Counsel share tales of products gone wrong

Photographs of handcuffed executives being led into court, company presidents apologizing on television and crowds jeering corporate spokesmen were among alarming images used at a session yesterday to illustrate the difficulties surrounding product recalls.

Panelists including John Packman, food law counsel at The Coca-Cola Company and Don Lofty, in-house counsel at SC Johnson & Son, shared stories about the problems companies face when products are blamed for accidents.

Coca-Cola's Packman opened his presentation with video footage of news coverage from yesterday morning about E-coli found in US spinach, a story that also featured on the front page of USA Today. Several producers have already recalled packaged spinach while regulators have advised consumers to stop buying spinach altogether.

"Undertaking a recall will draw the attention of both regulators and potential plaintiffs," said Packman. "But failing to recall will increase your company's potential liability, not decrease it."

Ingo Kruse, a lawyer with Lungershausen & Smith based in Germany, recounted the stories of Toyota and Mitsuibishi, both of which have faced regulatory investigations in Japan related to defects in the cars they manufacture. In the case of Mitsuibishi the negative media coverage related to product recalls contributed to a 56.3% drop in new sales of passenger vehicles in 2004, he explained.

Kristen went on to highlight difficulties faced by Mitsuibishi in Turkey, a case in which the company was fully absolved. The German car maker became the subject of a sustained media and political campaign accusing the company of producing faulty vehicles after a bus crash in the village of Konya in which 49 children died.

Despite the driver of the bus driving without a licence, being blind in one eye and speeding at the time of the crash, the judge ruled that the company executives were guilty of murder, a charge that had not even been made against them. The judgment was subsequently overturned on appeal.

SC Johnson’s Don Lofty shared his experience with the audience concerning a gel candle that turned out to burn with an unusually high flame and was deemed a fire hazard by the company. Although the company recalled their packaged spinach in 1.7 million candles were sold without a single fire being reported, SC Johnson recalled the product three months after launch. In the US, products need not cause actual harm to consumers to fall under the regulatory regime requiring a recall, explained Lofty:

"With the media you are often subjected to consumer distress to consumers. A recall too early or too broadly can cause unnecessary anxiety and even distress to consumers."

Lofty echoed this view. "Your story regime requiring a recall, products need not cause actual harm to consumers to fall under the regulatory regime requiring a recall, the company was absolved. The case became the subject of a media and political campaign accusing the company of manufacturing faulty vehicles after a bus crash in the village of Konya in which 49 children died. Despite the driver of the bus driving without a licence, being blind in one eye and speeding at the time of the crash, the judge ruled that the company executives were guilty of murder, a charge that had not even been made against them. The judgment was subsequently overturned on appeal.

Counsel share tales of products gone wrong

HUMAN TRAFFICKING

Panelists at Monday’s session on procedures for the prosecution of traffickers in humans for sexual and labour exploitation agreed that the role of N on-Governmental Organizations (NGOs) is crucial.

One of the key issues addressed was the need to train law enforcement officials to approach victims of human trafficking with sensitivity. "The first impression is the one that counts," said Anna Rodriguez of the NGO, Florida Coalition Against Human Trafficking (FCAHT). Rodriguez said that, since many victims of human trafficking have been transported from countries where law enforcement is corrupt, they are often distrustful of authorities and unwilling to relate their stories to officials, which can undermine efforts to prosecute human traffickers.

According to panelist Douglas Melloy, chief assistant attorney at the US Attorney’s Office for the Middle District of Florida, NGOs are most qualified to deal with such victims, and thereby form an integral part of the solution to human trafficking.

"NGOs secret weapon against traffickers..."
Saddam’s lessons from the Chicago Seven

Saddam’s lessons from the Chicago Seven

Surprises in yesterday’s session The Chicago Seven Reloaded included audience members punching the air amid shouts of “Right on”. David McQuoid-Mason, a professor at the University of Kwazulu-Natal in South Africa, led the session using role plays to recreate scenes from the Chicago Seven in Chicago in 1969.

Speakers drew parallels between tactics used by the defence in that trial and in the trial of Nielson Manuela seven years earlier. They went on to talk about how similar tactics are arguably being imported into the defence of Saddam Hussein in his trial for war crimes in Iraq.

All three trials are examples of a so-called power-oriented approach to lawyering, explained speakers. Rather than argue their case within the rules of the courtroom, the defendants questioned the legitimacy of the trial process itself. “This turns the court into a political arena,” said McQuoid-Mason.

Ed O’Brien of Street Law in Maryland set the scene for the session by describing the political assassinations and troop deployment to Vietnam that formed the backdrop to the Chicago riot. Ahead of the Democratic Convention that sparked the riot, the City’s mayor had claimed that hippies would poison the water supply with LSD, he said.

In the trial, several of the defendants sought to expose what they saw as the injustices in the American judicial system by attracting as much press attention as possible. Their tactics included wearing hippie clothes and judicial robes to court, blowing kisses to the jury and placing the flag of the National Liberation Front on the defense table. One of the lead lawyers for the defense, William Kunstler, was subsequently convicted of contempt of court and sentenced to six months imprisonment, later overturned at appeal.

In one outburst, reenacted by audience members during yesterday’s session, Kunstler told Judge Hoffman: “I have sat here for four and a half months and I watched the objections denied and sustained by your Honor, and I know this is not a fair trial. I know it in my heart. If I have to lose my licence to practice law and if I have to go to jail, I can’t think of a better course to go to jail for and to lose my licence for... than to tell your Honor that you are doing a disservice to the law.”

McQuoid-Mason pointed to similarities in the way that Nielson Manuela used the court as a forum in which to challenge apartheid during several trials in the early 1960s. At his first trial, McQuoid-Mason made a symbolic gesture by attending court in traditional leopard-skin dress before challenging the idea that he was morally bound to obey laws made by a parliament in which he had no representation. Manuela has said: “I wanted to make it clear to the bench, the gallery and the press that I intended to put the state on trial.”

In more recent times the defence team for Saddam Hussein has been said to be using a similar tactic. And, in a fascinating twist, Ramsey Clark, the attorney general who declined to prosecute the Chicago Seven and was later called as a defence witness in their trial, is now part of the defence team for Saddam Hussein. Clark has been accused of actively importing the disruptive strategies used in the Chicago Seven trial to that of the Iraqi dictator.

The three trials raise important questions about how lawyers and judges should behave in politically charged cases, says McQuoid-Mason. Among the lessons that advocates can take from these cases is how and when it might be appropriate to take advantage of an opportunity to use a trial as a chance to influence public opinion. Doing this requires lawyers to depart from their usual legal skills and engage in an exercise in political theatre, explains McQuoid-Mason.

In an unjust society, doing that might be a lawyer’s best or only option. Judges, on the other hand, must consider how they should deal with defendants attempting to undermine the judicial process. The defendants in the Chicago Seven trial considered Hoffman’s reactionary response to their behaviour to be an unexpected boost for their case.

Hoffman ordered Bobby Seale, the leader of the Black Panther movement, who was on trial alongside the Chicago Seven, to be bound and gagged in the courtroom – the only time before or since that a defendant has been treated that way in the US.

Some in the audience at yesterday’s session were unconvinced by the tactics under discussion. One suggested that Kuntler could have made a better case for his clients by speaking less about his personal disappointment in the court and more about the prejudice of the court against his client. “He lost his rag and lost his focus,” said the delegate.

TRIAL TACTICS

“The trials of both Saddam Hussein and Nelson Mandela are examples of a so-called power-oriented approach to lawyering”

IBA DELEGATE QUIZ

Join the fun

Throughout the week, the IBA will be running a competition for IBA delegates. Winners will be announced each day in the IBA DAILY NEWS. Below is a list of questions which must be answered correctly on the correct day. Answers should be written on the back of a business card and put in a ballot box on the IBA Marketing Stand. There will be a different prize every day.

TUESDAY

1) How many different Thomson brands are under their Legal & Regulatory division? Thomson stand

2) Which are the five largest law firms in the world, by revenue and by attorney count? Is the order the same for both metrics? ALM stand

3) Who is the author of The Tyrannicide Brief and what is the subject matter? Hammicks Legal Bookshop Stand

Quiz rules

1) One entry per person per day – Entries each day must only answer the question for that day

2) Winners will be announced each day in the IBA Daily News

3) Winners will be selected on Thursday 21 September at 5pm

4) Winners will be listed in the IBA Daily News

5) Prize – Cartier Pen

6) Wipe your correct answer on your business card and post it in the ballot box on the IBA Marketing Stand

7) A winner will be drawn at the relevant exhibitor stands

8) Staff of the IBA and exhibitors cannot enter the competition

9) IBA design is final
Delegates at a showcase session on economic development and the rule of law heard that there has been a “massive shift” toward judicial development assistance, but no evidence that the schemes are yielding positive results.

More investigation into the efficacy of the many rule of law-enhancing projects is needed, said Livingston Armytage, senior counsel, legal and judicial reform, at the United Nations. At present, delegates were told, the international community is spending around $1.5 billion every year on judicial reform internationally without qualitative evidence that the reforms actually work.

Speaking at the session presented by the Public and Professional Interest Division, Armytage said that there has been a “rule of law revival” in that it is now universally accepted among donor organizations that the rule of law is vital for building a framework to secure investment and provide security. But more effort was needed on the part of the international community to accurately measure the results of this revival.

Earlier delegates had heard from Glenn Yago, director of capital studies at the Milken Institute. Yago pointed to his organization’s work on opacity (the degree to which countries lack clear, accurate, easily discernible and widely accepted practices governing the relationships among businesses, investors and governments) to demonstrate the link between legal transparency and investment. Business faces two types of risk, said Yago. The first is headline-grabbing, large-scale but low frequency risks that include wars, natural disasters and acts of terrorism. The second type is smaller in scale but high in frequency, and includes unenforceable contracts, fraudulent transactions and legal complexity. It is these smaller-scale risks that interfere with commerce, add to costs and slow growth. Yago used the growing trend in cross-border M&A to show delegates that legal risk deters investment. Lack of legal and regulatory transparency should be seen as a tax on business, said Yago, but also an opportunity for lawyers.

Delegates were presented with an opportunity map that, by plotting economic growth against legal complexity, shows where justice system reform is especially important. The results demonstrated that reform is particularly pressing in the European Union, China and India.

“Lawyers have a big role to play in reducing transactional costs,” said David Freestone, deputy general counsel at the World Bank. Freestone demonstrated that there is a direct positive correlation between economic development and a country’s rule of law index (a score taking into account different measures of procedural and substantive legal clarity).

Livingston Armytage

HEDGE FUNDS

Hedge funds are at a turning point

Lawyers at a session on the role of hedge funds yesterday were split over the direction the industry will take in the future.

Some saw the recent reversal of US registration as the peak of disclosure, with the investigation and attention paid to funds in US Congress inevitably lessening. Others pointed to the fact that only a handful of funds have deregistered since the Court of Appeals decision in June, and that an increasing number are taking on other forms of disclosure, such as appointing independent directors.

Panellist Scott J Lederman, of Grosvenor Capital Management, said that although only a few hedge funds had deregistered since the Court of Appeals decision in June, and that an increasing number of independent directors have been appointed, this wasn’t necessarily a sign of acceptance of disclosure. “M any of the funds are adopting a wait-and-see approach because the registration process was a headache, so it makes sense to be absolutely sure before unwinding it, and because there are still rumblings in Washington about a challenge to the ruling,” he said.

Lederman did also point out, however, that some funds have found that they are more popular with institutional investors as a result of the transparency brought about by registration. Jon Fowler, of Maples and Calder, said that the change in boards of directors at many funds was a sign of greater disclosure: “The drive towards greater corporate governance can be seen in the number of independent directors at many funds. Often the majority, say two out of three, are independent.”

H owever, Philip Harris of Skadden Arps Slate Meagher & Flom argued that the importance of directors varies. “For some, corporate governance is just another form of marketing. Others genuinely support the idea of independent directors, often because it takes some of the pressure off them as managers,” he said.

In addition to providing comprehensive legal advice to our clients in all areas of a corporate and commercial practice, we are:

Effective Efficiency International Independent

Over 170 specialized lawyers and tax advisors provide full service M&A, regulatory compliance, and dispute settlement counselling.

www.legalmediagroup.com

IBA Daily News - Tuesday, September 19 2006
Freakish success

An economics book that analyzes crack dealing, sumo wrestling and the Ku Klux Clan? It’s Steven Levitt’s book Freakonomics, and Nicholas Pettifer spoke to the University of Chicago professor as he prepared for the IBA’s International Rule of Law Symposium.

S t even Levitt does not crave attention. “I’m not someone who likes to be in the spotlight,” he says. “I don’t like birthday parties; I’ve never had a birthday party and I never want a birthday party. I’m just kind of a loner.” Yet over the last 12 months, he has had to deal with the phenomenal success of his bestselling book: Freakonomics.

Levitt is sympathetic towards them. “They respond to incentives,” he explains. “It’s not really their fault that the incentives are skewed in a way that makes them not want to serve their clients’ best interests. They come off bad, but it could have been auto mechanics, maybe even lawyers.

“Brokers get big commissions from the first offer. So they step on the heels of their clients,” explains Levitt rather matter-of-factly. “And they are often not willing to take on risk.”

Despite attacking real-estate agents in the book, Levitt is sympathetic towards them. “They respond to incentives,” he explains. “It’s not really their fault that the incentives are skewed in a way that makes them not want to serve their clients’ best interests.

The bad news for the real-estate agents is the fact that the data is there to let you see their behaviour,” he continues. Lawyers don’t often represent themselves, but real-estate agents in the US have to make clear their ownership interests when they list their own homes. So Levitt could see that they left their properties on the market longer than they do for clients and waited for the best offer.

However, Levitt believes that “real-estate agents are no different to any other profession; it’s just that we can see it, we can document it.” There is little doubt that doctors, auto mechanics and lawyers will breathe a sigh of relief at the fact that they are not Levitt’s scapegoats in proving his point.

In a more controversial section of Freakonomics, Levitt tackles the huge dip in crime in America in the 1990s. Most of the chapter analyzes the seven popular explanations: innovative policing strategies, increased reliance on prisons, changes in crack and other drug markets, aging of the population, tougher gun control laws, a strong economy and an increased number of police.

While Levitt agrees that these three of do have an impact, he is not completely satisfied and poses an alternative reason – Roe v. Wade. He proposes that the legalization of abortion in 1973 meant that the lowest classes had access to the procedure. By the mid-1990s, this meant that society was missing a large proportion of people who were the most likely to turn to crime.

Naturally, when Levitt first put forward this theory in an economics paper, the media leached onto it. “I was just incredibely impressed with him and when he left neither of us had any intention of ever seeing each other again. But then people really liked the piece and the publishers started calling.”

Initially Levitt was sceptical about writing a book, but soon recognized that Dubner’s enormous amount of effort in learning about what he did gave him confidence. “More than that, he recognized that Dubner’s enormous amount of effort in learning about what he did gave him confidence. “More than that, he recognized that Dubner’s enormous amount of effort in learning about what he did gave him confidence.

But what is this voice and what is it talking about? It is a “somewhat tongue-in-cheek” (Levitt’s own description) look into the application of economic theory to everyday life. It is a simplified synopsis of some of the papers Levitt has written over the last 10 years. However, on a number of occasions it also explains how two seemingly unrelated groups in society are incredibly similar.

Levitt works purely on subjects that stimulate him. He observes changes in society and quirky, almost trivial facts and uses economic theory to explore the causation. For example, the book tells us that teachers cheat, as do sumo wrestlers, crack dealers operate to a complex business plan and a real-estate agent’s commission is not greatly affected by an extra $10,000 on the purchase price.

This is why lots of teachers were getting good bonuses for improved grades, why crack dealers at the bottom of the structure still live with their mums (because they earn less than minimum wage) and why real-estate agents urge you to accept the first decent offer for your house.

Despite attacking real-estate agents in the book, Levitt is sympathetic towards them. “They respond to incentives,” he explains. “It’s not really their fault that the incentives are skewed in a way that makes them not want to serve their clients’ best interests. They come off bad, but it could have been doctors, it could have been auto mechanics, maybe even lawyers.

“The bad news for the real-estate agents is the fact that the data is there to let you see their behaviour,” he continues. Lawyers don’t often represent themselves, but real-estate agents in the US have to make clear their ownership interests when they list their own homes. So Levitt could see that they left their properties on the market longer than they do for clients and waited for the best offer.

However, Levitt believes that “real-estate agents are no different to any other profession; it’s just that we can see it, we can document it.” There is little doubt that doctors, auto mechanics and lawyers will breathe a sigh of relief at the fact that they are not Levitt’s scapegoats in proving his point.

In a more controversial section of Freakonomics, Levitt tackles the huge dip in crime in America in the 1990s. Most of the chapter analyzes the seven popular explanations: innovative policing strategies, increased reliance on prisons, changes in crack and other drug markets, aging of the population, tougher gun control laws, a strong economy and an increased number of police.

While Levitt agrees that these three of do have an impact, he is not completely satisfied and poses an alternative reason – Roe v. Wade. He proposes that the legalization of abortion in 1973 meant that the lowest classes had access to the procedure. By the mid-1990s, this meant that society was missing a large proportion of people who were the most likely to turn to crime.

Naturally, when Levitt first put forward this theory in an economics paper, the media leached onto it. “I could never tell the abortion story in a full way,” Levitt explains. “It’d always been moderated through very short media clips and taken out of context.”

Despite feeling that the topic was old hat, Levitt and Dubner decided to include the abortion issue to fully explain the theory. As a result, the chapter


Thank you to our clients, colleagues and community for recognizing our performance.

The American Lawyer’s “A-List” identified Jenner & Block as one of the top 20 law firms in the nation.

BTI Consulting Group’s survey indicated corporate counsel consider Jenner & Block a “go-to” law firm and one of the “Power Elite.”

The American Lawyer’s “Litigation Department of the Year” edition recognized Jenner & Block as having one of the top five litigation departments in the country.

JENNER&BLOCK

CHICAGO | DALLAS | NEW YORK | WASHINGTON, DC | JENNER & BLOCK LLP | JENNER.COM
does not come across as an ideological argument and even ends with a pro-life tilt to it if anything.

Levitt admits that there has still been controversy: "Every time the abortion issue comes up it’s like it comes anew and no one has ever heard it before." But he notes that "there is not the sort of anger and hatred that has happened in the past. People are somewhat accepting of it now."

This may also be due to Levitt proclaiming that it is only a theory, just like aging of the population or an increased police presence. It is the sensitive nature of the topic that courts controversy. "Many people don't agree with it and I think that's right. It's a theory. It's somewhat speculative and it may be right, it may be wrong. People are entitled to their opinions."

A brief flick through the book confirms why Levitt has caused such a splash in economics. He incorporates sociological and psychological factors in his microeconomics research in a way that others have tried and failed to do. "It is not because of me, it is because, like me, these young economists are seeing the opportunities."

"I think I am more a reflection of a trend than the cause," he says. "I'm not sure if it has made my research better or worse, but it has certainly changed the nature of what I'm doing," Levitt says, and he even goes on to admit that he is tackling certain issues regarding terrorism. "It's a new move in economics, an overdue one and I think a very important one."

Hopefully some of you will have caught Levitt's opinions on Saturday morning and who knows, perhaps you witnessed the spark for a chapter in *Freakonomics 2*. I'm not sure if it has made my research better or worse, but it has certainly changed the nature of what I'm doing," Levitt says, and he even goes on to admit that he is tackling certain issues regarding terrorism. "It's a new move in economics, an overdue one and I think a very important one."

Due to this feverish activity ("I'm doing so much stuff I can barely remember myself what I'm working on") it looks like publishers and fans of the book will have to wait for *Freakonomics 2*. "We are going to do another book," Levitt says, "but in order to produce another book I've got to do the research, so that's in process. I think we are looking at maybe 2010 for a new book to come out."

In the meantime, Levitt and Dubner continue to discuss new topics of *Freakonomics* in a monthly column for the *New York Times Magazine* and are frequently called upon to lecture on the subject. Indeed, Levitt had to cut short his interview to catch a flight to New York where he was giving a speech. He might not like the attention, but it doesn't look like Levitt will be able to escape it any time soon.

---

**International Rule of Law Symposium**

Last weekend saw the American Bar Association and the International Bar Association jointly host the International Law Symposium at the Westin River North Hotel in Chicago. Due to the ever-growing reputation of Steven Levitt, he was invited to be on the panel for the first discussion of the weekend – The Role of Law and Economic Development: A Business Perspective.

When this interview with Levitt was conducted, he was still preparing his notes for the discussion, but he did reveal his opinions on the topic. "It's clear that the Rule of Law is the most critical aspect to economic development," he said. "All economic activity fundamentally hinges on being able to protect one's capital and enforce one's legal rights."

"My emphasis [at the symposium] will be on how important the law is and how little, until recently, economists have understood the focal role that law plays in development," he continued. "It's a new move in economics, an overdue one and I think a very important one."

Legal problems in Finland or the Baltics?
Visit www.borenius.com

---

**Titus & Co. Advocates**

**TITUS HOUSE, R-77A, GREATER KAILASH-1, NEW DELHI-110048, INDIA**

**Telephone:** +91 (11) 26470700, 26473500, 26280010/0800/0800/26280900

**Fax:** +91 (11) 26480300, 26489950

**E-mail:** titus@titus-india.com; **Video:** +91 (11) 26237134

**Associate offices:**
Bangalore, Mumbai, Kolkata, Chennai, Hyderabad, Jalandhar, Jabalpur
Founding Member: India Legal Group

**CORPORATE & COMMERCIAL PRACTICE GROUP**

- Mergers & Acquisitions
- Cross Border Transactions
- Joint Ventures
- Inbound & Outbound Investments
- Regulatory/Government Approvals & Relations
- Technology Transfers
- Foreign Exchange Management
- Environment
- Import-Export
- Anti Trust
- IPO's
- Institutional Investments

**BANKING, FINANCE & CAPITAL MARKETS PRACTICE GROUP**

- Import-Export
- Cross Border Financing
- Structured Finance
- Lease Finance
- Acquisition Finance
- Venture Capital
- IPO's
- Insurance (General & Life)
- Institutional Investments

**TAX PRACTICE GROUP**

- Anti Trust
- Loans, Corporate Finance
- Anti Trust
- Asset Finance
- Excise Duty & Customs Duty
- Lease Finance
- Tax Rulings
- Insurance (General & Life)
- Securities
- Mutual Funds

**Contact:** sikhania@titus-india.com

---

**IBA Daily News - Tuesday, September 19, 2006**

Last weekend saw the American Bar Association and the International Bar Association jointly host the International Law Symposium at the Westin River North Hotel in Chicago. Due to the ever-growing reputation of Steven Levitt, he was invited to be on the panel for the first discussion of the weekend – The Role of Law and Economic Development: A Business Perspective.

When this interview with Levitt was conducted, he was still preparing his notes for the discussion, but he did reveal his opinions on the topic. "It's clear that the Rule of Law is the most critical aspect to economic development," he said. "All economic activity fundamentally hinges on being able to protect one's capital and enforce one's legal rights."

"My emphasis [at the symposium] will be on how important the law is and how little, until recently, economists have understood the focal role that law plays in development," he continued. "It's a new move in economics, an overdue one and I think a very important one."

Hopefully some of you will have caught Levitt's opinions on Saturday morning and who knows, perhaps you witnessed the spark for a chapter in *Freakonomics 2*. I'm not sure if it has made my research better or worse, but it has certainly changed the nature of what I'm doing," Levitt says, and he even goes on to admit that he is tackling certain issues regarding terrorism. "It's a new move in economics, an overdue one and I think a very important one."

Due to this feverish activity ("I'm doing so much stuff I can barely remember myself what I'm working on") it looks like publishers and fans of the book will have to wait for *Freakonomics 2*. "We are going to do another book," Levitt says, "but in order to produce another book I've got to do the research, so that's in process. I think we are looking at maybe 2010 for a new book to come out."

In the meantime, Levitt and Dubner continue to discuss new topics of *Freakonomics* in a monthly column for the *New York Times Magazine* and are frequently called upon to lecture on the subject. Indeed, Levitt had to cut short his interview to catch a flight to New York where he was giving a speech. He might not like the attention, but it doesn't look like Levitt will be able to escape it any time soon.
Firms build bridges across the

Due diligence, partner persuasion and the alignment of cultures are key issues in making international law firm mergers work. Here Ian Collard, Tom Yale and Chris Ritchie of The Royal Bank Scotland and US subsidiaries Citizens and Charter One, look at the dynamics of successful transatlantic mergers and offer some practical advice.

Consolidation is evident in every market sector. Over the last 10 years the pharmaceutical, banking and professional service sectors have been particularly affected. According to research commissioned by Richards Butler, the UK law firm, in the banking sector 28 major institutions have been reduced to eight, in pharmaceuticals 33 to 13 and among mid-tier UK law firms in London 16 to 11. Similarly, according to Ward Bower of Altman Weil, in the US there have been on average 40-50 mergers per annum over the past 3-4 years, following a peak in 2002 of 70, gradually increasing in size.

With this trend continuing, market rumour is of more law firms looking to implement international strategies and embrace transatlantic mergers as a means of increasing revenue and servicing multi national clients. There is pressure to change. As Darwin once said: “It is not the strongest of the species that survive, nor the most intelligent, but the ones who are the most responsive to change.”

Strategic fit

International mergers have been compared by many to a marriage: in order to succeed they need a long courtship, shared objectives and both must feel that their individual strengths and values are recognised.

To ensure the union is a harmonious one, preparation and due diligence leading up to a merger is key. Before the merger between Mayer Brown and Rowe & Maw in February 2002, an inner-negotiating group consisting of 11 partners from Mayer Brown and seven from Rowe & Maw underwent an intensive five-month negotiation phase to thrash out details of the deal. Only when a tie-up had been officially pencilled in did the negotiating group begin the extensive operation of presenting the merger to the wider partnership.

Firms may opt for creating a pre-merger group. This would be made up of partners from the two firms and would be used to discuss the details in a carefully planned negotiation stage. Only after this would fostering partner buy-in and an extensive operation of presenting the merger to the wider partnership begin.

In order to achieve acceptance from the wider partnership, persuading staff of the business case for the merger is essential. One of the biggest tasks we have seen in preparing for a merger is convincing partners of the smaller firm that their voice will not be lost within a unified whole. The need for the benefit to be clear to all cannot be underestimated, as a seismic shift if not carefully communicated and implemented may upset the delicate balance of a business that has evolved over years.

Compatibility of practice and client base will give a merger the highest chance of success. Ward Bower of Altman Weil says a merged firm can achieve incremental revenues from the services of one firm being met by another in a different jurisdiction. With this joined-up approach, the likelihood of exposing the relationship to a competitor is closed.

Tom Todd, senior US partner of Reed Smith in London, commenting in regard to their recently announced merger with Richards Butler, said: “Reed Smith’s ethos is as a relationship firm, rather than one focused purely on transactions. As a result we looked tirelessly for a partner who viewed clients in the same way and would work with us to broaden still further the combined Firm’s overall business. It took time but was key to our aims for a strategic fit.”

Operational issues

Salaries, profit sharing, billable hours and targets form the biggest cultural issues in any transatlantic merger.

Change can take time, and patience is a pre-requisite for the drawn out process.
of aligning separate IT, billing and remuneration systems. Does a newly merged transatlantic firm pay dollars or sterling? We would advise partners on both sides of the Atlantic to make sure they are not exposed to a lesser or greater remuneration at the hands of a fluctuating exchange rate.

Mergers are not about pure cost reduction, but are more driven by the potential for increased revenues both in an absolute sense and per individual lawyer. Traditionally US firms record significantly more hours than their London counterparts, but also bill at a lower charge-out rate. When moving a merger forward, leaders need to be pragmatic in regard to the respective expectations of lawyers in terms of hours and rates.

Of course sometimes merger plans fail to achieve the desired goal, even where media coverage suggests the merger is closer to completion than is the case. Few describe this as a failed merger, but rather a realization that potential benefits are lower than expected, economic and global circumstances are changing and that cultures are wider apart than predicted.

Maintaining enthusiasm
Clearly the vote for two or more firms to merge is not the end of the process, only the beginning. Probably more than 80% of the work is still to be done when the merger is formally consummated, and a clear plan of action and execution is fundamental. As Tony Williams of law firm consultants Jomati has seen from his experience in advising on mergers, the need for an ongoing communication both internally and externally is critical to success and should help generate real energy and excitement. The danger is of being overwhelmed by some of the inevitable and yet unexpected difficulties, giving the merger a negative edge.

One very real cultural issue is how to make the objective of shared international clients a reality. If fee earners or partners in a US office do not know their UK counterparts and have no financial incentives, such as a shared profit pool, to refer work to them, why should they not continue referring work to an existing contact outside the firm?

We find this issue has been overcome with the introduction of certain measures, instituted to encourage cross-referrals by recognition of such referrals in overall performance assessments.

Law firms like any other business need a clear sense of direction and a business plan that reflects where they wish to get to. Increasingly, major UK firms are run on a more corporate culture with an executive board driving the firm forward. They have been accelerated by the steady rate of conversions to LLP and potentially for UK Law Firms, the proposed changes embraced in the Legal Services Bill currently before the U.K. Parliament.

Whatever structure is used, we find the most effective strategies are those that respond to a changing market place - with the biggest impact on the international stage.

Conclusion
As said at the outset, consolidation is not restricted to any one particular sector, and law firms can be and are vulnerable to the need to consider change. The US/UK market may represent major opportunities to both sides and further mergers such as Reed Smith/Richards Butler are anticipated.

As a final message on how consolidation has affected most sectors, we would like to leave you with the following thought. Those businesses that have pursued a strategy of following their client base and of staying true to their own core values have generally achieved the greatest successes. How many law firms have fully adopted this strategy?
Offshore firms react to change

The top 10 trends driving change and growth in the offshore legal market, by Seán Williams

The offshore legal market appears more aggressively competitive than ever before. Contrary to the image of working leisurely underneath a palm tree, offshore lawyers have had to drive dynamism, creativity and adaptability in order to meet the challenges to their business. This has reaped rewards: despite the black clouds of increased regulation and competing onshore financial centres, offshore firms across the globe reported growth over the last 12 months. Richard Gerwat from top Jersey law firm Bedell Cridlin, for example, says the firm sees growth rates of 15 to 25% year on year. Here are the top ten trends that typify this positive climate in the offshore legal world.

1. Growth in all market sectors

All market sectors are experiencing growth. For some, this may be unexpected. Bruce Putterill of Appleby Spurling Hunter says: “I’ve been pleasantly surprised that the private wealth management sector has continued to grow in spite of Know Your Customer checks and increased regulation.” Private wealth management is a mature market, although less so in Middle Eastern and Asian jurisdictions, where private banking is under-developed, compared to Europe and the US. As Michael Castel of Gibraltar’s Hassans points out, however, some private client work (particularly that of large family firms) can be on such a scale that it is almost institutional, often involving huge transactions. In such cases, “the work is virtually corporate.”

It is institutional work that has seen the largest growth. In some cases the growth is cyclical (private equity funds, for example, are back in fashion) while other work types, such as hedge funds, have seen constant growth. The Cayman Islands are the leading offshore domicile for this market sector, with 80% of the world’s hedge funds registered with the Cayman Islands Monetary Authority (Cima). Last year was a record for the registration of hedge funds in the jurisdiction.

2. Growth in all jurisdictions

Firms from jurisdictions across the world reported growth in their business over the last 12 months, although naturally some jurisdictions were busier than others. The cake is getting bigger and there seems to be plenty to go round. As Richard Gerwat points out: “Jersay may end up with a smaller slice of a larger cake, but in absolute terms, that’s growth for Jersey and for our business.”

Gus Pope from M aples and Calder suggests one reason for this overall growth. When the status and legitimacy of offshore jurisdictions was reviewed and determined by various supranational bodies a few years ago, jurisdictions such as the Grendalines and the Turks and Caicos islands did not have the critical mass and ability to face the regulatory onslaught and so turned to tourism for their chief source of national income: “The increased regulation was a weeding out process,” says Pope. The market is now dominated by fewer but stronger players, and for them, business is booming.

3. Increasing (inter-)governmental regulation

Increased regulation by the OECD, EU and US authorities such as the FBC may be seen as an old threat to offshore law firms, but there is talk of further regulation to come. The UK’s FSA is proposing stricter regulation of hedge funds, and Michael Castel of Hassans adds: “I believe and we all believe here that the rest of the world will soon catch up with regulation, and so all reputable finance centres will be caught up in the same limitations in terms of the tax advantages that they can offer.” Jurisdictions as well as individual law firms have all responded to increased regulation differently. But Mary Mahabir from the relatively small offshore firm Lex Caribbean says, “I don’t think regulation has particularly hampered growth.” Most other firms seem to agree.

4. New and untapped markets

According to Richard Finlay of Conyers Dill & Pearman’s Cayman office, one of the greatest opportunities facing offshore law firms is new and untapped markets such as the Middle East, India, Rusia and China. In the case of China, its large asset base could enable it to become one of the largest securities markets in Asia.

Conyers Dill & Pearman now has offices in both Singapore and Hong Kong. Its Hong Kong office is keenly interested in Chinese-backed, Hong Kong-driven transactions that use the Cayman Islands. The Cayman Islands, the British Virgin Islands and Bermuda are all popular jurisdictions for Chinese-backed transactions since all are traditional offshore jurisdictions offering tried-and-tested investment options. The Cayman Islands and Bermuda are kept busy with IPO work, while the British Virgin Islands are busy with organizational, holding and operating companies. Richard Finlay speaks of the herd instinct of many clients when choosing an offshore jurisdiction for their transactions.

For Hassans, new markets aren’t perceived geographically but rather in terms of market sectors. The firm has seen a shift away from traditional tax havens to work for multinational corporations using the firm for tax planning and corporate restructuring work. However, the firm’s largest area of growth has been in e-gaming, with big-name clients such as Partygaming PLC and 888.com.

5. More onshore

Perhaps the greatest threat to offshore law firms is offshore finance centres, such as the new Dubai International Finance Centre (DIFC), the Heron Tower or the new London centre. Even London may threaten some offshore investment products with the introduction of the UK Retail Investment Vouchers (RIVs) – a tax-transparent vehicle. Offshore has come to be a delictic term referring simply to jurisdictions outside of the jurisdiction in which the term is used. Gus Pope of M aples and Calder says, “I don’t see it as the end of the game for
Structural remedies criticized

Structural remedies are still the solution of choice for governments in merger cases, delegates at an antitrust session were disappointed to hear yesterday.

The vast majority of mergers that raise competition issues are resolved by negotiating a settlement between the company and the relevant competition authority. Settlements require companies to undertake either structural or behavioural remedies before the proposed merger can be placed on the market. Formerly usually involve the sale of some of the merging companies’ assets or businesses. Behavioural remedies are broader in scope but generally involve a commitment not to use the competitive balance now or in the future.

Competition authorities in most parts of the world have traditionally favoured structural remedies, but they continue to face pressure from companies, lawyers and sometimes courts to use behavioural solutions. At yesterday’s session representatives from the two leading competition authorities, the US Federal Trade Commission (FTC) and the European Commission (EC), defended their positions.

Authorities prefer structural remedies for a variety of reasons, most notably that they are clear, immediate and cost-efficient. Behavioural remedies require the authority to monitor companies following mergers for long periods of time to make sure they continue to comply with the settlement. Competition bodies argue that this is expensive and requires them to play a more activist role than they would like.

“Structured remedies are a safeguard on the road towards interventionism,” said Jeffrey Schmidt of the FTC, arguing that they help the Commission to concentrate on being a criminal enforcer rather than a financial regulator.

A number of speakers expressed their concerns about the continued preference for structural over behavioural remedies. Bernard Amory of Jones Day’s Brussels office noted that there has been an increasing willingness on the part of the EC to use behavioural remedies, but expressed frustration that these solutions are not considered more often.

Amory argued that the cost of behavioural remedies could be avoided by “delegating” the burden of monitoring compliance to the market, an approach he said had been successfully used following Vodafone’s acquisition of Mannesmann, or to specific industry regulators. He acknowledged, however, that behavioural remedies need to be very tightly defined.

In response Carlos Esteva Mosso of the EC pointed out that the Commission has been willing to accept a variety of remedies where access, such as to non-exclusive intellectual property rights, aviation slots and media content, is included in settlements. He also said that, although the EC continues to strongly oppose pure promises not to abuse, a recent court ruling had prevented it from issuing a blanket ban on all such remedies.

The FTC’s Jeffrey Schmidt admitted that there have been internal discussions at the Commission regarding the use of behavioural remedies, but said that these discussions only highlight the difficulties inherent in this kind of approach.

Ultimately, however, lawyers have to accept that in a merger context, they have little power to influence competition authorities if they favour a structural remedy. “All leverage is with the government, and if they say they don’t want a behavioural remedy you’re dead,” said Kenneth Logan of Simpson Thacher & Bartlett.
<table>
<thead>
<tr>
<th>Time</th>
<th>Session</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>09:30 – 17:00</td>
<td>Access to justice: best practices</td>
<td>Room S503a</td>
</tr>
<tr>
<td></td>
<td>Are client protection funds providing adequate protection against loss upon theft of trust monies by lawyers?</td>
<td>Room S502b</td>
</tr>
<tr>
<td></td>
<td>Having children by natural and artificial means</td>
<td>Room S501b</td>
</tr>
<tr>
<td></td>
<td>Broadband telecommunication – IP issues related to new distribution models</td>
<td>Room N427bc</td>
</tr>
<tr>
<td></td>
<td>Evolving global standards of privacy and confidentiality in the workplace</td>
<td>Room S501a</td>
</tr>
<tr>
<td></td>
<td>Public private partnerships in the construction industry</td>
<td>Room S505a</td>
</tr>
<tr>
<td></td>
<td>Class actions: global invasion or liberation?</td>
<td>Room S401bc</td>
</tr>
<tr>
<td>09:30 – 12:30</td>
<td>Antitrust compliance: prevention is better than cure</td>
<td>Room S402b</td>
</tr>
<tr>
<td></td>
<td>Due diligence, representations and warranties and disclosures</td>
<td>Room S403a</td>
</tr>
<tr>
<td></td>
<td>Investment treaty arbitration workshop</td>
<td>Room S401a</td>
</tr>
<tr>
<td></td>
<td>Challenges of cross-border sales of electricity</td>
<td>Room S504d</td>
</tr>
<tr>
<td></td>
<td>Schemes of arrangement - rewriting the rules of the risk business?</td>
<td>Room S403b</td>
</tr>
<tr>
<td></td>
<td>Safety on-line</td>
<td>Room N426c</td>
</tr>
<tr>
<td></td>
<td>Keeping your client out of jail: the risks of doing business abroad</td>
<td>Room N426a</td>
</tr>
<tr>
<td></td>
<td>Advertising in the digital age</td>
<td>Room N427d</td>
</tr>
<tr>
<td></td>
<td>Recent developments in shipping law around the world</td>
<td>Room N427a</td>
</tr>
<tr>
<td></td>
<td>Hedge fund investments</td>
<td>Room S404a</td>
</tr>
<tr>
<td></td>
<td>Rules affecting in-house counsel</td>
<td>Room S404d</td>
</tr>
<tr>
<td></td>
<td>Private equity in the United Europe</td>
<td>Room S502a</td>
</tr>
<tr>
<td></td>
<td>BIC open forum meeting</td>
<td>Room S504bc</td>
</tr>
<tr>
<td></td>
<td>Workplaces welcoming women lawyers: best practices in retention and development of talent</td>
<td>Room S501d</td>
</tr>
<tr>
<td></td>
<td>Young lawyers introductory meeting</td>
<td>Room S503b</td>
</tr>
<tr>
<td></td>
<td>International aspects of the FCPA</td>
<td>Room S504a</td>
</tr>
<tr>
<td></td>
<td>Breaking the mould? A new approach to warranties, due diligence and disclosures</td>
<td>Room S403a</td>
</tr>
<tr>
<td>10:30 – 12:30</td>
<td>International Bar Association Foundation and Charitable Trust</td>
<td>Room S503b</td>
</tr>
<tr>
<td>12:30</td>
<td>Corporate Counsel lunch</td>
<td>Room N228</td>
</tr>
<tr>
<td></td>
<td>European Forum lunch</td>
<td>Room S104</td>
</tr>
<tr>
<td></td>
<td>Latin American Regional Forum lunch</td>
<td>Room N227</td>
</tr>
<tr>
<td>13:45</td>
<td>Committees on maritime and transport law and insurance joint lunch/architectural tour</td>
<td></td>
</tr>
<tr>
<td>14:00 – 17:00</td>
<td>Finding a criminal practitioner in another jurisdiction – secrets to success</td>
<td>Room S502a</td>
</tr>
<tr>
<td></td>
<td>Representation of the financial advisor in connection with M&amp;A transactions</td>
<td>Room S405a</td>
</tr>
<tr>
<td></td>
<td>Engineers and scientists without borders</td>
<td>Room S501d</td>
</tr>
<tr>
<td></td>
<td>Who are these guys? – how turnaround professionals can save the day for a client in distress</td>
<td>Room S403b</td>
</tr>
<tr>
<td></td>
<td>Risk management and compliance challenges in the global investment funds industry</td>
<td>Room S404a</td>
</tr>
<tr>
<td></td>
<td>Ambush marketing</td>
<td>Room N427d</td>
</tr>
<tr>
<td></td>
<td>A review of franchise disclosure laws: part II</td>
<td>Room N426a</td>
</tr>
<tr>
<td></td>
<td>Blacklisting of airlines</td>
<td>Room N427a</td>
</tr>
<tr>
<td></td>
<td>Structuring tax efficient Asian investments</td>
<td>Room S401d</td>
</tr>
<tr>
<td></td>
<td>Washing the family’s dirty linen in private: can trust disputes be resolved by arbitration?</td>
<td>Room S402a</td>
</tr>
<tr>
<td></td>
<td>Advertising v not revealing names of clients</td>
<td>Room S504bc</td>
</tr>
<tr>
<td></td>
<td>Corporate image</td>
<td>Room S404bc</td>
</tr>
<tr>
<td></td>
<td>In-house/outside counsel relationships: winning the global beauty contest</td>
<td>Room S404d</td>
</tr>
<tr>
<td></td>
<td>Performance management on an international stage</td>
<td>Room S504a</td>
</tr>
<tr>
<td></td>
<td>ICC: combating impunity for the most serious crimes of international concern</td>
<td>Room S503b</td>
</tr>
<tr>
<td></td>
<td>Making the leap: setting up your own law firm</td>
<td>Room S505b</td>
</tr>
<tr>
<td></td>
<td>General Interest – Turn contacts into clients: five steps for effective rainmaking</td>
<td>Room N229</td>
</tr>
</tbody>
</table>
Regulators will not lower standards to compete

Global competition between stock exchanges and listing authorities will not lead to falling regulatory standards, a leading US securities regulator told delegates yesterday. “It’ll be at least a race to the middle, if not a race to the top,” said Paul Dudek, chief of the office of international corporate finance at the Washington, DC-based Securities and Exchange Commission (SEC).

Dudek was speaking at a session held to discuss trends in securities offerings around the world. Over recent years, increasingly loud voices have claimed that tighter regulation of companies who list their shares in the US by authorities such as the SEC is driving foreign, and even domestic, companies away from the country’s capital markets.

Philip Boeckman of Cravath Swaine & Moore, hosting the session, quoted figures that suggest a dramatic fall in the appeal of US stock markets to foreign companies. Between 2000 and 2002, for example, an average of 48 foreign companies per year listed their shares on the New York Stock Exchange (NYSE). That figure dropped to an average of 18 per year between 2003 and 2005. At the same time Rule 144A offerings, by which companies can sell shares to US investors without having to register and comply with SEC rules, have increased rapidly.

Critics of US regulatory policy have pointed to reforms such as the Sarbanes-Oxley Act, which requires companies to review their own financial reporting processes, as one of the key factors behind this trend. They also point to US generally accepted accounting principles (GApp) requirements, the perception and reality of higher litigation and enforcement risks, difficulties in using ADRs and the complexity of deregistering from SEC oversight as further powerful disincentives to list on US stock exchanges.

The falling interest in US capital markets has coincided with an increase in the success of exchanges in other countries. Brazil and India, where local companies have traditionally looked to sell their shares to US investors, have found that issuers are instead focusing on the domestic portion of their IPOs. Exchanges such as the lightly-regulated Aim in London have in turn become increasingly popular destinations for foreign issuers. US stock exchanges have begun to look abroad for potential merger partners in an attempt to retain their standing, most notably with NYSE’s plan to combine with Euronext and Nasdaq’s acquisition of a stake in the London Stock Exchange.

Matthew Blows of Macfarlanes in London acknowledged that “the lighter regulatory touch has been a big factor in companies deciding to list [on Aim]”. Blows predicted, however, that at some point a company listed on Aim would collapse or encounter difficulties, which would lead people to demand tougher regulatory scrutiny.

Philip Boeckman also refuted the idea that regulation has been the sole reason behind the declining appeal of US markets. He highlighted the growing depth and liquidity of local markets, higher underwriter fees in US offerings and the declining need for companies to have US listings for prestige and stock option purposes as other reasons for the shift in issuing patterns. These factors, he said, were as important if not more so than regulatory considerations.

In the meantime, the SEC is planning to reform the deregistration requirements to make it simpler and easier for companies to exit its control. The proposals announced earlier this year were generally welcomed but many commenters asked that they go further. The final rule is due out within the next few weeks.
**The Worldwide Connection**

**A CASE STUDY**

**Client:** Large international telecom operator

**Case:** Competition matters in 28 countries

**Solution:** The Lex Mundi member firm for France supervised a coalition of European member firms to set up a permanent hotline connecting the client with each firm for legal assistance.

**Result:** Immediate, seamless service that enabled the client to respond to the challenging Pan-European competition environment.

Choose The Mark of Excellence.
Choose a Lex Mundi Member Firm.

---

16,000 lawyers
160 firms
100 countries
550 offices

*For a copy of our directory of member firms contact us at 1.713.676.9393 or access the directory online at www.lexmundi.com.*