


BYFIELD

Reputation Counsel



Finding the right line: litigation PR in an evolving dispute ecosystem

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Foreword

Reputation has been an important consideration when litigation stakeholders are formulating their overall litigation strategy. The role of a good PR strategy is most appreciated when high-profile companies or individuals are facing claims over alleged wrongdoings or criminal offences that can generate widespread publicity and seriously damage their reputation.

Byfield has recently conducted an attitude survey of influential litigation market participants including general counsels, litigation partners of law firms, QC, litigation funders and PR advisers in various jurisdictions. The key message is clear, an overwhelming majority of the respondents recognised that the impact of a dispute on reputation is always an important consideration when advising a client.

However, the research also finds that in most cases, litigation PR is not yet fully utilised in protecting clients' reputation during litigation nor as a key part of the litigation toolkit.

With several trends developing in the litigation landscape in the UK, demand for specialist litigation PR support will grow. One of the main drivers behind the growth is the rising tide of class actions. The *Merricks v Mastercard* case, for example, which has been certified as the first ever class action on an opt-out basis, is one of the most remarkable developments for litigation practice in 2021. It involves 46 million claimants who are seeking damages that could amount to £13.8bn, the largest award of damages in English legal history.

A robust PR and communication plan is essential for both the claimants and the defendants in a class action that concerns a significant part of the population and attracts extensive media coverage.

In addition to class actions, several other themes have emerged throughout the research process which can influence the role of PR in litigation. As the volume of cross-border disputes is increasing rapidly, it is key for litigators, clients and PR advisers to be familiar with the nuances in media culture, litigation practices, reporting restrictions and PR approaches across several jurisdictions.

Social media is another driving force behind the changing practice in litigation PR. The speed at which news stories develop in the digital media era dictates even closer collaboration between the clients' PR advisers and legal teams right from the outset.

Finally, ESG (environmental, social and governance) has been identified by most survey respondents and interviewees as a dominant theme in future disputes. Potential ESG claims add another layer of complexity of reputational risks for businesses and investors alike.

This thought leadership report aims to highlight the key findings from the survey on the sector's current views on litigation PR; provides insights into the latest developments in five leading international dispute resolution centres – London, Paris, Dubai, New York and Singapore; and explores important trends that will define the future of litigation PR.



Context & media landscape

The concept and practice of litigation PR has been developing as the legal ecosystem in the UK evolves. In the litigation space, the year 2021 can be defined by several key judgments around collective actions.

While class actions are most prevalent in the US, it is increasingly clear that companies in the UK and Europe are facing greater risks of being embroiled in 'US style' group litigation. Compared to other types of disputes, a class action has greater potential to generate major media stories with far-reaching reputational impact and can lead to large financial damages. For those bringing class actions, litigation PR is an essential ingredient in the 'book building' strategy of any opt-in claim. Accordingly, once a representative group is built, regular communications about the status of the claim is also critical and this is where litigation PR also has an important role to play.

With the rising tide of class actions in the UK, there is now a profound recognition that well-formulated litigation PR strategies are critical in mitigating reputational risks while high-profile disputes are being fought hard in courts.

Last year saw some trailblazing cases. The three-year legal challenge launched by prominent consumer rights campaigner Richard Lloyd against Google came to a dramatic end in November (*Lloyd v Google*), with the Supreme Court dismissing Mr Lloyd's innovative representative (opt-out) action against the tech giant for alleged data breaches.

The claim, seeking damages of approximately £3bn on behalf of millions of iPhone users, could have opened the floodgates for similar data privacy group actions if successful. Although it has fallen short to move the dial in data protection litigation, the case demonstrates the sheer scale of media coverage and momentous exposure a high-profile defendant may endure,

even if the case doesn't reach the court hearing stage. Companies, therefore, need to have a robust and strategic media and communications plan right from the outset.

Further progress of the class action shift is expected on the competition law front, thanks to the *Merricks v Mastercard* case. It has been given the go ahead by the UK Supreme Court to be the first ever class action on an opt-out basis. In this case, Mr Merricks is challenging Mastercard on behalf of a potential class of 46m claimants and seeking damages that could amount to £13.8bn, the largest award of damages in English legal history.

Another sign of the expanding segment of the litigation market is the growing number of participants and stakeholders. More specialist claimant law firms and litigation funding providers have been set up in London. New York claimant litigation law firm Milberg is among the new arrivals. Its London office has been involved in some of the landmark cases, including *Lloyd v Google*.

Third-party litigation funders have played an instrumental role in driving forward the development of group actions in the UK. Global funder Therium, for example, provided financial backing to the claimants in the pioneering *Lloyd v Google* case and the *Post Office* case, in which it enabled 550 sub-postmasters to unlock decades of injustice suffered. Several new players have recently entered the market. LionFish Litigation Finance (part of the listed RBG Holdings) and MDR Solutions I (a joint venture between litigation heavyweight Mishcon de Reya and Harbour) are two examples.

As the litigation ecosystem evolves, the demand for litigation PR has increased consequentially. Parties litigating as well as the litigation funders and law firms acting for them also increasingly need litigation PR support, especially in complex and high-stake disputes.



The rapidly evolving ESG policy and compliance regimes in the UK and around the world add another layer of complication for corporate clients' litigation and reputational risks. ESG-related disputes are tipped to be a dominant theme in litigation practice over the next decade. Risks, both reputational and financial, are especially high for public companies considering the combined effect of the ESG revolution and the rising shareholder activism in the UK. Public companies will require highly specialised PR strategies and advice when defending ESG claims.

Furthermore, the media sector itself is also undergoing fast-paced changes. Social media has become a popular source of breaking news. Increasingly journalists tweet or live blog from the courtrooms to give quick updates throughout the trial. One piece of information, be it accurate or false, can go viral and spread globally within minutes.

The speed of reaction, either to an allegation, a new piece of evidence or a judgment, is vital to an effective PR strategy in the digital media era.

Effective and timely communication can only be achieved through solid preparation and close collaboration between the PR teams and the legal teams.

Against this background, Byfield has produced its inaugural litigation PR thought leadership report, based on an attitude survey and in-depth interviews with influential and leading market participants including general counsel, barristers, litigation lawyers and litigation funders.

Methodology

Byfield interviewed a broad range of market participants in key jurisdictions whose contributions make up this report. Additionally, 50 respondents in London, New York, Singapore, Paris and Dubai completed a survey on their attitudes to litigation PR.



Key findings

In summary

- The majority of the respondents agree that reputational impact is always an important consideration when advising a client in a dispute.
- There is a growing recognition that litigation PR is a necessary element to a client's legal strategy in a dispute, but external PR consultants' involvement when advising clients on litigation strategies remains low.
- 61% of the respondents agree that the impact of a dispute on reputation is always an important consideration when advising a client.
- 40% of the respondents think that intense and unwelcome media coverage of a case can cause parties to settle to avoid reputational fallout.
- 45% of the respondents see the media as a key stakeholder within a litigation strategy.
- 76% of the respondents agree that litigation PR is a necessary element to their legal strategy in a dispute, depending on the nature of the dispute.
- Only 8% of the respondents always involve external PR consultants when advising clients on litigation strategies.

The power of media coverage and litigation PR

There is a high degree of recognition that media coverage can affect the reputation of a company in litigation and influence parties' decisions. Therefore, litigation PR is perceived as a very important or increasingly important aspect of managing high-profile cases.

Around 40% of the respondents agree that intense and unwelcome media coverage of a case can cause parties to settle to avoid reputational fallout. The survey also shows that litigation PR has a broad definition and carries out a wide range of functions during a litigation.

Some respondents refer to litigation PR as "advice on how to deal with the press; often reactively but could be proactively"; "ensuring the correct message is presented to the outside world regarding your claim"; "ensuring the litigation is not seen to reflect badly on the client"; and "controlling public perception of a case".

One respondent elaborated its media relations aspect, describing litigation PR as "managing the impact of publicity generated by a dispute on the client's and the opponent's business and reputation as well as on the dispute itself and its resolution."

Taking charge of the narrative of a dispute to cast the client in the best possible light and to minimise any damage to the client's reputation or brand image is the more noticeable and defence aspect of a litigation PR specialist's role. The other main aspect is that litigation PR can be a useful part of a litigation toolkit.

Several litigation partners and general counsel emphasised that litigation PR is "both a shield to defend against bad publicity or a sword to put pressure on the other side, but one needs to know when to use it and how to make it effective".



"I suppose it's a weapon that can be used both offensively and defensively and if one's careful about it, you can use it in anticipation of where you think your strategy and tactics are going to fall into place over time," explained BCLP deputy head of commercial litigation Graham Shear.

Others went further to describe litigation PR as "a significant element of a comprehensive litigation strategy and a valuable part of a litigation toolkit."

A few litigators highlight its role as one that is important throughout the entire process of a litigation case but changes and adapts constantly as the case progresses. "It's about communication in different stages of and for different purposes in litigation to achieve respective goals," said one respondent in the survey.

Our research shows that PR encompasses many functions across strategic communications, media relations, and crisis management. If deployed effectively and in a timely fashion, litigation PR can not only mitigate reputational impacts on a client, but also influence the outcome of a dispute.

PR should be an integral part of overall strategy

It is not uncommon that in some highly publicised cases, a party may have won in the court room, but came off badly in the court of public opinion. Survey respondents identified an array of other cases in which the winning parties have suffered severe reputational damages.

In one of the most mentioned cases, high-profile City financier Amanda Staveley lost her £665m high court case against Barclays (*PCP Capital Partners v Barclays Bank PLC*). But the press hailed it a PR victory to Staveley as the judge found that the bank was "guilty of serious deceit" in the way it raised billions of emergency funding to avoid

a UK government bailout during the financial crisis in 2008. Barclays was ordered to pay its own costs, which amounted to £33m, because it was found guilty of deceit.

One survey respondent acknowledged that it is essential to strike "a balance between what can be won by winning the dispute and what damage the same can do to the reputation of the client". Sometimes, reputational considerations can be the driver of decisions in a dispute resolution strategy.

When asked if litigation PR is a necessary element to your legal strategy in a dispute, 76% of the respondents said "sometimes, depending on the nature of the dispute". Some 15% answered "yes" while only 9% answered "no".

Litigation PR advice can demonstrate the most value when it is an integral part of the team forming a comprehensive strategy to achieve the client's overall goal. The best outcome for a client may be through settling before the matter goes to court or to rebut robustly the allegations by the opponent and set the narrative in the media. Other times, it could be to merely manage negative and inaccurate publicity, or to actively maintain the discipline to say nothing at all, which is not often as easy as it may appear.

However, as one commentator pointed out, "it should always be considered as part of a litigation strategy, but it is not always deployed". Indeed, according to the survey results, only 8% of the respondents said that external PR consultants were always involved when advising clients on litigation strategies, while 34% answered they were rarely involved. The majority, 49%, indicated that external PR consultants were sometimes involved.

One of the areas where clients have the most demand for PR support is when the companies or their executives are subject to white collar litigation or regulatory investigations and enforcement actions.

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Collective actions, which involve the interests of a huge number of people allegedly hurt by the misconducts of corporate giants, is a typical example where litigation PR should be a key element to a legal strategy.

Climate change cases and corporate accountability for human rights disputes are also mentioned, as one observer commented: "Many of them have been unsuccessful on legal liability but nevertheless tarnish corporate reputation."

One respondent suggested that litigation PR advisers could help in these situations by putting out press releases, social media posts, and other forms of communication, which "present facts that will not prejudice the case and would otherwise be obscured by passionate crowds or interest groups pushing an agenda".

Close collaboration between legal and PR advisers

Another clear message from the survey respondents and interviewees during the research is that the 24-hour news cycle and increasing pressures from social media demand closer collaboration between a client's legal and PR advisers.

About 45% of the total respondents see the media as a key stakeholder within a litigation strategy, while 36% disagree with the notion.

It is crucial that lawyers and PR teams, advising the same client in a litigation case, are sharing the same narrative both in the courtroom and outside to optimise the litigation outcome and mitigate the regulatory impact.

"In the types of litigation cases I focus on, which is white collar crime and regulatory investigation, it has become a norm that PR advisers are required to be present at the initial meetings with clients and their legal teams. Some clients won't instruct external law firms who don't want to collaborate or share information with their PR adviser," said one litigation partner.

There needs to be a high degree of coordination between legal and PR professionals on when and how each piece of key information is delivered in court and to the media. For example, when a news story develops from live-blogging or tweeting from a courtroom during a hearing, such as cross-examination of witnesses, the client's PR teams should be well prepared to handle any related media enquiries as soon as they arise or correct misinformation at the earliest opportunity.

Preparation and speed are key and working alongside each other as an integral team is the only way to achieve that.

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Litigation Partner



Litigation funders' perspective

The third-party litigation funding market has been growing strongly both in the UK and globally. It has become a driving force behind many high-profile cases of great significance while shaping the litigation landscape.

In the UK, for example, global litigation funder Therium has provided financial backing to the claimants in the pioneering *Lloyd v Google* case and the *Post Office* case. In the latter, vital financial resources provided by Therium enabled 550 sub-postmasters to unlock decades of injustice suffered.

Like the *Post Office* case, funding from the litigation funders is often a critical enabler in pursuing landmark collective actions. These claims usually involve well-known global companies, precedent-setting legal issues and the interest of mass population. A perfect recipe for generating widespread publicity and media headlines. The *Merricks v Mastercard* case is one of the most ground-breaking cases in 2021. Backed by US funder Innsworth Capital, Mr Merrick's £14bn group action against Mastercard on behalf of a potential class of 46m consumers over alleged "illegal card fees" has been given the permission to go to trial.

The volume of high-profile and high-stake cases involving litigation funders is only going to increase. Reputational impact from being associated in a particular dispute and litigating party has become a more important consideration for funders.

"The investment itself has to be reputation-strong, and by that, I mean you don't want to be questioned as to the client with who you are partnering and working with. Reputation is very much a consideration," says Matthew Denney, London-based investment manager of AIM-listed LCM Finance.

When considering or assessing a case, an investment decision will be made primarily based on its legal merits, prospect of success and the financials. However, there is always a test internally to evaluate the potential reputation impact.

"In a way you can class that as the 'Mail on Sunday test'. Do you want to fund something that has the strong potential of appearing in the public domain, particularly in newspaper press, and it being seen that you're funding a character of ill repute or taking on a state when their citizens are starving?" says Denney.

It is increasingly common for litigation funders to instruct their own external PR advisers to provide PR and media support from their point of view, alongside clients' PR teams.

"We work with external PR advisers to help the media and journalists better understand the role of litigation funding and what we do, particularly when we are involved in a case that generates considerable publicity. Journalists writing about the big cases are not necessarily familiar with litigation funding. So, we need to make sure that the messaging and information in the press is accurate," says a communications manager of an international litigation finance provider.

When litigation funders talk to law firms about their strategies, PR is often a relevant element of the discussions and at times PR services form a considerable part of the litigation budgets.

"PR within litigation is quite relevant and quite important, and I do think law firms and litigators don't always take the media into quite as much importance as they do with the law. Obviously, law is the most important part, but there is a tool in a litigator tool kit which is PR. I don't think it's used an awful lot, or as much as it could be," observes Denney.

In situations where the opponent doesn't want a close public scrutiny of the matters in dispute, the more pressure both from a legal and from a media point of view will help encourage settlement. Having the right PR strategy throughout the different stages of legal proceedings can help clients and legal advisers achieve their objectives while mitigating reputational risks.

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**Communications manager
of an international litigation
finance provider**



"I don't know very many corporate players who enjoy having media coverage about their litigation undertakings. So, I do think that the media attention and investor attention is a factor in determining corporate willingness or enthusiasm to settle," says a CEO of another major global litigation funding provider.

"I subscribe to the media view that everything has the potential of becoming public. I think we have to be prepared for our involvement in every single case to potentially be public," he adds.

In class action or shareholder activism, PR is an important tool for claimants, particularly in book building and pushing their agenda in the press and raising public awareness. With the rise of "US-style" group actions in the UK, the role of litigation PR has been increasingly recognised and utilised, albeit with caution.

"In some cases, like class actions, law firms need to drum up a PR campaign for book building reasons. But there's a risk of building too much of a campaign before a case is done. Because things can crop up and take an unexpected turn even if a case looks like a slam dunk, you don't want to have done this big PR piece and then things go sour," comments one PR adviser.

As ESG will become a huge focus for most businesses, investors, and governments around the world, this is an area where plenty of litigation and plenty of funded litigation can be expected in the next decade.

"There's no doubt that we're going to see a large number of ESG claims. It's going to be a fertile ground for a whole range of disputes. We've already seen this trend happening in other jurisdictions, where groups of members of the public bringing actions against governments' decisions in the world of climate change, or shareholder cases being brought against companies in the world of greenwashing. Individual actions are also being brought against corporates for not meeting regulatory obligations," says Nick West, partner and strategy officer of Mishcon de Reya, which recently launched its own ancillary litigation funding business branded MDR Solutions.

For litigation funders the bottom line to take on a case is the profits and financial return for investors. But in the age where ESG has become a key focus among businesses and investors, many aspire to serve a dual purpose.

"Funding as a concept is very relevant to the importance and to the existence of ESG," says a managing director of a London-based litigation funding provider. "It's a really important part of what we do, and I think litigation funding is part of the ESG movement. Providing funding to enable individuals and companies to access justice and seek recourse for injustice is a really important component to enforcing ESG principles."

It is a view shared among senior leaders of litigation funders interviewed for the research. The rise of the ESG claims not only provide business opportunities for funders, but also a good chance to define their purpose and build reputation.

Litigation funders also have their own reputations to consider when choosing cases as well as in terms of their governance and structure, particularly listed funders.

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Partner and strategy officer
Mishcon de Reya



London

As host to a world-class legal system that demonstrates the highest levels of independence, integrity, and flexibility, as well as exceptional legal talent among the Commercial Bar and law firms, London is a top global hub for litigation and arbitration that continues to attract international commercial parties who choose the UK capital to resolve their disputes.

London's thriving disputes sector operates under the watch of several national, legal and sector-specific publications whose journalists independently and actively report on disputes in detail – utilising their robust relationships with lawyers, in-house legal PRs and external PR firms – often before a case is even filed.

Reputation

Anneliese Day QC of Fountain Court Chambers believes that advising clients about potential reputational fallout is her “professional duty”. “We don't get involved normally in wording or exactly what is said to the press, but as a general concept, obviously you have to warn clients that if it is public, it may be reported,” she says adding that even with the privacy associated with arbitration, disputes can and have ended up reported in industry media.

Acknowledging the importance of discussing reputation, Kenny Henderson, a partner at CMS in London, says that depending on who the client is, their industry, sensitivities, who the other parties in the dispute are and whether ongoing business relationships are at stake, “the reputational aspect and the perceived aspect can sometimes almost be the driver of decisions”.

Run of the mill commercial cases require less consideration about reputation, UK-based Suber Akther, principal litigation counsel at Siemens, says: “We lose, we win by the strength of the facts and your contract, end of story.” However, he adds that certain types of disputes attract greater public interest, and that is where the PR element is very important, and high. “It is how you manage that, and how you manage it depends very much on specific facts.”

Use of external PR

London interviewees all had experience of use of external PR firms, particularly in high stakes matters where the reputational risk to the client, if or when a matter becomes public, either in the press or within industry circles, could significantly influence the overall litigation strategy.

“If it is a dispute which goes to the way in which you behave or treated people; whether you have been open and honest, if it goes to your reputation and your integrity, then the PR element becomes much more important. It is only in those sorts of cases we find that our clients will involve and will be working quite closely with external PR from the off,” Satindar Dogra, a partner and head of Linklaters' London dispute resolution practice explains.

For the matters that Henderson has been involved in, often class and group actions, external PR professionals “have really acted as another voice at the table that has a lot of experience in this area. I have never been in a situation, I think quite rightly, where it was felt that they were driving the whole PR. I have always worked with external PRs who are very collaborative”.

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Linklaters



Settlement

Both Day and Dogra agree that, in certain cases, the prospect of a dispute playing out publicly can influence a party's appetite to settle before the claim reaches trial. This is where litigation PR experts can be pivotal in identifying potential reputational risks early in the life cycle of the dispute.

While adverse media coverage undoubtedly can influence settlement, Day warns that this can sometimes have an opposite effect where a party may feel "blackmailed" and "actually would rather go to court and have it reported – they are not afraid of that". The Queen's Counsel cites a gambling trial in which she acted where her client went to the press "against advice" and the coverage was unhelpful.

"Sometimes the best leverage you will have is immediately before you issue a claim, but once it is issued, then often parties want to go and defend themselves. So yes, it depends, but I do not think I have ever seen somebody pay the wrong price to settle something with an element of blackmail.

There's always going to be a range of settlement, but I have never ever seen someone pay something that clearly is a bad claim to avoid it."

Social media

While 45% of respondents see the media as a key stakeholder in litigation strategy, it is the immediacy of social media, such as Twitter and LinkedIn, that can quickly shift public opinion and/or force parties to reconsider their legal strategy.

Akther acknowledges social media as "an increasingly complex and difficult area to manage", although he warns that it can become a self-fulfilling prophecy: "If, sometimes, you just ignore it, it will die a death. There are millions of people with time on their hands and the more you indulge them, the more you play to their game."

For Dogra, there is no "one-size-fits-all approach". He points to historic matters he has acted in "where I think social media would, if that happened today, play a big part". Sensitivity in certain matters is important, he continues: "You have to be very mindful of what is been said and actually that does drive the need to bring PR people on board, so you are monitoring that feed and you have in mind how what you say might then be spun and interpreted in the Twittersphere."

Henderson raises the concern about matters going viral. "Companies are aware of this, it intersects with the increasing prevalence and coming to the fore of ethical corporate values." He goes on to note that a particular stance, or activity or reaction can create "very major problems for companies".

Pyrrhic victories

Survey respondents identified a number of cases where a party may have won its case but came off badly in the court of public opinion. Many identified cartel defence cases, as well as libel actions as those among the likeliest to reveal damaging details about parties on both sides of the 'v'. However, one recent financial services dispute was highly cited by respondents.

In *PCP Capital Partners v Barclays Bank PLC* [2021] EWHC 307 (Comm), financier Amanda Staveley had sought significant damages against Barclays claiming that the bank had given her firm PCP less favourable treatment than other parties during the multi-billion fundraise that helped Barclays avoid a state bailout in 2008.

While Staveley's claim ultimately failed, Mr Justice Waksman, sitting in the High Court, found Barclays to be "guilty of serious deceit" in the matter, while he praised Staveley as a "tough, clever and creative entrepreneur", despite Barclays' attempts to discredit her.

The media was quick to follow suit. On the day of the judgment, *The Guardian's* headline read "Amanda Staveley v Barclays: a financial defeat but a PR victory" and added: "The high-profile financier lost her High Court claim, but Barclays walks away wounded". *The Times* later reported on the Judge's criticism at Barclays' "attempts to denigrate Staveley", while the *Financial Times* reported in March that the "High Court rules that bank should pay its own costs [£33m] because it was found guilty of deceit".

Paris

Paris has a long-standing reputation as a favoured seat for international arbitration. The reform on French civil procedures in 2020 aims to make French courts more attractive to international litigants. The establishment of a new international chamber of the Paris Court of Appeal that allows proceedings in English, cross-examination and fast-track procedures is another effort to reinforce Paris' position as an important hub for resolving cross-border disputes.

The development of litigation PR in Paris has also been gathering pace. Litigation lawyers in Paris say there has been a real shift in the legal profession's attitude towards the engagement of PR and communications specialists in litigation.

Litigation partner Benjamin van Gaver of Paris-based law firm August Debouzy recalls that meaningful involvement of PR advisers in clients' litigation cases started around ten years ago.

"At first, it was our clients who insisted on bringing their PR teams to the meetings with their litigation lawyers and having them working alongside the lawyers for the preparation and examination of the files. Initially the legal advisers were reluctant and concerned about confidentiality and the risk of negative consequences of too much media coverage on the case which dilutes the legal issues and can annoy the courts," says van Gaver.

However, now it is common for litigation lawyers to recommend clients to engage a PR specialist when they don't already have one at the first meeting.

"It's absolutely crucial for us to have PR and communications experts on the matter when a client is in a case that is sensitive, difficult and attracts significant media interest," says van Gaver.

Clients' need to mitigate reputational impact from an ongoing litigation is generally greater in cases such as criminal prosecutions of major companies or their executives and CEOs.

"A client may achieve a very good decision at the end of a long trial, but that judgment could be several years down the road. Good PR and communications support is essential throughout the trial and right from the start," he explains.

A plaintiff-friendly jurisdiction

France is characterised as a plaintiff-friendly jurisdiction. There is a perception that if a case involves a significant amount of money in relation to an individual or a public policy issue, the social justice considerations by the courts may outweigh the application of the rules of law.

Considering the recent reforms to the EU's access to justice laws, it has become easier for NGOs and consumer associations to challenge corporates' and governments' wrongdoings in European jurisdictions such as France. Climate change litigation is a growing trend in France. NGOs and activist groups increasingly use the courts to scrutinise governments' and businesses' climate change commitments and other legal obligations.

French oil major Total, for instance, is being sued by five NGOs over the inadequacy of its climate commitments with the objectives of the Paris Agreement. French supermarket chain Casino is also facing a claim by eleven NGOs for allegedly selling beef linked to deforestation in Brazil.

Many veteran litigators in Paris suggest that France has a rather "business-unfriendly" litigation landscape. This environment is one of the reasons driving the demand for strong media relations and PR strategies among corporate defendants.

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**Benjamin van Gaver
August Debouzy**



“There’s clearly a favour being given to the so-called weaker parties versus the multinational companies. In the French legal system, there are lots of ways for consumer associations, NGOs and individuals to bring their cases forward, and the courts take a very sympathetic approach to these kinds of cases,” says Thomas Rouhette, founding partner of Signature Litigation’s Paris office.

The same approach can be seen in the French media. “If it’s a ‘Robinhood’ like individual or organisation fighting against a big corporation in court, the media will probably look at the claimant nicely because that’s a good story,” he adds.

This is a phenomenon van Gaver refers to as the “criminalisation of the business life”. Compared to 10 or 15 years ago when most of the commercial disputes between two parties remained unknown by the public, now the litigation landscape is filled with widely publicised criminal actions launched by NGOs, associations and individuals against companies.

“There’s a remarkable increase in the use of criminal proceedings and media publicity of the criminal proceedings. May it be a white-collar issue, labour law issue, environmental or human rights issue, there’s a reflex to immediately start with a criminal action to show your determination to the other party. Every NGO, association or individual knows that if they want their case to be seriously considered by the opponent or the company, they need to communicate it this way,” says van Gaver.

Presenting facts in a compelling way

As courts in key European jurisdictions give growing weight to social justice considerations, companies facing collective actions must demonstrate good citizenship and social responsibility in the court of public opinion as well as before the judges.

“When it comes to these difficult disputes, clients need to make sure their voice is heard. They will need to use PR and communications experts who can help identify the more open and fair media so that their side of stories and the truth can be heard; you need to present the facts in a compelling way so the judges can be convinced that you deserve to win,” observes Rouhette.

Kami Haeri, head of commercial litigation and white-collar practices at Quinn Emanuel Urquhart & Sullivan’s Paris office shares a similar view.

“The reputational impact of a newly-born litigation or crisis affecting my clients can be analysed and understood by PR and media consultants in a way that lawyers are unable to achieve. In many cases, we’ve worked with clients’ in-house PR teams and external PR and media agencies. We bundle the forces to address the different views and the platform generally is created rather early,” says Haeri.

Haeri points out that business-to-consumer controversies around data protection, environmental and health are on the rise, and they are prone to generate huge amount of media coverage and public scrutinise. The speed of the deployment of a communication strategy is of paramount importance.

“The spread of the news is rapid. Often by the time we reach the ability to create the right narrative, some harm, a critical and immediate one, might have occurred. But it takes time to create the right narrative and understand what the threat to reputation is or how the strategy should be deployed. You must convince journalists that our narrative, our side of the story is worth discussing and understanding things are more sophisticated than they seem. So, the process of formulating a plan with the PR specialists must start as early as possible,” says Haeri.

“The reputational impact of a newly-born litigation or crisis affecting my clients can be analysed and understood by PR and media consultants in a way that lawyers are unable to achieve. In many cases, we’ve worked with clients’ in-house PR teams and external PR and media agencies”

**Kami Haeri
Quinn Emanuel Urquhart
& Sullivan**

Dubai

Dubai, arguably the most attractive financial centre in the Middle East, has established itself as a regional hub for dispute resolution. Much of its success is thanks to the Dubai International Financial Centre (DIFC). The special zone has its own body of laws and an independent juridical authority and courts that are modelled on common law system and operates in English, while the rest of Dubai operates under a civil law system where proceedings are conducted in Arabic. Backed by its robust and familiar legal system, the DIFC has been favoured by international businesses and financial services institutions as a gateway to operate and invest in the Middle East.

As the international business community and foreign investment grow within the DIFC, the volume of cases in the DIFC Courts have also risen significantly. According to official figures, in the first six months of 2021, the number of cases in the main Court of First instance increased by 11 per cent over the same period of 2020. The total value of cases across the CFI in the same period amounted to AED2.8bn, up 27 per cent year on year. The growth was achieved notwithstanding that all hearings now take place remotely through digital platforms following the onset of the COVID-19 pandemic.

International arbitration is another preferred method of dispute resolution in the UAE, particularly by multinational companies in the construction and real estate sector. Dubai has been a popular seat of arbitration for multinational companies.

Difference in media culture

The city has attracted many international law firms to set up shop to service clients and tap into the growing market. Litigation-focused US firm Kobre & Kim is among the most recent firms to land in Dubai, reflecting the city's growing importance in the global dispute resolution practice. It also plays host to a high concentration of British expat lawyers.

Lawyers who have relocated from the UK to Dubai and spent considerable time practising there can tell the distinctly different media culture in the Middle East's international hub. Reputational impact on a client involved in legal proceedings is always a consideration no matter where it takes place. But the level of concern for a commercial litigation case in Dubai is usually not so high as it would be in London.

"It was a much larger consideration when I was in London than in the Middle East," says a litigation partner of a global firm based in Dubai.

"I think it's the different approach that the press takes about reporting regionally. There's a lot of self-censorship in the press. They don't tend to report the names of parties to disputes because if they do cover it as a business story at all, it tends to be quite anodyne in comparison with how the public relations would be handled in the London market," he explains.

However, when working on a matter where there are real international consequences and something the international press would be interested, then in-house PR teams of law firms and the clients will be involved, according to several Dubai based in-house lawyers and litigators.

A litigation partner of a Dubai-based firm agrees with the observation, citing that local media's coverage is generally "friendly" in nature and editorial teams are reluctant to report anything negative or critical unless it can have no negative consequences on them.



The common understanding is that the definition of libel is much broader in the UAE than in the UK. For example, according to Dubai's Court of Cassation, mere criticism may be regarded as defamatory if it exceeds the 'normal limits' or affects the honour of a defamed individual. Unlike in the UK where defamation is a civil offence, in the UAE it is a criminal offence and carries a potential prison sentence.

UAE is one of the countries that has the highest internet penetration rate and around 98.98% of its population remain active on social media. However, there is also a high degree of self-censorship as messages and commentaries on a social platform can fall foul of the stringent cybercrime law and can lead to more severe punishment.

Litigation PR remains underdeveloped

Aside from its media environment, commercial disputes heard in Dubai (apart from DIFC courts) usually have few or no oral hearings. The public is not able to inspect court files and only the parties to the litigation and their lawyers have access to the records of proceedings, such as pleadings, evidence, and court orders. Although all proceedings are by law public, they remain confidential in practice.

For many high-profile cross-border disputes, parties mostly resort to international arbitration. In the UAE, particularly in the so-called "offshore" jurisdictions such as DIFC, confidentiality in arbitral proceedings is robustly upheld.

Furthermore, while third party litigation funding is not prohibited for DIFC cases, the mechanism for collective actions is yet to be developed in the region.

The combination of the local media environment and legal practices in Dubai means there is less impetus and urgency to engage PR specialists for litigation communication support. The only exception is when a case involves foreign elements or parties from foreign jurisdictions and significant enough to attract international media coverage.

"Clients in the region don't like to resort to media at all. Companies and law firms here usually take a very cautious approach towards the press and the use of social media," observes one litigation lawyer in Dubai.

There is also a tendency among clients to settle to avoid reputation fallouts or stop a dispute being aired in a public forum.

"Practically every case I deal with will have some aspect of that where clients are inclined to settle to avoid reputational damage. There are other concerns, such as the prospects of doing future business with the other party, or, if it's a state party continuing to be able to do business within the jurisdiction," says Paul Stothard, dispute resolution partner of Norton Rose Fulbright in Dubai.

"If the matter concerns any issue of fraud, sanctions, or other compliance issues that could lead to broader regulatory consequences, then clients would try to avoid the matters in dispute being aired in a public forum," he adds.

However, changes could be on the horizon as the disputes resolution landscape in Dubai evolves with new legislation and stronger enforcement by the regulators.

"We expect to see more enforcement actions relating to VAT and more bankruptcy cases as more people are trying to utilise the bankruptcy law that was introduced a few years ago. Issues related to capital markets, securities and mismanagement of listed companies is another area that's expected to grow in Dubai," predicts Dr Habib Al Mulla, executive chairman of Baker McKenzie's Dubai office.

"For now, PR is not a major consideration for litigation cases. But it could change soon as Dubai's litigation landscape is changing massively," says Dr Habib.

"Clients in the region don't like to resort to media at all. Companies and law firms here usually take a very cautious approach towards the press and the use of social media"

Dubai-based litigation lawyer

Singapore

Wide-ranging investment by the Singaporean Government into its legal infrastructure in recent years has meant the country's status as a global dispute resolution hub continues to go from strength to strength. With well over 100 international law firms located in the Lion City, either registered as foreign law firms or having formed formal law firm alliances, Singapore – as a neutral seat – attracts parties in disputes from all over the world.

Its media, too, is well-regarded and perceived as overall neutral. Publications, such as *The Straits Times* and *Asian Legal Business*, actively report in the disputes space, although anecdotally will adopt a more conservative approach when coverage involves state entities.

Reputation

When considering their company's involvement in any dispute, one general counsel of a Singapore-based energy company says that reputation is very important. "Although, most disputes we are involved in are of little interest to the public and/or would not have a reputational impact, as a general principle one of the biggest considerations when entering into, and managing, a dispute is reputation," adding that litigation PR is a "fundamental part of corporate reputation management".

Roger Milburn, a Singapore-based Investment Manager at disputes finance company Litigation Capital Management, and previously a lawyer at BCLP, who reviews litigation and arbitration cases for potential investment, explains that his firm considers its own reputation when reviewing the cases it will fund, particularly so as the firm is publicly listed in London. While many funders may also use litigation PR proactively to build on claims they are funding, such as class actions to attract more claimants.

Use of external PR

With their disputes on the whole garnering little public interest, the general counsel has in one dispute drafted in external PR in one dispute but would otherwise not do so unless there was reputational risk.

At his former firm, Milburn, too, has a small amount of experience working with external PR companies, particularly early on when a litigation strategy was being formulated, while an international arbitration lawyer at an international law firm says she has never encountered the use of external PR at all. However, she adds that "confidential arbitrations involving technical issues, for example, are not likely to have a PR element".

Settlement

For Milburn, the risk of a dispute becoming public can in some cases influence parties to settle, particularly if it is litigation as opposed to international arbitration. Although, "this would apply to parties in any common law jurisdiction where anyone can turn up and sit in court and reporters can report on court cases.", such as in Australia and the UK.

The international arbitration lawyer expands on this saying that while impetus to settle to avoid reputational fallout is "possible", "it depends on a host of factors, including relative strength of case"; a viewpoint shared by the general counsel.

Social media

While traditional legal reporting is neutral, social media commentary in Singapore can be more aggressive, Milburn notes, citing examples of what could be perceived as anti-foreigner sentiment at times.



"It is hard to say if social media has affected managing disputes specifically," says the international arbitration lawyer. "But as a general matter, [clients] value a social media presence and having accurate information portrayed on social media platforms."

The general counsel highlights the broad, ongoing risk to a company's reputation if a dispute plays out on social media, as well as the permanence of comments, concluding: "Social media stories can snowball very quickly, and we need to react quickly. There is also no way to require postings to be taken down, as would be the case with traditional print media."

"Although, most disputes we are involved in are of little interest to the public and/or would not have a reputational impact, as a general principle one of the biggest considerations when entering into, and managing, a dispute is reputation"

**General counsel of a
Singapore-based energy
company**

New York

New York City is home to many of the world's largest law firms and most prominent litigation practices. The largest legal market in the US and the global financial centre has become an increasingly strategic location for leading UK firms and their litigation groups. Freshfields Bruckhaus Deringer for example has been bulking up its securities and shareholder litigation practice in New York by hiring partners from US rivals.

Well-known for being a "litigious society", a signature feature of the US litigation landscape is the lawyer-led opt-out class action regime. This system has generated by far the most collective securities lawsuits in the world. Along with the robust media industry and strong freedom of speech protection in the US, it has also created a highly sophisticated litigation PR and crisis communication sector.

Litigation PR's impact on resolution

In most jurisdictions the main role of litigation PR falls in the reputation management aspect – protecting the clients' reputation before and during the trial and influencing attitude about the individual and companies.

While it is widely used in high-profile and high-stake legal matters for defendants in the US, other functions of litigation PR are more commonly carried out in the US compared to other jurisdictions.

For example, the use of litigation PR to manage how a case is publicised by the media can influence the outcome of the court case by pressuring the opponent through media coverage to settle early or favourably. It has the power to influence the negotiating position of the parties in disputes when they get to the settlement table.

It is a tactic frequently deployed for individual claimants in insurance litigation. By bringing the stories and allegations to major media outlets, as well as campaign on social media platforms such as Facebook and Twitter, the press coverage and public security put the insurance companies and those involved with the matter in the spotlight. If they are battered in media and social media for a considerable period, they are more likely to lean towards settlement or payouts.

According to PR specialist James Haggerty, the author of the book *In the Court of Public Opinion: Winning Strategies for Litigation Communications*, it is estimated that more than 95% of legal actions in the US settle before trial or other formal adjudication. That's why the court of public opinion is relevant and important – it is often the forum where the guilt or innocence verdict is ultimately perceived.

For parties in disputes, managing communications and media narrative effectively can have an impact on the outcome of the resolution.

Navigating a distinctive media environment

Freedom of speech is a sacred right protected by the First Amendment in the US. In the context of social media, while in Europe the "right to be forgotten" on the internet is allowed, the US courts hold the view that removal of articles or content from internet is impermissible.

In today's "digital first" publishing world, getting the narrative right and knowing what to communicate to the media before and during a litigation case and its ramifications is of more significance in the US' unique media culture.

"News stories about litigation can develop in real time as new details emerge. You'll lose control of the narrative when things on social media, in the midst of a trial, are going the wrong way. For example, when a witness statement is getting a ton of attention on social media. It's essential to have a PR team working hand in glove with the legal team to address that immediately and try and course correct as much as possible"

Justin Perras
Prosek Partners



“There’s a greater understanding today of the benefits of engaging in PR around litigation than five or 10 years ago. I believe social media plays a big part in it,” says Justin Perras, Managing Director at Prosek Partners in New York and former head of media relations for White & Case.

No longer were the days when a trial could generate a few news articles in the legal trade publications or several stories in the broadsheet newspapers for a period, and the buzz would go away when the news cycle moves on to the next thing.

“What has complicated things now is that social media, particularly places like Twitter, allows journalists to tweet live about what’s happening. If a lawyer, a witness or a judge says something that’s particularly interesting, that piece of information can get around quickly. As people retweet it, react to it and comment on it, it takes on a life of its own and creates news cycles in a way that it didn’t before,” says Perras.

The awareness of the concept of narrative is a much bigger emphasis now for clients, whether they are in litigation or not, says Perras.

“News stories about litigation can develop in real time as new details emerge. You’ll lose control of the narrative when things on social media, in the midst of a trial, are going the wrong way. For example, when a witness statement is getting a ton of attention on social media. It’s essential to have a PR team working hand in glove with the legal team to address that immediately and try and course correct as much as possible,” he continues.

Most of the time, litigation PR aspect of the overall strategy is invisible to the outside world. But it is increasingly appreciated and valued by clients and the legal profession. PR strategy is not a driving force behind a litigation strategy, but it works in concert with it and supports it. It’s described by one respondent as “one spoke of the wheel”.

“If a couple of the spokes of the wheel weren’t there, the wheel wouldn’t be quite as strong. Although they are there and you don’t notice them when the wheels are turning, it’s important to get everything moving forward nicely and get to desired destination successfully,” says the respondent.



Outlook

ESG to take centre stage in future disputes landscape

The global disputes sector continues to see matters evolving around privacy and use of data, and while the world awaits the raft of insolvency and other Covid-related claims that industry commentators have been predicting since the global pandemic began in early 2020, one area of litigation identified by the largest percentage of survey respondents and interviewees that looks set to dominate future disputes is ESG.

Top five areas predicted to dominate future disputes

Area	% of responses
ESG	30%
Collective actions	14%
Data privacy	10%
Medical/pharmaceutical	9%
Brexit	7%

Driven in large part by increased regulatory scrutiny upon corporates whose once voluntary regimes have turned into mandatory disclosure obligations, as well as heightened expectations from shareholders and investors on companies to adopt greater levels of accountability, one only needs to look as far as the marketing efforts of international law firms in the last 24 months to observe a concerted effort in pushing ESG-related dispute resolution services.

From a PR perspective, the potential reputational fallout from ESG-related violations can be game-changing for corporates – not only regarding regulatory fines and other restrictions placed on operations and trade, but also in terms of that company's ability to attract investment and talent even years down the line.

Conduct that has a real ethical nuance, that speaks to a culture of misconduct or lack of integrity among a company's board or senior leadership – such as matters involving human rights breaches, environmental disasters, climate change violations and discrimination – carries with it a high likelihood of playing out on the public stage.

There is also high litigation risk that can leave the company exposed to class and group actions, shareholder litigation, government prosecution and disputes around parent company liability across multiple jurisdictions – even when the action under dispute occurs in a different country and/or may have been attributable to a subsidiary company.

The immediacy of social media and the 24-hour news cycle makes it almost impossible for global corporations to be fully in control of a dispute as it arises. Maintaining a narrative, managing internal messaging to staff and external messaging to key stakeholders, while making regulatory disclosures and fielding media interest can feel like a game of whack-a-mole.

As one interviewee puts it: "These are areas where there is going to be clickbait. Any company which already, in of itself, has a bit of a public profile and there is an ESG slant to that, it will complicate the PR piece of a dispute or a developing dispute."

"These are areas where there is going to be clickbait. Any company which already, in of itself, has a bit of a public profile and there is an ESG slant to that, it will complicate the PR piece of a dispute or a developing dispute"

Byfield survey respondent

Finding the right line:
litigation PR in an evolving
dispute ecosystem

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