

Strategies for Handling Unwanted Litigation in England

August 2008

Introduction

Every year, U.S. companies are sued in England. For those companies not accustomed to it, English litigation involves an unfamiliar legal system and procedures. U.S. companies must first deal with a legal profession split between solicitors, who prepare the case for trial, and barristers, who advocate for their client at trial. Pleadings and discovery are also conducted differently. Trials are always conducted before a judge, not a jury, are longer in length, and are structured differently than in the U.S. court system. Losers are regularly ordered to pay the winners' legal costs. It is an efficient system, less expensive overall, and very different from that of the United States.

When faced with such litigation, companies seek to deal with it in the most painless way possible. Some companies seek to settle out of court, while others may adopt the strategy of getting to trial as quickly as possible. Others will seek to minimize their legal costs.

The Question of Jurisdiction

The first matter that must be decided when being sued in the English courts is whether England is the correct place for such a matter to be tried. Different factors come into play in making such a decision, such as whether the U.S. company had previously agreed with its opponent that disputes would be brought to another jurisdiction, or whether the companies are contractually bound to enter into arbitration rather than litigation. An English court will generally honor a prior agreement, but a company must bring its application to stay the action as soon as possible after the start of the process.

Without prior agreement that the U.S. company will be taken to another jurisdiction or to arbitration, the litigation process must begin.

Avoiding Litigation

As a general rule, a case that is not very complex will usually take around 18 months to get to trial. More complex cases can take two to three years to come to trial.

Some companies attempt to string out litigation, endeavoring to reduce their opponent's appetite to fight by employing procedural delays and multiple applications to the court. The English court system

makes it difficult to employ such strategies, as the conduct of the case is controlled by the court. The courts have a series of “overriding duties”: (i) to ensure parties are on an equal footing as far as is practical; (ii) to lower costs; (iii) to deal with matters in a proportionate way; and (iv) to ensure a case reaches trial “expeditiously and fairly,” “allotting to it an appropriate share of the court’s resources.”¹ The courts are aware of delaying strategies and will seek to contain them.

However, a number of other techniques are available to avoid going to trial:

- A U.S. company’s counsel can check whether any contractual dispute escalation or resolution procedure has been used in the relevant matter. If not, the company can try to insist on it, and, if necessary, apply to the English court to stay the action while the contractual procedures are put into action.
- A U.S. company’s counsel can check to see whether its opponent has gone through the prelitigation steps required by English rules of procedure. Parties are required to follow certain steps, known as “Pre-Action Protocols,” designed to enable early resolution of disputes. These include an explanatory letter setting out the claim and allowing an opportunity to respond. The court is empowered to take into account noncompliance with the protocols when giving case management directives and costs orders. So, if a company’s opponent has not complied with any Pre-Action Protocol, its counsel may apply to stay the proceedings until the Pre-Action Protocol has been followed. This has the dual advantage of delaying one’s opponent and of affording an opportunity to settle the litigation before it officially begins.
- Once the case has begun, English courts *require* all parties to consider Alternative Dispute Resolution (ADR). The judge will specifically address the parties regarding ADR early on in the litigation, and will encourage a short stay of the action to allow ADR to take place. A U.S. company’s counsel therefore needs not only to consider how to maximize its chances of successful ADR, but also the most strategic timing of the ADR proposal. It is important to have built as strong a case as possible before submitting such a proposal, so as to approach the ADR from a position of strength. In some cases, judges will assent to requests that lawyers be excluded from ADR; this means that choosing a mediator with the particular skills and experience relevant to the case is another important matter to consider.
- The English court system allows either the plaintiff or the defendant to make use of a formal procedure for presenting a written offer to settle all or a specified part of the proceedings, usually on payment of a monetary sum. If a company’s opponent refuses its offer, and then at trial is awarded by the court a sum equal to or lower than the company’s offer, the opponent will then be liable for the legal costs (plus interest) the company incurred after the offer was made. Such offers (known as “Part 36 offers”) are not disclosed to the judge hearing the case until after the merits of the case have been decided.
- A more aggressive strategy is to apply to “strike out”—or obtain summary judgment against—all or part of the other party’s case, or seek a ruling on a preliminary matter that is capable of deciding the whole case. The comparison with similar U.S. procedures is not exact. A successful

¹ CPR 1.1 – “The Overriding Objective.”

strike out or summary judgment application can take much of the wind out of opposing counsel's sails.

- Straightforward negotiations to settle the case are always possible. They can be handled by the parties or by their solicitors or barristers. In practice there are three common times when such approaches are made: after the exchange of pleadings, so that each side can see the issues they are facing and put their best case forward; after disclosure/discovery, when the opposing party's documents have been reviewed; and just before trial. The best approach, whether you communicate in writing or orally, is to tell your opponent that you are speaking to them "without prejudice." Genuine settlement communications cannot then be used against you in the court proceedings.

Speeding Up the Trial Process

Getting to trial as quickly as possible can minimize the cost and disruption of litigation, as well as increase pressure on an opponent. A few techniques for reaching trial quickly include:

- At the very first hearing, which usually takes place after the parties have exchanged their pleadings, ask the court to set an aggressive timetable for the case. This is an opportunity to set the pace of the litigation; a judge will want to be ambitious but realistic. It is often helpful to ask the judge to set the trial date at this stage, and then work backward from that date to schedule all the procedural steps that are needed.
- Consider early applications for summary judgment, strike out, or preliminary issues, as discussed in the previous section. Early decisions on these matters can also help to set the pace of the litigation, and have the added benefit of flushing out the details of opposing counsel's case sooner than they might wish.
- Consider limiting the scope of the case. Many cases could get to trial with fewer points than are put in the pleadings.
- Consider an application to limit the scope of discovery and evidence. The courts are open to such requests. Discovery in England can be more limited, and thus considerably quicker, than in the United States, and there is no deposition process.

Limiting Legal Costs

In addition to the above techniques, several other methods may be applied to help keep legal costs down:

- The U.S. discovery process can be expensive, time consuming, and sometimes of limited value. The English procedure (called "disclosure") can be much more limited and cost much less than in the United States. The disclosure process involves a proportionate search for documents and the preparation of a list of (i) documents upon which the U.S. company relies to present its case; (ii) documents that adversely affect the company's case or its opponent's case; and (iii) documents that support the opponent's case. The list of documents (which can be identified by file name) is then sent to the opponent with a written statement certifying the extent of the search and disclosure. The opponent can then require copies of the documents and inspect the originals. If

more documents are needed (for example, if it is obvious that the opponent has held back relevant documents), the court can be asked to rule on that matter.

- The costs of the disclosure process can be greatly reduced if you can provide the necessary number of review personnel required to search for, prepare, and list the relevant documents. That team can work closely with the solicitors to ensure the task is done correctly.
- A key step in English litigation is the service before trial of written statements of the evidence given by a company's witnesses. This process needs to be managed by the solicitor who is the responsible attorney on the case, but there is no reason why the company cannot work very closely with the solicitor in the preparation of these statements, thereby reducing the legal costs involved.
- In an appropriate case, it is possible to ask the court to fix an early date for trial—even just a few months after the claim is filed. This is particularly useful if the issues before the court are urgent or are capable of being decided without the usual full litigation process. Often, the shorter the process, the lower the costs.
- Often litigants will want an early opinion on the strengths and weaknesses of the case. Although companies will normally engage a firm of solicitors to deliver such an opinion, non-UK companies are permitted to engage a barrister without going through a solicitor. This can be useful, as barristers tend to be the persons who undertake the trial advocacy, as opposed to trial preparation. A company could, therefore, approach a barrister directly at the start of a dispute to get an opinion on the viability of the case without going through a firm of solicitors. But it would be financially unwise, and certainly not advisable, to try to conduct the trial without engaging a firm of solicitors and benefiting from their trial-preparation expertise.
- Consider your lawyers' fee structure carefully. Good firms are usually prepared to give detailed fee estimates—the act of doing so can help structure the litigation plan and reduce costs. Many lawyers are willing to discuss fee arrangements that are not based on hourly bills. Contingency fees are not allowed in England, but a similar, much less expensive version called a *conditional fee agreement* is permitted.
- Consider obtaining litigation insurance. After The Event (ATE) insurance is a type of legal expenses insurance policy that provides coverage for costs incurred in the successful or unsuccessful pursuit or defense of litigation. The policy is purchased after the legal dispute has arisen, and the premium paid may be recoverable from one's opponent if a company wins at trial. Premiums are often available on a deferred basis so that the premium is only payable by the policyholder at the conclusion of the case, and then only if the case is successful. This process can help pre-set and limit legal costs.

Conclusion

Trial litigation in England can be as robust and challenging as it is in the United States. But strategies are available to help deal with disputes in ways that strengthen a U.S. company's position without going to trial, enabling a company to go to court speedily and/or to save on legal costs.

For more information regarding the subject discussed in this LawFlash, please contact either of the following Morgan Lewis attorneys:

London

Neville Byford	+44 (0) 20.3201.5563	nbyford@morganlewis.com
Robert Goldspink	+44 (0) 20.3201.5517	rgoldspink@morganlewis.com

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