ThoughtLeaders4 Disputes • June 2025

TL4 Disputes MAGAZINE

ISSUE 17

THE COMPASS POINT OF RESOLUTION

INTRODUCTION

"In most disputes, the truth is somewhere in between."

- Judge Frank Easterbrook

We are thrilled to present Issue 17 of the Disputes magazine. This edition dives into the themes of: Competition in Disputes, Class Actions, Crypto & Digital Assets, International Arbitration and Financial Services. Each theme offers an insight into the current trends and hot topics in the ever-changing nature of legal conflicts.

As always, we extend our sincere thanks to our Corporate Partners, contributors, and readers for their support in bringing this issue to you.

Do keep an eye out as we continue to offer various engaging events within the Disputes Community.

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CONTENTS

TL4 Disputes

QUARTERLY EVENT ROUND UP

THE ARBITRATION SUMMIT

In May we were treated to a wonderful day at the Dilly discussing the future of Arbitration. The day was filled with immersive learning, networking, and thought-provoking discussion.

We would also like to take this opportunity to once again thank our amazing Advisory Board for opening and closing another successful event.

We would also like to thank all of our event partners for helping to make this all possible.

SHAREHOLDER & SECURITIES DISPUTES FORUM

One Whitehall Place was the venue for our Shareholder & Securities Disputes Forum at the end of April. An insightful lineup explored everything from small business conflict to strategic global litigation in what was a brilliant event full of insights, analysis, and discussion.

A big thank you to our fantastic chairs: Dan Smith (Stephenson Harwood LLP), Jenny Morrissey (Harcus Parker Limited), Lucy Pert (Hausfeld UK), and Kate Allass (Farrer & Co UK).

THE EUROPEAN CLASS ACTIONS FORUM 2025

We were delighted to welcome the Disputes community to The European Class Actions Forum 2025, which took place from the 11th – 12th June 2025 at Hôtel Mövenpick Amsterdam City Centre.

Many thanks to our co-chairs Ozan Akyurek and Vikram Kumar, for their opening remarks this morning.

Her Royal Highness Princess Laurentien of the Netherlands, kicked off the conference with TL4's first ever Royal Keynote!

We look forward to welcoming you again next year for our 3rd Annual European Class Actions Forum

Disputes

Upcoming Events

Financial Services Disputes - The Third Annual Conference 2025
24 June 2025 | One Whitehall Place, London

European Collective Redress Circle
4 - 5 September 2025 | Grande Real Villa Itália Hotel & Spa, Lisbon, Portugal

Sanctions in Disputes Circle
18 - 19 September 2025 | Royal Berkshire Hotel, Ascot, UK

Sovereign & States Litigation Summit USA
23 - 24 September 2025 | Kimpton Hotel Monaco Washington, D.C., USA

The Family Business Disputes Forum 2025
30 September 2025 | One Whitehall Place, London

International Arbitration & Enforcement Forum 2025
8 October 2025 | Central London

UK Class Actions - The 5th Annual
14 - 15 October 2025 | Central London

The European ESG Litigation Forum
4 November 2025 | Hôtel Mövenpick Amsterdam City Centre

US/UK Litigation Circle
20 - 21 November 2025 | Fairmont Windsor Park, UK

Corporate Disputes 2025 - 5th Annual Forum
2 December 2025 I Central London

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COMPETITION LITIGATION IS INCREASING

WHAT DOES IT MEAN FOR EXPERTS?

Authored by: Mark Bosley (Director) - BRG

In the United States, antitrust issues have long been decided in the courtroom. But across the Atlantic, competition litigation has only proliferated more recently. Are the United Kingdom and European Union (EU) playing catchup, or are we heading in a different direction?

Over the last couple of decades, the UK's specialist court—the Competition Appeal Tribunal (CAT)—has grown from a relatively niche litigation venue to hosting some of the largest claims going, collectively worth tens of billions in potential damages. Over the last five years, this has been driven by a burgeoning class action regime that has seen over fifty claims filed, mostly on an opt-out basis. Many UK readers of this article are likely to be a member of several classes.

In the EU, the European Commission (the "Commission") has an established track record of bringing high-profile public enforcement actions against large multinationals, some of which have spent years making their way through the courts.

The EU has sought to stimulate more private litigation within member states (both follow-on and standalone)—first with the Damages Directive and then the Representative Actions Directive. In anticipation, the Commission has issued guidance to national courts on how they should assess common economic issues in competition litigation. This may be bearing fruit, although the picture varies across individual member states. Countries such as Germany have relatively active and mature competition litigation regimes, while others are more nascent.

From the perspective of competition experts, two key questions emerge from this proliferation of litigation, which I address below:

- As new cases test the boundaries of competition law, what tools do experts need to address the economic issues which arise?
- As experts take centre stage in increasingly large and complex cases, what should their role be—and how can they best give evidence that assists the court?

New Cases Push Boundaries Of Competition Law

BRG experts are increasingly seeing competition cases push into new areas such as intellectual property (IP), economic regulation, sports governance and consumer protection. In these cases, we have been challenged to develop analyses that reconcile competition principles with other economic and legal issues that may arise.

Competition and IP Rights

IP law is perhaps the most obvious area in which tensions can arise with the precepts of competition law.

Principles of economics underpin both competition law and IP law. Competition theory explains the benefits that can flow from fostering competitive and contestable markets, while IP law recognises the need for innovators and creators to earn just reward for their investment and risk-taking—without the risk of others free-riding on their investments. Both objectives have sound motivations in economic theory but come into tension when enforcement in one area trespasses on the other. This trade-off is recognised explicitly within the competition law on "essential facilities" arising from Bronner, though it also arises more widely.

BRG experts have been appointed on behalf of both defendants and claimants in matters concerning the design of—and terms of access to—markets within which firms may also hold IP rights. BRG experts are also involved in cases where the crossover occurs in the opposite direction, where competition issues arise in the context of an IP case (e.g. counterclaims in response to litigation seeking to enforce IP rights that argue such enforcement forecloses competition because the rights-holder is also a dominant firm).

In these cases, experts must unify and reconcile competition economics analysis with the analytical frameworks typically deployed in IP licensing and valuation contexts, particularly with regard to identifying the relevant IP and source of any returns it may generate.

Competition and Ex Ante Regulation

At first glance, one might be surprised to find ex post private enforcement cases being brought in a regulated market, as one would assume that effective regulation would preclude anticompetitive conduct. However, several UK class actions have been brought against regulated businesses where the claimants seek competition law to intervene, broadly because the regulation was alleged to have been deficient or absent, or because the regulated business was allegedly dishonest. In most cases, the courts have been open to such cases proceeding beyond the certification stage, absent a specific legal exemption.

In these cases, the experts must combine competition economics expertise with a deep understanding of often complex regulatory mechanisms which must be analysed to assess the effects of conduct, identify which parties have been affected and quantify a robust counterfactual scenario. BRG experts have given evidence in several such cases on behalf of both defendants and claimants.

Competition and Sports Governance

Sport may not seem an obvious flashpoint for competition law, but the EU and UK have seen multiple competition cases concerning football, golf, rugby union and ice skating, among others. Most sports in most countries have a single governing body, typically a member of some multinational institution that recognises only a single member for each country. There may be sound reasons for this in many aspects of sports governance. However, recent judgments have held that governing bodies are "dominant" within UK and EU law and have limited the scope of competition law exemptions for sports governance.

In these cases, experts must combine the tools of competition economics with a thorough understanding of the particular economic incentives arising in sports, as well as a detailed factual understanding of the governance process. This combination of expertise is important in defining the scope of the relevant market(s); analysing the constraints on the governing body; explaining procompetitive implications of having a clear set of rules providing a "level playing field"; and explaining how resulting economic effects are distributed between the governing body, clubs, players, sponsors, broadcasters and, not least, sports fans. BRG experts have been appointed on behalf of governing bodies, clubs and other parties in sports competition matters.

Competition and Consumer Protection

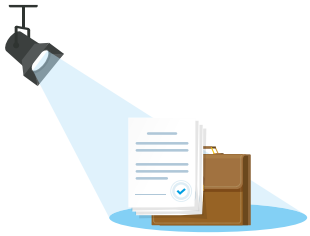
Consumer protection has become a hot topic in the EU and UK, particularly in relation to digital markets with the EU Digital Services Act and UK Digital Markets, Competition and Consumers Act. The crossover between competition and consumer protection has long been recognised, with competition policy objectives typically stressing the potential benefits of competition for the consumer and competition regulators often also being responsible for consumer protection. However, consumer protection regularly embeds wider objectives, such as duties in relation to "fairness," which can come into tension with competition policy.

BRG experts have been appointed on behalf of both defendants and claimants in consumer cases that have been formulated as competition claims (typically abuse cases brought against allegedly dominant firms) but which embed consumer protection issues.

In these cases, the usual competition economics analyses must be combined with a careful assessment of the extent to which the effects on competition in the counterfactual flow through consumers, which may then be quantified based on a robust analysis of consumer preferences.

Summing Up

It seems likely that we will continue to see new cases that push boundaries, and the economic analyses in such cases will require versatile experts with broad expertise who are able to present compelling and broad-based economic analyses of the relevant markets and conduct.



Expert Evidence in the Spotlight

Economics lies at the heart of competition law, and hence liability often turns on the courts' assessment of complex economic questions. The Academy of Experts defines an expert as anyone with "knowledge or experience of a particular field or discipline beyond that to be expected of a layman". Thus, while reliance on

expert evidence is common in civil litigation, expert evidence on economics often takes on prominence in competition litigation. This remains true at the CAT, where the three-member tribunals typically include an economist.

As competition litigation proliferates, more questions have been raised about the role of experts and how their evidence should be given. In a notable judgment in the long-running trucks cartel litigation, the CAT remarked in relation to the expert evidence that "it appeared quite marked to us in this case that all the experts…came to conclusions that favoured their clients". The CAT emphasised the importance of the expert evidence to their decision-making: "[when] there are fine and difficult issues for us to decide, it is important that we are able to trust the independence of the experts" but also commented that "the volume of such evidence was huge and, in our view, excessive".

This begs the question:

How can experts provide economic evidence on complex matters in a way that assists the court most effectively?

BRG experts have given evidence in numerous cases that have involved significant procedural innovations in relation to the nature of disclosure, the format and sequence in which expert evidence is given, and the ways in which different parties are represented. These innovations have included:

- **Ordering experts to exchange reports, and/or hold joint meetings to discuss their proposed methodologies before producing substantive reports.** The idea is to mitigate the risk of experts becoming "ships passing in the night". While generally welcome in theory, it can be difficult for an expert to predict the precise analyses they will rely on ex ante, ahead of receiving disclosure and considering the inherent uncertainties as litigation progresses. As such, it remains to be seen whether this will make the process more efficient.
- **Ordering split trials or phasing into a series of "mini-trials" on separate issues.** Competition matters often involve dependencies between the economic issues at play (e.g. there cannot be an abuse of dominance unless dominance has been established). These dependencies, coupled with the volume of issues in complex cases, have led the CAT to find ways to break cases into phases. Making the work more manageable is welcome from an expert perspective and generally good for the quality of evidence. However, this must be weighed against other factors, such as whether a split trial could affect efficiency through the duplication of costs.

- **Consolidating separate proceedings or creating joint "umbrella" proceedings to decide overlapping issues (e.g. pass-on).** An increasing number of claims have been filed that relate to the same underlying conduct but are brought by different claimants with potentially conflicting interests. Typically, this arises when claims are brought by both direct purchasers (who typically argue that overcharges were not passed on) and indirect purchasers (who typically argue that they were). From an expert perspective, deciding economic issues on a consistent basis between cases is welcome. However, we have found that the need to engage with multiple other experts expands the scope of the work substantially, and, if experts are not aligned on the analytical framework, the differences in their opinions may not always be set out clearly for the court.
- **Limiting the number of experts.** In cases with either large numbers of claimants or claimant groups, or multiple separate defendants (such as cartels), the CAT has sought to reduce the number of experts—sometimes proposing that parties with aligned interests share a single expert or, in one case, dividing responsibility for different issues between the parties' experts. While the intention is understandable, the approach has downsides, in particular the risk of overreliance on a single expert with a very substantial volume of work who must also ensure that they have considered all the evidence from all the parties on whose behalf they act. From the parties' perspective, there is also unlikely to be a material cost saving as they are likely to retain their own expert in a "shadow" capacity, even if such experts cannot give their own evidence.
- **Systematic use of expert "hot tubbing".** It is now routine in the CAT that an expert hot tub is held ahead of cross-examination. Often, this provides a good opportunity for the expert to explain their view in a more structured way and enables the Tribunal to directly compare and contrast opposing expert views. However, hot tubs can become less effective when they include large numbers of experts or when experts from different disciplines express opinions on overlapping issues.

Conclusions

It seems likely that experts will remain central to competition cases. When it comes to changing how expert evidence is given, it is fair to say that some innovations have worked better than others. Economists generally welcome innovation and hope that, as in competitive markets, the best ideas succeed. With that said, procedure need not always be reinvented for courts to produce sound judgments in complex competition cases. Case in point: BRG experts were involved in two recent cases that followed the customary routine of disclosure, exchanges of reports and cross-examination, which ultimately yielded detailed and well-reasoned judgments that engaged carefully with the economic issues.

BRG M&A Disputes Report 2025

Improved Macroeconomic Landscape Spurs Deal Growth While Renewing Dispute Challenges

After moderate deal market gains in 2024, dealmakers are eager to leave the uncertainty of the last few years behind and enter a new chapter of mergers and acquisitions (M&A) activity. The conditions look right for further improvement in 2025: interest rates and inflation declined last year, and valuations and investor confidence are recovering in response. That backdrop could unyoke pent-up demand to deploy capital, especially amongst private equity (PE) firms, potentially giving the market a jump start in the first half of 2025.

Yet dealmakers have obstacles to overcome in the year ahead. Those include questions about how new governments elected in 2024—the returning Trump administration in the US chief amongst them—will shape key components of economic policy, from taxes and interest rates to antitrust interventions. Other challenges— including foreign exchange volatility, rising geopolitical tensions in China and the use of US tariffs as a bargaining tool for negotiating with key trading partners—could hinder M&A activity and foster deal-related disputes.

BRG's sixth-annual M&A Disputes Report finds dealmakers are adapting to these challenges by managing financial risk with carefully crafted deal terms and looking for new ways to extract value from transactions. However, these same strategies frequently appeared as catalysts for disputes between buyers and sellers in 2024—and could pose further problems in the year ahead. Our latest research into dealmaker expectations and disputes also finds:

- Financial services industry deals saw heightened dispute activity in 2024 amidst ongoing fallout from the 2023 banking crisis and a critical antitrust lens from regulators. Increased deal volume in the sector could extend this elevated dispute risk.
- Regulatory issues frequently led to M&A disputes last year as governments scrutinised large transactions and cross-border deals with an eye towards antitrust and foreign investment risks. These priorities could shift under incoming administrations.
- Earnouts pose a growing dispute risk in 2025, with ambiguous language and shifting post-transaction business conditions expected to amplify scope for disagreement as investors attempt to limit financial risk. In 2024, purchase price adjustments were frequently at issue.– Europe, the Middle East and Africa (EMEA) is expected to see the most dispute activity amongst regions in 2025 due to regulatory challenges. For the second year in a row, it was the leading region driving increased dispute volumes— particularly amongst larger deals.
- Private equity involvement in deals is increasing dispute risks. PE firms are maintaining high due-diligence standards but are becoming more comfortable with litigation.

This year's report draws on quantitative findings from a survey of more than 200 lawyers, corporate finance advisors and PE professionals across Asia-Pacific, EMEA, Latin America and North America. It also includes insights and analysis from BRG experts and deal and disputes lawyers from leading global firms. This year's survey also incorporates new insights about dealmakers' preferred dispute resolution venues, from courtrooms to the negotiation table.

Read the full report

Disputes

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SUPERCHARGING MASS CLAIMS
LEVERAGING AI AND LLMS IN UK GROUP LITIGATION

FROM RESEARCH TO RESOLUTION
A NEW PARADIGM FOR CLAIMANT FIRMS

Authored by: John Hays (Managing Director), Mark King (Senior Managing Director) & Rob Jones (Managing Director) - Ankura

Introduction

As the UK's collective redress regime continues to evolve, law firms face novel challenges at every turn. Building and managing mass claims in this environment demands not merely legal acumen, but also exceptional efficiency and strategic insight. The traditional, largely manual processes of research, data collection, fact preparation, and claim management are simply not sustainable when dealing with thousands — or even millions — of claimants.

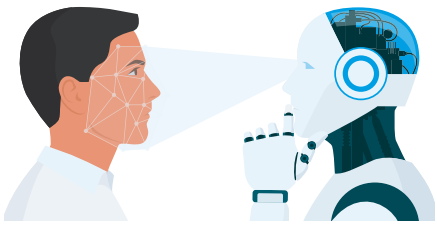
The sheer volume of data involved can be overwhelming. Identifying eligible claimants, establishing commonality, assessing economic impact and liability, building a robust claim inventory matrix, and processing claims, while identifying fraud, are all incredibly time-consuming and resource-intensive tasks. In this context, speed and accuracy are not only desirable; they are essential for securing funding, attracting claimants, and achieving a successful outcome.

This is where the transformative power of Artificial Intelligence (AI), and specifically Large Language Models (LLMs), comes into play. LLMs, with their ability to understand, analyse, and generate human language at scale, offer a significant advantage for law firms. This isn't about replacing legal expertise; it's about providing the tools to significantly enhance every stage of the mass claims process, from initial research to final resolution. It's about moving from laborious workflows to data-driven, AI-assisted efficiency. It's about gaining a crucial competitive edge over those who are late to adopting AI tools and their myriad benefits.

Part 1: The Bottleneck — Overcoming Traditional Limitations

The early stages of a mass claim — and indeed the entire lifecycle — present significant operational hurdles. Law firms typically grapple with:

- **Massive Data Ingestion and Analysis:** Gathering and analysing relevant documents — contracts, emails, financial statements, regulatory reports — is monumental undertaking. Manual review is slow, costly, and prone to error.
- **Claimant Identification and Recruitment:** Finding, vetting, and onboarding eligible claimants is a major logistical challenge. Traditional methods can be inefficient, and identifying claimants with multiple law firms presents coordination issues.
- **Establishing Commonality and Building Cohorts:** Demonstrating that claimants share a common harm and legal standing is crucial for securing funding and achieving class certification.
- **Economic Impact and Liability Assessment:** Quantifying damages and establishing liability often involves complex economic modeling and analysis of vast datasets.
- **Claim Inventory Matrixing:** Organising and categorising all claims, including their characteristics and damages, is essential for settlement or trial.
- **Cost and Time Constraints:** The upfront costs and time investment are often prohibitive, particularly for smaller firms.
- **Fraud Detection and Prevention:** Identifying fraudulent claims within a large pool is critical, yet resource-intensive.



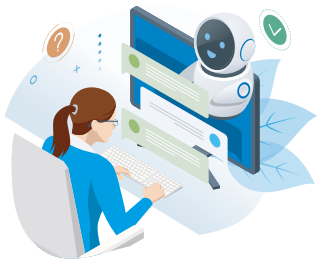
Part 2: AI And LLMs – Assisting At Every Stage

AI - specifically LLMs - offer tools to overcome these traditional limitations, significantly improving the mass claims process:

- **AI-Powered Research**
  - **Legal Research:** LLMs rapidly analyse legal databases, case law, regulatory guidance, contracts, license agreements, and other legal documents to identify relevant precedents, statutes, and potential legal arguments, accelerating the initial research phase.

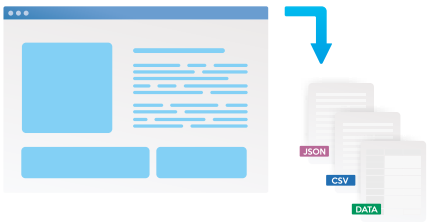
  - **Fact Finding:** LLMs can sift through news articles, social media, and other public information to uncover relevant facts helping to build a stronger case or support legal strategies.
- **Streamlined Data Collection and Processing**
  - **Data Extraction:** LLMs can automatically extract key information from unstructured documents (names, dates, amounts, clauses), as well as audio files like call recordings and transcriptions, reducing manual data entry and improving efficiency across various data formats.
  - **Data Classification and Organisation:** AI categorises and organises documents, making it easier to find relevant information.
  - **Data Cleansing and Validation:** AI identifies and flags potential errors in data, improving accuracy.

- **Enhanced Claimant Identification and Book Building**
  - **Claimant Profiling:** LLMs analyse claimant information to identify common characteristics and assist in grouping claimants into coherent cohorts.
  - **Claim Viability Assessment:** Machine learning models can assess the likelihood of success for individual claims, helping prioritise resources.
  - **Dual Representation Identification and Resolution Assistance:** AI can analyse claimant databases and communications to identify potential instances of duplicate legal representation. By flagging these instances early, AI facilitates prompt communication and coordination between law firms and claimants to resolve the issue efficiently and ethically.



- **AI-Assisted Analysis for Economic Impact and Liability**
  - **Supporting Damage Model Development:** AI can efficiently process and analyse large volumes of data, which can be useful in developing complex economic models to quantify damages.
  - **Liability Assessment:** LLMs can analyse legal documents, witness statements, and other evidence to assist in identifying and organising information relevant to liability arguments. By quickly processing large amounts of complex information, AI can help legal teams to identify key evidence and potential lines of argument.
  - **AI-Assisted Causation Exploration:** While establishing causation remains a complex legal determination, AI can assist in exploring potential causal links between events and alleged losses. AI algorithms can analyse data to identify correlations and patterns that may contribute to a better understanding of causation issues.

- **Fact Development and Preparation**
  - **Information Extraction and Summarisation:** LLMs rapidly identify and summarise key facts and events from various sources, saving significant time.
  - **Timeline Creation:** LLMs analyse documents and communications to assist in constructing chronological timelines.
  - **Drafting Assistance:** LLMs can assist in drafting factual sections of legal documents.
  - **Evidence Organisation:** LLMs can categorise and link pieces of evidence, creating a searchable database.



- **Assisted Claim Inventory Matrixing**
  - **Data Extraction and Population:** LLMs assist with extracting relevant data from claim forms and documentation, automatically populating the claim inventory matrix.
  - **Categorisation and Classification:** AI can assist in categorising and classifying claims based on various criteria, such as the type of injury, the severity of damages, the legal basis for the claim, the applicable limitation period, and the jurisdiction.
  - **Damage Calculation Assistance:** LLMs can help calculate damages based on pre-defined formulas and extracted data.

- **Fraud Detection and Prevention**
  - **Anomaly Detection:** AI algorithms identify unusual patterns in data that may indicate fraudulent activity.
  - **Predictive Modeling:** Machine learning models can be used to assess the risk of fraud for each claim based on historical data and identified patterns.
  - **Network Analysis:** AI can help identify and analyse connections between claimants, uncovering patterns that may indicate fraudulent activity.

Conclusion

The future of mass claims in the UK is being shaped by AI and LLMs. By embracing these technologies, law firms can unlock new levels of efficiency, accuracy, and scale. However, it's crucial to carefully vet AI vendors and their capabilities. The rapid rise of AI has led to a proliferation of providers, many with limited experience in the complexities of integration and the specific requirements within the mass claims domain. Law firms that invest in early adoption and develop relationships with trusted actors within the AI space will undoubtedly reap benefits as the UK mass claims regime continues to grow and evolve.

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SHAREHOLDER CLASS ACTION

EVIDENCE AND ANALYSIS

Authored by: Hamish Russell (Associate Director) - Forensic Risk Alliance

The number of shareholder class actions in the UK has been slow to rise. Unlike in the US, where this type of litigation is commonplace, the UK courts have seen few completed cases despite the provisions of sections 90 and 90A of the Financial Services and Markets Act (FSMA) being in place for around twenty years.

We have seen a few significant legal decisions which have clarified how the courts interpret some important aspects of such matters. However, a number of high-profile cases have been settled before or during the early stages of trial which means that there is still a great deal of uncertainty about how a full class action trial will play out.

In this context I will discuss some aspects of evidence in shareholder class actions that claimants and defendants are likely to pay attention to and the expert analysis that can help with their decision making.

Event studies

A staple of US-based securities litigation is the use of event studies to demonstrate whether changes in a company's share price can be attributed to the disclosure of specific information by assessing the likelihood that the share price movement occurred purely by chance. The effect that is measured by such a study can then be used as a basis for calculating the claimed damages should liability be established.

An event study is a well-established method of statistical analysis of the changes in a company's share price relative to changes that are predicted by an appropriately selected benchmark. The effect of disclosures or other events can be assessed through careful analysis of the difference between the predicted and the actual daily price changes. This difference is referred to as the abnormal return. The abnormal return on the day of the event being studied is measured, and the likelihood of that return happening by chance is determined. Where the magnitude of the abnormal return is such that it is highly unlikely to have occurred purely by chance, then it can be concluded that, in the absence of other influencing or "confounding" events, the disclosure is likely to be the cause of that abnormal return.

This measurement, termed price inflation, may ultimately be used to assess damages under S90 claims

arising from untrue or misleading statements within, or omissions from prospectuses or listing particulars. However, in contrast to its significance in US litigation, the event study is only one of a wide range of considerations in UK matters and its practical use has yet to be tested in court.

Confounding Events

One of the key considerations when assessing the impact of corrective disclosures on share price is whether there are any other company-specific but unrelated events that also influenced the share price on the day in question. Such confounding events could be directly related to the company, such as the release of quarterly or annual financial results, or external macroeconomic or political events such as the imposition of trade tariffs or sanctions which might have a disproportionate impact on the company's share price compared to the selected benchmark.

Disaggregating the individual effects of the corrective disclosure and other events is challenging, particularly when they occur very close together or outside of trading hours for the company's shares. In some cases, an analysis of intra-day trading activity and share price movements can help to identify discrete effects, although markets can take some time to fully react to specific news.

The existence of a confounding event on the day of the corrective disclosure must be accounted for in the findings of an event study. The effect of the confounding event may be sufficient to weaken the statistical linkage between the corrective disclosure and the abnormal return.

Recovery In Share Price

Event studies and the concept of price inflation are based on the assumption that markets are efficient, i.e. that the share price reflects all information that is available to market participants. However, in practice, share prices sometimes overreact to new information at first. In such situations, the initial overreaction may be followed by a partial or even complete correction. Where a statistically significant price fall is followed by a statistically significant price rise then it may be argued, in the absence of confounding events, that the level of price inflation implied by the initial fall is overstated.

This means that it is important to examine price behaviour during the days following the initial price drop after the corrective disclosure when assessing its overall effect.

Reliance

S90A claims relate to untrue or misleading statements within, or omissions from other information published by the company, or because of a dishonest delay by the company in publishing material information. Claimants must demonstrate that they traded in the shares in reliance of published information such that the untrue, misleading or omitted information caused their loss.

Recent developments concerning reliance clearly demonstrate the evolving nature of the law in this area. In 2024, in the context of claims against Barclays Plc relating to disclosures about its LX Liquidity Cross trading system, it was ruled that passive investors had no reasonable prospect of proving that they had relied on Barclays' published information.[1] However, in March this year in the context of a claim against Standard Chartered, the judge assessed that the issue remained unsettled and dismissed an application to strike out claims by passive investors prior to trial.[2]

Reliance can also be tested through analysis of the trading patterns of individual claimants. While this can be intricate work, there is value for a defendant showing that a claimant's buying was inconsistent with their assertion of reliance on specific statements in company disclosures.

Conclusion

There are a wide range of factors that should be considered by claimants and defendants dealing with securities claims under S90 and S90A of FSMA. I have sought to highlight just a few of these. Each merits considerably more discussion but I hope it is clear from this whistlestop tour that this is a fast-developing area of litigation that will continue to be watched with great interest.

1 https://www.bailii.org/ew/cases/EWHC/Ch/2024/2710.html
2 https://www.bailii.org/ew/cases/EWHC/Ch/2025/698.html

DISTRIBUTION AMIDST DISTRUST

WILL COLLECTIVE ACTIONS DELIVER FOR THE UK PUBLIC?

Authored by: Tara Flores (Associate Partner) - Thorndon Partners

After years of anticipation and legal wrangling, collective proceedings in the UK are entering a new, more consequential phase: distribution. With settlements like Merricks v Mastercard finally approved, attention is turning to the question that will define the credibility of the regime—will people actually claim what they're owed?

This is not a technical or peripheral issue. It goes to the heart of what collective redress is meant to achieve. The Competition Appeal Tribunal (CAT) itself even questioned whether collective proceedings offer a 'real prospect of benefit to members to the class, as distinct from lawyers and funders' at all.[1]

The fallout over the Merricks settlement certainly seemed to suggest that the public debate is dominated by lawyers and, without doubt, funders.

The question, though, is not who is shouting the loudest. It's whether or not class members will actually sign up to a distribution process.

The answer is becoming clearer. Recent cases, and the first comprehensive analysis of UK class behaviours, point the way. But the results are far from reassuring for a regime increasingly under the spotlight.

Take-Ups And Trade-Offs

To date, the UK has seen only one opt-out collective case (Gutmann v SSWT) distribute funds. There is no published data from this process yet. With recent approvals in Merricks and McLaren, which represent far larger classes, we are on the cusp of seeing whether eligible claimants will sign-up.

The debate on take-up rates dominates watercooler chat among competition lawyers. There is however very little data on what works and what doesn't.

1 Spottiswoode

The approach to the claims process so far has been based on precedent set in the US. This is even though the UK understanding of group actions is very different.

The allocation of settlement money has also largely been a commercial and legal negotiation in the UK so far. If collective actions and settlements are truly to have public benefit, however, it is essential to understand what the public thinks and how they will act.

Fundamentally, the success of collective actions settlements relies on individuals coming forward to collect their due. The raison d'être of the regime falls apart if that final piece of the puzzle is missing.

This demands a deeper understanding of the trade-off individuals face between two opposing forces. First, the incentives: compensation and a sense that they are holding the company in question to account. And second, the barriers: the time it takes, and the private information they need to share, in order to collect.

Different demographics and groups within a class will feel differently about different factors. For financial rewards, how much is enough to motivate individuals to bother with the process? And more broadly, do people in the UK understand and trust the idea of a pay-out from an opt-out collective action?

At its most basic, the claims process comes down to a law firm or claims management firm approaching an individual who may have never engaged with the legal process. Out of the blue, they are then offered money by an organisation they have likely not heard of in exchange for submitting their private details.

You can see the problem. There is an underlying assumption that people will simply be happy to be offered this 'free money'.

Huge efforts led by banks, government and financial institutions have gone into behaviour change campaigns teaching people to be wary of receiving exactly this kind of information. The UK public is increasingly concerned about their privacy, and increasingly better educated about what the next 'scam' will be.

It's perhaps unsurprising that early results, and recent research, indicates the cold approach will not land in the UK.

Initial Indications

While there is no publicly available data on take-up rates in real-life opt-out settlements in the UK yet, the first comprehensive research on take-up rates has provided some early answers.

The independent report, conducted and published by communications and research firm Thorndon Partners, will trouble those working in the CAT's opt-out collective action regime.

It indicates that take-up rates in settlements will likely remain low because the public do not yet trust the process. One of the biggest deterrents is confusion: Brits think that the process is just too complicated.

The UK public are also incredibly reluctant to share their personal details. All forms of ID requested in the survey acted as an active deterrent.

This is not necessarily news. There is an understanding in the industry that the process may need to be reformed. Many are asking whether the regime should offer vouchers or even credit refunds sent via the Defendants in some cases.

Nonetheless, the UK public is not interested in this innovative thinking.

The majority (63%) of people still want to be paid via bank transfer to their account. By contrast, only 24% want vouchers or gift cards; 16% a donation to charity; and 14% a pre-paid credit card.

This is where the confusion really comes into play. Despite the vast majority wanting to be paid into their own bank account, only 23% were willing to share their bank details.

The regime needs an awareness-raising, possibly even educational, campaign to correct some of these contradictory expectations. It also requires far more tailored and targeted communications for each collective action and their respective class members. The one-size-fits-all campaigns undermine success not just of individual cases but the regime as a whole.

Arguably however, this is more than a communications problem — it's a structural issue. For take-up rates to rise, people must feel safe, informed, and confident that their personal data won't be mishandled.

This means understanding each distinct class better – what and who they trust. Only when this level of detailed research underpins the distribution process will the regime be able to fully benefit those it was designed for.

A Broader Focus

For the broader credibility of the regime, it will also mean zooming out and reducing the focus on take-up rates alone. They are, after all, one piece of a much larger puzzle.

To declare the regime a failure if only a small proportion of eligible individuals claim their share is to ignore the broader public good that collective actions can deliver: deterrence, accountability, and systemic reform of corporate behaviour.

The reputational and financial impact of a major legal case is still acting as a deterrent, or at least a punitive factor, for Defendants.

It also ignores the fact that unclaimed settlement money is likely to still find its way into consumer hands. While unresolved at the point of writing, there are two charitable foundations who may receive unclaimed money from the Merricks v Mastercard settlement.

Nonetheless, the take-up rates are hard to ignore. Corporates are unlikely to tout or help us measure the deterrence factor. The hard facts and figures of the claims process may be the only demonstrable evidence of the broader public benefit.

These collective actions are loudly and proudly brought in the name of hundreds of thousands, often millions, of people. If these people are not seeing any tangible benefit then the repeated calls of 'holding the powerful to account' will ring increasingly hollow.

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REFRAMING CLAIMANT ENGAGEMENT IN COLLECTIVE ACTIONS

Authored by: James Thomson (Founder) - Media Tasks

Introduction

At the heart of every collective action lies a dual challenge: crafting a legally robust claim and mobilising individuals to join it. While much emphasis is rightly placed on legal arguments, funding structures, and procedural innovation, there remains a frequently overlooked factor—claimant psychology.

In this article, a deeper understanding of how claimants think, feel and respond is not simply helpful but essential to the success of mass litigation. Drawing from marketing psychology, behavioural insight, and real-world campaigns, I outline why many firms underestimate the emotional and communicative dynamics at play—and how that oversight can fatally weaken otherwise strong claims.

And to start, I'm going to begin with an unconventional anecdote, not from the courtroom - but from the park.

A Lesson From An Unexpected Source

Last year, my family adopted a rescue dog. Spirited and intelligent, he was also challenging to manage. We brought in a professional trainer who gave me advice that stayed with me long after the sessions ended. "James," he said, "your dog's attention is always asking: what's in it for me?"

It was a simple idea and an effective one. But its relevance, I soon realised, extended far beyond canine behaviour.

It described, almost perfectly, how claimants respond to collective actions.

Claimants, like most people, do not operate on a purely rational basis. They are not evaluating the quality of the legal theory or reading coverage in The Times with a highlighter in hand. More often, they are scrolling through content on their phone, wary of scams, inundated with noise, and hesitant to commit. When presented with a legal claim, their reflexive response is to ask:

"Is this worth my time? Can I trust this? What will I get out of it?" In short, What's in it for me?

This question is not selfish. It is human. Yet many legal campaigns, particularly in the collective space, fail to answer it.

Emotional Engagement Over Legal Explanation

Modern behavioural science has shown that people make decisions emotionally first and rationalise them later. While logic plays a vital role in justifying action, it is rarely the catalyst. This principle is well-established in marketing and design. In law, however, it is often overlooked.

The prevailing approach to claimant communication prioritises factual precision, legal compliance, and credibility. These are necessary but not sufficient. If a message does not emotionally resonate within the first few seconds, it is unlikely to persuade. Credibility must be felt, not just proven. Clarity must be intuitive, not only detailed.

This does not mean simplifying complex cases to the point of distortion.

Instead, it requires presenting them through a lens that acknowledges the claimant's perspective: their anxieties, motivations, and attention span. A message that feels legally sound but emotionally flat will struggle to engage. Conversely, a message that balances legal integrity with psychological relevance will perform significantly better—both in initial acquisition and longer-term retention.

The Structural Gap: From Legal Theory To Pr, Without An Offer

Time and again, we observe the same structural omission. A firm builds a robust legal case, secures litigation funding, and appoints a capable media agency. With the case announced and press releases issued, attention turns to advertising. And yet, few have paused to ask: what, precisely, is the claimant being offered?

In our experience, campaigns often go to market without a clearly defined claimant offer. By this, I do not mean eligibility criteria but rather a meaningful articulation of what joining the claim entails and why it matters to the individual.

What is the claimant signing up for? What can they expect? How long will the process take? What are the risks and trade-offs? And crucially, why should they care?

When these questions go unanswered, messaging tends to become vague and transactional. The result is a leaky funnel in which even well-targeted campaigns generate interest but fail to convert that interest into meaningful engagement. The legal theory may be watertight and the PR campaign award-worthy, but without a clear, emotionally resonant claimant-facing offer, results will be disappointing.

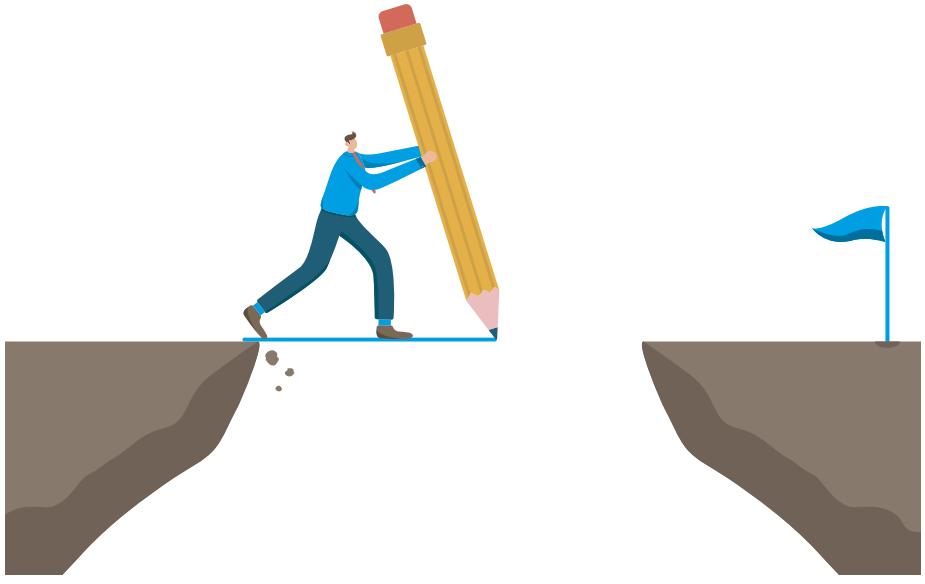
Claimants Think Like Consumers

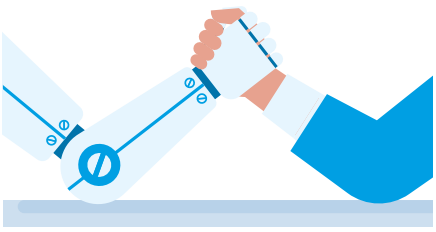
Though some practitioners may resist the analogy, claimants behave much like consumers. This is not to commodify the legal process but to acknowledge the reality of human behaviour in a digital-first society. When engaging with an opportunity—particularly one that arrives via social media, email, or online ads—people do not approach the task as legal analysts. They behave like cautious, emotionally driven decision-makers navigating an unfamiliar landscape.

In consumer marketing, successful brands understand that trust, simplicity, and emotional clarity are more persuasive than technical detail. The same holds in class actions.

The task is not only to explain but to reassure, not simply to inform but to invite.

This shift in mindset has practical consequences. It influences how landing pages are designed, how FAQs are written, how onboarding journeys are structured, and how follow-up communications are timed and phrased. It affects tone, imagery, user experience, and even the cadence of updates throughout the case lifecycle.





The Role Of Hybrid Systems: Human Insight Meets Automation

At Mediatasks, we have developed a claimant engagement methodology that combines traditional marketing

principles with AI-powered automation. The first stage of this process is grounded in human insight: understanding who the claimant is, what they care about, what fears or objections they might hold, and what language is likely to build trust.

Once these insights are established, we deploy technology to scale our efforts. This includes personalised message sequencing based on behavioural cues, rapid A/B testing of emotional tone, and AI analysis of sentiment and response data. The goal is not to automate communication for its own sake but to ensure that each claimant feels seen, understood, and guided at the right moments.

This approach allows us to replicate the effectiveness of high-touch engagement across thousands of individuals without losing the human touch that makes such engagement meaningful.

A Case Study In Re-Engagement: The Dieselgate Campaign

An instructive example of this approach in practice came during the Dieselgate litigation when we were tasked with reactivating a large cohort of dormant claimants. These were individuals who had initially expressed interest but had since gone silent—some for months.

Rather than treating these claimants as lost, we designed an emotionally-led re-engagement campaign and delivered it with AI. Using storytelling, behavioural triggers, and tailored communication flows, we sought to re-establish trust and relevance.

The result was striking. We successfully reactivated over 30% of the previously unresponsive claimants, many of whom progressed to full participation. In financial terms, this represented a significant recovery of value that most funders and firms would have written off. In strategic terms, it demonstrated that empathy and communication can be just as powerful as legal argument.

A Framework For The Full Claim Lifecycle

While much of the focus in claimant engagement falls on initial acquisition, it is important to consider the entire lifecycle. From early-stage case development through to re-engagement and post-settlement communication, every phase presents an opportunity to deepen trust, reduce attrition, and improve outcomes.

At the design stage, firms can use AI and search data to assess public sentiment and identify communication gaps before launching. During acquisition, plain English messaging and a clear emotional hook are essential. Onboarding should be seamless and predictable. Mid-case updates must be proactive and contextually relevant. When claimants disengage, consistent re-engagement efforts—grounded in behavioural understanding—can bring them back.

In Summary

Collective actions are not only legal undertakings; they are also human journeys. The individuals who join these cases do so not because they are persuaded by procedural complexity but because they trust the offer being made to them. They believe it is safe, worthwhile, and relevant.

If there is one lesson we can learn from behavioural science, marketing, and even dog training, it is this: people—like animals—respond best when they understand what is in it for them.

Incorporating this principle into the structure, messaging, and cadence of claimant engagement is not a distraction from legal strategy. It is a complement to it. And in a competitive, evolving sector, it may be the difference between a campaign that succeeds—and one that merely survives.

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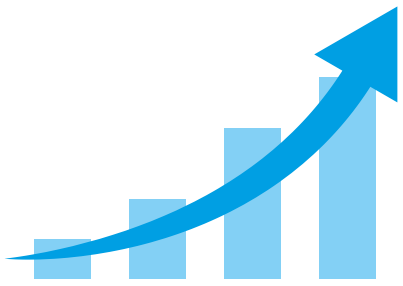
THE GROWING POPULARITY OF CLASS ACTIONS IN ITALY

Authored by: Alessandro Pierucci (Senior Counsel) - Bonelli Erede Pappalardo Studio Legale



Italy experienced a remarkable surge in class actions in 2024, with an average of more than three new cases filed every month.

Many factors led to such a significant increase (the average until 2021 was only one new case every two months), but the following are certainly of particular importance:

- the general legal community's greater and more widespread awareness of the potential that class actions offer;
- the increasing number of EU laws aimed at strengthening consumer protection in the European market; and
- the introduction of new procedural rules in Italy aimed at enhancing class actions, overcoming some of the issues that affected them in the past, and facilitating their use.

Thanks to the above factors, the use of class actions in Italy is expected to rise considerably in the coming years.

'General' And Representative Class Actions

Following recent legislative reforms, two types of class actions exist in Italy:

- General class actions – governed by the Italian Civil Procedure Code and in force since 19 May 2021 – can be brought by any individual or legal entity and concern law violations regarding essentially any matter.
- Representative class actions – a 'special' type of consumer class action governed by the Italian Consumer Protection Code (which transposed EU Directive 2020/1828 into Italian law) – have been in force since 25 June 2023. They can be brought only by consumer associations and independent public bodies and concern law violations regarding consumer matters listed by the legislator.

General and representative class actions have some differences but also major similarities, which make class actions in Italy particularly attractive for victims (mainly consumers) of multiple torts, but also risky – or rather, riskier than bringing numerous individual actions – for defendants of class actions (usually companies). The aspects explained further below are also particularly worthy of note in this respect.

Legal Standing Of Claimants

The new procedural rules grant organisations and associations the right to bring a class action themselves on condition they meet certain requirements and are listed on a special register held by the Ministry of Justice (for general class actions) and the Ministry of Enterprise and Made in Italy (for representative class actions) – the most important of which are consumer associations.

Indeed, organisations and associations are now no longer required to first obtain a mandate from each individual injured by the wrongdoer in order to validly bring a class action (as was previously the case). This change in the rules makes it easier and quicker to bring a class action.

The Opt-In Mechanism

The opt-in mechanism for (potential) class members is now simpler and more streamlined than before. Indeed, opting in: (a) requires no assistance from a lawyer; (b) takes place entirely online through the Ministry of Justice's portal; and, most importantly (c) can be done at two separate times:

- first, after the order declaring the action admissible is issued; and
- second, after the decision on the merits is issued (which makes it particularly difficult for defendants to assess the risk of litigation ex ante, as the 'class' is not finalised until after a decision that they will lose the action).

The System For Publicising Class Actions

The Italian legislator has improved the system for publicising class actions to ensure pending proceedings are as widely known as possible and to encourage injured parties to join. The system enables, among other things, the publication and free consultation – on the Ministry of Justice's portal – of the statement of claim filed and all the main court orders issued in a class action (e.g., the order on the admissibility of the action and the decision on the merits).

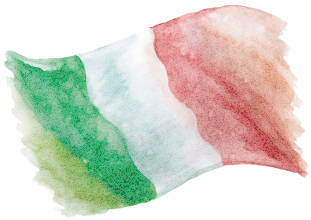
Evidentiary Facilities

The new procedural rules have introduced certain evidentiary facilities for claimants, including the possibility of requesting a court order to disclose evidence (or categories of evidence) reasonably within the defendant's control and sufficient to support the plausibility of a claim. Unlike in ordinary civil proceedings, a defendant's (or third-party addressee's) unjustifiable failure to comply with the order triggers an administrative fine of EUR 10,000–100,000 and – above all – could result in the court ruling that the facts the evidence relates to (and of which disclosure is requested) are proven.

Incentive Mechanisms

Finally, mechanisms have been introduced to incentivise claimants to bring class actions, including the following:

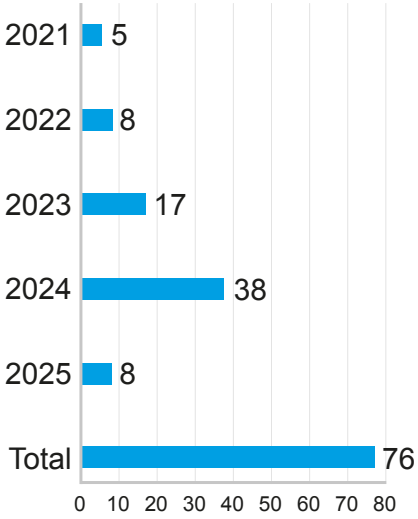
- Court-appointed experts are to be paid in advance by defendants unless special reasons exist requiring payment by claimants.
- Lead counsel (i.e., the claimants' counsel) are to receive a reward fee if the court rules in the claimants' favour. Reward fees are based on the number of class members and calculated as a percentage of the total damages payable by defendants.



Statistics On New General And Representative Class Actions In Italy

The great vitality of new class actions and their increasing use is reflected in the number of actions brought in Italy since 19 May 2021 (when, as mentioned above, the new rules regulating general class actions came into force): a total of 76 actions as at 30 April 2025 (according to publicly available data). As is clear also from the graph below, this figure shows strong growth in this type of litigation, with new class actions doubling compared to the previous year.

Class Actions Brought In Italy Under The New Rules (19 May 2021–30 April 2025)



Furthermore, analysis of the class actions brought in Italy during the abovementioned period reveals the following points of interest (among others):

- The majority of cases are brought by consumer associations (although a significant number of cases are brought by one or more individuals) mostly against banks and financial intermediaries.
- Consumer issues (e.g., unfair terms, commercial practices, and product liability) are very often the subject of litigation.
- Many claims pass the admissibility test and are subsequently upheld or settled.
- Many actions are brought following fines imposed by the Italian or European competition authority.
- The Italian procedural system is attractive for cross-border class actions (e.g., in 2024, a cross-border class action was brought before the Court of Milan to protect the right to health of more than one million individuals residing not only in Italy but also in the rest of Europe, i.e., a class action that could have been brought elsewhere in Europe given its nature).

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60 SECONDS WITH... ANDREW WILLIAMS PARTNER HFW

Q What Are You Looking Forward To In 2025?

A Apart from a family holiday to Disney World (Florida), workwise: I am looking forward to attending the Court of Appeal in July in respect of a long running dispute regarding the sale of PPE during the Covid pandemic.

Q What Is The Easiest/Hardest Aspect Of Your Job?

A The hardest is the number of emails I receive a day and trying to keep on top of them. The easiest aspect is that I have a brilliant team of associates who are all super pro-active and make my life much easier with their handling of the various disputes we currently have.

Q What Has Been The Best Piece Of Advice You Have Been Given In Your Career?

A There are no silly questions; but make sure you don't ask the same question more than once.

Q What Was The Last Book You Read?

A The latest book in the Cormoran Strike series by Robert Galbraith

Q If You Had To Sing Karaoke Right Now, Which Song Would You Pick?

A Easy. That would be **"Can't Take My Eyes Off You"** by my namesake, Andy Williams.

Q What do you see as the most rewarding thing about your job?

A Seeing trainees and junior lawyers progress through their careers. I think I have now trained over 20 trainees during my time at HFW and some of them are now very senior partners.

Q Do You Have A Favourite Food?

A Probably a bit boring, but you can't go wrong with a good steak (and a bottle of red)!

Q If You Could Start All Over Again, What If Anything Would You Do Differently?

A When I joined Landwell (now PwC Legal) as a trainee back in 2001, I thought I wanted to be a M&A or Corporate Finance lawyer. Unfortunately, I did my corporate seats just after the dot.com crash so there wasn't much work around. However, in hindsight, I think it all worked out for the best: I love the cut and thrust of litigation and really getting involved in the legal aspects of a case.

Q What's One Skill That's Helped You Succeed?

A Attention to detail. It is the key to everything.

Q What is the best film of all time?

A The original Star Wars (Episode IV – A New Hope).

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

A As a Classics scholar, I would choose Julius Caesar. Politician, orator, military genius – he had it all!

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

A I have had the pleasure of travelling to a number of different countries as part of the various disputes I have handled over the years, including Hong Kong, Switzerland, Scotland, Abu Dhabi and Iran. Iran was probably the scariest, primarily due to the lunatic drivers, but the people were really friendly and welcoming.

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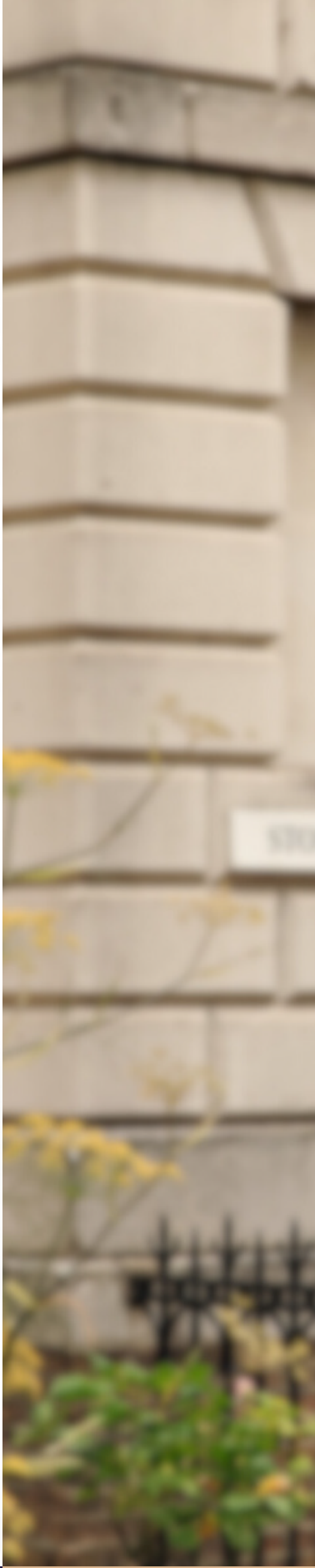

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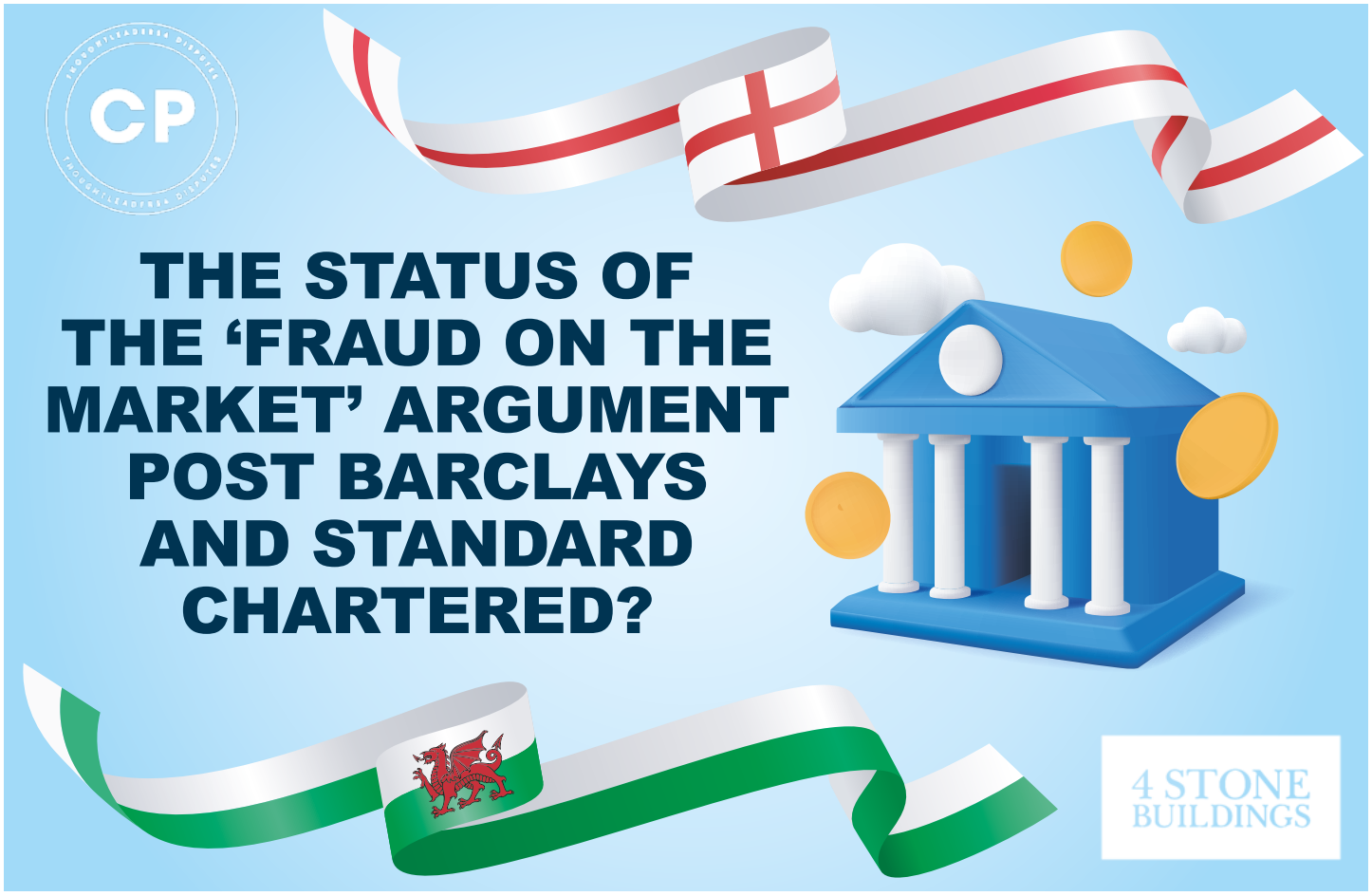

THE STATUS OF THE 'FRAUD ON THE MARKET' ARGUMENT POST BARCLAYS AND STANDARD CHARTERED?

Authored by: Nicola Timmins (Barrister) & Karl Anderson (Barrister) - 4 Stone Buildings

The landscape of securities litigation in England and Wales has been significantly influenced by two recent judicial decisions, particularly concerning the viability of the 'fraud on the market' argument under Section 90A of the Financial Services and Markets Act 2000. This article explores the implications of the High Court's rulings in Allianz Funds Multi-Strategy Trust and others v Barclays Plc [2024] EWHC 2710 (Ch) and Various Claimants v Standard Chartered PLC [2025] EWHC 698 (Ch), focusing on their impact on investors in tracker funds and with passive investment strategies.

Background On Section 90A And Schedule 10A

Section 90A and Schedule 10A of the Financial Services and Markets Act 2000 provide a statutory cause of action for investors in securities to claim compensation for loss resulting from untrue or misleading statements or dishonest omissions in certain published information relating to the securities, or a dishonest delay in publishing such information.

A critical element of this statutory framework is the requirement of reliance, which mandates that the investor must have acquired, held, or disposed of securities based on the information in question. This reliance requirement has been a focal point in recent litigation, particularly concerning the applicability of what is commonly referred to as the 'fraud on the market' theory. In the recent cases of Allianz Funds Multi-Strategy Trust and others v Barclays Plc and Various Claimants v Standard Chartered PLC the High Court considered whether 'fraud on the market' is sufficient to satisfy the reliance requirement.

The 'fraud on the market' argument is derived from the Efficient Markets Hypothesis which posits that the price of a security in an efficient market reflects all publicly available information. On this premise, an investor, when relying on the market price, is actually relying on the integrity of the price-sensitive publicly available information about the security in question, including the information published by the issuer. This provides a potential route through on reliance issues where the investor has relied on the market price in trading the security in question but has not read the relevant published information.

Fraud on the market is a concept familiar to securities litigators in other jurisdictions, in particular the United States.

The fraud on the market argument is of particular significance in the UK because tracker funds and passive investors represent a significant proportion of the UK investment market. Investors in those funds are not making buy or sell decisions for the individual securities and accordingly are not relying directly on information published by the issuer. There is an important question on whether such investors are able to claim under s.90A.

The Barclays Decision

In Barclays, investors brought claims against the bank in respect of certain express representations made in the published information and an implied representation that Barclays had not engaged in misconduct and had complied with its regulatory obligations.

The case concerned three categories of claimants:

- **Category A:** claimants who read and relied on the relevant published information directly;
- **Category B:** claimants who relied on the relevant published information indirectly through other sources which acted as a conduit for the substantive contents of the published information; and
- **Category C:** claimants who were alleged to have suffered losses solely as a consequence of movements in the share price of Barclays which reflected the published information, alleging that this amounted to indirect reliance on the published information.

The High Court considered whether 'fraud on the market' could satisfy the reliance requirement under Section 90A for category C claimants and in October 2024 ordered reverse summary judgment and strike out in relation to those claimants. Leech J held that:

- Parliament must have intended the reliance requirement to have some content, meaning that investors had to prove something more than that they suffered loss because of a false and misleading statement or omission being made to the market.
- Parliament intended the common law deceit test of reliance to apply to these claims.
- He agreed with the judgment of Hildyard J in ACL Netherlands BV v Lynch [2022] EWHC 1178 (Ch) (Autonomy) which found that the requirement for reliance cannot be satisfied in respect of a piece of published information which the acquirer did not consider at all.
- Therefore, category C claims could not satisfy the reliance test unless their representatives had read and considered the published information, or third parties who directed or influenced their investment decisions had read and considered the published information.

Interestingly, in January 2025 the Court of Appeal in Wirral Council v Indivior Plc/Reckitt [2025] EWCA Civ 40 said that Barclays represents the current state of the law. Was this a hint that the Court of Appeal is keen to consider the issue? The Court of Appeal's statement might explain the decision of Green J in Standard Chartered in March 2025 and his comment that this is "a live and possibly developing area of the law. The Barclays decision must have come as a surprise to many involved in this sort of securities litigation, as no other defendant had sought to strike out on that basis. It was probably anticipated that it would be appealed but as it turned out the case settled before an application for permission could be made to the Court of Appeal."

The Standard Chartered Case

In Standard Chartered, claims were brought by investors under Section 90A and Schedule 10A in respect of alleged misstatements in the bank's published information. The bank applied for strike out in respect of claims which were similar to the category C claims that were struck out in Barclays.

Green J refused to strike out the claims although he was careful to make clear that he was not convinced that Leech J was wrong that 'fraud on the market' could never satisfy the reliance requirement.

The Judge considered that there were potentially material distinctions between the cases advanced in Barclays and Standard Chartered in that the latter advanced a more extensive set of implied representations and the investors pleaded a "belief" in them, rather than the investors in Barclays merely "proceeding on the basis" that the implied representations were true.

The Judge went on to explain that:

- He had doubts if the common law test of reliance applied (mainly because it was unclear how it would apply to omissions and the law is still developing in relation to implied representations). He considered that such disputed legal questions should be resolved on the basis of actual facts established at trial, and not on assumed or hypothetical facts.
- He found that striking out the claims would not substantially reduce the burden of the trial as these claims would not materially increase the duration of the trial, and the parties had already spent time and costs preparing these claims for trial.

What Next For Passive Investors?

Following Barclays the general sentiment was that claims relying on 'fraud on the market' were bound to fail. Standard Chartered might offer some degree of hope that such claims may be brought.

Claims based on express representations remain susceptible to strike out but there is a better prospect for claims based on implied representations making it to trial.

In any event, the availability in principle of the fraud on the market argument is not the only challenge for passive investors. For a claim to succeed, claimants are likely to need to prove that the market price did reflect the published information, and that the fund's decision to acquire, continue to hold or dispose of shares was in reliance on the share price and not other qualitative factors, such as the company's ESG rating.

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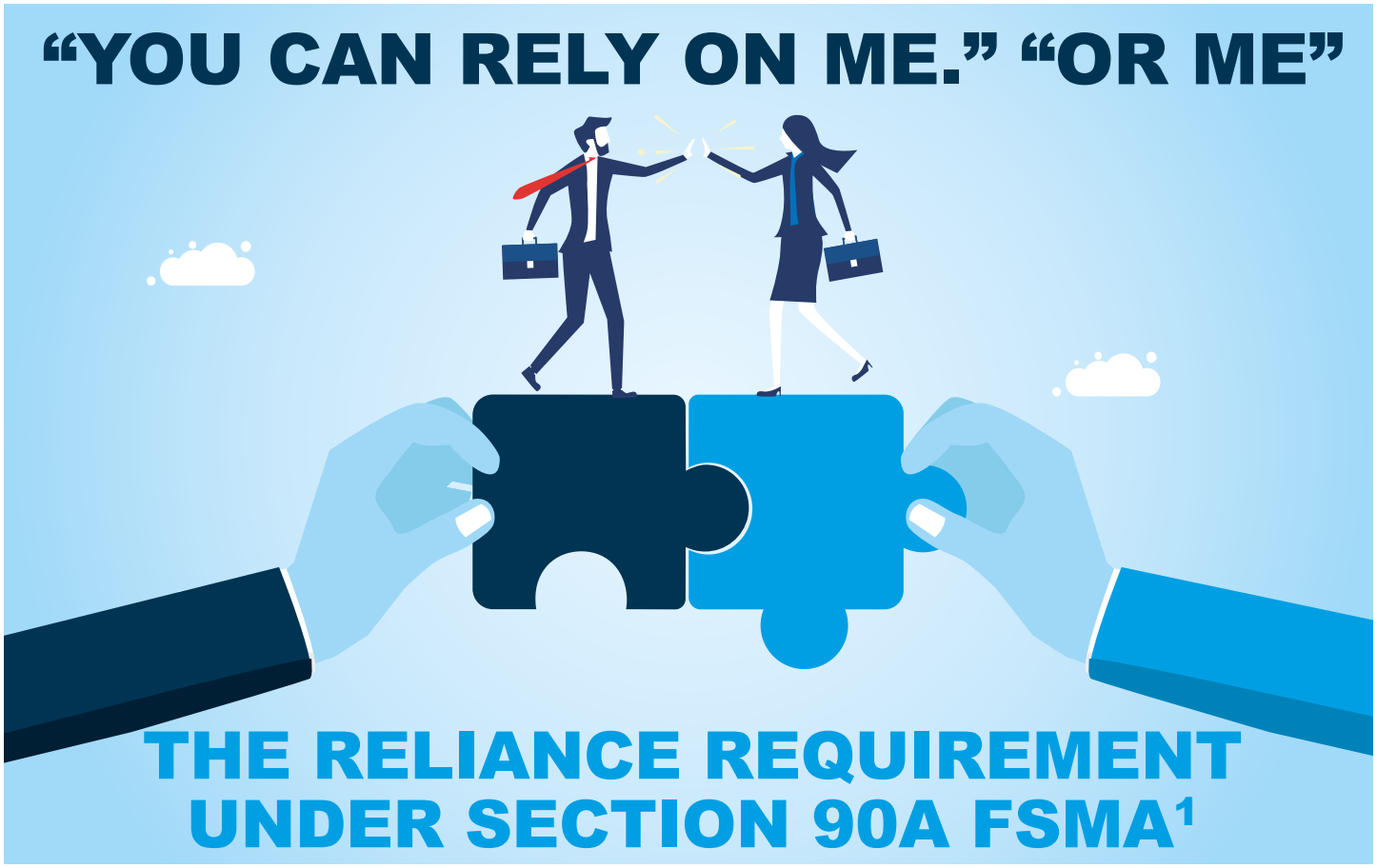
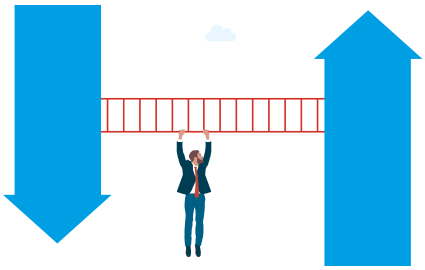


THE RELIANCE REQUIREMENT UNDER SECTION 90A FSMA[1]

Authored by: Alice Bernstein (Senior Associate) & Cian Mansfield (Co-Managing Partner) - Scott+Scott

Section 90A and Schedule 10A of the Financial Services and Markets Act 2000 (FSMA) (together, s. 90A FSMA) provide a recovery mechanism for investors who suffer loss because of untrue or misleading statements (or omissions) in published information by publicly listed companies. To succeed, one of the key hurdles a claimant must clear is demonstrating that they relied on the information (or lack thereof) when deciding to acquire, hold, or dispose of the relevant securities. This is commonly referred to as the



Reliance Requirement

While s. 90A FSMA has been in force for some time, the Court's interpretation of the Reliance Requirement is developing. Two recent judgments (handed down on 25 October 2024 and 25 March 2025) have adopted conflicting approaches to the Reliance Requirement. These are: Allianz Funds Multi-Strategy Trust & Ors v Barclays plc [2024] EWHC 2710 (Ch) (Barclays) and Various Claimants v Standard Chartered PLC [2025] EWHC 698 (Ch) (Standard Chartered).

The stringency of the Reliance Requirement has huge implications for investors and for the viability and attractiveness of the s. 90A FSMA regime. In this article we provide a short overview of what the High Court found in each judgment and discuss the implications.

The Reliance Requirement

Paragraph 3 of Schedule 10A provides that:

> "(1) An issuer of securities to which this Schedule applies is liable to pay compensation to a person who—(a) acquires, continues to hold or disposes of the securities in reliance on published information to which this Schedule applies, and (b) suffers loss in respect of the securities as a result of—(i) any untrue or misleading statement in that published information, or (ii) the omission from that published information of any matter required to be included in it."

To satisfy Paragraph 3, claimants must outline how they relied on the information in question in the Particulars of Claim. What has become a key issue is whether reliance by so-called passive investors on the market price of the security in question is sufficient to satisfy the Reliance Requirement, or whether a more active form of reliance is required. Given that many institutional investors engage in 'passive' investing (e.g. index tracking or automated strategies), this is a particularly important question.

Barclays and Standard Chartered both concern attempts by the defendant issuers to strike out claims due to allegedly inadequate reliance by passive investors.

1 Cian Mansfield (Partner) and Alice Bernstein (Senior Associate), Scott+Scott UK LLP.

Barclays

The underlying Barclays litigation relates to misleading information and dishonest delays regarding Barclays' LX Liquidity Cross trading system.

The High Court adopted a narrow and stringent interpretation of the Reliance Requirement. The claimants in the case were categorised into three distinct types based on how they claim to have relied on the information:

- **Category A[2]:** Claimants who read and relied directly on the relevant published statements;
- **Category B[3]:** Claimants who relied indirectly via intermediaries such as analysts, brokers, or investment advisers who had interpreted the published information; or
- **Category C[4]:** Claimants who relied solely on the integrity of the market price of the share, which is referred to as "price/market reliance". This assumes that market price reflected publicly available information regarding the shares, including any misstatements or omissions. This approach is similar to the "fraud on the market" doctrine familiar in U.S. securities litigation.

Leech J found that Category C claimants had no valid claim, striking them out on the basis that reliance on market pricing, without direct or indirect engagement with the published information, did not meet the statutory test[5]. This disposed of 241 funds or sub-funds that Leech J said had no real prospect of succeeding at trial in proving reliance under Paragraph 3[6].

Although the case later settled – preventing consideration by the Court of Appeal – the decision sent a message that price/market reliance alone was insufficient.

Standard Chartered

Standard Chartered, the defendant in these proceedings, sought to strike out, or alternatively obtain reverse summary judgment, on claims brought by 949 of the investment funds. These claims amounted to 68% of the total number of claimant funds and approximately £762 million in claimed losses (49% of the overall value)[7].

The underlying litigation concerns claims brought by shareholders of Standard Chartered. They allege significant losses were suffered because of untrue or misleading statements made by Standard Chartered in information that it published to the market concerning breaches of US sanctions.

Standard Chartered argued that the Court was bound by Barclays, and that such price/market reliance claims were doomed to fail. However, Green J took a more nuanced view. He declined to follow Barclays as determinative, observing that the elements of reliance under s. 90A FSMA are still in a state of development. Green J noted there had been no decision on the meaning of "reliance" in Paragraph 3 of Schedule 10A (see above) and certain elements of the test of reliance in the common law are not fully established[8]. Green J agreed with Waksman J in Crossley[9] that such legal questions should be resolved based on actual facts established at a trial, and not on assumed or hypothetical facts[10].

Green J also did not consider it was as clear cut as the reasoning in Leech J's judgment. Green J's view is that there are factual matters that require determination and the expert evidence might assist in understanding the extent to which the published information would have affected the market price and its influence therefore on the decisions made by the claimants[11].

As a result, Green J refused to strike out the claims at this stage, allowing them to proceed to trial[12]. While he did not expressly endorse reliance by Category C claimants, he left open the possibility that it—or a variation of it—could be accommodated within the framework of s. 90A FSMA, depending on how the factual and legal issues develop at trial.

Implications

The divergence between Barclays and Standard Chartered is a significant development and potential opportunity for investors in securities litigation under s. 90A FSMA. Whereas Barclays appeared to shut the door on Category C claims entirely, Standard Chartered has reopened it.

The judgment suggests that Barclays may be treated as fact-specific rather than setting a precedent, or that issues regarding Category C reliance can be addressed in the pleadings. In any event, it is clear the statutory concept of "reliance" under s. 90A FSMA is still evolving.

In the meantime, for claimants, Standard Chartered offers a promising shift. It recognises that investors who make decisions based on the integrity of market prices may now have a credible route to recovery under s. 90A FSMA. The judgment signals that such claims should not be prematurely shut down and deserve full and proper consideration of the evidence at trial.

2 Barclays Judgment, paragraph 19.
3 Barclays Judgment, paragraph 20.
4 Barclays Judgment, paragraph 21.
5 Barclays Judgment, paragraph 129.
6 Barclays Judgment, paragraph 153
7 Standard Chartered Judgment, paragraph 4.
8 Standard Chartered Judgment, paragraph 79.
9 Crossley v Volkswagen AG [2021] EWHC 3444 (QB).
10 Standard Chartered Judgment, paragraph 79.
11 Standard Chartered Judgment, paragraph 87.
12 Standard Chartered Judgment, paragraph 121.

Disputes

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KEEPING ARBITRATION CURRENT

KEY UPDATES IN LAW AND PRACTICE IN ENGLAND AND WALES IN 2025

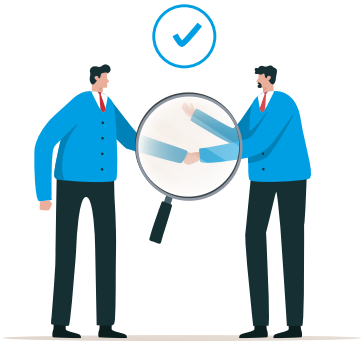
Authored by: Duran Ross (Partner) & Nicola Thompson (Managing Knowledge Lawyer) - Lewis Silkin

There have been several updates in arbitration law and practice in England and Wales this year which, taken together, highlight the UK's commitment to maintaining its position at the forefront of global arbitration practice.

Recent developments not only clarify and streamline arbitration law and procedure but also highlight the judiciary's support for arbitral processes and illustrate a necessary awareness of evolving technology.

Arbitration Act

The Arbitration Act, which received Royal Assent on 24 February 2025 and will be put into effect as soon as practicable, serves to modernise arbitration law in England and Wales. The legislative changes do not represent a complete overhaul of arbitration law; rather, specific changes have been made which are designed "to ensure that it remains fit for purpose and continues to promote England and Wales as a leading destination for commercial arbitration" (Law Commission).



One of the most prominent enhancements under the Act is the increased clarity on the governing law of arbitration agreements. Under the new legislation, the law of the arbitral seat will generally govern the arbitration agreement unless parties explicitly specify otherwise. This reform promotes legal certainty, particularly for international parties. However, the Act does not address the scenario where the parties have not chosen an arbitral seat or governing law for the arbitration agreement. It would therefore be necessary to resolve the question of the governing law in accordance with common law.

Also important is the introduction of an express statutory power enabling arbitrators to deliver decisions at an early stage on issues that have no real prospect of success, which may go some way to overcome concern by arbitrators of a due process challenge in such circumstances, in the absence of specific provisions. Through an expedited process, a party may apply for summary relief, which in turn can facilitate the faster resolution of disputes and reduce the overall length and cost of arbitral proceedings.

To support arbitral proceedings more effectively, emergency arbitrators and courts have been granted wider powers under the Act. One such amendment is

that emergency arbitrators, who are often called upon to provide urgent relief before a tribunal is fully constituted, can now make peremptory orders, requiring compliance within a specified timeframe. The court's powers to enforce peremptory orders are extended to include those made by emergency arbitrators. The courts are also now expressly authorised to issue orders against third parties where necessary. These reforms will facilitate the smooth and enforceable progress of arbitration.

Other changes relate to arbitrator immunity, the codification of an arbitrator's duty of disclosure, and simplified procedures for challenging arbitral awards on jurisdictional grounds.

Specialist list for arbitration claims

As set out in The Commercial Court Report 2023-2024, published in March 2025, matters arising from arbitration make up a significant proportion of the claims issued in the Commercial Court (around 20%), reflecting London's continued status as an important centre for international arbitration. The court will deal with

"a range of applications made in support of the arbitral process, such as applications for injunctions, for the enforcement of arbitration awards, and other matters such as applications to the court for the appointment of an arbitrator."

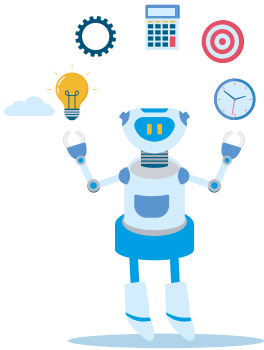
In March 2025, the London Circuit Commercial Court issued a practice note on arbitration claims announcing that, with effect from 1 July 2025, there will be a specialist list within the London Circuit Commercial Court in which all substantive hearings in arbitration claims will be listed, generally within set windows. Parameters are also set down for the swift handing down of judgments where judgment has been reserved and for the allocation of claims to an appropriate judge.

These arrangements have been introduced for the purpose of ensuring that arbitration claims can be dealt with by the court as swiftly and efficiently as possible, maintaining England and Wales as a go to jurisdiction for the timely resolution of arbitration matters.

Ciarb guidance on the use of AI in arbitration

No update would be complete without a reference to AI which is having a significant impact across legal practice. In March 2025, The Chartered Institute of Arbitrators, the London-headquartered organisation which represents alternative dispute resolution practitioners, issued guidelines on the use of AI in arbitration.

The guidelines are intended to encourage the responsible use of AI to reap the benefits of the technology, whilst supporting efforts to mitigate the risks which can arise from its use in arbitration.

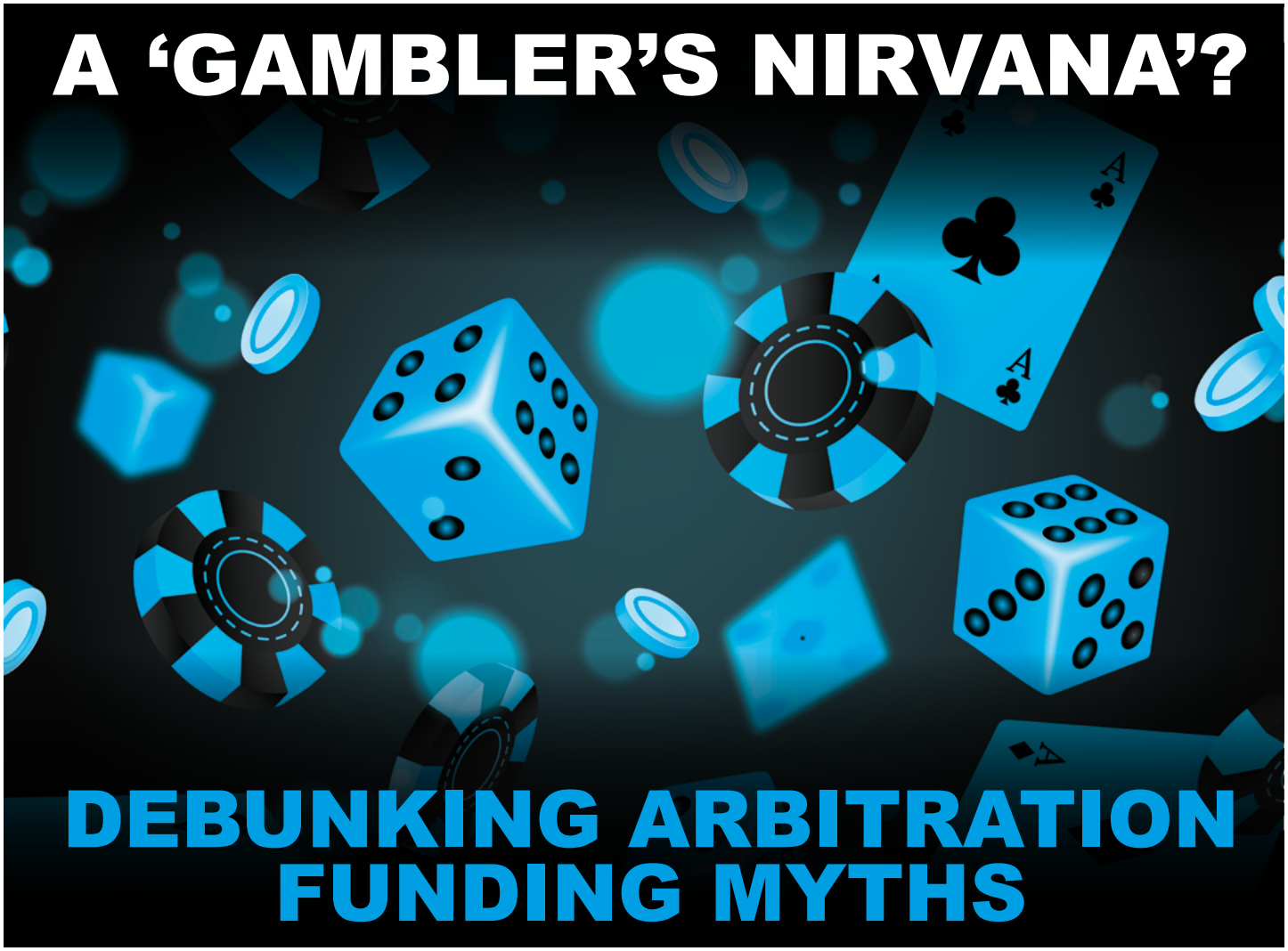


The guidelines highlight both the potential advantages of AI - such as improved legal research, enhanced data analysis, automated transcription, and the potential to balance access to resources - and the significant risks that can arise if its use is not properly managed, including confidentiality breaches, biases, the "black box" problem, and due process and enforceability concerns. The guidance encourages parties and arbitrators to balance these benefits and risks through reasonable enquiry into relevant AI technology, consideration of any applicable mandatory law or regulation, and clear procedural directions on confidentiality, security and disclosure obligations. It further clarifies that accountability for decisions - including any influenced by AI - ultimately remains with the parties and arbitrators, safeguarding the integrity of the arbitral process and ensuring that any resulting award remains valid and enforceable.

Concluding comments

These reforms in arbitration law and practice in England and Wales demonstrate a commitment to ensuring clarity, procedural efficiency, judicial assistance, and appropriate consideration of developing technologies within arbitration. Consequently, these reforms are anticipated to bolster the UK's continued standing as a premier centre for international dispute resolution.

A 'GAMBLER'S NIRVANA'?



DEBUNKING ARBITRATION FUNDING MYTHS

Authored by: Timothy Mayer (Director) - Exton Advisors

When is an arbitral claim a frivolous or speculative arbitral claim? When it fails? And if the claim that failed was funded, does that mean that funded arbitral claims are frivolous and speculative as a matter of course? And in those funded arbitral claims that fail, is the funder nonetheless the winner?

These issues (and others) may appear worthy of a philosophical debate over a fine red wine. Yet they increasingly form the prism through which actors in the world of international arbitration - specifically in investor-state dispute settlement ('ISDS')[1] - and in the more mainstream media[2], are questioning the legitimacy of third-party funding. Are there any logical bases for doing so?

The short answer is no.

In its submission to UNCITRAL Working Group III, commenting on the latter's proposed reforms to third-party funding in ISDS, the International Litigation Finance Association ('ILFA') formulated a compelling evidence-based thesis in support of third-party funding, whilst simultaneously debunking many anti-funding tropes[3]. ILFA highlighted that there is no evidence to support the assertion that funding leads to the pursuit of meritless or speculative claims. In fact, empirical research

'reveals that the statistics do not support the idea that funded claimants are more likely to bring frivolous claims, and instead provides some indication that funded claims are at least as successful on their merits as claims in a broader sample of investment arbitration cases[4]'

1 See the UNCITRAL Working Group III Third Party Funding Reform Proposals (2021).
2 See The Guardian (online), March 2025: 'Revealed: how Wall Street is making millions betting against green laws'
3 See ILFA's submission dated 31 July 2021 (61088589e63c5979a9f22599_ILFA comments UNCITRAL WG III TPF Reform Proposals FINAL.pdf).
4 Ibid, citing Ina Popova and Katherine Seifert's research (both of Debevoise & Plimpton LLP).

Nor did the evidence suggest that funding leads to an increase in the number of ISDS claims, results in claims where damages are inflated, or gives rise to unpaid costs where such claims fail.

Moreover, to suggest that a funded claim that fails is a frivolous claim is, respectfully, a non sequitur. In ELA USA Inc vs. the Republic of Estonia[5], an unsuccessful case brought under the US – Estonia bilateral investment treaty, the tribunal determined that the claimant had acted in good faith in pursuing its claims by way of arbitration and that the case presented 'serious and complex' issues and 'was not frivolous or vexatious.'

Significantly and relatedly, ILFA's commentary illustrates how funding for ISDS positively promotes the UN Global Compact, which strives for accountability, stability, equality and access to justice, leading to respect for human rights and the environment[6], and U.N. Sustainable Development Goal 16, which seeks to promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable and inclusive institutions at all levels[7].

There are numerous examples of successful funded ISDS claims, in which third-party funding has resulted in the rule of law being upheld and ensured state accountability: see for instance Kardassopoulos & Fuchs vs. Republic of Georgia; Dominion Minerals Corp. vs. Republic of Panama, and of course the claims against the Bolivarian Republic of Venezuela.

More recently, in GreenX Mining vs Republic of Poland, the claimant, a listed entity, utilised third-party funding in its successful claim against Poland over the obstruction of a coking-coal project[8]. Last year, a UK sustainable paper and packaging company filed a claim against Poland over a renewable energy project[9], following a trend set over the last ten years by the large volume of solar renewable-related claims brought against certain European states[10]. These claims are instructive with reference to a developing view, espoused in some quarters, linking funding to the pursuit of anti-environmental claims[11]. There is little evidence to support that contention.

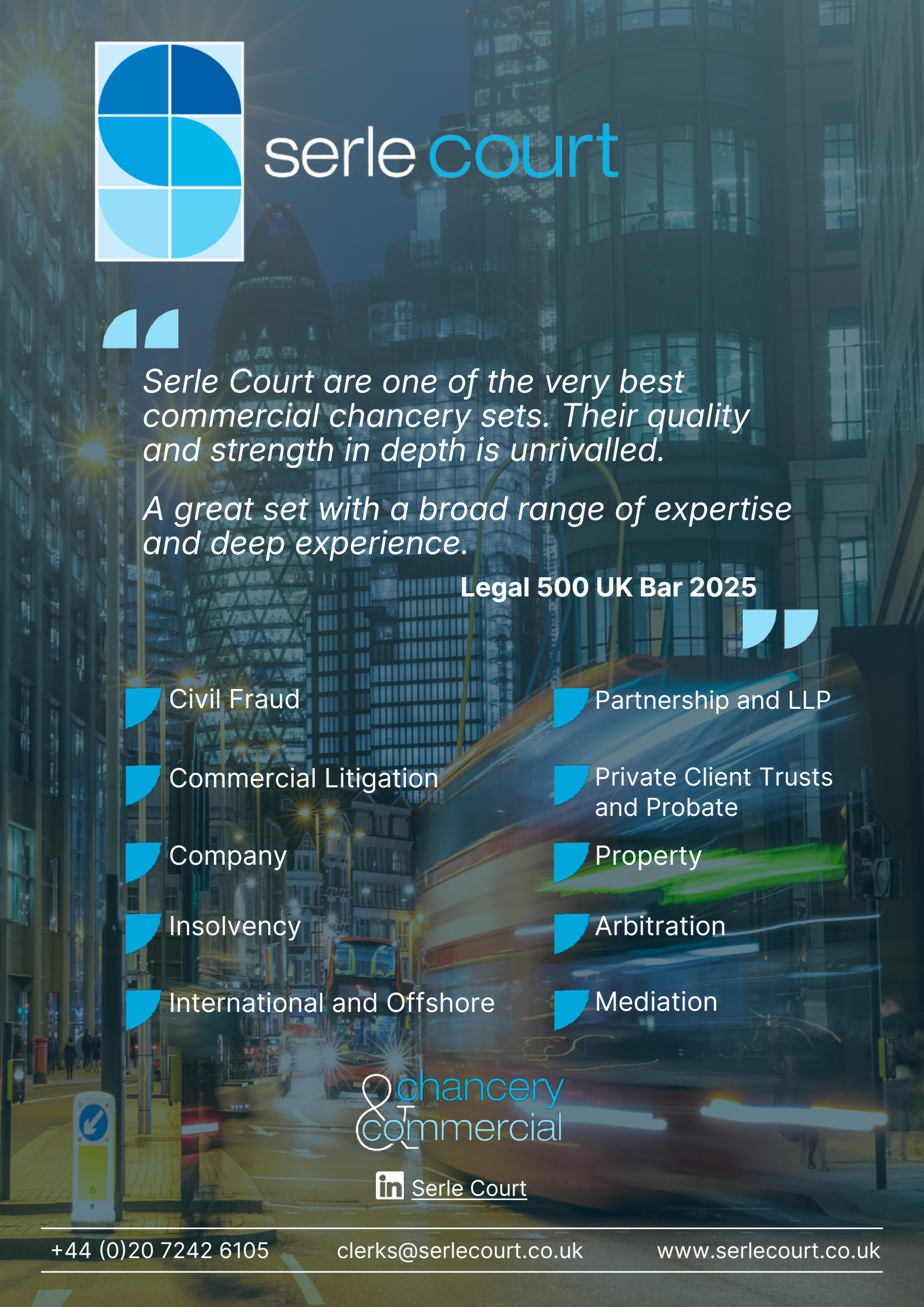
With respect to GreenX Mining, the European Commission's 2008 Raw Materials Initiative classed coking-coal as a critical raw material within the EU and the environmental implications of the project had been stringently managed in the granting of GreenX's priority mining right. The overarching environmental impact of a renewable energy project is self-evident.

Whilst it is correct that the EU is pursuing a 'coordinated withdrawal' of EU member states from the Energy Charter Treaty ('ECT'), reportedly on grounds that its investment protections could hinder efforts to mitigate climate change, the 2022 modernised version of the treaty (which includes the option to exclude protections for fossil fuel investments) is not yet in force and proponents of the ECT argue that member states are withdrawing from the treaty to avoid their obligations to investors, rather than because of climate change goals[12].

Third-party funding of arbitration is not therefore the spectre some would portray it as. ILFA's submission highlights that in ISDS overall, c. 27 – 29% of claims prevail and in the ICSID[13] context, 60% of cases that are funded result in a successful outcome for claimants. Equally however, it is not a 'gambler's nirvana', the colourful metaphor used over ten years ago by Gavan Griffith KC in RSM Production Corporation vs Saint Lucia; ISDS claims are not easy and where they fail, the funder generally loses its investment.

Within a tightening funding market, continued funder interest and deployment in ISDS claims which encompass the good-faith assertion of treaty rights, support the rule of law and encourage good governance and sustainability is anticipated. Such claims are not speculative; but neither are they 'risk-free' from the perspective of third-party funders.

5 PCA Case No. 2018-42.
6 https://www.unglobalcompact.org/what-is-gc/our-work/governance/rule-law.
7 https://www.un.org/sustainabledevelopment/peace-justice/.
8 The UNCITRAL tribunal ordered Poland to pay GreenX Mining c. GBP252m.
9 Mondi Investments vs. Republic of Poland (ICSID Case No ARB(AF)/24/1). It is unclear whether this claim is funded.
10 The majority of which have resulted in awards against the state.
11 See The Guardian: 'Revealed; how Wall Street is making millions betting against green laws' (supra).
12 The Energy Charter Secretariat reports that of the 162 cases brought under the ECT as at December 2023, 58% concerned renewable power generation, with only 33% relating to fossil fuels.
13 The International Centre for Settlement of Investment Disputes, administered under the auspices of the World Bank.



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TRIBUNAL SELECTION

SAFEGUARDING ARBITRATION'S LEGITIMACY

Authored by: Joseph Bentley (Counsel) & Leone Astolfi (Associate) - Norton Rose Fulbright

Introduction

In Lord Hodge's words in Halliburton v Chubb [2020] UKSC 48, "it is axiomatic that (…) an arbitrator must be impartial". Yet, a side-effect of the parties' right in arbitration to choose their decision-makers is that their independence and impartiality may be called into question. This article explores the implications for the legitimacy of the arbitral process and the mechanisms that protect against the risks.

Party Autonomy: Two Sides To One Coin

The right to appoint arbitrators is a key manifestation of party autonomy, a foundational principle of arbitration. Considered one of arbitration's comparative advantages, parties can choose decision-makers with suitable experience and be confident that someone in the process will hear their case. In 2023, arbitrators nominated by the parties accounted for 73% of total appointments in ICC arbitrations.[1]

The downside is that party-nominated arbitrators are the most obvious gateway for bias. The integrity of the process is important because, unlike litigation, arbitration is justice behind 'closed doors', national courts have limited oversight and there are few grounds for challenge. Furthermore, arbitrators are not judges whose independence is safeguarded through public salaries and tenure. They are private individuals who:

1. expect to be paid;
2. do not wish to unduly alienate the parties; and
3. will likely already be known to the nominating party or its lawyers – how else would they be put forward?

Selecting an arbitrator is also perhaps the most important decision a party can make and they will spend considerable time and money finding one they think will favour their case. Ultimately, that makes the pool small; in 2023, 30% of ICC appointments were repeat.[2]

1 https://iccwbo.org/wp-content/uploads/sites/3/2024/06/2023-Statistics_ICC_Dispute-Resolution_991.pdf]
2 https://iccwbo.org/wp-content/uploads/sites/3/2024/06/2023-Statistics_ICC_Dispute-Resolution_991.pdf]

Legitimacy In Tribunal Selection

There is inherent tension between the principle of party autonomy and the cardinal duty of impartiality. Arbitration wards against the threat of bias in the following ways.

1. Nearly all institutional rules and national laws require arbitrators to "remain impartial and independent of the parties". Fundamentally, arbitrators must conduct proceedings "fairly"[3].
2. This is enforced by arbitrators' duty to disclose circumstances likely to give rise to justifiable doubts about their impartiality, viewed through the eyes of the parties. While most institutional rules oblige arbitrators to make disclosures,[4] the UK's new Arbitration Act 2025 makes it a statutory duty.[5] It is a tall order because arbitrators need to put themselves in the parties' shoes and also consider the appearance of bias: in English law, whether a fair-minded observer, having considered all the facts, would conclude there was a real possibility of bias.
3. Institutions play a role by maintaining candidate lists and appointing arbitrators if the parties do not agree. They are also the frontline because they are tribunal interface and most conduct a conflict check, solicit disclosures and offer guidance.
4. Assessing whether an arbitrator is biased is complicated by the absence of uniform mandatory rules. The IBA Guidelines on Conflicts of Interest fill this gap and harmonise the management of conflicts which are one, but perhaps the main, indicator of bias. They comprise certain standards and guidance on how to apply them via a list of non-exhaustive scenarios, allocated in a traffic light system according to their severity.[6]
5. Finally, the parties police the process themselves through challenges, made to the institution or supervisory court.

Challenges

Examples of prominent challenges in recent years include:

1. DJP v others v DJO [2025] SGCA(I) 2

The tribunal's President acted in the same capacity in two other arbitrations involving the same claimant and project. Not only that, but, in his decision, he reproduced verbatim 212 out of 451 paragraphs from his earlier awards, referred to cases only relied on in the earlier arbitrations, cited the wrong contract and applied Indian, not Singapore, law.

Describing the facts as "unusual and troubling", the Singapore Court found that the arbitrator had failed to conduct an independent assessment (and the Court of Appeal agreed) and set aside the award on the grounds of natural justice. It is now fondly referred to as the "copy-and-paste" case.

2. Aiteo Eastern E&P Company Ltd v Shell Western Supply and Trading Ltd & Ors [2024] EWHC 1993

An arbitrator did not make timely disclosures of several appointments and other engagements by a law firm representing one of the parties.

The English court upheld the allegation of subconscious bias on the basis that a fair-minded and informed observer would think there had been a significant number of interactions with the nominating lawyers in a short space of time and failure to disclose. That led to the setting aside of an award on the grounds of substantial injustice.

3. DIT v. Port Autonome de Douala

The renowned academic, Professor Gaillard, passed away suddenly in April 2021. He had been counsel in an arbitration where the award has been issued in November 2020.

Many paid tribute to him, one of which was the President of the tribunal. He wrote that he had had regular meetings with Professor Gaillard over two decades and "consulted him before making any important decision".

While one might argue that this is merely extravagant rhetoric, the Paris Court found that it would "lead the parties to believe that he might not be free to make his own judgement and thus create reasonable doubt as to his independence and impartiality", and annulled the award.

Conclusion

Ultimately, challenges are rare and successful ones even more so: in 2023, only 8 out of 46 challenges in ICC arbitrations succeeded.[7] In some ways, the system regulates itself because a challenging party does so on risk that it will fail and the arbitrator will continue in post. It is not an option to be taken lightly.

That said, as arbitration grows in popularity, so does the risk that boundaries between parties, lawyers and tribunals will blur and more questions of bias will arise. The other consequence, of course, is that, because of the focus on disclosure, parties may be inspired to make tactical challenges in the hope of recusal or delay. This is also a threat and means that all involved in arbitration need to be vigilant in defending the process so that it is fair, looks like it is fair and its legitimacy is maintained.

3 Section 33(1)(a) Arbitration Act 1996
4 For example, Article 11, ICC Rules 2021.
5 Section 2, Arbitration Act 2025
6 https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024
7 https://iccwbo.org/wp-content/uploads/sites/3/2024/06/2023-Statistics_ICC_Dispute-Resolution_991.pdf.

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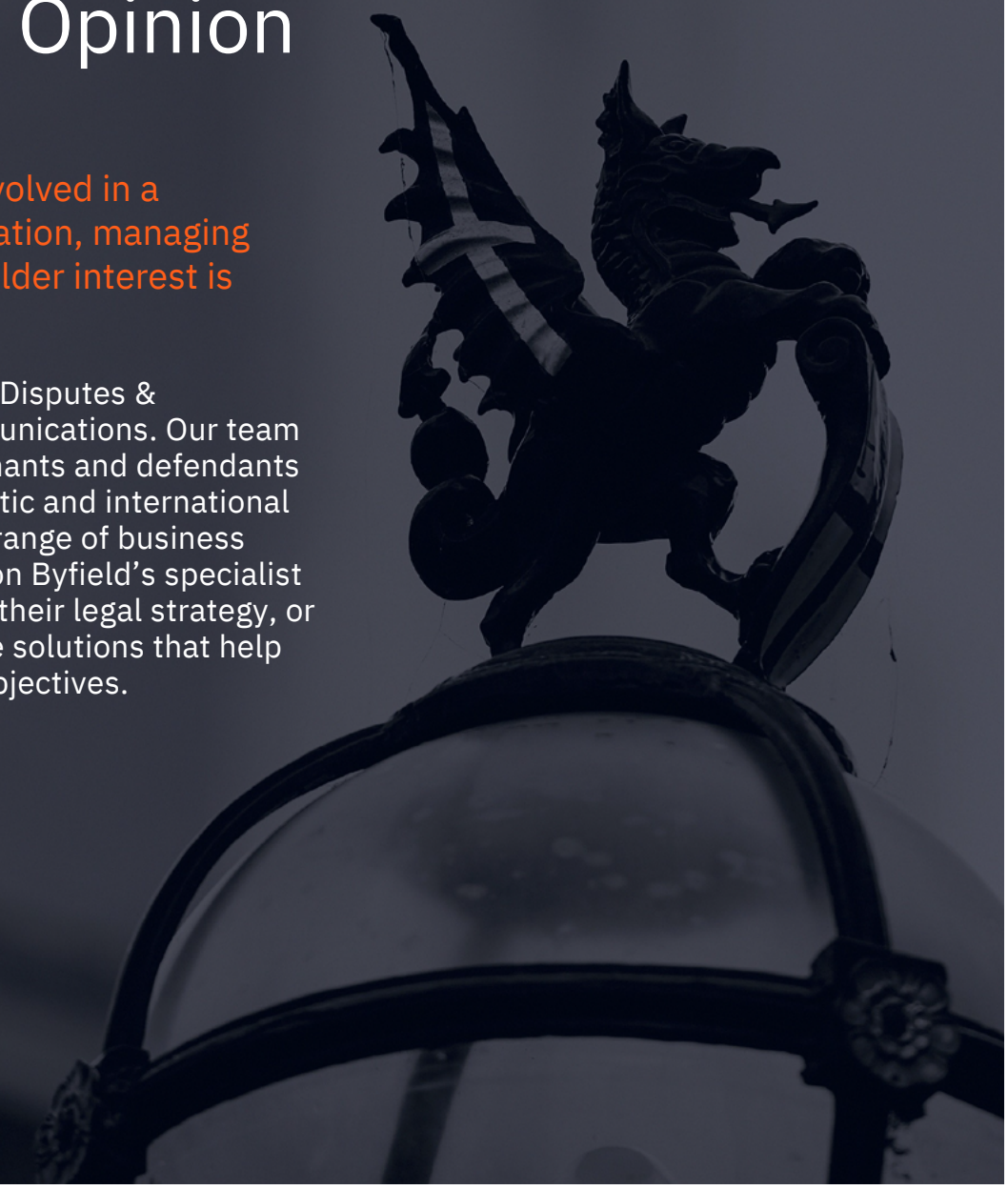

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COURT OF APPEAL CREATES ROADBLOCKS ON FOREIGN JUDGMENTS

SERVIS-TERMINAL LLC V DRELLE [2025] EWCA CIV 62

Authored by: Alexander Heylin (Barrister) - No5 Barristers Chambers

Introduction

In a very significant ruling that might be subject to further appeal, the Court of Appeal held that a bankruptcy petition cannot be presented in respect of an unrecognised foreign judgment. In coming to this conclusion, the Court acknowledged the position of foreign judgments in this jurisdiction, as set out in Dicey, Morris & Collins on the Conflict of the Laws, Rule 45:

"[a] judgment of a court of a foreign country… has no direct operation in England".

The Court also recognised Parliament's determination in section 267 of the Insolvency Act 1986 ("IA 1986") that only "debts" that satisfy the section's requirements can found the presentation of a bankruptcy petition, and considered what exactly constitutes a "debt" for those purposes.

Overall, the Court of Appeal's judgment provides valuable insight into the reasoning behind the treatment of unrecognised foreign judgments by domestic courts.

Factual Background

The Appellant, Mr Valeriy Drelle, was formerly the CEO of Servis-Terminal LLC, the Respondent, which is incorporated in Russia. The Respondent was declared bankrupt by a Russian court, and its Trustee in Bankruptcy brought proceedings against the Appellant for compensation for losses resulting from a breach of directors' duties.

The Russian Court gave judgment in favour of the Respondent and the Appellant's appeal was unsuccessful. The Respondent served on the Appellant, who was by now resident in London, a statutory demand under section 268(1)(a) IA 1986.

The Respondent subsequently presented a bankruptcy petition against the Appellant, and ICC Judge Burton made a bankruptcy order against the Appellant.

Richards J dismissed the subsequent appeal and held that the fact that the Russian judgment had not been the subject of recognition proceedings in this jurisdiction did not prevent it from being the basis of a bankruptcy petition.

The Appellant appealed to the Court of Appeal and sought the setting aside of the judgment.

Court Of Appeal Judgment

In determining that the Russian judgment was not capable of providing the basis for a bankruptcy petition, the Court addressed a number of issues regarding the treatment of foreign judgments in this jurisdiction.

Defence Or "Sword"?

Rule 51 of Dicey, Morris & Collins states that a foreign judgment can be determinative on a point even in the absence of recognition or registration. However, the Court of Appeal emphasised that this rule is only concerned with defences.

Any use of an unrecognised and unregistered judgment as a "sword", including presentation of a bankruptcy petition founded on it, is objectionable. This is because the principle that a foreign judgment "has no direct operation in England" reflects the common law's aversion to enforcing a foreign exercise of power.

What Constitutes A "Debt" Under S267 Ia 1986?

The Court of Appeal, in addressing whether an unrecognised judgment is to been seen as creating a "debt" within the meaning of s267(2)(b) IA 1986, looked to the "revenue rule" as an example.

This is a rule, affirmed in Government of India v Taylor [1955] AC 491, that the courts of one country will not enforce the tax laws of another. The "revenue rule" has been identified as "a particular manifestation of a more fundamental rule, that an assertion or exercise of the sovereign right of foreign state will not be enforced by an English court": Briggs, "Recognition of Foreign Judgments: a Matter of Obligation" (2013) 129 LQR 87, 88.

There can be no doubt that the "revenue rule" precludes presentation of a bankruptcy petition in respect of a foreign tax liability. It must, therefore, serve to prevent a foreign tax from being regarded as a "debt" in respect of which a petition could be presented, notwithstanding the fact that nothing to that effect is expressed in s267(2)(b) IA 1986.

The Court found that this supports the contention that an unrecognised foreign judgment, which has no "direct operation" because it arises from an exercise of sovereign power, is likewise not to be seen as giving rise to a "debt" capable of founding bankruptcy proceedings.

The Court also recognised a distinction between judgments that confirm an underlying debt and those that create the debt. If the underlying debt is for a liquidated sum and payable immediately (or at some certain, future time), the creditor may present a petition based on the underlying debt. It would not be necessary to first obtain a judgment.

Creditors Ineligible To Petition

The fact that a person in whose favour a foreign Court has given judgment could not resort to direct execution in the absence of recognition or registration would equally prevent him from "resorting to the bankruptcy court as an alternative means of enforcement": Fletcher, The Law of Insolvency, 5th ed., para 6-027.

If the fact that the foreign judgment has not been recognised means that, in the eyes of English law, there is no debt which can be pursued, that surely means that there is no debt in respect of which a statutory demand can be properly served.

Conclusion

The Court found that, where there is no statutory provision to contrary effect, a bankruptcy petition cannot be presented in respect of an foreign judgment which has not been the subject of recognition proceedings.

While an unrecognised judgment may be determinative for certain purposes, and this in itself may be important where an application is made for recognition, it will have no direct operation in this jurisdiction and so cannot be used as a "sword".

An obligation to make a payment imposed by an unrecognised foreign judgment is not enforceable as such in this jurisdiction and, in the eyes of the law of England and Wales, does not constitute a "debt" for the purposes of s267 IA 1986.

Like the "revenue rule", this accords with the principles of independent territorial sovereignty and reflects the common law's aversion to enforcing a foreign exercise of sovereign power.

Ultimately, the unrecognised Russian judgment in the case was not capable of providing the basis for a bankruptcy petition. Accordingly, the bankruptcy order made by ICC Judge Burton was set aside and the petition dismissed.

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THE STRATEGIC USE OF ANTISUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION

Authored by: Zoe Vanhegan (Paralegal) - PCB Byrne

In a global legal landscape currently characterised by sanctions regulations, competing political agendas and heightened adversarial appetite, the alternative dispute resolution measures provided for in cross-border trade contracts are being used more than ever. Parties are increasingly relying on arbitration clauses to resolve their disputes privately, away from the courts. This trend has been accompanied by an increased use of Antisuit Injunctions ("ASIs") to limit parties' attempts to jurisdiction shop by instigating proceedings about substantially the same issues in alternative jurisdictions.

The court's discretionary power to order ASIs stems from s37(1) Senior Courts Act 1981. As was recognised in SAS Institute Inc v World Programming Ltd [2020] EWCA Civ 599, this jurisdiction is to be exercised "when the ends of justice require it" ([90]). This extensive power may be exercised even where an arbitration is not yet contemplated, because the effect of an agreement to submit all issues to arbitration includes an implicit promise not to submit those same issues to another forum (Ust-Kamenogrosk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35).

It its judgment of 3 April 2025, the Court of Appeal in Renaissance Securities v Chlodwig Enterprises & Ors [2025] EWCA Civ 369 performed a comprehensive analysis of the law regarding the granting of ASIs. It has reminded parties of the importance of ensuring the application is accompanied by full disclosure of all the facts. The CA also observed that where an ASI is being sought against a third party, it must be possible for the applicant to show a legitimate interest.

Factual Background

Renaissance Securities entered into investment service agreements ("ISAs") with six Russian companies between 2019 and 2020, each governed by English law and containing an LCIA agreement. Following a breakdown of relations, the Defendants requested the Appellant return assets held on their behalf pursuant to the ISAs. The Appellant refused, claiming that all six Defendants were either directly or indirectly the subject of sanctions.

In October 2023, the Second and Sixth Defendants brought claims against the Appellant in the Commercial Court in Kaliningrad and in Moscow respectively. In November 2023, Dias J granted both an ASI and anti-anti-suit injunctive relief, on the basis that those claims breached the arbitration clauses in the ISAs. Further mandatory relief requiring the termination of the Russian proceedings was ordered by Henshaw J in April 2024.

The Respondents also sought to bring proceedings in Russia against three of the Appellant's Russian affiliates (defined in the judgment as Renaissance Russian Entities, "RREs"). In July 2024, at the Second Respondent's request, the RREs were joined as co-defendants to the Russian proceedings, and in September 2024 the First Respondent filed a standalone claim against them in the Court of Moscow. The undisputed evidence before the CA was that two RREs had been sold by the Appellant in November 2024; the third denied any affiliation.

At first instance, the Appellant sought an ASI to prevent the Respondents from bringing the Russian claims against the RREs, arguing (i) that they had been brought in breach of the arbitration agreements included in the ISAs and (ii) alternatively, that they were vexatious or oppressive (see Renaissance Securities v Chlodwig Enterprises & Ors [2024] EWHC 2843 (Comm) at [18]). HHJ Pelling KC refused to grant an ASI.

Proceedings In The Court Of Appeal

The following grounds of appeal were advanced ([16]):

1. The Judge was wrong to hold in law that there is a threshold "forum issue" for granting an ASI on vexatious and oppressive grounds;
2. Even if an alternative forum was required the Judge erred in holding that none existed, in that LCIA arbitration is available;
3. The Judge failed correctly to evaluate and/or characterise the claims against the RREs to determine whether they were vexatious and oppressive; and,
4. The Judge failed properly to interpret the arbitration agreements so that the RRE claims were within their scope.

In dismissing the appeal, Singh LJ undertook an analysis of the two main grounds for granting an ASI: (i) the contractual reason, where the foreign proceedings are in breach of a clause in a contract between the parties (Ground 4); and (ii) the non-contractual basis, where the foreign proceedings are otherwise vexatious or oppressive (Grounds 1-3).

Contractual Reasons To Grant An Asi: The Non-Party Issue

The Respondents had successfully argued at first instance that the third-party RREs would not be subject to the arbitration agreements within the ISAs. However, the Appellant contended that the arbitration agreement contained an implied negative promise not to bring claims against third parties for which the Appellant might be liable outside of the arbitration.

Applying the well-known principles of implication of terms (Marks & Spencer plc v BNP Paribas Securities Services Trust (Jersey) Ltd [2015] UKSC 72; Tesco Stores Ltd v USDAW [2024] UKSC 28), Singh LJ concluded that the Appellant was asking the court to go beyond the permissible extent of interpretation, requiring a rewriting of the ISAs ([48]).

This analysis is a reminder that, where the contractual instrument allows, it is possible for parties to seek an ASI against a non-party. In determining this, the court will apply the usual methods of contractual interpretation. Furthermore, Singh LJ's comment at [44] that it might have been preferable for the parties to have agreed to the term suggested by the Appellant ought to remind those drafting relevant contracts to consider including such terms.

Non-Contractual Reasons To Grant An ASI

The second ground for the grant of an ASI is that the foreign proceedings are otherwise vexatious or oppressive ([23]). Finding that there is no requirement for an alternative forum ([51]), Ground 2 therefore became academic and it fell to the court to determine whether to exercise its discretion to grant an ASI ([52]).

Singh LJ drew significance from the Appellant's refusal to provide the sale agreements for two of the three RREs ([68]), referring to Lord Bingham's statement in Donahue v Armco Inc at [16] that in order to exercise its discretion to grant an ASI, the court

"must have the fullest possible knowledge and understanding of all the circumstances relevant to the litigation and the parties to it" ([69]).

Without this however, the court could not be certain that the Appellant had sufficient interest, in that it was itself at risk of liability as a result of the claims it was seeking to stop ([66]-[68])

On the contrary, Singh LJ considered that the "evidential picture remains far from clear" because the precise nature of the relationship between the Appellant and the RREs, and what was said about them in the sale agreements, would have had material significance ([71]).

Similarly, Males LJ's distinct impression was that the court was invited to grant an ASI whilst being "deliberately kept in the dark" ([75]) such that the answer may depend on information that had been withheld from the court ([76]). Phillips LJ concurred, preferring not to opine on the merits and rather stating that the Appellant's non-disclosure of the documents needed to understand the relationship with its affiliates meant that the facts relevant to the determination were far from clear ([79]).

Conclusions

When awarding an ASI, the court is treading a fine line. References to the potential implications for international comity that come with the grant of an ASI can be found in the judgments of both Singh LJ (at [26]-[33]) and Males LJ ([75]). That "great caution" ([34]) is to be exercised before the grant of an ASI is illustrative that applicants must demonstrate sufficient interest to satisfy the court that it is exercising its discretion with full knowledge of the consequences. Applicants should remain aware of their obligations of frankness and honesty.

60 SECONDS WITH... MARK WILDEN BARRISTER 3PB

Q What Are You Looking Forward To In 2025?

A The Bristol Law Society Battle of the Bands. The 3PB band won two years ago, before I joined on drums, but were beaten last year, so we have everything to play for.

Q What Is The Easiest/Hardest Aspect Of Your Job?

A I host pro bono advice clinics for the creative industries with the Business and IP Centre in Bristol. It's one of the easiest parts of my job because it's lovely to meet creative people and help them understand how the law can help them, and because it's a drop-in clinic so there is no need to prepare and no expectation that I'll be able to answer every question on the spot.
The hardest is trying to get a good night's sleep in the run-up to a big hearing. I often find myself waking in the very small hours chewing points of strategy or remembering relevant details to incorporate into submissions. That's the satisfaction of the job, of course, but it doesn't always feel satisfying at 3am.

Q What Has Been The Best Piece Of Advice You Have Been Given In Your Career?

A Your best is good enough. I can always try to improve, and I do always try, but nobody can do better than their best and it isn't helpful for one's confidence to compare with others who have different expertise or more years under their belt. It's a very personal profession, and our clients are paying for our specific outlook and experience. That said, it is a profession that demands one's best, and that should never be forgotten.

Q What Was The Last Book You Read?

A **"Comet in Moominland"** by Tove Jansson. I never read the Moomin books as a child, but I have Scandinavian nieces and it's never too late to be immersed in that charming world of nature and fantasy. It was a welcome change of pace from the usual practitioner texts.

Q If You Had To Sing Karaoke Right Now, Which Song Would You Pick?

A The Proclaimers' **"I'm Gonna Be (500 Miles)"**. Everybody knows the chorus and it's impossible to stop people singing along, which takes the pressure off. A good call-and-response goes a long way.

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

A Getting an outcome that means my client won't need to talk to me again. It's not that I don't like my clients, but it's always satisfying bringing finality to a situation which will have caused months or years of stress. It's even better when had a hard-fought battle and won.

Q Do You Have A Favourite Food?

A The three "Ch"s – cheese, chili and chocolate. Not always when combined together. But you can usually get away with combining two out of the three.

Q If You Could Start All Over Again, What If Anything Would You Do Differently?

A Everything. I know where my previous choices have led me, and while I love my life and have no regrets I'm always curious to see what's down the paths I didn't take.

Q What's One Skill That's Helped You Succeed?

A Patience. It takes time to get good at anything, and the ability to stick with something even when it isn't going well tends to be what makes the difference between those who achieve what they set out to achieve and those who wonder whether they could have done.

Q What Is The Best Film Of All Time?

A Casablanca is probably the best for sheer density of mood, emotion, charisma and quotable lines. It shows what can be achieved when you gather creative people at the top of their game and give them low expectations, scant resources and a tight deadline.

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

A David Lynch. He seemed like he would be good company with plenty of stories to tell. And I'd be intrigued to see if he makes any more sense in person than his films do on screen.

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

A As a musician, it was feeding breakfast to a hungry audience while opening the Sunday morning of Truck Festival in Oxfordshire with a set of noisy electro-rock.
As a barrister, it was defending the decision to allocate a trade mark claim about dog toilets to the small claims track, which the claimant appealed to the Court of Appeal. The value of the claim was under the small claim threshold, and despite there being some interesting legal points (which there almost always are in trade mark actions) the Court agreed that the claim deserved as little as reasonably possible in the way of resources. Though it took a lot of resources to get to that answer.

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DIGITAL ASSETS IN ENGLISH LAW

AN UNUSUAL TYPE OF PROPERTY TO ADMINISTER

Authored by: Giles Hall (Senior Associate) - Russell Cooke

Undoubtedly, society has in recent years grappled with the implications of the ever-growing prevalence of digital assets, including specialised blockchain based cryptocurrencies (e.g., bitcoin or Ethereum) and non-fungible tokens (NFTs), as well as digital files, in-game digital assets and domains.

These assets are now increasingly integrated into commerce and, as items of private property, can hold significant value. These assets pose a challenge in English law as their unique nature does not neatly allow them to be categorised within traditional definitions of property.

Of particular interest are the implications of this for those involved with trust and probate. Executors, personal representatives and trustees have to reckon with the practical and legal realities of administering digital assets.

In England and Wales, these challenges have prompted calls for the modernisation of the law, which has resulted in the 'Property (Digital Assets Etc.) Bill' (the "Bill") being introduced to parliament. The fact sheet which accompanied the Bill stated that the advantages include "[e]nsuring that crypto-tokens and potentially certain other digital assets can be properly recognised by the law as personal property" and that "[p]ersonal property can also be part of a person's estate for inheritance purposes".

What Are The Specific Issues That Have Brought About Demand For Legal Change?

The law in England and Wales has historically recognised two main categories of property i.e., choses in possession and choses in action. In short, choses in possession are tangible, physical items capable of physical possession (e.g., cars and jewellery), and choses in action are intangible rights which are enforceable through proceedings (e.g., debts and company shares).

It is arguable the common law categories may in fact be exhaustive due to the case of Colonial Bank v Whinney (1885) 30 Ch D 261, within which Lord Justice Fry states: All personal things are either in possession or in action.

The law knows no tertium quid [third thing] between the two

Digital assets do not easily fit into either definition, because whilst they are inherently intangible, they can mimic the characteristics of a thing in possession. Digital assets are not merely a figment of legal imagination as they do actually exist as distinct assets (albeit virtually), however, this does not make them a chose in possession as they cannot be physically possessed or handled. Nonetheless, they cannot be considered a chose in action either, as unlike a chose in action they are capable of being damaged, destroyed or stolen.

In fact, a key factor in ushering in legal scrutiny over the treatment of digital assets is the prevalence of fraud, theft and hacking with respect to these assets. The nature of these assets, in particular those based on blockchain systems, mean that victims face great difficulty in recovering their stolen assets or even identifying the perpetrator due to their decentralised and pseudonymous nature. This is further exasperated by the ambiguity in the law as to the status of these items as personal property and how they are to be treated in disputes.

The categorisation of these assets as personal property has a direct impact on the corresponding duties on executors, trustees and personal representatives to safeguard and collect the same. Further, digital assets often fall outside the scope of the usual probate administration processes, and there tends to be a myriad of issues surrounding transferability and identification coupled with a lack of technical expertise from those that must administer. This is in no small part due to the complex technological environment within which digital assets are often created and accessed, including use of such things as cryptographic keys and distributive ledger technology.

How Does The Bill Seek To Assist?

The Bill introduces a new category of personal property, which is distinguishable from the two traditional categories. This category is designed to accommodate digital assets as a distinct category by preventing their exclusion merely by reason of failure to fit the current definitions.

The Bill states:

> "A thing (including a thing that is digital or electronic in nature) is not prevented from being the object of personal property rights merely because it is neither—
>
> **(a)** a thing in possession, nor
>
> **(b)** a thing in action."

The key point to note is that the Bill does not provide an exhaustive list of what constitutes a digital asset. Indeed, seeing as it seeks to correct an inflexible and traditionalist approach to personal property, this would seem to be the better option as the definition itself allows a great degree of judicial discretion. Any legislation which sought to provide a prescriptive list may risk becoming outdated, as technology and new and emerging digital assets continue to advance at unprecedented rates.

Whilst some may be of the view that in failing to specifically define the category the Bill fails in its primary objective, that would be to overlook the fact that it is for the common law to develop alongside the relevant technology as opposed to parliament. Indeed, the common law has already started to point towards a new category of "thing", for example, proprietary rights were recognised as attaching to crypto assets in the case of AA v Persons Unknown [2019] EWHC 3556 even though it was recognised that this did not fit a chose in action in the narrow sense. The Bill is designed not to replace the common law, but to remove the potential restriction placed on it by Colonial Bank v Whinney.

The Bill does therefore provide greater legal certainty in at least confirming that it is possible for another definition of "thing" to exist. This brings with it greater enforceability and protection through the English courts (with the scope being limited to England and Wales).

What's Next?

Whilst the greater clarity is to be welcomed (if the Bill does in fact pass into being an act of parliament) there remain numerous issues with the practical transfer / control of digital assets by anyone other than the initial owner.

As stated above, for those administering these assets, the issue is not merely legal but practical. There is a tension between the companies or entities that hold the assets and the personal representatives or trustees who seek to obtain them. There is a distinct lack of English case law on the transfer of digital assets. This may be due to the fact that many of the companies or entities that hold the digital assets are based overseas (with the US being a popular location). Nonetheless, this area does need to be developed, as otherwise the recognition of digital assets as property would merely represent a pyrrhic victory as far as personal representatives and trustees are concerned.

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