The good, the bad and Sarah Palin

When Jose-Miguel Vivanco walked into his hotel room on September 19, the police were waiting for him. They had entered his room while he was out, packed up his luggage and, when he returned, promptly informed him that he was in violation of the principle of non-interference in domestic affairs. Vivanco was expelled from the country, returning to the Human Rights Watch offices in Washington, DC.

Vivanco, who is the HRW’s executive director for the Americas, was expelled for his report on the state of human rights in Venezuela. It was ironic, therefore, that the government took just a few hours to expel him, supporting Vivanco’s conclusions on both human rights and the freedom of expression in Hugo Chavez’s Venezuela.

Carlos Ayala told this story to an intimate gathering of media lawyers yesterday morning, expressing his dismay at the government’s reaction. Ayala, the President of the Andean Commission in Caracas, said that across Latin America human rights are under threat from elected governments. Ayala’s comments on both human rights and the freedom of expression in Hugo Chavez’s Venezuela.

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Historically, it has been a struggle for lawyers to get the ability of citizens to access state information enshrined as a fundamental human right. Even in Europe, the Court of Human Rights has been reluctant to fully recognise this ability. It was important, therefore, that in Reyes the Inter-American Court reached its decision under the general principle of a democracy’s responsibility to be transparent.

The role of exemptions in Reyes drew several questions from the audience. If information can be kept secret if it is in the “national interest” or simply something that would “affect the functioning of the government body”, how will anything be released to the public?

David McCraw, counsel at the New York Times Company, had an interesting perspective on exemptions. When asked whether lawyers word their requests for information very specifically in order to avoid these exemptions, McCraw agreed that they did, but that inquirers from journalists tend in the opposite direction.

“The idea of legal discovery is seeping into journalists’ requests for information, which makes them rather too broad,” he said. “I saw one recently that was sent to Governor Sarah Palin’s office in Alaska. It asked for ‘any and all information pertaining to, connected to or in any other way relevant to’ the subject. Well, that’s going to be every piece of information the office has, and isn’t really going to help your enquiry.”

Elsewhere, Michael Smyth of Clifford Chance told the audience that journalists consider the UK Freedom of Information Act a big disappointment. “It means there are fewer scoops. If a journalist follows up a lead and tries to get information from a government department, it will often just put that information on its website rather than giving it to the journalist.”

The impact of Reyes will reach far and wide. There has recently been a new law in Uruguay, Mexico is looking at something similar and it is expected to affect the European Court of Human Rights and the African Court on Human and Peoples’ Rights in Tanzania.

But Olmedo revealed exclusively that the case is now over. “I have not revealed this before, but we have agreed to end the Reyes case and bring no more actions as long as the government promotes the new law among the judiciary,” he said. “As there’s a journalist in the room I’m sure this will be reported, so now it’s news.”

“I have not revealed this before, but we have agreed to end the Reyes case”

Juan Pablo Olmedo
If you use a detective you could go to jail

Lawyers that hire private investigators could face criminal charges if investigative regulations are breached.

Discussing UK privacy and surveillance laws at yesterday’s Industrial Espionage and Competitive Intelligence working group, financial fraud expert Brian Spiro of BCL Burton Copeland said that “simply saying ‘please don’t break the law’ is not enough.”

In a presentation that focused on the legal limits when private investigators are used to establish industrial espionage, Spiro made it clear that company owners were not the only ones at risk if privacy laws were broken.

He also argued that, given their professional and legal knowledge, lawyers should be more aware of the risks and could find it more difficult than a corporate CEO to argue their ignorance of any illegal activity.

According to Spiro, the days when companies could claim to be ignorant of private investigators “you don’t want to know” are over, and that this was no longer a valid means of protection or defence for those employing the PIs.

Under the Regulation of Investigatory Powers Act (Ripa) passed in 2000 by the UK government, surveillance measures such as phone tapping, call interception and computer hacking are classed as criminal acts unless authorised by the owner of either the information or the telecommunications system.

And whether the private investigator is acting with the prior knowledge of his employer or not, if he is found to have broken the terms of Ripa in obtaining competitive intelligence both parties can be charged.

Responding to a question from Steven Williams of Nabarro, who expressed concern over his own use of private investigation firms, Spiro said that an explicit instruction to a PI not to break the law wouldn’t be enough to protect a lawyer from prosecution, and could actually incriminate them.

“Well written into any request to remain within the law is an acknowledgement of the potential for law breaking,” said Spiro, who went on to urge lawyers to be “very precise about what you ask a private investigator to do.”

In a session that included speakers from Estudio Durrieu, the British Virgin Islands and IBA hosts Argentina, all made it clear that investigation firms must ensure their clients’ conduct complies with laws at yesterday’s Industrial Espionage and Competitive Intelligence working group, financial fraud expert Brian Spiro of BCL Burton Copeland said that “simply saying ‘please don’t break the law’ is not enough.”

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In a session that included speakers from Estudio Durrieu, the British Virgin Islands and IBA hosts Argentina, all made it clear that investigations into industrial or corporate espionage vary widely from country to country.

There was also agreement that such cases were dominated by questions of jurisdiction, particularly with computer crime.

Discussing what he called “e-procurement fraud,” where a remote hacker accesses sensitive company information and sells it to the highest bidder, Steven Williams said there was little hope for overlooked competition to claim compensation. Aside from the difficulty of locating an anonymous hacker, Williams said that such individuals had “no duty of care to an employer,” and therefore there was no obvious cause of action against them.

Session chair Charles-Henri De Pardieu of De Pardieu Brocas Maffei reiterated the threat that computer crime poses when he said that “justice is competing with the internet, and there’s no way it can win; it’s just too slow.”

Williams’ civil law perspective implied that computer crime was first introduced.

De Pardieu charted the development of corporate corruption regulations throughout the century, up to the introduction of private corruption legislation by the US government in December 2003 following the high-profile Enron and Parmalat cases.

He also spoke of the different legal processes across countries, with particular reference to Latin America, where no system of criminal liability exists for corporations.

All speakers agreed that computer crime was the single biggest challenge to preventing and contesting industrial espionage, with Steven Williams calling it “a new threat to the integrity of all tender processes”.

Durrieu cited a hypothetical case where a hacker operating somewhere in Latin America accesses information held at a US company’s headquarters. In such a case, which jurisdiction has governance over the hacker’s actions, and can there be any potential for cross-border legal action for victims?

Perhaps this is a question that can be answered by the presentation of the IBA Legal Practice Division’s task force on extraterritorial jurisdiction tomorrow morning.

Here’s my blueprint for climate change

It is a critical global goal given in the Golden Horn room yesterday, Shell’s Beat Hess spoke about the legal challenges for lawyers and fossil fuel companies that result from climate change. “There is no silver bullet,” he said. “There is no one answer. If the world is to meet the solution to the energy challenge it will require hard work from everyone.”

Hess, also a member of the Corporate Counsel Forum Advisory Board, laid out two paths, the scramble and the blueprint, that the world could travel down. The scramble plan involves international competition, with companies and governments making deals with each other.

Those immediate answers will exhaust the coal and oil supplies, creating further global climate change and drastic weather events. “The outcome will put pressure on governments and knee-jerk reactions,” he said. “All of this will give rise to global climate change because the sensible solutions will be ignored.”

The better solution is the blueprint. Hess joked that this part of the speech would take less time, partly because it was a better plan, and partly because he only had two more slides left.

In its cross-border methods address solutions such as biofuels and cap-and-trade, to create a harmonised market. By 2050 it could cut carbon-dioxide emissions by more than 30%. “These cooperative efforts will create more success and less volatility in the market,” said Hess. Even in the blueprint plan, fossil fuels will be needed to bridge the gap until infrastructure and industry can catch up. “The next five years are crucial, but we cannot do it without legislative cooperation, including efficiency in the transport sector, credible wind and solar targets and robust standards for holding carbon,” he said.

Guillermo Malm Green of Broun & Salas, from Buenos Aires, also went through three distinctly different countries and their development of political strategies to deal with global climate change: Argentina, the US and Canada.

Green explained how the political struggle for power between local and federal governments is viewed through the country’s environmental policies. In the western provinces of Argentina the federal government is attempting to impose standards among local businesses affecting pollution in the river border with Uruguay.

The provincial governments allow the federal government to impose minimum standards, but the federal government is trying to extend that power in hopes of stronger regulation.

“The pollution of the river triggered a lot of action from the senate and this had local industries arguing for a better balance of power,” he said. “The provinces literally destroyed bridges to get the government to stop overriding them.”
QUESTION: What did you enjoy about the opening ceremony?

Epiphany Ainge
Ainge and Ainge
Nigeria

I thought the ceremony was a very well organised cultural display and the keynote speaker was excellent. De Soto’s speech was highly informative and delivered brilliantly. Buenos Aires itself has been a pleasant surprise too. It seems a highly developed, well organised city and the people are very friendly.

Hernando de Soto’s speech was incredible. It had so much substance and provided a fresh perspective on the issues that are at the top of everyone’s mind. And he was an excellent speaker. I could have listened to him for another 30 or 40 minutes. The rest of the entertainment was fun, and I enjoyed spending time in the Tango Palace. Buenos Aires is a beautiful city and I’m looking forward to seeing more of it, particularly the Puerto Madero area.

Amira Rasekh
Mena Associates, in association with Amereller
Egypt

The opening ceremony was lovely, particularly the Opera Pampa show. The music and performers were excellent. The keynote speaker was also very interesting; it was great to hear from someone at one of the world’s leading think tanks. This is my first IBA conference and my first time to Buenos Aires. I’m looking forward to going to some of the workshops on sub-prime and capital markets.

Glenn P Hendrix
Arnall Golden Gregory
Atlanta, Georgia, US

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Latin America needs to catch up

Nicholas Pettifer analyses the IBA Poll results and finds that while there is good news for the rule of law, Latin America has its problems.

The rule of law worldwide is under less threat than last year according to a poll of IBA members. But there is a more pronounced concern about the legal systems in Latin America. The IBA Daily News polled members on this and other subjects in an anonymous online survey ahead of this year’s conference. Last year, 57% of respondents felt that the rule of law was under threat in their jurisdiction compared to 51% this year. This marginal swing indicates that there are still a lot of global concerns, although there has been a slight improvement.

Latin America concerns

But it was a new question that provided the most interesting results. More than two-thirds of respondents believe that the rule of law is under threat in Latin America specifically. The most pressing concern by far was succinctly described by a German lawyer: “Pseudo-democratic dictatorships are on the rise.” A Brazilian counterpart agreed: “It concerns me that there is a progressive lack of independence among the executive, legislative and judicial authorities in countries such as Venezuela, Ecuador and Peru. The constitutional principle of checks and balances cannot be duly exercised.”

Many of the comments left by members singled out Venezuelan president Hugo Chávez for particular criticism. “Corruption within the judiciary and public authorities was also high on the list of members’ concerns, alongside over-zealous censorship and the influence of drug cartels in the region. A significant number of members also expressed concern over property laws. The feeling is that they can be (and are) changed so frequently that it is nearly impossible to keep track. The unfair expropriation of assets is a major problem too.”

The combination of all of these aspects has undermined public confidence in Latin American law. “People do not believe in justice or in the legal system,” said one Portuguese lawyer. “It takes too much time, effort and money – people prefer to solve their problems on their own, which leads to serious problems.”

Global problems

Although the percentage of members that feel the rule of law is under threat in their jurisdiction has fallen, the majority is still worried. As with the Latin American comments, corruption was a major worry among lawyers worldwide. But there were also suggestions that judicialities are often weak. One exasperated Malaysian lawyer said that: “The selection of the judiciary often leads to judges who have no character to withstand the directions of the executive.”

Similarly, a Pakistani lawyer revealed that he “has doubts about the independence of the judiciary due to the alarming influence of previous and existing governments on the appointments of judges in the superior courts.”

There are also problems in the Philippines: “Violent revolution, rampant criminality and corruption foster cynicism about the legal process,” said one lawyer.

Core values threatened

Elsewhere in the poll, there was a 10-point swing towards the belief that the core values of the profession are under threat. Last year 55% said yes, but this year the figure is 65%. The vast majority of comments referred to the fact that “attorney-client privilege appears to be getting chipped away bit by bit.”

One lawyer from the British Virgin Islands said: “In the US, where I am also admitted to practice, efforts to erode attorney-client privilege under the guise of homeland security are troubling.”

This was a common concern in many other jurisdictions too. From Bermuda to Ireland and from Nigeria to Turkey, respondents bemoaned the lack of enforcement of privilege.

Rule of law is under threat:

- **AUSTRALIA**: “Politicians are too willing to pander to powerful special interest groups”
- **CROATIA**: “There is a selective application of laws by politicians and big business”
- **INDIA**: “There is a lack of transparency and accountability in judicial appointments”
- **JAPAN**: “Antitrust laws and consumer protection laws suffer in Japan”
- **MALAYSIA**: “Judges are so corrupt and easy to influence”
- **NIGERIA**: “Rule of man is rearing its ugly head”
- **PAKISTAN**: “There is no rule of law because our 60 judges were suspended”
- **PHILIPPINES**: “Violent revolution, rampant criminality and corruption foster cynicism about the legal process”
- **SOUTH AFRICA**: “There are continuing attacks on the integrity of the judiciary”
- **UK**: “Demands for the incorporation of sharia law will undermine the UK”
- **US**: “Bush eroded the rule of law with the treatment of potential terrorists”

In your opinion, is the rule of law under threat in your jurisdiction?

- **No**: 49%
- **Yes**: 51%

Is the rule of law under threat in Latin America in particular?

- **No**: 30%
- **Yes**: 70%

Do you feel that the core values of the profession such as independence and attorney-client privilege are under threat?

- **No**: 35%
- **Yes**: 65%

Should training in legal ethics be a requirement to become a lawyer?

- **No**: 5%
- **Yes**: 95%

Please describe your role:

- **Private practitioner**: 73%
- **Other**: 27%
Jefferson Miceli’s first year as superintendência jurídica for Banco Pine can best be described as trial by fire. Surging Brazilian equity markets and rising commodities prices over the past few years have kept the country’s financial institutions racing to meet demand. Particularly affected are Brazil’s domestic banks, who look to service a growing middle class while continuing their expansion throughout Latin America and the Caribbean. For Miceli, this burgeoning middle market—often volatile and always competitive—is exactly where he wants to be.

Miceli’s legal career began in the offices of the Brazilian firm Tozzini Freire Teixeira e Silva Advogados as a junior associate. Rising through the ranks of the corporate practice, he soon recognised his desire for a larger perspective on the financial markets. “When you work as an associate at a law firm, financial institutions look to your work in certain situations and you don’t see where the client is profiting; you don’t see the reasons for development in the transactions. I wanted to understand that, the scenarios and the ways of thinking in a financial institution,” Miceli says.

In 2002, he left Tozzini Freire for Banco Safra, a mid-market Brazilian bank. “I always had this interest in working in financial markets and the opportunity at Safra gave me four years of experience,” said Miceli. After serving as a senior lawyer for capital markets and investment funds work, Miceli moved again, this time to rival Banco Pine, in 2006. Still serving as a senior lawyer, he arrived at the bank as it looked to expand domestically and internationally. Within a year of being hired he became the bank’s lead in-house counsel.

“When I was hired by Banco Pine, it was a completely different institution than it is today,” Miceli says. As surging equity markets brought fresh capital to companies throughout the country, many through IPOs, Miceli notes how the average deal size soared in Brazil. The scope of the bank’s lending increased accordingly, bringing it to the middle market position it is in today.

In June 2007, Banco Pine and Miceli realised their decision to become publicly traded on São Paulo’s stock exchange, Bovespa. Miceli describes the offering as a major transformation for the company. “We were the first medium-sized bank in Brazil to go to the market. It was something new here. We benefited from a market that was very active for investors, and we had a huge increase in capital which allowed us to make several operations we were not able before,” says Miceli. In total, Banco Pine raised R$520 million ($273 million) through its share offering.

Highlighted in its latest earnings report was the bank’s growing corporate portfolio. Miceli says the bank’s collection of mid-market Brazilian companies as well as new, larger clients such as Petrobrás, Brazil’s state-owned oil company, have come as a result of the IPO. “After the IPO, we started to be looked at a different way by rating agencies, by foreign investors, even by the local market ... I don’t see any negative angle to us going public,” says Miceli. Without hesitation he describes the public offering as the greatest legal challenge he’s undertaken since joining the bank.

The transition after the IPO, however, included important changes for the general counsel position. Miceli’s role suddenly included serving as a conduit between the bank’s board of directors and its new shareholders, working to condition the relationship. The IPO also helped to revalue the bank’s debt, facilitating several issuances of medium-term notes in the last year, the latest totalling $150 million in June 2008.

The establishment of the middle market in Brazil has created two encouraging trends for banks like Banco Pine. The number of deals originating in Brazil and of inter-Brazilian deals are both increasing. Fragile as it may be, the country’s middle market is laying the groundwork for a sophistication many have long awaited. The institutions servicing this market are only too happy to aid its growth.

But as this growth continues to run contrary to North America’s financial markets, Miceli’s optimism is coming under control, focusing on the banking sector’s near term. “We are worried with what is happening in the US,” he says. “But the controlling shareholders [at Banco Pine] have more than 35 years of experience in the financial world.” This tempered attitude applies to competitors as well. “We have a lot of competition in the medium-sized bank peer group,” says Miceli, “competition we always face. It will always be a difficult market, but we have been here for 10 years now and aren’t planning any differently for next year.”
Now that we have the space to do it, we need to prove that we are ready”, says Enrique Burchard, partner at the Honduran office of Aguilar Castillo Love.

Times have changed since law firms adopted a strategy of regionalisation in Central America in the late nineties. The trend of regionalisation among Central American firms seems to have reached its zenith. All the firms that have an inclination to regionalise have already done so.

Since adjusting to their new roles as regional players, these firms have begun to rapidly grow and diversify in response to the overwhelming demand for legal services across the area. The Guatemala office of Arias & Muñoz, a firm with offices across all five Central American jurisdictions, has doubled in size since 2006. In this region, where firms are still largely traditional and where lateral hires are relatively rare, this expansion is unprecedented.

With the onset of globalisation and the ratification of various trade agreements including the Central American Free Trade Agreement (CAFTA), the region has seen an influx of foreign investment over the past 10 years. Companies are predominantly entering the region through M&A activity or other financing opportunities, and firms have had to develop niche practice areas in order to better serve these clients, many of them multinational corporations.

Because the regional firms that cater to international clients are all rather equally matched in terms of quality, in-house counsel have been able to take advantage of the relative parity and demand more competitive prices. In the rush to attract the growing number of international clients and gain more exposure, marketing departments, which used to be non-existent at many of these firms, are quickly being created and receiving attention and investment.

But in the past year, the slowdown in the American economy meant that foreign investment into the region was curtailed. Lawyers are optimistic that their practices will remain active, and that growth will continue, albeit at a slower rate. Lawyers like José Augusto Toledo Cruz, a partner at the Guatemala office of Arias y Muñoz, think that this downturn will not affect growth strategy for the long term, largely because the economy has diversified beyond the US, to include investors from Europe and Asia.

Expanding expectations

Firms are growing, specialising and trying to do banks’ work for them in Central America. Some think it will lead to takeovers by US firms, says Erin Kelechava

“Long-term growth will depend on the capacity of each firm to develop new services”
Enrique Rodriguez Burchard, Aguilar Castillo Love

The effects of consolidation

In the early 2000s, the banking industry in Central America was going through a period of consolidation. Large international banks saw opportunity in the emerging markets there and began buying up local banks in rapid succession. In an effort to become more efficient after the acquisitions, many banks have delegated much of their legal work to outside counsel. The banks that have begun operating in Central America in the past few years require not only a larger volume of legal work, especially on compliance, but the work is more complex, and requires a deeper knowledge of specific areas.

Attorneys are in the process of accommodating the new needs of their banking clients, both by increasing the number of attorneys and familiarising themselves with the international regulations that are now standard operating procedure at these institutions. The more bureaucracy and the more detailed the compliance regulations, the more indispensable the central American firms are making themselves. Banks are beginning to require answers to theoretical legal problems, rather than procedural questions.

The smaller local banks that remain are also interested in promoting efficiency to become more attractive acquisition targets. When the market was not deep or varied enough to require specialisations, general corporate lawyers advising on general matters were the norm. In the headier times of the last 10 years firms found a need to develop specialisations like labour law, banking and finance. Firms are also anticipating an increase in work for their litigation departments, as the parties to deals that...
have fallen apart since the sub-prime crisis begin to weigh their options.

As José Augusto Toledo Cruz explains the trend towards specialisation, “first a firm may work on one particular M&A transaction, but then you have an opportunity to keep the client, which would mean a lot of additional corporate and labour work, if you are on the buyer side. If you are representing the seller, you have the opportunity to have the buyer recognise the value of its opposing counsel, which could also result in more steady work.” The firms are gaining opportunities for sustained relationships with large companies in a way that they never have before.

**Cafta changes the landscape**

Another major change to the legal landscape was Cafta’s ratification in 2006. Lawyers across central America are enthusiastic about the number of cross-border transactions likely to emerge from Cafta’s implementation. In Costa Rica, for example, the agreement is expected to open up former state monopolies in telecommunications and insurance. Both industries are candidates for privatisation, and have the potential to lead to a torrent of new work.

To meet these additional demands, firms have not only had to grow, but have had to develop a more diversified practice. For example, in Costa Rica, many firms have created more sophisticated real-estate departments. Firms like Consortium, Arias y Muñoz, and BLP Abogados have capitalised on the recent real-estate boom, and have had to grow in order to do so.

BLP Abogados has adjusted to the new legal environment by hiring more partners with expertise in industries with potential for privatisation. Five years after the firm’s founding, it is growing at an amazing rate. Even though the firm does not have a regional presence, there is enough work to make it competitive within Costa Rica.

Firms have taken it upon themselves to facilitate a better understanding of the potential advantages to be gained from Cafta, and the other trade agreements that the countries have with countries like Chile, Colombia, Mexico and Taiwan. There are many opportunities for entrepreneurs under these agreements, and of course lawyers familiar with the benefits and pitfalls are in high demand.

**Specific developments**

Each jurisdiction has had its own domestic developments that have contributed to the growth of the legal market. For example, in Honduras over the last two years there were acquisitions in almost all major industries. In the wake of this consolidation, newly acquired companies are beginning to adopt international regulations at the local level and are starting to make changes to their internal governance and oversight. All these adjustments require legal counsel, and in order to provide these legal services, firms have been expanding quickly.

According to Burchard at Aguilar Castillo Love, “long-term growth will depend on the capacity of each firm to evaluate new opportunities and its ability to develop new services.” At Aguilar Castillo Love, they are taking the idea of diversification seriously. The firm has recently developed a practice focusing exclusively on trademarks, and is considering creating a new department dedicated to corporate compliance, to help clients with routine matters, like maintaining the corporate books, drafting powers of attorney and proxies, and other matters that are normally handled by lawyers working in-house. This practice makes sense given that many corporations, in an effort to reduce costs, are reducing their in-house legal groups and outsourcing the work to corporate law firms.

**Looking to the future**

Some predict that in the next 10 years there will be interest from international law firms looking to establish a presence in Latin America. Due to recent developments like Cafta, the US will continue to be the region’s biggest trading partner, and US firms will only have a greater interest in acquiring central American firms.

There is speculation on whether or not international firms have designs on these regional players and whether they might be interested in making acquisitions in the central American legal market. Some are certainly of this strategy, noting that large international firms are more comfortable with these regional firms assuming all the overhead, and are not eager to compete with firms that have long standing contacts and associations. According to José Augusto Toledo, “these international firms get responsiveness and the same quality of service from the regional firms here, with the upside that others are making the investments.”

Perhaps Burchard best summed up the need for firms to continue the strategy of diversification: “Clients have already seen that these regional firms can provide good service, but if the clients do not come you need to reimage your business.” These firms will need to face the challenges posed by economic developments around the world in order to remain viable in an increasingly active and competitive market.
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Regional fora will be my priority

The leading Latin American lawyer and incoming president of the IBA is keen to increase the Association’s presence in regional areas says Toby Marchant

What are you particularly looking forward to about the conference this year?
It’s a great opportunity to have our annual conference back in Latin America. It’s the first time we have had a Latin America, the first being in Argentina 20 years ago and the other was in Mexico in 2001. It’s a great opportunity for our members to meet for a week and take part in all the different sessions. Many of them will be analysing different fields of international law and different forms of business transactions.

Are there any specific sessions you are looking forward to?
There are many sessions that present the delegates with an excellent opportunity to update their knowledge of the latest trends in arbitration, M&A, litigation, intellectual property and contract negotiations.

We also have several important showcases that relate to extra-territorial jurisdiction and the importance of the independence of the judiciary. This is important for many of our members in Latin America and around the world.

Is the principle of an independent judiciary coming under increasing threat in Latin America?
In certain jurisdictions, yes.

Would this be in the countries with populist/nationalist governments?
Yes, especially in Venezuela under Hugo Chavez, but also in Bolivia, Nicaragua and Ecuador. In these countries there is a serious threat to the independence of the judiciary.

Are there any speakers who you think will be unmissable?
I am very interested in hearing Julio Maria Sanguinetti, the former president of Uruguay, speak at the rule of law symposium. I am also looking forward to hearing Leandro Despouy [Special Rapporteur on the Independence of Judges and Lawyers to the Human Rights Council of the United Nations] speak about the independence of the judiciary. I have been impressed by the articles of his I have read.

I believe that the prosecutor for the International Criminal Court, Luis Moreno-Ocampo, will be present as well.

Am I right in thinking that you will be the next president of the IBA?
That’s correct.

What do you most hope to achieve in your tenure as president?
Firstly, for 12 years I have been involved in the restructuring of the IBA’s regional activities. I am the founder of the Latin America Forum. This conference is an excellent opportunity to discuss the different situations affecting the legal profession. I will continue supporting this.

We have also been organising regional conferences for bar leaders for the Americas (from Canada to Argentina). I will make sure that the IBA continues organising these regional conferences. We organised a special programme for Asian developing powers in Singapore last year. This year we will have a special programme for developing powers in Latin America.

Are these the two regions where you are most looking to increase the presence of the IBA?
We launched the North America forum two years ago. I am eager to continue giving the necessary support to ensure that the forum can continue in development.

I intend to focus on the Asia-Pacific forum because it covers a large region with multiple and complex jurisdictions. Next September we are having a regional conference for the forum in Hong Kong. We are planning new activities in the region for 2009-2010.

We have also been working to relaunch the Arab forum. We recently opened our second office in the region in Dubai. I hope to increase our presence and activities there. I have been in contact with our members in the African forum as well, to support them and create a presence in Africa. I will continue supporting the work and activities of the human rights institute.

Are there any other parts of the world where you feel the rule of law or the independence of the judiciary is under threat?
I am sure that the countries I mentioned in Latin America are not the only ones where the rule of law is under threat. Not long ago Poland was facing serious problems in terms of the independence of the judiciary being influenced by the executive. I have also read many articles about this issue in Russia.

Is Buenos Aires a city you know well?
I have made many visits to Buenos Aires for both pleasure and business. I like it very much.

What would you recommend for first time visitors to the city?
I think Buenos Aires offers a very interesting cultural life. It has great restaurants. Unfortunately the National Theatre is closed, but they have excellent ballet performances. There’s a really wide range of activities. The tango is incredible, you can spend several evenings learning to tango and watching tango dancers.

Are there any social events outside the conference hall that you are hoping to attend?
I am obviously looking forward to the closing [party] which is a tango evening. The Latin American lunch has also become very popular.

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On wine lists you will encounter while entertaining clients in Buenos Aires, malbec, torrontes and other home-grown varieties will sit alongside clarets, riojas and burgundies. Once famed for its high-volume plonk, Argentine wines now win plaudits from connoisseurs. What’s more, the wine industry has a rich heritage. Since the odyssey of a Spanish Priest in the 16th century, Argentina has risen to become the world’s fifth largest wine producer.

Argentine winemaking dates to the arrival of Juan Cidrón in 1556. Amongst his belongings were vine stalks from his native Spain that he cultivated in the fields of Santiago del Estero. Over the next two centuries winemaking remained a cottage industry. Above all, vineyards were prized by Catholic clergy-men as a source of communion wine. After this sedate beginning, the industry developed apace in the late 19th century. A second wave of European immigration imported new varieties of grapes and more sophisticated production techniques. The railway line connecting Buenos Aires with grape-rich Mendoza province (opened in 1885) enhanced producers’ access to the thirsty capital. Despite these innovations, Argentine wine failed to satisfy the affluent classes which had tasted imports from France, Italy or Spain.

In the 20th century, Argentina became more of a wine-consuming country. At its zenith, popular consumption reached an estimated 90 litres per capita a year. The industry ignored international markets and dedicated itself to the tastes of domestic drinkers. The emphasis was decisively on quantity over quality. Argentine wine was characterised by its earthy, rough and quaffable properties. This level of demand proved unsustainable. In the eighties the native wine industry verged on the brink of collapse. Domestic consumption halved from its peak. Furthermore, the country’s formerly strained foreign relations and volatile currency were a disincentive for overseas investors. Perhaps as many as a third of the country’s vineyards were torn from the soil. Sprawling unkempt grape fields and abandoned workers’ cottages provide a legacy of this era.

Argentine winemaking has long since recovered from this nadir. In the nineties domestic producers, following their Chilean counterparts, compensated for weakened domestic demand by targeting overseas markets. Simultaneously, Pernod Ricard, the Lurton brothers and other international wineries bought vineyards in the country. They recognised its potential as a source of fruity middle-market wines for drinkers in northern Europe and the US.

Mendoza province, in the shadow of the Andes, remains the epicentre of the country’s wine industry. Its harsh arid climate is seemingly ill-suited to winemaking. But the intricate network of irrigation channels (a relic from when Incas ruled the land) ensures that vineyards are hydrated with meltwater from mountain glaciers. The wine is notable for the altitude at which it is grown. White grapes are often produced in excess of 1500 metres; the highest vineyard is at 2,400 metres. Growing at height has the advantage of exploiting cooler daytime temperatures. The intensity of ultra-violet rays at this level also causes grapes to develop thicker skins, producing wines with richer tannins and deeper colour.

Mendoza is the source of malbec, Argentina’s signature red wine. The malbec grape originates from south-west France, featuring in wines from the Cahors region. The grape is reputed to create spicy wines with a rich aroma and exceptionally dark complexion. Although experts consider them a weaker sibling, Argentine white wines are also winning admirers. Torrontes, a distant relative of Muscat, leads the pack. To complement these indigenous varieties, Argentina is also home to more ubiquitous chardonnays and cabernet sauvignons.

In a tasting sponsored by the influential Wine Advocate magazine, over 100 Argentine malbecs scored more than 90 points out of 100; 13 received an astronomical 96 points or higher. Even the elite producers of France or California would cherish these scores.
RULE OF LAW: AFGHANISTAN

A Bar against the odds

Though facing tough challenges, the IBA Human Rights Institute has seen success in Afghanistan, says Toby Marchant

July 30 2008 may prove a momentous date in the history of Afghanistan's judicial reform. Or a day of incon- sequential legal wrangling. Over 400 lawyers braved considerable danger to attend the inaugural General Assembly of the Independent Afghan Bar Association (IABA). The event is the highlight of the IBA Human Rights Institute's (IBAHRI) five-year engagement in Afghanistan. Due to its culture, history and geography, the challenges of resurrecting the rule of law in Afghanistan are incomparable with anything the organisation has faced in its short history. Afghanistan's complexity has made this a unique assignment for the IBAHRI. The mountainous landscape, primitive infrastructure and ambiguously drawn borders, which characterise Afghanistan, have produced a profoundly decentralised society. Popular affiliations are more likely to be based on language and religion than identity with the Afghan state. These factors have stymied the emergence of a unitary system of justice. Successive rulers, since British imperialists in the 19th century, have been unable to assert their authority far beyond Kabul or Kandahar; let alone across the whole of Afghanistan.

To exacerbate the IBAHRI’s challenge, to varying degrees Afghanistan has remained in a state of war since the Soviet invasion in 1979. The turmoil that raged throughout the Afghan civil war and Taliban rule ensured that, with Afghanistan, the IBAHRI has been dealing with a collapsed state.

The mission

The IBAHRI’s mission in Afghanistan has been to establish an independent sustainable Bar Association. It was felt this would help regulate the country’s disparate legal profession. A further aim of the project is to enhance the fairness of the justice system. Human rights organisations have expressed concern about the absence of legal rights for the accused in Afghanistan. Under the Taliban the concept of free legal representation for defendants was anathema.

In Afghanistan the work of the IBAHRI has been overseen by Phillip Tahmindjis, a prominent Australian lawyer who has worked extensively on human rights and anti-dis- crimination law. Describing his first impressions of the Afghan legal system, he remarks: “It is very disparate because of the country’s history; there are remnants of civil law, aspects of Russian law and a lot of alternative dispute resolution.”

Tahmindjis is referring to the prevalence of informal tribunals comprising of community elders to resolve local disputes. “The legal system became so endemically corrupt that most people wanted to avoid it as much as possible,” he notes.

The challenges

The project entailed obvious practical challenges for the IBAHRI. The mountainous landscape, primitive infrastructure and ambiguously drawn borders, which characterise Afghanistan, have produced a profoundly decentralised society. Popular affiliations are more likely to be based on language and religion than identity with the Afghan state. These factors have stymied the emergence of a unitary system of justice. Successive rulers, since British imperialists in the 19th century, have been unable to assert their authority far beyond Kabul or Kandahar; let alone across the whole of Afghanistan.

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The challenges

The project entailed obvious practical challenges for the IBAHRI. Since removing the Taliban, Nato forces have struggled to supplant anarchy with order. Afghanistan remains a conflict zone. Fearing for the safety of their personnel on the ground, the IBAHRI has restricted its operations to Kabul. To expand the scope of the mission, the organisation has drawn on non-government organisations (NGOs) working in the provinces to spread awareness of their activities.

Tahmindjis candidly admits: “We have had a major challenge with the language and getting ourselves understood. Each member of our team in Kabul started to learn Dari but when you are dealing with legal concepts you need more than a conversational ability.” The IBAHRI has relied on interpreters to convey their message to lawyers and the Afghan government. Even so, “there are some words that don’t translate easily into other languages,” says Tahmindjis, “for instance, the word ‘lawyer’. In Dari this translates as go-between or mediator.”

So disparate was the system that “just identifying who the legitimate lawyers were, let alone their level of training, was a challenge.”

“The IBAHRI has been dealing with a collapsed state”

Establishing the rule of law in Afghanistan has been a priority for the international community since the US-led overthrow of the Taliban in October 2001. The Bonn agreement – the transitional framework signed in December 2001 to prepare the country for self-governance – decreed that judicial power was vested in an independent Supreme Court of Afghanistan.

This agreement prescribed the creation of a Judicial Commission to rebuild the justice system in accordance with Islamic law, international standards and Afghan legal traditions. Infligting caused the acrimonious closure of the first commission in May 2003. After the establishment of a second commission in November, the reform process gained momentum. The commission cited improving the structure of judicial institutions as a vital component of its mission. Early in 2003, the commission issued a report outlining the four areas of work it considered crucial to fulfilling its mission. The last of these was the Structure of Judicial Institutions. This section outlined projects to establish a Bar association and strengthen the provision of legal aid.

Around the same time, Christian Åhlund, executive director of the Stockholm-based International Legal Aid Consortium (ILAC), undertook a scoping mission to Kabul. His task was to uncover what opportunities existed for the IALC’s members organisations to engage in the rebuilding of the country’s judicial system. He quickly realised the potential of the IBA to assist the Judicial Commission with its objective of creating a Bar association. These are the origins of the IBAHRI’s mission to Afghanistan.

The close links that the ILAC has with Sweden’s government helped ensure that the IBA’s work in Afghanistan has been generously funded by the Swedish foreign ministry.

Tahmindjis recalls. As the profession had remained largely unregulated, there was no directory of lawyers to refer to. Furthermore, during the Taliban era Afghans fled by the thousand to neighbouring countries, especially Pakistan. As they returned after the allied invasion, many claimed to be qualified lawyers, having studied at overseas universities. It was clear to the IBAHRI that many of these degrees were forged.

Tahmindjis characterises the IBAHRI’s work as winning the hearts and minds of the Afghan government and lawyers. He was fortunate that certain crucial stakeholders, notably the Ministry for Justice, were quick to appreciate merits of the project. The IABA became a legislative priority for President Karzai’s administration.

Naturally, he encountered scepticism: “There were lawyers who were convinced that a bar association was just another western idea that Afghanistan really didn’t need.” To convince the doubters, it was vital to liaise with the country’s lawyers, to inform them about the purpose of bar associations and address their concerns. “In particular we emphasised that Islamic countries such as Malaysia, Egypt and Iran all have Bar associations,” notes Tahmindjis.

The breakthrough came two years ago. A seminar was held in Kabul for Afghan lawyers, government officials and NGOs working in related fields. Following a series of lectures, the delegates were divided into eight working groups. Among other legal issues, these groups discussed the ethics of the profession, human rights and membership criteria for a Bar association. Their findings were reported to the plenary. A position paper was later compiled, which conveyed the consensus that emerged from the seminar.

According to Tahmindjis, “The seminar was very successful because it was among the first times that Afghans had been asked what they wanted; rather than an overseas organisation telling them what was good for them.”

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Background to Afghanistan

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for the profession and disciplining those who breach it,” says Tahmindjis. “Also, they strongly supported a system of regulated entry into the profession and equality for women.”

Breakthrough and assembly
In 2007 the Loya Jirga and Mascherano Jirga – the lower and upper houses of the Afghan parliament – passed the legislation required to bring the IABA into existence. “That was quite a job,” Tahmindjis reflects. “With so much new legislation on the books we had to push the bar association to the top of the heap.” It received the approval of President Karzai in December. That only seven laws were established in 2007 is a measure of the importance politicians have attached to the project.

The way was then clear for the Afghan legal community to hold a General Assembly to elect a President and Executive Council for the IABA. The United Nations Office on Drugs and Crime volunteered the $180,000 needed to cover expenses such as venue hire, printing costs and accommodation.

“This event was staged at the Intercontinental Hotel Ballroom in Kabul over four successive days at the end of July. Over 400 lawyers attended, 150 of whom had travelled in from the provinces. For this latter group, their journeys to Kabul were made at considerable risk. “Some of the attendees who were bused in left their registration cards at home, fearing the consequences if they were identified as lawyers at a Taliban road block,” explains Tahmindjis.

At its outset, the general assembly passed bylaws to govern the ethics, discipline and entry requirements for the IABA. Especially noteworthy are the clauses that guarantee a minimum level of representation for female lawyers on the Executive Council and ensure that at least one of the (two) vice presidents is female. The code of conduct for the profession remains to be finalised.

The climax of the assembly was the election of the 15-strong Executive Council on the final day. This took place in the presence of the Second Vice President of Afghanistan, the Minister for Justice and his two deputies and the Chief Justice of Afghanistan. The president of the IBA, Fernando Pompo, Phillip Tahmindjis and Alex Wilks, the IBA’s legal specialist for Afghanistan, also attended. Voting procedures were monitored by local and international electoral experts. The results were announced shortly before dawn on July 30.

Expectations
The establishment of the IABA does not signal the end of the IBA’s work in Afghanistan. Quite the opposite. “Now perhaps our most difficult task is beginning. That is physically setting up the Bar and making it self-sustaining,” Tahmindjis explains. “Our goal is to eliminate the need for the project’s support team in London.”

“It’s the stage we must not fail. Until now, if we’d failed people would say ‘oh well, it was a great try; you worked hard but sadly didn’t quite make it’. Now that we have got there, there are great expectations of the Bar. A lot is riding on this. If it fails, it may set the process of establishing the rule of law back by many years.”

However, the fate of Afghanistan’s fledgling Bar is inexorably linked to the outcome of the conflict raging between Nato forces and the resurgent Taliban. Were the unthinkable to happen, the progress the IBA has achieved in its five-year Afghan mission could soon be shattered.
What do you think of the US bailout?

This afternoon the Securities Law Section will discuss takeovers of financial institutions. Here, lawyers argue that the US Treasury’s own bailout of banks is unfortunate but necessary to stabilise the global economy. By Kyle Siskey

"I think it’s unfortunate but it has to happen," says one lawyer about US Treasury Secretary Henry Paulson’s Emergency Economic Stabilization Act, which will invest $700 billion in risky mortgages that caused the downfall of some of the biggest investment banks.

“Called the Troubled Asset Relief Programme by some, or Tarp, which seems rather appropriate. It’s a dark, waterproof cover that you can throw over things that you want to forget.”

Most lawyers felt the same way, with 55% agreeing the bailout was unfortunate but necessary. Of the remainder, 28% say it is unnecessary, 9% agree with it and 8% think it is a good idea, just too late. While this negative response doesn’t bode well for the bailout, most of those polled could not come up with any better alternative for fixing the American market.

All the US lawyers polled understood the significance of a plan that uses taxpayers’ money for uncertain investments.

“This is the most important decision the government will have to make this decade and maybe this century," says one lawyer. “If they do it correctly it will mean a bounce back of the economy, but if they do it incorrectly they’ll increase the debt and reduce US credibility on a global scale. It really is a monumental decision.”

Unfortunate but necessary

The sale of Bear Stearns to JP Morgan in March began a process that included the failure or adjustment in the status of every major US investment bank: Lehman Brothers was the next to go when it filed for bankruptcy, followed by Merrill Lynch being sold to Bank of America and both Goldman Sachs and Morgan Stanley becoming holding banks overnight.

Among those events were the government subsidisation of insurance giant AIG and most recently the sale of deposit banks Washington Mutual and Wachovia to JP Morgan and Citigroup respectively. With the collapse of major financial institutions beginning to surround him, Paulson was forced to act with greater drama than he had before.

“He’s moved in little steps each time, which all proved to be wrong,” says one lawyer. "There has been a long track of failure and they are finally getting to the source of the problem."

That source is the housing mortgage loans that institutions purchased and are defaulting across the country. As billions of dollars in payments failed to come in, the banks were forced to find buyers or go under.

"The last few months have been a game of Whack-a-Mole for the federal government," says one lawyer. “Now they are throwing a lot of money into the system to try and stop the problem. Hopefully that works.”

All of these events led to the Treasury Secretary’s plan to invest $700 billion of state funds into the banks in order to stabilise the investment industry and raise credit ratings. The plan also comes with “strong oversight” measures. After an initial $250 billion is given to the Treasury Department for investment, additional $100 billion and $300 billion allotments must be approved by Congress.

"I still think it is a good move for the US overall," says one lawyer who agrees with the plan. "If it means helping the groups that have failing stock will fail will fail with or without the government’s help, and leave the taxpayer with the bill. But if we find out who can support the economy with some help, then the programme will make sense, because the taxpayer may get their money back.”

On a simpler level the bailout may give investor a false sense of security. It may suggest that Paulson will continue to help banks take chances with public funds.

“People are only prudent when they know the risks they are taking,” says one partner. "If they think the government will help them every time, they’ll start to take bigger risks. There needs to be a risk adjustment from the top down, from the highest bank lender to everyone holding the mortgages.”

The European implications

European banks face the same potential failures if government doesn’t intervene. Already HBOS sought a buyer in Lloyds and Bradford & Bingley was bailed out by the UK government as the bank failure sweeps Europe. Fortis and WestLB also received government help.

While 50% of European lawyers thought the plan was unfortunate but necessary, most did not think a similar plan would be implemented in Europe. UK lawyers expect the government to remain hands off for political reasons, while EU lawyers think a lack of cooperation between European nations and banks will ultimately prevent any sophisticated bailout plan.

“It’s a tough question about the extent to which the state needs to intervene,” said one lawyer. “If we were to face the issue in the EU, no member state could mount a rescue, and the European Central Bank doesn’t have the power.”

Those who disagree

Most dissenters in the legal community question the amount of risk Paulson is putting upon the American taxpayer. The phrase Main Street is bailing out Wall Street is tossed around a lot while lawyers question the lack of specific investment strategy.

“If the government wanted to do this right they’d look at the institutions that are never going to fail, and help them,” says one lawyer. “The groups that have failing stock will fail with or without the government’s help, and leave the taxpayer with the bill. But if we find out who can support the economy with some help, then the programme will make sense, because the taxpayer may get their money back.”

POLL: US TREASURY BANK BAILOUT

**What do you think of the US bailout?**

**Unfortunate but necessary: 55%**

**Good idea: 9%**

**Good idea, bad timing: 8%**

**Bad idea: 28%**

**Bad idea, but necessary now: 55%**

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Meet in Buenos Aires: Urs Haegi, Dr. Rolf Auf der Maur, Dr. Christoph M. Pastalozzi, Dr. David Jenney, Dr. Roland M. Möller

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<td>Leisure Industries Section, Latin American Regional Forum, Media Law Committee and Young Lawyers' Committee joint dinner and tour</td>
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<td>Tuesday PM 1830</td>
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Do Argentine big Macs have enough beef?

Vendor due diligence is becoming increasingly common in Latin American M&A, but a lack of professional insurance in the region means that reliance letters are even more important. At an over-crowded session yesterday morning, Carlos Urrutia of Bogotá & Urrutia of Colombia explained the problem.

“Professional liability insurance is not widely held in Latin America,” he said. “And if a firm does have insurance, then it is for a fraction of the value of European levels. Law firms therefore have to be very careful. The reliance letters that they draft must cover liability caps and have disclaimers or the law firm could fold.”

Vendor due diligence is conducted by sellers who want to make it easy to generate interest in an auction and do not want multiple bidders conducting their own diligence at the same time. It is extremely beneficial to the investment banker running the auction too as it ensures that the first round of bids is based on useful information and therefore should reflect a fair market value. To some extent, it also avoids price erosion and bidders dropping out in the second round, as they have already had a guided tour of the data room.

Earlier in the session, Jacques Buhart from Herbert Smith’s Paris office explained how a typical European process works. First, the lawyers conducting the vendor due diligence write a release letter to all the bidders explaining that there are no contractual relationships. Even in this initial letter, there are many disclaimers to prevent them being sued over misstatement, misleading statements and the like. The bidders are then shortlisted and eventually an acquirer is selected.

“This is when the law firm writes the reliance letter to confirm the report to the acquirer,” he said. “It indicates that there has been no independent review of the vendor due diligence, it says that there may be more information that is not covered in the report and then it sets the liability cap.”

After joking that vendor due diligence is one of the only unexplained things that the UK has exported, Charles Martin of Macfarlanes in London agreed with Buhart that European liability caps can be as much as £20 million to £25 million (US$35 million to US$43 million).

This is the essence of the problem. Large European firms can afford to include large caps in their reliance letters because they can afford to insure against such cost. This is not widespread practice in Latin America, but as co-chair Jaime Carey of Carey y Cía half-jokingly warned: “If there is insurance, there is more incentive to sue!”

The solution therefore is to ensure that Latin American lawyers draft affordable liability caps into their reliance letters. Clarity of terminology is all important to ensure that the letter is enforceable. That said, things are made difficult in many jurisdictions in the region where gross negligence can be a criminal charge that overrides all liability caps. Insurance may be an inevitable consequence if vendor due diligence continues to grow in the region.

Later in the session, the panel’s discussion turned to material adverse change (Mac) clauses. These are added to contracts to protect the buyer in the weeks between agreeing to purchase and closing a transaction. Essentially, they are designed to ensure that buyers are not forced to purchase at the agreed price if a material adverse change (that typically affects the value of the target) occurs. Mac clauses can be as specific or general as you like, although the latter would lead to increased enforceability issues.

Normal carve-outs to a Mac clause include general economic issues, terrorism, changes in the law and other such provisions. After describing Mac clauses to the audience, Allen Miller of Chadbourne & Parke in New York then set a hypothetical scenario for the other panellists to comment on. He asked them if they thought it would be enforceable in their jurisdictions.

“The majority of Latin American jurisdictions do not have case law on this yet,” said Jose Luiz Homem de Mello of Pinheiro Neto Advogados in São Paulo. “But if the Mac is clearly defined, then I think it would be enforceable.”

Urrutia from Bogotá agreed: “There haven’t been many, if any, court decisions in the region. But if the clause is clear enough, the seller could walk away. However, the issue of good faith and fair dealing may arise.”

The UK perspective was less enthusiastic. Martin had strong doubts that the Mac clause could be relied upon. It was at this point that Miller revealed that the hypothetical situation was actually IBB v Tyson Foods. In this case, the Delaware Court of Chancery found that the Mac clause could not be enforced.

This prompted Miller to declare: “There is no beef in the big Mac.” That may be the case in the northern hemisphere, but in Latin America, as with the abundance of steak, the opinion of lawyers is more positive.
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