Complex Commercial Litigation 2022

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LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the fifth edition of *Complex Commercial Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Brazil, India and the United States.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Simon Bushell of Seladore Legal, for his continued assistance with this volume.

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Simon Bushell
Seladore Legal

As I put pen to paper to write this introductory chapter for the fifth edition of *Complex Commercial Litigation*, I am asking myself this question: has there ever been a better time to be practising complex commercial litigation?

I am gliding into London on a very fast, but sparsely populated, train preparing for a series of meetings with colleagues and clients who, like me, are eager for face-to-face interaction after far too long a period gazing at each other on a computer screen dressed in our 'leisure wear'. (The idea that the business of law could only be conducted with a jacket and tie (for men at least) now seems to be a fast-receding view from a bygone era.)

The sea change in the use of technology has meant that we are closer than ever to our clients (virtually at least) as well as able to attend hearings across the world from our own desks. For practitioners of complex multi-jurisdictional litigation, this has not only reduced the amount of time spent travelling but also enhanced our ability to oversee aspects of disputes playing out in far-flung jurisdictions.

As we know, disruption triggers commercial conflict, and we are currently experiencing the effects of Brexit, the pandemic, political turmoil, new technologies and increased focus on environmental, social and governance (ESG) responsibilities. These factors, coupled with the glut of litigation funding and changes to regulation to permit more creative (and risk-sharing) lawyers' fee agreements, create the perfect environment for a boom in complex disputes.

However, while the current environment is ripe of commercial litigation, there are also some good recent examples of what looked to be large disputes being resolved in unusual ways without recourse to litigation.

One example of this arises out of the shattering of the myth that blockchain – the technology which underpins crypto-currency and non-fungible token (NFT) based commerce – is so secure as to be impossible to hack. Not so (and difficult to fathom that so many believed it to be true). In early August the world came to know that an alleged hacker made off with US$600m in a colossal crypto-heist that gripped the world of fraud investigation and left the crypto industry scratching its head. The target was a company called Poly Network which links together some of the most widely used digital ledgers. Poly Network had developed a computer-based set of rules permitting users to transfer tokens tied to one blockchain to a different network. This is said to solve the problem of how investors in cryptocurrencies move tokens from one blockchain platform to another to enable them to effect trading and presumably broaden the market. Somehow the hacker found a weakness in the cyber security, thereby gaining access to the ledgers which were previously thought to be impenetrable.

In a staggering development, likely to alarm the professional mediator community, the anonymous hacker (adopting the nom de plume 'Mr White Hat') began engaging in a series of messages via blockchain (but effectively fully accessible to the public) regarding his motives, and before long the victim had offered the hacker a 'bounty' of US$500,000 as an incentive to return the stolen assets, and a reward for exposing the technical flaw that allowed the hack in the first place. As at the time of writing it is understood that almost everything which had been misappropriated has been returned. Quite where this leaves individual victims is unclear. Poly Network does not appear to have a readily identifiable legal structure behind it, and no actual loss may have been suffered. If what had been 'borrowed' had been personal data then all sorts of General Data Protection Regulation (GDPR) and other data protection violations would have occurred, triggering regulatory action and collective redress. The actions of Mr White Hat may go unpunished, and even uninvestigated, by any law enforcement agency. What is clear is that there is now every incentive to try to hack blockchain, and hold the victims to ransom – transforming a wholly unlawful and 'fraudulent' act into an almost legitimate profit centre by accepting a much smaller 'reward' as consideration for returning the money. At some point this wild, gyrating, parallel financial world that now exists is going to collide catastrophically with the real world. I hope to be there when it does.

A further example was the short-lived European Super League to be formed by 12 'rebel' European football clubs. This was announced on Sunday 18 April 2021 and threatened to change the face of European domestic football by ring-fencing the breakaway clubs, guaranteeing their 'elite' status forever and insuring them against future relegation. It immediately generated an enormous backlash, and many football clubs (both those who were to be part of the league, and those who were excluded) retained many of the leading London litigation firms and QCs to prepare for what was seen as an inevitable major legal dispute. It was believed that, if the new league went ahead, the 'rebel' clubs would be in breach of elements of their contractual obligations to their respective domestic leagues (and it is unclear on what basis they thought they could simply ignore those obligations). However, before proceedings could be commenced, the enormous adverse reaction from fans, which resulted in politicians also criticising the plan (including Boris Johnson, the UK prime minister vowing to block the Super League by legislation if necessary), led

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to the rapid collapse of the proposal and by Wednesday 21 April 2021 it was dead. That said, there is a possible coda. According to reports, the 12 'rebel' clubs are potentially liable for up to £130 million of fees: if true, that may well result in further disputes to come.

Finally, and coming back full circle to the familiarity we all now have with video conferencing – our collective fatigue with this sort of communication will surely not lead to its displacement. Are we not now bound to adapt to a more flexible approach to the office and working from home (WFH) involving an appropriate balance between, on the one hand, saving time and money utilising the very best video conferencing facilities, and, on the other, the need for social contact, relationship-building and business-like meetings in which negotiations are conducted and the art of compromise practised. I for one am convinced that video conferencing is here to stay. At a lively dinner with a client recently, I was told of a new innovation which seems to me is going to address the fundamental issue of why we are all tired of looking at ourselves: video image enhancement. Yes, we will soon be able to watch better-looking versions of ourselves on our computer screens. What better way to ensure the survival of virtual hearings than by reviving our tired-looking and over-worked judiciary!

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