

“Litigation now isn’t just about the merits of your case – it’s about reputational impact and public opinion.”



ANTONIO SUAREZ-MARTINEZ | HEAD OF UK LITIGATION, ASSISTANT GENERAL COUNSEL, GSK

What are the trends you have seen in pharma disputes in recent years?

Patents disputes have remained live – companies, not just in pharma, are very strong in protecting brands and their IP. In pharma, it is particularly important. Looking outside of IP, companies have been willing to address contractual disputes head-on, becoming much more protective of their investment or capital. In terms of litigation forums, I have seen companies moving more towards arbitral processes – primarily because of the confidentiality. However, I think Brexit will add to that, to ensure certainty on jurisdiction.

Is reputation becoming a bigger part of your litigation strategy?

Absolutely. Trust is of enormous importance. Certainly, when you approach litigation now, it’s not just about the merits of your case, there’s very strong thinking around the reputational impact of fighting and what that looks like in the sphere of public opinion.

How do you feel about London’s global position for dispute resolution over the next five years?

How successful we are coming out of Brexit and the pandemic will determine how London stands on the international scene and if its role in litigation will diminish. Disputes ultimately follow business and where business is located. The Bar remains well placed; it has such a high standing that it will obtain mandates, particularly from the arbitration world. The seat of arbitrations may well shift and other forums will do their upmost to seize that opportunity from London. Singapore, Hong Kong, France, Switzerland and the Nordic countries are pushing to replace London as a hub for arbitration. In commercial litigation, companies are migrating to some hubs in Europe – I imagine GSK is going to have to build a larger hub in Europe, for example, because the European Medicines Agency is now based Amsterdam. I am certainly seeing a shift in London being a seat of arbitration in contracts right now. Over time, the question will be whether companies or even individuals still come to London to address their disputes because of the English language, certainty of English law and that we’re still seen as the bastion of the rule of law.

So there’s a challenge to English law’s popularity in contracts over the next five years?

We’ve got courts that are brilliant; my concern is a gradual drain you may see over time. The UK as a forum has to work harder than it has ever done to ensure it remains at the forefront of disputes. You need to actively promote London. I don’t mean to sound pessimistic, but I haven’t heard the strong argument to the contrary other than: “We rely on our historic strength.” That’s a loser of an argument frankly. We have to remain innovative and relevant.

“As far as GSK is concerned, hourly billing is already almost obsolete.”

What kind of disputes are you are expecting over the next three to five years?

There's going to be companies looking to re-evaluate or renege on their contractual obligations because they've been hit by the pandemic and, with Brexit, there may be a double-whammy. We are likely to see disputes arising from the desire to renegotiate contracts through litigation. You'll see this in 18 to 24 months. Fund holders generally will be looking at the companies they've invested in. A lot of companies will not fare well, so there will be greater scrutiny on management and board judgements. There will probably be lots of actions arising out of liquidations. Civil fraud claims are likely to increase too. From a pharma perspective, product liability litigation will always be a concern. There will be scrutiny of the safety of vaccines. Obviously, any vaccine produced must be shown to be safe to be approved, so I would hope there is no litigation in this area. But we'll have to monitor.

Do you see a change in pharma's regulatory environment in the next five years?

What's interesting is that vaccines have been developed as quickly as possible while trying to ensure safety. It will be interesting if life-saving drugs are developed in a shorter timeframe in future and whether regulators have developed processes to make quicker evaluations. Certainly, we'll have a greater understanding of how to address pandemics in the future, and potentially how to more speedily assess the safety of drugs.

Does GSK have a style of dealing with disputes?

It's become much more bullish. In the commercial space, GSK was perceived as being willing to strike a deal, which sometimes may not be the most favourable for GSK but avoids reputational damage and expenditure. Over recent years, GSK has been willing to take a position that's firmer on disputes and has been willing to litigate if we feel we have a strong case. That will probably continue to change, in terms of GSK becoming more aggressive, as GSK continues to preserve the value of its capital for shareholders and its IP. Equally, GSK is very prepared to defend its products and rights.

How much impact will Covid-19 have on disputes in the next five years?

Before companies press the trigger on full-blown litigation there's going to be a bigger intake of breath than previously and attempts to resolve the dispute, recognising that companies need to be focusing on the immediate issues. But as we move into business as usual, companies will come back to the table. Some disputes are already crystalising because there's an urgency to it. I think there will be an increase in the second half of 2021 as the fallout starts becoming more visible, and hopefully we pull out of this pandemic.

The other thing Covid has done from a litigation perspective is technology. The world of litigation was slow – the courts and even arbitration using technology – but that's been turbo charged now. The US courts have barely skipped a beat during the pandemic and the UK courts have been pretty good. Virtual hearings have worked. That will change the dynamic of the industry and that's where London has to pick up where it is right now and make sure it's at the cutting edge.

How much scope do you see for radical change in dispute resolution?

GSK is at the cutting edge in its alternative billing. We've got a legal procurement team based in the US and a long time ago we moved from the hourly to fixed rates. For certain work firms have to enter into competitive tenders. Competition is now even higher to

get an instruction. GSK is always looking for firms that are innovative in helping us fund litigation with the reward element at the other side. Law firms have to be much more commercial and think more like their client. We are already on that track. The hourly rate, as far as GSK is concerned, is almost obsolete.

What is your advice to peers to manage disputes more effectively?

Early case assessment helps to ensure a better outcome. It's that mini case assessment at the outset, which may involve speaking to some witnesses, reviewing some emails, and not finding out six months later you've got a surprise. That often doesn't happen until later down the road and front-loading it can reap rewards, help you pick the right advisers and start plugging weaknesses in your case. That will either strengthen your position or make you think more closely about a negotiated outcome.

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.**