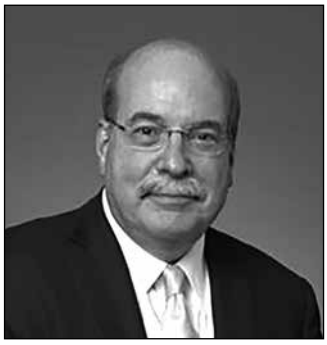
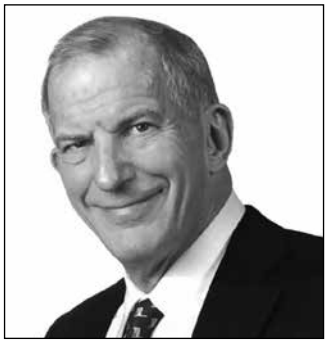
ROUNDTABLE

Who's Who Legal brings together four of the leading practitioners in the world to discuss key issues facing litigation lawyers today.



MARK GLASSER
Sidley Austin
US

DANIEL WEINHOLD
Weinhold Legal
Czech Republic



STEPHEN SUSMAN
Susman Godfrey
US

BETTINA KNOETZL
Wolf Theiss
Austria

WWL: Economies around the world have continued their recovery over the past year, and although many respondents have observed a slowing of disputes and claims arising from the financial crisis, there is still work available in this area. How has your work been affected by this trend and do you think there will continue to be new claims filed over the next year?

Mark Glasser: Texas trial practitioners have seen relatively modest work flowing from the financial crisis, most of this litigation having been concentrated in the banking centres on the East Coast. A respectable number of class action and related opt-out claims have been filed in Texas respecting the sale of mortgage-backed securities when the alleged victims, the issuers, or the sponsors of those offerings have a Texas connection. So while the slowing of disputes and claims arising from the financial crisis has not had a material effect on the practice of most securities trial lawyers here, we see with every new merger agreement or hostile takeover that is announced a corresponding fiduciary duty "bump-up" claim. That trend will continue for as long as merger and acquisition (M&A) activity remains vibrant in the region.

Daniel Weinhold: I cannot say there is a major trend for fewer disputes despite a somewhat better situation in the economy overall. People in business may have learnt to be more litigious in difficult times and once they have tested various dispute resolution mechanisms, they won't change back. For instance, before the crisis it was vary rare in my practice to see any significant representations and warranties or price adjustment related claims submitted to courts or arbitrators in respect of M&A transactions. Then it became much more frequent for such disputes to be escalated and I do not see this trend disappearing.

Stephen Susman: The good claims have already been filed. Almost all of the ones that have not been filed are now barred by limitations.

Bettina Knoetzl: While it is correct that the recovery has been ongoing, we believe that it will not result in a boom-phase in and around Austria. Central Europe will continue to struggle with lower growth rates compared with years before the financial crisis. Even if disputes arising in direct connection with this event diminish naturally due to the statute of limitations, we will continue to see litigation as one of the very busy fields for law firms. As claims become time barred after three years of awareness of the damage and the person who caused it, damaged parties need to quickly file their lawsuits. Besides, criminal investigations are shedding light on some cases and often produce helpful evidence for the civil proceedings. Thus, the Commercial Court Vienna has not seen a slowdown. Just the opposite: We believe this business is currently booming and this trend will continue.

WWL: In your jurisdiction, which sectors have been the most active sources of dispute work for you? Have there been, or are you expecting, any legislative or regulatory developments which will affect the focus of your practice?

Mark Glasser: As one would expect, the energy sector has been the most active source of dispute work for me and my firm. Much of that litigation is tied to exploration in the several areas of shale production in and around the State of Texas. With the growing

infrastructure pertinent to these and other projects, including vigorous activity relating to the construction of LNG export terminals here, I also anticipate a growing number of claims arising from the construction and operation of these facilities. Certainly legislative and regulatory developments will affect the energy aspect of my practice, particularly as they may relate to restrictions on hydraulic fracking, carbon emissions and the like.

Daniel Weinhold: There is still a broad variety of disputes I deal with – including disputes arising from SPAs, construction disputes, disputes of corporate clients with their former directors or shareholders, and tax-related disputes.

A giant legislative change in Czech civil law became effective this year – the voluminous new Civil Code and dozens of related pieces of legislation replaced numerous old laws. Although disputes under the new laws are still rare, they will come and it will be a big challenge for both counsel and judges because of unclear interpretation of the many new provisions and a lack of relevant case law. I expect more directors' liability disputes because the new laws bring extra requirements in this area.

Stephen Susman: Our patent infringement practice remains very busy, but I am expecting patent reform legislation that will make winning an infringement case much more difficult for the plaintiff. I also expect a continued attack on class actions and further obstacles to getting a class certified.

Bettina Knoetzl: We have seen a strong focus on financial disputes. Currently, for example, we are handling a €500 million matter on behalf of an Austrian bank arising out of a swap agreement. The latest legal development affecting our work significantly was the Hypo Alpe Adria haircut. After the bank's financial crash, the state of Austria had to step in and is now sole owner of the bank. In an attempt to atone for the financial disaster without opening insolvency proceedings, the government basically annulled the liability of the Carinthia region with the help of a recently passed controversial law. We are now mandated to challenge this law. We expect this heavy focus on disputes in the field of banking and finance to continue. We have also noticed increased work in life sciences.

WWL: The popularity of ADR as a means of resolving disputes appears to vary from country to country. With clients more concerned than ever about risk management and cost effectiveness and given the number of arbitration clauses in commercial contracts, how would you describe levels of activity in ADR compared with litigation?

Mark Glasser: While it is true that clients today are more concerned than ever about risk management and cost effectiveness, my impression is that many clients have lost or are losing faith in the efficacy of domestic arbitration. Many clients have concluded that it is no less expensive than litigation, that it is no less protracted than litigation, and that, particularly given the near-total unavailability of appeal from an adverse ruling, even the most unpredictable and inexplicable rulings are not subject to review. As a result, I now see in many commercial contracts the inclusion of arbitration provisions that are substantially more detailed in respect of the process for selection of the arbitration panel than in years past. As elsewhere, however, international arbitration is today a very fertile area, and I expect this to continue.

Daniel Weinhold: There is a relatively new special law on mediation that became effective two years ago. However, I have not observed any major trend towards mediation or other ADR methods since then. When the new Civil Code came into effect this year, there was one tricky issue that became relevant. There is a provision in the Civil Code dealing with time limitation, which makes a tenuous link to mediation or other ADR. Before the meaning of this provision is clarified through court practice, disputing parties will not be sure whether a claim may become statute barred if not brought to the courts or whether the time limitation period is suspended during negotiations in out-of-court settlements. This is one of factors that may make ADR less attractive.

Stephen Susman: Discovery is much more limited in arbitration. On the other hand, most arbitrators have little incentive to grant motions to dismiss, make a summary judgment, encourage settlement or shorten hearings, so cost effectiveness is lessened. But I see no appetite in corporate America to abandon arbitration for litigation.

Bettina Knoetzl: In Austria, for good reasons, Arbitration is especially popular for disputes where court proceedings would not lead to an enforceable judgment. For instance, most of the judgments rendered by US states would not be enforceable in Austria, as the requirement of reciprocity is lacking. Therefore, especially in cross-border cases, the benefits of arbitration clearly outweigh those of litigation, even if in Austria litigation is rather affordable and therefore the cost argument is not the most compelling one. A recent improvement to the Austrian Civil Procedural Code aims at enhancing the popularity of arbitration. Ideally, Vienna should become the "go-to" venue for disputes in the central, eastern and southeastern European regions. The Austrian arbitration community has made significant progress in achieving this goal. Looking at other ADR methods, there is still a long way to go to catch up with arbitration, not to mention litigation. Despite its clear benefits, mediation is still struggling to become a commonly used tool for dispute resolution. For instance, some state courts try to foster mediation with special training for judges and frequent requests to parties who might be able to solve a dispute amicably, to consider mediation rather than immediately enter into court proceedings. Pilot projects at several courts, among them the Commercial Court Vienna, have shown remarkable success in this regard. Nevertheless, litigation is still the preferred tool.

WWL: Many recruiters have reported a rise in the number of disputes jobs available, firms with a focus on financial services being most likely to seek out new litigation hires. How would you described the current legal market, both in terms of new hiring opportunities and the prospects for full-service firms and disputes boutiques?

Mark Glasser: For the reasons stated in response to the first question, I do not find that firms with a focus on financial services are the area most likely to seek out new litigation hires. Rather, I believe that firms with a focus on energy-related disputes are the most likely to do so. This may be unique to this part of the country. While we see in Houston the rapid growth of litigation boutiques, full-service firms will continue to be retained by major corporations for their litigation needs, so long as these firms bring the same price flexibility and other accommodations offered by the litigation boutiques. I might also note that there is an extraordinary amount of migration of lawyers from one firm to another in Houston, including migration from well-established firms to out-of-state firms that have only recently established offices in Houston. Frankly, however, I see that trend slowing.

Daniel Weinhold: A country the size of ours, with more than 10,000 bar members and a very saturated legal market, seems to have rather a surplus of legal counsel. Significant corporate clients, nevertheless, still tend to hire law firms capable of delivering expertise in multiple areas of law, which could give them the edge in major disputes. There is definitely room for litigation boutiques as well, but I believe there is a bright future for multi-disciplined providers.

Stephen Susman: It is very easy to hire good lawyers, but still extremely competitive to get the great ones. Our firm limits itself to hiring lawyers who have completed a clerkship for a federal judge. And we pay huge signing bonuses to get these recruits.

Bettina Knoetzl: It is correct that litigation experts are in rather hot demand. In general, a good litigator needs to have significant courtroom experience. This requirement cannot be substituted by excellent grades at university or other technical legal skills. Ultimately, practice in court matters for a competent, seasoned, trial lawyer. Of course, this process takes a lot of time. Thus, the market cannot be grown from one day to the next. Apparently, many law firms, which had their focus on corporate and mergers and acquisitions or niche practice lines, have revised their strategy (as opposed to Wolf Theiss, where litigation was always a core pillar) to reinvent themselves as trial-ready. The newly created demand for seasoned litigators has created a disparity in the hiring market. There is more demand than supply. We notice, however, that among junior lawyers it is quite popular to seek a position in dispute resolution departments. It is currently regarded as a highly interesting opportunity.