Simon Bushell

GLOBAL TRENDS

SIMON BUSHELL OF SIGNATURE LITIGATION

Described by *Chambers UK* as a 'go-to lawyer when the stakes are exceptionally high', Simon Bushell regularly advises on high-value complex commercial disputes, including investment banking disputes, breaches of trust and fiduciary duty, professional negligence, money laundering, bribery and corruption, and shareholder disputes, as well as a wide variety of general commercial disputes. Mr Bushell has undertaken investigations into complex, worldwide frauds, conspiracies and insolvencies, and has wide experience in coordinating parallel cross-border disputes and proceedings before a number of courts and tribunals. Mr Bushell also has substantial international arbitration experience, in particular in the LCIA.

Mr Bushell is general editor of *International Fraud and Asset Tracing*, co-author of *Disclosure of Information: Norwich Pharmacal and Related Principles* and lectures widely on topics relating to international disputes, fraud litigation and crisis management.

Mr Bushell's recent experience includes acting for: Bluewaters Communications Holdings LLC regarding claims against Bernie Ecclestone, Bambino Holdings Limited and Bayerische Landesbank (BayernLB), arising from the $2 billion purchase of Formula One in 2005 by CVC Capital Partners; and Ontario Teachers' Pension Plan Board in a dispute with Macquarie Bank concerning a joint investment in Brussels Airport.

At the time of writing, it has been almost two years since the referendum in which the United Kingdom voted for Brexit, and with less than a year until the UK leaves the EU, there is still much uncertainty as to what the future will hold and how the business landscape will be reshaped. Some progress has been made: the UK government has made it clear that it intends for the UK to leave the customs union so it can negotiate trade agreements directly with other countries around the world; agreement has been reached in principle with the EU over the status of EU citizens living in the UK (and vice versa) and the UK's 'divorce bill' to be paid upon leaving; and a transition period until 31 December 2020 has been agreed during which the UK will be able to negotiate its own trade deals while remaining subject to existing EU trade deals and the jurisdiction of the European Court of Justice over matters relating to EU law. But none of this is as yet certain. Negotiations on what the future relationship will be between the UK and the EU have only just begun.

Political and economic uncertainty is generally a fertile environment for disputes lawyers, but time will tell. That there will be more disputes arising from Brexit seems inevitable, but how those disputes will be resolved, as between litigation and arbitration, becomes increasingly relevant to practitioners and their clients.

The post-Brexit prospects for the UK litigation market may depend on what becomes of the current framework that is enshrined in the Recast Brussels Regulation. This is an EU law that regulates both the ways in which EU courts determine their authority to exercise jurisdiction over EU parties, and the recognition and enforcement of EU member state judgments. While the UK government has not as yet provided any detail on how it envisages a post-Brexit enforcement regime will work (including whether or not it would be willing to offer to remain bound by the Recast Brussels Regulation), it has indicated its intention to agree to something that reflects closely the current EU system. In addition, the UK government has made clear its intention to continue to participate in both the Lugano Convention (which is modelled on the predecessor to the Recast Brussels Regulation) and the Hague Convention on Choice of Court Agreements (to which the EU is a party).

There are also now being developed in Paris, Amsterdam, Brussels and Frankfurt specialist commercial courts where the proceedings can be conducted in English – all as a direct response to Brexit in order to compete directly with London for cases currently heard in the English Commercial Court. The proposed Netherlands Commercial Court advertises itself, for example, as being able to provide 'an alternative to parties who want to litigate in English, but wish to avoid expensive forums such as London or the United States'. The Paris Court (which opened its doors on 1 March 2018) goes further still – not only can the proceedings be conducted in English (although pleadings will still need to be in French), but the court can also handle disputes governed by English law, and will import some of the English court's procedural features such as limited disclosure and cross-examination of witnesses.

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As for arbitration, arguably its defining feature is the streamlined and far-reaching process of enforcement afforded to arbitral awards pursuant to the New York Convention. Moreover, arbitration sits largely outside the EU regime (the English Arbitration Act 1996, for example, being unaffected by EU law) and so London can and should continue to be a popular choice of arbitration seat. Indeed, the 2018 International Arbitration Survey conducted by White & Case and Queen Mary University of London found that London is still the most popular seat of arbitration and has, in fact, significantly increased from being the seat of choice for 45 per cent of respondents in 2015 to being preferred by 64 per cent of respondents in 2018, notwithstanding Brexit. The UK government has also indicated its preference for the creation of an independent arbitration mechanism to deal with post-Brexit disputes between the UK and EU.

For the time being, however, it is still a case of business as usual and in the meantime litigation lawyers in London anxiously await the unfolding Brexit process to see how far London's financial and legal prominence is affected.

Blockchain/smart contracts

The rate at which blockchain technology has proliferated the financial markets has caused regulators and courts across the globe to stand up and take notice. While international regulators will have the challenge of devising a strategy in which blockchain is integrated with traditional financial systems, the courts must also be alive to the technology and how any disputes involving the technology can be resolved.

The Chancellor of the High Court in the UK, Sir Geoffrey Vos, has indicated that the judiciary in the UK are already considering these issues. In a speech to the Legal Business Seminar in Frankfurt and in the Law Society's Inaugural Lecture on the Future of Law, the Chancellor stated his belief that the English common law, and by extension the English judiciary and solicitors, are particularly well placed to adapt to the novel commercial

issues created by fast-moving new technologies, such as blockchain.

There are, however, a number of pertinent questions that will need to be answered in the not too distant future. In particular, the courts may have to grapple with jurisdictional and enforcement issues.

Looking first at jurisdictional issues, the courts may have to be flexible if not creative in the application of existing rules for determining jurisdiction to hear such disputes. As to enforcement issues, it may not be possible for the courts to unwind transactions in the traditional sense in the event that the transaction 'block' has already been added to the blockchain. In such a scenario, it is likely that the courts will have to look to order specific performance, in particular specific performance of a further transaction on the blockchain reversing exactly that which has improperly occurred.

Cost efficiency in international arbitration

With the increasing globalisation of disputes, there has been an equivalent increase in the popularity of arbitration as a preferred method of dispute resolution. As the scale and complexity of the disputes being referred to arbitration has grown, however, so too has the cost and time involved in pursuing those claims. Indeed, where arbitration was once lauded as being a cheaper and quicker alternative to court ligation (and in some instances it still can be), for comparable high-value international disputes, it is often now not that different. In step, therefore, with other trends around the world in litigation to try to reduce cost, many arbitral institutions are taking steps to adopt rules that are specifically designed to promote the efficiency and cost-effectiveness of arbitral proceedings.

In 2016, for example, the Singapore International Arbitration Centre (SIAC) adopted rules enabling a tribunal to convene a procedural meeting at any time (and not just at the outset of the case) to discuss the procedures that will be the most efficient and appropriate for the case, and in 2017 the International Court of Arbitration of the International Chamber of Commerce (ICC) issued guidance on the expeditious determination of manifestly unmeritorious claims or defences (ensuring costs and time are not wasted pursuing patently bad arguments).

More recently, the Vienna International Arbitration Centre (VIAC) updated its rules at the beginning of 2018, placing both the parties and the tribunal under an express obligation to conduct proceedings in an efficient and cost-effective manner, and giving tribunals an express power to take into account the contribution by the parties in this regard in their decisions on costs. The VIAC rules also, more interestingly, enable the VIAC secretary general to take into account the tribunal's contribution to the conduct of efficient proceedings in determining the level of their fees, giving the secretary general the power to either increase or decrease the amount payable to the arbitrators by up to 40 per cent. This latter provision is particularly interesting as it recognises the role, and arguably the duty, of the tribunal in seeking to ensure that the proceedings are run efficiently, particularly in circumstances where the parties (or more accurately their lawyers) are often slow to propose procedures that might be seen as restricting the way they can argue their case. It will be interesting to see to what extent the secretary general exerts that power, and whether it has the desired effect on the tribunal's case management – if so, we might see it adopted by other institutions in the not too distant future.

The German Arbitration Institute (DIS) has also adopted new rules in 2018, including a requirement that the tribunal, throughout the arbitration, seek to encourage an amicable settlement of the dispute. It will be interesting to see to what extent any such encouragement leads to an increase in the amount of cases settling early, as well as how any failure to reach settlement, notwithstanding such encouragement, may be taken into account by the tribunal on costs.

The rise of third-party funding

The use of third-party funding to finance disputes is a growing trend, not only for parties who otherwise would not have the means to bring their claims, but increasingly also for those commercial parties that can afford the costs of the dispute but either do not wish to tie up significant amounts of working capital in pursuing them or wish to take the cost (and risk) off-balance sheet. This growth in interest has led both to an increase in the number of funders, and a shift in attitudes in some jurisdictions to open up their markets to third-party funders.

Despite this apparent increase in competition, third-party funding remains expensive. The average return on investment that funders seek is the greater of three times the committed amount or 30 per cent of the damages recovered. In smaller value disputes, in particular, this can mean that third-party funding is not financially viable. For those entities that can afford to run the dispute themselves, the advantages of obtaining third-party funding noted above may be outweighed by the expense of it if they will actually recover only a small portion of the damages at the end of the day. This is particularly true in jurisdictions such as England where costs shifting means that the winning party can recover a portion of its costs from the other side.

Of course, costs shifting works both ways and no party wants to be in a position where it has had to pay its own costs and then those of the other side on top (in addition to damages). This applies equally to third-party funders in jurisdictions where they may be liable for any adverse costs award, and so it is commonplace for funders to require that after-the-event insurance be taken

out to cover that risk. This again comes at a price, reducing further the final recovery of the funded party.

It is also interesting to consider the position of the defendant when faced with a funded claimant. Knowing that the claimant is funded demonstrates that a third party has reviewed the claim and considered that it has a sufficiently high prospect of success that they are willing to take the risk on funding it (as after all, if the case does not succeed, the funder gets nothing back for its investment), which may encourage a defendant to seek an early settlement of the matter. Yet this does not seem to be borne out in practice. One reason for this could be the lack of alignment between the parties given that the defendant's lawyers are not being paid dependent on the success of their defence and so will not view the case any differently in this regard simply because it is funded.

Defendants with deep pockets have in the past sought to financially cripple claimants with little money in the hope that this forces a low settlement or abandonment of the claim. Recent case-law in arbitration, however, has penalised such conduct where it has effectively forced a claimant to seek third-party funding, by requiring the losing defendant to pay not only the claimant's costs but also the uplift payable to the funder on success. This ensures that an impecunious claimant does not suffer a double disadvantage in having been forced to seek funding and then having to give up a large portion of the damages recovered to the funder. It will be interesting to see if other courts or tribunals in different jurisdictions will adopt similar principles.

Defendants may also seek to attack or undermine the credibility, probity or honesty of the claimant whether in the context of the current claim or outside of it. Such tactics are aimed not necessarily at the merits of the claim, but directly at the source of the claimant's funding, by raising serious concerns in the minds of the funders and insurers who are reliant on the honesty and probity of the underlying client. We are already starting to see the cynical use of these tactics to try to stifle claimant's attempts to obtain funding.

A further area of interest for the future is whether the funding market will need to be regulated. Both Singapore and Hong Kong have recently legislated to allow for third-party funding in arbitration, but only within the confines of (admittedly light) regulation. This includes an obligation to disclose the existence of a funding agreement and the name of the funder (something that funders have generally been resistant to), not least to ensure that arbitrators do not have any conflicts of interest. It is too early to tell whether this will make any significant difference to how funding operates in those markets, but it is something that will be watched carefully by disputes lawyers and funders alike.