



## Climate justice: the time is now

**F**ormer US vice-president Al Gore and former Irish president Mary Robinson have urged lawyers to take forward the recommendations in the IBA's groundbreaking report that makes the link between climate change and human rights.

Climate change is the biggest risk to human rights in the 21st century. Yet Robinson, a former lawyer, has felt for some time that the global legal profession has been behind the curve in recognising its negative impacts.

The urgency to legally address climate justice has never been greater. Under business-as-usual scenarios, the world is on the path to destructive climate change. By 2050 there could be 200 million climate displaced people worldwide. This generation has been described as the first to fully understand the threat of climate change and the last with time to do something about it.

In December 2015, world leaders will meet in Paris to thrash out a new legally-binding climate change agreement to take effect in 2020. That gives the legal community a short window of 14 months to ensure its impact on human rights is incorporated into the global framework on climate change – before it's too late.

### WEDNESDAY HIGHLIGHT

#### SESSION

#### IBA SHOWCASE: Achieving justice and human rights in an era of climate disruption

##### Key takeaways

- Al Gore and Mary Robinson praised the IBA's groundbreaking report which makes the largely unrecognised link between climate change and human rights;
- Immediate action is needed to amend legal frameworks to reflect climate justice and have its principles incorporated into a binding global agreement to be agreed in December 2015;
- All lawyers are responsible for implementing the recommendations through their practice and motivating political and legal change.

The impassioned pleas of Gore and Robinson, two of the world's foremost climate change authorities, were made at yesterday's showcase session at which the presidential taskforce's report 'Achieving justice and human rights in an era of climate disruption' was discussed.

The fundamental premise of the report is that access to a safe, clean, healthy and sustainable environment is a universal human right. Yet existing legal mechanisms neither adequately recognise nor protect those rights to the extent they are threatened by climate change. It's a situation made worse by the fact vulnerable communities are most at risk.

This is where lawyers have a key role.

"You have an extraordinary and rare opportunity to help chart the course toward a sustainable and just and survivable future," said Gore, appearing from the US via live satellite. "We need your help, we need your wisdom and special expertise."

Robinson, UN special envoy on climate change, echoed his call. "We cannot solve the climate crisis without you, the lawyers of the world."

To date, the profession has categorised climate change as an area of environmental law. The panel, which included taskforce

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Myanmar must focus on developing its legal system to protect human rights

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How AIFMD's lack of passporting is confusing an industry

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#### THE END OF THE LINE

Is Skype the limit? Are phone bills a thing of the past?

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## Google: harmonise global data rules

**A** representative of Google has called for harmonisation of global rules on companies' use of personal data.

The debate about the vulnerability of the internet has intensified in the wake of the Edward Snowden National Security Agency scandal. This focused international

attention on profiling, or the extent to which information circulating freely on the internet should be subject to explicit consent.

"You can see the development of a significant conflict with jurisdictional laws and principles that need to be resolved at

the international level for a global harmonisation, versus just harmonisation in particular areas," said Bryan Schilling, who deals with international law enforcement and security issues for Google.

Schilling commented that Google is stuck in the middle of the multijurisdictional debate.

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"The EU and other governments are, perhaps justifiably, frustrated and upset with the American and UK governments and the actions they took," he said. "Since they can't get the governments to change, they are coming after multinational US corporations to address the issue that governments are not addressing."

Schilling noted that the continued pushing of data localisation mandates in Russia and other countries is going to lead to an internet fragmentation. Governments use these requirements to keep information inside their borders, citing concerns about foreign surveillance, privacy and security.

"There will be a trade-off between privacy and security with the data localisation requirements," he said.

This summer, the UK also enacted the controversial data retention and investigative powers act. "[The UK] will say this was an attempt to clarify the existing laws," said Schilling. "But it really gives it the power

to have extraterritorial reach to go into any country in the world and serve warrants and orders to produce data for any citizen."

### Individual accountability

Schilling emphasised Google's belief that it should be accountable for the data entrusted in it, highlighting its use of anonymised data.

He described how Google has been able to successfully predict instances of the flu in Japan through aggregated search data.

"Data is driving issues of social value, economic growth and social need," he said.

But Schilling also stressed the need for more individual responsibility and self-regulation when it comes to personal data. "Within the overall tech industry we are about giving users individual choice and control," he said.

He demonstrated the Google dashboard, which allows people to see the services they are using, how they are using them and the profile that is being created.

Pointing to his own corporate Google account, he showed how it can calculate an age range for his profile, knew that he had been searching for bicycles, and had recorded his film preferences. "I can edit or opt out of any of those features," he told delegates. "You can change your profile or the amount of data that is or is not being collected about you as an individual."

### The internet never forgets?

Another important element of the unfolding debate is the European Court of Justice's (ECJ) controversial ruling of May, which said that Google must remove links to any content that is "inadequate, irrelevant or no longer relevant." While the information will still be online, the search engine will not index it.

Speaking about the ruling yesterday, Schilling noted it's interesting that the ECJ decided what it did, but then also put it in Google's hands to decide what is to be forgotten or what is in the public interest.

## WEDNESDAY HIGHLIGHT

SESSION

### Is there a trade-off between privacy and security?


#### Key takeaways

- Global rules on how companies use personal data should be harmonised;
- There should also be more individual responsibility when it comes to personal information on the internet;
- Google has set up an advisory council to formulate principles on the ECJ's right to be forgotten ruling.

"That's something that we as a company are working through," he said, adding that Google has set up an advisory council in Europe to try to not only come up with some good principles but also to push the European Union to provide a firmer definition.



Google data centre: The Dalles, Oregon




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co-chair and human rights authority Baroness Helena Kennedy, urged lawyers to rethink this.

"Climate change is an issue of justice with repercussions for all aspects of law," said Robinson. "Whether you work to protect the interests of business, citizens or states – climate change is part of your portfolio."

IBA president Michael Reynolds said the significance of this first-of-its-kind report depends on the extent the legal community can motivate those in power to create change.

It recommends 50 practical ways to strengthen existing legal frameworks and calls on lawyers – as well as world leaders, policymakers, corporations, governments and other bodies – to 'take bold action towards climate justice.'

These include the development of a model statute on legal remedies for

climate change, 'greening' existing human rights, and creation of an IBA council to raise awareness of climate justice among lawyers, judges and lawmakers around the world.

Robinson's speech at the 2012 IBA annual conference inspired Reynolds to provide leadership on climate justice, and was the impetus for the taskforce. Yesterday, she laid out a new set of challenges.

She encouraged the inclusion of vulnerable and marginalised people in decision-making at all levels, noting "we should never presume the professionals among us have all the answers."

Responsibility for implementing the recommendations lies with the entire legal profession. She also said the protect, respect and remedy principles of the UN Guiding Principles on Business and Human Rights could help the IBA develop a useful tool for climate justice.

#### EDITORIAL

Editor: Tom Young

Reporters: Ashley Lee, Danielle Myles, Zoe Thomas, Gemma Varriale

#### PRODUCTION

Production editor: Andy Alcock

Web designer: Joshua Pasanisi

#### ADVERTISING

Head of sales: Richard Valmarana

Associate publisher Latin America: Roberto Miranda  
Tel: +44 20 7779 8435

rmiranda@euromoneyplc.com

Associate publisher Asia & Africa: William Lo  
Tel: +852 2842 6970

william.lo@iflrasia.com

Business development: Europe & North America: Liam Sharkey  
Tel: +44 207 779 8384

lsharkey@iflrasia.com

Managing director: Timothy Wakefield

Divisional director: Greg Kilminster

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#### IFLR SUBSCRIPTIONS

UK hotline Tel: +44 20 7779 8999

Fax: +44 20 7246 5200

US hotline Tel: +1 212 224 3570

Fax: +1 212 224 3671

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# AIFMD confusion for non-EU funds

Non-EU funds cannot rely on reverse solicitation to build their presence in Europe, according to panellists speaking on 'Asia – merging into the global investment community' yesterday.

The first half of the session focused on European regulations – namely questions raised by the implementation of the Alternative Investment Fund Managers Directive (AIFMD). While custodial arrangements and remuneration were discussed, AIFMD's marketing changes sparked the most discussion.

A passport for non-EU funds under AIFMD has not yet been introduced. Instead they've relied on reverse solicitation – which isn't included under marketing – to sell products to European investors.

"In Germany...we advise that reliance on reverse solicitation is not the basis for a marketing model," said chair Edgar Wallach, a partner at Hengeler Mueller in Frankfurt.

He advised funds to instead

notify the regulator, which is required under German law.

But panellists from elsewhere agreed that funds cannot build a sustainable client base on reverse solicitation alone.

## Compliance concerns

For a while there were more aggressive views of what constitutes reverse solicitation, but that has changed.

"Given the behaviour of the regulators now in terms of using sanctions to try and inform behaviour, I think people are being a lot more cautious," said Daniel Morrissey, who heads William Fry's asset management and investment funds practice.

But funds risk irritating existing European investors by not marketing to them at all. And it would be challenging to increase a fund's European presence by word of mouth alone.

Reverse solicitation requests entail careful record-keeping. Alternative investment fund managers (AIFMs) must keep a record of the sequence of

communications that demonstrates which documents were sent, said Wallach.

But even the definition of marketing under AIFMD varies on a jurisdiction-by-jurisdiction basis.

An audience member noted that in the Netherlands, a manager can



Edgar Wallach: Germany has the strictest approach

say that the fund exists but people need to call for information. In Luxembourg, said Frédérique Lifrange of Elvinger Hass & Prussen, listing does not count as marketing as long as the sales and redemption information is removed.

Germany has the strictest

approach. Wallach said that it requires authorisation – not only registration or notification – if a manager wants to disclose the name of the fund and details about the fund. Although roadshows are permitted, the regulator's approach to details is still a grey area.

## Possible passports

Lawyers were hopeful the European Securities and Markets Authority (Esma) would recommend beginning work on a non-EU funds passport soon. Under the passport, funds will have a reference member state selected by criteria that has not yet been released.

Esma has an ambitious timeline, recommending it be done by July 22 2015 so that it could be implemented by early 2016. It will likely take longer. In a recent speech, an executive at the Irish central bank hinted that there is still much to do.

In the meantime there is a solution, but it requires AIFMD compliance.

Managing companies can be established in Luxembourg or

## WEDNESDAY HIGHLIGHT

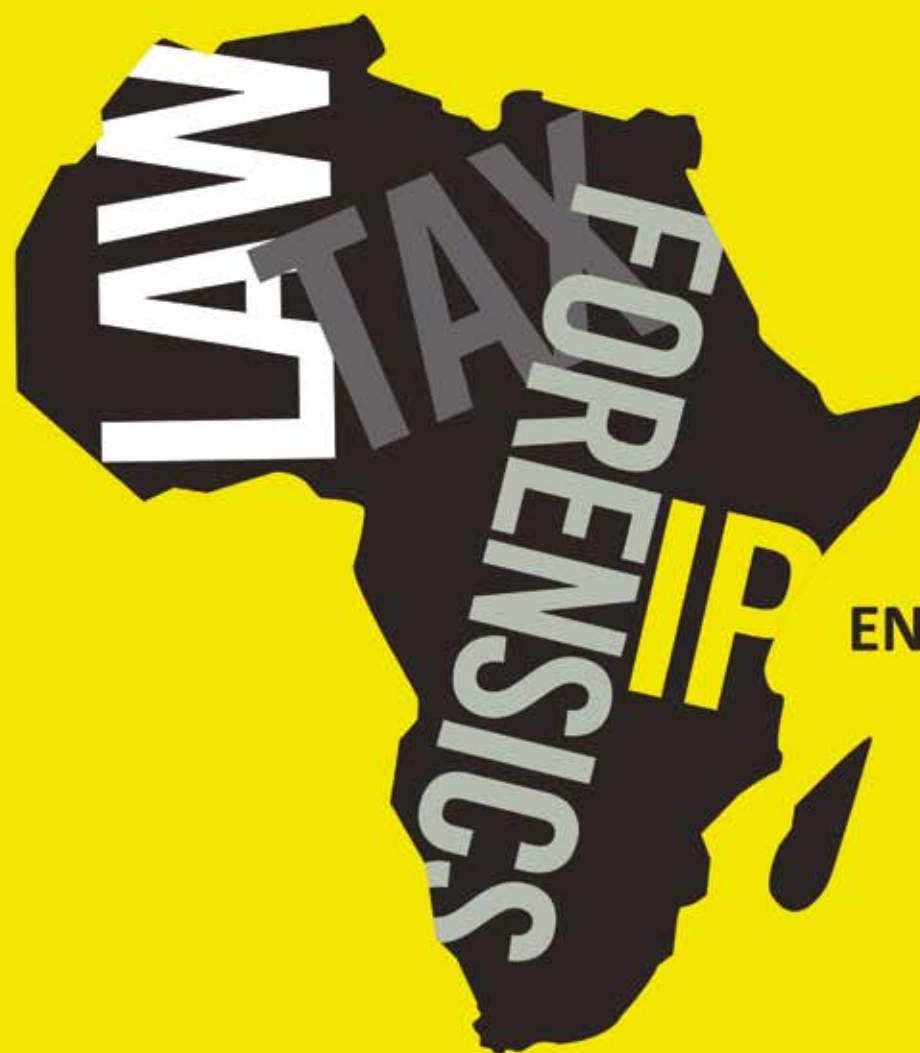
SESSION

### Asia – merging into the global investment community

#### Key takeaways

- Non-EU funds are in a difficult position following the introduction of AIFMD;
- Lawyers agreed that relying on reverse solicitation is not a sustainable marketing model;
- It's hoped that a non-EU passport will be introduced in 2016, but regulators have recently hinted that it might come later.

another European country under AIFMD to take advantage of the EU passport, said Stéphane Karolczuk of Arendt & Medernach in Hong Kong. That company will then delegate fund management responsibilities back to Europe.



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# Fighting for leprosy victims

Leprosy has dropped drastically since 2000. But although its international prevalence is low, its victims face discrimination – and possibly ostracisation – from members of society. Some do not have basic human rights – even after they're cured.

Yohei Sasakawa, chairman of the Nippon Foundation, the World Health Organisation (WHO) Goodwill Ambassador for Leprosy Elimination and Japanese Government Goodwill Ambassador for the Human Rights of People affected by Leprosy, has made it his life's work to ensure that the human rights of those affected by leprosy are upheld.

In January 2013 the IBA and the Nippon Foundation announced their Global Appeal 2013 to end stigma and discrimination against people affected by leprosy. They are working together to increase awareness of discriminatory laws against leprosy sufferers and to lobby governments for their repeal. Here Sasakawa discusses how he became involved in the fight against leprosy and his hopes for the collaboration between the Nippon Foundation and the IBA.

**Q You have described the elimination of leprosy as your life's work. What motivates you toward that goal?**

I became involved in the fight against leprosy after a visit to a small village in South Korea, 45 years ago. At that time I was working in business, but had a chance to visit a leprosarium alongside my father—the founder and chairman of the Nippon Foundation. I met a leprosy patient for the first time there.

Many of the patients were severely disfigured or disabled. But what shocked me more were their expressionless faces and lifeless eyes after years of discrimination and isolation. I was very frightened.

But my father wasn't. He went up to each patient, held their hands and gave them words of encouragement. While watching my father, I realised that working for people in need was what I really wanted to do.

Once I started working for the Nippon Foundation, I channeled most of my energy towards the fight against leprosy. Initially we set out to achieve the World Health Organisation (WHO) elimination target as a public health problem

– defined as reducing the prevalence of leprosy to fewer than one case per 10,000 people. By promoting the widespread use of multi-drug therapy (MDT) for early diagnosis and treatment, the number of endemic countries went down dramatically; Brazil is the only country yet to reach elimination as a public health problem.

**Existing laws are perpetuating discrimination against leprosy patients**

The day when leprosy is eliminated from every country may seem within reach, but our fight does not end there. Instead, we will need to strengthen our activities: there are still places where people treated for leprosy are excluded from society and are unable to return even after they are completely cured.

Leprosy is a medical problem and a human rights problem. Although there has been a lot of progress on the medical front, it has been a challenge to solve the human rights problem.

I often use the example of a motorcycle when talking about leprosy: the front wheel represents the medical aspect of curing the disease, while the rear wheel represents the social aspect of eliminating discrimination against people affected by leprosy. If the motorcycle is to move forward, both wheels must be the same size.

I am determined to continue this

fight until there are no more people suffering from leprosy, as well as the stigma and discrimination it entails.

**Q Could you describe an average day in trying to eliminate leprosy?**

My strategy is fourfold. First, I visit leprosy hospitals and colonies inhabited by people affected by the disease. On my visits I check whether patients have access to MDT, and I make sure to hold their hands and give words of encouragement. Many of the residents have lived in these facilities long after they finish treatment, fearing discrimination if they attempt to return to mainstream society. I listen to them to understand what's needed to help them reclaim their human rights.

Second, I encourage local health workers and social workers during my visits to leprosy hospitals and colonies. I am always eager to hear their updates as I find that there is much to learn from their day-to-day work. I believe that many solutions are hidden in the frontlines, so I share their observations with political leaders and health authorities.

Third, I receive commitments

from endemic countries' leaders to keep leprosy on the list of health priorities. The prevalence of leprosy is lower compared to diseases such as HIV/AIDS, malaria and tuberculosis, so it often ranks lower on the list of health priorities.

It is also necessary to inform them of the importance of eliminating discrimination against people affected by leprosy. By calling on heads of state to pledge their support for leprosy control, my goal is to energise health authorities and establish measures that call for elimination of discrimination to be incorporated into government policies.

Lastly, I raise awareness through media. Many still believe that leprosy is a curse, that it is hereditary, and that it is highly contagious. None of these statements are true. We need media support so that the public understands that leprosy is curable, medication is free and that discrimination has no place.

Wherever possible, I invite local media when meeting people affected by leprosy because I want our handshakes, hugs and interactions to be shown to the public. I believe these images help change public attitudes toward the disease.

**Q How has the Nippon Foundation collaborated with the IBA on its World Leprosy Day campaign?**

On January 24 2013, the IBA and the Nippon Foundation launched the 8th Global Appeal to End Stigma and Discrimination against People Affected by Leprosy in London. The two organisations pledged to work together to

raise awareness about discriminatory laws and lobby governments around the world for their repeal to ensure that the human rights of people affected by leprosy are upheld accordance with the principles and guidelines enshrined in the UN Universal Declaration of Human Rights. Representatives of people affected by leprosy also played a key part in this event.

Since 2006 I have led Global Appeals to End Stigma and Discrimination against People Affected by Leprosy as the WHO Goodwill Ambassador for Leprosy Elimination, timing its launch on or near World Leprosy Day. It is intended to raise public awareness through the media and to draw in the support of world leaders, representatives of people affected by leprosy, and organisations concerned with human rights.

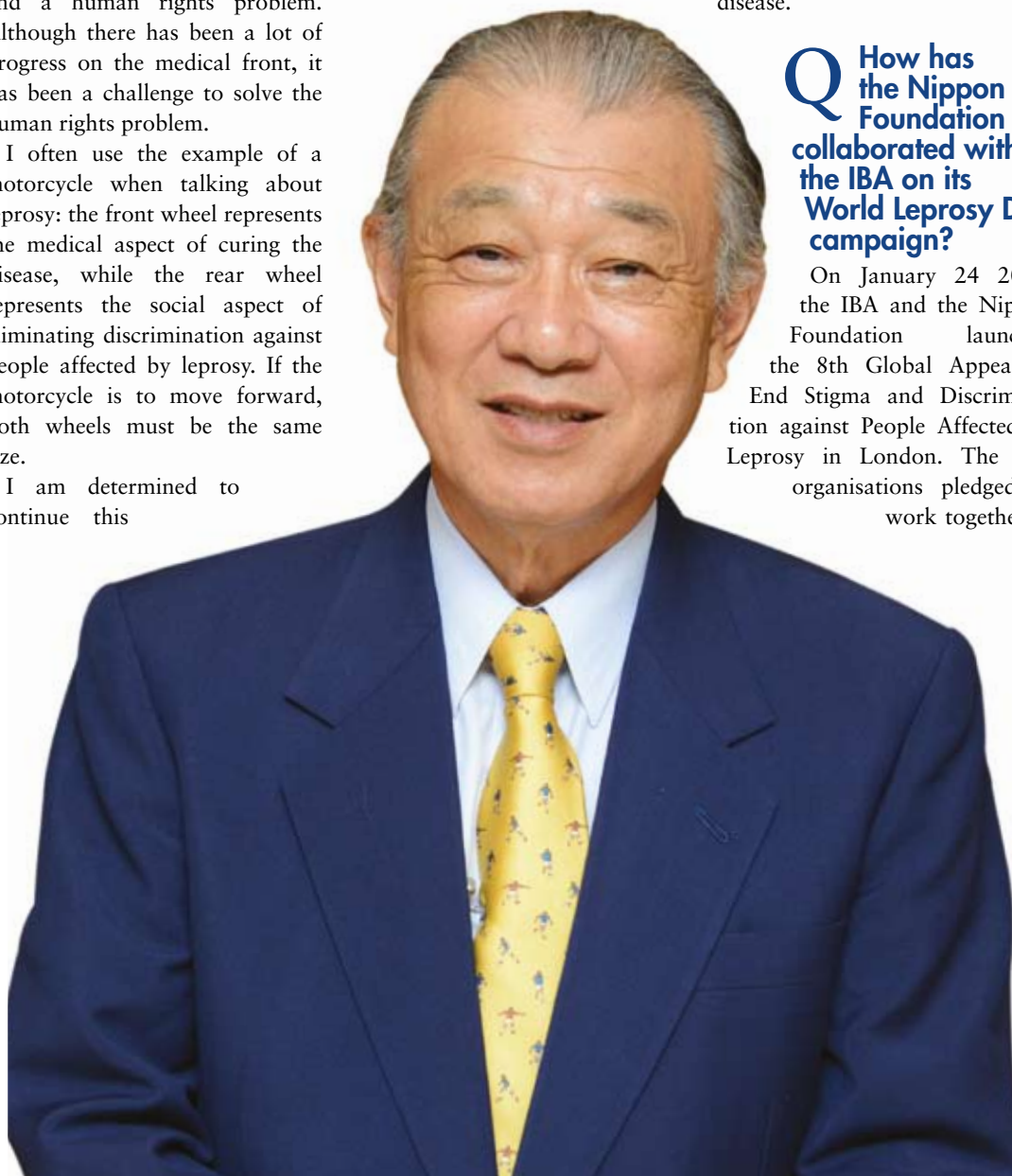
Many countries still recognise leprosy as grounds for divorce. It is also a reason to prohibit someone from standing for elections, travelling on public transportation, and obtaining a drivers' license. Existing laws and regulations are perpetuating this discrimination.

In 2003 I began raising problems caused by leprosy as a human rights issue. I visited the Office of the High Commissioner for Human Rights in Geneva and then approached the UN Human Rights Council (UNHRC) – the successor to the Human Rights Commission – to call for the abolishment of stigma and discrimination against people affected by leprosy and their families.

Our efforts paid off on June 2008 when a resolution titled "Elimination of discrimination against persons affected by leprosy and their family members" was submitted to the UNHRC by 59 countries under the leadership of the Japanese government. It was adopted after unanimous vote by all 47 member states. In December 2010, the UN General Assembly adopted the resolution and its set of principles and guidelines without a vote. With this, the UN officially recognised leprosy as a global human rights issue.

After that I hoped to collaborate with the world's legal practitioners, bar associations and law societies to end discrimination against people affected by leprosy.

As the global voice of the legal profession, I cannot emphasise how meaningful the IBA's endorsement has been for everyone involved in the global fight against leprosy.





# How to build the rule of law

The development of human rights in Myanmar has been a crucial topic as the country moves from a military-controlled state to a democracy. After decades of military rule, it has been an arduous process to establish rule of law to protect basic rights.

International media has focused on disenfranchised minorities denied citizenship or even official recognition. But the country's human rights problems extend far beyond those issues; they involve the framework of the law itself.

"In this transition towards democracy in Myanmar, it's very important to discuss the rule of law, the judiciary and judicial power after 40 years of military government," says Tomas Ojea Quintana, former UN Special Rapporteur on the Situation of Human Rights in Myanmar.

## Constitutional reform

"The foundation for the country is the constitution, and constitutional reform needs to be at the top of the agenda in Myanmar," says Robert Pe, partner at Orrick Herrington Sutcliffe and advisor to Aung San Suu Kyi, the leader of Myanmar's opposition party.

"That is the starting-point for other reforms," he adds.

Clarity is needed soon. There is a general election next year, and it is still unclear whether Aung San Suu Kyi is eligible. The constitution prohibits those whose spouse or children have 'allegiance to a foreign power' from running for president; her late husband was British, while her two sons are also foreign citizens.

There is a drive to amend the constitution, but alarmingly the military retains the right to veto constitutional amendments. Suu



Kyi's party, the National League of Democracy, recently ran a signature campaign to amend the military veto provision, and five million signatures were gathered within two months.

Pe says that the government must listen to the people's will: "You can do a lot of building around the edges, but if a very large number of people in the country believe the constitution is fundamentally flawed and want it changed and you fail to deal with that, you are not building on a very strong base."

## Legal recourse

Another issue is establishing processes for average citizens to hold government officials accountable for their actions. They did not exist in Myanmar's four decades under military rule – neither did the rule of law. "Myanmar needs a lot of support

*Some progress has been made and there's reason to be cautiously optimistic, but there's still a huge distance that needs to be covered*

from the international community to create an environment to bring their complaints, to file suits and complain about human rights issues," Ojea says.

Although systemic human rights abuses were well-documented, there has not been any

process of accountability in the country versus the perpetrators. "The question for the country is whether it can establish accountability mechanisms," Ojea says, adding that they are also needed for the present and the future so that ordinary people can protect their rights.

The government has attempted to address this. Three years ago the president created a human rights commission, but it answers to the executive branch; Ojea emphasised that it's important to have an independent institution to protect human rights.

Lawyers are working to rebuild key systems. The IBA's Human Rights Institute is working with Myanmar lawyers to establish an independent national bar association. A pilot programme for rule of law centres, which will give intensive legal training to members of the legal profession

### SESSION

**Human rights in Myanmar – prospects for the rule of law**

### COMMITTEE

**Human Rights Institute**

### TIME/VENUE

**Thursday, 2.30pm – 5.30pm, Room G402**

### Key takeaways

- After 40 years under military rule, Myanmar must focus on developing its legal system to protect human rights
- Constitutional reform is needed before a general election next year
- The government must also establish an independent ombudsman or institution to protect human rights in the country
- Lawyers are also organising to protect human rights, with the IBA working with local counsel to establish an independent bar association

and the judiciary, may start in November.

Regardless, change will not happen overnight. Pe stresses that people must understand that Myanmar has a long way to go. "Some progress has been made and there's reason to be cautiously optimistic, but there's still a huge distance that needs to be covered in terms of reform, liberalisation and rebuilding the rule of law, the judiciary and other legal institutions."

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# The end of the line?

## SESSION

**Is Skype the limit? Are phone bills a thing of the past?**

## COMMITTEE

**The Communications Law Committee**

## TIME/VENUE

**Thursday, 9.30am – 12.30pm, Seminar room 2**

## Key takeaways

- As VoIP technology grows, regulators are struggling to regulate it appropriately
- Traditional telephony regulation will not always work in the context of new technology
- Speakers in today's session will examine different approaches to regulating the market, tackling Japan, Nigeria, Turkey and Singapore

The rise of Skype – and more generally Voice-over-Internet-Protocol (VoIP) – has been dramatic. While landlines still prevail in major businesses, the domestic and personal telecoms market has been almost consumed by VoIP.

As the technology grows, suppliers such as Skype have developed a range of disruptive low cost (and even no cost) services that have become wildly popular with consumers. But they've also threatened incumbent operators and puzzled regulators.

How should this growing technology be regulated, and should the VoIP market be defined in the same manner as the traditional telecoms sector?

Anne Vallery, a partner at VVGB in Belgium and secretary of the Communications Law Committee, along with Diane Mullenex, partner at Pinsent Masons, are hoping to find the answers.

In this morning's session, 'Is Skype the limit? Are phone bills a thing of the past?', Vallery, Mullenex and their panellists will

explore the latest regulatory developments relating to VoIP services.

The session will discuss the approaches taken in various jurisdictions to regulate VoIP services, and how these are changing in light of new technologies including apps. Speakers from Japan, Nigeria, Turkey and Singapore will discuss their national approaches to regulation, and examine the successes and failures in their respective regimes.

## What's the market?

Crucially though, speakers will also discuss how to define the market. "We see the session as a way to first tackle the description of the business model of different players," says Vallery.

There are nuances. Certain markets contain a large number of over-the-top content (OTT) providers. This refers to the delivery of audio, video, and other media over the internet, but without a multiple system operator being involved in the control or distribution of the content. Elsewhere, VoIP dominates – but



some is so-called managed VoIP and others unmanaged. "So we want to define these, and assess the competitive structure of the different national markets," says Vallery.

By looking into the future concerns that VoIP service providers are likely to face as the technology continues to develop, this session will assess the practical implications for businesses, telecom operators and consumers.

At one extreme, some jurisdictions have tried to outlaw certain VoIP services. And while most others have accepted that VoIP can be offered to their citizens,

they have imposed varying degrees of regulatory supervision over providers and their services.

Where regulation has been imposed, many questions and grey areas remain.

In Europe, for instance, the traditional telecom operators historically had a monopoly over the so-called fixed voice market. This monopoly led to advantages and as a result the European Commission introduced competition law, forcing regulators to grant more licenses and, as a result, create more competition. The session aims to uncover how this will apply, if at all, to new technologies.



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# No selfies in the courtroom

The legal profession is underusing social media because many don't understand the risks and are concerned about breaching unspecified rules.

Ethical and confidentiality lapses can be easier to make on social media sites such as Twitter, LinkedIn and Facebook. Both individuals and law firms are finding themselves caught between the desire to use these services as a way to maintain contacts, participate in discussions or as a promotional tool and the fear that doing this could put themselves, their business and their clients at risk.

The release of principles by the IBA along with the development of local guidelines by bars and regulators in various jurisdictions is helping to address the risk. But prevailing fear and lack of understanding of how to manage those risks are preventing attorneys from using social media outlets in a positive way.

"I would say we should be encouraging the use of social

media, so long as it's used appropriately," says Anurag Bana, a senior lawyer with the IBA who will co-chair today's panel "Character machination": 140 intangible characters can have tangible professional consequences testing the very character, integrity and independence of the legal profession'.

Bana says that social media is indifferent to cultural variations; making it a great tool for global communication, but the reactive nature of that communication can be compromising to the justice system. "More people are using social media and that is why these principles are so important for members," he says.

As social media has grown, the legal market has debated how best to adapt. Some firms have reacted by banning its use, others by developing firm profiles. But the legal profession trails

other industries in its use of the tools. Failing to use this properly has meant that important legal insights are missing from global debates.

"The important thing on social media is to ask questions and be topical," says Howard Kennedy FSI partner Mark Stephens, a panellist for the session. "One thing lawyers are bad at is being provocative and opinionated."

The lack of guidelines stating how to use social media has further delayed the growth in social media use. Many lawyers have opted for caution, not wanting to cross a line whose whereabouts is unclear. Because of this, the legal professionals who are active on social media are able to develop disproportionately stronger followings.

To help their members, bar associations from South Africa and Scotland to Boston are outlining

rules. While they have the same goals, the approaches are different. Those attending the panel can expect the merits of each to be debated.

"With social media, detailed rules are necessary because it's so complicated. That is difficult to address through general principles," says the panel's other co-chair, Claudio Visco, managing partner at Macchi di Cellere Gangemi in Rome. "I think you have to address a number of cases so that each can be treated differently."

Visco, who does not use social media, is unsure whether the benefits outweighed risks.

So far, the only cases in which the use of social media led to a contempt of court or criminal charge have been against jurors. Attorneys will have a clearer idea of what violates the rules of court and client confidentiality. Nonetheless, having clear guidelines will help to set the record straight and allow lawyers to use social media as a productive communication tool.



## SESSION

**'Character machination': 140 intangible characters can have tangible professional consequences testing the very character, integrity and independence of the legal profession**

## COMMITTEE

**The Bar Issues Commission**

## TIME/VENUE

**Thursday, 9.30am – 12.30pm, G408**

## Key takeaways

- Attorneys are not taking full advantage of social media for fear of the risks, some of which still remain unclear
- New guidelines drawn up by the IBA and local bars should help clarify how legal professions should and should not use social media
- Fear of crossing the line has limited the voice of the legal professions in social media

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# Spoilt for choice

Christophe Bernasconi of the Hague conference on Private international law explains to Danielle Myles the benefits of a global treaty on the effectiveness of choice of court agreements

A global agreement on the recognition and enforcement of court rulings makes so much sense, it's difficult to understand why it isn't already in place. After all, a similar agreement regarding arbitration has been in effect since the 1950s.

But cross-border cooperation among courts has been a problem for some time. Judges in different countries can disagree on who has jurisdiction to hear cases, and whether foreign rulings should be enforced.

The Convention of Choice on Court Agreements, better known as the Choice of Court Convention (Convention), fills an important gap in this regard. Today it has just one party – Mexico – and two signatories – the EU and US – but if all goes to plan, it should take effect as early as next year.

Christophe Bernasconi, secretary general of the Hague Conference on Private International Law, is heading the initiative. Here, he speaks about its underlying principles, the advantages to flow from its adoption, and the difficulties in reconciling its provisions with local law.

**Q Can you briefly explain the fundamental principles underpinning the Choice of Court Convention?**

The Convention aims to ensure the effectiveness of choice of court agreements – also known as forum selection clauses – between parties to international transactions. It only applies to business-to-business (B2B) contracts in an international context. There are three basic rules which, subject to a short list of narrow exceptions, must be followed. First, the court chosen by the parties must hear the case (article 5). Second, any court not chosen must decline to hear the case (article 6). Third, any judgment rendered by the chosen court must be recognised and enforced in other contracting states (articles 8 and 9).

So in effect, the courts are required to respect and give effect to forum selection clauses in B2B contracts. The primary objective is to give legal certainty and predictability to the contacting parties regarding where to litigate a dispute that arises under their contract. It reduces the time and

expense that both courts and businesses face when dealing with international jurisdictional issues and the enforcement of foreign rulings. And this, in turn, creates a legal environment that is amenable to international trade and foreign direct investment.

**Q When did work on the Convention begin, and what must happen for it to take effect?**

Work formally started in April 2002 when the political decision was made to develop a convention in this field. And the actual negotiations lasted until 2005 when the 20th session of the Hague Conference approved the final text of the Convention. But strictly speaking, the negotiations go back further than that. The Convention is actually a spin-off of a broader project – known as the judgments project. This was started in

**The Convention will enter into force after the deposit of a second instrument of ratification or accession**

the early 1990s with a view to developing a global instrument on jurisdiction as well as recognition and enforcement of judgments in civil and commercial matters. But this massive project proved too ambitious, and the members of the Hague Conference wisely decided to scale down its scope, and do something more manageable and which was more likely to achieve consensus: the Choice of Court Convention.

Looking ahead, the Convention will enter into force after the deposit of a second instrument of ratification or accession. Today, only Mexico has acceded to the Convention. But on January 30 this year the European Commission issued a proposal for approval of the Convention. That means that after the proposal is approved by the European Parliament and European Council, and the necessary formalities have



occurred, there will be a second contracting party (the EU) and the Convention will enter into force. It will bind Mexico and 27 of the EU's 28 member states (Denmark will not be bound). I'm very hopeful that this will occur in early 2015, as this is the time the revised Brussels I regulation will enter into force. So the EU authorities are, rather wisely, planning for the two instruments to enter into force on the same day.

**Q The Convention is often described as the litigation counterpart to the New York Arbitration Convention. Is this an accurate description?**

Absolutely. Commercial arbitration is, of course, widely used. But good commercial arbitration has also become very expensive, and so it is not always an option – in particular for small and mid-sized companies (SME). When these companies consider the court avenue, their first question of course is: which court has jurisdiction to hear the dispute? If the parties have agreed on the court in their contract, the Convention provides a very clear and predictable answer to this question. So the Convention will ensure that parties can expect what they have bargained for – to have any disputes arising from their contract heard exclusively by the court they have chosen – and have the judgment recognised and enforced elsewhere.

That really demonstrates the similarity between the conventions; both of which promote certainty, efficiency and predictability in international dispute settlement. At a comparable level, the New York Convention will continue

to be the basic legal instrument for international commercial arbitration, but the choice of court convention will make the litigation path more attractive, in particular for SMEs that cannot always afford commercial arbitration.

**Q Today, how common are choice of court agreements in contracts to which the Convention would apply, and how readily do courts respect them?**

To my knowledge there is no comprehensive and updated data on this. There are, however, some sectorial or regional surveys that suggest that these agreements are indeed very common in B2B contracts. The problem is that choice of court agreements are not always respected under divergent national rules. Especially when cases are brought to a court other than the one designated by the parties; courts often don't regard these agreements as binding. In the common law context, for example, you often hear courts saying 'you may have chosen me as the court, but I declare myself forum non conveniens because a given court elsewhere is better placed to hear the dispute' (or words to that effect). The Choice of Court Convention would change that.

**Q Other than the EU, the only other party to sign but not ratify the Convention is the US. Has it taken any steps to ratifying it?**

Yes the ratification of the convention is very much being discussed by the relevant authorities in the US. The challenge is that they are still deciding whether to implement it at the

federal level or state level. So the delay has nothing to do with the merits of the convention, which is clear to the US, but rather they are still assessing the best model for implementing the Convention into domestic law.

**Q Which other countries have shown the greatest interest in signing?**

We know that the Convention is being assessed in Argentina, Australia, Canada, New Zealand, the Russian Federation, Paraguay, Singapore, and to some extent Turkey. In some of these jurisdictions, the Convention has already left a clear mark. Australia and New Zealand, for example, underscored the importance of the Convention via the Trans-Tasman Proceedings Regime, which implements essential elements of the Convention and entered into force in October 2013. And Hong Kong and Mainland China have concluded a bilateral treaty for the recognition and enforcement of judgments in civil and commercial matters. Again, that takes the Choice of Court Convention as a model to the extent it deals with choice of court clauses.

Some very senior people have also put their weight behind the Convention. Last year, Australia's chief justice and solicitor general called for the country to sign and ratify the Convention. And the chief justice of Singapore has

**The problem is that choice of court agreements are not always respected under divergent national rules**

really championed the country's accession. He was one of the first high ranking officials to recognise the Convention would be a very important alternative to arbitration which clearly has become too expensive to many players. There is also express support from the International Chamber of Commerce, German Bar Association and the Inter-American bar association. And in February 2014 the Council of Bars and Law Societies of Europe also strongly encouraged the EU to ratify.



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## VOX POPS:

# What are your Tokyo highlights?



**Veronica Zarate**  
**Mitrani Caballero Ojam & Ruiz**  
**Moreno**  
**Argentina**

The whole place is beautiful. I love the Tsukiji fish market near the river. I also like Roppongi for the night life and Ginza, which is like the Japanese Fifth Avenue.



**Paul Cohen**  
**Perkins Coie**  
**US**

I have loved taking the underground at rush hour. It's one of those iconic Tokyo experiences that you have to have here.



**Stéphan Le Goueff**  
**LG Avocats**  
**Luxembourg**

It's difficult to sum up in one sentence, but the energy of the city has really struck me. The Sunday markets were a highlight for me.



**Pia Lisbeth Nielson**  
**Molt Wengel**  
**Denmark**

We went to the Peninsula hotel and you can see the whole city from up there, which was fantastic. It's also been great just to catch up with people.



**Rajiv Dutta**  
**Senior advocate**  
**India**

It's such a beautiful and organised city. I particularly like the Japanese style of small, hidden-away restaurants, with such fresh food.



**Bunmi Akaakar**  
**River State University**  
**Nigeria**

The people are so friendly and respectful. I haven't had time to really sight-see, but you can certainly never get lost – everyone's happy to offer directions.



**Greg Moore**  
**Barreau de Montréal**  
**Canada**

I visited the the Hamarikyu Gardens which were simply beautiful; an oasis in the city. It felt like you'd had a massage when you left.



**Marina Hadjisoteriou**  
**Michael Kyprianou & Co**  
**Cyprus**

I haven't seen much yet, but I love the fact that the city is so clean, and the people are so honest. I have always felt really safe, too.

# Corruption prosecutions lag behind legislation

More than half of the countries that are party to the OECD anti-bribery convention have only had between zero and two investigations into bribery or corruption in the 15 years since the convention was signed.

Many of these investigations have been minor, particularly in respect of foreign bribery. At yesterday's 'Global update on anti-corruption enforcement and legislation' panel, the speakers noted that the strength of many laws is increasing. That raised the question of why so many countries were still failing to increase the number of prosecutions.

"The reason for this situation is not necessarily the same in every country," said Nicola Bonucci from the OECD. "The more we know about the level of investigation, enforcement and prosecutions the better we can understand the triggering factors. We know there are common triggering factors and specific factors."

Italy is a prime example of a

country that, according to Bonucci, has both reasonable laws and a good track record for opening investigations. Two-thirds of investigations, however, have been closed due to statute of limitation provisions in the law.

The US is leading in enforcement of foreign corruption and bribery laws, opening investigation and prosecutions on foreign officials with assets in the US.



Nicola Bonucci

Last week the US Department of Justice (DOJ) reached a settlement on corruption charges with an official from Equatorial Guinea. The deal allows the official, who is also the son of the country's president, to sell US-based assets, including his Malibu mansion, a Ferrari and his six life-size Michael Jackson statues. The agreement is seen as an embarrassment for the family of Equatorial Guinea's president, but is only half the value of the assets the US government was originally seeking.

The proceeds of the asset sale are intended to be used to help the people of Equatorial Guinea. The attitude of the government towards the seizure, however, makes it unclear how that plan will be carried out.

Part of the issue in enforcing laws on cross-border corruption, has been how those concepts are viewed elsewhere.

Bribery is rare in Africa, according to Babajide Ogundipe, a partner with Sofunde Osakwe Ogundipe & Belgore in Nigeria. More commonly,

assets belonging to the government are taken or used by officials when they are in power, with the view that their position gives them this privilege. Many officials do not see

**The deal allows the official...to sell...his Malibu mansion, a Ferrari and his six life-size Michael Jackson statues**

this as corruption. The position held by officials in Equatorial Guinea is that the money belongs to the government and how it is used should not be the business of foreign powers.

The effect of this case and the seizure of assets in Europe is that those looking to move assets acquired through corruption are placing them in the Middle East,

## WEDNESDAY HIGHLIGHT

SESSION

**Global update on anti-corruption enforcement and legislation**

### Key takeaways

- Anti-corruption laws are increasing, but investigations and prosecutions still lag;
- The recent US case against an official from Equatorial Guinea is an example of how cross-border corruption laws are being enforced.

particularly Dubai. "I think you will find that they will be more careful," said Ogundipe.

The US's actions have raised concern that if all countries took such a sweeping view to how they enforce their own anti-bribery and corruption laws it would make any enforcement chaotic. The global level of inaction lessens this concern for the moment though.





**Eiji Suga**  
**KPMG**  
**Japan**

I'm from Tokyo so I have a different perspective. I love the international food though; and the Imperial Palace in Ginza is the perfect place to exercise.



**Matthew Giles**  
**Washington University – St. Louis**  
**US**

Tokyo at night is amazing: the view and the lights. We also went to the Japan Correspondents Club earlier this week, which we loved.



**Agada Elachi**  
**Greenfield Chambers**  
**Nigeria**

The Tokyo Tower has been a highlight for me. I had a look around the base yesterday and tomorrow I'm going to go up it and admire the view.



**Mauricio Costa du Rels**  
**Würth Kim & Costa du Rels**  
**Bolivia**

Tokyo's attitude towards this conference has impressed me. The fact that we had royalty and the executive in one room for the opening ceremony on Sunday is staggering.



**Emmanuel Iwuanyanwu**  
**Emmanuel Iwuanyanwu & Associates**  
**Nigeria**

The city itself is beautiful. I've enjoyed the wonderful infrastructure, the hugely effective trains, and of course the people, who are so calm and welcoming.



**John Birch**  
**Cassels Brock & Blackwell**  
**Canada**

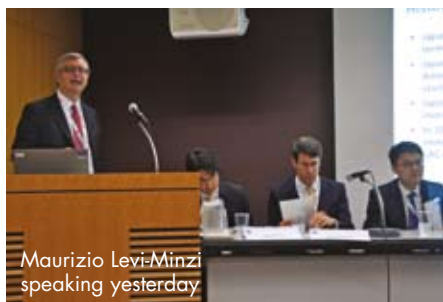
I enjoy the mix of modern and old, the skyscrapers and the temples. I also love the Japanese sense of formality and service. It puts North America to shame.

## How to make Asia-LatAm partnerships work

Partnerships between Asian and Latin American companies are increasingly long-term growth ventures. Reaching these fruitful arrangements, however, can be a long and arduous process, particularly for the lawyers.

That was the message from panellists at yesterday's session 'Cross-border deals between Asian and Latin American companies – the untold stories by both in-house and outside counsel who lived through them'.

Many large Asian investors have been present in Latin America for decades, in the cases of Japan, close to half a century.



Maurizio Levi-Minzi speaking yesterday

However, increasingly joint ventures and strategic acquisitions are done with an eye towards long term growth.

Asian investors are looking at the rising middle class in Latin America as an opportunity to solidify longer term investments.

"The change is a very important

one," said Maurizio Levi-Minzi, a New York-based partner with Debevoise & Plimpton. "You come from a position focused exclusively on commodities and on taking resources, to one of investing in the future of Latin America. That changes the rules of the game very significantly."

Asian capital accounts for more than a quarter of the total value of deals in Latin America. This is made up mostly through a large number of small and mid-market deals rather than high value transactions.

The number of deals is also indicative of the increasingly long-term relationships between Asian investors and Latin America business. The preference towards these relationships is reflected in Asian discomfort to discuss breakup clauses at the beginning of a partnership.

"Sometimes Japanese companies don't want to discuss exit mechanisms because they are hesitant to discuss divorce when they marry," said Hideaki Umetsu, a partner with Mori Hamada & Matsumoto in Tokyo.

This can lead to a desire for less detail in a contract that runs counter to Latin American civil law practices.

The number of questions and the demands placed on local Latin American counsel can also be off-putting. Language barriers and different ideas about the role of lawyers can contribute to this confusion.

## The thorny issues of conflict management

All lawyers confront conflicts in their daily practice, but definitional problems complicate the matter further.

Carlos Valls Martinez of Fornesa Abogados in Barcelona noted that the medical profession has a clearer definition than the legal profession.

"They define it as when there is a primary interest [...] but we also encounter a secondary interest that has a zone of influence in our duty to defend the primary interest," he said. "From the law's point of view that in itself is already considered a zone of risk for a potential breach."

How lawyers tackle conflicts affects society's view of the profession, he warned.

Clients cannot evaluate the quality of

is a dynamic process. "That means you have to be on the lookout for changing conflicts and changing duties all the time."

Factors to consider include the size of the economy, size of the legal market and the



size of the law firms in the legal market. To complicate matters, common and civil law jurisdictions, as well as those following other legal traditions, have different views on conflicts; others may have their own quirks.

The client also matters. Myron Steele of Potter Anderson & Corroon noted a recent paper that said that closed corporations and publicly traded companies should be treated differently because of a lack of liquidity. Shareholders cannot quickly remove themselves, nor can directors, officers and managers.

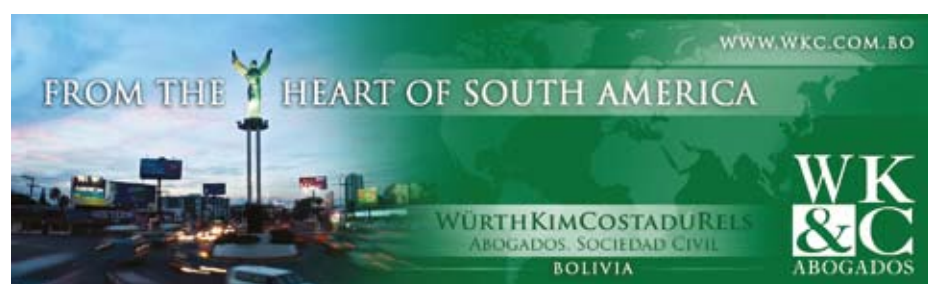
"For those of us who work with this committee, you have to be even more careful than perhaps even the multijurisdictional major law firms and their representations of transnational publicly traded corporations," he said.

**You have to be on the lookout for changing conflicts and changing duties all the time**

lawyers' assessments – for example, whether they're right when they've been advised to litigate or to settle, he said. "Ultimately it's a question of trust."

### A changing landscape

Session co-chair Martin Kovnats, a Toronto-based partner at Aird & Berlis, said that this





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