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# Young Lawyers

Newsletter of the International Bar Association Public and Professional Interest Division

**JUNE 2012 VOL 18 NO 2**

INTERNATIONAL BAR ASSOCIATION CONFERENCES




**CPD/CLE HOURS AVAILABLE**

# Managing client relationships: A multi-generational approach

**20–22 June 2012** **Kempinski Hotel Vier Jahreszeiten, Munich**

A conference presented by the IBA Young Lawyers' Committee, the Senior Lawyers' Committee and the Law Firm Management Committee

**Topics include:**

- Hiring – the needs of law firms – big or small – and the young lawyers' expectations
- Mentoring – assisting young lawyers in becoming future owners of the firm
- Compensation – monitoring performance and rewarding contributions on all career stages
- Teaming – introducing lawyers on various levels and managing the client relationship
- The client's view – attract client's attention; criteria for selecting counsel; fee structures

**Who should attend?**

Law firm partners and associates, bar representatives, professionals interested in hearing leading lawyers address current issues affecting the internal operations of law firms.

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London São Paulo Dubai Seoul

4th Floor, 10 St Bride Street, London EC4A 4AD, United Kingdom Tel: +44 (0)20 7842 0090 Fax: +44 (0)20 7842 0091 www.ibanet.org

## IN THIS ISSUE




**Communications Officer**
Catriona Watt
Fox, London
Tel: +44 (20) 7618 2400
Fax +44 (20) 7618 2409
cwatt@foxlawyers.com



**International Bar Association**
4th floor, 10 St Bride Street
London, EC4A 4AD
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
www.ibanet.org




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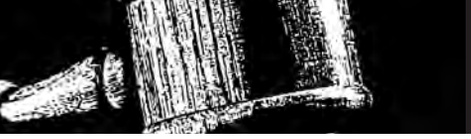
This newsletter is intended to provide general information regarding recent developments affecting young lawyers. The views expressed are not necessarily those of the International Bar Association.





# Welcome to our committee newsletter!

**Rouven F Bodeheimer**
Lungerich Lenz Schuhmacher, Cologne
bodenheimer@lls-law.de

We are getting closer and closer to our June conference which is being held in the Kempinski Hotel Vier Jahreszeiten in Munich, Germany, from 20–22 June 2012.

We are very proud of, and excited about, the progress being made so far. The conference organising committee, which consists of senior officers from the Young Lawyers' Committee, the Senior Lawyers' Committee and the Law Firm Management Committee, have secured several prestigious speakers to make up the panels. Content-wise, the conference sessions will be on a broad mix of topical subjects of interest to lawyers young and old. We have taken great care to ensure that a balance is found between the two sides, with a heavy focus on mentoring and guiding lawyers through their careers.

On the Friday morning we will also have a session where in-house lawyers from high-profile companies will be explaining what it is that they seek when hiring a lawyer or law firm. As is the case with all the sessions, we want this to be very interactive, and look forward to a stimulating debate between floor and panel on what clients look for and the perspectives of lawyers themselves.

Other topics include mentoring, hiring and compensation models. We believe there is something of interest for everyone at this conference and hope that many of you can join us and participate in the discussions – and, of course, the social and other surrounding events we have planned, such as our Friday afternoon tour of the BMW plant.

Another important piece of news I am delighted to announce is that the Annual IBA Outstanding Young Lawyers of the Year Award in recognition of William Reece Smith Jr, is now open for nominations. The nomination form can be downloaded from the Young Lawyers' Committee page of the IBA website at **www.ibanet.org/PPID/Constituent/Young_Lawyers_Committee/Default.aspx** and on page 26 of this newsletter.

Please do spread the word amongst your colleagues and friends; the judging panel looks forward to receiving many remarkable and inspiring nominations.

Once again, if you have any suggestions for ways in which we can make this newsletter more relevant and interesting to you, please do not hesitate to drop myself or one of my fellow officers a line – we are always happy to receive feedback!

I look forward to meeting you, again or indeed for the first time, in the nearer future.

# Committee officers

**Chair**
Rouven F Bodenheimer
Lungerich Lenz Schuhmacher, Cologne
Tel: +49 (221) 130 8160
Fax: +49 (221) 130 8162
bodenheimer@lls-law.de

**Vice-Chairs**
Heather Irvine
Deneys Reitz, Johannesburg
Tel: +27 (11) 685 8829
Fax: +27 (11) 883 4000
hpi@deneysreitz.co.za

Agustín Mayer
Ferrere Attorneys at Law, Montevideo
Tel: +598 (2) 623 0000
Fax: +598 (2) 628 2100
amayer@ferreres.com

**Co-Secretary**
Amit Bansal
Kundra & Bansal, New Delhi
Tel: +91 (11) 2923 8021
Fax: +91 (11) 2923 8023
amit@kundrabansal.com

**Co-Secretary**
Garrett Miller
Eugene F Collins, Dublin
Tel: +353 1 202 6400
Fax: +353 1 667 5200
gmiller@efc.ie

**Communications Officer**
Catriona Watt
Fox, London
Tel: +44 (20) 7618 2400
Fax +44 (20) 7618 2409
cwatt@foxlawyers.com

**Events Officer**
Adam Goodman
Heenan Blaikie, Toronto
Tel: +1 (416) 643 6857
Fax: +1 (416) 360 8425
agoodman@heenan.ca

**Website Officer**
Robert Wakulat
Wakulat, Toronto
Tel: +1 (416) 458 4841
robert@wakulat.ca

**PPID Liaison Officer**
Christian Nielsen
Moalem Weitemeyer Bendtsen Advokatpartnerselskab, Copenhagen
Tel: +45 7070 1505
Fax: +45 7070 1506
crn@mwblaw.dk

**European Forum Liaison Officer**
Marc Baltus
Heuking Kühn Lüer Wojtek, Düsseldorf
Tel: +49 (211) 600 55 257
Fax: +49 (211) 600 55 285
m.baltus@heuking.de

**American Bar Assocation Liaison Officer**
Robert Steven Bernstein
McCarter & English, New York
Tel: +1 (212) 609 6834
Fax: +1 (212) 645 0853
rbernstein@mccarter.com

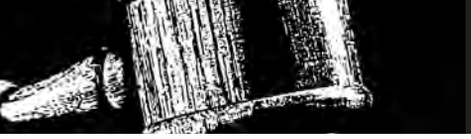
**LPD Liaison Officer**
Sunil Abraham
Zul Rafique & Partners, Kuala Lumpur
Tel: +60 (3) 6209 8228
Fax: +60 (3) 6209 8381
sunil@zulrafique.com.my

**National Representatives Officer**
Makoto Hirasawa
Okuno & Partners, Tokyo
Tel: +81 (3) 3274 3805
Fax: +81 (3) 3272 2245
makoto.hirasawa@okunolaw.com

**Junior Communications Officer**
Bruno Barata Magalhaes
Correa de Mello & Tolomei, Rio de Janeiro
Tel: +55 (21) 8747 0210
Fax: +55 (21) 2232 4415
brunobarata@cmtadv.com.br

**Junior Website Officer**
Dominik Ziegenhahn
Graf von Westphalen, Hamburg
Tel: +49 40 3592 2128
Fax +49 40 3592 2239
d.ziegenhahn@gvw.com

**PPID Administrator**
Robyn Wheatley
ppid@int-bar.org





INTERNATIONAL BAR ASSOCIATION
# ANNUAL CONFERENCE

# DUBLIN 30 SEPTEMBER – 5 OCTOBER 2012

## Young Lawyers' Committee sessions

### Monday 0930 – 1230

**Round the tables – breakfast and a taste of hot topics in the Intellectual Property, Communications and Technology Section**
*Joint session with the Intellectual Property, Communications and Technology Section and the Young Lawyers' Committee.*

This always very dynamic and well attended session enables you to select from a menu of hot topics in the IP, communications, media and technology sectors and participate in roundtable discussions. The format is interactive and the topics are selected to ensure that they are of current interest and likely to stimulate a lively debate. Moderators on each table introduce the table topic and the participants do the rest. Background knowledge or experience within areas for discussion is not required. You will have the opportunity to discuss three or four topics at scheduled turnover times as the participants move around the tables to the next topic of their choosing. The opportunities for networking are almost endless!

Topics will include:

- patent harmonisation – a state of the union in light of the US's America Invents Act;
- digital identity and online personality rights;
- protecting trade secrets in tech transfer agreements and subsequent litigation;
- smart grids and smart metering – what's the count?
- SOPA – whose rights and whose tubes?
- 'how to' discussion on basic IP licensing;
- flash sales and new on line marketing – are you astroturfing already?
- Big Pharma vs Generics – an update;
- social media on the workfloor;
- futurology in communications – where inventions and the law meet; and
- Chicken Little was right: 'the sky is falling' – a discussion of space debris issues.

**Young lawyers introductory meeting**
*Presented by the Young Lawyers' Committee.*

A must-attend if this is your first IBA event!

IBA Annual Conferences can be rather overwhelming or even intimidating, particularly for those who are attending one for the first time. To help you find your way, the Young Lawyers' Committee traditionally hosts an introductory meeting for young lawyers, to which you are warmly invited.

Officers of the Young Lawyers' Committee will provide a general introduction to the IBA, guide you through the conference programme, share with you how to get the most out of the conference and inform you of social events particularly targeted at young lawyers. We are planning to address other topics of interest to newcomers as well.

Moreover, it has also become a much appreciated tradition for the Young Lawyers' Committee to invite Chairs from other IBA Committees to present their group and plans for the conference week. This has led to the perfect win-win situation in which young lawyers learn who to address when identifying their focus of interest, and in which committees from both the LPD and PPID are able to attract and recruit 'fresh blood'. Hence, make this session your priority check-in for the Monday morning. And by the way, don't worry if you can't make head nor tail of those abbreviations used two sentences above – this will be only one of the thousand topics covered in this essential nutshell to the IBA!

### Monday 1430 – 1730

**When worlds collide: judicial independence and the democratic process**
*Joint session with the Forum for Barristers and Advocates, Judges' Forum, the IBA Human Rights Institute and Young Lawyers' Committee.*

What should be the response of the judiciary and the organised bar when politicians threaten to use democratic processes such as elections, recalls, impeachments, or compelled appearance before legislative investigations, to intimidate judges and limit judicial independence? On the other hand, should not judges in a democracy be accountable to the people for their actions? If so, what should be the terms and conditions of that accountability?

## Tuesday 0930 – 1230

**Controlling discovery in commercial litigation**
*Joint session with the Forum for Barristers and Advocates, the Judges' Forum and the Young Lawyers' Committee.*

Discovery in commercial litigation can become a quagmire. Enormous volumes of documents are routinely discovered. Meanwhile the time taken to resolve disputes is prolonged. The advent of email has refocused attention on the cost and volume of discovery. This session will identify the purpose of discovery and consider methods employed in different jurisdictions to streamline discovery and the alternatives to documentary discovery. It will be addressed by leading barristers, advocates, trial lawyers and judges.

## Tuesday 1430 – 1730

**Is water law a sexy career for young lawyers?**
*Joint session with the Water Law Committee and the Young Lawyers' Committee.*

This session is designed to provide information and advice to young lawyers considering a career in water law. Experienced practitioners in various water-related fields will describe how they got into the area, what they do today and where they see the practice going in the next decades.

## Wednesday 1430 – 1730

**Get your IP house in order – the what, why, and how – advising entrepreneurs and closely held businesses in setting up an IP strategy**
*Joint session with the Closely Held and Growing Business Enterprises Committee, the Intellectual Property and Entertainment Law Committee and the Young Lawyers' Committee.*

This session will focus on the common IP issues which face start-up and closely held businesses (including family-owned businesses). These will include ownership of trademarks, copyright and inventions, with a particular focus on contributions from those both inside and outside the circle of owners. The importance of assignments and IP audits will be explored. Preparing for IP due diligence by investors will also be a major topic. Protection strategies 'how to protect your brand, creative and technical IP', growth financing and what venture capitalists and private equity investors look at in terms of IP before they invest, succession issues and maintaining the position of the founders through the business life cycle, IP valuation and the protection and export of IP internationally will all be considered, as will the internationalisation of IP.

## Thursday 0930 – 1230

**Where will the new law jobs be? Legal trends and practical strategies to consider in developing the next generation of lawyers**
*Joint session with the Academic and Professional Development Committee, Hague Institute for the Internationalisation of Law (HiiL), and the Young Lawyers' Committee.*

Rapidly emerging and developing markets, new tools of technology, and globalisation in every sector of life create tremendous opportunities for lawyers who are motivated and properly prepared to take on these challenges. At the same time, in many jurisdictions, job opportunities under traditional law firm business models are shrinking. In this programme, experts on future trends in the law, representatives of major clients, educators, professional development experts and lawyers from every stage of a professional career will work together with the participants to discuss and develop practical strategies for lawyers and employers to recognise and anticipate changing legal landscapes and identify potential business opportunities.

**The do's and don'ts of trial work – an Asian, European and North American perspective**
*Joint Session with the Asia Pacific Regional Forum, the Forum for Barristers and Advocates, the Judges' Forum and the Young Lawyers' Committee.*

This session will discuss the subtle intricacies of trial work from a practical perspective insofar as how one is to 'pitch' one's case to a judge or jury. This session will look at issues pertaining to witness preparation, conduct of counsel at a trial vis-à-vis cross-examination of witnesses as well as the presentation of facts, reading a judge or jury among others and the different approaches adopted by counsel in Asia, Europe and North America in this regard.

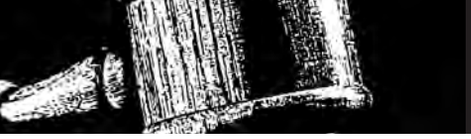
## Friday 0930 – 1230

**The true meaning of success: what really makes you an outstanding lawyer?**
*Presented by the Young Lawyers' Committee.*

Young lawyers tend to be, rightly so, fiercely ambitious and have high expectations of their career progress. It is easy, particularly in large law firms with multi-million pound/dollar turnovers, to lose sight of the fact that heading onto the fast-track to being a wealthy partner is not necessarily all that matters in the long-term.

This half-day session will illustrate the other important aspects of practicing law, the importance of moral and social responsibility, of helping those who cannot perhaps stand up for themselves and how practicing the law in this way does not preclude your becoming a well-respected and even wealthy lawyer, but rather will even help you become a genuinely successful lawyer with a rewarding career path.

Who best to demonstrate this than representatives from the Young Lawyers' Committee leadership, the Senior Lawyers' Committee and past IBA Outstanding Young Lawyer of the Year award recipient(s) who prove that being a lawyer truly is more than a profession.





# From Sky Sports to 'Slopping Out': the luxuries of prisoners' rights

**Philippa Greer**
Graduate of the University of Edinburgh, Scotland
philippagreer@hotmail.com

The term 'prisoners' rights' has become a subject of controversy in recent years, particularly in the UK following the international development of human rights jurisprudence. In the UK the media often reports on the 'life of luxury' in UK prisons, stating, for example, that 'prisoners receive free bed and board, wages and cash bonuses for good behaviour, while drugs are cheaper in jails than they are on the streets.' Articles frequently evoke a sense of horror from readers, with suggestions that 'prison officials have reported watching inmates simply sitting in their cells watching sport on television – sometimes on the Pay-TV channel Sky Sports – or playing games on computers or Playstation consoles.'[1]

Yet the absence of integral sanitation at a prison and the use by a prisoner of a chemical toilet in his cell does not automatically amount to a breach of the prisoner's basic civil rights in the UK. It remains the case that not having access to a flushing toilet does not necessarily mean that there has been a breach of the prisoner's right not to be subjected to inhuman or degrading treatment under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Perhaps an examination of the law on 'slopping out' in Scotland (heavily shaped by the Strasbourg jurisprudence of the European Court of Human Rights) might help to put the hysteria surrounding prisoners' rights into perspective.

'Slopping out' refers to the use of a bucket as a lavatory when there is no in-cell sanitation at a prison. This practice was formally abolished in British prisons in 1996. However, due to logistical and financial restraints, alterations to some jails remained difficult – especially in the case of those built in the Victorian era – meaning that 'slopping out' still takes place in a number of prisons when normal sanitation systems break down. In other words 'slopping out' per se is still widely accepted.

Despite frantic media reporting of the landmark Scottish case of *Napier v Scottish Ministers* [2004] 1 SC 229 in which the 'triple vices' of overcrowding, 'slopping out' and an impoverished regime in a Scottish prison lead to the court finding that Article 3 Convention rights had been breached, 'slopping out' per se remains acceptable.

There is a consistent line of domestic Scottish authority which suggests that the *Napier* case is specific to its own facts and is not applicable to single-cell cases. It has been distinguished from cases where the prisoner has his own cell with a much higher degree of privacy; where he rarely has to use the chemical toilet; where he is allowed out of the cell for a significant part of the day; and where the cell conditions may be balanced by an overall assessment of the day to day routine.

In short, it is clear that case law looks to the entirety of the prisoner's circumstances, including the effect of cumulative vices when a prisoner's claim is being assessed that his human rights are being breached by the requirement to 'slop out'. Yet negative media reporting of such cases typically follows headlines in Scotland such as 'Slopping out case: Scottish prisoners in line for £3.5m payout'[2] and 'Prisoners use Human Rights to try to ban 'slopping out' in British jails'.[3]

Not having access to a flushing toilet does not automatically mean that there has been a breach of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as highlighted by Lady Dorrian in the subsequent Scottish case of *Greens and others v Scottish Ministers* [2011] SLT 549 at [278]: 'I do not accept that access to a screened and flushing lavatory is a basic human right'. A later case, *Grant v Ministry of Justice* [2011] EWHC 3379, further suggests that the requirement for a prisoner to urinate or defecate into a bucket is not necessarily, and of itself, degrading and a violation of Article 3. Whether it is so degrading will depend upon all the circumstances of the case. Indeed, as highlighted in the case of

*Greens* at [259], 'it is the totality of conditions' which are important.

It has frequently been stated that, for treatment to amount to a breach of Article 3 of the Convention, it requires a 'minimum level of seriousness' (*Gorodnichev v Russia* [2007] Application No 52058/99 at paragraph 100) or a 'minimum level of severity' (*Pretty v United Kingdom* [2002] 35 E H R R 1 at paragraph 52). And, as noted by Lady Dorrian in *Greens and others v Scottish Ministers* [2011] SLT 549 at [258]:

> 'With the exception of cells of a size allowing less than about $3m^2$ per person, the ECtHR has not isolated one aspect of imprisonment as being sufficiently severe to meet the threshold.'

Mr Justice Hickinbottom in the case of *Grant v Ministry of Justice* [2011] EWHC 3379 further explains at paragraph 52 that:

> 'The test with regard to minimum severity is an objective test, to be determined on the basis of all relevant circumstances […] unless a claimant can show, by direct or inferential evidence, that the ill-treatment in fact caused him serious suffering in terms of physical or psychiatric injury, or psychological harm or particularly serious evidenced distress, it will usually be difficult for him in practice to show that that objective test has been satisfied.'

Accordingly, it is usually only where the prisoner has complained of having to use the toilet or having to empty it in the presence of others that he has a real claim. As highlighted again in the case of *Greens* [2011] SLT 549 at [258]:

> 'It is clear that the ECtHR has repeatedly found a violation of Article 3 in situations where a prisoner has been required to relieve himself into a bucket in the presence of others, and having to be present when others did the same.'

Certainly, returning to the landmark Scottish case of *Napier v Scottish Ministers* [2004] 1 SC 229, the prisoner's core complaints about 'slopping out' were that the containers had to be emptied in the presence of other prisoners. In the case of *Peers v Greece* [2001] 33 E H R R 51 at paragraph 75 the fact that the prisoner had to use the toilet in the presence of another inmate and be present while the toilet was being used by his cellmate was similarly a key factor that persuaded the Court that the minimum level of severity had been reached.

In the cases to which reference has been made above, there were a number of serious deficiencies. *Napier v Scottish Ministers* [2004] 1 SC 229 is a case in point. Not only did it involve the use of a chamber pot, the decision was based on the 'triple vices' of overcrowding, 'slopping out' and an impoverished regime. Additionally, the heightened place of 'slopping out' in the daily routine of the prisoner was significant to that case. For instance (at 27) the Court noted that:

> 'the disposal of bodily waste was so closely associated with the very limited extent to which prisoners were released from their cells in the course of the normal day.'

The prisoner's personal circumstances also differentiated him from the general prison population, as he suffered from a severe outbreak of eczema and psychological symptoms due to the conditions in which he was held. As Lord Bonomy noted in that case at [76]:

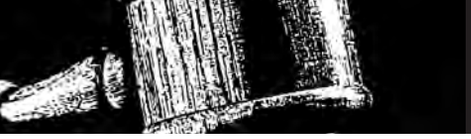
> 'Of crucial importance to my determination in this case is the effect on the petitioner of the serious outbreak of eczema.'

In *Greens and others v Scottish Ministers* [2011] SLT 549, the lack of hand-washing facilities within the cells and the lack of ventilation were specific considerations of the court. Complaints were also made about the practice of 'bombing' (throwing excrement), the size of the cells and the degree of natural or electric light available.

In short, whether the conditions endured by a prisoner subject him to treatment which infringes his Article 3 Convention rights in relation to 'slopping out' will largely hang on his precise factual situation. This will depend on the evidence ultimately put before the court – in terms of the factual evidence, the medical experts, the psychological, scientific and technical evidence presented.

Yet of course the public would be forgiven for thinking that such decisions, including that of Robert Napier in Scotland are: 'expected to lead to more than 1,700 criminals including rapists, pedophiles and murderers awarded damages.'[4]

Indeed, a 2011 public opinion poll launched by *The Telegraph* in Britain reports that 23.62 per cent of readers who took the poll think that prisoners should be made to slop out, with 57.3 per cent actually stating that: 'more prisoners should slop out because prisons are too comfortable.'[5] Is it just me, or does something not add up?





**Notes**

1 Andrew Hough, 'Slopping out case: life of luxury in British jails', *The Telegraph*, 26 September 2011. Available at <**www.telegraph.co.uk/news/uknews/law-and-order/8789794/Slopping-out-case-life-of-luxury-in-British-jails.html**>.

2 Andrew Hough, 'Slopping out case: Scottish prisoners in line for £3.5m payout', *The Telegraph*, 26 September 2011. Available at <**www.telegraph.co.uk/news/uknews/law-and-order/8789510/Slopping-out-case-Scottish-prisoners-in-line-for-3.5m-payout.html**>.

3 Andrew Hough, 'Prisoners use Human Rights to try to ban 'slopping out' in British jails', *The Telegraph*, 26 September 2011. Available at <**www.telegraph.co.uk/news/uknews/law-and-order/8788741/Prisoners-use-Human-Rights-to-try-to-ban-slopping-out-in-British-jails.html**>.

4 See note 2 above.

5 See note 3 above.

# Magistrates Court in Nigeria – commentary on the Magistrate Court Law of Lagos State [Law No 16, 2009]

**Olaoye Peter Olalere**
SPA Ajibade & Co, Lagos
peterolalere@yahoo.com

## Introduction

A recent and important development in the Magistrate Court law and practice in Nigeria which has implications on the practice of young lawyers is the Magistrate Court Law of Lagos State, [2009] Law No 16, which introduces a substantial increase in the monetary value of both civil and criminal matters over which the Magistrate Court may exercise jurisdiction. By virtue of this law, the jurisdictional limits on all civil causes and matters Magistrate Courts in Lagos can deal with have been increased from a mere ₦1m in the 2007 Amendment of the law ('Law No 26 of 2007') to ₦10m in the 2009 Law ('Law No 16 of 2009') and the High Court has relinquished jurisdiction in respect of such matters to the Magistrate Court upon coming into operation of the law. The law has attracted comments or even generated controversies regarding some of its new/amended provisions.

The government has on its part explained that the law is one of the most forward-looking in the country 'aimed at restructuring magistrates' court practice, the magistrate as an institution, its perception and place in the justice sector, as well as to provide summary justice close to the expectations of the citizens'[1] by facilitating the expeditious disposition of cases.

## Who is a Magistrate?

It is important to highlight the status of the court under reference for ease of comprehension. Magistrate is a judicial officer with strictly limited jurisdiction and authority, often on local level and often restricted to criminal cases.[2] A Magistrate may be described as a member of the Magisterial Bench, a judicial officer or '[…] a small claim judge' who does the bulk of the work of the judicial process and administration of justice.[3]

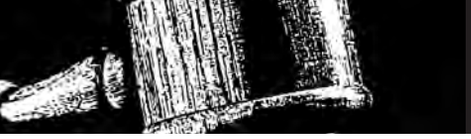
The Magistrate Courts in Nigeria owe their legitimacy indirectly to the provisions of the 1999 Constitution[4] and directly to the various State Assembly Laws and the National Assembly Act in the case of the Federal Capital Territory, Abuja. The extant Magistrate Court law in Lagos State, which forms the subject of this article, is the Lagos State Magistrates' Court Law, 2009.[5]

## Commentary on new or substantially amended provisions

1. Significantly, the 2009 law abolishes the cadre and grade system in the state magistracy by removing the designation such as 'Chief Magistrates', 'Senior Magistrates', 'Magistrate Grade 1' or 'Magistrate Grade 2' or similar

description that obtains in all the other states of the Federation and the position hitherto retained in the 2007 law. Upon appointment, all Magistrates now have in all respects, equal powers, authority and jurisdiction, except the Chief Magistrate (one per district and so designated by the authority) whose only additional duty is to represent the Magistracy at official and ceremonial functions.[6] This upgrade of the status of the Magistrate may be connected to the high number of qualified personnel now available for appointment as Magistrates and the need to strengthen the Lagos State Magistracy for better efficiency.

2. Following this is also substantial increase in the monetary value of all the civil cases that the Magistrate has power to handle. Subject to the provisions of the Constitution, a Magistrate now has jurisdiction in civil causes and matters in all personal actions arising from contract, tort or both where the debt or damage claimed, whether as a balance of account or otherwise at the time of filing; in all actions between landlord and tenant where rental or where the general claim is not more than ₦10m. The Claimant may, in addition, claim arrears of rent and mesne profits even if the total claim exceeds ₦10m.
3. Magistrates can also appoint Guardian *ad litem* and make orders, issue and give directions relating to their appointment; grant injunctions in any action or order a stay, waste or alienate or for the detention and preservation of any property, the subject of such action or to retrain breaches of contract or tort; and to handle appeals from Customary Courts including all civil causes for the recovery of penalties, charges, rates, taxes, expenses, cost of enforcement of statutory provisions, contributions or other like demands, which may be recoverable by virtue of any existing law except where expressly provided otherwise by any other law that the demand shall be recoverable in some other Courts or the amount involved exceeds N10m.[7]
4. While the 2007 Law expressly excluded the jurisdiction of the Magistrate to a summary trial of a capital offence (indictable offence) the 2009 Law[8] provides that a Magistrate shall have jurisdiction for the summary trial of offences and on the conviction of any person accused of any such offence, the magistrate has the jurisdiction to impose the punishment provided the sentence is not more than a prison term of 14 years.[9] Under the 2007 Law, the chief Magistrate, being the highest grade of Magistrate, may impose only N 50,000 and a term of imprisonment of seven years as against the present N10m and 14 years.
5. As a summary trial court, the 2009 Law strictly maintains that a Magistrate is expected to deliver judgment no later than 21 days after close of trial. He may deliver the judgment and reserve the reasons to a later date which again must not exceed another 21 days. Also, a Magistrate may adjourn from date of commencement of trial and during the proceedings for a period not exceeding 14 working days.[10]
6. Unlike under the 2007 Law, the rules hitherto applicable to Magistrate Court in Lagos were made by the Chief Judge,[11] the 2009 Law provides that the Rules applicable to the Magistrate Courts are as set out in the Magistrate Courts (Civil Procedure) Rules and any other relevant Rules as may be prescribed from time to time.[12] The Chief Judge can only make rules relating to practice and procedures of civil and criminal appeals, on fees and costs where lacuna exist in the High Court Law or the Magistrates Court Law 2009 and on Mediation and Arbitration and all matters incidental thereto.
7. The 2009 Law[13] intends to reserve the rights of Legal Practitioners (including Senior Advocate of Nigeria, SAN) to appear before the Magistrate Court in Lagos State by providing that notwithstanding any custom or practice, all Legal Practitioners called to the Bar in Nigeria are entitled, regardless of conferment, title or rank, to appear in any Magistrate court in the state. The applicability of the section is however doubtful in view of the decision of the Court of Appeal in the case of *Regd Trustees, Ecwa Church v Ijesha*[14] where, after reviewing the applicable sections of the Constitution, the Legal Practitioners Act and the Senior Advocates of Nigeria





(Privileges and Functions) Rules, the Court concluded that a SAN cannot appear before an inferior court

## Conclusion

The law has many innovative reviews which, as explained by the government, can aid the restructuring of Magistrates' court practice, the institution, and improve the public perception and appreciation of the justice delivery system at that level as fast, efficient and fair. The provisions on reconciliation and referral of civil cases to Citizens Mediation Centre or Lagos Multi-Door Courthouse for Alternative Dispute Resolution proceedings is commendable; likewise the increase in the monetary value of the court's jurisdiction all of which gives more opportunities to young lawyers.

Magistrate's courts in Lagos State still deal with congested cause lists almost on daily basis and from personal experience, although, the Magistrates are usually appointed from among 'Young Lawyers' considering that the qualification requirement for appointment is just five years post-call, the quality displayed sometimes suggests that some appointees might not have garnered considerable practice exposure during the post-call years. Training and re-training of the Magistrates is, therefore, key to ensure quality justice delivery and to achieve the aims of the law.

**Notes**

1 As Governor's Office explained and was published by **www.allAfrica.com** on the 13 August 2009.
2 Black's Law Dictionary, ed Bryan A Garner (9th edn) p 1036.
3 Honourable Justice Alfred Awala as quoted in 'The Nigerian magistrate in Action' (2001).
4 See section 6 [4a].
5 Law No 16 in the *Official Gazette* No 53 signed into law on the 26th October 2009 with commencement date put at 16th January 2010.
6 See sections 6 and 18 for equality of powers, jurisdictions and other functions.
7 See section 28 of the 2009 law which generally specifies the jurisdiction of the Magistrate Court in Lagos State.
8 See section 8 (2 & 3) of the 2007 Law and section 29 of the 2009 law.
9 See above.
10 See sections 60 and 42 of the Law.
11 Section 75 of the Magistrate Courts' Law Cap M1 Laws of Lagos State of 2003 and section 70 of the Magistrate Court (Amendment) Law 2007.
12 Section 90 of the 2009 Law.
13 Section 9 thereof.
14 (1999) 13 NWLR PT 635 P 368 @ 393.

# To specialise or not to specialise? A young lawyer's conundrum in the developing world

**Brian Kalule**
Nsubuga & Co Advocates, Kampala, Uganda.
bkalule@nsubugaadvocates.com

## The case for specialisation

It is said that carving out a niche at an early age is essential for a young lawyer looking to get ahead fast. Mostly, this involves choosing an area of the law and becoming highly skilled in it to gain expert status. The case for specialisation is even stronger these days. As new problems, ideas and technologies emerge, the legal market is becoming highly complex and sophisticated. Ultimately, it may be difficult to efficiently keep up with all these trends as a general practitioner. Specialists would be expected to be aware of recent developments in their particular areas of practice through Continuing Legal Education programmes and the like. Further, due to increased familiarity with the area, a specialist is less likely to misinterpret the relevant law or to overlook material issues and an intimate understanding of procedures in the area is also beneficial to the client in terms of cost, efficiency and quality of service.

However, it is said often that specialisation goes against the fundamentals of law as a profession. Ideally, a lawyer should experience different areas of law. In most

cases, a legal problem may contain a great range of legal issues all interwoven in one. As such, a specialist in one area may lack the dynamism and creativity to brilliantly execute the problem.

Despite such criticism, I believe the benefits of specialisation outweigh the negatives. In the developing world, and Africa in particular, there are many incentives to specialise. The economic landscape is rapidly changing. African countries are amongst the fastest growing countries in the world mostly as a result of a high rate of foreign investment. Telecoms, banking, and retailing are flourishing. Construction is booming. Private-investment inflows are surging. In East Africa, from where I am originally from, there has been discovery of oil. With information technology advancing rapidly, the world has become globally interconnected. New areas of legal practice that never existed before have emerged.

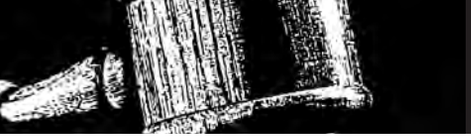
### What should one specialise in?

This is perhaps the most difficult of all questions facing young lawyers in the developing world jurisdictions. In the grand scheme of things, the decision should be personal driven by one's tastes and passions. However, the recent changes in the economies of developing countries are a harbinger of areas of practice that are likely to emerge or proliferate. The growing of the economies point to a proliferation in commercial and corporate law practice as a result of infusing the continent with a new commercial vibrancy. These new areas, though not necessarily 'new' when compared to other jurisdictions, would be 'easier' to break into since they are not overcrowded. For instance, with the discovery of oil in the East African region, oil and gas law would make a reasonable and hopefully a rewarding practice with the added benefit that there are few such lawyers in the region.

### The conundrum

The developing world presents a unique problem to specialisation. Though most of these economies are growing, they are comparatively small. There is a real danger, therefore, of dearth of work. In these economies there are usually few major companies. In Uganda for instance, the whole oil industry, though admittedly nascent, has one major player who happens to be a British firm. Inevitably such monopolies move their work to large regional or even international forms. In such a case, a local lawyer specialising in oil and gas law may wait for ages before receiving meaningful work. The same applies to other areas of the law. The market being small, it means that the sizeable clients are really very competitive as all the top firms direct their gazes towards them. The rest are left to do general practices to ensure survival. In such circumstances, it is easy to see why specialisation becomes problematic for the young lawyer. So should one specialise and hope for the best or remain in general practice to ensure survival?

I think the answer lies in balance. As my good friend and mentor James Klotz, a partner in the Canadian firm, Miller Thomson, tells me always: 'avoid the areas of practice that diffuse your brand.' For instance, in his words, where as an international commercial lawyer can do litigation, it would not be advisable to do purely domestic litigation. He could get lost in the maze and lose sight of his main area of focus. The upshot is to keep an eye on this central focus and intermittently delve into different areas while patiently waiting for your field of interest to grow.





# Domestic violence in UK: a curable curse

**Amjad Malik***

UK representative of IBA Young Lawyers' Committee, Solicitor Advocate of the Supreme Court of England, Chair of Association of Pakistani Lawyers

amsolicitors@aol.com

In 2000, acting from an advice agency, I challenged the UK Home Office's policy of domestic violence and sought a declaration of incompatibility with Human Rights Law (Articles 3 and 6 ECHR 1950). I drew the court's attention towards the fact that women of Asian culture in particular are often reluctant to go to the courts/police to seek justice against their husbands as their society disapproves of it, considering it an honour issue. According to the UK Crown Prosecution Service, nearly one million women experience domestic violence every year and 750,000 children witness it. Of these women, two die every week from domestic violence. Keir Starmer, a renowned Human Rights Lawyer and the director of public prosecutions, issued a timely warning against complacency and said that domestic violence was:

> 'serious and pernicious […] It ruins lives, breaks up families and has a lasting impact. It is criminal. And it has been with us for a very long time, yet it is only in the last [ten] years that it has been taken seriously as a criminal justice issue.'

For the Asian female victim of violence who suffers silently in UK the problem is twofold: they are, in the first instance, already victims of abuse, and the UK Home Office (UKBA) puts a further burden on them to prove their misfortune through mandatory caution, conviction and/or injunction against their British spouses, which is a particular problem if they are immigrants. Moreover, in pursuing that struggle for evidence, non-availability of legal aid is the icing on the cake. Socially and culturally the consensus is already against them because the very act of going to the police, social services and courts for help is often considered a kind of 'crime', bringing dishonour to the family, though goal posts are changing slowly every week as a result of it. Legal aid has a vital role to play in helping to create an escape route for many abused women and children trapped in dysfunctional relationships. Without legal aid, many women could not afford to see a lawyer. 'This would have placed my two young daughters at very real risk of future abuse.'

'It has long been known that psychological abuse within a domestic context can cause at least as much long-term harm to the victim as physical abuse,' said Lord Brown at the beginning of 2012. Home Secretary Theresa May is intending to change the domestic violence rule within the immigration rules. It enables people who are on a spouse or partner visa and experiencing domestic violence to be able to leave that relationship and apply for indefinite leave. According to the Immigration Minister, Damian Green, 700 victims of domestic violence rely upon this rule every year while the Immigration Law Practitioners' Association indicates that this figure could be as high as 1,500. In a letter to the ILPA, Green states that the UK Border Agency will continue to provide leave when needed to help protect women and girls 'but settlement will not be automatic. […] For the very small number of cases of minor unspent criminality which would lead to a refusal under these rules, we will take a case-by-case approach.' It is alarming.

Any victim of domestic violence needs legal advice on routes to immediate safety, injunction, house, divorce, and children, and, in some instances, quick access to safeguard children's immediate place of stay. Most of the victims, if stranded, seek such advice from charitable organisations such as Refuge, Shelter or from police custody or telephone advise lines; the majority do not come forward due to the uncertain, lengthy and bureaucratic process, which can be painful to endure. How they will get access to justice if they are stranded and revolt against their spouses without legal aid is food for thought in a country which claims to be the mother of all democracies and human rights. Either women will suffer in silence without legal aid, or a message is being sent out that unless you fight social and cultural norms as an individual, you must 'put up' or 'shut up'. This is unacceptable in any modern day civilised society.

The second element to consider is the effect of the Asian society in general, which is still caught between a rock and hard place: either to move forward and embrace

modernity coupled with respect, justice and human rights or stay in dark ages where women suffer in silence, obey, cook, clean and produce and look after their offspring. If any member of this society wishes to change the trend, they are cast out or punished often as a deterrent to others.

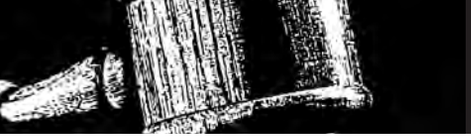
In such cases the police, social services and law courts turn a blind eye on bilateral family issues and domestic violence that are swept under the carpet for various and often unknown reasons. But these authorities have a vital responsibility to create awareness, pick up on such issues at the earliest moment and educate and instil teenagers with the confidence to face up to the situation without breaking families or waiting until it is unbearable. Pre-emptive knowledge and intervention by social services, police and society in general may save lives from being ruined in the first instance, rather than post-operative actions which punish the culprit and only save the victim after the fact, with no regard for family values and the institutions where damage is done. There is very little support for Asian female victims of domestic violence. Police, in certain cases, have even sent the girl back to the same house from which she is trying to run away simply due to fear of the unknown or lack of funding for adequate investigation, assistance or alternative accommodation. Immigrants who cannot claim benefits are turned away, even from shelters, because of funding issues, thus genuine complaints of domestic violence can end up in complicated, often temporary, and sometimes dangerous, reconciliation between involved parties.

There is a stigma attached to divorce, and separation as well as medical conditions such as depression, anxiety and post-natal issues, which go unacknowledged in many families and/or classes. Even if they are addressed, this tends to be done only in the higher middle or upper classes. There is a tendency to take a very lackadaisical approach to dealing with women's issues, often appearing disinterested. This whole attitude needs to be changed in the wake of human rights development in society. Services should be provided to everyone equally and law-enforcing agencies should try to reduce tensions that exist between society at large and attitudes towards women. Human rights groups are working at these issues but need more funding and support to create awareness about female rights and issues around access to justice and education due to language barriers and segregation. Younger members of society are either reluctant or unable to seek proper advice to make an informed decision whether it's their choice of an academic route, matrimony, separation, divorce, place of stay post-marriage, job or accessing services if they are at the earliest stages of being a victim of 'domestic violence'.

I believe the root cause of such violence towards female immigrants often lies in the stringency of visa requirements as it puts the sponsor in a position of power. The sponsor and his extended family then have the opportunity to abuse the rights of an individual, often in horrific ways. In other words, the foreign spouse becomes a slave of circumstance – especially girls – and has no voice of their own. There must be a system of making advice available to Asian females in their teens, and to fiancées or spouses, whether British or foreign nationals, to make them aware of their rights and stop them from suffering in silence. Such advice must be offered without prejudice and without being a taboo within any particular culture or society. Domestic abuse is a curable curse and we must work together to put a stop to violence against women. and let there be no more violence against women.

**Note**

* Amjad Malik was named 'young human rights lawyer of the year 2000' for representing Asian female victims of violence from an advice centre. Late Lord Bingham the former Lord Chief Justice awarded him the honour on 6 December 2000 at Law Society Hall (London).





# Austria – an interesting holding company location

**Niklas Schmidt**
WOLF THEISS Attorneys at Law, Vienna
niklas.schmidt@wolftheiss.com

## General

Austria is an attractive location for holding companies. The following factors may be mentioned in this context: (i) while Austria has a nominal corporate income tax rate of 25 per cent, many exemptions apply that are particularly relevant for holding companies; (ii) Austria has a comprehensive network of double-taxation treaties with more than 80 countries, the majority of which do not contain specific anti-abuse rules; (iii) Austria is a Member State of the European Union and has implemented all directives relating to direct taxation, in particular the EU Parent/Subsidiary Directive, the EU Merger Directive and the EU Interest and Royalties Directive; (iv) Austria has not implemented CFC-style legislation; (v) Austria has no formal thin-capitalisation rules; (vi) most types of restructurings of Austrian companies (eg, mergers, demergers and contributions of qualifying assets) can be effected in a tax-free manner; and (vii) taxpayers may obtain tax rulings confirming the tax treatment of a specific situation in advance.

## Formation

The limited liability company (Gesellschaft mit beschränkter Haftung, GmbH) is the form most widely used for holding companies. The formation of a GmbH basically requires the execution of the articles of association by one or more persons before a notary public. The minimum share capital for an Austrian GmbH is €35,000, at least half of which must be paid into an account held with an Austrian bank. When all required documents have been filed, the court orders the company to be registered in the commercial register, at which point it comes into full legal existence.

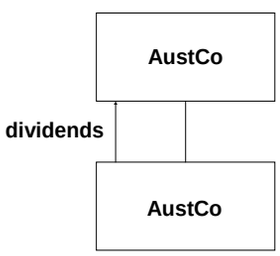
## Taxation

### *General*

The GmbH is subject to unlimited corporate income tax liability in Austria on its worldwide income, at a rate of 25 per cent. There exist several tax exemptions which are relevant for holding companies and which will be described in the following sections.

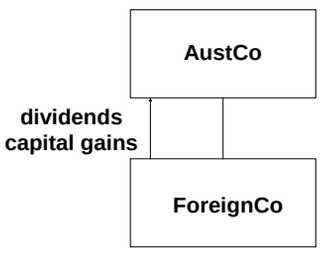
### *National participation exemption*

Pursuant to the national participation exemption, dividends received by an Austrian corporation from another Austrian corporation are tax exempt regardless of the holding period or the participation level (cf section 10(1)(1) of the Austrian Corporate Income Tax Act – Körperschaftsteuergesetz).




### *International qualified participation exemption*

Pursuant to the international qualified participation exemption, dividends and capital gains earned by an Austrian corporation from a non-Austrian corporation are tax exempt if the following conditions are met (*cf* section 10(1)(7) in connection with section (10)(2) of the Austrian Corporate Income Tax Act): (i) the participation must amount to at least ten per cent of the stated share capital of the foreign subsidiary; (ii) the participation must have been held for a minimum duration of one year; and (iii) the participation must be in a foreign subsidiary (i) having one of the legal forms listed in the annex to the EC Parent/Subsidiary Directive or (ii) being legally comparable to an Austrian corporation.

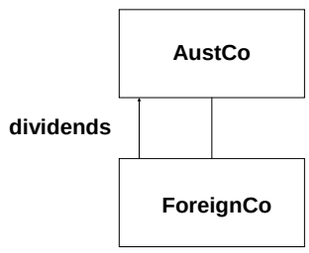



It should be noted that, in case of participations falling under the international qualified participation exemption, not only are capital gains tax exempt, but capital losses and other positive and negative changes in value are deemed tax neutral. It is, however, possible to opt for the taxability of a specific participation in the corporate income tax return filed for the year of such participation's acquisition. In this case, capital gains and write-ups would be taxable, whereas capital losses and write-downs would be tax-deductible.

Since Austria has no CFC legislation, in certain cases, where there are reasons to suspect tax avoidance, the international participation exemption is replaced by an indirect tax credit system. If this so-called switch-over clause is triggered, then dividends as well as capital gains from foreign subsidiaries are subject to the standard corporate income tax rate of 25 per cent (rather than being tax-exempt), with a tax credit for the underlying foreign taxes, if any, being granted in case of dividends. Such switch-over clause applies if both of the following two criteria are fulfilled or if one of the following two criteria is 'strongly' fulfilled and the other is 'nearly' fulfilled: (i) the foreign subsidiary predominantly focuses on earning, directly or indirectly, interest income, income from the letting of moveable tangible or intangible assets or income from the sale of participations; and (ii) the foreign subsidiary's income is not subject to foreign tax comparable to the Austrian corporate income tax in respect of the calculation of the taxable basis or in respect of the tax rates.

### *International portfolio participation exemption*

Pursuant to the international portfolio participation exemption, dividends received by an Austrian corporation from a non-Austrian corporation, which do not fall under the international qualified participation exemption aforementioned, are tax exempt, regardless of the participation level or the holding period, if the following conditions are met (*cf* section 10(1)(5) and 10(1)(6) of the Austrian Corporate Income Tax Act): (i) the foreign subsidiary has one of the legal forms listed in the annex to the EC Parent/Subsidiary Directive; or (ii) the foreign subsidiary is legally comparable to an Austrian corporation and has its seat in a state with which Austria has agreed to the comprehensive exchange of information.




In the case of participations covered by the international portfolio participation exemption, a switch-over (taxability of dividends with credit for underlying taxes) applies if one of the following criteria is fulfilled: (i) the foreign subsidiary is not subject to a corporate income tax in its country of residence that is comparable to the Austrian corporate income tax; (ii) the foreign subsidiary is subject to a corporate income tax that is comparable to the Austrian corporate income tax, but its rate is less than 15 per cent; and (iii) the foreign corporation is subject to a comprehensive exemption from taxation in its country of residence.

### *Group taxation*

Austria offers a very interesting group taxation regime, which includes cross-border loss relief: pursuant to section 9 of the Austrian Corporate Income Tax Act, affiliated companies may jointly file a group taxation application with the tax authorities in order to establish a tax group. The formation of a tax group results in the taxable income of the group members being attributed to the top-tier company in the tax group. The incomes of the various group members are calculated separately and then attributed to such top-tier company. Thus, unlike in consolidation

processes, income resulting from intra-group transactions is not eliminated for the purpose of calculating group income. Furthermore, it is important to note that setting up a tax group in no way affects the profits of the companies involved under financial accounting rules.

Finally, it should be noted that the establishment of an Austrian tax group offers the possibility to amortise, and subsequently deduct for tax purposes, goodwill acquired in the acquisition of the shares in an Austrian company by a group member.

*Interest deductibility*

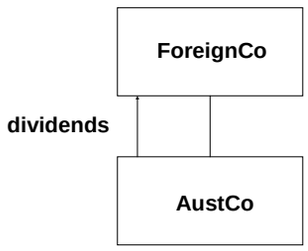
Pursuant to section 11(1)(4) of the Austrian Corporate Income Tax Act, interest costs incurred in connection with the acquisition of participations falling under (i) the national participation exemption, (ii) the international qualified participation exemption and (iii) the international portfolio participation exemption may be fully deducted from the tax base.

There are no statutory thin-capitalisation rules in Austria. However, the Austrian Administrative Court (Verwaltungsgerichtshof) has established certain broad guidelines that are used to determine whether the equity funding at hand is adequate for the purpose of taxation. In practice, debt/equity ratios of 4:1 are not uncommon.

The only other restriction regarding interest deductibility is that interest costs incurred in connection with the acquisition of shares that were, directly or indirectly, purchased from a group company or from a controlling shareholder are not deductible.

*Outbound dividends*

Dividends distributed by an Austrian GmbH are generally subject to the deduction of 25 per cent withholding tax (except if dividends constitute the repayment of capital –Einlagenrückzahlungen – whether resulting from a formal capital reduction or from the distribution of capital reserves).




In the case of non-resident shareholders, the withholding tax has the effect of final taxation.

In those cases where a double taxation treaty provides for a lower rate, the distributing company may, pursuant to the treaty, apply the standard rate of 25 per cent with the recipient shareholder having the possibility to reclaim the excess amount or directly apply the lower tax treaty rate (relief at source).

In addition, under the Austrian provisions implementing the EU Parent/Subsidiary Directive outbound dividends are totally exempt from any withholding tax insofar as the following conditions are satisfied (*cf* section 94(2) of the Austrian Income Tax Act; Einkommensteuergesetz): (i) a foreign company having one of the legal forms listed in the annex to the EC Parent/Subsidiary Directive; (ii) has held a participation of at least ten per cent of the stated share capital of an Austrian corporation; (iii) for an uninterrupted holding period of at least one year; and (iv) no abuse of law exists.

In summary, it may be said that Austria as a jurisdiction offers some quite interesting features for holding companies.

**Kay KW Chan**
Barrister-at-Law (Hong Kong Collaborative Practice Group), Hong Kong
kay_chan_122@hotmail.com

# Differences that Collaborative Law training can make to a young lawyer's practice

Collaborative law is a rather new form of dispute resolution method which is taking hold in many jurisdictions. In Hong Kong, the Hong Kong Collaborative Practice Group (HKCPG) was set up in 2010, and the second set of training courses were conducted by trainers from England in September 2011. A good number of family law practitioners took part in the courses and amongst them there were a healthy number of young lawyers.

It is beyond dispute that training of any kind has wide-ranging benefits for any lawyer's development. I even believe firmly that positives can be gained from a badly conducted training session; as some would say 'knowing what not to do can be more important than knowing what to do.'

In a world that is so focused on what one can gain from spending time and money, below are three things a young lawyer (or even a not-so-young lawyer) can gain from taking a Collaborative Law training course.

## A different point of view

Collaborative Law, being a dispute resolution method away from litigation, emphasises the importance of taking a different point of view on a dispute to that of a classical litigator's. It is very much like seeing a negotiation from an interests-based viewpoint instead of from a positional stance. Yet instead of learning to look behind one's position in attempt to find out the interests of the parties and exploring creative or composite solutions, the paradigm shift brought about by Collaborative Law training is one that I would term is a 'directional shift'.

Rather than still somewhat going against each other in an interests-based negotiation, the conflicting parties taking part in a collaborative process shifts their focus to the problems and away from themselves. The mathematical illustration of this is two vector arrows which, instead of going against each other, go in the same direction, parallel to one another, against the problem at hand.

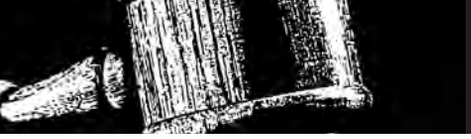
This requires a re-focusing of the parties' minds right at the outset and such re-focusing has to be done constantly by the collaborative professionals throughout the entire collaborative process. Such continual re-focusing requires the professionals involved to be self-conscious of their own directional focus.

Young lawyers who are fresh out of training or who have just qualified may often have some training or exposure in dispute resolution methods. Yet training in Collaborative Law may further provide an alternative way of looking at a case what one may not have been exposed to before. This exposure may have profound effects on a litigator's approach to cases and I would dare say that such exposure may make the litigator's approach to cases more complete.

On the other hand, professionals from different fields often get involved in Collaborative Law. In an era where a mono-disciplinary approach (ie, lawyers only having a legal viewpoint) may not satisfy the clients' needs, there is no harm is broadening ones' horizon by learning and observing how other professionals see the same problem that clients' are facing.

## A different skill set

The fact that taking such a different viewpoint requires training logically leads to the diversification of skills required by young lawyers. Principally most of the skills concerned are communication related: how does a lawyer greet a client and explain the process them, how does the lawyer defuse a situation which, in a litigation interview would not happen, but has to be explored. The use of language by the professional would also need a major make-over as negativity in speech has to be weeded out and how to assess whether a case is suitable to this process is also a main part of the skill set that needs to be learned.





### A different market

Collaborative Law is a rather new method and it is currently mainly used in family disputes. That is not to say the method has reached its limit. Exploration is now being done in finding new ways to utilise this method for example in the areas of probate and commercial disputes. It is perfectly possible that this method may open up new markets for young lawyers.

There is no harm is adding a string to your bow after all.

# Jury still deliberating on Twitter's usefulness in the legal sector

**Robert Wakulat***
WakulatlLaw, Toronto
robert@wakulat.ca

When Rupert Murdoch, of all people, started using Twitter in early 2012 (@rupertmurdoch), he generated considerable curiosity and speculation as to his true intentions. There would obviously have been a business angle involved, and early tweets did promote his studio's latest films. More importantly, the octogenarian media mogul had attracted approximately 50,000 followers by the end of his second day. Whether this experiment ultimately meets Murdoch's expectations is a question that is likely shared by many businesses and professionals who join the site to further their commercial success.

The 2009 LegalTech conference in New York attempted the challenging task of defining what Twitter is with a panel of social media experts. In the true spirit of engagement, the speakers deferred the question to their Twitter followers and received over 135 responses in 30 minutes. Some of the more interesting responses included:

- a virtual collective consciousness;
- a 'revolutionary marketing, real-time connecting' tool by day, a 'sleep-sucking, friend-making, idea-creating' tool by night;
- a social GPS;
- a social conversation tool that allows people to connect within communities, both personally and professionally.

However Twitter is defined, maximising its use is challenging for many law firms and opinions of its effectiveness are divided. Intendance Limited conducted a 2010 survey in the UK and found that, although 66 per cent of the top 50 UK law firms had a corporate Twitter account, nearly half had failed to 'tweet' at all. The report concluded that even the active accounts 'lack a personal touch and simply act as another distribution outlet for news and press releases' and 'tend to be quite bland because of privacy and disclosure issues'.

A 2011 LexisNexis global survey of 110 law firms also found poor use of social media. While 77 per cent of the firms participated on at least one social media platform, they 'don't use it for engagement, recruiting, client development or reputation management'. The social network of choice was LinkedIn, with 85 firms reporting a company page. Twitter was the runner-up with only 35 firms boasting a profile. Firms typically focused on simply claiming their usernames or broadcasting press releases but failed to interactively engage with followers. Finding a unique corporate voice seems to be a common challenge no matter where a firm is located.

Despite gloomy statistics of large firm Twitter usage, personal experience and anecdotal evidence suggests that many individual lawyers find value in their Twitter experience, especially for small and solo firms. Attendees at the Law Society of Upper Canada's 2011 Annual Solo and Small Firm Conference live-tweeted panel discussions with pithy snippets of key points. They arranged impromptu gatherings, initiated conversations with strangers and easily exchanged contact information. Business cards were quickly replaced by Twitter handles. More importantly, relationships were started that could lead to professional friendships, access to resources and even referral sources.

Individual lawyers do not use Twitter to promote new partnerships or deal announcements, but rather for networking with like-minded peers, showcasing expertise, responding to questions posted by followers, and monitoring industry trends and developments.

Twitter should not be overwhelming. Getting started is as easy as choosing a name, signing up for a free account and starting to follow people. Begin with friends, colleagues, IBA News (@IBAnews) or me (@robertwakulat). Recognised leaders in the legal field on Twitter include Kevin O'Keefe, LexBlog (@kevinokeefe), Jordan Furlong, Edge International; Stem Legal (@jordan_law21), AllenOvery (@AllenOvery), SMG Law, Toronto (@SGMLaw) and Robert Hyndman, Hyndman Law (@rhh).

Once you have followed someone, you'll start seeing their Tweets in your Twitter stream. Until they follow you back they won't see yours at all. Take your time and don't follow too many people right away. Choose your followers carefully for the value they add to you and your network. Upload a recent photo, add a personal description and maybe include a link to your law firm website, LinkedIn page or blog to provide more context about you or your work.

You will quickly hone in on the leaders in various fields engaged in interesting discussions. The key here is to be useful though; just listen if you don't have anything useful to say. Start with discussions, exchanging links, debating, giving endorsements, or public critiques. It's a big dinner table conversation with peers that you get to choose.

An effective Twitter feed can lead you to benefits such as business referrals, speaking gigs and media exposure. You will also start to understand legal issues that clients potentially face with their Twitter usage.

The challenge larger firms face in finding a unique voice to speak to all their stakeholders may prove to be an opportunity for individual lawyers to build their industry niches with colleagues, clients and opinion leaders. To paraphrase Jay Shepherd from the 'Above the Law' blog, lawyers can use Twitter to connect with people and share information. That sounds suspiciously like our job description.

**Note**

* Robert Wakulat can be found tweeting about local cuisine, alternative energy and legal issues at @robertwakulat. Robert would like to express his appreciation to Toronto-based lawyer and social media expert Omar Ha-Redeye (@OmarHaRedey) for his contribution to this article.

**Dr María Victoria Vergara Gallo**
Ferrere Attorneys at Law, Uruguay
vvergara@ferrere.com

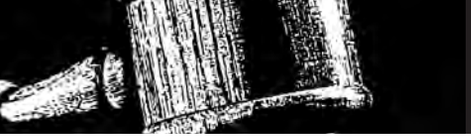
# Investment in infrastructure: the way of Latin America towards development

## The Uruguayan case[1]

Most of the economies of Latin America, unlike those in other parts of the world, are going through a major process of growth. The Uruguayan economy is not alien to this process.

In fact, after the deep depression experienced in 2002, the Uruguayan economy has been growing in leaps and bounds. This growth, which was not expected by economists and therefore not planned by the government, has to overcome several obstacles in order to continue to develop.

One of the main obstacles is the lack of infrastructure for major foreign investment projects, which would have a direct impact on productivity and international competitiveness, which will lead to higher social welfare and a better quality of life. According to studies from different public-sector agencies, reinforced by economic analyses provided from the private sector,[2] eliminating infrastructure gaps would require investments that can be estimated at US$5bn. Amounts like these are extremely relevant given the size of Uruguay and its economy, and finding such investments will probably make a relevant difference.





The term infrastructure is commonly used to refer to 'all physical assets, equipment and facilities to provide essential services for the life of communities in a given time.'[3]

These essential services can be of various kinds. On the one hand, there are those which are mostly focused on economic development in a given community at a given time, such as transport services (roads, railways, ports and airports, etc), telecommunications and power grids. This is called economic infrastructure.

On the other hand, there are those essential services which have a social profile, recognised as 'social services', which refer to health, education, security, etc. This is called social infrastructure.[4]

The challenge is then to create appropriate regulations to allow investments and business in Uruguay for both foreign and domestic capitals.

## Regulatory framework

In the light of the above, a regulatory framework was created with the purpose of ensuring the sustainability of projects through Public-Private Participation (PPP). In this way, and collecting the different findings of international law on the subject, the Uruguayan Parliament approved Act 18,786 on 12 July 2011. This act was known as the law on 'public-private participation contracts for the performance of infrastructure and related services'.

This new rule came to create the regulatory regime applicable to the Public-Private Contracts, establishing a 'new' private link with the State and shuffling elements of interest and the appropriate allocation of risk, assessment of best value for money, competitive dialogue, compulsory arbitration and sufficient guarantees to creditors.

In those contracts the public administration entrusts a third party regulated by private law (contractor) for a given period, with the design, construction and operation of infrastructure.

Under the constitutional boundaries, such contracts may be used for the development of infrastructure in the following sectors:

- roads, rail, port and airport;
- energy infrastructure;
- construction of waste treatment and disposal facilities; and
- social infrastructure including prisons, health centres, education centres, affordable housing, sports and improvement works, equipment and urban development.

Such contracts are also expected to be used for the colonisation of land, which according to its location, size and agricultural characteristics might be economically suitable for population settlements.[5]

Tasks that are exclusively provided by the State and activities conducted by monopolies established by law in favour of the State are excepted from this new contractual regime.

## Advantages of using PPP

This new law introduces new mechanisms through which private and public sectors can work together to obtain the best possible infrastructure project: the most profitable for the private party, the most advisable for the administration, and the most beneficial for users of the services provided. At least, that is the intention of those who supported the new legislation.

To our understanding there are different elements, at least from a theoretical point of view, which lead us to conclude that we should opt for investment projects in infrastructure as Public-Private partnerships.

### *Funds*[6]

Infrastructure works generally require large sums of money. In Uruguay, the public sector is the main executor of major infrastructure projects, both through member agencies of the central government (Ministry of Transport and Public Works for example) and through the work undertaken by Public Enterprises (UTE[7], ANTEL[8], ANCAP[9] and OSE[10]).

From the financial point of view, the realisation of large works has two major implications for public finances. The first one is obtaining the necessary funds for these investments.

However, this would not be the main difficulty.

The second relevant implication is the impact that these investments would have on the fiscal balance. Public sector accounting in Uruguay is not done on an 'accrual basis' but instead on a 'cash basis'. This implies that the funds invested in infrastructure are not integrated as part of the asset but are recorded as a loss for the year in which the cash outflow was recorded, and hence increase the fiscal deficit. For example, if works were executed in 2012 for US$2bn, this cost increase would generate a fiscal deficit

of about two per cent of GDP, which added to the deficit as projected by the government (approximately one per cent of GDP) would leave Uruguay with a fiscal imbalance of six per cent of GDP, a figure that could affect the market's credibility in the sustainability of public finances.

The PPP law is presented as a possible solution to these problems. Through private investment the disbursement is not initially recorded on the public sector accounts.

Notwithstanding the above, the administration should not ignore the evaluation of the budget liability involved in a PPP project so that solution will not be a problem in the future, since under PPP the cash disbursements begin after the work is in operation and not before.[11] Failure to perform this evaluation can mean that future contingencies will be passed along to future administrations without the latter having estimated the fact that they would have to deal with them.[1213]

In addition to those provisions, the PPP law limits the flow of projects that can be performed using this mechanism to seven per cent of the previous year's Gross Domestic Product (GDP). In turn, the expenditures of the State using this mechanism cannot exceed five per 1,000 of GDP per year.

### *Efficiency*

There are different reasons that lead us to conclude that governments are unable to manage public enterprises and most public services in an efficient way.

The private sector can improve performance even in very difficult situations. The private sector has a different conception of doing business, and always tries to 'win', to obtain the best value for money, all of which implies being efficient.

Being efficient is required by the Public Private Participation law. When we talk about 'efficiency' as a principle that we must follow we need to know that the term comes from economics, and means that a party is efficient if it can produce a good or provide a service at the lowest possible cost.[14] It is clear that the concept of efficiency must be understood in a broad sense,[15] including effectiveness notions (accomplishment of objectives and goals) and efficiency (lowest possible cost).[16]

### *Transfer of risk and 'value for money'[17]*

The PPP law itself includes, among its principles, 'adequate risk distribution'. According to this, contracts must provide adequate distribution of risks between the Private Party and the State, so as to minimise the costs associated with such risks.

This type of contract must analyse all possible variables and risks involved in the infrastructure project to be carried out, and attribute those risks depending on which party is in better position to face and mitigate them if necessary. If each risk is taken by the party most suited to cope with it, in the most efficient or economical manner, the risk will be reduced and the cost will be lower. This will prevent resources from being wasted and will bring the best possible return on the investment, greater economic efficiency, and the highest value for money.[18]

### *Definition of obligations such as service standards and fostering of innovation[19]*

In Public-Private Participation contracts a specific outcome and a specific compliance standard are sought. In fact, unlike other agreements such as public works contracts, these contracts are focused on the service and not on the work itself.

We strongly believe that this is an advantage as it goes a step further on what is entrusted to privates who will have to show inventiveness and creativity and, thus, encourage innovation. Innovation will be fostered as long as privates agree to achieve certain results, to follow certain standards for which they will have to obtain the best cost–benefit ratio.

### *Collaboration*

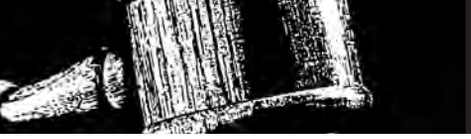
For a venture carried out through a PPP project to be successful it is imperative to have the cooperation of both parties (public and private), so that it will be efficiently executed according to the highest quality standards.

**Notes**

1 Summary of the paper 'Investment in infrastructure: the way of Latin America towards development - The Uruguayan case' prepared for the Application for the Rogelio de la Guardia Scholarship for which it was awarded the runner-up position.

2 Information provided by CPA/FERRERE Consultants – Economist Alfonso Capurro

3 Echeverría Petit, José Luis, 'En el foco de la discusión nacional: infraestructura y participación público privada', *Tribuna del Abogado*, nº 173 (June/July 2011), p 5.





4 Echeverría Petit, José Luis, Op cit, p 5.
5 On the other hand, a series of restrictions are established. In any case, Public-Private Participation agreements may include educational services in the case of schools, health services in the case of health centers and either security services, health and rehabilitation of prisoners in the case of prisons.
6 Information provided by CPA / FERRERE Consultants - Economist Alfonso Capurro
7 National Electric Power Plant and Transmission Administration (UTE).
8 National Telecommunications Administration (Administración Nacional de Telecomunicaciones – ANTEL)
9 Fuel, Alcohol and Portland National Administration (Administración Nacional de Combustibles, Alcohol y Portland – ANCAP)
10 National Administration of Sanitary Works (Obras Sanitarias del Estado – OSE)
11 Treasury Commission of the House of Representatives File No 485 of 2010 – Stenographic Version No 360 of 2010. Session held on 1 December 2010. Further information available at <**http://www0.parlamento.gub.uy/dgip/websip/lisficha/fichaap.asp?Asunto=105584**>.
12 In analysing the 'cash flow' the legislature understood the forecasts established to prevent failures at this point. Thus, it established tools to assess the contingencies and other liabilities to pay and define the accounting treatment to be given. Also established limits on the amounts of these items that the State can assume and the controls exercised by Parliament (see Article 60 of Law 18,786).
13 CAF report, 'La vinculación del capital privado en el desarrollo de proyectos de infraestructura de transporte y energía en la República Oriental del Uruguay', Volumen I, p 33.
14 Correa Freitas, Ruben, 'Los principios constitucionales de la función pública' in *Manual de la Función Pública* by Correa Freitas, Ruben and Vazquez, Cristina (FCU 1998), p 12.
15 Correa Freitas, Ruben, Op. cit p 15.
16 Correa Freitas, Ruben, Op cit p 15.
17 Echeverría Petit, José Luis, Op cit, p 8.
18 'Value for money' is a term used to assess whether or not an organisation has obtained the maximum benefit from the goods and services it both acquires and provides, within the resources available to it.
19 Echeverría Petit, José Luis, Op cit, p 8.

# Italy and the Issuers Regulation implementing the Italian Consolidated Law on Finance: new amendments

**Marco Monaco Sorge**
Tonucci & Partners, Milan; Italian National Representative of the IBA Young Lawyers' Committee
mmonacosorge@tonucci.com

## Introduction and background

The Italian Legislative Decree No 58/1998 as subsequently amended (the 'Consolidated Law on Finance' – TUF) has been implemented by the Consob Regulation No 11971/1999 concerning the discipline of Issuers ('Issuers Regulation').

The Commissione Nazionale per le Società e la Borsa (CONSOB) is the Italian public authority responsible for regulating the Italian securities market.

The object of this paper is the overview of the last amendments of the Issuers Regulation, approved by the Consob Resolution No 18079 dated 20 January 2012 and by the Resolution No 18098 dated 8 February 2012.

The Resolution No 18079 considered: (i) the EU Directives 2003/71CE on the prospectus related to the offer of securities to the public or traded, as amended by Directive 2010/73/UE; (ii) the execution Regulation No 809/2004/CE; (iii) the Directive 2004/109/CE on the transparency requirements related to information about issuers with securities traded on regulated market (the 'Transparency Directive'); (iv) the Directive 2010/78/UE related to the powers of Eba, Eiopa and Esma. The aim of such Consob Resolution is to adapt and harmonise Italian to EU law as well as facilitating the access to the Italian stock market and improving the competitiveness through regulation simplification.

The second Resolution No 18098 dated 8 February 2012 considered (i) the Article 147 ter, section 1 *ter* and (ii) Article 148, section 1-*bis* of the Consolidated Law on Finance, as amended by the Law No 120 dated 12 July 2011 on the rules related to the 'balance between genders' applicable to the election and composition of the board of directors and of the internal control bodies. The new Article 144 *undecies* has been added by this Consob Resolution in order to introduce the above mentioned rule, as detailed below.

## Overview of the main amendments

The main amendments are related to:

(i) definitions, including: public offering, key information, small and medium size companies, small capitalisation companies (Article 3);

(ii) offering Prospectus and applicability of the Regulation No 809/2004/CE; applicable requirements to the summary note and to the final conditions of the offer not included in the base prospectuses or in the supplements (Articles 5 and 6);

(iii) omission or equivalent information (Article 7);

(iv) regulations related to the prospectuses and to the related supplements with particular reference to the terms and condition of publication, the EU and Italian validity, language applicable (Articles 9, 10, 11, 12);

(v) mandatory disclosure of the financial results related to the public offering (Article 13);

(vi) implementation of the amounts and amendments related to inapplicability and exemptions hypothesis (Article 34 *ter*);

(vii) performance, compliance and subscription related to the public offering (Article 34 *quinquies*);

(vii) the faculty to preliminary discuss with Consob about any particular terms and characteristics related to the public offering, in order to join evaluate any following effects on the prospectus' provisions (Article 52);

(viii) the faculty of introducing new attachments to the summary note should any relevant updates and new information have to be mentioned (Article 53);

(ix) terms and conditions related to the publication of the prospectus and of any attachment, exemptions included, with particular reference to the mandatory deadline represented by the start of trading (Articles 56 and 57);

(x) disclosure to Consob and publication of the prospectus with reference to public offering relating to the EU financial instruments subject to listing (Article 63);

(xi) mandatory disclosure of financial data, privileged information in case of delay, forecast and periodic accounting data (Articles 66, 66 *bis* and 68);

(xii) credit rating activities shall comply with the provisions set out in the Regulation no. 1060/2009/CE (Article 69 – *decies*);

(xiii) modification of the provisions related to the disclosure of information concerning mergers, spin-offs and share capital increases also by way of the conferral of assets in kind (Articles 70 and 71);

(xiv) disclosure of information related to the intention of not complying with codes of conduct (Article 89 *bis*);

(xv) codes of conduct adopted by the management companies and by the financial operators' associations and the related obligations concerning terms and condition of publication and disclosure to Consob (Article 89 - *ter*);

(xvi) introduction of the rules related to the 'balance between genders' applicable to the election and composition of the board of directors and of the internal control bodies: the less-represented gender shall obtain at least one third of the regular members of the boards of directors and auditors (Article 144 *undecies*);

(xvii) limitations on the plurality of offices (Articles 144 – *terdecies* and 144 *quarterdecies*);

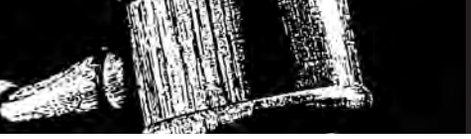
(xviii) limitations on the applicability of disclosure obligations (Article 152 – *septies*);

(xix) the attachment no 1 of the *Issuers Regulation* named 'public offer of financial instruments and admission to trading of EU financial instruments' has been modified as follows: (a) sub-attachments no 1A, 1F, 1I and 1M were replaced (b) sub-attachments no 1N and 3C were abrogated;

(xx) a transitory entry into force regime related to the above mentioned amendments has been provided by Article 3, section 2, of this Consob Resolution No 18079 / 2012.

## Conclusion

The above mentioned amendments to the *Issuers Regulation* aimed by the strengthening of investor protection and of markets transparency, represent a very welcomed adjustment of the modified Italian regulations that also allows the approach to best international practices as well as the recent new edition of the Italian Corporate Governance Code of Listed Companies and the 2011 amendments to the Consolidated Law on Finance.





# Outstanding Young Lawyer of the Year Award 2012

**Rouven F Bodeheimer**
Lungerich Lenz Schuhmacher, Cologne
bodenheimer@lls-law.de

As Chair of the IBA Young Lawyers' Committee I am pleased to announce that we will now be accepting nominations for the IBA Young Lawyers' Committee 'Outstanding Young Lawyer of the Year Award' in recognition of William Reece Smith Jr.

Nominees will be considered for the award based on the following criteria:

- professional excellence;
- a reputation for, or advancement of, legal ethics and professional responsibility;
- service to the community – local and further afield; and
- other merits, similar to the above, or considered relevant by the candidate or his/her nominators, such as an innovative approach to their legal practice, including, but not restricted to, pro bono work.

The award is free to enter and it is open to all lawyers, up to and including the age of 35, whether or not they are members of the IBA.

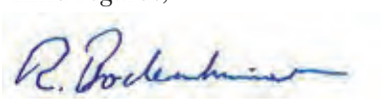
The award will be presented to the winner during the Young Lawyers' Reception, which will be held on Thursday, 4 October at the IBA 2012 Annual Conference in Dublin. The winner, as part of the award, will receive the following:

- free registration for the IBA 2012 Annual Conference, 30 September – 5 October 2012, Dublin, Ireland;
- a contribution towards accommodation and travel costs to attend the conference;
- one years' free membership of the IBA, PPID and Young Lawyers' Committee

In order to apply for this award, nomination forms must be sent to Jemma McVey, IBA Divisions Administrative Assistant, no later than **Friday 15 June 2012**.

The IBA Young Lawyers' Committee looks forward to receiving your nominations for this award.

Kind regards,



Chair, IBA Young Lawyers' Committee
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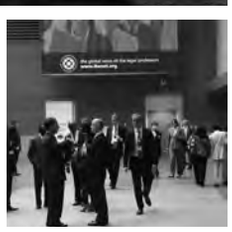




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