Guarding the intellectual property rights of television formats has become an increasingly global problem. From dancing competitions, to the world of reality television, the uphill battle that is protecting television formats is giving entertainment lawyers a headache on a global scale.

The problem centres on where creativity ends and plagiarism begins. Some of the most successful shows on television in recent years have been talent shows, but as Bart Jan Gorissen, vice-president of commercial and business affairs at Fremantle Media in London and a panelist at yesterday’s ‘Duelling nannies and bad singing competitions – protecting television formats’ session, said: “a talent show is generic, you can’t protect it, like you can’t protect a dating show.”

In an industry where much is borrowed from previous shows and very little is genuinely new, taking a rival producer into lengthy legal proceedings for effectively stealing an idea can prove problematic.

Part of the issue is that there is no global definition of the word format when used to describe television concepts. Protecting a talent show that has been copied is nigh on impossible without establishing a format that can be deemed protectable.

According to panelist David Modzeleski of Discovery Communications: “You need more than just a general similarity between generic elements to constitute copyright infringement.”

An example raised by Gorissen looks at a case involving the Talent franchise that includes Britain’s Got Talent and other countries’ equivalents. In the case, a rival broadcaster in Brazil aired a nearly identical show while the company was in midst of negotiations to air it in that country.

In court Gorisson applied the law of unfair competition and the judge ruled in Fremantle’s favour. “The way we built on the genre of talent show such as adding elements like the graphics, the host, the music, the stage, all combined to make it an original program,” he said.

Gorissen recommended using a cease and desist battle. “If you push the competitor as far from the original format, in the end the competitor makes a program that is really pretty crappy, and then it tanks.”

Competition law is preventing the development of European mobile networks that’s needed to connect smart devices in the future, according to Qualcomm senior manager for government affairs, Dahlia Kownator.

Mobile network providers have seen their revenues fall dramatically in Europe as the European Commission has introduced regulations aimed at fostering a single telecoms market for the continent.

“In the fast-moving IT space, competition is critical to preserve market dynamics but we need to be sure it’s not going to kill the Internet of Things (IoT) before it’s begun,” said Kownator in yesterday’s session, ‘Internet of things, machine to machine communication and other spooky things: how best to deal with smart homes, intelligent cars, computer-based automated trading and self-automated logistics’. 
Despite recent Supreme Court decisions in Germany and the US, there are still plenty of obstacles remaining for gay, lesbian and transgender couples wishing to have children.

The US Supreme Court decision in June 2015 for same sex marriage and a German Federal Court of Justice ruling relating to surrogacy in December 2014 are two recent cases that have allowed many more people to have a family by law. But as speakers in yesterday morning’s session ‘Having a family: a human right’ explained, much work remains to be done, with key difficulties include the citizenship and rights of the surrogate child once born.

Matthias Stupp of White & Case in Germany explained the difficulties of having a surrogate child outside of jurisdictions that prohibit surrogacy and then returning home with the infant. Speaking from the perspective of one half of a gay couple who successfully had a child, Stupp outlined the German restrictions. “We have the Embryo Protection Act which stems from the idea that children have to be protected, along with the surrogate mother.”

Bringing in a surrogate child from outside Germany is not legal either. This presents problems. “It feels very restricted in Germany when you bring a child in, you want to get a passport and tax benefits.” Instead, said Stupp, the babies enter as tourists. “This is tricky because you have the three-month tourist visa and you need to sort it in that time.”

Sanford Benardo, a lawyer at the Northeast Assisted Fertility in New York, outlined the US approach to surrogacy. California is an established jurisdiction for surrogacy, others are silent on the matter, while some actively prohibit the practice. New York, for instance, considers surrogacy to be a felony. “Nobody has been courageous enough to challenge it after all these years,” said Benardo.
While there is more collaboration between policymakers and the industry now than ever before, the regulatory environment remains a heavy burden on insurance companies in particular.

Fabienne-Anne Rehulka, general counsel at Swiss Reinsurance Company said that there are around 70,000 statutes affecting the US insurance industry in some way. “Every year we look at the data, and by the time we work out what we need to do, the legislation changes again,” she said, citing Safe Harbour for example, which was recently overturned.

Rehulka, speaking at yesterday’s session ‘The regulatory juggernaut keeps on truckin’ – but who’s behind the wheel?’ said that while some insurance regulations were intended to make the industry more competitive, they have had the opposite effect. If the cost burden on companies keeps getting heavier, it may be unfeasible to continue operating.

“We need to look back and ask what the regulation was supposed to do,” she said. Panellists agreed that Solvency II, which took fifteen years and significant funds to develop, should be revisited.

As far as trying to prevent the next crisis can go, post-crisis policies on the whole are aimed more at understanding the risks being taken, said David Deal, counsel at Apple. Financial crises are cyclical and inevitable, not least because businesses cannot make money without taking risks. The problem was that bankers thought they were in control, and everyone assumed that regulators were ensuring those who took out mortgages could afford to pay them. “What the regulators want to eliminate is that disconnect,” he said.

But it was not insurance firms that caused the crisis, according to panelists. They were not the ones who invested in the high-risk products that sent global markets tumbling; rather there had to be a limit to what they could come up with when the claims started coming in, said Belinda Miller, chief of staff at the Florida Office of Insurance Regulation.

Regulators were frankly surprised that it took AIG so long to collapse, she said.
**Merger control authorities must lead by example**

Established merger control enforcement authorities must lead by example and keep investigations relevant. That was the message on Monday morning as competition lawyers from across the globe came together to celebrate the 10th anniversary of the International Competition Network (ICN). While analysing the effectiveness of the best practices it established a decade ago, they also compared merger control standards and regimes in their own respective jurisdictions.

As testament to its success, the ICN’s annual meeting is the single largest gathering of competition lawyers. But as an international organisation like any other global regulator, the control it has over implementation on the ground is limited. According to speaker William Kovacic, professor of law and policy at George Washington University Law School and ex-chairman of the US Federal Trade Commission (FTC), its main challenge at the moment is establishing a recurring review process. The problem with that, he said, is that ICN participation is voluntary. Critiquing a country’s regime is a disservice.

Competition law has come a long way in the recent past. In 1978 there were fewer than 10 jurisdictions with a regime; there are now nearly 120, most of which are mandatory.

A mammoth task
In the initial stages of establishing a competition committee, regulators must be aware of the mammoth task they are undertaking. “Always start with higher thresholds, and revisit them after five years,” said Kovacic. “Match commitments to capabilities – then double the commitments you anticipate.”

China’s Ministry of Commerce (MoCom) was an unlikely hero of the debate. While moderator of the session Dave Podzar, a partner at Clifford Chance, referred to China with a degree of trepidation, Adrian Emch, a partner at Hogan Lovells in Beijing, proclaimed a state of cautious optimism going forward. The authority has recently streamlined the filing process and reorganised its staff, he said, reducing the number of teams working on a case from two to one. But thresholds remain low, and to date no party has made a court appeal to dispute a MoCom ruling. “As lawyers we’d like to see that,” he added.

Still in its infancy in comparison, the Competition Commission of India (CCI) is just four years old. Cyril Amarchand Mangaldas partner Nisha Kaur Ubhori said that while it is efficient, there have been inconsistencies in its approach so far.

According to Pinter, the solution to this was the clear guidance on merger control standards. Kovacic said there is a temptation to engage in regulatory leveraging; offering faster clearance if the merging parties agreed to other, often irrelevant concessions. When Bosch acquired the SPX Service Solutions business from SPX Corporation in 2013, for example, the FTC took the opportunity to resolve standard-essential patent issues concurrently. “Basically we should all be purists,” said Kovacic. “If you are doing enough, or are the rights of the individual? We all have to promote these rights.”

**HIGHLIGHTS**

- Europe must remember its long cherished commitment to human rights, according to a panelist at Monday’s session ‘Human rights in Europe’.
- The rights of the individual should not be put above that of the public at large. The general public should be educated with neutral information.
- Member states of Europe are increasingly retreating back to national sovereignty, it is no longer about making human rights for all.

Still in its infancy in comparison, the Competition Commission of India (CCI) is just four years old. Cyril Amarchand Mangaldas partner Nisha Kaur Ubhori said that while it is efficient, there have been inconsistencies in its approach so far.

Speakers also discussed the need for competition regulators to keep investigations focussed. Kovacic said there is a temptation to engage in regulatory leveraging; offering faster clearance if the merging parties agreed to other, often irrelevant concessions. When Bosch acquired the SPX Service Solutions business from SPX Corporation in 2013, for example, the FTC took the opportunity to resolve standard-essential patent issues concurrently. “Basically we should all be purists,” said Kovacic. “If you are doing enough, or are the rights of the individual? We all have to promote these rights.”

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**Key takeaways**

- Europe must remember its long cherished commitment to human rights, according to a panelist at Monday’s session ‘Human rights in Europe’.
- The rights of the individual should not be put above that of the public at large. The general public should be educated with neutral information.
- Member states of Europe are increasingly retreating back to national sovereignty, it is no longer about making human rights for all.
The value of classic cars has increased at a steadier rate than any other alternative asset over the past 10 years. For investors, the evidence suggests that they have been a cash-cow for some time. But should buyers uphold these personal passion projects, or delve into the unchartered territories of investment fund asset classes?

In Monday’s session, ‘Classic cars as a new asset class’, a panel of experts was undecided on the answer to this question. Philip Kantor, of Bonhams International Auctioneers and Valuers, outlined the impressive levels of inflation seen on some models that has contributed to the markets’ overall steady growth.

As an example, Kantor gave the 1962 Ferrari 250 GTO. Known as a ‘widow maker’ for killing its first owner, it initially sold for around $18,000 (adjusted price). The Ferrari eventually sold in 2014 for $34.5 million, to this day a world record in the auction market. Another example is that of a rare McLaren F1, sold once in 2003 for $731,000, and then again earlier this year for a staggering $13.75 million.

“The top stuff always commands top prices, even when the market is flat,” said Kantor.

With the right investment, the market is clearly lucrative. Private banks are telling their customers to invest, but as panelist Dirk Kolvenbach of Heuking Kühn Lüer Wojtek suggested, there is a significant risk. “By yourself, you can buy, sell, make a profit. But if you invest in a fund, it can go wrong.” He goes on to suggest factors like human error, technical faults and problems with evaluation, that make classic cars far too much of a risk to be an asset class in their own right. Kolvenbach’s final thought: “If the fund goes wrong, it’s not like a wine fund, you can’t drink it.”

Law firms should encourage and enable partners to plan the latter years of their careers by having open discussions and clearly defined pathways. That was the message that emerged from Monday’s afternoon session, ‘Trends in partner’s careers’.

A panel including several former European law firm partners shared their varying experiences of retiring from international firms, both forced and voluntary, and all were for actively planning for the future.

Former Eversheds chairman, John Heaps, now a non-executive director at Yorkshire Building Society, left the firm at 60, the age partners may first retire. “I was fully aware I was going to leave and I began thinking about it because I had an exact date in mind. I was grateful I knew when I was going to leave; I embraced the time I had left at the firm and planned for my next step.”

Not every firm defines a partner’s career options as clearly as Eversheds. The experience of another panelist, Michael Lappe, who spent more than 20 years at Linklaters, leaving as senior partner, highlighted how detrimental contractual ambiguities can be. Lappe resigned from the firm on his fifty-first birthday, a year after he had unsuccessfully asked Linklaters to amend his, and all partners’ contracts, to include parameters for retirement.

“I think that in order to make partners aware of what the deal looks like today, less romantic and with more of a contracting aspect to it, it would be useful to formally implement into the articles of the firm when you will retire,” said Lappe.

“When you join the partnership you need to know when it will end” – Michael Lappe
**Renewable energy fuels European split**

Erratic approaches by European countries to renewable energy subsidies has had a divisive impact on the complex and economics of the energy sector in the trading bloc, according to panelists in Tuesday’s session, ‘Economic incentive regime of renewable energy projects’.

Decisions by countries across the EU to incentivise renewable energy development through feed-in tariffs and then, years later, retroactively cut the schemes, has had a drastic impact on the energy market.

Feed-in tariffs, a state subsidy whereby the government guarantees a fixed-rate for the renewable energy company produces for a certain period, were first introduced in Europe around 25 years ago, having been piloted by the US in 1978.

It was not until the beginning of the millennium, around the time in 1978, that the industry really took hold. Looking at the difference between EU wind energy capacity then and now is revealing. The bloc could produce 10GW in 2000; by the end of 2014 it was up to 130GW.

Investors were quick to catch on to the opportunities feed-in tariffs presented – mainly high, guaranteed returns – and with the strong cash-flows the sector grew accordingly. With the influx of cheaper, clean energy, some traditional power plants, such as coal-powered, have become financially unviable. “The old system has collapsed,” according to Ines Kastil, who manages the German wind park portfolio of Austria’s biggest utility, Verbund.

**Ignoring innovation**

Traditional businesses in the sector such as Verbund have suffered financially as the industry has grown more competitive. Kastil revealed that Verbund’s share price has dropped to around 30% of what it was in 2008. “Utilities were not active enough in renewables, we ignored the market for too long,” said Kastil.

Although the incentive model seemed like a sound strategy, the ramifications of over-capacity and falling energy prices had not been anticipated. “The problem was the system worked too well,” said Kastil. “There were so many windfarms the bubble of secure cash-flows burst. New players that came in – turbine manufacturers, project developers – got their piece of the cake. At the same time the energy prices have been falling,” explained Kastil. In Germany, wholesale electricity sells for a third of the price it did in 2008. Unable to meet the prices they pledged to pay, governments have had no option but to amend the regimes, cutting subsidies and, in some countries, implementing taxes to balance costs. In Europe and the Nordics, only Germany, Sweden, Norway and Finland have not made significant changes to the existing feed-in tariff regimes. “We have seen retroactive cuts to regimes and we have seen creative measures. Some countries have introduced building tax for renewable developments, for example,” said Kastil.

The changes have led investors in a number of countries, including Bulgaria, Czech Republic and Spain, to challenge any revisions to laws and, in some cases, win damages. The long-term impact of cuts, however, is stalling renewable energy development. OECD countries in Europe added only 21GW of renewable capacity in 2014, down from more than 24GW in 2013 and the lowest amount since 2009.

**Promoting access to justice**

Access and the rule of law are principles to which all justice systems should be held to account, according to Lawrence McNamara, author of an IBA-commissioned report on the subject.

McNamara is from the Bingham Centre for the Rule of Law and is author of the report entitled International Access to Justice, which had its first oral presentation in Tuesday’s session ‘The availability and effectiveness of legal aid for those accused of crimes/redress for victims of violence’.

In the words of its author, the report reveals the magnitude of disadvantage and highlights the need for localised solutions to improve access to justice.

The timing of the report, which had 30 participants (half of which had over 20 years of legal practice) across 26 countries, is apt, given the paring back of legal aid in the UK, similar debates elsewhere in Europe and issues raised by the refugee crisis.

“The report chimed with what I am seeing in court every day,” said Neelum Sultan from the Chambers of Lord Gifford QC in London and a practitioner to legal aid for 20 years. “The last 15 months has seen unprecedented changes and knock-on impacts of the severe curtailment of legal aid.”

Due to these changes in England and Wales, two thirds of family law cases in courts now have at least one side represented by a litigant-in-person. “It is driving judges to despair,” said Sultan, “I don’t think it’s an exaggeration to say that this is a crisis and there is a head of steam building.”

McNamara highlighted three key conclusions from the report. First, that the UN Sustainable Development Goals mean that legal aid is going to be incredibly important, and needs concrete measurements.

Second, that while access to justice and the rule of law are universal themes, there is a gulf between the barriers faced by those in developing communities and those faced in wealthy countries. “I don’t think we should kid ourselves that these are the same conversations, but there is common ground,” he said.

Third, that the current migration crisis throws access to justice into sharp relief in terms of transparency in decision making, rights to appeal, the risk of people becoming both the victim and accused and access to information, among other issues.

The report, he said, should provide “food for thought about applying innovative local solutions... and sheds light on the complexity of some of the issues,” said McNamara.

**An offence on law**

The session discussed situations in Nigeria, Belgium, Argentina, Poland and Tajikistan. In Nigeria the state-funded legal aid team has 240 lawyers serving a population of 160 million and the issue of access to justice is vastly magnified compared with that in Western Europe, for instance.

In Belgium, the legal aid bill has remained at €800 million for ten years, while in Argentina no equivalent legal aid system exists although lawyers are obliged to provide legal aid. A delegate explained how it in Australia indigenous communities are severely disadvantaged due to language barriers, poverty and culture.

It was a point elaborated on by the Communications Officer for the Women Lawyers’ Interest Group Dominika Stepińska-Duch, who tackled the theme of access of justice to the poor and vulnerable, minority communities, people living far from cities, those exposed to strong religious authorities through the example of violence against women.

Dominika Stepińska-Duch argued that education is key, not just for vulnerable groups but also for young people and enforcers including police officers, who may be the first to receive reports of injustice.

The open question the report could help answer was what legal communities can do to promote access to justice. In this respect, Axel Filges, co-chair of the IBA Access to Justice and Legal Aid Committee, reacted to comments by British Justice Minister Michael Gove, who is considering mandatory pro-bono time for lawyers, as “an offence on law”.

**“There were so many windfarms the bubble of secure cash-flows burst”**

- Michael Gove
Jurisdiction is more crucial than ever when it comes to the complicated issue of international divorce. This was the underlying message in Tuesday’s ‘Destination divorces: where to go to call it quits?’ session, presented by the Family Law Committee.

Growing numbers of multi-cultural marriages – and inevitably, divorces – has become increasingly important in today’s globalised world. The members of the panel, ranging from the Ukraine to the US, each outlined the intricacies of their own particular jurisdiction’s family law, and how they applied to international divorce. Each country offers very distinct methodologies, which in turn has significant implications on the proceeding’s outcome for both parties.

“In some countries you file for divorce and that’s it, in other countries, like Spain, it is much more complicated,” said co-chair Alberto Pérez Cedillo, of Alberto Pérez Cedillo Spanish Lawyers & Solicitors. He argued that the jurisdiction in which parties file for international divorce is paramount to its outcome; most countries cover important issues such as maintenance, asset division and child custody in entirely different ways.

**Spiritual home**

Panel member Tim Amos broached the subject of domicile in England and Wales, an issue of great importance in international divorce. “In England, domicile is your spiritual home, where you will end up dying.” British citizens have the right to argue about where they call home, he continued, “great news for lawyers, and great news for English citizens who have lived abroad for a long time”.

Other jurisdictions consider a citizen’s place of residence as their legal jurisdiction, according to international family lawyer and panellist Roberta Ceschini of Ceschini & Restignoli in Italy. She cited her home jurisdiction as an example, “in Italy, domicile is the place you actually live”.

To emphasise his point Amos, a barrister based in London, turned to a recent trial he had worked on. His case involved a German couple, resident in England for several years, whose marriage had broken down. Both parties applied for divorce independently, the husband in Germany, the wife in the UK. EU regulation dictates that the first application takes precedence, which in this instance was the husband. The crux came as the German judge applied English law to the case on grounds of domicile, and subsequently rejected the application for grounds of not fulfilling his representation of ‘unreasonable behavior’.

Had the case been seen in an English court, a jurisdiction with far looser divorce parameters, it would likely have been approved. Just the tip of the iceberg in terms of divorce regulation, domicility spreads far wider than the jurisdiction that governs it.

To summarise key points:

- International marriages can be regulated by a number of different jurisdictions. The outcome of these divorces can change significantly depending on the laws of the land.
- Family lawyers need to consider a number of factors when advising on international divorce. It is important to clarify which court will take jurisdiction, or which offers most benefits to your client.
- There are no single instruments that can be applied to divorce law across jurisdictions. Processes vary significantly from country to country.

**Grounds for divorce**

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- Had the case been seen in an English court, a jurisdiction with far looser divorce parameters, it would likely have been approved. Just the tip of the iceberg in terms of divorce regulation, domicility spreads far wider than the jurisdiction that governs it.
Defining genocide

Genocide case law is incoherent and securing a conviction is increasingly difficult, according to a panel on the subject on Wednesday morning. The legal definition of genocide as a crime was coined by Ralph Lemkin following World War II, and ratified by the UN general assembly though the Convention on the Prevention and Punishment of the Crime of Genocide in 1951. The definition was a legacy of the Nuremberg trials into the Holocaust, which also prompted the UN to enact so-called crimes against humanity into legislation as it sought to deter future acts of genocide.

Since Nuremberg, a number of international tribunals have been established to decide whether acts of genocide have been perpetrated. Among the most prominent cases were those for individuals accused of involvement in massacres carried out in the Gulf War, Rwanda and the former Yugoslavia.

Discussing the case law that has emerged from these trials, the panelists on ‘Genocide: national, ethnic, racial, religious groups – is the 1948 definition in need of reform or would it be too dangerous to change?’ agreed that some decisions have been confusing and have engendered an inconsistent body of law.

Professor William Schabas of Middlesex University cited the example of trials concerning events in the Bosnian war in the 1990s as an example of contrasting decisions that have been made.

In the trial that followed the war, it was not deemed that the mass murder of Bosnian Muslims by Bosnian Serbs was genocide. However, one event, a massacre in Srebrenica where around 8,000 men and boys were slaughtered, was ruled an act of genocide. That stayed with the case law, and was endorsed by the International Court of Justice in 2007.

“We’re left with incoherent law. It’s not logical to look at that conflict in Bosnia and conclude that wasn’t genocide apart from those five days in Srebrenica,” Schabas explained. The law will remain untested until overturned at appeal, and one hearing continues today. “If this [a successful appeal] were to happen, we will have an even more incoherent body of case law,” Schabas added.

**Difficult to prove**

Since it became a defined crime, convictions of genocide have been relatively few because it is so difficult to prove, particularly when compared to a crime against humanity.

In terms of a hierarchy of severity of international crimes, genocide is regarded as the world’s most heinous, with crimes against humanity second, and war crimes taking third position in the eyes of courts and plaintiffs.

Yet the results of a conviction are similar, and for prosecutors, there are a number of additional elements that must be proved to secure a conviction for genocide that are not necessary when the charge is a crime against humanity.

While the latter is defined as a widespread systematic attack against a civilian population, in the case of genocide, the intent to destroy, in whole or in part, a national, ethnical, racial or religious group must be demonstrated. One of the key differentiators, and also the most difficult element to prove, is the “specific intent of the individual,” said Gregory Kehoe, a partner at Greenberg Traurig, and former prosecutor with US Department of Justice.

Considering the challenges of securing a verdict of genocide, the benefit of seeking one over a perceived lesser charge of a crime against humanity has little merit, they stressed.

Kehoe, who was part of the team prosecuting Saddam Hussein for his actions in the Gulf during the 1990s, questioned whether the difference was largely semantic. “If there are 250,000 civilians killed, which is approximately what we were dealing with in Kurdistan when we put the case together against Saddam, does it really matter to those victims if it’s genocide or a crime against humanity?”
Punishments for concealing cartel offences can be just as bad as the offence itself, if not worse, according to Brent Snyder of the US Department of Justice.

Speaking in Wednesday’s session “Hot topics in international cartel enforcement”, Snyder was addressing the question of whether to cooperate in cartel investigations. “Cooperation benefits but covering up never does,” he said, adding that obstruction of an investigation in the US carries a more severe punishment than cartel infringement, and that more countries around the world recognise obstruction than cartels.

The session heard US, EU and Japanese regulators outline their efforts to thwart cartel behaviour in areas such as bid rigging and price fixing while private practitioners questioned the integrity of some of those efforts and queried definitions.

In the regulators’ arsenal is a mix of carrot and stick approaches which include immunity, settlement and leniency programmes for self-reporting and compliant companies to heavy financial penalties and criminal measures against bullish infringers.

The EC view
Fresh from eight cartel-related decisions since last year, in markets including LCD screens, Libor rate and animal feeds, Kris Dekeyser, from the European Commission’s Directorate General for Competition, stressed that cartels remain at the top of the Commission’s priorities… no matter the complexity of the market.

The Commission has lately been making its approach more sophisticated with the introduction of a Damages Directive that potentially escalates the size of the financial penalty for infringements. It does this by giving victims easier access to information to allow them to pursue their own claims. The Commission’s policies on settlement procedures and leniency applications have also recently been consolidated by test cases.

These mechanisms represent the carrot approach. However, in a recent first, in a smart car chip cartel investigation the Commission abandoned a settlement process to revert back to prosecution. “While we are willing to explore settlement we are not willing to tolerated gaming of the system,” said Dekeyser.

From Tokyo, Deputy Secretary General of the Japan Fair Trade Commission (JFTC) Tashiyuki Nambu explained where the Japanese position varied marginally from the EU and US approaches.

Hiding the evidence
A core question for companies being investigated is compliance. Snyder outlined instances where executives had written false transcripts for employees to read, attempted to change handwritten notes, deleted email accounts and falsified certificates.

“Most common are efforts to destroy and hide documents,” said Snyder, adding that “I worked on one case where an executive had buried documents in his back yard.”

Aside from the risk of obstruction prosecution, such actions raise the questions over the motives for hiding the documents. The decision can also undermine later efforts to plead for leniency.

Melanie Aitken and Andrew Ward, private practice lawyers from Bennett Jones in Canada and Cuatrecasas Gonçalves Pereira in Spain, voiced a number of concerns, in particular relating to leniency applications, with Ward indicating instances where leniency and rule of law clashed. But regulators highlighted the importance and integrity of the tool as a way of rooting out cartel activity.

From the regulators’ side, drawing the lines between parallel activities (where prices coincide without amounting to market fixing) and a conspiracy, continues to be a fine art. According to Nambu, “rigging can continue for a long time and rigging conspiracies can be framed a long time ago and this means it can be very hard to prove”.

“The mere fact that you discuss with your competitor future prices and strategy is enough for us to build a case,” said Dekeyser. According to Ward, this left companies with little option but to simply not communicate with competitors.
Rule of law under the microscope

Today’s IBA showcase symposium tackles one of the body’s core focuses, with speakers from around the world exploring what might constitute failures and successes in the rule of law.

The debate over what the rule of law is, and what can be judged as a failure or success of the concept comes at a crucial time. Recent global events have been testing the concept and attacking its credibility.

Reflecting this shift, in March 2014 the European Commission adopted a Rule of Law Framework to counter what it called a “systematic threat to the rule of law.” To stress the importance of timing, as recently as September this year Russia’s parliament approved airstrikes in Syria in support of the Syrian government and against Islamic State (IIS) strongholds, following its argument that the US-led coalition’s air strikes in Syria violated international law as they had neither UN Security Council backing nor Syrian government consent.

Elsewhere, Taliban forces took control of the northern Afghan city of Kunduz, triggering NATO deployments on the ground to support the beleaguered Afghan government and the conflict in the Central African Republic (CAR) has continued to escalate.

Looking further back, but still at the fore of European and world affairs, was Russia’s annexation of Crimea in March 2014, ostensibly backed by Russian parliamentary approval and a referendum in Crimea, and the advent of Isis and a network of related militant groups across the Levant and North Africa.

All these cases challenge the definition of the term ‘rule of law’: who owns it, how it is enacted and who owns it, how it is enacted, and what to do when it is threatened.

The Arab Spring fundamentally challenged this concept on many levels with varying interpretations from disparate groups on the ground (the people, the ousted governments) and from international institutions and governments.

One key question is what happens when the rule of law is taken away? The post-World War II generation is hugely aware of this. Many understood that the rule of law was not a given and that without it fundamental human rights cannot be protected. It is also argued that the rule of law is intrinsic to democracy and to development, so a weak rule of law necessarily means weak democracy and poor development, and is therefore a core obstacle to the recently adopted UN Sustainable Development Goals.

Questions of a different nature have also been raised, for instance, whether the financial crash of 2008 was at heart a failure of the rule of law. With the upcoming UN climate change talks in Paris in December, it could also be asked if binding measures are not agreed to and dangerous levels of carbon in the atmosphere trigger global warming and human catastrophe, would that be a failure of the rule of law?

Egregious failures?
The first session is entitled ‘Egregious Failures of the Rule of Law?’ and will hear from a panel of speakers from Latin America, the Baltics, Africa and Europe that includes a former chief legal officer of the UN, the first prosecutor of the ICC, the immediate past co-chair of the Human Rights committee of the IBA and a distinguished law professor who served on the UN Commission for Human Rights.

According to session co-chair Homer Moyer, head of Washington DC firm Miller & Chevalier Chartered’s international practice: “The purpose of the symposium and this panel is to focus on the ‘rule of law’, a phrase that has been quite popular in this last generation and seems to be somewhat elastic. We will examine how the rule of law applies to different situations in which there have been failures, successes or both.”

Moyer, giving nothing away about what topics will be raised, says the panel will discuss situations in particular countries and some other thematic issues that are in more than one single country.

“All delegates considering attending might think about what they believe to be egregious failures in the rule of law,” he says. “The really interesting stories will be after we have had the panel talks,” Moyer promises.

The speakers include Luis Moreno Ocampo, Argentinian lawyer and the first prosecutor of the International Criminal Court (ICC) in The Hague. Ocampo conducted investigations against Muammar Gaddafi for crimes against humanity in Libya and initiated investigations into Sudanese president Omar Al Bashir for genocide in Darfur. Sternford Moyo, from law firm Scallen & Holderness in Zimbabwe and chair of the IBA’s African Regional Forum, will approach the debate from an African perspective.

Also on the panel is Patricia O’Brien, under-secretary general for legal affairs, legal counsel of the UN and a specialist in public international law, human rights law and European Union law. The fourth speaker will be Reim Mullerson, president of the Academy of Law of Tallinn University, Estonia, former professor and chair of international law at King’s College, London, past member of the UN Human Rights Committee and former first deputy foreign minister of Estonia.

Following the ‘Arab Springs’
As stated in the preamble to the United Nations Universal Declaration of Human Rights: “It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by law.”

This statement was highly relevant to the Arab Spring and continues to resonate over the topic of this second session, which will be moderated by Easam Al Tamimi, founder and senior partner of Al Tamimi & Associates, and will explore the rule of law in the context of the ‘Arab summer and autumn’.

The topic of the rule of law during and immediately after the Arab Spring has been much discussed and commentators have noted how the hope of Tahrir Square turned to frustration with a persistent security state, how the anti-Gaddafi wave, supported by UN and ICC-justified intervention, broke onto a tribally and politically divided shore, and how calls for change in Syria have led to catastrophe.

Speakers will analyse decisions that have been made since the Arab Spring and examine successes and failures of reforms, the state of democracy, corruption and the rights of minorities.

The speakers include Ibrahim Al Najjar, a lawyer and a Lebanese politician and a former cabinet minister for justice who is associated with the March 14 Alliance, which commemorates the Cedar Revolution and advocates the removal of Syrian troops from Lebanon and of the Syrian-influenced government, the establishment of an international commission to investigate the assassination of Prime Minister Hariri and the organisation of free parliamentary elections. Najjar is also a member of the International Commission against the Death Penalty.

Alongside Najjar will be Mohamed ElBaradei, former director of the International Atomic Energy Agency, and the last Vice President of Egypt serving on an acting basis. He and the IAEA were jointly awarded the Nobel Peace Prize in 2005. ElBaradei was a key figure during the Arab Spring, and in the 2011 revolution that ousted Hosni Mubarak, and has continued to be at the forefront of calls for democratic development in Egypt. Lastly, Shariif Ali Zizi, senior partner of Jordanian law firm Ali Sharif Zizi Advocates & Legal Consultants and former minister of industry and trade and of justice and a member of the Higher Council for the Interpretation of the Constitution and the senate’s Legal and Foreign Affairs Committees.

Key takeaways
- This first session will cover the meaning of the ‘rule of law’ and dissect recent cases to examine why there has been a failure or success in rule of law and what it constitutes
- The second session will examine the rule of law in the context of the Arab ‘summer and autumn’, exploring legal reforms and the evolution of rights
- Speakers include lawyers, professors and former ministers, Nobel Peace Prize recipient, the Under-Secretary General for legal affairs to the UN and the first prosecutor of the ICC

SESSION
Rule of law symposium

Rule of Law Forum, Arab Regional Forum

TIME/VENUE
Today, 10:00am – 12:30pm and 2:30pm – 5:00pm, Hall F1

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Rule of law symposium

Committee
Rule of Law Forum, Arab Regional Forum

IBA Daily News

VIENNA

Tahrir square during the Arab Spring

This has been done in cooperation with Motto Catering which provided catering for the conference. IBA President David W Rivkin said: “In my opening speech, I asked all lawyers to think of how they could assist the migrants. I’m very pleased that the IBA has led by example in providing so much food to the many who need it.”

IBA’s food for thought

Each day the excess food, from amply providing for 6,000 delegates at the IBA Annual Conference, has been collected by a team at local charity Samariterbund and taken to the refugee camp in Vienna, Oktobring for families and children, and distributed.
Thank you Vienna from Hadef & Partners

A huge thank you from our IBA team to Vienna and all our hosts for a successful conference.

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The Dubai International Arbitration Centre (DIAC) is the largest arbitration centre in the Middle East. It is a non-profit institution that provides efficient and impartial administration of commercial disputes. The DIAC Arbitration Rules, adopted in 2007, are in line with international standards. The DIAC is comprised of the Board of Trustees, the Executive Committee and the Secretariat.

The cases registered with the DIAC relate to different sectors such as real estate, engineering and construction, general commercial, media, insurance and oil and gas with large amounts in dispute, some exceeding one billion dirhams.

The DIAC has developed a pool of experienced arbitrators from different cultural and legal backgrounds located in the UAE and abroad.

The DIAC has recently established DIAC 40, a forum for young arbitration practitioners, and organizes a wide range of specialized training courses and events.