



“Pandemic disruption means civil cases are being delayed by years in most US jurisdictions.”

STUART SINGER | PARTNER, EXCOM MEMBER AND ADMINISTRATIVE PARTNER FOR FORT LAUDERDALE, BOIES SCHILLER FLEXNER

Looking at the last five years, what are the big trends in US disputes?

There are fewer trials and a greater focus on alternative dispute resolution. Virtually every significant commercial dispute goes to mediation and there's also an increased reliance on arbitration.

What's driving that?

One factor is cost. It's very expensive to litigate matters fully in the courts. The second factor is the desire to minimise risk by having a negotiated solution, or through arbitration having a more expert finder of fact than a jury would be to decide a case.

This has been a fairly long-term trend, but it's been more noticeable over the last three-to-five years. It started in the securities industry and the construction industry, and it's spread to the financial industry. Now it is very common in all forms of commercial agreements and that trend has been accelerated, in this country at least, by the courts taking a very pro-arbitration stance.

Historically, foreign litigants can be wary of the American courts. Will the US keep attracting foreign parties for disputes resolution?

I believe so. The US has a well-developed body of law, the judicial process is quite independent of corruption, and it provides a very reliable and predictable dispute resolution process.

Do you see the pandemic triggering a large cycle of disputes?

Yes, but it's had a more immediate effect. It's had a tremendous interruptive effect on pending cases; cases with nothing to do with the pandemic. The courts are simply not in a position to have jury trials and, for the most part, not to have judge trials. When the pandemic passes its acute phase, there will be a huge backlog of criminal and civil cases – and the criminal cases will have priority. This means civil cases are being delayed by a matter of years in most jurisdictions. With respect to coronavirus litigation, the most significant thing is involving insurance coverage. Our firm is involved in having brought one of the first class actions alleging there is coverage under general liability policies for Covid-related interruptions of business – that will be a major issue playing out in many courts around the country and the UK as well.

Aside from insurance, what other litigation are you expecting from Covid-19?

There's going to be some fallout litigation regarding force majeure clauses, there's also going to be litigation arising from insolvencies from companies going out of business due to the pandemic.

“Agencies that were rendered almost toothless under the Trump administration will now be able to be more aggressive with enforcement.”

How well have US civil courts stood up to pandemic disruption?

They've done a very good job on everything except full trials. We're having appellate proceedings go forward with arguments on Zoom or by telephone – even in the US Supreme Court. At the lower levels of the courts there are routine hearings on Zoom all the time. What is not happening is many courts having fully blown trials – especially jury trials conducted remotely. And that's something unique to our country. In England, with the exception of libel cases, civil cases are not tried to a jury. But here they are, and it's much more complex to have a remote trial with a jury than just a judge or an arbitration panel.

How much scope do you see for US courts to improve their use of technology? Will that happen in the next five years?

The judges are discovering that many more things can be done remotely using technology than ever before and it's not necessary to have a personal appearance from counsel or witnesses on many routine items. That will continue even after coronavirus recedes. It doesn't make sense to run down to court, wait an hour for a 10-minute hearing on a routine discovery matter which the court can handle by a videoconference very efficiently.

We have a Biden presidency – how will that impact the disputes and regulatory environment?

We'll see in the Biden administration more types of regulation and litigation related to that regulatory effort than we did in the Trump administration. First, it's reasonable to think antitrust enforcement will be more robust – that usually leads to a lot of private suits. There will be more environmental regulation and more cases challenging that regulation in the courts. The third area will be a renewal in the litigation brought by consumer finance protection agencies to protect consumer rights – those died down during the Trump administration. And there will be more suits brought by government and private parties on consumer finance issues.

Will securities enforcement will be tougher? The SEC was pretty quiet during the Trump years.

The SEC was active on certain fronts – insider trading, for example. A lot depends on what happens in the securities markets. A rising market obscures a lot of problems; if the market turns, there will be more claims. This country has some pretty severe hurdles for securities class actions to jump over, and those aren't going away – even in a new administration.

Will a post-pandemic environment lead government to relax regulation to kick start business?

There may be some of that, but that's also going to be offset by a Democratic administration that believes it's important to have regulation. One area where there will be a tremendous focus is on climate, which was completely ignored by the Trump administration. That doesn't translate directly to litigation, but regulations could well be issued over the next few years which could be in the form of carbon taxes or carbon credit, trading etc. That leads to lawsuits.

A number of GCs are citing ESG as a growing field of liability and potential disputes – do you see that in the US?

We've always had pretty robust requirements on environmental issues here, both in securities laws and also with the National Environmental Policy Act. I am not sure that

will change, but enforcement will increase. Agencies like the Environmental Protection Agency, which have been rendered almost toothless under the Trump administration, will be able to take more aggressive steps to enforce regulation.

How should external advisers be adapting to changing client demands?

Law firms need a value proposition. As litigation expenses increase – especially the cost of electronic discovery, which has skyrocketed – companies will be more selective about the cases they litigate. They will decide to handle those in the way that the transaction costs of the litigation don't exceed the economic value of what they are fighting about. Law firms that adjust to that are the ones that will do best in the years to come.

How much scope do you see for a radical shake-up of the disputes market in the US?

There is one major force we haven't discussed yet that will only increase: litigation finance. There's more money in the market than ever before, looking to finance litigation – that will have an accelerative effect, particularly on class actions, big antitrust cases, the cases with the kind of discovery that will justify that investment.

This is part of a series of 30 interviews with senior in-house counsel and other leading figures from across the global disputes industry. You can find the other interviews, as well as insights from our expert litigators, at:

www.hfw.com/litigation

HFW LITIGATION

HFW has one of the most active disputes practices in the market, covering litigation, international arbitration and alternative forms of dispute resolution.

We have more than 350 specialist disputes lawyers across the Americas, Europe, the Middle East and Asia-Pacific, handling high-value, complex, multi-party and multi-jurisdictional disputes, including fraud and asset recovery, insolvency, class actions, and enforcement actions.

Our expert lawyers frequently litigate on behalf of clients in courts around the world.

To find out more about our leading disputes offering, contact:

NOEL CAMPBELL

Global Head of Litigation
T +852 3983 7757
M +44 (0)7774 964184/+852 6113 9280
E noel.campbell@hfw.com

NICOLA GARE

Disputes PSL
T +44 (0)20 7264 8158
M +44 (0)7795 612270
E nicola.gare@hfw.com

DAMIAN HONEY

Head of International Arbitration
T +44 (0)20 7264 8354
M +44 (0)7976 916412
E damian.honey@hfw.com

SEAN TWOMEY

Director of Business Development
T +44 (0)20 7264 8546
M +44 (0)7976 282592
E sean.twomey@hfw.com

Find us on LinkedIn at www.linkedin.com/company/hfw or search for #HFWlitigation.