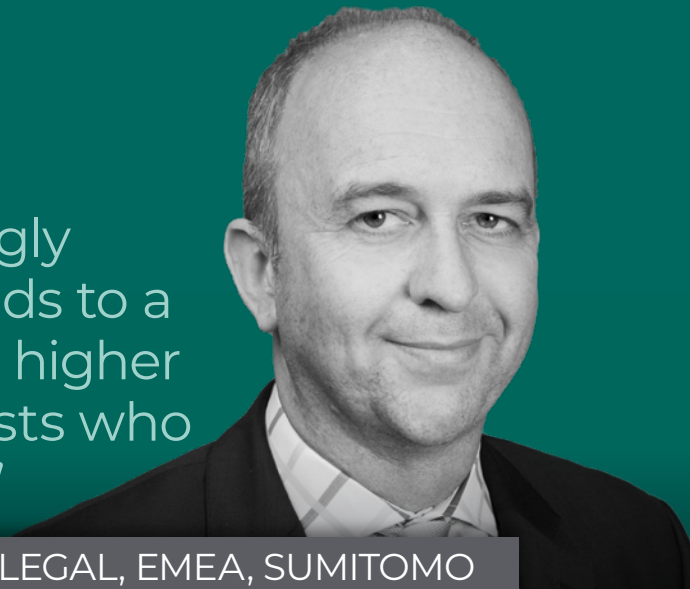


“Lawyers are increasingly specialist, but that leads to a fragmented view and higher costs. I value generalists who understand our risks.”



SEAN EDWARDS | HEAD OF LEGAL, EMEA, SUMITOMO MITSUI BANKING CORPORATION

What have been the key risk trends facing SMBC in recent years?

The main trend as a bank has been a lot more regulatory enforcement. For us, the big one has been LIBOR. We're not one of those that allegedly manipulated the rate, but we were part of the panel and paid the price in having to respond to regulatory enquiries. Regulatory enforcement brings huge exposure to US litigation. There is still some stuff going on there. Though there has been no wrongdoing, we've been advised to settle some of these cases. Within a Japanese bank, that is very hard to explain; why you have to pay millions of dollars to settle litigation when everybody has said: "You've done nothing wrong." But that's the reality of litigation in the US. That has been the big phenomenon for us in the last five years.

How much is the drive for tougher banking regulation occurring at a global level now?

General regulatory investigations have tended to happen for us more in the US and to some extent Europe. I don't think we're seeing that in our other regions, like APAC, or Japan. But with a region like the Americas, problems there obviously affect the whole group.

The regulatory environment has changed so much since the banking crisis. Will enforcement keep getting tougher in the years ahead?

I think it will continue. Banking is now also being used to achieve social and political ends, so you have already had for some time the whole AML KYC [anti-money laundering and know your customer] requirements, which are really about enrolling banks in the government fight against crime. But take ESG finance, for example: through stick and carrot, banks are being persuaded to fall in line with these policies. You're told you have to do more green finance and if you don't achieve it, there is a regulatory risk. And the regulator is getting more demanding. A good example is the LIBOR replacement. There are time-line requirements that regulators are putting on banks, which are not always reasonable in my opinion.

What regulatory risks concern you the most?

As a Japanese bank, we don't have a great deal of litigation beyond cases that arise from regulatory issues, so it's about managing regulatory expectations. That brings increased exposure to private litigation, which we're increasingly looking at in how we manage risks. My bank is fairly straightforward, but we've had issues over LIBOR. ESG potentially will become an issue.

“Have a very close relationship with your regulator and proactively disclose – that often avoids the worst of potential sanctions.”

What is the most effective means to head off or manage that regulatory risk?

One is to have a very close relationship with your regulator and that involves proactively disclosing – that often avoids the worst of potential sanctions they can impose. Trying to find a safe legal position is often not the most effective route to avoiding, problems because regulators don't have to justify themselves as a private litigant would in court. You must understand the issues fully from a legal perspective, but then go that one step further to say: “Legally, we're OK, but we need to take a different view based on the regulatory environment.” That's increasingly the way banking is moving.

Some GCs flag reputational issues as becoming a bigger part of their approach to disputes and regulation. Is that your perspective?

I was going to mention reputational risk. These are all part of anti-corruption issues. We have a reputation committee, but there is a debate about how much teeth such a committee should have and how far you should be directed by what the committee thinks on grounds of government policy. There are deals – take coal, for example, where maybe it's a good deal commercially and legally it's fine, but you start having big reputational issues. That's becoming a bigger factor in our decisions.

What about the cultural challenges? SMBC is a Japanese institution with a very different approach to disputes – how do you manage that?

The Japanese are very sensitive to what is happening in the rest of the world – even with things they wouldn't understand in their domestic culture. The Japanese look very carefully at America, for example. They see the real change happening there that is going to catch up to them. Sumitomo, or our Japanese competitors, are big global banks. The global and overseas parts of the businesses are becoming increasingly important to the bottom line, so it's important issues which first arise and take on importance in the West – ESG, LGBTQ, Black Lives Matter – are issues we raise, that we institute policies for in Europe and America, and head office listens. The last couple of years there have been a huge number of initiatives on diversity and inclusion.

Any other emerging risk classes you're expecting on the next three to five years?

The other risk is Brexit for us as a foreign bank. The whole marketing and licensing environment is getting quite difficult. Although we're a Japanese bank, we operate through a UK incorporated bank and we have the most people here of all the European operations. That's true of a lot of international banks – the larger parts of their operations are in London, so there is a question over how those people can effectively serve EU clients. It's becoming a big issue for us. The risk is displeasure and fines – in this case from the European Central Bank.

How do you see London's future as a dispute resolution hub?

I see a definite trend towards trying to reduce or minimise the use of English law. I see it at all levels. Sometimes it's rational, sometimes irrational, but that will increase, so we'll see less use of English law and less use of English dispute resolution fora. While you can get rid of English law, you can't with Brexit get rid of the English language – that's still the language of business. Some countries have risen to the challenge, so in France you've got increasing modernisation and “Anglo-Saxonisation” of the law. Trusts, for example, are recognised now there to a greater extent than before. For international business, England will still be the venue of choice, but definitely we are seeing use of its courts being challenged in Europe.

And you're seeing some pressure on the use of English law in international contracts?

Most definitely.

In what scenarios is that most prevalent?

For us, it's loans, but also in the derivatives area. ISDA now has a French law master agreement and we've seen increasing demand from French clients to use French law or a local version for loan agreements. We are seeing a lot more demands to avoid English law on the derivatives side, but on the lending side it is starting. There are some reasons for that – if you want to use loans as collateral with the ECB, for example, they have to be governed by a European system of law. It's starting to ramp up and it will only increase over the next few years by a variety of different means.

Looking at how the risk and disputes world is changing, how should external advisers be evolving?

What's been happening in a lot of law firms is increasing specialisation, but we need a very wide view of the risks we are taking on apparently straightforward lending transactions. We have to remember all these other risks that are coming up: corruption, sanctions, licensing and that is not the way a lot of lawyers think. You end up with a fragmented view, inevitably costs go up. What I increasingly value is finding generalists who understand these new areas of risk.

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

DAMIAN HONEY

Head of International Arbitration

T +44 (0)20 7264 8354

M +44 (0)7976 916412

E damian.honey@hfw.com

NICOLA GARE

Disputes PSL

T +44 (0)20 7264 8158

M +44 (0)7795 612270

E nicola.gare@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.

© 2021 Holman Fenwick Willan LLP. All rights reserved. Ref: 002876

Americas | Europe | Middle East | Asia Pacific