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COMMERCIAL DISPUTES

Concluding our feature on commercial disputes, *Lawyer Monthly* speaks to Lawrence Jacobson, an in-house Barrister specialising in domestic and international commercial arbitration and litigation at Zaiwalla & Co LLP. Zaiwalla & Co was the first firm of solicitors to be established in the City of London by a principal who had been born outside the United Kingdom and has been in practice for around 32 years. The Firm's range of business covers Company/Commercial Projects in Europe, the Middle East, Asia and Africa; Litigation including the areas of aviation and shipping and commercial fraud and debt; International law and Sanctions relating to individuals and entities who or which have been targeted by among others, the UK Government, the EU Council and the US Office of Foreign Asset Control (OFAC); and Arbitration comprising ad hoc arbitrations and those which are governed by the following rules of arbitral institutions such as GAFTA, LCIA, ICC, DIAC and others.

What are the unique challenges of representing a foreign company which is involved in a dispute? How can you overcome these? What would be your advice to foreign company currently facing a lawsuit in England?

Foreign companies often prefer to deal with UK lawyers through intermediaries. In such instances due diligence in the sense of Know Your Client (KYC) is not sufficient. One also needs to Know Your Client's Client (KYCC). In the case of potential CIS and Middle Eastern clients it is becoming increasingly necessary to check the UK Government, EU and US OFAC Sanctions Lists.

I would recommend that any foreign company seeking to instruct a firm in the UK should instruct a firm, depending on relevant competence and expertise, that is able to assign a lawyer capable of conversing with the client's internal representatives in their own language. Many foreign litigants prefer to instruct lawyers in London who would be familiar with their internal business cultures.

What area of Partnership law has left a lasting impression on you?

The area of Partnership law in which I have maintained an enduring interest is whether a partner in a general partnership causes a dissolution of the partnership by accepting a repudiatory breach of one or more of his co-partners, without the intervention of the Court. There now appear to be two schools of thought on the issue. The line of cases led by the Court of Appeal in Hurst v Bryk [1999] Ch 1 (which has never been overturned) supports the proposition that the contractual doctrine applies without the intervention of the court whereas the first instance cases of Mullins v Laughton [2003] Ch 250 and Golstein v Bishop [2014] Ch 131 take the view, based on the obiter dicta of Lord Millett in Hurst v Bryk [2002] 1 AC 185 HL, that only a decree by a court under section 35(d) of the Partnership Act 1890 will cause a dissolution of the partnership. In my view the former proposition should prevail based on stare decisis and the commercial relationship between the partners: See the Article I co-wrote in the Lex Witness Magazine (India),Vol. 6, Issue 7, February 2015,p33.

What are your current views on a party's right to challenge an arbitral award?

Generally, it seems to me that a dissatisfied party has the option of challenging an arbitral award by one of three ways under the Arbitration Act 1996: Section 67, on the basis that the arbitral tribunal had no substantive jurisdiction; Section 68 on the grounds of serious irregularity affecting the tribunal (otherwise than by exceeding its substantive jurisdiction), the proceedings or the award; and Section 69 on a question of law arising out of an award made in the proceedings. Presently there does not appear to be much controversy in the application of sections 68 and 69. The treatment of Section 67 by the courts is potentially much more remarkable. The current trend of cases starting with Lesotho Highlands Development Authority v Impregilo SpA [2003] 1 All ER 22 @ 25 per Morison J (confirmed by Lord Steyn obiter) [2006] 1 AC 221 @ 229A HL, CNH Global v PGN Logistics Ltd [2009] 1 CLC 807 per Burton J and Union Marine Classification Services LLC v Government of the Union of Comoros [2015] EWHC 508 per Eder J collectively suggest that the concept of functus officio would not be relevant in determining whether the tribunal is properly constituted, whereas the cases of Pirtek (UK) Ltd v Deanswood & another: 18 February 2005, Aikens J; and Five Oceans Salvage Ltd v Wenzhou Timber Group Co. [2011] EWHC 3282 per Field J have indicated to the contrary. Clearly the matter urgently needs to go to the Court of Appeal for clarification.

You are an experienced mediation advocate, in what situations is mediation more appropriate than appearing in court?

As a mediation advocate of many years standing, I have found that there are very few cases that are not suitable for mediation. Mediation is often much more preferable than court. In the following cases mediation would not be appropriate: fraud; where the parties want the court to determine issues of law or construction which may be essential to any future commercial relationships between them; where the issues are important for those carrying on a particular trade or participating in a certain market or sector or where injunctive relief is required. **LM**