VIRTUAL ROUND TABLE

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LITIGATION & DISPUTE RESOLUTION 2016

MEET THE EXPERTS

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Olexander's practice includes broad experience in advising multi-national and local companies, institutions and organisations on their compliance and business activities in Ukraine, as well as on corporate and competition law, corporate restructuring and mergers and acquisitions. Olexander has over 25 years of experience representing clients in the Ukrainian system of general and commercial courts, including the Supreme Court of Ukraine and has over 20 years of experience representing clients in international commercial arbitration proceedings, both within and outside Ukraine (including involvement in more than a dozen international commercial arbitration proceedings).

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Alexandre is the Partner at Sysouev, Bondar, Khrapoutski Law Office. He enjoys strong reputation as arbitrator and litigator.

Alexandre is the member of the Chartered Institute of Arbitrators and a member of the International Bar Association. In 2015 he was reelected for another term as Board Member of Russian Arbitration Association.

Co-author of Commentary on the Civil Code of the Republic of Belarus, the author of numerous publications in the field of business activity and arbitration, manuals and teaching materials in the Republic of Belarus and abroad.

Chambers Global about Alexandre Khrapoutski: "a practitioner who is very well known for his corporate work," according to interviewees. Clients speak of him as "a lawyer you know you can turn to with delicate and confidential issues."

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Thomas Weibel is a partner in VISCHER's dispute resolution team. He has a wealth of experience in complex disputes both before state courts and arbitral tribunals. His practice focuses on

i) complex national and transnational commercial disputes (financial services, industry, services, post M & A disputes, aviation),
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Thomas regularly publishes and lectures on national and international civil procedure law as well as Swiss inheritance law. He is editor in chief for civil procedure law for a periodical on Swiss case law. Thomas is listed in Chambers, Legal500, Who's Who Legal, and Best Lawyers.

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Alexandra is a Partner in Makarim & Taira S and has extensive experience in handling litigation and dispute resolution cases including police investigations into allegations of forestry and environmental crimes, civil lawsuits, arbitration and alternative means of resolving disputes, anti-corruption investigations, internal/independent investigations and terminations of employment, and has handled liquidation, bankruptcy and due diligence, general corporate and commercial issues, as well as power projects. She is also a registered sworn translator from English to Indonesia and vice versa.

MEET THE EXPERTS

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Selvyn Seidel founded and chairs Fulbrook Capital Management LLC, an institutional advisor in commercial claims. Fulbrook identifies, evaluates, manages, and arranges capital for commercial claimants to apply towards prosecuting meritorious claims. Fulbrook specializes in complex national and international claims, whether brought in the United States, or in another country. It has a special and in some important ways unique capacity and goal to assist in enhancing the value of the claim closer to its true value, reducing costs needed to prosecute the claim, and bringing more certainty to the process and costs involved.

Prior to Fulbrook, Mr. Seidel co-founded and chaired Burford Group Ltd., the investment manager for Burford Capital, LLC. Burford Capital went public on the UK Aim market of the London Exchange in October of 2009. It is now the largest institutional litigation funder in the world. Mr. Seidel is often identified as a leading voice and visionary in the funding industry.

Before entering the funding industry, Mr. Seidel practiced as a litigation attorney, and has over 40 years of experience in complex litigations and arbitrations. He represented business entities in diverse complex projects in the United States and abroad. Until December 31, 2006, he was a senior partner at Latham & Watkins, a leading international law firm. At Latham Mr. Seidel was a co-founder of Latham's New York office in 1985, and was, at different times, the Chairman of its International Practice, the founder and Chairman of its International Litigation and Arbitration practice, and the Chairman of its New York Litigation Department.

Mr. Seidel was for ten years an Adjunct professor at New York University School of Law. He is an Advisory Board Member of the Center for International Arbitration law of New York University Law School. He is currently an Alumnus Lecturer at Linacre College, Oxford University. He is also a Board Member of Oxford Law Alumni of America. He lectures on the industry and participates in conferences and presentations at various leading law schools in the U.S. and UK, and at leading Institutes (such as the RAND Institute of Civil Justice). He has authored many papers and publications relating to Third-Party Funding of Commercial Claims. He is widely referred to and cited in the media.

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Practice Areas

Marco Tulio Venegas is engaged in the following pratice areas:

- Constitutional and Administrative Proceedings
- Commercial Litigation
- Industrial and Intellectual Property
- National and International Commercial Arbitration
- Tax Advise and Litigation

Litigation & Dispute Resolution 2016

In our Litigation & Dispute Resolution 2016 Roundtable we spoke with six experts from around the world. We discover which centres are preferred for international litigation and arbitration, the implications of the new Trans-Pacific Partnership (TPP), major regulatory changes in Belarus and an analysis of international dispute resolution mechanisms with case study reference to the Ukrainian-Russian conflict. Featured countries are: United Kingdom, United States, Mexico, Hong Kong, Singapore, India, Belarus and Ukraine.

1. Have there been any recent regulatory changes or interesting developments?

Martinenko: The most interesting legal developments relate to the legal implications of the Russian aggression against Ukraine. With the Russian annexation of the Crimea, Ukrainian and international investors lost numerous assets on the peninsula. People have now started considering how to recover those losses.

The obvious choice would be to use international dispute resolution mechanisms as the national ones will be either ineffective or unattainable. One would perhaps – theoretically – be able to get a judgment against Russia in Ukrainian courts. Such a judgment will serve no purpose, however, as the likelihood of its enforcement will be close to zero. Equally an attempt to sue Russia in its own domestic courts on those matters will be a doomed enterprise from the very beginning.

Unfortunately, there are not too many international dispute resolution tools available for those purposes either. Out of the two obvious ones – international commercial arbitration and international investment arbitration – the former is a non-starter for obvious reason as those are not international commercial disputes arising out of contracts. Hence, people are left with only one choice – international investment arbitration.

That choice is not an easy one either. International investment arbitration option can be pursued by using certain available international instruments (UNCITRAL Rules or ICSID) in the event a bilateral investment agreement ("BIT") between the countries provides investors with such an opportunity.

The legal trick here is that investors face a unique situation where they made their investments either under domestic Ukrainian law (Ukrainian investors) or under the respective BIT with Ukraine (international investors). And that is not Ukraine who violated the investors' rights and who was in breach of a BIT or Ukrainian domestic legislation. All of the wrongdoings were made by a third party – the Russian Federation – who has nothing to do with the Ukrainian law or Ukrainian BITs. The aggressor has no legal obligation to honour Ukrainian domestic investment laws. Nor has it any treaty obligations to honour any international undertakings of Ukraine under its BITs.

The situation is unique from the legal standpoint as Russia has only now set out that aggression precedent. It simply has no adequate legal dimension in the modern world. The whole international treaty system has proved to be ill-prepared to facing such legal challenges.

Yet people use even the remotely available legal means to protect their proprietary interests in Crimea. To the best of our knowledge they mostly attempt to sue Russia under the available international dispute resolution mechanisms on the basis of Ukrainian BITs. It remains to be seen whether that tactic will prove to be effective and whether the international investment dispute mechanisms will be expanded to also apply to situations where investors lose their assets as a result of the sovereign aggression of one country against another.

Seidel: In the third party finance world of commercial claims ("TPF"), regulatory changes are a hot button and are on a lot of lips. They have not occurred yet in terms of legislation, but they are being studied in the U.S., the U.K., and Hong Kong, three centers of third party finance. There is little doubt in my mind that specific legislative regulations will start to be enacted in one or more of these jurisdictions, and/or more.

First, the U.S.: A U.S. Senate Committee has been empaneled under Senator Grassly to investigate the industry with an eye, probably, to enacting regulations. It is currently receiving and soliciting input. Today, in the U.S., no statutory regulation exists for third party finance of commercial claims.

Second, the U.K.: Under the auspices of the government, and in connection with judicial studies, various industry members prepared a voluntary code of conduct for TPF. The thought was, from the Judicial Report as to the industry, that the industry promotes "access to justice", and voluntary regulation should occur and there would then be a basis to see if statutory regulation was appropriate. The voluntary Code has been in place for several years now. The U.S. Chamber of Commerce

is, along with some others, urging that statutory regulation be enacted because voluntary regulation has not, in the Chamber's view, worked.

Hong Kong's government selected a group to investigate whether TPF should be supported in the international arbitration sphere. After about a year, the Consultation produced a Consultation Report recently concluding that the industry was beneficial, and proposed certain regulations. The ball is now in the government's court.

Australia, the so called mother or father of TPF, going back over 50 years to see it born and continue to grow, has regulations in some areas, including conflicts.

While statutory regulation thus seems on its way, open questions go to: in what specific areas? What will they be? When? In addition, there are key questions about international TPF, given its importance, complexity and difference from domestic finance. The UK voluntary code, for example, does not cover international, despite London being a center of international disputes, and TPF.

Further, and to me of central significance, there is no focus whatsoever on regulations that need to be enacted to regulate the claimants, or the defendants, and their representatives. Regulation here should not only be of the financing party. We have a seamless web, covering the other players, and at the least, the claimants and defendants and their representatives are key players.

Finally, on this topic, it must not be forgotten that some specific and important "regulation" and regulators that have been important for years: the Courts. Many court and arbitration decisions exist involving TPF, and laying down rules and regulations. They have had and have and will have an important impact. Beyond this, there are many general rules and regulations that apply to the industry and all others. The laws of negligence and fraud are good examples.

One other significant point should be made: informal "regulators" exist and have their say. These include, ethics opinions of State and City bar associations, studies and the American Bar Association, and so on. Law Reviews, Journals, and magazines, play a part. They have an important impact.

Gerungan: Yes. The Indonesian Supreme Court has introduced a small claim lawsuit through Regulation No. 2 of 2015 on The Procedure for Settling Small Claim Lawsuits ("Regulation 2/2015"). A small civil lawsuit is one involving a claim of up to Rp 200,000,000 which can be settled in a straightforward manner. A small claim lawsuit should be registered with the competent district court registrar. The claim will be examined by a single judge, and must be decided within 25 days of the first hearing.

The parties may submit an objection against the ruling within 7 days of the ruling being issued. The panel of judges must issue its ruling on the objection within 7 days of its appointment. The ruling on the objection is final and binding and cannot be appealed to the High Court or Supreme Court.

Khrapoutski: Yes, there has been major regulatory change in Belarus in past year. In 2015 the possibility to recover uncontested debt through obtaining executory endorsement made by notary public was substantially expanded. Now it is also possible to recover uncontested debt under supply, lease, carriage contracts and some others.

Obtaining executory endorsement made by notary public is a simplified out-of-court procedure, which in certain cases replace the writ proceedings in court. On the basis of executory endorsement legal entity is entitled to recover debt without application to the court in uncontested order, as well as a penalty (fine) in connection with such debt.

Weibel: The Swiss Civil Procedure Code, effective since 2011, has unified civil procedure law that had, before, been regulated individually by each of the 26 Cantons. At the same time, the revised Lugano Convention came into force rendering Europe a single enforcement area in civil and commercial matters. The once parallel European Union Brussels I Regulation has, however, already been revised again in the meantime. From an international perspective, the 2015 entry into force of the Hague Convention on Choice of Court Agreements is important. It aims at providing greater predictability and legal certainty for choice of court agreements in civil and commercial matters. So far, it has been ratified by the EU (except Denmark) and Mexico. Its scope is, thus, still limited. Due to the signatures of Singapore and the US, its importance will, however, grow shortly.

Venegas: The most relevant development among dispute resolution is the

soon to be valid Trans-Pacific Partnership treaty. The Trans-Pacific Partnership (TPP) is a trade agreement among Australia, Canada, Japan, Malaysia, Peru, United States, Vietnam, Chile, Brunei, Singapore, New Zealand and Mexico that aims to rule the global trade between these countries. This treaty will officially start when enough countries ratify the agreement through their own domestic processes. It is important as it establishes interesting rules regarding the dispute settlement mechanism that emerge from cross-border conflicts. The chapter commits the TPP Parties to make every attempt to resolve disputes through cooperation and consultation, and encourages the use of alternative dispute resolution mechanisms where the parties believe that it would be helpful to resolve a dispute.

2. Are you noticing any trends in industry-specific litigation or dispute resolution?

Seidel: A critical trend is the growth of international disputes in general, and specifically international arbitration. This is not a surprise since as the world becomes more international in every way — "flatter", in Thomas Friedman's words — the parties are more and more using international litigation, and especially arbitration, to resolve their disputes.

That trend in the globalization of the world is no doubt going to continue. Globalization of more than one world seems inevitable. This will push increased international disputes, and increased international arbitration. The increased arbitration seems destined to include increased public arbitration, as well as private arbitration; more and more claims in international arbitration against Sovereigns, are going to appear.

These trends are closely watched by the funding industry. For those funders interested and capable in this very complex area, funding of international disputes will become more of a part of their portfolio. This is certainly a trend that is happening, or going to happen.

The trend in funding will of course, in its own right, support the trend towards international disputes. These trends intersect and support each other.

Khrapoutski: A common trend for Belarusian legal market at the moment is incising number of litigation and arbitral proceedings in general. The substance of services required by clients has changed from provision of legal support for M&A deals and investment projects to protection of debtors' and creditors' interests in courts (both state and arbitration) and during liquidation and bankruptcy proceedings.

Weibel: The Federal Counsel is proposing a new Financial Services Act and a Financial Institutions Act that are expected to be dealt with by Parliament in 2016. From a litigation perspective, the draft Acts do not go as far as the original draft. While originally the Federal Council had in mind far-reaching changes by providing a type of class actions for bank customers, an arbitration court, a procedural costs fund, and a reversal of the burden of proof, the new concept now in essence provides for a dispensation of litigation advance-costs and securities. Nonetheless, the financial sector continues to be under considerable regulatory pressure.

Venegas: Yes, litigation is increasing in matters of financial institutions, energy, infrastructure, mining and commodities, life sciences and healthcare, technology and innovation, and transportation. In México, the most recurring themes are commercial disputes arising from distribution, loans and bankruptcy proceedings. As for the particular industries or sectors involved in litigation, we have seen an increase in the construction and energy sectors. The reason behind this is that there has been a drastic reduction in governmental expenditure in these sectors, which has led companies to try to save money through several strategies, some of which have resulted in litigation. In addition, the reduction of the oil price has drastically affected the liquidity of companies involved in these sectors, prompting the increase in disputes.

3. According to BTI, the number of companies with 'bet-the-company' litigation tripled from the previous year in 2015. What are the best practices for surviving this type of threat?

Weibel: When faced with "bet-the-company" litigation, it is crucial to carefully select and assemble the defence team. Such a team preferably consists of expert outside counsel as well as experienced inside resources such as the general counsel, senior in-house litigation lawyers, and senior management of the affected business. It is vital that the team receives support from the top management and is closely advised by PR professionals to protect the company's reputation and business relations. The team must be well-organised and have clear and efficient lines of communication. Finally, the relevant facts

must be investigated most carefully and neutrally as early as possible.

Venegas: Any litigation which involves and potentially jeopardizes a company is often referred to as "bet-the-company" litigation. As a company's survival depends on the cost and outcome of a single lawsuit, well-developed and executed litigation strategies are key to guaranteeing a win.

When such a situation is presented, having the best team of litigators, legal consultants, business consultants, and technology consultants is imperative.

The selected team must work together as much as possible during the early stages of the case to establish a balanced litigation team that keeps the company's goals directly in sight as well as focuses on the facts of the case. The teams' target goals should include understanding the allegations involved in the litigation, determining the facts related to the claims, interviewing key people to understand the scope of the issues and getting a handle on relevant documents while also ensuring that relevant material is preserved and collected. It's also recommended to have a public relations professional available on your team throughout the matter to help defend the reputation of your company.

Nevertheless, an analysis of each particular case is needed in order to determine the best convenient practices for each type of company. Every case is different and so is every company.

4. What systems can be put into place to minimise the risk of litigation?

Seidel: This excellent question should replace the age-old and unsolved question of how to reduce or make proportionate the costs of litigation. While my answer will or should be discounted because it has the bias of one in the industry, I think an effective system exists within the third party finance industry, if recognized and focused on.

A pivotal, and perhaps *the* pivotal, threshold process in the industry is to evaluate the claim. If this is done well, and actually is a mission assigned to it, it should turn up a better and truer evaluation of the claim than the claim otherwise can get from the claimant and its lawyers. This, in turn, should push the dispute towards a settlement before the litigation starts, or even sometime during the litigation. If this evaluation is combined with an honest objective evaluation from the defendant's side, all the better.

This process and result would work whether or not the claim was deemed "fundable", or as most are, deemed "unfundable."

This evaluation might, if needed or useful, be coupled with a mediation. The combination, if needed, would be the next step if the evaluations themselves did not resolve the dispute. The process should defang the risk aspect of the litigations to make litigations as a whole more prone to solution.

Gerungan: To minimize the risk of litigation, it is essential to maintain strict compliance to prevailing relevant laws and regulations when drafting an agreement. In addition, incorporating alternative dispute resolution mechanism such as through mediation or arbitration can help the parties to avoid the risk of engaging in litigation. Setting a timeframe for resolving a dispute, such as mediation for up to 30 days, can also be an option to prevent lengthy negotiation or discussion.

Weibel: Clear written agreements are not a cure-all and have, of course, no influence on the parties' contractual performance, their agenda, and outside factors. However, they help to avoid misunderstanding and are aimed at creating a clear legal situation in case of default. Further, in particular if the parties have an ongoing business relationship, constant communication and evaluation of their relationship is vital to identify and resolve any issues before they actually result in a serious dispute. The risk of litigation can also be minimised by adopting multi-tiered dispute resolution clauses typically providing cooling-off periods, terms of amicable discussions with or without the assistance of a third party, mediation, or the submission of the dispute to a neutral expert before resorting to litigation or arbitration. Such clauses must be drafted carefully, lest they create new uncertainties and procedural issues that can be litigated.

Venegas: As litigation and dispute resolutions are often risky, expensive, stressful and time consuming, they should be treated as a last resort.

In order to minimise the risk of litigation in a Company, it is imperative to improve and adopt new practices that can put the business in a stronger position that will derive in the avoidance of potential conflicts.

As for specific recommendations, I consider that the interested party should

record all his valuable arrangements and relationships in writing. Also, an understanding of those agreements is needed. Another way to avoid conflicts is by informing and communicating to the other party the current circumstances that concern us, trying to agree in potential solutions that could avoid the commence of a conflict. It's also important to be updated about the legislation changes and concerns of the current situation of the country, and to be proactive and identify our relations' historic performances in order to determine whether it's the best decision to go to litigation or not. The party should always remain objective about the emotion and principles of the parties involved.

Nevertheless, litigation can always be avoided through the use of Alternative Dispute Resolution methods. This is generally understood to include all dispute resolution methods apart from litigation and often involves the use of an independent third party such as a mediator or an expert to help arranging a settlement.

5. What can be learned from analysing competing companies' litigation patterns and behaviour?

Venegas: The ultimate objective of analysing the competing companies litigation patterns and behaviour is to know enough about a competitor to be able to think like him so a strategy can be formulated. The strategy must be executed taking in consideration the competitors' likely actions and responses. From a practical viewpoint, a lawyer needs to be able to live in the competitors' strategic shoes. The lawyer needs to be able to understand the situation as the competitors see it and needs to know what actions the competitors would take to maximize their outcomes.

The goal of competitor analysis and what can be learned is the understanding of the nature and likely success of the counterpart's strategy in order to provide the clients with a better one that could guarantee the win of the case.

6. Is London still the preferred forum for international litigation and arbitration?

Seidel: Yes and No.

It is still a leading forum for resolution of international disputes. It has a particularly good structure for resolving international arbitration disputes, which are a breed of dispute resolution that is ballooning. Further, London has recently declared its goal is to become the leading international arbitration center in the world.

That, however, in itself recognizes it is not now the preferred forum worldwide, but rather wants to become the best forum. Becoming the best will itself be a challenge since New York has declared the same, Paris says it is and will remain so, and other jurisdictions, like Singapore, Switzerland, Sweden, and Toronto mark this area as a specialty or to be specialty. Even New Zealand has raised its hand to becoming an international center.

Also, as noted elsewhere, funding of international litigation and arbitration — which supports its growth — is not as supported as it can, and probably will, be. The Voluntary Code of Funders in the UK does not even address international disputes, focussing in essence and as a practical matter specifically on domestic disputes.

Where does that leave London? It is and will remain a center for resolution of international litigation and arbitration. It has excellent experience and a framework to do so. On the litigation side itself, the courts are seeing huge litigations relating to Russia and other former members of the Soviet Union. Also, many international contracts identify UK law to govern, which makes it a follow on often to have a UK forum.

Although the UK is experiencing its own financial difficulties, and its central position in financial services is being challenged, I do not believe this will have a short term, and maybe not even a long term, effect on London as a dispute center.

So in my mind London will continue to be a leading forum to resolve international dispute. It will just not become *the* leading forum.

Gerungan: This would heavily depend on who the parties to the agreement are. For instance, if they are Europeans, London may still be favoured for international litigation and arbitration. However, if the parties are from Asian countries, Singapore or Hong Kong seem to be a more desirable choice of forum.

Weibel: For arbitration, a shift from London to Hong Kong and Singapore can be observed. These two cities are important regional business hubs and have solid judicial systems. They are being confronted with an increasing number of disputes due to the rapid growth

of Asia-related trade. In addition, the launch of the Singapore International Commercial Court (SICC) in early 2015 has strengthened Singapore's position as a forum for international commercial dispute resolution and related legal services. Nonetheless, continental Europe provides, with Paris, Zurich, and Geneva, very attractive for international litigation and arbitration that can certainly keep up with London and New York as well as Hong Kong and Singapore.

Venegas: As a Latin American in my experience London is not much sought by companies within America. The preferred forum for international litigation and arbitration for Latin American companies is New York, Paris or even Mexico City.

7. About 70% of all infringement actions in patent litigation in Europe are brought before German courts. How do you determine which jurisdiction patent litigation should be filed in?

Martinenko: The rule of thumb is very simple. Patents are all about inventions, utility models, industrial designs and/or plants. That means that patent owners are interested in getting patent protection in those jurisdictions that are primarily capable of getting economic use of them. Why would one spend money, time and efforts in order to get patent protection in a jurisdiction where such a patent will certainly not be used for the next decade or two?

People wanting to challenge a patent are therefore forced to do it in a jurisdiction where the respective patent protection for a particular invention/utility model/industrial design/plant is granted.

Equally patent owners can also challenge perpetrators only in those jurisdictions where their patents legally exist. As the patent rights stem out of certain legal instrument – a patent – one is prevented from challenging wrongdoers in those jurisdictions where one has no patent protection for one's IP objects.

As a result that would explain why Germany is a popular place for patent litigation.

Weibel: Patents are usually registered internationally. German courts, in particular in Düsseldorf and Hamburg, have a strong track-record and are therefore often chosen by litigants due to their business sense, know-how, and fast procedure. In Switzerland, the Federal Patent Court located in St. Gallen is the patent court of first instance and has exclusive jurisdiction over validity, infringement, and licence claims including interim measures (Art. 26 Swiss Patent Court Act). It also has jurisdiction in other civil matters that have a factual connection to patents. Since its inception in 2012, it has rapidly grown in both reputation and importance.

Venegas: The countries that handle the majority of all patent cases in Europe are Germany, the UK, France, and the Netherlands. I particularly find substantial differences across the jurisdictions aforementioned. In order to determine which jurisdiction patent litigation should be filed in it is important to take in consideration the terms of outcomes, the share of cases that is appealed, as well as the characteristics of litigants and litigated patents.

I see that some jurisdictions have a system that allows for a choice between bifurcation and an integrated process for hearing infringement and invalidity cases. Currently, German system is bifurcated whereby infringement and validity are handled separately at different courts. The other three systems combine both issues in the same court action.

There are also important institutional and procedural differences across jurisdictions, which account in part for the concentration of cases involving certain matters in a given jurisdiction. For example, pharmaceutical cases and technologies related to telecommunication and digital data transmission is litigated more frequently in the UK, whereas cases related to machinery and engineering are litigated mostly in Germany.

The jurisdiction can also be determined according how long it takes courts to reach a first decision on the merits of the case. Proceedings take around two years in France, but are substantially faster in the other three jurisdictions. Median durations for infringement cases are 9 months in Germany, 10 months in the Netherlands, and 11 months in the UK.

8. What are the main difficulties in representing international clients in cross-border disputes?

Martinenko: In domestic courts the most challenging matters relate to the rules of evidence and trial procedure. People coming from another jurisdiction who are accustomed to the respective rules of their home jurisdictions often find them terribly inconvenient

or even unjust in the foreign jurisdictions. The challenge for a local counsel is, therefore, to educate its clients and to get them accustomed to the judicial realities of another country.

In international commercial arbitration the principal challenge relates to the absence of precedents. Hence, one needs to build up the arguments base almost from the scratch each time one handles a similar case.

Seidel: The main difficulty to me has always been the differences usually encountered in culture. This leads to different values, practices, work ethic, legal systems and laws, political systems, and communications. A host of differences thus flow from what I think of as the hub of the difficulties. And this difference does not mean, of course, that their culture is not as good, for it may be better as to the issue being addressed.

How does one address this? One key way, if possible, is to put someone on the matter who has been raised in and understands that culture and all its ramifications (including language), and also a local lawyer and/or other professionals to help. This also requires the leader acquiring enough of an understanding of the differences to be strategic and otherwise effective.

Professionals and others equipped to handle international matters, should be altogether able to do this. In the process, it is essential to not assume our culture and practices are superior, or are the only way to go. That can not only be false, but regardless, lead directly to a train wreck.

Another way is to measure as best as one can the differences and if you decide the bridge to cross is one too many, or is too far, to not take on the transaction. A hard decision to make, but one that avoids heartache later on.

Gerungan: Some of the main complexities in cross-border disputes are usually the distinction in legal systems or procedural rules. In addition, some jurisdictions may not allow foreign attorneys to have an active role in the proceedings. The different time zones can at times be an obstacle such as for setting up negotiations or hearings.

Weibel: Overlapping jurisdictional power and the possibility of conflicting decisions being rendered by courts in different States offers both opportunities and risks for the parties in cross-border disputes. Accordingly, a thorough risk analysis and extensive coordination with the legal teams in the respective jurisdictions are indispensable. Not only the strategy and thrust, but also the fact finding as well as the parties' assertions in proceedings before courts in different jurisdictions require careful coordination by the lead counsel. Clients from different jurisdictions or with different legal backgrounds are, also, often unaware of the particularities of the applicable procedural law and the general legal environment at the place, or places, of jurisdiction.

Venegas: There is increasing awareness about problems that may arise, both for parties and their counsel, in international disputes. Two main difficulties arise. Firstly, difficulty lies in identifying the relevant conduct and rules with which counsel must comply. Secondly, there is the potential for an inequality to arise between the parties as a result of counsel for one party being subject to greater or different constraints that the other.

Problems for Clients: In the majority of litigation proceedings, parties must be represented by counsel licensed to practise in the jurisdiction where the litigation is taking place. The two parties may be represented by lawyers who are from different jurisdictions and, therefore, subject to different sets of laws and rules. These differences between counsel's jurisdictions may impact in their ability to use the different techniques to fight the case.

Problems for Lawyers: The main problem is that counsel must identify the rules applicable to every particular case to which they are subject, especially if the dispute is taking place outside their home jurisdiction. The problem for counsel is to identify all the applicable law when he may be subject to more than one set of rules at the same time.

9. What impact, if any, will the decline in Bilateral Investment Treaties have on international litigation & dispute resolution?

Martinenko: I guess making such a general statement would amount to certain exaggeration. We certainly see the degradation of the BIT instruments within the EU. That fact would be explained by the unique status of the EU legal system that has the concept of single market in its foundation. Hence, the BITs among EU countries become redundant by definition of law.

For as long as the matter concerns other parts of the world we do not ob-

serve such a tendency. If we take an example of Ukraine we can see that the expansion of the country's international commercial links is followed by the increase in the country's exposure to international investment activity. The latter prompts Ukraine to expand its fleet of BITs that international investors can benefit from.

The above policy is common to all countries active in the matter of attracting foreign investors. Moreover, it remains in the interests of both the investor-source countries and the investor-target ones to put the investor protection infrastructure in place for the sake of building up the sustainable legal foundation for investment activity. An OECD Model BIT is good proof of the globalization and universalization of that matter.

Venegas: The impact of declining this bilateral Investment Treaties would be that private investment between nationals and companies of one state to another will decrease because of the lack of standards, rules, and protection guidelines that give the investor legal protection on his transactions. However, this impact may be tempered if the States strengthen their domestic legal system to put in motion strong protections for foreign investment. Moreover, even though there is a decline in BIT's it is a fact that multilateral treaties have appeared that may change the dynamics of potential investment arbitration in a positive manner.

10. What are the advantages and disadvantages of alternative dispute resolution?

Martinenko: International arbitration is a comparatively effective tool. It is backed up by the New York Convention and currently covers almost all of the jurisdictions of the world. Hence, one can easily take advantage of international commercial arbitration instruments in resolving cross-border disputes with comparatively little hassle (domestic courts have only very limited ability to affect an international commercial arbitration award).

The downside of international commercial arbitration is that it lacks the *stare decisis* principle behind it. One cannot effectively build up one's arbitration strategy on the basis of the available precedents in such or similar cases. One can only hope that the current arbitration panel may give a thought to them in order to take a well-balanced decision in the current case. But that step is not mandatory for the panel. Hence, certain lack of predictability makes international commercial arbitration a bit risky enterprise.

It follows that another downside may relate to the single-tier international commercial arbitration procedure. If a panel issues an obviously unjust arbitral award one is stuck with it as one cannot appeal/challenge it in most cases.

Another layer of the problems relates to the fact that typically an international commercial arbitration panel consists of arbitrators coming from different jurisdictions having different legal background/training/traditions. Sometimes that may be quite a challenge for a counsel wishing effectively to handle arbitration on behalf of its client.

Domestic arbitration is also widely offered by the majority of countries. However, that is a topic for a completely separate discussion as domestic arbitration standards widely vary from jurisdiction to jurisdiction. As a result, it is difficult to discuss advantages/disadvantages of domestic arbitration as a general matter.

Mediation can be an option. The practice shows, however, that it is more suitable for comparatively low-level disputes that do not amount to complicated matters. Also, it can be an effective instrument only in the event both parties to a dispute try to find an equitable solution in earnest. There will be little (if any at all) room for mediation if the sole purpose of the dispute is to eliminate/destroy an adversary.

Seidel: "It depends". That is the only answer to a question like this.

The threshold question is: what alternative dispute resolution method is being talked about? There are countless methods, or what can be defined as methods. Arbitration? Mediation? Contingency lawyers? Third Party Funding? Flat fees? Project Fees? Something else which goes under the name "alternative dispute resolution?"

I will address only the industry I work in – third party funding. Here, a third party to a litigation enters the picture and pays the legal fees of the prosecuting lawyers of a meritorious commercial claim, on a non-recourse basis, or otherwise monitizes the claim (such as by paying an amount needed by the claimant not for prosecution fees but for business working capital or other needs), in exchange for security from the claim and/or other security, and a return if there is a recovery on the

claim, and taken from that recovery.

This is a newer industry. It is gaining the public's awareness. It is growing in name, reputation, and use, particularly in the U.S. and the U.K., the two leading jurisdictions in terms of where the third party funders are based and using this product and service. Today, as in the past, the claimants using third party funding are financially distressed. Without financial help, they are threatened with losing the value of a legitimate claim altogether, or seeing it diminished badly. Claimants who can afford the prosecution costs are also starting to turn to it for various benefits it offers.

The advantages to a financially distressed claimant are clear. In brief, without this support the claimant faces losing entirely, or in good part, a meritorious claim. In the U.K., the government and the court system have investigated the industry and, in the words of Justice Jackson whole led the judicial investigation, it has the advantage of giving "access to justice."

To me the advantage of third party funding is access to both civil justice, and commercial justice. It is giving life to and supporting a meritorious claim. That in itself is an advantage that is a huge one for this alternative dispute resolution path. There are many others, such as lowering court costs, that can be listed but not in this limited space.

The disadvantages that the defendant community (or members of it, or the association that speaks on its behalf, the U.S. Chamber of Commerce), are many. Some have merit. Others do not. They include the claims that the industry: causes sham or meritless claims to be brought; overloads the courts; costs far too much; compromises clients rights, including the right to legal advice that is free from conflict; and operates without rules and regulations.

Answers from the industry include: it only funds meritorious, not sham claims, and its whole reason for being is to back meritorious claims that will be successful; if meritorious claims add to the court workload, that is what the legal system needs to address and deal with; the costs of funding take into account a lot of factors, such as risk, which justify the costs; if the lawyers fulfil their duties, as they should since firms dealing with funding are as a rule honorable and good, clients rights will not be compromised ; there are plenty of rules and regulations in effect, formal from the courts and specific to the industry, and others that are voluntary in the UK; with legislation being considered in the funding centers; and more informal rules from bar associations and position papers and law articles; and of course general rules that apply to everyone, such as anti-fraud rules.

There have been many debates and discussions in these and other areas. They will go on. But it would seem that the fundamental advantage of overall, promoting justice, justifies the existence and expansion of the industry. And that seems to be the conclusion of the market using the product and services, after the debates and discussions going on.

Gerungan: Several advantages of alternative dispute resolution such as mediation or arbitration are that the settlement process may take less time. The dispute will also be examined by an expert in the field. In addition, the process will not be open to the public (private and personal). Some of the disadvantages are that the ruling can be subject to annulment process. Alternative dispute settlement also tends to be expensive as the fees are calculated at a certain percentage depending on the claim value. Also, the enforcement of the award requires approval from the courts.

Khrapoutski: One of the biggest advantages of ADR is "parties' control". Parties can choose preferred ADR mechanism, appropriate forum, experts and etc. That also makes resolution of dispute more predictable. Another good advantage of ADR is confidentiality of process.

It is considered that ADR is more time and cost efficient, however, this point is controversial and would depend on the jurisdiction, type of ADR and its outcome. Using ADR, by contrast, could prolong the process of dispute resolution if finishes unsuccessfully. With regard to Belarus depending on the type of court proceeding and dispute itself, litigation could be even faster and more cost efficient than arbitration and mediation.

Weibel: ADR mechanisms are often flexible and creative, allowing the parties to reach a solution favourable to both and to continue their business relationship. Successful ADR helps by saving time and reducing the costs of disputes and the management attention they absorb. ADR can, however, only be successful if both parties are willing to participate in good faith and to compromise. It is therefore not suited for all kinds of disputes and situations and may, in particular if used as a

stalling tactic by one party, turn out to be a waste of time, energy, and money. ADR is also not appropriate in cases where one party requires legal protection as a matter of urgency.

Venegas: The advantages to use alternative dispute resolution include the fact that it usually takes less time to reach a final resolution than if the matter were to go to trial. Also, it costs significantly less money, as well. Furthermore, in the case of arbitration the parties have more flexibility in choosing what rules will be applied to their dispute. The parties can also have their dispute arbitrated or mediated by a person who is an expert in the relevant field. In an ordinary trial involving complicated and technical issues that are not understood by anyone who is not involved in the relevant industry, a lot of time is spent trying to explain the judge and jury every matter on study, so they can make an informed decision. If an arbitrator has experience in the relevant field, however, less time needs to be spent on this.

There are some disadvantages, as well. The most important may be the increase in the cost of litigating through this ADR's which is usually higher than domestic litigation before national courts.

11. How has the role of corporate counsel evolved or changed over the years?

Seidel: The evolution and changes in the role of corporate counsel since inception are not hard to summarize for someone like me who has been around long enough to have seen most of the creation of the corporate counsel, and dealt with them ever since. At first they were simply but essential personnel for entities taking under their control, and at cheaper costs, a number of the roles previously performed by pricey outside counsel. At the outset, they were usually viewed as "lesser" professionals, and only asked to perform more mundane and boring activities, much like a hygienist is today asked to perform such tasks for a dentist.

The role expanded when a few companies, led in many ways by General Electric, took the position very seriously, and built up a talented team of lawyers led by a talented lawyer. Ben Heineman, who joined General Electric out of a leading private practice firm, was the pioneer here. He built a formidable team with the quality of an excellent outside private practice firm. The teams here have taken over much of what had been done by outside firms, at reduced costs and other benefits.

This development was fuelled by the need of companies to address high and increasing outside legal fees. In some ways, it has been a development running parallel with law firm efforts to reduce their own costs through outsourcing, using contract lawyers, using technology more, and so on.

Today, some companies have what might be considered their own internal private law firm. The trend here should continue, at least among the companies that have a lot of complex costly legal needs.

The General Counsel's goals have also evolved of course. A major change going on here is the tilt towards becoming not only a cost center, but more of a profit center. GC's are more attentive to bringing their own claims, rather than having the structure, mentality and approach which is not just a "defendant's", but is one which also looks at things as a claimant who might profit from a claim, and indeed changes from one whose defiant defendant's attitude starts as an attack attitude, but rather considers more how to resolve the dispute early on.

At a time when the legal services industry, and the financial services industry, are themselves changing and evolving rapidly and seriously, much of that in response to the changes going on within the clients and the client's General Counsel, there are wheels within wheels turning. It will be a long time before the evolutions and changes slow down a bit and stabilize.

Khrapoutski: Indeed the role of corporate counsels in Belarus has changed during past year. An increasing number of companies focus on strengthening their own legal departments. As a general trend there is an ongoing outflow of staff from law firms to the corporate sector.

Weibel: Compliance regulations and the risk of massive sanctions in case of breach are fast growing. Corporate counsels are increasingly in charge of compliance and policy matters, so their duties have become considerably more formalistic. Not only has business become more international and global, but also legal services are considered more and more a mere commodity that is purchased according to supply chain standards. Corporate counsel's task to manage outside counsel and negotiate (and constantly supervise) the terms of cooperation is increasingly driven by form instead of substance. Companies who want their legal department to have more than administrative func-

tions must augment both budget and manpower, and may also consider involving their General Counsel in management and business decisions.

Venegas: Corporate counsels started as lawyers who work directly for a business or company. At first, lawyers could work for a variety of clients, but as the companies started growing and the workload began increasing, it became essential for a company to have a corporate counsel that devoted all his talents and energy to one single employer.

Nowadays, the corporate counsels are very important as they provide legal protection and services to a company and its employees. The corporate counsel may offer advice on issues like contracts, property interests, collective bargaining agreements, government regulations and patents. Also, usually represent their employers in Court, in the case legal proceedings are presented.

The role of corporate counsel will do no more than maintain or increase its importance during the pass of years.

12. What key trends do you expect to see over the coming year and in an ideal world what would you like to see implemented or changed?

Martinenko: For as long as it concerns Ukraine we expect to see sweeping changes in the Ukrainian legislation aimed at radical reorganization of the Ukrainian judiciary in order to bring it in line with the EU/Western standards and common sense.

In an ideal world I would also like to see further increase in the protection of private investors at the expense of the sovereigns - perhaps new international instruments that will go beyond the current investor protection system based on BITs/ICSID/UNCITRAL. Ideally that would be a system whereby any investor would be able to sue any sovereign state for any wrongdoings that such a state can do to its investments. That system may be a good solution for the investor problems such as the ones that arise out of the Russian annexation of the Crimea, for example.

Gerungan: Since the issuance of Regulation 2/2015, one possible trend in 2016 will likely be small claim lawsuits filed since it can be the best way to settle disputes involving small claims more quickly than through regular proceeding (which can take more between 6 to 12 months, in the court of first instance). This kind of lawsuit may be preferred, for example, by a big manufacturing company to prefer a small claim dispute with local vendors who supply stationary to the company.

In an ideal world, changes to the enforcement of international arbitration awards in Indonesia are essential. Currently, the enforcement process can take a long time as no timeframe is specified. Over the coming year, we would like to see these changes to provide certainty regarding their enforcement to the parties who have settled a dispute through the International arbitration.

Khrapoutski: In Belarus it is expected the unification of rules on civil litigation. At the moment civil procedure in Belarus is governed by two codes: the Civil Procedure Code (CPC) and the Code of Economic Procedure (CEP). The CPC regulates the proceedings in the courts of general jurisdiction; the CEP regulates the proceeding of commercial disputes by the economic courts.

Venegas: The current trend I notice is a sign of a more litigious society. Plaintiffs are increasingly suing frivolous legal actions instead of analysing the nature of the conflict in order to provide the client a better choice than litigation. As commented, litigation is risky, expensive, time consuming and stressful, and as so, it should be treated as a last resort. I look forward to see a society where the use of Alternative Dispute Resolution methods such as mediation rule over litigation. This way, a lawyer's client could focus more in his needs and interests, would try to maintain a continuing relationship, will resolve his controversy faster that going to court and will spend much less money in court processes that not always guarantee the repair of damages or the solution of the problem.