My gender, my choice

Gender identity and its effects on an individual’s human rights remains a legal problem and more work needs to be done globally. That was the message from panellists at yesterday’s session on transgender people.

In May, the IBA passed a resolution stating that laws criminalising consensual acts between adults based on their sexual orientation or gender should be repealed. The persistence of such laws has created refugees and displaced people outside of their countries. Transgender individuals can find it hard to secure employment or be accepted into a community.

A growing number of progressive laws and court rulings are offering hope to some that more acceptance will come. However restrictions within these laws, including requirements that a person undergo surgery and sterilisation remain a problem even in some forward-thinking jurisdictions.

“Despite many significant advances in some countries, the social status of transpeople ranges from concerning to critical,” said Federico Godoy of Beretta Godoy in Buenos Aires, who co-chaired yesterday’s session, ‘Mr, Ms or Mx? Legal issues facing gender persons’.

The session looked at a range of global legal developments affecting transgender people, including new laws to allow individuals to change their gender on legal documents such as passports, driver’s licences and birth certificates.

On the panel was Akkai Padmashali, who had traveled to the conference for the first time using a new passport that identified her as a woman. In 2012 she was the first transgender person to be invited by India’s President to the swearing in of the Supreme Court Chief Justice.

But most of her life has not been easy. Padmashali described the difficulties and abuse she suffered at the hands of family, classmates and even police when she identified as female. Growing up, she regularly faced beatings at home and was raped in school and at work. Upon reporting the incident, she was told it would not happen if she behaved more like a man.

“The physiological abuse was really unimaginable,” Padmashali said. “I had no friends to talk to about this with; no family members, no siblings.”

The violence persisted as she got older. Padmashali eventually turned to prostitution, where she was treated violently by customers and police.

According to the other panellists, the abuse Padmashali suffered is not unique. In many countries transgender people struggle with unemployment and homelessness, even when they can receive legal recognition.

Increasingly progressive laws are helping. Changes to existing laws that remove requirements for sexual reassignment surgery, hormone treatment or counseling are also making it easier for transgender people to self-identify.

“This matter of self-identification is really a discussion around the world,” said Matthias Stupp, a Hamburg partner with White & Case.

Stupp explained that although in Europe family privacy has been a guaranteed human right since 1953, it wasn’t until 1992 that the European Court of Human Rights ruled that gender self-identification should be included. Sweden and Germany have both now removed legal requirements for surgical sexual change.

While very few Latin American countries have laws allowing people to legally change their gender, Argentina is seen as a leading light for progress.

Under a 2012 law, a person can change their gender through a simple administrative process. They are not required to prove anything in a court or undergo a surgery.

Once the paperwork has been processed they are issued a new birth certificate and passport. The law even allows minors to change their gender either with the parents’ permission or the help of a court appointed lawyer.

“Until recently, the life expectancy of a transgender women was around 33 to 40 years old, while for the general population it is around 70 to 75,” said Buenos Aires based Alejandro Nasif Salum, who works for the Federación Argentina LGBT. “When you look at this you see that discrimination has real consequences on the lives of people.”
WANTED: art lawyers

As the art industry grows into a multi-billion dollar business, issues such as customs, transportability and tax rates are calling for expert legal advice.

‘The ABCs for travelling Picassos...’ highlighted the challenges of uniting the largely unregulated and relationship-based art market with that of customs, international trade and corporate law.

In a series of individual presentations, lawyers and art market professionals explained some of the intricacies involved in importing and exporting art across borders, with a focus on cross-border museum loans.

It highlighted the global nature of the industry while explaining the tax and customs regulations that apply to works of cultural importance.

And they are only becoming more complex. Elizabeth von Habsburg, managing director of independent art advisory consultancy Winston Art Group, encouraged lawyers to practice art law. “It would be a great area to get into because I can see it getting more complicated as the market gets larger, deeper and broader over the years,” she said.

Title and transferability

Detailed provenance gives buyers more confidence in a work’s value and authenticity, while the correct paperwork – including all related licences and approvals – is needed for artworks to move across borders.

“There are all these issues of due diligence that we have to do for our clients as they’re transacting worldwide,” she added.

In particular, the transferability of art is an issue; values decrease drastically when works cannot be moved out of a particular jurisdiction. Some jurisdictions might prohibit works by certain artists from leaving the country, or works of a certain age and significance from leaving without paying an export tax.

Domestic regulation is also a concern. This year New York adopted a state law that prohibits transfer of ivory over state lines, although the state was the largest importer and exporter of ivory in the US due to its large art market.

Objects ranging from older pianos with ivory keys to 18th and 19th century European miniatures can no longer cross state lines.

“These regulations come up with all good intentions but have a lot of collateral damage,” von Habsburg commented.

It’s now unclear, for example, how insurance policies for artwork that involves ivory should function. There is now no market for ivory in New York, and therefore works have no market value.

Museum loans

Objects worth billions of dollars are constantly on the move in the museum business, as they are dispatched, loaned and traded, said Johann Kräftr, director of the Privately Collections of Lichtenstein.

“But in the museum sector it’s very rare that these movements are accompanied and safeguarded by elaborately worked-out contractual agreements,” he added. “Such procedures are usually guaranteed by a high degree of basic trust, which to a great extent substitutes legal protection.”

Only in rare cases do such cases become public and are discussed in more extensive detail. Lawrence Kaye, a New York partner at Hennick Feinstein disagreed with that approach: “As a lawyer I don’t think that should be the key factor; I think the key factor should be detailed agreements.”

He emphasised that agreements must include clauses that the institution does not have the authority to sell the work, and account for insurance, copyright, standard of care, value and legal jurisdiction. It must also include concerns beyond the institution’s control such as war, natural disaster and political unrest.

Another crucial legal element is a state guarantee against confiscation. Without a guarantee, it’s possible for works to be seized due to provenance questions or to repay claims following a sovereign or state-owned enterprise default. Some go further: Taiwan requires countries to pass a law to prevent seizures from Beijing before its National Palace Museum will loan art.

Kaye focused on recent changes in the US immunity provisions for exhibitions in a non-profit institution. It was thought that lenders could not be sued under the US immunity provision, but recent cases have proved that they can indeed be sued, but assets can’t be seized immediately.

A bill to override that decision is now pending. It intends to expand the immunity provision except in relation to works stolen during the Holocaust. It is now in the Senate, where some have argued that it will allow too many stolen works to be brought into the US.
To properly address drug and alcohol abuse in the legal profession, bar associations and firms must bridge the gap between the ideal and reality of how to intervene.

Statistics cited at yesterday’s session ‘Sex, drugs and legal practice: stress, alcohol and substance abuse in the profession’ make clear that the level of substance abuse among lawyers is extremely high.

According to a US study, nearly 70% of lawyers are likely candidates for alcohol-related problems at some point in their career. For the average population, that figure is 13.7%. The same study found that 26% of lawyers had used cocaine; double the number for the general population. The problem usually starts early, sometimes in the first year of law school.

Robert Vineberg, of Davies Ward Phillips & Vineberg in Quebec said that stress is clearly the prime culprit. “The levels of stress around the world are very high, and they are corridors for abuse and the kind of dependencies that are ruining the lives of so many in our profession.”

In one case, extreme stress caused a sole practitioner to get up in the middle of the night and bury his client’s files in his garden. Examples of how alcohol abuse can lead to malpractice included lawyers appearing drunk in court, and another attempting to run away with a large amount of client money (for which he served several months in prison).

Bar associations have implemented a variety of tools: from helplines to support programmes, psychologist services to health and wellbeing courses. These and law firm efforts tend to follow a best practice of early detection, prevention and support – and all are done confidentially.

Personality traits
But their effectiveness is frustrated by the realities of the situation.

Mark Hepburn, a consultant with LawCare in Scotland said that the legal profession undeniably has a part to play, but that the problem is more fundamental in that it is partly attributable to the personalities drawn to the profession. These people are driven, with a high level of perfectionism, hard workers, and great attention to detail. These characteristics, combined with the role of a lawyer, means they tend to rationalise things – looking for a good reason, rather than the real reason. “That makes you difficult to treat,” he said.

While early intervention is a laudable goal, Hepburn said it exists in the school of perfection. “If we could get the early intervention we could prevent a whole load of problems. But the reality tells us that it isn’t going to happen.”

“In my experience people generally only change for two reasons: inspiration and desperation. And desperation seems to be a greater motivator a lot of the time,” he added. This means lawyers have a high personal threshold for seeking or accepting help. Privacy is key. “It is very important that assistance programmes must remain confidential,” said the Norwegian Bar Association’s Marete Smith. But Vineberg said this conflicts with the need to deal with the issues. “If privacy predominates, then it is hard to break through the protective shell that lawyers create around themselves, and prevents detection and dealing with the problem.”

Marete Smith
Antitrust compliance must be prioritised

Major corporations are regularly failing to do more than pay lip service to their antitrust compliance programmes.

Speaking at yesterday’s ‘Antitrust and trade compliance’ session, panellists agreed that some corporates needed a culture shift in their approach to the issue. “Surprisingly large companies are downplaying the risks they face in non-compliance until they’re merely existential problems,” said Matthew Kronby, partner at Bennett Jones in Toronto. “It’s great for lawyers, but not great as a business model for companies,” he added.

A rise in antitrust enforcement globally, with rapidly developing regimes in China and India, has alerted multinationals to the risks of non-compliance.

The need for good policies was recognised by the International Chamber of Commerce (ICC) in April last year, when it published a global toolkit on antitrust compliance. It has since launched a series of events in Latin America and North Africa to raise awareness of the issue.

Speakers agreed on the need for a top-down, cultural insistence on compliance rather than “major international corporates with top-notch policies on their website that are nothing more than ceremonial,” according to Kronby.

A Japanese success

Kiyohisa Kamekawa, an in-house lawyer at Mitsubishi Heavy Industries in Tokyo offered insight into his company’s successful approach.

Mitsubishi has particular challenges due to the varied nature of its products. “The more products a company has, the more difficult it is to stay compliant. We produce ships, rockets, power plants and now aircraft – these are diverse industries with diverse requirements.”

So the company focuses on education. It routinely holds seminars on antitrust issues, including compliance leadership training for employees.

But Kamekawa also highlighted how cultural differences could have a negative impact on Japanese companies’ antitrust compliance too. “It’s typical in Japan to work for a company for more than 10 years, so there doesn’t feel as strong a need to record in writing [for a successor],” he said.

US corporates have an advantage here, according to Kamekawa. “Their companies’ rigorous reporting process means that they are not merely complying with requirements but also proving they have done so with documentation, which is a major factor in current regimes.”

TUESDAY HIGHLIGHT SESSION
Antitrust and trade compliance

Key takeaways

• A shift in culture is needed among some corporates’ approach to antitrust compliance

• Lateral hires are perceived to be particularly risky, and should be monitored heavily for the first year

• Mitsubishi’s in-house offered tips from his experiences at the company, including a focus on education and compliance leadership courses

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L&E Global is an integrated alliance of premier employment law boutique firms advising on all worklaw related matters that international employers may have to deal with.
Intellectual Property (IP) rights are intangible assets that are either the creations of minds or are chosen or created in the form of distinctive signs. Among IP rights, trademarks and copyrights stand out as the most important and relevant for use by law firms. Trademarks form the legal basis for protecting a law firm’s brand, while copyrights form the legal basis for protecting its knowledge. Trademarks provide an exclusive ownership and protection perpetually as long as they exist, while copyrights provide similar rights for a certain period of time.

In terms of establishing the brand of a law firm, the first step is to choose a distinctive name and create a logo that is distinct from others in the market. Once a firm adopts a name and logo as a trademark, trademark applications should immediately be filed in the jurisdictions that the firm currently provides services and has plans to provide services in the future.

Internet domain names are not regarded among IP rights but, due to their nature, they are related to trademarks and have become very important over the past decade. Therefore, internet domain names for the word parts of trademarks along with relevant and most popular extensions should also be registered as they become available.

All lawyers produce briefs, memoranda, pleadings, contracts, checklists, manuals, e-mail messages, letters, reports, application forms, articles, databases and other written texts in the course of performing their tasks. Researching legal information, analysing it, identifying the information to be used and incorporating it into legal advice, briefs and pleadings, which may all qualify as work products, in a way that would convince a client or a judge, is the art of delivering legal services and the quality of the texts created changes from one lawyer to another. If original, and if they bear the personal imprint of their owners, these texts are protected under the copyright laws in most countries.

Recent developments in information and communication technologies have made it much easier to copy and reproduce any work product. So copyright protection on work product has become more important than ever. Law firms should ensure they retain the copyright on all work products created by their professionals. Additionally, everyone should be properly made aware that the law firm retains copyrights over their work products. On the other hand, since the legal services profession is knowledge-based and work products constitute an important component of knowledge, an intranet should be set up within the firm allowing easy access to such work products.

Creating and maintaining a reputable and trusted brand and forming a knowledge-based organisation have become increasingly important for law firms squeezed by globalisation, and IP rights play a vital role in achieving these goals. There may be challenges but these may be overcome by creating awareness of IP and ensuring the commitment and contribution of all members of the firm to the creation and protection of intellectual property.

Ugur Aktekin, senior partner, Gün + Partners, Istanbul
Global M&A has come back with a bang this year, and the preference is for bigger, bolder deals. Boardroom confidence has returned, and the bulk of portfolio sales needed to shore up corporates’ balance sheets are largely a thing of the past. It’s in this environment that merger approval becomes a bigger completion risk, and, unfortunately for deal counsel, it coincides with a number of merger authorities showing their teeth. This afternoon’s session titled ‘Hot topics in merger enforcement’ will assess regulators’ actions over the past 12 months, using case studies and drawing on panellists’ recent experience.

While US and EU developments will be addressed, the focus will be on Asia. Not only because the region’s growth story makes its corporates particularly attractive targets, but also because many of its authorities are intent on using their powers – even on deals with a remote connection to their jurisdiction. There are some recurrent offenders, in this regard. Session co-chair Janet McDavid notes that China’s Ministry of Commerce (Mofcom) and the Korea Fair Trade Commission (KFTC) have been especially aggressive in assessing deals involving multinational firms. “Review by Asian authorities, particularly Mofcom and the KFTC, has become more challenging and important in recent years,” says the US-based Hogan Lovells partner.

Her fellow co-chair, Koya Uemura agrees that over the last few years, China has proved the biggest headache for many international companies. Mofcom’s reviews can take more than a year, with the official investigation often not starting until a few months after the initial filing. “There are huge complaints and concerns, particularly among Japanese companies, that the merger control procedures in China take too long,” says the Tokyo-based partner with Oh-Ebashi LPC & Partners. Despite occurring last year, the regulator’s conditional approval of Japanese trading company Marubeni’s acquisition of US-based Gavilon has cast a long shadow over cross-border mergers in which China should be a non-issue. “Their combined market share was extremely low, so merger practitioners were surprised that it was cleared subject to conditions,” says Uemura.

But while Mofcom and the KFTC’s intrusive approach are causing problems for deal counsel, other merger regulators in the region have become more progressive. The Japan Fair Trading Commission (JFTC) is a case in point. Uemura tells IBA Daily News that over the past 12 months it has become easier and quicker to obtain clearance from the Commission. Five years ago, there were widespread complaints about the JFTC’s inefficiencies, with clearances taking up to two years. But the Commission seems to have taken this feedback as constructive criticism. “The JFTC has become more concerned about keeping pace with other foreign agencies – particularly in relation to big international merger investigations,” he says. “This, I think, has contributed to the regulator being more reasonable” Other positive developments to be discussed include US and EU efforts to forge greater international cooperation in cross-border reviews. With panellists from China, South Korea, the US, the UK, and Japan – including the JFTC’s Masanori Fukamachi – attendees can expect to walk away with a better understanding of the important role Asian antitrust authorities can play in global transactions.

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The human toll of climate change

At the IBA's 2012 annual conference, the UN's Mary Robinson stood on stage before a packed room of delegates and urged the IBA to provide more leadership in the area of climate change. Two years later, it's fair to say the Association has lived up to that challenge.

The IBA has recently unveiled a groundbreaking task force report on the connection between climate change and poverty. Today's showcase session presents the findings and recommendations of this first-of-its-kind study, titled Achieving Justice and Human Rights in an Era of Climate Disruption.

Climate change has been a popular social cause for some time now. But the focus is often on its long-term effects. The more immediate – and very direct – connection between global warming and human rights has received little attention. Until now.

“The link between disadvantage and poverty and human rights doesn’t need much arguing. But what this report drives home is that the poorest in the world are much more at risk than anyone else of suffering the effects of climate change,” says Baroness Helena Kennedy QC, who co-chaired the task force. Some of the world’s poorest communities live in arid lands where water is already scarce. Others rely on fishing for their livelihood, and live along rivers and coastlines which are vulnerable to rising sea levels.

It’s this human impact, rather than environmental issues, which forms the focus of the report. While environmentalist and environmental lawyers were closely involved – including as a co-chair – the report and showcase session make clear that this issue spans the full spectrum of the legal profession. It is based on the critical and rigorous analysis of commercial practitioners, judges and scholars. “This document was created by lawyers, and we ask the hard questions and need an evidential base. So the arguments are as much head as they are heart,” says Baroness Kennedy.

Her fellow co-chair, Gowling's partner David Estrin, notes that this is the first study to describe why legal systems are poorly suited to prevent such effects and provide climate justice to those impacted. In some ways, this debate takes the UN's 2011 Guiding Principles on Business and Human Rights one step further. “It's positive that in the last few years corporate leaders have begun to embrace responsibilities regarding human rights, but corporate leaders must now also realise that their corporation's operations and supply chains can exacerbate climate change and that this also impacts on human rights,” says Estrin.

As these effects know no boundaries, a global solution is needed. In this sense, an international text similar to the Guiding Principles on Business and Human Rights (which were discussed in Monday's showcase session) would be a useful, if not long-term outcome. Perhaps a more immediate and achievable result would be existing treaties' recognition of the climate change-poverty connect.

For example, climate disruption is already inundating island states and other low lying areas. “Developed countries will increasingly be faced with climate change refugee, people who are displaced from their countries due to loss of territory, loss of food supplies and environmentally caused social disruption. Current international treaties and national laws don't recognise these issues,” says Estrin.

A new status of climate change refugee would help deal with this issue, and could be accommodated within existing frameworks. In this vein, the task force is recommending that a working group be established to develop legal principles to achieve climate justice for those so affected.

In addition to meeting the challenge set by Mary Robinson, the UN secretary-general’s special envoy for climate change, the task force has delivered on IBA president Michael Reynolds’s promise to focus on climate change throughout his term. “It was a combination of these two things, and the fact the IBA is the voice of the global legal profession – which prompted the take-up of this challenge,” says Estrin. “They deserve a lot of credit for building this momentum.”

Robinson will speak at today's session, along with the session co-chairs and a number of other esteemed keynote speakers. This includes former US vice-president Al Gore (participating via video link) and Mohamed Nasheed, former president of the Maldives which, at 1.5 metres above sea level, is a country well-aware of the threats of climate change. A pre-recorded speech of former Mexican president Felipe Calderón will also be shown. Calderón will discuss the activities and achievements of the Global Commission on the Economy and Climate, a seven-nation organisation which he chairs.

While neither of the co-chairs were necessarily surprised by the report's findings, for them it pressed the urgency of the need for change. Estrin describes the past one-and-a-half years of his work on the task force as a challenging but revelatory experience. “In working with our task force members, and other expert advisors, it really became apparent to me how short a time period we have and therefore how critical it is to get both agreements and take other practical and legal actions to limit the gases that are causing global warming and climate change,” he says.

While the scientific community has stressed for some time the threats of climate change, this is the first time it has been connected directly to the plight of vulnerable communities. And as the message is coming from lawyers, it is hoped that their peers will listen.
The biggest challenge facing bar associations globally is adapting to rapid changes stemming from political and technological developments and increasing globalisation. Nowhere is this clearer than in jurisdictions undergoing turbulence or political change.

For bar associations in jurisdictions experiencing political instability, remaining independent and adapting quickly are important to ensuring that justice can be upheld for the country’s population. The Bar Issues Commission’s (BIC) showcase: ‘Change and opportunity – the challenge of administering justice in shifting legal environments’, will give attendees the opportunity to hear from members ofbars in some of the world’s toughest political and legal environments. Lawyers from countries where the legal profession faces enormous challenges including Egypt, Venezuela, and Afghanistan, will have the opportunity to speak candidly about the challenges they face.

“We want to discuss how the legal profession, bars and professional associations reacted in cases of quick and extreme shifting of the legal environment in their countries,” says Horacio Bernardes Neto a partner with Motra Fernandes Rocha Advocate in Sao Paulo who will serve as one of the session’s co-chairs.

All of the panellists come from countries where the challenges facing the bar associations and the legal profession are particularly acute, but vary widely. The discussion they will undertake will look at the impact of government interference, poverty, conflict and ethnic and religious differences on maintaining a strong judicial system and an independent bar.

Conflict, constitutional change and technological development are among some of the most daunting challenges thatbars face. They can often threaten the very existence of bar associations and their protection of the rule of law – at times when they are often most needed.

“One of the greatest hindrances to the international community to redressing injustice is interference, or pressure, from the executive arm of the state on lawyers and bar associations,” says Margery Nicoll from the Law Council of Australia the showcase’s other co-chair. “Such interference can undermine a bar’s independence and impede its ability to uphold the principles, including the rule of law, upon which modern societies are based.”

The independence of bars is often what creates the trust the general public has in the law. As that trust collapses, so can other features of functioning society. This can lead to an unfortunate cycle of deterioration.

“When the rule of law breaks down, and state laws and institutions cannot be relied upon to regulate the behaviour of the government or its citizens, economic development inevitably suffers as well,” says Nicoll.

Venezuela is one example of such a break down. The country’s independent judiciary was taken over by the government in 1999, which now has the ability to fire judges. While there are independent lawyers they must tread carefully under the watchful eye of the government.

Recent violent protest and the country’s economic troubles, including inflation and a thriving black market all have at least some roots in the public’s lack of faith that the law will be fairly upheld.

In countries where the rule of law is disregarded, the role of independent attorneys andbars is even more important. “Such毳ries have to count on a courageous voice in favour of the individuals, so the bars and the legal profession, in these cases, can and must play the role of the gatekeeper of the constitution and the rule of law,” says Neto.

Another example is Afghanistan, where after years of war the IBA has helped to set up a new independent bar for the country. The goal is to support the creation of a strong and trusted legal profession and rebuild trust in the countries justice system.

The Afghan Independent Bar Association (AIBA) has worked to improve access of Afghan citizens to well trained and ethical defence attorneys and social justice more generally. They have worked to reach this goal, all battling the continued hurdles facing the country including intense corruption, violence and tribal conflict.

**Technology**

While bar associations in countries undergoing significant social and political upheaval feel the brunt of the challenges, bars in stable and developed countries are also facing challenges posed by globalisation and technology.

The legal profession is not typically at the forefront of quick technological development, but the pace at which technology is advancing is having an immediate effect of the industry.

New ways of delivering legal advice and services are creating new competition from non-lawyers. Even when these new technologies are used by licensed attorneys they can create challenges for confidentially and disclosures. Bar associations will not be able to shy away from these developments, but will need to take the lead in drafting rules for their members.

These changes also pose challenges for societies at large. The general public is unlikely to trust the judicial system’s ability to maintain its privacy, freedom of speech and human rights if it doesn’t have a handle on the technology that could be used to violate them.

**Globalisation**

Globalisation poses its own challenges to the legal profession at large, though not all of these should be seen as threats. Increased global connectivity can allowbars in different jurisdictions to work more closely together and facilitate greater levels of cross-border justice.

The growth of large global firms can help to meet the needs of clients with increasingly multi-jurisdictional needs. But their presence and the consolidation they bring to the market can also threaten the work of smaller independent firms and local practitioners. Bar associations will need to look at the impact of these changes internally, but also look to each other globally for solutions.

“Without a common vision for the future role of lawyers in society and shared values, a united legal profession is at risk,” says Nicoll. She stresses that educating and preparing new young attorneys was one of the most important elements to keeping the society strong and ensuring there were a wide range of practitioners to meet the societies future legal needs.

“While the profession changes,bar associations must understand why legal practice is changing and how it is changing. Bars must ensure they consider how the functions of the legal profession as a part of legal-social infrastructure can continue to be conducted in a globalised and technologically-advanced world,” she says.

As bar associations across the world are facing a range of legal challenges brought on by global and local events, their best hope for adapting and protecting the profession is to address the changes head on. The open discussions at the BIC showcase will be an opportunity to do just that.
While European and US M&A deals frequently use warranty and indemnity (W&I) insurance, the product hasn’t yet taken off in Asia – even in riskier emerging jurisdictions.

The insurance policies have proved popular elsewhere because they can protect either a buyer or seller from losses caused by inaccuracies in representations and warranties included in deal documentation.

It is available in Hong Kong, Singapore and Japan, as well as more emerging markets like China, Korea, Indonesia, Thailand and Malaysia. But it is not yet common across the region.

Lee Suet-Fern, senior director at Stamford Law, has recently seen W&I insurance being pushed quite hard by various insurance brokers. But she doesn’t see a large take-up in Asean [Association of Southeast Asian Nations]. “At this stage it is not a product that buyers or sellers in our markets embrace naturally,” she says.

Rod Brown, partner at Latham & Watkins, hopes that will change. He describes it as a useful tool for getting deals done, especially those that might not get done without a W&I policy, adding that it’s helpful when there’s a contingent risk that neither side wants to take.

“I’ve seen it used to save deals in Europe and I expect it is only a matter of time before we see these products being increasingly used in Asia,” he adds.

Dealmakers have also expressed concerns about the regulatory status of warranties and indemnities. “W&I insurance might also help buyers offer a more competitive liability structure when it’s used to top up either the warranty cap or warranty survival period. "Responsibility for the premium is often tightly negotiated and often we see the amount discounted off the purchase price if the buyer is paying,” says Roach.

What’s next

It’s unclear whether insurers are ready to expand their coverage to Asia’s frontier markets. “We are aware of examples where W&I has been considered on transactions in Vietnam and are confident that with time Myanmar will become a jurisdiction of interest for insurers, although this won’t be in the immediate future,” Roach says.

Instead Brown predicts that growth in Asia – and globally – will likely come from sponsors using W&I insurance as a tool to make bids more competitive in auctions. In a typical auction, the seller is in a position of strength and will probably offer few typical deal protections. Without W&I, buyers would be forced to mark up the transaction documents or live without customary protections. But marked up documents would be less competitive.

But for W&I products to become more popular in strategic M&A, insurance brokers must convince Asian businessmen and corporates that their products actually provide benefits.

Lee believes it may be a while before there is traction. “The typical Asian businessman may consider insurance but may believe that he has assessed and is ready to accept the W&I risks, or has factored this into the pricing,” she adds.

Coming soon: Asian W&I insurance

“I’ve seen it used to save deals in Europe and I expect it is only a matter of time before we see these products being increasingly used in Asia”
When allegations broke in June this year around Qatar's winning bid for the 2022 World Cup, it felt like a tipping point in sport’s relationship with corruption.

The Sunday Times in London revealed that Mohammed bin Hammam, a Qatari former Fifa executive committee member, paid $5 million in cash, gifts and legal fees to senior football officials to help build support for the bid.

It wasn’t the first instance of high-level corruption allegations in sport, or even the first time controversy surrounded a country winning host-status. But an event with the global pull of the World Cup, married with the clear improprieties of hosting the tournament in a desert – in the summer – inflated the sport’s fanbase.

The FIFA Qatar debate is a good place to start today’s session, ‘Corruption in Sport’, which will begin with a presentation by Jonathan Calvert and Heidi Blake, The Times journalists who broke the story this summer. Blake and Calvert will focus on how the Qatar scandal has evolved, before explaining the role of journalism in uncovering corruption in sport. The panelists will then move on to discuss a number of themes relating to sport’s susceptibility to corruption and the legal tools to battle it.

Growing pains
One widely held belief is that while sport’s business and marketing side has grown enormously over the past 15 years, its governance has not developed at the same pace. This effectively positions sport as a lucrative yet vulnerable target for criminality. Recent match-fixing and claims and governance scandals in almost all major European football leagues, international cricket, tennis, basketball and even badminton appear to back this up.

According to session chair Nick Benwell, a partner at Simmons & Simmons in London, the catch-all term ‘corruption’ takes wildly different forms depending on the sport, and that the session will examine the practice in all its forms. “We will look at corruption in relation to bids for events, corruption related to associated infrastructure projects for those events, but also match-fixing,” says Benwell.

The differences are stark. Match-fixing is heavily related to organised crime whereas the more large-scale corruption is more closely linked to the projects and bids themselves.

There are other, more specific causes for the rise in sporting corruption. A surge in online gambling is thought to have caused the growth in illegal betting. According to a study from the International Centre for Sport Security (ICCS), criminal bodies launder more than £80 billion a year from illegal betting, with football and cricket most heavily affected.

The ICCS estimated wagers worth between £164 billion and £408 billion were made each year around the world with more than 80% carried out illegally.

The session will examine this issue of gambling, but will also look at the weaknesses in sport that are ultimately exploited by individuals, and how those weaknesses can be addressed by education, regulatory oversight and enforcement within the sport itself and through the courts. “Governance is likely to be a theme that runs through the session,” says Benwell.

Sponsor responsibility
An unlikely source of upholding sport’s values is thought to be commercial sponsors, and speakers will tackle their role in fighting corruption. “It’s in sponsors’ interests to ensure sport is run in a clean way,” says Benwell, who insists that the measures they can take go further than simply terminating contracts with players or teams found guilty of corruption or doping.

Cycling’s Team Sky, for instance made pro-active steps in 2013, following Lance Armstrong’s revelations, to promote itself as a team that was actively anti-doping. It insisted on assurances from cyclists before signing up to the team as well as carrying out more rigorous testing. “These are the sorts of measures some of the more closely-involved sponsors can take.”

A more theoretical question to be answered is around the tolerance for corruption in sport. “Is the corruption that does occur taken less seriously because it takes place in sport, rather than the realm of more traditional businesses?” says Benwell. “We’ll be examining that too”.

The award will be presented by IBA’s Human Rights Award winner has shown outstanding dedication to Human rights in Bangladesh, even in the face of adversity, says Melissa Parvis

Since Bangladesh’s formation 43 years ago, its citizens have struggled to constitute a well-established democracy based on equality, human dignity and social justice. Violations of human rights in Bangladesh are common: extra-judicial killings, enforced disappearances and custodial torture have now become regular acts, allegedly practiced by law enforcement and government agents.

And over the past year, the lack of democracy in Bangladesh has worsened. During general elections in January 2014, government party nominees were declared elected by the electoral commission, without any contest in 153 of the 300 constituencies. Only 5% to 15% of the voting population participated in the elections, amid boycotts by other political parties who were not in the government alliance.

Which is why Odhikar, a small non-profit organisation registered in Dhaka, Bangladesh is more vital than ever. Odhikar encourages government transparency and accountability in order to improve the country’s human rights record and to facilitate an active democracy. Since its creation in 1994, the organisation has raised awareness of the civil and political rights abuses in Bangladesh, through non-partisan, consistent and unbiased human rights reporting.

Arbitrary arrest
Because Odhikar’s work regularly challenges government actions, its members have endured a multi-pronged attack on behalf of state agencies. This has included arbitrary arrest, wrongful imprison-

Odhikar’s members have endured a multi-pronged attack
ment, harassment, surveillance and monitoring. Adilur Rahman Khan, secretary of Odhikar, has been a specific target victim of such harassment for his dedication to the promotion of human rights.

Although the government’s attack has left Odhikar on the brink of closure, the ordeal has only strengthened the it willingness to commit to this cause.

Both Khan and Nasiruddin Elan, director of Odhikar, have been arbitrarily accused of producing false information in a fact-finding report published by Odhikar. The report revealed damning evidence that supported potential violations of human rights committed by government officials. If convicted, both Khan and Elan face between seven and 14 years imprisonment, along with a fine of up to £130,000.

Odhikar is the only NGO in Bangladesh that investigates violations of civil and political rights independent of government intervention. Due to the alleged wide-scale corruption in the Bangladesh government, Odhikar chooses to carry out its human rights work independently, challenging the government on human rights violations. But the organisation’s plight needs publicity to ensure it can continue its work in Bangladesh.

As a result of Khan’s bravery and outstanding commitment to the field of human rights in the face of adversity, he has been awarded this year’s IBA’s Human Rights Award.

“I’m extremely grateful to the International Bar Association for bestowing upon me such an honour,” says Khan. “It not only encourages me to continue my human rights work; but is also a catalyst and a boost of energy and renewed strength to the persecuted, harassed and threatened grass roots human rights defenders associated with Odhikar.”

The award will be presented by IBA President, Michael Reynolds, during the Rule of Law Symposium on Friday October 24 at 10am.
Meet our IBA team at today’s showcase panel session

The topic is, “The world invests in Asia & Asia invests in the world” and the session will be held in hall B7-2 from 09:30.

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Workplace quotas: enough already?

Quotas aimed at raising the number of disabled people in the workplace may have led to huge strides forward in some countries, but they have also been criticised on the grounds of tokenism and pigeon-holing.

The percentage of disabled people working in Germany increased by 12% as a result of quota laws. In Austria, research indicates the figure rose by 18%.

But panellists at one of yesterday’s sessions debated whether quotas really help disabled people, and are a good motivation, or whether they only encourage companies to hire disabled people because they are afraid of a lawsuit.

Under the German quota system, businesses are required to fill at least five percent of their workforce with disabled people.

“If companies don’t fulfil this quota, they have to pay an administrative fine of €10,000 ($12,800) as well as a monthly compensation charge of between €100 and €200,” said Regina Glaser, of Heuking Kühn Lüer Wokte in Germany, and co-chair of the Disability Rights Working Group.

“My experience is that employers refrain from hiring disabled people because, once they hire them, it’s very hard to dismiss them because they have special protection in Germany,” she added.

But Glaser continued that, to her surprise, almost every company in Germany fulfills this quota.

The US view

In contrast, quotas are prohibited in the US, and it is illegal to hire individuals on the grounds of disability.

But, said Philip Berkowitz, a US-based lawyer with Littler Mendelson, an employment and labour solutions company, the laws that prohibit discrimination in the US are vigorous.

“Employers are very concerned about accommodating employees with disabilities and indeed making opportunities available for employees with disabilities because they know they are going to get sued [if they don’t do so] and the lawsuit will be embarrassing and expensive,” he said during yesterday’s session.

“It sounds to me as though companies can essentially buy themselves out of any obligation under the quotas,” he said, referring to the German regime.

“I’m not sure what kind of opportunities they really provide to individuals who are disabled.”

“In Germany,” the quotas are set at five percent, so 93% of the time a company can choose to discriminate,” Berkowitz continued.

“You’re starting with a workforce which is maybe at best five percent disabled. In the US there is no such protection, you’re required to hire somebody who has a disability, so long as they can do the job.”

South Africa’s “forgotten class”

Another audience member noted that quotas aimed at raising the number of disabled employees had likewise failed in South Africa.

“The quota laws have made substantial progress on race and some progress on gender, but have noticeably failed in practice on disability,” said Stuart Harrison, co-chair of the Discrimination and Equality Law Committee.

Under South Africa’s quota system, employers must take affirmative action so that the demographics of their workforce represents the national demographics for disability, which is between three and five percent.

“[Disabled people] are the forgotten class of designated people to affirm in South Africa at the moment,” Harrison added.

If the quotas are not met, a fine will be levied, set at two percent of a company’s turnover. But, said Harrison, employers do not have to reach an empirical quota. Instead, they must show a reasonable progress towards achieving the demographics.

The history of Tokyo

As a city steeped in culture and tradition with a past that stretches back 400 years, Melissa Parvis investigates the rich history of Japan’s capital.

Originally named Edo, Tokyo began to thrive when Japan’s last feudal Japanese military government, the Tokugawa Shogunate, was established here in 1603.

Then, the capital of Japan was Kyoto, whilst Edo remained the second city.

Over the course of the 16th and 17th century, Edo became the centre of culture and politics in Japan. The city flourished and the population grew to over a million by the mid-18th century.

In 1868, Edo entered the Meiji period, when the isolated feudal government was overthrown by the new Imperial Empire.

The Emperor of Japan subsequently moved the Imperial Palace to Edo, and renamed the city Tokyo, the new capital of Japan.

During the Meiji era, Japan began integrating with western civilisation. Many buildings made of stone and brick were built and major roads were paved with round stones to mimic the fashionable streets commonly seen in Europe.

Western hairstyles replaced the traditional Japanese topknot worn by men, and bowler hats, high collars and bunched skirts were the height of fashion.

The year 1912 marked the end of Japan’s Meiji period, and the beginning of the Taisho period.

By this point, the number of people working and living in cities surpassed the rural population of Japan.

In September 1923, disaster struck though, as Tokyo was devastated by the Great Kanto Earthquake.

Fires caused by the earthquake burned the city centre to the ground. Over 140,000 people were reported dead or missing and 300,000 homes were destroyed.

Shortly after the Great Kanto Earthquake, the Showa era was established by the new emperor, Hirohito.

In this period, Japan opened its first subway line between Asakusa and Ueno in 1927.

By 1935, the resident population of Tokyo had grown to 6.36 million people, comparable to the current population of New York or London.

Firebombing raids

The year 1941 marked the outbreak of the Pacific War, which further ravaged the city of Tokyo. The war came to an end two years later when state representatives signed the Instrument of Surrender after Tokyo was firebombed 102 times.

Hundreds of thousands were killed.

Following the war, the population had halved from over 6 million in 1940, to just over 3 million in 1945.

The 1950s were a time of gradual recovery for the nation and, in the 1960s, Japan entered a period of rapid economic growth due to the increasing prevalence of technological innovation and the introduction of new industries.

This marked the beginning of mass production for Japanese consumers. As refrigerators, washing machines and televisions became widely available, the everyday lives of the residents of Tokyo underwent a considerable transformation.

In the 1970s, economic growth began to stagnate, as the country was beset by environmental issues and high levels of noise pollution caused by the rapidly emerging industries of the previous decade.

However, this progression was reversed in the 1980s as Tokyo became one of the world’s most active major cities; boasting cutting edge technology and a high level of public safety.

From 1986 onwards, Tokyo developed a bubble economy, where land and stock prices boomed until the 1990s, a decade characterised by economic malaise.

Today, Tokyo is a thriving and truly magical city. Having overcome economic boom and bust, firebombing raids and devastating earthquakes, it continues to evolve and develop into one of the largest and most eclectic cities on the planet.
Some general counsel fear they are not being acknowledged within their businesses, according to one senior in-house lawyer at yesterday’s conference.

Abhijit Mukhopadhyay, general counsel at global conglomerate Hinduja Group in London, said that he would regularly meet with other in-house peers and discuss the role.

“The common complaint is that we’re not being taken seriously in the organisation,” said Mukhopadhyay. “And its not being acknowledged within their role. That’s the reason that there’s a difference between the way we want the business to go and the way that it does,” he added.

Speaking at ‘Corporate counsel: confronting new challenges’, Mukhopadhyay and his panellists were adding to the findings from KPMG’s report ‘Over the horizon: how corporate counsel are crossing frontiers to address new challenges’.

The report, presented by Kathryn Britten, global head of legal services sector at KPMG, consisted of 13 in-depth interviews with general counsel. Its findings highlighted the changing roles of general counsel. A growing proportion of their work is not strictly involved in legal matters but in commercial decision-making, especially in the area of risk management.

Nevertheless the change in focus didn’t always translate into a rise in respect, which, the report found, normally came from length of time served in the company.

According to the report, most interviewees agreed that gaining influence tends to take years to build up, but the process can accelerate at critical times for the company.

“You should never waste a crisis,” said BT Group’s general counsel Dan Fitz.

Mukhopadhyay also commented on the trend of a new type of general counsel entirely: the emerging market GC, who 15 years ago would have been overseeing limited operations but is now responsible for large teams and substantial liabilities.

“The role of in-house at these companies has changed,” said Mukhopadhyay. “Imagine Indian companies 15 years ago tussling with Foreign Corrupt Practices Act, UK Bribery Act and anti-money laundering rules?”

Are GCs being taken seriously?

He also highlighted political tensions, which make Myanmar an uncertain place to do business.

Restricted activities

In theory a foreign investor can own 100% of a local entity, but the 2012 foreign investment law specifies a number of prohibited and restricted activities.

Prohibited activities include mining, administrating electricity supply and certain strategic national security interests.

An 80% ownership cap is placed on restricted activities. “Restricted activities involve most manufacturing operations, so to all intents and purposes, 90% of the things people want to invest in are in restricted areas which require joint venture (JV) partners,” said Walter.

Counterparty risk

That JV requirement increases counterparty risk.

“The number one piece of advice I always give […] is know who you are dealing with,” said Walter. “Make sure you are not dealing with people engaged in corrupt activities, make sure they are not on [US] lists of specially designated persons, do your homework in relation to your counterparty.”

Be patient

Lastly, Walter highlighted the patience required to do business in Myanmar. “You have to do it in partnership with local people and with a careful dialogue with the Myanmar government.”

Companies must not lose sight of the risks of doing business in Myanmar as international investors flock to the frontier market.

Speaking during a session on M&A in Asia yesterday, Michael Walter of Herbert Smith Freehills highlighted four challenges: ethnic tensions and political uncertainty; restricted activities; counterparty risk; and the time it takes to get things done.

“Myanmar isn’t so much an emerging market as a frontier market,” he said. “But the unexploited mineral wealth, natural resources, and opportunities in infrastructure are immense and people with patience and time that want to take advantage of those opportunities are very keen.”

Ethnic tensions

Myanmar’s population stands at just over 51 million, with 135 different ethnic groups comprising significant minorities. Ethnic tension is always an issue, said Walter.

He also highlighted political tensions, which make Myanmar an uncertain place to do business.

Make sure you are not dealing with people engaged in corrupt activities, and they are not on [US] lists of specially designated persons

Myanmar: worth the risk

Recent developments have transformed data privacy for internet intermediaries into a legal minefield, ensuring this afternoon’s session, ‘Don’t shoot the messenger’ shouldn’t be missed.

In May 2014, the EU Court of Justice ruled against Google Spain, stating that the EU Data Protection Directive includes a so-called right to be forgotten. Across the Atlantic, technology companies have fought US government information demands.

Both have been difficult compliance topics for technology companies, who have found themselves caught between consumers and their governments.

There will be debate on the EU Court of Justice ruling, which permits users to demand the removal of websites from search engines – even if they contain accurate and lawful information.

This will be the first time Joachim Munoz, the lawyer who acted for the plaintiff in the Google Spain case, will speak on a panel with the search engines, represented by Microsoft’s Steve Crown and Google’s David Schilling.

Mark Stephens, partner at HowardKennedyFsi, urges delegates to attend because every lawyer at this conference may be affected. The EU hopes to apply this law internationally, while other countries are considering implementing similar versions. “It’s catching on like wildfire,” he says.

While the EU side focuses on whether information should be forgotten, the US part of this session is likely to focus on information collection by governments. This will involve panellists Robert Litt, general counsel of the US’ Office of the Director of National Intelligence, and Jameel Jaffee, deputy legal director at the American Civil Liberties Union (ACLU). This is first time the American security services will debate the ACLU on this topic in a public forum, says Stephens.

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PREVIEW

Data mines

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SESSION

Don’t shoot the messenger: imposing liability on internet intermediaries for user-generated content – what should the rules be?

MEDIA LAW COMMITTEE AND TECHNOLOGY LAW COMMITTEE

Wednesday, 2.30pm – 5.30pm, Hall B7-2

Key takeaways

• The responsibility of internet intermediaries for user-generated content remains a difficult legal topic, with the EU and US taking notably different stances;

• This session will represent the first time Joachim Munoz, the lawyer who acted for the plaintiff in the EU Court of Justice’s ruling against Google Spain, will debate lawyers from search engines;

• On the US side, a lawyer from the American security services will discuss data privacy and intermediaries with one from the ACLU.
VOX POPS:
What do you come to the annual IBA conference for?

Sir Peter Singer
Former British High Court judge
England
Cherry blossoms and new acquaintances inspire better horizons. As a retired judge I’m free from the burden of sitting in court all day, so my horizons can be broadened.

Jan Antonija Stanich
Oman tourism department
Oman
I came because I am the only lawyer in a department and this is a chance to connect with colleagues. It’s also a chance update myself on best practices.

Emilia Eyo Danabia
Nigerian Ministry of Justice
Nigeria
I know the experience I will gain here will help me to prosecute cases in my country. We need to introduce more international law here, because we have a lot of genocide issues.

Kwon Lee
Lee International
South Korea
This is a really interesting event because I work with a lot of Japanese clients and it has been very good to be here and meet the Japanese lawyers.

Niranjan Chakraborty
Supreme Court of England and Wales
India
I came to learn about the latest laws from different jurisdictions which are affecting global business, and in particular human rights – especially in regard to the rule of law in different jurisdictions.

Armen Khachaturyan
Asters
Ukraine
I came this year because of the venue and to catch up with new trends. This is a good opportunity to be keep up with colleagues and to update my skills.

Nicholas O’Donnell
Sullivan & Worcester
US
It’s a great place to meet people at the top of the profession from around the world. I find that people come with an open mind to meet each other, and it’s not competitive.

Orit Gonen
Gilat Bareket & Co
Israel
This is my first time, I wanted to check out the conference and see what it was all about. It’s a nice way to meet new associates and grow my network.

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