ROUNDTABLE

Who's Who Legal brings together three leading experts to discuss issues facing litigators and their clients in the industry today.

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WWL: Which industries have seen an increase in the level of litigation over the past 12 months?

Bettina Knoetzl: In fraud and white-collar crime-related matters, industries which are regarded as "red flag" industries, such as construction and defence-related industries, have faced greater scrutiny from prosecutors, resulting in increased work for litigators active in the fields of business crime and internal investigations. We have also seen a marked increase in activity in antitrust/competition investigations and prosecutions. Private enforcement claims have gained significant popularity. Banking litigation continues to take a lion's share, with an ongoing, unstable economic environment producing an inevitably increased level of disputes. As an example, the most recent spike in the value of the Swiss franc compared to the euro has caused another round of collapses in Swiss franc-linked finance transactions. The rather weak euro, in combination with the economic troubles of the EU market and the international capital markets, commands a constant call for financial litigation experts worldwide.

Edward Davis Jr: As a specialised lawyer who focuses his practice on international financial fraud and asset recovery I don't think that I can comment extensively on trends in general commercial litigation. The concept of asset recovery as its own practice specialisation has been on the rise. Perhaps this is because of a growing awareness of it as a separate specialisation, as well as cases finally being seen as asset recovery cases, which heretofore may have been lumped into commercial litigation for want of a distinct category.

Martin Bernet: The financial industry is traditionally a source of substantial commercial litigation in Switzerland. While the wave of post-financial crisis cases has ebbed, there continue to be classic disputes between (mostly wealthy private) clients and their banks. One particular topic that has made the headlines in Switzerland's financial industry is the decision of the Swiss Federal Supreme Court in late 2012 to the effect that trailer fees traditionally earned by banks on customers' assets invested in funds had to be passed on to the customers unless relevant claims had been validly waived. Those trailer fees were very substantial. There are, to this day, actions by bank customers seeking reimbursement of trailer fees paid in the pre-2012 era. One of the issues that the Federal Supreme Court did not decide in its 2012 decision was the question of a time bar. This question is currently being litigated in Swiss courts in some cases.

Outside the financial industry, there is ongoing litigation in connection with the disputed public takeover bid by the French Saint-Gobain group for Swiss-listed company Sika.

A general trend that we see is white-collar criminal cases spilling over into commercial litigation or white-collar criminal cases being conducted in parallel to civil actions. This is what happened in the case of Swiss industrialist Stephan Schmidheiny who was and is still being prosecuted in Italy for manslaughter and the like while the surviving members of families of some former workers of asbestos processing factories of Schmidheiny's group brought civil actions at the same time for the consequence of the loss of their breadwinner. Another quite frequent example are cases in which investigations for money laundering lead to tort claims against the banks whose

staff abetted money laundering. These actions typically seek damages for monies alienated through a money laundering scheme.

WWL: With the rise of alternative dispute resolution, many lawyers we spoke to commented on the increasing trend for litigation lawyers to reinvent themselves also as mediators. How has this trend impacted your work?

Bettina Knoetzl: I have practised as certified mediator since 2000 because of my unshaken belief that mediation is a powerful tool for every dispute resolution lawyer, provided the client seeks to settle the matter at hand. However, it is of utmost importance to understand the available mediation techniques as a seminal matter, to assess the suitability of a dispute for mediation, well before addressing the issue of competence for participating in the mediation as counsel or even in the role as mediator. To simply declare oneself a mediator will not suffice to serve the client best. Mediation has its merits but – especially when it fails – also its downsides. To give examples of negatives, consider the requirements of early disclosure of information, lack of cost reimbursement and loss of time. Ultimately, entering into a mediation with untrained or inexperienced counsel can result in a disadvantageous position for the client. I would therefore encourage all dispute resolution lawyers to undergo mediation training, even if it is just a crash course, to gain a better understanding of the capabilities of this great dispute resolution tool. By 2020, I believe every dispute resolution lawyer should be familiar with mediation.

Edward Davis Jr: I don't think that lawyers need to reinvent themselves as "mediators" as much as they should acquire skills to obtain the best result from mediation. While some lawyers and retired jurists are becoming mediators I don't think that the market needs more mediators. What the market needs are better mediators. I think that mediators who are more involved in learning the facts of a case and who take a more determined approach to show each side the good and bad aspects of their cases are starting to distance themselves from their competitors. Many mediators simply shuttle offers between camps without much energy in learning the case and applying appropriate pressure on both sides to resolve their disputes. There is also a dearth of international mediators. Mediation is now a permanent and increasingly mandatory part of the legal landscape in the United States in both the state and federal systems and on both the trial and appellate levels. Unfortunately fraud and asset recovery cases have some dynamics at work that make them difficult to settle. There is a usually a high degree of emotion on both sides and the putative fraudster is at some level sociopathic and difficult to control at a mediation. The same bent outlook that led someone to commit fraud often does not allow them to compromise easily. Conversely, mediation has proven quite effective in more straightforward commercial litigation cases in which I've been involved, as it creates a "trial substitute" which allows a catharsis to occur resulting in litigants feeling that they got to "tell their story". This is a good trend in commercial litigation.

Martin Bernet: Mediation in commercial disputes has for a number of reasons not become significant in the Swiss dispute resolution scene. One of the main reasons is that Swiss courts have traditionally seen their roles not just as decision makers but also as conciliators. In many Swiss courts, there will at some point in the proceedings always be a conciliation conference, which in the majority of cases leads to a commercial resolution of the matter.

WWL: With this trend in mind, how would you describe the current legal market and firms' prospects for the future?

Bettina Knoetzl: In general, the trend to form specialised dispute resolution (DR) departments, which offer all available DR tools, from litigation to arbitration and from mediation to all other alternative DR (ADR) tools, will continue. I am convinced that clients will want to see their critical disputes to be handled by true DR experts and not just any general private practitioner, or industry-focused non-litigator specialist. With the forming of sizeable, worldwide acting law firms, however, conflicts of interests are inevitably increasing. Thus, I expect both these trends to ultimately lead to the creation of more independent DR boutiques, comprised of only highly specialised DR lawyers.

Edward Davis Jr: One trend that I see in commercial litigation, to the extent that asset recovery and financial fraud are subsets of commercial litigation (and to a degree they are), is that clients are declining to bring cases that don't have a high likelihood of success and are settling cases much faster as the costs of litigation continue to spiral. I think the legal market has still not recovered fully from the 2008 recession. Firms have cut costs and staff, and have more aggressively weeded out partners they feel are not producing or are not likely to generate business. However, only so much can be gained by cutting and there seems to be some disconnect between the concept of client development and the generation of lawyers that are poised to take the helm in the next five to 10 years. I'm concerned that firms and law schools have not taught this skill nor selected for it, and that societal changes may have made the concept of "marketing" somewhat distasteful to up and coming firm leaders. Conversely, the generation behind them (those law school graduates who came out of law school since 2008) have had to confront a shrinking and unfriendly marketplace which may make them a much more aggressive group in the long run when it comes to business generation. The future of commercial litigation seems to belong to the mega-firm and the specialised boutique. Firms that are between those two extremes seems to struggle more as their costs are not much lower than mega-firms but they may not be able to compete for the mega cases. Boutiques on the other hand tend to be more nimble and able to offer alternative cost structures which are generally less available from the larger firms. Legal work isn't going away but the competition or even hyper-competition for the work has brought a sharper and meaner approach which undermines the

professional relationship necessary (even in an adversarial system) for the justice system to work well.

Martin Bernet: As I said, mediation has so far not changed the litigation landscape in Switzerland, and most likely will not do so at any point in the foreseeable future. I expect commercial litigation to remain at the current level in the next years.

WWL: The volume of commercial litigation appears to be quite jurisdiction specific. What are the current factors affecting clients' decisions to start a suit in your jurisdiction? How do these impact complex cross-border litigation?

Bettina Knoetzl: In my view, if forum shopping is possible, there are, among others, the following decisive factors which determine whether it makes sense to start a litigation in my jurisdiction: costs; convenience; geographic reach of enforceability; and quality and level of independence and neutrality of judges.

Regarding the first of these, as obvious as the costs factor might be, in litigation clients have to think well ahead. This creates a particular challenge, given the inherent vagaries of court contests. However, there are critical differences between jurisdictions which allow for an enhanced choice, provided they are made to be understood by the client making such a decision. In Austria, for instance, there are two appeal levels available, implicating three court levels, which may end in lengthy proceedings. Depending on the amount in dispute, the court fees can be significant. Recently, I handled a matter with the amount of €500 million in dispute. Our client had to pay more than €5 million court fees, at the time of filing the complaint. Over all three levels, the courts fees would have totalled €22 million. To put it in other words, depending on the amount in dispute, Austria could be an expensive place to litigate, where a good cost/benefit analysis is critical.

Regarding the geographic reach of enforceability of a judgment, in cross-border litigation this is a decisive factor in selecting an initial forum. For instance, most judgments rendered by a US court would not be enforceable in several European countries, and the judgment would likely have limited precedential value.

As for the quality and level of independence and neutrality of judges, the possibility of facing corrupt or biased judges creates a significant risk factor in cross-border litigation. There is only one piece of advice, if there is a choice: stay away. The frustration of litigating with a biased judge, driven by motives other than to apply justice, is beyond the typical tolerance level of our clients.

Edward Davis Jr: The cost of litigation could very well ultimately chill litigation. In addition, clients seem to be settling cases faster due to the high costs of producing and reviewing voluminous electronic discovery. The cost of electronic discovery is sky-rocketing and most solutions are geared toward the larger firms with few new options targeted on the smaller and boutique firms. It is not the cost of entry (preparing a complaint and a filing fee) that stifles otherwise good litigation but the cost of sustaining it. Also, courts are clogged and their funding is under assault from those that profit from the status quo and from using their overweening economic and other powers to drag cases on much longer than is necessary. The cost-of-litigation issue is particularly true in some cross-border cases when so-called "closed" jurisdictions are involved. These closed jurisdictions purposefully limit competition but litigation is currently drawn there by necessity. In some of these jurisdictions practitioners are charging rates that are now close to par with New York and London (some examples are the Bahamas, Bermuda, the Cayman Islands and the British Virgin Islands). While they are just as deserving of those rates as their counterparts in London or New York the additional cost can be a factor in either not proceeding with a case or settling it much faster and for a less than ideal outcome.

Martin Bernet: A good indicator for the volume of commercial litigation is the statistics of the Zurich Commercial Court, which is probably the most important first instance court for commercial litigation in this country. The number of cases in the Zurich Commercial Court per year has decreased over the last 10 years but there was again a sharp increase in 2014. In parallel, the number of completed cases, ie, cases in which a judgment was handed down or which settled, has steadily declined in recent years. This is seen as an indication that commercial litigations have become more complex and that parties are fighting harder.

In complex cross-border litigation, one of the factors that militate in favour of litigating in Switzerland is the well-functioning legal system, the full independence of its judges and, compared to most of the developed common law jurisdictions, the reasonable cost of litigating in Switzerland. One option that has so far not been fully exploited, in my view, is the possibility offered by the Lugano Convention for parties to choose Switzerland as a neutral forum.

WWL: As businesses become more aware of the negative aspects of some forms of alternative dispute resolution methods, such as cost pressures, what do you anticipate the effect will be on your work in the future?

Bettina Knoetzl: Mediation and other ADR methods have been shown to be a highly successful tool to settle cases, provided the matter is actually suitable for mediation. Otherwise, the time, effort and money spent on mediation is wasted. Parties, and their international referring or co-counsel, therefore, should select their DR counsel carefully and thoughtfully. Paying attention that the litigator under consideration is also familiar with, or expert in, a spectrum of ADR methods will, most likely, be classified as a best practice for in-house counsel in the future. Of course this will affect the training of young lawyers. In the future, I expect to see more well-trained ADR lawyers among the litigation community and I am looking forward to welcoming and working with them.

Edward Davis Jr: One of the historical selling points of alternative dispute resolution was that it was cheaper. I think everyone knows that once you factor

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in the cost of the arbitral body and the arbitrator(s) (as opposed to a taxpayer supported court system) the cost of big-time arbitration can easily be on a par with complex litigation. However, it was probably a mistake to sell any form of justice dealing with large complex commercial litigation as "cheaper" from the start. By doing so it introduced a cost/benefit narrative that has been shown to be somewhat dubious. The reality is that there are better reasons for using arbitration than just cost savings. First, an international arbitral award can be enforced around the world by treaty while enforcement of judgments is much harder and many times you almost have to start over. Second, it allows the use of specialised fact-finders who may know the industry involved while most judges are generalists at best. Third, it allows confidentiality which many court systems do not allow. So, while the cost pressures in large arbitration are approaching, if not equalising, with complex litigation there are other pressures and considerations that likely outweigh the cost considerations.

Martin Bernet: Irrespective of the modest success of mediation in commercial matters in Switzerland so far, I believe that a firm like ours with an international disputes practice needs to be conversant in all forms of alternative dispute resolution. In fact, many of our international clients routinely look to the whole range of dispute resolution methods in any major case. This is already a reality today and I do not think that the situation will greatly change in the coming years.