



**Lunch with Powell:**  
Former Secretary of State on nuclear threats, Syria and more

## EBA: Banking Union needs work

The European Central Bank has admitted there's still work to be done in the pursuit of the eurozone's Banking Union. In particular, the central bank cites challenges facing the Single Supervisory Mechanism (SSM) in harmonising national and European law and supervisory cultures.

"In the last two years we have notched up a lot of achievements. But there is still much to do. We need to further the work of the harmonisation of liquidity risk," said Bernhard Hörtnagl, head of section at the European Central Bank, speaking on yesterday's panel 'Has the European Banking Union kept its promises?'

The 2007-2008 global financial crisis originated in the US mortgage and wholesale banking market, but quickly spread worldwide. In Europe, this financial contagion morphed into the euro area crisis.

Most press coverage of the crisis focused on the fate of Greece, and the issue of whether the country could remain in the single currency.

But another key feature of the crisis was the so-called sovereign doom loop in which potentially insolvent banks were reliant on the fiscal resources of likewise potentially insolvent states. Troubled European banks and governments faced a potential, mutually-reinforcing negative spiral.

Eurozone policymakers responded, in part, with the Banking Union, a comprehensive plan to break the link between banks and sovereigns. The key pillars of the Banking Union are the euro area's SSM, a comprehensive European-level supervisory regime, and the Single Resolution Mechanism (SRM), a plan for winding-up insolvent European banks. The Banking Union was initiated in 2012.

### Italian concerns

The scope of Banking Union is huge. "The SSM is the largest supervisor in the world, with the significant institutions it covers holding €21.7 billion in assets," according to Dirk Bliesener, partner at Hengeler Mueller and European liaison officer at the Banking Law Committee.

With so much at stake, and with the European economy so reliant on its banks, a key aim of the Banking Union is that it is ready to help deal with any future bank crises in Europe. In this regard, one country's banking sector in particular is currently playing on many minds. "Italy still has some problematic banks, which revived the old debate on bail-in versus bail-out," said Sascha Hoedl, partner at Schönherr Rechtsanwälte.

That, it seems, is an understatement. And lawyers in Italy are more frank. "I'm afraid to say we've had a lot of Italian banks that

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### THE TROUBLED TRIO

The lessons to draw from the recent Greece, Argentina and Puerto Rico restructurings

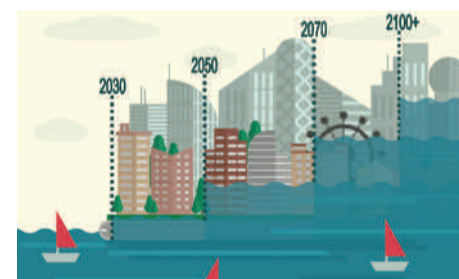
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### ROBERT S MUELLER III

Catch the former FBI director at this lunchtime's keynote

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### PREVENTING CLIMATE CHAOS

A grassroots-driven legal campaign against government negligence has begun

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## Why gender diversity pays

Companies with a diverse and inclusive culture will improve their bottom line, grow innovation and increase customer satisfaction. But too many companies still treat diversity as a box-ticking compliance exercise, according to speakers at yesterday's panel.

There is a clear competitive advantage to be gained from employing a diverse workforce. Engagement – which leads to retention and greater productivity and, therefore, to greater results – is beneficial to all employees.

Employers with a diverse range of em-

ployees are well – placed to understand the needs of a wide range of customers, and can interact with a broad client base. A recent McKinsey study found that adding full female diversity could lead to \$12 trillion of global growth.

But panellists at yesterday's session 'Building a more diverse workforce: is affirmative action the answer?' offered a global view on the obstacles to progress and the changes that could – and should – be made by companies.

The legal framework is not deemed to be a major blocker to improving diversity glob-

ally. From the perspective of gender diversity, the Convention on the Elimination of All Forms of Discrimination against Women, which was adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women.

According to Flavia Piovesan, Secretary for Human Rights at the Ministry of Justice of Brazil, and speaker at the session, this has been ratified by 189 countries. "And those countries have the duty to prohibit discrimination against women and promote equality," said Piovesan.

But the problem is deemed to be a

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# Immigration's impact on law

Increased flows of migrants as seen in Europe in recent years could have a dramatic impact on legislation, according to lawyers at yesterday's morning session 'Where will my nanny or plumber come from?'

Immigration laws often focus on skilled workers, to ensure major corporates and financial institutions can hire the best staff. In fact many countries either do not have quotas or limits for skilled workers, or have them as political formalities but do not use them.

But for middle and lower skilled workers the situation can be very different. "Countries are happy to receive high levels of skilled workers, and little of the rest," said Luca Massimo Failla of Lablaw Studio Legale in Milan, who moderated the panel.

This is an especially pressing issue in Germany, which last year opened its doors to 1 million refugees fleeing conflict in Syria. "Germany has a demographic problem, we need refugees, so Angela Merkel has shown real leadership in her choice," said Thomas Griebe of Vangard in Hamburg. "Now language, location and training is key to getting these people into work, so we intend to change the law to make it easier."

Language courses are only made available to refugees whose asylum has been accepted, for example, which leaves thousands of people in Germany simply waiting for this to be approved and doing very little in the process.

Immigrants are also only permitted to seek work through temporary employment agencies if they have been in the country for more than 15 months. But these agencies have proven very successful in getting low-skilled German workers into jobs, so are well suited to working with asylum seekers.

So the plan, as told by Griebe, is to change asylum law to reflect the country's changing circumstances.

Likewise the war on terror has forced Australia to transform its immigration landscape. "As immigration lawyers, we're now used to working with the police force. It's extraordinary – we're certainly earning our keep," said Maria Jockel of Holding Redlich in Melbourne. "The problem is now that we have so many immigration agents



Thomas Griebe, Vangard

that there's a common perception of incompetence, criminality and fraud." Working with clients has become more difficult as the country's circumstances have changed, she explained.

Back to Europe, the reaction in Austria has been almost entirely different to Germany's approach. Right wing politicians and press have perpetuated a culture of fear and insecurity, according to Sabine Straka of her namesake Law Office Straka in Vienna. "The authorities have reacted by drawing borders and building fences," she said. "We are jeopardising the great social achievements we have made, largely through the use of misinformation."

The misinformation problem is felt perhaps nowhere more than in the UK, where the leaders of the Brexit campaign allegedly used repeated falsities to promote their cause. For example the claim made that the country is 'at breaking point' on immigration, explained Melanie Lane, partner at Olswang in London.

"It's clear that British people want to see a reduction of immigration, even at the cost of full access to the single market," she said. "So there's no doubt the vote to leave will lead to a shortage of low skilled workers in the UK, at least in the short to medium term."

Generally EU countries will source their lower skilled workers from other EU coun-

## Key takeaways

- Large influxes of migrants or refugees have the power to impact immigration and employment legislation, sometimes drastically;
- The clearest modern example of this is in Germany, where asylum laws are to be changed to better suit the arrival of 1 million refugees fleeing war in Syria;
- Generally countries are happy to make exceptions to immigration law for highly skilled workers, but not for anyone else.

**"We are jeopardising the great social achievements we have made"**

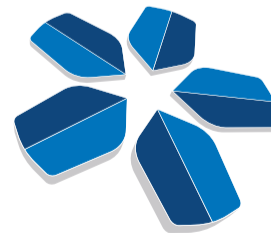
tries, reducing the need for extensive legislation and points-based systems. But that's likely to change when the UK can no longer take advantage of the stream of workers from eastern European countries like Poland, Slovakia and Hungary.

So the UK will likely be forced to overhaul its third country immigration programme. Lane speculated this could mean a parallel system put in place where EU migrants require a lower level of skills than those from outside of the bloc, or more occupations added to skill shortage lists.

But of course, it can also go the other way. Naturally, legislation can have an equally drastic effect on inflows of foreign workers to any country. When the new Canadian conservative government overhauled the system in 2008 migration fell sharply year-on-year from around 116,000 in 2011 to 73,000 in 2015. That's set to be reversed with the new liberal government.

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cultural one. “The issue is not legislation,” said session speaker Abhijit Mukhopadhyay of Hinduja Group. “When I look at FTSE100 companies and see how many female CEOs feature on it, it’s very low. If this is the case in UK, a developed economy, you can imagine the situation in less developed economies.” A study in 2015 found that 26% of FTSE 100 board members are now women, beating a goal of 25%. This is more than double the 12.5% female proportion in 2011 but still clearly relatively low.

And individual vocations – including the legal profession – are not taking heed. According to the Law Society more women are entering the legal profession than ever before, yet the percentage of women represented at partner level is low. “That is a very real problem. There is evidence that we are not seeing the benefits of full diversity,” said session chair Antony Hyams-Parish, partner at Rawlison Butler in London and co-chair



Flavia Piovesan, Ministry of Justice of Brazil

of the Discrimination and Equality Law Committee.

The absence of gender diversity is partic-

ularly pronounced in the technology industry. Young, successful and vibrant companies such as Apple, Facebook and LinkedIn have noticeable mismatches between men and women in their senior ranks. Mukhopadhyay quoted a recent study on gender diversity across the large tech companies. Apple has a 70% male to 30% female split, Yahoo stands at 62% male and 38% female, while Facebook is at a 69% male and 31% female split.

Improvements are being made at an institution level though. Mukhopadhyay explained that his employer, Hinduja, owns and runs companies in several different industries and that gender imbalances were difficult to rectify across sectors.

“We run hospitals. There, most of the doctors and nurses are female. And in our educational establishments most of the teachers and professors are female. But then our automotive business is a male – domi-

nated industry,” said Mukhopadhyay.

But at management level, a hotel chain recently launched by the company has a female chief executive officer at the helm. “Are we perfect? No, we are a long way from that. But we have started,” he said.

**Key takeaways**

- A recent McKinsey study found that adding full female diversity could lead to \$12 trillion of global growth.
- But despite a relatively strong global legislative framework, cultural practices lag behind. This is particularly true in the legal and tech sectors, among many others.
- Apple, Yahoo and Facebook all have significantly higher proportions of male employees. Apple is the worst offender with 70% male to 30% female split.

Continued from page 1

have suffered – and suffered is the right word,” said Alessandro Portolano, co-managing partner at Chiomenti Studio Legale.

“The arguments in favour of the Banking Union are compelling, but there are also practical difficulties,” said Portolano.

From his vantage point in Italy, Portolano also recognises the ECB’s self-confessed issue with the crossover of the national and European approach. “We’ve noticed that the ECB has taken an aggressive approach to aspects of law which, at least in Italy, are more the domain of other regulators such as the exchange commission,” said Portolano.

**Looking to the US**

Europeans are now looking to the US for guidance, which has long had an established bank deposit insurance framework and also made provisions, albeit overlapping ones, for bank resolution in Title I and Title II of the 2010 Dodd-Frank Act.

According to Randall Guynn, partner at Davis Polk & Wardwell, there’s a distinct contrast between US and European bank resolution models. In Europe, the bridge model can be used, sometimes referred to as the two company model, in which a new bridge bank is created. The alternative in Eu-

rope is the bail-in model, sometimes referred to as the one company model.

“Under US resolution laws, the only option is the two company model and under US bankruptcy code you can use both,” said Guynn. But before the Europeans imagine that the US is entirely ahead of the game, it should be remembered that issues are also outstanding in the US. “There’s progress that needs to be made, but there’s impatience in Congress as to when it will be done. And some say, if it’s not finished soon, we should break [the banks] up,” said Guynn.

**Key takeaways**

- The European Central Bank has admitted there’s still work to be done in the pursuit of the eurozone’s Banking Union.
- In particular, the central bank cites challenges facing the Single Supervisory Mechanism (SSM) in harmonising national and European law and supervisory cultures.
- The SSM is the largest supervisor in the world, with the significant institutions it covers holding €21.7 billion in assets.

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# The other side of M&A

**M**&A lawyers are all project managers, they just don't necessarily realise that they are. Ensuring stronger governance over transactions requires counsel to have management skills and the ability to do their job in the most efficient way possible – on top of their expertise managing an M&A transaction.

This was one of the messages during yesterday's 'Project management in M&A transactions' session, presented by the Law Firm Management and the Corporate and M&A Law Committees.

"It is hard to be profitable and competitive, and keep our clients happy if we are not efficient, and legal project management [LPM] is the way to we can achieve that," said Cyril Schoff, managing partner of Cyril Amarchand Mangaldas.

The old way of doing things is not the way to do things anymore, and lawyers actively need to direct, monitor and control.

## Why project manage?

According to the panellists, LPM is the answer to managing three variables of the M&A transaction: predicting the timelines and costs involved in a deal, achieving the right objectives, and, crucially, ensuring everything and everyone stays on track.

The size, importance and scale of the deal will also play a crucial role in the level of project management needed, or, according

to Kate Simpson, national director of knowledge management at Bennett Jones, the "level of ceremony" required for each deal.

"The smaller or less complex the deal, the lighter project management touch you need," she said. "It's when we get into the more complex deals that the need for project management increases, the need to make things less costly and eliminate errors."

As such, LPM is about processes, and not necessarily only technology. In practice, this can translate into document and knowledge sharing, budget optimisation, team management and structuring, as well as effective collaboration between firms, clients and parties.

Process maps are a visual way of describing what happens during a deal, and are also a great training tool for younger lawyers.

There are three essential components to LPM: scoping, tracking and communicating. According to Lise Lotte Hjerrild, partner at Horten and secretary of the Women Lawyers' Interest Group, while client communication is key and the "scary part of the transaction," scoping and keeping track will play integral roles in helping define the level of organisation and governance needed.

This means gathering background information on the transaction right at the start – what the client's business goals are, the anticipated timing of the deal, and the ex-



Lawyers need to ensure the M&A process runs smoothly and efficiently

pected structure of that deal. Several variables are at play here: the depth and breadth of due diligence, and the level of negotiation required, the client's risk appetite, and their definition of success.

"As a project manager, you need to assess how far or deep the client wants to go in terms of due diligence, and crucially, what they want to achieve from the M&A deal," explained, Gabriella Covino, partner at Gianni Origoni Grippo Cappelli & Partners, and vice chair of the Europe, Law Firm Management Committee.

And, as with most things, technology is never far away. According to Simpson, new tools are constantly emerging to support all parts of the M&A process. The now well-known virtual data room gathers all docu-

ments relevant to the transaction. Online instant messaging and calling platforms for businesses have emerged. Software can help identify relevant information from the document used during a deal. The list goes on.

## Key takeaways

- Ensuring stronger governance over the M&A transaction requires counsel to have management skills and the necessary tools at their disposal;
- Scoping, tracking and communicating are three important parts of LPM;
- The size, importance and scale of the deal will impact the level of project management needed.

## CHOOSE WISELY. WE HAVE.

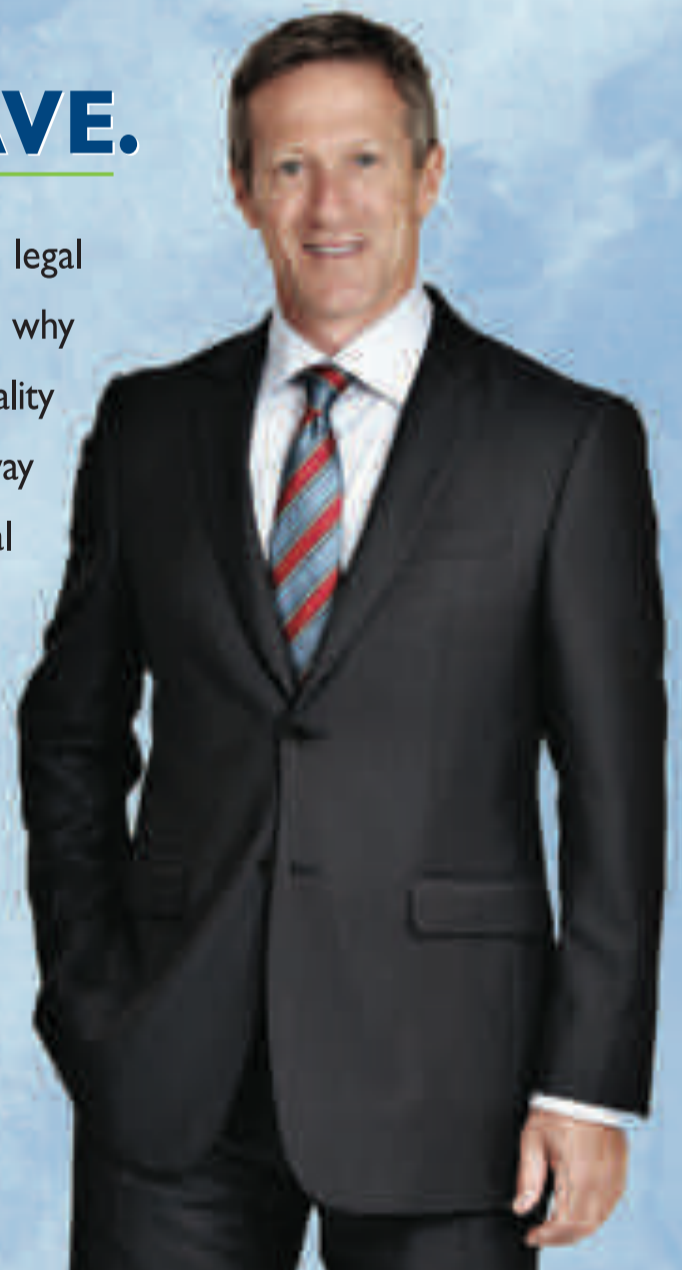
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# A conversation with... Robert S Mueller III

Today's lunchtime conversation is with the former director of the FBI who remodelled the Bureau in the wake of 9/11

**R**obert Swan Mueller III, long serving federal prosecutor, litigator and former director of the FBI, was born in 1944 in New York and grew up outside Philadelphia.

Mueller has a strong academic background, graduating from Princeton University, earning an MA in international relations from New York University and a juris doctor from the University of Virginia Law School (1973). Since 2013 he has been a visiting professor at Stanford University and among his key areas of expertise are counter-terrorism and counter-intelligence, cyber-security, civil liberties and white collar crime; founded on decades in litigation, law enforcement and public prosecutions.

Mueller joined the US Marine Corps after college and served in Vietnam, where he was decorated for bravery. Having qualified as a lawyer he practiced as a litigator in San Francisco until 1976 and spent the next 12 years as a federal prosecutor for the Northern District of California and District of Massachusetts. After a stint in private practice he returned to

public service to serve as an assistant to Attorney General Dick Thornburgh in the Department of Justice, heading up the criminal division a year later. In this role he led on the conviction of Panamanian dictator Manuel Noriega, the investigation into the Lockerbie bombing case and the prosecution of family crime syndicate boss John Gotti.

From 1993 to 1995 Mueller worked in private practice but was again drawn back to public service as senior litigator in the homicide section of the District of Columbia US Attorney's Office. In 1998 he returned to being a prosecutor for the Northern District of California until 2001, when he was appointed director of the FBI.

#### Director of the FBI

Undeniably Mueller's most significant role was that of the sixth director of the FBI. Mueller was appointed by George W Bush on September 4 2001, one week before 9/11. He subsequently spent 12 years in that role, with Barack Obama extending his tenure by two years in 2011.



SESSION

**A conversation with...  
Robert S Mueller III**

TIME/VENUE

**Today 13:15 – 14:15  
Salon 2, Lobby level**

During his directorship Mueller remodelled the Bureau's *modus operandi* and significantly changed the metrics it used and in its mind-set as a reactive rather than preemptive force. As Mueller has previously summarised, prior to 9/11 the FBI investigated attacks after the event, identified those responsible and brought them to justice. ut 9/11 prompted the question of how the FBI let it happen. Mueller reprioritised the Bureau to lay the foundations for a domestic investigations bureau to anticipate and prevent such events. The Bureau explicitly prioritised counterterrorism, counterintelligence and cybersecurity.

On the criminal front Mueller focused the

Bureau on public corruption, civil rights abuses, organised crime, violent crime and white collar crime. After all, the early 2000s were the years of vast corporate fraud scandals including those of Enron, HealthSouth and WorldCom.

To achieve these changes, the Bureau shifted 2000 agents and recruited about 1000 analysts. Half of the Bureau's current workforce of 35000 joined after 2001. In 2006, Mueller established the Weapons of Mass Destruction Directorate to pre-empt worse case scenarios and worked to increase FBI attaché offices overseas and build links with other intelligence agencies in the US and elsewhere, particularly in the Middle East.



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# The troubled trio

There are lessons to draw from the recent debt restructures of Greece, Argentina and Puerto Rico. This morning's session will offer tips for the future

If today's panel on sovereign debt restructuring seems timely, even prescient, that's because it is. "The idea of the panel was set almost a year in advance. The plan was to look at what was happening in sovereign debt restructuring, and to investigate three countries," says Roberto E Silva of Marval O'Farrell & Mairal.

Those three countries are Puerto Rico, which is already undergoing a restructuring, Argentina, which managed to successfully close its holdout issues earlier in 2016, and of course Greece, which is mired in an ongoing, slow-motion restructuring.

"We wanted to talk about those three, as very interesting cases, and highlight any similarities and differences," says Silva. Each case is certainly an interesting study in its own right.

This year, President Obama signed the PROMESA Act, a bipartisan bill that passed both the US House of Representatives and the Senate with ease. The law is designed to help the US territory protect itself against lawsuits issued from bondholders. In June, the island also announced a moratorium on debt payments, on its general obligation bonds, the first time Puerto Rico hasn't paid.

Greece has been mired in an ongoing sovereign debt drama for years. The centre of the euro area crisis from 2010, the country's 2012 debt restructuring saw large debt relief at over 50% of the country's 2012 gross domestic product (GDP). That and events since have left the country in better shape – at least on paper – than its 2010 revelation of fudged figures and an inability to service existing debt with fresh borrowing on the international capital markets.

But the country has never quite left the danger zone. Periodically, its financial issues will appear in the news and so seems locked in an endless debate with Germany, the EU, the euro area and IMF as to structural issues in its economy and its ability to at once both repay euro-denominated debts and remain in the euro area.

Argentina is also a special case. In 2001, the country's government defaulted on \$82 billion in sovereign bonds. The country undertook debt restructurings in 2005 and 2010, but couldn't shake an ongoing dispute with holdout creditors. These bondholders, around seven percent of the total number of bondholders, made

***"There's a politics to restructuring. If someone is willing to bail a country out, it certainly becomes political"***



How to avoid a repeat of this

life very difficult for the country – effectively barring it from accessing international capital markets. Argentina returned to international markets in late April this year, issuing \$16.5 billion in bonds. In July, the country saw through a second successful \$2.75 billion bond issuance.

A sovereign debt restructuring is different in every case. Nonetheless, according to Silva, one of the key issues is the presence (or absence) of collective action clauses (CACs). Whether the contracts that govern bonds do and don't have such clauses is very important. Another important factor is legislation: it's a lot easier to do sovereign debt restructurings when operating under domestic legislation than under foreign law. That's for the simple reason that it's a lot easier for a sovereign country to change its own laws than it is to change foreign law to suit an individual circumstance or restructuring.

"Certainly, one of the impressions after the case of Argentina is that New York law favours creditors to a greater extent than English law," says Silva. Although, according to Silva that's only an impression and as such it's too early to say for sure how things will play out in future.

## Argentina and Puerto Rico

According to Silva, there are very few comparison points between the case of Argentina and Puerto Rico. The key issue is that if the latter can gain access to US bankruptcy protection, it will be able to deal with holdouts and will so avoid facing a situation similar to the one that faced Argentina over the last decade. But there's another potential lesson that Puerto Rico could learn from Argentina, one that could take Puerto Rico in another direction entirely.

"One of the lessons of Argentina, and it remains to be seen if this lesson can be applied to Puerto Rico, is that it was actually more convenient and cheaper to pay the country's holdouts than it was not to pay them," says Silva.

That power play has been the novelty of the new Argentinian government under President Mauricio Macri. The previous government, that of Cristina Fernández de Kirchner who served between 2007 and 2015, probably also realised it would be

cheaper, but simply wasn't willing to take President Macri's approach to the country's remaining holdouts.

"The old Argentinian government didn't want to play on the same political ground, but the new government is a very technocratic government and asked 'what's best for us?'" says Silva.

And as it turned out, they decided paying up was best. The same calculation may yet be made in Puerto Rico.

## The politics of restructuring

Silva is keen to stress the unique nature of every sovereign debt restructuring, but also that, particularly with Puerto Rico, people are not always aware of exactly how its case is unique. "Non-Americans, and even some Americans, have no idea whether Puerto Rico is a state, a territory, a hybrid, or what if anything makes it different from a sovereign," according to Silva.

That widespread unfamiliarity masks how unique the island's case is. "Puerto Rico is very different and, in a way, a very domestic case. Puerto Rico doesn't have much in common with other cases of sovereign debt restructuring," Silva says.

That said, a question common to both Greece and Puerto Rico's sovereign debt restructurings is whether, and to what extent, a majority's will can bind that of a minority. Under bankruptcy law, a majority can impose its will. Collective action clauses contractually achieve pretty much the same effect. But there's also the 'p' word: politics.

"There's a politics to restructuring. If someone is willing to bail a country out, it certainly becomes political," said Silva.

The so-called troika – consisting of the IMF, EU and European Central Bank (ECB) – has been bailing Greece out, but only as long as the troubled country complies with certain conditions. According to Silva, that's a much more political situation than the case of Argentina, with the key differentiating factor being that no external governments or the IMF were willing to sponsor the Argentinian restructuring. As a parallel, the open question is whether the US will bail out Puerto Rico. And the Greek situation is also open-ended.

### SESSION

**Puerto Rico and other developments in sovereign debt restructuring**

### COMMITTEE

**Banking Law Committee, Securities Law Committee, Insolvency Section**

### TIME/VENUE

**Today 10.45 – 12.30**

**Roosevelt 4 Exhibition level**

***"Puerto Rico doesn't have much in common with other cases of sovereign debt restructuring"***

"Greece is an ongoing movie – we haven't yet seen the end," says Silva. In that way, Greece is a strange case as well as unique, in that it's a bailout-like situation but also features a permanent restructuring. "Every now and then, Greece can't pay its debts and so needs another restructuring and needs another bail out. It's ongoing," he said.

## International law

Silva believes the currently fragmented international legal regime for sovereign debt restructurings as deficient. One of the key issues is the fairness, or otherwise, of a legal environment that allows for vulture funds.

"Any holdout situation is very unfair if you think about it: some take haircuts while others don't. The lack of investor protection in international law is the underlying causes of this disparity," says Silva. His suggested remedy is logical, albeit hard to pull off. "By all means there should be an international bankruptcy law, and the same thing that applies to domestic companies and local states should apply in sovereign cases," said Silva.

International law in this area would certainly stimulate the market, and would also reign in future holdouts.

"The theory behind bankruptcy is simple right? There's not enough to pay everyone back, so you have to find a way to share the losses," says Silva. The theory is simple, but until now, and with the exception of the contractual remedy, there doesn't seem to be sufficient international will or organisation to deal with the issue.

# Preventing climate chaos

A grassroots-driven legal campaign against government negligence on global warming has begun

Grassroots advocacy groups and individuals have taken up the cause of combating climate change issues in their respective countries. The move has been seen as a departure from the traditional view that a task of such scale should be carried out by governments. But this increasingly global phenomenon has been interpreted by lawyers and environmental activists as the result of authorities' inability to address environmental issues at home.

Roger Martella, a partner at Sidley Austin in Washington DC, will be co-chairing today's session 'Preventing climate chaos: the latest judicial, legal and policy developments in achieving justice and human rights in an era of climate disruption.'

He tells the *IBA Daily News* that the growing trend is reflective of grassroots groups' growing impatience with the pace of government action on climate change. So they have sought to bypass political mechanisms altogether and go to the courts to get additional relief to address climate change.

"In our session we plan to survey all the avenues being discussed for remedies, and to talk about how some of these cases have developed in a way that could influence the outcome," says Martella, adding that the discussion will also cover some of the major legal issues involving climate litigation, and how they could be addressed going forward.

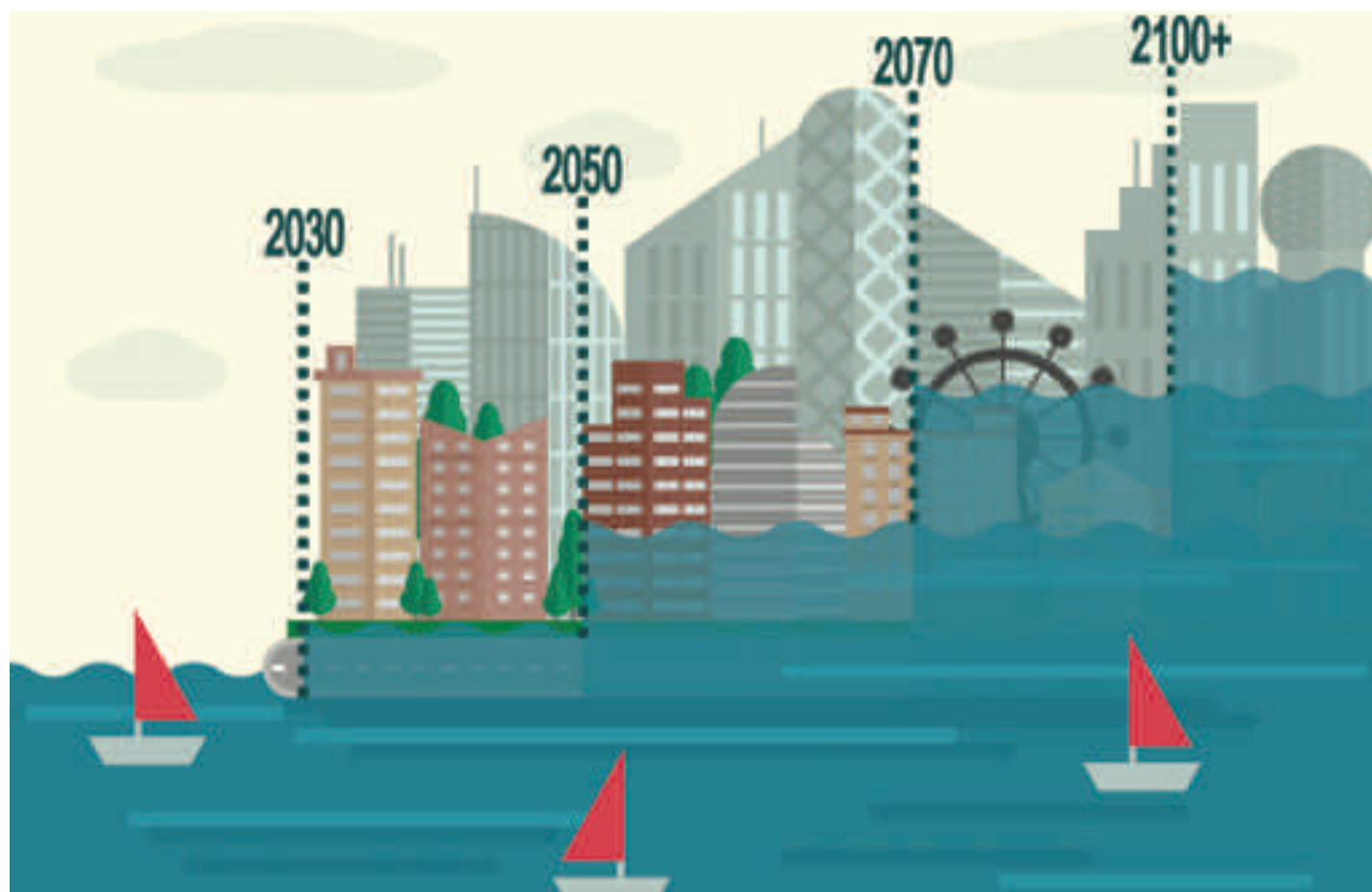
The panel will focus on two issues. The first is the extent to which groups can bring legal challenges to courts that push their government to regulate sooner and more aggressively than they otherwise would have done. The second is the extent to which groups are pursuing legal arguments and claims to seek compensation or other remedies from companies directly; as well as the possibility for those claims being brought, where will they be brought, what the theories are behind them and what are the legal defences to them.

## Recent cases

Pakistan, the Netherlands and the Philippines are three countries that have fallen under the media spotlight in the past two years. One of the most prominent cases, as pointed out by legal counsel, is a case involving a lawsuit filed last year by a Pakistani farmer, Ashgar Leghari, with Lahore High Court against the country's federal government for having failed to implement climate change mitigation measures as spelled out in its National Climate Change Policy 2013. The court found the country's federal government at fault for the failure, and ordered the establishment of a national Climate Change Commission tasked with ensuring effective implementation of relevant measures.

In the Netherlands, a group of 886 plaintiffs organised by the Dutch Urgenda Foundation sued the Dutch government last year for negligence of duty over a breach of the 2C maximum target for global warming. This resulted in a Hague-based court ordering the government to reduce carbon emissions by at least 25% within five years.

But the most recent case took place this July in the Philippines. There, the Commission of Human Rights of the Philippines accused 50 international companies operating



in the Philippines, among them Exxon Mobil and BHP Billiton, of excessive greenhouse gas emissions, setting a precedent in the region for climate change-related lawsuits involving corporate defendants. The companies involved have since been ordered by a court to respond to the accusation within 45 days, and to submit plans for setting emissions reduction targets.

Martella argues that those two cases present fundamentally harder opportunities for relief for the parties involved. He explains that the Pakistan case represents one category with groups seeking remedies from government actors, while the Philippines case is one in which groups are seeking remedies, whether directly or indirectly, that attempt to implicate private parties such as multinational companies.

But he points to more nations working towards implementing the Paris agreement by seeking remedies against companies directly despite significant legal hurdles. The Philippines case, as cited by Martella, is an example of where there has been much discussion on the use of other legal mechanisms as well.

"Lawyers and courts are going to become key players in the next steps following the Paris agreement, and it is not going to be as simple as looking at the agreement and the obligations of individual countries," says Martella. He added that, since the Paris meeting last winter, lawyers have increasingly been looking to courts to either seek additional remedy from governments or companies. Martella is not alone in this view. "Lawyers can help slow and reverse climate change in many different ways," says David W Rivkin, IBA President. "We're very good at developing innovative structures for projects to create new energy sources or otherwise fight climate change. All of these new structures need con-



Roger Martella, Sidley Austin

**"Lawyers and courts are going to become key players... following the Paris agreement"**

tracts and legal advice at every stage."

## The US precedent

These global cases go back ten years to 2007 in the US and in *Massachusetts vs EPA (Environmental Protection Agency)*. Martella was the EPA's general counsel in 2007 when the Bush administration argued that the agency did not have the authority to regulate greenhouse gas emissions. His team lost in a 5-4 decision, a case that set the stage for the Obama administration's far-reaching carbon rule.

Additionally, an IBA report published two years ago discussed the distinction between seeking remedies against governments and those seeking against companies. It also touched on the heightened standard of proof

needed and the legal challenges that are standing in the way of remedies against companies.

But, given the agreement reached by world leaders on greenhouse gas reduction in the Paris meeting last winter, Martella points out that part of the panel will be devoted to ways that lawyers will be responding to the Paris agreement. And in light of the Philippines case, parts of the panel discussion will centre on the potential implications of the Paris agreement on multinational companies that historically have admitted greenhouse gases.

"The goal is to help lawyers working with multinational companies, on issues pertaining to where the legal challenges are going to be brought and what the legal impacts will be in the post-Paris era," says Martella.

## SESSION

**Preventing climate chaos: the latest judicial, legal and policy developments in achieving justice and human rights in an era of climate disruption**

## COMMITTEE

**The Presidential Task Force on Climate Change Justice and Human Rights, and the Environment, Health and Safety Law Committee and the IBA's Human Rights Institute/Legal Practice Division**

## TIME/VENUE

**Today 10:45 – 12:00 pm  
Salon 3, Lobby level**



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# Eat like the president

From historically significant Senate bean soup to modern organic fine dining, Washington DC caters for all. Here's a selection of the best of the best

**R**ich political history, neoclassical monuments, hordes of museums and home to one of the most powerful people in the world – there's so much for which Washington DC is famous.

Perhaps less well-known is its vast and rich selection of eateries, which span the city from the upmarket Dupont Circle in the centre all the way to the trendy, rough-round-the-edges waterfront Navy Yard in the south.

So when full of street vendor half-smokes – a local delicacy a bit like a big, spicy hot-dog, in case you were wondering – try one of these for size.

On the edge of the historic Georgetown neighbourhood is the award-winning **Blue Duck Tavern**, serving rustic seasonal new American cuisine for breakfast, lunch and dinner. Share the 45-day dry-aged ribeye between two while studying the market-based menu to learn exactly where each dish's ingredients originated. And if you're staying at the Park Hyatt Washington where the restaurant is located, you needn't even leave bed to gorge on seared scallops, roasted quail and chocolate Guinness brownies.

If you're staying around a while and have

the chance to get away from the city, **The Inn at Little Washington** – which has twice-graced the Forbes List of most expensive restaurants in the country – is an absolute must. Dine with other patrons and enjoy the whimsical classic interiors of the main room, or book ahead for a spot at the chef's table. Famed for miles around, it's a bit of a trek deeper into Virginia, but well worth the trip.

To truly dine like the President check out the **Oval Room**, just a stone's throw from – you guessed it – the Oval Office. This stylish eatery rose to fame when Condoleezza Rice declared it her favourite restaurant on NBC, and other relatively well-known alleged former diners include Bill Clinton and George W Bush.

If natural is your thing check out trail-blazer **Nora**, the first certified organic restaurant in the US. Now in its 37th year, more than 95% of the menu is supplied by organic and biodynamic growers and producers. But organic needn't mean boring at this romantic eatery just north of Dupont Circle: feast on crispy Amish duck confit or seared Alaskan halibut, and be confident in the knowledge of where it came from. And if dinner has you yearning for more,

renowned owner and environmentalist Nora Pouillon also has her own cookbook.

For caviar and all the rest head to **Marcel's**: the flagship and arguably greatest venture of local chef and restaurateur Robert Weidmaier, whose repertoire also includes Brasserie Beck, Brabo, Wildwood Kitchen and Mussel Bar. Combining big French and Belgian flavours with contemporary, playful presentation, Marcel's is no stranger to global restaurant rankings. Perhaps most widely acclaimed is the chef's signature boudin blanc, but the *foie gras* also comes highly commended.

If you're in the mood for a surprise, just two blocks from Dupont Circle Metro is menulless **Komi**, a modern Greek experience where all you'll be asked upon arrival is whether or not you have allergies. Then just sit back and enjoy a variety of large and small plates from warm seaweed brioche topped with caviar to slow-cooked goat shoulder with pickled dragon tongue beans. Highly commended – though not that diners have a choice in the matter – is the suckling pig.

For a taste of history but perhaps not culinary glory head to none other than the **Senate Dining Room**, which is open to the public by reservation provided Congress is in session. Senate bean soup might not be the most glamorous of fares, but it's been served in the Senate daily since the early 20th cen-



tury. Its origin is unknown; the two most popular theories are requests made by Senator Fred Dubois of Idaho and Senator Knute Nelson of Minnesota in 1903. Either way, sip on this classic recipe of navy beans and smoked ham and consider the many who have done so before you.

And finally, a city guide – let alone one for an American city – wouldn't be complete without a steakhouse recommendation. DC has plenty to choose from, but the winner has to be the aptly named **Prime Rib**. With plush black leather interiors, bowtie-clad staff and a live jazz performance with every meal, an evening at Prime Rib feels like a step back to the Manhattan supper club scene of the 1930s.



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# Save now, pay later

As regulatory oversight grows, multinational companies must engage more actively with rulemakers. Failure to shape policy will cost them

According to a 2016 survey by management consultants McKinsey & Company, only 11% of executives say their companies frequently succeed at shaping government and regulatory decisions.

Given that a 2013 survey estimated that the business value at stake from government and regulatory intervention was about 30% of earnings in most industries and up to 50% in banking, this meagre 11% is significant. Breaking the numbers down, the 2016 survey reveals that of those companies that report an active approach to engaging with outside regulators, 27% say they succeed at shaping policy and regulatory decisions.

McKinsey reports that external affairs (engaging regulators) and corporate reputation management are two priorities very much on the rise.

There are a number of reasons for this. Among them that the large accounting scandals of Enron and WorldCom in the early 2000s and the financial crisis of 2008 pushed governments into increasing both regulations and the stakes for companies that fall foul. Key examples include the Sarbanes-Oxley Act (2002) and Foreign Account Tax Compliance Act (FATCA – 2010) and stringent anti-corruption laws such as the FCPA or the UK Bribery Act.

This afternoon's 'LDP Showcase: new corporate gladiators – leaders of multinational business in a highly regulated environment' will bring together two panels of chief executive officers (CEOs) and in-house counsel to discuss how to manage in a world of increasingly complicated regulatory demands with a heightened risk of sanctions and manage the delicate art of corporate reputation.

According to Jocelyn Kelley, session co-chair and partner of Blake Cassels & Graydon, the session will cover a series of issues: which areas of regulation and government interaction have become the most critical for companies, what percentage of time is spent addressing regulatory issues and whether that has changed over recent years.

The session will also examine whether the panellists' corporations have influenced regulation and if so what methods have proved successful and the challenges in managing consistent business practices across jurisdictions that have different legal and regulatory regimes.

## A valuable insight

The session's two panels boast a wide range of speakers with first-hand experience in negotiating the government-private corporate divide, managing rules in highly regulated



Jocelyn Kelley, Blake Cassels & Graydon

areas such as pharma and healthcare, promoting strong CSR policies and tackling the cross-boundary multi-jurisdictional maze of conflicting laws.

The CEO panel, moderated by CNBC broadcaster Kayla Tausche, will host Doug Parker, chairman and CEO of the American Airlines Group and Jim Squires, CEO of Norfolk Southern, Chris Dodd, CEO of the Motion Picture Association of America (MAPP) and Graeme Miller CEO of the UK Telecom JT Global.

Dodd will prove an especially interesting voice having made the trip over from public office, where he was a Democratic senator for Connecticut until 2011 and where, as

### SESSION

**LDP SHOWCASE: new corporate gladiators – leaders of multinational business in a highly regulated environment**

### COMMITTEE

**Corporate and M&A Law Committee and the Legal Practice Division (LPD)**

### TIME/VENUE

**Today 14:30 – 16:30  
Salon 3 Lobby Level**

head of the Senate Banking Committee, he lent his name to a huge piece of regulation in the 2010 Dodd-Frank Act. MAPP is Hollywood's top lobbying organisation in Washington and before leaving public office Dodd was hesitant about lobbying.

The second panel consists of Sabine Chalmers, chief legal and corporate affairs officer for Anheuser-Busch InBev; Felix Ehrat, Group GC of Novartis; and Laura Stein, GC of The Clorox Company. Stephen Hills, former general manager of The Washington Post and now a professor at Georgetown Law who teaches law students the fundamentals of business, management and organisation, will moderate.

# The great escape

Countries are ducking their legal responsibilities to refugees as numbers of displaced citizens soar

According to the United Nations High Commissioner for Refugees (UNHCR) the world has more displaced people than ever before. The numbers are staggering: 65.3 million people, 20.1 million of whom are refugees and the rest internally displaced. Over half the refugees come from just three countries: Syria, Afghanistan and Somalia. And over half are children.

These figures come from a UNHCR report published in June 2016 and while the numbers may create an abstract picture the scale is worth bearing in mind. Through the last 12 months the news has been focused in particular on one aspect of the increasing refugee challenge: the European refugee crisis. In 2015, one million people arrived in Europe across the Mediterranean, over 80% of them from Syria, Eritrea, Somalia, Afghanistan and Iraq.

One key question that is being muddled to deny displaced citizens their legal protection is who qualifies as a refugee. In a sense, says Idil Atak, professor at Ryerston and a speaker in today's session, the answer is very clear. It is enshrined in the 1951 Refugee Convention. Furthermore recent legal instruments such as

the Cartagena Declaration, the AU Convention Governing Specific Aspects of Refugee Problems in Africa and court rulings from the EU and numerous countries have broadened and strengthened refugee protection.

"Refugees benefit from a wonderful international protection framework. We have everything, the instruments and legal tools available," says Atak. However Atak points to a fundamental paradox. "We have this broadening definition and increasing protection for refugees and even for irregular migrants but at the same time we have an international community, including some member states of the European Union, which are very reluctant to implement these international and European instruments or case rulings from national courts".

The session, chaired by former Under-Secretary-General for Legal Affairs for the UN Hans Corell and with speakers including Helena Kennedy QC and Amnesty International's Alex Neve, will endeavour to investigate the root causes behind refugees, the different scenarios in which refugees seek refuge, the different responses by countries and whether the regime is adequate.



Michael Kirby, chair of UN report Commission of Inquiry on Human Rights in North Korea

## Failing the desperate

There are plenty of examples that, put mildly, test internationally agreed conventions on how to humanely treat refugees. Michael Kirby, former Justice of the High Court of Australia and chair of the UN report Commission of Inquiry on Human Rights in North Korea, wants to use the session to highlight three crises that bring the problem into stark contrast.

The first is the concept of refugees *sur place*: a person who was not a refugee when she left her country but becomes one at a later date. In December 2015 the UN urged China to stop repatriating North Korean defectors. China is not the only country to have done this. China has been classing the defectors as economic migrants rather than refugees and therefore deny-

ing them refugee protection. "Someone who started as a migrant or otherwise and crossed a border becomes a refugee if they discover that returning them to their country of nationality will elicit a well-founded fear of persecution," says Kirby. "I don't think this is fully appreciated in the international community."

A second is refugees with LGBTI status. "Some countries have taken a line with LGBTI status refugees that if they 'keep themselves to themselves' they can avoid persecution in their country of origin and hence can be repatriated," says Kirby. But it is impermissible in law to oblige refugee applicants to pretend to be other than they are. "In some countries of persecution [Iran, for instance] returned homosexuals face very great risks. So this is not a theoretical question," adds Kirby.

### SESSION

**Who is a refugee?**

### COMMITTEE

**International Bar Association's Human Rights Institute**

### TIME/VENUE

**Today 14:30 – 17:30  
Harding, Mezzanine level**





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# The fintech upheaval

New technology promises to revolutionise financial services and overhaul traditional business models

“The biggest technological development since the internet”, is what enthusiasts believe that blockchain, the technology that allows cryptocurrencies such as bitcoin to exist, represents. It is the purest form of peer-to-peer lending which cuts out the need for any financial intermediary.

Blockchain is just one technological development, albeit potentially the most transformative one, that falls into the clamouring basket of developments that the term fintech covers. Peer-to-peer lending, mobile banking, crowd-funding and other platforms that both threaten traditional financial service models and provide vast opportunities all fall into the category.

Investigating the developments in this morning’s session moderators Joost Linnemann from Dutch firm Kennedy Van der Laan and Alexei Bonamin from Brazilian firm TozziniFreire will attempt to tell the story of fintech from various perspectives: the entrepreneurs, traditional banking, the regulators and academia.

The panel consists of finance lawyers Rebecca Simmons (Sullivan & Cromwell) and Nicolette Kost De Sevres (DLA Piper); Arvind

Narayanan from Princeton University; Conor French and Bart Selden from start-ups Funding Circle and Taulia; and David Mills from the Federal Reserve System.

Among the key aspects the session will discuss will be the dynamic between disruptive technologies that seek to bypass the intermediary (banks) altogether and collaborative technologies that traditional financial services are snapping up and, through accelerator programmes, helping to develop.

“Technology in financial services is potentially disruptive in many ways,” says Linnemann. “For instance blockchain technology underlying the cryptocurrencies that we will be discussing has applications in lots of other areas of law,” he adds. Linnemann however stresses that the change in business models, implied by services such as crowd-funding as well as blockchain, is equally important.

“What I personally think is very interesting is the clash of cultures that it represents between the entrepreneurial technology start-ups on the one hand and a very traditional industry on the other hand that is used to being subject to regulatory scrutiny. In all kinds of ways it spells disruption”.



Joost Linnemann, Kennedy Van der Laan

According to management consultants Accenture, global investment into fintech has rocketed upwards since 2010. It reached \$12.7 billion in 2014 and almost doubled to \$22.3 billion in 2015. The first quarter of 2016 saw a 60% year-on-year leap. Investment is also truly global, ranging from more collaborative investments in the mature ecosystem of the US, particularly Silicon Valley, to faster investment growth in disruptive technologies in Europe, led by London and Asia-Pacific.

## The technology

The disruptive potential of the technology is clear. The birth of blockchain and bitcoin was announced in a paper just two weeks after the collapse of Lehman brothers. The paper’s first line stated: “a purely peer-to-peer version of electronic cash would allow online payments to be sent directly from one party to another without going through a financial institution”.

One vision was to bypass the centralised financial system that had failed its customers. Blockchain is at its core a database, publicly owned by anybody and distributed on com-

## SESSION

**Rocking your (financial) world: FinTech and financial market infrastructure**

## COMMITTEE

**Capital Markets Forum and the Technology Law Committee**

## TIME/VENUE

**Today 10:45 – 12:30**

**Coolidge, Mezzanine level**

puters around the world, constantly synchronised and secured by cryptography to make it tamper proof, therefore allowing secure peer-to-peer lending through cryptocurrencies.

Peer-to-peer lending and crowd-funding have also been steadily growing and diversifying. Better known models include Kickstarter, Funding Circle, which has so far leant out £1.45 billion in peer-to-peer lending, Nutmeg, which facilitates private investing and Taulia, which focuses on the financial supply chain. “We have seen various developments in different jurisdictions. In Brazil we have seen fintech focus not only on peer-to-peer lending but also crowd-funding and other platforms, so the diversification of models is huge and the opportunities are impressive,” says Bonamin.

“There is an actual change in the sense that companies have access to funds that previously they have not had access to because traditional banks would be hesitant to lend them money,” says Linnemann, who also highlights the way that credit risks are assessed by using technology. “Fintech is more than minor and incidental and represents a fundamental change in the way financial services are conducted”.



**“In Brazil we have seen fintech focus on peer-to-peer lending, crowd-funding and other platforms”**

Alexei Bonamin, TozziniFreire

## Blockchain basics

As most commonly understood, a blockchain is a distributed database in digital form maintaining a continuously-growing list of records which are grouped into blocks and protected against malicious alteration through being

encrypted and decentralised. Each computer in the network maintaining the database holds the full ledger though, in some cases (through the use of additional cryptography), may only have visibility of limited portions of the ledger. Data is

validated in accordance with the specific consensus model which applies to the network.

Validated blocks are then added sequentially to a linked chain in which each block is tied to the blocks preceding it by certain linking information, which may include a timestamp. Once blocks of data are added to the chain, they are effectively

immutable in that it is virtually impossible to alter the mutually stored data. Blockchains can either be open to the public, such as the blockchain utilised for bitcoin transactions, or limited to a set of participants who have been granted permissioned access.

One of the key attributes of blockchain technology is that

participants in the system can transact bilaterally without a third party intermediary that is typically required in order to establish an element of trust between the transacting parties. The trust necessary for parties to conduct transactions with each other is established instead by the shared distributed ledger and the system of validation through consensus.





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## QUESTION

What sessions are you most looking forward to?



**Shoaib Aslam Spal**  
Dubai Healthcare City  
Authority  
UAE

I am particularly interested in international arbitration sessions and anything relating to arbitration and M&A in the Arab region. The enforcement and the execution of awards is the most hotly-debated topic in the Arab arbitration world.



**Mikaël Pelan**  
Lusis Avocats  
France

I am eager to gain insights from sessions on criminal and commercial law as pertinent to crimes in relation to the execution of commercial strategies. This is important as France is about to change its laws.



**Rigoberto Paredes Ayllón**  
Rigoberto Paredes  
Bolivia

Sessions on employment discrimination interest me. And I am looking for highlights as far as employment discrimination is concerned. I am also going to attend a session about LGBT discrimination too.



**Nguyen Quang Hung Vilaf**  
Vietnam

The keynote addresses and sessions on M&A and law firm management stand out. In Vietnam, we have a lot of cross-border transactions, and it is important for me to get an idea of issues facing foreign firms.



**Christian Roschmann**  
Lefosse Advogados  
Brazil

M&A sessions are most interesting to me. It is important for me to get an idea of the countries more likely to make FDI investment into Brazil – which is my home country.



**Tariq Muneer**  
CKM Partners  
India

I am looking forward to the M&A dinner we have tomorrow. It is good to know what's happening in other jurisdictions and the sentiment around acquisitions among multinational companies.



**MJA Lukwaro**  
Lukwaro and  
Company Advocates  
Tanzania

I am interested in the dispute resolution session and settlement of disputes via arbitration. Right now this is being developed in Tanzania and membership of arbitration in the country is expanding rapidly.

# To whom it may concern...

**P**olicymakers, human rights activists and counsel will write to the new US President with the aim of raising a number of human rights concerns.

"We of course don't send letters to every incoming premier around the world – so why a letter to the President? Because the US is the world's leading democracy," said Helena Kennedy, a member of the UK House of Lords and the chair of yesterday's IBA panel 'Human Rights in the United States – a letter to the next President from the international legal community'.

The concerns include pushing the new President to continue work on domestic human rights in the US, including LGBT rights.

"When Eric Holder was Attorney General of the US, he said people in the country were cowards when it came to discussing issues of

race. Let's extend that to issues of sexuality and identity," said D'Arcy Kemnitz of the National LGBT Bar Association in Washington DC.

### The Three 'T's

Another critical area is US foreign policy. "I've got three 'T's on my wish list: torture, so-called targeting, which usually involves drones outside declared war zones, and transparency – or the lack of it – during the war on terror," said Cori Crider, who directs Libya rendition cases for Reprieve in the UK.

Crider spoke on the so-called Deal in the Desert that came during a period when George W Bush and Tony Blair were looking for a diplomatic success. The deal was that former Libyan leader Colonel Gaddafi would give up his weapons of mass destruction. "What we didn't know until 2011 was that there was an

unspoken part of the deal: that MI6 and the CIA would deliver to Gaddafi his opponents," Crider said.

"Not too many Americans know the US put the wives and children of rendition suspects on planes too. In the US, there's no acknowledgement, no apology, no explanation," said Crider.

On the issue of so-called targeting, or drone strikes, however, views are split.

"The current administration, in targeting practices, has been quite constrained," said Ryan Goodman of NY University's faculty of law. According to Goodman, the turning point was President Obama's 2013 speech binding the US executive branch to high standards of targeting outside of battlefields.

"One of the rules is there should never be a strike unless near-certainty that no civilian will

be harmed, and the target of the strike is present," said Goodman, adding that there could nevertheless be a discussion as to whether or not human rights apply to drone strikes.

### Key takeaways

- The international legal community will be writing a letter to the new US President to raise human rights concerns;
- Domestically, concerns include LGBT rights, gender discrimination, gun laws and the use of the death penalty;
- Foreign policy concerns include the use of drone strikes, CIA renditions, international relations and the rule of law.

# Emerging markets' next challenge

**E**merging markets need to improve their financial system amidst a global economic downturn and rising debt levels. That was the message from speakers at yesterday's panel 'The commodity price downturn: would the industries survive?'

Driven by strong Chinese demand for natural resources, global statistics point to an upward trend in the global demand for minerals, such as crude steel and aluminum. But panelists point to the lack of supervision among emerging markets on their financial system.

"Important work is still needed to be done by emerging markets on their financial system supervision and the micro-prudential ratios," said Samya Beidas-Strom, senior economist at the International Monetary Fund in Washington DC. "All these things need to be monitored given the accumula-

tion of debt," said added Beidas-Strom.

According to statistics provided by the panelists, global demand for minerals is expected to continue growing at a modest rate. This will largely be driven by China, which accounts for 51% of the production of crude steel, 54% of aluminum usage, 53% of iron ore, 49% of copper and 47% of zinc.

Philip Crowson, honorary professor and member of CEPMLP Global Academic Team at the University of Dundee in the UK, while predicting a further revival of commodity prices, argues that this will solely depend on sound management and profitability after tax.

"A further revival of prices is assured, but that is merely a necessity rather than a sufficient condition for the industries to survive," said Crowson. He added that ris-

ing demand in prices doesn't automatically translate into rising profits.

With the recent increase in crude oil prices, the world has seen a 50% increase in drilling activity. Alfred Michael Schaal, principal at Energy Ventures Analysis in Virginia, points out that demand for oil is on a rebound propped up by emerging economies such as China and India. This



**Michael Schaal**, Principal at Energy Ventures Analysis in Virginia, USA

could lead to an increase in global demand from 500,000 barrels to 700,000 barrels per day.

### Key takeaways

- Driven by strong China's demand for natural resources, global statistics point to an upward trend in the global demand for minerals, such as crude, steel and aluminum;
- Speaking on the panel about the survival of industries amid the commodity price downturn, panelists point to the lack of supervision among emerging markets on their financial system;
- With the recent increase in crude oil prices, the world has seen a 50% increase in drilling activity.





**Ana Isabel Cáceres Troncoso y Cáceres**  
Dominican Republic

I am most interested in the M&A and corporate law sessions, particularly intellectual property ones. We're witnessing growing activities among corporates in the M&A space in the Dominican Republic.



**Shirley Wang**  
Zhong Lun Law Firm  
China

I'm attending sessions chaired by the Banking and Finance Committee because they are perfect opportunities for me to network with relevant professionals on cross-border transactions with a focus on debt finance.



**Peter Hsu**  
Bär & Karrer  
Switzerland

I am looking forward to the banking and insurance sessions, especially in the context of M&A and in particular the regulatory aspects of the practice area. It is helpful to understand new trends in the industry.



**Fadi S Sarkis**  
Sarkis & Associates  
Syria

What interests me is whether arbitrators are being attacked for impartiality. As a practitioner, the methodologies are there but the practice is different in terms of how awards are considered.



**Gustavo Lazo**  
Rodrigo Elías & Medrano  
Peru

I am most looking forward to the tax committee session because issues regarding the new base erosion and profit-shifting rules, though implemented by OECD countries, will have a huge impact on the developing world.



**Abir Roy**  
Lakshmikumaran & Sridharan  
India

I am an antitrust lawyer so I am interested in the session on cartel and corruption. I am also looking at merger control trends due to the rise of inbound M&A coming into India.



**Cynthia M Pornavalai**  
Tilleke & Gibbins  
Thailand

Sessions on M&A, corporate, banking and finance are most interesting to me. I would particularly like to know more about fintech banking practice, as well as public-private partnerships.



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I am most interested in the private equity exits session because getting views on how US and UK private equity funds work and their developments will serve as good precedents for clients at home.

## How lobbying is adapting

Lobbying is big business, but as it becomes a regulated practice in more jurisdictions, the practitioners are being forced to adapt. That was the message from yesterday's session 'Lobbying: the intersection of business, politics and the legal profession'.

Lobbyists in the US alone spend between \$10 and \$16 billion a year. But in a recent public opinion survey they ranked below advertising executives, car salesmen and congressmen. "So while being good business for lawyers, the reputational issue is certainly significant," said session chair Richard Kelly of Mintz Levin in Boston.

While lobbying is common in most of the world, in the US it's more explicit, more regulated, more transparent and more deeply embedded in legal practice, explained Sidley Austin's Cameron F Kerry, speaking as an ex-

official who has been lobbied in the past.

"The greatest perception is the myth of the magician – the notion that there's someone who can make a single phone call and solve the problem. It's almost never the case in this day and age," he said. In his opinion, this is largely down to increased transparency.

The Obama administration introduced more restrictions on spending for meals and gifts for public officials. "So often, meals are conducted standing up, as the spending limit only applies to a sit-down meal," added Kerry.

Another way around the restrictions is so-called shadow lobbying: using campaigns, advertising, think tank research and education to try to shape the political landscape without making direct contact with officials.

The Russian government, in contrast, has

a policy of actively taking advice from lobbyists, said Dmitry Afanasiev of Egorov Pugin-sky Afanasiev. Lobbying is entirely unregulated in the Federation.

"My problem is not an inefficient government, but that our own community of lobbyists isn't sophisticated enough to give a reasonable argument – which is the opposite of Washington," he added. "Often things that work for the US work in opposite ways for emerging markets."

It helps to hire a firm advising the government on other matters, as they're already viewed as credible practitioners.

In the EU, however, lobbying has for a long time been a dirty word, said Van Bael & Bellis' Jean François Bellis.

The EU only introduced a register, which is entirely voluntary, for lobbyists in 2011.



Dimitry Afanasiev, Egorov Pugin-sky Afanasiev & Partners

Being on the registry means firms must disclose who they are acting for and the revenue they receive from them – in exchange for passes to Parliament buildings. Not one firm or individual has been sanctioned since the registry was introduced. "But it's clear we're moving in the direction of a compulsory registry," he added.

## Make law not war

The prevention of aggression is one of the core aims of the United Nations (UN), and before it, of various international organisations and tribunals created to address the illegal use of armed force.

But despite its prohibition in international law, a definition of the act itself remains shrouded in uncertainty and inconsistency.

Federica D'Alessandra, co-leader of the Carr Center Study Group at Harvard University and co-chair of the War Crimes Committee, told delegates at yesterday's 'War of aggression' session that the term has evolved over time and taken on many nuances. It now reflects real conflicts, politics, and of course jurisprudence.

The UN General Assembly made a first attempt at a definition in 1974, and over 35 years later, the Kampala Amendments to the

Statute of the International Criminal Court (ICC) defined a crime of aggression. According to the Kampala amendment, only an act of aggression which by "character, gravity and scale, constitutes a manifest violation of the UN Charter," can be considered a crime of aggression and trigger the application of relevant sanctions.

The relationship between both concepts is unclear, explained Antonios Tzanakopoulos, associate professor of public international law at Oxford University's Faculty of Law.

"If you look at the jurisprudence of the ICC, it doesn't actually even use the term act of aggression," he said. "And defining what is a manifest violation of the UN Charter can also be difficult."

In this case, it may be useful to look at which direction the UN's International Court of Justice has gone in. Crucially, it has never

found that there has been an aggression against another state. But it has relied indirectly on the concept of aggression as defined by the General Assembly in cases involving military and paramilitary activities in and against Nicaragua, and in the Oil Platforms case involving Iran.

The lack of a clear and consistent definition is only set to increase as global conflicts grow in complexity and sophistication. Donald Ferencz, convenor of the Global Institute for the Prevention of Aggression, told delegates that the fact that some nations reserve the right to use military force under certain conditions – notably the preservation of national interests and the removal of threats to the global community – has muddied the waters further. Several global conflicts, notably the most recent Iraq War, have certainly not helped.



Donald Ferencz

### Key takeaways

- Despite its prohibition in international law, the definition of an act of aggression remains shrouded in uncertainty and inconsistency;
- The ICC's jurisprudence never uses the term of act of aggression;
- The fact that some nations reserve the right to use military force under certain conditions has complicated matters.

# DUBAI INTERNATIONAL ARBITRATION CENTRE (DIAC)



The Dubai International Arbitration Centre (DIAC) is the largest arbitration centre in the Middle East. It is a non-profit institution that provides efficient and impartial administration of commercial disputes. The DIAC Arbitration Rules, adopted in 2007, are in line with international standards. The DIAC is comprised of the Board of Trustees, the Executive Committee and the Secretariat.

The cases registered with the DIAC relate to different sectors such as real estate, engineering and construction, general commercial, media, insurance and oil and gas with large amounts in dispute, some exceeding one billion dirhams.

The DIAC has developed a pool of experienced arbitrators from different cultural and legal backgrounds located in the UAE and abroad.

The DIAC has recently established DIAC 40, a forum for young arbitration practitioners, and organizes a wide range of specialized training courses and events.

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