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LEARN FROM THE PAST, STRATEGISE FOR THE FUTURE

INTRODUCTION

"Twenty years from now you will be more disappointed by the things you didn't do than by the ones you did do. So throw off the bowlines, sail away from safe harbor. Catch the trade wind in your sails. EXPLORE. DREAM. DISCOVER" **- Mark Twain**

It is with great pleasure that we welcome our readers to the 3rd Edition of the ThoughtLeaders4 Disputes Community Quarterly Magazine. By collaborating with the wide range of legal professionals, this publication delivers exclusive new insights and technical knowledge helping our readers stay ahead of the game.

We would like to express our sincere gratitude to contributing authors and our fantastic Community Partners for their support of this edition.

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THE RUSSIAN BEAR FIGHTS ON

Authored by: Trevor Mascarenhas and Nicola Boulton - PCB Byrne

The days of massive commercial disputes emanating from Russia and other FSU States are dead. That has been a constant concern of many leading practitioners in London, the epicentre of the largest, most high-profile of those disputes in the past 20 years.

2000-2009 – clash of the oligarchs

The privatisation of vast natural resources and industries in the 1990's led to highly publicised squabbles between oligarchs played out before London's Commercial Court in the first decade of the 21st century. That decade included the eye-wateringly expensive claim brought by Tajik Aluminium plant against Avaz Nazarov, where it was alleged that Tajik Aluminium had been defrauded of hundreds of millions of dollars as a result of the corruption of senior management.

It also saw the start of multi-billion-dollar claims brought by Michael Cherney against Oleg Deripaska and by Boris Berezovsky against Roman Abramovich, as former business associates who had been at the forefront of acquiring privatised assets fell out with each other. In the former case, Mr Cherney was able to persuade the English Court that he would not be able to obtain justice in Russia, such that the English Court should assume jurisdiction. The latter case famously started with a scuffle in a luxury goods boutique in West London as Mr Berezovsky evaded Mr Abramovich's bodyguards to serve him with the claim form.

2010-2019 – bank disputes dominate

The second decade opened with a bang: simultaneous service of search orders at 3 premises and freezing orders in 4 jurisdictions in a US$500m claim between the new and former owners of KazakhGold, relating to gold mines in Kazakhstan. But it was another Kazakh dispute which was to dominate most of the decade: the claims brought by BTA Bank against Mukhtar Ablyazov alleging numerous schemes by which he and a number of conspirators had siphoned billions of dollars out of the bank.

Indeed, claims by banks have featured heavily throughout the second decade of the 21st century. Some, like the BTA litigation, have been against alleged former owners/controllers. These include the claims brought by Mezh Prom Bank against Sergei Pugachev; by National Bank Trust against Ilya Yurov; and by Vneshprombank against Georgy Bedzhamov, where there have been allegations of uncommercial lending to related parties to extract funds for the benefit of the defendants.

Other banks have sought to recover assets in respect of defaults on loans, both as against borrowers, guarantors and owners of the borrowers. VTB Bank brought substantial claims against each of Konstantin Malofeev and Pavel Skurikhin, whilst Bank of Moscow pursued Vladimir Kekhman and Andrey Chernyakov. These cases highlighted the attractions of litigating in London, with use of weapons such as freezing and search orders, receivers and committal applications.

The 2020's – families at war

Early into the third decade and a different type of claim is beginning to come to the fore. 20 years ago it was business partners falling out. Now it is family members. Akhmedova v Akhmedov resulted in a £450m award in favour of Tatiana Akhmedova, but Farkhad Akhmedov was determined not to pay a penny. This spawned litigation in numerous jurisdictions including England, Dubai, Liechtenstein, Switzerland, Cyprus, the Isle of Man, the US and the Marshall Islands before leading to what has been reported to be a very substantial settlement. Again, the weapons of the English Court including freezing and search orders, as well as committal proceedings all assisted in achieving recoveries against a recalcitrant debtor.

Looming on the horizon is the US$1.5bn fraud and conspiracy claim brought by Loudmila Bourlakova against her former husband (now deceased) and his associates alleging that they put assets beyond her reach in Monegasque matrimonial proceedings.

Most favoured jurisdictions

There are a number of factors why common law jurisdictions, and London in particular, have been attractive places for the resolution of such claims.

First, there is a highly regarded, independent judiciary, and a pool of high-class litigation lawyers, who are experienced in dealing with complex disputes emanating from the region. Lawyers and judges are familiar with Russian tort law and similar provisions.

Second, as regards contracts, English law is seen as well suited to commerce, particularly in respect of complex financial transactions.

Third, there are the tools to ensure that justice is achieved. That includes a disclosure regime designed to prevent parties concealing adverse documents, and cross-examination to test witness testimony. It also includes the use of powerful orders (search and freezing orders) to prevent destruction of evidence and dissipation of assets.

Fourth, even post-Brexit there is value in obtaining judgments/orders from the English Court in terms of enforceability and in persuading courts in other jurisdictions to grant similar orders to secure assets.

The English and common law jurisdictions also provide assistance where the main claim is being fought in Russia or elsewhere. The English Court can grant a freezing order in support of a foreign proceedings under s25 of the Civil Jurisdiction and Judgments Act 1982, or even in support of a foreign appeal, as it did in Ukrsibbank v Polyakov all the way up to the Ukrainian Supreme Court. The Privy Council has in the recent Broad Idea case held that freezing order relief is available in the BVI in support of foreign proceedings.

However, London may not remain the jurisdiction of choice. Previously, many wealthy individuals from Russia and the former FSU moved to London but some have seen that this makes them vulnerable to the jurisdiction of the English Courts and the freezing and search order relief that might be obtained against them. At least one high-profile Ukrainian oligarch chose to move from England to Switzerland so as to avoid being a target for English litigation.

Some prospective claimants are being put off by recent judgments where the English Court has declined jurisdiction, or by increasing costs of litigating and arbitrating in England. Businesses are looking at different venues, such as mainland Europe and Singapore, and at alternatives to English law.

The future

So as new claims begin to emerge from Russia and other former FSU States, London and other common law jurisdictions will probably still see further substantial litigation. Whether it will be on the scale that we have seen over the past 20 years is perhaps more doubtful.

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UNJUST ENRICHMENT: WINDFALL OR SHORTFALL?

HOW NOT TO GET WHAT YOU PAID FOR WHEN BUYING AND SELLING ASSETS

DARGAMO HOLDINGS LTD AND ANOTHER V AVONWICK HOLDINGS LTD AND OTHERS [2021] EWCA CIV 1149

Authored by: Dipti Hunter and Laura Coad- Keidan Harrison

Introduction

Shareholder Disputes have been on the rise during the past year. Often this is due to the inadequate or misunderstood documents drawn up at the time of relationships being formed to demarcate the value and risks being shared. So this case is a timely reminder of the pitfalls of allocating risk and reward in an SPA whilst failing to grasp the commercial rationale in the way the valuation, consideration and asset portfolio are being redistributed.

Further, parties have purchased companies/businesses and been disappointed with the results, leading to an increase in breach of warranty claims which (often) must be notified within 1 year of completion.

Commercial parties buying and selling shares tend to have in mind differing approaches to valuation. When one party appears to have obtained a windfall or shortfall without the ancillary comparable consideration being paid, then that can lead to disputes. Nobody likes to think they have either overpaid or underpaid.

Asset valuation and assessment of portfolios is further complicated when considering cross border investments and deals that have imported English Law into a shareholder agreement which deals with a variety of complex group shareholdings.

This case shows that it is possible for clients to over pay and under receive when the asset portfolio exchange fails to live up to the aspirations and objectives of the paying parties.

Background

The Court of Appeal had to review a claim for unjust enrichment arising from a complex shareholder transaction which produced outcomes beyond what one party thought was fair.

In order to get a claim for unjust enrichment off the ground, a claimant needs to have evidence of the following:

- There has been a financial improvement enjoyed by the intended defendant which amounts to an enrichment;
- Such improvement was at the expense of the intended claimant;
- It is unjust for the intended defendant to keep the benefits of such enrichment.

Unjust enrichment can be a useful tool to correct the imbalance in unfair rewards received by one party at the expense of another.

In shareholder disputes for example one party may by mistake have received property or value that is above that which was intended compared to the allocation of risks taken by that party. However, where there is a contract, many of the unjust points of concern which a party may raise, may have been dealt with in the contract and terms may have been included on the basis of a mistaken assumption or representation which the contract excludes as a possible breach.

Separation of mutually owned interests in connected companies in Ukraine

The Court considered an agreement referred to as the Castlerose SPA which had been concluded by the parties as part of the division of assets in the "divorce" of dealings between three Ukrainian businessmen who had fallen out. These three men had a number of shared business enterprises in the metallurgical sector in Ukraine involving a company called Industrial Union of Donbass ("IUD") and used a variety of special purpose companies to invest in with each other, namely Dargamo Holdings Limited (Dargamo), Avonwick Holdings Limited (Avonwick) and Azitio Holdings Limited (Azitio).

Avonwick was the Claimant and First Respondent in the Appeal. Avonwick had issued a claim against Dargamo and Azitio alleging deceit which in turn led to various cross claims and/or Part 20 claims being asserted.

Put briefly, the SPA included express terms dealing with the payment of USD 950 million for transfer of shares in IUD, (the holding company) but did not include express terms dealing with the transfer of other assets which had been alluded to in an unsigned memorandum of understanding and side letter which had been prepared at the same time as the SPA.

Judge's comments at First Instance

Avonwick had agreed to sell its interest in a company called IUD but asserted in its claim that such sale had been induced by fraudulent misrepresentations. Put briefly, the various asset transfers and splits were supposedly to be conducted in such a way that would enable the "same price per share" to be paid to and received by each party. The Judge at first instance held that this had not happened.

In addition to various contractual claims that were raised, the Judge considered a claim for unjust enrichment, which he ultimately dismissed. He considered whether Avonwick had not done what it had agreed to do. The Judge found that Avonwick had only agreed under the SPA to transfer shares in a company called Castlerose.

Court of Appeal

The issue considered by the Court of Appeal was whether a claim for unjust enrichment could be made where the SPA had expressly provided the basis of the payment as being consideration for the transfer of shares in Castlerose and such transfer had already completed.

The Appeal was argued on the basis that it was a matter of agreement that the Avonwick shares represented only USD 750 million of the total USD 950 million,000 which had been paid. The Appellants argued that the remaining USD 200 million was contingent on other things being transferred which did not happen.

Ultimately the Court of Appeal decided that the parties had taken a risk when entering in to the Castlerose SPA in the agreed terms by not being clear as to how consideration was allocated under the calculation of the price of USD 950 million. Of this sum USD 200 million was agreed as being assets other than the Castlerose shares but there was not an actual agreement for transfer of any additional assets as had been suggested.

Comments

This case highlights that a claim for unjust enrichment will face significant difficulties if used to seek to "override" contractual agreements and thus goes against the express intentions of the parties.

It is a reminder that unjust enrichment is not a licence to overwrite the black letter of any related written agreement which has been made by the parties.

The case is a timely reminder of the utility of having litigation input on corporate transactions which are managing expectations and redistributing assets following longstanding animosity between shareholders, in particular when the deal involves a variety of international companies and assets with differing approaches to asset valuation.

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We are proud to be associated with the Disputes community and delighted to be a supporting partner to ThoughtLeaders4. We look forward to sharing our unique perspectives and expertise more widely with the various stakeholders in the community. By connecting through this platform, we hope to broaden the debate on the impact of legal developments, share our perspectives on how the law and practice of disputes in England & Wales are evolving and connect with fellow lawyers and businesses.

Finding common ground, even with opponents, is at the heart of any successful settlement strategy. With our colleagues in the Disputes community, we look forward to exploring common ground about best practice and long overdue reform in a post-pandemic disputes landscape.

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60-SECONDS WITH:

ANDY MCGREGOR
HEAD OF CIVIL FRAUD
RPC

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

A That I'm saving the world, one Russian oligarch at a time. The reality is that it is very difficult to explain exactly what it is that disputes lawyers do. I feel incredibly privileged to do a job that I enjoy so much and it is that enjoyment that I generally try to communicate. If anyone shows a genuine interest after my saving the world answer I tell them that people come to me with big problems that I try to solve for them.

Q **What would you like to be doing right now if you weren't at work considering these questions?**

A I would be out running or cycling. I have a tendency to become fixated on work and exercise is my release. Although I also often do some of my best strategic thinking while exercising!

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

A Nothing at all. Life is about learning from your mistakes (we all make them!) and making friendships along the way. I've worked with many brilliant, inspiring, crazy people over the years and I'm delighted that so many of them are still friends. I wouldn't change where I am now for anything and you can't remove any of the building blocks that got you there.

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

A Unfortunately some of the best stories can't be told in print. Best to corner me and ask this question after a few drinks! One of my first work trips on a Russian dispute was among the most exciting though and ignited my passion for Russian / CIS work. From being picked up by helicopter in Nice and doing a flyby of the opposing oligarch's (then) largest yacht before landing on a helipad built into the cliffs, to an underground car park full of Ferraris and the pool being used by a who's who of influential Russians over to watch a football match - it was quite a trip.

Q **If you had a money tree and could afford never to work again, would you and why?**

A No chance. If I had too much time on my hands I would just wind myself and my family up. I'm not sure how they put up with me as it is. It has been said that I can occasionally be competitive and work provides the perfect outlet for my competitive juices. Without it I dread to think what inane things I would find to be competitive about around the house.

Q **Other than seeing family and friends, what did you miss most during the COVID-19 restrictions?**

A I really missed celebrating with colleagues and clients after reaching a notable milestone in a case or winning a hearing. It is great to go out for dinner with the team after a particularly busy period and just have a laugh together. We all tried to find substitutes for that over Zoom but there are some things you just have to do in person.

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

A My dog Juno. My wife is a cat person and had always said I was in the office too much to look after a puppy. I had my name down within 24 hours of the first lockdown being announced!

Q **What does the perfect weekend look like?**

A Sitting in front of the fire with the latest edition of the White Book. In truth I have 5 kids so my weekends are always noisy and hectic but I wouldn't have it any other way. Except for trampoline parks, they are hell on earth.

Q **Which famous person would you most like to invite to a dinner party?**

A Sir Ranulph Fiennes. The stories he must have to tell. Not only was he the first person to visit both the North and South Poles by surface means and climbed Everest at 65, he also managed to lose his car in Berlin because he was too drunk to remember where he had parked it and was kicked out of the SAS for blowing up an ugly dam built by a film studio in a pretty Wiltshire village. You need to be pretty robust to do what we do but he is the pinnacle.

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

A Don't take yourself too seriously. You could be doing this for 40 years so make sure you have fun doing it. And start building your network of like-minded lawyers as early as possible. You will definitely make friends for life.

FORUM SHOPPING FOR GDPR CLASS ACTIONS

Authored by: Michael Jacobs - Locke Lord

Overview

The UK incorporated its own version of GDPR into domestic law in 2018, with further modifications made following Brexit. The provisions dealing with the jurisdiction(s) in which data subjects may pursue judicial redress do not constitute a complete code and are not so clear-cut. This potentially allows for forum shopping by UK-based data subjects who wish to pursue claims against data controllers and processors. As there is still great uncertainty on whether class actions can be pursued in the English Courts for data breaches (particularly following the Supreme Court's recent judgment in Lloyd v Google [1]), some claimants may be bold enough to pursue their claims outside the UK.

Background

The rights of individuals with respect to their personal data are governed in the UK by:

the General Data Protection Regulation ("GDPR"), now applied in the UK through the Data Protection Act 2018 ("DPA 2018") as amended, referred to as the "UK GDPR"; and

- the Data Protection Act 1998 ("DPA 1998") for all processing prior to 25 May 2018.
- Data breach claims are typically pursued in respect of:
- one-off data breaches, such as cyberattacks or security lapses where several individuals' personal data is compromised (e.g. the British Airways and Marriott International claims); or
- conduct over a sustained period of time by a data controller or processor that has involved unlawful processing or some other recurring breach to the detriment of data subjects (e.g. the Safari workaround allegedly operated by Google, which was the subject of Mr Lloyd's claim).

Under GDPR, the original text of Article 79(2) provided that:

"Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence […]"

1 On 10 November 2021, the Supreme Court held that Mr Lloyd cannot pursue a representative action against Google for breaches of the Data Protection Act 1998 in connection with it collecting browser generated information of over 4 million iPhone users between 2011 and 2012 (the so-called "Safari workaround").

In other words, GDPR made it mandatory to sue in the Member State where the controller or processor is located, subject to a very useful option for claimants to sue in their home Member State. Curiously, "Member State" only covers EU Member States, so where controllers or processors had no establishment in the EU [2], there was never anything in principle under GDPR to stop data subjects suing them in countries outside of the EU.

However, the creation of UK GDPR had the effect of deleting Article 79(2) altogether. [3] The only provision addressing jurisdiction for compensation claims under UK GDPR [4] is s.180(1) DPA 2018. Yet this is not a mandatory jurisdiction provision – it simply confirms that claims for compensation under UK GDPR may be brought in England, Wales, Scotland or Northern Ireland as applicable.

Why consider forum shopping?

Most data subjects will be inclined to sue in their home jurisdiction for several reasons, including convenience, familiarity with local court processes and more established jurisprudence/ experienced judges.

Nevertheless, forum shopping could become more prevalent in due course for a number of reasons.

First, the Supreme Court's decision in Lloyd has almost entirely closed the door on class actions relating to data breaches being brought as representative opt-out actions in England (at least where the damages suffered vary between each affected individual). Although litigation pursuant to a group litigation order (GLO) is theoretically possible, this can be almost impossible to manage in cases with very large numbers of individual claimants.

Secondly, data processing is rarely a domestic matter in the online age. Controllers and processors are located all over the globe and can – at least in theory – be sued in their home jurisdictions.

Thirdly, data subjects will not always have (validly) signed up to terms and conditions with controllers/processors that contain an exclusive jurisdiction clause in favour of the English courts, so they may be free to sue in different forums. For example, until 2019, Google's terms of service were subject to the courts in Santa Clara County, California, even for UK users.

A warning shot in California

This year has already seen a UK-based data subject bring a class action outside the UK/EU. Although this attempt failed, it may be a sign of things to come.

In March 2021, Hugo Elliott, an English citizen, commenced proceedings against PubMatic Inc. in California, USA (which is the latter's principal place of business) on behalf of a class of UK residents[5]. He alleged that PubMatic had placed unique identifying cookies on individuals' devices to monitor and track their online activities, in breach of UK GDPR.

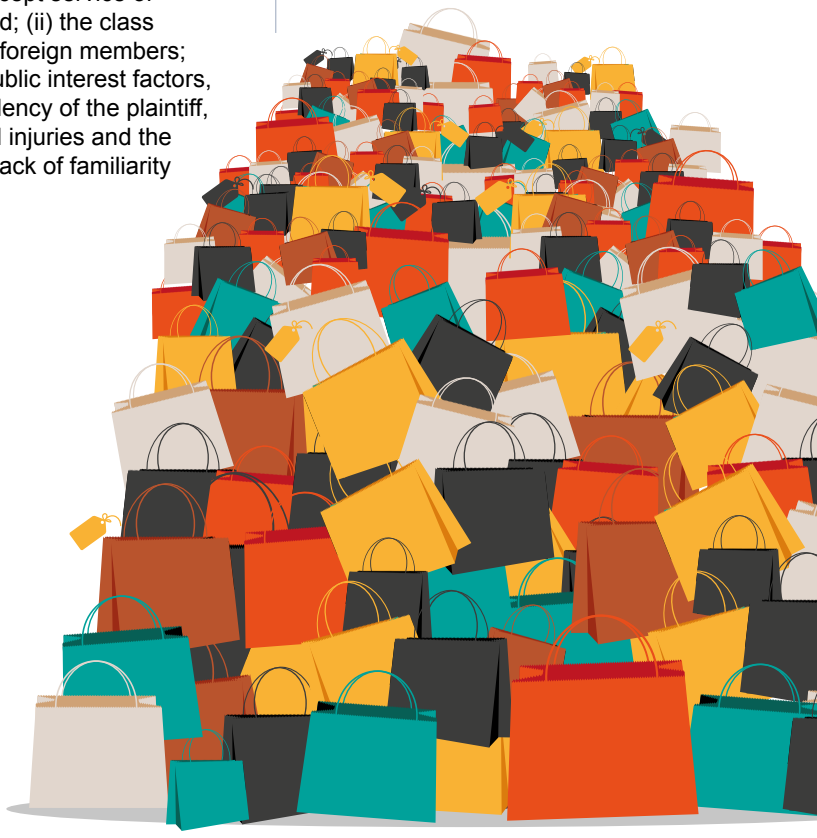
The claim was dismissed in August 2021, on grounds of forum non conveniens (with the court recognising that "there exists an adequate alternative forum", i.e. England) and international comity. The Court placed considerable weight on (i) PubMatic being willing to accept service of process in England; (ii) the class comprising solely foreign members; and (iii) various public interest factors, including the residency of the plaintiff, location of alleged injuries and the California court's lack of familiarity with English law.

Looking ahead

Despite Mr Elliott's claim failing in California, creative claimants based in the UK and their lawyers may be minded to explore foreign jurisdictions to pursue their claims, particularly if:

- following the Supreme Court's decision in Lloyd, claimants and practitioners are struggling to find alternative mechanisms by which to bring such claims in the UK;
- a defendant is not prepared to accept service in the UK; [6] and/or
- a foreign court considers itself competent to interpret and apply UK GDPR (which is not inconceivable in an EU member state).

It would take a bold claimant to roll the dice abroad given that (i) most foreign judges will not want to step on the toes of their UK counterparts and (ii) there is a paucity of settled law on the interpretation and effect of UK GDPR. Nevertheless, prospective defendants should not completely discount the risk of seeing further test cases issued outside the UK in the near future.



2 GDPR can apply to data controllers or processors not established in the EU – see Article 3(2).

3 It is somewhat unclear whether Article 79(2) can be invoked for claims which (i) were commenced after its deletion from UK law and (ii) concern historic breaches of GDPR that occurred while Article 79(2) was still in force in the UK.

4 Such claims brought under Article 82 UK GDPR.

5 Elliott v. PubMatic, Inc., 2021 U.S. Dist. LEXIS 154053 (N.D. Cal. Aug. 16, 2021)

6 Conversely, threatening foreign proceedings could ultimately force a defendant's hand in agreeing to be served in the UK.

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SANCTIONS COMPLIANCE IN THE WORLD OF CRYPTOCURRENCY

AN ASSET CLASS RIDDLED WITH FRAUD, RISKS AND SCAMS

Authored by : Priyanka Kapoor – PCB Byrne

Virtual currencies have not only arrived but have become a major player in the global economy. The meteoric rise in their importance and the inherent material risks are not lost on the regulators. Cryptoassets by design facilitate the anonymous or pseudonymous conduct of international commercial transactions, making them the target of choice by sanctioned actors and cybercriminals to channel and hide the source of their financial transactions, evade sanctions and launder money. In the post-pandemic world, with the shift to remote working, ransomware attacks have exploded in volume and criminals have come to rely on digital currencies to force victims to pay millions of dollars to regain access to their own files and to prevent leaks of stolen data.

Deficient customer screening compliance programmes in peer-to-peer marketplaces or over-the-counter traders operating on exchanges have only added to the attractiveness of the digital wild west. Given that the virtual currency is decentralised, government agencies across the world have struggled to tame the underregulated world of cryptocurrency and its use for nefarious activities.

Due diligence has forever been the bedrock of sanctions compliance. A risk-based assessment followed by internal policies and procedures specific to the industry and market risks aid in the identification and screening of sanctioned customers and counterparties. But the anonymity or pseudonymity offered by cryptocurrency makes sanctions significantly more difficult to comply with and enforce.

Recent trends indicate that the regulators have opted for an all-in approach wherein irrespective of whether a transaction in question involves fiat or digital currency, the compliance obligations remain the same, sending a clear message to the cryptocurrency players that they will be expected to comply with the sanctions regime in the same way as other industries.

Businesses that allow digital currency payments or those that are involved in the digital currency market or sector (including banks) need to consider how to implement appropriate risk-based compliance measures that address the specific vulnerabilities of digital currency. Due diligence and controls to determine whether digital currency has been tainted by sanctionable or criminal cyber activity may be necessary for certain transactions or businesses. In the current climate of the global pandemic, businesses of any size that utilise the internet (even if only for e-mail), may face an increasing risk of ransomware attacks, which raise cyber-related sanctions compliance concerns. Those involved in the digital currency sector, including companies that facilitate or engage in online

commerce or process transactions using digital currencies, may be more likely to face malicious cyber-enabled attacks, incurring increased sanctions compliance risks.

The US has been at the forefront of establishing a cyber-focused economic sanctions regime. The U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") has introduced a variety of sanctions targeting malicious cyber-related activities, under OFAC's "Cyber-Related Sanctions Program", as well as Executive Order (EO) 14024, Blocking Property with Respect to Specified Harmful Foreign Activities of the Government of the Russian Federation, issued on 15 April 2021. On October 15, 2021, OFAC issued "Sanctions Compliance Guidance for the Virtual Currency Industry" (the "Guidance").

The Guidance is an important step in meeting the need for a robust sanctions compliance program and increases the scrutiny of digital currency transactions. A risk-based compliance programme has the potential to mean the difference between private caution and a public penalty, with far-reaching consequences for the investors. However, the recommended best practices do not differ from the existing guidance for compliance programs. At best, they set out the expectations of OFAC.

In March 2021 HMRC, the UK regulating body, released a manual outlining the tax consequences of different types of crypto-asset transactions. [1] Meanwhile, the Treasury is also reviewing evidence from consultation on how to regulate crypto-assets.

Risk-Based Compliance Program

A risk-based compliance program is tailored to the specific company and / or end user, and typically considers the types of products and services offered, the markets and geographic locations served, the company's size and sophistication and the types of intermediaries and customers. It also includes the established best practices for KYC checks.

In addition, a robust compliance program for players in the digital currency industry should ideally incorporate:

- Screening information to detect activity involving sanctioned jurisdictions. Location information acquired with the use of geolocation and IP blocking tools (including IP misattribution screening) can identify parties operating in sanctioned jurisdictions;
- use of blockchain analytics services can help mitigate risks associated with dealing with sanctions-listed addresses and avoid potential sanctions violations;
- adopting a compliance culture that promotes voluntarily self-disclosing any violations and carrying out an internal investigation to understand the reason for the violation, leading to implantation of new internal controls to address the identified weakness and avoid future violations;
- formulating a list of potential red flags that help address risks associated with the factors considered in the risk-based approach, like deficient KYC checks resulting in incomplete client information or a transaction with a VPN or digital currency address linked to a sanctioned person or jurisdiction. This will encourage a compliance culture and empower employees to raise an alarm in a timely manner;
- To the extent that some industry players do not fall within the realm of regulated financial institutions, requiring them to comply with anti-money laundering regulatory requirements and incorporating robust KYC procedures; and
- Voluntary self-disclosure to the relevant regulator, if the company becomes aware that it has engaged in an unauthorised transaction or dealt with a sanctioned person or jurisdiction.

Essential components of a sanctions compliance programme:[2]

The key issues every business (especially those in financial services) should consider when evaluating a virtual currency industry player are centred on the fundamentals of any compliance program, namely: management commitment, risk assessment, internal controls, testing and training. Enquiries may include:

- whether the virtual currency industry player has established an integrated compliance culture throughout the organisation;
- whether the management is actively involved with the compliance and risk mitigation and has established incentives to incorporate compliance objectives;
- whether the policies and procedures are aligned with the business' operating model, products and markets it caters to;
- whether there is an internal protocol for periodic compliance monitoring and testing to identify potential weaknesses; and
- whether the crypto asset firm, for example, is registered with a regulator (if applicable).

Looking ahead

Law enforcement and regulators are focused on arresting the misuse of cryptoassets for nefarious activities, without placing unnecessary limits on the technology itself. Sanctions regimes face the challenge of attempting to address some of the most complicated compliance issues without a "one size fits all" solution for mitigating these sanctions-related risks. For market players in the virtual currency industry, therefore, a combination of a risk-based approach and a voluntary self-disclosure of potential

1 https://www.gov.uk/hmrc-internal-manuals/cryptoassets-manual

2 Fig: https://home.treasury.gov/system/files/126/virtual_currency_guidance_brochure.pdf

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ROBERT CHRISTIE
PARTNER
BEDELL CRISTIN JERSEY PARTNERSHIP

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

A I say I'm a lawyer. My days of claiming to be a matador are long gone.

Q Why did you choose this profession?

A One morning when I was 14 I was arguing about something with my mum. She said that I ought to become a barrister as people would pay me to be argumentative and I wouldn't feel the need to argue with her. I thought it was the first good point she had made all morning.

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

A Acting (in BVI) for an Irish bank, persons unknown had used a BVI company to defraud the bank of the ownership of a Ukrainian shopping centre. We got a Norwich Pharmacal order forcing the BVI company's registered agents to disclose the identity of the BVI company's UBO. Tearing open the disclosure envelope in the registered agents' car park, we discovered that the culprit was Aleksandr Orlov. The name was familiar, but why? We raced back to the office to google it, only to discover the horrifying truth: our client had been swindled by the meerkat from Comparethemeerkat.com. (When we informed our Ukrainian counterpart, it took a while to explain who the meerkat was before he calmly reassured us that it was just a coincidence, this meerkat was not behind the fraud).

Arresting an oil tanker in the port of New Orleans was also quite exciting.

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

A I can't think of anything. Spending 6 years at the English bar and 3 ½ years in BVI before moving to Jersey does mean your career slips a few rungs back down the ladder every time you move; but I wouldn't trade the experiences I've had.

Q What is the most challenging/most rewarding aspect of working on dispute resolution cases?

A For me the most challenging aspect is trying to come up with a strategy which achieves a result for the client at a cost and within a timeframe they can afford. Getting a result within a year or so is frustratingly rare, although I managed it in 2019-2020 on 2 or 3 cases where for once I was acting for Davids against Goliaths – those cases genuinely changed my clients' lives, which felt massively rewarding.

Q If you had a money tree and could afford to never work again, would you and why?

A Yes – otherwise I'd get bored – but I wouldn't be a lawyer. I don't know what I'd do. It's a bit late to become a matador. I have a bad knee.

Q What does the perfect weekend look like?

A Rafting the orange river (the stretch which forms the border between South Africa and Namibia) with my kids would be up there. That would be a long weekend. In a perfect world my wife would feel adventurous enough to come too.

Q Which famous person would you most like to invite to a dinner party?

A Jeremy Corbyn, so I can prove to my wife once and for all that I look nothing like a young Jeremy Corbyn.

Q Now the world is beginning to open up again, what are you most looking forward to doing?

A Many things, but most of all being able to take my kids on holiday somewhere other than Scotland (not that Scotland isn't the best country in the world).

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

A The best advice I've ever been given was to make a point of taking responsibility when you've got something wrong. It always draws the sting – there no surer way to lose the respect of others (judges included) than trying to escape blame you should be owning.

DAMNED IF YOU DO, DAMNED IF YOU DON'T: CULPABILITY FOR ACTIONS OF FOREIGN SUBSIDIARIES

Authored by: Sue Millar, Harriet Campbell, Jo Jones, Emily Rivett - Stephenson Harwood

The Fundão Dam near Mariana, in Brazil was owned and operated by Samarco Mineração SA, and was designed to accommodate waste resulting from the extraction of iron ore. On 6 November 2015, the dam collapsed, triggering the release of more than 40 million cubic metres of mining waste. This slurry travelled 620 km downriver, destroying multiple villages and over 3000 acres of forest, decimating entire fish populations, and killing nineteen people. The polluting waste eventually found its way, through the Doce River, to the Atlantic Ocean over 400 miles away destroying, damaging or contaminating everything in its path. To date, it remains Brazil's worst environmental disaster.

Samarco Mineração SA was owned as a joint venture between mining giants Vale (headquartered in Brazil) and BHP (an Australian company). Given its location, and the global web of corporate ownership, the disaster has resulted in multiple legal actions being brought worldwide, by both impacted individuals and shareholders and investors in Vale and BHP.

UK High court history

In November 2018, dissatisfied with the redress available in Brazil, over 200,000 Brazilian claimants (the Município de Mariana) initiated proceedings in the UK, seeking compensation of £5 billion. The claim was brought against BHP Group PLC, a UK company (who owned BHP's 50% stake in Samarco Mineração SA) and BHP Group Limited, an Australian company linked with BHP Group PLC in a dual listed arrangement.

The Defendants argued that the parallel proceedings in Brazil meant that any concurrent UK action would be "irredeemably unmanageable". Mounting an abuse of process argument, the Defendants applied for strike out, or alternatively a stay of proceedings.

The High Court granted the Defendant's application, finding that many of the Claimants were seeking identical remedies in Brazil, and over 150,000 of them had already received compensation by way of settlement. The High Court stated that managing the large claim, particularly where the first language of many of the Claimants was Portuguese would be like "trying to build a house of cards in a wind tunnel".

The Court of Appeal denied permission to appeal the High Court judgment, but the Claimants applied to reopen the refusal under the rarely used provision set out in CPR 52.30.

UK Court of Appeal involvement

In a "monumental judgment" [1] the Court of Appeal reopened the refusal to grant permission and went on to grant permission to appeal.

CPR 52.30 confirms that a refusal will not be reopened unless:

(i) It is necessary to do so in order to avoid real injustice;

(ii) The circumstances are exceptional and make it appropriate to reopen the appeal; and

(iii) There is no alternative effective remedy.

In its judgment [2] the Court of Appeal determined that in denying permission to appeal at first instance, the court had not adequately grappled with the claimants' essential challenges. Although the test was a stringent one, the Court of Appeal was satisfied that in this case, the parameters had been met.

The Court of Appeal held that the case was of "exceptional importance", and that the "combination of circumstances" was "truly exceptional". Whilst the impact of this decision will not be properly understood until the Court of Appeal decides the substantive appeal, the court's conclusion that there was a "real prospect of success" on appeal is noteworthy.

ESG – an exceptional area?

Between the High Court Fundão Dam judgment of November 2020, and the Court of Appeal's judgment in July 2021, sits the Supreme Court's decision in Okpabi v Royal Dutch Shell. [3] Both cases involve large corporations having to litigate in England, in connection with activities of overseas subsidiaries which resulted in environmental havoc. Could it be that environmental, social and governance ("ESG") disasters are axiomatically "exceptional", resulting in high levels of judicial scrutiny?

In Okpabi, the Supreme Court held that two communities in Nigeria could bring proceedings in the English courts against Royal Dutch Shell and a Nigerian operating subsidiary for negligence, following widespread environmental damage and contaminated water sources from a Nigerian oil spill. The Supreme Court emphasised that the number of circumstances in which a parent company may owe a duty of care towards the victims of a tort perpetrated by overseas subsidiaries are various and should not be limited.

There are many reasons why overseas claimants, such as those in Okpabi and the Município de Mariana may wish to sue an overseas subsidiary and a UK parent in the English courts. To bring such a claim successfully, a claimant will have to establish jurisdiction and argue that there is a real issue to be tried against the UK parents. Following Okpabi, the threshold for establishing this has arguably been lowered, although clearly each case turns on its own facts. Claimants also need to consider the procedural mechanism by which a claim can be brought. In the Fundão Dam case, the inherent "unmanageability" of the UK and Brazilian proceedings operating in parallel remains to be resolved. Further, the Court of Appeal has recently rejected an attempt by the claimants in an environmental remediation claim to bring their claim on a "representative basis" under CPR 19.6. In Jalla & Anr v Shell International Trading & Anr [4], the court concluded that the circa 28,000 claimants in this case did not meet the necessary "same interest" test, a requirement for the court allowing such a claim to be pursued in the name of one or more "representative" claimants on behalf of a group.

The future for ESG claims

The jurisdictional threat to large companies facing overseas ESG issues is not diminishing. Because environmental threats often have global consequences, multinational companies will face difficulties in trying to separate themselves from the actions of foreign subsidiaries. While the English courts are currently grappling with the mechanisms by which such claims can be brought, the indication from judicial decisions to date is that such claims are, in theory at least, viable. Whether or not they succeed will depend on the facts of each particular case, leaving the scope of liability for future, similar claims yet to be clarified.

1 Tom Goodhead, PGMBM Managing Partner, bringing the claim on behalf of the Município de Mariana
2 Município de Mariana and others v BHP Group PLC [2021] EWCA Civ 1156
3 Okpabi and others v Royal Dutch Shell PLC and another [2021] UKSC 3
4 [2021] EWCA Civ 1389

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THE RISE OF SOVEREIGN ASSET TRACING

Authored by: Lorna van Oss and Ramon Ghosh - Control Risks

While a return to some form of commercial normality is anticipated in a small number of wealthy nations, the economic impact of the COVID-19 pandemic will continue to be felt across the globe. The effect has been particularly acute for the debt profiles of many nation states, especially in the developing world. According to World Bank estimates, in 2020 government debt of emerging markets and developing economies reached 60.8% of GDP, an increase from 52.1% in 2019.

As a result, disputes involving sovereign states are on the rise. Now more than ever, understanding a sovereign state's asset profile will form a critical part of the dispute resolution strategy for any party pursuing a remedy for contract frustration via litigation or alternative dispute resolution.

Navigating enforcement challenges

Enforcing an award against a sovereign state presents unique challenges for counsel and investigators. The sovereign immunity doctrine protects most state-owned assets – including properties held by diplomatic missions abroad and central bank assets – from being seized.

That said, sovereign immunity does not typically extend to a state's commercial activities, such as:

- The acquisition of immovable property
- The purchase of stakes in private companies
- Investments in government-owned airlines
- The repayment of commercial loans
- Military procurement

A well-planned asset recovery strategy will therefore prioritise the identification of assets most likely to fall beyond the protections of sovereign immunity. Investigators will consider an asset's commercial use, liquidity, transferability, location and prestige value to inform how resources can be allocated in the most cost-effective manner.

SOE Ownership and proximity

Another challenge involves potentially seizeable assets that are not directly owned by a sovereign state, but rather by a separate legal entity such as a state-owned enterprise (SOE). SOEs often own a state's most valuable assets and many have footprints outside their national jurisdictions.

In such a case, a party must demonstrate that the entity is sufficiently interconnected with the state that its assets can be seized to satisfy

an award against the sovereign. For example, in July 2019, the US Court of Appeals found that Petróleos de Venezuela (PDVSA), Venezuela's state-owned oil company was "so extensively controlled" by the Republic of Venezuela that it was an alter ego of the sovereign, allowing the creditor to attach PDVSA's assets in the US.

Information obtained from the public domain can help legal teams to build alter ego arguments by unpicking the corporate structures used to hold government assets or showing the extent of the role played by the sovereign in the management of SOEs. Targeted enquiries among contacts with direct knowledge of a target SOE's internal workings can also be critical to understanding its management and level of independence, especially in jurisdictions where public records are not widely accessible.

Asset mapping

A crucial early step in any sovereign asset trace is to map out the assets that are likely exempt from traditional sovereign immunity protections. The most attractive targets tend to be immovable assets, such as real estate located in debtor-friendly jurisdictions – which, depending on the award, would typically include common law and Western European jurisdictions – and movable ones such as vessels and aircraft that travel outside of the country's national borders.

Immovable assets

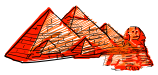
Immovable assets, such as real estate held outside the sovereign entity's home jurisdiction, are particularly attractive as they are usually exempt from state immunity. This is in marked contrast to liquid assets, for which targeted governments have often successfully argued in court that they cannot be seized as they are being used for sovereign purposes.

Investigators can leverage transparency initiatives such as the UK's 2018 Registration of Overseas Entities Bill, which has created a publicly accessible register of beneficial owners of overseas entities that own UK land, to link sovereign states to immovable assets that can then be frozen. Planning applications or tenders for improvement works can also be used to connect property to a government and provide further context on its use. In the tax dispute between Cairn Energy Plc and the Government of India, the former successfully used public tender documentation to win an application in the French courts to freeze EUR 20m of property in July 2021.

Movable assets

Movable assets such as aircraft or vessels are another desirable asset class. In addition to the monetary value they hold, and the possibility of seizing them as they move into friendly jurisdictions, they may also hold symbolic importance for the country.

A pertinent example is the seizure of a Falcon 7X aircraft used by the Republic of the Congo's president Denis Sassou Nguesso as it landed in the airport of Bordeaux in June 2020. The French courts authorised the seizure of the plane to help satisfy a USD 1.5bn debt owed by Congo-Brazzaville to Lebanese businessman Mohsen Hojeij. Hojeij's legal team had successfully argued that the plane fell outside of diplomatic immunity as it was mostly used by President Denis Sassou Nguesso for personal trips rather than official visits.



Other assets

Beyond the asset classes discussed above, other attractive assets include:

- Foreign subsidiaries of SOEs
- A sovereign state's shareholdings in foreign companies
- Shipments of valuable export goods documented by bills of lading
- Overseas accounts used by the sovereign

For creditors, overseas bank accounts held by government are, at face value, appealing targets. However, banking privacy laws in most jurisdictions prevent private outfits from accessing bank account details. One potential work around is to look for accounts used for specific activities such as servicing interest payments on bonds it has issued or paying overseas royalties.

By reverse engineering the receipt of funds by, for example, a bondholder, we can identify the account used to make these payments and thus associate it conclusively with the sovereign, regardless of the entity that is legally registered as holder of the funds. This allows investigators to leap over complex corporate structures built around shell companies and attach the assets directly to the debtor.

Obtaining the most from a client's award

The ultimate goal of an asset tracing exercise is to maximise the funds recovered by a creditor following an award. In cases where a State has few assets held outside its home jurisdiction, or where it has successfully argued in court that they are covered by sovereign immunity, a creditor's best option may be to apply pressure on the State that pushes them towards settlement.

One effective way is by targeting high profile flagship assets. Freezing assets that paralyse an SOE's operations can cut off vital revenue streams for a State and alienate potential business partners who are sensitive to the risks of working with the sovereign debtor. Or, successfully seizing movable assets used by senior government officials, such as the Head of State's private jet, can create embarrassment, gain media traction, and deprive a key decision maker of the use of a luxury asset. These can all be instrumental in bringing the sovereign debtor to the negotiating table, and ultimately forcing it to agree to a favourable settlement for the creditor.

60-SECONDS WITH:

GUS SELLITTO MANAGING DIRECTOR AND CO-FOUNDER BYFIELD CONSULTANCY

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

A I manage the PR and communication aspects of high profile disputes

Q Why did you choose this profession?

A I like working on difficult and highly polarised PR issues. Litigation PR gives me the chance to do this

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

A I helped to force a former prime minister to apologise to a client I was representing in a high profile dispute on national TV. We achieved this through applying aggressive media pressure.

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

A I wouldn't change anything. The biggest lessons I've learnt are from the mistakes I've made along the way.

Q What is the most challenging/most rewarding aspect of working on dispute resolution cases?

A Protecting my client's reputation in the court of public opinion, win or lose in the legal case

Q If you had a money tree and could afford to never work again, would you and why?

A I get bored too easily not to work. Maybe a more part time role doing what I do.

Q What does the perfect weekend look like?

A FT Weekend, Classic FM, long walks, Italian food and good company

Q Which famous person would you most like to invite to a dinner party?

A The late, great actor and producer James Gandolfini. I'm watching The Sopranos for the first time and I'm captivated by his acting.

Q Now the world is beginning to open up again, what are you most looking forward to doing?

A (Hopefully) spending a month in Australia early next year

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

A The court of public opinion can be as important as the court of law in managing your client's reputation

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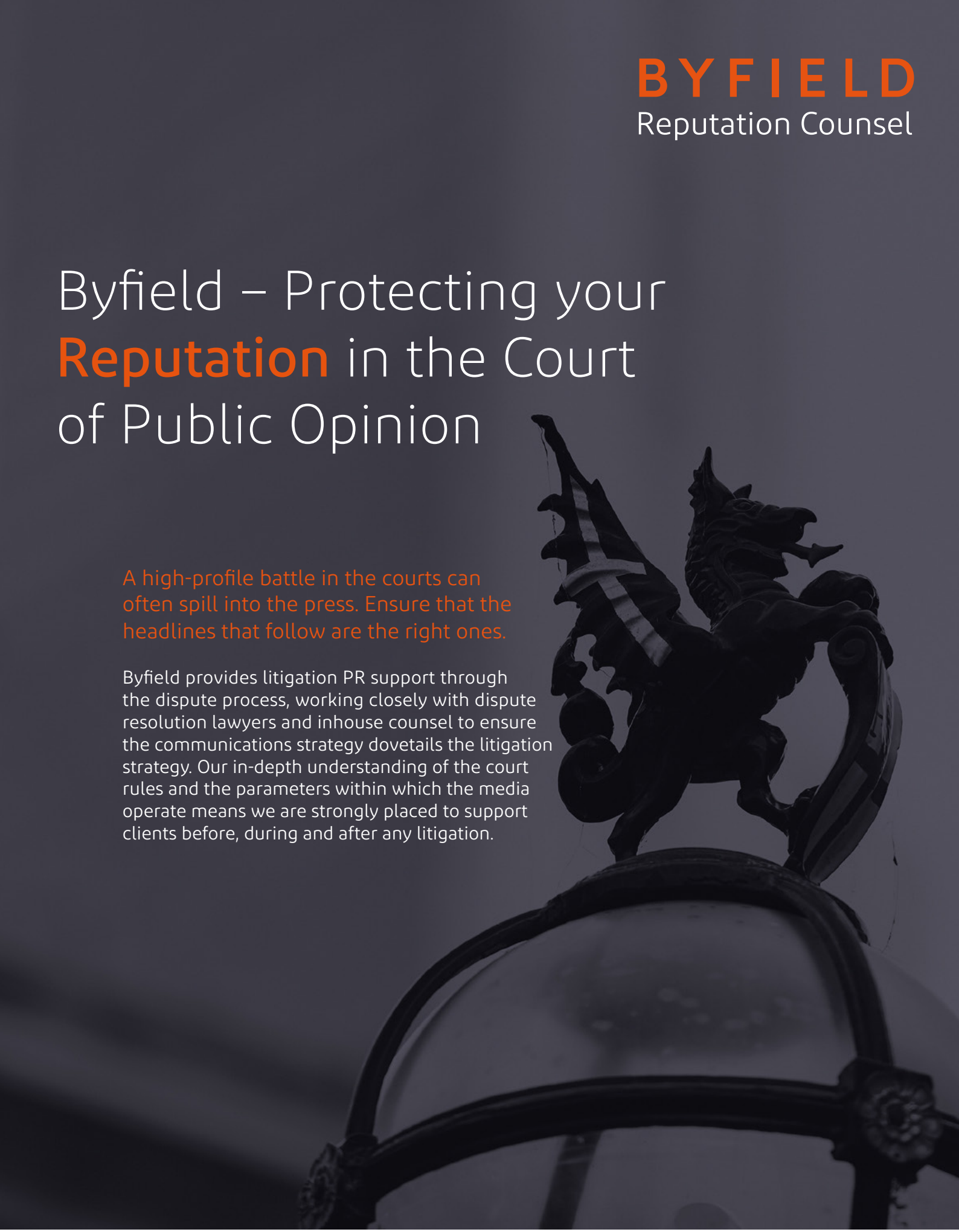

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THIRD-PARTY FUNDING IN SINGAPORE: EFFICIENT RISK ALLOCATION IN TROUBLED TIMES

Authored by: Mubin Shah and Kyle Yew - Joseph Lopez LLP

INTRODUCTION

When deciding whether to pursue a legal claim, parties often ask - "do we have the budget for this?" This question is revisited even after dispute resolution proceedings have commenced, due to changes in a party's financial circumstances, unknown strategies deployed in the legal proceedings, and the fluctuating economic climate (e.g. insolvency risks due to the COVID-19 pandemic).

One way to allocate risks and manage financial exposure of legal proceedings is via third-party funding ("TPF"), where an unrelated entity steps in to fund the legal proceedings in return for financial gain. This article features the recent expansions to Singapore's TPF framework, one of the many features cementing Singapore's attractiveness as an international dispute resolution hub.

GROWTH OF TPF IN SINGAPORE

TPF used to be prohibited due to the common law principles of maintenance and champerty. In short, the concern was manipulation of the legal system arising from frivolous or vexatious litigation if third parties could profit from litigation in which they had no legitimate interest.

However, there is a competing policy concern of access to justice. This is especially important for aggrieved parties who are left with little or no funds to pursue legal proceedings against a counterparty whose conduct led to the former's lack of finances.

Legislative amendments were thus introduced in 2017 to create a TPF framework where qualified funders were allowed to fund limited types of legal proceedings (i.e. international arbitration proceedings, and court and mediation proceedings connected with international arbitration proceedings). The TPF framework was later extended to certain insolvency-related proceedings in 2020 (e.g. claims relating to undervalue transactions, unfair preference transactions, and fraudulent trading).

Stakeholders have since expressed favourable feedback to the Ministry of Law for the TPF framework. In particular, commercial parties appreciate additional options for financing their legal proceedings, legal and arbitration communities have likewise responded positively, and professional funders have since increased their presence in Singapore. With the "final catalyst" being the financial disruptions due to the COVID-19 pandemic, further TPF developments were only a matter of time.

THE NEW DEVELOPMENTS

From June 2021, TPF was expanded to include:

1. Domestic arbitration proceedings and court proceedings arising from or connected with domestic arbitration proceedings;

2. Proceedings commenced in the Singapore International Commercial Court ("SICC") so long as they remain in the SICC, and appeals arising from decisions in such SICC proceedings; and

3. Mediation proceedings relating to any of the above.

We discuss three of the many benefits from these developments.

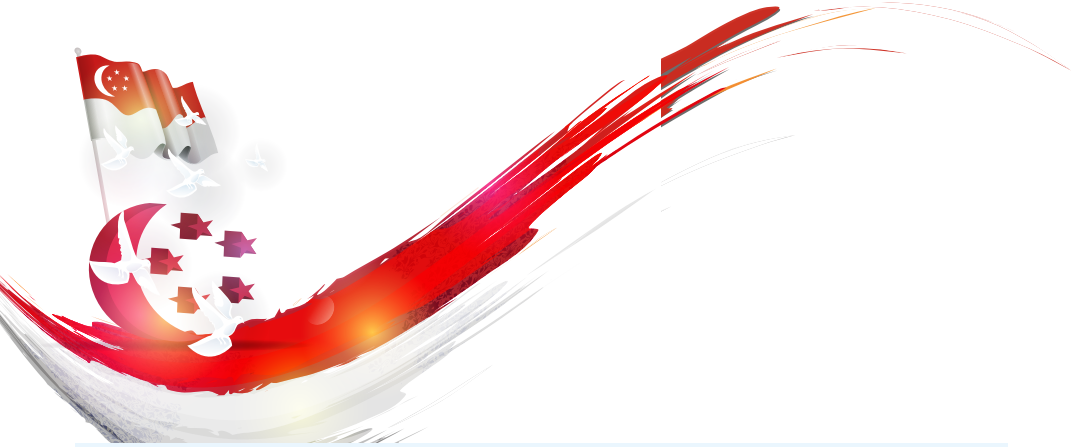
First, it is increasingly common for disputes to be resolved via domestic arbitration (as compared to international arbitration). Where parties have their place of business within Singapore and a substantial part of their contractual obligations are to be performed within Singapore, it is not uncommon for parties to opt for domestic arbitration to resolve disputes. One example is domestic construction projects for large public infrastructure (e.g. housing and transport facilities). The stringent labour restrictions and increased material costs during the Covid-19 pandemic have stalled many projects. Aggrieved contractors/suppliers, who are out of pocket from having performed the works/supplied the materials, now have a practical alternative to finance their pursuit of meritorious claims.

Second, the TPF framework now expressly includes SICC proceedings, which usually involve high-value international commercial disputes. Notwithstanding the availability of international arbitration, as an alternative, parties may prefer resolving disputes in the SICC for its court-based mechanism to avoid certain problems that are associated with arbitrations (e.g. delay in proceedings, less developed precedents/jurisprudence, higher upfront costs, and the general absence of appeals). Further, parties may be drawn to the SICC for its panel of internationally renowned judges from both common law and civil law jurisdictions. TPF for SICC proceedings thus allows parties to manage the financial burdens of pursuing their claims in the SICC, and thereafter moving quickly to enforce the judgment obtained.

Finally, including mediation proceedings as one of the permitted TPF categories is helpful to parties who prioritise confidentiality and the preservation of commercial relationships. Arbitration/litigation proceedings are commenced for various reasons, one of which includes drawing the counterparty to the "negotiating table" to reach a settlement. It is also common for parties to attempt mediation after commencing arbitration/litigation, and resolving the dispute without going through the entire adversarial arbitration/litigation process. This mode of resolution may be preferred by listed companies (who do not wish to affect investor confidence), especially if they are reliant on the counterparty for future business (e.g. the counterparty is the sole supplier of a certain commodity that is vital for the aggrieved claimant's business). Even if aggrieved claimants can independently finance their legal proceedings, they may wish to utilize TPF instead so that cashflow can be channeled towards their other ongoing transactions instead of legal proceedings.

CONCLUSION

The developments in Singapore's TPF framework provide an important but understated tool for all stakeholders especially in the current economic climate. By efficiently allocating the financial risk of legal proceedings to a party with deeper pockets (i.e. third-party funders), commercial parties can maximize their chances of recovery on meritorious claims, i.e. "legal assets" which would otherwise go to waste for want of funds. In turn, professional funders have access to increased business opportunities, while legal representatives and other professionals involved in the legal proceedings (e.g. expert witnesses) can be assured that their fees will be accounted for. Parties involved in dispute resolution proceedings in Singapore should thus engage counsels who not only have deep knowledge of the legal issues, but also the commercial expertise to advise on how to resolve the dispute in the most cost-effective way, which includes taking advantage of the expanded TPF framework.



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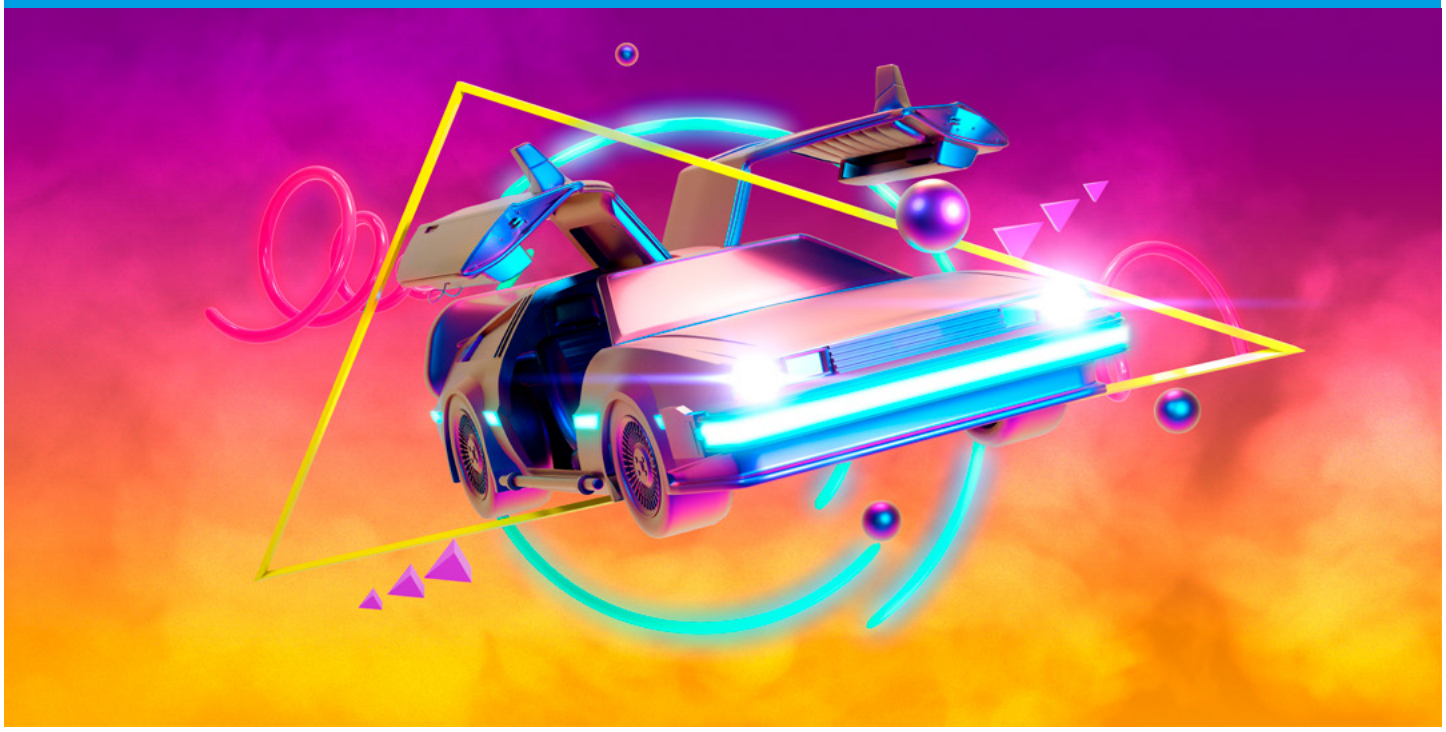
BACK TO THE FUTURE: THE RETURN TO PROMINENCE OF FORUM NON CONVENIENS



Authored by: Fred Kuchlin and Dan Wyatt - RPC

Marty McFly travelled from 1985 to 1955 in Back to the Future; English law is currently embarking on a similar journey in relation to jurisdiction.

A change arising from Brexit has heralded a return to prominence of the doctrine of forum non conveniens, allowing the English Court once again to decline jurisdiction over defendants domiciled in England.

Pre-Brexit position: forum non conveniens challenges less likely to succeed where there was an English party

Before the end of the transition period on 31 December 2020, the English Court had been bound by Article 4(1) of Regulation (EU) 1215/2012 (the Recast Brussels Regulation). That required, subject to some exceptions, that persons domiciled in an EU member state, whatever their nationality, must be sued in the courts of that member state.

In Owusu v Jackson (Case C-281/02) [2005] ECR I-1383, the European Court of Justice (ECJ) considered the application of the forum non conveniens doctrine where the English Court had jurisdiction under the equivalent provision of the Recast Brussels Regulation's predecessor, Council Regulation (EC) No 44/2001 (the Brussels Regulation). The ECJ held that the jurisdiction conferred by Article 2 of the Brussels Regulation was mandatory even without any factors otherwise connecting the case to the member state. In practice, this meant that the English Court would have to accept jurisdiction over the English partyeven if the jurisdiction of another EU member state was not in issue.

The effect of this decision was to make it very difficult to challenge the English Court's jurisdiction over a party domiciled in England. As a result, claimants could sue English domiciled parties as "anchor defendants" over which the English Court could not refuse jurisdiction and then include in the claim other foreign defendants as "necessary or proper" parties pursuant to CPR PD 6B paragraph 3.1 (3)(b). This was commonly used to bring claims before the English Court with relatively limited connections to the jurisdiction.

Although the English Court was not guaranteed to refuse any stay application on forum non conveniens grounds brought by "necessary or proper" parties, it was far less likely to do so if claims against any English defendants were to proceed in England in any event.

Post-Brexit position: a holistic approach to forum non conveniens challenges

Following the end of the Brexit transition period, the Recast Brussels Regulation no longer applies in the UK. Nor is the English Court bound by Owusu v Jackson.

As a result, parties domiciled in England may once again challenge the English

Court's jurisdiction on the basis of forum non conveniens. While the presence of defendants in England is still highly relevant to the question of the appropriate forum, the English Court is no longer automatically obliged to accept jurisdiction over them.

Instead, the English Court will apply a more holistic approach to considering whether to grant a stay on forum non conveniens grounds based on the principles set out in the relevant cases, foremost of which is the House of Lords' decision in Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460. Spiliada confirmed that a stay of English proceedings will be granted if the English Court is satisfied that there is another available forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

The English Court's approach: Spiliada, but make it 21st century

There have been a number of decisions on forum non conveniens during 2021, with many more expected to follow.

One such case is VTB Commodities Trading DAC v JSC Antipinsky Refinery & Ors [2021] EWHC 1758 (Comm), which illustrates how Spiliada is now to be applied in the 21st century. Although this case did not involve any parties domiciled in England, it is illustrative of the approach that the English Court takes when applying the forum non conveniens doctrine. Cockerill J gave the following reasons for finding that Russia would be the most convenient forum:

1. **Russian law:** it was an "unappealing prospect" for the English Court to determine issues of Russian law that are "hotly contentious and indeed in the process of development". In addition, any appeal on an issue of Russian law would be "impeded by being a decision on facts and expert evidence" in which the Court of Appeal would be unlikely to interfere, whereas in Russia the full appeals process would be available.
2. **Irreconcilable judgments:** there was a risk of irreconcilable judgments, which issue needed to be taken "very seriously".
3. **Documents:** translated documents would not be "the ideal vehicle for" determining the defendants' state of mind, motives and actions.
4. **Witness evidence:** although the English court is "well used" to taking evidence through interpreters, there is "no doubt" that interpreted evidence is less easy to assess than evidence in a person's first language.

In view of the above factors, Cockerill J held that the burden of establishing that England was "clearly and distinctly" the most appropriate forum had not been discharged and that the English Court should not exercise its discretion to permit service out.

The future: more stays in favour of foreign proceedings

There is no reason in principle why the English Court should decline jurisdiction over defendants domiciled in England, while the courts of EU member states continue to be prevented from staying proceedings over their own residents. But absent a change in domestic law, or England's accession to the Lugano regime, the renewed prominence of forum non conveniens will remain.

This will inevitably mean an increase in stays in favour of foreign proceedings. It will be harder for claimants to establish English jurisdiction in cases with few links to the jurisdiction. Where significant factors point decisively in favour of another jurisdiction – such as in VTB v Antipinksy – such stays are especially likely to be granted.

Accordingly, practitioners should ensure in appropriate cases that they advise potential claimants of the increased risk of a stay on forum non conveniens grounds. It is, of course, important to identify that risk before issuing proceedings in England by conducting a comprehensive assessment of the connections of the potential claim to England and other jurisdictions. Otherwise, issuing in England may prove a mistake as costly as Marty McFly's when trapped in 1955.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SHAREHOLDER DISPUTES ARE THEY ON THE RISE?

Authored by: Katie Philipson - Stevens & Bolton LLP

For many businesses just surviving the pandemic could (and perhaps should) be hailed a huge achievement. However, as the bumpy economic climate looks set to continue for the foreseeable future, some fall outs between business owners and directors are inevitable and there is likely to be an upturn in allegations of unfair prejudice.

Here we give an overview of recent unfair prejudice cases – highlighting points of note, before outlining our predictions for the future and ways directors might avoid the pitfalls that lie ahead.

Stripping the standing to petition?

The September 2021 judgment in Re Motion Picture Capital Ltd [2021] EWHC 2504 (Ch) serves as a useful reminder that an unfair prejudice petition cannot be avoided simply by transferring the petitioner's shares! Here the petitioner was seeking the purchase of his shares at a price that fairly reflected the value of the company following the unfairly prejudicial conduct of the respondents. Thwarted in their attempts to dismiss the petition, the respondents simply exercised the company's entitlement to transfer the petitioner's shares to themselves as nominees for the company and thus removed the petitioner as a member. However, the respondents failed to appreciate that this did not automatically strip the petitioner of standing to continue the petition.

Section 994(2) contains a requirement for a petitioner to be a member at the time a petition is presented. There is no continuing obligation to remain a member. In assessing whether to allow a petition to continue the court will look at whether there is a continuing interest in pursuing the petition. Unless there is a continuing interest a petition will be struck out. However, given the court's wide discretion under section 996 when considering remedies for unfairly prejudicial conduct, a respondent will rightly face an uphill struggle to show that a petition should be struck out for lack of continuing interest.

It's all about the remedy…

The wide discretion found in section 996 warrants careful consideration. The unwary might assume that a buyout order is automatic enabling the petitioning shareholder to be bought out. However, disgruntled petitioners may seek an order to buyout the respondent(s) as an alternative to exiting the business themselves.

Furthermore, as was demonstrated in Macom GmBH v Bozeat [2021] EWHC 1661 (Ch) in June 2021 even though unfairly prejudicial conduct had taken place, there was no financial loss suffered by the petitioner. When considering what remedy was appropriate the court felt it disproportionate to order the buyout of the petitioner's shares. Instead, the court used its discretion and made an order regulating the future conduct of the company's affairs. In every case the court will look to the over-arching requirement of section 996 so that it makes such order as it thinks fit for "giving relief in respect of the matters complained of".

The impact of good faith clauses

The final case in this overview is Faulkner v Vollin Holdings Ltd [2021] EWHC 787 (Ch) (subject to an outstanding appeal). This case serves to highlight the significant effect the inclusion of express good faith obligations can have on the outcome of shareholder disputes. Here it was held that minority shareholders had been unfairly prejudiced by the actions of the majority shareholder investors who had, amongst other things, excluded the two founding directors from the management of the company. This was despite the Shareholders' Agreement and Articles of Association including specific clauses designed to protect the founding directors' interests and position on the board.

The impact of good faith clauses is a key consideration when setting up a business venture, or taking new shareholders into an existing business. There can be advantages and disadvantages to expressly including a good faith obligation to underpin contractual rights. For those who are subject to agreements containing such an obligation, they breach it at their peril.

Predictions for the future

Directors face a tough time ahead balancing the interests of the business, their shareholders and other stakeholders. We're expecting an uptick in allegations of unfair prejudice as shareholders continue to expect a return on their investment whilst many businesses will be struggling with the economic and social impact of the last 20 months.

Shareholders are increasingly looking to see that their investments are (at least to an extent) ethical. The media focus firstly on corporate social responsibility (CSR) and then the shift to environmental, social and governance (ESG) issues has led to significantly higher expectations amongst shareholders. Not only do directors have to operate business profitably, they must do so whilst satisfying the social mores of their shareholders, employees and other stakeholders. Setting a realistic strategy and delivering on it is much more likely to keep stakeholders happy than failing to deliver on an overly ambitious plan.

Whilst majority director shareholders may think that where discontent arises the solution is to ease out the disgruntled minority or dilute their control, this must be executed with care. Undoubtedly the valuation of many businesses will be lower now than prior to the pandemic. This perhaps gives rise to:

- **The possible buy out of a minority at a price which the majority could not otherwise afford. However, forced buyouts are fraught with risk (even if achievable) as the minority may prefer to hold the shares and await the recovery of the share price.**
- **A need for additional capital through an Open Offer. This can operate to dilute a shareholding if the shareholder declines to participate.**

In both of these areas though the price / valuation is fundamental. It must be a fair value otherwise it will be susceptible to challenge. It is also imperative in an Open Offer scenario to ensure that the directors are acting in the best interests of the company, in accordance with its constitution and any shareholder agreements (including any good faith obligations). It is also necessary to ensure that the directors have the ability to allot new shares.

A failure to carefully analyse intended courses of actions can lead to unintended consequences which open up routes to allegations of breach of contract, breach of duty and/or unfair prejudice.

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PROFESSIONAL SUPPORT LAWYER
HFW

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

A I try not to! I've found saying you're a solicitor is a bit like saying you're a doctor, everyone wants you to have a quick look at something, and it's usually something far outside of my experience as a Disputes lawyer. Explaining that I am a knowledge management lawyer is often a step too far.

Q Why did you choose this profession?

A For the travel opportunities and adventure. I grew up around a few in the profession- they always seemed to be jetting somewhere exotic to deal with one crisis or another, and as a child I benefited by living in exciting places (NZ & HK). I had a slightly glamorised view of the profession – but soon found out that hotels merge into one after a while, and cities aren't best viewed from the window of a cab between meetings!

Q What's the strangest or most exciting thing you've ever done as an investigator (a lawyer; a barrister, etc)? NB: Choose one applicable to you

A I trained as a shipping lawyer, and the first time I arrested a ship was before everything was computerized. We needed to track the ship from her last known port until we found her, coincidently in our waters. Making submissions on the reasons for the arrest and putting forward the evidence to the Admiralty Marshall, and subsequently releasing her after obtaining security for the claim was a pretty stand out day. It was all very quick and very effective, and really showed how dynamic the English courts are.

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

A How long do you have? I've learnt a lot on my journey (and am still) and there are things I would try and do differently- for example, I don't think I really got the life-balance quite right when I was a junior lawyer; it was all about who could bill the most hours, and I don't think that is particularly healthy. It is good to see that the culture of law is changing in that respect, albeit slowly.

Q What is the most challenging/most rewarding aspect of working on dispute resolution cases?

A I love being a KM lawyer and certainly know the law and the court rules etc far better than I ever did when I worked on cases, but I really miss negotiating, and frankly winning. There is nothing better than obtaining judgment in your client's favour, and enforcing it. Now I enjoy finding solutions to problems, and making the business of law more efficient.

Q If you had a money tree and could afford to never work again, would you and why?

A I really think I would – but probably not full time. I enjoy the law, I like lawyers and clients, and wouldn't want to give up. I'd try combining it with a spot of law lecturing, or get my acrylics out and paint- ideally whilst looking at the sea.

Q What does the perfect weekend look like?

A For me the perfect place to spend the weekend is with family at the beach- sandy or stony, rain or shine. The evening would be spent at the ballet, preferably the Royal Ballet, getting lost in the magic of the movement and the music.

Q Which famous person would you most like to invite to a dinner party?

A Can I invite more than one? My first guest would be Lady Hale, I would enjoy hearing about her life and path to the Supreme Court. I imagine Oscar Wilde to be the most entertaining person you could ever have at dinner. Lastly, as a devoted Chelsea fan, it would have to be Didier Drogba, such a great player and personality.

Q Now the world is beginning to open up again, what are you most looking forward to doing?

A Now that we have been able to see family and friends again, and I know I should probably say something more meaningful - but to be honest, I just want to hop on a plane and go somewhere hot for a week. I really need a regular supply of sun. My last holiday was to Dubai in February 2020, so I was very lucky to fit one in just before covid hit the UK, but the tan has now faded and it is time for a top up.

Q If you could give one piece of advice to aspiring investigators (lawyers, barristers), what would it be? NB: Choose one applicable to you

A Know when to ask for help, it is not a sign of weakness - none of us knows everything (not even knowledge management lawyers!).

WHERE WOULD WE BE WITHOUT CLASS ACTIONS?

Authored by: Clare Ducksbury and Natasha Wootton – Case Pilots Ltd

The tide is turning in the world of UK class actions. In the space of just the last three months, we have seen our first three collective actions being given the 'green light' to proceed in the Competition Appeal Tribunal – Merricks v Mastercard, Le Patourel v BT and Gutmann v First MTR South Western Trains & Others. These claims are all trailblazers in the mass claims arena and promote a new wave in the UK justice system. With this comes a renewed energy and enthusiasm for the prospects of collective redress in the UK, at least in the competition space for now.

Most would see these developments in the regime as positive ones, we certainly believe they are, however there are some amongst us who resist the introduction of mass claims on an opt-out basis of this nature, considering it overly litigious or, dare we say, "ambulance chasing". It is therefore important to reflect on where we would be without class actions here in the UK.

Class actions are on an upward trajectory across the globe, having once been considered as typically an American mechanism of litigation. Post-Brexit, it is important to ensure our domestic framework has the ability to protect and compensate consumers here in the UK. Whilst we are seeing the development of collective action regimes in many European countries, in line with the EU Directive on representative actions, this gives rise to a greater need for UK citizens to have access to justice in the same way. Surely, it would be detrimental to our society if a resistance to class actions here left our consumers less protected than those in the EU.

The heightened awareness of corporate behaviour that is to the detriment of consumers, which in part must be informed by the rise in class actions, has also encouraged regulatory review. Recently, the Competition and Markets Authority announced it will place a higher level of scrutiny on UK businesses and strengthen the enforcement of consumer law. Until now, it has often been the case that corporate wrongdoings go unnoticed until such a time as they are brought to light by regulatory findings. An optimist might like to consider the CMA reforms, once implemented, will put an end to businesses breaching competition law. Others will argue that regulatory enforcement acts as a sufficient penalty and deterrent. But will stronger, enforced regulation actually be effective and until we reach a time when corporates are no longer guilty of such conduct, how will consumers be protected?

The emerging CAT's stance on important considerations, such as common issues and suitability, appear to further support the belief that mass consumer claims must be brought on an opt-out basis, sending a strong message that it will no longer be 'business as usual' for corporates making profits from their wrongdoings against consumers.

Outside of the competition space, the prospects for redress on a mass scale are more challenging. Lloyd v Google serves as a reminder of the complexities of collective proceedings, where no framework or established regime exists. The decision in that case throws into question the feasibility of claimants lodging aggregated claims for redress outside the competition space, even where they share a common question of law. A claim regarding loss of control of personal data requires proof of material damage – not an easy task to demonstrate before the Court.

So, why shouldn't those who are ultimately affected by corporate wrongdoings have the right to seek redress in a collective manner, particularly when profit has been made at their expense, which is so often the case.

It is fair to say, without the opt-out class action regime, the scales of justice for consumers in the UK cannot be balanced. The regime relies on individuals willing to perform the important role of class representative, creative legal teams who are committed to collective actions and professional funders willing to finance the litigation – demonstrating a significant number of stakeholders who share a commitment to the development of class actions. And for consumers, damage is damage. Whether they have been cheated in terms of business competition, or their data has been mistreated, their consumer rights have still been impacted.

The key question in this ongoing debate is always going to be whether, eventually, class members will participate and be compensated. That, of course, remains to be seen. But, if we can continue to educate consumers and promote the benefits of these actions being brought on their behalf, for their benefit, and ultimately ensure there is a credible, accessible process for redress, then we stand a good chance of demonstrating that no ambulances are being chased. Instead, that the UK continues to deserve its recognition as a global leader in consumer protection, enforcement and justice.

ENFORCEMENT OF EXCLUSIVE JURISDICTION CLAUSES IN THE ENGLISH, SINGAPORE AND HONG KONG COURTS

A COMPARATIVE ANALYSIS

Authored by: Justin Gan - Stephenson Harwood (Singapore), Kaili Ang - Stephenson Harwood (Singapore) Alliance firm Virtus Law LLP, Emily Li - Stephenson Harwood (Hong Kong) and Gloria Leung - Stephenson Harwood LLP (London)

When instituting proceedings, forum is one of the most important decisions to make as opting for the wrong forum could leave the claimant with a dismissed claim, in addition to bearing costs.

In this article, we will discuss the attitude of the English, Singapore, and Hong Kong courts when faced with exclusive jurisdiction clauses, and the general rules applicable.

England & Wales

As the Brexit transition period ended on 31 December 2020, in determining the validity and enforceability of exclusive jurisdiction clauses, the applicable regime depends on when the proceedings were instituted.

For proceedings instituted on or before 31 December 2020, the jurisdiction of the English courts is largely dictated by the Recast Brussels Regulation,[1] under which English courts generally shall defer to the courts of the EU member state which has jurisdiction under an exclusive jurisdiction agreement.

From 1 January 2021, the applicable convention is now the Hague Convention [2] which requires English courts to uphold qualifying exclusive jurisdiction clauses in favour of another contracting state [3].

Where neither the Recast Brussels Regulation nor the Hague Convention apply, the English court will apply the common law rules of private international law. English courts have a broad inherent discretion but will generally uphold exclusive jurisdiction clauses unless there are strong reasons not to. In considering whether to depart from an exclusive jurisdiction clause, the approach is still to apply the well-established forum non conveniens test formulated in Spiliada Maritime Corporation v Cansulex Ltd [4] (the "Spiliada Test").

1 Regulation (EU) No 1215/2012
2 2005 Hague Convention on Choice of Court Agreements, to which the UK acceded as an independent state
3 Other than the UK, the contracting states to the Hague Convention are the EU, Singapore, Mexico and Montenegro.
4 [1987] AC 460

One reason to depart from an exclusive jurisdiction clause can be a risk of parallel, irreconcilable judgments. The principles set out in the Spiliada Test in relation to this ground were recently considered in Axis Corporate Capital UK Ltd v Absa Group Ltd [5]. The court held that a clause in a reinsurance contract in which the parties agreed to submit to the jurisdiction of the English courts "to comply with all requirements necessary to give such court jurisdiction" was an exclusive English jurisdiction clause. However, it held the equivalent clause in the primary layer reinsurance contract by which the parties agreed to submit to "worldwide jurisdiction", could not be interpreted as an implied English exclusive jurisdiction clause, despite the risk of inconsistent decisions and increased expense.

This case demonstrates the primacy given by the English courts to the parties' choice of law and jurisdiction, even where such choices may result in an inconvenient and undesirable multiplicity of proceedings.

Singapore

In deciding whether an exclusive jurisdiction agreement exists and applies under common law rules, the Singapore courts require a "good arguable case".

Once an exclusive jurisdiction clause is established to apply, its effect can only be challenged if there is shown "strong cause" or "exceptional circumstances" amounting to a "strong cause" as to why the Singapore courts should not enforce the jurisdiction bargain agreed between the parties: Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd [6].

An exclusive jurisdiction clause is therefore useful to have as, generally, absent an exclusive (or non-exclusive) jurisdiction clause, the Singapore courts will apply the Spiliada Test, under which a party contesting the Singapore court's jurisdiction only needs to show that there is another more appropriate forum to hear and determine the action.

Whilst it is clear that the Singapore courts are ready to uphold exclusive jurisdiction clauses, it should also be borne in mind that one's right to rely on an exclusive jurisdiction clause can be lost as a result of conduct. For example, if the steps taken by a party were steps incompatible with an assertion that the Singapore court should not assume jurisdiction over the proceedings commenced by the respondent, the Singapore courts may find that effectively the party had waived its right to rely on the exclusive jurisdiction clause contained in the contract: Reputation Administration Service Pte Ltd v Spamhaus Technology Ltd [7].

Hong Kong

In Hong Kong, albeit none of the private international rules mentioned above applies, Hong Kong courts are also keen to uphold exclusive jurisdiction clauses generally, other than in exceptional circumstances: Noble Power Investments Ltd and another v Nissei Stomach Tokyo Co Ltd [8].

For instance, in the recent case of Quaestus Capital Pte Ltd v Everton Associates Ltd [9], the Hong Kong Court of First Instance refused to invoke an exclusive jurisdiction clause in favour of the English courts, on the basis of potential multiplicity of proceedings.

In Quaestus, the plaintiff and the 1st defendant entered into a loan agreement and a pledge agreement, both subject to exclusive Hong Kong jurisdiction, for a loan to be provided by the 1st defendant and a share pledge by the plaintiff as security. Separately, the plaintiff and the 1st and 2nd defendants entered into a brokerage agreement, subject to exclusive English jurisdiction, for the pledged shares to be transferred to the 2nd defendant.

After the pledged shares were sold without any loan having been provided, the plaintiff, alleging fraud, commenced proceedings against the defendants in Hong Kong pursuant to the brokerage agreement subject to exclusive English jurisdiction.

Notwithstanding its recognition that the claim should be subject to exclusive English jurisdiction under the agreement, the Hong Kong court considered that there was a strong cause for not giving effect to the exclusive jurisdiction clause, as it is in the interests of justice to have one tribunal adjudicating the plaintiff's claims against the defendants in the same suit in order to avoid the waste of costs and the potential disaster of having separate actions in different jurisdictions which may result in inconsistent findings.

Conclusion

The courts of all three jurisdictions are generally keen to uphold exclusive jurisdiction agreements. However, as is clear from this analysis the courts may depart from the general rule in view of "strong cause" or "exceptional circumstances". Despite applying similar tests, the outcome may vary and each dispute has to be examined on a case-by-case basis.

5 [2021] EWHC 861
6 [1977-1978] SLR(R) 112
7 [2021] 2 SLR 341
8 [2008] HKCA 255
9 [2021] HKCFI 1367

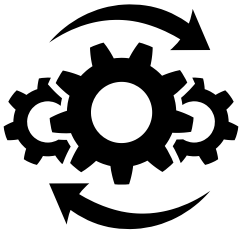
LEADING THE FIGHT AGAINST DISINFORMATION FOR HIRE

Authored by: Carys Whomsley - Digitalis

Disinformation has become one of the most prominent challenges in navigating the online world. Government bodies, academic institutions, think tanks, and even private companies have researched and proposed innumerable approaches to curb its effects. In this context, defamation lawsuits have emerged as one of the most effective contenders in the struggle against the plague of deceptive information infecting public discourse.

In the early months of 2021, voting technology companies Smartmatic and Dominion Voting Systems filed billion-dollar lawsuits against Fox News in response to the broadcaster's airing of conspiracy theories claiming the companies had rigged the results of the 2020 US Presidential Elections. The companies claimed these false stories had significantly injured their reputations.

Until that point, public pressure and advertising boycotts had achieved almost no perceptible result in combatting the flow of misinformation promoted by right-wing media bodies surrounding the elections. The lawsuits and legal threats had, however, in a matter of weeks, resulted in the cancellation of Lou Dobbs Tonight, Fox Business' highest rated show at the time.



Automated Anonymity

Attributing blame for the spread of a defamatory or false narrative is fairly straightforward when it comes from traditional media channels, where presenters are rarely anonymous personas.

Many people are now, however, flocking to social and alternative media channels as their primary source of information. These channels are highly prone to manipulation, and can be exploited to artificially present any story as credible or widely backed. Automation is cheap and anonymity is easy to achieve, while the platforms themselves are difficult to regulate and moderate.

Under these circumstances, the origin, direction, authenticity and veracity of any circulating story are obscured. Social media has resultingly become one of the most effective tools in propagating targeted disinformation. Empowered by the shield of anonymity, sophisticated, orchestrated attacks on a person or group's reputation can reach millions of people. While the most egregious can be taken down, identifying the attackers themselves for remedial action often seems out of reach.

Covert Operations and Dark PR

Adding to the difficulties in achieving justice for defamatory campaigns playing out online is that many covert influence operations are directed beyond the borders of a target's country.

One powerful tool used in sophisticated campaigns is a practice known as 'astroturfing', in which foreign influence operations masquerade as organic discussion taking place domestically. This type of attack has primarily been seen by actors exploiting political events.

Political leaders and parties have, however, not been the only targets of foreign social media attacks. 'Black' or 'Dark' PR, the practice of destroying a competitor or opponent's reputation through smear campaigns, is increasingly being deployed against organisations and figures in the corporate world. The disinformation for hire market is booming, with services by private contractors offering to manipulate online opinion targeting almost 50 countries last year.

The Network Contagion Research Institute reported that disinformation is increasingly being used against brands and corporations, often through conspiratorial narratives, as seen for example in the 5G conspiracy theories in the UK, which inspired widespread attacks on infrastructure. Companies producing Covid-19 vaccines have been targeted, as has furniture retailer Wayfair, with conspiracy theories gaining enormous traction across Twitter, Facebook and TikTok.

Although the originators of these campaigns are difficult to pinpoint, supportive investigations can nonetheless unearth the real-life identity behind the orchestrators of these campaigns, to expose the attackers and ultimately put an end to the campaign's sway.

Investigatory Methods

Perhaps the most famous investigation into the originators of an influence operation is Robert Mueller's report on Russian interference in the 2016 US elections, the findings of which were achieved through a lengthy process involving subpoenas, search warrants and witness interviews.

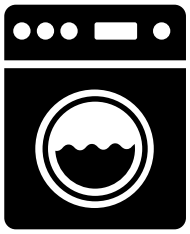
Yet several organisations continue to successfully unveil attackers through open-source investigation. The Stanford Internet Observatory, for example, focuses on the identification of foreign influence operations. Its research has led to the takedown of thousands of inauthentic accounts spreading targeted disinformation across multiple social media platforms.

Even the most sophisticated and ostensibly authentic disinformation campaigns leave traces of orchestrated, inauthentic activity. While undetectable to the everyday consumer, investigators can employ numerous tools and methods to confirm the origin, authenticity and modus operandi of these actors.

Influence operations on Twitter, for example, usually take the form of hashtag campaigns. These are achieved by making a hashtag gain enough traction to start trending and reach the desired audience, reinforcing the narrative's apparent legitimacy. To succeed, such operations rely on large bot networks, or 'botnets', created specifically for to spread and amplify the campaign.

Manually creating large enough botnets would be a painstaking process, and may ultimately prove futile if platform moderators find and take down the offending accounts. Botnet creation is therefore most often automated and easily evidenced through shared images, username types and creation dates.

These botnets are often used across multiple campaigns, amplifying the same narratives and relying on key campaign drivers – often accounts under real identities with large followings, which can point to the campaign's true originator.



The New Disinformation Laundromat

Unfortunately, as detection methods evolve, so do tactics to evade them. Disinformation for hire is on the rise, changing the evidence gathering landscape for investigators. With social media campaigns orchestrated by a party in one country, outsourced to a second country and designed to influence a third, the structures behind which the originator of a campaign can hide are becoming increasingly opaque.

Influence operations do however rely on many of the same processes as seen in previous approaches, as the key to a successful disinformation campaign is to make it appear organic enough to generate real engagement. For example, campaigns rely on real individuals, whether paid or indoctrinated, with substantial followings, presenting one avenue for investigators to follow. Separately, the cross-platform nature of these campaigns and reliance on existing perceptions and narratives to be exploited provide other routes into discovering the initiators of these.

The rise of online disinformation is a collective problem with no quick fix, the effects of which will likely only be extinguished through long term educational initiatives. Legal actions and threats have however proved an effective deterrent to disinformation on other media platforms. With investigative support able to unearth actionable intelligence on the leaders of anonymous social media campaigns, a combined approach may offer one solution to put a stop to its ramifications in the meantime.

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60-SECONDS WITH:

NIKOS ASIMAKOPOULOS
DIRECTOR DISPUTES
ALACO

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

A I say I am an investigator, but not a cop or a law enforcement agent - and wait for eyes to roll. I then explain the kind of investigations I do and how, and the conversation carries on from there.

Q Why did you choose this profession?

A A bit like my boss – I was minding my own business teaching Economics when a friend of mine from University reached out about an interesting job doing research and talking to people in weird places... it was a great fit from the start.

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

A Most have been exciting but by far the strangest was when we were asked to establish how many fish did a Ukrainian businessman steal in his youth in the early 80s. It cropped up on a dispute and the instructing lawyers insisted on us finding an answer.. We never got the amount but we established it was carp!

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

A Not a ton. I would probably have put in the time to get my Russian to above barely passable. And I wish I'd grasped earlier how essential financial literacy is to our work.

Q What is the most challenging/most rewarding aspect of working on dispute resolution cases?

A The biggest challenge and reward come from the fact that our input has a direct bearing on the outcome for the client. It can be very stress-inducing, but anything less would be nowhere near as thrilling.

Q If you had a money tree and could afford to never work again, would you and why?

A Not yet.

Q What does the perfect weekend look like?

A I have two young children so options for regular excitement are somewhat limited. A weekend in Greece with my family in the sun is very hard to beat.

Q Which famous person would you most like to invite to a dinner party?

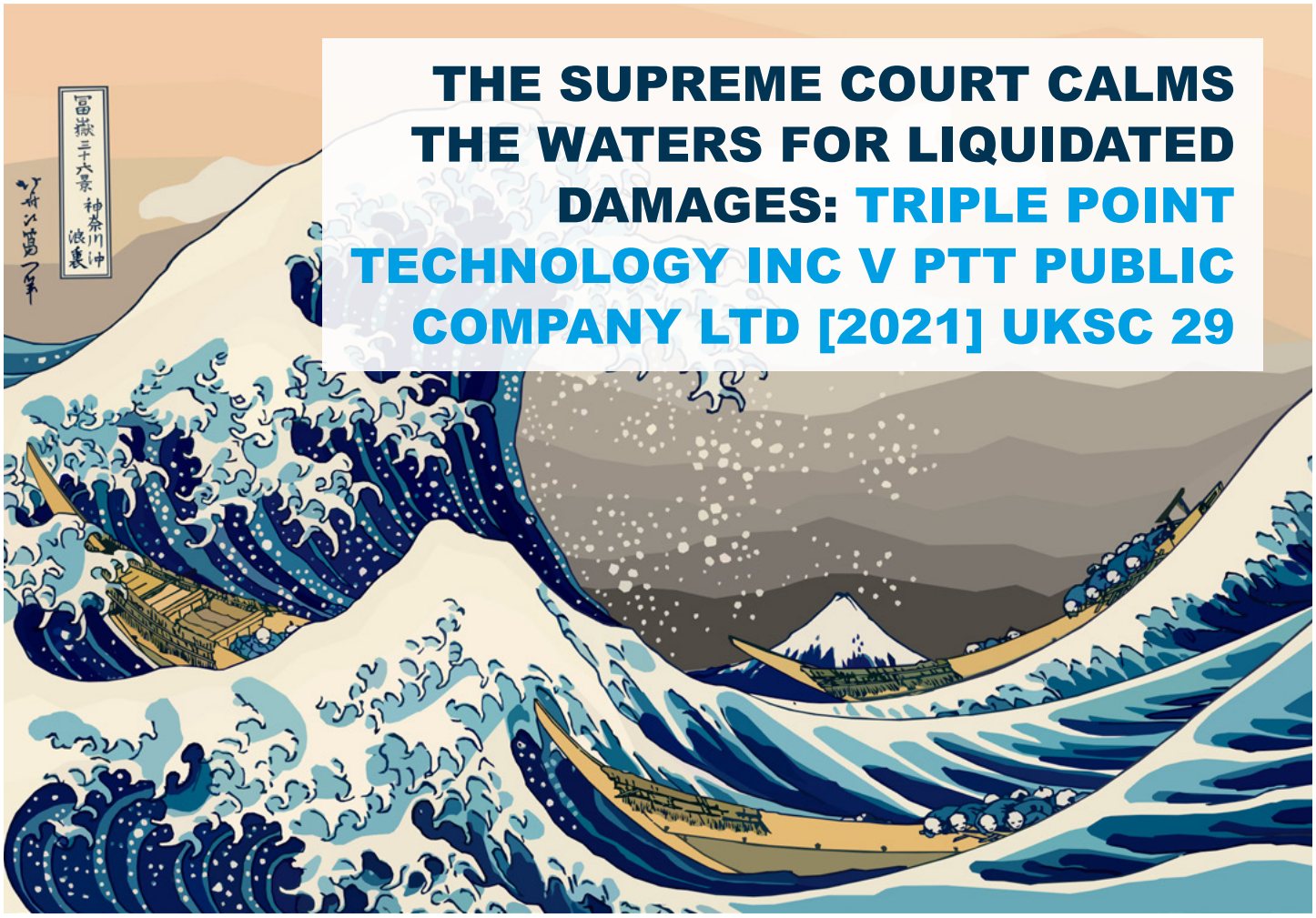
A Billy Joel for a detailed discussion on every historical reference included in "We Didn't Start the Fire".

Q Now the world is beginning to open up again, what are you most looking forward to doing?

A Seeing contacts across the world face to face. Zoom has been great for keeping in touch with clients, but our work relies on the help of some fairly idiosyncratic people in strange places and Zoom simply doesn't cut through.

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

A Don't foster any presumptions of grandeur or mystique, learn to look for facts and read the newspaper.



THE SUPREME COURT CALMS THE WATERS FOR LIQUIDATED DAMAGES: TRIPLE POINT TECHNOLOGY INC V PTT PUBLIC COMPANY LTD [2021] UKSC 29

Authored by: Dipti Hunter and Alex Akin - Keidan Harrison

A recent Supreme Court decision handed down on 16 July 2021 has brought welcome clarity to liquidated damages clauses and related damages caps.

Executive Summary

The commercial utility of Liquidated Damages clauses had been thrown into doubt after the Court of Appeal decision in Triple Point Technology v PTT Public Company Ltd [2019] EWCA Civ 230. The effect of that decision was that parties are only entitled to Liquidated Damages in relation to delays for works that had already been accepted/completed, and not up to the date of termination of a contract if further works had not been accepted/completed at the point of termination.

The importance of Liquidated Damages clauses cannot be overstated given their use in a variety of cross border contracts, particularly in construction and IT contracts with English law as the governing law clause. A key example of this is the decision that many large businesses make when outsourcing their back office or IT functions to third party companies in foreign jurisdictions.

The generally accepted view had been that Liquidated Damages clauses were there to help contracting employers who wished to be compensated for half-completed projects, where unacceptable delays had led to the contractual relationship breaking down and termination being triggered.

The particular clauses under consideration in this case arose from an IT contract for the development of software. It is probably fair to comment that in IT contracts standardised terms have yet to take on the substantially settled status afforded to terms in standard form construction contracts, which have been litigated and refined over many years.

Rather than force an employer to prove, often by way of a detailed and granular analysis, the level of damages caused by a breach, such clauses allow the parties to negotiate, at the point of contracting, the sum that should be paid in certain specified circumstances, without the need to quantify the actual damages (which may exceed the sum agreed in the clause). As these clauses often sit alongside limitation of liability clauses, it is possible that the sum payable is also capped by agreement thereby balancing up the commercial bargain struck between the parties.

The more recent Supreme Court decision handed down earlier this year has reintroduced some clarity as to the accepted commercial purpose, namely to compensate an adversely impacted party for the delays to completing works on time, which brings the underlying contractual relationship to an end and enables pre-agreed compensation to be paid.

In many cases the work that has not been done by the contractor has to be paid to someone else. Therefore the paying party can end up paying twice or delaying payment until work has been done. The cut and thrust of such disputes inevitably brings with it the risk of counter-claims. It is therefore

important for the terms of such clauses to be as clear as possible and to, with a sufficient degree of precision, what should be paid in aggregate bearing in mind all the other terms of the agreement.

Background facts in the case

The parties had agreed a software contract on 8 February 2013 (referred to as the "CTRM contract") as well as a Perpetual License Agreement ("PLA"). The contracts were bespoke to the project.

The intention was to design software suitable for commodity trading which would assist PTT's business model.

The Supreme Court's approach to the issues

Issue 1

Are liquidated damages payable under article 5.3 of the Main Part where Triple Point completes the work and PTT never accepts it?

Court of Appeal was wrong in its approach to suggesting that a party can delay and avoid liquidated damages under the clause upon termination. As the Judgment said:

"Reading the clause in that way meets commercial common sense and prevents the unlikely elimination of accrued rights. The Court of Appeal was aware of the importance of accrued rights because after the sentence last quoted the judgment of Sir Rupert Jackson begins: "Although accrued rights must be protected, ...". However the rest of that sentence and the next sentence go on to hold that it may be that the parties intended that general damages should take the place of liquidated damages: "… it may sometimes be artificial and inconsistent with the parties' agreement to categorise the employer's losses as £x per week up to a specified date and then general damages thereafter. It may be more logical and more consonant with the parties' bargain to assess the employer's total losses flowing from the abandonment or termination, applying the ordinary rules for assessing damages for breach of contract." If that were so, it is hard to believe that the parties would have gone to the trouble of providing for liquidated damages in the first place. Moreover, under this approach, accrued rights are not protected. They are lost."

Unlike the Court of Appeal, the Supreme Court held that the words "up to the date PTT accepts such work" as meaning "up to the date (if any) PTT accepts such work".

Issue 2

Are damages for Triple Point's negligent breach of the CTRM Contract within the liability-limitation exception in the final sentence of article 12.3?

The sentence in issue provided as follows:

"….4. This limitation of liability shall not apply to CONTRACTOR'S liability resulting from fraud, negligence, gross negligence or wilful misconduct of CONTRACTOR or any of its officers, employees or agents."

The Supreme Court found that the Liquidated Damages are within the cap carve out set out in clause 12.3 if they result from contractual breaches involving skill & care thereby meaning that damages fall outside the cap.

The Court of Appeal had considered that the word "negligence" was a reference to an independent tort rather than to a contractual skill & care claim. However, the decision of the Supreme Court is that this is not the case in the context of this contract. As the Judgment said:

"In my judgment, the Court of Appeal went down the wrong route in concluding that the word "negligence" in the cap carve-out referred to an independent tort. The matters referred to in the final sentence are all characteristics of conduct: fraud, wilful misconduct, gross negligence and negligence. These can apply to breaches of the CTRM Contract. Considering the sentence as a whole it is clear that it includes an act which is a breach of contract and which possesses one of those characteristics. Thus, if there is a breach of contract to exercise skill and care by reason of Triple Point's negligence, that will not be subject to the cap in article 12.3".

Issue 3

Are liquidated damages subject to the cap in article 12.3?

The Supreme Court found that there were individual "mini caps" in each sentence and the Appeal on this issue was dismissed.

Comments

Whilst there are many projects that evolve without the need for litigation, the revenues that litigation teams at law firms are posting for dispute related work in the last few years suggests that there is still a considerable degree of ambiguity in the drafting of contracts. The need for clarity with respect to allocation of risks still causes clients difficulties when considering how to compensate each party, even where contracts have been drafted by experienced IT contract lawyers.

This case underlines that it may often be prudent for commercial lawyers to bring in litigators to review boiler plate clauses to seek to understand the traps that are being set for either party when seeking compensation or resisting compensation being paid. The underlying assumption that litigators are only useful when things go wrong should perhaps be re-thought and include consideration of allocating the risks of commercial relationships breaking down.

A final thought is that this dispute illustrates the grave difficulties that can flow from a "carve out" approach to drafting commercial contracts and the lack of attention given by some parties as to where the risk of breach lies. The ambiguity that may arise can cause clients to incur millions in legal expenses. So why do commercial parties do this? Why not redraft these clauses to say what "can happen" rather than what "cannot happen"?

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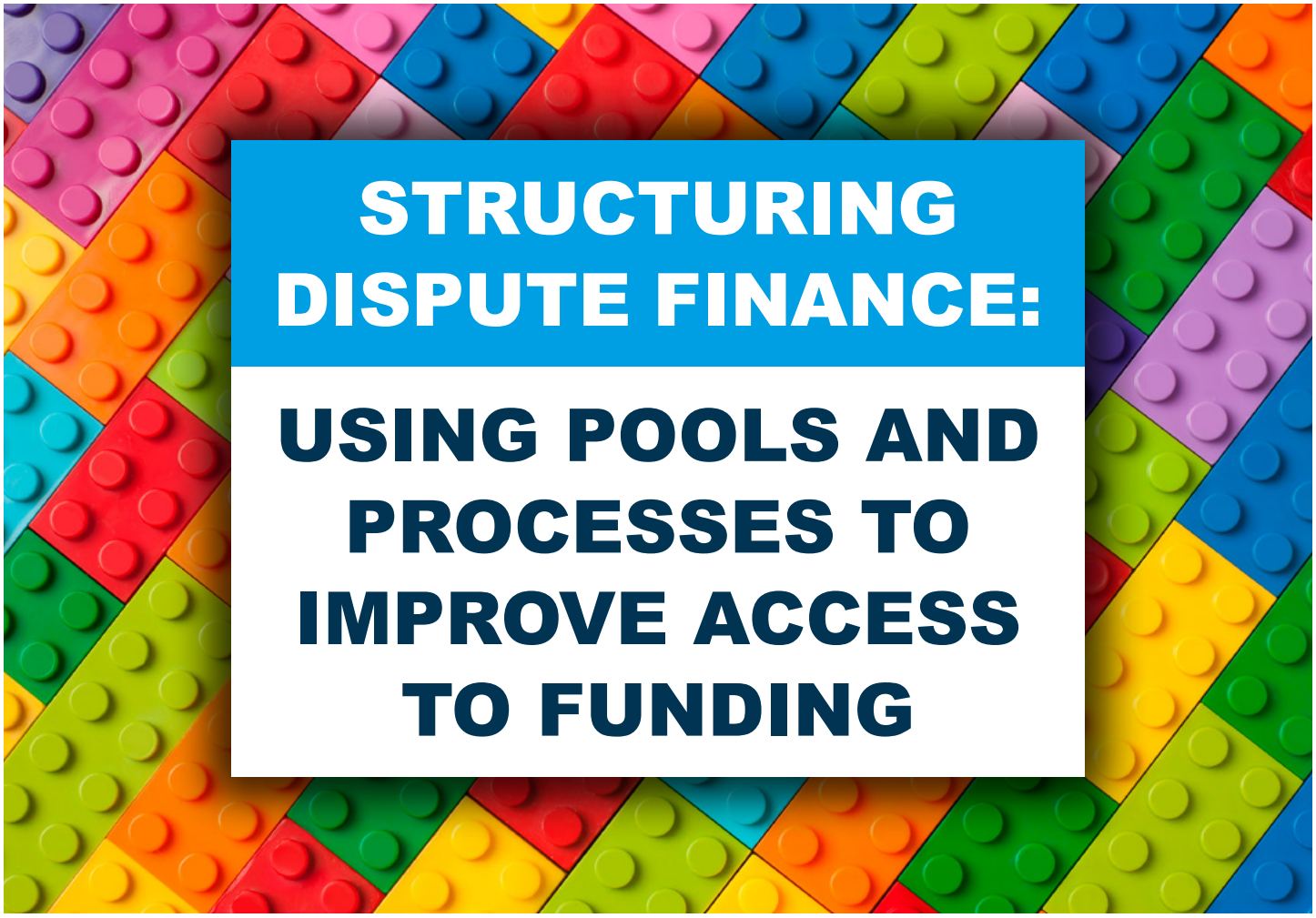


STRUCTURING DISPUTE FINANCE:

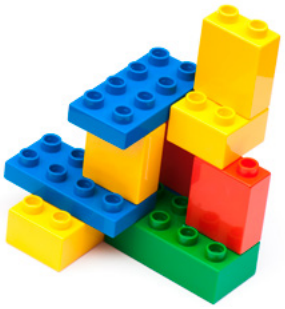
USING POOLS AND PROCESSES TO IMPROVE ACCESS TO FUNDING

Authored by: Louis Young and Sean McGuiness - Augusta Ventures Ltd

The dispute finance market is continuing to mature and grow at pace. When considering funding, one factor that clients and law firms may not recognise as a driver to both the availability and terms of funding is the underlying capital structure of the funder. Yes, case prospects, portfolio diversification and pricing are key drivers of the terms that a funder offers to a client, however as the market becomes more sophisticated, spreading single case investments across multiple pools of capital provides an opportunity for funders to provide more efficient terms across a greater number of claims.

The challenge of larger claims

One issue the market has traditionally faced has been the provision of capital for riskier or larger investments, and the pricing premiums which are associated with these funding solutions when compared to a more traditional litigation investment. The premiums that funders require for these riskier or larger investments can often mean that funding becomes economically unfeasible as the required return for the funder as a percentage of the estimated recoveries is deemed excessive.



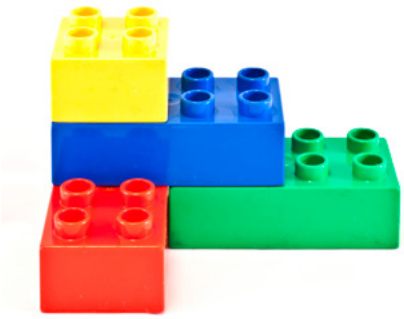
Managing large investments through volume and diversification

One model some funders have adopted relies on diversification and volume. The objective is to invest in enough meritorious claims to achieve diversification and create a successful portfolio where more cases in the portfolio win than lose. High-level diligence is conducted to assess basic portfolio eligibility, but there is less emphasis on detailed diligence as the objective here is to invest in volume. As a result, this strategy generally delivers relatively high pricing for stronger cases, which could otherwise attract lower pricing with the benefit of detailed diligence and enhanced risk assessment. The drawback of this model is it can prevent funding of claims with leaner economics which would otherwise be funded at lower premiums, as well as leading to clients paying higher premiums than necessary if they do not test the market with other funders.

Detailed due diligence and low risk investments

At the other end of the spectrum is a model which relies heavily on a detailed

diligence process to identify lower risk investments which attract lower premiums. This model can have a bias for smaller investments as there is less benefit in investing in high value single cases given the associated concentration risks and lack of diversification where volume is limited. Under this model, fewer investments are made, and greater reliance is placed on the strength of the diligence process to identify strong claims and filter out weaker claims. Claims which require significant investments or carry even medium levels of risk may be declined and drive the client to the higher premium diversification model as described above.



Spreading risk through claim syndication

The size of the finance required for some claims is driving some funders to the spread the risk across multiple pools of capital. A single funder may operate multiple pools and slice up the capital required across these pools, or multiple funders may syndicate the investment. The benefit to the market is that the universe of claim risk or claim size is deepened, and the benefit for investors is the broader diversification across claims types. Each pool in theory bears less risk, and so under this syndication model lower pricing can be achieved than the simple diversification model described above, even where the same level of diligence is applied.

Using pools and process together for the best results

If clients can achieve better pricing by funding cases across multiple pools, the next question is to establish the role of diligence. Clients are usually motivated to complete diligence as quickly as possible either to avoid delay or the costs associated with detailed diligence. These demands should be balanced against the benefits that detailed diligence may yield in terms of accurately assessing risk and the subsequent assessment of price.

An investment process which benefits from expertise on legal merits, quantum and recoverability can more accurately assess the risks of a claim and result in lower premiums. Investors into dispute finance funds may also demand lower returns based on the quality of the underwriting, and in turn this further cost savings that can be passed to clients. Taking a strong process together with a pooled investment model is therefore more likely to result in lower litigation costs which in turn allows more cases to be funded, and at the most attractive premium.

Does it really make a difference?

Consider a commercial arbitration with a claim value of £160m which requires £15m of investment. Under a pure diversification model a funder might require 5X of committed capital plus capital back. On a £15m investment, that represents a return to the funder of £90m. This is likely to result in the investment being declined as the funder would receive over half of the proceeds on resolution.

By contrast, under a model which relies on multiple pools this investment could be split across three pools, each providing £5m of capital, thereby reducing the exposure of each investor. Taken together with a strong and efficient diligence process the same investment might be able to be priced at 3X plus capital back resulting in the funder receiving £60m of a £160m claim. This would ensure that the borrower would receive more than half of the proceeds, which could be the difference between the finance being accepted or not, as well as keeping £30m more on resolution.

Is it necessary?

In June 2021 Alix Partners and The Lawyer published a joint study [1] with the results of a survey which attracted over 200 responses. That survey found that for in-house counsel – which will usually determine which funding arrangement to use - the most important factor when choosing a funder was overall cost. Funders which utilise models which reduce costs will therefore be in high demand from decision makers, not just as it will ensure more cases can be funded, but because it results in a competitive and compelling cost of funding.

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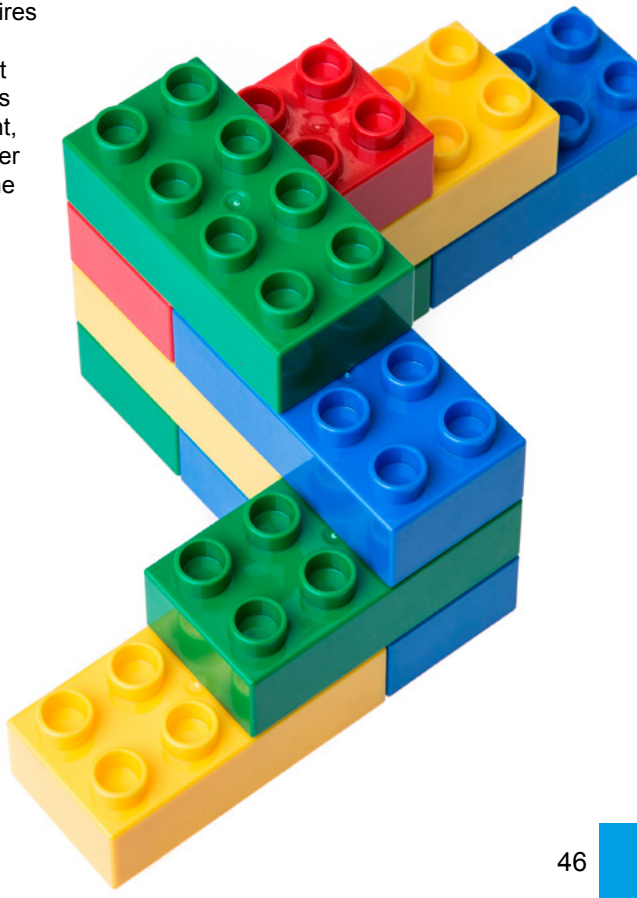

1 https://www.alixpartners.com/insights-impact/insights/the-future-of-third-party-litigation-funding/

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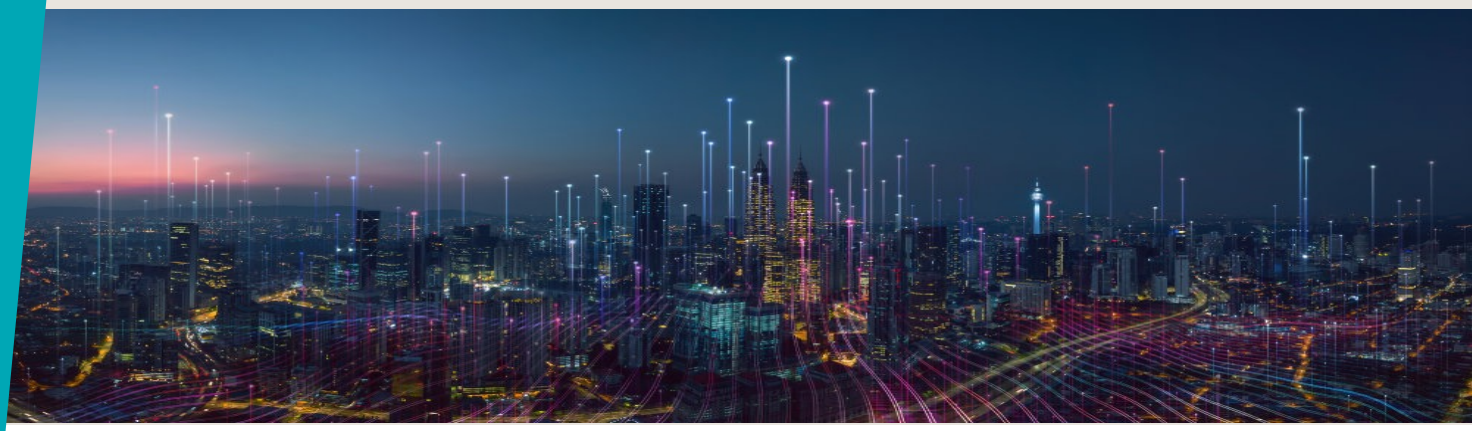

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FAIR VALUE FOR DISSENTING SHAREHOLDERS IN CAYMAN MERGER REGIME

Authored By: Adam Crane and Nicosia Lawson - Baker & Partners

When minority shareholders of Cayman Islands entities are being treated unfairly, they are able to take advantage of some strong tools under the Companies Act (As Revised) (the Act). One of those tools are the appraisal rights and fair value assessments available to a shareholder who has dissented from a merger or consolidation pursuant to section 238 of the Act. This type of litigation is experiencing a sharp increase in the Cayman Islands as a result of a number of factors including the delisting of Chinese companies in the United States due to legislative and policy changes there and in China.

A company intending to carry out a merger must obtain the approval of its directors and members by way of special resolution, or other requirement stated under its articles. A shareholder who intends to dissent from the merger must give the company written notice of its objection before the vote on the merger. Immediately, the shareholder ceases its rights under the shares except to be paid the fair value of those shares.

The Act sets out other procedural steps to be taken by the company and the dissenter, including deadlines for the company to issue a written notice to those shareholders who object to the merger that the merger is approved, a written notice to the company of the shareholder's decision to dissent and demand payment of the fair value of its shares, and a written offer from the company to each dissenter to purchase its shares. The shareholder risks permanently losing its right to an appraisal if these steps are not followed.

If within the statutory timeframe the price of the shares is not agreed, the company shall (and the dissenter may) petition the court for a determination of the fair value and fair rate of interest of the shares of all dissenters. The reference to 'fair' requires that the court considers all relevant facts and matters and the true monetary worth of the shares, without considering any particular valuation methodologies and fairly balancing, where appropriate, the competing approaches to valuation relied on by the parties [1]. The court is tasked with determining the price at which the shares would be exchanged between a willing buyer and seller in an arm's length transaction based on publicly available information. The rights of a dissenter are limited to seeking relief on the grounds that the merger is void or unlawful [2].

Section 238 proceedings give rise to specific and somewhat unique procedural requirements. In 2019 the court published standard pre-trial practice direction to provide a framework for the management of these proceedings (Practice Direction)[3]. The Practice Direction focuses on the key areas that have been contentious between parties over the years. These include the creation and population of an electronic data room for maintaining

1 Re Trina Solar Limited (Unreported, 23 September 2020) (FSD 92 OF 2017 (NSJ)).
2 Ibid.
3 Practice Direction No. 1 of 2019, Directions for Proceedings Brought Under Section 238 of the Companies [Act] (As Revised).

documents relevant to the fair value of the company as at the relevant valuation date, including documents created both before and after that date; discovery and inspection of documents relevant to the fair value; the provision of factual and expert evidence; the convening and conducting of meetings between the experts and the company's management; and requests by the experts for further information from the company.

The importance of the Practice Direction was reinforced in eHi Car Services Limited[4], a decision in which the court refused an application by the company to materially vary the directions orders made in similar cases, which have to some extent become fairly "standard". The court refused the application because it was not satisfied that the "standard" directions had been working any material injustice or are otherwise unfair such that it should grant a significant departure from the norm. Nevertheless, there remains latitude for disagreement between parties because the Practice Direction is not detailed or comprehensive. There are often competing arguments regarding the appropriate valuation methodology that should be used to ascertain "fair value", whether a minority discount should be applied, and the "fair rate of interest" (if any).

Valuation methodology

The court is tasked with determining the appropriate methodology on the facts and circumstances of each case. Whether fair value, as estimated using a DCF method analysis or any other generally accepted business valuation method, should be above or below the deal price, is also dictated by the facts and circumstances of each case.

Minority discount

A minority discount is the level of discount that could be applied in an appropriate case, depending on the valuation exercise under consideration, to determine the value of the dissenter's minority interest. The court will rely on expert evidence on the principle to be applied in deciding whether a minority discount is appropriate.

Interest

The court has a discretion to award a dissenter the "fair rate of interest" for his shares, which is the midway point between a rate of interest representing the return on the unpaid appraisal moneys that a prudent investor could have made and the rate of interest that the company would have had to pay to borrow the equivalent sum.

Conclusion

The statutory mechanism serves to protect minority shareholders; however, there is a risk that the court can determine a value less than that of the merger price. Section 238 proceedings are to a large extent an expert driven process therefore, the reliability of expert evidence at trial is critical to the court's performance of the assessment of "fair value".

The jurisprudence relating to Cayman's merger regime is relatively young. However, the Cayman courts have found guidance from Delaware and Canada, which have similar merger regimes to Cayman, to be helpful in terms of the approach to the similar issues the courts of those jurisdictions have adopted, notwithstanding the differences in the language of the relevant legislation, the policy behind it, insofar as one can identify that, and procedure.

4 (Unreported, 24 February 2020) (FSD 115 of 2019).

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CLASS ACTIONS AND LITIGATION FUNDING IN AUSTRALIA - AN UPDATE

Authored by: Sophy Woodward and Kate Fisher - HFW

The Inquiry:

On 21 December 2020, the Parliamentary Joint Committee on Corporations and Financial Services handed down their 454 page report "*Litigation funding and the regulation of the class action industry*" (**the PJC Report**)[1]. This followed an extensive consultative inquiry (**the PJC Inquiry**); comprising over 100 submissions from industry stakeholders and 5 public hearings conducted throughout July and August 2020. Central to the PJC Inquiry was the recent substantial growth in class action activity across Australia, particularly shareholder claims, and the evolution of the litigation funding market in Australia, which had seen a marked increase in participation of international players, and a trend towards increased profits. A key focus of the PJC Report was the need to increase the transparency of the litigation funding market.

The PJC Report detailed 31 recommendations. The Australian government continues to consult on these recommendations and has committed to respond fulsomely in 2021.

Litigation Funding in Australia: A Changing Landscape

Regulatory Reform

In response to concerns over a perceived lack of regulation of the Australian litigation funding market (and, more significantly, the rising numbers of funded class actions), and prior to the PJC Report's publication, the Government legislated to require funders to obtain an Australian Financial Services License (**AFSL**), and be subject to the managed investment scheme regulatory regime in the *Corporations Act 2001* (**MIS Regime**).

These reforms commenced on 22 August 2020. Funders have been slow to obtain an AFSL, with only a small proportion having done so, indicating uncertainty and suggesting that many funders intend to exit the Australian market or have already done so.

The Australian Securities and Investments Commission (**ASIC**) has, to date, issued two relief instruments:

1. Relief for responsible entities of funding managed investment schemes from certain requirements (such as the requirement to give product disclosure statements to passive general members); and
2. Relief from the obligation to regularly value scheme property.

ASIC has also released a consultation paper offering guidance regarding the MIS Regime for litigation funding schemes and has also foreshadowed that further relief will be made available.

1 https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Litigationfunding/Report

A number of submissions to the PJC Inquiry emphasised concerns that the MIS Regime was not fit for purpose in the context of litigation funding. Recommendation 28 of the PJC Report called on the Australian government to legislate a fit-for-purpose MIS Regime, tailored for litigation funders. We are yet to see any developments to this end.

Already, the impact of increased regulation of the funding market has had visible results, including a substantial decrease in the number of class actions funded by litigation funders. In 2019, 59% of class actions were known to have received third party funding. In 2020 that figure had reduced to approximately 33%.

Continuous Disclosure

Recently, on 11 August 2021 the Australian government passed legislation to make permanent changes to Australia's continuous disclosure laws, as per Recommendation 29 of the PJC Report. *The Treasury Laws Amendment (2021 Measures No. 1)* Bill received Royal Assent on 13 August 2021 and amends the provisions of the *Corporations Act 2001* regarding continuous disclosure obligations. The amendments introduce a fault element so that companies and their officers will only be found to be in breach of their obligations, if they act with "knowledge, recklessness or negligence" in disclosing or failing to disclose information which would have a material effect on the price or value of a company's share price.

The introduction of a fault element brings Australia's continuous disclosure regime closer to that in England. The justification for the changes is to provide companies with increased confidence to disseminate company updates and forecasts of future earnings made on reasonable bases to shareholders, as the risk of class actions being brought against them has been mitigated. This development is predicted to ultimately decrease the number of shareholder class actions brought in Australia.

Caps on Returns

Recommendation 20 of the PJC Report proposed the introduction of a guaranteed minimum rate of return for class action members, for the purpose of ensuring successful class members receive adequate compensation. The PJC Report recognised, however, that any reforms would need to ensure that funders receive reasonable returns.

Significantly, on 30 September 2021, the Australian government introduced the *Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation funders (***The Bill***)*. The Bill creates a rebuttable presumption that any return of class action proceeds to group members that is less than 70% of the total proceeds is not fair or reasonable. This is notable given that, historically, on average, 41% of total proceeds in such matters have gone to lawyers and funders.

The 30% minimum return has already proven controversial. Research commissioned by funder Omni Bridgeway and undertaken by PWC concluded that the proposed 30% cap will result in 36% fewer class actions. If brought into law, the reforms will significantly reduce class action activity in Australia.

Looking forward:

The class action and litigation funding landscape in Australia remains fluid, as industry and government strive for an approach that adequately balances considerations of facilitating access to justice, containing litigation risk for companies, ensuring adequate returns for litigants, and regulating an historically opaque industry.

It remains to be seen whether Australia will eventually have a fit for purpose regime to regulate funders, whether the proposed 30% cap on funder profits will be enacted and, of course, what the market response to the cap on profits will be.

As we are now in the final quarter of 2021, achieving certainty on the outcomes of the PJC Report this year seems ambitious. This lack of certainty, escalating regulatory costs, together with the proposed cap on returns, may keep many funders at bay, potentially – and counter-productively – decreasing competition in the Australian market, increasing the cost of funding and curtailing access to justice.

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STUDY REVEALS HIDDEN PSYCHOLOGICAL IMPACT OF REMOTE HEARINGS

Authored by: Daniel Ryan - BRG

Following the exponential and global outbreak of Covid-19 in early 2020, more than 100 countries instituted either full or partial lockdowns which resulted in the majority of hearings and tribunals being held remotely.

Since then, a consensus has emerged that virtual hearings and tribunals are here to stay, at least in some form, for the foreseeable future. This was just one of the findings from a recent **BRG study** aimed at understanding better the experiences of remote hearings from the perspective of expert witnesses, lawyers and arbitrators from around the world, as well as to contemplate the possible psychological impact of different hearing environments.

As with other aspects of our professional lives since the start of the Covid-19 pandemic, a combination of resilience, innovation and flexibility have meant hearings have been able to continue efficiently and effectively across the globe. Nevertheless, the study also found that remote hearings had an often-unobserved psychological impact, and one that cannot be simply ignored.

Through interviews conducted with expert witnesses, lawyers, as well as a psychologist from London to New York and Hong Kong, the cross-border report focused on ascertaining the psychological impact of conducting proceedings remotely and, importantly, the extent to which these had affected the outcome of hearings and tribunals.

The findings revealed that the virtual courtroom setting did indeed have a psychological impact, both positive and negative, to varying degrees, according to the majority of those who formed part of the report. For example, psychologists would argue a virtual setting has had a considerable impact on hearings, however, it's unlikely this would have registered with most participants at the time.

On one side, the majority of expert witnesses interviewed responded positively to being able to take part in proceedings from the familiarity of their own homes. They said this virtual barrier during cross-examination rendered the traditional techniques deployed by lawyers as part of attempts to exert pressure and unnerve them during tribunals significantly less effective.

However, the psychological impact of remote hearings has not been weighted wholly in one direction. Familiar surroundings can also result in the witness being lulled into a false sense of security to the benefit of the opposing counsel when undergoing cross-examination, with some also reportedly resorting to imagining the traditional physical courtroom environment to maintain focus and mentally prepare for each question.

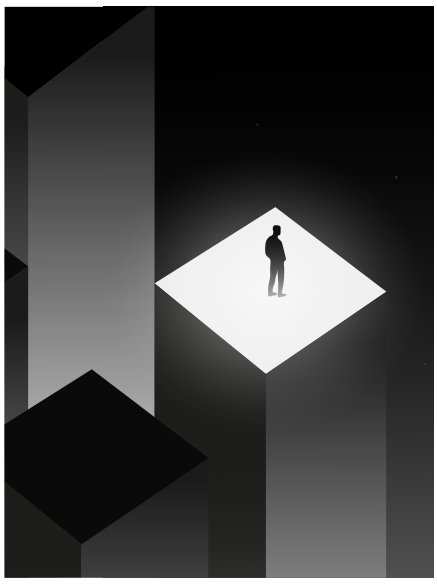
Preparation was a strong theme identified in the report. Virtual hearings and tribunals were found to lack the intensity and anticipation compared to in-person proceedings which helps to build confidence and make sure everyone is on the same page, a major drawback identified by the study. In

combination with a lack of pre-tribunal team building, this could sometimes lead to miscommunication between counsel and expert witnesses. Such was the importance placed on the psychological impact of the mental preparedness provided by engaging with their teams in a physical setting, expert witnesses stressed a clear preference for travelling to conduct arrangements in person, even if the hearing itself was to be conducted in a remote setting.

At the same time, once removed from their natural position of authority in the physical courtroom, both arbitrators and judges were seemingly less inclined to interject on procedural grounds, arguably detracting from the value of cross-examination to the tribunal as a whole. Hearings could become considerably more relaxed, difficult to police at times and open to abuse.

The psychological perspective also raised the subliminal processes that can affect decision-making, arguing that remote settings hinder the ability of the opposing counsel and decision makers to judge the reaction of expert witnesses to questioning and form a sense of the room. Crucially, several of the study's participants noted that juries, judges and arbitrators were taking less interest in their testimonies, with decisions being reached significantly quicker compared to in-person hearings.

One reasoning put forward was that decision makers were associating the frustration of technical issues with those providing evidence, or spending a greater proportion of their mental capacity managing an unnatural situation instead of carefully considering all aspects of the evidence provided as they would in the usual in-person environment.



Another potential influence on decision-making highlighted by the report is the onset of "Zoom fatigue", a term now synonymous with the pandemic. While not limited to arbitrators or decision makers, staring at a screen for long periods of time, often in an observational capacity, is noticeably less engaging than if the proceedings are taking place within the atmosphere of a physical courtroom.

Responding to this, a legal psychologist made the case for removing video from the equation altogether, thereby allowing decisions to be made based purely on speech and diminishing the potential impact of unconscious bias – an argument worthy of careful consideration.

Yet, the degree to which the points mentioned above were significant enough to influence proceedings is debated. Notwithstanding some notable individual examples of proceedings being open to undue influence, most outcomes are considered to have been the same as if they had taken place in person under traditional circumstances. While some lawyers interviewed pointed to remote hearings not affecting the ability to question or determine the validity of an expert witness's viewpoint, the main reason cited for the limited impact is the experience and professionalism of expert witnesses. After all, expert witnesses are trained to cope with the heightened anxiety and pressures known to accompany the physical, and often unfamiliar, courtroom setting. Therefore, adjusting to the virtual setting has been relatively straightforward for the majority.

However, the report also accepted that there are limitations in establishing whether the outcome of proceedings would have been different if conducted in person under traditional circumstances. Continued success in cases for some expert witnesses interviewed meant they could not accurately evaluate the impact on proceedings and with a number of cases still awaiting judgement, the true extent of the impact could become clearer over time, aided by the benefit of hindsight.

Yet, what is clear is that the disputes system has been able to continue mainly unimpeded thanks to remote hearings and tribunals, and the BRG report raises some thought-provoking observations which may not have been obvious to begin with.

Opinions about the degree to which virtual hearings and tribunals are here

to stay vary greatly, depending on factors such as geographical location and one's own personal circumstances. For example, the proportion of hearings expected to take place fully face-to-face over the next 12 months ranged from 0 percent to 90 percent for those expert witnesses based in the US. At the same time, the range for hearings expected to be fully in person was much smaller for those based in Asia at 5 percent to 25 percent, with as many as 80 percent of hearings expected to stay fully remote over the next 12 months.

Opinion is also split on whether to introduce some form of procedural rules, or set standards to govern proceedings, as exists already in certain jurisdictions, for fully remote cases. Due to the need for flexibility in complex and particularly international arbitration, the report found it's unlikely such universal standards will be implemented. However, remote hearings do look set to stay in some form for the foreseeable future and the intriguing observations raised may require addressing to some degree in the interest of all.

Read our full report here.

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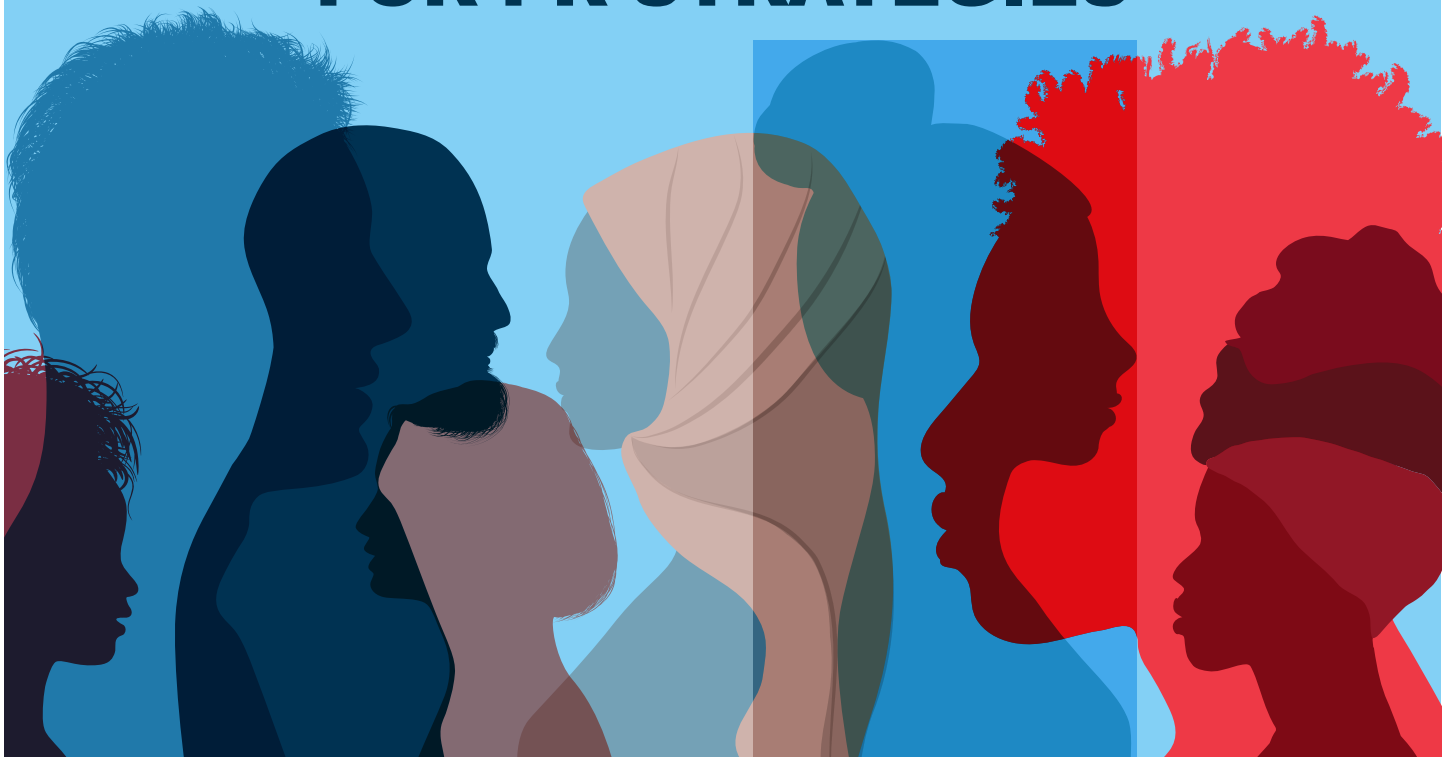
LITIGATION FUNDING, GROUP ACTIONS AND THE GROWING NEED FOR PR STRATEGIES



Authored by: Gus Sellitto - Byfield

Litigation practices are evolving fast in the UK and Europe. Neither group actions nor litigation funding are new, but they have both reached a tipping point and are now generating their own momentum. However, there is an increasing need to ensure that these commercially funded cases also have a clear and effective communication strategy attached to them. Crucially, this applies to defendants as much as claimants.

The speed and scale of change is evidenced by developments such as Stewarts teaming up with a broker to launch its own fast-track insurance facility and Mishcon de Reya's £150 million litigation finance venture with Harbour. RPC has conducted excellent research showing UK litigation funding market doubling in size in just three years.

At the same time, what began as a trickle of UK group actions has become a rapidly growing stream of high profile cases. These include the case involving Post Office submasters, *Merricks v Mastercard*, multiple dieselgate actions and the FCA's test case that ensured businesses were paid out under their business interruption insurance policies through Covid disruption.

What is notable here is that the general population has a high awareness of these cases because they have attracted so much conventional and social media profile. They are penetrating the national psyche in a way that would have been unthinkable for litigation a decade ago.

The need for PR

These cases are not high-profile by accident. PR is a huge feature of claimant law firms' book building strategies. Tools at their disposal include aggressive media relations strategies to sell David v Goliath stories to mainstream or tabloid media, sophisticated social media campaigns and paid advertising to dangle attractive sums in front of consumers to entice them into signing up to join an action.

Increasingly this advertising means creating a specialist microsite about the claim and paying to it to the top of any Google search about the topic and then making it as easy as possible for consumers to join a claim. Claimant law firms will also seek to get consumer champions on side. All of this helps them build a class – the bigger the better.

All of the above demonstrates that litigation PR must be central to any group action litigation strategy and to any funder's commercial strategy. Returns on investment may depend upon it.

Defendants need to respond more quickly

Most big corporations have not yet been on the receiving end of a consumer redress class action in the UK. An awful lot more of them will be in the next few years. Class actions are still seen by many as something that only really happens in the US. That is no longer the case. Defendants need to get to grips with how quickly and easily they can lose the PR battle in a class action by not understanding, anticipating or responding to what a claimant firm is doing in the early stages of a potential group action.

For example, not engaging with media on the subject simply leaves the field clear for a claimant firm to occupy the space with their own messaging and build their book of consumers. This is a lose-lose for a defendant corporate. They suffer reputational damage while also facing a larger and potentially more expensive legal action than otherwise.

It is important that defendants grasp this. The right PR strategy not only helps protect the corporate reputation but can also impact squarely on the success of a claimant firm's book building activities. General counsel need to work closely with their boards, PR teams and the right external advisers to consider both offensive and defensive PR approaches as part of their litigation strategies.

Practicalities

Taking a reactive stance to litigation PR doesn't work; you need to have a strategy in place. For instance, anticipating when and how you might be attacked by the other side, what your key rebuttals are and how you would respond if allegations were being made about you that were not true.

The better planned in relation to thinking carefully about pre-trial, through-trial and post-trial in litigation PR you are, the better your outcome in terms of media and public perception will be.

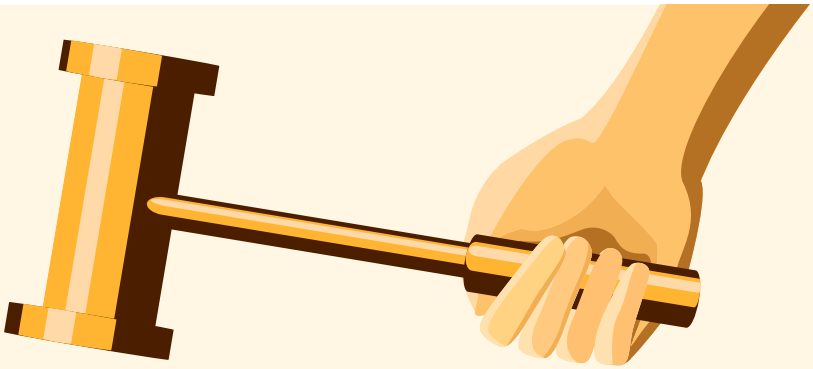
This requires bringing in PR specialists early in any funded case or group action. Planning your strategy around the facts and the timetable of the case are both essential, as is thinking about reputational considerations beyond the end of the case itself.

Perceptions of litigation becoming more sophisticated

Litigation funding and group actions are perceived by the public in a variety of ways. At one end of the scale they are seen as offering access to justice to consumers, businesses and sometimes individuals who would not otherwise be able to afford to bring a claim. They can also raise public awareness of corporate wrongdoing in a genuinely impactful way that drives change.

At the other end of the scale they can be perceived to be fuelling the commercialisation of justice, driven by an ambulance-chasing culture more akin to that of the plaintiff bar and litigation culture we have seen develop in the US over many years.

Different cases will fall in different places on this scale and the purpose of both defendant and claimant litigation PR strategies should be to try and determine those places, and then plan adapt their litigation PR strategies accordingly. Clearly , we are going to see more funded cases and more group actions over the coming months and years. Litigation PR should be a key consideration for all parties involved in those cases.



LAWYERS BEYOND THE JURISDICTION

Authored By: Robert Gardner and Sonia Minns - Bedell Cristin

The Courts of Jersey deal with some very complex, specialist and high value claims. Even the largest and most specialised litigation departments on the island find themselves unable to adequately recourse certain aspects of such claims and inevitably need to draw on the huge wealth of talented specialists at law firms (in London and elsewhere) and the English Bar to assist. This makes perfect sense, given that parts of Jersey's legislative regime, for example certain aspects of company law, are similar to (or modelled on) equivalent UK laws. And because the UK judicial system is much larger than Jersey's, the judgment library is vast, and therefore the practitioner experience is equivalently broad.

However, the benefits of drawing on English legal experience for use in Jersey proceedings must be viewed against the well-worn dicta[1] of Bailhache Bailiff (as he was at the time) that "… Jersey is not, and never has been a colony to which the corpus of English law has been exported…".

This theme manifests itself throughout the Jersey legal system, including who has, and does not have, rights of audience in Jersey Courts, the fact that the Legal Aid burden is shared on a rota basis, amongst those who have gained rights of audience, and how the fees of lawyers outside the jurisdiction (who do not have rights of audience unless admitted to the Jersey Bar, which is a process not for the faint hearted) are viewed. A recent case presided over by the Deputy Bailiff highlights a point worth bearing in mind for Jersey practitioners and their onshore support, when it comes to what can be reasonably claimed from an opponent on a taxation of legal costs and the caution parties must take in the preparation of their bill of costs.

Matters relating to costs in Jersey proceedings are governed by the Royal Court Rules (the "**Rules**"), the Civil Proceedings (Jersey) Law and the Practice Direction [2]. Taxation is a function of the judicial Greffier of the Royal Court [3]. Templates for suggested bills of costs are set out in the Practice Direction.

1 [1999] JLR 118 State of Qatar v Al Thani
2 RC 09/01 https://www.jerseylaw.je/courts/Pages/RC-09-01.aspx
3 RCR 12/3

The starting point of the Rules[4] is to allow costs after taxation on the *standard basis*, unless the Court considers otherwise[5]. The standard basis is described as [6]:

"… a reasonable amount in respect of all costs reasonably incurred and any doubts which the Greffier may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party …"

Chargeable costs are categorised as either *direct cost* (**"Factor A"**) or *care and conduct* (**"Factor B"**) [7]. Factor A encompasses any time which was reasonably done arising out of or incidental to the subject proceedings and is fixed at rates which are intended to cover the salary and overheads of each practitioner, such as taking instructions, interviewing witnesses, correspondence with other parties, drafting pleadings and affidavits, negotiations and hearing preparation. Factor A costs are determined by the Court, and are published as a separate practice direction and are updated from time to time [8]. As it stands, for example, the Factor A hourly rate of a partner is £275, and the hourly rate for a paralegal is £100.

Factor B is a somewhat more amorphous component than its Factor A counterpart, 'reflecting all the relevant circumstances of the case', and is applied as an uplift to the Factor A rate. Chargeable line items can attract different Factor B rates, dependent on whether the charge concerns Interlocutory attendances, conferences or taxation (**"B1"**) or preparation and attendances at trial or hearing (**"B2"**). Helpfully the practice direction provides guidance; the norms for a B1 and B2 uplifts are 35% and 50% respectively. Where a party is seeking a higher uplift then it is necessary to articulate the rationale and only in cases which can be described as 'exceptional' will attract an uplift of 100% or more.

The Rules deal specifically with '*advice obtained from or work done by lawyers outside the jurisdiction*'. Generally, such costs are permissible, but they are caveated and are dependent upon whether the chargeable time was for work which either could, or could not, have been undertaken by a Jersey lawyer.

So what are the rules relating to the recovery of overseas lawyers? The leading Jersey case on the recoverability of the legal fees of non-jurisdictional practitioners is that of *Incat Equatorial Guinea Limited v Luba Freeport Limited* [9], which concerned an appeal against a decision of the Greffier who, on a taxation allowed the recovery of English lawyers' costs which the appellant described as "duplication and wholly unnecessary expense"[10]. All grounds of appeal were dismissed. Birt, Bailiff as he was then, commented that the work that could be undertaken by a Jersey lawyer included *' …preparing a witness statement, drafting a pleading …'*[11] and as such if a foreign lawyer was doing this work, their rate would reflect the Jersey Factor A, with the relevant Factor B uplift (B1 or B2 as the case may be). On the other hand, legal work ' … *which in the context of the proceedings, could not reasonably have been done by a Jersey lawyer … is not related to a Jersey lawyer's fees; it is simply what is reasonable'*[12]. Therefore, the chargeable rate of (for example) specialist UK counsel or UK solicitors may be greater than that which could be recovered by a Jersey lawyer.

The three groups of Plaintiffs in the matter of *FTV & Ors v ETFS & Anor,* sought costs of nearly £11 million[13] in relation to pursuing a substantial shareholder dispute to a trial which lasted 4 weeks (**"FTV Legal Fees Case"**). Notwithstanding the Court found the Plaintiffs *'failure[d] on the majority of their pleaded case'* the Court awarded them 50% of their costs on the standard basis, taxed if not agreed[14]. As the First Defendant (ETFS) was ordered to bear its own costs, the Plaintiffs (collectively 35% shareholders of ETFS), bore a share of those costs too as those costs were factored in to the calculation of the value of ETFS[15].

On the Plaintiffs' argument that their costs were proportionate, the Court's view was[16]:

"… Bearing in mind the difference between what the Plaintiffs 'recovered', in terms of the sum that Mr Tuckwell will need to pay to purchase their shares and what he was prepared to offer (the difference between Mr Tuckwell's offer at trial, and the sum effectively awarded by the Royal Court ranges from $44.23m to $56.64m, depending on the valuation of the portfolio companies), legal costs incurred by the parties exceeding £17 million (£11 million for the Plaintiffs) may not necessarily be described as 'proportionate'."

4 It is of course open to the parties to agree costs
5 RCR 12/2(1)
6 RCR 12/4
7 Travel (and waiting) costs are not considered further, noting that these costs are considered as a third component of chargeable time (Factor C) related only to Factor A costs, attract no uplift and are not allowed for local travel.
8 The current practice direction is found here: https://www.jerseylaw.je/courts/Pages/RC-20-03.aspx
9 2010 JRC 165 https://www.jerseylaw.je/judgments/unreported/Pages/[2010]JRC165.aspx
10 Ibid para 7
11 Ibid para 25
12 Ibid para 26
13 2021 JCR 118 https://www.jerseylaw.je/judgments/unreported/Pages/[2021]JRC118.aspx
14 Certain other costs were discounted, including costs related to the failed claims related to Mr Tuckwell's relocation to Australia, refer ibid paragraph 64 "Costs of Counsel"
15 Ibid para 86
16 Ibid para 58

Initially, for the purposes of the contested costs hearing, none of the foreign lawyers' chargeable time had been calculated at the applicable Jersey rates[17], but when the Plaintiffs resubmitted the costs having applied the Jersey rates (but at B1 and B2 of both 100%) the costs were reduced by almost £1,500,000.

The Court was also surprised at the assertion by the Plaintiffs that both the B1 and B2 uplifts were applied at 100%[18] stating: *'That may be appropriate for some of the trial work but perhaps not for all work done'*[19]. There was nothing approaching exceptional about certain aspects of work done in the proceedings, which were, ostensibly an application for just and equitable winding up or a buyout in the alternative. The standard 35% and 50% relevant uplifts for B1 and B2 would have been appropriate in the circumstances, and would have reduced the amount sought by the Plaintiffs a further £1,500,000.

The Court was critical of the Plaintiffs' contention that there was unlikely to have been any duplication between the lawyers acting, describing it as an *'optimistic assertion'* [20]. Each of the three Plaintiffs had instructed their own on-shore law firms, but just one firm of Jersey advocates. One Plaintiff onshore firm clocked up almost as many hours as the Jersey advocates, and their bill of costs was more than £500,000 higher. The Court emphasised the need to be cautious when approaching the Jersey costs scheme, and went so far as saying:

"... Mr Tuckwell may, as will be his right, object to the costs of the entirety of the sums billed by the said [Plaintiff] firms" [21].

The FTV Legal Fees Case clearly demonstrates that the Royal Court is alive to the need to accommodate the assistance given by onshore law firms to local ones, particularly for large scale litigation. However, onshore firms need to be cognisant that their fees will typically be pegged to the current Jersey charge rate unless a case can be made for certain specialised assistance being required as a result of not being available in Jersey, and the Court will scrutinise any bill of costs to ensure that the correct factors are being applied and that there is no duplication between the firms.

17 Ibid para 60
18 Ibid para 63
19 Ibid para 63
20 Ibid para 59
21 Ibid para 60

SHAREHOLDER DISPUTES IN THE CAYMAN ISLANDS IN 2021

Authored by: Alex Potts QC and Sarah McLennan - Conyers

International businesses incorporated in the Cayman Islands find themselves increasingly subject to shareholder disputes of different sorts in the Grand Court of the Cayman Islands.

One trend that has emerged and grown in 2021 involves disputes involving Cayman holding companies and businesses with operations in the People's Republic of China ("PRC") and Hong Kong.

Many of such companies have financially distressed businesses and international creditors, giving rise to insolvency-related issues. Despite this, these companies are often the owners of profitable businesses, where the disputes between the parties principally relate to allegations of mismanagement, or lack of transparency, or abuse of power by controlling shareholders.

As a result, the Grand Court of the Cayman Islands continues to deal with a significant number of 'Just and Equitable' winding-up petitions brought by oppressed minority shareholders, as well as urgent applications for the interim appointment of Provisional Liquidators.

For example, in the recent case of *In the Matter of Principal Investing Fund I Ltd and Long View II Limited and Global Fixed Income Fund I Limited* (29 September 2021), the Court ordered the appointment of Provisional Liquidators on the application of the shareholder petitioner who had presented a Just and Equitable winding-up petition. The application for the appointment of Provisional Liquidators over three Cayman fund companies was made in circumstances where the ultimate beneficial owner ("UBO") of the shares alleged serious acts of misconduct by the funds' principals. This alleged misconduct demonstrated that there was a need for Provisional Liquidators to be appointed to "hold the ring" and investigate the affairs of the funds. The Court held that there was a real risk that if the order was not made, the Cayman funds' assets would be further depleted, the UBO would continue to be oppressed, and there would be further misconduct and mismanagement.

The conduct of general meetings of shareholders, and the finality of the decision making powers of the Chairman of a general meeting, are issues that also continue to come under judicial scrutiny.

In *Re Convoy Global Holdings Limited* [2021] HKCA 1145, the Hong Kong Court of Appeal gave leave to appeal to the Hong Kong Court of Final Appeal on the question of whether, in the context of a Cayman Islands company, the decision of the Chairman of a Company's General Meeting on an objection raised to the qualification of any voter, may be challenged in Court on the ground that it was manifestly wrong or *Wednesbury* unreasonable, notwithstanding a provision in the Articles of Association that the Chairman's decision on such a matter shall be "final and conclusive".

The High Court and the Court of Appeal of Hong Kong held that, on the wording of the Articles of Association, the Chairman's decision can only be overturned by the Court if it can be shown to have been made 'fraudulently or 'in bad faith'. This position is consistent with a line of English authorities which have also been followed in the Cayman Islands (see, for example, *In Re China Agrotech Holdings Limited* [2019] (2) CILR 302). The decisions are, however, at odds Australian and New Zealand authorities.

The Hong Kong Court of Appeal noted in its judgment granting leave to appeal, that in 2019, of a total of 2071 publicly listed companies in Hong Kong, 1084 of them were incorporated in the Cayman Islands, the majority of which had the same, or similar, provisions in their Articles of Association regarding the status of a Chairman's decision at general meeting. The Hong Kong Court of Appeal also noted that the decision of the Hong Kong Court of Final Appeal on an issue of Cayman Islands law will not be binding as a matter of Cayman Islands law and precedent, but it is likely to have persuasive (and commercial) value. Therefore, the final determination of the issue is likely to have a wide impact on the corporate governance of Cayman Islands companies.

Section 238 of the Cayman Islands' Companies Act continues to generate a significant number of share appraisal actions brought by dissenting shareholders, in the context of corporate mergers.

In *Re Changyou.com Limited*, 28 January 2021, the Grand Court of the Cayman Islands considered whether the section 238 appraisal regime applied to 'short-form' mergers between parent companies and their 90% controlled subsidiaries, where no shareholder vote is required.

This was a novel point and despite the literal wording of the Companies Act to the contrary, the Court held that the section 238 appraisal regime should be made available to minority shareholders in a 'short-form' merger. The decision is being appealed: the appeal is being heard by the Court of Appeal of the Cayman Islands in November 2021, with a further appeal to the Privy Council by either of the parties being a distinct possibility.

As well as the increasing number of trial and appeal judgments under section 238 of the Companies Act (dealing mainly with the substantive valuation and accounting questions that arise on the facts of each merger), there is now a large body of case law from the Cayman Courts that concerns ancillary procedural issues relating to discovery, witness evidence, expert opinion evidence, interest and costs.

For example, in the recent decision of *Xiaodu Life Technology Limited*, 27 April 2021, the Grand Court of the Cayman Islands took the novel step of issuing a Letter of Request to the High Court of Hong Kong for the examination and production of documents by various officers of the company, as well as ordering specific ¿discovery of documents.

Looking forwards, we expect to see shareholder disputes continue to dominate the litigation landscape in the Cayman Islands over the next year as the worldwide economy, and the PRC economy in particular, experiences further disruption in light of COVID-19.

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