

FUTURE OF DISPUTES

The Big Picture

Tuesday 3 November 2020, 4.00 - 5.00 pm GMT

Key Takeaways...

from Baker McKenzie's Future of Disputes plenary session

The world is changing and changing fast. The line between cause and consequence of that change is blurred, but clearly there are some major shifts and shocks happening right now that will shape all of our futures and those of generations to come: technological acceleration, climate change, social and cultural activism, nationalistic trade policy from governments around the world, BREXIT and many others will all play a role. COVID-19 has turbo charged the pace of change in many respects.

As a Firm, we have been thinking carefully about what this means for our own business and the way that we work, as well as implications for our clients and their businesses.

Our conversations involved using a foresight lens to illuminate blind spots and have critical strategic conversations about the complex interrelated challenges of global change.

Futurist Sanjay Khanna explained how strategic foresight can be used—and plausible scenarios developed—by considering the patterns and signals that we see in the present - even when living in turbulent, uncertain, novel and ambiguous times. We discussed three key themes that will inform corporate strategy and the trends business should anticipate through 2021:



Location and nature of disputes

We also considered whether these trends might lead to a shift in the location and nature of disputes and the way in which we resolve these disputes.

The location of disputes: We expect the established centres of disputes (e.g. London, Paris, Geneva, Dubai, Singapore etc.) to continue to attract claimant activity, bolstered by their offering of greater certainty on handling and technological support than other, emerging centres. They have adapted well to the challenges presented by the COVID-19 pandemic by, for example, transferring proceedings online.

We expect that there will be shifts in some areas. For example, we anticipate a change in energy and mining disputes as production moves away from natural resources and there is a greater focus on renewable energy. This may shift the focus of energy/heavy industry disputes away from jurisdictions where extraction takes place and towards jurisdictions where renewable energy is being created.

The nature of disputes: Commercial litigation and contractual disputes will continue to be a core concern for business. The key trends we've identified will likely drive a greater volume of regulatory litigation as well as use of litigation as a lever to effect changes in corporate behaviour or secure commercial objectives.

Increased government intervention into commercial life has been accelerated by the COVID-19 pandemic (e.g. direct awards of large public contracts without competitive tenders in the name of emergency). We expect businesses will wish to push back and will reach for the public law toolbox in order to support a strategy of regulatory engagement.

Methods of resolving disputes

Growth of Alternative Dispute Resolution (ADR): In relatively recent times, we have seen judicial and public attempts to reduce the costs of commercial dispute resolution through the encouragement of ADR, such as mediation and arbitration. That trend will continue and likely will expand online.

Growth of AI: Can AI be used to predict case outcomes, whether to help a judge make a decision or simply to facilitate settlement by more accurately predicting litigation prospects? There has been a small number of studies carried out over the past couple of decades which suggest that machine learning can be used to produce remarkable powers of prediction compared to the highly trained legal mind. In one study AI software achieved 75% accuracy in predicting the case outcome, compared with 59% accuracy of the human lawyer. Other studies showed similar results, with 70-80% accuracy of outcome. However, while there may be a place for AI in the context of certain types of disputes e.g. where there is a long history of precedent, it is always likely to have its limitations for more complex, commercial litigation. Our view is that AI does not signal the end of the lawyer, but it will play a role in informing settlement discussions/strategy alongside traditional legal advice.

Cost-saving measures: As the amount of data involved in any commercial dispute increases exponentially, parties to litigation will also continue to look to drive down costs. The use of offshore review

Brexit has also increased the uncertainty that businesses face in the UK and across the EU. In the run up to the end of the transition period we anticipate an increase in secondary legislation in the UK that is introduced under significant time pressure. This may well be legally flawed and bring with it public law challenges and disputes.

The regulatory burden on businesses is compounded by the rise in private enforcement through litigation across the globe. Expansion in consumer rights, routes for mass recovery and availability of litigation funding increases the prospect of claims being pursued and demands a litigation strategy that coordinates responses across borders.

We will also continue to see extensive technological acceleration. One such example is the rise in adoption of blockchain technology to manage global supply chains. Accompanying this increased reliance on technology is the increased risk of serious data breaches and cyber attacks and the serious reputational damage that they can cause.

Compliance risks will continue to present issues for companies. As our working environment changes, questions arise as to how the conduct of employees and other third parties (who may incur criminal liability for the company) can be monitored adequately from a compliance perspective with less in-person contact.

centres and AI is now a familiar feature of large-scale commercial litigation and arbitration. The technology is improving and will continue to improve as the need to drive down costs continues.

Rise of online hearings: Our experience of attending virtual hearings has been very positive, and we expect they are here to stay. They offer significant logistical benefits and cost savings in multi-jurisdictional complex litigation and are particularly suitable to resolve procedural issues arising throughout a matter. However, feedback and experience over this period indicates that parties will continue to favour in person hearings on substantive issues as they arise over the course of proceedings. This conclusion is supported by a joint Baker McKenzie and KPMG survey (the results of which will be published in the coming weeks), in which 70% of respondents stated that they would prefer a virtual interim hearing, but only 17% preferred it for a final hearing. Fewer than 20% of respondents stated that they thought virtual mediations were as effective as in-person mediations.

The changing role of the disputes adviser: The future will also see greater need for lawyers to predict areas of risk and opportunity for their clients. They can only do that by having a good understanding of industry and public opinion. As disputes lawyers we will need to be business advisors / commercial pragmatists as well as legal analysts.

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Lawyers should explore whether or not COVID-19 indicates a shift to more complicated, complex, and cantankerous (three Cs) disputes in the years to come. With this in mind, lawyers need to ask what sorts of scenarios may emerge over the next one, three, six and 12 months. They should also explore longer-term scenarios: one, three, and five years out. In those scenarios, they should ask themselves what sorts of business issues and associated legal questions will emerge, and what their responses could be in various "worlds."

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Lawyers will more than ever becoming business advisors rather than legal analysts, advising on risk and reputation management, as well as the law. To perform this role, lawyers will need to be able to advise not just on law and procedure, but the wider geopolitical, social and economic context.

KEY PRACTICAL TIPS

1

The need to collaborate with external advisors and work as one team is likely to increase so building those teams and driving seamless collaboration will increasingly be a key skill for any in-house or private practice disputes lawyer.

2

Don't forget to think about whether there are public law arguments you can deploy to support your commercial objectives, especially ahead of decisions being made, in order to seek to influence the outcome of the decision.

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