

ANNUAL REVIEW

Litigation & alternative dispute resolution

REPRINTED FROM
ONLINE CONTENT
NOVEMBER 2017

© 2017 Financier Worldwide Limited
Permission to use this reprint has been granted
by the publisher



PREPARED ON BEHALF OF



SCA ONTIER

FINANCIER
WORLDWIDE corporatefinanceintelligence



UNITED KINGDOM

PAUL FERGUSON

SCA ONTIER LLP

Q ARE YOU SEEING ANY RECURRING THEMES IN COMMERCIAL DISPUTES IN THE UK? DO ANY PARTICULAR INDUSTRIES OR SECTORS SEEM TO BE PLAYING HOST TO A SIGNIFICANT NUMBER OF DISPUTES?

FERGUSON: Not necessarily recurring themes, but we have certainly seen a drop off in disputes arising out of the financial crisis and an increase in disputes arising out of the uncertainty created by Brexit. There has also been a growth in litigation funding and, perhaps, more fundamentally, a growth in the awareness of litigation funding as a viable means of bringing a claim. Whereas a few years ago Russian businesses and businessmen were dominating the disputes sector, we have seen more disputes from developing nations. One other noticeable change is that we have seen that parties are more inclined to make allegations of fraud in order to raise the stakes and seek a wider range of remedies than was the case even a few years ago.

.....

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF MEDIATION, ARBITRATION, LITIGATION AND OTHER METHODS?

FERGUSON: An effective strategy requires considering the range of dispute resolution processes available and which may be appropriate in the circumstances. For example mediation, a confidential and flexible process in which a mediator assists parties to seek to resolve their dispute, may be particularly effective where businesses wish to preserve ongoing relationships. Naturally, not all disputes can be resolved commercially and adjudicative processes such as arbitration or litigation will be necessary. Various factors – such as time, cost, confidentiality, forum, any required expertise and level of control – will influence the most appropriate mechanisms. Whatever the chosen method, planning and preparation, including strategies to seek to minimise the risk of a dispute arising or escalating, and ongoing management, are key.

.....



Q IN YOUR EXPERIENCE, ARE COMPANIES IN THE UK MORE LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION? ARE THERE ANY LEGAL OR PROCEDURAL OBSTACLES TO A SUCCESSFUL ADR PROCESS?

FERGUSON: It depends on the size of the claim and stature of the parties in dispute. In smaller claims, the parties are perhaps more likely to explore ADR options when faced with the possibility of significant legal expenses as against modest returns. In larger claims, or claims brought by or against larger enterprises, pre-action ADR is more of a rare commodity. Once a claim has been issued, or when the parties realise the commercial realities of a full trial, ADR more often than not resurfaces as a viable option.

.....

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN THE UK? TO WHAT EXTENT IS ARBITRATION BECOMING THE DOMINANT METHOD OF RESOLVING INTERNATIONAL DISPUTES?

FERGUSON: The arbitration facilities and processes in London are of course excellent, as one would expect of a major international arbitration centre. If London is to maintain its status alongside New York as the leading international centre for arbitration that must remain the case and, given the pressure being exerted from a number of other newer international arbitration centres, it must continue to improve. As for dominant method, it is hard to say, as much will depend on the circumstances of the particular agreement as to which will be preferable.

.....



“Whatever methods or forum may be considered appropriate; this should be built in to the contract in clear terms.”

Q IN YOUR EXPERIENCE, WHAT STEPS SHOULD COMPANIES TAKE AT THE OUTSET OF A COMMERCIAL AGREEMENT TO MANAGE DISPUTES THAT MAY ARISE IN THE FUTURE? IS ENOUGH ATTENTION PAID TO DISPUTE RESOLUTION CLAUSES IN COMMERCIAL AGREEMENTS, FOR EXAMPLE?

FERGUSON: In negotiating any transaction, a company will wish to focus not only on the commercial terms, but also anticipate the types of dispute which may arise and where and how best to seek to resolve them. Businesses will be familiar with the range of dispute resolution processes available, including non-adjudicative forms of dispute resolution, such as mediation, and adjudicative methods, such as arbitration or litigation. Indeed, we increasingly see the use of hybrid processes and multi-tiered dispute resolution clauses, reflecting more sophisticated approaches to dispute resolution. Whatever methods or forum may be considered appropriate; this should be built in to the contract in clear terms. A clause, such as an arbitration clause, which is ineffective, unclear or ambiguous, could lead to satellite litigation, ultimately delaying resolution of the dispute and increasing costs, among other potential consequences. In short, the importance of governing law and dispute resolution clauses should not be underestimated and it would be unwise to regard these simply as ‘boilerplate’ clauses.

Q TO WHAT EXTENT CAN COMPANIES AVOID DISPUTES BY BEING MORE DILIGENT IN THEIR DEALINGS WITH POTENTIAL BUSINESS PARTNERS?

FERGUSON: At the risk of sounding cynical, disputes themselves can never really be avoided in the commercial, or any, world. All that companies can do to protect themselves is to agree at the outset clear procedures to work through those disputes, making sure that the contractual documentation is clear and precise with as little room for different interpretations as possible. Most companies will have a pretty good idea where disputes can and do arise in their business dealings so that foreseeability enables a company to minimise the commercial disruption when problems are encountered.

Q HOW IMPORTANT ARE EXTERNAL ADVISERS TO HELP COMPANIES NAVIGATE THEIR WAY THROUGH A COMMERCIAL CONFLICT?

FERGUSON: An external adviser needs to wear two hats – one commercial that understands the nature of the client’s business and the commercial realities of the dispute, and the other legal to enable him or her to best serve the client’s interests. An external adviser who can marry the two will be able to provide invaluable support to a company navigating its way through a commercial conflict.

.....



SCA ONTIER



www.scaontier.com

Paul Ferguson

Partner
SCA ONTIER LLP
+44 (0)20 7183 1701
paul.ferguson@scaontier.com

Paul Ferguson is a highly experienced litigation and arbitration lawyer, with particular expertise in high-value international finance disputes. Well-known for his prowess in cross-border litigation, Mr Ferguson is recommended in The Legal 500 for both commercial litigation and civil fraud.



www.financierworldwide.com