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# Roundtable: views from the top

Jane Colston and Sandrine Giroud interview the current and former chairs of the IBA Litigation Committee to get their views on the current trends in litigation and their role within the IBA



**Mike Hales**

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Mike Hales has 30 years of dispute resolution experience both in the UK and Australia. He has advised on a wide range of disputes covering many industries, including banking, construction, energy and resources and real estate. Much of his work is international, both before courts and in arbitrations.



**Liam Kennedy**

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Liam Kennedy specialises in international and domestic commercial disputes including: product liability; M&A; securities/auditors' litigation (including international class actions); European Union and competition law; and constitutional litigation.



**Bettina Knoetzl**

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Bettina Knoetzl, co-founder of Knoetzl, was recognised as 'The Lawyer of the Year' in Asset Recovery by *Who's Who's Legal* in 2017. Chambers ranks her in Band 1 in both Litigation and White Collar Crime.



**Ira Nishisato**

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Ira Nishisato is a litigation partner and National Leader of Borden Ladner Gervais' Cybersecurity and Cyber-Risk Management practice. He focuses on complex commercial litigation, commercial fraud, intellectual property litigation, cybersecurity and information technology litigation and international disputes and investigations. He has extensive experience in extraordinary remedies and has appeared in nearly 100 injunction proceedings before Canadian courts.



### Michael Novicoff

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Michael Novicoff has extensive experience handling complex business litigation, arbitration and mediation throughout North America, Europe and Asia, with particular emphasis on matters involving entertainment, media and intellectual property, and on the liability of corporate entities and their directors and officers.



### Tom Price

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Tom Price specialises in complex and high-value cross-border commercial disputes. He has over 20 years of experience resolving disputes (usually of a cross-border nature) both in the English courts and through international arbitration in numerous arbitration centres around the globe. He is also an expert in jurisdictional issues, cross-border enforcement of judgments and arbitral awards, and the taking of evidence in cross-border disputes.



### John Reynolds

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John Reynolds is a well-known dispute resolution lawyer whose broad international practice has a particular focus on banking, finance and investment disputes. He also litigates in jurisdictions outside the UK, with recent experience in territories including the US, Nigeria, Eastern Caribbean and other offshore jurisdictions.

### Describe your career to date

**Hales:** I started my career at Clifford-Turner, which soon after merged to become Clifford Chance. After four years there, I moved to Sydney where I worked for two years for what was then Freehill Hollingdale & Page. After returning to the United Kingdom, I became a partner at Nabarro Nathanson. I left that firm in 2012 to move to Perth as a partner at Minter Ellison. In addition to being admitted in England & Wales and Australia, I am also admitted in the British Virgin Islands as a result of work that I have done there.

**Kennedy:** I studied law at the University of Otago in New Zealand, before joining Wellington firm, Kensington Swan, for three years. In 1989, I travelled to the UK and worked in Herbert Smith's litigation department for four years, before joining A&L Goodbody. Throughout my career, I have specialised in commercial litigation, particularly financial services litigation, product liability disputes, regulatory

litigation, investments and the like. As well as being a former Chair of the IBA's Litigation Committee, I have been a member of the Council of the Law Society of Ireland for the last ten years and I am the current chair of its litigation committee.

**Knoetzl:** After spending two years in academia at the law faculty in Vienna, I was selected by what is today's UniCredit Bank Austria for a year and a half elite trainee programme. Here, I acquired valuable business skills, completed an education as a merchant banker with a legal background and worked in the finance department, before joining Wolf Theiss in 1993. There, I came to understand that my heart belongs to litigation and I belong in the courtroom. We developed that firm into the market leader in Austria and added offices in 13 jurisdictions. In 2002, I practised at Allen & Overy's litigation department in London, with a focus on fraud matters. For more than a decade, I helped build and headed Wolf Theiss's firm-wide litigation and dispute resolution department.

In 2016, I co-founded Knoetzl, a leading dispute resolution firm, with a focus on litigation, arbitration, alternative dispute resolution and white collar crime.

**Nishisato:** I have practised in two of Canada's largest litigation firms and have spent the last 20 years with Borden Ladner Gervais in Toronto. I am a product of the generalist barrister tradition that was prevalent in Canada when I started out but that is increasingly rare in our hyper-specialised world. I'm proud that my practice gets me to court often and that I've appeared in an enormous variety of interesting and challenging cases before all levels of courts in Canada.

**Novicoff:** I began my career at Sidley Austin and then practised at three major Los Angeles litigation firms, specialising primarily in cross-border commercial disputes and on matters involving media, technology, entertainment and other intellectual property-based industries. I am now a partner in the Los Angeles office of Pryor Cashman, a 225-lawyer full-service firm based in New York City, carrying on the same practice but with a significantly broader national reach.

**Price:** I spent the first ten years of my practising life at Macfarlanes in the City of London and since then have been at Gowling WLG (formerly known in the UK as Wragge Lawrence Graham). Over the last 30 years, I have practiced both commercial litigation (always with an international element) and international arbitration. I have worked in a number of sectors (including financial services, energy and natural resources) and along the way have been seconded to, among others, Barclays Capital and BP, as well as chairing the IBA's Litigation Committee. I also head up the firm's Commonwealth of Independent States and Central and Eastern Europe desk.

**Reynolds:** I trained at a small firm in Mayfair in London, where I did the sort of work that you see lawyers do on television: criminal, divorce, etc. I joined Herbert Smith when I qualified and spent a formative period as a junior associate in the New York office. Eventually, I joined a United States firm and, in 2006, moved to White & Case.

## What traits do you think serve a litigator well?

**Hales:** The list could be endless but one trait I would emphasise is never losing sight of the big picture. Disputes are business problems first, legal ones second. If you understand the business dispute, you will be in a good position to resolve the legal one and, more importantly, meet your client's commercial expectations.

**Kennedy:** A litigator needs to be confident, articulate and incisive in terms of developing and presenting an argument, but he or she also needs to be a good listener, a lateral thinker and flexible in developing and being receptive to novel solutions to legal problems and in negotiating.

**Knoetzl:** Put curiosity, creativity, the stamina to know your case inside out, technical legal excellence and great advocacy skills into a shaker, stir well, add a spoonful of fun and charm and some nerves of steel, and here you have your great litigator cocktail. Not to be forgotten: a big splash of team spirit. Behind a great litigator is a great team.

**Nishisato:** The conventional wisdom is that litigators must be silver-tongued. While eloquence helps, the more time I spend in the courts, the more I realise that the ability to listen and really think about what you've heard is actually more important. To be able to think well, it's important to disconnect from email and the outside world and focus on the issues before you. Developing ways to shut out the 'noise' all around you and identify what really matters is a critical element of effective advocacy. Cases are complex and there are no shortcuts. That is why we admire the great litigators who distil cases down and focus on a few points. Ultimately, there is no substitute for clarity of thought and expression. But that only comes with the investment of time, great organisational skills and unrelenting hard work.

**Novicoff:** Especially for a litigator, I think there are no substitutes for intellectual curiosity, hard work, and an ability to devise solutions which are both innovative and practical. Almost by definition, the problems that cross our desks are unique and have no easy solution, so every industry, every client and every matter presents an opportunity to confront something new. A really great litigator, I think, sees that challenge as the very best part of the job.

**Price:** Thoroughness, an eye for detail, strategic thinking and the ability to keep the big picture in mind at all times. Help the client manage what, for them, is usually a very stressful process (unless they are a professional litigator) and be courteous at all times.

**Reynolds:** Attention to detail and mastery of the facts. When I look back on my biggest successes, they have been because we took the time to explore every angle. Most important, though, a love of the law. (It may seem obvious, but some lawyers don't use the law that much.)

### In five years, what changes in the litigation space do you hope we'll see?

**Hales:** In a word, increased efficiency. Dispute resolution has got to become more affordable. Western Australia has just abandoned witness statements partly for this reason. Efficiency can come in many forms: narrower or no discovery; greater promotion of settlement in international arbitrations to match the court's approach to this; better use of technology; better cost forecasting, to name a few.

**Kennedy:** The increased use of technology is clearly a feature of modern litigation and this will accelerate. I hope lawyers will be the masters of, rather than servants to, that process. As a profession, we are outsourcing much of our responsibility for data analysis and interpretation to external providers and non-lawyers. Ultimately, it will be crucial for lawyers themselves to have the ability to use the increasingly powerful technological tools to rapidly comprehend, analyse and digest the facts regarding legal problems and to provide cogent, practical and high-quality legal advice for our clients. If external providers become 'gatekeepers' over the underlying data, this could impede our effectiveness in meeting the client's requirements.

**Knoetzi:** Other than the obvious change of huge progress in technology, which should ease our forensic research work significantly, I hope to see a development in understanding from buyers (of legal services) that high specialisation serves them better. In many

legal markets across the world, there are still businesspeople who do not know that 'litigation' requires special skills, different to those required by a tax or corporate lawyer.

**Nishisato:** I believe that litigators add the greatest value when we are examining witnesses and appearing in court. I hope that technology-assisted review (TAR) and artificial intelligence (AI) will enable us to spend less time reviewing documents and assembling data, and more time focused on strategy and submissions. This will mean that some of the traditional tasks performed by lawyers will eventually be replaced by computers, but in dispute resolution there will be no substitute for the advocacy, strategy and judgment calls that we make every day. Technologies will help to 'high grade' the tasks that we perform and, I hope, bring economies to the escalating costs of litigation.

**Novicoff:** The key word there is 'hope': I hope that we'll see a more globalised and inclusive approach to legal problems and the legal profession, along with a reversal of some of the dangerous and nationalistic trends that have begun to erode the rule of law, or at least the dependability and predictability of legal outcomes, all over the world. At a more practical level, it also seems clear that continuing technological advancements will drive further change and, if managed properly, help litigators to deliver better value for their clients.

**Price:** The profession has made great strides towards the holy grail of keeping disclosure in proportion, through electronic search platforms and tools but also through changes to the court rules. It would be great for those reforms and improvements to continue and be successful and so, in some way, help keep a lid on the spiralling costs of litigation.

**Reynolds:** A simplification of the process, in particular of the extent of document disclosure and witness statements in the English jurisdiction. This should lead to a reduction in time and cost. I also hope that AI can be used to more accurately predict the cost of litigation, by learning from the times recorded for previous matters.

**How do you ensure effective coordination between litigators and teams around the globe?**

**Hales:** In addition to great communication, it is important that there is a clear agreement about the client’s objectives and priorities. This may mean favouring one jurisdiction over another and, if so, it is important that the whole team buys into that strategy. Respect across the team is essential; egos are not. It is also important to appreciate the different legal cultures within the team that can lead people to see issues in different ways.

**Kennedy:** I frequently work with lawyers in other jurisdictions when a client is facing a global litigation or regulatory issues. Effective communication is crucial. Regular meetings or calls are invaluable so everybody knows what is happening and can make sure that issues in one jurisdiction don’t impact on others: their implications need to be identified and understood. There also needs to be an awareness of the different procedural and substantive rules across jurisdictions, including as to privilege, and these differences may impact on how communications are conducted and the extent to which drafts can appropriately be exchanged.

**Knoetzl:** Communication is the obvious answer. Mine is slightly modified and therefore more difficult to comply with: crystal-clear communication. This requires a lead counsel who steps up and takes this role, with all other teams accepting their own role as supporting and helping to form the strategy, which then is executed by clear instructions from the top. How to communicate? Nothing can substitute a meeting in person. However, technology has progressed so much that missing team members can join by video conference, providing an ‘almost-there’ feeling. In the last two years I have come to recommend using two-dimensional, face-to-face calls rather than traditional conference calls.

**Nishisato:** In the age of mass email and conference calls, it is critically important for teams to actually spend time together and build the trust and confidence that is necessary to work as an integrated unit. Unfortunately, all too often, someone decides to ‘dial-in’ or only stay for part of the meeting. Effective coordination, particularly

on a global scale, requires the building and maintaining of many bridges, with parties that often have slightly different interests. Sometimes you have to get on a plane to make sure those relationships are forged and continue to work well in the future. Email is a very poor substitute for building real relationships.

**Novicoff:** I think that real-time communication is essential and the irony is that, in some cases, technology has actually made this a bit more difficult. Email and document-management software have (superficially) made it far easier to work together, but these tools can lead us to forget that, especially amongst professionals, there is still no substitute for actually speaking and debating with one another, challenging our assumptions and bringing our different skills to bear upon the same problem in real time, through actual conversation. And, of course, professional networks like those built up through the IBA are invaluable, since coordination is always easier and more efficient when the team leaders actually know one another.

**Price:** Regular communication, with as much of it being oral or by video link as possible or, even better, face-to-face meetings where costs allow.

**Reynolds:** Regular (scheduled) communication. However efficient email may be, use the telephone often. However expensive and inconvenient travel may be, meet face-to-face when you can.

**What are the pros and cons to using AI in litigation?**

**Hales:** The clear ‘pro’ is the saving of time and costs, particularly in areas like discovery. Inevitably, a number of ‘cons’ will be learned on the job as we find out more about the strengths and weaknesses of the technology. It will be important to ensure that we are firmly in control of what the technology is doing and understand its output. Having said that, I have no doubt that the ‘pros’ will firmly outweigh the ‘cons’.

**Kennedy:** A key advantage of using AI in litigation is that the increasing volumes of data makes this the only cost-effective, practical way of analysing some of the huge data sets which can arise in modern litigation or investigations.

However, technology is not perfect. Computers will do what they are trained to do and cannot be expected (yet, anyway) to, for example, react to an issue which they have not been specifically tasked to focus upon. However, the tools are becoming increasingly powerful and effective and it would be very difficult to run cases of any scale without such tools. That said, the use of AI to, for instance, review entire data sets does not mean that more traditional tools should be abandoned completely. It may still be appropriate, for example, to do a document-by-document review of a key individual's folders if the circumstances warrant this.

**Knoetzi:** Technology, which is currently available and provided by the top leading forensic IT experts in my market, can be a tremendous help. That said, it has been our experience that none of these programs can operate without lawyers providing input, reviewing the results and refining the process. To answer the question, initially I would probably be scared to deal with such a tool. However, I can see that AI replacing my research assistant could be a tremendous help for the whole team and our clients. Not only would the results be more reliable, as AI does not get tired after ten hours of concentrated work, it would save our clients a lot of time and cost. It has been discussed that associates would lack training in a world like this. I beg to differ: they could fully focus on using the AI's output for building their argument. In my view, this is by far the more creative exercise (and much more fun). As having fun at work is key for success, my hope is that technology will soon advance to the level where everybody can focus much more at the core of this beautiful profession, rather than working his/her way through mountains of data.

**Nishisato:** AI represents change. Lawyers – and litigators – often resist change and deploy arguments as to how the 'old ways' are tried and true. But AI offers a path to the future that is full of promise. In jurisdictions that have broad discovery rights, it was inconceivable – only a few years ago – that a litigator would not review all of the documents. Today, we have cases with millions of documents and technology that is ever better at assisting us with document review. I think this is entirely appropriate, since when cases get to trial, they still turn on a relatively small number of documents. AI can help us find what matters most and, while it may not be perfect, neither

are human reviewers. In legal research, AI offers the ability to review and synthesise countless records in hours, if not minutes, and its ability to find exactly what we need is only improving. To succeed, AI needs litigators to test the tools and teach the machines, so that they improve. I wonder if we will eventually mentor the machines in the same way that we mentor our associates today!

**Novicoff:** The 'pro', of course, is that AI is a tremendous force-multiplier, allowing us to sift through data and draw conclusions in ways and at speeds not previously possible. AI will, however, always be a mere tool and there is danger when litigators delegate or abdicate their own role in the process. The result produced by AI will never be better than its underlying data and algorithm, so AI challenges litigators to use even better judgement, even earlier in the process, to ensure that case strategies are not founded upon untrustworthy AI results. As litigators we must also never forget to be sceptical and to continually test our theories as new evidence comes in. AI obviously has a role to play there as well.

**Price:** For users of dispute resolution processes, AI and other technological advances can have significant benefits. For example it, can allow them to approach disclosure/discovery in a more efficient way, by whittling-down the number of documents to be manually reviewed. It can even be used to shortcut settlement, deploying algorithms and game theory to determine the optimal acceptable meeting point between two disputants. 'ChatBots' have also had some success in automating more formulaic legal processes, like overturning parking fines. AI also has the potential to help law firms mine valuable historic data in order to model the likely costs and cash flow of litigation for clients, though the benefits of AI are so far mainly being felt in more straightforward-volume legal processes. There is also a risk that applying AI indiscriminately, in pursuit of efficiency alone, may (or may be seen to) undermine the human element of justice, in a search for litigation by numbers.

**Reynolds:** One 'pro' of AI is the potentially enormous savings in time and cost. A 'con' is that factual and cultural nuance is hard for a machine to learn. There will be no replacement for painstaking human review at some level. Machines don't develop hunches or act on instinct.

**What advice would you give to young lawyers hoping to one day be in your position?**

**Hales:** Your professional reputation is all-important: never compromise it or put it at risk. Make sure that you treat your fellow professionals, particularly your opponents, in the manner that you would wish to be treated. Also, law creates the opportunity for a long career. It can be easy to let it dominate but it is vital to have balance in your life, looking after your physical and mental well-being and plenty of outside interests. Issuing and defending proceedings may often be the best, perhaps the only way, of achieving that objective but we need to ensure that our work is very much focused on understanding the client's objectives.

**Kennedy:** Our role is to provide practical, ethical, legal solutions to the client's problems, rather than to be tied to any particular process, including litigation as an end in itself. I also think it's important for lawyers to get involved in a diverse range of work, including pro bono work, and to build their profile not just with one or two big cases, but by doing a range of work within their own firms.

**Knoetzl:** Pursue your dreams. If you have identified being a litigator as the best possible way to utilise all of your amazing talents, grab every chance you get to help your client prevail. Be better prepared than your opponent, be more creative, work harder, sleep less and enjoy, at every possible moment, the privilege of being a litigator, which is arguably the most exciting job in the world (and certainly is for me).

**Nishisato:** Step up. Jump in. Get things done. You will find the IBA Litigation Committee to be a very welcoming and receptive place. Bring forward new ideas and show that you will see them through. And then carry them out. Don't be deterred by the fact that others are more seasoned or have been around longer than you. The Committee needs you and the future of the Committee depends on you getting involved, continuing our traditions and propelling us forward. The time you spend being active in the Committee will be among the most satisfying and enjoyable parts of your career, so take full advantage of the opportunities that are before you.

**Novicoff:** Of course, any legal career needs to be founded upon excellence, in both product and value, but that alone is no longer enough. A lawyer today needs to remain focused upon professional growth and seek out new opportunities to expand both skills and relationships, both inside and outside of the law firm. Specialised associations like the IBA are great for this, but every professional interaction can and should be seen as a chance to learn, develop and impress. I have always been the most proud of work referred to me by former opposing counsel!

**Price:** While it is impossible to tell how the profession might change over the next ten years, let alone 30 years (as far as litigation is concerned), I think there will still be a call for many of the skills we practice today. The young lawyer should therefore be flexible and ready to adapt, but I suspect there will still be just as much demand to form strong professional relationships around the world as there is today and the need to travel, in order to make and maintain those relationships. The young lawyers of today need to be prepared to make those investments.

**Reynolds:** You need good fortune and, by taking every opportunity, you can go some way to making your own good fortune. Always hire people smarter than yourself.

**While IBA Litigation Chair, what was one of the things you best remember or are most proud of?**

**Hales:** I was proud to put on a very popular mid-year conference in Istanbul (in a less troubled time) to reach out to new members. I started a programme of providing local scholarships for the mid-year conference. I liked the idea because it involved the local law firms and their younger lawyers. Unfortunately, I am not sure that it stood the test of time. I was also the first Chair to ask for the parting gift to be given to charity and I am pleased that this has now become the tradition. At a less noble level, I also reinstated the current officers and past chairs' dinner at the annual conference!

**Kennedy:** I was very proud of the significant growth of the membership of the Committee, including its greatly increased diversity over the period during which I was most active on the Committee. I was also proud of the additional initiatives to reach out past our

traditional mid-year and annual conference, with our dynamic Italian colleagues starting the Milan Private International Law Conferences and with the Committee laying the foundations for our first litigation conference in Africa, under the stewardship of Jacques Bouyssou.

**Knoetzi:** There are three things. First, kicking off a better, deeper, understanding of (and preparedness for) the upcoming changes and challenges in the legal profession related to AI and new forensic tools when we introduced our Annual Litigation Forum in the spring. We organised the 2017 IBA Annual Litigation Forum to discuss Innovation in Litigation. The event quickly sold out, with over 350 participants, and received overwhelmingly positive feedback. Second, another initiative with long-lasting impact has been the Global Female Litigators' Breakfast at the IBA Annual Conference. After three successful events since 2016, when my chairmanship started, one can say it has become a popular event in the IBA's programme. Third, bringing the Annual Litigation Forum to Berlin in Spring 2019. Given the significant German under-representation in our membership, it was my goal to enhance the IBA's attractiveness by hosting an event in the important jurisdiction of Germany.

**Nishisato:** That's easy to answer: the warmth of the friendships between those on the Litigation Committee. As Chair, I had the unique opportunity to meet members from around the world and to conceive of ways to make our events and activities even more

enjoyable. Identifying conference venues, developing session themes and creating opportunities for new members to speak on panels and rise in the ranks was very satisfying. Many people helped me on the proverbial 'way up' and the chance to return that favour and help others was a great privilege. Finally, I'm proud of the fact that we have institutionalised the Committee officer retreats. This helps to knit the officers together into a cohesive, mutually-reinforcing team.

**Novicoff:** I served as Chair when the financial crisis was at its worst and when the legal profession faced unprecedented challenges at every level. Firms were cutting staff, management was lean and clients had little patience for litigation or anything else that was not providing immediate value. I was especially proud that we not only maintained but also grew our Committee during that time, and I think we helped our members realise that deep personal relationships with colleagues around the world mattered even more at times like that, as people looked after their friends a little more closely and were especially careful to refer work only to colleagues of known quality. I am also very proud of our inclusivity initiatives while I was Chair, as every single programme sponsored by our Committee during those two years included female litigators, first-time speakers and speakers from outside Europe and North America.

**Price:** I will tell you when I am done, but I suspect it will be about the 30 incredible officers who support me.