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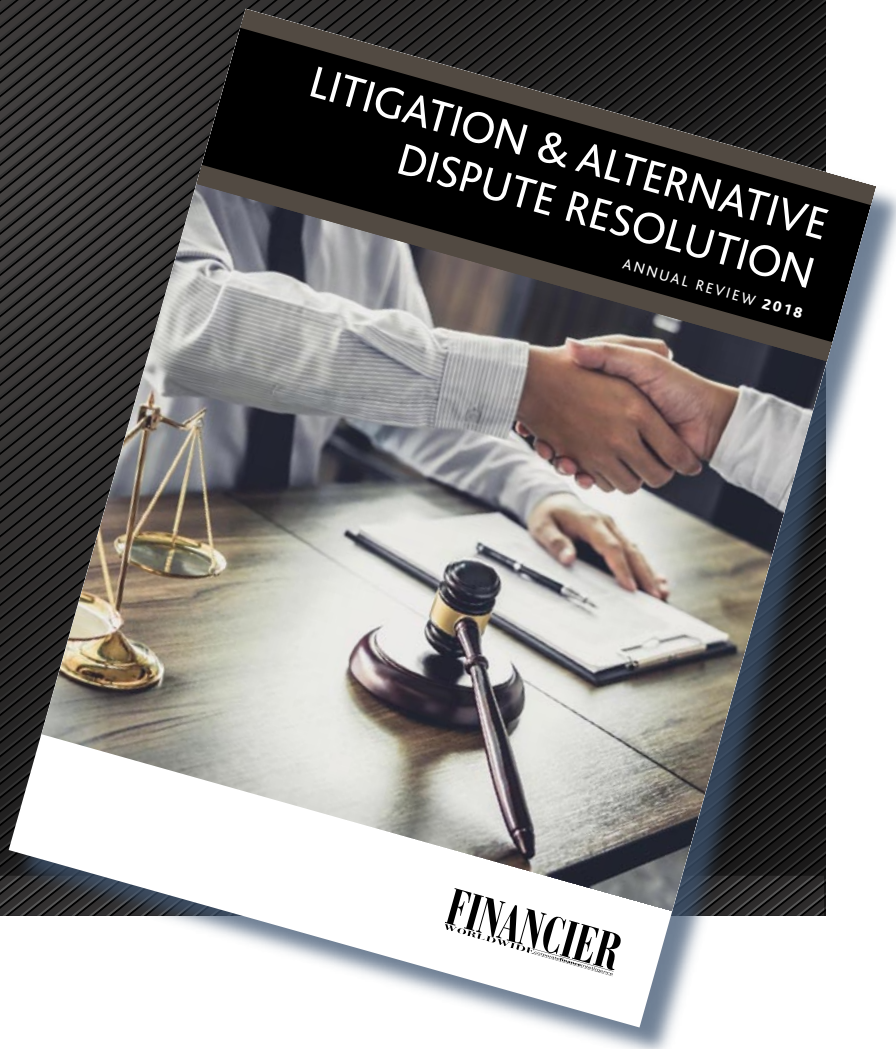
ANNUAL REVIEW

Litigation & alternative dispute resolution



REPRINTED FROM
ONLINE CONTENT
NOVEMBER 2018

PREPARED ON BEHALF OF

CANDEY

FINANCIER WORLDWIDE corporatefinanceintelligence

United Kingdom

ASHKHAN CANDEY
CANDEY
Managing Partner
+44 (0)20 3328 7774
acandey@candey.com

Ashkhan Candey, together with Andrew Dun, heads up the 20 lawyer team at leading litigation boutique CANDEY. Mr Candey is an enterprising, straight-talking lawyer who primarily acts for entrepreneurs. He aims to find solutions to complex problems by embracing the law and taking commercial risks.

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

CANDEY: Access to litigation funding and liability for adverse costs – meaning payment of your opponent's costs should you lose – remain one of the biggest market challenges to companies or individuals without access to capital. The ability of lawyers to charge fees on a percentage basis is a helpful development in this regard, but questions as to the legislative framework that governs contingency agreements and how the English 'damages based regulations' work mean that many lawyers are weary of entering into them. Having a sufficient number of judges is another challenge. Recent judicial appointments of a number of judges to the High Court bench has been a very welcome relief to the Court's listing department.

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: Mediation can occur at any time. A prudent player should always ensure that, where possible, they agree that disputes will be resolved by a court in a country where they have confidence in the legal system and where the country of domicile will recognise and enforce any judgment. Otherwise, if there is no confidence in the judicial system or there is a threat of political interference or bias, opt for arbitration to avoid lengthy, flaky judicial systems where the pursuit of justice could take years. Also, parties must consider that they may have to sue non-contractual parties in fraud and conspiracy. Consider where these individuals could be based and provide a carve out where cases of fraud can be pursued before a national court, to avoid the cost of concurrent proceedings and an arbitration.

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

CANDEY: The Civil Procedure Rules 1999 revolutionised the approach to English litigation. The rules require that parties identify their case prior to the issue of proceedings and the unreasonable failure to engage in mediation before trial will result in being penalised by way of costs orders against the party who refuses to engage. There is, however, no requirement to engage in mediation before the issue of proceedings. Delay itself can be fatal. ADR – notably, mediation – should always exist in parallel to court proceedings, particularly where there is a risk that delay will damage the case. Consider mediation clauses carefully. We have seen situations of poorly drafted agreements where there is an absolute contractual requirement to engage in mediation beforehand and where the defaulting party has sought to capitalise on the delay created by a mediation clause.

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

CANDEY: Arbitration facilities and processes in the UK are excellent. Under the Arbitration Act 1986, the Commercial Court is empowered to assist in the enforcement of arbitral awards and provide ancillary remedies, such as *ex-parte* freezing injunctions.

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

CANDEY: It is possible that you end up with arbitrators who you think are biased or incompetent. You may therefore place more trust in a High Court judge. Arbitration is a confidential process. There may be strategic reasons why you want publicity. The parties have to bear the costs of the arbitral body and each arbitrator. Court fees are minimal in comparison. Many cases involve substantial and multiple interlocutory applications where, for example, you may want to freeze assets or imprison someone for contempt of court. Arbitration may prove to be unattractive in such situations.

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

CANDEY: Putting together a top legal team, funding them and having funds available to pay any adverse costs are the chief challenges. Instructing a law firm with multiple offices around the world may appear to be the obvious choice, but you could end up with a great firm in London and mediocre support elsewhere. Using independent litigation leaders who have strong relationships with other top firms around the world may be a more attractive option.

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

CANDEY: Always insist on a dispute lawyer drafting the dispute resolution clause. In most cases the people drafting these clauses are corporate lawyers who do not undertake disputes, and when a dispute arises they drop out of the picture. Dispute resolution clauses should ensure there is no contradiction between the forum and applicable law. We have seen contracts which provide for arbitration and

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the courts to resolve a dispute or have English law as the governing law, but with a New York court to determine the dispute. Parties must also consider whether they want to have three arbitrators determine a £100,000 dispute, when the arbitrators' fees will be significantly in excess of this sum. Parties must ensure that any ADR process runs concurrently and will not hold up access to justice. They must also consider how service might be affected. Some countries have very odd service provisions which can delay service of proceedings for months. Consider what law as to service will apply and agree a contractual method for service which will avoid following archaic and obscure rules as to service of foreign proceedings. Ultimately, parties must keep it simple and consider in what jurisdictions disputes might arise. The real attraction of arbitration is that almost every country will recognise an arbitral award and should enforce it as signatories to the New York Convention. The same cannot be said, for example, about seeking to enforce a Paris court judgment in Russia. ■

ASHKHAN CANDEY
Managing Partner
+44 (0)20 3328 7774
acandey@candey.com