

Heard at the IBA 2022 Annual Conference

by Marc Kushner

The International Bar Association (ABA) Annual Conference was held October 30 to November 4, 2022, in Miami, Florida. Marc Kushner and Carlos Méndez-Peñate, two members of the Dorsey New York office's vibrant international practice, attended the conference. Marc Kushner filed this report.

Maintaining international connections, and building new ones, Dorsey attended the recent International Bar Association Annual Conference in Miami.

Here are some of the key themes, from both the hallways and the many seminars and formal events:

1. Near Universal Concern over Rising Interest Rates, with In-House Counsel also Worried about Antitrust Enforcement and Impact of Disinformation and Politicization on Business Climate

Led perhaps by deal lawyers, many IBA participants expressed concern about the impact of rising interest rates on business activity, both in general and on deal volume in particular. Inflation and the increasing cost of capital, along with parties' growing inability to reach agreement on target value, were often cited as factors in the sharp drop in 2022 M&A activity.

Many noted a growing capital crunch, with funds becoming harder to raise, especially for less well-established companies. As investors move to safer investments, many startups find themselves needing to offer more equity, often with sweeter warrant packages, to obtain funds. Others noted that spending is tightening, and with talent becoming harder to attract as access to capital recedes, some see risk of a negative downward cycle.

But with 10-Year US Treasury bonds hovering at 4%, and a seeming consensus that Q4 looks strong, it may well be that a new normal is taking shape and that deal makers and investors will soon settle in and money will flow again, with adjustments for the new reality. World-wide M&A activity may now be down approximately 40% from 2021 (and

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query how bad this may really be if 2021 actually reflects a not-soon-to-be repeated historic high), but the silver lining for buyers is that valuations are coming down fast and the sense at the IBA is that they can be both picky and drive harder bargains

Interestingly, in-house lawyers expressed greater concern over other, perhaps more political/structural, trends, particularly the more aggressive antitrust enforcement priorities of the Biden Administration and the impact of disinformation and politicization on the business climate. Many IBA attendees expressed a generalized concern that the increasing strains from international political climate, especially Russia's invasion of Ukraine and US-China conflict, had created many new risks and liability concerns. In addition, issues once thought well beyond the purview of the C-Suite, such as race relations and anti-Semitism, have become major concerns, with both corporate statements and silence on external events creating the risk of alienating customers across a growing political divide. Many lawyers also noted a growing list of stakeholders whose perspectives matter, with the need to focus beyond the customer and consider what employees and local governments will think.

Some have also become concerned that formally apolitical regulators will no longer be objective, with the politicization of mask mandates and vaccine approvals giving rise to concerns that agencies such as the FDA will not act in a predictable and objective fashion.

Solutions, unlike opinions, were in short supply on these issues, but anxiety definitely seemed to be rising.

2. The Influence of ESG Continues to Increase, Sometimes in Unexpected Ways

ESG was raised in many settings, with near universal agreement that, in light of growing customer, investor and regulatory demands, companies ignore it at their peril. Many noted a growing recognition that, at all levels of the value chain, producers, manufacturers and retailers need reliable supply chain certification to ensure their counterparties of the technical and ESG-related integrity of their products, from initial extraction to final end use, including a detailed understanding of one's carbon footprint and a deep social license. Lack of reliable generally accepted standards was often decried as a growing concern.

Some noted a trend toward vertical integration as a way to alleviate the risks caused by unreliable third party certification. But others noted the commercial and reputational risk of expanding too quickly beyond a company's true expertise. One interesting example comes from the automotive world, where OEMs clearly need a conflict-free EV battery supply chain, but are currently unwilling to invest in lithium mines due to both a perceived lack of expertise and risk of association with a negative-ESG reputation sometimes imputed to the mining industry.

Others see the growth of ESG concerns among financial investors as leading to a rise in activist-style investing by buyers who previously did not embrace such an approach. Increasingly, if the target has a good business case but raises ESG issues, investors are

perceived as having the power to demand change. This of course leads back to metrics and quality of certification and standards.

In a potential emerging industry trend, some referenced a growing understanding of the need to plan from inception to track, and perhaps monetize, carbon utilization through credits or otherwise. Hope was also expressed that coming SEC disclosure rules would create incentives to improve and a convergence toward best practices as stakeholders check and assess what others are doing.

3. Interconnected World Notwithstanding, Need for Local Knowledge in International Transactions Continues to Grow

Despite the truism that the world is more interconnected than ever before, an interesting perspective in the IBA halls posited that, especially when investing outside your home jurisdiction, local knowledge is more essential than ever to making smart investments.

In this view, despite the capital crunch caused by higher interest rates and more uncertain valuations, a growing number of companies will need capital in 2023. Many of those entities, despite valuation uncertainty, have strong fundamentals that should present good buying/investment opportunities. But, so the theory goes, to find those diamonds in the rough, local knowledge is key. Such targets are often mid-size, and can be overlooked by large funds as well as VC investors looking for smaller-scaled targets.

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Overall, despite the challenges noted above and the concerns expressed, IBA participants seemed to radiate a spirit of optimism and possibility, no doubt fostered in part by the Miami sunshine!