FIRE MAGAZINE

Fraud • Insolvency • Recovery • Enforcement

ISSUE 20

The FIRE STARTERS EDITION 2025

SHOWCASING THE EMERGING TALENTS OF THE NEXT GENERATION

INTRODUCTION

"The young lawyers of today are not just defenders of justice; they are architects of the legal future."

- Unknown

Our first issue of 2025 is here, and we are delighted to present our Issue 20 - FIRE Starters Edition, in conjunction with the FIRE Starters Global Summit. In this engaging edition, our practitioners explore the effects of fraud, sanctions, freezing orders, and lessons from recent cases, all curated by just some of our fantastic next-gen practitioners.

Our issue features a series of our winning entrants of our 4th Edition of the 'Future Thought Leaders Essay Competition'. Congratulations to **Ryan Al Hakim** of Milbank who was our 2025 winner along with **Kit Smith** of Keidan Harrison, **Emma Kirkpatrick** of Grant Thornton and **Fay Warrilow** of Ogier who came second and joint third respectively. Thank you to our esteemed judging panel and other entrants to this year's competition.

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- **FIRE International: Vilamoura**
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- **FIRE Channel Islands & Isle of Man**
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- **FIRE Summer School: The Ultimate Insider's Guide**
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- **FIRE Americas: Washington, D.C.**
  23 September 2025 | Kimpton Hotel Monaco, Washington D.C.
- **Sovereign & States Litigation Summit USA**
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  2-3 October 2025 | Kuala Lumpur, Malaysia
- **Women in FIRE**
  28 November 2025 | London

To register for the events and speaking opportunities contact:

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OUR STORY

We at ThoughtLeaders4 are serious about providing opportunities to up-and-coming practitioners specialising in Asset Recovery, Fraud, Insolvency and Enforcement. We strongly believe that the next generation of practitioners should be writing, speaking at and attending events in order to build their network and further their careers. With this in mind, we are proud to present the 4th Edition of our Future Thought Leaders Essay Competition.

Assessed by an illustriously experienced, senior and broad-ranging panel of practitioners this was our entrants chance to stick their head above the parapet and mark themselves as the one-to watch. With the opportunity to attend and speak at the **FIRE Starters Global Summit: Dublin** as well as attend the **FIRE International: Vilamoura event,** we welcomed our entrants into the FIRE Starters Community.

THE BRIEF

Essay Title: Politics has dominated news cycles in the rich world this year with more intensity than ever. How will today's global political trends affect the future practice of the FIRE practitioner?

The global political trends of 2024 present both challenges and opportunities. Whilst concerns over democracy are significant, they also drive the potential for positive change.

This essay competition encouraged participants to delve into the compelling political trends in their jurisdiction or around the world, and how it will affect future practice specifically within the domains of FIRE (fraud, insolvency, asset recovery and enforcement). Participants were encouraged to consider the intricate repercussions of today's global political trends whilst envisioning a future legal landscape that embraces a new reality.

Authored by: Ryan Al Hakim (Associate) - Milbank

Introduction

Thumbing through the pages of 'Project 2025'[1] reveals no indication that the incoming Trump administration intends to Make Asset-recovery Great Again. Nor does overthrow of the rule in Gibbs[2] appear to be high on the agenda of the average public protestor.[3] Indeed, in a year when half the world has gone to the polls,[4] I'd venture to guess that the interests of the FIRE practitioner have not been mentioned in a single manifesto or televised election debate worldwide. Nevertheless, the absence of overt public policy pronouncements should not lead anyone to conclude that the FIRE practitioner will be unaffected by political trends. In fact, the growth of populism, which is perhaps the most significant political phenomenon this century, stands to impact the domain of the FIRE practitioner by changing the nature and extent of international cooperation, as well as reshaping the economic environments in which FIRE practitioners operate. This essay explores those consequences, focussing on European and American populism.

Populism

The rise of populism can hardly go unnoticed. Recent examples can be identified in the re-election of Donald Trump, and the performance of populist parties in this year's European Parliament elections, which saw the number of populist parties with representation increase by 50% from 40 to 60, with a 36% share of the vote.

Populist ideology involves the general interest of the public being set in opposition to the interests of a privileged out-of-touch elite. One way in which this societal cleavage presents itself is through scepticism towards established institutions, multilateralism and top-down control. As Funke et al note,

"the erosion of institutions typically goes hand in hand with populist rule".[5]

Examples are readily available, such as the Euroscepticism of populist parties such as Reform UK, or the first Trump administration's withdrawal from regional institutions such as NAFTA, as well as organs of the United Nations such as UNESCO and the Human Rights Council.

1 P Dans and S Groves, Mandate for Leadership: the Conservative Promise (The Heritage Foundation 2023)

2 Antony Gibbs Sons v. La Société Industrielle Et Commerciale Des Métaux (1890) 25 QBD 399

3 This English law rule provides that a contract can only be amended or discharged in accordance with its governing law.

4 Helen Livingstone, 'Elections tracker 2024: every vote and why it matters' (The Guardian, 7 November 2024) <https://www.theguardian.com/world/2024/feb/23/2024-global-elections-tracker-voting-dates-us-india-indonesia-belarus-haiti-pakistan-full-list > accessed 29 November 2024

5 M Funke and others, 'Populist Leaders and the Economy' [2023] 113(12) American Economic Review 3249-3288

A third of Europeans now consider it likely that the European Union will collapse within 20 years,[6] while 45% of the U.S. public believe that few of their country's problems can be solved through international cooperation.[7] As Frieden notes, populism leaves in doubt

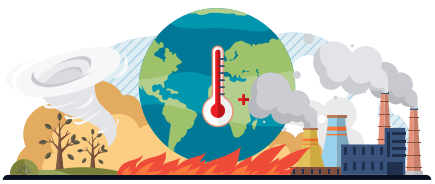
"the future of global cooperation, let alone global governance".[8]

Readers will readily appreciate that a large proportion, if not most, FIRE cases involve an international element. The inclination of populism towards disintegration indicates that international coordination could be set to become more difficult, just at the time when we ought to be moving closer together to tackle cross-border threats. For example, cyber, crypto and AI-enabled fraud do not recognise national borders and are therefore best dealt with through collective combative action, such as in the form of harmonised regulatory and legal standards. Multilateralism is of no less importance in these domains as it is in the context of financial crises and climate change. Technological globalisation is not likely to reduce but the ability of the FIRE practitioner to respond to it may.

Another key interest of the FIRE practitioner is the ability to obtain judgments that will be recognised and enforced abroad with relative ease and predictability. That populism threatens this interest has already been demonstrated by the impact of the UK's withdrawal from the European Union. The Recast Brussels Regulation no longer governs the recognition and enforcement of judgments made in England, meaning, for example, that the ability to enforce a Worldwide Freezing Order in Europe now depends on local law. Instead of being able to rely on a uniform process, FIRE practitioners must now engage with disparate rules and procedures, often contemplating whether orders are worth obtaining at all due to the potential for delays and uncertainty as to the ability to enforce.

Of course, recognising that populists have an appetite for disintegration does not mean to suggest that come January 20 anyone seeking Chapter 15 recognition will be laughed out of court. No, I'd confidently wager the UNCITRAL Model Law on Cross Border Insolvency will survive the next four years. The key point is that populism has the potential to create cascades that impact FIRE practitioners without them ever having been the intended targets. We should recognise and be prepared for practices which we consider to be entirely orthodox and immutable to nevertheless be subject to change.

It is important to bear in mind that, although populism could cause international cooperation to stutter, it does not necessitate a wholesale breakdown of cooperation. For example, whilst multilateralism may become more challenging, gaps could be filled by greater bilateralism rather than total isolation. Another plausible outcome is that, rather than a reduction in cooperation, there will instead be changes in the objectives of cooperation.



For example, although populists may be sceptical of cooperation on an issue such as climate change, which is often viewed as being incompatible with the national interests of countries with growing economies, it is less obvious that working together to prevent fraud would threaten sovereignty or domestic power. Moreover, as Pacciardi et al concluded in their study of American and European populism, disengagement is rarely manifested in the form of wholesale exit but is frequently exhibited in the form of criticism, obstruction and extortion.[9]

Although there are some reasons to be optimistic that existing structures will withstand the tremors of populism, this would be an insufficient victory for the FIRE practitioner given the importance of building on existing regimes, rather than simply preventing them from crumbling.

Populism and the economy

The nature of the FIRE practitioner's practice is, of course, influenced by the economy which itself is shaped in part by political decisions and priorities.

The ascendent forms of populism often respond to economic discontent among populations who believe they are the victims of globalisation, left behind as jobs move overseas and local economies stagnate. As Rodriquez-Pose finds, in Europe

6 Timothy Ash, 'Living in an à la carte world: What European policymakers should learn from global public opinion' (European Council on Foreign Relations, 15 November 2023) <https://ecfr.eu/publication/living-in-an-a-la-carte-world-what-european-policymakers-should-learn-from-global-public-opinion/> accessed 29 November 2024

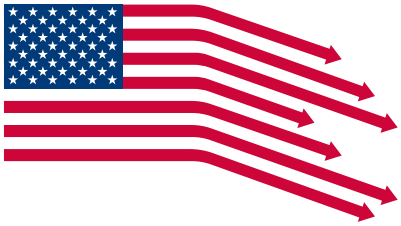
7 Mara Mordecai, 'Americans' views of key foreign policy goals depend on their attitudes toward international cooperation' (Pew Research Center, 23 April 2021) <https://www.pewresearch.org/short-reads/2021/04/23/americans-views-of-key-foreign-policy-goals-depend-on-their-attitudes-toward-international-cooperation/> accessed 29 November 2024

8 J Frieden, International Cooperation in the Age of Populism. in Pereira and others (eds), Economic Globalization and Governance (Springer 2021)

9 A Pacciardi and others, 'Beyond exit: how populist governments disengage from international institutions' [2024] 100(5) International Affairs 2025-2045

"the most significant factor behind the rise of far-right populism is economic decline".[10] Populists may seek to respond to economic anxieties through mechanisms such as tariffs and deregulation.

By their very nature, tariffs are antithetical to global cooperation and would create further barriers between nations, amplifying the negative effects of populism's ideological aversion to internationalism. President-elect Trump has already announced an intention to place substantial tariffs on goods imported from Canada and to increase tariffs on Chinese and Mexican goods.[11]



When it comes to deregulation, in 2017 Donald Trump famously adopted a policy of requiring two regulations to be identified for elimination each time a new regulation was proposed.[12] Whilst positive change may result from stripping back overly burdensome regulations, the risks of insufficient regulation are all too familiar. For example, it was concluded by the U.S. Financial Crisis Inquiry Commission that dramatic failures in financial regulation and supervision, combined with a systemic breakdown in accountability and ethics, were significant contributors to the 2008 financial crisis as market participants did not fear

"flying ever closer to the sun".[13]

FIRE practitioners should be prepared for the possibility that the slicing of red tape by populists charged with the electoral imperative of kickstarting their economies could result in increases in reckless behaviour within the market. This in turn could lead to an uptick in insolvencies and fraudulent behaviour.

Kurt Lewin's "field theory", which posits that behaviour is a function of the individual and their environment, helps to understand how this could occur.[14] Button et al. have applied field theory to fraud and conclude that one would expect the quantity of fraudulent behaviour to be a product of the forces in favour of fraud (threats) and forces against fraud (safeguards).[15] Threats include the opportunities available to commit fraud and the existence of enablers of fraud. Safeguards include (among other things) legal rules and enforcement regimes.[16]

A climate of deregulation cannot be expected to limit opportunities for misrepresentation, deception and dishonesty. Nor would reticence to cross-border solutions help to effectively police technological and financial institutions who are becoming ever more economically significant and (whether unwittingly or not) are familiar enablers of fraud. Naturally, it would also stand to reason that any further fragmentation of enforcement regimes through deregulation would embolden fraudsters. The crucial insight of field theory in this instance is that it indicates populism may not simply make existing challenges harder to deal with but a feedback loop could be created with the effect that more fraud may be expected to occur and systemic resilience to atrophy.

Again, we must be cautious not to group all forms of populism together. Although right wing populism could well result in the emergence of frothy markets and the propagation of incentives for excessive risk-taking, left-wing populism is instead associated with an expansion of the state rather than a rolling back of governmental frontiers. As such, the effects of populism are unlikely to be uniform across jurisdictions and may impact FIRE practitioners in unequal ways.

Conclusion

Over the coming years, FIRE practitioners will be operating within a sector that thrives on collective action against the backdrop of a political environment that is increasingly suspicious of it. To the extent that institutional or legal bonds are threatened by populism, personal connections between practitioners will become ever more important in efforts to bring about objectives such as the efficient and effective completion of investigations and the recovery of assets. As I hope to have demonstrated, FIRE practitioners will be operating in an environment of change, although it will not always be clear what the outcome of that change will be.

Finally, it should be acknowledged that trends towards populism are not necessarily permanent and nor are they overwhelmingly dominant. Most Europeans and their leaders are not populists and in the United States Donald Trump's resounding victory in the Electoral College was achieved with a share of the vote less than 2% higher than that of his opponent. As the rise of populism itself reveals, political proclivities are capable of changing and the FIRE practitioner should remain nimble, prepared for them to do so.

10 A Rodríguez-pose, 'Left-behind versus unequal places: interpersonal inequality, economic decline and the rise of populism in the USA and Europe' [2023] 23(5) Journal of Economic Geography 951-977

11 James Fitzgerald, ''No-one will win' - Canada, Mexico and China respond to Trump tariff threats' (BBC, 26 November 2024) <https://www.bbc.co.uk/news/articles/cj6kj2752jlo> accessed 29 November 2024

12 Executive Order No. 13,771 82 Federal Register 9339 (Feb. 3, 2017)

13 Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States (Featured Commission Publications 2011)

14 K Lewin, Field Theory in Social Science (University of Michigan 1951)

15 M Button and others, 'Understanding the rise of fraud in England and Wales through field theory: Blip or flip?' [2023] 1(1) Journal of Economic Criminology

16 Ibid.

FIRE AND THE BIG FREEZE: SANCTIONS, PARALLEL PROCEEDINGS AND ALTERNATIVE FORUMS

Authored by: Kit Smith (Managing Associate) - Keidan Harrison

Introduction

The year 2024 has seen the continuance and evolution of many pre-existing global political issues, including (notably, but not exhaustively):

- increased geopolitical tensions (see the stand off between the United States and China over issues including Taiwan and the South China Sea); and
- a rise in populist and nationalist ideology, particularly in Eastern Europe, and fuelled by hardening economic conditions and issues of cultural identity, often exacerbated by the question of immigration.

But above all else, and of paramount importance to the FIRE practitioner, has been the continuance of the Russia-Ukraine conflict during 2024, marked by its recent globalisation, including North Korea's commitment of troops to the Russian cause[1], or the G7's commitment to fund the Ukrainian war effort via leveraging sanctioned Russian assets to the tune of €35bn[2].

This essay will examine the impact of the Russia-Ukraine war on the issues before the Courts of England and Wales and the skillset demanded of the FIRE practitioner in 2024.

European sanctions in response to Russian invasion of Ukraine

Following the Russian invasion of Ukraine in February 2022, there has been a swathe of new and repeatedly enhanced sanctions imposed on Russia and key supporters of Vladimir Putin. The UK enacted the Russia (Sanctions) (EU Exit) Regulations 2019 (the "Russia Regulations"), which resulted in significant and extensive freezes being imposed on Russian resources held in the UK, including many financial assets. The extent and rigour of the Russia Regulations encapsulates the fact that UK-Russian relations are at an all time low.

Similarly, the EU has imposed a raft of restrictive measures on Russia, applicable to its member states, via EU Regulation (EU) No 833/2014 (the "EU Sanctions"). The restrictions have been periodically supplemented, including recently by the EU's new sanctions regime in response to hybrid threats from Russia[3] on 8 October 2024. Those hybrid threats include, amongst other

1 https://www.ft.com/content/54431ddb-45b3-4199-a026-021d90e4dccd

2 https://www.europarl.europa.eu/news/en/press-room/20241017IPR24736/parliament-approves-up-to-EU35-billion-loan-to-ukraine-backed-by-russian-assets

3 https://www.consilium.europa.eu/en/press/press-releases/2024/10/08/hybrid-threatsrussia-statement-by-the-high-representative-on-behalf-of-the-eu-on-russia-s-continued-hybrid-activity-against-the-eu-and-its-member-states/

things, the undermining of democratic institutions and the use of coordinate disinformation, foreign information manipulation and interference (addressed further below).

The Russian Response to Sanctions

In 2020, pursuant to Federal Law No. 171-FZ, the Russian legislature amended the Arbitration Procedural Code (the "Arbitrazh Code") (via the introduction of Articles 248.1 and 248.2) to grant exclusive jurisdiction to Russian Courts where disputes arose from foreign sanctions and/or involved sanctioned persons. Whilst it has not been suggested that the Arbitration Procedural Code was enacted for anything other than legitimate purposes, its more recent amended incarnation is undoubtedly being deployed for more nefarious intentions as regards recognition and enforcement.

Article 248.1 confers exclusive jurisdiction on Russian Courts over disputes between Russian persons and foreign persons arising out of foreign sanctions. Further, the legislation enables a Russian person affected by foreign sanctions to seek, amongst other interim reliefs, anti-suit relief against the commencement or continuance of foreign proceedings (regardless of the existence of an exclusive jurisdiction clause in a governing contract).

Impact upon the FIRE Practitioner: Sanctions

The present state of UK-Russia relations demands an increased awareness as to the application of sanctions regimes imposed not just by the Office of Financial Sanctions Implementation ("OFSI"), but also by foreign governments including the Office of Foreign Asset Control ("OFAC") in the US. Sanctions awareness is of course required to ensure compliance with the same, but also to counter those parties seeking to invoke the purported application of sanctions so as to avoid payment obligations – see O v C[4].

In O v C the Respondent entered into a charter with the Applicant, further to which the Applicant was to carry a cargo of naphtha from Singapore to Japan. Shortly after the vessel left Singapore with the cargo, the Respondent placed on the OFAC sanctions list.

The Respondent refused to return to Singapore and discharge the cargo leading to an LCIA Arbitration and a resultant application to the High Court for an order under s. 44 Arbitration Act 1996 to sell the cargo, so that the proceeds could be held pending the tribunal's award. The central issue was where funds should be paid by the Applicant – into an OFAC approved holding account controlled by the US Treasury, given the application of sanctions, or into the High Court account in England, in the usual way following a s. 44 order.

The Judge accepted the Applicant's submission that an order requiring payment of the sale proceeds into court would arguably require the Applicant to breach OFAC sanctions, but that was not in and of itself a reason not to make that order. The Applicant had to show a 'real' risk that it or its personnel would be subject to criminal prosecution. The Judge held that the risk of prosecution was 'fanciful' and ordered that the funds be paid into Court.

Whilst it is essential for the FIRE practitioner to understand sanctions, vis-à-vis uses in frustrating enforcement, it is also important to understand bona fide references to sanctions compliance and how these obligations interact with (often pre-existing) contractual obligations, involving sanctioned entities. s. 44 SAMLA[5] puts sanctions compliance on a higher pedestal than compliance with contractual duties and can offer a complete defence to claims.

However, the recent Court of Appeal decision in Celestial Aviation[6] confirmed that s. 44 will not provide a defence to claims for recovery of a debt that is lawfully due by party A to B, but remains unpaid by A because of sanctions imposed on B after A's default. In Celestial Aviation Unicredit had sought to avoid liability for paying interest and costs relating to unpaid amounts under letters of credit issued by the sanctioned entity, Sberbank.

Impact upon the FIRE Practitioner: Parallel Proceedings, Alternative Forums and Anti-Suit Relief

The effect of s. 44 is such that sanctioned parties now face difficulties in looking to the English Courts to uphold their contractual bargains, meaning that they are left to fall back on hastily amended domestic legislation such as the Arbitrazh Code to found jurisdiction in Russia. The ensuing parallel proceedings enabled by this legislation have of course has given rise to a swathe of cases before the Courts, often on an urgent basis, concerning the grant of anti-suit relief.

The Courts have shown a willingness to grant anti-suit (as well as anti-anti-suit) relief in favour of English seated arbitrations, as well as those seated in foreign jurisdictions. The ensuing line of

4 O v C [2024] EWHC 2383 (Comm)
5 Section 44 of SAMLA provides that a person is not liable to any civil proceedings in respect of any act or omission taken in the "reasonable belief" that it was done to comply with UK sanctions regulations.
6 Celestial Aviation Services Ltd v Unicredit Bank SA [2024] EWCA Civ 628

authorities (concluding with the recent Supreme Court decision in Unicredit v RusChemAlliance[7]) has held that the Courts of England and Wales can be the proper place in which to bring claims for anti-suit relief, (1) even where it relates to foreign seated arbitrations; and (2) even where there is an extant jurisdiction challenge.

The Courts have confirmed in the recent Magomedov[8] decision that it will take proactive steps to ensure that due judicial process is not circumvented by the pursuit of foreign proceedings. In Magomedov, the Court demonstrated its flexibility in this regard by turning jurisprudence from the family courts to grant a Hemain[9] anti-suit injunction – a specie of anti-suit injunction which are of limited duration and intended not to bring parallel foreign proceedings to an end, but to pause them whilst the English courts consider the jurisdictional challenge before it.

Impact upon the FIRE Practitioner: Flight of Funds from UK

With the aforementioned impact of sanctions and disruption to Russian economic interests, has come a flight of capital from the UK. For those seeking to trace funds passing through/out of the UK financial system in furtherance of a fraud, it is important consider the avenues available for disclosures against financial institutions at an early stage of the tracing exercise. In this regard two areas have recently received significant attention and experienced contrasting fortunes: Private Investigators and Norwich Pharmacal relief and the limitations (in England and Wales at least) thereon.

The role of Private Investigators and the veracity of their evidence has come under much scrutiny in recent times. The Director General of MI5 warned in October this year[10] that Russia is engaged in a disinformation campaign to undermine British institutions, including the judicial system.

Against this backdrop, there has been a notable trend of judicial scrutiny and, even criticism, of the veracity of evidence provided by investigators[11]. Solicitors deploying such evidence to their client's benefit are not immune to proceedings, as the High Court has recently ordered that a prominent London law firm give disclosures[12] to identify the "middleman" in order to identify the producer of a forged document, used to deceive an arbitral tribunal into a $300m award.

As regards the role of the law firm deploying the allegedly forged evidence, Calver J noted that they (the law firm):

"were not a mere onlooker or witness, advising on a document. They were actively involved in the (unwitting) verification and deployment of that document in legal proceedings, which it is strongly arguable was a forgery. They were accordingly mixed up in the alleged wrongdoing and enabled the purpose of that wrongdoing to be furthered."

The decision reinforces (1) the need for FIRE practitioners to take steps to verify the authenticity of the information deployed in litigation, and (2) the uses of Norwich Pharmacal relief in England and Wales.

Norwich Pharmacal relief may be used on a pre-action basis, but will not generally be granted where the intention is that the documents may be deployed in foreign proceedings[13]. However, the position is not the same in other jurisdictions and there are no prohibitions on seeking Norwich Pharmacal relief from certain other jurisdictions with the intention of deploying the resultant disclosure in domestic proceedings – including the Cayman Islands[14], British Virgin Islands[15] and most recently the Dubai International Financial Centre Courts[16].

Conclusion

In the current geopolitical climate, it is essential that the FIRE practitioner has, at least, an awareness of domestic and foreign sanctions regimes (including their application and reach) as well as how foreign judicial systems may be able to assist with fighting fraud claims seized in England and Wales.

It is also important for the FIRE practitioner to have regard to objective interests in proceedings before the Courts, particularly where there are significant sums or sensitive issues at play. It is essential to remember that litigation does not take place in a vacuum, immune from political interference and an objective view of international interest in proceedings taking place in our courts should be maintained. For a long time England and Wales has been a willing destination for the resolution of disputes originating in other jurisdictions, but with that comes scrutiny and interest from such states who may hold differing attitudes to democracy and respect for independent judicial process.

In conclusion, the successful FIRE practitioner will be forced to look beyond the traditional boundaries of our practises for answers to a new world order that looks set to last through 2024 and beyond for some time to come.

7 UniCredit Bank GmbH (Respondent) v RusChemAlliance LLC (Appellant) [2024] UKSC 30
8 Ziyavudin Magomedov and Ors v PJSC Transneft and Ors [2024] EWHC 1176 (Comm)
9 Hemain v Hemain [1988] 2 FLR 388
10 https://www.mi5.gov.uk/director-general-ken-mccallum-gives-latest-threat-update
11 https://www.ft.com/content/013f9b30-0209-4e24-989d-c17287cb01c2
12 Filatona Trading Limited and Anor v Quinn Emanuel Urquhart & Sullivan UK LLP [2024] EWHC 2573 (Comm)
13 Linda May Green v CT Group Holdings Limited [2023] EWHC 3168 (Comm)
14 Essar Global Fund Limited and Anor v Arcelormittal USA LLC (CICA (Civil) Appeal No 15 of 2019)
15 K&S v Z&Z BVIHCM (Comm) 2020/016
16 Skatteforvaltningen (The Danish Customs And Tax Administration) v FFA Private Bank (Dubai) Limited CFI 004/2024

A NEW WORLD ORDER?

CULTURE WARS AND ESG FOR THE FIRE PRACTITIONER

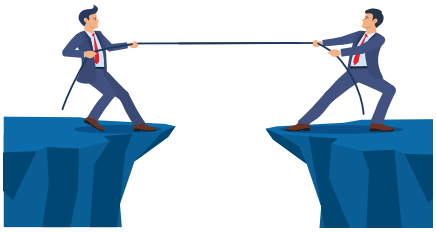
Authored by: Fay Warrilow (Counsel) - Ogier

Politics has dominated news cycles around the world this year with more intensity than ever. How will today's global political trends affect the future practice of the FIRE practitioner? In this article, Fay Warrilow, counsel in Ogier's Dispute Resolution team, shares her predictions.

On 5 November this year, the world shifted. How it shifted, and to what degree, depends on who you talk to. If you talk about it at all – sometimes the temptation is just to switch off.

Actually, that is what I did on the night of the US elections. I might have had feelings about which way I wanted it to go, but of course it was a matter for the American people, not me, and they made their decision.

This is not a political essay, but a legal one. The purpose of this piece is to look as objectively as possible at examples of how today's global political trends will affect the future practice of the FIRE practitioner.



The global political trend I'm thinking of is the shift to the right, even far right, in many areas of the world and most recently in the US with the re-election of Donald Trump. That comes with an associated trend – the "culture wars" and the polarisation of discourse on, let's face it, pretty much everything. This is an obvious trend to look at, but it's obvious because it's so important. What I'll focus on is the impact of these trends on another global trend. That is the rise, and possible decline, of ESG. ESG has historically been a source of great interest to FIRE practitioners and business leaders, particularly in terms of the various frauds associated with green technologies and the relevance of ESG considerations to directors' duties. I'll focus on the latter, and I'll ask whether ESG is a fad which has had its day.

The term ESG – "environmental, social and governance" – has been around for some 20 years, but its star is generally agreed to have risen in the past 10 years, with an estimate in 2023 of more than US$30 trillion assets under management[1]. Arguably, however, it is now on the decline. If that's true, why might it be? Earlier this year, Forbes Magazine and the Wall Street Journal

1 GSIA-Report-2022.pdf

both identified the "culture wars" as a primary reason for ESG becoming, as the WSJ put it, a "dirty word in corporate America".[2] It seems that ESG is now characterised in some quarters as a sort of "woke capitalism"[3].

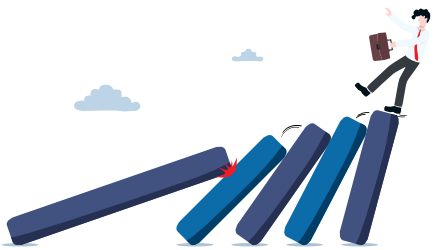
Whatever one's political leanings, it seems unarguable that Donald Trump's government will not be a great supporter of "woke capitalism". Chris Wright, his pick as head to lead the US energy department, recently wrote a corporate report advocating for increased access to hydrocarbons as a method of alleviating poverty, which he argued was a greater problem than the more remote risks of climate change.[4] In addition, one of Trump's first actions upon taking office was to withdraw the US from the Paris Agreement. Almost 200 nations adopted this international treaty on climate change in December 2015.

Time will tell if this comes to pass, but arguably it illustrates a shift away from ESG as mainstream, or at least ESG as it has come to be understood, underpinned by the philosophy of carbon reduction as a means to mitigate the key crisis to be faced by humanity in the coming decades.

The oil and gas industry has become bolder in the light of shifting attitudes – earlier this year Exxon Mobil sued investors to keep climate proposals off the shareholder ballot[5]. Business leaders have also rowed back from previous support for ESG, most famously BlackRock's Larry Fink, previously a prominent advocate for the concept, who last year described the term as "weaponised".[6]

The courts, too, have been less than enthusiastic to formalise ESG's role in corporate governance. Activists who have sought to argue that directors have a specific duty to implement ESG considerations in the best interests of a company have found the courts reluctant to agree – see for example last year's action in the English High Court by ClientEarth against the directors of Shell. In an oral hearing, the High Court confirmed its decision on papers that a non-profit environmental law organisation with a minority shareholding in Shell had failed to establish a prima facie case in its derivative claim against the company's directors regarding the company's climate change risk management strategy.

The court found that the evidence presented fell short of establishing that the way in which the business was being managed by the directors could not properly be regarded by them as being in the best interests of the company's members as a whole.[7] In its judgment, the court noted that "the management of a business of the size and complexity of that of Shell will require the directors to take into account a range of competing considerations, the proper balancing of which is a classic management decision with which the court is ill-equipped to interfere." ClientEarth sought to appeal the decision this year, but were refused permission.[8]



FIRE practitioners will wish to be mindful of these issues when they are deciding whether ESG considerations have any relevance to their practice. When it comes to directors' duties, the most obvious question is whether ESG factors will give rise to negligence claims in an insolvency, and if they do, whether a director will be negligent because they did not take into account ESG, or because they did.

That said, ESG is not simply a matter of case law and fiduciary judgment calls – there are legal and regulatory obligations in many jurisdictions which may give rise to civil liability. One notable example is this year's European Union directive on corporate sustainability due diligence (the CSDDD).[9]

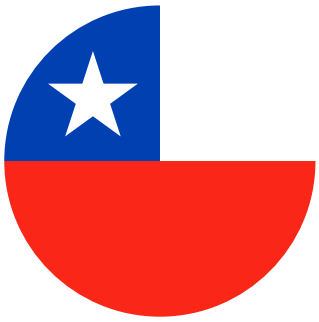
This directive requires companies in member states to "take appropriate steps to set up and carry out due diligence measures, with respect to their own operations, those of their subsidiaries, as well as those of their direct and indirect business partners throughout their chains of activities".10 Those measures will require, among other things, identification and assessment of adverse human rights and environmental impacts[11] and, importantly, member states will be required to lay down rules governing civil liability on companies for damage caused to natural or legal persons in this context.[12]

While the precise form of that liability will depend on the member state, it is something that directors and their equivalents in relevant jurisdictions will certainly need to be mindful of in the near future. Arguably, this directive exemplifies the fact that climate change is now beyond all but the most fringe debate, and that whatever a nation's political leanings, it is a reality which will only gain prominence in international and domestic law in the coming decades.

Further, there are commercial considerations. As the Forbes article notes, the ESG debate is moot if ESG supports firms' profit goals.[13] That

2 The Rise And Fall Of ESG; www.wsj.com/business/the-latest-dirty-word-in-corporate-america-esg-9c776003
3 The Rise And Fall Of ESG
4 Bettering-Human-Lives-Liberty-Energy-ESG-Report-2021-Spreads-Web.pdf
5 The Rise And Fall Of ESG; Exxon sues ESG investors to keep climate proposals off shareholder ballot (NYSE:XOM) | Seeking Alpha
6 BlackRock's Fink says he's stopped using 'weaponised' term ESG | Reuters
7 ClientEarth v Shell Plc [2023] EWHC 1897 (Ch)
8 Court of Appeal (Civil Division) [2023] 11 WLUK 782
9 Directive - EU - 2024/1760 - EN - EUR-Lex
10 CSDDD, Article 19
11 CSDDD, Article 20
12 CSDDD, Article 79
13 The Rise And Fall Of ESG

encompasses not only the 'E' but the 'S' and 'G' in the acronym. Global mining enterprises offer a good example of how social, environmental and governance concerns can align, objectively, with the commercial interests of shareholders.



Take Chile. Here, many mineral mines conflict with indigenous peoples and traditional communities who protest the lithium and copper mining to protect their lands and the environment. According to research by the Institute of Development Studies (IDS), around US$12 billion of investments in Chile – 80 percent of total investments submitted to the Environmental Authority (SEA) – were contested by civil society between 1998 and 2022, with 1 in 5 (21%) currently held up in the justice system. The IDS estimates that currently 60% of all medium- and large-scale mining in this country is involved in some kind of socio-environmental conflict.[14]

This provides an incentive for businesses to avoid that kind of conflict in the interests of progressing projects by engaging with local communities, as is increasingly the case in Chile, and elsewhere, according to sustainable minerals expert and Commissioner for the Global Investor Commission for Mining 2030, Estelle Levin-Nally.

Indeed, Ms Levin-Nally suggests that the commercial importance of ESG goes wider than companies' profit goals.

"It's more about value protection and creation. That includes profit but also share price."

For example, Glencore's share price fell by 7% the day 49 artisanal miners died in a gallery collapse at their subsidiary, Kamoto copper mine, in DRC.

"ESG is about controlling risk posed by the business to people and nature. But there is a reciprocity, because ESG risks which aren't adequately addressed can ricochet to general risks to the business. Good risk assessment means double materiality and guards against value attrition."[15]

This, in the end, may be the reason why reports of ESG's demise are greatly exaggerated – not only because it reflects the physical realities of a changing world, but because the principles of environmental, social and governance responsibility are better for business as well as communities and the climate.

If that's true, it will remain true despite the shifting sands of the global political scene. How will that scene unfold?

There is sometimes an assumption that right wing equals traditional profit-driven capitalism and a resistance to ESG discourse. However, my argument is that ESG considerations are not necessarily at odds with traditional business priorities, and they remain important to directors when they are considering what decisions are in the best interests of a company. They are not simply "woke capitalism", whatever that may mean. At the very least, ESG and business are not automatically enemies. Not everything has to be polarised and weaponised. We need more nuance in our conversations and a willingness to talk to those we do not agree with.

For FIRE practitioners, this means that it is not an area to give up on. For business leaders, it may be worth considering whether it is the polarisation that is the fad, rather than ESG. Whatever your view of these matters, it's not time to switch off just yet.

14 Scale of conflict between mineral mines and indigenous peoples revealed - Institute of Development Studies
15 Interview with author.

Authored by: Emma Kirkpatrick (Associate Director) - Grant Thornton

2024 has been an exciting year in politics. On the world stage, the US elections dominated headlines as the country returned President Trump to the White House after an intense campaign. Meanwhile, closer to home, the UK saw a change in Government for the first time in fourteen years. However, the excitement and hysteria that accompanied Labour's return to power in 1997, when "Things can only get better" played through the streets all night, were notably absent in 2024. This time, the reception was more muted and the honeymoon period was short-lived as Keir Starmer's approval ratings fell faster than those of Blair, Brown, Cameron, May, Johnson or Sunak (though not Truss).

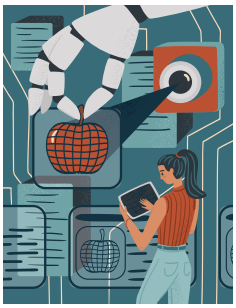
Global political trends refer to significant patterns in the political landscape that affect multiple countries or regions. This essay seeks to explore the impact of global political trends on the future practice of FIRE practitioners and how our political climate is shaping this field. First, climate politics, Net Zero and the environment remain a central issue throughout political campaigns, and we can expect to see this continue. Second, technological influence, the rise of digital threats, the use of generative AI and misinformation campaigns is becoming more prevalent. Third and finally, democratic challenges, many countries are experiencing increasing polarization, misinformation, and declining trust in democratic organisations leading to rising populism.

Climate Politics

This year, Ed Miliband was handed the keys to the Department for Energy Security and Net Zero. Labour promised bold energy plans as part of its manifesto, with commitments to decarbonise power by 2030. Estimates range massively around whether this is achievable and how much this will cost, the UK government has estimated between £50bn and £60bn while other commentators argue that at least £430bn will be needed. Regardless of which estimate is correct, it will clearly require vast amounts of public and private sector investment, with a high-pressure timetable in which to deliver. Furthermore, one of the Government's strategies in which to achieve its goals is the new state-owned entity "GB Energy", which aims to achieve its clean energy mission through project investment (among other functions). This will inevitably lead to opportunities for fraud, notably fraudulent grant applications and falsifying ESG credentials to gain funding (greenwashing).

Firstly, fraudulent grant applications could take a range of forms, from entirely fictitious claims from bad actors to less scrupulous organisations applying for duplicate funding where this is not permitted. We would expect to see robust anti-fraud measures in place from Government organisations to prevent a repeat of the scale of fraud and taxpayer money lost during the Covid pandemic (£21bn[1]). Given the reported scale of investment, we could see this trend having a significant impact on the FIRE industry. Proactive activity will include fraud risk assessments, counter-party due diligence and monitoring – we may see that monitoring becomes increasingly advanced with the harnessing of AI based threat modelling. We can also expect to see some reactive activity in the form of investigations and asset recovery where threats are missed.

Secondly, the falsifying of ESG credentials to gain funding, fraud practitioners will need to address fraudulent claims related to sustainability and greenwashing. We may begin to see a rise in allegations of misrepresentations in terms of ESG credentials, as promises made in bid stages fail to materialize over the course of contract delivery – this could result in investigations, litigation and consequently asset recovery. Interestingly, falsifying ESG credentials were specifically called out within the recently published guidance on the failure to prevent fraud offence under ECCTA. The guidance speaks to two examples; first where the offence is applied to investment funds promoting investments with fabricated environmental credentials and second a company that falsifies its energy efficiency tests to be eligible for UK government grants. We can infer that the Government is expecting to see a growth in this area of fraud and is positioning itself to be prepared to prosecute companies in respect of this.

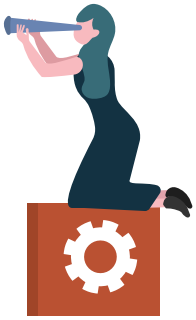


Technological Influence

In November this year, a US congressional commission proposed a Manhattan Project-style initiative to fund the development of AI systems amid intense competition with China over advanced technologies[2]. The objective is to develop AI systems that are as smart or smarter than humans. Jacob Helberg, a USCC commissioner and senior advisor to software company Palantir's CEO, told Reuters "we've seen throughout history that countries that are first to exploit periods of rapid technological change can often cause shifts in the global balance of power." Many consider that AI could represent transformative change for society.

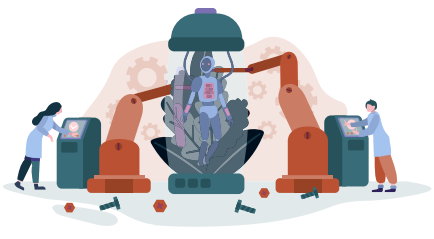
When considering how AI will impact the FIRE profession, we could examine the scale of the investment and the associated risks of fraud. However, it is more intriguing to explore the broader impact of advancing AI technology on the FIRE profession.

This is threefold, first, the impact of AI on the fraud that is committed, fraudsters are able to harness AI to make their frauds more sophisticated and also more scalable. The pace of change is so fast that 2024 has seen significant developments in photorealism such that the digital world is compromised and you can no longer trust that an individual on your screen telling you to make a payment over Microsoft Teams is indeed that individual. Furthermore, large language models such as ChatGPT can also be employed as a tool for conducting fraud by facilitating the creation of fake profiles or phishing emails. As such, we can expect to see evermore sophisticated AI enabled fraud as well as the traditional scams we are all too aware of taking place on a greater scale than ever before.



Looking beyond the now, AI's development is the first time in history that technology has been able to make its own decisions. Agentic AI is developing such that it can plan tasks and project manage itself. Given this, we can anticipate a future where AI will plan and orchestrate fraud, resulting in a new category of perpetrator entirely beyond human influence or action. This would present unexplored challenges in terms of law enforcement and culpability for crime where the directing 'mind' is a machine.

Secondly, AI has an impact on the investigation and litigation associated with fraud, insolvency and asset recovery, specifically in terms of evidence. AI can facilitate the creation of fictitious and fraudulent evidence, very quickly an individual can create email chains or contracts. However, more troublesome, there have been significant enhancements in voice and video simulation, it is possible one could be presented with a voice recording of one's own voice making a confession that was not real. This will present challenges in considering the veracity of evidence. Furthermore, when it is so easy to create an evidence trail, it opens a door to exploitation by individuals when facing questions from auditors or other regulators.



1 Taxpayer left to pay billions due to Covid fraud, say MPs - BBC News
2 US government commission pushes Manhattan Project-style AI initiative | Reuters

However, it is not all bad news, AI certainly presents the FIRE practitioner with enormous opportunities. The third impact is the ability for FIRE practitioners to incorporate AI into our own arsenal of investigatory tools. AI is well established within document review platforms, saving a tremendous amount of time by directing users to the most relevant documents in target assisted review. While legal requirements may still necessitate thorough reviews, AI greatly enhances efficiency and accuracy. Additionally, AI software offers efficiency savings, which could reduce the associated costs and improve access to fraud investigation services. As trust in AI grows and its reliability becomes more widely recognised, the full benefits of AI will be increasingly realised. The future looks bright for fraud practitioners who are willing to invest in AI to streamline and strengthen their investigative processes.

Democratic Challenges

2024 is remarkable for the number of elections held worldwide, around half the world's population were eligible to vote, 4 billion people in 76 nations[3]. Some of those elections have sparked conversations around threats to democracy and rising populism, such as Trump's re-election in the US. A trend we are familiar with in the UK following Brexit in 2016 and the growth of Nigel Farage's Reform party (achieving three MPs for the first time in 2024). The Tony Blair Institute describes populism's appeal

as "often based on real concerns about the failure of mainstream parties to address issues that citizens are worried about and the failure of institutions to deliver policy outcomes that matter to citizens[4]."

So what's the impact of this on fraud and the FIRE profession? Populist rhetoric, such as leaders claiming that systems are corrupt, can erode public trust in institutions. A lack of trust in systems has the potential to lead to fraud against the Government, as the belief in the system is diminished. As FIRE practitioners, we may experience the impact of this by witnessing a growth in fraud against the Government and an increasing number of both proactive and reactive cases in this space.

One can also expect an impact on resource allocation. Populist movements are more focused on short-term goals and less on long term objectives such as regulatory policy. Mainstream political parties will not be entirely immune to the impact of this, as all parties seek to sway this growing portion of the electorate. This can result in the prioritisation of certain types of regulation or investigations over others. Quality legislation and regulation is integral to the FIRE profession and therefore a lack of investment in this could erode the effectiveness of the profession over time. AI is an example of this; policymakers must react to rapid developments in AI to address potential issues and empower law enforcement to act where necessary.

As fraud has become increasingly complex, international and cross border, our law enforcement agencies have had to follow suit and build strong connections with their counterparts across the globe. As such, we rely on the continuing investment and funding for regulatory bodies to combat fraud around the world. Where populist agendas redirect these resources away from fraud prevention, the impact could be felt globally.

Conclusion

The investment in Net Zero is an exciting development, but the risk of fraud could be a PR disaster for the UK government and the Net Zero movement as a whole, potentially giving further momentum to populists. We await to see how Trump will respond to Biden's Inflation Reduction Act in the US. In the UK, some voices on the right have dismissed Net Zero as a waste of money, with the Reform party's manifesto including a promise to scrap all carbon emission targets to save the taxpayer £30bn a year. Large scale fraud and loss of taxpayer money in this space could irreparably damage Net Zero, making it essential that everyone gets this right.

AI also presents risks in terms of fraud in investment, but beyond that, the enhanced technology could significantly advance the ways in which fraud is perpetrated. It is crucial that these risks are adequately addressed by both the public and the private sectors.

Reflecting on these global trends, it is vital the Government responds to these risks. A populist focus by governments could lead to a greater focus on short-term goals, resulting in oversights on important political trends such as these. Corruption in Net Zero or AI could undermine these trends and be capitalized on by populist parties, leading to a loss of trust in public institutions and the movements themselves.

3 2024 will see more elections than any other year in history. Many will be unfair.
4 Populists in Power Around the World

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The International Fraud Group ("IFG") is a network of international lawyers who are experts in Asset Recovery and Fraud Investigation.

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In 1994 a Bank that Mishcon de Reya were working for in the international recovery space expressed a need to access like minded and similarly skilled lawyers across the globe to help them when their and their client's assets had gone astray. The IFG was born in response to that need.

The ethos of the IFG is based on responsiveness, know how and commerciality.

In the Asset Recovery & Fraud Investigation space there is no time to lose when a problem is discovered. Sometimes injunctions are needed on an immediate basis. IFG's members know that every second is valuable when chasing crooks and understand that responsiveness is critical.

There is a huge difference between knowledge and know how. It is the practical application of the law to get a result that the client wants which is at the very core of the IFG.

Knowing what to do and how to do it is not enough. What lawyers in this space need to understand is that clients want and are right to insist on a return on their investment. The costs that a client incurs in an Asset Recovery scenario and/or Fraud Investigation represent an investment. IFG Members know that to justify their existence they must produce a return on that investment in terms of funds or assets recovered.

The IFG also has in-depth expertise in the following sectors which are represented by 5 sub-groups namely Crypto Currency, White Collar Crime & Investigations, Arbitration, Shipping and Insolvency.

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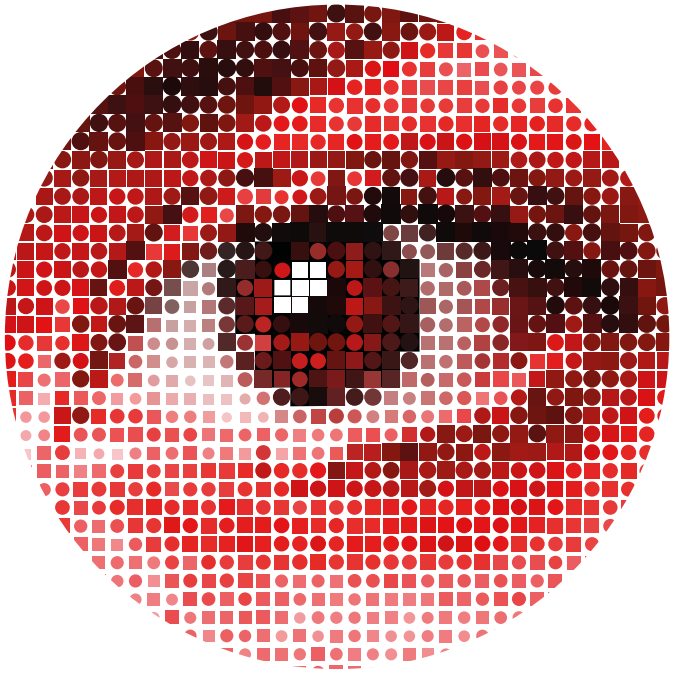

We freeze.
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60 SECONDS WITH...
JOHN SENDAMA
PARTNER
MISHCON DE REYA / IFG

Q What Would You Be Doing If You Weren't In This Profession?

A I would be a record label executive. But for a fork in the road many years ago, I would have started work as a record label A&R (Artist and Repertoire rep) - talent scouting, signing and developing emerging musicians.

Q What Is One Of Your Greatest Work-Related Achievements?

A I'm grateful that I've been able to build an engaging practice doing high-stakes, multijurisdictional asset recovery work for an array of corporate, individual and sovereign clients, often at the cutting edge of the practice.

It is also inherently fulfilling to right wrongs committed against my clients by bad actors who think they can operate with impunity. From those cases, the achievements I always consider the greatest, involve using my toolkit for the benefit of individuals whose entire lives have been turned upside down by fraudsters.

An example that springs to mind is making a full recovery for a vulnerable, elderly couple whose lifesavings were stolen in their entirety. They had each worked diligently for more than 40 years, spending very little, but in their retirement, they fell prey to a sophisticated authorised push payment (APP) scam. The scheme was executed by a team of individuals online, over the phone and in person. It involved elaborate social engineering, "number spoofing" and in person impersonation of law enforcement.

The successful recovery had a profound impact on my clients' daily lives, health and family's wellbeing.

Q What Personality Trait Do You Most Attribute To Your Success?

A Curiosity.

It is an obvious boost in relation to investigations in my fraud and asset recovery cases.

In my commercial disputes practice, I need a deep understanding of the wildly different businesses my clients operate, and challenges they face. I also need to understand how their competitors and/or opponents work and what motivates them.

My natural desire to know more and genuine interest in these questions fosters more effective working relationships and allows me to tailor strategy to best meet my clients' objectives.

Q You've Been Granted A Ticket To Another Country Of Your Choice. Where Are You Going And Why?

A Iceland.

I have only toured one side of the island but got to experience active lava fields, volcanic sand beaches, geysers, off-roading across alien-looking landscapes, ice caves, geothermal spas, and a small slice of the 10% of Iceland that is covered in glaciers.

There is a lot left to explore. I may still avoid the Hákarl (fermented shark). I'm not sold on the "strong ammonia smell and fishy taste" or description of the production process, which involves getting rid of the toxic urea in the shark meat by fermenting it buried or in a tub for months, then hanging it out to dry.

Q What Do You See As The Most Significant Trend In Your Practice In A Year's Time?

A A dramatic increase in the adoption of GenAI and machine learning tools on both sides of the arms race between fraud and asset recovery practitioners on one hand, and crooks on the other.

AI is already changing the way we litigate, allowing us to better search for a needle in a haystack when analysing massive data sets of evidence. Other key developments will be:

- Firms optimising and leveraging their AI adoption strategies. AI is coming for everyone but it's not a one-size-fits-all solution. Without a coherent and bespoke strategy for a specific organisation. Chasing the benefits of AI will be a costly and frustrating exercise.
- Further development in the ability to leverage court data and AI-enabled analytics to support litigation strategy, for example through more sophisticated analysis of High Court decisions to gain insights into potential outcomes.
- Bespoke agentified AI (essentially, chatbots), trained on a corpus of fraud related data to pull key insights quickly.
- Machine learning leveraged for pattern recognition and real-time fraud detection. To identify anomalies, fake documents, identities, and fake image and videos.

On the other side of the fence, more readily available DIY fraud tools will mean that we need to contend with the rise of:

- Deepfake-enabled APP fraud and corporate espionage
- Automated social engineering research to build target profiles
- Phishing attacks that are more sophisticated and harder to detect
- Intellectually property theft using AI to reverse-engineer proprietary algorithms or products
- Using machine learning to identify and exploit corporate security to enable data theft

Q Do You Have A Ny Resolution, If So How Do You Plan To Keep It?

A Less screen time, more outdoor time.

Between time recording for client work and alarming regular updates from my phone about screen time, I have access to a lot of data on how much time I spend on screens. That has been enough to scare me into action.

So far, so good.

Q Dead Or Alive, Which Famous Person Would You Most Like To Have Dinner With And Why?

A Prince.

He was an immensely gifted singer, songwriter, producer, multi-instrumentalist and showman. He very rarely played in the UK but before he died, I had the privilege of seeing him perform in during his record-breaking run of 21 consecutive shows at the O2 Arena, and a few years later at an intimate surprise gig for 1,500 fans at KOKO in Camden.

He has an amazing life story and from the accounts of the people who have met him, he would have some terrific dinner party tales.

Q What Is The Strangest, Most Exciting Thing You Have Done In Your Career?

A Over the years, I have executed a lot of search and computer imaging orders against defendants, and separately acted as an independent supervising solicitor during other lawyers' executions. It is a very unique experience for me to have engaged, without notice, with my client's opponents in their homes, offices, hotels and even farms!

Q What Motivates You Most About Your Work?

A Working alongside a surprisingly large number of incredibly smart, creative, fun, motivated, and often quite odd/interesting, colleagues at Mishcon. Never a dull moment.

Q What Does The Perfect Weekend Look Like?

A Sunny summer festival adventures with my daughter and son.

Q What's The Most Important Quote You've Heard That You Have Adopted To Your Personal Or Professional Life?

A "Alligator closest to the boat." A military saying that's a reminder to identify, then prioritise dealing with the things that are mission critical, even when surrounded by a multitude of seemingly insurmountable challenges at the same time.

Q What Is One Thing You Could Not Live Without?

A My motorbike. I've ridden almost every day for as long as I can remember and wouldn't have it any other way.

Authored by: John Sendama (Partner), Philippa Rees (Partner), Joe Hancock (Partner) & Emeric Bernard-Jones (Intelligence Manager) - Mishcon de Reya / IFG

Deepfake CEO fraud poses a substantial and growing threat to today's businesses. As has been widely reported, British engineering firm Arup fell victim to a deepfake fraud in 2024 when a Hong Kong employee was duped into joining a video conference call where the employee believed they were speaking with senior management. However, the 'people' on the call were in fact deepfake impersonations. Arup lost £20m as a result. Companies such as Octopus Energy and discoverIE have also reported being targeted, and fraudsters are exploiting AI and machine learning tools to create ever more convincing scams.

In the face of this growing threat, it is essential that businesses keep abreast of the latest methods and technologies being used by fraudsters and ensure that systems are in place to guard against such attacks. They must also ensure that a rapid response plan is in place to ensure swift action should the worst happen.

What are the developments in this area?

In recent years, we had seen a decrease in CEO frauds, where fraudsters generate emails, purportedly from senior officers of the company, requesting urgent transfer of funds to (what turns out to be) a fraudster-controlled account. As awareness of CEO frauds rose, and companies put systems in place to protect against them, fraudsters were forced to change tack.

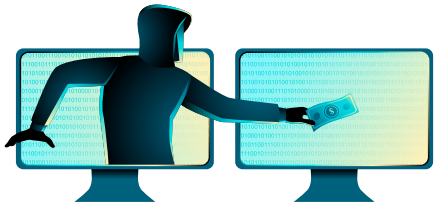
The development of voice and video cloning (DIY tools for which are now widely available) has enabled them to evolve. The convincing nature of well executed versions of such interactions can be enough to persuade an employee that they are dealing with a legitimate request. This risk is amplified at a time when awareness of these new technological capabilities is low in comparison to well-trodden scam methodologies.

Who is most at risk within organisations?

Not all members of an organisation are equally at risk of being targeted and prevention efforts and resources should be focussed in the right areas. As would be expected, it is those with access to payment systems, typically finance personnel, who are most at

risk of being targeted, with those at the junior end generally more at risk.

In addition, newly acquired subsidiaries may be targeted, with the fraudsters hoping to take advantage of a lack of familiarity with the broader organisation's systems and processes. Overseas subsidiaries can also be at risk, where physical distance from central business operations, and the increased likelihood of language barriers, can be exploited by the fraudsters.



How are these frauds carried out?

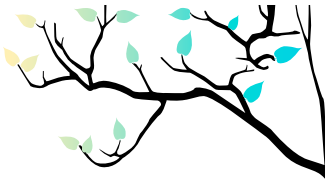
Whilst we are seeing voice and video cloning as a central feature in many fraud attacks, the way in which those clones are introduced or deployed may vary. Scam attempts often start with a direct message to the targeted employee, requesting their help with what is typically a 'highly confidential' and 'urgent' transaction, in which their 'discretion' is greatly valued.

Such messages may be sent through a fake WhatsApp profile that has been set up in the name of a senior executive. Messages in text form may be followed up by voice notes, in an attempt to bypass suspicion and convince the employee that they are genuinely engaging with the senior executive in question. Attempts by the employee to call the senior executive via WhatsApp may be deflected, with excuses given to explain the inability to have direct contact or redirected to other impersonated individuals. Alternatively, where live deepfake technology is being used, the call may be accepted and the scam continued on a live call. More sophisticated frauds will see video cloning deployed, with employees being invited to join video conferences, apparently with members of the senior management team.

How can businesses detect deepfake fraud attacks as they are happening?

New methods that utilise AI techniques to detect deepfakes in real time are currently being developed and marketed but these programmes have not yet been widely adopted. Most businesses must therefore rely on human judgment and on individuals being able to spot the tell-tale signs of deepfakes.

The good news is that many of the red flags that employees should already be trained to spot in 'traditional' email or payment frauds apply equally to deepfake impersonation fraud. A single executive demanding the transfer of a large sum of money to a new account late on a Friday afternoon should raise red flags however it is communicated, whether by email, WhatsApp, voice note, or video call. Similarly, requests which emphasise confidentiality and urgency and put pressure on the individual to act quickly without going through the normal channels should continue to raise alarm bells.

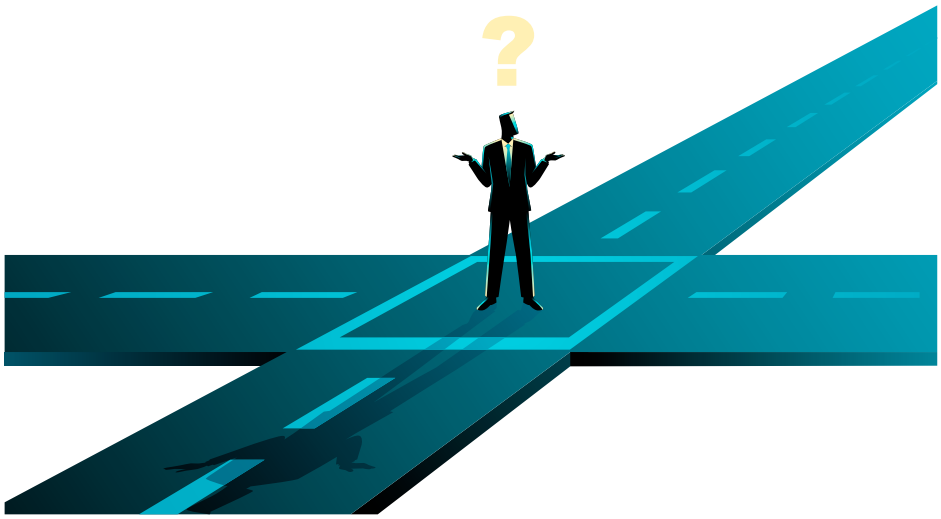


In addition, employees should be trained to look out for the tell-tale signs of audio or visual manipulation. These can include:-

- Unnatural lighting - deepfake algorithms often retain the lighting of the clips that were used to train the models, which can look unnatural in motion, depending on the lighting conditions.
- Incorrect glare of lighting reflections - if the subject wears glasses, does the glare appear believable and does the angle of the glare change in movement?
- Blurry skin or very soft-focus filters - often, in attempts to make videos seem more realistic, smoothing filters and technologies are used that can appear unnaturally 'soft'.
- Unusual lip movements – deepfake movements are often tracked to audio-cues. Do specific tones always come with a correlating movement? Do the lip movements look natural or are they slightly out of sync with the rest of someone's face?

How can a business protect itself against APP fraud?

Beyond training in how to detect deepfake fraud, robust systems and processes are the key to protection against APP fraud. Established protocols should be in place for payment requests and authorisations. This should involve a dual approval system for high value transactions, requiring approval from at least two senior managers. Where appropriate, mid-level business leaders can be used in this verification process. Fraudsters are more likely to target and impersonate the high profile 'public face' of a company but are less likely to even know about the mid-level business personnel and therefore the risk of them being impersonated is much lower. It may also be less likely that there will be publicly available voice or video content



of those mid-level business leaders, from which a deepfake can be created.

Once those systems are in place, awareness of the processes is critical, both in those requesting payments and those authorising them. Rigid compliance with the processes is also essential to avoid any creep towards informal approvals, as any gaps that emerge in the system can be easily exploited. If the policy is followed without exception, it substantially reduces the risks of individuals being pressured to deviate from the policy for a 'special case'.

What to do if it goes wrong?

If, despite the protections in place, the business falls victim to a fraud, the central message is to act quickly. Once monies have been transferred to the fraudster, they will be moved at speed to other bank accounts and most likely out of the jurisdiction. Victims of the fraud must react with equal speed, taking advantage of the 'golden' 24-hour window to maximise recovery. The first steps will be pivotal, and businesses must prioritise the rapid action steps that are most likely to have an impact on the recovery of their assets.

To achieve this rapid action response, it is essential to have a group of internal 'first responders' who fully understand the toolkit that is available to them and their external lawyers and know what can be achieved in the early stages.

The most time-critical step is for the internal 'first responders' to contact the fraud team at their bank. This enables the bank to take immediate inter-bank recovery steps such as sending SWIFT messages seeking to recall the payment. The second step is to instruct lawyers with experience of dealing with this type of fraud.

Once lawyers are instructed, they should immediately assess what steps have already been taken and ensure that all relevant people have been contacted and relevant preservation steps put in place. This will involve contacting both the sending and receiving banks and obtaining as much information as possible about the payment, the destination account and the current whereabouts of the money. Given the client confidentiality obligations owed by banks, these initial enquiries will typically be followed up with urgent applications to court for disclosure orders against the bank (Norwich Pharmacal Orders) to establish the current whereabouts of the money. If the money is still within reach, this will be supported by applications for Freezing Orders over the stolen monies.

Conclusion

As fraudsters evolve their approach, businesses must ensure that employees are kept apprised of the latest developments. Business culture is also key – employees must feel comfortable insisting that established approval processes are strictly complied with, should not be afraid to question the legitimacy of communications, and should feel able to own up if something goes wrong. This last point is critical. The worst outcome for a business will stem from an employee who tries to cover it up, or to 'fix it' on their own as it will deprive the business of enacting the rapid response plan that will give the business the best chance of maximising its financial recoveries.

This is an extract from our more detailed report, "Executive Deception: Combating the substantial threat that deepfake CEO fraud poses to today's businesses", which forms part of our wider series of "For the Attention of the Board" reports. For a copy of the full report and our other briefing papers, please visit mishcon.com/for-the-attention-of-the-board.

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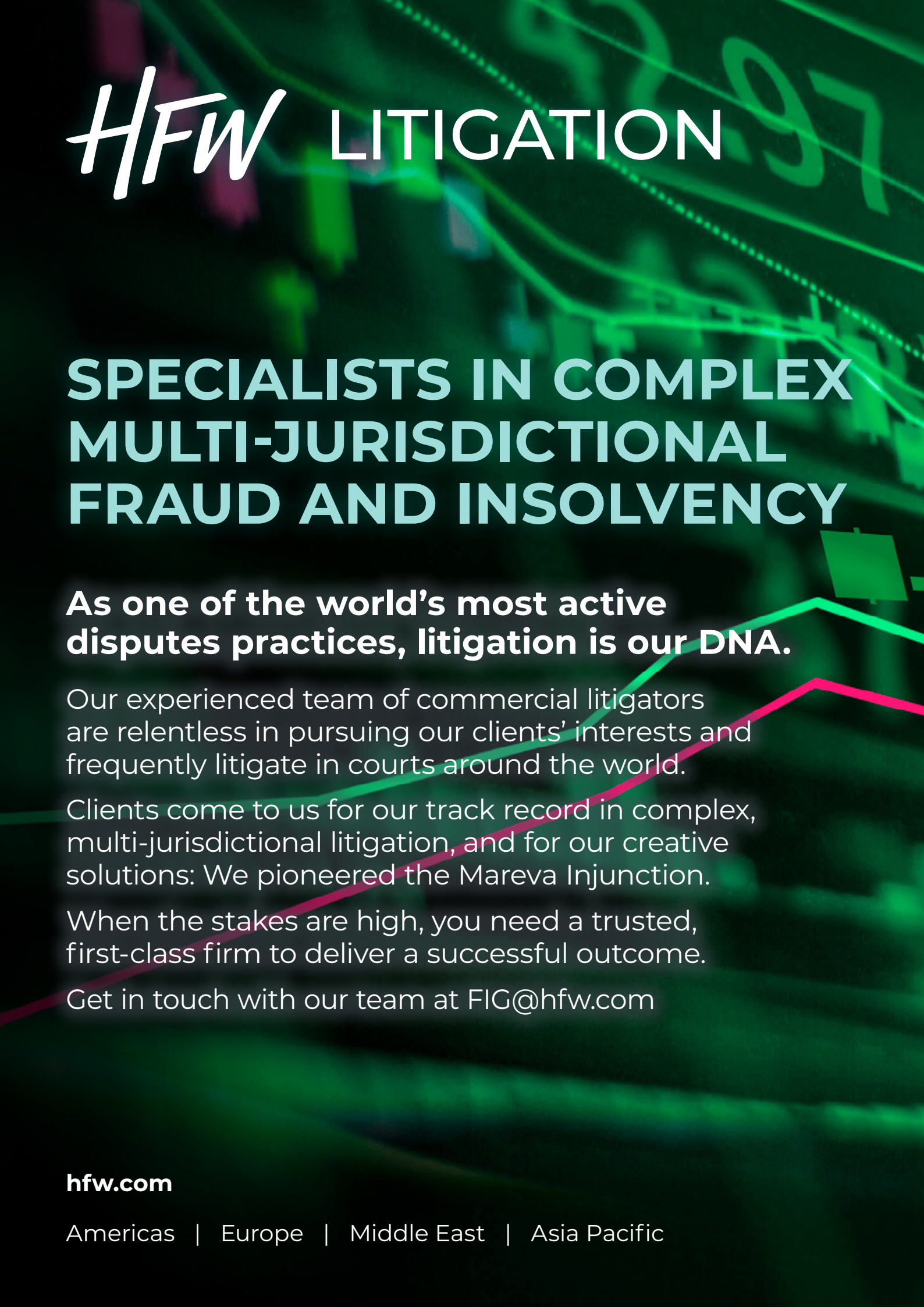
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LOST IN TRUSTLATION:

ENFORCEMENT OF ENGLISH JUDGMENTS AGAINST TRUST ASSETS HELD IN JURISDICTIONS THAT DO NOT RECOGNISE TRUSTS

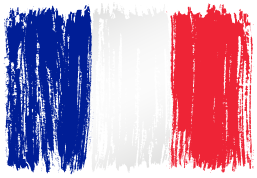
Authored by: Tom Serafin (Associate, London) Frédéric Creuset (Associate, Paris) & Abdullhaleem Ahmed Ammar (Consultant, Riyadh) - HFW

Overview

Enforcing an English judgment abroad can often be challenging, especially when it involves trust assets located in jurisdictions that do not recognise trusts (or do not recognise them in the same way as in England and other common law jurisdictions). This issue is particularly pertinent in non-common law countries. In this article, we explore the enforcement challenges in two such jurisdictions: France and Saudi Arabia.

The complexities arise from fundamental conceptual differences in legal systems. Common law jurisdictions, such as England and Australia, have a long-established history with trusts, whereas non-common law jurisdictions, like France and Saudi Arabia, may not recognise or enforce them in the same manner or at all. This divergence creates significant hurdles for practitioners aiming to enforce judgments against trust assets held in such jurisdictions.

Given our increasingly interconnected world, understanding these nuances is crucial. Reconciling different legal frameworks and concepts, particularly between common law and non-common law jurisdictions, remains a complex task. This article underscores the importance of addressing these challenges to ensure the effective enforcement of judgments involving foreign trust assets.



France: an overview

France is a civil law country that does not afford the same meaning to trusts as England does. In 2007, France introduced the concept of the fiducie which adopts the notion of segregated assets but is notably narrower because of its more restrictive regulatory framework (it is founded in contract law and limited in application) and scope (it still does not distinguish between legal and beneficial ownership that is fundamental to the concept of the English trust).[1]

France has signed, but not ratified, the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition, meaning that it cannot be applied by French courts. Nevertheless, French courts recognise the effects of trusts settled under a foreign law - either through an assimilation to notions of French Law, or directly by applying the foreign law to questions concerning the trust. The approach taken appears to depend on the purpose of the trust.

1 French Law n°2007-211 of 19 February 2007.

For example, in cases related to trusts settled for inheritance or succession planning purposes, the trustee has been equated to an executor[2] and the trust to an indirect donation taking effect upon the death of the settlor.[3] Yet, in other cases related to loans and securities, the French courts have confirmed that the trustee could bring claims in that capacity under the foreign law governing the trust. For example, the French courts have confirmed that a trustee could file a claim in French insolvency proceedings as creditor of "parallel debts" under a secured loan subject to New York Law[4] or claim the rights associated to the assets of a trust governed by English Law against the guarantor of a loan in France as the sole "legal owner" of the trust's assets and not merely an agent of the beneficiaries, the names of which the trustee did therefore not have to disclose to the court.[5]

Trusts settled under a foreign law are also defined and regulated by French tax law.[6]

Saudi Arabia: an overview

The Kingdom of Saudi Arabia (KSA) is a shari'ah law country that does not recognise the English trust. Saudi courts also do not apply foreign law and so, even if there is a valid trust concerning trust property in Saudi Arabia, those courts would apply only Saudi law to determine its effect. Saudi law however does recognise concepts similar to the English trust such as waqf (an Islamic endowment) and amaana (the moral responsibility to safeguard property entrusted by another).[7]

Waqf

A waqf is a charitable trust (or endowment) under Islamic law that is inalienable, irrevocable, and perpetual. The term waqf directly translates to "detain," and a waqf can be thought of as detaining property for charitable or religious purposes for the sake of Allah. An essential component of waqfs is that the assets being donated cannot be consumable. In other words, money can be donated, but it will be invested, and the interest from that investment will go towards the charitable cause. There are two main types of waqf:[8]

- Waqf al-Khairi: Dedicated to public or quasi-public charitable causes, such as mosques, schools, or hospitals.
- Waqf al-Dhurri: Benefits the founder's family members while also serving a charitable purpose.

Amaana

"Amaana" originates from the Arabic and means trust or loyalty. In the context of Islamic banking and finance, it refers to a transaction where a person entrusts property or an asset to another person or institution, with the expectation that it will be handled in a manner consistent with the owner's intentions. As in other jurisdictions governed or influenced by shari'ah law, this emphasises integrity and trustworthiness in dealing with the owner's property or asset, concepts which are very familiar to the English trustee.

Enforcement challenges in France

Following the United Kingdom's withdrawal from the European Union, the European enforcement regime ceased to apply to the enforcement of English judgments in Member States. Unless and until new arrangements are made (for example, the European Council agreeing to the UK's accession to the Lugano Convention), the enforcement of English judgments in France will be governed by one of the following regimes:

Hague Convention on Choice of Court Agreements

The Hague Convention on Choice of Court Agreements, which both France and the UK have ratified, applies only to judgments in civil and commercial matters given by a court designated in an exclusive choice of court agreement. It ensures that such judgments are recognised and enforced in other Contracting States. However, the Convention excludes a broad range of areas including family law, wills and succession, insolvency and rights in rem in land.[9] If the ruling involving trust assets concerns any of these areas in which trusts are frequently used, the Convention does not apply.

It is worth noting that the UK has (relatively) recently ratified the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (shortened to 'the Hague Judgments Convention'), to which France is also a party.[10] This Convention aims to provide a uniform framework for the recognition and enforcement of judgments in civil or commercial matters across different jurisdictions, regardless of whether they are based on choice of court

2 Cour de cassation [French Court of Cassation], Chambre civile 1, 3 November 1983 (n° 82-14.003).
3 Cour de cassation, Chambre commerciale, 15 May 2007 (n° 05-18.268); Chambre civile 1, 20 February 1996, n°93-19.855.
4 Cour de cassation, Chambre commerciale, 13 September 2011, n°10-25.533.
5 Cour d'appel de Paris [Paris Court of Appeal], 11 March 2005, n° 03/16917.
6 French Law n°2011-900 of 29 July 2011; article 792-0 bis of the French Tax Code (Code Général des impôts).
7 See Paul Stibbard, David Russel KC and Blake Bromley, 'Understanding the waqf in the world of the trust' (2012) 18(8) Trusts & Trustees 785 for an interesting journal article on Islamic jurisprudence and parellels with the English trust.
8 Law of the General Authority of Endowments, Issue Date1437/02/26 H Corresponding To : 08/12/2015 G.
9 Convention on Choice of Court Agreements, opened for signature 30 June 2005, MS 11/2018 (entered into force 1 October 2015), Article 2(2)(d).
10 The Hague Judgments Convention is due to enter into force in England and Wales on 1 July 2025 and will apply only to judgments handed down in proceedings after that date.

agreements.

The Convention implicitly confirms that it is applicable to trusts. Article 5.1(k) states that a judgment concerning the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, is eligible for recognition and enforcement if it is rendered by a court of a Contracting State that was, at the time the proceedings were instituted, designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined or in which the principal place of administration of the trust is situated. Consequently, its article 7.1(d) states that recognition or enforcement of a judgment by a different court may be refused.

However, like the Hague Convention on Choice of Court Agreements, the Hague Judgments Convention also excludes various matters, including family law, wills and succession and insolvency; it does however not exclude rights in rem in immovable property.[11]

Any reciprocal enforcement regime

France and the UK have a bilateral treaty in place for the reciprocal enforcement of judgments.[12] If the treaty applies and there are no objections to recognition of the judgment according to its article 3 that are similar to those under French Law (see below), the judgment holder can obtain an exequatur (declaration of enforceability) from the French court. However, only money judgments are enforceable under this treaty. This means a judgment over rights in rem in land or an injunction would not be enforceable under the treaty.

French law

If none of the above instruments applies, enforcement of a foreign judgment is subject to the general principles developed by the French courts. For a foreign (English) judgment to be recognised and declared enforceable in France, the French court must be satisfied of the following three conditions:[13]

1. The foreign court must have had "indirect" jurisdiction over the matter giving rise to the judgment; this condition is satisfied if there is a significant connection between the case and the foreign court and if the French courts do not have exclusive jurisdiction; for instance, French courts have exclusive jurisdiction over rights in rem in immovable property located in France included in a succession commenced abroad.[14]
2. The foreign judgment must be compatible with French international public policy.
3. Absence of fraud; in other words, the foreign judgment must not have been sought with an intention to defraud, such as to bypass French law or the French courts' jurisdiction.

English judgments rendered in succession matters with close ties to France, either because the succession is governed by French Law or certain inheritors are French, may face a hurdle of satisfying the condition of compatibility with French public policy. This is because French Law protects the rights of certain inheritors under the principle of réserve héréditaire (hereditary reserve).[15] While it is not per se a principle of international public policy, French courts may in specific circumstances consider that it bars the application of a foreign law or the enforcement of a foreign judgment.

An illustrative case[16] concerns a challenge to the validity of the will of Maurice Jarre, a famous French composer best known for composing the scores to Lawrence of Arabia and Doctor Zhivago. Mr Jarre made a will in California, in which he bequeathed all his property (including real property in California, movable property, royalties and copyrights to musical compositions in France) to his family trust. The bequeathal would benefit his wife and, upon her death, their children, but not the couple's children from other marriages, which conflicts with French law on heriditary reserve. Ultimately, the French Court of Cassation held that the Californian law governing the will did not contravene French public policy because it was not demonstrated that the absence of heriditary reserve under Californian Law would leave the other children in a state of precariousness or need. However, one can see that if there was any suggestion that such children would have been left in a state of precariousness or need, then the court would probably have reached a different conclusion. Whilst this case involved the validity of a foreign will, a French court will likely look at a foreign judgment seeking to enforce against trust assets in France in the same way if the succession has close ties to France.

French courts may also look at the purpose for which the trust has been settled. Transfers of assets of a succession to foreign trusts may be held to be fraudulent and therefore invalid towards inheritors if it is found that they were intended to deprive and defraud them of their heritage[17] or to bypass the application of French Law and in particular the hereditary reserve.[18] A foreign judgment admitting the trust and the rights of the trustee and beneficiaries may in such case be subject to scrutiny by French courts on whether it has been sought with an intention to bypass French law or the French courts' jurisdiction. If this is found to be the case, recognition and enforcement will be refused.

11 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, opened for signature 2 July 2019, MS 7/2024 (not yet in force), Article 2.1(d).
12 Convention between His Majesty in respect of the United Kingdom and the President of the French Republic providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters with Protocol, signed 18 January 1934, [1936] TS 18/1936 (entered into force 16 May 1936). Note there is still ongoing debate amongst academics whether or not this bilateral treaty was superseded or merely suspended and revived following the UK's exit from the EU.
13 Cour de cassation, chambre civile 1, 20 February 2007, n° 05-14.082.
14 Cour de cassation, Chambre civile 1, 14 March 1961; Cour de cassation, Chambre civile 1, 10 October 2012, n° 11-18.345.
15 Articles 912 to 917 of the French Civil Code.
16 Cour de cassation, Chambre civile 1, 27 September 2017 (no. 16-13.151).
17 Cour de cassation, chambre civile 1, 18 May 2022, n° 20-20.609.
18 Cour de cassation, chambre civile 1, 20 March 1985, n°82-15.033 regarding real estate located in France that had been transferred to a foreign trust.

Enforcement challenges in Saudi Arabia

As already mentioned, KSA will only recognise and apply Saudi law. There are several conditions that need to be satisfied before a Saudi court will recognise and enforce an English judgment.

For a foreign (English) judgment to be recognised and enforced in KSA, the enforcement judge responsible for determining the enforcement of any such decision cannot enforce it unless a 'basis of reciprocity' has been established.[19] After verifying the same, the enforcement judge must be satisfied of the following five conditions:

(a) That the courts of KSA do not have jurisdiction to hear the dispute in which the judgment or award was issued, and that the issuing foreign courts have jurisdiction according to the rules of international jurisdiction set forth in law.

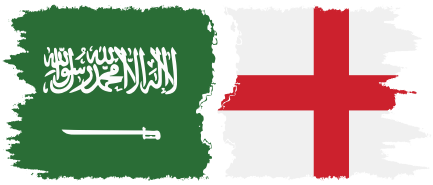
(b) That the litigants subject to the proceedings in which the judgment or award was issued were notified and duly represented and allowed to defend themselves. If the award was made in absentia, then proof that the respondent was notified of the proceedings is required.

(c) That the judgment or award has become final according to the rules of the Court or Tribunal that promulgated it.

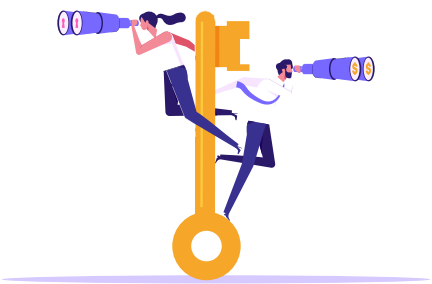
(d) That the judgment or award is not in violation of any principles of shari'ah law. For example, an award of interest in a judgment would be unenforceable (though severable, leaving the balance of the judgment capable of enforcement).

(e) That the judgment or award is not contrary to a judgment or order issued under the same subject matter by a competent judicial authority in the Kingdom.

There are some cases which, as a matter of KSA law, the Kingdom has sole jurisdiction to determine such disputes, such as, for example, in disputes involving real estate located in the Kingdom.



Insofar as an enforcing an English judgment against trust assets in Saudi Arabia is concerned, it is likely that a Saudi court would recognise a trust because its familiarity with concepts like waqf and amaana could be sufficient without needing to find a precise analogue in Islamic law. This was precisely the conclusion that Mr Justice Fancourt reached on consideration of the expert evidence in Byers v Samba.[20] This was an English High Court case involving a claim by liquidators of an investment company (the beneficiary of Cayman Island trusts) against a Saudi bank for knowing receipt of shares in five Saudi companies that were transferred to the Saudi bank by the investment company's trustee in breach of trust. Fancourt J concluded (at [181]) that a Saudi court would characterise the investment company's interest under the Cayman Island trusts as an ownership interest because of the court's "familiarity with concepts such as waqf, amaana and muhassa, which to varying degrees recognise and give effect to different rights of parties in the same property".[21] Therefore, the court would "be able to understand that [the investment company] would have ownership rights in the trust property, even though [the trustee] was the apparent owner of it."[22]



Key takeaways and alternative solutions?

Practitioners should be mindful of the following when considering the enforcement of an English judgment against trust assets abroad.

First, it is essential to understand the specific hurdles presented by the jurisdiction where enforcement is sought. This will usually require engagement with local counsel. Doing so early can prevent major headaches later.

Second, think outside the box and consider alternative strategies such as applying pressure on the trustees to bring in the assets voluntarily from the non-common law jurisdiction into the (usually common law) jurisdiction in which the trust is settled. Where they refuse, consider applying to the court of that jurisdiction in order to compel the transfer of (cash) assets into court or, where the transfer of the asset itself is not possible (for example, it concerns land or shares), to appoint a co-trustee and transfer ownership in the asset and prohibit the original trustee from dealing with the asset except jointly with the co-trustee.

Conclusion

Navigating the enforcement of English judgments against trust assets in jurisdictions that do not recognise trusts evidently presents challenges. The fundamental differences between common law and non-common law systems, as seen in France and Saudi Arabia, require a nuanced understanding and strategic approach. Practitioners must be well-versed across these shifting legal landscapes and engage with local counsel early to mitigate potential obstacles. Additionally, exploring alternative strategies, such as leveraging the trustees' cooperation or seeking judicial intervention, can be crucial in overcoming these enforcement hurdles. As the world's diverse legal climates continue to converge and intertwine, staying informed and adaptable will be key to successfully enforcing judgments across them.

This article is based on a presentation delivered by Tom Serafin at the TL4 Private Client Contentious Trusts conference in Dublin, Ireland in September 2024, and further developed with Frédéric Creuset and Abdullhaleem Ahmed Ammar.

19 Article 11 Enforcement Law in 2013 through Royal Decree Number M53 Dated 13/8/1433H Corresponding 03/07/2012G.
20 [2021] EWHC 60 (Ch).
21 Ibid at [177].
22 Ibid.

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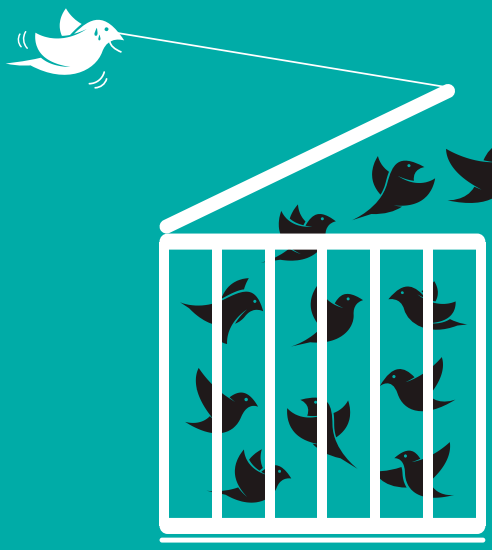

WHEN SHOULD FOREIGN BANKRUPTCY LIQUIDATORS APPLY FOR A WAIVER OF THE SWISS ANCILLARY BANKRUPTCY?

CORPORATE PARTNER

MBK.LAW
SWISS LITIGATORS

Authored by: Yves Klein (Partner), Evin Durmaz (Senior Associate) & Elisa Branca (Associate) - Monfrini Bitton Klein

Foreign bankruptcy liquidators often face significant hurdles when attempting to recover assets or enforce claims in Switzerland. These challenges largely stem from Article 271 of the Swiss Criminal Code (SCC), which acts as a blocking statute, prohibiting foreign officeholders from taking direct legal or administrative actions in Switzerland or litigants to obtain evidence in support of foreign proceedings. This provision is designed to protect Swiss sovereignty, ensuring that foreign actions do not infringe on the jurisdiction of Swiss authorities. However, Swiss lawmakers have developed mechanisms to balance this principle with the practical needs of cross-border insolvency cases, particularly through the recognition of foreign bankruptcies. In particular, since 2019, the sometimes-cumbersome Swiss ancillary bankruptcy can be waived, when this is compatible with the interests of Swiss creditors.

1. The Recognition of Foreign Bankruptcies and Mini-Bankruptcy Proceedings

Swiss law mandates that foreign bankruptcy decisions be formally recognized by local courts.

In principle, this recognition initiates a “mini-bankruptcy” or “ancillary bankruptcy” proceeding, which functions as a sort of mutual assistance mechanism.

Mini-bankruptcy proceedings involve the collection and liquidation of Swiss-based assets under the supervision of the local bankruptcy office. Bankruptcy offices are bestowed with coercive authority and can request document production from third parties (including from Swiss banks for example) based in Switzerland.

The proceeds are then used to satisfy privileged Swiss creditors. Any surplus can then be remitted to the foreign bankruptcy estate following the recognition of the foreign schedule of claims.

Once the Swiss privileged claims have been settled and once the foreign schedule of claims has been recognized by the local court, the bankruptcy office may apply with the local court to close the ancillary bankruptcy proceedings. This closure does not prevent the continuation of actions which right to conduct litigation has been assigned to the foreign liquidators.

While this system has provided a structured approach to cross-border insolvency, it has often been criticized for being cumbersome and unnecessary in cases where Swiss assets are minimal or where no local creditors exist who need to be protected.

2. The 2019 PILA Amendment and Waiver of Mini-Bankruptcy

Recognizing these inefficiencies, a key amendment to the Swiss Private

International Law Act (PILA) was introduced in 2019. The new Article 174a PILA allows for the waiver of the mini-bankruptcy under specific conditions:

- the foreign bankruptcy decision must be recognized by Swiss courts ;
- the foreign bankruptcy liquidators should file the waiver application ;
- there should be no privileged Swiss creditors ; and
- the non-privileged creditors must be able to file their claims in the foreign bankruptcy proceedings.

This provision streamlines the process for foreign liquidators.

The introduction of Article 174a PILA reflects Switzerland's commitment to adapting its legal framework to modern insolvency challenges. It aligns with international trends toward greater cooperation and efficiency in cross-border cases, making Switzerland an attractive jurisdiction for resolving complex insolvencies.

3. Practical Application and Swiss Courts' Approach

The implementation of this PILA amendment has led to significant case law, shaping how foreign liquidators can operate in Switzerland.

Swiss courts have demonstrated a pragmatic approach, prioritizing efficiency and international cooperation in cross-border insolvency matters.

In Geneva, in particular, two key decisions illustrate this trend and established that:

- **No Temporal Limitation on Waiver Requests:** the Geneva Court of Appeal clarified that there is no strict temporal limitation on when a waiver of the mini-bankruptcy can be requested. This flexibility allows foreign liquidators to adapt their strategies as the insolvency process unfolds, even if delays occur (Decision of the Geneva Court of Appeal ACJC/1691/2023 dated 14 December 2023). This ruling notably confirms and validates the practice of lower courts that a waiver of the ancillary bankruptcy may be granted merely after a call for Swiss privileged creditors has been published without result, namely without formally opening the ancillary bankruptcy.
- **Possible Waiver Even After Mini-Bankruptcy Closure:** the Geneva Court of Appeal has also held, in a groundbreaking interpretation, that a waiver can be granted even after a mini-bankruptcy proceeding has been closed in Switzerland. This ensures that foreign liquidators are not unduly restricted by procedural technicalities and can still act effectively in recovering assets, even after the Swiss proceedings are closed (Decision of the Geneva Court of Appeal ACJC/1545/2024 dated 2 December 2024).

4. Strategic Implications for Foreign Liquidators

These developments have opened the door for innovative recovery strategies.

For example, foreign bankruptcy liquidators can, first, leverage the local bankruptcy office coercive powers to obtain documents or evidence from third parties during a mini-bankruptcy proceeding. Once the necessary information and evidence is gathered, the liquidators can request a waiver, enabling them to act directly in Switzerland based on the evidence obtained.

This two-step approach combines the advantages of the coercive powers of the bankruptcy office with the streamlined execution enabled by the PILA amendment.

Another possibility is to file simultaneously the recognition of the foreign bankruptcy decision and the request for waiver of the mini-bankruptcy, when it is suspected that no Swiss privileged creditors exist and the coercive powers of the local bankruptcy office will not be necessary. This will allow to avoid the opening of any mini-bankruptcy in Switzerland and provide the foreign liquidators the ability to act directly in Switzerland. Such strategy significantly reduces costs and time.

This is particularly advantageous in cases where the potential Swiss assets or claims are already known to the foreign liquidators.

5. Conclusion

The 2019 PILA amendment and the evolving case law surrounding it represent a significant shift in Swiss cross-border insolvency practice. By allowing foreign bankruptcy liquidators to bypass the mini-bankruptcy process in appropriate cases, Switzerland has enhanced its reputation as a jurisdiction that values practicality and international cooperation. For foreign practitioners, understanding the nuances of these provisions and the strategic opportunities they present is essential when dealing with Swiss assets.

As more cases test the boundaries of these provisions, further clarity and opportunities will likely emerge, reinforcing Switzerland's pivotal role in international insolvency law.

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Q What Would You Be Doing If You Weren't In This Profession?

A Pursuing an acting career. I like to think I'd have a BAFTA by now.

Q What Is One Of Your Greatest Work-Related Achievements?

A It's been a privilege to be part of Vantage for nearly five years. The caliber of work, the complexity of the challenges, and the opportunity to collaborate with such talented colleagues have all made this a career-defining experience. It's rare to find a place where you're constantly pushed to grow.

Q What Personality Trait Do You Most Attribute To Your Success?

A Empathy. Understanding what drives people—their motives, fears, and goals—often reveals the real story behind the facts.

Q You've Been Granted A Ticket To Another Country Of Your Choice. Where Are You Going And Why?

A Bhutan. Tourism is still tightly regulated under their 'High Value, Low Impact' model, which makes every visit feel like a privilege. The landscapes are otherworldly, and where else can you experience a country that measures success in Gross National Happiness?

Q What Do You See As The Most Significant Trend In Your Practice In A Year's Time?

A AI-driven analytics are changing how we track digital breadcrumbs. But while the tools get smarter, the real skill lies in interpreting what they can't—context.

Q Do You Have A New Year's Resolution, And If So, How Do You Plan To Keep It?

A Actually, research shows that telling people your goals can actually make you less likely to achieve them, as the act of sharing can trigger a premature sense of accomplishment. Our brain might feel like we have already achieved a goal by simply stating it. So I'm gonna respectfully decline to answer.

Q Dead Or Alive, Which Famous Person Would You Most Like To Have Dinner With, And Why?

A Anthony Bourdain. But not just dinner—I'd want to join him on one of his unforgettable trips during the golden age of No Reservations or Parts Unknown. Exploring hidden corners of the world, sharing meals with strangers, and hearing his unfiltered take on life. He was wonderful—sharp, curious, and deeply human.

Q What's The Strangest, Most Exciting Thing You Have Done In Your Career?

A Finding myself in high-stakes situations where I had to think on my feet to gather crucial information. It's a fine line between feeling like James Bond and quietly hoping no one catches on to your improvisation.

Q What Motivates You Most About Your Work?

A Uncovering what wants to stay hidden.

Q What Does The Perfect Weekend Look Like?

A It depends on the season. In summer, it's pretending I know how to steer a boat while friends yell directions, discovering a hidden beach, and grilling something that may or may not be edible while the sun sets. In winter, it's a long day on the slopes, then warming up by the fire with a book I'll probably fall asleep reading.

Q What's The Most Important Quote You've Heard That You Have Adopted To Your Personal Or Professional Life?

A "Fear is the mind-killer" from Frank Herbert's Dune. It's a reminder that fear clouds judgment, and clarity comes from pushing through it. The biggest obstacles are often self-imposed.

Q What Is The One Thing You Could Not Live Without?

A Curiosity. Everything else—tools, resources, coffee—is just a means to feed it.

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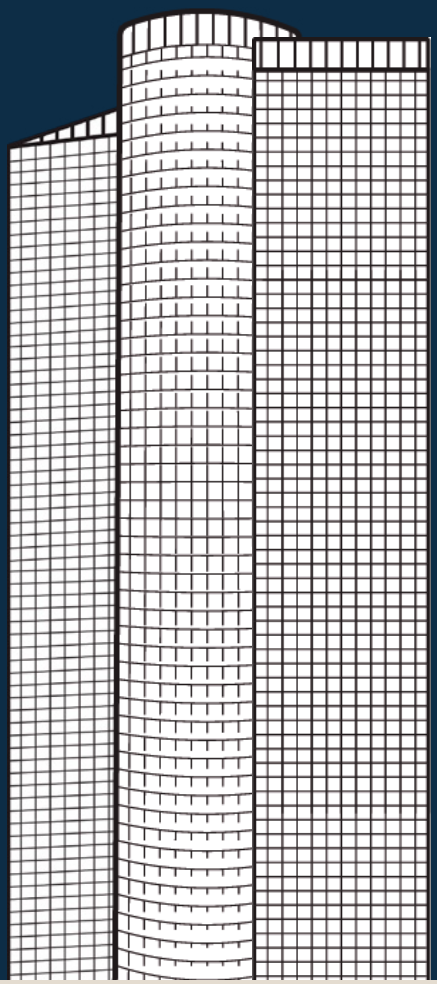

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FREEZING ORDERS: IS IT TIME TO CHANGE THE MERITS THRESHOLD?

CORPORATE PARTNER

ASSERSON

Authored by: Jonah Cowen (Associate) - Asserson Law Offices

How strong a case do you need to have to get a freezing injunction?

This question was considered by the Court of Appeal of England and Wales in the recent case of Dos Santos v Unitel SA [2024] EWCA Civ 1109. The lead judgment was given by Sir Julian Flaux, Chancellor of the High Court.

The case

Isabel dos Santos is an entrepreneur and daughter of the former president of Angola. She was defending a claim brought against her by Unitel, a telecoms company, to recover various disputed debts. Unitel successfully applied for a worldwide freezing order (WFO) against dos Santos in the High Court. Unitel succeeded in their application and dos Santos appealed the decision to the Court of Appeal.

The Court of Appeal considered the established test for a WFO, which requires the court to be satisfied on three points:

1. That the claimant has a good arguable case on the merits;
2. That there is a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets; and
3. That it would be just and convenient in all the circumstances to grant the order.

The argument in this case centred on the first point: What exactly is meant by a "good arguable case"?

Unitel argued that the principles set out in the 1983 case of The Niedersachsen were still good law. The claimant's case must be:

"… one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success."[1]

1 Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH ("The Niedersachsen") [1983] 2 Lloyd's Rep 600 at 605.

Ms dos Santos argued for a higher bar on the basis that more recent case law had overridden the Niedersachsen test. Instead, the claimant must show that it has "the better of the argument" in order to win a WFO application. This more onerous test is used in the context of jurisdictional disputes.

The Court of Appeal rejected the argument that, at an early, interlocutory stage, the court should go so far as to consider which side has the better of the argument in the case as a whole. The court will ultimately, at trial, hear the parties' arguments and determine the merits of the case. The "better of the argument" test proposed by Ms dos Santos would lead to two main problems:

1. The court would effectively hold a mini-trial at the hearing of the WFO application. WFO applications are usually heard on an urgent basis, and it would burden the court's resources to have to deal on an urgent basis with potentially extensive evidentiary issues. Such matters are best saved for trial.

2. Applying a stricter test would mean the rejection of many freezing order applications which should be granted. WFO applications are often made by a victim of fraud or dishonesty, who is not able to show early on that it has the better of the argument on the merits, particularly before disclosure. A stricter test would work against the interests of justice, denying those victims the interim protection which the freezing order regime is designed to afford.

Finally the court considered the issue of costs. It upheld the principle that a party which loses a strongly contested application must pay the other side's costs of that application. Such costs are not reserved to the winner of the case as a whole as 'costs in the case'; they should be dealt with as a separate matter. Ms dos Santos was ordered to pay Unitel's costs.

Implications of the decision

As the court noted in its reasoning, fraud victims can struggle to prove their claims in the early stages of a case. In a fraud case the victim's case will be substantially bolstered by disclosure and via cross examination at trial.

The merits test expressed in Dos Santos v Unitel is good news for fraud claimants, giving them easier access to the relief afforded by a WFO without the need to effectively prove their case first. A WFO is not easy to obtain and courts will always be loath to interfere with the property rights of a party, even on an interim basis, unless it is satisfied that the test has been met and it is just to do so.

In light of this low bar on the merits test, well-advised defendants frequently accept, for the limited purpose of a WFO application, that the claimant has a good arguable case on the merits. This can

take the wind out of the claimant's sails, and gives them less opportunity to focus on their prejudicial factual narrative when making the application. The focus of the application can then shift to the potential prejudice to be suffered by the defendant if the application were granted.

In a short concurring judgment in this case, Lord Justice Popplewell emphasised the other side of the coin, from the perspective of the party against whom the WFO is granted. He highlighted the onerous nature of a WFO – it can be both "harsh" and "invasive" and was once described as "one of the law's nuclear weapons". Popplewell LJ implicitly accepted the need to control the grant of freezing orders. However he agreed that a strict merits test should not be the tool used to do so, as this would merely filter out meritorious cases. Instead he pointed to three existing safeguards:

1. The power of the court to build appropriate exceptions into the wording of an order, on a case by case basis;

2. The cross-undertaking in damages given by the WFO applicant; and

3. The third limb of the test – namely whether it is just and convenient to grant a WFO – this gives the court a wide discretion to consider all the circumstances of the case.

In practical terms, the outcome of a dispute over a WFO can often determine the case itself. If a WFO is granted, a party may be forced to settle. A good understanding of the test which the court will apply on a WFO application is crucial to assessing the strategy behind making or defending an application.

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TO INFER OR NOT TO INFER, THAT IS THE QUESTION?

INVEST BANK P.S.C. V EL-HUSSEINI & ORS [2024] EWHC 2976 (COMM)

Authored by: Laura Coad (Associate) - Keidan Harrison

Introduction

On 21 November 2024, judgment was handed down by Mr Justice Claver in the case of Invest Bank P.S.C. v El-Husseini & Ors [2024] EWHC 2976 (Comm) which was a claim brought under s423 of the Insolvency Act 1986 alleging that there had been transactions defrauding creditors.

The case concerned various transactions carried out by the First Defendant ("Ahmad") in which he transferred a number of valuable assets and interests to his family members, companies under their control and a discretionary trust of which they were beneficiaries between 2016 and 2018.

This case provides important guidance on legal principles relating to s423 claims and in particular the circumstances in which a court may draw inferences.

Inferences under s423

A claim can be brought under s423 against a company or individual following a transaction at an undervalue which was undertaken with the purpose of putting assets beyond the reach of creditors.

Under s423(3)(a), the court shall only make an order if the court is satisfied that a transaction was entered into for the purpose of:

a) putting assets beyond the reach of a person who is making, or may at some time make, a claim against him; or

b) otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

This is otherwise known as the "Alleged Purpose".

In s423 claims the court may draw an inference from the factual circumstances concerning the particular transaction that the purpose of the asset transfers was the Alleged Purpose. The burden is on the claimant-creditor to prove, on the balance of probabilities, that there are sufficient admitted or alleged facts from which the court can draw such inference of the Alleged Purpose. In El-Husseini, therefore, it was for the Claimant Bank to persuade the court that it should draw such an inference and that there is no other equally likely or more likely inference which could be drawn from the admitted or proved facts.

What is an inference?

An inference is a conclusion which flows logically, reasonably or rationally, through a process of reasoning, from proven or admitted facts. Any inference must be drawn from, and be consistent with, all the relevant proved and admitted facts and an inference of this kind must be drawn on the balance of probabilities[1]. It is for the Court to be satisfied that the proposed inference is more likely than not.

The effect of drawing an inference is to strengthen the evidence adduced by the party seeking the inference or weaken the evidence adduced by the party resisting it.

What the Claimant Bank argued and the courts consideration

The Claimant Bank contended that the court should draw an inference from the factual circumstances concerning the particular transaction and that Ahmad intended to put his assets beyond reach of a creditor. An allegation of serious wrongdoing and any inferential case that this was Ahmed's subjective purpose meant the Claimant Bank was required to clearly plead the primary facts giving rise to this inference.

The Claimant Bank also contended that the court may draw an adverse inference against Ahmed in circumstances where he refused to engage with the proceedings. S423 claims require a court to draw an inference as to the debtor's subjective decision to transfer an asset. Only the debtor knows the true subjective intention and can refuse to participate. The Claimant Bank had made Ahmad a party to the claim which enabled them to seek an adverse inference against Ahmad by reason of his absence (or his failure to give disclosure), that each of the transactions were entered into for the Alleged Purpose.

The Court's decision

The Court found that the Claimant Bank failed to prove its claims under s423 and did not meet the requisite burden of proof in establishing that Ahmad acted with the intent to defraud creditors.

The Court found that owing to the Claimant Bank's insufficient pleading, it was unable to form a view and agree on the inferential case as the facts and evidence did not support it.

In relation to the adverse inference argument, Mr Justice Calver stated that Ahmed had

"haunted the trial like Banquo's ghost"

as the Court had not heard from Ahmad himself because he had failed to participate in the proceedings following an unsuccessful jurisdiction challenge. However, it was determined that the Claimant Bank was not entitled to an adverse inference "as of right" and on a close factual analysis of all the relevant consideration no inference could be drawn. It could not be assumed that Ahmad's reason for withdrawal was that he had no defence to the claim and an adverse inference is not the imposition of a penalty for a party's failure to comply with the court order.

The Court was unable to draw generalised inference in light of (i) the Claimant Banks pleaded case and (ii) the contemporaneous documents concerning which did not support it. The rationality of the particular inference contended for should be drawn upon an assessment of all relevant considerations.

Conclusion and looking forward

This case highlights the need to obtain the relevant evidence from which inferences can be drawn. When pleading a case based on s423 there should be a cogent pleading of facts which should be admitted or supported by evidence which provides the necessary support for allegations of Alleged Purpose. An inference will only be drawn where the facts are established by admission or on the evidence to support it. A defendant's engagement or lack of it will not warrant an adverse inference "as of right". The consequence of the transaction, that assets were put beyond reach of a creditor, will not establish the necessary subjective intention of the debtor, nor will it support an adverse inference being drawn on that basis.

1 Henwood v Barlow Clowes [2008] EWCA Civ 577, [65], [68]-[69])

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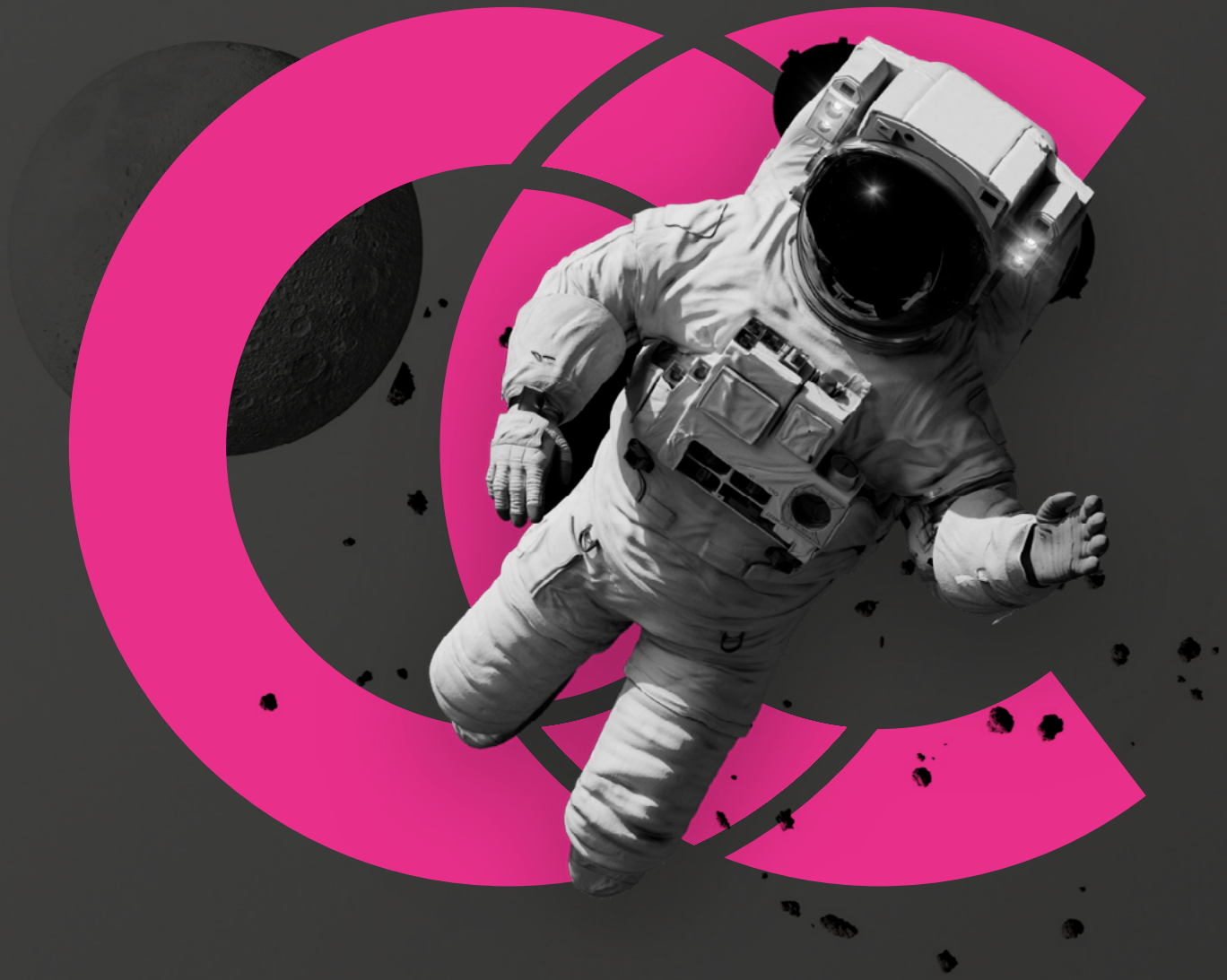

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TIANRUI V CHINA SHANSHUI:

IS IT TIME FOR FOSS V HARBOTTLE TO GO?

Authored by: Kirsten Bailey (Senior Associate) - Collas Crill

The recent Privy Council decision of Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd [2024] UKPC 36 will certainly have far-reaching implications for Cayman Islands company law.

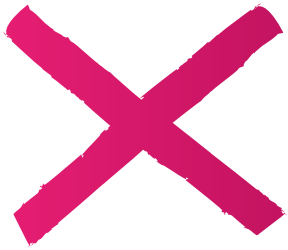
In the latest decision in a long spate of litigation between China Shanshui Cement Group Ltd (Company) and its minority shareholder, Tianrui (International) Holding Company Ltd (Tianrui), the Privy Council confirmed that the shareholder of a Cayman Islands company has a personal claim against the company to challenge the allotment of shares where that the allotment was made for an improper purpose.

Background

The dispute between the Company and Tianrui concerned the Company's allotment and issuance, by way of convertible bonds, of nearly 1 billion additional shares to third parties. This had the effect of reducing Tianrui's shareholding percentage below 25%, the practical implication of which was that Tianrui lost "negative control", its ability to (partially) control the direction of the Company by blocking special resolutions.

The Company maintains that these steps were taken legitimately, to ensure compliance with the Hong Kong Stock Exchange's ongoing listing requirements. Tianrui, on the other hand, alleges that the shares were issued for an improper purpose, namely allowing two large shareholders and their affiliates to take over voting control in the Company.[1]

Tianrui issued a writ action seeking certain declaratory orders as to the unlawfulness of the directors' exercise of their powers in relation to the issuance of the convertible bonds and their conversion into shares (Writ Proceedings).



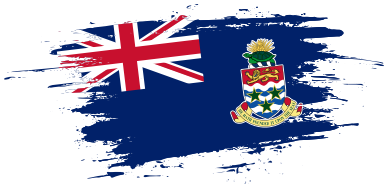
The Company applied for the Writ Proceedings to be struck out. In the strike-out application, the Company's position was that the Writ Proceedings were an abuse of process as Tianrui, as an individual shareholder, lacked standing to sue the Company because any alleged breaches by the directors were of duties owed to the Company, rather than to Tianrui as a shareholder.

It is this question of whether Tianrui had standing to bring such a claim that proceeded to the Privy Council, discussed further below.

1 The appeal proceeded in the Courts below and in the Privy Council on the basis that Tianrui's averments as to the improper purpose of the share allotment and issuance were true; however, this remains an issue to be determined as a matter of fact in the next chapters of this saga.

Quick recap: Foss v Harbottle

The foundational English case of Foss v Harbottle[2] is an (in)famous 1843 decision, which led to what is today known as "the rule in Foss v Harbottle," comprising two key tenets: first, the "proper plaintiff principle" stipulates that a company, not its shareholder, is the proper plaintiff to sue when harm has been caused to the company. Second, the "majority rule principle" stipulates that the will of the majority of shareholders typically prevails in the administration of the company's affairs, unless there is a fraud on the minority.



The Cayman position pre-Tianrui

Before Tianrui, the Cayman Islands position on direct shareholder claims was set out in the 2018 Grand Court decision of Gao v China Biologic.[3] The Grand Court held that, in accordance with the rule in Foss v Harbottle, a shareholder did not have standing to sue the company on the basis of an alleged breach of directors' duties in allotting and issuing shares. Such a claim concerned an alleged breach of duties owed to and enforceable by the company.

Interestingly, the position as set out in Gao is itself something of an outlier: whilst it abided by the rule in Foss v Harbottle, the position in respect of improper share allotment claims had diverged in other common law jurisdiction some 50 years ago.

In the 1970s Privy Council decision of Howard Smith v Ampol,[4] the Privy Council found that an improper allotment of shares by a company's directors affects the balance of voting power between the shareholders and thereby "interfere[s] with that element of the company's constitution which is separate from and set against [the directors'] powers".[5] As such, regardless of the rule in Foss v Harbottle, the shareholder enjoyed a direct claim to protect its personal interest in the shareholding proportion of the company.

The Privy Council's Tianrui decision

Having reviewed the various authorities, the Privy Council noted that the courts of England and Australia, applying law "not materially different to"[6] the law of the Cayman Islands, have repeatedly recognised a shareholder's personal action in these circumstances.

The Privy Council stated that both Gao and the decision below (which relied on Gao) were wrongly decided: Cayman Islands law recognises the right of a shareholder whose shareholding is diluted by an improper allotment of shares to bring a personal claim against the company to challenge that allotment.

The Privy Council's reasoning included the argument that a shareholder's "active power" to vote and participate in the company is "critically dependent upon"[7] the shareholder's relative holding. As such, dilution of that holding by an allotment of shares may alter the balance of power between shareholders. In addition, the Privy Council recognised that the cause of action is based on an implied term in the contract between the Company and Tianrui that the directors would exercise their powers to allot and issue shares in accordance with their fiduciary duties (that is to say, not for an improper purpose).

On this basis, the Privy Council held that the Court of Appeal had erred in allowing the Writ Proceedings to be struck out on the grounds of lack of standing, and allowed Tianrui's appeal.

Impact of this decision: start of the end of Foss v Harbottle?

This decision is of significance to shareholders in Cayman Islands companies because it clarifies that Cayman law is aligned with other common law jurisdictions as regards direct shareholder claims concerning improper share allotments.

That said, it is unlikely to deal a knockout blow to the nearly 200 years of juridical development represented by the rule in Foss v Harbottle. The Tianrui decision is specifically constrained to improper share issuances, which already enjoyed different treatment under the Howard Smith line of cases. It will certainly serve to bolster the arsenal available to minority shareholders in Cayman (and likely other jurisdictions that lack strong statutory shareholder protection regimes), and might well serve as a springboard from which other discrete shareholder claims are carved out of the general position.

However, at the end of the day, it is not only Foss v Harbottle that is responsible for the current state of the law: important considerations as to reflective loss, separate corporate personality and more all play a role, and are not easily defeated.

2 Foss v Harbottle (1843) 2 Hare 461.
3 Gao v China Biologic Products Holdings, Inc. [2018] (2) CILR 591.
4 Howard Smith Limited v Ampol Petroleum Ltd [1974] A.C. 821.
5 Howard Smith Limited v Ampol Petroleum Ltd [1974] A.C. 821 at 837.
6 Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd [2024] UKPC 36 at para 65.
7 Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd [2024] UKPC 36 at para 68.

60 SECONDS WITH...
KAREN STACHURA
COUNSEL
COLLAS CRILL

Q What Would You Be Doing If You Weren't In This Profession?

A What I would like to be doing and what I may have ended up doing may not be the same thing!

After I graduated I was not sure law was for me so I didn't go down the usual path of going straight into my Diploma in Legal Practice (a mandatory postgraduate requirement for those hoping to become a Scottish solicitor). However I soon realised that I was either overqualified or underexperienced, and found myself frustrated in the work I was able to obtain: hotel receptionist, "coffee person" (aka working in a cybercafé), pharmaceutical administrator (don't ask) and bar tender. I returned to the law a few years later, older and a little wiser. The break helped me appreciate some of my strengths and weaknesses, and that I knew I wanted to do something which challenged me.

When I was much younger I wanted to be an actress. When I was older, I wanted to be a writer. Being a litigator requires a bit of the former and lots of the latter!

Now, given my love of plants (as my garden and house attest) I would probably do something horticultural.

Q What Is One Of Your Greatest Work-Related Achievements?

A Being admitted as a solicitor advocate in Scotland, which grants me extended rights of audience in the higher Scottish civil courts, the Supreme Court and the Judicial Committee of the Privy Council. The closest I have come (so far) to appearing in the latter courts is having my photo taken outside the Supreme Court Buildings...

Q What Personality Trait Do You Most Attribute To Your Success?

A I have come to realise that I have imposter syndrome and am constantly trying to prove myself. But in turn, that makes me try and be the best that I can be and give my clients the best service that I can. My self-doubt makes me check and double-check things to ensure that whatever advice I am giving is as correct and thorough as it can be.

Q You've Been Granted A Ticket To Another Country Of Your Choice. Where Are You Going And Why?

A There are too many choices! Buenos Aires for everything; Japan in spring for the blossom; or Botswana for the wildlife and skies (and because I have heard so much about it when my parents lived there, before I was born).

Q What Do You See As The Most Significant Trend In Your Practice In A Year's Time?

A Gen-AI. Isn't it going to be everyone's?!

Q Do You Have A New Year's Resolution, And If So, How Do You Plan To Keep It?

A I have resolutions all the time, not just at New Year. Keeping quiet and just getting on with it is my general plan (and avoids everyone knowing if I have broken them!). At the end of the day, my resolutions are generally aimed at benefitting me and those around me, and keeping that in mind is a key driver.

Q Dead Or Alive, Which Famous Person Would You Most Like To Have Dinner With, And Why?

A Can I have a dinner party?! Again, there are too many to choose from.

If the person didn't have to be famous – my grandad, so I could hear his stories and ask him all the things I now wished I had when he was alive.

But if they do have to be famous – a choice between Prince (for the music), Brad Pitt (for his, erm, chat) and Kevin Bridges (for his caustic Scottish wit – with no "Hoose Rice" on the dinner menu).

Q What's The Strangest, Most Exciting Thing You Have Done In Your Career?

A A client of mine in Scotland once took me for a flight in his Cessna 150 airplane – the claim was a dispute about another Cessna 150 airplane, not the one we were in, I hasten to add! He flew me across the Forth and out to lunch as a thank you after trial.

Q What Motivates You Most About Your Work?

A The variety and the challenges. Finding solutions and helping clients with unwelcome problems. And being part of a fantastic team.

Q What Does The Perfect Weekend Look Like?

A Spending quality time with family with no real agenda. A morning walk with the dog, coffee and baguette (from Vienna Bakeries in Jersey– it is sublime), trip to a beach and a game of Finska and a lazy dinner outside watching the sun go down.

Q What's The Most Important Quote You've Heard That You Have Adopted To Your Personal Or Professional Life?

A My golden rule in life is to always treat others as I would wish to be treated. A quote I read in Bob Geldof's autobiography that has always stayed with me is:

"Nobody made a greater mistake than he who did nothing because he could only do a little."

It reminds me that I shouldn't stop myself from doing the smallest things, because it may ultimately make a difference. If everybody does a little, it adds up to a lot.

Q What Is The One Thing You Could Not Live Without?

A My family.

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IS THIS THE END OF THE SHAREHOLDER RULE?

CORPORATE PARTNER

Charles Russell Speechlys

Authored by: Emily Brammer (Associate) - Charles Russell Speechlys

Whilst legal professional privilege is a fundamental right central to civil litigation under English law, it has been firmly established for over 135 years that a company cannot claim privilege against one of its own shareholders, except in relation to documents created for the dominant purpose of hostile litigation between the company and that particular shareholder. This is known as the shareholder rule.

In the landmark first instance judgment given in Aabar Holdings S.á.r.l. v Glencore Plc [2024] EWHC 3046 (Comm) (Aabar Holdings), this entrenched rule has now been renounced as "unjustifiable". This decision has potentially far-reaching consequences for disputes between companies and shareholders, including both unfair prejudice petitions brought on the basis of fraud and derivative actions pursued in light of fraudulent acts by a corporation's management. If endorsed, this judgment will enable companies to withhold privileged information from shareholders. However, with an appeal already lodged against this judgment, definitive confirmation of the status of the shareholder rule remains awaited.

The shareholder rule

The shareholder rule was established in 1888 on the basis that: i) the position of shareholders was analogous to that of trust beneficiaries and partners; and ii) shareholders accordingly had a proprietary interest in company assets and, as a result, legal advice the company had paid for (Gouraud v Edison Gower Bell Telephone Co Ltd (1888) 57 LJ (Ch) 498).

A long-standing body of case law supporting the shareholder rule followed. However, in 2023, the rule was questioned before the High Court in Various Claimants v G4S Plc [2023] EWHC 2863 (Ch) (G4S) and doubt over its foundations expressed for the first time. Reference was made to the fact the rule emerged nine years before the "seminal case" of Salomon v A Salomon & Co Ltd [1897] AC 22 which set out that a company is a distinct legal person, separate from its directors, shareholders, employees and agents. Recognising that, the shareholder rule was said to be premised on a "shaky foundation" with the relationship between a company and its shareholders "clearly not a relationship of trustee and beneficiary". However, whilst questioning the logic on which the rule was based, the judge in G4S, Mr Justice Green, self-deprecatingly proclaimed himself a "lowly first instance judge" and concluded that he could not say the shareholder rule did not exist.

In the same year, the shareholder rule was also subject to critique before the courts of the Cayman Islands and Bermuda[1] and 2023 culminated in calls in commentary for consideration of the

1 See for example In the matter of the Companies Act (2020 Revision) and In the matter of 58.Com Inc March 22 2023, Cause FSD02275/2020 and In the matter of Jardine Strategic Holdings Ltd [2023] SC (Bda) 8 Civ.

ongoing legitimacy of the rule[2]. To echo the analogy utilised by Green J, the foundations of the rule appeared at best shaky and at worst, crumbling.

Rejection of the shareholder rule

Just over a year later came the judgment of Mr Justice Picken in Aabar Holdings. This considered the shareholder rule in the context of a claim brought by Aabar Holdings S.á.r.l (Aabar) against Glencore Plc (Glencore) and others under sections 90 and 90A of the Financial Services and Markets Act 2000 as part of shareholder group litigation against Glencore.

Aabar was the sole shareholder of the ultimate beneficial owner of shares in Glencore. Aabar brought action against Glencore and a number of its former directors for misconduct alleged to have occurred in Glencore's subsidiaries. A dispute arose as to whether and in what circumstances Glencore could assert privilege against the claimant shareholders.

Aabar argued that the existence of the shareholder rule meant Glencore could not claim privilege. Whilst noting that the rule had in some earlier cases been justified on the basis of shareholders having a proprietary interest in company assets, Aabar proposed an alternative "modern rationale" for the rule, the concept of joint interest privilege.

In response, Glencore emphasised that the shareholder rule was rooted in findings from the 19th century and should no longer be applied, with joint interest privilege being an unsuitable

"alternative … justification".

Echoing the deliberations of the High Court in G4S, Picken J held that the existence of the shareholder rule could no longer be justified by suggesting a shareholder has a proprietary interest in a company's assets. The rule could also not be justified with reference to joint interest privilege.

Whilst acknowledging there are cases that reference joint interest privilege in a shareholder / company context, Picken J highlighted that those cases did not address the application of the shareholder rule and added that there are in fact no authorities supporting the suggestion that joint interest privilege is even a standalone species of privilege. Picken J hypothesised that even if joint interest privilege is a freestanding species of privilege, there is no justification for concluding that it applies to a company / shareholder relationship so as to prohibit a company from asserting privilege against its own shareholder.

Picken J noted that if he was wrong and the shareholder rule did in fact exist:

1. Its application would turn on the facts of each case and a shareholder does not have an absolute right to access any company legal advice. In addition, whilst it would entitle a shareholder to documents otherwise protected by legal professional privilege, it would not extend to without prejudice (WP) privilege, primarily because of the involvement of a third party in WP communications.

   Specifically, it was stated that communications subject to WP privilege involve the interests of both the company and a counterparty. Even if shareholder and company interests are aligned, the interests of the shareholder and the third party are not necessarily aligned. A third party entering negotiations with a company would also not typically contemplate the possibility of WP communications being shared with company shareholders. Finally, it was stated that it is not for one party to waive WP privilege - parties must make that decision together.

2. The rule would also not be restricted to current, direct and registered shareholders. Whilst Aabar was not at the time of judgment (nor had it previously been) a direct / registered shareholder in Glencore, Picken J's view was that the shareholder rule would extend to Aabar.

Implications

Whether Picken J's dismissal of the shareholder rule will be endorsed remains to be seen, with an appeal of the judgment now reported to be pending. As Green J noted, it may be that the rule is so entrenched it is for the Supreme Court to overturn it. Even if subsequent decisions opt to preserve the rule in some form, Picken J's judgment has provided ample food for thought on the rule's breadth.

Leaving the outcome of an appeal to one side, the judgment has potentially significant implications, for example impacting on the ability of shareholders to obtain documents in both unfair prejudice proceedings and derivative actions and strengthening the ability of companies to protect legal advice from disclosure.

However for now, the status of the shareholder rule remains uncertain. Directors may wish to exercise caution by continuing to bear the shareholder rule in mind until the dust settles and the status and / or scope of the rule is definitively confirmed by a higher court.

2 "Time to wipe the slate blank? The shareholder exception to legal professional privilege: Various Claimants v G4S Plc [2023] EWHC 2863 (Ch)", Joseph Khaw, Civil Justice Quarterly C.J.Q. 2024, 43(3), 199-211.

60 SECONDS WITH... KATIE BEWICK SENIOR ASSOCIATE CHARLES RUSSELL SPEECHLYS

Q What Would You Be Doing If You Weren't In This Profession?

A I have friends in the medical profession, and I always find what they do fascinating, but I don't think I could hack it. I have the utmost respect for those who are in that profession.

Q What Do You See As The Most Important Thing About Your Job?

A Being able to navigate clients through difficult periods in their lives whilst maintaining objectivity, patience and resilience when dealing with difficult counterparties.

Q What Personality Traits Do You Most Attribute To Your Success?

A Good judgment, organisation, and empathy for clients' problems and challenges are key. Also, good communication with clients, colleagues and counterparties.

Q You've Been Granted A Ticket To Another Country Of Your Choice. Where Are You Going And Why?

A New Zealand – I have always wanted to visit, but it will probably now have to wait until my young family is a bit older.

Q If You Could Learn To Do Anything, What Would It Be?

A To play the piano. I always focused on sports, but I wish I had learned music.

Q What Motivates You Most About Your Work?

A The constant intellectual challenge and the variety that comes with a general commercial disputes practice, as well as working with like-minded colleagues to unpack a problem for a client and achieve a positive outcome in the various forms that can take.

Q What Does The Perfect Weekend Look Like?

A A weekend with not too many commitments but spending it with family and friends, with plenty of outdoor time, no tantrums (from my almost 4 and 2-year-olds, not me!), and perhaps a glass of wine!

Q What's The Most Important Quote You've Heard That You Have Adopted In Your Personal Or Professional Life?

A Be kind – you don't always know the circumstances of others.

Q What Is The One Thing You Could Not Live Without?

A Good sleep.

Q What Is One Goal You Have For 2025?

A To carve out more time for reading.

Authored by: Abigail Rushton (Senior Associate) - Charles Russell Speechlys

The Economic Crime and Corporate Transparency Act (ECCTA) 2023 came into force in the UK in March 2024. ECCTA introduced some of the biggest changes to laws tackling economic crime in over a decade. Implementation of the ECCTA's various provisions has taken place on a staggered basis over several months with more change set for 2025.

In the raft of reforms are:

- a new criminal offence for large organisations for the failure to prevent fraud, and
- an overhaul to corporate liability for economic crime.

The Home Office UK published guidance on the offence of failure to prevent fraud in November 2024. The offence itself is set to come into force on 1 September 2025 to give organisations time to develop and implement fraud prevention procedures. The message coming UK government and law enforcement agencies is that organisations caught by the legislation should start preparing for the changes now.

The ECCTA

The ECCTA is part of wider UK legislative reforms to tackle fraud, money laundering and corruption, with a particular focus on corporate bodies. It follows other reforms introduced to assist with the prevention and detection of economic crime in the UK.

Fraud is reportedly now the most common crime type in the UK. The failure to prevent fraud offence aims to hold large organisations to account if they profit from fraud. The UK government and law enforcement agencies hope it will lead to a shift in corporate culture and encourage large organisations to build an anti-fraud culture.

As well as the failure to prevent offences and change to corporate criminal liability, the ECCTA includes Companies House reforms which are designed to improve transparency over UK companies (including increased identity verification requirements, improving the reliability of a company's financial information, and broader powers for Companies House for company registration and information sharing with law enforcement) and their potential liability for economic crime offences.

Key economic crime reforms

1. Failure to prevent fraud offences

The failure to prevent offences mark a significant expansion to the current suite of economic crime offences in the UK. The failure to prevent fraud offence encompasses the following:

The offence will only apply to large companies, not-for-profit organisations and incorporated public bodies (in any sector) who meet two out of three of the

following criteria in the financial year preceding the year of the fraud offence:

- more than 250 employees,
- more than £36 million turnover, and/or
- more than £18 million in total assets.

It's a strict liability offence. An organisation captured by the legislation is guilty of an offence:

where fraud is committed by an employee, subsidiary, agent, or associated persons,

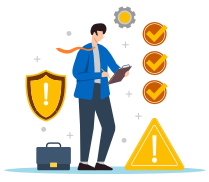
for the organisation's benefit, and

the organisation did not have reasonable fraud prevention procedures in place.

The offence covers a wide range of fraudulent conduct including fraud by false representation, failing to disclose information, abuse of position, obtaining services dishonestly, participation in fraudulent business activity, false statements by company directors, fraudulent trading, and cheating the public revenue.

It applies to organisations doing business in the UK and those working for it. It encompasses the whole organisation, including subsidiaries, and they can be prosecuted where there is a UK nexus. For example, the fraud took place in the UK (targeting UK-based victims), or the gain or loss occurred in the UK. That means organisations, employees, agents, or associated persons based outside the UK will be caught by the legislation if there is this UK connection.

Organisations will have a defence if they can prove at the time the fraud was committed that they had in place reasonable procedures in all the circumstances designed to prevent fraud or that it was not reasonable in all the circumstances for the organisation to have fraud prevention procedures in place.



The Home Office UK has published guidance on the framework for reasonable fraud prevention procedures which includes six principles. The principles are intended to be flexible, and outcome focused to cover a wide range of circumstances in which fraud might be committed.

The six principles:

- Top level commitment – this aims to put responsibility for fraud prevention on those in charge of the organisation's governance.
- Risk assessment – fraud will look different in each organisation. This is not meant to be a one-time assessment; it should be regularly reviewed.
- Proportionate risk-based prevention procedures - the fraud prevention procedures should be proportionate to the risk of fraud identified by the organisation from a risk assessment.
- Due diligence – this might include checks on associated persons, the supply chain, new business relationships, and for mergers and acquisitions.
- Communication (including training) – the aim is to make the fraud prevention procedures embedded within the organisation.
- Monitoring and review – the idea is to learn from investigations or potential risks and improve fraud prevention procedures where necessary.

Prosecutors will only have to show a lack of reasonable procedures in place to prevent the fraud – there is no need to identify a particular individual or individuals who intended not to put in place reasonable procedures designed to prevent the fraud.

If convicted, an organisation may be liable for an unlimited fine.

2. Reform to corporate liability for economic crime

The ECCTA reforms corporate criminal liability for economic crime. Currently in the UK for a company to be liable for many economic crime offences, prosecutors must show that a directing mind and will of the company intended to commit the offence e.g. a particular individual or director (what is called the identification principle). The ECCTA changes that to include 'senior managers'. The aim is to modernise the law to reflect modern company structures where decision making is not that of one person and responsibilities are diffused throughout the organisation

3. What should organisations be doing in 2025?

The ECCTA and failure to prevent offence will make it easier to prosecute organisations for economic crime and places the onus on them to spot possible fraud risks within their organisation. Before the failure to prevent fraud offence comes into force, organisations should be:

Assessing and managing risk:

- Assess whether the organisation is caught by the legislation – think about the organisation as a whole, whether there is any connection to the UK or might be in the future, and keep this under review.
- Carrying out a risk assessment – fraud will look different in every organisation and sector. Some sectors are more exposed than others. For example: credit and financial institutions, professional services firms, casinos, crypto asset exchanges and custodian wallet providers.

Reviewing the fraud prevention and detection procedures:

- Consider the Home Office UK guidance on reasonable fraud prevention procedures – assess by reference to each of the six principles what fraud prevention looks like for the organisation.
- Including training, whistle-blower procedures, internal and external reporting procedures, and the internal and external resources to assess, prevent, detect, and respond to fraud.
- Preparing a response strategy if fraud is identified within the organisation.

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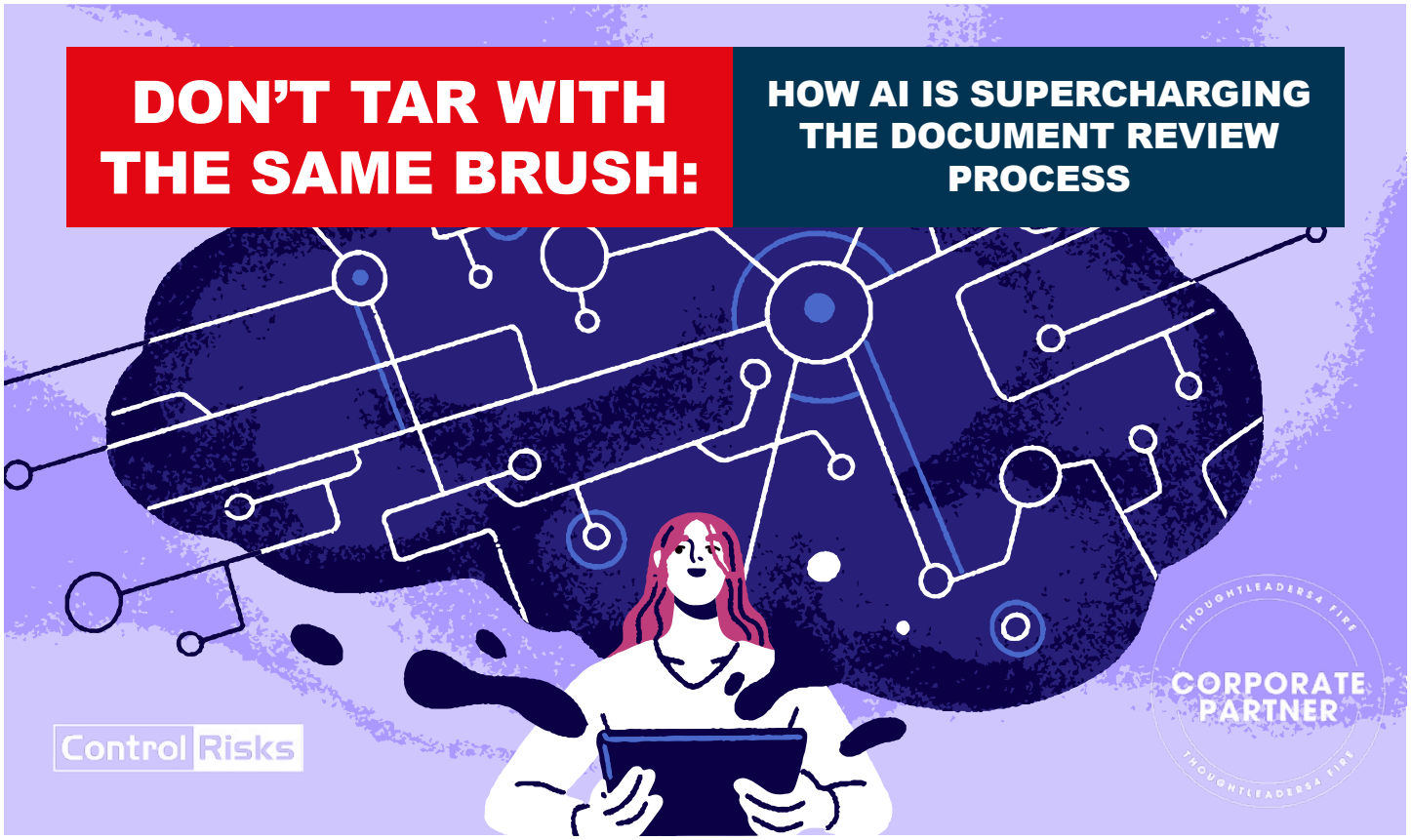
DON'T TAR WITH THE SAME BRUSH:

HOW AI IS SUPERCHARGING THE DOCUMENT REVIEW PROCESS



Authored by: Adam Garside (Director - Compliance, Forensics & Intelligence), Maggie Burtoft (Principal - Forensics & Intelligence) & Firyal Ali-Akbar (Associate Director - Principal, Forensics & Intelligence) - Control Risks

Up until recently, the gold standard in a document review workflow has been the deployment of technology assisted review (TAR) which uses technology alongside a human first pass review. TAR involves a machine learning model learning from the reviewer's coding results and then using that information to find and promote similar documents to the top of the review pile and potentially stop review when the rate of relevant documents drops to an acceptable level. A tool that helps the cream to rise to the top when time is of the essence. Whilst a big step forward from the traditional search-term responsive batching that defined workflows in the past, the time required to review a large population of documents remains significant.

As investigations become more complex and data grows exponentially, first level document reviews are becoming increasingly time consuming and costly. As with any other process that relies on technology, artificial intelligence (AI) is now being folded into workflows to speed up the review phase and make investigations more efficient.

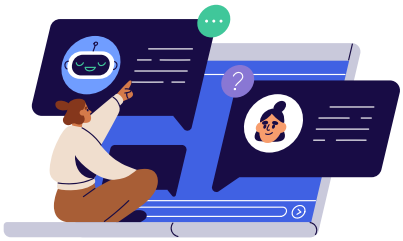
AI in practice – a case study

Background

Control Risks was recently retained by a multi-national corporation with operations in Mexico to conduct a sensitive internal investigation involving allegations of financial malfeasance and employee misconduct.

The case team faced a challenging workload constrained by a strict three-week deadline. In total, more than 120,000 Spanish language documents required review and analysis in order to produce a report of key findings to the client's auditor and Board. The use of a standard review workflow, utilising TAR, would not meet the deadline without a significant (and disproportionate) uplift in first level review costs. With the agreement of the client and its legal team, Control Risks leveraged Relativity's AI for Review (aiR)

Using aiR, the first level review costs were reduced by approximately 50% and achieve a nearly 80% reduction in total estimated review time compared to using a traditional first level review approach.



Customising Prompts for Efficient Document Classification

As an alternative to the standard first-level human review, Control Risks worked alongside the case team to convert a review protocol prepared by the case team into detailed customised prompts to automate the classification

process. These prompts were based on the digestion of a case summary which included details such as key individuals, events, and specific concerns as well as an instruction to identify evidence of suspected collusion.

aiR then used the prompts to apply predictive tagging to prioritise documents for second level human review. Relevance identified whether a document was pertinent to the investigation, whilst Issue assessed whether it related to a particular topic or legal concern. This allowed the team to quickly identify the most critical documents for further review, significantly speeding up the process. It is worth noting that aiR looks at the extracted text of documents to make predictions. Investigation teams should be mindful of scanned, photographed, or handwritten notes, especially if Optical Character Recognition (OCR) is ineffective in capturing the text accurately as these may need to be reviewed in a separate workstream.

The effectiveness of aiR relies on the quality of the prompt. Investigations teams must ensure that case details are captured in a way the AI can process it effectively. Experienced investigators are crucial in crafting these prompts to avoid over-reliance on technology, and ensure prompts are written to identify nuanced details and correctly classify documents in complex cases. Thorough QC workflows must also be established to ensure the accuracy of predictions and iterate on prompts as necessary.

Iterative Review and Continuous Learning

AI tools like aiR rely on human involvement to improve over time.

In this case, Control Risks and the case team initially tested the custom prompts by running them over sample sets of documents. The review team manually assessed these samples to validate the classifications and make necessary adjustments, a crucial step that requires investigative expertise and knowledge of the intricacies of investigations to ensure accuracy and effectiveness. This iterative process allowed more thorough prompts to be written so that the AI system could better understand the nuances of the investigation.

Once the prompts were refined, the final iteration was run over the entire document set. This approach allowed investigators to focus their efforts on the most pertinent documents, streamlining the review process and ensuring that the team could meet the tight deadline. Prompt iteration and generating predictions over the data set was completed in four days.

Facilitating second-level (and subsequent) reviews

Documents flagged as hot or highly relevant by aiR were pushed to the top of the second-level review queue, ensuring that the most critical materials were addressed first. Running aiR concurrently to identify specific issues helps to prioritise documents for second-level review by focusing on the most hot-button issues first.

The second-level review team was also able to benefit from the aiR generated comprehensive rationales, complete with citations for relevant documents, offering greater consistency than a team of first-level reviewers.

Foreign language optimisation

aiR can review documents in a number of foreign languages and produce comprehensive review notes in English. Custom prompts can also be written in English regardless of the source language of the documents.

In this case, as documents were primarily in Spanish, aiR was instrumental in performing the first pass review quickly, and at a reduced cost by requiring a smaller team of Spanish-speaking reviewers. The initial sample sets were reviewed by a small team of Spanish speakers. The hot or highly relevant documents were batched out directly to the legal team for second level review.

The Future of AI in Document Review

The application of AI in document review is still evolving. As AI models become more sophisticated, their ability to understand and categorise complex documents will continue to advance. Future innovations will almost certainly include even more powerful algorithms that can perform deep semantic analysis, detect subtle anomalies in financial or transactional data, and integrate with other investigative tools to provide a more comprehensive review solution.

Progress in this space is rapid and one of the key challenges for investigators and legal teams will be staying up to date with that progress.

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60 SECONDS WITH...

JEMMA BRIMBLECOMBE

PARTNER

KINGSLEY NAPLEY

Q What Would You Be Doing If You Weren't In This Profession?

A I would like to think it would be doing something creative involving writing, so perhaps an author (I used to love writing stories as a child) or a journalist.

Q What Is One Of Your Greatest Work-Related Achievements?

A I was promoted to partner last May and it is something I have worked hard towards for many years and it was genuinely one of my proudest moments in my career to date. I remember getting confirmation of the promotion and texting my family immediately to let them know.

Q What Personality Trait Do You Most Attribute To Your Success?

A I would say (and hope my family, friends and colleagues agree) my empathy and kindness. I treat everyone fairly and with respect and I try to bring out the best in people. I always think that if you have had a bad day at home or the office this should never turn into taking out your stress on others. If you have a strong team around you (and my KN colleagues are the most supportive people you could work with) then everyone has each other's back. Not only is the working environment more enjoyable (even in times of stressful litigation) but you work as cohesive unit and get better results for your clients.

Q You've Been Granted A Ticket To Another Country Of Your Choice. Where Are You Going And Why?

A I have never been to New Zealand and I have always wanted to go. As a not-so-secret Lord of the Rings fan it looks beautiful and peaceful and is on my list of places to visit.

Q What Do You See As The Most Significant Trend In Your Practice In A Year's Time?

A I have written an article on this in the TL4 Fire Magazine previously but ESG related content is everywhere at the moment. In the area of professional negligence (which is one of my specialisms) I predict more ESG related claims being made against advisers including brokers and more disputes over coverage of such claims under insurance policies.

Q Do You Have A New Year's Resolution, And If So, How Do You Plan To Keep It?

A This will sound very boring and cliched but I am determined to get into healthier eating and exercise habits. I have a big birthday in October this year and my goal is to be much healthier and fitter by then!

Q Dead Or Alive, Which Famous Person Would You Most Like To Have Dinner With, And Why?

A This took me a while to answer, and although an obvious choice, I would have to say David Attenborough. He is a national treasure and you would never run out of things to talk about. David… what is the weirdest thing you have seen a giraffe do in the wild? The topics of discussion would be endless!

Q What's The Strangest, Most Exciting Thing You Have Done In Your Career

A I am not sure this is necessarily strange, but in terms of exciting, my secondment over 10 years ago to an insurance company was a really exciting point in my career and I am extremely thankful to my old boss for putting me forward for it. As a northerner, and having never worked in London before, working in the Walkie Talkie building and getting to experience living in London was so much fun (and I enjoyed it so much I decided to move to London and now see it as my home). I met some really amazing colleagues during this time and gained some excellent insight into the insurance market, which has been invaluable when working on various professional negligence matters.

Q What Motivates You Most About Your Work?

A For me as an extrovert and someone who is very social, I really enjoy the office environment and seeing and working with my wonderful colleagues. As a typical litigator, I also love winning an argument and getting the best result possible for my clients.

Q What Does The Perfect Weekend Look Like?

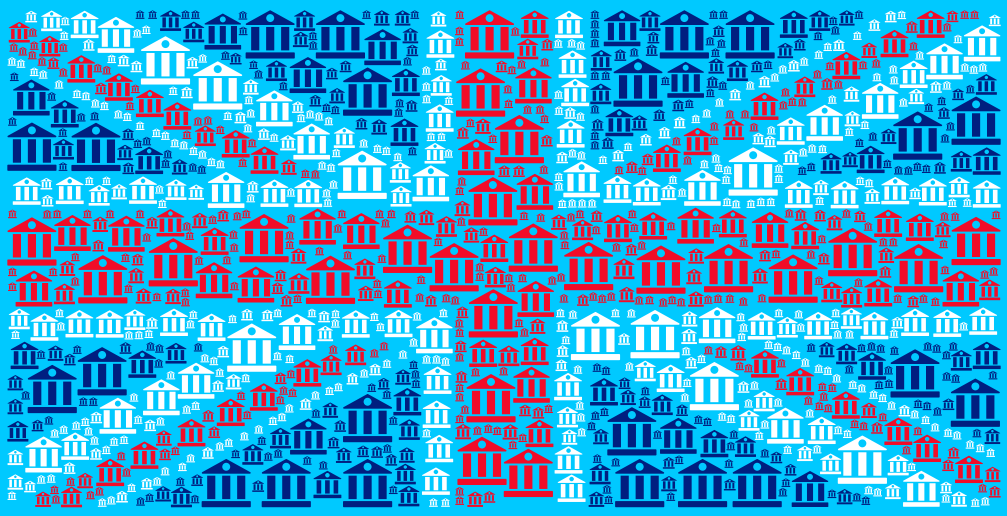
A Most mornings we are up very early with demands from my children to play board games (Cluedo is very popular at the moment) or get the crafts out for some 5.30am painting. So, the idea of having a morning to lie in and do absolutely nothing sounds amazing. If I could fit in a lovely meal and a film or a theatre show then even better!

Q What's The Most Important Quote You've Heard That You Have Adopted To Your Personal Or Professional Life?

A "Comparison is the thief of joy". There is always someone else both in your personal life and at work that is doing something different or (in your perception) better than you. The temptation to constantly compare yourself (and then often coming up short) is really unhelpful and I try my best to remind myself of this when necessary and how lucky I am (even when things are tough) for everything that I have.

Q What Is The One Thing You Could Not Live Without?

A An obvious answer but…. books. As a child I grew up reading books every night (Watership Down and the Secret Garden were my favourites) and until I had children I would read every night without fail (even just a couple of pages and even after a few drinks and a night out) just to clear my mind and help me fall asleep.



CORPORATE PARTNER

CAN YOU RELY ON COMPANIES HOUSE? LESSONS FROM BLAND AND MAYO V KEEGAN

KINGSLEY NAPLEY
WHEN IT MATTERS MOST

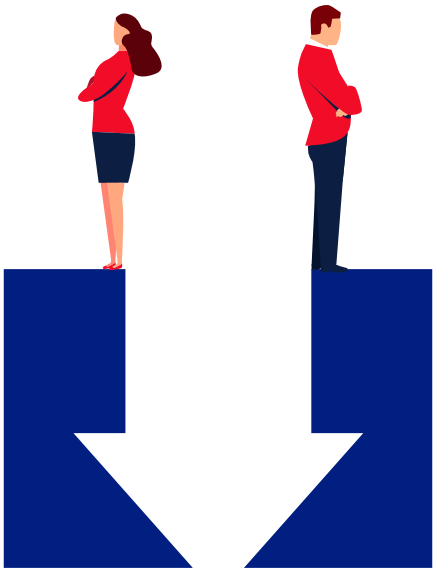
Authored by: Marieta Van Straaten (Legal Director) & Irene Schell (Trainee Solicitor) - Kingsley Napley

In the recent Court of Appeal case Bland and Mayo v Keegan [2024] EWCA Civ 934, the resolution appointing voluntary liquidators was signed by the person who was shown in the register of members as the holder of all the issued shares in the company. In fact, half of the shares had been registered in her name only following her unauthorised execution of a stock transfer form.

The Court of Appeal was asked to consider the reliance which can be placed upon the entries in the register of members of a company when determining the validity of a written resolution appointing voluntary liquidators.

Background

JDK Construction Ltd (the "Company") was incorporated in 2013 with a share capital of 100 shares of £1. The sole shareholder and director at incorporation was Jeanette Keegan ("Jeanette"). Jeanette's son, Darren Keegan ("Darren"), was responsible for the day-to-day management of the Company. Darren had married Julie Keegan ("Julie") in 2012. In October 2015, Julie became the second director and Jeanette transferred 50 ordinary shares in the Company to Julie. The transfer of the shares to Julie and her appointment as director were reflected in electronic filings made at Companies House.



Darren and Julie's relationship with Jeanette subsequently broke down. In April 2019 Julie executed a stock transfer form purporting to transfer the 50 ordinary shares held by Jeanette to herself (the "Stock Transfer Form"). The Stock Transfer Form was signed by Julie as 'J. Keegan'. Electronic filings reflecting this transfer and the termination of Jeanette's appointment as a director of the Company were made at Companies House in May 2019.

By around March 2021, Jeanette and Darren had reconciled but his marriage to Julie had broken down.

In July 2021, purporting to act as the sole shareholder of the Company, Julie signed a written resolution (the "Written Resolution") passing:

- a special resolution for the voluntary winding-up of the Company; and
- an ordinary resolution appointing Andrew Bland and Janet Mayo as joint liquidators (the "Liquidators").

Upon learning of the Written Resolution, Jeanette wrote to Julie denying that she had signed the Stock Transfer Form, and claiming the Written Resolution was therefore invalid. Whilst Julie accepted that she signed the Stock Transfer Form, she denied that she did so with the intention of forgery and claimed that she intended to sign it in her own capacity.

An application was then issued by the Liquidators seeking a declaration that

their appointment was valid. Jeanette also issued a Part 7 claim against Julie and the Company. The Part 7 claim sought declarations that the Stock Transfer Form was a forgery and void, and that Jeanette's name had been removed from the register of members without cause, and an order pursuant to section 125(1) of the Companies Act 2006 (the "CA 2006") rectifying the register of members accordingly.

The Part 7 claim was subsequently stayed on the terms of an agreement between Jeanette, Darren and Julie, which provided, inter alia, for Julie to transfer 50 ordinary shares to Jeanette (the "Agreement"). The terms of the Agreement did not indicate what was intended to happen in relation to the entries on the register of members in respect of the shares that had been the subject of the Stock Transfer Form. Furthermore, the Liquidators were not a party to the Agreement and their consent to the transfer of the shares under the terms of the Agreement was not obtained, which meant the transfer would be void[1].

HHJ Hodge KC, hearing the Liquidators' application, held that even on the footing that the Stock Transfer Form was a forgery, the register of members was conclusive as to the identity of the members of the Company at any particular point in time, so that the Written Resolution was valid and effective, and the Liquidators' appointment was valid. This decision was appealed by Jeanette.

Court of Appeal Judgment:

The Court of Appeal dismissed the appeal and held that whether or not the Stock Transfer Form had been forged did not matter. The Court of Appeal held the entries on a company's register of members are 'presumptively valid' and the members of a company are taken to be those shown on the register of members ***'unless and until the register is rectified'.***

At the time the Written Resolution was passed, according to the register of members, Julie was the sole member of the Company. Therefore the Written Resolution was valid and so was the appointment of the Liquidators.

In making his decision Lord Justice Snowden considered the following:

- The definition of a member of a company is taken from section 112 CA 2006. A person is a member of a company either as a result of subscribing to its memorandum or being entered as a member on its register of members.
- In Enviroco Limited v Farstad Supply A/S[2], the Supreme Court clarified that section 112 CA 2006 should be interpreted to mean that unless an express provision is made to the contrary, a person listed on the register of members is considered a member of the company. This remains the case unless and until the register of members is rectified.
- The general principle outlined in Enviroco Limited v Farstad Supply A/S applied even where a member's name was wrongly removed from the register as a result of forgery or fraud. The law did not simply disregard the entries on the register.
- In cases of fraud or forgery, an application for the rectification of the register can be made under s.125 CA 2006 or in an ordinary CPR Part 7 claim.[3]
- The courts have the discretion to rectify the register retrospectively, which addresses the concern that this interpretation might give fraudsters the opportunity to take control of companies. Courts also have the power to order compensation to innocent parties affected by the fraudulent entries.[4]

Key takeaways:

This case highlights the importance of companies keeping their register of members accurate and up to date. This includes making the appropriate filings at Companies House promptly. Failing to do so can have serious legal ramifications. It also provides reassurance to those placing reliance on the information in a company's register of members, in particular insolvency practitioners considering appointments as office holders. Finally, it highlights the importance of making a swift application to court for the rectification of a register of members in cases of fraud or forgery.

1 Insolvency Act 1986, s. 88
2 [2011] UKSC 16, [2011] 1 WLR 921
3 Re Bahia and San Francisco Railway Company limited (1868) LR 3 QB 584;Nilon v Royal Westminster Investments SA [2015] UKPC 2
4 Re Bahia and San Francisco Railway Company limited (1868) LR 3 QB 584

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60 SECONDS WITH... KATHRYN PURKIS CHAMBERS DIRECTOR SERLE COURT

Q What Would You Be Doing If You Weren't Chambers Director?

A Over the years the answer to this question has ranged between author, interior designer, psychotherapist, building conservationist and antique jeweller. But things move on. Writing now seems like a huge and solitary project, all in your head; I'd be a dreadful therapist, always dictating what people should do; and I'm not sure my eyesight is up to antique jewellery these days! In short, I'm happy where I am, but still like beautifying the house.

Q What Is One Of Your Greatest Work-Related Achievements?

A Reinventing myself from barrister to the role I have now.

Q What Personality Trait Do You Most Attribute To Your Success?

A If I have success at all: probably my reforming zeal and (fairly) big stick energy.

Q You've Been Granted A Ticket To Another Country Of Your Choice. Where Are You Going And Why?

A Ha! I might try and trade it in for cash and do my own version of Race Across the World and see a few more countries than one, from ground level. I think I'd choose South America (or Chile if I had to pick one) for the dramatic beauty and the good wine.

Q Do You Have A New Year's Resolution, And If So, How Do You Plan To Keep It?

A Get home in time for dinner at 7.30 – by remembering that almost everything will keep until the morning but my partner's good humour.

Q Dead Or Alive, Which Famous Person Would You Most Like To Have Dinner With, And Why?

A Oh, I'd be grateful for dinner with anyone who'd achieved success or prominence in any field. I'd always like to know how they did it, and what they think about the relevance of their contribution. I'd imagine creatives would talk about routine, practice, and seeing themselves with reference to a canon (in or out of it). As for politicians – that is so much about being able to connect and respond to a changing situation, in the present, but in so doing they shape the future for better or worse. For example, I wonder what Thatcher would think now about the extent of overseas ownership of our key infrastructure (utilities, transport and so on), and of our diminishing power.

Q What Does The Perfect Weekend Look Like?

A A trip on the Eurostar to a European city, maybe with some friends, or a concert at the Wigmore Hall followed by Sunday lunch in our wonderful local.

Q What Is The One Thing You Could Not Live Without?

A Aneurin George Shepherd (aka Nye, Corgiboy), age 5. He is the best dog there ever was. If I had to choose a superpower, it would be knowing what animals are really thinking, and I'd mostly want to use it around him. I dread to imagine the sass I'd hear.

Q Do You Have Any Hidden Talents?

A I don't cultivate it much, but probably singing. And cooking with spices. I know what my anti-talent is: anything athletic or gymnastic. My partner weeps with laughter every Olympics, imagining me up there, humiliating myself on the pommel horse or over the hurdles and becoming one of those catastrophic Youtube videos.

Q What Advice Would You Give To Your Younger Self?

A Become a runner in your early teens, when its easy, and keep going. Write that diary – you'll want to remember what you did and how you felt, better than you'll turn out to be able to. Prioritise your hobbies. Trust your instincts. Take your time. Have fun!

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SECURITY FOR COSTS: STRATEGIC CONSIDERATIONS WHEN APPLYING FOR SECURITY FOR COSTS

Authored by: Cherrene Balasanthiran (Senior Associate) & William Barker (Trainee Solicitor) - Payne Hicks Beach

When it comes to defending proceedings, the first consideration on receipt of a claim is often the strength of the claim, but the Oscar for best supporting actor surely goes to the question of whether to make an application security for costs.

It is not just claimants who should consider the question of recovery. Defendants to claims brought against them, often with little control of that process, should also consider the same question: recovery of their costs to defend a claim they may well consider baseless. Psychologically, this may help defendants frame the narrative in their favour at an early stage (and throw in some digs at the claimant's conduct at the same time). Practically, and most importantly, a favourable order provides costs protection in the event a defendant is successful at trial. The alternative is a pyrrhic victory. Strategically, it puts the claimant on the back foot, now in the position of having to defend an application which, if decided against them, leaves them with an unenviable choice: satisfy the order or withdraw the claim[1].

Defendants really need to embark on their campaign for an order early on. Consideration of the question, and any factual investigation and inter-partes correspondence, must be concluded in time to bring the application

"promptly as soon as the facts justifying the Order are known"[2].

In the Commercial Court this means before the first case management conference[3].

CPR 25.13 sets out the conditions to be satisfied for a security for costs order to be made. These conditions are in the alternative, and the question of whether one or more of the conditions listed there apply are relatively self-explanatory. A claimant resident outside the jurisdiction, an insolvent claimant company, a claimant who has changed their address to evade litigation or has given an incorrect one on the claim form will all be at risk of a security for costs order and rightly so; these are pre-ordained factors which call into question whether the claimant can or, even if they can, will satisfy a costs order against them. In some circumstances, whether the conditions have been met may demand a detailed factual investigation but, whether straightforward or complex, the fact that one or more of these conditions have been met is not an automatic route to a favourable award. You still have to persuade the court to exercise its discretion in your favour pursuant to CPR 25.13 (1), and then,

1 Commercial Court Guide, Appendix 10, para. 6

2 The White Book at para. 25.12.6

3 The Commercial Court Guide, Appendix 10, para 1

once it has agreed to do so, how it is going to do so.

In Santina[4], the court set out the three stages it must analyse before exercising its discretion to make an order: it must be satisfied that one of the conditions in CPR 25.13(2) is engaged; it must be just in all the circumstances to make an order and, if it considers an order should be made, the quantum, timing and appropriate form of the security.

There is much to say on all aspects of this three stage test but insufficient budget to do so. The remainder of this article will focus on quantum; in most cases this is the most significant factor. There are competing authorities on the question of quantum but a helpful decision for defendants is Giaquinto[5]. In that case the court ordered 65% of incurred costs, but 100% of budgeted costs. These percentages were ordered in reference to agreed costs which accords with a trend of the court to approve 100% of agreed costs.

In Sarpd[6], the Court of Appeal held that agreed costs budgets are the "relevant reference point" [49] for conducting an evaluation of security and provide a

"strong guide as to the likely costs order to be made after trial" [52].

In Giaquinto the court commented on the "broad level of agreement over the defendant's estimated costs" [at 75] and commended the defendant's approach as

"proportionate in seeking security only from the corporate claimants, which represents only half the overall costs bill, and also by limiting security requested at this stage to the conclusion of the experts phase."

Agreement and proportionality are arguably this season's buzzwords for winning the highest value possible award.

4 Santina Ltdv Rare Art (London) Ltd t/a Koopman Rare Art [2022] EWHC 3513 (Ch)
5 Giaquinto v ITI Capital Ltd [2022] EWHC 973 (QB)
6 Sarpd Oil Internal Ltd v Addax Energy SA and another [2016] EWCA Civ 120

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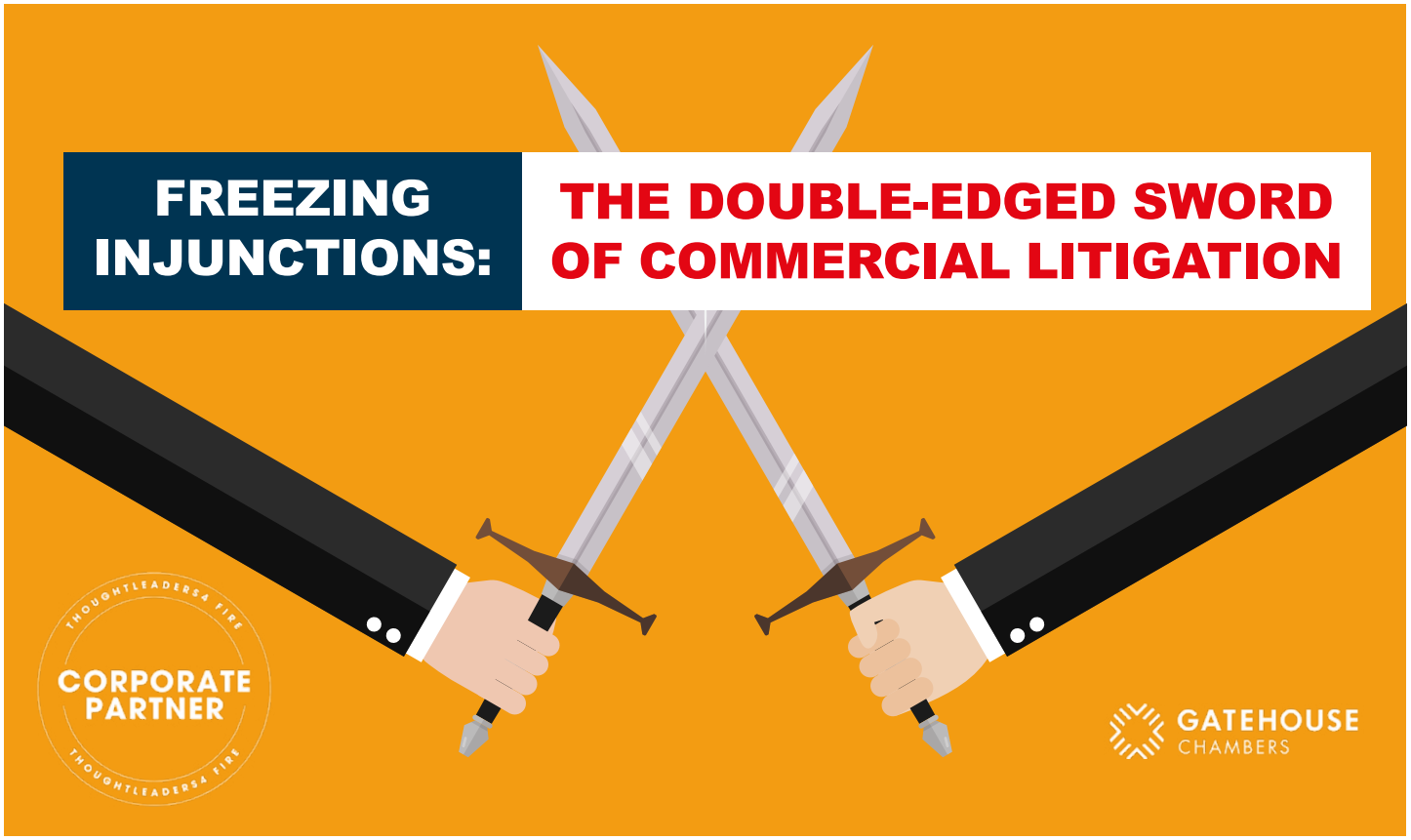


Authored by: Callum Reid-Hutchings (Barrister) – Gatehouse Chambers & William Rees (Associate) – Zaiwalla & Co

Power and Peril: Understanding Freezing Injunctions

Lord Justice Donaldson famously described the freezing injunction as one of the law's two **"nuclear weapons"** (alongside search orders). But like any powerful weapon, its deployment requires careful consideration, precise timing, and meticulous preparation.

A freezing injunction allows a claimant to apply to court without notice to prevent a defendant from disposing of or dealing with their assets. Once granted, it creates an immediate financial stranglehold - banks freeze the defendant's accounts, leaving them access only to limited funds for living and legal expenses.

However, this power comes with significant responsibilities and challenges. The courts won't grant such a draconian remedy without compelling evidence and careful consideration. The consequences of getting it wrong can be severe - applicants who obtain freezing orders wrongfully may face substantial damages claims under their cross-undertaking.

The Three Essential Requirements

To obtain a freezing injunction, applicants must satisfy three key requirements:

1. A "Good Arguable Case" on the merits
2. A Real Risk of Dissipation - objective evidence that a future judgment would be frustrated by unjustified asset dissipation
3. Just and Convenient - showing that granting the order would be appropriate in all circumstances

Landmark Clarification: The Dos Santos Decision

The recent Court of Appeal decision in Dos Santos v Unitel (2024) has provided crucial clarity on what constitutes a "good arguable case." This decision resolved a significant split in authority that had been causing uncertainty for practitioners.

The Competing Tests

Two competing tests had emerged:

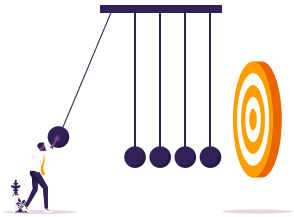
1. The Niedersachsen Test: A case "more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50% chance of success"

2. The Lakatamia Shipping Test: Requiring the applicant to have "the better of the argument" (based on the three-limb test from Brownlie used in jurisdictional cases)

The Court's Decision: A Deep Dive

The Court of Appeal, through Sir Julian Flaux C, delivered a comprehensive analysis that firmly endorsed the Niedersachsen test. The court's detailed reasoning reveals several key insights:

1. Context is Crucial: The court emphasised that while "good arguable case" appears in both freezing injunctions and jurisdictional cases, the context fundamentally differs. In freezing injunctions, it's a merits threshold where the court will later determine the full merits at trial. In jurisdictional cases, the gateway decision is final and won't be revisited.
2. Practical Reality: The court recognised that at the early stage when freezing orders are typically sought, it would be impractical and potentially prejudicial to require judges to determine which party has "the better of the argument."
3. Alignment with Other Injunctions: Significantly, the court effectively aligned the test with the American Cyanamid "serious issue to be tried" standard used in other interim injunctions. This provides welcome consistency in the interim remedies landscape.
4. Commonwealth Perspective: The court noted that the overwhelming weight of Commonwealth authority (except Canada) supports the Niedersachsen approach, providing additional confidence in this interpretation.



Practical Impact

This decision has several important implications for practitioners:

1. Clear Standard: The threshold for showing a good arguable case is now definitively established as the more accessible Niedersachsen test
2. Alignment with Other Injunctions: The court recognized that the "good arguable case" test is effectively the same as showing a "serious issue to be tried" in other interim injunctions
3. Focus on Evidence: While the merits threshold may be lower than previously thought by some, this emphasizes the importance of the other requirements, particularly evidence of dissipation risk

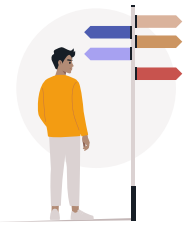
Strategic Considerations

When preparing a freezing injunction application:

1. Evidence Gathering: Focus on:
   - Solid evidence for your underlying case
   - Clear documentation of dissipation risk
   - Supporting evidence for any cross-undertaking in damages
2. Timing is Critical:
   - Act swiftly when dissipation risk is identified
   - Ensure you have enough evidence before moving
   - Consider whether the element of surprise is necessary
3. Risk Assessment:
   - Evaluate the strength of your evidence against the Niedersachsen test
   - Consider potential damage to the defendant and your liability under the cross-undertaking
   - Assess whether alternative remedies might be more appropriate

Looking Forward

The Dos Santos decision provides welcome clarity for practitioners. However, freezing injunctions remain an exceptional remedy that requires careful consideration and preparation. The lower merits threshold confirmed by the Court of Appeal doesn't make them any less "nuclear" - it simply provides clearer guidance on one aspect of this powerful but challenging remedy.



The Costs Implications: A New Approach

The Dos Santos decision also provided important clarity on costs. Unlike standard interim injunctions where costs are often reserved for trial, the Court of Appeal confirmed that unsuccessful respondents who "fight tooth and nail" against freezing injunctions should expect to pay the applicant's costs immediately.

This marks a significant departure from the approach to American Cyanamid-style interim injunctions, where costs are typically reserved. The court's reasoning highlighted a crucial distinction: even if the underlying claim ultimately fails at trial, this doesn't necessarily mean the freezing order was wrongly granted. If the three criteria were met at the time of the application, the order was properly made regardless of the final outcome.

This costs guidance adds real teeth to freezing injunctions and creates important strategic considerations for respondents. Fighting a freezing order application "tooth and nail" now carries significant cost risks, potentially encouraging more focused responses that target specific weaknesses rather than wholesale opposition.

Success in freezing injunction applications still requires meticulous preparation, strong evidence of dissipation risk, and careful consideration of the potential consequences. However, the clarified legal test and costs approach should help practitioners better advise their clients on both the prospects of success and the financial implications of their strategic choices, while maintaining appropriate respect for this powerful tool's exceptional nature.

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Authored by: Frances Jenkins (Senior Associate) - PCB Byrne

The English Court of Appeal ("CoA") recently dismissed two appeals by sovereign states claiming that state immunity protected them from the registration, and subsequent enforcement, of ICSID awards. In Border Timbers Ltd and another v Zimbabwe[1] and Infrastructure Services Luxembourg S.A.R.L. and another v Spain[2], which were heard together, both states relied on s.1(1) of the State Immunity Act 1978 ("SIA"), which gives immunity from the jurisdiction of the English courts to sovereign states, unless the exceptions as set out in the SIA apply. The CoA considered that Spain and Zimbabwe, as parties to the ICSID Convention, had submitted themselves to the English jurisdiction.

This decision helpfully reconciles two conflicting earlier judgments in these proceedings and underlines this jurisdiction's willingness to enforce international arbitral awards, including in the Investor-State context.

Factual Background

The Investors, Infrastructure Services Luxembourg S.A.R.L and Border Timbers Limited, both obtained separate ICSID awards against Spain and Zimbabwe respectively. The Investors obtained ex parte orders to register those awards under the Arbitration (International Investment Disputes) Act 1966 (the "AA").

Spain and Zimbabwe both applied to set aside those orders on the grounds of state immunity in separate proceedings.

In Infrastructure Services Luxembourg -v- Kingdom of Spain[3] Mr Justice Fraser (as he then was) dismissed Spain's application. He relied on the decision in Micula & Ors v Romania[4] on the basis that the ICSID Convention (the "Convention"), as given effect in this jurisdiction by the AA, precluded Spain from raising any defence under the SIA to challenge the registration of an ICSID award. Alternatively, if the SIA did apply, Fraser J found that Article 54 of

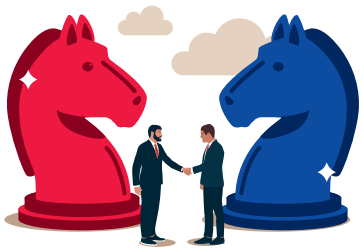
1 [2024] EWCA Civ 1257
2 2024 WL 04542950
3 [2023] EWHC 1226 (Comm)
4 [2020] UKSC 5, [2020] 1 WLR 1033

the Convention was a submission to the jurisdiction for the purposes of s.2 SIA.

In Border Timbers Limited v. Republic of Zimbabwe[5], Mrs Justice Dias DBE, considered that the registration of an award did not engage the general immunity provided by s.1(1) SIA because it was an automatic ministerial act, not involving any adjudicative step by the English courts in which immunity could arise. However, in contrast to Fraser J, Dias J did not think that Article 54 of the Convention constituted a sufficiently clear submission to the jurisdiction of the UK courts. Both Spain and Zimbabwe appealed.

Arguments on Appeal

Spain and Zimbabwe argued that the Convention and the AA did not strip foreign states of their general immunity under s.1(1) SIA. They further argued that the Convention (and Article 54, in particular) was not a prior written agreement to submit to the jurisdiction of the English court for the purposes of s.2 SIA. Both states argued that s.9 SIA, which provides an exception to s.1(1) where states have submitted to arbitration, was the only applicable exception permitting registration of an ICSID award but that they were entitled to challenge the validity of the reference to arbitration and the jurisdiction of the arbitral tribunal.



Decision

The CoA dismissed both appeals with Lord Justice Phillips delivered the leading judgment.

As a starting point, he found that an English court entering judgment against a foreign state was not simply an administrative act, but obviously an adjudicative act for the purposes of s.1(1) of the SIA. Registering an ICSID award was a clear case of an English court exercising jurisdiction over a sovereign state.

Phillips LJ further found that state immunity was not a central issue in Micula, so Fraser J's analysis on Micula did not advance the issue. (Enlarge)

Philips LJ then considered s.2 of the SIA and its relationship with Article 54 of the Convention. Article 54 is an agreement between all contracting states to enforce ICSID awards. Therefore, at first blush, Article 54 constitutes an agreement for the UK to enforce ICSID awards against other contracting states, including Spain and Zimbabwe. The recognition and enforcement described in Article 54 comes without qualification of any kind, making it impossible for Article 54 to be read only in relation to awards issued against investors. There is no exclusion of awards against states.

The Appellants' argument that the wording contained in Article 54 was insufficient to qualify it as "prior written agreement" under s.2(2) of the SIA was dismissed. Philips LJ held that Article 54 was clearly an agreement by signatory states (in this case Spain and Zimbabwe) to waive immunity and submit to the jurisdiction of other signatory states.

Given the conclusions on s.2 SIA, the CoA did not further consider the exception to general immunity established by s.9 SIA. However, Phillips LJ held that that s.9 SIA clearly imposed a duty on any court to satisfy itself that a signatory state had agreed to submit the dispute to arbitration.

Comment

This decision, and the commentary it contains, is a useful guide on the relationship between the concept of state immunity under English law and the UK's commitments under the Convention.

This decision follows an international line of cases dealing with the effect of Article 54 of the Convention, taking the same position as the law in Australia, New Zealand, France, Malaysia, and the US. It further establishes the UK as a pro-arbitration and pro-enforcement jurisdiction for Investor-State awards.

We expect that similar cases relating to the New York Convention will come through the English courts and explore the interaction between state immunity and the enforcement of non-ICSID awards against sovereign states, which will provide an interesting comparison.

5 [2024] EWHC 58 (Comm)

60 SECONDS WITH...

FRANCES JENKINS

SENIOR ASSOCIATE

PCB BYRNE

Q What Would You Be Doing If You Weren't In This Profession?

A I would have been a historian because my favourite subjects on my French & Russian degree (many years ago) were always the history modules, in particular the history of the Soviet Union. Even on a beach holiday, I am always reading a history book of some sort! I am currently reading Emperor of Rome by Mary Beard, which I highly recommend.

Q What Is One Of Your Greatest Work-Related Achievements?

A At a previous firm, I worked on an abuse claim for 40 gymnasts who had suffered ill treatment at the hands of their coaches as children and teenagers. Although I left the firm before the claim was completed, I was so proud of how my clients, by participating in the claim, had transformed from scared victims to eloquent and articulate advocates for better practices in gymnastics. It is deeply satisfying to know that a claim that I worked on will have a lasting legacy for the next generation of children who wish to train in gymnastics.

Q What Personality Trait Do You Most Attribute To Your Success?

A I am always open to trying something different! I have worked for lots of different firms whose work has ranged from commercial litigation, construction litigation, group claims and arbitration. This has given me a much broader understanding of the general litigation landscape so that I can appreciate and consider a case from a variety of angles.

Q You've Been Granted A Ticket To Another Country Of Your Choice. Where Are You Going And Why?

A Japan for my honeymoon! My husband and I were supposed to go to Japan for our honeymoon in 2020… and for obvious reasons we didn't end up going! Since then, we have moved out of London and bought a house in the countryside so have not found the time (or the money) to rekindle those plans. Hopefully in the next few years….

Q What Do You See As The Most Significant Trend In Your Practice In A Year's Time?

A In light of the tough economic outlook and stretched consumer budgets, I think we will continue to see high volumes of fraud at all ends of the spectrum e.g. where consumers lose money unwittingly to fraudsters or where companies fail and as part of the fall out, fraud and director misconduct is discovered.

Q Do You Have A New Year's Resolution, And If So, How Do You Plan To Keep It?

A My New Year's resolution is to finish reading the enormous pile of books I have accumulated over the years and have just never got round to reading.

Q Dead Or Alive, Which Famous Person Would You Most Like To Have Dinner With, And Why?

A I would love to have dinner with Lee Miller as I recently watched Kate Winslet's film "Lee" and it was superb. Miller had a fascinating life as a model in the 1920s before becoming a fashion and fine-art photographer in Paris. During World War II, she was a war correspondent for Vogue and her goal was to "document war as historical evidence". She famously posed in Hitler's bathtub which is an iconic image. If you have not yet watched "Lee", I highly recommend it!

Q What's The Strangest, Most Exciting Thing You Have Done In Your Career?

A The strangest thing I have ever done in my career is watch a Russian Kompromat video, frame by frame, in an open plan office, with a paralegal to identify the best frame to show that the individual accused of being in the video, was not the person in the video!
The most exciting thing I have ever done is launch the gymnast abuse claim I mentioned above, accompany my clients to TV interviews and watch all the media channels pick up the story. It was great to see my hard work (and that of my team!) snowball into an important and well-publicised claim.

Q What Motivates You Most About Your Work?

A Ultimately, I really enjoy learning and every single case I have ever worked on has taught me something. Sometimes I learn something new by tackling a legal dilemma which I have not come across before and sometimes I learn about a new industry and the commercial challenges which clients in that industry face.

Q What Does The Perfect Weekend Look Like?

A A long country walk with my husband and our two crazy cocker spaniels. No country walk is complete without stopping off at our local pub for a pie and a pint of ale (or two).

Q What's The Most Important Quote You've Heard That You Have Adopted To Your Personal Or Professional Life?

A The quote "Que Será, Será" (and the Doris Day song!) has brought me peace in moments of difficulty and helped me to accept events which are beyond my control, both in my professional and personal life.

Q What Is The One Thing You Could Not Live Without?

A My pets. Growing up, we always had rabbits, guinea pigs and cats so I just cannot imagine having a "home" without having a pet. Indeed, when I bought my first flat, it was primarily so I could have a cat as my landlord would not let me have one! I still have that same cat (Mishka) and two working cocker spaniels (Ellie & Emma) who keep me active and well exercised come rain or shine.

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DIGITAL ASSET RECOVERY AND THE UNIQUE CHALLENGES POSED BY DECENTRALISED AUTONOMOUS ORGANISATIONS ("DAOS")

Authored by: Nia Statham (Associate) - Baker & Partners

Never come across the term DAO before? You're not alone, but as of 13 January 2025, these virtual organisations held over US $32.2 billion in digital asset value on monitored blockchains[1] and represent the next frontier in digital asset recovery.

What is a DAO?

Sometimes described as "companies of the future", DAOs are virtual associations of anonymous[2] token holders which operate on a decentralised and open-source blockchain ledger. In ethos, they are intended to be highly democratised structures with no executive control and autonomous, in the sense that they are governed at their inception by code which is written into self-executing smart contracts deployed on the blockchain.

Generally speaking, DAOs will share a publicly viewable un-hosted wallet secured by a private key that can require multiple signatories to authorise withdrawals. This un-hosted (multi-sig) wallet (Treasury Wallet) is akin to the DAO's bank account and can hold hundreds of millions of dollars in digital assets (Treasury Assets). DAOs may (amongst other things) also utilise sub-Treasury Wallets to segregate its digital assets and, if it has adopted an intermediary corporate vehicle to "legally wrap" itself (discussed below), may purchase real world assets or interests in other companies, and have bank accounts and/or accounts with providers that offer crypto-fiat exchange services (which include centralised cryptocurrency exchanges) opened on its behalf.

Decisions with respect to how the Treasury Assets are managed and transferred away from the DAO fall to those who hold the DAO's "governance" tokens. These tokens give the holder voting rights with respect to proposals[3] that are put to the DAO; voting thresholds will be bespoke to each DAO. As such, a DAO may be unable to transfer its Treasury Assets until a proposal is passed.

To achieve a democratised structure, governance tokens should be distributed across a large pool of individual token holders (which has the effect of diluting voting power). However, governance tokens can be disproportionately allocated to numerous anonymous un-hosted wallet addresses **(which can be controlled by the same person or a consortium of persons)** at a DAO's inception, and this has the effect of "centralising" a DAO's token supply. Governance tokens can also be purchased in advance of being issued and traded on dApps, decentralised and centralised exchanges.

1 Private blockchain networks only permit a verified select number of users to access it, this provides a high level of privacy and security which may impact the accuracy of these figures.

2 Whether a token holder can be identifiable will depend on many factors, including how the token was acquired, the source of cryptocurrencies used and how sophisticated any blockchain based laundering methods were utilised before the token's acquisition.

3 Proposals are akin to resolutions put forward to members of a private company at a general meeting.

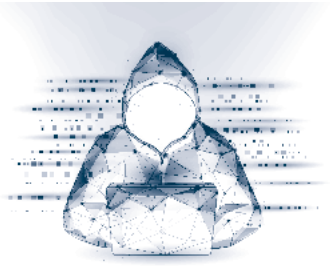
The objectives and parameters of each DAO can vary from fundraising for social and charitable causes (in which case holders waive the prospect of redeeming their tokens for value), to behaving closer to decentralised venture capital funds for start-ups (whereby tokens producing yields are issued and can be traded for value).

What is a legal wrapper?

Due to the anonymous nature of how a DAO's tokens can be held and its decentralised nature, DAOs by themselves are usually unable to purchase real-world assets (such as property and shares in companies) or open accounts in their own names. This will be particularly true if there is an obligation for the purchasing DAO to disclose the identities of the person/s which exert significant interest or control over it, supported by "Know Your Customer" information (KYC). This is why a corporate intermediary vehicle is usually adopted to act on its behalf in the "real world". We call this intermediary vehicle a "legal wrapper".

Additionally, DAOs which have not adopted a legal wrapper may also run the risk (or at least in the United States) of having their legal status inferred as an "unincorporated association" or a "general partnership"[4], which would result in all token holders in a DAO being liable for the acts of each other.

As a result, DAOs adopt legal wrappers in an attempt to limit the liability of its token holders, to enter into legally binding agreements, open accounts and to benefit from the KYC information that a legal wrapper can offer, which a standalone DAO would otherwise be unable to provide.



In terms of the legal wrappers on offer to DAOs and decentralised projects more generally, many DAOs are adopting "ownerless" companies (which are also offered in the Cayman Islands via the Foundation Company[5]). This is because the ownerless nature of these vehicles marries well with the anonymous and decentralised ethos of a DAO.

Ownerless companies can then be used to either hold a subsidiary company which acts as the DAO's legal wrapper, or can act as a legal wrapper in its own right. If a legal wrapper decides not to register as a Virtual Asset Service Provider (VASP) (if required in its home jurisdiction), or, if a holding company incorporates a legal wrapper in an unregulated / weaker regulated jurisdiction, then there is no / less enhanced regulatory oversight and no / minimised regulatory safeguards against unlawful activity.

From an asset recovery and tracing standpoint, the use of ownerless companies as legal wrappers throws up some curious issues. Clearly, any legal wrapper which minimises or avoids the need to record meaningful beneficial ownership information has the potential to make itself truly "ownerless" and anonymous, which may accurately reflect the decentralised nature of the DAO itself. Some may argue that token holders in a centralised DAO control the fate of the DAO's on-chain Treasury Assets, which may be worth hundreds of millions of dollars. However, for KYC purposes, all that may be required when onboarding an ownerless legal wrapper of a centralised DAO is KYC on the person/s who controls or manages the legal wrapper itself. Obviously, the person/s who controls the legal wrapper and the person/s who anonymously control a centralised DAO may not necessarily coincide. This is especially the case where the directors or controllers cannot by themselves administer the DAO's Treasury Assets without obtaining the requisite number of votes in favour from the token holders, or where they are taking instructions from those behind a centralised DAO. A point for individuals who are asked to act as directors of legal wrappers which is intended to administer a DAO is how they may properly assess, mitigate and discharge their duties as a director. This issue arises from the fact that in practice the anonymity enjoyed by token holders means that directors of such legal wrappers may not able to appreciate and evaluate the universe of stakeholders to whom they owe duties.

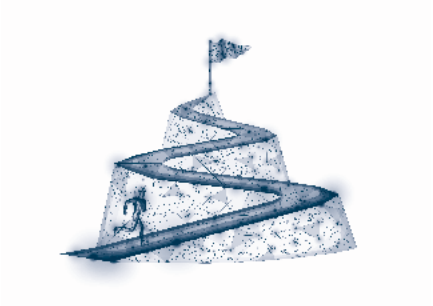
As to how legal wrappers hold a DAO's assets and who in fact "controls" the DAO, some guidance may result from litigation currently on foot in Hong Kong, where the Court is being asked to determine the true ownership of the Mantra DAO, which is wrapped by a Seychelles foundation vehicle[6]. It is alleged by the defendants that this vehicle holds the DAO's digital assets on behalf of the DAO and its token holders. However, it is presently unclear how a Cayman Court will treat a DAO's Treasury Assets (i.e. will they fall to be assets of the Foundation Company, or will they be deemed to be held on trust for the DAO's token holders?). These considerations are important from an asset recovery perspective in an insolvency scenario, as token holders may risk being found to be unsecured creditors if they cannot establish a proprietary right in the DAO's Treasury Assets.

In Mantra, the plaintiffs in their capacity as the DAO's founders, allege that the project belongs to and should be operated by them. Whereas the defendants, who were elected by the DAO's token holders to govern the legal wrapper (Councillors) and act on behalf of the DAO, argue that control in fact lies with the holders of the DAO's governance tokens. The Hong Kong Court has delivered an interim judgment which held that the Councillors have a duty to account to the token holders about the project's funds. It also indicated that it will need to consider the DAO's white paper, staff employment, governance and management agreements to fully determine the substantive issues at trial.

4 See Samuels v. Lido DAO, Order re Motion to Dismiss, No. 23-cv-06492 (N.D. Cal. Nov. 18, 2024); CFTC v. Ooki DAO, No. 3:22-cv-05416 (N.D. Cal. June 8, 2023) (default judgment); and Sarcuni v. bZx DAO, 664 F. Supp. 3d 1100, 1117–18 (S.D. Cal. 2023).

5 Foundation Companies are governed by the Foundation Companies Act, 2017. Section 8 permits all shares in a Foundation Company to be cancelled subject to the appointment of a supervisor (whose details are recorded in a register). The supervisor has no economic or beneficial interest in the Foundation Company, and its supervisory powers and duties can be restricted by the Foundation Company's constitution. A supervisor may also be the Foundation Company's director.

6 Mantra Dao Inc and Another v. John Patrick Mullin and Others [2024] HKCFI 2099.



Asset recovery challenges

Legitimate industry protects itself from the risks posed by bad actors who wish to abuse legal wrappers by (amongst other things) utilising responsible directors, and deploying sophisticated governance and security protocols. However, the utilisation of legal wrappers which do not identify those behind a centralised DAO or a decentralised project with a centralised token supply, provides scope to conceal the real identities of sophisticated bad actors which may be raising funds for seemingly legitimate projects, with the ultimate aim of transferring those assets away for illicit purposes.

Particular challenges with respect to enforcing a Court Order for the purposes of safeguarding Treasury Assets and appointing receivers or liquidators to a DAO's Treasury Wallet also arise due to several factors. For example, controllers of the legal wrapper (such as the directors) will unlikely exert any meaningful control over the DAO's Treasury Wallet unless they are the sole signatory and can control the outcome of a proposal (should one need to be passed in line with the DAO's protocol).

In any other case, the real identities and service details of the signatories to the Treasury Wallet must be located, as they will need to authorise any Court ordered transfer. Additionally, the DAO's token holders may also need to pass a proposal to authorise a Court ordered transfer of the DAO's Treasury Assets to a secured third party custodian wallet (for ringfencing purposes). However, this may be difficult to achieve should the DAO's token holders simply refuse to pass a proposal or where the DAO has been abandoned.

Applying for third-party disclosure relief to obtain the KYC on the beneficial owner of accounts registered to ownerless companies (or legal wrappers who are beneficially held by ownerless companies) with, for example, fiat-cryptocurrency exchange service providers (including centralised cryptocurrency exchanges) may also have limited tracing value. This is because non-membership information (for the legal wrapper or ultimately, its ownerless parent company) may be legitimately accepted in the alternative as good KYC[7]. Under those circumstances, such fiat-cryptocurrency service providers (of which some operate in jurisdictions that regulate centralised cryptocurrency exchanges) may give rise to similar asset tracing and recovery challenges posed by unregulated cryptocurrency exchanges.

In some cases, it may also be impossible to determine whether any intermediary vehicle (regardless of whether it is ownerless) legally wraps a particular project or DAO as there is currently no requirement to record or disclose this information in an accessible register. As such, where projects and their legal wrappers do not share the same name and a connection between them is not voluntarily disclosed, token holders may find it hard to discern whether the DAO or project they participate in is legally wrapped, where to bring a claim, what statutory rights they may have against the legal wrapper, what other assets that legal wrapper may hold and thus the full recovery paths available to them.

In addition to the above, there is no requirement to maintain a record (supported by high quality KYC) of who the signatories are to a Treasury Wallet. However, there are legitimate privacy and possibly serious safety concerns for these signatories should their information get into the wrong hands.

Risk round-up

As mentioned above, responsible industry arguably has the necessary experience, tools and safeguards in place to mitigate against the risks of abuse posed by bad actors through the utilisation of legal wrappers generally. However, asset recovery professionals must be alive to the risks posed by these vehicles where they're abused, since they could easily play a role in the "integration" and "placement" stage of a crypto-fiat laundering process. This is because legal wrappers are another means of off-ramping and on-ramping illicit cryptocurrencies, whether by purchasing real world assets or by opening accounts (including those which facilitate crypto-fiat exchange trades).

Due to the potential disconnect between those who operate or control a legal wrapper (of which KYC can be provided) and those who can anonymously control a centralised DAO which hosts a high value Treasury Wallet, there is a risk that legal wrappers and ownerless vehicles alike could be exploited by bad actors of a centralised project or DAO to circumvent the usual investigative advantages provided by regulated cryptocurrency exchanges and other providers which require traditional KYC on a corporate client.

Utilising any legal wrapper in this way (which circumvents the need to disclose who is behind a centralised project or DAO) for the purposes of on-ramping and off-ramping illicit cryptocurrencies can frustrate investigators' efforts to ascertain the identity of bad actors, and in turn their ability to meaningfully trace and recover a DAO or project's misappropriated digital assets.

7 This is because KYC on the controller of the legal wrapper, which could be the director or another office holder who is conferred with statutory stewardship powers, may be accepted.

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