Shaping the rule of law

The former US Secretary of State Madeleine Albright opened this year’s IBA conference by highlighting the connections between law, poverty and human rights.

This year the IBA has maintained its focus on human rights, establishing a taskforce on climate change justice and human rights as well as presenting an IBA showcase on human trafficking. In her opening keynote address, Albright urged the IBA to continue its human rights efforts.

The rule of law and its role in maintaining human rights was a recurring topic throughout her speech. She said that virtually every foreign policy initiative has a legal side to it. More broadly, she noted that wherever she goes, and whatever she does, the one thing that follows is the importance of law. “It is, in short, a cornerstone of civilisation,” she added.

Enforcing the rule of law

Statutes must, however, be shaped and enforced with the interests of true justice in mind, and that is easier to articulate than implement.

In yesterday’s address, Albright emphasised not only the importance of the rule of law, but also the difference between just and unjust laws. The former could provide a basis for a just and moral society, she said. But, she warned that the imposition of unjust statutes could create a platform for tyranny.

Indeed, in some countries the rule of law remains so fragile that there are no good answers for some questions from average citizens. It might be unclear, for example, that such citizens are able to seek redress through police and the courts if their rights are violated.

She added that there was another related question that might be posed by half the people on earth. That, she said, was: does the law even know my name?

Legal identity

The concept of a legal identity is an important aspect of poverty in society. Albright cited the work of the United Nations development program’s commission on legal empowerment of the poor, established in 2008. She served as co-chair of the commission, which focused on the poor and their lack of legal rights.

That absence of legal rights might involve a person that does not have a birth certificate or a driver’s license. Others might own land or a home but lack legal documentation for that property, and would therefore be unable to make the most of that asset. Without those documents, they cannot invest or borrow, for example. They are also vulnerable to theft.

Those disadvantages mean that it is much more difficult for the poor to escape poverty. It also drives them farther away from the legal system. The report by the commission said a characteristic of virtually all communities living in poverty was that they did not have access, on an equal footing, to government institutions and services that protect and promote human rights.

Often, it added, they are also unable to adequately voice their needs, to seek redress against injustice, participate in public life and influence policies that ultimately would shape their lives. Obstacles to obtaining justice undoubtedly reinforce poverty and exclusion.

That would obviously influence how communities living in poverty view the rule of law. It’s only natural that people who see themselves as less legally bound see themselves as less legally protected see themselves as less legally protected.

Continued on page 14

Biography: Dr Madeleine K Albright was the first woman to serve as US Secretary of State, holding the position from 1997 to 2001. At the time of her appointment, she was the highest-ranking woman in the US government.

In 1993, Albright was appointed US Ambassador to the United Nations in her first diplomatic post. She became Secretary of State in 1997, and was influential in forming US policy in the Balkans and in Iraq, as well as becoming the highest-ranking US official to visit North Korea.

Following her term as Secretary of State, Albright founded the Albright Group, an international strategy consulting firm based in Washington DC. She is on the Council of Foreign Relations’ board of directors and is Mortara distinguished professor of diplomacy at the Georgetown University Walsh School of Foreign Service.
Question: Which sessions are you most looking forward to?

Ugur Aktekin
Mehmet Gün & Partners
Turkey

I’m particularly interested in the intellectual property sessions, especially tomorrow’s. I am also looking forward to sessions run by the law firm management committee, and am following the mentoring programme run by the IBA.

Cristina Martinetti
Buffa Bartolotti & Mathis
Italy

I’m interested in international arbitration and international trade sessions. One of them is on trans-Atlantic trade, and one on hot topics in arbitration. I’m hoping to sessions run by the law firm management committee, and am following the mentoring programme run by the IBA.

Michael Molitor
Molitor
Luxembourg

I’m looking forward to all of the Banking Law Committee sessions, but particularly the one on enforcement by financial regulators. It is a concern for all of us currently and this is the first time we’ve had a session on this issue.

Steinar ter Jung
Selmer
Norway

I’m looking forward to the law firm management sessions because I’m a managing partner of a firm. I’ve also just been to a mentoring master class about how to improve mentoring, and how you can handle mentoring situations in a better way.

Gopal Subramaniam
Former Additional Solicitor
General of India

I’m a speaker in two of the showcase sessions – one on human trafficking and one on the changes in structures, technology and regulation (of the legal profession). I was also author of a committee report in India which was published immediately after the rape of a young girl in India.

Luiz Henrique Amaral
Dannemann
Brazil

I’m looking forward to hearing about intellectual property financing and consumer litigation. I’m very interested in trademarks, franchising, disputes and consumer mass litigation. We’re here to see what will happen next in Brazil, which is quite active in litigation.

Jaime Cubillos
Posse Herrera Ruiz
Colombia

The Latin America forum and the M&A committee are what I am most looking forward to. I’m looking to learn about current trends in cross-border M&A, particularly border dual tender offers and the coordination among jurisdictions.
Every year the annual conference invites a prestigious person to make remarks about the legal profession’s future, which is very exciting. I’m also looking forward to listening to experts in other fields, such as management and economics.

Mark Ellis
IBA executive director

The session that I’m most looking forward to is ‘A conversation with...’ on Guantanamo Bay. It is a very knowledgeable panel and an issue of great importance here in the US. Also, the session creates a way to engage with the issues in a very innovative way.

Mark Stephens, Howard Kennedy & Partners, UK; and Pierre Legault, Justice Canada, Canada

We have a fantastic panel lined up for our Monday morning session ‘We can handle the truth...’ on free speech. This includes Bill Keller, former executive editor of the New York Times, who is a leading authority on freedom of speech in the US, plus speakers from Russia, India, Turkey, Malaysia and Thailand, just to name a few.

Peter Leon
Webber Wentzel
South Africa

I’m involved in the mining law committee and I’m very much looking forward to those sessions, especially the one on indigenous law and consent. Indigenous rights have become such an important issue in South Africa and around the world.

Michelle de Rijke
Bird & Bird
The Netherlands

I work in the energy field so I’m most looking forward to sessions that cover new developments and provide context regarding energy sectors. I’m also speaking at the ‘Cross-border interconnection: global markets or national champions?’ session tomorrow morning. This will involve four or five presentations followed by an interactive session.

Oluwole Eludayi
Oluwole Elumoyin & Co
Nigeria

I’m most looking forward to listening to the speeches in the general law and practice sessions. I’m particularly interested in criminal law because I’m interested in human rights and the discussion of justice.
The future of Asia project bonds

Although successful project bond and sukuk deals have been seen in Asia, they have not become as important in the region as in other jurisdictions. But Asian lenders’ increased activity abroad may change that.

Latin America is increasingly becoming a key area for Asian lenders. For example, last year China Development Bank joined multilaterals Inter-American Development Bank and the Corporación Andina de Fomento (CAF) in providing financing for the expansion of Colombia’s El Dorado International Airport, in Bogotá.

Asian lenders may learn from high-profile Latin American project bond issuances, such as Brazil’s Terminais Portuarios Euroandinos Paita port expansion. This landmark deal saw the issuer tap the market in August 2012 to raise $110 million via a BB-rated offering with an 8.125% coupon and 25-year tenor.

China overtaking the US as Brazil’s largest trading partner in 2009 reflects China’s significant influence across Latin America, notes Clifford Chance’s Jon Zonis. The Japanese and Korean banks are also increasingly important in the region in terms of infrastructure financing and development.

But before project bonds are seen in Asia, he predicts that Chinese, Japanese and Korean sponsors and banks will consider their use in Latin America.

Some sponsors have also explored project financing via local currency debt capital markets. In Malaysia, the Tanjung Bin coal-fired power project was partially financed via a senior sukuk murabahah of up to RM 3.3 billion ($1.03 billion).

Although Australian sponsors appear the best candidates to be first movers in this space (due to their familiarity with US investors) the first Asian sponsor to tap the US market may be a lesser-known credit.

“In Latin America, we have seen project bonds used to finance infrastructure projects in markets where there was insufficient liquidity from international and local banks, and we could see a similar trend over time in parts of Asia,” says Zonis.

Product challenges

But it may be a while before project bonds emerge in Asia. Issues with the product include liability for misstatements and omissions in the offering context. It is also difficult for a sponsor to access the market multiple times. This means all costs – including factoring in cost overruns – must be raised in a single draw. That adds negative carry risk, which adds significant expense.

Project bonds are helpful as a means of diversifying funding sources and maturities. Clifford Chance’s Peter Kilner says that for big projects, there should be a mix of debt maturity to lessen refinancing risk.

“It’s possible to look to different types of investors: for example, to banks for shorter-term loans and to the capital markets for a long-term project bond,” he adds.

But Asian banks are well-capitalised and willing to lend to project sponsors – even at longer tenors.

Most pure Asian project finance deals involve Korean, Japanese or Chinese banks, or involve local liquidity, notes Clifford Chance’s Ashvin Seetulsingh. Thai power deals have been done local Thai banks and out to longer tenors. The larger deals have had a mix of local and international banks and export-credit agency support.

“When the banking mix is right, project bonds will not be a priority,” says Seetulsingh.

Basel III’s impact

As Asian banks begin the process of implementing Basel III, their willingness to keep long-term project financing loans on the books may decrease.

French project financing banks may provide an example. Seetulsingh notes that banks have been at the forefront of an evolving originate-to-distribute model.

Banks will evaluate and structure project financing deals, as they have experienced teams, but may not have the balance sheet appetite for the financing, he explains. Banks can then sell off the loans to those who may not have the structuring experience or are looking for longer-dated project finance-type cash-flow to match their liabilities.

But these players, including pension and insurance funds, may not be accustomed to making equity investments into projects. Instead they may be more comfortable with or restricted to investing in fixed income products, providing an opening for project bonds.

One feature of the project bond market is a long-term obligation match for pension funds and insurance companies, Kilner notes. As banks pull back, these players are naturally filling a gap.

“We’re also seeing funds set up to invest solely in debt – they had been more interested in taking equity, but are now looking to debt,” he adds.

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Standing up for human rights

As the Universal Declaration of Human Rights celebrates its 65th anniversary, the IBA’s Human Rights Institute’s co-chair Helena Kennedy QC, Baroness Kennedy of the Shaw’s, assesses the challenges to its nature and application in the 21st century.

The passing of the Universal Declaration of Human Rights in 1948 marked the first international recognition that all human beings have fundamental rights and freedoms. It forms the basis for a world built on peace, justice and freedom.

With globalisation, the visibility of human rights abuses has increased worldwide as more and more cross-border economic, social and cultural activity helps to highlight human rights abuses in one country to another. And yet, the 21st century has thrown up a number of challenges to the rights enshrined in the 1948 Declaration.

A leading barrister and an expert in human rights law, civil liberties and constitutional issues, Baroness Kennedy’s career has been dedicated to standing up for those who have the least power in the system. “Fighting for human rights is fundamental to peace and justice everywhere. It’s about raising legal standards and in turn human beings’ respect for one another,” she tells the IBA Daily News.

But such a fight is being hindered by contemporary challenges, which some nations argue necessitates a redefinition of the 1948 Declaration’s most basic principles. “Governments argue that human rights need to be considered in light of what is happening today,” Baroness Kennedy explains.

Modern day issues in the battle to protect human rights include unsatisfactory state support of the International Criminal Court – an essential aspect of the laws of war as well as human rights law. “The problem is one of the world’s most important nations, the US, has refused to participate,” she explains.

Today’s human rights abusers also commonly hide behind cultural essentialism. For example, barbaric acts of stoning, the death penalty and child executions are said to have been carried out under the guise of cultural essentialism. Such arguments are even used to facilitate the rule of undemocratic regimes, where parliament is powerless, the rule of law non-existent and corruption rife.

Policies, legislation and practices justified by governments in the name of anti-terror are also encroaching on human rights. This has not only led to the erosion of due process procedures and effective remedies. But it also provoked instances of torture, other inhuman and degrading treatment, transfer practices known as ‘extraordinary rendition’ and the use of secret prisons.

Governments’ treatment of illegal immigrants must also be addressed, with refugees often left outside of a state’s recognition of human rights and thereby subjected to harassment, divestment of their property and earnings, imprisonment without trial and even deportation to torture.

Further, societal idiosyncrasies are increasingly being used to perpetuate gender-specific human rights abuses across the globe. Such activity is not solely a feature of conflict zones and third world sweatshops, but is also prevalent closer to home – through domestic violence or racism on the bus, for example.

“As lawyers, we need to make the argument that this isn’t something only happening in the developing world, it is also happening on our doorstep,” says Baroness Kennedy. “These arguments need to be made more clearly and much more vocally.”

Indeed, Baroness Kennedy believes lawyers have an integral role to play in breathing life into human rights. “It doesn’t matter if you are a criminal lawyer or commercial lawyer of civil litigation advocates, as those who know and understand these matters; it falls on us to make the case,” she says.

Lawyers must also be especially attuned to the far-reaching implications for human rights abuses to the rule of law. “This is something that should concern all lawyers, everywhere,” says Baroness Kennedy. “It allows governments to take away liberty without due process and removes such activity from public scrutiny.”

The Declaration can be used to measure the legitimacy of governments and their legal regimes. “Its purpose is to provide a template of rights that can be used across all legal systems,” Baroness Kennedy says. “While the systems may differ, the fundamental principles remain the same.”

“The fundamental test of a democracy is if a government is able to retain due process when under threat,” she adds.

Looking to the future, she anticipates human rights abuses will centre on resource conflict. “The majority of conflict worldwide is going to be about resources – oil, water or territory,” Baroness Kennedy explains. “I think we are going to see continued conflict and it is important to establish clear ideas about the proper procedures for those involved in crimes in this context.”

“These are going to be very serious challenges in years to come, and we need to ensure we have proper protocols in place to deal with them,” she cautions.

In the face of such varied challenges, Baroness Kennedy is an ardent advocate of elevating human rights concerns to the forefront of contemporary debate. “I think you need to have very public discussions about why human rights matter,” she says.

Don’t miss today’s session – Human rights at 65: hale and hearty or in need of resuscitation?

**SESSION NAME**

IBAHR! SHOWCASE: Human rights at 65: hale and hearty or in need of resuscitation?

**Presented by the IBA Human Rights Institute**

**TIME/PLACE**

Monday 7th October 2.30pm-5.30pm Room 310, Third level

**Key takeaways**

- The passing of the Universal Declaration of Human Rights in 1948 marked the first international recognition that all human beings have fundamental rights and freedoms;
- The 21st century has thrown up a number of challenges to the rights enshrined in the Declaration;
- Today’s session will assess the need to bring human rights concerns to the forefront of the contemporary debate, as well as the role of lawyers in this.

**“This is something that should concern all lawyers, everywhere.”**

“When governments try to renge on their human rights obligations, it is up to us to make a robust argument to explain why that’s not good enough,” she continues.

The Universal Declaration of Human Rights is a living document. It is indispensable in situations of strife and in societies suffering oppression. But equally it is useful in combating social injustice and realising human dignity in well-established democracies.
The IBA’s priorities

In the 66 years since its establishment, the International Bar Association has cemented its position at the forefront of global legal issues. Here the IBA president Michael Reynolds tells Ashley Lee how he plans to maintain that tradition.

Interview: IBA’s Michael Reynolds

In the 66 years since its establishment, the International Bar Association (IBA) has cemented its position as the Association at the forefront of global legal issues. In his first ten months as IBA president Michael Reynolds has strived to maintain that tradition.

In doing so, he has worked to increase IBA participation in emerging economies, including the BRICs [Brazil, Russia, India, China], Vietnam, Indonesia and Africa’s French and Portuguese-speaking countries. He has also met with Myanmar politician Aung San Suu Kyi, with a view to building up the IBA’s presence in the former pariah-state.

Reynolds has successfully advanced the IBA’s human rights initiatives too, by establishing task forces focused on the impact of climate change on disadvantaged populations as well as on human trafficking.

This year the IBA also opened a North America Office, in Washington DC, to support the Association’s growing US membership and to enable closer collaboration with US Government Agencies and bodies such as the World Bank.

Here Reynolds opens up about his priorities as IBA president and his plans for the Association.

Q What are your priorities as IBA president?

Obviously a priority is having a very successful conference in Boston this year and in Tokyo next. They’re both fantastic venues, and we’ve had wonderful support from the Boston host committee and from our colleagues at the Japanese Federation of Bar Association (JFBA).

Aside from that, another key priority is continuing to integrate lawyers and law firms from the BRICs, which represent some of the fastest-growing areas in the market for legal services. We’re also looking to the countries that have rapidly growing markets in legal services, and often dynamic economies, such as Vietnam, Mexico and Indonesia.

This is reflected in my travel diary so far this year: I’ve been to Brazil three times, Russia twice, India once and am about to head to China. Other countries I’ve visited recently include Vietnam, Indonesia and Thailand, as well as certain Latin American jurisdictions – particularly Mexico, which has the fourth-largest number of lawyers in the world.

We’re also looking closely at the US. The American delegation to our annual conference is increasing every year – it’s now almost the largest – and an increasing number of American law firms and lawyers are taking part in our activities as they look to expand their international footprint.

During my presidency, we’ve opened an office in Washington DC that will enhance the support we give to our US members and help our ability to work with the Federal Government and its agencies, as well as international bodies such as the World Bank. We’ve strengthened our relationships with several international organisations, and we met recently with the United Nations’ (UN) Secretary-General Ban Ki-Moon. Much of the UN’s work, particularly in the human rights areas, is mirrored in the IBA’s activities as the global voice of the legal profession. We also have close relations with the European Commission and I met recently with Vice Presidents Joaquin Almunia and Viviane Reding.

Task forces

We recently set up the Climate Change and Human Rights Task Force – co-chaired by Baroness Helena Kennedy QC and David Estrin – to examine the extent to which human rights of disadvantaged populations globally are affected by climate change. This follows a speech by former President of Ireland Mary Robinson in Dublin last year which stressed that this is an issue that the IBA is uniquely placed to consider.

We also established a task force to focus on the area of human trafficking, which is a topical and relevant issue around the world as well as in the US itself. The American Bar Association (ABA) has a working group on trafficking, and the showcase at the annual conference will feature a number of experts including the immediate Past President of the ABA.

A third area of focus is the impact of new technologies on the legal profession and the issues raised. We’re planning a showcase on the right to free expression on new technology and its impact on privacy.

A further priority is to support the work of our group members. The IBA is unique in that we have both individual members and law firm members from around the world (about 152 law firms from 48 countries). At the conference, we are featuring a number of sessions on the globalisation of the legal services market. They will consider whether the present law firm model will survive and whether it will look fundamentally different in the future.

Myanmar

Myanmar has seen the degradation of its legal infrastructure since the military coup in 1962, but is moving to a steady and ongoing transition under President Thein Sein, with Aung San Suu Kyi playing an important role. We are working closely with the Attorney General and Aung San Suu Kyi, who chairs the Rule of Law Committee in Parliament. I met with Aung San Suu Kyi in Naypyidaw, and she discussed the role she felt the IBA could play in assisting lawyers as Myanmar transitions to a more democratic government and a free market economy.

Since my presidency began, we’ve launched a number of Myanmar initiatives

Before taking office this year, Reynolds has focused on developing the IBA’s presence in emerging economies in Asia, Africa and Latin America;

He has also advanced the IBA’s human rights initiatives, giving special attention to issues relating to the impact of climate change on disadvantaged populations, the effect of new technology on privacy rights and human trafficking;

The IBA is uniquely placed to address these issues as it brings together the leading legal experts in these areas from around the world.

Q How can lawyers help achieve these goals?

Our individual, law firm, and more than 200 bar association and law society members are
actively involved in furthering all our activities. Individual lawyers make up our various committees and task forces.

It is the lawyers, after all, who conduct training courses around the world. For example, we’ve sent arbitration experts to Myanmar to lead courses on the New York Convention, which Myanmar signed earlier this year.

Our task forces also comprise individual lawyers who are the leading experts in their respective fields in their countries. The climate change and human rights task force is an example: it comprises not only experts in climate change, but human rights experts such as Baroness Kennedy. Another example is the area of the new technologies, we have a lot of specialists in intellectual property and media law who play an active role in these committees.

These individuals are the leading experts in their jurisdictions, and their contributions enable us to work on these priorities.

Q: What do you hope conference delegates will take away from this year’s conference?
At this year’s conference, we are covering an incredible range of issues. This year we are covering an incredible range of issues. Our 70 specialist committees are all putting on top programmes, and I hope delegates will go away with an updated and state-of-the-art thinking on all these issues. This represents a unique opportunity to hear experts from top legal firms around the world.

Q: What are you looking forward to seeing in Boston?
Boston is a beautiful city with an enormous amount of history. As the crucible of the American Revolution, there are sites that are of special interest such as those related to the Boston Tea Party. We have an excursions programme so that attendees have an opportunity to see historic Boston.

We are using some of Boston’s great venues for IBA events. For example, the opening party will be at the impressive Museum of Fine Arts, which, in my view, is one of the top art galleries in the world. We have the whole building for our opening party, so we’ll have Madeline Albright at the opening ceremony, and then will have the party in a gallery with an internationally recognised collection. The closing party is at the Boston Public Library.

We have luminaries speaking such as Professor Cherif Bassiouni, who has enormous knowledge of the Middle East, and Beatrice Merca who will be speaking on her experiences related to human rights issues in Zimbabwe.

Our Rule of Law Symposium will feature Supreme Court Justice Stephen Breyer in a discussion on the Magna Carta and the rule of law ahead of its 800th anniversary in 2015. Former US Federal Reserve chairman Paul Volcker will speak on corruption and the rule of law.

Keynote speaker Madeline Albright – the first woman US Secretary of State – has enormous diplomatic experience, and now serves as US permanent representative to the UN and a professor of the practice of diplomacy at Georgetown University. To have her open the conference is tremendous.

Q: What are you looking forward to seeing in Boston?
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IBA World Cup Football Match

Over the last few years, many highly acclaimed international lawyers have graced the world stage as defenders, midfielders, attackers and goalkeepers of the highest quality. Boston 2013 will provide another opportunity for the good and the great to demonstrate their sporting prowess. We have secured the Boston Athletic Club, 653 Summer Street.

The match or matches will be played on Wednesday 9 October between 4 and 7 pm. The cost is likely to be in the region of $50, payable on the day or at the IBA registration desk at the Conference. Transport and other arrangements will be confirmed nearer the time and e-mailed to delegates who have registered an interest.

Please register your interest in playing prior to (or during) the conference week to Leonie Stevens (lstevens@petersandpeters.com) or contact Keith Oliver (keoliver@petersandpeters.com).

All spectators will be welcome.
The best of Boston

Whether it’s between sessions or an extended weekend getaway, delegates should do some exploring while in Boston. William Bowry takes a look at what the city has to offer.

Boston is a city that boasts a wide diversion of attractions for the international traveler, predominantly because, despite its iconic place in American History, part of Boston’s charm is that it is decidedly unique. The best means of travelling around the city is by foot, and much of the architecture heralds from the 18th and 19th century; Boston is more ‘Brownstone Foliage’, than ‘Concrete Jungle’.

One of the defining aspects of the city is its connection to sport, a definite love, love relationship. At the start of October, the official baseball season will have concluded, but with the Red Sox well positioned in the American league, there is every chance they will make the play-offs. If you are fortunate to grab a ticket to the hallowed turf of Fenway Park, it is de rigueur to snaffle a Fenway Frank doused in mustard and ketchup, washed down with an overpriced beer.

If basketball is more to your liking, the Boston Celtics will start their campaign, with a preseason games against the Toronto Raptors on Monday 7th October in the impressive TD Gardens stadium, a short walk from North Station. At the same venue, the Ice Hockey team, the Boston Bruins, will also be kicking off their season, playing the Detroit Red Wings on the 5th, and Colorado Avalanche on the 10th. Expect fleet-footed skills on ice, interspersed with acts of wanton violence.

For the foodie, Boston is similarly not lacking in a feast of culinary choices. If you are in the need for the classic American steakhouse experience, the famed New York franchise of The Palm, has opened to great acclaim in Boston, while Smith and Wollensky’s or Capital Grill, both offer tender fillets to sate any palate in the Financial District. Nonetheless, the classic Boston experience is of course, seafood. The obvious choice, are the many outlets of Legal Sea Foods, but if you are into Oysters, head to B&G Oysters in the South End, or the Citizen’s Public House and Oyster Bar in Fenway, with the latter serving excellent cocktails. For the more rustic experience, head to the Barling Crab on the seafront; whilst it may look like a dilapidated iron shack, it is a famed haunt of Boston locals, and offers a friendly and enjoyable evening out by the waterfront.

Of course, Boston can provide more than simply sport and shrimps, and has a host of cultural offerings, especially in the name of art. The ICA (Institute of Contemporary Art), an iconic piece of architecture on the waterfront, specialises in contemporary installations, while the colossal MFA (Museum of Fine Arts) in Fenway, offers art for every taste, with a particularly good section on the history of American Art.

Finally, if you don’t fancy listening to a Harvard student guide you round the Freedom Trail, then seek solace in some of Boston’s famed Dive Bars. If you’re missing Ireland, head to The Tam on Tremont Street for some rugged Celtic hospitality. If you’re after the All-American, Bud Light experience, Bukowski’s in Back Bay can’t be beaten. For the musical connoisseur, The Beehive, in the heart of the South End, is an excellent spot for live jazz music.

Otherwise, hop on the Hubway (Boston’s public bike scheme), get on the T (Boston’s subway), and happily meander around this wonderful city, taking in the sights of Back Bay, Boston Common or the Charles River. On word of warning though, best not to wear that New York Yankees cap...

CHOOSING WISELY. WE HAVE.

Meritas understands the inherent challenges of choosing the right legal counsel, especially when searching outside of your jurisdiction. That’s why our law firms undergo rigorous vetting and are required to maintain quality standards for membership. Whether you need a firm next door or halfway around the world, Meritas offers exceptional service, local insights, local rates and the assurance of a wise decision.

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THE RIGHT CHOICE FOR THE RIGHT LAWYER.
Over-regulating retail?

Lawyers in the asset management sector must work together to convince legislators to take a more measured approach to regulating retail funds, a panel today will argue.

There have been a slew of changes affecting the global retail funds sector in the last couple of years.

These range from the implementation of the European Alternative Investment Funds Managers Directive (AIFMD) and the UK’s Retail Distribution Review (RDR) to an overhaul of the investment guidelines applicable to Singapore-domiciled retail funds, among many others.

In today’s session, panel chair and Field Fisher Waterhouse’s partner Kirstene Baillie will outline how the industry can best prepare for this onslaught of reform.

“If it would be very useful if there was better coordination of regulatory initiatives as between legislators and regulators,” Baillie tells the IBA Daily News. “Asset managers are often global businesses, which are seeking to have global compliance regimes in place.”

“We need to avoid overregulating the industry and in such a way as to prevent investors taking their own view as to whether or not they wish to make a particular investment,” adds Baillie. “If that happens, we risk restricting investors’ choice of products.” Threadneedle Investments’ Abimbola Aileru-Thomas agrees.

According to Allen & Gledhill’s Tan E-Ping, another speaker on today’s panel, fund managers should be allowed to structure relevant products to meet market demand without being constrained by a potentially narrow or overly protective view of what should be sold to retail investors in order to maintain vibrancy in the market.

“Protection of investors’ interests should be through means of enhancing disclosure and ensuring investors have sufficient information to make suitable investment decisions for themselves,” Tan explains.

The key changes: Europe

The regulatory developments likely to have the most impact on Europe’s retail investment funds industry include — but are not limited to — the EU MiFID Directive, AIFMD related matters, and the European Securities and Markets Authority’s (ESMA) new remuneration guidelines for investment funds and, for the UK, the Financial Conduct Authority’s (FCA) RDR initiative.

Europe funds regulation

“We expect many of the more onerous provisions of AIFMD, when compared with the UCITS [ Undertakings for Collective Investment in Transferable Securities] Directive, to be applied in due course for UCITS funds,” says Baillie.

“We are seeing new proposals which confuse the divide between UCITS funds for retail investors and alternative investment fund for professional investors,” says Baillie. The European Commission’s June 2013 proposal for European Long Term Investment Funds (ELTIFs), for example, suggests that these are run as alternative investment funds (AIFs) with alternative investment fund managers (AIFMs) acting under AIFMD yet there will be a European passport for marketing to retail investors for them.

“So the framework for identifying what sort of funds are suitable for the retail investment fund space within Europe is therefore becoming quite muddled,” says Baillie.

Remuneration

ESMA’s new remuneration guidelines for authorised investment funds is also expected to markedly change the sector.

“The same approach will need to be applied for UCITS funds in due course once UCITS V is implemented,” explains Baillie. “While some local regulators’ proposals are now seeking to make sure that these new guidelines are applied proportionately, they will still cause fund managers concern as to how they can be implemented for managers of some products and across product ranges.”

RDR

In the UK, the RDR is having an impact too. Intended to target distributors, these rules are also having a knock-on effect on product providers.

“Pursuant to the banning of commission payments, there has been a need for fund managers to set up various new clean share classes,” says Baillie.

While it is important that the regulators tackle the product bias, which has been driven by the terms for commission arrangements, the regulatory changes have led to considerable costs for fund managers in setting up new share classes.

“An unforeseen consequence might be that some investors simply don’t take advice because they will not pay the fees to do so,” says Baillie.

Further these initiatives, in aggregate, increasingly seek to interfere with clients’ product structures – how they set the investment parameters and other commercial terms for products, including how they charge for it.

“Ideally one would leave the fund managers to devise their products to suit the market place rather than let regulation drive this,” says the session chair.

The key changes: Singapore and Hong Kong

The regulatory developments likely to have the most impact on Asia’s retail investment funds industry include — but are not limited to, an overhaul of the investment guidelines applicable to Singapore domiciled retail funds, enhancement of disclosure requirements and changes to how funds may be sold to investors.

Singapore’s investment guidelines overhaul has resulted in the imposition of a list of permissible investments, into which such funds may invest, and the removal of specific exceptions to counterparty limits as well as limits on unlisted securities for structured product funds.

The region’s enhancement of disclosure requirements includes the introduction of product highlights sheet to highlight key features and risks of the investment product to investors as well as increased disclosure items required to be included in a fund prospectus.

Hong Kong’s regime underwent a significant overhaul in 2010. The requirement for a summary prospectus, a ‘key facts statement’ was introduced before the KDID in Europe, says Rory Gallagher of Deacons in Hong Kong.

Since then, a number of enhanced disclosure requirements have been introduced to deal with more recent market events and risks as well as product developments or trends. There has been strong demand for income yielding funds which has led to detailed disclosure requirements for distributing funds, particularly those paying dividends out of capital or setting expenses against capital rather than income.

The Hong Kong regulator has issued a consultation paper on changes to the professional investor regime. Among the more heavily debated proposals are provisions to prevent intermediaries from relying on contractual terms to restrict the scope of their obligations to customers, and the imposition of a suitability obligation in all classes involving individual customers, regardless of wealth or sophistication.

Much publicity has been given to proposals for a mutual recognition agreement between Hong Kong and China which would permit certain Hong Kong domiciled and operated public funds to be sold to the public in China and vice versa. It is uncertain when the agreement is likely to be finalised as there will no doubt be a number of thorny issues to be resolved in view of the differences between the regimes. However, it does seem likely that this will occur long before the mooted ‘Asian passport’ comes to fruition.

These initiatives increasingly seek to interfere with clients’ product structures

While changes to the way in which funds are sold to investors who are not accredited investors, institutional investors or expert investors has essentially manifested as a requirement to conduct a customer account review and customer knowledge assessment in connection with the investor’s knowledge and experience in derivatives and in dealing with particular products,
This year the US military’s controversial Guantánamo Bay was once again brought to the forefront of international debate, following reports of hunger strikes and force-feeding. Today a panel of experts will discuss the legal, moral and political complexities surrounding the detention camp, as well as the realities of a US withdrawal.

Established in 2002, the Guantánamo Bay military prison is located within Cuba’s US Guantánamo Bay Naval Base. According to the Bush Administration Secretary of Defense Donald H Rumsfeld, the prison camp was established to detain extraordinarily dangerous prisoners, to interrogate prisoners in an optimal setting, and to prosecute prisoners for war crimes.

But the existence of the detention camp has proved to be a millstone for both the Bush and Obama Administrations. Housing war captives from Afghanistan, Iraq, the Horn of Africa and Southeast Asia, the camp has not only caused substantial damage to the US’s reputation as a champion of human rights and the rule of law, but has also posed great dilemmas for both presidencies.

Even so, in today’s general interest lunchtime debate, a former senior lawyer in the Bush Administration, Arnold & Porter’s John BELLINGER, will explain why it is likely that Guantánamo may remain open for the foreseeable future.

Although many critics didn’t believe him, President Bush said that he wanted to close Guantánamo, and his Administration transferred more than 500 detainees out of Guantánamo to other countries. President Obama ordered Guantánamo closed but was blocked from doing so by US Congress, which passed legislation preventing him from transferring detainees to the US and making it difficult to transfer them to other countries.

“Both the Bush and Obama Administrations have concluded that many of the individuals at Guantánamo are dangerous people who have engaged in acts of terrorism and who cannot be released without posing risks to the US and other countries,” Bellinger, who has long advocated the closure of the Guantánamo detention facility, tells the IBA Daily News. Nonetheless, many cannot be prosecuted for federal crimes either because the acts they engaged in did not constitute federal crimes or because there is not sufficient evidence to use in a federal court.

Rather than holding them as criminal suspects, both the Bush and Obama Administrations have held the detainees as combatants pursuant to the laws of war—a decision that has caused controversy around the world.

“It has proved difficult too for those detainees whom the Bush and Obama Administration concluded might be transferred or released, because—in addition to the restrictions on transfers passed by Congress—many of the countries of which the detainees are nationals have been reluctant to take them back,” says Bellinger. Both the Bush and Obama Administrations have also expressed concern that detainees might be mistreated if returned, or that the security situation in some detainees’ home countries are unstable.

For example, Bellinger explains, a large number of prisoners had been cleared for transfer to Yemen, but this was unable to take place due to Yemen’s currently highly unstable political climate. Furthermore, in many other cases, countries have been unwilling to resettle nationals of other countries.

“For all of these reasons, unfortunately, it is likely that Guantánamo may remain open for the foreseeable future,” he says. “But the Obama Administration may be able to transfer some individuals to third countries.”

Bellinger voiced similar concerns in a keynote speech at the 2010 IBA Rule of Law Symposium in Vancouver. There, he explained that the Obama Administration had continued and was likely to continue many of the Bush Administration’s counterterrorism policies. “I do not expect the Obama Administration to give up the war framework, indefinite detention without trial for some individuals, renditions, or drone strikes,” he told event delegates.

“My remarks were not very popular among IBA members at the time because it was not what people wanted to hear, but they have turned out to be true,” he says. Joining the discussion with Bellinger, will be the former National Security Agency general counsel and CIA general counsel Dean Parker, and the University Washington College of Law’s professor Stephen Vladeck.
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New technological innovations continue to increase the ease with which we can go about our daily lives, monitoring the distribution of a mounting proliferation of personal data has become increasingly paramount.

Large numbers of devices communicating with one another, or with the user, facilitate the accumulation of vast amounts of data or so-called big data. That can be used to provide a comprehensive overview of an individual’s behaviour, their financial records and their health. Technological advancements therefore make it easier for our personal data to be intercepted and manipulated. What’s more, the spontaneous networking of smart devices as well as the prevalence of big data is making it ever harder to trace where personal data is stored and how it is used.

The creation of software to analyse big data will enable the sale of unauthorised data for market research purposes. More pressing is its potential use for cybercrime, including activities such as identity theft, phishing and cyber stalking. It will also have important implications for the ability of governments to spy on their citizens.

In today’s session, session co-chairs CBIL Law Office’s Ceylin Beyli and Ichay & Mullènèx Avocats’ Diane Mullènèx will explain why, despite the furore the US National Security Agency scandal provoked, it did not shock them or others in their field.

Governments have been spying on their citizens for years and the proliferation of smart phones, along with pervasive computing, will continue to make this easier. Beyli and Mullènèx will also outline why businesses should be aware of the security issues potentially posed by technology. Security breaches can lead to the distribution of a company’s private information in the public sphere. The publication of emails between top-level executives can lead to revelations that prove costly, both financially and in terms of reputation.

The solutions explained
An effective response to such issues requires the establishment of an international standard through which individuals can protect their privacy. This is because much of today’s technology is able to transcend the borders of individual states. Moreover, pervasive computing will not be limited to individual states, as several services cannot evolve fully until they are made available across borders.

Yet, there are currently highly disparate approaches to privacy protection worldwide. While standards still vary throughout Europe, in general, it takes a much more conservative and restrictive approach than that followed in the US.

“One of the difficulties of using legislation to protect privacy in an increasingly digitised world is that the law runs behind technology,” says Mullènèx. “The solution will require advances on the technology side too. This would involve adapting technology to meet the challenge of privacy through software that allows the user to modify privacy settings in relation to the data they are disseminating.”
The 2013 IBA pro bono award

Susan Finegan

Finegan’s pro bono experience has focused on sexual assault and domestic violence

The 2013 IBA pro bono award committee this year honours a lawyer who has shown an outstanding commitment to pro bono work as part of her legal career.

The 2013 IBA pro bono award is sponsored by LexisNexis. The winner is Susan Finegan, a litigation partner at Mintz Levin Cohn Ferris Glovsky and Popeo.

Currently serving as firm chair of the pro bono committee and chair of the hiring committee, Finegan was appointed the firm’s first pro bono partner in 2007. In that capacity, she is responsible for managing the firm’s multifaceted pro bono programme of 400 varied cases throughout its eight offices.

Over the past two decades, Finegan’s pro bono experience has primarily focused on sexual assault and domestic violence, representing individuals and nonprofits. Several years ago, she led a team of lawyers who helped pass legislation that allows sexual assault victims to obtain criminally enforceable protective orders, filling a gap in the existing Massachusetts statute.

For this work, the American Bar Association (ABA) awarded the firm its 2010 pro bono publico award.

From 2004 to 2007, Finegan served as legal director of the Victim Rights Law Center, overseeing civil legal services to sexual assault survivors in Massachusetts and providing training to federal-ly-funded legal services programmes across the US.

She currently chairs the Massachusetts supreme judicial court’s standing committee on pro bono legal services, chairs a Magistrate Judge merit selection panel for the US district court, and is a member of the access to justice (ATJ) commission, the commission on judicial conduct, and the Boston Bar Association council. She also recently served as a member of the judicial nominating commission.

Among other achievements, she has led efforts to encourage in-house legal departments to participate in pro bono work by spearheading state-wide practice rule changes and forums. Most recently, she organised an in-house counsel pro bono forum for the ATJ, attended by over 100 in-house lawyers and legal service providers. She has also initiated unique statewide outreach and programmes for government lawyers, and for stay-at-home parents who are taking a break from their legal careers.

Together with a colleague, she developed the Access to Justice (ATJ) fellows programme, an innovative programme pairing retiring lawyers with non-profit and legal service organisations which, because of severe cutbacks in funding, have had to reduce staff and restrict services. Meanwhile, many experienced lawyers approaching retirement wish to remain active in the legal community. Participants in the year-long pilot programme include retired judges and partners from prestigious firms. The programme proved so successful that next year it will expand from 7 to 13 fellows.

Working with the Woman’s Bar Association, she also started a ‘know your rights’ programme for nonprofits serving low income women and their families by hosting informational legal seminars. The monthly sessions taught by prominent lawyers provide vital legal information to help these organisations better serve their clients. For this project, the National Conference of Women’s Bar Associations will award the WBA its public service award this summer. She has also previously served as a member of the Boston Bar Association’s task force on civil right to counsel, and as co-chair of the delivery of legal services section of the Boston Bar Association.

The IBA pro bono committee fosters world wide recognition of the principle that access to justice is the right of all individuals and promotes access to justice for all, regardless of their financial means, race, age, ethnicity, gender, or population of cause. Pro bono work is a cornerstone of the legal profession, and the committee wants to help build a culture of pro bono work by lawyers, law firms and organisations of lawyers, as a vehicle for access to justice where that right is not fully supported by legal aid.

The award will be presented on Monday 7th October, during the committee’s 3.30pm session.

The 2013 IBA outstanding young lawyer of the year

Alberto Mata Rodríguez

He has shown excellence in his work and commitment to professional and ethical standards

This accolade is in recognition of William Reece Smith Jr.

In 2003, Rodriguez studied at Pennsylvania’s Global Village for Future Leaders of Business and Industry at Lehigh University. Fluent in Spanish and English, he attained a law degree in 2007 from Spain’s Universidad Carlos III de Madrid. In 2013, he completed an externship at the International Monetary Fund’s financial and fiscal law unit in Washington D.C. and attained a degree in securities and financial regulation from Georgetown University, also in Washington D.C.

In 2013, in a career spanning over 50 years, he demonstrated leadership in the legal profession as an accomplished lawyer, an extensively published legal scholar and lecturer, a mentor and an outstanding community servant. In addition, Smith Jr exemplified a commitment to advancing many charitable and civic causes, most notably in his support for legal services to the poor.

The award will be presented during the IBA young lawyers’ reception, to be held on Thursday 10th October.

The 2013 IBA human rights award

Abukar Hassan Ahmed

is an inspiration in the human rights field.

A bukar Hassan Ahmed is the winner of the 2013 IBA Human Rights Award. With his courageous dedication to the fight for human rights during the brutal Siad Barre dictatorship, which ruled Somalia from 1969 to 1991, and his present work preparing the Human Rights Bill in Somali, Somali-British Ahmed

is an inspiration in the human rights field.

A former professor of constitutional and international law in the Somali National University, he was arbitrarily imprisoned in 1981, and tortured by the widely feared secret police of Somalia. Once released, he discovered that the Somali National Police Service was threatening to kill him and his family. Seeking asylum in the UK in 2005, he went on to file a lawsuit against the man responsible for his arbitrary detention, Colonel Abdi Aden Magan. In 2012, Magan was found liable for these brutal acts.

He is the current legal adviser to Somalia’s office of the president, and continues to fight for the rights of the vulnerable. The award will be presented during the IBA Rule of Law Symposium on Friday 11th October.

All three awards are sponsored by LexisNexis. “We congratulate the 2013 honorees and commend each for their commitment and dedication,” says Ian McDougall, EVP and general counsel of LexisNexis Legal & Professional. “These awards inspire lawyers from across the globe to pursue these same values and recognize outstanding individuals for their commitment to society.”

Monday, 7th October 2013
Digging for gold

The global economic downturn, as well as the extensive time and capital requirements, has forced the mining industry to develop alternative fundraising strategies.

Mining projects require the type of substantial long-term cash investment not often seen during economic downturns. The risk associated with the projects also keeps the cost capital high.

Few alternatives exist to fund mining projects, other than tapping the debt or equity capital markets.

But stream financing has significantly gained in popularity over the last two years.

According to Justin Cochran, Sandstorm Metals and Energy’s executive vice president and one of today's panelists, stream financing offers several attractive alternatives to traditional funding structures.

Stream financiers provide up front capital in return for a percentage of the mine's product. This form of funding thereby offers a complimentary source of capital to finance the life of mining projects. The need to tap both equity and debt capital markets still remains, but streaming’s offer of cheap upfront capital can ease the funding burden, particularly on new projects.

The benefits explained

This is a relatively low cost of capital compared to other funding methods. As streaming firms tend to be well diversified, tie their contacts to the production of the mine and have low operating cost they often find it easier to attract investors.

“We will always enjoy lower costs of capital because we have a lower risk models and more diversity profiles,” explains Cochran. “We don’t have a single mine or twin mines that traditional mining companies have. We aren’t providing all the capital that a mining projects needs; they are still going to have to go out and raise equity and raise debt, so it’s important for us that the markets are good,” says Cochran.

Another significant advantage of stream funding is its flexibility. The selective process through which streaming firms determine which mines to work with also allows them to tailor contracts to suit the local needs, the projected life of the mine, and legal and tax requirements.

“The streaming companies are viewed as acting as smart money where the equity markets are dumb money,” says Cochran. “We spend a lot of time hiring consultants, digging into sites, doing feasibility studies – for every 300 projects we look at we only do about three deals. We are quite selective. As a result of that when a streaming company enters a contract it is a stamp of approval and that gives third-party validation which goes a long way in investors’ minds.”

The flexibility of these contracts means the possibility for their use is continually evolving.

Cochran believes the next area that stream financiers might expand into is M&A financing. This type of financing could help solidify acquisitions into both new and existing mines.

“The contract would look very different for a new project and operating project,” says Cochran. “For a new project there needs to be a lot of risk mitigation to ensure the funding for the project is used to start the project. You can be a little more aggressive for an operating project it’s a different kind of risk profile.”

Fighting poverty

Continued from page 1

“The law provides the needle and thread that holds a society together,” she added. “Without it, the fabric of any society will unravel and fray.”

Breaking this chain of poverty will be difficult. Progress is most likely when broad sectors of the population understand the value of legal empowerment and organise themselves for that purpose, she predicted.

But the concept of a legal identity is more complex in cases of human trafficking. During her speech, Albright was especially supportive of IBAs new human trafficking showcase. She voiced her support of the association’s drive to pay attention to that issue.

It is an especially fraught topic – especially for lawyers as it is often an issue that spreads across borders. It also requires specific definitions that often differ on a jurisdiction-by-jurisdiction basis. When asked during the question and answer session following her speech to recommend the priorities and focus going forward for the human trafficking showcase, Albright noted that she began looking at trafficking when she was Secretary of State.

During her tenure as Secretary of State, Albright was involved in the creation of the Trafficking Victims Protection Act of 2000, which has since been renewed four times – most recently this year as an amendment to the Violence Against Women Act. The law also authorised the creation of the Office to Monitor and Combat Trafficking in Persons, which is an agency within the US Department of State.

Albright was also active in the completion of the UN Convention against Transnational Organised Crime, which was adopted in November 2000, as well as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which entered into force on 25 December 2003. The latter document was the first globally legally binding instrument with an agreed definition on trafficking in persons.

As for the IBAs advocacy, she stressed that this was an issue that must be considered internationally to come up with legal norms. Agreeing to those norms could be harder than it seemed, she warned. By way of example, she said those norms might include prostitution and what it entailed. But she added that there were a lot of issues in which lawyers could utilise their specific expertise.

Ultimately, however, Albright praised the IBAs work. She noted how much good lawyers could accomplish when contributing energy and talents to positive social goals, and cited several examples. They included helping democracies draft new constitutions, implementing new legal standards and giving real meaning to statutes against rape.

She noted that the Human Rights Institute established by the IBA is now almost two decades old, and that it has become a leading voice in connecting the promise of law to the reality of justice.

“For that, I congratulate you and urge you to continue to expand your efforts,” she said.
The five steps to developing high growth markets

Despite a series of recent setbacks, the balance of power is shifting east, in favour of emerging markets.

In the midst of recent speculation surrounding the US Federal Reserve’s plans regarding its bond-buying programme, one thing remains clear: emerging markets will be a major contributor to the growth projected in the securities markets over the next two decades.

Using equity markets as a proxy for the capital market, emerging markets, developed now account for 69% of the global equity capital market.

“[In 20 years] emerging countries will represent 55% of the total, meaning that the balance of power will have shifted away,” says Leonardo Gomes Pereira, chairman of Brazil’s Securities and Exchange Commission.

With this dramatic shift taking place, many are wondering how the reform agenda can best support the development of growth markets.

Today, the top capital markets in the world consist of two Anglo-Saxon markets and two Asian markets: the US, China, Japan and the UK.

Economists predict that by 2030 China will have surpassed the US. China’s equity market capital, including the mainland and Hong Kong, is projected to rise from $4.7 trillion to $41.4 trillion in 2030.

Another change is tipped to be the arrival in the top four of two emerging economies: India and Russia, with a ten percent and nine percent annual increase respectively. The following five key areas will determine the success of the development of these countries’ capital markets.

1. **Regulation:** A sound regulatory framework promotes confidence about issues such as investor protection and supervision of market participants.

2. **Infrastructure:** Improving market infrastructure helps modernise trading, custody, clearing and settlement systems.

3. **Issuer participation:** Encouraging a variety of issuers, particularly smaller ones, to engage with the public markets, is a key concern as policy-makers search for ways to encourage growth at a time when banks’ ability to lend is increasingly constrained.

4. **Investor participation:** Following the logic of World Bank economist Augusto de la Torre, the fourth way that Pereira identifies to foster the growth of emerging markets was increasing investor participation and making it easier for them to invest in capital markets.

In particular, the involvement of institutional investors such as mutual and pension funds is key to deepening the role of investors.
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