INTERNATIONAL BAR ASSOCIATION®

DAILY NEWS

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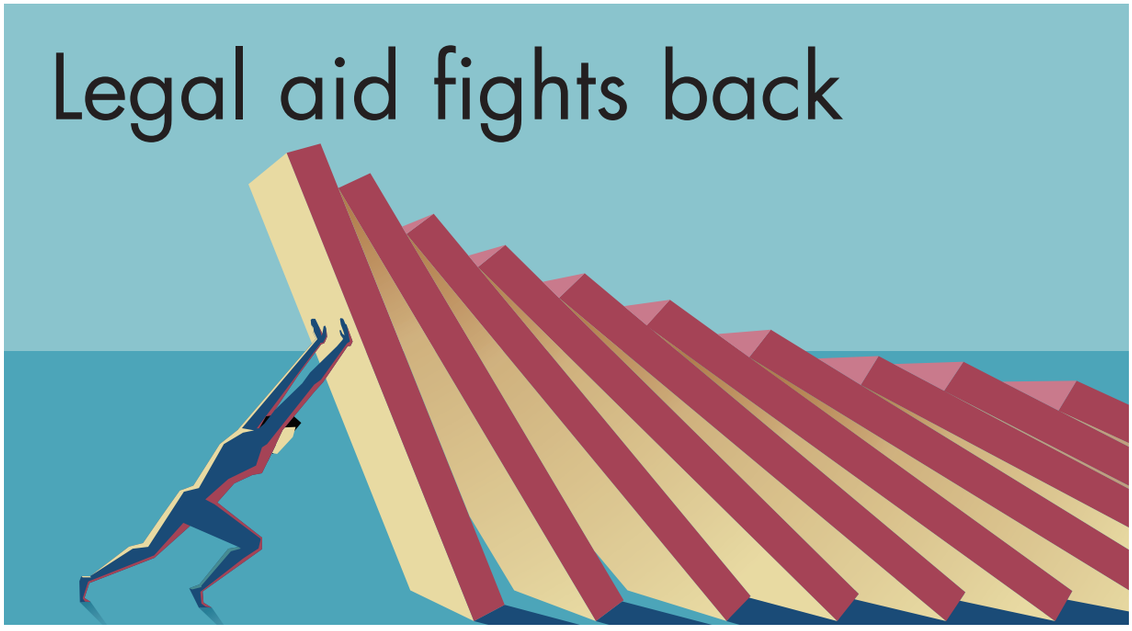


The IBA has launched guidance in support of civil legal aid, at a time when it is needed most

Yesterday morning's session, '*Legal aid across the globe: best practice and economics*,' marked the launch by the IBA of the first international principles in support of the funding and administration of civil legal aid.

The launch of these principles could not come at a more opportune time, as legal aid continues to be under threat in both developing and advanced economies.

The IBA collaborated with the UK based, Bingham Centre for the Rule of Law and legal aid experts from around the world to formulate a list of 27 principles which cover several areas: funding, scope and eligibility; administration; and provision of legal aid. The list of principles includes a series of comments, all of which were presented in an anonymised way to give contributors scope for full honesty.


Peter Köves

"The principles are not intended to be prescriptive but rather to be a starting point," said session co-chair Lucy Scott-Moncrieff, former president of The Law Society and founder of Scott-Moncrieff Associates. "For some jurisdictions, some of these might not necessarily be appropriate, but these could simply be something that a jurisdiction aims for."

The guidelines came about after a conversation session co-chair Peter Köves, founding partner of Lakatos, Köves and Partners, had with Scott-Moncrieff when he asked if there was any guidance that had been done on civil administrative and family law. With the increasing trend of governments deciding to cut funding for legal aid services in the belief that the costs outweigh the benefits, the need for a substantial framework that can provide guidance to governments and legal aid administrators becomes even more crucial.

"We thought it was important to get a whole range of opinions from different jurisdictions," Scott-Moncrieff said.

In total, over 25 jurisdictions participated to give a wide and varied view on what they believe to be best practice or necessary improvements to a given jurisdiction.

Some principles are contentious. For example, Principle 12 of the guidance provides that the body administering legal aid must be operationally independent of government, subject to its accountability obligations. Many jurisdictions do not have this type of arrangement in place, and instead favour a system where the government has control. For some, the fear is that conflict of interest issues will arise when lawyers administer legal aid themselves – not government officials – but in doing so they may be in a better position to satisfy the needs of clients.

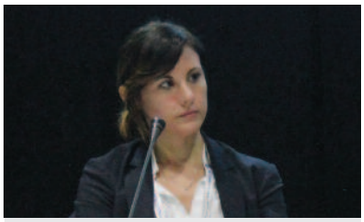
Yet, again, the principles are not concrete rules which should be followed to the letter of the law.

Cuts everywhere

In the UK, a jurisdiction widely considered to be the foremost globally, legal aid has been cut by £1 billion in the last five years. The Ministry of Justice will see its budget cut by 40% in 2019/20 as part of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, introduced by the Conservative and Liberal Democrat coalition.

This is also happening in France, the US and many other jurisdictions globally, with far more increased dependence on pro bono services to make up for the shortfall left by governments. A challenge then presents itself in whether pro bono services and legal aid can co-exist in the same legal areas.

Continued on page 2



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Blockchain can help to create much needed systemic change to global food production
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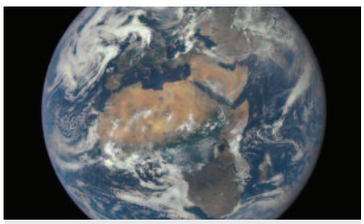

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The principles are not intended to be prescriptive but rather to be a starting point

"I think it's really complicated," Scott-Moncrieff said. "People may not be eligible for pro bono services, but there might not be enough lawyers. The main issue is whether governments support legal aid."

Hopes are that the guidance will be used by policymakers and politicians in decision-making, and that can only happen if IBA members get it on their radar. In doing so, legal aid might become an issue that is put back on the political agenda and one that could be seen to be of more value if lawyers' voices are heard loudly.

"We want to provide access to justice," Köves says. "The main issue is that the primary responsibility lies with the government; pro bono should not be used as an excuse not to fund legal aid."


Lucy Scott-Moncrieff

Guidance of this type could start reversing what has been a long and persistent trend. Low income claimants desperate for justice can only hope that politicians start listening.

KEY TAKEAWAYS

- The IBA has launched the first international principles in support of the funding and administration of civil legal aid. This could not come at a more opportune time, as legal aid continues to be under threat globally;
- With the increasing trend of governments deciding to cut funding for legal aid services in the belief that the costs outweigh the benefits, the need for a substantial framework to provide guidance to governments and legal aid administrators becomes even more crucial;
- Hopes are that the guidance will be used by policymakers and politicians in decision-making, and that can only happen if IBA members get it on their radar.

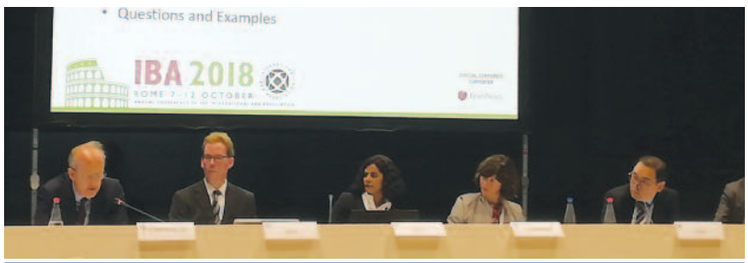
Down the supply chain

How are digital distribution platforms changing the way we think about content?

Apparently quite a lot, according to panellists at yesterday morning's '*Your eBook, your game, your drone? You probably don't own it!*' session.

Platforms such as Netflix, Amazon, Spotify or Apple are now hard to avoid if a user wants to access content quickly. But the legal implications surrounding this readily available digital content are sometimes complex and nearly always give rise to multiple issues surrounding ownership of copyright, and a user's rights compared to those of a publisher or author.

Session co-chair Jason Jardine, partner at Knobbe Martens Olson & Bear and vice-chair of the IBA's Emerging Intellectual Property Rights Subcommittee, cited the example of a user who found out that a number of movies he had purchased through Apple's iTunes had vanished from his personal online library. The user contacted Apple to find out why this had happened, and was informed that because Apple no longer had the licence rights for those movies, they had been removed from iTunes and from the libraries of the people who had bought them.



KEY TAKEAWAYS

- Digital distribution platforms are changing the way we think about content: in the world of online content, a user doesn't necessarily own something they buy;
- The layers of rights that are contained in works are huge. These rights are competing rights too, in some instances, and it's sometimes very difficult to deal with this kind of fragmentation.

Jardine laid out the harsh reality of the situation: the end user is only getting a licence to make a copy of a film or a song, subject to terms and conditions and restrictions.

"That user found out that what he had paid for was the ability to download a copy of the movie to his hard drive," he said. "What this situation shows is that in the world of online content, you don't necessarily own something you buy."

Multiple layers

But the situation is not only getting increasingly frustrating for users, it's getting difficult to navigate for those who create and distribute the content too. In some instances, publishers and artists are cutting out collective management organisations – which traditionally have been involved in managing the rights involved in copyright work – and dealing with the rights attached to the works directly with the distributors.

Eileen O'Gorman, partner at Irish law firm Gleeson McGrath Baldwin, and chair of the IBA's Licensing Intellectual Property and International Treaties Subcommittee, outlined the content supply chain from the creator to the consumer.

"The layers of rights that are contained in a music album for example are huge," she told delegates. "These rights are competing rights too in some instances and it's sometimes very difficult to deal with this kind of fragmentation. There is a lot of litigation involved in this area."

Rhodri Thompson QC, from Matrix Chambers, steered the discussion to the world of books and outlined very similar issues. "There used to be a simple structure of rights: the author holds the intellectual property rights, and the publisher, wholesaler and retailer all have their own as well," he said. "But there are no simple ownership rights in the digital world anymore."

Time to step up

The journalism industry has profoundly changed and this is leading to more incendiary attacks, including on the judiciary, according to speakers at yesterday's session, '*Journalists versus jurists: media coverage of court proceedings*'.

In the past two years, journalists and jurists have been branded as enemies of the people across both sides of the Atlantic. President Donald Trump's repeated tirades on the press caused New York Times publisher A.G. Sulzberger to plead with him to stop some of the more incendiary language in a private meeting in July, before relations predictably turned ugly on Twitter. Following the decision by the UK High Court in November 2016 that Parliament must be consulted before the government could trigger article 50, an edition of the *Daily Mail* featured the faces of the three judges with the headline 'enemies of the people'.

The Honourable Justice Peter Applegarth, from the Supreme Court of Queensland, in Australia, told delegates that the *Daily Mail* headline could have triggered a contempt of court case 30 years ago and of equal frustration was that the judges received no support from politicians said to be serving to defend them.

"The Lego company in Denmark, by withdrawing advertising from the *Daily Mail*, did more to defend the judiciary than the Lord Chancellor," he said.

From the right-wing press in the UK, the Brexit referendum has done more than simply secure Britain's exit from the European Union. The legacy of the vote has been a more divisive and aggressive form of discourse, leading lawyers to be branded elitist, out of touch and undemocratic.

Much of this has coincided with Brexit, but also with a new era of journalism, one centered on 24/7 news coverage without as much in-depth analysis and consideration as before. With social media, anyone has the ability to become a de facto journalist very quickly, with access to millions of people's attentions.

"There is now a journalism free-zone forming; instead there are media proprietors, interns and commentators filling the gap," said Applegarth.

As a result, staples of the industry, like court reporters, are dying out and bloggers are thriving. This might not be entirely negative but does mean that the fundamentals of journalism are changing.

Adam Cannon, senior legal counsel at *The Sun*, a newspaper that receives condemnation more than most, agreed that journalism has fundamentally changed. "If someone is looking for a view on vaccinations, they don't seek doctor's advice, they go on Twitter and look for a celebrity's view on them instead," he said.

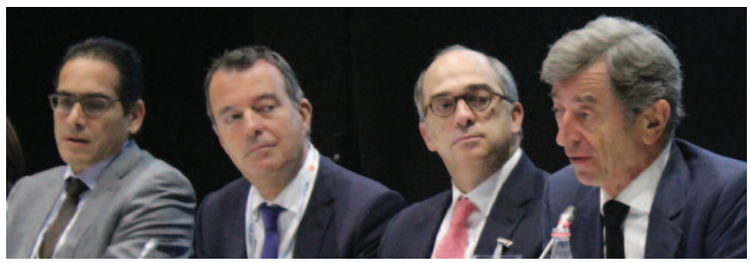
On occasions, public interest is used as a defence to report some of the more contentious stories. Reporting on a story could give many other victims the encouragement to report their story to the police and increase the chances of justice being done. But much of the rhetoric across both sides of the Atlantic has recently been defined by partisanship rather than a true desire for justice. And there is little sign of that stopping soon.

If politicians are not going to temper their language on an industry increasingly under attack from the public, journalists need to step up.

KEY TAKEAWAYS

- Journalists and jurists have been branded as enemies of the people across both sides of the Atlantic;
- As a result, staples of the industry, like court reporters, are dying out and bloggers are thriving. This might not be entirely negative but does mean that the fundamentals of journalism are changing.

Closing open doors



Political intervention in global acquisitions, especially from the US, is giving M&A practitioners around the world a headache.

In yesterday morning's '*State intervention in strategic M&A*' session, panellists shared their views on the potential avenues governments can use to restrict or block transactions in various jurisdictions. But one key takeaway is that many – if not most – countries are welcoming rather than rejecting investments.

The passing of the Foreign Investment Risk Review Modernization Act (FIRRMA) in August 2018 in the US has changed the Committee on Foreign Investment in the United States' (Cfius) screening process of foreign investment in the US. Paul Weiss partner Ariel Deckelbaum explained that the law has been kept vague and open-ended so it's not entirely clear what the government is trying to protect, but sensitive sectors such as defense and critical infrastructure will be off-limits. Scrutiny will also be placed on how much influence an investor will have in the target company's decision-making process in the future – for instance, whether the investor will have board seats. Crucially, the extra time needed to screen investments will mean a transaction's future will be shrouded in uncertainty.

"The government will do what it needs to do and in reality, if the government doesn't like a transaction and threatens to reject it unless certain conditions are put in, investors will need to find alternatives," said Deckelbaum.

Over in the EU, a draft regulation to control foreign investment is being debated. If passed, it will allow member states to screen foreign parties' acquisition plans. Jacques Buhart, partner at McDermott Will & Emery in Paris, said that while countries such as Italy, Germany and France support the regulation, a number of Eastern European states, like Bulgaria for example, are happy to receive investments, creating a disconnect within the EU. "The regulation is limited in scope as there is no harmonisation of national laws, so in reality the law is soft text," he said.

While the US has been closing doors to foreign investment, India has been doing the exact opposite since 1991.

"Since India's balance of payments crisis in 1991, the government has been liberalising foreign investment, especially in the past four years with the change of government," explained Akil Hirani, managing partner at Majumdar & Partners and co-chair of the IBA's Asia Pacific Regional Forum.

Even for sensitive sectors such as defence, foreign owners can acquire up to 49% of a company in the sector without government approval. For banking, the ownership cap goes up to 74% while 100% of foreign ownership is possible in areas such as fintech.

However, one area of uncertainty is around private equity buyouts as these have risen significantly in India in recent years. The Cabinet of Committee of Economic Affairs is looking more closely at the issue of money laundering and wants to know whether funds have proper credentials, which could add more time to the review period in M&A transactions.

KEY TAKEAWAYS

- Governments have several options available to them to restrict or block transactions – but most countries are welcoming rather than rejecting investments;
- The US has tightened its oversight of foreign parties buying national targets, while the EU is debating a draft regulation to allow member states to screen foreign parties' acquisition plans.

Food for thought

The earth's population is expected to reach 9.8 billion by 2050. Having enough food to feed the global population is an urgent issue that needs to be addressed now. And because the earth's water resources are dwindling due to climate change, food production will have to become more sustainable.

Not only does the world need more food but ensuring that the food is safe, healthy and made in a more sustainable and fair way is central to the issue. Panellists at yesterday afternoon's session '*The future of food: a global issue for humanity*' shared how blockchain technology can help create much needed systemic change to global food production.

Blockchain can offer a variety of solutions to help tackle issues such as food contamination and exploitation of small farmers in the global food supply chain. Valentina Lattanzi, partner at Gattai, Minoli, Agostinelli & Partners, explained that by using distributed ledger technology, participants in the supply chain can share data and information, and exchange services and goods. The immutability of data on a blockchain, as well as scalability and interoperability of blockchain can bring transparency and control in the supply chain as the food journeys from farmers to consumers.

Valentina Lattanzi

Reducing the possibility of fraud between farmers and traders can increase trust between participants, which means more efficient and safer trading while reducing costs.

"Blockchain technology helps to reduce health hazards, fraud and corruption in the supply chain, reducing food mismanagement and contamination," said Lattanzi.

While small farmers grow 60 to 80% of the food produced in developing countries, there is a clear gap when it comes to access to credit and capacity building in farming methods. Through smart contracts, the income of small-scale food producers can be increased by reducing supply chain costs and sharing knowhow. Going forward, digital assets can also be considered as currency within the food blockchain.

From poisonous infant formula scandals to hormone injected watermelons, food safety has been a big issue in Asia, especially China. Walmart's labelling practices in China were brought to light in 2011 when it was discovered that its employees mislabelled ordinary pork as organic for two years. On a more positive note, however, Walmart launched a pilot food traceability initiative in the country for pork that was very successful.

"There is still an institutional challenge because in order for blockchain instruments to be beneficial, the whole food economy needs to be revolutionalised," said Lattanzi.

Having the world's biggest retailers such as Walmart and Carrefour on a blockchain network is a first step and it has become reality. Matthew Kovac, executive director at Food Industry Asia, told delegates that the IBM Food Trust blockchain-based cloud network launched on October 8. Participants in the network can better trace data of their products in a much more transparent and efficient manner.

KEY TAKEAWAYS

- Panellists shared how blockchain technology can help create much needed systemic change in global food production, by enabling better traceability of food across the supply chain, reducing the possibility of fraud;
- Blockchain can offer a variety of solutions to help tackle issues such as food contamination and exploitation of small farmers in the global food supply chain.

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Back to the start

The trade war between the US and China is only one part of a wider cultural and legal conversation

SESSION: The opportunities and challenges in China's new era: market, law and culture

TIME: Today (1615 – 1730)

VENUE: Session Room F, Level -1

COMMITTEE: Asia Pacific Regional Forum

China is not the closed book that many believe it is: if anything, the ongoing tariff dispute with the US shows the country is a trade partner to contend with.

But beyond the economic considerations, the Asian country is a commercial and cultural giant, whose fundamental values and beliefs sometimes cause conflict. In August, US President Donald Trump signed into law the Foreign Investment Risk Review Modernization Act which broadens government oversight of takeovers undertaken by foreign buyers. While China is not directly identified as a target of this new framework, it will be on the receiving end of heightened oversight in practice. And while increased sensitivity regarding Chinese investment is a timely issue in the US, it's becoming a topic of discussion in other countries too, including in Europe.

Highlights of today's session include Jennifer Jia Chen, managing director at China Investment Corporation, who will be discussing how Chinese investors look at today's world, as well as Chao Liu from the China Council for the Promotion of International Trade, who will address the opportunities and challenges of promoting China as a commercial partner.

David Liu, JunHe

Lawyers from Homburger, MinterEllison and Steptoe & Johnson will discuss how the EU, Australia and the US view China's role in the global commercial arena.

The tariff dispute with the US shows China is a trade partner to contend with

Today's session co-chair David Liu, partner at JunHe and chair of the IBA's Project Finance Subcommittee, tells IBA Daily News that the panellists want to discuss not only the main legal issues, but also the interactions between law, market and culture.

"The case studies that the panellists will discuss highlight how different regions and local communities view Chinese investments," he says. "The current trade war between China, the US and other countries is creating uncertainty but also the opportunity for change. He adds: "Ancient Chinese culture may be a source of inspiration for human beings, especially its values of honesty, loyalty, benevolence and harmony."

The session will also make delegates think about the role of lawyers and the frameworks that laws are built upon as countries around the world become entangled in increasingly complex trade relations.

The new frontier

Small and medium businesses play a huge role in the economy of many African countries. But they need to overcome a number of obstacles if they are to grow properly

Small and medium-sized enterprises (SMEs) account for a significant proportion of the economy of most African nations. But the private sector is still facing a number of hurdles which are in the way of its growth.

Adequate corporate governance is a key area holding SMEs, and to some extent private sector work, back in Africa, suggests Letitia Adu-Ampoma, director at Peverett Maxwell, a corporate governance consultancy firm in Accra, Ghana.

"Many African SMEs don't put in place essential governance structures and processes needed to scale their businesses and gain access to foreign direct investment or even local sources of finance and investment," she said. "Business failures resulting from poor corporate governance also often occur in critical economic sectors like banking and financial services and so have a high adverse impact."

The bigger picture

The African private sector is overwhelmingly made up of SMEs that have a tendency not to look for legal services and support until it's too late. As the economies develop, these companies are subject to regional, national and international corporate governance regulations, the significance of which they generally tend to be unaware of. The UK Bribery Act and the US Foreign and Corrupt Practices Act (FCPA) are two examples.

Babatunde Ajibade

Adu-Ampoma adds that for lawyers or counsel setting up an entity of some sort, it is important to discuss the vision so as to be able to embed the importance of corporate governance for their clients. Professional advisors should know that good governance is what will enable their clients to scale and effectively contribute to their economy. "Governance is a key area that many legal practices in Africa don't focus on because they tend to work on a transactional basis with a short-term perspective. But there is preventative work that needs to be done," she said.

Session chair Babatunde Ajibade, managing partner of Nigerian law firm S.P.A. Ajibade & Co, suggests that SMEs on the African continent have a significant problem when it comes to their perception of the importance of corporate governance.

"It's something that I see as a major obstacle to their growth, and I see it all the time in my practice," he says.

He offers as an example a client that he spoke with recently, who has been running a very successful business. This client had made a significant amount of money and had grown so successful that a third party wanted to buy a stake in the business.

"He came to me for advice and I asked him: 'what are your accounts like, what is your tax position?' The client didn't have anything, his records were all over the place and he had an accountant who helped him to aggregate figures to get the taxman off his back!" he said.

It may well have been the case that SMEs like the one in this example have been able to get away with this sort of practice for many years. But when the time comes to get a proper return on their hard work, the fact they have not demonstrated proper corporate governance will come back to haunt them. This comes as a warning: nobody is going to buy a stake in a business if its management cannot establish that they have been running it properly, adequate records are in place, taxes have been paid, regular meetings happen and there is a board in place.

"Many African SMEs don't realise that these issues are important because they are small and typically owner run so they assume they don't need to account to anybody when they are actually about to go beyond being an SME or a proprietorship," says Ajibade.

Turning point

This is a pivotal moment for SMEs in Africa. The continent is home to some of the world's fastest growing economies, and there is a lot of foreign interest moving in. The challenge for SMEs is if they will be able to hold their own in this context: this will be partly determined by the extent of local corporate governance and their ability to adhere to international rules like the FCPA.

"The impact of international laws like the FCPA or the UK Bribery Act can no longer be ignored even if an SME's growth vision is totally local," says Adu-Ampoma. "To supply a multinational or be part of an international supply chain, SMEs are unlikely to be chosen as partners unless they can demonstrate that their business processes and fundamentals take into account the principles of such laws."

There is the opportunity to make a change, not just internationally but across the entire continent. Domestic corporate governance compliance and international standards are very important and gaining traction worldwide. Latin America has already made its changes, and this is the pivotal moment where Africa can do the same.

"We are different, and our growth needs the input of key professions like lawyers or accountants to ensure that the capacity building that has gone on with the African corporate governance initiative actually happens," says Adu-Ampoma. "It's really important to put it on the radars of those people who could make an actual difference; that is why this session is so important."

Africa is the last frontier. The world has almost forgotten the fact that a century ago, places like India and Latin America looked very different, but have since managed to turn themselves around.

SESSION: Corporate governance for African business: the role of lawyers on a continent of small and medium-sized enterprises

TIME: Today (1115 – 1230)

VENUE: Session Room C, Level -1

COMMITTEES: African Regional Forum (Lead), Corporate Governance Subcommittee, Corporate and M&A Law Committee

Learning to live together

Bar associations and law firms are mutually dependent but the disconnect between the two needs to be directly addressed

Over recent years there has been a step change in the pressures building around the relationship between bar associations and law firms.

This is neatly summarised by Berit Reiss-Andersen, president of the Norwegian Bar Association and co-chair of today's '*BIC Showcase: Can law firms survive without bar associations?*'.

"On the one hand, large law firms underestimate the importance of the work of bar associations in guarding the core values of the profession," she says. "On the other, bar associations need to adjust to the fact that our profession is also organised today in very big companies."

Bar associations developed their modus operandi dealing with the profession within the organisational framework of sole practitioners and small practices but the legal world now looks very different. Reiss-Andersen has the right background to understand these changes, having had long stints in a small law firm, a global law firm (DLA Piper) and at Norway's bar association.

Several current issues bring the bar association-law firm relationship into focus. Brexit is one example, and law societies across the UK and Europe have had to sit down and discuss its repercussions on multi-jurisdictional law firms and issues such as the free establishment of firms and free movement of lawyers. These are political issues that directly impact law firms.

Artificial intelligence (AI) is another. Large law firms are often the ones with the resources to develop AI tools and implement them in their work, but this throws up a new and important world of ethical issues and questions of confidentiality, both of which are the domain of bar associations.

"When it comes to the regulation of judicial services there is no one else but the bar association," says session co-chair Péter Köves, partner of Lakatos Koeves es Tarsai Uegyvadi Iroda in Hungary.


Berit Reiss-Andersen


Péter Köves

Both sides need to understand each other better

Both sides need to understand each other better.

Guardians of the (legal) galaxy

One of the key issues that both Köves and Reiss-Andersen will stress is that bar associations are the guardians of the profession's values. Without the high standards that bar associations set in relation to principles such as professional confidentiality and conflict of interest, there would be no difference between lawyers and any other type of consultant.

"Our profession plays a role in society because every lawyer must also uphold rule of law principles, whether you are advising in the business community or in criminal law," says Reiss-Andersen. "The purpose of the core values unites us all."

There is increasing pressure on these values that the bar associations defend to the benefit of law firms. For example, there have been calls from institutions such as the OECD that confidentiality should not apply to tax evasion cases. Similar questions are repeatedly raised in relation to a whole spectrum of topics, including money laundering, terrorism financing or child abuse. Bar associations are there to play the more political role of upholding the principle of professional confidentiality in these debates.

"Citizens have to be able to seek independent advice, without interference from the authorities and bar associations must fight these battles with far more authority than global law firms, though it is also a benefit to global law firms," argues Reiss-Andersen.

In this context law firms should understand the role bar associations have in training and the standards that they demand of lawyers. "Lawyers play a very important role in correcting clients' legal behaviour, as is our professional duty," she says.

The profession has been greatly damaged by revelations such as those in the Panama Papers, which undermined public interest and damaged trust. Bar associations have a central role in navigating these issues: training, confidentiality, client privilege and ethics.

"At the end of the day, this is all for the clients and the public interest," says Köves. "Law firms can't say 'you can't criticise us' when clear rules have been set by the bar association."

Stepping on each other's toes

Both Köves and Reiss-Andersen believe that there is a lack of understanding that needs to be bridged. In global law firms, commercial values, approaches to branding and the values and culture developed within a global firm over decades (and replicated in each of its global offices uniformly) can turn the demands, values and standards of individual bar associations into irritating background noise.

Associations across the world uphold a range of standards that can seem intrusive to large firms, such as what can and cannot be displayed on a website, how firms can and cannot market legal services, right down to (in some cases) what the name of a law firm should be.

Some of these issues have led to spats and uncertainties, particularly when it comes to firms operating across foreign markets. There are plenty of examples of grey areas, with foreign firms forming all manner of exclusive and non-exclusive associations with local entities to practice local law. Domestic law firms and sole practitioners have felt threatened. Bar associations have also positively mediated and resolved these issues to channel the positives (spreading knowledge, best practice, fostering competition, developing the sector) while guarding standards.

On a larger scale, bar associations and law societies should maybe also think about gender issues in the profession and workplace diversity, rather than leaving it up to the social responsibility of the law firms themselves. "Bar associations should strive not to be too inwards looking," says Köves.

The key takeaway will be that the two sides are more dependent on each other than they may realise, and upcoming developments will only serve to make this clearer.

Bob Carlson of the American Bar Association, Andrew Darwin of DLA Piper and Stephen Denyer from The Law Society of England and Wales will discuss their perspectives.

SESSION: BIC Showcase: Can law firms survive without bar associations?

TIME: Today (1430 – 1730)

VENUE: Room E, Level -1

COMMITTEES: Bar Issues Commission and Law Firm Management Committee

Lines of defence

Law firms can't be complacent when it comes to cyber strategy

Hackers determined long ago that vendors of data, and now third parties, are not only a vector into their primary targets, but also hold a lot of valuable information about companies and their clients generally.

No one holds more sensitive or highly confidential information than law firms: they know the timings of any transaction they are working on, of litigation and bargaining positions as well as all manner of sensitive intellectual property. But they have historically been weak at protecting this information, which has put them in hackers' line of sight.

This morning's showcase session marks the launch of new IBA guidelines on the topic, which will focus on the risks of a data breach and what law firms can do to minimise these risks.

Panellist Luke Dembosky, partner at Debevoise & Plimpton and member of the IBA's first Presidential Task Force on Cybersecurity, says that the session will present the work it is doing to help lawyers understand how to manage and prioritise the mix of legal, technical and business issues involved in digital security.

Security by design

The recognition is that digital security needs to be embedded across all work and decision-making processes.

"We realised a long time ago that cybersecurity is a cross-disciplinary threat and that management level involvement was needed to address it and make risk decisions: that is also very much true of law firms, which cannot rely on IT to make these decisions on their own," says Dembosky. "This is about raising the profile of these issues, but also convincing leaders in the legal industry that they must engage with these issues personally for the benefit of themselves, their firms and their clients."

The session will also look at case studies that have actually happened, looking at how they worked out, what their impact was and the types of reactions they garnered.

"Law firms are not just likely to be targets of large attacks across the board, they are likely to be specific targets," says Marianna Vintiadis, managing director at Kroll in Italy and also a panellist on today's session. "This is because they have incredibly sensitive and valuable information with significant resale value: if you take away a law firm's information, you take away the crown jewels, as you can imagine the firm would lose all their clients as well."

Global and local

These attacks aren't necessarily directed at specific targets: a law firm can be part of an outbreak that goes off on a global scale, like the WannaCry ransomware attack in 2017 that affected over 75 countries, tens of thousands of computers and brought large organisations to a standstill with enormous amounts of damage.

Firms can easily be caught up in something that is not directly related to them. The first thing that needs to be addressed is not necessarily the direct impact, but what the effects are on a global scale and the techniques that hackers are using to become increasingly sophisticated and well organised.

"Another thing to take into account is that we are seeing more attacks, rather than fewer, nowadays, and at least in the short-term there is not enough being done on security," added Vintiadis. "For the moment we are in the phase where a lot of our infrastructure is not sufficiently secure when it is 'born,' something needs to be done about this."


Luke Dembosky

On the technical side it's about securing systems and the perimeters. Attacks have different avenues, as they can either take the shape of a sophisticated virus or an 'open door' into a system (such as not doing a security update or not patching a computer, or simple human error, which overwhelmingly tends to be the cause). Knowing what kinds of things could have an impact is crucial in a defensive strategy.

"Most law firms tend to be fairly small, not a company the size of IBM that is able to invest a lot of money into infrastructure, but they also don't tend to know anything about technology," says Vintiadis. "Many firms are very un-savvy technologically, so they are easy targets with extremely valuable information. Because of that, attacks on law firms are on the increase."

SESSION: IBA Showcase: cybersecurity - launch of IBA guidelines

TIME: Today (0930 – 1045)

VENUE: Session Room B, Level -1

COMMITTEES: Technology Law Committee, Cybercrime Subcommittee and Presidential Task Force on Cybersecurity (Lead)

A wake-up call

The nuclear bombs that devastated Hiroshoma and Nagasaki were dropped in August 1945 and resulted in an estimated 340,000 deaths by 1950. Lawyers are not powerless to prevent a repeat

Today's session is possibly the most controversial in this year's conference, the one with the most urgency, and certainly the one with the highest stakes.

The debate aims to address anxiety about the effectiveness of international law governing nuclear weapons, says session chair Michael Kirby, former Justice of the High Court of Australia, and counter complacency, hesitation and a sense of powerlessness.

The timing is apt. In 2018, the International Campaign to Abolish Nuclear Weapons received the Nobel Peace Prize for its decade-long advocacy which resulted in the UN Treaty on the Prohibition of Nuclear Weapons, the first legally-binding international agreement to comprehensively prohibit nuclear weapons. The Treaty was adopted by the vast majority of the world's nations in July 2017, and will enter into force once 50 nations have signed and ratified it, something which will most likely happen.

There are currently five declared nuclear states (the US, UK, France, China and Russia) and a further four unofficial ones (India, Pakistan, Israel and North Korea). They harbour an estimated 15,000 nuclear weapons, enough to flatten the earth several times over. Belgium, Germany, Italy and the Netherlands host US nuclear weapons as part of their umbrella arrangements. They all boycotted the negotiations to draft the nuclear weapons ban (Netherlands alone voted, but against the Treaty).

Most disturbingly, while most nations pay lip service to nuclear disarmament, key actors in the debate, namely the US and Russia, have been moving in the opposite direction. President Barack Obama in 2016 agreed a $1 trillion 30-year nuclear weapons modernisation programme, which President Donald Trump has expanded on, meaning nuclear spending in the US is yet to peak. President Putin has also been growing Russia's arsenal.

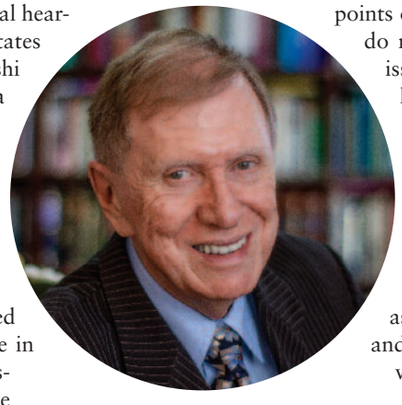
The landmark legal case on nuclear weapons is the 1996 Advisory Opinion issued by the International Court of Justice (ICJ), which bound all nuclear armed states to enter into bona fide negotiations with a view to reducing the stock piles of nuclear weapons.

But nuclear states have failed to do this. "The nuclear armed states, particularly the US, have simply ignored the statements and has attempted to influence, cajole or pressure the countries in its circle not to press this matter," says Kirby. "On any view, those stockpiles are grossly excessive to any possible military or strategic purpose."

The current legal position

The panel will revisit the International Court of Justice (ICJ) 1996 Advisory Opinion, in which 14 judges responded to a request from the UN General Assembly to address the question: "Is the threat or use of nuclear weapons in any circumstances permitted under international law?"

Forty-two states took part in the written pleadings and 22 in the oral hearings, including all nuclear states barring China. Khawar Qureshi QC, who has just published a book analysing ICJ advisory opinions, says that "whilst these are non-binding, they are intended to possess a declaratory effect as to the position under public international law".



Michael Kirby

The ICJ unanimously issued a plea for states to 'negotiate in good faith towards nuclear disarmament to achieve a precise result-nuclear disarmament in all its aspects'. On the legality of nuclear weapons, it concluded (11-3) that there was no specific prohibition on the threat or use of nuclear weapons. It was evenly split (7-7) in concluding that the threat or use of nuclear weapons would contravene international law, particularly international humanitarian law (IHL). But the ICJ did not rule out the possibility that use could be lawful in an extreme circumstance of self-defence.

This 7-7 split is misleading, however, because two of the seven dissenting judges voted against because they felt that it did not go far enough and that the ICJ should have unambiguously concluded that the use of nuclear weapons would be unlawful in all circumstances.

The judge who went furthest, Judge Weeramantry, expressed his view that the use or threat of use of nuclear weapons was 'illegal in any circumstances whatsoever'. 'It violates the fundamental principles of international law, and represents the very negation of the humanitarian concerns which underlie the structure of humanitarian law,' he said.

Sleep walking to annihilation

Feeling powerless is not an option, says Kirby. "Unless the law can speak effectively to such dangerous weapons, we run the risk of catastrophic consequences, including through accidents, mistakes and misjudgements," he explains. He argues that international law should apply "given the disproportionate impact upon civilians, the human race, life, health and property of human beings and the long-term impact on the biosphere".

Nor is turning a blind eye an alternative. There is not much use lawyers discussing the finer points of corporate restructuring if they do not "turn their attention to the issue of whether as a species the human race will be around by the end of this century".

"In this age of jingoistic and increasingly frenzied nationalism, we can ill afford to abdicate our responsibility as human beings," says Qureshi. "Lawyers must always consider themselves as instruments for positive change" and the "rule of law must be at the very core of any society."

Qureshi will argue that it may be time for the ICJ to re-visit the issue, especially regarding the questions of tactical/small nuclear weapons and the use of nuclear weapons to protect the survival of the state.

"There is far more data available now as to the effects of nuclear radiation and the notion that 'tactical battlefield' nuclear weapons can be consistent with humanitarian law needs to be scrutinised," he says.

Up till now lawyers have been too quiet, perhaps because this generation has not had "quite the same reminders of the destructive power of nuclear weapons," says Kirby, who remembers the closing phases of World War II and the terrible "eidetic image of the nuclear explosion".

Today's nuclear bombs are much more powerful. The Eternal City is an ominously suitable place to debate this existential challenge.

SESSION: Nuclear disarmament and non-proliferation: what can lawyers do?

TIME: Today (1115 – 1230)

VENUE: Session Room T, Level -1

COMMITTEES: IBA's Human Rights Institute (Lead), Human Rights Law Committee and War Crimes Committee

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A conversation with Mary Robinson

'She's created a whole new definition of the presidency,' said Taoiseach Bertie Ahern upon Mary Robinson's resignation as Irish President in 1997. Seven years after becoming Ireland's first female president, she exited office after transforming the role from that of a figurehead to one of real authority. And it is with real authority that Robinson has served in politics, ever since being elected to the Irish Parliament in 1969.

Her presidency was defined by her support of human rights, promoting Ireland as a modern and progressive republic, and her tireless efforts to change the perception of a country where homosexuality was illegal until 1993, divorce until 1995 and abortion until this year. She was the first head of state to visit Somalia in 1992 to address the famine crisis there, and the first to visit Rwanda in 1994 after the genocide.

Robinson helped change the political conversation, leading Ireland onto a more progressive path.

She exited the role of president in 1997 to become UN commissioner on human rights and served in a similar style as her presidency. She boldly criticised the US for the detention of al-Queda suspects at Guantanamo Bay and became the first high commissioner to visit China, which she did several times.

Robinson initially trained as a lawyer, lecturing in European Community law in 1975 at Trinity College and also establishing the Irish Centre for European Law at Trinity College in 1988.

In 2009, she received the Presidential Medal of Freedom from US President Barack Obama for her contribution to human rights. She also served for 10 years as honorary president of Oxfam International and was chairperson of the Global Alliance for Vaccines and Immunizations.

Robinson now devotes her time to climate change, through the Mary Robinson Foundation - Climate Justice. Between 2013 and 2016, she served as the UN secretary general's special envoy in three roles: first for the Great Lakes region of Africa, then on climate change, and most recently as a special envoy on El Niño and Climate. Robinson is calling for more action on climate change from nations across the globe, which she insists is a human rights issue.

If she has as much success as she had in transforming Ireland's social politics, then maybe a turning point could be reached in the battle against climate change.

TIME: Today (1315 – 1415)

COMMITTEE: General Interest

LOCATION: Auditorium

A history of the Eternal City

Rome is not only Italy's capital city, a key European cultural centre and the headquarters of the Roman Catholic Church: it was also once the centre of a global economic, intellectual and military power.

Over the centuries, Rome grew from a small settlement on the eastern banks of the Tiber River, founded, as legend has it, by twin boys who were brought up by a wolf, to an empire that covered most of Europe, North Africa, the Mediterranean and Asia – an empire without end, wrote Virgil in his epic poem, *The Aeneid*.

So much was its influence that Roman poet Tibullus referred to the city as *urbs aeterna*, the Eternal City, in the first century BC: if the world was ever destroyed, Rome would be strong enough and survive forever.

In the beginning

Rome's early days were characterised by alternating periods of conflict, chaos and prosperity, themes that would continue throughout later centuries.

Founder Romulus, son of Mars, the god of war, and of a descendant of Greek nobility, killed his brother Remus over a disagreement on which of seven hills to build Rome. The original city is believed to have been located on the Palatine Hill, with neighbouring settlements eventually coming together under its influence.

Romulus was the first of seven kings to rule the city-state: the last monarch, tyrant Lucius Tarquinius Superbus, was overthrown by a popular uprising, leading to the founding of a republic that would last over 500 years, and to the creation of the first

Roman law code. This was inscribed on 12 bronze tablets on public display in the forum, which covered everything from civil procedure to property rights. Republican Rome was ruled by senators, high ranking officials chosen from some of the city's wealthiest patrician families.

Rome's unstable political atmosphere, coupled with the ongoing fight for political power between the ruling class and the plebeians (the so-called Conflict of Orders), eventually led to dissatisfaction and chaos.

The appointment of military hero Julius Caesar as dictator for life, in 45 BC, marked the start the Roman empire. He is considered one of the most famous characters in Roman history, in spite of his short-lived career, not only because of his conquest of the Gallic tribes but also as a result of his efforts to unify conquered territories outside of Italy and bring peace to the troubled empire. *Panem et circenses* (bread and games) is a satirical phrase coined by poet Juvenal in the second century AD to indicate how the government provided food and entertainment to appease the public.

Julius Cesar was succeeded in 44 BC by emperor Augustus. His rule kicked off several decades of peace and prosperity, as Rome's economic, political and cultural influence grew in all directions. From a legal perspective, this period gave the world the Code of Justinian (*Codex Justinianus*), named after emperor Justinian I. A collection of Roman case law, legal opinions, and old and new laws, the four-part Code forms the basis of modern civil law frameworks today.

Fast forward to the seventh century AD, and the Roman empire was split into western and eastern parts: the former still governed out of Rome, the latter out of Constantinople (now known as Istanbul, in Turkey) a city which had progressively taken over as the empire's new focal point.

The emperors of this time had one sole purpose: keeping the empire's many enemies at bay – these included multiple Barbarian tribes, the Sasanians and the Huns.

Fall and rise

After years of declining influence, the rise of Christianity would be key to helping Rome regain its historical status. The Franks, a group of tribes originating from Western Europe, invaded Italy in the eight century AD. They pledged their allegiance to the Roman Catholic church and gifted large parts of Italian territories they had taken over to its head, Pope Stephen II. These became known as the papal states, with Rome their political, cultural and religious epicentre, a position it maintained until the 19th century.

But revolutionary movements across Europe jeopardised the status and influence of the Roman Catholic Church, which had gained tremendous power and financial prosperity over time. In early 1848, revolts in some Italian states and in Sicily called the Church's power into question, with people demanding the establishment of a democratic government.

The battle of Porta Pia in 1870 was the culmination of several decades of unification efforts (*risorgimento*) carried out by the southern kingdom of Piedmont-Sardinia. Rome became the capital of the Kingdom of Italy. But Pope Pius XI refused to relinquish power and recognise the newly-unified Italy, seeking refuge in the Vatican.

The 1929 Lateran Treaty, signed as a concession to the Catholic Church by Prime Minister, Benito Mussolini, created a sovereign Vatican State at the centre of Rome to house the Pope and the headquarters of the Catholic Church. Allied troops are believed to have spared Rome when they bombed Italy during World War II because it housed the Vatican, which had remained neutral throughout the conflict.

Twelve years after the end of the second world war, the city hosted the signature of the Treaty of Rome, establishing the European Economic Community (EEC), which would later become the European Union. The aim of the EEC was to 'lay the foundations of an ever closer union among the peoples of Europe'. The Treaty of Rome, now known as the Treaty on the Functioning of the European Union, is still the foundation of the EU institutions to this day.

QUESTION What will you be visiting

Alejandro Luna
Olivares
Mexico

We have the opportunity to go for an audience with the Pope at the Vatican tomorrow morning – we only booked about a week in advance.

Colin Lloyd
Velador Associates
UK

Over the next three or four days we hope to attend a number of the social events. The IBA is a brilliant networking opportunity for a company like ours.

Aarta Alkarimi
Chrysalis
UAE

We have some meetings with various law firms in Rome that are interested in doing business in our jurisdiction. I will also be catching up with some of my Rome-based alumni from back in the US.

Kimitoshi Yabuki
Yabuki Law Offices
Japan

I will be meeting with some friends and some lawyers I know, and will hopefully enjoy the beautiful city of Rome.

Carolina Monteiro Carvalho
Mundie Advogados
Brazil

I am going to meet colleagues that I've met at previous IBA Annual Conferences. I always try to meet people from different countries. I will also visit some Italian law firms here.

Paulina Kieszkowska-Knapik
Kieszkowska Rutkowska Kolasinski
Poland

I did an A level in Italian, so I am going to show my business partners some of Rome including the *Palazzo della Civiltà Italiana*. They are here for the first time so they will go around the city with me.

Brazil: managing conflict

Actions by the Brazilian court to remove the power of the board of Brazilian telecom company Oi from influencing negotiations of its restructuring plan removed a key roadblock that allowed management to successfully negotiate terms without its conflicted input.

The company, Brazil's largest telecoms operator by some margin, had been approximately $20 billion in debt at the time the restructuring deal was agreed, which was not only the largest in the country but in the Latin American region.

Key figures in the restructuring negotiations of Oi told attendees of yesterday's '*Restructuring Latin American companies*' panel that Brazilian laws had been stretched to capacity to prevent certain board members with vested interests from blocking all of the suggested alternatives. Existing Brazilian law dictates that creditors are not allowed to make formal alternative restructuring plans and that board members and management have sole authority to do so.

Ted Lodge of GoldenTree Asset Management told of his experience in the restructuring negotiations. "We had a conflicted shareholder group and a conflicted board, that makes this model very difficult to work with," he said.

Oi had two key shareholder groups: Pharol, the owner of the old Portugal Telecom which previously merged into Oi, and Nelson Tanure, a well-known activist with a history of involvement in conflicts.

Within a month after this court ruling we were able to approve a planned reorganisation

Over the course of the company's downfall, 10 board members had resigned from Oi, and as a consequence of those resignations, Pharol and Tanure had been able to ensure that seven out of 11 board members bore their interest and effectively gain control of the board.

Oi's corporate governance documents also required two executive managers to sign off on the reorganisation, which set up a conflict between management and the board.

"First of all, the board refused to negotiate a plan with the creditors which proved problematic, then the conflicted board adopted what I would call a cramdown plan support agreement – it doesn't have legal significance, but effectively 20% of the bonds aligned with the shareholders and the board to try to adopt a plan," continued Lodge.

Anatel (the Brazilian telecoms regulator) intervened and refused to let the board and shareholder group implement this agreement. At this point Anatel had a significant debt interest in the restructuring itself as well as over BRL 60 billion of tax credits.

Two of the bondholder groups then filed motions with the courts to neutralise the board and the shareholders. "Even though the banks weren't party to these motions, they were in court with us every step of the way, effectively showing the support of other creditors as well as the Temer government," said Lodge.

As a result, the court decided to neutralise the board and then empowered Oi's chief executive officer to negotiate a planned reorganisation with the creditors regardless of the board of directors. The board of directors at Oi was essentially hived off in the process, they were legally told they could not interfere in the process and individual management was left to work with the creditors.

"In essence we ended with a result where the management negotiated with the creditors successfully, and within a month after this court ruling we were able to approve a planned reorganisation, and actually provided for within the plan itself were some governance protections so that the shareholders and board could not further disrupt the reorganisation efforts," he added.

KEY TAKEAWAYS

- Court intervention allowed Brazilian telecoms company Oi to successfully negotiate terms of restructuring without input from a conflicted board;
- The board of directors at Oi was essentially hived off and told they could no longer interfere in the process while individual management was left to work with the creditors.

in Rome this week?

Ruchi Biyani
Nishith Desai Associates
Germany

As they say, when in Rome do as the Romans do. I will be enjoying the food and the monuments, and of course catching up with friends and clients.

Brad Pierce
Borden Ladner Gervais
Canada

We have 18 members here and we enjoy meeting colleagues from everywhere. Enjoying the parties and the receptions, there is quite a number of them so I am kept busy trying to find my way around Rome.

Ignacio Andrade Aycinena
Sfera Legal
Guatamala

I came with my wife, so we did some touristy things before the conference. Afterwards we are going to Milan and then to Croatia.

Linda Kalu
The Law Partners
Nigeria

I will be going to Vatican City and to the Colosseum, and hopefully to all the other tourist places afterwards.

Don Umealor
Independent National Electoral Commission
Nigeria

I would love to go to the *Basilica di San Pietro* to attend a church service, and possibly see the Pope. And of course, I need to go around and see.

Jeroen Raskin
Monard Law
Belgium

I will be visiting some historical monuments like Vatican City, the Trevi Fountain and all the other classics. I will combine it with meetings with lawyers. It is a combination of work and fun.

Olga Solovyova
AViDBIZ OÜ
Estonia

I love Rome. When I am not at sessions or networking I will be walking around here, so on Thursday I will be doing that.

Hyun Sik Shin
Korean Bar Association
South Korea

I like finding galleries and exhibitions, I hope to go to the National Roman Museum with clients. Rome itself is a city of art. On the way between the IBA and my hotel I have seen many beautiful structures and buildings.

Sushant Shetty
Fox Mandal
India

On Sunday I visited the Pantheon, the Spanish steps and the Trevi Fountain. I am staying after the conference so will also see the Colosseum, the Vatican museum and the Sistine chapel.

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