarily cutting off its sources of income.

The more direct responses in other countries, however, have fallen under criticism. The small number of press complaints has been pointed out to the Australian government since it commenced its inquiry into a potential tort of invasion.

“To have a new law would be the equivalent of cracking a nut with a sledgehammer,” said the panel chair Peter Bartlett from Minter Ellison in Melbourne.

## ISLAMIC FINANCE

## DFSA slams complex Islamic structures

Overly-complex Islamic finance structures such as the Nakheel *sukuk* leave open the potential for disruptive behavior, according to a Dubai Financial Services Authority (DFSA) regulator.

Complex Islamic finance structures which seek to replicate conventional products often require a large number of complex agreements, which in turn can lead to a large number of legal challenges down the line.

“All it does is give lawyers the opportunity to raise a new set of issues and to try it on on behalf of their clients,” said Peter Casey, head of Islamic finance at the DFSA, speaking at yesterday’s session ‘Islamic securities and structured products: new products or new paradigms?’.

Casey cited the example of UAE property company Nakheel’s *sukuk al ijara*, which required 19 separate agreements and 17 pieces of legal documentation to cover aspects such as share pledges and repurchase agreements.

The company was threatened with a restructuring, and some of the *sukuk* fell into the hands of vulture funds, which by their very nature look to use any legal tools available to get their *sukuk* bought out in full.

“The lawyers on that deal [Nakheel] had better have been good – if it gets into litigation, there’s an opportunity for someone to find a hole or inconsistency,” said Casey.

Parties have also attempted to use Islamic law to renounce their obligations should deals go bad. In 2007, Lebanon’s Blom Bank sued Kuwait company The Investment Dar to recover a \$10.7 million *wakala* investment. The Investment Dar claimed that as the *wakala* structure promised a 5% return, it was

not *shariah* compliant and therefore it was acting outside its capacity, or *ultra vires*.

“To my mind that was a really outrageous attempt by a firm announcing that, when it got in a bit of financial trouble, that it shouldn’t have done that,” said Casey. “I’m afraid you do get new legal openings for these types of arguments.”

Regulators also face problems when trying to regulate new and complex products, he said. One issue is the level of disclosure required for these products – do regulators require ongoing equity-like disclosure, or is ongoing disclosure on the underlying assets immaterial?

“Also, if a bank I regulate has bought these products, how do I treat it?” he said. “Are the bond exposures to only one obligor, or do we treat it as an equity-like exposure?”

In some cases, international regulators are hesitant to interfere with the *shariah* elements of transactions. The US Securities and Exchange Commission say that they can’t interfere with religious elements of transactions at all, said Casey.

The intersection of national law and *shariah* requirements is another difficult area, given that *shariah* law is not the national law of any country. This question was partially solved when in 2005 an English Court of Appeal case, *Shamil Batik of Bahrain EC v Beximco Pharmaceuticals*, found that where there was a dispute between *shariah* and English law in a *murabaha* agreement, *shariah* law was classed as a non-binding statement of purpose.

But nevertheless Islamic finance products still require *shariah* scholar approval, and *shariah* compliance is not regulated. Casey said claims of being *shariah* compliant are similar to com-



panies claiming green credentials or that they’re animal friendly, and would be dealt with under advertising law; albeit with a whole set of political minefields.

Countries with *shariah* based laws sometimes attempt to regulate transactions – Malaysian courts have occasionally taken a view on Islamic transactions, he said.

A big question remaining though is whether scholars on the supervisory board can be held liable for their decisions. Where does divine law stop and jurisdictional law begin? “It [the advice] would have to be so wrong as to have been negligent,” said Casey.

Another issue facing Islamic finance is the fact that *shariah* scholars on the board of banks often don’t agree on whether structures are Islamic-compliant. A scholar on the issuer’s bank may issue a *fatwa* saying that a structure complies, while the investing bank’s scholar may have a stricter view on, for example, leasing land that will be reclaimed from the sea and therefore doesn’t exist.



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# A woman's world?

Ahead of two sessions today focusing on women's rights and gender diversity in the workplace, **Lucy McNulty** finds out that the legal profession has a long way to go

**T**he American author and critic, Marya Mannes, once wrote: "Nobody objects to a woman being a good writer or sculptor or geneticist if at the same time she manages to be a good wife, a good mother, good-looking, good-tempered, well-dressed, well-groomed, and unaggressive."

It was a sharp insight into the many limitations women of her time faced every day. This was the 1960s – a period often referred to as 'second wave feminism' – when women may have gained the right to vote but still fought for equality in many other aspects of their lives, from the workplace to the home.

Forty years on and it is remarkable how little has changed. Even in the 21st century, women are facing bias in the home, in public and crucially in the workplace. And the legal profession is no exception. But what form does such bias take? And how does it vary from country to country, culture to culture?

We asked women working in the legal community in the US, UK, Australia and Asia to share their experiences with us. What issues do they believe women lawyers face today? And what has been happening with regards to diversity initiatives in their country in recent years?

## UK

"The progress of women to positions of authority in Britain has been tortuously slow." So opens a report recently published by the UK Equality and Human Rights Commission (EHRC) – Sex and Power 2011, which examines the number of women in top positions of power and influence across the nation's public and private sectors.

Implying a worrying trend of stalled progress, the study states that in 2003 6.8% of senior judicial appointments were held by women, compared to 12.9% in 2010/11. At this rate, the EHRC explains, "it will take another 45 years to achieve an equal number of women in the senior judiciary."

And yet over 50% of new entrants to the profession are women. So why are efforts to grow the numbers of female equity partners at the UK's largest firms consistently failing? "Positive discrimination seems to me to solve little, causing re-

**"The progress of women to positions of authority in Britain has been tortuously slow"**

sentment on both sides," says one London-based female lawyer at an international law firm. "An acknowledgement that there is a problem, and a spreading of awareness that there is no level playing field as things stand are key elements, but ultimately an organisation has to want to change."

Another female partner at a UK firm said that in general the pace of change was far too slow. "It's still a boy's club out there," she said.

There also continues to be a disparity in equal pay in solicitors in England and Wales with new research by the Chartered Management Institute (CMI) finding that the gender pay gap for female executives grew this year and that on current figures it will take almost 100 years for women executives to catch up with the pay of their male peers.

And this squandering of talent is coming at a cost, with the UK's Women and Work Commission estimating that unlocking women's talent in the workplace could be worth £15 billion or more.



"There are no easy solutions," says one UK-based male senior associate. "Numerical parity seems impossible while firms are unwilling to contemplate part-time partnership as a rule rather than as an exception. Able women tend to have to opt for an alternative career path to partnership if they want to play an active parental role."

## US

"Now is the time for less talk and more action," says a senior manager of professional development at a US law firm. "While we have had incoming classes with close to 50% women for many years, only 32% are promoted to equity and leadership positions," she explains, echoing the sentiments outlined above.

Retention of US women attorneys is another major issue as 81% of minority female associates leave law firms within five years of being hired.

The reasons for these discrepancies, says one female partner at an international firm, include inaccurate assumptions about women lawyers' abilities, commitment, and desire to succeed, a lack of well designed institutional infrastructure for supporting women at private US law firms, and a lack of opportunities given to women from the beginnings of their careers.

Recommended actions to address this focus on four key areas – leadership, retention and promotion, business development and compensation. "Publish the criteria for advancement to equity partner, refine leadership evaluation criteria at all levels, publish compensation criteria and measure access to key business-development opportunities by women," says one gender diversity group chair at a US firm.

## Australia

Women lawyers associations have worked with the Australian courts, clients, governments and their professional organisations to address issues of inequity and discrimination in the country for more than a decade, explains Fiona McLeod, senior counsel, president of Australian support group Australian Women Lawyers (AWL) and chair of the Victorian Bar's Equal Opportunity Committee.

"This work has focused especially on the problems of retention and the lack of advancement of women lawyers," she says. "The measures pursued include the appointment of women in significant numbers to judicial and political office, developing flexible working conditions for solicitors and equal opportunity briefing policies for barristers."

"In Australia we have seen the appointment of significant numbers of women judicial officers, growing numbers of women members of parliament and our first-ever woman Governor General, Quentin Bryce," she says.

Perhaps as a result of these appointments, the numbers of graduating women law students in Australia has surged. But if it all seems somewhat too good to be true, it's because it is. Much like in the US and UK, these graduates are not going on to fill senior judicial, professional or academic positions. "Despite a surge in women graduates entering the profession from universities, and various supportive policies and practices, the retention rate has not improved," says McLeod.

So what is being done to address the problem? "Recent policies have focused on flexible working conditions and parental leave policies with limited success so far," she explains. "Lawyers still feel pressured to prove themselves as super-human, wearing stress as a badge of honour."

"It is time to consider the introduction of aspirational targets – for appointments and for briefing practices," McLeod says. "I propose an initial target of 30%. Firms should work towards the appointment of women to at least 30% of all equity partnerships and all management roles within the next three years, and take all steps necessary to achieve this target. Likewise, the bars should adopt retention policies with a view to achieving women's representation of 30% of members and 30% of silks."

McLeod also suggests that the profession should proclaim its successes and failures to the rest of the world in order to emphasise the importance of these targets. "Successful firms should be awarded and promoted," she says.

## Asia

And from Australia to Asia where opinion on the issues affecting women lawyers working in the region is divided. One consultant based in Hong Kong believes the issues in Asia are "a difficulty to balance work and family commitments, a lack of acceptance of female part-time partners, a lack of support for alternative working hours and working from home, excess competition with one another and a lack of support from other female lawyers".

A capital markets partner at the Hong Kong office of an international law firm is more positive. "In Asia, over a quarter of our partners are women, the highest proportion of any region in the firm," she says. "This in itself sends a very clear message to our female lawyers - that it is possible to succeed at the very highest level in the firm."

"Asia arguably has some local market characteristics which help working families," she explains. "For instance, easy and cost-effective access to childcare is a feature of most of the main Asian financial centres. Many of our most senior female partners are married with young children and combine busy careers with families."

Asia is seemingly less affected by the obstacles women lawyers in the US, UK or Australia, face or at the very least as a region it is further ahead than others in its efforts to achieve equality in the workplace.

No matter how much progress different cultures and countries have made in this area, it is clear that there are a great many parallels in the efforts the legal community the world over are going to, to attain and maintain a diverse environment in the workplace.

In fact it seems that nowhere is the issue of gender diversity being ignored. The necessary actions have been outlined and the work is underway to ensure these actions are achieved, But, as one female partner warns, "it is now up to all of us to rise to those challenges and ensure that we are at the forefront when it comes to equality".

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### TUESDAY, 1 NOVEMBER 2011

9.30am – 12.30pm



**SAMEER HUDA**

Dealing with stakeholders – from cradle to the grave  
**Corporate and M&A Law Committee**

12.30pm – 2.30pm



**ERIK MUTHOW**

Visit to Emirates Roundtable  
**Aviation Law Committee**

2.30pm – 5.30pm



**MELISSA MURRAY**

How commercial agency laws impact franchising relationships  
**International Franchising Committee**



**MICHAEL LUNJEVICH**

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# Not my life?

Human trafficking is far more widespread than many like to admit. Ahead of today's CSR session on the subject, **Lucy McNulty** assesses the problem

The Sociology professor and president of human rights organisation 'Free the Slaves', Kevin Bales, once said: "What it takes to turn a person who is destitute and vulnerable into a slave is the absence of the rule of law".

Human trafficking spans all sectors of the economy from strip clubs, massage parlours and sweatshops to the more unexpected, such as construction sites, hotels, resorts and even to farms and private homes.

While some victims are hidden from the outside world; many are subject to regular contact with everyday society, prevented from making the reality of their situation known by shortcomings in the legal systems that are supposed to protect them.

According to the International Labour Organization, there are at least 12.3 million adults and children in forced or bonded labour, and commercial sexual servitude at any given time.

The economic reach and impact of human trafficking is also staggering. On a par with arms dealing, it is the second largest criminal industry in the world, behind only the illegal drugs trade, with an estimated \$32 billion in annual profits touching every one of the world's economies.

The IBA's corporate social responsibility (CSR) committee co-chair, Kenneth Thompson II said devoting an entire session – 'Human Trafficking: a 21st century problem for responsible business' – to the issue at the Annual IBA meeting was a huge step forward in raising awareness of the problem.

"Human trafficking is a difficult subject," he says. "People often assume this is an issue limited to a few geographic areas and industries or restricted only to sex trafficking."

## Wide impact

Yet the stark reality is that trafficking is a supply and demand problem. It impacts both the developed and the developing world across large and small businesses and a variety of industries including tourism, fashion, construction and many other service-related businesses where cheap labour benefits the bottom line, he said.

Businesses involved are often either not responsible or uninformed of the problem and its reach.

The session will focus primarily on the film *Not My Life*. Filmed on five continents over four years, *Not My Life* is the first documentary film to depict the horrifying practices of human trafficking and modern slavery on a global scale.

It features inspiring testimony from survivors, depictions of trafficking, exploitation and slavery across a wide variety of industries and in all parts of the world including forced labour in Africa; street begging and garbage picking in India; sexual trafficking in the US and south-east Asia; and various forms of child enslavement and abuse in both North and South America.

And while acknowledging that trafficking and slavery are universal crimes, affecting millions of human beings all over the world, *Not My Life* zeroes in on the fact that the vast majority of trafficking and slavery victims are indeed children.

This fundamental truth, says the film's director, Oscar nominee Robert Bilheimer, raises profound questions about the very nature of our civilization.

The second in a trilogy of films on human rights issues by Bilheimer, the documentary is due to premier on October 20 in London prior to its airing on CNNI on October 22. The first



in the series, *A Closer Walk*, was completed in 2003 and tackles issues relating to the global AIDS epidemic.

The session will also see a panel of leading experts discuss the legal corporate social responsibility (CSR) issues of which companies should be most aware.

"CSR legal issues start with a supply chain review and making sure that human trafficking is not part of the supply chain," explained Thomson. "Each company can help tremendously by simply making sure that they have an adequate supply chain management process."

"Likewise, with respect to the communities in which they operate, companies can serve a role in making sure that there are adequate re-entry resources available for human trafficking survivors," he said.

For more information or to preview the film visit <http://notmylife.org/>.

## DUBAI ATTRACTIONS

# Out and about

An at-a-glance guide to the top attractions in Dubai, from culture to commerce.

**Suzanne Burlton** introduces you to this week's must-dos

Dubai is a city characterised by dichotomy – steel and glass skyscrapers look down on the small remaining number of traditional homes, their tumbledown appearance at odds with the face of progress and grandeur that Dubai is presenting to the world. Attractions, too, range from the historic to the futuristic.

### BURJ KHALIFA: AT THE TOP

This skyscraper, which breaks sixteen height records and is home to the Armani Hotel has a viewing platform on the 124th floor. In forty seconds, a lift smoothly ascends to this level which has access to spectacular panoramas of the city, which visitors will have up to an hour to enjoy. Late afternoon gives the most detailed vistas, but at sunset waves of lights spread out as the Dubai comes to life at night. Tickets are available on the door or can be booked in advance for a discount.

### DUBAI FOUNTAINS

The 30-acre Burj Khalifa manmade lake houses a dazzling fountain display. There are regular five minute shows throughout the evening in which lights, music and fifty-foot high jets of water combine to create a spectacle which some claim might be visible from space.

### SOUKS

There are several of these traditional Arabic markets, crowded with stalls and the noise of haggling vendors. The most famous is the Spice Souk, where huge bags of saffron and cardamom



release their heady scents. Traditional jewellery nestles alongside modern homeware to make a stunning display. The Fish Souk, however, is only for the brave as the day's catch is gutted and prepared right in front of your eyes and the smell intensifies in the midday sun.

### PALM ISLANDS

These artificial islands resemble graphic palm trees from the air and are crammed with attractions, from the energetic Atlantis Aquatic Park (housed in one of the most expensive resorts in the world) to relaxing spas. There are a multitude of shopping opportunities and restaurants – ones to try are Al Nafoorah for simple Arabic cuisine and West 14th for steak. However, do bear in mind that as purpose-built tourist islands, these are bound to be busy. Access is by monorail or taxi.

### DUBAI DESERT CONSERVATION RESERVE

45km from the city, this vast stretch of desert is home to 33 mammal and reptile species indigenous to the Arabian Peninsula. Day visitors can take advantage of Jeep tours into the reserve run by authorised safari companies. The focus is on conservation and research, so visitors will be able to see such spectacular wildlife as the Barbary Falcon and the Arabian Gazelle in their natural habitat as animals (unlike humans) are free to roam throughout the 90km of dunes.

### BASTAKIYA DISTRICT

This is the oldest area of Dubai, located beside the creek, full of early 1900s houses topped with traditional wind towers to draw cool air down into the rooms. There are few shops and restaurants but its winding streets are enjoyable to get lost in and it is possible to catch a glimpse of how Dubai was before its economic boom in the late 20th century. Here one can also find Heritage House, the restored former dwelling of a pearl merchant filled with traditional furniture and informative displays.

## DUBAI ATTRACTIONS

### SHOPPING MALLS

Dubai can seem like a Mecca for shopping, so it would be a shame to come here without experiencing some of the city's malls. Dubai Outlet Mall is the best for bargains, with brands such as Alexander McQueen and Nike available for up to 70% off. Curiously, it is also home to the UAE's only Chuck E Cheese, although this will not be to everyone's taste. Ibn Battuta is packed with fashion, from high street brands like H&M to American designer Betsey Johnson. There is also the city's only IMAX screen. Wafi, an Egyptian-themed mall, is packed with boutiques but also has several excellent food options, including a selection of deli favourites at Wafi Gourmet.

### JUMEIRAH MOSQUE

While there are several mosques around the city worth admiring externally, only Jumeirah Mosque allows visitors



in on guided tours. Photography is allowed, but dress must be appropriate. The tours provide an opportunity to find out more about Islam as well as wander around the subtle interior, and are organised by the Sheikh Mohammed Centre for Cultural Understanding, a non-profit organisation which works to bring down cultural barriers between Muslims and those of other religions. This, more than the souk, will give you an insight into how today's Dubai is still connected to its history.

### ABRA

These cheap water taxis run along the edges of the central creek and are available for exclusive hire by the hour. While basic, they are strongly regulated, and run until midnight so can provide magical views of Dubai nightlife both in the older quarter and in the bustling crowds weaving among the skyscrapers.

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# What we must learn

**Mahmoud Cherif Bassiouni** has investigated the five largest wars in recent times. And as chair of two UN commissions investigating the Libya and the Bahrain revolutions, he is perfectly placed to discuss the significance of the Arab Spring. Here, he talks to **Gemma Varriale**

**M**ahmoud Cherif Bassiouni is an internationally renowned UN war crimes and human rights expert. He is currently chairing two commissions: the United Nations Commission established to investigate Libya and the Bahrain Independent Commission of Inquiry (BICI) established to investigate recent events in Bahrain. Bassiouni will be making a keynote speech at the IBA, in which he will review the Arab spring, its roots in the past and what should be taken into account by foreign investors and bankers to enable them to make adequate risk assessments.

## Are you concerned that people might expect too much of the BICI?

I think expectations are very high in Bahrain. This is because nothing has happened in the country since the February/March crises in terms of major reforms. For all practical purposes the only game in town is the BICI and so all expectations are focused on the Commission without regard to the fact that its mandate is limited to the events of February and March and their aftermath. The BICI hasn't been set up to recommend major institutional changes.

## Is it possible to compare the situation in Bahrain with what is happening elsewhere?

I don't think so. There is some link in the overall concept of the Arab spring, but every Arab country has its own particularities. For example you can't compare a country like Bahrain one and a half million citizens, half of which are foreign workers, with a country like Egypt, which has 84 million people. The whole of Bahrain is like a suburb of Cairo.

Libya is different. It's essentially a tribal population of 5 million people with extraordinary economic resources from oil. There's no reason why Libya should have an economic crisis with all of the resources it has. Libya is going to be

## “The west has become a society that is consumed by the present”

a management challenge: how do they administer reforms and economic development and growth? It's going to be an exercise in nation building. My fear is that major institutions like the EU or the EC, the UN, the US and other governments will rush to Libya to try to provide these services. Without any coordination of planning there might be the same disastrous results that we have seen in Afghanistan and Iraq.

So in Libya it's a management issue, in Egypt it's a resource issue, in Bahrain it's both a political and sectarian issue. You can't make a comparison of them all.

The one thing that all of these situations have in common is probably the absence in the local leaderships of all of these countries of a vision of where the respective countries should be going. Where do they want to be in 30 years from now? What type of society do they want to be in 30 years from now?



## Are there any lessons that we can learn from the Arab spring?

If you ask what the west can learn from the Arab spring, the first thing to say is that for centuries it seems that the west has failed to learn any lessons from the Arab world or any other parts of the world. The west has become a society that is consumed by the present, and in its total immersion in the present it fails to understand the lessons of history and it also fails to see what the future brings. There is no greater testimony to that than that the whole west, with the exception of France and the UK, has stood aside while the Gaddafi regime continued to kill innocent civilians, destroy the country and act as ruthless dictators.

## If Gaddafi is caught, do you think he should be tried in a local Libyan court, as many in the country want, or in the ICC?

I think that the indictment issued by the ICC concerning the actions of the Gaddafi government is very limited and narrow and only relates to the first months of the rebellion. That is a small sliver of all of the terrible things that he and his regime have done for 42 years. He needs to be tried elsewhere because the ICC will not have jurisdiction over his past crimes.

Many of these crimes have been committed against the Libyan people. Gaddafi has killed thousands of people and a large number have disappeared. He has spoliated the country of its resources and enriched himself and his family. These are major crimes that the ICC would have no jurisdiction over and therefore it would be much better if the Libyans had the capacity to set up a tribunal to deal with them.

## You carried out the world's first investigation on the use of rape as a war policy. Can you explain that in more detail?

I chaired the Security Council Commission to investigate war crimes in former Yugoslavia between 1992 and 1994. I was informed that rape was being used in a widespread and

systematic manner. I found that there had never been a rape investigation in the course of any war crimes investigation and I decided to carry one out.

We demonstrated, through extensive evidence, that the policy of rape was linked to ethnic cleansing. That women and young girls - very young girls - were raped to make sure that they and their families would not return to the Serb controlled areas.

We have only limited information about what's happening in Africa and the Congo now. You asked me

## “I have investigated five wars. What I took away is that human civilisation is very thin”

earlier about lessons learned. Have we learned anything from the former Yugoslavia and the use of rape as a weapon? It is outrageous that we aren't now looking at what's happening in Africa and the Congo with an estimated 30,000 women having been raped.

The international community is frequently sanctimonious. For 42 years Gaddafi was a dictator, supporting every terrorist organisation in the world and tyrannising his own people. Nobody said anything. This is probably because most of the major western powers were benefiting from oil and other business deals. Suddenly when that no longer became the point of interest, he became expendable. That's one of the major problems with the western world and the international community as a whole: it doesn't act on the basis of principle, it acts on the basis of interests.

## Has there been any single case that has stood out throughout your career?

I have investigated five wars in total: Afghanistan, Iraq, Yugoslavia, Libya and Bahrain. What I took away as a conclusion is that human civilisation is very thin. Once you scratch the veneer of civilisation you find the same type of human primitivism that one would expect eight or 10,000 years ago.

Human beings, whatever part of the world they're from, will all very quickly return to primitive behaviour. Europeans tend to be more smug and believe that primitivism doesn't happen there. The holocaust is not too far behind and what happened in the former Yugoslavia should still be present in our minds. So yes, it can happen in Europe and yes it can happen in the most civilised societies.

The fact that people think Africans and Asians are uncivilised by European standards is impressionistic and self-deluding. Similar situations occur in Europe. You see it in small things: in hooliganism in London with respect to sports or other demonstrations. Then you see how quickly things degenerate.

My concern is that most countries in the world have invested a great deal in their military, but they haven't invested much in education. We are producing human beings that are production units and not human beings because the values of education have been sorely missing.

# Beyond the mall

**Suzanne Burlton** discovers the Dubai shopping's hidden gems. And they're not all in the malls

**D**ubai essentially invented the shopping festival, held throughout the month of January. But aside from the luxury shops, there are some products unavailable anywhere else. Here are the best spots to shop.

## TEXTILES

The textile souk, in Bastakia, contains reams of silk, cotton, velvet, stacked according to the stallholder's whim. The most delicate embroidered saris or cloud-like chiffons are available. There are also tailors able to create bespoke outfits in a matter of days. Try Dream Girl Tailors (for women) or Al Nahda Tailors (for men), both on Al Fahidi street.

## WOMENS FASHION BOUTIQUES

*Pink Sushi* – A Dubai-based brand stocked by hipster boutique FiveGreen in Oud Metha. The designer takes inspiration from historic Arab clothing and grafts the patterns and shapes onto starkly contemporary garments and accessories. Look out for the signature red and white pattern drawn from Bedouin men's headscarves.

## MENS FASHION BOUTIQUES

*Rectangle Jaune* – Favoured by young entrepreneurs seeking to look cooler than corporate, this shop in Mall of the Emirates seeks to be elegant yet practical and is the perfect place to pick up a jaunty striped shirt or smart-casual jacket.

*Rodeo Drive* – A one-stop shop in Marina Mall for high-class men's fashion, stocking European designers such as Lanvin and Church's.



## PERFUME

For a unique scent head to the perfume souk or Ajmal in Mall of the Emirates. Typical choices are sandalwood and jasmine, often in twinkling cut glass bottles.

## BOOKS

Although second-hand, House of Prose's stock is excellent quality and its owner's passion for its stock is obvious. It is in Jumeirah Plaza and well worth a visit.

## PERSIAN RUGS

High lanolin-content wool, silk, natural dyes – the carpets from the Iranian shops are said to be the best in the world. Visit a few shops before deciding, because the same products crop up

at various prices. There are many designs, often based on village histories. The most popular are the garden of paradise and the prayer arch.

## JEWELLERY

*Gold Souk* – This market positively glows as gold coats every surface. Contemporary designs are widely available but seek out the following traditional motifs: the Hand of Fatima (hennaed hand stretching out, named for the most famous of Mohammed's daughters and said to protect the wearer.); Arabic lettering; coins (hundreds strung together to create headdresses, belts and collars) and bells

## ARABIAN SOUVENIRS

There are many stalls selling souvenirs, especially in the souks. The genie lamps are popular, as are the Aladdin slippers with curled toes, and the Moroccan lanterns will add a touch of Arabian glamour to your home or garden. The Antique Museum (a warehouse shop, not a museum) in Al Quoz Industry Area has everything the inquisitive tourist might covet, including T-shirts and actual antiques.

## ETHICAL

The Green EcoStore is in Mercato Mall and sells recycled and eco-friendly fashion and home items. Zen Beauty Lounge in the Discovery Gardens offers organic and vegan treatments which offers total immersion in a green environment which will leave you feeling refreshed and virtuous. Find upcycled cushions made from saris in The One Boutique in Mall of the Emirates.

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# What could go wrong?

Ahead of today's session on space tourism, **Gemma Varriale** finds out why commercial space travel is giving lawyers plenty to think about

**T**he nascent private spaceflight industry is working hard to develop a robust legal framework to regulate its activities. But uncertainty still surrounds many areas.

The threat that a fatal accident could result in a multimillion-dollar award has over-shadowed the space tourism business since 2001 saw the first paying passenger launch into outer space.

And with the rise of Virgin Galactic, which will own and operate space ships under a US licence, hundreds of people are now reserving flights to the edge of the atmosphere.

Commercial space travel is no longer just for the super rich. People are queuing up for the ultimate holiday experience and private space companies are driving innovation in extra-terrestrial travel.

Insuring these ventures poses practical and expensive problems because the space tourism industry depends upon unproven technology with no track record on which to base risk analysis.

"Because of this uncertainty, the risk curve will be skewed to assume something will go wrong on every trip," says Rachel Yates, Colorado-based vice chair of the space law committee. "That can make premiums higher than warranted."

Using waivers common in other leisure activities, recent US legislation has attempted to bar or limit future claims that would otherwise make the space tourism industry uninsurable.

However, whether traditional tourism laws will be enforceable for space activities is untested. It is a question that

might arise at today's 'tourism in space: now that we are doing it, what are the legal pitfalls?' session.

The session will consider the civil law implications, insurance dilemmas, and licensing conditions of space tourism. According to Yates, it's a constant effort to ensure the law keeps pace with events and technology.

"Although there are dangers of letting technology get ahead of the law, the law has now progressed as far as it can," added Yates.

The catalyst for further refinement of the legal regime is unfortunately an accident of some kind occurring in space.

The coverage provided by these insurance policies is also in need of clarification, particularly where exclusion clauses threaten to make the individual space tourist personally responsible if anything goes wrong.

In the public law domain, this experiment with holidays in space raises the question of whether liability will fall on individual US states or with the federal regulator.

"To the extent that this is a recreational activity I think it's appropriately dealt with by individual states," said Yates. "But if it becomes a more routine form of transport, then a federal regulatory scheme makes more sense."

However, if space travel becomes a means of transport comparable to the aviation industry many argue that there should be standardisation across international lines too.

To address these unresolved issues in commercial space travel, the session will be structured as a roundtable discussion in which each table will represent a different stakeholder. The



aim is to consider the issues arising from a hypothetical space trip and to anticipate the outcomes.

"This is exactly what the law is trying to do now," added Yates.

The session might also address the difficulty of striking a balance between effective regulation and encouraging innovation in this young industry.

Yates is optimistic that in the next five to ten years commercial space flights will become an everyday reality. With the recent announcement that Nasa is facing spending cuts from the US government, commercial space flight seems to be the obvious financial solution for the space agency.

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# Esma opens up

**Steven Maijoor**, Esma's new chairman, explains his position on investor responsibility, the regulator's resources and its relationship with the EC to Lukas Becker

**T**he European Securities and Markets Authority (Esma) came into existence on January 1 2011 amid a cloud of uncertainty and doubt from the legal community.

Many people questioned how exactly Esma planned to tackle the sheer number of priorities it set itself given its staffing, what its relationship with the European Commission was, and how it intended to develop its international credibility.

But six months in, Esma has shrugged off doubts about its capabilities, and has made strong progress on credit rating agencies and the Prospectus Directive.

However while the breadth of Esma's work has been plain to see, many in the legal community still query its powers, structure and funding arrangements. The answer to these questions may give market participants an idea of how Esma plans to tackle the regulation of complex products, for example.

Esma's views are not only important for banks and issuers – its recent announcement of its intention to force more disclosure from hedge funds and exchange-traded funds means there is widespread interest on the Authority's opinions.

## How will you approach your priorities given your resources and how creative will Esma need to be in this respect?

The numbers seem reasonable for the current tasks. On the other hand if there are additional tasks given to Esma it will be important to look again at the funding. I think we should realise how a regulator develops, and I've been in that process in the previous year in The Netherlands. It's not like the Parliament says: 'here's the mandate and here are the funds, now go ahead', and that's that for five years. It's a very dynamic process.

There will be extra mandates going to the regulator. We now know that there are different legislative files in which Esma is mentioned as possibly playing such a role such as in Emir [European Markets Infrastructure Regulation], internal supervision of trade repositories, and in the short selling area. And of course then you need to look at the funds that are available.

So we don't receive the funds and then get the mandate. It will be a process where in the coming months and years there will be discussions on the mandates of Esma, and the more mandates that go to Esma, the more funds it will need.

That process will also depend on the extent to which we deliver as an organisation and to the extent we are effective as a supervisor. We're new, and we have to prove ourselves. The more successful we are in that area, we can expect that relevant parties will be willing to give more mandates and more resources.

## Are you planning to use secondees from national regulators to bolster resources?

Secondments have always been a part of Cesr [the Committee

of European Securities Regulators], the predecessor of Esma. That will continue to be a part of Esma. On the other hand the top positions will be full-timers and fully employed by Esma. We expect there will be around 20% secondments.

## How do you plan to balance public pressure to reform quickly with the need to avoid unforeseen consequences?

It's very clear that we need to act swiftly and develop quickly. I started on April 1 2011. Since then, we've taken decisions on the new internal organisation of Esma and we've started to recruit. We have had decisions on CRAs in terms of the issuing by third countries. There is this whole issue of how we should treat and look at credit ratings developed and issued in third countries, for example in the US, and how we should use them in Europe.

It's very clear that we need to act quickly, and that we need to grow quickly. On the other hand it will take time to develop a reputation. That is not something you can do in one month's time.

Like any organisation, the development of the reputation of being an effective regulator needs to be shown in our actions. Despite the fact that we are moving quickly, that will take some time.

## How much is Esma restricted to the EC's agenda and how much scope will it have to feed back on market issues?

This very much depends on the issue at hand. There five priorities for Esma: CRA oversight; the single rulebook; contributing to stability by monitoring systemic risks developing in securities markets and by participating in the European Systemic Risk Board; investor protection – which can vary from warnings and banning certain products to intervening when we see EU law is not correctly applied. Underlying all this is avoiding regulatory competition.

What you can precisely do in those areas will vary from case to case. With regards to regulatory competition, in principle the rules and regulations under our remit are clearly stated in the regulations and it's quite broad. It varies from Ucits [Undertakings for Collective Investments in Transferable Securities] to the transparency directives. So regulatory competition is quite broad in terms of where we can intervene and have a role.

For technical standards it will depend on specific tasks given to us. It's called sectoral legislation, and there the legislator has to decide whether this goes to Esma to make the technical standards. We can't suddenly make technical standards on X, Y and Z. It's within a framework determined by the legislator where we can do technical standards.

On consumer protection, relatively speaking, we have more freedom on warnings and retail investor education. But when it gets to banning certain products, there needs to be a specific sectoral regulation that gives us the possibility to ban a certain product.

So in terms of how limited or how broad, it's very difficult to say. It depends on the issue at hand. If it's about looking at stability risks, we have the freedom to analyse data in a broad area. But banning certain products and activities would be very specific.

## What is the appropriate balance between disclosure regulation, intermediary regulation, product regulation and investor responsibility?

I was raised as an economist. And typically economists are convinced that disclosure should be sufficient. As long as the consumer has all the information, it is his or her responsibility to make the right choices.

I'm not saying that being a regulator has changed my views. I was in the camp saying disclosure should be sufficient, but I went through a sort of philosophical change when I saw my family members in an uneven situation compared to the financial services provider. My parents ended up with products in their portfolio that shouldn't belong there. The products were just too complicated; they [retail investors] cannot make the judgements.

And so the model we are moving towards is one of transparency and duty of care in the area of retail investors and financial consumers. I think it's the right move.

I think that to go much further than disclosure, so that you have a duty of care as a financial services provider in the area of financial consumers, is the right direction.

At the same time, we have the problem and the risk that the best supervisor is the financial consumer himself or herself. So of course it's better that they are careful in their decisions and look after their interest. A regulator cannot compensate for that.

But on the other hand a model where there is an obligation for the service provider to go further is a good model. We have seen disclosures that have been more confusing than helpful, but there's been a clear improvement there.

## Can you mandate investors to rely on short form disclosure when it's very difficult to convey everything investors need to know in such a short space?

Without commenting on the individual regulations or proposals, I'm coming from a regulator where we experimented with very simple pictures trying to convey the message. I think it is possible to be much more consumer oriented.

If you look at other industries and how successful they are in trying to make complex products very simple, having a very strong focus on how can we communicate as clear as possible to the consumer I think still needs a big improvement.

Of course things that are complex are complex. But again, I think we can improve in the financial sector by being more concise and trying to better communicate the characteristics of services or products.

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# The pioneers

Who are the real innovators within in-house departments at banks?

**H**istorically, the words ‘influential’ and ‘in-house’ would seem odd bedfellows. Lawyers at banks – however senior – were viewed as blockers; as the people downstairs, outlining what couldn’t be done, and why it couldn’t. Crucial, yes; influential, less so.

This has changed. In-house counsel have never been so vocal or visible. Despite banks’ legal budgets under as much scrutiny as other departments, the focus on utter transparency and regulatory compliance has put many senior counsel in the offices on the top floor.

In this poll, published first in *International Financial Law Review* in September, our team of journalists and editors acknowledge these leaders in their own right, and let them discuss what they think are the biggest concerns in their industry.

Here, we re-publish excerpts from the list. For the full write-up, visit [www.iflr.com](http://www.iflr.com)

## THE DODD-FRANK MASTER

**Kevin MacMillan**

**Bank of America Merrill Lynch**

When the US’s biggest bank decided it needed a counsel in Washington DC to lead its regulatory reform initiatives, it sought out Kevin MacMillan. With nine years experience between the US Treasury and House Financial Services Committee, MacMillan’s firsthand experience with the regulatory and legislative processes makes him ideally suited to coordinate Bank of America Merrill Lynch’s Dodd-Frank implementation.

Well known by the regulators and within Washington generally, MacMillan is the liaison between the bank and the regulatory and legislative world. He works closely with the bank’s Washington-based government affairs and public policy team, and is in regular contact with the regulators.

**How have you been preparing the bank for the implementation of Dodd-Frank reforms?**

We followed the bill through the legislative process for about a year prior to its passing, and had established informal working groups to address its various pieces as they were being developed in Congress. Once the bill was approved we formalised the working groups into a project management office and developed a reporting system in which we looked at the rules as they approached, identified the areas needing close work with the regulators, and identified key topics and opportunities to engage in the regulatory process.



So we evolved from a legislative team while Dodd-Frank was being written, to a regulatory team as the rules are written, and now as rules are becoming final we have an implementation side of the project management office. We are really coming full circle.

**What areas of the law identified by the bank will have the greatest impact and need the most attention?**

Derivatives are certainly the largest area of the bill and have the most rules, so that will take up a lot of time and energy. The derivatives section of the bill will have a dramatic impact on that market. The Volcker rule seemed like a fairly straightforward concept when first proposed, but it becomes more complicated when you think about market-making activities, asset liability management and risk-based hedging. All of these activities had the potential to be considered proprietary trading activities.

We needed to establish close dialogue with the regulators about those businesses to convey in a credible manner that these activities are not intended to be prohibited. It is then helpful to suggest how to craft the rules to achieve the goal of the legislation without encapsulating areas intended to be

**“Having bank counsel involved throughout the process is an important thread to ensuring consistency”**

exempt. We will also be closely following the new Consumer Financial Protection Bureau as it begins its work. There will be significant changes to the oversight of banks’ compliance with the consumer protection laws. It will take some time for us to fully establish a relationship with the bureau, but its creation was certainly a large and significant part of the bill.

**How important is it for bankers’ counsel to engage with the regulators for the rulemaking process?**

It’s critical. There are amendments to laws and rules that bank counsel deal with on a daily basis, and one of our key abilities is being able to distill these complex ideas into readily communicable concepts to a variety of audiences.

While we are talking to the regulators that are writing the rules, we are also talking to the trade associations that are analysing the rules, and responding to Congress when it wants to better understand how the rule-making process is progressing. While individuals in different roles contribute to the process, including government affairs teammates, public policy associates and SMEs, having bank counsel involved throughout the process is an important thread to ensuring consistency.

**Do you think your background with the Treasury and House Financial Services Committee gives you a better appreciation of the ability of bankers’ counsel to shape reform?**

I have seen the legislative and regulatory process from several positions. Being an attorney with significant Hill and bank experience gives me a tripod of experience and insight that allows me to provide a perspective that is comprehensive when dealing with these thorny issues.



## THE SINGAPORE OPPORTUNIST

**Ben Bowden**

**Standard Chartered**

As south-east Asia legal head at Standard Chartered, Ben Bowden has not just had a front-row seat for the Asian growth story. He has also played a starring role in his bank’s progression from what was essentially a small Asia-focused currency house to the regional success story it is today.

Standard Chartered’s development has benefited from the bank’s positioning as an international bank with an Asian focus. And so too has Bowden’s influence.

In a financial institution in which all key decision-makers sit in Asia, not New York or London and Singapore not Hong Kong, Bowden has been able to enjoy a uniquely Singapore-based but globally-focused role as the bank’s debt capital market (DCM) legal head.

His remit sees him juggle both day-to-day transactional deal and legal risk management work, bringing him much closer to the action of the business and all aspects of operational and credit risk management integration than many of his regionally-based counterparts.

Standard Chartered’s capabilities have progressed rapidly in the past few years, as it profits from its long-term focus on emerging markets in Asia, the Middle East and Africa.

The bank’s success has undoubtedly also been bolstered by its resilience to a credit crisis that forced many of its counterparts to cut corners.

“When the crisis hit we didn’t have problems with the balance sheet, we were liquid,” says Bowden. “We were able to use it to deepen relationships and capabilities within the capital markets, as well as hire talent while others were firing. It was an exciting time to be at the bank.”

Nonetheless his decision to join the bank five years ago from Linklaters’ well-respected Singapore capital markets practice was met initially with disbelief. “People couldn’t understand why I’d chosen somewhere which was pretty much nowhere in the cross-border capital markets space,” he says.

“Opportunity and timing are everything,” he says. “In hindsight, it looks like rather a good decision.”

## THE EUROPEAN REGULATORY GURU

**Mark Harding**

**Barclays**

Having spent time doing preparatory work on the UK’s Financial Services Act 1986 and two stints in Clifford Chance’s financial regulation team, Mark Harding is one of the most experienced regulatory experts in Europe. Here, he discusses

the Independent Commission on Banking report, the aborted ABN Amro merger and the problem with excessive disclosure requirements.

#### What has been the biggest challenge of your in-house career?

At UBS managing through a big merger [Union Bank of Switzerland and Swiss Bank Corporation in 1997] to create the new UBS, where I became the global general counsel for the investment bank, was a big challenge from a management point of view. Here at Barclays, we've grown from a legal department of 150 to 1,000 over the time that I've been here. I joined the executive committee here a couple of years ago; that in itself, being involved with the running of the bank, is a big deal.

More recently it's been managing through our attempted merger with ABN Amro before the crash in 2007. Then the crash, raising capital and keeping the bank healthy was a challenge as well. People used to say you had to work harder in private practice than in-house. I've never worked as hard as the year around the ABN Amro and the crash.

#### What's your view on the increasing level of disclosure requirements?

Generally speaking full disclosure of things that worry the markets or information that is needed by investor is something we support. But you need a really good cost benefit analysis before mandating disclosure in these areas as there's huge cost associated with some of it. The question is, is the transparency needed, the information that is generated as a result of it at all useful for any investor, institutional buyer or seller?

How much pre and post-trade transparency is necessary? You can see that a high level is needed in the equity markets. In the government bond markets, you can go far too far with pre-trade transparency in particular, because the market doesn't need much of the information.

In the case of derivatives, despite moving much of it into clearing or onto exchanges, the over-the-counter derivatives market is very bespoke, often reflecting different credit quality or hedging needs. It's just not helpful to have all that disclosure.

In the context of Mifid II, we're going to see a lot of interesting questions. There are a lot of people who want to have equity-style disclosure in the derivatives market.

We spent a long time in the context of Mifid I arguing that this was not a sensible thing to do. I think there is a danger that we end up in an unhelpful area with a huge cost and not much benefit.

#### What is the most important regulatory change for you at the moment?

One that has a very big legal aspect to it is the crisis management framework; the recovery and resolution, bail-in, contingent capital, and resolution authority plans that are being looked at from the Financial Stability Board downwards.

We believe that no bank should be too big to fail, we've said that publicly. We think it's possible to get to that position but



we do think there are a collection of things that are needed to be done to do that. It's partly legislative change, partly things financial institutions can do themselves, and partly things the regulators have got to do. These days most of our domestic regulation comes out of Brussels, so a lot of it involves engaging with the European authorities first. It becomes more important when they start using regulations rather than directives.

#### What will be causing banks problems next year?

One big issue is the Independent Commission on Banking report. The whole issue of ringfencing probably is now the biggest uncertainty hanging over UK banks. Also the G-Sifi stuff, and in that context what will be CRD 5 coming out at the end of the year, I would say they're the biggest issues. Otherwise it's just the sheer volume of legislation and regulation that keeps hitting us. Just as a small example – the Arab Spring. The exercise of keeping up with the new economic sanctions, anti money-laundering, is huge.

### THE LEADER IN DARK POOLS

#### Vaishali Javeri Credit Suisse

Vaishali Javeri is the natural choice to counsel the world's most successful dark pool and the world's only lit electronic communication network (ECN).

Through Crossfinder, the largest dark pool by volume, and the newly launched Light Pool, Credit Suisse has established itself as the leader in alternative trading systems (ATS). And Javeri, the bank's US broker-dealer equities lawyer, has had the best training ground to oversee the matching systems.

Starting her career with the Securities and Exchange Commission (SEC) in its oversight of securities exchanges and broker-dealers, Javeri was poached after just three years by Island ECN to become its number three lawyer. "It was an innovative, cutting-edge place, and I never thought what I did there ten years ago would translate into so much of what I do here with Crossfinder and Light Pool," she says.

Like Light Pool, Island ECN was a lit matching system. And like its contemporaries, Island ECN was ultimately acquired by a national exchange for its technology. ECNs disappeared and dark liquidity grew. But through Light Pool, Javeri is seeing the lit model come full circle and has steered its rebirth. "I think people look at Light Pool and think maybe this is the new wave of the future. And I wouldn't be surprised if new ECNs do pop up," she says.

Javeri has counselled Crossfinder and Light Pool through their launches since their inception in 2004 and earlier this year, respectively. Both matching systems are highly regulated and the continual innovation of both models sees her work closely with the SEC – something helped by relationships built since the start of her career.

She was key to structuring and obtaining regulatory approval for Light Pool. "It's a newer innovation so they definitely had questions for us. They were very intrigued and after more clarifications it's been filed with the SEC and now we are operating," she says.

It was necessary to explain how the system satisfies the



regime's fair access requirement, and its key features including its transparency, and how it distinguishes institutional liquidity from the toxic order flow that is excluded.

The two ATSs form just one part of Javeri's oversight of the bank's US cash trading businesses.

She also advises on Credit Suisse's algorithmic trading, global arbitrage trading and other equities related matters. She regularly meets with the SEC's division of trading and markets to talk about equity market structure, including high frequency and algorithmic trading – with the goal of assisting some of its rulemaking. "It's challenging as a regulator to come up with rules when you are not sitting in the middle of a trading floor," she says.

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# French multiculturalism is discriminatory

A “discriminatory” French parliamentary decision to ban religious symbols and all face-covering veils worn outside the home raises important questions about the role of the state in embracing multiculturalism, according to the IBA Discrimination Law Committee’s senior vice-chair.

Referring to a 2004 ruling banning crosses and Muslim headscarves from French public schools, as well as an April 2011 ban of the full-face Muslim veil, Cherie Booth QC argued France could not maintain that it upheld laws against discrimination while it also enacted discriminatory legislation.

Speaking at yesterday’s session ‘The rise of multiculturalism and resulting challenges of managing diversity in the workplace’, Booth questioned whether the entirety of France believed the enforcement of such neutrality was necessary.

The move highlighted the issues that could develop from the differing interpretations various jurisdictions give to the principle of proportionality, she said.

“From a UK perspective, we have the view that multiculturalism requires one to accept that people have different views and not to take that personally,” she added.

Bredin Prat’s Paris-based partner and IBA Employment and Industrial Relations Law Committee chair, Pascale Lagesse said the French approach to multiculturalism was rooted in its history.

“For French lawyers, the concept of multiculturalism is much closer to what others may term diversity or neutrality,” she said. “French citizens are viewed as universal subjects. It is the authorities’ aim to treat people first and foremost as a French citizen not according to any other cultural, racial or religious factors.”

“The decision to ban face-covering veils in public spaces goes back to the French motto: *Liberté, Égalité, and Fraternité*,” she said. “The ruling was motivated by a desire to develop a society in which everyone lives together in a tolerant environment.”

But Booth argued tolerance was a begrudging word and

authorities should focus instead on accepting and understanding cultural differences.

HSBC Middle East’s Dubai-based head of legal, Dr Nimer Basbous said there was no regulations governing what people should do or wear in the United Arab Emirates and that such issues, or any court cases relating to the topic, were rarely discussed in the public arena. But he argued the jurisdiction’s lack of regulation was, in fact, helpful as it insured there were no limitations in place in terms of how people dressed or how a workforce should behave.

“When I walk through the office floor I see so many different nationalities,” he said. “Foreign nationals make up about 80% of the workforce in the UAE so you can’t find a place more diverse than this.”

## “Tolerance is a begrudging word”

In breakout talks held later in the session, audience members agreed it was important for multinational corporations to set up their own rules on top of any national regulations.

Establishing a multiculturalism policy in the workplace should enable conversations about the topic and related issues to take place within a company, it was argued. This should then facilitate additional diversity initiatives such as company targets or a framework of standards.

Fox Lawyers’ principal, Ronnie Fox said the existence of such a policy was the first line of defense for any multinational.

The level to which such policies should be contractually binding concerned some participants. “By stipulating a



Photo: Nicola Bonucci

company’s multiculturalism policy is a binding agreement, you are effectively handing a weapon to be used against you by any dissident employer,” Fox said.

Education was seen as a very important part of the process. “This is when training comes into its own; no company is going to invest a substantial amount of money into educating its workforce on a specific policy if they are not then going to actively enforce that policy,” said Fox.

Others said training should not be top-down but should instead adopt a more bottom-up approach by placing stereotypes on the table in order to confront them at a local level.

From a practical perspective, flexibility was branded critical when enforcing any such policy. Those who were too proscriptive or aggressive in implementation were warned they might face economic consequences.

In yesterday’s IBA Daily, we incorrectly stated the timing of the session: ‘The shifting global economic order and its impact on corporate immigration’. It is in fact taking place on Thursday at 9.30 am.

## THE BUSINESS OF LAW

# Innovation could harm credibility

Launching non-traditional services is a good way of deepening law firms’ relationships with clients. But it can fatally harm a firm’s reputation if done incorrectly.

Speaking at yesterday’s session ‘Rethinking the law firm I: non-traditional services for law firm clients’, Antoine Henry de Frahan of legal consultants FrahanBlondé in Brussels said that with the traditional idea of a law firm increasingly under threat, introducing innovative new lines of businesses, for example advisory and training services, can help extend client relationships.

“Law firms have to replace the concept of services with the concept of value; we have to focus on the value of our relationships with clients,” he said. Deciding to charge for these extra services can also create a good stream of revenue.

Richard Fleck, a consultant at Herbert Smith, however warned that any services need to respond to client demand. “That demand should be worth paying for – we’re not in the business of providing things for free,” said Fleck.

While new services can provide a good revenue stream, combining advisory services with legal functions can have unintended consequences for a firm’s reputation.

Combined advisory services has been a big factor in the declining status of the large accountancy firms over the past 30 years, he said. Accountancy was the most respected profession in the 1970s, and was the first port of call for companies needing advice. This was followed by the investment banks, and then the lawyers.

However in the mid-1980s the accountancies became multi-disciplinary, which meant they had a range of services to sell. In a client’s mind, said Fleck, this potential conflict of interest jeopardised their integrity, to the extent that lawyers are now the first port of call, with accountancies third.

“Yes, look at the new opportunities, but you need to understand the effect on the way others judge your credibility as an independent legal adviser,” he said.

## ANTI-CORRUPTION

# Why anti-bribery is a global problem

Although the UK Bribery Act has focused attention on the UK regime, anti-bribery enforcement has moved up the global agenda with countries ramping up their anti-corruption initiatives, according to speakers yesterday.

Lawyers should exercise increased vigilance and awareness of these regimes, said Nicola Bonucci of the OECD in Paris, speaking at Monday afternoon’s ‘Global update on anti-corruption enforcement’ panel.

“This is a profession that is facing risks in foreign bribery offences throughout the world, not just the UK,” he added.

The OECD foreign bribery impact study, scheduled for publication in December, found that 46% of cases of foreign bribery involve bribes paid to officials in developed countries. On average, bribes paid are equal to 8% of the contract price.

The G20 anti-corruption agenda is set to be implemented within two years. It will target the implementation of the international legislative framework and international cooperation.

In addition to the highly publicised UK regime, Russia and China have introduced statutes criminalising foreign bribery, with a bill underway in India.

According to James Tillen of Washington-based Miller & Chevalier, it has been another busy year for the Foreign Corrupt Practices Act (FCPA) in terms of enforcement.

“Court actions have led to more FCPA clarity on the definition of foreign officials,” he added. “The Department of Justice is continuing to target foreign companies where they can get jurisdiction.”

There have been a number of acquisitions leading to enforcement actions, and Tillen’s advice was to focus on pre-merger due diligence to reduce FCPA violations.

The Dodd Frank act’s encouragement of whistle-blowing now means that an informant could obtain 10-30% of the sanctions ultimately awarded.

“There is a belief that this will generate even more FCPA cases and even more FCPA enforcement, so that is worth watching,” said Tillen.

**QUESTION:**

Which of this week's sessions are you most looking forward to?



**Giuliano Lanzavecchia**  
NCTM  
Italy

I'm looking at the corporate sessions, but M&A is my main area of interest. I'm still deciding which sessions to attend, but will definitely be at the 'dissecting the deal session'. This is my first conference and I'm hoping the panel discussions will help enhance my knowledge, and be an opportunity to network and find out what others are doing in the area.



**Marcus Boeglin**  
Lalive in Qatar  
Qatar

Hot topics in arbitration plus the international projects' session on construction in the Middle East I'm most looking forward to. The huge projects being developed in Qatar – including for the 2018 World Cup – make this an important area for us. Tuesday's *sharia*-compliant financing is also an important session

as Islamic banking becomes more important to traditional financiers.



**Jay Kim**  
Kim & Chang  
South Korea

I'm most looking forward to the session on competition law and its impact on patent rights. We have a client facing a competition patent law enforcement so the forum is spot on for us. It's the first case of its type in the country, and European and American law is the most developed in this area, so there's a lot to be obtained to point us in the right direction.



**Eszter Szakacs**  
Sar and Partners  
Hungary

The IP and entertainment law sessions over the first couple days are my priority, and I hope to attend some antitrust sessions as well. This is my first IBA and I'm hoping to meet firms that aren't yet part of our client and contact circles, and see how we can become involved with different IBA committees. I don't think I'll

attend all days though – Dubai is too tempting to visit!



**Ricardo Debatin Da Silveira**  
Machado Associados  
Brazil

I'm a tax lawyer working in M&A, and I'm a member of the IBA tax committee so I plan on attending most of their sessions. Last year I presented but this year I'll be in the audience, and am most interested in double taxation treaties, the area's recent developments in the most important jurisdictions, and local tax

authorities' interpretations of international tax planning.



**Ruth Bowe-Darville**  
Bahamas Bar Association  
Bahamas

The Human Rights Showcase will be the highlight; discrimination and immigration are the issues that are most important to us. Sessions on women's rights cover my other main areas of interest, but over the week I'm going to try going to as much as I can to have exchanges with delegates to see how we can best fulfill each others' needs.



**Ali Ismael Al Zarouni**  
Horizons & Co  
UAE

I'm interested in the arbitration and dispute resolution sessions – and it's a busy schedule. The combination of the financial crisis and construction being a fast growing area in the region – particularly in Dubai – has made arbitration in construction contracts very widespread over the past three years, so the sessions on that particular topic are particularly relevant.



**Karen Kaur**  
Deacons  
Hong Kong SAR

I work in the investment funds practice area which is quite a narrow field so I'm looking at quite specific sessions. The panels on *sharia* funds in the early part of the week are my focus, to see what is happening in this region and also to meet fellow practitioners from around the world. The rule of law symposium is also something outside my area that I'm really looking forward to.

**DIRECTORS' LIABILITY**

# Panelists debate insolvency reforms

**A**head of this week's deliberations in Vienna on Uncitral insolvency law reforms, international experts at IBA's annual conference debated the different approaches to directors' liability for insolvent trading.

"This is a new and hot topic in Vienna," Patrick Rona, a Duane Morris special counsel said at Monday morning's panel 'What's new in Vienna? The view of judges and practitioners on Uncitral insolvency law reforms affecting corporate groups.'

"We are now finally sitting down and trying to develop guidelines that would help directors globally to pinpoint when they have reached the point of insolvency," he said.

Panelist Spyridon Bazinas, UN office of legal affairs and international trade law division (Uncitral secretariat), put the issue in context by discussing the situation in Greece.

"The government and bankers of Greece, and also those in Europe, knew it was in trouble in 1987 because at that time Greece was borrowing again and again to service its loans," Bazinas said.

"There's a lot of this going on in the world," added Rona. "Directors run into the problem of knowing that there's an insolvency and trying to resolve it quietly."

Yesterday's panel reviewed different approaches adopted around the world to discuss the best way to develop a model law in the area.

The situation under UK law is clear. In an insolvency, the overriding fiduciary duty is to the company's creditors. Wrongful trading is a civil action where a liquidator can make directors liable for trading beyond the point when they knew, or should have known, that there was no reasonable prospect of avoiding liquidation, and in so doing worsened the creditors' position.

The US, however, is in a state of flux. The pendulum is swinging away from directors' duties to creditors in the so-called zone of insolvency.

The Supreme Court of Delaware, the country's leading corporate authority, has taken the stance that the zone of insolvency is not a period in which to impose any special directors' liability. But there is no federal level approach to this issue and rules vary from state to state.

According to the honourable Christopher Klein, chief judge of the US bankruptcy court for the eastern district of California: "The law in California is neither brilliant nor clear. That's why lawyers do well there."

The key issue being debated this week in Vienna is how the Uncitral working group should take away from these jurisdictions' experiences as it drafts its recommendations on the subject. With so much divergence on the subject, the no-nonsense Australian approach might be best: a company that is not solvent, is insolvent.



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