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# juriste

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UIA President  
for 2019-2020

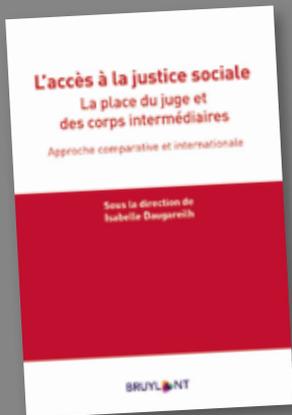


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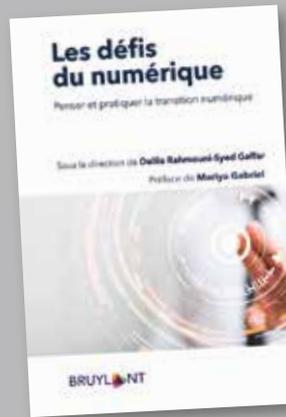
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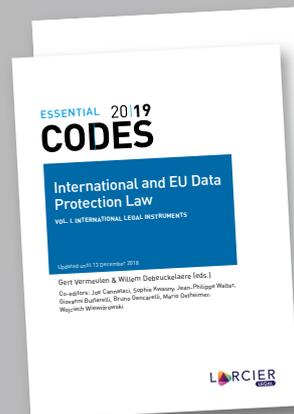
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# Table of contents Sommaire Indice

## Table of contents ■ Sommaire ■ Indice ■ 2

---

President's Editorial 3 Éditorial du Président 4 Editorial del Presidente 5 Message from the Editor-in-Chief 7 Message du rédacteur en chef 8 Mensaje del Redactor Jefe 9

## UIA News ■ Actualités de l'UIA ■ Novedades de la UIA ■ 10

---

Retour sur le Congrès 2019 - Luxembourg 10 63<sup>e</sup> congrès UIA - Luxembourg - Inaugural Speech of President Jerome Roth 18 UIA International Bar Leaders' Senate meets in Luxembourg 21 L'influence grandissante du droit européen sur l'arbitrage 23 The UIA in Vienna 25 UIA's International Litigation Summit in San Francisco 27 The UIA in St. Anton am Arlberg (Austria) 28

## Human Rights and Protection of Lawyers ■ Droits de l'Homme et de la Défense ■ Derechos Humanos y de la Defensa ■ 30

---

La Comunidad LGTBI: avances y retrocesos 31 Human Rights Education for Legal Professionals: HELP Programme of the Council of Europe 36 LexisNexis Global Foundation to Advance the Rule of Law 40 Condamnation à la peine capitale de djihadistes français détenus en Irak : l'obsession sécuritaire au mépris du droit international 41 CEDH et droits de visite des pères séparés 44 Purposes of Incarcerating International Criminal Court's Convicts 46

## The Legal Profession ■ La Profession d'Avocat ■ La Abogacía ■ 50

---

Professional Secrecy and Legal Privilege: Issues in Applying a Fundamental Principle 51

## Legal Practice ■ Pratique du Droit ■ Ejercicio de la Abogacía ■ 56

---

La réglementation du marché de l'art: exemples d'ordres juridiques 57 Protection of Intellectual Property Rights during the Mobile World Congress 59 The New Swiss Financial Market Legislation – New Momentum for ADR? 61 Green Finance and Fighting Climate Change 63 Health Science, Virtual and Augmented Reality, and Legal Frameworks: What is the Future? Part I 66 Computer-Implemented Inventions: Varying International Standards for Patent Eligibility 71



# Editorial

*Opening of the Hong Kong Legal Year – January 2020*





# President's Editorial

## *Change and Stability: The Role of UIA*

I Jerome ROTH

The more we see fundamental assumptions of legal practice challenged around the world, and the more lawyers face new challenges as we enter another decade, the more important UIA becomes for each of us. Our members form a diverse group across borders, but our values are constant. With our mission to bring together lawyers for exchange, networking, and protection of the independence of the bar and judiciary, with our emphasis on collegiality and friendship, UIA is uniquely situated to help the legal profession innovate while maintaining its bearings.

As UIA President, I already have had the privilege of meeting with bar association leaders across the globe confronting similar concerns as we enter 2020 amid roiling change. I have come to think of some key issues as the 6 "A's". Each presents risks, but also opportunities for renewed commitment, and all render UIA more essential.

### **Artificial Intelligence (AI)**

A theme of our Luxembourg Congress, the advent of AI fascinates and troubles lawyers everywhere. Will technology and robotics replace functions lawyers and judges fulfill, such as computer analysis of precedent to find the data-driven answers to legal issues? Or is the human element of lawyering – judgment, creativity, and emotion – destined to preserve our role? AI is surely an extraordinary tool, but whether it will become transformative as opposed to additive, and whether transformation will be positive, are questions bound to dominate the next decade.

### **Alternative Arrangements**

Sophisticated clients increasingly demand creative fee arrangements in place of standard hourly or fixed fee agreements. Some seek new firm structures such as bundling legal with other business services like accounting, consulting, public relations or tax work. These services may be offered by a single entity or closely-related

affiliates. Novel fee agreements and law firm configurations raise questions under ethical codes and governing regulations.

### **Arbitration**

International arbitration is flourishing, as clients in global transactions remain wary of submitting to the national courts of the other party. But arbitration is hardly static. The market to attract arbitrations is robust, and new arbitral institutions pop up regularly. Mediation is becoming an essential tool, as reflected by the Singapore Mediation Convention, which provides for direct enforcement of cross-border settlement agreements. Arbitration extends to ever broader categories of litigation, and we see constant evolution in such areas as reliance on precedent, civil versus common-law approaches to discovery, and the use of experts and witness preparation.

### **Across-Border Transactions and Litigation**

Lawyers now face the reality that virtually every contract and dispute has the potential for transnational issues. Despite choice of law and similar clauses that attempt to reduce uncertainty, questions arise about jurisdiction, public policy, inconsistent national regulations, and parallel proceedings before different tribunals. In a true sense, all of us are required to be "international" lawyers and have a basic understanding of the cross-border implications of deals and litigation.

### **Apps**

Social and professional media applications on smartphones and other devices are changing the practice of law, just as they have altered the economic, political, and social landscape. With "alternative" or "fake" facts omnipresent, anyone with a keyboard can offer a legal opinion, seek to sway a client, or try to influence a proceeding. Questions abound regarding evidentiary use of posts, liability of website platforms for statements made by users,

antitrust and monopolization concerns, and data privacy, a practice area in itself. Controversy surrounding the role social media giants play in national governance, legal disputes, and day-to-day decision-making (not to mention allegations that their products are literally habit-forming), will continue to roil many jurisdictions.

### **Access to Justice**

Most urgently, lawyers around the world see growing threats to the Rule of Law and encroachments on the independence of lawyers and judges. Populist politicians appeal to nationalist tendencies and prioritize parochial concerns over global ones, while totalitarian rulers have become more entrenched. Some governments claim they are advancing the Rule of Law by distorting its definition to mean blind adherence to laws they dictate, regardless of substantive or procedural fairness or human rights. They disenfranchise communities. They persecute lawyers for practicing law, especially those who defend unpopular positions. And they punish judges for judgments disfavored by the government. These indefensible attacks on citizens' access to justice presents the legal profession with the greatest challenge we have faced in decades.

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Change is accelerating as we begin the new decade. The legal profession is far from immune. Adaptation and innovation present opportunities. But our values, ethics and fundamental principles are immutable. The highest calling of the UIA and its membership at this pivotal time in our history is to work together to help legal professionals around the globe navigate an ever-shifting landscape while remaining true to their age-old professional obligations and to themselves.

Jerome ROTH  
UIA President  
[president@uianet.org](mailto:president@uianet.org)

# Editorial du Président

## Entre évolution et stabilité : quel rôle pour l'UIA ?

I Jerome ROTH

À mesure que les principes fondamentaux de la pratique juridique se voient remis en question de par le monde, et alors que les avocats se retrouvent confrontés à de nouveaux défis en ce début de décennie, l'UIA se positionne plus que jamais comme un acteur essentiel de la profession.

En tant que Président de l'UIA, j'ai déjà eu le privilège de rencontrer les dirigeants des barreaux de différentes juridictions à travers le monde confrontés aux mêmes préoccupations, tandis que nous entamons l'année 2020, début d'une nouvelle ère déjà en pleine mutation. J'en suis arrivé à la conclusion que les questions cruciales de cette décennie sont plusieurs dont les 6 suivants (qui commencent par la lettre A en anglais). Chacune d'elles présente des risques, mais aussi des possibilités d'engagement renouvelé, et toutes viennent renforcer le rôle indispensable de l'UIA.

### Intelligence artificielle (IA)

L'avènement de l'IA, thème de notre Congrès luxembourgeois, suscite aussi bien l'intérêt que la crainte des avocats du monde entier. Les fonctions exercées jusqu'ici par les juges et les avocats, telles que l'analyse informatique des précédents permettant d'obtenir des réponses basées sur des données aux questions juridiques, sont-elles amenées à être remplacées par la technologie et la robotique ? Ou bien la composante humaine qui caractérise la pratique du droit – et sa force de jugement, de créativité et d'émotion – est-elle vouée à préserver notre rôle ?

### Dispositions alternatives

Les clients les plus avertis négocient de plus en plus des accords spécifiques sur les honoraires hors du cadre habituel des honoraires au temps passé ou des honoraires forfaitaires. Certains sont en quête de nouvelles structures de cabinet, comme le regroupement de services juridiques avec d'autres services commerciaux tels que la comptabilité, le conseil, les relations publiques ou la fiscalité. Ces services peuvent être proposés par une seule entité ou par des sociétés affiliées étroitement liées. Les nouveaux accords sur les honoraires et les

nouvelles configurations de cabinets d'avocats soulèvent des questions au regard des codes d'éthique et des règlements en vigueur.

### Arbitrage

L'arbitrage international est en plein essor. Les clients impliqués dans des transactions mondiales sont en effet bien souvent réticents à se soumettre aux tribunaux étatiques de l'autre partie pour régler leurs litiges. Mais l'arbitrage n'est pas statique. Le marché appelle des arbitrages de plus en plus fréquents, et de nouvelles institutions d'arbitrage font régulièrement leur apparition. La médiation devient un outil essentiel, comme en témoigne la Convention de Singapour sur la Médiation, qui prévoit l'exécution spontanée des accords transfrontaliers en résultant.

### Transactions transfrontalières et litiges

Les avocats sont aujourd'hui confrontés à une réalité : tous les contrats et différends – ou presque – sont susceptibles de soulever des questions d'ordre transnational. Si le choix de la loi applicable et de clauses similaires tendent à réduire l'incertitude, des inquiétudes subsistent quant à la compétence, l'ordre public, l'incohérence des réglementations nationales et les procédures parallèles devant différents tribunaux. En un sens, nous sommes tous tenus d'être des avocats « internationaux » et d'avoir une compréhension de base des implications transfrontalières des transactions et des litiges.

### Applications mobiles

Les réseaux sociaux et professionnels sur smartphones et autres modifient la pratique du droit, de la même manière qu'elles ont modifié le paysage économique, politique et social. Les faits « déformés » ou « erronés » étant omniprésents, toute personne possédant un clavier peut formuler un avis juridique, tenter d'influencer un client ou d'influer sur une procédure. Les questions abondent concernant l'utilisation probante des messages, la responsabilité des plateformes de sites Web concernant les déclarations faites par les utilisateurs,

les préoccupations en matière d'antitrust et de monopolisation, et la confidentialité des données, un domaine de pratique à part entière. La controverse entourant le rôle que jouent les géants des réseaux sociaux dans la gouvernance nationale continuera d'ébranler de nombreuses juridictions.

### Accès à la justice

Plus urgent encore, les avocats du monde entier constatent les menaces croissantes qui pèsent sur l'État de droit et leur entrave à l'indépendance des avocats et des juges. Certains gouvernements prétendent faire progresser l'État de droit mais ne font qu'en déformer la définition pour que l'on adhère aveuglément aux lois qu'ils dictent, sans tenir compte de l'équité matérielle ou procédurale ni même des droits de l'homme. Ils privent ainsi les communautés de leurs droits et persécutent les avocats qui pratiquent le droit, en particulier ceux qui défendent des positions impopulaires. Enfin, ils punissent les juges pour des jugements défavorables au gouvernement. Ces attaques indéfendables contre l'accès des citoyens à la justice représentent pour la profession juridique le plus grand défi auquel nous ayons été confrontés depuis des décennies.

\*\*\*

Alors que nous entrons dans une nouvelle décennie, les transformations s'amplifient et la profession juridique est loin d'être épargnée par celles-ci. Les capacités d'adaptation et d'innovation offrent des possibilités dont il faut se saisir. Mais nos valeurs, notre éthique et nos principes fondamentaux, eux, doivent demeurer. Aussi, en cette période charnière de notre histoire, l'ambition ultime de l'UIA et de ses membres est de travailler ensemble pour aider les professionnels du droit du monde entier à naviguer dans un paysage en constante évolution tout en restant fidèles à leurs obligations professionnelles séculaires et à eux-mêmes.

Jerome ROTH  
Président de l'UIA  
president@uianet.org

# Editorial del Presidente

## Cambio y estabilidad: El papel de la UIA

### I Jerome ROTH

Cuanto más vemos cuestionarse los postulados fundamentales del ejercicio del derecho en todo el mundo, y cuanto más nos enfrentamos los abogados a nuevos retos conforme nos adentramos en una nueva década, más importante resulta la UIA para cada uno de nosotros.

Como Presidente de la UIA, ya he tenido el privilegio de reunirme con los responsables de asociaciones de abogados del planeta enfrentados a preocupaciones parecidas en este comienzo de 2020, en una época de plena mutación. Pienso en algunas de las cuestiones más importantes como las «6 aes» (en inglés, todas ellas empiezan por A). Cada una presenta sus riesgos, pero también oportunidades para un compromiso renovado, y todas dan más relevancia al papel de la UIA.

### Inteligencia artificial o IA

La llegada de la IA, que fue tema de nuestro Congreso de Luxemburgo, fascina y preocupa a los abogados de todo el mundo. ¿La tecnología y los robots sustituirán a los abogados y los jueces realizando las funciones que ellos desempeñan? (Por ejemplo, con el análisis informático de antecedentes para encontrar respuestas basadas en datos a cuestiones jurídicas.) ¿O el elemento humano de la abogacía – juicio, creatividad y emoción – preservará nuestro papel?

### Contratos alternativos

Los clientes exigentes cada vez demandan más unos acuerdos de honorarios flexibles en lugar de los acuerdos convencionales de honorarios fijos o por horas. Algunos buscan nuevas estructuras de bufetes, como las que aúnan servicios jurídicos con otros servicios para empresas, como contabilidad, consultoría, relaciones públicas o fiscalidad. Estos servicios puede prestarlos una misma entidad u pueden ofrecerse a través de socios colaboradores. Los nuevos acuerdos de tarifas y configuraciones de bufetes de abogados plantean preguntas en relación con los códigos éticos y la normativa reguladora.

### Arbitraje

El arbitraje internacional está en auge, pues los clientes con transacciones internacionales se muestran recelosos ante la idea de someterse a los tribunales nacionales de la otra parte. Pero es difícil que el arbitraje sea estático. El mercado para atraer arbitrajes es robusto y periódicamente aparecen nuevas instituciones arbitrales. La mediación se está convirtiendo en una herramienta fundamental, tal como refleja la Convención sobre Mediación de Singapur, que establece la ejecución directa de los contratos de liquidación transfronteriza. El arbitraje se extiende a categorías aún más amplias, y vemos una evolución constante en áreas como la fundamentación en precedentes, las diferencias entre el enfoque del derecho civil y el derecho común, y el recurso a peritos y la preparación de testigos.

### Transacciones y litigios transfronterizos

Los abogados se enfrentan ahora a la realidad de que casi todos los contratos y litigios pueden presentar cuestiones transnacionales. A pesar de la elección del derecho y otras cláusulas similares que tratan de reducir la incertidumbre, se plantean preguntas sobre la jurisdicción, las políticas públicas, la incoherencia entre reglamentos nacionales, y los procedimientos paralelos ante distintos tribunales. En realidad, a todos se nos exige que seamos abogados «internacionales» y que tengamos unas nociones básicas de las implicaciones transfronterizas de los contratos y litigios.

### Aplicaciones

Las aplicaciones multimedia sociales y profesionales en teléfonos móviles y otros dispositivos están modificando el ejercicio del derecho, puesto que han alterado el panorama económico, político y social. Con información «alternativa» o «falsa» presente en todas partes, cualquiera que tenga un teclado a mano puede dar una opinión jurídica, tratar de persuadir a un cliente o de influir en un procedimiento. Surgen un montón de preguntas acerca del uso probatorio de las

publicaciones en redes, la responsabilidad de las plataformas web en relación con las declaraciones realizadas por los usuarios, las cuestiones relativas a la monopolización y las leyes antimonopolio, y la privacidad de los datos, que constituye una área de ejercicio en sí misma. La controversia en torno al papel que desempeñan los gigantes de las redes sociales en el gobierno nacional seguirá afectando a muchas jurisdicciones.

### Acceso a la justicia

Especialmente urgente es el hecho de que los abogados de todo el mundo ven cómo crecen las amenazas al Estado de derecho y la privación de la independencia de los abogados y los jueces. Algunos gobiernos sostienen que promueven el Estado de derecho distorsionando su definición para convertirla en una adhesión ciega a las leyes que dictan, ignorando la equidad sustantiva o procesal o los derechos humanos. Privan a las comunidades de sus derechos. Persiguen a los abogados por ejercer el derecho, especialmente a quienes defienden posturas impopulares. Y castigan a los jueces por las sentencias que el gobierno desaprueba. Estos ataques insostenibles al acceso de los ciudadanos a la justicia presenta para la abogacía el mayor reto al que se ha enfrentado en décadas.

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Ahora que entramos en esta nueva década, los cambios se están acelerando. La abogacía no es inmune a ellos ni mucho menos. La adaptación y la innovación brindan oportunidades. Pero nuestros valores, nuestra ética y nuestros principios fundamentales son inmutables. El mayor llamamiento de la UIA y sus miembros en este momento de inflexión en nuestra historia es a trabajar juntos para ayudar a los profesionales del derecho de todo el mundo a orientarse en un panorama cambiante, manteniéndose fieles a sus obligaciones profesionales de siempre y a sí mismos.

Jerome ROTH  
Presidente de la UIA  
president@uianet.org



Union Internationale des Avocats  
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# 64° CONGRESO DE LA UIA

# GUADALAJARA

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28 DE OCTUBRE - 1° DE NOVIEMBRE DE 2020

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## Message from the Editor-in-Chief

I Nicole VAN CROMBRUGGHE

Have the long winter evenings begun to weigh you down? Well, here's a new issue of the *Juriste* to cheer you up and awaken your neurons! And it will also remind you of the highlights and spotlights of our Luxembourg Congress. What beautiful memories we have of this Congress – be it the festivities it offered us or its working sessions, the main themes or commission sessions! We must thank the organisers and, in particular, the Luxembourg Congress Organising Committee. We will also not forget the emotional words shared by the outgoing President as he handed over the torch to his successor. Many thanks to Issouf for the work accomplished and thanks, Jerry, for your first speech, so full of enthusiasm and gusto. You can count on UIA's members to support your efforts.

The current issue – the last of the past year – offers you particularly interesting contributions in a wide variety of fields.

In particular, the article by Camille Lucotte and Martin Pradel (*Condamnation à la peine capitale de jihadistes français détenus en Irak: l'obsession sécuritaire au mépris du droit international*) deals with the fate of the French jihadists who were allegedly transferred to Iraq with the help of the French State, in total contradiction with its international commitments, since they risk the death penalty there. In Belgium, the repatriation of Belgian jihadists, especially their family members, also poses a problem. The Belgian State has recently been forced to pay a fine of EUR 5,000 per day of delay to ten children trapped in a refugee camp in Syria. With regard to the jihadists themselves, at the end of October 2019, our Prime Minister's office replied to a statement by the American ambassador in Brussels, declaring that Belgium's stand had not changed, being one of "judging foreign terrorist fighters as close as possible to the scene of their crimes" – in other words, in Iraq.

This issue also offers you an article by Rosalia Perera Gutierrez (*La Comunidad*

*LGBTI: avances y retrocesos*) on another hot and controversial topic: the rights of the LGBT community and the progress made so far, but also the setbacks faced. The author highlights the progress that remains to be made if the fundamental rights of this community's members are to be respected throughout the world.

Among the excellent articles published in the "Legal Practice" section, we would like to highlight the article by Barbara Bandiera (*Green Finance and Fighting Climate Change*), which broaches global initiatives aimed at making growth more sustainable in a context that has become unpredictable, if not precarious, due to climate change and the depletion of resources. Let us hope that this does not remain just wishful thinking – even climate sceptics have everything to gain from measures to promote the sustainability of positive economic development.

Although there is an article drafted by Barbara J. Gislason, a member of the *Juriste's* Editorial Committee, the team would be remiss if it failed to mention Part I of the article, which deals with the highly topical – and challenging – issue of the impact of virtual and augmented reality on human life. In its first part, particular attention is paid to their impact on health sciences (*Health Science, Virtual and Augmented Reality, and Legal Frameworks: What is the Future?*). No doubt you will be looking forward to "Season 2" as well, which will be published in the next edition.

Finally, some news from the *Juriste's* team. We would like to welcome our new members: for the "Human Rights and Defence" section, Romina Bossa Abiven from the UIA Centre, who has already been of great help in the past, and Nadine Dossou (Benin) who will be joining the team to support Gustavo Salas Rodriguez (Mexico), for the "Legal Profession" section, Marie-Daphné Fishelson (France) and Aboubacar Fall (Senegal) who will join Pierluca Degni (Switzerland) for the "Legal Practice" section, and Steven Richman (USA) and

Christoph Örtel (Germany) will work alongside Marc Gallardo (Spain). In addition, Thomas Rudkin (UK) will represent young lawyers. Paolo Lombardi shall continue alone faithfully in his post, looking after the "UIA News" section and making sure that you have news of our association's many activities. Finally, Barbara J. Gislason and I will continue to play our respective roles as Deputy Editor-in-Chief and Editor-in-Chief.

The UIA Centre's team will also continue to provide us with its valuable assistance and we are very grateful to Marie-Pierre Richard, Marie-Pierre Liénard and Anne-Marie Villain, without whom the *Juriste* would not be in your hands.

As you will have noticed from the Editorial Committee's membership, we have taken care to diversify the team's geographical representation. Of course, we are still far from having become the "dream team", especially in this respect, particularly since Asia does not yet have a representative, but we do not despair of being able to add to our team in the future. In any case, the current membership should already make it possible to publish articles covering a large part of the globe. That being said, we will do our best, as always, to place a magazine worthy of our association in your hands. We would like to once again remind you that all contributions are welcome. So take up your pens, or rather – let's be modern – your keyboards!

Nicole VAN CROMBRUGGHE  
Chief Editor – *Juriste International*  
[n.vancrombrugghe@faberinter.be](mailto:n.vancrombrugghe@faberinter.be)

# Message du rédacteur en chef

I **Nicole VAN CROMBRUGGHE**

Les longues soirées d'hiver commencent à vous peser ? Qu'à cela ne tienne, voici une nouvelle édition du *Juriste* pour vous ragailardir et titiller vos neurones ! Pour vous rappeler les lumières et les flonflons de notre Congrès à Luxembourg aussi. Que de beaux souvenirs nous a réservés ce Congrès : qu'il s'agisse des festivités qu'il nous a offertes ou des séances de travail ; que ce soit dans le cadre des thèmes principaux ou des sessions des commissions. Merci aux organisateurs et en particulier au comité d'organisation luxembourgeois. Nous n'oublierons pas non plus l'émotion du Président sortant lors de la passation du flambeau à son successeur. Merci à Issouf pour le travail accompli et merci à Jerry pour ce premier discours plein d'enthousiasme et d'ardeur. Tu peux compter sur les membres de l'UIA pour soutenir ton effort.

Le numéro actuel, le dernier de l'exercice écoulé, vous réserve des contributions particulièrement intéressantes dans des domaines très divers.

Ainsi, notamment, l'article de Camille Lucotte et Martin Pradel (*Condamnation à la peine capitale de djihadistes français détenus en Irak : l'obsession sécuritaire au mépris du droit international*) aborde la problématique du sort de djihadistes français qui auraient été transférés en Irak avec le concours de l'État français en totale contradiction avec ses engagements internationaux dès lors qu'ils y risquent la peine de mort. En Belgique, le rapatriement des djihadistes belges et surtout des membres de leur famille pose problème. L'État belge vient ainsi récemment d'être contraint à verser une astreinte de 5 000 euros par jour de retard aux dix enfants bloqués dans un camp de réfugiés en Syrie. En ce qui concerne les djihadistes eux-mêmes, le cabinet de notre Première ministre répliquait fin octobre 2019 à une déclaration de l'ambassadeur américain à Bruxelles que la position belge n'a pas changé, qui consiste « à juger les combattants terroristes étrangers au plus près du lieu de leurs crimes », soit en Irak.

Dans ce numéro, vous trouverez également un article consacré par Rosalia Perera Gutierrez (*La Comunidad LGBTI : avances y retrocesos*) à un autre sujet brûlant et controversé, les droits de la communauté LGBT et les avancées, mais aussi les reculs, rencontrés dans ce domaine. L'auteur y souligne les progrès qui doivent encore être accomplis pour que les droits fondamentaux des membres de cette communauté soient respectés partout dans le monde.

Parmi les excellents articles publiés dans la section « Pratique du droit », nous épinglerons celui de Barbara Bandiera (*Green Finance and Fighting Climate Change*) qui développe les initiatives prises au niveau mondial en vue de rendre la croissance plus durable dans un contexte rendu imprévisible, sinon précaire, compte tenu du changement climatique et de l'épuisement des ressources. Espérons qu'il ne s'agisse pas de vœux pieux : même les climat-sceptiques ont tout à gagner à voir mises en place des mesures visant à favoriser la pérennité d'une évolution économique positive.

Quitte à passer pour immodeste puisque cet article est écrit par l'un des membres du comité de rédaction du *Juriste*, Barbara J. Gislason, l'équipe s'en voudrait de passer sous silence la première partie de l'article qu'elle consacre à la question hautement actuelle – et interpellante – de l'impact de la réalité virtuelle et de la réalité augmentée sur la vie humaine. Dans cette première partie, une attention particulière est apportée à leur incidence sur les sciences de la santé (*Health Science, Virtual and Augmented Reality, and Legal Frameworks : What is the Future?*). Nul doute que vous attendrez avec impatience la « saison 2 », qui sera publiée dans la prochaine édition.

Enfin, quelques nouvelles de l'équipe du *Juriste*. Elle accueille de nouveaux membres: pour la section « Droits de l'Homme et la Défense », Romina Bossa Abiven du Centre UIA qui fut déjà par le passé une aide précieuse, et Nadine Dossou (Bénin), viendront appuyer

Gustavo Salas Rodriguez (Mexique), pour la section « La Profession d'Avocat », Marie-Daphné Fishelson (France) et Aboubacar Fall (Sénégal) viennent rejoindre Pierluca Degni (Suisse) et pour la section « Pratique du Droit », Steven Richman (USA) et Christoph Örtel (Allemagne) seront aux côtés de Marc Gallardo (Espagne). En outre, Thomas Rudkin (Royaume-Uni) représentera les jeunes avocats. Paolo Lombardi reste fidèlement seul au poste pour assurer la rubrique « Vie de l'UIA » et veiller à ce que vous ayez des nouvelles des multiples activités de notre association. Enfin, Barbara J. Gislason et moi conserveront, encore cette année, nos rôles respectifs de Rédacteur en Chef Adjoint et de Rédacteur en Chef.

L'équipe du Centre UIA continuera aussi à nous accorder son concours précieux et nous remercions vivement Marie-Pierre Richard, Marie-Pierre Liénard et Anne-Marie Villain sans lesquelles le *Juriste* ne serait pas entre vos mains.

Vous aurez constaté, à la lecture de la composition du Comité de Rédaction, que nous avons veillé à diversifier la représentation géographique. Bien sûr nous sommes encore loin de la « dream team » en particulier sur ce plan, notamment parce que l'Asie n'a pas encore de représentant, mais nous ne désespérons pas de pouvoir encore enrichir notre équipe. En tout cas, la composition actuelle devrait déjà permettre d'assurer la publication d'articles couvrant une large partie du globe. Cela étant, nous ferons de notre mieux, comme à chaque fois, pour mettre entre vos mains une revue digne de notre association. Nous vous rappelons que toutes les contributions sont les bienvenues. A vos plumes donc ou plutôt, soyons modernes, à vos claviers !

Nicole VAN CROMBRUGGHE  
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# Mensaje del Redactor Jefe

**I Nicole VAN CROMBRUGGHE**

¿Las largas tardes invernales empiezan a sumirle en un letargo? ¡Pues aquí tiene una nueva edición del *Juriste* para reactivar y hacer chisporrotear sus neuronas! Y también para recordarle las luces y los compases de nuestro congreso en Luxemburgo. Cuántos buenos recuerdos nos ha dejado este congreso: tanto por las fiestas que nos ofreció como por las sesiones de trabajo, tanto en los temas principales como en las sesiones de las comisiones. Gracias a los organizadores, y en especial al comité organizador luxemburgués. No olvidaremos tampoco la emoción del Presidente Saliente cuando le pasó el testigo a su sucesor. Gracias a Issouf por el trabajo realizado y gracias a Jerry por ese primer discurso lleno de entusiasmo y pasión. Puedes contar con los miembros de la UIA para apoyarte.

El número actual, el último del ejercicio terminado, les reserva unas contribuciones especialmente interesantes en muy diversos ámbitos.

Concretamente, el artículo de Camille Lucotte y Martin Pradel (*Condamnation à la peine capitale de djihadistes français détenus en Irak: l'obsession sécuritaire au mépris du droit international*) aborda la problemática del destino de los yihadistas franceses que habrían sido trasladados a Irak con la ayuda del Estado francés de una forma que contradice totalmente sus compromisos internacionales, dado que en ese país se arriesgan a la pena de muerte. En Bélgica, la repatriación de los yihadistas belgas y, sobre todo, de los miembros de su familia, plantea un problema. Hace poco, se obligó al Estado belga a pagar una multa de 5000 euros por día de retraso a los diez menores bloqueados en un campo de refugiados en Siria. Por lo que respecta a los propios yihadistas, el gabinete de nuestro Primer Ministro respondía a finales de octubre de 2019 a una declaración del embajador americano en Bruselas que la posición belga no ha cambiado, que consiste en «juzgar a los combatientes terroristas extranjeros junto a su lugar del crimen», es decir, en Irak.

En este número, encontrarán también un artículo (*La Comunidad LGBTI: avances y retrocesos*) que Rosalía Perera Gutiérrez dedica a otro tema candente y controvertido, los derechos de la comunidad LGBTI y los avances, pero también los retrocesos, que se han producido al respecto. La autora destaca los avances que deben realizarse todavía para se respeten los derechos fundamentales de los miembros de esta comunidad en todo el mundo.

Entre los excelentes artículos publicados en la sección «Ejercicio del derecho», recordaremos aquí el de Barbara Bandiera (*Green Finance and Fighting Climate Change*), que desarrolla las iniciativas emprendidas a escala mundial para hacer el crecimiento más sostenible en un contexto que es ya imprevisible, si no precario, teniendo en cuenta el cambio climático y el agotamiento de los recursos. Esperemos que no sean meras buenas intenciones: hasta los escépticos del clima saldrán ganando, a la luz de las medidas implantadas para favorecer la perennidad de una evolución económica positiva.

Aun a riesgo de pecar de inmodestia, dado que este artículo lo escribe Barbara J. Gislason, miembro del comité de redacción del *Juriste*, el equipo no querría dejar de reseñar la primera parte del artículo que dedica a la cuestión muy candente – y urgente – del impacto de la realidad virtual y de la realidad aumentada para la vida humana. En esta primera parte, se presta especial atención a su repercusión en las ciencias de la salud (*Health Science, Virtual and Augmented Reality, and Legal Frameworks: What is the Future?*). No cabe duda de que esperarán impacientes la «2.ª temporada», que se publicará en la próxima edición.

Por último, les contamos algunas novedades del equipo del *Juriste*, que recibe a nuevos miembros: para la sección «Derechos Humanos y de la Defensa», Romina Bossa Abiven, del Centro UIA, cuya ayuda fue ya muy valiosa en el pasado, y Nadine Dossou (Benin) apoyarán a Gustavo Salas Rodríguez

(México), en la sección «La abogacía», Marie-Daphné Fishelson (Francia) y Aboubacar Fall (Senegal) se unen a Pierluca Degni (Suiza), y para la sección «Ejercicio del derecho», Steven Richman (EE. UU.) y Christoph Örtel (Alemania) trabajarán con Marc Gallardo (España). Además, Thomas Rudkin (Reino Unido) representará a los jóvenes abogados. Paolo Lombardi se mantiene fielmente solo en el puesto para desarrollar la sección «Vida de la UIA» y asegurarse de que tengan noticias de las múltiples actividades de nuestra asociación. Por último, Barbara J. Gislason y yo seguiremos cumpliendo un año más nuestras respectivas funciones de Redactora Jefa Adjunta y Redactora Jefa.

El equipo del Centro UIA seguirá prestándonos su inestimable ayuda y deseamos expresar nuestro profundo agradecimiento a Marie-Pierre Richard, Marie-Pierre Liénard y Anne-Marie Villain, sin quienes ustedes no tendrían el *Juriste* en sus manos.

Tal como habrán podido comprobar leyendo la composición del Comité de Redacción, nos hemos esforzado en diversificar la representación geográfica. Estamos aún lejos sin duda del «dream team», especialmente en este plano, porque Asia todavía no tiene representación, pero no cejamos en nuestro empeño de enriquecer todavía más nuestro equipo. En todo caso, la composición actual debería permitir ya publicar artículos que abarquen gran parte del mundo. Así pues, como siempre, haremos todo cuanto esté en nuestras manos para hacerles llegar una revista digna de nuestra asociación. Les recordamos que todas las contribuciones son bienvenidas. ¡Así que no duden en ponerse a escribir!

Nicole VAN CROMBRUGGHE  
Redactora Jefe – *Juriste International*  
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UIA News  
Actualités de l'UIA  
Novedades de la UIA





# Retour sur le **congrès 2019**

6-10 NOVEMBRE 2019

# LUXEMBOURG



## Remerciements

L'UIA remercie le Grand-Duché de Luxembourg d'avoir accueilli si chaleureusement son 63<sup>e</sup> congrès. Ce fut un honneur qu'il soit placé sous le Haut Patronage de Son Altesse Royale le Grand-Duc, et que Son Altesse Royale le Grand-Duc Héritier, le Prince Guillaume, accepte d'assister à la cérémonie d'ouverture du congrès. L'UIA remercie également Xavier Bettel, Premier ministre du Luxembourg, d'avoir prononcé un vibrant discours de bienvenue à la Philharmonie.

Un grand merci enfin au Barreau de Luxembourg, à François Prum, Président du congrès, Alain Grosjean, Président du Comité organisateur et à l'ensemble des membres du comité national luxembourgeois, sans qui la réussite de ce congrès n'aurait pas été possible.



Comité national luxembourgeois



Xavier Bettel, Premier ministre du Luxembourg



S.A.R. le Grand-Duc Héritier



## Networking Day

The UIA Networking Day was an opportunity to meet lawyers with the same regional and language affinities in a friendly atmosphere. The participants were able to attend seven different forum sessions and talk to lawyers who are facing the same issues.

## Opening Ceremony

In the spirit of UIA tradition, several officials and public figures from Luxembourg and other countries delivered welcome speeches and keynote addresses focused on innovation, business and investment. The speakers included Pierre Albouze, the Deputy Secretary General of the European Investment Bank, Norbert Becker, an investor and manager, Lydie Polfer, the Mayor of the City of Luxembourg, and François Kremer, the President of the Luxembourg Bar Association.

The speeches were interspersed with performances by the Estro Armonico Chamber Orchestra and the Lux Vocalis Choir, conducted by Thomas Raoult.



## UIA/LexisNexis Rule of Law Prize Awarded to Bertrand Favreau

The French lawyer, Bertrand Favreau, a former President of the Bordeaux Bar Association (France), the President of the European Bar Human Rights Institute (IDHAE), and the President and founder of the Jury of the Ludovic-Trarieux International Human Rights Prize, won the 2019 UIA/LexisNexis Rule of Law Prize.

Through this award, the UIA and LexisNexis recognised Mr Favreau's tireless efforts and initiatives to highlight attacks against the legal profession and support fellow lawyers who are being prosecuted throughout the world.



## Projection du documentaire « Enfants reporters de guerre »

En présence de la réalisatrice yéménite Khadija Al-Salami - lauréate du Prix AMADE (Association mondiale des amis de l'enfance) et du Prix CICR (Comité international de la Croix-Rouge) au dernier festival de Monte-Carlo.

La projection a été suivie d'un débat avec plusieurs intervenants.

L'UIA vous propose d'adresser un don à l'association ALBARADONI, Solidarité France Yémen, 1 rue du tramway, 67114 Eschau.  
Contact : [segoleneblondelbelier@hotmail.fr](mailto:segoleneblondelbelier@hotmail.fr)

## Audience privée au Palais grand-ducal

Son Altesse Royale le Grand-Duc a reçu une délégation de l'UIA le 7 novembre.





# Working sessions



## Publicaciones

### UIA – LexisNexis

El 7 de noviembre, la UIA y LexisNexis presentaron los nuevos libros de su colección conjunta:

Las publicaciones se pueden comprar en la página web de LexisNexis.



#### Legal Aspects of Artificial Intelligence

Editores: Jérémy Bensoussan y Jean-François Henrotte



SCAN ME

#### Drafting Effective International Contracts of Agency and Distributorship – A Practical Handbook

Editor: Horst Becker



SCAN ME

#### International Public Procurement

Editor: Pedro Melo



SCAN ME



### Informal Evening

The informal evening took place at the Rockhal, a concert hall located on a former industrial site in Belval, opposite the ruins of the Grand Duchy's last two blast furnaces.





## Premio Internacional de Derechos Humanos Ludovic Trarieux

En una emotiva ceremonia, el abogado colombiano Rommel Durán Castellanos recibió el Premio Internacional de Derechos Humanos Ludovic Trarieux 2019 de manos del Presidente Issouf Baadhio.

Uno a uno, los representantes de las instituciones que forman parte del Jurado del Premio rindieron homenaje a la valentía y al compromiso que ha demostrado Rommel Durán Castellanos para ejercer la abogacía a pesar de las amenazas y detenciones arbitrarias de las que ha sido víctima y de los riesgos que aún corre.

Asimismo se presentó la mención especial al Colegio de Abogados del Año que distinguió en 2019 el coraje y la dedicación del Colegio de Abogados de Crimea.



## Dîner de Gala

Le dîner de gala s'est déroulé au Mudam, Musée d'Art Moderne Grand-Duc Jean. Situé dans le Park Draï Eechelen, il est l'œuvre de l'architecte sino-américain Ieoh Ming Pei. Inauguré en 2006, le Mudam a pour mission de promouvoir l'art emblématique de notre époque. Un cadre d'exception pour un dîner fastueux. C'est la toute première fois que le Mudam accueillait ce type d'événement.



## UIA Congress Awards

### Commission de l'année

Le Prix de la commission de l'année a été attribué à la commission investissements étrangers présidée par Eduardo Lorenzetti Marques. Ce prix récompense le travail scientifique de la commission tout au long de l'année 2019.



### Comité nacional del año

El premio del comité nacional del año fue entregado al comité nacional italiano presidido por Claudio Coggiatti. Este premio recompensa los esfuerzos del comité nacional al contribuir al desarrollo de la UIA en su país.



## UIA Resolution and Statement

The UIA adopted a resolution and issued a statement during the Congress:



### Resolution on the Situation in Poland

In this resolution, the UIA Governing Board expressed its grave concern over the alarming attempts to weaken the rule of law in numerous regions of the world, and especially in Poland.



### Statement Regarding Pension Reform Efforts

In this statement, the UIA expressed its concern over efforts made by several national governments to make drastic changes to pension and retirement systems, which will affect lawyers.

## Jerome Roth succeeds Issouf Baadhio as UIA President



Jerome Roth took office at the closing ceremony on 9 November in Luxembourg. He is a litigation lawyer practicing in San Francisco, California, United States. He is a member of both the New York and California bars, and he has been in private practice since 1991 and at his current law firm Munger, Tolles & Olson for 24 years since 1995.



Jerome Roth joined the UIA almost 20 years ago, and he has been active in the association's leadership for over a decade, being respectively President of the Criminal Law Commission and Co-director of the Human Rights and Protection of Lawyers department.

"I believe that lawyers bear a unique responsibility to advance international information exchange and understanding, including learning from other countries' experiences; to serve their clients' needs consistent with the rule of law and respect for the world's legal systems; and to protect the independence and freedom of lawyers and judges around the globe", he said during his speech.

## Luxembourg Congress Figures

- 1,000 participants
- 72 countries represented
- 67 sponsors (15 exhibitors)
- 314 speakers
- 54 working sessions

## Testimonies

*"The UIA gives me the possibility to broaden my knowledge of the world society of lawyers. It brings me new fantastic ideas on how to do business in Poland and what to implement here to provide clients and partners with the highest standards of legal work, communication and overall service. In fact, UIA membership changed my life, because I met partners here with whom I established an international law firm, which is currently present in 16 countries."*

**Malgorzata Krzyzowska**  
(Aliant Krzyzowska) Poznan, Poland

*"The Congress was a great way to network with lawyers from all over the world."*

**Geneviève Tania Borgat**  
(Cabinet Borgat & Associés) Port-au-Prince, Haiti

*"The Congress was excellent, I would like to participate next year."*

**Yoko Kamiko**  
(Kamiko Law Office) Tokyo, Japan

*"The young lawyer's session was perfectly planned. A perfect combination of young talent and seniority. The topics and discussions raised by the speakers allowed the audience to interact with each other making a successful and useful session."*

**Isidro Niñerola Torres**  
(Dawson Cornwell) London, United Kingdom

*"We are a growing but awesome organization blessed with dedicated staff who keep things together for us. Overall, the Luxembourg Congress was very well put together thanks to the local hosts and the coordination from UIA Secretariat."*

**Olufemi Sunmonu**  
(Aliant Qais Conrad Laureate) Lagos, Nigeria



- ◆ Do not forget to fill out the online questionnaire!



- ◆ Access the pictures & the videos

- ◆ Save the date for the UIA Congress in Guadalajara, Mexico, which will take place from October 28 to November 1, 2020! #UIAGDL



# 63<sup>e</sup> congrès UIA LUXEMBOURG



## Inaugural Speech of President Jerome Roth

I Jerome ROTH

Good evening, ladies and gentlemen.

Dear Colleagues:

What an enormous honor to stand before you here tonight at the center of this extraordinary hemicycle at the center of this beautiful city at the center of Europe.

After these past days of the truly outstanding work by our Congress participants and headquarters staff, after the graciousness of our *Luxembourgeois* hosts, after new and rekindled friendships, I am extremely proud of and humbled by the trust you place in me now.

I am also very excited to begin my term as President after the inspiring example set by my good friend and mentor Issouf Baadhio. As I said at the General Assembly, working with you, Issouf, has been of the great privileges of my professional life. Who would have thought a lawyer from California and one from Burkina Faso would become the closest personal colleagues – that is UIA in a nutshell.

And how gratifying to begin my term at one of the most vibrant points in UIA's 92 years, active, engaged, full of promise and ready to confront the expectations of new generations of lawyers.

But my friends, we have other, more ominous realities to confront.

It would betray the frankness this occasion and venue demand if I did address the stark challenges we face as lawyers at this

moment in history, challenges that have been a theme of this Congress.

The world is struggling. The profession we practice, the legal environment we inhabit, the values we cherish, are under siege. The historic arc towards global cooperation and increased acceptance of the rule of law is shifting beneath our feet. In fact, we face the gravest risks to the legal order many of us have witnessed in our lifetimes. And responding to those risks firmly and without compromise must define our responsibilities as lawyers and as UIA members.

Headlines this past year, even this past week, remind us that democratic values and the rule of law are under assault. Disillusionment has tipped many nations towards populism and nationalism, threatening legal norms our predecessors built out of the ashes of two world wars.

**Governments willfully ignore these lessons of the past and instead adopt a cynical appeal to narrow, nationalistic instincts.**

Governments willfully ignore these lessons of the past and instead adopt a cynical appeal to narrow, nationalistic instincts. They scorn the idea that nations should care about and learn from one another, insisting only their own countries matter.

Many governments make clear they have no use for the rule of law. Worse yet, they distort the phrase by redefining it,

insisting that strict adherence to the edicts they issue in the name of their agendas is what the rule of law requires. They ignore fundamental principles of electoral fairness and disenfranchise those they disagree with. They dismiss the core principle of separation of powers and try to undermine the judiciary, the branch least able to protect itself and most essential to the rule of law.

Beyond that, we see a world in self-destructive conflict. Impeachment proceedings and debased political discourse in my country the United States; Britain's tortuous struggles over its departure from the EU; violent protests throughout the world in Paris, Hong Kong, Santiago, Barcelona, and Beirut. We see deep frustration and protests in Africa; increasingly anti-democratic tendencies in Russia and Brazil, in Poland and Hungary; territorial disputes and religious tensions in India; and scandal and political shocks around the world – in Canada,

in Israel. One of our colleagues told our General Assembly on Wednesday of the dire situation in parts of Latin America.

As we observe this historic dislocation, we have to ask ourselves an essential question – one that nags at me and that I intend to make the center of my presidency – because I believe we in the UIA must strive to answer it together.

**What is the role of the lawyer in a world that is turning away from democratic values, global cooperation and the rule of law and is slipping towards nationalism, populism, and authoritarianism?**

The question is not theoretical, instead it affects each of us personally.

Quand j'étais à l'université, j'étais fasciné par l'ouvrage d'un auteur français, Julien Benda, intitulé *La trahison des clercs* ou « *Treason of the Intellectuals* » en anglais. Le livre insistait sur cette question : où se trouvaient les avocats au moment où le monde sombra dans le fascisme pendant les années 30 ? Je n'ai jamais pu oublier cet ouvrage – la grave interrogation adressée par l'auteur à la génération précédente exigeait une réponse, mais il n'y en avait bien sûr aucune.

Et aujourd'hui, j'imagine un futur auteur, qui n'est peut-être encore qu'un enfant, peut-être même un de nos enfants, écrivant en 2050 et posant la même question accusatoire: où étiez-vous, vous les avocats, en 2020 ? Qu'avez-vous fait pour protéger nos valeurs démocratiques, l'État de droit, et l'indépendance de la profession et du pouvoir judiciaire ?

La question s'impose à chacun de nous parce que nous sommes aussi tous des produits de la mondialisation dans son sens le plus large. Il est impossible de démêler notre interdépendance. Je viens de San Francisco en Californie, à plus de 9 000 kilomètres d'ici. Mais mes grands-parents sont arrivés aux États-Unis en provenance de Moldavie et de Pologne il y a 100 ans et n'ont jamais appris l'anglais. San Francisco s'est établie comme mission espagnole et est devenue mexicaine au début du dix-neuvième siècle. Au même moment, les marchands russes parcouraient la côte nord de la Californie: il y a d'ailleurs un vieux fort russe à proximité de mon domicile. Dix ans plus tard, la ruée vers l'or attirait des chercheurs du monde entier. Des travailleurs chinois et japonais se sont alors dirigés vers la Californie pour gagner leur vie ou y ont été amenés contre leur gré. Les Français, en quête de nouvelles opportunités après la révolution de 1848, sont arrivés en nombre. Les Italiens ont créé une grande partie de ce qui est aujourd'hui la ville de San Francisco, et l'une de nos entreprises fondatrices a été établie par un fils d'immigrants de Gênes. Le pionnier de notre industrie vinicole actuelle est un Hongrois qui a fondé une cave



[...] Nos histoires, la mienne et les vôtres, sont toutes entrelacées et nos préoccupations sont, par définition, mondiales.

dans la vallée de Sonoma. Et les Africains, descendants d'esclaves affranchis du sud et, plus tard, de nouveaux immigrants venus du continent, ont afflué vers San Francisco pour intégrer la vie politique et artistique de cette ville. Ma ville, mon pays, se sont vus façonner par des populations d'immigrants de tous les continents. En résumé, nos histoires, la mienne et les vôtres, sont toutes entrelacées et nos préoccupations sont, par définition, mondiales.

Personal as these questions are to us, however, we have to recognize that lawyers face inherent limitations in meeting the challenges we face.

Our principal goal is to zealously represent the interests of our clients. That goal can sometimes seem in conflict with protection of the rule of law. What if our client's interests would benefit from a personal attack on the judge in a matter or on the justice system more broadly?

And lawyers are not politicians. We are supposed to rise above politics. Entering the fray as partisans can seem inappropriate and even unethical.

We are also not homogenous and do not speak with one voice, nor should we. We come from Kinshasa and London, Tokyo and Sao Paolo. We are men, women, older, younger, liberal, conservative, straight and gay, wealthy and of more modest means.

Nor is our strength physical. It is more subtle. We have no armies, no police force, no enforcement power. We rely only on the power of advocacy and reason.

Al mismo tiempo, tenemos también puntos fuertes indiscutibles. Tenemos años de formación y experiencia. Tenemos el acceso a nuestros tribunales e instituciones de poder. Entendemos cómo funcionan nuestros gobiernos. Y tenemos códigos deontológicos que nos obligan a hacer lo que es correcto y honorable.

Gracias a nuestras fortalezas, creo que, en la UIA, tenemos misiones importantes que, espero, inspirarán nuestras actividades:

1. Dar sentido y sustancia al Estado de derecho, contribuyendo a definir su forma pero también su fondo, lo que incluye proteger el sistema electoral para determinar la voluntad de la mayoría, y garantizar la protección de los derechos de la minoría.

2. Comprometernos con el globalismo. Me refiero con esto a adoptar la actitud abierta necesaria para aprender unos de otros y considerar los intereses de otros países. Esta manera de pensar nos ofrece más posibilidades de mejorar el derecho y la humanidad que la construcción de barreras o la adhesión ciega a la convicción de que el único sistema correcto es el nuestro.
3. Proteger la independencia de nuestros jueces.
4. Y ponernos a prueba a nosotros mismos, y a nuestros clientes para asegurarnos de que sean compatibles con el Estado de derecho.

With this in mind, I plan to undertake a number of initiatives at the UIA this year.

First, I along with Jackie Scott and the extraordinary IROL team will be working to ensure that Rule of Law has real significance. Our organization has spent years working on a definition that comports with international standards including that of the United Nations, and we will not hesitate to hold governments accountable when they distort the concept.

Second, we will focus on the essential right to vote, including a joint project with the ABA and a special session at our next Congress in Guadalajara.

Third, we will work to enhance the participation of judges in the UIA and study ways that lawyers can help protect judicial independence and integrity.

Fourth, we will continue to exchange information, to learn from one another, through our commissions, national committees and valued bar association members, and through innovative new programs like UIAdvance for our law firm members and our new mentoring project to match early career lawyers with more experienced lawyers.

Fifth, we will focus on increasing diversity not just in our membership but in our leadership, not just national and geographic but gender, and minority groups – lawyers from less privileged backgrounds, LGBT lawyers and those with disabilities. Different perspectives from those kept out of the mainstream of our profession are essential to protecting our values.



Gracias a nuestras fortalezas, creo que, en la UIA, tenemos misiones importantes que, espero, inspirarán nuestras actividades.

All of this in the context of trying to answer the question: what is the role of the lawyer in the face of a world in turmoil? I intend to push that question wherever I travel on behalf of UIA and hope to have more concrete answers when we meet again next year in magnificent Guadalajara. I will be maintaining a blog through my travels and I hope you will join me there.

In the meantime, I want to thank all of you for your support and encouragement. In particular, let me thank my best friend in life, my partner Ray, who has helped me through more struggles and taken care of the homestead during more extended business and UIA travel than I care to remember;

- to my son Jeremy who always keeps me honest with humor and friendship;
- to my law firm Munger, Tolles & Olson which has supported me throughout my dedication of time and resources to UIA;
- and to all of you, my UIA colleagues and friends, the many I have dined, toured, laughed, and argued with, in places all over the world from estancias in Argentina to the shores of the Bosphorus, and especially those at the headquarters in Paris who strive to make everything our

far-flung organization does around the world appear seamless.

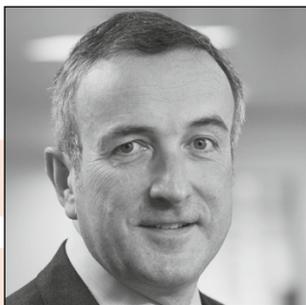
My fellow lawyers, the issues we face are immediate. We are facing a call to action. We cannot justify our special privileges if we do not fully embrace our responsibilities.

At the same time we are prepared. I am absolutely convinced and truly optimistic that we at the UIA can make an enormous difference in helping get the arc of history back on the right track. Let's have a ready answer for the inevitable question in a few decades – what did you lawyers do to protect democratic values and the rule of law at this difficult time? Let's seize the enormous opportunity UIA affords us to work together with firmness of purpose and with the benefit of the collegiality and friendship we enjoy.

I'm ready to roll up my sleeves and I know you are too.

Thank you very much and good evening.

Jerome ROTH  
UIA President  
president@uianet.org



# UIA International Bar Leaders' Senate meets in Luxembourg

*Use and impact of Artificial Intelligence (AI)*

**Robert BOURNS**

## Speakers

Hernan Colli, President of the Colegio de Abogados de la Plata, Argentina  
Naoki Idei, Secretary General of the Japan Federation of Bar Associations, Japan  
Joachim Bile-Aka, Past President of the Ordre des Avocats de Côte d'Ivoire  
Valentyn Gvozdiy, Vice-President of the Ukrainian National Bar, Ukraine  
Esther Montalvá, Madrid Bar Association, Spain

## Moderator

Robert Bourns, Past President of the Law Society of England & Wales, United Kingdom

The meeting was well attended by up to 42 members of the UIA, most of whom stayed throughout the 3.5 hours, receiving and then contributing to the discussion of the papers presented by our speakers.

Opening the meeting the Chair acknowledged that many commentators emphasise the prediction that AI will remove huge numbers of jobs by 2022. However he preferred to consider the use of AI as an opportunity, changing the way we work in practice, without altering the fundamental values of a lawyer in practice, their duties to clients, the administration of justice and the Rule of Law. In short, AI provides opportunities to grow our practices.

The meeting was pleased to receive varied presentations from our speakers.

Hernan Colli opened, recognising that the speed with which technology is developing, forcing change, creates fear in some, but urged that we should embrace the new reality and use it as a tool in practice, not a threat.

This theme was picked up by Joachim Bile-Aka, who expressed concern for inequalities in accessing systems, where physical infrastructure is unreliable or impaired, but went on to emphasise the universal use of mobile phones, providing access to data and information for a huge proportion of the



population, with information available across borders. He urged the Profession to work across borders to create an environment with greater harmonisation, consistency and predictability of regulation. Joachim questioned the skills required of lawyers, the need to re-educate ourselves so that we can embrace and employ technology effectively, to provide what our clients want and need.

Esther Montalvá, took up the discussion, enthusiastically promoting the opportunities for all. The opportunity. The use of tech and social media to promote a lawyer's practice. The ability to be agile and thereby accessible to large numbers of potential clients. In many respects technology is a "leveller", allowing small firms to compete with larger offices- indeed they may be able to communicate more effectively than larger offices who have to adhere to their own firm wide policies and protocols. Esther was hugely confident for the Profession and its role in advising clients as new areas of law and practice are established. She spoke of the opportunity and obligation on Bars

to educate and equip members, so that they can make the most of the immediate and future environment. See referred to the Madrid Bars design and validation of a postgraduate masters in IT, taught with input from IT professionals.

She ended by proposing that the Profession work collectively, via organisations such as the UIA, to make the best of our power to lobby, promoting the Rule of Law and the fundamental role of the practitioner in its administration. She also suggested that we should look to harness collective buying power and the establishment of a Tech Commission to share ideas and expertise.

The opportunity to share experiences and developments collectively was taken up by Naoki Idei from Japan. He suggested that although technically advanced and powerfully prosperous with a growing legal profession, Japan has been slower than some in adopting Tech to support the administration of justice or the practice of law. Recent discussions with the Government in Japan



meant that E-case management, E-filing and an E-court are being developed. He noted that change can bring resistance from some practitioners, but that the Japan Federation of Bar Association is supporting its members in embracing change, while emphasising that core values of independence and integrity are unchanging and not to be compromised.

The panel presentations concluded with a fascinating and comprehensive explanation from Valentyn Gvozdiy, demonstrating the steps the Ukrainian National Bar has implemented to register and track its members, supporting them in practice and maintaining and developing legal knowledge. The systems put in place appeared to be comprehensive, including links to a members' social media profiles and accounts.

Those present joined in the discussion, with contributions from members from Brasil, Italy, Japan and New South Wales, Australia. There was a real interest in sharing research and experiences. Ours is a Profession with longevity, committed to principles of justice. Through history we have developed and adapted to changed social and technological environments. There was optimism in the room that we will continue to grow and adapt, adopting and employing new technology.

There was enthusiasm for a sharing of information and an expectation that UIA should facilitate this.

Summing up, the Chair thanked all for their contributions to a stimulating discussion – demonstrated by the fact that most stayed throughout the 3.5 hours and then continued their discussions after the meeting had closed.

The Chair had introduced Joachim Bile-Aka (Côte d'Ivoire) (Joachim.bileaka@bilebrizoua.ci) and Alfonso Perez-Cuellar Martinez (Mexico) (alfonso@perezcuellar.co.mx) as working with him to promote the work of the Bar Leaders' Senate within the UIA. He invited those present to offer ideas, issues, and topics for consideration at future meetings as well as ongoing cooperation between meetings.

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 Former President of the Law Society of  
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# L'influence grandissante du droit européen sur l'arbitrage

Compte rendu de la session de la commission arbitrage international

I Laurence KIFFER

Le thème a été décliné sous l'angle de l'arbitrage commercial comme sous l'angle de l'arbitrage d'investissement.

L'arbitrage commercial résulte de la volonté de partenaires commerciaux de voir les litiges résultant de leurs contrats résolus par la voie de l'arbitrage.

On entend par arbitrage d'investissement la procédure d'arbitrage opposant un investisseur et un Etat. Cette procédure peut être introduite sur le fondement d'un traité auquel sont parties l'Etat d'origine de l'investisseur et l'Etat d'accueil de l'investissement (traité bilatéral de protection des investissements (TBI), accord de libre-échange (ALE) ou accord multilatéral (Traité sur la Charte de l'Energie par exemple) ou, plus rarement, sur le fondement d'un accord entre l'investisseur et l'Etat d'accueil ou encore sur le fondement d'une loi d'investissement de l'Etat d'accueil.

Dans le panel consacré à l'arbitrage commercial, on s'est d'abord interrogé sur les liens entre la convention de Bruxelles de 1968 et l'arbitrage.

La Convention de Bruxelles concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale instaure un droit judiciaire européen. Dans le cadre de ce processus d'intégration, le règlement n°44/2001 dit « Bruxelles I » a été adopté en 2000 puis a fait l'objet d'une refonte en 2012 par le règlement n°2015/2012 dit « Bruxelles I bis ».

L'article 1<sup>er</sup> de Bruxelles I excluait l'arbitrage de son champ d'application. A l'occasion de la refonte de Bruxelles I, des questionnements sont apparus sur le bien-fondé de l'exclusion de l'arbitrage. Bruxelles I<sup>bis</sup> a finalement conservé l'exclusion de l'arbitrage de son champ d'application. Ce règlement a rappelé les contours de cette exclusion dans le cadre d'un considérant 12 de son préambule.

L'article 73 de Bruxelles I<sup>bis</sup> indique également que ce règlement n'affecte pas

l'application de la Convention de New York de 1958. La Convention de New York qui donne d'une part effet aux conventions d'arbitrage et, d'autre part, permet la reconnaissance des sentences arbitrales étrangères est à l'origine de l'exclusion de l'arbitrage de la Convention de Bruxelles.

La notion d'exclusion telle que précisée par le préambule de Bruxelles I<sup>bis</sup> et par la jurisprudence de la Cour de Justice de l'Union Européenne a permis de clarifier cette notion d'exclusion.

L'arrêt Marc Rich de 1991<sup>1</sup> a confirmé que les procédures accessoires à l'arbitrage introduites devant les juridictions étatiques étaient exclues du champ d'application de la Convention. De ce fait il en est de même pour l'appréciation de la validité de la clause d'arbitrage.

Cependant, malgré l'exclusion de l'arbitrage de la convention de Bruxelles, dans l'arrêt Westankers<sup>2</sup> la CJCE a interdit aux Etats membres de recourir aux « *antisuit injunctions* » en matière d'arbitrage au motif qu'elles priveraient le juge normalement compétent d'un Etat de l'UE de statuer sur sa propre compétence en vertu du règlement. L'arrêt Gazprom<sup>3</sup> rendu

ultérieurement a jugé que la reconnaissance par une juridiction d'un Etat membre de l'UE d'une *antisuit injunction* prononcée par un tribunal arbitral, et non par une juridiction d'un Etat membre comme dans l'affaire Westankers, n'est pas contraire à Bruxelles I, l'arbitrage n'entrant pas dans le champ d'application de ce texte.

Le premier panel s'est aussi interrogé sur le point de savoir si les dispositions de droit européen prévalaient sur les conventions d'arbitrage. Il a été montré que tel est le cas lorsque la CJUE qualifie certaines règles de l'UE comme des lois de police. Il en est ainsi de la directive européenne 86/653 sur la protection des agents commerciaux<sup>4</sup> ou du droit de la concurrence<sup>5</sup>. Le contrôle du respect du droit européen s'opère au stade du contrôle de la sentence puisque les arbitres, ne constituant pas une juridiction au sens du droit européen ne peuvent poser de questions préjudicielles<sup>6</sup>.

Le second panel a illustré le rôle grandissant de l'Union européenne (UE) dans l'arbitrage d'investissement.<sup>7</sup>

En l'absence d'accord multilatéral global sur l'investissement, la plupart des règles conventionnelles régissant les rapports entre



pays d'accueil et investisseurs étrangers ont été organisées au niveau bilatéral. Il y a environ 3000 TBI dans le monde. Ces TBI comprennent des TBI entre Etats de l'UE (traités intra-communautaires). Le nombre de TBI intra-communautaires a augmenté du fait de l'élargissement de l'Union européenne en 2004. Les TBI prévoient des modes de règlement des litiges entre les Etats signataires et des modes de règlement des litiges entre investisseurs et l'Etat d'accueil.

Le traité de Lisbonne entré en vigueur le 1<sup>er</sup> décembre 2009 a transféré à l'UE de manière exclusive la compétence des Etats en matière d'investissements directs étrangers.

La Commission européenne a remis en cause le système existant de règlement des différends entre investisseurs et Etats (RDIE) sur le fondement du manque de transparence, de cohérence. Elle a alors mis en place une politique d'investissements internationaux visant à créer une juridiction en matière d'investissements à l'échelle mondiale.

La Commission européenne a, dans un premier temps, inséré des mécanismes de règlement des différends permanents, institutionnalisés, dans les nouveaux accords commerciaux et d'investissement (Accord économique et commercial global entre l'UE et le Canada, Accord de libre-échange entre l'UE et le Vietnam). Dans un second temps elle a lancé des négociations relatives à une convention instituant un tribunal multilatéral chargé du règlement des différends en matière d'investissement.

La décision «*Achmea*»<sup>8</sup> rendue le 6 mars 2018 par la CJUE a marqué un tournant dans le processus européen dans la mesure où la clause d'arbitrage investisseur-Etat d'un traité bilatéral d'investissement entre deux Etats membres de l'UE a été jugée incompatible avec le droit de l'Union.

Reconnaissant leur obligation de tirer les conclusions juridiques de la décision *Achmea*, les Etats membres de l'Union ont déclaré qu'ils s'engageaient à mettre fin aux TBI intra-communautaires au plus tard le 6 décembre 2019 par un traité plurilatéral en cours de négociation<sup>9</sup>. Ainsi lorsqu'elles sont saisies de procédures d'annulation, de reconnaissance ou d'exécution de sentences d'investissement, les tribunaux

des Etats membres de l'UE doivent appliquer le droit national de manière à assurer l'application du droit européen en annulant les sentences contraires à l'ordre public européen.

La jurisprudence *Achmea* ne s'applique pas aux sentences CIRDI puisque le CIRDI est un système de règlement des litiges autonome qui ne prévoit pas de mécanisme de révision devant les tribunaux nationaux.

Le 15 janvier 2019, 22 Etats membres de l'UE<sup>10</sup> ont adopté une « Déclaration relative aux conséquences juridiques de l'arrêt *Achmea* » et ont négocié un traité plurilatéral.

Le 19 octobre 2019 ces Etats sont parvenus à un accord sur le texte de ce traité par lequel ils s'engagent à se coordonner pour mettre fin aux traités bilatéraux intra-communautaires. La Commission constate que certains Etats de l'UE se sont opposés au projet de texte et les a informés qu'elle engagerait des poursuites à leur rencontre.

Le dernier panéliste a fait un point sur les négociations engagées sous l'impulsion de l'UE dans le cadre de la CNUDCI pour mettre en place au niveau mondial un nouveau mécanisme permanent de règlement des litiges d'investissement.

La Commission de l'UE a considéré que le système existant présentait plusieurs défis en matière de transparence, de cohérence et de prévisibilité. Elle a par ailleurs noté que les TBI constituaient un macrocosme relativement vaste et fragmenté.

En 2017, la Commission de la CNUDCI a confié au Groupe de travail III un mandat concernant une éventuelle réforme du RDIE. Ce mandat consiste à i) recenser et examiner les préoccupations exprimées au sujet du RDIE ; ii) déterminer si une réforme est souhaitable compte tenu de ces préoccupations ; iii) s'il décidait que tel était le cas, mettre au point des solutions qu'il recommanderait à la Commission.

Les préoccupations qui ont été recensées par le groupe de travail au sujet du RDIE actuel sont : La durée et les coûts, le manque d'uniformité, de cohérence et de rectitude des sentences arbitrales, le manque de diversité des arbitres, le manque supposé ou réel d'indépendance ou d'impartialité des

arbitres. Le Groupe de travail a considéré qu'une réforme du RDIE était nécessaire.

Parmi les éléments de la réforme évoqués à ce stade par le Groupe de travail figurent :

- La création d'un centre consultatif sur le RDIE qui pourrait répondre à des préoccupations telles que le coût de la procédure, la régularité et l'uniformité des décisions, et l'accès à la justice ;
- L'élaboration d'un code de conduite pour les arbitres ;
- La modification du financement par les tiers ;
- La mise en place d'un mécanisme autonome de réexamen ou d'appel ;
- L'instauration d'un tribunal multilatéral permanent des investissements ;
- La sélection et la nomination des arbitres et des juges.

La suite des travaux du Groupe de travail portera sur les options de réforme pour commencer à mettre au point des solutions pour la réforme du RDIE.

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1. CJCE, 25 juillet 1991, aff. n° 190/89, *Marc Rich & Co AG c/ Societa italiana impianti PA*
2. CJCE 10 février 2009, aff. C-185/07, D. 2009, 981, note Kessedjian; *Rev. Arb.* 2009, p.407, note Sylvain Bollée; *JDI* 2009, p.1281, note Audit
3. CJUE, 13 mai 2015, aff. C-536/13, *Gazprom OAO c/ République de Lituanie*
4. Civ. 1<sup>re</sup>, 22 mars 2009, n° 08-12.149, *Bull.civ. I*, n° 48; D. 2009, 880, obs. X. Delpech; *ibid.* 2959, obs. T. Clay
5. CJCE, 1<sup>er</sup> juin 1999, aff. C-126/97, *Eco Swiss China Time Ltd c/ Benetton International NV*
6. CJCE, 23 mars 1982, aff. C-102/82
7. Voir aussi « Le mécanisme de résolution des litiges en matière d'investissement : une nouvelle configuration dictée par la Commission européenne », L.Kiffer et A. Rafiq, *Juriste International*, 2017.3, pp.72-74
8. CJUE, 6 mars 2018, aff. C-284/16, *République slovaque c/ Achmea BV*.
9. Déclarations des 15 et 16 janvier 2019 sur les conséquences juridiques de l'arrêt *Achmea*.
10. Allemagne, Autriche, Belgique, Bulgarie, Chypre, Croatie, Danemark, Espagne, Estonie, France, Grèce, Irlande, Italie, Lettonie, Lituanie, Pays-Bas, Pologne, Portugal, République tchèque, Roumanie, Royaume-Uni, Slovaquie.



## The UIA in Vienna

10<sup>th</sup> UIA Business Law Forum – Anniversary under the sign of digitalization



**I Astrid ABLASSER-NEUHUBER  
and Michael MEYENBURG**

This year the UIA celebrated the 10<sup>th</sup> anniversary of its successful *Business Law Forum* seminar series, taking place on September 20 & 21, 2019 in Vienna. As on previous occasions, the seminar was co-organized by the *International League of Competition Law (LIDC)*. The topicality of the issues dealt with also led to the engagement of further supporters, such as the *Austrian Association for the Protection of Intellectual Property and Copyright (ÖV)* and in particular the *Vienna Bar Association*, which hosted the event on its premises in the

center of Vienna. On the part of the UIA members, the seminar was co-organized by the Austrian law firms *Meyenburg* and *bpv Hügel Rechtsanwälte GmbH*, who also offered the traditional Welcome Cocktail, with a wonderful view over the Danube and a traditional Austrian “Heurigen” buffet. Further great support was provided by *WKB Wierciński, Kwieciński, Baehr*, Poland.

Over 30 speakers contributed to new legal questions related to the e-commerce and platform economy. In keeping with

the tradition of the Forum, the topic was discussed in an interdisciplinary manner, for example from the perspective of antitrust, unfair competition, data protection, labour, corporate and even criminal law – to name just a few... Accordingly, experts from various fields of law and from different areas of practice such as the bar, the authorities and in-house lawyers joined in mixed panels for in-depth discussions.

Consequently, the focus of the seminar was to identify specific risks (liability issues for the



e-commerce and platform industry) that may arise in connection with new business models and from the lack of convergence of different rules applicable to the same issue. In this sense, it became for example clear that while - the legal framework for e-commerce and platform business (in particular with regard to antitrust) is nothing but a moving target – the melding of antitrust, data protection, unfair competition and consumer protection is the legal trend in enforcement practice. Basically all key issues for manufacturers, brand owners and distributors, such as restrictions on online sales, price positioning of products, platform-based distribution systems, selective distribution systems, etc. are concerned by this development. As just an example, there is an antitrust, data and consumer protection as well as a copyright law angle to meta-tags, keyword advertising or influencers' marketing. On enforcers' side, the Austrian Competition Authority, as just one amongst others, has been assigned considerable tasks in the area of consumer protection.

The outcome of our panel on corporate & personal liability for legal risks in the digital economy equally showed a complex development. Administrative and criminal fines for managers and companies are imposed not only for cybercrime, including bitcoin-fraud and questions of dark-web marketplaces but also for quite a range of pitfalls in the e-commerce sector starting with antitrust and fraud but also in connection with violations of data protection regulations and, for example, protective regulations provided for in the Telecommunications Act. A hurdle for legal compliance in this regard is that while business are international, relevant laws or remedies are not. Despite the attempt to establish a European Public Prosecutor's Office ('the EPPO') many uncertainties remain for businesses, stemming in particular from requirements by the GDPR *vis-à-vis* US related businesses.

A new field of activity is the assertion of claims for damages, which relate specifically to infringements in the e-commerce and platform sector (e.g. damage claims for resale price maintenance, geoblocking violations, abuse of market dominance, unfair competition violations, etc.). A dedicated panel of renowned experts dealt with this topic and showed that legal



issues - e.g. in antitrust law - are mainly resolved at the national level, sometimes in very different ways, or at least with great nuance. This is despite the European damages directive. Moreover, at present time, more new questions are arising than answers are pouring in from the highest courts. However, a case to watch is Idealo's EUR 500 million claim against Google.

All this clearly calls for more effective and more sophisticated compliance safeguards taking on board not only antitrust and corruption but also data protection, copyright and certain consumer protection laws. While we had an impressive panel on the effective use of whistleblowing hotlines in the digital age- be it in-house or external by the authorities - we also enjoyed the occasion to get an insight on how companies measure the effectiveness of their own compliance programs and which obstacles general counsels face to demonstrate that compliance pays out the investment following a survey done in Poland.

As the last highlight of the Forum we finally also looked at the labour law angle of digital business models as there are many forms of employment contracts, secondments of employees to other countries and other forms of "cross border cooperation" (e.g. in the field of collaborative research). In this regard, the Saturday panel dealt with confidentiality clauses in employment contracts in digital business models and asked about the specific requirements of

the industry in international employment contracts of P&MS and more specifically on how to deal with protection of IP stemming from "employee inputs". Protection of trade secret is only the "second choice" versus "Registered" IP protection. The Directive (EU) 2016/943 on Trade secrets has left some questions open in this respect. However from its Art. 1, 3. b) and c) it can be derived that confidentiality clauses should not be formulated in an overly general manner, but should contain a sufficiently defined specific scope, however without unduly restricting the further professional career of the employee.

Finally, it was pointed out that (as recent cases in the USA, England and Germany show) confidentiality agreements could also be challenged by shareholders, consumers or public authorities, e.g. due to questions of public interest. So yet another aspect to be duly considered in the legal protection of new business models in the e-commerce and platform industry.

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# UIA's International Litigation Summit in San Francisco

*Cross-Border Litigation in the Digital Economy:  
How to Avoid Getting Lost in Translation*

**I Ian DE FREITAS**



In the film “Lost in Translation” Bill Murray’s character, Bob Harris, is in unfamiliar territory – alone in Tokyo, encouraged to appear in an advert for Japanese whisky by his agent for reasons he doesn’t fully understand, jet-lagged, and not comprehending the language or culture.

This sense of dislocation and confusion can be familiar to our clients. Business necessarily takes them (either in person or through the services and products they offer) to many parts of the world. The laws and underlying culture in those countries are often alien yet need to be negotiated if our clients are to achieve their ultimate goals and avoid the many potential pitfalls along the way. Clients look to us to guide them, but in an increasingly inter-connected yet dislocated world, this is not always easy.

The UIA’s International Litigation Summit in San Francisco in March 2020 seeks to address the issues that we and our clients face in this respect. It does so from the perspective of Litigation and Investigations (the “sharp-end” of these matters) in the context of the area of commerce that is perhaps most exposed – the Digital Economy. We are especially pleased at the level of participation in the Summit from in-house counsel from major Bay Area and Silicon Valley companies who will be taking part in our panel sessions. We are also pleased to welcome speakers from our sponsors, FTI Consulting, who will provide us with their views on how they can support us and our clients in areas such as managing evidence in a cross-border context. And of course, we will have expert speakers from the UIA representing the Litigation, Privacy, Criminal Law, Intellectual Property, Competition and Labor Law Commissions, as well as others.

We will start the Summit with a panel on managing cross border issues from the perspective of in-house counsel. Our guest speakers from Facebook and LinkedIn will explain how they go about understanding the impact of foreign laws and reconcile

the requirements of different legal regimes (including in relation to legal privilege), what they look for when selecting outside counsel to work together across different jurisdictions, and what they want in terms of coordination within the legal teams to ensure it all works seamlessly. They will also touch on wider issues such as cultural and ethical considerations, down to practical yet very important considerations such as how to effectively manage documents and evidence in foreign languages.

We will then turn to consider regulatory issues in the context of Anti-Trust. The EU’s regulatory focus on US companies in this area is very topical. We will examine how US companies deal with differing anti-trust regimes which impact them and what the particular areas of focus are for global regulators and Plaintiffs right now.

Our third panel will look at the increasing use of technology in the workplace and the issues that this raises. In an Employment context, the use of technology might be seen as perfectly acceptable in one jurisdiction and underpin a business model, yet when transported abroad it raises substantial privacy and labor law issues. Coupled with this are the problems caused when employees mix private and business data on multiple platforms and devices which then become the focus for disclosure in litigation, where practices differ as to what is and is not accessible in a cross-border context.

Our final panel on the first day will cover Data Privacy and Platform Liability. Data privacy is a huge topic as an increasingly complex web of data protection laws grows globally. The extra-territorial impact of the EU’s GDPR laws are just one example. Litigation and enforcement action by regulators in this area is also becoming increasingly common. The liability of online platforms and networks for what users post or transmit has been the subject of litigation for many years and has led to competing principles, rulings and regulatory approaches. More recently, platforms have

come under increasing pressure to police what they host.

On our second day we move on to consider issues of Criminal Law. In particular, this panel will consider the exposure of those conducting business overseas to foreign criminal laws, as well as the requirements to produce evidence for use in criminal proceedings abroad.

Finally, we will close the Summit with a session on Intellectual Property. This will explore how IP might be best protected globally and will also examine the growing trend for jurisdictions to ring-fence their IP laws by imposing mandatory and public policy provisions, as well as requirements that any disputes over IP are heard in their courts.

The Summit is supported by the Bar Association of San Francisco and will be held at the BASF’s downtown headquarters. We will be welcomed on Wednesday March 11, by a cocktail reception at the offices of Munger Tolles & Olson, the law firm of the current UIA President, Jerry Roth, and whose partners have been extremely generous in helping to organize the Summit.

Returning to Lost in Translation, at the end of the film, and with the help of Scarlett Johansson (Charlotte) and his new local friends, Bob comes to an understanding of where he is and embraces it (actually and metaphorically). We are confident that at the end of this Summit you will have developed a better understanding of how we and our clients can better navigate an increasingly complex global commercial world and embrace the opportunities that it presents. And there are fewer better places in the world to get lost than in San Francisco with its diverse culture, world-class cuisine, and the spectacular scenery of Northern California. We hope to see you there.

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# The UIA in St. Anton am Arlberg (Austria)

15<sup>th</sup> Winter Seminar on Recent Legal Developments and Soft Law

Angela DÍAZ-BASTIEN VARGAS-ZÚÑIGA



The UIA Winter Seminar, co-sponsored by the ABA Litigation Section and the ABA Section of International Law, is part of the magic of a UIA winter seminar because of its formal-informal and dynamic nature. Each presentation has generous Q&A opportunities where delegates can share experiences from their own practices. Everyone is involved in every session.

The goal and drive of the seminar is to provide top quality and substantive excellence during the sessions while entertaining, practicing winter sports, and making good connections and friends.

The UIA 15th Winter Seminar promises to be very exceptional. This year's topic is "Recent Legal Developments and Soft Law: M&A, Corporate Law, Sports & Entertainment Law, White Collar Crimes and Dispute Resolution." The aim is to bring together delegates from various UIA Commissions, ABA lawyers, and other legal professionals practicing in different areas from all over the world, thereby facilitating and fostering an interdisciplinary and transnational exchange with very productive discussions involving the audience as participants on recent legal developments and soft law.

This year, the UIA Winter Seminar will take place in St. Anton am Arlberg (Austria) on March 21-28, 2020. Saturday 21<sup>st</sup> of March is The Informal Get-Together is scheduled for March 21, 2020 and the Opening Reception will take place on March 22, 2020. The sessions will begin the morning of March 23, 2020. This seminar is available for participants as a full course (Monday to Friday) or three-day course (Monday to Tuesday focuses on corporate law and Thursday to Friday focuses on dispute resolution). Accordingly, participants can register for the entire seminar or for part of it.

More specifically, Monday will be dedicated to recent developments in cross-border VC / PE / M&A and Tuesday will focus on developments and soft law in corporate

governance and business conduct in contract law. Wednesday presentations will focus on the key challenges faced by corporates operating internationally and recent developments in litigation and white collar defense. Thursday and Friday presentations will focus on Alternative Dispute Resolution, arbitration and recent developments, and soft law in sports, employment, and others areas of the law of interest to the participants.

You can find more details about the topic, sessions, and speakers in the preliminary program: <https://www.uianet.org/es/eventos/uia-15th-winter-seminar-recent-legal-developments-and-soft-law?backlist>

St. Anton am Arlberg, a cozy little town with 2,470 inhabitants, has maintained its genuine ambiance and charming atmosphere over time. Relax and unwind at the elevation of 1,300 m above sea level, where crisp and clean mountain air is guaranteed!

Hospitality and Tyrolean customs are as much a trademark of the village as its international, cosmopolitan character. And not only does the town offer a colossal backdrop of peaks and popular (skiing) mountains, it also has all the comforts you would expect from an international resort. Experience genuine Tirolean hospitality and spend the most beautiful days of the year among colleagues that become good friends.

"Ski Arlberg" referred to as the cradle of Alpine skiing (<http://www.skiarlberg.at/en>), and to which St. Anton belongs, will provide an exceptional environment for ski, winter sports, and outdoor enthusiasts.

St. Anton am Arlberg has always been famous for its beauty and reliable snow. This modern resort has retained its traditional appeal. A total of 88 of state-of-the-art cable cars and lifts offer the highest standard of safety and comfort.

St. Anton am Arlberg is now also considered a destination for cross-country skiers, too.

Tyrol boasts a 40-kilometre-long network of trails and was awarded the quality seal for cross-country skiing. Those who travel to the St. Anton am Arlberg region in the winter enter a snow paradise which has enjoyed a world-wide reputation since hosting the Alpine Ski World Championships in 2001.

High standards, a superlative winter sports area, excellent hospitality, a ferris wheel style cable car, the finest gourmet food, the new multi-functional sports center, and numerous events promise an unforgettable winter experience during 2020. With guaranteed snow until at least the end of April, St. Anton am Arlberg offers the very best prerequisites for an incredible winter stay for at least half a year.

The Winter Seminar is a fantastic opportunity to have fun practicing skiing or any other winter activity while getting to know very interesting people and friends from various professional backgrounds and jurisdictions. Take the chance to learn from your peers about highly demanding topics while sharing your own experience and knowledge.

Do not miss this opportunity to meet with your colleagues. Save the date and make sure to register! We look forward to welcoming you to St. Anton!

Angela DÍAZ-BASTIEN VARGAS-ZÚÑIGA  
*Director Defence of the Defence – UIA-IROL*  
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Derechos Humanos y de la Defensa





# La Comunidad LGTBI: avances y retrocesos

I Rosalia PERERA GUTIERREZ

*“Si el hombre pudiera decir lo que ama,  
si el hombre pudiera levantar su amor por el cielo  
como una nube en la luz;  
si como muros que se derrumban,  
para saludar la verdad erguida en medio,  
pudiera derrumbar su cuerpo,  
dejando sólo la verdad de su amor,  
la verdad de sí mismo. ..”*

Escribió el poeta español Luis Cernuda, en 1931, en el libro de *Los placeres prohibidos*.

Cuando abordamos el estudio de la comunidad LGTBI, unos lo hacen desde la definición de la palabra amor, despojandola, como deseaba Cernuda, de todo ropaje que no fuera la verdad misma, es decir, sin que convencionalismos, ni etiquetas, pudieran oscurecer su más puro significado. Otros, sin embargo, nos empeñamos en conjugar estas siglas, con la libertad. Y quizá ambos conceptos no solo no sean incompatibles, sino que se trate simplemente de dos formas complementarias.

Así, hablando de libertad, hablamos de derechos fundamentales y de su respeto. Por eso, parece obvio que este primer acercamiento a la comunidad LGTBI del *Juriste International*, comencemos con la definición y unas someras pinceladas sobre el marco normativo.

Aunque no sería completa la visión que los lectores pudieran tener, sin que ofrezcamos, aunque sea en forma somera, los avances que en esta materia se han conseguido y, por tanto, la situación que hoy en día disfrutan las personas que conforman esta amplia y diversa comunidad. Enfatizamos los aspectos positivos sin dejar de reconocer el largo camino que aún resta por recorrer, en materia de derechos humanos en general, y en concreto, en los que afectan al colectivo LGTBI.

Desgraciadamente, y aunque pudiera parecer lo contrario, los movimientos políticos actuales, parecen pretender una involución en algunos casos, y la materia que nos ocupa, que es de especial sensibilidad, aparece como punto de mira para estos.



Fotografía Amnistía Internacional

En 2011, Naciones Unidas emitió un informe que relataba y recogía las violaciones de derechos fundamentales por razón de la orientación sexual.

Avances y retrocesos, pues, se simultanean y se suceden.

Pasos atrás que aparecen impulsados por gobiernos populistas, o ultraconservadores, con el resultado de que la persecución y la vulneración de los derechos de la comunidad LGTBI vuelven de forma recurrente y alarmante para un estado de derecho.

## I- Nociones básicas

LGBTI es un acrónimo que se usa como término colectivo para referirse a las personas Lesbianas, Gais, Bisexuales, Trans (el término trans se refiere a travestis, transexuales y transgéneros) e Intersexuales

El concepto de diversidad sexual, define y aúna, mejor, a mi juicio, que el de LGTBI, por tratarse de siglas que pueden constreñir las diferentes realidades relacionadas con orientación sexual e identidad sexual y de género y que siempre están a riesgo de excluir a individuos o colectivos que no se sientan, en y por las mismas, representados.

La legislación que se refiere a la población LGTBI es variada y diversa, y dista tanto entre los Estados, que podemos encontrar territorios con un reconocimiento amplio de derechos (véase matrimonio entre personas del mismo sexo, adopción...) y otros, donde se sigue contemplando condenas de pena de muerte para las referidas conductas.

Las leyes que amparan o que tienen por objeto los derechos de la comunidad LGBT, se refieren, aunque no se limitan, a los siguientes supuestos:

- Evitar y perseguir cualquier tipo de discriminación por razón de la orientación sexual, expresión de género o identidad de género de los individuos, tanto en el ámbito público como en el privado.
- Promulgar leyes que garanticen esta igualdad de derechos en el ámbito laboral, administrativo, educativo, sanitario, prestaciones y servicios.
- Despenalización: Derogando las que tipificaban como ilícito penal o dictando nuevas que expresamente contenga cobertura legal para las relaciones entre personas del mismo sexo.
- Libre acceso a las Fuerzas Armadas y no discriminación de personas LGTBI
- Especial y expresa protección en materia de menores y jóvenes. (Cuya necesidad viene dada por el gran número de víctimas de acoso escolar, acoso en redes sociales y el creciente número de suicidios)
- Prohibición de políticas, textos o conductas que identifiquen o definan la homosexualidad como una patología.
- Perseguir las políticas de “reeducación” y las “terapias de conversión” cuyo objeto sea la modificación de la identidad de género y orientación sexual
- Acceso a la cirugía de reasignación de sexo y/o financiación pública
- Acceso y/o financiación pública para tratamiento hormonal (sustitución hormonal)
- Reconocimiento de la autodeterminación de género a las personas trans
- Reconocimiento de la modificación legal de su identidad con cambio de nombre y sexo en el registro
- Reconocimiento legal del nombre y género reasignado, en cualquier documento oficial, otorgándole plena validez. Entendiéndose estas entre adultos y de forma consentida
- Endurecimiento y/o promulgación de legislación en contra de los delitos de odio a la comunidad LGTBI
- Matrimonio entre personas del mismo sexo.
- Reconocimiento de la familia homoparental
- Adopción homoparental

- No distinción en cuanto al acceso a las técnicas de reproducción asistida para parejas del mismo sexo respecto a las parejas heterosexuales
  - No distinción en cuanto a los derechos migratorios para parejas del mismo sexo respecto a las parejas heterosexuales
  - No distinción en cuanto a los derechos migratorios para parejas del mismo sexo respecto a las parejas heterosexuales
  - No distinción en cuanto al consentimiento en las relaciones sexuales para parejas del mismo sexo respecto a las parejas heterosexuales.
- ...

## II- Marco normativo

Encontramos como marco internacional el Convenio europeo de derechos humanos, un tratado internacional del Consejo de Europa para la protección de los derechos humanos y libertades fundamentales que se redactó en 1950, desarrollándose y completándose paulatinamente con protocolos que ampliaban ese listado inicial

**No podemos olvidar, por su relevancia, la decisión de la Corte Interamericana a favor del matrimonio igualitario.**

de derechos y libertades y que ha sido ratificado por la totalidad de los Estados miembros del Consejo. Y aunque en un principio, al ser redactado, no contenía expresamente disposiciones sobre la diversidad sexual, la jurisprudencia del Tribunal de derechos humanos se erigió como una fuente de protección para estos derechos, sirviendo como “avanzadilla” para otros órganos supranacionales.

Dicho Convenio encuentra su inspiración más directa en la Declaración Universal de Derechos Humanos, proclamada por la Asamblea General de las Naciones Unidas el 10 de diciembre de 1948:

*“Toda persona tiene los derechos y libertades proclamados en esta Declaración, sin distinción alguna de raza, color, sexo, idioma, religión, opinión política o de cualquier otra índole, origen nacional o social, posición económica, nacimiento o cualquier otra condición”.*

## Declaración Universal de los Derechos Humanos

*“Derecho al respeto a la vida privada y familiar.*

1. *Toda persona tiene derecho al respeto de su vida privada y familiar, de su domicilio y de su correspondencia.*
2. *No podrá haber injerencia de la autoridad pública en el ejercicio de este derecho, sino en tanto en cuanto esta injerencia esté prevista por la ley y constituya una medida que, en una sociedad democrática, sea necesaria para la seguridad nacional, la seguridad pública, el bienestar económico del país, la defensa del orden y la prevención del delito, la protección de la salud o de la moral, o la protección de los derechos y las libertades de los demás.”*

## Convenio para la Protección de los Derechos Humanos y las Libertades Fundamentales (CEDH)

Tanto Naciones Unidas como la Unión Europea han establecido principios internacionales para sus estados miembros en relación con la homosexualidad.

Así, los Principios de Yogyakarta (Principios sobre la aplicación de la legislación internacional de derechos humanos con relación a la orientación sexual y la identidad de género, 2007), extienden expresamente a la población que integra la comunidad LGTBI, los derechos que ya implícitamente se contenían en el artículo 2 de la Declaración Universal de los Derechos humanos.

El Comité de Derechos Humanos de Naciones Unidas, en 1994 dictaminó que la penalización de la homosexualidad vulneraba los derechos a no sufrir cualquier tipo de discriminación y también el derecho a la privacidad.

La Unión Europea en el año 2000, censura toda discriminación por motivos de orientación sexual:

*“Se prohíbe toda discriminación, y en particular la ejercida por razón de sexo, raza, color,*

orígenes étnicos o sociales, características genéticas, lengua, religión o convicciones, opiniones políticas o de cualquier otro tipo, pertenencia a una minoría nacional, patrimonio, nacimiento, discapacidad, edad u orientación sexual”

### **Carta de Derechos Fundamentales de la Unión Europea**

En su art. 9, sin embargo, se contempla que la regulación en cuanto al derecho o no a contraer matrimonio por personas del mismo sexo, es exclusiva de los estados miembros, regulándose necesariamente, por tanto, en el marco jurídico estatal.

En 2011, Naciones Unidas emitió un informe que relataba y recogía las violaciones de derechos fundamentales por razón de la orientación sexual. Instó por ello a todos los países que aún no lo contemplaban de modo expreso, a dictar leyes que protegieran y garantizaran los derechos de las personas LGTB( en aquel entonces no se extendía a las personas intersexuales ). Se aprobó, pues, una resolución que, ya entonces se consideró histórica, que reconoce los derechos de las personas LGBT.

Hubo a partir de entonces otras resoluciones como la que se aprobó en 2014 para combatir la violencia y la discriminación por identidad de género y por la orientación sexual, en 2016 sobre protección contra la violencia y la discriminación, en 2017 para que los estados que aún no habían abolido la pena de muerte, no impusieran esa pena a las relaciones homosexuales de forma consentida.

Deviene necesaria una referencia a la regulación en materia de refugio: Las personas con una orientación sexual u orientación diversa no necesitan autoidentificarse bajo las siglas LGBTI para ser acreedora de protección, que viene definido en el texto del ACNUR (Alto Comisionado de las Naciones Unidas para los Refugiados) “Directrices sobre Protección Internacional: Solicitudes de la condición de refugiado relacionadas con la orientación sexual y/o la identidad de género en el contexto del artículo 1<sup>A</sup> de la Convención sobre el Estatuto de los Refugiados de 1951 y/o su Protocolo de 1967:

“En muchas partes del mundo, las personas experimentan viol. Las personas que huyen de sus países de origen por esta causa deben, por lo tanto,

siempre tener acceso a mecanismos de protección ya que pueden calificar para recibir la protección internacional como refugiadas o ser consideradas como beneficiarias de otras formas de protección complementaria en los países de asilo.”

### **III - Mecanismos de control: activismo social y jurídico - Cambios legislativos. Transformación social - Jurisprudencia de especial relevancia**

Es de remarcable la incidencia de los movimientos asociativos y activistas LGTBI para impulsar pronunciamientos y resoluciones que han innovado y que se han constatado verdaderamente transformadoras.

Existen gobiernos donde en lugar de perseguir la igualdad y garantizar los derechos de las personas LGBTI, acentúan la desigualdad [...].

El que exista una reivindicación de un colectivo, el que el colectivo se agrupe, asociándose, para reivindicar esos derechos, que la salvaguarda de estos, se convierta en una necesidad y que esta necesidad sea oída y compartida por la sociedad, es lo que ha conseguido el colectivo LGTBI.

En este punto, nos encontrábamos ante la tesis, desgraciadamente clásica, de que los gobiernos y la norma, van muchos pasos atrás. Fue la profusa actividad, incluso litigadora, de los colectivos, la que propició estos cambios, modificando los textos legislativos de la Unión Europea y la jurisprudencia del Tribunal de Justicia de la Unión Europea y del Tribunal Europeo de Derechos Humanos.

Como recordaremos, este último es un Tribunal de protección de derechos humanos, ya que su objeto son los derechos contemplados en el Convenio y la labor del Tribunal de Justicia de la Unión Europea, sin embargo, tiene como marco la Carta de Derechos Fundamentales de la Unión Europea.

Si estudiamos los progresos del Tribunal Europeo de derechos humanos, en esta materia, observamos que la jurisprudencia

relacionada con la orientación sexual se asentó sobre dos pilares como fueron, la idea y derecho a la privacidad y familia, y la orientación sexual propiamente dicha, como elemento a proteger (causa antidiscriminatoria del Convenio).

Podemos, a modo de ejemplo, traer las sentencias que ilustran el desarrollo en esta materia. En la que se consideró por primera vez que la penalización de la homosexualidad, atentaba contra el Convenio, la que, enarbolando la privacidad y el ámbito familiar del individuo, censuró las prácticas discriminatorias por razón de su orientación sexual y, finalmente, la que otorga protección a la población trans.

Y recomendar la lectura de las más importantes en cuanto a los derechos de

la comunidad LGTBI: El asunto Dudgeon v. Reino Unido, Salgueiro Da Silva Mouta v. Portugal, sentencia Taddeucci y McCall v. Italia y E. B. v Francia, L -V v. Austria, Lustig-Prean y Beckett c. Reino Unido, Karner v. Austria e I. v. Reino Unido.

### **IV- Avances y retrocesos**

Enlazando con lo anterior encontramos que, basta una somera lectura para comprobar la profusa actividad del Tribunal en pro de los derechos relacionados con la diversidad sexual, y los avances, que por ende, en los Estados, en la sociedad, estas han propiciado. Partiendo, en los comienzos de los años 80, de una situación tanto social, como normativa, absolutamente restrictiva y nada garantista para la comunidad LGTBI, la jurisprudencia fue resolviendo en contra de las políticas discriminatorias. Desde un momento inicial en que tomó posición en contra de la penalización de las relaciones sexuales consentidas entre hombres, la desigualdad en cuanto a la edad de consentimiento en las relaciones sexuales entre personas del mismo sexo, derecho a contraer matrimonio de las personas transexuales, acceso a las Fuerzas Armadas, no discriminación laboral, a favor de la adopción por parte de homosexuales...

Pero también es obligado mencionar que aunque las referidas sentencias han conseguido avances obvios y notorios, constatables por la población, también es cierto que ello no significa que el giro, el cambio, se haya instaurado de un modo generalizado en todos los países miembros del Consejo de Europa.

Desglosamos seguidamente los más recientes avances, muchos de ellos conseguidos, incluso en este mismo año.

No podemos olvidar, por su relevancia, la decisión de la Corte Interamericana a favor del matrimonio igualitario. La Corte Interamericana de Derechos Humanos emitió este año una opinión consultiva por la que exige la igualdad de derechos de parejas del mismo sexo, recomendando el reconocimiento del matrimonio entre personas del mismo sexo, como un camino para lograr dicha igualdad.

En los últimos años, se pone como ejemplo de país avanzado en esta materia, a Uruguay, que con la reforma del Código de la Niñez y Adolescencia de 2004, las parejas del mismo sexo pueden adoptar, dictó la Ley Integral para las Personas Trans de 2018 y además, ya en 2013, había aprobado el matrimonio entre personas del mismo sexo. En la actualidad está elaborando una ley para que los extranjeros LGTB no residentes puedan casarse en ese país con su pareja del mismo sexo, convirtiéndose en referente mundial.

En México encontramos, además de un creciente apoyo social reflejado, por ejemplo, en la multitudinaria marcha a favor de los derechos de la comunidad LGTBI de ese año, diversas legislaciones (Ciudad de México y los estados de Coahuila, Campeche, Chihuahua, Colima, Michoacán, Morelos, Nayarit, Hidalgo, Quintana Roo y Baja California Sur), que reconocen el matrimonio entre personas del mismo sexo (En otros estados como Chiapas, Jalisco, Nuevo León, Baja California y Puebla se acepta el matrimonio igualitario por orden de la Suprema Corte).

En junio de 2019, el Tribunal Supremo de Brasil resolvió que los actos en contra de la población LGTBI, los actos de transfobia y homofobia, sean considerados delitos, lo que afianza el camino de las libertades y garantías para este colectivo

También este año, en Ecuador, la Corte Constitucional aprobó el matrimonio entre personas del mismo sexo.

Argentina, Brasil, y Colombia reconocen, así mismo, matrimonios entre personas del mismo sexo.

Irlanda del Norte acaba de legalizar aborto y el matrimonio homosexual, por decisión del Parlamento.

Las reformas más llamativas y por las que, sin duda, merecen también felicitación expresa, se producen en Angola que ha modificado el texto del Código penal, despenalizando la homosexualidad. Y en la misma senda parece situarse Botsuana, Kenia y Sri Lanka.

Igualmente, en 2018, Trinidad y Tobago declaró inconstitucional la Ley sobre Delitos Sexuales y despenalizó la homosexualidad que conllevaba penas de hasta 25 años de cárcel.

La transcendencia de la derogación del art. 377 del Código penal indio, que estipulaba hasta diez años de prisión, y que en el año 2018 despenalizó la homosexualidad, puede servir como ejemplo para otros países.

También de enorme relevancia ha sido el paso dado por Taiwán, en mayo del presente año, dando el visto bueno y legalizando el matrimonio homosexual y convirtiéndose, así, en el primer país de Asia, en hacerlo.

Dichas reformas, por las que no podemos dejar de felicitarnos, pueden tener una gran incidencia en su entorno, y producir en las zonas limítrofes nuevas modificaciones.

Ello, no puede llevarnos a obviar, sin embargo, los pasos atrás que se extienden en los distintos continentes, mirar hacia otro lado no permite avanzar, solo la denuncia posibilita el cambio, solo visibilizando se progresa:

Se han abolido el matrimonio igualitario en países donde apenas ha estado vigente. Existen gobiernos donde en lugar de perseguir la igualdad y garantizar los derechos de las personas LGTBI, acentúan la desigualdad y la vulneración de derechos de este colectivo, incluso incidiendo en la idea, que ya parecía superada, de que las personas LGTBI corren el riesgo de sufrir problemas o enfermedades mentales, que su orientación es, en sí misma, una patología, y penalizando las relaciones homosexuales.

**El riesgo a nivel mundial, según los activistas LGTBI, es el retroceso de los derechos humanos en general.**



Las detenciones, encarcelamientos y el hostigamiento público no son, desgraciadamente, excepcionales en muchos lugares del mundo.

Lejos de disminuir los asesinatos a personas trans no dejan de crecer:

*“A nivel mundial, se calcula que más de 2.000 personas han sido asesinadas por su condición de transexuales desde el año 2008. “y esos son sólo los casos que se han denunciado”, advierte Fotis Filippou, Director de campañas para Europa de Amnistía Internacional.*

Y para terminar con un apunte reciente, debemos mencionar el informe de este año, 2019, que anualmente publica la ILGA Europa (Asociación Internacional de Lesbianas, Gays, Bisexuales, Trans e Intersex en Europa).

En el listado de países europeos, destaca en primer lugar Malta, debido a las grandes medidas y novedades legislativas dictadas en los últimos años, tomando decisiones y promulgando leyes innovadoras que recogen, por ejemplo, la prohibición de terapias o tratamientos que supongan considerar la homosexualidad y/o la transexualidad una patología, la consideración de los menores, la posibilidad de los que sufren condenas de prisión, cumplir sus condenas en un centro penitenciario acorde con su identidad de género, la adopción homoparental, el cambio del nombre y sexo en el registro a las personas trans género a partir de los 16 años y el matrimonio entre personas del mismo sexo ...

También se valora las medidas recientemente tomadas por Luxemburgo, en cuanto a la no discriminación por identidad de género y orientación sexual.

Pero desgraciadamente, al igual que se reseñan en dicho Informe, los avances, también lo hacen con los retrocesos en cuanto a pérdida de derechos adquiridos

(eliminación de normativa como el acceso a la reproducción asistida para mujeres, independientemente de su estado civil, procedimientos administrativos para el cambio legal del nombre o del género en los documentos oficiales de las personas trans; y en otros no han renovado sus planes de acción para la igualdad o no han respetado derechos civiles y políticos fundamentales, como la libertad de reunión, la libertad de asociación y la protección de los defensores de los derechos humanos durante el año pasado).

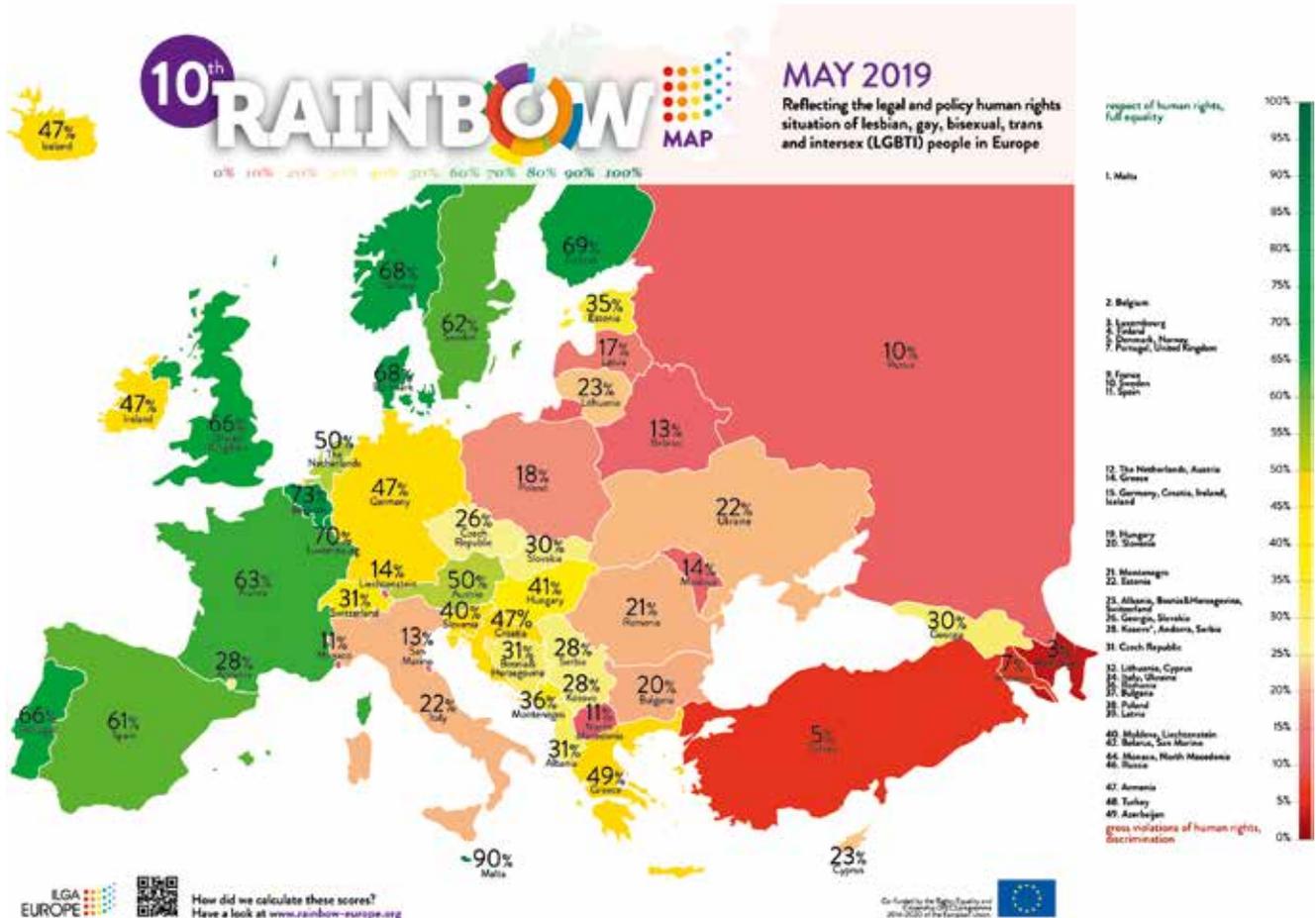
“La redacción de las nuevas normas en los distintos países / o las reformas de los textos legales existentes deberían tener en cuenta la diversidad sexual y de género para incluir, expresamente, la realidad las personas LGBTI. La invisibilidad legal no solo ampara sino que fomenta la vulneración sistemática de los derechos fundamentales de lesbianas, gays, transexuales y bisexuales”. ILGA Europa.

El riesgo a nivel mundial, según los activistas LGBTI, es el retroceso de los derechos humanos en general.

Un escenario de claroscuros se nos presenta en una actualidad en la que, a la vez que se celebra, en las calles de occidente, los logros conseguidos, los importantes avances en materia de igualdad, las estadísticas arrojan cifras alarmantes que señalan que la homofobia y la transfobia, siguen siendo unos de los principales problemas de odio en un mundo en el que aún existen campos de concentración, ejecuciones detenciones, encarcelamientos, torturas y hasta penas capitales.

Un horizonte dispar, un trayecto difícil en el que se han conseguido grandes avances, y un largo camino aún por recorrer, en cuanto a la garantía de los derechos fundamentales de la comunidad LGBTI en el mundo

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# Human Rights Education for Legal Professionals: HELP Programme of the Council of Europe

■ Eva PASTRANA  
& Elena YURKINA

## Introduction

2021 will mark the 70<sup>th</sup> anniversary of the European Convention of Human Rights (ECHR). This is the main instrument setting forth human rights protection on the European continent from Lisbon to Vladivostok. This instrument is unique as it provides the opportunity to bring individual applications to the European Court of Human Rights (ECtHR), which examines the allegations on human rights violations and adopts judgments. Following the judgments, the states take individual and general measures in order to remedy the violation and improve the situation.

The Convention is a practical instrument for human rights protection for more than 830 million Europeans living in 47 countries and beyond.<sup>1</sup> The big success of the Strasbourg Court, with the accompanying massive influx of cases, almost caused it to collapse. As a result, some key reforms were launched to lighten the burden on the Court and to ensure faster access to justice by victims. Professional training was also seen as crucial to safeguarding fundamental rights and ensuring the implementation of the ECHR system at the national level, without having to resort to Strasbourg. This is when the **Human Rights Education for Legal Professionals (HELP)** programme of the Council of Europe was born.

HELP's birth certificate was the Council of Europe (CoE's) Committee of Ministers Recommendation (2004) 4 on the ECHR in university education and professional

training adopted back in 2004. It was replaced in late 2019 by a new Committee of Ministers Recommendation CM/Rec(2019)5 on the system of the ECHR in university education and professional training.

Even though the text of the European Convention was adopted almost 70 years ago and is relatively short, the case law which has been developed on its basis is immense, with almost 70,000 judgments issued by the date of this publication.<sup>2</sup> On the basis of a dozen articles providing

where there are blogs, forums, and chats,<sup>8</sup> for blocking websites,<sup>9</sup> or for preventing secret surveillance both by state authorities and private companies.<sup>10</sup>

Generally, human rights issues can be found in all spheres of legal practice, including from criminal and civil proceedings, to investigation (with traditional or special investigation techniques), to detention, to searches (including in lawyers' offices), and to access to lawyers, as well as to pure commercial disputes over various property

HELP is the CoE's main educational platform for legal professionals.

protection of main human rights, the case law of the Court has developed significantly and touches upon difficult and sometimes very controversial issues evolving in Europe due to social, economic, and technical developments in the society.

Such issues include questions in the field of bioethics such as euthanasia,<sup>3</sup> discontinuation of artificial nutrition and hydration to support the life of a patient,<sup>4</sup> rights to embryos (in particular, their donation for scientific research<sup>5</sup> or destruction upon withdrawal of the consent of a partner to use them for in-vitro fertilisation<sup>6</sup>), or the right of informed consent by patients.<sup>7</sup>

Another area is technology, and it includes who is responsible for online platforms,

rights (including intellectual property, bankruptcy proceedings, and taxes). As the case law of the European Court is fast developing, legal professionals need to continue their education throughout their career; it is a life-long journey.

Taking into account all these specific objectives, the CoE offers free online courses on topics with human right elements. They are available at the HELP platform ([help.elearning.ext.coe.int/](http://help.elearning.ext.coe.int/)). But HELP is not just a platform with online courses. It has a philosophy and concept.

## What is HELP?

HELP is the CoE's main **educational platform for legal professionals.**

HELP supports the CoE member states in effectively implementing the ECHR, the European Social Charter (ESC), and other relevant European standards at the national level.

The **objective of HELP is to provide high quality education on human rights to judges, lawyers, and prosecutors throughout Europe.** Law enforcement authorities, including police and prison staff, are also targeted by HELP. This education means that legal professionals can better protect human rights on a national level and stay up to date with the ever-evolving standards and case law of the ECHR.

As stated above, apart from the **ECHR**, HELP covers other instruments, such as the ESC or CoE Conventions, in areas including data protection, bioethics, fighting against domestic violence or human trafficking, and responding to the serious challenges that Europe is facing on many fronts. Furthermore, and **with EU support**, since 2015, the **EU Charter of Fundamental Rights and relevant EU law** is also included in the courses specifically developed for EU countries. HELP courses contain practical examples and case law from both the ECtHR and the Court of Justice of the European Union (CJEU).

## The 3 Pillars of HELP

1. HELP is a **pan-European network** of the **National Training Institutions for Judges and Prosecutors (NTIs)** and **Bar Associations (BAs)** of the CoE's 47 member states. Their representatives, national experts appointed to be the link between the respective training institution and the HELP Secretariat, support the implementation of concrete HELP courses/activities in their countries. With its peer-to-peer approach, the HELP Network shares best practices in the annual HELP conference, provides advice, and adopts a roadmap with priority topics to be developed in future HELP courses.

2. Secondly, HELP is an **e-learning platform** on human rights, with **online courses** and training resources on European human rights standards. In contrast with other legal training platforms, HELP offers all their courses **for free, ensuring access for all** interested legal professionals ready

to invest time, regardless of their financial capacities.

The CoE is indeed in a unique and privileged position to develop practical training content. Not only does it utilise CoE standards as its basis, but it can also factor in its case law and the results of its monitoring bodies. It is in a position to also mobilize CoE expertise for the design of HELP courses, be they lawyers or judges of the ECtHR or experts from relevant CoE bodies (Human Rights Commissioner's Office, Execution Department, Committee for the Prevention of Torture, Data Protection Unit, etc.). This collaboration guarantees the high-quality and practical approach of HELP educational resources.

The **of HELP courses** covers, among others, the following topics:

1. Admissibility Criteria in Applications Submitted to the ECtHR
2. Alternative Measures to Detention
3. Anti-Discrimination
4. Asylum and the ECHR (UNHCR)
5. Key Human Rights Principles in Biomedicine
6. Business and Human Rights
7. Child-Friendly Justice
8. Combatting Trafficking in Human Beings
9. CPT Standards (2019)
10. Data Protection and Privacy Rights\*
11. Effective Investigation/Prosecution of Hate Crimes (2019)
12. Family Law (2019)\*
13. Fight against Racism, Xenophobia, Transphobia\*
14. Freedom of Expression
15. Hate Crime and Hate Speech
16. Human Rights in Sports
17. Introduction to the ECHR and ECtHR
18. Internally Displaced Persons
19. Labour Rights\*
20. Pre-Trial Investigation in Light of the ECHR
21. Prohibition of Ill-Treatment
22. Procedural Safeguards in Criminal Proceedings and Victims' Rights (2019)\*
23. Property Rights
24. Radicalisation Prevention – Gathering and Use of Evidence in Counter-Terrorism Cases (2019)\*

25. Refugee and Migrant Children
26. Reasoning of (Criminal) Judgments
27. Rights of Persons with Disabilities
28. Right to Liberty and Security (Art 5 ECHR)
29. Right to Respect for Private and Family Life (Art 8 ECHR)
30. Right to the Integrity of the Person (Bioethics)\*
31. Skills-Based Hate Crime Investigations
32. Transitional Justice
33. Violence Against Women
34. Access to Justice for Women
35. International Cooperation in Criminal Matters
36. *Right to the Integrity of the Person (Bioethics)\**

\*Courses developed with the funding of the EU (DG Justice)

The HELP platform gives legal professionals the opportunity to learn about what they want, when they want, by giving them free and easy access to self-learning materials.

There are **two main types of HELP training resources** available on the HELP platform:

- **Self-learning courses** on above-mentioned topics are available to any user who opens an account on the HELP online platform (<http://help.elearning.ext.coe.int/>).

These courses include interactive content, as well as training manuals and other resources on different ECHR Articles. Increasingly, since 2015, the EU law and case law dimensions are also being considered.

While the model courses are available in English, HELP strives to gradually translate them into other national languages and to adapt them to national legal orders, a colossal task considering the CoE's 47 member states. However, the CoE's available financial and human resources are insufficient to respond to increasing demands for the adaptation and launching of courses.

Anyone who successfully completes an online course has the opportunity to print a statement of accomplishment (different from the certificate described below).

- **Tutored courses** are available for groups of legal professionals selected by the national partners, including bar associations, to participate in pilot courses moderated by certified national tutors. Completing a distance-learning course leads to each participant getting a joint certificate issued by the respective national training institution and the CoE. It can also lead to appropriate accreditation for the participants.

HELP e-learning courses are unique in their content and format. They cover the relevant CoE and EU legislation and include references to the case-law both from the ECtHR and the CJEU. The decisions of the ECSR, including in the course on labour rights or anti-discrimination, are also included when relevant. The courses are interactive, with a wide range of visuals, exercises, and case studies. HELP is adapted to meet all needs through the use of modern technologies.

The goal is to make sure that participants will gain a practical understanding of when and how to apply the European system of protection in each of the areas covered. The objective is not to make every single judge, prosecutor, and lawyer an expert on human rights; it is rather to create a “reflex” among them so they can recognize a human rights issue in their cases and to give them the tools needed to address it adequately.

3. The third pillar is HELP’s human rights training **methodology** for legal professionals.

The HELP methodology, based on the principle of open education, takes into consideration the busy schedules and heavy time pressure imposed on legal professionals in their daily work. The **curricula are tailor-made to meet participants’ specific training needs and learning paces**. On average, a HELP course requires a first phase investment of three real learning hours per one to two weeks over a period of two to four months, depending on the course. This is followed by a shorter self-learning second phase, between eight and 20 hours if without a tutor, or longer if utilizing a tutor, as then the time may double, in part because the content will be more tailored to the national legal order. The adaptation to the national legal order

by a national tutor ensures that the course is relevant to the audience and that the European perspective is integrated into national law, so that it is not perceived as something alien.

The HELP methodology, though **cheap and flexible**, has good quality educational materials. **Courses and materials** are usually designed by international experts with different and complementary backgrounds and then translated and adapted to the national legal order of each country.

**Training of Trainers (ToT)** are organised to prepare participants to fulfil the role of HELP trainers and to increase ownership by national training institutions. Successful participants are inserted in a list of certified HELP trainers so that national training institutions can involve them into activities on European Human Rights standards.

After the course completion, an **evaluation** of the course materials is carried out based on the participants’ and trainers’ feedback. This allows HELP to constantly improve its products and offer them as **self-learning resources** of high quality that are available to any legal professional/user of the HELP platform.

## HELP e-learning courses are unique in their content and format.

The HELP methodology and resources are systematically used in all CoE capacity building activities on the ECHR organised in the member states.<sup>11</sup>

### Conclusion

HELP has become the umbrella for all human rights capacity development endeavours undertaken by the CoE. HELP’s high-quality courses, developed by “legal professionals for legal professionals,” are increasingly more demanded by the Bar Associations of the HELP Network.

HELP has five key strengths:

- 1) It is the only genuine legal education pan-European Programme based on a

pan-European HELP Network (judiciary schools and bar associations of CoE 47 member states);

- 2) It offers an “*a la carte*” and tailor-made approach with huge potential for development and adaptation to a national training system;
- 3) It focuses on the enhanced capacity of national trainers utilising the train-the-trainers approach, thus creating a sense of strong national ownership of the HELP Programme;
- 4) Its quality training modules merge European standards (CoE and EU) with national law; and
- 5) Its use of modern technologies include, but are not limited to, interactive online learning opportunities combined with face-to-face seminars moderated by a tutor.

To briefly illustrate the positive impact of the HELP courses on the professional activities of lawyers, a few success stories may be mentioned:

France, 2017:

- The participants of the HELP course on Data Protection and Privacy Rights (DPPR) resulted in an organisation that collectively drafted a proposal to improve

the new DPPR law to be compliant with the French data protection authority.

- A HELP-trained lawyer said that having undertaken the course on the Fight Against Racism, Xenophobia, Homophobia and Transphobia, she felt better equipped to make arguments in favour of her transsexual client, and won a court case.
- Participants of the HELP course on Business and Human Rights reported that after completing the course, they were able to identify situations where there was a potential risk of human rights violations by businesses. Several articles were prepared about business and human rights, one of which was presented at a meeting of lawyers with the purpose of informing the wider legal public about

human rights protection activities in the field of economics.

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1. The European Convention applies to the territory of Aruba island in the Caribbean Sea (Mathew v. the Netherlands), Gibraltar (Maccann and others v. the United Kingdom), Macao - a Special Administrative Region of the People's Republic of China (Yonghong v. Portugal), and New Caledonia in the southwest Pacific Ocean (Fakailo (Safoka) and other v. France).
2. According to the information available at case law database of the ECtHR – HUDOC in December 2019: <https://hudoc.echr.coe.int/eng>.
3. Koch v. Germany, 19 July 2012, Gross v. Switzerland, 30 September 2014 (GC), Pretty v. the United Kingdom, 29 April 2002 and others.
4. Lambert and Others v. France, 5 June 2015 (GC).
5. Parrillo v. Italy, 27 August 2015 (GC).
6. Evans v. United Kingdom, 10 April 2007 (GC).

7. Glass v. the United Kingdom, 9 March 2002, V.C. v. Slovakia, 8 February 2012.
8. Delfi AS v. Estonia, 16 June 2015 (GC), Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, 2 February 2016, Savva Terentyev v. Russia, 28 August 2018.
9. Ahmet Yıldırım v. Turkey, 18 December 2012.
10. Roman Zakharov v. Russia, 4 December 2015 (GC), Szabó and Vissy v. Hungary, 12 January 2016, Bărbulescu v. Romania, 5 September 2017 (GC), López Ribalda and Others v. Spain, 17 October 2019 (GC).
11. More information on the methodology is available online at <http://www.coe.int/en/web/help/help-training-methodology>.



Union Internationale des Avocats  
International Association of Lawyers  
Unión Internacional de Abogados

Seminar presented by the UIA in collaboration with the Paris Bar Human Rights Institute.

*Séminaire présenté par l'UIA en collaboration avec l'Institut des droits de l'homme du Barreau de Paris.*

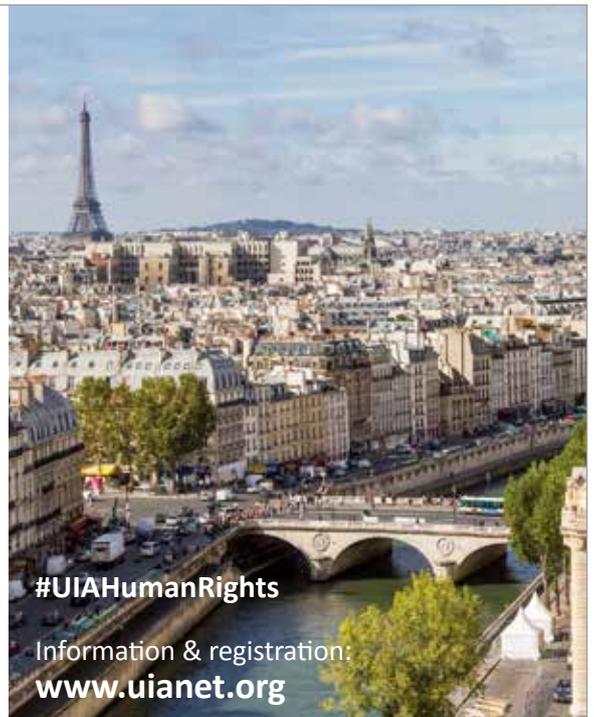
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# LexisNexis Global Foundation to Advance the Rule of Law

**I Nigel ROBERTS**

I am delighted to have this opportunity to share with the membership, news on the LexisNexis Rule of Law Foundation, a not-for-profit entity established to further achieve the LexisNexis Legal & Professional mission to advance the rule of law around the world. This new public charity, dedicated to engaging in Rule of Law projects across the globe, will enable leading entities from the legal, judicial, academic, NGO and other sectors to support and implement projects that address one or more of the four rule of law components: equal treatment under the law, transparency of the law, access to legal remedy, and independent judiciaries.

LexisNexis has been strongly committed to advancing the Rule of Law through projects such as the United Nations Global Compact's Business for the Rule of Law Framework (B4<sup>ROL</sup>), United Nations Global Compact's Business for the Rule of Law Framework (B4<sup>ROL</sup>), the International Bar Association eyeWitness to Atrocities app, eyeWitness to Atrocities app, and the LexisNexis Rule of Law Impact Tracker, (recently updated with 2019 data), <https://www.lexisnexis.com/en-us/rule-of-law/measuring-the-rule-of-law.page>

Our Rule of Law efforts also include partnering with the UIA in 2016 to establish the UIA/LexisNexis Rule of Law Award, to honor an individual or organization for their commitment to advancing the Rule of Law. It was a privilege and an absolute pleasure to participate in the award presentation with the UIA leadership at the Luxembourg UIA Congress in November 2019, to honor Monsieur Bertrand Favreau of France, for his incredible work and dedication over many years.



LexisNexis will offer GIJN members access to one of the world's largest electronic databases and analytic tools for legal, public-records, news and business information.

Pictured left to right: LexisNexis Rule of Law Foundation VP and Secretary, Nigel Roberts; President Ian McDougall; and VP and Treasurer, Terry Jennings.

In 2017, LexisNexis received the Corporate Leadership Award from Freedom House and its Global Legal Department won the Financial Times Innovative Lawyers Award for advancements in the rule of law. The establishment of the LexisNexis Rule of Law Foundation is an extension of its commitment to build legal infrastructures and solve deep-rooted problems in holistic ways that will achieve more robust outcomes and advance the rule of law.

*"Rule of law is foundational to the development of peaceful, equitable and prosperous societies," says Mike Walsh, CEO, LexisNexis Legal & Professional. "Data from the LexisNexis Rule of Law Impact Tracker shows that when the rule of law is strong in a country, other positive social and economic factors within the country are also strong. It is our hope the LexisNexis Rule of Law Foundation will provide the necessary resources and support to shed light on emerging issues critical to advancing the rule of law around the world."*

To help accomplish this, the LexisNexis Rule of Law Foundation will include collaborations with organizations (that we hope will include the UIA) to help increase awareness and understanding of the rule of law. LexisNexis announced the Foundation's first partnership with The Global Investigative Journalism Network (GIJN), an international association of journalism organizations that support the training and sharing of information among investigative and data journalists – even in repressive regimes and marginalized communities.

*"We're thrilled to partner with The Global Investigative Journalism Network, The Global Investigative Journalism Network (GIJN), and provide their journalists with access to the most comprehensive set of information tools at a discounted rate. More than half of the world's population lives outside the shelter of the law, struggling for basic human rights. Each of us shares responsibility to bring this percentage down to zero, ensuring vulnerable and disadvantaged populations receive equal treatment within criminal and civil justice systems. Working together with GIJN will allow us to build greater awareness of the rule of law and strengthen watchdog reporting around the world," says Ian McDougall, President of the LexisNexis Rule of Law Foundation.*

Most recently, the LexisNexis Rule of Law Foundation supported the UN Global Compact Action Platform on Peaceful, Just and Strong Institutions, by facilitating the first country consultation in Timor-Leste in November 2019.

To learn more about the LexisNexis Rule of Law Foundation, visit: [www.lexisnexisrlofoundation.org](http://www.lexisnexisrlofoundation.org).

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# Condamnation à la peine capitale de djihadistes français détenus en Irak : l'obsession sécuritaire au mépris du droit international



■ Camille LUCOTTE  
& Martin PRADEL

« Seul le respect total des garanties les plus rigoureuses d'une procédure régulière fait la différence entre la peine de mort éventuellement autorisée selon le droit international et une exécution arbitraire »<sup>1</sup>.

Depuis le début de l'année 2019, onze ressortissants français ont été condamnés à mort par la Cour pénale centrale de Bagdad, en raison de leur appartenance à une organisation terroriste, sur le fondement de l'article 4 de la loi irakienne n°13-2005.

Ces sentences n'ont pas encore été mises en œuvre, mais leur seule réalité interroge sur l'impuissance – ou, plus probablement, le refus – du gouvernement français à protéger ses ressortissants contre le risque d'une peine capitale, en dépit de ses engagements internationaux l'y engageant.

Plus grave encore, l'État français est mis en cause pour avoir contribué au transfert vers l'Irak de ses ressortissants, depuis leur lieu de détention initial situé au nord-est de la Syrie, dans le Kurdistan syrien, contrôlé jusqu'à l'offensive turque du 9 octobre 2019 par les Forces démocratiques syriennes.

Ces accusations sont prises très au sérieux par Agnès Callamard, Rapporteuse spéciale des Nations Unies sur les exécutions extrajudiciaires, sommaires ou arbitraires, qui a rappelé à la France la teneur de ses engagements internationaux<sup>2</sup>.

L'implication de la France dans ces transferts serait d'autant plus condamnable que les critiques formulées à l'encontre du système législatif et judiciaire irakien par de nombreux

acteurs inter-gouvernementaux et par la société civile, ne pouvaient être ignorées. Le risque de condamnation à la peine capitale par la justice irakienne est sérieux, s'agissant de faits de terrorisme qui ont profondément déstabilisé et endeuillé la région.

conduit certains à adopter des textes répressifs qui contreviennent aux principes de légalité des délits et des peines, et de sécurité juridique.

Pourtant, la Résolution 2178 du Conseil de sécurité des Nations Unies exige de tous

L'incapacité des États à se mettre d'accord sur une définition internationale du terrorisme conduit certains à adopter des textes répressifs qui contreviennent aux principes de légalité des délits et des peines, et de sécurité juridique.

## I. En Irak, un dispositif législatif de répression du terrorisme et un système judiciaire sources de graves violations des droits humains

Les défauts majeurs de la loi antiterroriste irakienne n°13-2005 sont pointés du doigt par l'Organisation des Nations Unies. Son article 4 pose en effet une définition « vague et beaucoup trop large »<sup>3</sup> des faits constitutifs de terrorisme, conduisant ainsi à inclure dans son champ d'application des comportements très variés, et notamment des infractions mineures.

La loi irakienne assimile expressément aux actes de terrorisme en tant que tels, l'incitation, la planification, le financement ou l'assistance fournie à des terroristes, sans distinction du degré d'implication et de gravité des faits reprochés à l'individu.

L'incapacité des États à se mettre d'accord sur une définition internationale du terrorisme

les États qu'ils veillent à prévoir dans leur arsenal législatif les moyens de réprimer les infractions en lien avec des faits de terrorisme « proportionnellement à la gravité de l'infraction »<sup>4</sup>.

Cette répression indiscriminée est d'autant plus critiquable que l'article 4 de la loi n°13-2005 prévoit une seule et unique sanction en cas de reconnaissance de culpabilité : la peine de mort.

Dans une lettre officielle adressée à la France le 3 août 2019, la Rapporteuse spéciale des Nations Unies Agnès Callamard exprime ses vives inquiétudes quant « aux violations graves qui affectent l'administration du système de justice irakien, notamment en ce qui concerne l'indépendance et la compétence des juges, l'absence des garanties d'une procédure régulière et d'un procès équitable, les allégations de torture et d'autres mauvais traitements, et les confessions forcées »<sup>5</sup>.

Elle rappelle que ces violations graves des droits fondamentaux ont été constatées

par de nombreux organes internationaux, à l'instar de la Mission d'assistance des Nations Unies pour l'Irak et le Haut-Commissariat des Nations Unies aux droits de l'homme.

Dans un rapport conjoint, ces deux organes ont relevé « *les failles du système judiciaire irakien, soulignant en particulier que les enquêtes pénales et les procédures judiciaires dans les affaires de condamnation à mort ne respectent et ne protègent pas pleinement les garanties internationales et constitutionnelles d'une procédure régulière et d'un procès équitable* »<sup>6</sup>.

L'Irak a le droit d'exercer sa juridiction à l'égard de toute personne qui se trouve sur son territoire, conformément au principe d'équité et de justice, selon lequel les crimes doivent être jugés là où ils ont été commis.

Mais la souveraineté de l'Irak ne le libère pas de ses obligations internationales<sup>7</sup>, en particulier celles relatives à l'état de droit et aux droits humains.

L'Irak est partie au Pacte international relatif aux droits civils et politiques du 16 décembre 1966 et à la Convention contre la torture et autres peines ou traitements cruels, inhumains, ou dégradants du 10 décembre 1984. Pourtant, les ressortissants français jugés en Irak, accusés d'appartenir à une organisation terroriste, ont tous dénoncé les actes de torture auxquels ils auraient été soumis lors d'interrogatoires conduits par les autorités irakiennes.

Lors du procès de l'un d'entre eux, Fodil Tahar Aouidate, au mois de mai 2019, le juge de la Cour pénale centrale de Bagdad a écarté ses allégations de torture, après avoir lui-même constaté la présence de blessures récentes sur le torse dévêtu de l'accusé. Il a prononcé la condamnation à mort du Français, sur le fondement d'aveux dont l'accusé a soutenu qu'ils avaient été obtenus sous la torture.

La Rapporteuse spéciale des Nations Unies, Agnès Callamard, a également fait état de violations graves des garanties du procès équitable.

Alors que la Constitution irakienne<sup>8</sup> et le code de procédure pénale irakien<sup>9</sup> garantissent à chaque détenu le droit d'être assisté par un avocat, plusieurs accusés

se sont plaints de n'avoir eu accès ni à un avocat, ni à un interprète avant leur procès. Les avocats commis d'office n'auraient, par ailleurs, eu accès au dossier de leur client que quelques instants avant l'audience.

Selon les observateurs étrangers présents, les onze djihadistes français ont été condamnés à la peine de mort à l'issue de procès ayant duré entre 20 et 90 minutes. Ces mêmes observateurs ont qualifié ces procès – *le mot est faible* – d'« expéditifs »...

Face au constat de ces violations graves et systématiques des principes et droits fondamentaux, la Rapporteuse spéciale Agnès Callamard a exhorté la France à rapatrier ses ressortissants, lui rappelant ses obligations internationales et son engagement diplomatique pour l'abolition de la peine capitale. À ce jour, cet appel est demeuré vain.

[...] La souveraineté de l'Irak ne le libère pas de ses obligations internationales, en particulier celles relatives à l'état de droit et aux droits humains.

## 2. En France, l'invocation aveugle de la souveraineté irakienne au mépris de ses engagements internationaux

Les médias n'ont révélé que peu de choses au sujet des ressortissants français condamnés à mort en Irak, obnubilés par le récit du convoi auquel ils auraient pris part<sup>10</sup>, de force, les conduisant du nord-syrien à Bagdad, en passant par Erbil et la prison secrète de Muthana, dans laquelle ils seraient restés du 25 au 28 février 2019.

Les onze ressortissants français affirment que ce convoi était escorté par des forces de la coalition, et notamment par des militaires français.

Ces accusations ont suffisamment convaincu la Rapporteuse spéciale, Agnès Callamard, pour qu'elle exprime à l'État français ses « *vives inquiétudes pour ce qui aurait été le rôle exercé par des autorités françaises dans le transfert des sept individus concernés depuis le nord-est de la Syrie vers l'Irak* »<sup>11</sup>.

Au regard des relations entretenues par la France avec, d'une part, les autorités du

Rojava au Kurdistan syrien, et d'autre part, le pouvoir central irakien, il est en effet tout à fait crédible que la décision de transférer onze djihadistes français, recherchés par les autorités françaises et représentant un enjeu de sécurité nationale et internationale majeur, ait été prise à l'initiative de la France ; du moins avec son accord et sa participation.

Des indices sérieux laissent craindre que l'État français a été, au mieux informé, au pire activement impliqué, dans le transfert des onze français depuis le Kurdistan syrien vers l'Irak, où ils ont été condamnés à mort.

L'accueil de djihadistes français aurait été monnayé par la France. Si le chiffre de 2 millions de dollars versés par djihadistes français détenus en Irak est avancé par la presse<sup>12</sup>, il n'a jamais été confirmé.

Il doit être rappelé que depuis 1981<sup>13</sup>, la France entend promouvoir l'abolition universelle de la peine de mort, usant de son poids diplomatique pour obtenir la ratification du Deuxième protocole facultatif se rapportant au Pacte international relatif aux droits civils et politiques du 15 décembre 1989.

En vertu de ce Protocole facultatif, la France est tenue d'adopter toutes les mesures raisonnables pour veiller à ce que ses ressortissants ne soient pas condamnés à mort ou exécutés à l'étranger. *A fortiori*, elle doit s'abstenir de tout comportement qui soumettrait ses ressortissants à un risque de condamnation à mort ou d'exécution à l'étranger.

La France est soumise à l'interdiction absolue de remettre à un autre État un individu qui serait exposé à un risque de condamnation à mort, sauf à obtenir de solides garanties que celle-ci ne sera pas prononcée.

S'il est avéré, le transfert des onze ressortissants français réalisé par – ou avec – la France, en dépit de risques sérieux de les voir subir des mauvais traitements, d'être soumis à la torture, d'être condamnés à l'issue d'un

procès expéditif et inéquitable, et à terme d'être exécutés, constituerait une violation caractérisée par la France de ses engagements internationaux et, plus grave encore peut-être, un reniement des valeurs auxquelles elle a toujours affirmé un attachement essentiel.

Il est exclu en effet que les autorités françaises aient pu légitimement ne rien connaître des violations graves des droits humains inhérentes au système judiciaire et légal irakien, qui sont régulièrement et internationalement dénoncées.

Notamment, le 8 octobre 2018, plusieurs Rapporteurs spéciaux des Nations Unies demandaient déjà à la France de prendre toutes les mesures utiles pour obtenir le rapatriement de ses ressortissants interpellés et détenus en Irak, et soumis au risque de condamnation à la peine capitale à l'issue d'un procès inéquitable<sup>14</sup>.

Sourde à ces alertes, la France a réaffirmé, dans sa réponse du 7 décembre 2018, qu'elle « reconnaît la compétence des tribunaux irakiens pour juger les combattants français présumés poursuivis pour des faits qui se sont déroulés en Irak ».

Elle assurait aux experts onusiens avoir fermement fait connaître à l'Irak son opposition à la peine de mort. Cette opposition n'aura été que de pure forme.

Le 29 mai 2019, Jean-Yves Le Drian, Ministre de l'Europe et des affaires étrangères français, assurait, contre toute évidence, que les Français jugés en Irak bénéficient de procès équitables et jouissent pleinement des droits de la défense. Il réaffirmait la souveraineté judiciaire de l'Irak.

Depuis, la France n'a pas officiellement condamné les sentences prononcées contre ses ressortissants.

Au contraire, elle s'en satisfait. Si bien que Jean-Yves Le Drian a été chargé de conclure avec les autorités irakiennes un nouvel accord visant à transférer à Bagdad, pour qu'ils y soient jugés, plusieurs dizaines de djihadistes français détenus en Syrie et menaçant de recouvrer la liberté à la suite de l'offensive turque débutée le 9 octobre 2019.

Les autorités irakiennes ont refusé de conclure un tel accord, affirmant que l'Irak



ne devait pas être regardée par la France comme « un dépotoir à djihadistes »<sup>15</sup>.

\* \*

La France a failli à son obligation de protéger ses ressortissants contre le risque d'être condamné à la peine capitale.

Plus encore, si la participation de la France au transfèrement de ses ressortissants depuis la Syrie vers l'Irak était confirmée, son image et sa crédibilité sur la scène internationale en serait profondément et durablement dégradée.

Seule certitude : après une procédure d'appel de pure forme, onze ressortissants français pourraient être exécutés, sans avoir bénéficié d'un procès juste et équitable.

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1. Lettre officielle commune à plusieurs Rapporteurs spéciaux des Nations Unies et Groupes de travail, adressée à la France le 15 octobre 2018 (page 3).

2. *dem.*

3. *Idem* (page 5).

4. Résolution 2178 du Conseil de sécurité, 24 septembre 2014 (point 6).

5. Lettre officielle de la Rapporteuse spéciale sur les exécutions extrajudiciaires, sommaires ou arbitraires, adressée à la France le 8 août 2019 (page 5).

6. Rapport sur la peine de mort en Irak, UNAMI/OHCHR, Bagdad, octobre 2014.

7. L'article 8 de la constitution irakienne exige « le respect [des] obligations internationales ».

8. Article 19 de la Constitution irakienne.

9. Article 123 du code de procédure irakien.

10. Voir par exemple : « Irak : plusieurs Français condamnés à mort mettent en cause Paris », Le Figaro, 6 juillet 2019.

11. Lettre officielle du 8 août 2019 (point 6).

12. Voir par exemple : « Djihadistes français jugés en Irak : Paris et Bagdad démentent le versement de contreparties », Le Monde, 12 août 2019.

13. La peine de mort a été abolie en France par la loi n°81-908 du 9 octobre 1981.

14. Lettre officielle commune du 15 octobre 2018.

15. Déclaration du Ministre des affaires étrangères irakien, Mohamed Ali al Hakim, à la suite de la visite de Jean-Yves Le Drian.



## CEDH et droits de visite des pères séparés

I Bruno MICOLANO

### Arrêt du 5 décembre 2019 *Luzi c. Italie*

L'État doit assurer ce droit dans l'intérêt du parent, mais surtout dans l'intérêt du mineur, lequel a le droit mais aussi la nécessité de voir son père, en vertu, justement, du principe de bi-parentalité, plusieurs fois proclamé au congrès et en doctrine, mais en réalité ignoré et non assuré.

Ainsi, une fois encore l'État italien s'est vu condamné pour ne pas avoir protégé à suffisance un père séparé alors que la mère de son enfant mineur l'empêchait de le voir.

En effet, dans son arrêt du 5 décembre 2019 (Requête 48322/17) *Luzi c. Italie*, la Cour européenne des droits de l'homme de Strasbourg a reconnu qu'en restant en défaut de déployer les efforts adéquats pour faire respecter le droit de visite de ce père, les autorités nationales ont violé le droit du requérant au respect de sa vie familiale (article 8 de la Convention européenne des droits de l'homme).

Analysons les faits :

Le requérant, M. Valter Luzi, est un ressortissant italien, né en 1974 et résidant à Mellaredo di Pianiga (Venise). De son union avec J. B. est née une fille, G., le 21 avril 2009.

Après quatre mois de vie commune, J. B. a quitté le domicile familial avec l'enfant pour aller vivre auprès de sa famille. Le 8 février 2010, M. Luzi a saisi le tribunal pour enfants pour se plaindre de difficultés dans l'exercice de son droit de visite et demander la garde partagée. En février 2011, le tribunal décida de limiter la responsabilité parentale des deux parents en faveur des services sociaux de la mairie. J. B. forma un recours devant la cour d'appel. Celle-ci le rejeta.

En décembre 2011, les services sociaux transmirent un rapport au tribunal indiquant



La Cour constate que les autorités n'ont entrepris aucune action à l'égard de J. B. Elle estime que les autorités ont laissé se consolider une situation de fait au mépris des décisions judiciaires.

que les rencontres se passaient très difficilement en raison du comportement des deux parents.

En février 2013, les services sociaux signalèrent une aggravation des conflits entre les parents. Le 21 septembre 2013, le tribunal fut informé de l'interruption des rencontres entre M. Luzi et sa fille.

En janvier 2014, le tribunal décida d'attribuer la garde exclusive de l'enfant à sa mère, dans l'intérêt de la mineure. Au mois de décembre, la cour d'appel ordonna à J. B. d'exécuter la décision du tribunal et de respecter le calendrier des rencontres entre le père et sa fille. Au cours de l'année 2014, M. Luzi ne put rencontrer sa fille que trois fois. En septembre 2015, la cour d'appel révoqua l'octroi de la garde exclusive de la mineure à la mère en faveur d'une garde conjointe,

limita la responsabilité parentale des deux parties et confia la garde de l'enfant aux services sociaux en leur enjoignant de signaler au juge des tutelles et au parquet d'éventuelles violations de la décision.

À partir d'octobre 2016, M. Luzi ne put rencontrer sa fille en raison de l'opposition de la mère et du refus de l'enfant. En février 2017, les services sociaux signalèrent que la mère manipulait l'enfant pour la dresser contre son père et empêcher tout contact avec lui.

La plainte pénale déposée en mai 2015 par M. Luzi tendant à sanctionner le non-respect par J. B. de la décision sur le droit de visite fut classée pour absence d'élément moral du délit. Une seconde plainte fut classée pour le même motif.

M. Luzi introduisit alors une requête devant la Cour de Strasbourg, se plaignant d'une violation du respect de sa vie familiale au motif qu'il n'avait pu exercer pleinement son droit de visite pendant huit ans en dépit de plusieurs décisions judiciaires. Il invoqua l'article 8 (droit au respect de la vie privée et familiale).

Dans son arrêt, en droit, la Cour relève, en premier lieu, qu'à partir de 2010, alors que l'enfant n'avait qu'un an, M. Luzi n'avait cessé de demander au tribunal l'organisation de rencontres avec sa fille mais qu'il n'avait pu exercer son droit de visite que de manière très limitée en raison de l'opposition de la mère.

Ensuite, la Cour note que l'expert mandaté par la Cour d'appel en 2015 a souligné que le comportement néfaste de J. B. avait empêché l'enfant d'établir un lien avec son père et qu'elle faisait échouer tout projet de rapprochement envisagé. La Cour d'appel avait demandé aux services sociaux de signaler tout non-respect de la décision accordant à M. Luzi un droit de visite. Les signalements auxquels avaient procédé les services sociaux dénonçaient l'attitude manipulatrice de J. B. et faisaient état de l'impossibilité pour le père d'exercer son droit de visite. Ces signalements étaient toutefois restés sans suite.

Ainsi, en 2015, M. Luzi n'a pu rencontrer sa fille que deux fois et cette situation a perduré jusqu'en 2018. La Cour reconnaît que les autorités étaient confrontées à une situation très difficile qui découlait notamment des tensions entre les parents de l'enfant.

Cependant, la Cour estime que les juridictions internes n'avaient pas pris les mesures appropriées à créer les conditions nécessaires à la pleine réalisation du droit de visite du père de l'enfant. Ces juridictions n'ont pas pris, dès le début de la séparation des parents, de mesures concrètes et utiles visant à l'instauration de contacts effectifs. Elles ont ensuite toléré pendant environ huit ans que la mère, par son comportement, empêche l'établissement d'une véritable relation entre le père et l'enfant. Le déroulement de la procédure devant le tribunal laisse apparaître une série de mesures automatiques et stéréotypées, qui n'ont pas eu d'effet utile. De leur côté,

les services sociaux n'ont pas correctement exécuté les décisions judiciaires.

La Cour constate que les autorités n'ont entrepris aucune action à l'égard de J. B. Elle estime que les autorités ont laissé se consolider une situation de fait au mépris des décisions judiciaires. Face à l'opposition de la mère de l'enfant qui a perduré pendant environ huit ans, les autorités nationales n'ont pas pris toutes les mesures nécessaires pour faire respecter le droit du requérant d'avoir des contacts avec sa fille. Si les tribunaux ont été inspirés dans leurs démarches par l'intérêt supérieur de la mineure, l'objectif n'a pas été atteint, car neuf ans après la séparation des parents, l'enfant n'a presque aucune relation avec son père, en dépit des décisions des juridictions internes.

La Cour a dès lors considéré que les autorités nationales n'ont pas déployé les efforts adéquats et suffisants pour faire respecter le droit de visite du requérant et ont méconnu le droit de l'intéressé au respect de sa vie familiale.

En conséquence, elle a déclaré à l'unanimité qu'il y avait eu violation de l'article 8 de la Convention et lui a accordé une indemnisation en vertu de l'article 41 de la Convention.

L'article 41 de la Convention permet, en effet, à la Cour dès lors qu'elle conclut à l'existence d'une violation de la Convention ou de ses Protocoles, et que le droit interne de la Haute Partie contractante ne permet d'effacer qu'imparfaitement les conséquences de cette violation, d'accorder à la partie lésée, s'il y a lieu, une satisfaction équitable.

Au-delà d'une telle indemnisation, il est toutefois souhaitable que tous les États membres adoptent des procédures et des structures permettant, même dans l'urgence, de garantir le droit des pères de voir leurs enfants.

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# Purposes of Incarcerating International Criminal Court's Convicts

I Ashley PAYET

Les peines d'emprisonnement prononcées par la Cour pénale internationale (CPI ou la Cour) ont souvent été critiquées pour leur manque de gravité. On peut affirmer que la détermination de la peine adéquate vise, entre autres, à mettre les criminels internationaux derrière les barreaux. Cet article aborde les objectifs poursuivis par la Cour lors de la détermination des peines qu'elle prononce, à savoir châtement mais aussi dissuasion, mais aussi les attentes des victimes et les droits des détenus.

## I. Introduction

According to the Rome Statute of 17 July 1998 (Rome Statute or the RS), the mission of the ICC is to combat impunity for the most heinous and nefarious crimes falling under its jurisdiction and to deliver justice to victims whilst ensuring a fair trial for the accused (Preamble, articles 21(3) and 64(2) of the Statute). Following conviction, such a goal underpins the polarising question of the adequate incarceration time for international offenders.

Since the establishment of the Court in 2002, five sentencing decisions have been handed down. First, Mr Lubanga was sentenced to fourteen years imprisonment, as a co-perpetrator of the war crimes of conscription and enlistment of child soldiers (*The Prosecutor v. Thomas Lubanga*, No. ICC-01/04-01/06, July 10, 2012). Then, Mr Katanga was sentenced to twelve years imprisonment, reduced to ten after serving two-third of it, for the commission of multiple crimes as an accessory, including murder as a crime against humanity of attacking civilians, and destruction of property and pillage as war crimes (*The Prosecutor v. Germain Katanga*, No. ICC-01/04-01/07-3484, May 23, 2014 and No. ICC-01/04-01/07-3615, November 13, 2015). For his part, Mr Al Mahdi was found guilty of co-perpetrating the war crime of intentionally attacking religious and historic buildings and was sentenced to nine

years in prison (*The Prosecutor v. Ahmad Al Faqi Al Mahdi*, No. ICC-01/12-01/15-171, 27 September 2016). As for Mr Jean-Pierre Bemba, he was sentenced to eighteen years' imprisonment as a military commander for a number of war crimes and crimes against humanity and was ultimately acquitted in the main case (*The Prosecutor v. Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08-3399, June 21, 2016 and No. ICC-01/05-01/08-3636-Red, 08 June 2018). Lastly, on November 7, 2019, Mr Bosco Ntaganda was sentenced to thirty years imprisonment as a direct perpetrator and as an indirect co-perpetrator of eighteen war crimes and crimes against humanity, respectively with a considerable number of aggravating circumstances (*The Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06, November 7, 2019).

a certain leniency on the part of the ICC. However, the recent decision in Ntaganda brought some relief across the board, insofar as the victims, prosecution and other such stakeholders are concerned. Although the latter's 30-year sentence did not meet the victims' submissions of life imprisonment, the judgment was nevertheless met with greater satisfaction from the prosecution, a few victims and the international community as a whole.

Indeed, a number of key factors go into determining a sentence, such as its purposes, the gravity of crimes committed and the existence of any aggravating and/or mitigating circumstances (articles 77 and 78 of the RS, and rule 145 of the Rules of Procedure and Evidence of the

Although the latter's 30-year sentence did not meet the victims' submissions of life imprisonment [...].

Individuals and stakeholders directly or indirectly affected by sentencing such as victims, the prosecution, and to a greater extent, the international community have been voicing discontent regarding the lengths of imprisonment sentences. For instance, Mr Lubanga's sentence fell short of the 30 years the prosecution had originally requested (Lubanga, §92) and most victims were unhappy with the judgment; in a 2012 article published by the International Justice Monitor titled '14 Years: Too Much or Not Enough?', one victim stated that "14 years is too little...so he is just going to fool around in this European prison where he is going to get fat...it is not like our prisons, which are death traps". In 2014, another article published by the non-governmental organisation titled 'Reactions to the Sentencing of Germain Katanga: Some Comfort, Some Frustration' showed that, when it came to Mr Katanga's sentence, the victims were also unhappy and described it as 'too light', 'too weak' and hoped that had been 'more severe'. Such criticisms point to

RS). That said, the primary focus of this article lies with the objectives of the ICC's prison sentences, namely retribution and deterrence, and extends to victims' satisfaction and detainees' interests.

It goes without saying that, sentencing affects victims and convicted persons differently; for the victims, it means that the harmful acts committed against them are recognised and punished whilst for the convicted person, it determines the length of time they will be deprived of physical liberty. Following this introduction, section II explores the objectives of putting international criminal offenders behind bars by reviewing (A) the meaning of retribution in the light of victims' expectations; and (B) general deterrence. Finally, section III concludes by arguing that, in terms of retribution, emotions or vengeance should not get in the way of sentence determination and that, as far as general deterrence goes, international offenders should not be used as tools;

equally, potential offenders are perhaps not necessarily dissuaded by (harsh) sentences.

## II. Objectives of Imprisonment Sentences

Articles 76, 77 and 78 of the Rome Statute provide the legal framework for applicable penalties and determination of sentences. However, the statute does not refer *per se*, to any explicit provision related to the purposes of a sentence. The jurisprudence of the Court highlights a consistent interpretation of paragraphs three to five of the preamble; accordingly, fighting against impunity of ‘the most serious crimes of concern to the international community’ and contributing ‘to the prevention of such crimes’ amount to retribution and deterrence (*Katanga*, §37; *Bemba*, §10; *Al Mahdi*, §66). Although not considered as being part of the main sentencing objectives, the Court has also given consideration, to a lesser extent, to reconciliation, peace building and rehabilitation of international offenders (*Katanga*, §38; *Bemba*, §11; *Ntaganda*, §10). The following subsections explore the meaning of retribution and deterrence in the Court’s sentencing judgments as concerns victims’ satisfaction and detainees’ rights.

### A. Hitting Back Hard Enough

Retribution may be defined as the desire to hit back at those who have committed wrongful acts, ‘on the basis that the offenders deserve punishment for what they have done’.<sup>1</sup> This goal was originally associated with the *lex talionis*, which reflects the maxim an eye for an eye, a tooth for a tooth. Retribution is said to be backward-looking and the most passionate advocates for harsher sentences in international punishments invoke this objective.<sup>2</sup> This is why, whenever retribution is referred to in the ICC’s jurisprudence, the latter carefully spells out its scope so as to avoid any conflation of it with vengeance.

For instance, in the *Katanga*, *Bemba* and *Ntaganda* cases, the respective trial chambers stated that retribution should exclude ‘any desire to exact vengeance’ (§38, §11 and §10 respectively). The chambers, in the same decisions and respective paragraphs, further stated that the notion could be understood as ‘the expression of society’s condemnation of the criminal act and of the person who committed it, which is

also a way of acknowledging the harm and suffering caused to the victims.

As a matter of fact, article 68(3) of the Rome Statute allows for victim participation in the proceedings before the ICC. In practice, victims may also present observations during sentencing (see for instance, the Observations on the sentence and reparations by victims in *Lubanga*, No. ICC-01/04-01/06-2864-tENG, April 18, 2012 and the Observations relatives à la procédure et aux principes relatifs à la fixation de la peine in *Katanga*, No. ICC-01/04-01/07-3441, March 17, 2014). In this regard, expectations of victims are oftentimes a reflection of their subjection to inhumane treatment, and understandably so. Consequently, victims tend to advocate for the highest imposable sentence and submit life imprisonment as the appropriate punishment (*Al Mahdi*, No. ICC-01/12-01/15, §46 and *Ntaganda*, §29). In general, many victims believe in the necessity to strike back as hard as they possibly can; some even believe that capital punishment is the only appropriate punishment for certain offenders.<sup>3</sup> Their position is often rooted in the nightmares, traumatic experiences and unimaginable sufferings they have endured.

should also bear in mind that, in the context of sentence determination, such a voice may reflect a certain level of emotion. This may conflict with the defendant’s right to a fair trial and to an adequate sentence.

### B. Dissuading Commission of Like Crimes

Deterrence is about deflecting those planning to commit similar crimes from their purpose (*Katanga*, §38). In the *Al Mahdi*, *Bemba* and *Ntaganda* cases, the Trial Chamber stated that ‘a sentence should be adequate to discourage a convicted person from recidivism [specific deterrence], as well as to ensure that those who would consider committing similar crimes will be dissuaded from doing so [general deterrence]’ (*Al Mahdi*, §67, *Ntaganda* §29).

Severe sentences are believed to dissuade future offenders and send a strong signal to continuous attacks and international crimes (*Al Mahdi*, §46). In *Bemba*, the prosecution argued in favour of a ‘long sentence, proportionate to [the] gravity of Bemba’s culpability [that] would also pursue the objective of deterring other military commanders from committing

As a matter of fact, article 68(3) of the Rome Statute allows for victim participation in the proceedings before the ICC.

Cherif Bassiouni (2003) regards the imposition of punishments as an implied social contract depriving victims of the possibility to punish their attackers.<sup>4</sup> In his view, part of giving up the right to punish criminals is coming to terms with the fact that society takes over the situation and ultimately imposes the adequate punishment. Wheeler, C. H. (2018, p. 360.) acknowledges that this may give rise to instances where victims feel like justice has not been delivered. The latter argues that ‘the victims’ desire for revenge perpetuates the cycle of violence (and) it conflicts with the primary sentencing goals, the preservation of the world order and the maintenance of peace and security’.

As a result of their participation in the proceedings, when it comes to proving the accused’s culpability, victims contribute to the story-telling and narratives and significantly help to establish the truth. However, one

similar crimes.’ (*Bemba*, No. ICC-01/05-01/08-3363-Red, §126).

The first drawback of this argument is that it only ‘sees people as a means to an end’ and uses or misuses the culprit as a tool to achieve an ulterior motive (Wolf, W.-J. van der. (2011, p.57). Such reasoning sees the accused as a tool, and a platform, to get a broader message across to potential offenders. This is perhaps misconceived as each offender should be judged on the basis of what they have done and not what others might also do. The idea of purposefully magnifying a particular criminal act for the purpose of deterring its commission by others is flawed because it goes beyond the primary goal of proportionately punishing the offender on the basis of what they have done.

Furthermore, general deterrence has a tendency to treat individuals who are about

to commit crimes as rational thinkers, who attentively weigh up the pros and the cons of their actions, when this does not reflect the reality of their decision-making process, if any.<sup>5</sup> Many people believe that the idea of thinking about consequences crosses the mind of future offenders before they actually go on to commit crimes (Wolf, W.-J. van der. (2011, p.58)). This belief is inaccurate as international offenders may not necessarily sit down and think about the pros and the cons of their actions beforehand; oftentimes, they act in groups, execute orders or are more likely to offend in the heat of the moment. Unless it concerns the highest commanders of military groups, it would be inaccurate to sustain that harsher sentences considerably deter others from committing such crimes.

As argued by DeGuzman, M. M. (2014, p.3), 'contrary to the claims of harsh justice proponents, no punishment theory dictates a particular level of punishment severity for international crimes.' The latter further underlined that, although punishment theories have been debated internationally for a long time, no theory has developed that can explain how much punishment is deserved for genocide, war crimes or crimes against humanity to successfully deter their commission. There is no solid evidence which has convincingly established the dissuasive effects of severe or lenient sentences on international offenders. As a result, it would be inappropriate to strongly rely on general deterrence and deprive someone of their freedom when it is not warranted by other factors such as gravity of crimes and/or aggravating circumstances.

### III. Conclusion

Insofar as victims are concerned, their discontentment should not always be viewed as an objective decrying of leniency since their experiences and the emotions attached to them may defeat such objectivity. Whilst the acknowledgement of the harms suffered by victims is of utmost importance, one should not let such emotions get in the way of the duty to strike a fair balance between their right to justice and the defendants' right to a fair trial. In such circumstances, fair trials may be conceived as a space for victims to make observations without prejudice to the accused' right to a fair legal determination of their sentences.

Calls for harsher punishments neglect such principles of fairness and proportionality while considering how much time offenders should serve behind bars. Moreover, inflicting harsher sentences on offenders is not right in instances where the latter are viewed as tools to achieve a wider objective not related to the individual cases. Equally, potential offenders should not always be seen as individuals who take precedent sentences into account before committing crimes.

On the other one hand, international condemnation of such atrocious crimes is a meaningful sentence objective and should perhaps be further stressed by the Court. What comes with it is the shame of having done something wrong, being looked at in the eye and told that they did something horrible and deserve to be punished.

and proportional (article 81(2)(a) of the RS). Because of that, we should wipe the tears of the devastated victims and children who have lost their moms, dads, homes and childhood. We need them to understand that we stand strongly behind them have but also that, what matters the most is not striking back as hard as we possibly can. We need to give consideration to the principles of fairness and reasonableness in the face of atrocities and look towards building a more peaceful future.

*A big thank you to attorney at law Julie Goffin and my fellow colleagues and friends from the ICC for their support and participation into the discussion.*

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As a result of their participation in the proceedings, when it comes to proving the accused's culpability, victims contribute to the story-telling and narratives and significantly help to establish the truth.

That said, the truth is that no amount of years spent in confinement will ever erase the abominable acts committed by heartless perpetrators and repair victims' physical and mental injuries. Harmon M. & Gaynor F. (2007, p.692) argue that 'a sentence, however harsh, will never be able to rectify the wrongs, and will be able to soothe only to a limited extent the suffering of the victims, their feelings of deprivation, anguish, and hopelessness.'<sup>6</sup>

For all the wrong committed by criminals, there is nothing within the reach of human beings to accurately measure the level of pain and sufferings and reattribute them to the wrongdoers. Determining how much punishment is needed is a matter of where one stands on the spectrum of severity and the principles applied in order to reach an approximate figure. There is no applicable mathematical formula to make a precise calculation possible and consequently bring absolute satisfaction and closure to the victims.

Such an undertaking is about striking the right balance between the fight against impunity, the victims' right to justice and the defendant's rights to have a fair imprisonment sentence. The sentence has to be humane

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# Professional Secrecy and Legal Privilege: Issues in Applying a Fundamental Principle



■ Eugenia GAY ROSELL  
& Nielson SANCHEZ STEWART

En este artículo se analiza la importancia del secreto profesional a través de un análisis comparativo entre diferentes ordenamientos jurídicos.

Se destaca la evolución de la obligación de guardar el secreto y su relación con una sociedad cada vez más compleja y global, en la que confluyen distintos derechos y la irrupción del concepto de transparencia.

Se enfatiza que el secreto no está establecido como un privilegio del abogado sino del cliente para su adecuada defensa y correcto asesoramiento.

## Introduction

Professional secrecy constitutes one of the most important pillars of our juridical system. Rule of Law and Justice are two of the cornerstones of a democratic society. Without defence, Rule of Law does not exist and without lawyer, there is no defence. Defence is not possible without the right of the client to express himself/herself freely and confide in his/her advocate. Besides, a lawyer is also a counsellor and therefore has to obtain all necessary information in order to fulfil his duty. The client expects that all data supplied is to be kept confidentially and intimately. For these reasons, professional secrecy has been considered the guarantee of fundamental rights of defence, intimacy and privacy of the citizens, and as a last resort, freedom. In addition, it protects the social interests of the legal profession. However, recently the erosion of the concept has been a cause of concern within the legal field.

The duty of professional secrecy between client-lawyer dates back to Roman Law and has evolved during centuries. In some periods the concept has been seriously affected by the aim of obtaining a false security by applying coercive methods.

Professional secrecy is part of the correct administration of justice, the need of a citizen to be able to trust another, the lawyer in this case, without the fear of being denounced, imprisoned or tortured. An authoritarian state has used the system of abolishing the professional secret to obtain full control of its subjects.

The first thing that would need to be stated is that professional secrecy is not and has never been established in favour of the lawyers, but exclusively for the society who is entitled to live and develop in an environment of freedom and justice.

We are living an era where transparency is considered as a virtue and *prima facie* professional secrecy may be regarded as a way to hide all sorts of harmful actions. Transparency is sometimes and often contrary to personal privacy. Besides, it is imposed by the states and the authorities, who want to know everything about our private lives in order to control our behaviours, despite of the right to privacy.

Professional secrecy is not conceived to hide illegal activities. If the advice of the lawyer is to assist the client to perform a criminal activity, knowing it to be illegal, the lawyer should be subject to criminal and disciplinary sanctions.

Legal privileges and professional secrecy are not identical in all jurisdictions. In civil law jurisdictions, to keep professional secrecy is an obligation imposed on lawyers by law, and at the same time it is their right to not reveal what they have learned through their activity. It applies normally to lawyers with independent practice. *In-house* lawyers are usually subject to a different treatment. In common law, legal privilege includes the contents of documents issued by a lawyer to the client and also applies to in-house lawyers, but it is normally imposed by contractual relationship with the client. At present, professional secrecy and privilege in the law profession is an evolving topic that concerns all legal professionals worldwide in a variety of fields. The theoretical debate surrounding professional secrecy has saturated legal forums with the purpose of developing a complete understanding of the topic by means of addressing a variety of questions including: (1) the unwillingness to go to court, for fear of disclosing the trade secrets that are defended; (2) the right of confidentiality that clashes with the need to access information for a proper defence; (3) arbitration helping lawyers to manage data access through establishing the degree of confidentiality of the information accessed; (4) harmonization as a beneficial factor for companies and individuals, and (5) unwillingness of companies to advise on privacy and secrecy policy. These are all subjects that differ greatly from culture to culture and that have changed over time.

## The situation in Europe

Across Europe, communications between lawyers and their clients are confidential

and protected. This is vital to protecting the **rule of law** and **access to justice**.

In common law jurisdictions, professional secrecy is referred to as 'legal professional privilege', and protects communications between professional legal advisers.

In England and Wales, legal professional privilege applies to communications between lawyer and his/her client, but is imposed by the client when contracting the services of the lawyer. No privilege arises if a lawyer's assistance is sought to advise a crime or fraud; money laundering reporting and anti-terrorism are the most important exception in practice. The lawyer's duty of confidentiality is wider than privilege and refers to any information received by a lawyer in the course of their legal practice.

In civil law, professional secrecy is understood as a duty of the lawyer and not as a right of the client, who cannot liberate the lawyer from keeping the secrecy of what he/she may have learned during the relationship. The duty of confidentiality differs from professional secrecy as it protects communication between lawyers.

In both systems, a negligent failure of the duty can give rise to criminal penalties, civil damages or disciplinary sanctions. In addition, in certain countries professional secrecy does not cover the advice given by in-house counsel. France, Italy and Sweden categorically refuse to protect the confidentiality of advice provided by in-house legal counsel. In the United Kingdom, Denmark, Spain, Portugal, Ireland, Greece and Scotland in-house counsel has the same status and regulation as a lawyer employed by a law firm.

Nowadays, the fight against terrorism, cross-border organized crime and money laundering has tended to take priority over the protection of confidentiality, and the proliferation of new communication technologies is likely to keep the topic of lawyer-client confidentiality in the spotlight.

### **The situation in Spain**

The professional secrecy is recognized in the Spanish Constitution, in which it is promulgated as the right of professional secrecy. The judgment of the Supreme

Court of Justice *delivered on 17<sup>th</sup> February 1998* ruled that professional secrecy was the basis of the right to be defended, which means that the lawyer is not only a defender but he is also a consultant and an adviser.

The ultimate basis of the lawyer's professional confidentiality is therefore two-pronged. On one hand, it is based on the right of the client to privacy and on the other, to not give evidence against his/her client.

The duty to abide by secrecy is objectively absolute, that is, it embraces all facts or information, but it is not universal. In other words, not all lawyers, whatever function they are performing, are subject to such an obligation. The general consensus is that professional secrecy is not only in the interest of the client but also of society as a whole and a matter of public policy.

Violation of the obligation of keeping facts confidentially may cause damages to the client and in certain cases to a third party. Violation of the obligation of keeping confidentiality is punishable by criminal sanctions and disciplinary measures.

To conclude, it can be affirmed that no one in Spain, not even a judge nor the president of the Bar Association, no authority, no matter how high-ranking and important it might be, can intervene and relieve the lawyer from his obligation to keep secret the information that may have come to him as a consequence of his professional practice. Neither can the client, with the exception of what is foreseen in some areas such as Barcelona, for example. And, over time, when the legal professional secrecy rule was conceived, it was not done to cover conduct, but to guarantee that the truth can only be obtained by following the straight path while respecting the presumption of innocence.

### **The situation in North America**

In the United States, lawyers do not reveal information relating to the representation of a client unless the client gives informed consent. The only exception to this general rule occurs when the lawyer reveals the information to prevent harm, crime or per court order. Attorney-client privilege can be invoked in respect of communication between privileged persons in confidence,

and for the purpose of obtaining or providing legal assistance for the client.

The fundamental principle is that trust encourages full and frank discussion including embarrassing or legally demanding subjects, to enable lawyers to effectively represent clients. Generally, in-house counsel in the United States has attorney-client privilege for legal, but not business advice. Furthermore, it is possible to extend privilege to third parties sharing a common legal interest.

Attorney-client privilege is a matter of state procedural law from the federal standpoint, but determining which state's privilege applies is still the subject of a choice of law analysis; state courts will also undergo that analysis.

The attorney-client privilege can be waived if the information, subject to certain exceptions relating essentially to physical or economic harm, is disclosed to third parties. At this point, it is important to remark that attorney work doctrine may vary state to state.

### **The situation in Latin America: Argentina – Colombia - Peru**

Professional secrecy in Latin America is not only considered a moral duty, but also a legal obligation. The protection of professional secrecy is justified in 1) the need to protect people from the harm that may be caused by the disclosure of private information, especially in the course of a trial, 2) the confidence, because it is necessary to be sure that information can be trusted, and 3) the Human Right to Privacy that everyone has.

Since the beginning of the current year in Argentina and other South American countries, the Financial Intelligence Unit (UIF) began to investigate attorneys of the defendant in cases related with corruption, drug trafficking and money laundering. In effect, UIF asked them to report collected, pending or agreed fees, as well as the date, form of payment and the name of the payer. The organism has the clear purpose of determining the origin of the funds. These requests are openly unconstitutional, since they damage the code of rights and basic guarantees. The same unconstitutionality can be applied to telephone tapings which occurred periodically in Latin America.

Finally, the current situation in South America is worth mentioning: in Argentina in the current year, telephone hearings have been spread between lawyers and clients. The indiscriminate dissemination of this eavesdropping represents serious violations of human rights. In Colombia, attempts are being made to adapt the rules of professional secrecy contained in the Constitution to international standards after its entry into the OECD. Finally in Peru, certain lawyers have been required to implement an asset laundering prevention system.

To conclude, in most of the Latin America countries, they have created standards and policies that jeopardize the basic guarantees of a state of law, as well as affect the free exercise of our profession.

### **The situation in North Africa**

In several countries of North Africa, the French Criminal Code is directly applicable, but other countries have their own legislation regarding legal privilege. It is worth highlighting the huge differences across Africa, which makes it difficult to create a general view of the entire continent. However, many North African countries apply similar practices as in Europe.

As in other countries, legal privilege in North Africa is considered a duty for the lawyer but also considered a right for the client. In these countries, legal privilege covers the conversations and meetings held between the lawyer and his/her client, the information that comes from third parties regarding the issues under defence on behalf of the client, the correspondence held between the lawyer and the client, but also between lawyers themselves.

There are some exceptions to this principal rule: when the lawyer has to defend himself from their own client; criminal offence; security of the country or money laundry regulation. Negligent failure of this duty will imply deontological and criminal consequences; imprisonment and fines.

### **The situation in South Africa - Congo**

Professional secrecy and corollary confidentiality of correspondence between

lawyers remain the basis of the profession of the lawyer. From the point of view of comparative law, the regime that applies to professional secrecy and the confidentiality in Congo is closer to the Belgian and French systems on which it is based.

The obligation of confidentiality is general and absolute. A decision of *Barreau de Kinshasa* of 22 January 1970 and the decision of *Conseil National de l'ordre n° CNO/8/87* of 19 August 1987 on the rules of procedure of the Bar Associations of the Democratic Republic of the Congo establish that: 1) correspondence between lawyers is strictly confidential; 2) its submission to the courts is only exceptionally allowed with the prior authorization of the President of Lawyers; 3) the term "non-confidential" is inoperative, 4) only the commitments, agreements or acquiescence noted in correspondence between lawyers are excluded from the confidentiality if they have acted as agents of the clients. The *Conseil National de l'Ordre des avocats de la République Démocratique du Congo* has introduced a one-year waiting period, which seems too short a time.

All in all, it is up to the profession to preserve this right to secrecy and confidentiality, the result of a long, distant and painful conquest.

### **The situation in Asia - Japan**

In Japan, the concept attorney-client privilege is somewhat brand-new. In some circumstances, it may sometimes be adversely interpreted as the attorney's right to conceal unfavourable evidence. Some people unreasonably argue that any documents undesirable for the client and provided to an attorney would automatically come under the umbrella of privilege and that the truth would accordingly be hindered from revelation in administrative or judicial proceedings. Therefore, the existence of such privilege would not unreasonably hinder the revelation of truth at all.

Nowadays, some people who generally distrust the attorney as a defender of evil argue that attorneys may abuse the privilege by alleging or advising the client that certain documents outside the scope of privilege are to be protected against disclosure. Yet the Tokyo Bar Association firmly believes that such risks should be hedged by reinforcing disciplinary sanctions

against violation of professional ethics or by establishing tough and effective in-camera procedures in the event of differences as to the scope of coverage under privilege.

### **The situation in Oceania – Australia**

In Australia, professional secrecy and privilege is more frequently called "legal professional privilege," or "client legal privilege". Both refer to a common law right that protects the confidentiality of communications made between a lawyer and his/her client. However, this privilege can be lost either by deliberate waiver or by inadvertent oversight. Lawyers have a duty to assert the privilege even though the privilege is a protection afforded to the client.

In Australia, legal professional privilege is considered a fundamental protection and pillar of the legal system. However, to call it "fundamental" isn't to say it is uncontested - far from it. Recent doctrine has revealed underlying tensions around this issue. Lawyers show the complexities of legal professional privilege, at both an individual and institutional level. Also, the development of a new protocol, announced in July by the Law Council of Australia concerning legal professional privilege, highlights the sometimes-tense relationship between members of the legal profession and regulators.

### **Conclusion**

All things considered, in performance of the obligation to ensure the protection of the fundamental human right of confidentiality of the attorney-client relationship, it is necessary to remind all individuals, governments and lawyers that client privilege is a fundamental human right and a lawyer's obligation to maintain since legal professional privilege belongs to and protects the client. This right is pivotal to protect access to a proper administration of justice, and along with the independence of the lawyer, client privilege is integral to the preservation of the rule of law and the right to a fair trial.

The importance of the attorney-client privilege and confidentiality to preserve the frankness and honesty in the conversations

between the client and his/her lawyer with the finality of preserving this right has been observed, as well as to guarantee a proper advice and defence. The lawyers are the only professionals that, through the practice of professional secrecy, sufficiently and necessarily guarantee the right of defence to the citizens and legal entities.

As previously exposed, some aspects greatly differ from culture to culture and have changed over time. The constant evolution of our society, increasingly more sophisticated and complex must also be considered. It has been the purpose of this article to develop a complete understanding of the concept.

In light of all the positions exposed and taking into account UIA and its collective member's statement, it is certain that all Bars and Law Societies and all lawyers' associations globally must promote awareness of the right of all citizens to legal professional privilege. Furthermore,

all national governments, European and international institutions must respect this fundamental human right, as any attack upon the integrity of this confidential and trusted attorney-client relationship would undermine the rule of law.

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# La réglementation du marché de l'art: exemples d'ordres juridiques

I Lavinia SAVINI

Compte tenu de la vocation évidente de la ville de Venise d'être le lieu idéal pour aborder les thématiques relatives au monde de l'art et de la culture, la Chambre Arbitrale de Venise a instauré une chambre spécialisée en matière d'arbitrages relatifs aux litiges nationaux et internationaux dans le domaine de l'art, première en son genre à être instituée en Italie. À l'occasion de la présentation de ce nouveau service, la Chambre Arbitrale a organisé une série de 7 rencontres sur le sujet « Art et Droit ». Dans le cadre de cette rencontre, s'est déroulée une conférence sur le thème « La réglementation du Marché : exemples d'ordres juridiques étrangers », où des avocats italiens et étrangers sont intervenus en tant que rapporteurs.

L'ordre juridique italien a ainsi été comparé aux principaux ordres juridiques européens tels que ceux de la France, l'Allemagne et l'Angleterre, ainsi que celui des États-Unis, sur les principales thématiques juridiques et fiscales relatives au marché de l'art.

De la rencontre a émergé l'existence d'une réglementation définitivement hétérogène au sein des différents pays, et ce, malgré les tentatives d'harmonisation du marché européen.

La question du rôle central des experts dans le déroulement des transactions commerciales en France, en Allemagne et aux États-Unis, a été abordée. Dans ces pays, il a été constaté qu'il était courant de faire participer des experts, particulièrement dans le cadre de deux *diligences* lors de l'achat d'œuvres d'art et qu'il existait aux États-Unis une ample jurisprudence sur les *best practice* pour la réalisation de ces *diligences*. La différence par rapport à l'Italie est malheureusement évidente, puisque la réalisation de deux *diligences* sur les opérations lors de l'achat est une pratique presque inconnue en Italie et, plus généralement, la participation d'experts dans les transactions commerciales est très rare et se rattache à des litiges déjà existants.

Quant à l'utilisation de l'instrument contractuel dans le domaine des marchés de l'art, l'Italie se différencie des autres pays. Le système italien est encore réticent et peu sensible à l'utilisation de contrats en matière de vente mais également, par exemple, pour la réglementation des rapports avec les artistes, à la différence d'autres pays comme l'Allemagne, où le contrat est largement utilisé. En Allemagne, notamment, les contrats prévoient normalement une description minutieuse des œuvres, de leur provenance et de leur authenticité.

En ce qui concerne le droit d'auteur moral – défini à l'article 20 de la loi italienne sur le droit d'auteur n°633 de 1941 comme étant « [...] le droit de revendiquer la paternité de l'œuvre et de s'opposer à une quelconque

les héritiers conféraient tous les droits, y compris le droit d'auteur moral, à une unique personne chargée de l'authentification des œuvres d'un artiste.

Un thème très important, celui de la dation en paiement d'œuvres d'art, a également été abordé : cette pratique, prévue dans tous les systèmes juridiques étrangers étudiés, est largement utilisée. L'exemple du Musée Picasso de Paris constitué grâce à la dation en paiement d'œuvres d'art en est un exemple retentissant. Cette institution est prévue en droit italien par l'art. 6 de la loi 512 de 1982, qui reconnaît aux héritiers ou légataires, la possibilité de payer les droits de succession, et à certaines conditions les impôts indirects, par la cession à l'État de biens culturels, meubles ou immeubles,

Un autre thème abordé, très actuel et très discuté en Italie, est celui de la taxation de la plus-value générée en cas de revente d'œuvres d'art.

*déformation, mutilation ou autre modification, et à tout acte qui porterait préjudice à l'œuvre elle-même, à son honneur ou à sa réputation* » – la comparaison la plus intéressante concerne les ordres juridiques français et italien, en ce que ces deux systèmes sont les plus similaires quant à la réglementation de ce droit. Dans les deux pays, le droit moral est imprescriptible, perpétuel et on ne peut y renoncer, à la différence des États-Unis par exemple. En France, en revanche, les héritiers de l'artiste désignés par la loi peuvent disposer du droit moral en le conférant, par exemple, à une fondation, comme ce fut le cas du sculpteur Rodin. En Italie, cette option n'est pas envisageable puisque le droit moral est intransmissible. Ce choix contribue à rendre encore plus complexe la détermination déjà difficile de l'authenticité des œuvres d'un artiste décédé, et la résolution des nombreux litiges existants entre les héritiers d'un artiste et les éventuelles fondations ou archives. À l'inverse, la situation serait plus facile si

qui ont été acquis *mortis causa*. La dation de ces biens doit avoir lieu à travers la présentation d'une offre, qui sera ensuite soumise à l'examen d'une commission ministérielle spécifique. Malgré le fait que cette disposition soit en vigueur depuis plus d'une trentaine d'années, rares sont les cas de contribuables y ayant eu recours ; cette carence s'explique notamment par le fait que la commission a de nouveau été instituée en octobre 2014 après des années d'inactivité.

En matière de fiscalité de l'art, le système juridique allemand s'est démarqué, en prévoyant des avantages fiscaux pour les collectionneurs qui achètent des œuvres d'artistes qualifiés comme « inconnus », identifiés sur la base de critères légalement prévus. Ceci aide bien évidemment les artistes émergents.

En France, en revanche, le mécénat est très développé et facilité par d'importants avantages fiscaux, non seulement en faveur

des entreprises mais également en faveur des privés, et en cas de donations d'œuvres aux institutions et aux musées. Il s'agit donc d'avantages beaucoup plus importants que ceux accordés en Italie – principalement des actions de restauration de biens publics - où les avantages fiscaux en faveur des privés et des donations d'œuvres d'art sont rares. Un changement vers une conformité aux standards européens en la matière est donc souhaitable.

Un autre thème abordé, très actuel et très discuté en Italie, concerne de la taxation de la plus-value générée en cas de revente d'œuvres d'art. Cette taxation existe dans tous les systèmes juridiques analysés, que la vente advienne dans le cadre de l'exercice d'une activité commerciale, professionnelle ou habituelle, ou qu'elle soit occasionnellement effectuée par une personne privée. Actuellement en Italie, la pratique démontre qu'il n'y a pas de taxation de la plus-value générée lors de la vente occasionnelle d'œuvres d'art, étant donné que l'article 76 du décret présidentiel 597/1973 n'est plus en vigueur.

Un alignement des pays européens s'observe en revanche en ce qui concerne le droit de suite, droit relativement débattu. Ce droit revient à l'artiste et à ses héritiers, pour toute la durée de sa vie et pour les 70 années suivant son décès, et il lui accorde le droit de percevoir un pourcentage sur le prix de vente de ses œuvres pour chaque cession ultérieure à la première, dans laquelle intervient en tant que vendeur, intermédiaire ou acheteur, un acteur professionnel du marché de l'art.

En Europe, le droit de suite a été introduit par la Directive 2001/84/CE, et est donc appliqué de manière quasi homogène en France, au Royaume Uni, en Allemagne et en Italie. En Italie, la directive a été transposée par le décret législatif 118 de 2006, qui a modifié quelques articles de la loi sur le droit d'auteur. Le droit de suite est complètement absent aux États Unis, y compris en Californie où il avait été introduit initialement, car il a été déclaré inconstitutionnel.

En ce qui concerne l'exportation de biens culturels, l'Italie apparaît comme étant le système le plus pénalisant, bien que la récente et très attendue réforme opérée par la loi 124 de 2017 ait modifié quelques dispositions du Code des Biens Culturels et du Paysage italien, actuellement en



Une confrontation avec le système juridique français est encore une fois opportune, puisque ce dernier prévoit l'autorisation à l'exportation pour les œuvres qui ont plus de 50 ans.

vigueur (décret législatif 42 de 2004), en changeant les seuils, temporels et de valeur, en dessous desquels les choses qui présentent un intérêt culturel et qui proviennent d'auteur décédés, peuvent circuler librement en dehors des frontières nationales et européennes, sur la base d'une simple auto certification, sans qu'un permis à l'exportation ne soit nécessaire : le seuil temporel est de 50 à 70 ans après la création de l'œuvre et le seuil de valeur est de 13 000 € (seuil le plus bas en Europe).

La possibilité de reconnaître le statut d'«exceptionnelle valeur artistique» à n'importe quelle œuvre qui a plus de 50 ans et moins de 70 a été reconnue au Ministère ; en tant que telle, l'œuvre a donc besoin d'un permis à l'exportation.

Une confrontation avec le système juridique français est encore une fois opportune, puisque ce dernier prévoit l'autorisation à l'exportation pour les œuvres qui ont plus de 50 ans. Le seuil de valeur, en revanche, dépend du type de bien à exporter (le seuil est, par exemple, de 150 000 € pour les peintures, de 50 000 € pour les sculptures et de 30 000 € pour les aquarelles). Il y a ensuite des règles *ad hoc* pour les trésors nationaux (qui équivalent aux biens culturels en Italie), pour lesquels l'État a 30 jours à compter de la communication de la volonté d'exporter, pour exercer son droit de préférence: à défaut, le bien pourra être

librement exporté. Ici aussi une différence avec l'ordre juridique italien émerge : en Italie, en effet, le bien d'intérêt historique et artistique ne peut pas quitter le territoire national, même en cas de renonciation de l'État à exercer son droit de préférence. Aux États-Unis, il n'y a pas d'obstacle à l'exportation étant donné que la notion de bien culturel n'existe pas.

Enfin, à propos des délais et des coûts d'une procédure judiciaire au sein des différents systèmes, le système britannique démontre des coûts élevés et une faible répression des délits portant sur des œuvres d'art, alors même que Scotland Yard dispose d'un département d'investigation spécialement dédié et qui est l'équivalent des *Carabinieri Nucleo Tutela Patrimonio Artistico* en Italie (qui bénéficient du reste d'une grande estime et d'une grande confiance au niveau international). En France, en Allemagne et aux États-Unis, les délais sont plus brefs qu'en Italie. Ces données mettent en évidence la pertinence et l'opportunité des modalités de règlement alternatif des litiges tels que l'arbitrage institutionnel, qui se distingue non seulement par sa rapidité mais également par sa confidentialité et sa spécialisation.

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# Protection of Intellectual Property Rights during the Mobile World Congress



**Javier GARCÍA PÉREZ**  
and **Dr. Montiano MONTEAGUDO MONEDERO**

## Introduction: The Barcelona MWC

GSMA is an association that represents the interests of mobile network operators worldwide and hosts the Mobile World Congress (MWC), the world's largest congress for the mobile industry. The congress has been celebrated annually in Barcelona in the month of February since 2006. The MWC 2019 attracted 109,000 attendees from 198 countries and 2,400 exhibitors. Of the participants, 7,900 were CEOs and 59% hold senior level positions. Covered by more than 3,640 journalists from all over the world, the MWC is an indispensable event for all those who work in the new technologies sector.

Many of the mobile phone industry's leading companies use the MWC to unveil their latest products. This showcasing of creativity and innovation is also a prime opportunity for legal intellectual property violations to be committed with regard to copyright, trademarks, patents, designs, unfair competition law, and advertising laws. As a result of these concerning behaviors, those whose intellectual property interests have been violated seek *inaudita parte* interim measures prior to filing a claim with the intention of preventing or hampering the worldwide presentation of a new product during the MWC.

## Protection of Intellectual Property Rights during the Mobile World Congress

The courts with jurisdiction over proceedings regarding intellectual property

rights, unfair competition, and antitrust filed during the MWC are the commercial courts of Barcelona or of Alicante. The Alicante courts have jurisdiction when the right allegedly infringed concerns a European Union trademark or a community design.

In order to guarantee a fast, balanced, and effective system of interim protection, the assemblies of commercial court judges of Barcelona and Alicante jointly adopted an on-call rapid response protocol that applies during the whole month of February. This protocol has been followed by the

interim measures without the interested party being heard.

- b) Priority is given to the processing, with or without hearing the other party, of applications for urgent interim measures aimed at protecting technological innovations and industrial designs that are to be presented in the MWC, as well as claims for trademark and copyright infringements, and antitrust, unfair competition, and illegal advertising actions in connection with products that are exhibited in the MWC.

## The Alicante courts have jurisdiction when the right allegedly infringed concerns a European Union trademark or a community design.

commercial courts of Barcelona since 2015 and was applied for the first time by the commercial courts of Alicante in 2019. The assemblies even submitted the protocol for approval to the High Courts of Justice of Catalonia and Valencia, and subsequently to the General Council of the Spanish Judiciary.

The main elements of this protocol are the following:

- a) Protective letters may be filed by those who have well-founded concerns that intellectual property interim measures may be sought in relation to their products or services during the MWC. The aim of these protective letters is to avoid, as far as possible, the adoption of

- c) Judges hand down a decision:
  - I. within two days of the filing of an application for interim measures when there is no hearing;
  - II. within ten days of the filing of an application for interim measures when a hearing is scheduled, provided that a protective letter has been sent; and
  - III. within 24 hours of the filing of a request for a protective letter.
- d) In order to assess if the urgency requirements that would permit the judges to adopt interim measures without a hearing are met, special consideration is given to the defendant's previous conduct. The judges determine when the defendant could reasonably have

known about the disputed matter in order to assess whether the defendant could have reasonably sought interim protection. As such, the key factor is whether the matter is urgent, or if steps could have been taken sooner, and therefore whether the party requesting the precautionary measure has acted with necessary diligence.

e) The commercial courts of Barcelona immediately enforce any interim or urgent measures that the commercial courts of Alicante issue in relation to European Union trademarks and community designs, thus guaranteeing that the decisions taken are swift and effective.

In parallel, last year, the Barcelona Bar Association prepared a list of its members who are experts in intellectual property law and fluent in English to be handed out to MWC attendees to facilitate their access to specialised legal counsel. The two

authors of this article had the privilege to be included in that list.

### Evolution of the On-Call Rapid Response Protocol over the Years

The popularity of the on-call rapid response protocol during the MWC increases every year. According to official figures, in 2015, only one case, a request for an injunction, was filed within the framework of the protocol. Yet in 2019, 50 cases were handled under the protocol, which included 38 protective letters, seven injunctions, five evidence gathering interventions, and two oppositions to *inaudita parte* injunctions. This dramatic increase in protocol-based litigation is the best evidence of its effectiveness.

In light of the success of the protocol, it is foreseeable that the commercial court judges' assemblies will once again approve

its application during the 2020 edition of the Barcelona MWC. Needless to say that, in the opinion of the authors of this article, this would be an appropriate course of action that will reinforce legal certainty for all those who participate in the MWC.

We hope to see you all in Barcelona from February 24-27, 2020 at MWC!

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# The New Swiss Financial Market Legislation – New Momentum for ADR?

I Niklaus ZAUGG

On January 1, 2020, the new Financial Services Act (FinSA), introducing new regulations for financial services, and the Financial Institutions Act (FinIA), harmonising the authorisation rules for financial services providers, have entered into force in Switzerland. The acts are aimed at better protecting the interest of clients and avoiding unequal competitive conditions amongst the various categories of financial services providers.

Under the FinIA, managers of assets of occupational benefits schemes, managers of individual client assets as well as trustees are now also being placed under the prudential supervision of the competent authorities. By adopting the FinSA, the Swiss legislator sought to strengthen the position of clients by improving their information rights in various respects. For example, financial services providers are now explicitly required by statutory law to give clients appropriate explanations and advice with regard to the offered products. In addition, the FinSA provides for uniform rules regarding the financial services providers' prospectus duty and their obligation to make available a key information document to their clients.

In the wake of the 2008 financial crisis, it was widely felt that under the former system it was overly burdensome for retail customers to enforce their claims against financial institutions.

One of the objectives of FinSA was, therefore, to strengthen the position of such customers regarding activities of financial services providers. In addition to imposing various obligations on financial services providers with respect to information, organisation and documentation, the preliminary draft of FinSA, therefore, also included various proposals to facilitate the enforcement of investors' claims on a procedural level.

Pursuant to art. 3(e) FinSA, a financial services provider is any person who provides financial services on a professional basis in Switzerland or for clients in Switzerland. Financial services falling within the scope of FinSA are the

acquisition or disposal of financial instruments, the receipt and transmission of orders relating to financial instruments, the administration of assets (i.e. portfolio management), the provision of personal recommendations on transactions with financial instruments (i.e. investment advice), and the granting of loans to finance transactions with financial instruments (art. 3(d) FinSA).

## Initial Proposals to Facilitate Legal Action Against Financial Institutions

The preliminary draft of FinSA provided for the establishment of a permanent arbitral tribunal that would have the final and binding say on financial services disputes. The preliminary draft further envisaged that bank customers could have their claims arbitrated at low cost or even free of charge. Alternatively, it was proposed that the legal fees of bank customers would be paid from a fund financed by the industry, provided the customers' claims had some prospect of success. However, following heavy criticism

final version of FinSA does no longer make any reference to the concept of reversing the burden of proof.

The preliminary draft of FinSA also proposed a class action and a group settlement procedure. These instruments of collective redress were primarily aimed at ensuring access to justice for bank customers with relatively small claims. The idea was finally also left out of the final version of FinSA. Similar concepts are, however, again being discussed in the context of the ongoing review of the Swiss Civil Procedure Code.

## The Only Leftover from Previous Initiatives: Strengthening the Banking Ombudsman

The only proposal included in the preliminary draft of FinSA that was finally enacted, relates to the strengthening of the Banking Ombudsman. The office of the Swiss Banking Association's Ombudsman was established in 1993. Under FinSA, several new Ombudsman's offices will

The preliminary draft further envisaged that bank customers could have their claims arbitrated at low cost or even free of charge.

in the legislative consultation process, none of these proposals made it into law. It is worth noting, however, that certain cost alleviations for claimant bank customers are currently being considered in the context of a review of the Swiss Civil Procedure Code.

The idea of reversing the burden of proof in the financial services providers' duty of care was also rejected during the legislative consultation process for FinSA. Under this concept, the investor suing the financial institution would no longer have been required to prove a breach of the latter's duties of care. Rather, the onus would have been on the financial institution to prove that it acted in compliance with its duties. The

come into operation following approval from the Swiss Federal Department of Finance (art. 77 FinSA). The Banking Ombudsman can be seized in relation to all sorts of disputes relating to the provision of financial services, irrespective of whether the client is private, professional or institutional. FinSA aims to enhance the role of the Banking Ombudsman's system in the financial industry by introducing various further features:

Both FinSA and FinIA provide that all financial services providers are obliged to join one of the approved Ombudsman's offices (art. 77 FinSA and art. 16(1) FinIA). Financial institutions will also be required to fund the Banking Ombudsman's office

to which they are affiliated (art. 80 FinSA). For this reason, some commentators believe that the Banking Ombudsmen may not be sufficiently independent from the industry. However, Banking Ombudsmen are required to freely assess the cases submitted to them and to process them without receiving any instructions from third parties (art. 75(6) FinSA). In addition, their activities are supervised by the Swiss Federal Department of Finance. Hence, there seem to be adequate measures in place to ensure that Banking Ombudsmen act independently under FinSA.

Financial services providers, as opposed to bank customers, are further obliged under FinSA to participate in proceedings initiated against them before the Banking Ombudsman (art. 78 FinSA). This obligation includes the duty to appear before the Banking Ombudsman and to file comments on the matter within the applicable time frames. Under FinSA, the proceedings before the Banking Ombudsman continue to be of conciliatory nature only. The Banking Ombudsman is not equipped with any decision-making power, but is expected to submit non-binding draft proposals for an amicable settlement of the parties' disputes.

This objective is in line with the purpose behind the largely mandatory conciliation proceedings before the Justice of Peace (cf. art. 197 et seqq. of the Swiss Civil Procedure Code). Under FinSA, the claimant party may, therefore, choose not to initiate conciliation proceedings if it has gone through the process before the Banking Ombudsman (art. 76(2) FinSA). In this context, it should be noted that, contrary to what is the case with the filing of a conciliation request (cf. art. 135(2) of the Swiss Code of Obligations), the initiation of proceedings before the Banking Ombudsman does *not* interrupt the statute of limitation.

The strengthening of the Banking Ombudsman may help to further promote that office as an effective and cost-efficient dispute resolution body in the financial industry. This would reduce the case load of the Swiss state courts.

## New Momentum for Arbitration in the Financial Industry?

The same effect would be achieved if financial disputes were more frequently referred to

arbitration instead of state court litigation. For certain types of financial disputes, arbitral proceedings may, indeed, offer significant benefits.

Banks and their clients tend to prefer not to disclose their business relationship, or to see their disputes being followed by the public. The confidentiality of arbitral proceedings may address these concerns. The flexibility of the arbitration process is a further advantage. It includes the possibility for the parties to appoint arbitrators with sector-specific expertise or to select the language of the arbitration. Finally, the facilitated enforceability of arbitral awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is often regarded as another key advantage of arbitration in cross-border banking disputes.

Although the establishment of a permanent arbitral tribunal was rejected by the Swiss legislator, FinSA nevertheless repeatedly refers to the competence of state courts or arbitral tribunals for the resolution of financial disputes (cf. arts. 75(4)(d), 76(3), 87(3) FinSA). The financial services provider's duty under FinSA to categorise its customers into private, professional and institutional clients (art. 4 FinSA) seems to further facilitate the systematic inclusion of arbitration clauses into contracts concluded with certain types of bank customers. It remains to be seen

field of (cross-border) financial disputes would probably have such an effect.

Indeed, according to the 2018 International Arbitration Survey, recently published by the Queen Mary University of London, amongst financial institutions the interest in arbitration now appears to be higher than ever - 56% of respondents expressed the view that the use of international arbitration for cross-border financial disputes would increase in the years to come.

## Outlook

Given its few and modest modifications, FinSA will not revolutionize the dispute resolution regime currently in place in Switzerland. Rather, it is to be expected that Swiss banks and their customers will continue to appreciate the efficient and high quality services provided by the (commercial) state courts.

This preference may be further reinforced with the contemplated introduction of a Zurich International Commercial Court. The project has been launched by members of the Zurich bar, and it aims to establish an adjudicative body composed of experts familiar with the particularities of international trade in different industries. In addition, the intention is that proceedings before the Zurich International Commercial Court would be conducted in English.

The strengthening of the Banking Ombudsman may help to further promote that office as an effective and cost-efficient dispute resolution body in the financial industry.

whether these features of FinSA will lead to banks considering arbitration more frequently as an alternative to state court litigation.

In March 2019, views on this topic were exchanged at the Zurich conference "Arbitrating financial disputes - are there tangible benefits?" which was co-organised by CMS and the Swiss Chambers' Arbitration Institution (SCAI). In-house counsel attending the conference considered it rather unlikely that FinSA alone would add significant momentum to the use of arbitration in the financial industry. However, various participants pointed out that raising awareness of the tangible benefits of arbitration in the

Against this background, it is unlikely that alternative dispute resolution will meaningfully compete with Swiss state court litigation in the financial industry in the near future. However, in certain cases, alternative approaches may better accommodate the needs of the parties. If awareness of such benefits is raised, alternatives to state court litigation will most likely gain further ground as viable niche offerings for the resolution of financial disputes in Switzerland.

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# Green Finance and Fighting Climate Change

I **Barbara BANDIERA**

Notre planète est de plus en plus exposée aux conséquences imprévisibles du changement climatique et de l'épuisement des ressources. Il est donc urgent d'agir pour nous adapter à un modèle plus durable. L'Union européenne et des gouvernements du monde entier se sont engagés à rendre l'économie et la société plus durables lorsqu'ils ont adopté l'Accord de Paris sur le Changement Climatique et le Programme de Développement Durable à l'Horizon 2030 des Nations Unies. Chaque acteur de la société a un rôle à jouer pour rendre la croissance plus durable. Le système financier ne fait pas exception.

## Paris Agreement and UN 2030 Agenda

Governments from around the world chose a more sustainable path for our planet and our economy by adopting the 2015 Paris Agreement on Climate Change and the United Nations (UN) 2030 Agenda for Sustainable Development.

The UN 2030 Agenda has at its core 17 Sustainable Development Goals (SDGs). The 17 SDGs provide qualitative and quantitative objectives for the next 15 years to prepare ourselves for the future and work towards human dignity, stability, a healthy planet, fair and resilient societies and prosperous economies.

The Paris Agreement, signed in December 2015 by 195 countries, is the first-ever universal, global climate deal to adapt and build resilience to climate change and to limit global warming to well below 2°C.

## Climate Change

Climate change is one of the greatest challenges of this century.

Climate risks are recognised as a critical threat to society. The numbers speak for themselves:

- Over 90% of geo-physical disasters are climate-related.
- These disasters have killed 1.3 million people between 1998 and 2017.
- The economic losses from climate-related disasters are hundreds of billions of euros.

Climate change mitigation requires a large-scale transition to a low-carbon economy. The scientific consensus is that climate change is undermining the ecological systems on which human and all other forms of life depend, and that mitigating climate change is crucial to preserving the conditions for economic growth and life within earth systems. The literature provides a menu of policy tools for mitigation. A key conclusion is that fiscal tools are first in line and central, but can and may need to be complemented by financial and monetary policy instruments.

of catastrophe-related losses covered by insurance reached an all-time high of €110 billion. Banks will also be exposed to greater losses due to the lower profitability of companies most exposed to climate change or highly dependent on dwindling natural resources. Another example is that rising sea levels and a higher incidence of extreme weather events can cause losses for homeowners and diminish property values, leading to greater risks in mortgage portfolios.

In contrast, transition risks arise from uncertainties surrounding the timing and speed of the transition to a low-carbon economy. These risks include the economic costs and benefits resulting from adjustments to regulations, as well as the implementation of government policies

All three components – environmental, social and governance (ESG) – are integral parts of sustainable economic development and finance.

To finance the transition to a climate-neutral economy, Europe needs massive investment – trillions of euros over the next decades. Public funding is vital for the transition, but it will not be enough. A substantial part of the financial flows will have to come from the private sector.

## Risks to Financial Stability

Economists identify two main risks for financial stability: “physical risks” and “transition risks”.

Physical risks occur from exposure to more frequent and devastating disasters caused by natural hazards.

Physical risks associated with climate change impact the financial system. One example of how this occurs is that the increase in weather-related natural disasters means that insurance companies need to prepare for higher costs. In 2017, the amount

aimed at decarbonising the economy. Polluting production processes must be scrapped, investments in researching and developing green technologies must grow, and new taxes on carbon producers or subsidies on carbon reducers must be adopted.

## Finance for a More Sustainable World

“Sustainable finance” generally refers to the process of taking due account of environmental and social considerations in investment decision-making. This in turn leads to increased investments in longer-term and sustainable activities. More specifically, environmental considerations refer to climate change mitigation and adaptation, as well as the environment more broadly and related risks (e.g. natural disasters). Social considerations may refer

to issues of inequality, inclusiveness, labour relations, investment in human capital and communities. Environmental and social considerations are often intertwined, especially as climate change can exacerbate existing systems of inequality. The governance of public and private institutions, including management structures, employee relations and executive remuneration, plays a fundamental role in ensuring the inclusion of social and environmental considerations in the decision-making process.

All three components – environmental, social and governance (ESG) – are integral parts of sustainable economic development and finance.

### “EU Action Plan: Financing Sustainable Growth”

On March 8, 2018, the European Commission proposed an European Union (EU) strategy on sustainable finance called the “Action Plan: Financing Sustainable Growth.” This plan is part of broader efforts to connect finance with the specific needs of the European and global economy for the benefit of the planet and our society. Specifically, this Action Plan aims to:

1. reorient capital flows towards sustainable investment in order to achieve sustainable and inclusive growth;
2. manage financial risks stemming from climate change, resource depletion, environmental degradation and social issues; and
3. foster transparency and long-termism in financial and economic activity.

In particular, the EU is leading a comprehensive shift of the financial system to a sustainable path through among other things:

- Establishing a common language: a unified EU classification system (“taxonomy”), to define which economic activities are sustainable and identify areas where sustainable investment can make the biggest impact.
- Reducing the risk of greenwashing: creating standards and labels for green financial products allowing investors to easily identify investments that comply with green or low-carbon criteria. Green bonds allow entities (companies, banks, governmental organisations, etc.) to borrow money from investors in order to finance or re-finance

“green” projects, assets or business activities. While the green bond market has been expanding rapidly in recent years, it still accounts for less than 1% of total bonds outstanding worldwide. Drawing on current best practices, an EU standard accessible to market participants would make it easier to channel more investments into green projects. It would also constitute a basis for the development of reliable labelling for certain financial products. The EU will work on EU green bond standards, which could support local and regional authorities, as well as small and medium-sized enterprises (SMEs), to issue bonds to assist in setting up sustainable projects.

- Incorporating sustainability in investment advice: requiring insurance and investment firms to advise clients on the basis of their preferences on sustainability.
- Developing sustainability benchmarks and fostering their transparency. Benchmarks are indices that play a central role in the price formation of financial instruments and other relevant assets in the financial system. Benchmarks are useful instruments for investors as they allow them to track and measure performance and allocate assets accordingly.

consider sustainability factors and risks in the investment process. Also, institutional investors and asset managers do not sufficiently disclose to their clients if and how they consider these sustainability factors in their decision-making process. End-investors may, therefore, not receive the full information they need, should they want to take into account sustainability-related issues when making their investment decisions. As a result, investors do not sufficiently take into account the impact of sustainability risks when assessing the performance of their investments over time.

- Incorporating sustainability in prudential requirements: include a green supporting factor when it is justified from a risk perspective to safeguard financial stability. Aware that as banks and insurance companies are an important source of external finance for the European economy, the European Commission is exploring the feasibility of recalibrating capital requirements for banks when it is justified from a risk perspective, while ensuring that financial stability is safeguarded. This method is also known as a green supporting factor for sustainable development.

On October 18, 2019, the EU launched the International Platform on Sustainable Finance (IPSF) together with relevant authorities from Argentina, Canada, Chile, China, India, Kenya, and Morocco.

- Clarifying institutional investors and asset managers’ duties: ensuring they take sustainability into account in the investment decision-making process and enhance their disclosure requirements towards end-investors by explaining how they integrate sustainability factors in their investment decisions, and also detail their exposure to sustainability risks. Several pieces of EU legislation require institutional investors and asset managers to act in the best interest of their end-investors/beneficiaries. This is commonly referred to as “fiduciary duty”. Current EU rules on the duty of institutional investors and asset managers to consider sustainability factors and risks in the investment decision process, however, are neither sufficiently clear nor consistent across sectors. Evidence suggests that institutional investors and asset managers still do not systematically

### International Platform on Sustainable Finance

On October 18, 2019, the EU launched the International Platform on Sustainable Finance (IPSF) together with relevant authorities from Argentina, Canada, Chile, China, India, Kenya, and Morocco.

The launch of this Platform is essential to stimulate investment and redirect capital flows towards our climate objectives at the scale required for the most important economic transition of our time. It will act as a forum for facilitating exchanges and, where relevant, serve to coordinate efforts on initiatives and approaches to environmentally sustainable finance, while respecting national and regional contexts. It will focus on environmentally sustainable initiatives, in particular, in the areas of taxonomies,



disclosures, standards and labels. These are fundamental for investors to identify and seize green investment opportunities worldwide. The IPSF is supported by the Coalition of Finance Ministers for Climate Action, the European Bank for Reconstruction and Development, the European Investment Bank, the International Organisation of Securities Commissions, the Network for Greening the Financial System, the Organisation for Economic Co-operation and Development, and the United Nations Environment Programme - Finance Initiative, in their role of observer.

## The Network for Greening the Financial System

Climate change affects everyone, including central banks. Members of The Network for Greening the Financial System (NGFS) include central banks and financial supervisors from all five continents. They look for ways to support a smooth transition towards a low-carbon economy. On April 17, 2019, they published their first report with recommendations on how central banks and supervisors can foster a greener financial system.

### “Principles for Responsible Banking”

Banks play a key role in society.

As society’s expectations change, banks must be transparent and clear about how their products and services create value for

## Climate change affects everyone, including central banks.

their customers, clients, and investors, as well as society. The “*Principles for Responsible Banking*” help any bank - whatever its starting point - to align its business strategy with society’s goals.

The “*Principles for Responsible Banking*” were designed by a core group of 30 “Founding Banks,” together with the United Nations Environment Programme’s Finance Initiative, and were launched by 130 banks from 49 countries, representing more than USD 47 trillion in assets, on September 22 and 23, 2019 in New York City, during the annual United Nations General Assembly. These Principles provide the framework for a sustainable banking system, and help the industry to demonstrate how it makes a positive contribution to society. Utilization of these Principles has the effect of accelerating the banking industry’s contribution to achieving society’s goals, as expressed in the SDGs and the Paris Climate Agreement.

### Illicit Financial Flow and Sustainable Development

“Illicit financial flow” refers to the movement of money across borders that have an illegal source (e.g. corruption, smuggling), illegal

transfer (e.g. tax evasion), or illegal use (e.g. terrorist financing). The term emerged in the 1990s and was initially associated with capital flight.

Illicit financial flow constitutes a major disabler to sustainable development. They can have a direct impact on a country’s ability to raise, retain and mobilise its own resources to finance sustainable development.

The SDGs call on countries to significantly reduce illicit financial and arms flows by 2030 (SDG target 16.4) and to substantially reduce corruption and bribery in all their forms (SDG target 16.5).

### Conclusion

To achieve more sustainable growth, everyone in society must play a role. The financial system is no exception.

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# Health Science, Virtual and Augmented Reality, and Legal Frameworks: What is the Future? Part I

I Barbara J. GISLASON

## Introduction

This article is the first of a two-part series. Part I addresses virtual reality (VR) and augmented reality (AR), and how this technology is becoming big business. VR and its cousin, AR, will change every aspect of human lives in the next decade. These technologies are already being used in healthcare, engineering, entertainment, and education. Part I further considers how this technology affects the health sciences, including treatment of mental illnesses, as well as new surgical methods. The conclusion is that individuals promoting the use of compulsive technologies need more regulation.

Also considered is the transformation of health sciences and the risks and dangers that virtual and augmented technologies represent (in a broader context), and the legal and ethical implications thereof. Discussed are anticipatory technology ethics, including sensory vulnerability, desensitization, physical harm, and virtual torture.

Part 2 will focus on how people think about property, crimes, torts, contracts, and intellectual property in the real world differently in a VR environment. From a legal standpoint, causes of action include old real-world (RW) standards, but old legal standards can be hard to apply in new realities (NR), especially those where haptic technology makes RW and VR experiences difficult to separate.

People were surprised in recent decades to learn that the physical, chemical, biological, and even optical properties of matter are different at macro and nano scale. By analogy, the rule of law may apply differently in RW and VR.

## Defining VR and AR

From a definitional standpoint, the common features of VR systems are (1) immersion, ranging from non-immersive to semi-

immersive to immersive; (2) perceiving oneself to be present in an environment (i.e. being there); and (3) the ability to interact with that environment. By contrast, AR is a system wherein virtual objects become part of the user's real time experience, as in when a user looks at their hand, they can see their hand's anatomy, including veins, as if the two were merged. In other words, in VR you are in the "other" world; in AR, the "other" world is in yours.

AR is sometimes called spatial computing because the technology enables the merging of digital and physical spaces. Mixed reality (MR) is when VR and AR are combined. Developers are making their technology as realistic as possible based on the premise that a real experience is dependent upon a "realistic interaction," not just "great resolution."

though your hand is being stroked, you can only see your avatar's hand being stroked, not your own. After about 20 seconds, you may have an out-of-body experience feeling the stroke as belonging to your avatar because your brain references the touch to the avatar instead of to you.

## Where the Action Is

Top countries developing VR and AR products include the United States, China, England, and Germany. Japan, Canada, Italy, France, Spain, South Korea, the Netherlands, and Australia are also pursuing product development.

Technology titans like Apple, Google, Microsoft, and Facebook are continuing

The melding together of different types of data, including personalized and big data, may be used to achieve new reality product design goals.

Although there are many definitions of VR worlds and environments available, a common element is the presence of an online computer system utilizing software to synchronize both RW and NR and events. When a user's avatar takes an action in VR, the user experiences the consequences of that action. The VR experience may include sight, sound, touch, and smell. The user feels present outside of the RW.

## Avatars

In a VR context, the user can control, observe, and interact with the user's computer-generated avatar, as well as other computer-generated avatars. The essence of this method is the creation of a body-transfer illusion. To better understand the avatar experience, consider the illusion called the "rubber hand." Imagine that you are watching two hands being stroked simultaneously, one belonging to your avatar, and the other belonging to you. Even

to develop VR products. This evolving technology is expected to mean \$162 billion in business opportunities in the future. The current projection is that there will be 300 million VR users by 2020.

Many NR products have already gained public attention, including the Google Glass AR headset, Google Cardboard, Samsung Gear VR, Oculus Rift, HTC Vive, and Sony Playstation VR.

## AR, VR, and the Health Sciences

The melding together of different types of data, including personalized and big data, may be used to achieve new reality product design goals. AR technology may effectively blend computer-generated images with other data, including data sourced from Magnetic Resonance Imaging (MRI) and Computed Tomography (CT) scans, with



the real world. This technology can aid in surgical precision, including when a doctor is searching for a vein or deciding where to make an injection or incision. VR is a creature of computer science. VR can simulate internal bodily signals, provide vestibular input, meaning the sensation of change of position or direction based upon receptors in the ear, and influence time perception and heart rates.<sup>1</sup> These VR affect one's experience of being in a body and also challenge people to reimagine a healthy mind in a healthy body.

## Brain Function

Brain function, including attention, memory, facial recognition, finger tapping, and language, and other sensory motor cognitive functions, can be measured in a VR context. Science is just beginning to understand how VR experiences can affect the brain differently than RW environments. By using interactive multimodal sensory stimuli, typically those compatible with imaging technology such as Functional Magnetic Resonance Imaging, researchers can present stimuli while recording brain activity changes. Scientists may also compare how brain functions change when presented with two-dimensional (2D) and three-dimensional (3D) experiences.

Our GPS cells create a mental map of our environment from a variety of inputs, including sights, sounds, and smells.

## VR and Mental Illness Diagnoses

VR platforms are becoming a tool for diagnosing and treating a variety of brain injuries, such as Post Traumatic Stress Disorder and Traumatic Brain Injury, and forms of mental illnesses, including Attention-Deficit/Hyperactivity Disorder, Depression, Schizophrenia, Autism, and Alzheimer's.

By combining VR, brain monitoring, and motion capture technology, baseline brain activity can be compared between people with different types of neurological disorders. This comparison enables scientists to isolate what they deem to be the "signatures" of disease and brain processes. This makes an accurate diagnosis possible as a predicate to treatment.

One example of the application of the technology to effectuate RW treatments is found in the work of Dr. Susan J. Persky, associate investigator and head of

the Immersive Virtual Environment Test Unit at the National Human Genome Research Institute. Dr. Persky is studying how immersive VR and avatar technology could affect weight loss, and has learned that after eating virtual donuts, people feel satiated.

## Treatment

For people with physical challenges, VR and AR products may help. The AR platform, Aira, utilizes Artificial Intelligence (AI) to enable a blind person wearing smart glasses, or carrying a phone camera, to know what is ahead of them in real-time. Burn victims benefit from VR technology as they often have difficulty to treat pain. Through a VR game called "SnowWorld," patients are distracted and report 50% less pain due to a combination of pharmaceuticals and VR. The HoloLens app, "HoloAnatomy," was developed from a collaboration between Case Western Reserve University, Cleveland Clinic, and Microsoft. The MR application

allows the user to behold the human body in 3D. Medsights Tech has developed software to create 3D reconstructions of tumors. This enables doctors to more effectively treat patients.

## VR Wellness

Companies are developing wellness products, including Deep, where you can walk underwater in a meditated state through diaphragmatic breathing. Zen Zone is a product designed to help find your inner peace.

## Surgeries Using AR and VR Technologies

Prior to brain surgery, some neurosurgeons now give patients and their families a “virtual reality tour of the surgical path to their tumor.” In Switzerland, doctors planning to specialize in orthopaedics must pass a simulation exam on VirtaMed’s ArthroS. Remote surgeries are possible using Virtual Interactive Presence in Augmented Reality and Google Lens technology developed at the University of Alabama. The idea is that the remote surgeon sees and feels what the local surgeon does. In Paris, a hospital group used a HoloLens and a TeraRecon medical holographic platform via YouTube to coordinate with a surgeon to operate from a remote location. ImmersiveTouch increases medical precision. In London, a surgeon can perform an operation using a Medical Realities VR camera called “The Virtual Surgeon.”

VR methods are proving successful in helping amputees recover from phantom limb symptoms and pain following an amputation.<sup>2</sup> In one experiment, a mirror box was used to provide visual data from the surviving symmetric limb. As the user sees their good limb function in the mirror, sensors applied to the limb stump give the brain kinesthetic feedback. Eventually, their brains will enable users to telekinetically control machines. There is hope for changing the lives of the disabled because as VR and brain imaging technology improve, there will be both better theoretical frameworks and translational applications in brain science.

## Nobel Prize and GPS Cells

VR experiments involving rats on treadmills revealed that rats were unable to form a mental map of their surroundings the way

they could in a RW setting because mammal brains have GPS cells. Our GPS cells create a mental map of our environment from a variety of inputs, including sights, sounds, and smells. These GPS cells were identified in 2014 by Noble Prize winners John O’Keefe, May-Britt Moser, and Edvard I. Moser. These experiments demonstrate how RW and NR are still different.

## Regulating Habit-Forming Technology

A well-crafted article from *Fordham Law Review* entitled *Regulating Habit-Forming Technology* is essential reading for understanding the issues discussed in this Part I.<sup>3</sup> Although not explicitly about VR and AR, the concerning business models and behaviors described are likely to further impact, and perhaps be more difficult to identify, in our more fluid NR.

Currently, there is a “zero-price” expectation by technology users, meaning users expect free use of technology. Producers and distributors “extract value from users” through micropayments and advertising. Advertising-based models focus on “time

includes Internet Gaming Disorder as a mental illness diagnosis. In other words, such habit-forming technology have risen to the status of a recognized mental illness. The World Health Organization (WHO) includes “gaming disorder” as a behavioral addiction in its International Classification of Diseases.

Technology companies utilize four steps to develop clients. First, they invite the future user to try the product. Next, the user takes an affirmative action, such as a download. Third, rather than getting a consistent reward, the computer program serves up a variable reward, such as a gamer’s “loot box.” Step four is to get the user to invest in the product by taking an action, such as posting a photograph to Instagram.

According to the *Fordham* article, research shows that user compulsivity increases when the user becomes enamored by features including infinite scroll, pull to refresh, and flashing lights, sounds, badges, and streaks. To get a sense of how close users are to their technology, which arguably makes them more vulnerable to manipulation, many smart phone users touch their phones an average of 2,617 times a day.

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on device,” while the micropayment option is more of a hybrid as there may be initial revenue at the point of sale, followed by micropayments, at least from gamers.

The *Fordham Law Review* article vividly explains how well-known companies have design practices that promote compulsive behaviors, in part because the products give the user rewards in the form of “dopamine hits.” For example, Facebook’s “like” button fits into this design concept.

In a 2009 study, the authors of *Online Video Game Addiction: Identification of Addicted Adolescent Gamers* noted that approximately 1.5% of 13 to 16-year-olds in the Netherlands were exposed to online video-gaming reported addictive tendencies.<sup>4</sup> The *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) now

This *Fordham Law Review* article also highlights more disturbing problems. Facebook platforms can detect when a teenage user feels insecure and worthless. Technology designers are aware that they can secure and monetize extended engagement by promoting messages that stimulate feelings of anger and tribalism. Social media providers can influence users by making recommendations passed through ever more sophisticated algorithms. Off-the-shelf mental health products and applications can be promoted as authoritative.

The *Fordham Law Review* article reveals how easily users can be influenced when not in an immersive environment. A greater risk is posed to a user in a fully immersive environment where the designer is more able to affect a user’s dopamine hits and entice the user to remain in the virtual

world, thereby increasing the coveted “time on the device.”

Consider, too, that while in a VR environment, data on individuals is gathered to be sold and monetized that may be used in unanticipated and unwanted ways. The user’s vulnerability for surveillance is real, and users could range from the disabled to working, to corporate executives, to military generals, to presidents and prime ministers. All these compulsive technology risks, as well as others, are present even if the product advertises itself as one promoting health.

## How VR and AR Technology May Affect You and Your Clients

Potential dangers of AR include invasion of privacy, information overload, perceptual impairment, and distraction. Effects presented by security threats and hackers include malware attacks, denial of service, having the wrong information overlaid, or being misdirected.<sup>5</sup> From a health sciences perspective, the latter, the overlay of wrong information, could have fatal consequences.

VR also has many side effects. People at greater risk for detachment and dissociative responses are those with pre-existing tendencies. Not only are those with mental health problems vulnerable to VR addiction, the so-called “normal population” is also at risk, as new technology may arouse the brain and involve the neuroendocrine system.

For example, when using a headset, ill effects may include nausea, dizziness, and seizures. Nausea may be caused when a user moves their head and the virtual images do not keep up. The users’ eyes think their body is moving, but their inner ear does not. When there is contradictory sensory input, and a mismatch between the signals from the inner ear’s vestibular system and the visual system, a feeling of unreality may result. Such “vergence-accommodation conflict,” as it is known, causes eyestrain.

According to a 2019 article in *The Atlantic*, VR experiences can also cause an “existential hangover,” which can manifest by a user feeling fuzzy, light-headed, or entering a dream-like state with detachment



Consumer advocates would agree that designers and developers of VR technology products should be able to prove that ethical considerations were integral to the design process of their products.

and even disassociation.<sup>6</sup> She wrote about this in an article entitled *7 Surprising Side Effects of Virtual Reality*.<sup>7</sup> Another risk of VR technology is that a user may experience “Game Transfer Phenomena” (GTP). When in the RW, symptoms of GTP include seeing objects as pixel clusters, hearing game sounds, or avoiding unreal game-based landmines. According to Dr. Angelica Ortiz de Gortari of Nottingham Trent University, who is engaged in research on GTP, the user may confuse virtual and physical events.<sup>8</sup>

## Anticipatory Technology Ethics

New technologies bring with them daunting ethical issues. Phillip A.E. Brey is a pioneer in exploring that topic, now described as anticipatory technology ethics (ATE). Through ATE, designers and developers explore moral obligations to the public at the R&D stage. Hence, there is a transformation of morality in an analog age being reimaged in the digital age and beyond.

Although ATE may appear to be an ethical standard outside of legal standards, think about how ATE may be relevant to accountability, foreseeability, and even liability. If a VR user, for example, expects to be the only user in a VR environment, who is responsible if the user is instead being swarmed there instead?

Part of the quandary here is what is foreseeable given AI variables. Even so, what is foreseeable with the products being used as intended is different from when the products, which include its software and hardware, are used contrary to terms of use, incorrectly, or unethically. There is also the pervasive threat of a hacker.

Consumer advocates would agree that designers and developers of VR technology products should be able to prove that ethical considerations were integral to the design process of their products. This would require transparency and openness about how their ethical goals were implemented at each stage of development. Without safeguards and remedies within the confines of these NR, the privatization of a growing form of reality will have growing lawless aspects as VR and AR products and platforms are still largely unregulated and affected by terms of use. Default settings, for example, could protect users from unwanted nudity and physical contact, or prevent strobe lights. Ethics, though, may remain subjective, and consideration of actual hard law through regulations or statutes may be needed to ensure consistency and enforcement of policy considerations to address the impact of these technologies.

From an ethics perspective, VR experiences that qualify as “active real,” meaning having

the illusion of real, are known to be especially dangerous when used by young individuals or those otherwise unable to discern risks. Small children may think that if their avatar can swim with a dolphin, that they can, too. What responsibility does a developer have if a child jumps in the water but cannot swim following this type of VR experience? What began as an interesting thought experience quickly moves towards RW injury and harm, further suggesting the need for a legal framework. This will be elaborated in Part 2 of this series.

The quality of intimate relations may also be an ethical concern. Emerging VR platforms, where exaggerated adult fantasies can seem real, may cause problems for people in RW sexual interactions. Little is known yet about what type or amount of VR use is too much, as technologies can be developed to promote compulsive tendencies.

## Ethics Influencer Fiona McEvoy

In response to the ethical issues arising in VR systems, Fiona McEvoy, founder of YouTheData.com, has written extensively in this area. She proposed these ethical categories: sensory vulnerability, social isolation, desensitization, problems related to overestimation of abilities, psychiatric harm, unpalatable fantasies, virtual torture, manipulation, inappropriate roaming and re-creation, and privacy and data violation.<sup>9</sup>

Building on McEvoy's approach, once immersed in a VR experience, a user may not be able to appreciate or react to danger. When individuals choose to meet others in VR environments, RW face-to-face interaction may diminish. This may lead to negative mental health consequences. People may become desensitized to violence after being immersed in violent VR environments, including in VR games utilizing haptic immersion. Playing RW violent video games may negatively impact a user's emotional sensitivity and capacity for guilt.

Immature participants in VR environments may confuse their VR abilities with their RW abilities, and therefore engage in dangerous behaviors while unaware of their physical limitations. This is even more concerning when vulnerable children are involved.

A person may experience confusion between their RW physical body and their avatar body in VR. A curious after-effect of utilizing VR is that it can affect the user in ordinary reality. According to a study, when given a choice in the RW of which chair to sit in, the user often avoids sitting in the avatar's chair, and when people feel an avatar is watching them, they may have difficulty with task completion.

Those who already have psychiatric vulnerabilities may suffer hallucinations. The virtual world, in addition to treating PTSD, may cause real-world PTSD. Sexual deviants, including pedophiles and rapists, will predictably seek prey in VR environments. It has yet to be learned what types of harm they may inflict in avatar form.

It is worthwhile to explore how McEvoy's categories, including virtual torture, might apply in existing legal structures. The Geneva Convention and its protocols prohibit torture and other cruel and inhumane treatment. How will these prohibitions apply in a VR environment where cruel interrogation techniques may be harder to prove, including in a military context? Advertisers may be able to influence consumer choices in a VR environment, including subliminal messaging. Where should the limits be in keeping virtual "peeping Toms," even invisible ones, from roaming and getting into our businesses and our homes?

## Privacy and Data Violation

Big data, including health data, is integral to establishing a VR platform. Bad actors will seek to harvest this data and use it to exploit users in both VR and RW realities. Consider how AI may cause these violations to be undetectable because of new algorithms and speeds never even imagined.

While current legal attention is being paid to the re-creation of an individual's likeness, which could be fabricated for video and audio content and writing style, thereby enabling a RW impersonation, it is also foreseeable that an individual's cells and organs could be impersonated and negatively impact the practice of medicine. A surgeon might incorrectly believe that computer-generated VR information, including medical

records and an individual's anatomy, coming from big data is accurate. Medical providers should conduct assessments on probable patient or medical targets. Medical personnel should be trained in evolving VR threats and what protocols should be implemented to mitigate harm.

## Conclusion

In this Part 1, the background of VR and AR has been discussed. In Part 2, the focus is on the current state of the law, and what legal framework may be appropriate. Part 2 will appear in the next issue of the *Juriste International*.

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# Computer-Implemented Inventions: Varying International Standards for Patent Eligibility



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Note: The views expressed in this article are those of the authors and should not be attributed to their firm or its clients.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), which became effective in 1995 and to which over 150 countries are parties, introduced global minimum standards for protecting and enforcing intellectual property rights with the purpose of facilitating international trade. While the TRIPS Agreement helps harmonize intellectual property laws globally, the implementation of these laws varies from country to country.

With respect to patent laws, the standard for patentable subject matter, or what is eligible for patent protection, is set forth in Article 27 of TRIPS and recites, in part, “Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.” Thus, the language of the TRIPS Agreement is broad and refers to “any invention ... in all fields of technology.”

Under the basic language of Article 27, inventions implemented using computer-related technology should be eligible for patenting. However, whether “computer-implemented inventions” (CIIs) may be entitled to patent protection is not always clear. This Article briefly compares subject matter eligibility standards for CIIs in three major global markets: the United States, China, and Europe.

## Patent Eligible Subject Matter in the United States

In the United States, the availability of patent protection for CIIs is uncertain, as is enforcement of patents that are directed to these inventions. The lack of certainty in the area of what is patent eligible has led to activity in all branches of U.S. government – from the courts to the legislature to the executive branch.

in *Mayo Collaborative Servs. v. Prometheus Labs, Inc.*, these excluded categories of invention “are the basic tools of scientific and technological work” and thus “the grant of a patent might tend to impede innovation more than it would tend to promote it.”

Based on U.S. Supreme Court caselaw, the Court developed a two-step test to determine whether a claimed invention is eligible for patenting. The first prong of

Under the basic language of Article 27 [of TRIPS], inventions implemented using computer-related technology should be eligible for patenting.

## What Is the Current U.S. Law?

Section 101 of the U.S. Patent Act sets out four categories of patent eligible inventions. Specifically, 35 U.S.C. § 101 states that “[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.” The United States is a common law country and the U.S. Supreme Court (the highest court in the U.S.) has judicially developed specific categories of invention that are excluded from patentability: namely abstract ideas, laws of nature, and natural phenomenon. These are sometimes referred to as judicial exceptions to patent eligibility. According to the Supreme Court in a 2012 decision

the test, as set forth in the U.S. Supreme Court case *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, analyzes whether a claim is directed to a patent-ineligible abstract idea, law of nature, or physical phenomena. If so, the second prong focuses on whether the claim is directed to an inventive concept, i.e., whether there is something “significantly more” that transforms the nature of the claim into a patent-eligible application.<sup>1</sup> With CIIs, the focus of the two-part analysis is typically whether an invention is directed to an abstract idea or includes an inventive concept that makes it patent eligible.

The application of this judicially developed law has varied across U.S. district courts, which adjudicate patent infringement disputes, and frequently determine the issue of invalidity as a defense to patent

infringement. Likewise, the U.S. Court of Appeals for the Federal Circuit (the U.S. appellate court that hears appeals of patent cases from U.S. district courts), has varied in its application of whether CII is patent eligible.

### How Is This Law Applied by the USPTO?

The United States Patent and Trademark Office (USPTO) is responsible for examining patent applications and issuing U.S. patents on inventions that meet requirements for patent protection. It is an agency that operates as part of the U.S. Department of Commerce and falls under the executive branch of government. In the patent examination process, the USPTO endeavors to apply patent laws, as interpreted by the courts, including determining whether CII are patent eligible. As caselaw has developed, the USPTO has updated its guidance for patent examiners, including guidelines the USPTO applies to CII to determine patent eligibility. In 2019, the USPTO issued guidelines to apply the framework developed by the U.S. Supreme Court.<sup>2</sup>

These guidelines appear to have helped facilitate examination of CII at the USPTO. Nevertheless, there remains a lack of predictability among both innovators and users of CII in determining what is patent eligible.

### Industry Group Concerns

Some industry groups have noted their concerns over uncertainty in the law of patent eligible subject matter in the U.S. In fact, three intellectual property associations in the U.S., the American Intellectual Property Law Association, the Intellectual Property Owners Association, and the American Bar Association's Section of Intellectual Property Law, issued a joint principles paper on Section 101, requesting that "Congress Must Remedy Uncertainty in 35 U.S.C. §101 and Return Balance to the U.S. Patent System."<sup>3</sup> They note that the uncertainty created by Supreme Court decisions is "threatening investment in new technologies including new medical products and software technology." At the same time, there are other groups that do not believe any changes are warranted.

They advocate, in part, that the current laws help protect businesses against meritless litigation over patents that should never have issued.

### Legislative Developments

In the meantime, the U.S. Congress also has been evaluating concerns regarding patentable subject matter laws. Beginning in December 2018, the Intellectual Property Subcommittee of the U.S. Senate Judiciary Committee held a series of meetings among various stakeholder groups. In May 2019, a group of senators and representatives released draft legislative text for consideration. The draft legislation would have amended Section 101 and abrogated or done away with the judicially created exceptions to subject matter eligibility, including abstract ideas, laws of nature, or natural phenomena.

inventors aren't at a global disadvantage. I've been working on reforming this test with my colleagues in both the House and the Senate, and I look forward to continuing this important work."<sup>4</sup>

### What Will Happen Next?

In the meantime, the U.S. Supreme Court considers whether to further address cases involving Section 101 or patent eligibility issues. On December 6, 2019, the U.S. Solicitor General filed briefs with the U.S. Supreme Court stating that the Court should not review two pending cases, but recognized problems with the current Section 101 framework. Whether the U.S. Congress or the courts will further address the area of patent eligible subject matter remains to be seen. In the meantime, the United States has become one of the less

The courts have misstated the law several times, which deprives many innovative products of adequate protection.

The Senate Judiciary Committee Subcommittee held three days of hearings and called 45 witnesses who had varying views on the legislative proposal, including whether any legislative reform is necessary. Since that time, there have been reports that Congress continues to work a legislative proposal to address concerns with Section 101 and strike an appropriate balance among stakeholder interests.

Following a Federal Circuit appellate court decision in the *American Axle & Manufacturing* case, the ranking member of the U.S. House of Representatives Judiciary Committee issued the following statement: "Our patent eligibility test is clearly flawed, and the court's decision yesterday regarding *American Axle & Manufacturing, Inc.* showcases the inadequacies of this test. It's unthinkable the courts found this invention, a manufacturing process for making a key automotive part, as patent ineligible. The courts have misstated the law several times, which deprives many innovative products of adequate protection. Congress must establish a new eligibility test to encourage investment in developing new U.S. technologies and ensure American

predictable countries in which to obtain and enforce patents involving CII.

### Computer-Implemented Inventions in China

By contrast, China is becoming more permissive with the availability of patent protection for CII. China, whose legal system is based on civil law tradition, had no official patent laws in place until 1984. China's patent activity increased quickly, and China is now one of the global leaders in patent filings.

Chapter 1, Article 2 of the Patent Law of the People's Republic of China defines "inventions" to "mean new technical solutions proposed for a product, a process or the improvement thereof." Article 25 provides that patent rights are excluded for certain categories, including "rules and methods for intellectual activities," and computer programs may fall into this category of exclusion. While computer programs per se are not patent eligible, that same exclusion does not apply to all inventions that are computer-implemented.

As a civil law country, China's laws on patent eligibility have developed, at least in part, through China's Guidelines for Patent Examination. Chapter 1 of Part 2 of the 2010 Guidelines explains that a technical solution "is an aggregation of technical means applying the laws of nature to solve a technical problem" and that "a solution that does not adopt a technical means to solve a technical problem and thereby does not achieve any technical effect in compliance with the laws of nature does not constitute a subject matter as defined in Article 2.2."<sup>5</sup> When assessing the patentability of a CII in China, if the invention is a technical solution that obtains a technical effect and solves a technical problem, it may be patent eligible.<sup>6</sup>

However, under Chapter 9 of Part 2 of the 2010 Guidelines for Patent Examination, if a claim of a patent for a computer program merely relates to an algorithm or mathematical computing rules or a program itself, it falls under the rules and methods for mental activities and is ineligible. The most recent amendment to these Guidelines, which took effect in 2017, specifically carves out CII from computer programs which had been held as per se excluded from patent protection.<sup>7</sup> Under the revised guidelines, "If a claim merely relates to an algorithm, or mathematical computing rules, or computer programs per se, or computer programs per se recorded in mediums (such as tapes, discs, optical discs, magnetic optical discs, ROM, PROM, VCD, DVD, or other computer-readable mediums), or rules or methods for games, etc., it falls into the scope of the rules and methods for mental activities and does not constitute the subject matter for which patent protection may be sought." This amendment was "intended to distinguish a sequence of machine-readable code which should be protected by copyright from the technical solution based wholly or partially on process flow of computer programs." Thus, CII that involve a technical feature may be protectable under patent laws in China.

## Computer-Implemented Inventions in Europe

In Europe, similar to China, computer programs are excluded from patent eligibility, but CII may be patent eligible. Most European countries are parties to the European Patent Convention (EPC). Similar to Article 27 of the TRIPS Agreement,

Article 52 of the EPC sets forth the definition of patentable subject matter: "European patents shall be granted for any inventions, in all fields of technology, provided that they are new, involve an inventive step and are susceptible of industrial application."

However, the EPC provides specific exceptions to patentability under Article 52.2 for "discoveries, scientific theories and mathematical methods; aesthetic creations; schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers; presentations of information." Article 52.3 further states, "[p]aragraph 2 shall exclude the patentability of the subject-matter or activities referred to therein only to the extent to which a European patent application or European patent relates to such subject-matter or activities *as such*." While "programs for computers" are specifically excluded from patentability under the EPC, Article 52.3 does not preclude patentability for CII.

Examination decisions of the EPO may be appealed to the EPO's Technical Boards of Appeal. The Technical Boards of Appeal have issued several precedential opinions addressing whether software-related inventions may be patent eligible. (Similarly, decisions of the USPTO may be appealed to the USPTO's Patent Trademark and Appeal Board (PTAB), which may be appealed to the U.S. Court of Appeals for the Federal Circuit.)

Recently, the EPO's Enlarged Board of Appeal was asked to review a decision relating to the patentability of CII in G1/19. The title of the invention at issue is "Simulation of the movement of an autonomous entity through an environment," and it includes computer-implemented claim limitations. (Claim limitations define the metes and bounds of a patented invention.) The matter was referred from an EPO Board of Appeal in case T489/14.<sup>9</sup>

In this case, several questions have been referred to the Enlarged Board of Appeal,

In Europe, similar to China, computer programs are excluded from patent eligibility, but CII may be patent eligible.

Under the European Patent Office (EPO) Guidelines of Examination, the guidelines define CII as "solutions which are technical and involve computers, computer networks or other programmable apparatuses, wherein at least one feature is realized by means of a computer program."<sup>8</sup> If a computer program has technical character, it should not fall within the per se exclusion from patent eligibility.

According to Chapter II of these Guidelines for Examination, the exclusion does not apply to computer programs having a "technical character." Under section 3.6, "[i]n order to have a technical character, and thus not be excluded from patentability, a computer program must produce a 'further technical effect' when run on a computer. A 'further technical effect' is a technical effect going beyond the 'normal' physical interactions between the program (software) and the computer (hardware) on which it is run. The normal physical effects of the execution of a program, e.g. the circulation of electrical currents in the computer, are not in themselves sufficient to confer technical character to a computer program."

including "what are the relevant criteria for assessing whether a computer-implemented simulation claimed as such solves a technical problem?" This case has garnered a lot of interest from the industry and several groups have filed amicus (friends of the court) submissions. The President of the EPO submitted comments to the Board, too. How this case is decided may have a significant impact on patent protection for CII in Europe.

## Conclusion

Patent subject matter eligibility has become more complex with the advent of more CII. While the TRIPS Agreement provides minimum standards for patent eligibility, how the laws are implemented varies from country to country and region to region. In the last decade, the trend in three major global markets has varied, with protection for CII being less certain in the United States, while the same inventions may be protectable in China and in Europe. In each state or region, however, the laws and how they are applied continue to be dynamic. As innovation becomes more reliant

on computer-implemented technologies, the availability of patent protection for CILs may become more critical. Likewise, implementers of computer-implemented technologies will continue to seek certainty with respect to their ability to use such technology in a global marketplace.

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1. See *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014); *Mayo Collaborative Servs. v. Prometheus Labs, Inc.*, 132 S. Ct. 1289 (2012).

2. 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019) (<https://www.govinfo.gov/content/pkg/FR-2019-01-07/pdf/2018-28282.pdf>); October 2019 Update: Subject Matter Eligibility ([https://www.uspto.gov/sites/default/files/documents/peg\\_oct\\_2019\\_update.pdf](https://www.uspto.gov/sites/default/files/documents/peg_oct_2019_update.pdf)).

3. <https://www.aipla.org/advocacy/legislative/aipla-ipo-aba---ipl-joint-principles-paper-on-section-101>.

4. <https://republicans-judiciary.house.gov/press-release/collins-calls-for-new-patent-eligibility-test-following-flawed-court-ruling/>.

5. English version of Guidelines for Patent Examination, Ch. 1 Part 2, (2010), available at: [http://www.gechengip.com/information/gfpe2010\\_en.htm](http://www.gechengip.com/information/gfpe2010_en.htm).

6. See Patent Subject Matter Eligibility: Part II, <http://www.asiaiplaw.com/article/112926/>.

7. See Revisions of the Patent Examination Guidelines in China, <https://www.regimbeau.eu/REGIMBEAU/GST/COM/PUBLICATIONS/2017-03-Revisions-to-the-Patent-Examination-Guidelines-in-China-DAS-b.pdf>; see also <https://www.ccpit-patent.com.cn/node/4375>.

8. Guidelines for Examination in the European Patent Office, Part F, Ch. 4, § 3.9, <https://www.epo.org/law-practice/legal-texts/html/guidelines/el/index.htm>

9. See <https://www.epo.org/law-practice/case-law-appeals/pdf/t140489ex1.pdf> and <https://www.epo.org/law-practice/case-law-appeals/pdf/t140489ex1.pdf>.

10. Sharon A. Israel focuses on intellectual property litigation. She is a past president of the American Intellectual Property Law Association and currently serves on the Council for the Intellectual Property Section of the American Bar Association.



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## JANUARY - JANVIER - ENERO



27<sup>th</sup> UIA World Forum of Mediation Centres  
MILAN – ITALY (EN)



11<sup>th</sup> UIA Annual Business Law Forum: Geography and the Digital World  
AMSTERDAM – NETHERLANDS (EN)

## FEBRUARY - FÉVRIER - FEBRERO



La protection juridique et judiciaire des investissements : rôle de l'avocat  
ALGER – ALGÉRIE (FR) (AR)



Formation UIA/CCI : étude d'un cas pratique selon le Règlement d'arbitrage de la CCI  
KINSHASA – RDC (FR)

## MARCH - MARS - MARZO



Cross-Border Litigation in the Digital Economy: How to Avoid Getting Lost in Translation  
SAN FRANCISCO, CA – USA (EN)



15<sup>th</sup> Winter Seminar – Recent Legal Developments and Soft Law: M&A, Corporate Law, Sports & Entertainment Law, White Collar Crimes and Dispute Resolution  
ST. ANTON AM ARLBERG – AUSTRIA (EN)



Les cours régionales des droits de l'homme : convergence, divergences et défis  
*The Regional Human Rights Courts: Convergence, Divergences and Challenges*  
PARIS – FRANCE (FR) (EN)

## APRIL - AVRIL - ABRIL



La convention de Singapour, une hirondelle qui annonce le printemps international de la médiation?  
*The Singapore Convention, a first light of the international dawn of mediation?*  
TUNIS – TUNISIE (FR) (EN) (AR)



The EU's Digital Market Programme – Achievements to Date and Outlook  
BRUSSELS – BELGIUM (EN)

## MAY - MAI - MAYO



International Arbitration, Current Perspectives – 4<sup>th</sup> Edition  
*Arbitraje Internacional, Perspectivas Actuales – 4<sup>o</sup> Edición*  
BILBAO – SPAIN / ESPAÑA (EN) (ES)



Les modes alternatifs de règlement des différends et l'exécution des décisions arbitrales étrangères  
AGADIR – MAROC (FR) (AR)

## JUNE - JUIN - JUNIO



The Fashion Industry 2020-2030: Legal Trends and New Challenges  
BARCELONA – SPAIN (EN)



Secret professionnel vs *legal privilege*  
PARIS LA DÉFENSE – FRANCE (FR)



Foreign Investment and International Arbitration  
*Inversiones Extranjeras y Arbitraje Internacional*  
SANTIAGO DE CHILE – CHILI / CHILE (EN) (ES)

## JULY - JUILLET - JULIO



Science & Law: International Law Answers to Scientists' Current Challenges  
TRIESTE – ITALY (EN)

## SEPTEMBER - SEPTEMBRE - SEPTIEMBRE



28<sup>th</sup> UIA World Forum of Mediation Centres  
SYDNEY – AUSTRALIA (EN)



Modern Families: Current Challenges, Equal Rights and Ways to Protect their Wealth  
LONDON – UNITED KINGDOM (EN)

## OCTOBER - OCTOBRE - OCTUBRE



64<sup>th</sup> Annual Congress / *Congrès annuel / Congreso anual*  
GUADALAJARA - MEXICO (EN) (FR) (ES)

## NOVEMBER - NOVEMBRE - NOVIEMBRE



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