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Disputes MAGAZINE

ISSUE 1

DAWN OF THE NEXT GENERATION IN DISPUTE RESOLUTION

INTRODUCTION

"It is time for a new generation of leadership, to cope with new problems and new opportunities. For there is a new world to be won. **John F. Kennedy**

Welcome to the first edition of the Disputes Community Quarterly Magazine dedicated to "NEXT GENERATION IN DISPUTE RESOLUTION". Just like the Community's next generation component, this issue is very special to us. By marking the first significant milestone in our development, this bumper publication offers a platform to the diverse range of current and future leaders in commercial litigation, arbitration and investigations.

We would like to express our sincere gratitude to contributing authors and our fantastic Guest Editorial Board. Your support and dedication have been critical to ensuring high-quality content.

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CONTENTS

MEET OUR GUEST EDITORIAL BOARD:

In this launch title, we speak to Guest Editors and Members of the Community's Next Generation Founding Committee about dinner parties, perfect weekends and their advice to aspiring lawyers...

60-SECONDS WITH:

JO JONES, SENIOR ASSOCIATE, STEPHENSON HARWOOD

Q What do you tell people when they ask you what you do?

A Guess it depends on my audience. I find 'lawyer' usually suffices — which is often followed by a Suits related question.

Q What would you be doing now if you weren't here?

A 'Here' as in writing the answers to these questions? Probably indulging in Selling Sunsets or some other guilty pleasure. You're worth it, though.

Q If you could start all over again, what if anything would you do differently?

A A partner at Stephenson Harwood who I have a lot of respect for told me to always remember that you are at least as good as everyone else. If I was to start again, I'd remind myself of this more — and I'd give myself permission to snap up opportunities as soon as they arise, without wasting time second-guessing myself.

Q What's the strangest, most exciting thing you have done as a lawyer?

A I don't really have any 'one' thing. I really enjoy meeting the clients and witnesses on their home turf, and I always get excited by the opportunity to travel. It doesn't have to be anywhere especially exotic or exciting — just new. Whether that's Dubai, Jordan, Lithuania... In fact, thinking about it, Milton Keynes actually turned out to be one of my favourite trips, purely because of the people. I also still get excited by the buzz of court. I love watching counsel in action, the mood of the judge, how everyone interacts and reacts, and seeing all your hard work come to fruition.

Q What have you most missed during the Covid restrictions?

A Spontaneity and choice. At the simplest level, just having the choice of where to get your coffee seems like a luxury now. And the buzz of London. I love this city.

Q If you could never work again, would you and why?

A That really depends on my bank balance. If I had enough money, hobbies and lovely people around to keep things interesting and fulfilling, why not? (N.B. 'Hobbies' here can include 'designer handbags/shoes'.)

Q What one positive has come out of COVID-19 for you?

A For years, I have been getting the train to Waterloo at 6am. This last year I have been catching the sunrise running in Bushy Park and taking my daughter to nursery — both of which have been lovely. I don't intend to completely let go of either of them.

Q What does the perfect weekend look like?

A A combination of lie-ins (anything after 7am counts), sunshine, family, good food, good wine, horse-riding, no phones and minimal toddler tantrums. I have simple pleasures.

Q Who would you most like to invite to a dinner party?

A This is the question where I think you're supposed to show how widely read/politically astute/ethically-minded you are. To be honest, after this year, my perfect dinner party would just involve having all my family and friends in one place. Plus Phoebe Waller-Bridge and Louis Theroux.

Q If you could give one piece of advice to aspiring lawyers, what would it be?

A It's never too early to start building a network. Make as many internal and external relationships as you can — because you never know who could become a potential client, or whose advice you may want to seek. Having someone to whom you can ask 'that stupid question' is invaluable. Don't leave it until you're considering partnership.

60-SECONDS WITH:

NATALIE TODD, PARTNER, PCB BYRNE

Q What do you tell people when they ask you what you do?

A I generally come clean and say I am a solicitor.

Q What would you be doing right now if you weren't here?

A I'd be at the bar. If I wasn't a solicitor, I'd be a police officer. I seriously considered a career change after my second child.

Q If you could start all over again, what if anything would you do differently?

A There isn't anything that I regret in my life so this is a difficult question. I lost my father very suddenly when I was pretty young so I would have loved to have spent more time with him instead of being so keen to escape home and find my independence.

Q What's the strangest or most exciting thing you've ever done as a lawyer?

A Chasing assets for a trustee in bankruptcy appointed in relation to a large Ponzi scheme in Jamaica. We found monies in a bank account in Dubai and were the first solicitors to obtain a freezing order in the DIFC (Dubai International Finance Centre). Unfortunately those assets disappeared (?!), and we were then the first solicitors to lose a freezing order in the DIFC. We then went to Jamaica and to a police station in downtown Kingston as there were ongoing criminal investigations. On arrival at the police station, I realised that it was the same police station that featured in my pro bono Privy Council appeal matter with a shoot out which had occurred outside that very police station. Contrary to our client's advice (who had been concerned as to our safety), when we had finished, we ducked our driver and went for a stroll to a local Wimpey and got some lunch before heading back to our client's office.

Q If you could never work again, would you and why?

A I think I would. I am very lucky as I really enjoy my work and enjoy having a sense of purpose. I think you might get lost if you never needed to work again. That said, I'd most definitely take some extended holidays if I could and spend time travelling and with my family.

Q What have you most missed during the COVID-19 restrictions?

A I'm known to be the most social person in the office. Need I say more...

Q What one positive has come out of COVID-19 for you?

A This is an interesting question – my positive is the same as my negative: spending a lot more time with my family. We commenced a significant house renovation project in June 2020 and spent 7 months living in a studio at the bottom of the garden. It was a challenging time, the kids slept in a corridor and at one stage, my son had to self isolate, but we survived and now have a wonderfully spacious house.

Q What does the perfect weekend look like?

A The perfect weekend – goodness – with or without my darling young children?! Without would probably involve a weekend trip to Amsterdam – it's one of my favourite places. With kids, a family (2 kids and dog) trip to the beach messing around on paddleboards and kayaks, getting slightly sunburnt and enjoying a couple of well deserved GnTs at the end of the day.

Q Who would you most like to invite to a dinner party?

A The Obamas – I've been reading their books recently – such an interesting and inspiring couple.

Q If you could give one piece of advice to aspiring lawyers, what would it be?

A Don't be afraid to step outside your comfort zone. Have the confidence to be able to rely on your knowledge and skills without being bamboozled with complex terms or concepts you are not completely comfortable with. AND make sure you enjoy yourself!

60-SECONDS WITH:

DAN WYATT, PARTNER, RPC LAW FIRM

Q What do you tell people when they ask you what you do?

A That I'm a lawyer. That's usually enough for them to change the subject pretty quickly.

Q What would you be doing right now if you weren't here?

A I'd like to be blasting around mountains on skis somewhere with perfect snow & sun, before some Après at the end of the day. Not one for 2021 though, sadly.

Q If you could start all over again, what if anything would you do differently?

A Not much – I wouldn't be talking to you now without the mistakes I've made!

Q What's the strangest or most exciting thing you've ever done as a lawyer?

A Getting a call at midday on a very average Wednesday, telling me to be at a Swiss ski resort for a client meeting at midnight that evening. I got there in time – just – and then the meeting was cancelled.

Q If you could never work again, would you and why?

A I find it hard to sit still for more than about 5 minutes. So continuing with a bit of work would help keep me sane and out of trouble.

Q What have you most missed during the COVID-19 restrictions?

A Seeing family and travelling.

Q What one positive has come out of COVID-19 for you?

A Being able to work more flexibly which has allowed me to see much more of my wife and young son.

Q What does the perfect weekend look like?

A A balance of family time, walks, a few drinks and watching sport. And mowing my lawn – a bit obsessively.

Q Who would you most like to invite to a dinner party?

A Sir Alex Ferguson. What he doesn't know about people management, drive and success isn't worth knowing.

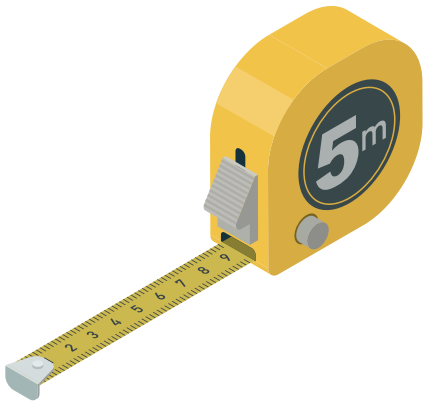
Q If you could give one piece of advice to aspiring lawyers, what would it be?

A Don't take yourself too seriously. The job can be very demanding and stressful at times, but also very rewarding. Try to enjoy the ride.

SHAREHOLDER DISPUTES: A LAWYER'S TOOLKIT

Authored by: Harriet Campbell and Jo Jones - Stephenson Harwood

Shareholder disputes are common, particularly in times of economic trouble. The primary causes of action (which often overlap) include unfair prejudice petitions, winding-up petitions and derivative actions. Understanding which cause of action will be most appropriate (both in terms of the hurdles to pass and the likely remedy) is important. We consider the current status of the law in this area by reference to a number of recent decisions.



Unfair prejudice petitions (the "Classic" option)

Company law prescribes how companies are run and in general, majority shareholders have power over minority shareholders. However, where a company's affairs are run in a way which "unfairly prejudices" some of its shareholders, the court can order a remedy. Although the court has a wide discretion, the usual order will be that the majority purchase the minority's shares at a value determined by the court. For that reason, an unfair prejudice petition is usually only viable when the petitioner's shares have a substantial value at the time of trial.

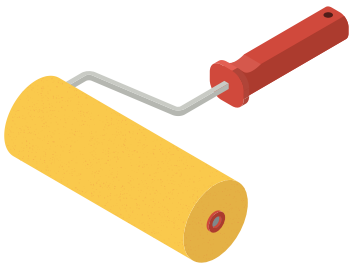
There are two main types of unfair prejudice: 1) where a company breaches its articles or a shareholders agreement, or where the company's directors breach their duties in such a way that it amounts to unfair prejudice; and 2) where the company is a "quasi-partnership" and the majority act inequitably in a way that prejudices the minority.

Precisely what makes any prejudice unfair can be, however, hard to define. In the recent case of Compound Photonics Group Limited [2021] EWHC 787 (Ch), the court examined when exclusion from the management of a business can constitute unfair prejudice. The key findings were as follows:

- Even where a company is not a quasi-partnership, the combined effect of its constitutional documents can be interpreted as requiring an "acceptable balance of power" between existing and new shareholders.
- Where that balance is disturbed and the company's board "effectively usurped" by new majority shareholders, that can entitle the disadvantage shareholders to claim relief for unfair prejudice.

- Even if the majority shareholders are entitled, as a matter of company law, to remove directors, such a step may still be a breach of contract capable of founding an unfair prejudice petition.

This case highlights the importance of properly drafting (and understanding) company documentation, including shareholders agreements. Here, the court interpreted the company's constitutional documents (which included a good faith provision) as imposing a contractual restriction on the rights of the majority shareholders to exercise their majority power as they saw fit. Breach of that contract gave rise to a successful claim for unfair prejudice.



Winding up petitions (the "Nuclear" option)

Winding up a company as a means of resolving a dispute is a significant step. For that reason, the court will not normally grant this remedy where there is a realistic alternative. However, in the recent decision of Chu v Lau [2020] UKPC 24, the Privy Council provided welcome clarification of the circumstances in which it is reasonable to petition for the winding-up of a company as opposed to seeking alternative relief.

Whilst Privy Council decisions are not binding precedent in English proceedings, they are persuasive authority. The key takeaways from this case are:

- In cases of quasi-partnerships, disagreements linked to the management of a subsidiary are likely to be considered relevant when assessing the functional deadlock of its parent company or the parties' relationship generally;
- A quasi-partnership can exist in circumstances where there are no restrictions on shareholders transferring their shares in the company;
- The winding-up of a company will only be prohibited if a petitioner is solely responsible for the breakdown in the parties' relationship and not where the petitioner is merely partially responsible; and
- Although winding-up is a remedy of last resort, a petitioner will only be expected to pursue alternative remedies (or alternatives generally such as the selling of their shares) where it is reasonable for the petitioner to do so, and those alternatives are realistic rather than just purely theoretical.

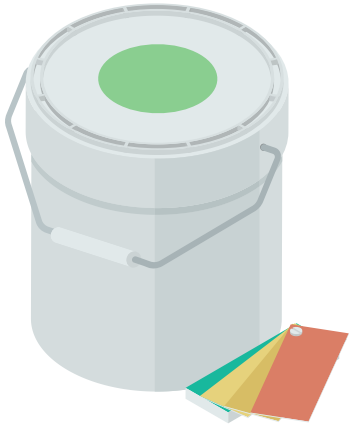
Share valuation (the "Fair" option)

Sometimes shareholder disputes can be resolved simply by buying out the minority shareholder. The problem is that when a relationship has irretrievably broken down, it can be difficult for the parties to agree on the price.

In the recent case of In the matter of Euro Accessories Limited [2021] EWHC 47 (Ch), the court gave guidance on the way in which "fair value" should be determined where a company's Articles of Association confer a right for the compulsory acquisition of a minority shareholding. Rejecting the petitioner's claim for unfair prejudice (in relation to the valuation), the court held:

- Unless the contract indicates otherwise, where a contract refers to a right to acquire shares for "fair value", that value is no more than the actual value.
- There is no basis for attributing to shares a pro rata share of the company's overall value or any other hypothetical value by reference to equitable or other factors.
- Where the right to compulsorily acquire shares is contained in a company's Articles of Association, it is unlikely that the circumstances in which that provision came to exist will amount to relevant background information for construing that provision.

This decision underlines the importance of clearly specifying in any contractual documentation how shares are to be valued in the event of a compulsory acquisition.



Practical points

All of these cases demonstrate the importance of ensuring that company contractual documentation reflects the parties' agreed provisions. In particular, dispute resolution provisions within companies' constitutional documents are essential to ensure that shareholder disputes are managed appropriately and effectively. Where litigation cannot be avoided, careful consideration needs to be given to the most appropriate cause of action to resolve the dispute.

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WHAT'S NEW?

REVISIONS TO THE IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION 2020

Authored by: Uliana Cooke - PCB Byrne LLP

On 17 December 2020, the International Bar Association (the IBA) adopted revisions to the IBA Rules on the Taking of Evidence in International Arbitration which were released on 15 February 2021 (the revised IBA Rules). The revised IBA Rules supersede the IBA Rules of 1999 and 2010 and, unless there is an indication to the contrary, will apply to all arbitrations in which the parties agree to apply the IBA Rules after 17 December 2020.

Although the revisions are limited in number, they continue to reflect best practice in the taking of evidence in international arbitration and address technology-driven developments precipitated by the global pandemic Covid-19. Among the key changes are the following:

1. Including cybersecurity and data protection in the list of issues for the initial consultation on evidentiary issues;
2. Introducing provisions on remote hearings including the definition of a Remote Hearing and establishing a Remote Hearing protocol; and
3. Setting out further powers of the Arbitral Tribunal in matters such as the treatment of evidence and document production.

The most notable revisions are discussed in more detail below.

Cybersecurity and data protection

Cyber-attack and data loss are the highest rated risks facing businesses according to the D&I Liability Survey Report of April 2021.[1] With the world having had to adjust to working remotely due to COVID-19, it is not surprising that cyber criminals have been seeking to exploit weaknesses in IT systems.[2] It was reported that 30bn data records were stolen in 2020 which is more than in the previous 15 years combined. [3]The Financial Times cited "our growing dependence on networked technologies, massively accelerated by the pandemic" and "the increased outsourcing of computer systems to cloud-based companies" as two big trends that contributed to it.[4]

International arbitration as a forum for resolving commercially sensitive, confidential, often high value and complex disputes involving multiple parties in various jurisdictions is of no exception.

Arbitral institutions and arbitration users including clients, their counsel team and arbitrators have become increasingly reliant on electronic and digital means for conducting arbitration proceedings. This involves not only handling large quantities of data which is being processed, managed and transmitted through electronic channels (which are not necessarily encrypted) across multiple jurisdictions but also participating in virtual hearings through online technology platforms from various locations. All of this has further accentuated concerns surrounding data protection, including data privacy and cybersecurity, in international

1 Global FINEX – Directors and Officers Insurance (D&O) Liability Survey 2021 (the D&I Liability Survey Report).
2 The D&I Liability Survey Report, page 9.
3 See Report on "Cybersecurity investment grows in 2020, but organizations face record data breaches", 29 March 2021, as referred to by the Financial Times article, "Pandemic accelerates growth in cybercrime", 28 April 2021.
4 The Financial Times article, "Pandemic accelerates growth in cybercrime", 28 April 2021.

arbitration.

To encourage addressing these concerns at an early stage of the arbitration proceedings, the revised IBA Rules have introduced Article 2.2(e) which places "the treatment of any issues of cybersecurity and data protection" in the list of evidentiary issues which may be addressed, "to the extent applicable", at the initial consultation between the parties and the Arbitral Tribunal.

In practical terms, this could involve an adoption of the data protection and cybersecurity protocol for the duration of the arbitration proceedings in compliance with the European Union's General Data Protection Regulation and applicable data protection regimes.

As an example of useful resources for the parties and Arbitral Tribunals to consult, the 2020 Review Task Force referred to the ICCA-IBA Roadmap to Data Protection in International Arbitration [5] and the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration [6] in its commentary on the revised IBA Rules (the revised IBA Commentary).[7]

Remote hearings

Although remote hearings are not a novel feature in international arbitration, the revised IBA Rules have expressly introduced provisions on conducting remote hearings in line with the realities brought out by the global COVID-19 pandemic which "caused national lockdowns, quarantines and restriction of free movement, and inevitably affected arbitration proceedings, in particular, the conduct of in-person evidentiary hearings".[8]

Firstly, the revised IBA Rules define a 'Remote Hearing' as "a hearing conducted, for the entire hearing or parts thereof, or only with respect to certain participants, using teleconference, videoconference or other communication technology by which persons in more than one location simultaneously participate".

This definition reflects the versatile nature of international arbitration contemplating the possibility of conducting virtual evidentiary hearings for the entirety of the arbitration proceedings as well as some part of it in case of mixed evidentiary hearings (e.g. both remote and in-person during the course of one arbitration).

Secondly, the revised IBA Rules outline the active role of the Arbitral Tribunal in managing the conduct of a Remote Hearing. In particular, Article 8.2 provides that "[a]t the request of a Party or on its own motion, the Arbitral Tribunal may, after consultation with the Parties, order that the Evidentiary Hearing be conducted as a Remote Hearing" and, if a Remote Hearing is ordered, it shall "consult with the Parties with a view to establishing a Remote Hearing protocol to conduct the Remote Hearing efficiently, fairly and, to the extent possible, without unintended interruptions".

Adoption of protocols for remote hearings have become widespread in international arbitration in recent months and the revised IBA Rules go hand in hand with the tools and practices adopted by the users of arbitration to combat technological challenges and ensure smooth running of the arbitration.

Article 8.2 of the revised IBA Rules specifies that the protocol may address the following:

(a) the technology to be used;

(b) advance testing of the technology or training in use of the technology;

(c) the starting and ending times considering, in particular, the time zones in which participants will be located;

(d) how Documents may be placed before a witness or the Arbitral Tribunal; and

(e) measures to ensure that witnesses giving oral testimony are not improperly influenced or distracted.

The above issues are indicative of potential difficulties and technological challenges when conducting remote hearings which are best addressed in a Remote Hearing protocol.

As regards witness testimony, the revised IBA commentary suggests different means to ensure that "witnesses are not improperly assisted by other persons or make improper reference to documents when giving oral testimony".[9] These include:

(a) questioning the witness at the outset of the examination about the room in which the testimony is being given, the persons present and documents available;

(b) installation of mirrors behind the witness;

(c) use of fish-eye lenses; or

(d) the physical presence with the witness of a representative of opposing counsel.[10]

Treatment of evidence and document production

The remaining revisions reflect established international arbitration practices, clarify the framework for the taking of evidence established by the IBA Rules and provide for a more active role of the Arbitral Tribunal. Among such revisions are:

1. **Treatment of evidence:** Article 9.3 of the revised IBA Rules expressly recognises that "[t]he Arbitral Tribunal may, at the request of a Party or on its own motion, exclude evidence obtained illegally". Unlike Article 9.2 where grounds for exclusion from evidence are listed, Article 9.3 was deliberately drafted in broad terms without specifying circumstances in which such evidence is to be excluded and using "may" instead of "shall". This was done to preserve divergence in national law approaches regarding the exclusion of such evidence and to contemplate potentially differing views of Arbitral Tribunals on the issue "depending on, among other things, whether the party offering the evidence was involved in the illegality, considerations of proportionality and whether the evidence is material and outcome determinative, whether the evidence has entered the public domain through public "leaks," and the clarity and severity of the illegality".[11]

5 The ICCA Reports No. 7: The ICCA-IBA Roadmap to Data Protection in International Arbitration 2020.
6 ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration 2020.
7 Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration, January 2021 (the revised IBA Commentary), pages 6-7.
8 The revised IBA Commentary, page 25.
9 The revised IBA Commentary, page 25.
10 Ibid.
11 The revised IBA Commentary, pages 30-31.

2. Document production requests:

(a) Article 3.5 provides for the right of the requesting party to respond to the opposing party's objection "[i]f so directed by the Arbitral Tribunal". This revision is in line with the prevailing practice in international arbitration in the context of requests for the production of documents in the form of a Redfern Schedule where a party's response to an objection may lead to a useful clarification or further narrowing down of the issues in dispute for which evidence is being sought;

(b) consistently with Article 3.5, Article 3.7 of the revised IBA Rules adds that the Arbitral Tribunal shall consider a party's objection and "any response thereto" and eliminates the perceived requirement for the Arbitral Tribunal to consult with the parties when considering, "in timely fashion", the Request to Produce, the objection and any response to the objection;

(c) Article 9.5 of the revised IBA Rules clarifies that the Arbitral Tribunal's discretionary power to afford suitable confidentiality protection extends to documents to be produced in response to a Request to Produce in addition to the introduction of documents as evidence in the proceeding. Such protection measures may include orders to produce documents in a redacted form, order "attorneys-eyes only" production, appoint an independent and impartial expert to review the document in question in order to report to the Arbitral Tribunal and the parties about the non-confidential content under Article 3.8 of the IBA Rules.[12]

3. Document translations and copies:

(a) Articles 3.12(d)-(e) of the revised IBA Rules clarify that, unlike documents submitted in the evidentiary record on which a party intends to rely, documents produced in response to document requests do not need to be translated into the language of the arbitration unless the parties agree otherwise or unless the Arbitral Tribunal decides otherwise in the absence of such agreement. This clarification is potentially cost-saving in voluminous document production requests and reinforces the burden to provide translations for the party relying on and submitting foreign-language documents into the record;

(b) Article 3.12(c) expressly says a party is not obligated to produce multiple copies of "essentially identical" documents unless the parties agree otherwise or unless the Arbitral Tribunal decides otherwise in the absence of such agreement. The Arbitral Tribunal may decide otherwise if, for example, various versions of a particular document may be material to the outcome of the case.

4. New developments:

The revised IBA Rules allow for "revised or additional" witness statements and expert reports to be submitted to respond only to "new factual developments that could not have been addressed in a previous Witness Statement" and "new developments that could not have been addressed in a previous Expert Report" in Articles 4.6(b) and 5(3)(b) of the revised IBA Rules respectively. This provides greater flexibility for witness and expert evidence and clarifies the scope of that evidence.

Conclusion

The latest revisions demonstrate the adaptability of the IBA Rules to the realities of the modern age of technology at the time of the global pandemic. The revised IBA Rules continue to harmonise procedures in international arbitration reconciling common law and civil law differences and reflect best practice in the taking of evidence in transnational disputes. Nonetheless, there is scope for further developments in certain areas such as refining the framework for drawing adverse inferences by the Arbitral Tribunal which have the potential to significantly impact the outcome of proceedings. It will be interesting to see how the IBA Rules evolve in line with the international arbitration practice in the years to come.

12 **The revised IBA Commentary, page 30.**

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DIGITAL DISPUTE RESOLUTION LAWYERS OF THE NEXT GENERATION

Authored by: Professor Suzanne Rab – Serle Court

The Dynamic of the digitised Courts

The world has changed over the course of a few months and, with changes in the world, come changes in law. The legal sector had to adapt in short order to the restrictions imposed by COVID-19. In England and Wales, as early as March 2020 courts were using technology to allow participants to attend remote hearings. With more limited virtual alternatives, this situation exacerbated an already overburdened legal justice system. The response of the legal profession was to leverage tech-based solutions to keep the wheels of justice moving, including online mediation. Advances in technology, brought to the foreground during and in the wake of COVID-19, reignite the debate about how such developments may remove barriers to access to justice.

The role of virtual courtrooms during and after COVID-19

The move towards a more digitised court environment has long been considered inevitable yet it was the 'real-life experience' of the pandemic that forced the imperative.

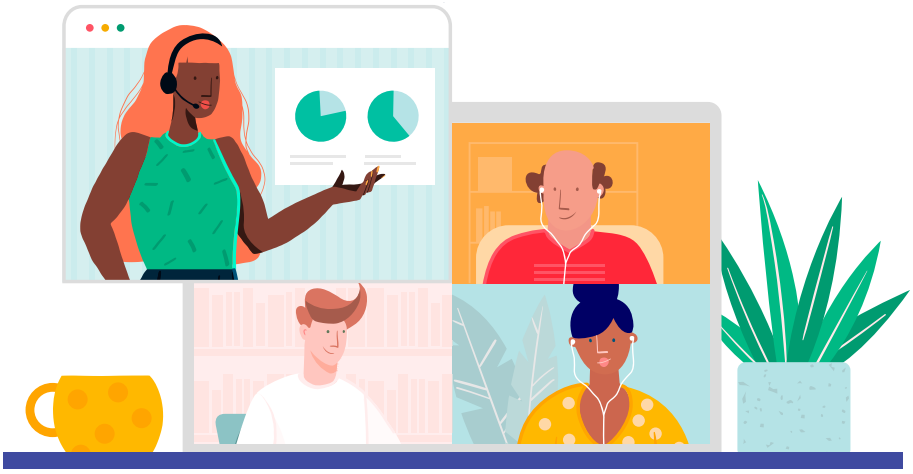
In 2016, Lord Justice Michael Briggs evaluated the potential for online courts, noting that the legacy IT systems at the time were in need of a makeover. That observation might now seem prescient.

National Bank of Kazakhstan & Anor v The Bank of New York Mellon & ors [2020] EWHC 916 (Comm) is an early example of how technology was deployed in a virtual hearing. In anticipation of a lockdown, the parties were directed to attend a hearing on 19 March 2020 and against the defendants' submissions that the trial should be adjourned. This case is symptomatic of a 'no nonsense' approach to moving to full virtual trials, in appropriate circumstances.

Responses to the pandemic have tested the courts' digital preparedness. Even before the pandemic, the courts were using video links in appropriate circumstances which do not necessitate a physical hearing. However, there were concerns about the capacity of video links to meet increased demands, especially if they are being used for evidence.

The pandemic has seen the growth of comprehensive commercial virtual trial solutions of which the writer has experience, comprising services such as video-conferencing, live streaming, e-bundling and transcription. Providers including Epiq Global, Opus2 and Sparq have developed their pre-pandemic offerings to cater for the increased demand. As yet, the courts in England and Wales have yet to declare a provider of choice. It may be anticipated that the emphasis will be on functional equivalence where factors such as reliability, security, confidentiality and comprehensiveness will govern technology choices.

The oral tradition in advocacy in England and Wales means that we are not yet seeing the 'mainstreaming' of virtual courtrooms for the foreseeable future. The pandemic has shown that technology can and does yield efficiencies which would have been scarcely credible only eighteen months ago and this is here to stay. The move to virtual environments is not a linear move to ubiquitous virtual hearings but, rather, a transition to a more hybridised courtroom with enhanced digitised functionality.



The role of virtual mediation in the wake of COVID-19

Significant agility has been shown by the judiciary and litigants in participating in video-hearings. More radical shifts are required to manage the impact on both existing and pipeline cases as the full effects of COVID-19 play out.

Mediation is an accepted method of dispute resolution and anecdotally enjoys a 4 in 5 success rate. It uses a neutral third party through a series of joint and individual meetings with parties to disrupt entrenched positions and reach settlements based on mutually converging interests.

Whilst modern technology has the potential to make virtual mediation as accessible and effective as its real-life form, mediators and advisors need to familiarise themselves with necessary protocols. The skills that they have honed in traditional forms of ADR in a physical environment will need to adapt as digitisation presents new opportunities.

Many of the disputes emerging from the crisis raise specific issues but others including B2C and some B2B disputes will have elements of uniformity. Mass claims dealing with common issues need to be dealt with in a way that provides quick, easy and cheap access to settlement. Business interruption insurance claims might be a prime candidate for bulk resolution. To translate this into practice, common issues or categories of mass claims can be identified and could be mediated through online panels. Similar programmes have found success in the US in the wake of natural disasters such as Storm Sandy and Hurricanes Katrina and Rita.

As social distancing measures in one form or another will be a fact of life or prudent for the foreseeable future, in-person mediations will not always be the medium of choice. This puts the spotlight on virtual solutions while recognising that an element of training and openness to using technology will be required to equip mediators and advisors with the necessary skills to navigate a new platform.

The areas of growth and opportunity in legal disputes resolution

In addition to COVID-related disputes, other areas of law which were previously under-explored that may see growth are legal technology and social media regulation. There is an imperative to have digital solutions to deal with disputes with customers over cancellations and delays, employment disputes, education law disputes and with the inevitable economic hit, insolvency, mental health law and family law.

Government regulations aimed at flattening the COVID-19 inflection curve inevitably lead to businesses finding it impossible or extremely difficult to perform their contractual duties. Parties affected by the pandemic may find relief if their contractual agreements include “Force Majeure” clauses. In the absence of such protective clauses, many businesses find themselves in breach of their arrangements unless they can rely on general doctrines such as that of frustration.

The lockdown caused most if not all live entertainment and sporting events to be postponed or cancelled indefinitely. As political and social pressure mounted on organisations not to place staff on furlough or lay-off, there may be a greater push towards wage cuts. This has the potential to cause more disputes than are reported.

The virus has led to unprecedented peace-time restrictions on public liberty and enjoyment. The Coronavirus Act 2020 prohibited public gatherings, restrained free movement and allowed for enforced closure of businesses. It did so without directly compensating businesses for the ensuing economic losses, albeit other support schemes have been put in place to alleviate the economic burden.

While few would question the need for resolute action, the longer lockdown lasts, and with its iterative 'stop – start' nature, the more likely it is that these assumptions are to be challenged. Private groups and the Opposition decried a lack of an exit strategy within the earlier lockdown, which could conceivably have been used as a basis for a public law challenge. The appetite to challenge public bodies will have increased as a result of successes in cases arising from EU withdrawal.

The pandemic crisis is also a representation of how dynamic the judicial landscape is. The courtroom has seen a transition in the type of cases in the last years and the last few months suggest these trends are not relenting: cases of increased commercial disputes, cyber-fraud, financial services disputes, and data-privacy breaches are some visible changes which courtrooms can anticipate in a post-coronavirus world and which the writer anticipates are not a temporary aberration.

The role of AI and other advances in technology in legal dispute resolution

Artificial intelligence (AI) and other advances in technology has been used extensively in legal practice and provides opportunities to deliver and access legal services in ways previously unimaginable. These innovations represent the nearest that the legal world has come to a sci-fi drama.

An effective civil justice system is based on the rule of law, where the law must be fair, accessible and enforceable. There are well documented obstacles to accessing justice. In England and Wales the Legal Services Research Centre (LSRC) commissioned surveys between 2001 and 2011 involving more than 5000 participants to explore whether they had experienced problems in accessing justice. Cost is a major barrier.

Advances in technology have unleashed automated document generation or information provided via chatbots in order to provide free or cheaper access to legal information. There are practical limitations of chatbots regarding more complex areas of law.

Predictive analysis draws on big data to forecast the outcome of a case and advise clients whether to proceed, effectively substituting an individual lawyer's experience, assessment and intuition. Decisions predicated on such tools could result in cheaper outcomes than pursuing cases with limited prospects of success. Predictive analysis based on reported cases will cover a small subset of actual disputes given that over 90% of disputes do not see final judgment. This raises some doubts about the robustness of the data used and insights derived at least currently.

The Future of the Digitised Courtroom

Despite the exigencies of the pandemic, the courts of England and Wales have remained open for business, albeit in a more digitised form. This suggests some resilience not only in addressing the immediate situation of the pandemic, but some cause for optimism that the attractions of litigating in the jurisdiction will continue. While it may be difficult to contemplate, at least presently, that machines will replace lawyers, developments in technology have potential to reshape some parts of legal practice.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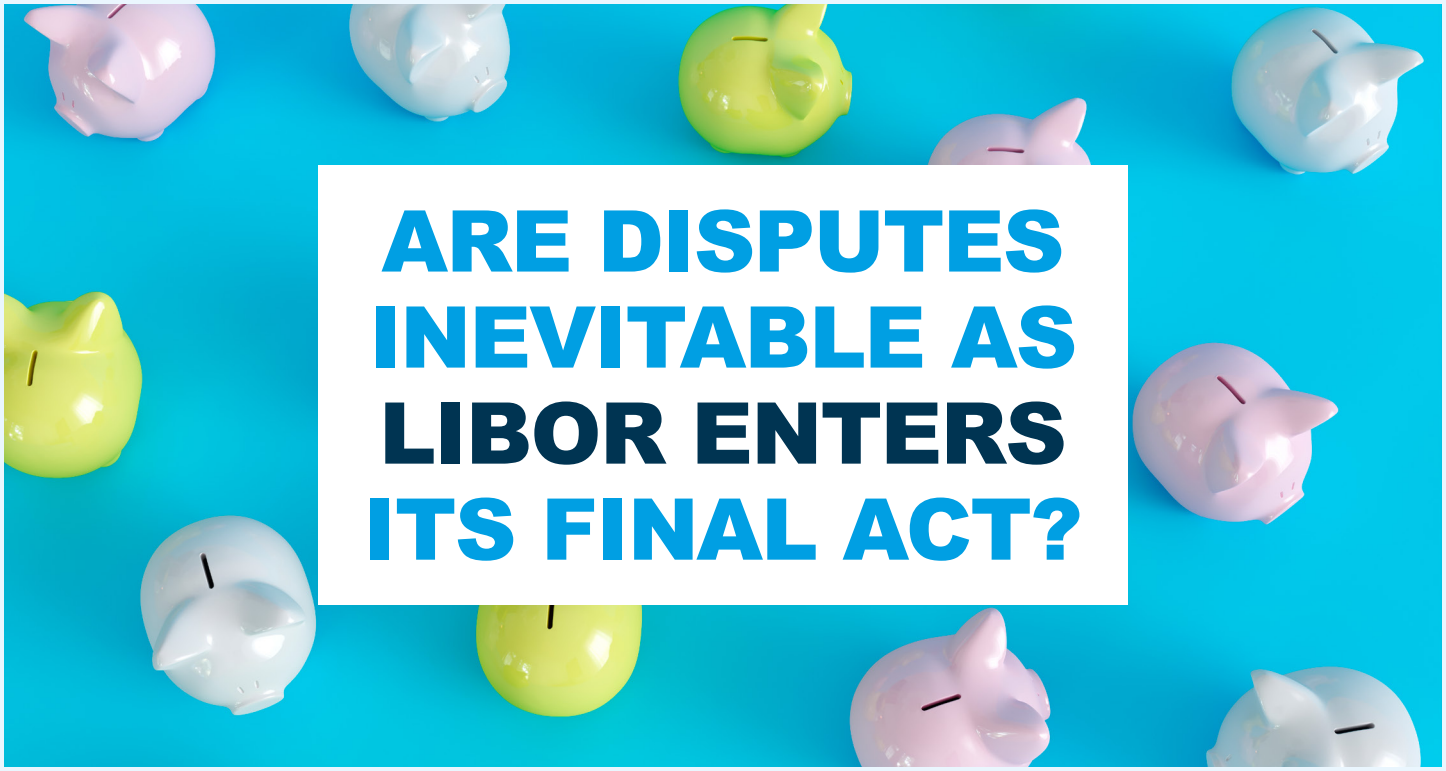
In Focus: Libor



ARE DISPUTES INEVITABLE AS LIBOR ENTERS ITS FINAL ACT?

Authored by: Daniel Hemming - RPC

Where are we now?

Nearly four years after the FCA sounded the death knell for LIBOR, the benchmark is moving into its final act. Despite the pandemic, the FCA and the Bank of England are showing few signs of wavering in their determination to end LIBOR in 2021. Although some USD settings will continue to be published until mid-2023, GBP and all other currencies will, as matters stand, cease to be published in their current form at the end of this year.

Despite this, the signs are that very significant work remains to the done in transitioning legacy contracts away from LIBOR onto the preferred risk-free rates, such as SONIA in GPB markets. For example, in its latest quarterly report, the International Capital Markets Association said that of an estimated 490 floating rate notes and securitisations linked to GBP LIBOR and maturing after 2021, it was aware of only 50 that have been converted to SONIA through bondholder consents.

Matters are complicated further by the fundamental differences between LIBOR and e.g. SONIA. LIBOR is forward-looking, incorporates credit risk and is published for a range of tenors. SONIA is backward-looking (so cannot be determined until the end of the relevant interest period), risk-free and overnight only. Doubts remain as to how successful the methodologies to be applied by ISDA and others to convert LIBOR rates to SONIA rates in a value-neutral way will be.

In Q2 2021, the FCA is consulting on requiring the continued publication of 1m, 3m and 6m GBP LIBOR on a synthetic basis. However, no commitment has been made to do this or, if synthetic rates are published, on which legacy contracts will be permitted to use them. The FCA has also said any synthetic rates will not be representative of the markets LIBOR was intended to measure. In short, market participants have fair warning that synthetic rates will not save them from disruption if they fail to take adequate steps to transition.

Against that background, the potential for disputes looms ever larger. We consider three potential categories below.

Contractual interpretation claims

Applicability of existing fallback provisions

Parties to legacy LIBOR contracts will need to identify whether and how any existing fallback provisions apply. However, these are often aimed at situations where LIBOR is temporarily unavailable. In 2018, the Loan Market Association acknowledged that its existing fallbacks were not designed to be used long term and produced revised wording to allow for a replacement benchmark to be selected in various scenarios.

Accordingly, existing fallback provisions could change the economics of a contract in an unintended manner. For example, a floating rate product could become a fixed rate product if the fallback provision refers to the last-published LIBOR, which would be applied in perpetuity.

Some fallbacks provide for the lender or an independent expert to select a replacement rate, which could also be a source of controversy and disputes.

Force majeure and frustration

Force majeure and frustration are difficult to establish, but where they are, they can relieve the parties from their obligations under a contract. Where contracts have force majeure clauses they will amend the obligations of a party (or parties) to a contract when triggered by an extraordinary event or circumstances. On the other hand, frustration is a common law principle that applies where something occurs after the formation of a contract that renders the contract impossible to fulfil or transforms the performance obligation to something completely different from the obligation that existed when the contract was formed. Where a contract is frustrated, all the parties' obligations are discharged.

In the context of the LIBOR transition, where parties cannot rely on fallback provisions (or, potentially, a synthetic replacement rate) or agree an amendment, a party may seek to enforce a force majeure clause and/or claim that the contract has been frustrated. The consequences could be severe for counterparties: they could, for example, be left with immediately repayable loans or unhedged positions.

Claims arising out of renegotiations

As identified above, many LIBOR contracts have been and will continue to be renegotiated ahead of the transition deadline and given the fundamental differences in LIBOR and e.g. SONIA it will be very difficult, if not impossible, to amend existing agreements in a value neutral manner. However, these negotiations may not take place against the same background as the original negotiations of the LIBOR contract. Borrowers may find themselves in a weaker bargaining position if, for example, market conditions are worse than they were at the time of entering into the contract or if the borrower is closer to its covenant limits. This could mean that lenders take advantage of their strengthened bargaining position to impose additional covenants on borrowers, require them to pay additional fees or simply increase the interest rate payable. Such actions may give rise to common law claims and may also engage FCA rules.

Mis-selling claims

Where a party suffers loss under LIBOR contracts that were entered into post-July 2017, after the transition had been announced, there may be scope for mis-selling claims against their counterparty. For example, a borrower may claim that the lender failed adequately to explain relevant information related to the LIBOR transition, or made misrepresentations in respect of it, such as how it would work or even its existence.

Additionally, claims could arise from representations made by lenders to borrowers in the context of agreeing amendments to their legacy LIBOR contracts. For example, a lender may have represented that an amendment was cost-neutral when that was not in fact the case.

Conclusion

With the date the LIBOR music finally stops fast approaching, attention needs to be paid to the litigation risks that exist. However, the intrinsic difficulties with the transition, including the divergence in the interests of counterparties, points towards a view that contractual, renegotiation and mis-selling disputes will arise. How widespread these claims will be remains to be seen but given the prevalence of LIBOR as a reference rate across a wide range of financial markets and products, the scope is clearly significant.

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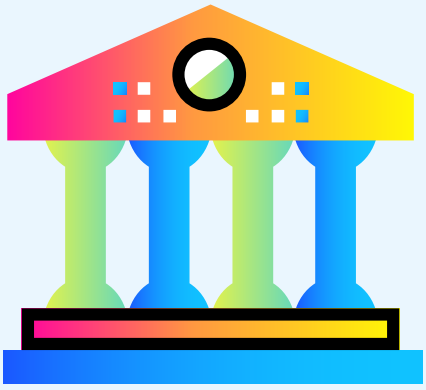
#Disputespowerhouse

THE QUESTION OF AWARENESS IN LIBOR MISREPRESENTATION DISPUTES

Authored by: Eamon Khorsheed and Dave Johnson, PCB Byrne

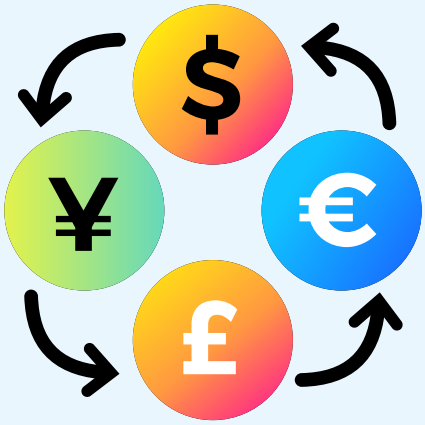


Summary

In ***Leeds City Council and others v Barclays Bank plc and another [2021] EWHC 363 (Comm),*** a consortium of local authorities (the "Claimants") sought to rescind loan agreements with Barclays (the "Bank") on the grounds of fraudulent misrepresentation. It was alleged that the Bank had made an implied representation that the LIBOR rates applicable to the loans were set honestly, and that this amounted to fraudulent misrepresentation as the Bank was in fact manipulating those rates.

The Court considered what constitutes reliance in the context of a LIBOR misrepresentation claim and confirmed that the representee (i.e. the claimants) must have an active appreciation of the representation being made, and that the mere assumption based on conduct is not sufficient in complex cases such as those surrounding LIBOR.

Ultimately, the Court decided that the claim stood no realistic prospect of success and struck out the claim; the Claimants failed to plead awareness of the alleged misrepresentation at the time the representation was being made.



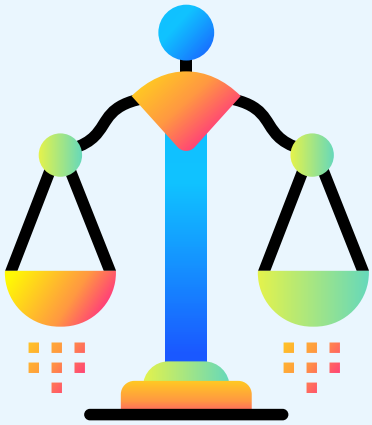
Factual Background

The Claimants entered into loans with the Bank, each of which applied rates which were calculated with reference to LIBOR. It was common ground and public knowledge that the Bank had engaged in LIBOR manipulation.

The Claimants brought an action of fraudulent misrepresentation against the Bank on the basis that the loans were tainted by a number of misrepresentations. The Claimants alleged that the Bank made representations to the effect that LIBOR rates were being set honestly and properly and that the Bank was not (and had no intention of) engaging in any improper conduct in connection with its participation in the LIBOR panel (the "Alleged Representations").

The Bank applied to strike out the claim on the basis that the Claimants failed to satisfy the legal requirement concerning reliance in relation to misrepresentation. The Bank submitted that the Claimants could not show that they considered and understood the Alleged Representations at the time they were made.

For the purposes of the strike out application, the Court took the Claimants' factual case at its highest. The Bank also accepted that the Court should determine the strike out application on the assumption that the Alleged Representations which had been made, were false, and had been made fraudulently. The question was whether, as a matter of law and on the basis of the Claimant's pleaded case, the Claimants could establish that they had relied on the Bank's misrepresentation.



The Legal Arguments

The Bank relied on Marme Inversiones 2007 SL v Natwest Markets Plc [2019] EWHC 366 (Comm) ("Marme"). In that case, Picken J found that in order for the claimant to satisfy the reliance criteria there would need to be "some contemporaneous conscious thought" given to the fact that some representations were being implied.

The Bank cited Marme and submitted that the claim must fail as the Claimants could not show that they actively considered the Alleged Representation before entering into the loans. In short, the Bank submitted that the Claimants could not show they had actually considered that the Bank was making implied representations that LIBOR was not being manipulated. If the matter was never considered by the Claimants, they could not logically maintain that they had relied on it as a matter of fact.

The Claimants rejected the Bank's submission that reliance cannot be shown unless a claimant specifically considered the representation at the time it was made. The Claimants argued that this would amount to the Court sanctioning a "rogue's charter" which would allow misrepresentors to escape liability for their wrongdoing.

The Claimants submitted that it was unnecessary for a claimant to show that they had consciously considered the misrepresentation. The touchstone was whether there was a sufficient causal link between the defendant's conduct and the actions of the claimant. In some cases, the misrepresentation may induce the claimant to act in a certain way, notwithstanding that the claimant did not turn his mind specifically to the misrepresentation before entering into the contract. On that basis, the Claimants submitted that there is no requirement for a claimant to show "contemporaneous conscious" consideration of the representation. The test was effectively one of causation.

After an extensive review of the relevant authorities, the Court held that, as a matter of logic, a claimant could not establish reliance on a misrepresentation without showing that they were aware of that misrepresentation when it was made. In doing so, the Court supported the Bank's case based on Marme (and other authorities) and rejected the causation test put forward by the Claimant.

The Court then considered whether the facts of the present case precluded a finding of reliance. Whilst the Court expressed a reluctance to deal summarily with questions which turn on complex facts, the Court noted that the present case was factually similar to two earlier cases in which a lack of conscious consideration of the representation was found to be fatal to the misrepresentation claim. On that basis, the Court concluded that the claims had no real prospect of success and granted the Bank's strike out application.

Implications of the Judgment

This decision is significant in confirming that a claimant's awareness is a prerequisite to a misrepresentation claim, specifically in instances where the alleged representation is implied. Additionally, this case has also confirmed that the level of awareness that a claimant needs to achieve will vary depending on the circumstances of the case. The Court emphasised that misrepresentation is capable of occurring in a huge range of factual circumstances of varying complexity; difference in complexity of different representations may also have an impact both on how the representation is spelled out and how it is received (and understood).

With respect to LIBOR misrepresentation cases (none of which have been successful at trial at the time of this article) this case serves to clarify that for a misrepresentation to be actionable, the misrepresentees must be aware of the alleged misrepresentation, understand it, and have it "actively present in his mind" and that a mere assumption will not suffice; more is needed than an assertion of "subconscious operation".

With respect to LIBOR misrepresentation cases (none of which have been successful at trial at the time of this article) this case serves to clarify that for a misrepresentation to be actionable, the misrepresentees must be aware of the alleged misrepresentation, understand it, and have it "actively present in his mind" and that a mere assumption will not suffice; more is needed than an assertion of "subconscious operation"

Whilst the case is clearly unhelpful to claimants in certain circumstances, the suggestion that the awareness requirement provides a "rogues charter" appears overstated. There seems to be limited scope for wrongdoers to defraud victims by misrepresentations which are not consciously considered by the victim but nevertheless influence the victims' conduct.

The Claimants are considering an appeal.

IN-HOUSE PERSPECTIVE

SHEREENA RAI, LITIGATION & REGULATORY LAWYER, BRITISH AIRWAYS

Q **On a day-to-day basis, what does your role as litigation and regulatory lawyer for BA involve?**

A I report directly to our Associate General Counsel and Head of Legal and provide advice on a real range of contentious and regulatory matters, such as the application of EU and international law, contractual issues and interaction with regulatory bodies and third party service providers. I work with practically every area of the business, from Finance to Press Office, to Procurement to Worldwide Airports.

Q **How did you get into this role?**

A I trained at DLA Piper in London and qualified into the Aviation Litigation team where I spent 7 years working on all manner of disputes on behalf of insurers, regulators and airlines. I worked on a number of air accidents in Latin America and spent six months on secondment to law firm Marval, Mairal, O'Farrell in Buenos Aires where I got to put my Spanish to the test and work with some fascinating clients. One of my favourite things about Aviation litigation is the cross-border element and the fact that the issues we face have such a relatable element to them. I've always been interested in the broader commercial ramifications of our advice and the decision-making process, so an in-house role appealed.

Q **What was it that drew you to this role?**

A Without a doubt, the quality of work on offer and knowing I was joining a fantastic team.

Q **What so far have you found most rewarding?**

A Being able to support different areas of the businesses with decisions and seeing the commercial impact first-hand.

Q **What did you find to be the biggest difference with working in private practice– did you need to adjust at all?**

A Working with non-lawyers. It demands a different approach, but offers an opportunity to learn about new aspects of the business every day and really immerse yourself in other people's expertise. One day that expertise might be piloting, the next it might be ticketing. No day is ever the same.

Q **Were there any surprises?**

A I don't think anyone predicted that the entire aviation industry was about to face its greatest challenge in history.

Q **What are the main differences do you think between private practice and inhouse? Do you think people's preconceptions of inhouse are right?**

A In a litigation context, one of the key differences is the type of work. In-house, there is much more exposure to disputes pre-litigation which means it's possible to identify trends and develop strategies that address root causes, rather than the focus being mainly on litigation outcomes. In terms of preconceptions, in-house roles can be misconceived as less challenging than matters that are handled externally. In my experience, that couldn't be further from the truth. In-house counsel need to be highly versatile and quick to grasp new areas of law, especially in the current legal landscape that is evolving at quite a pace globally amidst an unprecedented crisis.

Q **You obviously deal with a lot of matters internally, when do you look to instruct externally?**

A We instruct external law firms where local law support is required, or a particular point of law requires the analysis of a subject matter expert, in addition to higher-value litigation formally issued at Court or subject to arbitration. We tend to work with lawyers that know our business and sector so they require minimal "management" – it's more a relationship based on trusting our advisors.

Q **Is there anything you know now, that you wish you knew when working in private practice?**

A That I never should have taken all the free wine for granted!

Q **As the client, what it is that you really want and expect from the external lawyers?**

A Practical, concise advice with costs transparency.

Q **Any advice for people wanting to go inhouse?**

A Try out a secondment first if you can. And every business is distinct – one in-house role may be completely different to another one with the same title.

Q **And at the end of the day, how do you relax and unwind?**

A Lockdown life has definitely made me appreciate food more than ever, so I've been honing my focaccia technique which is definitely helping me win a few points with my family.

ENFORCEMENT AGAINST JERSEY STRUCTURES – SOME RECENT DEVELOPMENTS

Authored by: Robert Christie and Sonia Shah - Bedell Cristin Jersey Partnership

Trust-busting

It is a common experience for commercial litigators to find that judgment debtors have placed their wealth in offshore discretionary trusts. Two recent Jersey decisions underline that, while traditional trust-busting is alive and well, any attempt to cut corners is unlikely to succeed.

In Kea Investments v Watson [2021] JRC 009, Kea had obtained a significant money judgment against Mr Watson in England and Wales based on fraud. Mr Watson is a discretionary beneficiary of a number of Jersey trusts (the "Trusts"), as are his children. Kea faced a choice – to pursue "expensive causes of action available to it in Jersey against the trusts, namely a proprietary claim and fact-intensive claims that at least some of the corporate assets within the trusts are in fact held on resulting trusts for Mr Watson" (the Prest v Petrodel approach recently successful in the English High Court in Cobussen Principal Investment Holdings v Akbar [2020] EWHC 2805 (QB)); or, alternatively, to take what the court described as a shortcut, and attempt to enforce its judgment debts against Mr Watson's discretionary beneficial interests in the trusts.

"expensive causes of action available to it in Jersey against the trusts, namely a proprietary claim and fact-intensive claims that at least some of the corporate assets within the trusts are in fact held on resulting trusts for Mr Watson"

Kea accepted that Mr Watson had no right or entitlement to any part of the Trusts' property. Its case that it could enforce against his discretionary beneficial interest rested largely on the definitions in the Trusts (Jersey) Law 1984 (the "TJL"), which are clear that (i) the interest of a beneficiary constitutes movable property, and (ii) a beneficiary includes a discretionary beneficiary. Kea argued that if a discretionary interest was movable property, it could be enforced against – albeit Kea accepted that in doing so it could not get any better interest in the trust than Mr Watson had. Kea argued it would be able to request a distribution as if it were a beneficiary; the trustee would then be obliged to consider that request, accede or not, and its decision would ultimately be subject to challenge by Kea as a beneficiary (on the usual limited grounds).

Although the Royal Court accepted that the TJL defined a discretionary interest as movable property, it held that this was subject to the terms of the trusts in question. It found that on the (relatively standard) terms of the Trusts, a discretionary beneficiary had no power to assign or transmit their interest to a third party; and if they did so, any exercise of a discretionary power by the trustee in favour of that third party would necessarily be a fraud on a power, as it will have been exercised

clear that (i) the interest of a beneficiary constitutes movable property, and (ii) a beneficiary includes a discretionary beneficiary

for an improper purpose (i.e. to benefit a non-beneficiary). The interests of a discretionary beneficiary are not by their nature transmissible. If Mr Watson's rights were somehow assigned to Kea by way of distraint, it could not use them in any practical way as it would not itself be a beneficiary.

By contrast, the decision in Re Arpettaz Settlement 2020 (2) JLR 119 confirms that traditional trust-busting is alive and kicking. This case involved ongoing English fraud proceedings against the settlor, including the key allegation that the assets of a Jersey trust were the proceeds of the settlor's fraud. The English claimants sought to join the trustee to the English proceedings. The trustee sought (and was ultimately granted) permission from the Jersey court to submit to the jurisdiction of the English court, to take a neutral position, and to disclose certain privileged advice.

Some Jersey commentators have expressed the view that, on the face of it, the approach of the trustee and the court in Arpettaz (in favour of submitting to the English court) undermines the firewall in the TJL, which would normally require that matters concerning Jersey trusts be decided under Jersey law. However, exceptions to the application of the firewall (Article 9(2A)(a) and (b) of the TJL) expressly preserve (inter alia) the application of foreign law when it comes to the question of whether a settlor actually owned property settled into trust, or had the power to settle it into trust. Given the English proceedings alleged that the settlor had misappropriated the assets settled into trust, the decision of the English court on this question, applying English law, would (on this point at least) be capable of enforcement by the Jersey courts. On the face of it, the trustee's decision to submit made sense. In a later judgment, it was confirmed that the trustee had signed up (in principle) to a settlement agreement which involved a payment of unknown quantum from the trust.

Accordingly, traditional trust-busting approaches continue to succeed (including, in addition to those identified above, "Pauline actions" based on the allegation that the trust was settled with the intention of putting assets beyond the reach of creditors), and when the right approach is available it continues to be possible to bring trustees to the negotiating table at an early stage.

Enforcement generally

Jersey operates effectively as a modern, creditor-friendly jurisdiction when it comes to enforcement generally. It was formally confirmed in a judgment for the first time in Representation of Roberts [2021] JRC 008 that the Royal Court can appoint enforcement receivers in aid of enforcement of a judgment, but the receivers in this case were in fact appointed in 2017 and, in our view, it was never in question (even before 2017) that this was a weapon in the armoury of the Royal Court. The Royal Court has had the jurisdiction to grant freestanding freezing injunctions in aid of foreign proceedings since 1996 (Solvalub v Match Investments 1996/161 and 1996/238) and, while the imminent decision of the Privy Council on appeal from the BVI in Convoy v Broad Idea is awaited with some interest, we consider that the Jersey legal system is sufficiently different to continue to plough its own furrow regardless of the result. The Royal Court also adopts an expansive approach to discovery in support of freezing injunctions, Norwich Pharmacals, and its own Jersey-specific enforcement tools such as saisies judiciaires and arrêt entre mains.

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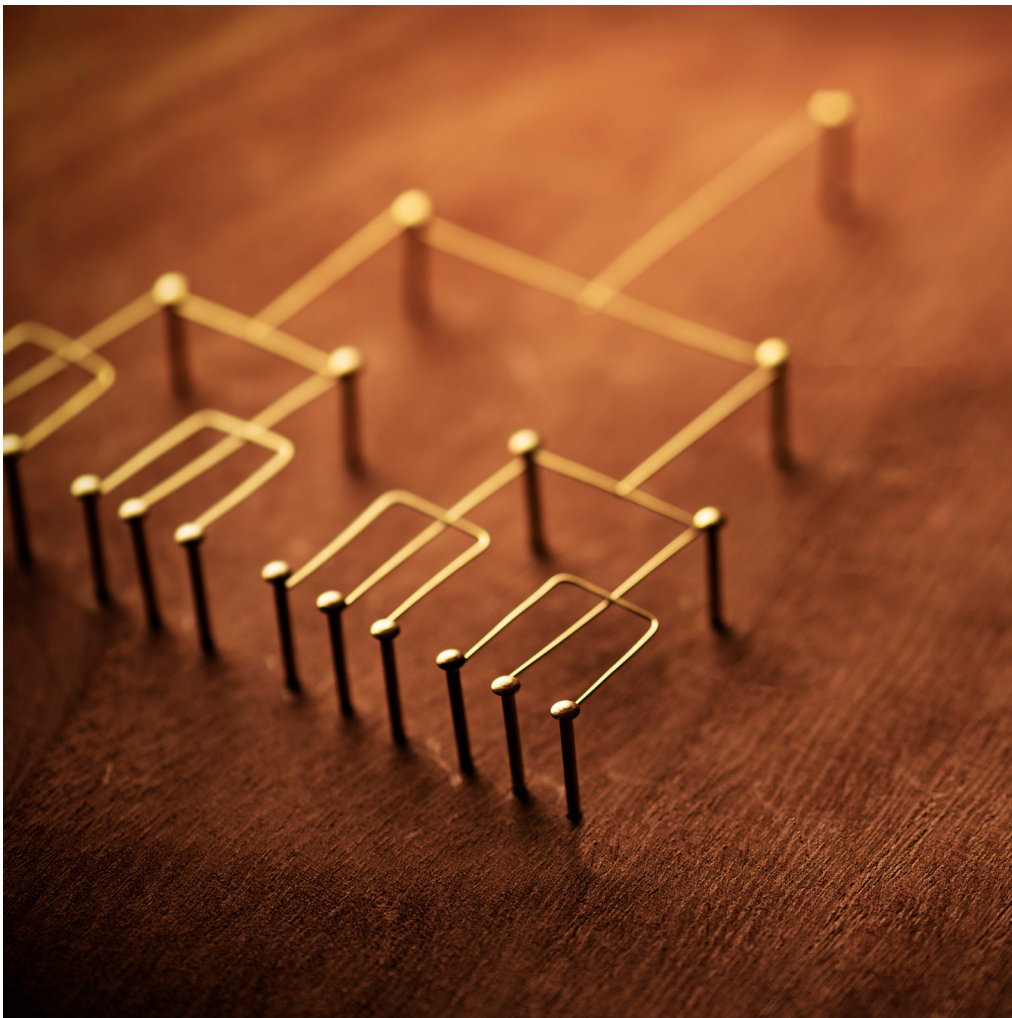
However, exceptions to the application of the firewall (Article 9(2A)(a) and (b) of the TJL) expressly preserve (inter alia) the application of foreign law when it comes to the question of whether a settlor actually owned property settled into trust, or had the power to settle it into trust.



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THE USE OF SUMMARY JUDGMENT TO DISPOSE OF WEAK DEFENCES IN THE BUSINESS AND PROPERTY COURTS

Authored by: Laura Coad - Keidan Harrison LLP

Background to a summary judgment application

A party to litigation can make a summary judgment application in which the court may decide a claim or particular issue without a trial. If the application is successful, then it may effectively in some circumstances bring an end to the proceedings. Summary judgment applications are an important tool for commercial disputes practitioners and the Business and Property Courts are particularly robust at disposing of a case where the test for summary judgment is met.

The grounds for summary judgment

Therefore, the application is considered in two stages. Firstly, the court should consider whether the claim or defence has any real prospect of success and secondly, whether there is any other compelling reason that a trial should take place. This means that even where an application is successful at the first stage, it will fail if the other party can show that there is some other compelling reason as to why a trial should take place.

In the case of Swain v Hillman [2001] 1 All ER 91 it was stated the court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success and that in reaching its conclusion the court must not conduct a "mini trial". These were considered more closely in the case of EasyAir Ltd v Opal Telecom Ltd [2009] EWHC Ch in which Lewison J set out a summary of the applicable principles, which also included a principle that a "realistic" defence is one that carries some degree of conviction, meaning that the defence is more than merely arguable.

Civil Procedure Rule ("CPR") Part 24.2 sets out the grounds for summary judgment and provides as follows:

"The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that –

(i) the claimant has no real prospect of succeeding on the claim or issue; or

(ii) the defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

A claimant must wait before applying for summary judgment until the defendant has filed an Acknowledgement of Service or Defence, unless the court has given permission otherwise. A defendant may apply at any time but it is usually sensible for a defendant to file its defence, to show the court at the summary judgment hearing because it provides a convenient way of articulating the Defendant's case even if not strictly required in order to make an application for summary judgment.

Recent summary judgment decisions of the Business and Property Courts

There have been two notable recent decisions where the claimants have been successful in obtaining summary judgment:

Arani & Ors v Cordic Group Ltd [2021] EWHC 829 (Comm)

The claimant vendors obtained summary judgment in this case involving a share purchase agreement relating to the payment of outstanding consideration which was being held in an escrow account. The defendant purchasers had sent a letter to the claimant vendors asserting possible breach of warranties and refused to authorise the payment of money held.

Andrew Hochhauser QC sitting as a deputy judge, considering the principles set out in Easyair, also took into consideration that a summary judgment application would not be appropriate to resolve complex questions of law and fact where the determination of these necessitate a trial of the issue, having regard to all the evidence and in circumstances where the overall burden of proof rests on the applicant.

It was held that the defendant purchasers had not notified claims pursuant to the contractual mechanisms nor brought them within the contractual limitation period. They were also not entitled to seek to set-off the claims through a plea of fraud and were obliged to make payment to the claimant vendors. This case reinforces the importance of well drafted commercial agreements on which to rely in aid of summary judgment applications.

Green v Petfre (Gibraltar) Ltd (t/a Betfred) [2021] EWHC 842 (QB)

Summary judgment was granted to a claimant who sought to recover the amount of his winnings totalling £1,722,500.24 from the defendant, an online gambling business. The defendant's case was that there was a glitch in the game and therefore the key issue was whether the defendant could rely on various exclusion clauses to avoid liability and avoid paying the claimant's winnings. The defendant also argued that the claim was not suitable for summary judgment because it related to standard terms in the online gaming industry which had wider implications, necessitating expert evidence and a full trial of the issues.

The court found that there were three main issues to be determined, being the meaning, incorporation and fairness of the clauses which were sought to be relied upon by the defendant. The clauses were said to be "long and complex" and the language used was "obscure and unclear". The clauses were considered to be onerous and had not been incorporated into the contract as they had not been sufficiently signposted. It was evident that sufficient notice had not been provided particularly in this case where it would be unlikely that an online betting player would spend time looking through documentation provided.

Mrs Justice Foster DBE awarded summary judgment in favour of the Claimant, holding that the defendant had no realistic prospect of successfully defending the claim. The case highlights the importance of drawing obscure or unusual terms to the attention of the counter party particularly where there is an imbalance in the relationship. It also demonstrates the willingness of the court to decide questions, such as that of incorporation of terms, on a summary basis where there is no substantial dispute of fact.

Conclusions

These recent decisions serve to demonstrate how summary judgment can be a valuable tool for parties in disposing of cases where the other side's case does not stand a reasonable prospect of success. A summary judgment application can end litigation early, thus avoiding lengthy and costly proceedings. Although the threshold for seeking summary judgment is high, if it can be shown that the other party's claim or defence has no real prospect of success and that there are no other compelling reasons why the case should be dealt with at a full trial then the summary judgment is likely to be granted. Of course, on the other side of the equation, a failed application for summary judgment can (albeit not inevitably will) result in an immediate order for adverse costs, and can in some circumstances prove to be a tactical error which makes the dispute more difficult to settle on favourable terms prior to trial.

THE RUSSIAN DATA LANDSCAPE

Authored by: Sebastian Neave – GPW

Both officially and unofficially, from the point of view of gathering data Russia is easily the most open country in the world.

The level of access to official corporate information in Russia is almost second-to-none. There are few good news stories about Russia in the West these days but I for one am very grateful for the progress made by the Russian government in developing open data platforms over the ten years since I began my career researching Russian companies.

From the better-known Arbitrazh Court database [1] and EGRUL [2], to the Federal Tax Service's excellent financial statements resource [3] and the maze of filings available in the Unified Federal Register of Bankruptcy Information, along with the slightly more obscure Federal Notary Chamber's Register of Notifications on Pledges of Movable Property.[4]

These databases work and they work well. Often without registering (or indeed paying), one can quickly and easily download reams of data on practically any Russian-registered legal entity that has ever existed. Thresholds for corporate disclosure in Russia tend to be low. They make most states in the US look like the Marshall Islands when it comes to transparency.

In terms of the sophistication of the various resources, did you know that all Russian commercial court decisions include a QR code which will take you directly to the public profile of the relevant case on the court database – complete with interactive lists of parties and judges, a useful calendar of previous and upcoming hearing dates, and – of course – all other decisions in the case? Anybody who has ever spent time in a queue in the Rolls Building will know that our system of obtaining court filings in England is not quite at that level, to say the least.

Did you know that all Russian commercial court decisions include a QR code which will take you directly to the public profile of the relevant case on the court database – complete with interactive lists of parties and judges, a useful calendar of previous and upcoming hearing dates, and – of course – all other decisions in the case?

1 https://kad.arbitr.ru
2 The Unified State Register of Legal Entities, maintained by the Federal Tax Service (https://egrul.nalog.ru/)
3 https://bo.nalog.ru This resource neatly complements a similar official database maintained by the Federal Service of State Statistics (ROSSTAT).
4 https://reestr-zalogov.ru

Although relatively easily accessible, much of the corporate data available in Russia is complicated and requires experience (in addition to Russian language skills) to interpret. While there are a range of proprietary databases which collate and triage Russian corporate data (with the best-known being Interfax's SPARK), essential details can be missed without analysing the primary source.

Armed with a basic understanding of Russian accounting idiosyncrasies, filings from a combination of these sources can unlock dramatic findings regarding money flows in a manner that would be nigh on impossible through public data in most western European countries.

The next step is understanding how the Russian data can complement and enhance other information from – for example – public accounts disclosed by a Cypriot parent company. Under sophisticated analysis, such techniques can provide a significant edge in commercial disputes and fraud and asset recovery proceedings.

In parallel to the official data sources made available by the Russian government's admirable ability to centralise and publicise information, there is the "unofficial" data landscape. This information is variously leaked and sold on black markets on- and off-line, [5] as you can read in press coverage of the issue.

Reports published by the British investigative organisation Bellingcat – including into the alleged perpetrators of the Salisbury and Navalny poisonings – have done much to demonstrate the extent to which unofficial data from Russia can be used in criminal style investigations. In the case of Bellingcat, these investigations have shown that leaked data has also included passport records, border crossings, tax disclosures, mobile phone records, and even Moscow car parking payments.[6]

In its most basic form, such data is freely available online and often comes up in a simple Google (or Yandex) search into research subjects. Were you aware, for instance, that most (if not all) of the Moscow traffic police's car ownership records to 2005 are all freely searchable online – just in case you ever have the desire to find out what your favourite Russian entrepreneur was driving in the 1990s? In the case of one Roman Arkadievich Abramovich, it was apparently a 1989 VAZ-2106 – known as a LADA 1600 in export markets – until he upgraded to a 1992 Mitsubishi Pajero. [7]

Whereas 5 or 10 years ago, enormous sets of leaked personal and financial data were sold on CDs and flash drives in Moscow markets, much is now downloadable online or available from anonymised "bots" operating on the messaging app Telegram. The ultimate source of this data is likely to be a leak – or theft – from a public institution but the journey it takes to the open market is engineered to anonymise those involved. Moreover, the widespread availability has led some to call such data "semi-public" and examples have been accepted as admissible in English courts and in respected seats of international arbitration. Be careful of the provenance of this data – and be aware you may be looking at data that has been illegally obtained.

Bellingcat has begun an initiative to test the findings of certain open-source investigative techniques in mock admissibility hearings. However, it has not tested this with "unofficial" Russian data.[8] While there may be question marks over the admissibility of some of the unofficial information, data from both official and unofficial sources will no doubt continue to play an important role in disputes.

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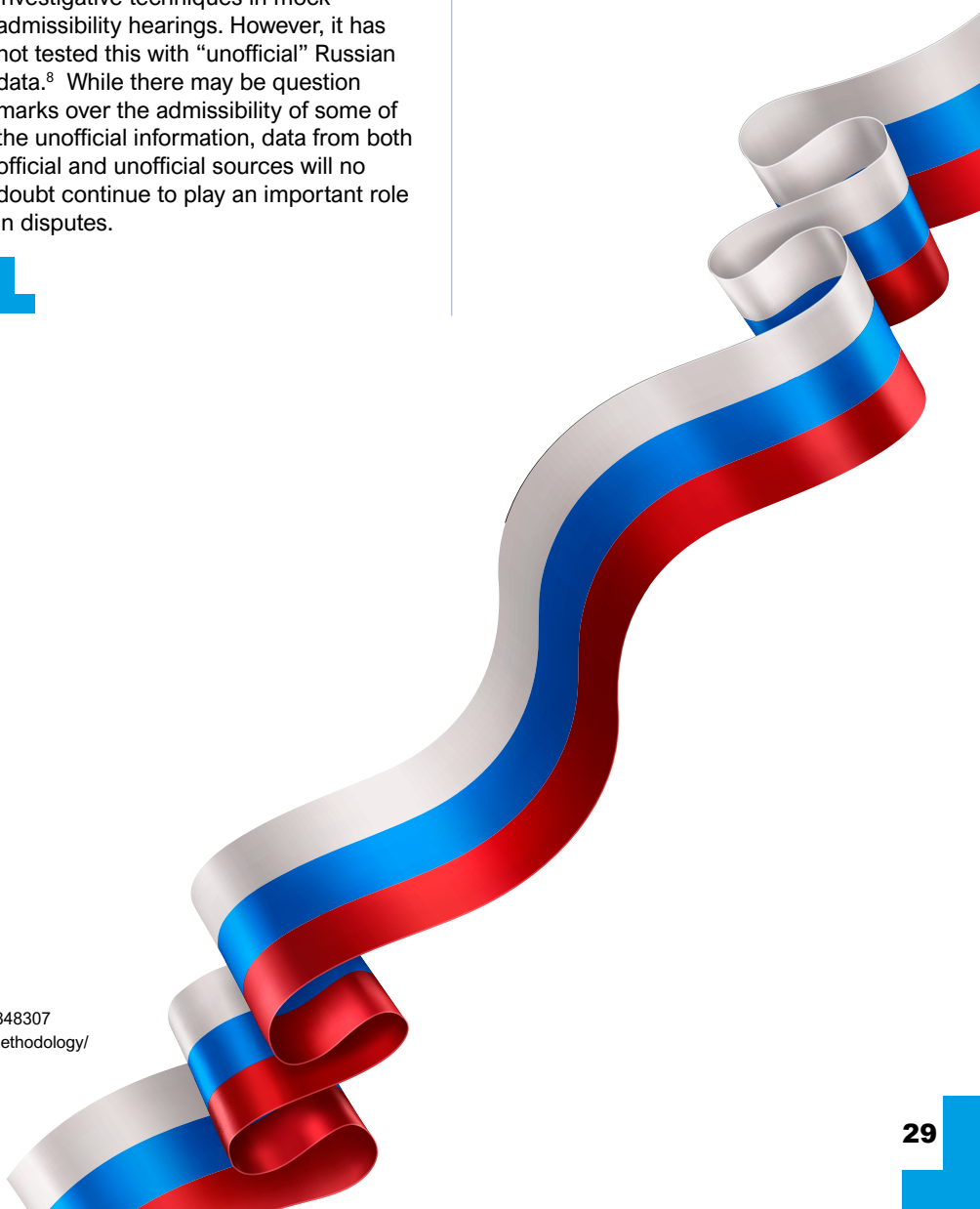

5 See, for example: https://www.bbc.co.uk/news/world-europe-48348307
6 https://www.bellingcat.com/resources/2020/12/14/navalny-fsb-methodology/
7 Search here: http://nomer-org.website/mosgibdd/
8 https://osr4rights.org/mock-admissibility-hearing/

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IF NOT NOW, WHEN?

CLIMATE CHANGE LEGISLATION VIS-À-VIS INTERNATIONAL DISPUTES

Authored by: Niyati Ahuja - Diamond McCarthy LLP (US)

"Orbiting Earth in the spaceship, I saw how beautiful our planet is. People, let us preserve and increase this beauty, not destroy it."

Yuri Gagarin (First man in space)

Introduction

On December 12 2015, 196 parties adopted the Paris Agreement[1] at the COP21 in Paris in response to the rising concerns relating to the rapidly changing climate. This agreement aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty.[2]

The goals of the Paris Agreement are to limit global warming to 1.5 degrees Celsius, and to reduce carbon emissions. The agreement requires all countries to identify and implement their best ambitious efforts on climate change mitigation, adaptation and finance and to communicate them to the UNFCCC through Nationally Determined Contributions (NDCs).[3] In furtherance of this, several states have implemented climate change legislation, for example, Sweden enacted its Climate Legislation in 2018. Furthermore, individuals and environmental groups, like Greenpeace Mexico and Urgenda Foundation, have initiated several legal proceedings against governments and companies for failure to act on climate change, which has also acted as a push to states to implement climate change legislation reflecting their commitments under the Paris Agreement.

New laws to reduce the effect of climate change are beneficial for the planet in the long run, but are also a source of uncertainty for investors, as long-term investments in industries such as energy might be financially and operationally impacted by these climate change regulations. These new laws and regulations demand lower carbon emissions globally, and the ICC International Court of Arbitration's November 2019 report on Resolving Climate Change Related Disputes through Arbitration and ADR suggested that investment is streaming away from projects which contribute to climate change and towards those which are environmentally friendly.[4]

Adoption of Climate Change Legislation

Amongst the parties to the Paris Agreement, Suriname and Bhutan have declared themselves carbon negative. Sweden, France, the United Kingdom, New Zealand, Denmark, and Hungary have adopted legislation relaying their commitment

1 Paris Agreement, 2015, available at https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf
2 Article 2, Paris Agreement, 2015
3 What is the state of international climate talks?, updated January 2020, available at https://www.lse.ac.uk/granthaminstitute/explainers/what-is-the-state-of-international-climate-talks/
4 Andrew Mizner, The rise of climate arbitration and litigation, 16 March 2021, available at https://iclg.com/cdr/litigation/15675-the-rise-of-climate-arbitration-and-litigation

to net zero emissions[5]. "Net zero" means that any greenhouse gas emissions released are balanced by an equal amount being taken out of the atmosphere. [6]

The report 'Taking Stock: A global assessment of net zero targets' published by the Energy and Climate Intelligence Unit indicates that 61% of countries, 9% of states & regions in the largest emitting countries and 13% of cities over 500k in population have now committed to net zero.[7]

Amongst several new reforms, the Dutch Climate Act, adopted in May 2019, introduced a phased ban of the use of coal to generate electricity. The legislation is intended to reduce greenhouse gas emissions by 49% from 1990s levels before 2030 and meet targets under the Paris Agreement on climate change. Companies have already threatened

Apart from the implementation of new legislations, some countries are utilizing their objectives under the Paris Agreement and striking partnerships to work together towards reducing emissions. For instance, in August 2020, Germany and Ukraine signed an energy partnership which commits the countries to cooperating more frequently in the energy sector.

According to the German Federal Ministry of Economic Affairs and Energy the energy partnership aims to increase energy efficiency in buildings and in the industry, to modernise the electricity sector, to expand and integrate renewable energies and to reduce emissions.

The Grantham Research Institute at LSE and the Sabin Center at Columbia Law School have created a database consisting national-level climate change legislation and policies globally. This can act as a good source for new and existing investors to ensure they are in compliance with the new legislations of their host states.

Disputes vis-à-vis Climate Change Legislation

The ICC Task Force described three primary categories in which climate change-related arbitrations may arise[8]. These are:

- directly related to transition, mitigation and adaptation: contracts specifically related to mitigation, adaption and transition activities in line with the Paris Agreement;
- indirectly related to transition, mitigation and adaptation: contracts without any specific climate change-related purpose, but incorporating a climate or environmental issue e.g., where climate risks or climate policy are considered to have materially impacted industrial assets and asset values; and submission agreements: submission or agreements entered into after a climate change or environmental dispute has arisen.

We are already seeing a rise in disputes related to the adoption of new legislation, for example, legislation mandating phasing out of coal plants to reduce carbon emissions. Most recently, German energy company Uniper has threatened to file an Energy Charter Treaty claim against the Netherlands over its Climate Act aimed at phasing out of coal power plants to reduce greenhouse emissions. Another German energy company, RWE, initiated its claim against the Netherlands at ICSID over the same legislation.

It remains to be seen whether states will be adequately compensating the companies for the financial impact on the various investments or they will use the 'public interest' defense to expropriation claims in the prospective arbitration proceedings.

The Way Forward

The increasing number of arbitration proceedings threatened or initiated against state governments reflects on the lack of payment of adequate compensation for potential indirect expropriations undertaken by governments by adopting legislations such as the Dutch Climate Act. At the same time, an amendment in the Climate legislation might turn out to be financially burdensome on many states, especially ones with limited resources.

Separately, some states may renegotiate their Bilateral Investment Treaties which have historically had more protection for the investors, and add protections specifically relating to their commitments under the Paris Agreement.

Additionally, it is likely that there will be newer investments made in order to develop a low carbon economy, and therefore, investment agreements and instruments will be pertinent to ensure protection of both parties' interest. This will also incentivize investors to make the crucial investments.

5 Net Zero Tracker, Energy & Climate Intelligence Unit, available at https://eciu.net/netzerotracker

6 What is Net Zero, 2 December 2020, available at https://medialibrary.climatecentral.org/resources/what-is-net-zero

7 Taking stock: A global assessment of net zero targets, 23 March 2021, available at https://ca1-eci.edcdn.com/reports/ECIUOxford_Taking_Stock.pdf?mtime=20210323005817&focal=none

8 International Chamber of Commerce (ICC), Resolving Climate Change Related Disputes through Arbitration and ADR, November 2019.

NEW DIGITAL DISPUTE RESOLUTION RULES MAKE UK A HUB FOR CRYPTOASSET DISPUTES

Authored by: Darragh Connell, Forum Chambers

Introduction

On 22 April 2021, the UK Jurisdiction Taskforce ("UKJT") chaired by the Master of the Rolls, Sir Geoffrey Vos Q.C., published new Digital Dispute Resolution Rules [1] ("Rules") designed to be incorporated into blockchain digital relationships and smart contracts.

If incorporated into the relevant legal relationship, these Rules will ensure that any disputes arising from the use of blockchain and cryptoassets will be resolved principally by arbitration subject to the English Arbitration Act 1996. In effect, the new rules intend to make English law the pre-eminent applicable law governing the exercise of legal rights in relation to cryptoassets and smart contracts.

Background

In November 2019, the UKJT released its Legal Statement on Cryptoassets and Smart Contracts ("Legal Statement"). The Legal Statement concluded that cryptoassets and smart contracts constitute property for the purposes of English law.

Whilst the Legal Statement was non-binding in nature, the detailed analysis contained within it as to the English legal position in respect of digital assets has proven persuasive. Thus, the approach adopted by the UKJT in the Legal Statement was approved and endorsed by the Commercial Court in the context of interim applications in both AA v Persons Unknown & Ors [2019] EWHC 3556 (Comm) and more recently, in Ion Science Ltd and Duncan Johns v Persons Unknown, Binance Holdings Limited and Payward Limited (unreported) 21 December 2020.

Following the publication of the Legal Statement, the UKJT formalised the Rules after extensive public and private consultation with lawyers, technical experts and financial services firms and commercial parties.

A key objective of the UKJT in developing the Rules was to leverage the flexibility offered by English arbitration processes so as to mould dispute resolution procedures to the distinctive features of blockchain technologies. In doing so, the published Rules seek to ensure that disputes are resolved quickly by arbitrators with appropriate expertise.

Accordingly, the stated purpose of the Rules is to "facilitate the rapid and cost-effective resolution of commercial disputes, particularly those involving novel digital technology such as cryptoassets, cryptocurrency, smart contracts, distributed ledger technology, and fintech applications."

New Rules

The Rules specify the means of their incorporation such that they may be incorporated into a contract, digital asset or digital asset system by including the following text:

The above wording may be included in electronic or encoded form.

The Rules themselves can be adopted with modifications by the parties prior to incorporation. It is possible for the parties to specify expert determination of any issue or dispute instead of

1 https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2021/04/Lawtech_DDRR_Final.pdf <last accessed 23 April 2021>

arbitration which is the principal dispute resolution process identified in the Rules.

In particular, provision can be made for individual preferences as to the procedure to be adopted for the resolution of a dispute, including as

"Any dispute shall be resolved in accordance with UKJT Digital Dispute Resolution Rules"

to form and timing of any decision or arbitral award (as applicable), recoverable costs and anonymity.

The Society for Computers and Law is afforded a role as the appointment body for the arbitral tribunal under the Rules. Once appointed, the tribunal is afforded considerable discretion including as to the form in which parties submit evidence and argument.

Significantly, the Rules provide that no party shall have the right to an oral hearing, and the tribunal may, if it considers it appropriate, determine the dispute on the basis of written submissions only.

In addition to the tribunal's broad discretion concerning its processes and procedures, the Rules helpfully provide for the tribunal to have the power at any time to operate, modify, sign or cancel any digital asset relevant to the dispute using any digital signature, cryptographic key, password or other digital access or control mechanism available to it. In so providing, the tribunal also have the power to direct any "interested party" to do any of those things.

Notably, the Rules define an "interested party" broadly as a party to a contract into which the Rules are incorporated including, in relation to a digital asset, a person who has digitally signed that asset or who claims to own or control it through possession or knowledge of a digital key.

Finally, the Rules specify that they are to be construed in accordance with English law and incorporate the Arbitration Act 1996 which amongst other things, prescribes sensible provisions for circumstances not expressly dealt with by the Rules themselves.

The Rules are accompanied by non-binding guidance which distil a number of the key concepts and principles underpinning the operation of the Rules.

Conclusion

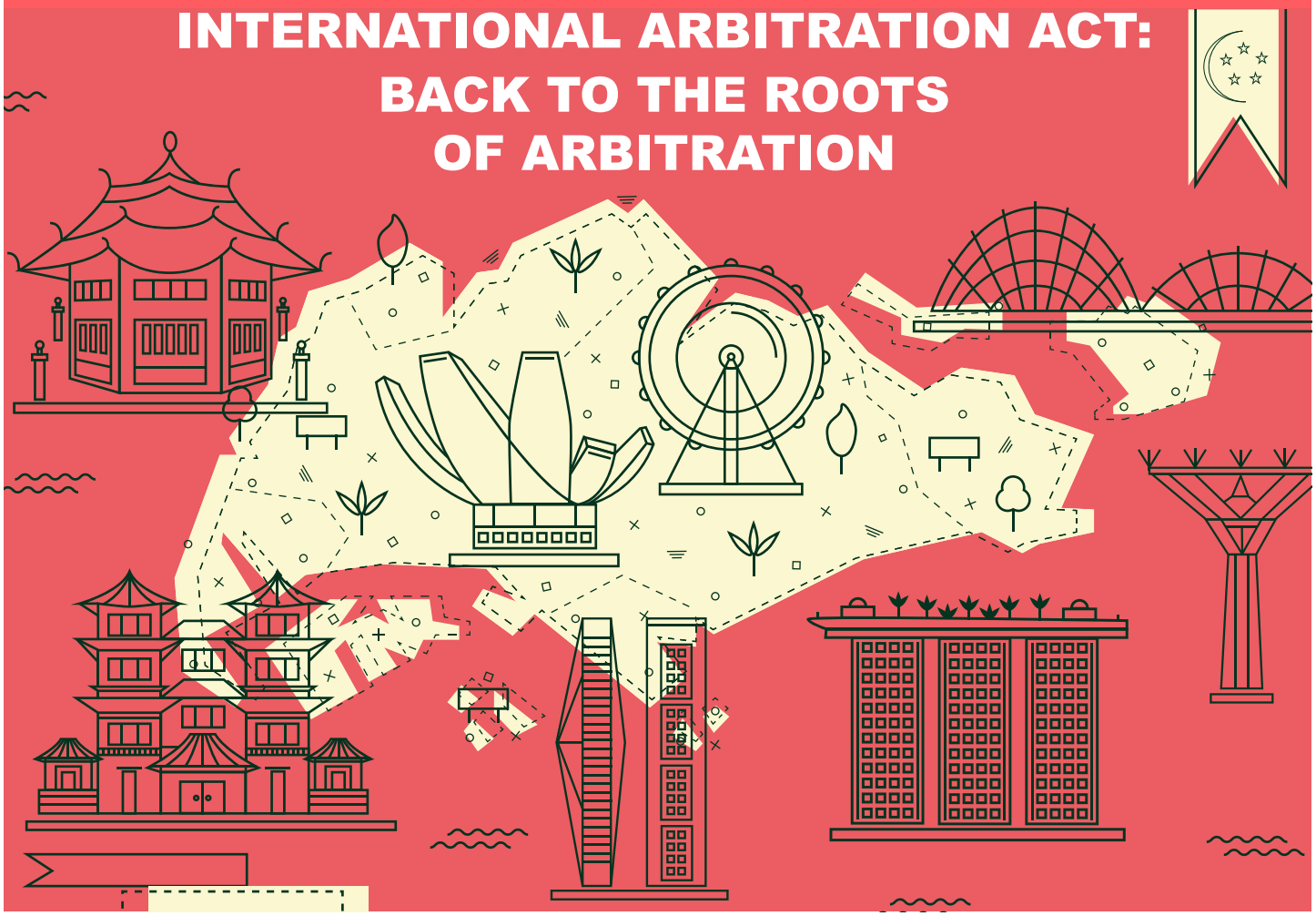
The publication of the Rules developed by the UKJT represents a portentous moment for the development of coherent dispute resolution procedures for digital asset disputes. For those practising in the field of digital asset disputes, this sensible and flexible framework will be welcomed.

The Rules are deliberately short, provide for a speedy process and encourage the use of technology throughout the dispute resolution process.

As a result of the laudable work of the UKJT alongside various recent decisions of the Commercial Court, it is increasingly apparent that English law is the pre-eminent law for the development of legal principles governing the exercise of legal rights in relation to digital assets.

The published Rules may be viewed online here:
https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2021/04/Lawtech_DDRR_Final.pdf

AMENDMENTS TO SINGAPORE'S INTERNATIONAL ARBITRATION ACT: BACK TO THE ROOTS OF ARBITRATION



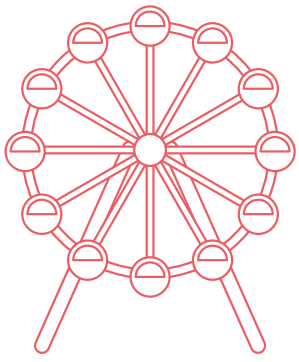
Authored by: Kyle Yew - Joseph Lopez LLP (Singapore)

Introduction

Singapore is renowned internationally as a dispute resolution hub, especially within Asia. The constantly expanding volume handled by the Singapore International Arbitration Centre ("SIAC") which saw over 1,000 new case filings in 2020 alone, and the growing number of arbitrations seated in Singapore, are clear testament of commercial parties' preference for their arbitrations to be regulated by arbitration-related legislation in Singapore.

Unsurprisingly, there have been regular updates to Singapore's International Arbitration Act (Cap. 143A) ("IAA"), with the latest amendments coming into effect from December 2020. By keeping up to date with these amendments, arbitration users will be better placed to take advantage of the applicable procedures for Singapore-seated arbitrations that they are involved in. A summary of these amendments is provided below.

Singapore is renowned internationally as a dispute resolution hub, especially within Asia. The constantly expanding volume handled by the Singapore International Arbitration Centre ("SIAC") which saw over 1,000 new case filings in 2020 alone, and the growing number of arbitrations seated in Singapore, are clear testament of commercial parties' preference for their arbitrations to be regulated by arbitration-related legislation in Singapore.



Appointment of Tribunal for Multi-Party Arbitrations

The first amendment relates to a procedural matter at the start of any arbitration proceeding, i.e. the appointment of the arbitral tribunal.

Commercial parties are often keen for arbitrations to be concluded efficiently but may not be familiar with the specifics of the dispute resolution

clauses in their contracts. Experienced arbitration users and counsels would know that the appointment of the tribunal can be a heavily contested procedural issue that unnecessarily delays the arbitration. This problem is exacerbated when the dispute involves multiple parties, such as joint-venture projects and complex cross-border transactions. It is not uncommon to hear of respondents who delay and/or dispute the nomination of arbitrators, for tactical purposes and to buy time.

Leading arbitral institutions have sought to tackle this issue by setting out comprehensive procedures for the appointment of the tribunal (e.g. SIAC Rules 2016, Rules 9 to 17).

The new Section 9B of the IAA essentially mirrors the principles behind those established procedures and provides for a default procedure to constitute a three-arbitrator tribunal for multi-party arbitrations (i.e. more than three parties) where there was no prior agreement for how the tribunal should be constituted especially for ad-hoc arbitrations. In short: the claimant(s) will jointly appoint an arbitrator when requesting for the dispute to be referred to arbitration; the respondent(s) will jointly appoint an arbitrator within 30 days thereafter; and the appointed arbitrators will then nominate a third arbitrator within 60 days thereafter, who will become the presiding arbitrator. The default procedure also covers situations where either the claimant(s) or the respondent(s) fail(s) to make an appointment, or where the appointed arbitrators are unable to agree on the nomination of the third arbitrator.

The amendment ensures that the arbitration can proceed expeditiously from the outset, and is likely to reduce challenges to arbitral awards based on bias by the tribunal.

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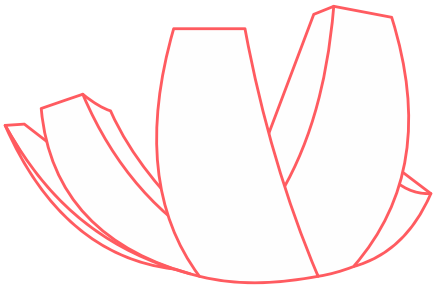


Enforcement of Confidentiality Obligations

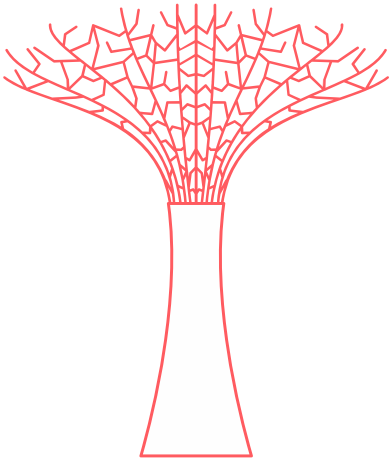
The second amendment deals with the issue of confidentiality, which is a key factor that parties have in mind when choosing arbitration as the dispute resolution mechanism for their contracts.

The issue of confidentiality is especially important where publicity of identities of parties to the arbitration and/or the nature of the transactions involved in the dispute may have an impact beyond the scope of the arbitration. For instance, a company's reputation is likely to be adversely affected if an arbitration award is made against its favour and the public receives news of the same. In the case of listed companies, existing shareholders may choose to let go of their shares in the company and potential investors may refrain from investing money into the company for the time being. Even if an award has not been made, the knowledge that a company is involved in arbitration proceedings and incurring legal fees to fund the arbitration may shake the confidence of existing and potential clients and/or business partners. Another example to illustrate the importance of confidentiality is where related parties are involved in multiple legal proceedings at once. Problems may arise if a key issue in one of the legal proceedings turns on the contents of documents/submissions that have been tendered in another arbitration.

The general legal position in Singapore is that confidentiality obligations exist by way of the parties' agreement, or pursuant to any relevant arbitral institution rules, or under an implied common law duty, Unfortunately, the law was silent on the enforceability of such obligations.

The new Section 12(1)(j) of the IAA fills this gap, by expressly granting arbitral tribunals with the powers to "make orders or give directions to any party for enforcing any obligation of confidentiality". Although the rules of leading arbitral institutions already provide for similar powers (e.g. SIAC Rules 2016, Rule 39.4), these rules may not apply when parties are engaged in ad hoc arbitrations.

The amendment thus brings clarity to the powers of tribunals via express legislation, which translates into increased confidence for arbitration users regarding the enforceability of parties' confidentiality obligations in Singapore-seated arbitrations.



Conclusion

The amendments to the IAA are illustrative of Singapore's consistent efforts to ensure that it remains the premier choice seat for international arbitration. Arbitral users who are equipped with knowledge and understanding of these amendments can better navigate proceedings in the manner that arbitration was initially designed for: party autonomy and control, time and costs efficiency, as well as confidentiality of procedure and results.

THIRD PARTY LITIGATION FUNDING AND PRIVATE FUNDING OF LEGAL SERVICES ACT – CAYMAN ISLANDS

Authored by: Oliver Green – Ogier (Cayman Islands)

Introduction

The ground-breaking Private Funding of Legal Services Act 2020 (the "Act") will come into force in the Cayman Islands on 1 May 2021.

Litigation funding arrangements are a topical issue and there have been a number of recent developments in this area in the offshore space.

For example, on 29 September 2020 the BVI Commercial Court (In the matter of Exential Investments Inc (in liquidation) (BVIHC (COM) 81 of 2020)) approved in the first ever written judgment of its kind, a third party funding agreement and confirmed that third party funding for litigation and other liquidation fees and expenses, in appropriate cases and on appropriate terms, is permissible as a matter of BVI law. In this case, the deciding factor was that without the funding, the liquidators would not be able to obtain recoveries for the benefit of the creditors of the company.

Third Party Litigation Funding in the Cayman Islands

A litigation funding agreement is where a third party agrees to provide funding for litigation in return for payment of a percentage of the recoveries.

Unlike the BVI where the crimes of maintenance and champerty were abolished in 1997, and England where both the crimes and torts were abolished in 1967, the doctrines remained applicable in the Cayman Islands.

Prior to the Act, third party litigation funding agreements therefore had to be individually approved by the Court. In recognising the growing limitations on the application of the maintenance and champerty doctrines, the Grand Court sought to confine the question of whether a funding agreement is unlawful to whether the agreement "has a tendency to corrupt public justice" and set out and applied various factors in determining this question. [1] These factors were:

1. *Control: how much control does the funder over the conduct of proceedings and decision making?*
2. *The funder's termination rights: on what grounds can the funder terminate the funding agreement? Can the funder terminate at will or without reasonable cause?*
3. *Communications between the funded litigant and the lawyers*
4. *The prejudice likely to be suffered by a defendant if the claim fails: if the funder is unwilling or unable to fund an adverse costs order, this increases the risk of abuse.*
5. *The decision making power of the litigant as opposed to the funder*
6. *The amount of profit that the funder stands to make: is the potential return to the funder appropriate and proportionate?*
7. *Is the funder a professional funder and regulated*

1 See for example A Company v A Funder [2017] (CILR) FSD 68 of 2017; The Trustee v A Funder Grand Court, 26 July 2018, unreported and Re Platinum Partners Value Arbitrage Fund L.P. (In Official Liquidation) Grand Court, 13 December 2018, unreported.

The Act

The Cayman Islands Law Reform Commission, following a request from the Attorney General, carried out an initial review of litigation funding in 2015 and more recently in 2019. Its most recent report was published in September 2019 and an earlier draft form of the Act was appended.

Maintenance and Champerty

- Section 17 of the Act repeals these offences

Contingency Agreements

Under a contingency agreement an attorney agrees that their fees will be a percentage of a monetary award or the value of assets recovered. Such agreements are now permitted, having previously been considered contrary to Cayman Islands public policy and therefore void and unenforceable.

- There will be a cap on the maximum contingency fee payable, to be prescribed by regulations [2]
- The Court can approve an agreement providing for a higher contingency fee, but cannot approve a fee of more than 40%

Conditional Fee Agreements

A conditional fee agreement allows an attorney to agree to defer payment in return for a percentage uplift in their fees in the event of a defined success event. Until now such agreements were subject to approval by the Court in each case and relatively rare in the Cayman Islands.

- The maximum success fee an attorney can agree under the Act is 100% [3]
- It is possible to increase this success fee cap if the attorney and client apply to the Court[4]. In deciding whether to grant the application, the Court will consider the complexity of the case, the expense or risk to the attorney and any other factors the Court considers relevant.
- Both conditional and contingency agreements must be in writing and signed by the client and attorney[5].

Litigation Funding Agreements

- The agreement must be in writing
- The agreement must comply with prescribed requirements, if any[6]
- The sum to be paid by the client shall consist of any costs, together with an amount calculated by reference to the funder's anticipated funding expenditure in funding the provision of the services or a percentage of the amount or the value of the property recovered in the action or proceedings to which the agreement relates[7].

Conclusion

The Act has been several years in the making, and builds on case law endorsing the use of regulated litigation funding in the Cayman Islands, giving parties in the Cayman Islands greater access to justice and a wider range of funding options. The Cayman Islands legislature has recognised the changing nature of the litigation landscape, and that outdated public policy concerns have circumscribed the role of litigation funders and alternative fee arrangements which are commonplace and utilised to good effect in other jurisdictions.

2 Regulation 8 of the draft Private Funding of Litigation Regulations (the "Regulations") provides that the prescribed percentage cap is 33.3%.

3 Section 4 of the Act.

4 The total amount payable to the attorney under the agreement cannot exceed a percentage cap of the client's money judgment to be prescribed by regulations. Again, Regulation 8 of the Regulations states that this percentage cap is 33.3%.

5 Section 5 of the Act.

6 The requirements which may be prescribed may include (a) requirements for the funder to have provided prescribed information to the client before the funding agreement is entered into, and (b) be different for different descriptions of litigation funding agreements.

7 Section 16 of the Act.

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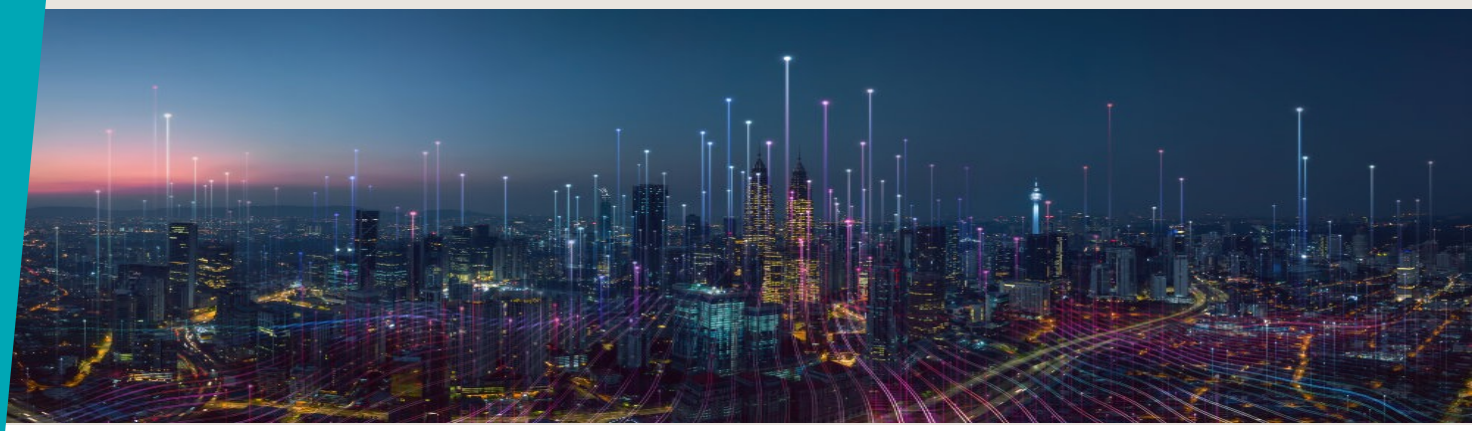

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COMING TO A CASE NEAR YOU.

LITIGATION ANALYTICS AND CONTEMPORARY LITIGATION PRACTICE

Authored by: Edward Bird - Solomonic

The use of data and analysis in litigation is increasingly prevalent. It is generated from the structured analysis of judgments, pleadings and court forms; from the meta-data attached to a case; and from the digitisation of court services. This yields large and insight-rich data sets.

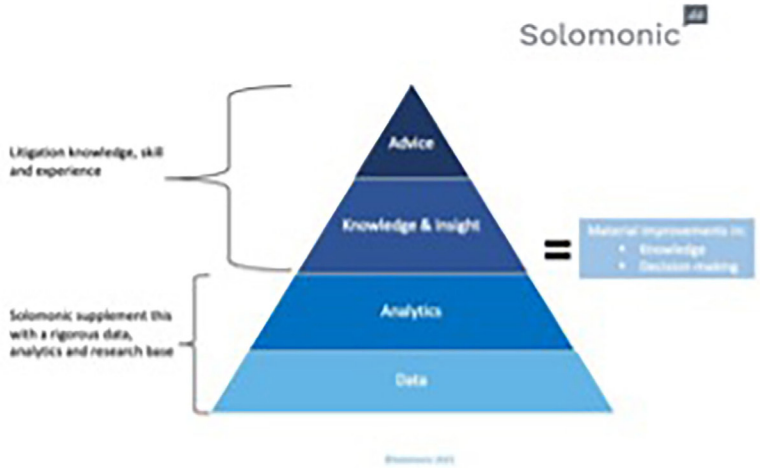
As with other innovations in legaltech, the United States leads the way. The availability of court data and technology has established the potential for advanced analytics; the growing corporate appetite for data driven decision-making, and improved outcome or risk measurement, has created the demand.

Three years ago, Bob Ambrogi, prominent US lawyer and legal writer, noted "we could be nearing the point where it would be malpractice for a lawyer not to use analytics." (https://www.lawsitesblog.com/2018/12/20-important-legal-technology-developments-2018.html)

England and Wales have been rather far behind. Analogue processes, fragmented workflows and pressing demands on Court Services mean that the application of API-supported, large data sets has been slow to take off.

However, more recently, data and analytics companies in the UK have begun to develop the tools and systems to provide this, particularly for civil claims in the High Court. Forward-looking law firms, litigation funders, insurers and in-house teams are embracing the newly available products.

Recent advancements show the future is about the augmentation to knowledge, decisions and actions that rich, rigorous analytics bring to the practice of litigation. This extends from developing new business to delivering optimal advice, fine tuning ahead of trial, to weighing up the prospects for appeal.



The proposition for a data minded corporate is to optimise decisions for the top and bottom line. This means treating litigation as an asset or a measurable risk. In these scenarios, the C-suite are always more comfortable taking decisions supported by robust data and an intelligent analysis.

Staying on top of the latest activity

Value for practitioners begins with identifying new risks and opportunities in litigation, as disputes become public information. The process followed, where a claim is issued perhaps weeks before it is served, means that the media often seize on more newsworthy cases, running the story before the defendants see the claim.

Litigators can now monitor this and act quickly to alert clients, providing a valuable early warning. More than this, smart firms realise that defending parties may not have instructed a firm to act; indeed they are often unaware that the dispute exists. Acting quickly to alert a prospective client can lead to instruction and certainly adds value to the client relationship.

Looking at the form

Further, analysis of the data reveals the range of past behaviours evidenced by parties and their advisors. These differences can be as instrumental in estimating the prospects for a claim as an assessment of the facts of the case. Analytics can show the propensity of a party to settle or fight disputes and, in their selection of a particular firm, strong clues as to their likely approach. Understanding the current litigation burden of a party is also valuable in assessing the pressures they face or their strategy.

Expert selection is another area where data analysis can play a role. Contemporary tools and analysis help in sifting out relevant judge praise and criticism of experts, their evidence and how they have been utilised in a case. This is valuable not just for due diligence on expert selection, but also for understanding the attitudes of individual judges towards expert evidence.

Fine tuning

Anticipating judge behaviour is a key use of litigation analytics in the United States, where jurisdiction and judge selection is possible. You don't choose your judge in the English High Court and may only know who it is very close to the hearing, when most of the preparation has been done. Nevertheless, understanding how a judge has ruled before can be very helpful in fine-tuning your approach and anticipating how a judge may respond to certain arguments.

This adds a new angle to the research task. Outcomes-focused research draws practitioner attention to cases with similar features. Exploring why they succeeded or failed can bring unique insight and help contextualise advice to clients.

Forecasting to super forecasting

The foundation of client advice is the assessment of prospects.

The reality is lawyers already forecast; they have done ever since the first client asked them if they had a strong case. Litigators are cautious, skilled and detail oriented. They consequently make good forecasters because they tend to avoid rushing to a view and will look at a case on its merits.

However there are two fundamental challenges with their approach. The first is that they are uncomfortable with numbers and tend to prefer terminology. Describing a case as having "strong" prospects means different things to different audiences.

Secondly, when pressed to provide a number or percentage, as numerous practitioners have confessed, they will forecast within a narrow range, usually between 45% and 55%. The client doesn't find this very helpful, for obvious reasons. One in-house litigation head told us they added between 10 and 15 percentage points to the advisor's prediction so as to make it more accurate.

Having said this, it's also the case that for complex disputes a "black box" algorithm that predicts outcomes is not necessarily going to win the confidence of decision-makers, even if it is more accurate. This is partly because the value, complexity and dynamics of most High Court disputes means this can change over time and circumstance. Also, cases take months, often years to conclude. Trusting an algorithm in a complex, multi-million pound dispute is hard enough; to keep faith in it over several years generates too much cognitive dissonance.

Where litigation analytics is very powerful is in assisting practitioners by providing a baseline or anchor point, founded on past cases with similar features, allowing them to begin their own prediction. Using past case data creates a valuable, less subjective way of starting an analysis. Research shows this leads to significantly more accurate forecasts (see Philip Tetlock's 2015 book on Super forecasting for example: https://en.wikipedia.org/wiki/Superforecasting:_The_Art_and_Science_of_Prediction).

This approach has additional benefits especially in contextualising advice for clients, who want to understand how their case sits on the prospects spectrum, compared to other cases with similar features.

Litigation analytics is a powerful new tool for litigation practitioners, but ultimately needs to be moderated. Developing the skills to wield analytics effectively will be the new challenge.

PROPOSED CHANGES TO CORPORATE GOVERNANCE AND AUDITOR RESPONSIBILITIES IN THE UK

Authored by: Lucas Arnold and Vaiben Lipman - Lipman Karas LLP

On 18 March 2021 the UK Government published the White Paper "Restoring trust in audit and corporate governance", setting out a package of measures aimed at improving the UK's audit, corporate reporting and corporate governance structures.

Whilst noting the UK's standing as a leading commercial centre, trust in the credibility of directors' reporting and the statutory audit were found to have been shaken by a succession of sudden and major corporate collapses well known to readers.

The development of the White Paper into legislation will be keenly watched by practitioners. We have set out a brief discussion of three proposed changes likely to be of particular interest: increased duties and safeguards directed at directors and auditors in relation to internal controls/solvency; additional proposed responsibilities of auditors; and proposals targeted at the detection of fraud.

Proposed developments in director duties and responsibilities

The White Paper confirms that responsible behaviour by directors is the fundamental starting point for high quality and reliable corporate governance and reporting. However, the current framework was deemed inadequate in holding to account directors of large companies and other Public Interest Entities (PIEs) who neglect their reporting responsibilities. Three particular areas where further reporting and accountability requirements were needed concerned: (i) internal controls and risk management over financial reporting; (ii) dividend and capital management decisions; and (iii) the steps that directors are taking to consider and strengthen a company's future resilience.

In relation to internal controls, the White Paper sets out the Government's initial preferred option, requiring:

- an annual directors' responsibility statement;
- an annual review by the directors of internal control effectiveness and new disclosures;
- audit committee and shareholder overview of internal control effectiveness; and
- regulator authority to investigate and if need be sanction directors for inadequacies in this area.

In relation to dividends and capital maintenance, the well-established law on dividend payments had failed to prevent recent high profile examples of companies paying out significant dividends shortly before profit warnings or insolvency. New reporting requirements are proposed on distribution policies and capacity to pay dividends, as well as greater definitional criteria of what amounts to distributable reserves. Any new duties will likely build on existing duties, including promoting the success of the company and, in an insolvency context, the duty to creditors.

There is also a proposal for two new

reporting requirements to promote resilience, which will likely impose additional responsibilities on directors that PIEs publish:

- an annual Resilience Statement, consolidating and building on the existing going concern and viability statements; and
- an annual Audit and Assurance Policy, describing the company's approach to seeking assurance of its reported information over the next three years.

Proposed developments in auditor duties and responsibilities

The Government proposes several changes to the duties and responsibilities of auditors. Aside from accepting the conclusion that "the concept of audit needs to be rethought and redefined", the Government supports the adoption of a non-binding purpose statement of establishing and maintaining confidence in a company, its management and information.

However, the Government also supports the introduction of concrete changes both to audit practice and scope, including giving auditors a specific statutory responsibility to consider broader factors, including relevant director conduct and wider financial or other information, in reaching their judgments. The FRC agreed to consider incorporating these auditor duties, including to assess external signals of an enhanced risk profile for the company, into its standards.

Furthermore, the new regulator would be empowered to set and enforce new binding principles of corporate auditing that promote a stronger ethos of scepticism, challenge and informative-ness. These would have a form of priority over existing auditing requirements and may be enforceable in practice. It is still unclear the extent to which any deviation from the content of these principles or responsibilities would support a private claim against the auditor, such as by the company in liquidation.

The Government considers the current independent and impartial decision-making arm of the FRC competent to determine the culpability of auditors in both fraud and non-fraud cases, despite the Brydon Review reporting on a deep anxiety among auditors that any failure to detect fraud would be assessed with hindsight and in a prejudicial manner.

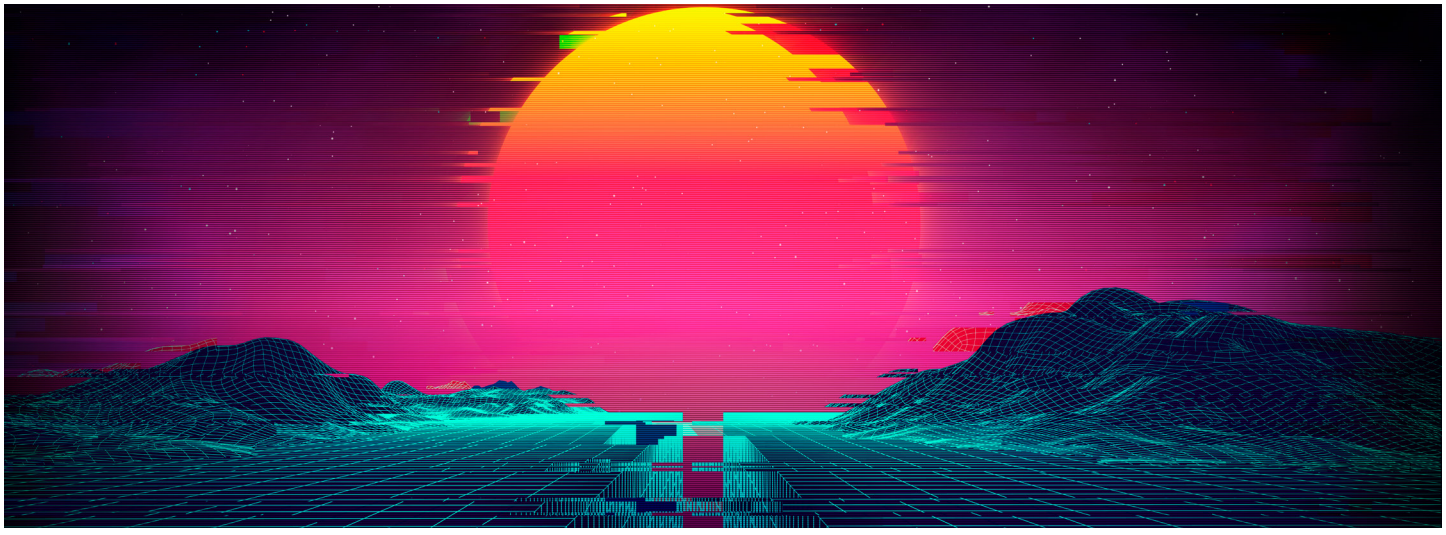
Finally, the Government considers that directors who in good faith recommended to shareholders a Liability Limitation Agreement (LLA), which may limit an auditor's liability but only to an amount that is fair and reasonable, would not be in breach of their duties. It seeks views on directors', investors' and auditors' experiences with LLAs, and also encourages a dialogue on how an auditor liability regime could facilitate a more informative audit without increasing the auditors' potential exposure to litigation.

Proposals targeted at the detection of fraud

The White Paper makes a number of proposals aimed at the duties of both directors and auditors to prevent and detect fraud. The Government proposes to legislate to require directors of PIEs to report on the steps they have taken to prevent and detect material fraud. It may also, in some cases, enhance directors' focus on the risks relating to fraudulent financial reporting. This likely expands on directors' core duty to safeguard the assets of the company.

Significantly, in response to recommendations on tackling fraud, the Government proposes that legislation would also require auditors of PIEs to report on the work they performed to conclude whether the proposed directors' statement regarding actions taken to prevent and detect material fraud is factually accurate as part of their statutory audit. The Government also supports the requirement for auditors to report on the steps they took to detect any material fraud and assess the effectiveness of relevant controls. The Government plans to consult with the FRC about what changes to company law or auditor reporting standards would give effect to such requirements.

Whilst it remains to be seen the extent to which these proposals make their way into formal legislation, the White Paper contains an important discussion of current perceived issues in relation to director and auditor duties and accountability, and possible solutions to these issues.



WILL COVID-19 TRANSFORM THE WAY WE LOOK AT VALUING RISK IN COMMERCIAL DAMAGES?

Authored by: Greg Harman, Robert Outram and Daniel Ryan – BRG

When a market shock ripples through the wider economy in the way COVID-19 has, there's much to be said about updating the technical elements of valuations to reflect the heightened economic risk. However, the current crisis raises broader questions about whether typical valuation practices are fit for purpose both during the pandemic induced turmoil and in the longer term once the effects of the pandemic subside.

Valuation practitioners often consider a 'base case' cash flow forecast as a central estimate for a valuation; a method which implicitly assumes that the upside and downside risks are equal and opposite in terms of both probability and impact. However, the financial impact of an unexpected negative event such as a pandemic may be more significant and more sudden than a prolonged bull market and these 'tail risks' can have a significant impact on expected returns for investors. If we accept that the risk leans towards the downside, then a valuer might need to change their approach to consider the risk of so-called 'black swan' events.

Drawing the line between normal and abnormal

When operating under commonly used frameworks of market value the valuer needs to hypothesise a transaction and consider what would have been known by a purchaser about the expected economic returns of, and risks to, the business at the valuation date without using hindsight. The risk of a pandemic will affect both the market in general and the business specifically. However, it is important to determine at what point the risks began to materialise and make a clear a distinction between the existence of the event and the risk of the event itself.

The risk of a pandemic will affect both the market in general and the business specifically. However, it is important to determine at what point the risks began to materialise and make a clear a distinction between the existence of the event and the risk of the event itself.

This distinction is not always clear cut. There are indications that some investors were able to predict the impact of COVID-19 on markets bringing into question whether the risk should have been identified. Of course, it is difficult to determine whether these investors were just lucky or simply gambled; even with this in mind the valuer must judge whether such risks should be considered if the wider market does not ultimately price such risks into valuations. It is generally assumed that market values incorporate the consensus views of knowledgeable and rational market participants. However, that is not to say that such views will always be 'correct', and the Efficient Market Hypothesis, which presupposes the reaction of the market to information will be appropriate, has been criticised for chronically underestimating risk before.

In light of this, it is perhaps obvious that experts valuing companies or assessing damages in the post-COVID world will need to reevaluate their approach to such risks by acknowledging that Black Swan events occur, with some regularity. In contentious valuations there is likely to be increased scrutiny and how the valuer considered these risks will need to be explicit in cases following the pandemic; claimants may be incentivised to argue for earlier valuation dates or that the market does not typically price in these risks, while respondents may argue these risks do need to be included.

Optimism bias and downside risk of the 'black swan'

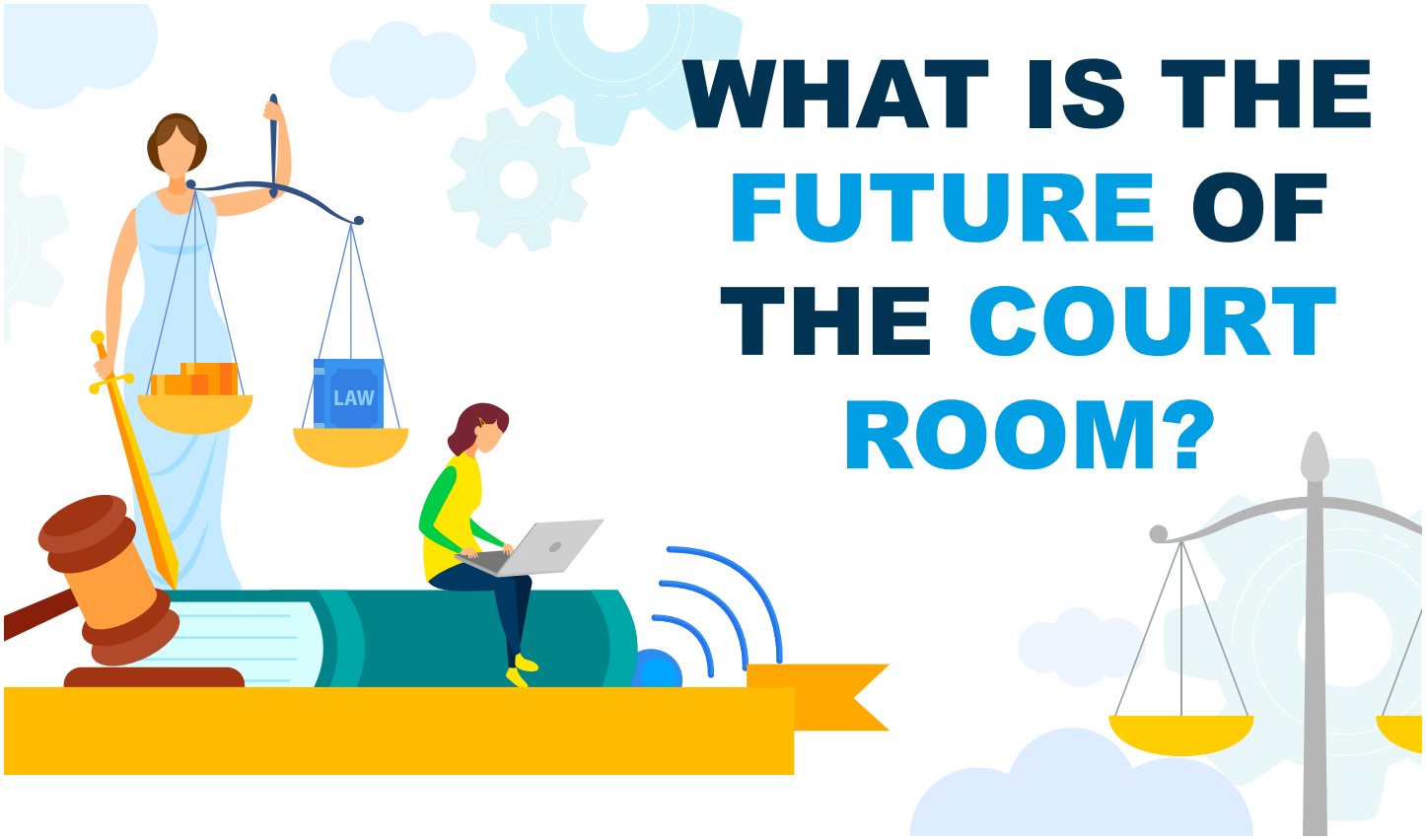
A key problem with these 'black swan' events for valuers is that the timing and nature of their occurrence are unforeseeable. Despite these events occurring with some regularity, their probability is assumed to be low and the impact on value and risk can be significant.

Currently, practitioners typically incorporate an equity market risk premium (EMRP) when valuing businesses. In theory, this forward looking premium might account for some aspects of black swan events; to the extent that if it has been estimated based on historical returns then it will likely include periods of history where catastrophic economic events have occurred.

However, the EMRP is unlikely to capture all relevant risks and practitioners also need to assess the 'beta' factor - a measure of the relative risk of the subject company or sector compared to the market as whole. This is typically measured over relatively short periods of time and if no significant negative risks crystalised within that period, then the risk of those catastrophic events on the sector will not be incorporated. Hence, applying a historical EMRP to a short-term beta, may well produce a biased estimate of market risk.

The EMRP and beta also do not account for the specific risks and impacts of 'black swan' events on the business being valued raising the question of how they should be incorporated into the expected cash flows of the business. Theory would suggest that such risks can be incorporated into a valuation using scenario analysis, where one scenario should consider a significant downturn therefore providing a more holistic view than give some absolute optimistic or pessimistic value.

Valuers should stand back and think about the approach to assessing risk and return in this 'new normal'. Parties to a dispute will be alive to the need to reflect the risks associated with COVID-19 in assessments of damages. As independent experts, it is important for valuers to demonstrate the extent to which the risk of the pandemic has been accounted for and articulate any uncertainties regarding the quantification of damages as a result. It remains to be seen how tribunals will deal with these issues in awards of damages. They may seek more in-depth evidence on the assessment of risk where the cash flows are significantly impacted by the pandemic, and perhaps in some circumstances will be inclined to place less reliance on a cash flow approach.



WHAT IS THE FUTURE OF THE COURT ROOM?

Authored by: Stephen Alexander - Mourant Ozannes (Jersey) LLP

The late John F Kennedy was quoted as saying: "Change is the law of life. And those who look only to the past or present are certain to miss the future."

When looking at legal systems, and in particular, litigation within those systems, what is the future? Arguably, this is harder than ever to predict, given the seismic changes, many of which we may have not yet seen, resulting from global Covid-19 pandemic. But, one part of the legal future, which has, as we will discuss below, already become a small part of the present, is the digitisation of courts and, in particular, the advent of an online or "virtual" court. Digitisation and the implementation of virtual courts began in some jurisdictions several years ago. However, in many offshore jurisdictions such as Jersey, significant change has begun to occur very recently. This article explores how this has happened and why they are set to stay.

The 'Live' Courtroom

The importance of the court in any democratic society, properly functioning as a public forum for the determination of matters of law, cannot be overstated. Its importance is perhaps only properly understood when compared against the decisions and processes of failing courts (which, of course, exist in both developing and developed societies).

Since their very inception until very recently, courts have been entirely physical institutions. In many ways, this is entirely unsurprising. How else could issues of law and order be determined by an adjudicating body, in the presence of the parties and others involved, if they were not all together physically in the same room? But even with the advent of the internet and video technology over the last two decades, the limited amount of change to the court room is marked. In most countries, courts have changed little, in terms of their form and composition, from how they were a hundred years ago. This points to other possible reasons – perhaps based in social ethics, culture and human psychology - why people have felt that a physical court is preferable. Some consider that the adjudicating body and participating parties need to see their each other in the flesh and that witnesses need to be physically observed in the course of cross-examination. Some also feel that those charged with managing large bundles and other hard copy paperwork need physical copies in a room in order to manage a case efficiently.

Change is in air, however. The kernel sprouted in England in the late 1990s, in the aftermath of the Jackson reforms. The spirit of those reforms (which have been followed across not just England, but much of the common law world), focussed on increasing access to justice and reducing the inefficiencies and costs of litigation. If this was the platform for viewing civil litigation differently, then the battering ram of change towards digitisation came through technological advances since the early 2000s and, of course, more recently, the global pandemic arising from Covid-19.

Technological advances

It is still surprising how quickly internet has grown. Google began only in 1998. Paypal began only in 1999. At that time, it was believed that only around 4% of the world's population (some 150 million) used the internet. By the end of last year, that figure stood at around 64% of the world's population (some 5,053 million). This has only been possible by the ever-increasing scale and speed of internet capabilities and processes.

In England and in many other jurisdictions with developed legal systems, there was a sense in the late 2000s, that the bricks and mortar court rooms and paper-based systems had "not kept pace with the world" and that there was a need to "make justice less confusing, easier to navigate and better at responding to the needs of the public"[1].

In 2016, the HM Courts and Tribunals Service in England launched a programme of digital reform to the court system of England Wales. In civil litigation, the result would be that litigants could opt to resolve simple disputes online with the support of a mediation service, and if that is not appropriate, progress it under the case management of judges to resolve the dispute online, or at a hearing they can attend by video, or in person in a court or tribunal room. In criminal litigation, the reforms would build on the more recent improvements to introduce digital working and provide smarter, more joined-up and streamlined processes to deliver better criminal justice for all.

As a result of these changes, more than 62,000 online civil claims (those of a civil nature of less than £10,000 in value) had been made since the service launch (in 2018) worth a total of more than £6m. In the same period, more than 200 settlements had been reached online without involving a court. Now, users in the Queen's Bench Division (claims and appeals) and the Business and Property Courts can issue claims, file documents and pay court fees online. Developments to the criminal courts over the same period have resulted in the development of significant digital case management systems, online jury summons responses, plea online services and more. Further significant developments are planned and the reform programme is currently set to continue until at least 2023.

However, despite these developments onshore, surprisingly little changed in court room processes in leading offshore jurisdictions such as Jersey, until very recently.

The global pandemic

Recent news reports of strangely feline advocates appearing in the far away courts of the State of Texas have assured those of us on small British islands amid the English Channel that we were not the only legal community forced to adjust the new virtual reality of online courts during 2020 and to encounter one or two teething problems.

What was this new, pandemic driven, virtual reality in Jersey? Some changes were temporary. For example, the COVID-19 (Emergency Provisions – Courts) (Jersey) Regulations 2020, which operated between 23 April 2020 and 30 September 2020, contained certain short term alterations to the conduct of court proceedings, including hearings by video and telephone. However, others remain in force and are likely to become permanent. For example, the introduction of Practice Direction RC 20/10 (Guide for interlocutory hearings before the Master of the Royal Court or the Judicial Greffier) in 2020 migrated the vast majority of interlocutory hearings to the online court system (hosted by Starleaf) and provided the practical and procedural framework by which that could be done. Also in 2020, Royal Court set out guidance on the remote execution of powers of attorney and the signing and swearing of affidavits.

Change has not just been confined to online hearings and remote execution of documents. Traditional paper file bundling has evolved to ebundling. Practice Direction RC 21/01 has established a framework for the use of an ebundling platform, CaseLines, which will become the default system for the supply of bundles for all court hearings. Previously, ebundling was used with much success in the large disputes concerning Financial Technology Ventures II (Q) LP & Ors v ETFS Capital Limited & Tuckwell [2021] JRC025 and BNP Paribas Jersey Trust Corporation Limited v de Bourbon des Deux Siciles [2020] JRC267.

In December 2020, the European Commission adopted a package of initiatives to modernise the EU justice systems, based on the digitisation of justice. These initiatives included making digital the default option in cross-border judicial cooperation, updating online case management systems and encouraging member states to digitise their registers.

1 **Transforming Our Justice System By the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals – September 2016**

The pandemic has also prompted digital developments elsewhere onshore. In October 2020, the European Council adopted conclusions encouraging Member States to make use of digital tools throughout judicial proceedings. In December 2020, the European Commission adopted a package of initiatives to modernise the EU justice systems, based on the digitisation of justice. These initiatives included making digital the default option in cross-border judicial cooperation, updating online case management systems and encouraging member states to digitise their registers. However, virtual courts are not yet in contemplation.

Digital love

Virtual courts are still not the mainstay. However, their use in England, Jersey and elsewhere is growing and it appears that this will continue, long after the pandemic passes. The vast majority of the concerns harboured about online courts have simply not materialised. Experience has shown that the courts can appropriately manage and control complex hearings by video conference, advocates can effectively cross-examine witnesses by the same means and documentation can be managed efficiently via online court management systems (and perhaps even more so than in hard copy form). Furthermore, the pandemic era has shown that the format of a virtual court removes some of the potential pitfalls and risks of the physical court, such as the inability of key individuals to attend hearings due to travel complications and the limitations of physical space in busy, over-subscribed court centres.

The court is ultimately a service rather than a place. It is there to work for the public. Its form and composition should reflect what is needed to deliver justice, rather than what tradition dictates.

Are there winners and losers arising from these changes and if so, who are they? The losers are hard to identify. However, one category is likely to be lawyers and other advisors whose principle value lies in the form of project management of webs of intersecting work streams. Their work may be harder to justify in a more stream lined, online courts orientated future. The winners, on the other hand, will likely be those litigators who embrace the new technology and hone their skills to become extremely competent in its usage. It is possible that a new, more modern layer of courtroom etiquette develops from this technology. The lawyers who succeed are likely to be those able to best use this new format strategically and to deliver cost effective solutions for their clients, which may result from outmanoeuvring opponents around the procedural system.

This brings us neatly to the greatest potential winner of all: the client. The court is ultimately a service rather than a place. It is there to work for the public. Its form and composition should reflect what is needed to deliver justice, rather than what tradition dictates. The virtual court creates new opportunities for clients not only to manage the costs of litigation, but to access litigation itself, litigation which they previously considered not readily easily possible. Many disputes can and should now be determined through a court managed online system with virtual hearings. This will increase access to justice for all and will ultimately reduce the costs and time involved in obtaining that justice.

What is the future of the court room? Simple. The future is virtual.

LITIGATION FUNDING – A USER'S GUIDE

Authored by: Chris Ross and Suzan Kurdi – RPC

Introduction

Litigation funding is now an established part of the legal landscape in the UK. The market has developed rapidly in the last few years, with funding being used in an increasingly wide variety of disputes. New funders continue to enter the market and the assets held by litigation funders have increased 400% over the five years from 2015 to 2020, from £378 million to £1.9 billion of assets. Litigation funding is no longer simply for the impecunious litigant, but is increasingly also being used by corporates as a tool to better manage their legal budgets.

Notwithstanding the increase in the amount of capital available, stringent criteria will be applied by funders before committing money to a case.

Against that background, this article explores some of the commercial and practical issues involved in obtaining and using funding.

The process of obtaining litigation funding

There are an increasing number of funders in the market. Using a broker to help identify and approach those most suitable for any particular case can be a good starting point.

Whilst each litigation funder will have its own processes, in practical terms, obtaining litigation funding can be an elongated process. A prospective litigant will typically first need to instruct solicitors to analyse the claim and to produce a pack for the funders to review. Whilst the contents of the pack will vary from claim to claim and from funder to funder, a document setting out the legal basis of the claim, potential defences and the likely quantum is normally a prerequisite. The identity of the claimant's lawyers it itself an important factor taken into account by funders.

An opinion from the lawyers – and potentially counsel - on the merits of the potential claim is normally required, together with an assessment of the prospects of success. As a general rule a c.60% chance of success will be required. An estimated budget for the conduct of the claim, from the pre-action stage all the way through to trial will also to be required. A report from an expert might also be required if the prospects turn upon a technical issue or the subject matter of the claim is very niche.

Crucially, the funder will want to ensure that the potential defendant has sufficient assets to meet a damages award and be comfortable that those assets are located in a jurisdiction where an award can be enforced.

The materials will then be reviewed by the funder, a number of which have in-house legally-qualified investment analysts. Usually there are a number of stages to the review – initial review by an investment officer, followed by review by the investment committee before any formal offer of funding is made. The funder may also instruct independent counsel to review the claim and advise on the merits. There may be an exclusivity period while the funder considers the claim.

At each stage of the process, it is possible that further queries will be raised or further information required and it is incumbent upon a prospective litigant and his or her team to respond to those queries accurately and promptly. This process can take time and there is no guarantee that an offer of funding will be forthcoming at the end of the process, or that it will be offered on terms that are acceptable to the prospective litigant. Prospective litigants should therefore make a realistic assessment of their case at the outset before committing to the funding process.

Some funders offer what is sometimes referred to as seed funding, i.e. an initial, limited amount of funding for the preparatory stages of a claim, when the initial investigation and assessment of the merits is carried out. This seed funding can then be rolled into a funding agreement if the merits justify and the financials are attractive enough.

Commercial issues

The general principle underpinning litigation funding is that the funder advances non-recourse monies to fund legal spend in accordance with an agreed legal budget, and expects to recoup the sums advanced plus an uplift from recoveries in the litigation. Whilst pricing models vary, and the market is constantly developing, in general the uplift paid to the funder on success is calculated either by reference to a multiple of the amounts advanced or committed (typically 3-4x) or as a percentage of the damages/settlement sum (typically 30-50%), whichever is the higher. This can vary depending on at what stage of the litigation the matter settles and how long the money has therefore been deployed for.

A further rule of thumb is that the market applies a 10:1 ratio, meaning that the likely settlement value (not headline claim value) of the claim must be 10 times the proposed legal spend, in order to build in sufficient margins. That may rule many cases out.

A further matter to consider is the legal team's fee arrangement. A funder will often want the legal team to have "skin in the game", and act on a Conditional Fee Agreement (CFA) or damages-based agreement (DBA).

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Another important factor in the equation is after-the-event (ATE) insurance. This is insurance that covers the risk of the claimant / funder being ordered to pay the defendant's costs. This can be offered as part of the funding package provided by the litigation funder or arranged separately by the claimant. Obtaining ATE cover can be complex as there is limited capacity in the market and prospective insurers will want to understand the merits of the claim in much the same way as potential litigation funders.

The future

At present, litigation funding is best suited to substantial commercial actions, where the quantum and potential recoveries make the most sense. Large shareholders actions and competition claims are areas in which litigation funding is increasingly prevalent. Claims in the restructuring and insolvency arena, where licensed practitioners are under a duty to maximise returns but have limited cash to spend in order to do so, are also often commonly funded.

As new entrants continue to enter the market it will be interesting to see whether competition for good cases drives down prices and whether funders branch out into less mainstream areas in order to produce returns for their investors.

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