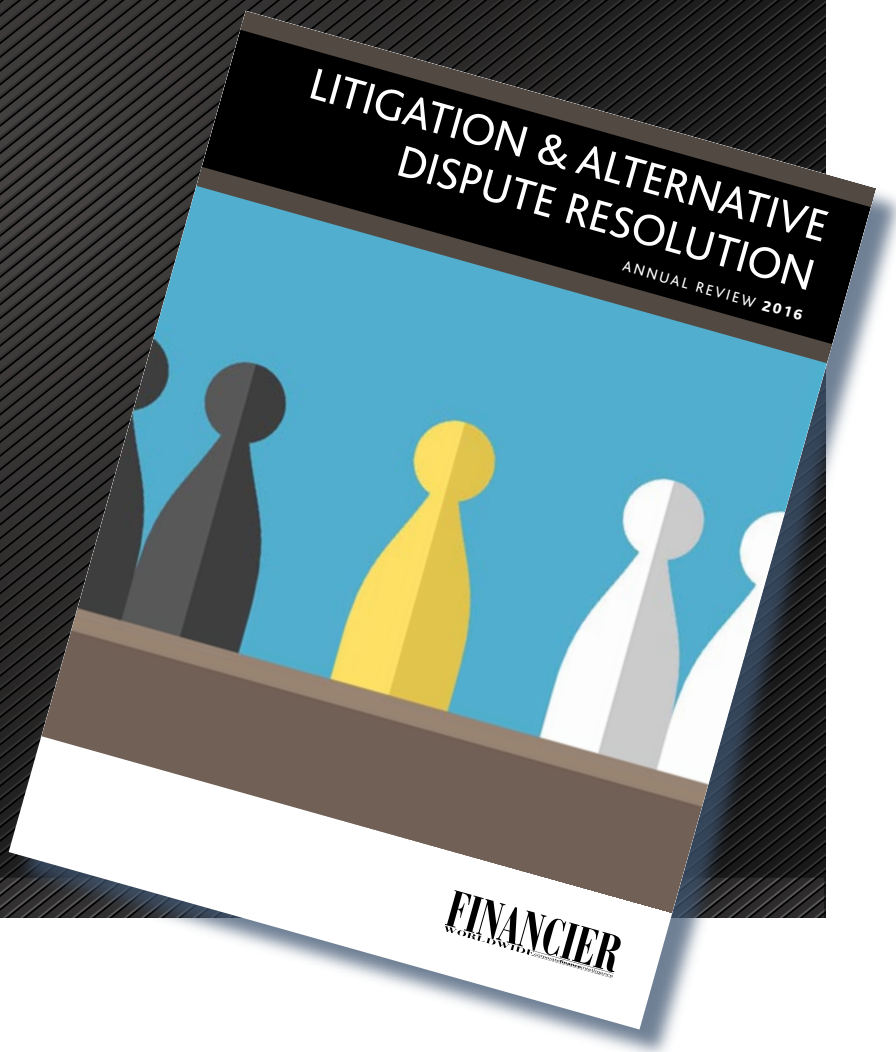
ANNUAL REVIEW

LITIGATION & ALTERNATIVE DISPUTE RESOLUTION



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UNITED KINGDOM

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Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN THE UK?

CANDEY: Companies and individuals need clarity when it comes to legal fees and budgets. Lawyers who offer fixed fees, value based billing or success based billing will find themselves in a better position than those who ask for blank cheques each month. English lawyers are now able to offer Damages Based Agreements (DBAs) whereby fees are calculated as a percentage of recoveries on a contingent, or 'no win – no fee', basis. Those lawyers who are willing to share risk and reward in this fashion will find themselves far better placed to win work from new clients.

Q WHAT GENERAL ADVICE CAN YOU OFFER 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?

CANDEY: Choose a lawyer with commercial nous. No one should have to pay for an essay in response to a straightforward question; advice should be concise and creative. Dispute resolution, whether court proceedings, arbitration or mediation, should not be a cash drain. Litigation can often be very positive. It should always be seen as an opportunity to generate cash for a business or protect the balance sheet.

Q TO WHAT EXTENT ARE COMPANIES IN THE UK LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION?

CANDEY: ADR is likely to be considered alongside litigation. The judge or arbitral tribunal will expect the parties to explore ADR options. Those who refuse to engage in mediation at some point before trial may be penalised when it comes to recovering legal costs. But not all disputes are suitable for ADR. Do not get side-tracked and do not spend a disproportionate amount of time or money on ADR. Sometimes the best option is to fight, or to attend a mediation and use it as an opportunity to make clear to your opponents that if they are not prepared to settle on favourable terms, you are resolute in going all the way.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN THE UK? ARE LOCAL COURTS SUPPORTIVE OF THE PROCESS?

CANDEY: It is important to make three key distinctions between the question of applicable law, the procedural rules which are to apply and the 'seat' or place of arbitration. For example, you could have an arbitration where the parties have agreed that English law governs any dispute, under the rules of the ICC and it will take place in Hong Kong. The facilities in London – in terms of different buildings that will host arbitrations – are pretty good, but where London excels is the number of available arbitrators who are specialists in English law, which is seen internationally as arguably the fairest law available to international disputes. English courts are supportive of the process and will uphold any recognisable award from a known arbitral body.

Q WHAT KINDS OF SITUATIONS OR CIRCUMSTANCES MIGHT LEAD COMPANIES TO PURSUE LITIGATION INSTEAD OF ARBITRATION?

CANDEY: Firstly, arbitration can only be pursued where parties had previously agreed to submit to arbitration by way of contract. Indeed, where they have done so and one party launches court proceedings, the other party can halt those proceedings in favour of an arbitration. The party can also elect to ignore the contractual agreement and choose to fight in the courts. The advantage of litigation is that it is much cheaper than arbitration – where you have to pay the arbitrators' time costs – and, depending on your strategy, it is not confidential. Arbitration is held behind closed doors; High Court litigation takes place in a public court. You may take the view that there is no dispute and that you need to wind up the company or that provisional liquidators should be appointed on a just and equitable ground, because the company's management cannot be trusted. These are situations where, despite the existence of an arbitration clause, you may be able to have the court intervene. The other chief area to litigate before the court is where you need emergency relief, such as worldwide freezing injunctions to freeze bank accounts, seize assets and computers or passports, and obtain disclosure orders.

Q WHAT PRACTICAL CHALLENGES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTIJURISDICTIONAL DISPUTES IN THE UK?

CANDEY: You need to work with lawyers who have strong working relationships with overseas law firms. This is sometimes better than using one firm with worldwide offices as your lawyer can pick and choose who they want to work with, as opposed to having to use the firm's designated man or woman in a country, even though they would prefer to work with someone they rated in a leading firm in that region. Time differences are always challenging, particularly when you are dealing with Australia, the Far East, London, New York and the West Coast of the US on the same commercial dispute. The key is to have a lawyer in charge who is nimble, flexible and has strong leadership skills. This is where personality, concise communication skills and a sense of humour are so important to bind the team. The last thing you want is a poor communicator who writes reams of legalese and is unable to quickly build trust and establish close relationships.

"No one wants to have a pretty judgment that they cannot enforce."

Q WHAT CONSIDERATIONS SHOULD COMPANIES MAKE WHEN DRAFTING A DISPUTE RESOLUTION CLAUSE IN THEIR COMMERCIAL CONTRACTS TO ADDRESS THE POSSIBILITY OF FUTURE DISPUTES?

CANDEY: Ask whoever is drafting your contract to run the dispute resolution clause past a good litigator. They will be the ones who have to deal with the clause when a dispute kicks off and it is better that they are consulted in advance. Ensure that they are commercial and creative. No one wants to have a pretty judgment that they cannot enforce. It is essential that you have a dispute resolution clause which gives you control and acts as a deterrent to ensure that if matters turn sour, you are suitably armed and protected to recover your cash. A good tip that is often missed is to ensure that there is also a contractual indemnity clause for all your legal costs. Under English law you never recover all your costs. With a contractual clause which provides that the other side pays all of your costs, you stand a much better chance of recovering all your costs and incentivising your lawyers to potentially take on a case on the basis that they will be paid by the other side when they win.

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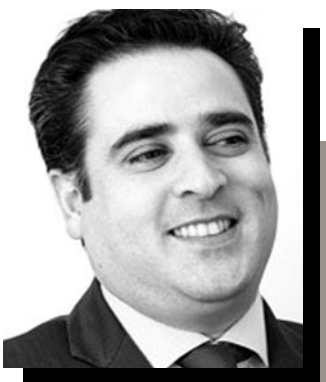

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Ashkhan Candey and Andrew Dunn lead the team of 15 lawyers at leading litigation boutique CANDEY. Their advice brings the benefit of business nous, both legal and commercial, and a long track record of successive wins and major settlements in High Court proceedings and international arbitrations. Ashkhan Candey has full rights of audience as a solicitor advocate in England and is a Barrister (non-practising). He is also admitted as a solicitor advocate (non-practising) in the British Virgin Islands. In addition to being a solicitor in England, his colleague Andrew Dunn is called as a solicitor in the British Virgin Islands.

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