**ThoughtLeaders4 Disputes** • September 2024

ISSUE 14

# REACHING THE SUMMIT: Q3'S INSIGHTS ON NEXT GEN DISPUTES

# INTRODUCTION

*"We must choose dialogue over confrontation, and peaceful settlement of disputes over unilateral acts of imposition"*

**- Nguyen Phu Trong**

We are delighted to present Issue 14 of the Disputes magazine to our readers, *Reaching The Summit: Q3's Insights on Next Gen Disputes*. This edition encompasses the complex themes of Corporate Disputes, Sanctions, Arbitration, and Crypto & Digital Assets. Each theme delves deep into the current industry issues, and we hope provides insightful reading. We extend our sincere thanks to our corporate partners, contributors, and readers for their support in bringing Issue 14 to life. Do keep an eye out as we continue to offer exciting events from within the Disputes community.

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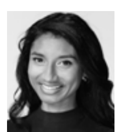

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# CONTENTS


## | *Corporate Disputes* |

60-Seconds With: David Parratt KC ........ 4
Debt, Damages and The Mackay V Dick Principle - Pay Attention to the Intention ........ 5
Attendance Orders Against "Officers" - How wide may The Net Be Thrown? ........ 7
Holding The Purse Strings when Third-Party Assets are Captured By a Freezing Order ........ 9
Directors In The Firing Line - The Duty to Promote The Success of The Company ........ 14
Expansion of Liability for Fraudulent and Wrongful Trading for Insolvent Companies - Why Corporates need to be Aware ........ 16
Recognition and Enforcement of European Judgments In Dubai And The UAE - Issues and Solutions ........ 18
60-Seconds With: Professor Suzanne Rab ........ 21

## | *Sanctions* |

The Non-Contractual Jurisdiction for Anti-Suit Relief ........ 24
Economic Sanctions - Lessons to Learn from AML Compliance ........ 27
USA Sanctions in The UAE ........ 29

## | *Arbitration* |

60-Seconds With: Devon Airey ........ 32
Arbitration in UAE and Saudi – Where are We now? ........ 35
Navigating Pathological Clauses - The Curious Case of the Abolition of the DIFC-LCIA Arbitration Centre ........ 37
Corruption Evidence in Arbitration - The Role of Red Flags ........ 39
Arbitration vs Insolvency - Privy Council endorses BVI Approach ........ 41
Cyprus' Arbitration Law Amendments - A Refinement in International Dispute Resolution ........ 43

## | *Crypto & Digital Assets* |

Beyond the Breach - The Evolving Landscape of Crypto Asset Security and Litigation ........ 48
Crypto Mining and Sanctions Evasion - How Russia Trades Its Energy Resources ........ 50

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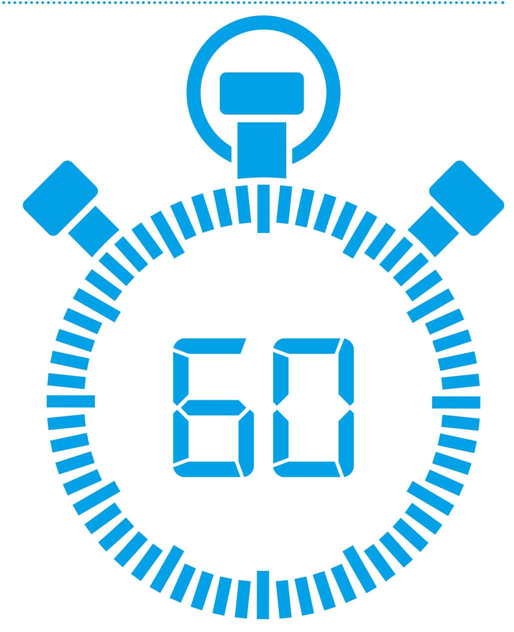
# 60-SECONDS WITH:

## DAVID PARRATT KC
## BARRISTER & DEPUTY HEAD OF CHAMBERS
## 3PB




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

A: Walking my dog, listening to podcasts.

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

A: Every case is different. You have to learn about and master details relating to all kinds of issues in dispute.

**Q: What's the strangest, most exciting thing you have done in your career?**

A: Still waiting for it…

**Q: What is the best life lesson you have learned?**

A: Listen to your instincts, but don't jump to conclusions.

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

A: Patience.

**Q: What film do you think everyone should watch, and why?**

A: Cheesy answer, but *The Shawshank Redemption* – a powerful film that still resonates.

**Q: Dead or alive, which famous guests would you invite to a dinner party?**

A: Mozart; Amelia Earhart, Leonardo da Vinci, Cleopatra and Oscar Wilde

**Q: What is the best novel of all time?**

A: *Kidnapped* by Robert Louis Stevenson: Written in 1886 by a fellow member of the Faculty of Advocates in Edinburgh. It is a thrilling adventure set in the aftermath of the Jacobite rising of 1745, and follows young David Balfour as he navigates betrayal, kidnapping, and survival in the rugged Scottish landscape.

**Q: What legacy would you hope to leave behind?**

A: "Did his best"

**Q: What are the most significant trends in your practice today?**

A: (i) So much is virtual and (ii) seeing the advance of AI as a tool in daily use.

**Q: Do you have any hidden talents?**

A: I think so, but they must be too well hidden.

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

A: I would like to be part of 3PB's continued expansion into the international legal services market.

# DEBT, DAMAGES AND THE MACKAY V DICK PRINCIPLE

CORPORATE PARTNER

3PB BARRISTERS

## PAY ATTENTION TO THE INTENTION

**Authored by: Poppy Watson (Barrister) - 3PB**

In a recent Court of Appeal case, the Court considered the concept of relying on your own wrong to avoid liability for payment under a contract. Although this principle can be traced back to Scotland in 1881, it is only in 2024 that the Court of Appeal has confirmed that this is also a principle of English law. Yet, when that principle applies and what remedy is available is not as straightforward as one would have hoped. In his leading judgment, Popplewell LJ has made clear that, when things don't go as planned, you must pay attention to the parties' intention.

## The Background: King Crude Carriers SA & Others v Ridgebury November LLC & Others [2024] EWCA Civ 719

The Defendants/Appellants (Ridgebury November LLC and Ors) (the "Sellers") sold three second-hand tankers to the Claimants/Respondents (King Crude Carriers SA and Ors) (the "Buyers") pursuant to three sale contracts (the "Contracts"). The Contracts were concluded on an amended 2012 Norwegian Saleform (the "MOAs"), which were in material terms identical.

## The Terms

Per Clause 2 of the MOAs ("Clause 2"), the Buyers needed to:

1. Pay 10% deposits (the "Deposits") of the purchase price of the vessels to a solicitors' firm ("HFW") as escrow holders for the Sellers; and
2. Provide HFW with "all necessary documentation to open and maintain the account without delay".

Under Clause 13 of the MOAs ("Clause 13"), the Sellers were entitled to cancel the MOAs if the Deposits were not lodged in accordance with the MOAs.

## The Breach and Termination

The Buyers breached Clause 2 and HFW could not open the escrow accounts or confirm they were ready to receive the Deposits. Ultimately, the Deposits were not paid to HFW.

The Sellers purported to terminate the MOAs on two alternative bases:

1. Under Clause 13; and
2. Under common law, treating non-payment of the Deposits as a repudiatory breach, which was accepted.

The Sellers commenced arbitration to recover the Deposits as a debt or, in the alternative, as damages.

## The Mackay v Dick Principle

In Mackay v Dick & Stevenson (1881) 6 App Cas 251 the Scottish Courts held that where a party wrongfully prevented the fulfilment of a condition precedent to a debt, the condition would be deemed fulfilled or dispensed with, meaning that the debt had accrued and would be recoverable as a debt, rather than damages (the "Mackay v Dick Principle").

## Debt vs Damages

An action in debt is a claim to enforce a primary obligation to pay monies either currently owed or that will become payable due to a present obligation. An action in damages is a claim for compensation. Generally, damages are compensatory, whereas debts are not.

Here it mattered whether the Sellers' claim was in debt or damages because it impacted whether the Sellers' termination of the contract was lawful and whether any loss had been incurred.

## Arbitration and The High Court

The arbitral tribunal found that the Sellers could recover the Deposits in debt. The Buyers were granted leave to appeal on whether the Deposits could be recovered in debt or damages.

In the High Court, Dias J found that the Mackay v Dick principle did not exist under English law. Mrs Justice Dias agreed with the Buyers that where a party breaches a contract and that breach prevents the fulfilment of a pre-condition to the accrual of a debt, the remedy for the breach lies in damages, not in debt. The Sellers appealed.

## The Appeal

The Court of Appeal reversed the High Court's ruling. Popplewell LJ held that the Mackay v Dick Principle was a principle of English law, but it was case-specific and the legal basis for the rule is that it represents the presumed intention of the parties. He noted that it is a principle which "gives effect to contractual intention, not one which frustrates it".

***Its applicability depends on the nature of the condition and the circumstances of the case. Parties can contract out of it, and it may be inapplicable to certain contractual 'conditions'.***

The focus needs to be on the advantage the wrongdoer is seeking to take – where the advantage is the avoidance of liability in debt, it is to that liability that a remedy must be applied, so a remedy in debt is applicable.

Here, the Buyers were seeking to take advantage of their failure to ensure the escrow account could be opened and their failure to pay the Deposits. Deposits generally show an 'earnest of performance', i.e. an earnest of the buyer's ability and intention to complete a purchase. The Court held that the parties intended that the Buyers should ensure the escrow account could be opened as a preliminary to paying the Deposits, not that the MOAs gave the Buyers an option of whether to pay or not and leave the Sellers to sue for damages.

## The Applicable Criteria

The Court of Appeal clarified that, for the Mackay v Dick Principle to apply, there must be:

a. An agreement capable of giving rise to a debt;

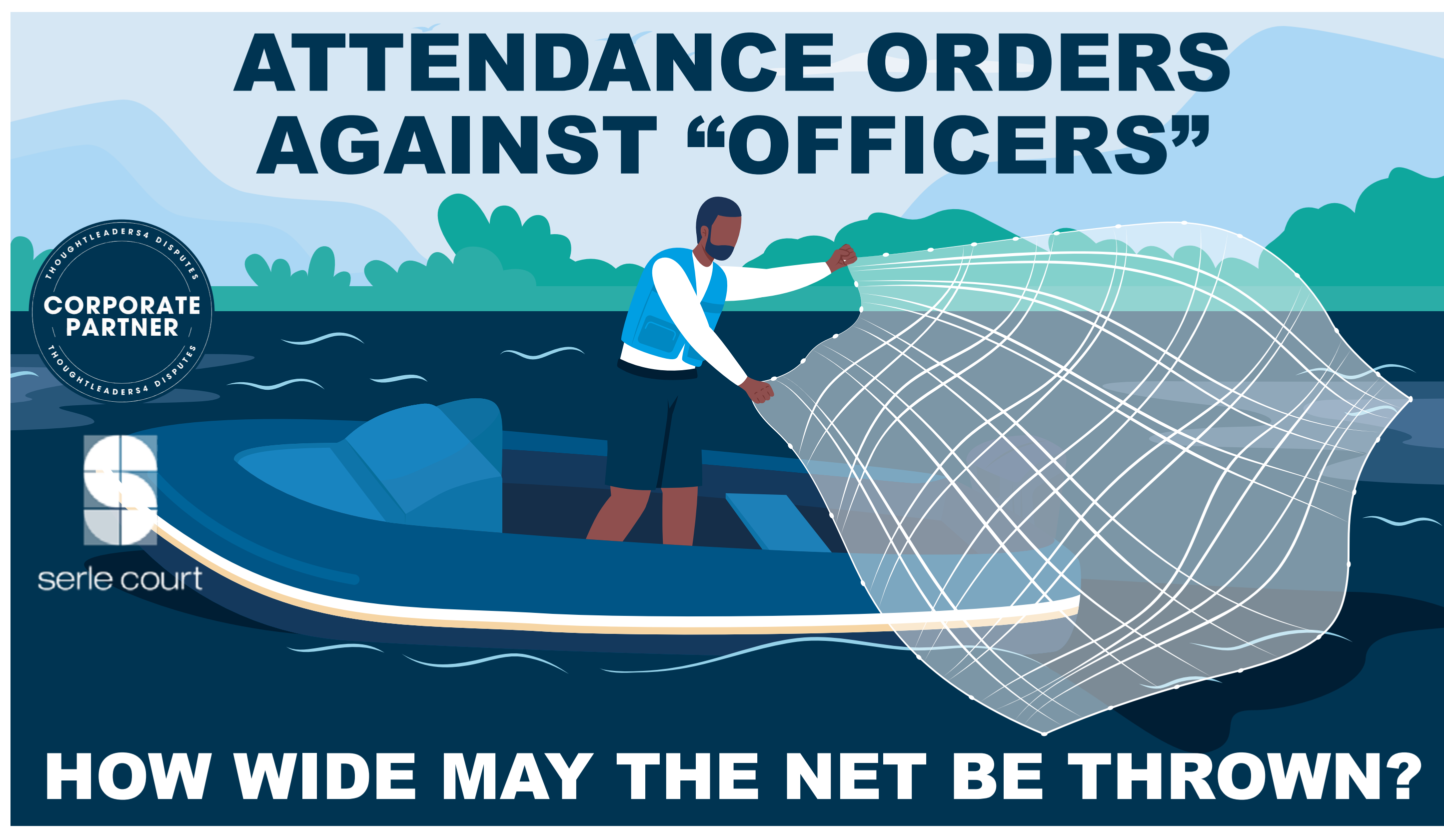
b. An agreement that the debt will accrue and/or be payable subject to fulfilment of the condition precedent; and

c. An agreement that the obligor will not do anything to prevent the condition precedent being fulfilled, which would prevent the debt accruing and/or becoming payable (whether by express or implied term).

## An Important Reminder

As is so often the case in contractual disputes, the parties' intention is key. It is important not to get carried away with general, overarching principles and always look at the case at hand and consider principles and reality in tandem. Take a step back and look at why parties have acted in a certain way and what they were hoping to achieve.

The Courts will presume that the parties did not intend to allow a wrongdoer to take advantage of their own wrongdoing. So, when a dispute arises, one must pay attention to the intention.



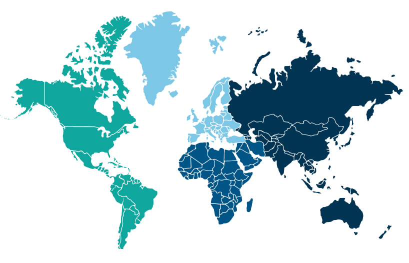

Authored by: Rupert Reed KC (Barrister) and Max Marenbon (Barrister) - Serle Court

## Introduction

Orders that a judgment debtor attend court for examination about their assets or means to satisfy an unpaid judgment debt ("Attendance Orders") are a vital enforcement tool in many common law jurisdictions.

Available in England and Wales, the Dubai International Financial Centre (DIFC) Courts, and other common law jurisdictions, Attendance Orders are of value precisely because the judgment debtor is at risk of committal for contempt if they lie or mislead, and can be cross-examined on answers that are partial or evasive.

However, where the debtor is a corporate entity, although Attendance Orders are typically available against its "officers", creditors seeking an Attendance Order can face additional challenges when seeking to enforce in an international commercial context.



## Jurisdictional Limitations

A key challenge stems from the common requirement that an Attendance Order be served personally on the person ordered to attend court (see for example CPR 71.3 and RDC 50.12). This means that difficulties can arise if the company's officers are based abroad rather than being present within the relevant jurisdiction.

In Masri v Consolidated Contractors International Co SAL [2010] 1 A.C. 90 the UK House of Lords applied a presumption against extraterritoriality, holding that CPR 71 did not contemplate this procedure being used against company officers outside England and Wales. This was reinforced by the absence of any provision in the CPR for obtaining permission to serve such an Attendance Order out of the jurisdiction.

The High Court of England and Wales went even further in CIMC Raffles Offshore (Singapore) PTE Ltd v Yantai CIMC Raffles Offshore Ltd [2014] EWHC 1742 (Comm) the High Court, suggesting that an Attendance Order cannot be made unless the Respondent attendee is present within the jurisdiction both at the time the application for the order is made and at the time the order is made.

## Who Can Be Ordered To Attend Court?

This raises a related issue as to which individuals are considered an "officer" of a corporate body for the purpose of an Attendance Order. In an international commercial context, significant individuals associated with a company may be located in a number of jurisdictions across the globe.

In a multinational corporate group, the real decision-makers in relation to a corporate entity may not be those formally appointed to its board of directors, but its controlling shareholders or partners, or indeed the directors of a parent company. Similarly, in many Middle Eastern jurisdictions, day to day management decisions are likely to be taken by a General Manager, who may in turn be

acting on the instructions of the majority shareholder and who is responsible to the shareholders or 'partners' in circumstances where the company may not have any registered 'directors'.

While it seems uncontroversial that a director is an "officer", judgment creditors may therefore wish to target other individuals meeting that definition – whether because they are likely to have better information about the company's assets or for the more prosaic reason that they happen to be the individuals present in the jurisdiction in which the creditor wishes to obtain an enforcement order.

In contrast to the Courts' caution about making orders with extraterritorial effect, there is a clear public interest in the effective enforcement of judgment debts. Consistent with the public policy in favour of enforcement, it is to be anticipated that the Courts will afford a broad interpretation to the term "officer" in the context of the relevant enforcement regime (be that CPR 71, RDC 50, or their equivalent).

***Outside the specific context of Attendance Orders, the weight of legislative and judicial authority across the common law world supports a broad understanding of the term "officer" in relation to a body corporate.***

In the Corporations Act 2001 of Australia, for example, in addition to directors, company secretaries and various others such as administrators, any "person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation" is deemed to be an "officer" (s 9AD(1)(b)(i)).

In the UK Companies Act 2006 and Insolvency Act 1986 (ss. 1173 and 251 respectively) the term is not exhaustively defined but is said to include a "manager", which is likely to include anyone who has taken some part in the management of the company's business, even at quite a low level. In Re A Company [1980] 1 Ch 138, the Court of Appeal of England and Wales (not overruled on this point by Re Racal [1981] AC 374) cautioned against a narrow interpretation, encouraged giving the term "officer" a meaning consistent with the purpose of the provision in which it appeared and held that it could capture anyone exercising a supervisory control in the company's affairs.

Such authorities as there are on the meaning of the term in the context of enforcement of judgments by Attendance Orders, on the whole, also tend in favour of a broad interpretation, consistently with the public policy interest in effective enforcement. In Société Générale du Commerce et De L'Industrie en France v Johann Maria Farina & Co [1904] 1 KB 794, the Court of Appeal of England and Wales held that an "officer" included a former officer of a company for the purposes of making an Attendance Order (commenting that it "might work serious injustice if an officer of a corporation merely by resigning his position could get rid of the responsibility of giving the information that is sought by a plaintiff"). In Vitol SA v Capri Marine Ltd [2009] Bus. L.R. 271 (QBD) the High Court acknowledged the force of this view, although it was ultimately unable to apply Vitol because the wording of the relevant provisions and practice direction had changed in such a way as to clearly exclude former officers.

There are early signs that the Courts of the DIFC have adopted a similarly pro-enforcement attitude to the interpretation of "officer" in the context of Attendance Orders. In Bocimar International N.V. v Emirates Trading Agency LLC [2015] DIFC CFI 008 (18 August 2016) it is recorded that the Chairman, Managing Director and Licensed Manager of the judgment debtor's parent company had been ordered to attend Court under RDC 50.

***The Court's interpretation of "officer" in the context of Attendance Orders therefore appears to have been consistent with the broad approach adopted in other contexts across the common law world, such as in s 9AD(1)(b)(i)) of Australia's Corporations Act 2001.***

Recently, in China State Constructing Engineering Corporation (Middle East) (L.L.C) v Zaya Living Real Estate Development L.L.C. [2023] DIFC ENF 316 (10 July 2024), the DIFC Court of First Instance gave a rare grant of permission to appeal against its own decision to enable the DIFC Court of Appeal to set a precedent on the breadth of interpretation of the term "officer" in the context of RDC 50, and specifically whether it could extend to a majority shareholder who had held themselves out as being the 'CEO' and who was likely to have involved in corporate decision-making at high level.

## Conclusion

The outcome of that appeal will no doubt be closely watched by the creditors of corporate judgment debtors seeking to increase their recovery prospects. However, it can be seen that by affording a broader meaning to the term "officer", courts across the common law world can promote the public policy of effective enforcement while drawing some of the sting out of the jurisdictional limitations of Attendance Orders.

# HOLDING THE PURSE STRINGS

# WHEN THIRD-PARTY ASSETS ARE CAPTURED BY A FREEZING ORDER

**Authored by: Samuel Cuthbert (Barrister) - 4 New Square Chambers, Felix Parker (Managing Associate) and Sam Clare (Trainee Solicitor) - Mishcon de Reya**

Following a first-of-its-kind decision in the High Court, there is now clarity that asset freezing orders can apply to third-party assets which are not directly legally or beneficially owned by a respondent, where it can be shown that the respondent has control over the assets and intends to dissipate them in order to frustrate a future judgment.

## Freezing Order and Third Party Corporate Assets

A domestic freezing order will only apply to a respondent's assets held within the jurisdiction.

***In respect of third-party corporate assets, even when the respondent is a shareholder, it is difficult to advance that the respondent is the owner of such assets for the purposes of Mareva relief.***

Indeed, it was described by Hildyard J in Group Seven Limited v Allied Investment Corporation Limited and Others [2013] EWHC 1509 (Ch) as contradictory to "settled principles of company law". This default position is undeniably derived from the Salomon principle – that the company is a separate legal entity from its shareholders. This is complicated further where the individual in question does not own the shares or control the interested company solely.

## Background to Mold v Holloway (1), Jacques (2) (As Yet Unreported)

The Claimant company brought a claim against of its two former directors (the Defendants) for breaching their statutory and fiduciary duties. Prior to issuing the claim, the Claimant successfully obtained a freezing order in August 2023 against the Defendants (the Freezing Order).

The Defendants' held shares in a number of other companies (the Third Party Companies). However, their shareholdings in the Third Party Companies did not exceed more than 50%, save for one exception. As a result, and in light of the principles set out above, the assets of the Third Party Companies were assumed to be sufficiently separate from the Defendants to fall outside of the scope of the Freezing Order.

As this is the typical approach to third party assets, the Claimant accepted this proposition in August 2023, and a number of variations were agreed by consent so as to allow the Third Party Companies (and their bank accounts) to operate without restriction.

In January 2024, however, the Claimant received anonymous text messages and phone calls threatening to denude the Third Party Companies of their assets. The Claimant was always of the view that these communications were from the Defendants. The Claimant

contended that the Defendants carrying out such threats would devalue the Third Party Companies, and therefore the Defendants' shares in them, with the purpose of frustrating any future judgment in the Claimant's claim against them. The Claimant believed that the communications showed the Defendants in fact exercised control over the Third Party Companies' assets.

## The Application To Vary The Freezing Order

The Claimant therefore promptly applied to the High Court requesting an order vary the Freezing Order under section 37 of the Senior Courts Act 1981. The order sought would extend the Freezing Order to include the assets of the Third Party Companies, despite the companies being owned by the Defendants jointly with other shareholders.

It was submitted by the Claimant that there had been a material change of circumstances since the Freezing Order was granted in August 2023. When the order was first granted, the Claimant had not apprehended the Defendants' willingness and ability to deal with the assets of the Third Party Companies in such a way as to: (i) negatively affect the value of their shares in the Third Party Companies; and/or (ii) defraud their creditors by dissipating assets for the purposes of section 423 of the Insolvency Act 1986.

The application was not made pursuant to the Chabra jurisdiction (TSB Private Bank International SA v Chabra [1992] 2 All ER 245).

***The application was instead predicated on the Claimant's proposition that the form of order should not depend on whether the Defendants legally or beneficially owned the company assets, but rather on whether the Defendants exercised control over the companies and their assets.***

In support of this proposition, the Claimant pointed to the following authorities:

1. **Motorola v Hytera [2020] EWHC 980(Comm)[1]:** the court noted that an injunction may be granted over corporate assets so as to preserve the value of the shareholding against which a future judgment could be enforced. This is despite the company itself remaining a third party to the proceedings and retaining separate legal personality to the respondent.

2. **Group Seven Ltd v Allied Investment Corp [2014] 1 WLR 735[2]:** the court held that an injunction may be appropriate to preserve assets for later enforcement of a judgment debt, so long as the corporate is wholly owned and controlled by the respondent, and is deemed a 'pocket or wallet' of the respondent.

3. **JSC BTA Bank v Ablyazov [2015] UKSC 64[3]:** the Supreme Court determined that the extended definition of assets in paragraph 6 of the Commercial Court's standard form freezing order applies to assets over which the respondent has control, regardless of these assets being owned legally or beneficially by the respondents. Lord Clarke noted that "the whole point" of the extended definition is to catch assets which otherwise would not be caught. The extended definition of 'asset' in paragraph 6 reads as follows:

   Paragraph 5 applies to all the Respondent's assets whether or not they are in his own name and whether they are solely or jointly owned. For the purpose of this order the Respondent's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions.

However, further application of Ablyazov in respect of third party corporate assets did indicate an alignment with the view of the Court of Appeal in Group Seven, with the expectation that such corporate assets are wholly owned by the respondent. In FM Capital Partners Ltd v Marino [2018] EWHC 2889 (Comm)[4], the Commercial Court observed that

1 https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Comm/2020/980.html
2 https://www.bailii.org/ew/cases/EWHC/Ch/2013/1509.html
3 https://www.bailii.org/uk/cases/UKSC/2015/64.html
4 https://www.bailii.org/ew/cases/EWHC/Comm/2018/2889.html

the freezing order could be applied to assets of a third-party corporate entity, provided that: (i) the company is wholly owned or controlled by the respondent; and (ii) the company assets are in essence the respondent's assets. In the present case, the Defendants were neither the sole director(s) nor the sole shareholder(s) of the Third Party Companies.

## The Decision

In Mold the High Court was willing to extend the freezing order to encompass the assets of the Third Party Companies, notwithstanding that they were not wholly owned by the Defendants. This therefore indicates a departure from the restrictive interpretation of Ablyazov put forward in FM Capital Partners.

The test for extending freezing orders to third-party assets, including corporate assets, continues to be one of control. The judge put it simply as "whether there is good reason to suppose that the assets are, in fact, owned by the respondent." However, contrary to FM Capital Partners, the Defendants in the proceedings were deemed capable of exhibiting control over the company and the company assets, despite not being the sole shareholder or the sole director of the companies, and despite there being no evidence of beneficial ownership.

In respect of the authority cited by the Claimant, it was said that although asset freezing orders will generally be reserved for assets over which a respondent has a legal or beneficial interest, the judge noted that freezing orders can also extend to assets owned by corporate entities  where such entities are effectively "no more than a pocket or a wallet for the defendant."

***The unique factor in the present case related to the evidence obtained by the Claimant indicating that the Defendants would denude assets in the companies without regard to their obligations to those companies.***

In so acting the Defendants would be acting on their own behalf – not as agents of their respective companies – and so would be exercising direct personal control over the corporate assets.  On that basis the assets of the Companies fell within the extended definition in paragraph 6 and satisfy the requisite control for the purposes of Ablyazov.

The Court was further satisfied that there had been a material change of circumstances warranting an amendment to the previous Freezing Order, as the Claimant had not anticipated the Defendants' willingness to breach their fiduciary duties or to defraud creditors by dissipating assets at the time the Freezing Order or its subsequent variations were granted.

This decision marks a significant shift from FM Capital Partners and allows applicants a more flexible tool against individuals who exhibit control over company assets, which on paper do not appear as their own, but thereafter intend to dissipate those assets to circumvent any award in the applicant's favour.

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**Declan Redmond**
Managing Director
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Berkeley Research Group (BRG) has appointed Declan Redmond as managing director in the firm's Global Construction practice. In a broad role which will cover business development and client services, strategy and practice management, his remit will span Europe, the Middle East and Africa (EMEA), Asia–Pacific (APAC) and the Americas, with a particular focus on key markets across the Middle East and in the United Kingdom, Hong Kong and Singapore.

Redmond has over 40 years' experience in the professional services sector, including three decades at Wilberforce Chambers, most recently as its chief executive, and almost a decade at Keating Chambers as its CEO and director of Clerking. Alongside his deep sector expertise in construction and engineering, his wealth of experience spans key BRG service lines including antitrust and competition, commercial disputes, litigation and international arbitration, and forensic accounting and investigations.

Commenting on Redmond's appointment, Michael Kenyon, a managing director in BRG's Global Construction practice and head of the firm's Dubai office, said: "BRG is seeing substantial growth across the board and particularly in EMEA and APAC. Declan joins us at a significant time for the business, and we are confident that his expertise and wide-ranging experience will prove invaluable to driving our future success".

Redmond commented: "This role will allow me to marry up the best of my professional experience acquired across both the legal and consulting worlds. BRG is renowned for its progressive vision and extensive experience across key dispute resolution centres globally, and I look forward to joining their talented team to help drive new opportunities in key markets".

Redmond's appointment underscores BRG's growth momentum internationally, and the firm expects to announce further significant hires in its Construction practice over the coming months. In recent months, BRG has appointed renowned experts Prof. Pablo T. Spiller, Dr. Manuel A. Abdala and Michael Seelhof to its international arbitration and cross-border disputes group in New York, as well as a team of economic consultants to its Competition practice in Brussels.

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# DIRECTORS IN THE FIRING LINE

# THE DUTY TO PROMOTE THE SUCCESS OF THE COMPANY

Authored by: Rachel Brown (Senior Associate) - Howard Kennedy

## Directors' Duties and Development By Common Law

Company directors have a broad range of duties and responsibilities.

The key duties of a director are set out in Part 10 of the Companies Act 2006 ("the Act"). However, these statutory duties[1] must be considered alongside the overlapping common law rules and equitable principles[2]. The Courts play a key role in interpreting and applying the duties of a director as laid down in the Act.

Over the last few years, we have seen a number of cases which have sought to develop the law surrounding directors' duties. Many of these cases have focused on the duty to promote the success of the company under section 172(1) of the Act ("the Section 172 duty").

The Section 172 duty requires a director to act in a manner which, he considers in good faith, will be likely to promote the success of the company for the benefit of its members as a whole[3]. The duty is broadly defined within the Act, which provides a degree of flexibility. It also provides fertile ground for development by case law. Recent case law shows that directors are increasingly in the firing line.

***Over the last few years we have seen a number of attempts to try and persuade the Court to intervene with board decision making processes and expand the liability burden for directors.***

So, when can the Court intervene?

Section 172 states that in promoting the success of the company, the director must have regard (amongst other matters) to:

1. The likely consequence of any decision in the long term;
2. The interests of the company's employees;
3. The need to foster the company's business relationships with suppliers, customers and others;
4. The impact of the company's operations on the community and the environment;
5. The desirability of the company maintaining a reputation for high standards of business conduct; and
6. The need to act fairly as between members of the company.

Whilst not an exhaustive list, it is clear from the factors described that company directors are expected to consider a range of factors and balance different interests when making decisions.

1 Sections 171-177 of Companies Act 2006
2 Section 170(3) of Companies Act 2006
3 Section 172 of Companies Act 2006

The standard required of directors under section 172 is subjective. However, there are a number of situations where the Court can look at things objectively.

Specifically:

1. Where the creditor duty has been trigged and the interests of creditors have become paramount (see BTI 2014 LLC v Sequana SA below).
2. Where there is no actual evidence of the director considering the best interests of the company and the Court needs to consider whether an honest and intelligent person in the director's position would have taken the same actions to comply with their duties.
3. Where there is a material interest (such as the interests of a large creditor) which has not been taken into account without justification.

In these situations, the board's decision-making processes are subject to closer scrutiny. It is also open to the Court to question the rationality of the directors' decisions and vary the standard required to comply with the Section 172 duty.

## Recent Developments

As mentioned above, the scope of the Section 172 duty has been subject of judicial consideration in a number of recent cases.

In BTI 2014 LLC v Sequana SA [2022] UKSC 25 the Supreme Court considered the nature, scope and content of the directors' duty to creditors. The Supreme Court held that there is no separate, standalone creditor duty and instead it forms part of the director's fiduciary duty to promote the best interests of the company. The Court also considered that when a company is bordering on insolvency, or insolvency is probable, a director must consider the interests of creditors and give appropriate weight to those interests to comply with the Section 172 duty. In practice, it may be difficult to identify the exact point at which a company starts bordering on insolvency. It may also be difficult to identify the appropriate weight to be given to creditor interests at a particular point in time. Whilst aware of these challenges, the Supreme Court was reluctant to allow directors unfettered discretion. Lady Arden opined that restrictions on the discretionary exercise of the Section 172 duty were required to provide a measure of protection for creditors. She also emphasised the need for directors to stay informed, record the reasons for their decisions and maintain up to date accounting records.

In ClientEarth v Shell [2023] EWHC 1897 ClientEarth argued that the section 172 duty was a sufficiently broad concept to require the Shell directors to consider the impact of their decisions on climate change. The Court was not persuaded by this argument and refused to impose specific climate related considerations on the Shell directors. However, the decision appears to be unique to the facts. In this particular case, there were evidential concerns about the case put forward by ClientEarth. There were also concerns about an ulterior motive. In different circumstances, with more persuasive evidence, it may be possible to successfully argue a claim for breach of section 172 based on climate-related considerations.

***As we transition away from fossil fuels to renewable energy and social concerns about climate change grow, we are likely to see more disputes in this area.***

We are also likely to see further attempts to develop the section 172 duty to impose personal liability on directors for failing to consider environmental factors.

In the recent decision of Wright and Rowley, BHS and others v Chappel [2024] EWHC 1417 it was argued by the liquidators that the directors should be held liable for breaching the section 172 duty because they had failed to consider the interests of creditors irrespective of whether a claim for wrongful trading was successful established. The Court agreed and determined that there had been a breach of the section 172 duty and misfeasance, prior to the date of insolvency. The Court also held the BHS directors liable for a new offence of "misfeasant trading". This decision appears to make it more difficult for directors to form the view, in times of financial distress, that a company has a reasonable prospect of avoiding an insolvent liquidation.

## What Next?

Although these cases each turn on their own facts, there is an obvious trend here. The section 172 duty is increasingly being applied by the Courts in a broader context with greater scrutiny of the wider impact of board decisions. We are also seeing a noticeable shift away from the idea that the success of a company can be identified by reference to financial gains and the corresponding fiscal benefit to members.

Instead, the pursuit of profits has to be balanced against the need to have regard to other groups affected by the company's operations. Directors also need to be able to demonstrate which interests have been considered, as well as being able to explain how each factor has been considered in the decision-making process.

Whilst it remains to be seen how the Section 172 duty will be developed over the next few years, we can expect to see more corporate disputes focusing on the discretionary exercise of the Section 172 duty. We can also expect to see a greater emphasis from the Courts on good corporate governance. Given the evolving complexity in this area, directors would be well advised to seek professional and expert advice at an early stage.

# EXPANSION OF LIABILITY FOR FRAUDULENT AND WRONGFUL TRADING FOR INSOLVENT COMPANIES

## WHY CORPORATES NEED TO BE AWARE

**Authored by: Ben Mellett (Counsel) and Emily Greig (Associate) - Norton Rose Fulbright**

The ADGM Court recently handed down a judgment[1] that holds importance which may well extend beyond the UAE and should be borne in mind for corporates, legal practitioners and insolvency practitioners.

The judgment by Justice Sir Andrew Smith decided a number of preliminary issues in relation to claims arising from the ADGM insolvency regulations. The judgment determined that it is permissible to grant retrospective relief for fraudulent and wrongful trading in circumstances where the conduct in question:

a) Was committed prior to the companies' continuance (i.e. re-domiciliation) in the jurisdiction in question, in this case the ADGM; and

b) Was committed prior to the date that the legislation in question came into effect, in this case, sections 251 (fraudulent trading) and 252 (wrongful trading) of the ADGM Insolvency Regulations 2022 (the ADGM IR 2022).

It was further held that there did not need to be a sufficient connection between the Defendants and the ADGM in order for the court to confirm its jurisdiction: a connection to the UAE more broadly was sufficient.

The decision expands the potential for liability for historic breaches, reaffirms administrators' and liquidators' extensive powers as well as opening doors for them to adopt resourceful strategies around jurisdiction to maximise potential recoveries. This case further raises interesting questions about the extraterritorial jurisdiction of the courts in an international insolvency context and has the potential to be relevant to other common law jurisdictions which have similar fraudulent and wrongful trading legislation and continuance / re-domiciliation regimes.

## Background

The case in question concerns the long-running NMC saga. NMC was a prominent healthcare operator headquartered in the UAE. By March 2020 it had been discovered that its English, publicly listed parent company, NMC Health PLC (NMC PLC) had incurred large debts which had not been disclosed in its financial statements.

> *It was ultimately uncovered that, as at June 2019, the true indebtedness of the NMC Group was approximately USD $6.2 billion[2].*

Shortly after the discovery, NMC PLC was put into administration and in June 2020, the administrators sought permission from the ADGM Registration Authority for NMC Healthcare Ltd (NMC Healthcare), NMC Holding LTD (NMC Holding), and various other group operating entities incorporated in onshore UAE jurisdictions including Dubai, Sharjah and Abu Dhabi, to be granted certificates of continuance to enable them to be re-registered as ADGM companies (the ADGM Companies). In light of the alleged fraud and the importance of the NMC Group, the ADGM Registration Authority granted the certificates, waiving the general prohibition against insolvent companies applying for such certificates. Shortly afterwards, the ADGM Courts placed the ADGM Companies into administration.

1 NMC Healthare Limited & Ors v Shetty & Ors [2024] ADGMCFI 0007

2 NMC Healthcare LTD (in administration) and associated companies v Dubai Islamic Bank PJSC and ors, [2023] ADGMCFI 0017

In the present case, the administrators of NMC Healthcare and NMC Holdings brought claims of over USD $5 billion including both insolvency claims under the ADGM IR 2022 as well as civil claims under the UAE Civil Code for allegations of fraud, breaches of director/manager's duties and extortion.

## Fraudulent and Wrongful Trading Before The Companies Were Continued In The ADGM

Seeking certificates of continuation was a critical move taken by the administrators in ensuring creditors could seek to benefit from the ADGM's insolvency regime, particularly the claims for fraudulent and wrongful trading, since such actions would not necessarily have been available under the onshore regimes where the companies were initially incorporated. The court found that the fraudulent and wrongful trading claims could apply to the companies prior to their re-registration because:

a) **The Administrators' Statutory Discretion:** The judge reasoned that fraudulent and wrongful trading in the 2022 Insolvency Rules gives a company's administrator a "statutory discretion" to apply to the Court for relief. Sections 251 and 252 do not provide for a cause of action that accrues at the time of the conduct in question or resultant damage. Instead, the statutory discretions arise upon the commencement of the administration (or winding-up) when the office holder may apply to the court for relief.

b) **Purposive Interpretation of the Legislation:** The judge further held that the purpose of the legislation permits the claims in such a context and that if the legislature had intended an alternative outcome, office holders of re-registered companies and foreign companies wound-up in the ADGM would lack important powers to make good creditors' estates that had been wrongfully depleted. The court highlighted that, when enacting sections 251 and 252 the legislature of the ADGM sought, in line with the provisions in England and Wales, to ensure the court has a wide discretion when applying these provisions. It is this discretion which the judge described as an answer to any potential unfairness. If the result of the remedy would result in unfairness, the Court would not exercise its discretion to grant the requested relief.

## Fraudulent and Wrongful Trading Before The ADGM IR 2022 Came Into Effect

The administrators alleged the Defendants engaged in fraudulent/ wrongful activity since at least 2012, being both prior to commencement of the rules' predecessor (the 2015 Insolvency Rules), and indeed even before the ADGM was established (in 2013).

The Defendants objected on the basis that the ADGM IR 2022 could not apply retrospectively and sought to rely on several arguments to support this, including that Article 112 of the UAE Constitution provides that there can be no retrospective effect of laws, unless "the law stipulates to the contrary" and "if necessity so requires".

The judge rejected the Defendants' arguments and held that the presumption against retrospective legislation could be displaced where proceedings were brought in the context of the insolvency regime, which is considered by UAE law to be in the public interest (being necessary to provide for fair and orderly distributions) and capable of overriding private interests of a company's creditors or liabilities of potential defendants.

## Connection To The Jurisdiction Is Not Necessarily Required

The Defendants further argued that the administrators had to establish that there was a "sufficient connection" between the Defendants and the ADGM in order to bring the claims under the ADGM IR 2022. The court rejected the Defendants' argument, finding that a connection between the Defendants and the ADGM was "not invariably or necessarily required" to establish a claim for fraudulent or wrongful trading. Even if some connection was required, merely a connection with the UAE was sufficient, and the fact that other civil claims were afoot in the UAE would help serve as a sufficient nexus.

## Key Take-Aways

- **Expansion of Liability:** the judgment positively signals an expansion of powers for insolvency practitioners and creditors to seek to secure recoveries. The court has confirmed administrators' and liquidators' statutory discretion runs from when the company is put into administration, cleanly overcoming issues as to whether the company was re-registered. The confirmation that public policy considerations prevail over technical arguments as to when legislation came into effect further assists in expanding the window of opportunity for creditors to make recoveries for historic breaches.

- **Continuation Strategy:** the judgment opens the doors to insolvency practitioners seeking to re-register companies prior to placing them into administration, which will likely be of interest both in the UAE in order to avoid potential difficulties onshore as well as in a number of other jurisdictions which offer continuance / re-domiciliation regimes such as the BVI and Canada.

- **International Enforcement:** it will be interesting to see how a foreign court may in time treat an ADGM judgment issued on this basis given the extra-territorial jurisdiction applied by the ADGM and whether this may cause any issues in respect of international enforcement. The trial on this case is due to take place in 2026, and it will be no doubt be insightful to see what further decisions the ADGM Court is prepared to take both in respect of the insolvency and the civil claims.

# RECOGNITION AND ENFORCEMENT OF EUROPEAN JUDGMENTS IN DUBAI AND THE UAE

## ISSUES AND SOLUTIONS

Authored by: Andrea Moja (Partner) and Elisabetta Stella De Rosa (Associate) - SLCLEX Law Firm

In the last two decades, the UAE became an important market for international commerce. While the Confederation managed to increase its international ranking with the implementation of the Vision 2021 National Agenda[1], an index still problematic because of the difficulties in timing, costs and methods to conclude international commercial disputes.

***Most issues with the UAE in controversies are related to the recognition and enforcement of foreign judgments and foreign arbitral awards, in particular when applied in international contracts that are characterised by the presence of choice of court and choice of applicable law clauses.***

This tendency in international trade, that aims to foresee potential future conflicts between the commercial counterparties, risks to be rendered useless by legal systems that don't have a clear and easily applied mechanism for recognition and enforcement of foreign judgments. In these cases, the judgement is not applicable in practice, and the winning party won't see their economic claim satisfied.

The recognition and enforcement of foreign judgments is an area of international law that straddles both private law—because it concerns private individuals or companies subject to a domestic legal system interacting with the national system of a third country—and public law, particularly the judicial power that operates at the state level.

Of particular relevance in public law is the concept of reciprocity with the state of origin of the judgment, which involves the relationship between states, regardless of the legitimacy of the private party's right that the judgment is intended to protect. Reciprocity can be defined as an "exchange of favours" between states[2], that can be summarised as: "State A, called upon to enforce a judgment from State B, recognises it as valid within its territory only if there is certainty that the judge of State B will in turn enforce a judgment from State A."

For the United Arab Emirates, however, the concept of state's sovereignty within the territory is still very pronounced, and remains very relevant; because Islamic laws are sources of law, often non-derogable, Emirati judges have historically been reluctant to enforce foreign judgments within their territory.

As a result, private parties who possess a foreign judgment recognising an economic right often fail to obtain enforcement—and thus satisfaction—against the counterparty holding assets within the UAE.

1 Now substituted with the "Vision 2023 National Agenda"

2 generally speaking, the concept can be summarised as 'mutual concessions (between states) of advantages or privileges for the purpose of encouraging commercial or diplomatic relations'. (Black's Law Dictionary, 2009).

The recognition and enforcement of foreign judgments in the UAE are regulated by: multilateral treaties to which the UAE is a signatory[3] , bilateral treaties (such as the treaty between France and the UAE, which will be discussed later), and domestic law.

The main limitations on the enforcement of foreign judgments under Emirati domestic law are threefold: the exclusive jurisdiction of UAE courts, reciprocity with the state of origin of the judgment, and public order. Regarding exclusive jurisdiction, the Emirati judge applies the rules of competence allocation as provided by domestic federal law and rejects requests for enforcement of judgments issued by foreign courts deemed not competent. The conflict with public order pertains to the incompatibility of the cause of action, the subject of the foreign judgment, with the non-derogable norms of the state and Islamic Sharia.

In this complex framework, an important new development has emerged: the UAE Minister of Justice's circular dated September 13, 2022, and its recent application. The circular is a response to the Lenkor Energy judgment[4] issued by the English Supreme Court, which for the first time recognised and enforced a Dubai Court of Cassation judgment in England. In the circular, the minister asserts that the requirement of reciprocity between Dubai and England has been met and encourages Dubai judges to recognise judgments issued by the Courts of England and Wales.

The circular marks a significant shift for the UAE, whose judges had previously always deemed English judgments unenforceable within their territory. However, the real breakthrough came with a recent decision by the Dubai Court of Cassation[5], which recognised the enforceability of a judgment issued by an English judge concerning the property rights of spouses following a divorce.

The Emirati judges did not provide a detailed reasoning on the point of reciprocity, merely acknowledging that the requirement was satisfied. Moreover, contrary to past rulings, despite the fact that the subject matter of the dispute could be deemed subject to the exclusive jurisdiction of UAE courts—the cause of action involved real estate located in Dubai—the Emirati judges did not reject the request for enforceability. The recent ruling has several important implications, particularly in terms of negotiating cross-border contracts.

***It is necessary to analyse the applicability of the MOJ circular and the influence of the judgment recognising reciprocity with England across the entire Confederation's territory.***

The UAE has a mixed court system, operating at both the federal and local levels. Specifically, the Emirate of Dubai has an internal court system that, in various matters, is autonomous from the courts of the other Emirates. The judgments of Emirati judges are not binding—because the UAE's legal system is based on codification. Additionally, the judgments of the Dubai Court of Cassation serve also the function of interpreting codified law only for the local courts of the Emirate and not for the federal courts or the Federal Supreme Court, located in Abu Dhabi. It is certainly possible, therefore, that an English judgment may not be recognised in one of the other six Emirates that make up the Confederation.

What are the possible schemes to facilitate the enforcement of a European judgment in the UAE? The proposal is to introduce, in the cross-border contract, an exclusive jurisdiction clause in favour of either the English court, based on recent developments, or the French court, based on the bilateral treaty between France and the UAE.

Let's analyse the pros and cons: The exclusive jurisdiction clause of the English court implies that, in the event of a dispute between the parties to the cross-border contract, the British judge must be approached. Given the recent developments in the UAE legal landscape, if the debtor counterparty has assets located in the Emirate of Dubai, the chances of having one's rights satisfied are high. Additionally, the English forum is highly regarded internationally for its speed, flexibility, and competence, ensuring high levels of legal certainty.

***Where the counterparty's assets are located in an Emirate other than Dubai, it is possible to include an exclusive jurisdiction clause in favour of the French judge.***

France and the UAE are parties to a bilateral treaty[6] aimed at cooperation in civil and commercial matters, which establishes different rules, hierarchically superior to domestic law, for the recognition and enforcement of foreign judgments. With the presence of the treaty, the principle of reciprocity is fulfilled. Furthermore, regarding exclusive jurisdiction, the Emirati judge is limited by the allocation rules provided by the treaty, which affirm the validity of the jurisdiction clause chosen by the parties. Thus, with the presence of the treaty, two of the major limitations on the enforceability of a judgment issued by a French judge in the UAE are overcome.

3 The most relevant being the Riyadh Convention, signed on the 6th of April 1983, and ratified by the UAE on the 17th of June 1999.

4 Lenkor Energy Trading DMCC v Irfan Puri [2021] EWCA Civ 770

5 Court of Cassation of Dubai, case No. 592 of the 25th of January 2024

6 Convention on judicial assistance, recognition and enforcement of judgments in civil and commercial matters between the French Republic and the United Arab Emirates, signed in Paris on the 9th of September 1991

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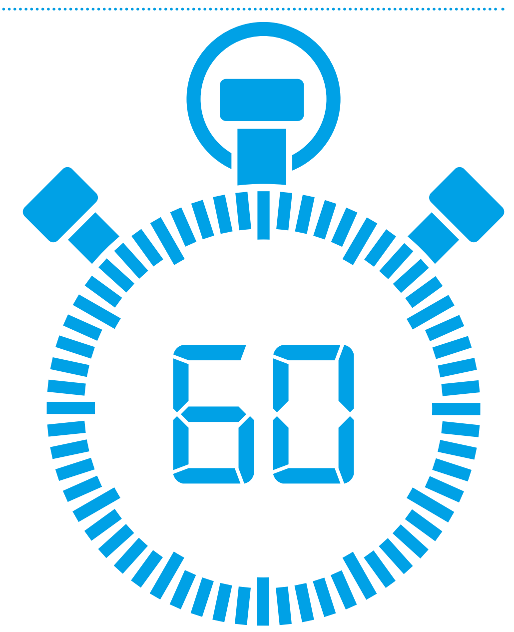
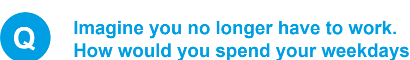
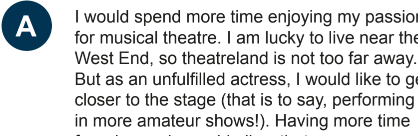
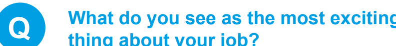


**Q Imagine you no longer have to work. How would you spend your weekdays?**



**A** I would spend more time enjoying my passion for musical theatre. I am lucky to live near the West End, so theatreland is not too far away. But as an unfulfilled actress, I would like to get closer to the stage (that is to say, performing in more amateur shows!). Having more time for rehearsals would allow that.



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

**A** Seeing my cases in the news and knowing that they can have a real impact on people's lives. I do not have a difficulty explaining to friends and family what I do because competition law is something we can all relate to. Competition law and regulation touch every sector of the economy. Whether it is the price we pay for groceries, the battery life on a mobile phone, or access to clean water, these are issues that make the world go round but can be highly controversial. I was first asked by the BBC to talk about a competition case on TV back in 2008 at the height of the financial crisis. That my practice area has such a direct link with the people and prosperity of a country, adds another level of excitement, purpose and reality.

**Q What's the strangest, most exciting thing you have done in your career?**

**A** These relate to my rather niche space law and communications practice which can be strange and exciting all at the same time. I have not yet been to the Moon (it is on my bucket list) but I have experienced a vertical bed designed for astronauts while attending clients on location at a space centre. I have also discovered how to track down lost satellites with the help of experts.

**Q What is the best life lesson you have learned?**

**A** No-one is perfect or invincible and it is fine not to be. I have found that selectively revealing your imperfections and even vulnerabilities, makes you more human and more relatable. I am speaking as a recovering perfectionist and inspired by work for client Hewlett-Packard and Carly Fiorina's book *Perfect Enough*.

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

**A** Emotional intelligence, the ability to recognise and manage your own emotions, as well as the emotions of others. It helps you build relationships and navigate difficult situations – in law, and life.

**Q What film do you think everyone should watch, and why?**

**A** *Matilda* (the 1996 film version). This is considered more a family film and there is much to like for adults. My favourite quote from Danny DeVito (also known as Mr Wormwood) is a clarion call to action for anyone with a problem: "I'm smart, you're dumb. I'm big, you're little. I'm right, you're wrong, and there's nothing you can do about it."

**Q Dead or alive, which famous guests would you invite to a dinner party?**

**A** I would assemble some of the best critical thinkers, from different times and places. #1 – Albert Einstein - if something looks wrong, then it's probably worth finding out why. #2 – Martin Luther King – the art of persuasion. #3 – Simone de Beauvoir - don't be afraid to think differently, even if that means challenging what other people think and assume.

**Q What is the best novel of all time?**

**A** E.M. Foster's *A Passage to India*. The novel is about an Indian doctor and his relationships with an English professor and a visiting English schoolteacher. It speaks to my own cultural heritage and mixed parentage. I think it can be considered an enduring work of great fiction beyond the specific setting where it shows friendship and connection between people despite political and cultural differences.

**Q What legacy would you hope to leave behind?**

**A** I would like to hope that people remember me not just for what I did but the values I stood for or tried to live. Many of my clients work in the public sector. They have taught me that skills and attributes often undervalued in other contexts are important: candour, judgement, balance, neutrality, patience, perspective, calmness, grace under fire, dignity, emotional intelligence. I would like to be remembered for at least one of those things.

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

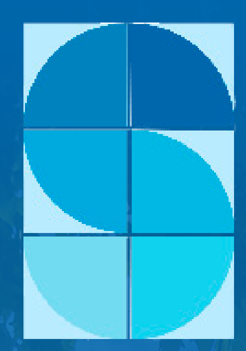
**A** The growth in competition law collective actions in the Competition Appeal Tribunal (for non-competition lawyers, known as the "CAT"). Part of my motivation in transferring to the Bar from private practice as a solicitor in 2013 was the attraction of this newer area and where I felt that my skills as an advocate could be developed. Added momentum came with changes under the Consumer Rights Act 2015 allowing for opt-out collective actions covering an entire market. The growth has been considerable in the last two years and it is exciting to be part of this where in the middle of 2024 the average claim value is over £3.2 billion. Many small business claims currently pending would not have justified individual actions and many consumer to business claims would not have been brought at all, but for this regime.

**Q Do you have any hidden talents?**

**A** I am still looking. If descending a near-vertical surface by using a double-coiled rope counts as a talent, I have abseiled off a number of tall buildings. This includes Guy's Hospital Tower which remains one of the tallest buildings in London and is the world's fifth-tallest hospital building. Quite exhilarating and all in aid of charity.

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

**A** I tend to have a plan for almost everything but for the next five years, I am aiming for doing more of the same after what has been some years of build-up. I transferred to the Bar just over 10 years ago after 15 years as a solicitor. This was already the fulfilment of a long-standing life ambition and inspired by my father. I knew him only for a short while but his encouragement that I would one day become a barrister proved strangely prophetic. He did quip that I would become the next female prime minister. That was said in 1979 so is no longer possible, even if I wanted to or had the skills. In the next five years I would like to see some of the pipeline collective damages cases I am working on deliver the benefits the regime set up to achieve. The life of these cases is measured in years, and some are not yet announced – watch this space!



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# THE NON-CONTRACTUAL JURISDICTION FOR ANTI-SUIT RELIEF

CORPORATE PARTNER

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

## Introduction

The recent line of authority preceding Bourlakova[1] and Magomedov[2] had largely centred on the contractual jurisdiction for granting an anti-suit injunction ("ASI") to restrain foreign proceedings. However, the case of Bourlakova considered the non-contractual jurisdiction for granting ASI relief. Similarly, Magomedov considered the non-contractual jurisdiction for granting anti-anti-suit injunctive ("AASI") relief.

## The Test for Anti-Suit Relief

The two requirements (see The Angelic Grace[3]) for an ASI are for: (1) the existence (demonstrated at least with a high degree of probability) of an arbitration clause to which the defendant is party and covers the dispute in question; and (2) the absence of exceptional circumstances.

***The jurisdiction for anti-suit relief also encompasses non-contractual rights to relief where the claimant can point to clearly unconscionable conduct on the party sought to be restrained[4].***

Unconscionable conduct is usually to be established where the pursuit of foreign proceedings is vexatious or oppressive or interferes with the due process of the court. The non-contractual jurisdiction for anti-suit relief is considered further below.

## The Source of the Jurisdiction

The anti-suit jurisdiction takes its roots from s.37 Senior Courts Act 1981. A consequence of relying on s. 37 Senior Courts Act 1981 as the proper basis for an ASI, is that for the purposes of service out of the jurisdiction CPR 6.36 will have to be relied, requiring the applicant to show that England and Wales is the proper forum in which to bring the claim.

1 Loudmila Bourlakova and Ors v Oleg Bourlakov and Ors [2024] EWHC 929 (Ch)
2 Ziyavudin Magomedov and Ors v PJSC Transneft and Ors [2024] EWHC 1176 (Comm)
3 Aggeliki Charis Compania Martima SA v Pagna SpA (The Angelic Grace) [1995] 1 Lloyd's Rep 87
4 Seismic Shipping Inc & Anor v Total E & P UK plc (The Western Regent) 2005 EWCA Civ 985, [44 – 45]

## Non-Contractual ASIs: The Law

In Airbus Industrie v Patel[5] Lord Goff confirmed that a non-contractual ASI would only be granted where: (1) the English forum had a sufficient interest in the dispute and; (2) where there were two potential fora, a decision that England is the natural forum. Additionally, a claimant must show that the defendant's conduct (actual or proposed) of foreign proceedings would be vexatious and oppressive or unconscionable.

In the Western Regent, Clarke LJ described the situation in which unconscionability might be established:

> "The Court may conclude that a party is acting vexatiously or oppressively in pursuing foreign proceedings and that he should be ordered not to pursue them if (a) the English court is the natural forum for the trial of the dispute, and (b) justice does not require that the action should be allowed to proceed in the foreign court, and more specifically, that there is no advantage to the party sought to be restrained in pursuing the foreign proceedings of which he would be deprived and of which it would be unjust to deprive him."[6]

The second limb of this formulation of unconscionability was considered in Deutsche Bank v Highland Crusader Partners[7] - where the issuance of proceedings in foreign courts is said to be vexatious or oppressive on the grounds of forum non conveniens then it will be necessary to show that (a) England and Wales is the appropriate forum, and (b) justice requires the restraint of the foreign proceedings.

## Bourlakova: Background

Following the breakdown in the marriage between Mr Bourlakov (the First Defendant in the underlying proceedings) and Mrs Bourlakova in 2017, Mr Bourlakov engaged in (what was said to be) a dishonest and unlawful scheme to maximise his own share of the matrimonial estate, said to be worth several billion dollars.

***In 2018, Mr Bourlakov claimed that the family assets were subject to a long-standing oral contract with a Mr Kazakov, whereby they were held 50:50. This is despite the comparative lifestyles of Mr Bourlakov – that of a "multi-billionaire" – and of Mr Kazakov – that of "comparative poverty".***

Mrs Bourlakova commenced high court proceedings in 2020, following which Mr Kazakov and other defendants challenged jurisdiction. In 2021 Mr Bourlakov died.

In January of 2024, Mr Kazakov issued a bankruptcy application against Mr Bourlakov's estate, in the Arbitrazh Courts of St Petersburg. That petition was founded on an alleged €1.45bn debt owed pursuant to an April 2020 agreement between Mr Bourlakov and Mr Kazakov. The Russian Court accepted the bankruptcy petition of Mr Kazakov, further to which Mrs Bourlakova applied for an ASI against the continuance of the bankruptcy proceedings in Russia.

## Bourlakova: Single Forum Cases

The Courts will be wary of granting an ASI restraining foreign proceedings, in the case of a "single forum" case - where the cause of action relied upon in the foreign court cannot be advanced in England, and there is no cause of action available (as a matter of English domestic law or the law applicable under its choice of law rules) to the claimant to allow him to win before the English courts.[8]

In single forum cases, particular caution will be exercised by the Court when considering whether to grant an ASI.[9]

## Bourlakova: The Court's Approach

Mrs Bourlakova averred that Mr Kazakov's bankruptcy petition in Russia was a vexatious attempt to extricate himself from the effects of the substantive English proceedings. Mr Kazakov contended that Russia was the only forum in which a bankruptcy administrator could be appointed pursuant to Russian law and, as such, the case was equivalent to a "single forum" case. This was a point with which Trower J ultimately agreed.

Trower J clarified the right Mr Kazakov was seeking to enforce – that being the right to appoint a bankruptcy administrator – this was said to be separate and distinct to his claim for payment under the agreement with Mr Bourlakov as advanced in the High Court proceedings. Whilst the bankruptcy proceedings were parallel to the English proceedings, they did not seek relief which mirrored that sought in England.

The commencement of the bankruptcy proceedings was not deemed to be vexatious: whilst Mr Kazakov's motivations for the Russian petition may be scrutinised at a later point, the bankruptcy proceedings were not considered to be "incredible" or "hopeless".

In light of the above, Trower J refused the application for an ASI restraining the continuance of the Bankruptcy application.

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5 Airbus Industrie G.I.E. v Patel [1999] 1 AC 119
6 The Western Regent, [44vi] and [45]
7 Deutsche Bank v Highland Crusader Partners LP [2009] EWCA Civ 725
8 See Dicey, Morris and Collins on The Conflict of Laws (16th edn, 2022) vol 1 at [12–136]
9 Oceanconnect UK Ltd v Anagara Maritime Ltd [2010] EWCA Civ 1050 at [43]: "The need for particular caution in single forum cases is readily apparent; as the only possible forum is the foreign forum, the risk of injustice is very real: 'The decision the court has to make is therefore not in which forum the claims should proceed, but rather whether they should proceed at all.'

## Magomedov: Background

The Magomedov proceedings concerned two conspiracy claims in the English High Court relating to the alleged deprivation of Mr Magomedov's and Port Petrovsk's (together the "Claimants") interests in the Russian entity, PJSC Novorossiysk Commercial Sea Port ("PNSCSP").

Transneft was served on 5 September 2023, before duly filing it jurisdictional challenge on 14 February 2024 (which was listed for September – November 2024), but not before it had applied to the Moscow courts for a Russian ASI against each of the Claimants. Following notice of the Russian ASIs, the Claimants applied for and were granted interim AASIs against Transneft by Foxton J. The AASIs directed that Transneft was not to pursue the Russian ASIs at the (then) forthcoming hearing of the same.

Despite the terms of the ASIs (and Transneft requesting that the hearings be adjourned) the Russian Courts granted final form ASIs against the Claimants, which sought to prohibit the continuation of the High Court proceedings. The final form Russian ASIs also contained penalty provisions enabling Transneft to seek to enforce a total sum of $7.5bn for breaches of the same.

Transneft agreed not to enforce the awards against the Claimant, pending the return date hearing of the AASI. As well as AASI relief, the Claimants sought an Anti-Enforcement Injunction ("AEI") preventing enforcement of the Russian ASIs against them, and an Anti-Reliance Injunction ("ARI") preventing reliance by Transneft on the actions of the Claimants in these proceedings.

## Service Out/Natural Forum

The vexed question of natural forum was raised by Transneft. For the service out application, it had been decided that England and Wales was the natural forum for the determination for the issues in dispute between the parties, since the result of the alleged conspiracies was a share purchase agreement, by which Port Petrovsk sold its interests in PNCSP. That share purchase agreement was governed by English law, including the non-contractual obligations.

At the return date hearing of the AASI, Bright J declined to form a provisional view of whether England or Russia was the natural forum for the resolution of the disputes, since not all of the evidence on the issue was before him.

## Hemain Injunctions

Bright J referred to a species of ASI from the family courts, known as a Hemain[10] ASI, which are of limited duration and are intended not to bring parallel foreign proceedings to an end, but to pause them whist the English court considers the jurisdictional challenge before it. It is within this narrow window of time within a case that a Hemain injunction may be granted.

Bright J allowed the continuation of the AASI on the basis that the English court must have the power to give itself the chance to decide the question of the natural forum.

## Conclusions

Before granting a non-contractual ASI, the Court will undertake a careful balancing act to consider whether the parallel proceedings are truly connected and whether the relief sought in the foreign jurisdiction can only be obtained there. If that relief could be sought in England, as well as the foreign jurisdiction, then it may be deemed abusive to pursue the same with the intention of frustrating English proceedings. In such circumstances, the Court has shown a willingness to protect the English proceedings via the grant of ASI and AASI relief, rather than being hamstrung by the operation (potentially abusively) of foreign proceedings, including ASIs.

10 Hemain v Hemain [1988] 2 FLR 388

# ECONOMIC SANCTIONS

# LESSONS TO LEARN FROM AML COMPLIANCE

**Authored by: Sarah Wrigley (Director) and David Trotter (Manager) - Grant Thornton**

Since Russia's invasion of Ukraine, businesses have encountered an increasingly complex set of challenges in navigating their sanctions compliance responsibilities. Firms more than ever need to be aware of their risk exposure and appetite, and the risk-based measures they must implement to maintain compliance.

***While the UK's Office of Financial Sanctions Implementation (OFSI) doesn't mandate any particular compliance strategy, in recent enforcement notices it has made clear the importance of firms maintaining a compliance programme based on an understanding of their risk exposure.***

The US Office of Foreign Assets Control's (OFAC) Framework for OFAC Compliance Commitments also 'strongly encourages' organisations subject to US jurisdictional oversight 'to employ a risk-based approach to sanctions compliance by developing, implementing, and routinely updating a sanctions compliance program'.

While this advice isn't legally binding - not least for entities operating outside of the US - it can serve as a useful blueprint for managing sanctions risk. In it, OFAC highlights 'five essential components' of compliance as being management commitment, risk assessment internal controls, testing and auditing, and training.

Firms operating in the regulated sector will be familiar with principles like these, given longstanding obligations under UK legislation to prevent, recognise and report money laundering. Given this, it can be useful to explore how best practice related to money laundering compliance can inform sanctions compliance.

## The Risk-Based Approach

In its AML/CTF guidance, the Joint Money Laundering Steering Group emphasises the importance of a risk based approach to compliance. This is echoed in the second of OFAC's five principles, which recommends that firms carry out periodic or ongoing assessments of their sanctions risk exposure.

***An effective risk assessment will identify a business' touch points to the outside world, such as through their products, services, geographic reach, customers and supply chain, and assign risk categories to these.***

After building up an understanding of its risk exposure, a firm can then define its risk appetite, for example by documenting which categories of exposure it has no or limited appetite for. This acts as a foundation for a documented risk-based approach, which will allow the firm to apply increased scrutiny to areas of its business which carry the highest risk. This is a vital step in managing a compliance programme as it also enables a firm to deploy its resources more appropriately.

## Resources

An appropriate allocation of resource helps a firm more efficiently mitigate risk. This is important as ensuring a robust programme may require investment in people and technology. While specific exposure to sanctions will vary between industries and geographies, all firms with a UK nexus must ensure they adhere to the UK Sanctions list. It may be appropriate for a business therefore to employ tools such as sanctions screening software in order to ensure they avoid doing business with sanctioned entities. For this to be effective, businesses must be confident that they know the identity of third parties such as customers and suppliers.

***Some sanctions will also apply to a designated individual with a qualifying degree of ownership or control of an entity, creating a requirement to also understand the ownership strcuture of third parties.***

A common mistake in AML compliance is to view this role as a tick box exercise that only involves basic information gathering. However legal persons and opaque corporate structures such as nominee relationships can be used by sanctions evaders to obfuscate ownership. It is therefore important that teams conducting third party due diligence are effectively trained, resourced and incentivised to spot evasion typologies and apply added scrutiny where necessary.

## Assurance

An effective AML compliance framework will follow a three lines of defence model. The first line usually sits in a business' operating units, allowing risk to be owned and managed at source. A second line function usually concentrates specialist financial crime expertise, owning the firm's compliance policies and procedures. It may also monitor and carry out independent oversight of the first line risk functions. The firm's internal audit function will operate as a third line of defence, providing assurance to senior management who ultimately hold responsibility for the firm's risk management responsibilities. Deploying a similar model can bolster a firm's defences against sanctions breaches by providing layers of protection against deficiencies, and entrenching a framework that allows its leadership to play an active role in managing sanctions risk.

## Governance

It will be no surprise, therefore, that good governance plays a key role in determining the success of a firm's ability to manage risk. Senior management involvement is vital to maintaining a robust governance structure by setting and enforcing the values of a business, thus in its thematic review of financial crime risk, the Financial Conduct Authority highlights the importance of management in embedding a strong compliance culture.

By enforcing a culture of compliance, not only will management achieve greater buy-in to a firm's compliance activities, it is also more likely to play an active oversight role in managing sanctions risk across the firm.

## Looking Ahead

In OFSI's most recent annual review, it highlighted increases in its enforcement capabilities, as well as 172 cases it had under investigation. That these will likely involve sanctions across the UK's various regimes serves as a reminder for firms to manage all sanctions risk they are exposed to, despite the prominence of Russian Sanctions in the media. That said, in a written submission to a Treasury Select Committee earlier this year it also noted its expectation of enforcement action specifically related to Russia sanctions to begin this year.

In December last year, the UK Government announced the creation of a new Office of Trade Sanctions Implementation, responsible for the civil enforcement of trade sanctions. Once established, its duties will include monitoring compliance with trade sanctions, sending a further signal that the government is taking enforcement seriously.

Firms seeking to reinforce their sanctions compliance programmes can take inspiration from some of the fundamental principles which have developed within AML best practice by ensuring programmes are risk-based, well-resourced and effectively monitored. These components should be driven overall by strong governance, and management promoting a firmwide culture of compliance.

# USA SANCTIONS IN THE UAE

Authored by: Arthur Dedels (Senior Associate) - ADG Legal

What happens when the world's most powerful economy decides to blacklist your business or you personally as a security threat? Brace yourself for the harsh reality of the United States' sanctions list. It adds to the thrill that you will probably have no advance warning and will find out about your new status when all your bank accounts get blocked, unless you had a reason to suspect that you may be targeted. In our experience, most do not even understand why exactly they have been sanctioned as they do not realise that something they did could lead to this outcome.

This article provides an introduction to commonly occurring sanctions issues in the UAE. The UAE has a sanctions regime which consists of the following two main components:

1. Sanctions initiated by the UAE.
2. Sanctions introduced by the United Nations and the Terrorist Financing Targeting Centre (whose members apart from the UAE are US, Bahrain, Kuwait, Oman, Qatar and Saudi Arabia).

These sanctions are enforced by law and are a subject for another day. The focus of this article is on the practical ad hoc enforcement of the US sanctions. It looks at what may lead to being added to the sanctions list of the US's Office of Foreign Assets Control (OFAC), its practical effects and what can be done about it within the UAE. Similar considerations apply to persons designated by the EU and UK.

By their scope of application, OFAC sanctions are categorised as primary or secondary.

The primary sanctions require compliance when there is a US nexus. This means compliance is required by US persons (which includes entities incorporated/organised in the US and their foreign branches, US citizens, permanent residents (wherever located), and anyone located in the US) and anyone who is involved in transactions processed in the US dollar or via the US financial system.

***Certain programs also require compliance by subsidiaries owned or controlled by US companies and by foreign persons in possession of US-origin goods.***

Violation of the primary sanctions may lead to a fine or imprisonment by the US.

The secondary sanctions regime is applicable even when there is no US nexus. This means that anyone anywhere in the world risks facing the

consequences of non-compliance. The scope of activities that may constitute violations however represent a small fraction of those that are prohibited by the primary sanctions. These primarily include the following:

1. Material support to an individual, entity, vessel, or aircraft sanctioned by OFAC (SDN). This includes supply of financial, material, or technological support for SDNs, or goods or services in support of SDNs. Support needs to be deemed material by OFAC – usually, it involves high value transactions, activity at the core of US sanctions objectives, deceptive or evasive conduct and acting for or on behalf of SDNs.
2. Significant transactions with SDNs (usually worth millions of dollars).
3. Operating in sanctioned sectors.
4. Ownership or control by SDN.

Violation of the secondary sanctions regime may result in limitations on or exclusion from accessing the US financial system and market or it may result in being sanctioned by OFAC.

For example, OFAC has sanctioned individuals and entities for owning or managing/operating significant assets (e.g. aircrafts or vessels) used by SDNs, attempting to conceal SDNs' involvement or a sanctioned activity, acting as a leader/representative of SDNs, facilitating circumvention of sanctions by SDNs, handling daily operations of SDNs, and helping SDNs to set up shell companies.

The effect of being sanctioned by OFAC usually makes it extremely difficult or impossible to continue business. The practical effects within the UAE usually include the following:

1. Software registered to the accounts of SDN's are frozen – for example, Microsoft and Apple accounts.
2. Vendors may refuse to supply services or goods even when there is an existing contract with no US nexus.
3. Banks block all SDN's accounts and request to transfer all funds elsewhere. While technically, the prohibition on dealing with SDN's relates only to US dollar accounts, in practice, we have seen that all SDN's accounts have been frozen, regardless of currency.

The author is not aware of any cases in the UAE courts testing the legality of such actions by the UAE banks and other service providers. If the UAE courts are requested to consider it, then they are likely to consider not only law but also the public policy of the UAE.

Whether the newly designated SDN is a company or an individual, they will find it very difficult, if not impossible, to engage in business activities due to the effect of sanctions. In practice, they will have the following main options concerning the sanctions:

## Option 1: Do Nothing

If the SDN is a company and it does not intend to continue its business, it can be liquidated or continue its existence in a dormant state.

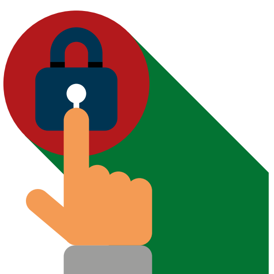
If the business tries to continue (whether via the sanctioned or a newly established entity) without eliminating the factors which led to the imposition of sanctions, then its owners and managers might well be sanctioned in a further round.

## Option 2: Change Behaviour

The main goal of OFAC's sanctions is to change behaviour of SDNs. Accordingly, an SDN may change their behaviour to ensure that it no longer violates the sanctions regime and continue its business. Due to the effect of sanctions, it will usually be necessary to set up a new entity. For example, if a shipping company has been sanctioned because it has shipped dual-use items to Russia, it may set up a new entity and continue its shipping business, however it must ensure that it does not ship dual-use items to Russia, and the safest options would be to refrain from any shipments to Russia or states that are known to facilitate sanctions evasion. This does not lift sanctions, which requires a de-listing application to OFAC. Rather, it simply reduces the risk of the owners and managers of the designated company being subject to a further round of sanctions later.

## Option 3: Seek De-Listing

Many SDN's believe they have no chance of being de-listed. However, there has been success by a number of those who have. There are various grounds for seeking de-listing, including claiming designation in error (or a lack of lawful basis for being listed) or demonstrating a clear change of behaviour, whether or not it is admitted that past behaviour justified the listing. (It should also be noted that the basis for seeking delisting from the UK and EU sanctions is very different).



While sanctions have been and can be a very effective deterrent for the US and others to advance foreign policy objectives, at the same time, the practical effects upon an SDN's business and (for individuals) personal life can be devastating.

***While of course those issues cannot be compared to the suffering of individuals caught up in Russia's war against Ukraine and other conflicts, it does not detract from the fact that the existing regime is ill-resourced to address those who have been designated in error and those who inadvertently breached sanctions and have since changed their behaviour.***

The process is slow and there are no shortcuts. During that time, even within the UAE, a designated person may struggle to buy a carton of milk, thanks to the dependence we now all have on being able to use a bank account.

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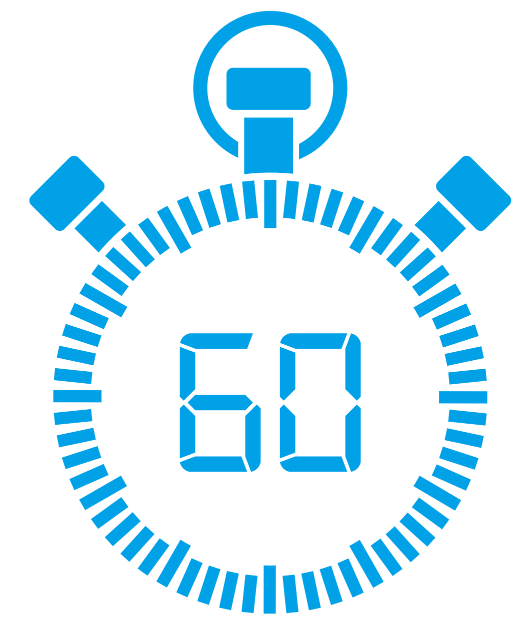


**Q What do you see as the most important thing about your job?**

**A** Resilience. The bar is a dynamic and highly-rewarding career, but it's also challenging. The junior end of the bar, in particular, is a real learning curve. I truly believe to succeed you need to persevere, work hard and be open to all feedback (good and constructive). I'm sure I'll thank myself for it in the long run!

**Q What has been your greatest work-related achievement so far?**

**A** Successfully defending a small charity against several claims from a former trustee. It was my first trial as sole counsel and, though low in value, the stakes for the charity were high. I'll never forget the charity's chairwoman bursting into tears when the claims were dismissed. It was a good reminder of how impactful the job can be.

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

**A** One partner at a firm I was seconded to told me that, in his view, the key to being a successful barrister was the "Three As". A barrister should be (in this order): (i) Available; (ii) Affable; and (iii) Able.
His point was that, while solicitors expect barristers to be able, this was not the only metric for success. The bar, as in most professions, is also about building relationships - showing you are a team player, and someone who not only delivers results but is great to work with. It's something I endeavour to keep in mind.

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

**A** Good interpersonal skills. Our profession requires us to engage (and persuade!) people from a wide range of backgrounds and disciplines. It's important to know your audience (be it your client, the Judge, your colleagues, etc.) and to be adaptable.

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

**A** I've long been interested in efforts to alleviate homelessness. I'm particularly interested in social enterprises or charities which help people experiencing, or who have experienced, homelessness to find employment. For example, the Big Issue – a street-based newspaper offering those affected by homelessness the opportunity to earn a legitimate income. I remember as a child walking with my parents down our local high street and insisting that we buy a newspaper from every person we passed. We'd end up with about 5 copies, but it's a small price if it helps someone back on their feet.

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

**A** I've been lucky to go to some wonderful places. Probably Lake Tahoe, California. A stunning lake surrounded by beautiful mountains. What's not to like?

**Q What is one goal you would like to achieve in the next year?**

**A** To keep building my practice. I've been fortunate in my first year of tenancy to be involved in some really interesting work. I went on secondment, took part in my first High Court trial, and have been involved in some complex cases. I'm looking forward to building on this start.

**Q What music do you like?**

**A** I'm open to anything (although, perhaps not heavy metal). One of my favourite bands is The Divine Comedy. Their song "Our Mutual Friend" is worth a listen. Equally, Beethoven's Symphony No. 7 has been known to get me through some late-night drafting!

**Q What piece of advice would you give to your younger self?**

**A** Don't be afraid to take the occasional risk. It's too easy, sometimes, to talk yourself out of doing something because of a fear of failure. It's scary making decisions when the outcome is uncertain. But if you never try, you'll know.

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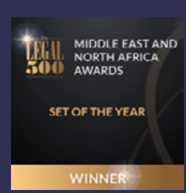

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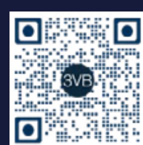

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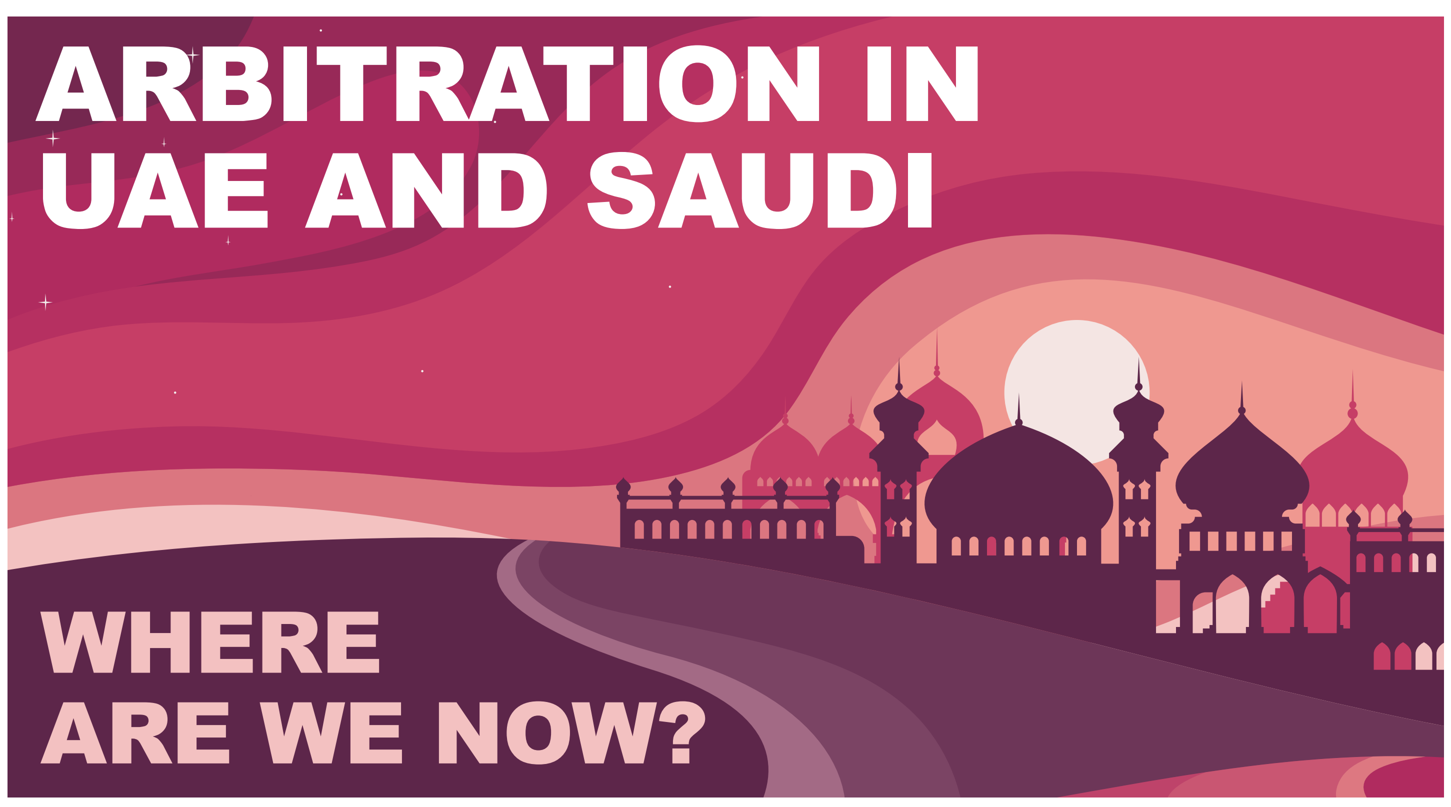



# ARBITRATION IN UAE AND SAUDI: WHERE ARE WE NOW?

Authored by: Peter Smith (Legal Director) - Charles Russell Speechlys

Three years can feel like a lifetime in arbitration. In September 2021, the DIFC-LCIA Arbitration Centre in the UAE was abolished, which raised some concerns in the international arbitration community. This change, however, created an opportunity to revamp the arbitration landscape in Dubai, and, together with changes in Abu Dhabi, has led to a new era of arbitration in the Emirates. Since then there have also been substantial developments in Saudi Arabia. This article gives a snapshot of these changes that have taken place in two of the most prominent jurisdictions for arbitration in the Middle East, and consider what the future may hold.

## United Arab Emirates

In Dubai, there have been two major arbitration events. In September 2021, the Government of Dubai unexpectedly abolished the DIFC-LCIA Arbitration Centre, a joint venture between the DIFC and the LCIA that was based in the heart of the financial district.

The lesser-known Emirates Maritime Arbitration Centre was also abolished. Dubai Decree 34 of 2021[1] declared that all agreements opting into DIFC-LCIA or EMAC arbitration were now to be subject to the institutional rules of the Dubai International Arbitration Centre (DIAC), who would manage all existing and future arbitrations.

At the same time, Decree 34 shifted the default seat of arbitration under DIAC from onshore Dubai to the DIFC.

In March 2022, DIAC issued a revised set of rules as part of an institutional renewal that saw its former executive committee replaced by the 'DIAC Arbitration Court'. Changes to DIAC's 2007 Rules were long-awaited and had been heralded by the release of draft (but never effective) rules in 2016. The 2022 rules contained amendments that other arbitration institutions had come to adopt, including provisions on the consolidation of claims, the joinder of third parties, alternative means of appointing arbitrators, third-party funding, expedited procedures, interim measures, and emergency arbitration.

***Practitioners particularly welcomed the express recovery of legal fees, ending uncertainty present in the 2007 rules. The 2022 rules also changed the default seat to the DIFC, in line with Decree 34.***

Notwithstanding the refresh of DIAC's rules in 2022, the effects of Decree 34 are still being felt around the world, with courts pulling in different ways. In February 2024, the US District Court for the Eastern District of Louisiana in New Orleans ruled that a DIFC-LCIA arbitration clause was unenforceable because it referred to an arbitral institution that had been abolished. At the time of writing, an appeal of the decision to the US Fifth Circuit Court of Appeals is awaited. The Singapore High Court followed the US District Court with a further finding of unenforceability in DFL v DFM [2024] SGHC 71 (15 March 2024). Then, reaching a different outcome, in its ruling in case number 449 of 2024 dated 24 April 2024, the Abu Dhabi Court of Appeal upheld a first instance decision that decided a DIFC-LCIA arbitration agreement was binding and effective despite the abolition of the DIFC-LCIA.

1 https://dlp.dubai.gov.ae/Legislation%20Reference/2021/Decree%20No.%20(34)%20of%202021.pdf

In Abu Dhabi, the end of 2023 brought major change in the creation of the Abu Dhabi International Arbitration Centre, known as 'arbitrateAD'. Although a free-standing organisation, from 1 February 2024 arbitrateAD has replaced the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC) and all ADCCAC arbitrations filed from 1 February 2024 will be administered by the new institution. arbitrateAD is a substantial step forward for arbitration in Abu Dhabi, with a board including arbitration doyen Gary Born. arbitrateAD published its new rules in February 2024, containing similar provisions as those in the updated 2022 DIAC rules, and making the ADGM the default seat for arbitrateAD arbitrations.

***The ADGM also hosts a case administration office for the ICC, and there have been some notable decisions by the "onshore" courts of UAE relating to ICC arbitrations stemming from the fact that it has an office in the ADGM.***

In case number 1045 of 2022, the Abu Dhabi Court of Cassation declined to annul an ICC arbitration seated in "Abu Dhabi" on the grounds that it lacked jurisdiction to consider the application, finding that the presence of the ICC within the territory of the ADGM made the financial free zone the juridical place of the arbitration and the ICC an "ADGM Establishment" for the purposes of the ADGM's own jurisdictional rules. The ADGM Courts later accepted jurisdiction over the dispute (A6 v B6 [2023] ADGM CFI 0005 (13 March 2023)).

Moving back to Dubai, it has also had a recent notable decision relating to the ICC. On 5 February 2024, the Dubai Court of Cassation issued a judgment (case number 821 of 2023 upholding an earlier decision of the Dubai Court of Appeal) in which it found (on a very narrow reading of an article of the ICC Rules 2021) that an ICC tribunal had exceeded its jurisdiction by dealing with a matter not falling within the scope of the arbitration agreement when the tribunal awarded a party the legal fees of its representation in the dispute.

## Kingdom of Saudi Arabia

Arbitration is booming in the Kingdom, in particular driven by the Saudi Centre for Commercial Arbitration. The SCCA opened a representative office in the DIFC in February 2023, its first overseas, and then issued new rules in May 2023. One of the most far-reaching changes has been the introduction of the SCCA Court, which has responsibility for making key administrative decisions in SCCA arbitrations. The 15-person-strong Court consists of arbitration experts from a dozen countries with many years' experience.

Other significant changes in the new rules include an emphasis on using technology in filing documents and managing cases, including allowing parties to opt into the Online Dispute Resolution Procedure Rules where the aggregate amount in dispute does not exceed SAR 200,000 (roughly USD 53,000); the significant expansion of the tribunal's discretionary powers, such as the ability to determine the most effective format for hearings (including remote hearings), to reject changes in party representation as a procedural safeguard to avoiding conflicts, and to encourage parties to resort to mediation where appropriate; new rules addressing multi-party arbitrations and multi-contract disputes; the consolidation, or otherwise coordination, of parallel arbitrations; rules on third party funding; the publication of redacted awards absent party objection; and rules addressing the need for cybersecurity, privacy, and data protection.

The SCCA has also published research on arbitration in Saudi Arabia in conjunction with the KSA Ministry of Justice demonstrating how arbitration friendly the Kingdom has become, particularly to international counterparties. In 2021, courts in Saudi Arabia enforced 204 domestic and foreign awards, representing an aggregate value of US$2.1 billion, with enforcement proceedings being resolved on average within two weeks. Since the Saudi Arbitration Act in 2012, there have been approximately 35,000 applications for enforcement with an aggregate value of enforced arbitral awards coming in at just over US$6.16 billion. In 2019 alone, more applications for enforcement were filed than in the period from 2013 to 2018 inclusive. From 2017 to 2022, of 720 arbitration-related judgments in the Saudi Courts, 31 per cent were applications to annul or enforce awards; of the former, only 8% were successful (equating to 11 applications, 7 granted in full and 4 partially). Of the 24 sharia grounds identified, only five were successful (around 21 per cent). The Saudi government also encourages its entities to use SCCA arbitration clauses with international counterparties, thereby increasing investor confidence.

## The Future

Where now for the Middle East? The mainstay of regional arbitration will still be construction-related for the foreseeable future and Saudi is likely to be the largest market, driven in part by their so-called giga-projects, ranging from Neom and the Red Sea developments to King Abdulla Financial District and the New Murabba projects in Riyadh. In commercial arbitration, several sectors will see growth in arbitration as the preferred mode of dispute resolution: disputes arising from digital assets (including cryptocurrency and non-fungible tokens); private wealth and family business disputes, as the generational shift in families continues; and disputes with environmental, social and governance aspects. With the recent upgrades to their arbitration centres, the UAE and Saudi Arabia are well-placed to support the demand for arbitral services in the region.

# NAVIGATING PATHOLOGICAL CLAUSES

## THE CURIOUS CASE OF THE ABOLITION OF THE DIFC-LCIA ARBITRATION CENTRE

**Authored by: Khaled AlMulla (Associate) and Alexandra Lester (Partner) - Clyde & Co.**

On 14 September 2021, the Dubai Government issued Decree 34/2021, which abolished the DIFC Arbitration Institute (DAI). DAI was the LCIA's counterparty to an operating agreement that established the DIFC-LCIA Arbitration Centre. The Decree provided that arbitration agreements referring to the DIFC-LCIA Rules would remain valid, but that the existing Dubai International Arbitration Centre (DIAC) would administer cases commenced after the Decree came into effect.

This article will examine international cases where courts have grappled with the following question: is an arbitration agreement that refers to arbitration under the DIFC-LCIA Rules valid? The cases can be divided into two categories: those where a (1) defendant in court proceedings raises the arbitration agreement to challenge the court's jurisdiction and (2) party seeks to resist enforcement of an award on the ground that the arbitration proceeded under different rules to what was agreed.

### Abu Dhabi Court of First Instance Case 1046/2023

The claimant brought a claim for unpaid invoices and compensation under a contract for the supply of medical equipment. The defendant argued that the court had no jurisdiction because the contract contained an arbitration agreement. The arbitration agreement, however, provided for arbitration under the DIFC-LCIA Rules and the DIFC-LCIA no longer existed. The claimant argued, therefore, that (1) it was impossible to enforce the arbitration agreement because the DIFC-LCIA no longer existed and (2) the parties did not intend to refer disputes to DIAC, which existed at the time of the agreement.

***The court considered whether the clause was valid and enforceable under the law governing the arbitration agreement. This, it found, was UAE law because that was the law governing the main contract and the parties had not agreed to a different governing law for the arbitration agreement.***

It also, however, considered the approach of courts from other jurisdictions when faced with pathological clauses (e.g., where the arbitration agreement referred to a non-existent institution).

Referring to the travaux preparatoires of the New York Convention, the court noted that the abolition of an arbitral institution is not a situation which would render an arbitration agreement ''null and void, inoperative or incapable of being performed'' under Article II(3). The travaux preparatoires are silent on the criteria to be applied when determining whether an agreement was impossible to perform nor do they provide additional clarification on the meaning of ''null and void, inoperative or incapable of being performed''.

In its analysis, the court also highlighted that the arbitration agreement referred to the DIFC-LCIA Rules ''in effect at the time of the dispute''. This meant that the parties accepted that the rules to which their arbitration may be subject at the time of the dispute might differ from those in effect at the time the agreement was concluded.

It emphasised that arbitration agreements should not be interpreted restrictively. The parties' main intention was to resolve disputes by arbitration. The court treated the means by which that is effected as incidental. Because of this, it upheld the arbitration agreement. In doing so, it took a different approach to the Eastern District Court of Louisiana in an earlier case, to which it had been referred.

## Baker Hughes Saudi Arabia Co. Ltd vs Dynamic Industries[1] (Louisiana)

Baker Hughes sued Dynamic Industries for allegedly failing to pay sums due under a contract for the supply of materials and services for an oil and gas project in Saudi Arabia. Dynamic Industries moved to dismiss the claim, relying on the DIFC-LCIA arbitration agreement in the contract.

The court dismissed Dynamic Industries' motion. It stated that arbitration is a creature of contract and parties cannot be compelled to arbitrate under rules to which they had not agreed.

## DFL vs DFM [2024] SGHC 71 (Singapore) and Mr Nasser Sulaiman H M Al-Haidar vs Mr Jetty Venkata Uma Maheshwara Rao (Cayman Islands)

These cases concerned applications to set aside provisional awards for interim relief because the arbitration was not conducted in accordance with the parties' agreement (i.e., it was conducted under the DIAC Rules instead of the DIFC-LCIA Rules).

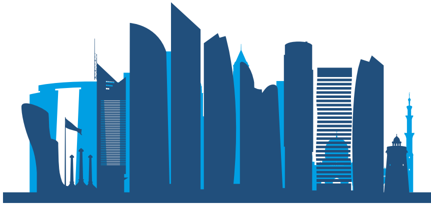
Both courts agreed with the Louisiana court that the arbitration agreement had been frustrated. The Singapore court highlighted differences between the DIAC Rules and the DIFC-LCIA Rules and held that parties cannot be forced to arbitrate under a different set of rules to what they had agreed.

Both courts refused, however, to set aside the award. But they only did so because they found that the applicant had submitted to the tribunal's jurisdiction for the purposes of the interim relief proceedings.

## Dominant Purpose Test vs Textual Fidelity Approach

The cases above illustrate the different treatments of DIFC-LCIA arbitration agreements. The Abu Dhabi court adopted ''the dominant purpose'' test: the agreement's dominant purpose was to resolve disputes by arbitration. Courts should give effect to this purpose. The Louisiana, Singapore, and Cayman Islands courts took what might be termed a ''textual fidelity'' approach by strictly interpreting the arbitration agreement. While there is nothing wrong with this approach, it could result in something that neither party intended when concluding the arbitration agreement: one party may sue another

in either party's national courts. The DIAC Rules differ from the DIFC-LCIA Rules. But they are likely to have more in common with each other than with the idiosyncratic civil procedure rules of any nation.



No matter which approach one ascribes to, parties may wish to cure arbitration agreements referring to the DIFC-LCIA. This can be by expressly agreeing to DIAC arbitration or arbitration under the supervision of another institution. This will of course be easier pre-dispute. If a cure is not plausible, parties should consider the likelihood of the clause being found ''null and void, inoperative or incapable of being performed'' under the following before proceeding with an arbitration:

1) Law governing the arbitration agreement (if one is specified);
2) Law of the seat;
3) Law governing the main contract;
4) Law of the jurisdiction in whose local courts the arbitration agreement might need to be enforced (e.g., the law of either party's domicile if different to any of the above laws);
5) Law where any award will likely be enforced (this will likely be the jurisdiction where the parties have a substantial presence or significant assets against which to enforce an award); and
6) Any relevant enforcement treaties, like the New York Convention or Riyadh Convention, that may be applicable.

These considerations are also likely to be relevant to other abolished institutions like the Abu Dhabi Commercial Conciliation and Arbitration Centre, which was recently replaced by the Abu Dhabi International Arbitration Centre.

1 Baker Hughes Saudi Arabia Co Ltd vs (1) Dynamic Industries Inc, (2) Dynamic Industries International, LLC, and (3) Dynamic Industries International Holdings LLC

# CORRUPTION EVIDENCE IN ARBITRATION

# THE ROLE OF RED FLAGS

Authored by: Jorge Lopes (Associate Director) and Kim Qvale (Associate) - Forensic Risk Alliance

## Introduction

There is a growing recognition of the need for arbitrators to be vigilant and proactive in addressing signs of corruption.

While corruption is a term without a universal definition, we can broadly refer to it as a wide variety of dishonest practices, including among others, bribery, money laundering, embezzlement and false accounting.

***Proving corruption during arbitration proceedings is even more difficult than defining it.***

Not only do counsel and experts have the challenging task of identifying and presenting evidence of corruption before a tribunal, but tribunals have also adopted different standards of proof for corruption allegations, requiring varying degrees of evidence.

However, an approach that most arbitral tribunals and national courts (in annulment proceedings) appear to agree on involves relying on the identification of red flags to pinpoint and describe potentially suspicious business activities or transactions. For instance, in a recent ruling in England during October 2023,[1] the High Court of Justice overturned arbitration awards of US$11 billion (including interest). The court noted that the awards were tainted by fraud and violated public policy, even highlighting several red flags marked the transactions at the core of the dispute.

## What Do Red Flags Look Like?

The concept of red flags covers a broad spectrum of indicators that may suggest unethical or illicit behaviour aimed at gaining an undue advantage. These indicators can reveal potential misconduct in various forms, including

1 The Federal Republic of Nigeria v. Process of Industrial Developments Limited [2023] EWHC 2638 (Comm).

attempts to improperly obtain or retain business through a transfer of value or the promise of transfer of value. Red flags can largely be considered as transactional or contextual, and experts should consider both types in tandem as this is often helpful in guiding their methodology and in identifying potential risks or irregularities.

***Transactional red flags are identified based on the details and characteristics of specific transactions. They focus on the who, the what, and the why: largely the nature, value, timing, frequency, and parties involved in the transaction.***

Transactional red flags are often uncovered in detailed accounting data and supporting documentation, including invoices, purchase orders, contracts, and payment documentation. Forensic accountants typically identify them through detailed review of potentially relevant transactions, looking at discrepancies, anomalies, and patterns that may indicate irregularities or potential misconduct. Examples of typical red flags, depending on the context of the matter, may include: purchase orders dated after the invoice date which may indicate overriding internal controls; non-compliance with local tendering rules such as fast-tracking public tenders; unnecessarily complex transaction structures that obscure the true nature or purpose of the transaction; the use of unusually high transaction prices in comparison to market benchmarks; or lack of details and/or evidence of services rendered and billed that may put into question the legitimacy of the transaction.

Contextual red flags relate to potential issues or irregularities surrounding the broader context in which a transaction occurs. They consider the environment, background, and patterns associated with the entities and individuals involved. Contextual red flags are generally identified in publicly available information such as company records, adverse regulatory filings, jurisdiction and risk indicators, or even compliance program assessments. They emerge from analysing patterns and risk factors associated with the entities and environments involved, rather than the specifics of individual transactions. For example, potential red flags may include entities operating in a country with historically high corruption risk; absence of internet presence or credentials in the relevant industry that may indicate lack of legitimacy of an entity; a company historically in a low-risk industry suddenly shifting to a high-risk environment; payments to third-party intermediaries with poor reputation or a history of regulatory issues; or even the absence of a well-designed and active compliance programme.

## How Are Red Flags Best Presented To Arbitral Tribunals?

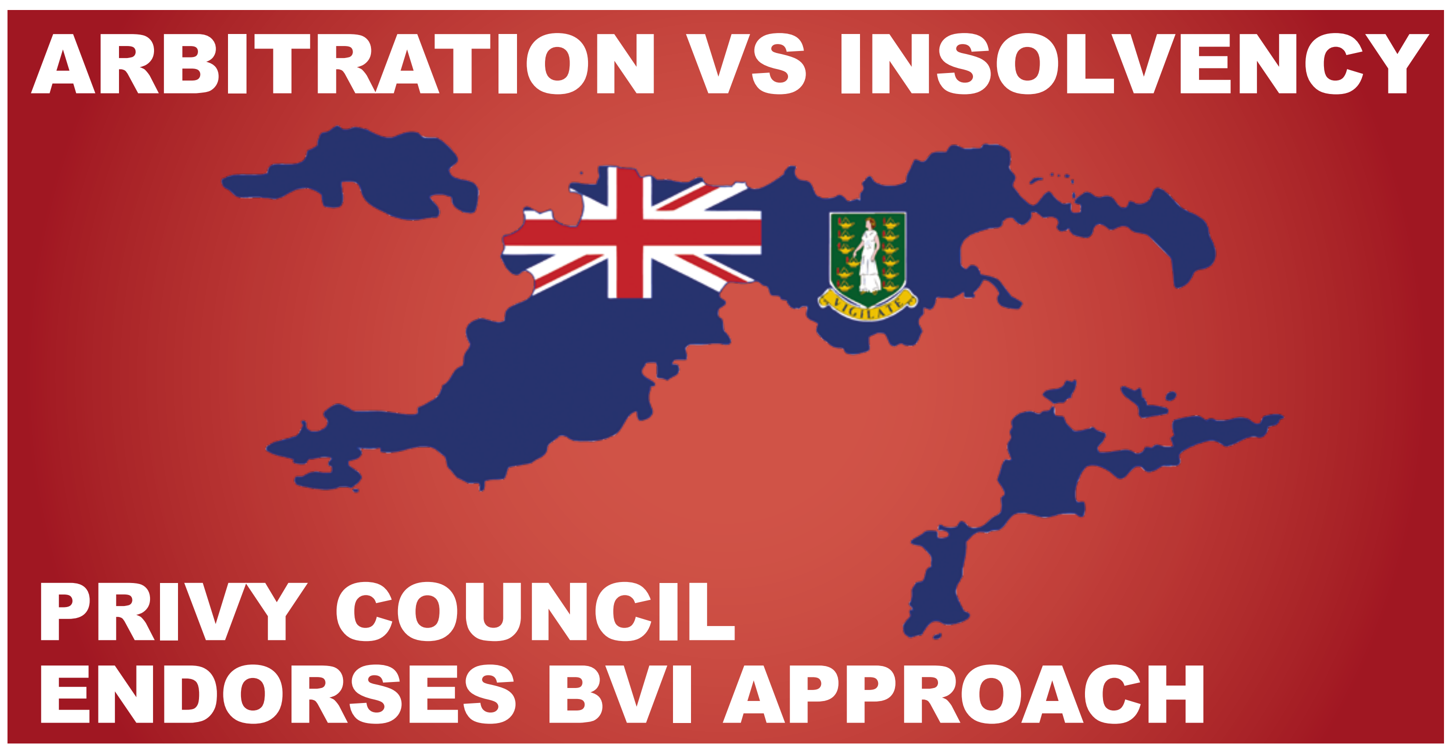
When reporting the results of their work, experts should keep in mind that the facts will be critically examined and interpreted based on the judgement of the tribunal. Therefore, they must carefully analyse and contextualise any findings to assist the tribunal in making an informed judgement. A compelling expert report should build on a clear representation of the expert's instructions, relevant context and circumstances (including region and industry), the assumptions on which experts relied, the methodology adopted to assess indicators of corruption, and the type of evidence they obtained and how they obtained it.

When describing red flags, experts should lay out how they were identified, any patterns, and why they represent a risk within the matter. It is important to note that one single red flag, despite indicating potential risk, is unlikely to constitute evidence of corruption.

For instance, a transaction involving a commission payment to an agent may not be indicative of corruption on its own. However, when assessed jointly with other red flags, such as the payment being routed through an entity registered in a tax haven or the agent having little to no internet presence/ industry credentials, this transaction may carry a higher risk of corruption and be of relevance to a case.

Very rarely will experts find a smoking gun that undoubtedly proves corruption. Ultimately, it is up to the experts and counsel to present their findings in a way that highlights the consistency of the evidence with corruption to a point where tribunals cannot reasonably ignore it.

***Contributions kindly added by: Dinara Afaunova, (Senior Associate) & Isabelle Vinter (Senior Associate) – Forensic Risk Alliance***

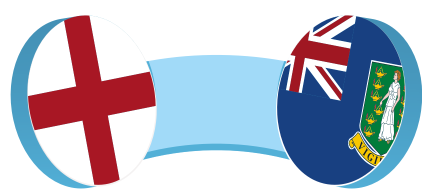



# ARBITRATION VS INSOLVENCY PRIVY COUNCIL ENDORSES BVI APPROACH

**Authored by: Paul Madden (Partner) and Julia Iarmukhametova (Associate) - Harneys**

The landmark decision by the Privy Council in Sian Participation Corp v Halimeda International Ltd (Sian)[1], handed down in June 2024, provided, among other things, a welcome conceptual clarity on the interplay between arbitration and insolvency, endorsing the approach adopted by the Commercial Court in the British Virgin Islands (BVI).

This article examines the approaches to the issues of the interface between an arbitration clause and winding up proceedings taken in England and Wales and the BVI before Sian, and the impact of Sian on the principles established by previous authorities at the highest level across common law jurisdictions.



## Pre-Sian: English Approach vs BVI Approach

In the BVI, which aligns the position in England and Wales, the Arbitration Act 2013[2] requires that if a dispute arises between parties subject to a valid arbitration agreement, any court proceedings should be stayed to allow the resolution of the dispute by an arbitral tribunal in accordance with the parties' pre-existing contractual arrangement.

*In respect of insolvency, it is in the public interest to have clear and efficient procedures for placing a company into liquidation when it is unable to pay its debts as they fall due.*

In England and Wales, following the decision in Salford Estates (No.2) Ltd v Altomart Ltd (No.2)(Salford Estates), the courts demonstrated a strong pro-arbitration stance.

In Salford Estates, the English Court of Appeal established that the discretionary power under section 122(1) of the English Insolvency Act 1986 to wind up a company must be exercised in accordance with the parties' agreement regarding the appropriate forum for dispute resolution. Sir Terence Etherton C highlighted this point in paragraph 40 of Salford Estate, stating that: "It is entirely appropriate that the court should save in wholly exceptional circumstances (emphasis added) which I presently find difficult to envisage, exercise its discretion consistently with the legislative policy embodied in the 1996 [Arbitration ] Act" (which provides for a mandatory stay in favour of arbitration in section 9(1) of the English Arbitration Act 1996).

In the BVI, the courts have been diverging from the Salford Estates approach following the decision in C-Mobile Services Ltd v Huawei Technologies Co Limited[3] (C-Mobile). In C-Mobile, the BVI Court of Appeal rejected the English law requirement that a creditor should have to prove exceptional circumstances to invite the court to exercise its discretion to make a winding up order. A similar stance on the interplay between arbitration and insolvency was taken in Jinpeng Group Limited v Peak Hotels and Resorts Limited[4], where the court found that if a company can demonstrate that a debt is subject to an arbitration agreement and that the debt is disputed on genuine and substantial grounds, the BVI Court should exercise its wide discretionary powers to dismiss or stay the liquidation application in favour of arbitration.

1 [2024] UKPC 16
2 Section 18
3 BVIHCMAP 2014/0006 and BVIHCMAP 2014/0017
4 BVIHCMAP2014/0025 (8 December 2015) at paras [45]-[49]

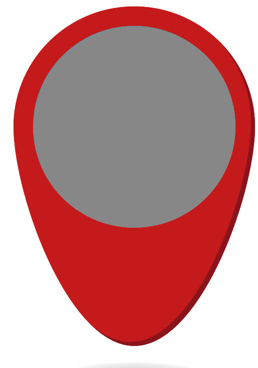
## Sian Approach

In Sian, the company argued that the ECSC Court of Appeal should have followed the English position in Salford Estates, asserting that there is no difference between England and the BVI concerning public policies on enforcing arbitration agreements and liquidation proceedings. The Board found that Salford Estates had been wrongly decided, thereby reversing years of settled law on the interplay between arbitration proceedings and insolvency.

It was held that the English Court of Appeal was wrong to have introduced a discretionary stay of winding up petitions "where an insubstantial dispute about the creditor's debt was raised by parties to an arbitration agreement". In doing so, the Privy Council held that there was "an impermissible and unexplained leap in the reasoning of the Court of Appeal as to the extent of the legislative policy behind the [arbitration legislation]"

Their rationale was as follows:

1. The policies underlying the Model Law, which the BVI Arbitration Act is based on, are not undermined by pursuing the liquidation of a company that has failed to settle a debt. Genuine disputes should be resolved through arbitration prior to initiating liquidation.
2. Liquidation applications are not subject to the mandatory stay provisions of section 18 of the Arbitration Act 2013, as they do not address the issue of whether the petitioner is owed money by the company.
3. An arbitration agreement is an agreement between parties to resolve a dispute through arbitration rather than through the courts. Liquidation proceedings fall outside the scope of this agreement.



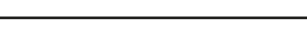
The Board determined that: "…as a matter of BVI law, the correct test for the court to apply to the exercise of its discretion to make an order for the liquidation of a company where the debt on which the application is based is subject to an arbitration agreement or an exclusive jurisdiction clause and is said to be disputed is whether the debt is disputed on genuine and substantial grounds. This conclusion applies to a generally worded arbitration agreement or exclusive jurisdiction clause. Different considerations would arise if the agreement or clause was framed in terms which applied to such a liquidation application."

Interestingly, the Board distinguished the recent Privy Council decision in the case of FamilyMart China Holding Co. Ltd and Ting Chuan (Cayman Islands) Holding (FamilyMart[5]), handed down in September 2023, which broadly endorsed the Salford Estates approach. FamilyMart was distinguished on the basis that "in the present case [Sian]… it was not disputed that application to wind up a company "on the just and equitable ground were "legal proceedings" so as to fall within the mandatory stay provisions". However, the Board endorsed a pro-arbitration and expansive approach to interpreting arbitration agreements, as provided in FamilyMart.

## Conclusion

The Privy Council's decision in Sian is the first example of the BVI's highest appeal court using its powers to bind the courts of England and Wales, clarifying, among other things, the issue of the interplay between arbitration agreements and liquidation proceedings.

***Although the Privy Council emphasised that "there is nothing anti-arbitration" in the decision, the reinstatement of the requirement to demonstrate a "genuine and substantial dispute" is likely to be advantageous for creditors, offering them a more expedited and straightforward path to recourse.***



5 JCPC 2020/0055

# CYPRUS' ARBITRATION LAW AMENDMENTS

## A REFINEMENT IN INTERNATIONAL DISPUTE RESOLUTION

Authored by: Christopher Lytras (Managing Partner) - Lytras & Associates

Cyprus has recently embarked on a profound journey of legal reform with the amendments to its International Commercial Arbitration Law (Law 101/1987) (the "Law") by virtue of the International Commercial Arbitration (Amending) Law of 2024 (Law 11(I)/2024). These changes bring the Law into greater harmony with the UNCITRAL Model Law and represent a sophisticated enhancement of the arbitration framework, positioning Cyprus as an increasingly attractive jurisdiction for international commercial arbitration. This article examines the amendments and elucidates their significance.

### Interpretation Of The Law By Use Of Extrinsic Material

A significant addition to the Law is the introduction of Section 2(9), which explicitly allows for the use of extrinsic materials as interpretative tools. This provision mandates that, in applying the Law, consideration should be given to the "UNCITRAL Model Law on International Commercial Arbitration" and the accompanying explanatory note adopted by the United Nations Commission on International Trade Law. This ensures the observance of modern and uniform rules grounded in good faith.

Further, the inclusion of Section 2(9) grafts the element of adaptability into the Law, ensuring that Cyprus will continue to evolve along with the modern and continuous trends enunciated by UNCITRAL.

## Interim Measures

The main focus of the amendment was to introduce a new chapter relating to Interim Measures, replacing the simplified Section 17, which only provided that the tribunal had the power to issue interim relief unless the arbitration agreement expressly prohibited it.

The newly introduced Part IV (A)—Interim Measures, provides a comprehensive chapter on a number of issues related to interim measures, inter alia, condition for issuing, the procedure for applying for them, provision of security, recognition and enforcement.

### Section 17
### Power Of The Arbitral Tribunal To Order Interim Measures

This section lays down the general framework for interim measures, affirming the tribunal's power to issue such measures unless expressly excluded by party agreement. It also provides a detailed definition of the term 'interim measure', which can take the form of an award or in any other form, whereby the arbitral tribunal can order a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself  the forms that an interim measure can take ;

(c) Preserving assets out of which a subsequent award may be satisfied; and/or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

### Section 17(A)
### Conditions For Granting Interim Measures

The issuance of an interim measure, the arbitral tribunal must be satisfied that:

(a) If the requested interim measure (i) is not granted, the resulting harm cannot be adequately compensated through an award of damages, and (ii) if granted, the harm avoided by issuing the measure outweighs the harm that is likely to result against whom the measure is addressed.

(b) There is a reasonable possibility that the applicant will succeed on the merits of the claim.

### Section 17(B)
### Applications for Preliminary Orders and Conditions for granting Preliminary Orders

This section provides that an application for interim measures can be advanced without notice (ex parte) unless the parties otherwise agree. Such a measure will be referred to as a preliminary order, which, although it is a subset of the interim measures, has a distinct character given its narrower objective—to order the party (against whom it is aimed) to maintain the status quo until further notice in order to avoid the sought interim measure from being frustrated.

### Section 17(C)
### Specific Regime for Preliminary Orders (Section 17C)

This section serves as the second step to Section 17B of the Law, outlining how a preliminary order should be administered in practice. It elaborates on the procedure to be followed once the preliminary order is issued and gives the arbitral tribunal the necessary guidance when confronted with an application for a preliminary order.

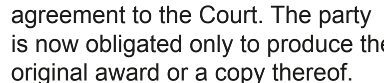
### Section 17(D)
### Modification, suspension or termination of interim measure or order

The arbitral tribunal may amend, suspend, or terminate an interim measure or a preliminary order issued upon application by a party or, in extraordinary circumstances and with prior notice to the parties, on its own initiative.

### Section 17(E)
### Provision of Security

In addition to convincing itself that the application for an interim measure or a preliminary order meets the conditions set forth in Sections 17(A) and 17(B), the arbitral tribunal is given an added instrument to safeguard the parties' interest by providing it with the possibility of attaching the interim measure or the preliminary order with the condition that appropriate security is provided.

For an interim measure, the arbitration tribunal may (indicating its discretionary power) order the party requesting it to provide appropriate security. On the contrary, for a preliminary order, the arbitration tribunal shall (indicating its mandatory obligation) order the party requesting it to provide appropriate security unless it considers it inappropriate or unnecessary to do so.



### Section 17(F)
### Disclosure Obligations

This section introduces the parties' continuing obligation to disclose a material change in the circumstances on which the interim measure or the preliminary order is applied. This feature ensures that interim measures and preliminary orders only remain in force as long as they are deemed necessary and appropriate by the arbitral tribunal.

Further, it also inserts a similar duty of full and frank disclosure, whereby the application of a preliminary order should disclose all material facts and circumstances that are likely to be relevant to the arbitral tribunal's determination of whether to grant or maintain the order.

### Section 17(G)
### Costs and Damages

This section sets out the guidelines in relation to costs and damages. In essence, the party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted.

### Section 17(H)
### Recognition and Enforcement

The gist of these sections is that an interim measure given by an arbitral tribunal is binding and, unless otherwise specified, will be regarded enforceable and recognisable by an application to the Court provided that it is in accordance with the provisions of the Law on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Ratification), (Law 84/1979), regardless of the country of issue.

### Section 17(I)
### Grounds for Refusing Recognition and Enforcement

It provides grounds for refusing to recognise or enforce an interim measure or preliminary order given by an arbitral tribunal.

### Section 17(J)
### Court-Ordered Interim Measures

Lastly, this section reaffirms the Cyprus Court's jurisdiction to issue an interim measure in connection to arbitration procedures, regardless of whether they take place in its territory, as it does in relation to court proceedings.

## Abolishment Of The Necessity To Submit The Arbitration Agreement

Finally, it is pertinent to observe that Section 35(2) has been amended to dispense with the requirement for a party invoking an award or pursuing its enforcement to submit the arbitration agreement to the Court. The party is now obligated only to produce the original award or a copy thereof.

## Conclusion

In summary, the amendments to the Law underscore Cyprus's steadfast commitment to maintaining the highest standards of arbitration practice. These amendments not only modernise the current legal framework but also position Cyprus to assume a more prominent role in the global arbitration landscape.

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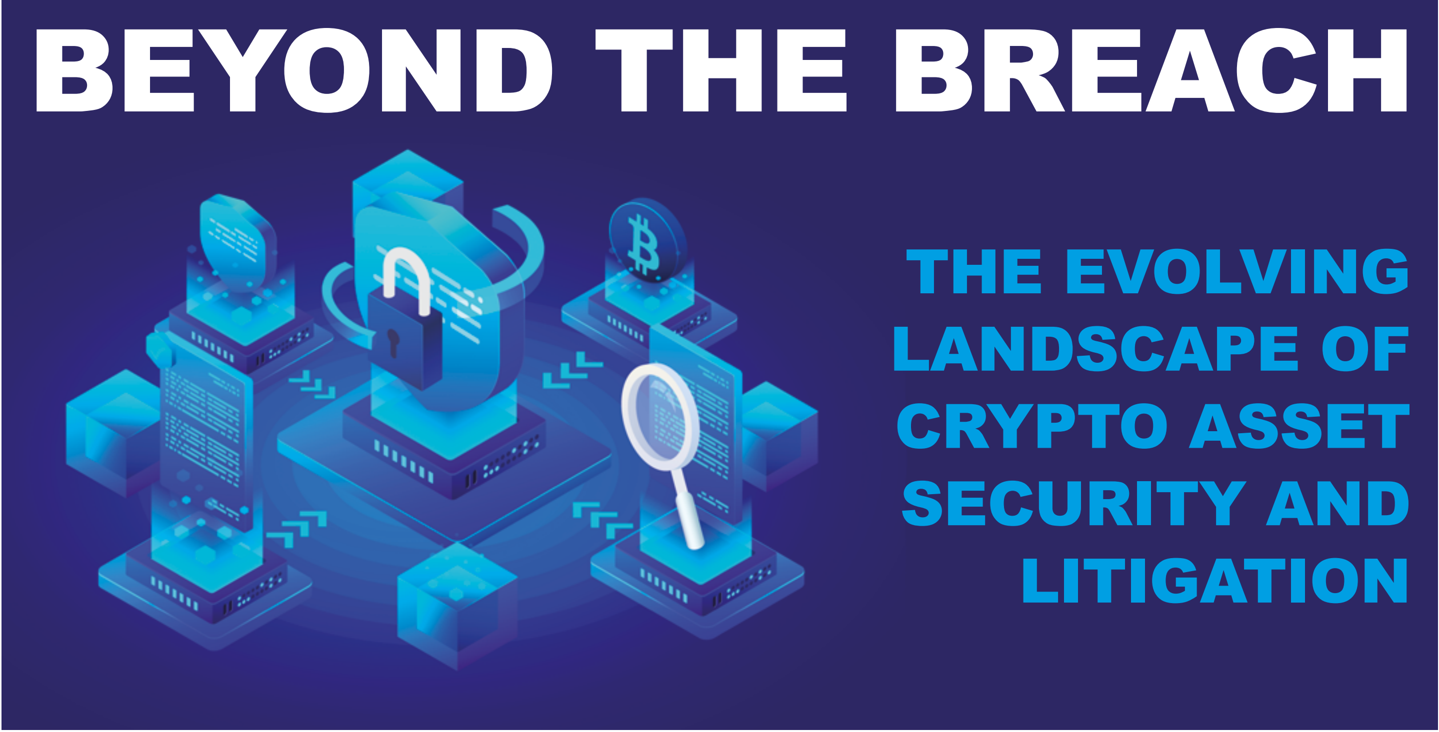


# BEYOND THE BREACH

## THE EVOLVING LANDSCAPE OF CRYPTO ASSET SECURITY AND LITIGATION

**Authored by: Phillippa Ellis (Principal Associate), Charlotte Dawes (Senior Associate) and Freya Piper (Trainee Solicitor) - Capital Law**

Cryptocurrency has changed the financial landscape, providing new ways online transactions can occur. While digital assets are no longer 'emerging' and firmly here to stay, the UK is still developing a regulatory framework to cover the dynamic sector. The volatile ecosystem faces significant security risks, as evidenced by the recent data breach at WazirX, a major Indian cryptocurrency exchange. This incident is part of a troubling trend of sophisticated cyberattacks specifically targeting the crypto sector.

## The Nature of Cryptocurrency

Cryptocurrency is a digital payment system that operates independently from banks to verify transactions. It functions as a peer-to-peer network, allowing individuals anywhere in the world to send and receive payments without the need for physical money.

***Cryptocurrency exists solely as digital entries in an online database detailing specific transactions. These are recorded in a public ledger when cryptocurrency funds are transferred and stored in digital wallets.***

The term "cryptocurrency" stems from the use of encryption to verify transactions, involving advanced coding to securely store and transmit data between wallets and public ledgers. This encryption aims to ensure security and safety. Much of the interest in cryptocurrencies comes from trading for profit, with speculators sometimes driving prices to extreme highs and also extreme lows.

In traditional financial systems, transactions are directly tied to the identities of the individuals involved. By contrast, cryptocurrency transactions are recorded on the blockchain with addresses that do not reveal the user's identity. This pseudonymity enhances privacy but complicates regulatory compliance. While the transparency of blockchain allows for the tracing of transactions, linking these transactions to individuals poses an issue. This anonymity afforded often attracts criminal activities such as money laundering, tax evasion, and ransomware attacks. Regulatory bodies around the world are grappling with how to balance the benefits of cryptocurrency with the need to prevent its misuse. This tension between privacy and regulation is a core challenge facing the crypto industry.

## What Was The Breach?

In June 2024, WazirX a large crypto platform experienced a data breach involving its multisig wallet. The company reported the breach compromised the personal information of millions of users. Hackers accessed sensitive data, including names, email addresses, and transaction details, exposing its users to the possibility of identity theft and financial fraud.

*The breach was only detected after various users began reporting suspicious activity in their accounts. WazirX promptly investigated the reports and took steps to secure its systems, but in many cases damage had already been done.*

The breach sent shockwaves through the crypto sphere as it showed the vulnerabilities that even major cryptocurrency exchanges face. Despite investing in advanced security measures, WazirX was unable to prevent the breach, causing many to raise questions about the adequacy of current security protocols in the crypto industry. The incident also highlighted the need for exchanges to not only focus on securing digital assets but also to protect user data comprehensively.

## Recent Trends

The WazirX breach is not an isolated incident. It is part of a broader pattern of increasingly sophisticated cyberattacks targeting the crypto sector. In recent years, there have been numerous high-profile breaches that have resulted in significant financial losses and shaken user confidence.

An example of this type of activity is the 2019 attack on Binance, one of the world's largest cryptocurrency exchanges. The breach resulted in the loss of 7,000 bitcoins, worth approximately $40 million at the time. The attackers used a combination of phishing, viruses, and other techniques to gain access to user accounts and withdraw the funds.

These attacks are becoming more complex, often involving advanced tactics like social engineering, exploitation of vulnerabilities and insider threats. As the value and popularity of cryptocurrencies continue to rise, so too does cyber threats. This ongoing threat underscores the need for continuous improvement in security measures and practices within the crypto industry.

## Possible Legal Implications

The anonymous nature of cryptocurrency presents significant legal challenges, particularly in the context of data protection and regulatory compliance. The WazirX breach highlights the tension between the need for user privacy and safeguarding sensitive information.

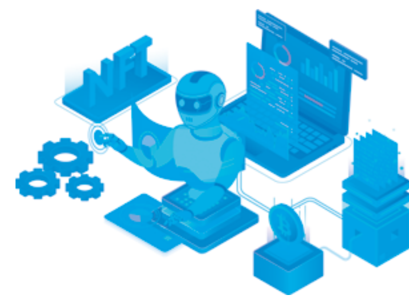
The General Data Protection Regulation (GDPR) mandates stringent data protection standards, including the requirement for companies to implement appropriate measures to secure personal data. Non-compliance can result in heavy fines and penalties. The very nature of cryptocurrency makes it difficult to align with such regulations, as the very structure of blockchain technology can conflict with GDPR requirements, such as the right to be forgotten.

In India, the legal landscape is still evolving. The Personal Data Protection Bill, which aims to regulate the processing of personal data, is yet to be enacted. The absence of comprehensive data protection legislation complicates the regulatory environment for cryptocurrency exchanges like WazirX.

*It is likely this breach may accelerate efforts to establish more rigorous cybersecurity frameworks and data protection laws, balancing innovation with security.*

There are significant challenges to litigation in cryptocurrency cases, but these are slowly being addressed. In the UK, courts have developed mechanisms for handling cases where the identity of a fraudster is unknown. Claims can be brought against "Persons Unknown," allowing proceedings to commence without identifying specific defendants. This is crucial in cryptocurrency cases, where the pseudonymous nature of transactions complicates identification. Courts categorise "Persons Unknown" into groups such as unauthorised accessors, knowing receivers, and innocent receivers of stolen assets, ensuring legal actions can target responsible parties while protecting those unintentionally involved.

Yet another layer of complexity is added by the global nature of cryptocurrency. Cyberattacks often involve individuals from multiple jurisdictions, making it challenging to coordinate legal responses and investigations. International cooperation and the development of standardised regulations are crucial to addressing these issues effectively. Furthermore the challenge of serving legal notices on unknown individuals from different jurisdictions has been addressed by UK courts allowing alternative approaches such as serving notices via email, through crypto exchanges, or even using Non-Fungible Tokens (NFTs) sent to fraudsters' wallets. This flexibility demonstrates the legal system's adaptability to the unique challenges of cryptocurrency fraud, particularly when dealing with cross-border jurisdiction and asset recovery.




## The Way Forward

The WazirX data breach serves as a stark reminder of the vulnerabilities in the ever-evolving cryptocurrency industry. While digital currencies offer transformative potential, they also present significant security and regulatory challenges. As cyber threats become more prominent, it is imperative for organisations to bolster their defences and for policy makers to develop robust legal frameworks that protect users without preventing innovation.

The future of cryptocurrency depends on finding a balance between security, privacy, and regulatory compliance. As the industry develops, it must prioritise the protection of user data and the implementation of best practices in cybersecurity. Simultaneously, regulatory bodies must strive to create an environment that supports innovation while safeguarding users.

# CRYPTO MINING AND SANCTIONS EVASION

## HOW RUSSIA TRADES ITS ENERGY RESOURCES

**Authored by: James Ramsden KC (Partner) and Khrystyna Khanas (Associate) - Astraea Group**

Russia has recently emerged as the second largest crypto miner after the US, leveraging its vast energy resources and cold climate to earn billions of dollars and bypass Western sanctions.

Crypto mining industry in Russia is blooming – it is now also backed by the state regulators and most powerful players in both energy and banking sectors of Russia, including GazProm Neft, RosEnergoAtom, En+, Rusal, EuroSibEnergo and SberBank.

Russian miners earn billions of dollars a year, the supply of specialised mining hardware to Russia is breaking all records. Russian energy companies affected by the Western sanctions increase their income through crypto mining – they sell energy (which is generated in surplus at their mining fields) to crypto mining companies and allow them to use their infrastructure.

***Crypto mining companies, in turn, get electricity for their mining operations at cheaper prices. Crypto mining effectively converts energy into cryptocurrencies.***

This month, Russian president Vladimir Putin signed 2 important legislative acts enacted by the Russian parliament earlier. The first law legalised crypto mining in Russia (despite raising billions of dollars in profits each year, the industry had previously been unregulated). The second law allowed the use of cryptocurrencies (both mined in Russia and elsewhere) in cross-border trade. Both laws will come into force this autumn.

## The Rise Of Crypto Mining In Russia

Between 2017 and 2021, the revenue from crypto mining in Russia has reportedly increased 18 times – from around $114 million in 2017 to over $2 billion in 2021. Between 2020 – 2023, the volume of industrial mining in Russia has almost tripled. As of early February 2022, before the Russian invasion of Ukraine and the imposition of unprecedented sanctions on Russian Federation as a result of that, Russia's cryptocurrency market was reportedly valued at over $215 billion, constituting about 12% of the global market. Cryptocurrency worth about $4 billion was being mined in Russia, and Russia had the world's third largest crypto mining industry, behind the United States and Kazakhstan. A year later, by the end of March 2023, Russia has become the second most powerful cryptocurrency mining country, after the United States.

***The vast majority (over 90%) of Russian industrial miners reportedly focus their efforts on bitcoin.***

The growth of mining capacity in Russia was to be expected. There are a number of remote areas across Russia (such as Irkutsk and Sverdlovsk regions, Krasnoyarsk territory and others) that are the most profitable for cryptocurrency mining because of cheap electricity. The climate there is also extremely favourable for mining, allowing miners to save considerable costs on cooling equipment for their mining farms. Cryptocurrency mining is even more attractive for a sanctions-hit economy suffering from a shortage of hard cash, but with a surplus of oil and natural gas.

After the imposition of unprecedented sanctions on Russia in 2022 and the pressure on its banking system, caused by the sanctions and withdrawal of Visa and MasterCard from Russia, Russian bitcoin mining industry has started to grow exponentially: not only mining offered an alternative revenue stream for energy companies hit by severe sanctions, but it also facilitated conversion of Russian rubles into cryptocurrency (bitcoin), which could be exchanged globally, unlike Russia's fiat currency. Plus, as a result of the ruble's fall following Russia's invasion of Ukraine, bitcoin was worth even more in rubles, and so the mining has become even more profitable.

Back in 2021 (before the Russian full-scale invasion of Ukraine and the imposition of sanctions on Russia), the Russian Ministry of Industry and Trade, the Ministry of Digital Development and the Central Bank jointly discussed the project of Russian oil companies to mine cryptocurrency at their fields. The companies came up with the proposals to use associated petroleum gas (APG) for these purposes. Russia's largest and most powerful oil and gas companies have since shown great interest in industrial bitcoin mining, providing electricity from the associated petroleum gas (APG) to bitcoin mining companies on their sites and for cheaper prices.

## Biggest Mining Operator and Its Strategic Ties To Russian Energy Companies

BitRiver is officially the biggest bitcoin mining operator in Russia. It has 15 operating data centers with a total capacity of more than 533 MW, where more than 175 thousand units of computing equipment are already located and is building 14 new enterprises with a total capacity of more than 1 GW. BitRiver proudly advertises on its website its close relationship with various Russian government agencies. The three most important, "strategic" and "critical", partners of BitRiver (according to its website) are:

- **Gazprom Neft.** Gazprom Neft is a subsidiary of Russia's state-owned energy company, GazProm. In February 2022, both GazProm and GazProm Neft were sanctioned as agents of the government of Russia.
- **EN+ Group.** EN+ Group is the world leader in the production of low-carbon aluminium and renewable energy sources and the largest private energy holding in the world, with strong links to Oleg Deripaska, a Russian aluminium tycoon. BitRiver and EN+ Group formed a separate company for collaboration called Bit+. Due to close partnership with EN+, BitRiver has built its facilities and is using resources of the various strategic objects of the energy infrastructure in Russia, like Bratsk Hydroelectric Station (owned by EuroSibEnergo), a hydroelectric dam in Ust-Ilimsk (owned by IrkutskEnergo, another subsidiary of En+) and others.
- **SberBank.** BitRiver announced strategic cooperation with Sberbank as recently as in July 2024. The parties reportedly intend to develop long-term partnerships for digital transformation projects. "The joint implementation of projects with the largest Russian bank will allow BitRiver to take another step towards strengthening Russia's digital and financial sovereignty," said Igor Runets, owner and CEO of BitRiver.

## Crypto Miners in Russia and Sanctions

BitRiver was sanctioned by the US on April 20, 2022. In its statement, OFAC referred to Russia's "comparative advantage in crypto mining due to energy resources and a cold climate" and said that the Treasury "can and will target those who evade, attempt to evade, or aid the evasion of U.S. sanctions against Russia". Despite the statement, this was the only time, as far as sanctions against Russia are concerned, when the US Treasury has designated a crypto mining company.

Notably, in response to sanctions, various sources allegedly close to BitRiver, claimed that sanctions would not affect the operations of the company, and it would continue working with its foreign customers as usual: BitRiver's customers mine cryptocurrencies themselves, under the licenses from BitRiver, albeit using BitRiver's mining facilities (in Rusia): it is difficult to determine whether cryptocurrencies are mined in Russia or not. BitRiver's official representative, commenting on the designation, said that the company's orders for machines were scheduled for almost a year ahead.

## New Russian Legislation and Plans Ahead

Legalised mining, along with the newly-gained opportunity for miners to trade their mined cryptocurrency internationally, is hailed in Russia as "a source of pure cryptocurrency liquidity", "a promising mechanism that helps the Russian economy overcome all existing restrictions" and as providing "a new impetus to the development of the domestic economy".

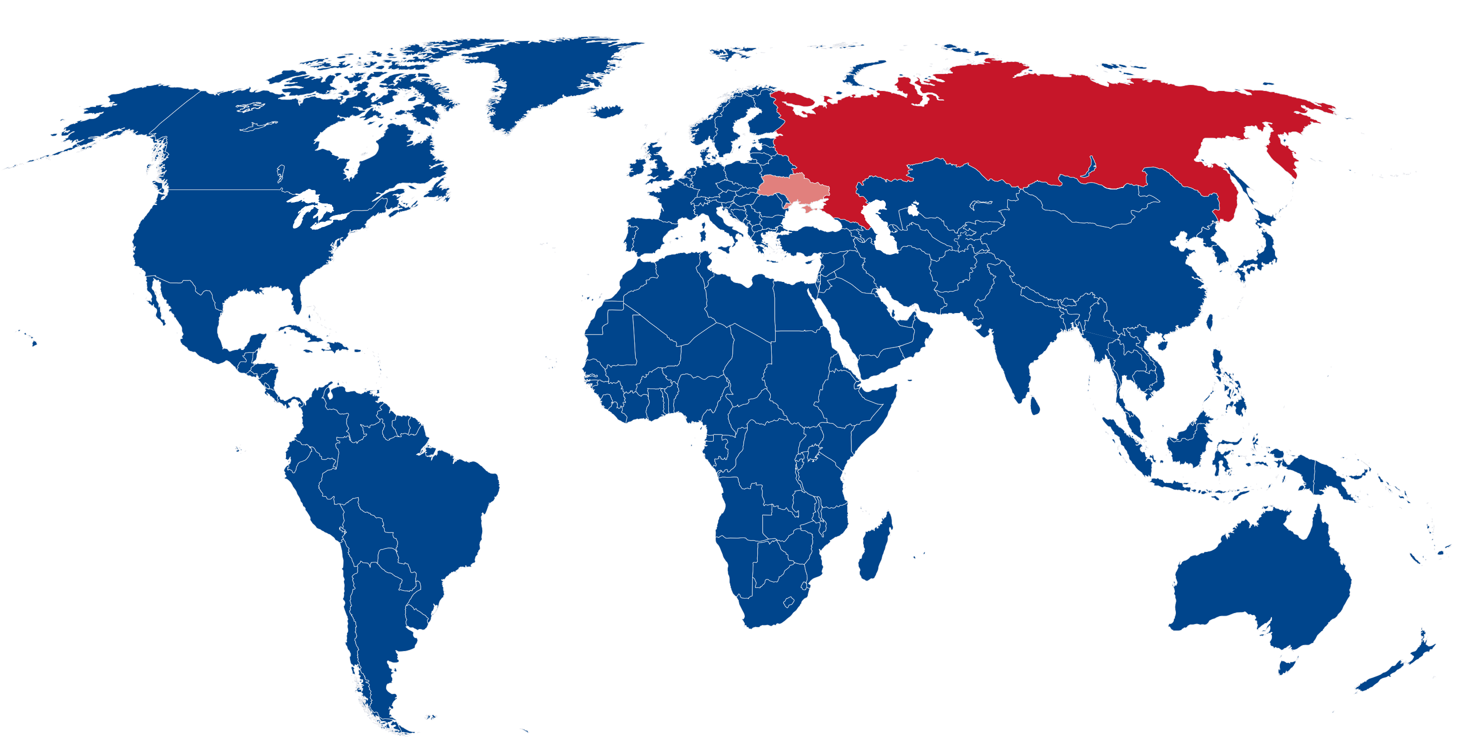
***The new legislation will also help Russian mining industry attract investments from the largest investors, various sources close to Russian industrial crypto miners claim.***

The next step in Russia's plan is apparently to create its own crypto exchanges: Russian finance minister Anton Siluanov recently stated, "We have legalised our own mining industry and the possibility of paying for foreign [goods and services] with the bitcoin we mine. Now a question of additional regulation remains – namely, the creation of our own legal crypto exchanges."

Indeed, Moscow ministers and Russia's Central Bank are reportedly discussing a plan to "create" Russian crypto exchanges – earlier this month Siluanov said that the parties had not yet settled on a mutually agreeable "solution", but claimed that a breakthrough may be close, and that the relevant legislation may be ready for the autumn session of the State Duma (the lower house of the Russian parliament).

The new Russian legislation and the newly emerged support of the crypto mining industry at the state level is only consistent with its wider efforts and strategy to use cryptocurrencies to evade and mitigate Western sanctions. Considering the scale of industrial bitcoin mining in Russia in particular, the strategy has so far proved to be quite successful.

The reaction of the Western regulators, in the meantime, has been non-existent, despite the vocal discussions of their plans among the Russian ministers and regulators over the last couple of years. This has to change now.



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