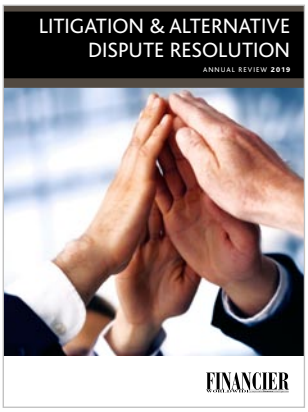

WALKER MORRIS

ANNUAL REVIEW Reprint November 2019

Litigation & alternative dispute resolution

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

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Nick Lees specialises in commercial litigation and advises on a broad range of commercial matters. His experience includes disputes concerning trading relationships, transactions, employees, banking and finance, professional negligence and fraud. He also advises in connection with shareholder disputes, partnership disputes and claims concerning directors' duties. His practice encompasses litigation, arbitration and mediation and he has advised clients in regulatory investigations and proceedings before regulatory bodies. He has also been endorsed by 'The Best Lawyers in the United Kingdom' directory for litigation.

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?

LEES: Since the General Data Protection Regulation (GDPR) came into force last year, consumers have become increasingly aware of their status as data subjects and emboldened in relation to the exercise of their rights. For example, we are seeing data subject access requests being used tactically, both prior to and alongside the litigation process. While the floodgates have not yet opened to US-style class actions in data breach cases, this is an emerging threat highlighted by the Court of Appeal's recent decision in the *Lloyd v. Google* case. There has been a flurry of recent commercial contract cases in the courts, particularly surrounding contract formation and interpretation, highlighting the risks associated with informality and underlining why certainty is key when it comes to entering into and drafting commercial agreements. An increasing number of parties are seeking advice on termination or variation of unfavourable contracts with suppliers and customers, for example in IT, logistics, warehousing and manufacturing. There is also a perception of a rise in professional negligence

disputes. In our experience, there has been an increase in IT outsourcing and software licensing disputes and an increased number of allegations of fraud, civil bribery and conspiracy to injure as part of wider commercial disputes. We have also seen several shareholder disputes arising in successful entrepreneurial companies which have been through a period of rapid commercial growth and expansion without pausing to revisit the governance structure and constitutional documents. These disputes are hard fought and can distract stakeholder focus from more productive commercial matters.

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?

LEES: It is worth making the upfront investment with the legal team and experts to really get under the skin of a dispute. Clients are then well-positioned to weigh up the risks and cost/benefit of taking a case to trial. Timing of settlement discussions and mediation is key and regular discussions should take place between lawyer and client to monitor this on an ongoing basis. The most cost-effective method of dispute resolution will, in many cases, be a form of alternative dispute resolution (ADR). Parties should bear in mind, however, that there is a major drive toward the courts offering more varied, flexible and cost-effective dispute resolution options. Recent innovations include the Shorter and Flexible Trials Schemes.

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?

LEES: Generally, parties are ready and willing to explore ADR. The courts can apply costs sanctions where a party unreasonably refuses to participate in ADR. Unless matters require urgent resolution or relief, we are now seeing many parties seeking to explore ADR, and mediation particularly. Substantial contracts will often mandate that parties engage in mediation to seek to resolve or narrow the scope of the dispute before entering litigation. While adjudications were previously largely limited to construction disputes, we are also increasingly seeing parties

agreeing to adjudicate on non-construction related matters in order to obtain a swift resolution, which is often accepted by them as final. Aside from the legal merits of the case, there are very few, if any, legal or procedural obstacles to a successful ADR process and factors that may frustrate it are more usually commercial.

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?

LEES: London boasts a wealth of highly experienced practitioners and arbitrators and is home to the London Court of International Arbitration. World-class facilities include the new International Arbitration Centre. There remains a concern that arbitrator availability in heavy arbitrations can lead to delays, but arbitration remains an attractive and effective method of resolving international disputes due to its procedural flexibility. There are moves for 'English' arbitrations to be heard abroad, but parties seem willing to continue with London as a seat and English as the governing law, reflecting well on the current processes. Expedited procedures allow parties to arbitrate at reasonable and proportionate cost, and obtain a quick resolution, especially where they can agree to resolve the dispute based on documents alone, avoiding the need to attend a hearing in person. While court litigation remains as popular as arbitration, arbitration has become the dominant method of resolving international disputes in the oil & gas sector.

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?

LEES: At the outset, when parties are seeking to work constructively together, they often fail to plan how they will resolve disputes if issues do arise. Effective strategies should be implemented when relationships commence, well in advance of any dispute becoming a reality. A well-structured clause can require matters to be escalated to senior representatives swiftly, and facilitate sensible commercial discussions using ADR in an attempt to resolve issues, keep a relationship on track and avoid potentially costly litigation or arbitration. We see 'boilerplate' clauses where little thought has been given to the type of dispute which might arise or how, practically, parties would wish to approach its resolution. In complex contracts, it is important to consider whether different mechanisms should apply to different aspects of the contract. Careful drafting of governing law and jurisdiction provisions can lead to significant time and costs savings.

Q. To what extent can companies avoid disputes by being more diligent in their dealings with potential business partners?

LEES: Many contractual disputes emerge or escalate due to a lack of diligence on behalf of one or other party. It is helpful in managing legal risk and avoiding disputes for companies to regularly review their contractual arrangements and ensure that they remain appropriate and fit for purpose as commercial relationships evolve and change over time. Key performance indicators (KPIs) in commercial contracts remain a regular source of uncertainty and 'toothless' obligations, lacking the

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clarity and contractual machinery to be enforced with any certainty legally or to give rise to express or common law termination grounds.

Q. How important are external advisers to help companies navigate their way through a commercial conflict?

LEES: Parties can take a lead in structured commercial negotiations, but they still invariably depend on external advisers when it comes to progressing formal disputes, both in terms of practicalities and tactics. External advisers can share an arm's length perspective, which is valuable in helping decision makers to reach their commercial decisions, including developing innovative strategies to break the deadlock between parties and help resolve disputes at an early stage. Lawyers play a vital role in enabling parties to understand the legal position and the strength of their case, as well as explaining complex legal procedure. Other expert advisers are also very important. For example, forensic accountants are often required to provide the client with advice on issues of quantum. Unless the parties understand the value of their claims, it is difficult to engage in meaningful settlement discussions. A closer involvement of external advisers at the point of contracting and at the outset of a potential dispute would potentially avoid or significantly mitigate many disputes.

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