Mackrell Turner Garrett

Dispute Resolution

in England & Wales

DISPUTE RESOLUTION IN ENGLAND & WALES

Basic Principles

The United Kingdom (UK) consists of four different countries; England, Wales, Scotland and Northern Ireland.

The UK does not have a single unified legal system, rather it consists of three; England and Wales have one legal system, whereas Scotland and Northern Ireland both have their own, separate legal systems.

Different laws and dispute resolution procedures may therefore apply depending on which UK country you are doing business in.

When entering into any contract with your customers or when doing business in the UK generally, careful consideration should therefore be given as to which law and jurisdiction, as well as dispute resolution method, is going to apply in the event of a dispute.

Court Proceedings

In England and Wales, the most common form of dispute resolution is taking legal action through the courts.

England and Wales, as common law countries, base their legal system upon a host of long-standing case law. The court procedural rules of civil dispute resolution, however, are codified by way of the Civil Procedure Rules 1998 (generally referred to as the CPR) and a number of accompanying Practice Directions which elaborate on the CPR in order for it to be correctly understood and interpreted. As a result of the CPR and Practice Directions, the courts of England and Wales are in control of the court proceedings.

The highest court in England and Wales is the Supreme Court of the United Kingdom, which has jurisdiction over both civil and criminal matters.

Litigation regarding civil business matters is first however carried out in the Queens Bench Division of the High Court, or in the County Courts, depending on the importance of the matter and the size of the matter in monetary terms.

There are also alternative courts where proceedings may be commenced for specialist matters, such as the Commercial Court, Mercantile Court, Technology and Construction Court, and the Chancery Division. The majority of commercial claims will commence in either the relevant County Court, or within the Queens Bench Division of the High Court.

The right of appeal within England and Wales is not automatic, and any appeal must first be determined to be upon acceptable grounds by a judge. If an application for appeal is however accepted, the matter could eventually be heard by the highest Court, the Supreme Court, after being appealed through any necessary lower courts. In exceptional circumstances, a decision of the High Court can be appealed directly to the Supreme Court and in some circumstances appeals can reach the European Court of Justice.

Conduct of court proceedings

Prior to the commencement of court proceedings, the CPR sets out a number of steps which parties should take, for example writing a letter before action to the potential defendant to set out in detail the nature of the claim and provide relevant documents. These pre-court action steps are formalised by a variety of Pre-action Protocols, depending on the nature of the dispute. For example there

are Pre-Action Protocols for personal injury matters, construction matters, negligence matters and so on.

The parties should follow the Pre-Action Protocol prior to commencing litigation at court, as otherwise the defaulting party may face costs consequences should the court consider that their conduct prior to the commencement of the litigation at court was unreasonable.

Litigation is commenced by the claiming party filing a claim form at court. Should the defendant wish to defend the claim, then a defence is filed and the litigation process begins in earnest. The court then takes control of the litigation by holding a case management conference. The parties must consider the issues of length and cost of trial and are usually required to give full disclosure of all the documents relevant to the issues in dispute (also known as discovery), and must request permission from the court if the party requires the use of an expert to give either oral or written evidence.

Alternative dispute resolution methods must also be considered.

Once all the steps ordered at the case management conference have been complied with, the trial in court takes place. The court system allows both oral and written evidence to be heard at trial and accordingly trials can be long in length.

Interim measures

Pre-trial interim measures and orders are commonly used within English dispute resolution. Measures can be obtained, for example, if it is necessary to protect one party from the possibility of not recovering a monetary order from the other side, or to have a claim set aside for lack of evidence or lack of a real issue to be tried.

Costs

The issue of costs of any proceedings generally follows the principle of "costs follow the event" with the loser paying the winner its legal costs. However, the CPR has created an intricate set of rules for situations which may effect the general principle that costs follow the event; any party commencing proceedings must therefore be wary of deviating from the CPR as to do so can result in large cost penalties and the inability to recover all costs that could have been possible at the end of the trial.

Alternative Dispute Resolution Methods

Alternative dispute resolution (ADR) methods are continuously encouraged throughout the pre-trial period of court proceedings; if such a method could be used once trial has commenced, the court can stay proceedings in order for parties to carry out ADR if appropriate.

Arbitration and mediation can be seen as the prominent ADR methods within England and Wales; however there are also other ADR methods, such as expert determination or expert appraisal.

England has a number of prominent arbitration bodies which have become well respected throughout the commercial world. As such, many parties who often have no connection with England and Wales choose to incorporate an English arbitration jurisdiction clause into their commercial contracts in order to resolve their disputes in a timely manner and with the judgement of a well respected and knowledgeable arbitrator.

Arbitration is governed by the Arbitration Act 1996, which generally gives the relevant Arbitrator the same powers to settle the dispute as the Courts; however, the parties are free to agree the number of arbitrators, and the grounds upon which they will arbitrate the relevant dispute.

The English courts are obliged to decline jurisdiction over any commercial contract which incorporates an arbitration clause, unless the clause can be shown to be null or void. It is then for the arbitrator to decide whether a valid arbitration agreement exists, and upon what terms.

Many commercial parties however often prefer to resolve their dispute through non-binding ADR, such as mediation. The Centre for Effective Dispute Resolution (CEDR) and the ADR group are also now being used by international parties who have no connection with England or Wales due to their prominence and excellence within the field of international dispute resolution.

In Summary

England and Wales' historic legal system, its abundance of case law and world respected judges has led to prominence within all forms of dispute resolution. Many foreign parties select England and Wales to hold sole jurisdiction over both litigation and ADR; demonstrating the attraction of international litigation and excellence within England and Wales.

DISPUTE RESOLUTION IN ENGLAND AND WALES: ARBITRATION AND MEDIATION

Although court proceedings are often commenced in order to resolve disputes between parties, disputes are in fact more often than not resolved by the parties in one form or another without a court judge having to give judgement.

This can be through settlement negotiations by the parties, or by the use of formal alternative dispute resolution ("ADR") methods.

ADR methods are continuously encouraged prior to the commencement of court proceedings and if ADR is appropriate once court proceedings have commenced, the court can stay proceedings in order for parties to carry out ADR. Furthermore, the parties are free to choose which particular ADR method suits their circumstances best.

ADR can broadly be categorised into two types: determinative ADR where a binding decision is reached and non-determinative ADR whereby the parties after evaluating their respective positions reach a voluntary settlement.

The focus of this section is on arbitration (which is a determinative form of ADR) and mediation (a non-determinative form of ADR) which are the most prominent ADR methods in England and Wales.

Arbitration

Arbitration is a determinative form of dispute resolution meaning that the parties are bound by the decision of the arbitrator(s) and that decision can be enforced without commencing court proceedings. It is a method of dispute resolution that can be used and is used in many areas of law.

In commercial contracts, many parties choose to include an arbitration clause in the contract for business in order to enable the parties to arbitrate rather than litigate the matter.

Arbitration does not, however, solely rely on the presence of an arbitration clause. It is possible to arbitrate a matter even if an agreement did not originally make requirements for arbitration. Parties are free to arbitrate a matter at any point, even after court proceedings have commenced.

For many, arbitration is advantageous as it gives the parties control over the dispute resolution process.

Arbitrations can be held in private and the parties are free to choose an arbitrator who specialises in the subject of the arbitration. Accordingly, the parties can be confident that their dispute will be resolved by persons with the relevant expertise.

Furthermore, the parties are free to decide the procedure that the arbitration should take, including the number of arbitrators, the country to arbitrate in, the language of the arbitration and the law which will govern the arbitration procedure.

Arbitration in England and Wales is governed by the Arbitration Act 1996 (the "Act").

England and Wales have international recognition for dealing with arbitration matters through their arbitration bodies, such as the Chartered Institute of Arbitrators, and the London Court of International Arbitration.

By agreeing that any arbitration will be determined in England and Wales, parties are given the security that a fair decision will be reached due to the arbitration being governed by the Act.

The Act applies to any arbitration agreements which are in writing, and requires that certain terms of the arbitration will be mandatory, and certain terms will be non-mandatory and may be decided by the parties. It also acts as a fall back position to deal with the terms of the arbitration when such terms are not expressly stated in the written agreement.

The Act also supports arbitrations carried out in England and Wales in that it allows the courts to issue injunctions and provides that an arbitral award will be recognised and enforced with the same effect as if it were an order of the court. Furthermore, the Act will only allow a challenge to an arbitral award in specific circumstances in relation to jurisdiction, irregularity and on point(s) of law.

Therefore, not only does the Act provide structure for commercial agreements which do not expressly state specific terms on which the arbitration is to take place; it also provides, for example, a way by which parties may request that an arbitrator is removed by the courts and provides that an arbitrator's decision may be enforced as if it were a court judgment. The rules of the Act therefore exist to assist the arbitration without interfering in the arbitrator's decision unless this is needed.

Accordingly, due to the attractiveness of England and Wales as an arbitration venue, it is common for parties who have no specific link to these countries to include an arbitration clause within their commercial contracts stating that any disputes which may arise are to be determined by arbitration within England and Wales and that they will be governed by the Act.

Mediation

Mediation is a form of non-determinative ADR meaning that no enforceable judgment is given at the conclusion of the mediation. The parties are therefore obliged; if they wish the mediation to succeed, to reach a consensual agreement usually in writing in order to resolve their dispute. Once an agreement between the parties is reached in writing this agreement can then be enforced through the courts if necessary.

Mediation is a method of dispute resolution that all parties should consider before they commence court proceedings; and in fact, all parties are obliged, under the Civil Procedure Rules of England and Wales, to consider whether mediation as a form of ADR could be suitably used to resolve the dispute outside of court in order to save the parties relationship and to save costs.

At a mediation, the parties will jointly decide upon a neutral third party to act as a mediator. His or her role will often be to direct the parties to an appropriate outcome, and to give their view as to what is an appropriate settlement in the given situation. They are not, however, in a position to determine the outcome of the mediation. As with arbitration, the mediation is private and confidential.

Many parties view mediation as an attractive method of dispute resolution to use alongside court proceedings, due to the fact that it may take place at any time while the court proceedings are ongoing. Accordingly this can therefore assist in curbing the costs that could be incurred if a disagreement was to be decided by a judge in court as the parties are free to reach a consensual agreement at any point, and are free to request that the court proceedings be stayed.

It is also possible to carry out mediation before commencing proceedings in court. This can assist the parties financially and commercially. Not only is mediation generally far cheaper than court proceedings, but it may also be possible to protect the commercial relationship of the parties if the dispute can be resolved amicably.

Conclusion

Arbitration and mediation within England and Wales are often viewed as appropriate alternatives to commencing court proceedings not only due to their ability to save commercial relationships and allow for privacy, but also because they grant the parties more control over how the dispute is resolved.

The broad numbers of arbitration and mediation bodies, along with the Arbitration Act 1996 have assisted in creating a high calibre stage within England and Wales for international parties to resolve their legal disputes amicably without the need to litigate.

Both these methods of ADR should therefore always be considered before litigating any kind of dispute.

PARTNER PROFILE

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Nigel Rowley is Head of Litigation and Dispute Resolution in the London Office of Mackrell Turner Garrett. A brief look at his experience of acting in the last few years includes:

- Acting for a US hedge fund against a UK bank in a claim for in excess of $10 million claiming misrepresentation.
- Acting for a UK based software company in a claim for £15 million against a UK infringer claiming commercial infringement.
- Acting for a US film producer in a claim against a UK media company claiming commercial infringement of rights.
- Acting for a US high net worth individual in a claim against a UK architect designer claiming substantial over invoicing.
- Acting for a SA company in a £12 million claim against a Canadian conglomerate – share dispute.
- Acting for a UK motor trader in a £1 million+ claim against a UK individual – breach of guarantee.
- Acting for a UK company Director in defending a claim against an Iranian state owned business – alleged misallocation of payments.
- Acting for a Middle Eastern Royal in defending a £20 million+ claim made by a UK bank – alleged bank guarantee default.
- Acting for non-UK national in major extradition case.
- Acting for non-UK nationals in international freezing injunction cases.

Nigel has considerable experience in defending FSA prosecutions, and HMRC Appeals.

Nigel is an International Committee member for EMEA on Mackrell International, the independent network of 80+ law firms around the World. As well as the Chairman of the Membership Committee for Mackrell International.

As a result of the firms membership of Mackrell International, very experienced in cross-border disputes, and multi-jurisdictional litigation.

For more information, please contact Nigel on

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