



Photo by Alena Veasey on Shutterstock

LEXOLOGY
Getting The Deal Through

Market Intelligence

DISPUTE RESOLUTION 2023

Global interview panel led by Seladore Legal

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

Led by Seladore Legal, this Dispute Resolution volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

Market Intelligence offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most significant cases and deals.

Litigation versus Arbitration
ADR Trends
The Client Experience
Litigation Funding

START READING

About the editor



Simon Bushell

Seladore Legal

Simon Bushell of Seladore Legal is described as a forceful, determined and clear-sighted litigator and has consistently been ranked in Chambers UK from the early days of his career. He is frequently lauded in The Legal 500, having been recently inducted into its Hall of Fame for civil fraud expertise and praised as a Leading Individual in commercial litigation. Simon acts for a broad range of clients, including large corporates, private equity houses, financial institutions, banks and ultra-high net worth individuals, in addition to foreign government agencies and state-owned companies. He has undertaken investigations into complex, worldwide frauds, conspiracies and insolvencies, and has wide experience in coordinating parallel cross-border disputes. Prior to founding Seladore Legal with Gareth Keillor, Simon was a partner at Herbert Smith Freehills from 1997 to 2013, whereupon he joined Latham and Watkins and became chair of its litigation department in London. Simon has more than 30 years' experience in high-stakes commercial litigation.

Contents

<u>Global trends</u>	1
<u>Brazil</u>	5
<u>British Virgin Islands</u>	15
<u>Cayman Islands</u>	25
<u>China</u>	34
<u>France</u>	43
<u>Guernsey</u>	51
<u>Italy</u>	59
<u>Monaco</u>	66
<u>Nigeria</u>	74
<u>Qatar</u>	83
<u>Spain</u>	95
<u>Turkey</u>	101
<u>United Kingdom</u>	109

About Market Intelligence 121



While reading, click this icon to return to the Contents at any time



Photo by IR Stone on Shutterstock

Global trends

Simon Bushell of Seladore Legal is described as a forceful, determined and clear-sighted litigator and has consistently been ranked in Chambers UK from the early days of his career. He is frequently lauded in The Legal 500, having been recently inducted into its Hall of Fame for civil fraud expertise and praised as a Leading Individual in commercial litigation. Simon acts for a broad range of clients, including large corporates, private equity houses, financial institutions, banks and ultra-high net worth individuals, in addition to foreign government agencies and state-owned companies. He has undertaken investigations into complex, worldwide frauds, conspiracies and insolvencies, and has wide experience in coordinating parallel cross-border disputes. Prior to founding Seladore Legal with Gareth Keillor, Simon was a partner at Herbert Smith Freehills from 1997 to 2013, whereupon he joined Latham and Watkins and became chair of its litigation department in London. Simon has more than 30 years' experience in high-stakes commercial litigation.



Although the past year showed how the world has begun to awaken from the long covid winter, the economic effects of the pandemic, the impact of the Russia–Ukraine war and soaring inflation has meant that the cracks in the global economy were growing in 2022. These cracks are causing many to think that we are on the brink of another significant global recession.

At times of economic downturn, increased financial pressures can see parties deciding to proceed with claims that they might otherwise defer, or not pursue. The disputes arising out of the 2008 financial crisis really only began in 2010 and continued in earnest until as late as 2018. We are now three years from the beginning of the pandemic and one year from Russia's invasion of Ukraine; it is no surprise that litigators are busier than ever. In our own practice, we are already very busy, and, when we speak to our colleagues around the globe, the message is the same. We expect this only to increase over the coming year and set out below our view on some of the trends that are likely to arise in disputes.

Increase in fraud

The current global uncertainty coupled with the potential of economic downturn creates a perfect storm that is likely to see an increase in fraudulent activity. Any recession or period of economic hardship will hit everyone, regardless of their wealth or financial security, and this can fuel fraud.

For example, employees could be more tempted to commit fraud as financial pressures grow. We could see a rise in rogue directors who have misrepresented company accounts or misappropriated company property. At the same time, directors may also approach their role with increased vigilance, be more aware to becoming a victim of fraud and take a more aggressive approach to litigation in order to protect their business from fraud.



Furthermore, as the much of the corporate world seems to have settled on a hybrid working model, with many employees working for much of the time from home, or away from their main office, there will be a greater risk of fraud due to the increasing challenges of remote supervision.

The powers available to combat fraud have grown in recent years. We have seen that the courts are more willing to grant expansive orders to combat or prevent fraud, including search orders against third parties (*Norwich Pharmacal* orders) and preventing evidence from being destroyed. There may also be an increase in claims for failure to prevent fraud arising. Courts are also willing, in appropriate cases, to hold banks responsible for failing to prevent fraud being committed against its customers. There is a growing sentiment among lawmakers that other regulated businesses, such as lawyers and accountants, should be held liable for failing to prevent fraud

“While the revision of arbitration laws and rules to make them more appropriate for modern dispute resolution is always to be welcomed, these changes may also themselves give rise to some disputes.”



being carried out by their clients. While that is primarily a regulatory or criminal issue, the disclosures and prosecutions that might arise, may well give rise to civil proceedings in due course.

ESG disputes

With climate action being an ever-growing priority and the prevalence of ESG regulation, climate-related claims are increasing. There is a growing awareness of a business' environmental impact and appreciation of the importance that consumers place on climate-related considerations.

While civil claims have traditionally been brought to compensate for financial losses, there is a growing number of claims brought on environmentally motivated grounds. For example, in England, a charity, ClientEarth has filed a derivative claim against the directors of Royal Dutch Shell for their mismanagement of the company's climate plan, and in those proceedings the charity was represented by a disputes boutique, better known for its financial services litigation. The claim asserts that the board breached duties by failing

to manage the risks caused by climate change, and that it is in the company's best interests (and will generate long-term shareholder value) to adopt an energy transition strategy aligned with the Paris Agreement. While this claim is still in pre-action phases, what is most noticeable is the unprecedented support from institutional investors, including large pension funds and asset managers. This indicates that businesses need to prepare for a very real prospect of climate-related litigation with claimants seeking more than merely damages and in some cases being highly motivated campaigners seeking to bring about a genuine change in the approach to the environment.

There have also been a number of ESG-related claims in Germany, where there is also a raft of new ESG legislation being introduced.

Over the past few years, regulators have felt that their powers are limited in challenging poor environmental habits of big corporations and financial institutions and have sought (successfully) to strengthen their powers and prioritise ESG in their agenda. For example, last year the UK Financial Conduct Authority introduced mandatory Taskforce on Climate-related Financial Disclosures requirements for certain listed companies that focus on purely ESG-related considerations. This will need to be taken seriously by companies as they could face an investigation and could also see enforcement action for poor reporting. It also means that there will be a new pool of publicly available information on listed companies' ESG data that will be available to litigants and may serve to further fuel ESG-related litigation.

Insurance litigation

At the time of Russia's invasion of Ukraine, there was broad speculation as to what disputes would follow. Outside of the human tragedy, the war is resulting in a significant loss to the global insurance industry. While the total is difficult to estimate, the conflict



has the possibility to become the largest man-made catastrophe loss in modern times.

Currently the insurance sector's greatest exposure is in relation to aviation insurance due to aircraft that are either stuck on Russian runways or have been requisitioned by Russian Airlines. Aircraft leasing companies are seeking to claim on their insurance policies; however, certain exclusions in the standard aviation leasing agreements, coupled with the fact that Russia has been a country of higher insurance risk since the invasion of Crimea in 2014, means that insurers are contesting the extent of the insurance coverage. Currently there are already claims listed for insurance payouts in excess of US\$3 billion, and this is likely to be the biggest loss event in the sector's history. The possibilities for potential insurance claims are endless, with big claims likely to be made in relation to marine cargo and energy industries.

These claims are likely to give rise to challenging issues. For example, where assets, such as aircraft, have been stranded due to sanctions, is that a loss of the aircraft? The aircraft, of course, still exists, and there is the prospect that in the future it will be returned, so any loss is potentially only temporary. This is likely to result in developments in insurance jurisprudence.

Sanctions

The Russian invasion of Ukraine resulted in a wave of international economic sanctions. While the pace of new sanctions has slowed down significantly, there is now discussion as to what to do with assets that have been frozen through sanctions, and there are suggestions that assets could be confiscated and sold for the benefit of Ukraine. If that route is pursued, then it is likely to generate significant litigation as to, for example, the human rights issues that might arise, as well as questions as to the true ownership of assets, where they are not directly held by sanctioned individuals.

Arbitration

Finally, while arbitration is of course, not a new trend, there does appear to be a current trend for jurisdictions to revise and update their arbitration laws. For example, there is a process of reforming arbitration laws in China and Japan; Germany is expected to review its arbitration laws this year, and in the UK the Law Commission has just completed its consultation on the Arbitration Act 1996, with proposals made for changes to the law to make it even more effective and England more competitive as a dispute resolution centre.

The arbitral institutions are also unveiling new rules. ICSID amended its rules with effect from July 2022, and the Arbitration Institute of the Stockholm Chamber of Commerce implemented new rules on 1 January 2023.

While the revision of arbitration laws and rules to make them more appropriate for modern dispute resolution is always to be welcomed, these changes may also themselves give rise to some disputes as practitioners get used to the new rules and laws and any areas of ambiguity are resolved.

Simon Bushell

simon.bushell@seladorelegal.com

Seladore Legal

London

www.seladorelegal.com

[Read more from this firm on Lexology](#)