THE ROUGH AND THE

SMOOTH

Having enjoyed a peaceful and lucrative existence for many years, the Swiss legal market now faces tougher conditions

DOMINIC CARMAN

Switzerland has not been in a foreign conflict since 1815 when its neutrality was first established by the Treaty of Paris. But, two centuries on, the peace-loving nation could be set to experience a discreet civil war – this time between its law firms.

Despite a cluster of top domestic players vying for the best work, Swiss lawyers have never experienced the level of international competition felt by France and Germany. The market has perhaps been too cosy, the work too plentiful and the outlook too certain. Yet there is something in the Alpine air that suggests this might change – and when it does, the battle for business will intensify. To be fought entirely by stealth rather than with steel, it may nevertheless reshape the domestic legal landscape.

None of this potential turbulence is yet apparent in the comments from Swiss managing partners about their firms' performance last year. The good times are still rolling and, for now, prosperity appears to reign unchecked with plenty of deals and disputes.

'A large number of mid-size transactions have kept us very busy,' says Daniel Hochstrasser, managing partner at Bär & Karrer. 'Everything is good: we had a record year in terms of revenues in 2015, a bit of a contraction in 2016, and 2017 looks like 2015 again – in terms of business it's absolutely fabulous,' adds Daniel Daeniker, his counterpart at Homburger.

'Revenues last year were in line with 2016, even though I was expecting a downshift,' says Guy Vermeil, Lenz & Staehelin's managing partner. 'We were happy to end the year with results slightly above budget and above expectations.'

These positive messages are uniformly echoed. 'We had an excellent 2017, the best year ever, and took off to an equally exciting start in the new year,' says Hans Rudolf Trüeb, partner at Walder Wyss. 'We certainly benefited from a strong economy and strong capital markets, and we still do,' says Philippe Weber, managing partner at Niederer Kraft & Frey (NKF). 'We have never had such a full pipeline as we have now.'

Schellenberg Wittmer's managing partner Benjamin Borsodi is perhaps the most upbeat of all: 'We have had the best year ever, so we are very optimistic.'

'Over 90% of our clients are non-Swiss: more than half of our arbitrations have no link to Switzerland.' Marc Veit, Lalive

SCRATCH BENEATH

Nor is the Swiss economy yet showing any signs of weakness. Buoyed by a sustained recovery across the Eurozone and stronger global

growth, the short-term outlook is bright. Although GDP is anticipated to increase by only 1%, due to a weak first half, when the final figures for 2017 are published, the Swiss Federal Government's Expert Group forecasts growth of 2.3% in 2018 and 1.9% for 2019.

But nagging issues remain. Chief among them is tax reform. Last year's attempt by the government to update Switzerland's corporate tax regime suffered a severe setback when voters (by 59%:41%) decisively rejected the proposals in a referendum. Success would have harmonised the country's tax practices with international standards and was designed to make Swiss corporate tax rates globally competitive while abolishing special privileges for multinational companies. However, initial fears that companies would leave Switzerland as a result have not materialised. The silver lining for Swiss law firms has been an increase in demand for tax advice.

'Obviously, the result was a setback in terms of certainty,' says Hochstrasser. 'If the package proposed by the government had been accepted, that would have allowed corporations to do their tax planning on a certain basis. There will be a second attempt, but we do not yet know when.'

Vischer partner Benedict Christ adds: 'There is significant pressure from the EU, the G20 and other international organisations that we do tax reform. It's very high on the agenda of the national parliament. The expectation is that they will come up with new legislation that will hopefully pass the popular vote – should it be necessary. That's very important for cross-border business so that international investors have certainty in Switzerland: the most significant and important thing for the country.'

At Lenz & Staehelin, Switzerland's largest firm which has seen double-digit revenue growth over the past two years, standout areas include the perennial core practice of tax and the more cyclical sector of real estate. The firm has been advising on substantial sale and leaseback arrangements for two large banks, valued at around €500m each. 'Because of negative Swiss interest rates, pension funds have been increasing their exposure to real estate, acquiring very large buildings,' notes Vermeil. Lenz's Zürich office moved to a larger new building itself last May – in time for the firm's centenary celebrations and making room for more lawyers to be added.

For Bär & Karrer, which added an arbitration team in Geneva at the beginning of 2017, the flow of deals was strong, with 29 completed transactions, valued at $13.4bn, according to Mergermarket. There was no repeat of the $43bn ChemChina-Syngenta mega deal of 2016. The flow of large Chinese deals has slowed all round – at least for now. In January, Zürich prosecutors announced the launch of a criminal investigation relating to the 2016 takeover of Swiss air services group gategroup by Chinese conglomerate HNA. The enquiries, not directed against HNA, follow last November's ruling by the Swiss takeover watchdog that HNA provided 'untrue or incomplete' information about its ownership. In the deal, gategroup hired Homburger as its legal adviser while Bär & Karrer advised HNA.

But there were still a lot of sizeable

THE DISRUPTORS – THE CHANGING FACE OF SWITZERLAND'S LEGAL MARKET

Lateral partner moves between elite firms in London and New York are routine. Not so in Switzerland, where most heavyweight partners spend a lifetime with their firm. That was until 40-year-old Till Spillmann left Bär & Karrer last November. Following a brief interlude when the M&A dealmaker was widely courted, he decided to join Niederer Kraft & Frey (NKF) on 1 January.

'Traditionally, it was almost inconceivable to think of a move from Bär & Karrer to NKF,' says Benedict Christ, partner at Vischer. 'NKF made a good move though; he definitely gives them more visibility in the market,' says Walder Wyss partner Hans Rudolf Trüeb.

'NKF is more eat-what-you-kill than Bär & Karrer,' adds a prominent managing partner, 'but that's only half the story.'

The fact that it is really a story at all says much about Switzerland. While new technology is widely embraced by Swiss firms, other forms of disruption are notably less welcome than elsewhere, including prominent lateral hires.

In the last five years, Walder Wyss has made disruption its business: the firm has doubled in size to 190 lawyers by taking lateral hires from a range of different firms, most notably Froriep, as well as Urs Schenker from Baker McKenzie. 'Walder Wyss has been growing very rapidly, swallowing many lawyers – it's been very unusual and I'm not sure it's going to continue at this pace,' says Manuel Bianchi, managing partner of BianchiSchwald.

Bianchi's sentiments are widely repeated. Benjamin Borsodi, managing partner of Schellenberg Wittmer, adds praise: 'Walder Wyss has shown a willingness to expand its horizons.' Another managing partner believes 'Walder Wyss wants to be the largest – ten years ago they were almost nowhere. They are doing well, quite aggressive on price, located in several cities. They represent increasing competition. We need to be very careful.'

'Walder Wyss wants to be the largest. They represent increasing competition. We need to be very careful.'

One effect of Walder Wyss' disruption strategy has been its appointment to Nestlé's Swiss law firm panel alongside Homburger. Trevor Brown, general counsel EMENA, explains why he appointed them: 'Nestlé has had a deep-rooted relationship with Homburger for many years, and this is still the case – Danny Daeniker is our relationship partner (he's excellent). However, Homburger are based in Zürich and Nestlé is based in the Swiss Romande. When reviewing the global panel, we also decided to establish a panel at the Swiss level, replicating some of the operating principles of the global panel. Our decision to appoint Walder Wyss was driven by their clear ambition to be disruptive to the market, ie to compete on a geographic basis (they have offices in Geneva and Lausanne) and to adapt their resource to the needs of the client.'

There is nothing unusual in the Walder Wyss strategy – it follows a well-established pattern of expansion by firms in other markets to gain market share – but it is unique in Switzerland. And, in the long run, a 'clear ambition to be disruptive' can only benefit clients.

transactions, as well as rights offerings, capital raisings, and placements for Bär & Karrer to advise on. Aside from the slew of mid-sized deals characterised by ‘Swiss-based private equity companies buying companies in Switzerland, rights offerings, and public tender offers for Swiss companies’, Hochstrasser points to ‘a lot of internal investigations still going on in the banking and pharmaceuticals sector emanating from the US, where multinational companies sitting in Switzerland are involved’.

Thanks to its role in advising Johnson & Johnson on its $30bn acquisition of Swiss biotechnology firm Actelion, Homburger once again topped the Mergermarket deal table, advising on 20 deals with a combined value of $44.2bn. ‘One big deal and you are already high on the list,’ quips Daeniker. ‘In transactions we’ve had 18 months of “end-of-cycle frenzy”, but unlike other end-of-cycle frenzies, there is no sign of it abating. It’s normally eight years – it has now been almost 11.’ This continued deal boom has helped to push firm-wide revenues just short of the €100m mark. Homburger’s 140 lawyers have been extremely stretched, he adds, and there may be a need to expand.

‘I am cautious because at the moment we have so much work and there are deals coming in all the time – when things go so well you have to be cautious,’ says NKF’s Weber. Second-ranked among Swiss domestic firms by total deal value, the firm advised on nine transactions in 2017 with a combined worth of $31.8bn. This cements another year in which NKF saw revenues surpass the €100m threshold following very strong growth in 2016.

Commercial instructions for Swiss law firms have involved much more than just doing cross-border deals. Following the US Department of Justice investigation, NKF’s advisory work for FIFA continues with a range of investigations, arbitrations and settlements in high-profile white-collar crime matters. Supplementing its 100-lawyer team, the firm has some 20 contractors working on investigations and due diligence matters. NKF has been enhancing its capacity, notably with the rare recent lateral hire of prominent M&A and finance partner Till Spillmann from Bär & Karrer (see ‘The disruptors’, page 124).

‘In banking and finance, it has been amazing – the markets have performed well, so that brings a lot of new products and new business that we can set up,’ says Caroline Clemetson, head of Schellenberg Wittmer’s banking and finance group in Geneva. Some of this centres on initial


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OLD, INFLEXIBLE, STUPID AND PROFITABLE: THE INCREASING POPULARITY OF ICOs

In China, Russia and South Korea, they are banned, while caution is advised by the EU, the US and the UK. But initial coin offerings (ICOs), through which start-ups raise funds by selling tokens, are all the rage in Switzerland. This is despite the volatility of crypto-currencies and the comments of Luka Müller, partner at MME Legal, who recently said that the legal structure that he helped establish for ICOs was 'old, inflexible and stupid'.

Meanwhile, officials have given mixed messages. In January, Johann Schneider-Ammann, the Swiss economics minister, said that he wanted his country 'to be the crypto-nation'. At the same time, the Swiss government announced an ICO working group which will consider possible actions by regulators and lawmakers.

According to PwC, four of the ten largest proposed ICOs in 2017 used Zug (*pictured*) as a base: the small Swiss town has become known as Crypto Valley. More are set to follow with ICO offerings fast becoming a new business stream for Swiss lawyers.

Bär & Karrer's managing partner Daniel Hochstrasser labels it 'an interesting development – you could talk to 100 people and get at least 20 different views'. Guy Vermeil, managing partner at Lenz & Staehelin is equally circumspect: 'Our banking department has been involved in giving advice on ICOs. Whether it will last in the long term, history will tell.'

Daniel Daeniker, managing partner of Homburger, adds: 'It looks like the new economy craze we had in the late 1990s: the ideas are right, but the world is not yet ripe for such a development.' Pestalozzi's managing partner, Urs Kloeti, counters: 'It's interesting to see how something new is developing and regulatory advice in the digital currency business gave us some work as well.'

So why is Switzerland attractive for ICOs? Philippe Weber, managing partner at Niederer Kraft & Frey, notes: 'Firstly, the regulation is benign; secondly, Switzerland has a lot of knowhow in fintech and financial services; and thirdly, the Zug region traditionally has been home to innovative industries like biotech and they have a very favourable tax environment.'

At Schellenberg Wittmer, which has also been advising ICO clients, partner Caroline Clemetson says: 'We're very active in the business and working on various business models that want to set up in Switzerland. The aim is to have regulated businesses or in full compliance with the regulations.' The firm sees opportunities both for advisory work and for disputes relating to investigations that are anticipated. The Zug-based Tezos Foundation is already facing class-action claims from US investors who claim that they were misled and defrauded in its ICO.

Lalive also anticipates litigation from ICOs arising in Switzerland. Partner Marc Veit says: 'There have been a number of regulatory questions about ICOs in the context of Bitcoin and other blockchain-based products – one of the new areas where our regulatory lawyers have been especially busy in recent months.'

Perhaps more regulation is the answer? 'Once regulation starts kicking in, it's going to work to the detriment of one of the big pluses of ICOs – the more regulation, the more the costs will increase for ICO offerings,' concludes Manuel Bianchi, managing partner of BianchiSchwald.

coin offerings (ICOs) and crypto-currencies (see 'Old, inflexible, stupid and profitable', page 128), helping clients to establish products and companies in that area in line with the applicable regulations.

The firm has also been very active in the courts, defending UBS in an investigation by the federal public prosecutor's office into allegations of cross-border money laundering: The Swiss supreme court's decision is expected later this year. But its most high-profile instruction has been advising 45 Russian Olympic athletes over allegations of state-organised doping schemes in relation to the Sochi Winter Olympic Games. In February, the Court of Arbitration for Sport overturned the International Olympic Committee's previous lifetime ban relating to 28 of these athletes.

Specialist disputes practice Lalive has been very active in investor-state arbitration. 'We are currently acting in 12 such cases out of about 165 arbitrations overall,' says partner Marc Veit. Other disputes work includes representing the Libyan Investment Authority (LIA) in support of UK legal proceedings which led to asset-tracing actions in Switzerland settled with Société Générale, which paid €963m to the LIA; acting for KBA-NotaSys in the first case of self-reporting to the Attorney General of a suspected corporate failure to prevent bribery of foreign officials which resulted in a symbolic fine of CHF1; and acting for the independent review panel appointed by the governing bodies of international tennis involving extensive investigations into allegations of corruption.

In domestic litigation, Veit sees Schellenberg as the firm's strongest competitor. But in arbitration work, Lalive is one of the few Swiss firms whose competition is international. 'Over 90% of our clients are non-Swiss: more than half of our arbitrations have no link to Switzerland,' he says. His main competitors, he suggests, include Freshfields Bruckhaus Deringer, Debevoise & Plimpton, Allen & Overy, White & Case and specialised boutiques such as Three Crowns.

Regulation also continues to occupy the time of many Swiss lawyers. 'In banking, the MiFID II implementation was a big issue,' says Urs Kloeti, managing partner of Pestalozzi. 'We await Swiss regulation, which is comparable to MiFID II, either next year or in 2020. Because the banks and big financial institutions are already active in the EU, they have had to implement MiFID II, which means that Swiss implementation will be much easier for them.'

Kloeti adds: 'We reinforced our tax team again last year. Our strategy is to become even better in the areas where we are strong, and then the old question arises: should we grow or not? Certain types of mandates that increased demand and encouraged the market to grow very quickly in the last five years are running out. I'm referring to investigations work – basically driven by the US programme – this type of very labour-intensive work is shrinking.'

As Switzerland's fastest-growing law firm, Walder Wyss has more than doubled its revenue and headcount since 2012/13, making it the country's second-largest firm with nearly 190 lawyers. 'Economically, I think back to the 2000s, which were extremely busy in terms of M&A and IPOs,' says Trüeb. 2017 was very similar to 2007, he argues: 'Ten years later it is different industries, but there is a lot of confidence in the market. People have money, businesses have earned well and financing is cheap and easily available. Unless the European Central Bank changes course, which will not happen before the year end, the climate for transactions remains positive.'

Walder Wyss' expansion strategy has paid tangible dividends, notably in the SME market – the firm topped the Mergermarket transactions

'We have more pressure on fees. We have no choice but to say: "Yes, we will help you on a case-by-case basis, depending on how the matter is evolving."' Guy Vermeil, Lenz & Staehelin

> **'In transactions we've had 18 months of "end-of-cycle frenzy", but unlike other end-of-cycle frenzies, there is no sign of it abating.'** Daniel Daeniker, Homburger

table by volume last year with 47 deals, although the combined value was a much more modest $2.6bn. Regulatory work has also flourished, with many firms providing GDPR advice: 'Swiss international businesses are running their GDPR projects very similarly to UK or German firms – many Swiss firms have adopted GDPR as their worldwide standard and Swiss regulation will come in time,' adds Trüeb.

BianchiSchwald, which merged last year from a combination of BCCC in Geneva and Lausanne and lawyers at Staiger Schwald in Zürich and Berne, is another firm that can claim to have had a robust year. The Zürich practice is mainly focused on corporate, M&A and IP, says partner Thomas Schmid. 'We were very busy in M&A, mostly active in the SME/PE market – we have been able to continuously increase the number of small and medium-sized transactions our firm is advising on. The merger and the new brand have been well perceived by the market.' The firm's close relationship with top 20 UK firm Bird & Bird has led to a number of mandates being referred from Chinese clients to its Zürich office.

TROUBLE AHEAD?

Given this impressive catalogue of work and a benign economic environment, all seems to be set fair among the leading Swiss players. But the partial insulation of Swiss law firms from some external pressures is diminishing, even while work flows are strong.

So far, so good. But where are the warning signs that conflict may be on the horizon?

First, there is the fees problem. The hourly partner rate of the Zürich and Geneva elite, typically in the €600-650 range, is under increasing strain as general counsel (GCs)everywhere want the increased flexibility on fees that they get from their lawyers in other European jurisdictions.

'We have more and more pressure on

'Unless the ECB changes course, which will not happen before the year end, the climate for deals remains positive.'

Hans Rudolf Trüeb, Walder Wyss

fees with requests for fixed quotas, caps and rebates,' notes Vermeil. 'Clients are increasingly asking not for general advice, but very specific, difficult and technical questions that they cannot answer. For 90% of the work, they try to cope with it themselves. Increasingly often, they only come to highly-specialised lawyers for very complex issues that they cannot deal with, or where they want to have confirmation. This is not as we would like, but we have no choice but to say: "Yes, we will help you on a case-by-case basis, depending on how the matter is evolving."'

Kloeti agrees: 'We have also noticed fee pressure. I guess everybody is complaining about that, but it is particularly visible in banking and finance transactions, where we basically just work for fixed fees or on pre-agreed terms, but no longer on an hourly rate. Also in litigation, fee pressures are starting to become an issue. We have to manage our workforce much better and be more efficient.'

Another managing partner adds: 'Unlike European clients, US corporations create less fee pressure. Our US clients are much more loyal. So, if I get contacted by a US law firm or a US client, they don't even ask me about fees, the first question is never: "What will it cost?" The first question is: "Can you act? What is your experience?" And then: "Please send me an engagement letter."'

Second, there is a question of how GCs perceive Swiss law firms in terms of value and service, and what impact that may have. The GC of a major international bank with much experience of Swiss and international law firms summarises the position: 'The local Swiss firms we use are excellent in their field. You take the service they offer, but you don't always get the service you might be looking for. Although what they do is very good and the quality very solid, it is not the most imaginative and they don't always listen to what we are asking for. You do get a very attentive service – they really are focused on you, but if you ask them to do a bit more, they are not always very responsive. It may just be a question of scale – unlike London or New York, they don't have the capacity and they are really quite small by comparison.'

Another GC comments: 'They don't appear to have the same hunger to keep us as a client compared with international firms. Switzerland as a place is known for its innovation and tech whereas the Swiss law firms are a bit of a cosy cartel – not as innovative as they might be if that competition were present. Significantly, none of them have a tie-up with an international law firm. There is a downside to that. Does the Swiss legal profession punch with the same weight as Swiss industry or commerce – multinational global companies? Probably not.'

If one of the Magic Circle or leading US transactional firms chose to develop a local practice in Switzerland, they might find a receptive market. Daeniker says: 'Our top-notch English and US competitors have still not entered the Swiss market with their own offices. Some of them are very outspoken in having a sort of non-intervention strategy. Linklaters, Freshfields and Allen & Overy have made noises to that effect.' According to local headhunters, A&O is notable among the Magic Circle for periodically looking to open a Swiss office, but then deciding against it.

STAYING HUNGRY

Veit also believes that some Swiss firms suffer from a degree of insularity – most are 'too monocultural' and this needs to change. 'Apart from our Swiss lawyers who deal with domestic litigation and advisory matters, the vast majority of the lawyers in the firm's arbitration group are non-Swiss,' he says. 'The end product is much better if you have lawyers from several cultures and jurisdictions on a team. Being multicultural strengthens your offering.'

The fact that Swiss lawyers have remained largely immune from the decades of international competition faced by their French and German counterparts may be explained as a matter of size and scale: the Swiss market is simply too small for global firms to consider making a go of it in Zürich or Geneva. But what has been true in the past is not a guarantee of future certainty. While indiscriminate flag-planting is no longer in vogue for most international firms, the strategic opportunity to enter new, high-value, open and profitable markets still remains – especially if it is driven by client demand.

Two of the largest international firms, Baker McKenzie and CMS, have a long history as successful local players. Likewise, a handful of US firms doing arbitration and several international private client firms are prospering in Geneva, although they have very little impact on the domestic market. However, the true test will be the advent of the strongest international competitors in the premium areas of practice. This may or may not come to pass – either by alliances, mergers, takeovers, or new offices. But when Daeniker says he is ‘a little bit surprised’ that this has not yet happened, it means he expects that it will.

More immediately, the strategic focus of Walder Wyss as a disruptor in the Swiss market has grabbed the attention of every other leading Swiss firm. ‘I am flattered,’ says Trüeb. ‘That people talk about us is always good – the worst thing that could happen to a lawyer is to be flatly ignored. The main thing is we get a lot of attention in the market because we are perceiving and processing things a little bit differently from our competitors. We pitch more aggressively and try to be close to our clients wherever they need us.’ Some may follow Walder Wyss: they may have no choice if, as seems likely, it soon becomes the largest Swiss firm. But size is not everything. Other firms are more concerned about the effect of aggressive pricing on their margins rather than relative size.

Doing things differently in Switzerland certainly makes waves. Christ summarises: ‘Switzerland is a mature market; there are no rapid movements. Typically, things move on rather slowly.’ In challenging long-accepted norms, the effect of disruption in other European markets – from new entrants, new technologies and new ways of doing things – is both profound and rapid. The argument that Switzerland is sufficiently different for this not to apply is unsustainable.

There is a further irony. In the last few years, Swiss lawyers have been instrumental in securing the acquisition of big Swiss companies by foreign buyers, sometimes in the face of hostile opinion from large swathes of Swiss nationals opposed to outside influence. However, some of these Swiss law firms may yet themselves be targets for larger foreign law firms seeking to stake their claim on the Swiss market.

Although inherently cautious, the consensus view among managing partners is that 2018 will be another good year for Swiss law firms. But irrespective of the robust economy and large volumes of legal work, there is also palpable anxiety about what may lie ahead.

Manuel Bianchi, managing partner of BianchiSchwald, summarises their collective anxiety: ‘The legal market will no longer be the same in Switzerland. We used to be insulated and protected from very aggressive moves. But now it’s coming, and I see professional search companies who are mandated by law firms in order to try to poach the best talent. It’s becoming tougher here and I don’t believe it’s going to stop.’ LB