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LITIGATION & ALTERNATIVE DISPUTE RESOLUTION

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in litigation & alternative dispute resolution.

UNITED KINGDOM

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Respondents

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Q. Could you outline some of the current market challenges at the centre of commercial disputes in the UK?

A. English courts, and the Competition Appeal Tribunal in particular, are currently handling a growing wave of competition class actions and other types of mass claims against financial institutions and large corporates. The growth in competition collective actions follows the Supreme Court's decision in *Merricks v Mastercard* – in relation to interchange fees for card payments – in December 2020, which is generally considered to have made it easier for such claims to be brought. While this has been welcomed by claimants, it has prompted concern among companies faced with an increase in high-value claims, including both claims which follow-on directly from regulatory findings against the companies concerned, as well as many which do not rely directly on such findings. In addition to competition class actions, a number of claims have been brought against UK parent companies for alleged environmental, social and governance (ESG)-related breaches by subsidiaries in other jurisdictions. Among the most prominent of these claims is the Brazilian Fundão Dam litigation brought on behalf of over 700,000 individual claimants against BHP plc. Companies which have issued securities may also face claims from investors over alleged false or misleading statements and disclosures, utilising UK investor protection legislation.

Q. What general advice can you offer to companies on implementing an effective dispute resolution strategy to deal with conflict arising from commercial agreements?

A. In general, companies should consider how they will manage commercial disputes at the outset of transactions and review their strategy for dealing with conflicts as they arise through the lifecycle of the relevant business relationship. A clear contractual procedure for the escalation of disputes is often advisable and could, for example, require senior management meetings or mediation before formal proceedings can be issued. This may provide an opportunity to settle a dispute confidentially before a claim is filed, which may be particularly important if parties want to maintain a constructive business relationship once the dispute is resolved.

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However, adopting such procedures should be weighed against the scope to add unnecessary time and expense where it is clear that the claim in question is incapable of being resolved by agreement. Where it is not possible to resolve a dispute by agreement, including after mediation, companies should consider carefully at the outset, and ensure their agreements provide for, the most appropriate procedure and forum for resolving their disputes through litigation, arbitration or other binding process, such as expert determination.

Q. To what extent are companies in the UK likely to explore alternative dispute resolution (ADR) options before engaging in litigation?

A. It is relatively common for companies in the UK to explore alternative dispute resolution (ADR) options such as mediation or confidential 'without prejudice' negotiations before engaging in litigation and this may be a requirement under their contracts. The English Civil Procedure Rules also impose obligations on parties in this regard, for example providing that litigation should be a last resort, and parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings. Moreover, if a party refuses an invitation to participate in ADR, this may be considered unreasonable by the court, and could result in that party being ordered to pay additional costs. The court may also require parties to provide evidence that they have given appropriate consideration to ADR. In future, companies may also find it easier to enforce a settlement agreement resulting from mediation in other jurisdictions, once the Singapore Convention on Mediation has been ratified, following the decision by the UK to sign the convention in May 2023.

Q. How would you describe arbitration facilities and processes in the UK? Are local courts supportive of the process?

A. Commercial parties from a wide range of jurisdictions frequently select London as the seat for their arbitrations. This is generally to benefit from the pro-arbitration approach of English courts, the wealth of existing case law under the English Arbitration Act, the availability of specialist advisers and the wide range of facilities. The UK government is also

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taking steps to enhance London's standing as a preferred seat for international arbitration by amending the Arbitration Act, following recommendations of the Law Commission published in September 2023. The Arbitration Bill is expected to become law in 2024/25 and currently includes amendments to clarify the law applicable to arbitration agreements, codify the duty of disclosure for arbitrators and empower arbitrators to make awards on a summary basis in certain circumstances. London also has a number of dedicated arbitration facilities, as well as more general-purpose meeting and hearing rooms that can be used for arbitrations.

Q. What kinds of situations or circumstances might lead companies to pursue litigation instead of arbitration?

A. Whether litigation or arbitration appears more suitable for determining a dispute will generally be a very circumstance-specific question, involving weighing a number of factors. Examples which might lead companies to pursue litigation could include the following. First, the availability of summary judgment and other forms of early determination before trial, such as

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a preliminary issue. Second, the typically more extensive powers of the court to force parties to adhere to procedural rules and deadlines by penalising non-compliance. Third, the generally wider scope for appealing a judgment. Fourth, the precedential value of a public judgment, such as where the key issue in dispute is the meaning of a particular clause used in several contracts, whereas an arbitral award will generally be confidential. Fifth, the ability to bind third parties to the dispute. Finally, the high quality of English judges familiar with commercial and financial sector cases. Clearly, many of these factors cut both ways – for example, a company may want proceedings to be conducted confidentially or with more limited scope for appeals, both of which would point to arbitration. Depending on the relevant jurisdictions, it may also be easier to enforce an arbitral award than a court judgment. Other factors may not point strongly in either direction, such as the speed and cost of proceedings, which often do not differ considerably between litigation and arbitration, although this will depend on the subject matter of the dispute. In any case, litigation remains the only option for a number of types of dispute, such as competition collective actions.

Q. What practical challenges need to be dealt with when undertaking complex international, multijurisdictional disputes in the UK?

A. Commercial disputes involving more than one jurisdiction frequently give rise to complex and overlapping factual, legal and procedural issues. Certain situations, such as where regulatory authorities in several jurisdictions have taken enforcement action against multiple firms in relation to widespread alleged misconduct – for example in the financial sector – are liable to result in claims brought by a wide range of claimants in multiple jurisdictions and on various bases. This can be illustrated by, for example, the variety of claims in the US, UK and European Union arising from enforcement action in relation to interest rate benchmarks. In such situations, a coordinated strategy, and expert and experienced advisers working with high-calibre local counsel, is of critical importance. Companies will also need to be alive to significant differences in law and procedure between jurisdictions, given the

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scope for steps in one jurisdiction to affect claims in others, including differences in the scope of legal professional privilege to protect documents containing legal advice.

Q. What considerations should companies make when drafting a dispute resolution clause in their commercial contracts to address the possibility of future disputes?

A. Dispute resolution clauses can have major implications for the conduct of disputes and the enforcement of companies' rights. Such clauses should therefore be carefully considered, while the wider agreement is being negotiated, and calibrated in light of a number of factors. Fundamentally, the drafting of a dispute resolution clause must be clear and unambiguous. If not, there is an increased risk of satellite litigation as to the clause's effect, and even that one of the parties will find itself litigating before the courts of an unexpected jurisdiction. Consideration should also be given to aligning dispute resolution clauses, including any requirements for the parties to engage in ADR, across different agreements that comprise the overall transaction. ❑

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