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# LITIGATION & ALTERNATIVE DISPUTE RESOLUTION

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Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in Litigation & ADR.

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# UNITED KINGDOM

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*Winston & Strawn LLP*

*Respondent*



**MICHAEL J. STEPEK**

**Partner**

**Winston & Strawn LLP**

**+44 (0)20 7011 8754**

**[mstepek@winston.com](mailto:mstepek@winston.com)**

Michael Stepek's practice focuses on international commercial arbitration and litigation, investment treaty arbitration and complex, high-value disputes. He advises on matters involving the control of corporate entities, foreign direct investment, concession agreements, major infrastructure projects, and joint ventures. He has over 30 years of experience in international arbitration conducted pursuant to various institutional rules as well as ad hoc.

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**Q. Over the last 12-18 months, what key trends have you seen in commercial disputes in the UK? Do any particular industries or sectors seem to be playing host to a significant number of disputes?**

**A.** In addition to the infrastructure and energy industries, private equity houses continue to play a key role in a significant number of disputes. It is not uncommon to see these investors run into various joint venture disputes. The disruption caused by the pandemic is also likely to increase the number of disputes over the terms of earn-out payments. By the same token, it would not be surprising to see more cases involving insolvent parties. This can result in some interesting and difficult legal issues as the jurisdiction of insolvency is often not the jurisdiction of the underlying dispute.

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**Q. Drilling down, how has the dispute resolution space responded to the coronavirus (COVID-19) pandemic? How have processes changed and what innovative methods have been embraced?**

**A.** In a sense, the dispute resolution space was well-placed to respond to the pandemic in that a large part of it –

arbitration – was already a virtual system. The primary change was to shift physical hearings, whether for procedural matters or for the merits, to online hearings. In our experience, schedules were maintained in this way despite the pandemic. So, the dispute resolution space has responded very well to the challenge.

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**Q. What is your advice 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?**

**A.** Our advice is to first understand each method and its relative advantages and disadvantages which will guide one to the best method for any dispute that might arise. Often, we do not see such a process undertaken, but rather a preference for one or the other that is used in all circumstances. Each form of dispute resolution has its advantages and disadvantages which can be utilised or avoided as needed.

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**Q. How important are external advisers to help companies navigate their way through a commercial conflict?**

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*Ensuring that commercial transactions receive legal input while the contract is being negotiated is a critical function that can greatly help in avoiding unnecessary disputes.*

**A.** External advisers can serve an important function helping companies navigate their way through a conflict as they can provide a view on the dispute unaffected by the personalities or internal company politics that might otherwise influence decision making. In our experience, early advice from an external adviser can be very helpful in defusing disputes before they get to formal proceedings.

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**Q. In your experience, what steps should companies take at the outset of a commercial agreement to manage disputes that may arise in the future? Is enough attention paid to dispute resolution clauses in commercial agreements, for example?**

**A.** A well-managed internal legal function is the first step. Ensuring that commercial transactions receive legal input while the contract is being negotiated is a critical function that can greatly help in avoiding unnecessary disputes. This function goes beyond dispute resolution clauses, but extends to all legal issues, particularly concerning the allocation of risks, limitation of damages and the like. In terms of the dispute resolution clause itself,



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regrettably these often appear to be treated as an afterthought, with little attention paid to them at the time of contracting. While companies should endeavour not to need them, the reality is that not all disputes can be managed short of formal proceedings, so dispute resolution clauses need careful consideration as well.

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**Q. To what extent can companies avoid disputes by being more diligent in their dealings with business partners?**

**A.** There exists little question that companies can avoid disputes by being diligent in their dealings with business partners. A well-managed legal function within the company should be effective in doing so. However, disputes are often driven by personality and other considerations beyond the legal implications of them and will always exist.

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**Q. What is the outlook for commercial disputes in the UK? What issues and challenges do you expect to see in the months ahead?**

**A.** Clearly, disputes are not going to disappear. They always have existed and

always will. The issues and challenges arising out of them though continue to change, and the pace of that change has increased over the last year. Two areas where we would expect to see significant development would be in the use of videoconferencing and in data. The use of video for hearings is an interesting case in point as it only started to be used with any degree of frequency over the last year. From that near standing start, it has become virtually standard. We can likely expect its features to improve, whether that be via higher definition video and audio or otherwise. Similarly, the omnipresence of data is likely to have a greater presence in future disputes. Whereas previously data may have been limited to laptops, it now extends to phones, servers, internet communications logs and the like, and lawyers and tribunals are becoming more adept at understanding where to look for such relevant material. □

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**MICHAEL J. STEPEK** Partner  
+44 (0)20 7011 8754  
mstepek@winston.com

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