Approved for tabling.
28/3/19

PARLIAMENT OF KENYA

TWELFTH PARLIAMENT – SECOND SESSION

THE NATIONAL ASSEMBLY

DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

REPORT ON: ATTENDANCE OF THE INTERNATIONAL BAR ASSOCIATION (IBA) ANNUAL CONFERENCE HELD FROM 7TH TO 12TH OCTOBER, 2018 IN ROME, ITALY

Directorate of Committee Services,
National Assembly,
Parliament Buildings,
Nairobi

March, 2019

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LIST OF ABBREVIATIONS AND ACRONYMS

ABA	:	American Bar Association
FBI	:	Federal Bureau of Investigation
FINCEN	:	Financial Crimes Enforcement Network
FSA	:	Financial Services Agreement
CFTC	:	Commodity Future Trading Commission
IBA	:	International Bar Association
ICC	:	International Criminal Court
ICJ	:	International Court of Justice
ICO	:	Initial Coin Offer
SEC	:	Securities and Exchange Commission
PSA	:	Payment Services Act
RUPA	:	Revised Uniform Partnership Act
UK	:	United Kingdom
UN	:	United Nations
UNO	:	United Nations Organisation
USA	:	United States of America

CHAIRPERSON'S FOREWORD

The International Bar Association was stablished in 1947 and is the world's leading international organisation of legal practitioners, bar associations and law societies. The Association's founding principle is to influence the development of international law reform and shape the future of the legal profession throughout the globe.

The Association has considerable expertise in providing assistance to the global legal community. The aims and objectives for the formation of the Association are; to promote an exchange of information between legal associations worldwide and to support the independence of the judiciary and the right of lawyers to practise their profession without interference.

Towards this, the Association convened various conferences worldwide with the main one being the annual conference. The Association's 2018 annual conference was held from 7th to 12th October, 2018 at the Roma Convention Centre La Nuvola in Rome, Italy.The conference featured several conference sessions taking place concurrently in several meeting rooms at the venue and gave participants the opportunity to attend meetings focusing on areas of interest.
The Departmental Committee on Justice and Legal Affairs was represented at the conference by the following Members-

(i) Hon. Alice Muthoni Wahome, M.P. - Vice Chairperson
(ii) Hon. Jennifer Shamalla, M.P.

Mr. George Gazemba, Principal Clerk Assistant served as the delegation's secretary. The delegation departed Nairobi for Rome on 5th October, 2018 and returned on 13thOctober, 2018. Hon. Charles Gimose was to be part of the delegation but owing to unavoidable circumstances, he didn't travel.

The conference offered the Committee an opportunity to attend and learn from the various events, workshops and meetings on emerging issues in law. The delegation attended various sessions of the conference.

As the Leader of Delegation, I take this opportunity to thank the Offices of the Speaker and the Clerk of the National Assembly for the support extended to it in the execution of its mandate. I also wish to commend the Members of the delegation who showed great commitment to duty throughout the duration of the meeting.

On behalf of the Departmental Committee on Justice and Legal Affairs and pursuant to the provisions of Standing Order 199(6), it's my privilege and duty to present to the House, for noting, a report of the Committee on the attendance to the International Bar Association Annual Conference held from 7th to 12th October, 2018 in Rome, Italy.

Signed.....**Date**.....

Hon. Alice Muthoni Wahome, M.P.
Vice Chairperson

Date.....27/11/2018.....

EXECUTIVE SUMMARY

The International Bar Association's 2018 annual conference was held from 7th to 12th October, 2018 at the Roma Convention Centre La Nuvola in Rome, Italy. This report talks about Rome as not only Italy's capital city but a key European cultural centre and the headquarters of the Roman Catholic Church.

The conference was officially opened by H.E. Romano Prodi former Prime Minister of Italy. In his remarks, he appealed to European nations to remain peaceful and united. He warned that a divided and weakened post-Brexit Europe would have a detrimental impact on the continent's influence globally.

The conference had several sessions taking place concurrently in various rooms at the conference venue and the following are some of the conference presentations this report is about-

(i) Perspectives on law firm hiring;
(ii) Cryptocurrencies;
(iii) Initial Coin Offer;
(iv) Legal issues on termination of contracts;
(v) Media coverage of court proceedings;
(vi) Relationship between bar associations and law firms

The Conference officially ended on 12th October, 2018 with the rule of law symposium. The symposium focused on specific roles that legal professionals have to play in respecting, supporting and advancing the rule of law. The symposium noted that stable jurisdictions with strong rule of law attract and provide confidence for business entities to make long term investment decisions.

The symposium was informed that a growing number of businesses around the globe supported the rule of law. The symposium heard from a panel of eminent in-house counsels, as well as business leaders on the specific initiatives their companies were pursuing to promote the rule of law through internal business, human right policies, strategic social investment, public policy engagement and collective action. The symposium also identified and discussed significant violations of the rule of law around the world, based on the inaugural 2017 report of the rule of law.
The Committee recommends that the House should during the budget making process ensure that law enforcement agencies are well resourced

to enable them discharge their functions well. The Committee also recommends that law firms must ensure that they have a good working relationship with their Bar Associations, the Judiciary and law enforcement agencies to ensure seamless processes in the administration of justice. The Committee further recommends that here is need for legal framework that can provide guidance to the government to finance legal aid programmes in order to ensure the needy are represented in Court.

The 2019 Annual Conference would be held in Seoul South Korea. The country is the 4th largest economy in Asia and the 12th largest in the world and is one of the fastest growing developed economies.

1.0 PREFACE

1.1. Mandate of the Committee

1. The Departmental Committee on Justice and Legal Affairs derives its mandate from Standing Order No. 216(5) which provides for the functions of Departmental Committees as follows-

(a) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;

(b) study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;

(c) study and review all legislation referred to it;

(d) study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;

(e) investigate and enquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;

(f) vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments);

(g) examine treaties, agreements and conventions;

(h) make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;

(i) consider reports of Commissions and Independent Offices submitted to the House pursuant to provisions of Article 254 of the Constitution; and

(j) examine any questions raised by Members on a matter within its mandate.

2. The Second Schedule of the Standing Orders on Departmental Committees further outlines the subjects of the Committee, as follows-

(a) Constitutional affairs;
(b) The administration of law and Justice
(c) The Judiciary;
(d) Public prosecutions;
(e) Elections;
(f) Ethics, integrity and anti-corruption; and
(g) Human rights.

1.2. Committee Membership

3. The Committee was constituted on Thursday, 14th December, 2017 and comprises the following Honourable Members-

Hon. William Cheptumo, M.P. – ***Chairperson***
Hon. Alice Muthoni Wahome, M.P. – ***Vice Chairperson***
Hon. John Olago Aluoch, M.P.
Hon. Roselinda Soipan Tuya, M.P.
Hon. Charles Gimose, M.P.
Hon. Johana Ng'eno, M.P.
Hon. William Kamoti Mwamkale, M.P.
Hon. Ben Orori Momanyi, M.P.
Hon. Peter Opondo Kaluma, M.P.
Hon. Zuleikha Hassan, M.P.
Hon. Jennifer Shamalla, M.P.
Hon. Beatrice Adagala, M.P.
Hon. Gladys Boss Shollei, CBS, M.P.
Hon. John Munene Wambugu, M.P.
Hon. George Gitonga Murugara, M.P.
Hon. Anthony Githiaka Kiai, M.P.
Hon. John Kiarie Waweru, M.P.
Hon. Japheth Mutai, M.P.
Hon. Adan Haji Yussuf, M.P.

1.3. Committee Secretariat`

Mr. George Gazemba	-	Principal Clerk Assistant II
Mr. Denis Abisai	-	Principal Legal Counsel I
Ms. Halima Hussein	-	Clerk Assistant III
Ms. Fiona Musili	-	Research Officer III

Mr. Omar Abdirahim	-	Fiscal Analyst III
Mr. Joseph Okongo	-	Media Liaison Officer
Ms. Roselyne Ndegi	-	Serjeant-at-Arms
Mr. Hakeem Kimiti	-	Audio Officer

2.0 THE 2018 INTERNATIONAL BAR ASSOCIATION (IBA) CONFERENCE

2.1 ABOUT THE INTERNATIONAL BAR ASSOCIATION (IBA)

4. The International Bar Association was stablished in 1947 and is the world's leading international organisation of legal practitioners, bar associations and law societies. The Association's founding principle is to influence the development of international law reform and shape the future of the legal profession throughout the globe.

5. The Association has more than eighty-thousand (80,000) members comprising individual lawyers and more than one hundred and ninety (190) bar associations and law societies in over one hundred and seventy (170 countries) in all the continents. The Association has considerable expertise in providing assistance to the global legal community.

6. The aims and objectives for the formation of the Association are as follows-

a) To promote an exchange of information between legal associations worldwide;
b) To support the independence of the judiciary and the right of lawyers to practise their profession without interference
c) Support of human rights for lawyers worldwide through its Human Rights Institute

7. The Association works towards these objectives through three main areas of activity namely-

a) Services for individual lawyer members through its divisions, committees and constituents
b) Support for activities of bar associations and in particular, developing bars
c) Support of human rights for lawyers worldwide

8. Grouped into two divisions; the Legal Practice Division and the Public and Professional Interest Division. The Association covers all practice areas and professional interests, providing members with access to leading experts and up-to-date information. Through the various committees of the divisions, the Association enables an interchange of information and views among its members as to laws, practices and professional responsibilities relating to the practice of business law around the globe.

2.2 OFFICIAL OPENING

2.2.1 IBA chairperson's remarks during official opening of the conference

Mr. Martin Šolc, IBA Chairperson made the following remarks during the conference official opening-

8. He was glad to see many delegates travel to the far end of the globe to attend the 2017 Annual Conference in Sydney, Australia and was in 2018 delighted to invite delegates to the annual conference in Rome, Italy. He urged delegates to remember the old saying that goes *all roads lead to Rome!*

10. Every IBA conference has its own signature style and he believed Rome 2018 would be an unforgettable event, as well as possibly the biggest annual cconference. Against the unique background of history and culture, he believed the 2018 IBA Annual Conference would exceed participant's expectations. Over 200 sessions would form part of the programme which would culminate in the Rule of Law Symposium on 12th October, 2018.

11. There would be exceptional showcase sessions and the committee sessions would offer the chance to hear from the best experts in the field which would benefit all delegates, whichever the area of practice. There wwould also be sessions highlighting the exciting work of the Presidential Task Forces.

12. He appealed to participants who were not Members of IBA to join the Association not only for the instant discount offered during the conference, but also for the value in the continuous benefits to their education and professional development throughout the year and the networking opportunities the IBA committees can provide.

13. He called on participants to be a part of history and join IBA for the memorable week in Rome.

2.2.2 Official opening remarks by H.E. Romano Prodi, former Prime Minister of Italy

14. H.E. Romano Prodi remarked that European nations should work together and ensure that a strong, peaceful and united Europe that can defuse tensions around the world, particularly those between the USA and China, while defending threatened liberal democracies.

15. He warned that a divided and weakened post-Brexit Europe would have a detrimental impact on the continent's calming influence on the world

arena. Drawing attention first to the increasing occurrence of populism and the growing desire to defuse traditional authorities, a phenomenon witnessed from the Philippines and China to the US and within Europe itself, he suggested that people should appear more uneasy of traditional decision-making processes and democracy itself. The leaders of today's political parties were dedicating themselves to the next generation without taking care of the here and now.

16. The populist revolution happening around Europe was a direct consequence of globalization. Another key theme was migration. He called on the EU to defend the rights and history of justice of those countries devastated by brutal wars. He observed that in the USA, Asia and everywhere, the symbol of all fears was migration. In many cases like Europe and Italy, migrants were indispensable to daily life.

17. He noted that the European Union's priorities had shifted from the creation of a union of minorities to a system heavily led by its two strongest constituents that is Germany and France. For a long time, he said, Germany was an obvious leader, which, in line with German spirit, led European policy makers to look at the political economy first. However, with the election of President Emmanuel Macron and the growing influence of France, there was increased emphasis on a strong foreign policy. The reaction was clear, the German government had increased focus on economic aspects, and the French on foreign policy. He said Europe was designed as one engine with two pistons, but now it was two engines with one piston each.

18. He reemphasized the importance of Europe remaining united to defend against the increasing challenge of the rise of China and the apparent reduction of significance of the continent in the USA, demonstrated first by H.E. Obama and continued under H.E. Donald Trump.

2.3 CONFERENCE PRESENTATIONS

19. The conference had several sessions taking place concurrently in various rooms at the conference venue and the following were some of the conference presentations made -

2.3.1 THE PERSPECTIVES OF USA IN LATERAL LAW FIRM HIRING

IBA Rome Presentation on October 11, 2018 by Leigh-Alexandra Basha an Attorney at Law

20. In a 2016 survey, 85% of firms reported adding lawyers who brought business, compared to 47% of firms who lost lawyers who took business with them. There was reported decrease in institutional loyalty in many law firms.

21. It was observed that there was a type of clients who were sophisticated and typically "hired the lawyer, not the firm" This was well explained in a book *Robert W. Hillman, Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms, 55 Wash. & Lee L. Rev. 997, 1010-11 (1998).*

22. The Four Perspectives in the USA landscape hiring are as follows:-

(i) The departing lawyer;
(ii) The former firm;
(iii) The new firm;
(iv) The client

(i) The Departing Lawyer

23. Lawyers should consult the following (sometimes conflicting) authorities:-

- The law firm's partnership or shareholder agreement, to which partnership statutes generally apply by default;
- Ethics rules and opinions;
- Restatement Third of the Law Governing Lawyers;
- Laws governing partnerships and business entities, property law, contract law, and tort law;
- Treatises, such as the leading treatise on partner withdrawals and law firm breakups: R. Hillman, Hillman on Lawyer Mobility (2d ed. 1998).

State Bar Rules

24. The American Bar Association (ABA) published the model rules of professional conduct to provide the substance for legal ethics rules, but the model rules are not legally binding. States are free to adopt and modify the model rules upon integrating them into state ethic bar rules, which are legally binding.

25. State courts (and higher courts as necessary) rule on state bar rules. State Ethics Committees and the ABA issue ethics opinions to provide guidance on important legal ethics issues.

Restatement of Agency

26. Applies to associates and non-equity or non-capital partners, due to employment relationship as these persons are agents to the firm, which is the principal. Applies to equity or capital partners as the Principal.

27. Restatement (Third) of Agency § 1.01 (2006) defined - "Agency is the fiduciary relationship that arises when one person (a 'principal' *[the law firm or equity partner])* manifests assent to another person (an 'agent' *[the associate or non-equity partner])* that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents to act."

Revised Uniform Partnership Act (RUPA)

28. Adopted by majority of states, including California and D.C. Some states, such as New York follow the Uniform Partnership Act (UPA).

29. Under the Act, a partner has duty of care and duty of loyalty to the law firm and other partners. A partner is entitled to reasonable compensation for services rendered in winding up the business of the partnership. "Winding up" refers to the phase after dissolution until a partnership's unfinished business is completed.

30. RUPA implicitly allows partners to waive out of the automatic dissolution that occurs by default when a partner departs. Instead, the partners can trigger a disassociation in which the partnership continues existing and buys out the leaving partner.

31. A partner has a duty to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property or information, including the appropriation of a partnership opportunity."

Notification to Firm

32. A Lawyer should notify his firm of departure as soon as departure is solidified, as lawyer has a duty of loyalty and care to partnership and partners under RUPA § 404 or applicable partnership law. (See also Philadelphia Joint Ethics Op. 2007-300 (2007);

33. Lawyers may prepare pre-departure logistics (e.g., sign lease, obtain financing, print new letterhead) in advance of departing firm, unless it violates the partnership agreement. Ifhowever the lawyer's firm is about to take on major new financial commitments based on lawyer's presumed continued association with the firm, or if the lawyer is asked whether he or she is talking to other firms or making plans to leave, the lawyer should give early notice. Pennsylvania and Philadelphia Joint Ethics Op. 2007-300.

Notification to client

34. A lawyer should notify clients for which he or she plays a principal role or is responsible for representing. He should do so in time to allow client sufficient time to decide.
35. A lawyer should not be disparaging of former firm. See Meehan v. Shaughnessy, 535 N.E.2d 1255 (Mass. 1989) and should indicate client's freedom to choose counsel. By best practice, both the lawyer and law firm should jointly notify client of the departure of the lawyer.

State bar rules on notification of clients

36. In the District of Columbia, the lawyer may inform the client before informing the firm. This is as per the DC Ethics Opinion 273. In Florida, the Florida Bar rules require a departing lawyer to negotiate in good faith with the firm for joint notification of clients, which effectively precludes the lawyer from advising clients of the departure prior to notifying the firm. Florida Bar Rule 4-5.83.

37. In New York, although lawyers must notify clients of exit from firms, they should be careful not to interfere with the contracts the firm has with existing clients. See, e.g., Raymond H. Wong Inc. v. Xue, No. 115269/04 (N.Y. Sup.Ct. N.Y. Cty. 1/21/05)(associate enjoined from attempting to lure away firm clients).

State Bar Rules: D.C. Ethics Opinion 273

38. D.C. Ethics Opinion 273 explains that the lawyer's communication to the client. It should include the fact and date of the change in affiliation; and should include whether the lawyer wishes to continue the representation or not. The lawyer should also be prepared to provide to the client information about the new firm (such as fees and staffing) sufficient to enable the client to make an informed decision concerning continued representation by the lawyer at the new firm.

39. The client must also be informed of any conflict of interest matters affecting its representation at the new firm. Although a conflict with a new firm's existing clients may exist, most conflicts can generally be cured by obtaining the client's written, informed consent and/or by screening the incoming lawyer.

40. Any communication which exceeds that required by ethical rules could run afoul of the lawyer's obligations under partnership law (for departing partners). For example, solicitation of clients by a departing partner (i.e., activity going beyond neutrally informing a client of the lawyer's planned departure and new affiliation) may be a breach of a partner's fiduciary obligations to other partners and may constitute tortious interference with the law firm's business relations.

Departing with other lawyers

41. ABA Informal Ethics Op. 1417 (1978) advised that partners could not agree among themselves that any of them who left the firm would, for five years, not hire away or work with any of the firm's associates, explaining that although the agreement in question does not restrict the right of the individual lawyer to practice law directly, by restricting the right of association between attorneys it restricts such right indirectly and so falls within the prohibition of DR 2-108(A).". Florida Ethics Op. 93-4 (1995), also states that an employment agreement that prohibited inducing other lawyers to leave firm violated Rule 5.6(a). Rule 5.6 prohibits lawyers from signing partnership or employment agreements that restrict their right to practice after termination.

Restrictions on Right to Practice

42. A lawyer shall not participate in offering or making a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement.

43. Rule 5.6, Comment 1: An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer.

Impact of Rule 5.6

44. Courts routinely strike down contract provisions in law firm partnership agreements that provide for unethical behaviour, such as the following three types of provisions:

- ***Explicit allocations of clients***

45. Dwyer v. Jung, 336 A.2d 498 (N.J. Super. Ct. Ch. Div.) in which the court refused to enforce dissolution agreement in which the partners distributed named clients amongst themselves and agreed not to retain each other's clients for five years.

- ***Formal anti-competition covenants***

46. People v. Wilson, 953 P.2d 1292 in which the Court concluded lawyer may not require associates to sign a covenant in which they agreed not to solicit any of the firm's clients if the associates departed.

- **Financial penalties**

47. Ethics prohibition on covenants not to compete extended to financial penalties on withdrawing partners, because those penalties "functionally and realistically discourage and foreclose a withdrawing partner from serving clients who might wish to continue to be represented by the withdrawing lawyer and would thus interfere with.

Lawyer's confidentiality obligations continue

48. Where a lawyer who departs one firm for another, leaving the representation of certain clients with the former firm, that lawyer must continue to guard against unauthorized use or disclosure of information protected under Rule 1.6. which states that a lawyer shall not reveal information relating to client representation unless the client gave informed consent, the disclosure is impliedly authorized or the disclosure falls within one of seven listed exceptions.

49. The lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to client representation. Where the lawyer brings files of a former client to the new law firm, care must be taken not to reveal confidential information in those files to others, including the lawyer's new professional colleagues." DC Bar Ethics Opinion 273.

The Former Firm's Perspective

Does the firm have a property right in the lawyer's client matter?

50. Courts have been consistent that matters handled on an hourly basis are not firm property: The Supreme Court of California concluded that hourly fee matters pending when a law firm dissolves are not firm property. Heller Ehrman LLP v. Davis Wright Treamaine LLP, 4. Cal. 5th 467.The same result was reached in under District of Columbia law in Hogan Lovells US LLP v. Howrey LLP, 61 Bankr. Ct. Dec. (CRR) 36, 2015 WL 3505518 (N.D. Cal. 2015). New York Court held that pending hourly fee matters are not partnership property or unfinished business within the meaning of New York partnership law.

51. New York courts have never suggested that a law firm owns anything with respect to a client matter other than yet-unpaid compensation for legal services already provided. In re Thelen LLP, 24 N.Y.3d 16, 22, 995 N.Y.S.2d 534, 20 N.E.3d 264 (2014).

Contingent Fee

52. The firm and lawyer must agree how they wish to apportion the contingent fee between them, based upon their respective contributions to the case

("quantum meruit") or based upon terms in the partnership agreement. A departing lawyer cannot keep all of a contingent fee but only his partnership portion for a case that came into the old firm but for which the lawyer completed most of the work at the new firm. Still, most courts find the lawyer is entitled to quantum meruit for the value of work performed.

Transitional Period

53. Firms often include a requirement in their partnership agreements that no partner may withdraw without giving advance notice, typically 30 or 60 days. In Kline & Spectre, PC v. Englert, No. 110700421 (Pa. Ct. C.P. July 19, 2011) the law firm succeeded in securing a preliminary injunction against a lawyer who departed the law firm prior to the expiration of a sixty-day notice of withdrawal period required by the lawyer's employment agreement.

54. Former law firms are incentivized to forgo enforcement of notice requirements given the following considerations:

- Firm morale may be jeopardized by requiring an attorney to stay when he or she wants to depart;
- Talent recruitment impaired if firm acquires a reputation for making departures difficult; and
- the client's best interests may be neglected.

New Law Firm's Perspective

55. Restrictions on Information; Rule 1.6 prohibits a lawyer from disclosing "information relating to the representation of a client" unless the client consents to the disclosure or one of the exceptions to the confidentiality rule applies.

56. The lawyer may not disclose the names of clients to anyone outside current firm unless the clients gave implicit authorization. When interviewing with a firm, the lawyer may discuss the general nature of the matters that the lawyer is handling. D.C. Bar Ethics Opinion 312 (April 2002).

Conflicts of Interest

57. D.C. Bar Ethics Opinion 273 delineates four-part conjunctive test for disqualification of lawyer based on the newly arrived lawyer's former legal work:
    - The lawyer must have formerly represented the client;
    - The new matter must be the same as or substantially related to the prior representation;
    - The position of the prospective new client must be averse to that of the former client;
    - The lawyer must have learned information confidential to the former client which is material to the new representation.

58. The opinion clarifies that a lawyer who had only peripheral involvement in a matter (e.g., preparing research memo on legal point), would not subject firm to a disqualification because the lawyer did not learn any client representation confidences. Mere screening cannot cure a disqualification.

Conflicts of interest

59. New York Ethics Rules provide as follows-

    - When lawyers move from one firm to another firm as lateral hires, or when two law firms merge, the lateral lawyers' conflicts and the merging firms' conflicts arising under Rule 1.9(a) and (b) will be imputed to the hiring or newly merged firms under Rule 1.10(a).

    - Rule 1.10(e) requires a law firm to avoid conflicts of interest by checking proposed engagements against current and previous engagements.

    - Under rule 1.7, a lawyer may cure a conflict of interest by obtaining the client's informed, written consent.

The Client's Perspective

Clients Retain Choice

60. The client has an established freedom to retain counsel of choice (departing lawyer, current law firm, or neither). See Model Rule 5.6: stating that a lawyer shall not participate in offering or making a partnership,

shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement. See also Restatement (Third) of the Law Governing Lawyers, §14, Comment h.

Clients benefit

61. Clients prefer an environment of competition in the provision of legal services, which correlates with lawyer mobility. Robert W. Hillman, Loyalty in the Firm: *A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms, 55 Wash. & Lee L. Rev. 997, 1010-11 (1998).*

62. A recent journal article argues facilitating lateral mobility would allow lawyers to be more efficient which ultimately gives clients access to more cost effective legal services. Jones, Davis, Chester, Hart. *Reforming Lawyer Mobility–Protecting Turf or Serving Clients?* 30 Georgetown Journal of Legal Ethics 125 (2017).

2.3.2 FINANCIAL REGULATORY TREATMENT FOR DIFFERENT TYPES OF CRYPTOCURRENCIES

The Presenter was Adrian Ang from Singapore

(i) Types of cryptocurrencies

63. The facilitator made the presentation from a Singapore perspective and classified various types of cryptocurrencies as follows-

(i) Virtual Currencies (e.g. Bitcoin, Ether, Ripple, Dash and Litecoin);

(ii) Utility Tokens (can be used to purchase goods and services from one specific underlying business);

(iii) Security Tokens (have certain "security" type characteristics); and

(iv) Asset-backed Tokens (usually linked to ownership in precious metals or real estate).

64. The circumstances where people deal with cryptocurrencies include –

(i) Mining (typically virtual currencies); and

(ii) Payment for goods and services (typically utility tokens and cryptocurrencies)

(iii) Trading (typically utility tokens and cryptocurrencies); and

(iv) Initial Coin Offerings (typically utility tokens)

65. It's not common for security tokens to be treated the same as securities. It's also not common for asset-backed tokens to be treated as securities due to regulatory and licensing factors.

(ii) Financial regulatory implications

66. Currently there is no regulation on virtual currencies and utility tokens, but there is regulation for intermediaries under proposed Payment Services Bill. Security tokens are regulated under the Securities and Futures Act and Financial Advisers Act.

67. Regulation of asset-backed tokens is dependent on the underlying assets. Real estate arrangement may be seen as a collective investment scheme and may attract estate agency licensing requirements. Commodity trading of tokens may attract licensing requirements under the Commodity Trading Act.

68. Even if financial regulatory hurdles are cleared, one would need to consider other issues like Corporate Tax and Goods and Services Tax

2.3.4 BLOCKCHAIN AND CRYPTOCURRENCY REGULATION IN THE USA

69. Mr. Alexandra C. Scheibe an Attorney made a presentation on cryptocurrencies from a USA perspective.

(i) Blockchain and Cryptocurrency Regulation in the United States

70. The regulatory agencies in the USA are as follows-

(i) USA Commodity Futures Trading Commission
(ii) USA Securities and Exchange Commission
(iii) USA Department of the Treasury - Financial Crimes Enforcement Network,
(iv) Financial Industry Regulatory Authority

(ii) <u>USA Commodity Futures Trading Commission ("CFTC") Recent Developments</u>

71. Tokens and cryptocurrencies are referred to as "virtual currencies," and are subject to regulation by the CFTC as commodities. The CFTC's regulations apply: –

(i) Whenever cryptocurrency or virtual tokens are used in a derivatives contract (or to any transaction with virtual tokens that are considered derivatives contracts);

(ii) If any fraud or manipulation exists with regards to cryptocurrencies or tokens that are traded in interstate commerce.

72. CFTC v. McDonnell. On August 23, 2018, the United States District Court for the Eastern District of New York found in favor of the CFTC and again held that "virtual currency may be regulated by the CFTC as a commodity." CFTC's broad statutory authority and regulatory authority extends to fraud or manipulation in the virtual currency derivatives market and its underlying spot market.

(iii) <u>USA Securities and Exchange Commission ("SEC") Recent Developments</u>

73. The SEC regulates primary issuance and secondary trading of securities. Howey Test: investment of money; in a common enterprise; with the expectation of profits; solely from the efforts of others.

74. The features of the blockchain token and its issuance determine whether a token would be viewed as a security. Merely calling a token a "utility" token or structuring it to provide some utility does not prevent the token from being a security.

(iv) <u>SEC Recent Developments</u>

75. William Hinman, Director, Division of Corporation Finance in June 14, 2018 outlined factors to consider in assessing whether a digital asset is offered as an investment contract–

(i) Token creation should be commensurate with meeting the needs of users or feeding speculation;

(ii) Whether independent actors are setting the price or is the promoter influencing trading?

(iii) Whether the primary motivation for the purchase is personal use, consumption or investment?

(iv) Are tokens dispersed across a diverse user base or concentrated in the hands of a few that can exert influence over the application?

(v) Whether the application is marketed to potential users or the general public?

(vi) Is the application fully functioning or in early stages of development?

(v) <u>Financial Crimes Enforcement Network ("FINCEN") and Financial Industry Regulatory Authority ("FINRA") Recent Developments</u>

76. FinCEN categorizes participants in virtual currencies as either "exchangers" and "administrators" both of which are "money services businesses" under the Bank Secrecy Act.

77. Exchangers engage in the business of exchanging virtual currency for real currency, funds or other virtual currency while administrators engage in the business of issuing virtual currency and have the authority to redeem (withdraw from circulation) such virtual currency. Users obtain virtual currency to purchase goods or services (including miners and forgers) and bona fide investment companies which invest in virtual currencies for their own account and are not money transmitters.

78. On February 13, 2018, FinCEN authored a letter to Senator Ron Wyden, a Ranking Member of the Committee on Finance: – "generally, under existing regulations and interpretations, a developer that sells convertible virtual currency, including in the form of Initial Coin Offering (ICO) of coins or tokens in exchange for another type of value that substitutes for currency is a money transmitter". An exchange that sells (ICO) coins or tokens, or exchanges them for other virtual currency, fiat currency, or other value that substitutes for currency, would typically also be a money transmitter."

(vi) USA State Law

79. At least seven states have enacted or adopted laws that address blockchain. Certain states are attempting to facilitate adoption. At least thirty-eight (38) states have introduced bills that reference blockchain culminating into the following-
    (i) National Conference of Commissioners on Uniform State Laws Uniform Regulation of Virtual Currency Businesses Act;
    (ii) State Securities Laws;
    (iii) State Money Transmitter Laws;
    (iv) New York – NYDFS Regulation.

2.3.5 REGULATORY ASPECTS OF ICOs IN JAPAN

Yuri Suzuki, Senior Partner Atsumi & Sakai Advocates made a presentation from a Japan perspective

(i) Regulatory Aspects of ICOs in Japan

80. The basic idea of the Financial Services Agency (FSA) is: "Depending on the structure of the ICO or the nature of tokens, they may be subject to the Payment Services Act (PSA) and/or the Financial Instruments and Exchange Act (FIEA)."

(ii) Application of the PSA

81. If the tokens issued under the ICO meet either of the following two conditions, such tokens are deemed to fall under virtual currencies under the PSA:
    (a) The tokens can be used for payment of consideration to unspecified persons, and are mutually exchangeable with legal currencies against unspecified persons as counterparties; or

(b) The tokens are mutually exchangeable with virtual currencies against unspecified persons.

82. Conducting the sale and purchase of tokens that fall under virtual currencies or exchanging the same for other virtual currencies as a business constitutes a virtual currency exchange service and would be subject to regulations under the PSA.

(iii) Laws and Regulations Applicable to ICOs

83. If the tokens issued under the ICO are profit distribution-type tokens and also meet either of the following two conditions, such tokens are deemed to fall under collective investment scheme interests under the FIEA:

(a) The tokens are purchased with legal currencies;
(b) The tokens are purchased with virtual currencies but are actually deemed to be equivalent to being purchased with legal currencies.

84. A collective investment scheme interest means the right, by investing money, to receive dividends of profits from a business conducted by applying such money. It is a security under the FIEA.

85. With respect to tokens that fall under collective investment scheme interests, offering of such tokens as business, for example, falls under type II financial instruments business and is subject to the following regulations:

(a) Obligation to register (financial requirements, personnel requirements, etc)
(b) Regulations on conduct (advertisement control, prohibition of false notification, principle of suitability, etc.)
(c) Mandatory reporting, inspection, and business improvement order, by the FSA

(Source: FSA's material of the Virtual Currency Exchange Service Study Meeting 1)

(iv) Hurdles of Virtual Currency Regulation

86. Virtual currencies are regulated by the following legislation: -

(a) The Act on Prevention of Transfer of Criminal Proceeds which restricts money laundering and terrorist funding is applied to virtual currency exchangers; and

(b) The PSA requires the virtual currency exchangers to comply with user protection rules.

87. If tokens fall under virtual currencies under the PSA, an issuer is required to be registered with the FSA as a virtual currency exchanger and file with the FSA a notice of virtual currencies handled.

88. It may take one year or more to obtain a virtual currency exchange license because there are over one-hundred (100) applicants waiting for licenses. The FSA may not approve new tokens. Accounting for virtual currencies has not been established as a matter of practice.

89. According to the FSA's application of law, most tokens should be regulated as virtual currencies by the PSA. Security tokens are regulated as securities by the FIEA, but at the same time the issuer could be required to obtain a virtual currency exchange license under the PSA. Even if an issuer delegates sale to another virtual currency exchanger, the issuer could be required to be registered as a virtual currency exchanger.

90. Possible new legislation includes revision of legislation, additional regulations or new self-regulations on ICOs addressing the AML/CFT, disclosure regulations, insider trading regulations, security, advertisements and solicitation regulations, and ICO screening standards, etc.

2.3.6 CRYPTOCURRENCIES

Presentation by Yuval Horn, founder of Horn & Co, institutional investors

91. Cryptocurrencies have quickly become one of the most discussed developments in finance. Cryptocurrencies are key to developing the ecosystem and helping the market to grow. But they are reacting slowly. Many financial institutions are skeptical about cryptocurrencies, but less so about the underlying technology – blockchain – which is being used for many different purposes, so much so that banks are said to be investing more in blockchain than technology companies. There has been much evidence to bolster crypto-sceptics' negativity.

92. A spate of Securities and Exchange Commission (SEC) rejections for US cryptocurrency exchange-traded funds saw the value of cryptocurrencies fall recently, reinforced by a number of hacks on exchanges in Asia this year. Concerns about overarching regulation are also believed to create roadblocks in the market, particularly in the US, where the regulator claims

that nearly every Initial Coin Offering (ICO) is a security. This has prompted some issuers to exclude US investors from participating to avoid stringent securities laws.

93. While jurisdictions like Gibraltar and Switzerland have a more flexible regulatory framework, the US shows no sign of change. This has led many observers to predict that security token offerings will become the new normal. While this may favour institutional investors, people that built the market into what it is today will likely be excluded from these issuances yet all issuers want is clarity.

94. Doubts over the regulatory status of ICOs is harming the development of blockchain, which many in the sector believe holds at least some benefit. For companies that want to play by the rules but don't want to comply with securities laws, there are alternative steps to take but a lack of guidance is not helping. Horn says exemptions should exist for companies that don't issue a security token and for those that issue more of a currency.

95. Given the uncertainty and potential pitfalls that come with investing in this nascent sector, investors are desperate for reassurance and are looking for the same type of regulation they are accustomed to. "Our client which has submitted a prospectus with the SEC intends to be a regulated exchange and the offering of their tokens will be covered by a prospectus," Horn says. "Once they have raised money, it will be appealing to an institutional investor because there will be no difference in the disclosure requirements from a company that sells shares." This point is crucial if virtual currencies are to establish themselves as a mainstream asset class. Without the same kind of regulatory oversight, they will always be a niche, alternative investment that never receives the level of regard as a conventional investment.

96. Fears that regulation would legitimize an investment that supporters believe is a true threat to the entire financial system prevented some regulators from stepping in initially. Yet the tide is turning, certainly in Europe, and regulators are now stepping in. The next six months will define whether cryptocurrencies can become what its supporters believe it is capable of. Much of that success will depend on regulation.

97. Underfunded law enforcement agencies need the help of lawyers to succeed in the battle to recover lost art. Law enforcement agencies are said to be doing phenomenal work across the globe but are increasingly under resourced. This increases the importance of lawyers and law enforcement

to closely collaborate to meet the high demand. The Bust of the Goddess Diana incident illustrates this need. After being lost during World War II, the piece was returned to the Lazienki Palace in Poland in 2015, having been found in a Vienna auction house.

98. Christopher Marinello, Chief Executive Officer and founder of Art International said this was a perfect example of how lawyers and law enforcement agencies can work together so that positive conclusion can be reached, having persuaded the Polish Commissioner to broach the issue with the Austrian government. Yet there is a delicate balance that must be found. "When you work on art recovery, you have to be careful not to interfere with any criminal investigations," Marinello said. And this is a balance that is becoming more and more important to find.

99. In 2004, the FBI established a rapid deployment art team to respond to the high number of cases of stolen art. This team works across the globe and has done work recently in Baghdad following the museum looting, on Native American burial sites and in Syria. "We try to get the local authorities to help us," FBI special agent Elizabeth Rivas said. "We usually have individuals on the ground." There was consensus from the speakers that the US is the most favourable jurisdiction to recover works, due to its adeptness and desire to help. Yet the 25-year limitation period has caused some difficulties.

100. The Isabella Stewart Gardner Museum Heist, 28 years ago involved the theft of art valued $500 million, including works from Rembrandt and Vermeer. Rivas said that the FBI believes they know who is responsible but cannot file charges given that the limitation period has elapsed. Clients are however mostly concerned with resolving rather than litigating cases so the pieces are returned back to them. Other jurisdictions have more challenging aspects. The Italian state, for example, claimed ownership of a bronze statue named Victorious Youth because it was found on a ship with an Italian flag.

101. Panelist Mark Stephens CBE, lawyer at Howard Kennedy, said: "I always thought it was a long stretch, but because the Italian courts have accepted this it should be taken seriously." To navigate these complexities, clients need the full assistance of government and lawyers together to recover works. Without this, cases go unsolved and beloved works remain lost.

2.3.7 ISSUES ARISING ON TERMINATION OF CONSTRUCTION CONTRACTS

102. The presentation was made by Dimitris Kourkoumelis of Kourkoumelis & Partners Advocates of Greece.

(i) A construction agreement from a civil law perspective

103. A construction agreement under civil law is a bilateral agreement and is considered as instantaneous where a party delivers the work and the counterparty the contract price. The relationship which is created from it expires with the due fulfilment of the parties' obligations and is terminated pursuant to the general reasons for the termination of bilateral contracts such as the mutual discharge of the contracting parties due to the incidental inability of any of them to fulfil its obligations. However, in practice agreements, construction agreements create a de facto long-lasting relationship which is the reason why the law provides for earlier termination for default or convenience.

104. Under the Greek Civil Code, the employer is entitled to at any time before the physical completion of works, terminate the contract for convenience without reasons. As regards general law of obligations, this is an important deviation from the standard of permitting unilateral termination only for default and or good reason.

105. The termination provided for under the Code applies directly to after the employer's respective declaration and without notice. Upon its exercise, the contract is terminated and the parties are discharged from the non-fulfilled obligations, without any claims arising up to the point of termination being affected. However, the contract is not overturned in its entirety but it remains applicable as to the agreed fees, which remains payable to the contractor irrespective of the termination.

106. Upon termination of contract, the employer shall pay the contract price but anything the contractor saved is recovered from the amount due such as expenses not incurred by the contractor, any other works executed during the term of the contract and anything else which is willfully omitted for its benefit. The basic consequence of termination in accordance with section 700 of the Greek Civil Code, is also the creation of the obligation

for the contractor to deliver and for the employer to accept the executed part of the works.

107. Besides termination for convenience, the employer has the right to terminate the agreement for good reason. A specific form such right is the right of withdrawal in the case of substantially delayed construction. More specifically, in the event the contractor delays the commencement of the execution of the works, it delays the pace of works which makes the prompt completion of the project impossible. The employer has the right to withdraw from the contract without waiting for delivery of the project, provided he is not the one liable for the delay. Further, the right of early withdrawal is available to the employer irrespective of the existence of the conditions of default of the contractor, any liability on its part or the condition of the force majeure.

108. For withdrawal to be valid, the respective notice must mention the exact reasons for the withdrawal otherwise, it is presumed to be termination of Article 700 of the Greek Civil Code since an invalid withdrawal may be applicable as a termination for convenience upon conversion. The exercise of this right rescinds the contract as if the contract. Consequently, the mutual obligations cease to exist while the parties are obliged to return anything delivered in accordance to the provisions of unjust enrichment. In the event of such withdrawal, the Greek Civil Code provides for reasonable damages.

109. The right to withdraw when works are substantially delayed is a specific application to the right to terminate contract for good cause, which is recognized in all long-term contracts. Both the aforementioned rights are justified by the need of each of the parties to terminate the contractual commitment due to the specific incidents and the continuous nature of the of the relationship. In the case of withdrawal of Article 686 of the Greek Civil Code, a good reason is the certainty that the project will not be completed within the deadlines at the time agreed and that this will result in increasing the damages that the employer will suffer.

110. The exercise of the right of Article 686 of the Greek Civil Code results to the immediate termination of the contract with the retrospective effect, meaning the right of the parties to make subsequent claims to exist. At the same time, the parties are obliged to return anything delivered up to that moment in accordance with the provisions of unjust enrichment. More specifically, the contractor on the one hand is obliged to return part of the entire fees he may have received as well as anything provided to him by

the employer for the execution of the project, while the employer must return the value of the part of the project which may have been executed.

111. Withdrawal is always possible when the contractor is in default of fulfilling the obligations under Article 686 of the Greek Civil Code as well as his main obligation to promptly deliver the works. The employer retains its full rights arising from the default. More specifically, the employer may either withdraw before the main obligation becomes due and payable or wait until it becomes due and payable and request the execution of the project and compensation for damages for the delay pursuant to Article 343 of the Greek Civil Code or to set reasonable deadline pursuant to Article 383 of the Greek Civil Code and following its expiration, to withdraw and request for reasonable compensation. The claim will be determined by the Court based on criteria such as the financial condition of the parties and the ability to cover the damages from another source or to request compensation for damages for non-implementation, which covers the positive interest namely; what the employer would have if the contractor's obligation was fulfilled.

112. Comparing termination rights for default and for convenience leads to the conclusion that there is similarity as to the requirements for their application, but they differ as to the results and consequences. In the event of concurrency, the right of withdrawal is preferable since it discharges the employer from the obligation to pay the contract price provided however that the facts can be proved.

113. Contractor's default is a circumstance allowing the employer to terminate the agreement under public works contracts and shall call his bond and seek further damages. Under public works contracts, the contractor's rights to terminate are limited to delay or non-payment, as well as in case of a long-term suspension of works.

(ii) A construction agreement from a common law perspective

(a) Termination for default

114. Not every breach of contract gives the innocent party the right to terminate a contract. For most breaches, the remedy for the innocent party lies in damages.

115. In common law, the innocent party will only be liable to terminate a contract if the term breached is a condition of the contract. A condition is

a term of contract where the intention of the parties to the contract was to designate that term as one that is so important that any breach, regardless of the actual consequences of such breach would entitle the innocent party to terminate the contract. The focus here is not so much on the consequences of the breach but rather on the nature of the term breached.

116. In common law, a contract may also be breached if there is serious breach of an intermediate or innominate term. The focus here is on the consequences of the breach such as where the breach deprives the non-breaching party of substantially the whole benefit of the contract.

117. In common law, a contract can also be terminated by renunciation by party where a party a party in breach of a contract by its words or conduct, unequivocally conveys to the innocent party that it does not wish to perform the contract any further. In addition to the common law rights of termination, parties usually provide in their contracts for circumstances in which each party may terminate the contract. These rights operate in addition to common law rights to terminate unless the latter are expressly or impliedly excluded.

(b)<u>Termination for convenience</u>

118. There is no common law right to terminate for convenience. However, most common law jurisdictions allow parties to contract for the right to terminate for convenience.

119. It is an established principle of common law that the employer cannot without clear words allowing it, exercise a power to omit work in order to employ another contractor to do that work. By extension, it is arguable that the employer cannot terminate the contract for convenience so as to give work to another contractor or to carry out the work. Clause 15.15 of FIDIC Silver Book (1999) reflects this philosophy by expressly stating that ***''The employer shall not terminate the contract under this sub-clause, order to execute the works himself or to arrange for the works to be executed by another contractor''***

(c)<u>Electing between common law termination or contractual termination</u>

120. Where a party has the right to terminate under both common law and contract but elects to terminate pursuant to the contract rather than alleging repudiatory breach, it will be prevented from claiming loss of bargain unless the contract expressly provides for otherwise. For example, in *Phones 4U Ltd (in administration) Vs EE Ltd (2018) EWHC 49,* claim for

damages by EE (mobile network operator) for loss of bargain was rejected because the termination notice relied solely on contractual right to terminate for convenience.

(c) <u>Compliance with contractual provisions</u>

'(a) termination of the parties' relationship under the terms of commercial contracts is a serious step. ***There needs to be substantive compliance with the contractual provisions to achieve an effective contractual termination.***

(b)Generally, where notice has to be given to effect termination, it needs to be in sufficiently clear terms to communicate to the recipient clearly the decision to exercise the contractual right to terminate.

(c)It is a matter of contractual interpretation first as to what the requirements for the notice are and secondly, whether each and every specific requirement is an indispensable ***condition compliance without which the termination cannot be effective.*** *That interpretation needs to be tempered by reference to commercial common sense'*

Obrascon Huarte Lain SA Vs Her Majesty's Attorney-General for Gibralter (2014) (EWHC).

121. Given that an effective or wrongful termination can amount to a renunciation of the contract which entitles the other party to in turn terminate the contract and claim damages. It is important that parties comply with contractual obligations.

122. Some practical issues with clause 15.2 of FIDIC Silver Book (1999) ***''The employer may upon giving 14 days' notice to the contractor, terminate the contract and expel the contractor from the site''***

- Exactly how many notices are required under clause 15.2? Is the contract automatically terminated after 14 days?

- 14 days' notice – is this a cure period? What happens if the contractor remedies the breach within 14 days? Does the employer then lose the right to terminate?.

123. These issues have been addressed in the new 2017 Silver Book. Employer will need to first serve a notice of intention to terminate before serving a notice of termination is breach not remedied.

What requirements are there for the form and substance of a valid termination?

Civil Procedure perspective by Redeker Sellner Dahs, Lepzig, Germany

(iii) <u>How to end a contract under German law</u>

124. German law provides several possibilities to end a contract. In most cases, these possibilities are dealt with in statutes, especially the German Civil Code. They vary depending on the type of contract concerned and the reason for the intention to end contract.

125. The devices of most importance in the legal practice are rescission and termination. If a party rescinds from a contract, the contract is deemed to be void from the beginning. Any services rendered under the contract up to when the rescission becomes effective have been made without legal basis as the contract is deemed not to have been existed. Thus, the parties have to retune anything they received as a result of the contract. If this is not possible, they have to refund the appropriate value. A termination to the contrary terminates the contracts for the future. The contract remains valid up to the date when termination becomes effective.

(iv) <u>How to end a construction contract under German law</u>

126. Until 2002 the normal way to end a contract was rescission. This legal concept was criticized as in most cases it was executed the contractor had begun to perform works. As generally, the owner of land becomes the owner of any building on it and the employer was enriched by the works performed and had to refund their value to the contractor. It was argued that it would be much easier if the contracts remained the legal base for all the services performed until the date on which the contract ended.

127. The legal situation changed in 2002 when a right to terminate a contract continuing for longer period was implemented by a new regulation according to which construction contracts may be terminated by both parties without notice for good reason.

128. In most German constructions which are entered into by the public or commercial entities, the parties agree on the standard form of contract. The contract provides that a construction contract may only be ended by means of termination and not rescission.

(v) <u>Form of termination under the standard form</u>

129. In all cases where the standard form provides for the possibility to terminate a contract, a written notice of termination has to be issued. In most cases before termination, the terminating party has to set a reasonable deadline and to declare its intention to terminate the contract on expiry of the deadline. This should warn the other party and give it the opportunity to fulfill its obligations.

130. Generally, under German law when a party terminates a contract, it does not have to state the reasons for termination. Thus it is admissible to submit reasons to justify termination, subsequently, as long as the reasons existed prior to termination. It is not necessary that a terminating party was aware of these reasons when terminating the contract. If however following termination a new reason to terminate the contract occurs, it is not possible to submit this reason subsequently, rather a new termination notice had to be issued.

131. However, termination under form of termination requires that before termination takes place, a reasonable period is set to warn the other party. The party intending to terminate has to state why it wishes to terminate the contract in order to give the other party the chance to fulfil its obligations. Under these conditions, it's not admissible to submit further reasons.

(vii) Termination of contract under common law perspective

Edward Corbet of Corbet & Co International Construction Lawyers, Teddingham, England

132. Getting termination wrong can be very expensive business. A wrongful termination will be regarded in most common law jurisdictions as repudiation leading to liability to the terminated party in damages. If the employer gets it wrong, it will be liable for the contractor's loss of profit and other damages. If the contractor gets it wrong, it will be liable for the employer's extra completion cost.

133. If the termination purports to be in accordance with the terms of construction contract termination provision, the most serious error would be to rely on grounds that are held by the arbitrator. For instance, the arbitrator may find that there was reasonable cause for delay.

134. Errors in substance or form of the termination notice are common. The question is whether such errors are fatal to the termination leading to repudiation or whether a valid termination can still be achieved.

135. Addressing form first, most contracts specify now a notice to be given. As contracts normally require notices to be written and to identify an address, a means of communication and to whom copies should be sent. The notice should state the section of the law under which it is issued.

136. It has been said as termination is a radical step, particularly where the contractual grounds are ones which would not amount to repudiation in the general law, then careful compliance with the contract must be observed. Repudiation is a severe fundamental breach of contract likened to the tearing up the contract or showing intention to be no longer bound by it.

137. Under the English law, a single non-payment by the employer is not regarded as repudiation. However, such a single non-payment is a good ground for termination of contract. Some tribunals have held that if a party wants to avail themselves of such a right of termination that would not exist in the general law, then strict compliance with form is required. However, in Gibralter airport case, Mr. Justice Akenhead held that delivery of the notice of termination to the site office rather than the specified head office of the contractor was not an indispensable requirement. It therefore appears that there is some leeway that courts and arbitrators may take a common-sense approach to non-compliance where the breach is *de minimis* or where it has not prejudicial effect on the other party.

138. If the purpose of the notice is to give the defaulting party a final opportunity to rectify default on pain of termination, then logic suggests that the default has to be stated. Similarly, if the notice is a 'show cause', notice inviting the defaulting party to explain why the contract should not be terminated, the ground for termination would have to be set out.

139. The International Federation of Consulting Engineers (FIDIC) 1999 contracts do not contain requirements as to the content of the notice if it's ambiguous as to whether the 14-day notice period is intended as a cure period. The 2017 edition resolves this ambiguity and for most defaults, the notice period is the final chance to remedy the breach.

140. What if there was no description or the ground later relied on is not mentioned in the notice? Where a contract provides a cure period and refers to a matter prescribed, the failure to specify the default would be fatal to the termination. It could be argued that the failure would be insignificant in cases where the default was obvious and or beyond repair, such as where a contractor has abandoned the project and demobilized from the country or gone into liquidation.

141. Interesting questions arise where a party learns of a ground for termination only after having terminated on different basis. This may be due to the discovery of facts or the taking of legal advice. The question is most acute where the ground notified is wrongful but the discovered ground would have justified termination.

142. In common law, a terminating party is not liable for ending the contract when the other party was in repudiatory breach whether or not the terminating party knew it at that time – Boston Deep Sea Fishing and Ice Co Vs Ansel (188) 39 ChD 339 in which the employer successfully defended a claim for wrongful dismissal on grounds of breach by the employee not known to the employer at the time of termination. Facts known but not cited at that time may also be relied on –Reinwood Ltd Vs L Brown & Sons Ltd (2008) EWCA Civ 1090.

143. However, each case must be considered on its facts. A party cannot raise new reasons to justify a termination if –

a) The breach could have been put right, if it had been brought to the other parties' attention in time – *Glencore Grain Rotterdam BV Vs Lebanese Organisation for International Commerce (Lorico) (1997) EWCA Civ 1958.*

b) The party wishing to terminate has waived its right to rely on the breach or is estopped from doing so. This is usually when a party knows of a breach but does not act on it.

144. Termination is a risky business. The advice to clients is always take great care with both form and substance.

2.3.8THE LEGAL CONSEQUENCES OF WRONGFUL TERMINATION OF CONTRACT

Civil law perspective

(i) Whether termination must be a matter of court

Virginie Colaiuta – LMS Legal LLP, Londong, England

145. Before the recent reform of the French Civil Code, termination was a matter for the court. Unless there was a termination clause in the contract,

a non-defaulting party who wished to terminate the contract had to apply to the court for an order to have the court discharged.

146. A party could not treat the breach as terminating the contract without the decision of the court. A rare exception to this general rule was defined in a case where the breach was so serious that continuation of the contract was impossible or extremely difficult.

147. The new Article 1224 of the French Civil Code offers three options for contact termination as follows-

- **Unilaterally on the basis of a right defined in termination clause contained in the contract**
-

148. Unless the parties have agreed otherwise, the party seeking to terminate the contract on the basis of an agreed termination clause will need to send notice to the party in breach before exercising its right to terminate and the notice must explicitly refer to the termination clause in the contract. Agreed termination clauses must be implemented in good faith.

- **Where the breach is sufficiently serious, through court decision or with unilateral notice from the creditor**

149. A creditor may at his own risk terminate the contract by notice. Unless there is urgency, he must previously have put the debtor in default on notice to perform his undertaking within reasonable time.

150. The notice to perform must state expressly that is the debtor fails to fulfil his obligation, the creditor will have a right to terminate the contract. Where no performance persists, the creditor notifies the debtor of the termination of contract and the reasons on which it is based. The debtor may at time bring proceedings to challenge such termination. The creditor must then establish the seriousness of the non-performance.

151. The defaulting party may challenge the termination notice and commence legal proceedings against the terminating party. The court though can deny the remedy to the terminating party and compel performance so that the contract remains in force. A court may according to the circumstances recognize or declare termination of the contract or order its performance with the possibility of allowing the debtor further time to so or award damages only.

152. If termination was without good cause or done abruptly, the terminated party may argue that termination violated the principle of good faith. If termination does not occur within any of the cited options and there are no exceptions that apply, the termination would in itself amount to breach of contract. The wrongfully terminated party would have thus the remedies available to a non-defaulting party.

153. The remedies available to a non-defaulting party are as follows-

a) Refuse to perform or suspend performance;
b) Seek enforced performance in kind of the understanding
c) Request for reduction in price;
d) Provoke the termination of the contract; and
e) Claim reparation of the consequences of non-performance.

154. As per Article 1223 of the Civil Code, having given notice to perform, a creditor may accept and imperfect contractual performance and reduce the price proportionately. If he has not yet paid, the creditor must give notice of his decision to reduce the price as quickly as possible.

155. In line with Article 1221, a creditor of an obligation may having given notice to perform seek performance in kind unless the performance is impossible or if there is manifest disproportion between its cost to the debtor and its interest for the creditor. Even through no guidance in the new article is given as to the meaning manifest disproportion between its cost to the debtor and to the interest of the creditor.

156. Even though no guidance in the new article is given as to the meaning of manifest disproportion, French Courts are likely to narrowly construe this condition and order specific performance except for in extreme cases. Furthermore, as per article 1222, having given a notice to perform, a creditor may also himself within reasonable time and at reasonable cost have an obligation performed or with the prior authorization of the court may have something which has been done in breach of an obligation destroyed. He may claim reimbursement of sums of money employed for this purpose from the debtor. He may also bring proceedings in order to require the debtor to advance a sum necessary for this performance or destruction.

157. The party for the benefit of whom the contract is terminated can also seek damages. As per Article 1229, termination brings to a close a contract. Termination takes effect according to the situation, on the conditions

provided by any termination clause, at date of receipt by the debtor a notice given by the creditor or on the date set by the court, or its absence, the day on which proceedings were brought.

158. Where the acts of performance exchanged were useful only on the full performance of the contract, which has been terminated, the parties must restore the whole of what they have obtained from each other. Where the acts of performance which were exchanged were useful to both parties from time to time during the reciprocal performance of the contract, there is no place for restitution in respect of the period before the last acts of performance which was not reflected in something received in return.

(ii) Whether a contractor can block a wrongful termination

159. There are two ways in which a contractor can block wrongful termination i.e. through injunction and specific performance which are effectively counterparts of each other. An injunction is to prevent an anticipated wrong while an application for specific performance is to require execution of contractual obligations. These remedies are at the discretion or the court which takes account of the whole facts and circumstances.

160. There are significant hurdles for a party seeking to obtain these remedies. The court will consider whether there is adequate remedy available in damages and if so, will be reluctant to grant the order. In the context of wrongful termination, it is difficult to mount an argument that damages will not suffice.

161. The reason for the court's reluctance stems partly from the fact that criminal sanctions flow from breach of injunctions or orders for specific performance and that it is always difficult to identify whether there is compliance or not. An order preventing a termination of contract is effectively an order requiring the employer to continue with performance of the contract. Construction contracts consist of a wide variety of rights and obligations on each party and the courts will not police compliance with such wide-ranging provisions. Unless it is possible to frame the request for an order in sufficiently clear and precise terms, these are not likely to be successful.

162. One commentator describes them in these words *"orders other than damages..... are drastic, unpredictable and wide ranging in their effects.... difficult to supervise and enforceable by imprisonment"* which summarizes well the challenges posed.

(iii) Claims available to the contractor subject to wrongful termination

163. The principle applied to claims for wrongful termination is that the contractor is to be put in same position as if the contract had been performed. That is subject to usual factors applied to quantifying losses including showing the casual link between the wrongful termination and the loss, the obligation to mitigate and damages being irrecoverable if too remote.

164. The question arising is "what would have been the monetary value if a contract had been performed?''. Typical losses which fall into this category would include the value of work done to termination, loss of profit for remaining work and loss of contribution to head office overheads.

165. There can be difficulties in proving loses. For example, the contractor will require to shoe that the contract would have been profitable and how much profit would have been earned on the balance of the work. If the pricing is weighted to front load profitable activities, there may be little profit on later activities. Similarly, if the contractor has been working uneconomically, the profit will be impacted. Other factors would include any overpayment to the contractor.

166. Other factors can also be relevant. In the Mihalis Angelos charters of a ship terminated the contract on grounds of force majeure. That was considered invalid and the ship owners accepted it as a repudiation of the contract by the charterer. However, the owners were unable to comply with a 'ready to load' provision. The court held that the owners were only entitled to be put in the position of having their ship on a charter which as soon as it arrived, could legally and would actually have been cancelled. They were therefore only entitled to nominal damages for what was in effect a worthless charter party.

167. The rationale was followed in Engineering Construction Pte Ltd V Att Gen of Singapore (No. 3) where the contractor was only entitled to nominal damages where there was wrongful termination by the employer due to contractual notice being served too early but where termination could have been affected validly.

168. In contrast, a surprisingly wide categorization of losses arising was allowed in Imperial Chemical Industries Ltd V Merit Merrell Technology

Ltd. The Plaintiff had pursued a strategy of withholding payments from the Defendant and seeking to terminate. In addition to loss of profit on the remaining work under the contract, the court awarded damages in respect of reduced final account accepted by the Defendant on another project due to its weak financial position which has arisen as a result of the Plaintiff's actions. It also awarded costs of wasted management time, professional advice in respect of insolvency matters, additional banking costs and VAT loan necessary for cash flow reasons. These heads of loss go further than would traditionally be thought to apply in a wrongful termination scenario.

2.3.9 UNDERFUNDING OF LAW ENFORCEMENT AGENCIES

169. Underfunded law enforcement agencies need the help of lawyers to succeed in the battle to recover lost art. Law enforcement agencies are said to be doing phenomenal work across the globe but are increasingly under resourced. This increases the importance of lawyers and law enforcement to closely collaborate to meet the high demand.

170. The Bust of the Goddess Diana incident illustrates this need. After being lost during World War II, the piece was returned to the Lazienki Palace in Poland in 2015, having been found in a Vienna auction house. Christopher Marinello, Chief Executive Officer and founder of Art International said this was a perfect example of how lawyers and law enforcement can work together so that a positive conclusion can be reached.

171. In 2004, the FBI established a rapid deployment art team to respond to the high number of cases of stolen art. This team works across the globe and had recently worked in Baghdad and Syria following the museum looting on Native American burial sites. The team has individuals on the ground and works closely with local authorities.

172. There was consensus from the speakers that the US is the most favourable jurisdiction to recover works, due to its adeptness and desire to help. The Isabella Stewart Gardner Museum Heist, 28 years ago, involved the theft of art valued $500 million, including works from Rembrandt and Vermeer. FBI believes it knows who was responsible but cannot file charges given that the limitation period of twenty-five years had elapsed.

173. Clients were however mostly concerned with resolving rather than litigating cases so that the pieces are returned back to them. Other jurisdictions had more challenging aspects. The Italian state, for instance

claimed ownership of a bronze statue named Victorious Youth because it was found on a ship with an Italian flag. Panelist Mark Stephens CBE, lawyer at Howard Kennedy however said he always thought it was a long stretch, but because the Italian courts had accepted this, it should be taken seriously. To navigate these complexities, clients needed the full assistance of government and lawyers together to recover works. Without this, cases go unsolved and beloved works remain lost.

2.3.10 THE DIGITAL TAX CONUNDRUM

174. Countries around the world were struggling with how to tax digital businesses, especially those that are profiting from user data. While some countries were holding out on digital taxation, others had already put in place measures as they become impatient in waiting to see a global agreement. For instance, India, one of the first countries to act on digital taxation, had put in place a six percent tax on online advertisement for companies with a significant digital presence.

175. Session chair Peter Canellos, from Wachtell Lipton, Rosen & Katz, set out some of the issues of digital economy taxation. He explained that the economics of the digital economy are driven by customer data and the customer itself and was a great a source of profit for the platform company.

176. Eight of the ten (10) largest tech companies were US multinationals and when almost all the companies making the most profits are concentrated in one country and the rest of world supplies users, it's not surprising that countries are considering unilateral measures on digital taxes to ensure that these companies are paying enough tax.

177. Countries feel that their users were contributing to the profitability of digital businesses, but they were not getting the benefit of the portion of profitability derived from the activities of their own citizens. The EU was struggling with it and so were other countries. The wide range of issues that need to be considered were challenging and without a long-term game plan, tax regulations were still targeting yesterday's business ideas, not tomorrow's. Nineteenth century tax principles were being applied to 21st century business models.

178. One of the issues that lacked consensus was how to identify digital business. Take the case of customer loyalty cards. Although customers may not realize it, they were giving out valuable data when they signed up for loyalty programmes. How should jurisdictions decide where the value creation occur? Should countries put in minor adjustments or is a major overhaul required? "It's difficult, if not impossible to ring-fence the digital economy. Added to this challenge was having 116 countries and jurisdictions working towards a consensus.

179. Views of countries on digital taxation were generally divided between those that were taking stock of the situation, others that were making targeted changes and focusing on certain businesses and those making broad brush applications to apply rules. The difficulty was to design tax systems that go beyond the next five to 10 years and are robust enough to adapt to change, especially as advancements in block chain and distributed ledger technology continue to change business models. Going forward, examining the business models of companies and their value creation would continue to pose a challenge globally.

2.3.11 LEGAL AID ACROSS THE GLOBE: BEST PRACTICE AND ECONOMIES

180. This session marked the launch by the IBA of the first international principles in support of the funding and administration of civil legal aid. The launch of these principles could not come at a more opportune time, as legal aid continues to be under threat in both developing and advanced economies.

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

182. The principles are not intended to be prescriptive but rather to be a starting point said session co-chair Lucy Scott-Moncrieff, former president of The Law Society and founder of Scott-Moncrieff Associates. For some jurisdictions, some of these might not necessarily be appropriate, but these could simply be something that a jurisdiction aims for. The guidelines came about after a conversation session co-chair Peter Köves, founding partner of Lakatos, Köves and Partners, had with Scott Moncrieff when

he asked if there was any guidance that had been done on civil administrative and family law.

183. With the increasing trend of governments deciding to cut funding for legal aid services in the belief that the costs outweigh the benefits, the need for a substantial framework that can provide guidance to governments and legal aid administrators becomes even more crucial. In total, over twenty-five (25) jurisdictions participated to give a wide and varied view on what they believe to be best practice or necessary improvements to a given jurisdiction. Some principles were contentious. For example, Principle 12 of the guidance provides that the body administering legal aid must be operationally independent of government, subject to its accountability obligations. Many jurisdictions do not have this type of arrangement in place, and instead favour a system where the government has control.

184. For some, the fear is that conflict of interest issues will arise when lawyers administer legal aid themselves and not government officials but in doing so, they may be in a better position to satisfy the needs of clients. Yet, again, the principles are not concrete rules which should be followed to the letter of the law.

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

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

187. People may not be eligible for pro bono services, but there might not be enough lawyers as well. The main issue here is whether governments would support legal aid. Hopes are that the guidance will be used by policymakers and politicians in decision-making and that can only happen if IBA members get it on their radar. In doing so, legal aid might become an issue that is put back on the political agenda and one that could be seen to be of more value if lawyers' voices are heard loudly.

188. Another issue is that the primary responsibility of providing legal aid lies with the government. Pro bono services should not be used as an excuse not to fund legal aid.

2.3.12 JOURNALISTS VS JURISTS – MEDIA COVERAGE OF COURT PROCEEDINGS

189. The journalism industry had profoundly changed and this was leading to more incendiary attacks, including on the judiciary, according to speakers. In the past two years, journalists and jurists had been branded as enemies of the people across both sides of the Atlantic.

190. President Donald Trump's repeated tirades on the press caused New York Times publisher A.G. Sulzberger to plead with him to stop some of the more incendiary language in a private meeting in July, before relations predictably turned ugly on Twitter. Following the decision by the UK High Court in November 2016 that Parliament must be consulted before the government could trigger article 50, an edition of the Daily Mail featured the faces of the three judges with the headline 'enemies of the people'. The Honourable Justice Peter Applegarth, from the Supreme Court of Queensland, in Australia, told delegates that the Daily Mail headline could have triggered a contempt of court case 30years ago and of equal frustration was that the judges received no support from politicians said to be serving to defend them.

191. The Lego Company in Denmark by withdrawing advertising from the Daily Mail did more to defend the judiciary. From the right-wing press in the UK, the Brexit referendum had done more than simply secure Britain's exit from the European Union. The legacy of the vote had been a more divisive and aggressive form of discourse leading lawyers to be branded elitist, out of touch and undemocratic. Much of this has coincided with Brexit, but also with a new era of journalism, one centered on 24/7 news coverage without as much in-depth analysis and consideration as before.

192. With social media, anyone has the ability to become a de facto journalist very quickly, with access to millions of people's attentions. There is now a journalism free zone forming; instead there are media proprietors, interns and commentators filling the gap. As a result, staples of the industry like court reporters, are dying out and bloggers are thriving. This might not be entirely negative but does mean that the fundamentals of journalism are changing.

193. Adam Cannon, senior legal counsel at The Sun, a newspaper that receives condemnation more than most agreed that journalism had fundamentally changed. If someone is looking for a view on vaccinations, he doesn't seek doctor's advice. He goes on Twitter and gets a solution. On occasions, public interest is used as a defence to report some of the more contentious stories. Reporting on a story could give many other victims the encouragement to report their story to the police and increase the chances of justice being done.

194. Much of the rhetoric across both sides of the Atlantic has recently been defined by partisanship rather than a true desire for justice. And there is little sign of that stopping soon. If politicians are not going to temper their language on an industry increasingly under attack from the public, journalists need to step up.

2.3.13 RELATIONSHIP BETWEEN BAR ASSOCIATIONS AND LAW FIRMS

Bob Carlson of the American Bar Association, Andrew Darwin of DLA Piper and Stephen Denyer from The Law Society of England and Wales were the facilitators

195. Over recent years there has been a step change in the pressures building around the relationship between bar associations and law firms. On the one hand, large law firms underestimate the importance of the work of bar associations in guarding the core values of the profession. On the other, bar associations need to adjust to the fact that the legal profession is also organized today in very big companies.

196. Bar associations developed their modus operandi dealing with the profession within the organizational framework of sole practitioners and small practices but the legal world now looks very different. Several current issues bring the bar association-law firm relationship into focus. Brexit is one example and law societies across the UK and Europe have had to sit down and discuss its repercussions on multi-jurisdictional law firms and issues such as the free establishment of firms and free movement of lawyers. These are political issues that directly impact law firms. Artificial intelligence (AI) is another.

197. Large law firms are often the ones with the resources to develop AI tools and implement them in their work, but this throws up a new and important world of ethical issues and questions of confidentiality, both of which are

the domain of bar associations. When it comes to the regulation of judicial services there is no one else but the bar association.

198. Both sides need to understand each other better. Bar associations are the guardians of the profession's values. Without the high standards that bar associations set in relation to principles such as professional confidentiality and conflict of interest, there would be no difference between lawyers and any other type of consultant.

199. The legal profession plays a role in society because every lawyer must also uphold rule of law principles, whether he or she is advising in the business community or in criminal law. The purpose of the core values unites the legal fraternity. There is increasing pressure on these values that the bar associations defend to the benefit of law firms. For example, there have been calls from institutions that confidentiality should not apply to tax evasion cases. Similar questions are repeatedly raised in relation to a whole spectrum of topics, including money laundering, terrorism financing or child abuse.

200. Bar associations are there to play the more political role of upholding the principle of professional confidentiality in these debates. Citizens have to be able to seek independent advice without interference from the authorities and bar associations must fight these battles with far more authority than global law firms, though it is also a benefit to global law firms. In this context law firms should understand the role bar associations have in training and the standards that they demand of lawyers.

201. Lawyers play a very important role in advising and correcting clients. The profession has been greatly damaged by revelations such as those in the Panama Papers, which undermined public interest and damaged trust. Bar associations have a central role in navigating these issues; training, confidentiality, client privilege and ethics. Law firms can't say they can't be criticized when clear rules have been set by the bar association. There is lack of understanding that needs to be bridged. In global law firms, commercial values, approaches to branding and the values and culture developed within a global firm over decades (and replicated in each of its global offices uniformly can turn the demands, values and standards of individual bar associations into irritating background noise.

202. Associations across the world uphold a range of standards that can seem intrusive to large firms, such as what can and cannot be displayed on a website, how firms can and cannot market legal services, right down to

(in some cases) what the name of a law firm should be. Some of these issues have led to spats and uncertainties, particularly when it comes to firms operating across foreign markets.

203. There are plenty of examples of grey areas, with foreign firms forming all manner of exclusive and non-exclusive associations with local entities to practice local law. Domestic law firms and sole practitioners have felt threatened. Bar associations have also positively mediated and resolved these issues to channel the positives (spreading knowledge, best practice, fostering competition, developing the sector) while guarding standards.
204. On a larger scale, bar associations and law societies should maybe also think about gender issues in the profession and workplace diversity, rather than leaving it up to the social responsibility of the law firms themselves. Bar associations should strive not to be too inwards looking. The key takeaway will be that the two sides are more dependent on each other than they may realize and upcoming developments will only serve to make this clearer.

2.3.14 LINES OF DEFENCE – CYBER STRATEGY

The Panelists were Luke Dembosky, partner at Debevoise& Plimpton Marianna Vintiadis, managing director at Kroll in Italy and *member of the IBA's first Presidential Task Force on Cybersecurity.*

205. Hackers determined long ago that vendors of data, and now third parties, are not only a vector into their primary targets, but also hold a lot of valuable information about companies and their clients generally. No one holds more sensitive or highly confidential information than law firms. They know the timings of any transaction they are working on, of litigation and bargaining positions as well as all manner of sensitive intellectual property. But they have historically been weak at protecting this information, which has put them in hackers' line of sight.

206. The session marked the launch of new IBA guidelines on the topic, which focused on the risks of data breach and what law firms can do to minimise these risks. The facilitators presented the work they are doing to help lawyers understand how to manage and prioritise the mix of legal, technical and business issues involved in digital security.

207. Digital security needs to be embedded across all work and decision-making processes. It had been established a long time ago that cybersecurity was a cross-disciplinary threat and that management level involvement was needed to address it and make risk decisions. That was

also very much true of law firms, which cannot rely on Information Technology (IT) to make these decisions on their own. This is about raising the profile of these issues, but also convincing leaders in the legal industry that they must engage with these issues personally for the benefit of themselves, their firms and their clients.

208. The session also looked at case studies that have actually happened, looking at how they worked out, what their impact was and the types of reactions they garnered. Law firms are not just likely to be targets of large attacks across the board, they are likely to be specific targets. This is because they have incredibly sensitive and valuable information with significant resale value. If you take away a law firm's information, you take away the crown jewels, as you can imagine the firm would lose all their clients as well.

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

210. Firms can easily be caught up in something that is not directly related to them. The first thing that needs to be addressed is not necessarily the direct impact, but what the effects are on a global scale and the techniques that hackers are using to become increasingly sophisticated and well organised. Another thing to take into account is that more attacks, rather than fewer, nowadays are being observed and at least in the short-term, there is not enough being done on security. For the moment we are in the phase where a lot of our infrastructure is not sufficiently secure when it is 'born,' something needs to be done about this.

211. On the technical side it's about securing systems and the perimeters. Attacks have different avenues as they can either take the shape of a sophisticated virus or an 'open door' into a system such as not doing a security update or not patching a computer, or simple human error, which overwhelmingly tends to be the cause. Knowing what kind of things could have an impact is crucial in a defensive strategy. Most law firms tend to be fairly small, not a company the size of IBM that is able to invest a lot of money into infrastructure, but they also don't tend to know anything about techno technology. Many firms are very un-savvy technologically, so they are easy targets with extremely valuable information. Because of that, attacks on law firms are on the increase.

2.3.15 THE HIROSHIMA AND NAGASAKI NUCLEAR BOMBING AND THE ROLE OF LAWYERS IN PREVENTING OCCURRENCE

Session facilitator was Mr. Michael Kirby, former Justice of the High Court of Australia

212. The nuclear bombs that devastated Hiroshoma and Nagasaki were dropped in August 1945 and resulted in an estimated 340,000 deaths by 1950. Lawyers are not powerless to prevent a repeat occurrence. The debate aims to address anxiety about the effectiveness of international law governing nuclear weapons, and counter complacency, hesitation and a sense of powerlessness.

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

214. There are currently five declared nuclear states (US, UK, France, China and Russia) and a further four unofficial ones (India, Pakistan, Israel and North Korea). They harbour an estimated 15,000 nuclear weapons, enough to flatten the earth several times over. Belgium, Germany, Italy and the Netherlands host US nuclear weapons as part of their umbrella arrangements. They all boycotted negotiations to draft the nuclear weapons ban. Netherlands alone voted, but against the Treaty. Most disturbingly, while most nations pay lip service to nuclear disarmament, key actors in the debate, namely the US and Russia, have been moving in the opposite direction.

215. President Barack Obama in 2016 agreed a $1 trillion 30-year nuclear weapons modernization programme, which President Donald Trump has increased. President Putin has also been growing Russia's arsenal. The landmark legal case on nuclear weapons is the 1996 Advisory Opinion issued by the International Court of Justice (ICJ), which bound all nuclear armed states to enter into bona fide negotiations with a view to reducing the stock piles of nuclear weapons. But nuclear states have failed to oblige.

216. The nuclear armed states, particularly the US, have simply ignored the statements and has attempted to influence, cajole or pressure the countries in its circle not to press this matter. Those stockpiles are grossly excessive to any possible military or strategic purpose.

217. The panel revisited the International Court of Justice (ICJ) 1996 Advisory Opinion in which 14 judges responded to a request from the UN General Assembly to address the question: "Is the threat or use of nuclear weapons in any circumstances permitted under international law?" Forty-two states took part in the written pleadings and 22 in the oral hearings including all nuclear states barring China.

218. Khawar Qureshi QC, who has just published a book analysing ICJ advisory opinions, says that "whilst these are non-binding, they are intended to possess a declaratory effect as to the position under public international law". The ICJ unanimously issued a plea for states to 'negotiate in good faith towards nuclear disarmament to achieve a precise result-nuclear disarmament in all its aspects'.

219. On the legality of nuclear weapons, it concluded that there was no specific prohibition on the threat or use of nuclear weapons. It was evenly split (7-7) in concluding that the threat or use of nuclear weapons would contravene international law, particularly international humanitarian law (IHL). But the ICJ did not rule out the possibility that use could be lawful in an extreme circumstance of self-defence. This 7-7 split is misleading, however, because two of the seven dissenting judges voted against because they felt that it did not go far enough and that the ICJ should have unambiguously concluded that the use of nuclear weapons would be unlawful in all circumstances.

2.3.16 TIPS AND ADVICE ON WHAT TO LOOK FOR WHEN CHOOSING OUTSIDE COUNSEL

Mr. Stephen Solursh wasvice president and associate general counsel at OP Trust Pension Plan, American Express vice president and senior M&A counsel Valentina Cassata were the facilitators.

220. The increase in cross-border work means that in-house counsel need to rely more on outside help to fill gaps and gain local expertise. Choosing between a local and an international firm is a question that in-house lawyers often struggle with. Some factors that need to be considered are whether legal advice is needed in multiple countries and if the firm has experience working with international clients.

221. While some businesses may prefer international firms because of their reputation, it's important to keep in mind that not all local offices may be equally strong. In-house counsel have to do their homework on the makeup and expertise of a local legal services provider. Working in certain industries and countries sometimes requires in-house lawyers to work with local counsel, and choosing international firms may not work. Libya was cited as a country where there are no international law firms and businesses going in have to choose from local firms.

222. In Asia, there is heavy reliance on local firms for a number of jurisdictions. In Korea, local firms are the only choice and in China, international firms can't litigate in court. What businesses could consider is working with both an international and a local firm. The first may be better in areas such as strategy while the second may have better connections with regulators.

223. Local v international firms pretend to be international to attract clients, in-house counsel need to keep in mind that being international is actually not the key. What is more important is the capability to culturally understand what the business is seeking to receive and provide guidance on the sensitivity of the transaction locally. Tapping into people networks is key when it comes to assessing outside counsel.

224. According to Stephen Solursh, vice president and associate general counsel at OP Trust Pension Plan, going to trusted counsel in your own country to see which firms they have worked with in the local country, speaking with in-house friends with similar industry rules and going to conferences like the IBA can provide more opportunities for in-house counsel to meet outside lawyers skilled in areas where future investment needs can be anticipated.

225. What about directories? While legal directories can be a good resource, they should not be the only one. "Directories can be used as a screening tool to see who the top firms are in particular markets, but should be used along with other options particularly when selecting individual lawyers," said Solursh. American Express vice president and senior M&A counsel Valentina Cassata added: "Legal directories are more of a confirmation check and help narrow down the choices but in-house counsel should not be shy to ask for materials. They should look for detailed biographies of not just the lead partner but the team working on a transaction to see how strong their specialty areas are." If a mandate is big and important enough, meeting directly with the firm is best as this can enable in-house counsel to understand the office culture and get to know and trust the firm. "Reach

out to the team directly," said Cassata. "Work out details such as billing arrangements and communication from the outset when you have the bargaining power."

2.3.17 MULTILATERAL JUSTICE: REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT

The Panelist was Ms. Melinda Taylor, the ICC counsel who was arrested in Libya sometimes back and accused for spying.

226. Twenty years on from the establishment of the International Criminal Court (ICC), work still needs to be done to make the instrument of international justice the fully functional intergovernmental ombudsman it was intended to be. The 2018 IBA host city was also the local for the diplomatic conference where the Court of last resort was originated in 1998 under the Rome Statute.

227. Although the court has made a number of key convictions, exclusively in sub-Saharan Africa and is engaged in several investigations in states including Georgia, the Ukraine, Iraq and the UK, it has numerous well documented flaws that must be addressed. In particular, the session looked at the ICC's lack of an independent organ for the defence within its structure and its lack of political support at the state level. One of the biggest gaps in the ICC is that the defence is not an organ of the court.

228. Equality of arms isn't just in the courtroom, it is about everything that happens outside the court rooms that allows the parties to present their case. Melinder Taylor joined the Office of Public Counsel for the Defence (OPCD) in 2006after the first defendant had arrived at the ICC and was only recruited because a judge issued an order requiring it.

229. The prosecutions operation was the priority and while there was a functioning office of public counsel for victims, the defence was an afterthought. This impacted how functions operated within the court because a lot of the policies, systems and disclosures had already been developed. It was set up in a way that fundamentally did not facilitate the work of the defence and unfortunately that has had a knock-on effect. However, each subsequent court and tribunal has had a more powerful defence office.

230. The defence of the special tribunal for Lebanon is almost on par with the prosecutors because they realise they need a strong and independent defence to prevent injustice. The range of factors impacts against the fairness of the proceedings, and if you have a prosecutor who can go out and secure an operation but you don't have the equivalent for the defence, that means you have lop sided trials, and lopsided trials risk a miscarriage of justice.
231. The way a court treats its defendants and the fairness it affords them, are essential to its legitimacy, because it is only if one has a fair, effective and vigorous trial that at the end of it one can say 'well, justice was done.

232. The lack of cooperation from states on the global stage is another fundamental flaw of the Court. The Rome Statute initially laid out the division of responsibilities between the ICC and the states parties, but how that works in practice differs in a variety of ways. What doesn't work well from a strategic perspective is the political and diplomatic support that is not out there for the Court.

233. Twenty years on from the Rome Statute, where is the public and diplomatic support that it so needs? Without that, how can one get any support or willingness to actually engage and cooperate with the court? Without it, this court is not going to succeed, simply put this court is going to fail.

3.0 **END OF THE CONFERENCE**

234. The Conference ended on 12th October, 2018 with the rule of law symposium. The symposium moved the debate from legal concepts and the role of state actors to the specific roles that both business including the legal profession have to play in respecting, supporting and advancing the rule of law. General Counsels, corporate lawyers and the overall legal profession were called to understand the impact of business for the rule of law initiatives and lead them.

235. Stable jurisdictions with strong rule of law attract and provide confidence for business entities to make long term investment decisions. The rule of law is also a matter of business. While public support for the rule of law by business is a relatively new concept, it was fast gaining traction and may have an enormous positive and multiplier effect.

236. A growing number of businesses around the globe were seizing the opportunity to take action and support the rule of law. The symposium heard from a panel of eminent in-house counsels, as business leaders on the specific initiatives their companies were pursuing. The symposium also heard how companies were supporting and advancing the rule of law through core business, internal business, human right policies, strategic social investment, public policy engagement and collective action.
237. Given the law regulates complex relationships, lawyers are essential to the rule of law irrespective of the character of the legal system. The legal profession has a role to play in the framing of laws and even more important role in the maintaining and advancing the rule of law. The symposium heard from leaders of the legal profession as to how they were pursuing this role. The symposium identified and discussed significant violations of the rule of law around the world, based on the inaugural 2017 report of the rule of law.

4.0 THE 2019 CONFERENCE

238. The 2019 Annual Conference would be held in Seoul, South Korea. The country is the 4th largest economy in Asia and the 12th largest in the world and is one of the fastest growing developed economies.

5.0 DELEGATION'S OBSERVATIONS

239. Having attended the conference, the delegation made the following observations-

(i) The IBA annual conference is the world biggest conference attended by legal practitioners from the globe. The conference was well attended by about ten thousand (10,000) legal practitioners from all over the word. England and Nigeria were the best represented countries at the conference with about one thousand (1000) per country legal practitioners attending;

(ii) The conference provided participants an opportunity to the world's best networking and business development event for lawyers and law firms. There were about 2700 law firms, corporations, governments and regulators from 130 jurisdictions attending.

(iii) Owing to the high number of participants attending the conference, one meeting involving all the participants would have been cumbersome. Instead, the conference was programmed into several sessions on different topics taking place in different meeting rooms at

the Roma Convention Centre La Nuvola. It was therefore upon individuals to decide which sessions and topics to attend.

(iv) The conference enabled participants gain up-to-date knowledge of the key developments in their areas of law. Presentations were made by the best selected presenters from all over the world;

(v) The conference enabled participants build international networks and connections with leading practitioners worldwide. For those in private practice, this would enable them get business in their areas of jurisdiction through referrals as a result of the networks and connections;

(vi) For those in private practice, the conference was a perfect opportunity for marketing their law firms' profiles in the international legal world;

(vii) The conference enabled participants acquire greater knowledge of the role of law in society through the rule of law and human rights. It was also an opportunity for participants to be part of the debate on the future of the law;

(viii) Law enforcement agencies worldwide were underfunded and this adversely affected their service delivery in the administration of justice

(ix) Taxation in digital business was still a challenge in many countries except India which had made tremendous progress.

(x) Whereas some countries worldwide were embracing cryptocurrencies in financial transactions, many were skeptical about them Kenya being one of them.

(xi) With millions of people worldwide accessing social media, anyone has the ability to become a de facto journalist very quickly, with access to millions of people's attentions.

(xii) There is an increasing trend worldwide of governments cutting funding for legal aid services in the belief that the costs outweigh the benefits which is not right.

(xiii) The conference was for five days and its registration and participation fees ranged from 2900 Euros to 4500 Euros depending on

participants' categorisation. This was on the higher side compared to fees charged by other conferences for a five (5) day conference. In addition, there were social events besides the conference which were charged separately.

10. RECOMMENDATIONS

240. The Committee recommends as follows-

(i) The National Treasury should through a consultative process make decision on whether or not to use cryptocurrencies in business transactions in Kenya.

(ii) Parties to contracts should ensure they hire Attorneys with good profiles in contractual matters to ensure their interests are well taken care of in the contractual agreements;

(iii) Termination of contracts has legal consequences some of which are pecuniary and parties to a contract are therefore advised to ensure contractual disputes are amicably resolved to avoid adverse consequences;

(iv) The House should during the budget making process ensure that law enforcement agencies are well resourced to enable them discharge their functions well;

(v) Law firms must ensure that they have a good working relationship with their Bar Associations, the Judiciary and law enforcement agencies to ensure seamless processes in the administration of justice.

(vi) There is need for legal framework that can provide guidance to the government to finance legal aid programmes in order to ensure the needy are represented in Court.

(vii) Social media users should be responsible in their platform engagement with others so as not share images or information that is offensives and unlawful.

Signed.....**Date**27/11/2018

Hon. Alice Muthoni Wahome, M.P.

Vice Chairperson and Leader of delegation

MINUTES OF THE ONE HUNDRED AND SIXTEENTH SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON THURSDAY, 21ST MARCH, 2019 AT 10.30 A.M. IN SHIMBA HALL, PRIDE-INN PARADISE HOTEL, MOMBASA

PRESENT-

1. Hon. William Cheptumo, M.P. - **Chairperson**
2. Hon. John Olago Aluoch, M.P.
3. Hon. William K. Mwamkale, M.P.
4. Hon. Peter Kaluma, M.P.
5. Hon. Charles Gimose, M.P.
6. Hon. George G. Murugara, M.P.
7. Hon. Adan Haji Yussuf, M.P.
8. Hon. Anthony G. Kiai, M.P.
9. Hon. John Kiarie Waweru, M.P.
10. Hon. Jennifer Shamalla, M.P.

ABSENT WITH APOLOGIES

1. Hon. Alice Muthoni Wahome, M.P. - **Vice Chairperson**
2. Hon. Ben Momanyi, M.P.
3. Hon. Roselinda Soipan Tuya, M.P
4. Hon. Johana Ng'eno, M.P.
5. Hon. Zuleikha Hassan, M.P.
6. Hon. Gladys Boss Shollei, CBS, M.P.
7. Hon. Japheth Mutai, M.P.
8. Hon. Beatrice Adagala, M.P.
9. Hon. John M. Wambugu, M.P.

IN ATTENDANCE-

COMMITTEE SECRETARIAT-

1. Mr. George Gazemba - Principal Clerk Assistant II
2. Mr. Denis Abisai - Principal Legal Counsel I
3. Ms. Halima Hussein - Third Clerk Assistant
4. Ms. Roselyn Ndegi - Serjeant-at-Arms
5. Ms. Brigitta Mati - Legal Counsel
6. Mr. Hakeem Kimiti - Audio Officer

7. Mr. Simon Maina - Support Staff

MIN No. 455/2019:- **PRELIMINARIES**

The meeting commenced at 10.40 a.m. with a word of prayer by Hon John Olago, Aluoch.

MIN No. 456/2019:- **CONSIDERATION AND ADOPTION OF REPORTS ON INTERNATIONAL TOURS**

The Committee considered and unanimously adopted the following reports for tabling in the House for noting by the Chairperson-

(i) Report on the Specialized Training Data Analysis and Management in Election Administration and United States of America Mid Term Elections observation mission in Maryland, United States of America from 5th to 9th November, 2018;

(ii) Report on Attendance to the 41st International Association of Commercial Administrators (IACA) Annual Conference held in Charlotte, North Carolina, United States of America from 6th to 10th May, 2018;

(iii) Reports on Electoral Conflict Resolution Training by the International Centre for Parliamentary Studies (ICPS) held in London, United Kingdom from 21st to 25th January, 2019; and

(iv) Report on Attendance to the International Bar Association (IBA) Annual Conference held from 7th to 12th October, 2018 in Rome, Italy.

MIN No. 457/2019:- **ADJOURNMENT**

There being no other business to transact, the meeting was adjourned at midday until 2.30 p.m. of the same day.

Signed.....

Chairperson

Date.....26/03/2019.....