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These are the 'ALL HITS' Super 7 key reasons that make Durban attractive to both residents and visitors alike.

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Fault lines exposed

Another summit that has failed to deliver, the seventeenth financial crisis meeting so far. There will be many more. The United Kingdom has been marginalised to the edge of the European Union for the sake of a treaty that offers absolutely no solution to the crisis at hand, or indeed any future crisis. The row conceals the real failure of the summit – and that is to come up with a solution for the problems of the euro.

The cracks have been painted over for now. Ultimately, external adjustment is needed. This is more important at the moment than the fiscal austerity route favoured by Germany and France. In the absence of external adjustment the fiscal cuts imposed on the weaker eurozone members will just cause prolonged and deeper recessions. This in turn will weaken the banks, further increasing sovereign debt. Or to put it another way, we have a sovereign debt crisis, which caused a banking crisis, which is in turn leading to a worsening of the sovereign debt crisis, in a vicious cycle that threatens to destroy the currency union.

On present policies economic growth is not going to return for some time in sufficient force to transform the finances of individual governments. This means that European debt levels will rise without pause. Investors will have little enthusiasm for buying the big quantities of bonds they are likely to be offered. There will be a funding crisis.

There's another problem, which stems from the existence of a single currency and a single interest rate: the competitiveness problem. Europe is not competitive. Therefore the whole euro project is problematic, and is liable to fail. To that, there is no immediate solution.

The euro project is not a good project economically because it's a political project. Someone has to pay. The eurozone has been looking for others to pay, whether it's China or the IMF, anybody but themselves. But they must pay, because no-one else will. The solution to prevent bank and sovereign defaults is the same as it always was: the sovereign balance sheets of the northern Europeans must be used to stand against the liabilities of the rest of the eurozone.

It's hard to be optimistic about what lies ahead for the eurozone. The eurozone crisis is an entirely internalised affair which can ultimately only be resolved via burden-sharing within the region of national debts. The stability of the eurozone probably requires Germany to underwrite more-or-less all eurozone sovereign debts, to end the contagion from weak sovereigns to weak banks; but that won't happen until the Germans are reassured that they are not throwing good money after bad. For that to happen requires other countries to accept greater control of their budget from technocrats acceptable to Germany.

This will lead to a democratic crisis. How will the electorates of countries such as France accept the impression of German hegemony over the eurozone? 2012 promises to be interesting. It will be a year of muddling through, with the euro surviving as the single currency, because a break up would be too calamitous. European policy-makers have to face up to the reality and do what is necessary, or if not then reconstitute the euro accordingly. ■

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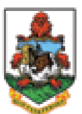

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Trade tensions mount

Simon J Evenett is Professor of International Trade at the University of St Gallen, and Member of the Warwick Commission on the Future of the Multilateral Trading System after Doha. He is also Co-Director of the CEPR Programme in International Trade and Regional Economics

The last Global Trade Alert report back in July 2011 raised concerns that a deteriorating macroeconomic climate would lead to greater protectionism. The fear has come to pass. This column, which introduces the latest GTA report, shows that the incidence of protectionism in the third quarter of 2011 is as high as during the most troubling of 2009, when protectionist fears were at their peak. Several large trading nations have taken across-the-board measures that adversely affect many trading partners. The world trading system may face its greatest test in the year ahead.

The 10th Global Trade Alert report documents several factors that together imply that the protectionist threat to the world trading system is probably as significant as it was in the first half of 2009, when such concerns were last at their peak. In our last report, published in July 2011, concerns were raised that a deteriorating macroeconomic climate would lead to greater protectionism. This fear has come to pass. The initial reports of the quantum of protectionism in the third quarter of 2011 are as bad as comparable early reports on protectionism in the first half of 2009. Less than a third of these protectionist measures taken are tariff increases or trade defence measures; worse, some of these measures have been taken by large trading nations and affect many sectors or trading partners. Recent protectionism cannot be dismissed as a large number of small pinpricks.

"What is particularly troubling is that in recent months, trade disputes between leading trading nations have widened in scope"

Looking forward, the macroeconomic climate is expected to deteriorate further. For example, it is telling that the most recent estimate for growth by the EU economies in 2012 was only half a percentage point, and that was on the assumption that the Greek and Italian sovereign debt concerns are contained and will abate quickly. The European Commission's forecast openly acknowledged that worse outcomes, ie. a recession, were possible and, in a telling aside, noted that they could be worsened by growing protectionist pressures.[1] The growth slowdown in Europe has already caused the pace of Chinese export growth to Europe to lessen. A recession in Europe would also affect North American multinationals, many of whom still earn a disproportionate amount of sales and profits from European customers.

What is particularly troubling is that in recent months, trade disputes between leading trading nations have widened in scope. For much of 2010 and early 2011, the highest profile disputes concerned so-called currency wars and misalignments - and arguably these were only taken so far. Nowadays, many of the subsidy regimes instituted early in the crisis are becoming the subject of disputes between leading trading nations (see Box 1). The disagreements between China, India, the US, and the EU over local content requirements, technology transfers, and subsidies in the solar power industry are cases in point.[2]

Now that the scale of discriminatory government intervention in markets during the crisis is adding to trade tensions, one has to ask how strong are the domestic political restraints should another global economic downturn lead to pressures on governments to *"save jobs," "protect local industries"*, etc. As remarkable as it may seem given the tumult of 2008 and 2009, the open world trading system may face its greatest test in the year ahead.

Trade policy developments since July 2011: new protectionist measures outnumber liberalising measures by nearly three to one

Information on trade policy developments discovered after our last report was published in July 2011 to augment the GTA database, available at www.globaltradealert.org. In total, 199 announcements of state measures were found, taking the total number of reports in the GTA database to over 2,000 for the first time. Two-thirds of those new entries (132) relate to state measures that are likely to, or almost certain to, increase the discrimination against some form of foreign commercial interests.[5] These measures outnumber the 47 neutral or liberalising measures by almost three to one.

Consistent with previous GTA reports, only a fraction of recently documented protectionism are trade defence measures or tariff increases. Since our last report, new protectionist non-tariff barriers, discriminatory investment measures, export subsidies, and discriminatory bailouts together outnumber new trade defence measures and tariff increases by a ratio of five to two. Once again, governments appear to prefer measures that are subject to fewer, looser, or no multilateral trade rules. One possible interpretation of these findings is, to the extent that legally binding

Box 1. The aggregation of crisis-era measures has begun; the period of denial is over.

A recent exchange at the World Trade Organization between China and the US highlights the growing reluctance of leading trading partners to overlook the discriminatory measures that others have taken during the crisis era. In October 2011, the US submitted a notification to the WTO, which is said to include around a thousand pages of translated Chinese legislation, requesting that China notify its WTO partners of 184 subsidy regimes. According to the WTO's website, the US position was characterised as follows at a meeting on 26-27 October 2011:

> *"The Committee carried out the transitional review of China's subsidies regime. The United States said China has made many impressive steps to reform its economy, but expressed concern that it still pursued an industrial policy in which subsidies are widely used to protect domestic industry. It said China has an opaque subsidies regime, and that the US had had to file counter-notification on China's unreported subsidy programmes. Canada expressed concerns about China's subsidies in the iron and steel sector. Japan urged more transparency, and welcomed China's recent subsidy notification. Mexico, the European Union and Norway shared the US concerns."*[3]

Days later, the Chinese submitted a formal notification listing 93 subsidy programmes. Some of these programmes[4] had been notified by the Chinese government before, but they could well have been scaled up during the crisis era. Other notifications were new. Most of the notified subsidies were part of schemes implemented by the Ministry of Finance and are forms of tax relief (some of which are directly trade-related), cash transfers and other subsidies.

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WTO rules have had any effect at all, that it is probably through the choice of protectionist trade instruments rather than the quantum of protectionism.

Once again, the G20 nations are responsible for the lion's share of the recently documented protectionist measures. Since July 2011, a further 104 protectionist measures implemented by the G20 countries have come to light. In the interests of balance, it should be noted that the G20 also implemented 37 measures that limited or reduced discrimination against foreign commercial interests.

The number of product categories (tariff lines) affected by G20 protectionism continues to rise. With the recent protectionist measures, the total number of product categories affected by some type of G20 protectionism has risen 31 to 1080, out of a maximum of 1214. Moreover, since November 2008 - the starting point of GTA monitoring of G20 policies - 215 countries' commercial interests have been harmed by G20 protectionism. As well as the individual reports on each G20 member at the end of the 10th report, these figures give some sense of the scale of the harm done by discriminatory policies of the G20.

Another important recent development has been the fact that leading trading nations have not just undertaken the selective interventions that may harm only a small amount of trade or a small number of trading partners (such as the investigation and then imposition of antidumping tariffs), but some have now put in place measures that potentially affect all or most of their trading partners, or affect a wide range of domestic industries at home. Some of these measures have already received a lot of press attention, others have not. The concern, of course, is that domestic political restraints on discrimination against foreign commercial interests are weakening. Some of the wide-ranging measures implemented in the third quarter of 2011 alone are summarised in Table 1.

The latest update of the GTA database has also led to a revision of the ranking of countries according to the scale of the harm done by their policies. The most significant changes relate to China, now that due account has been taken of various measures China took during the crisis to affect exports. In terms of the number of almost certainly discriminatory measures implemented, China moves up from 9th position to 7th position. In terms of tariff lines (products affected), China now enters the top 10 offenders for the first time, ranked 4th and affecting 698 (out of 1214) product categories. China now moves to the 3rd spot in terms of sectors affected by protectionism, up from 7th. In terms of trading partners harmed, China edges out the combined effect of the 27 EU member states for the top rank. Now China's measures are estimated to have harmed 195 trading partners, as opposed to the EU27's 181 affected trading partners and Argentina's 175 harmed trading partners. The dominance of these rankings by G20 countries and EU member states is apparent.

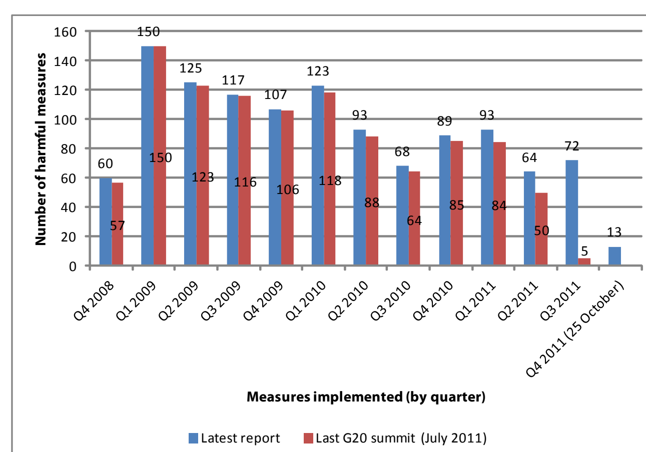
Table 1. Selected significant protectionist acts in Q3 2011

Implementing jurisdiction, date	Title in GTA database[6]	Government measures to be taken	Commerce affected
Australia, 20 October 2011	Changes in the antidumping and countervailing policy	Antidumping and countervailing duty policies	In principle affects all trading partners
Azerbaijan, 10 October 2011	A new policy of state protectionism	Public procurement preferences Local content requirements	Measure affects 752 industrial product categories
Brazil, 2 August 2011	The "Brasil Maior" plan to advance competitiveness	Government procurement preferences Faster antidumping investigations Reduced payroll taxes for selected firms	4 major sectors
France, 11 August 2011	Reduction of shortage occupations list for non-EU/EFTA citizens	Restrictive migration policies	Affects in principle all non-EU, non-EFTA migrants
Japan, 21 October 2011	Comprehensive Package Responding to the Yen Appreciation	Export and R&D subsidies	Multiple sectors affected plus additional targeting of small and medium enterprises
UK, 4 July 2011	Employment-related restrictions for holders of student visas	Migration restrictions	Affects in principle all non-EU, non-EFTA migrants

Initial totals for Q3 2011 protectionism are particularly high

One of the surprising findings from the latest update of the GTA database is the rather large number of discriminatory measures implemented in the third quarter of 2011. A total of 72 such measures were found by early November 2011. To facilitate interpretation, it may be useful to know that, almost six months after the first quarter of 2009 had closed, the GTA team found that 77 protectionist measures had been implemented in Q1 2009. This is significant for two reasons. First, during Q1 2009 concerns about protectionism early in the crisis were at their peak or, if not, close to it. Second, as the GTA team has come to learn, reporting lags have led us to revise upwards the number of protectionist measures implemented in Q1 2009 to 150 (see Figure 1). That the initial reports for the quantum of protectionism in Q3 2011 are almost as large as those for Q1 2009 is surely a cause for concern. That concern must surely be heightened by the fact that, as shown in Table 1, several protectionist measures were implemented by large trading nations whose effects are wide-ranging and, therefore, likely to be economically significant.

Figure 1. Deteriorating prospects for the world economy since Q4 2010 coincided with an increased resort to discrimination



Note 1: The total quarterly number of harmful measures for Q1-Q3 2011 are converging quickly to the 100-120 range seen in 2009. Q3 2010 seems more anomalous as time goes by. Note 2: A harmful measure is taken to be one which has been implemented since November 2008 and is almost certainly discriminatory (coded red) or likely to be discriminatory (coded amber).

Table 2. Which countries have inflicted the most harm? Certain emerging markets and European nations

Metric, Country in specified rank, number				
Rank	Ranked by number of (almost certainly) discriminatory measures imposed	Ranked by the number of tariff lines (product categories) affected by (almost certainly) discriminatory measures	Ranked by the number of sectors affected by (almost certainly) discriminatory measures	Ranked by the number of trading partners affected by (almost certainly) discriminatory measures
1	EU27 (242)	Viet Nam (927)	Algeria (62)	China (195)
2	Russian Federation (112)	Venezuela (786)	EU27 (58)	EU27 (181)
3	Argentina (111)	Kazakhstan (729)	China (47)	Argentina (175)
4	UK (59)	China (698)	Nigeria (45)	Germany (161)
5	Germany (58)	Nigeria (599)	Kazakhstan (43)	India (154)
6	India (56)	EU27 (550)	Germany (42)	UK (154)
7	China (55)	Algeria (476)	US (42)	Belgium (153)
8	France (51)	Russian Federation (439)	Ghana (41)	Finland (153)
9	Brazil (49)	Argentina (429)	Indonesia (40)	Indonesia (151)
10	Italy (47)	Indonesia (388)	Russian Federation (40)	France (150)

Note: There is no single metric to evaluate harm. Different policy measures affect different numbers of products, economic sectors, and trading partners. GTA reports four measures of harm.

The high number of protectionist measures implemented in Q3 2011 are important for other reasons too. First, the fear that the summer 2011 deterioration in economic prospects might lead to a greater resort to protectionism has come to pass. Policymakers are not dealing with hypotheticals – an increase in protectionism has already happened. Second, the upward revisions of the total amounts of protectionism in Q1 2010 through to Q2 2011, imply that 2010 and the early part of 2011 are rapidly converging to the 100-120 range of *"total number of protectionist measures implemented per quarter"* that was witnessed in 2009. The last GTA report cast doubt on the wisdom of downplaying protectionism in 2010, as certain policymakers and analysts did, and our latest findings reinforce that initial skepticism. There are real dangers in reading too much into low initial quarterly estimates of the number of protectionist measures implemented.

What policy implications follow from these findings?

For sure, there is diversity across countries, protectionist instruments used, and harm done. Moreover, the evolution of protectionism (away from more transparent policy instruments such as tariffs towards measures less well disciplined by international trade rules) adds to the difficulties in making clean-cut comparisons. Still, the findings reported here suggest that deteriorating macroeconomic prospects have already induced more protectionism, and more protectionism of the most damaging (that is, across-the-board) type. If the recent numbers are anything to go by, those policymakers that were concerned about protectionism in 2009 ought to be as concerned now, possibly more so if one takes a dim view of future global economic growth prospects. ■

Trade Tensions Mount: The 10th GTA Report is available to download at www.globaltradealert.org.

1. See page 5 of the forecast's "Overview," available at http://ec.europa.eu/economy_finance/eu/forecasts/2011_autumn/overview_en.pdf. This forecast was made public on 10 November 2011.
2. In addition to media reports, other examples of criticism of crisis-era policy responses can be found in the Minutes of the more recent meetings of the WTO's Council for Trade in Goods (obtainable from the WTO's website.)
3. Text taken from http://www.wto.org/english/news_e/news11_e/scm_26oct11_e.htm
4. WTO document G/SCM/N/155/CHN and G/SCM/N/186/CHN, dated 21 October 2011.
5. For these purposes a measure in the GTA database that is both implemented and categorised amber or red is treated as protectionist. The discrimination-based scheme used by the GTA to classify state measures is summarised below Table 2 of this report, which can be found in the next chapter.
6. With the title of the measure and the implementing jurisdiction interested readers should be able to easily access on the GTA's website the report on each of these measures

A version of the editorial was previously published on www.VoxEU.org

The political endgame for the euro crisis

Charles Goodhart is the Norman Sosnow Professor of Banking and Finance at the London School of Economics, and Dirk Schoenmaker is Dean of the Duisenberg School of Finance and Professor of Finance, banking and Insurance at the VU University Amsterdam

The euro crisis continues to deepen, as European leaders continue with their 'too little too late' policy reforms. This column argues that fixing the eurozone problems requires a strong direction of fiscal and banking policy, but that this in turn requires deeper political integration including an elected president of the European Commission and a two-chamber parliament representing EU citizens and EU member states.

The euro has a supranational monetary policy framework, while the fiscal side is still national/intergovernmental. We have a central bank president for the eurozone, but no finance minister. But how could countries possibly cede sovereignty over some aspects of fiscal policy without democratic legitimacy?

We need to fix the political dimension before we can finally solve the financial side of the sovereign and banking crisis. It is not sufficient to elevate the current Commissioner for Economic and Monetary Affairs to Finance Minister status. A full democratic setting – including an elected president of the European Commission – is necessary to complete political union.

Political legitimacy for the Commission president is needed for two reasons:

- To enforce budget discipline on participating members, to restrict the impact of fiscal spending on the wider eurozone.
- To oversee eurozone banking supervision and resolution, to foster the stability of the eurozone banking system.

Political union

The Treaty of Lisbon has created a union of democratic states. The EU itself also forms a democracy, albeit an incomplete one with the European Parliament as its main democratic element. The question is how the EU democracy can be further advanced with an elected executive.

The political framework starts with a much-needed eurozone (EZ) Minister of Finance, as suggested by Trichet[1]. There have been suggestions about the powers that such a position would involve[2]. But a strong, technocratic, finance minister is not sufficient in itself. Proper mechanisms for election and accountability are needed to have the EZ Finance Minister work in a democratic setting. This position would rest inside the European Commission.

National experience shows that the success of any finance minister crucially depends on strong support from the prime minister (and vice versa). Thinking about a democratic political union therefore starts with a President of the European Commission, elected by the citizens of the EU[3].

Angela Merkel has now made preparations for such a political endgame. At the recent Christian Democratic party conference[4], a resolution was endorsed proposing an elected President of the European Commission. After election, the President can then form a team, including his or her Commissioner for Economic and Monetary Affairs (ie. the EZ Finance Minister). The Commissioners will need to be approved in hearings by the European Parliament.

The CDU resolution also suggests reforms to the parliamentary side of political union. It proposes a two chamber system. The current European Parliament would continue to be chosen by European citizens, and form the equivalent of the Bundestag, House of Commons, Tweede Kamer, or House of Representatives in the respective national countries.

A new chamber – comprising the Council of Ministers – would be created and form the equivalent of the Bundesrat, House of Lords, Eerste Kamer or Senate. The central idea of such a two chamber system is that the political discussion would be initially held in the main chamber representing the full electorate, and that a separate "*chambre de réflexion*" would then represent the interests of the separate member countries.

"We need to fix the political dimension before we can finally solve the financial side of the sovereign and banking crisis"

Powers of the EZ Minister of Finance

The idea of an EZ Minister of Finance has its *raison d'etre* in the need for enforcement of the Stability and Growth Pact[1]. The intergovernmental approach has clearly failed, as EcoFin ministers followed the principle of non-intervention – ministers would not interfere with each other on the understanding that each of them would not be touched when they ran into problems. The EZ Minister of Finance would have full supranational powers to impose sanctions if a country transgresses the fiscal deficit rules.

Nevertheless, the concept of sanctions needs much further thought. Imposing pecuniary fines on a country already in fiscal difficulties does not make much sense. An alternative is to give the EZ Minister of Finance supranational powers to block budgetary expenditures, or to require his or her prior approval of expenditures by transgressing countries.

The EZ Minister of Finance would thus be the counterpart for the ECB president. In any country, the minister of finance and the central bank president are *de facto* choosing the appropriate monetary-fiscal policy mix. When the central bank is operating on an independent basis, the appropriate mix can emerge tacitly.

Banking

A second power is in the area of European banking. The Internal Market legislation enables banking on a European scale, while supervision and resolution is primarily done at national level, with some loose coordination.

The home country principle of the Internal Market does not suffice for the current large cross-border banks in Europe. During the 2008-9 financial crisis, it was clear that all authorities (both home and host) followed a national rather than a European agenda. To get out of the current setting dominated by national interests, banking supervision and resolution should be put on a European footing[5,6]. While the chairs of the European banking and resolution authorities can be accountable to the European Parliament, these chairs need a political counterpart in the setting of banking policies and overall accountability. Moreover, the EZ Minister of Finance needs to decide, if needed, on taxpayers' money for bank resolution.

Two-speed Europe

The EZ Minister of Finance will need budgetary oversight powers only for the eurozone members. It is therefore likely to start overseeing eurozone banking supervision. But the ultimate goal should be to operate at the EU level, since the Internal Market for Banking operates EU-wide.

The statement by the EZ Heads of State or Government at their 9 December 2011 meeting provides for a variable geometry[7]. The new legal framework will encompass the 17 eurozone members and up to 9 non-eurozone members. The UK prime minister has exercised its veto and decided not to join.

Nevertheless, financial services policy is as important for the UK (with the City as the premier financial centre for Europe and beyond) as agricultural policy for France. France has informal leadership on agricultural policy. It is difficult to outvote France on agricultural matters. Such a political arrangement could only work for financial services if the UK would be prepared to play the collaborative game (and not to demand unanimity in particular financial services domains, as it did at the December Summit).

The aim of our proposal is to keep the Internal Market on financial services. The financial system can then continue to support the real economy in an efficient way and thus foster economic growth. By contrast, an Alleingang of the eurozone in financial services would force a split in the EU's financial system. This may end up in an internationally competitive financial centre outside the "European" framework, and a more traditional financial system inside the "European" framework. This is clearly a lose-lose situation – London may lose some business from its European neighbours, while the remaining European countries face a less dynamic financial system.

Fiscal and legal imbedding

An EZ Minister of Finance without money is like an emperor without clothes. There are proposals to have tax capacity capable of funding a budget of about 2% of European GDP[2,3] . This 2% should cover most eventualities, including effective stabilisation policies. Yet there may be exceptional circumstances, for example, relating to banking resolution where more is needed (the deep pockets of government).

Examples are:

The fiscal backstop to a new European Deposit Insurance Corporation (EDIC).
The resolution of one or more large cross-border banks.

In that case, the EZ Minister of Finance should be able to share the burden amongst participating members based on an ex ante burden-sharing arrangement[8].

In addition to fiscal powers, the new EZ Minister of Finance would need appropriate legal powers. The coordination of budget policies is based on Article 5 of the TFEU (Treaty on the Functioning of the EU), and the rules governing the Excessive Deficit Procedure on Article 126 of the TFEU. After the decision at the December Summit to adopt a variable geometry[7], the new legal framework will start outside the EU Treaties. This is similar to the Schengen Arrangement (creating Europe's borderless Schengen Area), which is a treaty signed in 1985 between five of the ten member states of the European Community.

The Schengen Agreements and the rules adopted under them were, for the EU members of the Agreement, entirely separate from the EU structures until the 1997 Amsterdam Treaty, which incorporated them into the mainstream of EU law. The Council and the Commission are invited to prepare the new legal framework by March 2012.

The new banking supervision and resolution powers could be introduced by regulations, i.e. by standard EU law-making that does not involve changing the Treaties[5]. The new European System of Financial Supervision allows specific powers to be transferred to the European Supervisory Authorities (ESAs). For example:

- The European Securities and Markets Authority (ESMA) has received the power to supervise directly credit-rating agencies.
- Similarly, banking directives and regulations could transfer the supervision of large cross-border banks from the national banking authorities to the EBA.
- In addition, a new European Resolution Authority could be established by a regulation.

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- Finally, a special resolution regime laid down in an EU regulation would ensure application to the European-wide operations of a bank.

Such a regulation would provide a European mandate and override national legislation. This European mandate is crucial to overcome national interests. The Maastricht Treaty assigns, for example, the ECB with the task of monitoring price stability in the eurozone (instead of the inflation in the participating members). This ensures that both the ECB President (and executive directors) and the national central bank governors focus on eurozone inflation.

Conclusions

Any complete solution to the euro crisis needs to be political. A technocratic solution will not do. This includes:

- A strong EZ Minister of Finance with budgetary and banking powers.
- An elected president of the European Commission.
- A two chamber parliament representing EU citizens and EU member states. ■

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A version of the editorial was previously published on www.VoxEU.org

The launch conference in Paris was sold-out

ICC launches new rules of arbitration

The International Chamber of Commerce (ICC) has launched a much-anticipated revised version of its Rules of arbitration with the aim of better serving the existing and future needs of businesses and governments engaged in international commerce and investment. The new Rules will come into force on 1 January 2012 and take into account current requirements and developments in arbitration practice and procedure, as well as developments in information technology, since they were last revised in 1998.

Approved in Mexico City by the ICC World Council in June, additions to the Rules include provisions to address disputes involving multiple contracts and parties; updated case management procedures; the appointment of an emergency arbitrator to order urgent measures; and changes to facilitate the handling of disputes arising under investment treaties and free trade agreements.

Other amendments have also been made to ensure that the arbitral process is conducted in an expeditious and cost-effective manner.

In answer to the growing demand for a more holistic approach to dispute resolution techniques, the new Rules are published in a booklet that also includes the ICC ADR Rules, which provide for

Jason Fry, Secretary General of the ICC International Court of Arbitration

mediation and other forms of amicable dispute resolution. Both sets of Rules define a structured, institutional framework intended to ensure transparency, efficiency and fairness in the dispute resolution process while allowing parties to exercise their choice over many aspects of procedure.

John Beechey, Chairman of the ICC International Court of Arbitration, said: *"It is one of the principal aims of the International Court of Arbitration to ensure that its Rules promote efficiency in the arbitral process and that they reflect current practice, consistent with the overriding objective of doing justice between the parties.*

"To the extent that it was thought necessary to do so, new measures and procedures have been introduced, such that the 2012 Rules of Arbitration respond to today's business needs while remaining faithful to the ethos, and retaining the essential features, of ICC Arbitration."

The revision process began in 2008 and was undertaken by a small drafting committee of up to 20 members, supported by a wider task force of 202 members and a consultation process with ICC national committees around the world and the ICC Commission on Arbitration.

"With this revision of the rules we have tried, in particular, to listen to the users of international arbitration, whether they come from business or government. Many of the new provisions in the rules have been shaped with their input"

"A great many dispute resolution specialists and corporate users from different legal traditions, cultures and professions had an opportunity to comment on the drafts, make suggestions and record their views," said Jason Fry, Secretary General of the ICC International Court of Arbitration. *"With this revision of the rules we have tried, in particular, to listen to the users of international arbitration, whether they come from business or government. Many of the new provisions in the rules have been shaped with their input."*

Peter Wolrich, Managing Partner, Mallet-Prevost, Colt & Mosle, France; and Chairman of the ICC Commission on Arbitration said: *"The International Court of Arbitration is at the cutting edge of change, continuously working to promote greater efficiency through the innovative design of new tools and procedures. The new Rules meet the growing complexity of today's business transactions, the needs surrounding disputes involving states, and the demand for greater speed and cost-efficiency."*

A sold-out launch conference took place in Paris in September giving over 270 participants a comprehensive overview of the changes to the Rules and a chance to have direct interaction with several drafting group experts.

The Rules are available in several languages and are intended for use by parties in any part of the world in proceedings conducted in any language and subject to any rules of law.

ICC is not only a trusted provider of arbitration but also of other dispute resolution services. The launch of the new Rules coincided with the launch of the ICC International Centre for ADR. The Centre oversees ICC Amicable Dispute Resolution, Expertise, Dispute Boards and DOCDEX (Documentary Instruments Dispute Resolution Expertise), helping to secure settlements efficiently with minimal loss of time and resources. ■

To download a copy of the ICC Rules of Arbitration visit www.iccwbo.org/ICCDRSRules

Bank debt: an opportunity

In this article Scott McMunn, CEO of RBS Asset Management Limited, argues the case for investing in bank debt where prices are at historic lows, but with significantly reduced fundamental risk.

The banking sector has suffered more than any other industry since the global financial crisis in 2008, both in sentiment from fixed income and equity investors, but also in the views held by the popular press and the average layman. Much of this is deserved; after all, the excessive levels of leverage employed and the allegations of casino-style trading carried out by many banks are not exactly conducive to them having a fair hearing. However, three years on banks continue to remain a fundamental component of the global economy and indeed will likely be a cornerstone of any upcoming recovery. Within the banking sector, or indeed any sector which has been subject to widespread vilification, there does lie in our opinion an area of opportunity and of value.

"...three years on banks continue to remain a fundamental component of the global economy and indeed will likely be a cornerstone of any upcoming recovery"

Looking back over the past three years, bank securities were, and still are in many cases, effectively disowned as investors feared uncertainty surrounding bank funding, balance sheet quality and capital levels.

Since the middle of 2011 markets have been showing some similar characteristics and patterns as those seen in late 2008 and the collapse of Lehman Brothers. The recent movements in bank debt have been driven by fears over a full-blown European sovereign crisis and a global economic slowdown. Bonds issued by European banks have slumped to a 2½ year low. This year prices of junior bank debt have fallen on average 15% - the lowest level in two years according to Bank of America Merrill Lynch indices.

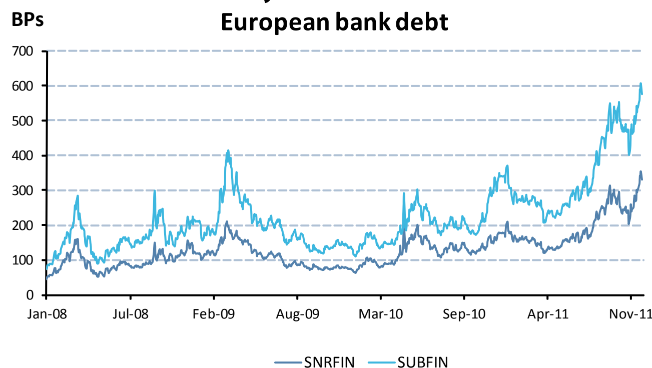
The chart below shows the dramatic rise in yields (fall in prices) of senior and subordinated bank debt over the last three years as seen in the Markit Itraxx Financials Index. The chart shows premiums on a credit derivative index over a basket of names and implies a default rate of some 20-30% over five years.

A lesson learned from the first financial crisis was that banks were not sufficiently capitalised to cope with such stress in the market, had overstretched their balance sheets and were massively overleveraged. Combined with a disregard for prudent funding strategies to match their bloated balance sheets, this was a catalyst for the crisis which followed.

However, banks have not been sluggish to react to past challenges and look to the future. Over the last two years the funding profile and balance sheets of banks have improved and this has been supported by a tightening regulatory environment forcing banks to strengthen all aspects of their business, more prominently their levels of capitalisation and transparency.

Indeed, the Basel Committee on Banking Supervision (the Committee that, among other matters, sets the major banking communities' capital requirements) has increased the total capital requirement of a bank from 8 percent under Basel II to 10.5 percent of risk weighted assets under Basel III. These capital requirements don't come into effect until 2013, however even before then and in response to the current European sovereign debt crisis, the European Banking Authority has asked banks to strengthen their capital buffers against sovereign debt exposure and reach a core tier 1 ratio of 9% by mid 2012.

Since 2008 global banks have raised their equity by around $500bn and shrunk their assets by $3 trillion. As a result, global banks' leverage has halved. Banks' liquid assets have risen even more dramatically. UK and US banks' cash ratios are at their highest levels for several decades. Therefore, despite current market valuations, the balance sheets of banks have strengthened and are continuing to strengthen. It is also important to note that for many of the national champion,



Source: Bloomberg

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systemically important banks exposure to periphery sovereigns is a manageable portion of balance sheet and risk weighted assets (RWAs), as shown in the chart below:

Of course access to funding remains a concern as raising debt on an unsecured basis is currently expensive. However, liquidity and access to liquidity is still available via the ECB. Larger banks can also gain access to cheaper funding via the secured debt markets and are launching covered bond programmes. Finally, measures of liquidity are significantly stronger than going into late 2008 aided by more transparent balance sheets and reporting measures and, at the least, the universal application of a stress test.

We believe that systemically important banks are in the late stages of repair and this is supported by improving capital ratios and a fundamental change in banks' business models. Bank valuations have reached historic lows – in our view this is fair due to the uncertainty on when the dividend tap is switched back on – but bank debt is seeing returns of 10% or more and is offering good value.

In our opinion, the evidence suggests that the current negative price movements within financials are more technical in nature and are driven by the liquidity of the banking sector (which is the largest sector in the fixed income market by notional value and number of issuers) and the related *"sell what you can"* mentality. In addition, investors have been scared of the link between banks' balance sheets and the issues within the sovereign space and the risk that certain banks may default.

We feel that although there may be consolidation within the banking sector and some weaker banks may fail, fundamentally banks have improved their balance sheets, and have reduced risk. Indeed, we believe that it is unlikely that systemically important banks will be allowed to fail. Whilst market liquidity is weaker, banks still have multiple means of funding. In addition, for many national champion banks, exposure to periphery sovereigns is a manageable portion of balance sheet and RWAs. The overriding theme is regulatory changes and oversight will lead to restructuring and recapitalisation of the banking sector.

New forms of Basel III compliant capital are already being launched. Over the last month Rabobank issued $2bn of qualifying Tier 1 bonds, the first to comply with these new rules, which were priced to yield a very attractive 8.5%. Rabobank, which was a AAA rated entity at the time of launch (although due to the recent change to S&P rating criteria it is now rated AA), is still probably the best regarded bank in the market in terms of access to funding and capitalisation and so this sets the yield benchmark for similar deals.

Navigating the current financial markets is clearly not without risk although it is certainly suited to prudent buyers. Current market levels price in unprecedented default rates for banks and categorise all banks similarly irrespective of their systemic importance. Therefore investors today must focus on an approach more suited to stressed assets than a traditional search for yield, and must be able to separate the wheat from the chaff. Indeed, successful investment in this asset class requires a thorough understanding of the US and European financial sector, experience in understanding the intricacies of a bank's balance sheet and finally the size, strength and skill to gain access to deals in the primary and secondary markets and execute at the best price possible.

RBS Asset Management Limited is a dedicated fixed income and cash manager. We are experts in investing in financials, with an average of over 20 years experience investing in this sector. We believe that economic data points to a challenging outlook and therefore we feel that defensive trades in sectors that are fundamental to the economy will outperform recovery trades. This is why we are developing a new Bank Capital Opportunity Fund to take advantage of current market dislocations where we believe the strengthening of banks' balance sheets has not been reflected in prices, therefore offering a strong value proposition. The team manages c. £20 billion assets, c. 60% within financials and we actively follow all of the major international banking names globally. ■

Major European banks' total net exposure to stressed sovereigns (% CET1), 1H11

	Portugal	Ireland	Greece	Subtotal	Spain	Italy	Belgium	Subtotal	Total
St Chartered	0%	0%	0%	0%	0%	0%	0%	0%	0%
Lloyds	0%	0%	0%	0%	0%	0%	0%	0%	0%
Credit Suisse	0%	0%	0%	0%	0%	2%	0%	2%	2%
UBS	0%	0%	0%	1%	1%	4%	2%	7%	7%
HSBC[2]	0%	0%	1%	2%	1%	4%	1%	6%	7%
Deutsche[2]	0%	1%	4%	5%	3%	3%	7%	13%	18%
Barclays[2]	2%	1%	0%	3%	12%	13%	6%	31%	35%
Soc Gen[2]	2%	1%	6%	9%	7%	16%	5%	29%	38%
Credit Agricole[2]	3%	0%	1%	4%	5%	27%	7%	40%	44%
ING Bank[2]	2%	0%	2%	4%	5%	15%	30%	50%	54%
Commerzbank[2]	5%	0%	11%	16%	15%	45%	4%	64%	80%
Santander[1]	7%	0%	0%	7%	79%	0%	0%	80%	87%
BNP	3%	1%	7%	10%	4%	40%	34%	78%	89%
Bankinter[1]	0%	0%	0%	0%	100%	0%	0%	100%	100%
UniCredit[2]	0%	0%	1%	1%	5%	95%	1%	100%	102%
Banco Popular[1,2]	7%	0%	0%	7%	94%	2%	0%	96%	103%
UBI	0%	0%	0%	0%	0%	116%	0%	116%	116%
Sabadell[1]	2%	1%	0%	2%	140%	0%	0%	140%	142%
Bankia	0%	0%	15%	15%	145%	8%	2%	155%	170%
Banca Popolare[1,2]	0%	0%	1%	1%	0%	189%	0%	189%	190%
BBVA[2]	0%	0%	0%	1%	203%	15%	1%	219%	220%
Intesa	0%	0%	2%	2%	5%	262%	0%	267%	269%
BMPS[1]	2%	0%	0%	2%	3%	361%	1%	365%	368%
Aggregate	1%	0%	2%	4%	22%	33%	5%	60%	64%

1. FY10 disclosure (as 1H11 not available) for Bankinter, BMPS, Banco Popular, Banca Popolare, Sabadell, Santander.
2. Belgium exposure based on EBA FY10 for Barclays, BBVA, Commerzbank, Credit Agricole, Deutsche, HSBC, ING Bank, Popular, Popolare, Sabadell, Santander, Soc Gen, UniCredit

Source: Company data, EBA

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IPv6: letting the internet meet its potential

Neelie Kroes is Vice-President of the European Commission and the EU Commissioner for the Digital Agenda

It is crucial to Europe's future that the internet continues to be a place of innovation, growth and access. We are starting to see very close ahead of us the consequences if we don't make the switch to IPv6.

Let's take a moment to reflect on the information society over recent years. Two developments have transformed our lives profoundly: the internet, and the mobile phone. Both were hardly visible, almost unheard of, just 20 years ago: at best, niche gadgets used by a limited number. Both have now rocketed to near universal prominence, transforming how we access information, how we connect, how we transact. The internet now has two billion users worldwide; while more Europeans have access to a mobile phone than to a landline.

This digital revolution will continue. Future possibilities are only limited by our imagination.

The EU's Digital Agenda is the framework to ensure we can achieve this transition. It is at the centre of our economic strategy for Europe in the years and decades to come. Because, in these gloomy economic times, ICT is already a sector providing half of our productivity growth: it can shape the economy of the future.

"...we need every European digital. That means not just every citizen with access to affordable broadband internet connections. But also with the skills and awareness they need to enjoy ICT in their daily lives"

And it also offers social applications: innovations that can directly improve the well-being of citizens everywhere. Whether it is healthcare, ageing, the environment, education, or creating inclusive and sustainable *"smart cities"*.

All such developments are crucial to Europe's future prosperity.

How can we do this? Our strategy targets a number of areas, from building trust and security, to achieving a vibrant digital single market, to make better use of spectrum resources. And there is more.

But first and foremost, we need every European digital. That means not just every citizen with access to affordable broadband internet connections. But also with the skills and awareness they need to enjoy ICT in their daily lives.

In many respects, Europe is doing well. Today, nearly two out of three Europeans are regular internet users. But still, just over a quarter of Europeans have never used it. I want that number to decrease: because we cannot leave people on the wrong side of the digital divide, shut off from online opportunity.

We also need to get more Europeans onto fast and ultra-fast internet access. Currently only 1% of Europeans have a fast fibre-based internet connection, compared to 12% in Japan and 15% in South Korea. By 2020, I want all Europeans to have access to internet speeds of at least 30 megabits per second, with a full half of European households with subscriptions at 100 megabits per second or higher.

Our new *"Connecting Europe Facility"* will support broadband deployment in Europe. All together, in the period up until 2020, it could leverage between €50 and €100 billion of public and private investment, connecting tens of millions of households to broadband.

We also need to be alive to the new ways in which people access the internet. One in three Europeans can now do so through their mobile phone. Increasingly, people are demanding access to content anywhere, any time, and on any device.

And we are confronting new applications of the internet too: developments like the *"Internet of Things"*. That could mean a growing networking of sensors, appliances, and consumer devices also needing connections to the network.

More people online; more ways of getting online; more applications and devices online. All these developments put greater demands on our networks, and require ever higher performance from them.

The internet cannot adjust to these developments, cannot continue to grow and function properly, without sufficient IP addresses.

At the time the internet was created, a 32 bit address space, enabling four billion terminations, seemed like a lot. Or it certainly seemed like enough. But now the internet has proved its worth, taken off like no-one could imagine in totally new directions. And four billion does not seem so many any more.

Imagine for a moment that no more IP addresses were available; imagine how that would cramp the development of this global resource. Well, if we don't make the change to IPv6, you may not have to imagine for very long: in Europe, total depletion of IPv4 addresses is just around the corner. The solution is to have a larger address space, now. And that means IPv6!

Deploying this new protocol quickly is therefore very important. And indeed it's a priority of our Digital Agenda for Europe.

I'll admit that the introduction of a new internet protocol can be challenging.

Towards the end of the nineties, many expected a faster uptake of IPv6. After all, the advantages were quite convincing even then. And in 2002, the EU Commission started promoting it.

Since then, we have made good progress in many areas. Research networks in Europe, for example, are IPv6-ready. The European network GEANT is the world leader in IPv6 deployment, not to mention a fantastic resource for scientists. From this, we have gained expert knowledge and experience, and trained many engineers through numerous projects.

Overall, though there is still a big challenge to tackle: the uptake of IPv6 remains slow, too slow.

But IPv6 remains an important building block, for two reasons.

The IPv4 address space is exhausted and this is impeding the growth and future development of the internet. Many innovations fail to reach their potential due to the complexity of managing shortages. This is a deadlock situation.

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Meanwhile, the large-scale address space enabled by IPv6 offers large-scale innovation opportunities.

Instead of a "mere" four billion addresses, we would have an incredible number: over 300 trillion trillion trillion.

Thanks to IPv6, users can have many personal IP addresses. They can directly put personal content online, manage private networks and control their household devices remotely. Services like energy management can become easier to use, simpler, more affordable. IPv6 offers all this, and much much more.

With that many addresses, you could give every person on the planet as many addresses as there are grains of sand in the whole world; and still not be anywhere near running out.

We need to act now. The longer we wait, the more it will cost us. We need to convince those most concerned to think differently, and act for the future.

I am really glad to see that today in Germany, some Internet Service Providers already deploy IPv6 intensively, for example Kabel Deutschland and Kabel Baden Württemberg. These are good examples: others should follow suit. The speed of transition to IPv6 needs to accelerate and expand to all ISPs.

And I want to support that market activity with public authorities taking a lead. All public bodies should be IPv6 accessible as soon as possible. The Commission's own website already is, since this year's world IPv6 day.

Seven EU member states, plus Turkey, are part taking part in a pilot this year in the framework of our competitiveness and innovation programme. This experience should show how IPv6 can be deployed – and why it is important.

We must make this transition. The alternative is that the internet will begin to suffer; and innovation and economic growth will feel the consequences. These are not things we can afford at the moment. To all of you out there doing business on the Internet: governments, content providers, service providers, my message is clear. Switch to IPv6 as soon as possible. And we can start enjoying the amazing opportunities of the future internet. ■

This article is based upon a speech given by Neelie Kroes at the German IPv6 Summit 2011 Potsdam, 1 December 2011

Developing the right CIO to meet business needs – Bermuda's unique model

The development of the next generation of Information and Communications Technologies (ICT) leadership is a key concern around the world as technology is now a critical component of organizations.

The profile of a Chief Information Officer (CIO) today is that of a business strategist, fluent in both technology and business. They must understand the needs of the entire organization and how the technology that is used adds value.

While the role of CIO has risen in importance in the organization, the pool of future CIOs has not deepened. In jurisdictions such as the US, fewer young people are pursuing ICT careers and even less are pursuing ICT degrees. At the same time, CIOs are retiring or moving on to non-ICT leadership roles.

Finding strong ICT professionals is becoming more difficult for companies, even in the current economic climate. Once hired, succession planning and talent management strategies are necessary to develop those with potential. Still, much more must be done as the role of the CIO continues to change.

"Finding strong ICT professionals is becoming more difficult for companies, even in the current economic climate"

The next generation of CIOs must be business ready, with a mix of business and technology knowledge and experience.

Bermuda

Bermuda is dubbed the *"Wired Island"* and that is evident according to the recently published State of ICT in Bermuda 2010. The report indicates that 91% of businesses on the island have a broadband connection with 50% using DSL connections, 23% using T1 or greater lines and 6% report using MPLS, 10MB, IPLC or a Quantum fibre link connection.

The annual benchmark also trends corporate cellphone and smartphone ownership. Amid the economic recession, Bermuda saw a huge leap from 78% smartphone ownership in 2009 to 89% in 2010 with the average number of smartphones a company owns at 19 with 3G or 3G+ data speeds.

Bermuda-based businesses understand that competing globally means meeting or exceeding the global technology standards and adapting to the ever changing technology trends. The *State of ICT in Bermuda 2010* reports that 74% of employees in businesses were rated moderate-high in technological competency. ICT professionals were asked to rate employees within their companies on a scale of 1-10 based on 23 technological areas related to general computing, internet usage, smartphones and other technologies.

The report also suggests that Bermuda businesses are keeping abreast with notably booming trends. We see this most apparently with the rise of social media, as 31% of companies are using social networking sites like Facebook to communicate with clients, with an additional 39% of companies planning to use social networking sites in the next year.

Recognizing that maintaining cutting edge technologies requires constant training, nearly half (49%) of Bermuda businesses offer formal technology training for their staff. Companies surveyed in the State of ICT in Bermuda 2010 look for professionals with a variety of skill sets in VMware, software development, network engineering, security, project management, SharePoint, Cisco networking and wireless infrastructure.

Technology Leadership Forum

In Bermuda, the Technology Leadership Forum (TLF) was founded because of an identified need for qualified local ICT talent. It is a leadership initiative designed as a partnership between private sector technology industry companies and the Bermuda Government.

The objectives of the TLF are to encourage dialogue, address issues, propose action steps, and to be a networking group amongst peers. Their goal is to contribute to advancing the agenda of creating a sustainable, qualified and professional ICT leadership pool of resources in Bermuda.

A cornerstone of the TLF is the annual Internship Programme. Participating companies in the TLF are committed to attracting and recruiting Bermudian ICT students, mentoring and networking with these talented individuals and providing the educational training that will make them invaluable in the ICT community.

The aim of the TLF Internship Programme is to effectively cultivate student interest in technology through a unified approach and philosophy to ICT career development. The intention is to develop world class talent into world class ICT leadership. In order to do this, exposure to experience and educational requirements to enhance their potential for employment in the future is critical.

In 2009, the TLF Internship Programme grew from an idea into an educational internship program that provides ICT students a well rounded and in-depth understanding of the ICT industry in Bermuda over 12 weeks during the summer.

Upon selection, the interns acquire experience in the ICT industry through classroom learning, team projects, examinations and fieldwork as members of staff at the participating companies. At the end of the internship program, students receive a certificate of excellence, which allows industry partners to know the level of expertise the student brings to the table, after their selection and participation in the TLF program.

Roundtable

To assess how the Technology Leadership Forum is regarded and used by Bermuda-based organizations, Forum participants were asked a series of questions. Ronnie Viera is Chief Operating Officer for First Atlantic Commerce. Coral Wells is Managing Director of W & W Solutions Limited. Sandra DeSilva is Managing Director of Nova Limited.

What do you believe the TLF's role to be in the Bermuda ICT community?

Viera: Broadening of industry knowledge, development of a more all-round professional, preparing the individual for the real world, encouraging the further development of IT in Bermuda by "producing" new talent to the industry. Providing some level of assurance to the employer that if someone has graduated from the TLF program, that they are a high quality candidate – badge of excellence.

Wells: The role of the TLF programme is to provide students with additional resources to expand their knowledge on the various aspects of ICT. The TLF bridges a gap between students studying or planning to study ICT and the entrance into the work force. Last but definitely not the least of the TLF objectives is to provide mentoring to students who are interested in ICT careers, by providing guidance and support before, during and after their TLF participation.

DeSilva: TLF plays an important role in the awareness, placement and initial growth of skill sets students need to contribute toward a sustainable ICT community. Succession planning is very important; identifying individuals with the aptitude and willingness to be part of the TLF program qualifies and validates there are capable individuals to carry on the ICT needs of Bermuda.

What has been the benefit of the Internship Programme to the ICT and business communities?

Wells: The graduates are trained in over 15 various IT and soft skilled areas, based on direct input from the business community's needs. TLF graduates complete our programme with well-rounded introductory ICT training, which allows businesses to be confident that our TLF students are self-sufficient and can hit the ground running with little supervision. In addition the business community now has access to students studying ICT on a regular basis, through our programme and networking events.

Viera: Opportunity to share knowledge and mentor new graduates. Connecting employers with students which has provided new employment opportunities.

DeSilva: Finding interns interested in ICT is difficult. This program assists the business community in identifying potential students who are interested. As the program matures and awareness expands tangible benefits will start to be revealed.

What is the Internship Programme's role in leadership identification and development?

Viera: Important. In theory the program is supposed to attract the best of the best. In the past 2-3 years, there have been some real stars come out of it which I believe will make their mark on the local IT scene.

How have former TLF interns integrated into the ICT community upon graduation from the programme?

DeSilva: Nova hired one TLF intern and we are extremely impressed with the continued progress this individual has displayed. I believe it is up to the various companies hiring these interns to constantly challenge these interns and allow them to expand their curiosity. The initial program accomplishes just that, it plants a seed for most students or provides an alternative view to students who were not aware of the available ICT career choices in Bermuda. These students are naturally curious and seek the opportunity to expand their skill set. If these students get the opportunity to step outside their comfort zone and are given the responsibility to produce, over time I believe they will contribute back to the community in a significant way.

Viera: Not sure what the percentage is, but my guess is that it is higher than 75% of interns who have found employment.

Wells: We ask the TLF graduates to volunteer in many ICT community initiatives such as speaking at Career Days in the schools, volunteering at IT networking events, and especially giving back to the TLF programme by mentoring other TLF students.

How must the TLF Internship Programme evolve to meet the ever changing needs of the Bermuda business environment?

Wells: The TLF must continuously review the 15 training modules to ensure we are training the students on the required ICT areas needed for Bermuda. This in turn assists the interns when they are successful in obtaining a job. Additionally, the TLF must ensure they continue to mentor our young students in the programme and after they complete the programme. The TLF should be there as a sounding board, offer guidance and advice as the students embark on their ICT careers.

DeSilva: The courses need to change to reflect the demands of the evolving ICT landscape in Bermuda.

Viera: The current program is very comprehensive so difficult to know how to evolve it. Perhaps adding a strategic planning component to it to extend their thinking further.

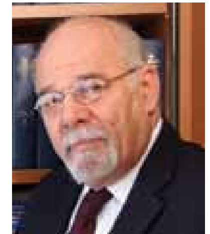
Future plans

While the TLF internship programme is focused on college students, the future objective is to engage students at an earlier age and help identify rising stars. A pilot programme is being developed to forge a closer relationship between the TLF and high school students. Recent graduates of the TLF are visiting high school technology students and acting as mentors. This also encourages a culture of giving back by the interns who have completed the TLF programme.

The TLF is also partnering with technology teachers to explore other opportunities for encouraging student development through exposure to top IT industry leaders through student and industry events. This unique collaboration between educators, industry and government shows a determined effort to ensure the robust and world class ICT industry in Bermuda remains just that. ■

For more information on the TLF internship programme, please visit www.tlf.bm

An introduction to Cyprus companies



Costas Tsirides is the founder of Costas Tsirides & Co LLC (www.tsirides.com) and is the President of the Cyprus Arbitration & Mediation Centre

Available corporate entities
The main corporate entity used in Cyprus is the Limited Company by Shares; this corporate structure is divided into two sub-categories: the Private Limited Company and the Public Limited Company.

A Private Limited Company is a company which by its Articles of Association:

a. Restricts the right of transfer of shares and
b. Restricts the maximum number of shareholders to fifty and
c. Prohibits an invitation to the public to subscribe for shares.

There is no minimum share capital for a Private Limited Company as opposed to a Public Limited Company, where there is a requirement of an issued share capital of at least €25,630.

In addition to the above, Cyprus Companies Law Cap.113 provides for a Limited Company by Guarantee. The essential difference compared with a Limited Company by shares is that the company does not have a share capital. The liability of the members of the company is limited to the maximum amount they have guaranteed, as opposed to a company limited by shares where the liability of the members/shareholders is limited to the number of shares they have subscribed for.

"This makes the use of a Cyprus company as the holding company of a business structure a particularly attractive proposition"

Pursuant to the Partnership Law Cap. 116, another 'corporate' structure which can be registered and operate under Cyprus law is the Limited Liability Partnership. In such a structure there is a need for at least one general partner who has unlimited liability and any number of limited partners whose liability is limited to the amount of their contribution to the partnership. Because of the requirement to have at least one unlimited liability partner this structure is not often used for business purposes.

Establishment of a company in Cyprus
Cyprus companies are incorporated by lawyers. It is not possible to incorporate a company in Cyprus without going through a lawyer who will draft and sign the Memorandum and Articles of Association.

It is possible for a person wishing to acquire a Cyprus company to buy a ready-made company. These are companies who have already been established and the shares of such companies are transferred to the new buyer/shareholder. At the same time the new directors and secretary are appointed in accordance with the requirements of the new shareholder.

It is now possible to have a 'one man' company in Cyprus. This means that a company can be incorporated with a single person being the sole shareholder, director and secretary of the company.

As from 1st October 2004 the Council of Ministers has approved complete freedom of direct investment from non-residents in Cyprus. Consequently, non-residents who wish to establish a company in Cyprus, or acquire shares in existing Cyprus companies, or otherwise to invest in or from Cyprus, no longer require approval by the Central Bank of Cyprus. Such applications should now be addressed directly to the Department of Registrar of Companies and Official Receiver.

The same applies for direct and portfolio investments by natural or legal persons from EU member states. Investors from the EU wishing to register a company in Cyprus or acquire shares in existing Cypriot legal entities should apply directly to the Registrar of Companies.

Necessary information and documentation required for incorporation
The following information and material is required for the relevant approval and formation of a company:

(a) The proposed name of the company, which has to be approved by the Registrar of Companies. Our office keeps available several approved names for speedy cases. A list of presently available names can be provided on request.
(b) The amount of the authorised capital of the company
(c) The amount of the issued and paid up capital of the company
(d) The main objectives and business of the company
(e) Full name, profession, address and nationality of each shareholder and their respective shareholding. One beneficial owner of all the shares is permissible. If full anonymity and confidentiality is desired, nominee shareholders may be used who will hold the shares in trust for the beneficial owner.
(f) Full names, professions, nationality and addresses of the directors and secretary of the company. All or any of the directors may be non-Cypriots. Cypriots (corporations or individuals) may also be directors or secretary of the company.

Anonymity services
Cyprus is fully compliant with the European regulation for the prevention of terrorism and money laundering. Lawyers who incorporate companies for clients need to go through the normal '*Know Your Client*' procedures.

During the KYC procedure the Ultimate Beneficial Owner ('UBO') should be disclosed to the lawyer. The Ultimate Beneficial Owner is the natural person or persons who ultimately are the beneficial owners of the Cyprus company.

When opening bank accounts in Cyprus for a Cyprus company, again the UBO needs to be disclosed to the bank.

Provided the above are complied with, it is possible to provide full anonymity services in relation to corporate structures. This is achieved by the service provider, through its associates, acting as registered shareholders, directors and secretaries of Cyprus companies on behalf of the UBO.

For the protection of the UBO, the registered shareholder makes a declaration of trust, stating that it holds the shares on behalf of the UBO. In addition he signs a blank instrument of transfer giving authority to the UBO to complete the instrument of transfer and transfer the shares into his name, or any other name.

This method ensures that anybody searching the Companies Registrar for information will only see the nominee shareholder and director, thus providing anonymity to the UBO.

There is no requirement to notify any other authorities of the identity of the UBO.

The service provider has a duty of confidence towards the client and never discloses information about the UBO without a court order.

The Bank also has a duty of confidence and never discloses any information about the UBO to any third party without a court order.

Advantages of using Cyprus companies

There is no distinction between local and offshore companies. The offshore regime was abolished in Cyprus in 2004, when Cyprus became a member of the European Union.

Cyprus has one of the lowest, if not the lowest, corporate tax rate, which stands at 10%.

Dividends for Cyprus residents are taxed at 17%, but dividends to non-residents have no withholding tax whatsoever. The dividends paid to non-residents may remain in Cyprus without any tax implications.

In addition there is no withholding tax on royalty payments to non-resident recipients when the right or asset giving rise to the royalty is used outside Cyprus, no withholding tax on payments of interest to non-resident recipients, no corporation tax on profits of the Cypriot company's permanent establishment abroad, no capital gains tax on the profits from the sale of the Cypriot company's foreign immovable property and no capital gains tax on profits from the disposal of securities.

When selling the shares of a Cyprus company there is no tax on the money received, provided the company has no immovable property in Cyprus. If there is immovable property situated in Cyprus, a calculation will be made of the value of the immovable property in relation to the total sale price of the shares and capital gains tax of 20% will be levied on that part of the sale price that relates to the immovable property.

This makes the use of a Cyprus company as the holding company of a business structure a particularly attractive proposition.

In addition Cyprus is a signatory to arrangements under the Treaty for the Prevention of Double Taxation with many countries all over the world. A double taxation prevention treaty, in principle, enables tax paid in one country to be offset against the tax payable in another, in this way preventing double taxation.

Another important factor is the grant of an exemption or tax at a reduced rate on certain receipts such as interest, royalties, dividends, capital gains and others that are connected with a transaction carried out between parties associated with a double taxation prevention treaty.

When certain income is taxable under the Cyprus income tax legislation, but there is an exemption (reduced tax) under any taxation treaty, the income is taxed, if at all, but only according to the provisions of the taxation treaty.

Some of the countries that Cyprus has double taxation treaties with are:

> Austria, Bulgaria, Belarus, Belgium, Canada, China, Denmark, Egypt, France, Germany, Greece, Hungary, India, Ireland, Italy, Kuwait, Malta, Mauritius, Norway, Poland, Romania, Russia, Singapore, South Africa, Sweden, Syria, Thailand, United Kingdom, United States, *Federal Republic of Yugoslavia, *Slovenia, **Slovakia, **Czech Republic, ***Azerbaijan, ***Armenia, ***Kyrkyzstan, ***Moldova, ***Tajikistan, ***Uzbekistan, ***Ukraine

Accounts

Pursuant to Companies Law Cap.113 a Cyprus company must maintain accounts in accordance with international accounting standards. Every company needs to have an auditor who will perform an annual audit of the accounts.

The accounting period in Cyprus is from 1/1 to 31/12 of every year. An income tax return must be filed with the tax authorities by 31/12 of every year for the previous year.

The accounts of the company must be filed with the Companies Registrar together with the annual return of the company.

The annual return is filed every year with the Companies Registrar specifying any alterations in the structure of the company ie change of shareholders, directors and secretary. Even if there are no changes, the Annual Return still needs to be filed.

Annual maintenance fees

In 2011 the Government of Cyprus set an annual administration/government fee of €350 payable by Cyprus registered companies.

The fee is not payable for the year of incorporation. It is due to be paid for 2011 before the end of December 2011 and before 30th June each subsequent year.

If the fee is paid with a delay of two months a 10% penalty will be applied. If the fee is paid within 2-5 month of delay then a 30% penalty will be applied.

If the company fails to pay the fee after 5 months then the company will be removed from the Registrar's records. The company will have two years to be reinstated in the Registrar's records by paying €500 per year of being inactive and €750 then after.

There is a maximum cap of €20,000 for group of companies. In the case of group of companies where the shareholders are the corporate service providers for anonymity reasons, the service provider makes a declaration to the authorities to the effect that they are part of a group.

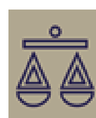
The annual charge of €350 shall not apply to the following companies:

- Dormant companies
- Companies or a group of companies which do not own any assets
- A company which owns property in Cyprus located in areas which are not controlled by the Republic of Cyprus eg. Turkish occupied areas of Cyprus

Disclaimer

The information set out above is believed to be correct as at 30th November 2011. As with all matters having legal consequences, however, advice should be obtained in relation to any proposed transaction or course of conduct as circumstances differ and points which are particular to an in individual set of circumstances may affect the advice given. The author accepts no responsibility for the dissemination of the above article, nor for the reliance placed on the information contained in it by any person, firm or corporation. ■

For further information contact:



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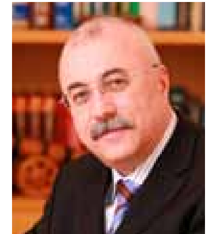
* Old treaty between Cyprus and Yugoslavia, ** Old treaty between Cyprus and Czech Republic, *** Old treaty between Cyprus and USSR

The new Bulgarian Renewable Energy Sources (RES) Act – in support of green energy or not?



Vladimir Penkov is the Managing Partner at Penkov, Markov & Partners

For many years, for known and unknown reasons, and in gross inconsistency with EU requirements, the state has (not) been dealing with the betterment of the investment climate and in particular, with the development of this sector. Its actions have been rather shy and non-transparent for citizens and the relevant branch organizations and other non-governmental organizations showing interest in the issue alike.

1. It is true that a little more than a year ago all interested organizations were invited and state representatives, on their behalf, created the impression that their expert opinions and proposals are taken into consideration. Despite some controversial wordings, not long before the finalization of the second reading within the Parliamentary Economic Committee there was a general conviction that, approximating to European rules, the new Act would irreversibly contribute to green energy in Bulgaria, setting long awaited clear rules and criteria required by bona fide investors.

2. I am not sure what happened in the afternoon of April 13, 2011 but within a few hours important sections of the Act were changed in the opposite sense, establishing unwarrantable practices resulting in unpredictability and respectively, in uncertainty of conditions, thus inducing a direct dependence on the subjective decisions of the state regulator.

> **"...it is advisable to recommend *de lege ferenda* and as soon as possible that the newly adopted Act be amended and supplemented"**

3. Through fixing the price for the entire period of time and regulating for the first time the issue of biomass energy production as well as providing for concrete deadlines for the inclusion of bio additives up to 10% for the different types of fuels and transport, the Act actually contributes to the development of green energy. However, apparently that is as far as it goes.

4. Under the pretence of excluding profiteers from the market, small and medium *bona fide* investors are confronted with unwarrantable difficulties. The latter comes as a direct consequence of the regulation provided for in the Act that the fixed preferential price shall not become effective as of the date of signing the preliminary contract to connect to the electricity grid but as of the date of issuing Act 15, ie. upon completion of the investment.

4.1. It would be absurd, from a legal point of view, to maintain that the regulation in question is beneficial to investors, the argument being that in the case of Act 16 it would be even worse, as its issuance depends also on the operator providing the connection.

4.2. The *bona fide* investor, who has to perform various activities related to purchasing real estate, arranging for their status, drawing up a detailed development plan, bargaining with suppliers, negotiating for a bank credit and, last but not least, negotiating with connecting operators, should have clarity over the concrete conditions and preferential price from the very beginning, which is clearly not the case when the latter are being set by the state regulator only upon completion of the investment.

Only upon termination of all these activities can one proceed to a production capacity building that entails substantial additional financial and time expenses prior to knowing payment terms and cost-effectiveness. The latter is another direct hindrance to receive credits under acceptable terms. Besides, it is well known that credit conditions in our country are rather hampering to investments.

5. The proposal to reduce purchase contract terms from 25 to 20 years for solar power-plants and from 15 to 12 years for wind farms also lacks logic and is likely to induce inequality between present and future green energy producers.

6. Being one of the well-functioning mechanisms of the previous law, the formula to fix the preferential purchase price of energy has been dropped from the present Act. Now the price in question is being fixed without clearly set criteria and is subject to change at the subjective discretion of the state regulator. Instead of just observing abidance by the law, the state regulator has been unwarrantably assigned extrinsic functions, such as to set prices subjectively on the basis of unclear criteria.

7. The regulation in the Act providing for operators to submit network development plans with a view to including new capacities is also ineffective and simply fictional, as there is no effective mechanism to make operators implement the plans. In case of failure to fulfil these plans no sanctions are provided for. How can the investor rely on free connecting capacities depending on such non-binding development plans in practice?

In order for the state to actually fulfil its obligations and to stimulate, by 2020, RES to reach not only the minimal 16% but also the recommended 23% of total production, it is advisable to recommend *de lege ferenda* and as soon as possible that the newly adopted Act be amended and supplemented envisaging the price to be fixed as of the date of signing the preliminary grid connection contract. Further, the previously well-functioning legal formula for calculating the preferential price should be restored, thus dropping off an extrinsic function of the state regulator. Clear obligations for operators to adapt their plans to the actual connecting needs should be provided for in the Act, together with the respective credible sanctions by the state in case of non-fulfilment. ■

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Will there be an inflow of Chinese money in Ukraine?

Artem Shyrkozhukhov is an Associate at Avellum Partners

In recent months, China has been dominating media headlines in connection with exchange rate disputes with the United States and possible participation of China in the bailout of some eurozone nations. China seems to be proving the truth behind the Chinese proverb that says that 'the saving man becomes the free man'. Developed and developing countries alike are turning to the biggest saver in the world in hope to get a share of financing out of large foreign currency reserves that China accumulated over the past years. Faced with the hard reality that capital markets remain closed and that European and American banks have scaled down their lending programmes in the aftermath of the sovereign debt crisis, more Ukrainian companies are also starting to look east.

Ukraine and China have always maintained good diplomatic relations. However, when we look behind the pleasantries of the diplomatic protocol language, for a number of years the Chinese government and Chinese investors were not particularly active in Ukraine for a number of reasons. On the one hand, for several years, especially in the period between 2005 and 2010, Ukrainian foreign policy was focused almost entirely on the issues of European-Atlantic integration of Ukraine, clearly to the detriment of the oriental vector of the national foreign policy. Ukrainian political instability and complex legal environment served as disincentives for any kind of investors, let alone the Chinese. On the other hand, China itself did not demonstrate particular interest in Ukraine or the Eastern European region, having been more active in Africa and other parts of the world that are rich in natural resources to support its economic growth.

Sino-Ukrainian contacts became more active in the last year of the previous Ukrainian government, headed by Prime Minister Yulia Tymoshenko and intensified after the arrival of the new president in 2010. During the state visit of President Viktor Yanukovych to China in 2010, leaders of both countries agreed that China, through the Export-Import Bank of China and other companies, will provide financing and technical support for several large-scale infrastructure projects in Ukraine, such as the construction of a high-speed railway line between Kyiv and Boryspil International Airport, the main gateway airport into the country, and a power station in Crimea. Also in 2010, China Development Bank has agreed to finance modernisation of several mines in eastern regions of Ukraine. It is expected that China will provide technical support and financing for projects in the extraction of hydrocarbons on the Ukrainian part of the Black Sea continental shelf, construction of the beltway road around Ukrainian capital and agriculture.

The principle distinctive feature of financing that comes from China is that very often loans are provided not only in hard cash, but also in non-monetary form, such as equipment, technologies, goods and services. This gives China a competitive edge, particularly in complex infrastructure projects. Loans from China are also attractive in terms of relatively low interest rates as compared to interest rates offered elsewhere. Chinese loans also tend to be more lenient in terms of covenants and other strings that are normally attached to financing from international financial institutions or foreign commercial banks.

At the same time, it is important to remember that China agrees to provide financing not simply as a gesture of good will, but in a pursuit of rather pragmatic goals. China views provision of financing as an opportunity to promote its own manufacturers and sometimes even its own workforce. All of the projects currently financed by Chinese financial institutions in Ukraine involve an element of supply of Chinese equipment and technology, from locomotives to power generation equipment and drilling rigs, etc. Despite clear benefits of such 'all-inclusive' approach in some projects, it may somewhat limit Ukrainian borrowers' choice of the best value-for-money options available on the market. It is also worth mentioning that in some industries, particularly, in metallurgy and chemical industries, Ukraine and China are direct competitors. It is therefore unlikely that Chinese financial institutions will be willing to finance Ukrainian competitors of Chinese companies.

"... Ukraine and the investment opportunities that it offers are largely unknown for the vast majority of Chinese investors"

In recent years, Ukraine has been actively promoting itself in the east, in an effort to attract more investment from China in its economy that is still recovering from the heavy blow after the financial crisis in 2008-2009. In recent months, as the second wave of the financial crisis begins to unravel, more and more Ukrainian businesses, from big agricultural groups to natural resources extraction companies and even Ukrainian banks are exploring opportunities for them in the east and in China in particular. It is apparent that Ukraine and the investment opportunities that it offers are largely unknown for the vast majority of Chinese investors.

However, with some ground work done and good Ukrainian lawyers to guide through the peculiarities of Ukrainian law, it should be possible to turn the tide. In the coming months and years, it remains to be seen how successfully Ukrainian companies will be able to spark interest in their businesses and to operate in a new territory that is quite different from their home turf or to what they have become used to when dealing with European and American investors. It also remains to be seen whether Chinese investors will be able to spot and master their business opportunities in Ukraine. There will not be a waterfall of Chinese money, but I think there is some room for optimism that in the next few years, Ukrainian economy will get a steady stream of Chinese investment albeit on Chinese special terms. ■

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Middle East Association

British companies urged to act now at MEA Iraq Conference

British companies need to move fast if they are to gain a foothold in Iraq and avoid losing out to their competitors.

This was the clear message emerging from the Middle East Association's 'Iraq: Untapped Opportunities' Conference held on 22nd November at the Dorchester Hotel, London. Supported by the National Investment Commission of Iraq, UK Trade & Investment and Allurentis, the event was sponsored by Shell, Parsons Brinckerhoff, Petrofac and Mott MacDonald and attended by over 230 business and government representatives. A strong Iraqi delegation attended, led by HE Dr Hussein al-Shahristani, Iraqi Deputy Prime Minister for Energy and including HE Dr Khairallah Hassan Babiker, Minister of Trade; HE Mr Herish Muharam, Chairman of the Kurdistan Regional Board of Investment; and Dr Abbas Al Sa'adi, Adviser and General Director of Legal Directorate of the General Secretary of the Council of Ministers.

The conference followed hot on the heels of the British trade mission to the Kurdistan Region in October for the Erbil Trade Fair, led by the Middle East Association with UKTI and Invest Northern Ireland. Comprising 80 delegates, it was the largest ever UK trade mission to Iraqi Kurdistan, and the largest UK trade delegation to anywhere in the world this year, including China.

"Iraq is one of the great opportunities of the next couple of decades"

Opening the conference Middle East Association Director General Charles Hollis commented that Iraq is now entering a more stable phase, and opportunities for business are growing. *"We need to replicate our success in the Kurdistan region throughout the whole of the country,"* he said, adding that the Association is looking to organise a trade mission to Baghdad and Basra within the next twelve months.

In a keynote speech, HE Dr al-Shahristani urged British companies to participate in Iraq's unprecedented reconstruction and development programme *"for the benefit of all parties."* He underlined the Iraqi government's commitment to creating a conducive environment for foreign investors through the generous benefits and incentives offered by Iraq's investment law. Highlighting Iraq's huge economic potential he noted that Iraq's real growth rate has been more than 7% per annum over the last four years, and is expected to grow even faster over the next decade, with GNP in 2010 standing at $150 billion.

Speaking of Iraq's plans for the energy sector, Dr al-Shahristani highlighted the potential for further development with at least 65 exploration blocs remaining unexplored and only 15 out of the 78 oil and gas fields already discovered being under development. Iraq plans to increase oil production capacity from just under 3 million b/d to 12 million b/d and to increase refinery capacity from 0.5 million b/d to 1.5 million b/d by 2017, as well as increasing electricity capacity from 6gw to 20gw over the next four years.

There are plans for a fourth bidding round in March 2012, for 12 blocs, and joint venture partners are sought for four new refineries. Iraq needs investment of $200 billion over the next six years in the oil and gas sector alone, with a need for new technology and modern management skills. Iraq's goals *"cannot be achieved without international companies"* he said.

He stressed that the opportunities are not limited to the energy sector, highlighting telecommunications, transport, housing, financial services and tourism as areas offering opportunities.

Lord Howell of Guildford, Minister of State at the Foreign & Commonwealth Office, stressed the importance attached by the UK government to developing its relationship with Iraq. *"Fundamental to*

Charles Hollis, Director General, Middle East Association; Lord Howell of Guildford, Minister of State, Foreign & Commonwealth Office; HE Dr Hussain al-Shahristani, Deputy Prime Minister for Energy, Republic of Iraq

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this relationship is building on our trade links," he said. He noted that Iraq has *"huge economic potential"* with its history of innovation, the fourth largest hydrocarbons reserves in the world, population of 30 million and largely untapped mineral resources, noting that it attracted $42 billion of foreign investment in 2010. With its GDP outpacing that of China Iraq is *"poised to take off"* as it seeks to overcome decades of conflict and underinvestment, he said.

"The combination of rebuilding and modernising infrastructure; developing the provision of public services; guaranteeing better security and training the population in the range of skills needed in a modern economy will offer excellent opportunities for British companies prepared to enter the Iraqi market," he added, noting the contribution of British companies such as Shell, BP, Foster Wheeler and Petrofac. *"There is opportunity for British businesses to do more."* The UK will continue to offer support to put Iraq back at the centre of the global economy, he concluded.

HE Mr Herish Muharam, Chairman, Kurdistan Board of Investment, acknowledged the role of the Middle East Association in championing trade with the Kurdistan Region and the rest of Iraq since 2006. Despite a slow start, British companies have been catching up in the past year, he said. The UK has the third highest number of firms registered with the KRG Ministry of Trade and Industry, and had one of the largest pavilions at the Erbil International Trade Fair. British expertise is sought in areas including electricity, water, road transport, health, education, banking and finance and engineering.

"Where British firms may not be able to compete on price, you can provide consulting, project management and project finance services, and partner with local contractors," he said, stressing the Kurdistan Region's affinity with the UK. The Kurdistan Region will continue to boom over the next two to three years, he said, noting the success in attracting foreign investment and adding that the Kurdistan Investment Law is one of the most investor-friendly in the Middle East.

Robin Ord-Smith, Director UKTI Iraq, noted the *"huge, huge opportunities"* for international companies in all sectors including healthcare, education and training, power, water, transport and housing. He acknowledged the leading role played by British companies in sectors such as oil and gas, with BP contributing $12 billion in the last twelve months to Iraq's exchequer, and noted the *"genuine affection and respect"* for British companies. However he suggested that the *"window is closing"* and British companies are in danger of being left behind. Iraq is *"one of the great opportunities of the next couple of decades. If you don't act soon, your international competitors will have stolen a march on you"*.

These comments were echoed by others including William Wakeham, CEO, AAIB Insurance Brokers, who called for more British companies to have a presence on the ground.

The obstacles in doing business with the market were not glossed over, however, and the practicalities of doing business were also addressed. While improvements in the security situation were acknowledged, there were calls for increased transparency, the speeding up of the decision making process, a more open financial sector, further private sector activity, enhanced export credit facilities from western governments, and improvements in the visa regime for business visitors in both directions.

As Gordon Turley, Mott MacDonald, remarked, *"There will be challenges, but everything is doable."* ■

'Opportunity Arabia 8' conference highlights huge scale of developments in Saudi Arabia

The strength of Saudi Arabia's economy, the Kingdom's continuing industrial diversification efforts and the mindboggling sums being spent on social and economic infrastructure were brought to the attention of UK companies at the Middle East Association's "Opportunity Arabia 8" conference held on 22 September at One Great George Street, London SW1. The conference, which was chaired by Sir Alan Munro and attended by around 180 delegates, was organised in partnership with the Saudi Committee for International Trade and sponsored by British Offset, SABB, Clariant-Tamimi, YbA Kanoo, BAE Systems, Zamil Offshore, Media Consortia International and Ahmad Nasser Albinali Holding Co.

Introducing the conference, Sir Alan Munro described Saudi Arabia as being *"on a roll, a massive economic roll"*. One of the world's most prosperous and high spending states, Saudi Arabia is spending its budgetary surplus on civil infrastructure, the development of its economy and society, and the development of a more mature and internationally focused industry outside the hydrocarbons sector, he said.

"...the atmosphere is ripe for professional adventures and new business ventures that go beyond the world of oil"

A powerful lineup of speakers covered the opportunities and challenges in the Kingdom, the UK's most important trading partner in the MENA region, which accounted for £3.1 billion of UK exports in 2010. They underlined the breathtaking scale of developments, from the $57 billion programme to build 500,000 houses to the $27 billion new Jeddah international airport; from the massive King Abdullah Economic City with its own $5 billion port, to the $68 billion Jubail II development that will house 25 new world scale industries.

Also highlighted was the growing requirement for local content, capacity building and the transfer of knowledge and skills to help the Kingdom to address the urgent challenge of providing jobs for its growing young population and to further develop its economy.

Nadia Bakhhurji, President of Nadia Bakhurji Architectural & Interior Design Consultants, and Board member of the Saudi Council of Engineers noted, *"We are at a critical stage of the economy, with huge projects on the horizon,"* while Hoda Al Helaissi, Head of Languages, King Saud University commented, *"The overall impression is one of a booming country that in a few short years has transformed itself ...to a competitive and flourishing nation where the atmosphere is ripe for professional adventures and new business ventures that go beyond the world of oil."*

It is not only the economic and business landscape that is experiencing far-reaching change – social attitudes are changing too. Many more parents are now allowing their daughters to travel abroad to pursue higher education, for example, and women are entering the workforce in increasing numbers, although constraints still exist.

Lots to offer

In a keynote address Baroness Symons stressed that *"the UK and Saudi Arabia have lots to offer each other"*, underlining the $400 billion stimulus package for capital projects to stimulate the economy and provide jobs, noting that 60% of the Saudi population is under 25. She highlighted efforts to boost diversification and regional development with the economic cities and industrial clusters, the developments underway in construction, engineering, mining, transport and communications, and the headway that British companies are making in the expanding healthcare and education sectors.

While acknowledging the contribution of delegations and high level visits such as the recent visit of Lord Green and the Duke of York, she called for an elevation of British Government engagement with the Kingdom and an increase in the number of ministerial visits. Further business to business and government to government interaction is needed, she said. *"Forging those relations will bring a sustainable future not only to Saudi Arabia but also to the UK."*

Sir Sherard Cowper Coles KCMG, former Ambassador to Saudi Arabia and now Business Development Director for BAE Systems, addressed some of the misconceptions about the Kingdom which still persist, speaking of *"images of Saudi Arabia instead of information, stereotypes instead of statistics, prejudice instead of plain facts."* He echoed the call for increased high level political support and ministerial visits to boost connectivity between the two Kingdoms. The opportunities are enormous and there is scope for doing much more. Saudi Arabia offers *"rewards without limit"* to those who visit regularly and have strategic patience, he said, not only in terms of business but also in terms of friendship with *"intelligent, brave and enterprising Saudis who want to connect with Western markets, Western exporters, and Western investors."*

Omar Bahlaiwa, Secretary General, Saudi Committee for International Trade, noted Saudi Arabia's massive $435 billion GDP, its resources in terms of possessing 25% of world oil reserves (700 billion barrels proven reserves) and the fourth largest gas reserves, as well as its status as tenth largest global exporter and 21st largest global importer. He highlighted the Kingdom's attractions to investors and improvements in the business climate which have enabled it to move up to eleventh place in the World Bank's 2010 Ease of Doing Business rankings.

Opportunities up to 2020

$200 billion Physical Infrastructure
$92 billion Petrochemical expansions
$90.7 billion Electric Power Generation
$88 billion Water Desalination
$70.7 billion Telecom and IT
$53.5 billion Tourism and Leisure Development
$50 billion Natural Gas Production
$28.3 billion Agricultural Expansion
$10.7 billion Education and Training

Source: Saudi Committee for International Trade

He commented that industry is *"booming,"* and that *"industrial clusters are the future in Saudi Arabia."* He urged foreign investors to come to this *"promising"* market, highlighting the availability of finance through the Saudi Industrial Development Fund, as well as the availability of land, infrastructure and manpower, and the thirst for technical know-how and technology. The Kingdom offers over $1 trillion in investment opportunities, and there are opportunities for SMEs as well as the big companies, he said, particularly in developing areas such as tourism.

Thamer Jan, Commercial Manager, SABB, endorsed this positive view of the strength of the Saudi economy and its international competitiveness. The Kingdom is expected to continue to buck the global downturn and stay on the growth plan, he said, forecasting economic growth of 4-5% a year between 2011-2013. He noted the

A powerful lineup of speakers covered the opportunities and challenges in the Kingdom, the UK's most important trading partner in the MENA region

Omar Bahlaiwa, Secretary General, Saudi Committee for International Trade
Photo courtesy of Andrew Mead

rising international trade flows, particularly with Asia and the Middle East, the increase in FDI (the Kingdom is the largest recipient of FDI in the Arab world) and the stimulus package which is promoting growth. However, population growth, unemployment and addressing the shortage of affordable housing remain key challenges.

Diversification drive

The petrochemicals and mining sectors are at the forefront of the Kingdom's diversification drive. The $20 billion Dow Chemicals/ Saudi Aramco chemicals complex will be one of the world's largest petrochemicals facilities. Leslie McCune, MD Chemical Management Resources, presented the increasingly complex picture of the Kingdom's petrochemicals development, with opportunities evolving to reflect the Kingdom's priorities such as adding value in Kingdom, local sourcing, providing employment and promoting R&D.

The mining sector continues to develop as Saudi Arabia's 'third pillar of industry'; the Kingdom has rich resources of phosphates, copper, bauxite, gold and other minerals. The focus has been on attracting private sector investment and expertise. Kier Construction has a joint venture with Ma'aden to develop and operate the Al Jalamid phosphate mine, potentially the world's largest phosphate project.

High priority to education and training

The high priority attached to education and training, which receives an allocation of $36.7 billion (25%) of the 2011 budget, was underlined. Chris Innes Hopkins, Director UK Trade & Investment, Saudi Arabia, highlighted recent developments including the 'Tatweer' education reform programme, the expansion of the King Abdullah scholarship programme which enables 120,000 Saudi students to study abroad, the Princess Noura University for women, (one of the largest university complexes in the world), the expansion of technical and vocational training and the growth in partnerships between higher education institutions. On the vocational training side, TQ is providing technical and vocational training at the Saudi Petroleum Services Polytechnic, and a forthcoming UKTI/TVET mission will include a roundtable meeting with HE Adel Faqih, the Minister of Labour.

Hoda Al Helaissi, King Saud University highlighted the growing need for professionals, the expansion of higher education and the growing numbers of women entering higher education. The provision of further training programmes for women could help raise the proportion of women in the workforce, currently only 15%.

The healthcare sector is another fertile area for cooperation, as Dr Ameed Hamid, Director, Saudi-British Medical Forum, outlined. The Ministry of Health plans 12 new hospitals, the expansion of existing facilities, the continuation of its programme to build 700 new primary care centres, as well as medical schools at the Kingdom's universities, and a further 50 private sector hospitals are also planned. An MOU signed with the Saudi Minister of Health, Dr Abdullah Alrabeea, envisages UK/Saudi cooperation in hospital management and operation, renovation and building, recruitment, pharmaceutical industries partnerships, research and training.

The conference also covered the investment environment and taxation regime, and provided a wealth of information and advice on doing business with the Kingdom. The strong message from all speakers was the need to visit regularly or have a local presence to build the all important relationships on which success depends.

Delegates were also urged to take note of the recently introduced 'nitaqat' initiative, which represents an intensification of the Saudisation programme – it tightens restrictions on the employment of expatriates and applies a points system to encourage Saudisation. Companies that fail to provide sufficient jobs for locals can be penalised by having visa applications for their expatriate staff refused. ■

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The sun is still shining

Örn Gunnarsson is an Attorney at Law at LEX Law Offices, Iceland

***"You must learn from the mistakes of others. You can't possibly live long enough to make them all yourself."* (Sam Levenson 1911-1980; American teacher and comedian).**

Iceland and, in fact, the rest of the western world, is at a unique place. Never in recent times have so many things gone wrong in the corporate and financial world. Three years after the fall of Lehman Brothers the western world is still fighting the aftermath of the financial crisis. What started as a banking crisis has evolved to a crisis that has seen governments fighting their debt levels, resulting in a cutting of a government spending almost worldwide.

The unique situation in Iceland, where almost the entire financial sector was put into administration, many of Iceland's major corporation went into financial difficulties, and were followed by difficulties for small and mid-size companies. The difficulties of Icelandic companies resulted from either too much debt (because of a leverage buyout or too much investments), or the evaporation of the markets the companies operated in. For example, after years of too much activity in the housing market there is now next to no demand for new houses. Companies that relied on providing infrastructure for the government or municipalities find life difficult because of decreased spending by the government and municipalities.

"All in all it has to be said that Iceland has an excellent platform for investments, both local and foreign"

The legal profession in Iceland and throughout the western world has been heavily involved in the tasks that these extraordinary events have caused, ranging from administration of fallen banks, restructuring of companies and improvement of the regulatory environment. In this article I will try to give some insight into the situation in Iceland, what has happened and what the outlook is.

The era of restructuring

In the corporate world of Iceland, the three years that have passed since the collapse of the Icelandic economy can be described as a period of restructuring. Followed be the crash of the big banks, hundreds of companies have filed for bankruptcy while a few hundred more have been taken over, either by the new banks established to take over the operations of the fallen banks or the estates of the old banks. At the same time thousands of companies of all shapes and sizes have gone through restructuring exercises, adjusting their debt levels to their ability to repay their debt.

These restructuring exercises have been done under the leadership of the current owners who have maintained their ownership post-restructuring. In many cases the owners have though had to secure new equity into the business, either from internal or external sources, and this has affected the ownership structure post-restructuring. The restructuring has quite often taken a long time due to legal uncertainties such as the question of the legality of currency based index in loan agreements that were common in Iceland prior to the crash.

In Iceland there has been a huge debate about the role the banks should play in the restructuring, with the owners of companies outside of the restructuring activities of the banks claiming that they face unfair competition. Companies that are not financially viable have been kept afloat in some cases with capital injection from the banks, resulting in healthy companies, that have gone about in their business in a responsible manner, have started to struggle in the competition against companies that have been irresponsible and are living under the armpit of the banks.

The banks have in return countered this argument by stating that they must be given the opportunity to protect the value within the business's the banks have repossessed, and that they must be allowed to wait for favourable market conditions to put their assets to the market.

One of the first major restructuring program introduced to the market was the restructuring of Icelandair, Iceland's major airline. This involved restructuring of Icelandair's debt, conversion of debt to equity and new equity being issued. This restructuring has been hugely successful as the price per share has doubled in value since the restructuring was introduced. Other restructurings are slowly coming to light with the announcement of Miðengi, the subsidiary of Íslandsbanki, of their disposal of their shares in Iceland drilling, one of the market leaders in geothermal drilling, and the announcement of the Enterprise Investment Fund of their disposal of their share in Husasmiðjan, one of Icleand's major DIY's.

These sale processes are now underway and are expected to be completed before the end of the year. Both of these sales processes have brought international interests. Many more restructuring have been completed or are in the final stages. These restructuring exercises have in many cases been complicated and dependant on various legal issues, such as tax law, finance law, competition law, mergers and acquisition, property law, law of securities, bankruptcy law and law on secured finance to name a few.

What have we learned?

In the era previous to the financial crash in Iceland, the Icelandic banking system increased to a level that surpassed many times domestic production, and was combined with many Icelandic businesses investing home and abroad beyond their means. Although the experience following the crash has not been a welcomed one, it is without a doubt an experience that a lot can be learned from.

Many people do not realize how young and immature the Icelandic economy is. A modern banking system has only been active in Iceland for a few decades and the regulatory environment is even younger. When suddenly all markets were open and the availability of funding looked unlimited it may not be as surprising as someone might think that things went as bad as they did. Given how things went in more mature economies such as the US and UK, Icelanders can count themselves lucky that things are not worse than they really are.

After three years of recovery since the crash the corporate world of Iceland is absorbing the knowledge (worth decades in experience), building a platform for a new era in Iceland. This involves investors, bankers, companies, lawyers, accountants and other in advisory or regulatory capacity. All these professions are much better equipped today than they were before the crash to handle complex transactions

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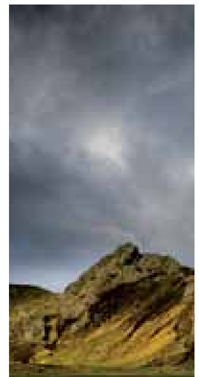

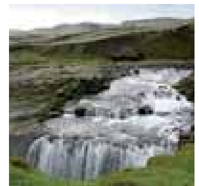

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and should be in a better position to evaluate merits of potential transactions.

They should also be in a position to stand up and be counted when a potential transaction does not make sense, or has identifiable threats associated with it.

Much more reliance can also be placed on the judicial system, as the courts today have gained valuable experience dealing with the aftermath of the crash. As Iceland is a party to the EEA agreement a framework is in place for foreign investment.

Is the timing right

Experts are still debating what should be the role of financial institution, with the classic debate on whether there should be a split between the investment banking operation and the retail operation. While central banks throughout the western world are working tirelessly on their fiscal policies fighting debt levels that are unprecedented, the financial markets in Iceland seem to be ready to get into action. Most of the restructuring exercises appear to be close to complete so assets are coming into the market either in the form of a private placement or via listings on the NASDAQ OMX NORDIC stock exchange. It can therefore be expected that the next few years will be fuelled with activity in the Icelandic financial and corporate market.

One must not forget that although the economic situation in Iceland has been difficult in the last few years, Iceland does not look all doom and gloom. Iceland has natural resources in abundance. Iceland is one of the world leaders in production of geothermal and hydro power electricity. Water supplies are in abundance and oil exploration is about to take place, offshore, east of Iceland. Iceland fisheries are renowned for their efficiencies and profitability. On top this Iceland has a very healthy pension system with hefty investment capabilities. The educational level in Iceland still remains one of the best in the world. All in all it has to be said that Iceland has an excellent platform for investments, both local and foreign.

The major current concerns of the Icelandic economy are the mismatch between foreign assets and liabilities in Iceland, topped with the inability of the recently reformed banks to fund them with foreign currency. This has resulted rightly or wrongly in that the Icelandic currency has devalued to a historically low level, making a foreign investment more feasible than ever. The lack of foreign currency also has the impact that exporting companies in Iceland that require foreign debt on their balance sheet are having difficulties in keeping the proper foreign exchange balance between debt and income. This creates an opportunity for foreign financial institutions to invest in debt of the many exporting companies, and many of them have a relatively stable and secure income.

Legal aspects of the financial meltdown

It cannot come as a surprise, but lawyers are playing a key role both in respect to the wind down of the bankrupt banks and to establish a new platform for the future. Many of the larger law firms have had their hands full in advising the estates of the old banks. One has to keep in mind that this has not been done before within Iceland, so a lot of knowledge has been sought abroad. At the same time the crash has affected almost every company and institution. In different law firms the situation has pretty much been an analysis: what happened? And, how will we go about it? For those companies still standing, the lawyers have helped them to maintain a stronger entity. The legal profession has surely been put to the test in Iceland as it has been involved in almost every aspect of the crash.

Closing remarks

Looking at the positives that can be drawn from the experience that Iceland has experienced in recent years, both pre and post the crash of the Icelandic economy, there are literarily hundreds of professionals that have been dealing with all sorts of issues that have come up as a result of the situation. Iceland, as in many other countries, has been dealing with the unthinkable, a collapse of almost the whole of the financial sector, followed by political and social unrest. The sustainable success of Iceland will rest on how well we will be able to put the experience gained into practice. To keep the sun still shining Iceland will as well have to show the world what it has learned. ■

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Cape Verde – one country, ten destinations and three continents

Júlio Martins Júnior is a Senior Associate at Raposo Bernardo and local lawyer at Cape Verde

This is the geographic environment of Cape Verde, a small but extraordinary African country, consisting of ten islands that lie in the Atlantic Ocean and are surrounded by three continents: Africa, America and Europe, thus benefiting from an extremely privileged geographical position. Cape Verde is just four hours flight from Europe, four hours flight from South America, six hours flight from Central and North America and just a one hour flight from the West African coast.

It is a prominent country in Africa, having a growth course of 5.4% and 5.6% in 2010 and 2011 respectively, looking ahead to 2012 for a growth of 6.4%. This economic growth is the result of the sustained implementation of appropriate economic policies (in the fields of taxation, labour laws and monetary policy and exchange rate) and that meant that in 2008 Cape Verde was elevated to a middle income country, a decision of the United Nations. From the point of view of "medium human development" and considering the regional context (West Africa) and Southern Africa (South Africa, Nigeria and Angola), Cape Verde is extremely well positioned, occupying top positions in this field.

Therefore, investors who decide to invest in Cape Verde will find a country extremely well structured and socially and politically stable. On the other hand Cape Verde is well integrated internationally. Cape Verde is part of the CPLP (Community of Portuguese Speaking Countries), ECOWAS – Economic Community of West African States and of Macaronesia, the WTO – World Trade Organization, benefits from AGOA – African Growth and Opportunity Act, and is in an advanced process of formalizing a special partnership agreement with the European Union, among other initiatives.

This excellent network of international integration, associated with its privileged geographical location, turns Cape Verde into a powerful investment platform or base of support for a safe approach to West Africa.

Structurally the country is served by four international airports, two deepwater ports and a modern road network, largely funded by the Millennium Challenge Account, a North American program to support the development. The communications operates efficiently, safely and continuously, served with fibre optic cables, one of them framed in the project WACS (West African Cable System) to connect the countries of Southern and Western Africa, and Western Europe.

In turn, the financial system is quite dynamic, robust and credible, comprising of eight commercial banks, twelve international financial institutions (that only perform operations with non-residents), two insurers and twelve ancillary banking institutions. The sector is supervised by the Central Bank of Cape Verde. The courts operate independently and processes are usually swiftly completed, in line with international standards of reference.

"This excellent network of international integration, associated with its privileged geographical location, turns Cape Verde into a powerful investment platform or base of support for a safe approach to West Africa"

The legal system of Cape Verde is based on international best practices, notably Directives issued by the European Union and the Portuguese legislation. The tax system in Cape Verde is characterized by being simple, stable and easy to apply. It has international competitive advantages as, for instance, the tax exemption on dividends distributed to shareholders of a company. In turn, the working regime presents itself as very flexible, and may permit, for example, hiring workers for a fixed term with relative ease.

In the context of the region in which it operates, and even in comparison with the region's major economies of East and Southern Africa – South Africa, Nigeria and Angola – Cape Verde came in the forefront among the countries placed in the class "medium human development", ranking in 118th place (182 countries observed). The population has a good level of education, the literacy rate is high and the seniors study at the best universities of the United States, Brazil, Canada, Germany, Portugal, Spain, China, among others, which facilitate the "business" in the country. Per capita GDP is approximately $3,500, far above the African average.

All these structural conditions provide the potential investor to invest in Cape Verde as an investment market but also as a platform for access to the vast and promising African continent, especially the ECOWAS market. It has approximately 230 million consumers, divided among 15 countries, with free trade and access to different markets. In addition to Cape Verde are other ECOWAS countries such as Benin, Nigeria, Senegal, Sierra Leone and Togo.

Besides the market of ECOWAS, Cape Verde can also serve as an investment platform for access to the market of the CPLP, which are part Portugal, Angola, Brazil, Guinea-Bissau, Mozambique, Sao Tome and Principe and East Timor, extending substantially the range of available options.

Deserving of equal prominence is the area known as Macaronesia, which is an area for political consultation and cooperation for development between Azores, the Canaries, Cape Verde and Madeira, which together forms a partnership under the EU's outermost regions.

Access to these markets through the use of Cape Verde as a gateway is further facilitated by the newly created International Business Centre, which comprises the International Industrial, International Trade Centre and International Centre for Service Delivery. It is a mechanism to promote international trade with Cape Verde as a starting point. Its structure consists of a set of geographically defined areas in which licensed operators can develop economic activities and under which tax benefits are allocated, non-tax benefits and special customs procedures when their activities are carried out with non-residents. For example, reductions in the tax rate on income in the order of 85% to 90%.

On the other hand, a legal mechanism has been recently established to promote the projects of internationalization of companies based in Cape Verde, independently of the nationality of the partners/promoters. Thus, the Cape Verdean companies who wish to develop investment projects to internationalize have now a relevant set of fiscal and financial incentives.

Another important advantage of Cape Verde lies in the reduced exchange rate risk as a result of the agreement of fixed exchange rate against the euro.

For all these reasons, we believe that Cape Verde is on the road to success and will certainly play an important role in Africa's future, especially if it is seen as a safe and efficient platform to channel investments in Africa.

Raposo Bernardo, a firm with an international outlook advising for several years on some of the largest operations at Cape Verde and the West African Coast, is naturally available to provide all the necessary support to the implementation of an investment project in this market. ■

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BVI – a gateway to easy registration of your yacht

Johann Henry is a Partner in the Private Client Department at Harneys, British Virgin Islands

Those persons who live in the northern hemisphere, have come to the end of yet another summer, and are moving quickly through autumn into a northern winter. On the flip side, no pun intended, those in the southern hemisphere, have bid farewell to Old Man Winter, and will themselves move quickly through a southern spring into summer. Regardless of time or season, it is always a good time to sail in the pristine waters of the British Virgin Islands (BVI) and naturally, it is similarly always relevant to consider registration of your yacht under the BVI flag.

By way of background, the BVI houses a Category 1 Branch of the General Register of British Ships that can accommodate the registration of yachts measuring up to 3000GT, and cargo vessels of unlimited tonnage. As a useful complement to the BVI's ship

registration categorisation, it is also home to a Category One aircraft register under the International Aviation Safety Assessment programme. Further, in the context of international corporate finance, it is widely accepted that the BVI is the premier tax-neutral offshore corporate domicile which is borne out in, among other things, the fact that in some international financial centres, the offshore company is known generically as a "BVI". The result is that lenders the world over are familiar and comfortable with structures involving BVI companies making lending easy and pain-free; so too are yacht owners, and yacht managers alike. Simply put, the combination of Category One aircraft and ship registries and the BVI company with its statutorily-engineered flexibility, viewed against the backdrop of the jurisdiction's political and social stability, makes the BVI the perfect choice of offshore centre for the discerning high net worth individual, among others.

"... the BVI is the premier tax-neutral offshore corporate domicile"

Registering a yacht under the BVI flag is simple. An application is made to the Registrar of Ships using prescribed forms which are readily available. To prevent name duplication, the proposed name of the yacht must first be approved, and a marine surveyor from an approved classification society or one appointed or authorised by the Registrar of Ships must survey the yacht and prepare a Certificate of Survey/ Tonnage Certificate in respect of the yacht. The proposed owner must be qualified to own a BVI-registered yacht, and a BVI company is typically incorporated for this purpose. To establish existence, the company's Certificate of Incorporation together with proof of title to the yacht by way of a Bill of Sale, Builder's Certificate or other evidence of ownership must be submitted along with the application. Once the Certificate of Survey/Tonnage Certificate and documentary evidence of title are available, the application is prepared using the prescribed forms. One known as "Appointment of Authorised Officer" must be executed by the owner naming an individual who will make the application for registration, and sign the application documents on the owner's behalf. An "Undertaking to Act as Representative Person" is required to be signed by the person appointed as such by the owner of the yacht.

Once the required documents are submitted to the Registrar of Ships in good order, an Official Number is assigned to the yacht, and the Carving and Marking Note (C&M Note) is issued to the applicant. The C&M Note is produced within 24 hours of submitting the application to the Registry, and reflects the yacht's name, Port of Registry, official number and registered tonnage, which are required to be carved/marked on the yacht in accordance with the instructions on the C&M Note. Depending on the size of the yacht, either an approved marine surveyor or the owner is required to complete and sign the C&M Note certifying that the yacht has been marked and carved accordingly. When the C&M Note has been returned to the Registry – in the case of a C&M Note signed by the owner, together with photographs reflecting due carving and marking – the Registry produces the Certificate of British Registry/Blue Book signifying completion of the registration of the yacht.

Given our significant expertise in BVI shipping law and practice, we at Harneys have developed an attractive portfolio of wealth management and asset-holding tools, which, coupled with the commercial sensitivity and breadth of experience of our industry-leading professionals, create the perfect counterpart to the jurisdiction's offerings as the offshore financial services centre of choice for, among other thing, company formation and yacht registrations. ■

For additional information on the registration of ships in the BVI, please contact us at shipping@harneys.com.

The foregoing discussion and analysis is for general information purposes only and not intended to be relied upon for legal advice in any specific or individual situation.

Preliminary injunction – indispensable for the protection of IP rights in Germany

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Since the entry into the World Trade Organization at the end of 2001, China has joined almost all of the important international conventions for the protection of intellectual property rights, for example, TRIPS (Convention on trade-related Aspects of property rights), Berne Convention (Berne Convention for the Protection of literary and Artistic works), Paris Convention (Paris Convention for the Protection of Industrial Property), to name the few. Nevertheless, quite a few Chinese exhibitors have been dumbfounded by the preliminary injunction while taking part in international exhibitions in Germany. The most confusing for them is the fact that the court in Germany could issue an injunction without prior hearing. How could a court make a decision without hearing the arguments of the defendant?

"... the German practice has made the barrier for the application of preliminary injunction as low as possible"

Here is the answer: while the preliminary injunction as a way of effective protection was introduced to China after its entry to WTO in 2001, this proceeding has been comprehensively developed in Germany for decades of years. For most of the German IP attorneys, preliminary injunction is indispensable for the protection of intellectual property. More than 60% of the disputes over intellectual property are settled through this proceeding (this statistic was told by the Chief Judge of the Chamber for Competition Matters of the Regional Court of Cologne, Judge Dieter Kehl, in his speech to the Chinese exhibitors in Beijing in 2007).

The difference between China and Germany in regard of preliminary injunction lies not only in the fact that this proceeding will only be initiated with big reservation in China, partly due to lack of experience. It is the approach of the lawmakers which makes the decisive difference: while the Chinese lawmaker is more considered with the protection of the defendant against the damage caused by the preliminary injunction, the German practice has made the barrier for the application of preliminary injunction as low as possible. The applicant does not have to pay the deposit to the court in advance, while deposit in China precondition is for the proceeding.

In Germany the court would make its decision without hearing if the applicant could prove in way of declaration in oath that he has warned

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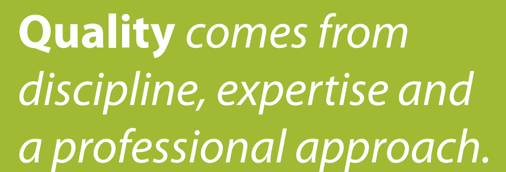

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the defendant beforehand. If the alleged infringement has taken place in an exhibition, some court could even do without a previous warning. The applicant could present the evidences mostly in form of copies or in way of declaration in oath, while in China all documents from foreign countries have to be notarized and verified by the responsible court and embassy, which is quite time-consuming. No wonder that a preliminary injunction could be issued within a day in Germany, while this is not conceivable yet in China today.

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The odd fate of German investment control

Christian Gehling practices in the areas of corporate and capital markets at SZA Schilling, Zutt & Anschütz Rechtsanwalts AG

In late 2007, speculation arose in Germany that the Russian energy group Gazprom was seeking a stake in the German energy giant RWE. This was the starting point of a hectic and somewhat nervous public debate in Germany on whether or not Germany should protect its blue chip companies against hostile takeovers. *"It is unacceptable that companies that are protected by the state in their own markets can buy into a free market such as Germany,"* complained Wulf Bernotat, the CEO of Germany's second energy giant EON, to the *Financial Times Deutschland*. *"I think for such cases it would make sense to implement some new German foreign trade legislation."*

While other German blue chips, many of them held by far more than 50 percent by foreign investors, were reluctant to introduce any form of investment restrictions or takeover protection, the politicians in Berlin intensely discussed the legislatory options. In April, 2009, the German parliament (Bundestag) ended up with a wondrous compromise: on one hand, the German legislator amended Section 53 of the German Foreign Trade Ordinance by a set of rules aimed at controlling acquisitions of resident companies by investors based outside the EU and the European Free Trade Association (EFTA). On the other hand, it was clear from the beginning that these new rules were, in effect, *lettre morte*.

> **"The main requirement for the conduction of any measures under the new rules is a threat to the public order or safety of the Federal Republic of Germany"**

The legal core of the investment control introduced in 2007 is the right of the Federal Ministry of Economics and Technology to prohibit the acquisition of more than 25 percent of the voting rights in a German company by a non-EU and non-EFTA investor if and to the extent necessary to safeguard the public policy or public security of the Federal Republic of Germany. The main requirement for the conduction of any measures under the new rules is a threat to the public order or safety of the Federal Republic of Germany. Although this might sound relatively imprecise and vague at first sight, upon closure inspection, one realizes that this is not the case.

It is undisputed in Germany that the new rules concerning the control of foreign investments in German companies need to be interpreted in the light of the European principle of free movement of capital, as stipulated in Article 63(1) and 65(1) of the Treaty on the Functioning of the European Union. The European Court of Justice has repeatedly stated that the right of free movement of capital can be restricted on the grounds of public security only *"if there is a genuine and sufficiently serious threat to a fundamental interest of society"*, such as the interest to safeguard supplies of petroleum, telecommunications and electricity sectors or the provision of such services in a crisis (see Case C-463/00). In contrast, the public security can and does not justify a general protection of blue chips or know how driven companies against unwanted takeovers or investments.

The legal analysis is mirrored by the M&A practice: since April, 2009, not a single transaction in Germany was prohibited under the investment control rules of Section 53 of the German Foreign Trade Ordinance. The parties are in no way obligated to file the proposed transaction for release or to notify the Federal Ministry of Economics and Technology of the transaction. They can apply for a *"no objection"* statement from the Federal Ministry of Economics and Technology if they want to be clear on this point, but there is no legal requirement to do so. ■

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