



## LITIGATION – THE ROAD AHEAD?

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The last decade has been fruitful for litigators on an international level, as global economic crises and other issues have generated significant domestic and international litigation. While many economies return to growth, litigation activity seems set to continue in many jurisdictions. However, the type of case facing leading litigation lawyers appears different to the caseload their predecessors might have dealt with a decade ago. Changes also appear inevitable to the way litigation is undertaken around the world, particularly in common law jurisdictions – if only to control the growing costs of discovery in an electronic world.

Some workstreams may not have changed fundamentally, such as claims for negligence or for product liability. The level of such litigation in many jurisdictions continues to reflect the extent to which class action procedures and litigation funding rules facilitate such claims in the particular jurisdictions. In Europe at least, such claims are now increasingly reinforced not only by evolving common law principles but also on the ever-growing web of EU and domestic regulation.

In many jurisdictions there has been a change over the last few years in the way that commercial or contractual disputes are resolved. Many such disputes, save for very high-value or business critical claims, appear to be less likely to give rise to litigation. Such issues are increasingly resolved at an early stage by negotiation or mediation. In addition, where some sectors such as construction frequently give rise to certain types of dispute, clients and their lawyers are resolving more of these issues through conciliation, adjudication or expert determination. Large-scale international contracts are also increasingly resolved by international arbitration. International arbitration activity generally, while growing, has

not proliferated to the extent that many litigators expected a few years ago.

Regulatory litigation has been a significant growth area over the last decade, a trend which looks set to continue. Regulators in many jurisdictions are more aggressive. Their powers have developed. The potential sanctions are far greater, as is the determination to invoke powers and impose sanctions. The likelihood of getting caught and prosecuted, and the potential consequences of a conviction, have also grown considerably.

In particular, the likelihood of individuals being prosecuted has also greatly increased. For example, in the United Kingdom there have been significant SFO convictions over the last year, including most recently, a 14-year prison term for Tom Hayes following his Libor-related conviction. Apart from such high-profile criminal investigations and prosecutions, regulators in many jurisdictions are frequently bringing punitive administrative sanction proceedings. Such regulatory proceedings have exposed certain sectors, such as the financial services sector and the pharmaceutical sector, to huge financial penalties across many jurisdictions over recent years, while simultaneously exposing them to expensive civil litigation.

The international upsurge in regulatory litigation has had significant consequences. Firstly, whereas criminal and commercial litigation were traditionally worlds apart, there has been an increasing convergence. Companies involved in a crisis now find themselves dealing with regulators (often more than one regulator and in more than one jurisdiction) even as they grapple with the litigation consequences of the issue. The need to simultaneously deal with regulatory and civil litigation issues

hugely enhances the complexity of the challenges facing clients embroiled in such difficulties. The disclosure required by regulators may provide a roadmap for hostile litigants, and disclosures to regulators may not be protected from disclosure in all jurisdictions.

Contentious regulatory litigation and related areas such as business crime are significant growth areas internationally; however, other significant litigation workstreams continue to flourish. Even in a time of economic growth, there will be ongoing restructuring and insolvency litigation. Lenders may be more inclined to avail of their rights and to intervene to protect their interests than they were in the years before the banking crisis.

Litigation also looks likely to be used more and more often as a tool in highly competitive commercial situations, where the stakes are sufficiently high to warrant such tactics. For example, competition issues will often have major business ramifications that require and justify litigation strategies. Likewise, the procurement processes associated with large tender processes will often justify large-scale litigation if only for strategic reasons. Litigation also appears likely to become more frequent in the context of large-scale M&A transactions.

Other traditional litigation workstreams such as claims traditionally covered by public liability and other insurance policies continue, but some are increasingly seen as commoditised, particularly when funded by insurers. This trend appears likely to continue. Commoditisation is likely to heighten pressure on law firms to use technology as a way of reducing the cost of servicing such litigation on the client's behalf, and of finding more effective ways to prosecute or defend claims.

A key issue for litigators, particularly in common law jurisdictions, will be

the costs involved in discovery and particularly e-discovery processes. The volume of information readily generated and preserved greatly increases the potential cost of subsequent litigation. However, modern technology offers sophisticated tools to process and analyse such information. Many civil litigation or regulatory investigation situations can easily require the processing or disclosure of thousands, if not millions, of documents. This presents huge challenges in terms of not only the expense of the project but also the need to effectively manage and analyse such information in order to identify and respond to the crucial issues emerging from such evidence. The lawyers who effectively employ such technology to identify the salient facts and to get to grips with the core issues in the case will

have a significant advantage in such an environment.

The continued migration of solicitors from private practice to in-house will also continue to change the profession. As that process continues, more litigation may well be dealt with in-house and this may impact on external law firms in due course. Indeed, when dealing with a specialist industry, it may be more effective to gather and provide the necessary legal expertise on certain issues (such as pharmaceutical, intellectual property or regulatory requirements) through in-house counsel. However, for many reasons, it will be more suitable for more complex or sensitive disputes to be dealt with by external counsel on a company's behalf. Accordingly, it appears that larger, more complex issues giving rise to greater exposure will continue

to require the involvement of outside counsel.

One thing is for sure. Clients will continue to demand cost-effectiveness, and the commoditisation of certain types of litigation will continue, particularly in areas funded by insurers. As far as higher-level, more strategic litigation is concerned, while clients are less cost-sensitive there will still be a need for value for money, and litigators will have to demonstrate their ability to project-manage large-scale litigation effectively, and to avoid costs becoming disproportionate. However, the priority in "bet the farm" cases will still be the need to secure the best outcome. The lawyer who can demonstrate ingenuity and creativity will always be able to attract a premium client base.