Why Basel III won’t save us

Basel III plans to raise banks’ capital requirements were slammed yesterday as both short-sighted and ineffectual.

Speaking at yesterday’s session, ‘The People v the financial industry’, Hendrik Haag said stifling the industry with overregulation in the hope of avoiding another crisis would not work.

“It is short-sighted of politicians to think they can impose additional deposit requirements on the financial sector and still expect the industry to continue to play a role in financing the market,” he said. “For the economy to grow fast you need there to be enough cheap money coming in.”

Wardyński & Partners’ Krzysztof Wojdylo said the proposed Tier One capital requirements under Basel III would not solve the majority of problems in most banks as it required too little capital to be retained. The average solvency ratios of Polish banks during the 2008 financial crisis were 2% to 3% higher than the current Basel III proposals. “High capital requirements are the main reason why the Polish banking sector performed so well through the last crisis,” he said.

Royal Bank of Scotland’s Robert McMillan believed regulatory bank capital should involve qualitative not quantitative assessment as well as direct calculations on individual financial institutions. Basing capital requirement increases on bank business model could mean failure of some but that was no bad thing. Walder Wyss’s Markus Pfenniger said the stipulation that banks put up more equity when taking more risk made sense. But he argued the practical reality of such an approach had not been adequately thought through. “Banks won’t agree to pay increased costs when negotiating large credit facility under LMA standards, for example,” he said.

Haag believed efforts to shore up the sector should be more focused on banks’ liquidity and investor confidence, he said.

“It is hoped that investors’ distrust in the market will not be as severe when bank capital requirements are higher, that the move will restore confidence in loss absorbing capacity of the market,” he said. “But if you look at what politicians’ treatment of risk weighting with government debt, it is unsurprising the public has become so cynical.”

“Rogue trading is often very hard to spot, so it becomes a fundamental issue in the sector – that one decision made by one person in one minute could become a real problem.”

Government had played a complicit role in encouraging the bubble, he said. Prior to the 2008 financial crisis banks simply did what they were expected to do. “That’s why I have no trust in such things as the European Systemic Risk Board or the US Financial Stability Oversight Council,” he said. “In the spring of 2007, they would probably have done nothing, because that was the general sentiment then.”

Rescue funds

The perception that banks have become too reliant on the concept of taxpayer-funded bail outs had prompted the politicians to come up with the concept of rescue fund, explained Haag. “This is a huge risk, but doesn’t hurt liquidity in financial markets and it can manage the ‘too big to fail’ issue. It also doesn’t require global participation.”

But Haag argued the concept raised an equal treatment issue. “Should banks not be treated in the same manner as other systemically important businesses, such as the nuclear energy sector?” he asked.

Crus said the banking sector was too interconnected to be compared or treated in a similar fashion to other industries. Wojdylo questioned whether rescue funds could ever be strong enough to protect the financial institutions in the face of multiple collapse of SIFIs [systemically important financial institutions].

Rogue trading

The panel unanimously agreed, however, on the need for greater regulation and surveillance of trading. “Crooked transactions corrode confidence and hurt institutions and investors,” said Cruz.

Haag said back office controls needed to be addressed. “After Nick Leeson bought down Barings banks, nobody thought this could happen again,” he said. “It is appalling that it has.”

Monitoring of rogue trading was a matter of operational risk, according to McMillan. “Regulation in this area is fine,” he said. “Everybody knows you shouldn’t be allowing traders to excessively trade and hide their losses. But the issue remains as to how you get controls in place to fix human errors.”

“Rogue trading is often very hard to spot, so it becomes a control issue not a regulatory one,” he said.

Wodjdylo said the 2008 financial crisis had highlighted a fundamental issue in the sector – that one decision made by one person in one minute could become a real problem. “It also highlighted the problems caused by the huge amount of surplus cash flowing around the world,” he said. “Put simply, no one knows what to do with this excess cash and that has resulted in situation where financial markets have themselves from the real economy.”

This presented a problem not only for lawyers but also economists and politicians. “Each year we have more new money coming in so each year the risks are multiplied,” he said.

The market had become credit junkies, reliant on foolish practices enabling credit to fall into the wrong hands. That had to change, he said. But the solution is unclear.
### CRIMINAL INDUSTRIES

**How lawyers can crush human trafficking**

The US Ambassador Luis CdeBaca issued a call to action yesterday in the global fight against human trafficking.

At least 12.3 million adults and children are in forced and bonded labour and commercial sexual servitude, according to the International Labour Organisation.

“The battle to end trafficking has only just begun,” said CdeBaca, adding that lawyers are best placed to provide the protection necessary to make a difference.

“There are things an individual lawyer can do based on his or her skill set, in negotiation and business development, for example, that no one else can,” he said. “Lawyers can help change the world.”

“Human trafficking survivors do not only need help in criminal cases but also assistance in negotiating welfare systems, as well as family and property law-related advice,” he said.

Microsoft’s Peter Avina said lawyers should also work to raise corporate awareness of the issue by advising clients on how best to ensure they and their supply chain are 100% slavery-free.

“Lawyers are a corporation’s first line of defence,” he said. It is their duty to make clients aware of the prevalence of human trafficking. They should also protect them from the reputational risks of association with the practice by making them aware of their moral and legal obligation to carry out the due diligence necessary to prevent their subcontractors being implicated, he said.

Ambassador CdeBaca believed there was an obvious business case for involvement in the cause. Those corporations that actively work to maintain a supply chain free from any association with slavery not only minimize reputational risks faced but also maximize profits. For example, retail businesses earn a 10 to 20% profit increase on any products which are proven to have no link to human or sex trafficking, he said.

“Global responsibility and the bottom line can be the same thing,” he said.

But lawyers’ involvement should not be limited to professional advice. The Ambassador called for delegates to get involved in local anti-human trafficking organisations. Where there aren’t those groups already in place, then set about establishing them, he said.

Bar associations, international and otherwise, could play a critical role too in helping to raise not just awareness but also possibility to the individual lawyer. “Raising awareness is not enough, it’s passive,” he said. “This is about enabling the individual lawyer to see how he can be part of this battle.”

### WAR CRIMES

A conversation with Cherif Bassioni

With clients increasingly demanding fee certainty, legal process outsourcing (LPO) can provide benefits for firms of all sizes – not just international firms.

“This [outsourcing] is an issue that firms of all sizes need to think about,” said Stephen Revell of Freshfields Bruckhaus Deringer at yesterday’s panel session “Rethinking the law firm LPO: outsourcing of legal services. “It can empower a small firm to have world-class support services that are equivalent to a big firm.”

The majority of the legal process outsourcing work has focused on English language work for US and UK law firms, due largely to the language being widely spoken in India.

John Croft of LPO provider Integreon said that while English language work makes up a large percentage of its volume, LPOs can cover other languages – Integreon can work in languages such as French and Farsi, he said.

As the market develops, this capability is likely to expand, particularly for back office functions such as human resources administration and research. Dino Wilkinson of Norton Rose in Abu Dhabi said that his firm can already send a client research request to his firm’s outsourcing company in India in four languages and get the work back the next day.

Not all work needs to be done in India though. According to Wilkinson, Francophone North Africa is set to become a hub for French firms, Central Europe for German firms, and Egypt for UAE and Saudi Arabian firms.

There’s no doubt that the cost savings are strong. Catherine Amirif of Debevoise & Plimpton said that junior associates can charge up to $400 per hour in the US for litigation work; outsourcing that work to an offshore LPO could cost as little as $90 per hour.

Keeping costs low can also free up resources to fight more nuisance litigations, she said, because often clients settle as the costs of preparing a case are no longer worth it.

While the initial LPO structure of outsourcing a single practice area to India was largely rejected by law firms, Croft said the newer, so-called LPO 2.0 model, taking in multiple practice areas and using India, the Philippines and onshore sites, is gaining popularity.

**C**herif Bassioni, the distinguished war crimes expert, has said that he does not believe Saif Al-Islam, Gaddafi’s fugitive son, should face justice in the Hague.

According to Bassioni, speaking in an open forum yesterday, Gaddafi should be made to stand trial in Libya.

“This would bring out all the abuses that have been committed against Libyans,” he said. “We have been going from a war crime to a war crime.

Iraq and Darfur, Bassiouni was asked how he managed to keep his faith in human nature.

“I am an optimist,” he said. “His daughter was a classmate of one of the girls there and she begged her father to go and prepare to rape her so that she would be spared.”

These are the stories that reinforce Bassiouni’s faith in the human spirit.

At least 12.3 million adults and children are in forced and bonded labour and commercial sexual servitude, according to the International Labour Organisation.

The lawyer suggested that the area’s future could be similar to mini EU, with a common electricity grid and the free movement of people.

“You don’t shoot at someone who can turn off your electricity and water,” he said. “If you have commonality then you can have greater interests about the future than we have problems about the past.”

At the close of an interview that covered a town in which Serbs had locked Croat and Bosnian women in a factory and were dragging men from the street to rape them.

“There was a man who went there on his mountain to climb, but there is definitely hope.”

“Global responsibility and the bottom line can be the same thing,” he said.

But lawyers’ involvement should not be limited to professional advice. The Ambassador called for delegates to get involved in local anti-human trafficking organisations. Where there aren’t those groups already in place, then set about establishing them, he said.

Bar associations, international and otherwise, could play a critical role too in helping to raise not just awareness but also possibility to the individual lawyer. “Raising awareness is not enough, it’s passive,” he said. “This is about enabling the individual lawyer to see how he can be part of this battle.”

IBA Corporate Social Responsibility Committee co-chair and Lexinexis global chief legal officer, Kenneth Thompson II said fighting human trafficking should follow a three-pronged approach, which includes raising awareness, enabling survivor support and advising on policy reform and implementation. “This is happening everywhere, it is in everyone’s backyards,” he said. “It is a hidden crime.”

International Justice Mission’s Peter Williams said it was critical to not lose sight of the individual in any efforts to combat human trafficking. “If we work to protect the individual, we can then build on those efforts by collaborating with national organisations and authorities to scale-up smaller successes,” he said. “We have a mountain to climb, but there is definitely hope.”

The time had come to make up for the millions of people who had lived and died in slavery, added Ambassador CdeBaca. “They say that lawyers are workaholics so I can think of nothing kinder to say to my colleagues then; let’s get to work.”

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Negotiations between companies and private equity investors can be difficult, requiring time, diplomacy and collaborative discussions. According to Tuesday morning's lively "Dealing with stakeholders – from cradle to the grave" panel, there are at least three contentious areas within the term sheet that both sides must be prepared to negotiate.

For those who missed session, here are some tips from the experts on how to approach negotiations.

Control
This is always the key factor for both company and investors, with private equity firms wanting to ensure that they have the appropriate level of influence over the business.

According to Andrew Thompson of Cravath Swaine & Moore in New York, acting for the investors in today’s mock negotiation panel "there would be serious issues on control if the company wanted to maintain full control despite receiving a sizeable investment."

During the session, the company pushed for 49% of the share capital, saying that the investors were entitled to two board seats out of five.

Although the equity firm was not seeking to run the management of the company, it wanted an advisory role in its development. "It is critical to us that in the downside scenario or if we disagree with the direction the company is taking, we have the ability to step in," Thompson added.

Due diligence
Although lawyers for the target company said that it had carried out extensive due diligence, with no public information, counsel for investors pushed for even more comfort.

"The management must step up and support the indemnification," said Thompson.

Faced with this demand, Gisèle Rosselle of White & Case in Brussels, acting for the company, said that they were only prepared to give limited warranties, which they considered acceptable in light of the due diligence.

In this scenario, with neither side willing to give in, the company ultimately agreed to give representations and warranties on specific areas that concerned the investors.

Private equity firms need to gain robust assurance that, if the company is found not to have told them everything it knows, knowingly or negligently, they retain the right to take appropriate action.

Agreement in this area has to be subject to the agreement of any business angel investors who may have a prior interest in the company.

Economic issues
The third and final term debated during the panel was the economic returns proposed on the term sheet.

Private equity parties were pushing for a cumulative dividend and quarterly returns to allow them to build up an interest in the company.

On being offered minority rights and protections at board level, Thompson was firm, saying that, on top of these customary protections, his client would want the ability to maintain control on exit. Without this control, they would need extensive veto rights.

Another contentious issue that Thompson was inflexible on was securing protection against an optional redemption. This was to allow his client to maximize the value of their investment and limit a third party’s ability to take them out easily.

Insolvency plans
The tone of negotiations will change in the event that a previously successful company is in default of its obligations.

The three points lawyers for the bank syndicate looked for were that their right to take action by enforcing and selling assets was acknowledged; that it would not share this right with another party; and that it could act in a way that minimized external control.

"A strong preference is to delist the company and remove it from the equity markets," said A&L Goodbody’s Paul White.

On top of the company’s request for a standstill agreement to give it time to produce a restructuring plan, Thompson questioned the appointment of a receiver with unfettered ability to sell the assets.

To limit this, counsel for the equity investors proposed putting in place certain thresholds. Like the bank, private equity wants to recover as much of its investment as possible. An important factor if events progress to this stage is to limit the way the receiver can behave within the context of the restructuring plan.
Resolving restructuring in the UAE

With the landmark completion of Dubai World still making headlines, Gemma Varriale explores why many think that the UAE’s insolvency laws need to change.

Before the financial crisis, insolvency cases were so rare in the UAE that people began to question whether the region had an insolvency law at all. However, few would now dispute that the UAE has an insolvency law. In fact, almost a third of the provisions of Federal Law No 18 1993 (Commercial Transactions Law) address insolvency and bankruptcy procedures.

But there are questions surrounding how this largely untested framework will be applied and whether the law is compatible with international statutory provisions.

According to Mazen Boustany of UAE law firm Habib Al Mulla, the globally significant Dubai World did not resolve the basic issues around restructuring in the region.

Dubai World was an amicable restructuring agreement that did not test the UAE insolvency provisions. With Dubai World and its subsidiaries, government intervention prompted a change of law to allow bespoke restructuring solutions.

On top of this, companies have tended to initiate private proceedings. The result is that federal insolvency law is for the most part untested in the UAE courts. The wide discretion given to bankruptcy courts increases uncertainty around how proceedings will unfold in practice.

A major issue for (relatively) newer markets like Dubai is that the lack of a transparent insolvency scheme is not only burdensome for companies, but the uncertainty prevents the region from attracting as much capital as it otherwise could.

UAE insolvency proceedings rely on the same legislation to deal with insolvencies of both banks and non-financial institutions.

According to Boustany, this needs to change to ensure that the region complies with what is happening in the most advanced financial centres around the world.

Not only is there no separate legal framework to address the orderly resolution of financial institutions, but the commercial transactions law applies indiscriminately to both conventional and Islamic financial institutions.

Boustany, one of the panellists on the insolvency and sharia law session on November 2, will discuss whether a separate set of sharia provisions should apply to Islamic financial institutions.

At present, lawyers are debating whether it would be better to wait until the UAE insolvency law is applied before amendments are made or whether moves should commence to amend it as soon as possible.

Another concern with the UAE’s insolvency procedures is that lenders in the region rely heavily on post-dated cheques, which, if not honoured constitute a crime punishable by imprisonment.

“This over-reliance on the cheque will hinder any application of insolvency procedures,” said Boustany. “Clearly most lenders would rather use the cheques they hold as security to instigate criminal proceedings than go through the long and difficult process of an insolvency.”

Filing a criminal complaint allows the creditor to avoid the normal insolvency procedure in favour of a criminal proceeding that eliminates any option of the company surviving.

In 2009, the UAE proposed to start proceedings to criminalise the cheque and apply the insolvency law. However, many believe that reliance on post-dated cheques is too deeply entrenched within the system for these moves to yield any real results.

International perspective

The international experience with Islamic products is also in need of clarification.

According to Justin Fogarty, co-chair of the reorganisation and workouts subcommittee, some jurisdictions are still working out the kinks in harmonising sharia law principles and banking law and insolvency law.

“Refinements are continuing,” he said. “There is still a gulf in understanding how sharia law works as compared to the standard securitisation transactions that western countries use.”

Uncertainty also surrounds what laws will apply to assets and undertakings. Today’s panel, entitled ‘Insolvency and Sharia law’ will discuss different impacts from the chapter 11 context to domestic insolvency proceedings.

A leading authority is the British case of Shamil Bank of Britain v Besimex Pharmaceuticals. This held that it’s not possible to stipulate that the national law governing a contract is subject to sharia principles. As a result, contracts have to be drafted carefully and clearly state the governing law. Most Islamic contracts are governed by English law, with some under New York law.

Innovative asset classes such as sukuk (sharia-compliant Islamic financial certificates) are relatively young. The regulations have never been tested as regards the treatment of Islamic bonds in the event of an insolvency and whether they would rank the same as other financial debt.

The recent case of the Investment Dar restructuring might arise at today’s session. This involved a Kuwaiti investment company that owned a 50% stake in Anton Martin Lagonda, the luxury car manufacturer.

Investment Dar was the first Gulf company to default on its repayment obligations under a sukuk. Because the sukuk was an asset based or unsecured sukuk, the investors did not have priority over the assets of the defaulting company.

On Sharia financing in general, Boustany believes that there are clear advantages of the capital source (the lender) sharing the risk and reward of the business venture.

Islamic finance is based on Sharia law, a religious law derived from the Holy Koran. It prohibits the payment and receipt of interest.

However, from a purely financial perspective, there are many downsides to Sharia finance, added Boustany. The primary concern is its historic reliance on the underlying assets, which are vulnerable to swift reductions in value.

Sharia financing was meant to appeal to a broader investor base than just the Muslim community, said Boustany.

“Islamic finance has taken a hit and is more restrictive than it was three or four years ago,” he said. “It will attract more people when it offers the returns it used to.”

Dr Mohd Duad Bakar of the Amanie Islamic Finance Consultancy and Education says that one way of improving the system is to reduce the risk associated with the instruments. This would require the development of a robust rating system so that investors have more information around the asset class.

Sharia law principles are highly refined and codified and sukuk are difficult to structure. By nature, they require costly and time-consuming legal and religious advice.

Following Boustany’s advice through creativity would be labour-intensive and would need extensive market research.

In a region that is still rumoured to prosecute debtors with prison sentences, it seems that there is some way to go before the UAE reaches international standards of transparency in its as yet untested insolvency laws.
In the internet age, buyers and sellers are matched up at the click of a button. If customers want a specific book, they visit Amazon's website, browse what's on offer, make their choice and wait for delivery.

Now imagine if it was possible to do this with human organs.

"It would be Amazon.org I suppose," says Neil Kirby of Werksmans in Johannesburg, one of the panellists in the ‘Buying bodies and the need for spare parts’ session led by the Medicine and the Law committee.

Presently the only parties which can trade body parts are hospitals and research facilities, and only on a donation basis. However Kirby believes this area needs re-regulation to allow for more widespread trading of organs, which would not only quash an insidious underground black market but may produce medical advancement in organ donations or the creation of organs.

It may also spell the end of the saga patients face to organise donation or the years spent on waiting lists.

However moral considerations have largely held back the development of a framework. People feel uncomfortable with the commodification of the human body. The law is also traditionally slow to react to changes in society. This advance of medical technology often poses new questions that remain unanswered by law.

"At the moment you could grow a liver outside your own body using your own cells. If it turns out I do that and I don’t need the liver, am I allowed to sell the organ?" says Kirby.

"I don’t think legislators know where to start on this issue," he says.

A functioning framework would have to have a very strict set of guidelines in a statute or legislation. Human organs are a special commodity that can run into a number of difficult issues such as potential defects or disease. Then there is the question about the extent of guarantees. However Kirby doesn’t think this is beyond the scope of the law.

He suggests establishing an international central registry with people waiting for organs as a result of a chronic failure of their own. Someone would need to supervise that registry and broker sales between the donor and donee.

The same process could be done domestically by establishing a registrar who manages a list to facilitate the transaction to ensure it’s conducted correctly.

But it isn’t just organs that face legal uncertainty. Surrogacy has been a grey area for a number of years, and lawyers are calling for an international approach to standardising the disparate legal positions on the practice.

For example, surrogacy agreements are illegal in the UK if they are for commercial purposes, so prospective couples need to visit countries such as Romania or Lithuania where the practise is legal. However when the child is born the couple can’t bring it back to the UK as it’s not recognised as the couple’s child.

Kirby says other difficulties arise when considering what can go wrong in a surrogacy: for example, a carrying mother could transmit Down Syndrome; there might be twins; the couple might change their mind – all areas that differ country by country.

Gillian Rivers of Collyer Bristow in London says there are discussions at the Permanent Court of Arbitration at The Hague to see to what extent some form of international treaty could be applied. But there is little progress.

"In the meantime lots of children are going to be born into the world under these surrogacy agreements and will be caught in the dilemma of being designated as legal orphans and stateless," says Rivers.
Fighting for Chinese transparency

A lawyer with corporate expertise and an activist streak can be a rare commodity in China, but Yan Yiming has both. Here, he talks to Lucy McNulty about his motivation and priorities

“Fighting for Chinese transparency is not just about the money.”

He wants the Chinese government to live up to pledges of transparency and accountability, especially with so much of the nation’s economic fortunes now resting on state spending plans. But China’s Communist Party discloses only the barest outline of the country’s small shareholders.

First developing an interest in the law after China began reforming its legal system in the late 1970s, Yan initially worked as an in-house counsel at Shanghai’s Bao Steel Group, before moving to Japan to study antitrust. A stint at a Japanese law firm helped land him a job as partner at Shanghai’s largest law firm, AllBright in 1999.

It was there he cemented his reputation as a champion of the underdog. Working tirelessly to protect shareholders’ rights by improving corporate governance of listed companies, as well as by promoting the legislation and transparency of China’s stock market, he targeted unscrupulous managers at China’s listed companies, who doctored their books, issued false revenue and earnings reports, and thereby cheated the small shareholders who make up the bulk of China’s investment class.

By fighting for the rights of the minority, it was his hope China’s legal system would become more transparent and that a fairer stock-trading scheme could be thereby be promoted within the country.

His decision to establish his own firm – Yan Yiming Law Firm in 2005 – prompted a shift in focus, however, to campaign for greater disclosure of government information and lobby authorities to improve the transparency of information as well as to exercise the administrative powers within the framework of law.

“My decision to practice law in China, coincided with a dream I had to make contributions to social justice in China”

The stock market in China was lacking in orders and full of chaos. That prompted my decision to choose to focus on securities law and domestic stock market in the early days.

Serious violations of small investors’ rights were rife in the domestic stock market in the early days. And so my decision to practice law in China, coincided with a dream I had to make contributions to social justice in China. That prompted my decision to choose to focus on securities law and particularly on the rights of small shareholders. At the time, China’s stock market was lacking in orders and full of chaos.

How has this experience benefited you in recent years?

Actually it hasn’t. My focus has brought with it a considerable amount of trouble to be honest. In recent years I have been repeatedly threatened. In one incident, I was accused of extorting a listing company and investigated by police when I helped a group of small shareholders in a case against this listing company.

What is your career highlight and why?

It is hard to pick just one. My reason for being is to pursue justice and fairness at all costs and the fact I have succeeded in doing so is a highlight alone because such a motivation is easy to talk about but hard to implement. I scored a big victory in January 2002, when China’s Supreme People’s Court ordered that lower courts must consider cases filed by me and other lawyers on behalf of small investors. The ruling came after a court in Shanghai refused to hear a suit filed on behalf of minority shareholders by me against biochemical company Guangxia (Yinchuan) Industry. The plaintiffs charged that the company’s misleading financial reports had caused the shareholders - mainly retirees and laid-off workers - to lose their savings. When Shanghai’s High People’s Court refused to hear the case, the shareholders staged a week of demonstrations, and I appealed to the higher court. The case marked China’s first collective, or class action for small shareholders’ protection. It was a huge step in nation’s stock market growth history.

What changes to the Chinese legal system do you predict in the near term?

I believe the Chinese legal system has degenerated in recent years. It is too lacking in independence and overly influenced by other so-called non-legal forces. For example, the current chief judge of the Supreme People’s Court insists that case trials must be grouped with the Party’s interests.

Some trials have even been intervened in the name of Party’s interests. The authority thereby places the Party’s interests over the evidence submitted and laws breached within such cases and laws and subsequently causes the country’s legal system to deteriorate. This needs to change. I want to see this happen. I want to help this happen.

What do you hope to achieve at the IBA Annual Conference?

I intend to use the forum to offer insight into collective action cases in China, and to promote discussion on developments and issues within the country’s legal system. I welcome all kinds of questions. I encourage contentious discussions.

I am also very interested in learning more about the Anglo-Saxon jurisdictions. I have never been to Europe, and want to know more about the region’s jury system. Chinese trials are too often hindered by differences of opinions and other such obstacles. This has made it very hard for China’s courts to make an independent decision, especially in controversial cases. For that reason, I am very curious as to how ordinary people in the Anglo-Saxon jurisdictions express their own voice in cases tried by Jury. It is a system that was established in early Medieval England, how does it continue to work in such a busy business-focused and internet-dominated society?

More generally, I think the IBA could focus more on promoting the rule-of-law in developing countries. More specifically, I believe the IBA could better support those lawyers who are practicing in the pro bono publico area within their own countries.
HEAR FROM HADEF & PARTNERS
AT THE IBA CONFERENCE TODAY

WEDNESDAY, 2 NOVEMBER 2011

9.30am – 12.30pm

ALAN RODGERS
Insolvency and Islamic Sharia principles and practice
Banking Law Committee / Insolvency, Restructuring and Creditors’ Rights Committee

BARTON HOGGARD
Role of counsel in mergers and acquisition transactions
Joint Corporate Counsel Forum and the Corporate and M&A Law Committee

RICHARD BRIGGS
Litigation in the Middle East and Islamic world
Litigation Committee

2.30pm – 5.30pm

RICHARD BRIGGS
Risks and liabilities in developing offshore resources
Maritime and Transport Law Committee

www.hadefpartners.com
There is also debate about what platforms we will use. As a US lawyer, London or Hong Kong we utilise for certain products. What will take place will involve where and what vehicles in New York, London or Dubai look like three four or five years from now. Many of the changes everybody in the firm, not just the legal department, has to be aware of.

Could you explain a typical day?

I'm clearly a generalist so I can't really structure my day, as the hot topics can change all the time and my agenda moves around a lot. I try to be as strategic and forward thinking as I can but it's not always possible. I think of myself as a consultative adviser to the senior business colleagues. Whatever is top of their agenda is on mine.

My team comprises 350 people in 30 countries in Europe, Middle East and Africa. I have lawyers in South Africa, the Czech Republic, Poland, and Russia. It makes the job much more different than that of a London financial services lawyer. London is merely a piece – albeit an important one. But covering Pakistan is tricky given the political and military situation.

How do you cope with the huge US and EU regulatory divergence on a practical basis?

The legal teams don't work in a vacuum. They plug into the business practices here. It is crucial for banks to be able to understand the cultural sensitivities in the business practices here.

It is a talent Yamahara dismisses as an obvious consequence of a career that has seen her move from New York to Japan via Hong Kong. “My experience has given me insight into the unique set of pressures in these markets. Clients need that understanding,” she says.

The ability to bridge cultural divides is crucial for most roles within an international financial institution operating in Tokyo. “Japan has the world’s third largest GDP but it is still very introverted and quite domestic,” explains Yamahara. “It is crucial for banks to be able to understand the cultural sensitivities in the business practices here.”

Few could say they are closer to their company’s core business than Yamahara is. With an office originally on Citi Japan’s trading floor, she has had to develop a very hands-on approach, tackling problems across a myriad of legal sectors and jurisdictions – from Japanese law to securities regulations. A task, Yamahara says, which required a “significant mindset shift from service provider to generalist.”

“My interface with the business is so much closer and so much more profound,” she says. Recognition for such success is always a high point, she says. Of course, the low-point is an obvious one. When the most powerful – and expensive – natural disaster hit on the morning of March 11, the country was thrown into a turmoil from which it is only just recovering.

“Every day following the earthquake was deeply scary and challenging,” she says. “In a situation like that, you have to rally together – maintaining a business-as-usual ethos in the hope that confidence would be restored and the markets reinvigorated.”
MERGING LEGAL: BANK OF AMERICA WITH MERRILL

Glen Rae
Bank of America Merrill Lynch

The strength of the team he has built at Bank of America Merrill Lynch, coupled with his clout in external business relationships puts Glen Rae’s position in our list beyond question. His influence extends far beyond that of most general counsel, and as the global relationship manager for 12 law firms working with the bank’s global banking and markets division, Rae has honed an appreciation for how a legal division fits within an investment bank’s operations.

“You need to run your legal group like a business,” he says. “We partner with firms who will work with us in multiple areas so that they gain institutional knowledge and contribute to the bank’s overall quality of service.”

Rae’s team is now nine times bigger than when he joined Bank of America in 2004. By applying the bank’s strategic hiring process when merging the legacy teams in 2009 – focusing on how each individual fits within the team – Rae could build the legal foundation needed to support the merged bank’s business.

In early 2010, one year after the bank’s merger, the culmination of Rae’s team’s work gave him a career highlight: “Really one of the proudest moments was seeing how, across the board, the team was working as a combined legal department and people were performing at their best.”

His highly performing and well respected team (including the likes of Tom Yang) had integrated, was winning industry awards, and was taking leadership positions on bodies such as Sifma (Securities Industry & Financial Markets Association), Afme (Association for Financial Markets in Europe) and Icma (International Capital Markets Association).

Rae is the north American chair of Isda’s (International Swaps & Derivatives Association) equity derivatives committee, and worked on the July 2011 update to Isda’s 2002 equity derivative definitions (a committee he co-chaired). The new definitions reflect the wider range of products now traded, and were constructed after careful consideration of the market events over the past nine years. “We have tried to get the equity derivatives market ready for centralised clearing by providing a matrix structure to put together a standard template where you have key standardised terms,” he explains.

Post-merger, Rae’s role became much more global, requiring him to spend increasing amounts of time in Europe and Asia. And this is where he sees most of the bank’s growth; not in the US, but overseas, particularly Asia and emerging markets.

“Those areas have their own rules and practices which we have to adapt to, and what I’m involved in is trying to keep global consistency to manage reputational risks with our business,” he says. “That’s one of the key themes of the job that I do.”

THE LEGAL BUILDER

Peter Siembab
Bank of America

If there is an overarching theme in Peter Siembab’s career as an in-house counsel, it is that he loves building things.

Whether it is coming to Asia to build out the infrastructure at his firms or creating a network within the in-house community, his desire to create shines through.

Siembab’s success as an in-house is partly down to another one of his strengths: communication. This was forged over years working in the entertainment industry and later through broadcast media business and regulatory work in Washington DC. And it prompted his move to Skadden Arps Slate Meagher & Flom to focus on transactional work.

But what changed his life was his move to Asia. “I came to Hong Kong for a two-week business trip and never looked back,” says Siembab. “I fell in love with the place.”

“Getting a job here was a seminal event for me,” he says. “The issues were complex and novel, the clients were interesting and diverse and the team in the office was terrific – they remain my best friends today.”

Since becoming an in-house counsel he has been a leader in the investment banking community, raising important issues for discussion at industry forums and with regulators. He views it as his duty as a bankers’ counsel to maintain the standards of best practices. And can frequently be found reminding his colleagues and external lawyers, it is the community’s responsibility to the market and to investors that standards are upheld.

“This is a competitive environment, so financial institutions may look for ways to gain advantages, and that may include cutting corners,” says Siembab. “In Asia, my colleagues and I are the safety net. We each have a moral and ethical obligation to protect the integrity of the market.”

“Any scandal can create a crisis in confidence in the market,” he says. “As a maturing market, it is incumbent on each of us do whatever we can to prevent such incidents.”

This philosophy was evident in his role as a lawyer at Cit-
ibank. There he covered legal matters for investment banking, and then retail banking where he worked on, among other things, customer complaints relating to the sales of Lehman Brothers structured notes.

From Citi, he moved to Nomura. “I saw this as a growth company looking to expand its product and footprint,” says Siembab. “The combination of building out the infrastructure, developing documentation and policies as well as running a team, was a positive experience and it brought me back to my core capabilities.”

His most recent move to head the investment banking legal team at Bank of America Merrill Lynch was motivated not only by his personal connection with the brand but also a desire to contribute through a bigger platform.

“There’s an emotional tie to this place,” he explains. “Growing up in California, Bank of America branches were everywhere around me. I had a Bank of America account when I was younger and it became a place I knew and trusted.”

LEADING SCOTIABANK’S LATAM EXPANSION

Deborah Alexander
Scotiabank

As the general counsel of Canada’s most international bank, Deborah Alexander’s role on foreign acquisitions could have been one of oversight. Instead, she is a key figure in the Scotiabank’s expansion, particularly in Latin America, and has tackled hands-on the challenges of operating in such diverse jurisdictions.

Alexander’s involvement at all transaction levels and in compliance has made her a compelling influence within Scotiabank, and one of the country’s most revered bankers’ counsel.

Does the interplay of your various roles allow you to have a broader scope of influence within the bank?

Since joining the bank nearly 10 years ago my role has evolved, and the bank has been very inclusive in terms of putting me on the executive management committee. I’ve developed very good working relationships with the group heads of all the business lines and my role is to facilitate and help them grow and develop their businesses instead of being an obstacle to them getting where they need to get to. So I think we have a very collaborative working group here at the bank.

Do you think there’s a risk of legal departments being more obstructive than constructive to a bank’s plans?

I think it’s only a risk if you’ve got somebody who isn’t prepared to say no. If I have to say no, I try to come up with a solution that gets to the same point. That goes to a bigger issue that I’ve identified: the role of general counsel, especially in a financial institution, requires a great deal of experience being an outside lawyer. When you come in-house, you are not as independent as when you are external, but you still need that ability to say no and be able to persuade people that your legal conclusions are valid. I do that by trying to find that solution, and that requires experience. A lot of young people might be very, very bright, but I think they need external experience before they can be an effective general counsel.

Which countries have you helped the bank enter since you joined?

We now have operations in Uruguay and Columbia, and are expanding in Central America and Asia. I was also involved in the major acquisition that substantially increased our very small operation in Peru. The owners were leaving the country and we were expanding so there were many government issues which made the structuring quite complicated. We had to deal with many political issues that you would not normally see in North America. In each case though I haven’t seen us do a large transaction in a country where we don’t have an existing footprint.

When you first joined the bank, it was starting to withdraw from Argentina following its debt crisis. How did that experience prepare you for your future challenges?

Getting out of Argentina was very difficult and probably gave me the best introduction to senior management I could have had. With those events, people get to know each other very quickly and you develop good relationships much quicker than usual. There is always a silver lining in bad things in the sense that it really does make people work well as a team and you walk away feeling like you accomplished something together. That’s a great way to start. You are an outsider, and it helps you earn your stripes on the inside.

The Corruption of Foreign Public Officials Act has received a lot of attention recently. How has the bank approached its compliance procedures?

There was a lot of concern when the UK Bribery Act came out because of its broader scope than the Canadian and US legislation; its not permitting facilitation payments and dealing with everyone, not just public officials. But many countries don’t allow facilitation payments and something which I think shows how international Scotiabank truly is, is that we decided several years ago not to permit facilitation payments and deal with bribery in connection with everybody not just public officials. So we had already written a code of conduct that’s in line with the UK’s, and we didn’t have to do any changes.

The compliance group reports through to me, and I’ve tried to make sure that we have processes from the very top down, because with some of this legislation not having a process in itself is a criminal offence.

With such a diverse international footprint, how do you manage the scope of regulations the bank must comply with?

It’s much more complicated for us than it might be for some of our peers in fewer countries, and we’re very careful to ensure we understand the local regulatory issues when the bank enters somewhere new. But Basel III and Dodd-Frank generally apply to all banks around the world, so in that sense we are not at any disadvantage.

What are the biggest concerns for Scotiabank regarding Basel III and Canadian regulation?

Trying to get a level playing field; ensuring that Canadian banks aren’t prejudiced for having more aggressive and rigid standards that aren’t present in other jurisdictions. Because we are in so many jurisdictions, we could be at a disadvantage internationally. The big issue generally for Canadian banks, though, is to minimise their regulation caused by the poor performance of other countries. All Canadian banks, especially Scotiabank, went into the crisis with a great deal of capital and we performed very, very well. It would be unfortunate if Canadian banks would have to pay the price for the mistakes of others.
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The whole idea of Fsoc has never been tried before,” said one bankers’ counsel, and these questions are a side-effect of a first attempt to regulate on a systemic level.

The real division among the country’s regulatory lawyers is over which agency must put the Sifi criteria into rules. Over one third of respondents believe Fsoc can’t write these rules. “For it [Fsoc] to go out and write rules on how to become a Sifi is beyond the authority it has been given by Congress,” said one respondent. Some believe the Council was intended to be an overseer and that true authority in this regard lies with the Federal Reserve.

Of those who believe Fsoc isn’t empowered to forge its criteria into rules, some see a simple way around this. “It does not in fact need regulations in order to make those designations,” noted a Washington-based partner. Guidelines could be just as effective, they said.

But for every lawyer who thinks Fsoc can’t write these rules, there is another who believes it can. “I’m in agreement that it really shouldn’t be writing substantive rules, but there is a certain amount of definitional rulemaking it needs to do,” said one New York-based partner. The argument is that Fsoc must decide which entities are Sifis, and so to that extent it must write the implementing regulations.

“They can write certain rules. They are required to designate Sifis, so the question really is what the rule is about,” said one Washington-based counsel.

Others in this category, however, have taken a strict reading of Dodd-Frank’s text and agree it’s questionable whether Fsoc can write these rules. They believe this will be overcome by some sort of plenary or generic authority being imposed on Fsoc by the courts.

And in court is where many respondents expect this issue to be resolved. One Washington-based counsel believes these queries are a warning to Fsoc to not overdo its designations. “Because if they bring too many non-bank institutions into the fold of financial regulation, one of them will sue and allege it doesn’t have authority,” he said.
Kenyan ICC case tests Rome Statute

The International Criminal Court’s (ICC) first-of-its kind proceedings arising from Kenya’s post-election violence is becoming a test case for key provisions and principles underlying the Rome Statute and international humanitarian law.

A panel of international and humanitarian law experts at Tuesday’s session ‘The ICC in Kenya: an early assessment’ described the proceedings as the most fascinating use of powers of the international community to bring about peace and reconciliation, and an excellent case study of the difficult relationship between justice, peace and prevention of future crimes.

Two cases brought by the ICC see six individuals accused of crimes against humanity for inciting violence after the December 2007 presidential elections which left over 1100 dead. Both cases were instigated by the ICC prosecutor of his own volition. All previous cases have occurred on the request of a national government or upon instructions of the UN Security Council.

“It’s very significant that this is the first time the prosecutor has acted proprio motu to initiate a case in a new country,” said panelist Juan Mendez, UN special rapporteur on torture and co-chair of the IBA’s Human Rights Institute.

But optics is also important, and for ICC investigations and proceedings to remain credible, its processes must be assessed from the perspective of those looking from the outside, according to panelist Greg Kehoe of Greenberg Taurig, who represents a defendant in one of the Kenya cases.

“This proceeding is a good laboratory as to how these cases are going to be viewed,” he said.

In addition to this being a propio motu first, other factors have come together to make these cases a key exercise of the ICC’s governing principle of complementarity, which permits it to act only when the relevant government is unwilling or unable to act.

At the beginning of his investigations, prosecutor Luis Moreno Ocampo was handed a sealed envelope listing the names of key suspects identified by the Waki Commission (chaired by a Kenyan judge) in its investigations into the violence.

The prosecutor gave the government ample time to start investigations before invoking his proprio motu powers, according to panelists, but the parliament refused on two separate occasions to set up special tribunals to investigate the events.

Notwithstanding this, the Kenyan government has since tried and failed to have the ICC proceedings transferred to domestic courts.

Panelists agreed that the threat of international intervention helped reduce the post-election violence, which was so severe that UN Secretary General Ban Ki-moon called on the international community to bring about peace and reconciliation.

But Kehoe said the question that will continue to be asked throughout the Kenya proceedings is whether, based on the facts of the case and also for reasons related to the appearance of ICC processes, it’s wise to bring such conflict before the ICC.

For instance, the court’s jurisdiction over crimes against humanity is designed to cover widespread systematic attacks against the civilian population, and must be done pursuant to a state or organisational policy.

Kehoe noted a dissenting judgment in the summonses in the Kenya cases stressed the need for there to be a structured entity to meet the organisational policy test, and said this point has been at the centre of proceedings to date.

The understanding of many is that the ICC prosecutor relied little on the Waki Commission’s investigations, and required, has relied on his own staff and investigations. Kehoe said: “I have to disagree with this.” He said around 70% of the evidence presented by the prosecutor has come from reports coming out of the Waki Commission, plus UN and NGO reports.

Fellow panelist Kenneth Akide, chair of the Law Society of Kenya, said he was certain there were more than six – possibly up to ten – names in the sealed envelope handed to the ICC prosecutor.

Kehoe also contested the view that the ICC pre-trial chamber had validated the Kenya cases – either through upholding the prosecutor’s general actions to date or refusing the government’s attempts to transfer proceedings. He noted that at this point of proceedings there has been no opportunity to present a defence, so to say the chamber has validated the proceedings in any way is not accurate.

In summary, he said: “Scrutinising this case is important at many different levels.”

At a broader level, other panelists conceded that there will always be objections to international justice mechanisms becoming involved in non-international violence. The most frequent claim is that it can make peace negotiations more difficult which, in turn, can risk further violence.

Mendez agreed this is a respectable position to take, and that country experts are best placed to know in any instance. But in the situations he knows, the argument has not been that persuasive. Breaking the cycle of impunity is part of the arsenal of tools to avoid further mass atrocities, he said.

Accountability, protection, humanitarian assistance and peace negotiation are the four areas which must work together to prevent these events. “I think Kenya is an example of all those four working effectively together,” he said.

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VOX POP

**QUESTION:**
What have you enjoyed in Dubai and what are you looking forward to doing?

**Eyitayo Fatogun**
Awamolo & Associates
Nigeria

I’m here with my family so we’re planning to go on desert safari together. I also want to see the Burj Al Arab to find out what the world’s only seven star hotel really looks like. I’m also sure I’ll get lost in the malls at some point this week!

**Abdul Rahman Al Fardan**
Al Fardan Lawyer and Legal Consultants
Dubai

I live here so I can only really offer tips on what to do. I recommend visiting the museums that talk about the UAE’s history. It will be easier to understand the Emirates’ speedy development. We also have beautiful beaches such as Jumeirah and about 100km away, Khor Fakkan which is stunning.

**Kelsey Froehlich**
James Mintz Group
UK

I got lost in the Dubai mall when trying to make my way between law firms – I wouldn’t recommend that! I was at the Armani Lounge last night which was really good. Before I go though, I’d like to go skiing in the indoor facility and visit that huge aquarium in Dubai mall.

**Dr Markus Zwicky**
Zwicky Windlin & Partners
Switzerland

I wanted to get a clearer sense of what Dubai is like to live in and how it had successfully developed so quickly. I was lucky enough to be invited to an expatriate garden party which was great. I also went to a fantastic Halloween party in the Armani Lounge.

**Tanimu Inuwa**
Independent National Electoral Commission
Nigeria

I really want to go sightseeing. I saw huge developments yesterday in the centre of town. It just baffles me how the country has developed so much in such a short space of time – and so peacefully too. I’ve also been enjoying the Middle Eastern food, which is delicious here.

**Asad Abedi**
Hatem Abbas Ghazzawi & Co
Saudi Arabia

I live nearby in Jeddah, so have a lot of friends and colleagues here. This week I’m just going to call them up and go for dinner and maybe some shopping. I’ve never been but I have heard the desert safari is fun, so I might try and fit that in if I have time.

**R A Inko-Dokubo**
Rose & Associates
Nigeria

I actually most enjoyed the metro. It’s so easy to access from my hotel in Deira and really convenient for the convention. I’ve also been to the markets which I would recommend. Most enjoyably though, I went to the gold city where I traded some of my old gold for cash. I got a great price!

**Ranjit Malhotra**
Malhotra & Malhotra Associates
India

I’ve been here since Saturday and all the shopping has been amazing. Last night after the Hadef party I was able to shop at 10pm which I can’t do in India. The shop Candylicious in the Dubai mall is the biggest chocolate and sweet shop in the world, so I stocked up for my daughters.
How tax has matured in the GCC

One of the most frequently asked questions surrounding tax in the Gulf Cooperation Council (GCC) countries is: what does a tax adviser do in a tax-free environment? Delegates gained some insights into the topic.

One response to the question was that when entities in this region expand multinationally, tax clearly becomes very important. But this is fast becoming an increasingly defunct question, given the changes to the way tax operates in the GCC countries.

Many of the GCC countries have had tax systems in place for several decades, originally introduced for oil companies. The application of these systems subsequently widened to cover any multinational operating in the region.

According to session chair Robert Peake, senior strategic adviser at the Cratus group, under previous systems, doing business was restricted and local agents were required. But in the last 10 years this has opened up, one example being Saudi Arabia, which has opened up most sectors to foreigners.

But, Peake added, this is not entirely uniform. In Kuwait joint ventures must still be entered into, with a Kuwait national required to hold at least 51% of the entity, and the foreign partner 49% or less.

These have been the historical business contexts in which the way tax operates has been reflected, with very limited tax legislation in terms of written words. There was previously, therefore, a heavy reliance on the tax authority’s policy and practice instead, and this served as tax legislation.

The panel pointed out that this was extremely difficult because authority tax policy was confidential and could not be accessed by the public, or by tax advisers. This led to an unhelpful trial and error approach.

Further, tax inspectors were often expatriates and they brought policies with them. “For instance, an Indian or an Egyptian inspector (in the GCC region) referred to Indian or Egyptian tax law,” said Peake.

Discriminatory taxes

In Saudi Arabia, Kuwait and Qatar, taxes were applied in a discriminatory fashion, applying to foreign companies but not nationals, or, as in Oman, at least imposing lower rates for nationals. The rates applied were also high and therefore prohibitive, which, said Peake and Janssen, is set to continue increasing, the TIEAs carry the weight they are intended to.

The rates applied were also high and therefore prohibitive, and there was no true concept of permanent establishment or what constituted a taxable presence. This meant liabilities could arise out of bizarre situations where no activity occurred in the country claiming tax, or where there was the briefest of visits, “extremely difficult because authority tax policy was confidential and could not be accessed by the public, or by tax advisers. This led to an unhelpful trial and error approach.

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However, there are tests, or reviews, being prepared to see if the TIEAs carry the weight they are intended to.

Despite such reform, there is still discrimination in the treatment of locals versus foreigners, except in Oman.

There have also been decreases in the income tax rates – Kuwait to 15%, Oman to 12%, Qatar to 10% and Saudi Arabia to 20% – and the introduction of withholding tax in a number of countries is becoming “quite a major feature” of the tax codes.

“The concept of permanent establishment is also entering into tax law. With the exception of Kuwait, which tries to tax with the merest of excuses, you no longer get taxed for the brief-est of visits,” said Peake.

“There is still ambiguity, but it is far more certain than before,” he added.

Tax authorities in the region are increasingly being run by nationals. The panelists agreed that this has caused an upturn in professionalism, as well as easing taxpayer interaction, because of their desire to develop their own tax laws and practices rather than borrow from others.

National law firms are also on the up, and are growing in confidence too.

“National law firms are now challenging the tax authorities more, leading to more disputes and dispute resolutions,” said Peake. “This is better for taxpayers as much fairer outcomes are achieved.

Tax treaty network

“There are new double tax treaties signed on a monthly basis with jurisdictions around the world,” said Stijn Janssen, of Loyens & Loef of Dubai, and Peake’s co-chair, before moving on to analyse the dichotomy between “old style and new style” when it comes to treaties in the GCC.

2005-2006 marked a new era for treaties in the region. “Before this, they were between countries within the region,” said Janssen. “That’s why they are quite often only available in Arabic.”

These treaties are essentially in line with OECD guidance, rather than being based on UN models.

“But there are important deviations,” said Janssen. “For instance, on residency.”

There is also a lot of pressure from the OECD for countries to implement tax information exchange agreements (TIEAs) and all GCC countries are on the OECD white list, which requires at least 12 treaties to be in place.

However, there are tests, or reviews, being prepared to see if countries can actually provide the information and thereby ensure the TIEAs carry the weight they are intended to.

Despite such treaty network widening and modernising, which, said Peake and Janssen, is set to continue increasing, the signing of treaties does still create tension in the area.

“There is still a sense that treaties reduce sovereignty,” said Peake.
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