LEGAL BUSINESS

DISPUTES YEARBOOK 2022

In association with

STEWARTS
THE LITIGATION SPECIALISTS

The world's **number one** legal directory.

2.3x higher traffic than Chambers.com*
+65% traffic growth year on year
Over **6 MILLION** users year to date

The Legal 500 (Legalease)

@thelegal500

* Sources: Google Analytics,
estimated traffic via semrush.com; ahrefs.com; similarweb.com

Data-driven
research
since 1987

Tom Baker
Disputes reporter

Chairman John Pritchard (Solicitor)
Managing editor
Mark McAteer (Tel: 020 7396 5664)
Editor Nathalie Tidman (Tel: 020 7396 5604)
Senior reporter Tom Baker (Tel: 020 7396 5632)
Reporter Charles Avery (Tel: 020 7031 7705)
Reporter Megan Mayers (Tel: 020 7071 0168)

Content development manager Eleanor King
Content development Claire Slater
Director of content Stephen Jones
Head of print and digital production
Siân Goodwin
Digital managing editor
Tom Myatt (Tel: 020 7396 9308)
Cover image Harry Milburn

Group director
David Goulthorpe (Tel: 020 7396 5628)
Head of sales Lee Cashman (Tel: 020 7031 7707)
Senior business development manager
John Jennings (Tel: 07756 675 873)
Business development manager
George Wilton (Tel: 07794 851 141)

Subscription enquiries Tel: 020 7396 9313
Email: subscriptions@legalease.co.uk

Address emails to:
firstname.surname@legalease.co.uk

www.legalbusiness.co.uk
Law firm subscription rate available upon request.

Legal Business
188 Fleet Street, London EC4A 2AG
Tel: +44 (0) 20 7396 9292
Fax: +44 (0) 20 7396 9301
Printed and bound by
Park Communications, London

Are the hunters being hunted?

Not wanting to be the bearer of bad news, but 2008 is officially a long time ago. In real terms, 15 years is not that long, but if your first instinct when someone cites 'the financial crisis' is to wonder 'which one?', you know that a lot has changed.

There is perhaps no stronger evidence for 2008 being a distant dream than the sight of those disruptors to the London litigation scene being disrupted themselves. In the wake of the financial crisis (the 2008 one), the likes of Quinn Emanuel Urquhart & Sullivan, Boies Schiller Flexner, Hausfeld, Enyo, Stewarts and Signature Litigation stormed into the London market, unburdened by the conflict constraints felt by the City's historic elite and ready to take on the financial institutions.

In the cases of Quinn and BSF, there was the added benefit of having a pre-existing and premier reputation in disputes garnered from years of stellar US work. This reputation was backed up by no shortage of cash, which made more than a few heads turn over the years. Why be shackled by the bureaucracy of your big full-service firm, when you could work for those two, do all the fun stuff, and get paid a shedload?

It was and remains an attractive proposition, and no-one would suggest that for Quinn in particular, launching in London has been anything but a roaring success. But the London office did see the departure of high-profile antitrust litigation partner Boris Bronfentrinker recently, along with two other antitrust partners, to Willkie Farr & Gallagher.

While Quinn is rightly confident that this rare, albeit notable, departure should not impact its upwards trajectory, recent events at BSF, that saw London head Natasha Harrison leave alongside several

> With the City riding a seemingly never-ending disputes wave, there has never been a better time to go your own way.

partners to set up their own firm, makes you ask if those one-time hunters are now being hunted. As noted in our feature, 'Boies Don't Cry' (page 18), even an optimistic reading of BSF's prospects begins with the firm starting again completely from scratch in London, concentrating on an even more niche set of specialisms than before.

It would have sounded ridiculous just a few years ago, but from speaking to the market, there is a subtle sense that these once-nimble specialist firms are becoming – as Obi-Wan Kenobi would say – the very thing they swore to destroy. As one prominent partner at a litigation-only firm says: 'I've been telling our partners to look at this news. We have gone from being essentially a start-up to where we are now, but I do sometimes think it would be easier to pick up the pieces of the business that we want and go out on our own!'

Another partner of similar profile admits: 'There's enough players in the market and important boutiques to make any person think about whether it's something they want to do. If I had enough of it here, I would think about setting up my own firm.'

One thing is for certain, with the City riding a seemingly never-ending disputes wave, there has never been a better time to go your own way.

INT ARB

INTERNATIONAL ARBITRATION CENTRE

MARKET-LEADING BESPOKE ONLINE ARBITRATION PLATFORM

- Online arbitration room – a decluttered screen focused on tribunal, advocates and witnesses
- All involved – clients, support lawyers etc – can attend and sit at the back of the hearing room
- Hearing room dashboard – allowing all to navigate between the hearing room and physically separated private breakout rooms
- Two-layer added security
- IAC technician in the virtual arbitration room at all times
- Pre-arbitration training, configuration and familiarisation for each party

INTERNATIONAL ARBITRATION CENTRE
190 Fleet Street
London
EC4A 2AG

Business Development Director
Julian Hawes
DDI: 0203 928 7288
Email: Julian.hawes@int-arb.com

www.int-arb.com

Contact information:
5 New Street Square
London
EC4A 3BF
T +44 (0)20 7822 8000
www.stewartslaw.com

STEWARTS
THE LITIGATION SPECIALISTS

Expect the unexpected – 2022 and beyond

It hardly seems a year ago that I was writing a commentary on the state of the UK disputes market and predicting that the only certain thing about the landscape was its unpredictability. At that time, I assumed that vaccines would be the panacea for Covid and that the whole rotten ordeal would be over by now. Furthermore, I felt that the fallout would quickly become obvious. I was wrong in making those assumptions. That said, by reading a combination of the tea leaves and observing the market, I do think it is possible to detect some discernible trends for the near future.

First and foremost the expected explosion of insolvency litigation did not quite happen in 2021. My firm view is that it will later this year, with the slow burn finally igniting. A gush of government money took the edge off the expected tidal wave of corporate and personal bankruptcies and emergency measures (especially in relation to property matters) continued to stem the tide. These short-term bits of sticky plaster will not have stopped the dam from bursting and the cracks are finally beginning to emerge. When this happens (perhaps triggered by damaging inflationary consequences) there will be a host of disputes and with it, the usual array of accompanying mayhem, typically in the form of emerging frauds.

On a more general note, I do sense a degree of post-pandemic malaise. Some lawyers are reporting a shortage of big ticket cases – the very opposite of a gold rush. In particular instances, the reason is clear. In the insurance litigation arena for example, there was an initial flurry of activity and indeed a Supreme Court ruling on business interruption but the flood of group cases did not happen. It may be that many companies are still gearing up to fight but more probably, the cost and risk of several group cases may have proved to be a barrier to entry. Lawyers trying to book-build en masse have struggled to overcome the practical problems and indeed to attract third party funding. In other realms, my sense is that many companies are battling with huge commercial issues, in some cases bet the ranch ones, and accordingly they are not rushing to spend money on court cases. On the contrary, they are exploring alternative avenues for dispute resolution like never before.

There is another shadow bearing over the legal world and it is very hard to assess. The big city centres still appear to be quiet. I now visit my post-apocalyptic offices a few times a week but the relative deadness of Central London is still striking. Although many of us have enjoyed the plus sides of the pandemic, working from home et al, the negative fallout is a bit like gravity – it's out there, it's invisible but it's powerful. During lockdown, networking certainly became much harder – a virtual gin tasting event on Zoom is no substitute for a real meeting. Moreover, the loneliness and lack of buzz undoubtedly took their toll on the morale and energy of many, in some cases with mental health issues. It must also be said that training young lawyers is much harder in the virtual world and that issue must be addressed.

> I do sense a degree of post-pandemic malaise. Some lawyers are reporting a shortage of big ticket cases – the very opposite of a gold rush.
>
> Clive Zietman, Stewarts

As I am neither a virologist nor a prophet nor an economist, I cannot say what the coming year holds but, like others, I obviously envisage turbulence of all sorts ahead. The unforeseeable has just happened and if nothing else, the war in Ukraine seems sure to produce the expected a wave of global economic and social calamities that may even dwarf Covid. This event in itself, looks certain to spawn bitter disputes of the legal variety across the globe. Expect the unexpected.

Contents


SFO
!!

Staying alive

Not for the first time in its chequered history, it seems the SFO is living on borrowed time. What can be done to restore the agency to former glories?

Tom Baker

Let's be honest – things might have gone a bit too far. In recent years, both the mainstream and business press have frequently stuck the boot into the Serious Fraud Office (SFO) – 'Serious Farce Office', anyone?

It has been with good reason – there have been legitimate failings worthy of legitimate criticism. By all accounts, the agency has achieved very little since signing a near-€1bn deferred prosecution agreement (DPA) with Airbus in January 2020. But in the context of woeful government funding, the agency's rare bright spots can appear even brighter. And sometimes, criticism can be totally wide of the mark. The white-collar community is generally in agreement now that an obsession with convictions in the face of unpredictable jury trials is misguided, for example.

And at what point do ostensibly well-meaning criticisms cross over into the realm of the personal? Avonhurst partner Audrey Koh spent 16 months on secondment at the SFO and offers an individual insight: 'My expectations were low because of all the SFO-bashing I had heard, but I was pleasantly surprised. People have been quite unfair on the SFO, because there are some excellent investigators and accountants and other professionals. They're hard-working people, not 9-5 civil service types.'

In this regard, there are interesting contrasts between the SFO and its US counterpart, the Department of Justice (DoJ). While the SFO's investigators are preoccupied with justifying their own existence, in the US, it is a rite of passage for talented white-collar practitioners to work in public prosecution. It is associated with a prestige and a public service far removed from its transatlantic cousin. 'Thank you for your service' posts on LinkedIn are not uncommon for those leaving the DoJ for a generally lucrative private practice role.

Current SFO director Lisa Osofsky was meant to bridge this gap. Announced as successor to the widely respected Sir David Green QC in June 2018, Osofsky brought a credible CV adorned with stints at both the FBI and DoJ in addition to her tenure at compliance and risk group Exiger. But she was on the backfoot

> If you look at the personal cost of someone speaking up against their business, their whole career might be impacted. In the US there's a framework for remuneration.
>
> Camilla de Silva, Simmons & Simmons

from day one, as white-collar partners criticised a seemingly inexplicable delay in announcing her appointment. Four years on, it is fair to say the jury is still out on Osofsky's impact, but more on that later.

Canvassing the great and good of London's white-collar community, *Legal Business* attempts to compile an action plan to reinvigorate the SFO. David Savage, head of financial crime at Stewarts, accepts the task as a kind of tough love: 'The SFO isn't helping itself, but a lot of people do want it to succeed. Partners aren't kicking it because they think it's shit, but because they want it to be better.'

Economic warfare

For many, the elephant in the room when offering the SFO some practical advice is the historic absence of adequate funding. But with a focus on the realistic, there is widespread agreement that some surgical legislative changes could go a long way toward reviving the agency.

In fact, some argue that the funding issue could be remedied in part by legislative backing. Neill Blundell is head of the corporate crime and investigations practice at Macfarlanes, and he points to data from Spotlight on Corruption's January 2022 report: *Closing the UK's economic crime enforcement gap*. According to the report, the SFO generated £1.63bn for the UK Treasury in the last five years through fines and confiscation. It says that if just a quarter of that figure was reinvested into the SFO, it could have hired an additional 289 investigators. He summarises: 'There is no good reason as to why there shouldn't be a piece of legislation that allows the SFO to keep a percentage of money recovered.'

Camilla de Silva, now a partner at Simmons & Simmons, spent six years at the SFO between 2014 and 2020. She most recently acted as the agency's co-head of fraud, bribery and corruption, but had been a case controller prior to that. In addition to leading on the Airbus case, she oversaw the Rolls-Royce DPA that generated over £497m, regarded by most commentators as a major victory. But for de Silva, the investigation leaves a bitter taste.

'Receiving some money from successful investigations should be available. I was a case controller for the Rolls-Royce investigation – many millions were brought into the Treasury as a result of that but we didn't see any of it. There's not an obvious financial benefit to the SFO in pursuing these cases. I'm not saying that they should put specific monetary rewards against certain cases because you don't want accusations of selective effort, but

clearly with some percentage recovered of the money brought in by successful cases going back to the SFO, this would pay for the SFO potentially for the next five years.'

Green was director of the SFO for six years before embarking on a private practice stint that began at Slaughter and May in 2018. These days, Green has a part-time partnership role at Cohen & Gresser, alongside similarly-storied white-collar practitioners John Gibson and Richard Kovalevsky QC. He is characteristically bullish on the question of where the SFO should get its money from: 'We are the seventh largest economy in the world. We spend 0.042% of our GDP on tackling economic crime.'

And it seems like the SFO isn't the only party lacking a monetary incentive. A common suggestion among those interviewed was a shake-up of whistleblowing rules – a majority argue that there is currently nowhere near enough of an incentive for employees to stick their neck out and report wrongdoing. Savage contends that whistleblowers 'need to receive a percentage of the money recovered as a reward for being brave'. De Silva outlines some of the potential risks for whistleblowers: 'If you look at the personal cost of someone speaking up against their business, their whole career might be impacted. In the US there's a framework for remuneration.'

On comparisons between the SFO and the DoJ, an oft-cited reason why the DoJ can go about prosecutions more efficiently is it has access to a broader range of tools. DPAs were written into UK law in 2014, and they allow a company charged with criminal activity the chance to reach an agreement with a prosecutor without going to trial. Such agreements are not generally allowed in the UK on an individual basis.

The UK legislative stumbling block is the Serious Organised Crime and Police Act 2005 (SOCPA), which does allow for a small number of named individuals (the director of the SFO being one of them) to arrange these plea bargains with individuals rather than companies. However, as per Blundell's personal experience, the process is far from a formality: 'SOCPA is quite constrained. What's remarkable is I've had clients who have fully co-operated try and get SOCPA and they haven't been offered it. In the US they would be all over it!'

Some argue that the SFO faces an uphill battle in most prosecutions due to the 2010 Bribery Act. According to the legislation, it is not enough for an individual to behave in a criminal way at an organisation. For the SFO to have a chance at securing a prosecution of the company, it must adhere to the 'identification principle' and prove that the 'controlling mind' of the organisation was implicated in the illegal conduct. Generally, this means someone at boardroom level. Savage describes the identification principle as 'totally bonkers'.

In smaller companies with comparatively fewer chains of command, this can be straightforward to establish. But at large corporates steeped in bureaucracy, finding a link to the controlling mind has been notoriously difficult. Green can't help but be sarcastic: 'The identification principle was absolutely fit for purpose during the industrial revolution. But these days, corporate structures are far too sophisticated, the board is often miles away from the action. It's simply inadequate.'

Therefore, white-collar practitioners have largely endorsed the idea of creating a 'failure to prevent economic crime' law, which would drastically lower the burden of proof required to secure convictions. Savage says: 'If you have systems in place to counteract wrongdoing, that is a defence. If you don't have those systems in place, then a director can be more easily prosecuted. But you must be able to prove that they had knowledge of the offence and didn't act, which is a very high bar. A "failure to prevent economic crime" law should be created.'

If new legislative tools are what the SFO needs, then help may be just around the corner. Due to recent events in Ukraine, the UK government has fast tracked the Economic Crime Bill through Parliament, positioning the legislation as part of the UK's punitive economic measures against Russia. Upping the rhetorical stakes, Conservative MP David Davis recently declared: 'We should not kid ourselves. This is not an economic crime Bill, but an economic warfare Bill, and it is a war that liberal democracies cannot afford to lose.'

The Bill is set to considerably beef up the SFO's arsenal, particularly via unexplained wealth orders (UWOs), which will allow law enforcement to confiscate criminal assets without having to prove that it was obtained as a result of crime. Additionally, the Bill will introduce 'strict liability' for sanctions offences, meaning that the Office of Financial Sanctions Implementation can impose monetary penalties on individuals regardless of intent or knowledge of the breach in question. This brings the UK's sanction regime in line with the US system.

But perhaps more importantly, the Bill represents a shift in mindset from the Government towards taking economic crime more seriously. Koh notes: 'There needs to be an upheaval in corporate crime liability. With recent sanctions on Russia, the Economic Crime Bill is coming to pass and that has given the government a real kick up the behind.'

Walk the walk

For many, if the SFO is set to thrive then it depends on the quality of its leadership and its people. A quick glance at the recent history of SFO directors reveals a chequered past.

Between 2008 and 2012, the agency was run by barrister and former tax investigator Richard Alderman, and it is fair to say that this period is not remembered as a vintage one for the SFO. In the years that followed, Alderman has been widely characterised as being too soft and lacking a focus on prosecutions. After stepping down from the position in 2012, Alderman appeared before the Public Accounts Committee in 2013, where he was criticised for running the SFO in a 'sloppy' and 'slovenly' way. Committee chair and Labour MP Margaret Hodge described Alderman's conduct as 'shocking' over three generous severance packages given to colleagues without Treasury approval.

Alderman was followed by Green, who brought a fresh ambition to reposition the SFO as a hard-nosed prosecution agency. During his tenure between 2012 and 2018, Green oversaw the first handful of DPAs after they were legally available in 2014, with high-profile and valuable settlements agreed with Standard Bank, Rolls-Royce and Tesco. He also secured several individual prosecutions, including that of former UBS and

> If the SFO is to survive it needs leadership with real experience of prosecuting large and complex cases, proper tactical nous, and the instinct and knowledge to help it steer clear of the catastrophic errors that have become a recent feature of the SFO's handling of its cases.
>
> Jonathan Pickworth, Paul Hastings

Citigroup derivatives trader Tom Hayes, who became the first individual to be convicted of manipulating Libor in 2015.

One prominent white-collar partner recalls a palpable shift in atmosphere when coming up against the SFO early on in Green's tenure: 'The change in the organisation was noticeable immediately. He took it all very seriously, he didn't even offer us cups of tea! It felt ridiculous at the time, but he was trying to put in place a different mindset.'

Despite this no-nonsense approach to investigations, Koh's experience from working under Green paints an entirely different picture: 'Leadership is impactful. David Green was head when I was there, and he was first class. He had very sound judgement and was not too high and mighty, in fact he was very personable. Everyone loved him.'

In contrast, while generally applauded for the Airbus DPA, the most valuable corporate plea deal in UK history, Osofsky's time as director has been tarnished with high-profile setbacks (See boxout, 'Highs and lows in the Osofsky years'). After the SFO bungled the disclosure process in a December 2021 case involving a former Unaoil executive, the Attorney General announced in February that an independent review of the SFO will be launched, led by Sir David Calvert-Smith, former Director of Public Prosecutions. According to three Court of Appeal judges, the SFO had withheld 'embarrassing' evidence involving contact between Osofsky and a US private investigator that led to former Unaoil Iraq manager, Ziad Akle, being jailed.

As the *Yearbook* went to press, things went from bad to worse as a second executive had their conviction quashed. Paul Bond, a co-defendant of Akle and formerly a manager at Dutch energy services company SBM Offshore, launched a successful appeal of his own three-and-half year jail sentence after Akle's sentence was overturned.

An SFO spokesperson said at the time of the Bond ruling: 'We are disappointed by today's decision and are co-operating fully with Sir David Calvert-Smith's review.'

Koh says: 'The Unaoil fiasco was very unfortunate. It's fair to say there's some naïve leadership, maybe she's not being switched on to how things work in the UK because of her American background.'

Savage also suggests that there's something lost in the transatlantic translation: 'I'm not convinced that Lisa is the right person; they need someone with a better understanding of UK politics and law.'

In the SFO's defence, the judges that presided over the Akle acquittal in December 2021, Lord Justice Holroyde, Justice Jeremy Baker and Justice Jay, found 'no abuse of process, no bad faith, no dishonesty' on the SFO's part. They also ruled that the disclosure discrepancies 'may well be innocent errors', and that they 'do not suggest that any individual official of the SFO deliberately sought to cover anything up.'

And Green was perhaps expectedly sympathetic: 'Disclosure is a huge challenge for any prosecutor, and the SFO is no exception. The Rolls-Royce case involved ten million computer documents. The way forward is increasing the use of AI to sift through data, like in civil litigation. The SFO has good technology but it ends up hiring junior barristers to go through reams of material and inevitably mistakes will be made.'

The agency was given a further chance to defend itself when Osofsky and Michelle Crotty, chief capability officer at the SFO, appeared before the House of Commons justice committee on Tuesday 29 March. A charitable interpretation of Osofsky's performance would highlight her staunch defence of the SFO's prosecution record: she produced statistics detailing the agency's 44 successful individual convictions in the past four years. According to Osofsky, the SFO has eight trials in court this year comprising 23 defendants, something she described as an outlier from the usual two or three trials per year.

She also spoke persuasively about the need for legislative change, establishing some common ground with the private practice community. In particular, she rallied against the identification principle as being outdated and not fit for purpose.

However, she drew considerable flak from Labour MP Diane Abbott for dodging questioning around the Akle disclosure failures. Osofsky borrowed a strategy from the Boris Johnson playbook by stating she was 'duty

HIGHS AND LOWS IN THE OSOFSKY YEARS

Highs:

- **October 2018** – Ex-Afren chief executive Osman Shahenshah and chief operating officer Shahid Ullah are convicted of fraud and money laundering related to a $300m oil business deal.
- **December 2018** – Five convictions are secured in the SFO's Alstom investigation into bribery and corruption committed to secure €325m of contracts.
- **February 2019** – Former senior executive, David Lufkin, is convicted as part of the Petrofac investigation after pleading guilty at Westminster Magistrates' Court to eleven counts of bribery.
- **March 2019** – Former Barclays banker Carlo Palombo and former managing director Colin Bermingham are convicted of manipulating the Euro Interbank Offered Rate (Euribor) at the height of the financial crisis.
- **January 2020** – In the UK's largest ever DPA, the SFO enters into a €991m agreement with Airbus as part of a €3.6bn global resolution.
- **March 2021** – By March, the SFO successfully prosecutes four former oil executives as part of the wide-ranging Unaoil investigation, which uncovers over $17m worth of bribes paid to secure $1.7bn worth of contracts for Unaoil and its clients.

Lows:

- **December 2018** – The agency's prosecution of two former Tesco executives is quashed, after the Court of Appeal rules against the SFO.
- **February 2019** – The SFO drops its probes into Rolls-Royce and GlaxoSmithKline due to what Osofsky terms an absence of 'a realistic prospect of conviction.' This despite Rolls-Royce agreeing to a £497.25m DPA in 2017.
- **February 2020** – Three former Barclays executives are acquitted of fraud after an expensive eight-year investigation. The jury deliberates for just five hours before returning a verdict.
- **January 2021** – The SFO abandons its three-year probe into British American Tobacco due to a lack of meaningful evidence.
- **February 2021** – Regarding its investigation into KBR, the Supreme Court rules that the SFO's Section 2 powers, which compel companies to produce documents to assist investigations, cannot be exerted over foreign companies that have no UK-based office. The decision has lasting ramifications for the SFO and its ability to gather evidence internationally.
- **December 2021** – Osofsky draws widespread criticism for the SFO's handling of a case involving former Unaoil Iraq manager, Ziad Akle. Three judges in the Court of Appeal, which quashes Akle's conviction, rule that the SFO had failed to provide Akle's lawyers with crucial documents.
- **March 2022** – As a result of Akle's acquittal, co-defendant Paul Bond, formerly a manager at Dutch energy services company SBM Offshore, has his three-and-a-half year bribery conviction quashed on appeal.

bound' to not speak on the matter until the conclusion of Calvert-Smith's review, which prompted Abbot to exclaim: 'That's a tiny bit disappointing…It's Parliament! You've come before a Parliamentary Committee, there's a Court of Appeal finding, it's in the public domain, and you're insisting you can't say anything about it?'

So, if Osofsky is not the right person, then who is? Unlike in previous rounds of director speculation, there are no obvious candidates being quoted by the market. However, there is uniformity in terms of the type of person that is needed.

De Silva summarises: 'Any new director needs to be a prosecutor, someone who can walk the walk and with an evident track record in successfully prosecuting cases.' Savage adds: 'We need someone like a barrister with a commercial bias, someone who's a proper lawyer.'

Paul Hastings partner Jonathan Pickworth is blunter: 'Things cannot continue as they are. If the SFO is to survive it needs leadership with real experience of prosecuting large and complex cases, proper tactical nous, and the instinct and knowledge to help it steer clear of the catastrophic errors that have become a recent feature of the SFO's handling of its cases.'

In terms of those specifically mentioned, one source put forward DLA Piper's global co-chair of its investigations and compliance group, Patrick Rappo. Rappo has considerable pedigree, having successfully defended former Barclays executive Thomas Kalaris in a fraud prosecution brought by the SFO in 2020. He also has experience within the agency, having acted as the SFO's joint head of bribery and corruption before joining DLA.

White-collar crime partner at Skadden, Elizabeth Robertson, was also cited as a potential successor, while the SFO's current

> The SFO is too stretched, it bites off more than it can chew. There are very good individual lawyers in the SFO but there are also some overworked lawyers. I don't think it's properly resourced.
>
> Bankim Thanki QC, Fountain Court Chambers

general counsel, Sara Lawson QC, was tipped as a safe pair of hands if needed as an interim appointment.

The consensus is that the SFO would benefit from some refreshed leadership, but what of the rank and file? Gathering opinions here results in more of a mixed bag. Koh is generous with praise for her ex-colleagues, and highlights Will Hotham (principal investigative lawyer), Andy Reston (principal investigator) and Marc Brown (deputy chief investigator) as talented individuals tipped for bright futures within the SFO or in private practice.

Case controllers Jacob Blatch and Laura Haywood were also highlighted as among the most talented, this time by de Silva: 'The people I worked with were exceptional lawyers, equal of anyone in private practice. In my view, they weren't being sufficiently monetarily rewarded, they did it out of a sense of commitment to their work and conscientiousness.'

Fountain Court's Bankim Thanki QC has locked horns with the SFO on more than one market-defining case. Perhaps most notably, he represented ENRC in its Court of Appeal victory against the SFO, denying the agency the right to claim legal professional privilege over substantial volumes of documentation. He has nothing but respect for its people, however: 'The SFO is too stretched, it bites off more than it can chew. There are very good individual lawyers in the SFO but there are also some overworked lawyers. I don't think it's properly resourced. There's a tendency to exaggerate its incompetence because you can't expect to win everything.'

Again, the funding issue rears its head. It is no secret that the disparity in pay between the SFO and private practice is stark: according to the SFO's most recent annual accounts, Osofsky's base salary was capped at £185,000. This is dwarfed by the pay received by most junior partners in the City. Blundell notes: 'It's difficult to keep quality when people can go to a firm and earn a lot more money.'

Green agrees: 'People have got to be paid better. The big problem at the SFO is retention of staff. You can recruit talented people in the short-term and get lawyers on secondment, but retention is key when it comes to a consistency of approach and a strength in depth.'

But some white-collar partners are unconvinced that simply boosting salaries will lead to long-term success. One prominent partner says: 'Even with better salaries, you can't just throw money around. I've done a lot of investigations with the SFO over the years and they don't strike me as the right sort of people.'

De Silva adds: 'When you talk about funding it needs to be broken down into what you mean by that. Absolutely there's a problem with funding the SFO in terms of salaries, but I don't know if that is the differential. The problem is a bit more fundamental.'

Others take an even dimmer view, directly opposed to Koh's assertion that there are no '9-5' types to be found at the agency. A senior white-collar partner laments: 'Personally, unless and until you can attract bright people to do it as a badge of honour, the salary won't make any difference. David Green and his management team were sensible people and were great in comparison to those before and after. Now it's mostly civil service types. Jobsworths who want to get the 6pm train home.'

For her part and to her credit, Osofsky took the salary question head on recently when writing a response to an FT article that suggested the SFO would benefit from a 'revolving door' of talent akin to the DoJ. She said: 'Your comparison of an SFO investigator to a private sector lawyer's salary is an attempt to compare apples with pears – they are entirely different roles.

'In my team I am proud to have individuals with a wealth of experience from both the public sector – National Crime Agency, the Metropolitan Police and HMRC – and private law firms: Fieldfisher and Steptoe & Johnson, to name but two. The SFO does – and I believe always will – attract talented, experienced staff because of the nature of the work that we do.'

The pendulum

If the SFO aspires to mimic the prestigious DoJ, salary obviously plays a large role. But are there some subtler and more cost-effective ways to improve the SFO's image?

De Silva believes a PR facelift could go a surprisingly long way towards reversing the agency's fortunes. She says: 'There's been a serious failure from the SFO to demonstrate to the public what the benefit of the organisation is through its media messaging. They've been on the defensive for so long that the focus has been on essentially crisis comms instead of trying to message what a good job they're doing. The media ends up inevitably focusing on the big negative stories, but there are other significant positive stories such as the global DPAs and other cases of corporate convictions and fraud where people get convicted.'

In the US of course, the credibility of the DoJ is beyond question. As Koh points out, there is 'more of a revolving door between big law and justice' in the US, which leads to an entirely different cultural perception of public prosecution. The no-nonsense public prosecutor is a common stereotype in American cinema.

According to de Silva, these stereotypes matter. She refers to *New Blood*, a TV show written by English novelist Anthony Horowitz that was released in 2016 on BBC One. The programme followed fictional investigators Stefan Kowolski and Arrash Sayyad as they pursued powerful corporations suspected of malpractice, with Kowolski employed at the SFO and Sayyad working as a trainee detective constable in the police force. It even featured a female SFO director.

> 'People have got to be paid better. The big problem at the SFO is retention of staff. You can recruit talented people in the short-term and get lawyers on secondment, but retention is key when it comes to a consistency of approach and a strength in depth.'
>
> Sir David Green QC, Cohen & Gresser

De Silva comments: 'It was filled with factual errors in terms of how people went about getting evidence, but interestingly there was a huge uptick in interest for our junior recruitment.'

In 2017, then-prime minister Theresa May ran a manifesto pledge to disband the SFO and roll it into her own creation, the National Crime Agency (NCA). These plans were subsequently scrapped after the Conservatives failed to secure a majority, but Koh argues that such thinking could also be dissuaded via public engagement: 'The starting point in terms of improvements would be a big PR push to make the SFO snazzier and more attractive. At the moment it looks clunky. It needs to be done and dusted with its review, and then make a big PR push to distinguish itself from the Crown Prosecution Service (CPS) and the NCA.'

Despite best efforts, SFO-bashing has returned. But, echoing the sentiments of Savage, it comes with the best of intentions. There is too great of a need for the SFO in these trying times, and, as Pickworth says: 'The public interest requires there to be an effective agency whose role it is to investigate and prosecute serious and complex fraud and corruption.'

As for Green, the SFO sniping should be largely brushed off, even if he wishes for a greater balance: 'It would be foolish to complain about any commentary on the SFO. People, for some reason, are fascinated by the SFO and one must accept that journalists can write what they like. I wouldn't complain about any publicity – except I wish the pendulum would land somewhere in the middle now. If the SFO has secured a conviction, the headline is: "A much-needed boost for the SFO", whereas if someone is acquitted, it's "a high-profile defeat." Surely it can go somewhere in the middle? Let's bring some responsible balance back to reporting!'

There also needs to be a collective promise to measure the SFO on the metrics that count from now on. Savage suggests that recording the amount of money brought into the government's coffers would be a good place to start, and the £1.63bn we quoted earlier isn't too shabby.

But likewise, the SFO can afford to sharpen up its approach to prosecutions, even if convictions are not being hawkishly monitored. The agency can ill afford another Unaoil calamity. As Blundell concludes: 'It's not losing, it's how you lose.' ■

HILL DICKINSON
HONG KONG
希德律師行 香港

Meet our Hong Kong Disputes and Corporate team: combining APAC market expertise and local knowledge with international reach

33B United Centre,
89 Queensway
Admiralty
Hong Kong

Tel: +852 2525 7525
Fax: +852 2525 7526
hilldickinsonhk@hilldickinson.com

Damien Laracy
Partner, Head of Hong Kong Office
(Admitted in Hong Kong, England, Wales and NZ)
Business Litigation and Arbitration, International trade
damien.laracy@hilldickinson.com

YK Chan
Partner
(Admitted in Hong Kong)
Corporate Finance, IPO/ECM
yk.chan@hilldickinson.com

Kelly Kim
Counsel
(Admitted in Hong Kong)
Arbitration, Korea Practice, Banking, Intellectual Property
kelly.kim@hilldickinson.com

Edward Liu
Partner of Hill Dickinson LLP (UK)
Solicitor of England & Wales
Counsel (Admitted in Hong Kong), Lawyer in P.R.C.
edward.liu@hilldickinson.com

Nicole Wong
Associate
(Admitted in Hong Kong)
Business Litigation and Arbitration, Insolvency, Employment
nicole.wong@hilldickinson.com

Jim James
Consultant
(UK and HK qualified)
Commercial, Maritime and Construction Arbitration
jim.james@hilldickinson.com

hilldickinson.com

We work closely with colleagues within the Hill Dickinson international network of offices to identify and maximise opportunities for clients and to resolve their problems.

In Hong Kong we have a high profile and award winning Disputes practice covering the following areas with our non contentious and corporate colleagues:

- Business litigation
- Data Management and Privacy
- International Arbitration
- Construction
- Insolvency
- China Practice
- Corporate / Commercial
- Korea Practice
- International Trade
- Regulatory issues / White Collar Crime
- Corporate Finance
- Employment / Employee Fraud

Yvette Yu
Partner
(Admitted in Hong Kong)
Business Litigation, Competition Law, Regulatory Investigations
yvette.yu@hilldickinson.com

Antony Cowie
Partner
(Admitted in Hong Kong, England and Wales)
Corporate / Commercial, M&A
antony.cowie@hilldickinson.com

Pui Yip Leung
Associate
(Admitted in Hong Kong)
Business Litigation and Arbitration, Insolvency
puiyip.leung@hilldickinson.com

Maggie Lee
Associate
(Admitted in Hong Kong)
Business Litigation and Arbitration, International Trade
maggie.lee@hilldickinson.com

Richard Lyons
Partner
(Admitted in Hong Kong)
Business Litigation and Arbitration, Construction
richard.lyons@hilldickinson.com

Bryan O'Hare
Partner
(Admitted in Hong Kong and Scotland)
Business Litigation and Arbitration, Insolvency
bryan.ohare@hilldickinson.com

Pick and choose from two menus?

Alsuwaidi & Company LLC provides a comparative analysis in bunker litigation under the Laws of England and Wales and the United Arab Emirates

A ship arrest in the United Arab Emirates (hereinafter as the 'UAE') is a preservatory remedy to obtain security, in favour of a claim in the merits whether to be commenced through court litigation or arbitration. For this purpose, the UAE adopted a 'closed-list' approach for the definition of a 'maritime claim', where a list consists of limited numbers of maritime debts are defined and based on which only a ship could be arrested. These are reduced to 15 classes of maritime claims listed in article 115(2) of the UAE Federal Law of No. 26 of 1981, as amended by Federal Law No. 11 of 1988, concerning the commercial maritime law (hereinafter as the 'CML'). A bunkering claim is listed in paragraph (i) of article 115(2) of the CML, which classifies it as: 'Supplies of products or equipment necessary for the utilisation or maintenance of the vessel, in whichever place the supply is made.'

> While a claim for unpaid bunker is given an automatic right to arrest for being a "maritime debt" in the UAE, to qualify for a right to arrest the same claim is subject to further conditions to be fulfilled under the English law.

The concept of priority debts in the UAE

Under the UAE laws, bunkering is not only classified as a 'maritime claim' but also a 'priority debt', which takes precedence over some other maritime debts such as ship mortgage, demurrages, and insurance premium. Indeed, although the provisions of the CML on priorities were seemingly imported from the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages of 1967, the concept of 'maritime lien' as applicable internationally is not recognised in the UAE. Rather, the concept termed 'priority debts' is in place and one of these priority debts is bunkering as stated forth in article 84 (e) of the CML. Article 84 (e) of the CML classifies bunkering debt as follows: 'Debts arising out of contracts made by the master, and operations carried out by him outside the port of registration of the vessel within the scope of his lawful powers for an actual requirement dictated by the maintenance of the vessel or the continuance of its voyage, whether or not the master is also the owner of the vessel, or whether the debt is due to him, or to persons undertaking supply, or lenders, persons who have repaired the vessel, or other contractors.'

Pursuant to article 86 of the CML, a right derived from priority debts shall attach to the vessel and to the freight of the voyage during which the debt arises, and to the appurtenances of both the vessel and the freight earned since the commencement of the voyage. Priority debts shall be ranked and dealt with in accordance with the sequence set out in article 84 of the CML. It is also stipulated that priority debts shall follow the vessel in the hands of whoever it may be. In this regard, the change of ownership does not affect a right attached to the vessel that is derived from a priority debt.

Following the above, we may notice that the legal position of a bunker supplier before the UAE courts and applying the UAE laws is comparatively stronger than one coming before the admiralty jurisdiction of the English Court, knowing that under English laws, there are two categories of maritime claims giving rise to the right to arrest a ship.

The English equivalent of the UAE's priority debts and maritime debts: maritime liens and statutory maritime claims

The first category contains 'maritime liens', which are equivalent to 'priority debts' in the UAE. These are enforceable by a claim *in rem* which enables the creditor to arrest the ship. They include claims related to collision and salvage claims, crew and master's wages, master's disbursements, bottomry and respondentia. The second category of claims are 'statutory maritime claims', which are equivalent to 'maritime debts' in the UAE. These include, amongst others, claims related to bunker supply and are enforceable by a claim *in personam* which may enable the creditor to arrest the ship subject to the satisfaction of certain conditions before an action *in rem* can arise.

As a result, any 'maritime debt' in the UAE, like unpaid bunker, would give rise to a right to arrest a ship within the UAE waters regardless of her ownership as stated forth in articles 84 and 115 of the CML. The same bunker supplier, however, would face hurdles before the English admiralty court as they must satisfy additional conditions set out in section 21(4) of the English Senior Courts Act 1981 in order to arrest the concerned vessel.

The position is similar in some other common law jurisdictions such as Singapore. Indeed, in *Precious Shipping Public Company et als. v O.W. Bunker Far East (Singapore) Pte Ltd and others* [2015] SGHC 187, it was stated that under Singaporean laws, no lien arose from the supply of bunkers nor could a lien be created by contract. Therefore, when it comes to arresting a ship within the UAE waters for unpaid bunker, it is important to rely on UAE laws.

However, why is it important to rely on any incorporated clause showing the application of English law when it comes to claims in the merits?

Under the UAE laws, claims for unpaid bunker are considered 'priority debts' which would be time-barred within six months as stated forth in article 93 of the CML. In comparison and as explained above, claims for unpaid bunker are not considered as a shipping nor a maritime claim under English laws. This is confirmed in the English case *PST Energy 7 Shipping LLC v O.W. Bunker Malta Ltd* [2015] EWCA Civ 1058 ('*Bunkers*'). It is noteworthy that despite deciding that claims for unpaid bunker shall not be considered as a shipping nor a maritime claim, the arbitrators, the first instance judge and the Court of Appeal subsequently held that the price of the supplied bunker was due as a matter of debt. In this regard, the supplier's claim is a straightforward claim in debt and as such is subject to section 5 of the Limitation Act 1980 of English laws, which states: 'Time limit for actions founded on simple contract: "An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued."'

> When it comes to arresting a ship within the UAE waters for unpaid bunker, it is important to rely on UAE laws.

Two menus, which should you choose?

To conclude, whenever the terms and conditions of the bunker suppliers apply English laws to their supply contracts and whenever the suppliers wish to arrest a ship within UAE territorial waters, they are advised to 'pick and choose' from the UAE menu the right given to them by article 115 of CML to enforce their debt by a claim *in rem* which enables them to arrest the ship as opposed to the English menu, and 'pick and choose' from the English menu the right to an extended statutory time limit stated forth by section 5 of the Limitation Act 1980 instead of article 93 of the CML.


Abdelhak Attalah

Abdelhak Attalah

Dispute resolution: litigation, arbitration, and maritime and international trade of commodities. Abdelhak Attalah is a UK-qualified maritime and international trade lawyer. He holds a postgraduate diploma in maritime law from London Metropolitan University and an LLM in international trade law from the University of Northumbria. His common law qualification was complemented by a civil law practice in UAE. He is a trilingual Arabic, English and French speaker at international conferences on transport, logistics and maritime arbitration, as well as a regular contributor to different specialised magazines and journals on various related topics. He is a supporting member of the London Maritime Arbitrators Association (LMAA).

ABDELHAK ATTALAH
E: abdelhak.attallah@alsuwaidi.ae

Alsuwaidi & Company
252 Emarat Atrium Building
Sheikh Zayed Road, PO Box 7273
Dubai, United Arab Emirates
Tel: 971 4 321 1000
E: info@alsuwaidi.ae
www.alsuwaidi.ae

ALSUWAIDI & COMPANY

Natasha Harrison,
Pallas Partners

Boies Don't Cry

Nearly a decade after launching in the City, Boies Schiller Flexner finds itself without its charismatic London leader and almost her entire team. What now for the litigation specialist?

Tom Baker

'What would you do if you weren't afraid? When I'm making big decisions, there's always fear attached. I try to put the fear aside and say: "What would I do if not afraid?" Last year when Natasha Harrison still ran Boies Schiller Flexner's (BSF) London office, she revealed her mantra in conversation with *Legal Business*. When news broke in January that she and the majority of her disputes team were leaving BSF to start a new litigation-only firm, Pallas Partners, such thinking must have been at the front of her mind.

While Harrison's intention to leave was probably the market's worst-kept secret, it didn't stop the event sending ripples around the City. On 28 January the die was cast. Harrison and partners Tracey Dovaston, Fiona Huntriss, Will Hooker, Neil Pigott and Matt Getz were exiting en masse for Pallas.

It was kind of a big deal. Such was Harrison's influence at the firm, she was put on track to succeed David Boies, the firm's high-profile chair. Fielding the views of litigators since, it is clear that, for many, the charismatic Harrison was the embodiment of BSF's London office.

The prognosis among market commentators for the litigation leader's London office is not rosy. How can the outpost recover from being all but gutted? Does it even want to come back? Perhaps surprisingly, BSF's leadership is bullish. Matthew Schwartz, its New York-based managing partner, insists: 'The first question we asked ourselves, which took 30 seconds to answer, was: "Do we want to stay in London?" And the answer was an emphatic "yes."'

Resurrection

The original vision for BSF's 2013 London launch was to establish a City offshoot that would acutely reflect firm-wide capabilities in High Court-level litigation, international arbitration and cross-border investigations work.

Senior sources with knowledge of the launch maintain it was propelled by just one key client of the firm, Barclays, accompanied by a focus on extending services to pre-existing clients. It was planned to act as a bridge for clients to the UK, Europe and eventually Asia.

> The first question we asked ourselves, which took 30 seconds to answer, was: "Do we want to stay in London?" And the answer was an emphatic "yes."
>
> Matthew Schwartz, BSF

BSF conducted an extensive search for a suitable leader, and it is no shock that they landed on Harrison, who only four years prior had turned down the opportunity to open the London office of another US law firm. By this point Harrison had established a strong reputation at Bingham McCutchen, honing her skills on mammoth pieces of litigation such as the Elektrim bondholder dispute. She especially earned repute for representing investors following the collapse of Iceland's banks after the 2008 financial crisis. BSF eyed a High Court practice born of that experience.

John Reynolds, partner at Avonhurst, believes BSF made the right call: 'Natasha gave Boies a presence in the market. You can't just set up shop in London, it takes relationship building and people on the ground. Quality individuals, claims and results. Boies picked a really good individual in Natasha and she made a significant impact.'

While the London iteration of BSF achieved its aims in building practices out of High Court litigation (with Harrison able to transfer a substantive book of work born out of her Icelandic practice), international arbitration and cross-border investigations, there were difficulties. According to senior sources involved, despite the best efforts of Harrison and her team, BSF was largely unable to effect the vision through transferring work and clients from the US to the UK.

The City practice also had a patchy record in retaining arbitration talent, one of Boies' traditional selling points. Just two years after joining, veteran arbitrator Wendy Miles QC left for Debevoise & Plimpton in 2017. Her replacement, Herbert Smith Freehills (HSF)' Dominic Roughton, then left for another US rival in 2021 – Quinn Emanuel.

According to a senior City litigation partner, Roughton's exit was a major reversal – his practice was said to be worth a significant proportion of the office's turnover. There were other notable departures, too.

In March 2021 dual arbitration and litigation partner (and Harrison's close colleague) Kenneth Beale left for King & Spalding. At this stage, rivals looked on with alarm. One high-profile litigation partner at a US firm notes: 'We actually didn't expect Boies to make it past 2021.'

Others suggest it was this spate of exits that accelerated Harrison's decision to leave. A Magic Circle disputes partner says: 'They've been beset by a number of problems certainly in terms of partners. Naturally people fell away and led to someone like Natasha wanting to branch out.'

This is firmly rebuffed by Harrison herself however, who insists the move was solely motivated 'by the opportunity to be the architect of my own firm, consistent with my value system.'

Optimists might say the silver lining for BSF's London operation is the chance to start over again with fresh blood and a rejuvenated strategy. BSF claims that the two partners who did not follow Harrison, arbitration specialist David Hunt and litigation, arbitration and white-collar expert Prateek Swaika, were chosen to stay on as they bought into the plan for London to replicate the firm's wider strengths. Other sources interviewed say that Hunt and Swaika were offered partnership as an incentive to stay.

Eyebrows have been raised – both Hunt and Swaika are as junior as a partner can be, having been made up during the exit of Harrison and her team. Reynolds acknowledges the mix of challenge and opportunity they face: 'It's not fair to ask people of that level to build up an office – I'm sure they'll be calling headhunters. It's an unenviable and enviable task. I remember when I was quite junior I was tasked with running HSF's New York office, and to be fair, that was the making of me.'

Tom Hibbert, global head of commercial disputes at RPC, takes a similar view: 'This is an extreme example of how difficult it is for a firm to move between generations. Everything is based around the founding fathers, it's incredibly difficult to move on from something driven by the actions of two or three people. My sense is that has been a massive problem for Boies.'

Despite concerns from others, Schwartz says the firm does not intend to burden the pair with undue responsibility: 'David and Prateek are young and upcoming, and they have just been made partner. We will probably make some more senior hires, but they are important young leaders, and they will grow into those roles. They will help us identify the right people to bring in.'

And to give them their dues, partners familiar with Hunt or Swaika are generous with praise. Reynolds worked with Hunt at White & Case, and recalls him fondly: 'Hunt left me at White & Case when he was three years PQE, he was a fantastic associate. A very good lawyer and a great human being as a well.' Another senior litigation partner describes the pair as 'bright young lawyers.'

There is no question that it will be a weighty task to rebuild the firm's London reputation. However, there is optimism both internally and among peers that with a similarly captivating leader installed to harness junior talent, progress can be made. Schwartz is not shy of ambition: 'If we're not at a headcount of about 20 in a

few years' time I would be surprised. It's a beautiful office space in London for 20 to 25 lawyers.'

Socially savvy

In February, more details of the Pallas launch emerged. Pallas will be an alternative business structure that has the potential to let non-legal staff members enter the partnership. Its offices on King William Street opened under a two-year lease, and Harrison confirmed that while she will assume the role of managing partner, she will predominantly focus on fee-earning.

Harrison has since declared that all her clients from BSF have followed her to Pallas. This has already translated to a decent pipeline of work for the fledgling firm. It boasts a High Court trial concerning Mozambique bonds, a group action on behalf of investors seeking redress from Credit Suisse in relation to Greensill Capital investments, and a 'very significant international arbitration' set for hearings in May.

Outlining Pallas' pitch, Harrison says: 'I believe there's a meaningful gap in the market at the very top end for a litigation boutique. Demand is growing for a number of reasons, but one of the key factors is the sophistication of clients now, who really unpackage the legal services they receive and pick the best in class for each piece of work. Increasingly that means they will go to a specialist boutique.'

Pallas has set challenging targets related to ESG. The firm will dedicate 5% of billable time to pro bono work, it aims to have diversity parity by 2025, and be carbon neutral the same year. This is matched by a desire to establish an ESG practice, something the firm has already made good strides towards by its pro bono representation of ClientEarth, as it challenges the board of Shell over its alleged climate risk failings.

Anyone who knows Harrison well – and, thanks to her natural aptitude for self-promotion, that group numbers many influential litigators and corporate partners – will say that such ambitious thinking is par for the course. Her legal credentials are unimpeachable, but what captures the attention more is what one London litigation heavyweight describes as a 'social media savviness.'

The London disputes clique will be well aware of Harrison's slick LinkedIn presence, and her dedication to publicising the achievements of herself and her team. Most weeks, there are at least a few posts celebrating the work of the firm, and timely contributions on topics ranging from International Women's Day to Russia's invasion of Ukraine.

Hibbert, a long-time friend and associate of Harrison, shares some good-natured views on her profile: 'Natasha does have a personal brand, I've never seen someone so active on LinkedIn despite having such a huge practice! She falls into the category of someone who would be successful everywhere they go. All the work went with her which is very indicative.'

Another partner, this time at a US litigation rival, admires Harrison's brand, saying it is a key differentiator for recruitment: 'Natasha has done a very good job in terms of PR and her own profile. If BSF does manage to get a number of people on board it will be difficult for them. They will be following in the footsteps of Natasha's departure. I struggle to see it becoming a big player in London again in the same way.'

The 'personal brand' suggestion tickles Harrison: 'I always thought I was rubbish with LinkedIn! It's nice to hear I have good branding but it's not just about me, we have a group of strong partners who are all successful in their own right. I hope what we have communicated over the launch will be attractive to recruits, but we've got to deliver more than on LinkedIn.'

> Natasha does have a personal brand, I've never seen someone so active on LinkedIn despite having such a huge practice! She falls into the category of someone who would be successful everywhere they go.
>
> Tom Hibbert, RPC

Proving the point, there was plenty of praise for the likes of Dovaston, who was described as 'a great coup' for Pallas by Reynolds. But Reynolds is under no illusions as to the ringleader: 'it was always Natasha's show – the fact she managed to take all but two partners with her is the best evidence of that. It's Boies Schiller but with a different name on the door.'

Headwinds

There is every reason to believe that Pallas will be prosperous. It is not truly starting from scratch, benefitting from an experienced bench of partners and starting with an enviable book of clients. Right now the leverage is a bit out of kilter – currently there are six partners to seven associates and one counsel, so hiring at the junior end will surely be a priority. On this front, Harrison says the firm has already had one offer accepted by an associate, with a view to hiring two more before long.

It is a good time to start a disputes firm in London – across the City, contentious lawyers are riding a tidal wave of litigation that shows no sign of diminishing. While disputes departments of all varieties are busy right now, Pallas may benefit from leaning into the class action space – the firm signalled as much by declaring upon launch it would 'work closely' with litigation funders, and already has a considerable group action on its books with the Greensill claims against Credit Suisse. The market is awash with these cash-rich funders looking for a home for their investments, and there seems to be no shortage of group claims to choose from.

As Alan Watts, global co-head of class actions at HSF notes: 'Often firms will open in the UK now on the back of just one big class action case. There's certainly no shortage of claimant firms, and similarly no shortage of people willing to give them money to do so.'

These same market conditions are also true for BSF however, which has high hopes of returning to somewhere near its former glory. As Schwartz concludes: 'Just as we did years ago, we identify in London a real opportunity for a lot of people. It's an opportunity to build something, not quite from the ground up, but with not too many headwinds. And we'll be doing it with a very strong disputes-only brand, a global team, and a great roster of clients.' ■

Claims in a post-pandemic litigation landscape

Tim Symes and Alice Glendenning discuss claims against valuers, auditors and banks in a professional liability context, and where such claims will go in a post-pandemic litigation landscape

Recessions precede a rise in litigation. Parties suffer losses arising from deals entered into in more buoyant times, businesses default on their loans, enter insolvency and fraud is uncovered. This happened after the global financial crisis. When faced with a severe liquidity crisis, banks stopped lending. Without access to finance, hundreds of thousands of businesses failed.[1]

The coronavirus pandemic has put the UK economy into the deepest slump since records began, with the country in recession for the first time since 2008.[2] It is expected that this crisis, as with other recessions before it, will produce a further surge of claims linked to a diminution in asset value and business default.[3]

The two crises are markedly different in their causes: the former, market participants and inherent banking system weakness,[4] the latter, the financial equivalent of an asteroid hitting earth.[5] They are also likely to differ in the intensity and duration of their economic effects. The UK economy took five years to return to pre-2008 levels, whereas the UK saw the fastest growth (7.5%) in 2021. Whether this growth is set to continue longer term is uncertain.[6 7] However, it is hoped the gargantuan sums spent in government support and the temporary insolvency measures introduced to protect businesses from creditor action will have diminished some of the longer-term financial consequences and speed recovery.

> The UK economy took five years to return to pre-2008 levels, whereas the UK saw the fastest growth (7.5%) in 2021.

There will be a delay before we see the full effects, for better or worse. Following the withdrawal of government intervention, certain businesses will recover while others fail.[8] Pressures on liquidity will mean companies will not be able to recover without restructuring or entering formal insolvency.[9] Borrowers, lenders, and creditors will commence litigation against solvent, insured professionals to seek to lay blame and recover losses. With experienced claimant firms, developed case law and a matured litigation funding market, we can expect claims to be issued sooner and in substantially greater numbers than following the 2008 crisis.[10]

Events are already in motion. In January 2022, company insolvencies rose back to pre-pandemic levels.[11] Many more insolvency filings are expected, particularly in the hospitality and retail sectors.[12] More insolvencies will naturally mean more litigation.

To make matters worse, the invasion of Ukraine and the unprecedented sanctions against Russia will take their toll on the West as well. We are already seeing that across markets globally. In addition, Russia has itself applied 'sanctions' by denying foreign creditors from an 'unfriendly state' repayments in relation to loans, credits and financial instruments.[13]

This article discusses three forms of defendant in a professional liability context: claims against valuers, auditors and banks. It offers a brief overview of the current state of play in those fields before indicating where we expect such claims will go in a post-pandemic litigation landscape.

Claims against valuers

Following 2008, in a declining market, the value of properties dropped. As borrowers defaulted on their loans, repossessions surged. When lenders discovered that secured properties were worth significantly less than they had lent, they challenged the integrity of the valuations through professional negligence claims.

After the pandemic, we will likely see a similar increase in professional negligence claims against valuers. Valuers were not always able to physically inspect assets and had less comparable data due to the unprecedented circumstances. As a result, they were obliged to rely more heavily on metrics such as rent collection statistics and professional judgment over fact.[14] This will have led to valuations being made beyond the reasonable margin of error that do not stand up to scrutiny. The Royal Institution of Chartered Surveyors was alive to this at the start of the pandemic, issuing guidance on the valuation uncertainty it would cause.[15] It advised members to insert material valuation uncertainty clauses


Alice Glendenning, associate

where appropriate to ensure clients understood they had been prepared under unprecedented circumstances and with an absence of relevant or sufficient market evidence.

The work from home regulations and successive lockdowns led to a change in the demand for office space and subsidiary services. While there is a steady return to the office, demand is of a high specification, and older offices may no longer be fit for purpose.[16] Lenders may struggle to sell commercial premises and look to valuers to recoup their losses.[17] The shift away from commercial, business and retail may restore value to these assets. Consider the closure of the House of Fraser stores and the government's move to expand permitted development rules to enable the conversion of commercial, business and services premises to residential with minimal permissions.[18] However, borrowers and lenders might still find themselves with a less valuable asset than bargained for when city centres were booming. Valuers might find themselves valuing assets with fewer comparables as one-off properties are converted to different uses.

Succeeding in a claim for valuation negligence is not straightforward. A valuer will only normally be negligent for valuations that fall outside the reasonable margin of error, which varies across different property types. It is anticipated that in the extraordinary circumstances during and following the pandemic (including remote working, fewer market comparables in the face of limited supply, increased changes of use and a distorted market), the acceptable margin for error may widen. This is particularly so where a 'material valuation uncertainty' clause has been included in the valuation report.[19]

In any UK formal insolvency, it is the job of the insolvency officeholder to realise assets for the creditors. That includes legal claims. Frequently, the claims identified will be against the directors for wrongdoing. But equally, claims against the company's service providers will be identified, namely its auditors and banks.

Claims against auditors

Recent high-profile corporate collapses and accounting scandals have put the spotlight firmly on the auditing profession and, more specifically, the Big Four. Such collapses have led to claims by insolvency officeholders against KPMG on their audits of Carillion,[20] Grant Thornton as Patisserie Valerie's auditors and most recently PWC as auditors of the classic car company JD Classics Ltd.

These high-profile examples have provoked a number of reviews, including the 2018 Financial Reporting Council review, the 2019 Brydon review and the 2019 Competition and Markets Authority study.[21] They also prompted the government white paper entitled 'Restoring Trust in Audit and Corporate Governance' in 2021. This set out a range of proposed reforms to the UK's audit and corporate governance framework and opened questions for consultation. Following slow progress, ongoing concerns of delay and row back, proposed reforms are expected to be set out in the coming weeks. These include the introduction of managed shared audits to increase competition in the sector and the institution of a new regulator, the Audit, Reporting and Governance Authority to replace the Financial Reporting Council with greater powers to police company directors. There are


Tim Symes, partner

concerns that the proposals, which for some cannot come soon enough, might not be in place until 2024.[22]

In the meantime, auditors will have been challenged by pandemic conditions and consequently the reliability of the audits. The inability to attend a client's office may have led to increased difficulties in independently identifying the risk of material misstatement in the financial statements, whether by fraud or error, and in confirming the directors' use of the going concern basis of accounting and company solvency.[23] [24] This is something the Financial Reporting Council was alive to in early 2020. It issued guidance flagging factors for auditors to consider, including:

- the identification of areas where confirmation was contingent on physical presence, and the consideration of heightening the assessment of the risk of material misstatement due to fraud or irregularity;
- alternative methods of hosting audit committees;
- other ways to obtain sufficient audit evidence as opposed to original source documentation, and
- reporting on material uncertainties in the 'going concern' status.[25]

> Auditors will have been challenged by pandemic conditions and consequently the reliability of the audits.

The pandemic is expected to have proved fertile ground for fraud,[26] as evidenced by reported misuse of the government financial support scheme. This is likely to impact auditors, given their obligation to obtain reasonable assurance on whether a company's financial statements are free from material misstatement due to fraud. It should be noted that the revisions to the UK auditing standard on the responsibilities of auditors in relation to fraud (ISA (UK) 240) came into effect from December 2021.[27] This confirms that reasonable assurance, while not absolute, is a 'high level of assurance'. Also, the risk of not detecting a material misstatement due to fraud 'may be higher than one due to error on the basis that the fraud may have involved sophisticated and organised schemes to conceal it, but that that does not diminish the auditor's responsibility to perform the audit to obtain that reasonable assurance.'[28]

Claims against banks

In the last two years, the courts have contributed important case law to banking litigation. The recent developments in relation to the 'Quincecare' duty of care, which requires a bank to exercise reasonable care and skill in carrying out a customer's instructions, represent an important milestone and a substantial basis for litigation for years to come. The latest in the string of cases, *Stanford International Bank Ltd v HSBC Bank plc* [2021], has now had its hearing before the Supreme Court. The judgment will be highly relevant to certain classes of cases against the banks and will greatly interest practitioners.

A claim in dishonest assistance is a form of secondary liability that an officeholder might pursue when a bank has assisted in, for

example, fraudulent transfers or permitted a defaulting fiduciary to operate a bank account which has caused loss. For this claim to succeed, it is necessary to establish dishonesty by particular individuals at the bank, which can be a high bar to meet. That said, dishonesty can be demonstrated when an individual has 'turned a blind eye' to what was apparent dishonest behaviour by the bank's customer.

This point was considered by the Court of Appeal in the *Stanford International Bank* case. The court held that where dishonesty is not pleaded against an individual but against a bank collectively, it is still necessary to evidence dishonesty or 'blind eye knowledge' against one or more individuals; to find dishonest assistance without this would be to allow gross negligence to be the basis for a finding of dishonesty. Nonetheless, despite the relatively high thresholds for these types of claims, we may well see more of them as fraud schemes emerge in the wake of the pandemic.

The next 12 months

As we exit the lag phase after the pandemic, the next 12 months promise to be very interesting. The liquidity pressures already felt by companies will be further exacerbated by the energy crisis and the war in Ukraine. This, together with the fact that litigation funding is now more accessible than ever and the availability of rapid high-value adverse costs insurance, will mean insolvency officeholders can do much more, more quickly in terms of asset recovery and realisation. The obvious attraction in suing insured professionals and banks will make them an ever-growing litigation target for insolvency officeholders wishing to bring monies back into the insolvency estate for creditors.

STEWARTS
THE LITIGATION SPECIALISTS

1. https://www.theguardian.com/business/2020/aug/12/how-does-uks-covid-recession-compare-with-previous-ones
2. https://www.theguardian.com/business/2020/aug/12/how-does-uks-covid-recession-compare-with-previous-ones
3. https://www.clydeco.com/en/insights/2020/04/covid-19-insurance-professional-indemnity-article
4. https://blogs.lse.ac.uk/businessreview/2020/03/28/comparing-the-coronavirus-crisis-to-2008-is-inevitable-but-theyre-quite-different/
5. https://blogs.lse.ac.uk/businessreview/2020/03/28/comparing-the-coronavirus-crisis-to-2008-is-inevitable-but-theyre-quite-different/
6. https://www.theguardian.com/business/2022/feb/11/lies-damn-lies-why-last-years-uk-economic-growth-cant-be-seen-in-isolation
7. https://brownrudnick.com/article/you-cant-sue-a-germ-comparing-the-2008-financial-crash-to-the-covid-19-economic-crisis/
8. https://www.clydeco.com/en/insights/2020/04/covid-19-insurance-professional-indemnity-article
9. https://www.rpc.co.uk/perspectives/commercial-disputes/disputes-yearbook-2021-financial-disputes/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration
10. https://www.clydeco.com/en/insights/2020/04/covid-19-insurance-professional-indemnity-article
11. https://www.gov.uk/government/statistics/monthly-insolvency-statistics-january-2022/commentary-monthly-insolvency-statistics-january-2022
12. https://brownrudnick.com/article/you-cant-sue-a-germ-comparing-the-2008-financial-crash-to-the-covid-19-economic-crisis/; https://www2.deloitte.com/ie/en/pages/finance/articles/significant-decrease-for-corporate-insolvencies-in-2021.html
13. https://www.morganlewis.com/pubs/2022/03/update-russia-adopts-decree-on-repayment-in-russian-rubles-of-debt-to-foreign-creditors
14. https://www.rics.org/uk/news-insight/latest-news/news-opinion/life-after-lockdown-part-7-for-what-its-worth/
15. https://www.rics.org/uk/upholding-professional-standards/sector-standards/valuation/valuation-coronavirus/
16. https://www.ft.com/content/8c231f78-82c4-4028-91c4-e091b8c4a3f9
17. https://dwfgroup.com/en/news-and-insights/insights/2021/3/looking-ahead-professional-indemnity?utm_source=Ceros&utm_medium=Web&utm_campaign=Ceros-insurance
18. https://www.business-live.co.uk/retail-consumer/what-next-stores-left-empty-19750484
19. https://www.dechert.com/knowledge/onpoint/2020/6/covid-19-and-valuations-in-the-uk.html
20. https://www.theguardian.com/business/2022/feb/03/kpmg-being-sued-for-13bn-over-carillion-audit-uk-official-receiver
21. https://www.nortonrosefulbright.com/en-us/knowledge/publications/9df824d4/restoring-trust-in-audit-and-corporate-governance
22. https://www.ft.com/content/f33f38ea-0019-4c40-ab8c-b0009f5ca514
23. https://www.frc.org.uk/auditors/audit-assurance/auditor-s-responsibilities-for-the-audit-of-the-fi/description-of-the-auditor%E2%80%99s-responsibilities-for
24. https://www.kingsleynapley.co.uk/insights/blogs/dispute-resolution-law-blog/firms-brace-for-negligence-impact
25. https://www.frc.org.uk/about-the-frc/covid-19/covid-19-bulletin-march-2020
26. https://www2.deloitte.com/ch/en/pages/financial-advisory/articles/covid-19-operating-in-the-new-normal-fraud-risk.html
27. https://www.frc.org.uk/getattachment/e48499f2-b69b-4f45-8bef-762583eab1cd/ISA-(UK)-240-Final.pdf
28. https://www.frc.org.uk/getattachment/e48499f2-b69b-4f45-8bef-762583eab1cd/ISA-(UK)-240-Final.pdf

RPC interview series – Dan Wyatt and Chris Ross

What are the major trends in civil fraud in 2022?

Dan: Crypto asset disputes are massively on the rise. I don't think I've been involved in a sector, or type of claim, that's generated so much interest and excitement and engagement from the legal industry as crypto disputes. We are getting inundated with enquiries and every Crypto Fraud and Asset Recovery (CFAAR) network event that we put on is very well attended. Secondly, I think there's going to be a huge amount of litigation coming out of what's happening in Ukraine and Russia, which is obvious. There will be direct instructions relating to the conflict, but also downstream supply issues are also going to arise as a result. We're seeing instructions in this space already: one example is a company in Europe that buys certain raw materials – the price of which has, as a result of the knock-on effects of the conflict, gone up drastically. Consequently, the company wants advice on whether it may get out of its contract. That is not directly linked to Ukraine or Russia at all, but there is obviously a huge global impact from what's happening there across pretty much all sectors and jurisdictions.

We can also see there's going to be a rise in ESG-related claims. They can take a number of forms, but perhaps one of the most obvious ones is section 90 of the Financial Services and Markets Act 2000 (FSMA) claims for false or misleading statements about ESG initiatives and so forth. We've seen a couple of them come across our desks already, but there'll be more to follow. And then fourthly, the other area in which we have seen growth is authorised push payment (APP) fraud – this takes many forms, but essentially is where fraudsters deceive individuals into sending them funds to a bank account controlled by them.

> Quincecare has been around for 30 years. But it's only really in the last few years that people have woken up to it again, and now it's being pleaded far more regularly.

How is cryptocurrency impacting the civil fraud market?

Dan: The last couple of years in particular have seen the use of cryptocurrency and other crypto assets grow exponentially among the general public looking for somewhere to put their money for potentially very attractive returns. It's becoming much more mainstream and more commonly used as an investment and payment mechanism. Fraudsters have, unsurprisingly, latched onto that and have identified that there's a number of ways to steal cryptocurrency. We've seen plenty of cases where people open their crypto wallet one day and everything's gone (ie a classic hacking case), and also cases where they've been confidence-tricked – for example, they've been told: 'You can make a lot of money by investing in crypto, send us over £500 and we'll double it.' Followed by: 'Great news, we've doubled your money. How about another £5,000?' And so people get lured into 'investing' very large amounts of money/crypto and everything seems to be going terribly well until they seek to withdraw some or all of it, and realise they have been scammed. We have also seen cases – perhaps the most unfortunate of the lot – where people have instructed firms purporting to help them recover their crypto only to discover that the firm itself is also controlled by fraudsters and further large amounts of money/crypto has by then been lost to funding the 'investigations', which turn out to yield no results.

Chris: There's also more expertise in the market now; that's not just around lawyers, but there are increasing numbers of firms who have forensic accountants and specialised in-house tracing teams, and so on, who we work closely with to build the strongest case possible. It's easier from a technical point of view to identify where your stolen Ethereum or other cryptocurrency has gone. That's part of the jigsaw of trying to get a claim off the ground – understanding what's actually happened. A few years ago, perhaps that expertise wasn't so readily available.

Were there any key cryptocurrency cases from last year that civil fraud lawyers should be keeping their eyes on?

Dan: While there were a couple of earlier decisions on crypto issues, a case from 2019 called *AA v Persons Unknown* is widely seen as the first key crypto decision. It dealt with whether cryptocurrency is property or information and, if it was property, what type of property? The court held that it was property which is important as it allows claimants to seek proprietary relief over it. That was very much a watershed moment, because it was a very important point to determine.

There has been a steady flow of crypto decisions since then, most notably *Ion Science* and *Toma v Murray* in 2020, *Reyes, Fetch.ai,* and *Wang v Darby* in 2021, and *Tulip Trading* in 2022. Most


Dan Wyatt


Chris Ross

of the key decisions so far have, with a few exceptions, been on an uncontested basis. But a few cases are now proceeding on a contested basis and so various legal issues will be subject to further scrutiny over the coming months and years.

Any other key cases?

Chris: There's a line of cases related to the Quincecare duty, which is going to be a hot topic this year. We've got the decision in the *Stanford v HSBC* case, with a Supreme Court judgment expected this year following the hearing in January. That relates to the question of whether an insolvent company suffers a loss if payments are made out of its bank account that discharge contractual debts owed to a third party.

There's also the *Federal Republic of Nigeria v JP Morgan* case, which RPC is instructed on. Nigeria is relying on the Quincecare duty in its claim against the bank for over US$1bn, relating to payments made out of the FRN's account when the bank was on notice there was a serious risk the payments were part of a corrupt scheme. Judgment will hopefully be handed down on that later this year. It's interesting, Quincecare has been around for 30 years. But it's only really in the last few years that people have woken up to it again, and now it's being pleaded far more regularly. But there does seem to be a willingness on the part of the judiciary to accept that its limits are not fixed and can be expanded.

In relation to authorised push payment (APP) fraud cases, we had the recent decision of the Court of Appeal in *Phillip v Barclays Bank*, in which the Court of Appeal overturned a decision to strike out the claim against the bank on the basis that its customer, Mrs Philipp, had herself instructed Barclays to make the payment in question directly, rather than via an agent. The Court of Appeal rejected the proposition that the duty can only arise where the payment instruction is given by an agent, potentially opening up the scope of the duty considerably.

What makes RPC's civil fraud team stand out?

Dan: We're obviously brilliant because we are committed, commercial and collaborative in defending our clients' interests, whether on the claimant or defendant side! In seriousness, we have one of the largest civil fraud teams in the city. We've got 14 partners and more than 30 associates working on some of the largest and most complex fraud disputes in the English courts.

That means that we've got a wealth of experience within the office, and the scale to work on multiple large and complex cases at the same time. Around 70% of our work as a firm is litigation, so we've got a huge number of litigators in the firm (over 250). Even beyond our immediate fraud team of 14 partners and 30 associates, we typically would bring in other specialists across the firm to support aspects of a case, so clients really get a full service offering.

We are also highly innovative. The most recent example of this is that we are a founder member of the Crypto Fraud and Asset Recovery 'CFAAR' network, which launched in August 2021. We already have over 1,100 members and it has been a huge success in bringing together professionals (both lawyers and non-lawyers) who conduct crypto-related work and providing a space to learn, share ideas, and network.

Chris: There's a virtuous circle, where you have a team who are interested and highly experienced in this work and have the opportunity to do a large amount of it. And then they have the experience and the learning to help build up the practice and work on the next case. At the same time, we have ambitions to keep growing across all career levels.

We also have lots of contacts in the market in terms of experts. As we talked about earlier: crypto tracing, experts in banking, financial markets etc – we are well-connected when it comes to putting together all the constituent parts of the case. Similarly, on funding, we have worked on funded cases for years now. We were one of the first firms to do full contingency work with 100% conditional fee arrangements and more recently damages-based agreements (DBAs). It's not that common around the City, but it's an attractive proposition if you can put the case together with the right legal team, the right experts and the right funding.

RPC

The current situation and the future: fraud victims through Cyprus courts

N. Pirilides & Associates LLC discusses the ancillary 'free-standing' assistance of fraud victims in asset recovery through Cyprus courts

1. Introduction

It is not exaggerating to say that the rates of what we lawyers refer to as a case of 'commercial fraud' or 'civil fraud', remain at record highs all around the globe and Cyprus is not an exception to this record as the economic globalisation is increasing businesses' exposure to fraud and the sophistication of the fraudsters' schemes is reaching across national boundaries. On top of that, with Cyprus being considered for over two decades as an important international business/financial center, mainly because of its beneficial corporate tax rate and wide network of Double Taxation Treaties, the set-up of complex corporate structures with various layers of companies from different jurisdictions often includes Cyprus. Inevitably, cross-border transactions which involve Cypriot entities may end up with commercial fraud being committed from a Cyprus company or a company managed and controlled from Cyprus. Therefore, our courts have become a hub for cross-border fraud litigation which usually employs the issue of freezing injunctions in various jurisdictions other than the country where the substantive proceedings have been initiated.

> The proposed new CPR will include a provision allowing a foreign litigant to apply to the Cyprus courts for injunctive relief in aid of foreign court proceedings or anticipated court proceedings, even where there are no substantive proceedings in Cyprus.

One question we are increasingly being asked to advise on is whether it is possible to obtain interim freezing injunctions in aid of foreign court proceedings without first having to instigate substantive proceedings in Cyprus. In other words, whether Cyprus courts have jurisdiction to issue the so-called 'stand-alone' or 'free standing' injunctions which, as the name suggests, 'stand-alone' in the sense that an injunction can be issued where no other substantive relief is sought within the jurisdiction.

2. The current situation with 'free-standing injunctions' in Cyprus

As things currently stand in Cyprus, a free-standing injunction could be issued in aid of foreign court proceedings only where there is a relevant bilateral or multilateral treaty which provides for such a pre-emptive relief and which links Cyprus with the country where the court proceedings have been initiated. More specifically, Cyprus courts have jurisdiction to issue this type of injunctions *only* in aid of court proceedings pending before courts of member states of the European Union pursuant to Regulation no. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters or in aid of international commercial arbitration cases by the use of section 9 of the Cyprus International Commercial Arbitration Law of 1987, Law no. 101/1987.

In other words, a fraud victim cannot request alone the issue of a freezing injunction or any other injunction in aid of the foreign court or arbitration proceedings since such a request could not be considered as a substantive claim under our civil procedure rules ('CPR'). Unlike other common law jurisdictions, Cyprus lacks the necessary legal framework providing for such jurisdictional power and is now clearer than ever before that it is the right time for a reform in this area of the law in order to incorporate this helpful tool in our jurisdiction as an ancillary remedy to foreign proceedings.

3. The future of 'free-standing injunctions'

The future in this area seems promising and there is indeed light at the end of the tunnel as the long-awaited change of our CPR is closer than ever before. The proposed new CPR, the first draft of which have been presented officially by the Supreme Court

of Cyprus in mid-2021, will include a provision (Part 25.4 of the new CPR) allowing a foreign litigant to apply to the Cyprus courts for injunctive relief in aid of foreign court proceedings or anticipated court proceedings, even where there are no substantive proceedings in Cyprus. This development will make available the relief of the so-called '*free-standing injunction*' or as it was called by many prior the overturning of the Black Swan decision, a '*Black Swan injunction*'.

Obviously, the aforesaid reform will benefit fraud victims who are seeking recovery through assets situated in Cyprus and of course, it will add strength and efficiency to the existing pre-emptive remedies available in Cyprus. Admittedly the battle against fraud by its victims is definitely not an easy task, though the anticipated availability of the remedy of a '*free-standing injunction*' in Cyprus is bringing us much closer to curbing cross-border fraud.

4. The available tools

With Cyprus being a common law jurisdiction, the influence of the latter on the Cyprus legal order is making available in Cyprus the same tools as for a victim of fraud in the UK or other common law countries. Therefore, both tracing and recovery consist of the rules developed by common law to deal with situations where assets have been fraudulently misappropriated.

The jurisdiction of Cyprus courts to issue an injunction derives mainly from the provisions of section 32 of the Courts of Justice Law no. 14/1960, the relevant provisions of the Civil Procedure Law (Cap. 6), the principles of equity and of course case law which evolved rapidly in this field over the last decade.

The main tools available in Cyprus to trace information of the whereabouts of misappropriated assets as well as to secure them for recovery include the following:

- Freezing ('*Mareva*') and ancillary disclosure orders;
- Third party disclosure orders ('*Norwich Pharmacal*');
- Search orders ('*Anton Piller*');
- Appointment of interim receivers.

5. Conclusion

The future in the battle against fraud and asset recovery looks brighter than ever! In the globalised world that we live in today, this development will armour fraud victims with a vital tool directed straight towards the enforcement of obligations to satisfy judgments which do not currently exist.

The aforesaid proposed legislative amendment to the CPR in Cyprus reflect the importance of injunctions in preserving the rights of a litigant before judgment is rendered in foreign proceedings, by freezing assets situated in Cyprus or revealing important information from parties residing in Cyprus who have become mixed up in a fraudulent scheme, helping thus the victims to pursue their claim in a foreign jurisdiction against those ultimately responsible and of course to eventually recover their losses.

Kyriakos Karatsis, partner

N. PIRILIDES & ASSOCIATES
Advocates and Legal Consultants

The journey travelled in building a modern barristers' chambers

Amanda Illing discusses the process of building a modern barristers' chambers

Last week, by chance I opened a box that had been untouched in our old basement for many years. Inside was a treasure chest of barristers' chambers' history – the diaries! Eight huge, beautiful red and blue leather-bound diaries from 1980 to 1987. Back then, barristers' livelihoods (their cases, hearings, court location, solicitor instructing and agreed fees) would be manually recorded day by day in this one diary and used by all the 'clerks' (often thrown across the room) in order to engage a barrister for a piece of work or a court appearance.

We've come a long way since then. The most obvious step has been the development of technology. We now use case management and diary systems that can be accessed remotely to share diaries, data, run reports, link to financial accounting software and deal with marketing and CRM activity. A modern barristers' chambers will be expected to have the latest technology: AV/IT equipment to run online and hybrid hearings and events, good client hospitality space and internal collaboration space to aid productive working relationships and wellbeing.

> 'Modern chambers will have a suite of organisational structures and policies with measures such as a constitution, parental leave schemes for barristers and other mechanisms to operate in a modern, ethical and sustainable way.'

However, there are many other ways we have modernised at the Bar. Like in any sector, every barristers' chambers is different, with its own personality and priorities.

Barristers' chambers are relatively lean, umbrella organisations, built on a collection of their self-employed barrister parts. Chambers go through different management and organisational cycles (rent, budget, committees, refurbishment, appointment of heads of chambers). They manage a variety of topics including risk and regulation, or staff and barrister recruitment; but must also be ready when something comes along with the potential to damage reputation, brand or income like a cyber breach, a pandemic, and (as happened to us) urgent consideration and decision to change our trading name (from Hardwicke to Gatehouse Chambers) when it emerged that the old name had adverse connotations with the slave trade.

Many barristers' chambers now behave like corporates. Our regulator the BSB treats us like corporates in its reporting requirements. Most barristers leave the running of their organisations to teams of staff professionals, some longstanding in the sector, alongside new entrants with different backgrounds, skills and expertise.

Chambers invest time and resources in building a corporate brand and marketing and profiling individuals as well as practice area groups and teams. Even in the old days some traded as 'the chambers of "X Barrister" QC', or from a building address. When they relocated, they took their location address as their brand name with them to a new address. Increasingly, chambers trade under names not associated with a person or location.

So, what defines a modern chambers? I would suggest it's down to resources, policies and attitudes.

Chambers are financed through a percentage contribution from barristers' fee income and usually some other fixed service charge element, like room rent. The percentage rates and other charges vary from chambers to chambers. Modern chambers will have a suite of organisational structures and policies with measures such as a constitution, parental leave schemes for barristers and other mechanisms to operate in a modern, ethical and sustainable way. They encourage retention, now that movement amongst barristers and staff in chambers is relatively common-place.

A modern chambers will have the necessary resources to run a range of other activities that often mirror their solicitor client base, including CSR ESG programmes, mentoring schemes, and

advanced training and development of staff. It will be working hard to ensure that recruitment practices reflect the modern-day workplace. You can build a modern chambers through your people.

Gatehouse Chambers' work is mostly privately paid commercial, construction, property and insurance work which allows us to be well resourced. For those in criminal or family law, or others whose work streams or incomes have been recently squeezed, even surviving, let alone investing in modernising will be a challenge.

A modern chambers will have good management, reporting and governance structures so that senior staff managers who collaborate and communicate well as a team make decisions with only strategic oversight and without being micro-managed. A past head of chambers taught me an important lesson to check on every decision, because it will affect the livelihoods of every person in chambers and their families, potentially hundreds of people.

I joined a barristers' chambers in 1999 after spending my first 12 years working in the Crown Prosecution Service as a case worker, a project manager, and then as the private secretary to the director of public prosecutions. I was used to barristers and courts, and indeed politicians. I was even used to negotiating substantial fees with barristers' clerks. But notwithstanding my many years of experience, at quite a senior level, when I joined chambers and went in to my first clerks' room I was still the only woman and an outsider.

Going back to the discovery of those diaries, I looked to see what was happening in the old Hardwicke Chambers on the day I had started work in the civil service – Monday 27 July 1987. I turned the huge pages to take a look. Two pages of beautiful handwriting in blue ink, usually the preserve of only the senior clerk and first junior clerk: the initials of barristers, the case name, court, and instructing solicitor. Something at the bottom of the page jumped out at me. Written in pencil, in very familiar handwriting: 'Jason away'. It was written by Jason Housden, whose first job in 1986 was as a junior clerk at Hardwicke. Jason was always someone with an enthusiasm for IT, systems and modernisation and we went on to work together in another chambers 20 years later. Jason is now chambers director at Henderson Chambers. I sent him a video message of me opening the diary, turning the pages and zooming in on the day and his note at the bottom, made nearly 35 years ago.

It's all very well putting the structure in place to build modern barristers' chambers as we have both done, but this unearthed Jurassic treasure brought a tear to the eye, a nod of respect to the past, and reminded us of the journey we have both travelled.

Amanda Illing, CEO

> A past head of chambers taught me an important lesson to check on every decision, because it will affect the livelihoods of every person in chambers and their families, potentially hundreds of people.

AMANDA ILLING
CEO
Gatehouse Chambers

GATEHOUSE CHAMBERS

The first Romanian law firm dedicated to white-collar crime

Budusan & Associates on being a white-collar defence and compliance practice in Romania

Established in 2008 as a private practice intended to mirror the increasingly organised, staffed and sophisticated investigative tools of the prosecution, the core services of Budusan & Associates consist in the integrated management of business crime cases, whether from a defensive standpoint, or by serving the needs of crime victims when seeking compensation from offenders or other responsible parties, as well as from a pre-emptive perspective, intended to identify and mitigate criminal law risks that may arise in the course of business activities.

The firm's white-collar defence and compliance practice only handles a select variety of criminal defence issues. The firm does not handle street crime, and selects its elite crime cases (political actors, high-profile state officials and dignitaries, industrialists etc) based on a thorough, case-to-case analysis. The firm represents corporations, boards of directors, executives, and public officials in criminal and related regulatory enforcement proceedings in Romania, or with Romanian ties.

Since its set-up, the firm has provided legal services in a vast majority of the local high-profile business crime and corruption cases. The firm's professional activity is defined by a combined legal and procedural approach to cases, integrating various branches of law (in consideration of the regulatory framework of the industry targeted by the investigation), as well as fields of expertise (through a well-established collaboration with reputed experts and specialists providing a skilled perspective on technical issues of the legal matter).

While staying focused on the needs of the clients, the firm is well-known for its coherent, client-tailored procedural strategy, designed to maximise the chances of the best possible outcome of judicial procedures.

Led by former high-ranking prosecutor, Mr Ovidiu Budusan, the firm continued to register successful outcomes in high-profile court cases. During the Covid pandemic, the firm honoured its professional commitment by providing uninterrupted, efficient legal advice and assistance to clients remotely, while also handling court representation in urgent matters (including during the total or partial lockdown).

For example, in 2021, the firm continued to handle high-profile corruption cases involving a former minister and MP, the shareholders of a major Romanian retailer, as well as major EU funds fraud cases in infrastructure and food industries, tax evasion cases in the food and beverages industry, as well as professional offences committed in Romania against global companies.

Budusan is the founding partner of the firm and a highly experienced litigator. The professional experience acquired as prosecutor-in-chief of the Division for the Prosecution of Corruption and Organised Crime (later reorganised into PNA/DNA and DIICOT) within the prosecutor's office of the Supreme Court of Justice (now PICCJ), as well as his subsequent prolific practice as attorney-at-law, recommend Budusan as one of the leading criminal defence attorneys in Romania.

Budusan manages defence in complex cases dealing with business crime charges in industries such as banking and finance, energy, oil and gas, IT, media, capital markets, pharmaceuticals, food industry, infrastructure, as well as charges of tax evasion and corruption offences.

Budusan also has a wealth of experience in the field of human rights, especially in the context of criminal and ancillary procedures, and has a notable track record of cases where individuals, companies or professional associations challenged the unjustified interferences of state authority in the exercise of fundamental rights, both before national courts and the European Court of Human Rights.

Liana Iacob is a partner in the firm since 2014. Her fields of expertise include fraud against the financial interests of the European Union, public procurement fraud, corruption and professional offences, tax evasion, financial and insurance fraud, embezzlement, corporate fraud and intellectual property crime. Iacob has managed complex cases of fraud in the financial and banking industry; she has provided legal consultancy and assistance to important corporate clients in the IT sector, in energy, real-estate, the food industry and financial services. She also practiced commercial and contract law, IPR, oil and gas, court litigations and represented clients in ECHR procedures.

Florentina Frumușanu is a partner with Budusan & Associates. She specialises in cases of tax evasion, accounting offences, capital market crimes, offences against the customs regime and intellectual property law, offshore transactions, corruption offences, corporate fraud and fraud against the financial interests

of the European Union. Frumușanu gathered experience as an in-house lawyer in a multinational oil group, where she advised regarding corporate, capital markets, intellectual property and environmental law, on matters concerning commercial contracts and negotiations, environmental conformity, capital market transactions, public-private partnerships, projects and public acquisition procedures for infrastructure projects.

Having joined Budusan & Associates as partner after years of fruitful collaboration, George Toniuc is an experienced, skilled litigator, with a keen understanding of the investigative procedures and court process, and with a balanced, client-oriented approach. With nearly 20 years of experience, Toniuc assisted and represented both industry, and individual clients in complex criminal matters, handled by specialised prosecutorial units. Toniuc also practiced corporate and industry law, in fields such as international transactions, oil and gas and aviation.

In addition to our white-collar experience, our lawyers draw upon their prior experience in other core practice areas, including corporate and securities, finance, accounting and tax, pharmaceutical industry, and energy industry. Clients also benefit from the firm's commanding presence on the Romanian market for over a decade, and of the firm's depth of experience counselling clients facing high-profile investigations and enforcement proceedings.

Our lawyers have collectively tried hundreds of major cases to verdict, defence lawyers, at all levels of the Romanian justice system. These trials include the following types of representative matters:

- Public and private corruption;
- Money laundering;
- Professional and corporate offences;
- Bank fraud;
- Tax evasion;
- Bankruptcy fraud;
- Health care fraud;
- Insider trading;
- Privatisation;
- Environmental and QHSE.

The firm has conducted or has assisted in internal investigations for private companies, boards of directors, audit committees and special committees relating to allegations of criminal misconduct. This practice includes counselling clients on the issues that frequently arise during internal investigations, including the decision of whether to voluntarily disclose information to law enforcement or, as the case may be, regulatory agencies, the strategic considerations arising from parallel government inquiries, and or parallel government inquiries and private litigation, employment law issues and communications with auditors.

The firm regularly represents companies and individuals in matters involving the Romanian corrupt practices law, including internal investigations into alleged Romanian corrupt practices law violations, National Anticorruption Directorate ('DNA') investigations, assets freezing procedures, as well as enforcement proceedings. Our capabilities in this area are strengthened by a wealth of experience in the field of EU funds regulatory and prosecution investigations, at both national level, and that of the European anti-fraud office. Based on this experience, the firm is ready to handle defence in investigations of the European Prosecution Office ('EPPO'), the independent prosecution body intended to tackle serious crimes against EU budget, such as fraud, corruption or serious cross-border VAT fraud, end of 2020.

Given the wide interpretation of the notion of organised crime under national law, the firm regularly represents companies and individuals in white-collar investigations handed by the Romanian highly specialised prosecution body, Directorate for Infringements of Organized Crime and Terrorism ('DIICOT'), as well as asset freezing and enforcement procedures. Such matters may include sophisticated tax fraud, embezzlement, fraud and false claims, security offences, corporate and professional offences, committed by an organised crime ring of three or more individuals.

Over the last year, the firm granted legal assistance and representation to a food and beverages company, indicted in a complex case of tax evasion with an estimated damage of approx €3m, as well as money laundering of an amount of approx €10m, allegedly intended for corrupt practices (in connection with high government officials, namely, ministers); managed the defence in a high-profile tax evasion case in the media field, with an estimated damage of approx €10m, as well as in a major tax evasion case concerning a railroad infrastructure company and an estimated damage of €2m. The firm handled, also, a complex case of criminal infringements on intellectual property rights, with an estimated damage exceeding €100m, as well as the associated civil claims. In 2021, the firm managed the criminal court case concerning the bankruptcy of Romanian top insurance company, ASTRA S.A., dealing with economic and professional offences, as well as estimated damages in the range of €200m, ending in final acquittal of the firm's client by the High Court of Cassation and Justice; as well as a complex case of bank fraud committed against the firm's client, with a loss of approx €8m, ending in a seven-year conviction and granting of all civil claims for our bank client. The firm currently handles the court case concerning alleged corruption offences committed by a former member of the government (minister).

OVIDIU BUDUSAN
Managing partner
Tel/Fax: +4 021 230 5088/
+4 021 316 8394
M: +4 072 267 7125
E: ovidiu@budusan.ro

BUDUSAN ASOCIATII

SUE MILLAR

WORDS: TOM BAKER

I was always naturally argumentative. But I didn't have any role model at all, nobody that I knew was involved in law.

I was either going to be a journalist or a lawyer. What swayed me? I grew up in the 1980s and you start to get politically awakened in your teens. This was at a time when Margaret Thatcher was in government and everything was extremely political. I realised that I would probably have to write in accordance with the political wishes of the editor and I didn't think I could do that.

I come from Middlesbrough. In the 80s, it was not a genteel place. It's probably not genteel now! My mum and dad didn't have any form of tertiary education. One of the reasons that I didn't study English at university was that it felt wrong to be studying something that didn't immediately lead to a job. I'd have a different view now, but at the time, it did feel self-indulgent because my mum and dad were making real sacrifices. I wanted to get to the position where I was repaying them as quickly as possible, and I don't mean repaying them in any kind of monetary way, but repaying that faith in me.

> My background has helped me in my career. My dad always told me to be true to myself, and that's what I've always been.

My background has helped me in my career. My dad always told me to be true to myself, and that's what I've always been.

I didn't really know that much about law firms, and I was applying at a time when it was quite difficult. We were in a recession. I applied to loads and loads of firms, it was pretty scattergun. I remember getting a summer placement with Stephenson Harwood and I really loved it and the people.

It came down to Stephenson Harwood or Slaughter and May. I had a great interview at Stephenson Harwood where the partner interviewing me and I were just talking about football. He was a Sunderland fan, and they're a massive rival to Middlesbrough, who I support, so we just had a really nice chat. I was invited to go down and see Slaughters, and the thing that really turned me off was that the trainee that showed me around didn't really know anyone. At one point he gestured towards an office and said to me: 'That's Mr Boardman!' I said: 'Okay...' After that, there was absolutely no way I was going to Slaughters.

I had convinced myself that I was going to do corporate because I really enjoyed studying company law. But by the time I qualified, the die had been cast in favour of litigation. I looked up to John Fordham. He was always working on a load of big-ticket litigation when I first started and is an incredibly charismatic individual.

In one of my earliest cases, I was sent to Marbella to serve a cease-and-desist order. I was struggling to find the individual. In the end I managed to serve the wrong person on the say-so of a waiter in a café – luckily the wrong person gave the papers to the right person, so it all worked out in the end!

I was once sent to Deal in Kent to serve an injunction, and I got stuck in the loo. I'd taken a paralegal with me, because the person I was meant to serve was known to be violent. I arrived at the hotel late, threw my phone onto the bed and nipped into the loo. Suddenly I realised I couldn't open the door. After lots of banging and shouting I managed to get somebody's attention. They wanted me to escape via a window and down a ladder. But it was really windy, so I said: 'That's not happening!'

I was shouting at my paralegal through the door, asking him to explain I'd be late. I could hear him saying: 'Yeah... Sue's in the loo…'

I eventually got out and managed to track down the individual's wife. She told me he'd meet me in the pub. I had to start furiously googling whether it was legal to serve notice on someone in a pub.

> My team would probably describe me as easily irritated, short-tempered, but incredibly loyal. I'm not lacking in self-awareness – some lawyers really are, but I'm not one of them.

My dispute resolution style? I hope that people would describe me as firm and effective. I don't see the point in being aggressive for the sake of it. I want to get the best results for my client, but I don't want to be miserable about achieving that.

A career defining case for me: I acted for RBS against a now-defunct law firm over a failed timeshare scheme. I was quite junior, but my partner just left me to it. I ended up sharing a house with my counsel team, which was Hazel Williamson QC and Anthony Trace (he wasn't QC at the time). I did everything. Chief cook, bottle washer, you name it. At the end of it Hazel gave me a red bag – leading counsel can give junior counsel a red bag in recognition of outstanding work – she actually had to get permission from the Bar Council to give it to a solicitor. At the time she told me I couldn't even publicise it!

The speed at which sanctions are being imposed right now is pretty unprecedented. The situation is changing two or three times a day. I've done sanctions work as part of my practice since around 2008 and it's never moved this fast before.

You've got to have fun while you're at work. I found isolation and working from home very difficult. In some ways, I found that side of things more difficult than my brain tumour diagnosis last year. You're on a treatment train, you get on it and at some point you get off. But with feelings of isolation from not seeing anyone, you're just constantly sitting at your desk and working. It's hard.

Me and Stephenson Harwood, we've had our ups and downs. In some respects, it would be extraordinary if it was all ups all the time. But the firm has been incredibly supportive over the last twelve months. The people are lovely. At the end of the day, they have always been there when I needed them.

My team would probably describe me as easily irritated, short-tempered, but incredibly loyal. I'm not lacking in self-awareness – some lawyers really are, but I'm not one of them.

Prior to my diagnosis I would have sleepless nights worrying about work all the time. After my diagnosis, and I've been working full-time since September 2021, I don't worry about anything. I will never make the client's problems my problems again. I sleep like a baby.

Work has been a welcome distraction. I collapsed in the street and they had to put me in an induced coma because they couldn't control my seizures. I then had an awake craniotomy in May last year. The thought of it is horrific, but it really wasn't. My speech therapist said to me: 'If you think about it, root canal treatment is worse.' Sounds crazy but it's true! Root canal treatment is uncomfortable. But when someone's operating on your brain you're in a comfortable spot and chatting away!

I underestimated how tiring chemotherapy is. I have an oncologist named Omar, but I call him 'the lovely

Omar' because he introduced himself as just 'Omar' rather than Dr Whoever. Doctors rarely do that! He told me at the outset that chemotherapy is additive in that you will get progressively more tired. I've got two more cycles to go out of six, and he was right. Because of what's going on in the sanctions world at the moment I am extraordinarily busy and that has been a good distraction for me.

I'm truly optimistic. I've learned an awful lot through the process. All in all, my condition is a gift, but it isn't one I would have willingly opened.

I love to travel in both my personal and professional lives. We went to Copenhagen during half-term. We pushed the boat out and stayed in an amazing hotel and an amazing room. I loved it.

My favourite holiday destination is Pollença, a town in the northeast of Mallorca. It feels like going home because it's so relaxed. I like a little bit of culture and a lot of relaxation.

I adore *Ted Lasso*. It's just so optimistic and well-played. The only thing they get wrong is describing the changing room as a 'locker room.' Otherwise, it's really well-observed.

Marcus Rashford is obviously well-advised. But the fact that he was willing to speak up around child poverty does actually make him one of my heroes. He's just such an incredible individual. He could just have kept his mouth shut but he stood up and got the government to U-turn more than once.

> I really didn't appreciate how optimistic my outlook was. I thought I was a natural-born pessimist, but I'm not. I always learn.

I hate Marmite, but I love Bovril. It's not the same! Marmite is like Vegemite but Bovril is bloody gorgeous. I tend to eat Bovril on my crumpets in the morning.

My favourite song ever is *Cigarettes & Alcohol* by Oasis. In the 90s I went to quite a few Oasis concerts when there was a big rivalry between Oasis and Blur. I just adore the optimism of that song.

I don't believe in 'what doesn't kill you makes you stronger' – that's nonsense. But I do believe in Nelson Mandela's quote of 'I either win or I learn.' I really didn't appreciate how optimistic my outlook was. I thought I was a natural-born pessimist, but I'm not. I always learn.

Sue Millar is a litigation partner at Stephenson Harwood.

The In-House Lawyer

for the modern in-house lawyer

Definitive analysis for general counsel
from the team behind *Legal Business*


The In-House Lawyer Winter 2022 Market report: real estate

Crisis averted?

The UK property litigation market has seen its fair share of twists and turns since Covid struck. *IHL* asks Mishcon de Reya's Joanna Lampert and Daniel Levy to scan the horizon for what's to come.

BY MEGAN MAYERS

'The whole property industry would have been paralysed had most landlords and tenants not been able to navigate their way through it,' says Joanna Lampert, Mishcon de Reya's property litigation partner, reflecting on the impact of the pandemic. Indeed, property litigators have had their work cut out in Covid times.

Now, with restrictions easing and an end to the moratorium in sight, what does the property litigation market hold in store?

The Commercial Rent (Coronavirus) Bill

'The court system is already overstretched and would simply collapse


The Legal 500 view The In-House Lawyer Winter 2022

UK firms with the highest percentage of ranked women (firms with at least 20 ranked lawyers)

- Bindmans 84%
- Bates Wells 73%
- Kingsley Napley 69%
- Moore Barlow 67%
- Boodle Hatfield 66%
- Pennington Manches Cooper 65%
- Trees Law 64%
- Irwin Mitchell 60%
- Greenwoods GRM 59%
- BDB Pitmans 59%

Firms with highest % of ranked women in London (firms with at least 20 ranked lawyers)

- Bindmans 84%
- Bates Wells 73%
- Kingsley Napley 69%
- Boodle Hatfield 62%
- Russell-Cooke 58%
- Irwin Mitchell 57%
- Forsters 56%
- Withers 54%
- Leigh Day 50%
- Pennington Manches Cooper 50%

LB100 top 50 firms with highest % of women ranked

- Irwin Mitchell 57%
- Withers 54%
- Pinsent Masons 48%
- Mishcon de Reya 46%
- Addleshaw Goddard 44%
- Charles Russell Speechlys 43%
- Eversheds Sutherland 42%
- CMS 40%
- Bryan Cave Leighton Painer 38%
- Stephenson Harwood 38%

The Legal 500 view | 19


Winter 2022

ihl

The In-House Lawyer

WHITE-COLLAR CRIME • CIVIL FRAUD • REAL ESTATE • CORPORATE GOVERNANCE • DIVERSITY

A bright future *in-house*

The award-winning GC talent rising to the top


hmed Badr
GoCardless


The In-House Lawyer Winter 2022 Market report: corporate governance

Top of the agenda

IHL speaks to leading corporate practitioners to gauge the governance issues keeping GCs awake at night.

BY DAVID KOEHNE

Cyber security, environmental and social issues, shareholder activism – corporate governance has never been so high up the business agenda as it is today. And the role GCs play in ensuring proper systems of checks and balances are in place and adhered to at their companies cannot be underestimated. Against a backdrop of continued economic uncertainty, soaring inflation pushing up the costs of doing business and new pressure on workforce management post pandemic, *IHL* spoke to some of the leading private practice partners in London, as identified by sibling title *The Legal 500*, about the issues likely to be at the top of the GC agenda in 2022.

The Green agenda

According to Baker McKenzie's Helen Bradley, who heads the global firm's London corporate finance practice and chairs the global capital markets group, the 'E' of ESG is going to be one of the biggest issues facing general counsel. 'It's the first year of mandatory reporting on a comply or explain basis with the Taskforce on Climate-Related Financial Disclosures (TCFD) under the Listing Rules', she says. 'So, companies will be grappling with that and particularly with their transition plans to net zero.'

But it isn't just the TCFD that listed companies need to focus on, according to Bradley, who draws attention to the Greening Finance roadmap to sustainable investment, noting the need for companies to take a longer-term look at their business and the targets they set to avoid being caught out in future.

'The government is looking at disclosure to help companies put climate at the heart of their business; to run their business in a way which makes money but that is also sustainable and done in a green way. This year, the government is consulting on various new disclosure regimes. It's quite difficult for companies, the temptation is to get a quick win and write something really positive – who wants to write something potentially negative? But you need to think about how this plays out going forward when interacting with stakeholders – increasingly companies are being held to account. You will have seen some companies in the press recently when they've been criticised for putting a metric out, which on further scrutiny, is just a feel-good metric. A more holistic survey would have shown that the metric focused on is a tiny fraction of the overall picture, and that actually the company's not getting anywhere near as good results as were suggested or hasn't put climate at the heart of its DNA.'

Alexandra Beldes, global head of employment and incentives at Linklaters, also notes the centrality of climate change as a governance issue. 'We're now seeing ESG everywhere. There is an expectation for all listed companies to be focused on it. And indeed, any company that wants to obtain finance. And consumers and other stakeholders are focused on it. It doesn't matter what sector you're in.' She believes that

32 | The In-House Lawyer Winter 2022

Contact lee.cashman@legalease.co.uk for more information

RPC interview series – Karen Hendy and Finella Fogarty

What is a restructuring plan?

Finella: The UK restructuring plan was first introduced by the UK Corporate Insolvency and Governance Act 2020. It is a court approved process where multiple classes of creditors' claims (eg, shareholders, secured creditors, preferential creditors and unsecured creditors) can be categorised. They get notified of how they'll be treated in the process and they get a chance to vote for or against the plan (with each class of creditors voting independently).

So far, the restructuring plans we've seen have been done with companies with average revenue of in excess of £700m and have a complex structure with several creditor classes impacted.

What are the pros and cons of restructuring plans for retailers?

Karen: When you're looking at pros and cons you're really comparing them against other more established restructuring tools utilised by retailers, particularly CVAs. The most appropriate route will likely depend upon the nature of the business, make-up of the creditors and dynamics around the risk of challenge and timings/costs constraints. That said, there have been examples of wider restructurings that have involved both a RP and a CVA.

> With a CVA there's always a risk during the 28-day challenge period that, although you might think you are done, an appeal comes in.

Finella: The main difference of a UK restructuring plan compared to a CVA, is that creditors get to have their day in court if they so wish. The court will decide whether it is better for the company as a whole to cram down the creditors – where the court could force through the restructuring plan on the other dissenting class(es) of creditors.

Is this a more appealing route forward for retailers? While it's more costly than a CVA, it gives more certainty because the court's decision is final (barring an appeal). Creditors have the opportunity to be heard during the process if they so wish. By the time you get to the end of the circa 12-week period creditors know where they stand.

Karen: It's definitely an advantage of the restructuring plan process, when you're done, you're done. With a CVA there's always a risk during the 28-day challenge period that, although you might think you are done, an appeal comes in.

Finella: With a CVA you've got all the unsecured lenders lumped together and voting in terms of volume. But if you had two creditor classes in a retail restructuring plan, with unsecured creditors and landlords, the court can cram down the landlords if necessary if it believes it's better for the company and the landlords will not necessarily be better off in the relevant alternative, such as liquidation. It means that landlords are no longer the biggest players; there are other voices that can be heard through this new process.

Who are the key winners and losers in the retail market right now?

Karen: A lot of people are actually very upbeat despite the pressures, with inflation and the cost of energy being big ones. Suddenly running a fleet of vans and having the lights on in your stores is more expensive. Retail margins aren't high. There's not a lot of slack when your operating costs start to rise, and you need to work out if you are going to pass that on to the consumer and, if so, how upfront about it are you going to be.

But look at some of the results that have come out recently, some businesses are doing incredibly well. Some would say too well! It's a really mixed picture.

Finella: We had a client in the home furnishings sector and they're looking pre-emptively at a sale or potentially an insolvency. They can see down the line some pressures: they manufacture in China where we are seeing another Covid-related lockdown which is leading to uncertainty there. There's the landlord issue which is going to hit their retail outlets at the end of the month. They've got increased transportation costs because of the war in Ukraine. It's the perfect storm for significant rising costs to the business whilst consumer spending in that area is likely to decrease.

Karen: The supply chain is critical. As is managing your store estate if you're a bricks and mortar retailer. It's rare to find a unique issue unless it's something like a fraud or some other outlier, most things in the sector aren't particular to any one business and it's how you address them. Also, how quickly.


Karen Hendy


Finella Fogarty

Has or will the much-anticipated wave of Covid-19 restructuring materialise?

Karen: My view is that Covid just accelerated changes that were already happening. Online retail is doing really well for example. If you look at the statistics, there was clearly a huge spike which has now dropped back as people value shopping in physical stores because of the shopping experience they get. But the share of wallet for online is still greater than it was pre-Covid. It was always going to happen. Covid changed consumer behaviour and forced companies to look at their operating model. The Government also provided a range of support to retailers and other businesses so, after an initial swathe of restructurings, the market quietened down. On the corporate side, my sense is distressed M&A in the sector is on the up. Whether or not the 'debt overhang' is going to be a decisive factor is one to watch out for.

> It's rare to find a unique issue unless it's something like a fraud or some other outlier, most things in the sector aren't particular to any one business and it's how you address them.

Finella: Our industry is expecting to see a significant increase in insolvencies. To some extent, we have seen some already. We think it is coming now, and the industry is getting busier. We're going to see a raft of insolvencies as they have to pay back some of the cash they borrowed as interest rates rise and the Government protections fall away. That coupled with the war in Ukraine and the recent sanctions will all have an impact.

What makes RPC's retail and restructuring offerings stand out?

Karen: We're tier 1 ranked for retail with more leading individuals than any other firm. We've been doing this for years, even before it was trendy! We have subject matter expertise among all our practice areas, loads of our lawyers have been on secondment, and we're got a range of fantastic – and really supportive – clients. We have brilliant business training as well as legal training. A lot of the training we give people is practical: it's how to run an e-commerce business rather than how to draft an SPA (though that's clearly important too!). There's a genuine love for retail in the firm.

Finella: Part of the reason my team were brought into the firm was to support our market-leading retail practice and its clients to manage and transform risks for those operating in the retail sector. I was in the thick of it during 2008/9 and I did a lot of retail insolvency back in that time. You used to be sent out on site a lot – I remember being out on site for three months plus once during one large retail administration. The team that came with me and the team that was here already, including our partners Paul Bagon and Tim Moynihan, have got a lot of experience within the retail sector. When your company is in trouble and someone's threatening to turn off your lights, we know exactly what to do.

Finella Fogarty is head of restructuring and insolvency and Karen Hendy is co-head of retail at RPC.

RPC

The Quincecare duty: when shouldn't you follow instructions?

Stephenson Harwood considers the current scope of the Quincecare duty and some of the practical issues of which banks need to be aware following the latest judgment from the Court of Appeal

Banks are under a duty to obey their customers' instructions. However, they are also under a duty not to obey them, in certain circumstances. Navigating the line between these duties has become increasingly difficult as the scope of the Quincecare duty has evolved. We consider the current scope of the duty and some of the practical issues of which banks need to be aware following the latest judgment on this key doctrine from the Court of Appeal in *Philipp v Barclays Bank UK Plc*.

What is the Quincecare duty?

The Quincecare duty is best defined as the duty placed on financial institutions not to follow their customer's instructions when they are 'put on enquiry' that following them might facilitate a fraud on their customer.

Although the Quincecare duty was first established in a 1992 case, (*Barclays Bank plc v Quincecare Limited*[1]), it was not until 2019 that a bank was first held liable for breach. Since then, the courts have struggled to apply it in practice.

The Quincecare duty was originally framed as a negative duty (ie the duty to refrain from following a customer's instructions). However, the Court of Appeal in the 2019 case of *Federal Republic of Nigeria v JP Morgan Chase* found that the Quincecare duty will require 'something more' from a bank than simply deciding not to comply with a payment instruction. Quite what that something more is, however, is an elusive concept.

> There remains a distinct lack of clarity, therefore, surrounding what a bank's so-called duty of enquiry means in practical terms and how this ought to be reconciled with a bank's duty to follow its customer's instructions.

Key points from recent case law

There have been four significant cases in recent years relating to the Quincecare duty which shed some light on its parameters. It is perhaps a sign of the difficulty with the doctrine that all four decisions have been appealed at least once, with two cases being appealed to the Supreme Court.

JP Morgan Chase Bank N.A v The Federal Republic of Nigeria[2]

This case considered the scope of the action which a bank should take when 'on notice' of a possible fraud. Although the Court of Appeal did not make any finding on the facts, (upholding the first instance decision not to grant strike out or summary judgment in the bank's favour), it raises some important issues. Here, the bank had complied with payment instructions made by authorised signatories. However, the Republic of Nigeria later alleged that the bank (which had submitted suspicious activity reports due to various red flags being raised) should have realised that it could not trust the senior Nigerian officials from whom it took instructions and should not have made the payments it was instructed to make. Precisely what the bank should have done instead of following its customer's instructions was deemed to be a matter for the trial judge.

There remains a distinct lack of clarity, therefore, surrounding what a bank's so-called duty of enquiry means in practical terms and how this ought to be reconciled with a bank's duty to follow its customer's instructions. The trial commenced in February 2022 and the outcome is keenly anticipated.

Singularis Holdings Ltd (in Official Liquidation) v Daiwa Capital Markets Europe Ltd[3]

The Supreme Court next considered the scope of the duty in *Singularis Holdings Ltd (in Official Liquidation) v Daiwa Capital*


Sue Millar

Markets Europe Ltd, which was handed down just days after the judgment in *Nigeria*.

This case was brought by the liquidator of Singularis. Mr Al Sanea (Singularis' sole shareholder (and a director)) had instructed Daiwa to transfer US$204m to accounts in the names of other group companies. At first instance, Daiwa was held to have breached the Quincecare duty as this was a particularly obvious fraud – and it did not appeal that finding. It instead appealed on the basis that Singularis was effectively a one-man company controlled by Mr Al Sanea and that the claim should fail for illegality, lack of causation or deceit. In dismissing Daiwa's appeal, the Supreme Court (again) did not address the steps that Daiwa ought to have taken to comply with its duty because the breach was such an obvious one. However, it made it clear that the Quincecare duty is not an easily escapable one, observing that if the appellant's argument had been accepted 'there would in reality be no Quincecare duty of care or its breach would cease to have consequences', something the court described as being a 'retrograde step'. The question of what practical steps a bank should take when on notice that following its customer's instructions might result in facilitating a fraud on that customer was not therefore answered in this judgment.

> The Court of Appeal held that the fact that the payments reduced the dividend to creditors was not a loss attributable to any breach of the Quincecare duty because HSBC owed its Quincecare duty to the company (its client) and not to the company's creditors.

Stanford International Bank Ltd (in liquidation) v HSBC Bank Plc [2021] EWCA Civ 535

In another case brought by liquidators, a claim was brought against HSBC for breach of the Quincecare duty and dishonest assistance. The payments in this case were effected by HSBC back in 2008 when, it was alleged, HSBC knew or should have known that Mr Stanford was using his company to operate a massive Ponzi scheme. The company went into insolvent liquidation shortly afterwards. Of the £118.5m paid out by HSBC, all but £2.4m were payments to genuine creditors and the judgment here turned on whether or not any loss had been sustained. Overturning the decision of the lower court, the Court of Appeal held that the fact that the payments reduced the dividend to creditors was not a loss attributable to

any breach of the Quincecare duty because HSBC owed its Quincecare duty to the company (its client) and not to the company's creditors. This contrasted with the position of the company's directors, who did owe a duty to its creditors during the relevant period.

Because it found there had been no loss, once again the Court of Appeal was not required to consider whether or not there had been a breach of the Quincecare duty, confirming only that the Quincecare duty is not owed to creditors. However, the case is being appealed to the Supreme Court and it therefore remains to be seen whether there will be any further modification of the duty as it applies to insolvent companies.

Philipp v Barclays Bank plc [2022] EWCA Civ 318

In *Philipp v Barclays Bank plc*[4], (a case relating to authorised push payment 'APP' fraud) the High Court granted summary judgment to Barclays because it held that the duty was limited to situations where payment instructions are not properly authorised, ie they are made by a customer's agent in an attempt to misappropriate funds. While in *Singularis* it was held that even a sole shareholder can steal from a company for whom they are a signatory, the High Court held that an individual could not steal from themselves.

However, the Court of Appeal has recently overturned that decision. It held that so long as a bank was put 'on inquiry' that complying with a customer's instructions (even those of an individual) might help facilitate fraud, the bank was obliged to make further inquiries and delay acting on the instructions given.

> The Court of Appeal's conclusion that the Quincecare duty extends to individual customers means that banks need to remain vigilant in relation to APP fraud in the context of international transactions.

The court held that the Quincecare duty as developed by authority was not limited to circumstances where the bank was instructed by the customer's agent. The duty arises in any case where a bank is put on inquiry. The extent to which Barclays Bank in this case had been put on inquiry will be for the trial judge to decide. However, the court listed the factors which might be relevant:

- Mrs Philipp's account history;
- her attendance at a branch which was not her own;
- seeking to transfer an enormous and, for her account, unprecedented sum of money;
- the money only moving into Mrs Philipp's account days before the transfer; and
- the fact that the payee was a petroleum company in the UAE.

If, at trial, it is determined that the bank had been put on inquiry, the court will have to decide whether an ordinary prudent banker acting with reasonable skill and care would have delayed the payment pending further inquiries. Such further inquiries, the Court of Appeal suggested, could have resulted in the payment not being made and Mrs Philipp not losing her life savings.

The court rejected two other issues which Barclays argued prevented the duty from operating in relation to individuals:

1. The 'onerous and unworkable' burden it would place on banks; and
2. The allegedly 'novel' nature of the duty if extended to individuals.

The court placed reliance on the expert evidence that applying the duty to individuals in 2018 (the relevant time of the transactions) would not have been unworkable or onerous. A voluntary code was already in existence and although the circumstances of this case might have put a bank on inquiry, that did not mean that a bank would be put on inquiry in the many millions of low value BACS transfers it conducted. Careful calibration of the Quincecare duty was key and it was not to be expected that it would apply across the board.

As to whether the decision would create a novel duty of care or impermissibly extend the scope of the Quincecare duty, the court concluded that the Quincecare duty has not been restricted to circumstances where the instruction to the bank comes from an agent. There has therefore been no 'extension'.

Practical points arising from case law

As can be seen from this summary of recent case law, the current scope of the Quincecare duty is unclear. Because of this, it is key from a practical perspective that financial institutions ensure that whenever a red flag is raised in relation to a customer's instructions, the process by which those instructions are dealt with is properly documented and a fully reasoned decision is taken. The transaction in *Philipp* pre-dated the introduction of the industry-wide CRM code designed to reimburse victims of APP fraud. However, as this does not apply to international payments, the Court of Appeal's conclusion that the Quincecare duty extends to individual customers means that banks need to remain vigilant in relation to APP fraud in the context of international transactions.

At the same time, it needs to be borne in mind that the disclosure of documents relating to these kinds of decisions is a developing area in case law. In *IFT SAL Offshore v Barclays Bank plc* [2020] EWHC 3125 (Comm), the court granted permission for information obtained in a Norwich Pharmacal disclosure application to be used, potentially, to


Harriet Campbell

bring proceedings against the bank who had provided the information in its capacity as a 'neutral' third party. Further, in a recent decision in the *Nigeria* case, (*Federal Republic of Nigeria v JP Morgan Chase Bank* [2021] EWHC 1192 (Comm)), the court ordered the bank to disclose documents from its compliance and AML teams which Nigeria argued were necessary to establish whether or not JP Morgan had breached its duty to take reasonable care in executing payment instructions. In particular, Nigeria requested (and was granted) disclosure of documents relating to alleged concerns held by the US compliance team.

In that case, the court appeared willing to accept that a broad scope of disclosure is required from banks in Quincecare cases and that the seniority of custodians is a relevant consideration. Documentation is therefore likely to be a key battleground in evidencing whether or not the duty has been breached.

In conclusion, further judicial clarification on the scope of the Quincecare duty is required to allow financial institutions to understand the standard against which they are to be judged. If the Court of Appeal's decision in *Barclays v Philipp* is any indication, it seems that the scope of the Quincecare duty is likely to grow wider rather than narrower. The court observed that the purpose of the duty is to protect consumers and that the duty of inquiry aspect is in line with sound policy because 'in the fight to combat fraud, banks with the relevant reasonable grounds for belief should not sit back and do nothing'. Decisions following trial in the *Nigeria* case (and any trial in *Philipp*) are eagerly awaited, as is any eventual judgment by the Supreme Court on the scope of the duty as it applies to insolvent companies in *Stanford*.

SUE MILLAR
Co-head of financial litigation
Tel: +44 20 7809 2329
E: sue.millar@shlegal.com

HARRIET CAMPBELL
Senior knowledge development lawyer
Tel: +44 20 7809 2517
E: harriet.campbell@shlegal.com

1. [1992] 4 All ER 363
2. [2019] EWCA Civ 1641
3. [2019] UKSC 50
4. [2021] EWHC 10 (Comm)

STEPHENSON HARWOOD

Cases of the year

Back to life – cases of the year

The energy has returned to London's disputes market after two years of lockdown. However, familiar types of cases have prevailed over 2021 and 2022

Megan Mayers

Two years on from the UK's first lockdown and the buzz has returned. Litigators might now work part-time from their homes and courts persist with virtual hearings for simple procedural hearings and the like, but a level of pre-2020 familiarity has been restored.

While 2021 saw a handful of cases arising from Covid-19, the City is yet to be flooded with the wave of countercyclical issues predicted back in March 2020. Instead, cases have been driven by trends that have been brewing for years. Top of that list: class actions.

The claimant-friendly judgment in *Merricks v Mastercard* in December 2020 certifying the collective action paved the way for group competition actions to proceed to the Competition Appeals Tribunal (CAT).

Since then, new actions have proceeded with pace says Backhouse Jones' Steven Meyerhoff, who is acting for the Road Haulage Association in the mammoth truck cartel litigation: 'There has been a plethora of actions since December 2020; there is a real appetite to formulate claims and hold to account those companies who flout competition law.'

Among the new claims to look out for in 2022 are the proposed opt-out actions against Google and Apple alleging abuse of dominant position of their respective app stores and the opt-out collective claim filed by consumers' association Which? against Qualcomm.

The *Merricks* decision has also unshackled existing claims, the progression of which will be closely watched as they make their way through the tribunal process. Among the issues to be considered is the tribunal's treatment of carriage disputes, which is relevant to both the foreign exchange interchange fee litigation and the truck cartel litigation, where competing claims relating to the same issues have been brought.

The result of which, expected in 2022 for the trucks litigation, will be another milestone for the CAT, says Addleshaw Goddard's Samantha Haigh, who is one of the partners advising the Road Haulage Association in its claim: 'That dynamic of how the CAT

is going to deal with multiple applicants for the same claim is going to be massive for the market because law firms spend a lot of time and money bringing a claim and getting the funding in place.'

High-profile class actions also continue outside of the CAT, including the emissions disputes arising from the much-publicised 'Dieselgate' scandal. This has snowballed since the original revelations made concerning Volkswagen in 2015, with further actions being brought against several other brands.

In the data privacy space, a wave of class actions was quelled by the *Lloyd v Google* claim, which was shot down by the Supreme Court in November 2021. Since then, several third-party funder-backed claims waiting in the wings have been dropped.

However, this is unlikely to be the end of data and privacy disputes. As Pinsent Masons' David Barker asserts: 'The court is grappling with the intersection between a range of causes of action such as misuse of private information, breach of confidence and even negligence in the context of the processing of data. We will continue to see cases dealing with these issues in the next few years.'

This is driven not only by regulatory changes and heightened public consciousness following GDPR, but also an increase in cybersecurity breaches. He observes: 'There are more cyber attacks and that's driving claim activity. There is also a more rigorous notification obligation under GDPR and therefore data subjects are getting to know about the possibility that data has been compromised.'

For group claims in this space, we could see claimant firms and funders divert their efforts to repackage data privacy claims as competition law issues before the CAT. A recent example of this is a damages claim backed by litigation funder Innsworth, which is being brought against Meta (formerly Facebook) on behalf of UK Facebook users for alleged abuse of its dominant market position.

Meanwhile, against a backdrop of group actions and innovative actions, our top cases countdown still finds room for some old-fashioned fraud litigation.

A development closely followed in this space is that of the Quincecare duty, which although dating back to the 1992 case of *Barclays Bank v Quincecare*, has been resurrected in a series of cases in recent years; first in *Singularis Holdings (In Official Liquidation) v Daiwa Capital Markets Europe* in 2019 and then *Hamblin & Anor v World First* in 2020.

This year, a decision handed down by the Court of Appeal on 14 March in *Philipp v Barclays Bank* confirmed that the duty could apply where an instruction comes directly from an individual customer. Now, all eyes are the high-profile case of *Nigeria v JP Morgan*, which explores the duty further.

Finally, adding fuel to the incoming court traffic, ESG issues are reaching maturity and hitting the courts. Following litigation exploring issues of corporate accountability of UK-domiciled parent companies for human rights and environmental breaches of their subsidiaries abroad, such as in V*edanta Resources v Lungowe* and *Okpabi v Royal Dutch Shell*, a recent claim against British American Tobacco (BAT) and Imperial Brands brought

on behalf of Malawian tobacco farmers will test this application regarding the defendants' supply chain.

The recent case of *the Hague District Court v Shell* on the continent has also thrust climate change issues to the fore. Since then, in the UK, Pallas Partners announced in March that it is representing ClientEarth in a claim against Shell's board of directors for their alleged climate risk mismanagement. While energy companies have been the first to come up against ESG claims, they should not be the only ones heeding the warning, says Hogan Lovells' Akima Paul-Lambert: 'While oil and gas are probably claimants' favourite targets, any industry which opts for an upstream model, where there is an integrated supply chain could be affected and ought to be taking advice.'

There is little doubt among litigators that disputes associated with a downturn are coming this year. The invasion of Ukraine and related sanctions only compound the predictions that have been made since the start of the pandemic. Not least, the impact of rising energy prices will reverberate across a range of industries as contracts become unprofitable.

But as the prodigal countercyclical cases return, competition disputes, technology, data and ESG issues, as well as the continued evolution of UK class actions, are unlikely to take a backseat. ■

Cases of the year – Contents

Dieselgate - Volkswagen emissions scandal

Claims arising from one of the biggest scandals to hit the automobile industry escalates in the UK courts after Volkswagen Group (VW) failed to convince the High Court to dismiss the case in December 2021.

The so-called 'Dieselgate' scandal broke in the US in September 2015, after the Environmental Protection Agency accused Volkswagen Group (VW), the owners of brands including Audi, Skoda and SEAT, of rigging diesel engine emission tests.

The controversy arises from the installation of software that acted as a 'defeat device' under EU rules, which enabled it to emit less emissions during compliance testing. The group action is brought by about 86,000 owners of the affected vehicles and alleges fraudulent misrepresentation in the sales, among other claims.

The trial, which is listed to begin in 2023, is the first of a series arising from the scandal to hit the UK courts, with others against brands including Daimler, Fiat Chrysler, Renault, Nissan, and Vauxhall, as well as a second claim against VW issued this year, all lined up. Meanwhile, the scandal has resulted in a series of civil and criminal claims across other jurisdictions, including the US and Germany.

For claimants: Gareth Pope (Slater & Gordon); Tony Winterburn (Excello Law); Boz Michalowska and Shazia Yamin (Leigh Day) instructing Tom de la Mare QC (Blackstone Chambers); Oliver Campbell QC and Adam Heppinstall QC (Henderson Chambers); Adam Kramer QC (3VB).

For defendants: Freshfields Bruckhaus Deringer partners John Blain and James Robert instructing Charles Gibson QC, Prashant Popat QC and Geraint Webb QC (Henderson Chambers); Brian Kennelly QC (Blackstone Chambers).

Eurasian Natural Resources Corporation (ENRC) v Dechert & SFO

The protracted saga between ENRC, the Serious Fraud Office (SFO), Dechert and the firm's former head of white-collar crime, Neil Gerrard, reached trial last year.

The £70m claim brought in 2019 was heard by the High Court in an 11-week trial between May and September 2021. It centres around allegations that Dechert, which represented ENRC between 2011 and 2013, colluded with the SFO during an investigation into the company.

After years of reputational snags for the SFO, the outcome is of enormous public interest. Judgment is pending.

For ENRC: Hogan Lovells' Michael Robert instructing Nathan Pillow QC, Tim Akkouh and Freddie Popplewell (Essex Court Chambers).

For Dechert: Clyde & Co's Richard Harrison instructing Andrew Onslow QC (3VB); Nicholas Purnell QC, Jonathan Barnard QC and Rachel Kapila (Cloth Fair Chambers).

For the SFO: Eversheds Sutherland's Gary Pellow instructing Simon Colton QC (One Essex Court).

Josiya & Ors v British American Tobacco (BAT) and Imperial Brands

An attempt to hold the tobacco giants to account for exploitation of vulnerable individuals in their supply chains is set to proceed, following failed strike-out attempts in 2021.

At the time of the strike-out application the claim was being brought on behalf of 7,263 tobacco farmers, comprising 4,066 adults and 3,197 children, against British American Tobacco. The claimant group has since grown to around 10,000 individuals.

The allegations of negligence and unjust enrichment relate to 'unlawful, exploitative and dangerous conditions', and child labour and forced labour on farms which purportedly form part of the defendant's supply chains.

This case follows the Supreme Court decisions in *Vedanta Resources v Lungowe* and *Okpabi v Royal Dutch Shell*, which tested the ability of claimants to bring claims against UK-domiciled parent companies for the acts or omissions of their overseas subsidiaries.

For claimants: Leigh Day's Martyn Day and Oliver Holland instructing Richard Hermer QC (Matrix Chambers); Tamara Oppenheimer QC (*pictured*) (Fountain Court Chambers); Edward Craven (Matrix Chambers) and Kate Boakes (12 King's Bench Walk).

For BAT: Slaughter and May's Camilla Sanger, Jonathan Clark and Richard Swallow instructing Charles Gibson QC (Henderson Chambers); Alex Barden and Jacob Turner (Fountain Court Chambers).

For Imperial: Ashurst's Jon Gale and Sophie Law instructing Shaheed Fatima QC and Andrew Scott QC and Timothy Lau (Blackstone Chambers).

Hewlett-Packard v Lynch and Hussain

After a gruelling seven years, a judgment was handed down in the UK's biggest fraud case.

The claim brought by US tech giant Hewlett-Packard (HP) related to its $10.3bn acquisition of Autonomy and alleged fraud by the defendants in distorting the value of the company.

While the full judgment is yet to be published, in a summary of the court's conclusions it held that HP 'substantially succeeded' in its claims. Quantum is also yet to be decided, although the judge ruled that the FTSE 100 giant will receive 'substantial' damages, but less than the $5bn claimed.

Autonomy co-founder Mike Lynch's extradition to the US to face criminal fraud charges has since been approved. Clifford Chance has announced its intention to appeal both the civil decision and the extradition.

For HP: Travers Smith's Toby Robinson and Andrew King (*pictured*) instructed Patrick Goodall QC (Fountain Court Chambers); Laurence Rabinowitz QC and Conall Patton QC (One Essex Court).

For Lynch: Clifford Chance's Kelwin Nicholls instructed Richard Hill QC and Sharif Shivji QC (4 Stone Buildings).

For Hussain: Simmons & Simmons' Ian Hammond instructed Paul Casey (Fountain Court Chambers).

Lloyd v Google

The long-awaited decision in *Lloyd v Google* quells the expectation of a deluge of privacy class actions in the UK.

The claim was brought on behalf of four million Apple iPhone users relating to a breach of privacy laws as a result of cookies used by Google to track some of their internet activity for commercial purposes.

The judgment, handed down on 10 November 2021, came as a blow to claimant firms and funders alike, many of which were gearing up to bring group actions in this space. Says Pinsent Mason's David Barker, who represented Google: 'Essentially, the court said that the s19.6 procedure under the Civil Procedure Rules (CPR) is just not amenable to this sort of class action, because the whole nature of damages in English law is about compensating claimants on an individualised basis for the wrong that has happened to them, insofar as that is possible.'

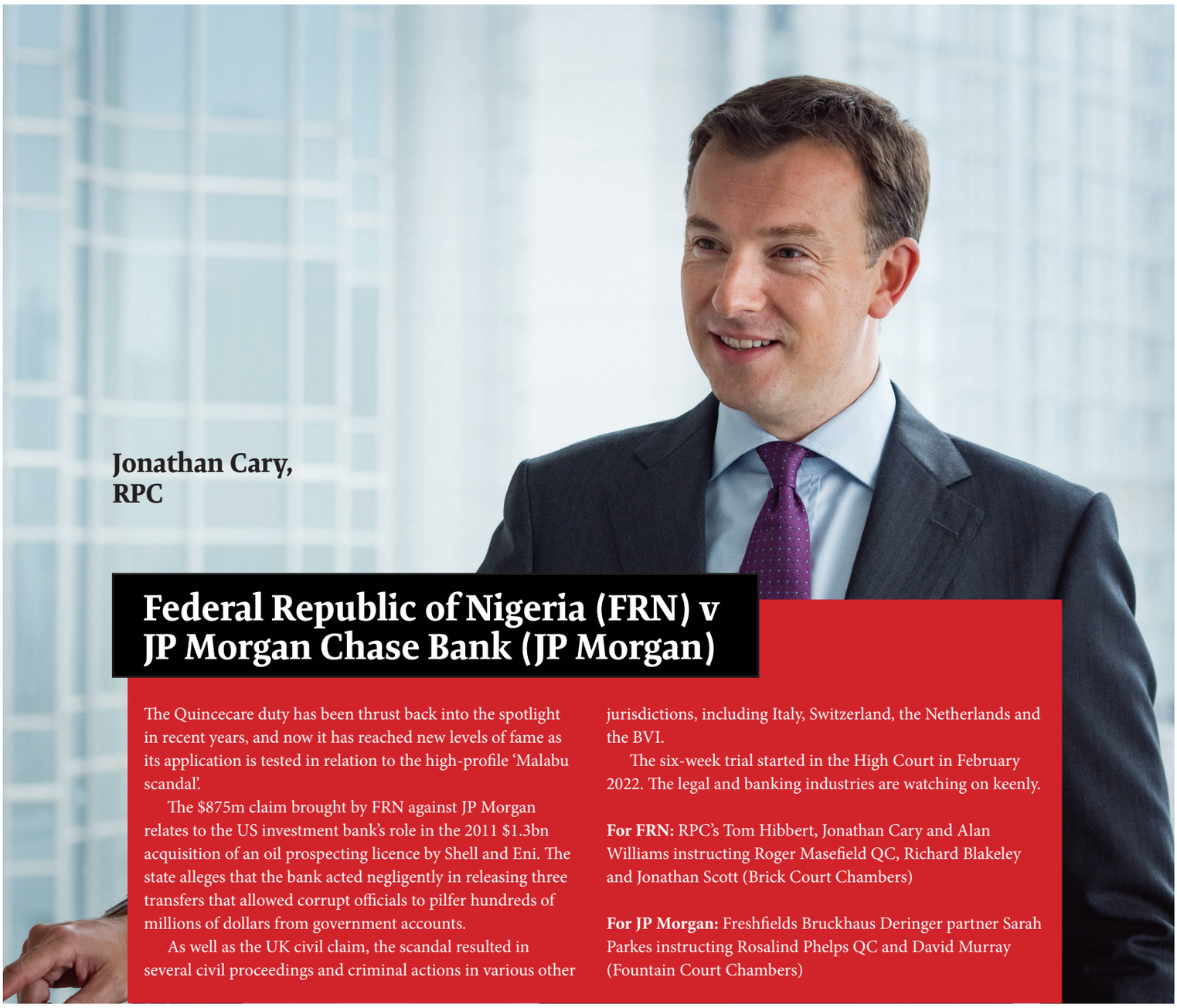
He adds: 'This is probably the most significant data protection case that there has been so far in this jurisdiction. It means that opt-out claims in a data privacy context are now unlikely to proceed with anything like the sort of momentum that the market thought might be the case.'

The impact could go beyond data privacy actions says Barker. 'It is also likely to have a dampening effect on class claims in other contexts too, because they are going to be less straightforward to bring under s19.6 of the CPR.'

For Lloyd: Milberg London's managing partner James Oldnall instructing Hugh Tomlinson QC (Matrix Chambers); Oliver Campbell QC (Henderson Chambers) and Victoria Wakefield QC (Brick Court Chambers).

For Google: Pinsent Masons' David Barker enlisted Antony White QC and Edward Craven (Matrix Chambers).

> 'This is probably the most significant data protection case that there has been so far in this jurisdiction. It means that opt-out claims in a data privacy context are now unlikely to proceed with anything like the sort of momentum that the market thought might be the case.'
> David Barker, Pinsent Masons



Jonathan Cary, RPC

Federal Republic of Nigeria (FRN) v JP Morgan Chase Bank (JP Morgan)

The Quincecare duty has been thrust back into the spotlight in recent years, and now it has reached new levels of fame as its application is tested in relation to the high-profile 'Malabu scandal'.

The $875m claim brought by FRN against JP Morgan relates to the US investment bank's role in the 2011 $1.3bn acquisition of an oil prospecting licence by Shell and Eni. The state alleges that the bank acted negligently in releasing three transfers that allowed corrupt officials to pilfer hundreds of millions of dollars from government accounts.

As well as the UK civil claim, the scandal resulted in several civil proceedings and criminal actions in various other jurisdictions, including Italy, Switzerland, the Netherlands and the BVI.

The six-week trial started in the High Court in February 2022. The legal and banking industries are watching on keenly.

For FRN: RPC's Tom Hibbert, Jonathan Cary and Alan Williams instructing Roger Masefield QC, Richard Blakeley and Jonathan Scott (Brick Court Chambers)

For JP Morgan: Freshfields Bruckhaus Deringer partner Sarah Parkes instructing Rosalind Phelps QC and David Murray (Fountain Court Chambers)

ZXC v Bloomberg

Another much-awaited Supreme Court decision came in 2022, signifying another blow for the media and freedom of expression.

The case concerns the publication by Bloomberg of a leaked, confidential document relating to a criminal investigation into the claimant, a US businessman.

Finding that individuals have an expectation of privacy in relation to criminal investigations, the decision leaves the door open for claimants to pursue reputational damage claims under misuse of privacy.

This reflects a trend of claimants moving away from onerous defamation claims to those of misuse of privacy as a means of achieving reputational redress. 'This has been happening over a period of years; one reason why the Supreme Court decision was anxiously awaited was because we haven't had many on this issue,' says Keith Mathieson of RPC, who represented Bloomberg.

The judgment, handed down on 16 February, follows earlier decisions that found for claimants against media companies, such as the 2018 case of *Sir Cliff Richard v BBC and Sicri v Associated Newspapers*.

As one media lawyer puts it: 'It's actually a bit depressing. The media has had a spate of cases where the facts are not engendering very much judicial sympathy, in fact it's the opposite, they are actually painting the media in quite a bad light.'

For ZXC: David Byrne (then of Byrne and Partners, now of counsel at Larson) instructed Tim Owen QC and Sara Mansoori of Matrix Chambers.

For Bloomberg: RPC's Keith Matheison instructed Antony White QC (Matrix Chambers) and Clara Hamer (5RB).

Skatteforvaltningen (the Danish Customs and Tax Administration) (SKAT) v Solo Capital Partners (In Special Administration)

The Court of Appeal has resurrected Danish national tax authority Skatteforvaltningen (SKAT)'s $1.4bn claim for recovery of dividend tax refunds that were paid following alleged fraudulent misrepresentations.

The 2022 Court of Appeal judgment allowed for all but one claim to proceed on the basis that they did not constitute revenue matters but fraud allegations. This reversed a High Court decision handed down on 27 April 2021, which dismissed all claims on the basis that the UK courts do not have jurisdiction under *Dicey Rule 3*.

For SKAT: Pinsent Masons' Alan Sheeley and Stuart McNeill instructing Lord Pannick QC and Andrew Scott QC (Blackstone Chambers); Michael Fealy QC, Jamie Goldsmith QC, Abra Bomp and KV Krishnaprasad (One Essex Court); Jonathan Schwarz (Temple Tax Chambers).

For the defendants: Chris Waters (Meaby & Co) Justin Nimmo (Rosenblatt) Richard Twomey and Joshua Fineman (DWF); Keith Thomas and Laura Jenkins (Stewarts); Richard Langley (BDB Pitmans); Kevin Roberts (Cadwalader); Nigel Jones QC (Gatehouse Chambers); Kieron Beal QC (Blackstone Chambers); Lisa Freeman (Furnival Chambers); Laurence Page (4 Pump Court); Ali Malek QC, George McPherson, Tom De Vecchi and Sophia Dzwig (3VB); Alison Macdonald QC and Luke Tattersall (Essex Court); Adam Zellick QC and Ian Bergson (Fountain Court Chambers); Robert Palmer QC, Christopher Vajda QC and Conor McCarthy (Monckton Chambers).

Truck cartel follow-on litigation

Six years after the European Commission issued a €2.9bn fine against six of the world's largest truck manufacturers for price fixing, the follow-on damages cases are still building momentum.

With multiple ongoing claims, including both opt-in and opt-out group claims, the volume of potential claimants is stacking up. The appetite of funders and firms alike means that the aftermath of this scandal is still gaining traction.

Most advanced in the tribunal process is a claim brought by Royal Mail against DAF Trucks and others, with a 10-week trial set to start on 26 April. The remaining claimants, funders and firms are watching intensely, hoping to gain insight into tribunal's approach to the case and how it will estimate price overcharge, following differing approaches coming from other European courts.

There are also two claims currently seeking collective proceedings orders (CPO) from the CAT. One is for an opt-out claim brought by UK Trucks Claim Limited against Iveco and Daimler, and the other brought by The Road Haulage Association on an opt-in basis on the behalf of over 17,000 claimants (including purchasers of both new and used trucks) against Iveco, MAN and DAF.

For claimants: Mark Molyneux and Samantha Haigh (Addleshaw Goddard); Laurence Pritchard (Weightmans); Ed Coulson (Bryan Cave Leighton Paisner); Scott Campbell and Anna Morfey (Hausfeld); Steven Meyerhoff (Backhouse Jones); Euan Burrows, James Levy and Simon Bromwich (Ashurst).


Photographer
JUAN TRUJILLO

For defendants: Jonathan Hitchins (Allen & Overy); Kim Dietzel, James Farrell and Stephen Wisking (Herbert Smith Freehills); Bea Tormey and Nicholas Frey (*pictured*) (Freshfields Bruckhaus Deringer), Damien Taylor, Holly Ware and Richard Swallow (Slaughter and May); Caroline Edwards (Travers Smith); Alan Davis and Jacqueline Harris (Pinsent Masons).

Enforceability of commercial contract terms

Zamakhchary & Co provides an overview of the main commercial terms that may face the risk of unenforceability before a commercial court in Saudi Arabia

When commercial contract disputes come before a Saudi court, judges are required to determine the case in line with Shari'ah principles. This means that, when entering into a contract governed by Saudi law, contracting parties must ensure they are familiar with the principles of Shari'ah that may result in certain provisions being deemed unenforceable before a Saudi court, to limit the risk of a judgment being issued that contradicts the original intention of the contracting parties.

The fundamental rule of Shari'ah contract law as interpreted in KSA can be summed up as, 'the contract is the law of the parties', which means that the parties to a contract are free to agree to the terms of their choosing, provided that these terms do not conflict with established Shari'ah principles.

> "The fundamental rule of Shari'ah contract law as interpreted in KSA can be summed up as, "the contract is the law of the parties."

Judges refer to statements of established scholars of Islamic theology to ascertain and apply the true intentions of the sacred texts. Islamic theology can be divided into four main schools of thought: Hanafi, Maliki, Shafai and Hanbali, with judges in KSA tending to apply the opinions of scholars who subscribe to the Hanbali school of thought. However, many of the judges in KSA are influenced by the views of the scholar, Ibn Taymeyya, who is known to balance and choose between different schools based on the supporting evidence for each view. This compromises the degree of certainty by which one can predict the outcome of how a judge will interpret the law.

In this article, we provide an overview of the main commercial terms that may face the risk of unenforceability before a commercial court in Saudi Arabia. Arbitrators tend to be less likely to determine that a commercially agreed provision is unenforceable on Shari'ah grounds, but the risk still remains.

Interest

Charging of interest on money is prohibited under Shari'ah, and neither the commercial courts nor an arbitration panel hearing a dispute under Saudi law would award a sum that includes an interest element. It is unlikely that re-characterising such amounts to avoid the term 'interest' (for example by referring to late payment penalties) will lead to them being enforced by the courts.[1]

Uncertainty

Contracts must generally be devoid of uncertainty and speculation. This is a potentially very wide prohibition which may affect numerous forms of transaction, including insurance contracts and certain financial instruments. There is difference of opinion in Islamic jurisprudence as to the extent of uncertainty in a transaction that is required for the prohibition to apply, meaning that application of the rule is very much in the court's discretion.

In appropriate circumstances the risks associated with the rule against uncertainty may be mitigated (but not avoided completely) by careful contractual drafting or by reference to custom. For example, if it can be demonstrated that long-term international sale and purchase contracts for certain types of commodities are universally concluded by reference to spot prices prevailing at the time of delivery, the tribunal may uphold the transaction because it is sanctioned by custom. In general, however, one should ensure that a contract leaves as little room as possible for uncertainty regarding the parties' intention.

Limitation of liability

There are differences of opinion among scholars of Shari'ah to the extent to which losses may be limited. Some view such limitations as unenforceable, particularly because, at the time of entering into the contract, the parties are unaware as to what future loss may arise, meaning that the limitation of liability clause could be deemed unenforceable due to uncertainty. The

contrary view is that parties are entitled to agree contractual terms that exclude or limit certain losses under the general Shari'ah principle that 'if a person imposes an obligation on himself, with his own free will and without duress, so he must abide by it.'

An exclusion or limitation of liability that protects a breaching party even in the event of willful misconduct or gross negligence is likely to be deemed unenforceable.

Buyer beware

Sellers of goods are entitled to include a provision in their contracts that the sale is made with no guarantee or warranty in respect of defects (with the buyer typically benefiting from a lower-priced purchase as a result of bearing such risk). However, the seller would not be freed from liability in respect of defects of which it is actually aware prior to the sale, as Shari'ah principles impose an obligation on sellers to notify purchasers of defects known to them.

Provisions that contradict the nature of the contract

Contractual terms that are deemed entirely contradictory to the nature of the contract could be deemed unenforceable. Examples may include a lease agreement in which the landlord is entitled to relocate the tenant at will, or a sale contract that seeks to restrict the buyer in its ability to sell the goods on in the future.

Future promises

Commercial agreements often include obligations that are triggered only if a future event occurs, such as an obligation on a party to take a lease of a building once constructed; or a put option requiring other shareholders to purchase an investor's shares at a specified future time.

Shari'ah principles typically consider such provisions to be non-binding 'promises' rather than contractually binding commitments, although there is one school of thought that considers such promises to be binding in certain circumstances, primarily where the beneficiary of the promise has acted in reliance on it. Whilst we have seen Saudi judges accommodating this view, it remains at the discretion of the court, creating significant uncertainty for the contracting parties.

This risk may be somewhat minimised, albeit not completely risk-free, if the future obligation is sufficiently detailed, clear, and made as a fundamental term of the contract (ie, that the benefiting party is entering into the contract in reliance on such term), so that the enforceability of the promise is not undermined by the uncertainty of the terms being agreed.

1. Banking and financing disputes are heard by specialist disputes committees, under the auspices of the Saudi Central Bank, and do enforce interest on financing contracts

Sarah Gonem (pictured left); Yazid Almasoud (pictured centre); and Martin Creek (pictured right) are all partners at Zamakhchary & Co.

> In contrast to "buyer beware" principles in some jurisdictions, Shari'ah principles impose a positive obligation on sellers to notify purchasers of defects known to them.

ZAMAKHCHARY & CO
Unit No 13, Ground Floor
Business Gate
2362 Qurtubah Road
Riyadh 13244-7440
Kingdom of Saudi Arabia
www.zamakhchary.com
Tel: +966 (0) 11 218 2900

Z&Co.
الزمخشري ومشاركوه

Catching up with the world: Korea updates its conflict of laws

Yulchon on South Korea's recent amendments to its Act on Private International Law and their implications

There is no disagreement that South Korea is now one of the world's largest economies. Korean companies are ubiquitous, as they are firmly entrenched in a variety of indispensable and cutting-edge industries. When it comes to legal rules that govern and/or are closely linked to international business, however, the Korean legal system has relatively lagged behind such remarkable success of Korean companies. As one example, the Arbitration Act of Korea, was amended somewhat belatedly in 2016 to incorporate the 2006 UNCITRAL Model Law on International Commercial Arbitration.

But if there is one thing Korean culture is renowned for, that is its remarkable ability to excel at playing catch up. To that end, the National Assembly of Korea passed a legislative bill for amending the Act on Private International Law (previously titled the Conflict of Laws Act) on 9 December 2021, and the amendments are scheduled to officially enter into effect six months from the date of promulgation. The amendments were heavily influenced by legal notions and rules already firmly entrenched in leading jurisdictions across the globe. Accordingly, the amendments were clearly designed to modernise Korea's preexisting conflict of laws system.

> The amendments seek to improve stability and predictability of the system by introducing specific regulations on international jurisdiction for different case types.

Consisting of revisions to 7 provisions already in place and the introduction of 35 new provisions, the amendments stipulate additional rules for Korean courts to rely on when determining whether they can validly exercise jurisdiction over matters with foreign (non-Korean) elements. The previous version of the statute, while providing courts with detailed rules for determining the law applicable to (the governing law of) such matters, had largely overlooked this question. In principle, Korean judges had no specific criteria to abide by other than the ambiguous requirement that a case must have a 'substantial connection' to Korea, which was problematic because the statute did not define the term itself. That being so, the substantial connection standard gave judges a significant amount of discretion, and litigants for thereby found themselves in the dark when it came to predicting whether Korean courts would hear their 'international' cases.

But legal certainty and predictability, of course, are some of the key virtues that all legal systems strive to achieve. Likewise, the amendments to the Act on Private International Law were carefully crafted with both in mind. For one thing, the amended statute now includes a number of specific guidelines pertaining to the notion of substantial connection. Specifically, it instructs Korean courts to take into account fairness between the parties and equity, swiftness and economy of the trial, all of which were based on the relevant precedents by the Supreme Court of Korea on this issue, in determining whether a case has a substantial connection to Korea.

And there's more. The revamped statute features general provisions codifying international norms such as general jurisdiction, special jurisdiction, and exclusive jurisdiction. Not only that, the amendments seek to improve stability and predictability of the system by introducing specific regulations on international jurisdiction for different case types such as claims, intellectual property rights, family/inheritance, and maritime jurisdiction. Therefore, although Korean courts will continue to utilise a balancing test, their discretion has been made much more predictable.

The revised statue also provides that, in case of parallel litigations before different national courts, the Korean court may stay the Korean court proceedings at its own discretion or by either party's request. Furthermore, the revised statue empowers the Korean courts to decide that they do not have international jurisdiction over the dispute at hand and to stay or even dismiss the Korean court proceedings.

From a broader perspective, the recent amendments to the Act on Private International Law demonstrate both Korea's acknowledgement that its legal infrastructure has been lacking in terms of its accommodation for international business, as well as its determination to catch up with the rest of the world. Since Korea has thus laid down the groundwork, we can expect Korean parties and courts to go full steam ahead. And when it comes to speed and efficiency, one should never count Korea out.

Yulchon LLC

Yulchon LLC is a full-service international law firm headquartered in Seoul, South Korea. It employs more than 600 professionals, including more than 60 licensed in jurisdictions outside of Korea, and has offices in Shanghai, Hanoi, Ho Chi Minh City, Moscow, Jakarta, and Yangon. An acknowledged market leader in the development and practice of law, it has been named as 'the most innovative law firm in Korea' by the *Financial Times* on three separate occasions. It is frequently retained to negotiate complex transactions, help draft new legislation and regulations, and represent clients in high-stakes adversarial proceedings. As one of Korea's premier law firms, Yulchon maintains its high standards of excellence by valuing a culture of collaborative problem-solving.

Authors

YUN JAE BAEK
Tel: +82 2 528 5473
F: +82 2 528 5228
E: yjbaek@yulchon.com

Yun Jae Baek is a partner at Yulchon LLC and the co-chair of its international dispute resolution team. He received an LLB from Seoul National University and an LLM from Harvard Law School. Mr Baek has acquired unparalleled knowledge and experience for over three decades and is qualified to practice in both Korea and New York. He is considered one of Korea's top lawyers in the areas of international arbitration, M&A, aviation, and general corporate practice. Currently, Mr Baek serves as arbitrator for many arbitral institutions including the KCAB, AIAC, and the ICC. His reputation has led to him being selected as a leading lawyer by renowned publications such as *Chambers Global* and *Who's Who Legal*.

JEONGHYE SOPHIE AHN
Tel: +82 2 528 5306
F: +82 2 528 5228
E: jhahn@yulchon.com

Jeonghye Sophie Ahn is a partner at Yulchon LLC and the co-chair of its international dispute resolution team. She received an LLB from Seoul National University and an LLM from Harvard Law School. Ms Ahn focuses on international disputes and has acted as counsel and arbitrator in international arbitrations administered under the SIAC, ICC, KCAB, and UNCITRAL Rules arising from a diverse range of commercial and corporate transactions including joint venture, intellectual property, media and telecommunication, and construction. She also specialises in arbitration-related proceedings in court and has represented both foreign and domestic corporations in seeking or resisting enforcement of awards, interim measures, and injunctions.

HYUNAH PARK
Tel: +82 2 528 5747
F: +82 2 528 5228
E: hapark@yulchon.com

Hyunah Park is a partner in the international dispute resolution team at Yulchon LLC's dispute resolution practice where her practice is mainly focused on domestic litigation as well as international arbitration and other types of international disputes. She also specialises in insurance law and has been dealing with many insurance-related cases, and regularly provides legal advice with regards to insurance disputes. Ms Park received an LLB from Korea University and an LLM from University College London. She is licensed to practice in Korea.

JOO HYUN (JULIAN) PARK
Tel: +82 2 528 5301
F: +82 2 528 5228
E: joohyunpark@yulchon.com

Joo Hyun (Julian) Park is an associate at Yulchon LLC and a member of its international dispute resolution team. He received his LLB from Seoul National University and his JD from Hanyang University Law School. He has also completed coursework for the SJD degree at Seoul National University School of Law. Mr Park practices primarily in the areas of international/domestic litigation and international arbitration, and also provides legal advice on international transactions and trade.

YULCHON 律村 YULCHON
Attorneys at Law
YULCHON

The new antitrust

Eugene Sokoloff discusses what the Biden Administration's antitrust overhaul means for litigation and enforcement

The confirmation last October of Jonathan Kanter as head of the influential antitrust division at the US Department of Justice completed an overhaul that could portend a progressive revolution in American competition law. Kanter is the last in a trio of key picks by President Joseph R. Biden's Administration, following the appointment in March of Tim Wu to a seat on the National Economic Council, which advises the President on economic policy, and the confirmation in June of Lina Khan as chair of the Federal Trade Commission, which polices business practices.

All three made names for themselves as critics of Big Tech – Khan and Wu as law professors, Kanter as an attorney for some of the world's leading tech companies. But their ascendance represents far more than a change in policy toward Silicon Valley. They are the leading edge of a new generation of antitrust thought leaders.

Since the early 1980s, successive Republican and Democratic administrations have largely shared an approach to competition law that focused on keeping output high and prices low. For progressives like Wu, Khan, and Kanter, this overriding focus on market outcomes at the expense of market structure fails to take account of competition policy's impact on workers, innovators, and independent entrepreneurs. That fundamentally different perspective portends much more than the shift in enforcement emphasis typically associated with a change in presidential administration.

> The Administration's immediate priorities include a shakeup in the enforcement guidance relied upon by industry participants and courts alike as definitive statements of federal antitrust policy.

A 'whole-of-government' approach

The Biden Administration's embrace of this new vanguard – sometimes called the New Brandeisians, after the great US Supreme Court Justice Louis Brandeis – is not just about personnel. In July 2021, President Biden issued a 72-point executive order setting out his administration's approach to competition policy. The order directed executive branch agencies to focus on anticompetitive practices in labour markets, as well as increased concentration in agricultural markets, healthcare markets, and the tech sector.

The July 2021 order also heralded a broader evolution in how the government implements competition policy. Antitrust enforcement has traditionally been the purview of the FTC and Department of Justice. But the order announced a new 'whole-of-government' approach that calls on more than a dozen federal agencies, from the Federal Communications Commission and the Commerce Department, to the Department of Health and Human Services and the Consumer Financial Protection Bureau, to take an active role in shaping the markets in the industries they regulate.

The new rules of the road

The Administration's immediate priorities include a shakeup in the enforcement guidance relied upon by industry participants and courts alike as definitive statements of federal antitrust policy. One of Ms Khan's first acts as FTC chair was to rescind a 2015 policy document that constrained the agency's use of its authority to police 'unfair methods of competition.' The Commission later withdrew from the guidelines for vertical mergers it issued jointly with the Department of Justice in 2020, ultimately prompting the agencies to announce in January that they would overhaul all guidance for vertical and horizontal mergers. And the department has begun the process of replacing its policy on the licensing of standard-essential patents – critical to everything from automobiles to mobile phones and computers.

The Administration is also signaling a more muscular response to perceived violations of the antitrust laws. Mr Kanter's antitrust division has brought on seasoned prosecutors from DOJ's criminal division. In a January 2022 speech, Kanter announced that the Department would emphasise litigation over settlements. It has filed criminal charges in several cases involving so-called 'no-

poach' agreements that limit labour mobility. And just last month, another DOJ official said that the department would consider criminally prosecuting monopolists – something that has not happened in more than 40 years. While the FTC has no criminal enforcement authority, it has ramped up administrative and civil enforcement actions.

Setting the tone, and lending a hand, in private litigation

The Biden Administration's antitrust overhaul is most likely to affect industry through merger clearance and enforcement actions. But it will also impact private litigation. US antitrust law gives private plaintiffs the right to bring claims for damages and injunctive relief under the antitrust laws. When that litigation touches on key policy priorities, the government will sometimes intervene to offer its views.

The Department of Justice has filed briefs in civil suits challenging no-poach and non-compete agreements, articulating the department's view that such agreements should sometimes be treated as presumptively illegal. The shift in policy has also led the government to sit out cases in which the previous administration filed briefs advancing policies that are now under review. Even where the government does not intervene, courts often look to the merger guidelines and other policy documents to aid in the analysis of complex antitrust questions. Any revision to those guidelines is therefore likely to help set the tone for private civil enforcement, as well.

What comes next?

The question now is whether the new antitrust is here to stay. Without legislation, Mr Biden's policy changes may not survive his administration. There is bipartisan support for reining in Big Tech. Several Republican Senators recently joined Democrats in advancing a bill that would clamp down on acquisitions by tech platforms of potential competitors. But that bipartisanship has been missing elsewhere. Some Republicans have expressed skepticism about a sweeping proposal to overhaul the antitrust laws that would, among other things, make it easier to block mergers. And the FTC has split on party lines over many of Ms Khan's initiatives. If Republicans regain control over the House or Senate in the 2022 midterm elections, Mr Biden will need their support to advance his agenda.

The new antitrust also faces an uncertain future in court. An overly aggressive approach to enforcement could trigger judicial backlash, particularly from courts that have grown accustomed to analysing competition questions through the long-dominant lens of consumer welfare. At the same time, concerns over the concentration of market power, particularly in Big Tech, may mean that a progressive approach to competition law has found its moment.

Eugene Sokoloff, counsel

> Even where the government does not intervene, courts often look to the merger guidelines and other policy documents to aid in the analysis of complex antitrust questions.

EUGENE SOKOLOFF
Counsel
MoloLamken LLP

MOLOLAMKEN

ROB FELL

WORDS: TOM BAKER; PORTRAITS: BRENDAN LEA

I was one of those children who spent a lot of time arguing with parents and siblings over the dinner table. They must have thought I was a natural advocate, even if I didn't. I fell into law, frankly; I studied history at university.

My grandfather was a senior judge in Scotland. His advice to me was 'Don't practise law in Scotland, it's a small pool in which to be a lawyer.' He was a really impressive guy. I thought about being a journalist or something different, but at the end of my degree I sort of slipped into law rather than making a focused decision.

I was very fortunate to study history at Cambridge. You do two years of broad subjects and then in your final year you do a 'special subject.' I studied the KGB and the CIA. It was 1992 and the USSR had just collapsed. I travelled to parts of Russia and the Crimea back then as a backpacker, and we had an ex-KGB spy give our lectures. That was a particularly fascinating thing to study.

Some dons at Cambridge would occasionally tap students on their shoulders. And then they get letters from an address somewhere near Whitehall, go to interviews and sign Official Secrets Act declarations, and so on...

I trained at Stephenson Harwood. There was a litigation sub-group within the firm, headed by a guy called Steven Lowe, and I did my seat with him. Steven was a very tough and versatile litigator, he got me involved in a load of interesting cases.

We acted for Heather Mills. She sued the Met Police after being hit by one of their motorcycles and was seriously injured. We did it pro bono. There I was as a trainee, sitting in an interview room with her taking witness statements. I just realised the range of things you can do as a litigator was huge.

I left Stephenson Harwood within about 18 months of qualifying and went to Freshfields Bruckhaus Deringer. Relatively soon after arriving, I ended up working for Ian Taylor. I had dinner with him last night. He would never do an interview of this kind; he's probably never had a photo taken for a publication! He's just a phenomenal litigator. There must be 40 or 50 litigation partners in the City who learned at his feet and view him as the gold standard.

At Freshfields, one time I came back from a three-week holiday in Brazil. I walked into my office and found Chris Pugh, who was one of the senior disputes partners there, waiting for me. Slightly unnerving. He was the lead partner on a case that was going to trial about three weeks later. It was a case that had a big reputation in Freshfields as being an absolute monster. He instructed me that I would be flying to San Francisco the following day to take witness evidence from a group of people who worked for a steel plant. It was a dispute about an oil rig.

I got on a plane the next day, flew out to San Francisco, got a load of witness statements, then flew to Texas to get some expert reports. All of this had to be served before the start of the trial, which was three weeks away. We had to get a private jet chartered by the client to get between meetings at one point. I remember being a junior partner, thinking 'this is pretty strange.'

Our client was this hard-bitten Texan oil man. He won at trial against BP/Amoco, the biggest company in Europe. It was a remarkable triumph. I made so many friendships on that case – for example Daniel Toledano QC at One Essex Court, who was a junior barrister at the time. The case gave me a good insight into what a monster piece of litigation looked like.

Every litigator will have that feeling when your witness walks into the box – your blood runs cold, and you wonder if it will all be OK. I remember one expert witness, Professor Keith Miller, an expert in fracture mechanics. He was an eccentric Yorkshireman with a big beard who the judge absolutely loved. I remember at one meeting, he pulled open his briefcase and he had a load of metal samples he wanted to show us that were wrapped up in his y-fronts. He was a totally charismatic guy. The first line in the judge's report of his evidence was: 'Professor Miller's evidence was a tour de force.'

I loved my time at Freshfields but I was in my mid-30s, my son had just been born, and I was questioning what I wanted to do with the rest of my career. I started looking around for other things – there was a recruiter who was working at Travers Smith looking for someone in the market. I hadn't heard of Travers – their branding back in the day was 'the City's best kept secret' which isn't particularly good branding if you think about it! I asked

> Every litigator will have that feeling when your witness walks into the box – your blood runs cold, and you wonder if it will all be OK.

around, I spoke to people at Travers, then quickly realised I should have known more about this firm.

I came to Travers and I haven't regretted it once. I made a speech when I became head of the disputes practice in 2018, saying that joining the firm was the second-best decision in my life, after getting down on one knee to my wife.

The firm definitely has a 'don't take yourself too seriously' personality. Don't ever think that what we do is so important that you should be self-important. There are partners in my team whose other halves do real jobs, like heart surgeons and people who work in schools in deprived areas. They are doing far more important jobs for far less pay.

To be a litigator, you must be prepared for disappointment. Usually you lose the cases you know you're going to lose and win the cases you expect to win. So, you're typically braced for disappointment, but it doesn't make it any easier. I met a litigator in New York once who said: 'You're not a litigator until you've lost a case worth over $100m.'

A few of us acted on a case against Deutsche Bank a few years ago. It wasn't just one disappointment; it was a demoralising march towards what ended up being an unsatisfactory result. That was a tough loss to take – there were people who had put their heart and soul into it for two or three years.

When my colleagues who worked on the HP/Autonomy case came back in January with a positive judgment, there were tears in the eyes of most of them. That had been eight or nine years of their careers dedicated to that one vast undertaking. You need to be prepared for the great highs but also the great lows.

My dispute resolution style? I try to use reason as much as I can. Learning from Ian was significant for me in that sense. I learned you don't have to shout – I never heard him raise his voice, ever. It was the calm application of logic and reason to a problem, not banging a fist on a table or shouting, 'You can't handle the truth!' My style is: reason always and aggression when required.

There was a case I did a while ago when we were suing a private individual who had cooked up a fraudulent scheme. It was apparent that we were on to something. The defendant was going to face a problem, and his solicitors in desperation started making accusations at me, threatening to report me to the SRA. I was a young partner at the time, and I took it more personally than I should. So I went to Stephen Paget-Brown, who at that time ran Travers' disputes team, and he said: 'That's how you know they're worried. Don't fret.'

In the mid 2010s I did two large investigations for the Bank of England. There was a day when I had to present the conclusion to the directors and the then-governor, Mark Cairney. There I was in this beautiful room with the governor of the Bank of England sitting across from me. It was a moment when I thought: 'I'm doing something with my career.' It was item number two on the Today programme. My parents saw it and knew I was doing something quite prominent.

I've been to so many places where I've felt lucky to be there. There's a road between north-western China and Pakistan called the Karakorum Highway, which runs through the mountains. It's a particularly beautiful part of the world. Very remote, very beautiful.

I'm Scottish, born and bred. I like whisky. I went through a stage of liking whisky a lot, I used to have a big thing about Macallan.

I love sports of most kinds, anything with a ball. I'm a fan of Dundee United – I grew up in Scotland in the 1980s when Rangers and Celtic dominated (as they always have). But for about five or ten years their duopoly was broken by Aberdeen and Dundee Utd. We won the Scottish Championship for the only time in our history. We were called the 'new firm', instead of the 'old firm' of Rangers and Celtic. Dundee Utd got to the European Cup semi-finals in 1984. We beat Roma 2-0 at home and lost 3-0 away, with two penalties awarded. Our fans have always made suggestions of brown envelopes given to the referee...

I force my children to listen to my late 80s/early 90s indie music. The Stone Roses, that sort of thing. Radiohead. They just say: 'Dad, please turn it off.' My daughter is massively into Olivia Rodrigo. When it's just the two of us in the car that goes up to max volume and we sing together. Favourite album? *OK Computer*.

I like my Russian literature and film. There's a film called *Burnt by the Sun*. It's about an ex-Russian soldier during the Stalin era who lives in this beautiful part of Russia with his family. But all the while the Stalinist net is closing in on him. It's not a jolly film, but it's wonderful.

Life mantra? I am a glass-half-full kind of person. I'm always willing to see the best of things if I can. As a leader specifically, it would be: 'Do unto others as you would have them do unto you.'

Rob Fell is a partner and head of the dispute resolution team at Travers Smith.

Costs and funding

Stewarts' Julian Chamberlayne, Bradley Meads and Stuart Carson consider the most significant developments in relation to costs recovery, cost management, security for costs, conditional and contingency fees, litigation funding and insurance

The costs and funding of complex commercial disputes is rarely straight forward and this multi-faceted landscape has continued to shift and develop over the last couple of years. In this review we will consider the most significant developments in relation to costs recovery, cost management, security for costs, conditional and contingency fees, litigation funding and insurance.

Guideline hourly rates ('GHRs')

In 2021, the Civil Justice Committee published its long-awaited report on GHRs ('the report'). While the new GHRs only came into force on 1 October 2021, they were already being adopted by the courts as early as July[1] and by August they were being applied retrospectively as the 2010 iteration was 'well out of date'.[2] The 2021 GHRs are on average around 20% higher than the 2010 rates, but with a fair degree of variation by grade of lawyer and between the London and national bands. Perhaps surprisingly, the increase equates to around 2% per annum since 2010 compared to the Bank of England's average inflation rate over the same period of 2.7%.[3] The rates for London also appear well below the rates being routinely charged in heavy weight commercial disputes, but enhancements can be sought[4] by reference to the factors within Civil Procedure Rule ('CPR') 44.4 and the updated Judicial Guide for Summary Assessment.[5]

> CFAs have been a feature of English litigation for nearly 30 years and are far more commonly used than DBAs as there is less uncertainty over enforceability.

The Master of the Rolls, Sir Geoffrey Vos, announced that the GHRs will be reviewed again within just two years. That may be too early for evaluation of the effect of any post pandemic changes in working practices to have impacted on charge rates, but will need to address the high levels of wage inflation in the legal sector and price inflation nationally.

Costs budgeting and management

Until recently, there has been little dissent among the judiciary to the benefits of costs management. In June 2021, however, Master Davison provided sweeping comments in *Smith v W Ford & Sons (Contractors) Ltd*[6] as to the effectiveness of costs management in avoiding detailed assessment proceedings by saying: 'QB Masters, Chancery Masters and Costs Judges do not necessarily share this defendant's expressed confidence that costs budgeting controls costs better, or more effectively, than detailed assessment. This is a large topic and a complex and somewhat sensitive issue.'[7]

While there may be quiet rumblings in some corridors of the High Court, in February 2021 the Competition Appeal Tribunal ('CAT') adapted the costs management regime to suit the niche procedural stages, in *Vattenfall AB & Others v Prysmian S.P.A & Others*.[8] The CAT said: 'Properly prepared costs budgets are a useful case management tool, particularly where questions of proportionality arise, as they do in the present case.'

Damages based agreements ('DBAs')

In 2019, the Ministry of Justice commissioned Professor Rachael Mulheron of Queen Mary University and Nicholas Bacon QC to conduct an independent review of the DBA regulations. The reforms which they proposed had wide ranging support, including from Sir Rupert Jackson; the architect of the 2013 LASPO reforms which made this type of contingency fee agreement lawful in civil proceedings. It is now three years on and these sensible proposals have not still resulted in any amendment to the flawed DBA regulations, but the courts have helpfully started to resolve some of the uncertainties.

In *Zuberi v Lexlaw Ltd*,[9] the Court of Appeal unanimously indicated that hybrid DBAs would be lawful. It now appears to be lawful to agree that a reduced hourly rate will be due if the claim is lost, mitigating some of the risk for the law firm. Furthermore, the CAT in *UK Trucks Claim Ltd v Fiat Chrysler Automobiles NV and Others*[10] (Judgment (Preliminary Issue), 28 October 2019 1282/7/7/18) rejected suggestions that third-party funding constituted a form of DBA, which would have

otherwise prohibited the use of third-party funding in collective proceedings in the CAT (where DBAs are not permitted).

Conditional fee agreements (CFAs)

CFAs have been a feature of English litigation for nearly 30 years and are far more commonly used than DBAs as there is less uncertainty over enforceability. That said there are several recent decisions of some clients challenging the validity of CFAs:

- While is it incumbent on the solicitor to ensure that the client is fully and properly advised on the terms of a CFA, the High Court held that this does not mandate referring the client to an independent advisor (*Acupay System LLC v Stephenson Harwood*[11]). This judgment also confirmed that whether a CFA was a contentious business agreement, which impacts on the rights to challenge the costs, could be determined by the inclusion in the CFA of a clear statement of the parties intentions.

- The High Court confirmed that failure to comply with the solicitors code of conduct could make a CFA unenforceable by solicitors (*Winros Partnership v Global Energy Horizons Corporation*[12]).

Third-party litigation funding

While third-party funding was historically seen as contrary to public policy (*Awwad v Geraghty & Co*[13]), it is now 'a well-recognised feature of modern litigation and facilitates access to justice for those who otherwise may be unable to afford' (*UK Trucks Claim Limited v Fiat Chrysler Automobiles NV and Others* and *Road Haulage Association Limited v Man SE and Others*[14]).

Law firms have embraced this, with many developing partnerships with a particular funder. In 2021, Mishcon de Reya LLP announced a deal with Harbour Litigation Funding to set up a litigation financing facility for the exclusive use of funding Mishcon's cases. Similar arrangements were agreed between Willkie Farr & Gallagher LLP and Longford Capital Management in 2021, and DLA and Litigation Capital Management/Aldersgate Funding Limited in 2020, to name a few. Law firms are duty-bound to act in their clients' best interests, but closer links with a third-party funder could arguably influence decision making, for example, in terms of presenting funding options to clients or dealing with disputes that may arise between a client and a funder. For these reasons Rosenblatt has taken a different approach, by adopting a protocol which prevents LionFish Litigation Finance from funding its cases, as both are owned by the same parent company (RBG Holdings PLC).

Back in November 2011 the *Code of Conduct for Litigation Funders* was introduced by the Association of Litigation Funders, which aims to develop and promote standards of best practice for litigation funders in the UK. In 2020 the International Legal Finance Association was formed to act as a global voice of the legal finance industry, with the aim of influencing the international legislative, regulatory and judicial landscape. However, only the minority of litigation funders are members of either of these bodies. In the meantime and despite its increasing prevalence, litigation funding is still an unregulated industry, so litigants and their lawyers would be well advised to carry out their own due diligence on prospective funders.


Julian Chamberlayne, partner

Proportionality

In his speech[15] to the 2021 conference of the Association of Costs Lawyers, the Master of the Rolls, commented on the 'seemingly unlimited' costs incurred in the Business and Property courts on cases, often involving foreign litigants, where costs could be used 'as a weapon to oppress or harm those on the receiving end.' These comments reflected judicial concern regarding the proportionality of costs incurred by parties in high-value complex litigation in the following recent cases:

- In *The Public Institution for Social Security v Banque Pictet & CIE SA & Others*[16] (where costs totalled £18.5m), the Court of Appeal[17] reiterated previous guidance given by the UK Supreme Court[18] that forum disputes should not involve masses of documents, long witness statements and detailed analysis of the issues. Lord Justice Peter Jackson commented that at the detailed assessment, a costs judge's power to disallow or reduce costs that are disproportionate in amount[19] would be engaged even in high value litigation.

- In *Município De Mariana & Ors v BHP Group PLC & Ors*,[20] the court noted that the parties had engaged in a 'forensic arms race.' This factor alone introduced a greater than usual breadth of argument over the proper assessment of the interim award. Just 50% of the £16m costs claimed was ordered.

Bradley Meads, costs lawyer

Security for costs

Pursuant to CPR 25, an order for security for costs can be made to require a party to pay into court or provide a guarantee as security for a defendant's costs in the event of an order being made against the claimant.

A claimant can provide alternative forms of security, but following the judgment given by the court in *Tulip Trading Limited v Bitcoin Association for BSV*[21], we know now that this cannot be in the form of cryptocurrency. Bitcoin's volatility could result in such security being effectively valueless and, therefore, did not provide the defendant with adequate protection.

The court also has the power to order third parties to provide security including where a third party has contributed towards the claimant's costs in return for a share of money or property that might be recovered in the proceedings. Following the decision in *The RBS Rights Litigation*, the threat of a potential cross undertaking had operated as a disincentive to applications for security against funders. However, the Court of Appeal's decision in *Mr Nigel Rowe & Others v Ingenious Media Holdings PLC & Others*,[22] overruled RBS and held that a court should only make orders for a cross-undertaking in damages in 'rare and exceptional cases', and only in even more exceptional circumstances should it do so in favour of commercial litigation funders. Lord Justice Popperwell commented that if the law were to be expanded in this area 'it would be preferable that it be considered and developed by primary or delegated legislation, rather than by way of individual judicial decision.' He also expressed a view that funders ought to be adequately capitalised and set up to provide security without passing on charges for doing so to their funded clients. This hope is not yet reflected in practice. At the time of writing, the authors have not yet seen or heard of any litigation funders who do not, one way or another, charge funded clients for reserving capital for security and/or require the clients to have fulsome security-proofed ATE insurance in place to insulate the funders from this risk.

‘The court also has the power to order third parties to provide security including where a third party has contributed towards the claimant’s costs in return for a share of money or property that might be recovered in the proceedings.’

After-the-event insurance ('ATE')

ATE insurance can also be used as security for costs. An area of recent focus has been on deeds of indemnity or anti-avoidance endorsements that confirm that the insurer will meet an order for costs in the defendants favour irrespective of any of the usual voidance and exclusion clauses in the policy. Whilst decisions on security tend to be fact specific the following cases are worth noting:

- In *Infinity Distribution Ltd (in administration) v Khan Partnership LLP*,[23] the Court of Appeal considered whether the additional cost to purchase a deed of indemnity (a proportion of which would be payable by the defendant at the conclusion of the case) was relevant to the issue of whether the deed of indemnity was 'good' security, as the

court below found. In ordering the claimant to pay the money into court instead of being able to rely on the deed of indemnity, the court noted the need to ensure a fair balance between the parties. Subjecting the defendant to this potential additional cost was contrary to the overriding objective.

- In *URE Energy Limited v Notting Hill Genesis*,[24] the High Court considered the position where a claimant who had purchased ATE insurance but could not afford to pay for a deed of indemnity. Notwithstanding the defendant's concerns about the policy avoidance terms and the cancellation rights of the insurer, the court allowed only a proportion of the total indemnity limit (£500,000) to stand as security for the defendant's costs.

Whilst some law firms have embraced the concept of a portfolio or facility arrangement with a funder, Stewarts have taken a different route by launching a facility with Arthur J Gallagher Insurance Brokers Limited with a rapid process to incept high level indemnities at pre-agreed market leading rates: giving their clients more certainty when structuring case finance.

Stuart Carson, partner

What's next?

Looking ahead to 2022 we tentatively predict more cases applying (or distinguishing) the 2021 GHR including applying CPR 44.4(3) enhancement factors, greater use of costs management in high value disputes notably when levels of ATE cover and security for costs are in play, plus yet more cases filling in some of the grey areas of the DBA regime building on the *Zuberi* decision.

STEWARTS
THE LITIGATION SPECIALISTS

1. *ECU Group PLC v Deutsche Bank AG & Anor* [2021] EWHC 2083 (Ch) (22 July 2021)
2. *Axnoller Events Ltd v Brake & Anor (Summary Costs Assessment)* [2021] EWHC 2362 (Ch) (23 August 2021)
3. https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator
4. For instance see *Justin Gutmann v First MTR South Western Trains Limited and Another* [2021] CAT 36
5. https://www.judiciary.uk/wp-content/uploads/2021/08/Guide-to-the-Summary-Assessment-of-Costs-2021-Final1.pdf
6. *Smith v W Ford & Sons (Contractors) Ltd* [2021] EWHC 1749 (QB) (25 June 2021)
7. *Smith v W Ford & Sons (Contractors) Ltd* [2021] EWHC 1749 (QB) (25 June 2021)
8. *Vattenfall AB & Others v Prysmian S.P.A & Others* [2021] CAT 3 (05 February 2021)
9. *Zuberi v Lexlaw Ltd* [2021] EWCA Civ 16
10. *UK Trucks Claim Ltd v Fiat Chrysler Automobiles NV and Others* [2019] CAT 26
11. *Acupay System LLC v Stephenson Harwood LLP* [2021] EWHC B11
12. *Winros Partnership v Global Energy Horizons Corporation* [2021] EWHC 3410 (Ch)
13. *Awwad v Geraghty & Co* [2000] 1 All ER 608
14. *UK Trucks Claim Limited v Fiat Chrysler Automobiles NV and Others and Road Haulage Association Limited v Man SE and Others* [2019] CAT 26, 2019, 10 WLUK 722
15. Law Society Gazette 25th November 2021
16. *The Public Institution for Social Security v Banque Pictet & CIE SA & Others* [2022] EWCA Civ 29
17. *The Public Institution for Social Security v Banque Pictet & CIE SA & ors* [2022] EWCA Civ 29
18. *VTB Capital plc v Nutritek International* [2013] UKSC at [82] and [83]
19. CPR 44.3(2)(a)
20. *Município De Mariana & Ors v BHP Group PLC & Ors* [2021] EWHC 146 (TCC)
21. *Tulip Trading Limited v Bitcoin Association for BSV* [2022] 2 (Ch)
22. *Mr Nigel Rowe & Others v Ingenious Media Holdings PLC & Others* [2021] EWCA Civ 29
23. *Infinity Distribution Ltd (in administration) v Khan Partnership LLP* [2021] EWCA Civ 565
24. *URE Energy Limited v Notting Hill Genesis* [2021] EWHC 2695

Legal developments in Qatar: what the UK legal community should know

K&L Gates on the growth, development and sophistication emerging in the Qatar legal market

Introduction

Over the decade in which our office has been operating in Doha, we have witnessed considerable growth, development and sophistication emerging in the Qatar legal market. Qatar's strategy is to modernise its legal investment framework making access to the market easier for investors, ensuring efficient business operations, allowing capital to follow businesses in the market, and finally guaranteeing a safe exit by investors from the market if they wish to divest or repatriate capital[1]. To this end Qatar has been issuing laws and making reforms which started in 2015 when the new Commercial Companies Law was enacted, followed by the establishment of the legal and regulatory regime of the Qatar Free Zones in 2017 to 2018. Building on from that, Qatar relaxed its foreign investment restrictions, increased business transparency, introduced sweeping reforms to the judicial system, and most topically, introduced what is colloquially known as the 'World Cup Framework Law'. This article provides the reader with a bird's-eye view of these latest legal developments in Qatar.

Qatar Law No. 10/2021 concerning the measures for hosting FIFA World Cup Qatar 2022

With the world's focus on the FIFA 2022 World Cup 2022 Qatar, scheduled to take place from 21 November 2022 to 18 December 2022, the 'World Cup Framework Law' takes centre stage in the legislative matrix. This law includes special standards and guarantees agreed upon in the hosting contract with FIFA, and the representations and undertakings issued by Qatar to FIFA on 22 February 2010, in relation to the several key commercial issues.[2]

One of the aims of this law is to facilitate doing business in preparation for and during the World Cup for FIFA, its contractors and suppliers including setting up 100% foreign-owned companies.

Qatar Law No. 1/2019 New Foreign Investment Law

One of the most significant changes in this context has been the enactment of a new Foreign Investment Law No. 1/2019. This law has created a legal environment with the aim to attract and allow foreign investment, and safeguard investors' rights. It has been enacted to stimulate business opportunities and help achieve Qatar Vision 2030's aims of a diversified economy. One of the key points in this particular law is the right of foreign investors to own 100% of a company's capital. This represents a radical shift from the prior corporate regime, in which a Qatari national (or Qatari company) had to be a majority shareholder (leading to what was colloquially known as the 51/49 ownership structure). Foreign investors have also been granted the right to invest in almost all economic sectors subject to obtaining the relevant approvals from competent authorities.[3]

The law provides additional investment incentives and guarantees, including the right to allocate the necessary (onshore)[4] land for investors, either by renting or under a usufruct, the right to import goods both for their project operations or expansion. The law also exempts foreign investors from income tax and customs duties on their imports of machinery and equipment required for their projects, and on raw materials and semi-manufactured materials which they need for production, and which are not available in the local markets.

This law allows foreign investors to repatriate all their investment returns, the results of any liquidation of their investments, or which has arisen from a settlement in an investment dispute or any compensation received by law. Finally, foreign investors have the right to transfer their ownership of an investment to any other foreign investors or other national investors.

Qatar Law No. 13/2019 on the establishment of the Media City Qatar

According to article 3 of the law, Media City aims to manage and develop media activity, and promote its position as a hub to attract international media, technology companies, related research and training institutions, and digital media. It also aims to support and promote media and digital technology projects, and to achieve the economic and professional integration with various State projects, and to provide an interactive environment through the licensed companies operating in Media City. On 3 February 2021 it was reported that Media City has signed a strategic partnership with Euronews, one of the most renowned media networks in the world. The agreement is considered an important milestone in Media City's effort to attract major media networks to Qatar.[5]

Qatar financial markets authority's new offering and listing rules

The Qatar financial markets authority issued new Offering and Listing Rules in 2021. These new rules apply to listing and offering in both the primary and secondary market on the Qatar Stock Exchange. The aim of the new rules is to encourage new listing and offering opportunities, and mainly to encourage small and medium family business to list on the secondary market to increase their capital. Significantly, the new rules allows – in addition to companies established in the Qatar financial centre – companies incorporated in the Qatar free zones to list or offer their shares on the Qatar Stock Exchange.

Law No.1 of 2020 on the Unified Economic Register Law

The Unified Economic Register Law compels the Ministry of Commerce and Industry (MoCI) to establish a unified economic registry (the Registry), with the goal of encouraging transparency in economic and financial transactions (and creating a register of beneficial ownership). Previously company information in Qatar was confidential, however under article 6, the MoCI is compelled to make certain basic information of a described list of entities available to the public[6]. These entities range from incorporated companies, to sole enterprises, trusts, non-profit organisations and freelance professionals. In order to exercise their right of access, members of the public will be able to make an application to MoCI to obtain an extract of the Registry or a certificate of particular information, or a certificate of absence in the case of non-registration.

Mediation Law (Law No. 20 of 2021) and Commercial Court Law (Law 21 of 2021)

Mediation has not historically been commonly used as a form of dispute resolution in Qatar. Parties often dismissed it for fear of significant time and cost being invested, and a settlement agreement being reached, but then not subsequently honoured, with no existing statutory framework in Qatar to enforce it.

On 7 October 2020 Qatar ratified the Singapore Convention on mediation. On 18 October 2021 Qatar enacted the Mediation Law[7] which outlines, among other things, the procedures and methods of mediation, conditions to be met by the mediator, provisions for stay of proceedings, and settlement agreement procedures. On the same day in 2021 Qatar enacted the Trade Court Law[8] which established the Investment and Commercial Court (also known as the Trade Court). The Mediation Law enables parties to the settlement of an international dispute by mediation to enforce the settlement in the same manner that international arbitral awards are recognised and enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral awards. The establishment of a new Commercial Court, alongside arbitration and investment mediation institutions, represents one further reason for national and foreign investors to continue investments in Qatar's fast-expanding economy.

Conclusion

These new laws have introduced many positive changes to the business and legal landscape, although many of the implementation mechanics of these new laws are still being tested in practice. From our experience we feel there is more room to promote the option of setting up 100% foreign-owned companies in accordance with the provisions of the new Foreign Investment Law, or under the umbrella of the Qatar Free Zones, Qatar Science and Technology Park, and soon Media City. The Qatar Financial Centre has continued to develop and extend the scope of its activities to attract more investments and business, while the Qatar Science and Technology Park continues to attract research and development business. In tandem with the changes to the business landscape, Qatar is continuously working on bringing about reforms to the judicial system. This was evident when the Arbitration Law was issued in 2017, and more recently with the issuing of the Mediation Law and the Commercial Court Law. We view the Mediation Law, and Commercial Court Law as welcome additions to the Qatar legal landscape. These laws should be readily used by practitioners working in the Middle East so that mediation can become an automatic, reflexive part of the dispute resolution toolkit.

By Matthew R.M Walker (partner) and Niel Coertse (senior associate) for K&L Gates, Doha

K&L GATES

1. https://www.lexismiddleeast.com/magazine/LexisMiddleEastLawAlert/2020_September_10/?V=pdf
2. Procedures related to entry and exit permits, passports, and travel, work permits, tax exemption, safety and security, bank and foreign exchange operations, protection and exploitation of commercial rights, communications and information technology, legal issues and compensation, and accommodation
3. Certain economic sectors are not open to foreign investors, such as banking, insurance companies and commercial agencies. Foreign investors are prohibited to own more than 49% of public shareholding companies in Qatar, however, it is possible to exceed this cap, by obtaining special approval from the Council of Ministers. The Council of Ministers are entitled to add new areas where foreign investors are prohibited
4. This is land which is not within a freezone
5. https://thepeninsulaqatar.com/article/03/02/2021/Media-City-Qatar-signs-strategic-partnership-with-Euronews
6. Defined as being information which allows for the identification of the entity stated above and which specifies the legal structure, main characteristics and purpose for establishment of such an entity
7. Law No. 20 of 2021 Promulgating the Law of Mediation in Settlement of Civil and Commercial Disputes
8. Law 21 of 2021 Promulgating the Law on the Establishment of the Investment and Commercial Court

The pro-arbitration trend continues to grow in China

Commerce & Finance Law Offices on China building a pro-arbitration jurisdiction

As one of the largest economies, China has been dedicated to building a pro-arbitration jurisdiction. Especially in recent years, the Chinese arbitration system is gradually geared to international practice, promoted by a favourable policy environment. The creditworthiness and attractiveness of Chinese jurisdiction have also been increased as an international arbitration centre.

Promote pro-arbitration legislation

The current arbitration law of the PRC was promulgated in 1994 and amended twice, respectively in 2009 and 2017. It has been practiced for 27 years and will be amended for the third time. On 30 July 2021, the Ministry of Justice of the PRC released the arbitration law of the PRC (amended) (draft for comments) (the 'draft amendment'), which is supportive of the leapfrog development of pro-arbitration in China. The proposed revisions in the draft amendment, especially those that allow foreign arbitration institutions to establish branches, entitle the tribunal to decide on provisional measures, omit the mandatory requirement of unambiguous arbitration institution in the arbitration agreement, extend the parties to an arbitration to those with unequal status, adopt the concept of the seat of arbitration, recognise the ad hoc arbitration regarding commercial disputes, etc, have released positive signals, ie, China is taking a pro-arbitration stance for international arbitration.

> If a court thinks the foreign arbitral award should be recognised and enforced during the level-by-level reporting process, it may stop reporting and directly make the decision.

Strengthen cross-border cooperation of preservation in arbitral proceedings

The Supreme People's Court of the PRC ('SPC') adopted the arrangement on mutual assistance in preservation in arbitral proceedings by the courts of the mainland of China and of the Hong Kong special administrative region in 2019, and the arrangement on mutual assistance in preservation in arbitral proceedings by the courts of the mainland of China and of the Macao special administrative region in 2021 ('arrangements'). The arrangements enable the parties to arbitration in Hong Kong and Macao to apply for preservation to the courts of the mainland of China, which makes arbitral proceedings in the aforesaid places have great advantages in such matters over other jurisdictions. It also reveals the attitude shift of China towards cross-border judicial assistance in arbitral proceedings.

Strong judicial safeguards for foreign arbitral awards' recognition and enforcement in China

China acceded to the Convention on the recognition and enforcement of foreign arbitral awards ('Convention') in 1987. To comply with the Convention, the arbitration law of the PRC provides that the recognition and enforcement of foreign arbitral awards are governed by an Intermediate People's Court rather than a basic-level court. Since 1995, moreover, the SPC has established the internal reporting system, which requests the Intermediate People's Courts to report to the SPC level-by-level if a foreign arbitral award may be refused to be recognised and enforced and the decision can not be made until the SPC replies. If a court thinks the foreign arbitral award should be recognised and enforced during the level-by-level reporting process, it may stop reporting and directly make the decision. In other words, only if the award is to be refused to be recognised and enforced, should the court report level-by-level. Such a reporting system ensures the recognition and enforcement of foreign arbitral awards in China to the maximum degree. In 2017, the reporting system, no longer being an extrajudicial

measure, is legally stipulated in the provisions of the Supreme People's Court on issues concerning the reporting of cases involving judicial review of arbitration for examination and approval.

Talent reserve expansion in the field of international arbitration

Many multinational law firms have established branches in China for tens of years. Chinese legal practitioners accumulate extensive experience in international arbitration through working at Chinese branches of multinational law firms as well as working and studying in countries with well-developed arbitration systems. Many Chinese lawyers serve as arbitrators at international arbitral institutions such as ICC, LCIA, SIAC, etc. The reasons behind this phenomenon are twofold. For one thing, such institutions attach importance to the Chinese market. They would like to invite Chinese lawyers to serve as arbitrators and even compile a version of the panel of arbitrators according to Chinese customs. For the other thing, Chinese legal practitioners' professional level has been increasing, which gains general recognition.

Enhance arbitral institutions' international competitiveness

It is shown that Beijing and Shanghai are respectively no. six and no. eight of the most preferred seats of arbitration while CIETAC is one of the five most preferred arbitral institutions in the *2021 International Arbitration Survey* released by Queen Mary University of London in May 2021. Under the influence of the Covid-19 pandemic, the administrative/logistics support to online hearings and diversification of arbitrators are critical factors that make CIETAC more attractive. It is learned that CIETAC has more than 400 arbitrators from Hong Kong, Macao, Taiwan, and foreign countries with a 62-year history of development, which forms an internationalised group of outstanding arbitrators.

In the annual report on *International Commercial Arbitration in China (2020-2021)* released by CIETAC in September 2021, it is shown that CIETAC accepted 739 foreign-related cases involving 76 countries and regions in 2020, which is approximately 20% of the cases accepted by CIETAC in total. The increasing number of overseas people who choose Chinese arbitral institutions indicates that the fairness and neutrality of Chinese arbitral institutions receive worldwide recognition.

Mr. Cui Qiang is a partner of Commerce & Finance Law Offices. He is also an arbitrator of CIETAC, CMAC and Qingdao Arbitration Commission. He has concentrated his practice on commercial dispute resolution with extensive experience in equity and bond investment, real estate, international trade and intellectual property.

Cui Qiang

> Under the influence of the Covid-19 pandemic, the administrative/logistics support to online hearings and diversification of arbitrators are critical factors that make CIETAC more attractive.

通商律師事務所
COMMERCE & FINANCE LAW OFFICES

The rise and fall of banking secrecy, or why time has come to knock at Swiss banks' door

Ardenter discusses prevailing interests of creditors and claimants over banking secrecy

Switzerland has been well-known for decades to be very restrictive with regard to the exchange of information with foreign jurisdictions.

Claimants in foreign proceedings for civil fraud or in commercial matters face with banking secrecy and the unavailability of pre-trial disclosure of evidence. As a result, they frequently have to resort to instituting criminal proceedings in order to obtain disclosure and freezing orders from Swiss law enforcement authorities (where banking secrecy does not apply).

This practice is efficient but also questionable, as the use of criminal proceedings should be kept for what they are meant to be: a last resort.

Recent trends can be observed in civil courts in favour of lifting banking secrecy even where the prevailing interest is not the prosecution of a crime, but (in particular) insolvency or requests for mutual assistance in civil matters.

> In spite of a clear trend in favour of international collaboration coming from courts, a culture of privacy still exists outside of courtrooms, which is henceforth worth challenging.

Overlooked alternative: duty of Swiss banks to disclose internal information in insolvency, even to their prejudice

Little use has been made of Swiss insolvency proceedings so far for the purpose of collecting evidence from Swiss banks.

By statute, insolvency trustees can seek the support of Swiss bankruptcy offices in order to obtain information from Swiss banks:

- concerning the debtor's assets that they hold; or
- against whom this debtor has existing or potential claims.

Insolvency practitioners have overlooked this second alternative for decades, with the latest case law dating back to 1941. The scope of the duty of banks to provide information to insolvency trustees was understood to be limited to their duty of accountability on the assets of the debtor as their client. This practice excluded the collection of internal information.

In a landmark decision of June 2020 regarding an application based on this second option (5A_126/2020), the Swiss Supreme Court ruled that in the context of insolvency, there is a public interest in the disclosure of internal information of the bank that may enable Swiss and foreign insolvency trustees to identify claims, to assess their amounts and to collect all supporting evidence for the purpose of bringing a legal action against the bank itself. In other words, the scope of the duty to inform insolvency trustees is much broader than their contractual duty of accountability.

This is almost to say that pre-trial collection of banking internal information as evidence in favour of insolvency trustees is now available in Switzerland, which is justified by the prevailing interest of all and worldwide creditors over banking secrecy.

This leading case was extensively commented in light of the legal provisions on the duty of accountability. Surprisingly, the key issue of such prevailing interest was overlooked. This shows that in spite of a clear trend in favour of international collaboration coming from courts, a culture of privacy still exists outside of courtrooms, which is henceforth worth challenging.

Civil mutual assistance and disclosure of banking information – who is the secret's keeper?

Outside the specific need of protection of creditors in the distressed situation of insolvency, Swiss courts also tend to lift banking secrecy in favour of foreign civil trials even where only private parties are at stake.

The execution of letters rogatory are as matter of public international law. As such, private persons have only limited legal standing related to State sovereignty and public order.

Private persons concerned by the execution of letters rogatory aiming at the collection of information from Swiss banks are:

- The parties to the main trial;
- The bank holding assets, which is the secret's keeper;
- The client of the bank, which is the secret's beneficiary.

It is a common pitfall to believe that anyone involved in a trial may invoke banking secrecy to defeat any attempt to obtain information from Swiss banks. The legal situation is, however, quite clear:

- First, banking secrecy is not part of Swiss sovereignty or public order.
- Second, only Swiss banks may invoke banking secrecy as they are the keeper of it.

Parties to the dispute have no standing in the Swiss execution of letters rogatory as they are neither the keeper of the secret nor, *per se*, the beneficiary of the secret.

The client of the bank (which is usually the account holder, but might be the beneficiary owner) is the beneficiary of the secret, which can be opposed to the bank as their counterparty. In turn, the bank cannot reveal to third parties the existence of the contractual relationship with their client. This contractual secrecy does not give any direct right to the client against third parties, including courts and authorities.

In fact, a bank's breach of secrecy at the expense of the client triggers criminal sanctions when revealed to a third party. To this and only extent, banking secrecy might be compared to the professional secrecy of lawyers or doctors. But the comparison stops where it just starts as banking secrecy does not grant any privileged right to refuse to collaborate before courts and authorities. In this regard, the Supreme Court took the opportunity to recall, in a decision of December 2015 (4A_340/2015), that banking secrecy is only an exception to the duty to collaborate of third parties holding information.

The only room that remains to Swiss banks to resist a request of collection of banking information is to argue, on a case-to-case basis, that the interest in keeping the secret outweighs the interest in finding the truth in the main trial abroad.

Legally speaking, banking secrecy has been relegated to the qualification of 'other legally protected secrets', far behind professional secrecy of lawyers, doctors or priests. This is to say, the chances of success of opposing banking secrecy to the collection of banking information in support of a trial abroad are shrinking.

***

Switzerland remains the main offshore banking centre in the world, with more than 25% of the world's foreign assets under management. Apart from its obvious attraction to chase assets, Switzerland can now be seen as an appropriate jurisdiction to collect information from all stakeholders in the market (banks, family offices, HNWI's service providers).

Criminal proceedings undoubtedly remain a powerful asset tracing tool to get access to banking information in case of fraud and money laundering. However, times where Switzerland was considered as a haven for dirty money is over, while remaining a private banking hub.

With this in mind, identifying the relevant interest at stake and the appropriate civil paths available appears as an efficient and more balanced approach to seek banking information for the upcoming decades.

About the author

Antonia Mottironi is a Swiss international civil, business crime and tax lawyer in Geneva. She was admitted to the Geneva and Swiss Bar in 2013, after graduating in law and economics.

She focuses on civil and criminal litigation, especially in the area of international business crime, international judicial assistance, enforcement of foreign arbitral awards and judgements, and cross-border insolvency.

Over the past years, she has handled a great number of international asset recovery cases which included the laying of civil and criminal attachments and the enforcement of foreign judgements. She also assisted clients in preparing and coordinating multi-jurisdictional disputes, in particular in common law jurisdictions.

In her asset recovery practice, she has developed a strong experience in cross-border insolvency cases involving foreign bankrupt banks and fraud schemes (Ponzi, wire transfer, Forex, tax fraud schemes). She has been involved over the past years in one of the largest art law disputes of the last decade between a Russian oligarch and his art dealer.

Mottironi has published on tracing and recovery of assets, with a specific focus on cross-border insolvency. She regularly speaks at international conferences on these matters.

She is a board member of the steering committee of the European network of the International Women's Insolvency and Restructuring Confederation IWIRC.

Ardentěr — Law
strategy across borders

RPC interview series – David Cran

How would you describe RPC's technology disputes practice?

It's booming. There is so much going on in the tech sector and in tech disputes now and we're right at the forefront of it. We've been building our tech team for many years, and everything is coming together. It's an exciting time for RPC and everyone involved in tech.

We have a broad technology disputes practice, which sits within our market-leading TMT group. We look after everything across the transactional and advisory spectrum, all the way through to the disputes – whether that be court proceedings, arbitration, expert determinations, mediation, or trying to resolve issues before they escalate. That broad spread of work reflects the way technology just pervades everything we do now. In the past, TMT might have been a separate team that handled contracts for tech companies or their customers. Now of course, tech impacts all clients and industries, and it's a core part of what we do.

That breadth of practice and experience is also reflected on the disputes side. We have a fantastic team, a mix of homegrown RPCers and those from other firms who are attracted by our culture, great clients and great work. We do lots of work with Big Tech companies, with the media industry (including data privacy-related work), in the retail and consumer sectors – with many tech companies now being very consumer-focused, and in insurance/financial services. Our work also covers what we might regard as the more 'traditional' tech work, such as tech projects, outsourcing and digital media, through to more recent developments, such as AI, cyber breaches and crypto-related issues. As you would expect, much of our work is international and there is a growing focus on regulation.

> We also expect to see a new wave of ESG-related disputes, and this will include disputes where tech investments and projects are being deployed to meet ESG goals.

What have been the growth areas for the tech disputes team over the last 12 months?

As mentioned, there is lots going on, but there are a few areas of very significant growth that I would highlight. In Big Tech, we are seeing increasing regulation in the sector across multiple jurisdictions, including on competition, data and consumer issues and that in turn is driving related litigation. In the UK, we see that particularly in relation to collective proceedings and other group actions.

There's a huge amount of regulatory scrutiny in the technology sector. Looking at the Competition and Markets Authority in the UK, you see how active it has been, not only in relation to Big Tech, but many other consumer-facing technology companies. There are similar approaches being taken in many other jurisdictions, including the EU and the US, and increasing coordination between regulators.

Follow-on damages claims, for instance, after a competition regulator finding, are well established, but we are increasingly seeing related claims against the background of regulatory review. For example, we are instructed on the Google Play UK litigation, both in respect of the claim brought by Epic in relation to its Fortnite game and the prospective UK consumer class action brought by Liz Coll, the former head of digital at Consumers International – both are in the UK's Competition Appeal Tribunal. The *Merricks* decision has led to a huge growth in UK collective proceedings, which is particularly relevant for consumer-facing tech businesses.

Data privacy continues to be a very active area notwithstanding the outcome of *Lloyd v Google*. We acted for techUK, as one of the successful third-party interveners in that case, but notwithstanding that decision there's still active litigation going on in the data privacy field and I think that will continue. Our 24/7 award-winning cyber breach response service, which has now handled in excess of 500 incidents, also continues to grow year on year.

We are also increasingly active on crypto issues, and we see this as one of the areas that will be very busy in the coming months and years. RPC is one of the founding members of CFAAR, the leading crypto-fraud and asset recovery group, that was founded with several law firms and other professionals last year. We also expect to see a new wave of ESG-related disputes, and this will include disputes where tech investments and projects are being deployed to meet ESG goals.

What is the impact of *Lloyd v Google* on data privacy litigation?

This was obviously a keenly awaited decision, and the big question was whether this was going to open the floodgates


David Cran

for representative actions for misuse of data claims. *Lloyd v Google* judgment firmly rejected the basis of this class action and the concept of 'loss of control' damages under the relevant legislation, an outcome that was warmly welcomed by data controllers – including the UK tech sector, as well as the insurance market – who were exposed to very significant potential liability arising from data claims. That probably means we will not see representative actions in that form being brought before the UK courts and several related claims were discontinued following *Lloyd*. That said, we do know that claimant law firms and litigation funders are looking at alternative ways to bring these types of data claims and we continue to advise on such matters.

There are also several very significant privacy-related disputes still going on. A lot of that work has arisen in the media sector. RPC, which has the leading UK media defendant practice, has a huge amount of experience in that space. We continue to be instructed on phone hacking litigation and acted in the recent Supreme Court case *ZXC v Bloomberg*. These data privacy/misuse of private information matters, while they are primarily in the media sector, will continue to inform how these will be tested in the tech sector.

What is driving the focus on privacy and data protection matters in the tech space?

Some of it is as a result of regulation, some of it is the nature of the business models. We are all so used to receiving free digital services and in return we make certain data available to technology companies. Because some of these technology businesses have very successful products and services, and large numbers of users, they have access to large amounts of data. There is also increased regulatory scrutiny on user data, and how that interacts with competition and consumer protection issues, particularly in the UK and the EU.

We also have a very active disputes and litigation funding market in the UK. For example, the recent proposed UK consumer class action against Meta characterises the use of personal data by Facebook as an abuse of a dominance competition claim to bring the claim within the UK's collective proceedings regime. That is only possible because of these litigation funders, who are prepared to come forward and fund these claims because when you aggregate the UK consumer claims together, it creates a sufficiently high-value claim that is worth funding. So, it's all of those factors coming together: increasing regulation, the nature of these 'one to many' business models, an opening up of the collective proceedings regime post *Merricks*, and the backing of litigation funders, all of which drives this focus and major litigation that's coming down the track.

Will we see more of these cases repackaged after *Lloyd v Google* to fit, for example, into competition actions?

Yes, we think so, because *Lloyd v Google* was brought under a CPR 19.6 procedure and the decision on the relevant data legislation makes future claims on the same basis more difficult. Although there are several ways to deal with *Lloyd*, such as the suggestion of a bifurcated claim where you seek to establish liability and then assess damages afterwards, that doesn't seem to work for litigation funders.

So, we might well see *Meta* as a test case for whether such data claims will be certified and can be pursued on that basis.

We do think that we will see a lot more of collective proceedings generally, because the procedure and the calculation of aggregate

damages are more attractive to a representative claimant and the litigation funders than the CPR 19.6 approach, at least as the law currently stands.

What has been the impact of Covid on tech disputes?

The tech sector, generally, is booming. That drives more investment in tech and in turn that means that sometimes investments do not pay off.

We are seeing a huge amount of investment in tech, including the adoption of new technologies and new platforms where infrastructure needed to be upgraded. Many of those projects go very well, but some will not. When they don't go well, that obviously drives traditional tech disputes relating to failed projects and implementation. A lot of those issues and disputes are still around, particularly in sectors which perhaps were a more behind the curve on their tech investment.

In some sectors, we are seeing that the pandemic has been a catalyst to bring a lot of this technology investment forward. So, in an industry that we at RPC know very well – the insurance sector – we are seeing a huge amount of investment into tech from the large, incumbent businesses, and also from insurtechs, start-ups and the like.

What have been some of the biggest regulatory changes over the past 12 months?

On Big Tech, we are seeing legislators and regulators, particularly in the EU, UK and the US, becoming much more active, not just on competition issues, but also on data and consumer issues. In the UK, the CMA has announced that it will be setting up a Digital Markets Unit, although it is waiting for statutory enactment. The Online Safety Bill is also currently before Parliament.

> On Big Tech, we are seeing legislators and regulators, particularly in the EU, UK and the US, becoming much more active, not just on competition issues, but also on data and consumer issues.

In the EU, the European Parliament and Council have reached provisional agreement on the Digital Markets Act recently and full agreement is expected shortly. The EU is also increasing consumer protection through the 'Omnibus Directive'.

We're seeing several regulators and governments at the same time say: 'This is an area we need to regulate more'. We're also have the added complications of the UK going its own way to an extent after Brexit. It certainly appears that we will have a much more regulatory interventionist approach. Whether or not this will in fact benefit consumers or improve the UK and European tech sectors remains to be seen, but it is likely to drive further follow-on and related claims concerning competition, data and consumer issues in the tech sector.

Have you seen an increase in technology companies using international arbitration over litigation?

Yes, arbitration is certainly a real growth area for tech disputes and it is something that we see a lot of – not just out of our UK offices, but also out of our offices in Singapore and Hong Kong, which are hubs for technology disputes and arbitration in Asia. Often these larger tech projects are international in scope, so arbitration is well suited to resolve those disputes. This also means that our arbitration and technology disputes specialists can work alongside each other and local lawyers to support the arbitration, wherever the venue and whatever arbitral rules apply.

We also find that arbitration is particularly attractive for the larger suppliers and some customers, because if there are any difficulties with delivery of the project, it's confidential, so you are not airing your dirty linen in public through the courts. We also see alternative jurisdiction provisions where appropriate – for example, problems with project delivery might be subject to arbitration, but if there is a simple payment dispute this may subject to court proceedings.

What distinguishes RPC from other firms?

We have a really strong team and a very open, collaborative way of working. That means that our technology disputes practice benefits from the fact that RPC is a full-service firm, with a real focus on tech. The way the technology market is moving also plays to our strengths.

We're a leading technology firm; we've been recognised as *Legal Business*' TMT Team of the Year two years running in 2020 and 2021. We are a leading disputes firm of course – we were listed as the top defendant law firm of 2021, with the greatest volume of defendant actions in the UK High Court among all law firms. We have the joint-most 'cases of the year' over the last three years, and are in the top five firms for overall days in the UK courts since January 2020. We are also the leading UK media defendant firm, which brings in all that data privacy experience, and we have almost twice the number of court days in the Media and Communications List compared to any other firm.

We are also a leading consumer and retail firm, a sector we have serviced for years. When many of the large firms left consumer behind because it wasn't lucrative enough for them, we remained as one of the leading consumer, advertising and marketing firms. That market-leading consumer work, which we've secured from working with all these leading brands over the years, and all the consumer regulation work that we've done, is now hugely valuable, because you need to understand the consumer landscape to handle this litigation well.

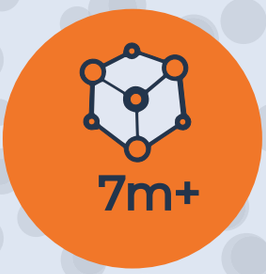
We've worked with litigation funders, both for and against them, for years. This has included on claims against the investment banks where we've acted with litigation funders, but also where we've defended some of the biggest group litigation in the UK courts, such as the *Ingenious* film finance litigation.

We've got all that experience, both from the disputes side, but importantly also from the advisory side, that most firms just don't have. The litigation boutiques do not have that rounded full-service technology and commercial offering, while the larger firms do not have that depth of day-to-day consumer work and specialist data privacy experience that we've got. So, we have a really good mix of experience and expertise, which provide a great fit to the current trends in tech disputes.

RPC

Legalease Research Services: Benchmarking client satisfaction for law firms

The only data that shows
client satisfaction performance
relative to **benchmarks** and **named law firms**



7+ million
data
points

500,000+
clients
surveyed

95% +/-
accurate and
statistically valid

LEGALEASE
RESEARCH
SERVICES

more data on law firms, and their clients,
than any other organisation

Contact: enquiries@legaleaseresearch.com

legaleasedata.com

Dispute resolution in the GCC region

Patrick Gearon and Georgina Munnik discuss how Bahrain has played an important role in the development of the international dispute resolution sector

The GCC region has, in recent years, seen significant development of the international dispute resolution sector. The Kingdom of Bahrain in particular has played an important role in the development of the sector in the region since the formation of the Bahrain Chamber for Dispute Resolution (the BCDR) which was established by Bahrain Legislative Decree No. 30 of 2009 as amended by Legislative Decree No. 64 of 2014. The BCDR has gone on to further establish itself as a dispute resolution institution through a joint venture between the Bahrain Ministry of Justice and the American Arbitration Association, launching new arbitration rules to establish best practice for arbitrations in the Kingdom. The BCDR Rules 2017 came into effect on 1 October 2017.

Case background

At the time of this matter, there had been only four arbitrations held in the BCDR and none pursuant to the new 2017 Rules. Notably this case was the fifth arbitration for the BCDR and the first to be held in accordance with the 2017 Rules. The case was in relation to a multi-million USD inter-bank Islamic finance dispute which arose out of an Unrestricted Wakala Agreement (an inter-bank investment agency agreement) entered into between a Conventional Wholesale Bank (claimant) and an Islamic Wholesale Bank (respondent). The dispute is one of the most significant inter-bank disputes in Bahrain in recent years and the largest ever conducted by the BCDR (with claims and crossclaims of over USD$30m). It is also the first inter-bank Islamic finance dispute to be the subject of a BCDR Arbitration.

The matter was multi-jurisdictional at its core with the BCDR being the arbitral institution and the laws of England and Wales governing the agreement. The seat of the arbitration was Bahrain.

We represented the claimant in this case under article 6 of the Bahrain Arbitration Law, which provides for international counsel to represent parties in arbitration cases where there is an international element. This in and of itself is ground-breaking for a jurisdiction that has not previously permitted international law firms to represent or advise parties on contentious Bahrain matters.

> This arbitration clearly demonstrates how disputes seated in the Middle East can be effectively resolved under the laws of England & Wales regardless of the choice of seat.

Case significance

This arbitration clearly demonstrates how disputes seated in the Middle East can be effectively resolved under the laws of England & Wales regardless of the choice of seat. This case also has important regulatory considerations with the parties being both licensed under the Central Bank of Bahrain regulatory regime but carrying out different licensed activities. Such a case required intimate knowledge of the conventional and Islamic finance sectors and regulatory requirements.

With the agreement being Shari'ah compliant yet subject to the laws of England and Wales and the lex arbitri being the laws of Bahrain, demonstrating a knowledge of the differing systems of law which were not always compatible was a crucial element of the case. The various defences advanced by the respondent included complex arguments of English law together with considerations of the principles of Shari'ah. Various (often lengthy and onerous) applications and objections were raised by the respondent throughout the case.

Coupled with this and the potentially juxtaposing legal positions, there were also allegations of complex shareholder fraud involving further jurisdictions and intricate company structures which required coordination across our firm's practice divisions and regional offices throughout.

Reflective of the arbitral institution and laws which governed the disputed agreement, every element of the case was complex and cross-jurisdictional. The parties, witnesses and experts were in Bahrain and Dubai (appearing from the BCDR and the claimant's premises), whilst the members of the Tribunal sat in Lebanon, Egypt and London. The transcribers attended remotely from England.


Georgina Munnik, senior associate


Patrick Gearon, partner, head of Middle East

In addition to the various technical legal considerations of this case, additional care had to be given throughout to both the attendance at hearings and the management of the matter which fell neatly into the first onset of the global Covid pandemic. Continued high-level project management, including extensive disclosure requests and document management procedures, was required together with ongoing co-ordination between the parties and the Tribunal to ensure that the various applications and objections made throughout this matter were aligned, together with the practicalities of managing the final hearing through this firm's own virtual platform.

As noted above, in addition to the standard format of the proceedings, the five-day final hearing was held virtually with this firm providing the online platform and IT support to ensure that the evidential hearing could proceed without delay. With entirely virtual hearings previously rarely implemented (especially for matters of this nature) the arrangement and coordination of the same was innovative and undertaken predominantly by means of a rigorous remote hearing protocol covering every aspect of the hearing from timetabling to management of parties in attendance at any given time and break out rooms for instructing parties and witnesses.

A cohesive and unified approach allowed client expectations to be met whilst simultaneously managing a constantly changing complex legal matter.

Final judgment

The final award was issued in July 2021 and is entirely in our client, the claimant's, favour, awarding each part of the claimant's claim and dismissing the totality of the respondent's defences. The Tribunal also ordered a 90% costs award in our client's favour. Enforcement is currently ongoing in the Bahrain court's and our client has successfully defended an application to the Bahrain High Court to set aside the Tribunal's findings, which is further evidence of the development of the Bahrain legal system and its acceptance of its statutory role in enforcing Arbitral Awards.

Conclusions

Not only is this matter of importance to the banking community in relation to the proper resolution of high-value, complex and multijurisdictional inter-bank disputes (including technical Shari'ah principles), but it also demonstrates the great strides that Bahrain's legal system has taken in recent years in relation to arbitration, cross jurisdictional matters and the acceptance and enforcement of arbitral awards (both issued abroad and at home).

In respect of the significance to the legal community globally, at a time of great uncertainty, this case is an example of the ability we have to adapt and strengthen (perhaps, some may say, improve and streamline) the current processes governing the way in matters are managed and concluded at hearings.

PATRICK GEARON
Partner, head of Middle East, Charles Russell Speechlys LLP
E: Patrick.gearon@crsblaw.com

GEORGINA MUNNIK
Senior associate, Charles Russell Speechlys LLP
E: Georgina.munnik@crsblaw.com

CRS | CharlesRussell Speechlys

Artificial intelligence (AI) in civil proceedings – a forecast

Heuking Kühn Lüer Wojtek gives an overview on artificial intelligence in civil proceedings and discusses the current obstacles of using AI within the law

The status quo

For many years, the legal sector has felt safe from technical innovations that have revolutionised other sectors in the last three decades, making countless activities redundant. Technical innovations in the legal sector over the last few decades served to speed up and facilitate work processes. E-mail led to enormous acceleration of written communication, and electronic lawyers' mailboxes replaced the physical submission of documents. None of these innovations fundamentally changed the actual work of lawyers: determining the facts with subsequent application of the law has long remained unaffected. This may soon change.

While using databases for legal research or search engines to check contracts for specific clauses (continues to) fall into the category of facilitating work, the application of the law itself remains firmly in lawyers' hands. The same applies to mass litigation with thousands of similar cases where all parties are operating with text modules. The lawyer determines the facts of the case and combines the pre-set text modules.

> Law that contains many descriptive or normative elements with simple definitions is better suited to AI than complex statutes that cannot be decrypted without prior knowledge.

Requirements for AI in litigation

The use of AI requires that the parties provide all pleadings and evidence in machine-readable form and, to the extent possible, in a uniform file format. A working group of presidents of German Higher Regional Courts and the Federal High Court of Justice already recommended that the parties present their facts and legal arguments in one preformatted document as basis for the proceedings. The parties shall then work simultaneously in the same document and each put their objections on law or fact at the right place. The use of such a uniform document should then allow the software to structure, combine and evaluate party submissions.

Once the software has extracted and compared all relevant text passages, it can check whether a particular element of the law is applicable. The judge may then concentrate on his individual legal assessment without having to spend time on structuring the file. While the use of such software will considerably accelerate the handling of cases in courts, the parties could also take advantage of such software. Lawyers can estimate their chances of success in court. This will help their clients to make an informed decision if the legal costs and efforts are worthwhile. The frequently observed rational lack of interest in the case of expected low yields is counteracted, and access to the law is facilitated.

Current obstacles to the use of AI

Even intelligent software may fail where complex issues are at stake that do not fall into simple yes/no categories. Software can therefore only be used once the facts have been established with sufficient probability.

Hurdles a software currently cannot overcome also exist within the law itself. There are not only complex statutory provisions that remain beyond the comprehension of AI, but also provisions that are open to interpretation and leave discretionary powers to the judge. It seems unlikely that AI will be able to penetrate these structures in the foreseeable future. Law that contains many descriptive or normative elements with simple definitions is better suited to AI than complex statutes that cannot be decrypted without prior knowledge.

An additional factor that makes it harder to predict the outcome of cases in Germany compared to common law jurisdictions is that lower courts do not have to follow precedents by other (higher) courts (although they usually voluntarily do). In the Volkswagen emissions scandal, for example, courts came to entirely different legal conclusions despite almost identical facts. That only changed after a Federal High Court of Justice landmark decision.

There are further serious constitutional objections to the use of AI in the judiciary. Article 101 (1) Basic Law grants access to

a court of law. It is common opinion that this has to be a human. Some commentators view judicial procedural sovereignty and independence under article 97 Basic Law at risk. Because of judicial independence, it will likely also be impermissible to require judges to use AI. Additionally, the right to legal protection under article 20 (3) Basic Law in conjunction with article 2 Basic Law is only guaranteed if every citizen has access to the digital portals and can upload documents.

The constitutional problem becomes particularly acute when judges can no longer justify their decisions independently but refer to the allegedly superior AI. The problem of non-transparency of automated systems also arises in cases of automated court decisions ('black box'). Defendants will be hard pressed to understand that they need to serve a multi-year prison sentence while doubting that the court has sufficiently considered the circumstances of their individual case – which are frequently on an interpersonal level.

A glimpse into the future

These developments are more tangible now than they were just a few years ago. German law in particular, with its generally clear structures and concepts, offers an ideal basis for the digitalised application of the law. The structuring of cases in accordance with the codified law that is at the core of legal studies in Germany is not significantly different from a 'mind map' that is part of digital processes. In addition, German law is the foundation of a large number of other legal systems. In conjunction with the now very precise translation programmes. It could therefore become another German exporting success.

About the author

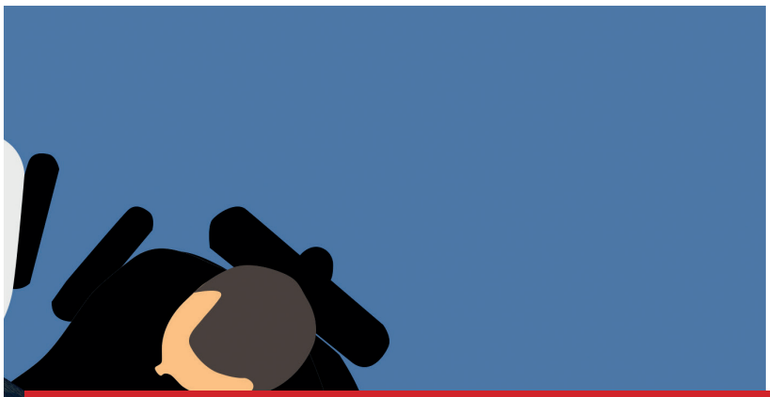
Dr Thomas Wambach is a lawyer based in Hamburg, focusing on commercial litigation. He has vast experience in handling complicated cases in all areas of commercial law. In the last couple of years he specialised in the defence against claims of investors in capital market cases, sample cases and mass litigation. He is a partner and co-chair of the dispute resolution practice at Heuking Kühn Lüer Wojtek. He is regularly recommended by leading handbooks.

DR THOMAS WAMBACH
Heuking Kühn Lüer Wojtek
Tel: +49 40 35 52 80 29
F: +49 40 35 52 80 80
E: t.wambach@heuking.de

Dr Thomas Wambach, partner

> The constitutional problem becomes particularly acute when judges can no longer justify their decisions independently but refer to the allegedly superior AI.

HEUKING KÜHN LÜER WOJTEK
LAWYERS AND TAX ADVISORS



More seats at the table

What does the regionalisation of international arbitration mean for London?

Megan Mayers

"There was a point where centres in Africa, Asia and other parts of the world started saying, "hang on, we have lots of parties from this region doing international arbitration but they're all going to London, Paris, Geneva – we should have some of it here"," recalls Herbert Smith Freehills London-based global arbitration partner and president of the London Court of International Arbitration (LCIA), Paula Hodges QC.

Over the past decade we have seen the rise of alternative international arbitration seats, particularly in Asia where Singapore and Hong Kong have steadily grown in popularity. But in 2021, for the first time, Singapore was named the top choice of seat for parties to international arbitration alongside London in a study conducted by Queen Mary University of London and White & Case.

While Singapore has been around the top three for years, this signals a shift in the market. The ranking is decided by participating organisations, which pick up to five preferred seats. Across the study, more than 90 different seats featured from a range of jurisdictions globally, with London and Singapore coming out on top both having been included in 54% of respondents' top five.

For Singapore, this is an impressive jump from 2018 where London was firmly the top seat selected by 64% of respondents while the city state came third with 39%. In 2015, Singapore came in fourth after London, Paris and Hong Kong, chosen by just 19%.

The Singapore International Arbitration Centre's (SIAC) data tells a similarly auspicious story. In 2020, SIAC saw 1,080 new cases administered, which was more than double the 479 cases in 2019. This marks a stratospheric 299% increase in five years from 271 new cases in 2015. This growth is more impressive when compared to the LIAC, which administered 407 cases in 2020, up only 18% from the previous year.

So, what is driving this? And what does it mean for London?

> The flexibility of arbitration is much more aligned with fast-moving modern businesses than the more formal procedures adopted in the courts.
>
> Paula Hodges QC, HSF

Rise of Asia

'It's a function of the stability, neutrality and sustainability that Singapore offers, coupled with its geographic proximity to some of the largest economies of the world such as China, India and Southeast Asia,' says Daryl Chew, who joined Three Crowns from Shearman & Sterling when the arbitration boutique launched its first office in Asia in 2022.

Three Crowns is one of many firms pursuing opportunities in the city state, with the rise of global powers, foreign investment, infrastructure development and the boom of sectors such as tech in the region, have created an influx in cross-border disputes suited to arbitration.

The belt-and-road initiative is oft-cited as one source of more international arbitration though the extent to which this has come to fruition thus far is challenged by practitioners – disputes are expected further down the line. However, the rise of technology disputes in Asia is undeniable. As a booming sector in the region, with cross-border contracts and a host of emerging players, arbitration is an obvious choice for tech companies. As Hodges QC notes: 'The flexibility of arbitration is much more aligned with fast-moving modern businesses than the more formal procedures adopted in the courts.'

The importance of proximity to booming economies in Asia is reflected by the fact that Hong Kong has had similar success as an international arbitration seat over the past decade. In fact, 50% of respondents picked Hong Kong as a preferred seat in the 2021 study. But while parties' confidence around Hong Kong's neutrality and political stability has been rocked, particularly following China's national security law for Hong Kong, which came into force in June 2020, Singapore has continued to demonstrate itself as a reliable base. This disparity is reflected in HKIAC's data, which shows 514 cases in 2020, up 6% from 483 the previous year. While still impressive, this falls notably behind SIAC's striking figures.

Further, it is becoming increasingly common for law firms to opt for Singapore as their sole Asia base, as was the case with Three Crown's recent launch. This can also be seen in *The Legal 500*'s 2021 APAC guide, which cites 40 recommended law firms, including five new practices, in its Singapore international arbitration rankings, compared to 20 ranked firms in Hong Kong.

Beyond its economic and political stability, the government has intentionally positioned the city state as an attractive seat says HSF Singapore-based partner, Gitta Satryani: 'It is not an accident and is actually a product of the government's will to turn Singapore into a legal hub, as well as the external economic factors that have taken place in the last ten years.'

A milestone change was the liberalisation of the legal market to allow foreign law firms to handle arbitration in the city. More recently, Singapore benefited from the legalisation of third-party funding for arbitration in 2017 and the Legal Profession (Amendment) Bill, which passed into law on the 8 February this year to support the use of conditional fee arrangements (CFAs) and other fee arrangements.

This continues to boost an already attractive environment for international arbitration, says Satryani's colleague Tomas Furlong: 'I think it'll be very good for the future of Singapore; our clients are already reacting to very positively. It's very strongly embedded in the culture of our clients here in Asia that they would like to see their lawyers taking some risk on cases or at least sharing that risk. It's not even really a financial point – it's a cultural point that they want to be working with someone who is in it with them.'

Elsewhere in the region, Beijing and Shenzhen are among the top ten most popular seats in the Queen Mary study, while Malaysia and South Korea are other jurisdictions making a play.

South Korea's sole arbitral institution, the Korean Commercial Arbitration Board in Seoul, shows promising data, consistently handling over 400 disputes each year with 443 in 2019 and 405 in 2020. The centre also benefited from its consolidation with Seoul International Dispute Resolution Center (SIDRC) – a hearing centre and education facility dedicated to international arbitration that opened in 2013.

Although only 69 (17%) of those arbitration cases handled in 2020 were international in nature, this is like Singapore's early trajectory, according to Furlong: 'Singapore started by catering for

> Singapore started by catering for quite local regional disputes but as it became more established, it has cast the net wider and wider. That will happen in other places in Asia too.
>
> Tomas Furlong, HSF

quite local regional disputes but as it became more established, it has cast the net wider and wider. That will happen in other places in Asia too.'

Emerging seats

This trend is not isolated to Asia, with globalisation also driving the rise of emerging arbitration centres in other regions.

In Africa, so far, no one jurisdiction has yet risen to the fore for arbitration but that does not mean that certain locations are not making a push, says Hodges QC: 'In Africa, regionalisation is definitely continuing but not at the same pace as we have seen in Singapore. You can understand why – there are many more countries, with more differences and not the same sort of political climate to make it happen.'

Kigali, Lagos and Johannesburg are among the cities vying to become notable arbitration seats while Cairo and Nairobi were among the preferred seats for African disputes in the Queen Mary study. And with the ever-resurfacing promise of an 'Africa rising' international trade revolution, opportunities in the region are plenty.

Dubai is another centre to watch. It had risen in popularity as a seat following the tie up between Dubai International Financial Centre (DIFC) and LCIA in 2015. But after the government of Dubai's bullish decision to abolish the joint venture became effective on 20 September 2021, it is trying to concentrate institutional arbitration into the Dubai International Arbitration Centre (DIAC).

Elsewhere, in Latin America many jurisdictions have seen an influx of direct foreign investment followed by stalled development projects and regulatory shifts due to the pandemic. Resulting disputes means the prospect of more international arbitration. Although Miami, as an already popular seat for disputes in the region due to geographical proximity, time zone adjacency and volume of Spanish speaking counsel, could be an obvious seat with the opportunity to grow its reputation, local jurisdictions are also ready to compete.

Among them is Panama, which has seen a number arbitration-friendly court and policy decisions in recent years. 'Panama has the benefit of being centrally located in the region. Infrastructure-wise it is good, and it has a growing and

> Proximity of justice matters, and it matters a lot particularly looking at cash-strapped individuals or cash-strapped states in a dispute.
>
> Akima Paul-Lambert, Hogan Lovells

increasingly strong arbitration community. It is very much a seat that adopts the general pro-arbitration policies that folks are looking for,' says Washington DC-based Foley Hoag partner Kenneth Figueroa, who co-heads the firm's Latin America practice.

Of course, Brazil already has a vibrant international arbitration community, having imposed somewhat of a monopoly on international disputes arising from domestic projects. Says Figueroa: 'It is kind of its own universe in all of this. They have done an amazing job of creating this bubble, because of their policy that only a Brazilian seat can be effectively executed in Brazil, so that effectively excludes all other seats.'

While many of these centres are yet to make an impact comparable to Singapore's, this move towards greater regionalisation would be positive, says Hogan Lovells partner Akima Paul-Lambert: 'Proximity of justice matters, and it matters a lot particularly looking at cash-strapped individuals or cash-strapped states in a dispute. If you're a Caribbean government having to come to London or go to Washington to get a dispute resolved, it is not just expensive, but probably culturally dissonant. It will add a much-needed dimension to the way in which disputes are resolved and hopefully new seats in new jurisdictions will encourage different cultural approaches which altogether will strengthen the arbitration offering.'

Figueroa echoes this sentiment, highlighting that the ability to tailor international arbitration – often touted as a main benefit of arbitration over litigation – is only enhanced by greater strategic discretion as to which locations might benefit a case. 'It gives users more options and it increases the responsibility of parties and their lawyers to really analyse where they're going, and why,' he says. ' It's not just an issue of geographic convenience, but really an analysis of the domestic law and how that will impact the particular case.'

However, as we have seen with Singapore and Hong Kong, growing an internationally accepted centre is no easy feat, stresses Satryani: 'Growing a legal hub requires an entire ecosystem. You also need supportive courts, because they are the place where awards get scrutinised and arbitrator appointments are challenged.'

Further, as political and economic instability surges globally, parties will increasingly prioritise the likelihood of constancy, says Chew: 'Amid all the volatility in the world, clients place an increasing premium on stability and neutrality because it facilitates certainty and that's critical for business planning. Especially in the resolution of cross-border disputes.'

London's falling?

With its perceived reliability, impressive track record and respected courts on its side, every arbitration practitioner we spoke to agreed that London will remain among the top choices for the foreseeable future.

London's international arbitration market has itself made impressive strides. The LCIA caseload continues to mount and the City is still regularly nominated as the preferred seat for disputes not associated with London or even Europe.

As a financial services hub, an increase in banking and finance disputes going to arbitration is another important development, accounting for 20% of LCIA cases in 2020 and 32% in 2019. It is its third most active sector behind energy and resources and transport and commodities, which make up 26% and 22% of cases respectively.

However, the UK is not as nimble as Singapore in updating and innovating around international arbitration, notes Hodges QC: 'When Singapore decides to do something, it does it and everyone gets behind it. Being quite a small country where the government is very influential, you can get everybody rowing in the same direction – that's much more difficult somewhere like London.'

Further, UK law firms have been notoriously slow to utilise alternative fee arrangements, such as CFAs. If this is something

Manish Aggarwal, Three Crowns

that their Singaporean counterparts can quickly master, this could prove to be an attractive proposition, particularly for cash-strapped clients or those looking to see their law firms take on risk.

But credit where credit is due, the UK legal market has proved over and again that it is able – even if it can be a little slower. In November 2021, the Law Commission announced its intention to review the UK's principal legislation governing arbitration (Arbitration Act 1996) 'to ensure that the UK remains at the forefront of international dispute resolution'. Areas touted for possible alterations include the power to summarily dismiss unmeritorious claims, procedures for jurisdictional award challenges and the availability of appeals on points of law.

But Hodges QC asserts that such amendments are not a necessity to keep up with other seats: 'I don't think we need to keep up with anyone else. I don't think it needs reforming but of course, there's always things that you can do better. Singapore amends its rules on an annual basis, which I don't think is a good thing because parties need certainty.'

Chew disagrees, proposing that constant review could be key to keep up with parties' commercial objectives: 'A jurisdiction has to constantly and relentlessly innovate and ensure that it's creating the right environment for parties to arbitrate and be able to make use of the right range of tools to meet their commercial objectives.'

Ultimately this diversity of opinion itself shows the value of diversity of seat choice. For financial institutions, for example, which may be seeking the certainty and a traditional approach, London's more conservative style might suit. Meanwhile neophiles – for example those in the tech space – may want to opt for Singapore. The much-commended flexibility of arbitration should offer this choice.

But despite London's practitioners largely sharing this optimistic outlook, Singapore's quick ascent shows that the City should not take its lofty position for granted. After all, according to Furlong, Singapore's upward trajectory is only likely to continue: 'I don't think we have seen arbitration peak in Singapore yet by any measure. All factors that have led to growth over the last five or 10 years are still very much there and will still generate further growth.' ■

Photographer FAITH WILLIAMS

Harriet Foster, Orrick

The next generation of arbitration

Legal Business **gathered the City's brightest stars at the International Arbitration Centre to celebrate the next wave of disputes talent**

Tom Baker and Megan Mayers

MARLEEN KRUEGER

Counsel
WilmerHale

Marleen Krueger is nominated for the sheer breadth of expertise amassed throughout her career. Originally from Germany, Krueger naturally has experience of German arbitration law, while also having international exposure to casework spanning Peru, France, Japan, and other jurisdictions.

Her work encompasses industries including pharma and oil and gas. Krueger says: 'I like the variety – that's the fantastic thing about this area of law. You learn so many things on each case, across different jurisdictions. You name it, I've done it. I like that WilmerHale allows me to do all that!'

She cites WilmerHale partners Rachael Kent and Gary Born as inspirational role models, with Kent hailed as a mentor.

KATE LOMAS

Senior associate
Eversheds Sutherland

Kate Lomas focuses on commercial international arbitration with a specialism in energy and construction disputes in the Middle East and Africa. Her recent experience includes acting for a Dutch client in a dispute with an Iraqi state-owned entity.

She had an early interest in international affairs, having studied Chinese at university, and developed an interest in energy disputes during her training contract at Herbert Smith Freehills (HSF). However, international arbitration was not always on the cards: 'I started out as an insurance litigator. I've been lucky to have a real mentor in Greg Falkof who I started working with on a case that ended up being very long running. Arbitration wasn't always the plan, but I love it.'

After gaining two and a half years' post-qualification experience at HSF, she joined Eversheds in 2020. She is touted as a rising star by *The Legal 500* and is praised by one peer for her 'great disputes instincts'.

SAMUEL PAPE

Associate
Latham & Watkins

Specialising in both commercial and investor-state arbitration, English and French speaker Samuel Pape is passionate about his career: 'I love the work I do for my clients. I enjoy arguing about the law, so I have chosen the right field!'

Bearing testament to his credentials, Pape is recognised as a 'Rising star' in *The Legal 500*'s international arbitration rankings.

He boasts an impressive breadth of sector know-how, having worked on disputes concerning joint ventures, post M&A matters, company law, banking law, ESG issues, public international law, and human rights law.

Pape points to Sophie Lamb QC, the high-profile London partner and global co-chair of Latham's arbitration group, as someone he admires: 'We've worked together for over a decade – she is really inspiring and supportive.'

ANNABEL MALTBY

Counsel
Hogan Lovells

Joining Hogan Lovells in 2008 and qualifying in 2010, Annabel Maltby has advised on international arbitration cases spanning numerous jurisdictions and sectors. However, picking a standout matter proves to be challenging: 'I'm a bit boring because I like every dispute I've worked on for different reasons! I enjoy working with experts and witnesses from all over the world, and I like the level of detail we go into but also the overall strategic thinking.'

Maltby relishes working with veteran London disputes partner (and now deputy chief executive) Michael Davison regularly. Davison has offered her mentoring and support, retaining a personal touch despite his executive commitments: 'After his meetings he still thinks to pop in and say hello!' Indeed, Davison embodies for Maltby a necessary attribute for all arbitration partners – emotional intelligence: 'That intelligence is important for connecting with clients to make sure they know we've got their back, and it also means we can read the room.'

MARINA BOTERASHVILI

Senior associate
Quinn Emanuel Urquhart & Sullivan

Marina Boterashvili is another practitioner with valuable skills in both litigation and arbitration: 'Practising a mix of the two has made me a better lawyer. It gives you a great appreciation of how different rules and systems work. The mix has stood me in good stead, but I really enjoy the flexibility that arbitration offers.'

Boterashvili concentrates her practice on both LCIA and investor-state arbitration, with a focus on the energy and natural resources, telecoms and mining sectors. Notable mandates for her and the wider Quinn Emanuel arbitration team include representing Braeburn in a high-profile pharmaceutical dispute with Camurus.

Boterashvili imparts some pearls of wisdom: 'The best arbitration practitioners are curious about the world around them, creative and adaptable to working with people across different industries, cultures and jurisdictions. You need to be a sponge!'

LUCY WINNINGTON-INGRAM

Senior associate
Reed Smith

Ranked as a 'Rising star' in *The Legal 500*'s dispute resolution public international law category, Lucy Winnington-Ingram has won plaudits from contemporaries. In the 2021 edition of *The Legal 500*, she is described as 'an outstanding arbitration lawyer and a real rising star. Her formidable intellect is paired with first-class drafting skills, exceptional forensic abilities and strategic instincts far beyond her years'.

Winnington-Ingram acts on cases for both claimants and respondents under UNCITRAL and ICSID rules, and in the mining, energy, construction and telecoms sectors.

She recently represented the Republic of Kazakhstan against World Wide Minerals and Paul A. Carroll QC in an ad hoc investment treaty arbitration under the UNCITRAL Rules regarding uranium-processing facilities.

HANNAH AMBROSE

Senior associate
Herbert Smith Freehills

Tipped for a bright future as a 'Rising star' in *The Legal 500*'s dispute resolution/public international law rankings, Hannah Ambrose is a solicitor advocate who has garnered plenty of high-level experience since joining Herbert Smith Freehills (HSF) in 2012.

She has advised on a number of investment treaty arbitration matters, including advising clients on investment structuring, and has acted as counsel on numerous investment treaty claims.

Underlining her considerable casework, Ambrose was part of the HSF team which advised Nord Stream 2 on its claim against the EU regarding the Energy Charter Treaty.

She is also a trustee of The International Lawyers Project, an international charitable organisation advancing economic justice and the rule of law through the provision of pro bono legal expertise to civil society, parliaments and communities.

RICHARD MOLESWORTH

Senior associate
Baker McKenzie

Richard Molesworth credits the culture at Baker McKenzie for his nomination, describing it as a testament to the support he has received and opportunities he has been given at the firm.

Primarily focusing on post-M&A and joint venture arbitrations, Molesworth is also versed in ancillary proceedings before the English courts, including in challenging and enforcing arbitral awards.

Molesworth has taken advantage of Bakers' international presence to bolster his multijurisdictional practice, working closely with colleagues in Houston and Dubai.

He gives props to partners Ed Poulton and Andy Moody: 'They each continue to provide invaluable opportunities for me to develop and support me in doing so. Their commitment to supporting upcoming talent has made Baker McKenzie a very rewarding place to work.'

YULIYA KUPCHENKO

Director
Fieldfisher

Yuliya Kupchenko has made a name for herself thanks to her strength in investment treaty arbitration. Throughout her career, she has worked on numerous large-scale, big-ticket disputes – often politically sensitive and complex in nature.

Like her colleague Rebecca McKee, Kupchenko possesses a novel background in civil fraud litigation, which has led her to some of the most high-profile cases. This year she will focus on the *PrivatBank v Kolomoisky* litigation, set to be one of the most anticipated trials of 2022.

She hopes to pursue the partnership track at Fieldfisher in the not-too-distant future, but is keen to maintain her 50/50 split between arbitration and litigation work: 'Both provide great development opportunities and the balance between the two makes me a better disputes lawyer.'

REBECCA McKEE

Director
Fieldfisher

Rebecca McKee brings a rare perspective to her arbitration practice. At Fieldfisher, solicitors are not required to choose between practising arbitration or litigation, meaning McKee has honed her skills in both disciplines. Her High Court work has gained her much experience in fraud-related disputes, adding another string to her bow.

McKee has recently acted on some weighty arbitration mandates. Last year, she was part of a team that assisted an African nation with a telecoms dispute worth $2bn. She also acted on an LCIA arbitration for a high-net-worth individual in a dispute concerning the synthetic diamond industry.

McKee cites Fieldfisher's dispute resolution partner Alexandra Underwood as an inspiration: 'She's such a hard worker while also being a mum like me – it's something very close to my heart. Seeing her balance the two aspects of her life is inspiring.'

SHOUVIK BHATTACHARYA

Senior associate
King & Spalding

Shouvik Bhattacharya gained experience at WilmerHale and Boies Schiller before joining King & Spalding in September 2021. He is dual-qualified in the UK and US and has experience acting for a range of clients including those in the energy, telecoms and technology sectors.

His recent work includes acting for the majority investors in a major Middle Eastern telecommunications company in a $2bn joint-venture dispute involving several interconnected ICC and LAMC arbitrations.

He credits his international education for preparing him for the global nature of international arbitration: 'I went to school in India until the tenth grade, I did my A levels from Singapore, then I went to the US for law school, during which l I also studied abroad in England. I now work at an American law firm in London, with clients all over the world.'

Kenneth Beale, partner at King & Spalding, praises his 'phenomenal credentials' and notes 'he's a superstar within K&S and amongst IA non-partners generally'.

HARRIET FOSTER

Managing associate
Orrick

Harriet Foster has a wealth of experience acting for clients in Europe, the Middle East, Africa and Asia in commercial and investment treaty arbitrations. A recent example of the latter saw her represent an African-based investor in an UNCITRAL arbitration under a bilateral investment treaty with India, concerning the cancellation of telecoms licences.

Since the first seat of her training contract at DLA Piper, her sights were set on international disputes: 'I was lucky to go to the International Court of Justice in the first seat of my training contract. I felt like something just clicked and from then on, I knew it was something I wanted to do. I really enjoy the general dynamics and topics of arbitration, which often are a bit geeky. I enjoy the legal side and that you work across different jurisdictions but also the range of clients, cultures and politics involved.'

After two years post-qualification at DLA Piper, Foster moved to Vinson & Elkins before joining Orrick in May 2020.

KATIA FINKEL

Senior associate
Baker McKenzie

Nominated by her colleague and dispute resolution partner Andy Moody, Katia Finkel has gained much arbitral experience through her decade-long spell at Bakers.

Finkel typically acts for both governments and private parties in energy, construction and post-M&A disputes. Her practice specialises in multijurisdictional issues and she frequently advises clients on investment structuring and restructuring. Additionally, Finkel has in-house experience gleaned from a nine-month secondment in Shell's EMENA litigation group, where she worked on high-stakes disputes.

Finkel welcomed her nomination as a vote of confidence from the firm: 'To have good feedback internally is one thing, but to advertise it is really putting your money where your mouth is, so it feels great. It gives me a lot of confidence.'

JENNY ARLINGTON

Counsel
Akin Gump

The Legal 500 rising star Jenny Arlington trained and qualified at Clifford Chance before joining Akin Gump. Native Bulgarian, she is fluent in English, Russian and German and frequently acts in disputes involving CIS member countries, Eastern Europe, Scandinavia and the Middle East.

She has a breadth of experience in energy and telecoms sector disputes and particular expertise in data protection, privacy and cyber security matters.

Not one to shy away from adversity, she says: 'I most enjoy a challenging case where the cards have been dealt, but not necessarily in your favour. I like trying to grapple with that and present arguments that will bring the client closer to what they want to achieve, and that aim to put them into the position they should have been in pre-arbitration.'

LAITH NAJJAR

Associate
Debevoise & Plimpton

Recognised as a rising star by *The Legal 500*, Laith Najjar counts both commercial and investor-state arbitration in the energy and natural resources and infrastructure sectors among his areas of know-how.

Najjar qualified at Reed Smith in 2012, joining Vinson & Elkins four years later and then moving to Debevoise in 2018.

KATIE MARQUET-HORWOOD

Senior associate
Enyo

Katie Marquet-Horwood has a range of international arbitration experience and has developed significant knowledge in the oil and gas space.

Knowing that she wanted a career in disputes, three out of four seats during her training contract at Mayer Brown were in contentious areas. Marquet-Horwood has since spent time at Milbank and Addleshaw Goddard before joining disputes boutique Enyo in 2019.

She enjoys the challenge of delving into new cases and understanding the technical intricacies of the sector: 'Each case requires you to become a technical expert in several different fields and immerse yourself into the industry or sector. I've had cases where I've had to become an expert in oil reserves, in the operation of satellites and the various pieces of equipment that are required to extract oil and gas from the ground. You end up with a weird and wacky general knowledge of things you never thought in your life you'd come across.'

ADAM TAHSIN

Associate
White & Case

Having trained at White & Case, Adam Tahsin worked out of the firm's Singapore and Geneva offices before joining the London team in July 2020.

He is most at home handling construction, corporate and pharmaceutical sector disputes. His recent experience includes acting for a consortium of East Asian contractors in a $1.5bn SIAC arbitration relating to the construction of an oil and petrochemical refinery in South-East Asia.

Tahsin said: 'I have had the opportunity at White & Case to conduct advocacy from an early stage in my career. For me, it is one of the most interesting and rewarding parts of what we do. I have also been lucky to work in some of the main arbitration centres globally: London; Singapore; and Geneva. Being able to experience first-hand how tribunals and parties approach cases differently across regions, and between common law and civil law systems, has been very valuable.'

REBECCA JAMES

Managing associate
Linklaters

Rebecca James is dual-qualified in Victoria, Australia and England and Wales, having trained at Allens in Melbourne before joining Linklaters' London office in 2013. She has a broad practice covering commercial and investor-state arbitration; her recent experience includes acting for the Islamic Republic of Pakistan in seeking the annulment of the second-largest award in ICSID's history: 'It's fun and it's challenging in all the right ways and no two days are the same. I know it's a cliche, but it's actually true. It's what keeps me motivated, engaged and turning up to do the best for the clients.'

James is also developing experience advising on ESG risk advisory and is currently a Research and Policy Director for the Campaign for Greener Arbitration.

MAANAS JAIN

Senior associate
Three Crowns

Elected as co-chair of Young ICCA in September 2021, Maanas Jain started his career as a barrister at Matrix Chambers before moving to Three Crowns in 2014. Now his practice includes commercial and investor-treaty arbitration as well as arbitration-related litigation.

Recent experience includes acting for an investor in a claim brought against Spain under the Energy Charter treaty relating to regulatory changes impacting renewable energy investments. He also appeared as counsel for the ICC as an intervenor in the high-profile Supreme Court case of *Halliburton v Chubb* in 2020.

Having handled only English law cases as a barrister, he has enjoyed the transition into a broader range of disputes: 'I was almost exclusively dealing with English law cases in courts up and down the country. My practice now is far less parochial. The beauty of international arbitration is that you are exposed to different legal and business cultures by working with clients and lawyers from different jurisdictions daily.'

NAOMI BRIERCLIFFE

Counsel
Allen & Overy

A *Legal 500* ranked rising star for international arbitration and public international law, Naomi Briercliffe works across commercial, investor-state and state-to-state cases. She joined Allen & Overy from Eversheds in 2014 and was promoted to counsel in 2020.

Her interest in international politics drew her to the law and to Eversheds where she trained: 'Nobody my family knew were lawyers; no one I knew worked in the City, so I went into the law quite blindly. At university I studied social political sciences and within that I was really interested in international politics. I thought about being an academic but I'm not good at being on my own all the time. Then I came across public international law. I just googled: "what are the top firms for public international law?" Eversheds at the time was at the top of the list, so I applied.'

Since then, she has represented Iran against the US before the Iranian Claims Tribunal. She says: 'It was incredible. I was pleading my own cases at about three years qualified on behalf of a sovereign state against the United States. All the politics that goes into the relationship between those countries. That was amazing.'

OLIVIA VALNER

Senior associate
Freshfields

Olivia Valner has over a decade of experience at Freshfields and was promoted to senior associate in 2020. She has experience in commercial international arbitration in the energy, natural resources, aviation, finance and litigation funding sectors.

Having enjoyed the international arbitration seat during her training contract, Valner went on to act for a consortium of international energy companies in an LCIA arbitration and related court proceedings against the Kurdistan Regional Government of Iraq as a junior associate, cementing her interest in the discipline.

Most recently she has been acting on high-value commercial disputes in the renewable energy sector arising out of changes to applicable renewables regimes. In 2020, she also acted for the LCIA as intervenor before the Supreme Court in the high-profile case of *Halliburton v Chubb*, which concerned the apparent bias and standards of disclosure in international arbitration.

Says Valner: 'I like the varied nature of the work – no two arbitrations are the same. Most of my cases have an international element; I enjoy the opportunity to work with colleagues in other jurisdictions and to get an insight into foreign law issues and learn about new sectors and businesses.'

ROBIN BACHMANN

Associate
Morrison & Foerster

Having trained at Linklaters, Robin Bachmann joined Morrison & Foerster in 2022 from disputes boutique Joseph Hage Aaronson. He is well-versed in construction and infrastructure project disputes as well as in M&A, shareholder disputes and finance arbitrations.

Of international arbitration, he enthuses: 'I love that each case offers unique opportunities to get to grips with a new business and the related context of the dispute. Working closely with clients to understand the dispute at hand and how it emerged is always interesting and essential when presenting your case to a tribunal. It's fun to reflect at the end of a case how far your understanding of a client's business has evolved since the outset and how your subject matter expertise has improved.'

KIMMIE FEARNSIDE

Associate
Pallas Partners

Kimmie Fearnside has experience acting for corporate and financial institutions in commercial arbitration, as well as for investors in investment treaty arbitration.

In addition to the financial services sector, recent experience includes disputes in the natural resources and retail spaces. Alongside her caseload, she leads the firm's pro bono offering and is interested in pursuing cases relating to climate change law and international human rights law issues.

She qualified at Linklaters, at first specialising in real estate litigation. There she found a role model in former Linklaters partner Katie Bradford: 'She gently cheered me on from the get-go. I was privileged and honoured to have that support from her at an early stage. She taught me a lot of technical skills.'

Fearnside moved to Boies Schiller Flexner (BSF) in 2018 to pursue more international arbitration work. This year she joined Pallas Partners after its launch by former BSF managing partner Natasha Harrison – another of Fearnside's role models alongside Baroness Hale.

She highlights three qualities of great arbitration practitioners: 'having the ability to provide clear, sharp legal analysis; having creativity to be able to adopt that legal analysis strategically to position your client in the best possible way to resolve the disputes and to be able to work collaboratively, including with the client, the tribunal and co-counsel.'

Section 2(1)(f) 'international commercial arbitration' – is it as simple as it looks?

Singhania & Partners LLP discuss section 2(1)(f) 'international commercial arbitration'

In India, section 2(1)(f) of the Arbitration and Conciliation Act, 1996 ('Act'), as amended w.e.f. 23rd October 2015, 'international commercial arbitration' means an arbitration relating to a commercial dispute where at least one of the parties is:

'**(i)** an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) a company or, an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country.'

Post the amendment, the words 'a company or' were omitted from section 2(1)(f)(iii) of the Act.

Prior to the amendment, a dispute revolving around the interpretation of section 2(1)(f)(ii) and (iii) had arisen before the Supreme Court of India in *TDM Infrastructure v UE Development India*[1]. A landmark judgment laying down the 'place of incorporation' principle, which paved the way for the above-mentioned amendment. A petition seeking appointment of an arbitrator was filed on the ground that the present arbitration was an international commercial arbitration and the exclusive jurisdiction to appoint an arbitrator lies with the Supreme Court of India and not the High Courts. Both the petitioner and respondent companies were registered and incorporated in India. However, the directors and shareholders of the petitioner company were residents of Malaysia. Based on section 2(1)(f)(iii) (*unamended*) as it stood then, it was pleaded that since the central management and control of the petitioner company is exercised in Malaysia, and does not take place in India, therefore, the petitioner would qualify under 2(1)(f)(iii). Per contra, it was contended that the petitioner company was registered in India and it would be a domestic arbitration. The Supreme Court while resolving the dichotomy regarding the aforesaid sub-clauses (ii) and (iii) of section 2(1)(f), observed that the word 'means' ought to be given a restrictive meaning and held that a body corporate should receive a construction similar to that of 'nationality' or being 'habitually resident' as contained in 2(1)(f)(i). Therefore, a company incorporated in India can only have Indian nationality for the purposes of the Act. The court held that the word 'or' being disjunctive, clause (iii) of section 2(1)(f) (*unamended Act*) would come into play only in a case where clause (ii) otherwise does not apply in its entirety.

> 'An association as referred to in section 2(1)(f)(iii) would therefore include a consortium consisting of two or more bodies corporate, at least one of whom is a body corporate incorporated in a country outside India.'

The Law Commission of India in its Report No. 246 of August 2014, inter alia, took into account the reasoning given in the judgment of *TDM Infrastructure* (supra) for recommending deletion of the words 'a company or'.

The interpretation of section 2(1)(f)(iii) was again considered by the Supreme Court in *L&T Limited Scomi Engineering BHD v MMRDA*[2]. A contract was executed between MMRDA and a consortium comprising of: (a) L&T, an Indian company and (b) M/s. Scomi, a Malaysian company. When disputes arose between the parties, the consortium filed a petition contending that one of the parties being a body corporate incorporated in Malaysia, it would attract section 2(1)(f)(ii). The Supreme Court held that section 2(1)(f)(iii) refers to two different sets of persons, an 'association' as distinct and separate from a 'body of individuals'. An association as referred to in section 2(1)(f)(iii) would therefore include a consortium consisting of two or more bodies corporate, at least one


Shambhu Sharan


Ravi Singhania


Yaman Deep

of whom is a body corporate incorporated in a country outside India. The Apex Court decided that it was a case of domestic arbitration since the central management and control of this consortium appeared to be exercised in India because L&T which was the lead member, was an Indian company having the consortium's office in Mumbai, India.

In a recent judgment of *Amway (India) Enterprises v Ravindranath Rao Sindhia*[3], the Supreme Court examined the nature of arbitration having regard to the nationality of the proprietors and their business enterprise having operations in India. The sole proprietorship of the respondents was appointed as a distributor for the Petitioner in India. While contesting the petition for appointment of arbitrator, the respondents contented that the same would be subject to domestic arbitration, however, the main plea of the opposite side was that since the parties to the dispute, are husband and wife, who are both nationals of and habitual residents in the United States of America, the dispute relates to an international commercial arbitration, being covered under section 2(1)(f)(i). This plea was rejected by the Delhi High Court holding that since the central management and control of this association or body of individuals is exercised only in India under section 2(1)(f)(iii), the dispute is not an international commercial arbitration. Thereafter, the appeal reached the Hon'ble Supreme Court. Reliance was placed on the *L&T* judgment (supra) and *Ashok Transport Agency v Awadhesh Kumar*[4], wherein it was held that a sole proprietorship is equated with the proprietors of the business and reversed the judgment of the Delhi High Court. The Supreme Court opined that if at least one of the parties is either a foreign national, or habitually resident in, any country other than India; or by a body corporate which is incorporated in any country other than India; or by the Government of a foreign country; the arbitration becomes an international commercial arbitration irrespective of the fact that the individual, body corporate, or government of a foreign country carry on business in India through a business office in India.

In view of the above judgments, it is concluded that the nature of arbitration in the case of the individuals would be based on their nationality or habitual residence and for body corporate, it would be the place of its incorporation. Where one of the parties to the dispute is an unincorporated consortium or joint venture of two or more entities, the identity of the lead member would decide the nature of arbitration.

> Where one of the parties to the dispute is an unincorporated consortium or joint venture of two or more entities, the identity of the lead member would decide the nature of arbitration.

RAVI SINGHANIA
E: ravi@singhania.in
International arbitration | litigation

SHAMBHU SHARAN
E: shambhu@singhania.in
Commercial arbitration | contractual disputes

YAMAN DEEP
E: yaman@singhania.in
Alternative dispute resolution | commercial litigation

1. (2008) 14 SCC 271
2. (2019) 2 SCC 271
3. (2021) 8 SCC 465
4. (1998) 5 SCC 567

S&P
SINGHANIA & PARTNERS LLP
SOLICITORS AND ADVOCATES

Preparing witness for arbitration

SOUKENÍK – ŠTRPKA discusses the importance of witness statements and preparing witnesses in international arbitrations

Introduction

The importance of witness evidence in international arbitrations is undisputable. Although it is not generally forbidden for the arbitration tribunal to order appearance of a witness, more often the witnesses are involved in arbitration proceedings on the parties' request.

It may be concluded that the witness evidence comprises of two stages:

a) written witness statements; and

b) cross-examination of witnesses.

With respect to witnesses appointed by the parties, counsels play key role in both of the aforementioned stages in terms of their preparation.

> The witness shall not be allowed to discuss its testimony with other witnesses nor to read other witness statements.

Witness statements

As per general rule, the witnesses should be interviewed and their written witness statements prepared as early in the proceedings as possible. This allows the party to further assess a case at an early stage of preparation of parties' written submission.

As the ICC Commission held in its report regarding the 'Accuracy of Fact Witness Memory in International Arbitration', there are different purposes of fact witness testimony, including:

(i) proving disputed facts;

(ii) explaining documents;

(iii) providing context of the case; and

(iv) providing technical explanations.

In the first place, party to the arbitration (together with its counsel) shall decide which of these issues should be proven by the witness evidence to determine potential witnesses for the relevant case. Relevant witness may be any person including employees, officers and main representatives of the party (as provided by the Art. 4.2 of the IBA Rules).

At this stage, experienced counsel would help the client with assessment of witness suitability.

As soon as the range of potential witnesses has been concluded, stage of witness interviews shall commence. Unless peremptory rules of *lex arbitri* provide otherwise, the counsel of a party shall interview witnesses and discuss their prospective testimony with them (see Art. 4.3 of the IBA Rules).

Prior to interview, it is advised to provide the witness with a list of questions. This would help the witness to better express its own perception of the facts. Questions asked by counsel should allow the witness to respond freely – thus, questions shall be open. It is recommended to show relevant documents from the time of the event to the witness in order to refresh his/her memory.

The witness shall not be allowed to discuss its testimony with other witnesses nor to read other witness statements. Such practice is considered unethical (potentially contravening *lex arbitri*) and may and probably will backfire at the cross-examination. Counsel shall notify the witnesses in this regard to protect its client's interests.

During preparation of witness statements, common structure of witness statement pursuant to Art. 4.5 of the IBA Rules shall be respected.

Preparing witness for cross-examination

Unprepared witness with lack of experience with cross-examinations may feel inconvenient and unmanageable pressure which affects his/her testimony and, ultimately the position of the party.

For such reasons, witness preparation is desirable.

As there is just a limited regulation for witness preparation in the arbitration laws (either statutory or institutional) or no


David Soukeník


Peter Štrpka


Lukáš Štefánik

regulation at all, ethical rules for counsels of different jurisdictions would apply.

Based on different approaches in various jurisdictions, the arbitration practice distinguishes between witness coaching and witness familiarisation.

Witness coaching vests in discussion of the facts and content of the evidence with the witness prior to cross-examination and in preparation of witnesses on what they should say at the oral hearing. Apart from the US and a few other jurisdictions, this practice is unlawful in most of the jurisdictions, including countries of Central Europe and the UK.

Witness familiarisation relates to explanation of practical aspects of cross-examination (eg sequence of cross-examination, responsibilities and roles of various persons present at the hearing). In relation to recent virtual hearings, the witness may also be instructed in terms of technical preparation and rules of the virtual hearing. Familiarisation may also include mock cross-examination (refraining from use of the facts of the case at hand). Witness familiarisation however shall not intervene to the content of witness evidence in any way.

Pursuant to internal rules of the Slovak Bar Association, the counsel shall not influence the witnesses. However, it is generally accepted that the counsel may interview the witness about facts and relevant documents and that it may explain practical aspects of cross-examination to the witness. The counsels in Slovak Republic are allowed to carry out witness familiarisation; witness coaching is not permitted.

Austrian lawyers' ethic code stipulates it is unethical to unduly influence a witness. Witness familiarisation as such is not prohibited. However, any attempt to convince the witness to give false testimony may result in criminal liability.

In Czech Republic, pursuant to ethical code of Czech attorneys, it is not possible to submit false or misleading evidence. Witness coaching is forbidden.

Lastly, witness familiarisation should be carried out by the counsel (unless the counsel would be precluded in particular jurisdiction – eg, in the UK as held in *Momodou* case) or by a firm specialised on witness familiarisation.

Selected arbitration cases

- Representing company operating in road sector in construction arbitration (2021 ICC Rules; case value: EUR €400m; co-operation with Simmons & Simmons);
- Representing Ministry of Transport and Construction of the Slovak Republic in ICC arbitration arising from delay of the PPP project, EOT and increased costs (2017 ICC Rules; case value: EUR €1.9bn; co-operation with Eversheds Sutherland);
- Counsel to a state-owned entity in respect to ICC arbitration arising from compensation for damage dispute (2012 ICC Rules; case value 700m);
- Counsel to the Slovak Republic in investment treaty arbitration based on a BIT, arising from the investment in the textile sector (UNCITRAL rules; case value: EUR €290m);
- Local counsel to the major international law firm in investment treaty arbitration based on a BIT, arising from health insurance (UNCITRAL rules; case value: EUR €1bn);
- Representing of the National Council of the Slovak Republic in six major court disputes (partially linked to investment arbitration proceedings) with foreign investors (cases value in total: EUR €600m).

L-R: David Soukeník (partner), Peter Štrpka (partner), and Lukáš Štefánik (head of litigation and arbitration)

SOUKENÍK – ŠTRPKA is a leading law firm in Slovak Republic
Tel: +421 2 322 02 111
E: akss@akss.sk

SOUKENÍK - ŠTRPKA

BANKIM THANKI QC

WORDS: TOM BAKER

My father had been a lawyer in India and East Africa but wasn't keen on me becoming a lawyer. It's a bit of a standing joke but it's true – every Indian parent wants their kid to become a doctor, whether or not you have any skillset in that direction! My dad was dead against the Bar in particular because it didn't have a regular income attached. There was no family encouragement whatsoever.

I defied my dad and did the subject I was most passionate about at university. History. I wanted to become a historian, and had a place to do a doctorate in modern British history at Oxford, but I changed my mind. My tutor at college suggested I wasn't necessarily suited to a solitary existence writing a thesis for three or four years. He suggested the Bar as it would be intellectually satisfying and I'd make some money.

My degree was ancient and modern history. I specialised in Roman history and modern British and European history from the 18th to the 20th century. I'd rather pick up a history book than a novel if I was on holiday.

You don't learn law from doing history, but handling a large set of facts and marshalling them – being able to put them together into a compelling narrative – is very much a historian's craft. Jonathan Sumption QC has spoken in similar terms about transferring history to the law. I would agree.

I hated Bar School. I found the conversion course boring. But I really enjoyed pupillage. I had marvellous pupil masters who were fun to be with. That's what convinced me I had gone down the right path.

I had Trevor Philipson QC as a pupil master. He sadly died a few years ago. He was the most marvellous and suave advocate, very smooth and polished in court, although he must have been like a duck furiously paddling under the water. While he prepared very thoroughly, he was effortless in court. Just a lovely man who loved the high life! He made a good living at the Bar and enjoyed his down time.

At Fountain Court, you don't do any advocacy in your second six months. In those days we used to be sent out to a criminal set of chambers under an exchange scheme. I came back briefly to Fountain Court and won a pro bono industrial tribunal hearing. The senior clerk at the criminal set must have thought I was a good advocate so he unleashed me on summary trials in the Magistrates' Court.

I got to do three jury trials which were utterly terrifying. My first experience I can remember vividly was making a plea in mitigation for someone at Hastings Magistrates' Court. While I was saying why he's such a great guy, he did a runner. I just heard a scuffle at the back of the room – he'd legged it. It wasn't a very auspicious beginning!

The most interesting early case I worked on involved a painting stolen from Berlin at the end of the Second World War by a Russian soldier. We think it went from the eastern part of Berlin back to Russia then back to East Germany, then to unified Germany. Then it ended up for sale at Sotheby's. It went to trial in front of Justice Moses for several weeks and it involved the most complex conflict of law issues. The ownership of the painting transferred between Nazi Germany, communist Russia, communist East Germany, Germany and then finally the UK. Legally it was very complicated!

My dispute resolution style is not overtly confrontational. I don't tend to pick fights with opponents. If an opponent is very aggressive or unpleasant I have ways of dealing with it, which tends to be speaking with the judge rather than reaching a compromise with an opponent. As a style it has served me well in cross-examination. The judges trust you more as being reasonable and balanced. And being co-operative advances both sides' cases.

It's organised warfare in court, and there's no need to extend it to outside the courtroom. I find that 95% of the time I get on perfectly well with the opposing counsel. There's no need for aggravation.

I have a good relationship with Mark Howard QC of Brick Court Chambers. I've done a lot of work against him, particularly the Russia v Ukraine case. He's got a reputation as an aggressive advocate but I haven't experienced that. I think we've formed a mutual respect. He's one of the best advocates I've seen. He's very polished and effective, and he has a commanding presence in court. What people say about him doesn't match my experience.

I did a recent case against Nigel Tozzi QC of 4 Pump Court. He was extremely nice to deal with outside court, but was very effective and tough in court in a way you wouldn't have predicted.

> Being a silk is a different existence, the buck stops with you. The existence you had sitting behind grand silks is gone – suddenly you're in the front row.

If there's anyone I try to model myself on in advocacy, it's Michael Crane QC at Fountain Court. He has a non-confrontational style. Smooth and effective, works ferociously hard, but also just nice. There's an infectiousness to it. Judges like him.

Chambers has been lonely and quiet at times since the pandemic. Because I'm head of chambers I see it as a duty, because I'm asking staff to come in, to come in most days myself. For large parts of 2020 and 2021 it has been very quiet. In normal times I've found chambers to be very collegiate and friendly. We've tended to have an open-door policy, where you can stumble into someone's room for advice.

I experienced the collegiality most profoundly after my wife died seven years ago. That's a time when you know you're in a genuinely supportive atmosphere. I had a lot of support from my head of chambers, and it couldn't have been a nicer and more supportive environment from the staff and all the members. I felt very lucky to be here.

I've been here since 1988 and I have a lot of affection for chambers. I've given a lot of my career to chambers in an unpaid capacity: I was head of our pupillage committee for many years, I've been deputy head of chambers and now head for the last four years. I've given a lot to chambers but I've got a lot out of it as well.

The ENRC/SFO case was an interesting one. I came in to do it for the appeal, and it was quite satisfying because I don't think the court was terribly sympathetic to my client. It was a tough appeal to argue because we had lost it at first instance comprehensively on the facts and the law. We had a very tough tribunal with Justices Leveson, Vos and McCombe. It was an uphill struggle.

Early as a silk I did a case against Michael Jackson. I was acting for one of the princes in Bahrain who was suing Jackson over a recording contract. Jackson was lying low in the Middle East for a year after the allegations, and he stayed with my client who was the second son of the king of Bahrain. He set Jackson up in a studio and entered into a recording contract, which Jackson then tried to get out of. It was all over the papers.

The social media road is not one I've gone down. People who are good explainers and can do it well provide a valuable role in busting myths. I'm too busy with my practice to spend time on my media exposure.

I sometimes find it's dangerous commenting on cases you don't know about. I'm often shocked when people are willing to comment on things they don't fully understand. They may be good lawyers, but they might not have grasped all the nuances.

Being a silk is a different existence, the buck stops with you. The existence you had sitting behind grand silks is gone – suddenly you're in the front row. It's scary in the beginning, but ultimately more enjoyable than life as a junior. If you don't enjoy advocacy then it's probably not for you!

Every barrister, bar a few, aspires to those two little letters.

We like slightly left-field holidays. The most exciting holiday we did was to Alaska with the whole family. There was lots of trekking and hiking and being quite close to grizzly bears! The last lodge we stayed in was only reachable by light aircraft. It's one of the advantages of being a barrister, you can allocate yourself a big slot of time and take a holiday.

I am a great fan of Woody Allen. I know I probably shouldn't say that seeing as he's been cancelled, but I really like him. My favourite film is *Play It Again, Sam*, which is a very funny take on *Casablanca*. Not a very fashionable opinion! Next on my list is *Parallel Mothers*, which is linked to the Spanish Civil War.

I'm a great fan of opera. It was one of the early things I went back to once we were able. Verdi is my favourite composer. The last opera I saw was Rigoletto.

I'm out of touch with contemporary music. My kids regarded me as a bit old-fashioned because I love people like Bob Dylan and Neil Young. But I've now converted them because they think modern music is crap.

I hate Marmite. Give me peanut butter any day. Tony Singla QC must have gone down well with you then. He loves Marmite, which had me surprised.

Crunchy or smooth? Smooth. I don't know why that rubs crunchy fans up the wrong way. I have this thing about mixed textures, I don't like the mixture of crunchy and smooth.

My favourite quote? "Because of the self-confidence with which he had spoken, no one could tell whether what he said was very clever or very stupid." From Tolstoy's *War and Peace*, the best novel ever written. The reason I like it is that life at the Bar has taught me that, because barristers are consummate bullshit merchants, one should never be beguiled by the confidence with which nonsense can sometimes be uttered in court!

Bankim Thanki QC is a barrister at Fountain Court Chambers.

LEGAL BUSINESS

WEBINARS

EXPERT CONTRIBUTORS

PRACTICAL GUIDANCE

PRIVATE PRACTICE, IN-HOUSE AND INDUSTRY PERSPECTIVE

WRITE UP OF WEBINAR TO FEATURE IN *LEGAL BUSINESS* MAGAZINE

WIDE-RANGING TOPICS

CORPORATE ETHICS

COVID-19

CRISIS MANAGEMENT

THE DIGITAL FUTURE

INSOLVENCY

INSURANCE

M&A

RESTRUCTURING

REAL ESTATE

+ MANY MORE

Disputes law in Egypt

Shalakany discusses private and administrative disputes in the Egyption legal system

One important point to immediately note about disputes law in Egypt is the difference between private law and administrative disputes. While it adopts a purely civilian system with respect to private law disputes, the Egyptian legal system adopts a hybrid system in relation to administrative disputes. Said hybrid system entails that, while the Egyptian administrative judiciary is tasked with applying statutory provisions to administrative disputes, it also enjoys the right to create the law in case of a lacuna in existing, applicable statutes. This dual role that is played by the administrative judiciary in Egypt of creating and applying the law carries with it important legal ramifications that should be noted and adequately studied by investors and companies who intend to carry out business in Egypt with the Egyptian government.

Pacta sunt servanda is a legal principle that is well established within the Egyptian legal system. However, contrary to private law disputes, it does not have an absolute, all-encompassing application within the context of administrative contracts. It is a well-established principle within the administrative judiciary in Egypt that, when a contract is classified under Egyptian law as an administrative contract, an administrative judge, or even an arbitral tribunal applying Egyptian law, would be empowered, even obliged, to read into the relevant administrative contract administrative law principles that are created by the Egyptian administrative judiciary throughout the years since its establishment in 1946. Said judge-made principles include, but are not limited to, principles that grant the contracting administrative authority the right to unilaterally amend contractual clauses, the power to apply sanctions onto the other, private law contracting party whenever the latter is in breach of its obligations under the relevant contract, the power to withdraw the works and enforce pending work at the expense of the other contracting party, and the power to unilaterally terminate an administrative contract whether for cause or for convenience.

> There are immediate caveats to note when contemplating the validity and enforceability of arbitration agreements that are concluded within the ambit or in relation to administrative contracts.

Said judge-created legal principles form part of Egypt's public order. Thus, said principles cannot be validly overridden, opted out of, or amended by way of adding contractual clauses that provide for a certain contractual order. A judge or an arbitral tribunal that applies Egyptian law would necessarily set aside any conflicting contractual clauses and, instead, give force and effect to said general, judge-made legal principles of administrative law, or otherwise risk its judgments or awards being nullified or denied recognition and enforcement by Egyptian courts.

Rather than being a theoretical legal problem that only occupies Egyptian legal textbooks, the aforementioned limitation on the application of the *pacta sunt servanda* principle within the context and sphere of administrative contracts has numerous practical applications, not only in Egypt but also in other civilian jurisdictions such as the UAE and Oman. Shalakany have recently been simultaneously involved in several international commercial arbitrations in relation to mega construction contracts for the execution of airports-related works in Egypt, Abu Dhabi and Oman. It is of importance to note that arbitral tribunals tend to approach substantive legal issues, such as unilateral termination by an employer for convenience or cause and the withdrawal of the works by an employer, with delicate care in an attempt to reach conclusions that do not offset the legitimate expectations of the contracting parties at the time of contracting, but does not conflict with judge-made legal principles that form part of the relevant jurisdiction's public order. Realising such a goal is far from a simple task, it can be fairly described as a difficult, if not impossible one. The likely end result being the court or arbitral tribunal reaching findings that do not necessarily

flow from the common intention of the contracting parties as outlined and reflected in the relevant agreement.

Secondly, in relation to the contracting parties' freedom of choice with respect to dispute resolution and governing law clauses, Shalakany notes that said freedom does exist but is not absolute. For instance, there are immediate caveats to note when contemplating the validity and enforceability of arbitration agreements that are concluded within the ambit or in relation to administrative contracts. Egyptian statutory provisions require the approval of the competent minister or whoever enjoys the competent minister's powers and privileges within public law personas. To ensure the fulfillment of said statutory requirement, a private law contracting party would need to ensure that the competent public official signs the arbitration agreement itself, not only the underlying agreement within which context and umbrella the arbitration agreement is concluded. Further, opting for a foreign, non-Egyptian law as the governing law of the underlying contract should not be considered as bulletproof means to evading mandatory, potentially unfavourable provisions of Egyptian law. Recognition and enforcement-related issues of a foreign judgment or award in Egypt tend to be important legal issues in the context of administrative contracts that are concluded with the Egyptian government. As such, it is of crucial importance that businesses, as well as transaction lawyers, approach such issues strategically by ensuring the non-existence of any fatal discrepancies between the governing law of the underlying contract as chosen by the contracting parties and the mandatory provisions that form part of Egypt's public order. Otherwise, a non-Egyptian investor would, in case of a dispute, end up expending substantial amounts in litigation or arbitration proceedings only to find that it cannot have a favourable ruling or award recognised and enforced in the host country of the investment. Moreover, it should be noted that Egyptian law does, in certain cases, adopt a strict regulation that denies the contracting parties any freedom to choose the governing law of their contract. For instance, transfer of technology contracts that are enforced in Egypt cannot be validly subjected, through the consent of the contracting parties, to a non-Egyptian governing law. Said restriction flows directly from a statutory provision of the Egyptian commercial law. Hence, when contemplating the conclusion of a mixed/hybrid contract that involves various elements rather than one simple transaction, one idea that could be explored is bifurcating said hybrid contract into stand-alone agreements. This solution could help realise various goals, including allowing a certain degree of flexibility in relation to the choice of governing law and dispute resolution mechanisms.

ADAM EL SHALAKANY
Tel: +20 (2) 272 88 888 (219)
E: adam.elshalakany@shalakany.com

MUHAMMAD USSAMA
Tel: +20 (2) 272 88 888 (314)
E: muhammad.ussama@shalakany.com

Dispute resolution in Malaysia

The team at Shook Lin & Bok discuss areas handled by the various sections of its dispute resolution department

Dispute resolution is playing an increasingly prominent role in Malaysia both in the civil courts and by way of arbitration.

This article seeks to set out, briefly, the areas handled by the various sections of the dispute resolution department of the firm and also to highlight some of the cases in which the firm has acted.

General and corporate litigation

The general litigation section deals with contractual and tort disputes including claims in defamation and fraud.

The section also provides representation in respect of proceedings brought under various statutory and regulatory provisions including securities legislation. The corporate litigation section deals with applications under the Companies Act 2016 (including applications for reduction in share capital) and company disputes relating to shareholders, directorships and winding-up of companies (encompassing all the circumstances in which a company may be wound up pursuant to the Companies Act).

> Judicial review applications are also being regularly sought where issues relating to planning permission approvals, development orders and the rights of land owners to be heard on such matters are considered by the courts.

Judicial review applications are also being regularly sought where issues relating to planning permission approvals, development orders and the rights of land owners to be heard on such matters are considered by the courts.

The Federal Court has, in a recent case involving a local authority, held that damages for pure economic loss are not recoverable, in tort, against a local authority. The Federal Court in doing so, relied on decisions in several commonwealth jurisdictions and also on general policy considerations including the specific funding provisions of local authorities.

Banking and finance litigation

The banking and finance litigation section is dedicated to assisting banking and financial institutions and securities companies in disputes, where they may be claimant or defendant. The section regularly handles matters concerning banking and securities laws, various aspects of the institution's operations and dealings including regulatory issues, claims against the institution be it civil or of a quasi-penal nature under anti-money laundering/anti-drug trafficking legislations and schemes/arrangements for transfer/vesting of its assets and business.

The section also handles retail, trade and corporate debt recovery (under conventional or Islamic financing, ranging from loans, hire purchase, leasing, syndication and margin/trade financing) and enforcement/realisation of security such as charges/mortgages over land, shares, maritime vessels or other assets.

The section was involved in a recent Federal Court matter where the issue was whether a statutory referral provision contravened the constitution.

In that case, a dispute arose as to whether a clause in an Islamic finance agreement was shariah-compliant. The High Court referred that clause to the Shariah Advisory Council (SAC) of the Central Bank pursuant to section 56 of the Central Bank of Malaysia Act 2009 (CBMA) to obtain a ruling on its validity under Shariah law.

The Federal Court considered whether sections 56 and 57 CBMA had the effect of vesting judicial power in the SAC and was therefore unconstitutional. It was contended that section 56 CBMA (which requires the court to take into consideration a SAC ruling or to refer a question on Islamic law to the SAC), as well as section 57 CBMA (which provides that any SAC ruling shall be binding on the court), had effectively usurped the court's judicial power to hear expert evidence itself and determine whether an Islamic banking transaction was shariah-compliant.

The Federal Court, by a majority, held those provisions were valid and constitutional and that the role of the SAC did not usurp the powers of the court as the SAC only ascertained the shariah law applicable to any Islamic banking transaction, with the final

determination of the dispute still within the jurisdiction of the civil court. It was also held that the SAC provided certainty to Islamic banking business.

Insolvencies, receiverships and restructuring

Insolvencies, receiverships and restructuring issues handled by the section include insolvency proceedings (personal/corporate insolvencies and receiverships), disputes concerning priorities to assets/payments, challenges to validity of dealings with assets (fraudulent/arising due to breach of insolvency laws) and asset distribution. With the recent amendments to the Companies Act 2016, the section has also acted in matters concerning the newly introduced corporate rescue mechanisms such as the appointment of judicial managers and schemes to restructure debts/turn around business.

Land disputes

The section also deals with disputes concerning land/real estate including disputes over rights to land and ownership issues (ie beneficial interests/trusts over land), land acquisitions/land reference and issues concerning land compensation, fraudulent disposals of land, land title issues, disputes concerning land use, tenancies/leases and the rights of landlord/tenants/leaseholders.

The section was involved in a landmark decision where the Federal Court (i) struck down section 40(D) of the Land Acquisition Act 1960 which provided that the opinions of two assessors assisting the court in determining compensation for land acquisition was final and binding on the court, in effect, restoring judicial independence as statutes that curtailed the power of the courts in contravention of the constitution may be struck down as unconstitutional, and (ii) held that compensation must be assessed and awarded for the extinguishment of business due to the acquisition on land.

Family, probate and trusts

This section acts in contentious litigation including divorce, judicial separation, adoption, annulment proceedings, maintenance for spouse and children, division/distribution of matrimonial property, custody disputes and settlement agreements. The section also deals in probate matters which include disputes on challenges to the validity of wills, construction of wills, advising beneficiaries for an account and inspection of documents, acting for beneficiaries in the removal of trustees.

Insurance

The insurance section deals with claims under general, life and also re-insurance policies. These include motor, industrial, maritime and aviation, construction risk, professional indemnity, product liability and workmen's compensation and business interruption claims.

The firm had occasion to appear for insurers in a fire policy claim where the Federal Court had to consider the principle of whether an 'agreed value clause' in a policy could apply where fraud was raised in view of disputes over the amount claimed and documents seeking to support the claim under the policy.

Conclusion

The broad ranging and diverse disputes which come before the courts will ensure that dispute resolution will continue as an important role in the Malaysian legal landscape.

ROMESH ABRAHAM
LLB (Hons) (Southampton)
Barrister-at-Law, Gray's Inn
Tel: (603) 2031 1788 (ext: 241)
E: romesh@shooklin.com.my

LAM KO LUEN
B.Comm. LLB, Monash University FCIArb, FMIArb
Tel: (603) 2031 1788 (ext: 243)
E: koluen@shooklin.com.my

CHAN KOK KEONG
LLB (Hons) (Leicester) C.L.P.
Tel: (603) 2031 1788 (ext: 237)
E: kkchan@shooklin.com.my

TAN GIAN CHUNG
LLB (Hons) (London) C.L.P.
Tel: (603) 2031 1788 (ext: 367)
E: gctan@shooklin.com.my

MEHALA MARIMUTHOO
LLB (Hons) (London) C.L.P.
Tel: (603) 2031 1788 (ext: 449)
E: mehala@shooklin.com.my

SHOOK LIN & BOK
EST 1918
KUALA LUMPUR

Recent developments in UK tax disputes

PwC discusses recent developments in what is being disputed with HMRC, and also how disputes are progressing

HMRC reports that it typically investigates around 50% of the UK's 2,000 largest businesses at any one time. Many of those businesses will, at some point, find themselves in dispute with HMRC – and these disputes are, in our experience, increasingly finding their way onto the radar of in-house legal teams.

Although some taxpayers saw HMRC pause their investigative work during the Covid-19 crisis as HMRC redeployed staff to administer the coronavirus job retention scheme, many taxpayers found that HMRC's enquiries continued unabated. The latest available figures show that HMRC investigative and compliance activities were responsible for around £30.4bn of tax revenues during the year ended 31 March 2021 (compared to £36.9bn in the previous year), notwithstanding Covid-19 difficulties. We have seen HMRC investigative activity steadily edge back towards 'business as usual'. HMRC told the public accounts committee in December 2021 that they expect work volumes, enquiry timelines and compliance yield to be back on an 'even keel' by 2022–23.

The UK tax disputes landscape is constantly evolving – as taxpayers and officers at HMRC adapt to challenges presented by changes in legislation, case law, and technological developments, as well as changes in how HMRC operates.

The UK tax disputes landscape is constantly evolving – as taxpayers and officers at HMRC adapt to challenges presented by changes in legislation, case law, and technological developments, as well as changes in how HMRC operates. We see development in both what is being disputed with HMRC but also in how disputes are progressing. We reflect on both of these below.

Developments in common areas of dispute

Anti-avoidance

Recent years have seen more and more disputes relating to anti-avoidance rules (of which there are several hundred in UK tax law). Whereas HMRC used to focus their anti-avoidance enquiries on tax planning which they saw as being particularly 'contrived', we are finding that HMRC now pursue vigorous anti-avoidance challenges much more routinely.

HMRC frequently table the 'unallowable purpose' anti-avoidance rule, which, when it applies, has the effect of disallowing corporation tax deductions arising from borrowings. In common with many UK anti-avoidance rules, the unallowable purpose rule is constructed to test the subjective purposes of the taxpayer in entering into a particular transaction or series of transactions.

Although it is clear that a company entering into borrowing with no meaningful commercial purposes for doing so, and clear tax purposes, can expect to be caught under the unallowable purpose rule, difficulty arises when taxpayers have mixed 'tax' and 'commercial' main purposes. There have been a string of recent tribunal cases – with more to come, and appeals ongoing – where the tribunals have grappled with, amongst other points, the question of what to do in these circumstances.

Good quality documentation contemporaneous to a transaction is essential in dealing with these sorts of anti-avoidance enquiries. In-house legal teams, with their evidence-based legal mindset, may find that they are able to add value to the thought-process here. To give one example: businesses can sometimes neglect to fully document points that may seem commercially 'obvious'. Yet capturing the thinking relating to such points in writing can prove useful to help inform HMRC (and, ultimately, the tax tribunal) looking at the matter many years later without inside knowledge of the business context.

Transfer pricing and diverted profits tax

Essentially, the transfer pricing rules apply when a UK company has overpaid expenses or under-received income on transactions

with connected parties compared to what would have been paid between unconnected parties acting at arm's length. The rules require the taxable profit of the UK company to be adjusted to reflect the arm's length figure. Cross-border loans, royalties, and management charges are typical areas of challenge. HMRC is also active in challenging the allocation of profits to UK branches of overseas companies.

Many taxpayers are, in our experience, finding it increasingly hard to agree arm's length prices with HMRC that the taxpayer can accept, and may find themselves facing potential double taxation as HMRC looks to price a transaction in one way but an overseas tax authority looks to price the same transaction in a different way.

We continue to see HMRC tabling specialist anti-avoidance rules which seek to identify profits which have been 'diverted' from the UK ('DPT rules') alongside transfer pricing challenges. A description of these rules is beyond the scope of this article, but put simply, the DPT rules impose strict time limits such that businesses may be motivated to move towards HMRC's view on the transfer pricing rather than face the potential risk of higher taxation under the DPT rules.

We are finding that many taxpayers are turning to a 'mutual agreement procedure' ('MAP') which is a process provided for in international tax treaties designed to eliminate double taxation where two territories seek to tax the same profits. In MAP, HMRC and the overseas tax authority impacted by a particular transaction(s) or situation are required by international law to endeavour to seek a mutual agreement about taxing rights. Over the last six years the total number of cases going through MAP globally has gone up by about 25%. We find that HMRC generally engages actively with MAP. According to the Organisation for Economic Co-operation and Development ('OECD'), 90% of UK MAP cases eventually reach some level of resolution, making recourse to the UK tax tribunal unnecessary in many cases. However, the MAP process is a lengthy one, with the global average duration being around three years – or a little under two years for UK cases.

Peter Johnson, director

> We continue to see HMRC tabling specialist anti-avoidance rules which seek to identify profits which have been "diverted" from the UK ("DPT rules") alongside transfer pricing challenges.

Employment taxes

Following recent legislative changes to the off-payroll working rules, PAYE compliance is another area that has received significant recent attention from HMRC. There has been significant activity in the tribunals and courts in relation to questions of employment status – the debate as to whether individuals are employed (and subject to PAYE) or self-employed. So far decisions are split broadly 50:50 (between the taxpayer and HMRC). Whilst themes are beginning to emerge from these cases, the application of status rules remains highly fact-specific. We are also seeing an increase in compliance activity in a number of specific sectors (financial services, oil and gas, public sector) as well as more generally in relation to engagements where contingent workers are providing highly regulated services. Labour shortages in a number of sectors such as logistics and healthcare are exacerbating the challenges faced by clients who are evermore reliant on temporary workers to fill gaps in their employed workforce.

Indirect taxes

Indirect tax disputes also continue to evolve. To give a flavour:

- Technology has been one driver of development. For instance, we have seen disputes arise regarding how aspects of VAT law pre-dating the digital age should be applied to new types of financial services products or operators (eg electronic payment systems).
- The consequences of Brexit have also underpinned some disputes. In particular, disputes have arisen regarding the application of UK VAT to intra-group transactions or arrangements arising as a result of Brexit.
- Another busy area of activity recently has been disputes relating to 'partial exemption special methods' (non-standard methods of calculating how much input VAT a business

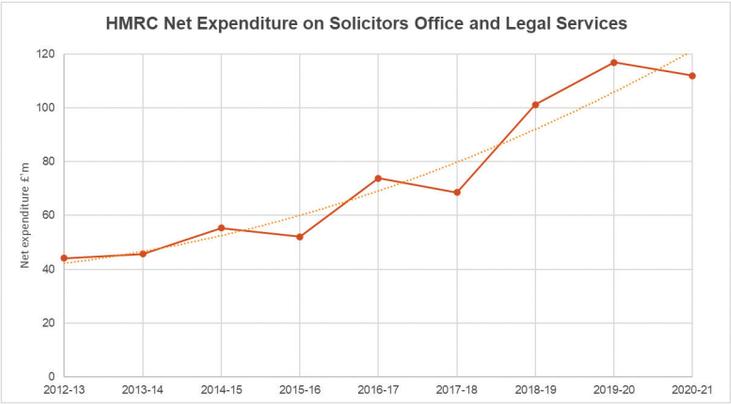


Figure 1 - HMRC net expenditure on 'Solicitors Office and Legal Services', according to HMRC's annual accounts. There has been a clear upward trend over the last eight years. We assume the slight dip in 2020-21 was a consequence of Covid-19 disruption.

should recover when it makes a mix of VAT-exempt and VAT-rated supplies).

Crypto assets

Tax authorities around the world are grappling with the question of how crypto assets – in their many forms – should be taxed and coming to different conclusions. There are several potential points of difficulty, particularly for UK resident non-domiciled individuals, but also for businesses investing or trading in crypto assets. We expect this to develop over the coming years.

International tax law changes

Significant changes to the taxation of international groups are currently in the pipeline, with a multinational effort involving around 130 countries, led by the OECD. One set of changes ('Pillar 1') will have a significant impact on how the digital economy is taxed. Another set of changes ('Pillar 2') will make radical changes to existing international tax rules in order to ensure a global minimum level of profit taxation. Many details about the mechanics of the new rules and how they will be administered are yet to be fully worked out. In time, points of contention may very well arise here.

'HMRC has a statutory power to require information and documents to assist them with their enquiries. Information requests can be onerous, and it is advisable to engage with HMRC to seek to agree a reasonable information request if possible.'

Developments in dealing with HMRC

HMRC's overall approach to disputes

Many businesses find that HMRC pursues tax enquiries vigorously.

Many disputes will begin with a HMRC information request. HMRC has a statutory power to require information and documents to assist them with their enquiries. Information requests can be onerous, and it is advisable to engage with HMRC to seek to agree a reasonable information request if possible.

Of potential concern to in-house legal teams, recent years have also seen an uptick in HMRC raising serious allegations about taxpayer behavior as a dispute unfolds. There are several reasons for this. Establishing 'careless' taxpayer behaviour will enable HMRC to assess to tax years that might otherwise be time-barred. HMRC will also wish to address whether in addition to collecting tax, they should also be charging penalties. We have also seen an increase in Code of Practice 8 and 9 enquiries – which are used by HMRC when they suspect serious taxpayer misconduct.

HMRC are not afraid of litigation. It is possible to get some sense of this by looking at the steady recent growth in HMRC's 'Solicitors Office and Legal Services' expenditure (figure 1). HMRC reports a very high litigation success rate (86% success rate in the year ended 31 March 2021). It is worth bearing in mind though that many of the 3,000-5,000 tax appeals that are submitted to the tribunal (upon which this success rate is based) are routine procedural matters, often involving unrepresented taxpayers, where the appeal may well be without any substantive merit. For more sophisticated disputes, it may be a more helpful indication of HMRC's success rate to look at appeals above the first instance tribunal – typically around 50% to around 80% in a given year.

Settlement

Despite these factors, our experience is that tax disputes can often still be resolved without resorting to litigation. However, it is important to keep in mind that HMRC does not approach settlement like a normal commercial opponent. Any settlement

must comply with HMRC's 'litigation and settlement strategy' which, (i) stops HMRC from compromising on black-and-white issues where HMRC thinks it has a greater than 50% chance of success, and (ii) requires there to be a legally-robust basis for settlement in cases which are not black-and-white. In our experience, the 'litigation and settlement strategy' is carefully applied to settlement decisions.

We find that it is also possible to usefully engage HMRC in alternative dispute resolution (ADR). HMRC reports that 78% of cases going to ADR during the year ended 31 March 2021 were successfully resolved. However, once again, ADR with HMRC is different to normal commercial ADR: for instance, HMRC insists that the 'independent' mediator needs to be one of their specially-trained officers. Our experience is that ADR can be a very useful way of moving to resolution in tax disputes.

Shifting the burden of risk assessment onto taxpayers?

HMRC, like many other tax authorities, faces the challenge of closing the gap between what the government thinks it should be collecting in tax revenues and what it actually collects (the 'tax gap'). Yet, despite efforts to continue to close the tax gap, the tax gap has remained steady – at around 5-6% of theoretical tax liabilities – since 2015. Preventing the tax gap from lifting up from this historically low level, and trying to shrink it further, remains a significant challenge for HMRC – which also needs to keep its own spending under control.

Part of HMRC's answer to this has been to seek more forensic ways to identify and assess risks, and HMRC has been relying increasingly on: (i) greater use of technology, and (ii) to place more of the compliance burden on taxpayers. We think this will steadily change the tax disputes landscape over coming years. There are two recent examples of this shifting compliance burden that spring to mind:

- The profit diversion compliance facility ('PDCF') – introduced in 2019 – where we have seen continual ongoing activity. Essentially, taxpayers entering into the PDCF undertake their own audit into their tax position (as regards 'international' matters such as transfer pricing), and send a comprehensive disclosure to HMRC to show why their historic filing positions have been correct or to propose amendments, in exchange for penalty mitigation. This facility has been supplemented by the use of 'nudge' letters that HMRC sends to selected taxpayers to invite them to consider entering into the facility.

- The 'uncertain tax treatment' regime, which became law in Finance Act 2022. This will apply to corporation tax, PAYE/NIC and VAT returns filed by certain larger businesses on or after 1 April 2022. This measure obliges businesses to make HMRC aware of particular types of uncertainty in their tax returns.

Conclusions

Anticipating and having a proactive approach to managing tax disputes can make successful resolution much more likely. Disputes are very likely to come to a head many years after the transactions at the heart of the dispute, and this can prove challenging when it comes to assembling the evidence. In practice these challenges can be mitigated by giving some thought to how to evidence positions on transactions that are likely to attract the attention of HMRC at the time of those transactions. HMRC is likely to be concerned to consider in detail the relevant taxpayer 'behaviours' and again this can be challenging to evidence many years later. Overall resolution must involve confronting HMRC with a real litigation risk, as HMRC will only reach a resolution on the basis that it is an outcome which is foreseeable in litigation.

Mark Whitehouse, partner

MARK WHITEHOUSE
Partner
Tel: +44 (0) 7715 705102
E: m.whitehouse@pwc.com

PETER JOHNSON
Director
Tel: +44 (0) 7710 036079
E: johnson.r.peter@pwc.com

PricewaterhouseCoopers LLP
1 Embankment Place, London, WC2N 6RH
www.pwc.co.uk

SUSAN DUNN

WORDS: MEGAN MAYERS; PORTRAITS: BRENDAN LEA

I come from a family of engineers. I have not a single engineering bone in my body, to my father's great disappointment, but it's about problem solving, and I guess that's the sort of thing that runs through engineering and through law.

During a periodic tidy up, my mum found a hymnbook from my school and in the front of it, as the prig of a child that I was, I had written that when I grow up I wanted to be, not one, but three things. I wanted to be a lawyer, a social worker, and prime minister. Those were my aims in life. Aged nine.

I love the stories that come with the law. I love telling a story and I love hearing a story. And that's basically what being a lawyer is, it's a story with the law wrapped around it. That brings with it endless variety and endless problem solving, and that appetite for the next story has never diminished.

A good friend of mine is the head of criminal justice in Edinburgh social services. I look at what she does and think: 'Gosh that's a big old job.' I wouldn't be prime minister, my politics probably wouldn't allow it. I love art, so if I wasn't a lawyer, artistic talent would be amazing. Or to be a stand-up comedian.

> I love telling a story and I love hearing a story. And that's basically what being a lawyer is, it's a story with the law wrapped around it.

I started in property, I was terrible at that. I was terrible at my seat in pensions, wills and trusts. I was terrible at corporate too. They all couldn't wait to see the back of me. But then I got into disputes and this wonderful woman called Helen Mason, who trained me and to this day is one of my dearest friends, spotted that there was some ability there and devoted a lot of time to basically saving my bacon so that I was kept on.

As a very young lawyer I found myself in the Court of Appeal; I remember being absolutely mesmerised by it. It was a case about Travel West Midlands bus drivers that were being balloted about whether they wanted to strike, and the legal question that came out of that was whether it had to be the majority of only those voting in the ballot or the majority of all the members.

I remember thinking: 'This is better than any kind of theatre or television drama.' I was in awe of the ability of the judges making those decisions and found it utterly fascinating that these people were so able, and so clever and gathered the points quickly.

I've had an interesting working life. I've worked in the States, I've been a diplomat, I've worked for a dotcom. When I came back here from living in the States, I knew I didn't want to go back into private practice.

I bumped into a barrister on the Tube who I used to instruct when I was in practice David Lock, now QC. I asked what he was going to do next, and one of the things he said he was contemplating was litigation funding. What I didn't learn until many, many years later was that night he spoke to Helen Mason and said: 'I bumped into Sue Dunn on the train, and I'm going to do this thing.' She said: 'You should do it with her.'

We started with a million pounds, first working out of his house, we then moved into a converted carpet factory in Kidderminster – which my colleague likes to say was a 'disused carpet factory', but it was converted. Quite quickly after that, he was offered the job to run the National Criminal Intelligence Service and I said it would probably be better if he did that full time while I focused on the funding. So, for five years it was just me and the board of the business.

There was always a quite a snooty response to us. Sort of: 'Oh, we don't want to talk about money.' Almost as if they were saying: 'Let's not sully ourselves by talking about money, it's just a very intellectual thing we do over here that people happen to pay us for.'

More times than I care to mention the first response I'd receive from litigators was not: 'That's great, can we

do some cases?' or 'Let me tell you about all the good stuff I do', it was: 'If I'm negligent, will you sue me?' I just thought: 'Really? Is that your most positive message?'

We tried to raise money in 2007. We had two suitors for £50m and then we had none because Northern Rock fell over and the world started falling apart. We set Harbour up in late 2007. First within a multi-strategy hedge fund, and then we spun it out in early 2009. We've been raising funds since then, we've now got $1.4bn across five funds.

Raising the first fund was still the most difficult thing I've ever done in my working life. Trying to raise money in 2008/9 when the world had just fallen apart was really difficult.

Nowadays there is nobody – no type of claimant, no type of law firm – who doesn't call us. So those people who used to ignore my calls or my emails then went: 'Ah, it turns out our client does need this money.' People have realised that we're just part of the ecosystem now. One of the things I get frustrated about is this notion that funders fund speculative cases. Well, we would go out of business if we handled speculative cases, we are only going to fund good cases.

> One of the things I get frustrated about is this notion that funders fund speculative cases. Well, we would go out of business if we handled speculative cases, we are only going to fund good cases.

There's an ongoing case we have for Indonesian seaweed farmers whose crop was ruined by an oil spill. There was also the *Roadchef* case, where we were funding employees who had money taken from their employee share option scheme. Those are the cases that, as and when they succeed, are particularly pleasing. Where you have claimants who would not have been able to succeed without the funding.

Whatever I do, I always try and bring people together. When I started Harbour, it was just me. But I have always tried to encourage a collegiate atmosphere so that people feel able to speak up. When we grew and we had more people, I had coaching to help with that sort of transition. I want to hear what everybody has to say. I believe people at all levels here would honestly say that they feel able and confident to be able to speak up. There's no hierarchy, we have a very flat structure. I'm very keen on that.

During the pandemic, we saw how different jurisdictions dealt with the challenge. I've got to say, hands down, this jurisdiction was head and shoulders above everywhere else in the world, the other common law jurisdictions. If you take the business interruption insurance cases that we funded, the claims were issued in July 2020, and we had a Supreme Court decision by January 2021.

My biggest inspiration from within the legal profession is Nicola Mumford, who was the managing partner of Wragge & Co. She has been a source of tremendous support and guidance and mentoring to me over the years, right from the very early days. Outside of the law? My dad. He made me helpfully oblivious to whether women can succeed or not. I never for a moment thought: 'I wonder if I can or cannot do this because I'm a woman', because he made me think that everything is possible.

I have a big art addiction. I have a large collection that I've loved buying, mostly from emerging or developing artists. I only ever buy things that I love. It's a passion that started in my teens, and I have become friends with several artists. I'm endlessly fascinated by the artistic mind and what it can represent.

I did a motorbike trip through India on a Royal Enfield Bullet motorbike. That was one of the most spectacular things I've ever done. I went from Goa to Cochin. I'd love to do something like that again.

One of the most fascinating places I've visited is Eritrea. I was drawn to go there because I love art deco architecture, and the Italian occupation there led to quite a big art deco development in the capital and likewise in next door Ethiopia, so I might have to go there too.

My friends would say that I'm a big 'pay it forward' person. I know that I have benefited massively from those who have supported me along the way, and I feel a huge responsibility to keep paying it forward for others. That's how we keep lifting everybody up; that is the key.

Susan Dunn is one of the founders of Harbour Litigation Funding and chair of the Association of Litigation Funders. She is widely regarded as one of the pioneers of third-party disputes funding in the UK.




International dispute resolution in Cyprus

SCORDIS, PAPAPETROU & Co LLC examines the key elements of civil fraud proceedings in Cyprus

Introduction

Cyprus has built on its emergence as an international business centre by becoming a serious litigation hub for international dispute resolution, involving, more often than not, international white-collar crime cases instigated by private individuals, companies and governmental bodies alike. The accession of Cyprus to the EU has also contributed to the number of civil fraud cases coming before the Cypriot courts, especially when coupled with the fact that Cyprus is a common law system and most of the leading litigators are UK-educated and qualified lawyers with support teams of analogous education and background.

This article will examine the key elements in bringing proceedings in Cyprus in respect of civil fraud. These include the application of the EU rules on international jurisdiction and the recognition and enforcement of judgments, the wide powers of the Cypriot courts to grant effective interim relief both in cases where substantive proceedings are brought in Cyprus and in cases where such proceedings are brought in the courts of other EU member states. It also includes the willingness of the Cypriot courts to exercise these powers in order to facilitate the identification of wrongdoers, enable the preservation or evidence and the disclosure of information and documents relating to the fraud, ensure the preservation of assets for the purposes of execution and facilitate the tracing of misappropriated funds. While there is always scope for improvement of the justice system (eg by the wider implementation of e-justice, reducing backlog and increasing the number of specialised courts), experience has shown that the Cypriot courts are a solid and successful option for international (common law) dispute resolution and especially international civil fraud cases.

“While there is always scope for improvement of the justice system, experience has shown that the Cypriot courts are a solid and successful option for international (common law) dispute resolution and especially international civil fraud cases.”

Jurisdiction

Cyprus being an EU member state, the rules governing the international jurisdiction of the Cypriot courts primarily consist of the rules set out in the Recast Brussels I Regulation[1], which apply with respect to defendants domiciled in Cyprus or in another EU member state, the rules set out in the Lugano Convention[2], which apply with respect to defendants domiciled in Switzerland, Norway and Iceland, and the national rules of jurisdiction which apply with respect to defendants domiciled in other countries. These rules enable substantive civil fraud proceedings to be brought in Cyprus in a wide variety of situations, such as where the defendants or any one of them is domiciled in Cyprus or where a significant part of the wrongful acts giving rise to liability occurred in Cyprus. It should be noted that:

- Where the provisions of the Recast Brussels I Regulation apply, the defendant's domicile in Cyprus is, generally, a sufficient basis for jurisdiction notwithstanding the facts of the case have little or no connection with Cyprus[3];
- In cases involving multiple defendants, the fact that one of the defendants is domiciled in Cyprus may permit the Cypriot courts to assume jurisdiction over other co-defendants not domiciled in Cyprus if the claims against such co-defendants arise from the same or similar facts or are otherwise sufficiently connected with the claims against the 'anchor defendant'.

Interim relief modelled after UK practice

Section 32(1) of the Courts of Justice Law of Cyprus[4], Law No. 14/60, provides that every court in the exercise of its civil


Alexandros Gavrielides, partner

jurisdiction may grant an interlocutory, perpetual or mandatory injunction or appoint a receiver 'in all cases in which it appears to the court to be just and convenient to do so'.

Section 32(1) of the Courts of Justice Law is based on the predecessor of section 37(1) of the UK Senior Courts Act 1981. Given its historical origins, in exercising their power to grant interim relief, the Cypriot courts have consistently looked into the case law of the English courts. As a result, Cypriot case law on interim relief has developed and continues to develop along the same lines as the case law of the English courts, as was noted by the Supreme Court of Cyprus in a landmark judgment in the case of *Seamark Consultancy Services Limited v Lasala*[5].This case was:

- The first time a Cypriot granted a worldwide freezing order *and* ancillary orders for the disclosure of assets in support of a civil fraud claim;
- used by the Supreme Court to encourage the lower courts to follow the developing English case law and make use of the very wide powers given to them by section 32 of the Courts of Justice Law so as to grant effective interim relief, bearing in mind the constant and rapid changes in the ways in which assets are held and transactions are carried out in a global environment as well as the fact that, in today's world, fraud knows no borders.

Types of court orders

Over the last 15 years the Cypriot courts have granted a wide range of interim orders in support of both domestic and foreign civil fraud proceedings, including, among others:

- Worldwide freezing orders;
- Ancillary orders for the disclosure of assets (including assets located outside Cyprus;
- Pre-action disclosure orders ordering the disclosure of information and documents held by banks, providers of administrative services in respect of companies and other parties for the purpose of enabling the applicant to identify wrongdoers involved in the fraud or obtain vital information concerning the wrongdoing;
- Disclosure orders ordering the disclosure of bank statements and other information for the purpose of enabling the applicant to trace misappropriated funds and/or identify assets acquired with misappropriated funds;
- 'Chabra orders' freezing assets held or controlled by third parties as trustees, agents or otherwise for or on behalf of the defendants and/or assets which could otherwise become available to satisfy a judgment against the defendants; and


Christos Scordis, partner

- Search orders (known as 'Anton Piller orders') ordering persons who were in control of premises situated in Cyprus to permit an independent 'supervising advocate' and the applicant's representatives to enter such premises for the purpose of searching them and obtaining and removing documents and information relating to the fraud or to the tracing of misappropriated funds which would otherwise be at risk of destruction.

The granting of such orders is, of course, always at the discretion of the court which must be satisfied, on the basis of detailed evidence on affidavit, that the conditions for the granting of such orders (the general conditions for the granting of interim relief and the special additional conditions which are required to be satisfied in each case depending on the type of order sought) are met.

> In order for a Cypriot court to exercise its power to grant interim relief in support of proceedings pending before the courts of another EU member state, there must be a "real connecting link" between the subject-matter of the interim relief sought and Cyprus.

Power to grant interim relief in support of foreign proceedings

The Cypriot courts have the power to grant the types of interim relief described above both in support of substantive civil fraud proceedings brought in Cyprus and in support of substantive proceedings pending before the courts of other EU member states. The power of the Cypriot courts to grant interim relief in support of substantive proceedings pending before the courts of other EU member states derives from Article 35 of the Recast Brussels I Regulation, which provides that application may be made to the courts of a member state for such provisions, including protective measures as may be available under the law of that member state, even if the courts of another member state have jurisdiction as to the substance of the matter.

As per the case law of the Court of Justice of the European Union[6], in order for a Cypriot court to exercise its power to grant interim relief in support of proceedings pending before the courts of another EU member state, there must be a 'real connecting link' between the subject-matter of the interim relief sought and Cyprus. This condition has been interpreted as meaning that a Cypriot court may only grant interim relief in support of proceedings pending before the courts of another EU member state if (a) the defendant against whom

interim relief is sought is domiciled in Cyprus; and/or the assets in respect of which interim relief is sought are situated in or held through legal entities incorporated in Cyprus.

An illustrative example: JSC BTA Bank v Ablyazov

The well-known and long-running international case of *JSC BTA Bank of Kazakhstan v Ablyazov*[7] is a case which illustrates both the wide range of tools that are available in the quest to recover assets in cases of white-collar crime in Cyprus and how putting them to good use can lead to tangible and significant relief, benefits and results.

In the case in question, which concerned a series of proceedings brought by the claimant bank in a number of jurisdictions against members of its former owner, management and persons associated with them in connection with the recovery of fraudulently misappropriated funds exceeding US$4bn, the Cypriot courts granted a series of orders which were instrumental and significantly assisted the claimant bank in achieving a successful outcome and recovering assets. These orders included:

- **Worldwide 'Chabra orders'** freezing the assets of over 600 companies believed to be ultimately owned and controlled, through various nominees, by the bank's former owner and used by him in order to conceal his wrongdoing and put misappropriated assets beyond the bank's reach;
- **Search orders** directed against two Cypriot providers of administrative services and a Cypriot company which resulted in the bank obtaining crucial evidence in respect of a wide-ranging fraudulent scheme as well as evidence which led to the bank's former owner being found guilty of contempt by the English High Court;
- **Recognition orders**, in relation to an order of the English High Court appointing interim receivers over the assets of the bank's former owner which resulted in the receivers assuming control of a large number of Cypriot companies believed to be ultimately owned and controlled by the bank's former owner and their assets;
- **Disclosure orders** against the administrator of a bank formerly operating in Cyprus which resulted in obtaining significant information with respect to transfers of misappropriated banks made using accounts maintained with the bank;
- **Injunctions** prohibiting a Cypriot company and its directors from invoking or relying on a forged 'Factoring Agreement' purportedly entered between the bank and the Cypriot company in question which resulted in the Cypriot company admitting that the purported 'Factoring Agreement; was illegal and void;
- **Intervention orders** granting permission to the bank's lawyers to intervene in Cypriot court proceedings in which the bank was not a party in order to protect the bank's interests and prevent the granting of relief affecting the bank's rights;
- **Imprisonment for contempt** where a key person in the operations of the main defendant (Mr Ablyazov) actively sought to evade the orders of the Court.

Cyprus as litigation hub post-Brexit

Cyprus combines a common law system with many of the advantages of England as a jurisdiction with the added advantage of ensured enforceability of Cypriot orders and judgments not just in all other EU member states but also in many non-EU countries with which Cyprus has bilateral agreements, including Russia and Ukraine. Brexit, and the absence of provisions in the UK's and EU's Trade and Cooperation Agreement of 30 December 2021 regarding jurisdiction and the enforcement of judgments, means there are few options for putting a claim before a common law Court, seek the remedies and processes that a common law system makes available and enjoy the benefits of EU-wide automatic recognition and enforcement. This is expected to lead to an increase in the number of international civil fraud cases coming before Cypriot courts.

Conclusion

All the above combine to make Cyprus a suitable and attractive jurisdiction for international dispute resolution (and in particular civil fraud litigation), well placed to host and handle successfully a bigger number of major international cases. Significant reforms and innovations are being introduced in order to ensure that cases are dealt with expeditiously, as well as fairly, in order to preserve and increase the attractiveness of Cyprus as an international dispute resolution location.

1. Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
2. Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters signed in Lugano on 30 October 2007
3. See *Owusu v Jackson* (Case C-281/02) [2005] ECR I-1383.
4. Law No. 14/1960 as amended.
5. *(2007) 1 (A) A.A.Δ. 162*
6. See *Van Uden Maritime BV t/a Van Uden Africa Line v Kommanditgesellschaft* in Firma Deco-Line, C-391/95
7. SCORDIS, PAPAPETROU & Co LLC acted as local counsel for the claimant

S P &Co
SCORDIS • PAPAPETROU

RPC interview series – Simon Hart

Two years on, how much of an impact has the pandemic had on banking litigation?

Considerably less than anybody predicted. I wrote a piece about a month into the first lockdown about some economic trends we might see and I'm pleased to say few of those bleak assessments came to pass. The reason they did not come to pass is largely because of Government financial support. Banking and financial markets litigation is closely correlated to the state of the economy, probably more so than most other litigation areas and we have seen the bounce back of the economy from the pandemic. The relative stability of the markets throughout 2020 and 2021 have meant that some of the things that we feared might happen economically have not materialised.

> ESG is now prominent, in every part of life frankly. It has come from nowhere to everywhere in the space of a year.

What types of disputes have materialised as a result?

In March 2020 when the pandemic began, financial markets nosedived. From the commodities markets, and oil market in particular, to the equity markets. We did see disputes off the back of those movements, almost instantly. Some of the disputes we are still working out, particularly in the derivatives space.

Could we see similar issues arising from current market volatility?

Significant volatility in financial markets gives rise to disputes, particularly when there are very significant movements very quickly, even if the market then bounces back. This is because participants in the market are often entitled to make margin calls against counterparties. When you get extreme margin calls that parties cannot meet, you then get the forced closeout of positions, often resulting in valuation disputes.

The way financial markets, particularly commodity markets, have been reacting to what's happening in Ukraine has an economic impact on those involved in those markets. We have seen the price of oil moving all over the place and other commodities have seen similar price movements. Somebody somewhere in the economic environment will be on the losing side of those price movements and very often that gives rise to disputes as to whether margin calls have been properly made.

We continue to see an increase in fraud disputes, what is driving this?

Two things are driving this. Firstly, in times of economic turbulence, the tide goes out and you see who has and has not got clothes on, so to speak. Significant corporate frauds, whatever form they might take, often materialise when the economy is stressed and there is no longer money coming in the front door to cover off that going out the back.

The other factor is the disaggregation of the financial markets over time. Banks themselves continue to make up a very significant part of the financial environment. They are pretty much fundamental to everything we do on a daily basis, whether visible or not, but there are now a lot of other platforms and instruments that have emerged into the financial markets. You only have to look at the emergence of cryptocurrencies in all their various guises and related crypto exchanges. Regulation is patchy at best, particularly in some of the jurisdictions most relevant to these assets. Once you get into that type of scenario, the door is open to fraudsters.

We have had a mass of crypto fraud enquiries. It is indicative of the experiences people can have when they deal with these more peripheral exchanges and crypto markets.

What other trends are you seeing in your practice?

Over the last decade people have become much more willing to litigate generally and are more willing to go head-to-head with a bank. The pure volume of banking litigation that we saw a few years ago post global financial crisis – where you had many disputes being determined involving derivatives close-outs, swap mis-selling and the like, has all washed through, bar the odd case. But it has been replaced, not by dozens of cases which fall within a particular single category, but instead by an increase in business-as-usual banking disputes.

Recent cases have put the Quincecare duty in the spotlight, what does this mean for banking litigation?

There has been the recent case of *Philipp v Barclays Bank* which is an interesting development because it effectively acknowledges at

least the possibility that it is a duty which extends to individuals, and not just corporates, including those who gave the relevant instruction to the bank themselves. Traditionally Quincecare was a duty which protected corporates from the fraudulent actions of their directors and their agents.

The decision in *Philipp* is obviously an interesting potential extension to the duty. The Court of Appeal in this case was only overturning a summary judgment decision, so they were not saying definitively that the duty was extended. Instead, they were saying that they are not going to rule out that that could happen on the particular facts of this case. The court, however, emphasised the public policy considerations underpinning the Quincecare duty which reflects the role of banks in combatting fraud.

There is also the *Nigeria v JP Morgan* case which took place in late February to early April this year and which concerns the Quincecare duty. Judgment is awaited. So, it's a case of 'watch this space' with regard to Quincecare.

Do you still expect to see banking litigation arise from the LIBOR transition?

There is no doubt that the process of market participants transitioning their contracts away from LIBOR has gone slower than the regulators wanted. It is not necessarily easy to do. Some market participants never really woke up to the fact that it had to be done. By extending the transition period beyond December 2021 and allowing the use of synthetic LIBOR, the FCA has taken some of the sting out of the risks that were evident. A cliff edge has been avoided.

It has been a wake-up call and given people an opportunity to do what they need to do. There may well be disputes down the line, but I do not think that they will be as widespread as they would have been had there not been the extended transition. There will be some people who do not get their act together, but it is not going to be the potential systemic issue that some people were concerned about 18 months ago.

Have ESG issues reached financial markets litigation?

I can definitely see it arising. ESG is now prominent, in every part of life frankly. It has come from nowhere to everywhere in the space of a year. In financial markets litigation, the area where it might first appear will be funds or products that have marketed themselves as green or meeting some particular ESG criteria and which have been mis-sold because they haven't in fact, met the advertised criteria.

That could cause a chain reaction where a particular product is not compliant with an ESG benchmark which it claimed to have been, and that product then becomes included in a green investment fund, putting the fund outside of its authorised investment parameters. In that context the legal principles are not really any different to any other misstatement or mis-selling scenario. So I can see people beginning to scrutinize whether products actually meet stated ESG criteria and what claims they might have if sold to them on a false basis. There is however a potentially interesting issue around loss as many ESG products have in fact performed well.

We have not seen this materialise in litigation as yet, but as people focus on it, we will inevitably see investors kicking the tyres on such claims. You can see this area growing just by the fact that people are focusing more on ESG credentials and the market for ESG compliant products and funds is expanding rapidly.


Simon Hart

How would you describe RPC's banking litigation practice?

Expansive and mature. The team at RPC has been operating in this space for 12 years now and we have grown enormously within that time. There is a huge amount of experience amongst the partners and associates in the group going back to the mid 1990s.

We are helped too, because we have soft borders between practice groups. We have a really experienced and very internationally-focused banking litigation practice, but we are also surrounded by other teams within the firm which are very relevant to what we do.

A number of the disputes we deal with have a restructuring or an insolvency angle and we have a team that specialises in that and provides support to us. Other cases need corporate advice. For example, I had a very high value dispute last year against an investment bank where the client needed advice as to whether it needed to notify the issue to the markets. The corporate team could provide that to us.

What differentiates RPC's banking litigation practice from other firms?

The majority of our work is claimant side, so the other firms who would be bringing those same claims against the investment banks would be large boutiques. What sets us apart from those firms is that we have support around us from different practice areas within the firm, such as the regulatory, corporate, insolvency and restructuring teams that I mentioned.

As against other more 'full-service' firms, we are one of the few full-service City firm that does not act for any of the top 20 largest investment banks. We have significant room for manouevre to act against those banks, unencumbered by transactional relationships.

RPC

Cryptocurrencies in the Kingdom of Morocco

Afrique Advisors on cryptocurrencies in the Kingdom of Morocco

'It is a question of when, not if. Cryptocurrencies represent the future and should be regulated.'[1] In a context where the regulation of cryptocurrencies is still under construction, Morocco is seeing the gradual emergence of a potential legal framework in this area.

Since 2017, the statements made by several regulators portray Morocco as a country where the use of crypto-currencies is formally prohibited and constitutes a violation of the country's foreign exchange regulations.

This image contrasts vigorously with the fact that, according to US research firm Chainalysis' Report,[2] the Kingdom not only ranked 24th in the world in the use of virtual currencies in 2021, but further ranked 4th in Africa, with a peer-to-peer crypto trade volume of US$6m exchanged, and first in North Africa. Data clearly illustrates that Moroccans have never stopped being active in the *crytposphere*, despite the conservative approaches originally taken by the authorities.

'It is important to emphasise that Moroccans currently handling cryptocurrencies are operating in a risky environment due to a major legal vacuum in this area, creating numerous jurisprudential divisions as a result of the original conservative stance taken by the authorities.'

In the aftermath of the publication of the report, Moroccan regulators launched a debate across both the legislative and executive branches to regulate the developing sector, according to the Minister of Finance.[3]

Thus, although cryptocurrencies attract more and more followers in the Kingdom, it is important to emphasise that Moroccans currently handling cryptocurrencies are operating in a risky environment due to a major legal vacuum in this area, creating numerous jurisprudential divisions as a result of the original conservative stance taken by the authorities (1). However, in the face of its continuous growing development and the many stakes involved, the regulators remain open to an attempt to insert these new technologies in the Moroccan legal framework (2) and the authorities are also intensifying their efforts to make room for blockchain projects for professional or institutional use in order to put the blockchain at the service of financial inclusion (3).

I. The absence of any specific regulation pertaining to cryptocurrencies in Morocco

The Foreign Exchange Office (FEO) and the Ministry of Finance informed the public in a 2017 press release that 'transactions carried out via virtual currencies constitute an infringement of foreign exchange regulations, subject to penalties and fines provided by the texts in force'. The regulator also urged 'those concerned to comply with the provisions of the foreign exchange regulations which provide that financial transactions with foreign countries must be made through authorized intermediaries and with foreign currencies listed by Bank Al-Maghrib' (BAM, the Moroccan Central Bank).[4]

The following day, the Ministry of Finances, BAM and the Moroccan National Capital Market regulator (AMMC) issued a press release in which they 'warn the public about the use of this instrument as a means of payment' as they are not regulated nor recognised by the monetary authorities and drawing 'the public's attention to the risks associated with the use of virtual currencies', including the lack of consumer protection, the lack of regulatory protection to cover losses in case of failure of the exchange platforms, the lack of a specific legal framework to protect users of these currencies in relation to the transactions carried out, the volatility of the exchange rate of these currencies, the use of these currencies for illicit or criminal purposes, and finally, the failure to comply with the regulations in force, in particular those relating to the capital markets and foreign exchange legislation.[5]

The statements, originally intended as simple warnings and recommendations[6], were quickly interpreted as a 'ban' on

cryptocurrencies, effectively extending to these assets the foreign exchange regulations that only allows Moroccans to hold accounts abroad under certain conditions and which provides that only currencies that are legal tender and recognised by the Central Bank can be used as a means of payment. Such interpretation was based on an interpretation of article 339 of the Penal Code which punishes 'the manufacture, issue, distribution, sale or introduction into the territory of the Kingdom of monetary signs whose purpose is to substitute or replace legal tender', an offence punishable by imprisonment of one to five years and a fine of 500 to 20,000 dirhams. This view is also supported by another press release jointly published by the financial regulators in 2022.[7]

This warning, as explained by the Governor of BAM in 2019, came at a time when international organisations, and in particular the IMF, had the same position.[8] However, taking into consideration the technological and financial developments in this field, Morocco has adapted its digital roadmap to include cryptocurrency as part of this reflection.

Such positions taken by the authorities have already greatly impacted the decisions taken and divided the judiciary in the course of the 20 prosecutions involving the use of cryptocurrencies recorded between 2019 and 2021.

While transactions made in crypto-currencies are subject to criminal prosecution, the lack of a clear legal framework governing their use greatly impacts many cases, the outcome of which remains at the discretion of judges and their interpretation of the provisions of Moroccan law. In June 2020, the Public Prosecutor Office addressed the issue in a study highlighting that the contradictory positions of the Kingdom's courts in the judgment of crypto-currency cases are mainly due to the nature of the said crypto-currency retained by the judges.[9] Those who consider it a currency in its own right rely on the Foreign Exchange Code and article 339 of the Penal Code to incriminate the defendants,[10] while those who do not consider it a currency rule that crypto-currency transactions do not constitute a crime in the absence of an explicit criminal text, pursuant to the principle of *nullum crimen, nulla poena sine*.[11]

"While transactions made in crypto-currencies are subject to criminal prosecution, the lack of a clear legal framework governing their use greatly impacts many cases."

In this context, since 2019, studies have been launched on how to best address these challenges from a legal perspective, and considering their forecasted impact on the Moroccan legal framework, Bank Al-Maghrib created a commission to examine the situation in detail with a view to regulating the practice. It is, in fact, one of the priority projects of BAM's strategic plan for the period 2019-2023. Furthermore, as part of their report on financial stability for the year 2020, the regulators have assured that they are working to define a mechanism to regulate the use of crypto-assets and private crypto-currencies (stablecoins).[12]

Laila Slassi, partner

II. Cautious opening of regulators' positions towards cryptocurrencies

Morocco is showing signs of change. While the grave tone of the regulators in 2017 has gradually lowered, the conservative stance remains the official policy, but their positions still pave the way for a potential inclusion of cryptocurrencies in Moroccan legal framework through various initiatives.

Indeed, a slight opening had already been initiated when in November 2019, BAM announced considering the idea of a Moroccan virtual currency based on blockchain technology during the second edition of the Africa BlockChain summit.[13] A reflection is thus initiated on the issue of central bank digital money (CBDM), a digital form of fiduciary money issued, controlled and regulated by the Central Bank.

In this context, an inter-authority working group was set up in 2018 to study the implications of the development of these crypto-assets on the missions of regulators, to draw up an overview of their use cases and to keep a watch on regulatory developments in this area.[14]

The Governor indicated that he did not close the door to innovative solutions, considering that the Kingdom looking to benefit from the contribution of fintech as part of the implementation of its financial inclusion strategy.[15]

BAM's whole strategy in crypto-assets is therefore to be well prepared for the day when these issues related to the risks involved in the use of crypto-assets are resolved, and an international consensus around a legal framework is reached as they do not


Maroua Alouaoui, associate

want there to be a divide between Morocco and the developed countries in this area.

Communication campaigns, awareness and training will also be conducted. A task that will be tedious in a country still very attached to the cash culture. But calls for the modernisation of its economy have been pushing Morocco for several years to liberalise the capital market, at the insistence of the IMF.

On 10 January 2022, questioned during a parliamentary session, the Minister of Finance, while recalling the regulators' recommendations, stressed that the government is working with its partners to study the interest of a legal framework for these cryptocurrencies.[16]

> The country would benefit directly from this new legal framework, both in terms of legal protection, but also in terms of economic expansion.

The implementation of this new legislation would enable the tapping into the immense potential that crypto-currencies are likely to offer. The country would benefit directly from this new legal framework, both in terms of legal protection, but also in terms of economic expansion. The development of a regulatory framework would signal Morocco's commitment to supporting the advancement of these technologies and fostering innovation in this sector.

III. Favourable framework for the development of blockchain technology

The authorities are also intensifying their efforts to make room for blockchain projects for professional or institutional use in order to put the blockchain at the service of financial inclusion and digital development. Indeed, cryptocurrency is only one of the applications of the blockchain process. While pending regulation of cryptocurrencies, the regulators seem favourable to blockchain initiatives, provided they remain private. The measures taken in this context are evidence of an evolution in the Kingdom since their 2017 first statements.

Notably, a Moroccan state-owned private company, global leader in the phosphate fertilizer market, was in 2021 the first African company to execute an intra-African trade transaction using blockchain technology: a $400m transaction with the Trade and Development Bank of Eastern and Southern Africa to finance the shipment of phosphate fertilizers from Morocco to Ethiopia. With the current slowdown in global logistics and supply chains, trade finance transactions can take weeks, due to border and airport closures. Yet, the blockchain technology allows all stakeholders to complete the transaction digitally and complete the import-export transaction in less than two hours, whereas equivalent 'paper' transactions typically take three weeks or more to complete due to the time it takes for suppliers to transfer physical documents to the buyer via the traditional banking system.[17]

This comes at a time when the decline in the use of cash has accelerated in recent months against the backdrop of the Covid-19 crisis, while digital payments have experienced very significant growth and digital currencies and crypto assets are playing an increasing role in the financial markets.

Having already used blockchain technology in its operations, Morocco will be able to use this technology in many projects. However, the challenge of Bank Al-Maghrib raises the question of the promotion of a technology that remains difficult to dissociate from cryptos.

IV. A way forward *de concert* with several other central banks' initiatives

The Moroccan initiatives taken towards the conceptualisation of a CBDC are in line with the steps taken by several central banks, as China's central bank is already experimenting with a 'digital yuan' or 'e-yuan'[18] and as the Governing Council of the European Central Bank (ECB) decided in 2021 to launch the investigation phase of a digital euro project.[19] In the same vein, Sweden, is also well advanced in the creation of its CBDC through a pilot project launched in February 2020 by the Swedish Central Bank, aiming for the country to have its own digital currency by 2026.[20] Moreover, Lithuania was also the first European country to launch its CBDC allowing transactions on the private blockchain of the Bank of Lithuania and on the public blockchain NEM.[21]

Some African countries, such as South Africa and Ghana, are also conducting CDBC related studies and reflections to support their ambition to move to a cashless economy and achieve financial inclusion. The aim for the Central Banks of the continent and emerging markets is to use fintech in order to overcome issues related to the delay and cost of financial transactions and make them more accessible to their unbanked citizens through this technology. Morocco would greatly benefit from integrating such technology in its economy and financial inclusion strategy.

1. Press briefing by the Governor of Bank Al Maghrib dated 22 March 2022. Available at https://video.ibm.com/live-BKAM, minute 53:30 (last accessed 12 April 2022)
2. The 2021 Geography of Cryptocurrency Report by Chainalysis, page 118. Available at https://www.mchain.uk/wp-content/uploads/2021/11/reportMC.pdf (last accessed 12 April 2022)
3. Press article from *Hesspress* dated 19 January 2022, entitled 'Cryptocurrency in Morocco: Investors remain divided over upcoming legislation' by Ms Khouloud Haskouri. Available at https://en.hespress.com/34483-cryptocurrency-in-morocco-investors-remain-divided-over-upcoming-legislation.html (last accessed 12 April 2022)
4. Foreign Exchange Office and Ministry of Finance press release dated 20 November 2017. Available at https://www.oc.gov.ma/sites/default/files/2018-05/communique%CC%81%20monnaies%20virtuelles%20fr.pdf (last accessed 12 April 2022)
5. Ministry of Finance, AMMC and BAM press release dated November 21, 2017. Available at https://www.ammc.ma/sites/default/files/communique%20monnaies%20virtuelles%20FR_0.pdf (last accessed 12 April 2022)
6. Opening statement of Bank Al Maghrib's Governor at the Africa Blockhain Summit in 2019, minute 21:38. Available at https://www.youtube.com/watch?v=vFUuPWovyNA (last accessed 12 April 2022)
7. Press release of the financial authorities dated April 5, 2021. Available at : https://www.ammc.ma/sites/default/files/CdP_Crypto_050422_fr_ff.pdf (last accessed 12 April 2022).
8. Opening statement of Bank Al Maghrib's Governor at the Africa Blockhain Summit in 2019, minute 25. Available at https://www.youtube.com/watch?v=vFUuPWovyNA (last accessed 4 April 2022)
9. Press article from Médias24 dated January 19, 2022, entitled 'bitcoin makes its way into the Moroccan courts' by A.E.H, available at https://medias24.com/2021/01/13/le-bitcoin-fait-son-entree-dans-les-tribunaux-marocains/ (last accessed 12 April 2022) and the review of the Public Prosecutor Office of June 2020, page 65. Available at http://www.pmp.ma/wp-content/uploads/liensutiles/revueversionectronique.pdf (last accessed 12 April 2022)
10. Decision of the Tribunal of first instance of Kénitra dated February 25, 2019, file n° 18-1250 (unpublished).
11. Decision of the First instance tribunal of Marrakech n°7929 dated 3 October 2017 (unpublished)
12. Financial Stability Report 2020 released by the financial authorities, Number 8, page 13, available at https://www.ammc.ma/sites/default/files/RSF%20n%C2%B08_Exercice%202020.pdf (last accessed 12 April 2022)
13. Opening statement of Bank Al Maghrib's Governor at the Africa Blockhain Summit in 2019, minute 23:55. Available at https://www.youtube.com/watch?v=vFUuPWovyNA (last accessed 12 April 2022)
14. Bank Al Maghrib's 2018 Annual report on financial market infrastructures and payment instruments, their supervision and initiatives, page 6, available at https://www.bkam.ma/content/download/675889/7751512/RSMPIF%202018.pdf (last accessed 4 April 2022)
15. Opening statement of Bank Al Maghrib's Governor at the Africa Blockhain Summit in 2019, minute 27:45. Available at https://www.youtube.com/watch?v=vFUuPWovyNA (last accessed 12 April 2022)
16. Press article from Challenge dated January 11, 2022, entitled 'Crypto. Morocco on track to regulate virtual currency transactions' by Ms. Siham Azeroual. Available at https://www.challenge.ma/crypto-le-maroc-en-voie-dencadrer-les-transactions-de-monnaies-virtuelles-230478/ (last accessed 12 April 2022)
17. Press release by OCP Group dated 30 March 2021, available at https://www.ocpgroup.ma/fr/press-release-article/la-trade-and-development-bank-le-groupe-ocp-et-dltledgers-propulsent-le (last accessed 12 April 2022)
18. Press article from Time, dated August 21, 2021, entitled 'How China's Digital Currency Could Challenge the Almighty Dollar' by Mr. Charlie Campbell available at https://time.com/6084146/china-digital-rmb-currency/ (last accessed 12 April 2022)
19. Press release by the European Central Bank dated July 14, 2021, available at https://www.ecb.europa.eu/press/pr/date/2021/html/ecb.pr210714~d99198ea23.en.html (last accessed 12 April 2022)
20. Bloomberg article dated April 15, 2021, entitled 'Sweden's Central Bank May Have a Digital Currency in 5 Years' by Niclas Rolander and Rafaela Lindeberg, available at https://www.bloomberg.com/news/articles/2021-04-15/sweden-s-central-bank-may-have-a-digital-currency-in-5-years (last accessed 12 April 2022)
21. Press release of Lietuvos Bankas (Lithuanian Central Bank) dated July 23, 2020, 'Bank of Lithuania issues LBCOIN – the world's first digital collector coin' available at https://www.lb.lt/en/news/bank-of-lithuania-issues-lbcoin-the-world-s-first-digital-collector-coin (last accessed 12 April 2022)
22. Press article from Bloomberg entitled 'Are Central Bank Digital Currencies the Key to Unlocking Financial Inclusion in Africa?' dated March 3, 2022, by Iftin Fatah, available at https://www.cnbcafrica.com/2022/are-central-bank-digital-currencies-the-key-to-unlocking-financial-inclusion-in-africa/ (last accessed 12 April 2022)

AFRIQUE ADVISORS
Correspondent of
MAYER | BROWN

Index of contributors

From the publishers of