Opaque financial instruments have been widely acknowledged as catalysts of the UK financial crisis. But that’s the fault of the politicians.

Speaking at yesterday’s session hosted by the financial services section, ‘Are financial products to blame? Farhaz Khan of Outer Temple Chambers put forward his opinion that the evolution of UK banking regulation over the last 25 years has been shaped, and to negative effect, by the priorities of its ruling political party.

Khan, who recently spent six months on secondment at the UK Financial Services Authority (FSA), likened the early days of banking regulation to a gentleman’s club, where concern over an institution’s actions would be met by “a quiet word in the ear over a long lunch” from its peers. This boys’ club attitude was partly curbed in 1979 with the passing of the first UK Banking Act, which was designed to strengthen the powers of the Bank of England and react to the banking crisis of 1973 to 1974.

The Banking Act acknowledged for the first time a distinction between so-called recognised institutions – mainly English banks with “high reputations and standing”, and less trusted deposit-taking banks, which were largely foreign institutions with no wholesale activity. A month after the Banking Act was passed, the UK Conservative party defeated the incumbent Labour government, and Margaret Thatcher became Prime Minister.

“How can we possibly blame Margaret Thatcher for what’s happening now?” asked Khan. “Because there’s always someone in the UK (and I must admit that I’m one of them) that want to blame her for everything.

Throughout Thatcher’s tenure in the eighties, further acts were passed that encouraged a liberalisation of the retail markets and to a lesser extent the wholesale markets. A slew of privatisations and a shift of focus away from manufacturing meant that the traditional Keynesian model of economics was being replaced by an economy centered on financial services.

The failure of the multi-national bank BCCI first highlighted the danger posed by systemically important banks that sidestep regulatory oversight. BCCI had over 400 branches in 78 countries and was headquartered in London, yet its business was incorporated in both Luxembourg and the Cayman Islands to avoid regulation from any one body. When a globally coordinated operation in 1991 uncovered fraud and manipulation by the BCCI’s board of directors, the bank was forced to liquidate its various operations.

But despite this case, Khan insisted that a landscape of banking failure was not the precursor to the establishment of the FSA. The first incarnation of the FSA emerged in 1998, a year after Labour won back power.

New Labour’s focus was very much on political party. When a globally coordinated operation in 1991 uncovered fraud and manipulation by the BCCI’s board of directors, the bank was forced to liquidate its various operations.

But despite this case, Khan insisted that a landscape of banking failure was not the precursor to the establishment of the FSA. The first incarnation of the FSA emerged in 1998, a year after Labour won back power. The idea of New Labour was born.

New Labour’s focus was very much on consumer protection, and the drive to set up the FSA was based on popular concerns about the retail markets, particularly the mis-selling of pension products. Its powers were formalised in 2001 by the Financial Services and Markets Act, which detailed the split of jurisdiction between the FSA and the Bank of England, giving the former sole macro-supervision over the conduct of financial businesses.

At the same time, a precedent for the new government and the City of London was informally developed, and it is this tacit agreement that explains the “political undertones to light-touch regulation”. In return for taking a step back from the intrusive regulation of innovative financial products and practices, the City would accept that taxes and profit schemes would be diverted to fund social initiatives in hospitals, schools and impoverished communities. Banks make money; Labour fulfills its campaign promises; everyone wins.

That is, of course, until the “perfect storm” that engulfed Northern Rock in 2007. For 10 years the UK banking market had been at the forefront of developing innovative financial products with high returns: derivatives, structured vehicles, asset-backed loans – all the buzzwords now familiar to lawyers regardless of their specialisation. Northern Rock had been a building society until it floated on the London Stock Exchange the same year Labour returned to power.

The expansion of business following its demutualisation saw Northern Rock indulge in large amounts of short-term borrowing, with three quarters of its balance sheet by 2007 estimated to be reliant on securitisation. In September 2007 it was the first UK institution to seek government support; leading to a run on the bank by worried customers, and its eventual nationalisation five months later. According to Khan, the failure of Northern Rock was a failure of the FSA, particularly its Arrow process, the regular audit of a bank’s business and balance sheet.

“It was not done with the rigour that one would have expected,” he said. So what will be the political reaction this time, and can financial regulators ever be far enough ahead of the market to foresee disaster? Quite simply, no. “The regulator will always be one step behind. What we need is a holistic global approach to ensure that when financial players innovate, the regulator knows.” Recent proposals at both UK and European level do seem to focus on transparency; suggesting that the regulation are aware that innovation is necessary, but above all impossible to curtail completely.

Khan’s analysis drew an enthusiastic response from the audience Stephen Kingdon of FTI Consulting supported a shake-up of the UK regulatory system. “I don’t buy the idea that the FSA can be fixed by a few tweaks here and there,” he said. “Its mandate is fundamentally flawed.”

But the UK might have to wait. A general election next year, which the Conservative party is widely expected to win, would once again shift power back to a government that has very different ideas on how regulators should be structured. So it looks like the UK’s political narrative will continue to drive regulatory change, and shape the market as it emerges from the recession.
African lawyers must ensure they are educated in international criminal justice and get involved with debate around the subject, rather than complaining about double standards and the threat to sovereignty. That was the message from Malvuto Ngoga, divisional director of SADC Lawyers Association in Malawi, at Monday afternoon’s African regional forum session ‘Peace versus justice’.

Their comments were echoed by the Prosecutor General of Rwanda, Martin Ngoga, who said that despite reservations about the way international justice is organised, he was optimistic about its future and adamant that “of course Africa should be part of global efforts towards improvement”.

Earlier this year, the International Criminal Court (ICC) issued a warrant for the arrest of Sudanese president Omar Hassan Ahmad al-Bashir. It was the first indication of an incumbent head of state, and has inevitably proved controversial amongst those that feel double standards are being applied by Western countries. Why indict an African leader, yet not turn the spotlight on leaders from the UK, US or Middle East that could be accused of comparable crimes?

Instead of complaining and resisting the ICC, African lawyers should engage with the Court and influence its actions from an internal position of power. And it’s down to national bar associations to facilitate that. (A point made in an earlier session – see opposite page.) “The debate in Africa is not entirely based on correct information,” said Hara, “and bar associations have a responsibility to educate their members more fully about what international justice means.”

Hara confessed his embarrassment that African nations are so underrepresented amongst the judges of the ICC, despite the fact that all of the cases it is investigating are in countries in Africa. This is partly due to the self-referring structure of the Court, which only accepts cases presented by the countries they affect.

And this substantiates the claims made by Hara that internal reform must take place before international reform can succeed. This is not limited to those already in the legal profession. “Lawyers must cooperate not only with the ICC outreach programmes but also work to promote awareness of the importance of international justice beyond its legal context,” he said.

Their work must begin with lobbying national governments about the commitment they have made to end impunity and human rights abuses. “Lawyers should recognise that denouncing the ICC sends the message that they don’t accept the notion that international jurisdiction over sovereign states should exist,” said Hara. “But the alternative could turn out to be the evil that Africa knows too well – abuses of sovereign power while the world stands back and refrains from intervening. We shouldn’t support a return to that.”

Hara emphasised that the experience of the ICC was far from positive. “When I was appointed as a family judge, I did not get special training,” said Miranda, “so I had to progress on my own and it’s been difficult.”

Other jurisdictions have opted to limit the role of judges in interviewing children. In South Africa, for example, the judge seldom gets directly involved. A family advocate is instead appointed to facilitate communication between the child, family and court. The family advocate does not act as a legal representative for the child; a separate legal representative can be appointed by the state if necessary. But this has not always proved easy.

Justice Belinda Jane van Heerden of the Supreme Court of Appeal, Bloemfontein, gave the example of a six-year legal battle that finally ended after the child called Childline to help secure legal representation.
The Rome Statute

Help implement international law in your country

Individual lawyers and bar associations must do more to promote international criminal law in their jurisdictions. While many countries have ratified the Rome Statute that set up the International Criminal Court (ICC), too few have introduced domestic legislation to support it.

Speaking at an inclusive session on implementing the Rome Statute yesterday morning, Judge Akua Kuenyehia of the International Criminal Court (right) made an impassioned call for action from the assembled lawyers:

― I urge law societies and bar associations to take up the mantle and not only urge governments to pass necessary legislation but to help them to do so,‖ she said.

The Rome Statute was drafted in July 1998. By 2002, it had been ratified by 60 countries and came into force in July of that year. To date 110 countries have ratified the statute. But, as a snapshot, of the 30 African countries to have ratified the statute, only two (South Africa and Kenya) have implemented domestic legislation to facilitate the ICC.

States that ratify the Rome Statute agree to use their own courts to try individuals that are responsible for war crimes, crimes against humanity and genocide to the extent that they are able. They also agree to cooperate in good faith with the ICC (Articles 86 and 88).

However, without secondary legislation at the national level, it is far harder for countries to fulfill these pledges. On a practical level, for example, the ICC has no police force or prison service so it relies completely on national cooperation to arrest people and, when convicted, to provide a venue for them to serve their sentence.

Several countries that have ratified the statute have run into difficulty when trying to implement national legislation. Epitomising this problem is Ghana, where implementing legislation has been on the books since 2002 but still hasn’t become law:

A number of factors have inhibited countries, particularly those in Africa and the developing world, from introducing domestic legislation. First, the ICC is viewed by some governments as a Western imposition. As Sternford Moyo of Zimbabwean firm Scallen and Holderness remarked from the floor: “Politicians have deliberately created a misconception that the ICC is targeting Africa. The louder we reject this, the better for international justice.”

A second factor is a lack of awareness. As Kuenyehia said: “There is a lack of knowledge about the statute and how it operates. It’s up to us as African lawyers to create greater awareness.”

But chair of the session Liliana De Marco Coenen (who heads the IBA’s outreach programme on the ICC) was keen to point out that this was not just a problem for African nations. There is also a lack of understanding of international justice in Europe and the Americas, despite the IBA’s resolution two years ago in Singapore to urge countries to ratify the treaty and improve implementing frameworks.

However, when the Rome Statute is supplemented by appropriate domestic legislation, the statute and the ICC can operate to their full potential.

Speaking after the coffee break, Nicole Fritz of the Southern Africa Litigation Centre highlighted South Africa as a model. Its domestic law extends national jurisdiction to prosecute those suspected of war crimes, crimes against humanity or genocide if they set foot in South Africa.

But even implementing legislation cannot safeguard international justice and uphold the Rome Statute unless it is used. Kenya has implementing legislation but has not yet used it to prosecute those responsible for the violence after last year’s elections in which hundreds were killed. Kofi Annan is visiting Nairobi this week to urge action, but while members of this session’s audience support the principle of prosecution, one explained that the practicality might be more complex.

― There is not an unwillingness to prosecute and Kenya is not unable, but we have a tenuous coalition government whose formation was a succession of war. It is very fragile and can break apart at any time,‖ said Evans Monari of Daly & Figgis from the floor. “I have a feeling that there is a disconnect between what the ICC is proposing and what’s on the ground. We could turn Kenya’s leaders into warlords if we arrest their lieutenants.”

This was not the only voice of caution or criticism regarding the Rome Statute. As Nzamba Kitonga of SCAT pointed out: “There is a belief that trials are expensive, luxurious and take a very long time. We need a mechanism to enable these trials to move faster without sacrificing standards.”

But the panellists and audience were broadly positive about the Rome Statute and ICC and focused on improving its implementation with domestic legislation. Some audience members were even keen to see the statute extended to cover corruption and terrorism. Ambitions for the ICC have clearly come a long way since in initial conception by Arthur Robinson of Trinidad and Tobago in 1989 as a way in which his small country could tackle drug cartels.
A great step up for young lawyers

Outstanding Young Lawyer of the Year

Congratulations to the winner of the IBA Outstanding Young Lawyer of the Year Award, Bruno Barata Magalhães. Bruno received his award yesterday at the conference. Barbara J Cooperman, Global Chief Marketing Officer at LexisNexis (below centre), commented: “It’s part of our culture to contribute to the legal community and to the broader community in which we live. Bruno Barata Magalhães is pursuing the same values with passion and dedication. We hope this recognition is an inspiration to young lawyers around the world.”

The IBA has made efforts in recent years to increase its membership among young lawyers, to sustain vigorous development. The Young Lawyer of the Year Award is one of these efforts. Nigel Roberts, director of LexisNexis (below right), believes that through the organization’s long-term partnership with the IBA both have realized the importance of providing real opportunities for young lawyers – for the development of the IBA and the legal profession as a whole. It was that idea that led to the initiation of this award alongside the Young Lawyers’ Committee.

The Committee, established five years ago with a clear focus on young practitioners and their specific aims and interests, has become an “entrance door” (as the Committee itself put it) for young lawyers to get them involved with the rest of the divisions of the IBA.

Eric Rieger, Chair of the Young Lawyers’ Committee (below left), echoes Roberts’ point: “The Outstanding Young Lawyer of the Year Award is a very rewarding and satisfactory project. It is an important way for the IBA to sustain its pursuit of promoting the Rule of Law and an excellent opportunity to get connected with a great number of interesting and high-level young colleagues around the world.”

This is the second year of the award, which was created in recognition of former IBA president William Reese Smith Jr. An accomplished lawyer and legal scholar, Smith demonstrated a commitment to advancing many charitable and civic causes, most notably legal services for the poor, in a career spanning more than 50 years.

Following in his footsteps, the award aims to create an opportunity for young lawyers that both show excellence in the profession and demonstrate a strong sense of ethics and civility – both essential elements to upholding the Rule of Law.

According to Rieger, both last year’s winner (Naeem Shahazad, a young lawyer from Pakistan) and this year’s will be regarded as models for young lawyers in terms of professionalism and ethical standards, and provide young role models for other young lawyers.

Although the award was jointly created by the IBA, it is not restricted to IBA members and is very international in scope. This year there were many applications from Europe, but also a high number from both Asia and Latin America. So the award generates fresh ideas and new contacts for the IBA and its constituents, helping to foster the next generation of legal experts and counsel within the organization.

Roberts adds, “this is also a great opportunity for young legal professionals in terms of their career development.” It’s a win-win situation. Besides physical reward and free membership of the IBA, Public Professional Interest Division and the Young Lawyers’ Committee, the award is expected to bring the winner professional and social recognition. It enlarges their network and skills, thanks to IBA programmes, conferences and other projects. Indeed Naeem Shahazad was quoted as saying the award changed his life.

Rieger expects more and more young colleagues in the legal profession around the world to get involved in the award and the IBA.

Restructuring and Insolvency

The Spanish insolvency system didn’t work when the credit crisis hit, largely because “it was written by lawyers”. The Italian system has been very speedy in its solutions, despite everyone being on the beach in August. And US bankruptcy judges are unfairly maligned, given that they are effectively in the job for life. Those were some of the conclusions reached in an active exchange at the session ‘The new role of governments in restructuring yesterday morning – even though it took place in the rather hot, dark and damp Ontario room on the ground floor. The co-chair of the section (Insolvency, Restructuring and Creditors’ Rights), Carsten Cetz, first explained that the room had no ventilation in order to keep out the noise. Then he apologised that the room was so dark, but that was to keep the temperature down. And ladly he advised everyone to take off their jackets to both cope with the heat and get stuck into the discussion. The first speaker, Antonio Fernández, did both.

Fernández, the head of the restructuring and insolvency practice at Garrigues in Madrid (above centre), explained to delegates that the Spanish bankruptcy law – introduced in 2003 – didn’t work. Despite drawing inspiration from the American and German systems amongst others, it was drafted by lawyers and so focused too much on legal certainty rather than business continuity.

“It focused on creditors’ rights, so it had to be established how much each creditor was owed, in what order. That meant litigation, challenges from creditors and judicial rulings. Given that some recent cases have had 600 or 700 creditors, you can imagine that this stage took a while,” explained Fernández.

For example, the collapse of Llanera in October 2007 led to a proceeding that only had its first creditors meeting last week. It took two years for all the creditor challenges. The reaction from Spanish lawyers to this law was to use out-of-court proceedings. But this is grounded in common law, which brings its own problems. In particular there was no statutory standstill, so first lawyers had to get banks to agree to a standstill – which would take three or four weeks. An out-of-court restructuring also needed unanimity among creditors, so minority players could hold up proceedings or threaten to sue separately. And finally, banks that extended working capital into longer-term loans often suffered claw-back from other creditors later on.

“Did any companies actually survive this system?” asked Derrick Tay of Ogilvy Macchi di Cellere Gangemi (pictured far left), from the audience. “With companies like Llanera, it meant they were gradually wound down and all value was lost,” replied Fernández. “The company used to have debts of $800 million. Now after various agreements, talks and disposals it is down to $120 million. It has become a minimal company that will probably disappear.”

“Out-of-court refinancings have worked, even though the process is hard. At Garrigues alone we refinanced around $38 billion between the start of the credit crisis and the decree in March 2009.”

This was an emergency measure from the government to correct some of the problems with the existing law. Creditor challenges would only go to trial if the judge agreed it was necessary and creditors were protected from claw-back – as long as the majority of creditors took part, an expert agreed it was the best thing for the company and every- thing was done through a public notary.

Asking from the Daily News if the government could have done more with its decree, Fernández replied: “Yes, but it was a good job considering the speed.”

Speed is something that the next speaker, Luigi Macchi di Cellere of Studio Legale Macchi di Cellere Gangemi (pictured far left), insisted Italy has in spades. The legal system there has consistently adapted to new events, amending the law for almost every big case. The Marzano Decree was introduced in 2003 to cope with Parmalat and has been amended several times since – most recently in August 2008 to deal with the Altaltana bailout.

It was this changing of the law that worried one member of the audience. He highlighted the fund that was created for small shareholders and bondholders in Altaltana, and asked if shareholders did not rank last in an insolvency, as they do in the UK and US. “Yes, that is the case in Italy too. But an exception was made for political reasons with Alitalia,” replied Macchi di Cellere. “And could that crack in the law be widened to other cases?” “No, unlike other cases this was not a change that can be applied elsewhere. It was pure politics.”

Elsewhere, Sally MacDonald Henry of Skaddens in New York (pictured right) argued that US bankruptcy judges had been unfairly maligned. Despite allegations that they ranked labour unions too highly in recent automobile bankruptcies – in breach of the law and at the behest of politicians – bankruptcy judges are independent and well-respected. Although they have to be reappointed regularly, that is done by other judges that themselves have life tenure. In the recent insolvency of broker Refco, for example, the judge initially rejected the appointment of a trustee. Eventually an examiner was appointed instead – by the Republican party but with a very limited scope of work. “I remember the front three rows of that case were filled with people from [Washington] DC,” she remembered. “They were all there to oversee the appointment of the trustee, but they lost.”
Learning from others

Cherie Booth talks to Elizabeth Fournier about employment rights, discrimination, and why the IBA conference is a worthy addition to her hectic work-life balance.

A way from the public life she lived for 10 years as the wife of the UK Prime Minister, Cherie Booth has forged a long and extensive career as one of England and Wales’ leading Queen’s Counsel (QC). After studying at London School of Economics, she was called to the Bar in 1976, and since 2000 has been a founder member of Matrix Chambers in London, where she focuses on human rights, employment and public law.

Cherie regularly gives speeches and presentations to diverse audiences worldwide, but has until now remained on the periphery of the IBA. Today she’s delighted to change that, taking centre stage at the Discrimination Committee’s session on Employment Rights as Human Rights between 10am and 1pm.

Using the UK’s proposed Single Equality Bill as a springboard for discussion, she’s certain that with parallels from Chile, Dubai, the Netherlands and the US there’ll be no shortage of interesting comparisons to be made.

What do you plan to talk about in the session?

I’ve submitted a paper about the Single Equality Bill here in Britain. My view is that governments should consolidate all the existing legislation we have on discrimination into one area, to make it more uniform across all the different areas, to extend it into new areas and in particular to start strengthening the obligations of public authorities to eliminate discrimination.

There are two levels of employment law. One is the international level, where on the whole we have, for example, international rules and laws against forced labour, the ILO (International Labour Organisation) conventions and workers’ rights. They’ve been on the statute book, most of them, for a very long time and as international instruments they serve as models of behaviour. The other level is domestic law and to see them more as an internal political judge of the law.

The former have been more closely associated with universal human rights but as a delivery mechanism of practical rights I think they’ve been disappointing. The latter level has been seen more as a purely internal reaction to a particular problem.

Some countries, for example those in South America, have tended to try to implement international obligations into domestic law, by being more upfront about meeting human rights obligations. Others, such as the UK, have tended to play down the international aspects of employment law and to see them more as a set of internal political judgement.

Now the question is, does the fact that so many countries have adopted their own version of workers’ rights indicate that international human rights instruments have not been seen as being effective when it comes to solving practical day-to-day work force problems?

So which system do you think works better?

I’m hoping to learn a bit more about how things can be done differently. Certainly in the British political context we have found some resistance to so-called alien, and particularly European, ideas. As someone who speaks often on human rights as well as on discrimination I can see that it can sometimes be a useful tool for those who are against these pieces of progressive legislation to say ‘Oh they’re just imposing alien ideas on us’. In a British context of course these alien ideas probably originated in the European Convention on Human Rights anyway, with Winston Churchill’s idea of bringing common standards across Europe after the war, but that’s not how it’s perceived in some of our newspapers. So I think a lot of it depends on what actually works in your particular context.

Historically, but no longer, we used to see more cases against Britain in the European Court of Human Rights than any other place. I think a lot of that is actually to do with the creativity of English lawyers, who use these rights to benefit their clients. In some other countries these rights are on the statute book, but they’re not necessarily used as imaginatively by the lawyers.

Also we have been fortunate to have a system that incorporates legal aid. The legal aid culture encourages lawyers to explore some of these rights for poorer people, but in a country where you don’t necessarily have quite the same support for legal services to the poor it’s more difficult to do. I think it will be interesting to talk about the role of public bodies such as national and local government in actively promoting a human rights culture. This is something that the European Convention on Human Rights is all about and is reflected too in the special obligations placed on public authorities by the new Single Equalities legislation. I don’t claim we are 100% successful in this, but Britain is actually a lot more equal as a society, and a lot more respectful of minorities than 30 years ago. I’m not saying there aren’t hiccoughs in relation to that, but how far has the law contributed to that? It has made a contribution but there’s no doubt at all that there’s also a political story and a campaigning story that has to be told.

Are there any particular countries or jurisdictions you’re most interested in hearing from?

I’m very interested to hear from colleagues in South America, and I’m looking forward to what Enrique [Munui], from Chile, has to say. We’ve obviously had some conference calls and his input should be interesting. I’m also very glad we’ve got a representative from the Middle East, not least because of my interest in women’s rights. But it’s not limited to that. In the Middle East there is a two-tier system where citizens have certain employment rights while visiting or guest workers at all levels, from high-powered lawyers to street cleaners, don’t having the same sort of protection. Does that in itself cause a distortion of the market and lead to employers taking different decisions about who to employ and who not to employ? It’s something I’m aware of from my visits to the Middle East.

It’s a mixed blessing for the citizens to have better rights than other employees, because it can sometimes lead to those citizens not getting certain jobs. What we do see in the Middle East is huge numbers of citizens in the public sector, but far fewer of them employed in the private sector. If we think that the private sector is about innovation and entrepreneurship that may not be a good balance for the economy.

It’s not so much discrimination as a question of unforeseen effects of the law. For example is it an unforeseen effect of the law that only giving workers’ rights to citizens means that women and men who’ve had breast cancer are the ones who come out from London straight after my employment appeal tribunal.

I think it’s always useful to support your talk using practical cases. I may talk a bit about our cases in which we have to do with sexual harassment and discrimination. In fact I was in China recently talking about how the Chinese have introduced new laws protecting women from sexual discrimination and harassment. The problem is they’ve tended to lump it all together, and have included domestic violence and rape too. I think we should distinguish between violent behaviour such as rape, which is obviously something that should be dealt with by the criminal law, and sexual harassment at work. Of course that can go as far as rape too. I’m not saying that rape doesn’t happen at work. But obviously it can also be less than that, and that shouldn’t necessarily be dealt with by the criminal law.

There are also issues about indirect discrimination and equal pay, where it’s always useful to talk about the case of Endersby for example. This was the case where several speech therapists, who were mainly women, working in the health service, were being paid less than those, mainly men, who fitted prostheses and also worked in the health service. This was a hangover from the war where injured soldiers being fitted with prostheses were considered by other employers as unemployable.

They were in different categories and being paid different amounts, but whether or not this was like work it turns the skills involved were legally the same. I think in a less developed framework of law where you’re looking at discrimination or unequal pay those cases are interesting because you start seeing why its not sufficient to say ‘just because you’re in the same job you have to be paid the same’ - you also have to look at work of equal value.

Are you expecting any contentious discussions or points of disagreement to arise?

I’m sure we will have some lively debates, because no one person or country has all the right answers. It’s actually good to see what works where, and I think we might be surprised to hear from some perhaps unforeseen places where we could get some useful lessons. I think we’re hoping for a fairly interactive session rather than static speeches – a lot more discussion among the panellists and then with the wider audience.

How long have you been involved with the IBA?

I’ve been involved on the periphery with the IBA for a while now, but I’m very happy to get involved more directly and in particular to be on the committee. The employment committee had a meeting a few years back and I spoke there, and since then I’ve kept in touch.

Were you in Buenos Aires last year?

I wish! I often talk about work-life balance, and I still have a nine-year-old son which means, particularly since my husband is now travelling a lot, that I like to spend as much time as possible around him. So as much as I’d love to spend several days in Madrid, I’m basically coming in and out for the session.

Have you visited the city before?

Yes, both on official visits and for pleasure. But this time I fly out from London straight after my employment appeal tribunal case the previous afternoon, and then I’m back the following evening. I’m patron of Breast Cancer Care and every year we have our big fundraising dinner – a fashion show where women and men who’ve had breast cancer are the models. I’ve not missed one yet and I’m not going to miss this year’s either. But I didn’t want to miss the IBA either.

What tips would you give to delegates that have a little longer to spend in Madrid?

The city has great art, great food, and I should think seeing the conference is in Spain they should be prepared to stay up late!
Strong firms relish a recession

Retain good relationships with staff you fire. Go for a coffee with a client rather than throwing a party. And launch a newsletter. These are some of the lessons from the recession, says Pippa Blakemore.

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his article evaluates how firms are coping with the downturn and compares reactions to the recession. It con-
ducts that there are five common, interrelated characteristics of law firms that are successfully managing the recession. The following are strong foundations, even if the recession continues to deepen:

1) An enduring relationship with clients
2) A respect for staff for those they make redundant and for those they retain
3) An innovative approach, underpinned by high quality of service and attention to detail
4) Effective communication
5) Confidence in their leaders and their staff

Collaborative working
Firms that have worked collaboratively with their clients to build long-standing and strong relationships, face an unprecedented economic environment on a sound basis. These firms recognise that clients are not an amorphous mass but are made up of individuals with whom they have personal relationships. The lawyers identify with the pressures that many of their clients are under, including declining markets, slow-down of projects, death of new initiatives, increased competition, reduced income, cash-flow difficulties and less to spend on legal services. Successful firms have developed a genuine commitment to their clients, together with a deep knowledge of the context in which they work. This was reflected recently in a beauty parade, where the law firm was told that they had won because, “you knew more about our business than we did.”

Current investment for long-term return
Successful firms recognise that the recession may get worse. So strengthening client relationships with those unlikely to go bankrupt must be viewed as a long-term investment, possibly with current costs and no immediate return. Changing client needs has provided a further opportunity to demonstrate the value of the relationship rather than a threat to it.

Cross-selling is essential
Cross-selling is no longer “nice-to-have-but-not-possible-to-do-effectively” because of internal politics and individual sensitivities about protecting a personal client base. Cross-selling is essential for survival and growth. A relationship with a client is like a tree. It will flourish if the roots go deeply throughout the firm, across departments and practice areas, and at every level from the most senior to the most junior. Similarly, the structure of the branches should reflect that of the roots and spread throughout the client organisation.

Loyalty is no longer just habit
Loyalty now has to be won over and over again. In the past, loyalty was often in reality, habit. “We instruct that firm because we always have.” Now, loyalty has to be earned, monitored and cultivated at every stage.

This dynamic approach is reflected by Detail Solicitors, a leading commercial law firm in Nigeria, which is increasing its turnover, size and profile year-on-year. Ayuji Jemide, lead partner, says: “Detail’s relationship with a client is like a walking together on an obstacle course: we identify in business goals and targets, and provide solutions for each obstacle on the path.” This approach, he says: “has been encapsulated in Detail’s strapline: “We mind your business!”

2) Respect for staff: those made redundant and those retained
Lawyers and support staff in many firms can be divided into two groups: those that are made redundant, let go or consolidated and those that stay.

Nobody realised that the economic meltdown, in some sectors, would lead to redundancies. Given this, the robust firms recognised it as an opportunity to strengthen their credibility and relationships with their staff, from the most senior lawyer to the most junior. Such firms applied objective and transparent redundancy criteria fairly. Redundant employees were told in a humane way, rather than by e-mail or voicemail. They were treated as individuals with respect.

Redundancies that have been handled sensitively mean that there is a pool of ambassadors in the outside world, speaking positively on the firm’s behalf. These ex-employees may be re-employed when the economy improves, may go in-house and so instruct law firms in future, may become entrepreneurs who need lawyers, or may influence the decision-makers on which lawyers to instruct. Handled badly, memories will be long and bitter. All the high profile and lavish marketing of the boom years will be undermined by word of mouth experience.

Successful firms also understand that remaining staff are under great pressure. Insensitively handled redundancies undermine the morale of those staying. The ever-present threat that “it may be me next” hangs over each person, like a Sword of Damocles, particularly now that some firms are in their fourth round of redundancies. Reduction in the numbers of lawyers and support staff means additional work, possibly in unfamiliar areas, resulting in longer hours and increasingly high expectations of business development, without the training, coaching and support. These pressures are often accompanied by a pay freeze, salary reductions, no bonuses, no incentives, a deferred trainee intake and the sobering sight of empty office desks, which once accommodated friends and colleagues.

Successful firms encourage a collegiate approach and generate suggestions from teams and staff. Lawyers in these firms have been galvanised into productive use of spare capacity, possibly in unfamiliar areas, in longer hours and increasingly high expectations of business development, without the training, coaching and support. These pressures are often accompanied by a pay freeze, salary reductions, no bonuses, no incentives, a deferred trainee intake and the sobering sight of empty office desks, which once accommodated friends and colleagues.

Durable firms encourage a collegiate approach and generate suggestions from teams and staff. Lawyers in these firms have been galvanised into productive use of spare capacity, asking “what can I do today to make things happen? How can I be more pro-active?” Successful firms are encouraging the development of the staff rather than reducing it.

Thriving law firm in libel, privacy and international law, Carter-Ruck has demonstrated its commitment to its staff through its growth in investment in marketing and training (two budgets under threat in many firms) from the Senior Partner to the trainees. Cameron Dooley, Managing Partner, says: “Our staff are our most important resource and we will continue to give them the skills to be excellent lawyers and the tools to provide outstanding service. Our commitment is reinforced by our recent move into new offices, which has been much welcomed.”

3) An innovative approach

Innovation with clients
“I believe that one of the key factors for a successful law firm today is the development of innovative, tailor-made products that overlap practice areas and focus on industries,” says Dr Alexander Popp, partner at Schoenherr – a leading firm in central and eastern Europe.

Successful firms have innovative approaches that are imaginative, sustainable, cost-effective and designed for the bad as well as the good times. Before the downturn, many firms invested in expensive ideas to stand out from the crowd. Even then, this generated a tension between providing the clients with the services they required and the additional cost to the firm. Many innovative approaches were appropriate when both clients and law firms were flourishing but have since become extravagant overheads.

Innovative approaches for clients have ranged from the coherent, consistent, and structured provision of global, international services, using ground-breaking technological solutions, to the creation of intranets for clients and access to fees on a real-time basis. To meet client needs, firms cannot respond in the way one did, when the client said “we want an innovative and pro-active firm.” The response was, “what would you like us to do?”

Beres Park London firm, Collins Benson Goldill LLP, has continued to flourish, despite its focus on commercial property. Senior partner Peter Ruchnakiewicz told me that: “Our continued success in the downturn can be attributed to our innovative approach. Every lawyer is very responsive and flexible and looks for imaginative solutions, which they then implement immediately.”

Innovation on fee proposals, structures and debt
There has been much discussion for years between clients and law firms on moving away from hourly rates. This is more likely to happen in future as clients look for value-based billing and demand flexibility, innovation and an imaginative approach on fee proposals and structures, which will still allow simple comparison between firms.

A similarly innovative approach is now required for clients with cash-flow problems in order that both firm and client survive. Firms are assessing the financial viability of those clients that argue over fees, delay paying fees or don’t pay at all. Innovative solutions are required, such as agreed staged payments and deferred payments with interest. Firms are sitting down and talking to the clients (without charge) about how to come to a mutually satisfactory arrangement, which will strengthen, not destroy the relationship, which might happen if the firm demands immediate payment with no compromise.

Innovative approaches to client entertainment
Clients are aware that the money spent on entertaining them is ultimately their money. Therefore, cash-strapped clients want their lawyers to be demonstrably interested in their business, but also want low-cost opportunities to catch up, discuss their organisations, cement relationships and allow lawyers to demonstrate their empathy for the pressures clients are under. One law firm was being courted by a firm of accountants in the good times. The accountants hired a cinema and screened a pre-release film. One lawyer commented, “it was a great evening but nobody took an interest in my business.” The half-hour cup of coffee around the corner is becoming an effective marketing and business development tool.

Innovative ideas to retain and motivate staff
A highlight of this recession is that firms have learned from the last downturn not to cut staff in swathes at certain levels to reduce costs. The consequence of doing this in the last recession was a gap at certain years of qualification which has never been filled. Responsibility is spreading down to more junior lawyers traditional roles are challenged and members of staff are asked to be flexible and adaptable as major projects slow down and there are fewer in the pipeline.

A number of firms have involved their staff in making suggestions and listening to their solutions. For many staff, the key objective is to keep their jobs, even with a pay cut. One law firm decided that the key to survival was a pay freeze, frozen salaries, sabbaticals, additional unpaid holidays, flexible working, job sharing and career breaks. At the same time innovative law firms are keeping in touch with those that have been made redundant.

www.ifl.com IBA Daily News - Tuesday, October 6 2009
4) Effective communication

Firms with effective communication regard unambiguous, appropriate and structured communication as an integral management tool, while constantly assessing its suitability for the job it is required to do. They have a frequent and regular approach to communication rather than a hit and run blitz that is followed by long periods of silence. They ask the following questions of any communication:

- What are its objectives?
- What is the message we are conveying?
- Who will be the receiver?
- What do we want the recipients to think, to feel, to do and to say as a result?
- How frequently should we communicate to achieve our objectives?
- What is the most appropriate method of delivery? (Not what is easiest for us, but what is best for the recipient.)
- How will the message be heard, absorbed and interpreted?
- From whom should it come?

Internally within the firm

Nowadays, most people think “no news is bad news.” No communication or poor communication, in times of uncertainty within law firms, leads to frenzied speculation, which inevitably assumes the worst. This exacerbates any demoralisation and leads to demotivation.

All firms have found it difficult to balance motivation with honesty. If a firm says that this is the last of the redundancies and then makes more, it leads to distrust in the leadership. If it is implied at each stage that there may be more, then there is permanent uncertainty.

Focusing on the receiver rather than the giver of information means that a redundancy interview, in which the employee will be losing his job, possibly his house and his immediate prospects, will not begin with the interviewer saying, as frequently happens, “this is as difficult for me as it is for you.”

Effective communication externally

Successful strategies have increased rather than decreased external communication. Firms are making it more personal and focused and ensuring that they stay in touch with all those with whom they have relationships. Firms are increasingly checking the value of their offer, visiting clients, talking to clients, asking well-informed questions, finding out how clients are coping, listening harder and longer to what is happening to them and what is likely to happen. Strong communication encourages the clients to give feedback on services, make suggestions on improvements and for firms to react to this positively, welcoming suggestions and not being defensive.

Superior communication enables strong firms to stand out from the competition at little extra cost and proportionately greater impact. This is because many firms have cut back on support services, whose contribution cannot be objectively measured, such as PR, press releases, events and communications. This creates a unique opportunity to raise and maintain a firm’s profile in a less crowded communication market place. Firms that are successful are continuing to generate press releases and some firms have been confident enough to launch newsletters in the recession, rather than cut back.

Successful Bulgarian law firm Atanasov & Ivanov has increased its turnover and numbers of staff since the start of the recession. Ilan Ivanov, partner, told me that: “As times have become more challenging, we have felt that it is important to increase our communication with our clients and our staff. The results speak for themselves.”

Taking advantage of new media

Looking to the future, firms that succeed will incorporate constantly evolving new media into their communication. Twitter, LinkedIn, Facebook and Wikipedia are becoming an integral part of everybody’s lives, including lawyers and their contacts. Blogs, unofficial websites and unauthorised commentaries on firms mean that firms’ messages have to be consistent, durable and credible because if not, this will be exposed in a variety of ways, by many people, across the web.

5) Confidence inspires confidence

Confidence inspires confidence: in clients, contacts, referrers, intermediaries and staff. Firms have to believe in themselves before others will believe in them. Underpinning the actions and reactions of the firms that will survive and flourish in the global economic downturn has been confidence built up over years. Successful firms have confidence in their leadership, their strategy and their decision-making. Confidence inspires trust in clients and motivates staff. Leaders that radiate confidence generate it in others.

Long-term confidence has been manifest well before and leading up to the economic crisis, by not going where others went (simply because that was what everybody was doing) but objectively evaluating the appropriate strategy and implementing it consistently and calmly against more opportunistic advice. They had the confidence and the control to know that the boom would inevitably end sometime and so did not distribute or spend the rapidly generated wealth in a profligate way.

Thriving firms are reacting to daily unforeseen challenges in the same measured way, incorporating imagination and adaptability. They are taking a long-term view and recognise that each day is an investment in tomorrow and the future. Rather than panic, feel threatened or be reduced to non-decision-making paralysis in a crisis, they are embracing the recession for creating the opportunities to review how they do things; to challenge the status quo and to take this breathing space to make things even better. They are reviewing the robustness of the strategy, testing it for durability, and taking action to revise it where necessary. They look forward if mistakes have been made, identifying lessons learned, rather than backward to allocate blame. They have the confidence to increase the communication to all those, internally and externally, with whom they have a relationship or would like to have a relationship.

For example, confidence in their position in the UAE has been reflected by Hadef & Partners, one of the oldest and largest law firms in the Middle East. Indeed, Hadef & Partners launched a reinvigorated new brand in April 2009, during the peak of the worldwide recession, which includes a tremendous website and highly regarded electronic newsletter.

I visited Dubai in August this year, and at a meeting at Hadef’s Dubai office, Sadiq Jafar, Managing Partner of that office, said: “The launch of our new brand, at a time when many businesses worldwide were reducing marketing budgets, helped demonstrate the confidence we have in our strategy and our brand essence, which is focused on depth of both relationships and expertise.”

Conclusion

By constantly checking the strength of relationships with clients, respect for staff, the innovative approach, the effectiveness of communication, successful firms face the challenges of the future with confidence, despite the likely short-term challenges.
The Task Force on the Financial Crisis was set up by the IBA to try and make a fresh contribution to global efforts to deal with the financial crisis. In the wake of the crisis there have been many voices from different professions debating how to deal with it. And, more importantly, how to prevent it from happening again. So far, there is definite consensus on one point: there was a major failure in the financial sector and in financial supervision. They were the fundamental causes of the crisis.

On the basis of that conclusion, governments, central banks, national financial regulatory authorities and the related international organisations have been putting forward proposals for solutions from different points of view. Both political and economic in nature, these proposals will have to be refined and implemented into law and regulations before they can become effective and their real impact felt. That means many complex legal issues, and so a very important role for lawyers.

As Fernando Peláez-Pier, the president of the IBA asserts, the financial crisis has passed beyond the financial sector and is affecting economies in every single corner of the world. “So all organisations in every field must contribute their own thoughts, including the IBA,” he says.

Hendric Haag, the chair of the IBA Legal Practice Division, echoes this point: “The current financial crisis is affecting everyone. It is necessary and appropriate for legal professionals to express their views.” Both Haag and Peláez-Pier are members of the Task Force.

In that respect, no group other than the IBA could provide such global expertise in relation to the legal framework of financial market regulation and offer objective commentary on, and suggestions for, the reform agenda. And while the IBA’s more than 60 years of experience, it has generated opinions and membership from all major jurisdictions in the world including many leading specialists in financial law.

The IBA set up the Task Force on the Financial Crisis with a view to contributing to the search for efficient and lasting solutions to the problems confronting the world’s financial markets and to rebuilding an efficient and appropriate global market system.

According to Peláez-Pier, the Task Force, which comprises leading legal practitioners and academics focusing on financial regulation, will contribute to the debate by providing access to legal professionals. Its main task is to analyse changes to be introduced to the existing financial regulation system. It will comment on their impact on the financial sector and other related sectors through conferences and sessions, and develop proposals for changes to the regulatory architecture.

Haag emphasises that, when contributing to the discussion, the Task Force won’t take a political point of view, because that is not the place of the IBA. “Rather we want to make sure that the legislature is moving in an appropriate way and is workable in practice,” he says.

As has been widely acknowledged, compared to previous financial crises such as south-east Asia in 1997, this one is unique in its global spread. As a result, governments have been forced to cooperate with each other and come up with true cross-border solutions. The crisis cannot be more than mitigated by any one country. So again, the reach of the IBA is crucial.

In Haag’s opinion, at the moment the biggest challenge in the financial world is supervision. As its stated mission, the task force will advocate liberal financial markets and take a firm stand against protectionism by law – and defend the rule of law as the fundamental principle and prerequisite of free trade.

He adds: “Now it’s truly time to talk about our global financial regulation and the uniformity of rules around the world. But this is also something to protect, as everyone is moving in different directions. Peláez-Pier expresses a similar point: “It’s difficult to build a global regulator for the financial system. Traditionally, financial regulation and supervision was always national. It’s inevitable that each country will issue its own rules and implement its own regulations. The key is to make sure communication between governments remains open at all times.”

In the US, Barack Obama’s administration has put forward proposals on the reform of financial regulation, in which a new Financial Services Oversight Council will be established and the Federal Reserve will be given more authority to supervise all firms that could pose a threat to financial stability. The EU has called for genuine and comprehensive reform of the world’s financial architecture. There are a number of proposals on the table, including one to enhance the power and authority of the International Monetary Fund and the World Bank. That would create an unprecedented level of global supervision of financial institutions, impose universal standards for accounting and regulation and serve as an early warning system for future crises.

Unlike the US, Germany and some other countries, the UK is trying to retain some of its economic liberalism and is critical of strong regulation. The Labour government’s proposals though, have been rather undermined by quite different plans from the Conservative Party, which would abolish the Financial Services Authority and the tripartite structure, and give the Bank of England more powers to ensure financial stability. The seeming inevitability of a Conservative government in 2010 doesn’t help either.

Haag says that, given the complicated global context, if a global financial regulator is established it will have to deal with many different regulatory structures in different countries, each pursuing contradictory goals. One major problem, if not the biggest problem, is promoting international financial regulation is how to harmonise the multilateral systems.

“The Task Force wants more and more parties to be involved in the debate to contribute to the building of a healthy financial regulation system. Without that any system is doomed to inconsistency. No one is better placed to help than the IBA.”

Fernando Peláez-Pier, IBA President

“IT’S INEVITABLE THAT EACH COUNTRY WILL ISSUE ITS OWN RULES. THE KEY IS TO MAKE SURE COMMUNICATION BETWEEN GOVERNMENTS REMAINS OPEN”
As a young child, which of us dreamed of being a matador?

Our IBA team from top: Dr. Faraj Ahnish, Managing Partner, Abu Dhabi; Sadiq Jafar, Managing Partner, Dubai; Richard Briggs, Executive Partner, Sameer Huda, Partner; Erik Muthow, Partner

www.hadefpartners.com
Experience across the Middle East

In regional rankings from the IFLR1000 research team, exclusive to the Daily News, Simon Crompton analyses the expertise of firms in the Middle East

**Capital markets**

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**Allen & Overy**

"A&O has just put bums on seats. That’s what it comes down to. The firm has continually invested in staff and getting people out to the UAE, trying to make that a real hub for the region rather than work coming back to be done through London. Some of its peers haven’t quite met that standard." These are the comments of one of Allen & Overy’s capital markets clients, based in Dubai. They reflect a broader feeling that, speaking for the Middle East as a whole, A&O has continued to invest when economic conditions have meant other firms have cut back. (The firm reached 100 lawyers in Dubai, Abu Dhabi and Riyadh for the first time in September 2008, as Lehman Brothers failed.)

On the whole, the legal market in the Gulf Cooperation Council (GCC) countries in the past year was characterised by many firms cutting back on investment and a few launching practices (Latham & Watkins, for example) or deciding to invest in what was already a strong position. Allen & Overy, according to its clients, is definitely one of the latter.

Capital markets work was not easy to find during that period, but one obvious trend was for companies to try to access the US. As the European and Asian markets remained largely closed, the institutional investor market in the US was relatively open. So A&O worked for the government of Abu Dhabi on a combined $3 billion of notes issued under Rule 144A to these investors, alongside those also sold under Reg S.

**Clifford Chance**

Saudi Arabia has always been a self-contained jurisdiction. But over time, there have gradually been changes. One is the emergence of a real capital market as companies have become less and less dependent on local banking. That capital market has also gradually become international, leading to a new stream of work that requires the combination of international (effectively English law here) expertise and local knowledge of disclosure and Islamic law issues.

Clifford Chance and its local partner Al-Jadaan have been a good example of this. The past 18 months saw a number of large capital markets transactions in Saudi despite the troubles in the international market. These included the Purple Island sukuk: an innovative issue of SR1 billion in which Clifford Chance and Al-Jadaan advised the lead arranger, HSBC Saudi Arabia. The deal used an ijara and mudaraba structure with respect to a usufruct right over 13 floors of the Al-Safa Tower of the Abriq Abi-Batt Complex in Makkah. The structure was the first to use real estate assets there, and it was organised to avoid the need for a purchase undertaking what still being able to refund the principal to investors on maturity.

**Latham & Watkins**

Latham is a newcomer to the Middle East – it only set up last year. But in that time its presence has been rather explosive. In the past year it has hired Andrew Tarbuck from Norton Rose, Chris Lester from Freshfields, Maysa Ibrahim from White & Case, Tim Ross from Linklaters and Craig Stocroft from Bderger Pacific Equity – all partners or counsel. It also hired associates from Linklaters, Simpson Thacher, Shearnman & Sterling and Berwin Leighton Paisner.

While it has offices in Abu Dhabi, Dubai and Doha, and the practice is led by Bryant Edwards and Tim Ross in Dubai, it is really the Qatar practice out of Doha that has gained the firm real recognition in the past 12 months. Everyone, clients and peers alike, say the same thing about Latham: “They’re all over Qatar, they’ve made a really strong impression there and have become a real competitor for all the work coming out of the country.”

**Linklaters**

Linklaters has had sporadic brilliance and consistent recommendations from its peers and clients. But both consistently mention that the firm doesn’t have enough people on the ground to compete with fellow UK firms like A&O and Clifford Chance. In 2008 it had a stellar year, winning IFLR Middle East Law Firm of the Year for its work on groundbreaking transactions like advising Tareed on the UAE’s first mandatory exchangeable sukuk and assisting Deutsche Bank on the Tamweel securitisation.

The previous year it had worked on one of the largest transactions of the year – DP World’s simultaneous sukuk and MTN programme – and advised the managers on the Dana Gas sukuk for $1 billion. On the equity side it also won the Deal of the Year for the Depa IPO, a $430 million deal that was the first listing by a private UAE company on the DIFX. The M&A team is also very strong – with the firm receiving the Team of the Year award in 2008, advising on three of the four shortlisted deals that year – including the Emirates Bank/NBD merger and the OMX sale to Nasdaq.

**Lovells**

Raif Ali and his team at Lovells have established quite a strong reputation for capital markets work in the Middle East, and particularly Islamic finance. Landmark sukuk that the firm has worked on include the first convertible sukuk, the largest sukuk, the first equity-linked sukuk and the first sukuk to combine musharakah with ijara. Pretty impressive.

Unfortunately, the financial crisis this past year has hit Islamic finance worse than almost any area in the Gulf.

In the long run, the question for Lovells’ capital markets practice in the Middle East is: will the sukuk market recover or will the firm generate work in other, conventional areas? “If they can’t do either then there’s a real question mark hanging over the practice,” comments one bank in the region. “But they certainly have the strength there to be a big name in Islamic finance if they want to be.” Another bank in the region is slightly less optimistic: “My question would be, does any bank go to Lovells as its first choice at the moment? And if they don’t, is it realistic that it will thrive through what is effectively a recession?”

**Banking**

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**Allen & Overy**

One of Allen & Overy’s banking highlights in the past year was the work for Samba Financial Group Riyadh Bank and Banque Saudi Fransi as the lead arrangers of a SR3 billion ($801 million) credit facility for Kingdom Holding Company. Al Rajhi Bank also called in the team to advise over a SR 700 million muntahaha (deferred sale) for the Investment Dar Company. More importantly from a regional perspective, though, this work demonstrated the firm’s growth in Saudi Arabia.

Julian Johansen leads the practice out of Riyadh and has been there for over two years. But while it used to be him and one associate (along with staff at associated firm Abdullah AlGasim), the office is now nine fee-earners with the partners resident in the country. The most recent senior addition was Johannes Bruski, who relocated from A&O’s Frankfurt office to Dubai in December 2008.

While it is far to say that the Saudi office is yet to be on a par with Al-Jadaan & Partners/Clifford Chance, The Alliance or Legal Advisors/Baker & McKenzie, it did raise some eyebrows by sending Bruski to the office as the second full-time partner there at a time when others were cutting back.

**Clifford Chance**

One reason capital markets have done so well is that the banks lost all their appetite for lending and risk. Unlike the previous year, when Clifford Chance advised on deals like the $10 billion financing of the Saudi Kayan petrochemical project and the $5.2 billion financing of Ma’aden phosphate.

But there was still work to be had, and on those deals the team at CC very often played a role. On the Qatar Telecom forward start facility, for example, where a section of the underwriters agree to a refinancing in advance. The structure, which has since found favour in the UK and Australia, as well as being talked about in the US, was first used in the Gulf in this QTD deal.

**M&A**

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**Allen & Overy**

In September 2008, Pervez Akhtar left Allen & Overy to join Dubai private equity group Abraaj Capital. Six months later, he was back. Apparently he just missed the kind of work he had been doing at A&O and the more commercial responsibilities at Abraaj had not been to his liking. “I missed the legal stuff,” he says. “But it did have very positive implications too. I understand the client a lot better now.”

The return is good news for A&O’s clients as well as for Akhtar. He is well-respected, particularly for international work from the UAE. It is also just one of a series of arrivals in the M&A department. Andrew Schoellemker relocated from London to Dubai just as Akhtar left, in September 2008, to take on the role of head of the corporate practice (Akhtar now has responsibility for “strategic high-level relationships”). Chris Thoms then also moved from London to Dubai, in January 2009, while televising and

“Latham is all over Qatar, they’ve made a really strong impression there and have become a real competitor for all the work coming out of the country”
MA specialist Tom Levine had moved from London to Abu Dhabi in August 2008. Along with Johannes Bratski in Riyadh (detail in the banking section), the firm also welcomed seasoned associates Tom Butterick, Nick O’Donnell and Carlo Pianese from the London and Milan offices.

Clifford Chance

The biggest event in this region for Clifford Chance in 2008 was undoubtedly the opening of its Abu Dhabi office. If the firm was going to have a real spread across the region, it needed an office there. You just don’t get work in Abu Dhabi unless you are in Abu Dhabi, something the project finance specialists and US firms have recognised for a while – though they had the advantage of deep and long relationships with the petrochemical companies.

The corporate team there is now led by US partner John Graham, who relocated to Abu Dhabi. The office as a whole now comprises six partners and 18 other fee-earners. Having a US-qualified partner is a big advantage, given the emirate’s history and connections with the US (many of the local businesses are often educated or spend time working in the US). In a way, Graham perfectly demonstrates the way a firm like Clifford Chance needs to develop regional strength – a partner at a UK firm, qualified in the US, working from Abu Dhabi.

Freshfields Bruckhaus Deringer

No one doubts the quality of the Freshfields offices in the Middle East. It now has locations in Dubai, Bahrain and Saudi Arabia (in association with the Law Firm of Fares Al-Hejalan) with strong lawyers in each. But both peers and clients do doubt in size and ability to cope with changing circumstances. The firm has 40 lawyers across those offices, only slightly more than Latham & Watkins, which only set up in the Middle East in 2008. It received two nominations for the IFLR Middle East Awards in that year, compared to the 14 for Allen & Overy. Linklaters has also been around for less time than UK competition A&O and Clifford Chance, yet it managed 13 nominations.

Latham & Watkins

As mentioned in the capital markets section, Latham has grown tremendously in the past year but, outside of Qatar, is just finding its feet. In that jurisdiction its reputation is already cemented, and on the corporate side the work out of Doha last year included the $10 billion Saudi Kayan project and $5 billion Ma’aden phosphate mine and fertiliser project.

Ashurst

The project finance team at Ashurst was pretty busy in the past year, despite only two deals actually closing: the Ras Laffan C and S2 Interim Bridge Loan. Partly this is because the Ashurst team is a small and growing one. Partly it is because the project finance deals across the Middle East were not as plentiful as hoped, slowed down or outright cancelled as the credit crunch really took hold.

On the team, it is led by David Wadham and Martin Rogens. But Rogers only joined in January 2009, transferring from the London office. Meanwhile senior associate Andrew Bailey came across from Denton Wilde Sapte, Adar Gordon Orr from Lehman Brothers, Robin Hickman from Travers Smith and Katharine Sonneborn from the Ashurst London office.

The s2 project the firm was able to advise two parties under two different partners – David Wadhma in Dubai and John Inglis in London. This demonstrated the strength of the Dubai team now – and allowed the firm to back two horses instead of just one.

Baker & McKenzie

Baker & McKenzie has been in Saudi Arabia for 30 years. It’s pretty hard for other firms to compete with that kind of longevity, but the firm does still suffer from allegations that “its strength is really just historical, more and more it is being out competed by the likes of A&O, Clifford Chance and the other UK firms” according to one competitor. This is certainly not the whole story. Any firm that has structured the first private sector petrochemical project in Saudi, issued the first bond there and been retained by the government to help implement the Capital Market Law in the Kingdom has enviable experience. But the jurisdiction is definitely more competitive than it was 30 years ago. The Bahrain office also deserves mention as a strong hub, and the firm has recently opened up an office in Abu Dhabi, led by Boris Dackiw.

Clifford Chance

Under the M&A section of this regional analysis, it was explained how important Clifford Chance’s new Abu Dhabi office is to the regional spread of its work. From a project finance point of view, the relocation of Mohamed Hamra-Krouha to Riyadh is almost as important.

Al-Jadaan & Partners is universally top-ranked in Saudi Arabia and unanimously praised. One client told researchers that “Al-Jadaan is tier one in Saudi Arabia, the best legal firm” and “Mohammed Al-Jadaan is top class, the best in Saudi Arabia”. So pretty good. But while Clifford Chance has long benefited from its association with this firm, and it has enabled them to rank equally with the international firms that have been there for a while (Baker & McKenzie, White & Case), Clifford Chance has never had a partner seconded there before, or had someone co-chairing the practice. Hamra-Krouha has taken on that role, and last year was involved in two big projects – the $10 billion Saudi Kayan project and $5 billion Ma’aden phosphate mine and fertiliser project.

Latham & Watkins

Latham & Watkins has a strong position in Qatar but only really started putting people on the ground in the Middle East last year. Project finance has been strong as a result of the growth of deals coming out of Doha, including the Ras Laffan C independent water and power project, on which Latham advised Ras Guita Power Company and Qatar Electricity and Water Company. Dennis Nathanson, William Voige and Simon Dickens were the lawyers involved.

While on the subject the lawyers last year that Latham hired in the department were Mark Godfrey (from Allen & Overy, counsel), Aaron Bileenberg, John Toufainan, Arjun Ahlawala and Inman Sharih (all associates, from Credit Suisse, Capitol Source, Allen & Overy and Bakers Botts respectively). Other deals include the Nakiliat ship financing and KGL Investment Company on all the financing, construction and operation aspects of the New Port in Aqaba, Jordan.

Milbank Tweed Hadley & McCloy

For a law firm without a stated office in the region, Milbank does a lot of project finance work in the Middle East. Usually representing the lenders and usually on the international, big-ticket deals, the firm has a good reputation for this work. It did its first Islamic finance deal in the region in 1994 and its pedigree for mining work in particular goes back 25 years.

Milbank has also developed expertise in dealing with multi-tranche funding structures (including banks, project bonds and governmental lenders) and political risk insurers. The spread of this work across the whole region is demonstrated by the four standout deals from last year, which were located in Yemen, Qatar, Oman and Bahrain.

Shearman & Sterling

Shearman & Sterling has an enviable position and reputation in Abu Dhabi. And as the emirate is the second biggest jurisdiction for project finance deals in the region (after Saudi Arabia, of course), the US firm is always going to be a powerful player on regional deals.

Although the firm cannot claim to have strong coverage across the rest of the Middle East, it does have a presence in this region, and our ranking is based on the basis of Abu Dhabi alone. Managing partner Philip Dundas is core to that reputation, but he manages a strong and growing team. “Shearman is just everywhere in Abu Dhabi, it’s hard to compete there,” admits one peer.
Galacticos and mattress makers

Local attraction: football in Madrid

T

ink Madrid; think Real. The two go hand in hand. Mention the Spanish capital to most people, and talk is sure to shift to that of white-shirted galacticos, European Cup, and astronomical transfer fees. Madrid is a city that loves its football. In the home of two of Spain’s most successful clubs, Real Madrid and Atlético Madrid, there is a rich footballing culture and a compelling rivalry. Real Madrid is the glamorous bride clad in nearly-white; city rival Atlético is the perennial bridesmaid, scrapping with the other guests to catch the bouquet.

Like a Hollywood film star, Real Madrid craves the spotlight. The brand power of the Real marketing machine reaps hundreds of millions of euros every year. The club has the pedigree, the prestige and the financial muscle to recruit anyone on the planet. Chairman Florentino Perez has been tossing euros around this summer as if they were monopoly money, hijacking the back pages after spending €250 million on new recruits for an all-singing, all-dancing cast, the most notable being the €94 million capture of Manchester United’s Portuguese superstar Cristiano Ronaldo. Such indulgence is synonymous with Real’s history, having established a reputation for buying the biggest names in world football at whatever cost.

Wearing the famous white shirt is arguably the pinnacle of any player’s career. If Real wants you, it means you’re the best.

Real has a glittering history, and is arguably the most successful club of the 20th century, having won a record 31 La Liga titles, 17 Spanish Cups, a record nine European Cups and two Uefa Cups. The club gained its famous name in 1920, after King Alfonso XIII granted them the title of Real (Royal). The big-spending tactics have also established Real as the world’s richest football club, with last year’s revenue estimated at €366 million. Yet unlike most European football clubs, Real Madrid’s members (socios) have owned and operated the club since its inception.

Real’s 80,354 capacity stadium, Santiago Bernabéu (pronounced Bem-ah-bay-oo), is named after former club president Sergio “Kun” Agüero. Atléti’s 54,851-capacity Vicente Calderón stadium is located near Pirámides Metro station along the line called Santiago Bernabéu. Guided tours are available, and are definitely worth a visit – somebody back home has probably asked you to buy them a Real shirt with ‘Ronaldo 9’ emblazoned on the back, and the Bernabéu is the place to get it.

Neighbour Atlético are on the other side of the proverbial tracks. Living in the shadow of the cross-town galacticos, Atléti are the people’s team, the working-class answer to the glitz and glamour of Real. Atléti has long held a reputation as the south- west thug of Madrid, in 54,851-capacity Vicente Calderón stadium perched next to a brewery on the banks of the murky river Manzanares at the mouth of the industrial half of the city, once punctuated by the urban decay of industrial chimneys and dangerous neighbourhoods. It’s certainly not the friendliest of venues for away supporters, as Atléti’s hincha (translated as either fans, or more ominously, hatred) make Real’s right-wing Ultra Sur section look like a night at the opera. On a match day, the Calderón stadium becomes a white-hot crucible of fervour and banter. For anybody wishing to sample the Spanish match-day experience, Atléti’s fans are always eager to belt out a rendition of the song “Real Madrid, Real Madrid, el equipo del gobierno, la verguenza de la patria” (the government’s team, the country’s shame). This clash of ideologies has made the fiery Madrid derby one of Europe’s most eagerly anticipated matches, with Atléti hosting Real for El Derbi madrileño on November 8. Real hold the bragging rights, with 77 victories against Atléti’s 35, with 31 draws.

The weekend of October 10 is scheduled for World Cup qualifying matches, and sadly Spain will be playing away (Armenia on the 10th and Bosnia on the 14th) and the next Real Madrid home fixture is against Valladolid on October 18. For anybody wishing to sample the Spanish match-day experience, Atléti’s fans are always eager to belt out a rendition of the song “Real Madrid, Real Madrid, el equipo del gobierno, la verguenza de la patria” (the government’s team, the country’s shame). This clash of ideologies has made the fiery Madrid derby one of Europe’s most eagerly anticipated matches, with Atléti hosting Real for El Derbi madrileño on November 8. Real hold the bragging rights, with 77 victories against Atléti’s 35, with 31 draws.

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**VOX POP**

**QUESTION:** Which social events are you most looking forward to?

- **Carlos Woodworth**
  **Olivares & CIA**
  **San Angel, Mexico**
  I am most looking forward to the Latin America Regional Forum lunch [Tuesday, 1pm, Velada Hotel], it will be a good chance to network with my fellow professionals. Unlike larger gatherings, the lunches are a better place to get closer to people and talk about the issues that are affecting us all. It allows for networking on a whole different scale.

- **Thomas Weitemeyer**
  **Moalem Weitemeyer Bendtsen**
  **Copenhagen, Denmark**
  I am going to participate in the IBA soccer game. I do not know who I will be playing for or in which position, but I am just excited to be playing. I met some guys last year who participated and they seemed to enjoy themselves, so I thought I would give it a go. Thankfully the game is towards the end of the week so it won’t tire me out for many sessions.

- **Michael Bernasconi**
  **Bär & Karrer**
  **Zurich, Switzerland**
  I am looking forward to the dinner of my committee [Committees on Communications Law and Space Law joint dinner, Tuesday evening, Club Allard]. This is always a very special event as it draws old faces, new faces and good friends all together. I plan to attend a few events and I think the opening party on Sunday was a good way to start things off. It was great to be outside enjoying the beautiful surroundings.

- **Maria Eugenia García**
  **Jaquín-García**
  **Managua, Nicaragua**
  I was really impressed by the opening party. If that is anything to go by then I expect the rest of the week’s social events to be good fun and well organised. I have a number of cocktail receptions to attend and they will be a nice way to unwind after a long day of panels and discussions. I hope to meet new people inside the IBA and to get to know them in the social events in the evenings.

- **Anne Gilson LaLonde**
  **Gilson on Trademarks**
  **South Burlington, US**
  The Corporate Counsel Forum lunch [Thursday, 1pm, Salon de Oriente, Ifema Exhibition Centre] is the event that I am looking forward to most. I will be speaking on a panel before lunch and so I hope the lunch will allow for the debate to be continued. I have never met anybody here before so the lunch will be an ideal opportunity for me to get to know all the distinguished lawyers at the conference.

- **Mary Keane**
  **Law Society of Ireland**
  **Dublin, Ireland**
  I am excited about the closing ceremony because there will be live opera and that is a very classy way to end the conference. I love opera and that is what made me decide to stay until the very end. I will also be taking part in a tour of the Spanish Supreme Court and visiting the local bar association headquarters on Wednesday morning. I am not sure if it counts as social, but I’m excited about it.

- **Rodrigo Jacobina**
  **Doria, Jacobina, Rosado e Gondinho**
  **Rio de Janeiro, Brazil**
  I thought the opening ceremony was great and I’m hoping that all the other social events live up to that high standard. The Taxation Section dinner [Tuesday, Casino de Madrid] will be good as it is one of the only times in a year when the community gets together. The closing party should also be a night to remember. The whole week is going to be good fun and there will be little time to rest.

- **Enrique Escobar**
  **Lexincorp**
  **San Salvador, El Salvador**
  The Latin American Regional Forum lunch [Tuesday, 1pm, Pullman Hotel] should be an interesting gathering of lawyers. It will be good as I will get to meet new people. I have not gone through the entire social programme yet and so I am not sure what I will be attending. I will probably choose events where I can do the most networking and meet like-minded lawyers. With 5,000 people here, I don’t think that will be hard.

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**CONUNDAUM**

11

The Transparency Fallacy

Too much of a good thing?

In these uncertain times, transparency has become one of the new buzzwords. Sure, transparency has its place. But it should not be confused with the almost endless flow of information, much of which is insignificant, and has the effect of obscuring important information. There is such a thing as too much information.

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ABA Daily News - Tuesday, October 6 2009
Bill fairly and whistle appropriately

Due to lighting issues, the beginning of the ‘Show me the money!’ showcase session yesterday was more like ‘Show me the panel’. Once the audience’s eyes had adjusted to the dark, it was treated to an often lively debate on legal billing and whistleblowing.

The financial crisis means that companies around the world are cutting costs. This includes legal, so there is pressure on law firms to make themselves more competitive. Last year there were rumours of international law firms pitching at such low prices that they were losing money. This eminently ridiculous practice has now been replaced by a debate on billing. But it is not new.

“After the dot-com bubble burst we talked about capped fees and fixed fees. The ethics were discussed at the time,” said Carlos Urrutia of Brigard & Urrutia in Colombia. “It is not a question of ethics, more of a shift towards lawyers organising themselves and pricing their services accordingly.”

Urrutia then recalled a consultant he heard speaking recently who claimed that international lawyers should not be so attached to the hourly rate. If other professionals can use fixed fees, then why can’t lawyers?

And here is the chicken-and-egg situation. Lawyers often complain that clients cannot tell them the scope of the matter in advance; they expect the specialist lawyers cannot tell them the scope of the matter in advance. Lawyers often complain that clients cannot tell them the scope of the matter in advance. Lawyers often complain that clients cannot tell them the scope of the matter in advance.

“This is hard to achieve. I have never prepared a budget that has been anywhere near accurate at the end. But if it is used as a monthly roadmap it can be very useful and can help reduce friction with the client,” said Benno Kimmelman, arbitration partner for Allen & Overy in New York. “This is the key to any billing method is honesty. The bill must be accurate, with no misrepresentations and, most importantly, reflect the work that has been done to add value. It is crucial that the person receiving the bill understands what has been done and why. Often this person is not the contact that lawyers have been dealing with, so clarity is essential.

“It is about building a relationship,” said Kimmelman. “There is no point in having a bill paid if the work hasn’t enhanced the relationship with the client. Ensuring that you bill paid if the work hasn’t enhanced the relationship with the client. Ensuring that you.”

The power of pre-recorded audio and a slideshow, Steven Richmond of Duane Morris in New Jersey agreed. He recalled the true story of a lawyer that was billing a client for $35,000 – including a $2 soda while he waited at the post office. The client was aghast at the pettiness and never used the lawyer again. Common sense is needed too. As Richmond joked: “A lawyer dies and goes to heaven complaining that he needed too. As Richmond joked: “A lawyer dies and goes to heaven complaining that he needed too. As Richmond joked: “A lawyer.”

In conclusion, the panel discovered a cultural split in the way law firms bill. In Latin America, fixed fees and success fees are used by the vast majority of lawyers. Indeed, in many jurisdictions the hourly rate is not trusted at all by the general population. This could stand as a lesson to the rest of the world. As co-chair Daniel Ferrere from Montevideo in Uruguay summed up: “The fixed fee isn’t all that bad. You don’t lose all the time. In fact, many times you win.”

In a later sub-panel, another Latin American split was unearthed. Co-chair Stephen Revell, partner at Freshfields Bruckhaus Deringer in London (below), had called for the IBA to lead the way in laying out guidelines for when lawyers are obliged to blow the whistle on their clients.

While the audience chuckled in agreement that lawyers really should say something if a client says he is going to settle a disagreement with a handgun, the Latin lawyers in the audience expressed dismay at the increased focus on whistleblowing.

“I find it outrageous that a lawyer has to blow the whistle unless it is for humanitar- an matters such as murder,” said Maximo Bomschul of M&C Bomschul from the floor. South American peers from the audience fervently agreed and criticised the shift in policy, especially in the US since the start of the war on terror.

The panel tended to agree. Much of the discussion had focused on the recent anti-money laundering legislation in the EU that had followed the guidelines of the Financial Action Group’s proposals. Originally, lawyers had been urged to agree with blowing the whistle in morally indefensible situations such as terrorism or drug trafficking. However, the majority of referrals in practice are based on tax offences. This isn’t what lawyers agreed to.

In closing, Revell repeated that lawyers have not talked about the situation enough and that “the IBA should help write the rules to avoid them being written for us”. He then finished by revealing the ridiculousness of an intercontinental issue.

“If a Spanish bullfighter comes to me in England to buy a house, I have to report him to the authorities as bullfighting is a criminal offence.”

OUR RESPONSE TO THE MURKY BUSINESS LANDSCAPE?

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