



“Virtual hearings will become the norm.”

SIR BERNARD EDER

Bernard Eder practised at the Bar for nearly 35 years before sitting at the High Court between 2011 and 2015. He was appointed as an international judge at the Singapore International Commercial Court in 2015. He currently accepts appointments as an arbitrator and mediator.

How is the disputes world evolving?

There is an arbitration boom at the moment – no doubt about that. General commercial disputes are now dominated by City firms, as well as big American firms – either in London, Paris or Geneva.

What is driving that growth?

The boom in international trade, cross-border transactions of a wide kind. I don't think there is a simple answer, but in the last four or five years, people are spending a lot of money on disputes. Over the past five years, I've done maybe 200 cases. Out of that, if five have settled I'd be surprised.

What is behind that?

I'm not sure. It could be lawyers on both sides giving clients over-optimistic advice, or clients deciding that they prefer to obtain a decision from an independent arbitral tribunal. There is another view – very much part of the shipping market, but it's spread – that arbitration is not a great battle between warring parties, but rather part of doing business. It has become less antagonistic and more a convenient and efficient method for resolving genuine disputes.

Are you seeing other patterns in disputes emerging?

There is a very broad range of cross-border work driven by foreign investment around the world and international joint ventures. Over the last few months, I've done an arbitration involving mobile phone technology in Africa, a case about the supply of electricity at a national level and a case about the construction of a chemical plant in Australia. That gives a brief insight into the variety of work. None of the parties have any link with England and still they choose London.

Is arbitration taking some cases that would have gone to litigation, or are both sides expanding?

All of those cases would never have gone anywhere near an English court. Arbitration is attracting work to London that would otherwise never have come to London.

“London will remain in a paramount position for disputes – provided it keeps a close eye on speed and costs.”

How do you see London faring as a global disputes centre? Is it holding its stature for arbitration?

I am of the strong view that London will remain in a paramount position – provided that it keeps a close eye on speed and costs. Around the world everyone is keen to get the work from London. It is a competitive market. Virtually every major country in the world has opened an arbitration centre in the last 10 years. Singapore has obviously become the main hub in the East – followed by Hong Kong. But there are also many other arbitration centres including Kuala Lumpur, Mauritius, the BVI, Kazakhstan etc. I read recently Germany is setting up its own commercial court and The Netherlands has one, France has one. India is the other big one, changing its legislation to attract more arbitration.

Are there any other aspects where London needs to be careful?

One issue. Some years ago, I went to a conference and the complaint by foreign arbitrators was to say: “Don’t go to London because the English courts interfere too much in the arbitral process.” If the English courts were interfering too much, that would be a real problem with London, but the evidence shows there is no truth whatsoever in the suggestion. Having said that, I am concerned about the recent decision in the Supreme Court, *Halliburton v Chubb*. Whilst I agree with much of what is said in that case, I disagree with the conclusion. The case has received much adverse criticism – from both home and abroad.

Because?

The case is about a well-known arbitrator who failed to disclose certain things. He offered to resign when he discovered this. Then one of the parties said he couldn’t resign. The question was: did he breach his duty or should he have disclosed what he failed to disclose? The Supreme Court said he was in breach of duty, which is correct, but for various reasons, which are, in my view, untenable, it concluded that the award should stand.

How do you feel the courts have done in terms of virtual hearings and dealing with the pandemic?

Completely brilliant. The courts in the UK have led the way magnificently both at Commercial Court level, Court of Appeal level and in the Supreme Court in dealing with the pandemic. It’s not only small hearings – there have been bigger hearings, the big insurance case involving the FCA. The use of virtual hearings, particularly for hearings that last a day or so, will become the norm. I should emphasise that the Singapore courts have also done brilliantly.

Will virtual hearings address the speed of justice issue you mentioned?

It will reduce waiting times – if used efficiently. If you’ve got an hour’s hearing on an application for disclosure of documents, you can probably do five of those a day and solicitors and lawyers don’t have to spend an hour going to the court and back. I did a case separately, at a tribunal four weeks ago. There were three arbitrators in London in three houses, London counsel cross-examining a witness in Beijing for a day, that witness giving evidence in Chinese through an interpreter in Singapore, with the proceedings transcribed in Kuala Lumpur. That’s a fantastic example. If that witness had had to come to London, he’d have had to travel, stay in London, give evidence and then go back again, and there were probably 10, 20 witnesses in a similar position.

You found the process to be effective?

Absolutely. There is a strong view that virtual hearings will work for small cases or interlocutory hearings lasting a day, but they're not good enough for a longer trial and in broad terms that is right. There's no doubt that lawyers on one side need to communicate effectively during a trial and that is hampered during a virtual hearing, but from a tribunal's point of view, everything works. I've probably done 20 hearings by Zoom in the last six months – not just short hearings – and they've all worked brilliantly.

How much disputes work will be driven by the pandemic?

I'm doing five shipping cases where the disputes have arisen at least partly because of the pandemic. I have also done insurance cases which have arisen because of the pandemic. It is said they'll be a lot of work.

Presumably the energy market will have a lot of dislocation with falling commodity prices. The oil and gas sector has always been a big user of arbitration.

Yes. Lawyers love a volatile market. The pandemic has had the effect of making markets very volatile and that will generate some work.

Are there other global hubs you see as rising powers? You sit as a judge in Singapore – does that stand out?

Singapore is already the leading hub in the Far East, both in terms of litigation and international arbitration, and I am sure that this will continue over the next 10 years. If you look at an international company doing business in that area of the world – China, Indonesia, Malaysia, Australia – the question is, where are you going to resolve any disputes? It's unlikely you would agree to arbitrate in London. The question is where? Hong Kong is a possibility, but the political turmoil over the last year leaves that in doubt. Singapore is the obvious choice. There is a strong tradition of the rule of law, with independent judges and a large pool of excellent legal talent.

How should external advisers be changing their service to meet client demands?

In arbitration, there is an increasing tendency not to use London barristers but to use solicitor advocates or American lawyers. Foreign lawyers and their clients still don't understand why if you go to a leading firm you should need to go to external counsel to conduct the advocacy. The solicitors do a fantastic job. But there is no doubt that having a barrister as part of the team adds real value. Looking ahead, I see no let-up in work. London stands in a great position.

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.**