How to fix global banking

The EU is at a crucial point of its further development

Regulatory efforts to clean up global banks must work within the current system and not seek to break up good banks from bad, speakers warned in yesterday’s session which assessed the decision to award the 2012 Nobel Peace Prize to the EU.

The global financial crisis highlighted a worldwide trend towards corporate mismanagement and reckless risk-taking in financial services organisations, as well as a dearth of effective regulation to tackle such behaviour. Global policymakers’ attempts to provide greater transparency, more consumer protection and reduce banks’ risk appetite have since focused on separating banks’ trading activities from deposits.

There are three main models for such banking reform: Volcker’s rule for US banks which bans financial institutions from proprietary trading; Vickers’ reform for UK banks which proposes placing retail and small and mid-sized enterprise deposits in ringfenced subsidiaries to separate them from the bank’s riskier trading business; and the Liikanen EU bank report which also recommends fencing off risky trading arms.

But Sonja Gibbs, the Institute of International Finance’s director of capital markets and emerging markets policy, believes banking reform policy that focuses on narrow banking and the separation of casino banks would rapidly run into problems.

“How can you run a globalised financial system if you have ringfencing of liquidity or certain requirements of one type of financial institution?” she asked. “There’s a price to pay for that. Personally I think that price is too high.”

“By segregating narrow banks and casino banks, the sector gives up some of the advantages of a global banking system,” she said.

It is better to find a way to work within the current system. “There is a tremendous opportunity here to design a much better way to regulate the banking sector,” she said.

Policymakers needed to focus on how best to move forward as opposed to dwelling on mistakes made in the past, she added.

Audience members, however, complained that too much of the post-crisis debate and media attention had focused on fixing Europe’s mistakes, despite the existence of similar issues within the US banking sector.

“Had a shutdown of government – as is ongoing in the US currently – occurred in Germany or Greece certain commentators would have written that this was the end of the eurozone, and the euro would collapse,” said one Germany-based delegate attending the session. “But if that same commentator writes about the US, it’s an unfortunate but manageable situation.”

“It’s interesting too, that we discuss Europe’s indebtedness and not the US’s, despite the fact that the US is indebted way beyond all the countries in Europe,” he continued.

“Many of the problems that are very transparent in Europe are not so transparent in the US,” he added.

The session co-chair and senior vice-chair of the European Regional Forum, AVM Advogados’ Claudia Santos Cruz agreed that the cause of the financial crisis was similar in the US and Europe citing, by way of example, bad regulation of financial institutions and forced government bail-outs into the real economies. But she stressed that solutions to past mistakes would have to be different in both regions.

“In Europe, we’ve got the euro so we have to look at a banking union,” she said. “Because right now Germany is...
Privacy in the internet age

Delegates have heard how individual privacy rights have not been effectively established or enforced on a global level. In particular, the speed and developments of technology mean it is difficult to draw hard and clear lines.

Panelists in a session on Tuesday debated where a line should or could be drawn.

Many concluded that the private world is shrinking. Paying for privacy may become more and more a reality to protect yourself from the media, but wouldn’t be sufficient to protect against government intrusion.

“There are two aspects of interests here; first how we deal with the media and if we have any privacy left from the media, but wouldn’t be sufficient to protect against government intrusion.

“With the media, this decision is instantaneous; the question now, is do you reprint it?”

Key takeaways
• Laws regarding privacy rights are ineffective and insufficient to keep up with the pace of technology;
• New regulations, rules or norms need to be established which consider how the internet has changed privacy, and construct a framework that develops a zone of privacy for ordinary citizens;
• The collection of information by governments, particularly in the US, has raised concern about the limits of privacy;
• There must be a balance between the public’s right to information, and an individual’s right to privacy. In the media, this decision is often made by editors based on ethical concerns and audience feedback.

A lot of decisions that journalists make are based on instantaneous feedback

A lthough there are regulations in the EU and many other countries, the panel concluded that these were insufficient and ineffective. In the US there is no federal guarantee to privacy, though individual states do have their own laws.

In the US, the first amendment is generally seen to protect freedom of speech and the role of the press above the privacy of individuals. In addition, the fourth amendment protects an individual’s right from intrusion of their privacy by the government in the form of due diligence requirements. Recent revelations by Edward Snowden published by The Guardian newspaper about a widespread National Security Agency (NSA) spying programme have shown that governments too are stepping over the bonds of privacy.

“The link between the two [privacy from the media and privacy from government] is the need to change how we think about privacy,” said David Schulz from Levine Sullivan Koch & Schulz. “We need to establish a legal framework for things that should be considered private.”

“It’s an important question on developing a zone of privacy for ordinary citizens,” he added.

In Europe, article eight of the European Convention on Human Rights provides for protection of privacy for private and family life, subject to some restrictions.

Within the EU, laws exist to protect individuals from prying eyes. But these have not stopped tabloids from publishing personal details, private photos, or as seen recently, the enquiry revealed, spying on the general public.

One audience member from the UK also voiced concerns over lawyers’ Google history being checked, and the ramification that could have for confidentiality.

“In a European context everyone is entitled to privacy; if you are a public figure obviously you will have trouble evoking that right. If you are a public figure that trades on your celebrity surely you have even less right,” said John Kampfner, counsel to Google.

Individuals’ rights to privacy

A person’s location and visibility are an important factor in determining who and what should remain private, as is what they choose to make public. Photographs taken of individuals outside or within normal view of the public area are typically considered not to infringe on a person’s privacy.

The discretion of news editors has become an increasingly important measure filling the gap between technology and the law in determining news-worthiness and value.

“There is a feeling, because the laws are so ambiguous, that a lot of decisions that journalists make are based on instantaneous feedback,” said Schulz.

Extending restrictions only to journalists will in itself not solve the problem. Emily Bell, former editor of the guardian.com stressed that these concerns need to be considered by society as a whole.

Journalists and editors do not often have control over photographs and information which is spread over the internet. “Often it is not a case of being the first person with a photo anymore,” said Bell. “The first photo is up in milliseconds; the question now, is do you reprint it?”

Scraping public data for the purposes of collecting old arrest records or gun permit records, has led to a backlash that has seen some information removed from the public space, either by being taken off the internet or being classified as private.

Keeping the public informed is still the primary goal of news outlets and an important use for the internet which can spread information in a matter of seconds.

“There needs to be a multi-national response to issues of privacy,” explained Schulz. “There is concern that the NSA has had a long term debilitating effect on the internet and the only way to reverse this trend is for multi-national rules and norms to be established to preserves confidence in the internet.”
Unlocking justice for women

One of yesterday’s most popular sessions revealed expert insight on how access to justice can be improved for women in Africa.

The issue remains a significant human rights challenge, and is one of the key determinants of poverty among women.

“Women’s capacity to access justice is hindered by structural inequalities and pressure coming from traditional stereotypes,” said Hauwa Evelyn Shekarau, national president of the International Federation of Women Lawyers (FIDA), Nigeria.

Topping Shekarau’s list of recommendations was a one-stop centre, which would make it easier for women to access information.

These centres could be incorporated within state healthcare centres. “There is also a need for a holistic approach centred on women’s empowerment,” added the FIDA’s president. She suggested legal aid providers teaming up with non-legal service providers such as domestic violence counseling in women’s shelters.

Shekarau also highlighted the need to strengthen the informal justice sector by making it gender-sensitive. “Some of the clients that come to the FIDA legal clinics will insist they don’t want to go to court,” she noted.

There was also need for a general implementation of sensitisation and awareness creation programmes, she said.

Preparation of more information in the form of guides and manuals could also improve access to justice. These should be published in local languages.

FIDA

Through FIDA, Nigeria has already taken important steps towards improving access to justice for women.

Legal clinics have been set up that provide pro bono legal services to indigent women who could not otherwise afford legal services. The clinics also provide litigation and other alternative dispute resolution mechanisms.

FIDA has also worked to engage policy-makers and legislators on gender-sensitive topics.

And, in some states, FIDA will also provide temporary shelters for battered women.

Breaking down the barriers

Shekarau identified the most significant barriers that, even today, prevent women in Africa from accessing justice.

Lack of education represents the most important barrier, meaning that women are often unable to read or understand complicated legal language.

Many women are also uninformed about how they can access justice.

Gender stereotyping is another hurdle. “Many African women often endure harmful stereotypes, especially when they try to bring complaints to the police,” said Shekarau.

In fact, in cases of rape and spousal battery, women are usually discouraged from prosecuting the grounds that such cases are private issues.

“For those who are bold enough to report, gender stereotyping is so bad that most times in the trials of sexual assault cases you discover that the woman more or less is the one that’s on trial,” she added.

When trying to seek justice, women will face suggestions that the way they were dressed or their body language may have invited the assault.

Financial and economic barriers also play a role. The high costs of litigation ensure that women, who generally constitute the larger portion of the poor population, are unable to obtain justice.

Male domination of formal and informal dispute resolution mechanisms in both the public and private spheres means that women are inevitably left in the weaker position.

And, according to Shekarau, the low representation of women in justice delivery agencies has contributed to a lack of gender sensitivity at all levels.

“Most times the system perpetuates the stigma women face with the justice system,” she added.

Often, and particularly in cases of rape and sexual assault, the justice processes also serve to re-victimise women.

Gender inequality is another key factor. Male domination of the law-making process has resulted in gender biased laws, as well as gender neutral laws that effectively discriminate against women.

Almost all African countries have adopted national constitutions and laws that are supposed to implement international human rights standards, such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

However, women are still unable to fully enjoy their rights under these instruments.

The issue has led to the formation of the African Women’s Law and Human Rights Centre of Excellence (AWLHREC) in 2008, with the main objective of combating gender discrimination, the main hindrance to attaining women’s rights in Africa.

The Centre supports a number of initiatives including the drafting of a gender sensitive constitution and training of women on human rights.

The Centre has recently published a report on the Implementation of the African Women’s Agenda and the Situation of Women in Africa.

The report highlights the key barriers that prevent women from accessing justice. It also identifies the main needs of women, including the need for legal education, the protection of women’s rights, and the need for the establishment of gender-sensitive laws.

The report is available online at the Centre’s website: www.awlhrec.org.

TUESDAY HIGHLIGHT

Key takeaways

• A popular session yesterday revealed ways to improve access to justice for women in Africa;
• Recommended strategies included one-stop centres, strengthening the informal justice sector, and providing information in guides and manuals;
• Lack of education was identified as the most significant barrier, preventing women from accessing justice. Gender stereotyping and financial obstacles also represent major hurdles.

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What clients want

There’s no question that the global legal market is consolidating. But strategies for success are still a topic of debate, particularly in relation to opening in new markets and finding new partners.

International and domestic firms alike are looking further afield to new markets and for new firm partnerships because that’s what their clients want.

Firms consider opening in new jurisdictions for both offensive and defensive reasons. They may want to gain access to new clients and new markets and capture inbound work, or they may be worried about losing clients to global competitors with a presence in markets where they lack capabilities.

Corporates are also reducing their panel sizes. Eversheds’ Kevin Doolan said that general counsel want fewer firms on their panels because there is a real management overhead for in-house managing external firms.

Their boards are demanding that in-house insist on better management information and control, which is easier to accomplish with fewer panel firms. In-house also want better and more certain pricing — another advantage of scaling up.

How to merge

But entering new markets and integrating new partners is challenging. After determining whether the firm will enter the market, which is a process requiring the firm to consider the availability of on-the-ground personnel, immediate profitability and the possibility of growth, it then needs to work out how it will open.

The preferred method of entering a new market is a merger or acquisition of a firm with an on-the-ground practice so that there’s immediate cash flow from one, said Ward Bower of Alman Weil. The alternative is to form a practice through lateral hires, which is expensive, can take a long time and sometimes doesn’t work. He cited US firms entering London as a cautionary tale.

However Allen & Overy global managing partner Wim Dejonghe said that his firm has been open-minded about the way it enters a market, whether that is through mergers, individual hiring or team recruitment. He stressed that the firm’s strategy in opening a new office — aside from the obvious business case — is about client needs and the personal fit of its people.

He considered the firm’s experiences. In Germany, the firm invested on an individual recruitment basis, and now has 65 partners. Although it is much slower and takes more time to gain market credibility, it is an easier option in terms of cultural integration and fit. Conversely mergers have immediate impact but is more challenging to integrate it into the rest of the organisation.

“The best experiences we’ve probably had are a hybrid structure where we recruit larger teams,” he said, citing experiences in Turkey, Australia and Morocco.

The firm insists on having at least one of its partners on the ground — either on a temporary or long-term basis — to take ownership of the new office. That partner bridges with the rest of the organisation to integrate the new practice, getting clients in front of partners and getting partners in front of clients. But mergers are a less appealing option for smaller firms. Dovile Burgiene of Lawin observed that unlike mergers with larger firms, these are not takeovers. Although all parties want to retain as much freedom to make decisions as possible, they must be willing to remain diplomatic and consolidate their interests.

The role of local firms

Although regional and international firms are consolidating, domestic firms remain significant players. Dejonghe stressed the importance of the network of firms that Allen & Overy works with on a regular basis, noting that active management of relationship firms is a big part of the firm’s global activities.

Clients demand this sort of expertise, said Clark. As they become bigger and more sophisticated, they need more service capabilities. He stressed that they expect a highly-coordinated shopping experience in terms of local delivery.

But there is a limit to consolidation, and it’s unlikely that the legal industry will ever look like accountancy’s so-called Big Four. “I don’t think you’ll ever see less than ten to 15 large global players because then you hit the limits of conflict, said Dejonghe. “Beyond that technical reason, there is one of how large one partnership can actually be.”

He did not believe that the global strategy was the only way. He believed there was room for domestic firms, regional firms and firms that focus on specific practice areas. But he warned the one thing firms could not afford in the current climate was not having a strategy at all.

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**BOSTON**
Otional matters too. compounded by the fact most of to the courtroom or arbitration. professional conduct relate only to the American Bar Association Model are drafted in the context of contested matters. Indeed, the Rule 4.1, relating to truthfulness apply to their client relationships, representing a client from m aking false statem ents of m aterial facts to disclose a m aterial fact. M odel for a lawyer to, am ong other things, “engage in conduct involving dishonesty, fraud, deceit or misrepresentations.” Consequently, the issue arises as to how such rules, among others, affects lawyer conduct in the transactional field, particularly where lawyers engage in negotiation ‘posturing’.

In this afternoon’s session, the panel intends to explore these issues, paying special attention to contract negotiation and performance. According to session co-chair Paul Monaghan, there is a need to explore these issues, as the increasing globalisation of the legal market means that contract negotiation is more frequently occurring between different jurisdictions and lawyers trained with different interpretations of ethical principles.

“This issue has also been identified in the IBA ‘International Principles on Conduct for the Legal Profession’, where “...hon esty, integrity and fairness towards a lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact...” is being promoted for the global profession to adopt,” he says.

As session co-chair Duane Morris’ Steven Richman explains, when it comes to contract negotiation and performance, it is important to distinguish between the lawyer’s ‘moral’ approach to an issue as opposed to what the rules of professional conduct dictate.

“There is a distinction between one’s individual morality and the rules of professional conduct that we all follow,” he says. “There is ultimately a risk if you don’t follow those rules.”

And yet, when it comes to following those rules on the transactional side, there are a number of grey areas. One of the trickiest is the point at which an omission or an affirmative statement becomes material. “Every jurisdiction will have its own test,” Richman explains. “Speaking generally, a good indicator of materiality in an affirmative statement or omission is what a reasonable person would consider an important factor in the decision-making process relating to the transaction.”

Another is when so-called puffing, or posturing, becomes exaggeration or misstatement. “A certain amount of puffing may be permitted in a jurisdiction. I think the answers lies in the actual statement and its plausibility,” he says. “Lawyers assert client positions in a variety of contexts; the line would probably be drawn at what is an outright lie that rises to the level of fraud, as opposed to simply posturing as to what a client is or is not willing to do.”

However, in recognition of the complexities involved, he adds, it is hard to always be that fair. The concept of an ‘acceptable lie’ is an interesting one. “A lawyer says he has authority to negotiate up to $100 when he knows he really has authority to go to $500,” Richman promises. “How can we tell if this is a lie or a commonly understood tactic that everyone knows and expects? Is this conduct ‘involving dishonesty?’ This is something the panel intends to discuss further in this afternoon’s session.

Another arduous area is how far a lawyer can go in counselling a client to breach.

“There is a line that must not be crossed, to remain independent and objective in advising your client.”

“As lawyers, our job is advise on the interpretation of a contract and the legal consequences of a breach,” says Richman. “We are not there to give business advice.”

“The lawyer’s obligation is to explain the consequences and defences. Business judgement is left to the client,” he adds.

As Monaghan explains, there is always an obligation upon the lawyer not to become party to or act in a dishonest manner while acting on instructions from your client in any contract negotiations. “There is a line that must not be crossed, to remain independent and objective in advising your client,” he says.

Determining whether a law firm should litigate a contract its corporate lawyers drafted is also difficult. “This is a question that has been coming to the surface more and more,” says Richman. “Many firms have litigators defend such contracts and other firms take the position that another firm should do it due to the potential for a conflict of interest. What if the clause might lead to a malpractice claim?”

And it doesn’t look like clearly defined lines are going to emerge any time soon. As Richman explains, contract negotiation is hard because, by its very nature, it is adversarial. “There is an assumption that each party’s asserted positions, certainly up front, are not necessarily ‘final’ even though they say so,” he says. “There is not only a grey area, but a practical reality as to where such lines can be realistically drawn.”

Consequently, Monaghan adds, the need for developing consistent and acceptable ethical practice in contract negotiation will continue to grow in response to the demand for providing legal services to the global market.
ever 650 million people worldwide live with a disability. They are all at greater risk of marginalisation and exclusion from society, but this is especially egregious for girls and women with disabilities.

In today’s session, panel co-chair Littler Mendelson PC’s Phillip Berkowitz argues disability rights should be treated as human rights. Too often disability discrimination is not viewed as a human rights issue. “It is important that disabled people are treated with the same rights and dignities,” Berkowitz explains.

According to Berkowitz, session speakers will focus specifically on disability discrimination as it affects young girls and women. Females with disabilities are often victims of ‘double discrimination’, he tells the IBA Daily News. “Worldwide, women have less educational opportunities than men,” he says. “When it comes to accessing an education, disabled girls and women can face discrimination on the basis of their gender, as well as their disability.”

In the face of a myriad of social, cultural and economic obstacles, coping with disability can be very challenging for women and young girls, says session co-chair Regina Glaser, from the German law firm Heuking Kühn Lier Wojtek. “It is particularly difficult for disabled women to combine a career with a family,” she says.

Cultural beliefs regarding HIV/AIDS and virginal rape, as well as the perception of disabled women as asexual beings, can compound this.

The gravity of the issues faced by disabled girls and women vary from country to country. As Glaser explains, 80% of disabled people live in a developing country and women in such countries are often victims of abuse. “It is very challenging,” she says.

In developed countries the protections tend to be more advanced but they are limited to the employment sphere. Today’s session, Berkowitz explains, will reach out beyond employment to focus on a broader cross-section of issues.

The UN response

The United Nations has enacted legislation to address a myriad of issues relating to disability discrimination. These include the Convention on the Rights of Persons with Disabilities as well as the Convention to Eliminate All Forms of Discrimination against Women. And yet, Glaser argues, legislation alone is not fully effective in the fight against disability discrimination for girls and women. “Legislation is one thing but it is only useful if authorities make provisions for its take up,” she says.

What’s next?

There are a number of cultural barriers to overcome. But national change must start with the introduction of legislation; this then drills down into a country’s culture. But Berkowitz and Glaser warn this is a process that takes some time. “Some cultures – even in advanced economies like Germany and the US – took years to bring about the necessary changes and even then problems remain,” says Glaser. “In other cultures, it is going to be an even bigger challenge”.

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**Double discrimination**

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A voice to be reckoned with

Having spent 30 years working with the US government, former chairman of the Federal Reserve Paul Volcker is a fitting choice to speak on corruption and rule of law. Here, Danielle Myles outlines what can be expected from Friday’s session.

Volcker rule fast facts

• The rule prohibits (subject to certain exceptions) US banks from: (i) engaging in proprietary trading; and, (ii) investing in or sponsoring hedge funds and private equity funds;
• It takes its name from Paul Volcker, after he championed its inclusion in the US’s financial regulatory overhaul statute known as the Dodd-Frank Act;
• The ban on proprietary trading is the most controversial aspect of the rule. A bank engages in proprietary trading when it trades securities on its own account, using its own capital and balance sheet, rather than on behalf of a customer;
• The ban is intended to prevent banks from taking excessive risks by trading on the basis of deposits that are insured by the federal government, and in turn improve financial stability and reduce systemic risk;
• In October 2011 regulators proposed rules implementing the statutory provision. The rules are yet to be finalised.

In an area of law where the boundaries may, at times, seem blurred, Volcker will provide clarity and a strong sense of purpose. After the onset of the global financial crisis, the renowned economist called for a series of far-reaching reforms which affirmed his reputation for doing the right thing, even at the risk of unpopularity. Most famously, he called for prohibiting deposit-taking institutions from engaging in riskier activities such as proprietary trading, and private equity, and hedge fund investments. Subsequently, in January 2010, President Barack Obama proposed aggressive bank regulations that became known as the Volcker rule (see box). As such, delegates should expect a frank and forthright discussion on how corruption by public officials critically undermines the population’s confidence in government, and why its elimination is needed to safeguard the rule of law.

It’s a topic Volcker is well-qualified to speak on, having worked within the US government for 30 years including as chairman of the Federal Reserve (the US central bank) from 1979 to 1987. Over those eight years he played a leading role in ending the inflation that had plagued the country in the 1970s and early 1980s. His interest in ensuring the proper functioning of government bodies is evident in his chairmanship of the Commission on the Public Service, which aims to attract and retain the best people to work within the public service.

Since 2006 the last day of the annual IBA conference has been dedicated to the promotion of the rule of law; Paul Volcker will be speaking about corruption and the rule of law at the Rule of Law Symposium on Friday at 10am.
How to negotiate tribal consent in North America

For countries with vast natural resources determining land use rights can be an arduous process, requiring politicians, businesses and local communities to balance economic prospects with the rights and concerns of indigenous people.

The process of consultation varies between and even within countries, but the goal of gaining indigenous consent remains the same.

Local regulations play an important role in shaping negotiations and consultation for the use of land in mining. But good business practice also requires companies to obtain consent from the local tribes rather just their acquiescence, according to session co-chair and Vancouver-based Fasken Martineau mining partner, Kevin O’Callaghan.

“The main overlay between mining and Aboriginal rights is access to land,” explains O’Callaghan. “Access to land in the context of indigenous rights can take many forms depending on the legal structure of the territory you’re dealing with.”

Due to the constitutional nature of Aboriginal rights, or title, in Canada the obligation is on the government to determine land use rights, but companies also have a practical obligation to engage with local landowners – a common theme across jurisdictions.

“It doesn’t just matter what their rights are, the company going into that area has a practical need to engage with the community,” says O’Callaghan. “Engaging with the community, consulting with community and getting acceptance for a project is critical from the perspective of that project.”

Currently, the Canadian province of Ontario is considering new legislation which would regulate the type of local consultation and consent a company would need in order to pursue a project on indigenous land. “In Canada the constitution is constructed in such a way that mining is a provincial matter,” explains the co-chair of today’s panel and Fasken Martineau’s partner Michael Bourassa. “In the US it’s not exactly the same, there is more federal oversight. Issues really do vary, even within Canada.”

In recent years, aboriginal groups have taken a more active role in negotiating with companies interested in their land.

In recent years, aboriginal groups have taken a more active role in attracting and negotiating with companies interested in their land. Many are eager to show they are not anti-business, encouraging firms to consider the benefits to using their land and pushing for business partnerships with revenue sharing arrangements, according to Bourassa.

“That’s how it’s been done in the energy sector in Alaska and we also see that in Alberta’s energy sector,” says Bourassa. “It’s possible that it will be done more and more in the mining area. The ring of fire [a large chromite development in Northern Ontario] is a possible place to see this as we move forward.”

There are a number of recent examples in which mining and other natural resources companies faced protests following failures to attain the full consent of local indigenous people. In Sweden, the Sami people have been protesting a mining project in their traditional reindeer herding territory. In Peru, changes to mining laws requiring consultation with indigenous groups, have drawn criticism for excluding some groups in the mineral-rich Andes.

Though today’s panel focuses on differences within North America, the co-chairs are confident that many of the points will offer globally transferable lessons.

“These are issues you have to deal with, no matter where a project is around the world. Lawyers will see what can be applied with respect to indigenous rights,” O’Callaghan says.
The race for Africa’s land

Africa’s meteoric rise to prominence on the global stage means the resource-rich continent has quickly become an investor darling. But escalating foreign interest must be balanced with the need to protect the rights of the continent’s indigenous population.

This morning’s session will address formal ownership rights in Africa, and the need to secure the land rights of local rural populations who depend on the land for their livelihood.

Competition for land rights is intense, and pervasive throughout the continent, from Angola’s diamond mines, to the forests of the Congo, and Zimbabwe’s farms and mines. Heads of government vie with foreign investors, state governments clash with indigenous settlers, and foreign agribusinesses compete with local farmers.

“We will deal with tenure reforms and tenure security in the light of prevailing social, cultural, economic, legal and political conditions,” says Olutunmi Oluyede, a panelist and senior partner at Trlp Law in Lagos. “We’ll be re-assessing old and new approaches to tenure restructuring with a view to the overall economic enhance-
ment of Sub-Saharan Africa.”

Recent statistics estimate that Africa possesses half of the world’s uncultivated arable land—around 202 million hectares.

“Increasing yields on existing farmlands by 50% alone would not only meet the continent’s own much-needed food supply, it would also provide a sizeable surplus for export,” says Oluyede.

With global food supply needing to increase by an estimated 70% by 2050, the continent is said to be at the heart of the challenge of global food security.

Part of the problem is that indigenous customary rights are, more often than not, unrecognised and unenforceable. Gender inequality also plays a role: women, who make up 70% of Africa’s farmers, are locked out of land ownership due to adverse customary laws.

More recently, the global land rush, also known as land grabbing, has seen large swathes of African farmland allocated to investors to provide for the future food and fuel needs of foreign nations.

This is usually achieved through long-term lease agreements for an initial period of between 25 and 99 years. The leases are often renewable, which Oluyede says suggests that, in practice, alienation of land from local users is likely to be permanent.

Much of this land is usually already occupied and used, mostly by Africa’s 80 million small-scale farmers who supply most of Africa’s food needs and produce 30% of its gross domestic product (GDP).

“While narratives rationalising these deals emphasise that land targeted is ‘idle land’ or ‘waste land’, case studies suggest that these terms often reflect an assessment of the productivity, rather than the existence, of current land uses,” Oluyede tells the IBA Daily News.

In search of a solution

A recent World Bank report identifies the root problem as poor land governance, meaning the way in which land rights are defined and administered.

The report offers a series of steps to improve land governance with a view to securing Africa’s land for shared prosperity.

The ten steps are based partly on lessons learned from agricultural land reform movements in Brazil and China and land rights reforms in slums in Argentina and Indonesia.

“...the steps are tailored to reflect experiences with land reform pilot projects underway in African countries and would go a long way towards the provision of the much-needed panacea required at this time,” says Oluyede.

SESSIO N N AM E
Who owns the land? Farming, mining and land rights in Africa

PLACE/TIM E
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Key takeaways
• Africa’s meteoric rise to prominence on the global stage has cemented the resource-rich continent’s standing as an investor darling;
• But escalating interest from foreign investors must be balanced with the need to protect the rights of Africa’s indigenous population;
• A recent World Bank report outlines the steps to improve land governance with a view to securing Africa’s land for shared prosperity;
• Today’s session will address formal ownership rights, and the need to secure the land rights of local rural populations who depend on the land for their livelihood.

Zimbabwe’s leading light

“I am a lawyer, it is my job to go out there and do what I do.” This is what Zimbabwe-based lawyer Beatrice Mtetwa said at this year’s UK launch of the documentary Beatrice Mtetwa and the Rule of Law.

Yet, few other human rights lawyers have shown the courage and self-sacrifice displayed by Mtetwa throughout her 20-year career in private practice. In a tear-stained country known for an oppressive government, she has endured physical abuse, unlawful arrest, and imprisonment in her fight for personal freedoms and the rule of law.

She defends journalists, political opponents of the ruling Zanu PF party, and others who have been arrested — often on questionable legal grounds — for refusing to toe the party line. And she’s been at this year’s annual IBA conference.

Wednesday’s lunchtime session ‘A conversation with Beatrice Mtetwa’ promises to be one of this year’s conference highlights. Mtetwa will provide valuable insights on the reality of the fight for justice in challenging circum-
stances. Of the 97 countries profiled in the World Justice Project’s latest Rule of Law Index, Zimbabwe ranks the lowest in the areas of fundamental rights, limited government powers, and open government. Against this backdrop, Mtetwa has proved a leading light for country, as well as the global fight for human rights.

The session will commence with a screening of the documentary Beatrice Mtetwa and the Rule of Law, followed by a question and answer session. Based on her life and work, this promises to be an inspiring conversation.

In an interview with IBA Global Insight, Mtetwa described her childhood as the eldest of 50 children, an early career as a government prosecutor, and her continuing work as a defence lawyer. In September, Mtetwa was on trial in Harare for ‘obstructing or defeating the course of justice’ after her colleagues were arrested in a failed attempt to serve police search warrants. She retained her client’s house without a search warrant. While ordeals such as this could force some to rethink their career, Mtetwa sees it as her duty to uphold the law, whatever the ramifications.

Her commitment to justice has extended to industry leadership roles, being the former president of the Law Society of Zimbabwe and former vice president of the Southern African Development Community Lawyers Association.

Mtetwa’s dedication has earned her a series of accolades including the International Press Freedom Award (2005) and American Bar Association’s International Human Rights Award (2010). In 2009 she became the only African other than Nelson Mandela to win the Ludovic-Trarieux International Human Rights Prize.

Beatrice Mtetwa epitomises global efforts to promote the rule of law, and the strength needed to do so in the face of adversity. Her lunchtime session promises to be nothing short of inspiring.

Key takeaways
• Wednesday’s lunchtime session will commence with a documentary on the Zimbabwe-based human rights lawyer’s life, followed by a Q&A session;
• Mtetwa has dedicated the past 20 years of her career to defending journalists, human rights activists and the government’s political opponents on often politically-motivated charges;
• She will provide a firsthand account of the self-sacrifice and hardship endured in fighting for the rule of law in trying conditions.
The changing face of gambling

In 2011, US Congress passed a law that barred banks from making transactions related to illegal online gambling, effectively forcing online poker companies such as PokerStars out of the US. But only two years later the regulatory landscape has shifted, and three states – Delaware, Nevada and New Jersey – have legalised online poker.

The immense popularity of online poker – and the subsequent federal crackdown – is by far the most high-profile issue related to online gaming. But the regulatory landscape must evolve as social gaming companies aim to incorporate real-money gambling and traditional gambling companies look to include more social elements in their internet businesses.

The internet's reach also complicates matters. In the US, gambling rules are determined on a state level – for example, online poker is legal in only three states. The regulatory landscape is therefore difficult to navigate. Earlier this year social gaming giant Zynga announced that it was giving up its pursuit of a real-money gambling license. Although the company says it is focusing on its core areas, it has been reported that the regulatory regime was too onerous. Outside of the US, different countries have varying frameworks.

Session co-chair Trevor Nagel observes that new disruptive players in the gaming industry have blurred the lines between gaming sites, gambling sites and social networks.

"These categories are all converging, and this is all the more complex in the context of a highly regulated industry that's also highly politicised and inherently cross-border," he says.

A regulatory regime in flux

This year has seen a number of developments in the online gambling space. These include Zynga's decision not to pursue a real-money gambling license, the Third Circuit Court ruling that poker was a game of skill rather than chance and the introduction of the Internet Poker Freedom Act of 2013 in the US House of Representatives – although this is unlikely to pass.

"Developments are happening so quickly – almost on a week-by-week basis – and industry players are all hedging their bets," says session co-chair Gabrielle Patrick.

"It will be interesting to see what happens in the next year," Nagel predicts that the US is going to be a social laboratory with different state-by-state regulatory developments.

"Both state and federal regulators have interesting challenges, including harmonising these approaches in a digital world," he adds.

What to expect from the panel

This panel has been co-organised between several committees as a recurring event, and has featured local, high-level speakers throughout its existence. Last year it focused on harmonisation on regulations within the EU, Nagel said, but this year the panel has been built on social gaming, which has been driven out of the US.

Patrick emphasises that the committees have tried as hard as possible to provide a diversity of views and perspectives. In addition to US views, there will be European and Asian perspectives offered from in-house counsel, industry executives and private practitioners, and even perhaps a surprise visit from regulators.

The panel will also feature a live demonstration from a Boston and China-based social gaming company. It may also include a live demonstration from in-house counsel, industry executives and private practitioners, and even perhaps a surprise visit from regulators.

The panel will also feature a live demonstration from local Boston social network Digisocial, which is also based out of Qingdao, China – tying into the Asian perspective ahead of the 2014 IBA conference, which will be held in Tokyo.

"We'll be seeing a real-time demo of social and gaming and how the industry is evolving," says Patrick.
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Changing construction

It’s time for the construction industry to take the next step in the fight against corruption, a panel today will argue.

The construction process is highly complex and competitive. It also depends on a myriad of relationships from clients, contractors and designers to subcontractors and suppliers.

In such a context, many companies use corrupt means to gain business, in lieu of improving their skills and expertise. This has significantly affected the fairness of the sector.

“Construction is highly oriented to corruption because some of the most important operations in the world are related to construction or infrastructure,” says Roberto Hernandez, session chair and the IBA’s anticorruption committee regional coordinator for Latin America. “Therefore getting or giving business to somebody in this area means providing a very relevant amount of resources.”

Construction law is focused on contracts, remedies and dispute resolution. Of course, having a good contract with adequate terms and adequate compliance programmes, targeted specifically to construction companies, can be a good means by which to combat corruption.

Even so, Hernandez says it is now time for those in the construction sector to take steps to bring integrity to the industry. He believes this could be achieved by lobbying domestic letting authoritiess to sanction more corrupt construction companies and encouraging the implementation of local laws to establish clear rules and authorities to clean the sector.

“It is important that construction companies understand what is considered corruption and what is not,” he says. “In this sector, relationships and activities can be somewhat ‘informal’ in many countries. That can lead executives to view some common commercial practices (such as meals, entertainment and so on) as part of the business, even though such activities are usually non-compliant with most countries’ construction laws.”

It is also important to implement an effective anticorruption programme in the company with people that understand the sector, he says.

Construction is not exempt from compliance and anticorruption laws, regulations and matters. Therefore all levels of a construction project must attend these regulations.

“It is a mistake to focus only on the main contract,” says Hernandez. “Some of the most relevant corruption problems can occur with a project’s subcontractors or suppliers.”

“Compliance and anticorruption law have to be always considered as a substantial part of construction law,” he adds.

“It is important to encourage companies, authorities and lawyers to share their experiences in this regard,” Hernandez says.

Panelists include expert speakers from across the world-wide construction industry – including compliance officers from three large construction companies, Turner, Bechtel and ICA, the president of COST (Construction Initiative for Transparency) and a World Bank officer as well as practitioners from the US, Europe, Africa, India and Latin America.

“It is important to encourage companies, authorities and lawyers to share their experiences in this regard,” Hernandez says.

Fighting corruption

Where corruption is suspected, Hernandez says a professional fact finding has to take place to garner a detailed understanding of the incident and ascertain whether or not the matter is in fact indicative of corruption.

“When there is a conviction that something is wrong, a more profound investigation should be carried out, with experts in the matter,” he says. If, following this, it is concluded that there is a problem, several corporate actions might have to be initiated and discussions with the relevant authorities, such as the Department of Justice or local regulators, begun.

Hernandez is hopeful that events such as today’s session, will prove a vital and positive step towards fighting corruption in the sector.

For more information on the session, please see the programme below:

**SESSION NAME**
Preventing cracks in the foundation: fighting corruption in the construction industry

**PLACE/TIME**
Wednesday 9th October, 2.30pm-5.30pm
Room 202, Second level

**Key takeaways**
- It’s time for the construction industry to take the next step in the fight against corruption, a panel today will argue;
- Construction is highly orientated to corruption because some of the most important operations in the world are related to construction or infrastructure;
- By lobbying domestic letting authorities to sanction more corrupt construction companies and encouraging the implementation of local laws to establish clear rules could help to bring integrity to the industry.

**“Construction is highly oriented to corruption”**

**“It is a mistake to focus only on the main contract”**
Guess who ate all the pies?

(The Boston cream pie was invented in 1856 at the Parker House Hotel in Boston and declared the official dessert of Massachusetts in 1996)

OUR IBA TEAM FROM THE TOP: SADIQ JAFAR, MANAGING PARTNER DUBAI, RICHARD BRIGGS, EXECUTIVE PARTNER DUBAI, ALAN RODGERS, PARTNER, MICHAEL LUNJEVICH, PARTNER, SAMEER HUDA, PARTNER, ERIK MUTHOW, PARTNER

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How tax abuse perpetuates poverty

Lamping down on tax abuse should be a critical tool in the war against global poverty. This was the message from yesterday's session presented by the IBA Human Rights Institute (IBA HRI).

Making the connection between human rights and tax avoidance and improper tax evasion has, until now, been largely uncharted waters. International human rights conventions are mostly silent on tax issues, and as reflected by the comments of one audience member and at least one tax authority, there is some scepticism over whether it is appropriate to include tax avoidance in the debate, and understand tax evasion as a human rights issue.

Panellist Lloyd Lipsett, of IKI International Consulting in Canada, acknowledged it was a complex and somewhat controversial subject. But the panel succeeded in providing compelling evidence of why tax abuse needs to be analysed in the context of human rights.

According to a 2009 OECD estimate, tax revenues lost by the developing world because of improper tax avoidance is in the vicinity of $120 billion a year. “This is approximately the total amount of aid provided to the developing world each year,” said panelist Stephen Cohen of Georgetown University, Washington DC. Ending this behaviour would essentially double the amount of aid provided to these countries.

The OECD’s figure, however, is thought to be a low estimate. According to the Tax Justice Network, the value is up to four times that much. “We are talking about a very substantial amount of money that could make an enormous contribution to the alleviation of poverty in the developing world,” Cohen added.

As noted by panelist Thomas Pogge, professor of philosophy and international affairs at Yale University: “The international financial system and tax rules are foreseeable and avoidably contributing greatly to very large human rights deficits.” Here are the key causes, and what needs to change.

Offshore accounts

One tax behaviour of particular concern is the use of offshore bank accounts in secrecy jurisdictions. Citizens are obliged to report the income they earn, and so using offshore investment accounts to shield their assets from taxation is deemed avoidance.

Notably, the amount of income shielded in offshore accounts by developing country citizens is much greater than citizens of more developed countries. While approximately two percent of North American wealth and eight percent of European wealth is held in offshore accounts, the figure for developing countries is in the vicinity of 30%.

“Roughly a third of private individual wealth in the developing world is held, not in the countries where they reside or where they are citizens, but in offshore accounts,” said Cohen. The overall effect is to erode the tax base of many countries in a manner that is not intended by domestic policy.

Natural resource taxes

An area of particular concern in Africa is practices relating to the taxation of mining and oil & gas. While the southern region in particular contains an abundance of natural resources, many such countries receive less revenue from these sectors than countries elsewhere in the world.

There are a number of reasons for this including a skills shortage regarding the negotiation of concession agreements and, in some instances, a greater possibility of corruption. But the granting of tax concessions is a significant problem.

To attract the long-term investment needed to develop these sectors, governments have found themselves in a race-to-the-bottom regarding taxation. This often comes in the form of stabilisation clauses, which effectively fix the revenues the state will receive, or tax holidays that continue throughout the early stages of a project.

While this may attract investment, it is not necessarily translating into greater tax revenues which the government could spend on local development. “What you don’t want is a hole in the ground and nothing to show for it,” said IBAHRI co-chair Sternford Moyo of Scanlen & Holderness in Zimbabwe.

An effective arrangement, he said, is one that creates a balance between the interests of the investor and the interests of the community where the resources are found. “That balance has not yet been achieved in southern Africa, unfortunately,” Moyo added.

Whose responsibility?

Governments, corporations and the legal community all have obligations to curtail tax abuses in the fight to uphold human rights.

At a domestic level, governments are obliged to protect and encourage the realisation of citizens’ social, economic and cultural rights. “This includes a corollary obligation to avoid corporate or fiscal tax measures that have retrogressive impacts on human rights,” said Lipsett.

While corporates’ primary obligation may be the return of profit to their shareholders, they do have corporate social responsibilities. The panel recommended corporations extend the UN guiding principles on this topic to the performance of due diligence regarding their tax practices.

“Multinationals and their advisors and financiers need to understand that tax planning strategies have potential negative impacts on human rights,” said Lipsett.

As noted by Pogge, the fact that sophisticated tax planning strategies are technically legal is no longer a justification for their use; given the tax abuse facilitated by secrecy jurisdictions has an enormous impact on global poverty.

Finally, bar associations should develop stronger guidance regarding the human rights dimension of tax, and law firms should adopt policies that explicitly require lawyers to give due consideration to the human rights impact of their legal advice, including on tax matters.

A problem that won’t go away

The session’s discussion was contextualised by some staggering statistics regarding global poverty.

Of the (recent average of) 57 million deaths that occur every year, at least 18 million – almost one third – are due to poverty-related causes. In addition, the number of people who have died from poverty-related causes since 1990 (more than 400 million) substantially dwarfs the aggregate number of people who died from international and civil wars and conflicts throughout the 20th century.

The distribution of global income also can’t be ignored. More than 90% of global income is earned by 25% of the population. While the top five percent continues to significantly enlarge their share, all others are declining.

This is particularly true for the poorest 10% of the population, who suffered a 25.3% drop in their percentage of world income between 1988 and 2008.

The IBAHRI’s latest book: Tax Abuses, Poverty and Human Rights

The session officially launched the report of the IBA’s Task Force on illicit Financial Flows, Poverty and Human Rights. The 264-page book includes the Task Force’s findings on the connection between tax abuses and human rights. This is based on 16 months of expert research, consultation and interviews with more than 100 tax authorities, multinationals and multilaterals.

It also includes recommendations for states, corporations, lawyers and bar associations regarding their responsibilities in fighting illicit financial flows within the context of human rights.

The book is available to download at: tinyurl.com/IBAHRI-Taxabuses

TUESDAY HIGHLIGHT
SESSION NAME
Tax abuses, poverty and human rights

Key takeaways
• Corporate, government and lawyers’ obligations regarding tax abuse is the next frontier in the global fight for human rights;
• Offshore accounts, tax holidays, natural resource tax practices, and transfer pricing deprive developing economies from the revenues they need to help local community gain access to fundamental economic and social rights;
• This is exacerbated by the fact that the divide between the world’s wealthy and poor continues to widen;
• This IBA session provided an overview of the findings and recommendations of the IBA Human Rights Institute Task Force in its recently launched report titled ‘Tax Abuses, Poverty and Human Rights’.

IBAHRI’s latest book: Tax Abuses, Poverty and Human Rights

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The book is available to download at: tinyurl.com/IBAHRI-Taxabuses
Emergency planning

Today’s Healthcare and Life Sciences Committee business meeting and breakfast will cover a recent tragedy in the IBA Annual Conference’s host city. Committee co-chairs Kelley Dye & Warren’s Beth Jacob and Werkmans’ Neil Kirby have organised a panel on the preparation for the emergency response to the Boston Marathon this year.

It features Thomas Grilk and Chris Troyanos, both of the Boston Athletic Association and the Boston Marathon, who are responsible for organising the Boston Marathon and its emergency preparedness.

Kirby said that this panel will prove an interesting presentation on how emergency procedures are planned, conceived and implemented for large public events. “These are views that lawyers in all fields, especially those that participate in high-profile events, will find interesting,” he added.

The Boston Marathon is an internationally recognised event held on Patriot’s Day, the third Monday of April and a state holiday in Boston. But on April 15 of this year, two pressure cooker bombs exploded at the finish line, killing three people and injuring approximately 264 others.

These are views that lawyers in all fields will find interesting

The tragedy has changed security preparations for large public events. For example, the New York Marathon, scheduled for November 3, has announced new security measures. For example, those wishing to sit in the grandstands at the finish line or wait in the family reunion area will now be subject to baggage inspections and screenings.

EU banking union

Continued from page 1

well but countries in southern Europe are not, so without a banking union everybody is weakened.”

Session co-chair Hengeler Mueller’s Hendrik Haag said it was clear the EU was at a crucial point of its further development.

Europe’s banking union

Panelists agreed that the establishment of an EU banking union will form a critical part of the survival of the euro itself. Even so, many hurdles stand in the way.

Establishment of such a union in the eurozone depends on three pillars of reform. These are the introduction of a single supervisory mechanism (SSM), the single resolution mechanism (SRM), and a common system of deposit protection.

Last month, the European Parliament voted in favour of the regulation to set up the SSM. It is anticipated the European policymakers’ attentions will now shift to the establishment of SRM. But the implementation of the banking union’s third pillar remains contentious.

“Of the three pillars to the banking union, I’d say one and a half of them have a good prospect of being put in place,” Gibbs said. “So I’d say the establishment of a banking union in the euro area is very likely, but it’s debatable whether a union based on one and half legs would be effective.”

Major questions surrounding such a union’s practical implementation remain, however. For example, who decides when banks get taken over when such banks might have subsidiaries and branches across EU countries? And who has the burden of rescuing ailing banks?

“Everybody wants a banking union in the EU, but nobody wants to pay for it,” Gibbs said. Nonetheless, she said markets remained hopeful a union would eventually transpire.

SESSION NAME
Open committee business meeting and breakfast Presented by the Healthcare and Life Sciences Committee

PLACE/TIME
Thursday 10th October 8.00am–9.30am Section A, Back Bay Ballroom, Sheraton Boston Hotel

Key takeaways
• Panelists will discuss how emergency procedures are planned and implemented for high-profile events;
• The discussion follows this year’s bombing at the finish line of the Boston Marathon, and will be of interest to lawyers in all fields – particularly those who participate in high-profile events.
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