2013 will be crunch time for the Eurozone, panelists on yesterday’s Legal Practice Division Showcase: ‘The euro area crisis – thinking the unthinkable’ warned.

Efforts to reduce deficits in a number of debtor countries within the troubled euro area have in many cases succeeded only in reducing those countries’ GDP figures, thereby worsening an already sorry situation. For many countries, survival of the euro has come to mean harsh, and potentially ineffective, austerity measures.

In this climate, a Eurozone break-up is no longer unthinkable.

Bank of Ireland’s chief economist Daniel McLaughlin said the situation was obviously concerning, but almost inevitable considering the eurozone included 17 countries that did not fulfil the criteria for a monetary union.

“There are a lot of things wrong in the zone, and the situation has been further exacerbated by global deceleration,” he said. “2013 is shaping up to be a tough year.”

Even so, he said any decision to break-up the euro would ultimately be politically and not economically motivated, just as the decision to establish the currency union was politically-driven.

A controlled exit – strong versus weak

Session co-chair and Hengeler Mueller partner, Hendrik Haag, said a voluntary withdrawal from the euro was not provided for under the terms of the European Union’s (EU) Lisbon Treaty. What’s more as it was also invariably include exiting the EU, it would therefore go against the EU’s founding principles.

Even so, he said violation of the EU treaty was possible.

“Of course, the EU member states could always agree on a consensual exit of a member – effectively a de facto change to the treaty,” he said. “But the treaty amendments that would be required to do this, and the attainment of the necessary parliamentary approval or referendum, would obviously be a long process in some member states.”

It could be possible to speed up the process, however, and potentially enable the approved unilateral exit of a member state overnight, if the exiting procedures were secretly negotiated and agreed by other member states in advance. “That option may shield member states from exposure to market forces,” he said.

He believed the withdrawal by a stronger member state would be the more likely and easier scenario. But he warned this would still be a drastic event which would have an obvious impact on exporters, as the new currency would inevitably appreciate against the euro.

“There would be a significant loss of credit in this scenario,” he said. “It would be likely to trigger a flight of capital from the remaining member states that would like to benefit from the redenomination of the new stronger currency.”

In this scenario, whatever the redenomination rules are going to be, investors from weaker member states would try to convert their euros into convertible euros in order to try to get the new currency, he said. There would also be a strong appreciation of receivables with respect to debtors outside the new currency, which will obviously have an impact on all companies that have outstanding dealings with other eurozone members.

“In this situation, the funding costs of the remaining countries in the zone are likely to remain under pressure because the new currency will be perceived a weaker currency than before,” he said. “There would also be a high incentive to leave sovereign debt denominated in euro for the leaving member state. ‘That’s a very elegant way to easily reduce a large portion of your debt through exchange rate operations.’”

If a weak state were to leave the union, the exiting state would benefit from being once again the master of its own currency. But all the benefits of being in a single currency would also obviously be lost, Haag said.

“In this situation, appreciation of the new currency is very likely, and a run on the currency would also obviously be lost,” Haag said.

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An uncontrolled exit

Of course, an uncontrolled eurozone collapse is also possible. In this event, Haag explained, the euro would cease to exist and member states could introduce replacement of currencies. “There would be redenomination of obligations into new national currencies in a very unorderly way,” he said. A non-consensual union exit can in theory happen overnight by implementing national legislation and introducing a new national currency.

The exiting member would be in breach of the EU treaty, but the courts of the exiting member would remain bound by EU law. Even so, Haag expected in such a scenario the withdrawing member would likely uphold new laws given by the national legislation at least as far as a party would sue in the courts of the exiting country.
EMERGING MARKETS

How to juggle family and career success

The “secret sauce” to attracting technology FDI

Emerging markets have an essential role in pushing the next stage of global technology advancements. But to reach their potential, much depends on their foreign investment framework and proactive legal advice.

Speaking at yesterday morning’s session titled “Apples to applications – attracting technology to emerging markets”, Intel Ireland’s Brendan Cormican and Hewlett Packard’s Felipe Ortega revealed what makes an attractive foreign direct investment (FDI) regime.

According to Cormican, FDI companies are looking for three things in small countries: infrastructure, competitive cost base, and community. “If you take those three things... they are really the secret sauce of FDI,” he said.

Infrastructure is the most important factor. It doesn’t have to be the best in the world, Cormican said, but it has to be good and stable, and there should be an evident desire to improve it.

Next is cost of operations, and then community. This last factor extends beyond the role of government. “You need a place where expats will feel comfortable and safe coming to,” said Cormican.

For Hewlett Packard’s Ortega, the key benefit of outsourcing overseas is no longer cost. “We are finding that setting up development centres in different countries not only helps us from the cost of engineering [perspective], but it has really increased our innovation,” he said.

“Why do I like to have development engineers in Costa Rica, Taiwan and Singapore working collaboratively with teams from the US on the same problems? Because of their culture and backdrops they will all come at it from a different perspective,” he said.

This is important given that the whole battle of technology today is innovation, he said, not reducing costs. And it’s one of the reasons Hewlett Packard has set up development centres in other countries.

Ortega said: “When I hear ‘developing countries’ it says more about the economic engine of that country. It doesn’t say anything about the quality of the talent and their desire to do great work and innovate.” Some of the best talent and people are coming out of the likes of Costa Rica and other emerging markets.

Don’t underestimate your role

Some of the panel’s lawyers played down their role in the all-important decisions of where technology companies should establish R&D and manufacturing centres. They said that the decision has already been made by the time lawyers became involved.

Instead, their function is to inform the client of the risks associated with operating in the chosen country, raise the appropriate questions, and then structure around any problems. But Cormican warned against underestimating the impact lawyers have on the choice of investment location, adding that the site selection process is simpler than many would expect.

The decision to include a country on the locations shortlist is essentially based on book research. It’s not obvious from this research what incentives are being offered by a country’s national investment body – such as IDA Ireland or the Costa Rican Investment and Trade Development Board – the shortlist can be lacking.

This is where lawyers’ advice has a potentially greater impact than they might imagine. Their advice, provided after the shortlist has been developed, has an impact on this crucial decision.

“So I think there is a huge role for lawyers in keeping current with what the situations are around the world, particularly in regard to regulatory environment,” Cormican said.

“The business will not make any decisions in isolation, especially when you are making a multi-billion dollar capital investment that may have a 10 or 15 year time horizon,” he said. “This is an incredibly risky adverse business and you need the best advice you can get, so there is a very definite role [for lawyers].”
VOX POP

QUESTION: What are you planning to do during your stay in Dublin?

Yaw Adjei Afriyie Nketiah
Legal Alliance
Ghana
I want to visit one of the oldest universities in the world, Trinity College, and find time to visit the courts and see how they function here compared to my country. Ghana and Ireland have been under the same British rule before. There is a connection between my country and Ireland historically.

Fred Chilton
Emil Ford
Australia
I’d like to visit the National Museum of Ireland because I understand it has some early archaeological finds. We spent some time earlier this week going to the Rock of Cashel where St. Patrick converted the king and we went to some of the old abbeys and monasteries.

Vyapak Desai
Nishith Desai Associates
Mumbai
One thing I’d like to do is see the city and obviously visit the oldest of breweries. People should take their time off and visit the countryside around Dublin. We did a city tour on Sunday. Dublin is excellent. There is a preserved history that people are obviously proud of.

Merete Smith
The Norwegian Bar Association
Norway
I read about two things I really want to do. I’d like to visit Marsh’s Library, one of the oldest public libraries in the world. Of course, I want to visit the pubs and hear some of the music which Ireland is very well known for. I think Dublin is a wonderful city. I think the Norwegians and the Irish have similarities as a people.

B.O. Sanusi
Lagos State Safety Commission
Lagos
This is where U2 have their humble beginnings so I would like to see evidence of their early days. Aside from that, the most popular drink for men in Nigeria is Guinness so to be in the country and the city where the whole thing started is amazing. I’ve heard the brewery has a 9,000 year lease – that’s quite something.

Scott Guan
Zhong Lun Law Firm
China
I will visit Trinity College which I understand is one of the most historical sites in Dublin and the oldest university in the country. One of my partners is a graduate from Trinity so I will buy a Trinity College t-shirt for him. I really look forward to events hosted by local Irish firms at the Guinness Brewery. I was told the quality for exports and local consumption is different, so I’ll try and figure out what the difference is!

Magnus Pousette
Tark Grunte Sutkiene
Estonia
I’ve been to Dublin several times before and there are plenty of places to visit, like Trinity College and the Guinness brewery. Years ago, I went on a Viking cruise through the canals. It was a little silly but a lot of fun.

Nico Ooyevaar
McMan & Co
The Netherlands
I’ve been to Dublin several times so I know the place. I would recommend spending some time in the Garden of Ireland in Wicklow which is just 30 minutes south of here. It’s a very beautiful area. The scenery is great – the mountains and the forests. There are excursions there as part of the IBA’s social program.

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The alternative fund management industry faces an uncertain future, says Lucy McNulty ahead of today’s panel on the topic of AIFMD, the story so far.

The biggest bone of contention for market participants is the ‘one-size-fits-all’ approach taken by the AIFMD to regulating what is a diverse industry. Biggs says in some cases it is not even clear what minimum the regulatory requirements are addressing. One approach simply cannot suit all types of alternative investment funds, Baillie says.

To Biggs the consequences of this oversight could be damaging. “Poorly targeted rules that create additional costs for firms, with no clear benefits for investors or other stakeholders, are frustrating and can affect the extent to which firms ‘buy-in’ to the regulatory regime,” she warns.

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Jim O’Neill is at it again. Eleven years after creating the BRIC concept (Brazil, Russia, India and China), the Goldman Sachs economist has named the MIST nations – Mexico, Indonesia, South Korea and Turkey – as the next most promising emerging markets.

The numbers are self-evident. MIST represents the four biggest markets in the bank’s N11 equity fund. But are their investment frameworks and legal regimes advanced enough to support an influx of foreign investment? To find out, IFLR polled emerging markets-focused lawyers with experience in the MIST countries.

The results reveal a distinction between economists and lawyers’ views on growth markets. As one London partner concludes: “Lawyers think with a little more common sense.”

Respondents agree that Turkey is the most accurate inclusion. With solid growth since 2003, it has overcome concerns about government stability and has continued to thrive through the downturn. “It’s been decoupled from the world economy over the past few years,” one respondent says. Bank regulations were strengthened following the country’s liquidity crisis in 2000, meaning it had financial controls in place when the global financial crisis hit. This and the recent overhaul of its Civil Code are examples of the regulatory responsiveness that will continue Turkey’s economic momentum. Importantly, market participants seem equally receptive to change. “There are many conglomerates run by their founders, and there is a lot of interest among these to divest businesses, westernise their structures and bring in foreign capital,” notes a London partner.

The next most worthy inclusion is South Korea. Following the 1997 Asian financial crisis, it opened up to financial (as opposed to just strategic) investors, and liberalised its capital market and real estate rules. “It has been doing fairly well in terms of balancing its historical and natural tendency to be closed off, and realising it must open itself up to foreign investment if it wants to continue its growth,” says one former Seoul-based partner. “It has recognised it can’t be the hermit kingdom.”

But the legacy of the government repeatedly blocking Lone Star’s sale of Korea Exchange Bank will be felt for some time. The sale by the US private equity firm was eventually approved, but its six-year tussle with local tax authorities fuelled the country’s reputation for draconian prosecution of its tax laws. On the whole though, it earns its place in the acronym.

One respondent disagrees with the country’s inclusion on the grounds it is already a first world country. “I think Korea is on par with Japan in terms of sophistication,” according to one partner. “I think it could be offensive to call it an emerging market.”

Elsewhere, Indonesia has an established exchange, which attracts a good number of listings. There is some hesitancy over the enforcement of its corporate governance standards, but investors are generally comfortable placing their money there. Taken as a whole, however, the country’s investment framework is not considered advanced enough to be part of the next BRIC. Projects are still a major driver of the country’s growth, and it needs greater business and financial sophistication.

However the weakest link in MIST is Mexico. The majority of foreign operations come from the US and Canada pursuant to the North American Free Trade Agreement. The perceived high levels of crime and corruption in the country has kept the rest of the world away.

“Mexico has a good legal system, and some promise, but it is a real problem child,” one respondent says. “Criminality and corruption has made doing business there extremely unattractive for foreigners.” The vast majority of respondents think Mexico should be dropped; and there is a clear contender for its replacement. “I really think Nigeria is missing. It’s a major place for external investment; and not just from an oil and gas perspective,” says one US partner. Other respondents also named Nigeria as a glaring omission.

Is MIST worthy of the hype?

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Is MIST the next BRIC?

The latest emerging markets acronym is based on economics. But the legal frameworks of its constituent countries need equal attention. By Danielle Myles

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Enric R. Bartlett
Dean of ESADE Law School

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Our IBA team from the top: Sadiq Jafar, Managing Partner Dubai, Richard Briggs, Executive Partner Dubai, Alan Rodgers, Partner, Michael Lunjevich, Partner, Sameer Huda, Partner, Erik Muthow, Partner

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L aw firms are expanding their international presence in an effort to take advantage of foreign business in a profession that is becoming increasingly globalised. Knowledge of jurisdictional specifics regarding the treatment of witnesses and duties to the court both ethically and legally could be the deciding factor for success on a global level.

Attendees at this morning’s session, “The truth, the whole truth and nothing but the truth – the obligations and responsibilities of lawyers when dealing with witnesses,” will hear from a litigator in Northern Ireland’s common law system and an arbitrator practising under Sweden’s civil law, in addition to experts from Ireland, Australia and the US. Honourable Justice Paul Gilligan of the High Court of Ireland will no doubt provide some insight into what is acceptable under the common law system.

**Duty to the court**
Witnesses are treated differently under common law and civil law systems. One of the most considerable differences arises from attorney obligations. Common law attorneys, while having a fiduciary duty to serve the best interests of their client, have a principal obligation as officers to the court.

Geraldine Clarke, co-chair of the session and the IBA’s Professional Ethics Committee, says that a lawyer involved in litigation has a duty not only to his or her client but also to the court and the administration of justice before. An example of conflict between those duties would be if a client included something in a witness statement that the lawyer knows to be a lie.

“The lawyer’s duty to the court dictates that the client be asked to withdraw that perjured evidence,” says Clarke. “If the client refuses to do so then the lawyer must cease to act.”

“I believe that most experienced lawyers are reasonably good at recognising when a client is lying and ethical lawyers will continue to represent a client in breach of their obligations to the court,” adds Clarke.

Ethical and financial incentives would likely conflict under this scenario, and withdrawing from cases does not necessarily attract new clients. One question likely to be raised during the discussion is whether ethical lawyers are successful lawyers.

“The answer, of course, is that as a profession we have to balance our obligations and reputations, and the reputation of the profession as a whole depends on lawyers acting ethically and fulfilling their obligations not only to their client but also to the courts,” Clarke says. Ethical lawyering is thought to be a public good in that regard. Benefits can be felt by all, but there are incentives to opt-out.

Another difference between the common law and the civil law is the common law restriction on coaching witnesses and leading them through proceedings. This is allowed in civil law systems where the paramount duty of attorneys is to their clients. John Corcoran, Chair of the IBA’s Professional Ethics Committee, said the civil law can create some practical and ethical dilemmas for lawyers.

**Discovery**
The panel will also seek to provide some answers to questions relating to the obligations of attorneys and their clients during discovery. New technology has made it unclear what materials must be provided to the opposition. “This is both in terms of the medium of storage and recovery of documents and information,” says Peter Campbell, a partner at Campbell Fitzpatrick in Belfast who will speak during the session.

Campbell says that courts are challenged with determining when a party to litigation can say a discovery request is too wide or irrelevant. “The rules relating to discovery have changed, but the parameters within which documents are created, stored and delivered have changed,” adds Campbell.

He cited telephone call recordings and documents archived or stored in a cloud as possible sources of speculation. One example would involve documents stored on a floppy disk — it is unlikely that the requesting party would have a reader on site for the outdated technology so it is unclear whether an opponent would have to provide a medium to access the information.

Panelists and attendees will be encouraged to tackle these issues under a short scenario prepared by panelist Adrien Corcoran, a law professor at Monash University in Australia.

“Although short and simple the issues raised are complex and should give adequate scope to explore the context for such questions especially when dealing with litigation in a modern and potentially international context,” Campbell says.

“I believe that most experienced lawyers are reasonably good at recognising when a client is lying” Geraldine Clarke

**Expert witnesses**
Lawyers have to be careful in selecting their independent expert witnesses, both from a credibility and benefit-to-client perspective. Drawing on an expert witness could be dangerous to the attorney if it turns out the witness’s findings turn-out to oppose to the client’s interest.

Lawyers may serve as expert witnesses to the court in cases filed against other lawyers, over negligence for example. Corcoran says these expert witness lawyers might have their credentials questioned, so it can be a risky move for a lawyer to serve as an expert witness. It could also diminish a lawyer’s credibility if they become known for serving as expert witnesses rather than litigators.

Another issue arises when an attorney serves as an expert witness in their own practice area. Conflicts could arise under this situation. Evans will discuss whether there is merit in a rule to prohibit this practice.

**Mediation**
Lawyers have different duties and obligations during mediation than they do during litigation. Panelists will discuss how lawyers prepare their client’s statements during mediation as well as their roles dealing with witnesses. An interesting topic, considering oral evidence is not given in mediation. Cross examination is also not allowed out of court.

Other topics of discussion will include the difficulties that arise when mediation turns into a lawsuit, particularly the applicability of non-disclosure agreements, and how courts could interpret when cross-examination of a client turns into bullying.

It might make sense for a litigator to turn to bullying as a way to get the truth out of an opponent’s client when they know their evidence is correct and the witness is lying. Litigators have to walk a fine line to not be viewed as a bully and encourage a jury to empathise with the witness. At the same time, a lawyer does not want to be perceived as weak by the opposition or their own client.

This panel marks the first time the IBA’s litigation and professional ethics committees have partnered to discuss these ethical issues before an international audience. Clarke expects the discussion to be extremely useful for legal practitioners because of the diverse jurisdictional make-up of the panel.

“‘The lawyer will have to be clear and strong on their obligations and avoid being overly influenced by powerful clients’” Peter Campbell

**“I believe that most experienced lawyers are reasonably good at recognising when a client is lying” Geraldine Clarke**
"They said it couldn’t be done. Until we did it."

Five years after Lord Kelvin - the father of absolute zero - had stated that nothing heavier than air would ever fly, Orville Wright made a fool of gravity. His world-changing flight - the first ever by a human - lasted a mere twelve seconds. But that was long enough to prove all the naysayers wrong.

A remarkably similar spirit - an eagerness to take on the impossible - is exactly what drives us at Attorneys at law Borenius. Were a law firm specialized in business law. Unlike the Wright brothers’ flight, people around the world seldom follow what we do. Yet our mindset is essentially the same. Embrace the impossible - and win.
Frontier markets are best defined by the rule of law, or the lack of it. The simplest way to view this ever-expanding class of developing countries is as a chaotic fourth world, open to foreign investors but without readily-enforced market rules.

These are the emerging markets’ younger, less-experienced siblings. A state of semi-lawlessness makes them unpredictable lands of huge risks. And yet they are capturing the interest of investors worldwide. One look at the numbers explains why.

Frontier markets are home to one billion of the world’s six billion people, but they account for just 5% of global GDP and 0.5% of global investment. In 2010 economic growth rates ranged from a high of 20% in Ghana to a low of 2% in Serbia, compared to the much narrower range in big emerging markets, from 9% in China to 3% in South Africa. The frontier stock markets magnify those gaps, ranging in 2010 from a gain of 80% in Sri Lanka to a loss of 20% in Bulgaria. The major emerging markets, however, produced a maximum gain of 20% in India and no gain in Brazil.

In a global economic climate where there is little else to get excited about - and in which even the man who coined the Bric [Brazil, Russia, India, China] acronym, Jim O’Neill of Goldman Sachs, has admitted that their best days are behind them - frontier markets present a very enticing business opportunity.

It pays to prepare
But what do we actually know about these markets? Or more pertinently, what do we need to know?

Leopard Capital’s founder Douglas Clayton is a man well placed to answer. As head of investment fund managers specialising in the world’s overlooked frontiers, he has years of experience guiding on-site teams to opportunities in pre-emerging economies. It is, he says, an impossible task without good advice.

“Frontier markets are full of guys who got rich quick, but even more who lost their shirts,” says Clayton. “The learning curve for newcomers can be pretty steep.”

The main hurdles are inexperienced policy makers and a lack of legal precedent. Of course, weak regulatory systems can be an advantage for some investors looking for markets into which they can pump money without dwelling on details; but it’s a disadvantage for other smaller investors.

With time and practice frontiers will change laws, as priorities evolve from simply attracting investors to protecting their own interests. In the meantime, however, potential foreign investors should hire a consulting company or lawyer who is aware of local laws and practice, and thereby better able to ensure investments are protected.

Local business partners can also play a critical role in this respect. But sourcing a viable and, most importantly, honest partner presents its own share of problems.

“Frontier markets are long on opportunities and short on human resources,” says Clayton. “Execution is everything so you have to really focus on management team quality.”

According to Hogan Lovells’ Ulaanbaatar-based partner Michael Aldrich, success comes down to common sense.

“Don’t be tempted to dispense with the same common sense approach you would bring to a transaction in Ohio or New South Wales simply because you are investing somewhere exotic,” he says.

“Before a law firm bills a single dollar to a local law firm, they should be comfortable with its reputation as a local partner,” he adds. “It’s always better to anticipate something going wrong, rather than learning behind the curve.”

Private investigators should be hired to verify the practices of business partners that investors are unfamiliar with, he says. They can help identify the investment risks, as well as any potential reputation problems that might not be recognised by prospective investors.

And in markets where recourse to a free and fair legal system is by no means guaranteed, investors should not chance their hand in the local courts because of something that could, and should, have been identified early on.

Ben Reowe, the Asia practice head at investigative firm Nardello & Co, believes it is critical for companies entering a joint venture to carry out proper due diligence beyond business’s books and records. The partner’s reputational integrity, as well as the political connections and principles of senior management and shareholders, should also be looked into.

“All too often I see instances where supposedly fantastic
Despite positive noises around the opening up of Myanmar, market participants in the country have branded the significance of proposed changes to its foreign investment law as over-hyped. Investors should enter with a healthy scepticism.

Among a series of changes proposed to the investment law are provisions allowing foreigners to set up businesses in Myanmar without local partners. Reforms also include a five-year tax exemption for foreign companies, government guarantees against nationalisation, easing of restrictions on private land use, and repatriation of profits.

Following months of delay, the foreign investment law was finalised in early May after, being approved by parliament and signed into law by president U Thein Sein.

One Yangon-based partner questions the international reaction to the news.

"Many are saying this is a huge change, but to me it is not game-changing at all," he says.

"The changes proposed are not drastically different to Myanmar’s Foreign Investment Law of 1988." • With so much else changing in Myanmar it is hard to say if these changes will make much difference," he adds.

Thura Boe-Paing, managing director of All Myanmar Investment & Development Partners, an affiliate of Singapore-based investment company Frontier Investment and Development Partners, agrees that the reported changes are only cosmetic.

"The common perception is that reforms in Myanmar are happening very fast, but people here are complaining it is going too slowly," he says.

"Economically things haven’t changed that much. Banking laws are still antiquated and there is still little transparency as to what the reform agenda or timeframe is," he adds.

DFDL Mekong’s James Finch says the draft foreign investment law was consistent with earlier laws, but represented a liberalisation of provisions in the Myanmar Foreign Investment Law of 1988.

However Darsik Tontin, chairman of foreign investment development organisation Network Myanmar, believes the fine print and follow-on reforms would prove important.

"This will mushroom in the coming months and years as it did in Vietnam from a single document to literally volumes of decrees, notifications, instructions on all sorts of matters related directly or indirectly to foreign investment," says Tontin, who is also the former British Ambassador to Thailand, Vietnam and Laos.

Over-hyping Myanmar

Investments turn sour after a year or two," he says.

Investors should wait until they have a thorough understanding of local regimes, especially in relation to foreign exchange, labour, foreign equity caps and methods of dispute resolution.

"Understanding the operating environment, including its political, social and economic conditions is just one part of the due diligence process," he adds. "In emerging frontiers, business and politics can be very intertwined. It is critical to determine what side of the fence a company or business is sitting on and how that may impact business."

Home country rules

Evaluating the impact of, and risk of exposure to, breaches of the US Foreign Corrupt Practices Act and UK Bribery Act is also critical. "Claiming you didn’t know about a company’s problematic relationship with corrupt senior officials or dodgy government connections simply isn’t going to cut it when you are being investigated for FCPC breaches a few years down the line," according to Rowse.

"Identifying these factors early on in the deal will enable you to ring-fence certain areas of a business or simply walk away if an investment becomes too high-risk," he says.

Informal business practice should also be avoided.

Foreign investors are often encouraged to take this more relaxed route. But to Aldrich, it is critical that informal practices are reserved for locals. "Full compliance with the law is the only way to protect investments in the event of a dispute with business owners or the government," he says.

It is also important for investors to make clear from the outset if they are uncomfortable with any business practices. If, for example, a foreign investor makes an exception for corrupt or unclear working methods in order to win a contract or have a transaction processed faster, they have set themselves up for repeat outcomes. "If that means a deal takes much longer then so be it," says Aldrich.

International companies should take a stand from the start and make it clear that they have their own obligations to abide by laws in their home country. "That is harder for small to medium enterprises without the gravitas to make that statement effectively, but it is imperative that a position is taken," he adds.

Relaying on a local partner’s political capital to get you out of problems is also unwise. "Invest in your own reputations and political capital with the relevant authorities," says Aldrich. "It’s overly-optimistic to assume your partner’s influence will protect you if things go wrong."

Investors need more than just a leading knowledge of a jurisdiction’s culture and history. The more one is conversant with local customs, laws, history and culture, the more one takes on the role of being a respected guest as opposed to someone who has come for short-term profit or for hardship pay. "Such people will soon cultivate an image of being a carpetbagger and won’t be welcome," adds Aldrich.

Where to invest and why

It is, according to Clayton, important to focus on poor countries in rich neighbourhoods, especially the ones that seemed more successful 40 to 50 years ago than they are now. Here is a rundown of the best destinations.

Middle East and north Africa

In response to the Arab Spring of 2011, the White House announced an initiative focused primarily on the economic development of the Middle East and north Africa. This initiative was complemented by the Deauville Partnership, which saw the promise of a $33 billion facility by the IMF and a pledge by the G-8 to increase the region’s trade and inbound foreign investment. The region presents enormous growth opportunities. But money laundering and terrorism, bribery, cronyism and gender discrimination remain challenges to involvement.

Africa

By 2020 Africa is projected to have a collective GDP of $2.6 trillion and consumer spending power of $1.4 trillion. Sub-Saharan Africa will lead this growth with an average regional economic growth forecast of 5%. In Ghana alone, which is projected as the fastest growing in the region, the economy grew by 13.5% between 2010 and 2011, and is expected to grow at a rate of 7.3% in 2012.

South Sudan also offers significant potential. Its foreign investor-friendly common law background and resource-rich climate contribute to a society open to international investment. Political instability and risk of clashes between Sudan and South Sudan governments will prove an ongoing challenge for market participants. Even so, increasing international attention is likely in the short term.

Asia

With a projected growth rate of 5.6% over the next four years, Southeast Asia emerged from the global financial crisis relatively unscathed. Growth in the region will be led by emerging markets such as Indonesia and Vietnam.

But frontiers such as Myanmar (see box) should not be overlooked. Positioned in an unusually strategic location between China, Thailand and India, Myanmar has

Fools rush in

Myanmar’s banking sector is not prepared for a flood of foreign investment, according to the deputy chairman of the country’s largest commercial bank.

A landslide victory by opposition leader Aung San Suu Kyi’s National League for Democracy party in April’s by-elections, as well as a series of political and economic reforms, led the US, EU, Japan and Australia to announce plans to relax sanctions against the Southeast Asian country. This prompted a rush of foreign investors eager to profit from the opening up of the country.

But KBZ Bank’s U Than Lwin believes that foreign-owners should, for the moment, hold-aside from taking advantage of the investment opportunities available in Myanmar.

"I advise potential investors to wait for the various regulatory revisions currently being enacted to be finalised," he says.

Although Myanmar’s new Foreign Investment Law has been finalised, work is still underway to rewrite outdated banking laws ahead of the country’s integration with ASEAN in 2015.

"Discussions are being held as to whether updates should be made to foreign exchange control laws. "There’s a lot of change on the cards," Lwin says. "Wait for these regulatory amendments and the incentives provided under these reforms to come clear."

The floating of Myanmar’s currency, the kyat, on April 1 after 35 years pegged to IMF’s special drawing rights unified rates used by business, government and consumers to a new reference rate, set at 818 kyat per US dollar.

As the most dramatic economic reform yet by the country’s one-year-old civilian government, it is hoped it will transform trade, banking and public finances.

According to presidential economist Set Aung, it marks the first step towards the full internationalisation of Myanmar’s banking sector. He expects foreign banks to be allowed into Myanmar by 2018, but thinks joint ventures between foreign and domestic banks are likely much sooner.

U Than Lwin says the domestic banking sector would struggle to compete with its larger international counterparts once the market fully opens up. It would be better for global banks interested in entering the market to consider joint ventures with local financial institutions instead, he says.

Myanmar has a basic banking system in place, he says. But work was underway to train domestic banking staff in international practices and technology. Senior staff at KBZ Bank have been participating in training with global banks such as Japan’s Bank of Tokyo, Mitsubishi UFJ.
Continued from page 11

recently catapulted from an impoverished pariah state to the darling of the global investment community, thanks to a series of sweeping regulatory reforms.

Rich in natural resources, and with a population of 55 million it offers both an untapped consumer market and a substantial labour pool. Extractive industries such as mining, oil & gas, and hydropower have seen the most concentrated investment over the last decade, but there are opportunities too in the tourism sector, financial services and telecommunications. Its common law system is also nicely familiar for those of us used to English-speaking jurisdictions.

Mongolia follows close behind (see box). But without Myanmar’s large population, and therefore the cheap labour force to support extensive manufacturing facilities, investment here is purely a mining, infrastructure and construction play.

The next generation

Although admittedly a long way behind, North Korea could well join the growing ranks of frontier markets, thanks to a decreasing regimentation in society and China’s increasing economic impact on country. “North Korea is much more than a goose-populating country,” says Aldrich. “Thanks to China’s growing influence in the country, North Koreans are increasingly abandoning their ideological foundation of reliance on the state. They are playing.

Myanmar’s large population, and therefore the cheap labour force to support extensive manufacturing facilities, investment here is purely a mining, infrastructure and construction play.

Tips for Mongolia

In investor appetite for Mongolia’s rich natural resources has grown rapidly over the past year. However, as with most frontier markets, new legislation must be navigated carefully.

On May 17 Mongolia’s parliament passed a new foreign investment law ahead of the country’s June 28 elections. Mongolian parliament members, anxious to retain their seats ahead of the highly-anticipated 2013 opening of the Oyu Tolgoi mine, are introducing extensive legislative reforms, including the foreign investment law titled the Law of Mongolia on the Regulation of Foreign Investment in Business Entities Operating in Sectors of Strategic Importance.

The law was proposed in a bid to curb China’s increasing investment and influence in the country, after speculation that Chinese aluminum company, ChinaAlco, planned to acquire a minority stake in Canadian coal miner SouthGobi Resources.

Mongolia has long promised an open foreign investment regulatory scheme, but the foreign investment law proposed would introduce a new level of regulation for a variety of industries, including oil & gas production.

Michael Aldrich, managing partner at Hogan Lovells’ Ulaanbaatar office says the draft law was very complex. “It makes the foreign investment approval process in China and Russia look relatively straightforward,” he says.

Early drafts included provisions that a foreign entity could own no more than 49% of any company worth MNT 100 billion ($78 million), as these would be classified as a business entity of strategic importance (BESI). The BESI designation applies to companies operating in banking and finance, media and telecommunications, and minerals including oil and gas.

The new law stipulates that there is a reporting requirement to the Foreign Investment Agency of Mongolia (PIA) if a foreign investment totals more than 5%, but less than a 33% interest, in a BESI. If a foreign entity owns more than a 33% stake, there will be a FIA review process. Parliamentary approval will be required if a foreign entity wishes to acquire a 49% or greater stake in a BESI worth more than MNT 100 billion. Non-compliance could result in the revocation of the offending company’s business license.

The changes would leave broad and discretionary authority in government hands. Violation of the law may result in the revocation of the business registration of the strategically important company. Stephen Tricks, head of Clyde & Co’s Mongolia practice, says investors are growing increasingly concerned about the wide range of industries poten-

SOFT POWER

ally subject to the law, and the level of state ownership of ventures operating under the law. “There is a danger that an over-zealous approach in the draft law could frighten foreign investors and choke off the rapid expansion in the economy,” he says.

The law’s cumbersome procedures could significantly slow processes. It also does not specify how the 49% foreign investment threshold for parliamentary approval is calculated. Though there were rumours of a retroactive clause, the plenary session has since clarified that there will be no retrospective application of the law. At the time of going to press, the law was set to take effect on May 27, 10 days after it was passed. The president, however, can veto the law.

Given Mongolia’s history of quickly repealing legislation, such as the Windfall Profits Tax, many suggest that the law will be repealed after the new parliament takes office. However, Aldrich thinks that patience is critical. “The bedrock of Mongolia’s political system is a participatory democracy,” he says. “There is an element of popular sentiment in the political process, resource nationalism and populism can play a significant role. And there is a tendency for people to dwell on its faults, but Mongolia’s political system isn’t doing too badly.”

The next generation

Continued from page 11

be more entrepreneurial,” he says.

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Myanmar’s large population, and therefore the cheap labour too in the tourism sector, financial services and telecommu-

oil & gas, and hydropower have seen the most concentrated series of sweeping regulatory reforms.

Darling of the global investment community, thanks to a recently catapulted from an impoverished pariah state to the Foreign Investment Act. Mohamed Fizan of Shah, a partner at Hussen & Co, says this iteration of the Act has been a major complaint for lawyers and investors. It requires foreign companies to register with the Ministry of Trade and Industries, long considered an unpredictable regulatory body. A proposed solution is for foreign companies to register with the relevant sector’s government authority.

Further legislation to be debated in parliament this year includes the Trust Act, to provide for the establishment and regulation of trusts, and the Central Securities Depository Bill to further expand the country’s stock exchange.

Maldives’ modernisation

The Maldives is to modernise its commercial laws in a bid to attract sophisticated foreign investment outside the tourism sector.

Most of the country’s commercial laws were passed in the late 1980s and early 1990s amid an influx of foreign investment. Subsequent amendments have often been stymied by the Majlis (parliament), but despite an ideological unrest in the country, the government has reinitiated its commitment to encouraging investment.

An arbitration bill was debated in parliament on April 9. Subject to revision, it is expected to incorporate United Nations Commission on International Trade Law (UNCITRAL) rules. It is a direct result of the Maldives’ recent accession to the New York Convention to enforce awards from international arbitration.

Awarded to Mohamed Shahid Anwar, senior partner at Sucoid Anwar & Co, the bill outlines the framework of a Maldives body similar to the Singapore International Arbitration Centre and the Kuala Lumpur International Arbitration Centre.

Practitioners say the arbitration bill has broad support and will encourage the arrival of investors who have been reluctant to invest due to divisive disputes in Maldivian courts.

Additionally, the country’s 1996 Companies Act will undergo broad revisions. The Act lacks provisions for public disclosure, terms and conditions for company directors and establishing a company with only one shareholder or director. A draft was debated in parliament last October, and a revised version will return sometime this year.

Lawyers hope that the amendments will also establish a clearer means to register foreign companies, which is regulated by the 1979 Foreign Investment Act. Mohamed Fizan of Shah, a partner at Hussen & Co, says this iteration of the Act has been a major complaint for lawyers and investors. It requires foreign companies to register with the Ministry of Trade and Industries, long considered an unpredictable regulatory body. A proposed solution is for foreign companies to register with the relevant sector’s government authority.

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“Claiming you didn’t know about a company’s relationship with corrupt senior officials isn’t going to cut it when you are being investigated for FCPA breaches”

would develop as it has. I sense North Korea might be in a similar situation.”

The opportunities within the Russian far east and Siberia are also frequently overlooked. The region offers similar opportunities to Mongolia, and potential for successful investment from professional service providers, but it is too often dismissed. “Foreign investors tend to think of Russia as no more than Moscow but the east of the country is defi-

ently one to watch,” according to Aldrich.

Populated by descendants of those exiled from Soviet and Tsar Russia, or by pioneering spirits, who relocated to build a better life less influenced by reliance on the state, the eastern Russian population is more progressive from businesses perspective than their less-reactive counterparts in the west. Elsewhere, Haiti and Cuba have also been flagged by frontier-focused private equity houses.

Most economists believe that the frontier shares of the economy and money flows will grow. Certainly, in frontier nation leaders can unleash explosive growth just by instigating a few well-timed reforms. In nations emerging from bouts of ethnic strife or civil war merely the absence of con-

But it will be a rollercoaster ride. Investors need to choose wisely and quickly. “Move to a frontier and join its business community, or buy in through a country fund,” says Clayton. “Either way you want to buy into the best companies before others show up.”
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Legal measures for ensuring biodiversity stability will not be enough to slow the pace of species extinction. Jurisdictions need a change of attitude towards the environment, according to speakers at an IBA session on biodiversity yesterday.

“We need something more fundamental than law and policies,” said Dr Debra Roberts of the Ethekwini Municipality in Durban, South Africa. “We must forge an emotional bond between ourselves and nature. We will not fight to save what we do not love.”

Despite the need for a change in global outlook, there is still much work to be done on a practical level too, said Roberts, speaking at the ‘Biodiversity preservation in the face of global industrialisation’ session.

“There is no clear constitutional mandate for local government, with a limited ability to act directly and decisively,” she said, referring to the situation in South Africa. Roberts said that South Africa’s Environmental Impact Assessment legislation, thought to be among the best globally, is ineffective and hampers development. The triggers set in that legislation are aimed at national level, not local, according to Roberts. “It indicates growing the disjuncture between lawmakers and the scientists on the ground.”

She added that the process of developing law in the area is also slow. “And when laws are passed, it takes another five to ten years for the regulations to appear, which are the only useful aspect.” To make matters worse, when the regulations are passed, there is a shortage of trained enforcers to capitalise on them.

Roberts said that a lack of political will was also damaging. “This means laws suddenly become terribly flexible in the way they are interpreted and applied. I have some real horror stories of this from South Africa,” said Roberts.

Roberts outlined the extent of the damage already done to the planet. Forty three percent of the land’s surface has been converted by humans. That exceeds the physical transformation at the end of the last ice age. The effect on species is catastrophic already, said Roberts. The loss is estimated to be up to 1000 times higher than the natural extinction rate. In 1993, American biologist E.O Wilson estimated that the planet was losing around 30,000 species per year. “That’s nine species while we sit in this session alone,” said Roberts.

Over the evolution of life on earth, during the last 3.5 billion years, there have been over 20 great extinctions, with five occurring in the last five million years. These extinctions were caused by abiotic factors, such as asteroids and volcanoes. "But we now exist in a unique time, with a biological cause – humans – as the reason for our next extinction," she said. "We are now in the sixth extinction. Our impact is so great, that geologists are considering naming this extinction after us: the anthropocene extinction.”

The evidence is documented in the Global Biodiversity Outlook reports. The most recent report, in 2010, found that between 12% and 55% of species are currently threatened with extinction. Roberts also cited the new benchmark, called Earth Overshoot Day, which is the date when humanity has exhausted nature’s budget for that year. In 2012, the date was August 22.

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Poor application
Giving an Australian perspective, Brian J Preston, chief judge of the Land and Environment Court of New South Wales explained the problems with interpretation and application of the country’s well-respected environment laws.

Preston argued that in Australia, when legislators use normative concepts such as ‘reasonable’, it will be ambulatory. “What was reasonable in an environmental context 200 years ago is completely different to what is reasonable today.” That’s important in a changing environment, he said. “If we looked at laws written even 30 years ago, and we now look at the environmental imperatives, we might have a different interpretation.”

That’s why having a judiciary which is environmentally literate is so important, said Preston. “If judges can know about the environmental issues when they apply those laws, a better outcome is more likely,” he said.
A banking union without any fiscal commitment is a shell

An extremely important domestic enforcement mechanism for civil suits against individuals and corporations that engage in gross human rights abuses,” said Malone. “The significance of this case can’t be overestimated globally. It’s not just a case of US litigation.” The precedents clearly suggest that the Act applies to abuses that occur outside the US, and Malone said it would be “tragic, historically incorrect and legally incorrect” if the court rules that the Act does not apply extraterritorially.

But the court is sharply divided. Of its nine justices, four are against extraterritoriality, four are for it, and one – Justice Kennedy – is undecided. In a 2004 case, Justice Kennedy was the swing vote that kept alive the Act’s extraterritorial application. So if he rules against extraterritoriality in the Kiobel case, he will essentially be reversing his own decision, as well as lower court precedent.

The Kiobel case was originally brought by Nigerian plaintiffs against Dutch Shell and a British firm. It is alleged that the defendants aided and abetted the Nigerian government’s killing and torture of oil exploration protestors between 1992 and 1995. The Supreme Court must deliver its verdict by June 2013.

How to correct for conflicts of interest

Recent US court decisions have clarified the parameters of a board’s fiduciary role towards its shareholders, and provided guidance on how to properly correct for conflicts of interest without jeopardising the integrity of a deal. So it was fitting for Supreme Court of Delaware chief justice Myron Steele to discuss how to treat conflicts with lawyers from other jurisdictions during “Gorilla or guerilla – managing related party and conflict of interest transactions”, yesterday afternoon.

Many jurisdictions such as Ireland, the US and Canada require corporate directors to maximise shareholder value when negotiating a transaction. Others, like Switzerland require directors to act in the best interests of the company. The type of transaction and the extent to which directors, controlling shareholders and financial advisers are able to act independently further complicates the process. Much of the discussion revolved around the entire fairness standard for judicial review of transactions in which a controlling shareholder engages in self-dealing – understandable considering Steele’s August 27 affirmation of the Delaware Court of Chancery’s opinion in Southern Peru Copper Derivative Litigation. The court’s opinion in that case recognised a potential for controlling shareholders to appoint independent committees and require minority shareholder approval as tools to shift the burden of proof in those proceedings to the defense.

“Our general attitude is it is hard to oppress people when they’ve been fully informed by a fair process of what an adequate price might be and then a majority of those people vote in favour of it,” Steele said during yesterday’s discussion.

How to split up the euro

Continued from page 1

He believed an uncontrolled exit was quite unlikely, owing to the EU rules of redenomination. But conceded if it were to happen, it would create significant uncertainty with respect to national contracts.

“It would be even more drastic if the EU dissolved and there’s only one member state left that still calls its new currency euro,” he said. “You have to draw a line when the euro is still the euro. That applies for contracts under any law, the name doesn’t make the game.”

“Contracts governed by the laws of the remaining member states and denominated in euro are likely to remain relevant and binding if one member state leaves the union,” he said. “If one or more, it begs the question when is the euro still the euro.”

But Antonios Simajdadas, the ex-CEO of Greece’s Olympic Air Group, said he was bothered by panellists’ attempts to find solutions to EU policy through corporate law provisions.

“A state is not a corporation in my view, because that state is not entirely represented by its directors,” he said. “A government is not necessarily representative of the entirety of the state. It’s presumptuous to assume in the case if Greece, Portugal or Spain or any of the eurozone countries that are now in trouble that all their people should suffer because their government has violated agreements previously made.”

“Oh of course these governments should be punished in some way, and I’m sure there will be some legal engineering that can assist the present situation, but I don’t think we should try to find legal solutions to engineer reductions in size because I don’t think that’s a viable, long-term solution,” he said.

Session co-chair and Financial Times associate editor Wolfgang Münchau said it was important not to downplay the role an EU banking union could play in the resolving the crisis.

US could lose key human rights enforcement tool

The future of a potent weapon used to fight humanitarian abuses hangs in the balance after a US Supreme Court hearing on Monday.

It’s possible the historical right of foreigners to sue in US courts for torts vio- lations of customary international law conducted overseas could be taken away. Speaking at Tuesday afternoon’s session ‘Pillage: the corporate war crime?’ panelist Professor Linda Malone, from the William and Mary Law School in the US, briefed the audience on Monday’s developments.

“Based on yesterday’s legal arguments… it is going to be an absolute legal cliffhanger,”

Malone said. “I’m usually pretty bold about making predictions, but I really stymied on this one.”

Permitted by the Alien Tort Claims Act, this has proved an extremely important avenue to enforce human rights obligations since 1980. The outcome of this case, Kiobel v Royal Dutch Petroleum, could change that.

“It portends the possibility of the end of an extremely important domestic enforcement mechanism for civil suits against individuals and corporations that engage in gross human rights abuses,” said Malone. “The signif- icance of this case can’t be overestimated globally. It’s not just a case of US litigation.”

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