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IBA Daily News

Vancouver Conference 2010

Wednesday, October 6

Battle of the high seas

Delegates attending a session on environmental crime yesterday were treated to a heated exchange between a US state prosecutor and one of the country's leading admiralty defence lawyers.

Richard Udell from the US Department of Justice environmental crimes section, and Michael Chalos of Chalos O'Connor & Duffy debated US anti-pollution laws. They disagreed over the effect of whistleblower provisions, media influence and the extraterritorial application of national laws.

Chalos, who moderator Irwin Schwartz estimated had been involved in at least half of all US maritime pollution cases, attacked a clause in US legislation that allows whistleblowers to claim half of any fine that results from a successful prosecution.

The clause significantly helps Udell's department. The government prosecutor admitted that in several cases this information was the only way that prosecutors had learnt about violations, often on vessels that weren't even under surveillance.

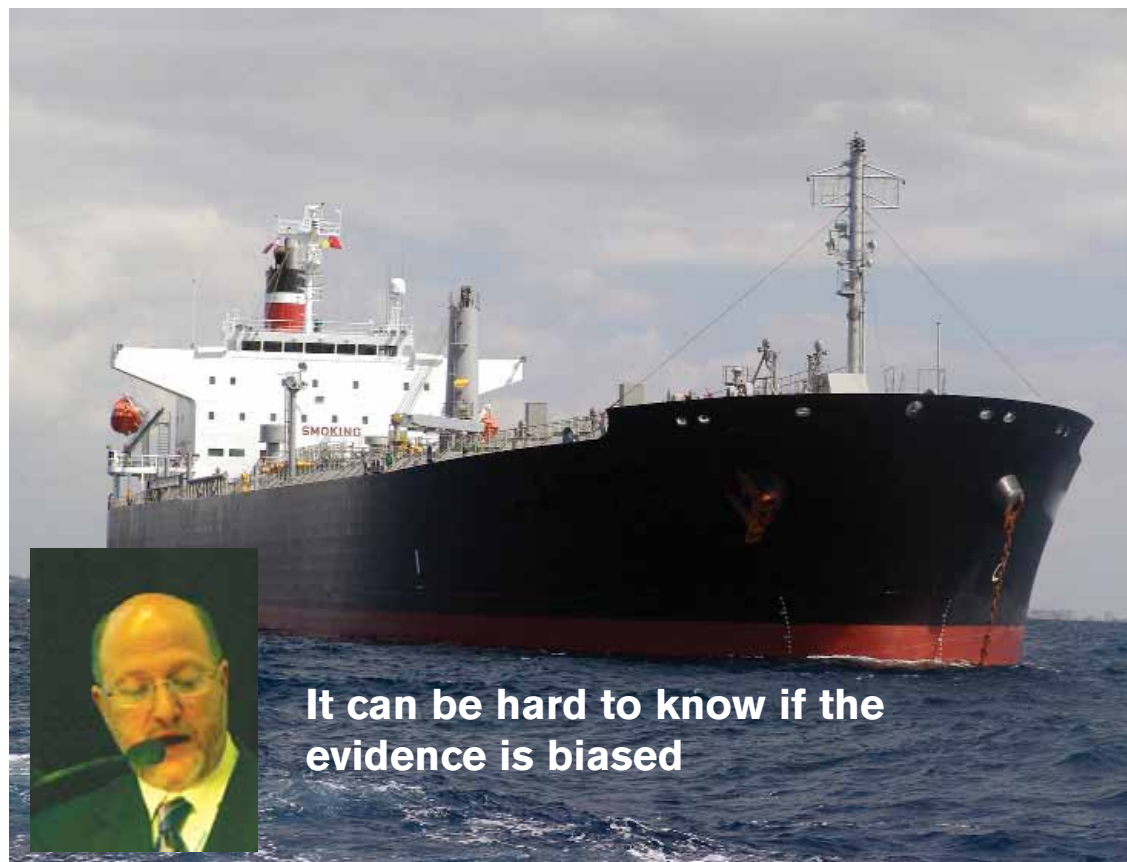
He told the story of one extraordinary case where, on docking in a US port, a Filipino ship worker had walked downtown and asked directions to the nearest police station. There, he informed police that he had been instructed to dump waste overboard, and received half of the eventual \$4.2 million fine for his trouble.

But though crew tip-offs can be helpful, they also place an extra burden on both prosecutors and the defence. "With the financial incentive it can be hard to know if the evidence is biased," said Udell. "These cases need even more thorough and time-consuming investigation."

Chalos picked up on this point, and highlighted the lack of repercussions that accompany a false claim. "If you're earning \$10,000 to \$20,000 a year, and you suddenly have the opportunity to make upwards of \$500,000, once in a while you're going to make up a story," he said.

And there appears to be no potential downside for informants, who face no charges for a false claim. "The government claims that whistleblowing helps level the playing field," said Chalos. "But if you want a level playing field you have to be able to charge these guys."

Udell objected to Chalos's allegations, calling them "salacious and serious", and insisting he'd be the first



It can be hard to know if the evidence is biased

person to step forward and prosecute a false claim where the right evidence existed. He also challenged the assertion that media attention and publicity played a big role in US prosecutions.

Chalos referred specifically to the Cosco Busan oil spill in 2007, where a container ship collided with the San Francisco – Oakland Bay Bridge in foggy conditions, and spilt more than 53,000 US gallons of oil into the bay.

He claimed the influence of very active environmental groups in the San Francisco area led to increased publicity for the case and a greater political will to prosecute. Udell unequivocally disagreed, again labelling the claims as salacious.

"There may be cases where the media uncovers a crime or focuses attention on it," he said. "But that absolutely does not factor into who should and shouldn't be charged, and I object to that suggestion."

Chalos also opposed the US policy of prosecuting flag states that the government considers to be violating the UN convention for the prevention of pollu-

tion from ships, known as Marpol. As UN conventions are implemented through national legislation, gold-plating can occur that leads to discrepancies in their application.

"It's very arrogant of the US to prosecute flag states for not enforcing Marpol when they're only not doing it in exactly the same way as the US," said Chalos. "It's offensive to flag states that are genuinely trying to do the right thing, and instead there should be a collaborative process to develop shared standards and practices."

But the adversaries found common ground on one of the biggest contributors to the continued proliferation of deliberate oil dumping. Despite increased prosecution and improved technology, violations have continued, and both speakers admitted that corporate cultures were partly to blame.

To illustrate the top-down complacency that exists, Udell even cited one case where the president of the offending company was so proud of its pollution that he named the oil dumping site after himself.

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CAPITAL MARKETS

A new way for Mexican funds

Relaxed regulations and an innovative new hybrid product have opened up investment options for Mexican pension funds (Afores), explained Jean Michel Enriquez of Creel Garcia-Cuellar Aiza y Enriquez at a session on new capital markets products yesterday afternoon.

Pioneered in late 2007, before the global financial crisis, the structured notes pay both a principal guaranteed amount, plus a coupon linked to the Ebitda and performance of the underlying asset. But largely due to suspicion of equity risk among investors, the product failed to take off before liquidity was squeezed, and only one deal was completed.

The idea for the product came, said Enriquez, as returns on traditional investments in government debt decreased, and pressure grew for pension funds to find securities offering higher yield.

"Investment banks were constantly pitching packages to investors where they could invest, through newly introduced securities instruments, in hybrids," explained Enriquez. "But both regulators and investors were reluctant to have equity risk in their portfolios."

As the most recent crisis lessened, funds began to look again at how these so-called development certificates could be best used. One hurdle was the requirement for them to be issued through a public offering, and submitted to the regulators accordingly.

"The regulators essentially saw this as raising private equity through the public markets," said Enriquez. "So they decided to enforce the rules on Afores only being allowed to invest in listed securi-

ties, forcing a public offering."

When the hybrids are issued for fundraising, their only limitation is that the profits must be redirected into domestic projects, ensuring the money is redirected into the Mexican economy.

But they are further limited by a pre-funding requirement, which Enriquez cited as the biggest hurdle to their further development. "There are initiatives underway to try to amend the Securities Markets Law and other applicable regulations," he said.

"At the moment if someone was looking to structure something similar I'd advise them to think twice, though the complexity of the structuring is great for lawyers."

Other questions about the model that need answering include how much scrutiny regulators will want to exert over the funds' managers, and how far investor appetite will extend beyond large, brand name sponsors (Macquarie and Prudential Real Estate are two of the big-hitters that have so far launched successful deals). "Not much thought has been given to those sorts of things yet," admitted Enriquez. "But no doubt it will be in the near future."

It's also hoped that the relaxation of investment rules could encourage more specific investment in Mexican companies. The domestic equity markets in Mexico have traditionally been shallow, with businesses wanting to launch public offerings usually needing to dual list (or at least compile a 144a-compliant offer) in order to tap the mostly international demand.

FRANCHISE LAW

Social media pitfalls explained

As more companies adopt social media as a means of free marketing, new legal issues are evolving around the trend.

In yesterday morning's session 'Use and control of social media in international franchise systems', speakers examined issues ranging from managing intellectual property rights to protecting trade secrets.

The session was chaired by Marco Hero of TIGGES Rechtsanwälte who was joined by a host of franchise and internet specialists. These included Michael Lindsey of Paul Hastings, Leonard Polsky of Gowling Lafleur Henderson, Nico Härting of Härting Rechtsanwälte and Starbucks counsel Adam Ekberg.

Several informal audience polls throughout the session were particularly telling. When asked how many had Facebook profiles nearly all hands went up, and a majority said they used Twitter, the micro blogging site. When the panel asked how many firms represented by the audience maintained a Facebook page, just one attendee responded affirmatively.

While most people in the US by now take social media for granted, Härting said the reaction to networking sites in Germany and Europe in general is far different. Using the Starbucks brand as an example, he contrasted the coffee company's US Facebook page, which has almost 15 million fans, with the company's German page, which has just 200,000.

"While the fact that businesses are jumping into social media is true for the US, it is not true for



Adam Ekberg

Europe," Härting said.

To highlight the vast and varying amount of personal information available on the internet, he examined one Starbucks fan, for which he was able to discover her age, height, occupation and sexual orientation just from a brief glance at her profile.

"The great thing about social media is you learn everything about people," Härting said, "so I now know all about the latest fan of Starbucks."

The panel discussed recent cases that highlighted

the issue of protecting trade secrets on the internet. Lindsey looked at the case of the DVD Copy Control Association, which had its encryption technology leaked to the internet, voiding its trade secret protection. The example of the Afghan War Diary on Wikileaks, where thousands of pages of top secret CIA material was posted for the general public, emphasised the critical nature of this issue.

"If the CCA and US military can't control their trade secrets, what's a poor franchise operator to do?" Lindsey said.

The panel shared some video examples of where social media-targeted advertising has backfired on companies, including a Chevy marketing campaign inviting viewers to create an ad for the Tahoe model SUV using stock footage and catch phrases supplied by the viewers. Lindsey said hundreds of the submissions criticised the Tahoe with sarcasm and were posted on third-party sites like YouTube.

Another example involved a Ruby Tuesday's marketing hoax depicting the company "accidentally" demolishing a competitor's restaurant. But Lindsey said many viewers of the ad believed it was a true portrayal and felt duped when the hoax was made clear, triggering a stream of negative responses.

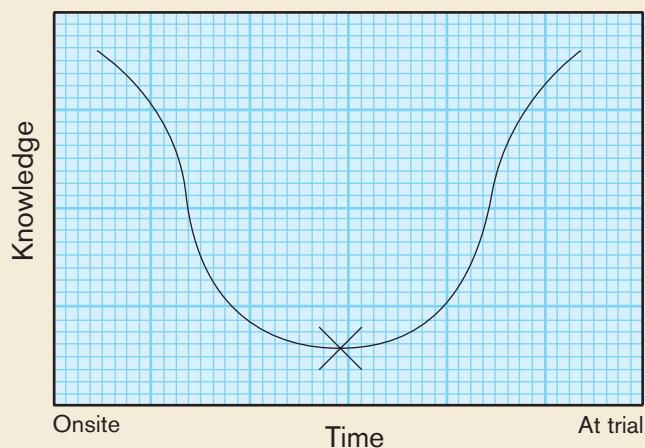
"There's nothing worse than having the social media world think you're deceiving them," said Ekberg. "At the very least you want to make sure all communications are honest and transparent."

When should you mediate?

Companies often enter mediation proceedings too late. They therefore end up spending money to relearn information that they had possessed in the past and have since forgotten.

In an entertaining session from the Legal Practice Division yesterday morning, barrister Patrick Green from ResoLex revealed his knowledge curve (see graph). His reading of most cases indicates that it is better to mediate early. When an issue or conflict arises, the knowledge on both sides is at its peak. With time, this knowledge deteriorates and it is often at the bottom of the collective recollection of information that companies approach lawyers (see x on graph). The lawyers then have to rebuild the case to a position when mediation (or litigation) may succeed.

Patrick Green's knowledge curve



"But there is an uncertainty in rebuilding the knowledge base and there is a cost to do so," said Green. He also suggested that £50,000-worth of mediation (\$79,500) at the start of a dispute prevents a £500,000 court case. While this is theoretical, the panel agreed that mediating early saves money.

It can also be profitable. David Burt of DuPont revealed that his mediation activities have recovered his employers \$50 million in 2010 alone. He followed this by underlining the importance of litigation pre-nuptial clauses. According to Burt, there is nothing less businesslike than litigation.

But more importantly: "Has anybody seen a joint venture that hasn't fallen apart within 15 years and needs repairing? Conflicts happen," he said.

Anecdotally, Burt raised some smiles in the room by suggesting that M&A partners tend to draft the alternative dispute resolution (ADR) clause at 11.59pm on the last day before closing. But he added that when a joint venture falls apart, it is the ADR clause that everyone wants to read first. Each party needs to be able to prove their case from their own file.

Later in the session, a comment from the floor suggested that mediation itself is a recourse that can provide unnecessary additional cost. The delegate from London suggested that direct negotiation with the other side before mediation is often overlooked.

Al Hilber of Swiss Re agreed: "We have longstanding clients and tend to say, 'Let's sit down and talk through



Patrick Green

things.' This is because there is a mutual interest on both sides to keep the relationship going," he said.

Hilber then went on to echo the earlier thoughts of the panel by saying that when mediation is used, it should be viewed "as an investment, not a cost".

In a humorous moment before the coffee break, co-chair F Peter Philips of Business Conflict Management recalled a Chinese dinner that the panel had on Monday evening in preparation for the session. Inevitably fortune cookies were brought out at the end of the meal. One of the messages read: "Do not dwell on differences with a loved one. Try to compromise."

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Game over for Mac clauses

Material adverse change clauses (Macs) have failed to protect buyers and should not be relied upon.

This was one of the messages from yesterday morning's session 'When M&A transactions go wrong: the resolution of disputes arising out of M&A transactions', crushing any hope that the catch-all provision might help bidders back out of deals before closing.

In the joint session hosted by the corporate, arbitration and litigation committees, targets and buyers, M&A lawyers and litigators, and civil and common law practitioners agreed the concept was fraught with problems, and has not assisted transactions in the recent economic uncertainty.



Damien Zoubek

“No court in Delaware has ever found a Mac to have occurred”



Sergio Sánchez Solé

“Macs are a constant source of litigation”

“Macs are a constant source of litigation,” said co-chair Sergio Sánchez Solé, who injected humour into the lively session.

Panellist Damien Zoubek confirmed that no court in Delaware has ever found a Mac to have occurred while Markus Koehnen gave the Canadian view that “they don’t give you much to bank on,” adding that the clauses don’t have a future.

The Mac clause doesn’t even exist for private deals in many European jurisdictions, but speaker Guy Harles said if you’re going to include one in your transaction document, it should be defined widely.

And here lies one of the biggest tensions.

Speaking from a target perspective, Martine Turcotte recommended including clear exceptions of what is not considered to be material. But Zoubek retorted: “But once Martine’s put all of her exceptions in then the clause is pretty much worthless for buyers.”

Litigator Marco Schnabl agreed that as the clause becomes more specific, the further it strays from the intention of a Mac. If you draft it as a representation or warranty then it’s not a Mac. This is because a Mac is intended to cover something you can’t define, he said.

Koehnen then gave a detailed account of how to challenge the clause in court. Targets should ascribe to the bidder an economic or tactical reason for them not asking for specific protection (in a separate clause) against the event that has occurred.

“This prevents them getting through the back door what they didn’t try to get through the front,” he said.

Schnabl also raised the questions of whether Macs are just a revamped version of force majeure.

“I always toy with how this is trying to do something different,” he said. While there was an air of agreement in the room, Harles suggested there is a distinction: an event of force majeure makes performance of the contract impossible, but a Mac simply makes it very difficult to perform.

Third party challenges grow

Third party challenges are becoming larger stumbling blocks to M&A in North America. Speakers Martine Turcotte and Markus Koehnen brought the topic to life yesterday morning by reflecting on a recent court battle in which they appeared opposite one another.

Koehnen represented bondholders who challenged the proposed sale of Bell Canada Enterprises (BCE), where Turcotte is the chief legal officer, on the grounds the debt levels introduced by the leveraged buyout would lose their bonds’ investment grade rating.

The case was eventually decided in favour of BCE (“you dragged me through three levels of Canadian courts over nine

months,” said Turcotte, shaking her finger at Koehnen), but it raised questions over directors’ fiduciary obligations to shareholders.

The ruling made clear that in M&A transactions the board’s overarching duty is still to act in shareholders’ best interests, but that it must also act in the best interest of the company as a whole.

This means that getting the best price is not always the preeminent factor; and certainly not if the sale jeopardises the company’s future by overloading it with debt.

Co-chair Sánchez Solé joked that it was necessary to seat the panellists apart and they played along by shaking hands at the session’s start, but it didn’t stop them jibing at each other throughout the morning.

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The changing face of the ICC

Peter Cary explores some of the wider issues behind the ICC'S campaign for more female African lawyers

Following the Rome Statute's introduction in 2002, the global community has witnessed dynamic change in legal proceedings for the most serious of crimes. With all current International Criminal Court (ICC) investigations focused on African nations, the court is keen to even-out the imbalance in numbers of female lawyers, particularly those from Africa.

In last year's edition of IBA Daily News, Judge Akua Kuenyehia of the ICC brought to attention one of many ways in which the Rome Statute alone does not guarantee a smooth process toward justice: bar associations and governments still need to implement legislation which facilitates ICC enforcement.

The reluctance amongst some countries to introduce legislation has, however, been met with persistence from the ICC as links with the IBA and the UN develop into ongoing working relationships. And as attention turns increasingly toward problems in Africa, the IBA and the ICC set out in May to address gender inequality regarding the numbers of practising ICC counsel members. So far, 61 of the 335 members of the ICC list of counsel are female (18%), out of which just 22% are African (4% of the total counsel).

Confidence

As well as creating a balance for the ICC as a legal structure focussed on equality, the location of some of the court's operations also call for an increase in female and African lawyers. With all present ICC investigations focussed in central and eastern African states where sexual violence against women as a tactic of war is common, victims rely on female legal representation. It offers them the confidence to tell their story. Executive Director of the IBA, Mark Ellis described this as being a case of ensuring "effective, balanced legal representation" at the May conference that launched the campaign.

The project has rather inevitably faced some deep-rooted discrimination on a domestic scale, where glaring imbalances between genders and education in African nations still exist. But campaign heads remain positive about the chance of success. "Despite what we've seen as inequalities in education, there are a significant number of practising female lawyers in Africa who have been interested in the campaign so far," says Lorraine Smith, IBA Programme Manager for the ICC. "From the IBA side particularly, we

have ensured that this is achieved through local bar associations, which also helps raise awareness among the male members of their association," she adds.

Many hope these initiatives ensure the campaign proves to be a success, after its six-month run ends in November. "The ICC has recognised the importance of engaging members of the legal community in these efforts," says Smith. She hopes that in time similar principles will be applied to other geographical regions. There are currently no female Asian lawyers on the list of counsel, for instance.

The IBA and ICC are also aware how difficult it will be to define the campaign's success. "The figures have not been tallied yet to assess whether the campaign has been successful or not," admits Smith, but maintains that the partnership has facilitated more effective dissemination of the material to a targeted group. As investigations in Darfur continue following the decision to add genocide to the list of charges against Omar Al-Bashir in July, proportionality within the counsel becomes increasingly urgent. Mark Ellis reflected these concerns in the campaign's opening conference: "The widespread sexual violence against women is more than a consequence of war; it has become an instrument of war used to destroy the cultural fabric of a targeted group... it is timely and prudent to launch this campaign," he said.

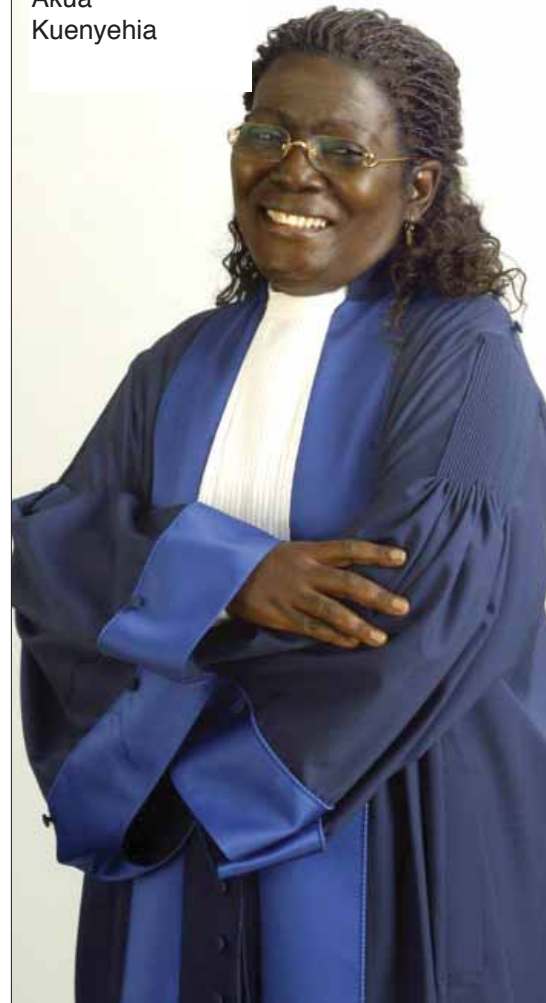
And with the project now reaching its final stages, it's not yet clear whether it can be labelled a success.

But recognising the imbalance combined with the enthusiasm for instilling wider IBA/ICC ideals at a local level have begun a process that both organisations hope to continue. "It's a positive step," says Smith, "As to why it has taken so long, that I cannot answer," she adds.

Both the court and the IBA are right to remain hopeful for the future. The ICC's influence and reach has grown considerably in the past eight years and campaigns like this represent only a small part of its activity.

As Smith says: "We are fully committed to improve the legal profession and this was a campaign that strongly facilitated this." The IBA appears quietly confident about the long-term impact this will have – for Africa, and for the international legal community as a whole.

Akua Kuenyehia



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Only 18% of the ICC list of counsel is female

Throw the book at them

Juan E Méndez of the IBA Human Rights Institute talks to **Peter Cary** about the IBA task force on International Terrorism's new publication and the difficulties of language in law.



“The task force struggled to come up with an objective definition of terrorism”

Juan Méndez is the acting president of the International Centre for Transitional Justice (ICTJ) and a visiting professor on international human rights and international humanitarian law at Notre Dame. He has served as president for the Inter-American Commission on Human Rights, as director for the Inter-American Institute on Human Rights and was appointed by former UN Secretary General, Kofi Annan to act as Special Advisor on the Prevention of Genocide between 2004 and 2007.

In addition to acting as co-chair for the IBA Human Rights Institute he is also an acting member of the IBA Task Force for International Terrorism, which is set to release its new publication, *Terrorism and International Law: Accountability, Remedies and Reform* in early December.

How does this book tie in with previous publications, and what new areas does it explore?

The IBA conducted a similar exercise a few years ago with a task force also chaired by Justice Richard Goldstone of South Africa who chairs this second task force as well. I have only been involved in this second exercise, but it seemed clear to the IBA that developments in law and state practise merited a second look at what had happened some years earlier. There have been similar efforts, for example by the International Commission of Jurists (ICJ) who set up a panel of jurists to produce a report, by inter-governmental organisations and a number of organisations like Interights in London. This creates a wealth of very well thought-out material on states' obligations when embarking on a fight against terrorism. The reason there's so much is because the international nature of terrorism after 9/11 has called into question a number of assumptions of what can and cannot be done. It's especially important to indicate the fact that terrorism can be defeated with-

out losing faith in our values of a democratic society, which are embodied mostly in the kinds of human rights laws that we have.

The area contains a great deal of politicised vocabulary and disputes between terms such as ‘terrorist’ and ‘freedom fighter’. How does the publication address issues of language and culture?

We recognise that terrorism has a less than satisfactory definition in international law, but it is still not such a vague term that people can feel free to define it any way they want. We struggled in the task force to come up with an objective definition that accounts for what happens in real life and also the fact that it is important not to simply brand a label of terrorism on anything we don't like.

So we are not identifying terrorism with resorting to violence generally, but we are defining it as the use of violence designed to spread terror among the civilian population. And there, I think, the agreements ensue. It may not be a complete definition, but it's objective enough to prevent any mistakes. And beyond that, whether one wants to label someone a freedom fighter or a terrorist for ideological reasons is not the issue.

There have been questions about how the western media has presented terrorism in the past ten years, normally linked specifically to Islamic fundamentalism. With this in mind, how does the task force deal with the cultural discrimination when dealing with terrorism?

That is absolutely true, but it is also motivated not so much by the western media itself, but by manipulations of public opinion by countries and governments. This particularly applies to those who embarked on the struggle against terrorism after 9/11 and especially the George W Bush administration that bullied people into a certain understanding of terrorism and worse, a certain understanding that the fight against terrorism would know no bounds, have no limits or rules. The Bush administration was free to re-write the rules from scratch. I think the western media portrayal that you described is influenced by that manipulation and for our part we have tried to show, that for us, the ideological, religious or political motivations are completely irrelevant.

What matters are the methods and means of exercising violence. So whatever your motivation, if you choose to shoot indiscriminately against civilians, to create terror in the civilian population by an indiscriminate attack – that's terrorism. It could be domestic or international, but it's really the kind of tactics and events that define whether something is terrorism.

How does the task force aim to deal with issues of terrorism? Is there a procedure that you feel a nation should follow?

We start from the assumption that nations have not only a right, but an obligation to prevent terrorist attacks and to do so by punishing those that have already carried them out. But we also try to make it clear that states are not free to engage in either their own brand of terrorism or even in human rights violations under the guise

of the struggle against terrorism.

And that poses for us the question: are we only saying what you cannot do, or are we also dealing with what states can do, what is legitimate and at the same time, effective against terrorism? We try to come up with some of the latter ideas and demonstrate not only that it is possible to defeat terrorist organisations by upholding the rule of law and the values of a certain democratic society, but also that it is the most effective way of doing it because you don't create a whole generation of new willing martyrs who are resentful of what happened to the people that they follow.

So, yes, we deal with matters of an exchange of information of intelligence between states, we try to deal extensively with questions like what kind of trials are legitimate and at the same time effective, what rules should be followed, including the need for protecting sources of intelligence etc, which we recognise is an important issue in these kinds of trials.

Guantanamo Bay and detention periods in general have been very controversial. How does the task force question issues of detention and how can it be monitored?

We recognise that some of the struggle against terrorism is governed by international humanitarian law; by the laws of war. Whatever happens in the battlefield concerning armies fighting each other, plus the application of the Geneva Convention and the additional protocols on the laws of war generally. It is possible during war to detain enemy combatants for the duration of hostilities, released only at their conclusion. That means that there are very clear rules about how and for what reasons people can be detained, but it is not illegal for a beligerent state to detain its enemy combatants.

However, we try to make it clear that that applies to certain kinds of combatants. You just cannot extend it so broadly as to incarcerate for as long as you like under the war of terrorism, which becomes more of a rhetorical question, so people who are taken from an area which is not a battlefield cannot be seriously branded as combatants – whether legitimate or illegal combatants is another question. But for those who are not arrested under those circumstances, prolonged detention is a violation of human rights. The international human rights laws, under a separate body of international law apply fully to people indefinitely held without trial.

What impact do you think the IBA has had on creating and monitoring process on international law on terrorism so far? How would you like to see it develop?

I think the IBA has the potential to be a very powerful voice, particularly because it brings together lawyers from around the world with very different legal cultures and backgrounds but with a shared respect for the rule of law. The bars are influential actors in their own countries and they can shape public opinion and policy making in very significant ways.

The fact that the IBA has chosen not to ignore this very serious problem of how it is possible to counter terrorism while upholding human rights is a very welcome development. Obviously several bar associations in their own countries have been at the forefront and many lawyers have paid with their lives for defending human rights and the rule of law. It is very welcome that such a prestigious, representative entity as the IBA takes on this manner of respect for human rights with such seriousness of purpose.

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How mandates are really won

Pippa Blakemore, strategic business partner of The PEP Partnership, explains the ways to win clients

1 – Build relationships

Strong relationships are fundamental to winning mandates. These relationships are based on the client, contact, referrer or intermediary, liking you, developing trust in you, and so entrusting you to help him to achieve his objectives and solve his problems. The development of these relationships is best illustrated by the diagram below.

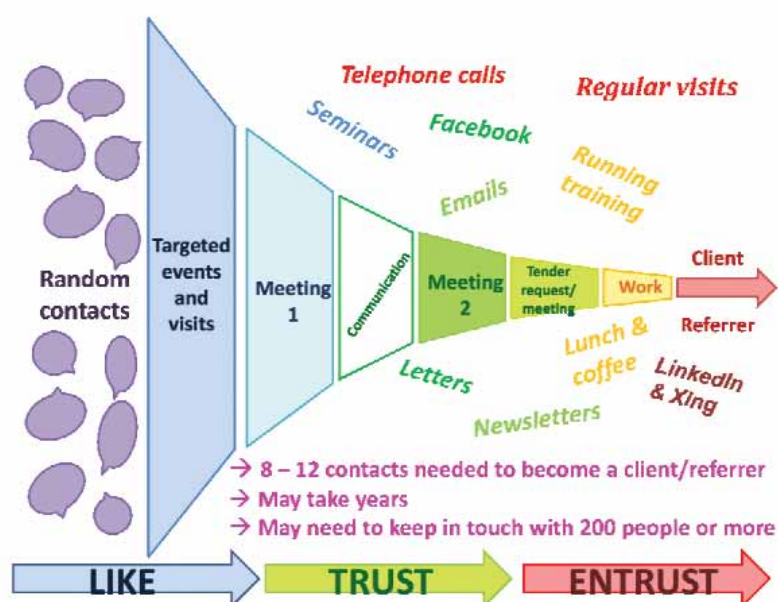
The speech bubbles on the left-hand side indicate talking to everybody you ever meet, as you never know when they, or people they know, might need legal services. Lawyers in planes around the world have received instructions by talking to the person sitting next to them on the flight.

Targeted conferences, seminars and events on the left of the funnel, are more likely to produce appropriate potential clients.

The funnel narrows as you become closer to converting a contact into a client or a referrer. Plan regular visits and have face-to-face meetings. Between meetings there are numerous ways to keep in touch including for example LinkedIn and Xing.

You may need eight to 12 contacts with an individual before they become a client or referrer. It may take several years. You may need to keep in touch with more than 200 people, on a regular basis before they become clients, particularly in litigation.

For example, lawyers have come to me and said: "We held a seminar, which was well attended and was very successful, and yet we didn't win any work from it." This would be similar to going to a party, seeing somebody across the room, chatting for a few minutes, and then saying: "Will you marry me?" There has been no opportunity to develop the relationship from like, to trust to entrust.



2 – Target your resources for maximum return

Existing clients generate approximately 60% – 80% of your current income. It costs you about nine times as much to win a new client as it does to win additional mandates from a current client.

However, you still need to replace the 20% that leave each year. The principles which apply to win-

ning new work and clients also applies to winning more referrals from intermediaries, such as consultants, accountants and bankers.

In the current economic climate evaluating where you should focus your resources should also include four critical questions:

Which clients and contacts have the money?

Will they pay?

Will they argue about the bill?

Will they delay payment? (If they are current clients, what is their payment history?)

Take every opportunity when you meet clients to increase your mandates from them. Identify areas in which you can help and demonstrate how. These opportunities include: briefing before a case or matter; meetings and discussions throughout transactions; closing dinners; coffee after court and formal feedback sessions. The more the client talks about vision, objectives, problems and challenges, the more you are able to identify opportunities now and in future to provide additional services.

Analyse the fee-income from each of your top 20 to 50 clients over the last three to five years. Evaluate the sources of this income, including jurisdictions, industries, products, services, practice areas and departments. Compare this analysis against your own firm and identify mismatches. Then conduct a systematic and structured plan of communication to the client of areas in which you can help them to achieve their objectives. This has produced much work, with the most common phrase from the client's perspective: "I didn't know you did that."

To replace the 20%, analyse clients that you have not heard from over the last two to three years. Find a hook that gives you a reason to get in touch with

them. If you categorise them by industry, markets or services, you will be able to use the same hook for a number of different dormant and past clients.

There are plenty of reasons to be in touch even after a long period of time. These could be changes in their industry; introduction of new legislation which might affect their business; changes in your firm; your contact has been promoted; you have been promoted; you have done something interesting recently which might be of interest to them; you have read something which could be of interest to them; you have written an article which they might be

interested in; you have read an article which might be of interest to them; you could ask them for a quote for something you are writing; you could ask them to contribute to a survey.

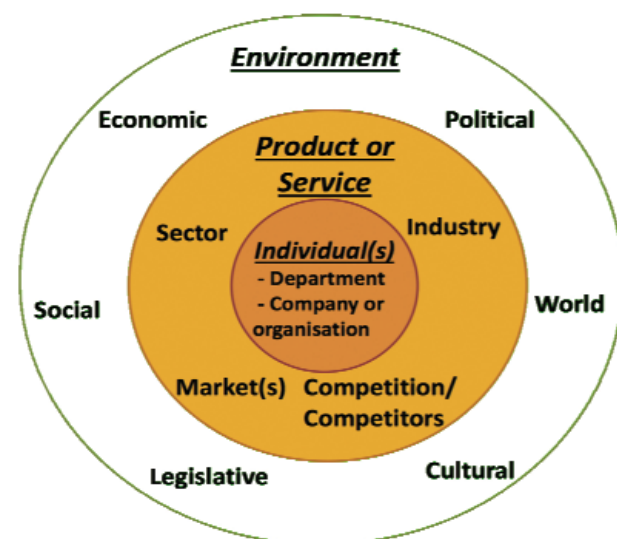
Your knowledge of your target organisations, industries and markets will enable you to focus your resources on the most fruitful contacts, referrers, intermediaries and clients.

3 – Know and understand your clients and contacts

As the diagram above shows, at the centre of any relationship with an institution are individual people.

People buy people first. Because of this, it is important to research these individuals. Research their experience of lawyers, and the pressures they are under. For example, how many e-mails do they receive a day; how many jurisdictions are they managing; how many matters do they have on their desk at any one time?

Research and keep up-to-date on the products and services they provide. I know one lawyer who will only



use and buy the products of his clients.

Be aware of the opportunities and the challenges within their industries, sectors, and their markets. Who are their competitors? What is their competition doing and what is their market share? Read the financial pages every day to ensure that you understand not only what is happening to your clients but the context in which they are working. Keep a record of their share price.

One law firm walked into a beauty parade meeting, made a presentation on how commercial they were, and the first question they were asked was: "What is our share price?" They did not know the answer. They did not win the mandate.

Set Google alerts on your computer to let you know what is happening to your target contacts and client's industries and markets. Research the political, economic, cultural and legislative opportunities and constraints of each jurisdiction and market.

One of the best ways to get to know contacts and clients is to go and visit them. One firm won a mandate because it went regularly to a potential client on another continent, with several lawyers working in their offices for two or three weeks at a time, to try and understand their business. It won the resulting competitive pitch, because the rest did not have the passion to learn about this client and only dropped in on occasional, intermittent and irregular so-called marketing trips.

Take every opportunity offered by your contact and clients to get to know them better on a personal and face-to-face basis. However busy you are, just say "yes" because these people want to feel that they are the only people that you are interested in. Just like personal relationships.

4 – Appreciate cultural differences and requirements

Research and learn every element of the culture that you are intending to do business in. Never assume

anything. Double-check with three sources what you are told. Try and ensure that one of these sources is from the country and works in the country itself.

Personal relationships and family ties play a major part in business in many cultures. You need to understand the importance of these in the conduct of business in a country.

Nuances to understand include the use of titles, use of first names, who is introduced first, who enters a room first and who speaks first.

Knowledge of a country's history, traditions, religions and languages is essential for business development in other jurisdictions. Appreciate that these may be different in various parts of the country, for example in countries such as India and China.

Try and learn some basic introductions, please, thank you and goodbye. It often is well-received if you open a meeting in the local language of the people you are visiting even if you continue in English.

5 – Skills required

Make time every day to develop your business relationships when you are not on visits or at conferences. If you charge in six minute units, then ensure that you spend at least three 6 minute units (18 minutes) per day. If you charge in 15 minute units then have at least one unit per day. This is more than 1.25 hours per week, more than 60 hours for a year (including holidays) which is more than a working week, with very little effort. The more you do, the better the results, the more optimistic and encouraged you will feel about doing it.

Concentrate on the time that is best for you but take into account time differences with other parts of the world and what is the best time for those you are communicating with. Very early in the morning is often a good time to telephone, when decision-makers may be in their offices and before everybody else has arrived at work. Another good time for people is at the end of the working day when most people have left the office and it is quite quiet. It is important however to remember that the times for the start and the end of the working day vary from country to country.

6 – Apply the P-I-F approach

Apply the P-I-F approach to every business development activity, including networking events, new business meetings and international visits.

P = plan, prepare and practise

I = implement: do what you plan and what you say you are going to do

F = follow-up, which is essential to ensure that every business development activity that you do is productive. If you do not follow up the opportunities that you create then they are wasted and it would have been better not to start them.

Your relationship-building needs to be consistent,

systematic and regular. Like fitness and dieting, a little and often, is the most effective approach. It needs to become a habit and part of your role as a lawyer. It will not be effective if you do it in irregular bursts, when you have no work at that moment, and think that it's time to do some practice development.

7 – Productive and enjoyable networking

Plan which are the most appropriate events to attend and who you would like to meet. Prepare your research on the individuals, their companies, their industries and jurisdictions. Prepare your research on your own organisation and the offer that it might have to any individuals that you meet. Prepare and practise a 12-word summary on who you are and what you do. Make it interesting and attention grabbing.

Implement your plan by setting yourself targets which are SMART (simple, measurable, achievable, results-driven, time-bound) on the number of people to meet, both new and those you know already. For example, meet five new people and talk to five people that you know already, within an hour, and obtain a reason to keep in touch with each of them.

There are three elements which make keeping in touch more comfortable. Find a hook, which is a reason to keep in touch. This could be work, hobby, travel, or the family; make a commitment, such as e-mailing a link, sending a copy of the article; and gain permission from the person to whom you make the suggestion.

Follow-up all the contacts you have made. Gaining permission is important to enable you to follow up comfortably, for three reasons. The first reason is that it does not make it feel like a cold follow-up, contact, call or communication, the second is that you will find out the best way to communicate from the other person's perspective. The third reason is that this may be the first step towards demonstrating to that person the way that you provide legal services: quickly, efficiently and reliably. Therefore, if you do not fulfil the commitments you have made and follow-up, you are letting that person down.

8 – Plan every international visit in detail

Pre-visit preparation and planning are essential for a successful visit. International visits need to be part of a long-term strategy of development into a country or jurisdiction. The principles of building long-term relationships apply so that one-off visits are unlikely to be particularly effective unless they are seen by contacts and clients as part of your long-term desire to be their legal adviser or to work with their local legal advisers.

Evaluate the potential of each of the individuals and the organisations that you will be visiting.

Do not expect too much too quickly.

Occasionally, you will win work immediately because you are at the right place at the right time. In other cases it may require several visits over several years, before your investment of time results in new mandates.

9 – Winning business meetings

Prepare an agenda, even if you do not use it. Prepare twice as many business

cards as you think you will need, translated into the appropriate language. Research their potential requirements, plan your offer, have an outline presentation, practise your message and have suggestions for what you could do. An essential part of successful business meetings is planning preparing and practising answers to difficult questions you might be asked, and any subsequent follow-up questions. These need to be practised, with a video camera, before you leave your home country.

You might have arranged to have an informal chat over a cup of coffee to arrive and be faced with the chairman, managing director, the finance director and the company secretary, and be asked to do a full presentation.

In the meeting itself, ask appropriate, well-informed questions which demonstrate your desire to listen and your knowledge of the individual and company. Listen to the answers and ask additional follow-up questions, if that's what the potential client and client wants to talk about.

Follow-up immediately, systematically and consistently over a long time. Many meetings in a short period of time, in a different country and culture are intense and tiring. It is very easy for each meeting to blend into the next and you not to remember who said what, to whom, when, in which meeting. Therefore, as soon as you leave the meeting dictate your attendance note, which should include:

- Names, titles and responsibilities of those attending the meeting from their side and yours.
- Date, time, location of the meeting.
- Key areas of discussion (these do not need to be full minutes, but a record of the major areas of interest and concern of the client or potential client.)
- Commitments made by them to you.
- Commitments made by you to them. Include who will be responsible, dates by which it needs to be done, who else needs to be informed and involved within the firm.
- These plans then need to be implemented according to deadlines and commitments.

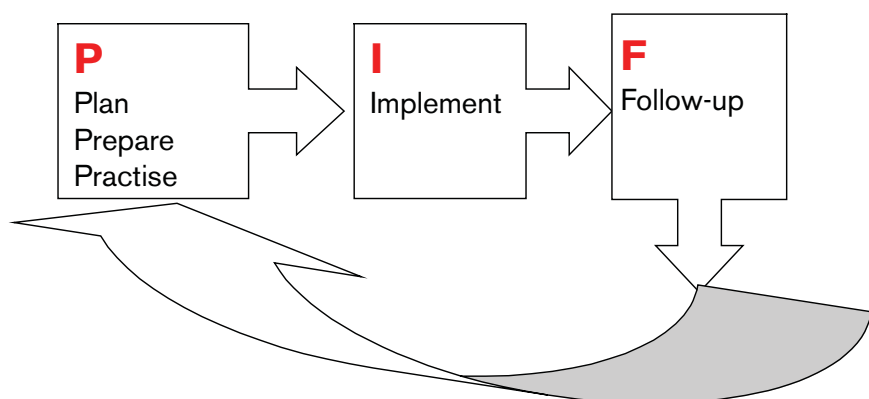
10 – Explain the value of your fees

Breakdown each element of your fees and know the value that each person you are seeing gives to each as well as the value to your firm. Plan beforehand the range of negotiables that you have, which may include:

- Timescales, which enable you to negotiate fees against speed of producing work.
- Volume of work – if a client requires a discount you could offset this against volume.
- Level of qualification of the lawyers doing work.
- Communication, including the frequency, method and detail both in level of advice and narrative on bills.
- Method of delivery and the approach, content and structure of the advice.
- In which currency the payments are to be made.
- Speed of payment may help your cashflow.
- Regularity of payments.
- Timing of payments.
- Range of different fee structures.

It is essential before each new business meeting that you understand the value of each element of the fee to your own firm and the value of each element of the fee to the client so that you can both emerge from any renegotiation feeling satisfied.

Using these ten steps, you and your clients will both be in a win-win position.



A real melting pot

Vancouver's culinary excellence mirrors the city's ethnicity and location. **Elizabeth Fournier** picks the gastronomic highlights

It's easy to see why Vancouver is home to some of the world's best quality dining. Sandwiched between the teaming waters of the Pacific Ocean and the grazing fields of Alberta, the highest quality seafood and meat is never far away.

Whether you favour haute cuisine or innovative street food, there's bound to be something to inspire your tastebuds, from fresh-off-the-boat seafood to Japanese tapas and traditional French-Canadian *poutine*.

No visitor to Vancouver can fail to notice the city's sizeable Chinese population – it has the second biggest Chinatown in North America and is home to approximately 400,000 Chinese Canadians. The resultant thriving food scene used to centre on Pender, Main and Keefer Streets, but has since spread throughout the city, where numerous restaurants can be found serving classic Cantonese cuisine.

One of the newest and most upmarket is *Bao-Bai*, a brasserie that's reviving Keefer Street by dishing up small plates of fresh Chinese specialties such as crisp pork belly and Mantou steamed buns. Alongside Asian-inspired cocktails containing Chinese plum syrup and candied ginger, the restaurant also has a select sake and wine list.

Although not so visible a minority, Vancouver's South Asian population is still significant, with the world's first India Gate built at the entrance to the city's Punjabi business district in time for this year's Winter Olympics. The most famous place to sample this region's gastronomic treats is at *Vij's* in the South Granville district. Owned by celebrity chef Vikram Vij, the restaurant is at the higher end of the price range (\$150+ for a meal for two) but well worth the wait that the no-reservations policy demands.

Ask any Vancouver native for a food recommendation, and sushi is bound to feature somewhere on their list. From high-end restaurants to \$10 all-you-can-eat cafés, the sushi here is fresh, reliable and great value. For something more adventurous though, head to one of the city's *Izakayas* – Japanese bars that serve tapas-style dishes to accompany your wine, sake and Canadian or Japanese beer. Be prepared for a loud cry of “*irashaimase*” (welcome) when you enter an *Izakaya*, and try bite-size fusion dishes like honeyed mascarpone tofu and enoki mushrooms wrapped in bacon.

And for an even more alternative take on Japanese cuisine seek out an unassuming sidewalk stall outside the



Sutton Place hotel on Burrard Street, where enterprising Tokyo emigrant Noriki Tamura serves street meat (Canadian slang for hot dogs) with a twist. Topped with traditional Japanese condiments such as daikon, wasabi and soy, the innovative creations were Tamura's way around outdated vending laws that only allow certain foods to be sold on Vancouver streets. It worked, too: during the recent Winter Olympics, visitors lined up for several blocks to get their Japadog fix.

Cheesy chips

For those celebrity spotters, Vancouver's bars and restaurants are a rich hunting ground. With cheaper rental prices for outdoor filming than New York or Los Angeles, it has quickly been dubbed Hollywood North, with recent blockbusters *X Men: The Last Stand* and the *Twilight* series both shot in the city.

Film-star favourites include *Cinán*, an upmarket Italian off Robson Street. Or head for the Blue Water Cafe, a seafood restaurant that uses only wild and sustainable produce and is home to a popular raw oyster and sushi bar.

If your tastes are a little more down-to-earth, then no trip to Canada would be complete without sampling

poutine. A French-Canadian specialty that originated in Quebec, the basic dish of fries, curd cheese and gravy has spread across the country, though you'll rarely find it south of the border. Its name is believed to originate from an Acadian French word for 'mess.' Though perhaps not the most sophisticated of dishes it's a popular and filling late-night snack that's certain to soak up a hangover.

Poutine purists will argue for hours over the squeak of the cheese and the crispness of the fries, but a passable version of the unhealthy snack can be found at most fast foods restaurants throughout the city. For something a bit different head to *Crave* on Main Street, which serves a short rib *poutine* made with parmesan truffle fries and foie gras mayo, or try *Brado* on Commercial Drive, where cultures clash with the invention of a *poutine*-topped pizza.

If your appetite isn't quite up to a cholesterol feast, then Gastown's thriving bar scene could be more suited to your tastes. The *Salt Tasting Room*, on the intriguingly named Blood Alley, is a popular pre-dinner spot. With an extensive wine cellar and close links to local producers, *Salt* serves an array of carefully picked meats and cheeses to complement your drink. Pick first from the food board of cheese, charcuterie and condiments, then either choose your own wine to go accompany it, or let one of *Salt's* staff point you in the right direction. A safe bet is the Best of BC platter, which features whichever locally produced meats are in stock on that day paired with three tastings of wine.

Finally, when that inevitable mid-afternoon tiredness hits, you'll never be short of a cup of coffee in Vancouver. Just like their Seattle neighbours over the border, Canadians are enthusiastic coffee addicts, rarely seen without a portable mug in hand. So when the only answer is caffeine and sugar, head for any of the numerous *Tim Hortons* outlets scattered around downtown Vancouver.

A Canadian institution, *Tim Hortons* was established by a 1950s hockey player of the same name. Though Horton died in a car crash in 1974, his legacy lives on in the form of delicious donuts, muffins, and the infamous Timbits – miniature balls of donut dough that come in boxes of 10, 20, or even 40. Line up behind the stream of devotees, order a Double-Double (coffee with two sugars and two creams), and refuel for the evening's activities.

All recommendations in this article are based on independent research, not sponsorship.

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QUESTION:

What are your reasons for coming to the IBA conference?



Dr Barbara Mayer
Friedrich Graf von
Westphalen, Germany

I have come almost every year since 2004. One of the main reasons I attend is to meet new people but also to freshen up existing contacts. I often combine the IBA conference with other meetings. It saves me travelling around the world

to places like Korea and the US when I know they will all be here during this week.



Anil Malhotra
Malhotra & Malhotra
Associates, India

I've been coming to this conference since 1997. I can meet the cream of the legal world – it really is a melting pot. For instance, yesterday at the UK Law Society event I met friends from Hong Kong, Sydney, New York and Toronto,

all within an hour. I wouldn't be able to do that anywhere else.



Joakim Sundbom
Hammarstiö & Co
Stockholm

This is my first year, but I came to Vancouver both to meet people and see old friends too. Also, I wanted to catch up with developments within my specialist area, which is competition and antitrust. There are plenty of fantastic

competition sessions this week.



Kenneth Akide
Chairman of the Law
Society of Kenya

I attend every year because it's the only opportunity to meet the top legal minds internationally. The IBA shows us that we are really part of one community, regardless of where we come from. My specific focus is dispute

resolution and there is plenty for me to see here within that area.



Jay Foonberg
Foonberg Law Publishing,
US

We're exhibiting. We came last year to Madrid for the first time and were so impressed we came again this year. From an exhibitor's point of view, it really is the best organised event of its type. People will come halfway around the

world for the content alone.

“The IBA shows us that we are really part of one community, regardless of where we come from”



Maria Jimena Londoño Ferrer
In-house counsel, Avianca
Colombia

I like to meet people I work with already and discuss matters of mutual interest. I also come to explore the possibility of working with new people. My focus is on M&A and corporate governance, and

there are some really good Foreign Corrupt Practices Act and money laundering sessions in those areas.



Ademola Onitiju
Directorate of legal services
Nigerian Airforce

The biggest reason for attending is because this is a global forum where lawyers from various nations meet to apprise themselves of new developments. But it's also a chance for me to see other lands. I've never been to

Vancouver and this was the perfect opportunity for me to do so.

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Today's schedule

0830 – 1000

Family Law breakfast meeting	Ballroom D, Level 1
The IBA Rules on the Taking of Evidence in Arbitration: presentation of the 2010 revised text	Ballroom A, Level 1

1000 – 1800

Environment responsibilities of resource companies under host country and home country laws – the growing demand for extraterritorial liability – case studies and options for reform	204, Level 2
Merchandising and art limits: regimes and new perspectives	202, Level 2
The cruise industry – tales from Davy Jones' locker: a case study following the grounding of a cruise liner and the aftermath of a hijacking by pirates of her sister ship.	220, Level 2

1000 – 1300

Making Africa work – young lawyers in Africa and African lawyers abroad	116 & 117, Level 1
International corporate governance	211, Level 2
Investment treaty arbitration	Ballroom B, Level 1
Dawn raids and search powers in antitrust investigations	217 & 218, Level 2 64
Corporate governance in family-owned enterprises – creating tomorrow's enterprise from today's prevention and planning	109, Level 1
Cultural issues in litigation in the Asia Pacific region – myth or reality?	110, Level 1
Investor-State mediation	214, Level 2
'The big risk game' – an interactive experience	207, Level 2
Financing major mining projects in Latin America	216, Level 2
Buy side exposures – the risks	201, Level 2
The use of derivatives in M&A	212, Level 2
Unions today	221&222, Level 2
Human rights crisis: state-sanctioned crimes and violence against lesbian, gay, bisexual and transgender persons	210, Level 2
Cooperation and communication by courts in crossborder insolvency cases	118, Level 1
Patentability of business methods and software implemented inventions globally	114 & 115, Level 1
Technology rights and distressed companies	213, Level 2
The right to compensation for goodwill on termination or non-renewal of a franchise (or distribution) agreement	205, Level 2
Legal trends and developments in consumer product warranties and indemnities	122, Level 1
Open forum discussion – accessing healthcare – right or privilege?	203, Level 2
Quotas, minorities, government and the private sector: regulating working and commercial lif	119, Level 1
Opportunities resulting from the crisis – a picture of the real estate market in North America	121, Level 1
Focus on resource exploitation	208 & 209, Level 2
SHOWCASE: The future of legal aid: and justice for all?	223 & 224, Level 2
Management training for lawyers: developing firm leaders	120, Level 1
Anti-Corruption Global update on anti-corruption enforcement	111 & 112, Level 1

1500 – 1800

China in Africa	116 & 117, Level 1
Private equity funds as a financing opportunity	210, Level 2
Specifics of antitrust regulation and enforcement in emerging markets of BRIC countries	221 & 222, Level 2
Public M&A – advanced topics	109, Level 1
Seeking justice worldwide: examining whether criminal defendants can receive a fair trial	121, Level 1
Hot topics in international arbitration	211, Level 2
Has the consumer suffered a disadvantage in relation to the acquisition of goods or services? Competing perspectives from the manufacturer, provider and the consumer	203, Level 2
2020 vision – building the litigation department of the future	208 & 209, Level 2
Acquisition finance – the North American perspective	201, Level 2
Sex and immigration: where taboo subjects and national laws collide	122, Level 1
Multijurisdictional enforcement of business method patents	114 & 115, Level 1
'Cloud' computing: opportunities and risks	212, Level 2
1500 – 1700 Franchising into North America and the Caribbean	119, Level 1
Structuring the international sales contract: when the boilerplate bursts	215, Level 2
Inter-country adoption – a child's right to family life	120, Level 1
Pitfalls on the acquisition of aircraft and its financing: legal and tax issues	216, Level 2
Private enterprises and investment in real estate	110, Level 1
Nuts and bolts of trust mechanics	118, Level 1
Tailoring dispute resolution strategies for tax positions involving multiple jurisdictions	217 & 218, Level 2
Client/lawyer relationships: what role do bar associations play in helping lawyers with their client relationships?	223&224, Level 2
Money, money, money – the array of client fee arrangements	223 & 224, Level 2
Terrorism and the law – accountability, remedies and reform	205, Level 2
The role of the judge – restorative justice in criminal, civil and family jurisdictions	207, Level 2
What's next for law firms V – managing the international law firm	214, Level 2
Increase your value to current and future clients: Pippa's RAINBOW strategy	Ballroom A, Level 1

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