ThoughtLeaders4 Disputes • March 2022

Disputes MAGAZINE

ISSUE 4

INTERNATIONAL CROSS-BORDER DISPUTES

INTRODUCTION

"I do know one thing about me: I don't measure myself by others' expectations or let others define my worth."

- Sonia Sotomayor, associate justice of the U.S. Supreme Court

We are delighted to present Issue 4 of Disputes Magazine, where our authors discuss International Cross-Border Disputes over a variety of jurisdictions, including India, Cayman Islands, Lebanon and more. We also hear more about our members with a series of 60 seconds with interviews, with special mentions to our women contributors in honour of International Women's Day.

Thank you to all of our authors, members, and community partners for their continued support. The Disputes community is ready for a busy 2022 as we head into Q2, and we look forward to connecting with you all along the way.

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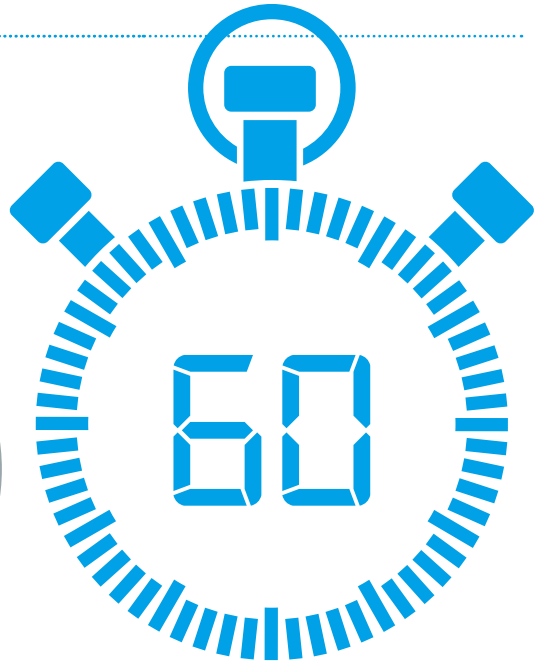

Q What would you be doing if you weren't in this profession?

A I'd be an investigative reporter. There are lots of similarities with the work we do as corporate investigators: digging through datasets, persuading people to speak to you, and having a sixth sense for when something's not quite right and needs to be interrogated further. Investigative journalists who uncover state-sponsored corruption or abuse are working in the public interest, so they get the satisfaction of the moral high ground, too.

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

A Pre-Covid I travelled a lot for work, often to meet interesting people. I once interviewed a senior Ukrainian politician in a dingey underground cigar lounge that felt more appropriate for plotting a coup than discussing the government's planned economic reforms. The only other people there were a pair of men who kept glancing over at us in quite an intimidating way. It was only once the meeting was over that I realised they were my host's security detail.

Q What is the easiest/hardest aspect of your job?

A The easiest (or most enjoyable) aspect is working with other people. From clients to colleagues to consultants to human sources – every asset recovery or dispute support case we work on will require extensive collaboration, usually across borders and areas of expertise.

The hardest aspect is knowing when to change course. Our investigative work tends to be iterative and you can't necessarily predict where it's going to lead. When you've put a lot of time and energy into a line of enquiry that ends up going nowhere, it can be hard to admit defeat and start again with an entirely new approach.

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

A Everything is an opportunity to learn. No two matters are the same, so even a task that is superficially mundane will have something about it that makes it interesting or new. Also, things can and do go wrong, and when this happens on cases you'll develop much more quickly by reflecting and learning from the experience.

Q What do you think will be the most significant trend in your practice over the next 12 months?

A The rising incidence of disputes linked to corporate collapse and scandals that have come to light due to Covid-19, supply chain and cashflow issues.

Q If you could learn to do anything, what would it be?

A Until recently I would've said kitesurfing, but I did a taster course and was so bad that they didn't even allow me out onto the water. I might have to set my sights a bit lower.

Q What is the one thing you could not live without?

A Peanut butter

Q If you could meet anyone, living or dead, who would you meet?

A I love social history and tend to be more interested in the lives of ordinary people who have lived through great change than those who caused it. For that reason, I would choose to meet the writer and Nobel Prize winner Svetlana Alexievich. She has an unrivalled talent for capturing the unique voices of her interviewees and using them to humanise history.

Q What songs are included on the soundtrack to your life?

A David Bowie's Space Oddity. It was a family favourite when I was a child and I still think it's a perfect song.
I Know There's Gonna be (Good Times) by Jamie xx reminds me of exactly that. It was the sound of the summer of 2015.
Truth Hurts by Lizzo. You can't not feel good after listening to it.

Q What does the perfect weekend look like?

A At this time of year, it would involve a trip out to the Surrey Hills on my bike, followed by a Sunday roast in a cosy pub to warm up.

Q Looking forward to 2022, what are you most looking forward to?

A Continuing the trend towards more in-person meetings and events, both work-related and social.


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INDIAN ANTITRUST PRIVATE LITIGATION:

IN NEED OF REFORM?

Authored by: Professor Suzanne Rab - Serle Court

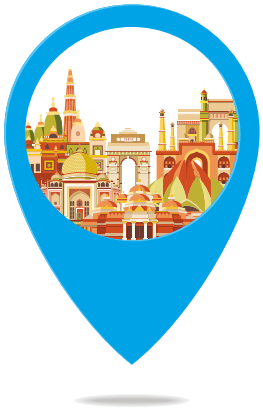
Competition law in India has developed significantly since the coming into force of the Indian Competition Act 2002 (**"Competition Act"**). The nation's sector-wide competition authority, the Competition Commission of India (**"CCI"**), has already built up a reputation as a serious antitrust enforcer. While the system of public enforcement is advanced, the private enforcement of competition has yet to fulfil its potential.

After a tumultuous start where the Competition Act was challenged on constitutional grounds, the main behavioural provisions of Indian competition law contained in sections 3 and 4 of the Competition Act dealing with, respectively, anti-competitive agreements and abuse of a dominant position, came into force in 2009, followed by sector-wide merger control in 2011.

The competition regime in Indian drew some inspiration from more established competition laws internationally including those of the EU and UK and, to a lesser extent, the United States. Indeed, section 3 and 4 are derived from, or at least modelled on, Articles 101 and 102 of the Treaty on the Functioning of the EU which are themselves mirrored in the Chapter I and Chapter II prohibitions of the UK Competition Act 1998. In view of the similarity in the substantive law provisions, it is useful to cast a comparative glance to consider why India's private enforcement regime has not burgeoned in the same way as its public counterpart especially given the renewed emphasis on private enforcement I recent years particularly in the EU. After almost a decade of debate the European Parliament approved a new EU directive on private damages for infringements of competition law (Directive 2014/104/EU, the **"Damages Directive"**).

The Directive states that it is designed to ensure that "anyone who has suffered harm caused by an infringement of competition law…can effectively exercise the right to claim full compensation".

The broad aim of the Directive is to address the impediments to the effective enforcement of competition law in the majority of Member States and to establish minimum standards and approaches in the procedural rules. The UK Consumer Rights Act 2015 reflects similar trends.



The legislative framework in India currently curtails private enforcement of competition claims and creates a multi-layered appeal structure. There is no procedure for so-called 'standalone' competition law actions independently of a finding of a violation through the public enforcement system. As a result, parties who are harmed by a breach of India's competition law are limited to so-called 'follow-on' actions. An application for compensation can only be made before National Company Law Appellate Tribunal (**"NCLAT"**) after the CCI or the NCLAT has made a determination that there has been a contravention of the Competition Act.

Any person who is aggrieved by a CCI order can file an appeal before the NCLAT within 60 days of the communication of the order (section 53B, Competition Act). An appeal can be made to the Supreme Court against orders of the NCLAT within 60 days of the communication of the order (section 53T, Competition Act). Such appeals may be made based on issues of fact or substantive law.

As a result, a claim for compensation can only be started before the NCLAT if there has been a finding of an infringement by the CCI or the NCLAT (section 53N, Competition Act).

The category of potential claimants includes any enterprise or person who has suffered loss or damage as a result of a contravention of the Competition Act, the central or state government or a local authority. The role of third parties is limited both at the administrative stage and before the NCLAT. Third parties cannot be a party to the case before the CCI and cannot file an appeal before the NCLAT on a finding of no infringement by the CCI or the NCLAT.

A claim for compensation may be lodged before the NCLAT immediately following a CCI decision finding that there has been an infringement regardless of whether there has been an appeal to the NCLAT. However, the appellate structure contributes to a further delay in reaching finality in such actions. The NCLAT has also shown some deference to the Supreme Court by putting a stay on private enforcement while an appeal to the Supreme Court is pending.

There is currently a dearth of case law on such important matters as standing to bring private claims for compensation, limitation and the stage at which such claims may be made. In *Food Corporation of India v Excel Crop Care Ltd and Ors* (**"Excel Corp"**) the NCLAT addressed some important questions. It found that a limitation period of three years was reasonable as compensation claims are monetary claims and this period starts from the date of the Supreme Court's decision. However, this decision is itself on appeal to the Supreme Court so does not conclusively determine these issues.

There remain many unresolved questions and issues which create challenges for would-be private litigation claimants. The disclosure regime applying to such claims is undeveloped and it is unclear how confidential information will be protected.

Another open question relates to the status of leniency applications. The majority of the competition law jurisdictions worldwide and in Asia in particular offer some form of immunity or reduced penalties in return for cooperation by the company concerned with a competition law investigation. Leniency will only be attractive to business if the net benefit to the company exceeds the real and likely penalty. The lack of decisional practice or guidance on the likely level of penalty or the potential size of the reduction for leniency can seriously undermine a country's leniency policy and with it the ability to root out and successfully prosecute cartels. Although Indian competition law allows for leniency there are no detailed guidelines on the circumstances in which leniency will be available. There is a lack of clarity in terms of nature and quality of evidence that is required for the applicant to qualify for leniency. There is no guidance on the extent to which the CCI will permit disclosure of leniency documents to private litigants and third parties in private damages actions in India or elsewhere.

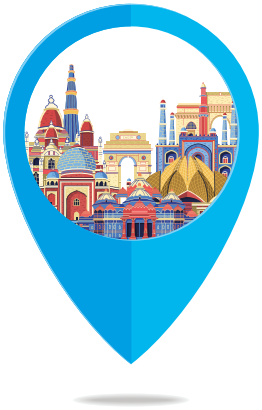
There is similarly limited information on the approach to calculation of compensation although the reference to "loss or damage shown to have been suffered" suggests that the measure will be compensatory. It remains to be seen whether the NCLAT will award exemplary or punitive damages. In principle, the administrative penalty imposed by the CCI is not relevant to the level of compensation awarded to a private claimant. Anecdotal evidence suggests that claimants are not deterred from seeking a significant uplift to reflect the harm they claim to have suffered. Following the CCI's imposition of a penalty of INR550 million (approximately USD7.3 million) on the National Stock Exchange for abuse of dominance, the informant in the case MCX Stock Exchange Limited made an application for compensation for INR8.5 billion. In Excel Corp, it is understood that the claimants have filed for compensation for their actual losses, 18% compound interest and litigation and legal costs. It remains to be seen whether these claimants will be successful in their claims for compensation or whether they will settle.

The majority of Asian competition regimes permit standalone and follow-on private rights of action, whether through the general courts or as in Indonesia via a quasi-judicial procedure of the competition authority. India is not alone in curtailing private damages actions and to limit these to follow-on actions.

The right of private action following a breach of competition law has been curtailed under Hong Kong's competition regime. Private actions based on infringement of the Hong Kong Competition Ordinance can only be brought after the Competition Tribunal has ruled that there has been

a violation following an application by the Competition Commission for the imposition of a fine or an order to stop the infringing practices. By contrast, in China parties to a monopolistic agreement who have suffered loss as a result can bring damages claims in the courts. There is no requirement for there to be a prior finding of infringement by a competition agency. Unlike the position in the EU, most competition law private enforcement claims in China tend to be standalone rather than follow-on actions.

Private claimants are assisted in follow-on actions by the prior finding of infringement by the competition authority. India's competition law also contains evidential presumptions which assist claimants. For example, horizontal arrangements, relating to price fixing, limitations on production or supply, market sharing and bid rigging, are presumed to have an appreciable adverse effect on competition in India under section 3(3) of the Competition Act. Proving harm in such cases as information exchange would be an additional burden in the absence of a prior finding of infringement by the CCI. However, there is no reason why a developed private enforcement regime cannot supplement the public regime in both standalone and follow-on actions. The EU Damages Directive contains a number of measures which will be attractive to claimants including a presumption that a cartel caused harm, standard disclosure rules across the Member States, confirmation that indirect purchasers may bring claims against cartelists and recognition that co-cartelists (with the exception of leniency applicants) are jointly and severally liable for the full loss caused by the cartel.



Despite the more limited published information on the extent of private competition law litigation in India, the writer has anecdotal experience of such claims featuring in commercial negotiations as part of an overall litigation strategy involving both public and private claimants and defendants. Substantive competition law claims also feature in arbitrations with their seat in India where, owing to the nature of those claims, the substantive theory of harm and the resulting awards do not typically become public. The writer has also appeared as an expert witness on matters of international law in such proceedings where the tribunal has considered approaches under other comparable legal regimes. These experiences are not unique to any one sector although there is a striking similarity in the types of cases which are being considered in antitrust proceedings worldwide. Examples in the UK/EU with counterparts in India of which the writer has experience include claims for access to essential facilities in regulated sectors, access to IPR, resale price maintenance and restrictions in online selling.

The direction of travel bears testimony to the increasing maturing of India's competition law regime. A specialist bar that has grown up where skills of economic literacy are as highly prized as technical legal knowledge. In that respect, India's competition law regime is not that dissimilar from other modern competition regimes where a major part of private actions takes place below the radar. However, the difference is the lack of a credible threat of a standalone claim which does not currently exist and the limited agency guidance which, if it was available, would give private claims more legitimacy and predictability.

Private competition law enforcement is gaining momentum internationally. It may be expected that it is not so much a question of "if" but "when" these claims become more of a reality in India. At the time of writing there are no specific reform proposals which are under public consideration, but a committee has been established to review the Competition Act. Now, over two decades after India's competition regime took its first steps it has rightly come of age. Now might well be the right time to consider amending the existing legal framework and issuing guidance on such important matters as damages methodology and collective claims.

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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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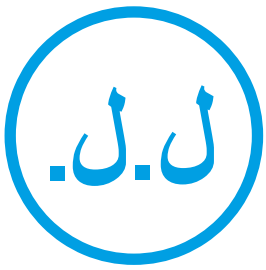
BLOM BANK SAL SUCCESSFULLY DEFENDS CLAIM IN LONDON IN WHAT THE COURT DESCRIBED AS A "ESOTERIC DISPUTE" OVER FOREIGN CURRENCY CONTROLS

BILAL KHALIFEH -V- BLOM BANK SAL [2021] EWHC 3399 (QB)

Authored by: Dipti Hunter - Keidan Harrison



Background: Economic and Legal challenges

In October 2019 the Lebanese economy was in difficulties which led to the Government defaulting on its borrowings in March 2020. This was also against the backdrop of renewed sectarianism which Lebanon had not experienced for some 30 years. Pressure was then put on local banks by the central bank, Banque du Liban (**"Bdl"**) to restrict payments of foreign currency out of the jurisdiction.

Following a change in the local and regulatory rules placed on banks and the transfer of foreign currency, Lebanese banks have been involved in a number of disputes around the world in particular due to the strict currency controls that were imposed as part of those changes.

Many customers with foreign currency accounts in Lebanon have found the changes challenging when accessing their personal accounts.

According to some media reports, the Lebanese pound lost up to 90% of its value following the financial crisis. With a government unable to agree on the controls required to deal with the crisis, local banks imposed their own controls on foreign currency accounts, thereby leaving up to 1.4 million deposit holders with accounts and monies they could not access.

This case illustrates again the ability of the English Courts to consider the application of foreign law and how the court will treat claims based on implied terms when considering Rome 1.

Claimant's money transfer request refused

This matter involved an account holder (**"the Claimant"**) and a Lebanese bank, Blom Bank SAL (**"the Defendant"**). The Claimant had opened two USD accounts with the Defendant in 2016 when he had declared himself a Dubai resident in to which he made seven transfers from his savings in USD to the new USD accounts. In 2018 the Claimant later opened up other bank accounts for his business interests in which the Claimant submitted at the hearing that he declared himself a UK resident to the bank. By October 2019 Lebanon was experiencing a severe banking crisis.

Without seeking the Claimant's consent, the Defendant opened a Lebanese Pound account in the Claimant's name into which interest payments were made on the Claimant's personal USD dollar account.

The Claimant then made a number of requests for the Defendant to make transfers from his accounts to his account in the UK. The Defendant's response noted as follows:

> ***"We regretfully inform you that we are unable to provide the requested transfer service for the time being, noting that our Bank is prepared to remit to you a banker's cheque drawn on the [BdL] for the amount of your choice out of the net balance available in your account with us at maturity, subject to request being compliant with all applicable laws and regulations".***

As the economic crisis worsened, the Claimant instructed English solicitors and further demanded the repayment of his accounts in USD in 2020.

Why English Jurisdiction?

It is worth noting that before the Judgment was handed down there had been a prior hearing to consider choice of jurisdiction about whether this case should be decided by a Lebanese Court or a English Court. It appears that the Defendant had a preference for the matter to be heard in the Lebanese Courts but then later conceded the anti-suit injunction (which was sought by the Claimant at the prior hearing) which meant that the case proceeded in London.

The Court had previously held that consumer protection legislation under EU law (namely Article 17 of the EU Recast Judgments Regulation) meant that the Claimant could have his case heard by an English Court, but what had not been answered was whether an English Court could force a Lebanese bank to transfer the Claimant's monies out of a bank account held in Lebanon.

Though choice of jurisdiction was conceded, the issues of choice of law and whether English law or Lebanese law applied was then decided at the substantive hearing.

What issues did the Court consider?

The Court had to consider, inter alia, the following legal issues:

- **(i)** What is the applicable law, Lebanese Law or English Law?
- **(ii)** Whether the Claimant was entitled to Judgment and whether the payment should have been in USD under the applicable law?
- **(iii)** Assuming Lebanese law applied, whether the Defendant had a valid defence under the Lebanese Code of Civil Procedure?
- **(iv)** Assuming Lebanese law applied and the debt was owed in USD, whether there was a claim in damages against the Defendant for non-payment?
- **(v)** Assuming English law applied, whether the Defendant had a defence under Rome 1 Article 12(2)?
- **(vi)** Assuming English law applied, whether the Claimant had a cause of action for damages for consequential loss which arose from non-payment?

Location, Visa, Residence and Choice of Law

The High Court was alive to the challenging economic circumstances in Lebanon which had led to the dispute. But the matter turned on the individual facts of the case and how the banking relationship had been set up in Lebanon by reference to the contractual documents in particular the Key Features Document which had been agreed at the outset.

The Claimant attempted to argue that English law should apply and tried to shoehorn his submissions within the Rome Regulation on the law applicable to contractual obligations (EC) No 593/2008) (**"Rome I"**) to attempt to bring the arrangements within consumer contracts. The Court held that one of the relevant agreements referred to as the "General Agreement" contained an exclusive jurisdiction clause in favour of the courts of Beirut and that the existence of that clause meant that Lebanese law applied to the banking relationship under Article 6 of Rome I. English law therefore did not apply.

The court rejected the submission that the Defendant had directed banking activities to the UK. Although not directly related to the first point, the court did not accept the submissions that the Claimant was habitually resident in the UK in October 2016 when the accounts had been opened with the bank. For example, the Claimant's visa status until April 2017 did not permit him to live in the UK and for the years 2014, 2015 and 2016, the Claimant spent more days in the UAE and Qatar, than he did in the UK.

Lastly, the court found that the Defendant was not required to transfer the Claimant's monies to him to an account outside Lebanon.

The debt due was payable in Lebanon.

The Defendant's requirement to pay via a cheque deposited with a notary was therefore a valid method of payment. The Claimant was not entitled to demand the payment be made as an international transfer.

Conclusion

This case again illustrates again the confident way in which the High Court is able to deal with international cross border disputes and consider foreign law submissions. Despite the earlier litigation with regards to jurisdiction, the English Court shows that it will look at the reality of the relationships between a customer and a bank by reference to the available documentation both in terms of the contract but also here in terms of assessing habitual residence.

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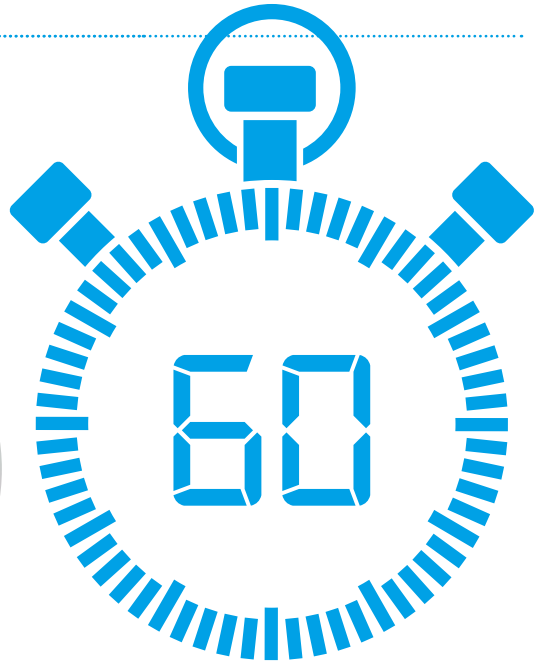

Q What would you be doing if you weren't in this profession?

A I am not sure where life would have taken me, but I have always enjoyed cooking and the thought of being a chef in a rustic restaurant in an exotic corner of the world, is appealing. I enjoyed working as a chef part-time during university and am hooked on Masterchef, the Professionals. Being Brazilian, I am particularly partial to barbequing.

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

A I have sat on the International Committee of the Bar Council for almost my entire career. This has led me to meet and work with various chairs of the Bar over the years. Some of the strangest most exciting experiences involve downtime on trips with the various chairs around the world, whether it was sake shots at a reception in Japan, swimming in shark infested waters in Brazil or spontaneously being ushered into a limousine in Cyprus. Some of the more colourful stories may be subject to privilege, however…

Q What is the easiest/hardest aspect of your job?

A The easiest part of life at the bar is the lack of office politics. Being self-employed means the dynamic in chambers is very different to any other office and the profession is very collegiate. The most difficult, is time management. If I could take all my instructions in one year and distribute the work evenly over that year, life would be great.

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

A The harder a time you have when you are a junior, the better prepared you will be as you become more senior. I spent the first 5 years of practice as a common law barrister, undertaking a variety of work in different areas of practice and fora. At the time, I found it frustrating to learn and adapt to such a wide range of advocacy styles and procedural rules. However, as my practice gravitated towards international dispute resolution, I realised that experience was invaluable. I am still learning and adapting to various legal systems, cultural differences, and legal thinking. I think I may have found my current practice a lot more challenging had it not been for those early years.

Q What do you think will be the most significant trend in your practice over the next 12 months?

A I suspect there will be further increase in cases related to the pandemic. We have already seen the wave of business interruption insurance cases and I think delay and disruption claims in construction will increase over this and the coming years. The pandemic has also affected supply chains, resulting in a rise international trade and transport disputes. This is likely because there is a lag period from breach of contract to disputes reaching the courts and/or arbitral tribunals. Ultimately, we will see a rise in disputes between parties trying to get out of, or enforce, a contract they entered before the pandemic.

Q If you could learn to do anything, what would it be?

A To speak more languages. I can speak Portuguese, which gives me an understanding of Latin languages such as Spanish, Italian, and French, but I am lost with other languages such as German or Greek. Mandarin must be one of the most useful languages to learn in the future.

Q What is the one thing you could not live without?

A My son Sebastian. He is an eternal source of joy and amusement.

Q If you could meet anyone, living or dead, who would you meet?

A Having a good education is such an advantage, which is why I really admire high achievers who did not have one. I would like to meet Michael Faraday, the scientist. He educated himself by taking an apprenticeship with a bookbinder when he was 14. He read the books he bound and eventually became interested in science, especially physics. He was the first scientist to unify the forces of electricity and magnetism into one of the four fundamental forces – electromagnetism. We talk about promoting social mobility in law, and Michael Faraday is a great example of what is possible if you have intellect, perseverance and make the most of opportunities.

Q What songs are included on the soundtrack to your life?

A I have very eclectic taste in music having grown up around the world. The artists I listen to range from Jorge Ben Jor and Cartola, which remind me of growing up in Brazil. I really enjoy classic rock such as the Rolling Stones, the Beatles and The Doors, which I became well acquainted with at university. I love to listen to acoustic and classical music on Sunday mornings. It very much depends on the mood I am in.

Q What does the perfect weekend look like?

A Relaxing with family and friends in a faraway tropical island, with no cars, barefoot and perhaps more importantly, completely off grid.

Q Looking forward to 2022, what are you most looking forward to?

A Hopefully, being able to travel again and catch up with dear colleagues and friends.

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GUARDING TRUST ASSETS AND CORPORATE CONTROL IN TRUST DISPUTES

Authored by: Jonathan O'Mahony - Conyers

Given trustees' personal liability to the extent of their wealth for liabilities associated with trust property, trustees have long mitigated their risk through the use of special purpose corporate vehicles. It is commonplace in these circumstances for directors of the trust corporation (trustee) to be directors of underlying companies and for the trust corporation to have a majority interest in the underlying companies. In these circumstances questions of control and accountability should be straightforward to manage.

However, what happens when the directors of the trust corporation and the underlying companies diverge or when the trust corporation's ability to remove problematic directors in the underlying companies is absent?

In Spanish Steps Holdings Inc v Point Investments Ltd [2021] SC (Bda) 90 Comm, the Petitioner (Spanish Steps Ltd) was a company which was wholly owned by the trustee of A. Eugene Brockman Charitable Trust (**"the Trust"**). The Petitioner, as shareholder, sought to wind up the Respondent on just and equitable grounds to have joint provisional liquidators (**"JPLs"**) appointed.

The Respondent (Point Investments Ltd) was a corporate investment vehicle for the petitioner and ultimately the Trust, which held assets in Cayman Islands funds worth in the region of $1.8 billion.

Somewhat unusually, although the Petitioner held the totality of the economic interest in the Respondent and 4.9 common million shares, it held none of the voting power. All of the voting power was held by the single "manager share".

The original trustee of the Trust was St. Johns Trust Company Limited (**"SJTC"**), one of the directors of which was, until 2018, a Mr Evatt Tamine. The current trustee of the Trust, BCT Limited (**"BCT"**), and the Petitioner are separately pursuing Mr Tamine

and his associated company, Tangarra Consultants Limited, for the return of US$28 million, alleged to have been wrongfully removed by Mr Tamine from the Trust when he had control of SJTC. Mr Tamine was also, until 2018, a director of the Respondent.

Mr Tamine used his position as director of SJTC and the Respondent to cause James Watlington and Glenn Ferguson to be appointed as directors of both SJTC and the Respondent. In addition, the holder of the manager share in the Respondent was a Nevis company, Point Investments LLC the shares in which were understood to be controlled by Mr Tamine.

Accordingly the position was that the directors of the Trust's investment vehicle were individuals who owed their position to Mr Tamine and the controlling shareholding interest in the Trust's investment vehicle (by means of ultimate ownership of the manager share) was held by Mr Tamine.

The Petitioner claimed that BCT had asked Mr Tamine to transfer his nominee share in the Respondent to a BCT nominee and he had refused. The Petitioner claimed the Respondent's directors operated under an incurable conflict of interest. It claimed that it had been prevented from withdrawing its investments in the Respondent, that it and BCT had been unable to access billions of dollars of Trust assets, that the Trust had had to reduce its charitable commitments and that the Respondent had failed to meet capital calls on one of its funds.

In the circumstances the Petitioner argued that it was just and equitable the Respondent be wound up and JPLs appointed. As the sole purpose of the Respondent was to act as an investment vehicle for the Petitioner (which was owned by the Trust), and as the Trust and Petitioner wished to terminate the Respondent's role as an investment vehicle for the Trust, it was said that the directors had been acting in breach of their duties and without proper justification.

The Court accepted the Petitioner's submission that in order to hold a trustee accountable as a trustee the Court had to ensure that the trustee was able to gather, control and manage the trust property and considered that it would be *an abdication of this Court's inherent jurisdiction to supervise the administration of trusts to allow a situation to arise and/or continue where the entire corpus of the trust is managed by whom the trustee considers by sworn evidence before the Court not to be fit and proper individuals to be in the position.*

The Respondent sought to oppose the petition on grounds that the US Department of Justice did not wish the liquidation to proceed. The Court indicated its concern that the Respondent had failed to remain neutral (per *Westport Trust v Paragon Trust* [2010] Bda LR 35) and that the directors of the Respondent appears to be unaware of their duties towards the DoJ (per *Government of India v Taylor* [1955] AC 491).

Applying the legal principles with respect to the appointment of JPLs following the presentation of a winding up petition as summarised in *Raswant v Centaur Ventures* [2019] SC (Bda) 55 Com (a contributory's petition)[1] the Chief Justice accepted that the directors should be replaced by JPLs. The Chief Justice also accepted that the relationship between the Respondent and its sole economic shareholder was, in all the circumstances, dysfunctional.

Absent special circumstances, a shareholder cannot bring a derivative action against directors of a company who cause the company loss[2].

However it will usually be open to shareholders to attempt to remove problematic directors by exercise of their voting rights not least when it is felt that trust assets may be under threat. In Spanish Steps this was not possible in light of the absence of voting rights held by the Petitioner. The solution in those circumstances is likely to be the appointment of JPLs on a just and equitable winding up petition where, as the Court here made clear, the relationship between the investment vehicle and its sole economic shareholder was dysfunctional.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

1 Following the guidance given by Sir Robert Megarry in Re Highfield Commodities Ltd [1984] 3 All ER 884.

2 Prudential Assurance Co v Newman Industries (No.2) [1982] 1 Ch 204; the leading case is now Johnson v Gore-Woood [2002] 2 AC1.

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EASIER ENFORCEMENT FOR INTERNATIONAL BANKS IN ENGLAND?

Authored by: Priya Grigoriadis and Harriet Campbell - Stephenson Harwood

A number of recent decisions involving Indian banks have demonstrated the ease with which international banks can obtain English judgments and/or enforce foreign judgments through the English courts. Defendants to such claims frequently rely on the same principal defences, namely: challenges to English law / the jurisdiction of the English courts; challenges to the effective service of proceedings; challenges to the suitability of summary judgment; and challenges to enforcement of foreign judgments because of procedural irregularities in the obtaining of the original judgment. In this article, we look at the recent trends from the English courts in dealing with these kinds of challenges.

Questions of jurisdiction

Where permission to serve outside the jurisdiction is required[1], a claim must be shown to pass through at least one "jurisdictional gateway". The gateways that are most frequently used in these kinds of claims are:

- a defendant is domiciled in England;
- in cases with multiple defendants, if there is one defendant who is subject to English jurisdiction (for example because of domicile), the claimant can treat them as an 'anchor defendant' and seek permission to sue any other necessary or proper party to that claim in England;
- a claim relates to a contract made within the jurisdiction or subject to English law or both;
- a claim relates to a breach of contract committed in England; or
- in tort claims, the harmful event occurs in England.

In the recent related cases of *Punjab National Bank International Limited (PNB) v Vishal Cruises (Private) & others and PNB v Passat Kreuzfahrten GmbH & others*[2], the Commercial Court considered a number of challenges to these gateways.

PNB provided loan and overdraft facilities to a Mauritian and a German company. In both cases, the facility agreements contained English law and jurisdiction clauses. The loans were guaranteed by a combination of individual Indian businessman and an Indian company. Some of the guarantees contained English law and jurisdiction clauses, some were subject to Indian law, and others contained no reference to law or jurisdiction.

PNB obtained appropriate permissions (where required) to serve the claims out of the jurisdiction. It argued that three possible "gateways" for service out of the jurisdiction applied: 1) the defendants were "necessary and proper parties"; 2) some of the guarantees were subject to English law and; 3) the breach of contract (i.e. the failure to pay) occurred in England.

The court agreed that at least two gateways were met. On the third gateway (the location of the breach), the defendants had argued that this was India, the place from where the funds should have been remitted. However, the court held that where no place of performance is specified in the contract, the general rule is that the place will be that of the principal debtor. In this case, the bank to whom the guarantees

1 Where a contract provides for the jurisdiction of the English courts, permission to serve outside the jurisdiction will no longer be required from 6 April 2021 following a change to the Civil Procedure Rules

2 [2020] EWHC 1962 (Comm)

were owed was based in England and payment in at least one instance was to be made to a specified English bank account. The court also ruled it made no difference that PNB was a subsidiary of an Indian entity.

Further, the court held that England was the correct forum for the dispute. The English courts clearly had jurisdiction over some of the claims (pursuant to the English jurisdiction clauses) and the disputes were so closely linked that it would be inappropriate for the English court to decline jurisdiction as it would risk irreconcilable outcomes.

Service of proceedings

The Hague Service Convention is the treaty governing service of proceedings between many countries, including India and England. Although in PNB's claim against Vishal and Passat there were minor procedural defects in compliance with the Hague Convention, the court held that where the Indian judicial authority (as here) had provided certificates of service, there was a very strong presumption that service had been validly effected in accordance with Indian law. The court further confirmed that if service had not been validly effected, it would have exercised its discretion to permit service to be dispensed with in any event. PNB had taken steps to ensure the defendants were aware of the proceedings, the defendants clearly were so aware, and any further attempts at service would simply cause unnecessary cost and delay.

Substantive challenges

PNB's claims against Vishal and Passat have not yet reached trial. However, at the jurisdiction challenge, the court dismissed the defendants' argument that the agreements were invalid under Indian law. It is only where a contract is illegal at the place of performance (in this case, England) that the English court will refuse to pass judgment. This finding is likely to be of significant comfort to banks fighting defences based on non-compliance with local laws, where the place of performance of the contract is deemed to be England.

In *Union Bank of India (UK) Ltd v Alectrona Energy Private Ltd & Ors*[3], the bank secured summary judgment on a loan agreement, despite complex issues raised in the defence, including whether an earlier alleged repudiatory breach of the contract by the bank prevented it from relying on acceleration provisions in the loan agreement. The court considered the arguments and concluded in favour of the claimant. This case is an example of the forthright approach of the English courts to spurious defences even on a summary basis. The court confirmed that it can and should resolve short points of law where this can be achieved without unfairness.

Enforcement of foreign judgments

In Barclays Bank Plc v Shetty[4], the court granted summary judgment on a claim by Barclays to enforce a judgment for $131 million against Mr Shetty (currently resident in India) which had been obtained in the Dubai International Financial Centre Courts (the DIFC). Of particular interest was the court's approach to the request for an adjournment by Mr Shetty. Mr Shetty argued that the hearing should be adjourned on the basis that he had been unable to secure legal representation due to the freezing of his assets by worldwide freezing orders granted in India. The court rejected the request, finding that Mr Shetty had failed to take *'obvious steps'* to obtain representation in the time available to him and characterising the application as a *'delaying tactic'*.

Easier enforcement in the future?

The successful outcomes in these cases show that the English courts will adopt a robust approach to questions of service and compliance with local laws, provided it can be shown that appropriate steps have been taken to bring proceedings to the attention of defendants, and that the English court's procedural rules have been complied with. The decisions are in line with a series of similar cases where international banks have successfully pursued debtors in the English courts who are either resident in England, have assets within the jurisdiction or where agreements are subject to English law and jurisdiction. While the English courts will adopt a practical approach to service under the Hague Convention, clearly, ensuring finance agreements have appropriate jurisdiction and process agent clauses in the first place is the best starting point.

3 Union Bank of India (UK) Ltd v Alectrona Energy Private Ltd & Ors [2020] EWHC 3344 (Comm)

4 Barclays Bank Plc v Shetty [2022] EWHC 19 (Comm)

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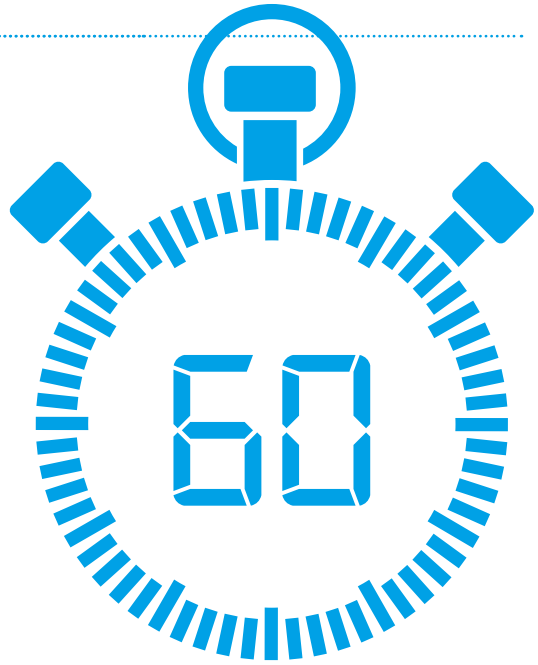

Q What would you be doing if you weren't in this profession?

A Running a supermarket chain, I like to think. Realistically, probably a senior civil servant.

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

A Cross-dressing in 18th century court costume for my QC ceremony and coming out of Westminster Hall to the stares of the tourists. It was the closest I've ever coming to understanding what a celebrity feels like.

Q What is the easiest/hardest aspect of your job?

A I find it very satisfying working out the issues in a new case, it's like doing a jigsaw without a picture. The hardest job is giving bad news to a client.

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

A Remember that everyone makes mistakes (but learn from your own).

Q What do you think will be the most significant trend in your practice over the next 12 months?

A An increasing number of appointments as arbitrator. I've really enjoyed being the person who gets to decide the result, and it has hugely affected my view of what makes effective advocacy.

Q If you could learn to do anything, what would it be?

A How to dance the salsa. I love Strictly but I can't manage the hip movements.

Q What is the one thing you could not live without?

A My children

Q If you could meet anyone, living or dead, who would you meet?

A George Eliot, the author of my favourite book, Middlemarch, a person of great insight and compassion. I often wonder what she would make of our modern society.

Q What songs are included on the soundtrack to your life?

A The birth of each of my three sons coincided with the release of the first three Coldplay albums. I've also sung Bach's St Matthew Passion with the Bach Choir more times than I can remember.

Q What does the perfect weekend look like?

A It would involve a walk in the Highlands of Scotland followed by whisky in front of a roaring fire

Q Looking forward to 2022, what are you most looking forward to?

A I want to take a sleeper train somewhere in Europe, I hear they are coming back into popularity.

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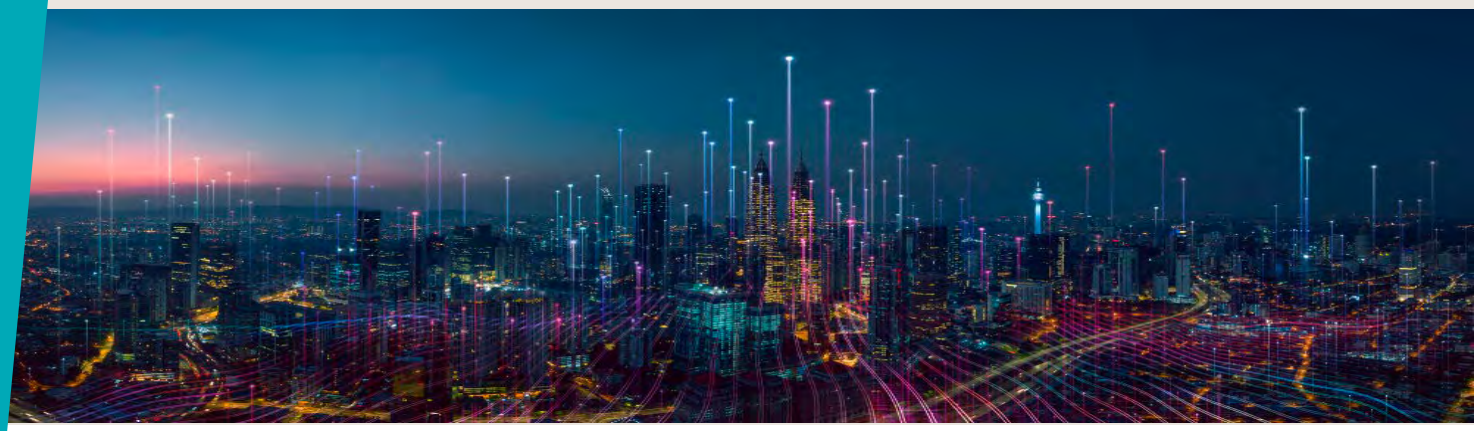

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THE USE OF THIRD PARTY DEBTS ORDERS FOLLOWING CROSS-BORDER COMMERCIAL LITIGATION

Authored by: Phillip Patterson - Gatehouse Chambers

Perhaps as a result of restrictions being imposed upon other common methods of enforcing judgments since the start of the COVID-19 pandemic, there is at least anecdotal evidence in the UK of increased interest in and applications for third party debt orders in recent months ("TPDO"). This article considers the extent to which they may be used in the context of cross-border commercial litigation and issues about which practitioners ought to be aware when seeking or opposing them.

The rules governing the making of a TPDO are set out in Part 72 of the Civil Procedure Rules. They are the modern form of what were once known as "Garnishee Orders". They are available to anyone who has obtained or is entitled to enforce a judgment obtained from a Court in England and Wales.

The judgment creditor must demonstrate that the judgment debtor is itself owed a debt by a third party.

If so, a TPDO permits, via a two-stage process, the judgment creditor to recover either (a) the amount of any debt due or accruing due to the judgment debtor from the third party; or (b) so much of that debt as is sufficient to satisfy the judgment debt and the judgment creditor's costs of the application.

The typical circumstance in which a TPDO is sought is where the judgment debtor holds funds in one or more bank accounts. In such circumstances, the bank is properly described as a debtor of the judgment debtor and, therefore, can be named as a third party in a TPDO application. There are, however, a very wide range of third party debts which are capable of falling within the scope of a TPDO.

At the first stage (usually without notice), an interim TPDO is made, the effect of which is similar to that of a limited freezing injunction. At a return date, if the Court makes the TPDO final, the third party is order to make payment directly to the judgment creditor in discharge of the debt it owed previously to the judgment debtor.

Important limits are placed upon the use of TPDOs, however. These can be particularly significant in the context of cross-border commercial litigation.

First, the debt owed by the third party to the judgment debtor must be due or accruing due to the judgment debtor. Sums held in a pension fund, for example, have been excluded from the scope of TPDOs on this basis, even where the judgment debtor had a right to elect to drawn down the fund (*Blight v Brewster* [2012] 1 W.L.R. 2841). Similarly, a TPDO was refused in *Michael Wilson & Partners Limited v Sinclair and others* [2020] EWHC 1249 (Comm) on the basis that notices to repay served by the judgment debtor on the third party had not yet expired.

Second, TPDOs are commonly challenged on jurisdictional grounds. Rule 72.1(1), CPR states:

> *"This part contains rules which provide for a judgment creditor to obtain an order for the payment to him of money which a third party who is within the jurisdiction owes to the judgment creditor."*

This simple statement conceals behind it a wealth of complexity which is revealed by the authorities.

On its face, it appears to prevent the making of a TPDO which binds any non-resident third party. This may be relevant in circumstances where an English judgment debtor is a company within an international group and is

owed sums by other group companies based in other jurisdictions.

Temporary physical presence by the third party in the jurisdiction at the time the interim TPDO is sought will suffice, however. A TPDO may also be obtained against an entity based out of the jurisdiction if it has agreed to submit to the jurisdiction for the purpose of the application *(SCF Finance Co Ltd v Masri (No. 3)* [1987] Q.B. 1028).

A further issue which has exercised the Courts at some length is whether the debt owed to the judgment debtor must itself be sited within the jurisdiction for it to fall within the scope of a TPDO. The leading authority in relation to this question remains the decision of the House of Lords in *Société Eram Shipping Co Ltd v Hong Kong & Shanghai Banking Corp Ltd* [2004] 1 A.C. 260.

According to a senior Court of Appeal in *Masri v Consolidated Contractors International (UK) Ltd (No. 2)* [2009] Q.B. 450, five key principles can be drawn from the decision in Société Eram:

(1) It is not permissible as a matter of international law for one state to trespass upon the authority of another, by attempting to seize assets situated within the jurisdiction of the foreign state or compelling its citizens to do acts within the foreign state's boundaries;

(2) It would be an exorbitant exercise of jurisdiction to put a third party abroad in the position of having to choose between being in contempt of an English court and having to dishonour its obligations under a law which does not regard the English order as a valid excuse;

(3) An *in personam* order against a person subject to the English jurisdiction may be contrary to international comity;

(4) A third party debt order is a proprietary remedy which operates by way of attachment against the property of the judgment debtor; and

(5) A third party debt order cannot be made where it will not discharge the debt of the third party or garnishee to the judgment debtor according to the law which governs that debt, even if the order is directed *in personam* to a bank with a branch in London, because the order in respect of a foreign debt was an attempt to levy execution on an asset in the foreign jurisdiction.

The authors of Gee on Commercial Injunctions (7th edition) have concluded, accordingly, that:

"With one possible exception of little practical importance, debts situated abroad are outside of the limits of the procedure. This is as a matter of the territorial jurisdiction of the court and not merely discretion. It goes to "subject matter" jurisdiction. The English court only has jurisdiction over assets within its territorial jurisdiction because of the need to respect the sovereignty of foreign states and their courts over persons and assets within their territorial jurisdictions."

The exception, said to be of "little practical importance" is set out at paragraph [111] of the *Société Eram* case:

"The only relevant question is whether the foreign court would regard the debt as ***automatically discharged*** *by the order of the English court. Since* ***this would be most unusual****, it would be for the judgment creditor to establish."*

Practitioners have, in light of this authority, generally proceeded on the assumption that TPDOs were, for practical purposes, unobtainable in respect of debts sited otherwise than in England and Wales. As Lord Hoffman noted at paragraph [78] in the Société Eram case:

"with banks and the debts of banks to their customers, the debt is, absent some special agreement, repayable at the branch where the customer's account is kept and the situs of the debt is in that country. This has a double significance. It is part of and defines the substantive obligation of the bank to its customer and it identifies the situs of the debt for the purposes of Private International Law."

The decision, therefore, was understood to exclude monies deposited at bank branches out of the jurisdiction from the scope of a TPDO.

Practitioners should, however, note the recent decision of Master Cook in *Balengani v Sharifpoor and others* [2020] EWHC 3888 (QB).

At paragraphs 22 and 23 of his judgment, the Master said:

In my judgment the situs of the debt is clearly the British Virgin Islands therefore the relevant question is whether the Judgment Creditor can establish that the BVI courts would regard the debt as automatically discharged by the order of the English Court.

While I have not admitted specific evidence of BVI law, on the facts of this case, I am of the view I can be satisfied that the BVI courts would recognise the debt as discharged by order of the English Court. In my view the evidential presumption applies and there can be no doubt that English law would recognise the debt as discharged. In any event I accept Mr Young's submission that the BVI is a dependant territory of the United Kingdom with a legal system closely modelled on our own and as such the principle of res judicata would apply.

Interestingly, in the later case of *Ross Leasing Limited and others v Nile Air and another* [2021] EWHC 2201 (Comm), Master Davison considered what Master Cook had said and concluded that the facts of *Balengani* did fall within the "unusual circumstances" exception carved out by the House of Lords in the *Société Eram* case. If that is right, sums held in accounts in any jurisdiction modelled on that of England and Wales could potentially fall within the scope of a TPDO. These recent decisions are not easy to reconcile with the generally accepted understanding of the decision in the *Société Eram* case, encompassed by the passage from Gee on Commercial Injunctions to which reference has already been made. Many jurisdictions are modelled on that of England and Wales and a doctrine of *res judicata* (at least in terms of its effect) is by no means unique to this jurisdiction. If Master Cook and Master Davison are right, the exception carved out by the House of Lords in the *Société Eram* case would be of much greater practical importance than the editors of Gee might have thought.

Neither Ross Leasing nor *Balengani* are understood to be subject to an appeal. This author would urge caution, however, before significant reliance is placed upon them prior to their consideration by the appellate courts.

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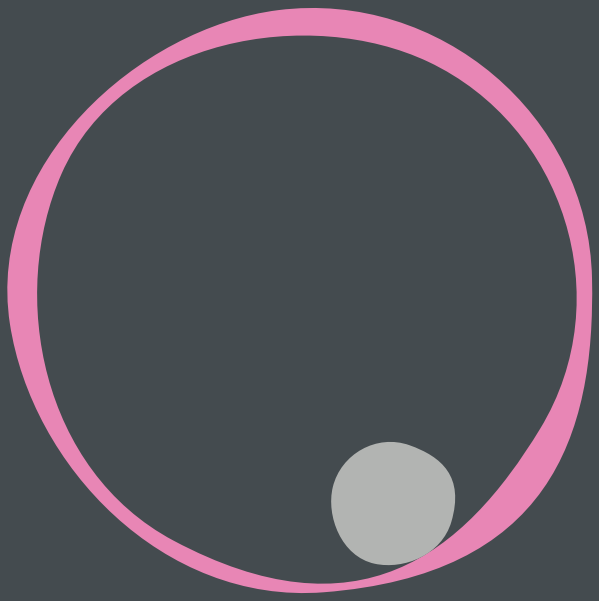

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DISSENTING SHAREHOLDER CLAIMS IN THE CAYMAN ISLANDS

THE FAIR VALUE DATE DEBATE

Authored by: Jo Verbiesen - Bedell Cristin

Section 238 Companies Act claims in the Cayman Islands, which provide recourse for shareholders who believe that their shares have been undervalued in a merger, continue at pace as PRC-based companies delist from US exchanges. With so much judicial development in this area since 2016, the suggestion in the recent decision of the Hon. Justice Parker in In the Matter of *Sina Corporation* (**"Sina"**) that there had until now been no confirmed position as to the date at which the fair value of the dissenting shareholders' shares should be assessed, is surprising. The date at which fair value is assessed would seem to be pretty fundamental to the whole assessment.

In *Sina*, Sina Corporation owned a controlling share in Weibo, the PRC social media platform similar to Twitter. On 28 September 2020 Sina Corporation's Board executed a merger agreement accepting an offer from a buyer group to acquire Sina Corporation's shares for US$43.50 per share. The merger was then approved by a special resolution at an EGM on 23 December 2020. Prior to that date, certain dissenting shareholders had notified the company of their objections to the merger. On 22 March 2021 the Plan of Merger was completed and filed with the Registrar of Companies in the Cayman Islands.

According to Parker J and counsel for Sina Corporation, prior to this case, fair value had always been assessed as at the date of the approval of the merger at a general meeting of the company (the **"Approval Date"**); however, this had always been by agreement (save in the first fair value case in the Cayman Islands to reach trial, considered further below). Nevertheless, the dissenting shareholders in Sina challenged this position in and instead sought to argue that the correct date is the date that the Plan of Merger was filed (the **"Completion Date"**) because (i) this accords with a fair construction of the statutory regime; and (ii) it is the date on which the non-dissenting shareholders 'reap the benefits' of the merger as well as being the trigger for the obligation to pay the dissenters the fair value of their shares.

Parker J rejected the dissenters' argument and decided to stick with the status quo, confirming that the applicable assessment date is the Approval Date. At first blush, this decision appears sound; but on closer analysis it isn't clear that this decision is entirely logical or consistent with previous decisions of the Grand Court including, in particular, Parker J's own decision in *In the Matter of Qunar* 2019 (1) CILR 611. In *Qunar*, Parker J held that *"The valuation is to be performed immediately before the merger. Fair value does not take into account advantages which accrue to the company post-merger including anticipated synergies."* This begs the question of what is meant by "immediately before the merger" and what "advantages" should be excluded from the assessment of fair value.

The decision in *Qunar* as to fair value indicates that "immediately before the merger" might actually mean before the company entered into the merger agreement (i.e. in Sina Corporation's case before 28 September 2020 or

earlier) for two reasons: (i) in *Qunar* Parker J accepted the company's expert's valuation approach, which estimated the company's value (emphasis added) *"by giving equal weighting to a DCF approach* ***and a market trading approach which was based on the company's share price immediately prior to the announcement of the merger on June 23rd, 2016"*** (Qunar first announced receipt of a preliminary non-binding offer on 23 June 2016); and (ii) Parker J accepted in *Sina Corporation* and in *Qunar* the view expressed by the Hon. Justice Jones in *In the Matter of Intergra Group* 2016(1) CILR 192 (the first s238 case to reach trial in the Cayman Islands) that fair value should be determined **disregarding the effects of the merger**, whether the effect would be positive or negative.

If it is accepted that (i) the share price of a publicly traded company is a relevant factor in assessing fair value (as it was in Qunar and in subsequent decisions); and that (ii) news of a merger could potentially have a substantial impact on the share price of a publicly traded company; and (iii) the impact of the news of the merger should not be taken into account in assessing fair value (since it is an effect of the merger), then the correct date must in fact be before the merger agreement is entered into and the merger is announced to the public.

To illustrate this point, one can look at the impact of a recent buy-out announcement on share price. On 10 January 2022, Zynga Inc announced that it has entered into a merger agreement with Take Two Interactive Software (**"Take Two"**) by which it accepted Take Two's buy-out offer of Zynga at a value of US$9.86 per share (the transaction is subject to Delaware, not Cayman law). Immediately prior to the announcement, on Friday 7 January 2022, Zynga shares closed at US$6.01. On Monday 10 January 2022 (the next trading day and the day of the announcement), the share price moved sharply upwards, trading as high as US$9.20 before closing at US$8.90. It has continued to trade above US$8.00 since 10 January and history would suggest it is likely to do so up to the date of Zynga's stockholder meeting to approve the merger (assuming no higher offer is received during the current "go-shop" period). It is unarguable that the increase in Zynga's share price is directly attributable to the buy-out announcement. The question is – should any dissenting shareholders be entitled to the benefit of that announcement? If not, then shouldn't the effective valuation date be earlier than the point at which the share price of the company is impacted by the merger itself?

The Hon. Chief Justice Smellie in another s238 case, In the Matter of JA Solar Holdings Co., Ltd, held that "As confirmed in Integra, the "valuation date" is to be the date of the extraordinary general meeting, as "the fair value should be determined at the point immediately before the merger is agreed".

Presumably this means agreed by the shareholders at the EGM, which may certainly be a pivotal date if there was any prospect in these cases that the merger would not be approved at the EGM. Practically speaking, however, there is little prospect of the merger not being approved by the members in these cases because the buyer group almost always has a controlling share and/or the majority shareholders are bound by the merger agreement to vote in favour of the proposal. That being so, the "value" (pun intended) of the Approval Date is questionable.

60-SECONDS WITH:

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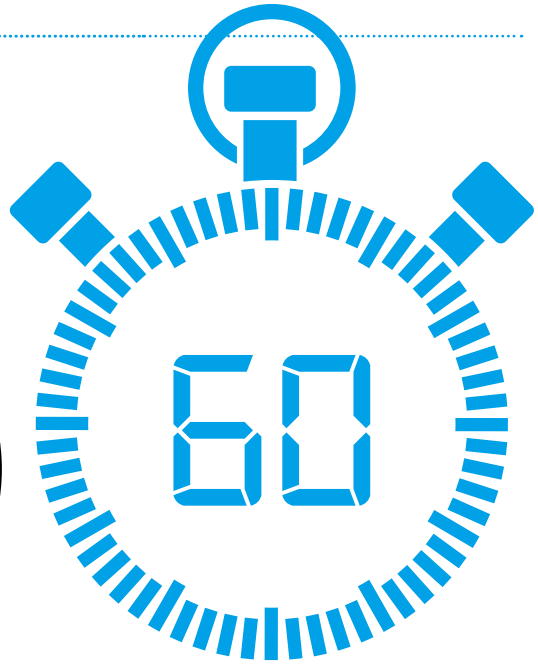

Q What would you be doing if you weren't in this profession?

A Something in the music industry, hopefully singing. As a child I said I wanted to be an opera singer when I grew up. I am operatically trained – a mezzo soprano – but I may be past my sell-by date now!

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

A The examples under the 'strange' category aren't for publication unfortunately, but back when I was an NQ I was flown first class to New York by a Silicon Valley tech client – my first trip there. My client, an insanely cool woman on the board of directors who knew the Big Apple like the back of her hand, introduced me to the New York bar scene after we'd got all our work done. That was pretty exciting for my 25 year old self!

Q What is the easiest/hardest aspect of your job?

A The easiest bit is working with and for my clients – it's genuinely an absolute joy. I am extremely lucky to have so many fantastic clients many of whom I also count as friends. The hardest aspect I find is knowing when to put the iphone down/turn the laptop off. I'm really not very good at switching off, and the pandemic along with working from home has made it even harder.

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

A If you are conscientious and work hard, you will go far. It's glaringly obvious to lawyers who have been around the block a few times which trainees and junior lawyers don't have their heart in it. Also, try to find yourself a mentor in the profession – I did and I've so much to thank him for (you know who you are!).

Q What do you think will be the most significant trend in your practice over the next 12 months?

A Hybrid working arrangements – hallelujah! I can't believe it took a global pandemic to convince law firms that flexible and remote working arrangements were viable and might indeed be more efficient than coming into the office 5 days a week.

Q If you could learn to do anything, what would it be?

A To speak another language fluently

Q What is the one thing you could not live without?

A My friends (including my family) – loneliness is the worst.

Q If you could meet anyone, living or dead, who would you meet?

A The Beatles (I know, that's four people!) at The Cavern Club on 9 February 1961 after their first ever gig.

Q What songs are included on the soundtrack to your life?

A Always look on the bright side of life
Mamma Mia
One Man's Ceiling is Another Man's Floor
Any song by Stevie Wonder as they're all glorious
(and for the more sombre moments)
Erbarme Dich Mein Gott (sung by Janet Baker)

Q What does the perfect weekend look like?

A Spending plenty of time outside, in the sun, with my kids, plenty of delicious food, comfy beds and piles of books!

Q Looking forward to 2022, what are you most looking forward to?

A Going abroad a bit more, and finally getting to know more of my colleagues – I joined Stephenson Harwood in the second lockdown and feel like I still barely know anyone.

RPC

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BVI CROSS-BORDER LITIGATION:

THE CURRENT STATE OF COST RECOVERY

Authored by: Jerry Samuel - Conyers

The Legal Profession Act 2015 (as amended) (the "LPA") introduced significant changes to regulation of the legal profession in the British Virgin Islands (BVI)[1], including restrictions aimed at preventing persons not admitted in the BVI from recovering fees[2]. This article reviews the leading cases on recoverability of fees of non-admitted persons since enactment of the LPA, highlighting uncertainties addressed by the courts and issues that require regulatory intervention.

Key statutory provisions

The important statutory provisions related to recoverability of fees are sections 2(1) and 18 of the LPA. Section 2(1) defines a legal practitioner as a person whose name is entered on the register of legal practitioners, known as the Roll, and states that *"practise law"* means *"to practise as a legal practitioner or to undertake or perform the functions of a legal practitioner, as recognised by any law…"* before or after commencement of the LPA. Sections 18(1) and (2) impose criminal sanctions for unlawful practice, while section 18(3) prevents recovery of fees *"in respect of anything done by a person whose name is not registered on the Roll or to whom subsection (2) relates, acting as a legal practitioner…in any action, suit or matter by any person."*

Litigants should be aware that these statutory changes have significantly impacted cost recovery in cross-border commercial disputes in the BVI and important points of statutory interpretation have been determined by the courts.

Abrogation of the common law

Prior to enactment of the LPA, the fees of non-admitted foreign lawyers were recoverable at common law as

1 Those changes included introduction of a General Legal Council, a Code of Ethics and a Disciplinary Tribunal.
2 See sections 15 and 18 of the LPA.

disbursements. Following enactment of the LPA, the Court of Appeal in *Dimitry Vladimirovich Garkusha v. Ashot Yegiazaryan and Others*[3] ("Garkusha") decided that the common law right to recovery was abrogated by the LPA. On the facts of Garkusha, the fees of the non-admitted overseas lawyers were incurred providing expert evidence of foreign law and assisting with the defence to an application for security for costs.

In considering sections 2 and 18 of the LPA, the Court of Appeal reasoned that, "assisting local lawyers with the advice and conduct in a BVI matter must be regarded, as a matter of BVI law, as practising BVI law, albeit from outside the BVI"[4], contrary to section 18.

As a result, only the fees related to provision of expert evidence were recoverable.

In *John Shrimpton and Another v. Domonic Scriven and Others*[5] ("Shrimpton"), the Court of Appeal decided that Garkusha was not *per incuriam* for failing to appreciate that section 2(2) of the LPA[6] was not in force. The Court reasoned that abrogation of the common law could have been supported by independent consideration of section 18(3). As a result, the Court held that it would not have been compelled to a different conclusion in Garkusha, had it known that section 2(2) was not in force. In relation to recoverability, the work performed by the non-admitted, overseas lawyers in Shrimpton included assisting a BVI firm with advice.

The Court analysed section 18(3) and opined that, "it is not concerned simply to deny a person whose name is not registered on the Roll from recovering any fee in respect of anything done by him acting as a legal practitioner, but to deny anyone from so recovering."

The Court concluded that section 18(3) broadly imposes a prohibition against recoverability, albeit without criminal sanction. Notably, in *Sonera Holding B.V. v Cukurova Holding A.S. and Others*[7] ("Sonera") the High Court (Commercial Division) opined that it was bound by Garkusha and Shrimpton, which meant that the common law concept of agency in *McCullie v Butler [1962] 2 QB 309* had been abolished in the BVI. Consequently, on the facts in Sonera the Court disallowed all fees and disbursements of non-admitted, overseas lawyers who assisted with advice and conduct of BVI proceedings.

Acting as a legal practitioner

Given the broad interpretation of section 18(3) in Garkusha and Shrimpton, did the court's power to examine the nature of work performed survive abrogation of the common law and enactment of section 18(3)? The Court of Appeal in *Gany Holdings (PTC) SA and Another v. Zorin Sachak Khan and Others*[8] ("Gany") decided that section 18(3) was not retrospective[9] and held that section 18(3) required examination of the nature of work performed by a non-admitted costs draftsman[10] as against conduct that amounts to *"acting as a legal practitioner"*. The Court opined that section 2 provided non-exhaustive guidance as to what constituted 'acting as a legal practitioner', but ultimately this was a question of fact in each case.

3 BVIHCMAP2015/0010 judgment in 2016

4 Paragraph 70 of the judgment

5 BVIHCMAP2016/0031 judgment in 2017

6 A provision purporting to create extra-territorial illegality

7 Claim No. BVIHC (COM) 2011/119 judgment in 2018

8 BVIHCMAP2018/0045 and 0048 judgment in 2020

9 This was relevant to whether fees for pre-LPA work was recoverable

10 Notably, there was no requirement for the costs draftsman to be admitted as a legal professional in his home jurisdiction in England and Wales, such that he could not be admitted on the Roll in the BVI

On the facts in Gany, the Court concluded that the costs draftsman's qualification was not determinative and the nature of the work performed[11] prevented recovery. The approach in Gany seems logical, since the court must be able to consider the work performed to determine whether a person was 'acting as a legal practitioner'[12].

In *Yao Juan v. Kwok Kin Kwok and Another*[13] ("Kwok") the Court of Appeal was required to determine whether fees incurred by overseas lawyers who were not admitted in the BVI were recoverable, where they performed legal work as employees of the Hong Kong office of a firm with a substantive BVI presence[14]. The Court endorsed the approach in Gany (albeit *obiter*) and held that direct supervision of such lawyers by BVI admitted lawyers was no point of distinction. The Court appeared to reinforce the breadth of the prohibition under section 18(3) (as interpreted by Garkusha and Shrimpton) by concluding that it was unnecessary to dissect the work performed having found that the non-admitted lawyers were 'acting as legal practitioners'. The Court further opined that, *"any administrative tasks would be incidental to anything done by them if done to assist in the conduct of the litigation"*.

Conclusions

Garkusha and Shrimpton provide clear authority that the fees of legally qualified, non-admitted persons are no longer recoverable in the BVI as disbursements at common law, except fees related to provision of expert evidence of foreign law. Gany confirms that the work performed by non-admitted persons who are not legally qualified may be examined for recoverability under section 18(3) as against conduct that amounts to 'acting as a legal practitioner'. The overseas qualification of such persons is not determinative. Kwok confirms that direct supervision by a BVI-admitted person of non-admitted persons who are legally qualified is not relevant to recoverability, such that detailed examination of the work performed by such persons is unnecessary if they are performing legal work. The administrative tasks performed by such persons will be considered incidental to assisting with the conduct of litigation.

More recently, in *The Matter of Summerfame Ltd. (In Liquidation)*[15], the Commercial Court opined that examination of the work performed (as prescribed by Gany) applies to work done by BVI-based paralegals. The Court further highlighted the risks of criminal sanction to paralegals, trainees and unqualified clerks working in the jurisdiction under the current law. Given the functions such persons perform in fostering the administration of justice, there are strong policy arguments in favour of urgent regulatory intervention to prevent unintended consequences. In the final analysis, the effect of the current law on cost recoverability in cross-border litigation in the BVI requires practitioners and litigants to be aware of the attendant risks. Since the procedure to get suitably qualified persons admitted in the BVI remains relatively straightforward it may be prudent to consider at an early stage whether BVI admission is appropriate as part of the overall litigation strategy.

11 The work performed by the costs draftsman was reviewing files and preparing a cost schedule in accordance with the ECSC Rules and Practice Directions.

12 Notably, section 2 qualifies "practise as a legal practitioner" or performing the "functions of a legal practitioner" by the words "as recognised by any law".

13 BVIHCMAP2018/0042 judgment in 2021

14 The connection between the overseas lawyers and a BVI firm in this case appears to be the main factual distinction between Gany and the facts in Garkusha and Shrimpton

15 Claim No. BVIHC (COM) 2020/0055 judgment in 2021

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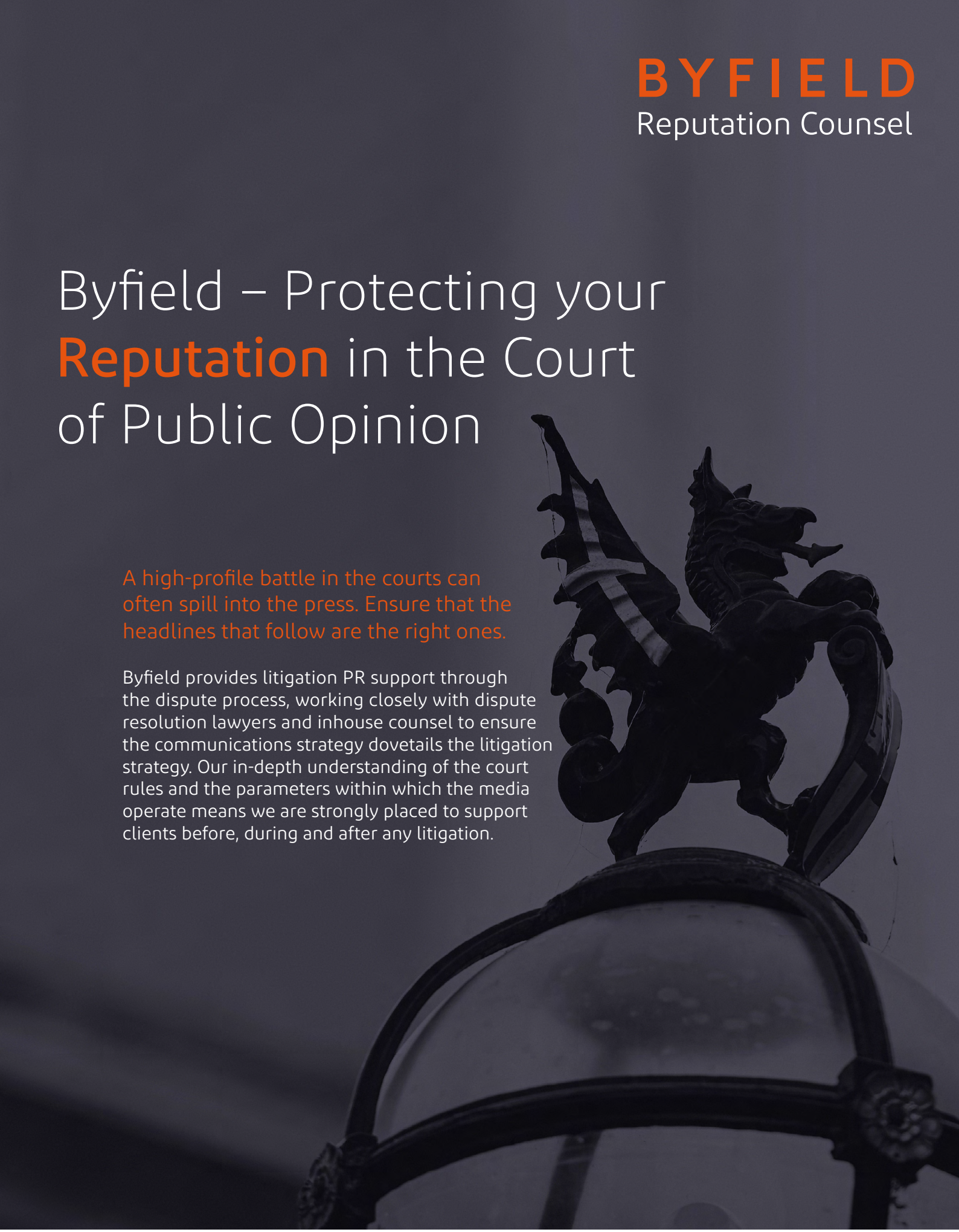

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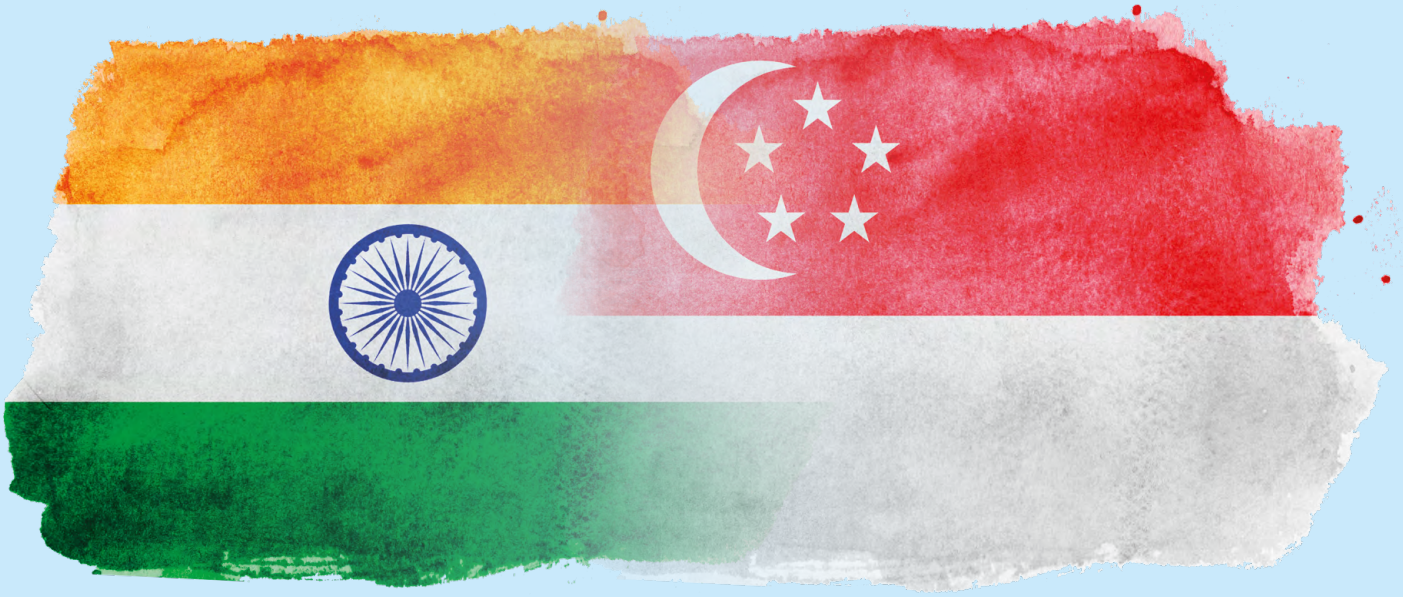


A VALID GROUND TO SET ASIDE SINGAPORE SEATED ARBITRATION AWARDS?

Authored by: Mubin Shah and Kyle Yew - Joseph Lopez

Introduction

One of the common motivations for commercial parties referring cross-border disputes to arbitration is the desire for finality after the award is issued, and the ease of enforcement of the award in various jurisdictions under the New York Convention. However, it is not uncommon to see "disgruntled" parties coming up with novel arguments to take a second bite of the cherry and attempt to re-litigate the matter by resisting enforcement or applying to set aside the award in court. Such challenges to the award cause significant time and costs to be incurred by the "successful" parties in the arbitration, and ultimately undermine the effectiveness and finality of the award.

One example of such a challenge to the award is whether an award should still stand if there are potential issues of illegality surrounding the underlying transaction forming the subject matter of the dispute, the arbitration proceedings, and the award? Recent challenges have been made by Indian parties on this basis, seeking to set aside awards on the ground of illegality under Indian law. The Singapore International Commercial Court (**"SICC"**) considered three such cases recently, which provide useful guidance for commercial parties faced with such a challenge. Notably, the SICC dismissed all three cases and upheld the respective awards.

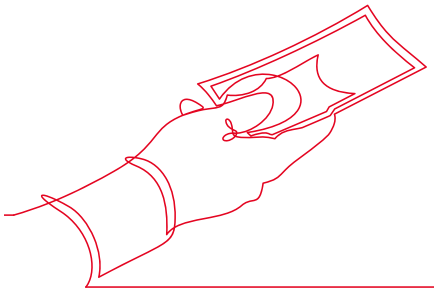
Illegal Contracts

In the first case of *Gokul Patnaik v Nine Rivers Capital Limited* [2020] SGHC(I) 23,[1] the plaintiff claimed that the contracts in dispute breached Indian law and Indian public policy because they were inconsistent with certain Indian regulations. The plaintiff contended that it would be a breach of international comity and against Singapore public policy to affirm the award.

The SICC engaged in a detailed review of the parties' submissions during the arbitration and the tribunal's decision. In particular, the SICC considered how the issue of legality of the contracts had been canvassed before the tribunal, who eventually determined that the contracts did not contravene the said Indian regulations.

The SICC thus held that these were findings of fact by the tribunal, and under Singapore law, such findings may not be "reopened" by the courts unless there were vitiating factors like fraud or breach of natural justice. Without such vitiating factors, the challenge based on purported illegal contracts was hence unsuccessful.

1 https://www.elitigation.sg/gd/s/2020_SGHCI_23



Illegal Transactions

The second case of *Twarit Consultancy Services Pte Ltd and Anor v GPE (India) Ltd and Ors* [2021] SGHC(I) 17,[2] relate to the underlying transactions in dispute which were purportedly illegal under Indian law.

During the arbitration, the plaintiff initially claimed that the arbitration agreements in the contracts were illegal and hence void. The plaintiff later reframed its position as follows: the arbitration concerned issues of illegality under Indian law, which were not arbitrable in Singapore. The tribunal eventually held that the transactions in dispute were demonstrably capable of being performed consistently under the relevant Indian regimes.

At the setting aside application in the SICC, the plaintiff submitted that the underlying transactions were illegal under Indian law, which rendered the dispute non-arbitrable on the basis that its outcome would affect the interests of persons beyond the immediate disputants because the matter concerned insolvency proceedings of a company. The plaintiff argued that the interests of Indian regulators and other stakeholders in the company's insolvency proceedings such as creditors would be affected. The SICC dismissed the plaintiff's application and held that disputes over illegality of transactions are not uncommon in arbitral proceedings, and there is no reason why such disputes cannot be decided by the tribunal.

In other words, even if there is a possibility of an economic effect on the *"persons beyond the immediate disputants"*, that alone will not prevent the tribunal from deciding on the illegality issue.

The SICC's decision reinforces the importance of commercial parties putting forth all arguments and engaging counsel with sufficient expertise or experts to deal with any potential illegality issue(s) during the arbitration proceedings itself, instead of doing so only at the setting aside stage.

Illegal Acts

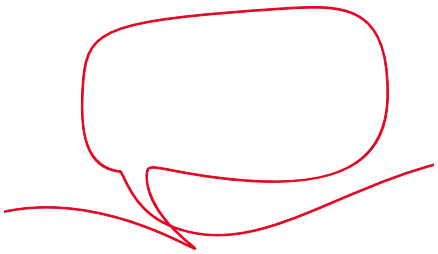
In the final case of *CHY & Anor v CIA* [2022] SGHC(I) 3,[3] the plaintiff contended that an award which compels the parties to perform illegal acts punishable by criminal sanctions in India is contrary to the public policy of Singapore and should be set aside. These "acts" in question relate to the payment of damages and the transfer of shares, which were purportedly illegal under Indian law.

The SICC adopted an approach consistent with *Gokul Patnaik v Nine Rivers Capital Limited*, because the relevant facts of both cases were similar. In particular, the contracts were all governed by Indian law, which meant that the tribunal's findings on Indian law are considered to be findings of fact insofar as the Singapore courts are concerned.

The tribunal had held, both on its findings of fact and findings on Indian law, that the acts required under the terms of the contracts did not violate the relevant Indian regulations. On that basis, the SICC declined to reopen the tribunal's findings and held that the plaintiff had no basis to challenge the award.

The plaintiff also argued that condoning an award which compels the performance of an illegal act in India would run contrary to the public policy of maintaining international comity. The SICC disagreed with that submission, observing that the authorities relied by the plaintiff were derived from cases involving corruption or illicit practice, which was not present in the dispute before the SICC.

In this regard, commercial parties can be assured that the courts are unlikely to turn a blind eye to obvious criminal activity such as bribery or fraud.



Conclusion

The trinity of SICC decisions reinforces Singapore's pro-arbitration policy and sends a clear message to commercial parties that save for extreme examples of illegality like bribery or fraud, attempts to set aside an award based on alleged issues of illegality surrounding the underlying transaction forming the subject matter of the dispute, the arbitration proceedings, and the award are not likely to succeed. These decisions are positive developments which boosts the effectiveness and finality of arbitration awards.

2 https://www.elitigation.sg/gd/s/2021_SGHCI_17
3 https://www.elitigation.sg/gd/s/2022_SGHCI_3

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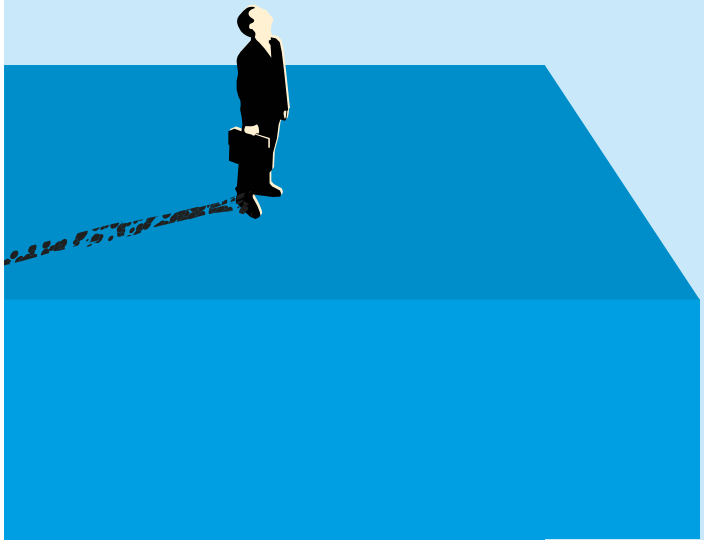

RESPONDING TO DISCLOSURE ORDERS RELATING TO ENGLISH CIVIL PROCEEDINGS WHERE THERE IS A THREAT OF CRIMINAL PROSECUTION IN A FOREIGN STATE

Authored by: Galina Usorova and Paulina Corbetis-Baynham - Stephenson Harwood

The English civil courts have long been a popular venue for international commercial litigation given their expertise in complex international disputes, and their perceived status as a "neutral" forum. In cross-border litigation it is often the case that there are related proceedings in other jurisdictions. In such cases, litigants might find themselves in a difficult position when compliance with an English court order or procedural requirement may result in them breaching their obligations in another jurisdiction, potentially resulting in criminal sanctions.

The recent case of *Tugushev v Orlov* [2021] EWHC 1514 (Comm) is a good illustration of this issue. In *Tugushev*, the Court considered the implications of the defendant complying with an English disclosure order in circumstances where to do so could lead to criminal prosecution in Russia. Similar problems often arise in fraud disputes involving Russian litigants because in Russia, fraud claims are commonly pursued through the criminal courts, and so it is not unusual for litigants to face competing obligations under English civil procedure and domestic criminal law.

This article suggests some practical steps for litigants to consider in this scenario.

Common scenarios emerging from case law

There are two ways in which this issue commonly arises. The first is where compliance with an English disclosure order might result in a litigant committing a criminal offence in a foreign state (as was the case in *Tugushev* and also in *Bank Mellat v Her Majesty's Treasury* [2019] EWCA Civ 449).

On the other side of the coin, litigants might be required to comply with a disclosure order in a foreign jurisdiction in relation to material disclosed in English proceedings, where failure to do so may result in criminal sanction in the foreign jurisdiction (as was the case in *ACL Netherlands BV and others v Lynch and another* [2019] EWHC 249 (Ch)). In the ACL case, the claimants applied for permission to comply with a US subpoena which required them to provide to the FBI copies of documents disclosed by the defendants and witness statements given in English

proceedings (failing which, they might be found to be in contempt of the US court). The English Court's permission was required because these documents were subject to the usual collateral use restrictions under English civil procedure rules.

In each of these cases, the Court conducted a balancing exercising, weighing up the opposing factors militating both in favour of and against compliance with the relevant disclosure order. In the *Tugushev, Bank Mellat* and *ACL cases*, the Courts refused the parties' applications, and upheld the requirement for them to comply with their English law obligations. However, in *Bank of Crete SA v Koskotas* (No 2) [1992] 1 WLR 919 the Court released the applicant from its obligations under English civil procedure so that it could comply with its obligations in the foreign jurisdiction.

As such, there is no general trend or propensity towards one approach over the other and each case will turn on its own facts.

Practical considerations

1 Consider what measures can be taken in advance to mitigate or minimise the effect of the issue

The most important course of action that litigants can take is pre-emptive measures, to avoid a situation where compliance with a disclosure requirement in one jurisdiction might result in them breaching their obligations in another jurisdiction.

The most obvious answer to this problem would be to avoid engaging in parallel proceedings in the first place, but this is not always possible or desirable, particularly in high-value international fraud litigation.

Other possible measures include applying to seal the court file, obtaining a confidentiality order in relation to particularly sensitive evidence, limiting disclosure of certain documents to solicitors only or applying for court hearings to be heard in private.

At the same time, litigants will need to be mindful of the open justice principle and the Court's general reluctance to depart from the basic premise that court hearings should take place in public and that case materials should be a matter of public record. Litigants seeking to implement confidentiality measures will therefore need to persuade the Court that the measures are necessary and proportionate in the circumstances of the case.

2 Assess the threat of criminal prosecution before the foreign court

Demonstrating that there is a threat of criminal prosecution for failure to comply with a foreign court order or requirement is usually a matter for expert evidence. The Court will not just take the litigant's word at face value. Litigants should therefore seek legal advice from a foreign lawyer in the relevant jurisdiction as soon as possible to understand the possible consequences for failure to comply with the foreign legal requirement.

As to the level of risk, the Court will assess the real – in the sense of the actual – risk of prosecution in the foreign state. In *Bank Mellat* and *Tugushev*, the Court emphasized this is not simply a matter of whether the conduct in question discloses a breach of foreign criminal law. Litigants need to prove that the risk of criminal sanction is an actual and substantial risk which is significant enough to tip the balance in favour of compliance with the foreign court order. They further need to show that the relevant foreign law provision is regularly enforced.

3 Assess the potential injustice to the other party/parties involved in the litigation

In exercising its discretion, the Court will also consider the potential injustice which may be caused to other parties involved in the English court proceedings if it were to relax the relevant English procedural requirements to enable compliance with a rule of foreign law. The nature of the potential injustice will vary depending on the facts of each case. In the *Bank Mellat* and *Tugushev* cases, the injustice arose from the fact that allowing the applicants to withhold relevant documents from disclosure might interfere with the Court's ability to fairly dispose of the proceedings. In the ACL case, the potential injustice arose from the fact that permitting disclosure of documents provided in English proceedings to a foreign court or authority would interfere with the respondent's right to confidentiality, which is protected by collateral use restrictions.

In deciding whether to oppose the application the respondent therefore should carefully consider the prejudice it may suffer. For example, the prejudice might involve implicating the respondent in criminal proceedings, placing the parties on an uneven playing field or risking the wider disclosure of confidential information. Proof of prejudice is an important part of the balancing exercise and as such, it is a factor that merits careful attention by the parties.

4 Consider the principle of international comity

A further factor which is relevant to the exercise of the Court's discretion is the application of the principle of international comity. Comity is a well-established legal doctrine under which courts will recognise and give effect to legal decisions made by courts in other jurisdictions. Therefore, the application of the principle of comity generally favours relaxing a domestic rule or decision to enable compliance with a rule or decision of a foreign court. This was the outcome in the *Bank of Crete* case, where the English Court permitted disclosure of documents protected by collateral use restrictions to enable compliance with a foreign procedural requirement.

Conversely, in Tugushev, the Court stated that *"comity cuts both ways"* and that it expected *"foreign states to take into account the fact that if disclosure is given in contravention of their domestic law it was in compliance with an English court order."* This approach was also followed in *Bank Mellat.*

Comity plays a particularly important role in the context of fraud and dishonesty claims, as it is generally acknowledged that there is a strong public interest in facilitating the prosecution of international fraud (*Marlwood Commercial Inc v Kozeny and others* [2005] 1 WLR 104).

5 Consider whether the English court can grant an order to take account of the requirements under foreign law

Case law shows that the Courts are open to finding a creative practical solution which might balance the interests of both parties. Such practical solutions might include, for example, redacting confidential information from documentation disclosed to foreign courts or entities or imposing a confidentiality ring to limit the number of entities that are privy to confidential documentation.

6 Consider whether there is a possibility of appealing the foreign order

Linked to the principle of comity, litigants should investigate whether there is a route for appealing the foreign order or decision on the basis that compliance with that order or decision would constitute a breach of English law. If routes of appeal are available to litigants, the Court will expect them to have taken reasonable steps to exhaust those avenues. If the possibility of an appeal is not available, or has already been exhausted, the litigant will need to adduce appropriate evidence to satisfy the Court that it has done all that it can to resolve the impasse.

7 Assess the applicant's involvement in initiating the foreign proceedings

A further matter which the Court might consider is the degree to which the applicant was involved in instigating the foreign proceedings in the first place. In Tugushev, the Court said that one of the factors which it took into account in reaching its decision was that "*the foreign proceedings in relation to which the First Defendant says he is at risk, are ones which were initiated by him.*"

This would be a particularly relevant consideration for litigants in Russia where criminal proceedings are often initiated by the alleged victim-claimant. As a result, Russian litigants should be conscious that the Court may rule that the difficulty they are in arose out of their own decision to pursue parallel civil and criminal proceedings.

Concluding remark

Litigants who find themselves faced with competing obligations in different jurisdictions are certainly caught between a rock and a hard place. As recent case law shows, there is no clear-cut solution. Litigants should therefore engage legal advice on the issue in both England and in the foreign jurisdiction as early as possible to find a solution that may protect them from possible sanctions in both jurisdictions.

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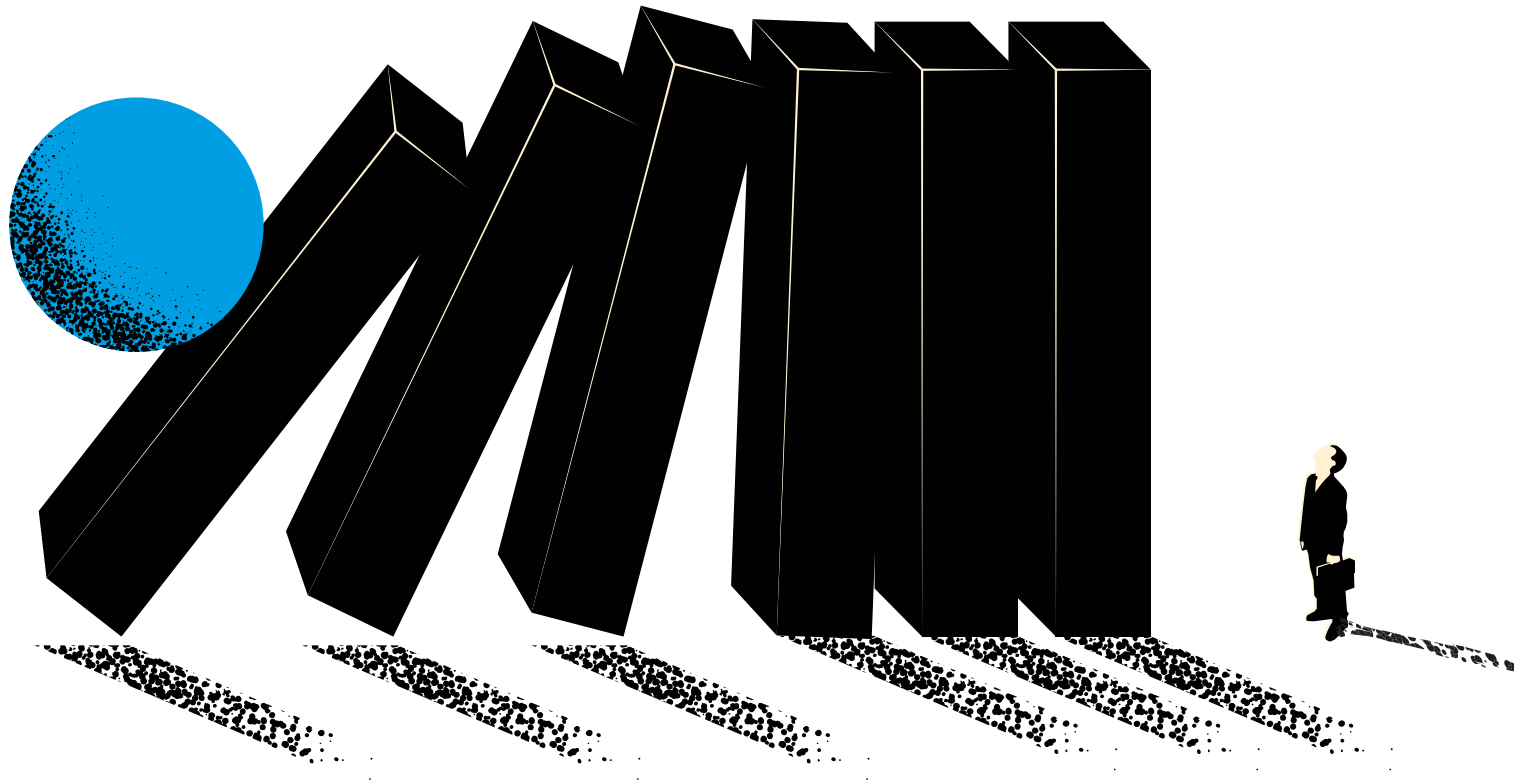

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We are delighted to be part of the Disputes community and, coupled with our involvement in the FIRE community, look forward to helping this initiative grow from strength to strength.

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

- according to the Legal 500 United Kingdom 2022 edition.

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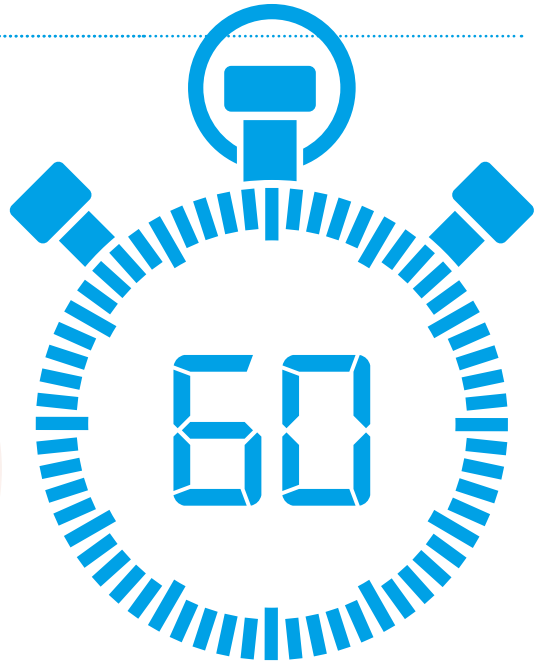

Q What would you be doing if you weren't in this profession?

A A journalist following the English cricket team (men and women) around the world. Although the last few months following the men's team would not have been much fun, particularly cooped up in a Covid bubble and not being able sooth the painful loses with the joys of the Aussie sun and outdoor lifestyle.

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

A The strangest thing was in 2009, having previously worked in mid-tier multi-disciplinary practices, walking into the office to start work with PCB Litigation – at that time a contrasting practice of three partners, two other fee-earners and three support staff! The most exciting thing is being involved in the rise and development of that practice into what it is today, PCB Byrne - a leading practice dealing with asset recovery and complex UK and international disputes in the civil, criminal and regulatory sectors with a combined total of partners and fee-earners in excess of 40.

Q What is the easiest/hardest aspect of your job?

A Dealing with people. Given human nature and individual characteristics whether it is clients, colleagues or fellow professionals this can be both pleasurable and a challenge.

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

A Beware the small dog. A few years ago, I had to serve personally a petition on a Russian businessman who owned a Doberman and a Chihuahua. On serving the petition, it was the Chihuahua that ran out of the front door and bit me on the ankle, the Doberman remained barking from inside the house.

More seriously - keep it simple. This advice was given to me by my principal on my first day as an article clerk. Civil fraud and asset recovery work is complex but it helps to start from a sound base of simple building blocks.

Q What do you think will be the most significant trend in your practice over the next 12 months?

A An upturn in people working from the office as they begin to recondition to the benefits of in person contact. Insolvency, electronic fraud and developments in the law on cryptocurrency are likely to be the key areas for generating work.

Q If you could learn to do anything, what would it be?

A To fly fish and catch a wild salmon.

Q What is the one thing you could not live without?

A It pains me to say it – but it is probably my i-phone. It is amazing how these devices now control our lives. Although I think having a sense of humour is vital to maintaining a positive and proportionate approach in the face of adversity when dealing with cases.

Q If you could meet anyone, living or dead, who would you meet?

A Richie Benaud – I am not old enough to have seen him play but he was the consummate professional as a cricket commentator. His knowledge and understanding of the game was second to none. I would love to sit down with him to discuss and get his views on the current issues facing English cricket both on and off the field, and the game generally.

Q What songs are included on the soundtrack to your life?

A Anything by the Police, Dire Straits, U2, David Bowie, Queen, George Michael or Coldplay. My family would insist that I include Summer Holiday by Cliff Richard and Daddy Cool by Boney M.

Q What does the perfect weekend look like?

A No work emails.

On Saturday, a walk with the dog, either a round of golf or a day at Lord's or Twickenham, followed by dinner with friends in the evening. On Sunday, read the newspapers, a walk to the pub with the dog and a roast at home with the family.

Q Looking forward to 2022, what are you most looking forward to?

A Face-to-face contact, interaction with colleagues and clients, and a return to pre-pandemic normality.

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