



The surge in foreign language document review projects

Jan 11th, 2011 | | By Gregory P. Bufithis, Esq.



As we have indicated in numerous posts over the last year, foreign language document reviews have dominated the U.S. contract attorney market due to the continuing increase in FCPA cases. It has provided a stream of work from firms such as Arnold & Porter, Baker & McKenzie, Kirkland & Ellis, Morgan Lewis, Sidley Austin, etc. which have strong FCPA practices.

Note: we try to cover the FCPA “marketplace” best we can (see all our FCPA posts [on this page](#)) but we rely on two of the most influential and cited FCPA blogs: Tom Fox (our “Mr FCPA Nuts & Bolts”) and his blog *FCPA Compliance and Ethics* ([click here](#)) plus Richard Cassin, FCPA guru and author of *The FCPA Blog* ([click here](#)). Incidentally, both blogs were cited as the “go to blogs” for FCPA coverage at last year’s BizNow FCPA event with the DOJ and SEC.

But four other factors have fuelled demand for attorney reviewers fluent in languages other than English.: (1) an uptick in cross-border IP litigation, (2) an uptick in banking/financial crisis cases that involve numerous foreign banks and financial entities, (3) the move by other countries to enforce laws similar to the FCPA, and (4) an uptick in cross-border M&A activity.

And this has also led to a surge of in-country litigation and compliance reviews in Europe. Our sister company [Project Counsel](#) has 6+ reviews underway in Europe covering internal compliance reviews, IP litigation and M&A due diligence.

A closer look at this surge in foreign language document review projects in the U.S.:

FCPA CASES

A few points:

- Foreign language document reviews were 74% of our postings last year, and over 42% of those were FCPA related. And we use the term FCPA broadly because it isn't only FCPA violations per se. These cases include money laundering, wire fraud, antitrust laws, private party civil litigations, etc.
- As we have previously discussed, the DOJ brought a record 39 FCPA actions in 2010; the SEC brought another 19, its second-most ever. The DOJ cases included prosecutions of 59 individuals—a huge surge from just nine in 2008, 10 in 2007, and six in 2006.
- The DOJ has also helped the surge overseas by assisting in establishing “best practices guidelines” to help countries outside the U.S. adopt similar provisions to the FCPA — which has resulted in a boatload of FCPA-like cases in Europe. This partly explains the surge in document review and e-discovery work in Europe as more and more cases are reviewed “in country”.
- But there has also been a surge in multi-jurisdiction prosecutions with co-operations between countries. And we have seen increased industry and sector-wide investigations which has cross-border implications
- There has also been an increased focus on transactional and M&A activity, and also other non-FCPA crime such as obstruction, false claims, and export control and asset trust — all things that you need to look at on a globalization basis.

.... AND ALL THOSE CJK PROJECTS ... AND THE M&A MARKET

That flood of requests you see on our job lists for CJK fluent attorneys (especially Chinese and Japanese) is due not only to the Toyota litigations and the never-ending Monsanto reviews but also the continuing increase in IP cases and a new stream of cross-border M&A work. A few points:

- Most of the Japanese document reviews have been IP litigation/commercial litigation although there have been some quite “case specific” such as the ones resulting from last year's FBI raids on various Japanese supply companies in various Michigan locations.
- We now have 1,900+ Posse List members on the CJK lists (attorneys and paralegals) and based on our document review tracking and feedback from Posse List members there are 22 CJK projects in the major CJK document review markets: Boston, Chicago, Detroit, DC, LA, NYC, and San Francisco. Most are IP litigation/commercial litigation and most are Japanese.
- Many of these projects are a result of the deluge of Asia deals by companies in the US and western Europe. Facing sluggish economies many companies are looking “afar” for growth and what has helped are a slew of Asia deals (and Europe deals) which has produced a record first

quarter for deal making. According to statistics in the *Financial Times* deals worth \$90bn+ were announced in Asia-Pacific in 2009/2010 with most requiring regulatory examination (hence document reviews in many cases). And as we all have read, Asia is the place to be. M&A offers one of the few ways corporations can gain immediate exposure to these markets.

AND THE EUROPEAN TELECOMS AND REGULATORS HAVE RAMPED UP INVESTIGATIONS

We have chronicled the increase in economic tensions/issues and the increase in high-profile scandals that has led to a rise in U.S. government data requests, compliance audits and investigations at both the state and federal level. But it has also increased in Europe where we have seen our European Posse List members on the Societe Generale and UBS financial cases; the DOJ/EU investigation of DTCC in the credit default swap probe; the EU target investigations of the energy, tech, and drug markets (the EU has stepped up antitrust enforcement in the technology, energy, drug and transportation sectors); the LCD makers cartel investigation, etc.

We recently attended [LeWeb](#) in Paris. While primarily a tech event, there was a large contingent of lawyers and regulators present. Some of Europe's leading telecoms groups are squaring up for a fight with Google over what they claim is the free ride enjoyed by the technology company's YouTube video-sharing service. To be brief, Telefónica, France Telecom and Deutsche Telekom all said Google should start paying them for carrying bandwidth-hungry content such as YouTube video over their networks.

The issue is this: YouTube video is fuelling an explosion of data traffic on their networks. Some European telecoms groups fear Google will reduce them to "dumb pipes" because the internet search and advertising company pays the network operators little or nothing for carrying its content. Telecoms groups are spending billions of euros on fixed-line and mobile infrastructure to increase broadband download speeds and network capacity, but some fear they may struggle to secure a return on their investments.

The telecom position: Google should share some of its online advertising revenue with the telecoms groups, so as to compensate the network operators for carrying the technology company's bandwidth-hungry content over their infrastructure. If no revenue sharing agreement is possible, the regulators should supervise a settlement. To increase the pressure on Google, the telecoms groups are interested in finding common cause with content owners such as media companies, which get little or no money from the technology company when it aggregates their content on Google News. They note there is not a single Google service that is not reliant on network service. According to our information, Google will have issues with regulators considering its cantankerous relationship with European regulators over its book digitization project.

AND THE RESULT

.... is a lot more work for foreign language contract attorneys, and lots of work for e-discovery companies that handle foreign language document collection, processing and review. Staffing

agencies still do the larger percentage of foreign language document review. But e-discovery companies have aggressively moved into this market on their own or by teaming with staffing agencies. It is why many of the CJK job posts you see on the Posse List are coming from these companies.

Side note: Foreign language document reviews and IP

Many of you are working on arbitration/alternative dispute resolution (“ADR”) IP projects. This is because businesses mired in IP disputes are increasingly reluctant to expend ever-dwindling resources on protection and enforcement of their IP rights. E-discovery in ADR is somewhat of a “new new” thing. A conventional litigation is long and costly, whereas ADR is relatively inexpensive and very fast. In the US, the average cost of patent litigation is \$2M, trademark litigation is \$600K, and other types of IP litigation average between \$500K and \$800K. This, of course, does not include the price of an appeal, which may add another \$2M to patent litigation. The time involved is possibly more astonishing: the average IP litigation lasts 2 years. Add an additional year for an appeal. ADR can take as little as 5 or 6 months.

And ADR is cost-efficient due, in large measure, to the curtailed procedure. In the case of arbitration, an appeal is rare, only the most serious cases alleging fraud get a second-look. Furthermore, ADR is confidential. For public firms, litigation could affect their ability to raise capital or acquire lucrative contracts because of the requirement that all litigation be disclosed to shareholders or potential shareholders.

But the IP field has not fully embraced ADR: the percentage of arbitrations has rapidly increased in other areas but not in IP, where it has remained stagnant.

Gregory P. Bufithis is the founder and chairman of The Posse List and its sister sites The Electronic Discovery Reading Room (<http://www.ediscoveryreadingroom.com>) and The Posse Ranch (www.theposseranch.com). He is also founder and chairman of Project Counsel (www.projectcounsel.com).