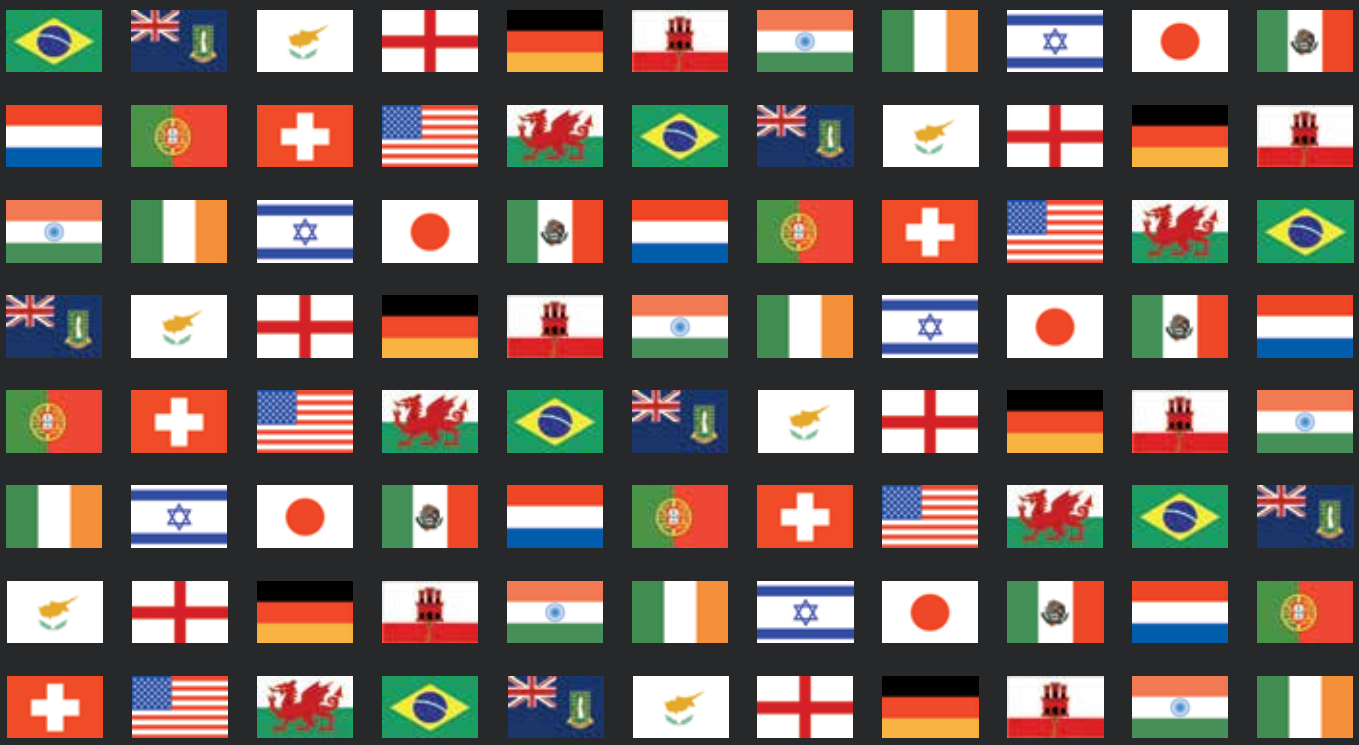
Complex Commercial Litigation

Contributing editors
Simon Bushell and Daniel Spendlove



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GETTING THE DEAL THROUGH

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Complex Commercial Litigation 2018

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CONTENTS

Introduction

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Welcome to this first edition of *Getting the Deal Through – Complex Commercial Litigation*. This publication is a new concept, that, uniquely, focuses exclusively on the intricacies of commercial litigation practised internationally.

The questions and answers have been tailored to provide corporate counsel and practitioners with a guide to commercial litigation in the major jurisdictions of the world. We hope that it provides a useful road map in navigating the key distinctions between those jurisdictions, as well as the similarities.

A principal aim of this publication is to provide guidance to parties (and their advisers) who may be involved in complex commercial litigation in the jurisdictions covered. However, we also hope that it will prove to be a useful resource when commercial contracts are negotiated. Often in those negotiations commercial parties pay little (or no) attention to dispute resolution mechanics, or treat them as an afterthought (evidenced by the fact that they are invariably at the back of the contract!). However, as will be clear from this publication, there are some fundamental differences in the practice of litigation between the major jurisdictions of the world. This presents contracting parties with an opportunity to select a forum that is either the most appropriate (or equally not the least appropriate) to their commercial relationship and the disputes that are likely to arise under it. For example, in many cases, litigating a dispute in one party's 'home' jurisdiction can provide that party with a clear tactical advantage over the other. This publication aims to provide a comprehensive but practical guide to the factors that ought to be considered in this regard. It will also address the critical issue of whether parties' choices of jurisdictions (contractual or otherwise) will be upheld when disputes arise.

One key factor that commercial parties typically consider in deciding between jurisdictions is the costs of litigation. In our experience, the three central questions tend to be:

- What costs will we have to pay?
- Can we seek third-party funding or incentivise our lawyer by offering a share in the recoveries?
- Can we shift the costs burden onto our opponents if we are successful?

When answering these questions as English legal practitioners, we are mindful that while England is generally perceived as a highly attractive jurisdiction in which to resolve complex commercial disputes, it is perceived to be one of the most expensive jurisdictions in which to litigate. Perceptions, of course, are very important. However, it is very easy to criticise high litigation costs if they are disproportionate to what is at stake. This publication is focused on complex commercial disputes, and often costs will be justified regardless of the outcome. Where a case is, however, cost-sensitive, there are ways of managing the issue. Costs can be a tremendous burden on a claimant, but in a system such as that which prevails in England, the fear of having to pay a successful claimant's costs can propel a case towards settlement. Equally, a defendant can use security for costs as a powerful weapon, typically against a foreign claimant. These considerations do not prevail across the Atlantic, where there are different causes for concern, such as jury trials and punitive damages, to name but two.

Another trend in the English litigation market is the increasing use of alternative ways to fund litigation costs. In a highly competitive world, commercial parties are understandably anxious to explore ways of pursuing and defending litigation without having to tie up substantial amounts of working capital in doing so. External litigation finance has emerged in several jurisdictions as an increasingly popular tool to allow parties to share the costs, risks and rewards associated with litigation with a third party. In some jurisdictions, such as Australia, litigation funding is a mature market. In other jurisdictions, such as England and Germany, it is a less mature but rapidly growing market. This publication will consider the availability of the different ways of funding and de-risking litigation in the major litigation centres, and whether there are any restrictions on their use.

This publication also discusses the recent emergence in the English litigation market of the use of group litigation and class actions. The English market is still behind other jurisdictions, such as the United States, in this respect; but it is quickly catching up. It is a beneficial tool for claimants, providing access to justice to those who may not otherwise have been able to afford to litigate alone, and it can be an efficient way of resolving issues that are common between thousands, if not millions, of claimants.

In any publication that focuses exclusively on litigation, there is always an elephant in the room: arbitration. The question, 'which is better for complex commercial disputes, litigation or arbitration?', is, to coin an often-used lawyers' phrase, a highly fact-dependent one. However, what is clear is that the continued emergence of a number of highly successful and high-quality regional arbitration centres (such as Singapore and Dubai) has only served to cement the importance of arbitration in complex commercial dispute resolution. Our own view is that litigation and arbitration can, and should continue to, coexist. However, in order to meet what is often perceived as a growing threat from arbitration, many jurisdictions have responded in perhaps the best way possible – innovation. The main beneficiaries of this are the users of the system, namely the parties who are litigating.

In England, for example, the creation of the Financial List in late 2015 was widely seen as a welcome development to enable London to confirm its status as the pre-eminent centre for the determination of complex banking and financial markets disputes. The idea behind this is to bring together a number of specialist judges to determine such disputes, which often demand a high level of technical and industry knowledge and expertise (a key selling point of arbitration). The feedback so far from this arguably long-overdue development has been positive.

It follows that, rather than posing a threat, arbitration can enhance domestic litigation systems (which, in many cases, were established hundreds of years ago) by encouraging them to adapt and respond to the demands of modern-day commercial parties.

A related trend in litigation is the increased use of technology both inside and outside the courtroom. For example, the courts in the Republic of Ireland were the first in Europe to approve the use of machine-based predictive coding for a review of documents for disclosure. The courts in England have since followed suit. Although we are confident that lawyers are not about to be replaced by robots, this development does underline the role and importance of technology to streamline the litigation process, including trial, and make it fit for the modern commercial world. This guide will outline a number of other ways that technology is making litigation as user-friendly as possible in jurisdictions across the world.

Finally, no introduction to a publication such as this would be complete without mention of 'Brexit', which is currently the talk of many litigation practitioners in Europe and beyond. Although the legal framework for civil litigation in Europe may not be at the top of the political agenda in the ongoing talks, the general sentiment is that the current regime governing the rules on service of proceedings and mutual recognition and enforcement of judgments must continue, in substance, if not in form, if the UK and Europe are to have any meaningful trading relationship post-Brexit. The response by the French courts – to seek to create an English-law-only court to determine disputes that would otherwise be determined by the English courts – has been seen by many as an ambitious and highly opportunistic step to take (if not also a flattering one). It does, however, underline the importance of the interplay between litigation and the wider political and economic environment in which it operates. It also demonstrates that competition between the major litigation centres for complex commercial litigation has never been greater. That, in our view, can only be a good thing for commercial parties.

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