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TL4 Disputes MAGAZINE

ISSUE 11

VERDICTS & VICTORIES:
A REVIEW OF DISPUTES IN 2023

INTRODUCTION

"In the long history of humankind, those who learned to collaborate and improvise most effectively have prevailed."

- Charles Darwin

We are delighted to present our latest Disputes Magazine, Issue 11. With a finger on the pulse of the ever-evolving legal landscape, this edition promises an exploration into the intricacies of arbitration, class actions, corporate disputes and the realm of Environmental, Social, and Governance (ESG) considerations.

We would like to thank our community partners and contributors for their support during this year. They have shed light in this edition on the emerging strategies, landmark cases, and the evolving dynamics that shape corporate decision-making.

We look forward to welcoming you in 2024. Keep an eye out as we unveil a series of compelling events within the Disputes Community.

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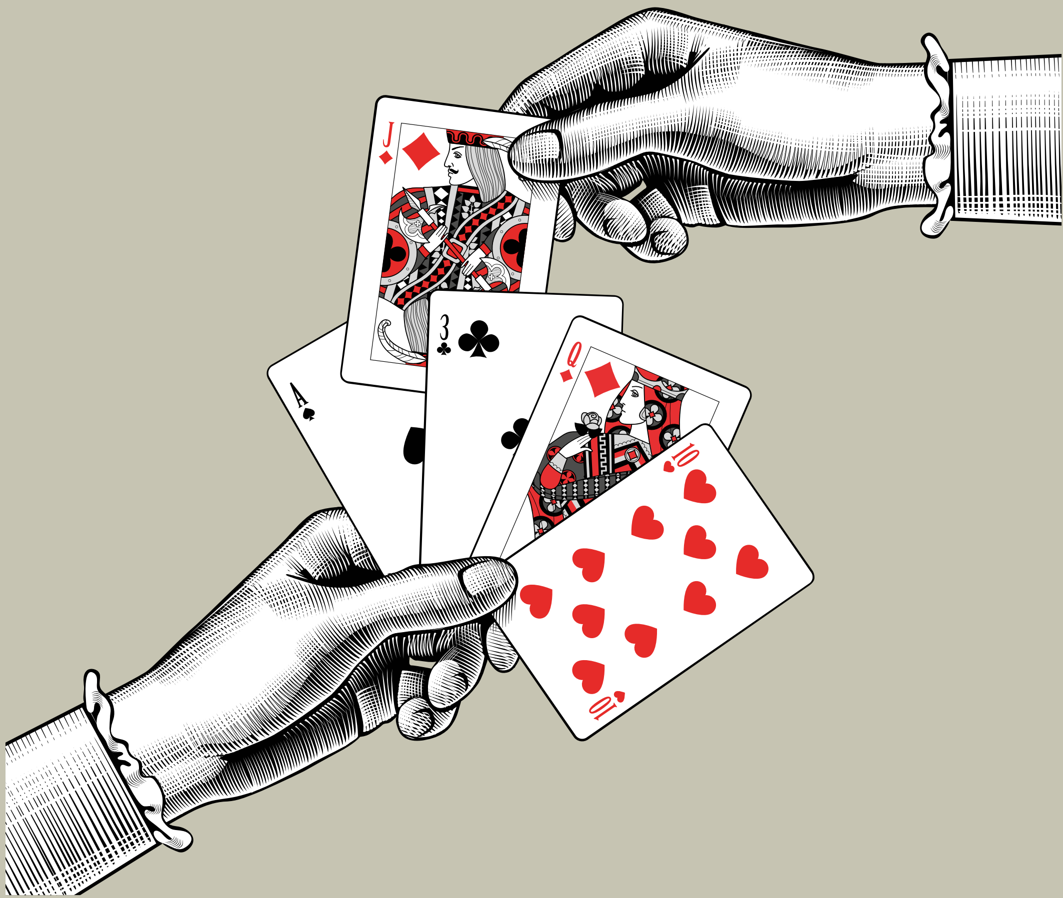


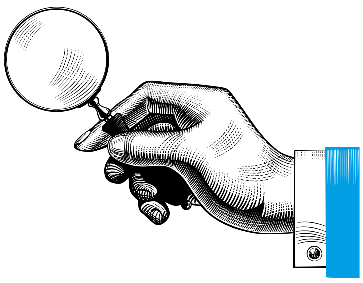
ON STAYING PROCEEDINGS UNDER S.9 OF ARBITRATION ACT

Authored by: Nicola Sharp (Legal Partner) - Rahman Ravelli

The Supreme Court has clarified when proceedings can and cannot be stayed in arbitration proceedings, in a first-of-its-kind decision about the meaning of section 9 of the Arbitration Act 1996.

Complex litigation is ongoing between the Republic of Mozambique (the Republic) and Credit Suisse International and Privinvest Shipbuilding entities (Privinvest). The substantial proceedings began in February 2019 in which the Republic is bringing claims for bribery, conspiracy to injure by unlawful means, dishonest assistance, and knowing receipt and proprietary claims.

The allegations concern a $2 billion corruption scandal accusing Privinvest of bribing Credit Suisse bankers into fraudulent loans and bond issues, which eventually led Mozambique into a financial crisis. The 3-month trial is due to begin in a few weeks, in October 2023.



Before the trial begins, the Supreme Court was asked to rule on a preliminary point. Privinvest contended that the Republic's claims against it fall within the arbitration agreements contained in the supply contracts. With that being the case, Privinvest says it is entitled it to a mandatory stay of the legal proceedings under section 9 of the Arbitration Act 1996.

At first instance [1], the High Court agreed with the Republic's argument that the claims in the substantive litigation were not within the scope of the arbitration agreements, and so the stay should be refused.

The Court of Appeal overturned that decision [2] and said that the entire claim was due to be arbitrated because Privinvest's defence to the liability could be an arbitral matter.

The Supreme Court decision[3] reverts to the outcome at first instance, determining that the claims will be heard in the English courts rather than in arbitration in Switzerland.

A 'matter' of interpretation

The decision revolves around the interpretation of a 'matter' under section 9 of the Arbitration Act 1996.

Section 9(1) allows a party to stay legal proceedings if a matter under the agreement is to be referred to arbitration. Pursuant to section 9(4), the court will grant the stay unless the arbitration agreement is null and void.

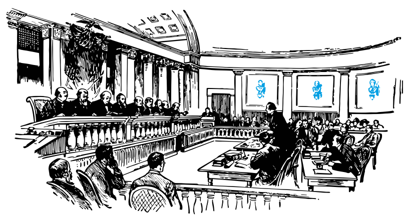
The exact wording is:

s. 9(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

s. 9(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

In the Court of Appeal, Carr LJ clarified that a "matter" is not the same as a cause of action and that section 9(4) of the Arbitration Act 1996 allowed for a pro tanto stay. A "matter", she stated "includes any issue capable of constituting a dispute under the relevant arbitration agreement."

With that in mind, the Court considered the Republic's claims and foreseeable defences. Carr LJ thought that the Republic was trying to bring its claims outside of the supply contracts in an artificial way. Her view was that the allegations of corruption were directed at the suite of contracts, which included the supply contracts containing the agreement to arbitrate. The foreseeable defences included the validity and genuineness of the supply contracts.



General international consensus

Lord Hodge's view in the Supreme Court decision was there is now a general international consensus among the leading jurisdictions involved in international arbitration in the common law world which are signatories of the New York Convention on the determination of "matters" which must be referred to arbitration:

Adopt a two stage process:

(1) Identify the matters which the parties have raised in the court proceedings.

(2) Determine whether it falls within the scope of the arbitration agreement.

The "matter" need not encompass the whole of the dispute between the parties.

A "matter" is a substantial issue that is legally relevant to a claim or a defence in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute.

The exercise for evaluation the substance and relevance of the "matter" requires a question of judgment and the application of common sense, rather than a mechanistic exercise.

Were the 'matters' in scope?

In first instance, Wakling J held that the Republic's claims in (i) bribery, (ii) dishonest assistance (iii) knowing receipt and (iv) unlawful means conspiracy did not fall within the scope of any of the arbitration agreements.

He considered that the disputes within and arising from the Republic's claims did not have a sufficient connection with the individual supply contracts.

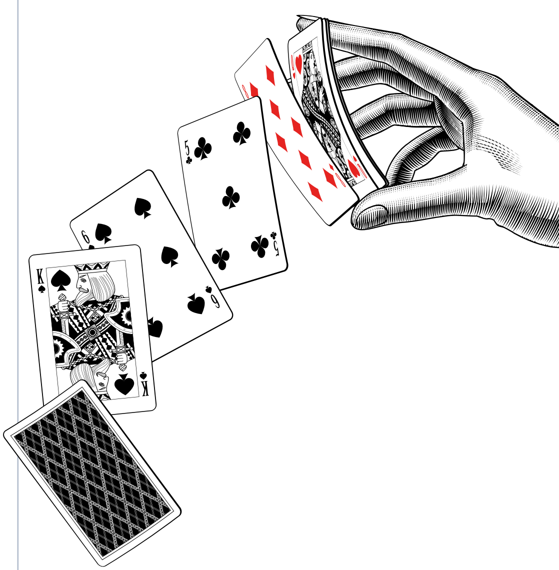
The Supreme Court agreed. In relation to these claims, Lord Hodge held that it did not require an examination of the validity of any of the supply contracts.

Accordingly the Supreme Court allowed for the trial to be heard in the courts of England and Wales.

Summary

While the English law continues to adopt a pro arbitration approach, when it comes to section 9 of the Arbitration Act 1996 and staying proceedings, there is now a clear test to guide the decision.

It is likely that the court will still stay proceedings if the court proceedings involve resolution of any issue which falls within the scope of the arbitration agreement between the parties. But when the issues fall outside of scope, court proceedings may continue.



Sources: • The Republic of Mozambique v Credit Suisse International & Ors [2020] EWHC 2012 (Comm) • [2021] EWCA Civ 329
• The Republic of Mozambique (acting through its Attorney General) v Privinvest Shipbuilding SAL (Holding) & Ors [2023] EWHC 2215 (Comm)

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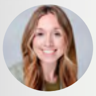

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Sovereign & States Disputes and Enforcement Summit 2024	**6 -7** Feb 2024
Corporate Crime: Detection & Reaction	**15** Feb 2024
Financial Institutions Litigation - The Second Annual Conference 2024	**28** Feb 2024
The UK Commercial Property Litigation and Disputes Forum 2024	**29** Feb 2024
ESG Litigation Second Annual Summit 2024	**12** Mar 2024


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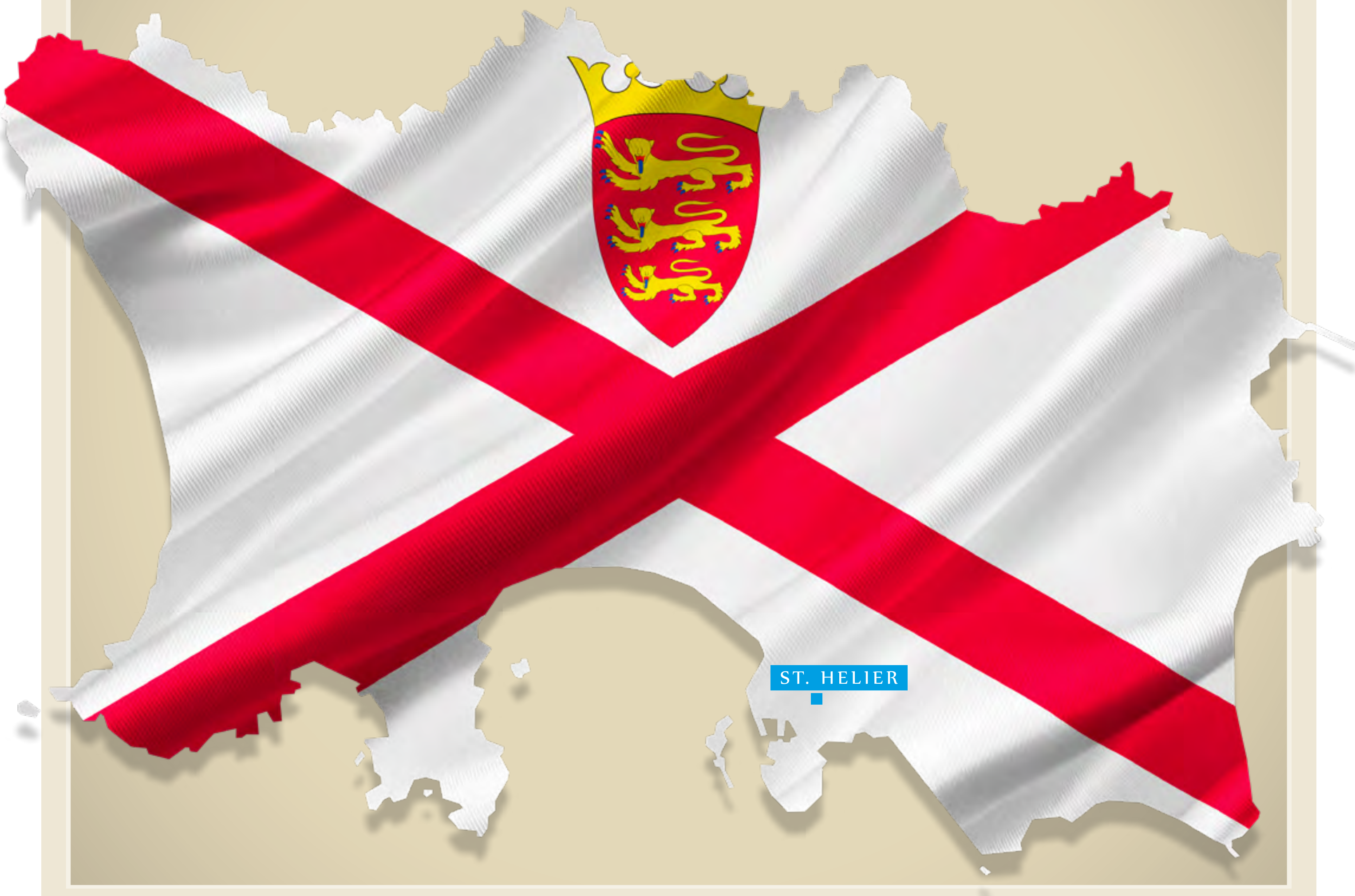
JUST, EQUITABLE, ARBITRABLE?



Authored by: Justin Harvey-Hills (Partner), Katie Hooper (Partner), and Stephan Venter (Senior Associate) - Mourant

In the recent case of the Representation of Shinhan Securities Company Limited [2022] JRC 293, in which Mourant acted for the successful applicant, the Royal Court of Jersey had to determine whether to grant a stay pending arbitration of a petition to wind up a company on the just and equitable basis.

Shinhan Securities Co Ltd (Shinhan) was a shareholder in a Jersey expert fund which took the form of an incorporated cell company (the Fund). The subscription agreements each contained a dispute resolution provision that required the parties first to attempt to resolve this by consultation, failing which, the dispute should be referred to mediation. Finally, should a mediation fail, the dispute was to be resolved by arbitration with the law and seat of the arbitration being Hong Kong (the Arbitration Agreements).

Shinhan issued a representation to the Jersey court under Article 155 of the Companies (Jersey) Law 1991 seeking a just and equitable winding-up. The Fund issued an application for a mandatory stay pending arbitration under Article 5 of the Arbitration (Jersey) Law 1998.

Shinhan's central argument was that a just and equitable winding-up petition was not 'arbitrable' and the Arbitration Agreements were therefore inoperative or incapable of being performed and consequently fell within one of the exceptions to Article 5. This was on the basis that only the Jersey court could make a winding-up order. The Fund argued that the underlying dispute between Shinhan and the Fund, including the question of whether a winding-up order should be made, was capable of being arbitrated, even if, following the arbitration, the matter had to come back to the Jersey court for any actual winding-up order to be made.

In its judgment, the Jersey court considered relevant case law from Jersey itself and across the common law world, including England, Cayman, Hong Kong, Singapore and Australia.

The Jersey Court of Appeal had previously considered this issue in Global Gold Consolidated Resources v Consolidated Resources Armenia [2015] (1) JLR 309. It had determined that the overriding principle was that "la convention fait la loi des parties". The parties were free to agree how their disputes should be resolved. There was no reason for the courts to interfere with that unless there was an overriding public interest that required them to do so. Having considered the English Court of Appeal decision in Fulham FC -v- Richards [2012] Ch 133, the Jersey Court of Appeal concluded that there was no reason of public policy for holding that a just and equitable winding-up petition was not capable of arbitration.

The Royal Court went on to consider more recent authority from other jurisdictions, paying particular regard to the decisions of the Hong Kong court in Re Quiksilver Glorious Sun JV Limited [2014] 4 HKLRD 759, of the Singapore Court of Appeal in Tomolugen Holdings Limited -v- Silica Investors Limited [2015] SGCA 57 and of the Federal Court of Australia in WDR Delaware Corporation -v- Hydrox Holdings Limited [2016] FCA 1164. These were also consistent with Global Gold and emphasised that, unlike in an insolvent winding-up, there was no public interest that overrode the agreement to arbitrate. Furthermore, arbitrability did not depend on whether the arbitral tribunal had the power to grant the final relief. Consequently, there was nothing to preclude the arbitral tribunal from resolving the underlying dispute, even if the matter had to return to court for it to make the just and equitable winding-up order.

However, there was a recent authority from the Cayman Court of Appeal which went in the other direction, FamilyMart China Holding v Ting Chuan (Cayman Islands) Holding Corporation, CICA (Civil) Appeal Nos 7 and 8 of 2019.

The Cayman Court of Appeal distinguished the other authorities on the basis that they all depended on the court's ability to identify discrete substantive issues which did not invoke the exclusive jurisdiction of the court.

It held that the petitioner had a statutory right to invoke the jurisdiction of the court and was concerned at the prospect of a two-stage process where the decision of the arbitrator and the court might conflict.

The Royal Court did not agree with the Cayman Court of Appeal. It derived from the authorities that all issues should be determined by arbitration in accordance with the arbitration agreement save where it would be contrary to public policy. The fact that only the court could make a winding-up order did not affect that.

The Royal Court held that the parties had agreed to arbitrate and that there was no overriding reason of public policy to depart from that simply because it was only the court that could grant the actual relief sought. On the contrary, there was a strong public interest in holding parties to their bargains. The Royal Court saw no reason to depart from the Jersey Court of Appeal decision in Global Gold which was prima facie binding in any event.

The Jersey Court of Appeal's decision in Global Gold and the Royal Court's decision in Shinhan were clearly correct. This was put beyond doubt when, on 20 September 2023, the Judicial Committee of the Privy Council reversed the Cayman Court of Appeal's decision in FamilyMart, following the same line of reasoning that the Jersey courts and, indeed, most other courts in the common law world had followed.

The Royal Court's decision is a modern confirmation that, as a matter of Jersey law, an application to wind up a company on just and equitable grounds is susceptible to arbitration. It underscores a critical point: courts generally uphold the sanctity of such clauses and refrain from intervening in disputes covered by them. Moreover, in jurisdictions with mandatory statutory stay provisions arising from Article II(3) of the New York Convention, there are limited instances where courts will be willing to decline to stay legal proceedings in favour of arbitration.

Justin-Harvey Hills, Katie Hooper and Stephan Venter acted for the Fund in this matter.

PCB BYRNE

PCB Byrne provides in-depth expertise and unparalleled service having decades of experience in dealing with complex UK and international disputes in the civil, criminal and regulatory sectors. PCB Byrne is a conflict-free firm delivering creative and commercially focused solutions. PCB Byrne builds the best bespoke teams for clients, whilst retaining its commitment to exceptional, hands-on service.

"The April 2021 merger of PCB Litigation LLP and Byrne & Partners saw **'two top tier boutiques join forces'** to form the market leading civil fraud practice of PCB Byrne"

- according to the Legal 500 United Kingdom 2022 edition.

We are delighted to be part of the Disputes community and, coupled with our involvement in the FIRE community, look forward to helping this initiative grow from strength to strength.

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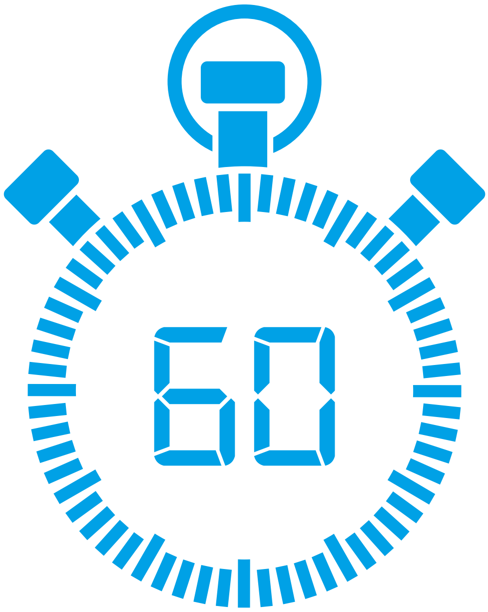
60-SECONDS WITH:

LUKE HARRISON PARTNER KEIDAN HARRISON



Q Imagine you no longer have to work. How would you spend your weekdays?

A If I no longer had to work I'd like to use my skills as a lawyer to help others. There are many in society who do not have access to legal representation. This leads to significant injustice despite the good work of the Courts and tribunals to try and accommodate unrepresented parties. We all have a moral duty at some point in our career to use our skills to help others pro bono.

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

A Delivering the best possible outcome I can for clients. There can often be a lot of "going through the motions" in dispute resolution but it's important to identify early on in an instruction what a client wants to achieve and to then be laser focused on delivering that objective.

Q What motivates you most about your work?

A Seeing the development of our junior lawyers. It is one thing being able to deliver yourself but something completely different to ensure that same level of quality is delivered by others. It's not as easy as it may seem and it's really a joint effort as junior lawyers need to be receptive to and act on feedback.

Q What is one work related goal you would like to achieve in the next five years?

A The firm has established itself now as one of the pack of high quality City of London disputes boutiques. We have a good platform on which to build. Over the next given years I would like to see the growth of the partnership both through organic career progression and lateral hires. I enjoy working with talented people who are as equally enthused about their practice and outcomes focused.

Q What has been the best piece of advice you have been given in your career?

A On my first day as a trainee my former firm's CEO took all the trainees to one side and told us that we should look at ourselves in the mirror every morning and tell ourselves we are idiots. Whilst I don't endorse his method his underlying message was an important one. It taught me the importance of humility, the need to recognise what can be learnt from colleagues (of all levels) and to be receptive to feedback. These days people can be defensive to feedback but feedback is always a gift.

Q What is the most significant trend in your practice today?

A There is currently a significant uptick in disputes arising out of financial distress. This is not only manifesting itself in formal insolvency proceedings but as in the last financial crisis is the catalyst for many other types of disputes. As part of this trend we are seeking more fraud related disputes particular in the context of shareholder or joint venture relationships.

Q Who has been your biggest role model in the industry?

A I have tremendous respect for the achievements of John Quinn of Quinn Emanuel Urquhart & Sullivan LLP ("QE"). QE have grown to be the largest and most feared global disputes boutique (albeit they are perhaps now better described as a disputes megastore). I respect their focus on the things that matter to clients, the quality of the lawyers and strategic insight. So many law firms these days prioritise investment in shiny offices and corporate branding but QE's strategy of delivering results has led to them being dubbed one of the most feared law firms in the world.

Q What is one important skill that you think everyone should have?

A The ability to be able to constantly ask yourself "why am I doing this" and "what is it going to achieve". Asking yourself these questions regularly helps keep you focused on outcomes.

Q What cause are you passionate about?

A I'm fortunate enough to have a house in the Vosges mountains in France where I can indulge in pastimes including skiing, hiking and mountain biking. I still downhill mountain bike (now with my 14 year old son) but I think my days in that regard are numbered!

Q Where has been your favorite holiday destination and why?

A The mountains. Give me a mountain rather than a beach any day.

Q Dead or alive, which famous person would you most like to have dinner with, and why?

A The late Queen Elizabeth II. Her reign spanned decades and she was able to contribute towards the leadership of the United Kingdom and Commonwealth in a manner which rose above politics yet still maintained significant influence on issues that were important to her. She is, perhaps, the greatest leader of all time.

PROPOSED REFORMS TO ARBITRATION ACT 1996

DEMONSTRATE ITS OVERALL SUCCESS

Authored by: Will Anderson (Partner) and Jack Laidlaw (Associate) - CMS

The Law Commission of England and Wales (the “Law Commission”) recently released a proposed bill and report recommending changes to the Arbitration Act 1996 (the “Act”). These publications were the culmination of an in-depth review process lasting over two years. The relatively minor scope of the Law Commission’s proposed “major initiatives” demonstrates the Act’s overall success and ability to stand the test of time.

Default Rule to Determine Governing Law of the Arbitration Agreement

One of the most critical proposed modifications is an amendment that would bring much-needed clarity to determining the law governing an arbitration agreement following the Supreme Court’s landmark decision in Enka v Chubb [2020] UKSC 38. Currently, if a contract stipulates a governing law, but it is unclear if the parties intended that law to also apply to the (separable) arbitration agreement, English courts apply a series of principles the Supreme Court set out in Enka. Under those principles, generally -- but not always -- the substantive law of the contract will govern the arbitration agreement rather than the procedural law of the seat. The Enka principles have been critiqued as too complex and as generating unpredictable outcomes (indeed the Supreme Court was divided on the result of their application in Enka). This in turn can create uncertainty, and unnecessary cost and delay for the parties.

Instead, the Law Commission has proposed a statutory default rule whereby the law of the seat will govern the arbitration agreement, unless the arbitration agreement expressly states otherwise. This change is a welcome one. The proposed amendment creates certainty for parties as English law will govern the arbitration agreements of all English-seated arbitrations, unless the parties exercise their ability to expressly designate a different governing law.

In addition, the Enka principles were often at odds with other jurisdictions’ provisions on determining governing law, leading to contradictory findings about the law applicable to the same contract. For example, the proposed default rule would have prevented the outcome in the Kabab-Ji cases, where French courts found that an arbitration agreement specifying a French seat was governed by French law during set aside proceedings, but during enforcement proceedings in England, the English courts decided that the same arbitration agreement was governed by English law.

Reduced Evidentiary Scope for Jurisdictional Challenges

Section 67 of the Act allows a party to challenge an arbitral tribunal's jurisdictional ruling in court. Currently, the court holds a full rehearing, i.e., the parties can raise arguments that were never presented to the tribunal, and all evidence can be reheard, resulting in criticisms that the underlying arbitration was a mere "dress rehearsal" for the English Courts.

In the interests of fairness, economy, and procedural efficiency, the Law Commission has proposed new court rules that would limit a party's ability to raise new arguments during a Section 67 challenge. Only new arguments that could not have been brought before the arbitral tribunal could be raised, and evidence would only be reheard if necessary, in the interests of justice.

These are welcome changes, as they prevent parties from getting a second bite at the cherry and enhance judicial efficiency.

Curiously, the Law Commission declined to adopt a previous proposal about the court affording at least some deference to the tribunal's jurisdictional findings as part of the Section 67 proceedings. Deference to a court of first instance is often afforded in circumstances where a reviewing court does not hear evidence, such as an appellate court deferring to the trial judge's findings of fact. Yet the Law Commission's final recommendations do not mention the court affording any deference to the tribunal's findings, let alone specifying the level of deference. Perhaps the Law Commission feels this is best left up to the courts, and it will be interesting to see how this aspect of the new procedure develops.

New Statutory Language on Arbitrator Disclosure

While English common law requires an arbitrator to disclose potential conflicts of interest, the Act was silent on both the scope and timing of the disclosure. The Law Commission has rectified that omission by proposing amending the Act to impose a "continuing duty" on arbitrators to "disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality." This duty, which is the same as that found in the common law, would apply not just to potential conflicts within the arbitrator's actual knowledge, but to potential conflicts the arbitrator reasonably should know. This could potentially create broader disclosure obligations for some arbitrators, such as an arbitrator who would be expected to know about potential conflicts ensuing from work performed by other attorneys at the same firm.

Section 69 and Confidentiality Remain Unchanged

Two items that the Law Commission decided to keep intact are also worth mentioning.

1. First, the Law Commission declined to make any changes to Section 69 challenges, despite competing calls from commentators to either expand or reduce their scope. Section 69 allows a party to challenge the legal merits of an arbitrator's decision in certain circumstances. Some commentators have noted that the ability to have a court review questions of English law is one of the factors that makes England a popular arbitral seat, as it is relatively unique. Most jurisdictions do not permit a court to revisit the substance of an arbitrator's decision. Other commentators expressed concern that the ability to overturn an arbitral award on the merits infringes upon the core principle of the finality of arbitration awards. However, as the Law Commission noted in its report, parties who want to ensure their awards are not reviewed by the court can "opt out" of Section 69, either expressly in their arbitration agreement or implicitly by agreeing to arbitrate under arbitral rules, like the ICC and LCIA rules, that say an award is final.

2. Second, the Act is silent on confidentiality, and apparently will remain so. While the Law Commission's reports appeared to, at least implicitly, recognise that the current law on confidentiality is a mix of contractual agreement, case law, institutional rules, and tribunal rulings, it declined to propose a clarifying default rule that arbitration is confidential unless the parties agree otherwise. The Law Commission felt that given the continuing evolution of English case law on confidentiality, it was not yet ripe for statutory codification. It also noted that transparency is increasingly popular in certain arbitrations such as those involving States and State-owned entities or arbitrations dealing with issues in the public interest.

Next Steps

The Law Commission's recommendations and proposed bill have been provided to the Government, and it remains to be seen whether they will be introduced into Parliament.

NEW DATA SHOWS JUDGMENT AND AWARD ENFORCEMENT REMAINS A PROBLEM

Authored by: Victoria Fox (Vice-President) - Burford Capital

After suffering significant financial harm because of the initial contract breach or malfeasant activity that was the subject of the original dispute, companies spend valuable resources pursuing litigation and arbitration claims. However, litigation is just the first step in a long road to recovery of damages owed when enforcement is a challenge all of its own especially when the losing side refuses to pay or hide assets offshore.

This is particularly true in the context of the current economic climate, with companies even less eager to spend working capital and time enforcing a judgment or an award.

To better understand how in-house lawyers are thinking about and managing enforcement, Burford commissioned independent research conducted by GLG with 350 GCs, head of litigation and senior in-house lawyers in the US, European, Asia, Australia and the Middle East.

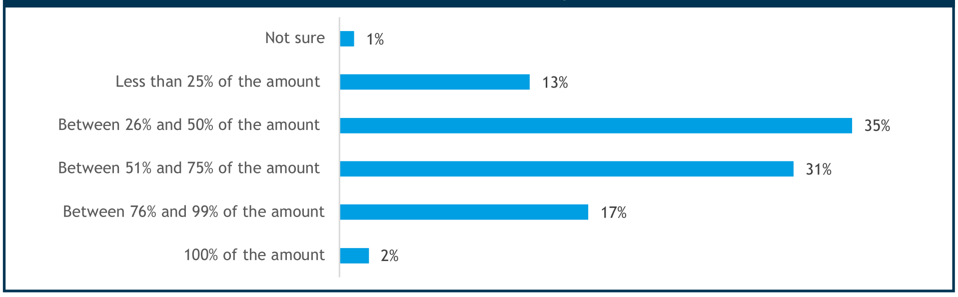
Key findings from the 2023 Commercial dispute & enforcement economics survey are highlighted below.

Businesses rarely recover the full value of their judgments and awards

Vanishingly few senior in-house lawyers (2%) say that they recovered 100% of the value of their judgments and awards over the last five years. Instead, the vast majority (67%) say that they instead recover somewhere between 25% and 75% of the total value of their outstanding judgments and awards. Clearly, businesses are leaving money on the table; innovative solutions are needed to help companies do better at recovering more of their pending judgments and awards.

Not surprisingly, the data show that among the reasons so few businesses recover the full value of their judgments and awards is that judgment debtors delay payment or simply don't pay. Indeed, a clear majority (61%) of in-house lawyers say that their opponents voluntarily pay their outstanding judgments and awards less than half of the time. Half (50%) say the losing side only pays in full after some delay. Four in ten (40%) say the losing side mostly negotiates a discount on the full value of awards and judgments to speed up recovery. The consequence of slow-to-pay or fail-to-pay judgment debtors is many millions of dollars in lost value to businesses at a time when legal teams need to minimise costs and maximise recoveries.

What was the average amount recovered by your organization of your judgments and awards over the last 5 years?



Enforceability plays an important role in litigation and arbitration decision-making

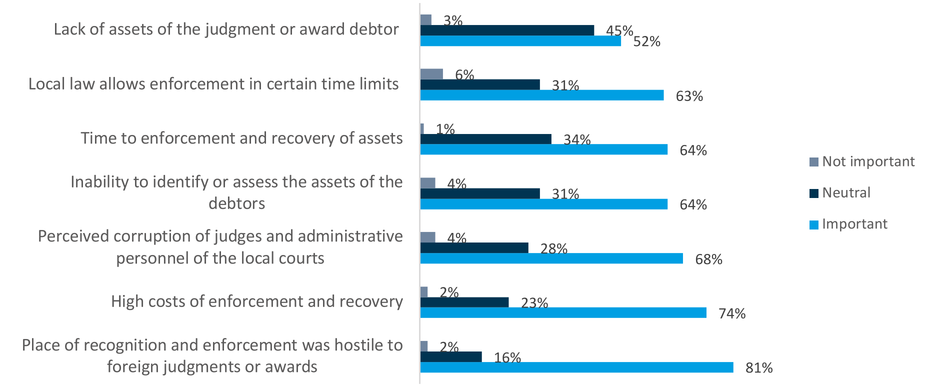
Seventy seven percent of senior in-house lawyers view the ease and likelihood of recoverability as important factors in whether to pursue litigation or arbitration claims. Top named reasons for not pursuing judgments and awards were that the place of recognition was hostile to foreign judgments or awards (81%) and the high costs associated with enforcement and recovery (74%). Interestingly, lack of judgment debtor assets was considered the least important hurdle to enforcement. This suggests that it is not that opponents do not have assets to enforce against, it is a lack of time and expertise to enforce awards effectively that puts off judgment creditors. Therefore, companies need specialised help finding and taking assets, including financing that recovery effort.

This problem is exacerbated in more complex jurisdictions. More than two thirds of senior in-house lawyers (68%) say they have had judgments and awards that could not be satisfied primarily because money was hidden offshore.

Unsurprisingly, Russia and China were named as the two most difficult regions in which to enforce, with 69% and 54% respectively saying there were significant barriers to recovery.

Outside expertise is needed when dealing with hostile or opaque jurisdictions. Often the key to successful collection is not necessarily enforcing against a single bank account or asset but developing a multi-prong strategy that frequently involves investigation and proceedings in multiple jurisdictions to gain leverage and incentivise the debtor to settle. Asset recovery specialists understand how recalcitrant debtors think, how they hide assets and how to bring them to the table. When dealing with debtors in places like Russia and China, we find solutions outside of those jurisdictions, restraining assets in international locations.

How important are the following hurdles to enforcement as to why your organization decides not to pursue a judgment or award?



In-house lawyers recognise the inherent benefits of funded enforcement

Given the substantial and often unanticipated cost of recovery of judgments and awards, not to mention collection risk, asset recovery finance is becoming an increasingly popular tool for businesses and their law firms. The legal finance provider will cover the costs of recovery, including legal and other costs, in return for a portion of the damages recovered. Because the funding is non-recourse, the judgment holder's risk exposure is immediately minimised.

Asset recovery financing can take two main forms:

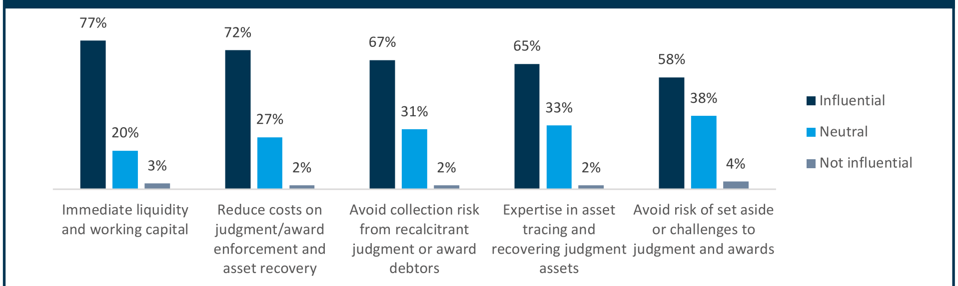
(1) The funder immediately monetises the asset by purchasing all or a portion of the judgment and takes full responsibility for enforcing it

(2) The funder provides asset recovery services on a full or partial-contingency basis

The research shows that in-house lawyers see the benefit of asset recovery financing for their portfolio of unenforced judgments and awards. A significant majority (57%) of senior in-house lawyers say they are likely to use financed enforcement and recovery services for a pending judgment or award while nearly half (47%) say they are likely to assign or monetise their awards on the secondary market to another party in return for immediate liquidity. The most influential benefit of financed enforcement cited by in-house lawyers is the possibility of access to immediate liquidity and working capital (77%) closely followed by cost reduction (72%).

A hard-won judgment should not go unpaid simply because the defendant debtor refuses to pay, and the judgment holder runs out of steam. The combination of asset recovery expertise and financing provides a practical approach to solving the enforcement problem.

How influential are the following benefits of funded judgment enforcement and asset recovery for your organization?



REFORMS TO THE ARBITRATION ACT 1996

CAREFUL DRAFTING OF ARBITRATION AGREEMENTS REMAINS IMPORTANT

Authored by: Jennifer Haywood (Barrister) - Serle Court

On 6 September 2023, the Law Commission published its final report on reforms to the Arbitration Act 1996 ("1996 Act"), together with a draft bill. The changes will be the subject of in-depth discussion at the rescheduled TL4 arbitration conference but, in the meantime, here are some of the headline points in the report.

Applicable law

Perhaps the most significant proposed change is the introduction of a new statutory rule (to be section 6A in the amended 1996 Act) providing that, in default of express agreement to the contrary, the law of the seat will apply to the arbitration agreement. The provision would provide some clarity as to the applicable law, reduce the scope for time consuming disputes about the applicable law, and make it more likely that English law, which is supportive of arbitration, governs arbitrations seated in England. It would remain open to parties to agree an alternative applicable law if they wished to do so.

However, the complexity arising from the decision in Enka v Chubb [2020] UKSC 38 that the law applicable to an arbitration agreement is the law chosen by the parties (expressly or impliedly) or, in the absence of a choice, the system of law with which the arbitration agreement is most closely connected, will persist for some time. As currently drafted, section 6A(3) provides that section 6A shall not apply to an arbitration agreement that predates the coming into force of the amendments.

Thus, parties with existing arbitration agreements or those entering into arbitration agreements before the changes are enacted and who wish to avoid a dispute about the law applicable to the agreement should specify their choice of law.

Streamlining the arbitration process

Arbitrations have become increasingly lengthy and expensive and two other proposed changes are intended to help streamline the process.

The first is the introduction of an express power of summary disposal. The Law Commission proposes that, unless the parties agree otherwise, an arbitral tribunal may, on the application of a party, issue an award on a summary basis, if the tribunal considers that a party has no real prospect on the claim/defence or on a particular issue. The "no real prospect of success" test will be familiar to litigators. There is a general consensus that the power is not necessary because section 34 of the 1996 Act provides that it is for the tribunal to decide all procedural and evidential matters, and s33(1)(b) imposes a positive duty on the tribunal to adopt procedures suitable to the circumstances of the case. However, an express power is desirable because of the due process paranoia about enforcement being challenged on grounds of serious irregularity.

It will remain to be seen whether the power does resolve due process paranoia, and it may well be worthwhile parties expressly affirming in the arbitration agreement the breadth of powers available to the tribunal or selecting institutional rules that stipulate that a claim/ defence or issue may be disposed of summarily. Challenging an award should be more difficult if parties have expressly agreed to the process.

The second is a move to rein in jurisdictional challenges under s67 of the Act. The Law Commission proposes that legislation confer the power to make rules of court to impose certain limits to an application to court following a determination on jurisdiction by the tribunal, (i) that the court will not entertain any new grounds of objection or new evidence, unless it could not have been put before the tribunal even with reasonable diligence, and (ii) that evidence will not be reheard, save in the interests of justice. Given that the judges of the Business and Property Courts responded to the consultation to the effect that it would be unfair to preclude a full rehearing if the applicant had not in fact consented to a tribunal's jurisdiction, and the court's case management powers are already sufficient to tackle the evidential issue, it will be interesting to see how much practical difference the proposed amendment makes, but the changes in the Act may at least emphasise to parties that they should not rely on being able to have a second bite at the cherry on a jurisdictional challenge and bring in new arguments and evidence.

The efficient resolution of disputes also underlies section 69 of the 1996 Act, which currently allows parties to agree that an appeal on a point of law should be unavailable, requires either the agreement of the parties or the permission of the court for an appeal and sets a high threshold for an appeal – the decision of the tribunal must be obviously wrong or be open to doubt on a question of general public importance. Some have expressed concern that section 69 hinders the development of the common law, but the Law Commission has concluded that the current arrangement strikes the right balance between the development of the common law on the one hand and the finality of arbitral awards and the efficient dispute resolution on the other.

Missed opportunities?

As a matter of common law, English arbitrations are, subject to exceptions, confidential. The Law Commission consulted on whether confidentiality should be codified but concluded that it would be better to leave it to the courts to develop the current position, rather than attempt to codify the law. The Law Commission took the view that any statutory rules would not be sufficiently comprehensive, nuanced or future proof. It is not wholly satisfactory that the 1996 Act does not flag the principle of confidentiality in arbitration to its users, many of whom might be based abroad, and that it leaves them to work out the nuances of the English common law.

However, if confidentiality is important to a party, the safest way for them to proceed is to incorporate a comprehensive confidentiality clause into their arbitration agreement.

The Law Commission also concluded, after consultation, against a restriction on the ability of parties to discriminate in the appointment of an arbitrator on the grounds of protected characteristics. Although a prohibition on discrimination might be desirable from a policy point of view, the report noted the challenges of legislating in this area to make an effective difference (although there is a statutory prohibition against discriminating in the selection of a barrister) and observed that professional codes of conduct prohibit discrimination on the grounds of protected characteristics in any event.

Conclusion

The Law Commission has, through its consultation process, achieved a high level of consensus about amending the 1996 Act so as to improve arbitration efficiency and help maintain London's appeal as a centre for international arbitration. It is to be hoped that the government will make time available for the draft Bill to be enacted in its current or in a form that applies the applicable law provisions to arbitrations commencing after enactment. However, the proposed amendments will only serve to reinforce the need for careful consideration of the terms of arbitration agreements and/or selection of institutional rules.

A BLUEPRINT TO SETTLEMENT

SETTING THE STANDARDS AND PLOTTING A PATH ACROSS THE ENTIRE DELIVERY OF LITIGATION CASES

Authored by: Claire Van der Zant (Director of Strategic Partnerships) - Shieldpay

On an Indian Summer's morning in mid-October, global experts gathered in London for ThoughtLeaders4 Dispute's 3rd Annual Forum for Group Litigation and Class Actions. I was honoured to join the panellists to share Shieldpay's experience and perspectives, shining a light on what good looks like post trial as we inch ever closer to the first settlements from the Competition Appeal Tribunal (CAT).

With new rulings on litigation funding agreements[1], and an evolving position on the role of the CAT as gatekeeper at certification and case management stages[2], many panellists touched on and debated these topics.

Understandably, everyone was focused on how to overcome the latest hurdles to keep cases moving forward, and a common theme appeared on the need for a Blueprint to Trial. Whilst it's hard to think beyond the current delays, unless we start to think beyond trial now, we run the risk of under-delivering on the very thing that this is all about - payments to claimants.

My proposal, therefore, is that we consider not just a Blueprint to Trial, but a Blueprint to Settlement, where we give time and focus to supporting effective and efficient payments to claimants.

A Blueprint to Settlement

Coming back to the purpose of Collective Redress, in all the different forms that it can take, it's a mechanism to provide justice. It's about righting the wrongs for millions of people who otherwise might not have the resources to do so on their own.

If we align on the objective of delivering compensation, we then need to focus on how. What considerations do we need to make, what are some of the challenges to overcome, and what defines best practice? What is the Blueprint to Settlement?

1 There is no single inflection point between settlement and payout

Perhaps the biggest myth to bust in writing the Blueprint to Settlement is that there is no single inflection point where litigation ends and the process of settling begins.

It's helpful to start discussing this as early as discussions on quantum, for the following reasons:

(1) The value of the payout can often dictate the most appropriate payment method, but there are different costs, requirements and processes associated with every payment method, that should be factored into quantum modelling

1 "A ruling from the Supreme Court on PACCAR that litigation funding agreements ("LFAs") which entitle funders to payment based on the amount of damages recovered are Damages-Based Agreements ("DBAs"). Consequently, such LFAs are unenforceable unless they comply with the relevant regulatory regime for DBAs – and cannot be used at all to fund opt-out collective proceedings before the CAT. While the LFAs at issue in PACCAR were entered into to support collective proceedings before the CAT, the decision stands to affect all LFAs entitling funders to payment based on the level of damages recovered." https://www.linklaters.com/en/insights/blogs/linkingcollectiveredress/2023/july/paccar-and-litigation-funding

2 https://www.linklaters.com/en-us/insights/blogs/linkingcollectiveredress/2023/june/an-evolution-of-the-cats-gatekeeper-function

(2) The location of claimants can also impact the payment method, where different markets have very different financial systems and preferences, which may not be apparent without engaging with payment experts

(3) Who pays the settlement fee and how will billing work are also critical questions to address at this stage

(4) Consideration for cross-border requirements, as there are likely to be additional costs and processes to include in the modelling

(5) Finally, the value of the payment[3] and associated payment methods will dictate due diligence requirements, prior to a payment, of which need to be factored into the claimant journey

The details and structure of a case can shift over time, so we must come back to the table regularly to iterate the payout plan and process, which leads me nicely on to the next point.

2 Collaborate early, Collaborate Often, Collaborate Continuously

Keeping key partners abreast of key details and changing requirements (and timelines!) means that plans can be more easily adjusted ahead of a settlement. Having regular touchpoints is what makes the difference between a fast, smooth payout process, and a challenging payout process that can overwhelm customer support functions and flood review sites with complaints.

It's also important to impress that settlements take time. The need for continuous collaboration once a payout has been initiated is key, as a typical project might take 6 – 12 months to complete.

Done well, the vast majority of claimants will receive their money in the first month of settlement. There will naturally be a tail end to achieving full[4] payout, as we send reminders, address changes of personal information, work through exceptions, and deal with concerns from claimants.

We have the power to truly delight claimants. Whether it's a free coffee or thousands of pounds, let's use this as an opportunity to make claimants feel like they've been fully compensated and make this a truly meaningful moment. Which again leads me on nicely to my final point.

3 Beyond Book Building to Brand Building

Compensation from litigation is relatively new to the UK and Europe. Add to this the growing threat of financial scams, and we have a challenge of trust to overcome; trust that a claim is real, trusting previously unknown law firms, trusting delivery partners are legitimate.

What we need to do is brand build across the entire litigation ecosystem. Chris Ford of Blackhawk Network talked about this last week, and it deserves airtime. How do we move from the very academic and complex language of litigation into something that is accessible to consumers? And have we done ourselves a disservice in labelling cases 'something-gate' or 'something-claim'?

Consumers need to know this is real, legitimate, and safe. Review sites are important, but it's bigger than that. We need the financial and regulatory infrastructure of the UK and Europe to understand this ecosystem and be able to uphold and support us if we're going to give confidence to compensation. To quote Chris, it's all about trust. And we've got work to do.

Practical Next Steps

We need to work together to get cases moving through to trial and beyond, and lean in to drive awareness and education with consumers. How we bridge these gaps is something that a Blueprint to Settlement should address. If we get this right, we can create an ecosystem that is acknowledged and celebrated for delivering justice to those who need it most.

3 Jurisdictions, source of funds, nature of transaction, preferred payment process will also influence the level of verification required, but in respect of the decisions being made on quantum, the value of the payment is why engaging at this stage is relevant to the payment.

4 For a case that has a single settlement, a defined and ready claimant cohort, and the intention to fully settle, it's sensible to consider a 6-month payout process. If your case has multiple defendants, an evolving claimant cohort or a requirement to settle in batches, this will add time and complexity to your payout, and could be up to or indeed more than 12 months to settle. It's highly unlikely that cases will ever fully settle, but the intention is always to achieve the highest completion possible. Shieldpay has achieved 95 - 98% completion of payouts for cases to date.

CLASS ACTIONS AND LITIGATION FUNDING

Authored by: Giles Kenningham (Founder) and Tom Anelay (Director) - Trafalgar Strategy

Class action claims have been growing in number and volume for a number of years. Thompson Reuters research found that the value of claims rose six-fold between 2021 and 2022, reaching over £26 billion. Advocates for class action claims have celebrated this rise and pointed to the importance of consumer protection, access to justice and corporate accountability. However, opposition to class actions is also growing with many suggesting that the growth of the regime needs to be reined in. For critics, their usual objection is the role of litigation funding.

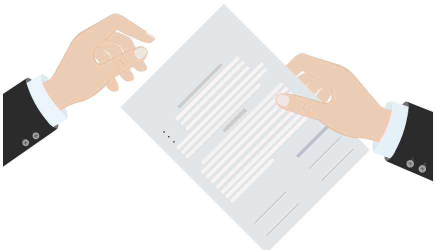
It was in this context that the recent Supreme Court case of PACCAR Inc & Ors v Competition Appeal Tribunal & Ors. was heard. At its heart, was the question of whether a series of Litigation Funding Agreements were providing “claims management services” as specified under the Compensation Act 2006. The court’s decision that the funding agreements in question fell under that definition meant that the funders would have to comply with the Damages Based Agreement Regulations 2013. This was particularly important as Damage Based Agreements cannot be used in opt-out competition class action claims.

The full impact of the Supreme Court’s decision in PACCAR Inc & Ors v Competition Appeal Tribunal & Ors. is yet to be seen. However, it seems clear that many litigation funding agreements in other cases will now be unenforceable. The result is a significant setback to the growth of class action claims in the UK.

In the short term, there is no doubt funders will work hard to ensure that they can recoup any investments already made and to restructure investments going forward to avoid falling within the definition of a Damage Based Agreement. In the longer term, the UK’s claimant class action sector will need to decide whether to seek clarity from parliament on the role of litigation funding in class action claims.

If litigation funders and claimant law firms choose to seek clarity on what constitutes acceptable funding arrangements, then they will have a number of powerful political arguments to rely upon. First and foremost is the ability of a class action lawsuit to provide consumer protection and cheap access to justice for those who would otherwise be unable to afford to bring a claim. Polling released earlier this year shows 60 per cent of Britons would be willing to take part in a class action claim whilst 55 per cent would bring a claim against their employer. Politically, it is hard for any party to support Goliath over David.

Claims against Google, Apple and Sony are likely to further assist those arguing for a permanent role for litigation funding. Politicians themselves are grappling with how best to regulate the technology sector and many will view the expected growth in class action claims surrounding issues like data protection as a useful fetter on large tech companies' behaviour. Similarly, there is a consensus amongst the legal community that the number of class action claims related to issues like ESG, cryptocurrencies and product liability are all likely to increase. It should be relatively simple for proponents of a regulated litigation funding sector to advance arguments to facilitate such claims.



Litigation funders and claimant law firms should also be able to draw upon a considerable amount of third-party support for their position. Several unions are actively supportive of current claims, notably the supermarket and high street equal pay claims. Some parliamentary support is also evident. For example, in 2017 the Business Select Committee, which was at the time chaired by Rachel Reeves (Labour's current Shadow Chancellor) reported on the gig economy and called for the enabling of class actions by groups of workers to establish employment status in claims so that companies would find it harder to suggest rulings only apply to individuals.

Despite these arguments, persuading politicians of the need to introduce a regulatory scheme for litigation funding will not be simple. Fair Civil Justice, a lobbying group backed by the Institute for Legal Reform which is itself linked to the US Chamber of Commerce, was launched earlier this year to promote regulation of the sector. They point to "compensation [being] swallowed up by funder's fees", "crowded courts" and warn of a "predatory claims culture". The group, which is led by Seema Kennedy, the former Conservative MP, has been holding a series of events and publishing research.

Although Fair Civil Justice and their allies are likely to struggle to gain widespread sympathy for their arguments that the growth of class actions poses a threat to business and undermines Britain's attractiveness, they will be able to continue to point to instances of perceived unfairness to bolster their wider arguments.

For example, following the UK's Post Office Horizon scandal, postmasters received just 20 per cent of a £58 million settlement. Public outcry prompted the government to create an additional taxpayer-funded compensation scheme.

Similarly, it is well reported that there is suspicion of much of the legal community amongst certain sections of the press and particularly Conservative MPs. Regardless of the accuracy of depictions of claimant law firms as being full of "lefty lawyers", denials of ambulance chasing will be done no favors by the preponderance of adverts inviting potential claimants to join claims which are plastered across buses, trains and the airwaves.

As proponents and detractors of litigation funding continue to come to terms with the Supreme Court's decision in PACCAR Inc & Ors v Competition Appeal Tribunal & Ors., these arguments and others will be rehearsed in the media and in the corridors of parliament. For those who support a role for litigation funders, the most important point to evidence will be that their returns are reasonable and proportionate. If this can be achieved, there are few reasons to doubt that the availability of redress mechanisms, high numbers of potential claimants, and the ease of engaging claimants will continue to make the UK a jurisdiction of choice for class action claims.

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COMMERCIAL LITIGATION IN IRELAND

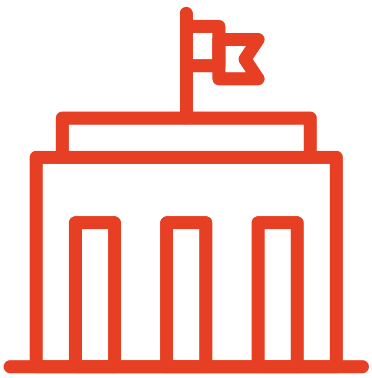
Authored by: Larry Fenelon (Partner) - Ogier

This Article explores the landscape of commercial litigation in Ireland, some of the key features by comparison to the system in England and emerging trends that may shape the future of commercial litigation in Ireland.

Legal and Litigation System

Ireland is a common law jurisdiction and in terms of litigation, the system is a hierarchical one comprised of the District Court, Circuit Court, High Court, Court of Appeal and the Supreme Court.

The High Court has unlimited monetary jurisdiction and the High Court's Commercial Division (the Commercial Court) is the primary forum for substantial commercial disputes, involving claims worth at least one million euros.



The Commercial Court

Since 2004, proceedings initiated in the High Court can apply to transfer proceedings to the Commercial Court division of the High Court where certain criteria is met.

Here are some key benefits of the Commercial Court:

1. Expertise: the judges presiding in the Commercial Court have significant expertise dealing with complex commercial disputes. This ensures that proceedings are handled by those who most understand the intricacies involved in commercial dispute resolution;
2. Efficiency: operating under strict procedures, timelines for the resolution of disputes are reduced significantly often with an expedited hearing date (on average 9 – 15 months from start to finish);
3. Case Management: case management is most prevalent in the Commercial Court where the

Judge will drive the case forward rigorously (for example, through a pre-trial timetable or by identifying specific issues of law or fact to be determined). This helps reduce time and costs involved in litigation; and

4. Alternative Dispute Resolution (ADR): recent trends have seen the Commercial Court encouraging the use of mediation as the Court has the ability to adjourn proceedings for the parties to attempt resolution through a form of ADR.

Other Key Features of the Irish Litigation Landscape

Adversarial

Civil litigation in Ireland is adversarial in nature and predominantly oral. Though Ireland has its own civil procedure rules, those in the commercial court are similar to the Rules of the Supreme Court in England (RSC) as existed prior to the CPR coming into force. Most proceedings are started by summons, with substantive disputes initiated by plenary summons followed by exchange of pleadings and trial on evidence, though petitions are used for bankruptcy proceedings or those requesting winding up of companies. Unlike England, there are no pre-action protocols.

Limitation Periods

Limitation periods are established by a number of statutes, and many are akin to those in England (for example, six years for simple contract and torts generally).

Payments into Court/offers to settle

In a similar vein to England, under the Irish rules, lodgments are designed to put a plaintiff at risk as to costs if awarded less than an unaccepted lodgment. Particular defendants may be permitted to make tender offers without an obligation to pay into court, which would be treated the same way.

Security for Costs

It is possible to obtain an order for security for costs, though this happens less often than in England and is always at the discretion of the court.

ADR

Contractual provisions setting out detailed mechanisms for dispute resolution requiring at least some form of ADR to be exhausted in the first instance before full litigation are becoming more common place in Ireland. As a result, mirroring other jurisdictions, the use of ADR procedures has increased significantly in commercial cases, even though it only applies where the parties agree to it. The preferred method of ADR is largely sector dependent. For example, insurance and real estate disputes are frequently dealt with by arbitration.

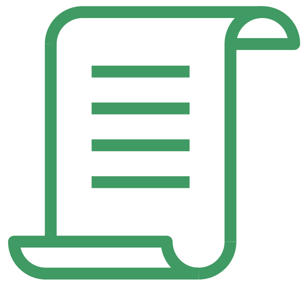
Mediation in particular has seen a big increase in Ireland in recent times particularly in commercial disputes. Irish solicitors are obliged to advise their clients to consider mediation. The Court can take into account refusal to mediate when deciding the issue of costs.

Evidence/Expert Evidence

The general rule is that evidence needs to be given orally at trial. The use of expert evidence is similar to the process in England, though under the Rules, any intended use of expert evidence must be flagged in the pleadings. A meeting of the experts has also been introduced along with a requirement that they produce a joint report setting out where they agree and disagree.

Discovery

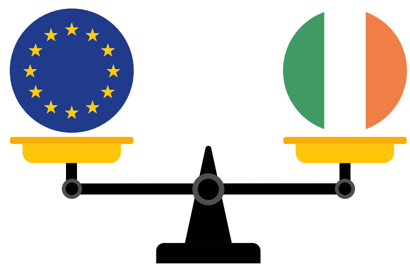
Discovery is a central part of litigation in Ireland but unlike England, discovery must be explicitly sought. Any party seeking discovery is required to provide descriptions of the categories of documents sought and give reasons why each category is required. If discovery is not given freely, it will usually be ordered by the Court, which would require the filing of an affidavit. We have seen the Irish Courts increasingly embrace technology and one example of this is the increasing receptiveness for using technology assisted review in the discovery process. There are no provisions for pre-action discovery in Ireland however, Norwich Pharma relief has been given on a number of recent occasions (albeit in a more restrictive sense than England).



Enforcement

With enforcement of local judgments, again there are similarities with England and a number of means of enforcement, including registration of a judgment mortgage, instalment payment orders and execution against goods.

As regards the enforcement of foreign judgments, judgments given in EU member states are enforceable in Ireland without requirement for an Irish court order under the Brussels Recast Regulation. Where judgments are subject to the Lugano Convention and/or the Hague Convention on Choice of Court Agreements, it would be necessary to make an application. In all other cases, Irish common law rules apply to an enforcement application.



Remedies

The core remedies available mirror those in England.

Costs/Litigation Funding

The usual rule is that the unsuccessful party pays the costs of the successful party, however this usually only extends to the reasonable costs incurred in dealing with the claim. Any shortfall in recovery of costs would be paid by the client to his solicitor. In more complex cases, costs will usually be apportioned on the basis of relative success on each issue. With very limited exceptions, litigation funding is currently not permitted in Ireland.

Appeals

There are strict time limits to be adhered to where looking to appeal a decision (28 days from perfection of the Court Order). The establishment of the Court of Appeal in Ireland has seen reduced timelines for appeals from the wider High Court (on average 6 months from Notice of Appeal to hearing). In limited circumstances it is also possible to appeal to the Supreme Court, usually where the case involves a matter of public importance, a novel/developing area of law, or it is in the interests of justice to do so.

Class Actions

It is possible to bring representative actions or test cases, even though there are no legislative provisions in respect of class actions. Typically test cases are brought instead.

Emerging Trends and Predictions for the Future

In recent years there has been a huge increase in complex commercial litigation in Ireland. In particular in the financial services industry reflective of the business and transaction operations that take place in Ireland.

Looking into the future, here are some predictions on how the Irish commercial litigation space may develop further in the coming years:

1. Funding for International arbitration disputes will be permitted in a matter of months which will make a compelling case for litigation funding in litigation in Ireland;
2. International corporate restructuring applications in the Irish Courts will become increasingly popular made to avail of the 'Examinership' restructuring process where a centre of main interest (COMI) can be established;
3. We can expect more civil procedure protocols to mandate lawyers to meet early to explore ADR before significant litigation costs are incurred;
4. There will be an increase in IP and technology related disputes where Irish law is increasingly the choice of law clause in contracts for US tech corporates with EMEA headquarters in Ireland. The Commercial Court's specialist sub-list for such disputes with specialist judges will undoubtedly increase confidence and efficiencies in such disputes;
5. Electronic filing of pleadings and affidavits will become the norm after a number of successful pilot projects by the Courts Service of Ireland.

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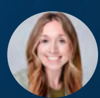

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MORE ESG CLASS ACTIONS ARE COMING

ECONOMIC ANALYSIS CAN HELP

Authored by: Neal Brody (Managing Director) and Robin Cantor (Managing Director) - BRG

As pressure to make ESG disclosures rises, business leaders open themselves to significant legal risk. Here's what they should know.

Are environmental, social, and governance (ESG) disclosures corporate America's latest double-edged sword?

Even supportive business leaders face mounting pressure—from regulators, investors, shareholders, and consumers—to be proactive and transparent about ESG issues. Yet doing so can make them vulnerable to legal and reputational risks.

Proof positive, ESG-related class actions are now being filed regularly across virtually all business sectors. According to a recent survey of general counsel and in-house litigators, nearly one-third saw their ESG dispute exposure grow in 2022; another 24 percent expect it to deepen in the year ahead.

Most cases revolve around misleading claims or statements about a company's ESG-related actions, from advertisements saying a product is "100 percent earth-friendly" to aspirational disclosures about diversity efforts, or—in the case of securities fraud—material misstatements about ESG efforts intended to create profit or value. The Securities and Exchange Commission's 2021 launch of a Climate and ESG Task Force to proactively identify ESG-related misconduct likely will ratchet up the pressure further.

Comprehensive economic analyses will be key to proving (or disproving) class-action claims and tangible harms related to ESG disclosures. Here's what executives and general counsel should know.

ESG Class Actions: Track Record, Types, Themes

Though ESG-related class actions have increased across the US, success so far has been mixed.

Misrepresentation and breach-of-warranty claims often have been dismissed as nonactionable "opinions" or "aspirational statements." Meanwhile, consumer protection laws leveraged to address greenwashing claims have fared somewhat better, with many cases resulting in an entity being restricted from certain actions.

Securities fraud suits also have been hit or miss; the challenge, as discussed below, has been for plaintiffs to demonstrate tangible and/or quantifiable damages or harm. However, as these types of class actions mature, plaintiffs' cases will strengthen. For example, an assessment of stock price changes can be a convincing indicator of overstated value and can provide a basis for potential damages to investors. The more data investors have on these indicators over time, the stronger their cases could be.

To prepare for ESG class actions, organizations should keep in mind the following risk areas:

Environmental accidents and pollution control

Following voluntary disclosure of environmental safety and pollution mitigation activities, companies will face greater scrutiny for aligning public statements with actual events, both planned and accidental—and regular inconsistencies can lead to class-action litigation from investors and affected communities. This is especially true in the context of highly visible environmental incidents.

For instance, in 2016, a shareholder class-action suit was brought in US federal court against Vale SA following the 2015 Mariana mining dam accident in Brazil, alleging that the company repeatedly ignored warnings about safety violations while publicizing its commitment to health, safety, and the environment in disclosed sustainability reports. Investors sued under the antifraud provisions of relevant securities laws, and Vale settled the case for $25 million.

Greenwashing

Unquestionably, another increasing area of class-action litigation concerns claims associated with greenwashing, which generally involves challenges to a company's ESG disclosures and/or when a business misrepresents that its practices or products are socially beneficial or responsibly manufactured.

On the consumer side, a growing number of greenwashing filings have involved allegations of fraud or negligent misrepresentation related to ESG practices of manufacturers and service providers.

In many cases, the claims are based on not so much the products themselves, but the failure of the manufacturer to adhere to its ESG representations.

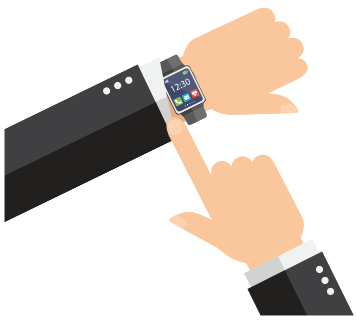
For instance, in the Vital Farms case, an egg producer that marketed itself as treating animals in an ethical, humane, and transparent manner was alleged to "allow in its chain of commerce practices that are inhumane, unethical, outrageous, and unconscionable."

Diversity, equity, and inclusion

Investors, activists, and employees have made it clear they want companies to start prioritizing not only their enterprise value and financial profits, but also their workers. Since the summer of 2020, shareholders have filed more than a dozen derivative actions accusing public companies of failing to follow through with diversity commitments in their proxy statements and other public disclosures.

Similarly, plaintiffs have filed securities fraud lawsuits following a drop in stock price and disclosures of claims alleging sexual harassment or gender discrimination. In the Signet Jewelers Limited matter, the plaintiffs alleged that the company allowed pervasive sexual harassment of female employees at all levels of the corporation, and that the defendant failed to disclose material and relevant information related to the investigation of these allegations. The plaintiffs also alleged that the disclosure of the allegations led to an 8.3 percent drop in the company's stock price.

While the court dismissed the allegations regarding sexual harassment (ruling that plaintiffs failed to show that the company's statements were false or misleading), the parties reached a settlement at mediation regarding all other allegations.



ESG Disclosures and Class-Action Suits: Economic Analysis Is Key

As previously noted, a key consideration for both sides in most ESG-related class-action suits is whether plaintiffs can demonstrate tangible damages or harm. Economic analyses can play a central role.

For instance, in the wake of a negative environmental event, ESG disclosures may contribute to media attention surrounding the event; however, in and of themselves these disclosures are not necessarily reliable measures of regional economic impacts and damages. Other factors contributing to or mitigating the economic losses caused by the accident for individual plaintiffs and the region need to be evaluated.

Realised impacts from environmental events can be alleviated by substitute resources and activities, as well as interregional connectivity. These factors can vary across economic sectors, geographies, and individual plaintiffs.

In virtually every case, economic analysis is necessary to determine common impact across class members and the feasibility of measuring the damages based on information common to said class.

At this early stage of ESG disclosures, the materiality of missed expectations also matters for certifying shareholder or stakeholder classes—particularly when it comes to consumer class actions related to greenwashing, where certification follows a more traditional process of examining the commonality of reliance and damages. Correspondingly, class plaintiffs have fared well in greenwashing cases where these elements are supported through accepted economic methodologies and analyses.

In these instances, it is critical to assess whether:

1. The alleged statements (assuming they are false) were relied on by the putative class. It has frequently been held that, absent evidence of a market-wide price premium for the misleading label, plaintiffs must show that all putative class members relied upon the specific misrepresentations at issue in deciding to purchase the product or service at hand.

   For example, where class representatives seek to establish common misrepresentations by basing their case on statements made in advertisements, plaintiffs will want to show that every class member not only was exposed to it, but also affirmatively relied on the misstatement in making their purchasing decision. Consumer surveys, focus-group interviews, and other forms of market research are often used—and misused—to accomplish this. Careful consideration should be given to both the economic and factual foundations of the alleged misstatements.

2. The class suffered a common detriment or compensable damages as result of its reliance. An additional challenge facing plaintiffs in class-action greenwashing cases involves the establishment of a price premium associated with the alleged false or misleading claims. For example, the Ninth Circuit upheld decertification in a recent case involving Dole Foods because the plaintiff "did not explain how this premium could be calculated with proof common to the class."

Conversely, in the Wesson Oil case, class certification was granted based in part on consideration of hedonic regression and conjoint analysis studies, which considered "twenty product attributes, including the brand of oil, the 'natural' claim at issue in this litigation, other product label claims, oil variety (e.g., canola, corn, blend, or vegetable), the size of the bottle of oil, promotional prices, and time period."

As suggested by the cases above, both plaintiffs and defendants should carefully consider what evidence can be gathered from their records or developed through survey evidence and expert testimony in bringing or defending greenwashing cases.

To Disclose or Not to Disclose?

For most organizations, the original greenwashing sin—articulated in a 1986 essay about how hotels' "save-a-towel" campaigns were driven by cost savings rather than the environment—is more relevant now than ever. In a variety of instances, organizations may seek credit—whether it's related to greenhouse gas emissions, labor practices, or investment activities—for virtuous reasons only to be shown that the primary drivers were far less noble. The major difference now is that companies, officers, directors, and executives are increasingly being held accountable.

ESG disclosures today are a balancing act: on the one hand, voluntary disclosures present a growing value to relevant stakeholders; on the other hand, the potential exposure for failing to meet expectations based on these disclosures—and the class-action suits that can follow—are also increasing. In both cases, sound economic assessment can be a powerful tool.

ASSESSING THE VALUE OF CLAIMS FOR BREACHES OF THE GDPR

A SHORT GUIDE FOR BUSINESSES

Authored by: Maria Peykova (Barrister) - 3PB

The rise of GDPR[1] compensation claims

In recent years courts have seen an increase in the number of claims for compensation under the GDPR. Claims are often brought against business entities such as banks or other institutions that store and handle personal data. A large number of these claims are issued by litigants in person, who are unable to properly assess the substance and value of their claim. In-house legal departments must be in a position to advise on the likely value of the claim (and thus track allocation and costs implications), evaluate and make settlement offers, inform funding decisions and overall strategy, as well as make the right call about whether (or when) to seek advice and/or representation from specialist counsel. However, businesses may find these decisions difficult or impossible to make where the actual likely value of the claim is difficult to ascertain.

Compensation: Article 82 GDPR

Article 82 of the GDPR provides data subjects with a right to compensation for material or non-material damage suffered as a result of a breach of the GDPR.[2] Whilst those who seek compensation for material damage will need to prove that they have suffered pecuniary loss, it now appears to be accepted that a Claimant who seeks compensation for non-material damage does not need to establish pecuniary loss, although there is at present limited guidance on what exactly amounts to 'non-material damage'. In Lloyd v Google [2021] UKSC 50 the Supreme Court reviewed the law relevant to compensation under the old data protection regime and concluded that the term 'damage' must involve financial loss or distress, and that compensation should not be recoverable for trivial damage.

In UI v Österreichische Post AG, Case C 300/21 (4th May 2023), the CJEU determined that Article 82 of the GDPR does not provide for compensation for mere infringement of an individual's data protection rights. Instead, a data subject must demonstrate that there has been an infringement, and the data subject has suffered damage (material or non-material) caused by the infringement. The Court rejected the view that to attract compensation, a non-material damage claim must reach a certain threshold of seriousness, and held that negative consequences caused by an infringement will not attract compensation unless such negative consequences amount to 'non-material damage'.

1 References to the GDPR are to the UK GDPR. The UK GDPR is the retained EU law version of the EU GDPR, which forms part of the law of England and Wales, Scotland, and Northern Ireland by virtue of s.3 of the European Union (Withdrawal) Act 2018, as amended by Schedule 1 to the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 (SI 2019/419). It is defined in section 3(10) of the Data Protection Act 2018 (DPA 2018), and supplemented by section 205(4). With effect from 1 January 2021, there are two legal texts to consider, where relevant: the UK GDPR as well as the DPA 2018.

2 This does not apply to the processing of data by individuals in the course of purely personal or household activity, the processing of data for law enforcement purposes, and intelligence services processing. The Data Protection Act 2018 provides for this.

Whilst CJEU case law is no longer binding, it seems likely that domestic courts will follow the same line of reasoning.[3] At the time of writing this article, there is no reported case law on a pure GDPR claim for compensation. However, guidance can be derived from reported authorities in which the claims consist of two or more causes of action, such as claims for misuse of private information and breaches of the GDRP.[4] Such claims yield higher awards in compensation, although the principles applied by the court when assessing quantum would be the same whether dealing with a pure GDPR claim, or a hybrid privacy claim.

It is now becoming clear that English courts are reluctant to encourage claims for relatively minor data protection breaches, although they have not introduced a threshold of seriousness. On the present state of the law, Claimants who seek compensation for non-material damage would need to establish that the breach has caused them distress. In assessing quantum, courts will refer to the Judicial College Guidelines;[5] a useful yardstick in gauging the likely level of an award will be to 'cross-reference' with personal injury awards for psychiatric and psychological injury, as per Warby J in TLT v Secretary of State for the Home Department [2016] EWHC 2217 (QB).

The following factors are likely to be of relevance in assessing where within the notional bracket an award is likely to fall:

01 The nature and content of the private information revealed. The more private and significant the information, the greater the effect on the subject will be (or will be likely to be);

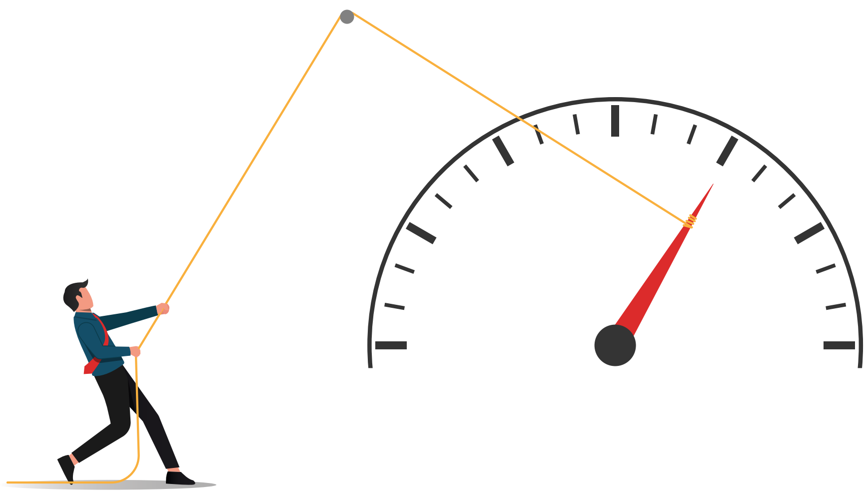
02 The scope of the publication/disclosure. The wider the publication, the greater the likely invasion and the greater the effect on the individual.

03 The presentation of the publication/disclosure. Sensationalist treatment might have a greater effect, and amount to a more serious invasion, than a more measured publication.

04 The likely individuals who will access or be perceived as likely to access such information.

05 The Court will take a sensible approach to whether or not there is or was likely to have been real interest in the disclosure.

Courts have awarded compensation for distress by reference to the above principles. For example, in Halliday v Creation Consumer Finance Ltd [2013] EWCA Civ 333, £750 was awarded for a data protection breach despite the lack of medical evidence. In ST (A Child) v L Primary School [2020] EWHC 1046 (QB), the court awarded damages of £1,500 for misuse of personal information in a case where there was "limited evidence of direct impact" on the Claimant. In ST reference was made to the decision of TLT referred to above, where awards of between £2,500 and £12,500 were made to asylum seekers whose details had been erroneously made public.



Practical advice for in-house legal departments

Pure data protection claims will usually be dealt with in the County Court. The value of such claims is unlikely to exceed the threshold for allocation to the fast track or multi-track. In the absence of unreasonable behaviour, Defendants cannot recover their costs on the small claims track, and this is something to bear in mind when advising Defendants on settlement options.

Claims associated with higher compensation will usually involve additional causes of action, such as a claim for misuse of private information or a breach of confidence claim, and are highly likely to be transferred to the High Court.

Advising defendant businesses on claims for breaches of the GDPR includes considering both reputational and cost implications. Seeking legal advice from specialist counsel early on is crucial, sometimes even more so where the claim is brought by a litigant in person. Often, litigants in person will present a claim as a pure GDPR claim, but the facts in the pleadings may point to additional causes of action (in tort, for example). In these circumstances, legal advice from specialist counsel should be sought as soon as possible on the best course of action.

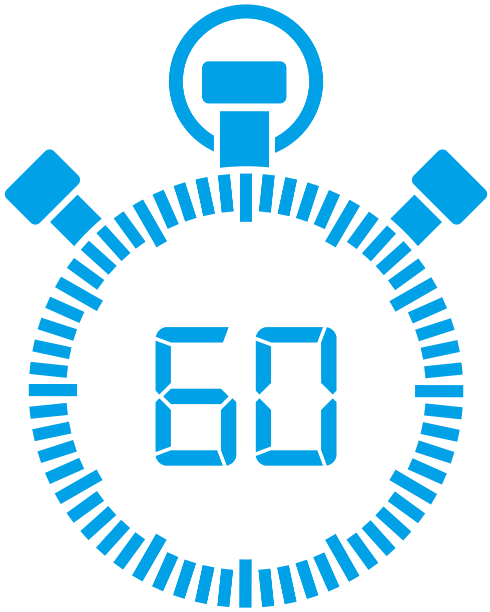
3 Lower value GDPR claims are already dealt with in the County Courts. See Emma Louise Johnson v Eastlight Community Homes Ltd [2021] EWHC 3069 (QB),Cleary v Marston (Holdings) Ltd [2021] EWHC 3809 (QB), and Stadler v Currys Group Ltd [2022] EWHC 160 (QB).

4 See Bekoe v Mayor and Burgesses of the London Borough of Islington [2023] EWHC 1668 (KB).

5 In Gulati v MGN Ltd [2015] EWCA Civ 1291 it was said that damages awards for misuse of private information should bear a "reasonable relationship" with awards in personal injury cases.

60-SECONDS WITH:

ANGELIKA HELLWEGER LEGAL DIRECTOR RAHMAN RAVELLI



Q **Imagine you no longer have to work. How would you spend your weekdays?**

A Dedicating more time to pro bono work, improving my Arabic language skills, signing up for an art course, travelling more often.

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

A One should have the passion of piecing together the often-complex facts of a case, analysing the conflicting position and coming up with a creative strategy.
Being able to navigate through different legal systems while also taking cultural differences into account.

Q **What motivates you most about your work?**

A The possibility to meet every day people from different walks of life and to work together with people from different cultures.

Q **What is one work related goal you would like to achieve in the next five years?**

A Achieving the best possible outcomes for my clients in their asset recovery cases by navigating them through various legal systems while also taking into account that many disputes are not always solved through courts, but also by negotiations.

Q **What has been the best piece of advice you have been given in your career?**

A When I started as young associate with first BDM activities I was quite insecure because there were no immediate results. My former boss back then told me: “the seeds you plant today, are your fruits many years down the line” and I believe that’s true. Every person you meet over the years, might one day turn into a client or you both will have interesting opportunities to work together, but one needs to give it time.

Q **What is the most significant trend in your practice today?**

A Emerging threats through the use of AI and impact of AI on the criminal proceedings.
Impact of ESG on disputes
Asset recovery while navigating through the various, every day changing sanctions regimes.

Q **Who has been your biggest role model in the industry?**

A There is more than one person. It were in particular those senior lawyers who I worked with in my associate days who genuinely valued and appreciated (and also voiced that loudly in front of everyone) the individual contribution of every team member and not only of those in the senior “client facing” roles.

Q **What is one important skill that you think everyone should have?**

A In my view there are a few skills needed. However, the skill to listen in order to understand, the skill to lead with kindness and curiosity are in my view very crucial ones.

Q **What cause are you passionate about?**

A
- Access to education for those coming from diverse backgrounds.
- Assisting victims of sexual violence in a war crime context.

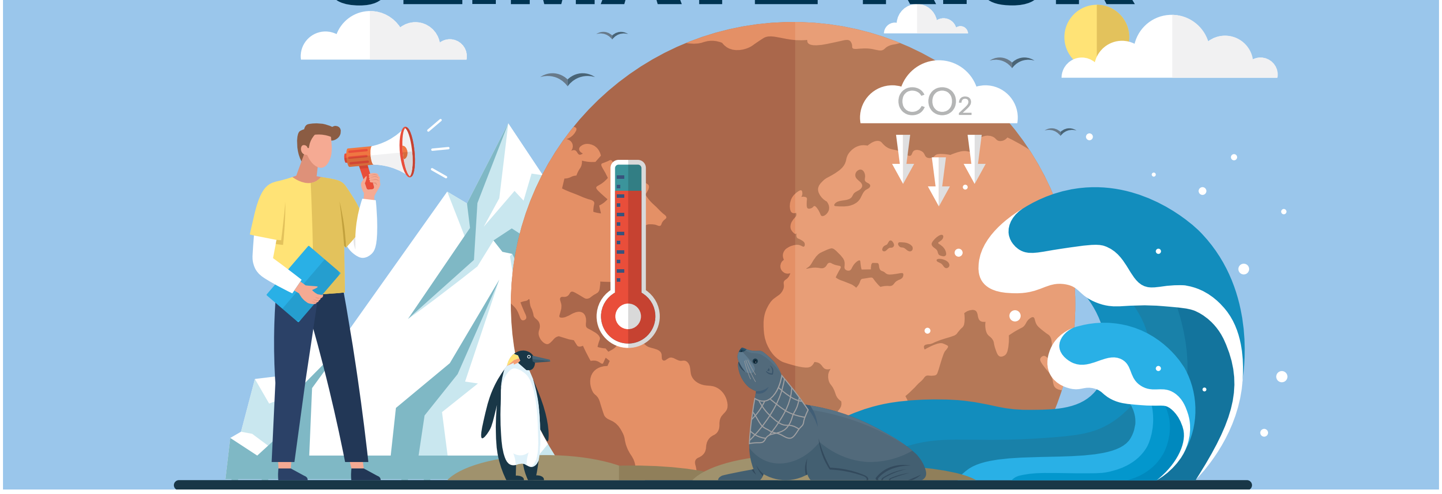
Q **Where has been your favorite holiday destination and why?**

A Lebanon. The unbelievable and diverse beauty of the country from the mountains to the sea, the amazing cuisine you will find in every place and the friendliness, kindness, steadfastness and hospitality of its people.

Q **Dead or alive, which famous person would you most like to have dinner with, and why?**

A Ms Malala Yousafzai.
Because she did not let outer circumstances stop from pursuing her own education and her dedication and advocacy that every child and in particular that every girl gets access to education.

ESG LITIGATION AND CLIMATE RISK



Authored by: Rick Brown (Partner) and Neil Chauhan (Associate) - HFW

COP 28 will reveal that participating governments do not yet have the levels of ambition needed to achieve the goals set out in the 2015 Paris Agreement (by which member countries agreed to limit the increase in global average temperatures to "well below" 2°C above the pre-industrial average, and ideally to 1.5°C). Accordingly, and in these circumstances, it is highly likely that the private sector will be called on to do better. And, to date, many private corporations have agreed, either voluntarily or otherwise, to make various climate-related pledges, including the pledge to achieve net-zero carbon emissions by 2050. However, as corporations make greater voluntary commitments, the risk of so-called "ESG litigation" increases. In this article, we therefore consider the impact of ESG litigation (with a focus on the Environment) and how corporations might seek to reduce the risk of climate-related claims.

The "E" in ESG Litigation

ESG litigation and, more particularly, climate change litigation, is still in its infancy. However, it is certainly gathering pace and has momentum. Companies, and directors, should therefore be aware of the risks they face and how they can reduce these risks. That is particularly so given that regulations in the UK and elsewhere are only likely to increase, widening the scope for potential breaches of those regulations. Furthermore, an increase in the availability of litigation funding for ESG claims and class actions is making it easier for claimants to bring such claims. Should this trend continue, this will likely lead to an increase in ESG litigation in the coming years.

The recent case of ClientEarth v Shell[1] is a good example of what we can expect. ClientEarth, an environmental law charity and a minority shareholder of Shell, brought a claim against the company's directors for breach of their duties under the UK Companies Act 2006. They alleged that the directors had failed to set appropriate targets or adopt a strategy sufficient to meet the company's goal of achieving net zero by 2050. Although the claim was rejected by the English court, the case is illustrative of the type of actions which companies and directors may face in the future.

In a less favourable 2021 decision for Shell, the Dutch courts held that Shell was under an obligation to cut its emissions and that the company's current climate policies were insufficient to achieve that result. The court ordered Shell to cut their global emissions by 45% by 2030.[2] Shell has appealed.

The risk from shareholder claims such as ClientEarth should not be underestimated, and the risk of ESG litigation for so-called 'hard to abate' sectors is also particularly acute. These are sectors for which clean alternatives are not technically or economically feasible. International shipping and aviation are prime among these, with Climate Action Tracker rating the policies and actions of these industries as "highly insufficient"[3] and "critically insufficient"[4] respectively.

1 [2023] EWHC 1897 (Ch)
2 Rechtbank Den Haag, C/09/571932, 26 May 2021
3 International Shipping | Climate Action Tracker
4 International Aviation | Climate Action Tracker

Advertisements can also be a source of risk for businesses

Regulators, particularly the UK's Advertising Standards Agency ("ASA"), are increasingly focusing on so called "greenwashing" in publicity materials.

Recent examples include the following:

1. Ryanair's advert branding itself as "Europe's … Lowest Emissions Airline". This was based on the airline's young fleet, its use of fuel-efficient engines and high load factors to substantiate the claim. However, the ASA held that the data used to back up the advert was not sufficiently transparent and robust and prohibited the advert from appearing again.[5]

2. HSBC's advert about its net zero financing goals. The advert promoted the bank's aim "to provide up to $1 trillion in financing and investment globally to help … [its] clients transition to net zero". The ASA ruled in 2021 that while this aim was contained in HSBC's annual report, that same report showed that it was financing emissions of at least 65 million tonnes of carbon dioxide a year, and likely more. The overall message of the advert was therefore misleading, as the bank "was continuing to significantly finance investments in businesses and industries that emitted notable levels of carbon dioxide".[6]

3. 4AIR LLC's paid-for Google Ad, in which it offered to provide "eco-friendly" and "sustainable" aviation advice and offered businesses the chance to "learn how to turn flying into a force for good." The ASA concluded that the claims were "likely to mislead businesses in relation to 4AIR's capability to ensure that aviation operations which purchased its services did not negatively impact the environment."[7] What is perhaps most interesting is that the advert was identified by the ASA through its recently launched Active Ad Monitoring System. The system, which uses AI technology to proactively search for online adverts that potentially break the rules, is currently processing more than 100,000 adverts a month.

Conclusions and Key Takeaways

COP 28 is likely to reveal a high level of global underperformance by governments. There will therefore be a call for greater action from the public sector.

The magnifying glass will be on companies in all industries to ensure that proper ESG policies are in place and, where they are in place, are being adhered to. And whilst ESG litigation is still in its early stages, the likely rise in regulations will likely lead to a rapid increase in ESG litigation in the next few years.

Companies should therefore be careful to reduce their risk of climate-related claims from shareholders, investors, and others.

We have set out below just some the key steps companies can take to avoid this:

1. Regularly monitoring and checking publications and products – ensuring that reports and products do not contain misstatements or false accreditations is key to guarding against potential 'greenwashing litigation'.

2. Being joined up internationally - ensuring that subsidiaries or operations around the globe are saying the same things on the climate as in the UK, is a key method in ensuring consistency across the board and not being caught out.

3. Taking advice - when making any claims about the environmental benefit of a new product, or a proposed course of action, consider first obtaining the advice of an expert as to whether these claims are verifiable. This is important to avoid accusations of 'greenwashing', which is increasingly attracting regulatory attention.[8] Seeking expert scientific and legal advice can also provide strong protection for a director against a shareholder claim, such as that in ClientEarth.

4. Full and timely compliance with new and emerging regulatory requirements – this will ensure that a company is fully aware of all potential risks in, for example, the supply chain and will allow a company to identify risk and take timely action to resolve it.

5. Taking action - genuine and positive engagement on all matters related to ESG can demonstrate goodwill.

5 Ryanair Ltd - ASA | CAP
6 HSBC UK Bank plc - ASA | CAP
7 20230830_21489_decision.pdf (climatecasechart.com)
8 ASOS, Boohoo and Asda investigated over fashion 'green' claims - GOV.UK (www.gov.uk)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THE RISE OF ESG CLAIMS

WHAT DOES THE FUTURE HOLD FOR PROFESSIONAL ADVISORS?

Authored by: Elliot Grosvenor-Taylor (Associate) and Jemma Brimblecombe (Legal Director) - Kingsley Napley

ESG is a framework by which an organisation measures its impact on the environment, society and governance.

What is ESG?

ESG considerations are becoming a key focus for organisations of all sizes. There is no legal definition of ESG but to break down the concept, the three component parts are:

(1) Environmental: the impact on the environment, including key issues such as climate change, energy use and pollution.

(2) Society: how an organisation treats employees, customers, suppliers and the wider community and extends to social, community and human rights issues; and

(3) Governance: how an organisation is run and covers topics such as bribery, corruption, anti-money laundering, as well as cyber and data security.

As a result of the increased focus on ESG, there has inevitably been an increase in ESG related litigation as businesses look to align themselves with ESG policies.

When reporting on key trends in 2023, the Grantham Institute noted that there have been a total of 2,341 climate related cases[1]. Of these, 190 were filed in the 12 months to 31 May 2023. The diversity and complexity of the cases is also increasing.

Recent cases

A key recent case is the landmark matter of ClientEarth v Shell Plc & Ors (Re Prima Facie Case) [2023] EWHC 1137 (Ch). For the first time, there was an attempt by shareholders to bring a derivative claim (that is a claim brought by shareholders on behalf of a company) to hold Shell responsible for failures to adopt and manage climate strategy. The shareholders sought to rely on the statutory duties in the Companies Act 2006 (CA 2006) and argued that Shell was (i) under a duty to promote the success of the company (s172 CA 2006) and (ii) to act with reasonable skill, care and diligence (s174 CA 2006) and that the Board's flawed climate strategy was inconsistent with the Paris Agreement (a legally binding international treaty on climate change).

The High Court rejected ClientEarth's application for permission to bring the derivative claim against Shell's directors on the basis that determining whether the directors had complied with their statutory duties under the CA 2006 was a matter for the directors of a company and not the Court.

More recently, in the case of McGaughey v Universities Superannuation Scheme Ltd [2023] EWCA Civ 873 the Court of Appeal rejected a derivative claim against the directors of a university pension scheme. One of the allegations made by the shareholders was that the directors had continued to invest in fossil fuels without an immediate plan for divestment, contrary to the company's long-term interests.

1 As captured in the Sabin Center's climate change litigation databases.

Whilst these cases show a reluctance by the Court to allow litigation by way of derivative claims to be a means for forcing a company to change its climate change policies, it is clear from the emerging cases in this area that claims are continuing to increase, become more complex and raise new arguments.

An area also attracting attention is "Greenwashing". These are claims where a company is sued for unsubstantiated or misleading ESG claims i.e. an attempt by a business to promote their products or organisation as being "greener" than they actually are.

A claim was recently brought by Dutch campaigners Fossielvrij against KLM challenging its "Fly Responsibly" campaign as being misleading, leading KLM to eventually drop these advertisements. Based on the successful outcome of Fossielvrji's claim, such claims are likely to increase.

The insurance market and Professional Negligence claims

One issue of particular interest is the impact of ESG on professional negligence claims and, linked to this, the impact on the insurance market generally.

In the ever-evolving sphere of ESG there is a concern that as businesses try and keep up with ESG developments and expand their profiles (including setting out their commitment in this area and releasing statements) this could lead to significant implications for their risk profiles, increase the potential for litigation and impact insurance coverage generally.

For example, in the area of directors and officer's insurance (D&O) the impact of cases such as ClientEarth and McGaughey (which go to the issue of directors' duties) are inevitably going to affect the risk profile of businesses and insurance companies will need to quickly adapt to help their insured clients assess and identify ESG based risk. Not only will this impact the insurance market in terms of the cost of cover for businesses but it is anticipated that this in turn could lead to an increase in professional negligence related claims against advisers, including insurance brokers as they attempt to manage and advise on ESG related risks. This could also extend to potential breach of duty arguments being raised against professionals for failing to properly take instructions on ESG related risks, insurance cover not meeting the requirements of the company and a general lack of understanding and knowledge about ESG related considerations.

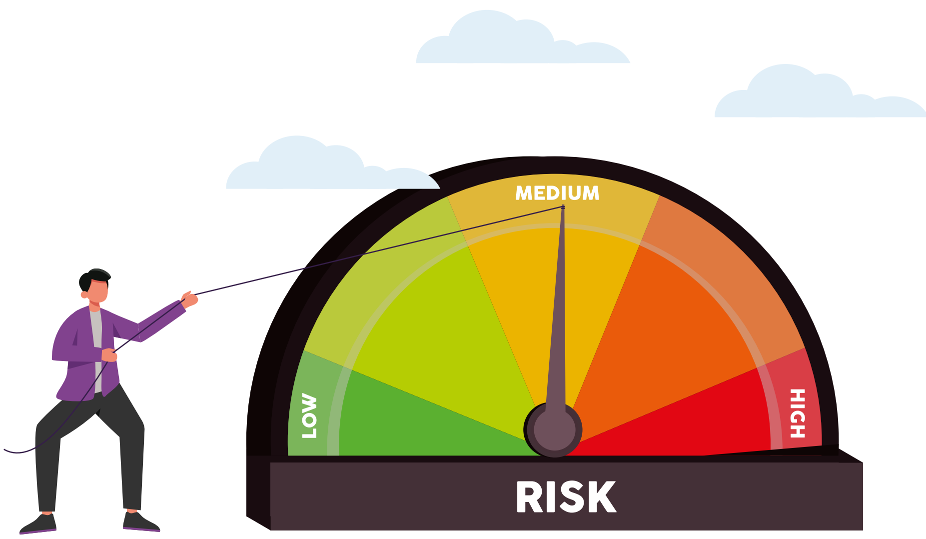
In relation to the uptake in greenwashing claims there is also clearly a risk for businesses if they sell a product which in fact does not fulfil the principles it alleges to support (i.e. product liability and/or negligent misstatement claims). In other situations, one can envisage a scenario where individuals and businesses might bring professional negligence claims against financial advisors who have given incorrect advice to a company on ESG risk. A good example of this is auditor negligence. Companies are increasingly including ESG information in their audited financial statements and there is then a responsibility on the auditor to check this information, which in the ever-evolving world of ESG is a difficult standard to comply with.

What next?

David Ackerman, Co-Head of Global Practice Group for Commercial D&O and Financial Institutions Claims at AGCS has commented that:

'In D&O and other financial lines we see increased claims activity around ESG issues. For example, in the US and Europe we see growing environmental and biodiversity regulation, including reporting requirements. This has not led to large losses yet but may well do so in the future'.

It is clear that ESG related litigation is on the rise and the evolving nature of ESG related considerations leaves businesses exposed should they fail to properly consider the policies they have in place and how this impacts their business. It is clear ESG considerations are not going to go away and businesses and professionals should ensure they do what they can to mitigate potential risks including conducting risk assessments and setting achievable targets and commitments.



ESG AND ITS SIGNIFICANCE IN THE REAL ESTATE SECTOR

Authored by: Victoria Hamblen (Barrister) - 3PB

Introduction to ESG

'ESG' or 'Environmental, Social, Governance' is a term which has recently been adopted as a measure of progressive practice for organisations in both public and private sectors across the world.

The three categories of ESG broadly relate to an organisation's impact on the planet (environmental), impact on society (social), and internal organisation and leadership (governance).

ESG can be seen to have developed in response to significant global milestones, such as the Paris Agreement 2015, COP26, and the general rise in strategic climate litigation across the globe.

The real estate industry has seen increasing expectations from investors and lenders for real estate investments and portfolios to show an adoption of and demonstrable adherence to ESG practices and principles.

Relevant Legislation and Policies

As awareness of ESG has become more widespread, so have ESG-focused legislation and policies. In the real estate sector, the following pieces of legislation and policies have likely acted as catalysts for ESG practices.

Minimum Energy Efficiency Standards ('MEES'):

MEES came into force in England on 1 April 2018. MEES applies to both private rented residential and non-domestic property and are a key component in the UK government strategy to reduce carbon emissions. Landlords and lenders have become more aware of the impact of an EPC rating on the valuation of a property. Many investors are looking at their real estate letting portfolios and weighing up the costs of making properties compliant with MEES, versus the impact of the market value if they sell them on prior to rendering the properties MEES-compliant. Meanwhile lenders are concerned with the risks associated with the loans they make.

The swift introduction and integration of MEES into real estate, shows how standardised methods of measuring energy efficiency can drive more action and awareness of environmental impacts of the sector.

Climate-related Disclosures:

The Taskforce on Climate-related Financial Disclosures (TCFD) was set up in 2015 by the Financial Stability Board (FSB) to create a set of voluntary, consistent disclosure recommendations for companies to use when providing information about their climate-related financial risks. TCFD is now disbanded and in 2024, the International Sustainability Standards Board (ISSB) will take over from TCFD. As the ISSB assumes responsibility over climate-related financial disclosures, it is envisaged that steps will be taken to establish the interoperability of ISSB standards across diverse jurisdictions.

For real estate investors and landlords with diverse real estate portfolios, metrics and data can vary dramatically in each locality.

A selection of TCFD metric categories for building-related reporting include:

(1) Building energy intensity

(2) GHG emissions intensity from buildings and from new construction and redevelopment

(3) Area of properties located in flood hazard areas.

(4) Percentage of properties certified as sustainable.

Whilst climate-related disclosures remain largely voluntary in nature, the increase in the engagement of market actors and the general pressure to attain CO2 reduction targets would suggest that the world is heading towards mandatory climate-related disclosure in the future.

Global Real Estate Sustainability Benchmark (GRESB)

GRESB is an independent organisation which was established and is driven by investors with the aim of providing transparent, and validated ESG data to financial markets. It serves real estate funds, REITs, property companies, real estate developers, infrastructure fund managers and asset operators to assess their performance within the three limbs of ESG. According to GRESB, 98% of investors use ESG data in their investment process, showing the industry's increasing focus on ESG.

Corporate Sustainable Reporting Directive (CSRD)

In the EU, on 5 January 2023, the CSRD came into force. Companies subject to the CSRD will be required to report according to European Sustainability Reporting Standards (ESRS). The ESRS will require reports on a range of information relating to ESG. As with other forms of climate-related disclosure, it aims to help investors, civil society, consumers and stakeholders evaluate the sustainability performance of companies.

For the real estate sector, which already has GRESB and defined metrics relating to buildings as set out by TCFD, it remains to be seen to what extent the ESRS for the sector will vary from those already established and commonly used in the sector.

Real Estate Investment Strategies

For the real estate sector, which encountered significant challenges during the Covid-19 pandemic, it can be seen to have responded remarkably in its increasing adoption and implementation of ESG practices and compliance. Whilst legislation like MEES have invariably forced change, the role of real estate investors in evoking change in the sector cannot be understated.

There are approximately 600 green certification systems worldwide, including BREEAM and LEED. Investors are increasingly taking into account potential long-term operational costs, higher rents and occupancy rates as additional incentives for complying with green ratings systems.

In the rental sector, investors can prompt change in a swift and simple manner. Investors can promote green leases where tenants agree to have for example, energy-efficient lighting and high-efficiency air conditioners.

For the building and construction industries, using green construction materials like sustainable timber are becoming more common and commercially viable for investors. For example, the use of sustainable timber can reduce construction times, compared to concrete and steel.

The 'Social' limb of ESG can also be embedded into the wider business case for real estate. Real estate is in a unique position in that real estate is an integral part of communities and their localities. In addition to measuring social impact through its environmental initiatives, real estate can also play a significant role in the economic wellbeing of a region.

Corporate social responsibility (CSR) forms a significant part of the 'Governance' pillar. Strong operational processes, diversity, inclusion and transparency are deemed key to the resilience of businesses. At all levels, real estate investment companies and

organisations can look to strengthen their processes and future-proof their businesses, enabling them to be well-equipped to deal with a multitude of socio-economic and environmental challenges.

Looking Ahead

The real estate sector has shown that it can be vulnerable to external shocks such as pandemics and conflict. Climate change is no exception. The cost of utilities and insurance for properties has increased in several regions around the world in response to climate-related risks such as wildfires, flooding, and higher energy production, with extreme heat for example, increasing the demand for air conditioning.

For real estate actors navigating this landscape, participating in climate-related disclosure, enables not just governments and private entities to have a better measure of sectoral impact, but also increases the awareness and focus of real estate investors on their role and influence on society, as well as areas of their portfolios which may be at greater risk as a result of climate change.

The term 'ESG', whilst often open to different interpretations, can be seen as a universal approach which can prompt organisations to be managed and adapted to robustly contend with present and future global challenges.

DEUTSCHE BANK'S ESG FINE

Authored by: Angelika Hellweger (Legal Director) - Rahman Ravelli

Angelika Hellweger of financial crime specialists Rahman Ravelli details how ESG claims made by the bank's investment arm led to it being fined millions.

In a recent case where its ESG (environmental, social and governance) claims were challenged, Deutsche Bank's investment arm agreed to pay $25 million.

The fine is the highest ever imposed by the US Securities and Exchange Commission (SEC) relating to allegations of greenwashing - and is an indicator that the regulators continue to crack down on the practice.

With fines only expected to increase in the future in order to act as a deterrent, the Deutsche Bank settlement can be seen as a warning that companies must adhere to industry standards and regulations in order to preserve the market's integrity.

Deutsche Bank's investment body DWS is to pay the money to settle allegations that it overstated how it used ESG factors in its funds and failed to comply with anti-money-laundering rules for its mutual funds. DWS did not admit or deny the charges. But it agreed to two separate cease-and-desist orders related to the ESG misstatements and anti-money-laundering violations.

This action brings to an end a series of events that begin in 2021 when it was alleged that DWS had struggled to both define and implement an ESG strategy, leading to investors being given an unrealistic account of its activities. Ms Desiree Fixler had become DWS' first head of sustainability in June 2020 but was dismissed less than a year later after raising concerns it had overstated its sustainability credentials in its annual report. Her actions led to investigations by German and US regulators and an internal investigation at the firm.

As a global investment firm with more than 800 billion euros of assets under its management, DWS has stated that it places ESG at the heart of what it does. But the SEC alleged that DWS made materially misleading statements about its controls in incorporating ESG factors into its research and investment recommendations for ESG-integrated products, including actively-managed ESG mutual funds and separately-managed accounts. DWS has agreed to pay $19 million to settle this, with $6 million paid to settle the money laundering allegation.

A DWS spokesperson said the firm has already taken steps to address the weaknesses in its processes and procedures identified by the SEC.

This action is one of several taken over the last couple of years in which a company's ESG representations have failed to live up to stated standards, leading to the SEC taking enforcement action.

Last year, Goldman Sachs' asset management arm paid $4 million to settle a regulatory investigation that found it did not follow a consistent investing framework in how it managed ESG mutual funds and other products. Like Brazilian mining company Vale and US investment banking services company BNY Mellon before it, Deutsche Bank has claimed too much when trying to establish its ESG credentials.

GLOBAL REGULATION IS COMING TO STABLECOINS

WILL CENTRAL BANK DIGITAL CURRENCIES FOLLOW?

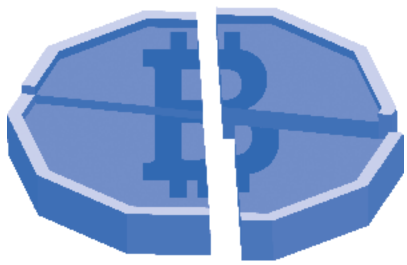
Authored by: Dan Perera (Partner) and Justine Barthe-Dejean (Senior Associate) - HFW Singapore

Amid recent signs that we may be slowly emerging from a two-year crypto winter, “stable” is a word which one would not easily attribute to the crypto markets. Indeed, high volatility has always been a hallmark of the space, with huge daily fluctuations in token prices commonly being driven by rapidly-changing and fickle public sentiment. Many tokens presently sit at over a 99% loss in value from their peak bull-run highs. Even some so-called ‘stablecoins’, which are intended to mirror the value of their underlying base fiat currency equivalent, have suffered from this volatility, with Terraform Labs’ algorithmic stablecoin, $USDT, spiralling to a collapse and losing 18bn in market capitalisation virtually overnight, caused partly by a rapid loss in public confidence. Other major stablecoins also suffered, with Circle’s cash-collateralised $UST depegging temporarily from its US dollar equivalent, amidst the freezing of deposits at Silicon Valley Bank in March this year, before eventually recovering.

The significant devaluation or collapse of supposedly “stable” crypto tokens has the potential to result in losses for retail and corporate investors; disputes; and insolvencies on an incredibly significant scale, as has been seen recently through the claims relating to Terraform Labs and FTX.

It is in this context which we now see a number of progressive jurisdictions globally seeking to regulate stablecoins within their jurisdictions. Partly, no doubt, to prevent incidents which may cause investors significant losses; but, most likely, with the ultimate goal of moving towards the adoption of Central Bank Digital Currencies (CBDC) – essentially, state-issued digital money on blockchain, permitting states to track the movement of money with full, granular-level, visibility, and in a manner which is simply impossible with traditional fiat alternatives such as cash and credit cards.

2023 has seen a number of jurisdictions moving to regulate the stablecoin space. Some of the most significant developments globally, by some of the first-moving jurisdictions to introduce regulations, are discussed below.



Japan

Japan has become known as one of the leading jurisdictions globally, when it comes to the regulation of stablecoins. Under revised regulations which came into effect in June 2023, through amendments to the Payment Services Act, the focus is on the value and security of the underlying assets backing the relevant stablecoin. These assets are now essentially required to be held on trust within the jurisdiction and in a limited range of forms. Holders of such regulated stablecoins have a right to redeem them to fiat at their face value.

Regulatory approval and licensing is necessary for issuers of stablecoins in Japan, which requires a significant level of scrutiny – to the point that this has not yet been achieved by any issuer – although major player Circle has made clear its intent to examine entering the market, potentially with a joint venture partner. It is anticipated that the first locally-licensed stablecoins will be seen in circulation within 2024.

Singapore

In August 2023, the Monetary Authority of Singapore (MAS) announced the introduction of a new framework for the regulation of stablecoins, following the conclusion of a public consultation which had been open since October 2022. The regulations apply to all stablecoins issued in Singapore which are pegged to the Singapore Dollar (SGD) or any of the fiat currencies issued by the G10 states.

The focus of the MAS appears to be ensuring that the underlying value of the relevant stablecoin remains equivalent to its intended fiat peg, through a range of rules relating to capital adequacy; regulation of the composition underlying assets backing the stablecoin; liquidity requirements; disclosure and audit obligations; and other protections, together aimed at avoiding value fluctuations and maintaining fiat pegs. A redemption to fiat option will exist for holders, and issuers can apply to the MAS for permission to use of the term: “MAS-regulated stablecoin”, which can be bestowed upon those stablecoins issued in Singapore and which meet all relevant compliance criteria.

Licensing will also be a requirement for issuers who intend to have more than SGD $5m of tokens in circulation, and who are not banks licensed in the jurisdiction.

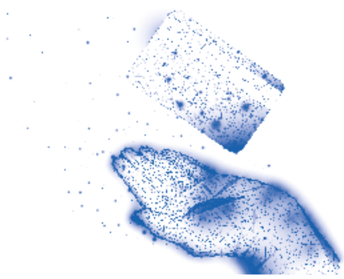
These new MAS regulations will sit alongside pre-existing requirements for the regulation of digital assets, including those aimed at avoiding money laundering and terrorist financing under the Payment Services Act 2019.

Dubai

In September 2023, the Virtual Asset Regulatory Authority (VARA) of Dubai took steps to add a virtual assets category to its comprehensive Virtual Assets Issuance Rulebook governing crypto activities and services within and provided to the jurisdiction (save for the Dubai International Finance Centre (DIFC), known as fiat-referenced virtual assets, (FRVAs), which are not themselves legal tender – i.e., stablecoins.

Dubai’s new rules require, amongst other things, the Virtual Asset Service Provider (VASP) issuers of stablecoins to be licensed and authorised by VARA, and place ongoing reporting and disclosure obligations on the VASPs in relation to the number of FRVAs in circulation and their value, to be confirmed by independent audit.

The definition of FRVA is sufficiently narrow so as to exclude any United Arab Emirate Dirham (AED)-denominated stablecoin, and the regulation of such products – and any Central Bank Digital Currency, which remains within the purview of the Central Bank of the United Arab Emirates. In May this year, the Central Bank itself published guidance regarding the conduct of VASPs and Licensed Financial Institutions (LFIs) active in the jurisdiction.



United Kingdom

Most recently, we have seen the UK move towards the implementation of stablecoin compliance requirements, through the publication of discussion papers by the Bank of England and the Financial Conduct Authority who, between them, will regulate the industry.

While we await detail of the proposed regulations, which are not likely to be in place prior to 2025, these proposals follow the adoption by the European Union of the Markets in Crypto Assets regulation (MiCA), which itself takes on the role of regulating stablecoins, amongst other crypto assets. It is likely that the UK’s eventual equivalent will seek to differentiate its own regulations from MiCA in a number of meaningful ways to offer it a competitive advantage against the bloc which it eventually split from in 2020.

Regulation a progressive step, and a means to an end?

While a number of jurisdictions have actively sought to move quickly to regulate the stablecoin space, other major jurisdictions remain slow to do so.

The USA, in particular, remains in a state of inertia as regulators compete against each other to establish their territory, whilst making licensing for crypto issuers largely a practical impossibility and instead taking action against them for the issuance of unregulated investment contracts.

The legal clarity which innovative jurisdictions bring to this area of law will give major players in the space the confidence they need to establish their presence in the relevant jurisdiction, and lead the development of the local market, to the detriment of other jurisdictions, which are riddled with regulatory infighting and inertia. Once stablecoins in those regulated markets become commonly adopted by the general public, the launch of a CBDC by the relevant authorities will not likely appear at all out of place.

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