



Round Table Debate

We welcomed a select group of senior in-house counsel for an open and frank discussion on the future of dispute resolution, the impact of Covid-19 on litigation, and how law firms should be responding to changing client demands.

Participants:

Jeremy Barton – UK General Counsel, KPMG

Maaïke de Bie – Group General Counsel, easyJet

Richard Blann – Head of Group Litigation, Lloyds Banking Group

Sean Edwards – Head of Legal, EMEA, Sumitomo Mitsui Banking Corporation

Damian Honey – Partner, HFW

Rosemary Martin – Group General Counsel, Vodafone

Michael Moller – Chief Legal Counsel, Maersk

Brian Perrott – Partner, HFW

Judith Prior – Partner, HFW

Alex Novarese (chair) – Former Editor-in-Chief of Legal Business and Legal Week

It is a widely accepted truism of legal services that litigation is counter-cyclical. The reality is that litigation is a constant risk that in-house counsel have to manage – it’s just the nature of claims and the motivation of claimants that changes from bull to bear markets.

However, it is certainly true that periods of significant market turbulence inevitably generate disputes. And with Covid-19 having placed global economies and virtually every sector under severe strain – the IMF forecasts a total cost of US\$28tn in lost output between 2020 and 2025 – in-house counsel are braced for a surge of litigation.

If there was one obvious relief as we opened the discussion with our round table attendees, it was that this surge of litigation did not materialise in 2020 – a year in which organisations across all industries faced huge operational challenges.

The pandemic was met by an initial flurry of activity as companies scrambled to check whether their contracts could handle its impact, but for most, that is yet to result in substantive claims. HFW partner Judith Prior summed up a familiar experience of 2020, commenting: “There was a huge rush of force majeure-type enquiries and panic early on, but that wave has really dropped off recently. The sort of disputes coming through now might have a small Covid element, but that’s not the main type of enquiry or problem.” This was echoed by Maersk’s chief legal counsel Michael Moller, who noted the “stampede for declaring force majeure left, right and centre settled relatively quickly when people started realising that maybe it wasn’t such a big issue after all”.

“Clients are not interested in a philosophical debate – we want to get a judgment as quickly and cheaply as possible.”

Sean Edwards, Head of Legal EMEA, SMBC



Covid-19 actually led to an initial lull in litigation as companies went into survival mode and courts around the world tried to adapt to the disruption of lockdowns and social distancing. As Vodafone GC Rosemary Martin said: “We thought there was going to be an upswing in litigation and it would all become a bit contentious and difficult. Maybe that will come this year, but last year was weirdly business-as-usual.”

Court data suggests that the upswing Martin and others predict may already be starting, with new disputes materialising at a brisk pace in the last quarter of 2020 and early 2021. “There will be an increasing number of failures and then those failures often expose bad practices,” said HFW partner Brian Perrott. “Most people were very pragmatic and tried to find solutions, but we should see the knock-on consequences materialise in challenges and disputes going forward.”

Risk and Reputation

For in-house counsel, this presents challenges and considerations that go beyond black letter law. Our round table participants all agreed that reputational risk is becoming increasingly core to GCs’ work. “The reputation call almost trumps the legal call in some situations,” asserted KPMG UK legal head Jeremy Barton, citing the speed and severity with which damaging disclosures can impact on brands in a digital world. “Anything can suddenly go viral on the internet. Managing that is absolutely crucial now.” The point was echoed by Sumitomo Mitsui Banking Corporation (SMBC)’s Sean Edwards, noting how reputationally-threatening issues will swiftly reach his bank’s senior decision-making team.

Reputation is also a key factor in another area highlighted by GCs as a growing area of liability and potential disputes: climate change and sustainability. Moller said that while the nature of Maersk’s business means it is spared some of the reputational slings and arrows facing consumer-driven counterparts, the shipping giant is seeing increasing demands from customers for green-sourcing and decarbonisation in its services. easyJet legal chief Maaïke de Bie, meanwhile, cited her airline’s efforts in offsetting carbon emissions, despite the challenge of a fossil fuel-dependent industry in tackling climate change. Highlighting rapidly changing priorities from investors and consumers, de Bie said easyJet research found 72% of consumers now consider sustainability in choosing an airline, adding: “This will increasingly become an important topic for everyone.” KPMG’s Barton also noted the emerging field of liability facing companies under widening non-financial reporting obligations and the “expectations gap” that exists between the companies and the various stakeholders relying on such reports – a field he predicts will generate disputes in years to come.

Mitigate and Avoid

With GCs facing risks across a startling range of fronts, our panel discussed approaches to manage, mitigate and avoid these risks – and any associated disputes that may follow. Vodafone’s Martin cited a drive to improve compliance and training, with the telecoms titan currently reviewing its approach in the area. “We’re increasingly upping the game because the cost of investing in doing it right in the first place is lower than the cost of a fine because fines are getting so much bigger.” Not that such tools are easy to effectively deploy, with Martin noting the need for major corporates to more rigorously test their compliance and training programmes to ensure they have an impact on the ground.

Addressing an increasing area for risk and fines, easyJet’s de Bie related the challenges

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Jeremy Barton, UK GC, KPMG



she is currently facing dealing with the aftermath of a cyber-breach that hit the airline in early 2020. After being asked by the Information Commissioner's Office to notify millions of customers whose details had been compromised, easyJet is now facing multiple group action claims. “Three days after [making an announcement to the market that easyJet was going to be notifying customers], we had the first class-action lawsuit and now we face many more, so our team will be busy for the next three-to-five years fending them off – and not just in the UK,” De Bie reflected. “It's the follow-on class action that's been really significant. I'm disappointed we're facing this – it feels opportunistic. The type of data exposed was not the data typically considered more sensitive. No passport details, no passwords, no financial data.” With the scope widening in recent years to launch group consumer claims in many European jurisdictions, most GCs are expecting class actions to be an ominous blip on their radar in the years ahead.

What Clients Want

If there was one topic that most strongly united our panel, it was how law firms need to evolve in order to address changing client demands.

KPMG's Barton called on law firms to think more creatively about how they deliver service – both in how they gel with in-house teams and in offering more holistic services, such as using disputes disciplines to advise on risk management.

Richard Blann, head of litigation at Lloyds Banking Group, focused on the familiar refrain of law firms needing to further hone their client knowledge and communication skills, noting that there often remains “an awful lot of translation” to make external legal advice relevant for Lloyds' wider leadership.

Blann clearly struck a chord, with Barton recalling having to explain the concept of a bullet point to one law firm. De Bie, meanwhile, gave the example of setting easyJet's new panel firms the exercise of turning page-long legal advice into a three-line Japanese poem format, commenting: “What was amazing was how quickly people were able to give the advice in a [very short] version.” HFW's Perrott, likewise, cited increasing demand for advice to be put in a more visual format – a stance that received a strong endorsement from Martin, who highlighted recent efforts by Vodafone to strip out pages of contracts in favour of easily understood diagrams. “For people who aren't lawyers, and are not used to reading a 120-page document, if you show them a picture, it's so much faster and stronger,” she said.

A Competitive Market

The conversation turned to London's future as a global leader for litigation and dispute resolution – a topic that has been subject to increasing debate following the UK's exit from the European Union.

The issue of cost was a common theme, with SMBC's Edwards highlighting the expense associated with London's gold-standard approach to legal services. “The quality of argument is much higher in English courts than in New York, but at the end of the day, [clients] are not interested in having a philosophical debate – we're interested in getting a judgment as quickly and cheaply as possible. And there are a lot of jurisdictions now beginning to challenge that.”

The panel agreed that London's long-term position as a global disputes hub would be tied to the continued success of English law. Moller said that Maersk is now avoiding

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Rosemary Martin, Group GC, Vodafone



English law on certain contracts to head off “prohibitively expensive” costs on routine matters, while Edwards also sees increasing challenge to its use for international contracts following Brexit. “I’m definitely seeing the use of English law under pressure,” he said. “I get a lot of Continental lawyers saying, ‘You won’t be able to enforce English judgments anymore.’ That’s not true, of course, but now Continental lawyers think there’s a rational reason for rejecting English law and jurisdiction. There’s a battle going on.”

Picking up on lingering post-Brexit questions of jurisdiction, Blann observed: “From a disputes point of view, the sooner we sort out the position on Lugano [the international convention on recognition of judgments] the better. We’re in the gap at the moment and that is going to cause problems for disputes.”

The panel also lamented the loss of influence of British companies in the EU, raising concerns about a lack of input in regulation in what remains a core market. Lloyds Bank’s Blann stated that financial service firms “have no voice in policy in the EU anymore, so we’re at their mercy”.

The Future of Disputes

Bringing the discussion to a close, our panel discussed how to bring about positive change in the litigation arena. HFW partner Damian Honey argued: “If there’s one thing I can ask the GC community to address, it is that I see too many litigators loving litigation in private practice and litigating for the fun of it, writing endless letters that are never read by the judge and just driving up costs. That has got to go.”

HFW’s Perrott said that the industry must learn from the hard-earned experience of the Covid-19 pandemic. “Remote hearings, online case management...these are things we must build upon. Clients should give some thought to arbitration clauses that say the hearing should be virtual.”

Finally, Lloyds’ Blann called on his peers to engage with attempts to reform areas like disclosure and witness statements, concluding: “We have to encourage cultural change about the way we approach litigation and that’s driven, in part at least, by an attempt to manage the costs and keep the UK competitive as a jurisdiction.”

With the business world facing a decade that will be dense with increasingly complex disputes spanning borders and industries, such calls could not be timelier.

This is an excerpt from an HFW report on the future of dispute resolution. To read the rest of the report, which includes a series of 30 interviews with senior in-house counsel and other leading figures from across the global disputes industry, as well as insights from our expert litigators, visit: www.hfw.com/litigation

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