Satellites need to join UN

Satellite technology is much more important than people consider it to be, according to Ambassador Emilio Cárdenas. There are a lot more of them out there than you think, and their possibilities are huge. Such is their potential, the ambassador said a session yesterday morning, that they may soon become the seventh member of the UN’s Security Council. (Apparently the sixth is CNN – “I know, I was as surprised as you are,” said Cárdenas.)

For two years the ambassador served as the Argentinean representative on the UN Security Council, two years he describes as “difficult.” During that time the massacres took place at Srebrenica during the Balkan wars – the killing of 7,000 Muslims in 1995 that has been described as Europe’s worst atrocity since the Second World War.

Cárdenas described to a hushed audience how he had been sitting next to Madeleine Albright from the US (due to alphabetical seating they sat elbow-to-elbow for two years) when she turned to him and said: “Today I am going to bring a new tool to the Security Council.” The members were shown classified satellite images that incontrovertibly proved that the massacre had taken place, in a football stadium.

The ambassador went on to describe how satellites have played a crucial role in more recent events. Despite the continuing stalemate over events in Burma, or Myanmar, satellites have helped identify exactly what is going on in the notoriously secretive country. According to Cárdenas, satellite images have shown entire villages being forcibly relocated, and the existence of towns that turned out to be concentration camps. The commercial satellites that took the pictures (three of them, which fly past the country twice a day) can identify objects up to about three feet across on the ground. This helped provide evidence of mass evacuations and the destruction of about 3,000 villages of the Karen tribe. The increasing availability and sophistication of satellites helps many, such as the International Criminal Court in The Hague, to issue arrest warrants with greater certainty.

“We need transparency”

But this potential is not being harnessed fully, said Cárdenas. Some people tried to prevent the Security Council seeing the images of Srebrenica, he suggested, and the transparency of who is using what and where is simply not good enough. “I believe satellite information can become a great tool in helping the UN maintain peace and human rights around the world,” he said. “But only if the big political players accept that the Security Council needs access to these images. We need real transparency.”

Earlier, Thomas Beer of the European Space Agency had taken the audience through the legal background to satellite photos, or remote imaging. Although a UN resolution on remote imaging was passed in 1986, confirming the legality of the activity and the general principle that states undertak- ing it have an international responsibility, individual countries also have their own data policies to regulate how this responsibility is carried out. The US, for example, retains the right to shut down satellites if the images they produce threaten its national security. This so-called shutter control was used during the Iraq war, with the US both preventing any shots of Iraq from its satellites from being distributed internationally and buying up all the images produced from other satellites. “This shutter control and bulk buying is standard policy for the US,” said Beer.

The UN resolution also makes no mention of military activities. Beer said this was because any negotiations on this subject would have been very lengthy and probably produced no solution. General principles were set down by the Outer Space Treaty of 1967, which Beer praised – bemoaning the fact that the Treaty’s anniversary this year passed without a party outside the UN building. But the principles are not necessarily legally binding. And as he said “all these rules have loopholes, otherwise no one would have agreed to them”.

Optimism

Beer was optimistic on international law in space, suggesting that consistent international practice now could lead to firmer rules in the future. Indeed, his enthusiasm for the subject was obvious as he strolled around the room, bouncing on his heels as he answered the audience’s questions.

The consistency of practice is certainly impressive. Russia, for example, paid millions of dollars to Canada when one of its satellites fell on Canadian territory and copious research was required to make sure the satellite’s nuclear motor had not caused contamination. A UN liability convention required Russia to reimburse Canada for the cost, and it did.

How many satellites are there?

Countries are meant to inform the UN when they send satellites into space. But not everyone does, and they never have to reveal their purpose. Thomas Beer of the European Space Agency said at yesterday’s session that the number of satellites in space today is around 800. Ambassador Emilio Cárdenas added that around 570 of those are for commercial use, though no one knows for sure what they are all being used for.

Incredibly, he also said that around 6600 satellites have been launched by mankind. The remaining 8600 are “just junk”. The standard procedure for dealing with a defunct satellite is to send it out into a non-dangerous orbit. A UN best practice standard requires that all satellites have enough fuel to enable them to be shot out to this distance, where they circulate outside any other human satellites or spacecraft. Some are also occasionally blasted into the sun, though Beer described this as a rather “extreme measure”.

The satellites are monitored by the US for any risk of collision, and each has its specific orbit. Indeed, the European Space Agency launched a precursor to the Galileo satellite last year purely to reserve an orbit slot. “We worked against the clock to get that initial satellite into orbit, as otherwise we would have missed out,” said Beer. “We didn’t put any sophisticated instruments on board, but of course we didn’t tell anyone that.”

But despite Beer’s optimism, the abiding memory of the audience at yesterday’s session will be the silence that fell as Emilio Cárdenas described seeing the images of the Srebrenica murders, and his passionate call for satellites to be put at the service of the Security Council.
PROFESSIONAL DEVELOPMENT

Associate training insufficient

Law firms should not use their training programmes as mere recruitment tools for their graduate intake, but start educating their lawyers throughout their whole career. That’s according to John Claydon of McCarthy Tétrault, a speaker at yesterday’s session on professional development.

As young graduates become more insistent on internal training, firms are installing, and heavily publicizing their professional development programmes. However, these schemes often stop after as little as two years. Understandably, this can cause an exodus of young lawyers, seeking senior associate positions elsewhere, and partly explains the poor retention rates of firms.

“Having a professional development programme is a very effective recruitment tool. All firms that have one will splash them across their websites,” said Claydon.

“But retention is difficult. Associates want one-on-one mentoring – they want feedback all the way through their time,” he added. Training for new recruits may bring graduates in, but, the speakers insist, they soon realise when the education stops, and this is seen as a weakness.

The death of mentoring

Professional development is more crucial than ever. All the speakers agreed that the standards expected from the mandatory programme were so low that it was ultimately up to the firm to devise a plan. Florida, for instance, has a 12-credit mandatory system, whereby lawyers must attend just 12 hours of training each year from the Florida bar association. “The bar association does its best, but it’s still just talking heads. There is no interaction,” said one panelist.

The session, which was titled “Establishing Professional Development Within the Firm,” concluded that training should consist of two broad topics: legal or technical training, and business skills. Amongst larger firms, especially following the recent spate of mergers, a so-called common culture also needs to be taught.

“This is crucial. Clients expect a uniform service amongst international firms. We need to create a recognisable style, but not clones,” said Tony King, of Clifford Chance and chair of the session.

Electronic future

This recognisable, uniform style can be helped by e-learning. While expensive to implement, once in place the system offers consistent information to all users. On the downside, said King, lawyers who spend their day staring at a computer screen do not care much for spending their evenings doing the same.

The session also discussed the possibility of a curriculum. King suggested that the IBA could have a role, or at least “facilitate a degree of support” for such a professional development programme. “It could be as straightforward as getting lawyers in similar practice areas together to chat, but the IBA could certainly do something to create a more constructive curriculum,” he said.
Law firms become litigation target

Lawyers are more used to conducting litigation than being its target. But this is changing, as hedge funds lash out at the legal representatives giving them bad advice. As yesterday’s session on the role of hedge funds in financial restructurings heard, counsel is increasingly being accused when investments go wrong.

“People involved in hedge funds are very careful and very savvy about reading documents, so it’s not surprising. No one likes to be blamed,” said Giovanni Prezioso of Cleary Gottlieb Steen & Hamilton’s Washington DC office.

Mayer and Akin Gump

Prezioso’s comments follow a number of cases brought by hedge funds against their counsel. In July this year Thomas H Lee began proceedings against Mayer Brown worth $245 million for poor due diligence and misrepresenting Refco’s financial situation. And in February this year, the ex-managers of Veras sued Akin Gump for $4.4 billion for allegedly advising the fund that late trading was legal. A court upheld part of this case, regarding fraud over a conflict of interest, in September.

The speakers at yesterday’s session included lawyers, bankers and hedge fund managers. The latter were keen to distance themselves from the bad press that has sometimes plagued them. As Myra Tabor of Cognis Capital remarked to amusement from the floor, “I’m a hedge fund manager and by definition represent the locusts and scum of the earth – as you can tell, I took that comment personally!” Tabor provided a detailed consideration of the different types of restructuring that hedge funds get involved in, and the importance of understanding different funds’ strategies before working with them. Investors can be less than knowledgeable about their hedge funds. An anecdote from Prezioso illustrated this, describing a cocktail-party game in which participants invent a hedge fund and see how many investors are clamouring to commit their cash by the end of the night.

But measures to protect investors in the US, by raising the minimum investment from $1 million to $2.5 million, were met with an outcry. Regulation of hedge funds was a topic that several members of the panel discussed. Prezioso pointed out that the French Minister of Finance Christine Lagarde has outlined measures to encourage more hedge funds to set up in France, such as removing the requirement to have documents in French.

Still corporate raiders

Although much was said in favour of hedge funds, their reputation as corporate raiders was acknowledged. Alfredo Perez of Weil Gotshal & Manges’ Texas branch discussed hedge funds’ dual personality – they both add liquidity and promote default. As Perez put it, “it’s like heads I win, tails you lose”.

Perez also drew attention to the tactics being used by hedge funds against companies in which they hold bonds. If these companies file their financial statements with the US Securities Exchange Commission late, funds are calling the default and demanding repayment of the debt. Perez predicted this aggressive strategy would continue and would prompt “a significant amount of litigation”.

The session was part of a “conference within a conference” by the Insolvency, Restructuring and Creditors’ Rights Section. A further session this morning will consider Transnational Insolvency and Fraud. Insolvency lawyers hope business will pick up after several lean years.

ANNOUNCEMENT

Supreme Court judge to speak

In a change to the advertised programme, Singapore Supreme Court judge Judith Prakash is making the opening speech at an afternoon session today. She is to introduce the session entitled Can We Afford the Dispute Resolution Process, which is co-chaired by Denis Chemla of Herbert Smith in Paris and John Reynolds of White & Case in London.

Justice Prakash has been invited to speak due to the success of the procedural reforms here in Singapore. She is expected to speak on the dramatic efficiencies introduced into the Supreme Court system, which has seen a huge backlog of cases cleared and a reduction in the duration of cases. They must now be less than 18 months from start to finish. The length of trials has also been reduced substantially.

To enable these results, there have been some fairly radical measures – higher filing fees, charges per page of filings and charges per day of court time (after a free three days).

To see Justice Prakash’s speech, please go to room 314 of the Suntec Convention Centre at 14:30. The session ends at 15:30.
EXTRATERRITORIAL JURISDICTION

Work in progress

The IBA’s task force reported yesterday on its two-year extraterritoriality assignment. In October 2006, the Legal Practice Division, under the stewardship of division chair David Rivkin, established the task force, setting it a two-year mission to produce a White Paper and recommendations on extraterritorial jurisdiction. Delegates yesterday heard that while progress had been made they would have to wait for the group’s final proposals.

The insolvency subcommittee had clearly had its creativity hat on when preparing the presentation. US bankruptcy judge Stephen Raslavich and Selinda Melnik of Edwards Angell Palmer & Dodge staged a dramatization, with each advocating the opposing positions on cross-border insolvency, territorialism and universalism. Under the territorial approach, or the so-called grab rule, the court (in every jurisdiction where the debtor has assets) distributes assets in its jurisdiction under local rules. It is sometimes called the grab rule since its detractors claim it leads to crazed creditors beating a path to the local courthouse in a race to seize whatever assets they can, disrupting international order in the process. (Its proponents argue it’s a settled and fair system and, in any case, what international orderliness?) Under the universality approach, one primary proceeding is started in the debtor’s home country, and other courts in different jurisdictions defer to the main proceeding.

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Universalism therefore demands collaboration from all the courts to facilitate the main liquidation, which goes ahead under the rules of the debtor’s home country.

Judge Raslavich, appearing as hypothetical advocate for the territorialist position, presented a convincing case (as one might expect) for the maintenance of national standards in deciding whose laws apply to liquidation and disputes in insolvency.

“Territorialism is the better view. People want certainty on the law that will apply; the parties then want low-cost, speedy resolution,” said Raslavich in his position as Devil’s advocate. Territorialism is not only the best way to achieve this (through an insurance backstop in the form of governing law clauses in documentation) it has been tried and tested through hundreds of years of history. “Territory has worked well for a long, long time. The notion that parties will find assets in foreign jurisdictions is not a novel one, it is as old as international trade itself. The other two approaches are just the new kids on the block,” he said.

By “the other two” judge Raslavich was referring to the two branches of universality, orthodox and modified universalism. (Modified universality adds a centre of main interest to the collaborative effort of orthodox universality.)

It is the universalist approach, however, that is in the ascendency, despite its proponents panning for fool’s gold said Raslavich, before inviting Selinda Melnik to present to the case for the universalists.

“The reality is that though one might want certainty in practice you can’t always have it. There must be some mechanism to resolve the different interpretations and applications of insolvency law,” said Melnik, before reiterating that the subcommittee’s presentation was a dramatization intended for the benefit of delegates in illustrating the opposing philosophies behind international insolvency disputes.

Earlier in the session the anti-trust committee presented its halfway-stage progress.

Delegates heard from former chairman of the Legal Practice Division and Allen & Overy partner Michael Reynolds that the committee has focused on regulation of cartel, merger control and abuse of dominant position rulings. Reynolds told delegates that as cross-border business continues to expand, anti-trust law will become increasingly prominent as more countries aggressively assert their codes and rules.

Reynolds used examples of the Gencor/Lonrho and GE/Honeywell takeovers to illustrate how vulnerable big mergers are to asymmetrical consideration by different national agencies. The recent Microsoft case, meanwhile, demonstrates the committee’s concerns in abuse-of-dominance cases. Delegates heard from Reynolds that different agencies assess dominance in different ways; he questioned whether the US Department of Justice would have come to the same decision as the European Court of First Instance in Microsoft.

Reynolds then handed over to Allen & Overy colleague Antonio Bavasso for the detail of the subcommittee’s work. Bavasso steered delegates through in work to private actions, extradition and execution of judgments before impressing delegates by branding an imposing 300-page report of the group’s initial findings.

The securities law subcommittee, while not quite matching its insolvency counterparts in the creativity stakes, did a good job in convincing delegates that theirs was the most timely practice area of the task force’s brief. Securities regulation is catching up with the reality that capital markets participants have experienced for years, said Eric Pan, assistant professor at Benjamin Cardozo School of Law. Regulators are now aware of their problems and they are taking action; the US Securities and Exchange Commission (SEC) has instituted a comprehensive review of its rulebook; and the bodies such as the Committee of European Securities Regulators, the International Organization of Securities Commissions and the UK Financial Services Authority can expect to receive a great deal of literature, along with the securities law subcommittee’s own findings in 2008.

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CONUNDRUM

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A Matter of Being

A famous zen riddle asks: “What is the sound of one hand clapping?” A less famous one asks: “Is the absence of risk the essence of nothingness?”

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Asia’s convention city

Singingapore was recognized many centuries ago as an important port, dealing with over half the world’s trade. By providing a link between east and west, the island became one of Asia’s major commercial hubs. Trade opened the doors to a regional population of over three billion people. This created an international mix of different cultures and races from Malay, Chinese and Indian to European and Eurasian.

That cultural mix has made Singapore a focal point for tourists, with over 4000 cultural performances held every year. It now refers to itself as a global city of the arts. One of the more recent additions to the city’s cultural wealth is the Asia Convention City, more commonly known as Suntec City.

A consortium of business and industry leaders commissioned and built Suntec City, with construction beginning in 1989 and completed in 1995 in the Marina Centre. The city was inaugurated by prime minister Lee Kuan Yew that same year. Suntec City’s array of events and activities, its neoclassical architecture, and innovative designs have coined the phrase “a city within a city.”

Suntec City is awash with philosophy. The design was inspired by two concepts: the Hindu mandala, the ancient philosophical symbol of the universe; and the Chinese geomancy of feng shui. Feng shui looks at how an environment affects people’s physical state. Once this relationship is understood, the environment is altered to better support the people within it. According to the geomancy masters Suntec City is perfectly aligned to create maximum harmony and is well placed for bringing fortune and success.

Wealth for all

Suntec City was also designed to resemble a left hand. The convention centre forms the wrist of the hand and its five office towers represent the fingers and thumb. The golden circular fountain of wealth stands in the palm, symbolising the Chinese saying “to hold the wealth of the world in the palm of your hand”. The bronze metal which forms the ring of the fountain is significant, as the Chinese believe that when metal and water are balanced, a pathway to success will follow. The inward flow of water instead of the more usual outflow represents the retention of wealth for Suntec City. The structure also contains modern lighting arrangements that bring the city to life after dark.

However, all this talk of prosperity for Suntec City doesn’t mean that tourists can’t get their own share of good fortune. During the day, some visitors walk around the fountain three times touching the water as they go for good luck. Tradition says that women should use their left hand and men their right. In the evening, the fountain...

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A PROBLEM SHARED WITH US IS A PROBLEM SOLVED.

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springs to life with a multimedia extravaganza. Visitors can enjoy shows where they are able to experiment with feng shui water techniques, watch the fountain’s laser show and participate in song and laser message dedications using the lasers emitted from the fountain. According to the Guinness book of Records, this fountain has been the largest in the world since 1998.

Suntec City is made up of four 45-storey towers and one 18-storey tower offering excellent views of Singapore’s picturesque skyline and harbour. The skyline is characteristic of the post-modernist architectural style now visible in most modern high-rise buildings. From the top of the towers you can make out the Singapore Land Tower and Temasek Tower, two of Singapore’s landmarks.

A shopping oasis
Another component of the city is Suntec City mall, Singapore’s largest shopping mall until 2006 and still a haven for shoppers. The mall is located right behind the towers and houses a variety of entertainment. It is divided into four thematic zones, with the galleria offering brand names and souvenirs and the tropics containing specialty stores. Entertainment includes the Summit Tour, where guests can enjoy a panoramic view of Singapore from the top of one of the towers, and the Duck tour, which offers a land and sea adventure on a military amphibious craft. For a more relaxing end to the day, board the Hippo tour and enjoy Suntec City’s oasis of greenery.

To the left of the city you can find the Suntec Singapore International Convention and Exhibition Centre (SSICEC). It is one of Asia-Pacific’s largest purpose-built convention spaces with a seating capacity of 12,000.

Arts and food
Suntec City has a vibrant arts scene and no lack of day or night entertainment. It offers a concoction of performances, from the Symphony Orchestra and the Eastern Opera to more interactive events such as the Hot Food Festival. Other venues include the K-Box Karaoke, The Star Factory and Virtualand for the more young at heart.

Singapore is a food paradise. For the newcomer, deciding where and what to eat can be intimidating though exciting. The fountain terrace and Sky Garden house offer more than 50 restaurants, with an impressive spread of international foods from traditional pub food to Swiss cuisine. For a spectacular dining experience amidst cascading waterfalls, the fountain terrace is a must see. Here visitors can choose from a myriad of food courts, fast food stores, cafes and restaurants. If you’re in the mood for a healthy and quaint venue try Country Manna. Not to be missed is the Tasty Treatz zone for local treats all under one roof. While for the more adventurous taste-buds, The House of Sundanese food, Tonkichi, and Muthus Curry offer a variety of Indonesian, Malay and Taiwanese aromatic foods.

**“During the day, some visitors walk around the fountain three times, touching the water for good luck. Tradition says that women should use their left hand and men their right”**
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Sadiq Jafar of leading independent law firm Hadeef Al Dhaheri & Associates surveys his peers identify out whether international impressions of working in the UAE are accurate appropriate.

Upon being asked to contribute this article, I thought it would be interesting to obtain feedback on the United Arab Emirates (UAE) from some of my 70 colleagues at our independent UAE law firm, general counsel at some multinational clients and several partners of the numerous international law firms with whom we deal regularly as local counsel and co-counsel in respect of inward investment and development projects.

I asked each to provide me with a quick impression of the UAE legal system in the context of current fitness for purpose and perceived priority areas for reform.

On one matter everyone seemed to agree, and that is that the current generation of UAE (and Gulf) lawyers is extremely fortunate to live and work in such a dynamic and critical part of the world at this point in time, advising on transformational infrastructure and development projects. Rapid economic development undoubtedly brings the legal framework into sharp focus, and there is general acknowledgement of the need for continued improvement in order to impart the appropriate foundation. While all concerned appreciate that there is still a long way to go, the leadership of the UAE undoubtedly values development, leadership and knowledge, and has the will and resources to initiate change at a tremendous pace at all levels. Indeed, one of the biggest challenges for independent UAE law firms is to provide a sufficiently deep mix of lawyers with appropriate local and international experience to keep pace with rapid legal change, and leverage commercial experience into language and solutions which global and regional investors and financiers understand.

Andrew Wright, general counsel of Dubai International Capital (the member of the Dubai Holdings Group that acquired Madame Tussauds, Doncaster Group, Travel Lodge and other foreign investments in recent years), and who is based in the Dubai International Financial Centre (DIFC), observed that: “The growth in commerce in the UAE has been phenomenal in recent years, and foreign investment has played an important part in the growth story, often by way of initiatives supported or sponsored by the government bodies or local businesses. Naturally, this growth has added certain pressure on the UAE legal system, but legislators have been quick to respond where necessary to amend laws and practices and facilitate the growth. The creation of strategic free-trade zones in recent years has further enhanced the attraction of the UAE as a sensible and reasonable legal environment in which to conduct business. I have no doubt that the UAE will continue to lead the way within the region in attracting foreign investors and providing them with a legal environment that supports and protects their investments.”

Tom Kingston, general counsel of Abu Dhabi Investment Company (ADIC), told me: “A great challenge can be explaining to foreign investors just how sophisticated the UAE marketplace is. It can be difficult to locate legislation or regulations from official sources, and to find accurate or reasonable local and international experience to keep pace with rapid legal change, and leverage commercial experience into language and solutions which global and regional lawyers and practitioners will understand.”

“Growth has added pressure on the UAE legal system, but legislators have been quick to respond to amend laws and practices”

Andrew Wright, Dubai International Capital

UAE. Aspects of the legal framework are undoubtedly still developing, but what does exist may well work for many types of investment. The UAE authorities are working on delivering the text of laws and regulations in decipherable form, the consumption and comfort of investors.”

By way of national context, it is well known that the emirate of Abu Dhabi holds 10% of the world’s proven oil reserves, together with substantial gas reserves. Moreover, the UAE continues to diversify its economy, both domestically and by way of considerable foreign investments, most notably in Dubai, which no longer possesses significant hydrocarbon reserves, and has developed its economy into that of a regional hub. There is considerable regional liquidity, which fuels the economy and the multiplier effect has given rise to a high GDP per capita.

Ownership threshold

From a corporate perspective, the minimum ownership threshold applicable to company incorporated in the UAE is generally considered to be an indemnity to foreign investment. UAE companies law still formally requires that at least 51% of the shares of UAE companies be owned by a UAE person, which makes structuring of inward investments and changes of control challenging. Although Dubai – and more recently seven of the other Emirates that constitute the UAE – have established so-called free-trade zones which enable 100% foreign ownership, as well as freedom from tax and customs duty, there remain operational limitations which make a more general reform of companies law long overdue.

Each of the free trade zone projects is innovative and ambitious, but the DIFC, which opened in 2004, goes a step further and in effect creates a jurisdiction within a jurisdiction. The DIFC has gained momentum, attracting many of the world’s leading banking and investment houses; it is intended to be an international hub for the banking, finance, securities and insurance sectors – providing a regulated environment in which banking services (including investment banking, corporate banking and private banking), capital markets (including equity, debt, derivatives and commodity trading), asset management and fund registration, insurance and reinsurance, Islamic finance and back-office operations are practiced. The DIFC’s laws and regulations were drafted by English lawyers, based on common law principles, and the zone is subject to a legal, regulatory and judicial regime that is separate from and distinct to that applicable to entities operating in the UAE proper.

Since 2004, more than 30 laws have been introduced within the DIFC to create a civil and commercial legal framework to govern the activities, rights and obligations of entities operating (and individuals working and/or living) in or from the DIFC. As with any newly created jurisdiction, there will be a period of stabilization, but the legal and regulatory system is showing strong indications of becoming settled and established. An interesting area for conflict of law specialists will be the various as yet untested issues relating to jurisdiction and enforcement beyond the DIFC’s boundaries, even within the UAE.

About 400 entities have been licensed to do business by the DIFC. Furthermore, the Dubai International Financial Exchange (DIFX) opened within the DIFC in 2005 and is now a functioning stock exchange that has attracted substantial interest from potential domestic and foreign issuers. But fewer than 40 securities and instruments have been listed to date, and trading in the handful of listed stocks has been relatively inactive.

Limitations on secured lending

Moving on from corporate law, when I speak to foreign lawyers with whom we work on transactions, such as partners at White & Case, Slaughter and May, Sidney Austin and Herbert Smith, they understandably focus on taking security. For instance, unlike in most common law jurisdictions, it is not generally possible for a lender in the UAE to take a floating charge or other form of first-ranking general security over all of a company’s assets, whether moveable or immovable, existing or future. Instead, piecemeal security may be taken by way of civil law type mortgages, pledges and assignments over interests in land and property. Permissible forms of pledges in the UAE are of a possessory nature, which often presents challenges from a trade financing and security perspective. There are also limitations in the UAE on the exercise of security rights, not least as a result of a general requirement that enforcement of pledges and mortgages is conducted by way of court-administered auction sales.

In terms of general banking, Muna Dandan, legal counsel at client HSBC, points out that: “Banks in the UAE (and the Gulf generally) cannot take a floating charge over assets such as plant and machinery and investment portfolios. This clearly limits a company’s ability to borrow. We currently have to consider taking a pledge over the asset in question, but can only do so if the asset is owned by, and in the physical possession of, the borrower at the time the pledge is granted. Furthermore, depending upon the nature of the asset, the pledge may need to be notarized and registered with a governmental authority making it impractical, for example, to take security over an actively traded portfolio of stocks and shares because each time a trade occurs a new pledge agreement must be notarized and registered with the relevant authority.”

In project finance structures, the issues which arise in relation to the creation and perfection of security can increase pricing and oblige lenders to consider offshore security structures to complement and enhance the onshore security being provided. However, it is in these kinds of structured transactions, where the right combination of international and local UAE expertise working closely together in a team can, in spite of the challenges, still deliver the commercial solutions our clients require.

Uncertainty in the law

Another issue which frequently arises in the context of financing transactions is the legality of derivative transactions in the UAE and the enforceability of netting and set-off
arrangements under the Isda Master Agreement or similar documentation. Various areas of legal uncertainty exist in relation to these types of transactions in the UAE. For example, many types of derivative transactions may be considered to be of a speculative nature and/or contravene various other basic principles of Islamic law. While, as a matter of commercial practice, derivative transactions are commonly entered into by UAE counterparties, it would be very helpful if specific legislation addressed the legal uncertainties that exist both in relation to the legality of the transactions themselves and the enforceability of the governing master agreements.

Insolvency is also an area of UAE law that requires more detailed laws and regulations. In practice, it is also a relatively untested area of law as compulsory windings up of UAE companies are rare. Accordingly, UAE practitioners find it difficult to provide definitive advice as to how the rights and obligations of an insolvent party and its creditors may be construed and addressed by the UAE courts in the event of the insolvency of UAE counterparty. This area of law will inevitably become very relevant if/when the UAE economy does take a downturn, and corporate law firms like ours, which possess in-house advocates within our dispute resolution practice, will continue to be in high demand.

During the past five years, international conversations about the UAE often turn to the subject of real estate. Historically, the ownership of land in the UAE was almost exclusively restricted to UAE nationals. However, in 2002, Dubai announced that ownership of property in designated areas was available to all nationalities, and legislation was issued to effect this in 2006. The initial announcement paved the way for a real estate and leisure boom in Dubai and a similar phenomenon has since been witnessed by other Emirates of the UAE, to differing degrees. Nevertheless, the more sophisticated or cautious investors still await further clarification of many related matters, such as regulation of developers, landlord and tenant, common ownership and management, taking of security (particularly by non-UAE based lenders), enforcement of security, and inheritance rules.

It will be reformed

I will close by citing four more examples of recent reforms of UAE law to show that change can and does occur.

First, the UAE acceded in late 2006 to the 1988 UN Convention on Reciprocity of Enforcement of Arbitral Awards (the so-called New York Convention), which means that, in principle, an arbitration award obtained in any country that has ratified the New York Convention should be enforceable in the UAE (and vice-versa). Whilst the manner in which the UAE courts may exercise discretionary powers in relation to enforcement of foreign awards remains to be seen, the UAE’s accession to the New York Convention is generally expected to enhance the position as regards enforcement in the UAE and to contribute to the UAE’s importance as a venue for international arbitration.

Second, there has for some time been an increasing acknowledgment of the need for reform of UAE Commercial Agency Law in order to facilitate foreign investment and to further align the UAE with WTO policy. UAE Commercial Agency Law historically provided registered UAE agents with significant protections in their relationships with foreign principals. In 2006 an amendment was passed to facilitate termination of the agency relationship by the foreign principal and to enable the importation of certain goods into the UAE without the need for a locally registered agent. The amendments to the Commercial Agency Law are generally viewed by foreign principals as a big step in the right direction, although questions remain as to how such amendments will be implemented by contracting parties and interpreted and applied by the UAE courts.

Third, the new Consumer Protection Law of 2006 is a big development for product liability and consumer protection in the UAE and a Committee for Consumer Protection has been established in order to prepare policies, laws and regulations enhancing consumer protection in the UAE.

Lastly, in early 2007 the UAE Ministry of Labour published a proposed revised draft Labour Law and invited public comment. Changes proposed in the Ministry draft include an obligation for employers to bear all medical costs for employees, an increase in maternity leave, the establishment of a general retirement age of 60, and the introduction of minimum quotas for UAE national employment.

Our tax advantage

In conclusion, although continued reform and improvement of the law is welcome in most spheres, as the UAE strives to get its laws up to the more developed levels achieved in its transportation, finance and real estate business sectors, for those of us who enjoy living and working in the UAE, there is one area in which change would not be quite so welcome, and that is taxation.

Tax lawyers among you may be aggrieved to learn that your practices may not flourish in the UAE, as the current position is that only foreign petroleum producers and branches of foreign banks are taxed, while all other persons (whether corporations or individuals, and irrespective of nationality) are not subject to tax in the UAE.
How Goldman Sachs, Latham & Watkins and others have benefited from their consensual approach. By David Maister and Jack Walker

In 1985, one of us (David Maister) wrote an article for the Sloan Management Review called “The One-Firm Firm”. It identified a strategy common to leading firms across a broad array of professions – creating institutional loyalty and team focus.

The firms named in that article were McKinsey, Goldman Sachs, Arthur Andersen, Hewitt Associates, and Latham & Watkins, where Jack Walker became managing partner three years later.

If one is prepared to accept the argument that Accenture (formerly Andersen Consulting) is the legacy firm of Arthur Andersen, and not the defunct audit-based business, then that 1985 list of one-firm firms stacks up remarkably well as a predictor of subsequent success. These are still pre-eminent and immensely successful firms.

The marketplace for professional services has changed in ways that were unimaginable in 1985. Clients and client relationships have become dynamic at best and fickle at worst. Shortages and mobility of talent have affected every profession. As a result, the five named firms – and their main competitors – have adapted by making dramatic and often risky changes. For example, of those five firms, Goldman Sachs, Arthur Andersen, Hewitt Associates, and Latham & Watkins, where Jack Walker became managing partner three years later.

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The one-firm firm approach is not simply a loose term to describe a culture. It refers to a set of concrete management practices consciously chosen to maximize the trust and loyalty that members of the firm feel both to the institution and to each other. In 1985, the elements of the one-firm firm approach were given as:

- Highly selective recruitment;
- A so-called grow your own people strategy as opposed to heavy use of laterals, growing only as fast as people could be developed and assimilated;
- Intensive use of training as a socialization process;
- Rejection of a so-called star system and related individualistic behaviour;
- Avoidance of mergers, in order to sustain the collaborative culture;
- Selective choice of services and markets, so as to win through significant investments in focused areas rather than many small initiatives;
- Active outplacement and alumni management, so that those who leave remain loyal to the firm;
- Compensation based mostly on group performance, not individual performance;
- High investments in research and development; and
- Extensive intra-firm communication, with broad use of consensus-building approaches.

A contrasting, and more common, approach to running a professional service firm is the star-based or warlord approach, which succeeds by emphasizing internal competition, individual entrepreneurialism, distinct profit centres, decentralized decision-making, and the strength that comes from stimulating many diverse initiatives.

In extreme warlord firms, the productive senior members operate as chieftains presiding over their own territories, coordinating occasionally but fundamentally without a commitment to the institution or each other. Many prosperous firms are close to the warlord end of the spectrum. Such firms achieve extreme levels of entrepreneurial energy.

Warlord firms succeed when management keeps the “big hitters” happy and productive. The past and the future are not high agenda items. Consequently, the performance of extreme warlord firms often swings through peaks and valleys over time.

What is it?
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Monaco
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E/ (+377) 93 10 55 11

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Twenty-one years on

Looking at the range of their services and locations, the five one-firm firms are now almost unrecognizable compared to 1985. Goldman now emphasizes proprietary trading, a change from its predominantly advisory roots. Hewitt and Accenture have considerable international presence. For that reason, and both McKinsey and Latham have expanded their service offerings and global coverage. As mentioned, Accenture, Hewitt, and Goldman have become public companies.

Latham has stretched the boundaries of the one-firm firm approach. As we discuss below, it has relied, like most of the one-firm firms, on an increasing use of laterals. For that reason, and both McKinsey and Latham have expanded their service offerings and global coverage. As mentioned, Accenture, Hewitt, and Goldman have become public companies.

The role of leadership

A key component in a successful one-firm firm is the governance structure. Members of the firm must feel that they have approved the leaders and that the leaders are accountable to them. This is normally accomplished by having the members (or most of them) elect the head of the firm, who would then serve for a term, typically renewable by election. In most cases, the leader is supported by a small, elected term-limited management committee made up representatively of practising professionals. This accountability is usually balanced by a structure that insulates the leadership from the wrath of colleagues, following tough decisions that may involve short-term costs for long-term gain.

In one-firm firms, driven as they are by a commonly held ideology, once all view points are aired and management makes its decision, the partners generally line up behind the decision. Partners or senior officers are willing to delegate managerial powers upward because they trust that those appointed to leadership will operate in accordance with the principles and values of the firm’s ideology. The existence of shared values underpins sustained management effectiveness. To maintain this environment takes active management effort and (usually) careful thought in the appointment of group leaders. Running on autopilot is not an option.

Selective recruiting and alumni

A core characteristic of the one-firm firm, in 1985 as well as 2006, is the careful hiring, training, and indoctrination of new talent. The one-firm firms described in Master’s 1985 article relied almost exclusively on hiring “from the bottom.” They resisted poaching and risky hire for the firm’s fabric. But, as mentioned, things have changed dramatically. One key feature still common to most one-firm firms is that the core (if no longer exclusive) strategy is to grow its own talent. Professionals hired directly from school invariably have the strongest emotional ties to each other and to the firm, and they are the ones who find it hardest to abandon ship. Focusing on young hires has the added virtue of creating a nimble, energetic army of people who are generally more willing to embrace the core teamwork culture and core values than are older lateral hires. Many warlord firms have reduced or eliminated entry-level recruiting, purporting it because of the (short-term) cost of hiring and training such people. They prefer to hire laterally from other firms, to avoid the costs of investing in junior people.

We believe these firms are sending two uncongenial messages: the people we hire are fungible, and there is nothing special about us. As a result, they are not developing sufficient loyalty and glue to survive the coming down periods, much less to take them to the upper reaches of their respective industry or profession.

One of the key to the one-firm firm model has been the vigorous enforcement of high standards for progression within the firm. This means that a relatively small percentage of those hired are actually promoted through the ranks. For that reason, one-firm firms may not have different nominal turnover rates than other firms. However, one of the hallmarks of the model is that people who leave one-firm firms do so with great pride and loyalty, often becoming a source of business referrals for the firm. Turnover among junior (and even senior) people has become a fact of life in all professions. In the eighties, Latham learned that it made all the difference in the world whether people left feeling, on the one hand, neglected or badly treated or, on the other hand, as proud advocates of the firm.

Up to that point in time, Latham had ferociously concentrated on hiring, training, indoctrinating, and holding on to talent. In that environment, when a lawyer left the firm to do something else, it was regarded as a failure rather than an opportunity. The pejorative term attrition was applied to these sad events. As a result, the firm often treated the departing lawyer negligently or even badly, as if he or she was a defector. This is an example of a one-firm firm principle run wild.

In retrospect, the firm lost millions of dollars in potential business because it mismanaged relationships with those who left. As Latham matured as an organization, it changed its practices to honour people who leave the firm and to cultivate their friendship. In the mid-nineties, Latham made a calculation about how much of their current business came directly or indirectly from alumni. The figure was approaching 50%. And it was great business—name-brand clients, often premium rates, quicker bill collection, pleasant dealings, and so on. Moreover, the clients benefited because the alumnus had a special feel for the firm, including knowledge of strengths and weaknesses. In some cases, alternative risk/reward billing arrangements could be worked out because of the built-in trust factor.

Lateral hiring

Before the eighties, firms entered new markets cautiously by redeploying existing talent. But affairs and clients began to move quickly and markets have shifted much more rapidly in the years since. Accordingly, most of the one-firm firms have expanded their use of lateral (experienced senior) hires. To seek inside talent proved difficult. As a result, expanding firms began to cherry-pick talented people from outside the firm. Most firms moved cautiously, bringing in only individuals and small groups and avoiding large-scale mergers. The key has been to make sure that when new laterals join the firm, they know what they are buying into. The lateral must understand that he or she is joining a firm with an established ideology. “If you don’t like this ideology,” the clear message is sent, “don’t think of joining us.” Surprisingly to many outsiders, one-firm firms have found that many laterals come to the firm to benefit from good management; that is, to be managed. They know about the firm’s reputation for effective management and team-based approaches, and they often come from poorly-run firms. Often (not always) they are the most fervent supporters of teamwork, management, and cohesiveness in their new organization.

Lateral hiring, now a competitive necessity, remains a double-edged sword for a one-firm firm. On the one hand, careful lateral hiring provides rich work opportunities for the home-grown. Also, laterals can help the firm challenge its settled view of itself. Done well, laterals can bring a new air of dynamism and creativity to a firm. On the other hand, lateral hiring is management-intensive. The bottom line is that a disciplined lateral programme, anathema not very long ago, can strengthen a one-firm firm. A poorly managed programme will tend to pull the firm apart.

We missed out flexibility

The five named one-firm firms are both similar to and different from what they were in 1985. Changes have happened, but they have been managed within a (mostly) coherent ideology. While they may not seem as pure in their commitment to the ideals described in 1985, these firms are still distinguished by their deep commitment to a teamwork approach.

So it might be fair to say that Master left out one important item when he listed the one-firm firm attributes in his 1985 article: flexibility, and the willingness to experiment and change within the firm’s value system. One-firm firms are known for their attention to what warlord firms would pejoratively characterize as soft values. If our experience since 1985 tells us anything, it is that this attention, balanced of course with high standards, can really pay off in terms of producing success.

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United by a common problem

“We may be from different countries and jurisdictions, but it is interesting to see that the problems are not so dissimilar,” said Jimmy Yim of local firm Drew & Napier at yesterday morning’s session on attracting and retaining young lawyers. This was proved by the numbers standing at the back of the overflowing room and the frantic calls during the coffee break telling colleagues to come along.

Joel Henning, a consultant at Hildebrandt International in Chicago, opened the session with an astonishing fact: “If Shearman & Sterling took every member of the Yale graduate class, they still wouldn’t fill their quota.” He then launched into a blisteringly fast summary of the yet-to-be-published Hildebrandt Associate survey – a US study based on Thomson West data.

Nine jobs by 32

On average, Henning told us, the average worker will change jobs nine times by the age of 32. In addition, only 27% of female and 31% of male associates remain at their original law firm after five years.

“Overall, satisfaction is higher than I expected,” said Henning. “To be frank, people always seem to bitch to me. Indeed, the more they earn, the more they seem to bitch.” Yet the problem of retention remains and the session frequently returned to the idea that today’s workforce is different from that of 30 years ago. Baby boomer’s dominance of the workforce is reducing and generation X is taking over. Indeed, generation Y (those born after 1981) is also beginning to have an impact on the way law firms think.

Steve Armstrong of WilmerHale in Washington DC told the audience that Stanford University has started grading law firms on all aspects of working for them. Applicants are increasingly referring to these grades in interviews. As technology, and in particular social network websites such as Facebook, makes it easier for law graduates to stay in contact, this problem is only going to get worse.

Word of mouth

When asked for his opinion by IBA Daily News, Armstrong agreed: “Word of mouth from those returning to universities is important. Word of mouth from those leaving your firm is important.” Indeed, you never know when you may work with someone again. They may return to the firm later in their career or even become your client.

There may not be a definite solution to the problem of retention, by Armstrong did raise some interesting ideas. “The ‘you are moving up or moving out’ model doesn’t make much sense anymore and lots of firms are turning away from lock step,” he said. “Does the difference between partner and employee lawyer make as much sense as it once did?” Apparently, some smaller firms are beginning to experiment with giving equity to all employees on a smoother sliding scale that is employed by most firms at the moment.

Gender problems

Later in the session, Helen McKenzie from Blake Dawson Waldron in Sydney tackled gender problems in the profession. She opened by wondering whether women need to accept that they may want to have babies at the same age that partners are appointed, or whether firm management needs to change. Clearly, it is the latter. Not only because of equality and fairness issues, but because, as many of the speakers noted, the highest performing quartile of law students is dominated by females. At McKenzie’s firm less than 20% of partners are female despite 65% of graduate hires being so.

“The women that make partnership are probably those who could adapt to the environment and the problems facing them on the way up,” McKenzie said. Later, she added that, “the billable target model is really inhibitive to truly flexible working and this is something that needs to change”.

Staff retention is not something unique to law firms though, so managing partners shouldn’t feel too bad. It is a social issue. As McKenzie informed the audience, childcare costs are not tax deductible in Australia. Until these sorts of things are changed, little progress can be made.
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