ThoughtLeaders4 Disputes • March 2023

Disputes MAGAZINE

ISSUE 8

PIECING TOGETHER THE PUZZLE OF DISPUTE RESOLUTION, ONE ISSUE AT A TIME

INTRODUCTION

"The greatest thing in the world is not so where we stand as in what direction we are moving."

- Johann Wolfgang von Goethe

We are nearing the end of Q1 and it has been a busy start to the year for the Disputes Community, and we are delighted to present the first edition of the year, Issue 8 of the Disputes Magazine. This year's editions explore different chapters throughout the year. For this issue, our authors discuss a variety of topics facing practitioners in the Arbitration, Corporate Disputes, and ESG space including recent cases, ChatGPT, the world of crypto, greenwashing, and more.

Thank you to all our community partners, members and contributors for their support as we head into an even bigger and more exciting year for the community.

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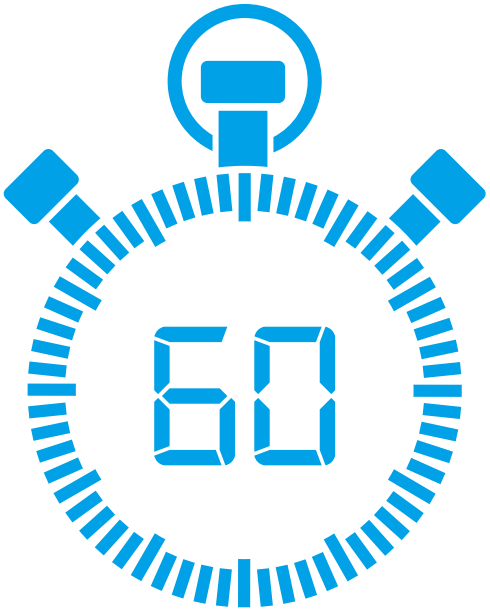
60-SECONDS WITH:

ALEX CLEMENTS DIRECTOR BOND SOLON



Q What do you like most about your job?

A The variety – we could be working on a divorce one day, and a high value arbitration the next.

Q What motivated you to pursue this career?

A It is quite a niche practice! I've always had an interest in the world of law but wanted to stay on the commercial side. What I do now blends the two.

Q What is the most rewarding thing about your work?

A Whether it is a social worker or the CEO of a company, you get a real sense you are helping people perform at their best when they take the stand.

Q Do you have any career aspirations, and have you achieved any of them so far?

A Running Bond Solon's Witness Familiarisation Team is a big highlight and privilege.

Q What do you see as being the biggest trends of 2023 in your practice area?

A We have already seen enquires on ESG related disputes, and I would imagine Covid-related litigation will begin to filter through. Also, the age of hybrid final hearings, certainly in the High Court, seems to be over as we are firmly back face to face.

Q What has been your most memorable experience during your career so far?

A Memorable for all the wrong reasons - as a junior member of staff I regularly had to fill in as the cross-examination victim at presentations at firms across the City, to show what can go wrong. I still have nightmares!

Q How do you deal with stress in your work life?

A I run – I find it refreshes me mentally more than anything.

Q What does your perfect holiday look like?

A Two weeks in Greece – for the sun, the food, the wine, the nostalgia and the people.

Q What was the last book you read?

A God is Dead: The Rise and Fall of Frank Vandenbrouck by Andy McGrath – a very interesting and ultimately tragic portrait of the Belgian cyclist.

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

A Would have to be two – Shane Warne & Anthony Bourdain, sadly both no longer with us. Not sure I would get a word in.

Q What cause are you passionate about?

A Education, both of self and equality of access to.

Q Do you have a New Year's Resolution, and if so, how do you plan to keep it?

A Nothing formal. Though I have been trying to carve out 30 mins each evening as protected reading time.

Q What are you looking forward to in 2023?

A Hopefully a calmer year than 2022. From a professional perspective, I look forward to engaging with the TL4 Disputes community!

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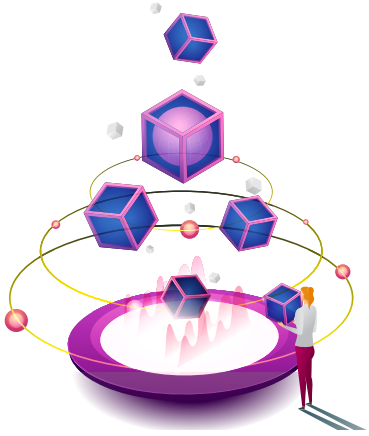
CONSUMERS GET TWO BITES OF THE CHERRY:

FINAL ARBITRAL AWARD DOES NOT AFFECT THE COURT'S JURISDICTION

Authored by: Eleni Papageorgiadou (Associate), Natalie Todd (Partner) and Jon Felce (Partner) - Cooke, Young & Keidan

Introduction

In Chechetkin v Payward Ltd and others [2022] EWHC 3057 (Ch), the Chancery Division dismissed the defendant's application for a declaration under Part 11 of the Civil Procedure Rules that the English Court had no jurisdiction over a claim before it on the basis that a final arbitration award had already been rendered in relation to the same subject matter.



Facts

The claimant, Mr Chechetkin, undertook various trading activities on a platform provided by the defendants for the trading of digital currencies and brought a claim against Payward before the English Courts based on the Financial Services and Markets Act 2000 (FSMA) for the repayment of sums which he says he lost in breach of various requirements of that Act.

Clause 23 of the Payward terms and conditions that Mr Chechetkin had

accepted in order to trade on the platform, included an arbitration clause by which the claimant agreed to submit the disputes to arbitration, that the arbitration clause was binding, and that the claimant was therefore prevented by that clause from bringing proceedings in this or any other court. On this basis, the defendants filed an application challenging the court's jurisdiction to decide Mr Chechetkin's claim, under Part 11 of the CPR.

In the course of the arbitration proceedings, the arbitrator made a partial award in June 2022 to confirm her jurisdiction. In October 2022, she made a final award that Mr Chechetkin's claims fail and that Payward are under no liability to him with paragraph 2 of the final award deciding that Mr Chechetkin was "enjoined from filing or prosecuting a claim against Payward in court whether in the UK or other jurisdiction".

Accordingly, Payward commenced proceedings before the English Courts to enforce the award under section 101 of the Arbitration Act 1996 for New York Convention awards. Payward then submitted that in the circumstances, the hearing of the jurisdiction challenge application should be adjourned pending the determination of the enforcement proceedings on the basis that if their application to enforce the award is successful, they will be able to rely on the award and the proceedings before the English court, including the jurisdiction challenge, will effectively become academic.

Mr Chechetkin resisted the adjournment application on the grounds that the parties had already incurred the costs in preparing for the hearing, and that in any event, to resist the enforcement application would not be a breach of paragraph 2 of the final award.

The Court's Decision

Miles J rejected the adjournment application, and heard the jurisdiction challenge application there and then.

In his decision, Miles held that Mr Chechetkin was a consumer, as defined in the Civil Jurisdiction and Judgments Act 1982 (section 15), and on this basis, neither the arbitration clause, nor the Final Award, deprived the English court of jurisdiction to decide Mr Chechetkin's FSMA claims.

The basis for his decision was that regardless of his level of sophistication as a trader of cryptocurrencies, Mr Chechetkin was a lawyer, and the purpose of the contract with Payward in relation to dealings with digital assets, was outside his trade or profession.

As for the effect of the New York Convention award, Miles J clarified that pursuant to section 101 of the Arbitration Act 1996, where the award is recognised it does not deprive the court of jurisdiction in relation to the dispute. Instead, the true effect of a recognised award is that it may then be relied upon by the parties by way of defence, setoff or otherwise in any legal proceedings in England and Wales or Northern Ireland.

In his decision, Miles J explained that the Arbitration Act 1996 sets out a code whereby section 9 enables the court to stay proceedings where the parties have entered into a binding arbitration agreement. The effect of this is that where a party applies for a stay under this section, the court accedes to the application without this removing the court's jurisdiction over any existing proceedings.

Comment

This case gave rise to the analysis and clarification of complex issues in arbitration proceedings where a consumer is involved. With the number of cryptocurrency and other digital asset related disputes constantly rising, this decision is certainly a desirable starting point for further discussion as to how the existence of an arbitration clause in consumer relationships interacts with the jurisdiction of the court where the consumer is domiciled.

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CHATGPT & INTERNATIONAL ARBITRATION: WHAT NEXT FOR PRACTITIONERS?

Authored by: Jide Adesokan (Partner) and Henry Simpson (Associate) - Stephenson Harwood

The rapid rise of ChatGPT has taken the legal profession by storm and sparked conversations about how practitioners could be impacted by its increased use. The language processing tool has impressed users with its ability to generate clear — and at first glance seemingly sophisticated — responses to complex questions in a matter of seconds. But while it's tempting to conclude the days of the arbitration practitioner are numbered, given that success in the profession is often predicated on the ability to write persuasively, such an assumption would be too simplistic. While ChatGPT and generative artificial intelligence tools like it are undoubtedly helpful, they do not come without their own set of problems, which we will explore further in this article. Simply put, any material disruption to the arbitration profession is unlikely — at least for the time being.

What is ChatGPT?

At its core, ChatGPT is a free-to-use chatbot that is capable of answering questions and generating text such as articles, or long-form essays. It was created by OpenAI, an American research firm, and officially launched for public use last November. The program is trained on data from the internet up to 2021. It contains more than 300 billion words and its answers are fine-tuned with human supervision — allowing it to create responses which appear human-like, when asked questions. Following ChatGPT's popularity, it is expected that similar, if not more, capable "chatbots" will proliferate in the coming years. Indeed, at the timing of writing, Google has since announced the launch of its own conversation programme called Bard. Bard is still only available to limited beta testers, but is expected to be rolled out more widely in the coming months — underscoring the appetite for such language-processing tools.

Dataset limitations

Still, just because something is popular doesn't mean it's problem-free. Arguably, one of the biggest limitations of ChatGPT at present, is the dataset on which it has been trained on. ChatGPT is based on data up to 2021 and is not connected to the internet. As a result, should you ask the programme about recent developments, there's a strong chance it wouldn't provide an accurate response. This presents particular problems for arbitration as, like other areas of law, a lot can turn on whether information is up to date. ChatGPT's limited dataset is also problematic for conducting legal research given that

its findings will not reflect the latest jurisprudence and/or commentary on international arbitration.

This obstacle could fall away if specialised legal chatbots emerge, which have access to the latest legal developments, or if OpenAI updates ChatGPT's dataset. If that occurs, then legal research, long the adversary of junior practitioners, could become more efficient and lead to potential cost savings for clients. However, for the moment, ChatGPT offers, at most, a helpful starting point for arbitration related queries.

Err on side of caution

Even then, we would suggest practitioners remain cautious before relying on ChatGPT.

The answers provided by chatbots reflect the statistical patterns in the data that it has been trained on. If part of the data set is wrong or biased, or if a certain viewpoint is overrepresented then this will cause the programme to generate inaccurate responses.

This flaw means international arbitration practitioners need to be particularly careful when using ChatGPT. Many concepts in arbitration are subject to debate and can differ from jurisdiction to jurisdiction. Further, the nature of an arbitration practitioner's task is often to distinguish one case from another – such a task may not be assisted by data that is based on overrepresented viewpoints. Accordingly, practitioners will need to carefully verify responses from ChatGPT for bias and to check if they are correct. The requirement for ChatGPT's responses to be scrutinised could limit costs savings for clients — assuming they are comfortable with their lawyers using the platform (noting possible concerns about confidentiality).

Limited capabilities

The link between the capabilities of a chatbot and its dataset gives rise to another limitation: it won't be familiar with specific cases.

For instance, ChatGPT won't know the identity of the parties, the history of their dispute or the key pieces of evidence.

Consequently, if asked to perform a routine drafting task in an arbitration such as the inter-partes correspondence, pleadings, or an award, it would struggle to generate any useful, accurate content. It is possible for a user to tell ChatGPT to consider certain pieces of information when providing responses. However, the programme is not yet capable of being provided with the significant amounts of information generated by an ongoing arbitration. Given this constraint, ChatGPT's ability to assist with complex drafting tasks in an arbitration will be limited.

Confidentiality

Confidentiality concerns may also limit the use of chatbot programmes. ChatGPT stores the data it receives from users and it is unclear from ChatGPT's terms of use how they store or guarantee the security of this data. Moreover, its terms limit OpenAI's liability for loss of data to just US$100, giving parties very limited recourse should any sensitive data be lost. This will likely make parties cautious about their lawyers using the programme in an arbitration, noting that confidentiality is one of the key reasons parties choose arbitration over the courts.

Indeed, the risks posed to the confidentiality of a dispute by using ChatGPT could lead to a party applying for, or parties agreeing that, its use be prohibited in an ongoing arbitration.

This development would raise novel questions for practitioners and arbitral tribunals. For example, how such a prohibition should be enforced by an arbitral tribunal (or institution) and the consequences if a party or arbitral tribunal is found to have used a chatbot.

Limited immediate-term impact

ChatGPT is the first chatbot to gain widespread prominence. It will certainly not be the last. Future programmes are likely to address some of the limitations we have identified such as ChatGPT's pre-2021 data set and the risk of possible bias or inaccurate responses. As chatbot capabilities increase, it is likely the debate around arbitration practitioners using such programmes and the risks to the confidentiality of arbitration proceedings will become more pronounced. The potential for improved chatbots to assist practitioners with more routine tasks and for clients to significantly reduce the cost of arbitrating is clear. But will those benefits outweigh the importance of confidentiality for arbitration users? Further still, will developers be able to create a chatbot with sufficient privacy safeguards to enable regular use by practitioners? We shall watch this space with interest.

For the moment though, ChatGPT's impact on international arbitration is likely to be limited. The programme represents an important technological development but is not without fault. Given the flaws identified, practitioners should, in our view, be cautious when using the programme, making sure to not use client or sensitive data in questions to ChatGPT and checking that responses are correct.

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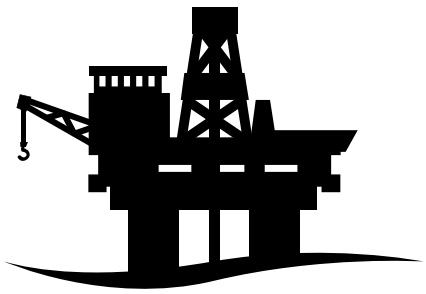
KAZAKHSTAN AND TRISTANGATE

Authored by: John Lough (Partner) - Highgate

The Government of Kazakhstan continues to challenge an arbitration award now worth around US$545 issued by an arbitration panel of the International Chamber of Commerce in Stockholm in 2013 under the Energy Charter Treaty. The Svea Court of Appeal and the Supreme Court of Sweden have both upheld the award.

The dispute has become known 'Tristangate' because the claimants owned Tristan Oil, a company established to fund the development of oil and gas assets in Kazakhstan. The owners were two Moldovan businessmen (the Statis) who invested in oil production in Kazakhstan and began building a new facility for processing liquefied petroleum gas.

In July 2010, the Statis' assets were forcibly nationalised by the Kazakh authorities following a coordinated harassment campaign. This campaign began in October 2008 and included multiple false accusations of criminal conspiracy, pressing of legal charges against local management, continuous unannounced inspections and audits, withdrawal of necessary licenses, and a massive unjustified tax bill. Kazakhstan's national oil and gas company KazMunayGas (KMG) took over the assets.



The Statis sought recovery of their losses via Swedish arbitration using the Energy Charter Treaty dispute resolution mechanism. In December 2013, a Swedish arbitration tribunal ruled in favour of Tristan's owners.

The tribunal acknowledged that the allegations levelled by the Kazakh government against the Statis had no foundation and were designed to construct a pretext for the illegal take-over of the company. The tribunal ordered Kazakhstan to pay approximately US$500 million in damages to the investors.

According to a sharing arrangement between the award claimants and international bondholders signed in 2012, 70% of the award proceeds are owed to bondholders.

Kazakhstan has attempted to avoid its obligation to pay the award by arguing that the investors allegedly obtained the award by fraud by making misrepresentations to the arbitral tribunal.

However, it was only after the first Svea Court's ruling upholding the award in 2016 that the Ministry of Justice brought the fraud arguments to the Swedish courts which have supervisory jurisdiction over the award. After extensive submissions from the parties on the issues, in October 2017 and May 2020, the Swedish Supreme Court rejected Kazakhstan's fraud arguments and upheld the award in full.

The arbitration award has been confirmed by the US District Court for the District of Columbia and affirmed by the DC Court of Appeals while the US Supreme Court has denied certiorari. The Arbitration has also been confirmed by the Supreme Court in Italy.

The award was based on the arbitration panel's unanimous finding that in this case, Kazakhstan violated the ECT's protections of "fair and equitable treatment" of foreign investors by expropriating assets and engaging in harassment of investors including incarcerating local management, pursuing pre-textual tax investigations and similar tactics.

Rather than complying with the award and the judgements of the courts in Sweden and the US, Kazakhstan has litigated not only against the Statis but more recently against international bondholders who originally invested in the Statis' oil and gas business in Kazakhstan.

In Belgium, Kazakhstan has made much of a decision issued by a Court of Appeal in Belgium in 2021 reversing a prior confirmation of the award and finding that the Statis committed fraud in obtaining the award. This ruling by a one-judge court is being appealed and has no impact on the validity of the award in Sweden, the seat of the arbitration.

In New York, Kazakhstan's efforts to frustrate the enforcement of the award extended to a civil claim, against one of the bondholders, the investment firm Argentem Creek Partners (ACP), alleging that financing of attempts to enforce the award constituted fraud. However, in August 2022, the Supreme Court, State of New York granted a motion to dismiss the claim as an 'impermissible collateral attack' on a confirmed arbitration award.

In January 2023, the Svea Court of Appeal court ruled that approximately $75m of cash held in a Swedish bank on behalf of the National Bank of Kazakhstan belongs to the Republic of Kazakhstan and may be collected by the owners of Tristan Oil.

Kazakhstan claims that it complies with the decisions of international arbitral tribunals and that the Tristan Oil case is exceptional. However, the country has previously contested arbitral awards against it, for example in the cases of AIG (2003) and World Wide Minerals (2019). In both cases, Kazakhstan challenged enforcement in the English courts.

Since the January 2022 disturbances in Kazakhstan that the government describes as an attempted coup, several of the individuals responsible for directing and overseeing the litigation related to Tristan Oil have been removed from their positions, and, in some cases, incarcerated. For example, the Prime Minister at the time of the expropriation is currently in detention on treason charges.

The ambition of Kazakhstan's President, Kassym-Jomart Tokayev, re-elected for a seven-year term in November 2022, is to attract US$ 150 billion of foreign direct investment by 2030. His promotion of 'Just and Fair Kazakhstan' is intended to mark a break with the corrupt practices that took hold during the decades of rule by his predecessor.

Foreign investors will be watching Tristangate closely to see if words are matched by deeds.

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THE PROTECTION OF INVESTMENTS IN SPACE

ONE SMALL STEP OR A GIANT LEAP FOR INVESTORS?

Authored by: Tracey Wright (Partner) and Emily Wyse Jackson (Director) - Fieldfisher
Other members of the team include Yuliya Kupchenko (Director) and Sonia Morton (Senior Associate).

The fast paced development of the space industry and, in particular, the increasing participation of private commercial actors, has brought into reality ideas that not so long ago would have sounded like science fiction – the recreational space flights undertaken by Jeff Bezos' Blue Origin being a recent example. It has also, however, opened up a whole new world of potential legal disputes: not only between States, but between private investors or between investors and States. This article focuses on the latter category: investor State disputes.

Investments in space exploration and technology are, as a general rule, capital-intensive and inherently risky. If States want to attract private investment in this "new frontier", offering effective investment protection is vital. Existing investment protection treaties providing for investor State arbitration ("ISDS") offer a ready-made and well-tested means of facilitating such protection.

Star wars: the profile of space-related investment disputes

The key characteristics to be expected of space-related investment disputes include: (i) their highly politicised nature; (ii) the pioneering technology at the heart of them; and (iii) their being set against a developing legal framework.

ISDS is well suited to resolve such disputes.

The availability of ISDS and the importance a State places on its international obligations are therefore likely to be important factors for investors when deciding where to establish their space-related investments.

Politicised area:

Due to its obvious strategic and defensive significance for all States, coupled with the public attention it attracts, space exploration is a highly politicised area, which can impact the treatment of investments in that field. This is at the centre of the very purpose of ISDS and what it was designed to address: rather than requiring investors to bring their claims against a host State in that State's domestic courts or to rely on diplomatic protection, it is intended to provide investors with direct access to a neutral forum. The robust enforcement regimes under the ICSID and New York Conventions offer some comfort to investors in their 158 and 172 (respectively, as at February 2023[1]) Contracting States as to the likelihood of recovery on any award in their favour.

1 ICSID Convention: https://icsid.worldbank.org/about/member-states/database-of-member-states; New York Convention: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

Technical issues:

Almost by definition, many space-related investments will involve cutting edge, innovative technology. A key feature of ISDS is the opportunity for parties to participate in the selection of arbitrators.

Having adjudicators experienced in handling complex technical disputes (or with particular sectoral expertise) may be critical to the effective resolution of an issue.

Save perhaps in certain specialist courts, sectoral or technical experience cannot be guaranteed when bringing a claim in court, but may be a factor prioritised by an investor when nominating an arbitrator. In recognition of this and to assist parties in identifying suitable candidates, the Permanent Court of Arbitration ("PCA") has established a panel of arbitrators[2] with expertise in space-related disputes.

Technical disputes should also be governed by appropriate procedural rules. For example, technical witness evidence typically is key, so effective rules need to be in place to ensure it is delivered fairly and efficiently. Again, this is familiar territory for ISDS tribunals and the procedural rules of all major arbitral institutions (as well as the UNCITRAL Arbitration rules) contain provisions regulating expert evidence.[3] In 2011, the PCA published the Optional Rules for Arbitration of Disputes Relating to Outer Space Activities (the "Space Rules"). The Space Rules are based on the 2010 edition of the UNCITRAL Arbitration Rules, but with certain amendments intended to tailor them to the specific requirements of space actors. For example, they provide for the tribunal to request the parties (jointly or separately) to provide a non technical document explaining the background to any scientific, technical or other specialised information that the tribunal requires in order fully to understand the matters in dispute.[4] While there have been no reported ISDS cases under the Space Rules yet, principally because the existing network of treaties under which ISDS claims are brought do not provide for their application,[5] as the significance of the space industry continues to increase, States may begin to modify their treaty practice to accommodate better disputes in this sector. That said, given the flexibility built in to the leading arbitral rules and the continuing efforts made by institutions to ensure those rules keep pace with the evolving disputes landscape, it is debatable whether this is currently necessary.

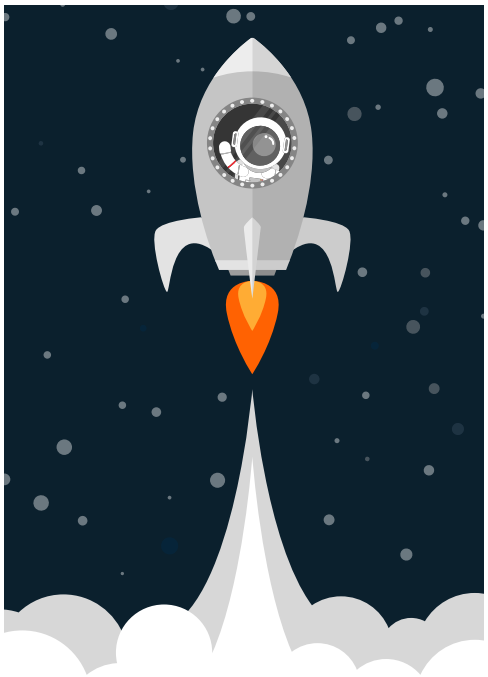
Developing legal landscape:

While steps have been taken towards an appropriate legal framework for outer space investments, there remain significant gaps in the international space law landscape (for example, in relation to the law applicable to property rights over space resources). As this body of law develops, complex issues in relation to the identification of the appropriate governing law(s) and the interpretation of novel legal provisions are expected to arise. Both of these obstacles are routinely tackled by ISDS tribunals handling disputes relating to other industry sectors. The rapidly changing regulatory environment applicable to energy investments is one example; this has been the backdrop to many ISDS cases. The ability to appoint an arbitrator with the competence and experience to navigate these potentially challenging legal issues is a key attraction of ISDS.

In Devas v India,[6] one of the few reported space-related ISDS claims to date, the claimants had been leased a portion of India's S band (part of the electro-magnetic spectrum) capacity to launch two satellites to provide multimedia services across India. The State owned lessor terminated the lease following a policy change that required all S band capacity to be reserved for State defensive and strategic purposes.[7] This dispute gave rise to multiple arbitration and court proceedings and a range of legal issues, which are beyond the scope of this article. Notably, however, despite the novel subject matter, the tribunal was able to analyse the claim in relatively conventional terms: for example, the claimants' qualifying investments were their shares in the Indian company that was party to the lease and their indirect partial ownership of that company's assets, including the lease itself.[8]

As shown by this early example, even without the widespread use of specific procedural rules or the existence of specific arbitral institutions focused on the resolution of space-related investment disputes, the existing ISDS framework is well-equipped and first in line to deal with these disputes.

Investors in the space industry – much like any other investor looking to invest funds overseas – would be well-advised to consider structuring their investments to benefit from investment treaty protection and the availability of ISDS in the event of a breach.



2 https://pca-cpa.org/en/about/panels/panels-of-arbitrators-and-experts-for-space-related-disputes/

3 See e.g. ICC Arbitration Rules 2021, Arts 25.2, 25.3, Appendix IV (b) and (e); ICSID Arbitration Rules 2022, Rules 38 and 39; UNCITRAL Arbitration Rules 2021, Arts 17.3, 27.2, 28.2, 29.

4 PCA Optional Rules for Arbitration of Disputes Relating to Outer Space Activities 2011, Article 27(4).

5 Most investment treaties refer ISDS disputes to institutions such as ICSID or the ICC, or to ad hoc arbitration under the UNCITRAL Rules.

6 CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited v India, PCA Case No. 2013-09.

7 CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited v India, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, paras 117 - 152.

8 CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited v India, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, paras 196 – 210. See also Deutsche Telekom AG v. The Republic of India, PCA Case No. 2014-10, Interim Award, 13 December 2017.

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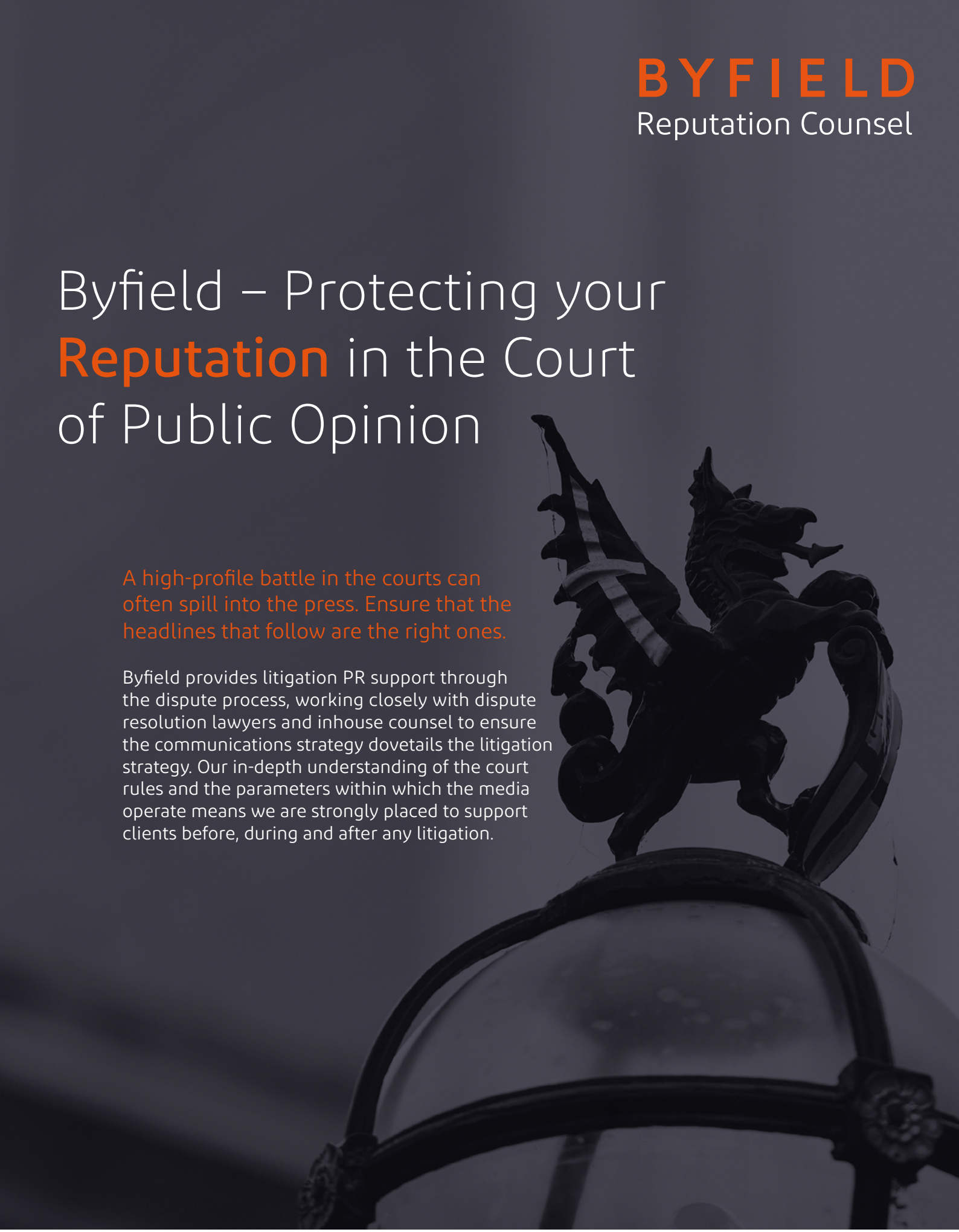

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THE DIVERSITY PROBLEM IN ARBITRATION

Authored by: John Evans (Partner), Nadia Osborne (Senior Associate) and Niah Sohal (Trainee Solicitor) - Fladgate

The English Arbitration Act 1996 saw its 25th anniversary in January 2022.

Arbitration as a dispute resolution method has grown rapidly in recent years (26% between 2016 and 2020) and is netting over £2.5 billion per annum for the UK economy.

It is unsurprising against this backdrop that the Government asked the Law Commission to review whether the 1996 Act remains fit for purpose. The Consultation Paper outlining the eight proposed reforms was released on 22 September 2022. One key area of reform is discrimination in the arbitral profession.

Interaction with the Equality Act 2010?

Under the current law, employment discrimination rules do not extend to arbitrators (as confirmed in Hashwani v Jivraj [2011]). This decision implies that the selection of arbitrators can be restricted by traits such as race, which are protected characteristics under the Equality Act 2010. The Law Commission described the selection of an arbitrator as "analogous" to the selection of a barrister, which is regulated by the Equality Act 2010.

However, this is yet to be confirmed by the courts. Additionally, the Law Commission points out that arbitration agreements with discriminatory clauses could be subject to s142 Equality Act 2010, which renders contractual terms unenforceable if they prescribe treatment of a person in a manner prohibited under the Equality Act 2010.

Diversity deficiencies amongst arbitrators

The lack of ethnic diversity among arbitrators is manifest.

The ICC's 2018 statistics show that 40.8% of all appointed arbitrators on ICC cases originated from Europe.

The African Promise was launched in 2019 to boost representation of African arbitrators, particularly in disputes with an African connection. However, a consultee to the International Arbitration Survey 2021 recounted an arbitration conference on the subject of arbitration in Africa where none of the invited speakers were African. Organisations such as REAL (Racial Equality for Arbitration Lawyers) are working to promote diversity and prevent discrimination too, but again in 2021 only 31% of those surveyed felt that positive progress had been made for ethnic diversity in arbitrations (contrasted with the 61% who felt that positive progress had been made regarding gender diversity in arbitrations).

The lack of progress on diversity in the arbitral field means that unique perspectives and understandings are being lost.

Parties may also feel unrepresented when seeking resolution through arbitration. This could have an adverse effect on arbitral outcomes and result in dissatisfaction with this forum of dispute resolution.

Proposed reforms

The Law Commission affirmed the decision that arbitrators are not employees for the purposes of the Equality Act 2010 as correct in law, but that equality legislation not extending to arbitrators is an issue of policy. Under the proposed reforms, (i) parties will not be able to challenge the appointment of an arbitrator on the basis of a protected characteristic (which includes race); and (ii) any agreement between the parties regarding the arbitrator's protected characteristics would be unenforceable unless an arbitration would require an arbitrator to have a protected characteristic as a proportionate means of achieving a legitimate aim (for example, the need for an arbitrator to be a particular race given the subject matter of the dispute underpinning the arbitration).

Additionally, discriminatory requirements would be ignored when courts consider the agreed qualifications required for appointment of an arbitrator, when removing an arbitrator for not possessing the required qualifications, or when an arbitral tribunal decides whether it is properly constituted.

Light at the end of the tunnel…

The proposed reforms seem to cover both bases – if only one party is being discriminatory, that party does not have grounds to object, and if both parties are being discriminatory the agreement is not enforceable (unless the 'discrimination' constitutes a proportionate means of achieving a legitimate aim).

However, it remains to be seen whether the proposed reforms will boost ethnic diversity in arbitration. In the UK, the pool from which arbitrators are selected usually consists of experienced barristers and solicitors, judges, or commercial experts.

These are professions where ethnic minority candidates have been historically underrepresented.

For example, in 2020 only 8% of court judges and 12% of tribunal judges were from ethnic minority backgrounds and as of October 2021 only 8% of UK-based partners at top tier law firms and less than 8.8% of King's Counsel were from this group.

Additionally, arbitrators are often chosen through referrals and repeat appointments, hence we are unlikely to see change in the near future.

It seems, therefore, that legislative change is just one step in the journey to achieve a racially diverse arbitration profession. Rather, the proposed reforms are part of a wider issue, such that the reforms will only go so far unless and until the systemic roots of under representation and lack of access for ethnic minority candidates in the legal profession is addressed.

This article was first published in The Global Legal Post

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SECURITIES THAT ARE IMPACTED BY SANCTIONS AGAINST RUSSIA

LEGAL AND PRACTICAL IMPLICATIONS FOR NOTEHOLDERS

Authored by: Julia Filippova (Senior Associate) - Withers, and Bulat Khalilov (Associate) - Nektorov, Saveliev & Partners

On 3 June 2022 National Settlement Depository ('NSD') in Russia was designated as a sanctioned entity by the EU. European clearing systems Euroclear (registered in Belgium) and Clearstream (registered in Luxembourg) that used to work closely with NSD stopped taking instructions from NSD. This has in turn led to the inability of the people and organisations who held securities through NSD to carry out any international transactions with these securities, including coupon payments and redemption of securities. This has had an effect not only on Russian security holders but on international investors who hold securities (Eurobonds or Credit Notes) issued by European holdings or SPVs of Russian companies. NSD recognized the sanctions against itself as an emergency, but did not impose additional restrictions against customers, except for the suspension of settlements in Euro.

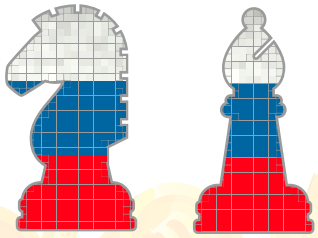
Russian companies often issued Eurobonds or Credit Notes through connected issuers registered in the EU, i.e. the issuer would be a company registered in one of the EU countries. Russian companies often acted as guarantors in respect of such securities. English law was very often the governing law of such securities, with either an arbitration clause or clause stipulating dispute resolution in the courts of England and Wales.

The problems with European clearing systems started even before NSD was designated as a sanctioned entity: on 17 March 2022 NSD informed everyone that Euroclear stopped carrying out any instructions received from NSD. A week later it became known that Clearstream had blocked NSD's account.

As a result of sanctions against NSD, millions of investors who held securities through NSD cannot dispose of those securities. In order to overcome this, brokers, depositories and private investors sent requests for authorisation and derogation to corresponding competent authorities, namely, the General Administration of Treasury of the Federal Public Service Finance in Belgium ('the Belgian Treasury') (in relation to Euroclear) and the Ministry of Finance of Luxembourg (in relation to Clearstream).

In accordance with Article 6 of the Council Regulation (EU) №269/2014 ('Regulation 269') the competent authorities of Member States may in certain cases authorise the release of certain frozen funds or economic resources if these assets shall be used for payment by a sanctioned person. On October 6, 2022, paragraph 5 of article 6b was added to Regulation 269 according to which the competent authorities of a Member State were allowed to authorise the release of certain frozen assets held through NSD if it is necessary for termination by 7 January 2023 of operations, contracts or other agreements concluded with, or otherwise involving NSD, before 3 June 2022.

On 20 December 2022 the Ministry of Finance of Luxembourg issued the General authorisation pursuant to article 6b paragraph 5 of Regulation 269. On 22 December 2022 the Belgian Treasury issued General conditions for the application of Article 6b (5) of Regulation 269.

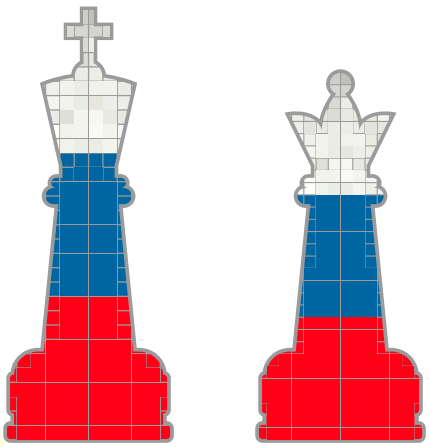


However, at the moment, not a single operation has been carried out in connection with the General authorisation of the Ministry of Finance of Luxembourg. Similarly, the Belgian Treasury has not yet issued any authorisations. It remains to be seen whether any authorisations will be issued in the future.

In addition to the problems with the European clearing systems, Council Regulation (EU) 2022/576 amending Regulation (EU) No 833/2014 ('Regulation 576') introduced prohibitions on the provision of services to trust arrangements involving Russian or Russian connected nationals or entities from 10 May 2022. In response to Regulation 576, a lot of Europe-based trustees and paying agents notified the holders of the securities of their inability to continue acting as trustees/paying agents from 10 May 2022. As a result, a lot of securities issued by Russian companies, or connected issuers registered in the EU ended up not having an acting trustee/paying agent.

Following this, Russian Government introduced counter sanctions, i.e. legislative measures in response to the EU/US/UK sanctions.

According to the Order of the President of the Russian Federation No 95 dated 5 March 2022 ('Order No 95'), coupon and dividend payments and/or operations with financial instruments (including securities) exceeding RUB 10 million (or equivalent in foreign currency) per month are allowed to non-residents from the so-called 'unfriendly countries'[1] (defined by Russian legislation) only if such payments are made to a designated type 'C' account in a Russian bank and the payments are made in rouble. Payments in rouble or foreign currency to a normal (not type 'C') account are allowed only by permission obtained from the Central Bank of the Russian Federation or the Ministry of Finance of the Russian Federation.



Funds from type 'C' account cannot be disposed of in the normal way, they can be spent only on the territory of the Russian Federation in certain prescribed ways.

Effectively, investors from 'unfriendly countries' currently cannot obtain coupon or dividend payments or payments in redemption of securities from companies registered in Russia or connected issuers registered in the EU.

Additionally, pursuant to the Order of the President of the Russian Federation No 85 dated 1 March 2022 ('Order No 81') there are restrictions on transactions entailing the establishment, change or termination of rights to own, use and/or dispose of securities of Russian joint stock companies involving a non-resident from an 'unfriendly country'. The execution of such transactions requires permission from the Government Commission on the Monitoring of Foreign Investment of the Russian Federation. According to Order No 81, operations with the shares of Russian public companies is also restricted for non-residents from 'unfriendly countries' – permission from the Central Bank of the Russian Federation is required.

Federal Law No 292-FZ dated 14 July 2022 allows Russian companies to issue replacement securities to replace the Eurobonds (or other securities) issued by them or connected issuers registered in the EU. The aim of such replacement securities is to resolve the issues with payments that used to be processed by Euroclear and Clearstream. Replacement securities are issued by Russian companies (i.e. not through European issuers), they are governed by Russian law and payments under such replacement securities are made in rouble. Replacement securities have already been issued by several large Russian companies, such as Gazprom, Lukoil, Sovkomflot, Metalloinvest, PIK Holding.

However, the issue of replacement securities is aimed primarily at Russian investors and does not resolve the problems faced by foreign investors.

Currently, for a lot of securities that are subject to sanctions against Russia, events of default have occurred and are continuing. Every case is, of course, unique and needs to be analysed carefully from the point of view of the governing law of the securities (which is often English law) and bearing in mind the current geopolitical situation, its practical impact, continuing changes to sanctions against Russia as well as Russian counter sanctions.

There may be an option of issuing either court proceedings or arbitration proceedings against the issuers and/or guarantors of the securities. However, enforcement may prove tricky since the European issuers are unlikely to have significant assets and enforcement in Russia against Russian-registered guarantors may currently be impossible. Still, there is a possibility of certain funds being blocked in European/UK/US banks due to sanctions that can be targeted by freezing orders in anticipation of enforcement.

In some cases, there may be certain additional issues regarding mis-selling of the securities and/or unfair prejudice against minority security holders. In Assenagon Asset management SA v Irish Bank Resolution Corp Ltd (formerly Anglo Irish Bank Corp Ltd) is was held that the majority of security holders could not abuse their voting majority to vote for a resolution which expropriated the minority's rights under their bonds for a nominal consideration.

We expect that in the near future the issues briefly addressed above are likely to be explored in more detail in court and/or arbitration proceedings in England and Wales.

1 'Unfriendly countries' include all of the EU countries as well as Australia, Albania, Andorra, the UK (including Jersey), Anguilla, BVI, Gibraltar, Iceland, Canada, Lichtenstein, Micronesia, Monaco, New Zealand, Norway, Republic of Korea, San-Marino, North Macedonia, Singapore, the US, Taiwan (China), Ukraine, Montenegro, Switzerland and Japan (according to the Order of the Government of the Russian Federation dated 5 March 2022 No 430-p).

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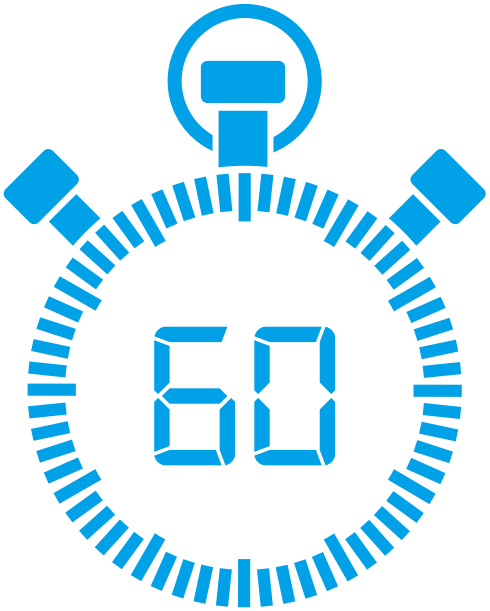

Q What do you like most about your job?

A Variety. Every day is different, and there is a good mix of intellectual challenge, creativity, and commercial problem-solving. I also get to work with a wide variety of cases, clients, and legal teams.

Q What motivated you to pursue this career?

A I find funding genuinely interesting. I still get to work as a disputes lawyer, but in a very different way to private practice. It's legal, factual, and commercial. I did want to be a travel writer and spend my days writing incisive and engaging narratives from far-flung locales, but funding will do for now.

Q What is the most rewarding thing about your work?

A Funding cases that deserve to win and watching them succeed. It's rarely so simple, but it's very rewarding when it happens.

Q Do you have any career aspirations, and have you achieved any of them so far?

A There are plenty more to be achieved, and we have big ambitions as a team.

Q What do you see as being the biggest trends of 2023 in your practice area?

A Predictions are always risky, but three things stand out. First, there will be an increasing appetite for law firm financing (for portfolios or for funding DBAs). Second, with a greater focus on ESG issues, more stakeholders and shareholders will use funding to access litigation for financial and environmental wrongdoing claims. A real focus will be on claims relating to environmental damage and "greenwashing." Finally, given the economic uncertainties, there is likely to be an uptick in contested insolvency claims.

Q What has been your most memorable experience during your career so far?

A The first time I saw a great cross-examination of a witness at an arbitration hearing. It showed the brilliance of the lawyer involved, but also how the dynamics of some cases can change rapidly once live evidence is involved.

Q How do you deal with stress in your work life?

A Breaking things down into small pieces makes everything more manageable. Ten small things on your To Do list can be easier to deal with than one mammoth item.

Q What does your perfect holiday look like?

A It would definitely be somewhere warm with really good food, but there has to be a mix of relaxation and activity. Three or four days by the beach and then a week doing something more active.

Q What was the last book you read?

A Factfulness by Hans Rosling. I'm late to the party on this one, but it's worth reading.

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

A It's a toss-up between Sandi Toksvig and Billy Connolly. Both are funny and would have good stories, and these are the key attributes of a good dinner party guest.

Q What cause are you passionate about?

A Levelling the playing field when it comes to disputes.

Q Do you have a New Year's Resolution, and if so, how do you plan to keep it?

A I'm trying to improve my Spanish. There is a long way to go, but I'm keeping to it so far.

Q What are you looking forward to in 2023?

A Aside from good funding opportunities?! An upcoming holiday to Northern Spain. Hopefully the Spanish will have improved by then…

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STANFORD INTERNATIONAL BANK V HSBC BANK PLC [2022] UKSC 34.

SUPREME COURT SIDES WITH BANKS IN LATEST QUINCECARE DUTY JUDGMENT - BUT WHAT IS THE COST FOR CREDITORS AND THE PARI PASSU PRINCIPLE?

Authored by: Dipti Hunter (Partner) and Kit Smith (Managing Associate) - Keidan Harrison

Introduction

The close of 2022 will have brought more than the usual dose of festive cheer for the banks, following the decision of the Supreme Court in the case of Stanford International Bank ("SIB") v HSBC Bank plc ("HSBC Bank"). For those representing creditors in distressed companies, the decision will place a significant hurdle to future attempts to collect in funds dissipated in the run up to a corporate collapse.

Executive Summary

The Supreme Court upheld the Court of Appeal decision by a majority of 4:1, thereby striking out a claim worth £116 million against HSBC Bank. The Appeal had asserted that there had been an alleged breach of Quincecare Duty by HSBC Bank when certain payments were authorised to a group of creditors shortly before SIB went into liquidation.

The Court held that of the £116 million of claimed losses, none was recoverable on the basis of SIB's pleaded case. The payment of due and valid debts did not reduce SIB's assets available to its creditors. This decision was reached on the basis that where monies had been paid to creditors of SIB to discharge validly owed debts, SIB had suffered no loss of a chance that had any monetary value to SIB. In essence, SIB's balance sheet was in the same "net" position it would have been had those payments not been made, since those benefitting creditors would have had equivalent claims for the totality of the sums paid out.

In this article we will examine the background to this Supreme Court decision and some of the points arising for future Claimants.

Background to the Ponzi Scheme

SIB is an Antiguan-Barbuda registered company that went into liquidation in 2009 whilst holdings bank accounts with HSBC Bank. At the time, SIB was controlled and owned by Robert Allen Stanford (Mr Stanford). SIB's business concerned the sale of Certificates of Deposit, sold as investment products offering an attractive rate of return. Investors in the certificates were led to believe that the funds they deposited would be invested by SIB in a diversified low risk portfolio of assets and securities. However, for a number of years in the run up to the demise of SIB, Mr Stanford had run the company as a Ponzi scheme whereby the proceeds of investments from one set of clients were used to provide notional profits to another set of clients. All payments were essentially directed by Mr Stanford and his cronies.

Following enforcement action taken by the SEC in the US, the HSBC accounts were frozen in 2009. However, in 2008 in the run up to the accounts being frozen, a number of transfers out of the bank accounts were authorised by Mr Stanford who had been orchestrating the fraud. These payments adversely impacted on all creditors who were unpaid at the time the monies became frozen as the company was deprived of those funds to pay creditors. These payments, before the liquidation crystallised, were estimated to be for c. £116 million.

SIB through its liquidator brought the litigation and claimed that HSBC had been on notice that the payments that had been made in 2008 were part of a fraud. SIB claimed HSBC was subject to the Quincecare duty at the time and should have refused the payments orchestrated by Mr Stanford.

It should be noted that under the Antiguan insolvency regime, the liquidators were unable to claim back money from those customers who received payments prior to the date of liquidation. There was no legal basis under common law or under Antiguan statutory insolvency laws for the avoidance of wrongful preferential payments.

What is a Quincecare Duty?

The Quincecare duty was established in 1992. At that time, it was regarded as an extension of the duty of care that banks are said to owe to their customers (including compliance with their instructions), which was established in the preceding case of Lipkin Gorman v Karpnale. In the Quincecare case, Mr Justice Steyn (as he then was) described the duty as one whereby:

"a banker must refrain from executing an order if and for as long as the banker is 'put on inquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company."

Having been dormant for a number of years following the decision in Barclays v Quincecare , there has been a renaissance of these claims, starting with the Singularis decision in 2017. These decisions have helped to clarify (and refine) the scope of the duty of care owed by banks.

In Singularis, the Court of Appeal had held that the purpose of the duty was to (i) "protect a bank's customers from the harm caused by people for whom the customer is, one way or another, responsible" and (ii) to protect companies against misappropriation by fraudulent agents.

In Fiona Lorraine Philipp v Barclays Bank UK Plc, it had been thought that the scope of the Quincecare Duty had been slightly widened to include a duty to a bank's individual (as opposed to corporate only) customers. This case involved an APP fraud. The facts of the case (and indeed whether the duty did arise in respect of Mrs Philipp and was breached) are yet to be tested at trial. The case (at the time of writing this article) is also subject to an appeal to the Supreme Court.

In RBS v JP SPC the Privy Council confirmed a key limitation on the duty, namely that a bank owes a duty of care to its client (or the account holder) alone. It does not owe a duty of care to third party beneficiaries of funds held in an account.

So the history of recent cases, suggested that banks had a duty to protect their customers alone.

This decision affirms the line of reasoning (and indeed, the confinements) adopted in RBS v JP SPC.

The Claim against HSBC

In this case, SIB had pleaded that HSBC had been reckless in how it had allowed a culture in its relationship with SIB to develop, where ignoring red flags and due diligence in the day-to-day operations as the norm. This sloppy due diligence, it was argued, meant that payments were allowed and by doing so HSBC had facilitated the operation of the dishonest Ponzi scheme. The HSBC accounts enabled the Ponzi scheme in particular the dishonesty of Mr Stanford in the lead up to the collapse and arguably helped the collapse to crystallise.

The issue before the Supreme Court was whether the Court of Appeal had been correct in its approach by striking out the £116 million Quincecare claim. But that required the court to consider the scope of the duty and when it was engaged.

Damages for Breach of Contract and the "no net loss" hurdle

The Judgment is a reminder that damages for breach of contract and breach of duty in tort are essentially compensatory and follow the "net loss" rule which takes a holistic approach taking into account the pluses and minuses of a breach including any potential recovery or gain.

The majority in the Supreme Court Judgment considered whether the payment to earlier customers created a loss or not. The payments authorised by Mr Stanford to customers before the liquidation made no difference to the company as those customers would have had claims in the same sum after a liquidation. The balance sheet of debts had therefore not been adversely impacted. SIB would not have been £116 million better off, as it would have claims against it in the same amount.

The Supreme Court followed the Court of Appeal and held that the Quincecare claim should be struck out: "SIB has not suffered the loss of a chance that has any pecuniary value to it and hence there is nothing recoverable on its pleaded case." (paragraph 31 of the SC Judgment).

It is worth noting the dissenting opinion of Lord Justice Sales. He took a different view because he focussed on the distinct corporate personality of SIB which he felt should not be confused with the claims of creditors as a class rather than as individuals. At paragraph 128 he states that:

> "In my view this reflects the point that in the eyes of the law the interests of a company which is hopelessly insolvent are fully aligned with those of its creditors as a general body. In those circumstances the purpose of the company, and the function to be served by its having corporate personality as the vehicle by means of which it holds assets so that they can be used for fulfilling that purpose, is to protect the interests of the creditors as a general body, ie according to the pari passu principle applicable in an insolvent liquidation, subject to any security rights creditors might have."

Lord Justice Sales dismissed the focus of the majority on whether a loss had been suffered or not as essentially out with the Quinceare Duty. At paragraph 132 he notes,

> "The Quincecare Duty should be kept within narrow bounds, lest it interfere unduly with the conduct of commerce…..However the very existence of the Quincecare duty qualifies that position and, in my respectful opinion, the solution to keeping its effect within proper bounds lies in analysis of the duty itself, not in distorting (as I see it) the question whether the company has suffered loss".

Concluding Remarks

However attractive the reasoning applied by Lord Justice Sales, the majority prevailed, and the Appeal dismissed meaning that the claims were struck out. If one looks at this purely as a loss analysis of SIB balance sheet, then of course the decision makes sense. But if you are an unpaid creditor who has been subject to fraudulent conduct and would like a proper investigation to understand how the banks enabled these payments, then you will be disappointed.

The impact of this decision means that those with claims are now deprived of being investigated further in these proceedings. The Bank no longer has any obligation to provide disclosure on the issues in the case. Of course, had Antigua had similar statutory insolvency protections on preferential payments to the UK, then that problem may have been mitigated. Other regulatory investigations may of course shed more light on the conduct that transpired and the relationships between the bank and SIB. However it is unfortunate that those investigations won't enable an unpaid creditor to be paid pari passu.

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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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2023 BUILDING AND WINNING CRYPTO CASES

Authored by: Nat Abramov (Founder & CEO) - Crystal Vantage

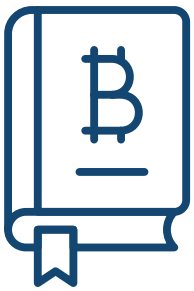
2023 is fast emerging as a formative year for cryptocurrency litigation and crypto fraud recovery. After its spectacular collapse in late 2022, crypto exchange FTX is heading into complex and lengthy bankruptcy with customer losses estimated at $8 billion. At this early stage, it seems FTX may represent simultaneously the most vivid warning light for the egregious excesses and risks of unregulated crypto, but also possibly the most high-profile demonstration of how our existing terrestrial legal systems are called upon to intervene on behalf of injured parties suffering crypto-related losses.

FTX will underscore to the wider world what many practitioners in this field will already know: for better or for worse, cryptocurrency is not a parallel universe, but a digital innovation that exists firmly within the scope and jurisdiction of our laws and institutions. When investors suffer crypto losses, they turn to national courts for disclosure to uncover the beneficiaries of their misappropriated funds, and to petition for bankruptcy when restitution is not forthcoming. How to navigate that reality, and extract the maximum from it, is the business of recovery practitioners operating in the crypto space.

A second instructive case coming to a head in early 2023 is that of crypto lending platform Nexo. As FTX grabbed crypto headlines, in January the Bulgarian National Police Service, in coordination with US authorities, raided the offices of Nexo on suspicion of running similar illicit activities. Nexo may yet emerge as the Inigo Philbrick to FTX's Madoff. It serves as a reminder of the myriad of less high profile, but no less important, crypto fraud cases that continue to proliferate.

As investigators, we see a range of crypto cases with widely varying prospects of success. In this briefing we share our observations on tooling up to succeed in a crypto case, and how to strategise from an early stage. At the outset, we ask ourselves a series of key questions:

1. What type of crypto case is it?
2. What is the evidence of wrongdoing?
3. Who is liable and who is viable as a collection target?
4. Who are the potential co-claimants and allies to the case?
5. What investigative resources are available or needed?
6. What is the best route to recovery?
7. How does the case get funded?



Types of Crypto Cases

By this point in its development cycle, the cryptocurrency sector has spawned a mini-economy comprising exchanges, miners, depositors, investors, insurers, issuers, lenders, intermediaries, programmers, marketers, promotors, IT providers, regulators, advisors, and much else. Cryptocurrency has a press and, like the traditional economy, it has established corporates and smaller challenger outfits or lone investors – a Wall Street and a Main Street.

This means that cryptocurrency cases can now span almost any type of claim. It is becoming outdated to view crypto cases narrowly as instances of disappearing fraudsters – though to be sure those still exist. Rather it is helpful to think about the events and parties to a crypto dispute a little more like an ordinary civil dispute.

By way of example, crypto cases can include:

(a) Claims against insurers, and insurer claims against culprits.

(b) Investor class actions.

(c) Misrepresentation and dishonest solicitation of investment.

(d) Market manipulation, such as rug pulling, or other types of fraud.

(e) Failure to adhere to terms of business or local laws.

(f) Improper liquidation of portfolios.

(g) Theft or non-safeguarding of client assets.

(h) Failure to provide access to funds or accounts.

(i) Bankruptcy and insolvency.

(j) Contractual disputes.

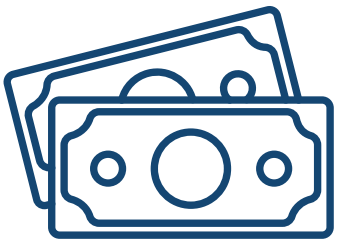
Evidencing Wrongdoing

The 17th century Anglican bishop and philosopher George Berkeley was probably not thinking of cryptocurrency when he asked "if a tree falls in a forest and no one is around to hear it, does it make a sound?"

Today crypto investors are faced with a somewhat updated question – "if my cryptocurrency disappeared when no one was watching, does it exist somewhere, and where can I find it?"

Berkeley concluded the answer to his question was yes because God could hear the tree fall. For slightly different reasons, the answer to the crypto corollary is also likely to be affirmative, because the crypto can be traced, as can the perpetrators; the case will yield to evidence; and recovery can often be achieved through the intelligent pursuit of solvent parties.

Like most claims, crypto cases turn on good evidence. Many clients approach a professional at the outset with a sense of resignation or helplessness and fail to appreciate how much evidence is actually available to them. In our experience, it can be very useful to guide the client to collect: account information; portal screenshots; wallet addresses; transaction IDs; deposit and transaction logs; consented terms and conditions, privacy notices, and contractual undertakings; email correspondence; and other materials amassed during their commercial interactions. Email correspondence in particular can be helpful as there is often disorganisation and disunity among staff when a crypto outfit is failing, which can result in communication with clients/ investors that inadvertently reveals wrongdoing. The way an investment proposition was sold at the outset is also crucial in substantiating possible misrepresentation claims.



Who is Liable and Who is Viable?

Like any well-run recovery campaign, the imperative is to pursue viable targets for collection, building a strategy around those, rather than an expensive chase after recalcitrant or insolvent parties. Therefore, wherever possible, it is worth considering whether any of these parties may be liable for the loss:

- Traditional financial institutions.
- Large or well-capitalised cryptocurrency exchanges.
- Established business figures or celebrities.
- Significant corporations.
- Third party associates or service providers.

The rationale is that these types of parties will frequently pay out a claim where they are liable, to avoid enforcement and reputational damage. High profile examples include Kim Kardashian who reached a $1.26 million settlement with the SEC in October 2022 for promoting EthereumMax without disclosing that she had been paid for the endorsement. In similar circumstances, boxer Floyd Mayweather and musician DJ Khaled reached settlements over their undeclared paid promotions of various ICOs.

For similar reasons, banks and financial institutions have also been targeted in crypto litigation. JP Morgan and Bank of America have both been sued for the fees they have applied to crypto trading. Italian bank UniCredit has also been sued for closing the accounts of cryptocurrency miner Bitminer Factory, which is said to have prevented an ICO. In March 2022, a court in Bosnia and Herzegovina fined a UniCredit branch €131 million in connection with this episode.

Tracing and Disclosure

In certain cases, tracing of cryptocurrency is necessary. This can typically be (a) to locate the culprits where the fraudster(s)/liable parties are not known at the outset; (b) to locate the missing cryptocurrency for enforcement; or (c) to provide evidence of the loss, even where enforcement might not target the direct proceeds of the fraud.

In these cases, a mixture of court applications and investigative tools are often needed. It is well established that most cryptocurrency can be traced along the public blockchain leger. Depending on the coin, or type of coins being traced, the tools used by crypto tracers include: Chainalysis Reactor; TRM Labs; and Elliptic Navigator, among various other specialist software platforms.

In principle, these platforms allow a client's missing cryptocurrency traced along the blockchain to a specific wallet address, or series of addresses. These may already be known to belong to a certain party or organisation, or may require disclosure to reveal the holder's identity.

There are various impediments to an effective trace. Mixing has been used by some fraudsters as a means of co-mingling assets to mask where a specific set of coins have moved. Some tracing platforms are more effective than others at picking this apart. In some cases, the assets have moved along a non-public blockchain using coins such as Monero (XMR), Dash (DASH) or Zcash (ZEC). In these situations, legal action can be considered to identify the last known user in a public blockchain transaction, before assets moved across to a private coin, or indeed to unmask the private blockchain.

Notwithstanding these issues, in the majority of cases, well established legal routes have emerged to uncover the ultimate owners of wallets which have received client funds. Disclosure orders are now commonplace in many jurisdictions to compel exchanges to reveal their KYC customer data behind a wallet. In Ion Science Ltd v Persons Unknown the English Commercial Court permitted victims of an ICO fraud who did not know the identities of the beneficiaries of the fraud, to serve various orders, including for disclosure, on crypto exchanges overseas. This allows victims to seek assistance from a court to reveal the perpetrators/ beneficiary of a fraud, and to receive information from exchanges in other jurisdictions.

Courts are expanding their support to crypto fraud victims. In Gary Jones v Persons Unknown & Ors the Commercial Court granted freezing injunctions against various unidentified parties who transferred the victim's cryptocurrency across the blockchain. This ensured that their wallets could be frozen to prevent dissipation. This then allowed Jones to include the exchange Huobi in the proceedings. In March 2022, the court held Huobi liable for the loss of £480,206, as a constructive trustee, allowing Jones to recover from the exchange rather than pursuing the end fraudster. In a first, the court also permitted Jones to serve the unknown parties by means of dropping an NFT into their wallets held with Huobi.

Non-crypto Assets

While avenues for recourse in the crypto space are developing, it remains significantly more straightforward to enforce against non-crypto assets. Therefore, where possible, it is worth thinking about avenues for collection against parties who have clearly identifiable and locatable assets. For example:

- **Banking or financial assets.** These could be held by an exchange, businessperson, corporation, or promotor of a coin.
- **Real estate assets.** These could include property owned by a crypto outfit, its principals, or the personal assets of individual(s) liable in a case.
- **Corporate assets.** These may include any relevant subsidiaries of a corporate adversary, or the personal corporate interests of a liable individual.
- **Alternative assets.** In the case of wealthy fraudsters, there may be artwork, valuable jewellery or watches, or other alternative investments against which enforcement can be sought.

In this manner, crypto cases can sometimes resemble regular civil fraud cases in their routes to recovery.

Funding

Crypto cases frequently lend themselves to special funding arrangements. This is because claimants have often not suffered a threshold loss individually, but form part of a collective that is owed a large aggregate sum. As such, class actions are becoming commonplace in the crypto space. Even in cases with large individual losses, clients can be reluctant to singularly fund litigation and recovery, which makes the natural case for finding allies, or similarly aggrieved parties.

In the crypto space, this endeavour can be less difficult than it may first seem. Clients themselves may be acquainted with, or have spoken to, other co-investors who suffered similar losses. Beyond this, the cryptosphere is a brimming network of voices who communicate regularly online through news portals, Telegram channels, forums and blogs, Twitter, and other social media. A modest investment of time in book building, by reaching out to other aggrieved parties, or making it known you represent claimants who suffered a certain loss, can bring forth many parties who may join forces with an existing client's efforts.

Due to the structure of these claims, third party funding would potentially be naturally suited to many crypto cases. While many funders take an interest in the crypto space, the industry remains cautious in deploying funding to these cases, perhaps due to the nascent nature of this space and the many risks that are difficult to assess at this early stage. There are nevertheless organisations that will fund crypto cases, and certain funds set up especially for these types of situations.

In preparing a crypto case for funding, a few key areas are worth addressing:

(a) **Size of claim:** The aggregate quantum of the claim will need to be large enough to allow a funder to invest in the case and achieve a several-fold multiple, and to remain commercially interesting for the claimants. In self-funded cases, those with a small number of co-claimants, or bankruptcy/insolvency cases, the quantum can be smaller while remaining viable.

(b) **Evidence:** The evidence base underpinning the claim should be as developed as possible at the point when funding is being sought. Where additional evidence will be required, it is useful to articulate how/where such evidence will be obtained.

(c) **Legal strategy:** A clear, costed legal strategy should be crafted that allows a funder to envisage the route to success, both legally and commercially. The legal basis for claims against any potential defendants should be firmly established. Given the multi-jurisdictional nature of these cases, it will often be important to address how claims will be legally anchored in the relevant jurisdictions, and how local legal action will lead to eventual recovery of assets. As such, the rationale of pursuing particular parties or legal proceedings should be demonstrable. It helps to have an oven-ready team of legal specialists and necessary consultants/experts in the relevant jurisdictions, who can lend the case their support and credibility.

(d) **Collection and enforcement:** The collectability of the claim is of primary importance for external funding. It can be valuable to draft an enforcement plan setting out what known assets can be pursued from potential defendants; what unlocated assets are expected to be located and how; and what asset tracing work can be carried out to map out the attachable assets of the prospective adversaries. An investigations company can help in putting together a recovery plan and costed asset tracing options. A valuation of any such assets, and explanation of how they can be legally recovered, will be important.

The volume of crypto related cases is naturally expected to grow, but they are also likely to diversify increasingly with the spread of cryptocurrency. The collapse of fraudulent crypto schemes will certainly signal caution, but may not reverse that trend. While the crypto space has been home to many notable frauds, it has also comprised some of the most significant asset freezes of recent times. Therefore, the need has never been higher for expertise to guide victims intelligently and judiciously to recovery in this area, using all the latest tools and strategies available.

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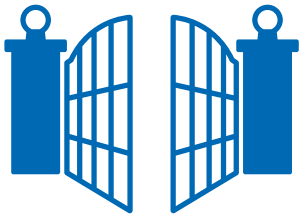
FONG CHAK KWAN V ASCENTIC LTD

HONG KONG COURT OF FINAL APPEAL ENDORSES WIDE MEANING OF "DAMAGE" IN TORT GATEWAY FOR SERVICE OUT OF THE JURISDICTION

Authored by: Wilson Leung (Barrister) - Serle Court

This article analyses the Hong Kong Court of Final Appeal's judgment in Fong Chak Kwan v Ascentic Ltd (2022) 25 HKCFAR 135, where Lord Collins of Mapesbury considered the meaning of "damage" in the tort gateway for service out of the jurisdiction. Lord Collins adopted a wide meaning of "damage" which includes all direct, indirect, and consequential damage flowing from the tort, and rejected a narrow interpretation that limits it to damage which completes the cause of action. In doing so, Lord Collins endorsed the majority judgments in the UK Supreme Court cases of Brownlie v Four Seasons Holdings Inc [2017] UKSC 80 and Brownlie v FS Cairo (Nile Plaza) LLC [2021] UKSC 45. Importantly, Lord Collins gave additional reasons for favouring the wide interpretation of the tort gateway, which are likely to have significant implications for the courts' future interpretations of the other gateways.



"Damage" and the tort gateway: the Brownlie decisions

The meaning of "damage" in the tort gateway for service out of the jurisdiction has attracted substantial debate. In the current English rules, the tort gateway appears in paragraph 3.1(9) of Practice Direction 6B. This includes the following limb, allowing the court to grant permission to serve out in circumstances where:

> "(9) A claim is made in tort where–
>
> (a) damage is sustained, or will be sustained, within the jurisdiction".

Does "damage" within this limb mean all damage that flows from the tort, including both physical harm and consequential financial loss? Or does it refer only to that damage which is necessary to complete the cause of action?

In two judgments arising out of the death of Sir Ian Brownlie QC (who was killed in a motor accident in Egypt), the UK Supreme Court decided in favour of the first, wider interpretation. In Brownlie v Four Seasons Holdings Inc [2017] UKSC 80 ("Brownlie 1"), a majority held, obiter, that the word "damage" should be given its natural and ordinary meaning, which referred to any significant physical and financial detriment that the claimant has suffered as a result of the defendant's tortious

conduct.[1] In Brownlie v FS Cairo (Nile Plaza) LLC [2021] UKSC 45 ("Brownlie 2"), a differently constituted court came to the same conclusion, with the majority deciding that "damage" is not limited to the damage which completes the cause of action, but extends to any significant physical and financial damage caused by the wrongdoing.[2] The court accepted, however, that in relation to pure economic loss, the nature of such loss creates a need for constraints on the legal consequences of remote effects, which could give rise to "complex and difficult issues" as to where the damage was suffered.[3]

The upshot of Brownlie is that the tort gateway is capable of being satisfied where the claimant suffers any significant physical or consequential financial damage in England, even if all elements necessary to complete the cause of action (e.g. the accident and initial injury) had occurred abroad. Once the test for the gateway is satisfied, the court would go on to apply the discretionary test (discussed below) in deciding whether to permit service out.

The Fong Chak Kwan case

In Fong Chak Kwan v Ascentic Ltd (2022) 25 HKCFAR 135, the Hong Kong Court of Final Appeal ("HKCFA") joined the fray by analysing the equivalent Hong Kong rule[4] and agreeing with the majority decisions in Brownlie. The judgment on this issue was given by Lord Collins NPJ, whose views are notable as a former justice of the UK Supreme Court and also the longtime editor of Dicey, Morris & Collins on the Conflict of Laws.

The plaintiff was a Hong Kong resident who was employed by a US company to work in Mainland China ("PRC"), where he was injured in a factory accident. He returned to Hong Kong and received medical treatment. Based on the tort gateway, he obtained leave from the Hong Kong court to serve a writ of summons on the US company in Pennsylvania. The plaintiff conceded that he had suffered immediate bodily injuries in the PRC (and hence the cause of action in negligence was completed there), but argued that the indirect damage which he suffered in Hong Kong (including pain, loss of amenity, and medical expenses) was sufficient to bring his claim within the tort gateway.

The plaintiff obtained default judgment against the US company. However, the Employees Compensation Assistance Fund (a statutory fund providing relief payments to certain injured employees) ("the Fund") intervened and applied to set aside the order for service out.

The Fund's challenge was rejected by the HKCFA on two grounds. The first ground was that the Fund had no standing to intervene because (on a correct interpretation of its statute) it had no possible liability to the plaintiff. The second ground (which is relevant here) concerned the tort gateway. The Fund, relying on the minority view in Brownlie, contended that the word "damage" was limited to damage directly caused by the tortious act, and therefore the gateway was not satisfied because all such damage had occurred in the PRC.

HKCFA's analysis of Brownlie

The Fund's argument on the second issue was rejected by the HKCFA.

Lord Collins accepted the majority's reasoning in Brownlie based on the natural and ordinary meaning of the word "damage"[5]. However, he also articulated additional grounds for favouring it over the minority view. In particular, he pinpointed three flaws in the minority judgments of Lord Sumption in Brownlie 1 and Lord Leggatt in Brownlie 2.

The first flaw was the minority's assumption that the legislative purpose of the gateways was to identify a real connection between the cause of action and the domestic forum (e.g. Hong Kong or England).[6] Lord Collins opined[7] that this was not the correct lens with which to interpret the gateways. This was demonstrated by the fact that some of the gateways do not require any real connection between the claim and the domestic forum (e.g. the "necessary or proper party"[8] gateway).

The second flaw was the minority's assumption that the question of discretion is entirely separate from that of jurisdiction.[9] The third (and related) flaw was the assumption that the exercise of discretion is exclusively or mainly related to 'forum conveniens'.[10]

Lord Collins held that that was an erroneous characterisation of the court's discretion in a service out application. He pointed out[11] (echoing

1 The lead judgment was given by Baroness Hale PSC ([41], [52]-[55]), with the concurrence of Lord Wilson JSC ([64]-[67]) and Lord Clarke JSC ([68]-[69]). See the dissent of Lord Sumption JSC at [23]-[28], [31] (with which Lord Hughes JSC agreed).

2 Lord Lloyd-Jones JSC at [49]-[51], [64]-[68], [76] (with whom Lord Reed PSC, Lord Briggs JSC, and Lord Burrows JSC agreed). Lord Leggatt JSC dissented on this issue ([177], [192]-[194], [197]-[199], [208]-[209]).

3 [75]-[76] per Lord Lloyd-Jones.

4 Rules of the High Court, Order 11, rule 1(1)(f), : "the claim is founded on a tort and the damage was sustained…within the jurisdiction." This is identical to the pre-CPR rule in England (RSC Order 11, rule 1(1)(f)).

5 [92], [107]

6 Brownlie 1 at [28]; Brownlie 2 at [192]-[194].

7 [105], [109]-[110]

8 RHC O.11 r.1(1)(c) (Hong Kong); para 3.1(4) of PD 6B (England).

9 Brownlie 1 at [31]; Brownlie 2 at [196]-[197].

10 Brownlie 1 at [31]; Brownlie 2 at [198], [202].

11 [111]-[112]

the majority's view in Brownlie 2[12]) that the gateways alone do not confer jurisdiction; jurisdiction is only conferred if, in addition to satisfying one of the gateways, it is also shown that the domestic forum is the proper place to bring the claim. Lord Collins also explained[13] that the discretionary stage is not limited to mere considerations of forum conveniens (e.g. the location of witnesses). Instead, the court is entitled to consider other discretionary factors – including whether the case falls within both the "spirit" and "letter" of the gateway. Where the plaintiff has no real connection with the domestic forum, the court may refuse permission on the ground that the claim is not within the "spirit" of the gateway (irrespective of whether the forum conveniens factors are satisfied).

Thus, Lord Collins' view[14] (which expanded on the majority's analysis in Brownlie 1[15] and Brownlie 2[16]) was that the wide interpretation of "damage" would not lead to an unacceptable enlargement of the domestic courts' jurisdiction over tort claims (contra the fears of Lords Sumption and Leggatt[17]), because the courts would carefully exercise their discretion, which was "sufficiently muscular" to prevent any inappropriate assumption of jurisdiction.

Conclusion

The meaning of "damage" in the tort gateway appears to be authoritatively settled by the UK Supreme Court's judgments in Brownlie and now the HKCFA's decision in Fong Chak Kwan.

More generally, the reasoning in these judgments is likely to have significant implications for the courts' interpretation of the other gateways in future cases.

The emphasis on the role of the discretionary test – which was expressed forcefully in Fong Chak Kwan – may encourage the courts to favour a wide construction of the other gateways, on the premise that the discretionary stage would be robust enough to mitigate the potential excesses which might otherwise result from a broad interpretation.

It remains to be seen whether this trend is a positive one – giving the courts greater flexibility in dealing with service out applications, and claimants more options as to forum – or one which simply leads (in the words of Lord Leggatt) to more "unpredictability, inefficiency…and inconsistency."[18]

12 Brownlie 2 at [77]
13 [114]-[120]
14 [95], [118]-[120]
15 Brownlie 1 at [54], [66]-[67]
16 Brownlie 2 at [77]-[79]
17 Brownlie 1 at [28], [31]; Brownlie 2 at [193]-[194]
18 Brownlie 2 at [199]-[200]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DISAPPEARING TRUSTEES AND THE APPROPRIATE FORUM FOR INTERNATIONAL DISPUTES

Authored by: Lavinia Randall (Associate) and Pia Mithani (Partner) - Stewarts

High-value commercial and trust disputes often have an international element, and it is not always clear which country's courts are the appropriate forum. There could be multiple options, including the country where a disputed transaction took place, the country of the governing law of a trust deed or contract, or the country where the trustee or beneficiary resides.

Before the UK left the European Union, the Brussels Regulation Recast (Regulation 1215/2012) ("the EU Regulation") resolved these questions as between EU member states. Since Brexit, common law has applied. Lavinia Randall and Pia Mithani examine the decision in Al Assam & Ors v Tsouvelekakis [2022] EWHC 451 (Ch), one of the first cases to consider the application of the common law in a trusts dispute post-Brexit.

The facts – establishing the trusts

The principal claimants, a father and son based in Dubai ("the Claimants"), engaged Mr Tsouvelekakis ("the Defendant") as a financial and investment advisor/manager. In around 2006-2007, the Defendant advised the Claimants and assisted them to set up trusts for wealth protection and financial planning purposes. This was alleged to have been a long-term relationship, both social and professional.

According to the Claimants, all their dealings in relation to the trusts until 2018 were through the Defendant. This included all communications in relation to the investments to be made with the trusts' assets and requests for distributions, which were always swiftly actioned. From time to time (typically in response to a request from the Claimants), the Defendant would

provide portfolio reports purporting to show the trusts' investments and their value. The Claimants were not aware of anyone else they could contact in relation to the trusts.

In late 2018, the Defendant stopped all communications with the Claimants regarding the trusts and more generally.

The investigation

In early 2019, the Claimants' solicitors wrote to the Defendant, seeking an undertaking that he would not remove or transfer any assets out of the trusts. The Defendant's solicitors responded, asserting that the Defendant was not a trustee, protector or guardian of the trusts and had no right nor power to make distributions or payments or to direct the trustee to do so.

At around this time, the Claimants received a letter from Latimer (Management Services) Limited (Latimer), a Cypriot company with which they had had no prior dealings. It transpired that Latimer was the trustee of both trusts. The Claimants each purported to appoint a protector over their trust, and the protectors purported to exercise their powers to remove Latimer as trustee and appoint a new trustee.

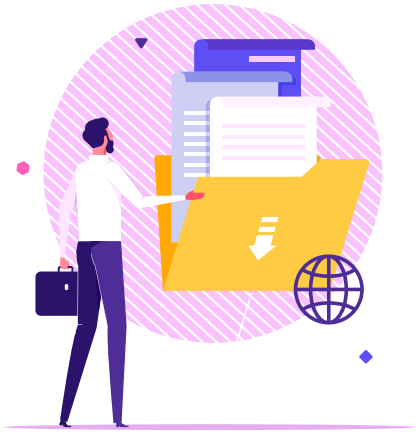
The Claimants issued proceedings in Cyprus against Latimer, the Defendant and other companies which, through their investigations, they had discovered were connected to the trusts. The relief sought was primarily directed to obtaining information about the trusts and safeguarding the trusts' assets. Latimer was ordered to file documents with the court, which appeared to show a significant diminution in the value of the trusts' assets and indicated that the portfolio reports provided by the Defendant to the Claimants had significantly misrepresented the position.

A settlement was reached in the Cypriot proceedings, which involved Latimer resigning as trustee and handing over a large volume of documents to the Claimants. The claims in Cyprus against the Defendant were discontinued while the Claimants continued their investigations using the documents provided by Latimer. They discovered that the Defendant had, via a complex arrangement that gave him effective control over the trusts, procured a series of disastrous investments in Cypriot companies carrying on business in Greece. The value of the trusts' assets was now significantly less than the Claimants had settled on the trust.

The English proceedings

In September 2021, the Claimants issued proceedings against the Defendant in England, where he was now living. The Claimants alleged breach of fiduciary duty, deceit, negligence and dishonest assistance arising from the Defendant's actions. Swiss law claims were also brought.

The Defendant challenged the jurisdiction of the English court to hear the claims, arguing that they should instead be heard in Cyprus.



The applicable law

The tests to be considered by the court are set out in the 1987 case Spiliada Maritime Corporation v Cansulex Limited. There are two limbs to the test. Under the first, the Defendant had to establish that the courts of Cyprus are:

- 'Available', in the sense that it would be open to the Claimants to institute proceedings in Cyprus, and
- Clearly and distinctly more appropriate than the English courts as a forum for determining the dispute.

The court concluded that the courts of Cyprus were available, so moved on to consider several factors relevant to the question of whether Cyprus was clearly and distinctly the more appropriate forum.

Personal connections

The Claimants placed significant weight on the fact that the Defendant is resident in the UK. Under the EU Regulation, this would have been the determining factor, but the High Court concluded that it was now simply a factor of "some significance".

Factual connections

This required consideration of where relevant events took place rather than where evidence and witnesses would be located. This was a particularly significant consideration in respect of the alleged torts, as the place of commission is the relevant starting point when considering the appropriate forum for a tort claim.

The judge, The Honourable Mr Justice Richards, said the claim would require consideration of how the Defendant interacted with Latimer. Given the dominance of electronic communications, he considered the location from which those communications were sent to have been less important than their substance. The court held that an English or Cypriot court could determine this.

He also considered the commercial wisdom or otherwise of the investments in the Cypriot companies would be a significant issue in the case but concluded that the fact the companies were incorporated in Cyprus carried comparatively little weight. The place of incorporation of the companies was more relevant when considering the evidence that might be available.

Evidence, convenience and expense

The court considered several practical issues related to the claim, including the location and first languages of witnesses who would be giving evidence, the language of any documentary evidence, and the practical logistics for hearing trials in the UK and Cyprus. Overall, the court concluded that considerations of evidence, convenience and expense did not point to Cyprus being clearly or distinctly a more appropriate forum for the dispute.

Applicable law

The Claimants asserted that Cypriot law applied to at least some of their claims, but the court considered this as nothing more than a "relatively slender indication" as to the appropriate forum. The judge concluded that the English courts would not have any particular difficulty in applying Cypriot law if necessary.

Ruling

Having weighed up the various factors above, The Honourable Mr Justice Richards said there were indications in favour of both Cyprus and England, but the Defendant had not demonstrated that the Cypriot courts are clearly or distinctly a more appropriate forum than the English courts. The judge, therefore, declined to order a stay of the English proceedings.

Second limb of the Spiliada test

As the first limb of the test in Spiliada had not been satisfied, the court was not required to consider the second limb of the test regarding the appropriate forum. However, it considered the arguments made by the parties. The Claimants argued that there was a real risk that they would not obtain justice in Cyprus, primarily because civil proceedings there suffer from such substantial delays as to amount to a denial of justice. The judge expressed the need for caution in expressing views on the quality of a foreign legal system. Having heard expert evidence on the point, he concluded that considerations of caution and comity (ie courtesy and reciprocity between legal systems) meant that he could not conclude that the court of Cyprus would not deliver justice.

Conclusion

This case demonstrates that questions of jurisdiction are more multifaceted post-Brexit. The courts can consider a broad range of factors beyond the defendant's residence and reach a decision in the round. Although, in this case, this led to the same outcome, it leaves open the possibility of potentially unexpected outcomes in future forum disputes.

This article was originally published on the Stewarts website.

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IN PRAISE OF THE TESTIFYING WITNESS

Authored by: Eugene Dizenko (Managing Director) - Vantage Intelligence

Little can make or break the outcome of a corporate dispute as much as the participation in legal proceedings of an informed, credible witness providing on-the-record testimony in the form of an affidavit or, should the case advance to trial, testimony in court. Whether or not a testifying witness can be identified is often one of the first and most critical requests lawyers pose to investigative firms. Yet, as every investigator faced with such a request knows, convincing someone to testify on-the-record can be mired in challenges both expected and unforeseen.

This is especially pertinent in those instances when a corporate dispute relates to matters of political sensitivity - and political sensitivity is almost always a factor in disputes stemming from developing economies, such as those of Eastern Europe or the wider Middle East, irrespective of where the disputes are litigated.

Political risk is often used to describe the risk faced by businesses or investors operating in developing economies. Yet, a very similar type of risk is also faced by testifying witnesses considering participation in corporate disputes. As a result, both the suitability of a testifying witness and the potential motivations for such participation are typically matters of great complexity; the two considerations are often inextricably linked, since the motivation of a potential testifying witness directly bears upon their suitability.

One of the issues that could complicate the participation of a potential witness comes down, in basic terms, to money: payment of expenses, whether travel-related or otherwise, is relatively routine; providing a testifying witness with a more generalized compensation plan can add complexity and controversy to their potential involvement. Some jurisdictions prohibit the participation of paid witnesses outright, while in other jurisdictions payment to a witness would be preclusive, or at the least limiting, of value attributable to any such testimony.

Ultimately, whether the use of paid testimony is possible - so long, for example, as the fact of payment is explicitly disclosed and the amount of compensation not contingent on outcome – will be decided upon by the legal team when the specific legal framework of a given jurisdiction is taken into consideration. However, these same concerns must also be taken into consideration by investigative firms, which are often in the position of identifying and, as per industry jargon, “recruiting,” potential witnesses.

Some costs can be difficult to quantify or anticipate. For example, these could be costs related to security considerations during or following participation in legal proceedings, the possibility of permanent relocation, loss of potential income resulting from testimony that is to be provided, and so on. These are all substantive issues that would be taken into consideration by a witness contemplating testimony. Yet, they are not as simple to quantify as, for example, hourly or daily billing rates to compensate for time spent or rudimentary expenses incurred, as would be the case for a professional expert witness.

Returning to questions of political risk and sensitivity, one region that has tended to occupy an outsize role in international corporate disputes, and where questions of a political nature relating to potential testifying witnesses are and will remain crucial, is Russia and the former Soviet states. Russian businesses are unlikely to be able to litigate in Western legal venues in the immediate future as a result of Russia's invasion of Ukraine.

However, corporate disputes in Western legal venues stemming from investments into or involving Russian businesses are likely to remain prominent, and it will be interesting to see whether formerly Russia-based individuals will begin to play a larger role as potential witnesses.

That the sizeable emigration of high net-worth individuals and white-collar professionals from Russia over the last year can also be viewed as a pool of potential testifying witnesses to ongoing or future corporate disputes is no longer in question. Nor is the probability that such individuals are more likely to consider becoming testifying witnesses in disputes occurring outside of Russia than had they chosen to remain in Russia, given current geopolitical circumstances. In any event, their ongoing, and likely continued, residence outside of Russia also raises the possibility of discovery mechanisms that would not be otherwise available, such as, for example, potential discovery under Section 1782 in the United States.

The current political circumstances in Russia also draw attention to the potential role of testifying witnesses in relation to matters much more rudimentary in nature than politically sensitive testimony. In general terms, testifying witnesses can serve as a deciding factor in providing necessary context to legal and investigative teams. For example, this is often the case in proving fraud that would not be otherwise identifiable as such through third-party analysis, or even documentary evidence, alone.

However, Russia has now passed various legislative measures restricting or entirely blocking certain types of corporate information disclosures – ostensibly with the intent of complicating, and thus countering, the imposition of sanctions by Western governments - which were previously accessible with the click of a button. This means that witnesses may be increasingly needed to testify to such questions as corporate ownership or relationships between corporate parties. In other words, the kind of information that was once generally publicly available.

Finally, the role of potential testifying witnesses also serves as a general reminder of the value of face-to- face meetings, which have become so much less frequent during the last several years of Covid-19 related travel restrictions. These restrictions have, in some parts of the world, only been lifted over the last six months.

Face-to-face meetings remain crucial in identifying testifying witnesses, assessing their potential value and building the rapport typically required to ensure their cooperation.

Just like the prevalence of iPads and e-books never did end the market for paper books, the plethora of open-source intelligence and the now- commonplace practice of video conferencing are unlikely to eliminate the need for testifying witnesses – and the face-to-face meetings that go hand in hand.

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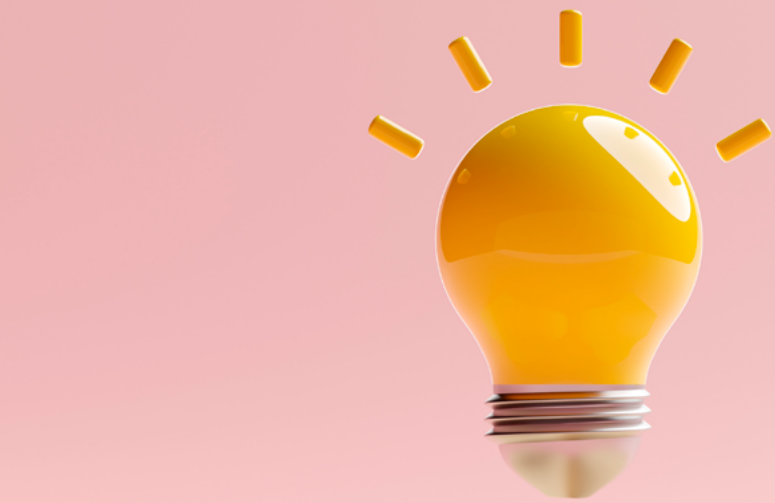

TOP TIPS FOR LAY WITNESSES

Authored by: Meera Shah (Content Manager) - Bond Solon

Put yourself in a witnesses' shoes. They could be a CEO of a multi-million-pound business accustomed to speaking in front of large groups of people. A race car driver, willingly putting themselves in perilous situations. Or an A&E doctor, dealing with life-or-death situations on a daily basis. Regardless of the intellect, tenacity, and confidence they may display in their day-to-day environment, the vast majority of lay witnesses will never have been inside a courtroom or tribunal before. So, the formalities, procedures and setting will be unfamiliar to them. Not to mention giving evidence and being cross-examined by barristers, which can often be an uncomfortable, unsettling, and daunting experience.

Bond Solon is a leading professional training company, which specialises in providing support and guidance to all types of witnesses, including witnesses of fact, professional witnesses and expert witnesses. Our team of experienced lawyer trainers are experts in understanding the specific requirements of a case and the needs of a witness. Having worked with over 250,000 witnesses in our 30-year history, we know the traps that witnesses can fall into and the fundamental behaviours that contribute to a witness presenting their evidence confidently and persuasively.

Whilst not a substitute for comprehensive witness familiarisation training, below we've shared our top tips by way of a 'cut out and keep' guide for factual witnesses when giving evidence in any legal hearing.

1. Preparation is key.

Your witness statement will form the basis of the questions that you will be asked when giving evidence. Opposing counsel will be looking for any discrepancies between the evidence you give at court and what you stated in your witness statement. So, make sure that your evidence is fresh in your mind. Read and re-read your statement and any related documents, before going into the witness box. You should also ensure that you are aware of any potential "challenges" to your evidence that you are likely to face in cross examination and how you might address such challenges.

2. Direct your answers to the decision maker.

When opposing counsel is asking you a question, turn to face them. Consider the question and your answer to it, before directing your answer to the decision maker. This will immediately make your responses more effective as you will be able to observe their reaction and gauge whether the answer is clearly understood. In addition, addressing the decision maker instead of opposing counsel will mean that you are less likely to be impacted by any non-verbal techniques they may have to unsettle you.

When you have finished your answer turn back to the lawyer, at your own pace. This is a signal of readiness.

3. Don't be afraid to seek clarification or assistance from the decision maker.

If you do not understand the question that you are being asked, always obtain clarification from the lawyer before answering. If you do not feel comfortable addressing your request to the lawyer, you will be permitted to ask the decision maker. The decision maker who can then refer any questions to the lawyer. This way you are minimising contact with the lawyer and reducing the risk of becoming unsettled or overwhelmed by contact with them.

4. Communicate effectively.

A legal hearing is not a natural environment. There is tendency for witnesses to mumble or speak too quickly when nervous or overwhelmed. It is important to be conscious of this and adjust your voice accordingly. Remember to take your time and speak clearly and slowly. Avoid using jargon and technical terms. But if you do, explain what the jargon or technical term means. When answering the decision maker, you may see them making notes. This is a useful reminder to you to slow down to give them time to write good notes of what you are saying. There is often no microphone in the hearing to amplify your voice, so you need to pitch their voice appropriately.

5. Assume nothing.

A bundle of documents will have been prepared by the legal team to assist the judge or panel with understanding the case in advance. However, you should not assume when you are giving evidence that the decision maker has had time to read everything beforehand and/or has understood your evidence. Take every opportunity to elaborate and expand on your answer, whilst remaining within the remit of your recollection.

6. Be aware of common cross-examination techniques.

Opposing counsel will use a variety of cross-examination techniques (for example, repeating questions, using an intimidating or aggressive tone, or displaying an overbearing stance) to try to achieve one of the following objectives:

- Attack or undermine your evidence (for example to make you seem inconsistent, mistaken etc.)
- Attack or undermine your character (for example to make you appear incompetent, difficult to deal with etc.)
- Put forward their client's alternative explanation (the "challenge") of what happened ('I put it to you…')

Keep your knowledge of these techniques in mind throughout your court appearance. Remind yourself that it is not personal – your opposing counsel is playing a role. This will help you keep your calm and not get flustered by their actions.

7. Stay calm.

This point cannot be reiterated enough.

The role of a cross-examiner is to undermine your evidence and/or your character. Do not take the bait.

Try to ignore their tone of voice or body language. Stay calm when answering the question put to you and refrain from mimicking their actions.

8. Answer honestly and completely.

You are under a legal obligation to tell the truth, the whole truth and nothing but the truth. This means, quite simply, when giving evidence that you give an honest answer, whether it helps your "side" or not.

The role of a witness is to help the decision maker come to a decision by answering questions. To be helpful the witness needs to give complete answers, not incomplete answers which could be misleading. Nor should a witness avoid answering questions – particularly difficult ones. To do so risks the witness appearing evasive.

9. Stick within the remit of your recollection.

When giving evidence, if you are asked about facts that you do not know, then you should say that you do not know. This is a perfectly proper answer if it is an honest one. Your answers should be limited to those matters of which you have personal knowledge, and you should not speculate or give opinion (if you are a witness of fact).

10. Be professional.

Whilst you are in court purely to give your evidence, appearing professional will only add weight to your credibility as a witness. Dress presentably. Ensure that you address the decision maker and opposing counsel in the correct manner.

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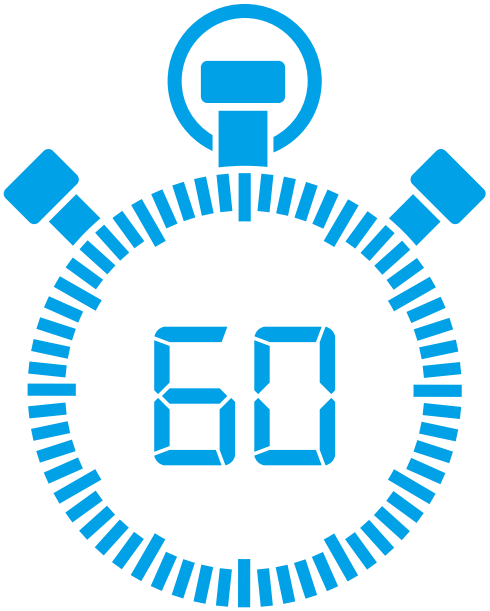

Q What do you like most about your job?

A As a commercial litigator no case is the same, so the intellectual challenge and ability to work as a team. Also seeing young lawyers develop from newly qualified lawyers to partners is really satisfying.

Q What motivated you to pursue this career?

A My father. He was a high profile lawyer and mediator. He meditated between the Colombian Government and M-19 Guerrilla Group and helped integrate M-19 into the Colombian political system.

Q What is the most rewarding thing about your work?

A Dealing with cases which make a difference and in particular inquiries work e.g. Shipman, Baha Mousa and recently the Covid-19 Inquiry but also the investigation into sexual abuse at Manchester City Football Club.

Q Do you have any career aspirations, and have you achieved any of them so far?

A To be a partner at an international law firm which I have achieved. Also when the time is right to become a non-executive director of a football club or sporting organisation.

Q What do you see as being the biggest trends of 2023 in your practice area?

A Class actions and redress schemes and ignore the 'S' bit in ESG at your peril.

Q What has been your most memorable experience during your career so far?

A Winning a major IPO mandate whilst on holiday in a swimming pool bar!

Q How do you deal with stress in your work life?

A Going to the gym 5 times a week and watching Liverpool FC with my daughter and son at Anfield.

Q What does your perfect holiday look like?

A A safari in Cape Town followed by a week of visiting vineyards.

Q What was the last book you read?

A Billion Dollar Whale by Tom Wright and Bradley Hope. I have met some of the individuals mentioned in it.

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

A Paddy Mayne. British Army officer from Newtownards, Norther Ireland (I was also born in Newtownards), capped for Ireland and the British Lions at rugby union, lawyer and a founding member of the Special Air Service.

Q What cause are you passionate about?

A The countryside – keeping our greenbelt and ensuring brownfield sites are regenerated instead.

Q Do you have a New Year's Resolution, and if so, how do you plan to keep it?

A To start weight training again. I gave this up during lockdown.

Q What are you looking forward to in 2023?

A We have lots of high-profile work in the pipeline, lots of talented lawyers some of whom have recently joined, and going on safari.

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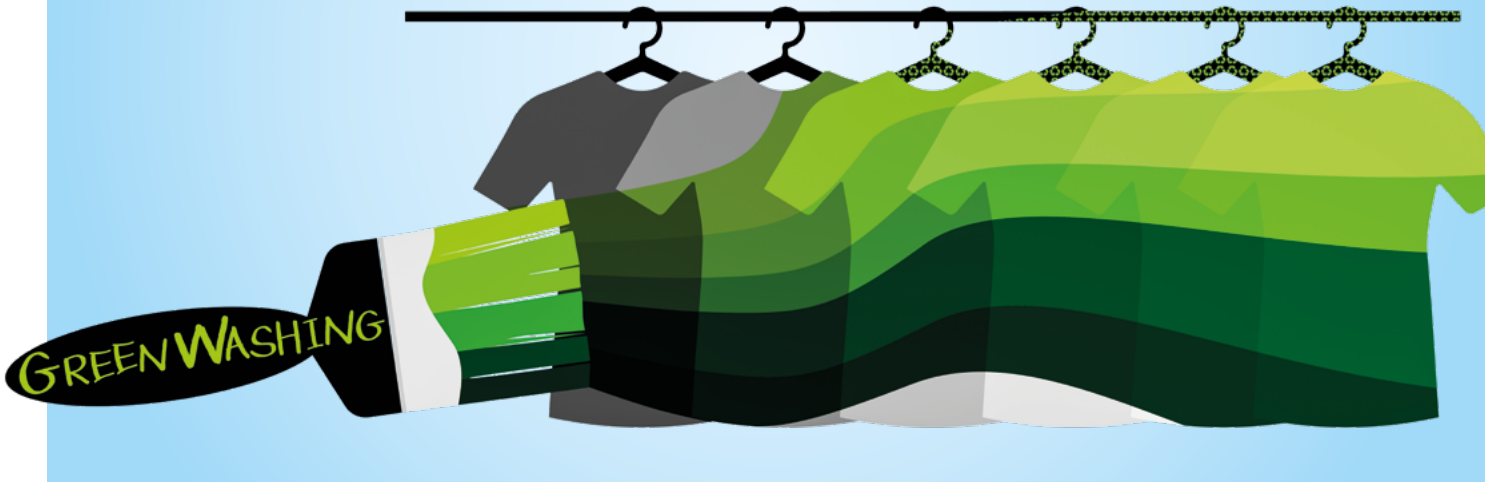

Authored by: Maria Cronin (Partner) and Cécile Nicod (Associate) - Peters & Peters

With more businesses using sustainability as a marketing tool, in a bid to attract environmentally aware consumers or to secure investment in environmental, social and governance (ESG)-related funds, it was only a matter of time before "green" or "eco-friendly" claims would attract the regulators' attention.

In July 2022, the UK Competition and Markets Authority (CMA) launched an investigation into three fashion giants – ASOS, Boohoo and George at Asda – to scrutinise their so-called green claims. This probe follows on from the publication of the CMA's "Green Claims Code" (the Green Code) in September 2021, the product of its inquiry into green claims that first began in 2020.

The Green Code[1] explains that "misleading environmental claims occur where a business makes claims about its products, services, processes, brands or its operations as a whole, or omits or hides information, to give the impression they are less harmful or more beneficial to the environment than they really are".

As of 26 January 2023, the investigation is ongoing according to a CMA press release[2]: "At this early stage, the CMA has not reached a view as to whether there have been any breaches of consumer protection law. The CMA's wider review of the fashion sector and potentially misleading environmental claims in other sectors will continue as the CMA will also consider whether to open further investigations".

On the same date[3], the CMA announced that it would begin to scrutinise green claims made about fast-moving consumer goods (FMCG) such as food and cleaning products both online and in store to consider whether companies are complying with UK consumer protection law.

Potential consequences

If the CMA concludes that companies' green claims constitute "greenwashing", potential outcomes include securing undertakings from the companies committing to change, taking no further action or starting litigation.

The Green Code sets out the legal framework for the guidance which is based on consumer protection rules under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and the Business Protection from Misleading Marketing Regulations 2008 (BPRs), which both contain powers of entry and investigation. The BPRs protect traders in business-to-business cases from misleading advertising.

1 https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims/environmental-claims-on-goods-and-services

2 https://www.gov.uk/cma-cases/asos-boohoo-and-asda-greenwashing-investigation#launch-of-investigation

3 https://www.gov.uk/government/news/cma-to-scrutinise-green-claims-in-sales-of-household-essentials

The CPRs introduced a general prohibition across all sectors preventing traders from engaging in unfair commercial practices towards consumers. Under the CPRs, sanctions include both criminal prosecution and enforcement through the civil courts; they also give consumers a civil right of redress.

Where an offence under the CPRs is said to have been committed with the consent or connivance of an officer of the company (a director, manager, secretary or similar officer) or is attributable to any neglect on their part, under regulation 15, the officer as well as the body corporate, are guilty of the offence.

In addition, the CMA works closely with other enforcement and regulatory bodies, such as the Trading Standards Service and the Advertising Standards Authority (ASA), and will consider "which authority is best placed to act, when taking decisions about enforcement action on misleading environmental claims".

Do not "wait and see"

It is interesting to note that on 28 August 2022, it was reported[4] that ASOS had removed its sustainable fashion collection, "the Responsible Edit" from its website. An ASOS spokesperson stated that "ASOS took the decision to proactively remove the functionality of the Responsible Edit, including filters, from the website in June as we co-operated with the CMA's review of the fashion retail sector and we informed them of this move".

It is clear that the CMA expects corporates to be prepared to justify and substantiate any claims they make on sustainability, including by co-operating and providing access to internal documentation to evidence any claims made. This means looking into the business introspectively as well as looking across to what competitors are doing and preparing to engage with the regulator.

Internally, corporates should be deploying two strategies in parallel: (i) a communications strategy; and (ii) a sustainability strategy.

In relation to communications, it is clear that ultimately, consumers are looking for businesses to be "authentic" and want the messaging to coincide with the product they purchase or in which they invest.

Regarding a sustainability strategy, corporates would be well advised to engage lawyers at an early stage to ensure that the internal documentation on which any sustainability claims are made will withhold scrutiny and is evidence-based.

Finally, the notion of working with competitors should not be ruled out as resources can be pooled to formulate sector-tailored commitments and standards which may reassure the regulator.

Extensive reforms to the CMA's powers are on the horizon by way of the Digital Markets, Competition and Consumer Bill, which the government announced in its Autumn Statement 2022[5] would be brought forward into the third parliamentary session. The Draft Bill as of 10 February 2023 is yet to be published[6] but a look at the government's response to the consultation on reforming competition and consumer policy published in April 2022[7] refers to a significant strengthening of the CMA's enforcement and evidence-gathering powers.

Notably, the CMA is not the only enforcement agency with a close eye on greenwashing: the Financial Conduct Authority is also looking to reinforce its supervisory and enforcement powers in this area.

Looking forward

ESG compliance has become an increasingly complex and challenging regulatory environment for companies to navigate. Increased levels of corporate transparency have been brought about by whistleblowing, corporate leaks, and the huge dissemination of corporate information online, often through social media campaigns. These factors have forced companies to look more closely at their health and safety, environmental and wider human rights practices to ensure compliance not only with legislation, but also with product and industry standards as well as consumers' moral and ethical expectations.

Corporations must start looking at their sustainability and communications policies now, be open to dialogue with the authorities and their competitors and be ready to provide the evidence that supports and substantiates their respective environmental claims.

4 https://inews.co.uk/news/asos-quietly-got-rid-of-its-responsible-clothing-collection-ahead-of-cma-greenwashing-probe-1820500
5 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1118417/CCS1022065440-001_SECURE_HMT_Autumn_Statement_November_2022_Web_accessible__1_.pdf
6 https://publications.parliament.uk/pa/cm5803/cmselect/cmbeis/1078/report.html
7 https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response

Authored by: Dr Robert Kovacs (Special Counsel), Tessa Schrempf (Associate) and Chloé Paloschi (Trainee) - Withers

With over 2000[1] cases filed internationally, climate change litigation is becoming an increasingly important and significant area of litigation. Not only is this type of litigation being used to seek to obtain compensation for affected persons, but it is also being used as a tool to hold governments and (often multinational) companies accountable for a perceived lack of climate mitigation efforts.[2]

This article explores the use and scope of climate change litigation and what it may mean for governments, local communities and investors.

Actions against Governments

The majority of global climate change related litigation cases are being brought against States.[3] These cases, amongst others, include (a) actions by litigants challenging national governments' policy response to climate change, (b) adaptation cases or (c) initiatives in which States are looking for guidance from international courts and tribunals.

Actions challenging national governments' response to climate change

There are a growing number of cases which seek to challenge a State governments' policy decisions in order to compel further action to set and meet national-level targets and take additional action to combat climate change. For example, in the case of Urgenda v State of the Netherlands ("Urgenda"), the District Court in The Hague found that the Dutch government had failed to fulfil its duty of care pursuant to Articles 2 and 8 of the European Convention on Human Rights by not taking steps to reduce emissions by at least 25% by the end of 2020.

Following this landmark case, governments of at least four other European countries (including Ireland, France, Germany and Belgium) have been held to be in breach of human rights obligations by their national courts for failing to implement climate commitments.[4]

1 In December 2022 there were 1522 cases classified as climate change related in the US and 654 outside the US; see Climate Case Chart available at http://climatecasechart.com/about

2 "Understanding the Role of ESG and Stakeholder Governance within the Framework", Harvard Law Publication, dated 29 November 2022, available at https://corpgov.law.harvard.edu/2022/11/29/understanding-the-role-of-esg-and-stakeholder-governance-within-the-framework-of-fiduciary-duties/. The definitions of climate change are those used by the Grantham Research Institute of Climate Change and Environment website, available at https://climate-laws.org/cclow/litigation_cases and Columbia Law School Sabin Center for Climate Change Law, available at http://climatecasechart.com/.

3 "Global Climate Change Litigation", Climate Case Chart, available at http://climatecasechart.com/non-us-climate-change-litigation/ , with "global" climate change litigation referring to non-US cases.

4 Urgenda Foundation (on behalf of 886 individuals) v State of the Netherlands (Ministry of Infrastructure and the Environment), ECLI:NL:HR:2019:2007, available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf

Other cases have sought to challenge States' national policy or regulation without reference to a State's human rights obligations. One example is R (on the application of Friends of the Earth) v UK Export Finance ("UKEF"), where a decision by the UK's export credit agency UKEF to back a liquefied natural gas project in Mozambique has been unsuccessfully challenged by environmental campaigners, Friends of the Earth.[5] In another UK case, R(oao Friends of the Earth) v Secretary of State for Business, Energy and Industrial Strategy ('Net Zero Challenge'),[6] three NGOs successfully challenged the UK government's compliance with specific duties under the Climate Change Act 2008. In July 2022, the English High Court ruled in favour of the NGOs and required the UK government to produce and re-approve an updated and improved strategy.[7]

Climate change adaptation cases

Another category of disputes seek compensation for monetary losses suffered by companies due to the impacts of climate change, such as rising sea levels, more frequently severe weather and intensifying wildfires affecting infrastructure and operations. These are often referred to as 'climate change adaptation cases'.

One such example is the discontinued 2016 Canadian class action of Burgess v Ontario Minister of Natural Resources and Forestry.[8] The case was brought by an individual on behalf of an affected class of persons, including companies, owning property or with ownership interests in property "situated on the shoreline of the Muskoka Lakes who suffered damages as a result of high-water levels, flooding, and/or floating ice in March or April 2016."[9]

Further 'climate change adaptation cases' have been brought in the United States, which have included actions seeking damages payments for losses incurred, challenges to adaptation measures and actions seeking greater adaptation measures.[10] Notably, many of these cases have been brought by governments or government departments against corporations. For example, in late 2022, two such cases were brought against Exxon Mobil Corp. and other fossil fuel companies. The cases seek damages for the alleged substantial impact that fossil fuel companies have had in causing climate change and resulting harms to New Jersey;[11] and for losses resulting from storms during the 2017 Puerto Rico hurricane season and ongoing economic losses since 2017.[12]

Initiatives before international courts and tribunals

A further significant avenue to address climate change impacts is through procuring advisory opinions from international courts or tribunals. Two such initiatives are currently being advanced by small island States in the so-called Tuvalu ITLOS Initiative and the Vanuatu ICJ Initiative:

a) On 31 October 2021, Antigua & Barbuda and Tuvalu signed an agreement[13] establishing a commission with the power to request an advisory opinion from the International Tribunal for the Law of the Sea ("ITLOS").

b) On 29 November 2022, a group of 16 States led by Vanuatu published the draft text of a proposed UN General Assembly resolution ("ICJ Resolution").[14] The intention of the ICJ Resolution is to request an advisory opinion from the International Court of Justice ("ICJ") on climate change. Vanuatu's related press release says that the "ICJ Advisory Opinion will clarify, for all States, our obligations under a range of international laws, treaties and agreements, so that we can all do more to protect vulnerable people across the world."[15]

A third initiative was commenced by Chile and Colombia on 9 January 2023, when the two States submitted a request[16] to the Inter-American Court of Human Rights ("IACHR") for an advisory opinion. The request asks the IACHR to opine on questions on the following issues:

a) State obligations derived from the duties of prevention and guarantee of human rights in the face of climate emergencies;

b) State obligations to preserve the right to life and survival in the face of a climate emergency, in light of science and human rights;

c) State obligations with regard to the rights of children and new generations in the face of the climate emergency;

d) State obligations arising from consultation and judicial procedures in the event of a climate emergency;

e) the conventional obligations of protection and prevention for environmental and territorial defenders, as well as women, indigenous peoples and Afro-descendant communities in a climate emergency; and

f) the shared and differentiated rights, obligations and responsibilities of States in the face of a climate emergency.

As climate change law develops, advisory opinions are capable of clarifying the applicable international law standards by providing guidance and serving as points of reference in future negotiations and court and tribunal decisions. These three initiatives, and others that may follow, will therefore be important developments to monitor.

5 R (on the application of Friends of the Earth) v UK Export Finance [2022] EWHC 568. In March 2022, a split two judge panel found that the decision was lawful, concluding that the decision-making process of UKEF was multifaceted and involved balancing different policy considerations. These included not only climate change but other factors, such as the eradication of poverty in Mozambique. Friends of the Earth was granted permission to appeal. See also J Setzer and C Higham, "Global Trends in Climate Change Litigation 2022", London School of Economics, dated June 2022, available at https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf .

6 England & Wales | R (on the application of Friends of the Earth) v Secretary of State for Business Energy [2022] EWHC 1841 (Admin).

7 J Setzer and C Higham, "Global trends in climate change litigation: 2022 snapshot", Grantham Research Institute on Climate Change and the Environment, dated June 2022, available at https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf .

8 Burgess v Ontario Minister of Natural Resources and Forestry, Court File No. 16-1325 CP, Ontario Superior Court of Justice.

9 Burgess v Ontario Minister of Natural Resources and Forestry, Court File No. 16-1325 CP, Ontario Superior Court of Justice, Statement of Claim, paragraph 4.

10 "U.S. Climate Change Litigation", Climate Case Chart Publication, available at http://climatecasechart.com/us-climate-change-litigation/, adaptation section

11 "The municipalities alleged that the defendants were responsible for 40.01% of all global industrial greenhouse gas emissions from 1965 to 2017, and that these collective emissions were a 'substantial factor in the increase in intensity of the 2017 Atlantic Hurricane Season' "; Platkin v Exxon Mobil Corporation, Superior Court of New Jersey Law Division, Docket No. GLO-L-000297-19; also available at http://climatecasechart.com/case/municipalities-of-puerto-rico-v-exxon-mobil-corp/.

12 Municipalities of Puerto Rico v Exxon Mobil Corporation, Case 3:22-cv-01550 (22 November 2022).

13 Multilateral Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law ("the COSIS Agreement"), dated 31 October 2021, available at https://treaties.un.org/doc/Publication/UNTS/No%20Volume/56940/Part/I-56940-08000002805c2ace.pdf

14 Draft Resolution of the Request for an Advisory Opinion on the obligations of States in respect of climate change, Vanatu International Court of Justice Resolution, dated 29 November 2022, available at https://www.vanuatuicj.com/resolution

15 "Vanatu Releases Draft Resolution asking the ISJ for an Advisory Opinion", Government of the Republic of Vanatu Press Release, dated 30 November 2022, available https://docs.google.com/document/d/1_kNu7m-tISjmKC4mrlkHPvGYQr69MyWU/edit

16 Request by Chile and Colombia to the Inter-American Court of Human Rights, dated 9 January 2023, available at (Spanish only): http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2023/20230109_18528_petition.pdf

Actions brought by affected local communities

Recent trends in climate change litigation show that communities in developing countries are potentially more acutely impacted by climate change.

For example, in Ioane Teitota v New Zealand,[17] the UN Human Rights Committee ("UNHRC") observed "the author's claim that sea level rise is likely to render Kiribati uninhabitable" in the next 10 to 15 years, noting also that the time frame could however "allow for intervening acts by Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population."[18]

A similar observation was made in the case of Daniel Billy et al v Australia ("Daniel Billy"),[19] in which the UNHRC amongst others, considered the islanders' claim that the relevant Torres Strait islands were likely to be uninhabitable within 10 to 15 years due to rising sea levels. In what is considered a landmark finding, the UNHRC observed that the Australian Government had violated its human rights obligations towards eight Torres Strait Islanders through its climate change inaction. The UNHRC noted the obligation on Australia to provide adequate compensation to the alleged victims for the harm suffered, and to take steps to secure the communities' continued safe existence.

In the case of Juliana v United States of America ("Juliana"),[20] the United States government was sued by 21 young claimants for failing to protect the right to life, liberty and property of young people by promoting and subsiding the use of fossil fuels despite having knowledge of the harmful environmental impacts. Similar to the Urgenda case, Juliana has precipitated similar lawsuits outside of the United States, such as the Supreme Court proceedings in Colombia, where 25 young claimants successfully sued the Colombian government on the grounds that climate change, and the government's failure to reduce deforestation in the Columbian Amazon, had breached their fundamental rights. As a result, in 2018, the Colombian government was ordered to formulate a plan, alongside the claimants and affected communities, to address the rate of deforestation.[21]

Actions brought by international investors

International investment law is also being increasingly considered as an effective avenue to address climate change issues. The international investment legal regime comprises more than 3,000 bilateral and multilateral International Investment Agreements ("IIAs") aimed at promoting foreign investment. In becoming party to an IIA, a State commits to afford minimum levels of protection to foreign nationals in other IIA party States who invest in their territory. If standards of protection offered by a State are breached, foreign investors may, under many IIAs, commence arbitral proceedings against the host State through Investor-State Dispute Settlement ("ISDS").

Over the last decade there has been an increase in ISDS cases which can be considered to relate to climate change.

Compensation claims

There are a group of claims that relate to the alleged reduction in value of existing assets or investments made by foreign investors following the introduction of policy measures intended to address climate change. For example, in the case of RWE v Kingdom of the Netherlands, the German energy company commenced proceedings against the Dutch government for planning to phase-out coal-fired power plants by 2030. The claim was brought under the Energy Charter Treaty ("ECT") for a claim of damages of around EUR 1.4 billion.[22]

Changes to climate legislation and policy

Another group of claims concern changes made to climate change-related legislation or policies originally introduced to meet climate goals, such as providing subsidies and other incentives to encourage investment in renewable energy. For example, in the case of PV Investors v Spain and Eskosol v Italy,[23] claims were brought against States after schemes were amended to reduce the level of incentives designed to encourage renewable energy investment.

Redress claims for insufficient action

A third category of IIA claims may potentially be brought against States for a failure to take sufficient action to combat the impacts of climate change which results in damage to investments, such as impacts of extreme weather on investments or rising sea levels flooding investments.

17 Ioane Teitiota v New Zealand (CCPR/C/127/D/2728/2016), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/127/D/2728/2016&Lang=en .

18 Ioane Teitiota v New Zealand (CCPR/C/127/D/2728/2016), paragraph 9.12.

19 Daniel Billy and other v Australia, No. 3624/2019, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f135%2fD%2f3624%2f2019&Lang=en

20 Juliana v United States, 947 F.3d 1159 (9th Cir. 2020), available at http://climatecasechart.com/case/juliana-v-united-states/

21 Demanda Generaciones Futuras v Minambiente (STC4360-2018), available at http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/

22 RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands, ICSID Case No. ARB/21/4 also available at http://climatecasechart.com/non-us-case/rwe-v-kingdom-of-the-netherlands/

23 The PV Investors v Spain, PCA Case No. 2012-14, available at https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/435/the-pv-investors-v-spain; and Eskosol S.p.A. in liquidazione v Italian Republic, ICSID Case No. ARB/15/50, available at https://www.italaw.com/cases/5895

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COUNTERING CORPORATE DISINFORMATION IN AN AGE OF ESG SCEPTICISM

Authored by: Carys Whomsley (Director) - Digitalis

The notion that companies should be concerned with how their business impacts society and the environment is not new. But in recent years, the impact of businesses on these areas has been at the forefront of public consciousness, influencing consumer behaviour and stakeholder expectations to an unprecedented degree. Activism in this area is gathering pace, with growing concern surrounding the protection of the environment, ethical working practices and human rights.

Demonstrating dedication to environmental, social and governance (ESG) practices is now a key strategy for many corporates. But in the rush to adapt, several have fallen short, with sustainability claims later unmasked as empty rhetoric. This has led to heavy scepticism of ESG claims, which are now closely scrutinised. Greenwashing, corporate hypocrisy and reputation washing – all terms describing the practices of exaggerating ESG credentials – are accusations frequently levelled against companies by the public, and beyond the potential regulatory issues such accusations can bring, they can have devastating and lasting consequences on an organisation's reputation.

Corporates striving to undo decades of unsustainable practices and implement lasting change are acutely aware that it cannot happen overnight.

However, the increasing appetite for change is providing fertile ground for reputational attacks on firms in the form of sensationalist media and social media campaigns. Such approaches can be highly effective in swaying the opinions of consumers who are already angered by the incessant stream of corporate hypocrisy stories.

Stopping the tap on increasingly sophisticated campaigns

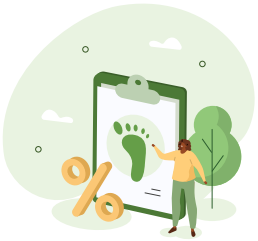
Public sentiment against organisations across multiple sectors is increasingly being manipulated by hostile groups. Coordinated hostile campaigns centred on greenwashing claims are conducted by activists and competitors under the guise of grassroots campaigns or the organic development of consumer concern. The vehicles used for these campaigns are designed to give them broad reach, mixing diverse media to maximise discussion and shareability. Such techniques appear to have been deployed in a fake press release

campaign against Adidas in January this year, which claimed that Cambodian former garment worker and trade union leader was to become its Co-CEO. The group responsible for the fabrication described Adidas as “masters of greenwashing” in explanation of its motive, and the story quickly took hold across traditional and social media outlets.

While the Adidas hoax was rapidly identified as false, the sophistication of disinformation attacks is developing at a frightening pace on social media, and many are not such obvious hoaxes. The orchestrators of these campaigns deploy manipulated media such as deepfakes and false online personas, exploiting new technologies and the limitations of social media platforms’ content moderation capabilities to create and spread the stories. Automated attacks will only become more convincing through the use of new AI software such as ChatGPT, which has already been shown to present misinformation in a deceptively authoritative manner.

With such campaigns proliferating on social media and being promoted through major internet platforms such as Google, all eyes have been on two US Supreme Court cases in February: Twitter v. Taamneh and Gonzalez v. Google. These have led to the examination of the suitability of Section 230 of the US Communications Decency Act, which protects internet providers from liability for the content they carry.

A subsequent bill introduced by a bipartisan group of US Senators and Members of Congress on 28 February 2023, which would make wide-reaching reforms to Section 230, called Safeguarding Against Fraud, Exploitation, Threats, Extremism and Consumer Harms (SAFE TECH), could lead social media companies to be held accountable for enabling forms of online harm including harassment. The outcome will have global implications on the responsibility of tech companies for the content they host – which, one day, may include disinformation.



The complexities of countering hostile campaigns

In the meantime, however, despite the extensive reach of corporate disinformation campaigns on social media and the potential harm that can be inflicted on an organisation’s reputation as a result, countering disinformation can be a slow process – particularly in jurisdictions with weak defamation laws, or when working with unsympathetic social media companies.

As hostile activist and social media campaigns are usually carried out anonymously, it can be difficult to identify their originator(s). The fastest way to prevent a campaign from spreading is often by directly approaching the platforms being used, and demonstrating that the campaign contravenes their terms of use – for example, by proving that coordinated inauthentic behaviour or platform manipulation has taken place. This may involve presenting evidence that participating accounts in a campaign form part of a group of automated accounts known as a botnet, created or co-opted specifically to amplify the hostile campaign. Other approaches may involve presenting evidence of unauthorised and misleading synthetic material, such as deepfakes or doctored photographs, or presenting indications of harassment.

Even if the platforms do agree to take the content down, significant damage may already have been caused by this stage.

A reputation management strategy focusing on communications and legal redress can be essential to mitigating further damage, and recovering resultant financial losses.

Investigative support options for judicial remedies

Digital investigative measures to support an organisation’s legal team are often crucial to ensure the best results are achieved.

The first important measure is preserving all evidence of a campaign as soon as it is identified, and prior to the potential removal of defamatory content on the platforms, to ensure that the potential reach and impact of the narrative can be quantified.

Following this, investigations to establish the spread and reach of the narrative across platforms can provide evidence to show that the threshold for serious harm has been met, for jurisdictions in which this is necessary for defamation claims. Digital investigations can also establish the identities of the individuals or groups behind a hostile campaign, even where they have worked to conceal their involvement. Targeting the originators of a campaign at source can significantly reduce the likelihood of future anonymous campaigns emerging, and close monitoring can ensure that the emergence of any new campaign is stopped in its tracks.

The increased public focus on the importance of ESG matters is a welcome step in the right direction – as is legislator focus on digital trust and safety, placing more responsibility on platforms to prevent the spread of harmful and sensationalist content. But during this adjustment period, it is more important than ever to stay aware of reputational attacks and the best ways to mitigate them.

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THE POWER OF ESG COMPLIANCE

THE KEY TO LONG-TERM SUCCESS FOR BUSINESS

Authored by: Gloria Mbevi (Associate) - Gikera & Vadgama Advocates

In Kenya, it is increasingly clear that sustainability is vital to any company's long-term success. Companies are actively striving to incorporate ESG principles into their operations and investments to remain competitive in the marketplace and protect their bottom line. ESG considerations now play a significant role in decision-making in both the public and commercial sectors, solidifying their place in the global conversation on climate change.

Many businesses are now proactively setting ESG targets and tracking key performance indicators. In light of this, it would be wise for businesses, especially those in financial distress, to be cognizant of the potential effects of ESG on lenders, borrowers, and stakeholders.

Understanding the impact and role of ESG will be prudent for businesses undergoing restructuring, as one can anticipate increased ESG scrutiny from buyers, investors, and lenders. This scrutiny will range from assessing a company's environmental impact and commitment to corporate social responsibility to evaluating its governance structure and management systems.

At the core of ESG is the concept of corporate governance, which ensures that businesses are managed responsibly and effectively when financial decisions are made while having the best interests of all stakeholders in mind.

Many corporations have had to declare bankruptcy or undergo reorganization as a result of inadequate or absent corporate governance. Consider the 2015 failure of the Imperial Bank of Kenya, which, among other causes, was due to poor corporate management and control.

When considering the potential restructuring options available to distressed businesses, the attitudes of lenders and investors towards risk will be fundamental.

For investors, ESG factors will be considered to evaluate a company's sustainability and long-term performance or to lower risk in their portfolio by avoiding companies with subpar ESG standards. For businesses, ESG standards will aid in establishing a favorable reputation, drawing in more investors, and identifying possible areas for development or improvement. For consumers, ESG will be utilized in choosing brands and businesses that align with their values and beliefs and to make wiser purchase decisions.

With this in mind, stricter ESG disclosure and reporting requirements are now being imposed by regulators and governments on financial

institutions, investors, and advisers. These entities, in turn, are scrutinizing their investments and portfolios more closely to ensure compliance with their own requirements. Before investing additional money in a distressed company, potential investors will also want to make sure the company is adhering to all pertinent regulatory obligations.

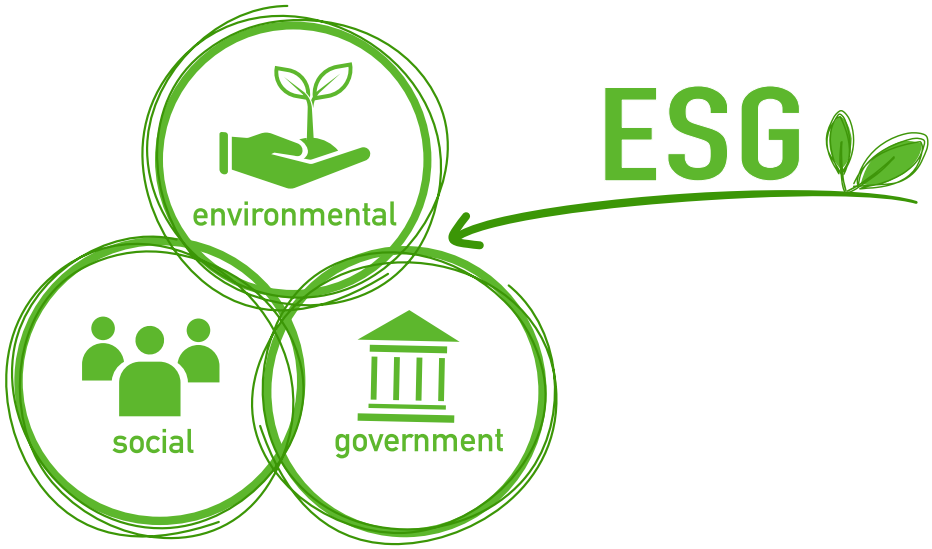
To this end, Kenya, as part of its Vision 2030 has made progress by enacting rules and regulations that encourage environmental stewardship and social responsibility. The Companies Act, 2015 requires companies to report on their social and environmental impact, while the Business Registration Act, 2015 promotes the incorporation of corporate social responsibility into the operations of companies and organizations. Regulators such as the Capital Markets Authority (CMA) require businesses to publish their ESG policies and performance, which promotes responsible investment. A Corporate Governance Code was also set up by the CMA, which stipulates that organizations must have an effective board of directors, adhere to the Code of Corporate Governance, and create and use internal controls.

Similarly, the Central Bank of Kenya has provided banks with guidelines on how to manage climate-related risks, forcing them to take into account the borrowers' potential business impacts on the environment.

The borrower's ability to show how their company combats climate change becomes a crucial component of enterprises seeking bank financing.

With these regulations, the demand for ESG reporting and performance continually grows, resulting in companies that implement ESG practices positioning themselves to fulfill the expectations of their stakeholders and contribute to sustainable development. Businesses across industries will increasingly recognize that partnering with companies with strong ESG profiles will result in more sustainable values for stakeholders in the long term.

By taking ESG into account, especially during the restructuring process, companies can better ensure that their operations are aligned with the highest standards of ESG principles, allowing them to recover from any restructuring more quickly and remain competitive in the long term.



Even though there is a pressing need for businesses to move toward ESG compliance, there are still obstacles in the way of its implementation, such as a lack of knowledge and comprehension of ESG principles among businesses and stakeholders. Companies also lack the necessary technical expertise to effectively implement ESG principles. These obstacles can sometimes lead to the imposition of hefty fines by regulators such as the Nairobi Securities Exchange and the CMA for failing to comply with corporate governance and ESG requirements.

However, with the right policies and measures in place, companies can work towards adapting and conforming to the evolving ESG and sustainability legal and regulatory landscape across a broad range of sectors, ensure they reduce their environmental footprint and navigate towards developing and reshaping ESG strategies to create, preserve, or unlock value of distressed businesses attempting a restructuring.

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