



## In global justice we trust

International cooperation is key to fighting harm and oppression, and combating the challenges arising from global threats, according to US attorney general Loretta Lynch.

“Serving justice increasingly requires a global outlook,” she told delegates at yesterday morning’s keynote session. “As lawyers, we have a responsibility to ensure this is not limited to one nation and its borders.”

Lynch referenced recent events in the US – Saturday’s bombings in New York, and two police shootings of black men in North Carolina and Oklahoma this past week – to highlight the Department of Justice’s (DoJ) goal of finding those who commit acts of terror, and rebuilding trust between law enforcement and the communities they serve.

The IBA has a key role to play to preserve the ideal of justice as a leader in the global effort to uphold the rule of law, she continued.

“In light of recent events, we are all connected,” Lynch said. “The IBA has fought tirelessly so that all people around the world can enjoy the freedom, the dignity, the opportunity and the justice that is their birthright. This indeed requires international cooperation and coordination.”

She described the DoJ’s work in fighting terrorism, one of the most important threats the world faces at this time. It has in recent years partnered with global police cooperation body Interpol, European equivalent Europol, and a number of other international organisations to detect, investigate and suppress terrorist activities. It is also exchanging staff with some of these organisations, and sharing information on approximately 4,000 suspected individuals.

“We have had some successful achievements, but we need cooperation,” Lynch stressed. “It’s not only in the interest of the US to see those individuals brought to justice, but of all of us around the world.”

Another area where the DoJ is also active is cybercrime. Once again, Lynch stressed that increased cooperation between nations had been a necessary response to the global challenges posed by digital criminals. US President Barack Obama has also been working with international partners to ensure the fight against cybercrime is a global undertaking.

Recent examples include a 2014 presidential directive outlining how the US collects intelligence in such a way to safeguard privacy – also extending protections to non-US people – and a 2016 umbrella agreement between the EU and US on the protection of data transferred for counter-terrorism purposes.

Lynch also referenced the DoJ’s third goal of combating corruption, stressing it is “anything but a victimless crime”. The US has recovered billions of dollars since setting up an asset recovery initiative in 2010.

Some of her most high-profile work in this field was the prosecution earlier this year of a number of senior executives working for international football federation Fifa and its regional subsidiaries on charges including racketeering and money laundering. US authorities, working in coordination with law enforcement in Switzerland, arrested several Fifa delegates last year over their role in a corruption scandal worth an estimated \$150 million.

IBA President David W Rivkin, who introduced the keynote address, called the

role played by Lynch and US federal prosecutors more generally ‘America’s greatest contribution to the world since the Marshall plan’.

One of the most appalling crimes of all time is human trafficking, said Lynch, another field where the DoJ has benefited from global coordination, notably by sharing intelligence and resources with international partners. This global work led to the arrest last June of a human trafficking network operating in the Ivory Coast.

According to Lynch, the common thread uniting all those threats and the work done to address them is that the effort is ongoing.

“We have a long way to go before [all those threats are eradicated], but have made tremendous progress by working together as an international community,” she said. “As lawyers, you ensure that might does not make right – laws are not tools for repression, but the bulwarks of liberty.”

### Key takeaways

- The IBA has a key role to play to preserve the ideal of justice, as a leader in the global effort to uphold the rule of law;
- The DoJ is focusing on areas including anti-terrorism, cybercrime, human trafficking and anti-corruption;
- One example of cooperation between the US and its international partners is the prosecution of a number of Fifa representatives on charges of money laundering and racketeering.



### UNCLE SAM’S LONG ARM

The extraterritorial reach of the US is growing

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Northern Ireland’s first minister reflects on conflict, peace and women in politics

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Counsel talk about the progress of LGBTI rights

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# Tough lessons on conflict

The Rt Hon. Arlene Foster MLA, First Minister of Northern Ireland, yesterday shared her thoughts on politics, global conflict and peace in Northern Ireland. She believes the Northern Ireland peace process holds lessons for resolving other conflicts, is excited at how more British women are taking up powerful positions, and thinks that Brexit will be good for the UK.

Foster became First Minister on January 11 2016. A lawyer by profession, she recently campaigned in favour of Brexit, the referendum decision by the UK to leave the European Union (EU). She's also had first-hand experience of conflict – and how it's resolved.

"It's easy to look at Northern Ireland and ask what we can take from it and put it down to a Colombia or a Middle East experience," Foster said.

But according to her, every conflict is completely different. In terms of whether the international community should intervene, she believes that international help can be positive. But if they are to be of use, international negotiators must be there to mediate, not tell local people what to do. Instead, the key on the ground is how fast, and how well, those people can move outside their comfort zones.

"It's not more difficult in terms of people dying, but peace can be more difficult than actual conflict, in terms of having to step outside your comfort zone," Foster said.

Foster certainly knows about conflict. She has a deep-rooted background in Northern Irish political life, including the so-called Troubles, the period of civil strife that blighted Northern Ireland for many years. "I was born in 1970 and that was literally at the start of the euphemistically-called Troubles," she said. Her experience of that conflict quickly became personal:



Rt Hon. Arlene Foster, MLA

her father was a police officer and small farmer, and on January 4 1979, the Irish Republican Army tried to murder him. "Thankfully he survived, I think because the weapon being used jammed," Foster said.

The family then left the area, on the border, and moved elsewhere. But as well as what happened to her father, her school bus was also bombed – its driver was a part-time member of the security forces. There were about a dozen children on the

bus; none were too badly injured.

"All of that obviously had a profound impact on me growing up," she said. A natural question is how she can, today, work with representatives of those that targeted her family. "You don't make peace with your friends, but with your enemies. That's what's been going on in Northern Ireland," Foster said.

## Women in power

Foster's a powerful example of a powerful

## Key takeaways

- The Rt Hon. Arlene Foster MLA believes that the Northern Ireland peace process holds lessons for resolving other conflicts worldwide;
- Foster's career has helped British politics change from an almost entirely male-dominated game, and she's excited to see so many women in power there today;
- She recently campaigned in favour of Brexit, believing the UK will be better off outside the EU.

woman. "I hope people respect me as a serious politician who wants to get things done," she said.

She's keeping a close eye on the US election, which may return the first US president in Hillary Clinton. And she's had a front seat as British politics have changed. "There have been funny moments along the way, I remember a male politician once saying to me 'bring me a cup of tea'," she said. "I said I wasn't there to make the tea. But I have tough skin," she said.

As a leader, Foster has recently applied that tough skin during the UK's Brexit debate. She campaigned to leave while the results of the June 23 referendum saw Northern Ireland vote by a majority to remain.

"What we have to do now is to get the best possible deal for the UK in terms of exiting the European Union," she said. For Northern Ireland, a key issue therein is what will happen to the free movement of people across its border with the Republic of Ireland. Foster thinks that freedom can, and must, be preserved – even if in future the border becomes international.

"It's very important that we have the maximum of free movement," she said.

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# PE: keep sellers involved

Involving the founders and senior management of an acquired company is crucial to a successful private equity-led deal. This was the key message from speakers at yesterday's panel 'Protecting sellers' interests'.

With buyout targets continuing to face issues, including those concerning the protection of minority investors and the valuation of assets, panellists called for more importance being attached to the protection of the founders and their senior executives.

"The continued involvement of the founders, senior management and even investors is what really distinguishes a successful

investment from a failed one," said Stephen Solursh, president and chief executive officer of Ontario Teachers' Pension Plan Board.

Solursh argued that there is a need for the founders and senior executives of an acquired company to continue to hold a stake in the firm post-acquisition. Contractual mechanisms can act as a means of ensuring the management still has a say in the company's daily affairs by keeping a percentage of their equity interest, which would be transferrable.

But, as Michael Coates, head of legal and associate general counsel at Shell International in the UK, pointed out, there are still some ju-

risdictions that don't allow different classes of shares. He argued that this has raised questions over how one can derive value out of the acquired company, and on whether it is appropriate to do so.

Coates also pointed to the spectre of a reduction, or dilution of the percentage of a share of stock owned due to newly-issued shares, in the case that the acquired company is subject to a further fundraising round. He emphasised the importance of seeking anti-dilution protections, so that one doesn't suddenly lose control or get forced to sell or tag along other parties to sell.



Michael Coates, Shell International

Paola Lozano, partner at Skadden Arps Slate Meagher & Flom in New York also echoed the views of other panellists on the importance of protection being given to the senior management. She added that, in terms of prices and dividends, there should be assurance that not only does the founder get the price that they have negotiated, but also that there are no exceptions for the investors to get out of a transaction after it has been agreed.

# ICC: the balanced view

Tuesday's panel entitled 'Seventy years after the judgement at Nuremberg – has the US failed to support international justice at the ICC', was conducted in the form of a mock trial prosecution of the US' decision not to join the International Criminal Court (ICC).

The trial involved speakers presenting their cases on the subject in the presence of three witnesses with experience of serving in

the ICC and in the US military respectively. The *IBA Daily* covered the panel in yesterday's edition, and specifically critical comments around the ICC's evidence gathering policy.

The situation is perhaps more nuanced than the reporting from the session suggests however.

Thankfully, the IBA has recently launched a new report *Evidence Matters in ICC Trials*

that examines the law and practice of some core evidence matters in ICC trials. The report looks at the ICC in the context of other international criminal tribunals, and builds on previous reports to identify existing issues and future considerations for fair trials before the ICC.

It also examines how evidence matters are affected by other dynamics at the court, including the overall project of making the

ICC's proceedings more efficient, and the roles played by judges and states parties.

The report provides an in-depth review and analysis of issues relating to: digital and technologically derived evidence; the use of prior recorded testimony as evidence; and assessments of evidence within trial proceedings through ICC Regulation 55 and through 'no case to answer' proceedings.

"The ICC is an institution in its adolescence and the IBA ICC & ICL Programme is examining its maturing procedures through the lens of due process to ensure that trials remain fair before this permanent court established to address international crimes worldwide," said Aurelie Roche-Mair, director, ICC & ICL Programme at the IBA.



No. **1**

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Former LAWIN Vilnius, LAWIN Riga and Raidla, Lejins & Norcous Tallinn offices have teamed up to form Ellex in May 2015, a circle of preeminent law firms from each of the Baltic States.

# Protecting our right to the environment

A standalone human right to the environment is not needed because other rights carry it in their scope, according to panellists at yesterday's morning session 'Human rights and the environment.'

"There's no doubt there's an international acceptance of the right to life and health," said Haynes and Boone's Hector Herrera. "It's not strictly necessary, but from a legal standpoint it would be convenient, for the purposes of legal proceedings in developing countries."

Today, around 90 countries have a constitutional right to the environment – but it may be that the right to participation is a more effective means of protection. Michael Burger from the Sabin Centre for Climate Change Law agreed, adding: "To the extent that participatory rights provide a platform for achieving substantive results, absolutely – and those are often easier to come by, and recognised both in and outside of the environmental context."

The issue is more pressing now than ever as around a third of all corporate human rights cases involve some kind of environmental harm. There are both public and private actors – mining, oil and gas drilling, climate finance projects, renewable energy and land grabs – all posing a threat to the rights to life, water, property, standard of living, and self-determination for people across the world.



Hector Herrera, Haynes and Boone

***"What happens to their land happens to them"***

"The fact is that environmental degradation has an adverse effect on human rights," added Burger.

And to ensure the most effective protection of those rights in the development of projects, the local community must be involved at the earliest stage possible – that

## Key takeaways

- An express human right to the environment is not necessary to protect that right as the protection of right to life and health encompasses it – but it would be useful from a legal standpoint;
- It may be that the right to participation is a more effective means, as it's easier to come by and recognised in areas outside of the environment;
- The most effective way of protecting human rights to the environment during project development is to have the local community involved from the beginning.

way, conflicts could be severely reduced, said Ramiro Fernandez of Avina.

He spoke of how the indigenous Mapuche community in Argentina has made strides in affecting environmental reforms in the Patagonia region of the country.

"These people got organised, and sent their children to study law, and have gained a right no one else in my country has – the right to previous consultation for underground resources projects," he said. "They understand that they have a right to life, and

that what happens to their land happens to them."

He added that citizens in Patagonia have more commonly had to use political tools such as demonstrations and roadblocks, as opposed to legal tools: "The legal tools aren't there yet, but are developing."

Speaking from the European side, Claus-Peter Martens of Sammler Usinger in Berlin explained that German Chancellor Angela Merkel's decision to accelerate the country's exit from nuclear power has resulted in a clash of human rights, industry and the environment.

That's been caused by the development of renewable energy in the country – which has now increased to 30% of total energy production. "It turns out planting windmills in forests and protected areas isn't a particularly good idea either," he said.

"So we went to the constitutional court and questioned whether, in light of the green power initiative, it's still permissible to destroy villages." In the Rhineland region of Germany alone, 130 villages have been relocated, affecting around 45,000 people.

Many road traffic reduction cases, including one recently in Düsseldorf, have been won in Germany via European law as opposed to local law. Often German courts will capitulate to the European Court of Justice on decisions, as long as European law grants basic constitutional rights at the same level. Member states have an overwhelming body of European law containing detailed rights.

But it's generally different in every member state, according to Martens. "Between 28 member states there tends to be around 20 different approaches," he said. "So that's interesting in light of Brexit."

## PREVIEW

# Financing renewable energy

The practical realities of financing green projects will be assessed in this morning's session

A combination of political, environmental and economic factors have left increasing numbers of countries reviewing their national energy portfolios. Falling commodity prices and man made disasters such as the Fukushima incident in Japan in 2011, have made emission-intensive, low cost sources of electricity less attractive to even developing countries like China.

But aside from the environmental benefits of renewable energy projects, what are the risks of financing such schemes? Sarah Fitts, partner at Debevoise & Plimpton in New York, is the co-moderator of today's session 'Climate change and the financing of renewable energy projects'. Fitts and her panellists will be tackling the issue head on. Fitts has also polled the panel on how much issues of climate change affect what they do, the results of which will form a part of the discussion.

## US history

When the US government adopted stimulus measures in 2008, renewable energy gained traction not only in the US, but also in other nations that later implemented austerity measures.

Later Fitts argues that part of the reason governments became involved in green energy at that time was the relative weakness of commercial banks following the financial crisis. As such, they viewed green technologies as risky compared to fossil-based technologies, as they had limited performance track records.

The US has traditionally employed financing in the form of tax equity and other non-bank lending, as well as private equity and hedge fund money. This has led to the introduction of the Property Assessed Clean Energy (PACE) bond. The concept was first conceived and proposed in the Monterey Bay Regional Energy Plan in 2005 but followed approval of a similar solar bond programme by San Francisco voters in 2000.

The PACE bond involves municipal authorities paying for the solar panels up front through the issuance of bonds. In turn, the homeowner is taxed over the projected life of the panels for the cost of the improvement to his home until it's paid off.

But this has proved to be highly controversial. In 2010 Freddie Mae and Freddie Mac refused to back mortgages with PACE liens on them and in August 2015, the Department of Housing and Urban Develop-

ment announced that it intends to require liens created by energy retrofit programmes to remain subordinate to loans guaranteed by the Federal Housing Administration, it said it would be issuing guidance on how to handle the transfer and sale of homes with a PACE assessment.

"In the US, anecdotally, the shortage is not on money interested in investing in renewable technology but on quality projects," says Fitts. But she adds that, in the US, smaller-scale 5 kW power projects tend to get scaled by being bundled with other projects and marketed through securitisation.

Fitts further points out that the real issue lies in how practitioners look at whether a renewable energy project makes sense. Studying it from the banks' perspective, she stresses that there are always questions over whether the technology has sufficient track records for commercial lenders to analyse and make lending decisions on.

But Fitts concedes that the ecosystem in which green technology will thrive has started to mature, and the panel is going to look at this in several parts of the world. She expects to hear views from speakers from

## SESSION

**Climate Change and the financing of renewable energy projects**

## COMMITTEE

**The Power Law Committee**

## TIME/VENUE

**Today 10:45 – 12:30**

**Hoover, Mezzanine level**

the American Council of Renewable Energy, the Middle-East and the International Finance Corp and from South Africa.

"If you had gone to a panel with this description ten years ago, it would have been rather a fringe panel," says Fitts. She adds that she is eager for delegates to understand that when they discuss renewable energy and its financing, they are really talking, in many cases, about the best available technology and not about some aspirational substitutes.

# The bathroom wars

Companies are grappling the implementation of LGBTI rights in the workplace

**L**egal recognition of the rights of LGBTI status people has greatly progressed in many, though not all, parts of the world over the past 10 years. And the battleground is now shifting to the practical measures that make such progress real. One area where these details are being debated is the workplace.

Working environment rules and employment laws are changing to implement, protect and promote rights that are confirmed on a case-by-case basis by the LGBTI community. The practical implications are suddenly weighing down on very specific issues and one such example of this is the current debate over bathroom usage laws in the US, particularly in relation to gender identity in transgender individuals.

In May 2016, 11 US states announced that they would take the government to court over a directive to US public schools that transgender students should use bathrooms and changing rooms that reflect their gender identity. Bathroom practices in public institutions, schools or otherwise, are crucial in the employment context.

As the bathroom usage laws illustrate, there is also a growing shift of focus onto transgender issues, as many of the larger questions concerning the rights of gay and lesbian citizens have been settled. Of course,

progress in LGBTI laws is by no means global and the battles in the US and Europe are very different to those in some African countries, for instance. Despite progress, 76 countries maintain anti-LGBTI laws, with 75 criminalising homosexuality. Ten nations use the death penalty for gay sex, with Iran and Saudi Arabia carrying out recent executions.

A survey of the global variation in legal approaches to LGBTI rights is going to be one of the discussions in this afternoon's session, chaired by Todd Solomon of McDermott Will & Emery and Regina Glaser of Heuking Kühn Lüer Wojtek. "In some countries there are broad and expansive rights and protections and in other countries LGBTI status is actually criminal behaviour," says Solomon.

## Key battlegrounds for companies

One of the key issues that will be raised is how a global company with a non-discrimination ethic can carry that culture across borders.

"We will be speaking about countries in Africa and multinational companies that have a global policy on discrimination," says Solomon. Often companies decide they will not discriminate on the basis of sexual orientation and gender identity but they have to balance that against country laws where not only is LGBTI status unlawful but in



Todd Solomon, McDermott Will & Emery

some cases punishable by death.

"That is a very challenging issue of how you protect employees inside the walls and then outside the walls where you really can't because the laws differ," says Solomon.

Another US-centric issue that will be discussed are the bathroom laws. The White House has issued a directive to public schools that all students must have access to facilities consistent with their gender identity, even if others object. In a parallel development the US Justice Department has filed a lawsuit against the state of North Carolina over a state law that bans transgender people from using bathrooms that do not match their birth certificate gender.

SESSION

**LGBTI discrimination in the workplace: the state of the law and best practices for multinational companies**

COMMITTEE

**Lesbian, Gay, Bisexual, Transgender and Intersex Law Committee**

TIME/VENUE

**Today 14:30 – 17:30**

**Virginia Suite C, Lobby level**

The panel will include Aakansha Bhaduri, a High Court advocate in India, Wesley Bizzell, from Altria Client Services in Washington DC, D'Arcy Kemnitz, from the US National LGBT Bar Association, Hans Georg, from Austrian firm Laimer Zeiler Partners, Tonya Moore from Darden Restaurants in Florida, Aldo Palumbo, partner at Italian law firm Toffoletto De Luca Tamajo e Soci, and Francisco Peniche, from Creel Garcia-Cuellar Aiza y Enriquez in Mexico City. The speakers will examine practical examples and discuss employment best practice and benefits laws.



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# Uncle Sam's long arm

The extraterritorial reach of US enforcement is growing. This morning's session will assess what this means for global companies

In the last few years, the US has consistently been extending its enforcement capabilities beyond its borders. And the number of cross-border criminal cases brought by the country continues to rise. Counsel point to increased US law enforcement activity in the area of financial crime investigation where events often occur outside the US and involve non-US citizens.

Jonathan Grimes, partner at Kingsley Napley in London, is the session chair for today's panel: "The USA's long arm of justice and what it means to the world" as well as the co-chair of the War Crimes Committee.

Grimes points to the investigation into the manipulation of the London Interbank Offered Rate (Libor) as a case in which many countries have had to consider behaviour occurring outside of their territory.

He argues that the reliance on Libor by different financial institutions globally means that the national interests of many countries have been engaged by the benchmark-rigging allegations.

Regulators from New York and Connecticut have already led a group of state attorney generals to launch an investigation into the role of Barclays in rigging US-dollar Libor between 2005 and 2009. The London-based bank has since agreed to pay a fine of \$100 million, while Royal Bank of Scotland has been slapped a \$669 million fine for the same offence.

Market participants have regarded the series of convictions sought by US authorities against the parents of global financial institutions as the first-of-its-kind, citing the absence of legal precedents on US soil.

"The nature of the globalised financial industry means that someone can sit at a desk in Singapore but be a member of a team based in New York," says Grimes. He adds that those investigating and defending these cases across the world have had to learn to communicate and cooperate far more than has previously been required.

Grimes also singles out the recent investiga-



Jonathan Grimes, Kingsley Napley, London

## SESSION

**SPPI SHOWCASE: The USA's long arm of justice and what it means to the world**

## COMMITTEE

**Section on Public and Professional Interest**

## TIME/VENUE

**Today 10:45 – 12:30  
Salon 3, Lobby level**

tion into corruption at the Federation Internationale de Football Association (Fifa) as another example of a US-led global investigation. The case, which has triggered investigations by law enforcement agencies, has resulted in the arrest of individuals from many different countries, with many of them potentially facing prosecution in the US.

### The beautiful game?

In May last year, the US Department of Justice, following an investigation by the Federal Bureau of Investigation (FBI), indicted 14 current and former Fifa officials and associates on corruption charges.



This was followed by the indictment of 16 more officials in December following the arrest of two Fifa vice-presidents in Zurich, all of whom had been accused of accepting bribes and kickbacks totalling \$200 million.

The series of criminal proceedings brought by US prosecutors against several high-profile Fifa officials has since ignited a global debate on the legitimacy of the US's corruption probe into an international body. Some have questioned the rationale for the courses of legal action taken by the US authorities. Others have pointed to the fact that the US only needs to prove a minor connection between the country and the bribery scandals to be qualified to prosecute cases involving foreign nationals.

"There are different views as to whether this behaviour goes too far or represents legitimate protection of US interests in an increasingly globalised world," says Grimes

Grimes tells the *IBA Daily* that he is particularly interested to hear the panel's views on the circumstances in which the US is entitled to bring cases concerning events outside the

country. He is also keen on learning about how panelists assess the level of legitimacy of the US's intervention in foreign affairs, and whether such practice has gone too far and needs rebalancing.

"Is this approach to law enforcement being adopted in other jurisdictions? And if it is, how practically does this work, particularly if there are investigations by different national law enforcement agencies into the same events?" says Grimes. He hopes the session will help delegates understand the reality of being on the receiving end of the long arm of US justice, and the extent to which other countries are adopting a similar approach.

Speakers on the panel include Mary K Butler, Department of Justice, International Unit Asset Forfeiture and Money Laundering Section in Washington DC; Charles Duross of Morrison & Foerster in Washington DC; James Klotz of Miller Thomson in Toronto; Amanda Pinto QC at The Chambers of Andrew Mitchell QC in London and Thomas Werlen of Quinn Emanuel Urquhart & Sullivan in Switzerland.

## POLL

# The challenges of Basel IV

Counsel in the US are considering the impending challenges posed by the so-called Basel IV framework

Basel IV, the latest proposed standard on capital reserves for banks, is in some ways an industry-derived appellation. Regulators deny the new reforms are significant enough to warrant their own roman numerals.

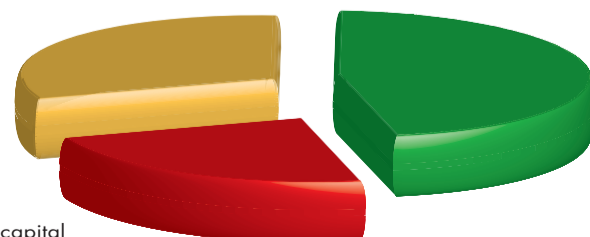
The rules are, on a general level, changes to the existing Basel III framework. Nonetheless, Basel IV, or whatever its rightful name, is substantial enough for industry partici-

pants to have dwelt on the proposals at length. Naturally, counsel are studying the upcoming changes and most agree that it's difficult to generalise. "The real answer on impact is that it's going to vary by between banks," says Luigi De Ghenghi, partner at Davis Polk & Wardwell. As a result of the industry's concern, back in September IFLR polled readers on which element of Basel IV

*continued on page 8*

### Which element of Basel IV could prove the biggest challenge for US banks?

Reducing banks' flexibility in calculating RWA: 31%



Introducing the standardised approach to calculating operational risk: 46%

Changing the capital treatment of banks' trading books: 23%

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## POLL

continued from page 6

could prove to be the biggest challenge for US banks.

### Wrong direction

Forty-six percent of those responding to the poll took the view that the introduction of the standardised approach to calculating operational risk would be the biggest challenge facing US banks. Counsel agree, and feel it's certainly a move in the wrong direction.

"The potential curtailing of the use of robust internal models that have been developed over decades by financial institutions, to be replaced instead with regulator-approved models, is troubling," says Jaime Senior Fernández, partner at Headrick Rizik Alvarez & Fernández.

According to Richard Farley, partner at Kramer Levin Naftalis & Frankel, the respondents are also right to identify standardising calculating operational risk as the biggest challenge, due to the complexity and diversity of operations involved.

Counsel suspect taking up the more standardised approach will also have negative repercussions on the market. "These new approaches will only increase the cost of capital and reduce liquidity in the market," says Senior Fernández, who believes that over the long-term this will only lead to greater market share for the shadow banking sector that regulators are already eyeing with a wary gaze.

### Other challenges

Respondents' views were fairly evenly split between the importance of the other two obvious challenges that Basel IV presents to US banks. Thirty one per cent felt that reducing banks' flexibility in calculating capital-to-risk-weighted assets (RWA) ratios would prove to be the number one challenge, while 23% identified the main challenge as the proposed changes to the capital treatment of banks' trading books.

On the issue of reducing flexibility in calculating RWA, counsel see a mixed bag. Some point out that the flexibility of advanced approaches from banks is already re-

**"For banks with significant trading activities, the FRTB for market risk is likely to have a significant impact"** Luigi De Ghenghi, Davis Polk & Wardwell

duced by the standardised approach. That's because they have to calculate RWAs using both that and the advanced approaches (i.e. their internal models) and then report whichever is the more constraining outcome.

The final concern poll respondents had was the proposed changes to the capital treatment of banks' trading books. It may be that this challenge came in last due to the effects on banks of the 2010 Dodd-Frank Act. "Trading has been de-emphasised at most banks post-Volcker," Farley adds. That means it's a select group of banks that may do well to worry more than others about the FRTB.

"For banks with significant trading activities, the FRTB for market risk is likely to have a significant impact," says De Ghenghi.

A key point among counsel interpreting the poll results is that much depends on US regulators choose to respond to Basel IV. "As with all of these things, it very much depends on how US regulators will act," he says.

Before this is known, US banks are preparing for Basel IV and counsel see growth in the wrong areas. "The banks continue to increase hiring in risk and compliance. Sadly, these are the fastest growing areas of most large banks," adds Farley.

## PREVIEW

WASHINGTON DC

# Disrupt or protect?

Representatives from Google, the Federal Trade Commission and leading counsel will tackle the conflict between privacy laws and technological progress today

The frantic conversion of the global economy to an increasingly digital, internet-driven model has long been stimulating changes in privacy, data protection and cybersecurity laws.

Governments have been playing catch-up with technological innovation. In the US, data breaches have vied with Edward Snowden and foreign state-sponsored hacking to make the biggest impression on policymakers and the public.

In Europe, the right to be forgotten, EU's General Data Protection Regulation (GDPR), the EU-US Privacy Shield, and national laws have all combined to form a suite of onerous and at times mismatched rules.

There is a conflict though: how far do these regulations stifle the progress of forward-thinking tech companies? Today's session, 'Disruption or protection? The impact of privacy, data protection and cybersecurity laws on the adoption and use of technology' seeks to answer it.

"We have innovative clients who are consumers or creators of technology," according to session chair Daren Orzechowski of White & Case in New York. "Do we have the right balance between the pace at which the technology is growing and being adopted and the privacy, cyber-security and data protection laws that are not all consistent with

each other?" he says.

According to Orzechowski, he and his speakers wanted to create a panel which had a number of different interests represented, and talk about whether there are situations where the technology is growing too fast and companies have not thought through all the privacy issues, or on the counterpoint, whether society is losing out on adoption of good technology because of privacy and data protection laws. "That is the kind of contrast and conversation we will aim to strike up," he adds.

### Google's view

A major draw of the session is undoubtedly two speakers on different sides of the argument. Maneesha Mithal of the Federal Trade Commission (FTC), the primary enforcement agency in the US, will talk about the commission's priorities in privacy, recent activities and policy as well as considerations on the privacy shield.

Joining Maneesha will be Wilson White, public policy and government regulations senior counsel at Google. White's insights will focus on the policy issues that relate to Google Glass and the considerations that had to be made.

While Orzechowski represents companies creating the technology, such as Google and Salesforce.com, session co-chair, Daniel Appelman, membership officer, IBA Human Rights Law Committee and partner at Montgomery & Hansen in California, advises smaller, Silicon Valley-based tech startups. "They are often conceiving products and services from scratch. Often it's their only service so thinking about what impact privacy and data security regulations would have on those services is really

**"White's insights will focus on the policy issues that relate to Google Glass"**



Daren Orzechowski, White & Case



Daniel Appelman, Montgomery & Hansen

## SESSION

**Disruption or protection? The impact of privacy, data protection and cybersecurity laws on the adoption and use of technology**

## COMMITTEE

**Technology Law Committee and the Human Rights Law Committee**

## TIME/VENUE

**Today 14:30 - 17:30  
Maryland Suite A, lobby level**

important from the inception of the company."

Elsewhere in the session, the speakers will be comparing and contrasting EU and US approaches and also bringing in less de-

veloped markets. "It will be interesting to see perspectives on those regimes that are less respectful of privacy and human rights and are more government-protective," says Appelman.





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## QUESTION

What have you enjoyed most about Washington?



**Bernat Mullerat**  
Cuatrecasas, Gonçalves Pereira  
Barcelona

I haven't had a chance to do a huge amount yet this week but I really enjoyed running in the area around the Washington monument. And of course I have visited the White House.



**Emil Emanuilov**  
Kambourov & Partners  
Bulgaria

This is arguably quite different to anything I have ever seen. The wide streets, the architecture and the government buildings are all staggering.



**Rebecca Morgan**  
Lawyer in the Making  
UK

I did the moonlight monument tour this week which was beautiful. I saw the Jefferson, Lincoln and Vietnam memorials. I've loved everything about the city so far.



**Carlos Domínguez**  
Hoet Pelaez Castillo & Duque  
Venezuela

On Friday I'm going to the space museum. I was there at the opening ceremony but only for ten minutes. I'm also going to go to Ben's Chili Bowl - I have heard great things about it.



**Irina Apekisheva**  
Howard Kennedy  
UK

We saw the White House at the Al Tamimi event which was great. I'm a fan of New York and normally other cities don't compare but this actually feels really lively.



**Julia Wookey**  
Howard Kennedy  
UK

The city feels really alive. We have our fingers on the pulse in terms of being here during election season. There is also a really good neighbourhood feel and it seems safe.



**Bethania Martínez**  
Ulises Cabrera  
Dominican Republic

I have seen the White House and all the surrounding monuments. It shows the country's democracy in the best light and illustrates the organisational skills of Americans.

# Tackling workplace discrimination

**M**ental health disabilities are the final frontier in creating robust protection against workplace discrimination, according to lawyers in yesterday's session 'Accommodating mental health disabilities in the workplace'.

"Disability is somewhat of a unique ground," said Ronnie Neville, partner at Mason Hayes & Curran. Affirmative action, positive action and reasonable accommodation in the workplace have all made strides in recent years. But while most employers have made changes to accommodate workers with physical disabilities, for mental health, progress is lagging.

"It's been described as taboo," Neville said speaking of mental health. Regardless of any legal provisions, that stigma often leads to workers with disabilities feeling unable to raise the issue with their boss. "I don't think workers are confident enough to put their hand up and identify with a mental health disability," he added.

## Complexity

Definitions of disability vary across jurisdictions. The US has the 1990 Americans with Disabilities Act. It requires employers to do something affirmative to help workers perform the essential functions of any job. But in terms of defining a disability, any condition that has an impact on a

*"There's room for debate on whether any particular condition, as it applies to you, qualifies"*



Progress made, but still a way to go

major life activity means that you may be defined as disabled in the US.

"There's room for debate on whether any particular condition, as it applies to you, qualifies," said Littler's Nancy Delogu. The legal burden is on the employer to find out who may be disabled and to show they reached out and discussed what that individual can do at work.

"We can actually discriminate in favour of individuals with disabilities in America," said Delogu. But this wasn't always the case. According to Andrew Imparato of the Association of University Centers on Disabilities, while under US law the definition of disability was quite broad, courts initially interpreted the definition quite narrowly.

Japan is also thinking about the issue, with Japanese laws moving closer to the US

model. "Japan has just amended an act on the employment of disabled people this year," said Hironobu Tsukamoto of Nagashima Ohno & Tsunematsu.

The amended act became active in April. There's an explicit prohibition on disability discrimination, and the employer is bound to provide reasonable accommodation.

"Our legislation has become quite similar to US legislation in that sense," Tsukamoto said. There's also a quota system in Japan, in which two percent of employees must be disabled.

"In Venezuela people with mental disabilities, in general, are very well protected. We have specific legislation," said Norton Rose Fulbright's Juan Carlos Pro-Risquez.

Venezuela also has a quota system. "The law says that every company must have five percent of people with disabilities – the

problem is it's hard to find people with disabilities because they need to be certified," he added. People simply don't want to be certified which, according to Pro-Risquez, is a cultural issue.

"The political climate is very hard. It makes people anxious and depressed. We also have a scarcity of food and medicine," said Pro-Risquez. He believes that in most Latin American countries, legislation paints a good picture in terms of the country people would like to see – but the reality on the ground is often lacking.

## A way to go

Belgium law is largely inspired by EU law and directives, but goes further on issues like handicap definitions, illness protection, and the future health of employees. As a result, many feel better able to speak up.

"In Belgium, there is a tendency to be more and more open and request accommodations up front. It's more and more the case that people step up from the beginning," said Kelley Drye's Bert Theeuwes.

But there's a barrier to progress. According to Theeuwes, the further you progress in a Belgian company, the less likely it is to find people willing to self-identify as having a mental health disability. "It's still not acceptable to show any weaknesses whatsoever, be it mental or physical," Theeuwes said of the higher ranks.

## Key takeaways

- The accommodation of mental health disabilities in the workplace remains taboo;
- While progress has been made and laws changed, individuals still feel unable to speak up;
- All too often, what's on the books and what transpires in reality can diverge.



**Gopal Trivedi**  
CKM Partners  
India

I haven't seen much of the city but DC is great. The people are incredibly helpful. On Friday I plan to go shopping in Georgetown which I'm looking forward to.



**Inuwa Abdul-Kadir**  
Inuwa Abdul-Kadir & Co  
Nigeria

The weather is great. I feel the place is very secure too. I have been to quite a few restaurants and have been amazed by the quality of their steaks!



**Eduardo Cárdenas**  
Dentons Cardenas &  
Cardenas Abogados  
Colombia

It's a great town. The ambience that comes from being in the nation's capital is fantastic. I had a good experience at the Library of Congress, seeing Thomas Jefferson's old books.



**Norbert Knittlmayer**  
Marccus Partners  
Germany

My favourite place has been the Air and Space Museum. Many years ago I did my doctorate in space law so it excites me. And my children are here with me so they love it.



**Prianka Ahsan**  
Amir & Amir Law  
Associates  
Bangladesh

Washington DC has the metro which I love to hop on. And the IBA has been great in organising tours and sightseeing trips so I have seen plenty of the city.



**Malaveeka Chakravarthy**  
Platinum Partners  
India

I have enjoyed all the restaurants that I have eaten in. In the past four days I have enjoyed Ethiopian, Peruvian, Afghani and Brazilian food. It's been quite a culinary experience.



**Sameer Tapia**  
ALMT Legal  
India

The Freshfields reception was fabulous, with a stunning view from the rooftop of the White House. I have been to DC a few times. I love the restaurants particularly.



**Anton Imennov**  
Pen & Paper Attorneys  
Russia

I was very surprised by DC's small size. It doesn't feel like a capital city, and I like that. I'd like to see a bit more and will certainly go to Georgetown.



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