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What types of kind of disputes have been facing Capita in recent years?

Capita is a large outsourcing company, so our disputes are based mainly on contract and contract performance, and employee disputes. We are seeing a lot more mediated settlements, and that includes bringing in a third party. There’s a short-term trend I am expecting, and we’re starting to see them a lot more, which are Covid-related: employee grievance disputes about everything from safety of workplaces through to redundancy and selection for furlough.

You’re going through arbitration or traditional mediation?

It’s been quite classic mediation so far. One of the big changes was to have a legal team – Capita didn’t have one before I joined, and we’ve put a much more structured approach in place. We divided our disputes into commercial disagreements, which should be dealt with through the commercial route, and taken a much more forensic look at what constitutes a dispute and therefore what the litigation team will look at. But the goal, as with most companies, remains to settle if and when sensible. That then becomes a challenge because mediation can be seen as splitting the baby – not a real settlement of the issues. It’s just: “It’s 50%/50% - close enough.” Mediation we’ve found very useful, but I’d like to see the process being more sophisticated.

Are businesses now just trying to avoid the courts as much as possible?

Yes, but that’s been a factor for a while – the costs, the uncertainty... There’s a more gung ho attitude at the start of litigation, with some leaders saying: “Sue them!” One role of the general counsel is to be very honest that you shouldn’t go into it on a point of principle or expecting it to settle. You’ve got to be prepared to go the whole way, even if 90% of cases settle ultimately. My role is to ensure that sense of realism of the risks and outcomes.

How should companies evolve their attitudes to risk and disputes?

Don’t go rushing into litigation. If we do go into this, we have to go in with our eyes open. That is a change I am starting to see: a much more forensic analysis of the cost/value debate of a dispute. Ten, 15 years ago you could have got away with saying: “It’s litigation, we don’t know how much it will cost.” Now, I’m asking my external counsel for a breakdown early. “Let’s talk about the phases; if we only get to this point, how much do we spend?” Then we bring a better sense of the dispute’s value.

How able do you feel to break down those stages?

Having the right data is important to avoid being let down. Over the last five years, there has definitely been a massive improvement in how we do risk analysis of disputes. I see the law firms becoming less pure advisers and more consultants in their approach. We’ve said for years, “The PwCs and Accentures all break down the work model and

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what it costs at each phase,” and the lawyers have been slower to do that. In the litigation context, you absolutely need it. If I am looking for an improvement over the next five to 10 years, that’s what I really want to see. Law, like everything, is a trade: how much risk do you want for how much reward?

Some GCs feel that law firms should package disputes know-how as systematic risk management advice. Do you see mileage in that?

Absolutely, and that’s where I see law firms being pushed to give a much rounder view. You have to have a broader offering because there are thousands of lawyers who can just give advice.

What kinds of disputes concern you the most?

The ones around regulators, financial services, CMA, FCA – they are becoming particularly active. The SFO and the whole deferred prosecution agreements (DPAs) is a really interesting area where there is no leniency for getting involved, so that impacts the analysis of why you seek a DPA. Additionally, activist regulators may be more of a concern.

Regulation and enforcement have become a lot more robust over the last decade. Do you see that continuing?

It will only increase. Every time we have a scandal or something goes wrong, the regulators need to step in and you have the politicised nature of enforcement as well.

What’s the best way for a company to manage risk or head off disputes?

The way we do it in Capita is having a tougher discussion about getting into contracts. One thing I can do with the legal team is, instead of starting with a conversation about liability, we are pushing to say: “Give us the operational plan.” If you have a watertight plan you can have unlimited liability, because we know we’re not going to trigger it. It’s that mindset flip of not what to do if it goes wrong, but what we do to make sure it goes right.

What are you expecting in commercial disputes over the next five years?

I expect a lot more employee claims to come through. And some of the impact of judicial reviews from the decisions that the government has made. We’re also talking a lot more about purpose-led companies. If you match that up with shareholder activism, it’s less about the words on the page – it’s not going to be enough to just plonk down: “We’re a responsible business and believe in having a purpose.” We are going to show what we do. It’s CSR activism.

Will London hold its position for dispute resolution in the years ahead?

I don’t see London disappearing. The common law basis of contracting is very helpful, as is the body of case law. A lot of people feel comfortable with that more than a civil law jurisdiction.

How will commercial disputes evolve? Will the courts step up their technology use?

I hope so. We’ve had some negative swings with e-discovery. I worry for the legal industry being slow to change. There’s certain activities that I would always go to a PwC or Deloitte for, rather than a traditional law firm.

Is commercial litigation in need of radical change?

I wonder how much there can be. You've got two, three, four parties fighting – outside of simplifying the processes, using technology, speeding it up, you still fundamentally have the issues of two groups of people at loggerheads.

The feeling is a lot of legal tech is not quite there yet. Do you agree?

With legal tech, what problem are you actually trying to solve? I get a lot of people saying: "I've got this great whizzy thing!" I say: "That'll be lovely, but it isn't solving any problem I have today." We need to be specific about what we are trying to solve.

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