



# Globalising your practice in Central America

Opportunities and challenges



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## **Globalising your practice – opportunities and challenges**

**9 April 2019, San José, Costa Rica**

### Introduction

The Bar Issues Commission of the International Bar Association (IBA) awarded funding for a conference on helping lawyers from Central America to face the consequences of globalisation. It was organised on 9 April 2019 in San José, Costa Rica, in cooperation with the Costa Rica Bar (Colegio de Abogados y Abogadas de Costa Rica).

The conference – entitled ‘Globalising your practice: opportunities and challenges’ - followed on the success of its predecessors: ‘Helping Zimbabwe’s lawyers face globalisation’, which took place on 2 and 3 November 2016 in Nyanga, Zimbabwe; and ‘Globalising your practice: opportunities and challenges’, which took place in Nairobi, Kenya on 18 and 19 May 2017, on 3 and 4 April 2018 in Livingstone, Zambia and on 1 November 2018 in Siem Reap, Cambodia.

There were some IBA speakers that had spoken on previous occasions, and some new ones. Their presentations were adapted to local needs. The topics covered included:

- instruments on international trade in legal services and their applicability in Latin America
- creation of joint ventures: different forms of international alliances and their benefits
- trends in law firm management
- working with international law firms and international business clients - top tips for business development
- raising capital in international markets – the role of the local legal advisor
- arbitration of international commercial disputes

The substantive content of the conference contributions is summarised in the pages that follow.

The whole conference was video-recorded, and has been posted on the Bar’s YouTube channel, which will make it possible for more lawyers to benefit from the various conference sessions.

The conference programme is attached as Annex A.

## The conference

**Julio Castellanos**, Secretary General of the Board of the Costa Rica Bar Association, gave the welcoming speech on behalf of the Costa Rican Bar. He said that globalisation of legal services has led to a new kind of lawyer, with a broader knowledge of laws and procedures. And this IBA conference aims to bring Costa Rican lawyers into this new world.

**Péter Köves**, President of the International Bar Association's Bar Issues Commission (IBA BIC), gave a welcoming speech on behalf of the IBA. He spoke about the work of the BIC, and provided the background to the conference. He said that there were a lot of misconceptions about the arrival of big law firms and the role of local lawyers. He spoke about what local lawyers can do to participate in the work which foreign lawyers need to have done in Costa Rica, and how this conference will benefit local lawyers.

**Fernando Cruz**, President of the Supreme Court of Costa Rica, gave the keynote address. He said that globalisation has been a constant in humanity. It was once called imperialism, and there is a continuing tension between national and international, between fair and unfair relations between countries. A lawyer has to play his or her own role. The decision to allow cross-border activity needs to be gradual and planned with a cross-cutting vision. Costa Rican lawyers will have to adapt themselves to a second or third language to prosper internationally, with English as a second language at least.

He said that the role of the lawyer transcends the knowledge of the law, and includes the economy, political realities etc. A growth in regionalisation and regional collaboration may help Costa Rican lawyers to gain skills. The knowledge needed is more than lawyers are taught in law schools. He also mentioned digital skills, which are necessary to master, and the role of the IBA.

He asked: does globalisation produce a fair society, and is everyone equal? 70 or 80 years ago, international affairs were just as important. But looking at President Trump, one sees that there are different visions of what an international order looks like. Looking at international relationships between lawyers, there is scope for networking in the areas of criminal and employment law. The Bar therefore should equip its lawyers to cope with this. There is also the interplay between different kinds of law – common, civil, traditional – to help towards the rule of law.

### Instruments on international trade in legal services and their applicability in Latin America

**Ben Greer**, former chair of the IBA's Bar Issues Commission's International Trade in Legal Services committee (BIC ITILS) and from the USA, began by saying that the principal trend today is uncertainty.

Populism, as evidenced by Brexit and President Trump's election, has had a real and continuing influence. Much of this represents a reaction to globalisation. But he wondered whether globalisation's tide is receding. Trade disputes have created uncertainty and while a recession isn't likely, growth will be slower. The US, China, and India are all slowing down, and Europe continues to be sluggish.

Yet, despite some current pessimism, globalisation is here to stay. At least twenty-five percent of the world's productive capacity is under the control of multinational corporations; global institutional frameworks are still functioning, and international cooperation is not in retreat, e.g. the Financial Action Task Force.

Although facilitation of trade and investment is the cornerstone of economic development, also fuelled by the technology revolution, it needs to be enabled and sustained by a robust legal framework which

promotes the rule of law. A competent, independent and well-regulated legal profession is an essential element of the rule of law.

This means that that for lawyers, excellence is no longer enough. They must have the ability to function in a cross-border context, and harness the ever-increasing use of technology. AI is coming. But so are new competitors to the current mega law firms – regional firms are building strength, so are global networks, and the Big Four accountancy firms have entered the legal services market in a big way. There are examples of these developments in the SICA area, too.

Bars have been slow to react. But professional regulation is essential to the maintenance of an independent legal profession. Nevertheless the question remains whether, in the market, there is a gap between the regulators and the regulated.

He went on to speak about the impact of trade agreements. The WTO agreements – in particular the General Agreement on Trade in Services and various regional agreements - remain in force, and cover international trade in legal services. These agreements are binding upon member governments, and new agreements are under negotiation.

The principal issues involve lawyer mobility and association. Trade agreements do not require liberalisation, only a commitment that regulation not become more restrictive. Legal services will continue to be on the table in trade negotiations.

In Central America, there are regional trade structures, such as SICA and CAFTA. So far these regional arrangements do not cover legal services, but GATS still applies. Only Panama has addressed legal services in trade negotiations.

He spoke about the role of the IBA. It has no regulatory authority. It merely advises its member bars on developments in international trade, and speaks for the legal profession through resolutions of its Council. To date, six resolutions have been passed by the IBA council and communicated to the WTO.

They can be found on the IBA's website at:

[http://www.ibanet.org/PPID/Constituent/Bar\\_Issues\\_Commission/BIC\\_ITILS\\_Committee/Default.aspx](http://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/BIC_ITILS_Committee/Default.aspx)

Of the six resolutions, four are of particular interest to the IBA's member bars, touching these topics:

- core values
- establishment
- skills transfer
- mutual recognition

In the question and answer session that followed, a participant asked for further clarification about the role, and possible break-up, of the Big Four accounting firms in relation to their impact on the legal market, and on the ability of the IBA to regulate lawyers directly.

**Julio Castellano** spoke about attitudes in Costa Rica to the participation by foreign lawyers in the local legal services market. The rules are rather strict about the ability of foreign lawyers to practise. There is no debate about whether markets should be open or closed, and the current position is accepted.

Creation of joint ventures: different forms of international alliances and their benefits

**Rolando Laclé Zúñiga**, a lawyer from Costa Rica, spoke to his slides on this topic.

In Costa Rica, there is no specific regulation for cooperation between local and international law firms. Current regulations apply only to local lawyers. They set rules and conditions for practicing law in Costa Rica. There is a general prohibition on practising a profession without being duly authorised by the proper authorities.

In order to practise law, you need to obtain a law degree from an authorised university. There are both government-owned universities and local private universities authorised by CONESUP.

Armed with a degree, you need to register with the local bar association (Colegio de Abogados). Article 6 of the Law of the Costa Rican Bar Association states that: “Before the authorities of the Republic, only those who are registered with the Bar shall be regarded as lawyers.” Article 315 of the Criminal Code of Costa Rica allows for a jail sentence for illegal exercise of a profession.

There are the following conditions for foreign lawyers: they must register with the Bar; they have must have their foreign title validated before the CONARE (confirmation that the degree complies with local requirements); and they must become a permanent resident in Costa Rica.

There is local cooperation with foreign law firms. For instance, there are alliances between law firms, but they are limited to student exchanges and marketing networks. On a regional level, there are lawyers practising in neighbouring countries.

Regarding opportunities for foreign lawyers in Costa Rica, there is limited experience due to applicable laws and the need to be registered with the Bar.

Generally all Central American countries require lawyers to be authorised as such and registered at the bar. There is no specific regulation for the operation and management of law firms. All rules apply to individuals, except for Honduras which regulates law firms as lawyers’ associations. The possibility for a foreign lawyer to practise law in another Central American country is very limited. Applicable regulations required registration and there is even a risk of criminal action. In most cases, there is no legal definition for the “exercise of law profession”, therefore, it can be open to discussion. In general, presenting oneself as a lawyer providing advice on a legal matter will be considered as acting as a lawyer.

**Jonathan Goldsmith**, a member of BIC ITILS from the UK but based now in Belgium, gave an abbreviated version of his slides, in view of the time left for the session.

He began by explaining the benefits of cooperation between Central American and foreign law firms, as follows:

#### For foreign law firms

- Local law firms provide services the foreign law firms cannot, or do not want to, provide – e.g. to support investment, debt financing, infrastructure projects, as part of regional advice (e.g. to a client wanting to do something in Asia and needing advice from various Central American countries), etc
- In order to advertise to clients that they (foreign law firms) have a pan-regional offering.

#### For Central American law firms

- foreign law firms provide access to new clients/branding
- they enable economies of scale/sharing of back office
- sharing of experience/technology transfer can take place

As for forms of cooperation, he mentioned the following:

#### For individual lawyers

- employment of a foreign lawyer/by a foreign lawyer
- partnership with foreign lawyers

#### For law firms

- marketing cooperation (e.g. referral networks such as Lex Mundi, or best friends)
- law firm networks and alliances
- partial integration models (joint ventures, vereins, etc)
- full mergers

There are regulatory issues to be considered, and he listed the principal ones:

- with which foreign lawyers should cooperation be allowed (e.g. WTO list versus one-by-one approved list, etc)
- what work should such joint practices be allowed to do? (e.g. full/limited licences)
- what kind of vehicles should be allowed? (e.g. partnership, limited liability, ABS etc)
- what are the approval processes?
- how to maintain regulatory oversight, and to what level? – should there be regulatory/disciplinary recognition agreements with home country Bars?
- what about insurance/social security/compensation fund contributions
- at what level should the fees be set (they should reflect the true cost of administration and not be a penalty for, or obstacle to, joint practice)
- does the local Code of Conduct apply to the joint practice, and how to deal with particular challenges e.g. names of firms
- be aware that a mix of domestic regulation and international rules (e.g. WTO, trade agreements) will be applicable

He then described how European lawyers are able to practise cross-border in the EU through the EU lawyers' directives, to provide a different vision of how a model of regional cooperation could work in Central America.

### Trends in law firm management

**Fernando Peláez-Pier**, a lawyer from Venezuela and former President of the IBA, spoke to his slides on challenges facing the legal sector.

He said that the main factors driving change in the legal services market are:

- new ways of creating value
- innovation and developments in legal technology
- globalisation and change in economic power
- disparity of skills and reform of legal education

Globalisation, the empowerment of clients, the development of technology, new generations, and other factors have modified the practice of the profession.

He spoke under the following four headings:



### **(1) New forms of value creation**

- trigger of change: the financial crisis of 2008
- client assumes the power to purchase services
- needs and expectations of unsatisfied customers
- greater customer demands, evolving with marked speed
- greater complexity of clients and therefore of their relationship with their lawyers
- sophistication of legal departments
- costs of inefficiencies transferred to firms
- pressure on the traditional model
- client seeks clear and transparent relationship
- the needs of the client must be understood
- greater influence of global firms and legal departments
- greater complexity of legal structures
- uncertainty of the future of economies

Reconfiguration of legal services:

- expertise
- complementary skills
- technological developments
- innovation
- generate added value
- competitive cost
- multidisciplinary practices (MDP)

Technology has and will have an increasingly important role with great impact in the provision of legal services.

The traditional relationship is changing from individual relationships to collaboration:

- collaboration between partners and associates vs a partner
- multiple contact benefit
- develop client based on team work
- collaboration is not cross selling
- delegation is important
- need to break barriers

Collaboration between the different practice areas

Necessary to understand the impact on:

- provision of the service
- business development
- the relationship with the client
- generation of work
- attraction and retention of talent
- competitive advantage
- culture of the firm

VUCA is an acronym used by the United States military in the 80's to describe a "volatile, uncertain, complex and ambiguous" environment.

The term is used in the business world, most notably at Harvard Business School:

- volatile: things can change very quickly
- uncertain: difficult to anticipate when a change will occur
- complex: the elements in a system react with each other in non-linear ways
- ambiguous: what one observes may be different from reality

In the client-lawyer relationship, the greatest challenges to providing services in a VUCA environment are:

- understanding which client has needs in areas of specialisation that are not traditional
- understanding that customer needs are often wrongly expressed
- there is a gap in expectations between clients and firms
- close that gap or reduce it to the maximum, a powerful source of competitive advantage
- create opportunities to consult clients about ways to redefine their working relationship

## **(2) Attraction, training and talent retention**

- millennials broke the model
- we need to understand them
- they see the profession differently
- there are 4 generations that should have the ability to work together with excellent results

The traditional vision was an analysis of the partner's performance according to the firm's compensation model.

New Trends:

- greater demands on the partner
- plans of goals and objectives
- review of the compensation model
- production bonuses

Why?

- competition
- new ways of creating value
- clients reducing the number of firms with which they work.
- pressure on fees
- technological developments

## **(3) Innovation and technological developments**

About innovation:

- technology and law do not go hand in hand
- improve processes
- respond to a need
- it must generate a change, a development, an improvement

About the legal sector

- there is no tradition of continuous improvement
- most work is still done in the same way
- it does not conform to best practices and standards
- it clings to its procedures

## Innovation

- greater efficiency
- improve customer service
- implement new policies and procedures
- take advantage of data and technological developments

## Considerations

- change of mentality to develop a culture of continuous improvement, innovation and collaboration
- innovation is possible in the legal sector
- we must accept and understand the needs of change
- AI and new technologies will not lead to the disappearance of firms but days are numbered for those that refuse to adopt them
- firms fear failure when they innovate and adopt new technologies
- failure is learning, it is an opportunity to improve
- partners and visionary firms manage to innovate, identifying the need for change, working on its development, generating an improvement, contributing a solution, creating a new culture

### **(4) Conclusions**

- leave your comfort zone
- work on reducing the gap that separates you from the expectations of your clients
- manage change and develop a culture of creativity, innovation and collaboration
- this new culture will enable you to understand your clients, innovate, change the basis of collaboration with them and among you

**Mariano Batalla**, a lawyer from Costa Rica, made the following comments on **Fernando Peláez Pier's** speech as it was being given.

First, we have to complement our skills and knowledge with other kinds of knowledge, since clients want solutions to problems. Attorneys must add value to solutions which go beyond mere technical legal advice. Clients are seeking a business solution, not an economic or legal solution. Clients want a whole solution, and so it is not enough to be a good attorney.

How do we standardise professional development of all people in firms? Being a millennial is irrelevant. None of us expect to work like our parents and grandparents. It is important for generations to come together in firms.

We as lawyers should embrace change and continuous improvement. You should not relax even at the summit of achievement. There is all kind of change: regulatory change, generational change, change in expectation of clients.

Innovation is not the same as technology. The client is the best guru. Do we seriously ask customers what we could do better? If we began now, would we have the same law firm structure, would we do the same things? Innovation is an acceptance that there might be better ways of doing things. Clients always want things more quickly. We should look at partners, relationships in the office – there is a good potential to innovate.

It is also rare for lawyer to contact clients afterwards to find out how things have gone. If lawyers introduced this practice, it would help. If a person or company is not yet your client, speak about their problems and challenges and not just about what you do.

There is a lot of competition out there. Our biggest challenge is to tackle change.

Following a question from the audience, the panellists said that law firms need to offer a wider range of services, for instance in relation to lobbying. If lawyers do not take up service offers, others will fill the gap. Past careers and past training in a lawyer can offer a huge amount to clients.

## Working with international law firms and international business clients - top tips for business development

**Alison Hook**, chair of the BIC ITILS committee and from the United Kingdom, spoke to her slides. At various points, she stopped to ask **Adriana Castro**, a lawyer from Costa Rica, who shared the platform with her, various questions about how she dealt with these issues in her firm.

Alison Hook outlined six steps to internationalising your law firm.

### Step 1: Understand your market

- what is the total demand for legal services in your market?
- for what?: legal services? legal + other professional or trust services?
- where?: San Jose? Costa Rica? Central America?
- what is the market available to your law firm – given your current capabilities and past experience?
- e.g. what area of law do you work on? what kind of clients have you had in the past? what types of legal cases or transactions have you dealt with?
- what is the realistic market share available to your law firm – given competition from others?

How does this relate to internationalising your law practice?

- international growth of the whole market
- inward investment will increase the market by bringing in new demand from new clients – either directly or via supply chains
- expatriates may need legal help
- domestic clients may seek to export to other countries and may need legal help
- growth of international opportunities in your part of the market
- what international work might be available to your law firm? have you worked with international clients before? do your lawyers have foreign qualifications? speak other languages etc?
- what share of this market might you win?
- i.e. is it a very competitive market? do you have some special expertise or characteristic which give you an advantage?

### Step 2: Understand Your Offer ...to international clients

- what do you do? e.g. ‘the go-to firm for specialist advice in real estate; energy and natural resources; and financial and banking sectors’ or ‘We are a leading UK Law Firm with expertise in Business Crime, Commercial Litigation, Civil Fraud, Corporate Compliance and Asset Tracing & Recovery’
- what do you charge? are you expensive, cheap or middle of the road? can you offer fixed fees for certain types of work? is your billing transparent?

- how do you deliver your services? regular communication with clients – information, regular updates; thinking around the problem; appropriate staffing – right skillsets deployed consistently

### Step 3: Understand what your target international clients want

- gain their trust - find proxies for trust – e.g. similar past experience, referral from trusted adviser or collaborator etc. what are you doing to build an ongoing relationship?
- understand their needs - what is it that international clients are ultimately after? think around the problem; understand their sector and business; what are the benefits you are offering a client? (e.g. risk management, a one-stop solution to regional expansion)
- meet expectations - an international client or referral partner will take it for granted that you know the law; be competent, efficient and consistent; the basic features of your service (e.g. legal advice on M&A in Costa Rica)

### Step 4: Decide on your strategy for international growth?

- can you provide international services to existing clients? how are your existing clients affected by globalisation? are they expanding abroad? or merging internationally?
- your starting point - what you currently do and who you do it for?
- develop new services to sell to new clients - a big challenge – there may be easier ways to grow more quickly
- can you provide your existing services to new international clients?

### Step 5: Decide on your Market Positioning

What do your competitors offer? What are the needs of the clients you want to serve? What do you offer now or could you offer in future? You should seek to occupy the overlap between the last two and where all three overlap.

### Step 6: Reaching clients – to win new business

- how to establish your ‘brand’ and credentials beyond the local market? conferences, sectoral exhibitions, articles, international memberships
- clients will notice how quickly you respond to initial enquiries, how far you understand what is asked of you and how you negotiate and agree terms with them
- most Important - stay in touch even after you have finished an assignment



- get ready internally to work with international partners: internal procedures; capacity; develop expertise; messaging
- what sources might target clients use to find a law firm in the region? e.g. referral law firm, international directory?
- your best marketing tool is your reputation and how you work with your clients; if they like you, they will not only ask you to work with them again but will recommend you to others
- reaching Clients is a continuous loop not a one-off process

### Conclusions

Developing your business is an ongoing task

You need to ask yourself three questions:

- what is my market?
- what is my ‘offer’? what makes it different?
- what do the clients I want to serve really want?

After answering those three questions, three decisions need to be taken:

- what is my international growth strategy?
- how do I want to position myself in the market?
- how will I reach new potential clients?

**Adriana Castro** said that in Costa Rica, millennials expected a balanced lifestyle and clients expected a reply with 24 hours. Millennials don’t need to be hugged – for instance, video conferences can replace face-to-face meetings.

In answer to a question, Alison Hook said that more and more law firms in the UK are using client portals (space where updates can be shared with clients).

Regarding software for case management, the panellists said that you don’t need to develop your own.

## Raising capital in international markets – the role of the local legal advisor

**Juan Javier Negri, Argentina** spoke to his slides on ‘Accessing International Markets: The Local Legal Advisor’s Role’.

Mr Negri started by explaining that global and local capital markets exist as part of the financial system, and are concerned with raising long-term capital through shares, bonds, and other long-term investments.

Types of capital markets:

- Primary market/New issue market – where securities are first issued and the issuer receives funds – IPO, bond issuance
- Secondary market/After issue market – where previously issued securities trade between investors

What is a security?

- A financial instrument representing a claim and that can be traded e.g. shares/stock, debt securities like bonds
- There are two main securities in the global capital markets:

Equity (shares)	Debt (bonds)
Holder is owner	Holder is creditor
Voting rights and economic rights	Conversion rights

Dividends	Interest
Board control	Usually no voting rights
Residual value in liquidation	Rank higher than shares

#### Why use capital markets?

- alternative source of financing apart from bank-based lending
- better pricing, longer maturities and wider investor base
- funding for riskier investments not supported by banks
- exit route for investors such as venture capital and private equity funds
- price discovery through listing and trading of such securities
- allows for efficient allocation of capital across industries, and by extension, society as a whole.
- wealth generation for savers and investors – attractive investment opportunities with better returns than banks can offer
- investors can manage risks by investing in a diversified portfolio

#### Domestic or foreign capital

- there can be challenges in raising funds domestically
- the capital requirements may be too big for a domestic market
- there might be no local appetite to invest in equity seeking capital

#### Why might you need foreign capital?

- larger pool of capital and lower costs due to the potential segmentation and saturation of domestic markets
- diversification of country risks and associated economic risks
- potential to hedge foreign exchange risk
- increased global recognition
- tax reduction or avoidance and lower interest rates

#### Where to raise capital?

- market considerations
- industry knowledge and best practice
- laws applicable and level of regulation
- financing structuring requirements e.g. accessing Sharia financing
- market liquidity for firm securities
- pricing standards (international or domestic)

#### Different equity transactions:

- private transactions
- stock purchase agreement (foreign investor acquires stock in a domestic corporation)
- incorporation of a new domestic company (with foreign investor as a shareholder)
- public transactions:
- initial public offering
- open market acquisitions
- takeovers and mergers

## Practical Questions in all cases

(for lawyers to respond):

- how is money brought in?
- ...and how does it leave?
- are there costs involved?
- (exchange controls)
- tax implications at exit or on cash flows?
- cross listing allowed? implications?

## Purchase of shares

In a new company

- are there different corporate types?
- are there particular benefits in the selection outcome?
- do all types grant limited liability to partners/shareholders?
- are they all similar as to tax consequences?

In an existing entity

- Which way to ensure against contingencies?

## The investor

- who will be investing?
- are all foreigners alike?
- individuals or corporate entities?
- need for registration of the investment
- need for registration of the investor
- physical presence
- taxation

## Different legal nature of transactions:

- new shares to be issued
- existing shares to be bought
- which corporate activity required from issuer/seller?
- limits?
- types of shares
- classes of stock

## Management

- directors (locals? expats?)
- directors
- directors standards
- ultra-activities
- fees
- auditors
- governance considerations
- compliance

## Divestiture (which way out?)

- tag along / bring along (piggy back)
- put options



- call options

#### Which role for lawyers?

- representatives / agents?
- directors?
- advisors?
- counsel to shareholders? / to company?

#### Structuring the deal

##### Consider

- institutional and regulatory differences
- different tax laws across countries
- interest rates and other economic fundamentals
- political risks, different market risks etc
- corporate finance strategy should minimise cost of financing and maintain different types of risks within acceptable levels
- if capital needs require global market, determine how you can access the global markets
- determine best time to go to market / postpone

#### Market requirements

- registration of securities and exemptions
- best options/modalities of raising money from global capital market
- ipo/ private placement/ bond issuance

#### Availability of funds

- Foreign direct investment
- Foreign investors

#### Costs of capital raise

- regulatory and advisory fees
- road shows

#### Interest coverage

#### Due diligence

- statutory and exchange market requirements
- other things to consider:
- continuing obligations
- disclosures and level of disclosures
- investor expectations
- dividend/coupon payments
- transparent corporate strategy
- corporate governance
- financial reporting (auditing)
- prepare prospectus (business plan with detailed information about the company and the securities being issued)

#### Disclosures and Investor Protection

Policy rationale for disclosure

- Transparency (including both issuer and market (transactions) transparency)
- Market efficiency (in re securities pricing)
- Investor protection and confidence
- Good (corporate) governance

Liability for – inadequate or defective disclosure, deceit, misrepresentation by action/omission

### Conclusion

Issuers have wide choice relating to capital raising

- what type of securities – equity or debt?
- where to raise the capital – domestic or global markets?
- when to raise the capital – timing

Legal advisors always play a critical role in the entire process

**Ricardo Hernández, Costa Rica**, added a commentary during the slide presentation, as follows. We don't have a capital market as such, like in most Latin American countries. Historically, our investors have worked with us short or middle term. Investors with long term infrastructure are more complicated. Investment is up to a period of a year. We haven't moved forward in some important systems e.g. bankruptcy procedures are from the 19<sup>th</sup> century.

He said investment funds for pensions do not have enough business in which to invest. Registration is not flexible because there is not enough paper. A significant percentage is in private regimes, which are not public offerings. What is not regulated does not exist (according to a President of Costa Rica) – but he thinks the opposite.

Since Costa Rica is stable, long-term investment should not be a problem – for instance, in Argentina, they won't invest for the period after the Presidential election later this year.

### Arbitration of international commercial disputes

**Mauricio París**, a lawyer from Costa Rica, first spoke to his slides. He began with the history of arbitration. Arbitration is a fundamental right in Costa Rica. Its nature is contractual with elements from procedure. Some powerful companies think that it is an abuse of process, taking disputes out of the courts. Should arbitration be local to the country of dispute? Should it be decided by applicable law? There is a dispute around the Lex Mercatoria, with the Mercatorians v the anti-Mercatorians.

**Thierry Ngoga**, member of the BIC ITILS committee from Rwanda, spoke to his slides.

He asked:

- 1) whether it is appropriate to impose restrictions on the choice of counsel (legal representation) in international arbitration, and the implication of doing so for positioning as a 'Safe Arbitration Seat';
- 2) using available statistical data in Central America regarding international arbitration, what lawyers and policy makers should be doing to get the 'cake shared properly' as a way to face globalisation.

Limitations on the parties' choice of legal representatives would contradict the basic concept of arbitration as a flexible and self-tailored dispute resolution system. Freedom of legal representation is recognised in most national arbitration laws, and by most institutional arbitration rules in Central America and elsewhere:

- Article 9 of CAM rules (Costa Rica) states that: *“The parties must be represented or advised by lawyers, who may be granted a special power, under the same terms and conditions that apply for a special judicial power.”*
- Article 8 of the CCA (Costa Rica) states: *“The parties must be represented or advised by lawyers of their choice. In case the party wishes its lawyer to represent them, the party must grant sufficient power, which must meet the requirements required by law.”*

The law on international arbitration in Costa Rica is silent regarding the nationality of legal counsel, however art 2(a) of the law states that regard is to be had to the international origin of this law, so it is arguable that foreign attorneys may represent clients in international commercial cases seated in Costa Rica. (Source: <http://djarbitraje.com/pdf/908CostaRicalBAArbitrationGuide.pdf>).

- Article 21 Paragraph 3 of the Brazilian Arbitration Act states that *“The parties may be represented by legal counsel, and the right to appoint someone to represent them in the arbitration proceeding will always be respected.”*

Despite what has been said, laws in a few jurisdictions require that counsel in locally-seated arbitration must be locally-qualified to represent in arbitration:

- That is true in Turkey, Thailand and was formerly true in Japan and a few other jurisdictions (Gary Born, 2014)
- There are difficulties also in India. There, the law appears to allow foreign lawyers to appear in arbitration but this has been challenged before the Supreme Court in Bar Council of India v. A.K. Balaji - SLP (Civil) No. 17150-54/2012. The position of the SC of March 18, 2018 appears to be that foreign lawyers are not allowed to appear in arbitration. (<http://www.advocatekhaj.com/library/judgments/announcement.php?WID=9848>)
- In Nigeria: the Nigeria Legal Practitioners Act defines a legal Practitioner only as a lawyer registered to practise law in Nigeria (is that a good way to share the cake?)

Other examples:

- Philippines: Article 13 of the Philippine Dispute Resolution Center rules of 2015: *“the parties may be represented by persons of their choice, irrespective of, in particular, nationality or professional qualification”*
- Mauritius: In the Mauritius Arbitration Act (section 31) *“Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the arbitral proceedings by a law practitioner or other person chosen by him, who need not to be qualified to practice law in Mauritius or in any other jurisdiction.”*
- Tested Best Practice without Precision: case of Rwanda with 32 KIAC international arbitration cases out 105 total cases (parties have been represented by foreign counsel but preferred to work with local counsel since the seat of arbitration and applicable law to the contract were mainly Rwandan in the 105 cases)

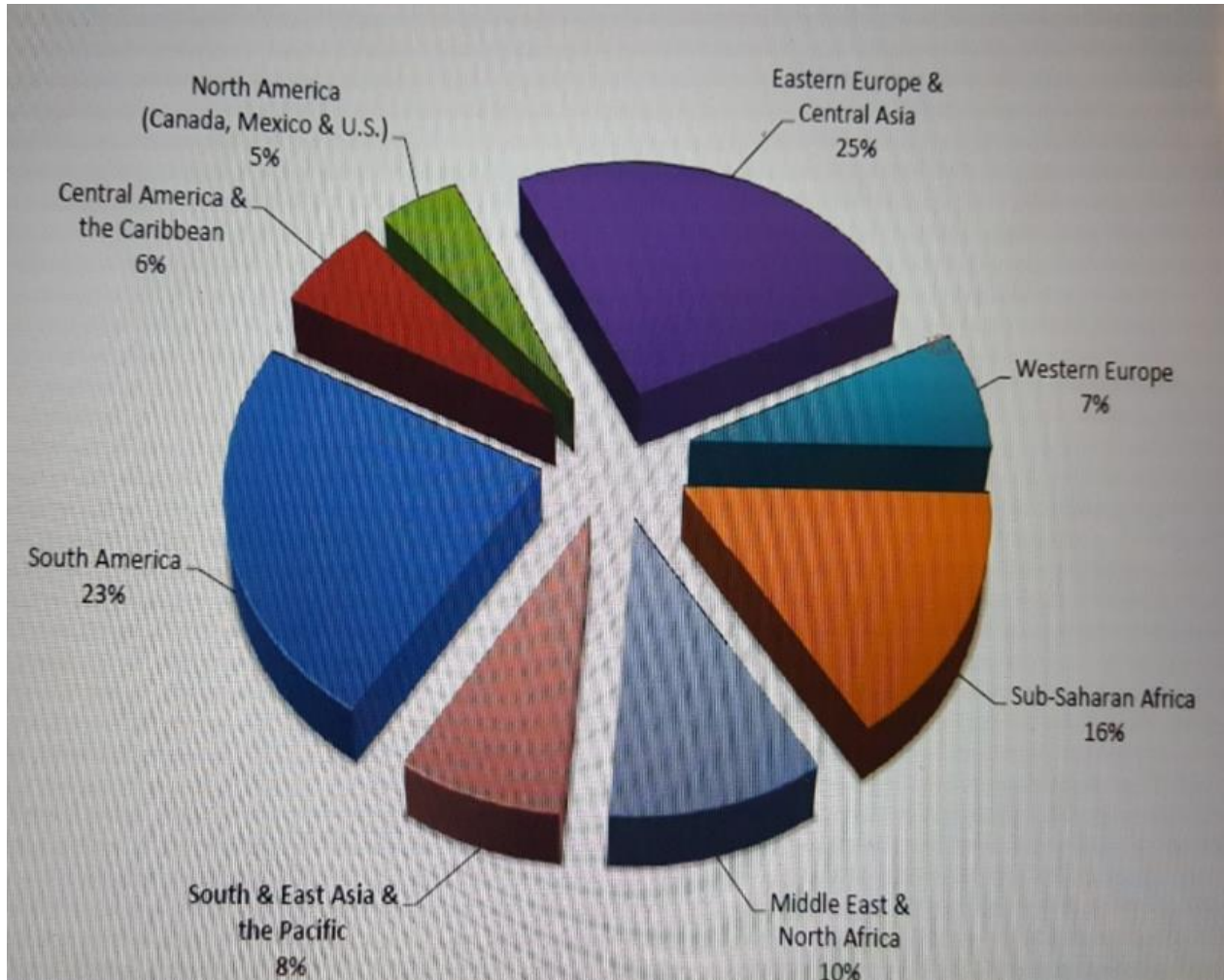
Conclusions:

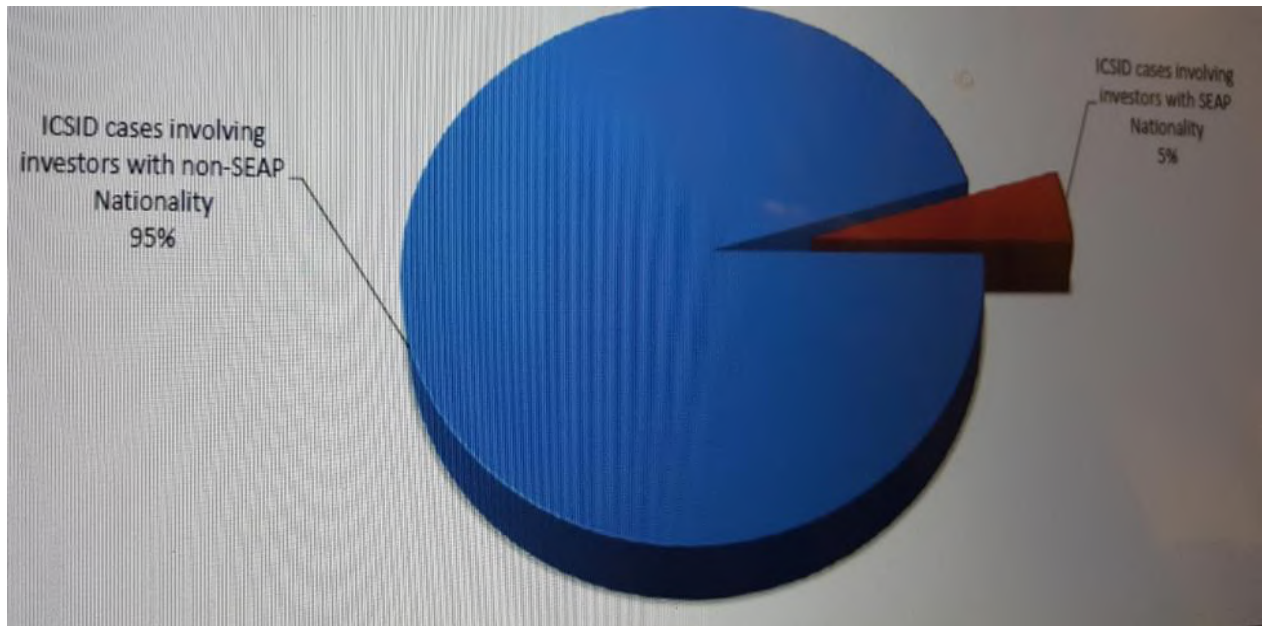
- Including also non-local counsel is important for defining a ‘safe arbitration seat’

- Focus more on your seat in the contract (applicable law) to improve the share in the ‘cake’

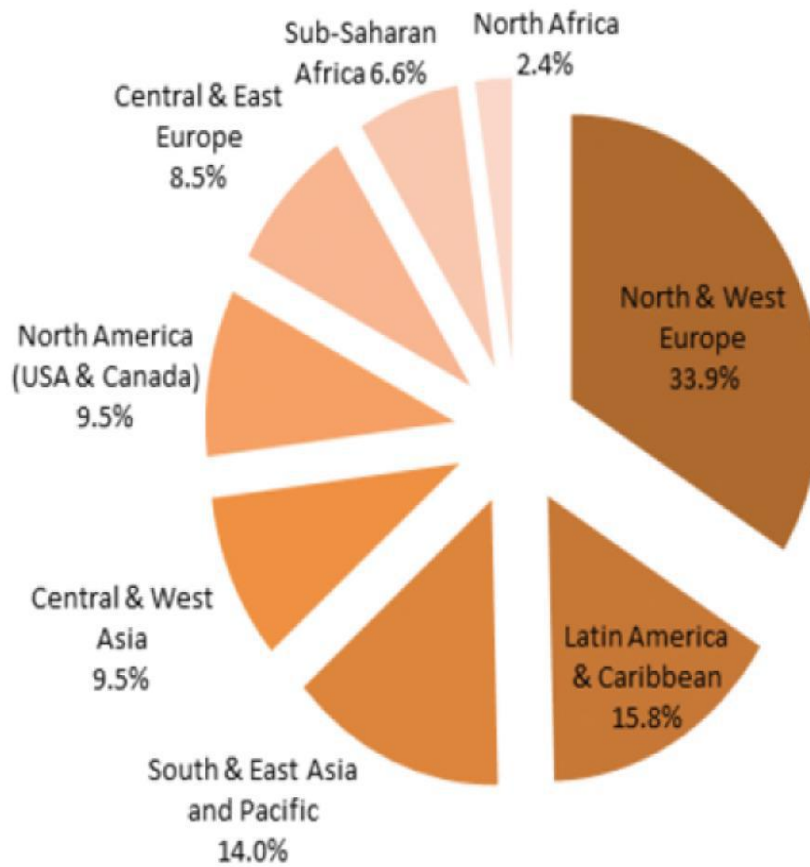
ICSID Statistics 2010-2018 revealed that Central American and Caribbean registered 6% of the total arbitration cases, with Western Europe at 7% and North America at 5%.

Arbitrators appointed: Latin American 165 , North and West Europe 798.





In 2017, of the 810 cases registered by the ICC, 15.8% involved Latin America, while North & West Europe were at 33.9%.



Origin of arbitrators appointed in ICC cases in 2017:

Region	Year	Men	Men	Women	Women
North America	2016	193	86%	32	14%
	2017	114	82%	25	18%
Latin America & Caribbean	2016	145	88%	19	12%
	2017	165	82%	36	18%
Central & West Asia	2016	46	84%	9	16%
	2017	43	68%	20	32%
South & East Asia and Pacific	2016	109	89%	14	11%
	2017	123	87%	18	13%
North & West Europe	2016	617	86%	103	14%
	2017	679	85%	119	15%
Central & East Europe	2016	64	70%	27	30%
	2017	61	69%	27	31%

In 87% of the disputes referred to ICC Arbitration in 2017, parties included a choice-of-law clause in their contracts. The laws of England and USA states remained the most frequent choices, followed by French and Swiss law.

Consideration: the choice of law (*lex arbitri*) determines the appointment and the counsel to involve (dispute resolution clause).

Some barriers to arbitrate in developing countries cited in literature (action needed):

- interference of courts
- corruption
- limited pool of trained professionals (issue of capacity building)
- poor legal/regulatory frameworks
- lack of data on enforcement in many developing countries?
- what else? political instability, visa issues? airlines?

There are always excuses for not arbitrating in developing countries.

We need to admit some of the weaknesses and work hard to improve them, but players need to fight the negative perceptions.

Sample data for arbitrating commercial disputes in Sub-Saharan Africa in 2011 shows that the time to enforce an arbitration award in Africa varies from a year in Ethiopia (375), Tanzania (425), and Ghana (436). The same survey indicated that the times for some Asian countries: Sri Lanka (720), Pakistan (806), Philippines (948).

The average dispute resolution time of ICSID case since 1 July 2003 is 3.2 years or 1,171 days (GAR Journal vol. 4, Issue No 5).

Recent Experience of Rwanda (as safe seat):

- Kigali International Arbitration Centre (KIAC) registered 105 cases in 5 years (32 international cases) 3-6 months (enforcement of award varies between 3 to 6 months)
- None of the 48 KIAC awards has yet been set aside by the Rwandan court

- Chief Justice rules of 2012 give priority of arbitration case over other matters, which does not follow the normal rule
- The new civil code procedure of April 2018 and the provision on court intervention
- Art: 21: Grounds for refusal of registration of a claim by the court Registrar
- Files a claim without demonstrating that he/she has used amicable settlement or arbitration specified in the contract

Some developing countries (in Central America and Caribbean, for example) have better rankings than developed countries in the indexes and surveys below:

- WB Doing Business report which ranked 186 economies of the world
- Global Competitive Index,
- Global States of Mind Surveys
- Business baseline profitability index

What lawyers and their jurisdictions can do to appear on the map of international arbitration and so share the cake:

- driving/positioning your respective countries as an arbitration safe seat (legal representation, 1958 New York Convention, model law, supportive courts, clear enforcement regime, visa policy, safety etc.)
- testing arbitral institutions in Central America and Caribbean (some of them have been tested)
- start with contract negotiation & drafting (seat-applicable law, avoid pathological clauses), for the purpose of sharing the cake when disputes arise
- learn more than one international languages (for young people)
- be aware that: arbitration is not only a legal concept or a form of justice but an industry which includes many attractive factors such as tourism, hotels facilities, zero tolerance to corruption, entry facilities (visa), safety, internet facility, transport etc....
- example: PRADA Report in France (2011)
- Rwanda: 2012 Ministerial Instruction on Contract Drafting, negotiation of dispute resolution clause, with model arbitration clause compulsory for government contracts

Conclusion:

- The economic expansion of Central American countries in which, according to the OECD, GDP is growing at 3.2% - there is a need to think and rethink arbitration dispute resolution mechanisms, especially for a future equitable share of the cake in a globalised world
- The lessons from some developing countries including Central America which tested their arbitrators and arbitral centres are encouraging. Change is possible, it is happening, and the mission of the legal practitioners gathered here is to contribute to make it happen more quickly than in the past, for the cake to be shared properly.

## Annex 1: Programme of the conference

### GENERAL INFORMATION



the global voice of  
the legal profession



#### IBA

The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 55,000 individual lawyers and more than 190 bar associations and law societies, spanning all continents. For more information, see <http://www.ibanet.org/>.

#### Costa Rica Bar Association (CACR)

The Costa Rica Bar Association (Colegio de Abogados y Abogadas de Costa Rica – CACR) guarantees the quality of lawyers' activities on behalf of Costa Rican society. It also protects the legal profession's interests and contributes to the development of legal knowledge. For more information, see: <https://www.abogados.or.cr/>

#### ELF

The European Lawyers Foundation (ELF) is an organisation that undertakes projects that relate to the exercise of the profession of lawyers, the development of the law and practice pertaining to the rule of law and administration of justice and substantive developments in the law itself, both at a European and international level. For more information, see <http://elf-fae.eu/>

## GLOBALISING YOUR PRACTICE OPPORTUNITIES AND CHALLENGES

9 APRIL 2019

VENUE: COLEGIO DE ABOGADOS Y ABOGADAS DE  
COSTA RICA

SAN JOSÉ, COSTA RICA

SIMULTANEOUS INTERPRETATION SPANISH/ENGLISH



## PROGRAMME

8.30	<b>Registration</b>	12.50	<b>Discussion</b>
9.00	<p><b>Welcome</b></p> <ul style="list-style-type: none"> <li>• Julio Castellanos, Secretary General of the Board of the Costa Rica Bar Association</li> <li>• Péter Köves, President of the International Bar Association's Bar Issues Commission</li> </ul>	13:00	<b>-Lunch-</b>
09:30	<p><b>Keynote Speaker:</b> Fernando Cruz, President of the Supreme Court of Costa Rica</p>	14.00	<p><b>Working with international law firms and international business clients - top tips for business development</b> Alison Hook, United Kingdom Adriana Castro, Costa Rica</p>
10:00	<p><b>Instruments on international trade in legal services and their applicability in Latin America</b> Ben Greer, United States of America</p>	14.45	<b>Discussion</b>
10.45	<b>Discussion</b>	15.00	<p><b>Raising capital in international markets – the role of the local legal advisor</b> Juan Javier Negri, Argentina Ricardo Hernández, Costa Rica</p>
11.00	<b>-Coffee break-</b>	15.45	<b>Discussion</b>
11.15	<p><b>Creation of joint ventures: different forms of international alliances and their benefits</b> Jonathan Goldsmith, Belgium Rolando Laclé Zúñiga, Costa Rica</p>	16.00	<p><b>Arbitration of international commercial disputes</b> Thierry Ngoga, Rwanda Mauricio París, Costa Rica</p>
12.00	<b>Discussion</b>	16.45	<b>Discussion</b>
12.15	<p><b>Trends in law firm management</b> Fernando Peláez-Pier, Venezuela Mariano Batalla, Costa Rica</p>	17.00	<b>Conclusions and closing remarks</b>