A FINANCIER WORLDWIDE EBOOK

MANAGING AND RESOLVING COMMERCIAL DISPUTES

2024 EDITION

IN ASSOCIATION WITH

ICDR INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

AMERICAN ARBITRATION ASSOCIATION®

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**Managing and Resolving
Commercial Disputes**

A FINANCIER WORLDWIDE EBOOK

in association with

International Centre for
Dispute Resolution (ICDR)

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ABOUT INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)

The not-for-profit American Arbitration Association (AAA) is the world's leading provider of alternative dispute resolution (ADR) services, administering over 7 million ADR cases since its 1926 founding. With 29 offices in the United States and Singapore, the AAA provides organisations of all sizes in virtually every industry with ADR services and products. The International Centre for Dispute Resolution (ICDR), the international division of the AAA, extends the AAA's role globally. Established in 1996, the ICDR serves parties from over 100 countries with a multilingual staff experienced in international dispute resolution proceedings and a roster of 725-plus arbitrators and mediators. For more information, visit www.adr.org and www.icdr.org.

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INTRODUCTION

BY FRASER TENNANT AND RICHARD SUMMERFIELD

TRENDS IN COMMERCIAL DISPUTES

A COMMERCIAL DISPUTE IS GENERALLY an undesirable scenario for any company, whatever its composition. But for those companies unable to absorb the time and cost implications of resolving disputes, the implications can multiply and prove damaging or even destructive.

Commercial disputes are, however, an unavoidable facet of the business world. They occur in all sectors and industries between companies and individuals, or a mixture of both, and arise as part of a designated contract or transaction.

Simply put, disagreements can be the result of issues with the exchange of goods or services, a company not performing contractual terms correctly, a misunderstanding between two companies, pricing problems, delays in performance or company mismanagement.

Much of this discontent is a result of geopolitical tensions over the past 12 months, which businesses see as the biggest threat to the global economy, both in the near and mid term. These tensions have, in turn, led to issues such as supply chain disruptions, which have served to pile pressure on companies' operations and the commercial relationships underpinning them.

Against this backdrop, common types of commercial disputes frequently rear their head, forcing parties to identify the best, preferably most expedient, means of resolution.

Contractual disputes may arise in many forms, but usually occur when a party does not comply with the terms of a contract or does not perform their side of its obligations under a contract. In such an instance, this may give rise to a claim for breach of contract.

Shareholder or director disputes typically involve conflicts between individuals with a vested interest in the company's success, such as majority and minority shareholders, and can involve breaches of directors' duties and unfair prejudice petitions.

I-nsolvency disputes – involving creditors, insolvency practitioners and former directors – range from an application to set aside a statutory demand to enforce a debt to complex insolvency litigation matters such as an application to make a former director personally liable for a company's debts.

Professional negligence claims cover a broad range of disputes where a professional has been instructed to provide a service, but the service has fallen short of the standard expected. If the problem has caused a loss to be suffered then a claim in professional negligence could be brought against that professional.

Partnership disputes occur when there are disagreements between partners in an enterprise. These can arise from a failure to agree on a business's direction, or as a result of a partner's misconduct. Disputes may emerge out of an unbalanced partnership, where one partner contributes significantly more than another.

Defective products and quality issues are significant factors in many construction disputes. These can include problems around poor quality workmanship, the use of substandard materials, failure to comply with specific contractual obligations and also incidences of failure to advise those managing the project's budget or otherwise paying for goods or services of increases in price for materials or labour.

Intellectual property (IP) disputes often arise from IP infringement, which seriously harms or destroys not only the value of the IP rights themselves, but also the individuals and commercial organisations behind them.

Lastly, with companies relying on the payment of invoices for cash flow, the late or non-payment of invoices is a large-scale problem, particularly for small and medium-sized enterprises, leading to debt-related disputes.

As well as being stressful, distracting and time-consuming, disputes of this nature – and this list is by no means exhaustive – also use up valuable financial resources, affect commercial relationships and impact reputation.

However, by taking proactive measures and following strategic legal guidance, disputing parties can manage and minimise the more undesirable impact of their disagreements.

These measures include a range of alternative dispute resolution mechanisms – including mediation, arbitration and neutral evaluation – that can be deployed to resolve a dispute as quickly and amicably as possible, thus avoiding a potentially lengthy and expensive litigation process.

Should a commercial dispute be allowed to linger, greater problems potentially lie in wait. Prolonged disputes are likely to result in increased legal costs, lost revenue and wasted time, with valuable resources being consumed that could be better spent on more pressing areas of business growth and development.

Furthermore, ongoing conflicts can strain relationships with clients, suppliers and partners, potentially leading to missed opportunities and a damaged reputation – essentially, disrupting or curtailing commercial objectives.

TRENDS IN ARBITRATION

ARBITRATION REMAINS AN ENDURINGLY popular method of resolving commercial disputes. While litigation will always have an important role to play, arbitration can be quicker, cheaper and more convenient than going to court, as well as having the principal commercial advantage of confidentiality.

Over time, arbitration has become the preferred method of resolving contractual and financial disputes, especially in the international context. The past decade has seen a rise in the number of disputes before arbitral institutions. With an uncertain economic, political and financial climate worldwide, that number is set to climb.

Amid this changing, turbulent landscape, arbitral institutions are revising and updating their rules. For instance, the revised arbitration rules of the China International Economic and Trade Arbitration Commission in force from 1 January 2024 include provisions for pre-arbitration consultation and mediation, early dismissal of claims, disclosure of third-party funding, electronic filing of submissions and virtual hearings.

Elsewhere, new rules have come into force at the Madrid International Arbitration Centre, and are expected from both the Netherlands Arbitration Institute and the Singapore International Arbitration Centre. Meanwhile, the Hong Kong International Arbitration Centre has launched a public consultation on proposed revisions to its 2018 Arbitration Rules.

Legislative reform in a number of jurisdictions will also have an impact on the uptake of arbitration over the coming years. In the UK, a new arbitration bill intended to update the Arbitration Act 1996 recently began its progress through the UK parliament. The bill is intended to implement the Law Commission's recommendations and is expected to be enacted this year.

In Japan, the country's new Arbitration Act is expected to come into force before April 2024. It will make several key changes, including on court enforcement of interim awards and waiving Japanese translation of certain court documents.

The German Ministry of Justice published a key issues paper on reforming its arbitration law and will continue consulting stakeholders through 2024. In Italy, decisions are expected to clarify interpretation of the 2023 amendments to the Italian Arbitration Law and application of the new Milan Chamber of Arbitration Rules.

New technological developments are also changing the face of international arbitration. The coronavirus (COVID-19) pandemic caused technology adoption rates to skyrocket. Though the arbitration space had utilised technology in the past, the switch to remote and virtual hearings during the crisis saw it become the new normal, bringing attendant savings on travel, accommodation and hearing centre costs.

Furthermore, the rapid adoption and growing deployment of technology across the economy is likely to lead to disputes in the coming years. The rise of generative artificial intelligence (GenAI), for example, is one potential source of arbitration cases. Advanced forms of AI and large language models present both opportunities and risks. In the dispute resolution field itself, AI is being deployed in areas including dispute prevention, arbitrator selection, management of arbitration proceedings and the drafting of documents. However, as with any innovation, there are risks associated with GenAI adoption, such as bias, 'hallucinations', privacy, due process, and the integrity of proceedings and evidence.

In light of AI's growing influence, governments are developing AI-related legislation. In the EU, for instance, the AI Act will be a landmark, harmonising regulation of AI across member states. The Act has been designed to protect fundamental rights by putting limits on high risk AI systems and setting transparency obligations for general-purpose AI systems. Notably, the US still lags behind, having not made any meaningful progress on federal legislation governing AI usage.

There has also been a notable rise in environmental, social and governance (ESG) issues affecting companies. This focus is finding its way into commercial contracts, particularly agreements between larger organisations. Naturally, an increase in ESG-related obligations, in addition to growing awareness of ESG ideals in corporate policies and investment decisions, could spark related disputes in the years ahead. Such disputes may originate in commercial contracts and international trade and investment treaties, with international arbitration likely to be the most appropriate forum in which to resolve them.

Amid myriad factors, such as the Russia-Ukraine war, conflict in the Middle East, disruption to supply chains, national protectionism, ESG-related concerns and the inexorable rise of AI, international arbitration will remain central to dispute resolution processes.

■ *Fraser Tennant and Richard Summerfield are associate editors at Financier Worldwide.*

Q&A

CLASS AND GROUP ACTIONS IN 2024

James Brady-Banzet at Cleary Gottlieb Steen & Hamilton LLP, Kenny Henderson at CMS Cameron McKenna Nabarro Olswang LLP and John Rhie at Quinn Emanuel Urquhart & Sullivan, LLP discuss trends in class and group actions.

Q: Could you provide an overview of notable trends shaping class and group actions in 2024? How would you characterise recent activity?

BRADY-BANZET: There is a meaningful volume of collective and group action litigation in the UK, with a marked growth in collective actions before the Competition Appeal Tribunal and group actions before the High Court as the legal regime around collective and group actions has become increasingly permissive. Several high-profile cases have drawn attention to the sector, and there is a growing body of case law at first instance and appellate level that is defining the boundaries and scope of collective action and group action regimes. Collective and group action procedures are increasingly deployed in relation to the environmental, social and governance (ESG) impact of corporations, and in areas such as consumer rights. The availability of litigation funding has facilitated a substantial increase in the number and scale of collective and group actions.

RHIE: Class arbitrations, being arbitrations brought by one class representative on behalf of itself and other class members, have become more common in recent years. The American Arbitration Association's (AAA's) case docket reveals that seven class arbitrations were received by the AAA in the first three months of 2024 – a sharp increase from 2023 where only four class arbitrations were received in the first three months, and from 2022 where only one class arbitration was received in the same time period. This rise of class arbitrations is driven by the same reasons that spurred the rise of class action litigations. Class arbitrations allow claimants with smaller claims to join with – and thereby spread the costs of arbitrating with – other claimants to prosecute their claims in a single action. Furthermore, class actions promote procedural efficiency, as they reduce the likelihood of multiple parallel proceedings against the same defendant.

Q: Have there been any changes legislative changes which are likely to impact class and group actions?

RHIE: Hong Kong law does not prescribe any class action mechanism. The mechanism for multiparty litigation takes the form of representative proceedings. Where 'numerous persons' have the 'same interest' in any proceedings, any one or more persons can commence proceedings to prosecute claims on behalf of themselves and all members of the class. The Law Reform Commission of Hong Kong published a 'Report on Class Actions' in May 2012, recommending the introduction of a class action regime through an incremental approach. The Department of Justice established a working group to consider the recommendations made in the report. On 26 August 2021, the working group appointed an advisory firm to review how introducing a class action regime for consumer cases would affect different stakeholders in Hong Kong. It is possible that we will see legislative changes to implement a class action regime for consumer cases in the coming years.

HENDERSON: We have seen recent efforts to expand the UK's competition class action regime into other causes of action through amendments to the Digital Markets, Competition and Consumers Bill. Those amendments were rejected. Another development is the Litigation Funding Agreements (Enforceability) Bill, which is presently passing through parliament. That bill would reverse the Supreme Court's decision in *PACCAR* and operates retrospectively. The retrospective application is controversial from a rule of law perspective. It is also questionable whether the bill is needed. *PACCAR* did not rule that all litigation funding agreements (LFAs) are damages-based agreements (DBAs), merely that that could be DBAs depending on how they are structured, and since *PACCAR* there have been three first instance judgments approving LFAs as valid.

BRADY-BANZET: The UK government recently proposed a significant piece of legislation that can be expected to facilitate the availability of litigation funding for class actions. The Litigation Funding Agreements (Enforceability) Bill would reverse a decision of the Supreme Court that brought the enforceability of many litigation funding agreements into question and would do so with retrospective effect. This will impact class and group actions by addressing current doubts and concerns about the enforceability of such agreements and is intended to address a perceived detrimental impact on the attractiveness of England as a global hub for disputes, and on access to justice more broadly.

Q: What are some of the key challenges typically involved in defending against class and group actions?

HENDERSON: Class actions bring a multitude of challenges for corporates. They most obviously bring significant financial exposure. The alleged conduct might also be the subject of actual or potential regulatory scrutiny. Corporates are aware of potential copycat claims or proliferation risk, including of claims being filed in different jurisdictions. Media coverage can add some pressure, but it is often overstated. In-house legal also need to manage their internal stakeholders and external stakeholders, such as customers, and reputational issues.

BRADY-BANZET: Defendants will often have limited, if any, opportunity to address a class or group action before it is announced publicly by the claimants, and therefore need to be prepared to respond swiftly once a claim is announced. Large groups of claimants also present challenges, as a defendant may require specific information about the claimants and their claims that can be difficult to obtain early in the proceedings. Settlement can also present challenges because of third party financial interests such as funders, and because of the requirement for approval from the Competition Appeal Tribunal in collective proceedings that are before it.

RHIE: Defendants in representative proceedings face an array of challenges. The first challenge is that under Hong Kong law, there is no cap on costs in litigation proceedings. Defendants to representative proceedings can – in theory – be liable to the costs of all claimants in the representative action. This might in turn lead to additional costs for defendants even before the commencement of a representative proceeding, for example in having to take out insurance to cover the risk of representative proceedings. A second challenge is that the existing law is not designed to deal specifically with group litigation. Courts have therefore proceeded on an ad hoc basis, and there is considerable uncertainty surrounding representative proceedings in Hong Kong.

Q: What strategies can in-house and outside counsel employ to effectively manage a class or group action case? How important is it for defendants and counsel to be proactive from the outset?

RHIE: It is imperative for defendants and their counsel to be proactive from the outset. This tracks back to the contract phase. In the US, businesses often include 'class action waivers' in their terms and conditions. These waivers prevent contractual counterparties from pursuing a class action. While enforceability of such provisions vary from jurisdiction to jurisdiction, they still constitute a helpful precaution for businesses. When confronted with a class or group action phase, defendants and their legal teams need to formulate a plan for response quickly with limited information. Strategies for consideration include seeking a stay instead of continuing with the ongoing action, engaging a special board committee, consulting firm or external counsel to help with investigations, and 'self-reporting' to relevant regulators in order to gain points for cooperation.

BRADY-BANZET: Proactive assessment of the claim, and analysis of potential issues with the class or group at the outset, is essential to assess the future direction of the claim and the risks for the defendant. Defendants will often seek to identify issues that may enable an early dismissal of the claim, or that would affect its viability as a collective or group action and will also often focus on the funding arrangements behind the claim and the adequacy of any adverse costs arrangements that are in place.

HENDERSON: It is very important for defendants to devise a clear strategy from inception. This must look to factors outside the immediate litigation, such as regulatory interest and risk of further claims being filed. The claimant side is almost invariably financially driven, and indicators of early settlement can encourage more claims and so must be thought through extremely carefully. Like with most litigation, it is critical for defendants to fully marshal the facts as soon as possible. It is simply not possible to run a cohesive approach without clear sight of the facts.

Q: Could you outline some of the main approaches and methods used to assess and calculate damages in relation to class and group actions? What kinds of considerations arise when calculating potential damages for multiple claimants, whether estimated or accurate?

BRADY-BANZET: In an opt-out action, damages are typically claimed through the use of expert evidence, such as evidence from economists. In group actions, or opt-in actions, expert evidence will also be relevant, as will any evidence that is available of actual loss suffered by the individual claimants. Collective proceedings involving competition law issues will involve damages being calculated on an aggregate basis, where a single figure is assessed for the class irrespective of the loss suffered by individual members. There is, however, limited experience of courts resolving issues on damages in the context of collective actions, and limited experience of settling such cases. Damages is therefore an area of considerable uncertainty on both the claimant side and the defendant side.

HENDERSON: The approach and method to be used entirely depends on both the class action procedural device being used and also the nature of the claim. Competition class actions are unusual in that damages can be awarded on an aggregate basis – they can be calculated on a class wide top-down approach. Competition claims also require complex economic analyses of the counterfactual and often pass-on. Opt-in claims, however, require calculation of losses on a bottom-up basis. This does not necessarily mean that damages much be calculated for all class members individually – sample claims can be helpful in identifying losses for cohorts of class members.

RHIE: Historically, it was not possible to claim damages in representative proceedings in Hong Kong – injunctive and declaratory relief were the main remedies that could be obtained. However, recently, courts have adopted a less rigid approach, having started to grant declarations of class members' entitlement to damages. Relying on these declarations, class members can then claim damages individually. The measure of damages for representative proceedings are the same as for any other civil proceedings under Hong Kong law. Thus, the measure of damages for contractual claims would be to put the claimants into a position they would have been had the contract been performed. The measure of damages for tort claims would be to put the claimants into a position they would have been had the tortious act not been committed. In very limited circumstances, the court may award punitive damages.

Q: What impact is technology having in the context of class and group actions? Are there any notable advancements or changes in the use of technology for case management, discovery or courtroom proceedings, for example?

HENDERSON: Technology is particularly important in communicating with the claimant group, persuading potential claimants to join a claim and also in distributing settlement or damages proceeds. Use of social media, targeted messaging and rapid onboarding means that for a given situation, the proportion of people who will join a claim now is far higher than in the past. This makes cases easier to fund, increases the overall number of cases and increases risk for business.

RHIE: Technological advancements have reshaped the experiences of both claimants and defendants in class and group actions. Most prominently, the emergence of virtual courtrooms has transformed class and group action proceedings. Virtual courtrooms allow parties to attend legal proceedings irrespective of their geographical location: claimants to class and group actions dispersed across the globe can now join in proceedings without having to physically appear in court. This, in turn, has both cost and time saving benefits. Furthermore, legal chatbots – artificial intelligence-powered software that can perform a variety of functions like answering legal questions, drafting legal documents and processing large amounts of information – have made case management easier. Among other things, these chatbots can help to coordinate and streamline processes across multiple claimants in class and group action proceedings, thereby increasing efficiency and reducing the room for human error in such proceedings.

BRADY-BANZET: In large, multiparty cases, courts are increasingly encouraging parties to use technology such as shared workspaces to manage the volume of case materials, and courts will often provide remote access to hearings to accommodate the parties and their legal teams. Technology also has a meaningful impact on the discovery process and is particularly meaningful in managing large volumes of documents, as well as facilitating more efficient review and disclosure. Technology is also relevant to the identification of claimants, who are frequently targeted by advertising online and on social media, and the collection of data and information from claimants can also be conducted using technology platforms.

Q: Looking ahead, what are your predictions for the future of class and group actions? Are there emerging issues or trends that you believe will shape the landscape of these legal proceedings in the coming years?

BRADY-BANZET: In the short and medium term, we expect a continued growth in collective and group actions in England, fuelled by the availability of litigation funding. The Competition Appeal Tribunal has taken an expansive view of the types of claims that can be brought under its collective action regime, and we expect will continue to do so. Whether the growth in collective and group actions will continue in the long term is likely to depend on how the courts approach damages and settlements, and whether substantial awards of damages are achieved in cases that progress to trial. The Competition Appeal Tribunal has recently approved the first settlement in an opt-out collective proceeding, and we expect to see further developments in how settlements are reached and, where required, approved.

RHIE: In Hong Kong, it is possible that a class action regime will be introduced for consumer cases. It is also possible that this regime will be incrementally expanded to protect minority shareholders of listed companies, especially since Hong Kong Stock Exchange listing rules now permit emerging and innovative companies with weighted voting right structures to apply for listing on the Main Board of Hong Kong. Outside of Hong Kong, we anticipate that there will be an increase in class arbitrations, including mass investment treaty arbitrations by, for example, international bondholders or bank depositors harmed by changes in government policy and legislation.

HENDERSON: All indicators are that the number and scale of class actions will continue to increase yet further. Antitrust will remain a key area of focus, but a major question is whether the UK's present competition class action regime will be expanded to encompass other causes of action. Amendments were proposed to the Digital Markets, Competition and Consumers Bill which would have expanded that class action regime. They were rejected, but the debate is open. Scotland has an opt-out class action mechanism for all causes of action on the statute book that has not yet been implemented. If it is implemented, there could be pressure for England and Wales to follow suit. Litigation funding will continue to be important, but post-*PACCAR* attention is turning to the pending review by the Civil Justice Council. Class action risk will continue to increase before it decreases.

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POINTS OF CONTACT: HOW FOREIGN ARBITRATIONS INTERFACE WITH DOMESTIC COURTS

BY ERIN CULBERTSON, TOM VILLALON AND KATHERINE SHEN

INTERNATIONAL ARBITRATION AND DOMESTIC LITIGATION generally occupy separate fora, yet they can come into contact with one another in complementary ways. In the US, requests for judicial intervention related to international arbitration are governed by the Federal Arbitration Act (FAA). This chapter discusses points of contact by US courts before, during and after international arbitral proceedings.

POINTS OF CONTACT BEFORE ARBITRATION

Prior to the commencement of international arbitration proceedings, judicial involvement can be vital to the efficacy of international arbitration. Generally, US courts may be called upon by a party to determine in the first instance if the parties agreed to submit the dispute to arbitration, unless the arbitration agreement makes clear by "clear and unmistakable evidence" that the parties intended an arbitral tribunal to decide this threshold issue (see *First Options of Chicago, Inc. v. Kaplan* (1995)).

Federal courts may be asked to compel arbitration when a party to an arbitration agreement either refuses to arbitrate or has filed a lawsuit in a US court instead of arbitrating (in which case a motion to stay the lawsuit likely will accompany the request to compel arbitration). Conversely, the opposing party may seek a permanent stay of arbitration by arguing that the arbitration agreement is invalid or does not apply to the dispute. Thus, domestic courts are often asked to decide whether, how, and to what extent they should compel the parties to arbitration.

This requires courts to decide two critical issues: whether the parties agreed to arbitrate the dispute and, if they did, whether the dispute is arbitrable. This second issues requires a court to decide questions as to existence, scope and enforceability – that is, whether the scope of the arbitration agreement is broad enough to cover the particular issues in dispute, the arbitration agreement binds all parties before the court, the party seeking to compel arbitration waived its right to arbitrate (by, for example, initiating litigation on a related issue), and the issues covered by the arbitration agreement are arbitrable (that is, they do not violate fundamental US public policy).

US courts have demonstrated a strong judicial regard for the enforceability of arbitration agreements, especially in the international context.

The US Supreme Court has been active recently in determining the interaction between domestic courts and arbitral tribunals when a party seeks to enforce an arbitration agreement. For example, in June 2023, the Supreme Court held in *Coinbase, Inc. v. Bielski* (2023) that domestic court proceedings must be immediately stayed pending the appeal of that court's denial of a motion to compel arbitration.

With this decision, the Supreme Court explained that to hold otherwise would result in the benefits of arbitration – efficiency, lower costs and less intrusive discovery – being "irretrievably lost", even if the case eventually ended up in arbitration. Petitioner Coinbase is back in front of the Supreme Court this year, asking the Supreme Court to decide whether, when parties enter into an arbitration agreement with a delegation clause, it is for the arbitrator or the court to decide whether that arbitration agreement is narrowed by a later contract between the same parties that is silent as to arbitration and delegation.

Furthermore, in the US, courts may permit enforcement of arbitration agreements by or against non-signatories. For example, there are a number of common law principles of contract law that a court may consider, including equitable estoppel, especially when the claims sought to be arbitrated are "intimately founded in and intertwined with" the underlying contract obligations, and there is a close relationship among the signatories and the non-signatories such that it can reasonably be inferred that the signatories had knowledge of, and consented to, the extension of their agreement to arbitrate to the non-signatories.

POINTS OF CONTACT DURING ARBITRATION

Once an arbitration is initiated, parties might nevertheless seek the assistance of domestic courts to aid the arbitral process. For example, a party may wish to collect evidence from a recalcitrant party, compel an unwilling witness to testify, or order a party to refrain from taking certain actions that might affect the status quo of the dispute.

The issue of preservation of the status quo is particularly relevant after the initiation of an arbitration and prior to the formation of an arbitral tribunal. While most major institutional rules address this issue by allowing for the appointment of 'emergency arbitrators', raising an application through domestic courts may be preferable if timing is a critical concern, as courts often hear applications on an ex parte basis.

Most major procedural rules routinely allow arbitrators to grant interim measures directly, but there are times when an application to domestic courts is necessary. Often, these instances hinge on the coercive power of domestic courts – that is, their power to compel any individual within their jurisdiction to undertake, or refrain from taking, a certain action. For example, domestic courts can use their coercive power to compel the attendance of a recalcitrant non-party witness to provide testimony – a power generally not possessed by arbitral tribunals who have no jurisdiction over non-parties.

In addition to summoning witnesses, domestic courts can compel the production of documents in aid of arbitration. As arbitration is a creature of contract, the tribunal's power to order the production of documents generally extends only to the parties to the underlying contract. In circumstances where critical documents may be in the possession of non-parties, domestic courts can play a key role in bringing these documents to light.

Until recently, many parties with US-seated arbitrations applied to US courts under section 1782 of Title 28 of the US Code, which allows parties to obtain discovery in the US for proceedings before "foreign or international tribunals". In June 2022, however, the US Supreme Court curtailed the scope of section 1782 significantly. The Supreme Court held that "foreign or international tribunals" as described in section 1782 did not apply to international commercial arbitration or to ad hoc investor-state arbitration under a bilateral investment treaty.

As such, parties to most private international arbitrations who wish to obtain third-party discovery in the US will have to explore alternative document production mechanisms. Specific jurisdictions may offer legislative tools to compel document production from non-signatory parties. For example, section 3102 of the New York Civil Practice Law and Rules affords an opportunity to request discovery "to aid in arbitration" and therefore may be an alternative to section 1782 in certain circumstances.

Under section 3102, an applicant may request disclosure by utilising discovery processes provided by the statute, including depositions, interrogatories and document demands – but only if the applicant shows "extraordinary circumstances". Generally, New York courts have granted requests for disclosure to obtain limited information as to the identity of potential defendants in an arbitration, as well as to allow the petitioner to present a proper case to the arbitrator.

Domestic courts may also play an important role in establishing the arbitral tribunal – for example, by appointing the presiding arbitrator if there is no agreement between the parties or if there is no institutional mechanism available. Conversely, domestic courts may play a role in deciding on a challenge to the independence or impartiality of an arbitrator and can act to remove that arbitrator if the challenge is successful.

POINTS OF CONTACT AFTER ARBITRATION

International arbitration proceedings and domestic litigation also come into contact through the recognition and enforcement or annulment of foreign arbitral awards, as well as anti-suit injunctions against enforcement proceedings in foreign jurisdictions.

The US is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which is implemented through the FAA. The FAA also provides federal court jurisdiction for the enforcement of foreign arbitral awards. Under the New York Convention, "recognition" of a foreign award means the award has preclusive legal effect and "enforcement" means reducing the award to a domestic judgment. Recognition and enforcement proceedings are typically undertaken simultaneously.

Although arbitral awards generally cannot be 'appealed', there are procedures for vacating an award under the FAA or the New York Convention. A foreign arbitral award may be set aside by US courts on the grounds set out in article V of the New York Convention: (i) incapacity of the parties or invalidity of the arbitration agreement; (ii) violation of due process; (iii) the award deals with matters beyond the scope of the submission to arbitration; (iv) improper composition of the arbitral authority or non-respect of arbitral procedure; (v) the award is not yet binding or has been set aside or suspended; (vi) subject matter that cannot be settled by arbitration; and (vii) violation of public policy.

US courts strongly favour enforcement of foreign arbitral awards. A federal district court's role in reviewing a foreign arbitral award is limited, and the grounds for setting aside an award are interpreted narrowly. Consequently, US courts frequently reject attempts by losing parties to resist enforcement of foreign arbitral awards. Indeed, a court can enforce a foreign arbitral award even if that award has been annulled at the seat of the arbitration.

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FUELLING GROWTH: ARBITRATING ENERGY SECTOR DISPUTES IN LATIN AMERICA

BY RICARDO OSTROWER, MARTIN VAINSTEIN AND MANUELA DÍAZ

THE LATIN AMERICAN ENERGY SECTOR stands as a pivotal force in regional development, with resources ranging from oil and gas to renewable energies. The wealth of Latin America's natural resources places the region in a privileged position in both domestic and international energy markets, offering an avenue for economic growth and prosperity.

For instance, Argentina boasts the world's second-largest shale gas deposit in the Vaca Muerta region and significant shale oil resources. Venezuela holds substantial natural gas and oil reserves. Brazil stands out as a major oil producer with ambitious plans for offshore exploration, aiming for self-sufficiency in energy. Meanwhile, as demand for renewable energy grows, the 'Lithium Triangle' region (composed of Chile, Argentina and Bolivia) will be key to meeting increasing demand for lithium.

However, amid this potential for growth, the sector grapples with a variety of challenges that have the potential to hinder progress. International arbitration provides for an effective dispute resolution mechanism in a heavily regulated industry, especially in complex cross-border value chains involving multiple contracts.

CHALLENGES IN THE LATIN AMERICAN ENERGY SECTOR

Investments in the energy sector are fraught with risks inherent to the sector's complexities and operating environment. Encompassing activities such as production, transportation, refining and retail distribution – to name just a few – multiple parties are involved in energy projects. In addition, the sector's key players, including state entities, corporations with public and private capital, and foreign corporations, oftentimes operate under multiple jurisdictions and regulatory frameworks.

The multiplicity of players translates into a multiplicity of contracts, incorporations of new companies and corporations, and the obligation to comply with each party's state's laws and regulations. This complex contractual structure is necessary to carry out energy projects characterised by technical intricacies, long-term commitments and substantial capital requirements.

In addition to its inherent risks, Latin America's energy landscape presents unique challenges, including intricate regulatory frameworks and political and economic instability often resulting in government intervention, environmental and social concerns, and frequent contractual disputes.

In most Latin American countries, administrative law and public contracts govern energy-related projects. States generally grant exploitation permits or production concessions to private entities, but retain eminent ownership and a strict control over natural resources. Argentina's and Brazil's constitutions, for example, establish sovereign ownership over all mineral resources in their territories.

Similarly, the electricity generation market is also heavily regulated. Generally considered a service of public interest, private entities are granted different types of governmental permits or contracts (e.g., utilities' concessions) to generate electricity, or provide transmission and distribution services.

These strictly regulated regimes are particularly vulnerable to regulatory changes and changing political climates. Host states' positions are likely to shift over time, ranging from promoting investments to imposing restrictions and levies. Argentina, for example, having gone through a period of extensive privatisation of public services and promotion of foreign investment in the 90s, later shifted dramatically with the 2001 crisis, when the government adopted a more interventionist role by implementing a system of strict regulated prices and subsidies that caused numerous disputes with investors. However, in recent years, Argentina has started to shift its energy policy to reduce regulatory intervention and boost investments in this sector and to diversify its energy matrix.

These drastic shifts in policy are not without consequences. For instance, in 2016, Ecuador changed its regulatory framework in order to tax investors' income on account of the rise in oil prices. While some oil and gas concessions were renegotiated, other companies such as Burlington, Perenco and Occidental challenged those measures before International Centre for Settlement of Investment Disputes tribunals in multimillion-dollar claims. In Argentina, the cancellation of state subsidies to implement market-oriented frameworks may trigger substantial claims against the government.

Added to the need to comply with increasingly abundant environmental regulations and an increasing number of social requirements, these challenges pose significant barriers to the smooth functioning and sustainable growth of the energy sector in the region.

ROLE OF ARBITRATION IN ENERGY SECTOR DISPUTES

In this context, international arbitration emerges as the preferred method for resolving disputes, offering increased procedural flexibility, neutrality and enforceability of awards.

This preference for arbitration is reflected in the portfolio of commercial disputes worldwide, where the main arbitral institutions report increasingly higher and more frequent energy related arbitrations. As energy related arbitrations rise, they often exhibit characteristics that are unique to the sector.

For example, a key topic currently shaping parties' strategies in energy disputes is the utilisation of multi-tiered dispute resolution clauses, also known as 'multi-step' or escalation clauses. These clauses require alternative dispute resolution methods before resorting to arbitration, mirroring practices seen in international construction contracts and investment arbitration.

Multi-tiered clauses encompass consensual methods, such as negotiation, mediation or conciliation, as well as quasi-adjudicative methods like expert determination or dispute boards. These mechanisms offer parties a more efficient and cooperative means of resolving disputes compared to formal litigation, thereby preserving ongoing business relationships and mitigating risks.

Especially in long-term and capital-intensive energy transactions, multi-tiered clauses serve as a vital tool for ensuring contractual stability and minimising losses due to delays or disputes. However, poorly drafted clauses, often treated as boilerplate provisions, can lead to complications, including challenges in enforcing arbitral awards.

The enforceability of multi-tiered clauses hinges on their precise wording and structure. Courts generally uphold agreements to negotiate or mediate if clearly delineated in the dispute resolution clause. Therefore, careful drafting of these provisions, tailored to the specifics of each transaction, is imperative.

While model clauses from international institutions can serve as a useful starting point, customisation is essential for optimal effectiveness.

Another distinct and desirable feature of energy arbitrations is the option to select experts and arbitrators with technical knowledge and expertise. The autonomy of parties to select arbitrators is a cornerstone of any arbitral proceeding, contrasting sharply with court litigation. This autonomy enhances the predictability of arbitration proceedings, but also poses risks if inexperienced arbitrators are chosen.

In energy arbitrations, arbitrator selection is particularly critical due to the complex technical nature of disputes and the high stakes involved. Parties seek individuals with industry expertise to navigate the intricacies of substantive and procedural matters. The appointment of non-lawyer arbitrators, often experts in engineering or economics, is common for their technical insight. However, caution is advised when appointing non-lawyers as sole arbitrators, as legal qualifications are crucial for addressing legal issues comprehensively.

While expertise in the energy industry is essential, arbitrators must also possess other skills, such as familiarity with contract law and linguistic fluency, in addition to their independence and impartiality.

In recent years, the advantages of arbitrating energy disputes have become clear not only to practitioners, but also at an institutional level.

Peru, for instance, has implemented legislative changes aimed at modernising its arbitration framework and enhancing investor confidence. The country's Arbitration Law, enacted in 2008 and amended in 2010, reflects a commitment to promoting arbitration as a reliable mechanism for resolving energy disputes.

Similarly, Colombia has taken proactive measures to strengthen its arbitration regime and attract foreign investment in the energy sector. The country's Arbitration Statute, enacted in 2012, introduced reforms aimed at expediting arbitration proceedings and enhancing the enforceability of arbitral awards.

Additionally, Colombia established the Bogotá Chamber of Commerce Arbitration and Conciliation Center (CAC), which specialises in handling energy disputes and offers efficient and transparent arbitration procedures.

In turn, Argentina recently enacted an International Commercial Arbitration Law, based on the UNCITRAL Model Law, and has included a UNCITRAL arbitration clause in long-term power purchase agreements (PPAs) procured through its 2016 RenovAr Program, a public tender process to award long-term renewable PPAs.

These examples of some pro-arbitration policies adopted by Latin American countries underscore a commitment to promoting investment, fostering contractual stability and facilitating sustainable growth in the energy sector. By embracing international arbitration as a dispute resolution mechanism, Latin American countries are positioning themselves as attractive destinations for energy investment while effectively managing the inherent complexities of the industry.

CONCLUSION

The rise of energy arbitration in the Latin American region reflects a global trend toward effective dispute resolution mechanisms in complex, cross-border industries. Offering specialised arbitrators, procedural flexibility and enforceability, arbitration emerges as the preferred dispute resolution method for many players in the industry. By embracing arbitration, stakeholders worldwide are enhancing investment prospects, ensuring stability and fostering sustainable growth in this critical sector.

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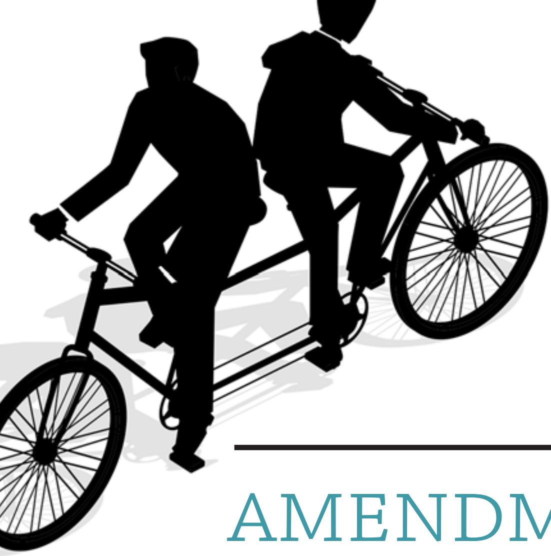

AMENDMENTS TO THE ENGLISH ARBITRATION ACT

BY PRAGATI SHARMA, KEVIN W. GRAY AND KABIR DUGGAL

FOLLOWING A TWO-AND-HALF-YEAR consultation process, the English Law Commission presented to parliament its proposed amendments to the Arbitration Act 1996 in September 2023.

The commission's recommendations were designed to improve the efficiency of English arbitrations by reducing costs associated with arbitration and the time to issue final awards. Additionally, the commission sought to address unresolved issues in international arbitration while maintaining the favourable position of English law in dispute resolution. Those proposals were adopted into a bill containing proposed amendments to the Arbitration Act that is currently before parliament.

The commission's proposal addressed several issues including arbitrator impartiality and liability, courts' powers during arbitral proceedings, the law governing arbitration and limitations on challenges to tribunals' jurisdiction before the court.

The most significant recommendation would appear to be codification of the method applicable to the arbitration clause where parties included no explicit choice of law provision in the agreement. The commission's proposal suggested introducing a new provision to the Arbitration Act specifying that the governing law in such instances would be the law of the seat of arbitration.

The draft bill provides that the law applicable to an arbitration agreement is the law that parties expressly agree applies to the arbitration agreement or, where no such agreement is made, the law of the seat of the arbitration in question. This proposal responded to the complexity created by the decision in *Enka v. Chubb* (2020), ensuring clarity on the governing law of arbitration agreements under English law.

CONFLICTING APPROACHES TO APPLICABLE LAW

In *Enka v. Chubb*, a Russian company brought a claim for damages in a Turkish court for a fire allegedly started by the defendants at a Russian nuclear power plant. The Turkish defendants moved for an anti-suit injunction, alleging that the dispute should be resolved by an arbitration under International Chamber of Commerce rules seated in England.

In *Chubb*, the UK Supreme Court was required to consider the application of the doctrine developed in *West Tankers* (2012) to the request for an anti-suit injunction. In *West Tankers*, which took place when the UK was still a member of the European Union (EU), the Court of Appeal found that anti-suit injunctions were not permissible to enjoin lawsuits in EU courts. In *Chubb*, however, parties were not nationals of EU states and were not involved in litigation in another member state.

The Turkish defendants argued before the High Court that English courts should issue an anti-suit injunction to allow arbitration to proceed seated in London. Justice Baker declined to issue the injunction, finding that the appropriate forum was the Moscow courts and that in any event, Enka's delay in pursuing arbitration amounted to a waiver of its rights. That ruling was overturned on appeal by the Court of Appeal, which found that the parties implicitly chose English law and issued an order to enjoin any further court proceedings in Russia.

The Supreme Court ultimately upheld the decision of the Court of Appeal, albeit on different grounds. To determine if the order granting an anti-suit injunction was proper, the Supreme Court first had to determine the proper law of the arbitration clause. The contract was 97 pages in length and contained over 400 pages of amendments yet contained no clear choice of law clause. Nonetheless, there were two clear candidates: Russian law, as argued for by Chubb, or English law, based on the seat of arbitration.

As Lord Burrows wrote, the case presented the court with "an intriguing question of law which courts and commentators have been grappling with for many years. What is the proper law… of an arbitration agreement where there is no express choice of law clause in the arbitration agreement?"

Ultimately, the Supreme Court adopted a two-part test (the *Enka* test). Under that test, the court found: (i) if there is an express or implied choice of law for the arbitration agreement, that chosen law governs unless such law is contrary to public policy; and (ii) if no choice of law clause exists, the arbitration agreement should be governed by the law with the closest connection.

The court itself was divided on how to analyse the second prong of the *Enka* test. For the majority, Lords Hamblen and Leggatt, joined by Lord Kerr, found that the law with the closest connection to the arbitration clause was the seat of arbitration. First, because parties voluntarily submitted to the supervisory jurisdiction of the courts in the arbitral seat, English law was the law most closely connected to the arbitration agreement. And second, because arbitration clauses are generally viewed as severable from the contracts in which they are embedded, there was no reason to favour the law most closely connected with the contract (as the minority proposed).

In contrast, the minority would have adopted the so-called 'main contract' approach. Lord Burrows, with whom Lord Sales agreed, found that in the absence of an express choice of law in the arbitration agreement, there should be a presumption that the law of the main contract governed the arbitration agreement. Central to the minority's approach was a concern that the majority's application of the *Enka* test would introduce artificiality into the interpretation of contracts with arbitration agreements. In particular, it might lead to the result that the contract was governed by a different law from the arbitration agreement contrary to what the minority understood to be parties' expectations.

THE COMMISSION'S RECOMMENDATION

The *Enka* test has been generally welcomed in the legal community in the UK. The English Law Commission found that the majority approach in *Enka* was preferable on public policy grounds as it aligns with the practices of other civil and common law jurisdictions in determining the law governing the arbitration agreement, thereby improving consistency.

It proposed to both simplify and codify the *Enka* test to clarify the law applicable to arbitration agreements. Under its proposal, courts should first look to the governing arbitration agreement. If the parties made no explicit choice, then the law of the seat would apply. The commission ultimately argued this rule would offer simplicity to proceedings and provide certainty for parties and the courts, including by eliminating debates over the application of foreign law.

Additionally, it accepted the argument of the majority in *Enka* that applying the seat's law would ensure the effectiveness and enforceability of the arbitration agreement and better align with the doctrine of separability. The rule would also respect party autonomy by allowing them, in the first instance, to choose the governing law. From a policy standpoint, the recommendation was expected to result in fewer English arbitrations under clauses governed by foreign law and avoid questions of whether English courts were correctly applying foreign law.

Finally, the commission's choice to embrace the law of the seat appears, although contentious, to mirror the predominant approach identified by Professor Maxi Scherer in her 2021 comparative analysis covering 80 jurisdictions globally. In that study, Professor Scherer found that the *lex contractus* approach to determining the law applicable to arbitration clauses was broadly disfavoured.

Nonetheless, the proposed rule has the potential to introduce new risks into the arbitral process. As the minority correctly identified, there is a risk that two laws will govern the interpretation of complex contracts: one law will govern the arbitration agreement and another the main contract, potentially leading to challenges in applying the contract holistically.

Another issue is the potential loss of flexibility and nuance in determining the governing law of the arbitration agreement, given that the proposed rule lacks provisions for exceptions or factors (such as relying on factors such as customary industry practice, commercial purpose and performance) which may have indicated a different intention on the part of the parties. This could impact the expectations and choices of the parties, particularly when they have chosen a foreign law for the main contract without expressly selecting a law for the arbitration agreement, or when they have chosen a foreign seat for the arbitration without expressly choosing a law for the arbitration agreement.

Until the new rules are formally enacted, the common law principles established in *Enka* will remain in effect. While the practical impact of the proposed amendments may not be known for several years, the proposal to codify the method for determining the law of seat may well protect English law governed arbitrations from being complicated by the addition of foreign law interpretations. If the law is eventually enacted by parliament, it will be interesting to observe whether other common law jurisdictions, such as Singapore and Hong Kong, which presently employ a comparable test to that of *Enka*, will revise their approach.

Ultimately, the commission's recommendations are unlikely to significantly modify the substantive provisions of the Arbitration Act. Instead, their primary effect should be to streamline the application of the Act and improve administrative consistency in arbitrations within England and Wales. By offering clarity in specific areas, these recommendations seek to strengthen England and Wales's position as a global arbitration destination.

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CORRUPTION AS A BASIS TO ANNUL OR REFUSE ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS: A FRANCO-ENGLISH COMPARISON

BY SAADIA BHATTY AND JACK BOWNES

THE FIGHT AGAINST CORRUPTION REMAINS A key global concern. Since corruption remains prevalent in commercial transactions across the world, it is routinely used both as a shield and a sword to contest the recognition and enforcement of foreign awards before domestic courts.

In recent years, there has been a growing number of high-profile post-arbitral proceedings centred around allegations of corruption, in particular before the French courts as well as those of England & Wales.

Since 2020, at least 19 such matters relating to corruption have been brought before the French courts. The corresponding number, while smaller in the UK, is no less important in terms of impact, especially with the recent English High Court decision in *Nigeria v. P&ID*.

This chapter provides a comparative analysis of the most recent English and French cases dealing with post-arbitral corruption-related claims and offers insights on whether there is an alignment or divergence between the two jurisdictions on the issue.

CORRUPTION: A PUBLIC POLICY EXCEPTION UNDER BOTH FRENCH AND ENGLISH LAW

The UK and France are both signatories to international agreements that seek to prevent corruption, notably the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) and the United Nations Convention against Corruption (2003). These instruments have established legally binding obligations for signatory states to prevent and tackle corrupt activities. Both countries are also signatories to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), which provides that a foreign arbitral award may be refused recognition and enforcement in very limited cases, including where it would be contrary to the public policy of the country where the recognition and enforcement is sought.

This so-called public policy corruption exception has been codified under French and English law by virtue of the French code of civil procedure (CCP) and the UK Arbitration Act (1996) (AA) respectively. French law expressly refers to "international" public order, arguably a narrower concept than domestic public policy. While no such specification exists under the AA, there is consensus that the reference is also one to 'international public policy' under English law.

DIFFERING ADMISSIBILITY REQUIREMENTS?

The principal issue of admissibility of corruption-related claims in post-arbitral proceedings concerns the determination of whether such claims had already been raised during the arbitral proceedings. Courts will generally assess whether to deal with such claims, and to what extent, in accordance with the legal doctrines of res judicata and issue estoppel.

Under both English and French law, a party may raise allegations of corruption for the first time at the post-arbitral stage but only if it had no knowledge of the misconduct during the arbitral proceedings.

Arguably, the English position seems more restrictive due to the added requirement for the party bringing such a claim to prove that it "could not with reasonable due diligence have discovered the grounds for objection".

In contrast, recent French cases have revealed a somewhat inconsistent position on the matter. In *Sorelec*, the French Supreme Court (Cour de Cassation) held that "respect for substantive international public policy cannot be conditioned by the attitude of a party before the arbitrator", thereby admitting allegations not previously raised, irrespective of the party's "disloyalty by not raising this complaint before the arbitrators". In ESISCO, the Paris Court of Appeal instead refused to admit a corruption allegation on the basis that the party making the claim should have been aware of the alleged misconduct, the information in question being publicly available.

English and French courts also seem to diverge on how they deal with corruption allegations that were already put to the arbitral tribunal.

The French courts do not shy away from effectively engaging in a de novo review of those claims to "ensure that violation of international public policy is not characterised", according to *Securiport*; albeit noting that the review is not a de novo investigation per se, as the purpose of the review is to assess whether the award is contrary to public policy, even admitting in new evidence.

Conversely, the English courts are more hesitant to re-open corruption claims already put before an arbitral tribunal, stressing the importance of issue estoppel and the finality of the award. The courts will even refuse to review such allegations where the same set of facts were presented to the tribunal, but not specifically as an allegation of corruption, according to *Province of Balochistan v. Tethyan Copper Company*, and only admit allegations where new, decisive evidence comes to light after the arbitral proceedings, as per W*estacre Investments v. Jugoimport*.

DIFFERING SCOPE OF THE PUBLIC POLICY CORRUPTION EXCEPTION?

While the two jurisdictions seem aligned on the principle that the misconduct in question must relate to the formation or performance of the underlying contract between the parties in dispute (to the extent that the conduct is so closely connected to the result of the arbitration that it would be unconscionable for the state to recognise or enforce it), they slightly differ in their respective applications of what misconduct falls within the scope of the public policy corruption exception.

In *Webcor*, the Paris Court of Appeal extended the public policy corruption exception to contracts which "would have the effect of financing or remunerating a corrupt activity"; that is, instances in which the corrupt activities are causally linked to the underlying contract as well as the obtention of the arbitral award.

Conversely, the English courts have resisted such widening of the scope. By way of example, a mere attempt at fraud was not considered as misconduct sufficiently corrupt as to outweigh the "public interest in the finality of arbitration awards" (*RBRG v. Sinocore*). Furthermore, English courts have stressed that it is only where the award itself is obtained by means of corruption that the balance is tipped in favour of respecting the public policy corruption exception over the finality of an arbitral award (*Nigeria v. P&ID*).

This divergence in approaches may be explained by the difference in wording under the respective laws: whereas both article 1520, 5° of the CCP and section 68 of the AA do refer to situations contrary to public order, the English text seems to add a more stringent requirement, that is, for such infringement to constitute "a serious irregularity… which the court considers has caused or will cause substantial injustice to the applicant".

CONVERGING EVIDENTIARY REQUIREMENTS FOR THE PUBLIC POLICY CORRUPTION EXCEPTION?

The burden of proof in both jurisdictions rests on the party alleging corruption in support of its claim or defence. In some instances, however, the French courts have shifted the burden of proof on the award creditor on the basis that only the latter was "in a position to justify the reality and seriousness of the negotiations" (*Sorelec*). To our knowledge, this shift has not occurred in the English courts to date.

With respect to the standards of proof, while somewhat differing in wording, they seem to be homogenous in substance: the English courts apply the common law standard of 'balance of probabilities' to ascertain whether "there has been conduct which infringes public policy" (as per *Alexander Brothers v. Alstom*). The French courts instead will look for "serious, precise and corroborating evidence" (*Seécuriport, Sorelec*), which reflects the emergence of an intermediate standard of proof, between that of 'balance of probabilities' and the more stringent 'beyond all reasonable doubt'.

Finally, in analysing the evidence put before them, the French courts will review and assess a collection of red flags as established in *Alexander Brothers v. Alstom* which may indicate the presence of corruption to ascertain whether they add up to "serious, precise and corroborating evidence" are linked to the facts of the dispute and provide a causal link between corruption and the underlying contract. The terms of the contract, the way it was concluded and the general level of corruption in the state at the time of negotiation and execution of the contract are frequently considered as potential indicia of corruption by the French courts. In a few exceptional cases, red flags can be so serious that they can constitute a direct indication of corruption without the need for the French court to look at corroborating indicia in detail, such as the payment for the honeymoon of a public official implicated in the construction project object of the dispute, evidenced in an official letter which was produced before the judge (*Webcor*).

While the means of assessing evidence of corruption has been extensively developed by French jurisprudence, the English courts do not seem to have identified a direct equivalent, instead simply looking for “convincing evidence” that would tip the balance of probabilities (*Nigeria v. P&ID*).

The above snapshot of recent cases on both sides of the Channel reveals that the French courts seemingly approach corruption allegations in post-arbitral proceedings with much more flexibility than the English courts. The latter tend to tip the balance in favour of the finality of awards and the doctrine of issue estoppel, thereby limiting the setting aside, non-recognition or non-enforcement of foreign awards to only exceptional circumstances.

This differing approach has been confirmed by recent data: since 2020, two awards have been set aside and two partially annulled by the French courts on the basis of corruption allegations, compared to only one in the UK, the infamous *Nigeria v. P&ID* matter, a particularly anomalous case given the unusual and extreme facts.

Will these differing approaches encourage those making such claims to choose French courts over English courts to resist recognition or enforcement of awards? This remains to be seen, especially given the ever-evolving practice of both courts in this area.

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ARBITRATION, IMPARTIALITY AND STATE AID: RECENT KEY DECISIONS

BY SERGE GRAVEL, RÉMI HANACHOWICZ AND RATHANA DANH SANG

THIS CHAPTER IS DEDICATED TO TWO substantial decisions, one from the French Supreme Court and the other from the Court of Justice of the European Union (CJEU), respectively tackling the requirement of impartiality and independence for any arbitrator and the compatibility of an arbitration award with the regulations on state aid under EU laws.

ARBITRATOR IMPARTIALITY AND INDEPENDENCE

In a Paris Court of Appeal decision dated 10 January 2023, which has attracted significant attention within the arbitration community in France, the issue of an arbitrator's impartiality and independence has been thrust into the spotlight.

A key principle of arbitration is the arbitrators' duty to remain impartial and independent from the parties involved, even where such parties have appointed them. This obligation is codified in the French Civil Code, which mandates arbitrators disclose any circumstances that might affect their impartiality or independence prior to accepting their assignment. Furthermore, any circumstances arising post-acceptance must also be promptly disclosed. This duty is echoed in the International Chamber of Commerce (ICC) Rules of Arbitration, reiterating the necessity for arbitrators to maintain their independence and impartiality throughout the arbitration process.

The case in question revolves around a partial arbitration award challenged by a party seeking its annulment by alleging that the tribunal was not properly constituted. The appellant's contention rested on the assertion that one of the arbitrators, more precisely the president of the arbitration tribunal, failed to disclose a close personal relationship with the opposing party's legal counsel, which, in their view, compromised the arbitrator's required impartiality and independence vis-à-vis the parties. This relationship came to light after the sudden death of the legal counsel, through an obituary penned by the arbitrator revealing not only a profound friendship but also an admiration for the late counsel, profound enough to write that he consulted him “prior to making any significant decision”. Such revelations, which were published, inevitably cast a shadow on the arbitrator’s impartiality and independence, triggering the appeal before the Paris Court of Appeal.

The court’s analysis in this matter offers a nuanced interpretation of the obligations of disclosure. While acknowledging that professional and academic relationships between an arbitrator and a party’s counsel do not necessitate disclosure, the court identified the existence of “close personal ties” that surpassed a “mere ordinary friendship”. This distinction underlines the court’s stance that the depth of the relationship in question should have been disclosed, as it was a circumstance that could lead parties to reasonably doubt the arbitrator’s independence and impartiality.

However, the ruling of the Court of Appeal specifies that failure to disclose does not inherently negate an arbitrator’s impartiality or independence. For such a failure to serve as a legal basis to set aside an award, it must be “such as to cause the parties to have a reasonable doubt as to his or her independence or impartiality”. In this specific situation, the court ruled that the arbitrator's obituary established close personal ties that could lead the parties to believe that the president of the arbitral tribunal might not be free in his judgment and thus legitimately created in the mind of the appellant a reasonable doubt as to the independence and impartiality of this arbitrator.

By underscoring the critical importance of transparency and the duty of disclosure in arbitration proceedings, that decision has raised concerns among some practitioners, who feared that the obligation to disclose all potential conflicts of interest, especially those stemming from personal and professional relationships, could become burdensome. Indeed, the arbitration community is a small one, where arbitrators and counsels are inevitably led to work with (or against) each other during their respective careers. Parties are usually aware of this. However, there is a subtle difference between potentially recurrent professional interactions between practitioners and any personal or intimate ties between them which could potentially taint the arbitrator's judgment. This concern highlights the balancing act arbitrators must perform between transparency and practicality.

Nevertheless, this case serves as a critical reminder of the importance of vigilance in maintaining the principles of impartiality and independence, not only within the arbitration process but also in the broader professional conduct of arbitrators. The decision reinforces the value of transparency and the duty of disclosure as foundational elements of fair and equitable arbitration proceedings. In doing so, it forces arbitrators to reflect on their relationships and potential biases, ensuring that their actions uphold the integrity of the arbitration process and the trust placed in them by the parties involved.

This decision will likely serve as a reference for discussions on ethics, disclosure and the essential trust that parties place in their appointed arbitrators. While the duty to disclose may pose challenges, it is a fundamental component of the arbitrator's role, ensuring that arbitration remains a respected and effective means of resolving disputes.

COMPATIBILITY OF AN ARBITRATION AWARD WITH EU STATE AID REGULATIONS

In a decision dated 22 February 2024, the CJEU addressed the complex issue of how arbitration awards rendered by state entities intersect with the EU's state aid regulations. The dispute in question involved a Greek state-controlled electricity producer and a private aluminium producer, which failed to agree on an electricity supply tariff in furtherance of the master agreement they had entered. The parties decided to entrust the resolution of their dispute to the permanent arbitration body of the Greek energy regulator. The arbitration tribunal, established under Greek law, awarded a reduced tariff for the benefit of the aluminium producer.

Failing to obtain the annulment of the award before the local courts, the state-controlled entity lodged a complaint with the European Commission (EC), asserting that this award constituted a state aid unnotified to the EC, in violation of EU law. State aid is defined under article 107, section one of the Treaty on the Functioning of the European Union (EU) as an aid granted by an EU country, or through state resources in any form, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, therefore affecting trade between EU countries.

For the EC, however, no state aid was involved as the state-controlled electricity producer had acted as a private entity by agreeing to settle the dispute by way of arbitration and by complying with the arbitration award, and therefore no advantage was granted to the private aluminium producer. The EC's decision was appealed before the General Court of the EU which had a different reasoning. By treating the arbitration tribunal in the same way as an ordinary national court, the General Court drew the conclusion that the award amounted for all intents and purposes to a state measure constituting state aid.

However, the judgment of the General Court was set aside by the CJEU, which ruled that the General Court erred in law in failing to ascertain whether the arbitration tribunal had, as is the case generally for state judicial courts, a mandatory jurisdiction which therefore did not depend solely on the will of the parties.

Indeed, the confusion of the General Court stems from the fact that the arbitration institution in question is a public agency created by national law which could also act as a public regulator. This led the General Court to erroneously assimilate the arbitration tribunal to a national court having a special jurisdiction.

The General Court's reasoning is not compatible with the essence of arbitration. Indeed, the decision of the parties to subject their dispute to arbitration is of a contractual nature. By opting for arbitration, the parties have both designated the Greek public agency to act as an independent third party, distancing it from its regulatory capacities. This contractual feature is critical considering that the public agency is technically entitled to act either as a public regulator or as an arbitration institution.

Contrary to a traditional court decision, the arbitration award is therefore, by nature, incompatible with the definition of a state aid measure, which is necessarily granted by the state or through state resources.

This case was referred back to the General Court by the CJEU, opening the door for further examination. While the ruling confirms the specificities of arbitration as a dispute resolution mechanism, the CJEU decision underscores the complexities inherent in reconciling national arbitration procedures with the framework of EU state aid law. However, in each of the decisions, including the arbitration award, the General Court decision and the CJEU ruling, the underlying master agreement for the supply of electricity is nowhere examined and challenged. It is submitted that if state aid actually existed, it could only result from the terms and conditions of the master agreement, not from the arbitral award.

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A SWISS VIEW ON THE POTENTIAL IMPACT OF SANCTIONS ON ARBITRATION PROCEEDINGS

BY RETO JENNY AND MARCEL FREY

IT IS SURELY BEYOND DOUBT THAT business risk scenarios have dramatically increased in the past year. The war in Ukraine and the unprecedented response by the US, the European Union (EU) and other countries (including Switzerland) in the form of sanctions against the Russian Federation have given rise to new hurdles for companies.

These sanctions not only have an impact on companies' daily operations but also on the commercial disputes that invariably arise out of economic interactions.

Since many commercial contracts provide for dispute resolution by means of arbitration, this chapter will provide an overview of some practical aspects that counsel need to bear in mind when approaching a commercial dispute with parties where a Swiss-based arbitration is potentially in the offing.

ANALYSIS

Background: EU sanctions and Swiss implementation. Switzerland has adopted EU sanctions based on the Swiss Federal Embargo Act, which forms the legislative basis for implementing sanctions issued by the United Nations, the EU and Switzerland's most important trading partners. On the basis of the Embargo Act, the Swiss Federal Council (the national government) has sought to largely align its own sanctions reaction with the EU sanctions regime by passing the Ordinance on Measures with regard to the Situation in the Ukraine (Ukraine Ordinance). The Ukraine Ordinance, dated 4 March 2022, is directly applicable and immediately in force after each amendment.

Bearing in mind the Federal Council's general aim to align the Swiss sanctions campaign with the EU sanctions regime as closely as possible, EU sanctions packages have been adopted with only minor differences. On 1 March 2024, Switzerland implemented the EU's 13th (and presently, most recent) sanctions package with a view to reflecting the latest measures imposed by the EU four days earlier.

As is the case with the EU sanctions regime, Switzerland's sanctions measures target individuals or organisations, certain sectors of the Russian Federation economy, specified goods, technology, technical assistance and other related services. To this end, the Ukraine Ordinance provides for the freezing of assets and economic resources of named individuals and entities listed in annex 8 of the ordinance. Equally, the financial assets of individuals or entities under the control of listed individuals or entities will be frozen. It is also prohibited to directly or indirectly provide or make any funds or economic resources available to listed individuals and entities, or to engage in any economic transactions with them.

Disputes with designated persons and entities. The present reaction to the Russian invasion has gone well beyond the traditional scope of sanctions we have come to know thus far. In particular, the EU's 8th package and its implementation by Switzerland – including the prohibition of legal services to the

Russian government, Russian registered legal entities and organisations – has had a direct impact on dispute management. This new provision has sparked fierce debate in Switzerland over the legality of its far-reaching curtailment of the right to access justice.

This prohibition has a potential impact on dispute resolution by means of arbitration on several levels, as outlined below.

First, at the outset, paying for an arbitrator nominated by a designated party, or a legal entity controlled by a designated party, from frozen funds, may be illegal or at least dependent on receiving a government licence by the competent authority, the Swiss State Secretariat for Economic Affairs (SECO). Furthermore, making a payment to an arbitrator (in particular a Russian-based person) may become complicated, as payments to Russian recipients might contravene foreign sanctions and give rise to secondary sanctions to banks wanting to effect payment in US dollars.

Second, for a designated party, paying advance costs for arbitration proceedings using frozen funds becomes difficult because the SECO would have to authorise this payment from frozen accounts. The SECO is currently of the view that such payments could be exempt under the Ukraine Ordinance which ensures legal access, and thus permissible.

Third, the question of whether it might be considered permissible to make advance payments for arbitrator fees or secretariat costs on behalf of a defaulting Russian party is still open at the SECO. In effect, doing so would provide financial resources to a designated party. The SECO has, however, indicated that it would consider granting a licence for such purposes based on the hardship clause of the Ukraine Ordinance.

Finally, a party unsuccessful in an arbitration faces a thorny issue when it needs to indemnify a sanctioned entity or person that loses and needs to make payment under an award. Presently, the SECO is of the opinion that payments into a frozen account are permissible. Whether a request for enforcement could be blocked by the losing party by invoking a breach of public order (payment to a designated person), is an open issue.

If a party is victorious in its dispute against a designated entity, it is not certain whether the designated party will be permitted to make payment, or – if not forthcoming – whether the party benefitting from the award can enforce it against the losing Russian party whose funds have been blocked. The SECO has indicated that it would, depending on the circumstances, grant such a licence as long as the receiving party is not itself designated.

To compound the complexities, financial institutions are, for risk management reasons, hesitant to release funds for such payments even where a SECO licence exists.

Exemption for legal services. The Ukraine Ordinance provides for an exemption for payments for legal services in as far as they are linked to a party's right of defence in legal proceedings or the right to an effective remedy, or necessary to ensure access to judicial, administrative or arbitral proceedings in Switzerland, a European Economic Area (EEA) member state or the UK or for the recognition or enforcement of a court judgement or arbitral award from Switzerland, an EEA member state or the UK. The core business of managing disputes would thus appear to be exempted. However, it may not always be clear where general consulting ends and where forensic advice begins.

The SECO has, however, repeatedly gone on record stating that it would adopt a broad reading of the term 'legal services' to also include to a large degree pre-litigious advice in connection with threatened disputes. Nevertheless, it may be prudent to contact the SECO in advance for its take on a particular case.

Trends and penal risks. Although not directly a commercial dispute risk, the threat of criminal consequences for evading sanctions through subsidiaries outside of Switzerland and the EU is potentially a reputational risk for large commercial conglomerates.

Recent developments have shown this to be more than an abstract danger. Despite the limits attached to the principle of territoriality which governs Swiss administrative law – and contrary to EU and US sanctions rules which, under certain circumstances, attach criminal consequences to persons acting outside of their respective territories – the SECO has recently transferred three cases under investigation to the attorney general's office for prosecution for suspected circumvention of Swiss sanctions through subsidiaries abroad. This demonstrates that companies may not turn a blind eye to what group companies are up to on the other side of the border.

CONCLUSION

Sanctions against Russia may have unwitting implications for managing commercial disputes with regard to Russian parties or Russian origin products. Awareness of such risks is important to manage potential commercial disputes and negotiations on future commercial endeavours. Where in doubt, obtaining specialised legal advice and contacting the SECO may be a well-advised step.

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RAISING THE BAR ON EFFICIENCY: FAST-TRACK PROCEDURES UNDER THE DRAFT 7TH EDITION SIAC RULES

BY ROB PALMER AND JASMIN MORAN

INTERNATIONAL ARBITRATION HAS TRADITIONALLY been touted as cheaper and faster than litigation. But that perception has changed. Costs awards in international arbitrations now routinely exceed several million US dollars, while the latest statistics from the International Chamber of Commerce (ICC) reveal that the average length of proceedings which reached a final award in 2020 exceeded two years.

It is therefore unsurprising that arbitral institutions like the Singapore International Arbitration Centre (SIAC) are attempting to make the arbitral process more efficient.

Users of international arbitration have reported dissatisfaction with the inefficiency of international arbitration for some time now. For example, respondents in the 2018 International Arbitration Survey by the School of International Arbitration at Queen Mary University London were asked to identify the worst characteristics of international arbitration. The most popular answer was cost. Lack of speed followed close behind in fourth place.

More recently, the Singapore International Dispute Resolution Academy's '2022 Dispute Resolution Survey' asked respondents to rate their satisfaction with arbitration and litigation across a range of factors. Respondents reported low levels of satisfaction with the cost and speed of arbitration, at 30 percent and 41 percent respectively. Notably, respondents did not perceive any benefit of arbitration over litigation in these areas, rating their satisfaction with the cost and speed of litigation at similarly low levels.

Concerns regarding the efficiency of international arbitration were recently highlighted at the 25th Annual International Bar Association Arbitration Day held in Singapore on 23 February 2024. In the keynote address, Sundaresh Menon, the chief justice of Singapore, described access to justice as a "systemic challenge" facing international arbitration. He noted that "many commercial parties and individuals may not be able to access justice through arbitration simply because they cannot afford the cost of arbitrating in the traditional way".

Edwin Tong, the minister for culture, community and youth and second minister for law, expressed similar concerns when speaking at the conference. Mr Menon challenged arbitral institutions to "proactively explore procedural innovations to make arbitral processes cheaper and easier to navigate". The SIAC has risen to that challenge in its Draft 7th Edition of the SIAC Rules, released for public consultation in August 2023. The draft rules propose a number of significant changes to the existing SIAC rules, which were last updated in 2016. The Registrar's Report accompanying the draft rules noted that "[e]very provision has been carefully crafted with a view to enhancing the user experience and raising the bar on efficiency, expedition and cost-effectiveness".

One way in which the draft rules aim to enhance the efficiency of SIAC arbitrations is through a reimagined fast track procedure. Fast track procedures have been a feature of institutional rules for some time now. While the exact details differ between arbitral institutions, fast track arbitrations typically involve the appointment of a single arbitrator, a simplified procedure and strict time limits.

Since 2010, the SIAC rules have included an expedited procedure, which requires a final award to be issued within six months of the tribunal being constituted. The draft rules refine this expedited procedure and introduce a new streamlined procedure, which requires a final award to be issued within three months of the constitution of the tribunal.

The expedited procedure under the existing SIAC rules is opt-in: it applies to an arbitration on application by one or more of the parties and following a determination by the SIAC president. The SIAC rules contain criteria that must be met before an application can be made. As currently drafted, a party may make an application to use the expedited procedure if one of three criteria are satisfied: (i) the amount in dispute does not exceed the equivalent amount of S$6m; (ii) the parties agree; or (iii) in cases of exceptional urgency.

The draft rules widen the eligibility criteria for the expedited procedure. First, the monetary cap is increased to S$10m (US$7.5m). This cap is significantly higher than other institutional rules. For example, the ICC rules adopt a US$3m cap (though, like the SIAC rules, parties with higher value disputes may nevertheless use the expedited procedure by agreement). Second, the draft rules remove the requirement to demonstrate "exceptional urgency", instead requiring that "the circumstances of the case warrant the application of the expedited procedure". This is a welcome amendment.

Exceptional urgency sets a high bar and in practice very few applications for the expedited procedure have been successful on this ground alone. It will be relatively easier for a party to establish that the circumstances of the case warrant the application of the expedited procedure. This requirement may be satisfied where, for example, the monetary cap is exceeded, but the legal and factual issues in dispute are relatively straightforward.

The draft rules propose changes to enhance the procedural efficiency of the expedited procedure, which in turn can be expected to lower costs. For example, the draft rules introduce a presumption that arbitrations conducted according to the expedited procedure will be determined on the papers, without a hearing. If a hearing is to take place, the presumption under the draft rules is that it will be a virtual one.

Finally, the draft rules adopt a similar provision to that contained in the ICC rules, empowering the tribunal to "adopt any procedural mechanisms it considers appropriate taking into account the expedited nature of the proceedings", including not allowing requests for document production, and limiting the number, length and scope of written submissions and written witness evidence. This amendment is likely to be well-received by users of international arbitration, given that document production and written submissions are often expensive exercises.

The changes to the expedited procedure are complemented by the introduction of a streamlined procedure, which similarly applies on application by one or more of the parties. Under the draft rules, a party can apply to use the streamlined procedure where: (i) the amount in dispute does not exceed S$1m; (ii) the parties agree; or (iii) the circumstances of the case warrant the application of the streamlined procedure. The latter criterion contemplates that the streamlined procedure could be used in higher value, but straightforward, disputes.

The streamlined procedure will be one of the quickest fast track procedures available under institutional rules, requiring a final award within three months of the tribunal being constituted. To achieve this ambitious timeframe, the draft rules include a presumption that the arbitration will be decided on the basis of written submissions and documentary evidence only, without any document production or fact and expert evidence. Consistent with the speed and efficiency contemplated, the draft rules offer users of the streamlined procedure an effective 50 percent discount on the fees of the tribunal and the SIAC, calculated under the SIAC's schedule of fees.

Subject to the results of consultation, the draft rules are expected to come into force later in 2024. It is likely that the reinvigorated fast track procedures will be popular with parties and practitioners alike, mirroring the popularity of the expedited procedure to date. For example, parties in almost one quarter of new cases filed with the SIAC in 2022 applied to use the expedited procedure.

This percentage can be expected to increase, given the proposed widening of the eligibility criteria. Meanwhile, the streamlined procedure will likely make SIAC arbitrations more accessible to parties with lower value disputes, for whom arbitration may not have previously been palatable. Overall, the amendments to the fast track procedure in the draft rules are positive innovations, which align with users' preferences for more cost-effective international arbitrations.

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FIVE MINUTES TO MIDNIGHT: ISSUES RELATING TO THE DRAFTING OF ARBITRATION CLAUSES IN HONG KONG AND SINGAPORE

BY SWEE SIANG BOEY AND YI-SHUN TEOH

A COMMON LAMENT HEARD AMONG arbitration practitioners is that arbitration clauses found in otherwise laboriously drafted contracts are often regarded as 'midnight clauses', which are tagged on with other boilerplate terms to the contract at the last minute. This has led to problematic clauses coming back to haunt parties when disputes arise and parties seek to arbitrate.

This chapter briefly examines the doctrine of separability and how it operates (especially in disputes where the validity or existence of the main agreement is challenged), the consequences of poorly drafted arbitration clauses (with a focus on the jurisprudence in Hong Kong and Singapore), important considerations when drafting arbitration clauses, and the need to give sufficient consideration when drafting escalating dispute resolution clauses.

Arbitration clauses are accorded the status of separate, standalone agreements, which continue to be binding and operative even when the validity or existence of the main contract is challenged. This is known as the 'doctrine of separability' and is contained in the relevant legislation of both Singapore and Hong Kong.

However, the validity or existence of the arbitration clause itself can be challenged, like any other agreement. It is thus necessary to ensure that the arbitration clause is drafted properly to avoid the drastic consequences for parties when an arbitration agreement is ultimately held to be pathological.

PATHOLOGICAL CLAUSES

A 'pathological' clause typically contains defects bringing into doubt the validity or existence of the arbitration clause, the arbitration proceedings or any award which may be issued pursuant to the proceedings. As noted in the Singapore High Court decision of *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* (2013): "[I]n a case where the arbitration clause, although contractually valid, is defective and by this I mean that after applying the general principles of contractual interpretation, or after rectification as the case may be, the court is unable to discern the meaning of that clause either in part or entirely, that clause is said to be pathological. There is no magic in that term. It merely describes the clause as one that is defective." The court further went on to note that the nature and extent of the pathology would determine whether or not the clause may be upheld.

While the courts in Singapore have adopted a generous approach to interpreting pathological clauses (for instance, in the case of *Insigma Technology Co. Ltd v Alstom Technology Ltd* (2009), where the Court of Appeal upheld an arbitration clause which required parties to resolve disputes by arbitration before the Singapore International Arbitration Centre in accordance with the rules of the International Chamber of Commerce), there are also cases where the courts have held that defects in the arbitration clauses were so fundamental as to render the arbitration clause unenforceable (for instance, in the High Court decision of *TMT Co Ltd v The Royal Bank of Scotland & Ors* (2017)).

Similar to Singapore, the approach of the Hong Kong courts to potentially pathological arbitration clauses has been to give effect to the clear intention of parties. Where parties have clearly expressed an intention to arbitrate any dispute which may arise under a contract, an arbitration agreement is not nullified because the parties chose the rules of a non-existent arbitral institution (see *Lucky-Goldstar International (HK) Ltd v Ng Moo Kee Engineering Ltd* (1993) per Kaplan J, where reference was made to the 'International Commercial Arbitration Association'). The arbitration agreement was not inoperative or incapable of being performed as parties could still arbitrate under the law of the seat of arbitration.

IMPORTANT CONSIDERATIONS WHEN DRAFTING ARBITRATION CLAUSES

When drafting arbitration clauses there are a number of important considerations that should be observed, as outlined below.

First, the arbitration clause should contain unambiguous language which mandates that parties submit all disputes arising from and related to the contract to arbitration. It is also good practice to include disputes relating to the validity or existence of the contract within the scope of the submission to arbitration. The doctrine of separability operates to enable the arbitral tribunal to determine the validity of the main contract without compromising its own jurisdiction derived from the arbitration agreement.

Second, the arbitration clause should specify the seat of the arbitration. This refers to the jurisdiction under which the arbitration proceedings will be conducted and is important, since the courts of the seat will have supervisory jurisdiction over the conduct of the litigation, and any application to set aside an award is brought before the courts of the seat. Given that different jurisdictions have varying attitudes toward intervention in arbitral proceedings or toward setting aside applications, the arbitral seat for any proceedings should be thought through carefully.

Third, the language of the arbitration ought to be set out. The importance of such a requirement need hardly be emphasised. Parties should agree the common language in which the arbitration proceedings are to be held, the evidence is to be submitted and the award is to be issued.

Fourth, it is important to consider the arbitrators themselves. This includes the number of arbitrators, whether there are any restrictions on their nationality or affiliations, whether they are required to have sector or technical expertise in certain areas, as well as a certain level of seniority.

Fifth, parties should determine whether the arbitration shall be subjected to certain procedural rules or administered by certain arbitral institutions. For instance, parties can specify that the dispute is to be submitted for arbitration before the Singapore International Arbitration Centre or the Hong Kong International Arbitration Centre. Arbitral institutions will have their own rules of procedure. One common mistake that drafters make is to incorporate incorrect references to the rules when specifying certain institutions, for example in the *Insigma v Alstom* case. Drafters should also bear in mind that all arbitral institutions update their rules from time to time, and may want to incorporate language in the arbitration clause that the rules in force as of the date of the dispute will apply, or (where there is any special consideration) a certain version of the rules will apply. Certain rules, such as the UNCITRAL Arbitration Rules, are not associated with any particular arbitral institution, and can be applied in ad hoc proceedings without any arbitral institution, or where an institution is agreeable to administer an arbitration applying these rules.

Sixth, the governing law of an arbitration agreement should be specified. This can have an impact on whether the subject matter of the dispute is arbitrable in the first place. In the case of *Anupam Mittal v Westbridge Ventures II Investment Holdings* (2023), the Singapore Court of Appeal dealt with the question of whether Indian law (the governing law of the arbitration agreement) or Singapore law (the law of the seat of the arbitration) should apply. That case involved issues of minority shareholder oppression, which is not arbitrable under Indian law but is arbitrable in Singapore. The Court of Appeal took the view that the question of arbitrability should be decided by reference to the law of the arbitration agreement, as that law determines what parties had agreed to arbitrate.

The Hong Kong courts considered the UK Supreme Court's decision in *Enka v Chubb* (2020) – which took the position that when the arbitration agreement does not specify a governing law, but parties had expressly chosen the law governing the substantive contract, this law will also apply to the arbitration agreement – and held that one had to consider both the relevant arbitration clause and parties' intentions to determine the governing law of the arbitration agreement (see *Capital Wealth Holdings Ltd* (2020)).

DRAFTING ESCALATION CLAUSES

Sufficient thought should also be given to drafting multi-tiered arbitration clauses, where parties agree to negotiate or mediate before commencing arbitration. Clear drafting is needed to ensure the escalation procedure is construed as a condition precedent to arbitration. In *C v D* (2023), the Hong Kong Court of Final Appeal held that there is a presumption that pre-arbitration conditions should be considered as matters of admissibility (not jurisdiction), unless the parties expressly and unequivocally convey a contrary intention. Non-compliance with an escalation procedure does not affect the jurisdiction of the arbitral tribunal.

CONCLUSION

The arbitration clause is one of the most important clauses in any contract, since it will determine the conduct of any proceedings in the event of a dispute. Drafters should not leave drafting of the arbitration clause to the last five minutes before midnight on the date of signing, as careful thought has to be given to ensuring that the arbitration clause meets the commercial consensus of parties to fully and finally resolve their disputes by arbitration, in as fair and expeditious a manner as possible.

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THE IMPORTANCE OF BEING TRIAL READY – EVEN IN ARBITRATION

BY BENJAMIN J. RAZI AND WILLIAM LOWERY

HIGH-STAKES COMMERCIAL DISPUTE resolution is a team sport. This is true in court litigation, and it is likewise true in arbitration practice. Due to growth in terms of both frequency and significance, arbitration – as distinct from its close cousin, litigation – is itself a specialty to which lawyers devote their entire practice.

And this is a good thing. There are features of arbitration practice, with its close community of arbitrators and particular style of written submissions, that require the expertise of a devoted arbitration practitioner. This is especially true in international arbitration, where the mechanics and chronology of proceedings can be meaningfully different from US litigation.

But there is a place in arbitration for trial lawyers. Most cases involve disputed issues of fact – for instance, questions of reasonableness, good faith, intent and quantum of damages – and require arbitrators to reconcile conflicting witness testimony.

Lawyers with trial skills help the team see the big picture at all stages of the arbitration, and understand how objective arbitrators are likely to view the evidence. They help shape the narrative of hearing presentations.

And, most importantly, trial lawyers use cross-examination to highlight their side's version of events and undermine that of their adversary. In a close case, cross-examination can decide the outcome.

ARBITRATION ESSENTIALS

For an arbitration, it is essential to have a lawyer who knows the rules, customs and practices of the field. But trial skills developed in a courtroom can helpfully shape advocacy in many aspects of an arbitration, including procedural steps.

Take, for instance, arbitrator selection. Leaving aside concepts such as forum selection or specialised proceedings, the typical trial lawyer takes the judge they are given. This contrasts with arbitration, where one of the key benefits is the ability of the parties to select the decision maker – either on the basis of technical or legal experience and expertise.

Devoted arbitration practitioners are well-regarded for their ability to identify arbitrator candidates that might suit a particular case; for example, an arbitrator who has written about or publicly embraced a particular procedure. But this is only one side of the coin: arbitration practitioners benefit from the wisdom of a seasoned trial lawyer, who has repeatedly observed how other objective decision makers (e.g., judges) have reacted to similar legal arguments or fact patterns and what narratives can credibly be presented in the circumstances.

The ability to assess a case in advance and think about how it can best be presented – an art often practiced by the trial lawyer – can helpfully identify the right sort of arbitrator for a particular matter.

Likewise, consider the procedural order. Steps ultimately referenced in a procedural order may be bespoke to arbitration (e.g., an exchange of Redfern or Stern schedules); but, in order to devise a procedure that affords a party the best chance of success, it is helpful to think like a trial lawyer.

What evidence is needed? How can I obtain it? How can the client put pressure on the other side to increase leverage for settlement? Will simplifying the issues in dispute help or hinder the overall chances of success? All of these are classic questions also asked by the trial lawyer. Considering them when advocating for a procedural calendar – and not just defaulting to the usual approach in international arbitration – can result in a more effective and efficient proceeding.

Finally, unlike US court litigation, it is common for arbitration proceedings to be document focused. A tribunal will often require parties to exchange rounds of written memorials, together with witness statements and supporting exhibits, prior to the hearing. Unfortunately, this can result in proceedings with voluminous records – often, unnecessarily so. Here, the skills of a trial lawyer can help hone and refine the presentation of legal and factual evidence: focusing on the law, facts and themes that are most likely to matter to an arbitrator, and setting the stage for the hearing.

WHAT IT MEANS TO BE TRIAL READY

Being trial ready is important not just at the time of the hearing, but for the whole life of a dispute. At the highest level, there are three components to a trial-ready team: credibility, focus and commitment.

Credibility. A lawyer develops credibility by taking credible positions from the earliest stages of a proceeding. This is just as true in arbitration as it is in courtroom litigation. It is critical not to over-reach or overstate one's case, but instead to take positions based on a cleareyed view of the facts and the law. Positions developed in a dispute must not only sound compelling to the lawyers and their client; they also need to account for their adversary's evidence and arguments so that the positions hold up throughout the case. Credibility in dispute resolution also comes from having lawyers that have done it before. Lawyers that people understand have the capability to extract the truth from recalcitrant and even dishonest witnesses.

Focus. In arbitration, just like in a trial court, it is critical for counsel and client to have a focused mindset. They must have a shared understanding of what they are trying to achieve in the arbitration and why they believe they are entitled to it. If a lawyer cannot say that in a few sentences, their case is not focused enough. Without focus, time and money will be wasted. Once the focused objective is developed, all discovery and other pre-hearing work should be in service of this objective. At the arbitration hearing, focus continues to be key. Counsel's presentation and witness examinations should be tightly focused on the key disputed issues.

Commitment. Being trial ready means that counsel and the client must be fully committed to the effort. To a trial-ready lawyer, there is nothing more important than the client's case. No other case or other commitment. On the client side, there must be a willingness to invest the time and resources to try the case. To use an obvious example, arbitrations cannot be won without witnesses and witnesses cannot perform their role effectively without necessary preparation. Deciding to pursue an arbitration is a major commitment for an organisation. Once that decision is made, it is important to invest the time and resources necessary to achieve the best possible outcome.

In conclusion, success in high-stakes arbitrations requires a team with diverse experiences and skillsets. Specialised arbitration experience is important, particularly in international arbitration. There is also a role in arbitration for lawyers focused on courtroom trial work. Their penchant for seeing the big picture and developing case themes can be key throughout the course of an arbitration. And, at the hearing, a trial lawyer's witness examination skills can be decisive in getting to the right outcome on disputed factual issues.

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BEST PRACTICES IN THE USE OF DAMAGES EXPERTS IN COMPLEX COMMERCIAL ARBITRATIONS

BY ANDREW TEPPERMAN

COMPLEX COMMERCIAL ARBITRATIONS PRESENT counsel with a range of choices and challenges involving damages expert witnesses. This chapter offers brief perspectives on some common issues and suggests potential approaches when considering the appropriate role and use of damages experts.

While these suggestions are based on experiences in contractual disputes involving parties in the life sciences sector, it is expected that the issues and challenges are sufficiently generic to remain applicable to a range of types of proceedings.

TIMING OF EXPERT INVOLVEMENT

An initial question often arises concerning the optimal timing and level of involvement of the damages expert in the early phases of the proceedings. At this stage, counsel typically invest substantial time in reviewing and compiling company documents and discussing those materials and the context within which they were prepared with client representatives. It can be advantageous to involve the damages expert even at this early stage.

As documents and data come to light, and corresponding discussions with company personnel occur, themes that are likely to be highly relevant for the proceedings frequently begin to emerge. The damages expert can often assist during this process by providing guidance on the types of additional documents and data that may be helpful in addressing these themes in a damages report to be prepared later. For example, the company's experience with other products or in other geographies may offer useful insights into the potential outcomes in the marketplace in question had the alleged breach not occurred.

Furthermore, involving the damages expert at this relatively early stage provides an opportunity to ask clarifying questions about the company's practices regarding data collection and the circumstances under which potentially important documents were prepared.

Business plans and various types of forecasts or projections often go through multiple iterations and involve contributions from a range of company personnel. Establishing the context of any such documents and data that may later be produced in the proceedings is important in ensuring the damages expert (and opposing experts) characterise and use the materials accurately.

Product development and sales projections are of special relevance in this respect. These are often referenced, used or misused by damages experts at later stages in the proceedings. Understanding the assumptions underlying any forecasts or projections, and the applicability of those assumptions to the proceedings, may be critical as a result. In many cases, a projection's supporting assumptions deviate from those that would be relevant for a damages assessment. In such cases, it would not be appropriate to apply the projection directly.

For example, commercial outcomes that would occur in the absence of (but for) the breach may differ in significant respects from those reflected in the 'actual' world that served as the basis for the projection. In such cases, the expert will likely need to create an alternative projection that varies the relevant assumptions. An intimate familiarity with the inner workings of relevant projections generated by the client may be necessary to do so.

COORDINATION ACROSS EXPERTS

A second important question concerns the damages expert's interactions with other experts retained in the case. Typically, complex commercial arbitrations involve experts who address a range of areas apart from damages and that may broadly be characterised as relating to liability issues. These may include contract interpretation, other matters of law, scientific or medical issues, and industry-specific issues.

For example, in a dispute over a development agreement, a technical or scientific expert may opine on whether or how the inputs and outputs of development efforts would have differed from what has actually been observed. In a commercialisation agreement dispute, an industry expert may offer opinions on whether or how commercially reasonable efforts to market or promote a product may have departed from those actually observed.

Each of these examples may have implications for the costs incurred by the party at issue (such as enhanced development activities, marketing costs and sales force costs) and outcomes observed in the marketplace (such as time to market, 'share of voice' in the market and other sources of potential competitive advantage and, ultimately, market share). Changes in costs and in the timing or level of sales revenues will have obvious implications for the quantification of profits that would have been realised but for the breach. As such, these commercial implications are of critical relevance for the development of a damages opinion that appropriately reflects liability positions.

It is recommended that counsel take care to ensure consistency between expert opinions on liability and those on damages, particularly when the expert opinion on damages is informed by expert opinions on liability. In these circumstances, it is essential that the damages opinion flow from, and be tied to, the implications of the liability opinion. Accordingly, if a damages expert opinion depends on the opinion of a different expert, as is frequently the case, it may be helpful for counsel to convey those opinions to the damages expert as they develop, rather than waiting until the expert report serving as an input to the damage opinion is finalised.

Similarly, it will be important to ensure those opinions are available early enough to allow the damages expert to consider their implications and incorporate them properly. In some cases, it may be feasible to internalise aspects of this interdependence by having the damages expert opine on selected liability issues (e.g., industry practices and characteristics), assuming of course that such areas fall within the damages expert's range of expertise.

ASSISTING THE TRIBUNAL

A third major question is how to manage the damages expert most effectively in carrying out their duty to assist the tribunal. Typically, in complex commercial proceedings there will be numerous areas on which the two sides' damages experts fail to reach agreement. These areas of disagreement often stem from a combination of different assumptions (i.e., inputs to the respective experts' damages frameworks) and different conclusions based on similar assumptions.

The tribunal may not always find it straightforward to discern the sources of disagreements between experts. Experienced damages experts are often appropriately mindful of their responsibility to assist the tribunal by (among other things) elucidating and unpacking these issues and explaining clearly why the approach tendered is to be preferred to that of the opposing expert. Other experts may require more guidance and attention. Counsel should understand from the outset the expert's capabilities in this regard, and how much time will be needed in order to ensure the resulting opinions are as helpful to the tribunal as possible.

An additional factor for counsel to attend to is the appropriate timing for these considerations by the damages expert. Often, treatment of the sources of differences in expert opinions is left to a later stage in the proceedings: for example, a reply expert report, a joint expert report (if any) or even the hearing itself. Where feasible, it may be helpful to anticipate major issues that are likely to be in dispute in the opening expert report, laying the foundation for work that may take place later. Doing so can reinforce the expert's credibility and helps the tribunal begin to focus on key issues at an early stage.

Finally, a damages expert's facility in explaining and clarifying differences between expert opinions often becomes of paramount importance during the hearing phase of the proceedings. This is especially true when the hearing is expected to involve witness conferencing (expert 'hot tubbing').

An expert who lacks confidence, is unable to articulate the implications of an opinion in a commercial context, or otherwise falls short with respect to the ability to distil and convey complex concepts may easily come across as less helpful to the tribunal. Counsel should consider a potential expert's abilities in this regard when selecting an expert in the first instance.

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NAVIGATING JOINDER AND CONSOLIDATION IN INSTITUTIONAL AND AD HOC ARBITRATION

BY CÉSAR RIVERA AND EUGENIA SEOANE

IN INTERNATIONAL COMMERCIAL ARBITRATION, complexities often arise when disputes involve multiple parties or contracts, or when several disputes stem from the same or related legal relationships. These complexities pose challenges for the parties, arbitrators and arbitration institutions, which often have to decide whether and how to join an additional party to an existing arbitration, or to consolidate two or more separate arbitrations into a single arbitration.

Decisions on joinder and consolidation affect the efficiency and the finality of the arbitration proceedings and they may also undermine the enforceability of arbitral awards.

This chapter provides an overview on how various arbitration institutions regulate joinder and consolidation and discusses the scenarios that parties face in ad hoc arbitration.

JOINDER IN INSTITUTIONAL ARBITRATION

Most reputable international arbitral institutions have established rules for joinder and consolidation, including the International Centre for Dispute Resolution (ICDR), the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Stockholm Chamber of Commerce Arbitration Institution (SCC), the Vienna International Arbitration Center (VIAC), the Madrid International Arbitration Centre (CIAM), the German Arbitration Institute (DIS), the China International Economic and Trade Arbitration Commission (CIETAC), the Hong Kong International Arbitration Centre (HKIAC), the Singapore International Arbitration Centre (SIAC) and the Kuala Lumpur Regional Center for Arbitration (KLRCA).

The joinder process involves a formal request by the party wishing to join an additional party to an ongoing arbitration, which must contain roughly the same information as a request for arbitration, followed by a response from the third party and observations from the existing parties. Some institutions also allow the request to be made by the third party wishing to join the arbitration, such as the SIAC, the VIAC or the CIAM.

Requests for joinder should be made promptly, with a pivotal moment being the tribunal's constitution or even the appointment of any arbitrator since a subsequent joinder implies that the additional party does not participate in the tribunal's formation.

Requests after that moment require the consent of the additional party in most institutions, although not in the SCC or the CIETAC. The rules of some institutions expressly state that the acceptance of the third party shall be deemed as a waiver to its right to participate in the constitution of the arbitral tribunal (the SIAC or the CIAM). Other institutions require the additional party's express acceptance of the constitution of the tribunal (such as the ICC or the LCIA). In the case of the SCC or the CIETAC, if the institution grants the request and the additional party does not accept the appointed arbitral tribunal, the institution will appoint a new tribunal.

The rules of most institutions provide that the institution will decide on requests submitted before the constitution of the tribunal and that subsequent requests shall be decided by the tribunal (the ICDR, the ICC, the SIAC or the KLRCA). Under CIETAC rules, the arbitral tribunal, once constituted, assesses the necessity of joinder, but the CIETAC makes the final determination. Other institutions keep the whole decision on joinder in all stages, as the SCC or the CIAM. Finally, others leave the decision in all cases in the hands of the arbitral tribunal, as the LCIA or the VIAC.

To grant the joinder, agreement among all parties and the additional party or evidence that the additional party is prima facie bound by the arbitration agreement is required. Additionally, all relevant circumstances must be considered, including the timing of the request, any possible conflicts of interest or the impact of the joinder on the arbitral procedure, as the rules of several institutions expressly establish.

It is noteworthy that any decision to join an additional party to an arbitration is without prejudice to the arbitral tribunal's decision as to its jurisdiction over that additional party.

CONSOLIDATION IN INSTITUTIONAL ARBITRATION

Institutions also regulate the consolidation of two or more arbitrations into one, provided that certain circumstances are met. Consolidation generally takes place upon application of one or several parties (the ICC, the HKIAC, the SIAC, the VIAC or the CIAM), but some institutions also regulate the possibility to consolidate arbitrations on their own initiative (the ICDR, the LCIA and the KLRCA).

It is noteworthy that the rules of the different institutions that regulate consolidation only apply to the consolidation of arbitrations pending under the same rules (in the case of the ICDR also under any different rules administered by the ICDR or the AAA). Additionally, consolidation is not possible if the arbitrations to consolidate have not been commenced under the same arbitration agreement or compatible agreements.

Under the rules of most institutions, the decision to consolidate is taken by the institution (the ICC, the SCC, the DIS, the HKIAC and the KLRCA). The LCIA rules also grant arbitral tribunals the power to order consolidation with the approval of the LCIA. The SIAC rules follow the same structure as in the case of a decision on joinder: the institution decides if no tribunal has been constituted in any of the arbitrations sought to be consolidated, and, after the constitution of any tribunal, the application must be addressed to any such tribunal. The ICDR rules, in force since 2021, introduce a unique mechanism: a 'consolidation arbitrator' appointed by the ICDR to decide on the consolidation.

As in the case of joinder, in deciding whether to consolidate, the parties are consulted and all relevant circumstances must be taken into consideration. In any event, in order for the consolidation to be granted, the following required alternative circumstances are widely established: (i) that the parties to the arbitrations agree to the consolidation; (ii) that all the claims in the arbitrations are made under the same arbitration agreement or that they are made under compatible arbitration agreements; and (iii) the arbitrations involve the same or related parties and the same legal relationship or the same or related transactions (the ICDR, the ICC, the HKIAC, the SIAC and the SCC). In the case of the LCIA, if there is no agreement of all parties, a further requirement is that either no arbitral or only one tribunal has been formed in the arbitrations to be consolidated or that the arbitral tribunals that have been constituted are composed of the same arbitrators. More restrictively, the DIS rules require that all the parties to all the arbitrations consent to consolidation.

If consolidation is granted, the later proceedings are typically consolidated into the arbitration that started first, unless the parties agree otherwise. In the case of the ICDR, the consolidation arbitrator has the authority to revoke the appointment of any arbitrators, select one of the previously appointed tribunals to serve in the consolidated proceedings and, if necessary, complete the appointment of the tribunal.

JOINDER AND CONSOLIDATION IN AD HOC ARBITRATION

Ad hoc arbitration presents bigger challenges, as parties to disputes concerning several parties or based on several contracts must navigate multiparty and multi-contract arbitration and, thus, the potential need or convenience to resort to a joinder or consolidation, without the aid of institutional frameworks.

In the absence of a regulation of joinder or consolidation in the ad hoc arbitration agreement, the following two scenarios may take place: (i) the parties have agreed to a set of procedural rules that regulate joinder or consolidation, or the arbitration law of the elected seat does so; or (ii) the parties have not agreed to any rules, or the agreed-upon rules do not provide for joinder and consolidation nor does the arbitration law of the seat.

One of the most common sets of procedural rules to be agreed upon by the parties to an ad hoc arbitration agreement (if any rules are agreed upon) are the UNCITRAL Arbitration Rules. These rules, originating from 1976, introduced the power of the arbitral tribunal to allow one or more third persons to be joined in the arbitration at the request of any party in the revised 2010 version.

The 2021 version of the UNCITRAL Arbitration Rules mentioned consolidation for the first time when it included “the possibility of joinder or consolidation” as one of the elements to consider when determining whether to refer a dispute to arbitration under the UNCITRAL Expedited Rules. However, the UNCITRAL Arbitration Rules lack any other reference to consolidation.

As per national laws, the UNCITRAL Model Law on International Commercial Arbitration, on which many modern arbitration acts are based, does not regulate joinder or consolidation. The US Federal Arbitration Act has no provision on consolidation either. The UK Arbitration Act establishes that, unless the parties agree to confer power to order consolidation on the arbitral tribunal, the arbitral tribunal has no such power.

In event that the parties agreed to a set of rules permitting joinder or consolidation (or the arbitration agreement or the law of the seat provides for those mechanisms), requests must be filed with the tribunal.

If the arbitral tribunal is not in place yet, that party will have to wait until the tribunal is constituted or consider the possibility of directing application to the courts of the seat. However, consolidation by state courts is unlikely. In the case of the US, courts have generally determined that consolidation is a procedural matter for the arbitrator to decide, and that consolidation (and joinder) by the court is possible only if the parties agree to it.

In scenarios where the parties have not agreed to rules that regulate joinder or consolidation, nor is there a provision for these mechanisms in the arbitration law of the seat, the implementation of such mechanisms will hinge solely on the agreement of all concerned parties. In the absence of such an agreement, there is no legal foundation to employ these mechanisms, particularly in the case of consolidation, potentially leading to multiple concurrent proceedings and the risk of contradictory arbitral rulings.

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UK SECURITIES LITIGATION: KEY TRENDS AND ISSUES

BY STEPHANIE LEE, ELLIE STEELE AND HAROON ZAMAN

ENGLISH LAW PROVIDES A STATUTORY regime for disgruntled investors to seek compensation from an issuer of publicly traded securities in respect of loss suffered as a result of misleading or incomplete information disseminated to the market. This regime is contained within the Financial Services and Markets Act 2000 (FSMA). FSMA provides two such routes to recovery: section 90 and schedule 10A.

First, section 90 provides redress for misleading statements or omissions in listing particulars or prospectuses (albeit it does not apply to an Alternative Investment Market (AIM) admission document). A claim may be made under section 90 against the issuer of the securities or against any person who took responsibility for the prospectus, such as a director of the issuer. An issuer or individual is not liable under section 90 if they reasonably believed (having made such enquiries, if any, as were reasonable) that the statements in the prospectus were true and not misleading, or any matters omitted were properly omitted.

Second, schedule 10A provides redress for misleading statements or omissions in "published information" such as quarterly or annual reports and trading updates in circumstances where: (i) a "person discharging managerial responsibilities" (PDMR) of the issuer knew that, or was reckless as to whether, the statement in question was untrue or misleading, knew that the relevant omission involved the dishonest concealment of a material fact, or acted dishonestly in delaying the publication of the information; and (ii) the person acquiring the securities relied on that published information in circumstances where such reliance was objectively reasonable.

The scope of schedule 10A is narrower than section 90 in a number of respects. Most notably, a claim under schedule 10A can only be brought against the issuer of the securities, while claims under section 90 can also be brought against any person who took responsibility for the prospectus, and a schedule 10A claim requires the threshold of dishonesty or recklessness to be met.

THE FSMA REGIME IN PRACTICE

Although the statutory regime under FSMA operates alongside the usual common law causes of action in negligence and deceit, FSMA provides a framework for claims that might otherwise be difficult to bring at common law. For example, it is not possible to bring a claim in the tort of deceit unless the maker of the statement in question intended the recipient to rely on it. Such an intention would be very difficult to establish in respect of annual or quarterly reports – since, unlike prospectuses, such documents are not intended to encourage prospective purchasers of securities to invest – and is not required under schedule 10A.

There have been a number of high-profile examples of claims brought under these provisions in recent years. The first was a claim brought by institutional and retail investors against The Royal Bank of Scotland (RBS), pursuant to section 90. The claim was brought in respect of allegedly false and misleading information contained in a prospectus published by RBS in

2008 in connection with its £12bn rights issue, shortly before the bank almost collapsed a few months later. The case settled in 2017 shortly before trial.

In 2016, a claim was brought by institutional shareholders against Tesco Plc, pursuant to section 90A (the predecessor of schedule 10A) and schedule 10A, following a public announcement in 2014 that the company's profits had been overstated in its accounts to the tune of £250m. The case was dropped by 'mutual agreement' in September 2020, again shortly before the trial was due to begin.

In 2019, a claim based on section 90A and schedule 10A was brought by certain institutional investors in Serco Group plc in relation to losses allegedly suffered in respect of shares that they held in the company between 2006 and 2013, amid allegations that Serco overcharged and failed to disclose its profits relating to UK government contracts. The case is proceeding on a split trial basis, with the first trial, on issues common to all of the claimants, listed for June 2024.

Also in 2019, three claims were brought under section 90A and schedule 10A by institutional investors in G4S, alleging that a failure to disclose wrongful billing practices and the provision of fraudulent financial models to the government in respect of the electronic tagging of offenders and the management of court facilities in G4S' published information was a material omission and constituted an actionable dishonest delay. The case settled in December 2023, shortly before the first trial in the case which was scheduled for January 2024.

Most recently, a claim has been brought under section 90A and schedule 10A for compensation in relation to alleged accounting fraud and allegedly untrue or misleading statements in BT Group's published information between 2013 and 2017. The claim was issued in January 2023 by institutional investors in BT and is proceeding in the Commercial Court.

Only one case under the FSMA provisions has so far made it to full trial in English courts: *Autonomy and others v Lynch and Hussain* (2022). The case relates to the acquisition by Hewlett-Packard (HP) of the FTSE 100 software company Autonomy for $11bn in 2011, and the subsequent discovery by HP of fraudulent accounting and disclosure practices at Autonomy.

Among common law causes of action, claims were brought against the former chief executive and chief financial officer of Autonomy pursuant to schedule 10A. The case has undoubtedly paved the way for future proceedings in this area, with the judgment providing much-needed guidance on some of the complex legal issues that arise in FSMA cases.

However, in contrast with other FSMA claims – which are generally brought by groups of investors who have acquired an interest in the defendant company – the claims in the Autonomy case uniquely arose out of the wholesale acquisition by HP of the entire issued share capital of Autonomy. The market is therefore still waiting for a 'typical' securities action to go all the way to trial.

It is notable that each of these cases relates to alleged misleading statements or omissions in respect of financial information. However, the FSMA provisions are not restricted in this way and may be used in respect of misleading statements or omissions relating to any subject.

By way of example, we may soon see the FSMA regime utilised in an environmental context, with investors seeking to claim in respect of misleading sustainability representations (i.e., 'greenwashing') in prospectuses and financial information. This is all the more likely in circumstances where UK companies are facing increasing pressure from regulators and investors to publish environmental disclosures in their market-facing information.

SECURITIES LITIGATION ON THE RISE

It is possible to point to additional factors that have contributed to the rise in FSMA litigation. Important among these is the growth of litigation funding, which is now a multi-billion dollar market. The nature of FSMA claims, which often involve groups of shareholders looking for a way to participate in claims without having to contribute to the costs, and where a single claim might not be financially viable, makes them an obvious area for investment and an attractive proposition for litigation funders, who seek high value claims to back. This has been mirrored by an increase in the availability of 'after the event' insurance for claimants, which allows for the risk of adverse costs orders in the event that claimants are unsuccessful to be passed on to litigation insurers.

The gain in momentum can also be attributed to the wide variety of procedural mechanisms now available for group claims. These include straightforward multi-party proceedings, 'opt-in' group litigation orders (successfully used in the RBS rights issue litigation), and 'opt-out' representative actions pursuant to Civil Procedure Rule 19.8.

Finally, the decision of the US Supreme Court in *Morrison v National Australia Bank Ltd* (2010) significantly restricted the extraterritorial application of US securities legislation, ruling that section 10(b) of the Securities Exchange Act 1934 applied only in connection with the acquisition or sale of a security listed on a US exchange, or any other security in the US. The decision rendered it more difficult for shareholders to bring claims under the well-established US class action regime against issuers not listed in the US, such that investors have been encouraged to pursue such claims elsewhere, including in English courts.

KEY ISSUES AND EMERGING TRENDS

There are a number of key issues and emerging trends that we are starting to see in FSMA claims. The first of these relates to the issue of 'standing'. Under both section 90 and schedule 10A, the claimant must have an "interest in the securities" in order to bring a claim. This is satisfied by the claimant having an indirect interest in the securities via a custodian or nominee. Investors who hold shares indirectly through the Certificateless Registry for Electronic Share Transfer (CREST) are deemed to have the necessary interest.

However, there remains some uncertainty as to whether only those investors who subscribe as part of the initial offering of securities to which the prospectus or listing particulars relate can bring a claim under section 90, or whether investors who subsequently purchase shares in the secondary market also have standing to bring such a claim.

The second key issue relates to the fact that claims pursuant to schedule 10A can only be brought against an issuer. This could in theory present a challenge for claimants that have themselves acquired the issuer. However, the acceptance of the so-called 'dog-leg structure' in the Autonomy litigation confirms that schedule 10A can nevertheless be used by claimants, who have proceeded to acquire the entire issued share capital of a company on the basis of misleading statements or omissions in published information, to found claims against the company's former directors.

The 'dog-leg' structure works by first acknowledging that a buyer of securities may have a claim against the issuer under schedule 10A, and second by accepting that the issuer may in turn have a claim against its directors in respect of the issuer's loss incurred as a result of it being liable under schedule 10A.

Such 'dog-leg' structure avoids the perverse consequence of putting an investor who has acquired 100 percent of a listed company's issued share capital in a worse position than an investor who had acquired 0.1 percent of the company's shares, on the basis that the only claim the former would have had (without a 'dog-leg' structure) would have been against an entity within its own group.

A third important and seemingly developing issue in FSMA claims is whether and in what circumstances the issuer company can assert privilege against, and therefore withhold documents from, its shareholders.

Although there is well-established case law to the effect that a company cannot assert privilege against its shareholders (the shareholder principle) unless the relevant documents came into existence in the context of, and were created for the dominant purpose of, a specific dispute which is contemplated against the relevant shareholder, the authorities establishing the shareholder principle have recently been criticised in the G4S case. It may therefore only be a matter of time before the shareholder principle itself is called into question and falls to be reconsidered by a higher court.

In the G4S case, the court emphasised the boundaries of the shareholder principle, holding that it: (i) should not be expanded beyond the category of registered shareholders recognised by the 'old authorities' and does not apply to those who hold shares indirectly via custodians through CREST or other depositary systems; (ii) applies only to those who were shareholders at the time that the relevant documents came into existence; and (iii) applies in the context of legal advice privilege and litigation privilege, but not in the context of without prejudice privilege.

Furthermore, notwithstanding the fact that three of the claimants were direct registered shareholders and consequently able in principle to rely on the shareholder principle, the court dismissed the application of those three claimants for disclosure of the relevant material, made at a late stage in the proceedings, on case management grounds.

This narrowing of the scope of the shareholder principle is likely to have significant consequences for FSMA cases, as it is commonplace for shares in listed companies to be held indirectly through CREST.

In addition, the court's refusal to grant disclosure in favour of the three registered shareholders on case management grounds suggests that future applications in similar cases will need to be carefully formulated to persuade the court that the difficulties involved in disclosing documents to certain shareholders and not others, and maintaining confidentiality, can be effectively navigated and managed.

Fourthly, there appears to be an emerging trend toward a split trial structure in UK securities litigation, whereby (generally speaking) issues of liability are dealt with in the first trial, and issues of reliance, causation and loss are dealt with in the second. Recent cases in which split trials have been ordered include the G4S and Serco proceedings.

To address some of the issues which arise in seeking to divorce issues of liability from related issues of reliance, causation and quantum, it is now common, where a split trial is adopted, for some or all of the claimants to be ordered to advance their case on issues to be determined at the second trial in the course of the first trial.

Where it is ordered that only some of the claimants will advance their case on 'trial two' issues, parties will seek to agree or the court will determine which claimants should be selected, aiming to identify claimants whose cases are representative of the variety within the claimant group as a whole.

Finally, a key issue for parties to FSMA litigation is that damages assessments in section 90 and schedule 10A claims are inevitably complex. Indeed, the complexity of damages assessments is one of the causes of the trend toward split trials in recent years, with parties attempting to isolate complex issues of quantum from other issues in the claim by pushing them into a second trial.

While there is not yet any case law on the measure of damages under the FSMA provisions, this may reflect the respective fault standards for section 90 and schedule 10A. Section 90 effectively requires a negligence standard of fault (an issuer or individual is not liable if they reasonably believed that the statements were true and not misleading, or any matters omitted were properly omitted), whereas schedule 10A requires fraud (dishonesty in the form of knowledge or recklessness on the part of the PDMR).

Whether damages in schedule 10A claims are indeed to be assessed on the fraud basis is an outstanding question for the court to consider in its quantum judgment in the Autonomy case.

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PRACTICAL CONSIDERATIONS IN SECURITIES LITIGATION IN NEW ZEALAND

BY TIMOTHY LINDSAY AND SAM MCNAE

SECURITIES LITIGATION INVOLVING widely held listed companies is typically suitable for class actions. Such cases benefit from economies of scale, where it would otherwise be inefficient and uneconomic for shareholders to individually pursue their claims. The scale of class actions has the advantage of making the proceeding more attractive to litigation funders, which further serves to improve the overall economics, and therefore access to justice, especially for smaller retail investors. It is therefore unsurprising that class actions are an emerging trend in securities litigation in Australia. The number of securities class actions in New

Zealand has been relatively smaller, but it seems inevitable that New Zealand will follow suit. That said, New Zealand may or may not adopt a different approach on key preliminary matters, which could have significant implications for plaintiffs, defendants, litigation funders and lawyers.

IS THERE A SUITABLE 'CLASS'?

To commence a class action in New Zealand, either all members of the class must consent to, or an application be made on their behalf, for so-called 'representative orders'. While not strictly necessary when class members consent, it is prudent that those bringing a class action apply to the court for directions. This has become standard practice in securities litigation in New Zealand.

Generally, there is a suitable class when each member has claims that arise out of the same or related circumstances. The greater the likelihood that the class action resolves most of the disputes for class members, the more likely the court will grant representative orders. In the securities litigation context, the class will be comprised of shareholders of a listed company that held or acquired shares during a period when the listed company is said to have engaged in wrongdoing, usually by either making statements that misled investors or for failing to disclose material information in a timely fashion.

Like Australia, the New Zealand courts have adopted a light touch approach when deciding whether to grant representative orders. This is consistent with the objective of the New Zealand civil procedure rules, namely, to secure the just, speedy and inexpensive determination of proceedings. Unlike the US, there is no formal class certification process. The practical implications of this approach are significant when considering the extent to which costs are 'front-loaded'. For example, the courts accept that a provisional assessment of the merits is appropriate, although it "requires no more than consideration of the claims as pleaded, to ensure that on their face they disclose an arguable case on the facts as pleaded". This contrasts with the approach adopted in the US, where class certification, in the securities context, often requires the court to evaluate price impact evidence and other loss causation issues. These topics can be costly and typically involve extensive expert evidence.

COMPETING CLASS ACTIONS

Multiplicity of proceedings arises where separate groups of plaintiffs bring class actions against the same defendant for claims arising out of the same or a similar series of events.

There is no formal process for resolving competing or overlapping class actions in Australia. How the courts deal with multiple claims is a matter of discretion and case management. New Zealand is no different. In Australia, competing claims give rise to so-called 'beauty parades' or 'carriage motions', whereby multiple parties effectively pitch to the court for the right to take carriage of the claim. New Zealand, however, has not adopted the 'beauty parade' process nor any presumption that multiplicity of proceedings is to be discouraged. Although the class action landscape is relatively new and continually evolving, there are indications from both the courts and the New Zealand Law Commission, which in 2023 published an extensive report on class actions, that New Zealand is unlikely to go down the same path as Australia and instead prefers an approach that retains flexibility.

The practical effect is significant for plaintiffs, funders and class action lawyers who have cases which may be run in either jurisdiction. The Australian approach means funders and lawyers risk spending significant time and money preparing a case, only for another proposed proceeding (with different lawyers and funders) to be preferred by the courts. Over time these additional costs will be borne, at least in part, by plaintiffs. That is not presently the approach in New Zealand, so the prospects of a claim brought in this jurisdiction being permitted to proceed are heightened. The differing approach is particularly relevant in cases involving wrongdoing by companies that are dual listed on the New Zealand Exchange (NZX) and Australian Securities Exchange (ASX) or NZX-listed companies with foreign exempt status in Australia.

LOOKING AHEAD

New Zealand can be seen as a 'friendly' jurisdiction with relatively low barriers to commencing class actions. We expect growth in the securities class actions space, with New Zealand likely to maintain its liberal approach to representative orders, at least for the foreseeable future. Given the similar legal framework and approach to date, we expect New Zealand courts will be influenced by the experiences of Australian courts.

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ADDRESSING COLLECTIVE REDRESS – TRENDS, CORPORATE BEHAVIOUR, FUNDING AND DAMAGES

BY SARAH MAY, MICHAEL BARBER AND TOM MIDDLETON

THE US HAS LONG BEEN A LEADING jurisdiction for collective actions. Think of the 2001 Enron securities fraud, the 2010 Deepwater Horizon oil rig explosion and the 2015 Volkswagen 'Dieselgate' scandal.

These were notorious events that led to some of the largest mass claims of all time, brought by investors duped by corporate fraud, victims of environmental harm and consumers allegedly misled about product performance.

In more recent years, the courts of England and Wales have become increasingly fertile ground for mass claims, a trend driven by enhancements to legislation, a sophisticated judiciary, the rise of third-party funding and increased appetite to hold parties to account. In this chapter, we consider the upward trajectory of mass claims in the UK, how they are funded, their role in regulating corporate behaviour and how damages may be quantified by experts.

RISE IN COLLECTIVE REDRESS

There are now various options for injured parties seeking collective redress in the UK. Multiple affected claimants may, for efficiency and cost reasons, coordinate to bring a multi-party claim, as is seen in several of the 'trucks cartel' claims currently being litigated in the Competition Appeal Tribunal (CAT).

For large volumes of claimants, opt-in and opt-out class actions may be brought in the CAT under a collective proceedings order (CPO).

Through the newer opt-out regime, introduced by the Consumer Rights Act 2015, a class representative seeks certification to represent class members who must proactively elect to be excluded. Opt-out claims are presently only available for breaches of competition law, such as harm caused by cartels or market dominance. Such is the appeal of the CPO option, it has also attracted opt-out claims more tangentially linked to competition issues.

There was a sluggish start, with only nine 'collective proceedings' cases brought in the CAT from 2015-20 (and one previously in 2007). However, following the key Supreme Court decision in *Merricks v Mastercard* (2020), which lowered the threshold for opt-out certification, collective proceedings cases filed in the CAT have since boomed to a total of 49 as of March 2024 (the majority of which are opt-out cases and three of which have been withdrawn or settled), with seven, 15 and 17 cases brought in the last three years respectively. Key sectors for claims so far include technology (e.g., phone batteries), utilities and energy (e.g., sewerage services), and financial services (e.g., credit card interchange fees).

THIRD-PARTY FUNDING

This rise in collective actions has been made possible by the increase in availability of third-party funding. This is where a party has its legal fees paid by a funder, usually in return for either a percentage of the eventual damages won, or a multiple of the funding provided.

Third-party funding is particularly important for collective actions as often no single claimant, with relatively modest individual damages, is otherwise incentivised to fund the litigation. Funding can therefore ensure access to justice by enabling cumulatively large and meritorious group claims to get off the ground. A recent example is the class action brought by the sub-postmasters against the Post Office.

The litigation funding industry has grown rapidly in England and Wales in the past decade, with it being reported that the assets on funders' balance sheets now exceed £2bn, a significant increase from the 2011-12 valuation of £198m.

However, in July 2023 the third-party funding market was disrupted by the decision of the UK Supreme Court in *PACCAR v CAT* (2023), which effectively made many litigation funding agreements (LFAs) with fees based on damages, unenforceable.

This was because it found that LFAs are damages based agreements (DBAs), which must comply with the DBA Regulations 2013, and many LFAs then in place in the market did not. Following *PACCAR*, funders sought to amend and renegotiate terms, generally so their fees only relied on a multiple of funding. This altered their risk and reward profile, however, and sometimes led to a compensatory increase in funding multiples sought.

The UK government recognised the unintended consequences of *PACCAR* and its potential to limit access to justice. On 19 March 2024, draft legislation was introduced before the UK parliament – the Litigation Funding Agreements (Enforceability) Bill – which, if brought into force, will reverse the effect of *PACCAR*. It will confirm that LFAs are not DBAs, regardless of when the agreement was entered into. As the bill is short, with only two clauses, it could move quickly through parliament.

IMPACT ON CORPORATE BEHAVIOUR

For corporates, the threat of scrutiny from consumers, investors and activists, and the possibility of mass claims, may provide a check on their behaviours and a clean-up of pockets of bad practice. This is particularly the case in relation to environmental, social and governance (ESG) issues, such as 'greenwashing', environmental damage and human rights breaches.

We expect an increase in greenwashing claims brought through class actions on behalf of groups of investors under sections 90 and 90A of the Financial Services and Markets Act 2000 (FSMA).

To date, most section 90 and 90A FSMA claims have settled before trial. However, the £147m case brought by law firm Morgan Lewis on behalf of 60 institutional investors against Serco Group plc (2023), scheduled for trial in June 2024, will be closely watched as the first opportunity for the court to rule on important legal questions in such cases.

Current environmental class actions brought in the CAT include claims against UK water and sewerage companies related to alleged unlawful discharges of untreated sewage and wastewater. Then there is the *Municipio De Mariana & Ors v BHP Group and Vale* (2023) claim, which goes to trial in the High Court in October 2024, regarding the 2015 collapse of the Fundão Dam in Brazil and the loss of life, damage and ecological harm that followed. This likely represents the largest group action ever brought in English courts, with more than 700,000 claimants and £36bn reportedly sought in damages.

DAMAGES CALCULATION

Quantum of damages suffered is a key area of interest to claimants, which forensic accountants and economists can help establish.

Damages are generally calculated on a 'compensatory' basis in English proceedings – putting the injured party back into the position it would have been but for the infringement. One must compare the economic outcomes for the claimant that prevailed in the presence of an alleged infringement, versus the estimated outcomes had it not occurred (the 'counterfactual').

Competition damages claims brought on behalf of consumers, such as the current UK collective action against Apple in relation to the conditions it imposes through its App Store, may involve a comparison of actual prices paid to those that would have been paid but for the competition infringement. In securities fraud claims, such as the now-settled securities action against Tesco (which was alleged to have made false statements in its accounts), this could involve a comparison of the evolution of the value of one's investment over time in the presence of a false statement and subsequent corrective disclosure, versus how this value would have evolved in the absence of the false statement.

In a fair pricing dispute, such as alleged excessive discretionary commission historically earned on some motor finance, this could involve comparing actual interest rates charged to those which would have been charged in the absence of such agreements. While this conceptual comparison is easy to define, the challenge is in robustly estimating counterfactual outcomes.

Consider the February 2024 High Court judgment in relation to the claim bought by the liquidators of a PC retailer seeking redress for harm suffered due to a cartel in the market for manufacturing LCD panels (*Granville v LG Display* (2024)). While not itself a collective action, it highlights key elements required to compute losses in a competition damages claim, including the value of the LCD panels purchased by the claimants (value of commerce), the increase in price as a result of the cartel (overcharge), the extent to which any increase in cost was passed on to the claimant, an indirect purchaser of LCD panels (upstream pass-on), the extent to which any increase in the cost of LCD panels which reached the claimant was passed on to consumers (downstream pass-on), to what extent cost increases caused customers to purchase other products (lost sales and diversion), profits on lost sales (including on sales of lucrative warranties) and interest applicable to the loss.

While some of these elements relate specifically to a competition damages claim, all types of collective redress require multifaceted forensic analysis. Class actions present several novel challenges, for instance quantifying damages for individual class members.

CONCLUSION

Collective redress continues to grow in prevalence in the UK. The developing collective redress regime and the availability of third-party litigation funding can provide the means for individuals and organisations that have suffered harm to seek redress and hold corporates to account.

Regardless of whether the claim arises from infringements of competition law, financial disclosure rules or another source, a key component of any claim is the calculation of damages. This typically requires expert input from economists and forensic accountants and can involve an intricate comparison of actual outcomes to those that would have occurred but for the misconduct or infringement, which should be articulated in a straightforward way that is easy for all parties to understand.

■ *Sarah May and Michael Barber are forensic accountants and Tom Middleton is an economist at Grant Thornton UK LLP.*

UNLOCKING IRISH CONSUMER REPRESENTATIVE ACTIONS – DOES THIRD-PARTY FUNDING REFORM HOLD THE KEY?

BY JULIE MURPHY O'CONNOR, TINA TURNER AND ROISIN PEART

THE BROAD LEGAL FRAMEWORK IS now in place to facilitate consumer representative actions in Ireland. This is a significant milestone as it is the first time that provision for any class-type action has been made. However, obstacles remain to the new legislation offering a valid means of redress in practice. In particular, key to facilitating these actions is the availability of both a suitable entity that can bring the action on behalf of impacted consumers and, importantly, a suitable source of funding. The possible legalisation of third-party litigation funding (TPLF), which is currently generally prohibited in Ireland, is under active consideration by the Law Reform Commission (LRC) and future change in this area will be central in enabling the legislation to have real effect.

THE IRISH LEGISLATION

The Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 was signed into law on 11 July 2023. The Act, which gives effect in Ireland to the EU Representative Actions Directive (RAD), permits collective domestic and cross-border actions to be taken on behalf of consumers impacted by infringements of a broad range of EU consumer protection legislation occurring on or after 25 June 2023.

The Act is still awaiting commencement by ministerial order (as required by section 1(2) of the Act) and so is not yet legally operative. Updates to relevant Irish court rules to reflect the new procedure are also awaited.

SCOPE

Over 60 pieces of consumer legislation are caught by the Act, covering sectors as diverse as product liability and safety, data protection, financial services, energy, telecommunications, travel and tourism, food safety and the environment. Follow-on competition actions in such sectors will potentially be an area of immediate interest for representative actions as a breach of EU law will already have been established.

Remedies for infringement are to seek injunctive relief and/or redress measures, namely compensation, repair, replacement, price reduction, contract termination or reimbursement. As provided for in the RAD, the Act does not require consumers to specifically opt-in to applications for injunctive relief, but they must opt-in to any application for redress measures.

CHALLENGES

While the Act has the potential to dramatically change the Irish commercial litigation landscape, the extent to which that will be realised, even if the Act is commenced in full, remains to be seen, particularly given the restrictions on who may bring a representative action, as well as ongoing concerns as to how such actions would be funded.

WHO MAY BRING A REPRESENTATIVE ACTION?

It is a requirement of the Act, as prescribed by the RAD, that consumer representative actions are brought by independent, not-for-profit 'qualified entities' (QEs), which, in Ireland, will be designated by the Minister for Enterprise, Trade and Employment. It is not yet clear which body or bodies will, or can, act as a QE in Ireland. Without at least one Irish QE designated, there is no domestic entity empowered to bring consumer collective actions under the Act, although a body designated as a QE in another member state could seek to bring a cross-border representative action in Ireland if, for example, Irish domiciled consumers were impacted by the infringement in question.

The requirements that an entity seeking to be designated as a QE must satisfy are extensive, including that its main purpose is a demonstrable legitimate interest in protecting consumer interests under the legislation captured by the Act. In addition to being a designation condition, this requirement may also be examined by the court as to whether a QE's main purpose justifies it taking a particular representative action.

FUNDING

When applying to the High Court to bring a given representative action, the QE must provide details of how the intended action will be funded.

Although the Act makes provision for fees to be charged by a QE to a consumer requesting to be represented in a representative action for redress, this is limited to what the Act refers to as a "modest" fee, with a maximum to be prescribed by the minister at a level that "shall not discourage" participation by a consumer. These fees are therefore unlikely to be a sufficient source of funding for QEs to bring a representative action.

Although the Act does refer to the use of third-party funding of representative actions for redress and provides certain safeguards in its use, it provides this is only "insofar as permitted in accordance with law". Given that TPLF in Ireland is largely prohibited because of the laws against maintenance and champerty, this is unlikely to be a viable funding source for QEs, at least in the short term.

On that basis and given that QEs must be non-profit organisations, the question of how to fund such actions continues to present a limitation on potential utilisation of the new legislation.

POTENTIAL REFORM OF LAWS RELATING TO THIRD-PARTY FUNDING IN IRELAND

There have been various calls for legislative intervention to allow TPLF more broadly in Ireland for some time, including in the January 2020 joint report by the EU Bar Association and the Irish Society for European Law and the report of the review of the administration of civil justice group chaired by Justice Peter Kelly (the Kelly Report) published later that same year.

There have been developments in this space since those reports. At EU level, the European Parliament's resolution in September 2022 on the responsible private funding of litigation recommended to the European Commission that, following the RAD becoming operational, a new directive should be proposed to establish common minimum standards for TPLF across the EU. At the national level, legislation was enacted last year to expressly permit third-party funding of international commercial arbitration in Ireland.

Although the Department of Justice has indicated that it intends to legislate for a limited form of TPLF for insolvency practitioners to increase the pool of assets available to creditors, it has also stated that any broader domestic policy change in relation to TPLF should await the completion of a review by the LRC. A public consultation by the LRC, which closed at the end of 2023, sought views on the various ways in which TPLF could be legalised and regulated in Ireland. The intention of the consultation was to "inform debate and stimulate discussion, which, it is hoped, will generate responses from all interests and perspectives that will enable the [LRC] to move to a final report setting out its recommendations".

Although any final report of the LRC is keenly awaited, even if the LRC recommends the legalisation of TPLF, its regulation is not, as experiences in other jurisdictions show, necessarily straightforward.

FUNDING – LESSONS FROM THE UK

In interpreting the relevant English legislative framework regulating litigation funding agreements, the UK Supreme Court in *R (on the application of PACCAR Inc and others) v. Competition Appeal Tribunal and others* found that, as the funders in question were providing "claims management services", the relevant funding agreements were damages based agreements (DBAs). As the requirements relating to DBAs had not been met, those agreements were therefore unenforceable.

Following that landmark decision, which put the enforceability of many litigation funding agreements into doubt, the UK government announced new legislation to effectively restore the pre-*PACCAR* position and provide clarity that many cases can continue to be funded. Access to justice seems to have been key in the UK government taking such action, with the UK lord chancellor stating the new legislation will, for the purposes of England and Wales at least, "mean more victims can secure vital third party funding to level the playing field and support their fight for justice".

Further underlining the ongoing regulatory difficulties presented by TPLF, the UK government has also stated it is considering a wider review, including whether increased regulation and safeguards are required.

CROSS-BORDER REPRESENTATIVE ACTIONS – FORUM SHOPPING

It is also noteworthy that a QE can be designated to bring domestic and/or cross-border representative actions and it is also possible for more than one QE designated by different member states to bring a cross-border representative action together. Where proceedings could be brought in several competing potential jurisdictions, although the allocation of jurisdiction between relevant courts will be governed by the Brussels Recast Regulation, this also provides flexibility as to where such consumer representative actions may be brought.

Such flexibility could result in QEs deciding to bring a particular action in an EU member state based on a preference for its procedural rules. The availability of third-party funding is likely to be of significance in a QE's forum selection. However, the fact that Ireland has a broad discovery regime that requires parties to disclose relevant documents in a party's power, possession or procurement sets it apart from civil law EU member states, where discovery is not an ordinary feature of litigation.

CONCLUSION

The recent events in the UK highlight the challenges faced by legislators in Ireland as they consider regulating the introduction of TPLF, and in particular how a suitable framework may need to have the flexibility to evolve over time in what is a developing and expanding industry.

Although it is difficult to see how the means of seeking collective redress envisaged by the RAD can be effectively utilised in Ireland until the issue of funding is addressed, momentum for change does appear to be gathering and the EU proposal for common minimum funding standards may be a further catalyst for reform.

Were TPLF to be legalised, this would likely pave the way for consumer representative actions in Ireland and, as the only remaining English-speaking common law jurisdiction in the EU, with a well-developed discovery regime, Ireland has much to offer as a jurisdiction of choice for such actions.

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CONSUMER RIGHTS ENFORCEMENT ACT IN GERMANY

BY ERIC WAGNER AND JULIAN JÖRGES

THE USE OF COLLECTIVE LEGAL PROTECTION is becoming increasingly important and is particularly relevant for consumers. Legislators in Europe have recognised this fact and adopted Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers. The German government took action to implement this directive into national legislation in October 2023. This is how the Act on the Bundled Enforcement of Consumer Rights came about. The aim of the EU Directive and the Consumer Rights Enforcement Act (*Verbraucherrechtedurchsetzungsgetz* (VDuG)) is to ensure effective and efficient procedural mechanisms for representative actions for injunctive and redress measures for consumers.

CONTENT

The VDuG establishes two types of representative actions: actions for redress measures and model declaratory actions. The latter were regulated under the German Code of Civil Procedure, before being integrated into the VDuG. Collective legal protection under the Act is available in civil disputes relating to claims and legal relationships of a large number of consumers against one business. However, small businesses with fewer than 10 employees and an annual turnover or balance sheet not exceeding €2m can also be a part of such class actions.

For the purpose of bundled enforcement of consumer interests, qualified consumer organisations and qualified entities from other EU member states are entitled to bring an action. A representative action requires a quorum of at least 50 consumers who have been affected by the alleged infringement. In addition, other consumers can join the representative action by way of an opt-in procedure by registering with the register of representative actions.

Action for redress measures. The newly introduced action for redress measures is aimed at ordering a trader to render performance to the consumers concerned. In addition, it is also possible to request payment of a collective total amount. In particular, the performance may be directed toward paying damages and asserting claims for subsequent performance. A special prerequisite for the admissibility of an action for redress measures is that the consumer claims are similar. The latter must be similar in a factual or legal respect, such that the court is able to rule on a large number of claims in one proceeding. The relevance of the action for redress measures in practice remains to be seen. Consumers and small businesses could use representative actions to assert their rights in a collective manner with relatively little effort, even if the value in dispute is low. Conversely, this means businesses could have valid concerns about facing liability issues *en masse*, due to small amounts in relation to individual consumers.

Model declaratory action. In contrast, a model declaratory action aims to establish whether legal or factual conditions for the existence or non-existence of claims or legal relationships between consumers and traders are present. It is not subordinate to an action for redress measures. The VDuG expressly provides that the possibility of bringing an action for redress measures does not preclude the admissibility of a model declaratory action.

Blocking effect. In addition to the German legislator's intent to ensure effective consumer protection with the VDuG, another consideration was relieving the burden on the judiciary through class actions. The Act contains provisions on the blocking effect in two respects. First, a pending representative action blocks another representative action with identical subject matter against the same trader. Second, the pending representative action has a blocking effect vis-à-vis an individual action brought against the trader by a consumer named in the register of representative actions.

ADDITIONAL COLLECTIVE LEGAL PROTECTION OPTIONS IN GERMANY

Along with representative actions under the VDuG, the German legal system offers other collective legal protection options, as outlined below.

Injunctions. Injunctions are governed by the Injunctions

Act and the Unfair Competition Act, both of which have been adapted to meet the provisions of Directive (EU) 2020/1828 which deal with injunctive relief.

In particular, the Injunctions Act enables organisations to collectively assert claims for injunctive relief, based on violations of consumer protection regulations. Implementing the Directive has meant extending the scope of law. Above all, the two Acts now include data protection provisions. In the future, consumers will be able to bring claims against traders for injunctive relief for all breaches of data protection provisions.

While the Injunctions Act extends to violations of consumer protection regulations, the Unfair Competition Act includes collective actions for elimination and injunctive relief in the context of violations of antitrust and competition-related provisions.

Model proceedings. The Capital Investors Model Proceedings Act establishes the possibility of model proceedings to deal with mass litigation relating to capital market disputes. The proceedings serve to determine the existence of conditions that justify or exclude a claim and to clarify legal issues. Claims based on false, misleading or omitted capital market information are a special focus. A current draft bill on the Act defines its scope of application and addresses the relationship between model proceedings under this Act and proceedings under the VDuG. According to the bill, a pending representative action on the same facts must not preclude the admission of model proceedings under the Capital Investors Model Proceedings Act.

CURRENT PROCEEDINGS

The first action for redress measures became pending before the Schleswig-Holstein Higher Regional Court in November 2023. The defendant company is Hansewerk Natur GmbH, a Hamburg-based regional heating and energy service provider. The plaintiff is the Bundesverband der Verbraucherzentralen und Verbraucherverbände.

The application for redress includes an order for Hansewerk Natur GmbH to pay unnamed consumers who had concluded contracts for the supply of district heating. The applications relate to the reimbursement of amounts charged in connection with price index clauses. The plaintiff has alternatively requested a determination that the defendant was not and is not authorised to implement certain price increases.

Hamm Higher Regional Court is currently dealing with a similar action for redress measures. The defendant is E.ON Energy Solutions GmbH, and the plaintiff is the Verbraucherzentrale Bundesverband. As in the case before Schleswig-Holstein Higher Regional Court, the application for redress concerns an order for a local and district heating supplier to reimburse an amount to unnamed customers due to a unilateral increase in kilowatt-hour (kWh) prices for district heating based on a price escalation clause. The defendant had calculated the respective basic and kWh price based on price index clauses. The plaintiff considers the defendant's price increases invalid to the extent they are based on a price index clause that incorporates natural gas price indices at a rate of greater than 59 percent. According to the plaintiff, the fees invalidly charged in this way constitute unjust enrichment and give rise to customer claims to repayment against the defendant. The plaintiff's application for model proceedings also includes a request for a declaration that the defendant is not entitled to unilaterally increase prices in this manner.

Hamm Higher Regional Court is currently dealing with a further action for redress brought by the Verbraucherzentrale

Bundesverband. These proceedings are also based on similar facts. The application for redress includes an order for energy supplier ExtraEnergie GmbH to repay an amount, plus interest, to unnamed consumers who had concluded contracts, outside the statutory default contracts, for the supply of electricity or natural gas and who were notified of a price increase. In addition, the plaintiff is also requesting a declaration that the price increase is invalid and that the consumers did not consent to a price adjustment by clicking on options relating to the determination of the instalment.

OUTLOOK

The newly implemented instruments of collective legal protection in Germany could become particularly important in connection with environmental, social and governance (ESG)-related lawsuits. This is conceivable considering the current dynamic developments and trends in German and European legislation on ESG. In the context of climate change litigation in particular, a new area of application of the VDuG can be expected regarding companies with international operations. After all, many people are often affected in the same way in such scenarios. It remains to be seen how the Act will specifically impact traders and consumers.

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JURISDICTIONAL ISSUES WITHIN CANADIAN IP LITIGATION

BY SHANE HARDY AND BRIGEETA RICHDALE

WHILE VIRTUALLY ALL JURISDICTIONS around the world struggle to maintain and strengthen intellectual property (IP) regimes in the face of rapid technological change, Canada's court and IP registration systems can often pose traps and pitfalls for advocates that do not often deal with IP assets.

Canada's court and administrative tribunal system has a mix of courts that possess 'inherent' jurisdiction and courts with jurisdiction that is created by statute. Aside from the judicial realm, Canada's Trademarks Opposition Board deals with the ability to register trademarks but does not possess jurisdiction to order that 'use' of a mark be halted.

This chapter is designed to highlight a handful of these jurisdictional issues and to assist readers to select the proper forum at the outset of an IP dispute.

Looking first at Canada's court system, section 96 of Canada's Constitution Act, 1867 creates a system of courts with inherent jurisdiction, meaning that those courts possess jurisdiction to hear and decide upon any manner of case, unless statutes reserve particular areas of specialty to a different court.

These courts are the most significant courts of first instance in Canada and typically hear cases of a complex variety. From serious criminal matters to civil disputes involving considerable monetary values, these provincial superior courts (sometimes referenced as section 96 courts) are granted very broad jurisdiction.

Provincial courts are typically a rung below superior courts and are reserved for matters such as less serious criminal acts, civil claims of a more modest sum and family law disputes, among others. Other specialised courts such as the Tax Court, military courts and various other judicial and quasi-judicial bodies exist, but those decision-making bodies (including lower-level provincial courts) typically do not have jurisdiction over IP disputes and are beyond the scope of this chapter.

Section 101 of the Constitution Act, 1867 provides that the parliament of Canada may establish additional courts for the better administration of the laws of Canada. The 'additional court' that is often seen as the most appropriate for dealing with IP disputes is the Federal Court.

The Supreme Court of Canada has had opportunity to review the establishment and constitutional legitimacy of Canada's court system on different occasions. Most specifically, in *R. v. Thomas Fuller Const. Co.* (1958), the Supreme Court held: "A special feature of the constitution enacted for Canada by the *British North America Act* is the provision for provincial superior courts of general jurisdiction to be established in cooperation by each province and by the federal authority. While it is usual to refer to these courts as provincial, they are so only in a limited sense. Under s. 96, the federal government plays the most important role in their establishment: the appointment of the judges and, under s. 100, their salaries are fixed and provided by Parliament."

And further: "It must be considered that the basic principle governing the Canadian system of judicature is the jurisdiction of the superior courts of the provinces in all matters federal and provincial. The federal Parliament is empowered to derogate from this principle by establishing additional courts only for the better administration of the laws of Canada."

Between provincial superior courts and the Federal Court, there is certainly room for overlap and, quite frankly, 'forum shopping'. However, there are instances when it is only possible to bring a particular claim in one court or the other. For example, section 20(1) of the Federal Courts Act removes some jurisdiction from the provincial superior courts by making it clear that the Federal Court has exclusive original jurisdiction in all cases of conflicting applications for any patent or for any certificate of supplementary protection under the Patent Act, or for the registration of any copyright, trademark, industrial design or topography within the meaning of the Integrated Circuit Topography Act.

The Federal Court also has exclusive original jurisdiction in all cases in which it is sought to impeach or annul any patent or any certificate of supplementary protection issued under the Patent Act, or to have any entry in any register of copyrights, trademarks, industrial designs or topographies made, expunged, varied or rectified.

Additionally, section 20(2) of the Federal Courts Act provides the Federal Court with concurrent jurisdiction (along with provincial superior courts) in all cases other than those mentioned in subsection (1) in which a remedy is sought under the authority of an Act of Parliament or at law or in equity respecting any patent, certificate of supplementary protection issued under the Patent Act, copyright, trademark, industrial design or topography referred to in paragraph (1)(a).

In summarising these provisions and case law, potential litigants should understand that the provincial superior courts and the Federal Court have concurrent jurisdiction with respect to most matters that are included within the Trademarks Act (1985) and the Copyright Act (1985). However, importantly, the Federal Court has exclusive jurisdiction over the right to expunge, vary or rectify any entry on the register of copyrights, trademarks, industrial designs and patents. These are important concepts for litigants when they select an appropriate forum in which to litigate a dispute.

These jurisdictional issues should be considered by plaintiffs before commencing a lawsuit. If a plaintiff needs to expunge a patent, copyright or trademark, the choice is clear and the only court with jurisdiction is the Federal Court. Should a plaintiff wish to limit the defendant's ability to counterclaim on the basis of expunging the plaintiff's registered IP rights, a superior court could be strategically beneficial.

If, on the other hand, a matter does not sufficiently involve IP assets (such as trademarks, copyrights or patents) and is primarily based upon tort or contract, the Federal Court may not have jurisdiction at all, and the action should be commenced within a provincial superior court. Of course, there are intricacies that are beyond the scope of this chapter, but it is always important to remember that the Federal Courts Act must be read in conjunction with the legislation at issue.

So, for example, the Trademarks Act does not specifically provide for the remedy of a 'declaration of non-infringement'. Absent such specific wording, query whether the Federal Court has jurisdiction to make an order that use of a mark does not infringe the rights of another. In cases where this type of declaratory relief is sought, it may be prudent to commence an action in a provincial superior court, which, as a court of inherent jurisdiction, has the ability to make such an order.

Aside from these specific issues, there are numerous other considerations that should be contemplated when choosing an appropriate forum for IP litigation in Canada, as outlined below.

Firstly, the Federal Court is quite well known as having a more particular focus on IP issues and, generally speaking, counsel can expect to find judges who have more knowledge of the intricacies of IP legislation and case law.

Secondly, matters commenced within a provincial superior court will only have effect within the province hosting the litigation. Significant additional steps would need to be taken in order to enforce, for example, an Ontario judgment in the province of British Columbia. As a result, litigants that have national interests tend to gravitate toward a claim in the Federal Court (which has applicability nationwide).

Thirdly, Canada is a country that has a 'loser pays' approach to costs. The winning party is typically entitled to receive a portion of its legal fees from the unsuccessful party. The range of cost awards varies depending upon the nature of the case, the conduct of parties and the court in which the claim is tried.

The Federal Court has a tariff-based system for costs that is often viewed as somewhat antiquated and out of date. Cost awards, as a result, are often lower in the Federal Court, leading some litigants to commence litigation in the appropriate provincial superior court. Lastly, as seasoned IP litigation counsel will appreciate, interlocutory injunctive relief is often an issue in cases involving patents and trademarks.

It has long been the generally held view that injunctions are less likely to be granted within the Federal Court. If injunctive relief is required, particularly on an interlocutory basis, counsel should pay careful attention to relevant case law within the potential jurisdictions in question since some provinces may be more likely and willing to grant such interlocutory relief.

Aside from court systems, Innovation, Science and Economic Development Canada (ISED) is a department of the federal government that operates IP registration regimes. ISED houses the Canadian Intellectual Property Office (CIPO), which includes the Copyright Office, Patent Office and the Trademark Office. Each of these offices maintains registers of the respective IP rights and examines and grants registrations for those rights.

Analysing the processes and rights granted by each of these offices could be the subject of a paper much lengthier than this one but, generally speaking, IP rights holders should pay close attention to the rights that can be granted (and cancelled) by these offices.

For example, the Trademarks Act sets out a complete code related to the filing, examination and registration of trademarks. As a subset of the Trademarks Office, the Trademarks Opposition Board governs trademark opposition proceedings which are initiated when one interested party elects to oppose an application that has been examined and subsequently published in the 'Trademarks Journal'.

While expungement proceedings can be commenced in the Federal Court subsequent to a mark being registered, the Opposition Board is the only body with jurisdiction to refuse registration of a trademark application that has been challenged by an opponent prior to registration. Strict time limits have been put in place by the Opposition Board and only registered trademark agents are actually entitled to practice before the Trademarks Office.

Canada's courts and quasi-judicial opposition boards have complex jurisdictional rules and considerations. Like other federations with both federal and provincial levels of government, Canada's judicial system is governed by what can be a confusing labyrinth of statutes and case law.

When IP rights are in question and disputes arise, there are significant strategic decisions that must be made before taking action. Again, disputes within the IP space in Canada can be complex, and strategic legal choices can only be made after having consulted expert Canadian litigation counsel.

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GONE WITH THE WIND: CONFRONTING THE PUZZLING CASE OF WAKE LOSS

BY JONATHAN RIPLEY-EVANS, FIORELLA NORIEGA DEL VALLE AND KYLE MELVILLE

SOUTH AFRICA HAS SUFFERED FROM A shortfall in electricity generation since 2008 which, to date, sits at between 4000 and 6000MW. As a consequence, the country's stalling economic growth and glacial industrial development is directly associated with the decreasing sustainability of electricity supply.

Renewable energy has been identified as one of the ways in which the generation shortfall can be addressed and, in an effort to stimulate development, the government has established dedicated renewable energy development zones (REDZ).

REDZ are, in essence, demarcated geographical corridors perfectly suited for the development of wind and solar renewable projects. The creation of REDZ not only provides incentives for developers but also allows for the streamlining of the administrative and approval processes necessary for the development of new renewable energy projects in South Africa.

Over 50 percent of designated REDZ have geographical characteristics which are suitable for wind energy production. However, an unintended consequence of having designated these specific zones is that wind projects are inevitably placed in relatively close proximity to one another. As a result of this, and depending on the proximity of wind farms, downwind turbines may suffer from a phenomenon known as ‘wake loss’.

The ‘wake loss effect’ occurs where wind volume is reduced through the process of electricity generation, thereby diminishing the generation capacity for downwind turbines. As such, the construction of a new wind project in relatively close proximity to an existing project may have an impact on that existing project’s generation capacity. The phenomenon of wake loss is not regulated in South Africa (as is the case in many other countries); instead, this issue is left to the individual parties to resolve. It should be noted, however, that there is no recognised legal right to compensation for the effect of wake loss in South Africa.

WAKE LOSS IN THE SOUTH AFRICAN CONTEXT

While this issue is relatively new in South Africa, a clear trend is emerging with parties adopting one of two main strategies aimed at addressing wake loss.

In many instances, potentially affected parties enter into commercial agreements in an effort to avoid conflicts which may delay the progress of the new project. These agreements often seek to compensate an affected party for the anticipated impact on the existing project. While the terms of such agreements will differ from project to project, there is no legal obligation under South African law to enter into such an agreement.

We have seen in some instances where competing parties have not reached any form of commercial agreement, that more 'creative' measures are adopted. Such creative measures include objecting to certain environmental authorisations or approvals required for the new projects. In such objections, parties have argued that wake impact constitutes a valid 'socioeconomic' consideration which requires compensation prior to the environmental approval of the new project. It has been argued that by granting authorisation to a new entrant (in the vicinity of the existing project) the existing project will be negatively impacted to such a degree that compensation should be awarded due to the socioeconomic impact of the new project.

The question as to the appropriateness of using environmental objections primarily as a tool to extract some form of financial compensation has not yet been considered by courts.

APPLICABLE LEGAL PRINCIPLES

In seeking compensation from a new entrant, the pre-existing power producer is essentially requesting a pre-estimate of 'damages' which it believes will suffer as a result of the construction of the new wind farm in its vicinity. Under South African law, damages may be claimed in three ways: (i) breach of contract; (ii) under a law which provides for damages or compensation following a breach of that law; and (iii) in terms of a delict (or tort).

As there is usually neither a contractual relationship, nor a statute, regulating this, the pre-existing power producer would generally be limited to a claim for damages under 'delict' or 'tort'.

Delictual liability in South Africa is generally limited to damages sustained to one's property or person. It is only in very limited circumstances that South African courts have extended delictual liability to instances where a party suffers financial losses absent any injury to their person or property (also known as a claim for pure economic loss).

Because the pre-existing power producer will not be able to point to any physical damage to its person or property, due to the fact that South African law regards 'wind' as something which is common to all persons but belongs to no one, its claim is essentially a claim for pure economic loss caused by a competitor.

The difficulty in a claim for pure economic loss in South Africa is that, for such a claim to succeed, all five elements of a delict must be satisfied: an act, loss suffered, causation, wrongfulness and fault. South African courts have held that, as a point of departure, it is not wrongful to cause pure economic loss to another person. The element of wrongfulness can only be established where it can be shown that there is a legal duty not to cause pure economic loss to the other party, and that legal duty has been breached. For a claim to succeed in this context, a party will need to show that a competing wind project owed it a legal duty not to cause it pure economic loss or not to interrupt or disturb its access to the wind.

South Africa's Supreme Court of Appeal has previously refused to develop the common law in relation to claims for pure economic loss, stating that allowing a party to claim financial loss absent this legal duty will open the proverbial floodgates and allow for indeterminable liability. However, this specific question, insofar as it relates to the wind, is a novel one in today's context and it thus remains to be seen, in the absence of statutory regulations to this effect, whether the courts will adopt a different approach.

A COMPARATIVE APPROACH

Renewable energy generation is, of course, a key focus for many other developed nations. The UK's net-zero plan aims to increase its offshore wind-energy generation by some 70GW in the next 30 years. The increase in new wind farm projects in the UK has led wake loss to become a prevalent consideration in the development of these projects. The UK has also not fully regulated how wake loss is dealt with, leading parties to enter into individual commercial agreements to offset the financial impact of wake loss and to avoid delays which may arise due to conflicts.

Other nations, such as Japan, have taken steps to enact regulations and its courts have grappled with similar considerations, albeit in the context of solar powered energy generation. Under the Japanese Civil Code, the guiding principle is that the authorities will undertake a balancing act of the rights of the power producers and must consider the prevailing social conditions that are specific to that particular area, in order to guide their decision.

In Brazil, it is understood that every project is granted a 10-rotor diameter 'buffer' area from its wind turbines, and that the authorities will not grant new permits within this 10-rotor diameter buffer, unless they provide a letter of a support from the existing project.

A WAY FORWARD FOR SOUTH AFRICA

Through the South African lens, a balance of the Brazilian and Japanese approaches may be best, given the individual circumstances and costs of each project, as well as the need to consider inclusive growth and participation in the South African economy. While South African courts are well-versed in the exercise of balancing competing interests, the practical problem is the delay in resolving disputes before South African courts, which could take many months (if not years) in each individual instance. It would therefore seem most appropriate to designate a regulator to deal with these situations on a case by case basis.

As increased electricity generation remains at the top of the national agenda, more nuanced disputes in the renewables space will undoubtedly arise. In the context of wake loss, bearing in mind that it remains largely unregulated around the world, it is vital that electricity generation is not held up because of a lack of regulations governing the relationships between parties in such circumstances. Until such time as this area is regulated or is guided by judicial precedent, parties may be forced to acquire surrounding land to ensure that no other competing projects are erected in a location that will cause wake loss.

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RISK-MITIGATION STRATEGIES FOR SAFEGUARDING FOREIGN INVESTMENTS

BY LINDSEY SCHMIDT, ANKITA RITWIK AND MARY ALINE FERTIN

INVESTING IN A FOREIGN JURISDICTION carries inherent risks due to varied legal and regulatory environments. Foreign investors must contend with differing contract laws, property rights, prevailing business practices, tax policies, environmental regulations, labour laws and dispute resolution mechanisms.

In today's global climate, these risks are further compounded by political instability, including high levels of corruption and frequent leadership changes, which often can precipitate policy shifts, asset nationalisation, expropriation or fluctuations in exchange rates. These risks, when manifested, can deprive investments of their value.

There are many risk mitigation strategies that investors can adopt when investing abroad. In this chapter we address three key risk mitigation strategies to protect foreign investments: political risk insurance (PRI), investment treaty structuring and contractual protections.

POLITICAL RISK INSURANCE

Foreign investors can substantially mitigate their risk by purchasing PRI. This specialised form of insurance provides coverage for a wide array of political instability, including the potential for unlawful expropriation, selective discrimination, forced divestiture, damage to assets because of violence, abandonment of the foreign enterprise due to violence, breach of contract and cancellation of licences by the state. Of course, all insurance policies have exclusions.

Common exclusions in PRI contracts are failure to comply with local laws, failure to obtain licences and permits, non-discriminatory measures of general application in relation to public health, safety or environmental protection, and non-compliance with the material terms of a contract with a public entity of the host state.

A major advantage of PRI is that each policy can be tailored to address the specific risks of the particular investment. PRI also offers the advantage of prompt claims resolution, as they are generally paid out within a year if the claims are not disputed by the insurer. This makes PRI an attractive proposition for enterprises with a high-risk tolerance operating in emerging or volatile markets. But for investors in politically stable countries, or particularly cost-sensitive investors, the cost of PRI (calculated as a percentage of the covered investment, with higher premiums for countries considered higher-risk by the insurer) may outweigh its benefits.

The cost of PRI may be compounded if the insurer disputes the claim, resulting in litigation or arbitration, which can itself be a lengthy and expensive process. However, that PRI is more cost-effective than after the event insurance, which provides coverage for costs once a dispute with the host state has commenced.

It is prudent to engage experienced counsel with significant disputes expertise to assist with negotiations of the insurance policy, so that investors can avoid common pitfalls that lead to expensive or prolonged disputes. Consulting counsel as soon as the investor has an insurance claim is also helpful to ensure that the claim is prepared and submitted properly, reducing the risk of rejection or dispute.

TREATY STRUCTURING

Structuring or restructuring an investment to benefit from bilateral or multilateral investment treaties can offer a potent measure of protection to the investment. Investment treaties establish frameworks to promote and protect investments made by investors from one country into another.

Violations of these treaties by countries hosting the investment can be addressed through international arbitration by the foreign investor directly, rather than resorting to diplomatic channels or local courts.

Arbitration, like court litigation, involves an adversarial process which generates a binding judgment. But unlike traditional litigation, it allows the parties to decide on the parameters of their dispute, including its location, procedural rules and the identity of the decision makers.

When structuring investments under investment treaties, the first step is to identify all the investment treaties to which the host state is a party. Those treaties must then be analysed to determine their robustness, including the types of investors and investments they protect, the procedures and requirements to raise a claim under the treaties, and the protections offered by the treaties.

Based on a comprehensive evaluation of the treaties, the optimal investment structure can then be adopted. For example, most investment treaties protect not just direct, but also indirect investments, allowing investment treaty structuring to be coordinated closely with tax treaty structuring.

A significant advantage of investment treaty structuring lies in its relatively straightforward implementation, especially in states with robust treaty frameworks. An international arbitration award is also capable of being enforced globally, meaning that a recalcitrant award debtor's assets can be seized almost anywhere in the world.

However, dispute resolution against a state for treaty breaches can be time consuming and costly. An average investment treaty arbitration takes over three years to resolve, which may be followed by expensive annulment or set aside proceedings. Despite these challenges, there is little disadvantage to strategically structuring an investment to preserve the opportunity for treaty arbitration, particularly as it can be tied into the tax treaty structuring process.

On the whole, it would be prudent to consult a disputes attorney prior to structuring an investment, to obtain specific advice related to the treaty regime of each nation involved. Once a dispute has arisen, foreign investors are no longer permitted to restructure the investment to take advantage of treaty protection.

PROTECTIVE CONTRACT PROVISIONS

Including protective provisions in investment contracts also reduces risk. These provisions can include procedural protections that ensure a fair and efficient dispute resolution process in case the government (or government entity) breaches its obligations under the investment contract.

For example, a foreign investor might stipulate that the contract be governed by investor-friendly or familiar governing law, and opt for arbitration in a neutral jurisdiction, thus avoiding potential biases associated with litigation or arbitration seated in the host state.

A powerful risk mitigation tool, often used in oil and gas contracts, is stabilisation clauses, which allow investors to reduce the impact of regulatory risk. There are three main types of stabilisation clauses: (i) 'freezing' clauses, which preserve the legal status quo at the time of entering the investment; (ii) 'economic equilibrium' clauses, which indemnify investors for the cost of complying with new laws; and (iii) 'hybrid' clauses, which combine the protections of the former two categories.

Stabilisation clauses are particularly important for capital-intensive projects with longer-term payoff horizons, such as mining or oil investments. Where investors place large initial capital investments at risk with delayed profitability, a stabilisation clause helps insulate the project from political and legal uncertainty. Notably, such investments often occur in regions where regulatory changes are frequent due to political or economic instability.

A major benefit of these contractual clauses is their cost effectiveness. If both parties agree, these provisions can be incorporated into the ordinary contract negotiation process at minimal additional cost. On the other hand, some investors may lack the political leverage needed to secure agreement over these contractual terms with the host state. Enterprises making significant investments in key national industries are more likely to have the political capital needed to successfully negotiate such agreements.

Ultimately, any political risk mitigation strategy will depend on the nature of the investment, the host state's geopolitical context, and the investor's risk profile and cost sensitivity. For high-risk investments, such as in emerging markets, PRI offers tailored coverage and prompt claims resolution, making it ideal for ventures with significant capital at stake. Investment treaty structuring is beneficial for investors seeking stability and legal recourse against adverse state actions.

Strategic structuring is generally recommended as a backstop due to its cost effectiveness. Contractual provisions, such as stabilisation clauses and procedural safeguards, also provide flexibility and cost effectiveness. They are particularly valuable for long-term projects or those subject to regulatory uncertainties. Combining these strategies can help optimise the safeguarding of investments.

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NAVIGATING THE INTERPLAY BETWEEN INSOLVENCY, ARBITRATION AND STATE RESPONSIBILITY

BY TOMAS VAIL AND KHUSHBOO DESHMUKH

SINCE THE 1990S, THERE HAS been a significant increase in international investment, leading to a proliferation of bilateral investment treaties (BITs). These agreements, numbering in the thousands, play a crucial role in shaping international public policy by establishing a framework for promoting and safeguarding investments between states.

BITs impose constraints on state regulatory authority to protect the substantive rights of foreign investors, including provisions for fair treatment, non-discrimination, protection against nationalisation or expropriation without compensation, and other safeguards. Investors are granted procedural rights to bring claims for breaches of these substantive rights against states, often through arbitration at institutions such as the International Centre for Settlement of Investment Disputes.

As BITs have become instrumental in establishing rules that protect the rights of foreign investors, these treaties often give investors the ability to bring claims against states for breaches of these rights through arbitration. However, the coronavirus (COVID-19) pandemic led to a rise in business insolvencies globally.

According to Statista, in 2024, France is anticipated to witness the highest incidence of business insolvencies globally, with close to 60,000 businesses facing insolvency. Following closely behind, the UK is projected to have approximately 30,000 insolvencies, while the US ranks third with an estimated 20,000 cases.

This prompts a closer examination of how insolvency proceedings intersect with international investment disputes. These cases often involve disputes over actions taken by insolvency administrators or foreign investors, raising questions about whether such actions can be attributed to the state and elevated to a treaty dispute. This would offer the foreign investors of companies undergoing insolvency a neutral forum for protection of their investments, as opposed to being left at the mercy of national courts.

Arbitration and insolvency laws are often referred to as polar opposites. Arbitration proceedings are decentralised and are guided by parties' mutual agreement to settle their dispute outside the national court system (in case of investor-state arbitration, the respondent and contracting state's consent is usually implicit under the respective BITs). In contrast, bankruptcy proceedings are conducted under domestic law and seek to address the interests of creditors collectively in a regulated and centralised environment. These cases necessitate striking a balance between the interests of the claimant undergoing bankruptcy, and the state's entitlement to rely on jurisdictional protections and recovery of costs.

Some BIT claims might be initiated either by bankruptcy administrators aiming to maximise the value of liquidated assets for creditors, or by foreign investors of the company contesting the state's improper conduct during the administration procedure or measures leading to bankruptcy.

These claims may extend beyond insolvency matters, involving allegations of nationalised assets, breached contracts, concession violations, licence revocations or illegal tax measures. The issues arising in such cases include establishing attribution to determine the state's responsibility, assessing the party's capacity to act, determining the arbitrability of the dispute and ensuring the enforceability of awards.

When a claim is initiated by a foreign investor challenging the measures or conduct of insolvency proceedings by state organs, attribution of such actions to the state becomes critically important. If the actions of these entities cannot be attributed to a state, the investor's claim may not fall within the purview of international investment treaty disputes, remaining instead a matter to be resolved under domestic law.

The responsibility of this determination falls on tribunals, while the burden of proving the attribution lies on the investors to avoid having their claim rejected at the jurisdiction or merits stage. For ascertainment of attribution, investor-state tribunals regularly rely on the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), drafted by the International Law Commission.

Article 4 of ARSIWA outlines how the actions of a government body, like its legislative, executive, or judicial branches, are considered the responsibility of the state itself. When article 4 does not directly apply, article 5 broadens the scope to include actions of individuals or entities authorised by the state to carry out governmental functions.

Article 8 further extends this to cover actions of individuals or groups acting under the direction or control of the state. In cases challenging actions of a bankruptcy trustee, the determination of whether their actions can be attributed to the state typically falls under either article 5 or article 8. This is because bankruptcy trustees are appointed by state courts and operate under their supervision, following statutory rules and duties.

Respondent states might abstain from disputing the attribution of actions by insolvency administrators to themselves when the claimant is undergoing insolvency proceedings. In such instances, states could contend that the actions of the investor or its administrator should be ascribed to the investor's home state, potentially shifting the dispute into a state's realm beyond the tribunal's jurisdiction. From present case law, it is observed that tribunals often reject the argument of attributing the conduct of bankruptcy administrators to the respondent state.

In *Frontier Petroleum Services Ltd. v. Czech Republic* (2010), the claimant brought a claim against Czech Republic for its failure to recognise and enforce an international arbitral award under the Canada-Czech Republic BIT. The claim, among other grounds, also focused on the treatment of the claimant's arbitral award by a Czech bankruptcy trustee, and whether the conduct of the trustee could be attributable to the respondent state.

The respondent state argued that the trustee was neither a de jure or de facto organ of the state, nor did he act on the directions of the state. The tribunal viewed the actions of the bankruptcy trustee to be legal under Czech law, and would not result in breach of the BIT, even if the actions in question were attributable to the Czech Republic.

The tribunal here found that it did not have to delve into the determination of the question of attribution. In contrast, in *Dan Cake S.A. v. Hungary* (2021), the claimant alleged that the actions of the Hungarian bankruptcy court and the liquidator were attributable to the state.

The tribunal concluded that the actions of the bankruptcy court would be attributable to Hungary under article 4 of AR-

SIWA. However, the tribunal followed *Frontier Petroleum* and refrained from ruling on attribution, determining that the liquidator's actions did not breach the BIT. A similar approach was seen in *Manchester Securities v. Poland* (2018) and *Marfin v. Cyprus* (2018), where the tribunals refrained from ruling on attribution.

In instances where tribunals have delved into the determination on attribution, they have dismissed the contention that the acts of the court-appointed bankruptcy trustee were attributable to the state under article 5 and article 8 of ARSIWA. This was seen in the final award in *Yukos Capital v. The Russian Federation* (2021) where, under Russian law, the acts of the liquidators were "substantially autonomous from the state authorities".

While there appears to be consistency in the approach adopted by tribunals in cases involving determination of attribution, there are two Czech cases which highlight the need for analysing the factual context of each case.

In *Peter Franz Vöcklinghaus v. Czech Republic* (2011), the tribunal followed the established approach, and held that the actions of the bankruptcy trustee were not attributable to the state because under Czech law, trustees act independently and would be held personally liable for the same. In contrast, in *AMF v. Czech*

Republic (2020), the tribunal chose not to follow this approach.

The tribunal instead relied on the decision of the Czech Constitutional Court to state that the trustee's actions would involve public function, and therefore would be attributable to the state. In light of the above, in cases where attribution issues are intertwined with the facts of the dispute or are not determinative of jurisdiction, tribunals may consider addressing attribution during the merits stage.

This would allow a thorough examination of the factual and contextual complexities involved in attribution, including analysis of the relevant national laws of the respondent state, text of the relevant treaty provisions and factual matrix of the insolvency process in each case. Practitioners must accordingly appreciate the intricate interplay between insolvency, arbitration and state responsibility, necessitating a comprehensive approach to navigate the complexities of international legal frameworks and protect stakeholders' rights effectively.

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ACCOUNTS WARRANTIES: DISPUTE-RELATED ISSUES IN M&A

BY PATRICIA MORONEY AND LAURA POWELL

IT IS COMMON FOR SELLERS TO PROVIDE warranties or indemnities over historical financial information relating to the target company in a sale and purchase agreement. While there is no 'standard' accounts warranty, as each will be tailored to the specific transaction, there are certain terms that will typically be included.

It is helpful to start with some example accounts warranties, including those outlined below.

In relation to financial statements: "The financial statements for the year ending 31 December 20XX comply with the requirements of applicable laws and International Financial Reporting Standards (IFRS) as consistently applied by the company as at the date the financial statements for the year ended 31 December 20XX were authorised for issue. The financial statements for the year ended 31 December 20XX... have been audited by [Audit Firm] who have issued an unmodified audit opinion."

In relation to management accounts: "The management accounts for the nine months ending 30 September 20XX have been prepared with due care on a basis consistent with the financial statements for the year ending 31 December 20XX and in accordance with the company's accounting policies."

In relation to specific figures or performance measures: "EBITDA is reported in accordance with IFRS with adjustment for non-recurring, exceptional and extraordinary items of income or expenditure."

As there are a number of different accounting frameworks in use across the world (for example, US Generally Accepted Accounting Principles (GAAP) or International Financial Reporting Standard), this guidance is provided in general terms, rather than in respect of a specific accounting framework.

WARRANTING COMPLIANCE

A key requirement of most accounts warranties is that the financial statements being warranted have been prepared in accordance with an applicable accounting framework.

Regardless of the framework adopted, generally the financial statements prepared by a company will include: (i) a statement showing the financial performance of the business during the reporting period (often referred to as an income statement or a statement of profit and loss); (ii) a statement showing the financial position of the business at the end of the reporting period (often referred to as a statement of financial position or a balance sheet); (iii) a statement showing the movement in the cash position of a business during the reporting period; and (iv) related notes providing breakdowns of items or narrative descriptions.

The recognition, measurement, presentation and disclosure of the items reported in these is governed by the applicable accounting framework.

So, what causes financial statements to be non-compliant with an accounting framework (and, therefore, at face value, in breach of an accounts warranty)? The simple answer is 'errors', which, at their most basic, are misstatements about, or omissions from, the information included in a set of financial statements when compared with the information required to be reported by the relevant accounting framework.

It is not expected that financial statements will be completely free from error, however they will not comply with the accounting framework if they contain errors which are deemed to be 'material', either individually or in aggregate, or that are immaterial but made intentionally to achieve a particular presentation.

Therefore, the concept of materiality, and consideration of what is and is not considered material, is critical in determining whether a set of financial statements complies with the relevant accounting framework. While accounting frameworks consider the concept of materiality differently, generally information is material if its omission or misstatement could reasonably be expected to influence the economic decisions made by users on the basis of the financial statements.

A common feature of disputes involving accounts warranties involves an assessment of whether identified errors are material, thus causing the warranted financial statements to be non-compliant with the relevant accounting framework.

ACCOUNTS WARRANTY AND RELEVANCE OF INFORMATION

Information discovered after financial statements were warranted often results in the identification of a potential breach of an accounts warranty.

From an accounting perspective, there are two particular dates relevant to a set of financial statements: the reporting date, the last day of the reporting period; and the authorisation date, the date on which the financial statements are approved for issue.

When considering events that take place between these dates, accounting frameworks typically distinguish between events that provide information or evidence about conditions that existed at the reporting date, and events that provide information or evidence about conditions that arose after the reporting date.

The difference is significant, and often not straightforward. Therefore, disputes involving accounts warranties often revolve around this.

In most instances, the accounts warranty will have been provided after the authorisation date and it is generally not feasible to make adjustments to financial statements that have already been authorised for issue. Nevertheless, information or evidence about conditions that arose after the reporting date, even if only discovered after the authorisation date and after the financial statements have been warranted, can still be relevant to an accounts warranty.

In such a situation, it is also necessary to consider whether the information was available, or could reasonably be expected to have been available, as at the authorisation date. If this is the case, events occurring, or information discovered, long after the authorisation date could be evidence that the warranted financial statements contained errors that, if material, would have caused them to be non-compliant with the relevant accounting framework.

WARRANTING AUDITED ACCOUNTS

The existence of an unmodified audit opinion is often relevant to common warranties, such as those referred to above. Furthermore, in some instances, an accounts warranty will warrant that the financial statements had been subject to an audit and received an unmodified, or clean, audit opinion.

The objective of an audit is for the auditor to obtain reasonable assurance over whether financial statements as a whole are free from material misstatement, thereby enabling them to express an opinion on whether they are prepared, in all material respects, in accordance with an applicable accounting framework.

Therefore, the existence of a reputable third-party audit firm expressing an independent opinion (prepared outside the context of a dispute) that the warranted financial statements complied with the applicable accounting framework and provided a true and fair view can be persuasive evidence in defence of an alleged breach of an accounts warranty.

Nevertheless, an unmodified audit opinion is not a guarantee that financial statements were prepared in accordance with an accounting framework. An audit is designed to give reasonable assurance, not absolute assurance.

There will always be a risk that material misstatements in a set of financial statements are not detected by the auditor, particularly when fraud has occurred (or is alleged), given fraudulent activity often involves complex and organised schemes designed to conceal the existence of the fraud. The auditor is not given specific legal powers that could compel a company to provide certain types of information.

Therefore, a forensic review performed after the signing of the audit report may reveal information that was not available to the auditor, and provide existence of material misstatements that the auditor could not have identified.

WARRANTING MANAGEMENT ACCOUNTS

Financial statements are prepared for the benefit of a wide range of stakeholders (including external) and cover a set accounting period. Management generally require information about a business more frequently than these accounting periods, which is usually provided via what are often described as management accounts, which might report the financial performance and position of the company once a month or even weekly.

The form and content of management accounts often vary from company to company, depending on the information needs of management. As such, it should not be expected that management accounts comply with an accounting framework.

Although the absence of a prescribed accounting framework means that the specific wording of a management accounts warranty can vary from transaction to transaction, it is not uncommon for an accounts warranty to refer to the figures in the management accounts having been prepared in accordance with a specified accounting framework. Disputes often arise in relation to these warranties.

In order for financial statements to have been prepared in accordance with an accounting framework, they must comply with all of the requirements of that framework, including disclosure requirements. Management accounts that do not provide such disclosures would therefore be non-compliant, even if the items reported had followed the recognition and measurement criteria required by the accounting framework.

Finally, statutory or regulatory bodies generally do not require management accounts to be audited or otherwise reviewed. Even when management accounts are reviewed by an external party, such engagements often provide limited rather than reasonable assurance.

WARRANTING ENTITY-SPECIFIC PERFORMANCE MEASURES

Some accounts warranties refer to concepts that are not strictly defined in the specified accounting framework (often referred to as 'non-GAAP' or 'alternative performance' measures). Accounting frameworks do not generally prohibit these, but typically require supplementary disclosures explaining how the alternative performance measure was determined.

Given that accounting frameworks do not prescribe methods to be adopted when determining non-GAAP measures, different companies may determine a non-GAAP measure in different ways, despite using the same name for it. This often leads to disputes, particularly where the non-GAAP measure has not previously been presented and explained in the company's financial statements, or is not clearly defined in the contract.

CONCLUSION

In the introduction to this chapter, we set out three typical example accounts warranties. Superficially, these may appear to be basic assurances, however, as we hope we have demonstrated, even the simplest of accounts warranties can be dependent upon further rules and principles, the application of which can often require the use of judgement and the interpretation of complex sets of facts and conditions, which often leads to disputes.

- *Patricia Moroney is a director and Laura Powell is a manager at Mazars.*

MEDIATION, AI, TECHNOLOGY AND ACCESS TO JUSTICE IN THE MODERN WORLD OF DISPUTE RESOLUTION

BY JANE COLSTON AND BETHANY WILLIAMS

MUCH HAS BEEN HAPPENING LATELY in the world of dispute resolution. This includes the recent decision by the Court of Appeal in England and Wales in *Churchill v Merthyr Tydfil*, the UK government's spring budget committing £170m to funding non-court dispute resolution and digitising the court process, and recent statements by Sir Geoffrey Vos, the Master of the Rolls (Head of Civil Justice in England and Wales), that it will "soon" be negligent not to use artificial intelligence (AI).

The future of dispute resolution is undoubtedly also outside of a courtroom and increasingly digital. Within this context, this chapter will discuss access to justice and the opportunities and challenges faced by litigants seeking to resolve disputes via alternative dispute resolution (ADR).

CHURCHILL V MERTHYR TYDFIL

The Court of Appeal's recent decision that judges in the courts of England and Wales have the power to order a stay to proceedings or order parties into ADR will undoubtedly increase the prominence of mediation, especially in longer running, high-cost litigation.

In *Churchill v Merthyr Tydfil County Borough Council* (2023), the Court of Appeal considered a nuisance claim between a local authority and an individual. In the first instance, Deputy District Judge Kempton Rees applied *Halsey* and did not award a stay to proceedings for ADR. In *Halsey v Milton Keynes General NHS Trust* (2004), Lord Justice Dyson held that "to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court." The Court of Appeal disagreed with this approach. The Court of Appeal emphasised that forcing parties to engage in ADR should always be "proportionate" and never impact upon the "very essence" of the parties' article 6 right (paragraph 50).

Mediation, a form of ADR, is defined by the Centre for Effective Dispute Resolution (CEDR) as a "flexible process conducted confidentially in which a trained neutral mediator actively assists parties to work towards a negotiated agreement of a dispute".

However, the judgment in *Churchill* leaves some questions regarding the factors which will be considered when a judge is determining whether ADR is an appropriate process to order, and the consequences of failure to engage with a *Churchill* order and the potential for adverse costs orders against the refusing party. Sir Vos stated in his judgment that all "relevant" factors should be considered "depending on the circumstances" (paragraph 66) thereby giving judges discretion to use this power when just.

ADR may not be the right method of dispute resolution for every party, and this should be reflected in a judge's decision-making process, but the intervention of parties including The Law Society, The Bar Council and The Civil Mediation Council in *Churchill* demonstrates support this judgment will have from legal practitioners and litigants alike litigating before the courts of England and Wales.

PUBLIC INVESTMENT IN ADR

In its spring 2024 budget, the UK government announced an investment of £170m to "deliver a modern justice system", including £15m toward introducing digital solutions and £55m toward an early legal advice pilot. This is in addition to the pre-existing policy that all claims with a value of less than £10,000 and allocated to the small claims track (SCT), where a defence has been filed, should be first referred to the free small claims mediation service (SCMS).

While parties are not obliged to reach a settlement during the mediation, they are required to attend the remote mediation appointment. When considering that small claims take up approximately 80 percent of all newly issued claims in the County Court, it would appear uncontroversial for parties to engage in mediation if it offers them the opportunity for a swift and low-cost resolution to their dispute.

In fact, in 2022 it was reported that 55 percent of claims mediated via the SCMS resulted in settlement – a contrast to the Civil Justice Council's 2018 paper on 'ADR and Civil Justice', which found there was "no or very little support for… automatic referral to mediation". As parties understand the benefits of mediation, we expect to see more uptake.

The concept of 'access to justice' can feel academic when considering claims with significantly higher values than those allocated to the SCT. Nevertheless, it is important to remember that the area in which mediation and technology can have the greatest impact is for parties that would otherwise be unable to afford legal advice. By reducing the upfront costs of litigation, both in terms of legal fees and court fees, mediation in a digital legal system will give individuals real-time legal assistance to help resolve their legal problems.

For litigants with large legal budgets, mediation early on allows the costs of the dispute, including management time and legal spend, to be nipped in the bud and resources spent on creatively resolving the dispute. In our experience, businesses like the control mediation gives them to achieve a resolution they fashion with their legal advisers, which allows them to move on and away from the dispute.

ARTIFICIAL INTELLIGENCE

The obvious (and most headline-grabbing) way to 'digitise' the court system is using AI. AI encompasses a wide range of technologies, many of which fall under the category of 'machine learning', including large language models (LLMs) and natural language processing (NLP). Sir Vos recently said: "I think that is undoubtedly a day that's coming soon. When an accountant can use an AI tool to spot fraud in a major corporate situation and fails to do so, surely there might be liability. The same for employer liability to protect employees and in every other field you can possibly imagine."

Given that Sir Vos gave the decision in favour of mediation in *Churchill*, it is not a leap to suggest that the ultimate way to facilitate improved access to justice is to combine mediation and AI.

Much has been made of the impact that AI will have on the legal industry of the future. But AI is a fact of business today, with a wide range of practice areas using LLMs and NLP to remain competitive. Therefore, the pertinent query is what is the eventual role of AI in mediation: as the mediator itself, or as a tool to assist a human mediator? Maybe, over time, both.

The concept of a 'digital company director' has already been considered, so why not an AI mediator? Mediators are highly trained and experienced professionals with finite availability.

The '2023 Tenth CEDR Mediation Audit' found that approximately 17,000 mediations take place each year in England and Wales, while there are only approximately 600 mediators registered with the Civil Mediation Council.

The increase in demand for the limited supply of mediators will only be exacerbated by *Churchill*, and the solution could be to utilise an AI mediation service as a first point of contact when simple claims are brought to mediation. Individuals in the UK face a similar system when making enquiries through the UK National Health Service website; the individual answers questions surrounding their symptoms, the website dispenses simple medical advice where it can, and directs patients with more complex symptoms to a human medical practitioner. Access to medical advice is also improved through the use of AI.

A digital mediator would require improved confidence, not only in mediation as an effective method of dispute resolution for small claims, but also greater public confidence in the technology as a replacement 'person' to mediate, not least to ensure confidential data is preserved.

In the context of larger, more complex claims, AI is an established tool for legal practitioners. Generative AI (GenAI) tools, akin to ChatGPT, have been integrated into commercial legal practice in several ways, including during disclosure, document review and legal research.

The ability of LLMs to interrogate vast amounts of data using NLP, identifying relevant documents, producing summaries and financial outcomes, and 'brainstorming' potential solutions, would be a significant support for a mediator when assisting parties to find a mutually agreeable solution to a dispute. This is likely to be the realistic implementation of AI in mediation, in cases of any value, as a tool to support a human.

CONCLUSION

As Sir Vos recently suggested, GenAI is increasingly being used by consumers. As parties become more aware of the opportunities technology offers to resolve disputes in a cost effective and fair manner, lawyers must be agile and respond to the need for ADR. The decision in Churchill confirms the integral role ADR plays in effectively resolving disputes for parties.

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SUCCESSFULLY MANAGING A GLOBAL DISPUTE

BY CRISTINA CAMARERO, MERCEDES ROMERO AND RAFAEL MONTEJO

INTERNATIONAL DEALS LEAD TO INTERNATIONAL disputes, and international disputes lead to legal proceedings in which various jurisdictions are involved. In today's increasingly globalised world, a lot of disputes demand that legal counsel is provided with an international approach, by a team comprised of practitioners from different legal systems.

These disputes carry additional complexities – both legal and operational – that go far beyond a mere difference in the languages involved. The plurality of locations, nationalities and applicable rules of law requires a seamless interaction between the different legal teams working in the dispute – hence the value of an international law firm. Though it is possible to manage these disputes by having the teams of different law firms working together for the same client, the differing interests and approaches of each firm may sometimes stand in the way of efficiency. The best results are achieved when the teams from different jurisdictions are properly integrated and there are fewer barriers between the lawyers working on the matter.

DIFFERENT OFFICES – ONE TEAM

The need for a global team will arise mainly and unavoidably when the laws of different countries can apply to the dispute. In such cases, the lawyers of a firm's different offices will have to work together to ensure that the client is covered at every step of the process. But being an international firm is not enough, nor is it enough to merely allocate each part of the work to the relevant office. The lawyers of the firm's different offices must work together as a single team. Here is where team building comes into play. It goes without saying that professional coordination requires some degree of personal coordination. The best results will be achieved when the lawyers of the different offices know each other beforehand. To this end, the firm must ensure that its offices in different countries conform to an international network, where all teams know each other's strengths and capabilities – and how to use them together. Global forums and conventions allow lawyers from different countries to get to know each other and be made aware of the jurisdictional reach of the firm.

COORDINATION REQUIRES PLANIFICATION

Building a globally integrated team is only the first step to successfully coordinating a global dispute. It must be followed by a proper planification of each specific dispute to ensure that all offices involved are perfectly aligned in their strategy and approach, so the decisions adopted in the early stages of the proceedings are compatible with the decisions made at a later stage.

Planification begins when the dispute surfaces. From that moment, an in-depth study of the case must be carried out so that the case manager has a thorough understanding of its needs and ramifications and knows which jurisdictions – and thus, which offices of the firm – will be involved. Once this has been established, all lawyers can participate in defining the overall case strategy, even before their actual input is required.

This includes the negotiations that may eventually lead to dispute resolution proceedings. For example, for a dispute submitted to arbitration in Spanish under English Law, the Madrid office can act as counsel in the arbitration proceedings while the London office provides counsel in relation to English law and conducts the necessary legal research. Before that, during the prior negotiations, a proper risk assessment must be carried out in advance of deciding whether the client should enter arbitration or not. If the dispute is submitted to English law, the assessment must involve the English lawyers of the firm, even if the Madrid office is the one doing the negotiation. In other words, assistance from lawyers of other jurisdictions must be sought as soon as the dispute emerges, and the possible implications of foreign law are discerned.

Such planification will be particularly necessary in cases where enforcement of the decision (e.g., the arbitration award) is also affected by the global nature of the dispute – namely, in cases where the winning party in the arbitration proceedings wants to seek enforcement of the award in different countries, each with a different enforcement procedure and a different legal criterion concerning the validity of the arbitration agreement or the notion of public policy, for example. In such cases, if the law firm has an office in any of those countries, it will be prudent to analyse whether enforcement is feasible even before arbitration proceedings begin.

DIFFERENT CULTURES, COSTS AND FEES

It is also important to bear in mind that not all offices work the same way. Each country has its own culture, which will inevitably have an influence on the manner in which work is performed. This can include working hours, the tone in which messages are conveyed, or the approach to negotiations and litigation – which could be more or less aggressive, for example. For a proper integration, the different teams should be accustomed to, or at least aware of, each other's idiosyncrasies so that maximum efficiency is achieved.

Another key aspect that will vary from country to country is the policy on costs and fees. For starters, pricing will not be the same. The hourly rates for one office may be significantly higher than those of others. These discrepancies will be difficult yet essential to manage. Given the global nature of the dispute, a certain client that may be accustomed to paying fees at its country's usual rates may have to pay the fees of a different country office at its rate, and may not expect it. Accordingly, an effort would have to be made to either make the client aware of the issue at the budgeting stage, or to have the office whose rates are more expensive concede so that the fee proposal is adjusted to the pricing of legal services in the country where the client operates.

Budgeting must also be accounted for, particularly in terms of how the fees are proposed and invoiced. For instance, common practice in Spain is to provide the client with a fixed, capped proposed fee for the dispute – generally split into the different stages or milestones of the proceedings. On the other hand, in some countries it is common for fees to be invoiced on an hourly basis, without a cap on the total. A Spanish client may oppose a fee proposal if fees are not subject to a cap, while some offices of the firm's international network may find it hard to make the case profitable otherwise. Again, an effort must be made to adapt to the specifics of the client and the case, so that these differences do not interfere with the management of the dispute.

CONCLUSION

Having offices in different countries does not imply having a global team, and being an international firm does not guarantee proper management of a global dispute – it is only the starting point. The firm must properly conduct its teams before and after the dispute arrives. Before the dispute arrives, the firm should have built an international network in which its lawyers already know one another and thus can work seamlessly as a single integrated team. After the dispute arrives, the firm must plan accordingly so that teams across different offices are involved from the beginning and aligned in their case strategy, that all risks and implications of foreign law are anticipated, and that cultural differences are addressed so they do not interfere with efficiency and consistency.

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HOW TO PREPARE FOR AND TESTIFY AS A WITNESS AT A HEARING

BY TIONG TECK WEE, DANIEL GAW AND HANNAH LEE

HAVING TO TESTIFY IN TRIALS OR arbitrations as a factual witness can be a daunting prospect. You are faced with an examiner whose goal is to undermine your testimony (and sometimes credibility) and who is hoping to extract admissions from you to advance his or her client's case, and you are worried that you may inadvertently or otherwise compromise the case of the party for whom you are giving evidence.

This short chapter provides practical tips and guidance on how to effectively prepare for and handle examination on the stand. While 'witness coaching' is not permitted in most jurisdictions and nothing in this chapter endorses or is intended to encourage the same, there are still many things that you can do within the boundaries of what is legally permissible to prepare effectively for examination.

PREPARATION BEGINS WITH WHAT GOES INTO YOUR WITNESS STATEMENT

It is now common practice in most jurisdictions and in arbitrations for a witness to file a written witness statement ahead of the merits hearing in lieu of oral examination-in-chief at the hearing. At the hearing itself, you will be examined primarily on the evidence that you have given in your witness statement. What goes into your witness statement is therefore of utmost importance.

In many instances, the lawyers are the ones who will be holding the pen on your witness statement, and there is a tendency for the lawyers to want to use your witness statement as a vehicle to set out the desired factual narrative for their clients' case. While there is nothing wrong with this per se, provided that what is set out in your witness statement is your evidence, bear in mind that this is your witness statement, and it is you who will be examined on the contents of the statement. Do not allow the lawyers to hijack your witness statement.

Participate actively in the drafting of your witness statement. Spend time sitting down with the lawyers to give them detailed instructions on your evidence. If you are unaware of or if you are not familiar with a particular issue or matter and are unable to give evidence on it, do not be afraid to say so.

Documents are your best friends. Ask to review the documents relevant to your evidence. Read them in detail and make sure that your evidence is consistent with or supported by the documents. Human memory is often imperfect and fallible and if you need to refer to the documents to jog your memory, do so.

Finally, review your witness statement and all accompanying documents carefully and make sure you understand everything that is set out in there. Do not be afraid to speak up if the draft does not accurately reflect your evidence. You should not sign your witness statement unless you are comfortable with and confident of what it sets out. Remember – it is you who will be examined on the contents of the statement.

PREPARATION BEFORE THE HEARING

After you have submitted your witness statement, it may be many months before you attend the hearing. It is therefore essential that you refamiliarise yourself with the contents of your witness statement before the hearing.

You will not be left to do this on your own. Typically, in the lead-up to the hearing, the lawyers will organise sessions with you to brief you on what to expect at the hearing and prepare you for examination. 'Witness coaching' is generally not permitted in most jurisdictions. What this means is that the lawyers may not coach you on what to say in response to specific questions and certainly not coach you to give false testimony. If you are uncomfortable with how the session is being conducted, and especially if you feel that you are being asked to say things that are not your evidence, highlight this at the first opportunity.

That said, it is generally permissible for the lawyers to take you through your witness statements, highlight the key areas that you may be examined on and the potential questions that you may be asked, and generally brief you on matters such as the procedure for examination, decorum, and what you may or may not be allowed to do during examination. Ultimately, what is permissible will depend on the specific rules and laws applicable to the lawyers, the hearing, and the trial or arbitration.

TIPS FOR CROSS-EXAMINATION

Be careful. Listen carefully to the question being asked and make sure you understand the question. If in doubt, ask the examiner to clarify or rephrase the question in a way that you can understand. There may also be many parts to a question. Feel free to ask the examiner to break down the question. You may also be referred to relevant portions of documents. Read the document carefully before answering. Then formulate your response in your head before answering rather than verbalising the first thought that comes to mind. Do not be afraid to take your time (within reason) and do not feel pressured to answer quickly.

Feel free to explain. Examiners will usually ask leading questions intended to elicit a 'yes' or 'no' response. When faced with such questions, you should consider whether a simple 'yes' or 'no' response would accurately reflect your evidence or if further explanation is required. If explanation is required, you may wish to first respond with either a 'yes' or 'no' to make sure that you have directly answered the question, and then ask to be given the opportunity to explain further. The typical response in such situations would be a 'yes' or 'no' followed by 'and if I may be allowed to explain'. Equally, you should feel free not to answer 'yes' or 'no' if the question cannot be fairly answered in that manner (the classic example being 'Have you stopped beating your wife?', to which both a 'yes' or 'no' answer would indicate culpability).

Be concise. Say only what is necessary in response to a question. The danger in saying what is more than necessary is that this may unintentionally expose you to further lines of examination and take you off track from your evidence. Also, there is considerable value in being succinct. The essence and force of your evidence, no matter how helpful, will tend to get lost in long, verbose answers.

Be consistent. If a question is asked on a matter that you think you have already covered in your witness statement, and you are concerned that your oral evidence may be inconsistent with what is in your witness statement, ask to refer to your witness statement to refresh your memory. Most hearings will also have live transcription services. This allows you to refer to answers that you have given earlier and helps you to make sure that your evidence is consistent.

Be credible. The credibility of a witness is a big part of the court or tribunal's assessment of the believability of a witness's evidence. It is therefore important that you always come across as truthful. Give evidence only on what you have personal knowledge of. Do not speculate and do not proffer your opinion on matters which you have no personal knowledge of, even if you are invited to. If you genuinely do not know the answer to a question, it is fine to say so. Do not be evasive and most importantly, do not give false testimony. It goes without saying that this will severely undermine your credibility as a witness. Also, while examination can be a high-pressure situation, always remember to keep your cool. Do not display signs of annoyance, anger or frustration at the examiner and do not snap or shout at the examiner.

TESTIFYING VIA VIDEOCONFERENCING

Where testimony is being given by videoconferencing, you should ensure that you are giving evidence from a quiet location with good lighting, excellent internet connectivity and satisfactory acoustics. Ensure that you can be seen clearly and that the video and audio equipment is of a good quality.

There will usually be a protocol for giving evidence by videoconferencing to ensure the integrity of the process. For example, there may be rules as to who (if anyone) can be in the room with you, and what documents you can have with you. Make sure you follow the protocol. If in doubt, ask your lawyers.

If possible, ask for a trial run ahead of the hearing to familiarise yourself with the space, the audiovisual setup, and the platform used for the hearing.

These are just some pointers to bear in mind in preparing for and handling examination on the stand. Depending on the case, there may be other points that are relevant. Always communicate openly and work with the lawyers and always remember – this is your evidence, and you should not do or say anything that you are not comfortable in or confident of.

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