HFW LITIGATION

"Clients don't want litigators – they want problems avoided or contained, and our current court system does neither."

RICHARD SUSSKIND | AUTHOR OF *ONLINE COURTS AND THE FUTURE OF JUSTICE* (OUP, 2019)

What are the big trends in disputes technology?

Over the last few years, pre-Covid, the main preoccupation of law firms was trying to get to grips with technology-assisted review using fairly basic AI systems to manage large numbers of documents. Though this demonstrably reduces the time lawyers spend on document review, it's still used pretty sparingly. Within courts, there were reform programmes around the world focused on digitisation, basically taking courts out of the 19th century and into the 20th, replacing paper systems with electronic systems. And there was also a build-up of case management systems.

The story of legal technology back to the 1960s is one of automation, using technology to streamline old ways of working, rather than change the way lawyers work. What we've seen since Covid is more exciting uses of technology to do things that previously weren't possible. But we've still got the same problems – litigation is too costly, too time-consuming, and the process is unintelligible unless you're a lawyer. These are fundamentally access to justice problems. For consumers, for small and medium-sized businesses, and even big businesses, our court system is no longer fit for purpose.

Covid has opened minds. What we are seeing now is planning in three different phases. In relation to courts, policymakers and judges are asking, "How do we get through the crisis?" Secondly, they are wondering, "How do we industrialise what's gone well through the Covid period and keep doing it?" Thirdly, the big transformation project involves asking fundamental questions about how we should resolve disputes.

This last set of issues shouldn't just be about dispute resolution. It should be about dispute containment and dispute avoidance. Dispute avoidance is putting a fence at the top of the cliff rather than an ambulance at the bottom. Clients don't want litigators; they want problems avoided or contained and our current court system does neither. One future for dispute resolution is dispute avoidance and risk management. This is where legal risk management – the preoccupation of most general counsel – becomes a new and exciting possibility.

How well have the London courts handled virtual hearings during the pandemic?

The business courts have handled them well and they've been fortunate because they've had Sir Geoffrey Vos [now Master of the Rolls, previously the Chancellor of the High Court], at the helm. Leadership is important. We have a Lord Chief Justice now and a Master of the Rolls who are both very reform-orientated. Most major business disputes have been held satisfactorily by video hearing. Many appeals have also been conducted well. Our Supreme Court held all its hearings as video hearings.

We have seen in the past year that when the platform was burning, lawyers and judges can be remarkably adaptable. The interesting challenge is how we might encourage innovation in absence of an emergency. Unless our court system is more accessible, a private sector online alternative dispute resolution world will emerge. Not ADR, but ODR – online dispute resolution, a kind of online ADR. It worries me that private sector services

> “By 2025, courts and litigation will have been fundamentally changed by systems that haven’t yet been developed.”

might upstage our courts, because we should want our court system to be a daily affirmation of the binding nature of law.

The big difference in online ADR versus traditional ADR is that it’s asynchronous. Synchronous communication is where those who are communicating need to be available at the same time. Asynchronous communication is when those communicating do not need to be available at the same time – for example, in using email or text messaging. Often this is so much more convenient. I call for asynchronous online judging in small disputes. Evidence and arguments are submitted electronically like email. Parties don’t need to take a day off work. Judges can work from home. It’s more convenient and that’s why systems like eBay have 60 million cases a year resolved asynchronously online.

How do online dispute procedures like eBay’s work?

A lot of people say it’s AI, but it’s far simpler than that. It’s a structured online process. There’s two phases. The first is online negotiation. If people have a dispute, they are given parameters, guidelines and a negotiation framework to work within. There are some standard situations and outcomes, so that, for example, if a parcel doesn’t arrive, the system indicates whose responsibility this is generally presumed to be. If negotiation fails then a human adjudicator has a look at the file online and comes to a decision. This is not for bet-the-ranch disputes, but our courts are not clogged with bet-the-ranch disputes. It’s the high-volume, low-margin cases across the world that provide the bottleneck. In Brazil, there are 80 million cases in the court system, in India there are 30 million. We need new and proportionate ways of disposing with these disputes.

Presumably, the challenge is how you lay a foundation to build new systems.

For dispute resolution systems to be effective, we need to introduce not just asynchronous hearings, we need ‘extended court’ services. People misunderstand the scope of the justice gap. Some say the problem is courts are too expensive. Others say lawyers aren’t affordable. In fact, it’s a combination of these two - people need to understand and enforce their entitlements. Online judging is a way of enforcing entitlements. Extended courts are a way of helping people understand their entitlements. There are tools that help people understand their legal position and identify options and remedies. There are tools that help court users organise their evidence and arguments. In my view, and I accept this is controversial, all this should not be an alternative to the state system – it should be part of the state system. I concede that extended court services may not be affordable for the state or practical because of Covid, in which case we can have ‘front-ends’ offering the same services but via private sector ADR in some way linked to the courts; a form of public/private collaboration.

That’s the picture. The question is, how to achieve it? If it’s left to the market, the gap will be filled with ODR, and will happen in a small number of years. Fundamentally changing a court system, in contrast, is a 10-year project. I said that when I advised Lord Woolf in the 90s and everyone said: “10 years is too long,” and … it never happened. I don’t think 2030 is so long from now – these are fundamental changes to ancient institutions, so we need long-term vision. We need support of the senior judiciary, financial backing from government, a willing legal profession and some proper strategic planning. This is a tall order.

It’s a polarizing discussion. Cynics are asking, reasonably, “What evidence do you have for all this?” The single best case study is probably the Civil Resolution Tribunal in Canada, where the vision I have has been fully implemented, and the feedback from users is positive. The difficulty is this too often takes judges out of their comfort zone and lawyers out of their profit zone. But what we have here, I hope, is an unstoppable social movement that argues our court system is no longer a proportionate way of resolving many disputes.

How do we create that first element of a new structure then?

The first step in all successful change programmes is a sense of urgency. Covid has delivered that. There is a deeper question: if you look at all successful technologies that we call “disruptive”, these almost all start at a modest level. These technologies succeed at a low level when few of the major players take them seriously. Once they gain traction, people start asking, “Why are we not using it here and there?” I always recommend to governments: don’t try to disrupt at the most ambitious level; start at the low level. Begin with high-volume, low-value disputes. Big bang disruption won’t work on the courts.

Serious change also means highly-simplified rules, asynchronous hearings and lawyers not being involved. The Canadian Civil Resolution Tribunal started off with small claims and condominium disputes, but when the government saw how effective it had been, it allocated most road traffic disputes to the Tribunal.

If you were applying that approach in the UK, what would be the closest equivalent?

Low-value civil claims. Don’t start with criminal or complex commercial disputes. At the same time, expect someone to create a standard platform for the private resolution of disputes. Whoever owns that platform, which will compete with state-based systems, could enjoy remarkable commercial success.

Are you seeing any players who could move into that space?

The Big Four are interesting players. You’ve also got to look at the big technology suppliers to the legal world and the court technology suppliers. If someone came forward with a standard platform that was convenient, you could see how that would make it far easier to get involved. Just now, most people are doing their own thing. There is a great satisfaction with the way the global medical community has come together to solve Covid. I call for the global legal community to come together to solve the access to justice problem. OECD figures say only 46% of people on our planet live under the protection of the law. It’s astonishing! We’ve got 59% people on the internet and only 46% with access to justice.

What are you seeing in the pipeline from legal tech?

We’ve gone from a few hundred players to a few thousand, each trying to do to a corner of law what Amazon did to bookselling. To understand law tech, remember 90% of the spend is by law firms. What you’re asking about is a more disruptive play, serving a market that perhaps doesn’t yet exist. There are quite a lot of companies doing work in AI for document review and litigation, but far fewer in court technology. There are also some interesting new systems for negotiation, but we’ve not yet seen an Amazon in court technology. That’s not to say it won’t come, because my view is by 2025 courts and litigation will have been fundamentally changed by systems that haven’t yet been developed. Law firms are now investing more in technology as a differentiator. That’s changed a lot over the years. I still think the opportunity lies for major legal providers to develop disruptive technologies.

Thinking five to 10 years ahead, what are your big predictions about how commercial disputes will evolve?

There are five things for the future. The first is online judging, the second is extended courts, the third is front-ends, the fourth is AI using predictions as determinations and the fifth is dispute avoidance. From 2025 to 2030, we’ll see a big shift in the direction of all five.

AI predictions as determinations is controversial. There are AI systems being developed that can predict the outcome of court decisions. I am not saying this should happen but consider Brazil with its backlog of 80 million cases. The great majority of these cases will never be decided by the courts. Imagine saying to parties: “We’ve developed systems based on past decisions of our courts that can predict the outcome of disputes such as yours. Would you accept the prediction of our systems as a binding determination?” If that gives some finality, at least it’s a candidate for radical reform. There are several countries that are already working actively in this direction.

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 counts 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.

Americas | Europe | Middle East | Asia Pacific