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ISSUE 2

OUR BIG ISSUE: INVESTOR-STATE, INTERNATIONAL COMMERCIAL ARBITRATION AND COMMERCIAL LITIGATION

INTRODUCTION

"The intersection of law, politics, and technology is going to force a lot of good thinking." **- Bill Gates**

Here at TL4 we are greatly encouraged by how the Community's brand identity has been evolving since we entered a rich ecosystem of dispute resolution practitioners a short 6 months ago. An overwhelmingly positive response to the launch edition of the Quarterly magazine last June proved to be hugely inspirational and rewarding.

We hope that by offering a multi-disciplinary blend of insights on the most pertinent topics ranging from ESG, SPACs to sanctions and sovereign enforcement, this second edition will serve as a helpful compendium of opinions, analyses and commentaries.

Many thanks to all our contributing authors for helping ThoughtLeaders4 to make a real difference to our growing Community.

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A VIEW ON THE MIDDLE EAST AND NORTH AFRICA:

HOW CAN THE REGION CAPITALISE ON A GROWING APPETITE FOR ARBITRATION?

Authored by: James Glaysher - Candey (UK)

The UAE is frequently lauded as the trailblazer for arbitration in the Middle East and North Africa ("**MENA**") region. This attribute is complemented by an apparently growing appetite for arbitration on the part of commercial parties operating in the UAE. In November 2020 the Dubai-based DIFC-LCIA Arbitration Centre reported an 18% increase in cases initiated under its rules compared to the previous year, with the aggregate value of cases doubling in that time from US$600 million to US$1.25 billion. Early indications from the DIFC-LCIA are that the figures for 2020 will report further increases, notwithstanding the effects of COVID-19.

The opening in April 2021 of a case management office IN Abu Dhabi for the ICC Court Secretariat is a further telling endorsement of this trend. In 2019 alone, more than 310 parties engaged in arbitral proceedings under the ICC Arbitration Rules.

Arbitration provides parties with a confidential, neutral battleground for any disputes arising from their commercial arrangements. As such, a national legal framework that both supports the arbitral process and provides for a reliable system of enforcement of arbitration awards can create a terrific stimulus for foreign investment into that country.

So how might other countries in the MENA follow the UAE's lead, and look to capitalise on commercial parties' increasing familiarity with arbitration as a means of dispute resolution? This article considers a possible 4-point plan.

1. Modernise National Arbitration Laws

The adoption of a modern national arbitration law, allied with other provisions to facilitate the process of arbitration, is a decisive signal that a jurisdiction is arbitration-friendly and therefore a dependable method of creating investor-confidence.

A new arbitration law came into force in the UAE in June 2018, and applies to any arbitration seated in the UAE. This law modernises the domestic arbitration framework and better facilities the enforcement of awards (see further below). Article 257 of the UAE Penal Code was also repealed in September 2018. This provision had placed arbitrators determining a dispute seated in the UAE at risk of imprisonment if they were found not to have maintained standards of "integrity" and "impartiality" while discharging their function as arbitrators. The law had previously discouraged many of the most experienced practitioners from accepting nominations in UAE-seated arbitrations.

Elsewhere, Qatar took a positive step in this regard in February 2017, adopting a new arbitration law broadly based on the internationally-recognised UNCITRAL model. This new law has been universally welcomed. For example, it provides a significantly clearer basis for the recognition and enforcement of awards brought to the Qatar courts, and contains clear definitions of the commercial disputes that are arbitrable in the jurisdiction.

2. Establish Specialised Arbitration Courts

A lack of familiarity with arbitration among judges, particularly at first instance, can lead to decisions that run counter to global arbitration jurisprudence. Even where an appellate court rectifies that first-instance decision, the resulting time and expense associated with finally achieving enforcement, particularly after the gruelling process of actually succeeding in the arbitration in the first place, can lead to lasting reputational damage for the jurisdiction involved.

A number of jurisdictions well-versed in arbitration outside of the MENA have long provided for some form or another of arbitration specialisation to their courts, but the UAE pioneered such measures for the region in 2018. Pursuant to Cabinet Resolution No. 57 of 2018 (part of the new arbitration law discussed above), applications for enforcement of a foreign award are now made to a judge in the specialist Execution Court, who must rule on the enforcement application within just three days (albeit the ruling may still be subject to appeal).

Although the establishment of specialised arbitration courts may run counter to regional legal traditions, other jurisdictions in the MENA might consider weighing up the benefits of specialising the process of award enforcement, given the tremendous value foreign investors place on a streamlined, reliable process.

3. Adopt a Consistent Approach to the Application of the New York Convention ("NYC")

The majority of countries in the MENA are signatories to the NYC. However, there has historically been some difficulty enforcing arbitral awards in the MENA, due to uncertainty created by apparently inconsistent rulings from the domestic courts.

For example, courts in the MENA have on occasions transposed a requirement of "double-exequatur" into the enforcement determination (for which there is no provision in the NYC), namely where an applicant has had to show that the award has been determined enforceable in the jurisdiction in which it was made before it can be enforced elsewhere. This approach has both undermined the fundamental purpose of the NYC – to provide for an internationally-uniform standard for the recognition and enforcement of foreign arbitral awards – and has made international parties wary of relying on enforcement procedures in the MENA region.

A consistent application of the NYC, whereby enforcement of foreign awards is refused only on the narrow grounds provided for by the NYC, will go a long way to reinforcing investor confidence in the region.

4. Support Proactive Arbitration Institutions

Commercial parties based in the MENA are of course at liberty to select any of the world's leading arbitration institutions to administer their disputes, regardless of whether they are headquartered in the MENA region. Nevertheless, arbitration institutions based in the region which are proactive both in (i) promoting arbitration as a reliable means of dispute resolution, and (ii) keeping its rules of arbitration updated so as to meet the evolving demands of commercial parties; will serve as further assurances to foreign investors of the region's commitment to arbitration.

The DIFC-LCIA leads the way in the MENA in providing arbitration rules representing best international practice, and as a result has seen its case load increase substantially in recent years. The Cairo Regional Centre for International Commercial Arbitration has also recently taken important steps to enhance regional cooperation with Asian and African parties, institutions and practitioners. This has been reflected in the appointment of eminent Chinese and African experts to its Board of Trustees.

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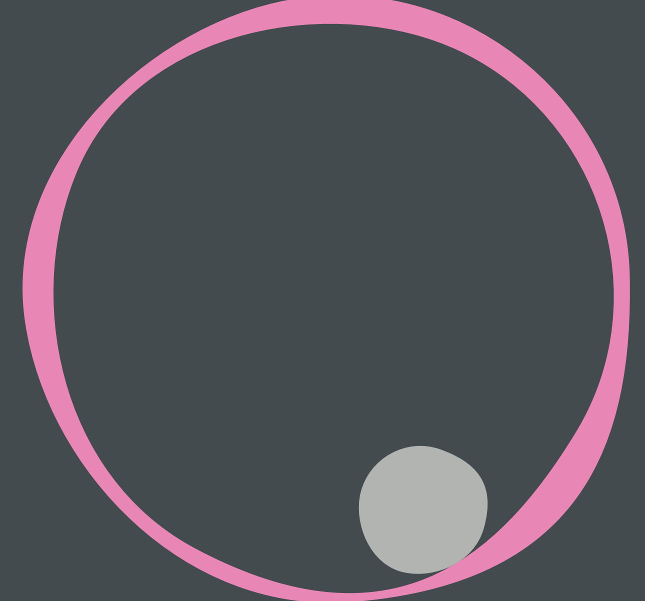

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SPECIAL PURPOSE ACQUISITION COMPANIES IN THE BVI AND CAYMAN ISLANDS AND THE POTENTIAL FOR LITIGATION

Authored by: Kai McGriele (Cayman Islands), and Owen Prew (BVI) - Bedell Cristin

Introduction

In recent years the BVI and Cayman Islands ("**Cayman**") have seen a sharp rise in the number of Special Purpose Acquisition Companies ("**SPAC**" or "**SPACs**") being incorporated.

A SPAC is an entity which is formed and listed on a major exchange with no specific business purpose except to raise capital for a future purpose. This purpose is often undefined or ambiguous at best and, for this reason, they are known euphemistically as 'blank cheque companies'. Often, the broad purpose of the SPAC is to identify and make acquisitions of other, as yet unidentified, target companies and it is usual for the SPAC to have a fixed amount of time to do this. This gives the SPAC a limited lifespan.

In the event that a transaction is not completed during the allotted timespan, the SPAC is required to be dissolved and any funds received from investors returned to them.

Given the nature of the SPAC and the 'unknown' nature of the transaction(s) involved, it is highly likely that the increasing demand for SPACs in the BVI and Cayman may lead to significant disputes between those investing in a SPAC and those employed to make investment decisions on its behalf.

The purpose of this article is to laser in on where those disputes may arise and the areas that those who structure, manage or invest in SPACs should pay close attention to in order to avoid future pitfalls.

Background

The genesis of the SPAC is not a new one and SPACs in one form or another have been around since at least the 1980s, with most onshore SPACs traditionally incorporated in the US state of Delaware. The major exchanges in London and New York now allow the listing of SPACs formed outside of the US and SPACs may be incorporated in most of the leading offshore jurisdictions.

The offshore boom in the formation of SPACs can be seen partly as a result of the perfect storm of a global pandemic, an excess of liquidity in the global markets and an election year in the US, alongside the inherent risks that a traditional IPO involves in terms of pricing and valuation risk.

Both the BVI and Cayman have implemented attractive and flexible regulatory regimes designed to accommodate SPAC structuring and are now at the forefront of pioneering their use internationally. Broadly speaking, there are three reasons why these jurisdictions are capitalising on the SPAC boom:

- ***firstly, the similarity of BVI and Cayman law to Delaware company law;***
- ***secondly, the 'soft touch' regulatory environment in both jurisdictions; and***
- ***lastly, the tax neutrality of the jurisdictions, which is particularly important when seeking out international acquisition targets.***

Notable BVI and Cayman SPAC IPOs over the past year include:

- ***Kismet Acquisition One Corp (US$250m);***
- ***Aries I Acquisition Corporation (US$143m);***
- ***Eucrates Biomedical Acquisition Corp (US$100m);***
- ***ITHAX Acquisition Corp (US$240m); and***
- ***ARYA Sciences acquisition vehicles III (US$143m) and IV (US$130m).***

Pioneering offshore innovation

In many ways, the BVI has been even more successful than Cayman in positioning itself as a global leader in SPAC innovation. It was the BVI that was the destination of choice for the first ever NASDAQ listed Chinese finance business back in 2016 as well as for the first India focused SPAC and, in 2018, it was a BVI SPAC, the National Energy Services Reunited Corp, that completed a unique simultaneous double business combination when it acquired two Middle Eastern oil businesses with a combined value of over US$1.1 billion.

The BVI has led innovation in terms of the structuring of these vehicles, including introducing novel features such as 'rights', 'fractional warrants' and the ability to extend the SPAC's lifespan. But wait…

Future disputes

It is in this last innovation that the seed of future disputes may lie.

It's easy to see why the ability to extend the life of the SPAC may be advantageous where the company is in the midst of negotiations or about to enter into a transaction and has a target squarely in its sights. It is, however, equally obvious that, from an investor's standpoint, investing capital 'blindly', for a defined period of time, into a company which can generate no ROI until it completes a transaction and owns no other assets, that company choosing to roll over its 'allotted time' could generate the potential for serious disputes.

Any decision to extend the lifespan of the SPAC, and thereby delay the return of capital to the investor, not only exacerbates the failure to generate a return, but also magnifies the opportunity cost of investing in the SPAC in the first place.

Investors, sponsors and directors

In addition to the risk of a SPAC attempting to keep itself alive beyond the originally anticipated investment period, investors face the more obvious risk that this is a true 'blank cheque investment'. They rely entirely on the judgment of those involved in forming the SPAC (the sponsors) and the management team during the life of the SPAC.

Directors of SPACs owe all of the same duties as directors of ordinary companies and, from an investor's standpoint, it is important to understand that they will almost certainly also benefit from the usual director's indemnity clauses which offer them protection unless their actions were carried out dishonestly, in bad faith or were illegal. Many directors may also enjoy generous remunerative arrangements linked to the ultimate success of the SPAC.

In this context it is, therefore, easy to see how conflicts may arise between the duties owed to the SPAC and the director's own self-interest which may lead to disputes with the investors, especially in circumstances where the directors want more time to find an acquisition target.

The opposite may also be true, i.e. that the directors 'rush into' a bad deal because they only have limited time to find an acquisition target, instead of waiting for a better deal or carrying out thorough due diligence. It is also clear that the time limitation of SPACs offer target companies a clear pinch point when leveraging negotiations and it is understandable that it might be desirable to allow the SPAC to extend its lifespan. To counter some of these risks, some SPACs are forming 'special committees' designed to offer increased objectivity but, again, this relies heavily on who appoints such committees and, again, disputes may arise.

Recent litigation

Following the boom in incorporating SPACs in the BVI and Cayman, it is highly likely that disputes may arise, given the high risk nature of the investment, the uncertainty as to outcome and the potential conflict for those managing the SPAC between their fiduciary duties and their own economic interest in its success.

Litigators in both Cayman and the BVI have been alerted to the likely development of SPAC litigation in their jurisdiction by recent law suits in New York and Delaware concerning alleged violations of the federal securities laws and claims against directors of SPACs for misrepresentation and breach of fiduciary duty. It is, therefore, almost certain that the wave of SPAC incorporations in Cayman and the BVI over the past few years will lead to similar litigation on behalf of disgruntled investors in those jurisdictions. It is a matter of when and not if such litigation will materialise.

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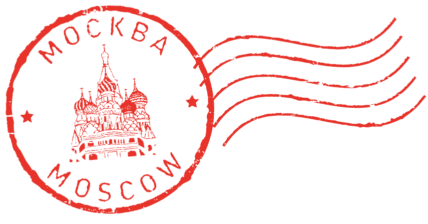
SANCTIONS VS ANTI-SANCTIONS:

APPLYING FOREIGN LAW IN RUSSIAN COURTS

Authored by: Viktor Rykov - Nexign, JSC and Ben Wells - Candey

Overview

A recent Russian judgment, *Instar Logistics*, demonstrates the incorrect application of the parties' governing law clause, in which the court failed to appropriately balance the parties' choice of governing law and mandatory Russian law. In light of recent amendments, Article 248.1 of the Russian Arbitrazh Procedural Code ("APC"), which gives the Russian courts exclusive jurisdiction over sanctioned persons in certain circumstances, courts are likely to encounter more sanctions-related cases governed by foreign law.



1. General Requirements on Applying Foreign Law

The freedom of contract principle is enshrined in Russian law with parties being allowed to choose any law they deem fit to govern their contract (Art. 1210(1) of the Russian Civil Code). Art. 1192 of the Civil Code explains the limitations of that freedom: namely, that overriding mandatory legislative requirements will still take precedence. More specifically, Art. 1210(5) of the Civil Code highlights that the parties' choice of law will not affect the court's decision to apply the mandatory law of a country to which all the circumstances concerning the essence of a deal are connected. Importantly, part IV of the Civil Code from which the above articles emanate does not allow parties' governing law clauses to be completely overridden.

The starting point for striking a balance is Art. 1191(1) of the Civil Code: a court, when applying foreign law, shall establish the relevant legal norms in accordance with their official interpretation, case law and doctrine in the relevant foreign state.

In *Instar Logistics* the Russian court's reasoning implied that the decision to apply English law to govern a contract contradicted '*applicable [Russian] law*'. The parties chose English law as the governing law of the contract and it was the court's task to determine which parts contradicted Russian mandatory legal norms.

Art. 12(b) of the Master Agreement stated: *'if any contractual term in the Master Agreement contradicts or violates applicable law, such a contractual term shall be varied to such a degree as necessary for observing applicable law'.* Choosing English law to govern the Master Agreement may violate Russian anti-sanction laws. Therefore the Appellation Court was expected not to replace English law by Russian law but to reject those norms which contradicted Russian mandatory norms.

2. English Law Approach to Determining and Applying US Sanctions in International Disputes

The situation may arise where an English court enforces US sanctions against Russian counterparties, while a Russian court will reject such enforcement. Alternatively, a dispute governed by English law may be brought directly before a Russian court, in which case a Russian court is expected to determine and construe English law from the standpoint of the English courts (Art. 1191(1) of the Civil Code). The question is to which extent English law allows enforcement of US sanctions.

Lamesa was a Court of Appeal case between Lamesa Investment Limited (Lamesa) and Cynergy Bank Limited (Cynergy) over non-payment by Cynergy of accrued interest under the loan agreement. Cynergy stopped payments following the inclusion of the Claimant's ultimate beneficiary owner, Viktor Vekselberg, in the US list of Specially Designated Nationals.

The main question was whether parties' underlying contract allowed Cynergy to stop paying interest. Consequently, the court devoted most of its time to construction of the contract to establish the extent to which US sanctions affected the parties' contractual relationship. Importantly, the court felt no need to address whether or not US sanctions had extraterritorial effects.

In particular, the Court stated that the word 'mandatory' in the parties' contract '*simply means compulsory or required*', rather than '*a provision from which the parties cannot derogate*'.

The court held that Cynergy was excused for its non-payment because it failed to perform payments '*in order to comply with any mandatory provision of law, regulation*' but that Cynergy was not in default and that there should be no liability for delaying payment.

Lamesa demonstrates that how US sanctions affect contractual obligations is an issue of construction.

BSJI: Effects of sanctions depend on risk allocation

In *BSJI*, before the High Court in England, Banco San Juan International Inc., the lender ("the Bank") and Petroleos De Venezuela S.A., the borrower ("PDVSA"), entered into a loan agreement. The contract provided that PDVSA '*will not repay Loans with the proceeds of… business activities that are or which become subject to [US] sanctions*' (clause 7.03). PDVSA became affected by US sanctions after the US authorities targeted the oil economic sector in Venezuela. Accordingly, PDVSA attempted to rely on the cited contractual clause as a reason for non-repayments to the Bank.

While in *Lamesa* the relevant background was that the sanctioned entity, Lamesa, tried to procure payment; in BSJI, PDVSA, being the sanctioned entity, attempted to avoid payment. However, the High Court distinguished the cases on the grounds of construction rather opposed to facts.

The High Court agreed with the Bank's contention that clause 7.03 was a negative covenant benefiting the Bank alone, not a condition precedent imposing payment obligations. The High Court supported its conclusion by the fact that violation of clause 7.03 triggered the lender's right to claim damages.

In conclusion, the findings in *BSJI* and *Lamesa* underline that US sanctions are not automatically enforceable under English law.

3. Enforcing Parties' Choice of English Law in the Russian Courts

Once the content of English law is established, it is then possible to examine its correlation to mandatory Russian law, which has been designed to protect sanctioned Russian parties.

i. Partial rejection of English law

We will now consider how a Russian party affected by a scenario similar to that encountered in Lamesa could be protected in the Russian courts. Under English law, a Russian party would not be able to claim interest on a payment delayed due to the risk of US sanctions being imposed on a counterparty. Accordingly, if a Russian court asserts its jurisdiction over such dispute which was contractually governed by English law, it could reasonably disregard this application of English law. Moreover, Art. 248.1 of the Russian Arbitrazh Procedural Code now allows both Russian and foreign parties to bring their claims before the Russian courts, in the instance that they have been deprived of access to justice.

ii. In absence of contradiction between Russian and English law, the latter is applied in full

While Russian courts are unlikely to enforce the English law approach established in *Lamesa*, as it would be to the detriment of a Russian party, there are scenarios when English law may be fully applied to determine the outcome of sanctions-related disputes. For instance, the outcomes in BSJI are unlikely to be in conflict with mandatory Russian law.

Another instance when English law may fully govern a contract in light of sanctions may be seen if the Russian courts are willing to accept the English law risk-based approach to commercial contracts. Before reaching a judgment on a case governed by English law, the Russian courts should address how the risks would be allocated in accordance with English law.

Conclusion

It is a basic need for both the Russian and English courts to resolve disputes in light of all the relevant circumstances, including the parties' contract. Although one may argue that the Russian courts are only expected to enforce law, while the English courts play an active role in the law-making process, neither are allowed to dismiss the parties' contractual promises out of hand.

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FORENSIC FOCUS:

UNCOVERING COMMON CONTROL AND CIRCUMSTANTIAL EVIDENCE IN LARGE-SCALE FRAUDULENT MISAPPROPRIATION SCHEMES - LESSONS FROM CIS FORENSIC ACCOUNTING INVESTIGATIONS

Authored by: Michael Barber and Michael Radcliffe - Grant Thornton UK LLP

Establishing control of entities is almost always a key part of big-ticket civil fraud litigation. With complex multi-jurisdictional structures, nominee owners and general lack of transparency, it can be challenging to definitively prove who controls an implicated entity. However, with careful investigation, a compelling raft of evidence can be gathered consisting of numerous coincidental factors alluding to common control. The evidence is often drawn from a range of sources, although the core documents are often simply bank statements and corporate filings. A meticulously assembled set of facts can greatly assist the courts and tribunals see through to the reality, make the logical inferences and ultimately make evidence-based decisions.

Imperfect frauds

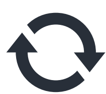
It is virtually impossible to conduct the 'perfect fraud'. Especially a big one. The 'best' fraudsters make frankly impressive efforts to disguise what is really happening, especially when there are tens or hundreds of millions of US dollars being shuffled around. At its most sophisticated, it can involve clusters of dozens of dedicated entities passing the fraudulent proceeds through a multi-step chain. These 'shell' companies may have already had artificial transactional and corporate histories built-up over a period of years, with nominee directors dutifully signing the annual filings year-on-year in preparation. Often, they are "trade agents" for a high value commodity, providing convenient cover for large transfers. Then comes the production of a faux paper trail of invoices, delivery receipts, perhaps customs documentation, and so on. A lot of work. However, ensuring each shell company is entirely different, and perfectly legitimate in appearance is near-impossible today. Establishing individual websites and online footprints is often a step too far, and the lack thereof can be a tell-tale sign of illegitimacy for an alleged trading business.

Basic links

Establishing control can be as simple as identifying public admissions made by the UBOs in the press, or through evidence previously given in open court. Otherwise, it can be signalled by two or more ostensibly independent companies having coincidental directors, addresses or establishment dates. A common trick for your common-garden oligarch is also the methodical tidying up of 'teams' of companies that have served their purpose by liquidating them en masse. Simultaneous bankruptcies and the appointment of common liquidators are further indications of links between entities. Going further, the recurrence of the same public officials approving the bankruptcies, when a variety of officials might ordinarily be expected, can be another red flag in countries with more 'flexible' judiciaries. It is also worth considering the main creditor who has put the company into insolvency: it may be a 'friendly' creditor whose status was established with an artificial debt to guarantee control of the creditor committee upon liquidation.

Innocent past?

A company may have initially been used for an entirely innocent purpose, then several years later, when long forgotten by the fraudster, that company may be used for more malign purposes. Transactions during the initial 'innocent' phase can reveal who owns that company, perhaps transactions with entities known to be linked to the targets, or even with the UBOs themselves or their close associates.



Circular flows

A powerful point about common control can be made from same-day circular payment flows. Why, and indeed how, would several companies that are unrelated make the same value payment in an apparent circle on the same day? A logical deduction is that this would not be possible without a single directing mind.

Uncommercial trade

Showing that payments between two companies lack a logical independent commercial rationale can be persuasive. A go-to transaction description is often simply "*financial assistance*", conveniently short and nebulous. Though, it draws various questions. Why would Company A assist Company B financially? That may indicate common control in itself. Why was the financial assistance not returned? Or if it was, why was no interest charged? A similar situation is where one company guarantees borrowing by another. Why would it do so if there was no link between them? The fact is, banks need real assets as collateral and that is when the fraudsters can show their hand.

For transactions purporting to be for the purchase of specified goods and services, the pricing can be compared to open market rates to determine if they were reasonable. The nature of the goods can also simply be contrasted with the stated business activities of the seller and purchaser – if it lacks sense, that is another red flag.

Further tell-tale signs of uncommercial behaviours may include constantly deferred payment or delivery timings, lack of apparent deliveries or imports of the goods, or the 'purchase' of absurd quantities (either individually or cumulatively) that have been calculated to match the sum being laundered rather than adhere to real-world logic.

The wrong crowd

We have frequently found the same nominee director's involvement not just with companies related to one alleged fraudulent case, but recurring across multiple separate cases we have been working on. Such individuals have often been found to have been reported publicly in the mainstream press as potentially involved in large-scale money laundering. When such individuals darken the door of the investigation it is not in itself proof of fraud or money laundering, but their presence adds further weight to the allegations.

Noisy traders

After travelling through layers of apparent shell companies, payments may then be funnelled into a legitimate busy trading entity as part of the layering stage of money laundering. This can be to seek to legitimise as well as properly obfuscate the payment flows, since busy trading businesses have more 'noisy' bank statements. Trading entities may have more transparent ownership structures which could unlock the identity of the invisible hand behind the apparent scheme.

Calmer seas

Further downstream, one can then emerge into calmer seas, where the misappropriated funds are being spent: classically the purchase of expensive goods in London or Dubai, paying expensive school fees and large transfers to solicitors for property acquisition (all of which can, of course, also assist with establishing jurisdiction). The 'placement' stage of money laundering. While fraudsters go to great lengths to ensure that access to the financial information sufficient to identify such transactions is exceedingly difficult to obtain, it can often be secured by international lawyers tenaciously pursuing the banking documents through various legal actions from Norwich Pharmacal orders to US CHIPS applications.[1]

Final reckoning

It is not for the forensic accountant to conclude on whether the above-described factors definitively prove common control. Or if when combined with other factors, the evidence adds up to a certified fraud. That is, of course, the prerogative of the court or tribunal. Methodical investigation and clear articulation of key facts though provides a weighty set of evidence for the decision maker to place on one side of the scales when making their reasoned judgment.

1 The Clearing House Payments Company L.L.C. (CHIPS) is the largest private sector USD clearing system in the world, clearing and settling $1.8 trillion in domestic and international payments per day.

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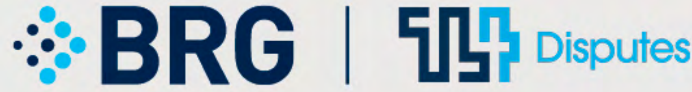

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WILL M&A DISPUTES RISE IN THE WAKE OF COVID-19?

DEALMAKERS EXPECTED THAT THEY MIGHT, AT LEAST IN THE ASIA-PACIFIC REGION, AS THE WORLD EMERGES FROM THE PANDEMIC.

Authored by: Mustafa Hadi - BRG (Hong Kong & Singapore)

As 2020 drew to a close, attorneys and dealmakers involved in M&A across the Asia-Pacific region were braced for a rise in deal-related disputes in 2021. There was a simple reason: The patience and empathy that parties extended to each other in 2020 – as the world grappled with a once-in-a-century pandemic – was running out.

That was clear in research BRG released around the end of last year. The dealmakers and attorneys whose insights informed the research said 2020's unique challenges would become increasingly intolerable and there would be a renewed focus on parties protecting their own interests.

"We are likely to see proceedings increasingly being used to resolve genuine disagreements, which have been festering over the past year," said John Choong, a partner at Freshfields Bruckhaus Deringer in Hong Kong, in December.

So far, it's too soon to say whether those queried in 2020 were right when they said an evolving dealmaking environment, international trade tensions, market volatility and continued fallout from COVID-19 would lead to increased M&A disputes in the Asia-Pacific region. We should have a better idea later this year about whether disputes increased there, and in other parts of the world, when we release new research. Until then, it's worth revisiting last year's predictions.

Delays and Difficulty, But M&A Activity Continued in 2020

While most attorneys and dealmakers said disputes didn't increase significantly in 2020 and that there was an incremental rise in disputes consistent with previous years, delays were common. Transactions stalled as parties struggled to complete due diligence—widespread travel restrictions made cross-border deals especially difficult—and other tasks traditionally undertaken on location.

That paused many deals that had signed but hadn't closed before the pandemic. Some buyers struggled to secure financing or representations and warranties insurance; others were unable to enter the countries where their acquisition targets were located. Broadly, buyers found it increasingly difficult to make fully informed valuation decisions.

Late in the year, buyers started using dispute proceedings—or the threat of such proceedings—to renegotiate prices on deals they'd signed before the pandemic, according to the dealmakers and lawyers we interviewed. Almost all of those we spoke with said they expected the cracks in deals that began to form in late 2020 to lead to 2021 disputes.

"People are more sensitive about the financial situation," said Matthew Skinner, a partner at Jones Day in Singapore. "In the past, they may have been inclined to let these things ride; they would not want to upset the apple cart. But now, it is different."

MACs Under the Microscope

Such growing tensions typically lead to attention paid to contract provisions that in more prosperous, less volatile times would have escaped much notice. That's why material adverse change (MAC) clauses and force majeure provisions rose quickly to the forefront of many dealmakers' thinking in late 2020.

In interviews then, lawyers said that in previous years, disputes that involved MACs and conditions precedent (CP) most often saw them included cursorily in long lists of claims simply to preserve all possible avenues for claimants. That began to change in 2020 and possibly positioning disputes that center on MACs to proliferate in 2021 as buyers and sellers grasp how the pandemic's effects have rippled through the parties' businesses.

The outcomes of these disputes will likely center on questions of how the pandemic directly impacted the business and the subsequent quantification. That means dealmakers and lawyers should look carefully at the wording of MAC provisions and CPs. In contracts where the provisions are precisely defined, the question may turn to whether COVID-19's impact qualifies as a MAC or makes a CP impossible to meet. But as one prominent Asia-based arbitration lawyer said last year, with a MAC that contemplates only general business disruption, "if a pandemic is not a MAC, then what else could be?"

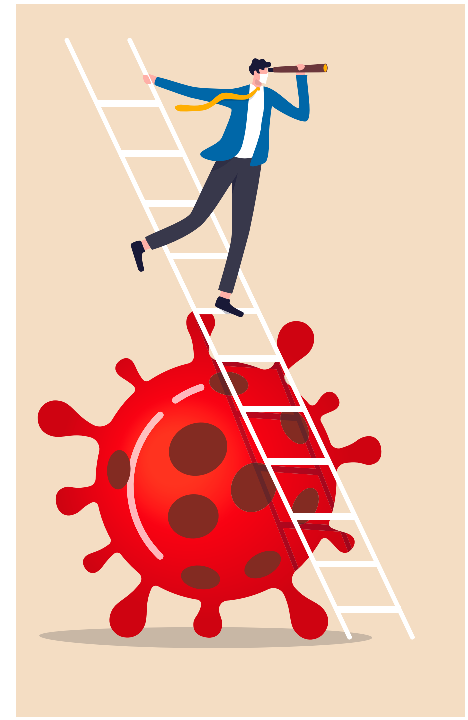
Hot Spots: Where Disputes Are Brewing

Geographically, China and South Korea were the most active jurisdictions for M&A-related disputes in 2020 and likely will be again in 2021, according to our research.

For China, the activity arose from the heavy volume of foreign-direct investment and cross-border deals, combined with a slowing economy and tightening credit market. Diplomatic tensions between the US and China also had the potential to impact cross-border M&A activity and disputes. South Korea's high level of disputes was driven by its unique business culture, according to the lawyers we interviewed.

In the industries hit hardest by COVID-19, plummeting valuations and precarious futures were expected to lead to active deal markets and probably to frequent disputes. For example, the commercial real estate, infrastructure, aviation and hospitality sectors were expected to see heavy activity in 2021.

But booming industries were expected to attract investors seeking acquisitions. In an industry such as pharmaceuticals, robust transaction volume combined with complex intellectual property issues and cross-border financing and ownership was primed to create a steady stream of complications that can foster disputes.



What's Ahead for M&A Disputes

The global recovery from the pandemic may be fragile, but with record M&A activity, dealmakers are getting on with business. The impact of the changing landscape on M&A disputes, however, will become clearer in the coming months.

EXPERT WITNESSES: THE CHALLENGES THEY FACE

Authored by: Daniel Turner and Alison Ross - Grant Thornton UK LLP and Mark Harper QC - Kings Chambers

Expert evidence is a common and, in most instances helpful, feature of modern litigation and arbitration. Grant Thornton UK LLP and Kings Chambers explain the challenges facing expert witnesses.

With disputes becoming more complex, courts and arbitration tribunals remain reliant on expert evidence. However, both judges and arbitrators are not reluctant to refuse the admission of expert evidence where it doesn't comply with the rules governing the relevant proceedings.

In this article, we address a number of the requirements of an expert witness and the challenges they can face in fulfilling this role effectively. In this first article, we explore the expectations made of the expert and the importance of establishing at the outset how the expert will transition from adviser to witness.

Expectations of expert witnesses

First and foremost an expert witness is not an advocate for his or her client, a fundamental concept that instructing lawyers are aware of, but often the client is not.

In our experience, clients can range from small owner-managed businesses through to blue-chip companies. With that comes not only varied levels of experience and previous exposure to litigation, but also varied levels of emotional investment in the process and expectations of all professional advisors engaged within the process.

When appointed in the role of expert in court proceedings or arbitration, an expert must comply with the rules relevant to the jurisdiction and proceedings, for example the Civil Procedure Rules ('CPR'), Part 35 – Experts and Assessors, when a matter is heard in the courts in England and Wales.

It's important for instructing solicitors, and appointed experts where necessary, to educate the client on the role of the expert and the expert's duty to the court or tribunal, which overrides any duty to the instructing party or parties. To put it succinctly, the role of the expert witness is not to articulate or advocate the position of the lay client, rather it is to assist the ultimate decision-maker.

The role of expert witnesses

While the role and responsibilities of the expert are clearly presented in Part 35 of the CPR for matters heard in the courts of England and Wales, there are other jurisdictions where guidance may not be as prescriptive.

To see how the role of an expert has been described in the most quoted English court judgment on the matter, one should review the judgment of Mr Justice Creswell in National Justice Compania Naviera SA versus Prudential Assurance Company Limited (commonly referred to as the 'Ikarian Reefer' case, [1993] 2 Lloyd's Rep. 68).

Among the areas addressed in this judgment, the following two key statements presented by Cresswell J are particularly relevant to what is expected of the expert:

'An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts that could detract from his concluded opinion'.

In our experience, lay clients sometimes express concern that matters that may be contrary to the position that they have presented or unfavourable to the overall position of the case have been considered by the expert. We often have to emphasise to these clients that an expert's overriding duty sometimes requires the expert to act in a manner that doesn't match a client's expectations or doesn't support all elements of a client's pleaded case.

'In cases where an expert witness, who has prepared a report, could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report'.

In certain matters, it's necessary to include a limitation of scope section in expert reports where the lay client, or the opposing client, has not been able to provide the required information or granularity of information to allow a full independent review and/or opinion to be drawn in respect of certain aspects of a claim. Clients are naturally reluctant for the inclusion of any such limitations, and while rare, such wording is necessary if the limitation of scope is relevant to the overall conclusions reached.

When seeking to explain an expert's approach and duties to a client, it's beneficial to refer back to the guidance provided by Lady Justice Carr in Secretariat Consulting PTE Ltd & Ors versus A Company ([2021] EWCA Civ 6), which neatly encapsulates an expert's duty:

'…an expert who complies fully with his duty of independence and objectivity to the court or arbitral tribunal is an expert who provides his client with the best possible service'.

? The question for expert witnesses

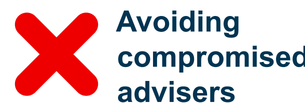
The question that needs to be asked and answered at the outset, is what role is the expert to perform? If the role is to be that of providing expert advice and assistance in the investigation and formulation of a claim, then the expert is not subject to the rules referred to above. If the role is to be that of expert witness, then the expert is subject to the rules.

The expert as adviser is an important role. Early engagement with the expert can inform as to, for example, the investigation of and formulation of a claim, estimating the value for the purposes of early alternative dispute resolution (ADR), client document management for the purposes of disclosure and subsequent expert reports and informing a team as to the disclosure to be sought from the other parties.

Often an expert will be brought in at the outset to provide advice in connection with proposed litigation but with a view to that expert becoming the party's expert witness in the litigation. If this is the expectation, then it needs to be communicated at the outset and plans put in place as to when and how the expert will transition from expert adviser to expert witness.

Unless there is a clear and provable demarcation, the expert will face difficulties in being able to identify (both for its own purposes and those of the tribunal) what has been relied upon for the purposes of the report. In this regard, CPR 35.10 is relevant as it provides that the expert must identify in the report the material instructions that have been received. To address this the common approach is to issue separate retainer letters for the advice and witness retainers (see CPR 35E-GB paragraphs 4 – 8).

While there is no bar to an expert acting as adviser and then as expert witness, this is subject to the fundamental principle underlying CPR Part 35 and the role of an expert witness namely that of independence.



Avoiding compromised advisers

Even though it might have always been envisaged and planned that an expert will transition from adviser to witness, the question still has to be asked (both by expert and instructing party) as to whether or not anything has occurred during the advice retainer that has compromised the independence of the expert.

As with any previous relationship/connection with a client/a dispute, the expert needs to ask and answer the question as to whether or not there is anything arising from the advice retainer that impacts on the ability to act as expert witness.

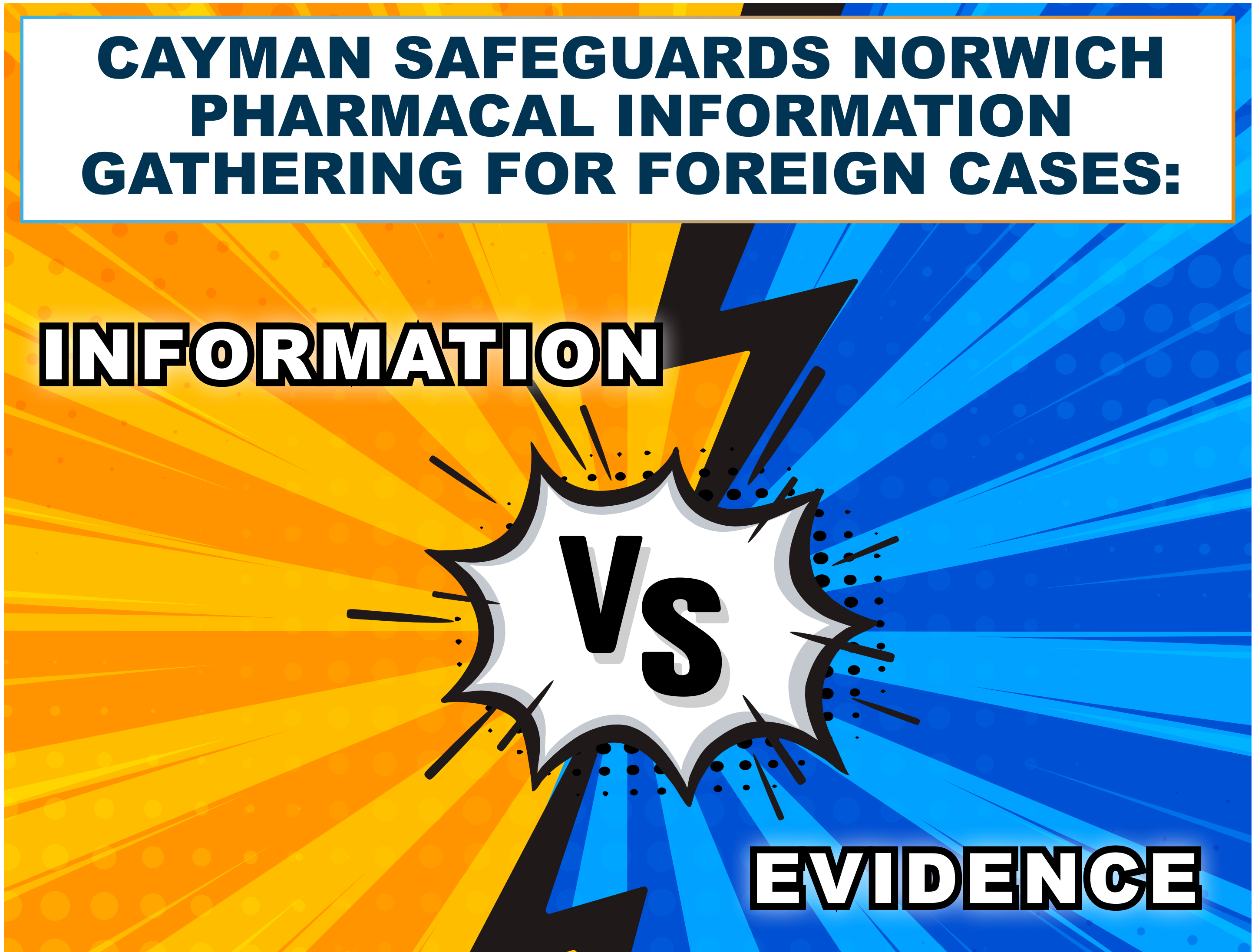
This further demonstrates the need to plan from the outset how the expert will transition from adviser to witness. Such plans will include taking steps to minimise the risk of the expert's ability to act as a witness being compromised.

To this end, it would be reasonable to expect the advice retainer letter to specify the specific tasks to be undertaken by the expert and for those to be limited to specific tasks that require or may require expert input.

Further considerations will be the extent to which information relating to the litigation (including the underlying dispute) is shared with the expert and the extent to which the expert has interaction with the client or is a party to legal team meetings, etc; in short, the approach has to be about ensuring that the expert does not become part of the story of the litigation.

If there is proper demarcation between the role of expert adviser and expert witness and a plan put in place and followed to ensure that both roles can be performed without one compromising the other, then the client stands to benefit from the best possible expert service.

CAYMAN SAFEGUARDS NORWICH PHARMACAL INFORMATION GATHERING FOR FOREIGN CASES:



Authored by: Laura Hatfield and Jamie McGee – Bedell Cristin (Cayman Islands)

The Cayman Islands Court of Appeal (the "**CICA**") recently handed down a decision in *Essar Global Fund Limited and Essar Capital Limited v ArcelorMittal USA LLC*. This application was initiated as part of a prolonged multi-jurisdictional battle between the parties which sought the grant of a Norwich Pharmacal Order ("**NPO**") whereby Essar Global Fund Limited and Essar Capital Limited (the "**Essar Group**") would be required to provide ArcelorMittal USA LLC ("**ArcelorMittal**") with documentation relating to the assets and affairs of another of Essar Group's subsidiaries, Essar Steel Limited. This application was successful and an NPO was granted by the Honourable Justice Kawaley for the purpose of assisting ArcelorMittal to collect money due pursuant to an award made by an ICC arbitral tribunal on 17 December 2017 in the amount of US$1.38 billion (plus interest) against Essar Steel Limited.

An NPO is a court order for the disclosure of documents or information from third parties who have been innocently 'mixed up' in a wrongdoing. The aim of securing the documents and/or information from the innocent third parties is to assist the applicant in identifying and commencing legal proceedings against the parties who are believed to have wronged the applicant and thereby recover their losses.

The NPO was challenged in the CICA on three main grounds: "the jurisdiction point"; "the wrongdoing point"; and "the enforcement point". The latter two points were disposed of with relative speed, and the former was the subject of the majority of the CICA's reasoning and the subject of this article. That being said, a brief synopsis of the other two points has been included for completeness' sake.

The enforcement point maintained that an "NPO could not properly be granted to support a foreign award which was not enforceable in the Cayman Islands". This was because, at the time of the first instance hearing, the necessary leave for the enforcement of the foreign arbitral award had not been given. Leave was subsequently given prior to the commencement of the appeal hearing and therefore the point had fallen away.

The wrongdoing point asserted that no arguable case of wrongdoing by Essar Steel Limited had been established at the first instance hearing. Whilst examining the point, the CICA provided helpful guidance in the light of unclear decisions from lower courts on the test for showing wrongdoing as a threshold for obtaining an NPO as the existence of a 'good arguable case', in the sense laid down by Mustill J (as he then was) in the English case of The Niedersachsen [1983] 2 Ll Rep 600 at 605 (lhc):

> ***"I consider that the right course is to adopt the test of a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than 50 per cent chance of success".***

It was concluded that, in the circumstances of the case, Essar Steel Limited's wilful evasion of the arbitral award was sufficient to satisfy the good arguable case criteria.

The Appellants' jurisdiction point challenge contended that the court had no jurisdiction to make an NPO in support of potential foreign proceedings because the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 (the "**Evidence Order**") provided the exclusive means of obtaining information or documents for use in overseas litigation.

The Essar Group argued that because of the availability of the statutory Evidence Order, through which requests can be made from foreign courts for evidence, either oral or documentary, to be used in foreign proceedings which are pending or contemplated, an NPO was not available to ArcelorMittal. Essar Group pointed to the reasoning of the English courts in *Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm) and *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 118, [2014] QB 112 which both concluded that common law remedies, such as the *Norwich Pharmacal* jurisdiction, were precluded once concurrent legislation was engaged.

This argument did not succeed. In dealing with this point, the CICA distinguished between the evidence that Essar Group would be obligated to provide pursuant to an Evidence Order and the information that they would be required to provide pursuant to the NPO.

The CICA, in utilizing a flexible approach, noted that "the Evidence Order only concerns the giving of evidence (whether oral or documentary) for the purposes of foreign proceedings, whereas the Norwich Pharmacal jurisdiction cannot as a matter of principle relate to evidence at all" and contrasted that to the NPO jurisdiction where there is a duty to provide information about wrongdoing. The CICA noted a potential risk in the "clear conceptual distinction between information and evidence", but noted that "so long as care is taken to confine the Norwich Pharmacal jurisdiction to its proper scope, there can in principle be no overlap between that jurisdiction and the statutory regime relating to evidence in foreign proceedings, and accordingly no reason to regard the former as excluded by the latter."

The CICA also considered that an additional jurisdiction to grant an order requiring disclosure of information existed under Section 11A of the Grand Court Act (2015 Revision) ("**Section 11A**") which gives the court power to grant interim relief in relation to foreign proceedings. The CICA found that although an NPO is final as between the parties to the application, Section 11A is clearly contemplating relief that is "interim" in relation to the actual or projected foreign proceedings and that the existence of the power "…makes it impossible to assert that the overall intention of the legislature is to exclude Norwich Pharmacal relief in support of foreign proceedings."

Conclusion

In delivering the purposeful decision, the CICA departed from the authorities of England and Wales, and sought to safeguard the use of NPO relief as a valuable weapon in the Cayman Islands for victims of wrongdoing seeking redress, particularly in such cases where funds have been dissipated via Cayman entities and where the information sought from the innocent third parties is vital to support the foreign proceedings.

This decision has been well received by all offshore practitioners who act in disclosure, asset-tracing and enforcement matters. The decision means that the ability to obtain an NPO is the same in Cayman and the British Virgin Islands where, after two decisions departed from the same authorities, section 3(5) of The Eastern Caribbean Supreme Court (Virgin Islands) (Amendment) Act 2020, put the question to rest. Given the existence of Section 11A and the decision on the effect of the powers thereunder, that is probably not a path Cayman will need to follow.

Note: In a separate application, the Appellants sought leave from the CICA for the matter to be referred to the Privy Council. Leave in this application was refused by the CICA; any subsequent application for leave to appeal will be made directly to the Privy Council.
At the time of writing this article, the authors are unsure of whether or not such application has been made.

ASSET RECOVERY TOOLKIT:

ACHIEVING AN INFORMATION ADVANTAGE IN A TRANSNATIONAL DISPUTE

Authored by: Stewart Kelly - Ground Truth Intelligence

Engaging in transnational asset recovery - with individuals, private businesses, sovereign entities, quasi-sovereign entities - requires significant investment of time and effort and can easily become extremely costly without producing results. With an outcome that is far from guaranteed, an early assessment of recoverability can be critical to ensuring a favourable outcome.

But what does it take to have a successful investigation and how can you ensure you are best placed to achieve an information advantage?

Assemble The Best Team

Identifying and assessing the activities and assets or likely assets of the target requires a combination of dogged creative investigative skills and access to public and non-public data on a global scale. It also requires close collaboration between the investigators and the legal team running the case.

What does this collaboration actually mean? Without guidance from the legal team, even a seasoned investigator may uncover interesting information that for one reason or another, does not support the legal strategy. The legal experts are uniquely positioned to guide the investigator on the type of data that could have the most impact given the nuances of the particular case. This could mean, for instance, assets in a jurisdiction whose legal system is more favourable to asset seizure.

A prime example of this in action was the 2012 case of Elliot Advisors and their pursuit of Argentine sovereign debt. The combination of good sleuthing and quick decision making resulted in the seizure of an Argentine naval vessel off the coast of Ghana.

Similarly, the investigator can inform the legal strategy, ensuring that the legal team maintains an information advantage over the opponent. For example, the investigators may uncover information that could help persuade the opponent to reach a favourable settlement without having to resort to complicated and time consuming asset recovery processes.

Hunt Then Assess

No two asset traces are the same and a key differentiator to successfully recovering assets lies in the information that can be gathered in each jurisdiction. This 'hunt' for information is driven by three key objectives:

1) Finding recoverable assets

2) Finding information that can be used as leverage that can be used as part of negotiation/settlement

3) Signalling that you have an information advantage

Not all information gathering tactics are viable in each country and there must be an assessment of the limitations of what can be found legally in a given jurisdiction. For example in countries with strict data privacy laws such as Germany, it can be more difficult to find information about individuals versus countries like the United Kingdom or United States. The savvy investigator -- working with local resources, even in the most obscure jurisdictions -- will be perfectly placed to guide the legal team on what can be obtained and how.

Once you've gathered all viable information, as efficiently as possible, you can analyse how difficult the recoverability is going to be and the corresponding strategy. In some cases, you may find that when all information avenues have been exhausted and there are no more good leads, you may have to step away. You may also conclude that the party genuinely can't pay as they don't have the assets so no longer wish to pursue.

Use Creative Research Techniques

It's highly likely that those who want to conceal their assets are always going to find a way to do so. Although it is possible to nominally conceal things through the structures of corporate secrecy there are many ways to reveal evidence of asset ownership. In countries that have corporate secrecy laws - or where people use complex corporate structures to conceal assets - you can use creative research techniques to uncover ownership details.

All of this can be done ethically and the aggressive 'hunting' of information doesn't have to mean untoward or illegal. Key to unlocking this information is the use of best-in-class investigators who utilise legal techniques and tactics to uncover information. The pandemic has forced many investigators to develop more flexible approaches as it is no longer possible to travel and conduct witness interviews as part of the evidence-gathering process.

It's often less complicated than you might think. For example, social media can be an excellent source of rich information, especially in the context of assets that may have been handed over to other family members or other nominees. It would surprise you just how often a family member is the key to identifying an asset by posing in front of a car or yacht to show off to friends on Instagram!

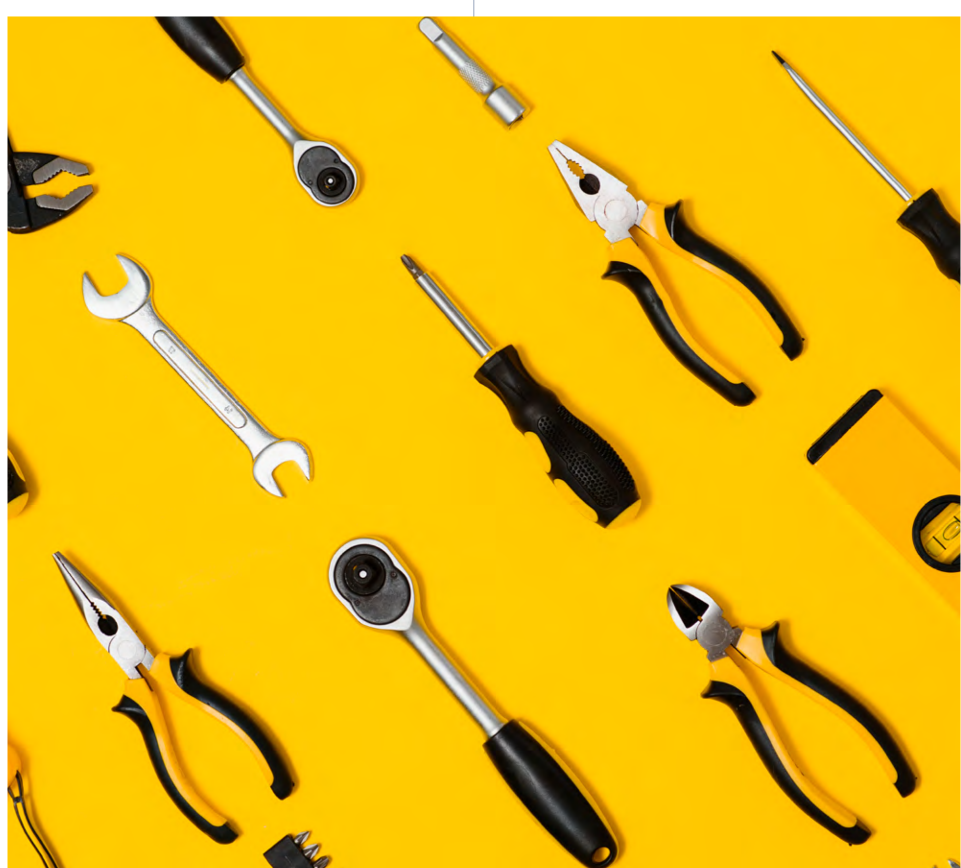
Look For Patterns

Nationals of different countries have tendencies to put their assets in certain places as they follow a path established by members of their networks. There are lots of patterns associated with different nationalities and common tactics that can be deployed in these circumstances.

Even as corporate transparency legislation changes in these preferred jurisdictions, these patterns will adapt and evolve reflecting the advice given by a reasonably small handful of tax advisors or patterns shared through social circles.

Work In Real-time

Speed is an essential factor in successful asset recovery, and those that act quickly often see the best results. There is no point in spending weeks producing a long report that is either 90% irrelevant or soon out of date. The most effective kind of asset tracing is an ongoing, agile process, where tactics can quickly shift as new information and new leads are uncovered around the world. A free exchange of information, ideas and hypotheses between the investigator and the legal team is vital to be ready to seize opportunities when they arise.



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THE ROLE OF LITIGATION PR IN LITIGATION – PROTECTING YOUR REPUTATION IN THE COURT OF PUBLIC OPINION

Authored by: Gus Sellitto - Byfield

Litigation PR is a specialist branch of legal PR, all about managing the reputation of a client – company or individual – through the litigation process, and then managing the PR when the case closes. It is important to note that there are different rules covering court reporting around criminal and civil cases – and for the purposes of this article, I focus only on litigation PR in relation to civil cases.

Preparing for Pre-Trial

Any individual or company involved in a dispute should be thinking carefully about how the case is going to impact their reputation – because it certainly will.

You and your client should consider carefully what your overall aim is in engaging litigation PR in the first place. For instance, is your aim to maintain a dignified silence? Is it simply to rebut the aggressive stance advanced by your opponent, or to discredit your opponent? Is it to pressure your opponent to settle a claim before it reaches court? Or is it to raise awareness among others that they have a recourse to justice?

Taking a reactive stance to litigation PR simply 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.

You also need to consider your client's perceived identity in terms of the media and, by extension, the public. Are they the David or the Goliath? The nasty bank or the victimised family? Or are they a global corporate who until now have enjoyed an unblemished record of wholesome brand values, but whose reputation could be severely tarnished by a challenging litigation.

In some cases, your starting point can define the overall effect on your reputation. Being fully conscious of where your client currently stands will enable you to better predict the initial challenges you may face in your campaign. The reason to do this is simple: you can win your case in the court of law but lose your case in the court of public opinion.

These considerations ultimately lead us to a point of caution: your litigation PR strategy can only ever be as good as the legal case which underlines it. An aggressive PR strategy cannot make up for the pitfalls of what is essentially a weak case. So what does it take to manage litigation PR effectively? Here are my tips for implementing a proactive strategy from start to finish.

Pre-trial: Build a narrative

Invite journalists on key trial dates

There will be peaks and troughs of when the press are going to be interested in reporting the case, so think tactically: plot on a timeline key dates of when you should be getting press interest to bolster your arguments. For

instance, you should invite journalists to the opening pleadings, when the witness statements are sworn in, to give them an overall picture of the dispute. Or you could use the highly pressured situation of when the opponents are under cross-examination by your legal team to again generate media interest and increase chances that more public scrutiny centres on your opponent than it does your client.

Take the pulse on your client's and your opponent's reputations

Just as you check your own media perception, do the same for your opponent. Look at who is involved, what their backgrounds are, what their reputations are, whether they've been involved with anything else controversial outside the litigation. An awareness of this, in tandem with knowledge of your own perception, will help you predict how different publications will report your case and the additional reputational pressure points you can squeeze your opponents on as part of your offensive strategy.

Make sure you know the court rules

You need to be fully appraised as a litigation PR. A key rule of engagement is knowing when you can start to speak about the case to the media in a meaningful way. Most national newspaper journalists will rely on the Particulars of Claim being made publicly available way before any physical court date, which, as a litigation PR practitioner, allows you to start building a public narrative around your client's case.

Flouting these rules could land you and your client in contempt of court, which has very serious ramifications. But an acute awareness of the status of legal documents and information and knowledge of when they can and can't be discussed are essential apparatus in the armoury of the litigation PR. Make sure you follow the rules of engagement.

Plan your strategy around the facts

Ally your litigation PR narrative to legal documents and be sure you know where the strengths and weaknesses of your case are. To build a compelling litigation PR strategy, you have to centre on the facts of the case and take a forensic eye to its weaknesses that could be exposed by the other side.

Through-trial: Be tactical

Lead the news on the case

Take all opportunities to distribute factual information about the case. For example, after they become public, release court documents accompanied with your narrative on what the documents show. This will help details of the case that you want to emerge make it into public consciousness.

Delegate spokespeople for your client

This will also help you shield your client's reputation, create a sense of power and coordination around the case, as well as limit association between key company actors and the case itself.

Ensure the continuity of business-as-usual PR

Litigation PR, without the attendant 'business as usual' PR, can consume the agenda of a business's public profile. It is therefore important that not all news about your client revolves around the case. Use PR on non-case related matters to ensure stakeholders know about your broader good news.

Think beyond the end of the case

What is the narrative you want to build if you win the case? What is it if you lose? Will there be an appeal? Remember that even if you win the case, it's still not necessarily a victory from a reputational standpoint. You'll need to think about how your client's reputation will be affected in the long-run and start working out your strategy for repair.

Post-trial: Rebuild

This is where the law stops and the PR starts. How much work your client has to do ultimately depends on how the litigation PR was conducted throughout the case, and its outcome. At this stage, it's good to assess your position and the reputation rebuild work that is required to re-establish your position to where it was before the litigation event.

Litigation has the potential to cause serious damage to companies' and individuals' reputations, regardless of the outcome of the case. But having a strategy in place for the communications around a dispute is an essential part of preventing (unnecessary) reputational damage and, if used effectively, can be a key lever for advancing your position in a litigation scenario.

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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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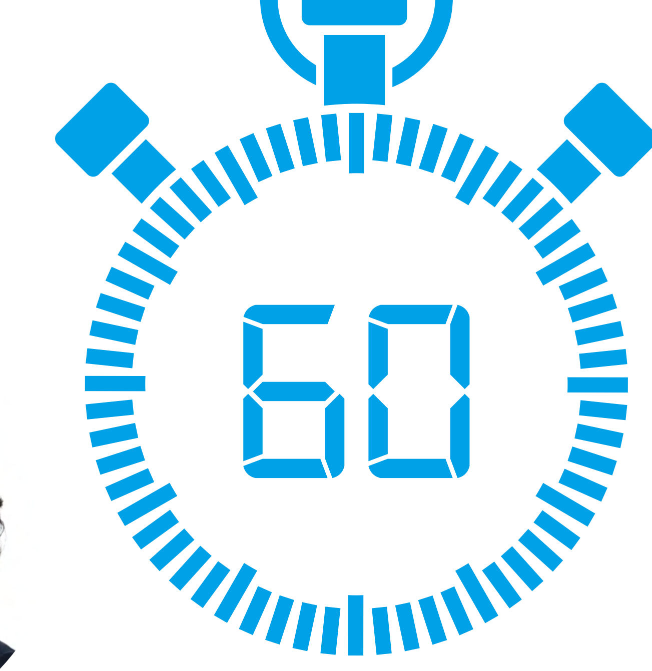
As we continue to introduce a diverse range of people behind the Disputes Community, Dipti Hunter of Keidan Harrison, Shantanu Majumdar QC of Radcliffe Chambers, John Petrie of Serle Court and Ed Brittain of Howden talk about their hobbies, challenges and personal experiences...



60-SECONDS WITH:

DIPTI HUNTER, PARTNER, KEIDAN HARRISON

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

A It depends on context, in 99% of settings I do use the word "solicitor" given the amount of money, sweat and tears that went in to qualifying. But let's be honest there are a few situations pre pandemic (eg when in a taxi alone in a foreign country) where being an "office worker" is an easier explanation. Also, is it okay to tell that to potential builders when I am trying to get a quote?

Q What would you like to be doing right now if you weren't working from home today considering these questions?

A I managed a brief trip between lockdown regimes to Southern Italy last year and cannot wait to be able to travel again safely, so ideally I would be sipping a cold drink on a beach watching the sun set.

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

A Somehow advance the creation and deployment of digital photocopiers that can paginate documents to 1997. Did we really spend so many days in the 90s taking out staples from documents so they could be photocopied and then paginated by hand?

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

A Client confidentiality stops me from sharing a number of stories. I have attended a number of search orders as a supervising solicitor and that has proved to be a wonderful insight into the mindset of a defendant, in particular the advice that is sometimes ignored. It is also a fascinating opportunity to observe the legal profession's ability to respond to potential new instruction before 9.30 am.

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

A An early, fully funded retirement would be very nice post lockdown. I could then focus on learning new languages, travel, international sports events, spending summers at music festivals and relearning how to sail. But, having work projects during lockdown has been a real blessing.

Q Other than seeing family and friends, what have you missed most during the COVID-19 restrictions?

A Live music. I am a big fan of music festivals and before the internet ruined my ability to buy tickets before they are sold out, I was often to be found at Glastonbury, Latitude or Lovebox mudfest.

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

A I am more tech savvy than I used to be and am amazed at the transformation of our working lives, both in our work as well as our family interactions. I also have enjoyed staying local and spending time in my little bit of London in Wanstead which has easy access to green spaces and a wonderful high street.

Q What does the perfect weekend look like?

A A visit to a new city around Europe and finding new culinary delights.

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

A I was a big fan of Dynasty as a youngster and loved how grownups had whisky, bourbon and ice in fancy decanters at the office. This is something I have obviously adopted in my working from home office setup. So probably Dame Joan Collins.

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

A Don't be afraid, do ask for help.

You are still learning.

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SO LONG LUGANO, HELLO HAGUE!

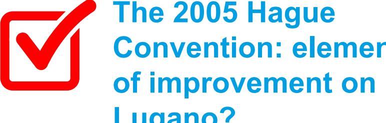
NEW RULES

WHAT DO THE NEW RULES ON CROSS-BORDER DISPUTES REALLY MEAN?

Authored by: Ed Davis, Chris Pettet and Henry Simpson - Stephenson Harwood

When Brussels Recast[1] ceased to apply to new proceedings in the UK, many pinned their hopes on the UK acceding to the Lugano Convention 2007 ("Lugano"). The EU Commission's recommendation on 4 May 2021 to reject the UK's application, followed by its notification on 22 June 2021 that it is "not in a position to give its consent" to accession, was therefore met with disappointment. Whilst the ultimate decision lies with the EU Council, it is safe to say that the UK's prospects of joining Lugano, at least in the near future, appear rather slim.

In this article we consider some of the key differences between Lugano and its rival jurisdictional convention, The Hague Convention of 30 June 2005 on Choice of Court Agreements ("Hague"), from the perspective of the recognition of jurisdiction clauses.



The 2005 Hague Convention: elements of improvement on Lugano?

Hague currently applies between the EU, Singapore, Montenegro, Mexico and the UK[2]. The UK acceded to Hague as a member in its own right on 1 January 2021. It had previously been a member as part of the EU since 1 October 2015.

Unlike Lugano, which is a comprehensive code that applies to any qualifying civil or commercial dispute, Hague only applies when the parties have elected that the courts of one of its contracting states should have exclusive jurisdiction to determine the dispute in question. In such cases, any court other than the chosen court is obliged to stay any proceedings before it, and any judgment arising out of a qualifying dispute must be recognised by the courts of all contracting states.

Although it is far narrower in scope, it does offer some advantages over Lugano in its treatment of exclusive jurisdiction clauses:

• *The Italian torpedo issue*

A key advantage of Hague is that it replicates the anti-torpedo provisions from Brussels Recast. One of the chief criticisms levelled at that Regulation's predecessor, the Brussels Regulation[3], was that its 'first in time' rule was open to a specific form of abuse known as the 'Italian torpedo'. A party acting in bad faith could, in breach of an exclusive jurisdiction clause, issue proceedings in a notoriously slow jurisdiction (or a country where questions of jurisdiction are not dealt with before the substantive

1 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

2 Many more countries have signed, notably the USA and China, but it remains to be seen when they will ratify.

3 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

dispute is progressed). As long as those proceedings were the first to be issued, proceedings in all other courts (including the chosen court) would have to be stayed until the court first seised had declined jurisdiction. This could delay resolution of the dispute for a number of years.

Brussels Recast modified the 'first in time' rule so that the courts of any jurisdiction other than the parties' express choice were obliged to stay any proceedings before them, regardless of when they were issued.

Hague contains similar protection against the Italian torpedo. Lugano does not, as it is modelled on the original Brussels Regulation. Where contracting parties benefit from a qualifying exclusive jurisdiction clause, their position is, therefore, as well protected under Hague as it was under Brussels Recast.

Further, Hague expressly preserves the effect of a conflicting treaty where all parties are resident in a state which is a party to that other treaty[4]. Were the UK to accede to Lugano, therefore, the anti-torpedo protection of Hague might be lost in certain circumstances (e.g. in a dispute between parties domiciled in the UK and the EU).

• The return of the anti-suit?

While a member of the EU, the English courts were not permitted to grant anti-suit injunctions to restrain proceedings in other EU member states brought in breach of an exclusive English jurisdiction clause[5]. Under Hague, however, there would in principle appear to be nothing to prevent the English Court from granting such relief. This will likely be seen as a welcome development by many, although the position has not yet been tested.

Again, were the UK to accede to Lugano it is likely that the EU jurisprudence prohibiting anti-suit injunctions would be applicable and therefore, where Lugano applied, such relief may not be available.

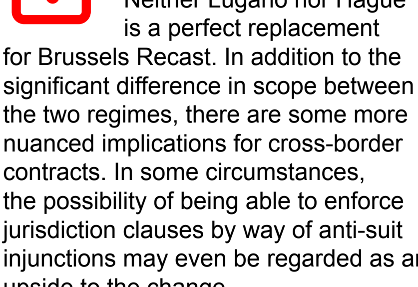
Practical points for cross-border dispute resolution

The key limitation of Hague when compared with Lugano (or Brussels Recast) is of course its narrow scope; it applies only when there is a qualifying jurisdiction clause. This means that where Hague does not apply (for example where parties have selected a non-exclusive clause), different national laws will govern disputes relating to jurisdiction and enforcement. In addition, there are a number of further limitations:

1. ***Unlike Lugano, Hague only applies to exclusive jurisdiction clauses. It appears, in light of (obiter) comments made by the Court of Appeal in Etihad Airways PJSC v Flöther[6], that asymmetric jurisdiction clauses[7] (which are very common in the banking context) may not benefit from Hague.***

2. ***Hague only applies to jurisdiction clauses entered into after the state whose courts are chosen acceded to the Convention. While the UK deems its membership to have been continuous since 1 October 2015 (when it joined by virtue of its EU membership), the EU Commission considers the relevant date to be 1 January 2021 (when it acceded as a state in its own right).***

3. ***Where all the parties are domiciled in an EU Member State, Brussels Recast will trump Hague[8]. An exclusive English jurisdiction clause between two EU-domiciled parties will therefore not come within Hague, but neither will it get the protection of Brussels Recast, as the UK is no longer a Member State.***



Looking ahead

Neither Lugano nor Hague is a perfect replacement for Brussels Recast. In addition to the significant difference in scope between the two regimes, there are some more nuanced implications for cross-border contracts. In some circumstances, the possibility of being able to enforce jurisdiction clauses by way of anti-suit injunctions may even be regarded as an upside to the change.

As Hague is currently the only applicable jurisdiction convention, some parties may consider switching from non-exclusive (or asymmetric) to exclusive jurisdiction clauses, in order to benefit from it[9]. On the other hand, other parties may prefer to retain the flexibility of non-exclusive jurisdiction clauses.

Whether or not the the UK will ever rejoin Lugano is currently in the EU's hands. For now, UK businesses trading in the EU (and EU businesses trading in the UK) need to be aware of the key differences arising from the jurisdictional regime change.

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4 See Article 26(2) of Hague

5 Turner v Grovit Case C-159/02

6 [2020] EWCA Civ 1707. Lord Justice Henderson stated that he was "prepared to proceed on the basis that the Hague 2005 Convention should probably be interpreted as not applying to asymmetric jurisdiction clauses."

7 An asymmetric jurisdiction clause provides that one party can only bring proceedings in the courts of a specific jurisdiction whilst the other party has a choice where to sue.

8 See Article 26(6) of Hague

9 The Loan Market Association has recently introduced an optional exclusive jurisdiction clause in light of concerns regarding the enforceability of assymetric clauses under Hague.

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ENGLISH COMMERCIAL COURT ORDERS TWO YEAR IMPRISONMENT FOR BREACH OF INJUNCTION:

THE NEW CONTEMPT RULES MEAN BUSINESS

Authored by: Nicola Gare – HFW

In brief

In one of the first judgments under the new contempt rules introduced in October 2020, the Commercial Court has recently imposed the maximum two year imprisonment term against an individual for contempt of court following his multiple and persistent breaches of freezing and proprietary orders. The breaches included:

1. ***failure to disclose assets by way of an affidavit in breach of the injunctions; and***
2. ***dissipation of assets from bank accounts in breach of the freezing injunctions.***

The second defendant, a director of the defendant company, did not attend the hearing, had not engaged with the proceedings for some years, and his whereabouts was unknown. The court therefore sentenced him in absentia and issued a warrant for his arrest.

In depth

The judgment in *XL Insurance Company SE v IPORS Underwriting Ltd*, Paul Alan Corcoran & Others [2021] EWHC 1407 (Comm)[1] serves as a reminder that freezing injunctions and related orders must be taken seriously.

The underlying action in this case related to the claimant suing for misappropriation of insurance premiums worth approximately £10 million, which the second defendant's company was meant to hold on trust and then send to the claimant. Instead, the claimant argued that the second defendant used the monies for his own purposes.

In 2014 and as part of the steps to trace the monies and preserve them, and as would be part of the usual process in these circumstances, the claimant obtained an asset disclosure order as well as various freezing and proprietary injunctions limiting the defendants' expenditure and use of the money subject to the freezing order.

In 2021, the claimant brought contempt proceedings against the defendants for disposing of assets in breach of the injunctions, and for failing to comply with the asset disclosure obligations. The defendants did not fully engage with the proceedings. However, the claimant was able to show evidence of the breaches using the information it received from the various non-party banks, who were required to provide information on assets held in the names

1 https://www.bailii.org/ew/cases/EWHC/Comm/2021/474.html

of the defendants, and in particular the second defendant. This was sufficient for the judge, who found there were 20 separate counts of contempt made up of numerous acts amounting to contempt.

In this case, the second defendant had not fully engaged in the proceedings. However, the judge was satisfied that:

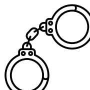
"[he] breached the Injunctions, that the breaches….. [were] established to the criminal standard; and also that [he] knew that he was breaching the Injunctions both when he failed to provide disclosure and when spending the amounts identified in the evidence."

This persuaded the court that the requirements under Varma v Atkinson & Another [2020][2] for a ruling of contempt were proved, and it was not necessary to show the second defendant was aware that his actions amounted to a breach. The judge was satisfied that:

"the elements of contempt of court [were] proved to the criminal standard and that Mr Corcoran [was] therefore guilty of contempt of court."

In terms of sentencing, the judge ordered the maximum two year imprisonment term, finding that there were no mitigating factors, and that as the claimant was unable to recover most of its money, "*…. the harm is about as high as it could well be.*"

The judge had considered issuing a bench warrant to secure the second defendant's attendance at the hearing, an option available to the courts under the revised CPR 81, but determined that this would not assist, as the claimant's lawyers had already gone to significant efforts to trace the second defendant without success.



How does a breach of an injunction lead to imprisonment?

Freezing and proprietary injunctions contain penal notices. Under CPR 81.2, the penal notice is "a prominent notice on the front of an order warning that if the person against whom the order is made (and, in the case of a corporate body, a director or officer of that body) disobeys the court's order, the person (or director or officer) may be held in contempt of court and punished by a fine, imprisonment, confiscation of assets or other punishment under the law."

Committal (imprisonment) proceedings are at the court's discretion (CPR 81.9), but are generally the remedy for breach of a freezing order, and are generally brought against the person on whom the injunction or order containing a penal notice has been served personally. To commit a person for breach of an injunction, it is necessary to prove beyond a reasonable doubt (the criminal standard of proof) that there has been a deliberate or wilful breach of the order.

Where a corporation is in default, a committal order may be made against a director or other officer of the company, if they were served with the injunction. Their liability for contempt will then depend on whether:

- the company was ordered not to do certain acts, or gives an undertaking to that effect
- the director is aware of the order or undertaking, if so this requires them to ensure the order is obeyed
- the director fails to take reasonable steps, resulting in the order or undertaking being breached.

In terms of sentencing, and as was the case here, a finding of contempt may result in imprisonment for up to two years, as provided for in s.14(1) of the *Contempt of Court Act 1981*. There are no formal guidelines on the length of the sentence, but as referenced by the judge in this case, the key factors include culpability and harm[3].

What does this mean for you?

Freezing and proprietary injunctions are possibly the most useful tool in the claimant's toolbox, and once obtained they can help reveal and secure assets. The threat of contempt proceedings leading to the possibility of imprisonment (or other punishment) will usually be sufficient to ensure compliance (in or out of the jurisdiction) with the freezing order.

This is therefore an unusual case for a number of reasons, including the defendants' lack of engagement in the proceedings; the judge's consideration of a bench warrant; and the sheer number of acts of contempt, all of which led to the eventual ruling imposing the maximum prison sentence.

2 [2020] EWCA Civ 1602
3 Otkrite v Gersamia [2015] EWHC 821 (Comm)

ESG IN THE UK: A SHIFT TO MANDATORY CORPORATE RESPONSIBILITY?

Authored by: Emily Blower - Simmons & Simmons LLP

Globally, we are witnessing a significant re-set of stakeholder expectations on corporates to take responsibility for their ESG impact. This has manifested in consumer and investor purchasing decisions and shareholder voting (for example, a rapid drop in Boohoo's share price following allegations of modern slavery and the change to the Board of Directors voted by ExxonMobil's shareholders for the company's failure to take into account the financial risks posed by climate change).

In the UK, until recently, taking such responsibility remained a voluntary choice for each company. However, lately we have seen a legislative push towards corporate accountability for ESG issues, as well as the English Courts paving the way for companies to be held legally responsible for the ESG impacts of their subsidiaries, and even the third parties in their supply chain.

Although this article will focus on the UK, this shift is also occurring in other jurisdictions.

The Legislation

The Modern Slavery Act

The Modern Slavery Act 2015 made the UK the first country in the world to require large businesses to report on how they work to prevent and address risks of modern slavery in their operations and supply chains. Since then a number of states have introduced similar and, in some cases, more onerous requirements. By comparison, and with a growing global focus on ESG, the Act has been criticised for being out of date and lacking 'teeth'.

In September 2020, the UK Government committed to bringing forward measures to "*strengthen and future-proof*" the Act, and to "*ensure that large businesses and public bodies tackle modern slavery risks in supply chains.*"

Although a lack of Parliamentary time has hampered progress, a private member's bill proposing radical changes for enforcing the Act was recently introduced. This, alongside legislative developments in mandatory human rights and environmental due diligence requirements across the world, and the continuing focus on corporate responsibility for ESG issues, means that we can expect modern slavery reform in the UK.

The Environment Bill

The Environment Bill proposes a mandatory supply chain due diligence requirement for those companies that use a forest risk commodity, or a product derived from that commodity. The purpose of the Bill is to "*clamp down on illegal deforestation*", a key driver of climate change and biodiversity loss, as well as often involving the displacement of local communities. Following delays, the Bill has now returned to Parliament.

What's next?

On 10 March 2021, the European Parliament adopted a resolution with recommendations to the Commission to "*adopt binding requirements for undertakings to identify, assess, prevent, cease, mitigate, monitor, communicate, account for, address and remediate potential and/or actual adverse impacts on human rights, the environment and good governance in their value chain*". It is unclear whether the UK Government will implement similar legislation but, at least, it may bolster the UK Government's approaches to the Modern Slavery Act and the Environment Bill.

The Courts

The landmark decision of *Vedanta v Lungowe* [2019] UKSC 20 held that a UK parent company can owe a direct duty of care, and so be liable, to third parties affected by the overseas operations of a subsidiary. This was reaffirmed in *Okpabi v Royal Dutch Shell* [2021] UKSC 3. Each case was brought by a local community impacted by environmental damage caused by the non-UK subsidiary's operations.

In *Hamida Begum v Maran (UK) Limited* [2021] EWCA Civ 326, it was held that a UK company's duty of care could, in certain circumstances, extend to the actions of third parties in its supply chain. In that case, the Claimant's husband was killed whilst working in unsafe conditions on the demolition of a ship sold by the UK company.

What's next?

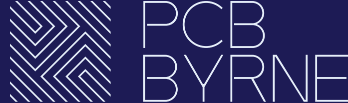
Although all three decisions turn on the specific facts of those cases (as emphasised by the courts), those facts are by no means unique and could fuel the interest of litigation funders and claimant law firms, encouraging equivalent claims, particularly in the current ESG-focused climate

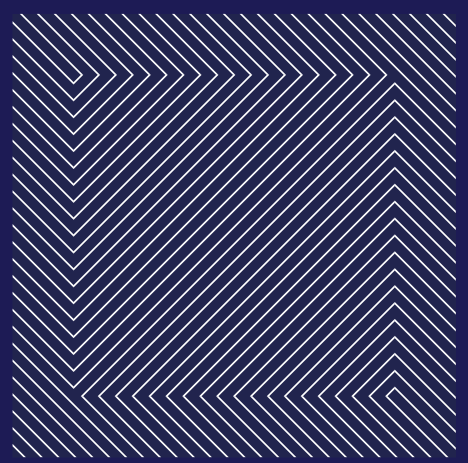
However, all three decisions were either made in relation to a jurisdiction challenge or strike out/summary judgment application, and therefore the duties of care considered were held to be arguable rather than actual. The attraction of the English courts to overseas claimants is ultimately likely to depend on whether an actual parent company duty of care is established once this type of case is considered on its merits. Vedanta settled in January 2021. The substantive trials of Okpabi and Hamida Begum are yet to be listed.

What does this mean for businesses?

- There is growing pressure on companies to manage ESG related risks effectively across their corporate groups and supply chains. In addition to potential action by consumers, investors and/or shareholders, a failure to mitigate these risks could create legal liability for companies, result in litigation and (subject to legislative developments) give rise to enforcement risk.
- Companies should conduct internal due diligence and supply chain or operational audits, anticipate risks and put in place robust processes and data management.
- Companies may need to implement quality controls and governance mechanisms to ensure that they adhere to their human rights and environmental due diligence and/or disclosure obligations, as well as any ESG related standards or targets they have adopted.
- Care must be taken with group-wide policies or standards. In *Okpabi* the Supreme Court rejected the suggestion that a group-wide policy or standard could not give rise to a duty of care for the activities of a subsidiary. The existence of that duty will be a question of fact in each specific case. Whilst this may deter some companies from taking group-wide steps to protect environmental and human rights, conversely, one of the better ways to avoid parent company liability is to ensure that risks are effectively monitored and mitigated across the group. Ultimately, every company will need to consider how it balances these competing risks.
- ESG-related obligations in supply chain agreements could be used to manage supply chain risks. Those obligations must be measurable and have real force, however. Companies should consider building in leverage, such as linking payment arrangements to the ESG-related obligation(s).

The shift towards mandatory corporate responsibility for ESG issues in the UK is not slowing. The time for companies to review their risks and implement changes is now.





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ENFORCING AGAINST SOVEREIGNS:

THE STATE OF PLAY

Authored by: Jon Felce - PCB Byrne LLP

Looking back at my recent TL4 article on Hot Topics in Enforcement in England and Wales[1], it is apparent that a number of the topics discussed arise in the context of enforcement against sovereigns. This is perhaps a reflection that (i) (some) sovereigns appear to be more resistant to meeting judgments and awards than perhaps before, and (ii) enforcing against a State has its own unique issues with which to grapple and which are ripe for testing before the courts. This article provides an overview of the State of play in relation to some recent interesting recent developments in the area.

1. Sovereign immunity – adjucative and enforcement immunity

When one first thinks about litigating against a State, the words "sovereign immunity" immediately spring to mind. However, not only are there exceptions to sovereign immunity, but there are subtle differences between the types of immunity available. Different rules apply to adjudicative immunity – whether a state can be sued at all – and whether any resulting judgment or award can be enforced (i.e. enforcement immunity). This distinction is sometimes overlooked. Just because one of the exceptions to adjudicative immunity applies, it does not mean that an exception to enforcement immunity arises (and vice-versa). This was recently highlighted in the BVI decision of *Tethyan Copper v Pakistan*[2], where at the ex parte stage Tethyan's focus had been on enforcement immunity rather than adjudicative immunity, and at the interpartes hearing the Court addressed whether it had jurisdiction at all.

1 See https://thoughtleaders4.com/images/uploads/news/TL4_FIRE_-_Issue_4_-_Q1_2021.pdf

2 BVI case number: BVIHC (Com) 2020/0196

2. Adjudicative immunity - validity of arbitration agreement

One of the exceptions to adjudicative immunity is found in section 9 of the State Immunity Act 1978 (SIA), where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, providing that the ensuing proceedings relate to the arbitration. One hot topic that has arisen in the context of arbitrations against EU member states is the impact of the CJEU's decision in the Achmea case[3]. Following that decision, EU member states are arguing that arbitral tribunals do not have jurisdiction to hear claims against them, including claims under bilateral investment treaties and the Energy Charter Treaty.

Notwithstanding that many tribunals have rejected that argument, it means that enforcement within the EU is likely to be a tall order, and arguments that paying creditors constitutes illegal state aid can make that a taller order still. All of this means that creditors holding judgments and awards against EU sovereigns are increasingly looking outside the EU to jurisdictions such as England and Wales when it comes to enforcement. This is particular the case in ICSID disputes, following the Supreme Court's decision in Micula[4] which prescribed limited circumstances in which the Court will stay enforcement of an ICSID award.

3. Can a third party (and therefore its assets) be assimilated with the sovereign?

Of course, the end goal is actually enforcing against an asset. Given enforcement immunity rules, parties are increasingly creative when it comes to targeting assets. One particular aspect of this involves identifying third party assets that can be said to be the assets of the sovereign. This strategy has been making headlines recently in relation to attempts to enforce against national airlines, with both Air India and Pakistan International Airlines (PIA) the subject of attempts to seize assets to satisfy billion dollar awards against India and Pakistan respectively.

In particular, in the aforementioned Tethyan case, Tethyan asserted that PIA and its subsidiaries should be treated as assets of the state amenable to enforcement, for example because PIA was referred to and sometimes treated as and like a government department. However, this was successfully challenged at the inter partes hearing, when the Court spent some time considering the Privy Council's decision in Gecamines[5].

In Tethyan, the simple answer was that PIA was a publicly listed company with private shareholders and therefore could hardly be assimilated with the state. The lesson from the case is that the true position of an entity in relation to the State requires close and detailed scrutiny of a considerable number of factors, going beyond merely superficial indicators. The decision sets out a number of the potential factors to which practitioners should pay close attention[6].

4. Procedural issues

Questions of procedure in sovereign cases have also been at the forefront of recent decisions. I deal with two procedural points now.

The first of those is service. Until now, there have been a number of cases grappling with what – if anything - needs to be served on a State and, if so, how. We now have the answer. In General *Dynamics United Kingdom Limited v Libya*[7], in the context of a New York Convention arbitration award, it has been held that: (i) a document does need to be served on the sovereign, such as the arbitration claim form or the order permitting enforcement, (ii) the document needs to be served through the Foreign, Commonwealth and Development Office, and (iii) service in this manner is mandatory and cannot be dispensed with.

The second procedural issue is whether sovereigns should be treated any differently from other litigants, not least given that it can sometimes take time to get instructions from sovereigns against a backdrop of bureaucracy and political changes. For example, in one recent case (concerning a challenge to an arbitration award itself), a State sought an extension of time and relief for sanctions having failed to meet the relevant deadline for its application, including by reference to a change of government[8]. However, the Court made clear that the fact that a party is a foreign state is of little significance, relying upon dicta from another sovereign case[9] that a foreign state is 'a litigant like any other litigant and … is expected to comply with the rules and provisions of the CPR and with any directions given by this court'. Further, the Court stated that the fact that an entity – whether a government or otherwise – may have a bureaucratic decision-making processes does not justify delay. It is important that this is conveyed to a State client at the outset so that attempts can be made to ameliorate the position before any deadlines expire.

5. Conclusion

Obtaining your judgment or award against a sovereign is often not the end of the matter. In that regard, as this tour through some recent developments illustrates, the State of play in sovereign enforcement cases is ever-changing.

3 *Slovak Republic v Achmea BV (Case C-284/16)*
4 *Micula v Romania [2020]* UKSC 5
5 *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27.
6 See paragraph 81.
7 [2021] UKSC 22
8 *STA v OFY* [2021] EWHC 1574 (Comm).
9 *Process and Industrial Developments v Federal Republic of Nigeria* [2018] EWHC 3714 (Comm).

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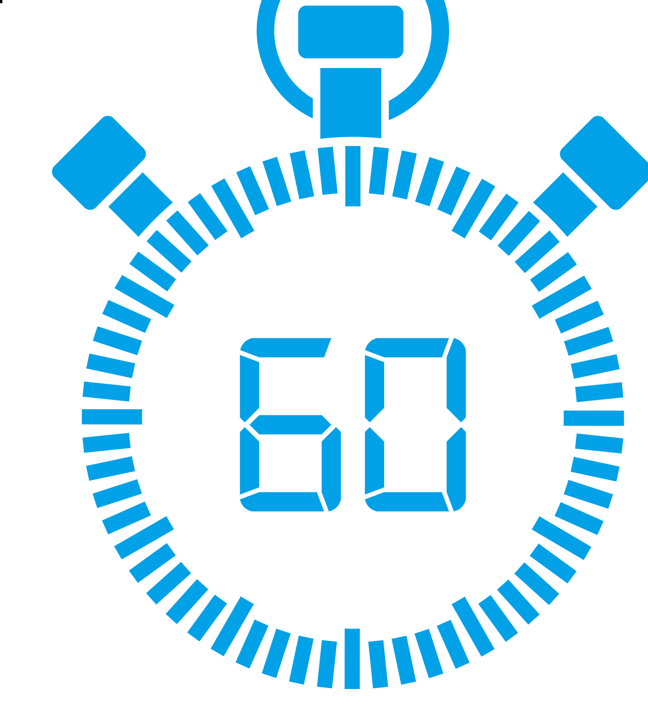
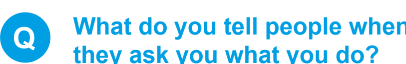


60-SECONDS WITH:

JOHN PETRIE MBE, CHIEF EXECUTIVE, SERLE COURT



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

A It depends whether they work in or understand legal profession. If they do, then I will simply say I am Chief Executive of Serle Court but if they do not know how a barristers' chambers is structured, I say that I manage the running of a barristers' chambers.

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

A I would be working in Rwanda on the peace and reconciliation education programmes that I worked on before coming to Serle Court. It is the most challenging but important work I have been involved with, working with genocide survivors and a top team of Rwandans to deliver programmes across the country and through the national curriculum.

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

A I work because I enjoy working and because I enjoy a challenge and working with the right team in the right place. I am enjoying that at Serle Court. When I leave Serle Court, I will probably replace those challenges by doing more in the other part of my life which is in the field of genocide prevention and reconciliation.

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

A Travelling and meeting friends. I have led a very international life and have close friends in several countries around the world. Zoom only does so much and my schedule of flights is a long one once we can travel freely again.

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

A I have enjoyed some quality time with my family whilst working from home. I have also been able to work on a series of books to address gender-based violence in Rwanda – "Sigaho" (which means "Stop" in English). The first two books have been launched through the teacher training academy and the pilot programmes will roll out this year.

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

A Similar to many places, the re-setting of work/life balance for barristers and employees. Whether reduced commuting time and cost, allowing staff to work more efficiently, and the general improvement in wellbeing that arises from having more "life" in the work/life balance.

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

A My wife (there is a risk she might read this). But if she were not available, Michelle Obama or from history Audrey Hepburn.

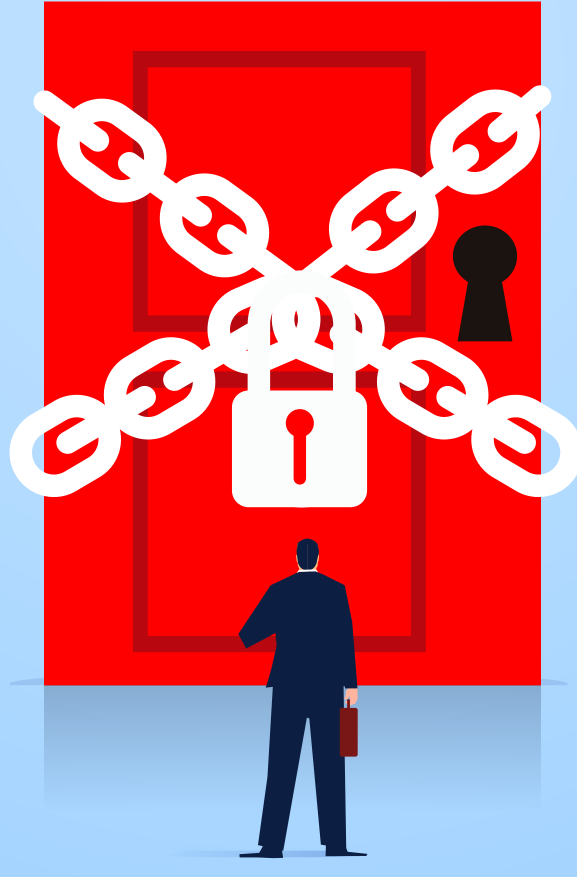
Q What's the biggest challenge you face as a Chief Executive of a barristers' chambers?

A Managing the wishes of 70 or so individual businesses, whilst trying to be as efficient as possible. It is a unique challenge, and that is what makes working in a chambers so interesting. "It always seems impossible until it's done".

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

A Make sure you also have an interest outside of law.

ECONOMIC SANCTIONS, CONTRACTUAL OBLIGATIONS AND SANCTIONS CLAUSES



Authored by: Shantanu Majumdar QC - Radcliffe Chambers

At London International Disputes Week in May, Radcliffe Chambers and Thought Leaders 4 Disputes jointly hosted a session on the complex and rapidly evolving world of economic sanctions including the thorny relationship between sanctions and contracts.

Under English law, the imposition of economic sanctions prohibiting the performance of obligations under an existing contract may give rise to “supervening illegality.”

Whether this is a species of frustration is a controversial question and can have important consequences:

- Frustration is crude and far-reaching and causes the discharge of the contract even though the sanctions may only be temporary.
- Demonstrating frustration may make the affected party’s case harder to prove given the stringent requirements of the doctrine.
- Whatever the precise analysis, in every case the court
- carefully scrutinises the legal prohibition relied upon and the contractual obligation which it is said to affect;
- will not readily conclude that a party is relieved of its obligation to perform.

What laws are relevant?

Since 1 January 2021, the only sanctions with direct effect are those under the UK sanctions regime. However, the performance of international contracts is obviously capable of being drastically affected by foreign sanctions. When will the English courts give effect to them?

English law does not generally excuse contractual performance by reference to foreign law unless it is either

- the law of the contract

or

- the law of the place of performance.

Illegality under the law of the place of performance is often called the rule in Ralli Bros (*Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287); there remain questions about

- whether it is part of the English law of frustration or a conflicts rule (or a rule of the forum);

- whether it applies to subsisting as well as supervening illegality;
- whether it applies only when the governing law is English law;
- whether it even survived Article 9 of the Rome Regulation.

It is, however, clear that the rule

- adopts a strict view as to the place of performance (ignoring essential preparatory acts elsewhere) and
- necessarily requires an act in that place which is unlawful in that place.

However, there may be other foreign sanctions which are not relevant on any of these bases, but which have a serious effect on one of the parties.

The chief concern is US sanctions:

- US "primary sanctions" apply to (1) any US person, (2) anyone operating in the US or (3) anyone dealing with property under US jurisdiction. They have obvious extra-territorial reach.
- US "secondary sanctions" purport to apply to everyone else and amount to an assertion of global jurisdiction which is hard to ignore given the dollar's status as the world's reserve currency.

Sanctions clauses

The best course is to make express provision for sanctions; arguments about common law illegality and frustration can thus be avoided and all of the sanctions to which a party may become subject can be made contractually relevant.

An appropriately worded force majeure clause might assist, but a specific sanctions clause is more likely to produce certainty of outcome and thus better risk-management and allocation. That, at least, is the theory.

Three recent cases illustrate some of the issues and problems.

In ***Lamesa Investments Limited v Cynergy Bank Limited*** [2020] EWCA Civ 821, Lamesa concluded a sterling-denominated loan agreement subject to English law and jurisdiction with an English bank, Cynergy. Lamesa then became a "blocked person" under US Ukraine sanctions.

Cynergy contended that its payment of interest would breach US Secondary sanctions thereby exposing it to prohibitions and restrictions on the opening/maintenance of a correspondent account in the US.

Cynergy relied on a clause providing that it would not be in breach if

"such sums were not paid in order to comply with any mandatory provision of law, regulation or order of any court of competent jurisdiction"

The agreement defined "regulation" in very wide terms but made no specific reference to foreign sanctions.

Cynergy succeeded in the Commercial Court. The Court of Appeal dismissed Lamesa's appeal, holding that

- It was crucial that it did not extinguish Cynergy's repayment obligation but rather only suspended it.
- a "mandatory" provision of law" simply meant compulsory.
- against a background which assumed knowledge of the terms of EU Blocking Regulation No 2271/96 and the possibility of US secondary sanctions, the words "not paid in order to comply" meant that a borrower would not be in default if its reason for non-payment was to "comply" with a foreign statute which would otherwise be engaged.
- On the wording of the clause, what mattered was that the reason for non-payment not the likelihood of Cynergy's being sanctioned if it did make payment.

In ***Banco San Juan Internacional Inc v Petróleos De Venezuela SA*** [2020] EWHC 2937 (Comm) a Puerto Rican bank sued Venezuela's state oil company (PDV) under credit agreements concluded after the US imposed sanctions on Venezuela in 2014.

PDV alleged that its payment obligations were suspended by a clause providing that it would not repay loans with the proceeds of either (a) business activities subject to US sanctions or (b) business activities in a country that was subject to US sanctions.

The judge decided that the clause did not suspend PDV's payment obligation (it made no mention of suspension). It was merely a negative covenant for the bank's benefit, not a condition to the accrual of the payment obligation. PDV's obligation to obtain all necessary licences also suggested that the payment obligation survived.

Mamancochet Mining Ltd v Aegis Managing Agency Ltd [2018] EWHC 2643 (Comm) was an insurance case involving which US Iran sanctions. The clause was a standard market provision (LMA3100):

"No (re)insurer shall be deemed to provide cover and no (re)insurer shall be liable to pay any claim or provide any benefit hereunder to the extent that the provision of such cover, payment of such claim or provision of such benefit would expose that (re)insurer to any sanction, prohibition or restriction under United Nations resolutions or the trade or economic sanctions, laws or regulations of the European Union, United Kingdom or United States of America."

It was held that this clause required the insurer to show that payment of the claim would actually be prohibited rather than that it would merely expose it to the risk that the enforcing agency would so conclude (cf Lamesa). Moreover, the clause operated to suspend rather than extinguish the insurer's payment obligation.

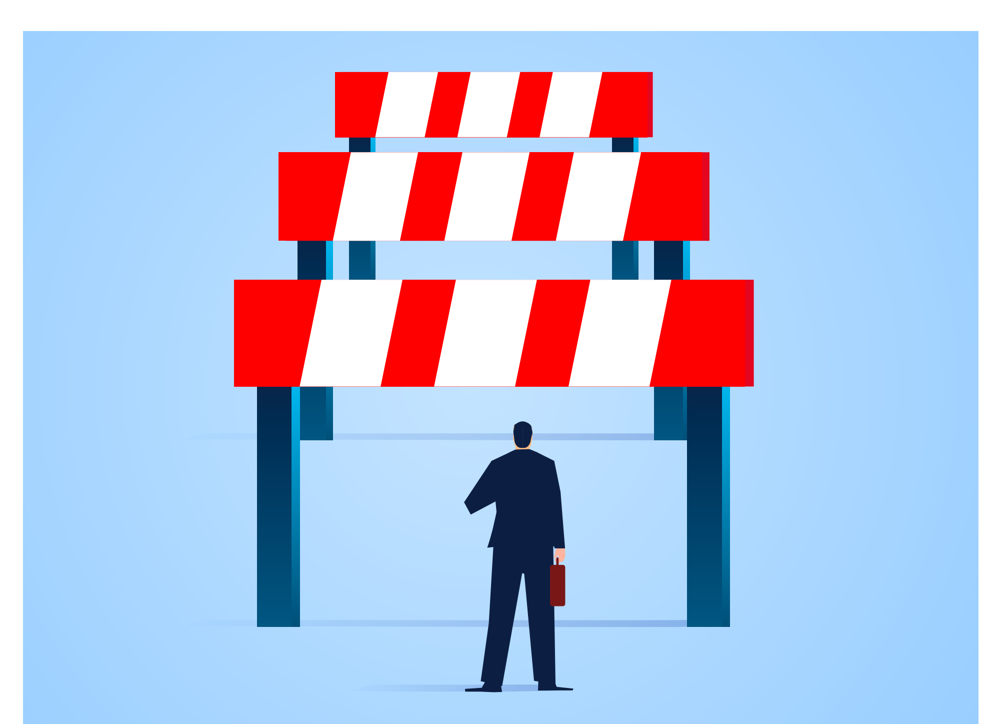
Conclusions

There are still too few cases to establish any meaningful jurisprudence on the meaning and effect of sanctions clauses.

It is, however, possible to draw some conclusions which are relevant both to the drafting of such clauses and their subsequent interpretation:

- Definitions of trigger events must be carefully considered and phrased:
    - Mamancochet: the conduct had to be actually prohibited not merely expose to the risk of a sanction.
    - Lamesa: the reason for non-payment needed to fall within the clause.
- Are sanctions a terminatory/discharge event or are they merely suspensory? There is a range of different possible techniques, eg
    - The BIMCO container vessel time charter parties 2021 clause provides that each party gives a continuing warranty that it is not a sanctioned party and if that warranty is breached then the other party can terminate and/or claim damages.
    - By contrast, in Mamancochet the Court took the view that clear(er) wording than LMA3100 would be required in order to discharge an insurer's liability to pay an otherwise valid claim.
- There is a tension between
    - sufficient specificity in order to ensure that all relevant sanctions regimes are covered (including US secondary sanctions) and
    - future-proofing the clause so that it is capable of contemplating sanctions which do not currently exist.
- There is also a tension between obtaining protection from liability to a counterparty and falling foul of a sanctions-blocking measure. That may be a question of what the clause says you can do and why (or it may not). Obiter dicta in Mamancochet (surprisingly) suggest that non-payment in accordance with a sanctions clause is not compliance with the triggering foreign sanction and thus does not engage the prohibition of such compliance by a blocking statute.

Finally, even if you know what you want the clause to say, getting your counterparty to agree to it may be quite another matter.



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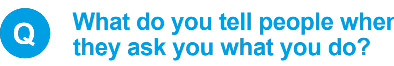
SHANTANU MAJUMDAR QC, RADCLIFFE CHAMBERS



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

A I usually do admit that I am a barrister, but at the risk of encountering all sorts of preconceptions eg. that it must mean that I practise in the criminal courts, that they are about to be cross-examined, that I must be terribly clever and/or entertaining... &c. All completely untrue of course.

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

A I am writing in the middle of a working day and so the (pressing) alternative activities are either (a) an advice about whether a proposed financial transaction would breach UK Russia economic sanctions or (b) advising on a draft settlement agreement in a (very) multi-party fraud claim. Decisions, decisions.

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

A If I could only find something that I was really good at then I would do that, but failing that…

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

A One of the strangest things was having to cross-examine a police officer in the Court of Appeal when I was 3 years call. In a dark past which I don't often admit to, I did do some crime (cf. my contradictory answer to Q1 above); this was a case in which I had done the jury trial in the Crown Court and then attempted to appeal against my client's conviction alleging that the key police witness had been an agent provocateur! It did not end well, but experiences like that make it harder to be fazed by other challenges.

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

A I would be tempted, there are so many other things which I would like to do but I wonder whether I would actually do them? I am someone who needs structure in my life and for that reason should probably never have become a barrister. I would certainly work less and travel more.

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

A Evensong. When people think of Cambridge choirs, King's College usually comes to mind but just down the road at St John's there is a choir at least as good and with a more intimate chapel. On 6 nights a week during term-time, members of the public can freely attend evensong sung by a world-class choir in a tradition which dates back to the reformation. Magical.

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

A Like a lot of people, I am very grateful for having been able to spend more time with my children. In my case, it was not a question of being there at bathtime or bedtime, given that my children are of university age, but much as I have worried about the effect of Covid on the prospects of young people, I was glad to be able to see so much of them when they would otherwise have been away having rather more fun!

Q What does the perfect weekend look like?

A It would probably start on Friday night with a cocktail (then to become the subject of a self-regarding LinkedIn post). I would then aim to spend as much of the weekend as possible outside – walking in Cambridge, running on Grantchester Meadow, visiting my favourite Cambridge bookshop (the wonderful G David) and buying a really succulent fish from the market. In high summer, I like to take a picnic and some (of my) children to see a Shakespeare play performed in a college garden (courtesy of the superb Cambridge Shakespeare Festival) and in pre- (and I hope post-) Covid times, my weekend would end with Sunday night evensong.

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

A My answer to a slightly different question is that I would most like to have been invited to a dinner party which was actually held in Paris in 1922 and was attended by Stravinsky, Diaghilev, Picasso, James Joyce and Proust. I would have had nothing remotely interesting to say, but just imagine listening to the other guests!

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

A Do it seriously, but don't take it seriously. If you can make and maintain that distinction then it will lessen the risks of both unnecessary stress (there is such a thing as necessary stress) and excessive ego. You might also preserve some life outside of the law, there can be one!

RECENT RUSSIAN CASES IN THE ENGLISH COURTS

Authored by: Natalie Todd - PCB Byrne

The English Courts have made some recent important decisions for Russian parties who chose to litigate before them. I set out below a very brief update on two recent decisions:

i) PJSC Tatneft v Bogolyubov & Others [2021] EWHC 411 (Comm) and

ii) PJSC National Bank Trust and another v Mints and others [2021] EWHC 692 (Comm).

PJSC Tatneft v Bogolyubov & Others

The case involves a $294.3 million claim by Tatneft, the fifth largest oil company in Russia, against four Ukrainian businessmen alleged to have fraudulently taken control of a Ukrainian oil refinery and diverted funds for their own benefit.

Mrs Justice Moulder considered whether the claim, brought 9 years after certain relevant events, was time-barred under the 3-year limitation period in Article 196 Russian Civil Code (RCC). As to this aspect of the claim, Moulder J found that:

1. Prior to law reforms in Russia in 2013, time ran on an Article 1064 claim from the date of actual or constructive knowledge of the "violation of right" under Article 200 RCC, without any separate requirement for the claimant to have knowledge of the identity of the defendant(s);

2. For the purposes of Article 200 RCC, ""knowledge" for this purpose is a belief that the violation of rights has occurred which goes beyond mere speculation but knowledge is distinct from evidence and a claimant can have knowledge even though it does not have evidence which would prove the case at trial" [1].

1 Paragraph 55 of the judgment.

Moulder J concluded that Tatneft and its agent, S-K both had actual knowledge of the violation of their rights by March 2010, or by December 2011 and, in any event, S-K had knowledge of both the requisite elements of the tort and the identity of all the Defendants more than three years before the claim was brought.

In addition, Moulder J found that had it been necessary to decide the point, that "*harm*" for the purposes of Article 1064 of the RCC does not extend to a claim by S-K based only on financial loss caused by the non-receipt of economic benefits which it had "*a legitimate expectation*" of receiving. This was not sufficient to constitute property for the purposes of a claim under Article 1064.

PJSC National Bank Trust and another v Mints and others

The case involves an alleged conspiracy between the first four defendants (the "Mints Defendants") and two major Russian banks. The Mints Defendants are domiciled in England, but all other elements of the claim point to Russia.

The claimants obtained permission from the Court to serve the claim outside the jurisdiction on the fifth, sixth and seventh defendants on the grounds that they are necessary and proper parties to the claim against the Mints Defendants. The fifth to seventh defendants argued that this is a Russian dispute and that they should be sued in Russia. They challenged the English Court's jurisdiction and applied to set aside the order allowing the claimants permission to serve the claim on them out of the jurisdiction. Where permission is required to serve out of the jurisdiction, the burden lies on the claimant to show that England is the proper place in which to bring the claim. If another forum appears to be the clearly or distinctly more appropriate forum then permission to serve out will be refused, unless the claimant has a legitimate juridical advantage in pursuing its claim in England so that "substantial justice" cannot be achieved in the alternative forum[2].

The claimants argued that there was a risk of a multiplicity of proceedings relating to the same issues leading to inconsistent decisions, therefore justifying that the fifth to seventh defendants should be parties to the proceedings in England rather than having to be sued in Russia.

The fifth to seventh defendants relied on *Lungowe and others v Vedanta Resources and another:* the claimants were only in a position to rely upon the undesirability of irreconcilable judgments because they had chosen to sue the Mints Defendants in England rather than in a jurisdiction which is an available and appropriate forum so the risk of inconsistent judgments loses its force.

The claimants argued that this case should be distinguished from Vedanta and that, whilst they could have issued proceedings against the Mints Defendants in Russia, issuing proceedings in England was the "only rational choice"[3] due to the relative ease of enforcing an English judgment (and the difficulty of enforcing a Russian judgment) over the relevant trust assets in the Cayman Islands and the fact that the Mints Defendants were likely to resist the enforcement of a Russian judgment. In particular, there was a risk the Mints Defendants would not appear in any Russian proceedings so that any Russian judgment granted would not be enforceable against the Cayman Islands assets.

The Court found in favour of the claimants and found that it was reasonable for the claim to have been issued against the Mints Defendants in England. The ease with which a judgment could be enforced was a legitimate juridical advantage to consider as was the fact that the defendants had not offered to submit to the jurisdiction of the Russian Court. The undesirability of a multiplicity of proceedings and the consequent risk of inconsistent judgments remained an important and legitimate factor to be considered when determining the appropriate forum for the claim, all the more so in cases where conspiracy is alleged.

2 See *Lungowe and others v Vedanta Resources and another* [2020] AC 1045

3 Paragraph 64 of the judgment.

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ALTOGETHER, NOW:

COLLECTIVE REDRESS AND THE UK LEGAL LANDSCAPE FOR CLAIMS ARISING FROM BREACHES OF DATA PROTECTION LEGISLATION ("DATA BREACH CLAIMS")

Authored by: Ben Sigler - Stephenson Harwood

There are four principal procedural mechanisms via which collective redress may be pursued before the English Court on behalf of a class of Claimants (a "**Claimant Class**"):

1. separate claims which are collectively case managed under a group litigation order pursuant to CPR 19.10 – 19.15 and PD19B ("**GLOs**");
2. representative actions pursuant to CPR 19.6 or 19.7 ("**RAs**");
3. opt-out and opt-in actions for breaches of competition law pursuant to s47A of the Consumer Rights Act 2015; and
4. test cases (primarily under the Financial Markets Test Case Scheme pursuant to paragraph 6 of PD63AA).

In the context of Data Breach Claims, the first two options are the only applicable procedural mechanisms pursuant to which such claims can be pursued.

GLOs

GLOs are becoming increasingly popular. Since their inception in 2000, 109 GLOs have been granted. There is no restriction on the subject matter of claims which may be pursued by way of a GLO and, to date, claims pursued as GLOs have spanned product liability, financial services, shareholder actions, Data Breach Claims[1] and privacy and ESG-related claims.

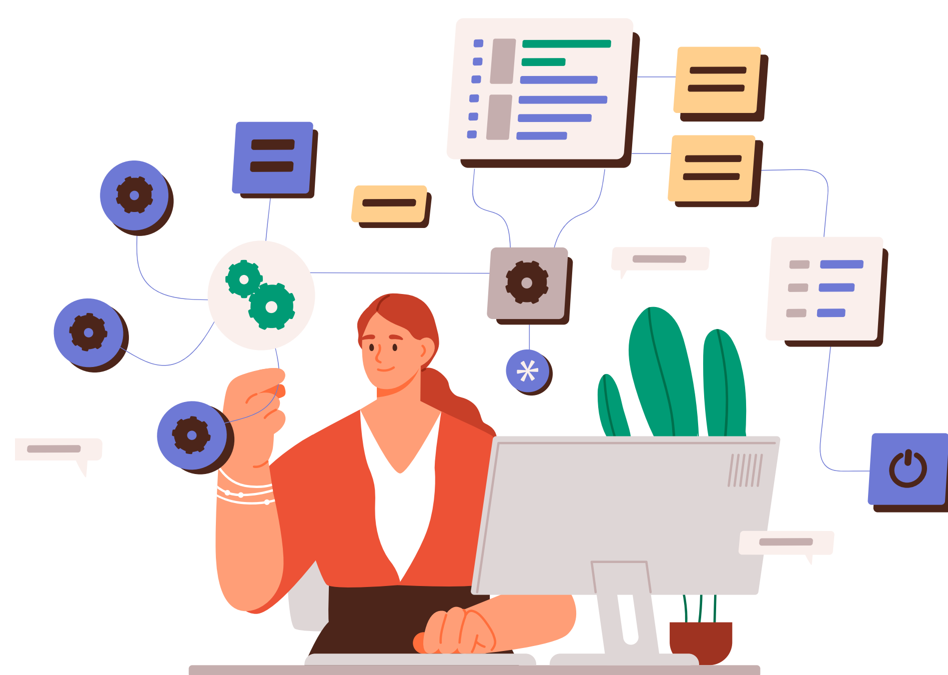
1 For example, the claims against WM Morrisons (Mr Robert Ingram + 3670 Others v Wm Morrisons Supermarkets plc) and British Airways (Weaver and others v British Airways plc), the latter of which recently settled.

Pursuant to a GLO, each member of the Claimant Class commences a claim in their own right (i.e. it is an opt-in procedure). However, for the Court to permit a GLO, the Claimant Class' claims must give rise to *"common or related"* issues of fact or law. This test permits some differences in the claims pursued by different members of the Claimant Class. For example, where members of the Claimant Class are seeking to recover damages for different heads of loss suffered (e.g. where some of the Claimant Class have suffered pecuniary loss, whereas others have only suffered non-pecuniary loss[2]), this procedural structure is flexible enough to permit this by contrast to RAs. While a trial will determine collectively the contested issues of fact or law, damages will be assessed for each individual Claimant (or, at the least, each category of Claimants).

RAs

An RA, by contrast to a GLO, is pursued on an opt-out basis; one or more Claimants represent the other members of the Claimant Class, who must all have *"the same interest in a claim"*. The requirements for utilising this procedural mechanism are therefore considerably more onerous than for a GLO. Amongst other things, RAs do not permit the Claimant Class to: recover different remedies (they are pursued on a lowest common denominator basis); or to pursue claims with materially different factual backgrounds.

A number of Data Breach Claims are presently being pursued as RAs before the English Court[3] (and other claims utilising this procedural mechanism are also afoot[4]). However, the extent to which Data Breach Claims may viably be pursued on this basis is currently uncertain pending the Supreme Court's decision in ***Lloyd v Google LLC***[5]. In this case, Mr Lloyd (the representative Claimant) is seeking to pursue an RA on behalf of a Claimant Class of several million affected data subjects in relation to the so-called *"Safari Workaround"* (by which Google took advantage of an Apple-devised exception to cookie blockers, which allowed it to harvest, without consent, browser generated information ("**BGI**") of Apple iPhone users)[6]. In the context of an application to serve out of the jurisdiction, the Court of Appeal considered that the claim was appropriate to be pursued:



- by way of an RA as the Claimant Class had the *"same interest"* as: (a) all of the Claimant Class had had their BGI taken by Google without their consent, in the same circumstances and during the same period; (b) the Claimants were not seeking to rely on any personal circumstances affecting any specific individual; and (c) there was no practical difficulty in identifying whether a given individual was within the Claimant Class; and

- as a data subject is entitled to be compensated, regardless of any pecuniary loss or distress, where a breach of data protection law causes them to lose control over their personal data of a non-trivial nature.

If the Supreme Court upholds the Court of Appeal's decision, this is very likely to lead to the increased use of RAs for certain types of Data Breach Claims.

GLO or RA in Data Breach Claims?

Choosing which procedural mechanism to deploy in Data Breach Claims is necessarily a fact-sensitive exercise. However, two key issues to be considered in this regard are:

Economics: One of the challenges presented by GLOs in the context of Data Breach Claims is that they are an opt-in procedure which obliges each member of the Claimant Class to be joined as a Claimant. Given: (1) that the damages recovered pursuant to Data Breach Claims are often relatively limited; and (2) the costs occasioned in class building, which are irrecoverable[7], can be significant; this may present challenges from the perspective of making such claims economically viable. In summary, it will be necessary for a sufficiently large number of Claimants to join the Claimant Class to justify proceeding with a claim using this procedural mechanism (which may entail persuading a funder that this is a realistic possibility before the costs attendant in class building[8] are incurred).

2 An example being the Claimant Class in the British Airways Proceedings.

3 For example, the claims against SalesForce and Oracle (Rumbul v Oracle Corporation and others), Marriott (Bryant v Marriott International Inc and others), Facebook (Carpio v Facebook, Inc and another), TikTok (SMO A child by Anne Longfield her Litigation Friend v TikTok Inc. and others), YouTube (McCann and others v. Google Ireland Ltd.) and Experian (Williams v Experian Limited).

4 For example, Mariana and others v. BHP Group PLC (a claim brought on behalf of more than 200,000 Brazilians against mining giant BHP over the collapse of the Fundao dam).

5 Judgment is expected later this year [UKSC 2019/0213].

6 For further details regarding these proceedings, and the judgment on appeal before the Supreme Court (Lloyd v Google LLC [2019] EWCA Civ 1599) see: https://www.shlegal.com/news/court-of-appeal-hands-down-significant-judgment-in-lloyd-v-google-llc-2019-ewca-civ-1599.

7 See Weaver and others v British Airways plc [2021] EWHC 217 (QB), in which Saini J held that the costs of advertising the claim were irrecoverable from BA, noting that such costs were: "essentially general overheads" and incurred by the Claimants' solicitors in "getting the business in".

8 By way of example, in Weaver as at 1 February 2021, the Claimants had incurred advertising costs of approximately £440k to recruit 22k Claimants.

Homogeneity of claims: The practical and economic difficulties inherent in GLOs mean that in certain circumstances (particularly where the Claimant class is difficult to easily identify and contact) an RA, if viable, is considerably more attractive. However, whether this is feasible will depend on the extent to which, amongst other things, it can be shown that the Claimant Class have *"the same interest in a claim"*. Following the Court of Appeal's decision in ***Lloyd***, the current position is that this may be possible in appropriate circumstances. In any event, if different Claimants have suffered different kinds of loss, even if the claim derives from the same facts and matters, an RA may not be appropriate for the Claimant Class (if an RA was used this would entail those who had suffered, for example, financial loss, being obliged only to recover damages in the amount of the least affected Claimant unless they opt-out of the RA and pursue a separate claim).

Where next for collective redress?

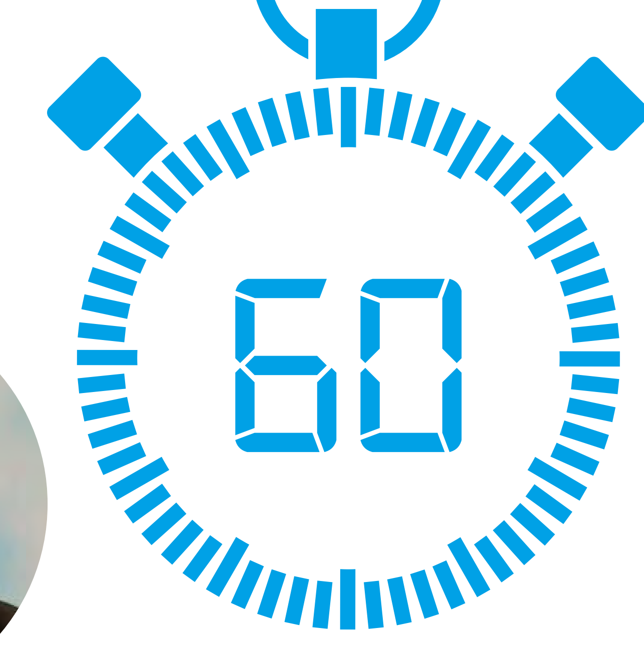
The Supreme Court has, of course, recently considered collective action in competition law cases and its decision in *Mastercard v Merricks* [2020] UKSC 51, confirming that an opt-out collective action could go forward, indicates its support for procedures facilitating collective redress where it would not be economically viable for individual members of a significant class to otherwise pursue claims.

However, if the Supreme Court decides against the viability of RAs in the context of Data Breach Claims in Lloyd, it may be that, absent further legislation, Claimants are left without recourse in relation to many significant breaches of data protection legislation (as, as the Supreme Court identified in Mastercard, pursuing claims on an individual basis may not be economically viable) which the author considers would be unsatisfactory9. Furthermore, without an effective, collective means of addressing the harm caused by such breaches of data protection legislation, the English Court risks losing its position as a pre-eminent centre for international dispute resolution.

In this regard it is worth noting, by the end of 2022, EU member states must implement the EU Collective Redress Directive10. The Directive is intended to provide an effective means for consumers to obtain redress, boost consumer confidence and create a level playing field for traders operating in the internal market Although the UK is no longer an EU member and not obliged to implement this Directive, it is worth noting that not only are its EU neighbours legislating for access to collective redress11 but closer to home, in Scotland last year legislation came into force facilitating collective redress on an opt-in basis12.

9 From a legislative perspective, it is worth noting that the UK Government recently concluded that there was "insufficient evidence of systemic failings" in the current statutory regime to warrant a new opt-out procedure for data protection cases UK Government response to Call for Views and Evidence - Review of Representative Action Provisions, Section 189 DPA 2018.
10 EU Directive on representative actions for the protection of the collective interests of consumers 2020/1828
11 For example, The Netherlands already has a well established system for opt-out collective redress pursuant to Act on Collective Damages in Class Actions (also known as WAMCA).
12 Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.

As we continue to introduce a diverse range of people behind the Disputes Community, Dipti Hunter of Keidan Harrison, Shantanu Majumdar QC of Radcliffe Chambers, John Petrie of Serle Court and Ed Brittain of Howden talk about their hobbies, challenges and personal experiences...



60-SECONDS WITH:

ED BRITTAIN, RESTRUCTURING & RESOLUTION, HOWDEN UK

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

A I have two answers, the first is "Insurance broker" but that generally ends a conversation (and whilst not untrue is a bit misleading), the second is for people who I don't want to scare off, where I describe myself as a "working in the risk transfer arena"

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

A Working with lawyers or restructuring agents designing risk transfer solutions for their assignments.

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

A Buy Bitcoin in 2009. Apart from that, very little as I have enjoyed the last 20 years.

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

A Being ferried around the same island just off the Shetlands in circles whilst the owner of the fish farm I had gone to survey tried to make me so seasick so I lost the ability to count fish pens …. After 2 hours of sailing in a small fishing boat to get to the pens I could see the harbour we had left from was 10 minutes away.

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

A No, everyday over the past 20 years has delivered a new and different challenge. Everyday is a school day, and gets me out of bed.

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

A Meeting new people at client events, getting around the UK on a daily basis and catching up with my colleagues. I am not sure the same 4 walls is good for any of us.

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

A It has a silver lining - I have contributed to developing several new risk transfer products, and I've found a quiet room with no interruptions can help sometimes

Q What does the perfect weekend look like?

A Being at my local rugby club with my boots on. Time to read the paper without a call for dad's taxi.

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

A Joe Marler (England rugby player) or Heston Blumenthal.

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

A Your integrity is a non-negotiable.

UNFAIR PREJUDICE CLAIMS: QUANTUM AND INVESTIGATION PERSPECTIVES

Authored by: Gabriel Tsui and Zachary Chang - PwC (China & HK)

Unfair Prejudice Claims

An unfair prejudice claim is common to many shareholder disputes where a shareholder purports to have been treated unfairly and prejudicially by other shareholder(s) of the same company. More often than not, the alleged victim seeks a buy-out order coupled with an expert direction for determining the fair value of its interest in the company. In some cases where investigations may be required, the victim may seek disclosure of further information from the other party and engage forensic accountants to conduct investigation.

In a buy-out scenario, one can imagine that the determination of the value of the subject shares will be an area fiercely contested between the parties given that the result could have a substantial financial impact. In the remaining part of this article, we will explain a number of critical issues and considerations from both quantum and investigation perspectives and cite some relevant cases in the UK and Hong Kong for reference purposes.

Valuation considerations

(1) Valuation Date

Valuation date is a critical matter to be considered for both the legal team and the quantum/valuation expert. Our experience is that the choice of a valuation date (or multiple dates) can make a considerable difference to the valuation analysis as the prevailing market conditions and the then company's financial performance would have an impact on the value. The decision is of course case-sensitive. Although it is possible for your quantum/valuation expert to perform valuations on a range of possible dates, the crux is whether the selected date is legally defensible and justifiable.

There are two competing authorities on the date of valuation. In Profinance Trust SA v Gladstone [2001] EWCA Civ 1031 (2 July 2001):

"…the shares should be valued at a date as close as possible to the actual sale so as to reflect the value of what the shareholder is selling."

The other consideration is stated in Re a Company (No. 002612 of 1984) (1986) BCC 99, 453:

"…the date on which the petitioner elects to treat the unfair conduct of the majority as in effect destroying the basis on which he agreed to continue to be a shareholder, and to look to his shares for his proper reward for participation in a joint undertaking."

(2) Basis of Value

From a valuation perspective, the basis of value determines how the valuation should be performed and what assumptions underly such valuation. For example, fair market value (or market value as defined in the International Valuation Standards) assumes a hypothetical transaction between a willing buyer and a willing seller where a specific buyer's interest will not be included in the valuation analysis. The valuation should only reflect the benefits available to market participants.

Fair value is a widely adopted basis of value in unfair prejudice cases. In Gallium Fund Solutions Group Ltd, Re [2021] EWHC 765 (Ch) (31 March 2021):

""Fair value" is the general principle to be applied when the court exercises its wide discretion to put right and cure unfair prejudice. There is a presumption that shares will be purchased on a non-discounted basis in the context of quasi-partnerships."

(3) Unfair Prejudicial Conduct

In cases where unfair prejudicial conduct is found by the Courts, certain adjustments / add-backs may be made to compensate for such conduct, such as by way of an increase of the value of assets or a reduction of expenses, both possibly resulting in an increase in the value of the subject shares. We note from previous cases that such conduct may include misappropriation of assets, unjustified and substantial increase in directors' or employees' remuneration and diversion of company business, etc.

However, in other cases, no adjustments were allowed if the conduct is found to have no impact on the subject company financially. In Kam Kwan Sing v. Kam Kwan Lai and Others [2012] HKCFI 1672:

"It does not follow that unfairly prejudicial conduct necessarily has an impact on the value of a company, although I accept that it commonly will….

So far as the use of the premises are concerned, I accept that it forms part of a pattern of behaviour which was unfairly prejudicial to the Petitioner, however, the evidence does not suggest that it had any adverse financial impact on the Company, I would not, therefore, have ordered that any allowance be made for this matter."

(4) Quasi-Partnership and Discounts

A minority shareholding is usually the subject of these valuation exercises, and hence one question repeatedly arises: should the minority shareholding be valued at a discount to reflect the minority position (usually referred to as discount for lack of control (**DLOC**)) or should it be valued on a pro rata basis? This is where the concept of quasi-partnership comes into play as one of the mostly contended subjects.

In Dinglis v Dinglis & Ors [2019] EWHC 1664 (Ch) (28 June 2019):

"Although not completely without controversy, the generally accepted approach in cases involving a quasi-partnership is that the minority holding of the successful Petitioner is valued without any discount."

However, in *Dinglis*, Adam Johnson QC (sitting as a Deputy High Court Judge) reached the conclusion that there was no quasi-partnership and hence, the petitioner's minority shareholding should be valued subject to a DLOC.

Investigation considerations

The discussions above largely touch on various factors to be considered or reflected in the valuation analysis. Equally important, the client and the legal team should consider engaging experienced investigation accountants for supporting services re unfair prejudicial conduct claims, such as

- fund flow or asset tracing analysis to substantiate a claim for misappropriation of assets / diversion of business and quantify the impact on the business / profitability of the subject company;
- review and analyse contemporaneous accounting and financial records to identify irregularities that warrant further investigation; and
- assistance in discovery of relevant key documents from the other party.

Findings from the above investigations could have a substantial financial impact on the valuation analysis.

Conclusion

Unfair prejudice petitions can be a powerful mechanism to protect the interests of shareholders from being unfairly and prejudicially treated. The success depends on a thorough analysis of all the key issues including valuation and investigation matters. In particular, engagement with your quantum/valuation expert and investigation expert at an early stage is crucial.

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