

CD corporate disputes

APR-JUN 2018

www.corporatedisputesmagazine.com



Inside this issue:

FEATURE

UK and UPC ratification

EXPERT FORUM

**Challenges when enforcing
arbitral awards**

HOT TOPIC

**Litigation in the pharmaceutical
and medical device sector**



Recovering assets and funds, wherever they are located.

Grant Thornton UK LLP has the largest international team focused on recovering hidden assets for clients across the globe.

Our seamless global network regularly takes joint cross-border appointments including offshore jurisdictions such as the BVI and Cyprus. We have a strong portfolio of Russian and CIS cases and work on some of the most high profile complex recovery cases.

We were awarded 'Asset Recovery Expert Firm of the Year' in Who's Who Legal Expert Analysis 2017, having received the highest number of nominations from peers, corporate counsel and other market sources.

grantthornton.co.uk

Kevin Hellard

**Asset Recovery and Insolvency
Practice Leader**

T +44 20 7865 2478

E kevin.hellard@uk.gt.com

Michael Leeds

**Asset Recovery and Insolvency
Partner**

T +44 20 7728 2368

E michael.t.leeds@uk.gt.com

Nick Wood

**Asset Recovery and Insolvency
Partner**

T +44 20 7728 2426

E nick.s.wood@uk.gt.com



Grant Thornton | An instinct for growth™

© 2018 Grant Thornton UK. All rights reserved.

Grant Thornton UK is a member firm of Grant Thornton International Limited (GTIL). GTIL and the member firms are not a worldwide partnership. Services are delivered by the member firms. GTIL and its member firms are not agents of, and do not obligate, one another and are not liable for one another's acts or omissions. Please see grantthornton.co.uk for further details.

CD CONTENTS

006 FOREWORD

009 FEATURE
UK and UPC ratification

015 FEATURE
ADR in the UAE: new arbitration rules proposed by DIAC

201 EDITORIAL PARTNERS

Editor: Mark Williams
Associate Editor: Fraser Tennant
Associate Editor: Richard Summerfield
Publisher: Peter Livingstone
Publisher: Peter Bailey
Production: Mark Truman
Design: Karen Watkins

Corporate Disputes
Published by Financier Worldwide Ltd
23rd Floor, Alpha Tower
Suffolk Street, Queensway
Birmingham B1 1TT
United Kingdom

+44 (0)845 345 0456
corporatedisputes@financierworldwide.com
www.corporatedisputesmagazine.com
h
ISSN: 2056-8983

© 2018 FINANCIER WORLDWIDE LTD
All rights reserved.

No part of this publication may be copied, reproduced, transmitted or held in a retrievable system without the written permission of the publishers. Whilst every effort is made to ensure the accuracy of all material published in Financier Worldwide, the publishers accept no responsibility for any errors or omissions, nor for any claims made as a result of such errors or omissions. Views expressed by contributors are not necessarily those of the publishers. Any statements expressed by professionals in this publication are understood to be general opinions and should not be relied upon as legal or financial advice. Opinions expressed herein do not necessarily represent the views of the author's firms or clients.

Financier Worldwide reserves full rights of international use of all published materials and all material is protected by copyright. Financier Worldwide retains the right to reprint any or all editorial material for promotional or nonprofit use, with credit given.

022 EXPERT FORUM
Challenges when enforcing arbitral awards
Freshfields Bruckhaus Deringer LLP; King & Spalding;
Skadden, Arps, Slate, Meagher & Flom LLP; Von Wobeser
& Sierra

035 PERSPECTIVES
The use of ADR in arbitration
Chartered Institute of Arbitrators

041 PERSPECTIVES
Positive steps for arbitration in mainland
China?
Hong Kong International Arbitration Centre

047 PERSPECTIVES
Third-party funding in international arbitration
Freshfields Bruckhaus Deringer LLP

052 PERSPECTIVES
ICCR 2018 state of the art arbitration rules
Popovici Nitu Stoica & Asociatii

056 MINI-ROUNDTABLE
Expert witnesses in competition disputes
NERA

064 PERSPECTIVES
'Dirty money' and poor controls – the key
areas of enforcement activity for 2018
Dechert LLP

070 MINI-ROUNDTABLE
Shareholder disputes
HFW; Norton Rose Fulbright; Skadden, Arps, Slate, Meagher
& Flom LLP; Slaughter and May; Wachtell, Lipton, Rosen
& Katz

- 089** PERSPECTIVES
Time to refresh those standard terms?
Forsters LLP
- 093** PERSPECTIVES
No laughing matter – emojis and contract law
Weil Gotshal & Manges (London) LLP
- 098** PERSPECTIVES
Supply chain disruption in the oil & gas industry
Hogan Lovells
- 103** MINI-ROUNDTABLE
Multijurisdictional product liability claims
Bird & Bird LLP; Kirkland & Ellis LLP; Skadden Arps Slate
Meagher & Flom LLP
- 116** PERSPECTIVES
Courts connectivity paves the way for increased
business certainty across MENA region
DIFC Courts
- 121** MINI-ROUNDTABLE
International disputes and asset recovery in
Russia & CIS
Bryan Cave; Freshfields Bruckhaus Deringer; Gorodissky &
Partners; Grant Thornton
- 134** PERSPECTIVES
An approach to the international jurisdiction
rules in Argentina
Marval O'Farrell & Mairal
- 138** MINI-ROUNDTABLE
Technology forensics in fraud investigations and
disputes
Brown Rudnick LLP; IT Group UK
- 151** ONE-ON-ONE INTERVIEW
Developing e-discovery best practices for the
legal department
Epiq
- 155** PERSPECTIVES
The impact of people, process and technology
on e-discovery
Epiq
- 160** PERSPECTIVES
Tips for avoiding & winning corporate disputes
CANDEY
- 165** MINI-ROUNDTABLE
Selection and use of external advisers in
disputes
BAM Nuttall Limited; Spectrum Geo Ltd
- 173** PERSPECTIVES
What next for alternative dispute resolution
– what change might mean for you
Cubism Law
- 177** PERSPECTIVES
A light at the end of the tunnel for internal
investigation privilege?
Kirkland & Ellis LLP
- 183** PERSPECTIVES
GDPR: compliance moves up the agenda
BLM
- 187** PERSPECTIVES
Ousting the boss – navigating the legal labyrinth
Blake Morgan
- 192** HOT TOPIC
Litigation in the pharmaceutical and medical
device sector
Charles River Associates; Goldman Ismail Tomaselli Brennan
& Baum LLP; GSK

A red carpet event with photographers and camera flashes. The scene is set on a red carpet that leads up a set of red stairs. On both sides of the carpet, a large group of photographers is crouching or kneeling, holding cameras with their flashes turned on, creating a bright, starburst effect. The background is dark, making the red carpet and the bright flashes stand out. The overall atmosphere is one of a high-profile premiere or launch event.

A class act.

epiq premiere

The two biggest names in high-performing legal solutions, **DTI** and **Epiq Systems** are now **Epiq**—rolling out the red carpet for clients and producing winning results in markets near you.

Learn more at epiqglobal.com

People. Partnership. Performance.

Business Process Solutions | Class Action & Mass Tort | Court Reporting | eDiscovery | Regulatory & Compliance | Restructuring & Bankruptcy

FOREWORD

Welcome to the twenty-third issue of Corporate Disputes, an e-magazine dedicated to the latest developments in corporate and commercial disputes. Published quarterly by Financier Worldwide, Corporate Disputes draws on the experience and expertise of leading experts in the field to deliver insight on litigation, arbitration, mediation and other methods of dispute resolution.

In this issue we present features on UPC ratification and on ADR in the UAE. We also look at: enforcing arbitral awards; ADR in arbitration; third-party funding in international arbitration; expert witnesses in competition disputes; shareholder disputes; contract terms; multijurisdictional product liability claims; international disputes and asset recovery in Russia & CIS; technology forensics in fraud investigations and disputes; e-discovery; selection and use of external advisers in disputes; alternative dispute resolution; litigation in the pharmaceutical and medical device sector; and more.

Thanks go to our esteemed editorial partners for their valued contribution: Bird & Bird; Charles River Associates (CRA); Epiq; Grant Thornton UK LLP; HFW; IT Group; NERA Economic Consulting; Von Wobeser y Sierra, S.C.; the Chartered Institute of Arbitrators (CI Arb); DIFC Courts; the Hong Kong International Arbitration Centre (HKIAC); and the International Centre for Dispute Resolution (ICDR).

– Editor



Bird & Bird & product liability



Bird & Bird is an international law firm with leading expertise across a full range of legal services. Our commitment to specific technology-focussed industry sectors distinguishes us from many other firms, enabling us to deliver first-rate service to our clients.

Our product liability team helps clients to navigate the legal implications of safety standards in various industry sectors and to assess their impact in terms of product liability risks. The team has extensive experience in handling product liability disputes and non-contentious matters both on a national and multi-jurisdictional basis.

twobirds.com

Aarhus & Abu Dhabi & Beijing & Bratislava & Brussels & Budapest & Copenhagen & Dubai & Düsseldorf & Frankfurt & The Hague & Hamburg & Helsinki & Hong Kong & London & Luxembourg & Lyon & Madrid & Milan & Munich & Paris & Prague & Rome & Shanghai & Singapore & Stockholm & Sydney & Warsaw

FEATURE

UK AND UPC RATIFICATION

BY **RICHARD SUMMERFIELD**

Despite the lingering uncertainty caused by Brexit, the UK is inching closer to ratifying the Unified Patent Court (UPC) Agreement. In December, the draft legislation was heard in the House of Lords and, following that reading, the ratification process has moved quickly. On 8 February the Privy Council approved the final piece of domestic legislation which is required for the UPC to be adapted into UK law: the Protocol on Privileges and Immunities. There is still a degree of confusion over the UK's ratification, however, as it is currently not known whether the government will now move to ratify the UPCA immediately following the approval process.

As with all current regulatory and legislative developments in the UK at the moment, there are myriad political factors to consider. Brexit casts a long shadow and, as such, it will continue to have an important impact on patent protection across the European bloc for the foreseeable future, even once the UK has left the EU. The question of how a non-EU jurisdiction will function as part of the new unitary and European patent enforcement system remains to be seen, particularly given the scale of change it presents.

Features of the UPC

The UPC and Unitary Patent system promise a single patent right, which will be enforceable in up



to 25 participating EU Member States.

The new system represents a considerable change to the status quo; indeed, it is the biggest change to patent law in Europe for 40 years. Member States will be subject to a single approach to patent registration and litigation. As such, all businesses within those Member States must ensure they understand the changes and are prepared for implementation.

The new system will be beneficial for parties looking to protect their intellectual property. It will be significantly more cost efficient for firms to establish patent protections across Europe using a unitary patent. It will also be possible for companies to challenge patents and to obtain rulings preventing the distribution of goods and the use of patented processes across all participating Member States. To benefit from the opportunities provided by the new system, companies must develop and implement a tailored patent strategy for Europe.

There are, however, some reservations. In the software space, for example, there are suggestions that the court could allow for a rise in so-called patent trolls. There has been a petition drawn up by

a group of UK software companies, backed by the Foundation for a Free Information Infrastructure, over the application of the new system. The group has argued that the new system plays into the hands of non-practicing entities or 'patent trolls'.

On the surface, the new patent system is a complex hybrid of EU and non-EU components. Though the UPC is officially an international judiciary outside the EU, it was set up under the auspices of the EU and is currently open only to Member States, which is the source of much of the consternation over the UK's place within the new system. The application of the UPC is further complicated by its relationship with the European Court of Justice (ECJ), as some of its underlying legal framework is subject to interpretation by the Court. This has created additional concern within the UK, as Brexit will see the UK fall outside the purview of the ECJ. "One of prime minister Theresa May's 'red lines' on Brexit is that the ECJ will have no jurisdiction on UK affairs, which is at odds with the Unitary Patent and the UPC agreement. This is just one issue that may present an obstacle for the UK's continued involvement in the system after Brexit," says Peter Arrowsmith, a partner at Gill Jennings & Every LLP.

For Joseph Lenthall, a partner at Mewburn Ellis LLP, resolving this issue may require additional and more drastic measures. "I believe the UPC system would benefit from being redrafted to remove all references to the EU and replace the CJEU with an independent Supreme Court. This would mean that other non-

EU European countries, such as Switzerland, can participate,” he suggests.

Regardless of the complexities brought about by Brexit, the UK, from an administrative perspective, will still have a major role to play in the application of the Unitary Patent and the UPC at least, in the short term. Though there will be regional offices of the UPC in a number of Member States, including Germany and Italy, part of the central division of the court, for the time being, will open in London, though whether this will remain the case is as yet unknown.

Much depends on when the UPC Agreement is finally ratified. “2018 is a pivotal year for the UPC and Unitary Patent,” says Dr Lenthall. “A key factor will be whether the UPC and Unitary Patent can begin before Brexit. I expect that if the UPC can open in 2018, then political momentum will ensure that the system continues as planned, including the Court remaining in London.” Michel Barnier, the EU’s chief Brexit negotiator, and Commissioner for Internal Market and Services in charge of the UPC, has noted that the EU is reviewing whether or not the London section of the central division of the UPC will need to be relocated when the UK leaves the EU. This is likely to prove contentious.

“Article 7 of the UPC Agreement requires that a Central Division of the Court shall be based in London,” explains Glyn Truscott, a partner at Elkington & Fife. “Article 20 of the Agreement requires that the Court shall apply EU law and ‘shall respect its primacy’, while Article 21 requires

that decisions of the CJEU shall be binding. The entire agreement refers to Member States. These are troublesome provisions post-Brexit. However, the UK Chartered Institute of Patent Attorneys has received an opinion from a UK lawyer experienced in UK and EU law, that it is legally possible for the UK to participate in the UPC and Unitary Patent system post-Brexit, although this would require a new agreement between the participating EU Member States and the UK to provide compatibility with EU law, plus a small number of amendments to the UPC agreement. If the UK were to ratify the agreement without amendment, and subsequently left the EU, then it is likely that the London seat would have to close.”

Milan has been mooted as a potential location for a replacement central division in the event that the UK branch were to close. However, there will likely be competing bids from other Member States. According to Alexander Robinson, an associate at Dehns, if the UK were to leave the agreement, there could be many other issues to resolve. “It seems, at present, that British patent attorneys should retain the right to represent parties in litigation at the UPC, and British nationals would still be eligible to act as technical judges in the court, even if the UK itself is not a member. Exclusion



of the UK would be a severe blow to the system, however, due to the size of the UK market and the UK's importance as a centre for patent litigation. The UPC/Unitary Patent system would potentially be much less attractive to users without the UK," he says.

The UK government may hope that the Unitary Patent and the UPC are well underway before the country finally leaves the EU in spring 2019. Logistically, it would be advantageous for the country to be operating within the new system before Brexit is finalised. The complications which would accompany removing the UK from an operational UPC could be myriad. Equally, relocating the court to elsewhere in the EU could also be problematic.

Realistically, however, it may be difficult for the UK to remain part of entire system post Brexit, according to Jack Gunning, a senior associate at Forresters. "When the UPC was written, it was envisaged that only EU members would be part of it, so, for example, Switzerland would not join. However, there are a number of practitioners, particularly in the UK, who believe that the UK may remain part of the UPC post Brexit. Membership of the Unitary Patent is separate from membership of the UPC. The unitary patent is brought into force by an EU regulation – an instrument of EU law. It therefore seems impossible for the UK to participate in the unitary patent without

being an EU Member State unless there is significant modification of the unitary patent."

“Despite confusion surrounding the UK’s position, the ratification process within the European bloc continues. Though not, perhaps, at a pace many would have hoped.”

European ratification

Despite confusion surrounding the UK's position, the ratification process within the European bloc continues. Though not, perhaps, at a pace many would have hoped. "The German ratification faces a legal challenge that could derail the whole project," points out Paul Misselbrook, a partner at Appleyard Lees. "Importantly though, the German ratification now faces a lengthy delay with a final decision not likely before 2020, which will almost certainly be after Brexit. There is an outside chance the German ratification could proceed quickly this year. But optimism is running out."

A quick German ratification to enable the UPC to start before Brexit relies on the German constitutional court declaring the complaint

inadmissible and soon. In mid-January, the German Bar Association published its opinion that the constitutional complaint halting the UPC's passage into law in Germany was 'inadmissible' and 'unfounded'. However, the German constitutional court has not given any indication of whether they agrees with the German Bar Association's partisan opinion nor when a decision on admissibility can be expected. Fifteen Member States have ratified the UPC Agreement to date, and more are expected to follow shortly, though nothing will be certain about the UPC's implementation until both British and German ratification is secured.


Trademarks

Fortunately, the European Patent Office and the European Patent Convention are independent of the EU. Therefore, Brexit will have no impact on the existing European patent system. After Brexit, it will still be possible to apply to the European Patent Office and to obtain patent protection in the UK, in exactly the same way as companies do today. However, Brexit will still have a significant impact on pan-European rights, such as EU trademarks and designs. "Any EU trademark or design application filed at the EU Intellectual Property Office (EUIPO) after the UK actually leaves the EU will very likely not give protection in the UK, depending on the terms of the UK's exit from the EU," says Dr Gunning. "Further, people will likely have to 'convert' or 're-register' their existing rights to obtain separate protection in

the UK. Exactly how this might be implemented is not yet clear."

Given Brexit's expected impact on trademarks across the European bloc, it is unsurprising that organisations are taking action. "There has already been an upsurge in domestic trademark and design filings, and this is likely to continue as EU rights cease to apply," says Richard Willoughby, a partner at D Young & Co. "It is hard to imagine businesses deciding not to have protection in the UK, or not to enforce their rights in a major market. In addition, the UK's IP courts and jurisprudence on harmonised law are widely respected in Europe and worldwide, and I would expect that to continue.

While ratification is close, final implementation of the Agreement is still some months away. The UPC Preparatory Committee has noted that the provisional application phase – the period in which the Administrative Committee, the Budget Committee and the Advisory Committee will be able to conclude necessary agreements with third parties and formalise all the preparatory work done by the Preparatory Committee – will take between six and eight months to get the right provisions in place for the UPC Agreement to come into force.

As has become customary since 23 June 2016, speculation and confusion surround the UK's relationship with European legislation and institutions. Though ratification has not yet been forthcoming, one could argue that swift action would be in the UK and the EU's wider interest. 

MEDIACIÓN
VÄLIMIESMENETTELY
ARBITRAJE ARBITRAGEM
МЕДИАЦИЯ
תחכים בוררות

WE SPEAK THE LANGUAGE OF
RESOLUTION

調停 MÉDIATION
ARBITRASI
επίλυση 仲裁
MÆGLING 仲裁
ARBITRAGE 중재
MEDIAZIONE
SCHLICHTUNG

In an international dispute, having a trusted arbitration and mediation provider is essential. With four international offices and parties from over 90 countries, the ICDR® is sensitive to cultural distinctions and procedural variations around the world. No matter how large or small your dispute, you will have access to our staff, fluent in over a dozen languages, and to our worldwide network of over 700 independent arbitrators and mediators. Find out why the ICDR is trusted around the world for impartiality, efficiency, and fairness.

icdr.org | +1.212.484.4181

RESOLVE **Faster.**



INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION®

FEATURE

ADR IN THE UAE: NEW ARBITRATION RULES PROPOSED BY DIAC

BY **FRASER TENNANT**

One of the most significant global trends in the world of alternative dispute resolution (ADR) in recent years has been the increasing popularity of arbitration as the preferred means of resolving complex, high-value international disputes. One offshoot of this favour is that arbitration is susceptible to developments in international ADR best practice.

One example of the international ADR community's sway is the Dubai International Arbitration Centre's (DIAC) decision to amend its arbitration rules – a resolution first announced by the DIAC during Dubai Arbitration Week in November 2017. Last updated in 2007, the rules were deemed by the DIAC's board of trustees and executive committee to no longer

be in sync with the innovations and best practices in arbitration that have taken root across the globe over the past decade.

According to Baker & McKenzie Habib Al Mulla, the key objectives of the Draft Rules are to: (i) maintain the procedural economy of the arbitration process to ensure that the process is conducted in a transparent and cost-efficient manner; and (ii) facilitate and enhance the enforcement of DIAC awards pending the promulgation of the long-awaited UAE arbitration law. Moreover, the changes are designed to ensure the efficient conduct of DIAC arbitrations, not only during the arbitration process, but also at the time of ratification and enforcement

of DIAC awards – elements of crucial importance to the international business community.

Other arbitral institutions that have amended their rules in recent times include the Singapore International Arbitration Centre (SIAC) on 1 August 2016, the Stockholm Chamber of Commerce (SCC) on 1 January 2017 and the International Chamber of Commerce (ICC) on 1 March 2017. Regionally, the Bahrain Chamber for Dispute Resolution (BCDR-AAA) introduced new rules on 1 October 2017. The SIAC also introduced its investment arbitration rules on 1 January 2017.

In the view of Tom Snider, a partner and head of arbitration at Al Tamimi & Company, the changes introduced by the DIAC will make it more competitive, vis-à-vis rival arbitral institutions such as the DIFC-LCIA Arbitration Centre (DIFC-LCIA), the case load of which is currently on an upward trajectory.

“Arbitration continues to be the most popular method of resolving disputes in the United Arab Emirates (UAE) and the DIAC is used for a significant proportion of those disputes,” says Charles Maeng, an associate at Berwin Leighton Paisner LLP. “It was therefore prudent for the DIAC to refresh its rules to incorporate new international developments – aimed at improving efficiency and fairness – to maintain its position as one of the leading arbitral institutions in the region.”

While the DIAC’s revisions to its arbitration rules have been announced and are generating much

discussion, they are, however, not quite ready to play their part on the arbitration stage. “It is important to note that the new DIAC rules have not yet been implemented and remain in draft stage at the moment,” advises Katy Hacking, an associate at Simmons & Simmons Middle East LLP. “However, it appears that the Draft Rules are only waiting approval in the form of the issuance of a decree by H.H. the Ruler of Dubai to give them sovereign effect.”

Key changes

With smoother arbitral procedures and processes the overall aim of the DIAC, many of the amendments to the rules are clearly designed to streamline the approach to arbitrations. The draft documentation also makes a strong play for a more international presence.

“The changes can be broadly divided into two categories: procedural certainty, and speed and efficiency,” says Mr Maeng. “Provisions such as emergency arbitrations, expedited proceedings and the ability of the arbitral tribunal to sanction counsel and parties for misconduct should make dispute resolution faster and more efficient.” The amendments to the rules are also expected to reduce the number of parallel proceedings and help avoid duplicated costs.

That said, according to Ms Hacking, the biggest change to the DIAC rules is the switch in the default arbitral seat, from mainland Dubai to the

Dubai International Financial Centre (DIFC). “Under the current DIAC rules, where the parties had not specified the seat of the arbitration in their contract, or were otherwise unable to agree on the seat, the default seat of the arbitration would be mainland Dubai,” she explains. “Accordingly, the arbitral proceedings would take place in accordance with mainland Dubai legislation – primarily the UAE Civil Procedure Code – and would fall under the supervision of Dubai courts.”

However, as stated in the Draft Rules, unless agreed otherwise the default seat of DIAC arbitrations will now be the DIFC. “This is a welcome development for parties wishing to have disputes resolved in the UAE, not least because the DIFC courts will usually simply uphold and not look behind the merits of an arbitral award which results in a more straightforward and certain ratification process than often experienced in the Dubai court system.”

An additional benefit of the shift to the DIFC is the perception that DIFC courts are generally more arbitration-friendly than their counterparts in Dubai. “A significant difference for international parties is that business in the DIFC courts is conducted in English, whereas Arabic is the language of the Dubai courts,” notes Mr Maeng. “This may obviate the need for often substantial amounts of written material to be translated.”

Another notable change is that awards made by arbitral tribunals will now be deemed to have been signed and issued at the seat of arbitration, regardless of whether the award signature was physically obtained there. Previously, arbitrators

“While the DIAC’s revisions to its arbitration rules have been announced and are generating much discussion, they are, however, not quite ready to play their part on the arbitration stage.”

were obliged to appear in the UAE in person – an interpretation of the Civil Procedure Code which the DIAC’s new Draft Rules clarify.

“Under the UAE Civil Procedure Law – which applies to arbitrations outside of the DIFC and Abu Dhabi Global Market (ADGM) – arbitration awards are required to be signed in the UAE,” says Adrian Cole, a partner at King & Spalding. “This necessitates international tribunals travelling to the UAE to sign awards after their completion. This causes delay and incurs expense, which could be saved under the Draft Rules. However, whether this provision ‘trumps’ the UAE Civil Procedure Law remains to be seen, as

parties and tribunals may not be prepared to take that risk with their awards.”

Supplemental revisions

Further revisions to the existing rules include an effort to address multiple parties and multiple contracts, including consolidation and joinder. Those engaged in complex contracting structures – such as those commonly found on large infrastructure projects – will now be able to take advantage of provisions in the Draft Rules for all related disputes to be dealt with in one proceeding, if necessary. This has the potential to significantly save on costs and avoid the dangers of inconsistent decisions in related proceedings. Also proposed is the introduction of a Secretariat to administer and scrutinise draft awards, in the anticipation that this will encourage awards of a higher quality and reduce scope for challenges.

“The Draft Rules have also clarified the position in respect of the fees of lawyers and experts,” adds Ms Hacking. “Currently, these are considered to be irrecoverable costs, but the Draft Rules have now clarified this issue, making it clear that such fees will be recoverable.”

Domestic and international response

Although unpublished as yet, by all accounts the changes made to the DIAC’s arbitration rules have been met with an enthusiastic reception from the international arbitral community since they were first aired during the latest Dubai Arbitration Week.





“The response from the arbitration community in the UAE has been very positive,” notes Mr Maeng. “The DIAC rules are perhaps the most commonly used arbitrational rules in the region, and all arbitrations commenced after the introduction of the Draft Rules will enjoy the innovations and efficiencies. Businesses need a dispute resolution process which is flexible, certain and fair. The Draft Rules go some way towards addressing the needs of both the arbitration and business communities.”

Others believe it is too early to draw a consensus. “The response of the international arbitration community to the Draft Rules is yet to be fully seen given that the Draft Rules have yet to be implemented,” suggests Ms Hacking. “However, given the nature of the proposed changes it is likely that they will be welcomed. If the Draft Rules are implemented as currently drafted, they are likely to bring much needed clarity and certainty to businesses who are involved in arbitration,” she adds.

Impacts on contracts


Among the issues the arrival of the Draft Rules may spark among businesses operating in the UAE is the need to amend existing contracts and draft new agreements in order to take advantage of the new regime. “Businesses should carefully consider what form of dispute resolution they wish to engage in to resolve their disputes and provide for this in their contracts,” advises Mr Cole. “Arbitration is a

commonly favoured mechanism as it gives parties autonomy they do not enjoy in state courts, allowing them to choose members of the tribunal, the rules and procedure to be adopted, among other things. In addition, arbitration is generally considered to be more confidential than court, where proceedings often proceed in public.”

Furthermore, in the majority of cases, arbitration clauses in contracts will specify the institution and therefore the rules that will govern the arbitration. That said, the version of the rules to be applied is usually not stated. “Where this is the case, any new arbitration commenced following the formal introduction of the Draft Rules will be subject to the Draft Rules, and no other steps are necessary,” explains Mr Maeng. “Where the arbitration clause identifies a specific previous version of the DIAC rules as being applicable, for example the 2007 version of the rules, parties can amend their arbitration agreement to specify that the DIAC rules current at the time of commencing an arbitration will apply. The same applies when entering into new contracts.”

Arbitration modernity

As the financial and commercial hub of the UAE, Dubai already has the standing of a regional centre for arbitration, with the DIAC playing a central role. However, given the absence of a modern arbitration law in the UAE – such as the UNCITRAL Model Law-based arbitration laws adopted by its neighbours in the region, including Saudi Arabia – the region may be constrained to some extent. This, though, may be about to change, with a new federal UAE arbitration law rumoured to be introduced.

Should this come to pass, and assuming the DIAC’s Draft Rules are duly promulgated by decree and take effect, the impact on dispute resolution in the region is likely to be substantial and far-reaching. Indeed, they could be major contributing factors toward maintaining as well as accelerating the DIAC’s status as a major arbitration institution and the UAE as a leading regional hub. 

FINDING

THE EVIDENCE

THAT
MATTERS

Our teams of specialists work at the cutting edge of digital forensics, applying our skills and expertise in civil and criminal claims. In cases of serious organised crime, fraud, IP theft, corporate hacking and employee misconduct, we identify and interpret digital evidence from corporate servers, computers, laptops, mobile phones and more.

For more information please contact us on **0845 226 0331** or visit www.itgroup-uk.com

EXPERT FORUM

CHALLENGES WHEN ENFORCING ARBITRAL AWARDS



PANEL EXPERTS

**Elie Kleiman**

Partner

Freshfields Bruckhaus Deringer LLP

T: +33 1 44 56 33 18

E: elie.kleiman@freshfields.com

Elie Kleiman is a partner at Freshfields Bruckhaus Deringer LLP. He is a member of the dispute resolution team and is the managing partner of the Paris office. Mr Kleiman's clients come from a variety of sectors and industries. He has in-depth knowledge of the oil & gas, mining, chemicals and pharmaceutical areas.

**Adrian Cole**

Partner

King & Spalding

T: +971 2 596 7013

E: acole@kslaw.com

Adrian Cole leads King & Spalding's Middle East dispute resolution practice. A construction law specialist advising on disputes relating to energy and infrastructure development, prior to becoming a lawyer Mr Cole qualified as an engineer and quantity surveyor and has first-hand experience of the practical issues in the engineering and construction industries.

**Julie Bédard**

Partner

Skadden, Arps, Slate, Meagher & Flom LLP

T: +1 (212) 735 3236

E: julie.bedard@skadden.com

Julie Bédard concentrates her practice on international litigation and arbitration. She regularly advises clients on the drafting of dispute resolution clauses and has served as counsel in international arbitration proceedings held under the auspices of the International Chamber of Commerce, the American Arbitration Association, the International Centre for Dispute Resolution and the International Centre for Settlement of Investment Disputes.

**Marco Tulio Venegas**

Partner

Von Wobeser y Sierra

T: +52 (55) 5258 1034

E: mtvenegas@wvys.com.mx

Marco Tulio Venegas is a partner at Von Wobeser y Sierra with 18 years' international experience, both on a professional and educational level. The youngest partner ever promoted by the firm, he has saved his clients billions of dollars and has protected and resolved several of the most complex and consequential litigation and arbitration matters for both multinational clients and governments around the world.

CD: Why is it important to ascertain the ability to enforce an arbitral award – both practically and legally – at the outset of a dispute? What are the key issues that need to be addressed at this stage?

Kleiman: Ascertaining the ability to enforce an arbitral award is important before a dispute arises. This exercise needs to be conducted as early as possible, and ideally before agreeing the terms of the arbitration clause. The choice of the seat of arbitration, for example, is critical. The seat of arbitration is where the arbitral award can be set aside and some jurisdictions also allow arbitration-unfriendly injunctions. It is therefore crucial for the award-creditor that the seat of arbitration be a ‘safe seat’, an arbitration-friendly jurisdiction. Regarding practical considerations, a claimant or counterclaimant must, as early as possible, understand where the respondent has assets, including receivables. When dealing with groups of companies, one should think tactically about the possibility of joining affiliates that were involved in the negotiation and performance of the agreement.

Bédard: It is important to determine whether it is worthwhile to spend time and resources on

the dispute. Many clients, understandably, are not inclined to devote significant time, energy and financial resources to a dispute, if they do not have solid prospects of recovering on the award. Assuming a lack of voluntary compliance with the award, the key is to determine whether, in practice, it will be possible to find assets and execute on them.

“Arbitration is just a private form of dispute resolution; however, from an attorney’s perspective it shares the same concerns regarding the potential enforcement of the final award.”

*Marco Tulio Venegas,
Von Wobeser y Sierra*

A recurring sensitive issue arises when the assets are located only in the home jurisdiction of the defendant, and a concern exists that the courts in that jurisdiction may not be sufficiently independent and impartial to support the enforcement of the award.

Venegas: Arbitration is just a private form of dispute resolution; however, from an attorney’s perspective it shares the same concerns regarding

the potential enforcement of the final award. Consequently, as in any other type of litigation, the basic recommendation about potential enforcement should be traced back to the moment in which the commercial relationship and the respective contracts were executed. If, from the beginning of the relationship, there are enough legal protections and guarantees, then the ability to enforce during a dispute increases. Additionally, it is healthy, at least in longstanding commercial relationships, to periodically monitor the performance of the obligations and, if possible, the financial situation of the other party. If, at some point, there are signs of the financial capabilities of the other party deteriorating or if the performance of the obligations begins to be defective, then parties should request additional guarantees and reassess the future of the contract.

Cole: The goal of nearly all arbitrations is to obtain an award that is capable of being enforced. Article four of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards sets out the grounds on which an international arbitral award may be refused. These include defects in the arbitration agreement, either because of some incapacity in the parties or because the arbitration agreement is not valid under the applicable law. Failure to give proper notice of the arbitration or its proceedings or prevent in any other way a party presenting its case will also prevent enforcement.

The arbitration must only deal with that which is within its jurisdiction, by a tribunal composed and operating in accordance with the procedure agreed by the parties or the law of the country where the arbitration took place. The dispute also must be one which is capable of determination by arbitration and the resulting award is not contrary to public policy.

CD: What strategies might be used by a losing party to challenge an arbitral award and frustrate the enforcement process?

Bédard: The losing party may attempt to move to set aside or annul the award in the place of arbitration. This is an uphill battle, and courts in many jurisdictions will not set aside an award lightly. If the place of arbitration is also the home jurisdiction of the losing party and the courts are not necessarily independent or impartial, then it is possible that the losing party may be able to gain more traction with an attempt to set aside the award. We have also seen situations where the losing party moved to annul the award in its home jurisdiction, even though this was not the place of arbitration. This strategy is extreme and normally should not be entertained by courts under any circumstances.

Venegas: There are several scenarios in which awards may be challenged or frustrated. First, a losing party may have willingly created several potential arguments of violations of due process

during the arbitration, knowing that the likelihood of losing was high. In this scenario, the other party should be alert and constantly ask the arbitral tribunal to correct any potential breach of due process. Another strategy commonly employed, once the award is rendered, is to try to try to illegally transfer to or hide assets with a third party or to artificially create debts between companies so that the enforcement becomes financially unviable. Other illegal strategies include changing domicile to a place in which the courts may not have much experience in enforcement proceedings of arbitral awards.

Cole: Losing parties will often carefully consider national arbitration laws, as well as the New York Convention, to see if any mandatory requirements for recognition and enforcement of arbitral awards have been breached. Particularly fertile complaints are that due process was not followed or that the enforcement of the award is contrary to public policy. In the case of due process, losing parties may seek to assert that the tribunal did not follow the process agreed by the parties or that there was some other impediment to it presenting its case. Public policy, by comparison, is a much more uncertain ground. Often described as an 'unruly horse', public policy is often subjectively applied, with applicable criteria changing from time to time.

Kleiman: A losing party may typically attempt to seek the setting aside of the arbitral award

before the courts of the seat of arbitration and simultaneously try to defeat or slow down enforcement with stay of execution applications to the courts where assets are located, which many jurisdictions may permit, based on the provisions of Article VI of the New York Convention. In France, such tactics are generally not efficient because arbitral awards are immediately enforceable, even pending set aside applications, unless a stay of execution is ordered which French courts seldom do. French courts also decide matters of arbitral award recognition and enforcement based on their own review without regard to what the courts of the seat of arbitration may have decided.

CD: Once it is clear that an award will not be honored by the non-prevailing party, what are the main methods of enforcement typically available to the winning side?

Venegas: The New York Convention allows the winning party to seek the enforcement of the award in any county in which the losing party may have assets. Thus, parties should identify the location of the assets and, if possible, bring enforcement action before the courts of the relevant countries. In addition to the enforcement proceedings, some jurisdictions allow parties to ask for preliminary measures to secure enforcement. In those jurisdictions, of course, it is advisable to seek this

type of measure. Ultimately, if the enforcing party secures assets and has a strong position before the courts, it is likely that the losing party may try to settle the case to avoid further expenses and losses.

Kleiman: The methods of enforcement that can be used by the award-creditor will be those available at the place where enforcement is sought. Under Article III of the New York Convention, arbitral awards must be enforced in accordance with the rules of procedure of the territory where the award is relied upon. In France, a variety of protective and enforcement measures are available that involve the registration of a surety on property, court ordered escrow, attachment of tangible and intangible properties and foreclosure. It is possible to take early interim asset preservation measures in anticipation of future enforcement steps. For example, while a set aside application is pending, the award-creditor may freeze its debtor's assets.

Cole: The main methods of enforcement are to bring an action for the recognition and enforcement of an award in courts in which the arbitration was seated or alternatively to bring such an action overseas. In the UAE, this typically involves commencing a court proceeding, either in the local Arabic courts or in the courts of the

Dubai International Financial Centre (DIFC) or Abu Dhabi Global Market (ADGM) financial free-zones. The DIFC courts have been a common route to the enforcement of awards in onshore Dubai, and elsewhere in the UAE, through 'conduit jurisdiction' between the DIFC courts and the Dubai courts. However, a series of recent cases determined by the Joint Judicial Tribunal has cast doubt on the effectiveness of the conduit jurisdiction in certain cases.

"The methods of enforcement that can be used by the award-creditor will be those available at the place where enforcement is sought."

*Elie Kleiman,
Freshfields Bruckhaus Deringer LLP*

Bédard: Enforcement depends on a thorough examination of the location of potential assets available for execution and the assessment of the likelihood of success of enforcement in the relevant jurisdictions.

CD: In your opinion, how effective are international treaties and conventions in providing effective and robust methods of enforcement around the world?

Cole: Most lawyers would agree that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is a very successful piece of legislation, facilitating the recognition and enforcement of arbitral awards in nearly 160 countries worldwide. Countries that have not joined the New York Convention tend to suffer from a lack of international investment, as without a reliable means of enforcing foreign arbitral awards, international investors often consider the risk of investing or contracting in such states to be too high. However, the New York Convention is not without its critics. The public policy exception introduces uncertainty and grants high levels of discretion for state courts to refuse enforcement.

Bédard: The New York Convention is effective. It does foster, as its name suggests, an easier path for the recognition and enforcement of arbitration awards. This is because it provides for limited grounds upon which the award may be denied enforcement. Courts in numerous jurisdictions have given effect to these provisions. There are, of course, exceptions, but these should not detract

from the overall positive track record of the convention.

Kleiman: The New York Convention makes enforcing arbitral awards very effective worldwide, almost as effective as the enforcement of judgments in the EU. Pursuant to Article III of the convention, Member States must recognise arbitral awards rendered in other contracting states and they may only refuse to enforce such awards on very limited grounds, such as the invalidity of the arbitration agreement, a breach of due process, *ultra petita* ruling by the tribunal, improper constitution of the tribunal, suspension or annulment of the award at the seat, inarbitrability of the dispute according to the law of the country of enforcement, or infringement of its public policy. These limited grounds and the absence of substantive revision contribute greatly to the success of international arbitration as the preferred means of dispute resolution worldwide.

Venegas: The international system is very robust. There are literally thousands of cases evidencing that the enforcement of arbitral awards is usually possible and successful. There are certain atypical cases in which the dynamics between enforcement and setting aside proceedings may create difficult scenarios and further complicate the situation of the prevailing party. However, on average, the rate of success in

enforcing an award or settling the enforcement is high. In connection with the ICSID system and Bilateral Investment Treaties' arbitration, despite the high profile of those cases and the political implications that some of them may have, the system has worked well. Currently, however, there is a trend to disarticulate the more global approach of the system and make more ad hoc systems. This trend is concerning and threatens to jeopardise all the benefits and advances in

predictability and legal security achieved during the past decades.

CD: Have you seen any recent legal or judicial developments which impact the process of enforcing arbitral awards? What insights can we draw from recent cases?

Bédard: The US Court of Appeals for the Second Circuit issued two 2017 rulings – *Micula v. Government of Romania and Mobil Cerro Negro, Ltd. v. Venezuela* – on the applicability of the US Foreign Sovereign Immunities Act to petitions to confirm or enforce ICSID arbitral awards against sovereigns. In both cases, the Second Circuit reversed district court decisions that had confirmed ICSID awards against sovereigns, pursuant to a summary *ex parte* procedure that is available under New York state procedural law. The federal appellate court ruled that the district court did not have jurisdiction over the sovereigns as a result of the summary *ex parte* procedure because the service of process and venue requirements of the FSIA had not been satisfied. These cases caution that parties attempting to enforce an arbitral award against a sovereign must give due consideration of the impact of the FSIA on the procedures that may be available to confirm or enforce the award.

Kleiman: Enforcement against sovereigns is impacted by the enactment in France of a statute known as '*Loi Sapin II*'. Under this new regime, enforcement against foreign sovereign assets in France is subject to the prior authorisation of a judge. Moreover, save for commercial assets, express waiver of immunity of enforcement is

required – and diplomatic and consular assets require the waiver to be not only express but also specific. In a 10 January 2018 ruling, the French Supreme Court held that strong policy reasons justified that consistent solutions in a matter of state sovereignty and concluded that the requirement

“One of the common errors made in arbitration agreements in the UAE is for parties to stipulate arbitration under the rules of the DIFC-LCIA and then provide for the seat of Dubai to apply.”

*Adrian Cole,
King & Spalding*

of an express and specific waiver for enforcement against diplomatic assets applied even to enforcement governed by the pre-*Sapin II* regime.

Venegas: There is definitively a trend to challenge the validity of awards more than in the past. Different grounds have been invoked to oppose enforcement and seek to set aside awards. The most controversial cases are related to arguments about the partiality of arbitrators or failure to adequately perform their duties by delegating most of their material work to

the secretary of the arbitral tribunal. Other common grounds to oppose enforcement relate to a breach of due process during the arbitration, or arguments about *ultra* or *infra petita*. The most interesting cases that we have seen recently refer to the enforcement of nullified awards. Although these types of cases are certainly exceptional, they provide a blueprint for how to take advantage of the New York Convention and to contrast considerations of national public policy against 'international' public policy.

Cole: The conduit jurisdiction between the DIFC and Dubai courts has been subject to considerable challenges over the last couple of years. Following the *Banyan Tree* case in 2013, the DIFC courts have recognised foreign and domestic arbitration awards, even where the award debtor had no presence or assets in the DIFC itself. This has allowed award creditors to seek judgment in the terms of the award and then use the 'conduit' afforded by the Judicial Authority Law of the protocol of enforcement between the DIFC and Dubai courts to enforce the DIFC court judgment in the Dubai courts without the courts having jurisdiction to review the merits. This has saved award creditors from being exposed to the sometimes unpredictable ratification process of the Dubai courts.

CD: What steps can parties take when negotiating and drafting business agreements, to assist the process of

enforcing awards should this become necessary down the line?

Cole: It is imperative that the arbitration agreement is effective and enforceable. Many parties, including their lawyers, are inexperienced in drafting binding arbitration agreements. Furthermore, the arbitration agreement, frequently coming at the end of a contract, is often given little consideration, especially when time is short. This can result in pathological arbitration clauses – ones in which there are defects which may permit a party to challenge its recognition and enforcement. One of the common errors made in arbitration agreements in the UAE is for parties to stipulate arbitration under the rules of the DIFC-LCIA and then provide for the seat of Dubai to apply. In doing so, parties think they are getting arbitration seated in the DIFC because they have specified the DIFC-LCIA rules.

Venegas: In addition to the general contractual recommendations about the existence of guarantees, and in general having the proper asset and due diligence research in place, it may be useful, when allowed by the corresponding substantive law, to include a formal and explicit waiver to challenge the validity of the award before courts, either through setting aside proceedings or opposing the judicial enforcement proceeding. Other more intrepid solutions may be to add a contractual

penalty or a high rate of post award interests in the contract against the party that does not voluntarily comply within five or 10 days of the award being rendered and notified.

Kleiman: One cannot overemphasise the importance of agreeing to an arbitration-friendly seat. Arbitration friendliness requires more than a jurisdiction that has endorsed UNCITRAL model legislation. It requires a well-established legal tradition that is supportive of arbitration and it also demands a strong tradition of independence of the judiciary. Choosing an experienced arbitral institution is also critically important. Parties should be wary of arbitral institutions that have not demonstrated their expertise and independence. Dispute resolution clauses should also be reviewed by specialist counsel.

Bédard: Small things can make a big difference. For example, it is useful to think of appointing an agent for the service of process to facilitate judicial proceedings for the purposes of enforcing the award. It is also useful to include a clause pursuant to which the parties recognise that jurisdictions where assets are located are competent to hear actions for the enforcement of an award.

CD: Going forward, are there any particular developments you expect to see in the way arbitral awards are enforced? What overarching trends are likely to shape this issue?

“Conventional wisdom is that New York Convention enforcement is easier than the recognition of judgments, which admittedly still lacks a treaty framework.”

*Julie Bédard,
Skadden, Arps, Slate, Meagher & Flom LLP*


Venegas: As more cases arise, it is foreseeable that the criteria adopted by the courts in analysing cases opposing enforcement will begin to standardise. In this regard, it is likely that jurisprudential definitions of what is deemed a breach of public policy in public contracts will be set. Other aspects, such as what type of violations of due process are really causes to deny enforcement, and in general the refusal to revisit the merits of an award, will also be fixed as undisputable criteria. As for the evolution of enforcement proceedings, it is also possible that amendments to local laws

may take place to allow the adoption of provisional measures immediately after an award to secure assets. Generally, I expect that a trend to strengthen the position of the enforcing party and the authority of the courts will prevail in the coming years.

Cole: Whether and in what circumstances security should be paid by an award creditor seeking to challenge an award is an issue that frequently comes before the courts of many jurisdictions. In the series of cases concerning *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corp (NNPC)*, NNPC gave security of over \$80m to stay enforcement proceedings commenced in 2004 in the English Commercial Court, pending the determination of a challenge to an arbitration award in Nigeria. In 2014, the challenge in Nigeria still had not been resolved. The stay only came to an end when the English Court of Appeal, apparently swayed by the evidence of a former Chief Justice of Nigeria, said that it was “conceivable that there will be no fixed determination of the issue of whether the arbitral award will be set aside for 20 or 30 years or longer”, directed the Commercial Court to determine an allegation of fraud, which was one of the grounds of challenge that the Nigerian court had failed to address.

Kleiman: Enforcing arbitral awards – or foreign judgments – against foreign sovereign assets in France will become increasingly difficult on account of more restrictive conditions on waivers

of immunity of execution. The perspective on this evolution will obviously vary if one is a foreign state, a foreign state’s debtor or a creditor. From the perspective of French debtors of any given foreign state, their exposure to attachment of tax debts owed by them to creditors of the state will be more limited and will reduce the risk of double payment that arises frequently when there is no recognition between France and that a state that is paying the state’s creditor would validly discharge the obligations of the debtor to pay the state itself. The enforcement of arbitral awards against a private party’s assets will remain highly efficient in France.

Bedard: It is interesting to compare the enforcement of arbitral awards with the recognition of judgments. Conventional wisdom is that New York Convention enforcement is easier than the recognition of judgments, which admittedly still lacks a treaty framework. In practice, however, in many jurisdictions, there is not much difference between the recognition of a foreign judgment and the enforcement of an arbitration award. I would not expect this trend to change. 



Von Wobeser y Sierra offers integrated legal solutions with more than 35 practice areas.

Our team is composed of more than 150 individuals. Our Firm's objective is to offer each one of our foreign and domestic clients with efficient legal solutions.

We have more than 30 years of experience.

Practice Areas

- ▶ Advertising, Consumer Protection & Product Liability
- ▶ Anti-Corruption & Compliance
- ▶ Banking & Finance
- ▶ Bankruptcy & Restructuring
- ▶ Civil & Commercial Litigation
- ▶ Commercial Arbitration
- ▶ Commercial Contracts
- ▶ Competition & Antitrust
- ▶ Constitutional *Amparo* & Administrative Proceedings
- ▶ Corporate
- ▶ Corporate Governance
- ▶ Corporate, Structured & Project Finance
- ▶ Energy & Natural Resources
- ▶ Environment
- ▶ Executive Compensation & Benefits
- ▶ Foreign Investment
- ▶ Government Procurement & Public Works
- ▶ Immigration
- ▶ Industrial & Intellectual Property
- ▶ Insurance
- ▶ International Trade & Customs
- ▶ Inventions & Patents
- ▶ Investor-State Arbitration
- ▶ Labor & Employment
- ▶ Maritime, Air & Transport
- ▶ Mergers & Acquisitions, Joint Ventures
- ▶ Oil & Gas
- ▶ Privacy & Data Protection
- ▶ Private Equity
- ▶ Projects & Infrastructure
- ▶ Public-Works Arbitration
- ▶ Real Estate
- ▶ Securities & Capital Markets
- ▶ Social Security
- ▶ Tax Advice & Litigation
- ▶ Telecommunications, Media & Technology

www.vonwobeserysierra.com

Paseo de los Tamarindos 60, 4th Floor, Col. Bosques de las Lomas,
Del. Cuajimalpa de Morelos, 05120, Mexico City. T: +52 (55) 52 58 10 00, E-mail: info@vwys.com.mx

PERSPECTIVES

THE USE OF ADR IN ARBITRATION

BY **SABINA ADASCALITEI**

> THE CHARTERED INSTITUTE OF ARBITRATORS

Arbitration is often referred to as a form of alternative dispute resolution (ADR), on the basis that it is a mechanism for resolving disputes outside the court system. However, arbitration is far more similar to court proceedings than other ADR mechanisms, *inter alia*, by virtue of a final and binding award. Recently, there has been scope for discussions about the use of mediation and other ADR methods in arbitral proceedings, with a view to improving the time and cost efficiency of the dispute resolution process. Due to different legal cultures and policy considerations, there is no uniform way in which different ADR methods may be integrated in arbitral proceedings.

Multi-tiered dispute resolution clauses

The most common way in which arbitration is used with other ADR mechanisms is by virtue of including a multi-tiered dispute resolution clause in one's contract. Such a clause would indicate that the parties agree to attempt to resolve their disputes via an ADR mechanism before resorting to arbitration. Parties must ensure that such clauses are carefully drafted, as ambiguity or lack of relevant details may result in the unenforceability of the dispute resolution clause. In such cases, the arbitral tribunal may, for instance, find that it does not have jurisdiction to hear the dispute, because the preliminary ADR step was a condition precedent

and the parties have failed to comply with it. Furthermore, this may also lead to the award being challenged on the basis that the tribunal lacked jurisdiction, because the relevant ADR steps have not been fulfilled. The criteria applied to assess a multi-tiered dispute resolution clause has been set out in *Wah (Aka Alan Tang) & Anor v. Grant Thornton International Ltd & Ors*, where the court held that any positive obligation would be enforceable if: (i) it shows a sufficiently certain and unequivocal commitment to commence a process; (ii) it sets out, with sufficient clarity, the steps each party is required to take in order to put the process in place; and (iii) it sets out a sufficiently clearly-defined process to enable the court to objectively determine the minimum required of the parties to the dispute in terms of their participation in the process and when and how the process will be exhausted or properly terminable without breach.

To avoid enforceability issues, parties should ensure that their rights and obligations with regard to the ADR steps are sufficiently well defined to provide certainty. Adequate language should be used to clearly set out whether any of the steps are a condition precedent, as well as to set out the relevant time limits to be complied with.

Hybrid dispute resolution processes

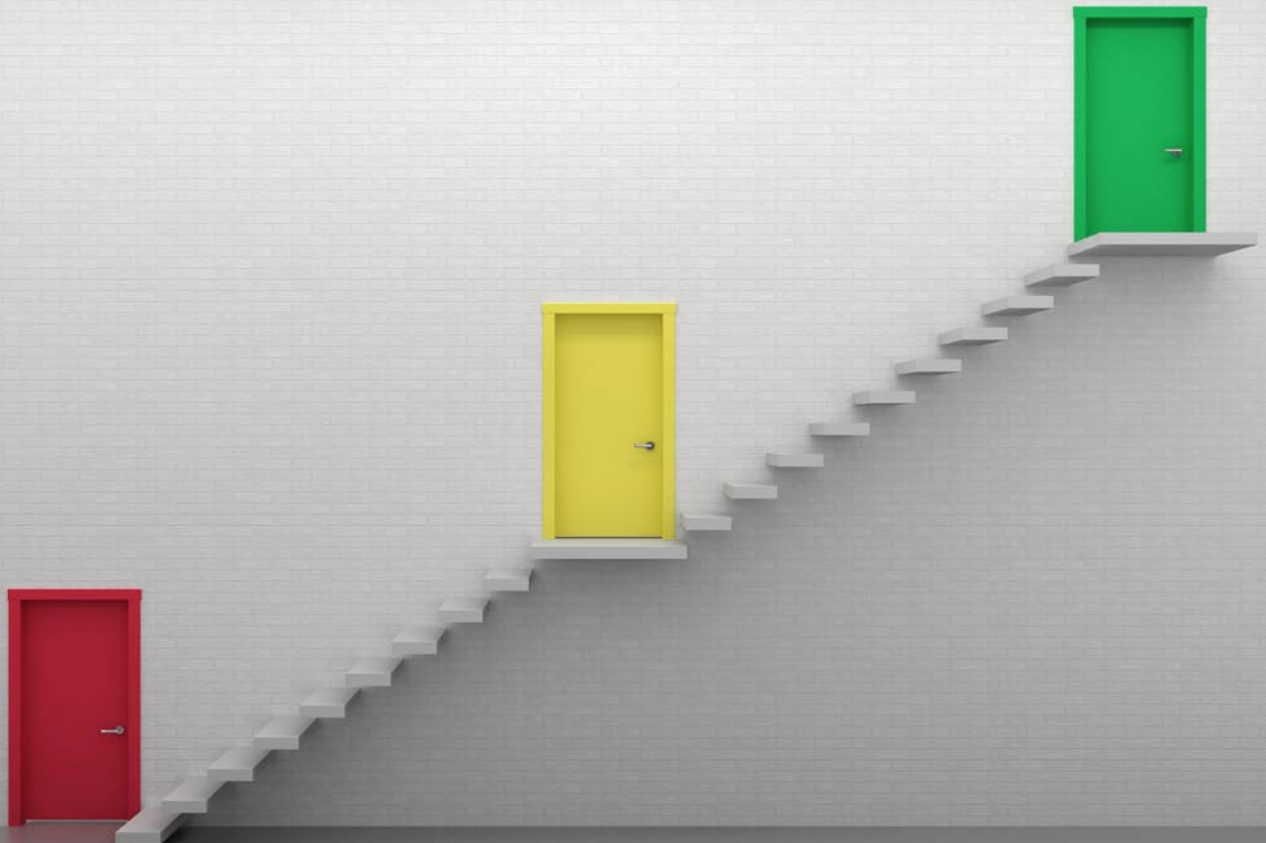
A hybrid dispute resolution process involves mediation and arbitration, most commonly, but it can sometimes also involve conciliation and arbitration,

with the same person 'wearing two hats' in the same case. In its traditional form, 'med-arb', the parties first go through mediation and if a settlement is not successfully reached, the same person would act as arbitrator and issue a final and binding award. The other option takes the form of 'arb-med', by which parties go through the arbitration process first and then an award is issued without being made available to the parties while they proceed to mediate the outstanding issues, with the same person acting first as arbitrator and then as mediator. Looking at both options, parties should bear in mind that a pure mediated agreement is as enforceable as a contract, which falls short of being enforceable under the New York Convention. The situation is different if the parties to med-arb proceed to arbitration, where arguably the settlement agreements that are recorded in the arbitral award will fall under the scope of the New York Convention. Essentially, if the arbitration has not started by the time the settlement agreement has been reached, it is likely that the mediated settlement will only be enforced as a contract.

Hybrid dispute resolution proceedings have raised concerns regarding the legitimacy of the process as a whole, given that the same person would act as both arbitrator and mediator in the same case. More precisely, there is a concern that the med-arbitrator would become privy to information that would normally not have been disclosed to the arbitrator. This has been seen to raise doubts with regard to the

independence of the med-arbitrator, who would be required to act in a fair and impartial manner when wearing the arbitrator hat in the same case. On the one hand, the dispute resolution community has shown scepticism as to whether the med-arbitrator would actually remain 'unaffected' as an arbitrator, after becoming privy to personal information or compromise positions. When acting as a mediator,

there is a risk that the med-arbitrator may become empathetic toward a party and this may raise issues if they further take on the role of arbitrator, as it is unlikely that the arbitrator would be able to completely ignore the confidential information they have received throughout the mediation stage. On the other hand, it has been noted that the case may be prejudiced if the med-arbitrator first engages



in an evaluation before being asked to render an award. Essentially, an arbitrator who initially personally assessed the case is seen to have lost his impartiality and would raise concerns with regard to the remaining part of the proceedings.

These hybrid systems are not immune to criticism, as there is no consensus on whether an arbitrator can act as a mediator or vice versa. However, they offer the advantage of timely and cost-efficient dispute resolution, which cannot be as easily achieved if the parties engage separately in arbitration, as well as other ADR mechanisms. Parties, as well as arbitrators, should approach these types of proceedings with caution, as an award resulting from a hybrid process may be open to challenges based on the dual mediator-arbitrator role. To address this issue, parties may wish to consider the following options. First, they would have to decide whether they are willing to waive their right to challenge the award based on the dual role of the third-party neutral and include a provision to this effect in their arbitration agreement. Second, parties could explore the option of having different people conduct the different stages of the hybrid process who could both sit in the open sessions and yet avoid the shortcomings of 'two hats, one person'. While having an additional person acting as

arbitrator or mediator may increase the costs, it is very likely that this option would address concerns regarding the lack of procedural fairness and perception of bias. Finally, parties should also seek to reach an agreement on the treatment of confidential and without prejudice information received by the

“Parties are not obliged to undertake mediation if this is suggested or directed by the arbitral tribunal. However, the tribunal may take into consideration the parties’ behaviour when rendering the costs award.”

mediator and in the event that either party becomes uncomfortable with the appointed neutral, a built in 'opt-out' should be included in the agreement to allow a new neutral to be appointed. To do otherwise may give rise to challenges on public policy grounds.

An ADR 'window' during arbitral proceedings

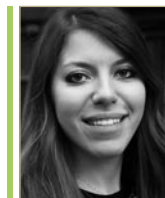
An alternative to hybrid proceedings is represented by allowing the parties to consider mediation during the course of the arbitral proceedings. This option appears suitable to parties

who envisage that a dispute that is being arbitrated may be settled via mediation. Parties should consider this option before the case management conference in the arbitration, in order to allow the tribunal to take into consideration the possibility of mediation when fixing the procedural timetable.

Depending on the institutional rules, where applicable, the *lex arbitri* or other rules and laws applicable, the arbitral tribunal may take a more proactive role in suggesting that the parties should seek to mediate either parts or the entirety of the dispute. For instance, the International Centre for Dispute Resolution (ICDR) Rules allow the ICDR to invite the parties to mediate in accordance with its mediation rules. Similarly, the German Institution of Arbitration (DIS) Arbitration Rules provide that the tribunal should seek to encourage amicable settlement of the dispute at every stage of the proceedings.

Parties should note that if an agreement is reached during the mediation proceedings, such an agreement will generally not be enforceable under the New York Convention and will rather be enforced

as a contract. In this respect, parties should agree from the outset that they will sign a draft consent award, recording the terms of the settlement agreement in its operative part. Furthermore, parties should pay careful attention to the institutional rules, where applicable, to ensure that the tribunal does indeed have the power to render a consent award. Finally, parties are not obliged to undertake mediation if this is suggested or directed by the arbitral tribunal. However, even though there is no coercive element to persuade them to mediate, the tribunal may take into consideration the parties' behaviour when rendering the costs award. **CD**



Sabina Adascalitei

Research and Academic Affairs
Coordinator

The Chartered Institute of Arbitrators

T: +44 (0)20 7421 7446

E: sadascalitei@ciarb.org

More than just numbers...



> 150

More than 150
antitrust
economists
worldwide



> 50

More than 50
years of helping
clients succeed
around the world



> 25

More than 25
offices across
North America,
Europe, and
Asia Pacific

More than just the world's leading
antitrust economics consulting firm.

www.nera.com/antitrust

PERSPECTIVES

POSITIVE STEPS FOR ARBITRATION IN MAINLAND CHINA?

BY **DR LING YANG AND KIRAN SANGHERA**

> HONG KONG INTERNATIONAL ARBITRATION CENTRE

In 2017, the key developments for arbitration in mainland China were the issuance of three documents by the Supreme People's Court, addressing the judicial review process for domestic and foreign-related arbitrations. The three documents were the Notice Concerning Some Questions Regarding the Centralised Handling of Judicial Review of Arbitration Cases (the 2017 Notice), the Provision of the SPC on Application for Approval of the Arbitration Cases that are Subject to Judicial Review (Provision No. 21) and the Provision of the SPC on Certain Issues Related to the Conduct of Judicial Review of Arbitration (Provision No. 22).

Given that the mainland Chinese arbitration law has not been amended since 1995, the documents

issued by the Supreme People's Court over the years have been important in clarifying the questions that have arisen. The documents issued in 2017 aim to: centralise the handling of cases subject to judicial review, clarify when cases can be submitted to judicial review, extend the pre-reporting procedure to include domestic arbitrations and clarify how the courts determine the law of international arbitration agreements.

Centralised handling of arbitration cases subject to judicial review

The 2017 Notice provides that all arbitration cases that are subject to judicial review be referred to specialised divisions responsible for handling



foreign-related commercial cases. The aim of the 2017 Notice is to encourage uniform decision making for all arbitration matters, whether domestic or foreign-related, put before the courts. Previously, almost all civil-related divisions of mainland courts could conduct judicial reviews of domestic arbitration matters. The judicial review of foreign-related arbitration matters would be considered by divisions responsible for cross-border commercial and civil cases. This led to inconsistent decisions

being rendered by the different divisions, a practice which should be reduced with the issuance of the 2017 Notice. Also, under the continued direction and training of the Supreme People's Court, judges from the divisions handling foreign-related commercial cases have comparatively more knowledge and experience in arbitration than their counterparts in other divisions. The centralisation of all arbitration matters subject to judicial review to these divisions should, therefore, lead to judges with more

knowledge and experience in arbitration being responsible for conducting the review.

Clarification of when arbitration cases can be subject to judicial review

The regulations governing when mainland courts can conduct a judicial review of arbitration cases is included in a number of different instruments, from the arbitration law to the various documents published by the Supreme People's Court. In Provision No. 21 and No. 22, the Court has, for the first time, consolidated into a single list all of the instances when arbitration cases can be subject to judicial review. The categories are as follows: (i) when verifying the validity of the arbitration agreement; (ii) when enforcing the award of a mainland arbitration institution; (iii) when setting aside the award of a mainland arbitration institution; (iv) when recognising and enforcing awards made in Hong Kong, Macau and Taiwan; (v) when recognising and enforcing a foreign arbitral award; and (vi) other – future case law will be needed to clarify which issues fall under the category of 'other'.

Extended application of the pre-reporting system to include domestic arbitrations

Another area where the treatment of domestic and foreign-related arbitrations has been different is the

procedure adopted for judicial review. When foreign-related arbitration cases are subject to judicial review, the lower courts must obtain approval from the relevant higher court if they determine that the arbitration agreement is invalid, refuse recognition

“The aim of the 2017 Notice is to encourage uniform decision making for all arbitration matters, whether domestic or foreign-related, put before the courts.”

and enforcement of the award or set it aside. If the higher court intends to approve the lower court's determination, it must report to the Supreme People's Court for final approval of the decision. This process is referred to as the 'pre-reporting system'. The pre-reporting system effectively means that, in the case of foreign-related arbitrations, the Supreme People's Court is the only body that can finally determine whether an international arbitration agreement is invalid or whether an award should be refused enforcement or set aside.

The purpose of the pre-reporting system is twofold: to preserve the effectiveness of foreign-

related arbitration cases and to eliminate local protectionism by courts. The pre-reporting system has proven successful in reducing local protectionism as only two awards have not been enforced on the grounds of public policy. The public policy ground is the ground through which protectionism is most commonly manifested.

Article 2 of Provision No. 21 states that the pre-reporting system should also apply to reviews of domestic arbitration cases. Therefore, domestic arbitrations will benefit from the same protective measures as foreign-related arbitrations. However, unlike foreign-related arbitrations, domestic arbitration cases will be reviewed finally by the relevant provincial high court, not the Supreme People's Court. But in situations where the parties are domiciled in different provinces or questions of public policy are involved, the issue shall be finally decided by the Supreme People's Court.

Clarifying how Chinese courts determine the law of international arbitration agreements

The arbitration law does not stipulate a principle by which the law governing an international arbitration agreement may be determined. This is an important point as it can lead to an arbitration agreement being deemed invalid. The question is determined pursuant to Article 18 of the Law on the Application of Law for Foreign-Related Civil Relations, whereby the courts determine the governing law

applicable to an international arbitration agreement, according to the following priority: the applicable law chosen by the parties or in the absence of an applicable law chosen by the parties, the law of the place where the administering arbitration institution is located or the law of the seat of arbitration.

Provision No. 22 provides guidance in favour of finding a valid arbitration agreement. In the absence of party agreement on the applicable law, the courts should apply the law that renders the arbitration agreement valid in situations where the law of the place of the administering arbitration institution and the law of the seat of arbitration result in conflicting outcomes. Furthermore, Articles 13 and 14 of Provision No. 22 state that the applicable law of the contract is not determinative of the law governing the arbitration agreement, which clarifies an earlier interpretation by the Supreme People's Court in 2006.

This is the first occasion where the Court has endorsed a view that the law supporting the validity of the arbitration agreement should prevail, which reflects the Court's wider pro-arbitration approach.

Further steps needed in 2018

Although progress was made in 2017, there are still important areas that require clarification and could benefit from change.

The arbitration law requires each arbitration agreement to designate an arbitration commission. *Ad hoc* arbitration, therefore, is not permitted.

However, further to an opinion issued by the Supreme People's Court on 30 December 2016, companies registered in free trade zones may not need to stipulate an arbitration commission, provided three specific requirements are met. The arbitration agreement must designate: (i) a specific place in mainland China; (ii) specific arbitral rules; and (iii) specific arbitrators. In 2017, some arbitration institutions issued special rules for *ad hoc* arbitrations and reports have shown that *ad hoc* awards have been confirmed by domestic arbitration institutions from time to time. However, more cases and judicial clarifications are needed to establish the extent to which *ad hoc* arbitrations will be accepted.

In 2015, the Hong Kong International Arbitration Centre established a representative office in mainland China. Since then, a number of other institutions have established a similar presence. A frequent question today is whether foreign institutions can administer cases in mainland Chinese cities. Although arbitration hearings can be held in mainland China, the arbitration law is unclear on whether non-mainland institutions are permitted to administer arbitrations in mainland China, but implies that only a mainland Chinese institution can do so. It is important to clarify the position as failure to comply with this restriction could lead to the arbitration agreement being deemed invalid or an award being set aside or enforcement of an award being refused.

In 2014, the question of whether an arbitration agreement providing for arbitration administered by a foreign institution in Beijing was referred to the Supreme People's Court. The Court agreed with the lower court's decision that the agreement complied with the arbitration law and was therefore deemed valid. However, further case law and interpretation from the Supreme People's Court would be welcomed as uncertainty remains around the nationality of such awards, which could impact on whether a mainland court or foreign court has the authority to set aside the award, and whether the New York Convention or mainland civil procedure law should be applied when enforcing the award.

Mainland Chinese legislation does not adopt the doctrine of the seat of arbitration even though it has been frequently referred to by judges of the SPC. Instead, the arbitral institution plays a role in determining issues that, in international practice, are usually determined by the seat. For example, the 'place of the institution' determines the nationality of the award and the 'law of the place of the institution' can determine the governing law of the arbitration agreement. The confusion between statute and judicial practice has led to many issues, including who should handle judicial reviews of arbitration matters, and questions about the validity of arbitration agreements and legal basis for the enforcement of awards. To eliminate ongoing uncertainty and unpredictability, substantive modification of the law is required.

Until then, the notices, opinions and judicial explanations issued by the Supreme People's Court will serve as helpful clarifications on the application of arbitration law in mainland China. **CD**



Dr Ling Yang

Deputy Secretary-General
Hong Kong International Arbitration Centre
E: lyang@hkiac.org



Kiran Sanghera

Business Development Deputy Director
Hong Kong International Arbitration Centre
E: ksanghera@hkiac.org

PERSPECTIVES

THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION

BY **DÉSIRÉE PRANTL AND AMANDA NEIL**
> FRESHFIELDS BRUCKHAUS DERINGER

The use of third-party funding in international arbitration continues to grow and evolve.

Originally, third-party funding was relied upon by claimants who lacked the financial means to pursue their claims. Increasingly, however, it is used as a general financing tool, including by companies that wish to move their dispute resolution costs off-balance sheet.

Third-party funding in international arbitration gives rise to a number of issues. The involvement of a funder has the potential to create conflicts of interest and affect the allocation of costs. These issues have led to calls for the field to be regulated. However, while some jurisdictions have introduced

regulation, others are taking a wait-and-see approach.

Development

Third-party funding is not new, but it has only recently started to move into the mainstream of international arbitration. Its rise can be explained by the roll-back of the common law doctrines of maintenance and champerty. Maintenance refers to the interference of third parties in litigation to support or encourage it. Champerty is a more extreme form of maintenance in which a third party finances litigation in return for a share in any proceeds.

These doctrines, which were both crimes and torts at common law, were developed in medieval England to prevent fraudulent and vexatious litigation and protect the purity of justice (*Re Trepca Mines (No 2)* (1963)). They have also been found to apply to arbitration (*Bevan Ashford v Geoff Yeandle* (1998)).

In recent years, public policy considerations relating to the purity of justice have given way to a broader concern with providing access to justice. As a result, a number of jurisdictions abolished the doctrines, including England and Wales and some parts of Australia, Canada and the US. This gave the green light to third-party funding, although the circumstances in which such arrangements are permitted are not consistent across jurisdictions. Moreover, the trend toward permitting third-party funding is not uniform. In 2017, the Supreme Court of Ireland found that third-party funding arrangements amounted to champerty under Irish law (*Persona Digital Telephony Limited & Sigma Wireless Networks Limited v The Minister for Public Enterprise, Ireland and the Attorney General, and, by order, Denis O'Brien and Michael Lowry* (2017)).

In a bid to clarify the position and to cement their reputation as hubs for international arbitration, some jurisdictions have enacted legislation which

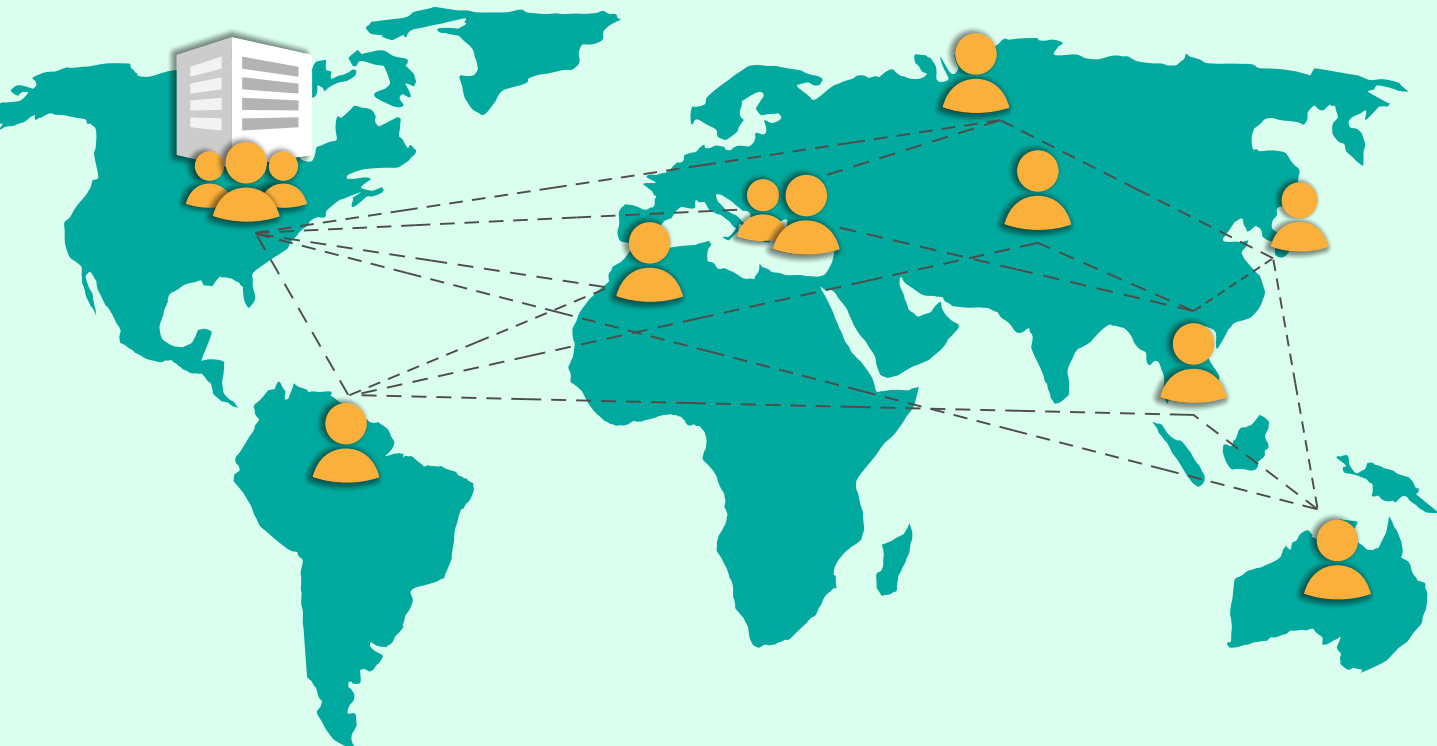
specifically permits third-party funding and sets out the circumstances in which it is allowed.

In Singapore, the Civil Law (Amendment) Act 2017 entered into force on 1 March 2017, together

“Some jurisdictions have enacted legislation which specifically permits third-party funding and sets out the circumstances in which it is allowed.”

with accompanying regulations and amendments to professional conduct rules. In essence, the Act abolishes the common law torts of maintenance and champerty and confirms that third-party funding is not contrary to public policy or illegal where it is provided by eligible funders in international arbitration and related litigation and mediation.

Similarly, on 23 June 2017, Hong Kong introduced amendments to its Arbitration Ordinance which abolish maintenance and champerty in relation to third-party funding for arbitrations seated in Hong Kong and work done in Hong Kong for arbitrations seated abroad, as well as related proceedings. The amendments will take effect on a date to



be announced, following the development of an industry code of conduct.

In civil law jurisdictions, where the doctrines of maintenance and champerty did not apply, there has not been the same need or call to regulate third-party funding. Moreover, while many of the major arbitration institutions have considered third-party funding, few have introduced specific rules to deal with it. It appears that these jurisdictions and institutions are taking a wait-and-see approach, allowing third-party funding to develop before they determine the extent to which the field may require oversight.

Specific issues

Given the lack of regulation, parties to international arbitration normally do not disclose the existence of a funding agreement. In practice, many funders prefer to keep their involvement confidential and therefore include confidentiality and non-disclosure clauses in the funding agreement. The existence of a funding agreement could, however, affect the neutrality of the arbitral tribunal.

A scenario where X is president of the arbitral tribunal in an arbitration where the claimant is funded by a funder, who is simultaneously funding the claimant in an unrelated arbitration where X acts as counsel, demonstrates that third-party

funding may lead to conflicts of interest. X's impartiality and independence as president in the first arbitration are threatened because, in the second arbitration, X's fees are paid by the funder. Moreover, X may have significant interaction with the funder in the second arbitration. The impact on X's impartiality and independence as president in the first arbitration therefore depends on the level of influence the funder has over the claimant in the second arbitration. In this case, the involvement of the funder may justify the removal of X as president in the first arbitration, or at least a tactical challenge. Against this background, it is argued that the involvement of funders in international arbitration should be disclosed, as conflicts of interest of this nature may threaten the enforceability of the award.

If one follows the arguments in favour of disclosure, further questions arise as to what should be disclosed, in what level of detail, by whom, and how. It is argued that disclosure of the mere existence of a funding agreement to the arbitral tribunal may be sufficient in the first instance. However, it is also arguable that disclosure to the other party should be considered in order to preserve procedural fairness and safeguard the parties' right to be heard. In general, given the parties' interest in maintaining the neutrality of the arbitral tribunal, it seems prudent that such disclosure should be made by the parties themselves at the outset of the arbitration, even absent a specific obligation.


Third-party funding also has a significant impact on the allocation of costs. For example, the extent to which funding costs form part of the party's costs is not clear. The matter is controversial because funding costs can include a success portion which increases the costs potentially payable by the losing party without proper justification.

Moreover, there are open issues as to whether an arbitral tribunal may order a funder to pay adverse costs. Given that the funder is neither a signatory to the arbitration agreement nor a party to the arbitration, it seems likely that the arbitral tribunal lacks the jurisdiction to do so. In cases where the arbitral tribunal is not convinced that the funded party will be able to satisfy any costs order made against it, the arbitral tribunal could require it to provide security for costs. According to the ICCA-Queen Mary Task Force on Third-Party Funding, however, the mere existence of a funding agreement is unlikely to suffice as evidence that such an order should be made. Security may also not cover the adverse costs entirely.

Outlook

Given the changing regulatory environment and the issues that arise when third-party funders are involved in international arbitration, a party who seeks funding should obtain legal advice from experienced international arbitration counsel. Such counsel will have the expertise required to guide the party through the process of identifying

an appropriate funder and negotiating a funding agreement that meets the party's needs. They will also be familiar with the different funding structures available, including new structures, such as portfolio funding.

Finally, experienced international arbitration counsel can manage the strategic issues that arise during arbitration, which is particularly important when the interests of the funder and those of the party are not aligned. This can happen in a variety of situations, such as where the party wishes to settle but the funder disagrees. Counsel who are familiar with the market and have the requisite legal know-how will be best placed to navigate these issues and get the best out of the funding process for their clients. 

**Désirée Prantl**

Principal Associate

Freshfields Bruckhaus Deringer LLP

T: +43 1 515 15 527

E: desiree.prantl@freshfields.com**Amanda Neil**

Principal Associate

Freshfields Bruckhaus Deringer LLP

T: +43 1 515 15 693

E: amanda.neil@freshfields.com

PERSPECTIVES

ICCR 2018 STATE OF THE ART ARBITRATION RULES

BY **FLORIAN NITU**

> POPOVICI NITU STOICA & ASOCIATII

International commercial arbitration remains a preferred method of dispute resolution, at least in matters of investments, transactions and concessions made in emerging markets.

Romania is one such emerging market, posting the largest GDP growth rate across the European Union last year and a safe forecast for at least 4 percent GDP growth in 2018. Thus, Romania makes for one of the most appealing investment propositions today.

Investors are inclined to arbitrate their business disputes in Romania, but they also want a fast, impartial, expert, pragmatic, legally effective and economically efficient dispute resolution process. The International Chamber of Commerce of Romania

(ICCR) has secured all these fundamental values of an international commercial arbitration process through its new set of arbitration rules, which have just entered into force in January 2018 (ICCR Rules 2018).

The ICCR Rules 2018 are state of the art in international commercial arbitration. They greatly simplify standard international arbitral proceedings, enhance the impartiality and independence of arbitrators, provide effective fast track arbitration mechanisms, as well as time and cost effective arbitration management tools, and facilitate functional mechanisms enforcing arbitral awards.



Simpler, less formalistic proceedings

The ICCR Rules 2018 have taken important steps towards the dejudicialisation of the arbitral process, steering away from the national courts' formalism and promoting high standards of flexibility and party autonomy. In this vein, one remarkable aspect is enhancement of the arbitral tribunal's powers to tackle procedural incidents, and safeguarding the party autonomy principle.

Enhancing the impartiality and independence of arbitrators

Compared to previous local rules and the relevant standards of international institutions such as the

ICC Paris and the Stockholm Chamber of Commerce (SCC), arbitration in Romania under ICCR Rules 2018 offers extended guarantees of impartiality and independence of arbitrators.

While the parties are encouraged to select the arbitrator they consider most appropriate for their dispute, the integrity of the process is protected by clear provisions for challenging the arbitrators, including express scenarios of incompatibility, coupled with stricter sanctions for conflicts of interest. One such notable provision is that a lawyer person listed in the ICCR Court's list of arbitrators may not plead as counsel in proceedings governed by the ICCR Rules.

Time and cost-effective arbitration management tools

The ICCR Rules 2018 provide a balanced mix of flexible procedural tools to ensure swift resolution of the dispute, through time management provisions or by keeping arbitral cost burdens to a minimum. They make available to arbitrators a procedural arsenal. Indeed, at the heart of the ICCR Rules 2018 stands the objective of enhancing the efficiency of the process and reducing its duration. For example, shorter deadlines, especially for matters outside of the parties' control, thereby speed up the process without compromising the parties' right to present their case in an optimal fashion.

Furthermore, the moderate cost of ICCR arbitration is yet another compelling advantage when compared to national courts litigation, or when submitting the dispute to one of the high-profile international institutions, such as the ICC Paris or the London Court of International Arbitration (LCIA).

The ICCR Rules provide for a clear delimitation of procedural stages: two stages of written exchanges of submissions, a case management conference and an oral stage characterised by a limited number of appearances. The rules encourage arbitrators to further simplify the procedural setting and tailor the

process to suit the particular circumstances of each dispute, for example through employing modern long-distance communication methods or bifurcating

“The role assumed by the ICCR through its 2018 arbitration rules is indeed challenging, but it looks well-equipped to provide a more effective dispute resolution service.”

the procedure. Still, the rules always keep the focus on principles like equality, confidentiality, party autonomy and transparency.

Fast track arbitration and emergency arbitration that work well

The innovative character of the ICCR Rules 2018 is best shown in the fast track arbitration procedure and emergency arbitrator provisions. Both signal a strong adaptability to cater to the parties' needs and specific circumstances of their dispute. To illustrate, the simplified fast track arbitration procedure is applicable by default under a certain value threshold, but at its core it is designed to service disputes that are simpler, not necessarily of high value. The ICCR Rules 2018 encourage the parties to opt into the

procedure even with disputes of higher value, which may also be handled in the appropriately simplified setting, provided of course that due process and equality are observed.


The ICCR Rules 2018 strike a balance between the interest of the parties in maintaining the privacy of their dispute and the public interest for a transparent arbitral process. This is achieved by vesting the board of the ICCR Court of Arbitration with powers to take action to preserve the public interest when called for, as long as privacy is observed.

Following this tendency, the ICCR Rules also strive to conciliate the need for celerity inherent to the emergency arbitrator procedure, allowing sufficient time for the arbitrator to make an informed, thoroughly-analysed decision regarding the urgent interim measures sought by the applicant. Furthermore, the ICCR Rules 2018 promote a departure from reliance on the judiciary system by providing the framework in which interim measures may be sought from the emergency arbitrator even before arbitration has been initiated, in contrast with international institutions like the International Centre for Dispute Resolution (ICDR), the Singapore International Arbitration Centre (SIAC) or the Hong Kong International Arbitration Centre (HKIAC).

Consolidation of claims and third parties' status

One of the most debated issues in international commercial arbitration relates to the status of

third parties. The ICCR Rules 2018 perform best our view by correctly capitalising on the international arbitral experience, including the courts' control, in both continental and common law legal systems. This is true not only in matters related to joinder of third parties, but also on consolidation of claims, security measures, disclosure of documents and transparency. In all such areas, the ICCR Rules 2018 look set to make arbitration work better than in the past.

The role assumed by the ICCR through its 2018 arbitration rules is indeed challenging, but it looks well-equipped to provide a more effective dispute resolution service. The ICCR court administers a wide range of services such as arbitration, consultancy on procedures, international cooperation, studies and research in the field of arbitration and cooperation with arbitration commissions. At present, the court's list of arbitrators comprises over 100 Romanian arbitrators and more than 50 foreign arbitrators. 



Florian Nitu

Managing Partner

Popovici Nitu Stoica & Asociatii

T: +40 (21) 317 7919

E: florian.nitu@pnsa.ro

MINI-ROUNDTABLE

EXPERT WITNESSES IN COMPETITION DISPUTES



PANEL EXPERTS

**Dr David Blackburn**

Director

NERA

T: +1 (202) 466 9264

E: david.blackburn@nera.com

David Blackburn's areas of expertise include intellectual property (IP), antitrust and competition policy, and econometric analysis. In his IP practice, he conducts research and prepares expert reports for patent, trademark and copyright infringement disputes, as well as false and misleading advertising cases. Dr Blackburn regularly conducts analyses related to the issues of commercial success and preliminary and permanent injunctions in both *inter partes* review and abbreviated new drug application (ANDA) proceedings, pursuant to the Hatch-Waxman Act.

**Dr Subbu Ramanarayanan**

Associate Director

NERA

T: +1 (212) 345 0745

E: subbu.ramanarayanan@nera.com

Subbu Ramanarayanan is an associate director in NERA's antitrust and healthcare practices, and adjunct associate professor of competitive strategy at UCLA Anderson School of Management. Dr Ramanarayanan has extensive experience advising clients on antitrust review of proposed mergers & acquisitions where he has analysed issues relating to market definition and market power, alleged monopolisation, exclusive contracting, price-fixing, alleged foreclosure and for-profit ownership across a variety of settings in healthcare, including hospital services, health insurance, physician services, group purchasing organisations, dialysis services, pharmaceuticals and benefits management.

**Nathan Blalock**

Senior Consultant

NERA

T: +1 (832) 871 5744

E: nathan.blalock@nera.com

Nathan Blalock specialises in the economics of antitrust and IP. His research focuses on the evaluation of liability and damages in antitrust lawsuits, the competitive effects of mergers & acquisitions and joint ventures, and global trends in the enforcement of IP rights. He has analysed economic issues across a wide range of industries, including agricultural products, oil & gas exploration, midstream oil products production and distribution, wholesale and retail gasoline, natural gas distribution, pharmaceuticals, death care services, retail clothing, air travel and travel services, mutual funds, microfinance loans, chemical production, pulp and paper products and construction materials.

**Dr Paul Wong**

Senior Consultant

NERA

T: +1 (212) 345 9361

E: paul.wong@nera.com

Paul Wong is a member of NERA's healthcare and life sciences practice, and the antitrust and competition practice. Since joining NERA, Dr Wong has consulted on a variety of healthcare mergers, including the Advocate-NorthShore hospital merger challenged by the Federal Trade Commission, the Aetna-Humana and Centene-Health Net health insurance mergers, as well as mergers involving major hospital systems in more than 15 states. Dr Wong has also consulted on antitrust litigation in healthcare industries, including those involving hospitals, multispecialty physician groups, health insurance, medical devices and medical supply distribution.

CD: Reflecting on the last 12 months or so, how would you describe the frequency and nature of competition disputes? What are some of the common sources of conflict?

Blalock: Department of Justice (DOJ) and Federal Trade Commission (FTC) investigations are potentially reliable indicators of broader trends in competition disputes. Actions taken by the antitrust agencies can give rise to class actions, opt-out litigation, state attorneys general investigations and possibly even arbitration or investigations by enforcers in foreign jurisdictions. For example, if the trend in price fixing disputes follows trends in DOJ criminal antitrust investigations, then one might anticipate fewer price fixing cases in the next few years. The number of criminal antitrust cases involving price fixing brought by the DOJ in 2017 fell by roughly half year-on-year, continuing a similar decline relative to 2015. However, these trends, more generally, must be taken with a pinch of salt. Antitrust enforcers have demonstrated an interest in expanding the frontiers of competition law to address new concerns arising in constantly evolving markets, such as antitrust markets for data and ‘algorithmic collusion’. Given greater uncertainty about the outcomes of investigations into these new

topics, the allocation of agency resources to these ‘frontier’ matters may limit resources available to

“An expert can contribute value to a client at all stages of a dispute, and can be utilised in a consulting role, alongside counsel or in an independent testifying role.”

*Dr Paul Wong,
NERA*

investigate more traditional areas of dispute in the near term – one possible explanation for recent declines in DOJ criminal antitrust cases – and possibly lead to more non-traditional competition disputes in the future.

CD: Could you provide some insight into when and how an expert witness may be deployed during a competition dispute?

Wong: An expert can contribute value to a client at all stages of a dispute, and can be utilised in a consulting role, alongside counsel or in an independent testifying role. Before a dispute even begins, an expert can be a valuable adviser,

helping firms avoid or mitigate their exposure to certain behaviours or helping to formulate a sound strategy heading into a litigation or investigation. In the early stages of the dispute itself, an expert can also be a valuable sounding board for legal and economic theories, best practices in discovery, complex technical issues and developing preliminary measures of risk and exposure. Further into a dispute, experts can be used surgically to probe and highlight specific topics that might prove crucial to a winning theory. And toward the end of a dispute, perhaps most significantly, an expert is often an important narrator for the audience, be it judges, juries or regulators. Experts can help explain both difficult or complex ideas and how these ideas fit into the overall dispute.

CD: What benefits can an expert witness typically bring to a competition dispute?

Blackburn: An expert's role will typically evolve over the course of a dispute – or different experts may serve different roles as a dispute unfolds – but a well-credentialed expert should be able to provide valuable guidance, advice and analysis throughout the entire dispute. An expert can typically provide the benefit of experience in understanding the fundamental issues of a competition dispute. For

example, in disputes that might rely heavily on issues related to relevant market definition, the benefit of engaging with an experienced expert is not just the quantitative and qualitative analysis undertaken, but also the expert's experience in understanding the way decision makers in the industry typically view, process and understand analysis and evidence that relates to identifying the boundaries of the relevant market. This can often be both direct experience – having provided expert advice and testimony in similar matters in the past – as well as indirect experience in having presented analyses focused

“A well-credentialed expert should be able to provide valuable guidance, advice and analysis throughout the entire dispute.”

*Dr David Blackburn,
NERA*

on the dispute's key issues to laypeople in other settings. And, of course, one should not overlook the clearest benefit of engaging an expert: the ability to provide a deep understanding of the issues at hand

and to use that understanding to shape the overall strategy of the dispute.

CD: How crucial is it to bring an expert witness on board early in the process? Can this ultimately prove to be a determining factor in the outcome of a dispute?

Ramanarayanan: Engaging an expert early in the process can be very beneficial and can meaningfully improve the likelihood of obtaining a favourable outcome. Particularly in complex disputes, early engagement allows the expert to spend the amount of time needed to develop and support the expert opinion that will be expressed at trial or in another forum. It allows the expert to become familiar with the record and conduct interviews with relevant personnel in order to seek out additional information and undertake a more informed analysis than that of an opposing expert. It also allows the expert the opportunity to participate more fully in the discovery process with the aim of helping counsel focus information requests on information that is most valuable to economic analysis and prepare for the depositions of important witnesses. Early engagement also enables an early exchange of information between the expert and counsel regarding the economic theories

of harm that are most appropriate and the relevant legal standards that should guide expert analysis, thereby granting counsel additional flexibility to refine the legal theory of the case as needed.

CD: In your opinion, what general characteristics should parties seek when looking to identify and retain a suitable expert witness in this space? How important is the impartiality and independence of an expert witness, for example?

“Engaging an expert early in the process can be very beneficial and can meaningfully improve the likelihood of obtaining a favourable outcome.”

*Dr Subbu Ramanarayanan,
NERA*

Blalock: Parties may often seek out a ‘brand name’ with a long history of analysing both the specific type of alleged anticompetitive behaviour and the specific industry at issue. Although these characteristics may improve the probability that

a court accepts an expert's opinion in some instances, they are neither necessary nor sufficient to achieving a successful outcome. In particular, Daubert challenges can, and in many cases are raised regardless of an expert's background. Skill in conducting high quality, independent analysis and clearly communicating an opinion targeted within the appropriate legal scope likely rivals the value of a 'brand name' background. Indeed, the rigorous application of economics in competition disputes can transcend case- and industry-specific facts. Likewise, the goal of communicating clearly to a non-technical audience – be it judge, jury or regulator – is not necessarily best served by obscure or esoteric economic approaches. It is, therefore, important to seek an expert who places a high value on his or her reputation for producing independent opinions, can communicate the complexities of an economic approach in down-to-earth language and has the time and resources, including staff, quality control procedures and computing assets, to produce an error-free opinion.

CD: Once an expert witness has been identified, what steps should parties take to ensure the witness is adequately prepared?

Wong: Counsel and experts face increasing magnitudes of information and data, which requires attention on two fronts. First, because an expert

“It is important to seek an expert who places a high value on his or her reputation for producing independent opinions.”

*Nathan Blalock,
NERA*

opinion must be applied to the specific context of a dispute, access to data stored on IT systems and to knowledgeable personnel may be vital to the work of an expert. In practice, the transfer of information and coordination of schedules between an expert and company personnel can require significant lead time. Starting the process early and establishing the appropriate conduits for flow of data and interviews can help ensure that the expert ultimately has access to the most relevant information in preparing a complete and thorough opinion. Second, it is important that counsel works with an expert to navigate the large volume of information and data once access is granted. For example, counsel can leverage its knowledge of documents and facts to

identify examples and 'natural experiments' which, in turn, can help an expert leverage a large dataset to undertake more powerful analyses.

CD: Are there any challenges or pitfalls involved in engaging an expert witness during a competition dispute? How can these be minimised or avoided?

Blackburn: The biggest challenge involved in engaging an expert is the risk that despite investing resources in identifying, engaging and working with an expert, and the time and money involved in doing so, the court may exclude the expert's testimony, through a successful Daubert challenge, for example, and render that investment moot. Winning challenges typically result from successfully arguing that an expert has not undertaken relevant and reliable analysis, generally because a court is convinced that the expert's methodology is unsound or untested or the evidence relied upon is not directly tied to the allegedly unlawful conduct. Of course, even expert testimony that survives exclusion may ultimately not prove persuasive to the decision maker, often for the same reasons. Minimising these risks requires a consistent and careful approach throughout the process. First, it is important to work with experts who place a high value on producing independent opinions, have the ability to produce rigorous analysis and can communicate the opinions clearly, both orally and

in written testimony. It is equally important to work with the expert to be sure the relevant information is available and that the expert's work, as well as the data and other information relied upon, is focused on the key issues in the dispute. Finally, the expert should not simply serve as a mouthpiece for the client; rather, it is important to ensure that the expert witness is in a position to conduct an independent and rigorous analysis of these issues.

CD: What trends and developments do you expect to see fuelling competition disputes in the months ahead? Are expert witnesses set to play a key role in the resolution of these disputes?

Ramanarayanan: Based on recent enforcement trends across jurisdictions and recent academic literature, there appears to be at least three broad trends developing in competition disputes that will likely continue in the near future. First, the issue of whether common ownership of competing firms by institutional investors leads to anticompetitive effects has garnered a fair amount of attention in recent academic studies, and has prompted antitrust agencies in the US and Europe to examine whether such effects might be pertinent to merger review. Second, the extent to which a merger, or any conduct by a firm or a group of firms acting in unison, might impact the incentive and ability of firms to invest and engage in innovation, has

been a key issue of focus in recent enforcement actions, particularly those brought by the European Commission. Third, the issue of whether availability and access to Big Data and algorithmic tools enables collusion or other forms of anticompetitive conduct is becoming increasingly relevant. In many of these areas, however, the economic literature is at a nascent stage and there continues to be substantial

debate about the mechanisms by which these factors might impact competition. That makes the role of an expert witness a critical one – not only to properly analyse the underlying mechanisms and ascribe cause and effect, but also to educate judges, juries, regulators and legislators about the same.

CD

PERSPECTIVES

'DIRTY MONEY' AND POOR CONTROLS – THE KEY AREAS OF ENFORCEMENT ACTIVITY FOR 2018

BY **CAROLINE BLACK, NEIL GERRARD AND MATTHEW BANHAM**
> DECHERT LLP

The publication of the UK Anti-Corruption Strategy 2017-2022 in December 2017 (Strategy) will motivate regulators and prosecuting agencies to increase attention on individuals and on those regulated entities whose controls fail to detect and prevent financial crime. Alongside the Strategy, significant legislative changes have come into force in the last 12 months, requiring immediate action if regulated entities are to remain compliant with English law and best compliance practice.

The key legislation underpinning the strategy includes the Criminal Finances Act 2017 (CFA), the

Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLR 2017) and the Significant Control (Amendment) Regulations 2017 (SC regulations) (together the new legislation). The new legislation makes it easier for regulators and prosecution agencies to investigate financial crime, creates a new strict liability criminal corporate offence and imposes further regulatory scrutiny on the effectiveness of the controls, which regulated entities must have in place to prevent and detect financial crime.

Regulators and prosecuting agencies, emboldened by the vision of the strategy and their new legislative

toolkit, will seek to use their powers with vigour, increasing the number of criminal and regulatory investigations and prosecutions over the coming 12 months.

UK anti-corruption strategy 2017 to 2022

The strategy outlines six priorities to establish a framework for the UK to tackle corruption. Of particular importance for regulated entities is priority two, which purports to “strengthen the integrity of the UK as an international financial centre” under which the government aims to implement the following measures: (i) greater transparency in respect of the ownership and control of companies and other legal entities; (ii) stronger law enforcement, prosecutorial and criminal justice action; (iii) further enhanced anti-money laundering and counter-terrorist financing capability; and (iv) stronger public-private partnerships, to share information and improve the targeting of those who pose the greatest risk.

This strategy strongly affirms the home secretary’s vision to ensure “in an increasingly competitive international marketplace, the UK is not seen as a haven for dirty money”.

New legislative powers

The new legislation implemented over the last 12 months provides regulators and prosecution agencies with enhanced tools to strengthen the integrity of the UK as an international financial

centre, by creating: (i) a new strict liability corporate offence of failing to prevent tax evasion both in the UK and overseas; (ii) less prescriptive but enhanced rules for regulated firms on how they manage and monitor clients designated as politically exposed persons (PEPs); and (iii) an expansion of the entities required to retain a public register of beneficial owners.

New criminal corporate offence

The CFA created two new corporate offences of failure to prevent tax evasion. As of 30 September 2017, it is a criminal offence if a business fails to prevent those providing services for or on its behalf from deliberately and dishonestly facilitating tax evasion.

The legislation creates two new offences. The first applies to all businesses, wherever located, in respect of the facilitation of UK tax evasion. The second offence applies to businesses with a UK connection in respect of the facilitation of overseas tax evasion. HMRC guidance confirms the offence extends to an overseas organisation having only part of its business in the UK.

Like the Bribery Act 2010 before it, the offences make a business vicariously liable for the criminal acts of their employees and persons “associated” with them, unless the company can show it had in place reasonable preventative measures at the time of the facilitation.

Firms wishing to mitigate their exposure to criminal investigation should consider and follow HMRC guidance, which requires firms to have a documented risk assessment of their entire business, implement mitigating actions and monitor the risks which they face on an ongoing basis. Firms with strong anti-bribery controls may find that they can adapt their existing preventative measures and training programmes to meet the need to ensure they have taken reasonable steps to prevent tax evasion. However, entirely new measures may also be required to combat the risks as identified during the risk assessment.

Those firms which fail to conduct a risk assessment and implement reasonable preventative measures risk a criminal conviction, disqualification from public

procurement contracts and an unlimited fine in the event that criminal tax evasion is found to have been facilitated by any individual or entity who performs services on their behalf.

New money laundering regulations

Anti-money laundering and financial crime is a permanent FCA priority and a cornerstone of the government's pledge for enhanced anti-money laundering and counter-terrorist financing measures. The MLR 2017, which came into force on 26 June 2017, is applicable to a wide industry base of financial institutions, auditors, accountants, lawyers, estate agents and casinos.

Greater penalties have recently been levied by the FCA upon those firms which fail to have sufficient preventative safeguards in place. In 2017, Deutsche Bank was fined £163m for failing to maintain an adequate anti-money laundering control framework





and much more recently the Gambling Commission issued its second highest fine – £6.2m – against William Hill for failures to protect customers and prevent money laundering.

Firms should expect an uptick in the number of regulatory and criminal investigations brought by the FCA (and others) for potential breaches of the MLR 2017. The FCA made plain in its 2017/18 business plan its willingness to prosecute firms and individuals for relevant breaches of the MLR 2017. This has serious consequences for individuals, who are at risk of two years imprisonment for contravening a relevant requirement, prejudicing an investigation or providing false or misleading information.

To avoid the risk of a criminal conviction, front line staff in business units must ensure they are compliant with their firm's anti-money laundering policies, are familiar with any published guidance for their business activity from professional bodies and are comfortable in the knowledge they have taken all reasonable steps to avoid breaching the MLR 2017.

Key changes

Some of the key changes to the Anti Money Laundering Regime are outlined below.

A new criminal offence. It is an offence for any individual to recklessly make a false or misleading statement in the context of a money laundering investigation.

A renewed emphasis on risk assessment and the application of a risk-based approach. There is an expectation on firms to determine and document their own risk-assessment and corresponding mitigating actions in respect of anti-money laundering.

Due diligence. The range of entities falling within the 'regulated sector' has expanded. Firms need to assess, on a qualitative basis, the risks associated with a customer, and record that risk assessment, together with the due diligence steps taken. The application of enhanced due diligence and enhanced monitoring measures have been extended. Ongoing client due diligence measures must be applied to existing customers at appropriate periodic intervals and upon a change in circumstances.

Politically exposed persons (PEP). The definition of a PEP now includes individuals who hold prominent domestic public positions, members of governing bodies of political parties and the directors, deputy directors and members of the board or equivalent function of international organisations. Additionally, for FCA regulated entities, senior management approval is required to establish a business relationship with a PEP, their family members and known associates. FCA guidance published on 6 July 2017 clarifies that PEPs should be individually risk assessed, as not all PEPs carry the same level of

risk. Only the "most prominent" positions will count as PEPs. Firms need not designate local government members, junior members of the senior civil service

“For the most part, the legislative changes require firms to review and enhance existing controls, rather than implement fundamental reform.”

or anyone other than the most senior military officials to be PEPs. Family members and "close associates" of PEPs should be treated as PEPs for the purposes of anti-money laundering monitoring. Not all PEPs are equal; the FCA has determined that lower levels of due diligence are permitted by firms for domestic PEPs compared to foreign PEPs.

Beneficial ownership


There is a new and added requirement to keep records about beneficial owners, including trustees.

The SC regulations, in conjunction with People with Significant Control Regulations 2016, support the strategy's objective to implement 'greater transparency'.

These regulations require UK companies (with broad exceptions), LLPs, UK-incorporated 'European Companies' and trustees of UK trusts and non-UK trusts with UK tax liabilities, to identify and keep a record of persons with significant control of the trust and for companies to file this information at Companies House. Failure to do so can result in a criminal conviction and imprisonment for up to two years.

The way forward

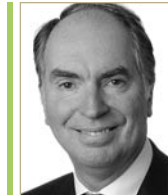
Firms must act immediately to ensure they have sufficient measures and controls in place to meet these new legislative requirements. For the most part, the legislative changes require firms to review and enhance existing controls, rather than implement fundamental reform. Risk assessments are essential and firms should adopt a holistic approach to the monitoring and onboarding of clients.

Those firms and individuals who fail to adopt and adapt their firm's controls to meet these legislative changes may well find themselves the focus of regulator attention and a criminal investigation in the future. 



Caroline Black

Partner
Dechert LLP
T: +44 (0)20 7184 7543
E: caroline.black@dechert.com



Neil Gerrard

Partner
Dechert LLP
T: +44 (0)20 7184 7672
E: neil.gerrard@dechert.com



Matthew Banham

Senior Associate
Dechert LLP
T: +44 (0)20 7184 7687
E: matthew.banham@dechert.com

MINI-ROUNDTABLE

SHAREHOLDER DISPUTES



PANEL EXPERTS

**Andrew Williams**

Partner

HFW

T: +44 (0)20 7264 8364

E: andrew.williams@hfw.com

Andrew Williams is a partner in HFW's Commercial Litigation and International Arbitration teams handling a variety of cases ranging from commodities disputes, fraud and insolvency, shareholder and director disputes, to banking and sanctions. He regularly obtains worldwide freezing orders and *Norwich Pharmacal* orders in order to protect the interests of his clients.

**Charlie Weston-Simons**

Senior Associate

Norton Rose Fulbright

T: +44 (0)20 7444 2261

E: charlie.weston-simons@nortonrosefulbright.com

Charlie Weston-Simons is a litigation and dispute resolution lawyer based in London. He has a particular focus on insurance and reinsurance litigation and arbitration, but also advises on banking, professional negligence and other types of commercial dispute. Prior to joining Norton Rose Fulbright, he worked for several years at another internationally renowned law firm.

**Noelle M. Reed**

Partner

Skadden, Arps, Slate, Meagher & Flom
LLP

T: +1 (713) 655 5122

E: noelle.reed@skadden.com

Noelle M. Reed heads Skadden's litigation practice in Houston. Ms Reed's practice includes representing corporations and individuals in a variety of complex civil and criminal litigation matters. She also regularly represents companies and their directors, officers and financial advisers in multiforum securities and fiduciary duty cases arising from mergers and acquisitions. She has represented clients in acquisition-related cases involving more than \$100bn in transaction value.

**Deborah Finkler**

Partner

Slaughter and May

T: +44 (0)20 7090 4088

E: deborah.finkler@slaughterandmay.com

Deborah Finkler was formerly head of Slaughter and May's dispute resolution group and its global investigations group. Her practice covers the broad spectrum of commercial litigation and both domestic and cross-border investigations. She acts on substantial and complex commercial disputes for a wide range of clients, including a number of international banks and financial institutions. Ms Finkler is highly regarded for her banking litigation practice, and is regularly involved in complex corporate recovery and insolvency work.

**William Savitt**

Partner

Wachtell, Lipton, Rosen & Katz

T: +1 (212) 403 1329

E: wdsavitt@wlrk.com

William Savitt is the co-chair of the Litigation Department of Wachtell, Lipton, Rosen & Katz. His practice focuses on representing corporations and directors in litigation involving M&A, proxy contests, corporate governance disputes, class actions involving allegations of breach of fiduciary duty and regulatory enforcement actions relating to corporate transactions. Mr Savitt writes and speaks extensively on corporate and securities law topics and is an adjunct law professor at Columbia Law School in the field of transactional litigation.

CD: To what extent are you seeing an increase in the number of shareholder disputes in today's business world?

Williams: Over the last few years we have seen a general increase in the number of UK shareholder disputes. There are a number of factors that have contributed to the increase. These include the continuing economic uncertainty and volatility caused by general economic conditions in conjunction with the result of the Brexit referendum and the subsequent negotiations. There are also growing levels of shareholder activism and a continued perception of unfairness in executive remuneration and management self-interest to the detriment of shareholders, together with an increase in third-party litigation funding support for these claims. We are also seeing an increasing number of shareholder disputes arising in jurisdictions where corporate governance structures are less developed and require less detailed documentation, which then results in misunderstanding and conflict over financial benefits received by some.

Reed: We have seen a moderate uptick in shareholder litigation in Texas in recent years. Many of these suits are an outgrowth of the broader problems in the energy business. When business is going poorly, investors are more likely to question management's decisions and disclosures. Plaintiffs

tend to file suit in the courts that they believe will be most hospitable, both to their substantive arguments and to quick settlements. While Texas courts – and state courts generally – have been out of favour in recent years, recent decisions by the Delaware courts that expressed scepticism about strike suits – and more importantly, attorney fee awards – appear to be motivating plaintiffs to file cases outside of Delaware and in federal courts again.

Finkler: There has been a growing trend in recent years for shareholder actions in the UK. As a general rule, the prevalence of such actions tends to ebb and flow with investor sentiment, market conditions, growth predictions and profits. However, there are particular drivers behind the current trend which differ depending on whether the action relates to a private or a listed company. Taking them in turn, actions against public companies were historically rare in this jurisdiction due to the absence of a US-style opt-out class action mechanism. Commencing and sustaining such actions by a diverse group of individual shareholders was costly and difficult to run. The big change in recent years, which has resulted in a few high-profile actions being commenced, is the availability of third-party funding and the relaxation of the rules relating to contingency fee or damages based agreements to allow lawyers to take on matters profitably. In the competition law space, opt-out class actions for

damages arising from breaches of competition law have been introduced, which, again while in the early days, could lead to increased activity in this area. That said, in private companies, I am not sure the number of 'traditional' shareholder disputes has actually increased.

Savitt: Aggregate data says that shareholder claims are increasing in the US. And that is largely consistent with our anecdotal experience. Because there is now a large, well-established and properly capitalised stockholder plaintiffs' bar, we think it is likely that shareholder disputes are not likely to decline rapidly anytime soon, though changes in law have had the effect of changing the venue and legal basis of stockholder litigation. The Private Securities Litigation Reform Act, for example, heralded a rise in fiduciary litigation and changes in fiduciary litigation designed to weed out meritless claims have given rise to a pendulum swing back to securities law. But given the incentives of class litigation, shareholder disputes are probably here to stay.

Weston-Simons: Since the global financial crisis, the incidence of shareholder disputes has increased significantly. In the UK, it is not too difficult to pinpoint the reasons for this shift. First of all, shareholder activism continues to make the

headlines, with directors being held to account over corporate governance and emotive issues such as remuneration. In this environment, bringing a claim against the directors of a company, or the company itself, is a less intimidating prospect than it perhaps once was. In the background, there have also been two important developments which have

"Aggregate data says that shareholder claims are increasing in the US. And that is largely consistent with our anecdotal experience."

*William Savitt,
Wachtell, Lipton, Rosen & Katz*

made mass shareholder actions more feasible: the implementation of the Group Litigation Order (GLO) procedure – the UK equivalent to the US class action regime – and the advent of litigation funding. Until relatively recently, it was not possible to invest in litigation in return for a share of the recovery. However, that has changed, the litigation funding market continues to grow, and as a result we now see claims being brought which in the past would not have been possible.

CD: Based on your experience, could you provide an overview of some of the common sources of shareholder disputes?

Reed: Historically, the big drivers for shareholder class action lawsuits have been a poor business climate, the company's release of unexpected bad news, industry-wide scandals or the announcement of a fundamental transaction, such as a merger. The considerations that drive these traditional shareholder lawsuits have not changed fundamentally in recent years. What has changed is the level of shareholder activism, which sometimes leads to litigation. If anything, that trend seems likely to accelerate in the coming years. In private companies, shareholder disputes tend to be related to the health of the business climate. Shareholders are more likely to look for or pursue potential issues in distressed companies. But in my experience, shareholder disputes arise most often when a shareholder believes that someone is receiving improper or disproportionate benefits from the company or when a minority shareholder is looking to sell his or her interest. These two circumstances often arise together.

Finkler: In private companies, actions can be bucketed into three categories: contractual disputes over the joint venture or shareholder agreements, common law actions for unfair prejudice or

“The basis of all shareholder disputes is the divergence of conflict between the interests of different shareholders and management.”

*Andrew Williams,
HFW*

statutory unfair prejudice, or derivative actions which can be pursued by minority shareholders or by a liquidator. Unfair prejudice actions tend to be difficult to bring in public companies as shareholders are typically on an arms-length basis and unlikely to be able to establish that they had any interest other than to have the company's affairs conducted in accordance with the articles of association or any other written agreement governing their membership. In public companies, the disputes can span claims for losses arising from misstatements by the company to threats of actions by minority or activist investors whose objective is

to force management to undertake, or not, as the case may be, a particular course of action.

Savitt: Shareholder disputes come in a variety of shapes and sizes. Traditionally, the most significant branch of stockholder litigation in the US was federal securities claims. That is, claims brought under the Securities Act of 1933 or, more frequently, the Securities Exchange Act of 1934, alleging violations of the comprehensive disclosure scheme that regulates US-traded and US-listed securities. A second branch of stockholder disputes involves challenges to mergers and other corporate transactions. These actions, like federal securities claims typically brought as class actions, are most often seen in the courts of Delaware, the state under whose laws most US companies are organised. The claims typically rest on allegations that corporate directors violated their fiduciary duties in negotiating a transaction, often on the ground that they failed to achieve the best possible price. A third significant area is derivative litigation brought by shareholders in the name of the corporation, alleging that directors failed to meet their obligations to manage the company properly. Such claims typically arise in the wake of corporate trauma or some sort of bad news that causes the company's share price to drop.

Weston-Simons: While it is mass shareholder actions against public companies that tend to grab

the headlines – usually because of the very high sums involved – those types of claim are only part of the story. Aside from those actions, minority shareholders frequently bring claims against board members if they consider the company is being run in a way that unfairly prejudices their interests. However, there is also ample scope for claims between shareholders where the underlying business relationship sours or when a shareholder is compelled to sell its interest. But in my experience all of these claims arise out of one or two general situations: when a shareholder has incurred a loss or considers its investment is at risk, or when a shareholder feels it has wrongly been prevented from maximising the potential of its investment.

Williams: The basis of all shareholder disputes is the divergence of conflict between the interests of different shareholders and management. This divergence can surface in a number of instances. Often it can be a difference of opinion as to the direction and strategy of the company. Sometimes a majority shareholder will seek to force out a minority shareholder or the company will engage in a corporate restructuring. In other cases, a simple lack of communication or a misunderstanding will lead to disputes. In all of these instances a shareholder will feel that its interests have been unfairly prejudiced or that they have been treated in a manner that runs contrary to the shareholder agreement. The frequency of these instances

and likelihood of their occurrence only increases in a challenging economic environment where companies and shareholders alike are often forced into making difficult decisions.

CD: How would you characterise the differences between shareholder disputes that occur between closely held businesses as opposed to public companies?

Finkler: There are a few differences between the substantive actions and tactics to be deployed. In public companies, the threat of negative publicity can spur management to action, whereas in a private business, leverage can be used by threatening to disrupt day-to-day management and its ability to make decisions. Whichever side one is on, it is important to be alive to the wider impact the litigation can have on the business. Fast forwarding to the end, in a public company context, achieving a negotiated outcome can often be a complex process, especially if the claimant group is large and not fully aligned, and where public disclosures need to be made. As a result, the lead time to negotiate such settlements and the time sensitivity of announcing the settlement terms can add a further layer of complexity. In private company disputes, where settlement is the preferred option, the complexity is usually in agreeing the exit

mechanism and the valuation of shares, which can itself be time-consuming and very contentious.

Savitt: The difference between shareholder disputes in closely held firms and public companies is profound. Shareholders in close corporations often derive their livelihood from the firm, whether as an investment, a source of employment, or both, and often have intricate relationships with fellow shareholders. Shareholders in public companies, on the other hand, generally have a simpler and more remote relationship with the company – holders of a fractional interest in the residual value of the firm. And while public company stockholders are generally diversified, private company stockholders may have a substantial portion of their wealth tied up in the firm. This means that private company disputes can sometimes be more intense and more protracted. On the other hand, public company disputes are generally litigated on a class action basis while private disputes are not. This means that the sums involved in public company disputes may be much greater than those in private firm disputes. Moreover, public company litigation is usually driven by entrepreneurial lawyers instead of those deeply involved with the subject company. So attending to the needs of absent class members and the complexity of plaintiff fee awards is often important in public company disputes, but only seldom in disputes involving private firms.

Williams: Shareholder disputes that occur within a closely held business will often have similarities with disputes in private companies. This is because closely held businesses, despite having shares that are publicly traded, have certain characteristics that are closer to private companies than public companies, notably a smaller number of shareholders and fewer changes in their identity. This will result in the relationships between shareholders in a closely held business potentially being closer and more deep-rooted. This should, in theory, lead to fewer shareholder disputes in closely held businesses but does mean that if a shareholder dispute does arise it has the potential of turning into a personal and protracted dispute.

Weston-Simons: Shareholder disputes in private companies are essentially between co-owners of the business. They are therefore often highly emotive and tend to arise from disagreements as to the direction which the company should take, or because one shareholder feels that its interests are being marginalised. In the UK, they are predominantly contractual disputes although there are also various mechanisms available under the companies legislation for bringing such claims. By contrast, shareholder disputes in public companies do not concern the small print of private contractual agreements. They

tend to be more about forcing company directors to listen to their shareholders, or restoring value to shareholders who feel they have either been misled or suffered losses as a result of the board's actions via well-established statutory and common law routes. They also tend to be played out in public.

Reed: The biggest difference concerns who is driving the litigation. Lawsuits involving public companies tend to be class actions or derivative suits driven by counsel, with the actual plaintiffs

“In litigation involving closely-held companies, in contrast, the actual plaintiffs typically have a strong financial and emotional stake in the outcome of the case.”

*Noelle M. Reed,
Skadden, Arps, Slate, Meagher & Flom LLP*

often playing a limited role in the oversight and direction of the litigation. In litigation involving closely-held companies, in contrast, the actual plaintiffs typically have a strong financial and emotional stake in the outcome of the case. As such, they tend to exercise much more direct control over the litigation. And the securities

plaintiffs' bar tends to avoid disputes involving closely held companies because of the relatively limited amounts at stake. As a consequence, lawsuits involving closely held companies tend to involve more substantively significant claims, and often do not lend themselves as readily to a quick and efficient resolution.

CD: Are you seeing an increase in cases involving minority shareholders considering a group or class action? What advice can you offer to companies facing such circumstances?

Savitt: The incidence of US class actions remains fairly stable. Notably, though, the circumstances that trigger such litigation in public companies are often predictable. A firm that has suffered a drop in share price, or that is undertaking a complex merger transaction, or that is in the midst of public controversy or subject to public criticism, should be expecting class litigation. There are steps that firms in that circumstance can do to prepare. One thing is to consider enacting a bylaw that will cabin at least fiduciary litigation to one court, thereby avoiding the expensive evil of multiple suits in multiple jurisdictions. Another is to ensure that the company, from the top of the firm to the bottom, is attentive to the risk and acts so as to create the best and most constructive record of engagement to whatever the potential claim may be. That will not

stop the litigation, but good corporate governance and a good structure for decision making always aid the defence.

Weston-Simons: Although claims under the GLO procedure are on the rise, they are still few in number. In the UK, we are certainly nowhere close to having a mature group or class action market that is comparable to the US. However, familiarity will inevitably breed confidence in the procedure and I think it is only a matter of time before we see more and more of this type of claim. For companies faced with such claims, the key advice I would offer is to be proactive and to use the prolonged period of time that it takes claimants to get a GLO action off the ground wisely. As a general rule, these actions tend to be very difficult to manage, and the courts require potential claimants to be given every opportunity to join the action. It can therefore take several months, and sometimes much longer, for the action to get underway. That time can very usefully be spent marshalling documents, evaluating the case and developing a strategy.

Reed: The class actions that we see are normally brought by minority shareholders and the overarching defence strategy depends on the nature of the lawsuit. Most securities fraud class actions follow a company's announcement of bad news, such as lower than expected earnings. For these standard class actions, the defendants will typically

ask the court to dismiss the lawsuit in the ordinary course of the litigation. Of course, some securities fraud class actions involve more serious allegations of wrongdoing, such as the announcement of a criminal investigation. In this situation, the company must craft an overall defence strategy that identifies the key risks the company faces and develops a comprehensive plan to manage those risks. Finally, if the class action involves a challenge to an ongoing transaction, such as attempt to enjoin a merger, the company may need to be more proactive in resolving that litigation quickly. This may involve defending an injunction hearing or negotiating an early settlement with the plaintiffs.

Williams: We have seen an increase in shareholder activism in the US and also in the EU in relation to environmental claims. Our expectation is that there will be a continued increase due to shareholder activism and the growing availability of third-party litigation funding. Our advice for companies facing a potential group or class action is the same advice as for any company facing any type of dispute. It is important to be proactive and to take the initiative. Engage your legal advisers at an early stage and seek to resolve the dispute at the earliest possible moment by maintaining a dialogue. This will spare the company leadership the time, effort and costs that are associated with dispute resolution and that would be best employed in the day-to-day operations of the business. Consider

the use of a specialist litigation PR firm to manage communications with the group – particularly if the matter has come into the public domain. It is, however, not always possible to avoid conflict. In such instances it is important to know that your dispute resolution and arbitration clauses are watertight so that you can face any dispute on your terms and in your chosen forum.

Finkler: Early action is key. Identifying the issue and what the claimant wants before the class or classes gain momentum can be critical to finding a negotiated solution which keeps the dispute out of the public eye and allows the company greater flexibility on solutions it may be willing to offer. It is critical to have accurate and up-to-date intelligence on shareholder sentiment to achieve this. Sometimes it is inevitable that an action is commenced. In which case, particularly where third-party funders and different sets of lawyers are involved, it becomes important for the company to have a clear and commercial strategy which complements the legal strategy. Management must also be willing and able to be flexible and agile on its approach as the dispute unfolds. Given the numerous pressures on a company's management, having a focused and motivated committee of senior management able to make key decisions as needed and who have close involvement with the case is also critical.

CD: Could you highlight any recent, high-profile shareholder disputes that have caught your attention? What insights can we draw from these scenarios?

Reed: Two Supreme Court cases could significantly reshape US securities class action litigation. In the June 2017 *Calpers* case, the Supreme Court decided that the filing of a putative class action did not toll the statute of repose for an individual plaintiff's claims under Section 11 of the Securities Act. While the courts will be grappling with the implications of this decision for some time, it could induce some large shareholders to opt out of class actions at an early stage and pursue their own claims. In the upcoming *Cyan* case, the Supreme Court will decide whether defendants can remove Securities Act class actions from state to federal court. This decision will have far-reaching implications, as state courts are generally viewed as more hospitable to securities class actions than federal courts, and plaintiffs who can keep such cases in state court may try to evade the procedural protections of federal securities laws.

Williams: High-profile shareholder disputes that have recently caught our attention include the Tesco and RBS disputes. These high-profile disputes cast a spotlight on third-party funding and





on the negative publicity associated with them. The strategy adopted by RBS in particular highlighted the important role that third-party funding can play. Once RBS had settled with the large shareholder groups, the smaller minority shareholders were left isolated, disorganised and without funding. The ability of a third-party funder to prevent smaller shareholders from becoming isolated, disorganised and, most importantly, without funding, will preclude large businesses from adopting this strategy. In many instances it will also encourage minority shareholders to see a claim through to trial. These cases have also highlighted the negative publicity associated with disputes. Not only will the negative publicity cause the share price of the company to fall, it will also encourage other minority shareholders to potentially come out of the woodwork and either seek involvement in the ongoing dispute or seek to bring a new claim against that company.

Finkler: In the public company context, the much talked about class action brought by shareholders of RBS in respect of the 2008 RBS rights issue was commenced for a face value of £4bn. As of mid-2017, an effective settlement of 87 percent of the claim, by value, occurred. The remaining claim is now stayed pending further settlement discussions with the surviving claimant group. Looking back, the distinguishing factors of this case include the factual and legal complexity, claimant diversity

and asymmetry in risk as the litigation progressed. On complexity, the claim was pleaded broadly, to include 11 separate heads of complaint. This introduced serious complexity of fact and ultimately proof, as many of the defects in the prospectus were covered in multiple sections and would have ultimately required extensive investigation into almost every area of the bank. Therefore, in practical terms, each of the claimant groups took responsibility for one part of the case, and once the two other groups had settled, it became impractical, and unaffordable, for the remaining claimant group to assume responsibility for the entire case.

Weston-Simons: In the UK, the big shareholder actions against banks arising from the financial crisis have now either concluded or will soon do so. They have thrown up some fascinating issues, but tough lessons have been learned about the difficulties of preserving professional privilege in the context of investigations. Among boards of public and private companies facing a serious issue with legal implications, it is now a common – and entirely understandable – reaction to instruct the company’s lawyers to undertake an investigation. These exercises generate large quantities of notes, documents and reports, some of which may contain information that is highly relevant to a subsequent

dispute, or which even provides claimants with a routemap to establishing liability. Measures can be taken to ensure that any documents that are created remain privileged, and therefore do not need to be disclosed, but as the cases in this area show it is not as easy to achieve this as one might think.

“Having a clear strategy from the outset is vital. At the heart of this is knowing the strengths and weaknesses of your case and having a sense for your exposure.”

*Charlie Weston-Simons,
Norton Rose Fulbright*

Savitt: The recently resolved federal securities suit involving Valeant’s attempted takeover of Allergan was notable – not only because it resulted in a multimillion dollar settlement, but also because of its role in making new law. The defendants, Valeant and the hedge fund Pershing Square, worked together to launch a hostile bid for Valeant. Valeant made the bid and Pershing Square acquired a very large block of Allergan

stock before disclosing the stake. Many observers thought the scheme stretched the law beyond the breaking point and the outcome appears to confirm that those observers were correct. The decision clarified the law of tender offers and required a very substantial payment too. Also interesting are recent decisions in the Delaware courts regarding shareholder appraisal rights. In the past few years, investment funds sprouted up with the business model of buying appraisal claims in companies that had announced mergers. The business model, called 'appraisal arbitrage', became very controversial and was for a time very profitable. But recent decisions in Delaware, including Supreme Court decisions called *Dell* and *DFC*, suggest that courts will be reluctant to appraise merging companies above the merger price, and will sometimes value them below that price, creating substantial risk for the arbitrage business. Again, the decisions helped to clarify the rules of the road and will affect the way investors and dealmakers go about their work.

CD: How important is it for parties to have recourse to a clear dispute resolution response from the outset? What, in your experience, are the most popular alternative dispute resolution (ADR) methods for shareholder disputes?

Weston-Simons: Having a clear strategy from the outset is vital. At the heart of this is knowing

the strengths and weaknesses of your case and having a sense for your exposure. When any party to a dispute has this information, it can work out its appetite and parameters for settlement and devise an appropriate strategy to reflect this. It is also important to remain flexible and keep these matters under review. As a dispute develops, it will often throw up new facts, arguments and claims which need to be placed in the balance. As for ADR methods, we see the full range being utilised in shareholder disputes, with mediation probably the most prominent, although these can be complex in multi-party action group scenarios. ADR is now an established feature of the UK dispute resolution landscape, and it is rare for some form of ADR – usually mediation – not to be attempted at some stage.

Finkler: There is no 'one-size-fits-all' approach to dispute resolution mechanisms. For private company disputes, mediation or expert determination are popular ADR options. Particularly where former partners have fallen out or there has been a pre-existing relationship between the parties, mediation offers a good opportunity for catharsis, which can sometimes allow for more rational negotiations to take place. Where the critical issue is valuing shares, which it often is, expert determination can be a cost-effective option. However, a court might be more appropriate if the dispute is particularly complex and of high value.

For shareholder disputes with public companies, the negative publicity and pressure that claimant groups can generate can be their strongest leverage, which would be lost in any private ADR mechanism.

Williams: It is generally good advice in any situation for parties to have recourse to a clear dispute resolution response. It is still surprising how often we come across dispute resolution clauses that do not operate effectively or reflect the intentions of the parties. A clear dispute resolution procedure will allow both sides to approach the dispute in a proactive manner which will lead to as smooth and timely a resolution as possible. It can be of no benefit to a company to have a dispute, of any kind, looming over its day-to-day operations. Proactive steps and the timely intervention of legal teams will provide the best possible platform from which to settle or resolve a dispute at an early stage, thereby avoiding the need for litigation altogether.

Savitt: The class action character of large public-company practice makes clear alternative dispute resolution very challenging. Public company stockholders are unlikely to approve a requirement that their claims be brought in an arbitral or similar forum, even if the courts would approve such provision. But mediation is often an integral tool in effectively resolving disputes. Choosing a commercially-savvy mediator who can command the respect of defendants, plaintiffs and insurers

can sometimes avoid lengthy trial litigation and lead to cost-effective resolutions in the interests of all parties.

Reed: In shareholder disputes involving public companies, there typically is no formal ADR mechanism that the parties must follow. Instead, the parties must decide what form of ADR, if any, makes sense in the context of a particular dispute. In a claim for damages, mediation is still the preferred form of ADR. In a dispute with shareholder activists, the most effective form of ADR may be a face-to-face meeting between the principals. Privately-held companies, in contrast, have more flexibility to address ADR issues upfront. Many privately-held companies now include ADR provisions in their key agreements that range from mandatory arbitration to requiring an aggrieved party to meet and confer with the other side before filing suit. I have seen several cases recently where the parties used this pre-dispute process to settle their differences before a lawsuit was filed. The process succeeded because the parties treated it seriously rather than as a mere condition precedent that had to be completed before a lawsuit could be filed.

CD: What particular challenges and legal considerations do shareholder disputes typically generate? What steps might be taken to overcome them?

Finkler: The biggest practical challenges are recognising and mitigating the drain on management time, and identifying any potential negative impact on the business early and dealing with it quickly. Particularly where the industry the client is operating in is small, like private equity, I have seen the reputational impact of being involved in litigation can be particularly damaging and in these circumstances it is important to attempt early resolution. For public companies, the need for a coordinated commercial, legal and PR strategy cannot be overstated given the need to keep key stakeholders and the market calm and abreast of developments. It is also worth parties thinking creatively about settlement offers which could include brokering an unrelated business or asset acquisition or disposal. Such options may be more cost effective and can help to change the parties' focus from an acrimonious dispute to a potential growth opportunity.

Williams: For a minority shareholder, a common challenge faced in a shareholder dispute is how to finance the dispute. This challenge may become less prevalent as third-party litigation funding gains in popularity and accessibility, where the case has good merits and where the quantum in question is suitably attractive to the third-party funder.

A majority shareholder will often face different challenges. In particular, the time, effort and attention that a majority shareholder has to invest in a dispute is time, effort and attention that a majority shareholder is unable to invest in the running of the company. The risk to reputation is a factor that is of concern to all majority shareholders and management, a pressure that minority shareholders

“The need for a coordinated commercial, legal and PR strategy cannot be overstated given the need to keep key stakeholders and the market calm and abreast of developments.”

*Deborah Finkler,
Slaughter and May*

often use to their advantage. Aside from avoiding disputes in the first place, third-party funders prove a solution to a lack of litigation funding for minority shareholders, while an effective document retention policy will often reduce the amount of time that a majority shareholder will have to spend searching for documents required to assist the lawyers.

Savitt: Shareholder litigation is an endlessly variable enterprise and so it is difficult to identify

challenges that are typical. But there are certain commonalities. One is that, in the US at least, where the riskiest shareholder litigation tends to come in the form of the class action, there is typically a substantial asymmetry in exposure: plaintiffs have little to lose while defendants have little to gain. This sometimes causes defendants to act defensively. And that is generally a mistake. Avoiding the defensive mindset, finding opportunities to play offence, and owning and driving the narrative – these are often the keys to a successful defence, because failure to occupy this ground leaves the plaintiff side of the caption on its comfortable home territory.

Reed: In today's world, it is essential for companies to proactively deal with potential shareholder disputes. If a company knows that it is about to release information that may cause a negative reaction or surprise shareholders, it should consider bringing in litigators and potentially other crisis management experts early on to help prepare for and navigate the company's response. Privately-held companies usually benefit from early, decisive steps to resolve shareholder disputes. If a breakup is necessary, a private company is typically best served by dealing with it as quickly and proactively as possible. We have also seen situations where relatively minor disputes quickly escalated into major lawsuits and ultimately the breakup of the ownership team. Often this entire process could

have been averted with a well-timed, diplomatic phone call. Finally, ending up in the right forum can often be decisive. If a company believes that litigation is likely, it should consider what steps it can take to ensure that the dispute is heard in its preferred court.

Weston-Simons: The challenges and legal considerations very much depend on the type of shareholder dispute and which side you are on. For example, if you are the director of a public company facing a shareholder action by a combination of institutional and retail investors, you will probably want to have a PR strategy in place and will want to think strategically about how you might drive a wedge between different groups of claimants. If you are on the other side, you may be one of a number of claimant groups, have litigation funders behind you naturally taking a close interest in the progress of the claim and there may be documents in existence which the claimant is extremely reluctant to provide. As for disputes between shareholders, establishing at an early stage if there is a relationship to be salvaged is crucial, as this will dictate the parameters for a negotiated solution.

CD: Looking ahead, how do you expect shareholder disputes to evolve? What particular trends and developments do you expect to see in this area?

Williams: We expect to see an increase in minority shareholder disputes as the use of and exposure to third-party litigation funding becomes more prevalent. Particularly in light of the recent English High Court decision in *Estera Trust v Edwardian Group Limited*, which found that correspondence between prospective funders and litigants could attract legal advice privilege if it gave the other party a clue as to the advice given by lawyers or betrayed the trend of the advice given. We also expect to see larger companies begin to take greater care of their corporate governance in a bid to reduce the possibility of shareholder disputes arising.

Reed: The level of shareholder activism is likely to increase over the next few years. Other than that, the shareholders' ability to control the forum will remain a key factor. For example, Delaware courts have grown increasingly hostile to awarding attorneys' fees for shareholder suits that are settled for public disclosures rather than tangible benefits to shareholders. If shareholders are not able to shop their claims to favourable forums, they may be less likely to assert them. In the context of shareholder disputes between private persons, the biggest challenge is drafting enforceable language that establishes the parties' legal rights. Unfortunately, we continue to see conflicting decisions from the courts, some of which appear to clarify the duties that parties owe and the contractual language

necessary to affect the parties' intent, others of which cast doubt on the enforceability of the parties' written agreements. We hope to see some more clarity from the courts on this issue.

Savitt: Shareholder litigation is big business and that should be expected to continue. We may well see further consolidation among the major plaintiffs' firms, each of which now feature first rate lawyers and large war chests. That would mean more effective prosecution of shareholder claims, potentially fewer earlier settlements and more cases going to trial, and an increasing premium on meticulous defence strategy and planning. Meanwhile, smaller firms might be expected to look to carve out new niche practices, so we may simultaneously see increased depth and breadth in the shareholder dispute practice.

Weston-Simons: In the next few years, I think it is likely that we will see new, high-profile shareholder actions brought in the UK arising from corporate scandals and perceived governance failures. I also do not foresee a decline in shareholder activism any time soon. In the current economic environment, share valuations are at a premium, which spurs investors to take a more activist approach in order to enhance returns on equity. I also expect the same steady flow of disputes between investors to continue. This type of

relationship has always provided fertile ground for disputes and I do not expect that to change.

Finkler: Trends vary by sector and market performance is a key indicator. When economic growth is slow, there tends to be an increase in shareholder scrutiny of management decisions. The level of shareholder activism is on the rise generally and growing support for activist investors on issues such as executive remuneration is being seen in the UK. While it may be too early to

speculate on Brexit, it would not be surprising if any associated slowdown in growth leads to an increase in challenges against company boards as they adapt and make strategic decisions in the face of regulatory and economic change. Economic slowdown, coupled with uncertainty over Brexit, may also impact performance of joint venture obligations and increase the likelihood of shareholder disputes. [CD](#)

PERSPECTIVES

TIME TO REFRESH THOSE
STANDARD TERMS?BY **BENEDICT WALTON AND BRYAN SHACKLADY**

> FORSTERS LLP

The 2017 decision in *Wood v Capita Services Insurance LTD* has reaffirmed that the approach which the courts will now take to contractual interpretation is one of fairly dogmatic literalism, as propounded in the *Arnold v Britton* decision in 2015. While commentators, and indeed the presiding judges in these two cases, do not uniformly agree on whether this has always been the correct approach or on whether *Arnold v Britton* actually really changed anything, it is clear that this will be the approach of the courts going forward.

As such, now may be an opportune time for in-house counsel to review their standard form contracts to ensure that they remain in line with the needs and requirements of the business. As the facts

of *Arnold v Britton* demonstrate, sloppy or even, for some businesses, just out-of-date drafting may be extremely dangerous.

In *Arnold v Britton*, the Supreme Court considered the effect of a provision relating to the payment of service charges under a 99 year lease by lessees of holiday homes in a holiday park. The relevant clause was a covenant under which each lessee covenanted: "To pay to the lessors without any deduction in addition to the said rent a proportionate part of the expenses and outgoings incurred by the lessors in the repair maintenance renewal and the provision of services hereafter set out the yearly sum of £90 and VAT (if any) for the first three years of the term hereby granted increasing thereafter by

ten pounds per hundred for every subsequent three year period or part thereof”.

While the clause is imperfectly drafted – it might benefit from insertion of the word ‘comprising’ after “hereafter set out” – its literal meaning seems fairly obviously to be that the initial service charge of £90 per annum would be increased on a compound basis by 10 percent every three years. However, different versions of the lease contained slightly different clauses providing for lessees to pay an initial service of £90 per annum to be increased by 10 percent on an annual, rather than triennial, basis.

The result was that different lessees would be liable to pay vastly different sums by the end of the term and some would be liable to pay sums which could not bear any relation to the landlord’s relevant costs. While one group of lessees stood to pay just under £2000 at the end of the term, the other stood to pay over £1m in service charge.

The appellants lessees argued understandably that this was unfair and commercially absurd. They therefore sought to imply the words “up to” between the two halves of the clause, so that the second part of the clause operated as a limit on what would have otherwise effectively have been an indemnity to the lessor in the first half of the clause for the costs of providing the services covered by the clause.

The Supreme Court held in favour of the respondent lessors by 4:1. Lord Neuberger regarded it as “tempting” to read the two parts of the clause separately, but chose to read it as a whole. He went as far as to comment that where the natural meaning of the words is clear: “the mere fact that a

“While one group of lessees stood to pay just under £2000 at the end of the term, the other stood to pay over £1m in service charge.”

Court may be pretty confident that the subsequent effect or consequences of a particular interpretation was not intended by the parties does not justify rejecting that interpretation.” While commercial common sense and context are important, they cannot override the meaning of the words used and are factors to be considered predominantly where the drafting is ambiguous. The worse the drafting, the more likely the court is to have recourse to them.

On the facts of the case, the decision was understandable; the interpretation argued for by the appellants lessees would have required the Court to

read into the clause words which in our view would have significantly altered the fairly clear natural meaning of the words used. It is true that the result was ultimately absurd and that is what made this such a difficult case and why it is unfortunate that it appears to have altered the way in which the Courts are approaching contractual interpretation. To our minds, this new approach imposes unnecessary limitations on the flexible set of principles available to the Courts for these purposes, as laid down by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* (1998). After all, words by themselves surely get you only so far. To understand their meaning properly, don't you also need to understand their context and purpose? Should these really be factors that are only considered when a clause is poorly drafted? This is certainly not how we read the requirements of Lord Hoffman's test. The judgments in both *Arnold v Britton* and *Wood v Capita* purport to follow that formulation, but appear to us to take the law in a new – or old, depending on how you look at it – dogmatic direction.


So what protection can the law provide from unfairness of the type resulting from decisions like *Arnold v Britton* and how should businesses protect themselves in light of it?

In terms of protection provided by the law, Sections 2 to 4 of the 1977 Unfair Contract Terms Act do not apply to contracts relating to the creation or transfer of interests in land. However,



there is no such restriction in the 1999 regulations. Unfortunately for the appellants in *Arnold v Britton*, the 1999 regulations are only applicable to contracts entered after the date upon which the 1999 regulations came into effect. The same is true of their 1994 predecessor, the Unfair Terms in Consumer Contract Regulations 1994. Contracts entered into after the coming into effect of those regulations may well be covered, although the position in respect of those regulations may be uncertain following Brexit, since both the 1994 and 1999 regulations give effect to Council Directive 93/13/EEC of 5 April 1993. It is also worth noting that the government is now specifically legislating on unfair leasehold practices – measures announced on 21 December 2017 by the Ministry of Housing, Communities and Local Government.

As for steps which businesses should take, first and most obviously, it must make sense to undertake a review of all standard form contracts, simply to be certain that they still reflect the needs of the business. Commercial common sense may

not save you from a badly drafted or out-of-date contractual provision. If that may sound like good news for lawyers, it is double-edged. Quite simply, lawyers can no longer get away with sloppy drafting by relying on commercial common sense or context. These cases are very much a reminder to legal professionals to exercise extreme care in the words that they choose. 



Benedict Walton

Partner

Forsters LLP

T: +44 (0)20 7399 4811

E: benedict.walton@forsters.co.uk



Bryan Shacklady

Senior Solicitor

Forsters LLP

T: +44 (0)20 7863 8398

E: bryan.shacklady@forsters.co.uk

PERSPECTIVES

NO LAUGHING MATTER – EMOJIS AND CONTRACT LAW

BY **HAYLEY LUND AND DAVID SHIPTON**
> WEIL GOTSHAL & MANGES (LONDON) LLP

Images of chipmunks, smiling faces and champagne bottles are not traditionally considered capable of forming the basis of legal obligations, but a recent Israeli judgment has held that a landlord's reliance upon these 'emojis' entitled him to damages from the prospective tenants who sent them in bad faith. In this case, the use of these digital symbols was interpreted as conveying "great optimism" to the landlord regarding the tenants' desire to rent his apartment, which prompted him to remove the listing from a property website. The emojis were not, in the circumstances, deemed to constitute a binding agreement, but the Israeli court's willingness to consider the meaning of the images has prompted widespread discussion

concerning the expansion of legal protection to emoji speech.

Emojis are small images of facial expressions or objects used in digital text. By replacing what would be conveyed face-to-face through body language, they bridge the communication gap inherent to text-only dialogue, and add creativity into our digital communications. From their creation in Japan in the 1990s, the use of emojis has precipitated an historic change in how humans communicate, with an estimated 92 percent of the world's online population using emojis in over three trillion digital messages. After the Oxford English Dictionary announced the 'tears with face of joy' emoji as 2015's 'word of the year', the Telegraph suggested

that: “Emoji is the fastest growing form of language in history based on its incredible adoption rate and speed of evolution.”

There has been a considerable expansion in the number of judgments worldwide which refer to emoji speech. In the US, for example, 33 decisions in 2017 made reference to emojis, doubling the number of references in 2015. However, online records reveal that just 12 reported English-law cases have so far cited the phenomenon, with only one arising in the context of a contractual dispute. In *Phones4U v. EE Limited*, the High Court did not consider it necessary to consider “the use of the sad face emoji as creating or involving a breach of contract” because the claimant had not, in any event, suffered any loss arising from such a breach. Given the spread of emojis across modern society, however, it is not inconceivable that the English courts will be required in the near future to opine upon their contractual effect.



Intention and emojis

From a preliminary view, the use of emojis in contracts appears fraught with risk. Firstly, the courts may question whether parties using emojis could ever have intended to be legally bound. Emojis are, it might be argued, light-hearted expressions of human empathy never intended to communicate binding agreement. After all, could a contractual counterparty have legitimately intended to signal its agreement to the terms of an asset purchase agreement by sending a ‘thumbs up’ emoji to the seller?

As case law has shown, however, the absence of formality does not preclude the courts from concluding that parties intended to be legally bound.

Instead, when assessing the parties' intentions, the courts will consider whether a reasonable man in the position of each of the parties would have concluded from their communication and conduct that they had intended to create legal relations. Given that the courts have held that counterparties may, in some circumstances, signal legally-binding acceptance of an offer by a simple nod of the head, a court's refusal to interpret an emoji with an equivalent meaning would appear illogical. The increasing importance of emojis in business should also not be underestimated. A 2016 report estimated that 72 percent of US workers used emojis at work, and many consultants and managers in the UK actively recommend their use as a means of softening the edges of digital discourse. Seemingly, emojis are regarded as a legitimate form of workplace literacy, and a court's failure to recognise this in a contractual dispute could lead to confusion and injustice.

Ambiguity and emojis

A greater challenge to the use of emojis in contracts may arise from the requirement for certainty of terms.

There are few reliable dictionaries which clearly define the meaning of each emoji. Although emoji designers may provide short descriptions of their

creations, there is no guarantee that the popular usage of the emoji will reflect this definition, or that the emoji will not evolve to have an alternative or additional meaning. There are countless examples of the fluidity of emoji definitions. The clapping hands emoji was originally intended to symbolise 'please', but is most commonly used as a substitute for 'high five' or 'deal!'. The absence of any stable definition for many emojis would also present challenges in

“A smiling face used to convey joy in Europe may imply sarcasm in Arabic countries, or outright contempt in China.”

establishing their historical meaning, for example where a court in 2030 attempts to interpret an emoji used in 2018.

Further, despite appearing to transcend linguistic and geographical barriers by depicting fundamental human emotions and experiences (the adoption of emojis with multiple available skin tones serves as a potent example of this commitment to universality), the meaning of emojis may differ across cultures. A smiling face used to convey joy in Europe may imply

sarcasm in Arabic countries, or outright contempt in China. Similar miscommunications could take place between generations, with younger users reportedly more likely to subvert the face-value meanings of emojis than their older equivalents. If identical emojis mean different things to different people, how can they evidence the meeting of minds upon which a contractual relationship is premised?

Finding meaning in emojis

However, emojis can sometimes communicate a message far more accurately than words alone. Moreover, an overemphasis on the requirement for contractual certainty risks understating the ambiguous nature of words themselves. Emojis hold no monopoly on confusion caused by the evolution of meaning and cross-cultural communication, and the courts have historically proven open-minded when considering the meaning of words used by contracting parties. Indeed, where the meaning of words used in an agreement are uncertain, vague or ambiguous, the courts will consider the full context of the agreement in order to establish what was intended by the parties, with the ‘popular’ sense of the word usually prevailing over its ‘scientific’ meaning.

The courts may consider the risk of miscommunication in emoji speech to be mitigated by the reality that parties would be unlikely to use a digital image in contractual negotiations in circumstances in which its meaning was not clear.

Inevitably, there will be circumstances in which a court will deem the sender and the recipient to have made objectively reasonable but different interpretations of an emoji in dispute. In this event, the court would be likely to apply the principle established in *Raffles v Wichelhaus*, under which no agreement can be made where the parties attach materially different meanings to their communications and neither party knows or has reason to know of the other party’s alternative meaning.

Practical implications

An acceptance by the courts of emoji communications could have profound implications for the management of contractual disputes. If the defined meaning of emojis cannot necessarily be taken at face value, emoji experts may be required to opine upon the objective meaning of certain symbols and challenges may arise in the disclosure process, where it may be necessary for disclosure software to search for symbols together with words and where reviewers themselves may interpret emojis differently. There may also be technical issues where emojis viewed on one device or platform appear different on another, and provision may need to be made for the inclusion of images in court judgments.

Imperfect as they are, emojis look set to continue their expansion into the business arena as we continue using technology to communicate. At their best, they can provide accuracy and nuance

to otherwise clumsy discourse. Emojis do, however, also present a significant risk of miscommunication and, before further guidance from the courts as to their status is given, contracting parties would be well-advised to accompany any emojis with unequivocal written language, or avoid their use in legal communications altogether. **CD**

**Hayley Lund**

Associate

Weil Gotshal & Manges (London) LLP

T: +44 (0)20 7903 1361

E: hayley.lund@weil.com

**David Shipton**

Associate

Weil Gotshal & Manges (London) LLP

T: +44 (0)20 7903 1282

E: david.shipton@weil.com

PERSPECTIVES

SUPPLY CHAIN DISRUPTION IN THE OIL & GAS INDUSTRY

BY **BEN HORNAN AND RASHIDA ABDULAI**
> HOGAN LOVELLS



Supply chain disruption represents a major threat to businesses in the oil & gas industry, and has a knock-on effect on the economic development of oil producing nations around the world. Over the years, supply chains have become longer and more complex, while the severity and frequency of supply chain disruption is increasing. From political instability and violence to legislative, regulatory and economic changes, there are a number of sources of supply chain disruption in the oil & gas industry, which often result in costly legal proceedings.

The oil & gas supply chain

The oil & gas industry remains one of the most significant industries in the global economy, accounting for four of the world's top 10 companies by revenue in Fortune's 2017 Global 500 list. Oil is the world's leading fuel, with over 90 million barrels of crude oil produced every day in countries including Saudi Arabia and Iran in the Middle East, parts of Russia and China in Asia, the US and Brazil in the Americas and Nigeria and Angola in Africa.

The industry is commonly divided into upstream, midstream and downstream sectors. The upstream sector comprises the exploration, development,

operation and production of oil & gas fields. The midstream sector processes, stores, markets and transports commodities, such as crude oil, natural gas, natural gas liquids (mainly ethane, propane and butane) and sulphur. The downstream sector covers the refining, distribution and retail of petroleum products around the world, all the way down to the retail of products such as petrol, diesel and natural gas to consumers.

The oil & gas supply chain is supported by a wide variety of contractual arrangements between numerous industry players, from production sharing agreements between oil & gas producing states and exploration and production (E&P) companies, to contracts for the hire of offshore drilling rigs, contracts for the provision of oilfield services, transportation agreements, and sale and marketing agreements, among several others.

Causes and consequences of supply chain disruption

Given the length and complexity of the oil & gas supply chain, any disruption can have a domino effect, triggering disputes in connection with the contractual arrangements that underpin relationships with suppliers, customers, partners and other stakeholders.

There are several potential causes of supply chain disruption. One is price volatility. Generally speaking, a decline in prices, such as the dramatic drop that was seen from around mid-2014, results in reduced revenues for oil & gas producing states and decreased profits for E&P companies. Host governments in the countries expected to be worst hit want to maximise oil & gas revenues for

“Over the years, supply chains have become longer and more complex, while the severity and frequency of supply chain disruption is increasing.”

their economies, and consequently in a low price environment E&P companies should be prepared to face an increased risk of expropriation and disputes about revenue sharing arrangements.

Similarly, a drop in oil & gas prices often leads to E&P companies having to stop or cut back on all significant expenditures, which can result in the early termination, suspension or renegotiation of development and production projects, in some cases, in failures to perform contractual obligations,

such as the non-payment of cash calls under joint operation agreements with other partners.

Reduced activity upstream has a knock-on effect throughout the supply chain. The utilisation of offshore drilling rigs is reduced. There is also an adverse impact on oilfield services companies, which provide technical solutions in respect of E&P, transportation and other activities across the supply chain.

Price volatility can also lead to disputes over pricing mechanisms in sale and supply contracts, as companies seek to preserve their profit margins. This is often exacerbated by the long-term nature of contracts for the supply of oil, gas, LNG and other products, such that market changes during the life of the contract can lead to once-profitable deals becoming less and less commercially viable or desirable for one party, which may then try to find a way out of the contract or renegotiate its terms.

Political activism and instability can also be a cause of supply chain disruption and continues to be a significant problem in some oil & gas producing countries. For example, in early 2017, clashes between armed groups in Libya brought oil & gas production at two western Libyan oilfields to a halt. In Nigeria, the sabotage of pipelines by militant groups is a perennial problem, resulting in leaks and prolonged shutdowns. Such activity has an immediate impact on cash flows and profitability.

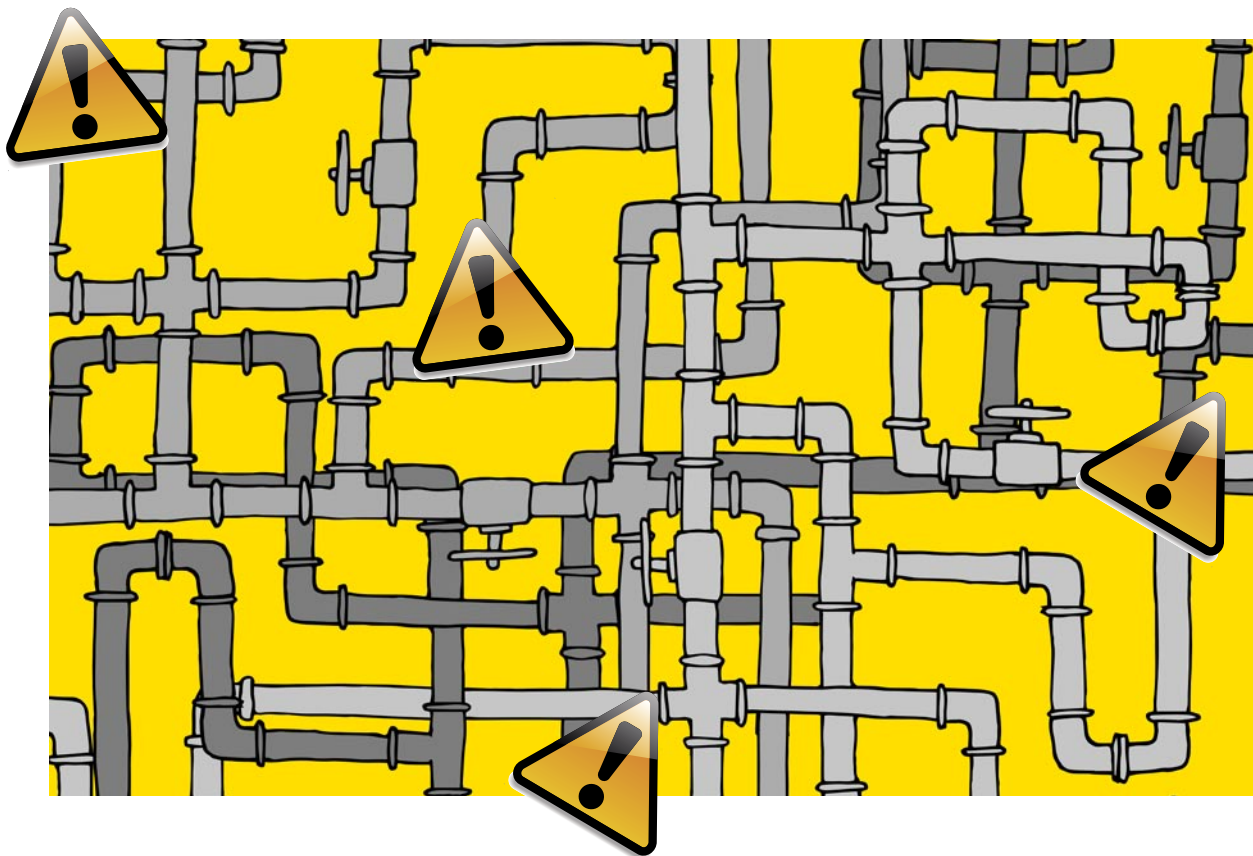
Changes in the law or the way the law is interpreted and applied is often a major cause of

supply chain disruption, as it can affect rights and obligations under existing oil & gas contracts. For many oil producing nations, revenues from this industry constitute a significant proportion of their GDP. According to OPEC, oil & gas revenues account for 50 percent or more of the GDP in Kuwait, Libya, Qatar and Saudi Arabia and 35 percent or more of GDP in the UAE, Angola, Algeria and Nigeria. The oil and gas industry is therefore a crucial contributor to the economic development of these and other oil & gas producing countries and it is in their interests to ensure that the national legislative framework for the regulation of the industry is effective, up-to-date and correctly applied. However, this is not always the case, and disputes arising from regulatory changes, for example about changes to the tax status of companies operating in the industry or the correct application of a particular kind of tax credit, are on the increase.

Protecting businesses' interests

The oil & gas industry is one of the most lucrative in the world, but it is also an industry fraught with risk, given the high upfront investment costs, volatility in prices and long and complex supply chains. It is not possible to eliminate the inherent risks of operating in this sector but there are a number of ways in which businesses can limit their exposure.

To protect against cash flow problems, oil & gas companies entering into long-term supply



agreements should consider the use of a well drafted 'take or pay' clause. This is a provision that requires the buyer to pay for a specified minimum quantity of products at an agreed price, whether or not the buyer actually takes all or any of the products. Its purpose is to ensure that the supplier has a guaranteed cash flow, which is crucial for suppliers who will have made significant capital investments in distribution and other facilities in order to start supplying the products.

Where protection is sought against the risk of joint venture partners failing to comply with their obligations, carefully drafted forfeiture and exit

provisions are invaluable. Joint exploration or operating agreements often contain a call option allowing a non-breaching party to call and purchase the breaching party's shares in the joint venture at an undervalue in the event of default, which may include a failure or inability to advance a sum toward the exploration costs. The undervaluation can often be significant – for example, 20 percent of the value of the shares.

Some protection against changes in law can be achieved through the use of 'stabilisation' or 'economic equilibrium' clauses in contracts with state entities. These clauses provide that the parties

will try to agree on changes to the contract where necessary to ensure that the contractor is not left worse off as a result of a change in law or policy that materially and adversely affects the contractor's existing rights and obligations under the contract.

Where contractual disputes are unavoidable, international arbitration is the dispute resolution mechanism of choice in the oil & gas industry, and with good reason. These disputes are often high stakes with hundreds of millions of dollars hanging in the balance, and are often between entities incorporated in different countries with different legal backgrounds. International arbitration allows the parties to avoid the reputational damage that often arises from disputes heard in public in the national courts of one of the parties. Instead, arbitration allows parties to reach a private resolution of their disputes through arbitral proceedings over which they have greater control, including over the selection of the tribunal, and which can be held on neutral ground. In addition, an

arbitral award is enforceable in over 150 countries worldwide under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is a significant advantage compared with the sometimes protracted and costly process of attempting to enforce a foreign judgment in national courts. **CD**

**Ben Hornan**

Counsel

Hogan Lovells

T: + 44 (0)20 7296 5701

E: ben.hornan@hoganlovells.com

**Rashida Abdulai**

Senior Associate

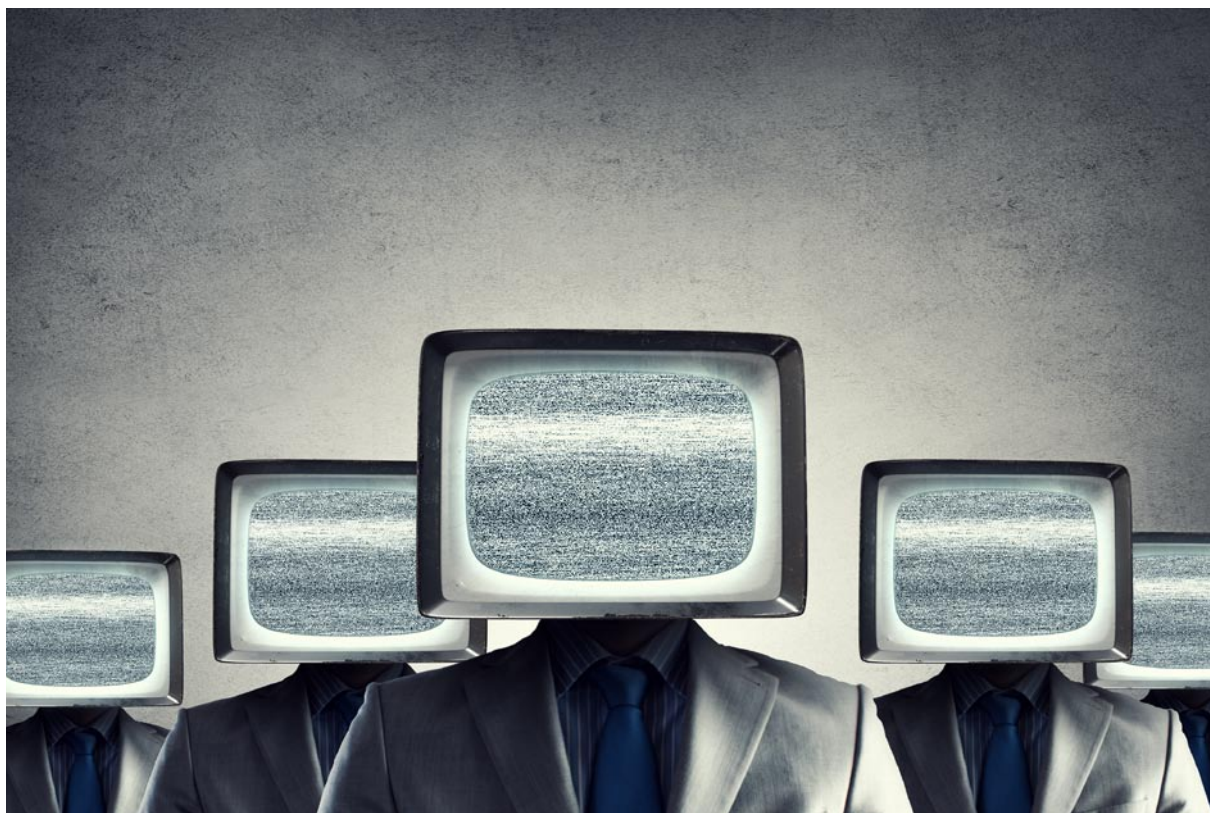
Hogan Lovells

T: +44 (0)20 7296 5966

E: rashida.abdulai@hoganlovells.com

MINI-ROUNDTABLE

MULTIJURISDICTIONAL PRODUCT LIABILITY CLAIMS



PANEL EXPERTS

**Jonathan Speed**

Partner
Bird & Bird LLP
T: +44 (0)20 7415 6000
E: jonathan.speed@twobirds.com

Jonathan Speed is a partner in Bird & Bird's international dispute resolution group based in London. He has over 20 years' experience of representing corporate clients in commercial disputes, most of which have a cross-border element. He regularly acts on complex technical disputes including product liability, and product safety issues with a particular focus on disputes in the automotive, communications and technology sectors.

**John Beisner**

Partner
Skadden Arps Slate Meagher & Flom LLP
T: +1 (202) 371 7410
E: john.beisner@skadden.com

John Beisner is national chair of Skadden's mass torts, insurance and consumer litigation group. Over his 40-year career, Mr Beisner has represented defendants in a wide range of high-visibility litigation and enforcement matters. He has been involved in defending over 650 class actions and has served as lead counsel for defendants in numerous federal multidistrict litigation proceedings. He is a 1978 graduate of the University of Michigan Law School and is a member of the Council of the American Law Institute.

**Doug Smith**

Partner
Kirkland & Ellis LLP
T: +1 (312) 862 3374
E: douglas.smith@kirkland.com

Doug Smith is a partner in the Chicago office of Kirkland & Ellis LLP. He has litigated a wide range of cases at both the trial and appellate stage, including commercial, mass tort, product liability, securities, bankruptcy, environmental and intellectual property cases.

CD: Reflecting on the past 12-18 months, what trends would you say have defined multijurisdictional product liability claims? Have you seen an increase in such cases?

Speed: From a UK and European perspective, we have seen no particular increase in noteworthy multijurisdictional product liability claims in recent months. This is in part because consumers will generally seek legal redress through means other than the courts, for example by exercising contractual rights under product guarantees or insurance policies. That said, we have increasingly seen that producers of products and participants within supply chains are becoming concerned about the product liability claims they could face in relation to new and disruptive technologies, where there is a blurring of the distinction between physical devices, intangible products and the provision of services – particularly for Internet of Things (IoT) and connected devices, products with autonomous functionality and artificial intelligence (AI). This is a real area of focus for the digital technology and automotive sectors.

Beisner: The volume of multijurisdictional product liability claims has been increasing, but not dramatically. With notable exceptions, such claims normally first appear in US courts. If they get traction in the US, filings may then commence in other jurisdictions. For plaintiffs' counsel, the key to getting

traction is to secure creation of a nationwide federal multidistrict litigation (MDL) proceeding, a step that normally encourages the filing of additional claims. In short, 'getting traction' is not so much a matter of plaintiffs successfully adjudicating their claims, it is much more about creating an appearance that many people have experienced a problem with a product. The creation of new mass tort MDL proceedings has slowed somewhat in recent years because the tribunal that decides whether to establish such proceedings – the Judicial Panel on Multidistrict Litigation also known as the MDL Panel – has become more discriminating on that score. However, that shift has been more than counterbalanced by the development of new, better routinised methods for launching and prosecuting mass tort claims in other countries. Thus, when a mass tort proceeding with respect to a particular product does 'get traction' in the US, claims likely will follow in more markets, and in higher volumes, than was the case five or 10 years ago. Thus, balancing these somewhat conflicting trends, I see growth – but for now, only modest growth – in multijurisdictional product liability claims.

Smith: The number of multijurisdictional product liability cases has appeared to remain constant. Nonetheless, there are trends within certain industries where such litigation is becoming increasingly common. For example, recently there have been several high-profile multijurisdictional

product liability claims involving the automobile industry. Global recalls have led to significant litigation involving both personal injury and economic loss claims. Plaintiffs have filed not only individual claims, but have taken advantage of procedures for aggregating claims such as class actions, resulting in highly complex and costly litigation.

CD: What are some of the common causes of product liability claims with a multijurisdictional dimension?

Beisner: At base, the prevailing core theory for most product liability claims that reach the international stage is not so much that the product is inherently defective. Instead, the contention is that the product at issue posed a risk – that is, a potential consequence of use – about which treating physicians, patients, regulators and the general public were not sufficiently warned. Often, such alleged risks, if grounded in fact, should have been obvious to the treating physicians. But plaintiffs’ counsel will often quibble with the adequacy of the product labelling regarding the alleged risk or argue that the company’s communications with physicians concerning the product were misleading. Thus, even though a product may actually be very effective in delivering the stated intended benefits to consumers, plaintiffs’ counsel will assert claims on behalf of a minority of product users who

allegedly experienced side effects about which they supposedly were inadequately warned.

Smith: Litigation with a multijurisdictional dimension tends to be large-scale litigation. Frequently, a critical mass of claims is necessary before cases are filed in multiple jurisdictions. Accordingly, product liability claims with a multijurisdictional dimension may arise when there is significant regulatory action taken by government authorities regarding a product. A significant link between regulatory action and ensuing litigation has developed in multijurisdictional practice. Such claims may also arise when there are significant safety or quality issues that impact products sold in multiple jurisdictions. Where such issues arise and are widely publicised, significant litigation may arise.

Speed: Product liability claims are usually founded on a potential defect with a product’s design, manufacture or assembly or inadequate warnings or instructions for use. Such claims are likely to have an international dimension either where the product has been supplied on a worldwide basis or where the supply chain involves numerous stakeholders located in different jurisdictions. The key catalyst for multijurisdictional claims is often where the potentially defective or unsafe product in question has been the subject of media scrutiny or publicised enforcement action by market surveillance authorities. Two recent examples are the Samsung

Galaxy Note 7 recall and the Volkswagen (VW) vehicles emission scandal.

CD: Have any recent regulatory and legislative developments had an impact on multijurisdictional product liability claims?

Speed: In Europe, the focus has very much been on the likely impact of Brexit. From the UK's viewpoint, product liability law is largely derived from EU law and – when the UK leaves the EU, which is currently expected to be on 29 March 2019 – the UK government's current strategy is to replicate existing EU legislation, at least in the short term, pursuant to the European Union Withdrawal Bill. However, looking further ahead, it is possible that the legal basis and requirements for product liability claims in the UK may slowly diverge from EU law. Furthermore, the enforcement of English Court judgments in other European jurisdictions may become more difficult, as the current European rules on the reciprocal enforcement of judgments will no longer apply to the UK. Leaving Brexit aside, one of the cornerstones of EU product liability law is the Product Liability Directive, which imposes a strict liability regime on certain entities for defective products. In January 2017, the European Commission

launched a public consultation to evaluate whether the Directive was still fit for purpose, especially in the context of new and complex technological developments, including IoT devices, connected products and autonomous technology. The results of the consultation have not yet been published, although commentators are eagerly waiting to

“It is possible that the legal basis and requirements for product liability claims in the UK may slowly diverge from EU law.”

*Jonathan Speed,
Bird & Bird LLP*

see whether important legal questions will be addressed. These include whether software should be considered a 'product' for the purposes of the strict liability regime, even when supplied intangibly such as by way of download, and if a product with inadequate security features should be considered to be 'defective' given the increasing risks of cyber attacks.

Smith: The level of regulatory scrutiny given to products may have an effect on the likelihood of multijurisdictional product liability claims. To the extent regulatory scrutiny increases, so does the potential for such claims. In the US, the level of regulatory attention to products on the market increased with the last administration.

Differences in approaches by regulators in different countries can have an impact on the likelihood of litigation. Frequently, companies find themselves subject to different regulatory requirements in different jurisdictions. For example, the labelling and disclosure required of pharmaceutical products in disparate jurisdictions may differ. While regulators frequently attempt to coordinate their activities to some extent, inevitably there will be some differences in approach.

Plaintiffs may seek to exploit such differences to suggest that a company could have done more to ensure the safety of its products, as evidenced by actions taken in other jurisdictions.

Beisner: In the US, the number of individual claims asserted in mass tort proceedings has grown rapidly in recent years, fuelled by pervasive attorney advertising seeking to drum up as many potential claims as possible. To some extent, that advertising is made possible by hedge fund-type entities, such as third-party litigation funders, which invest in

cases in return for a percentage of whatever return may be achieved. That litigation funder-driven business model emphasises filing large numbers of claims, often with only minimal regard for quality. Thus, many claims now being filed in US mass tort proceedings are not properly investigated and are

“The level of regulatory scrutiny given to products may have an effect on the likelihood of multijurisdictional product liability claims.”

*Doug Smith,
Kirkland & Ellis LLP*

simply not ‘real’, meaning the claimant did not actually use the product and did not experience the alleged side effect. Although US legislatures and courts are considering rules to ensure more rigorous pre-filing scrutiny of claims and to require disclosure of third-party litigation funding, they have not yet acted. Thus, these serious abuses are increasing and boosting the numbers of individual claims filed. Meanwhile, outside the US, the biggest impacts on mass tort claims are flowing from the establishment and refinement of procedures to address such claims – including creation of aggregation

mechanisms – that encourage more filings. In addition, regulators in some countries are more actively raising questions about particular products or requiring certain product monitoring activities, all of which can spawn litigation.

CD: Could you highlight any recent, high-profile cases which shed light on the nature of this type of dispute?

Smith: The recent litigation regarding alleged defects in automobile airbags manufactured by Takata evidences the relationship between regulation and litigation in multijurisdictional product liability litigation. When alleged defects were uncovered in airbag inflators, a recall and significant litigation ensued. The litigation involved not only claims for alleged personal injuries, but also a series of economic loss class actions involving millions of vehicles and billions of dollars in damages. This litigation evidences the complexity that is frequently found in multijurisdictional product liability litigation, with different kinds of claims being filed utilising different procedural vehicles.

Beisner: Several companies have experienced lawsuits regarding metal-on-metal joint replacement devices. After that litigation initially percolated in the US for several years, similar claims began appearing in other markets, particularly Canada and Europe.

Speed: The European Court of Justice's (ECJ) decision in *Boston Scientific Medizintechnik* in 2015 will potentially facilitate greater multijurisdictional product liability claims to be made in Europe in connection with malfunctioning products. The case concerned a manufacturer of pacemakers and an implantable cardioverter defibrillator, which had identified a potential defect which could lead to premature battery depletion and an issue with a magnetic switch. After determining that the standard of expected safety for the products was particularly high given their function and the vulnerability of end-user patients, the ECJ held that where it is found that a device has a potential defect, one can classify as defective all products of the same model or production series, without there being a need to show that an individual device within that production series had failed or was defective. While this decision related to specialised medical devices, it will be interesting to see whether claimants seek to rely on the ruling for consumer products when, for example, a batch of potentially defective goods are the subject of a voluntary recall from the market.

CD: Could you outline the proactive steps that companies need to take to prepare for a potential product liability claim, such as identifying product defects, planning for global recalls, responding to investigations and managing reputational fallout?

Beisner: Companies should establish concrete crisis management plans to immediately address product defect allegations as they arise. Such plans should contemplate rapid development of a coordinated global, all-market response strategy, as whatever issue may arise is unlikely to be confined to a single locale. Besides having a general crisis response plan in place, companies should also be vigilant to identify signals of potential crises before they blossom. Regulatory inquiries, even minor ones, may be precursors of potential litigation, as plaintiffs' counsel often try to turn such interactions – particularly regulator inquiries about company product performance statements – into misrepresentation theories. Monitoring attorneys' claims generation advertising is another important way to spot potential future claims, as such activity may indicate that certain attorneys and possibly third-party funders have decided to target a product. And increasingly, the agendas for plaintiff-only product liability conferences, which often draw international audiences, provide early warnings of future claims. Identifying the potential for claims at an early juncture should allow a company the opportunity to formulate a coordinated, specific strategy for responding to the expected factual allegations and any ensuing claims.

Speed: There are various steps that companies can take to be 'ready' for dealing with a potential product liability claim or the emergence of a safety





issue. First, set up an internal action team made up of employees who have knowledge of the relevant product's design, production, quality assurance and distribution. Second, establish a process to monitor information about the safety of products after they have been supplied. For example, a company could arrange sample testing of marketed products on a regular basis, keep a register of all complaints received and seek to ensure that its business customers and distributors provide prompt notice of any claims made against them in connection with the product. These processes will help a company identify early any potential warning signs which could evolve into a claim. Third, maintain records of customers, whether business or consumer, so that affected products can be quickly traced. For serious safety risks, regulators generally require a company to identify quickly all affected products which have been supplied. Fourth, establish a communications programme, with template draft press releases and consumer notices which can be adapted as necessary.

Smith: When there is a potential product liability claim on the horizon, one of the first steps is to understand the facts. This entails identifying the key individuals at the company with knowledge who may be witnesses in any litigation. It also entails identifying the key documents relating to the potential claim. Through this process, companies can obtain an understanding of the potential cause

of the problem, the significance of the problem and its effects, and the scope of the problem – also whether it is limited to certain products or batches of products or is more widespread. It is important to know the facts before interacting with regulators, making statements to the public, or taking positions in any litigation. Coordination among those responsible for interacting with regulatory authorities, planning the public message and defending litigation is also important. Once the facts are known, mechanisms should be put in place in order to ensure a consistent approach.

CD: What general advice can you offer to companies in terms of handling multijurisdictional claims, with different judicial systems and processes?

Smith: Coordination of cases filed in multiple jurisdictions is important. Companies facing multijurisdictional product liability claims can benefit by assessing each jurisdiction and taking advantage of potential differences among jurisdictions. Defendants may seek to obtain schedules that allow issues central to the litigation to be adjudicated first in a more favourable forum. In addition, procedural mechanisms may be available to argue that jurisdiction is more properly exercised in one jurisdiction as opposed to another. In making such determinations, there are many considerations that may be relevant in assessing different judicial

systems. For example, different judicial systems can have vastly different approaches to discovery. What may be deemed adequate in one jurisdiction may be deemed inadequate in another. Similarly, the likelihood that significant damages will be awarded may vary dramatically based on the jurisdiction. Careful attention to both differences and similarities in judicial systems and their procedures is important in the efficient and effective resolution of multijurisdictional product liability claims.

Speed: When faced with claims in multiple jurisdictions, it is important to have a team or a network of teams in place – ideally in each relevant country or region – to enable a company to address legal, regulatory and public relations issues on a consistent basis. One area often overlooked is the management and retention of a company's documents, which could potentially be disclosable in any formal litigation that is commenced and depending on the local procedural rules that apply. First, it is vital that documents relating to a product's design, testing, production and manufacture are preserved – especially as limitation periods for bringing product liability claims can vary worldwide. Second, a company should avoid the inadvertent creation of potentially harmful documents that could be used against it in any claim. In that regard, training can be given to employees about how product quality or safety issues should be recorded and to reduce the risk of misleading or exaggerated

comments being stated in internal communications, including emails.

Beisner: The most important goal when defending multijurisdictional claims should be to ensure coordination between defence teams in all markets in which claims are pending. This is not an easy task because judicial systems and processes may differ in critical respects. For example, defence arguments that may be very promising before one country's courts may be totally ineffective – or even counterproductive – before other tribunals. And settling a handful of claims in one market, even on a nuisance basis, may inadvertently create pressure to settle in markets where the company has larger exposure and may prefer to continue fighting. In any event, a company should have a global strategy that maximises the strength of its defence posture in all markets. And cases should be managed to avoid 'chimney' effects – situations in which those handling the company's defence in one market are making decisions in isolation from, and potentially in disregard of, what is happening elsewhere. Global collaboration is important because in some countries the process for handling mass tort claims is relatively nascent, particularly as new forms of aggregate litigation come into the picture. In those markets, a company may need to chart strategies with little

guidance from local precedent, and allowing counsel in the forum to draw on the experience of counsel in markets with more established processes can be extremely useful.

“The most important goal when defending multijurisdictional claims should be to ensure coordination between defence teams in all markets in which claims are pending.”

*John Beisner,
Skadden Arps Slate Meagher & Flom LLP*

CD: What steps can companies take to reduce their risk of becoming embroiled in a multijurisdictional product liability case?

Speed: An important step to take is to conduct a thorough review of the company's contracts – both with its customers and suppliers – to ensure that it has contractual protections and remedies in place in the event that a product liability issue arises. If a party's contractual obligations and rights are clear and certain, there is a greater chance

of a product liability dispute being resolved early. Within its contracts, a party may want to select the most favourable governing law and jurisdiction from its perspective, which could help to limit the number of claims it faces in multiple countries. Furthermore, given that the type of response that a company provides to a product complaint may make the difference between resolving an issue at an early stage and its escalation into a formal claim, companies should establish a customer complaints system with properly trained staff. Such a system can capture quality and safety information received from customers, and enable quick recovery of potentially dangerous or defective products so that problems can be properly investigated.

Beisner: Multijurisdictional disputes often first arise in the US and only if they get traction there do they spread to other jurisdictions. Thus, taking aggressive steps to bat down a mass tort in the US before it evolves fully is important to avoid involving other markets. In particular, where otherwise appropriate, a company should oppose creation of an MDL proceeding, an event that can encourage the filing of additional claims in the US and thereby heighten the attractiveness of pursuing claims in other markets. Further, taking early steps to create doubts about the substantive viability of the claims is likewise critical. Challenges to the scientific basis of any claims and arguments that the claims are not consistent with legal principles – if they are

preempted or time-barred – should be voiced early, even if the theories are not directly applicable in other markets. Any indication that there may be grounds for defeating the claims in the US may cause counsel to pause about pursuing such claims elsewhere.

Smith: A robust programme to ensure the quality and safety of a company's products is important to head off product liability claims. This includes sufficient testing before marketing as well as ongoing monitoring efforts. Regulatory frameworks across the globe have been put in place to monitor products and any incidents regarding their use. In addition to these regulatory requirements, companies can take proactive measures to continuously monitor their products to ensure both quality and safety. In addition, it is important to coordinate compliance efforts in the various jurisdictions in which products are sold in order to ensure consistency. Inconsistencies in disclosure or other actions under disparate regulatory systems may be exploited in the event that litigation arises. A consistent approach can help to avoid litigation or to improve the company's position in the event litigation ensues.


CD: Do you anticipate the number of multijurisdictional product liability claims increasing over the next 12 months or

so? What factors are likely to affect such cases?

Beisner: I expect the number of multijurisdictional product liability claims to continue growing over the next 12 months. In the US, the increasing use of attorney advertising and third-party litigation funding in the mass tort context will contribute to that upward trend, but it will be tempered to some extent by the MDL Panel's heightened scrutiny of requests to create new MDL proceedings. Outside the US, further development of mechanisms for filing and processing mass tort claims and increased regulatory activity will encourage the filing of more claims.

Smith: I do not anticipate that the number of multijurisdictional product liability claims will increase significantly over the next 12 months. One factor that may impact the level of litigation is the level of activism by regulators. The greater the regulatory action, the greater the potential for

multijurisdictional product liability litigation. The level of innovation and development of new products can also have an impact on the level of litigation. As new products brought to market proliferate, so too does the potential for issues regarding quality or safety of these new products, leading to the potential for litigation.

Speed: We expect that multijurisdictional product liability claims will increase given that products are becoming increasingly complex and connected to other things or variables, with a growing number of potential 'fault' points, and the global supply chains that exist. In particular, we anticipate that in the coming months claims may be focused on disruptive technologies and the allocation of responsibility between various possible defendants that input into a complete connected product. For example, the manufacturer of the hardware, the developer and provider of the software, the entity involved in the calibration of any software and providers of communications networks. 

PERSPECTIVES

COURTS CONNECTIVITY PAVES THE WAY FOR INCREASED BUSINESS CERTAINTY ACROSS MENA REGION

BY **NOUR HINEIDI KIRK AND MAHIKA HART**

> DIFC COURTS

The recent news that Carillion, the UK's second-largest construction company, will enter into compulsory liquidation has sent shockwaves throughout the sector and put thousands of jobs at risk. While the true cause of Carillion's collapse remains a developing story, delayed payments from Middle East contracts and the expensive withdrawal from other projects in the Middle East are commonly cited as significant contributory factors. While Carillion joint ventures remain active in the United Arab Emirates (UAE) and Oman, the major risks involved in doing business in the Middle East remain a key feature in the Carillion story.

There is currently some dispute as to how much these disputes in the Middle East contributed to Carillion's liquidation, with Carillion's auditors and Middle Eastern companies contesting evidence given by Carillion's chief executive. Nonetheless, the storyline of the Middle East's role in the collapse has taken shape and is unlikely to dissipate in the near future. Accordingly, this substantial and far-reaching collapse feeds into a widespread and misleading cautionary tale that doing business in the Middle East & North Africa (MENA) region is too risky to be worthwhile.



The fear of uncertainty in the MENA region is a topic of concern among business owners and other stakeholders as they consider entering into the region's markets, or as they consider steps forward on projects already initiated. However, the recent opening up of Saudi Arabia and additional regional efforts to create judicial collaboration and increased standardisation on other rule of law topics, signal a promising shift in the regional legal landscape.

In September 2017, Saudi Arabia established a committee to enhance global judicial cooperation, aimed at coordinating, with other governments, to boost international judicial cooperation and

exchange of international advice. Saudi Arabia also officially launched a new system of commercial courts in October 2017 to create a business environment rooted in trust and stability. Although the Saudi commercial courts follow a different model, they join the Dubai International Financial Centre (DIFC) Courts in the increasing regional trend towards specialised commercial courts aimed at creating trust and stability for international investors and business partners. In conjunction with the announcement of 'Saudi Vision 2030', the creation of these commercial courts and the establishment of the global judicial cooperation committee show Saudi's new

commitment toward implementing international legal best practices.

Saudi Arabia, along with Bahrain and Abu Dhabi, have recently provided modern updates to their arbitration laws. With the exception of Iraq, Libya, Yemen, Somalia and Sudan, most MENA countries are signatories to the New York Convention. However, implementation and application of the convention has traditionally been inconsistent across the region, leaving many businesses with significant challenges in seeking enforcement of their arbitral awards. The trend towards more standardisation in arbitration laws along with the proliferation of arbitration and mediation centres in the MENA region signal a new commitment to alternative dispute resolution that will likely continue in the years to come.

Many judiciaries and arbitration centres in the MENA region have also sought to modernise with increased use of technology, streamlined procedures and online tracking systems. Saudi Arabia and the UAE have taken great strides towards using technology to create more transparency and efficiency in national court litigation. The Saudi Ministry of Justice has initiated plans to digitise litigation operations and further implement state-of-the-art technology in its legal system as part of its plan to boost economic investment and

development. Specialised commercial courts in the region, including the DIFC Courts, have turned to technology to help accelerate the pace of litigation, reduce costs and create transparency. Similarly, the many arbitration and mediation centres across the

“At this pivotal time of change and positive development in the legal systems across MENA, attentiveness is the best practice for businesses operating in and looking to start operations in the region.”

MENA region are turning to electronic filing systems to increase efficiency.

Additionally, in the last few years there has been a flurry of cooperative agreements between judiciaries in the MENA region. Since May 2016, agreements on judicial cooperation have been established between Saudi Arabia and Egypt, Kuwait and Egypt, Oman and Morocco, and Jordan and Oman. Further discussions on judicial cooperation remain ongoing between Bahrain and Jordan, Bahrain and Egypt, as well as Kuwait and Sudan. Most of these agreements resolve to promote judicial cooperation through the mutual sharing of expertise and visits between judiciaries,

including training and seminars. Judges in the region are seeking to learn from each other and establish more standardised best practices in region – a promising development signalling that similar change in other areas of legal practice will be forthcoming.

In the UAE, there have been significant developments regarding judicial cooperation. Along with its many existing agreements with nations in the region, the UAE continues to lead with international collaborations, recently commencing discussions regarding judicial cooperation with Romania and Mozambique. The DIFC Courts, operating as an independent and international free zone court, has established important regional and international connections in the last few years, including a memorandum of understanding on judicial cooperation and on enforcement of foreign judgments. Among recent cooperative efforts are agreements with the High Court for Zambia, the Federal Court of Malaysia and the Shanghai High People's Court, adding to an already substantial list of partnerships.

These trends towards regional and international partnerships, judicial cooperation, technological developments and other standardisation in the legal field come during a climate of increased emphasis on international economic development and investment from nearly every government in the MENA region. The corresponding legal shifts across MENA signify an acknowledgment that stability and standardisation in the legal field are important gateways towards

further international economic progress in the region. Courts and judicial benches are seeking to learn from one another and to create more consistency in their provision of justice. This attitude will continue to flow through many aspects of the legal systems in the region, both criminal and civil, with a heavy emphasis on commercial disputes. While these shifts are still ongoing, businesses around the world must stay abreast of these developments, many of which will inform the best practices necessary to achieve and maintain security in contract in the MENA region.

At this pivotal time of change and positive development in the legal systems across MENA, attentiveness is the best practice for businesses operating in and looking to start operations in the region. Businesses must make sure to seek the most current legal advice on their dispute resolution clauses before entering into contracts and they should not neglect active negotiation of these clauses. Most importantly, businesses should invest in up-to-date legal advice to enable swift action and renegotiation of dispute resolution clauses as developments continue in the region. Unfortunately, renegotiation of dispute resolution clauses often seems unnecessary and is not commonly pursued. Too often, the dispute resolution clause could have been updated to reflect important legal shifts but was instead left to create larger problems once a dispute emerged.

Businesses should ensure their legal counsel takes an aggressive look from the outset towards

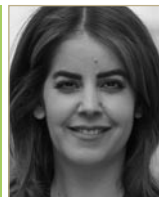
enforcement prospects should a dispute emerge. Parties should look towards enforceable assets and work backwards towards a dispute resolution clause that they prefer, seeking to maximise their prospects of enforcement in contract negotiations. This is especially relevant now in the MENA region, where the dispute resolution choices available are no longer bilateral. There is increasing choice among arbitration and mediation centres in the region, with increasing numbers having been established in recent years. Choice of arbitral seat and governing law can significantly change arbitral proceedings and enforcement prospects.

Even in the realm of national court litigation, there is choice between the newer international commercial courts that follow a common law system and proceed in English language – such as the DIFC Courts, and traditional local and onshore courts – which likely proceed under civil law traditions and that country's native language. These choices, from the outset, make a significant difference in the event a dispute emerges, particularly in the context of enforcement, which will be affected by the location and legal circumstances of relevant assets. While there is no formulaic dispute resolution clause appropriate for all businesses seeking to act in the MENA region, parties often fail to appreciate at the beginning of a relationship just how important these choices may become down the road.

The above observations are especially true in the construction industry, where large-scale disputes

seem to be more and more common, regardless of region. As evidenced by the Carillion collapse, which has principally been attributed to a few large construction contracts, construction disputes can make or break a company. Thorough consideration of dispute resolution choices may make all the difference.

Adequate attention to these ongoing changes in the legal landscape of the MENA region will help businesses to ensure that they will not be involved in the next Carillion catastrophe. In fact, adequate attentiveness and legal advice can provide the necessary assurances that doing business in the MENA will provide many of the safeguards that exist for international investors in other regions. This remains an exciting and dynamic area of change and positive development to watch in the coming years, with the MENA region trending towards an increased role in legal innovation and economic progress. **CD**



Nour Hineidi Kirk

Deputy Registrar
DIFC Courts
T: +971 (4) 427 3308
E: nour.kirk@difccourts.ae



Mahika Hart

Postgraduate Law Fellow
DIFC Courts
T: +971 (4) 427 3350
E: mahika.hart@difccourts.ae

MINI-ROUNDTABLE

INTERNATIONAL DISPUTES AND ASSET RECOVERY IN RUSSIA & CIS



PANEL EXPERTS

**Maria Gritsenko**

Counsel
Bryan Cave
T: +44 (0)20 3207 1227
E: maria.gritsenko@bryancave.com

Maria Gritsenko focuses her practice on international arbitration and litigation. She has extensive international experience, having spent several years with leading dispute resolution practices in London, Paris and Washington DC. Ms Gritsenko's experience includes bilateral and multilateral investment treaties arbitration, international commercial arbitration under a variety of rules, commercial litigation before the US and English courts, and coordination of international and local dispute resolution proceedings in multiple fora.

**Vladimir Biriulin**

Partner
Gorodissky & Partners
T: +7 (495) 937 6116
E: pat@gorodissky.ru

Vladimir Biriulin counsels clients on IP legislation implementation issues in Russia, including technology transfer, copyrights and intangible assets protection. His particular interests cover enforcement and infringement of IP owners' rights, unfair competition, parallel import and litigation. Mr Biriulin is a recognised litigation adviser representing a broad range of national and international clients. He delivers lectures at national and international IP events, and is an author of a large number of publications focusing on IP issues.

**Noah Rubins**

Partner
Freshfields Bruckhaus Deringer
T: +33 (1) 4456 4456
E: noah.rubins@freshfields.com

Noah Rubins heads Freshfields Bruckhaus Deringer's international arbitration practice group in Paris, as well the global CIS/Russia dispute resolution practice group. A US-qualified, Russian-speaking lawyer, Mr Rubins has represented clients in nearly 100 arbitrations, including some 30 investment treaty disputes. He specialises in construction and energy disputes, particularly upstream, pursuant to contracts and under the auspices of bilateral investment treaties. Mr Rubins has practiced law in New York, Washington, Houston and Istanbul.

**Michael Leeds**

Partner
Grant Thornton
T: +44 (0)20 7728 2368
E: michael.t.leeds@uk.gt.com

Michael Leeds has 11 years' experience in insolvency and asset tracing, and has been ranked in Who's Who Legal as a leading expert in this field. Mr Leeds has particular experience of working with the Global Grant Thornton network on asset recovery cases and has been involved in a number of matters with a Russian aspect. In particular, he has experience of dealing with assets and structures in Cyprus, Gibraltar, France, BVI, Cayman Islands, Germany, Spain, India, New Zealand, Italy, Dubai, Switzerland, Liechtenstein, the US and the UK.

CD: How would you describe the current level of commercial disputes across Russia and the Commonwealth of Independent States (CIS)? To what extent have you seen an increase in this area?

Gritsenko: The level of disputes is hard to estimate, given that a large number will remain confidential when resolved by arbitration. The English courts continued to assert jurisdiction over defendants, including Russian defendants, which have personal ties with England, in cases such as *Bestolov v. Povarenkin* and *Eng King v. Petrillo*. As to the LCIA, a third of their cases are connected with Russia and the Commonwealth of Independent States (CIS), even if the parties may not have a Russian nationality but rather are nationals of the British Virgin Islands or Cyprus, among others. Russian and CIS parties are also very active in arbitrations before the Stockholm Chamber of Commerce.

Biriulin: Commercial disputes are often a way to solve commercial problems. The number of cases in Russia has been moderately growing from 2011 to reach more than 1,500,000 in 2016. The growing number may be explained by the fact that business has been growing in recent years, even though

the growth rate of the economy is low. One of the problems is a shortage of money. Profits are used to finance turnover, so there is not much left to develop a business, hence many companies have to use credit. We believe the number of cases will remain approximately at the same level because the law is stable and no drastic changes are expected. Commercial disputes are examined for the most part

“The level of disputes is hard to estimate, given that a large number will remain confidential when resolved by arbitration.”

*Maria Gritsenko,
Bryan Cave*

by commercial courts. Common courts in Russia are the proper venue for a limited number of cases where physical persons are involved. These may be owners of copyrights or patents.

Leeds: The number of disputes across Russia and the CIS remains high and their value is also substantial, with many being in the bracket of hundreds of millions and even billions. There continue to be disputes within the region but often

they spread to other jurisdictions either due to the way that businesses are owned, such as through offshore corporate structures, or as a result of clauses which enable disputes to occur in, for example, London.

Rubins: The volume of CIS-related commercial disputes is holding rather steady. We have seen the tailing off of ‘desperation’ litigation that prevailed in 2014-2015, with the economic downturn and low oil prices arising out of sanctions leading to fights over the leavings of stressed Russian businesses. The Akhmetov cases that are currently in arbitration and the English courts show that this kind of situation persists, but is less common today.

CD: What types of dispute have been common in recent months? What are the driving factors behind them?

Biriulin: For the most part, conflicts arise from violation of the obligations between companies. There are also cases where companies dispute decisions made by administrative bodies such as tax authorities. These disputes may involve restoration of damages, disputed intellectual property and corporate disputes. In the past two years, the number of disputes related to bankruptcy has increased in Russia. This is due both to the introduction of a new institute of bankruptcy and to major changes in the law concerning bankruptcy

of legal entities, which significantly broadens the rights of creditors to challenge debtor’s suspicious transactions conducted in advance of bankruptcy.

Leeds: In recent months, the most common disputes that we have seen relate to claims being brought by parties seeking to recover assets and commence some form of enforcement process. In particular, we have seen a number of banks pursuing former management or bringing claims against debtors where they have loaned substantial sums of money and personal guarantees have been given. We have also been seeing a number of shareholder disputes where parties have fallen out over the business arrangements, whether that be a joint venture or joint shareholding, and accordingly litigation commences. Parties are increasingly using aggressive tactics within these disputes, such as obtaining freezing orders and even seeking criminal sanctions in extreme cases.

Rubins: The three most prevalent kinds of disputes are offshore shareholder battles, which are often fought in the courts of Cyprus, BVI or the Channel Islands as well as in LCIA arbitration, construction, normally with a CIS-based project and owner and a foreign contractor, and post-M&A disputes, which are primarily about the accuracy of representations and warranties after a company is sold. Also important are the various investment treaty arbitrations by Ukrainian businesses against

Russia in relation to the Crimean annexation, and Russian businesses against Ukraine in the wake of government retaliation.

Gritsenko: We have not seen a marked change in the types of disputes emerging in recent months. Shareholder disputes continue to be the most common, including disputes arising out of the shareholder agreements or share purchase agreements. We have also seen disputes involving loan defaults and loan guarantees, as well as those involving issues of performance of contract, such as supplies of goods. Finally, fraud-related disputes feature prominently, arising out of the efforts by companies or financial institutions to go after their former officers and shareholders who have diverted assets belonging to the company.

CD: What general considerations should parties make when deciding whether to pursue litigation or alternative dispute resolution (ADR) strategies, such as arbitration?

Leeds: There are a number of matters as to whether to pursue litigation or alternative dispute resolution (ADR) and often there will be multiple issues in play affecting the final decision. These disputes also take two parties, so the position

of the other side is also key. Cost is a major issue whereby arbitration has historically been perceived to be cheaper than litigation, which can become extremely expensive. Arbitration will also be considered where there will be a continuing relationship between the parties. However, a dispute

“The volume of CIS-related commercial disputes is holding rather steady.”

*Noah Rubins,
Freshfields Bruckhaus Deringer*

has arisen which needs to be resolved as effectively as possible. Yet, a number of the disputes that we have been looking at recently are likely to lead to termination of the relationship, so this is not necessarily the correct route to go down. Perhaps the largest consideration in this particular market is confidentiality. Confidentiality of the parties involved and their business interests is a key consideration, as is the possibility that the proceedings could have an impact on other proceedings due to information being released.

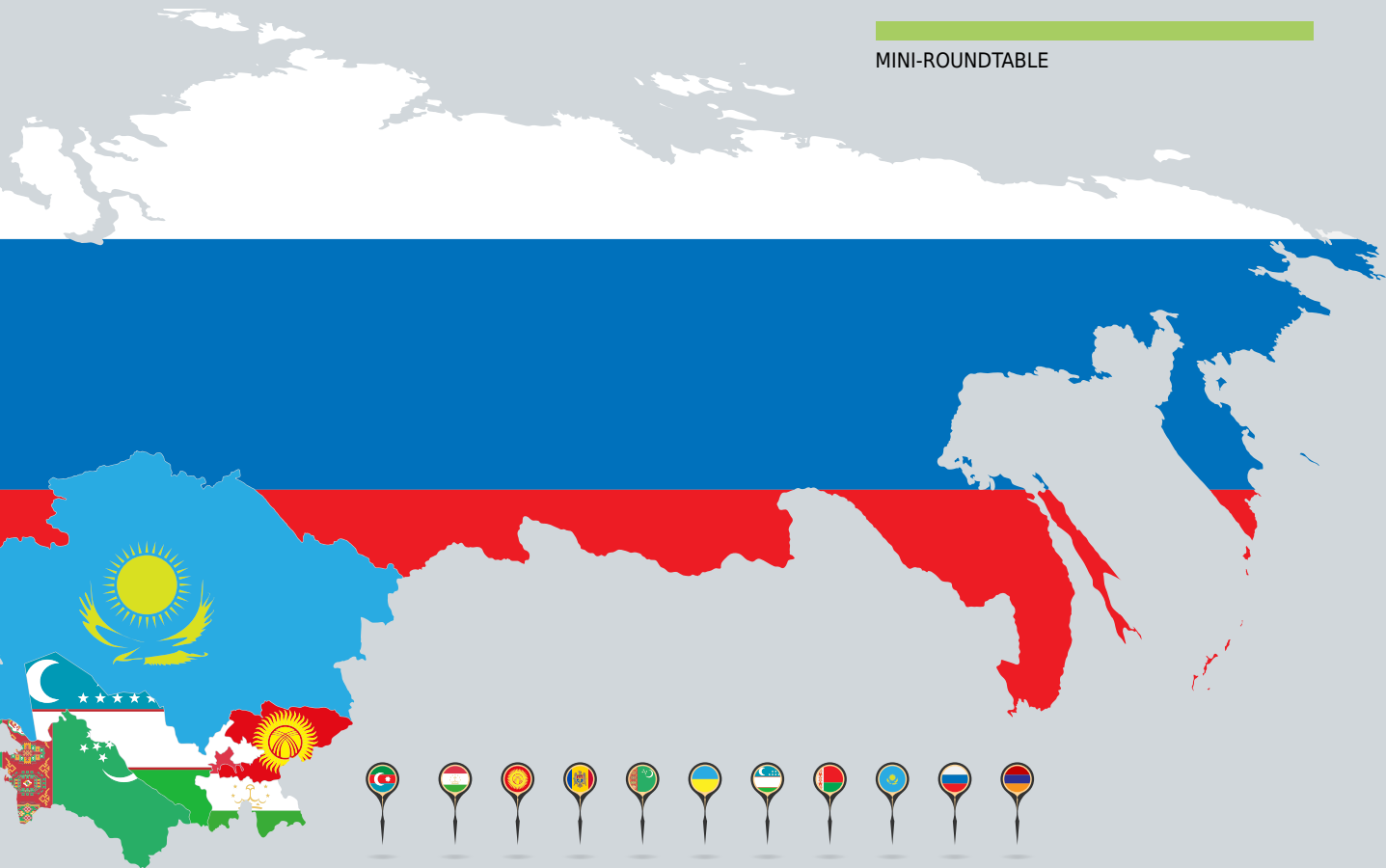
Gritsenko: After the dispute has arisen you will generally be constrained by the dispute resolution clause in your contract, even if you may have a litigation option, particularly in support of arbitration, such as interim measures to preserve assets, for example. There are a number of considerations which usually drive the selection of arbitration over court litigation. The first factor is the negotiating power of your counterparty. If you are in the presence of two parties from two different jurisdictions, there may be reluctance by the one party to agree to get the dispute resolved by the courts of the other's jurisdiction – with the exception of English and some other jurisdictions which are considered neutral and are actually sought after by foreign parties. The second factor is the competence of the arbitrators. While the judges in some jurisdictions, such as England, are highly professional, in many jurisdictions this is not always the case when it comes to sophisticated international contracts. The third factor is confidentiality. The final factor is enforcement. The New York Convention governing enforcement of arbitral awards is a more powerful and universal tool than any conventions on enforcement of judgments, especially when we are talking about non-EU parties.

Rubins: For any party, there are central questions. First, do you have a national court that both sides can trust? Are the courts that would have jurisdiction free from improper influence? Are the

judges sophisticated in international business transactions? If the answer to any of these questions is no, then arbitration is probably the best avenue. But even if the answer to all the questions is yes, arbitration will nevertheless be advisable where there may be a need to enforce the final decision internationally. Other than between EU countries, court judgments travel poorly. Arbitration awards are subject to simplified enforcement around the world through the New York Convention.

Biriulin: ADR, though existing in Russia, is not popular. Companies mostly go to commercial court to pursue their interests. However, this is not because arbitration courts are bad or inefficient, but mostly a tradition. When deciding upon an ADR procedure, it is necessary to clearly understand whether it will be possible to enforce a judgment in the country in which the dispute is to be executed. The decisions of any foreign courts or 'ad hoc' arbitrations rendered in accordance with procedures consistent with the New York Convention are relatively effective. The same situation exists in





respect of decisions rendered in Russia to be executed in the territory of many other countries.

CD: In what ways can the legal and regulatory landscape present challenges to those seeking to pursue, secure and preserve information and assets, often in a number of jurisdictions?

Rubins: There are actually a number of very effective means of obtaining information and preserving assets, particularly in common law jurisdictions. In CIS-related disputes, many of the companies involved in disputes are based in Cyprus, the Channel Islands, BVI or other countries and

territories where the courts will generally provide interim measures of protection, even without notice to the opponent, in support of litigation or arbitration abroad. In some of these places, the orders provided, freezing assets for example, can have worldwide scope – at least on its face, with enforceability another matter. The real challenge is that information and assets in CIS business disputes are often held by proxies, such as ex-wives, brothers-in-law or completely unrelated people. Getting at those can be tricky, because there are no uniform rules allowing courts to look behind ‘fronts’ to get at the beneficial owner. In most places this can be done, but it requires a level of evidence that is often going to be nearly impossible to satisfy.

Biriulin: The regulatory landscape is satisfactory and very detailed. There is a Civil Code in Russia with more than 1500 articles, the Commercial Procedure Code and other regulatory documents. There are four instances of courts with the supervisory instance with the Supreme Court at the top, so the parties may obtain a balanced settlement of their dispute. The system of commercial courts in Russia is multistage and is in contrast to a commercial arbitration, which is usually single-staged and cannot be appealed. Thus, if either party is not satisfied with the decision of a regular court of first instance, it can file an appeal or cassation complaint. If an appeal is filed, the decision of the court of first instance does not come into force and cannot be executed until the ruling is passed by the court of appeal. On the one hand, this guarantees a higher level of protection for the rights of the parties in judicial proceedings. But on the other hand, it can also be an unfair way of delaying resolution of a dispute until its execution may become difficult.

Gritsenko: The biggest challenge is the diversity of legal and regulatory landscapes. Tools that are available in one jurisdiction are not necessarily available in another. For example, the concept and test for an English freezing injunction is something that is not adopted by continental courts. Even if

you obtain a so-called ‘worldwide freezing order’ from an English court – you may not be able to actually enforce it in every jurisdiction where the assets are located. At the stage of looking for assets, every country’s data protection laws and evidence admissibility rules should be considered. Parties and lawyers engaging the services of investigators to look for assets should ensure that any such activity is conducted in a lawful way.

“The system of commercial courts in Russia is multistage and is in contrast to a commercial arbitration, which is usually single-staged and cannot be appealed.”

*Vladimir Biriulin,
Gorodissky & Partners*

Leeds: The impact of the legal and regulatory landscape is key to how a case can be managed effectively, so the choice of the ‘central’ jurisdiction is crucial, as the wrong jurisdiction can have an adverse impact on prospects of success. For example, the Insolvency Act 1986 in the UK is internationally recognised, so assets located outside of the UK can be recovered. To illustrate

this, if you are recovering the assets of an individual who is subject to UK proceedings but who has assets held offshore, the offshore courts will often recognise the jurisdiction of the UK Insolvency Act and can then provide assistance. The UK process also has well developed case law and experienced practitioners who can maximise the likelihood of success. In comparison, Russia has recently introduced insolvency legislation, but it is in its infancy and is largely untested. There are, of course, difficult jurisdictions to deal with and claimants and creditors should not assume that because money has been dissipated overseas it is irrecoverable. For cases which involve assets situated in multiple jurisdictions, building a strategy at an early stage is key.

CD: Have any developments had a particular impact on asset recovery processes? If so, are how might they affect the outcome of cross-border cases?

Biriulin: By virtue of the norms of the Russian procedural legislation, all disputes concerning the recognition of rights to real estate must take place in the commercial court of the Russian region where this real estate is located. There are also a number of restrictions for foreign companies to own certain types of assets in Russia. For example, a foreign person or a company in which foreigners own more than 50 percent of shares or stakes in the capital

cannot own a plot of agricultural land. This means that the court will not decide on foreclosure of the asset to a Russian company in favour of a foreign entity. Otherwise, there have been no significant developments in connection with recovery of assets. The statistics do not single out cross-border cases.

Leeds: There are two specific areas that have an impact on asset recovery cases. Firstly, there is the constantly evolving case law in this field, with the 2017 judgment regarding the Pugachev trusts and associated litigation around those being a good example. This is a particularly interesting judgment as it provides new guidance on cases where trusts have allegedly been established in order to protect assets. Investigations can now be linked to the types of information and evidence that a court wants to see to find that a trust is a sham. There continues to be evolving case law on the field of asset recovery, some of it helpful, some of it less so. The other major impact has been the recent unstoppable rise of litigation funding and after the event (ATE) insurance and the positive impact that is having on asset recovery cases. Litigation funding has enabled claimants to coordinate litigation in multiple jurisdictions and undertake key investigations from the outset of a case. This enables freezing orders and search orders to be obtained – by funding and insuring cross-undertakings in damages – with a view to securing recoveries. Litigation funding also assists insolvency practitioners in bringing their

claims against third parties and is playing an integral part in actually securing recoveries for parties. The involvement of funders in this area can increase the prospects of a successful recovery. There has recently been case law about litigation and ATE, so the two aspects also cross over.

Gritsenko: We would note the general trend toward transparency, including the disclosure of ultimate beneficiaries, and more stringent compliance rules across various jurisdictions. I think this creates a favourable environment leading to an increase of asset recovery cases. Another contributing factor to the proliferation of such cases is the willingness of third-party funders to get involved – this may encourage parties who otherwise would not have engaged in complicated cross-border proceedings in an attempt to recover assets. On a smaller scale, European Account Preservation Orders (EAPOs) have been an interesting development which now allow creditors in most European countries, but not in the UK, to seize their debtor's assets by using an online application form.

CD: What steps may be taken to pursue recognition and enforcement of judgments in asset recovery? In particularly challenging jurisdictions, how can parties increase the chances of a successful outcome?

Leeds: At the outset, you should always look to speak to local experts to see whether you can identify any easily accessible assets, which may include property or shares or cash in the defendant's name. You should get some visibility around target assets and try to establish what asset holding structures are in place. These could potentially be secured. For example, the appointment of a receiver over shares in those structures. Assets located in difficult jurisdictions may actually be owned by entities in friendlier jurisdictions, making enforcement a more realistic prospect. Undertaking research and speaking to local legal experts will help achieve a successful outcome.

Gritsenko: The set of rules governing the recognition and enforcement of judgments will be specific to each jurisdiction. It will be more straightforward if there is a treaty on mutual recognition and enforcement between the two countries, or a good track record of enforcement on the basis of comity and reciprocity. For example, there is no such treaty between Russia and the UK but the Russian courts have previously recognised and enforced English judgments, and vice versa. The enforcement of a judgment usually follows the location of assets, and this is something you have to consider from the outset of your case. If the debtor's assets are all located in a jurisdiction that is not enforcement-friendly, the legal team may want to reconsider the strategy, depending on the client's

objectives. For example, you can still employ the ongoing legal proceedings and any interim measures ordered as a pressure tool in settlement negotiations even if you know that the enforcement of a final judgment may be difficult.

Rubins: If the judgment is an arbitration award, then recognition and enforcement is normally straightforward. The New York Convention requires member states – the majority of countries worldwide – to ensure that their courts confirm and enforce foreign arbitral awards, unless the defending party can prove one of a limited list of defects. Almost all of these are rare procedural problems, such as improper constitution of the tribunal and fraudulent arbitrators, and public policy can be a proper basis for blocking enforcement. But by and large, the process is quite streamlined in most countries. With court judgments, the situation is more complex. Check if there is a bilateral treaty on mutual recognition of judgments, as there is for example between Russia and Cyprus. If not, local law will tell you what to do. Some countries will enforce a foreign court judgment if the country of origin recognises their judgments in practice. Others will require a new lawsuit on the merits, where the judgment is simply non-decisive evidence that the claim has merit. In any event, it is important when litigating towards a judgment that due process

be observed, including notice and service of the defendant, and all procedural safeguards recorded for posterity. This will be important to any foreign court asked to recognise the judgment.

Biriulin: A judgment must be rendered under the procedures governed by the New York Convention to pursue recognition and enforcement in Russia. Enforcement of judgments of other foreign courts, mainly those under the government, is carried out

“Assets located in difficult jurisdictions may actually be owned by entities in friendlier jurisdictions, making enforcement a more realistic prospect.”

*Michael Leeds,
Grant Thornton*

on the basis of the ‘principle of reciprocity’. That is, if a certain state on whose territory the court has issued a relevant decision recognises and enforces judgments of Russian state courts, then a judgment emanating from such a state may also be enforced in Russia. However, in most foreign jurisdictions, decisions made by Russian state courts are generally not recognised and are not enforced. This means

that the chance of enforcing judgments in Russia rendered by the courts of such states is also very small.

CD: For parties embroiled in international disputes and asset recovery in Russia and the CIS, what advice can you offer on some of the practical steps they should take from the outset?

Rubins: If you are advising CIS clients in business dealings, pre-dispute, encourage them to write things down. Too often clients conduct their business orally, and that makes it much more difficult later to prove what was done and said. Another common pre-dispute pitfall is moving away from the contract terms without leaving any record as to why this was done. One party will inevitably look to enforce the terms of the contract, and disputes arise about whether the contract was modified, rights were waived or terms mean what they seem to mean. Once a dispute arises, engage specialist disputes lawyers as soon as possible – procedure and strategy very quickly intertwine, and it is important to know what can and cannot be done. Finally, while it is important to answer letters from your opponent, the less that is said the better. What you say will be used against you, and it is preferable at the outset to reserve positions for later than to tie yourself to a position that may turn out to be indefensible.

Biriulin: If a conflict is brewing, the plaintiff should collect evidence that will be submitted to court. There are various ways of collecting evidence acceptable to a court, hence it is strongly advisable to engage a local attorney to handle the case. The first and main advice is to choose a well-known and respected permanent commercial arbitration institution when concluding the contract. The LCIA, the Arbitration Institute of the Stockholm Chamber of Commerce and the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation are most commonly indicated in arbitration clauses of agreements concluded by Russian companies with foreign counterparts. The judgements of these commercial arbitrations do not meet any enforcement problems in Russia. Moreover, it is very important to ensure the correct notification of the opposite party of the dispute on the commencement of the judicial procedure, since a breach of this requirement may result in the refusal to enforce a judgment against such a party.

Gritsenko: The main stages remain the same – locate, preserve, enforce. Parties should make use of all available tools across jurisdictions to locate and preserve assets while the proceedings, or resulting appeals, are pending. The ‘Russian’ assets would often have a link with such jurisdictions as Cyprus or the British Virgin Islands, which are receptive to the freezing orders issued by the English courts.

You can also use the English courts at the stage of looking for information, by requesting 'Norwich Pharmacal' – disclosure by a non-party – or 'Bankers Trust' – third-party disclosure by a bank – orders. Under certain conditions, Norwich Pharmacal orders may be issued, even if the information is sought from a defendant residing abroad; for example, in *Credit Suisse Trust v Intesa San Paulo* disclosure was ordered against Italian banks which had branches in London.

Leeds: You must always think about what you are trying to achieve while going through this process, which is usually a financial recovery. Having a piece

of paper in the form of a judgment in your favour is pointless until it can actually be converted into cash. Ultimately, it is about pulling together the right team for these assignments with the necessary experience and credentials to operate across multiple jurisdictions and in hostile circumstances. An important lesson is that it is much easier to get ahead of the curve and think about enforcement while litigation is underway and while money is being spent on that process. It is much more difficult after judgment is handed down or an award given where 12 months may have passed and a defendant will have had the opportunity to protect assets.

CD

PERSPECTIVES

AN APPROACH TO THE INTERNATIONAL JURISDICTION RULES IN ARGENTINA

BY **RICARDO A. OSTROWER AND MARTÍN VAINSTEIN**
> MARVAL O'FARRELL & MAIRAL

Globalisation has led to the exponential growth of international private relations. The technological progress applied to telecommunications and to the transportation of people, data and goods has given way to an age of increased interconnectedness of the world's societies. This phenomenon has accelerated at the turn of century, provoking major changes not only to the economy and society, but also in the law.

As a result, the issue of international jurisdiction has become one of the main legal challenges brought by globalisation. This is evidenced in the opinion of many local and foreign authors who consider that – though still relevant – choice-of-law has in practice

been displaced by jurisdiction from the spotlight of international private law.

Due to increasing internationalisation, conflicts that transcend borders are more and more recurrent, exposing individuals to the risk of transnational litigation, while offering new challenges for policymakers and international cooperation. The growing importance of this area of international jurisdiction principles is particularly evident in corporate and commercial matters, thanks to the development of international trade and investment.

The Civil and Commercial Code that Argentina recently enacted has been receptive to this tendency of international private law, as it introduces several





principles and basic rules on international jurisdiction.

The Code

– in force as of August 2015 – has had a major impact on the legal system and legal practice. It replaces and unifies both the existing civil and commercial acts approved over a century ago that were historically regulated separately. Thus, under this highly anticipated legislation, civil and commercial matters that were previously governed by separate acts are now governed by a single, updated and systematic new corpus.

Until now, Argentina's international private law lacked federal provisions containing general principles on international jurisdiction.

The previous Civil Code merely provided for certain jurisdiction rules on specific matters, while the majority of the general principles were established by judicial precedent. Under its Book VI, Title IV dedicated to international private law, the Civil and Commercial Federal Code introduces a specific chapter on 'International Jurisdiction' (Sections 2594 to 2612).

Among other principles, the new Code includes the following: (i) the sources of international jurisdiction;

(ii) the 'forum of necessity'; (iii) the power of issuing provisional measures and injunctions; (iv) an individualisation of certain exclusive jurisdictions; (v) equal procedural treatment for foreign nationals; (vi) international *lis pendens*; and (vii) international cooperation and procedural assistance.

We will further analyse the highlights of three of the main legal concepts listed above, considering their significance for international commercial litigation.

The sources of international jurisdiction

As stressed by legal authors, private international law can be systematised into three different categories of norms: those that determine the applicable law, those related to the enforcement of awards and judgments and, finally, those that determine the jurisdiction of state courts over international cases.

Section 2601 of the Argentine Civil and Commercial Code belongs to the latter category, as it establishes the order of precedence of the sources of international jurisdiction. According to this provision, the international jurisdiction of Argentine judges will be determined by: (i) international applicable treaties; (ii) the parties choice-of-forum selection agreement, when permitted; and (iii) the internal laws of Argentina.

In connection with this issue, the Code also contains certain provisions that specifically regulate the forum choice agreement referred to in point (ii).

Pursuant to Section 2605 of the Code, the choice-of-forum agreement will be valid to the extent that it refers to a patrimonial and international matter, that the parties are empowered to agree on the jurisdiction of foreign judges or arbitrators, and that the choice-of-forum is not prohibited by law. Once validly agreed, the forum chosen will be mandatory for the parties, in accordance with Section 2606. Finally, Section 2607 provides that the forum selection clause may be express or implied, in certain circumstances.

This new standard has raised questions about the validity of the *arraigo* preliminary objection under local procedural codes. According to this rule, certain foreign nationals may be required to provide

“Prior to the Civil and Commercial Code, Argentina lacked federal laws containing general principles and specific rules on international jurisdiction, combined in a single and systematic act.”

Equal procedural treatment for foreign nationals

Among its innovations, the Argentine Civil and Commercial Code has introduced the principle of equal procedural treatment for foreign nationals, granting non-nationals free access to Argentine courts. Under Section 2610 – which draws on the 1992 Mercosur Convention on Cooperation and Jurisdictional Assistance in Civil, Commercial, Labor and Administrative Matters – citizens and permanent residents of foreign countries enjoy free access to jurisdiction to defend their rights and interests under the same conditions as citizens and permanent residents of Argentina. Moreover, this clarifies that this principle also applies to legal entities which are constituted, authorised or registered under the laws of a different state.

a bond or similar undertaking when litigating before Argentine courts with respect to the costs associated with such proceedings.

However, this matter was recently clarified by in the *Eguiguren Laborde v. Chiramberro Larrategui* case, in which the Court of Appeals in Civil Proceedings held that the *arraigo* preliminary objection contained in local procedural codes should be considered to have been repealed following the entry into force of the principle of equal procedural treatment for foreign nationals under Section 2610 of the new Argentine Civil and Commercial Code. Accordingly, foreign nationals are granted free access to Argentine courts to defend their rights on an equal basis with permanent residents in Argentina.

International *lis pendens*

Section 2604 of the Civil and Commercial Federal Code incorporates into Argentine private international law the concept of international *lis pendens* – also known as ‘international parallel litigation’ or ‘duplicative foreign litigation’ – which was not previously legislated in the substantive and procedural codes that preceded the new Code.

The law covers the situation where there are two judicial proceedings between the same parties, with the same object and cause: one initiated in Argentina and the other one that has been previously initiated in an entirely different jurisdiction. In principle, there is no common superior authority to both states and if no international treaty applies, each court would determine its jurisdiction in accordance with rules of conflict that may be dissimilar.


In these circumstances, the new Code provides that the Argentine judge shall suspend the local proceedings if it is foreseeable that the judgment expected to be issued in the foreign forum might be recognised in Argentina.

The process in Argentina can be resumed if the foreign judge declines his or her own jurisdiction to intervene in the case, if the foreign process terminates without a decision on the merits of the dispute, or if the foreign judgment is incapable of being recognised in Argentina.

Closing remarks

Faced with the challenges of the globalisation phenomenon, private international law and, in particular, its international jurisdiction principles, play a preponderant role in providing efficient legal solutions to transnational conflicts.

Prior to the Civil and Commercial Code, Argentina lacked federal laws containing general principles and specific rules on international jurisdiction, combined in a single and systematic act. Conversely, Argentina merely had dispersed rules on international jurisdiction and certain provisions contained in international treaties to which the country is party.

Consequently, beyond the pros and cons of the amendments introduced by the Argentine Civil and Commercial Code, we can now say that Argentina has legislated on issues regarding this matter in the same way as many other countries. 



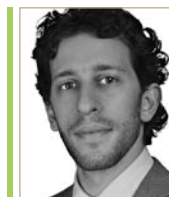
Ricardo A. Ostrower

Partner

Marval O'Farrell & Mairal

T: +54 11 4310 2418

E: rao@marval.com



Martín Vainstein

Associate

Marval O'Farrell & Mairal

T: +54 11 4310 0100, ext. 1912

E: mvai@marval.com

MINI-ROUNDTABLE

TECHNOLOGY FORENSICS IN FRAUD INVESTIGATIONS AND DISPUTES



PANEL EXPERTS**Jane Colston**

Partner
Brown Rudnick LLP
T: +44 (0)20 7851 6059
E: jcolston@brownrudnick.com

Jane Colston is one of the award winning 14 litigation partner team at Brown Rudnick London combining cross border civil fraud, criminal and regulatory experience under one roof. The team won in 2018 the Legal 500 award for civil fraud litigation. Ms Colston has acted in numerous complex, cross-border fraud cases and has extensive experience of forensic investigations. She has managed numerous cases involving freezing, search, disclosure, gagging and delivery up injunctions.

**Aaron Pickett**

Digital Forensic Examiner
IT Group UK
T: +44 (0)845 226 0331, ext 505
E: aaron.pickett@itgroup-uk.com

Aaron Pickett is a digital forensic examiner who specialises in computer and mobile investigations in both the civil and criminal sectors as well as cyber security. He has worked on cases involving employee theft, ransomware attacks, fraudulent activities as well as cases involving burglary, employee misconduct and money laundering.

**Tom Epps**

Partner
Brown Rudnick LLP
T: +44 (0)20 7851 6010
E: tepps@brownrudnick.com

Tom Epps is also one of the partners in Brown Rudnick's award winning litigation team. He is recognised in the UK and internationally as a leading white-collar crime lawyer specialising in business crime and regulatory investigations. He has been a partner with Brown Rudnick since July 2013 and has been involved in many of the UK's largest and most complex fraud investigations and prosecutions over the last 20 years.

**Kieran Maher**

Assistant Digital Forensic Examiner
IT Group UK
T: +44 (0)845 226 0331
E: kieran.maher@itgroup-uk.com

Kieran Maher is an assistant digital forensic examiner who specialises in computer and mobile investigations, alongside crucial expertise in web technologies. He has worked on cases involving post-breach remediation for online retailers, employee theft and the fraudulent doctoring of medical documentation.

CD: Could you provide an overview of how information recovered from digital technologies may contribute to evidence in a fraud investigation or dispute?

Colston: If you act for a claimant, seeking to obtain relevant data from dishonest defendants early on is essential to successfully tracing stolen assets and identifying the co-conspirators or those who, innocently or otherwise, hold relevant data. Search, freezing and Norwich Pharmacal disclosure orders (NPOs) are civil court ‘weapons’ of first choice to achieve this. These civil orders are designed to obtain data by catching the targets unaware so they do not have time to hide or destroy the data. Internet service providers (ISPs) and banks are also frequent targets for NPOs in order to obtain, without notice to the account holder, full details to help trace stolen monies and establish the wrongdoers or the wrongdoing. It is true there is significant frontloading of legal costs but such orders give you a lot of ‘bang for your buck’ and often accelerate an early disposal of the case.

Epps: If you are acting for a company under investigation by a UK enforcement agency, such as the Serious Fraud Office, you could feed electronic copies of documents into advanced fraud analytics engines which use artificial intelligence (AI) to get to the key information fast. That targeted insight is

then available to the company under investigation so it can prioritise documents that should be looked at first and therefore get ahead in understanding what has happened. The 2017 High Court decision on the scope of legal professional privilege (LPP) in the ENRC case (*Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd*) has, in practice, made defence lawyers in white-collar crime investigations think particularly carefully about creating new data, such as interview notes, since those notes or statements made by an employee during an internal investigation may not be privileged.

Maher: Data recovered from devices are often the backbone of fraud investigations. This is because typical data on a device can reveal much more information than an individual might at first imagine. For example, an image on a mobile phone does not contain just the date it was taken, but often the location coordinates pinpointing where the image was taken. Documents likewise contain similar metadata, often storing much more information than a user would first consider. Combining this metadata that is generated from almost every action on a device, with chat analysis from popular messaging applications, can more often than not be the foundation on which a fraud investigation is built. Deleted data likewise proves an invaluable resource, as actually deleting a file from a device is much more complex than one would initially believe.

Pickett: Recovered data could prove vital as part of a fraud investigation. Information from desktop and laptop machines can reveal documents, and associated metadata, for further analysis that can reveal forgery of documents, communication or images. Adding this to the plethora of data available from mobile phones – both the location through cell site analysis and information downloaded from the device – can often reveal motives and methods used to conduct fraud. Timeline forensics can particularly be important when cross-referencing against key times and dates, such as the receipt of an email from a ‘fake’ email account at the same time that one is sent from suspects’ computers.

CD: What fraud investigation techniques and procedures are typically deployed to gather evidence from technology to prove wrongdoing, particularly in cases where data has seemingly been erased, corrupted or destroyed?

Maher: There are a few key tools employed in forensic investigation, where an individual is believed to have deleted files or deliberately corrupted them. There is the process of data carving. Almost all investigations into fraud begin with a data carving process. This process allows us to recover deleted

data and files, potentially going back to the birth of the device. While metadata is usually lost as a result, the content of the file usually remains integral and can therefore serve as part of the investigation. There are also processes and resources available

“Data recovered from devices are often the backbone of fraud investigations. This is because typical data on a device can reveal much more information than an individual might at first imagine.”

*Kieran Maher,
IT Group UK*

that will attempt to mend or fix deliberately corrupted and broken files, such as when an individual tries to delete an email account from a device.

Pickett: One of the first stages of an examination where there is a suspicion that data has been erased would be to check for ‘anti-forensic’ tools. In the assumption that these have not been used, a carving exercise is conducted. This technique often gathers long-deleted files, but will not be able to recover dates and file names. Despite this, the method will often recover evidence of wrongdoing and

malicious deletion of files. Similarly, the investigation of documents and associated metadata often reveals key artefacts that can lead to a successful conclusion of a fraud investigation.

During the creation of any documents, a whole host of file system and embedded metadata is created. It is a well-known fact among many forensic professionals that one of the key members of the hacking group 'Anonymous' was caught using this method. Despite being well-known for hiding behind many layers of digital anonymity, a simple check of a press release document showed that the author, Alex Tapanaris, had left his real name in the metadata.

Colston: Hunting down the places where relevant data is hidden is a challenge. Often you are lucky, such as a chance remark or the wrongdoers being observed at the right time. Often you make your own luck, for example by getting search orders. This, however, requires a significant legal budget and a coordinated team of fraud litigators and forensic investigators that will image the seized e-data. Even when search orders have been obtained, thoroughly searching all the hiding places is a substantial exercise requiring tenacity. It also requires a thorough knowledge of where data can be hidden. Technology helps locate devices, as often they 'talk'

to each other or a WiFi will identify other devices logged onto it.

"Technology helps locate devices, as often they 'talk' to each other or a WiFi will identify other devices logged onto it."

*Jane Colston,
Brown Rudnick LLP*

Epps: Forensic investigators may be able to check whether the target's computer or laptop has had deletion software installed on it. If so, it is still possible to identify the type of files deleted. The analysis forensic investigators perform will also reveal USB and other devices connected to the target's computers and laptops to see if data was potentially copied to them. As fraudsters may well prefer to hide rather than destroy data, those forensics can usefully open a line of enquiry to uncovering the data. In one case, a Google map was found during the search on a suspect's PC which ultimately led to the recovery of a laptop which had been thrown into a lake. A forensic investigator was

nonetheless able to recover about 60 percent of the data on the laptop.

CD: What legal and regulatory considerations need to be made when assessing the hardware or data of a suspected criminal? Are there any challenges or barriers which may complicate the process?

Colston: A civil search order will prescribe the scope of the search that can be done and the data that can be seized and reviewed. The supervising solicitor on a search order is there to seek to ensure compliance with the order, for example so that legal privilege is safeguarded. Stepping over the line of what is court sanctioned would likely be a contempt punishable by imprisonment. To ensure admissibility of data recovered, the Association of Chief Police Officers' (ACPO) 'Good Practice Guide for Digital Evidence' should be and is usually followed. From a criminal perspective, the search warrant will typically define what is permissible. Those advising defendants should consider whether on any *ex parte* application for a warrant the police complied with their duty to provide full and frank disclosure to the court. Failure to do so would expose the police to a court challenge, as would overstepping the scope of the search warrant.

Epps: UK enforcement agents must also take particular care regarding documents that are journalistic materials, subject to commercial confidentiality or subject to legal professional privilege (LPP). Generally, LPP material must not be reviewed. The defence team must therefore engage at a very early stage with the enforcement agency to ensure LPP material remains unsighted. The suspect is nearly always well-advised to hold a very firm position in that regard throughout the initial exchanges. This is particularly important where the police exercise their powers – under Part 2 of the Criminal Justice and Police Act 2001 – during a search to seize large volumes of material and sift them later for the documents within scope of the warrant. Robust screening procedures must be put in place to prevent any infringement of a client's LPP, and they should seek to reach an agreement with the relevant agency, at the outset of the raid itself, about handling of LPP material.

Pickett: One of the key barriers to assessing data associated with any suspected criminal is the Human Rights Act. Any digital device that is analysed will have personal data on it, which could include communications with loved ones, family photographs or social media web history. Any of these artefacts could be seen as impacting upon an individual's human rights, hidden among a mountain of digital data that could prove or disprove a particular theory. Another area that is often not

considered is the Computer Misuse Act. If there is no court order, there is no authority to take any laptop and examine it for evidential artefacts. Adequate permission must be received from the court or the device's owner, which could be the user or the business owner, prior to the analysis of the laptop, or else the examiners themselves would be in breach of the Computer Misuse Act.

Maher: The legality of an investigation is constantly at the forefront of an investigator's mind. Before any investigation can be conducted, the Computer Misuse Act is considered, to be certain the person handing over the evidence is the owner of the data. During investigations all parties must remain vigilant to ensure evidence is kept secure and out of publicly accessible arenas. This is because, if an investigator were to allow the evidence to fall into the public domain, they might be found to be breaching the Data Protection Act, and not respecting the privacy of the individual being investigated.

CD: Given the sensitive and volatile nature of digital data, do you foresee established standards and processes for collecting, storing and preserving data struggling to keep pace?

Pickett: The standards and processes involved in the collecting, storing and preserving of data





are, for the most part, adequate measures that are proving to be relatively timeless. After all, no matter how the data is stored, it is ultimately a collection of ones and zeros, as it always has been. The ACPO guidelines provide a well-established methodology for collecting, storing and preserving the data that continues to be relevant. Despite this, more and more information is being stored in the cloud, causing problems where the collection of this evidence is important. New standards would be useful for collecting this data, which often proves troublesome, especially in cases where employee theft through cloud services such as OneDrive or DropBox is concerned. This is likely to become even harder with the upcoming General Data Protection Regulation (GDPR) further limiting the amount of information that can be stored, and where, and who can access it.

Colston: The principles in the ACPO's Guide have so far stood the test of time. For example, that no action should be taken which changes data which may be subsequently relied upon in court, and those accessing original data should be competent to do so and be able to give evidence explaining their actions and by reference to a clear audit trail. Given that this is fast changing, the guide will need to be periodically evaluated to ensure it remains fit for purpose. It is also key that those who specialise in fraud litigation keep pace with what technology can do and where data can be hidden and work

knowingly with legal engineers to exploit the AI systems available.

Epps: Technology has to be used to cost-efficiently mine data, otherwise the volume of data is likely to be overwhelming and the case, whether civil or criminal, prohibitively expensive to fight and slow to resolve. Those who fail to skill up may lose out to opponents who are using it and they may fail to gain significant insight into the modus operandi of some law enforcement agencies that are using it. We fully appreciate the significance, for example, of the Serious Fraud Office (SFO) having deployed AI – specifically, the RAVN software – to examine extensive batches of data to help identify particular material in the course of their corruption investigation regarding Rolls-Royce PLC. The SFO was reported to have said that the technology was “more effective, more efficient and more accurate than human intervention”. I understand, the SFO agreed to the use of RAVN to help identify and then quarantine documents subject to LPP. Using such technologies means cases could well be investigated quicker than if they were investigated manually. They are an enabling tool for the sifting, and then analysis, of huge volumes of data.

Maher: A lot of the industry is already subjected to well-established standards. A prime example would be ISO, with many organisations ISO 27001 and ISO 9001 accredited. This means they are

audited every year. In addition, there are the ACPO guidelines. These guidelines apply throughout any investigation, from the acquisition of data, through to the storage of such data. Furthermore, the new GDPR comes into force in May of this year and we have already begun preparations to be certain we comply in every way. While this poses a particular challenge for us internally, with reference to who can access which files, it is a welcome new safeguard, as the GDPR will further ensure we are taking every step we can to not only keep up to date with best practice in our field, but also keep our case data as safe and secure as possible.

CD: Once data has been recovered, what processes need to be undertaken to evaluate and maintain its integrity?

Pickett: Hashing processes are used to ensure that the integrity of data is maintained throughout the analysis of the recovered data. Created by running algorithms across data, be it a full hard drive or a single file, a hash is the digital equivalent of a fingerprint, with a change in a single byte of data dramatically altering the hash value. A hash is taken at the time of imaging, and this hash value is regularly checked and regenerated to ensure continued integrity. As a second layer of protection, any work conducted on evidence is conducted in a read-only format. This means that the data recovered will never be altered as the write-blocking

devices will not allow any changes to the files being worked upon.

Maher: The process of acquiring data using modern techniques will almost always allow for the generation of hashes. With a hash taken at the time of imaging, we can then reference back to this at any point in an investigation, to ensure the integrity of the data and make sure nothing has been changed in the evidence. A large portion of, although not all, forensic images are stored in a particular file format called an E01. This universally recognised format adds an element of safety in that we can be certain various tools and software are handling the evidence correctly, due to the established standard of the E01 format. Evidence handling standards likewise ensure the integrity of data, and allow any individual to be able to track the past movements of a piece of evidence.

Epps: Suspects, whether that be in the context of civil or criminal litigation, will usually challenge provenance of the data and examine in some detail the way in which the data has been handled throughout the investigative process. Many enforcement agencies are legally obliged to record and retain material which may be relevant to their investigation. As such, a clear audit trail must be

kept as to what was done to evaluate the data. Such evaluation may then be done using Technology Assisted Review (TAR) – machine learning (ML) algorithms which evaluate and help to determine the relevance of documents. However, it is worth bearing in mind that the quality of ML is naturally informed by the quality of the human guidance and input, and

“Many enforcement agencies are legally obliged to record and retain material which may be relevant to their investigation.”

*Tom Epps,
Brown Rudnick LLP*

we foresee vigorous challenges may well be pursued by criminal defence teams in relation to the integrity and cogency of the process. While we see a greater role for digital forensics in fraud investigations, there remains an absolute premium placed on making sure the right technology is managed very carefully and used in the right way.

Colston: In respect to evaluating the data, the English civil courts in the 2016 case of *Pyrrho Investment v MWB Property* have already sanctioned

the use of TAR. This is different from keyword searching and manual review by humans. Based on the human training TAR receives, it searches for patterns, common and related concepts, meaning of words, idioms and context to find other relevant documents in the data set. It is intelligent in the sense that it makes decisions based on the data's analysis as to whether a document is relevant to the issues in the case or covered by privilege. TAR can be used on language-based data, including foreign languages.

CD: To what extent do anti-forensics techniques such as encryption frustrate fraud investigators? Is the involvement of a digital forensics expert always a must-have component of a fraud investigation?

Maheer: Encryption will always be an issue when it comes to forensic investigation. Strong encryption is becoming commonplace in the industry, and for the most part is good practice to keep data safe. However, it is not fool proof. Specialised tools exist to break encryption algorithms, and while not always effective and rarely quick to run, they do allow us to at least attempt to break through the barrier of modern encryption. There are many anti-forensic techniques besides encryption. Fortunately, most

of these techniques prove fruitless in the modern era, as tools and programmes exist that allow us to detect such attempts to hide or delete data.

“Encryption is one of the leading frustrations for digital forensic investigators. Despite this, encryption cracking techniques have improved that can combat this issue.”

*Aaron Pickett,
IT Group UK*

Pickett: Encryption is one of the leading frustrations for digital forensic investigators. Despite this, encryption cracking techniques have improved that can combat this issue. This does rely on some idea of the users' password length or type to achieve results on a low budget and there is no guarantee of success. Many 'traditional' anti-forensic techniques – such as hiding data in bad clusters or changing the Master Boot Record to hide partitions – typically no longer cause problems for forensic investigators. Newer techniques and tools will look over all bytes on the machine, not just 'good' sectors and

partitions specified by the Master Boot Record for files, evidential artefacts and hidden partitions.

Colston: A digital forensics expert is essential on the execution of search orders or warrants. In respect of WhatsApp data, for example, although this is now fully encrypted from point-to-point, as long as you seize the phone and obtain the iTunes username and password for the iPhones, the data can be captured by the digital forensics expert in a decrypted format during the forensic process. A search order will usually require the target to disclose user names and passwords and give access to all devices and email accounts. Failure to do so would be a contempt of court. The civil courts have recently been prepared to imprison those who have defied its orders and have been willing to do so for up to two years. Freezing, disclosure and search orders can be used to compel a defendant to disclose his assets, including whether he has received stolen monies in the form of bitcoins. The question is whether a defendant will comply with such order and what you can do if he does not.

Epps: If disclosure is not made, the challenge is finding out about assets not mentioned, such as bitcoins owned by the defendant. NPOs are unlikely to assist, as the whole point of virtual currencies is that there is no intermediary from whom to seek disclosure. However, the defendant can be compelled by a court order to disclose bank

account statements in order to see if bitcoin-related purchases have been made from online merchants or an exchange. Furthermore, the imaging and analysis of data obtained from a search order may show if the defendant's private bitcoin key and wallet are stored on his computer and, if so, you may be able to view the user's blockchain transactions with his co-conspirators.

CD: Looking ahead, do you expect digital forensics to play an even greater role in fraud investigations? What trends are on the horizon?

Epps: TAR is still regarded with some scepticism but increasingly we will see it used. Document review has, of course, evolved over the years. It was not long ago that white-collar crime investigations began and often ended with sifting papers in archive boxes. Nowadays, all reviews are primarily electronic. The use of AI software is therefore simply a logical and necessary next step. The key challenge is how to harness AI most effectively. We are the generation that will and must master that skill. While one size will not fit all, and not every case will benefit from using AI, to ignore the advantages that AI brings or to fail to understand how enforcement agencies are using AI, is an increasingly outdated approach.

Pickett: Fraud involving digital devices is increasing. In some aspects, techniques that

fraudsters can use have multiplied exponentially thanks to the advances in document creation, new communication techniques and the ability to hide activities through layers of anonymity. I expect this trend to continue to grow as fraudsters exploit new technology. One of the biggest trends on the horizon is the growth of blockchain technology. The decentralised, but potentially huge, computing power could assist investigators by allowing them to compare evidential artefacts or find potentially-falsified communications by comparing them with proven-legitimate communication stored on a blockchain ledger. An example of this potential development can be seen with the introduction of KODAKCoin for assisting photographers protect their image copyrights using blockchain technology.

Colston: Keeping up to speed with new technology is crucial to ensure your civil order is fit for purpose. The English civil court has been willing to adapt its orders to be responsive to changing circumstances. For example, given it is possible to download what has been heard in the target's household on an 'Alexa' device, the civil courts may be willing to authorise access by a claimant. In

regard to any imaging order, it is key that the case's forensic expert reviews any draft order to check it works from a practical point of view. For example, some cloud service providers throttle how quickly data can be downloaded so the order must deny the defendant access during this time.

Maher: We do believe that due to the ever growing and expanding market, forensics will continue to grow within fraud investigations. Throughout the field of commercial technology, more and more devices are emerging at an increasing rate, and yet there remains no uniformity across these devices. That is to say, to investigate two phones by two different companies would require two different skillsets. The rate at which forensic tools can keep up with innovation is increasing, but it still requires manual input and knowledge of the respective field to know which technique of investigation would be appropriate and where. The trends seem to point towards an increased usage of encryption and similar methods of obfuscation. Relating this back to fraud, encryption algorithms can be used to prevent fraud at the source, as we see today in banking and large organisations. **CD**

ONE-ON-ONE-INTERVIEW

DEVELOPING E-DISCOVERY BEST PRACTICES FOR THE LEGAL DEPARTMENT



Deborah Blaxell

Senior Consultant

Epiq

T: +44 (0)20 7367 9154

E: dblaxell@epiqglobal.co.uk

Deborah Blaxell is a senior consultant within the consulting services group at Epiq. Ms Blaxell has primary responsibility for providing subject matter expertise especially in the fields of litigation readiness, information governance and compliance solutions, with particular reference to data protection and data privacy legislation. She is also responsible for the deployment of Epiq's General Data Protection Regulation (GDPR) solutions, assisting corporate clients to implement governance solutions in preparation for compliance with the new regulation. Previously, Ms Blaxell led the marketing function for Epiq in Europe and Asia.

CD: What impact does e-discovery have on the commercial dispute resolution process?

Blaxell: In the UK, e-disclosure plays an essential part in the dispute resolution process, as electronic evidence is central to any modern factual review exercise. However, as data volumes continue to grow, widespread concerns have been voiced by the judiciary, court users and practitioners about the perceived excessive costs, scale and complexity of electronic disclosure and its impact on efficient, proportionate access to justice. Proposals for a disclosure pilot in the business and property courts in England and Wales seek to resolve these concerns. The proposals include a new, strengthened disclosure regime that will require parties to focus on the issues of a dispute at the very start of litigation and the introduction of issue-based disclosure that will, in some circumstances, radically reduce the volume of information that is required to be disclosed.

CD: Why do legal departments need best practices in place?

Blaxell: The role of the legal department is evolving as complex layers of responsibility and broadening remit unfolds. At the same time, legal department budgets are in focus – teams are

having to do more, keep more in-house, become expert in a wider variety of areas, all while spending less. In addition, the legal landscape is becoming increasingly challenging as new national and cross-border laws and regulations are introduced. Against this backdrop, it is imperative that legal departments implement best practices to enable them to respond rapidly to ever-changing business demands while adding demonstrable value to the business. Guiding the businesses to ensure that measures are in place to effectively manage, delete and access corporate information should be a priority for legal teams. Having a defensible process in place for litigation and regulatory readiness, and mapping corporate information so that the business understands the information it holds will also be critical.

CD: Who needs to participate in drafting these policies?

Blaxell: Drafting best practice policies should be a joint effort between in-house legal, compliance, IT and e-disclosure partners to ensure that all policies are legally and technically correct. It is necessary to ensure that those implementing the policies have an understanding of the legal drivers pushing the requirement and those drafting the policy have an appreciation of the technical constraints that exist.

CD: What are some best practices for managing the e-discovery process?

Blaxell: Best practices should start with data governance. Good practices will flow when organisations take the time to audit, cleanse, monitor, index and assess their data. This enables them to retain business critical information while establishing efficient and effective data hygiene processes. Once that is complete, more granular best practices, like general processing specifications, production specifications and review protocols can be put in place.

CD: What can legal departments do to ensure the costs of e-discovery are kept in check and maintain control over the process?

Blaxell: First, choose vendors and providers in advance to ensure that they have an understanding of your systems, practices and priorities. Agree to contractual terms and pricing ahead of any disclosure obligations so that you can negotiate the most appropriate deal for your organisation. This way, when there is a major time rush, there are no surprises in terms of engagement, workflow or costs. Confirm all providers that hold your data have adequate security measures in place to ensure sufficient protective safeguards as to prevent unauthorised data access. Second, keep up-to-date with technology. As the means

of communication evolves and the Internet of Things continues to develop at a rapid pace, so too must the tools used to gather and interpret evidence. Maintaining a basic awareness of new and upcoming products on the e-discovery market and communicating regularly with your e-disclosure partners about evolving innovation will be critical to ensure that the business has access to the best tools for the job, while managing costs and time.

“Drafting best practice policies should be a joint effort between in-house legal, compliance, IT and e-disclosure partners to ensure that all policies are legally and technically correct.”

*Deborah Blaxell,
Epiq*

CD: What key piece of advice would you offer to legal departments on establishing effective e-discovery policies and procedures?

Blaxell: Unless everyone knows and understands the policies and procedures your organisation puts into place, they will not have any effect. Training your

entire legal and IT staff is critical to success, as is training any providers you are working with. Since every case has its own set of challenges, it is also important that any policy you draft is flexible enough to suit the specific case and data set. Also, make them adaptable enough to change as technology advances.

CD: Looking ahead, what changes do you expect legal departments to make to stay in touch with growing e-discovery demands?

Blaxell: With data volumes constantly increasing, breaches occurring every day, and the GDPR coming into force in May 2018, managing and protecting personal data will become paramount. To become and then remain compliant, legal departments will need to focus on moving from a mindset of data maximisation, keeping everything, to data minimisation, keeping only that which an organisation needs and is legally allowed to retain.

CD

PERSPECTIVES

THE IMPACT OF PEOPLE, PROCESS AND TECHNOLOGY ON E-DISCOVERY

BY **LORRAINE MEDCRAFT**

> EPIQ

The explosion of data in our world is almost incomprehensible and is growing at rapid rates. This requires law firms and their clients to think more proactively about electronic information – specifically, how to ensure potentially relevant data is preserved, collected, processed, reviewed and produced.

The reality of managing these increasing volumes of data in a rapidly evolving legal and technical landscape affects everyone, from small and large firms to Fortune 100 companies. While this can be a daunting task, filtering gigabytes into useful information can efficiently resolve a legal matter while simultaneously reducing costs and risks, so

long as the right combination of people, process and technology is in place.

With all this data can come great expense. While in the past many businesses wrote off legal expenses as 'overhead', today they are far more likely to scrutinise the cost of litigation. The emergence of the great recession, market consolidation, price pressure and the availability of real-time data have all contributed to increased accountability. Companies are eager to create best practices and create e-discovery protocols, then, use key performance indicators to determine whether their strategies are effective. Corporate legal departments and law firms have created critical positions to account for the quality of their legal operations. These



positions involve competencies such as strategy, financial analysis, data analytics, technology support, data governance, records management and litigation support.

To effectively create and measure value for an organisation, it is crucial to divide its accountabilities into the three key realms of people, process and technology.

People

Today's highly competitive job market presents numerous obstacles to hiring and keeping talent. These include compensation restrictions, limited career paths, training budgets, shared information technology resources, unpredictable work volumes, ageing technology, team utilisation expectations and global around-the-clock support.

In order to build an ideal team and keep your employees happily engaged, you must build a business case to justify your hiring choices, staff

to the median hours required to exceed expectations and develop a plan to rapidly scale your resources.

Before asking human resources to hire people, consider the following questions. What is the current team headcount, tenure and utilisation? Are there any overlapping roles and responsibilities?

Are there any scheduling and geographic restrictions? What is the annual turnover ratio and how can it be decreased? How can you streamline the employee onboarding process and timelines? What is the current process to augment the team during volume peaks and how can it be better streamlined? What are the quality-of-service grades from internal and external clients?

An effective e-discovery team should know how to identify relevant data in the most efficient and defensible manner and be able to limit the data set for review. Meeting those objectives requires more than just the best technology. A successful team requires the specialised skills to know how to leverage the appropriate software and the knowledge to filter the data in the most cost effective manner. Given that common pitfalls can lead to sanctions or increased costs, putting together the right people is imperative.

Process

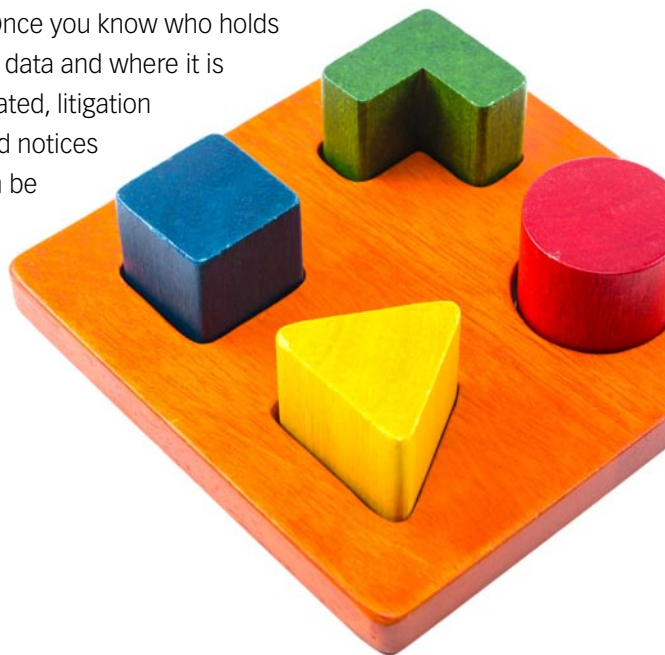
The best way to build efficiencies across your litigation portfolio is to develop, document and most importantly, ensure compliance with e-discovery protocols. Best practices help you achieve efficiency, quality output and consistency, while avoiding disconnects in communication and suboptimal service levels.

It is important to have processes in place around case design and kick-off, early case assessment, legal hold, forensic collections, data processing, production management, review management and beyond. How often are these processes evaluated and by whom? Do you have a change management process defined? Successful execution is incumbent upon leaders in your organisation to champion process discipline and clearly understand the soft cost savings, defensibility and quality gained by way of consistency.

The first set of procedures to have in place is for case kick-off. Starting the case off in an organised manner leads to less chaos down the road. There should always be one lead project manager to take charge and roles and responsibilities assigned to all the others involved in the case, including attorneys, paralegals and IT. Defining who will tackle what and how they will document each step is critical. Also, establishing a communication cadence for the team will ensure key deadlines are met.

Next, there should be procedures in place on how to preserve all potentially relevant data. A good plan will involve the client, their IT staff and key custodians. By working with the client, you can find out who owns relevant data. Once all the key custodians are identified, the location of where their data lives must be identified. This can be a very difficult task considering each custodian may save data in different locations (on the network versus locally) and there may be relevant data stored on personal computers or devices. Once there is a general map of where the relevant data lives, there needs to be a discussion on what tools would work best to preserve this data. Usually a broad scope of data is preserved at this stage.

Once you know who holds the data and where it is located, litigation hold notices can be



drafted and distributed. This notice is sent to all key custodians informing them of their legal obligation to preserve any relevant data. Defining relevant data is very important, as is defining how long they need to save this data. There needs to be documentation of this letter and regular communication with each custodian throughout the course of the litigation or investigation.

In order to maintain defensibility, data must be collected properly. If improper tools or methods are used, the data may be spoliated. Best practices include interviewing custodians to get exact data storage locations, using tools that keep all metadata in check and keeping proper chain of custody logs.

Once the data is collected, having procedures in place for how it should be processed can save a lot of time. Having a standard de-duplication methodology (by custodian vs. globally), a culling strategy (using keywords, date, file type filters or any form technology assisted review) and quality control methods in place gets your project off and running quickly. Having production specifications in place ensures you are getting the data in a format that works best for your network.

Finally, having best practices surrounding document review is essential. Document review is the most expensive part of discovery, so streamlining

the process can significantly drive down the cost. If you are working with contract attorneys, assessing the number of reviewers necessary to meet the deadline is key, as is putting workflow plans in place. Reporting is also important to ensure all reviewers understand the documents and are on target to hit all deadlines.

“As you wrestle with the burden of litigation and its unpredictable expenses, segment your objectives into the categories of people, process and technology.”

Technology

The strategic use of technology is essential for driving process efficiencies, streamlining your processes and ensuring that you stay ahead of your competitors. However, it can also be an enormous drain on your time, budget and resources when you choose your systems poorly or do not appropriately staff and budget to adequately maintain them. A sound approach is to assess technology as it pertains to e-discovery in three disparate categories: security, optimisation and innovation.

Security. You are likely subject to a diverse set of state, federal and international laws, and regulations regarding privacy. Certifications are available to validate that your organisation is taking appropriate steps to protect data under your watch, regardless of the size and reach of your organisation. Be cognisant that ignorance is not a defence for lax data security.


Optimisation. Certain realities are often overlooked and deprioritised throughout the process of evaluating a technology investment. To reap the benefit of a tool, properly planned and scoped IT support is required to avoid buyer's remorse. Before you make a financial commitment, it is necessary to discuss its ramifications with the team that will be responsible for its administration and maintenance. Doing so will ensure that they are up to the tasks from both a skills and knowledge perspective and a resource bandwidth perspective and understand the expectations of the internal customers. Once you have made a commitment, align your organisation's business priorities for the investment, document how and when success will be measured, and confirm that you have support from leadership and appropriate staff who have the capacity to take full advantage of your technology investment.

Innovation. Every day, companies issue press releases marketing innovative technologies designed to help you search and cull data faster, easier and cheaper. When you consider new technologies, you must ask yourself if the tool will add value across

cases, or only under unique circumstances. The reality is that we all have a fiscal responsibility to invest and innovate with an eye toward maximising return on investment.

Conclusion

As you wrestle with the burden of litigation and its unpredictable expenses, segment your objectives into the categories of people, process and technology. Assess and document your current state and solicit input across functions within your organisation at all levels. Once you have alignment on your current state, you can identify and prioritise objectives to improve. Document your priorities, assign accountability, and set expectations for when you plan to complete your objectives.

Once you are in agreement on what winning looks like, empower those accountable and request regular status reports. Committing to continuous improvement in the management of data related to litigation will allow the focus to remain on the dispute. Treat e-discovery as both a science and an art, and you are sure to save money and reduce your risk. 



Lorraine Medcraft

Senior Director

Epiq

E: lorraine.medcraft@epiqglobal.co.uk

PERSPECTIVES

TIPS FOR AVOIDING & WINNING CORPORATE DISPUTES

BY **ASHKHAN CANDEY AND ANDREW DUNN**

> CANDEY

Success in business is often down to knowing who to trust, but also taking risks. If every entrepreneur checked every step they took with their lawyers, nothing would ever get done. English law often follows common sense, and is your sword and your shield. The aim of this article is to provide some tips for businesses to avoid disputes and, where they arise, to help you win.

Contracts

An oral agreement is generally a good contract with some exceptions (e.g., a sale of land which must be in writing and an assignment of copyright

which must be signed). Difficulties arise and legal costs increase where there is a need to prove before a judge what was in fact said and agreed. By recording terms of agreements in writing in emails you can avoid a lot of this: the key terms and understandings are there for everyone to see.

An agreement to agree in England is unenforceable, hence why heads of terms are often useless and cannot be sued upon. If you want protection, consider agreeing some clear, enforceable terms with an exclusive option period, pending a more detailed agreement.



Keep it simple. Judges are attracted to simplicity. Often long contracts are a litigator's dream because they can create competing clauses and sow conflict and confusion.

Contractual terms

If you want to sue through the courts, ensure you have an appropriate choice of law clause and exclusivity for your favoured court. You want to avoid choosing different clauses, e.g., New York law to be applied in the English Court.

If you are contracting with foreign customers, ensure you have a contractually agreed method of

service to avoid delay serving proceedings outside of the jurisdiction. This is particularly true of parties based outside of the EU, where defendants may rely on the difficulty of effecting service of proceedings.

Be clear when drafting termination clauses so that you can exit contractual relationships quickly and cleanly without liability. Take care when terminating yourself when you perceive that the other side is in breach of contract. You may cause yourself to be in fundamental breach by wrongful termination, which will allow the other side to sue you.

Do not agree to the other side's standard terms and conditions other than on small deals. They are

not subject to tests of reasonableness, although limitations on liability are.

Costs

A winning party is entitled to their costs: if you are sued by a company with limited assets or are sued by a party outside of the EU, you should be entitled to obtain an order for 'security for costs'. This requires the claimant to pay monies into court shortly after the commencement of proceedings by way of a bond for your costs should you win. It is a very effective tool for dealing with frivolous and vexatious claims.

The court will not order security for costs where a defendant brings a counterclaim which requires examination of the same facts as the claimant's claim. This is known as the 'Crabtree principle'.

'After The Event' (ATE) insurance will provide cover for payment of your opponent's legal costs in the event you lose. But it is very expensive – it is often at least one third of the level of cover, or half if payment of the premium is deferred.

Strangers to a claim cannot take a bare assignment of a claim. This principle is policy driven to avoid ambulance chasers hanging around outside hospitals. But where you have a real interest in a claim, you may be the perfect person to take an assignment of a legal action, although you will be liable for costs if you lose. Third-party funders are

liable for adverse costs (a court order requiring a party to pay the other side's legal costs). Take care when funding a claim that you do not become liable

“The court will not order security for costs where a defendant brings a counterclaim which requires examination of the same facts as the claimant's claim. This is known as the ‘Crabtree principle’.”

for an adverse costs order (awarded where the opponent wins).

Pre-2013 conditional fee agreements are now assignable, which means that they can be 'novated' or transferred from one lawyer to another with the client's agreement. This is significant for any agreements that were entered into pre-2013 or pre-2016 for insolvency cases as you can then recover double your costs and your ATE insurance premium from the opponent.

Freezing orders

Always consider whether you should apply to the court to freeze a defendant's assets before you sue: there is no point in a pyrrhic judgment against an

entity or person with no money. Delay is often fatal to a freezing injunction.

'Cross undertakings' in damages are required to support applications for freezing injunctions. If the court finds that a freezing injunction was granted when it should not have been, it will look to the applicant to make good any damages caused by having obtained the freezing injunction. Be prepared to put up security and lose it.

Arbitration

Doing business in, say, Zimbabwe does not mean that you will want that country's Courts to determine your dispute, and if you choose your home Court, and assets are located elsewhere, you may not be able to have your English judgment recognised in the country where assets are located. Nearly every country in the world is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention) and pursuant to that international treaty will recognise and enforce an arbitration award. That is the primary reason why businesses who undertake work internationally opt to agree that any dispute should be settled by way of arbitration.

The downside of arbitration is that it is more expensive as you have to pay the fees of the arbitrators who are often senior lawyers. However, it is generally faster than the court system and is confidential.

Choose your arbitrators very carefully. Selecting a professor of German law at the outset will be of little use if the governing law is found to be English law: the professor may simply follow the lead of the ex-English judge who the other side appointed.

Disclosure and protecting confidentiality

In disclosure (known as discovery in the US) all your communications, including SMS messages and messages sent through Facebook, WhatsApp, SMS, Viber, etc., as well as emails, are relevant and disclosable unless they were to/from your lawyer or created for the purpose of obtaining legal advice in which case they will be 'privileged'. These privileged communications remain private and confidential unless you waive that confidentiality in them. Correspondence with accountants and other professionals are not privileged.

In negotiations where you want to protect confidential ideas and you have not got the time to enter into a non-disclosure agreement (NDA) then mark your emails 'Confidential'. One of the key legal tests is whether the recipient understood that the information being imparted was confidential, the other being whether it was in fact confidential.

Insolvency

An employee of a lender can be a receiver. This is not a job reserved for an insolvency practitioner.

A fixed charge without control over the assets will be held to be a floating charge. Think about what

control rights you have on your security and how you can effectively control the borrower and the asset so as to make sure you stay ahead of the other creditors.

An administrator's powers of sale will trump a receiver's powers of sale: thus you may wish to think carefully about taking a floating charge as well as fixed security. This is particularly relevant in, say, a hotel business where you want to have a floating charge over the hotel receipts and a fixed charge over the property.

If you are a creditor owed money by a company which appears insolvent, you may be able to appoint a provisional liquidator. This is a powerful tool, which can stop the rot and prevent dissipation.


A proprietary claim is one by which a claimant can follow or trace money through different hands and accounts. It may be your saviour where the defendant is bust and you are able to identify funds which fall outside of an insolvent estate.

Private prosecutions

A private individual can bring a criminal action in the English Courts by way of a private prosecution. It is not cheap, but should be an option on the table, for the right case.

Law firms

Do not assume that you always need a worldwide firm to undertake worldwide litigation. Boutique firms often have strong relationships with the leading lawyers in another jurisdiction. They can choose to work with the best lawyers as opposed to being tied to an internal office staffed by mediocre ones.

Most law firms set billing targets for their lawyers: do not be surprised when you see a large team racking up hourly rate costs without any regard for the value being delivered. They may at times (inadvertently) be conscious of their own personal positions and bonuses. Better to agree fixed fees, capped fees, contingent fees or costs linked with delivery of value. 



Ashkhan Candey

Managing Partner & Head of Commercial
Disputes
CANDEY
T: +44 (0)20 3328 7774
E: acandey@candey.com



Andrew Dunn

Partner
CANDEY
T: +44 (0)20 3328 7780
E: adunn@candey.com

MINI-ROUNDTABLE

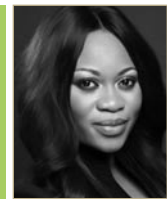
SELECTION AND USE OF EXTERNAL ADVISERS IN DISPUTES



PANEL EXPERTS**Graham Lowe**

General Counsel
BAM Nuttall Limited
T: +44 (0)1276 854 887
E: graham.lowe@bamnuttall.co.uk

Graham Lowe is general counsel at BAM Nuttall Limited with some 30 years experience encompassing contentious and non-contentious legal risk management, compliance and corporate governance. His main areas of focus include company and commercial dispute resolution, with particular expertise in matters involving construction and civil engineering.

**Tamara Egbedi**

EAME Legal Counsel & Global Contracts
Manager
Spectrum Geo Ltd
T: +44 (0)148 374 2649
E: tamara.egbedi@spectrumgeo.com

Tamara Egbedi is a lawyer with over eight years' experience in commercial contracts, corporate law, compliance, dispute resolution, commercial, maritime, energy and local content laws in the oil & gas industry gained in the UK, EAME and Asia Pacific countries. Ms Egbedi is currently the EAME legal counsel and global contracts manager for Spectrum Geo Ltd, a multi-client seismic data company in the UK.

CD: Particularly for companies that may be new to commercial disputes, what types of external advisers are available to help them through the process? How might the nature of a dispute influence the external advisers a company should seek to engage?

Lowe: Having the right advisers in place is critical to successful dispute resolution. In very broad terms, external advisers fall into two camps: those who will lead, manage, organise and advise generally such as lawyers and commercial claims managers; and technical specialists who will provide expert advice on specific aspects of a dispute. Unless you have an in-house legal department with the relevant skill set, an external adviser who specialises in dispute resolution will be essential. Traditionally, this is a role for a law firm and this remains the preferred approach for disputes involving matters of contractual interpretation. If a dispute is purely about value or quality, the services of a commercial claims manager may be more appropriate than a lawyer. Whether technical specialists will also be required to provide expert advice will depend on the nature of the dispute. The lead adviser will assist with the identification and appointment of specialists, and some commercial claims managers may also be able to offer expert technical advice as part of their services.

Egbedi: The nature of the dispute is the first and key factor in engaging any external adviser as it narrows down the key issues, areas of differences in the dispute and helps a company choose the right external advisers to engage. These external advisers may include law firms – especially those which specialise in the area connected to the company business – as well as insurance firms, accounting firms, IT software firms, language interpreting firms, among others.

CD: Could you outline the factors that need to be considered when selecting external advisers? What qualities and characteristics do you consider to be essential?

Egbedi: When selecting external advisers, parties need to consider the nature of the dispute, the company's business, the depth of knowledge and expertise of external advisers, the benefit of obtaining reliable feedback from previous clients who have used the external advisers, the company's budget, the urgency and timelines related to the dispute, and the risks and consequences of failure to resolve the dispute. External advisers should have essential qualities and characteristics. These include competence and experience, an ability to understand the big picture, practicality of services and not just idealistic advice, cost effectiveness, an ability to collaborate with the company's various

internal and external stakeholders, and soft skills in and some connection to the company's industry.

Lowe: Advisers come in all shapes and sizes, so choosing the right ones will affect not only the outcome of a dispute but also the cost of getting there. The two most important considerations are, first, does the adviser have a proven track record of successful outcomes resolving similar disputes for others clients and, second, do they offer value for money having regard to the importance of the dispute for your business? If a dispute is 'mission critical', make sure you engage the best team money can buy. If the dispute is no more than a distraction, engage an adviser who can be trusted to fix it at minimum cost and disruption to your business. A further factor which should not be overlooked is making sure that the adviser has the right team structure – you do not want to find that you are paying partner rates for routine work which should be done by a junior.

CD: In your experience, what objectives, parameters and expectations do the parties need to establish from the outset, to ensure that the company and its advisers are clear about the dispute, and the process can run as smoothly as possible?

Lowe: It is a good idea to start out by establishing what success looks like. If the business is seeking an early settlement and no publicity, you would not want external advisers gearing up to establish a new legal precedent in the appellate courts. There is no substitute for a robust brief which sets out the nature of the dispute, the role of the external adviser, the role of the corporate team, the budget, and governance controls in terms of who has the authority to instruct changes to the brief and make key decisions. This enables both the scope of the service to be fixed and for costs to be managed. It is common for disputes to evolve and change as they progress, so everyone needs to know in advance what to do when things change. One of the last things any business wants is to receive an unexpected bill from its advisers because the job turned out to be more complex than anticipated.

Egbedi: From the outset, the facts of the disputes must be provided and the key issues identified. This will help to narrow the differences between the parties. The relevant affected department must provide all information needed and thereafter the company's desired expectations and priorities regarding the dispute must be made clear. There must also be a clear communication matrix between the company and its advisers, with identifiable managers on both sides who will take responsibility. Finally, the pros and cons of the relevant issues in dispute, and the effect that winning or losing the

dispute will have on the company, must be made clear to both parties, as this will guide the company and its external advisers when choosing a course of action to proceed.

CD: What benefits can be gained from engaging external advisers early in a dispute? To what extent can this have a defining influence on the outcome?

Egbedi: There are a number of benefits arising from early engagement of external advisers. First, early understanding of the key issues and differences involved in the dispute. Second, early resolution of the dispute before it escalates to the courts or arbitration. Third, maintaining the relationship of the parties and creating a win-win situation. Fourth, saving costs in engaging external advisers for a long period of time. Fifth, improving the company's image. Sixth, ensuring a smooth, continuous operation of the company's business. Finally, cost effectiveness in the long run, as a late engagement could cause the company millions of dollars, whereas if engaged early, the dispute may be resolved sooner or a decision made in the company's favour.

Lowe: It is surprisingly easy to clutch defeat from the jaws of victory if you do not get advice soon enough. Early engagement of external advisers is essential. You cannot involve the professional team too soon and if you leave it too late you will prejudice your ability to achieve the best outcome. Resist the temptation to prepare a position and take

“It is surprisingly easy to clutch defeat from the jaws of victory if you do not get advice soon enough. Early engagement of external advisers is essential.”

*Graham Lowe,
BAM Nuttall Limited*

it as far as you can before engaging your advisers. It is a false economy. In my experience, without exception, client teams which take that approach – and it is common – lack the objectivity and expertise to identify all the issues, back them with the right evidence and present them to best advantage. Worse still, more often than not the team which tries to go it alone for as long as they can is likely to pick the wrong ‘ground for the battle’ and a potentially winning hand may be missed.

CD: How important is it for a company to maintain consistent and transparent communication with its advisers during a dispute? What are the consequences of failing to do so, such as withholding key information?

Lowe: There is an extraordinary myth about dispute resolution that if you tell your external advisers what you think they need to hear to achieve a good outcome, a good outcome will follow. Nothing could be further from the truth. In fact the opposite is true: an adviser who is only told part of the picture – invariably the part most favourable to the client – will not be able to prepare properly to protect their client from the least favourable part. Full, frank, honest and transparent disclosure is essential if the best outcome is to be achieved. The frequency of communication is equally important. Dispute resolution is not a game of pass-the-parcel. It is a team event which requires collaboration and teamworking between client and advisers for which major disputes warrant regular progress meetings with all key stakeholders involved.

Egbedi: Maintaining consistent and transparent communication with a company's advisers is

key to resolving disputes quickly, maintaining the relationship between the parties and resolving the dispute amicably. This is because where there is a failure in communication – such as withholding key information – mistakes could have significant financial implications and cause a company to lose

“A lack of understanding of the key issues in the dispute can cause companies to choose the wrong external advisers, who are not best suited for the dispute.”

*Tamara Egbed,
Spectrum Geo Ltd*

in the dispute. Withholding key facts or delaying communication may not only cause the company to lose, but trigger a domino effect with disastrous consequences for the company's reputation or share price, for example, and expose additional issues which could implicate the company in other matters, and ultimately result in the company's downfall.

CD: What strategies should parties deploy to get the most out of their external advisers during a dispute?

Egbedi: Regular meetings to improve communication will develop a common understanding of the dispute, identify key issues and ensure they are addressed quickly and efficiently. It is also worth having an internal stakeholder or team in the company, who are knowledgeable about the dispute, work closely with the external adviser to keep the adviser on track and act as an intermediary between the company and the adviser. In addition, parties should set a timeline and clear objectives for the adviser, to avoid wasting time and incurring further costs. Using technology, such as video conference calls, can also reduce costs and improve communication between the company and its advisers.

Lowe: Successful dispute resolution is a team event, so it is important to ensure that external advisers share a common goal, both commercially and individually. At an individual level, it is important that there is one team pulling in the same direction, with a common understanding and an open and frank agenda which allows stakeholders to contribute equally and openly. An environment which stifles the ability of external advisers to make a full and frank contribution will not be to the client's ultimate advantage. Commercially, goals should be aligned whenever this is possible. While not necessarily permitted in every jurisdiction, there can be considerable benefits to a fee structure which allows external advisers to put real skin in the game,

so that everyone benefits financially from a good outcome and everyone feels the financial pain of a poor result.

CD: What are some of the challenges typically involved in selecting and utilising external advisers throughout a dispute resolution process? How can parties overcome these challenges and maximise the relationship?

Egbedi: A lack of understanding of the key issues in the dispute can cause companies to choose the wrong external advisers, who are not best suited for the dispute. Companies may select external advisers based on the wrong priorities and parameters. Take for instance, a company choosing a law firm not because of its expertise in the subject matter of the dispute, but due to the firm's popularity or a partner being a friend. Company prejudices can result in stereotyping the dispute and its key issues. This can be detrimental, as a company may hire an external adviser ill-suited to the dispute at hand. An example of such prejudice is where a company ignores the cultural difference of the other party, when this difference is a key part of the dispute. Parties can overcome these challenges where there is a deep and clear understanding of the issues, and a strong commitment to resolve the dispute in a timely, amicable and cost-effective fashion with the aim of maintaining the relationship.

Lowe: It is often the small things which make the biggest difference. Some years ago I appointed a respected team of advisers to handle a new matter. It was the first time I had worked with them and they came well recommended. I had no complaint about the quality of their advice. The problem was they were not always available when needed. They kept taking holidays at crucial moments and on more than one occasion several members of the team were away at the same time. I learnt a lesson

from that: always check an external adviser's holiday plans before you appoint them. A more common problem is that of the inexpert expert – the person who may have a head crammed full of technical knowledge but is incapable of explaining themselves in black and white to anyone else. There is no room for this type of expert on your team. Make sure that any expert you intend to appoint has won their spurs in the courtroom. Being good on paper alone is not sufficient. **CD**

PERSPECTIVES

WHAT NEXT FOR ALTERNATIVE DISPUTE RESOLUTION – WHAT CHANGE MIGHT MEAN FOR YOU

BY **CATHY HAWKINS**
> CUBISM LAW

The Civil Justice Committee had a working group report late last year with 29 recommendations for increasing the use of alternative dispute resolution (ADR) in the justice system. It also asked 43 questions focusing on possible concerns. The next stage will presumably be proposals for changes that secure wider use, unless there is more consultation.

The starting point is that the group considers the use of ADR to be patchy and that it has not seized the hearts and minds of parties with disputes in a way that makes it a normalised part of dispute

culture. Indeed, it is seen as mysterious and is not understood in commercial litigation generally (outside some specialist areas), although it is widely used in family law and employment disputes, not to mention the proliferation of Ombudsman schemes in particular industries.

The group takes its starting point that most people who know about it see it as a good thing, but that something must be done to secure it being used much more often. This means that changes with implications for any business will be in the offing; whether the business is involved in a lot of smaller

disputes or faces occasional large ones. Although it is not really expressed in the report, the key point about increased use of ADR is that it saves money, both in paying lawyers, and because key business participants are not distracted from the roles that the business needs them to perform.

“Perhaps the most exciting proposed change, which admittedly needs a bit of engineering, is the approach of online dispute resolution. Much court process is online, so why not ADR?”

There are a lot of issues to consider and one idea, not favoured by the majority, is that using some form of ADR, such as mediation, should be a precondition to access to the justice system. This would be a very hardnosed approach, which is why it was not favoured by the majority. In fact, there are a lot of reasons why this would not be a great idea, apart from the obvious issue about breach of human rights. Mediation itself arguably does not work well with unwilling participants. More pertinently, in reality, most claims are simply straightforward cases, often about debt, which will

go undefended. There is not really a dispute, it is just that one party does not want to pay.

Nonetheless, the research cited suggests that mediations between parties who have been forced into it do not always go badly. While in some jurisdictions such ‘forced’ mediations can become a tick-box routine, with sulky participants presumably abandoning the process at the earliest moment, good mediators often fare better with such parties, who make progress in resolving the dispute.

It seems likely, however, that there will be at least much more proactive encouragement to use ADR with the suggestion that the court process for issuing proceedings contain a signpost explaining four types of ADR. The courts will also be much more interventionist, probably adopting a range of strategies to secure ADR use.

One area of debate is the use of cost sanctions to penalise refuseniks. The group were not too impressed by the get-outs utilised in the *Halsey* case which currently allow participants to refuse for reasons such as they feel there is no chance of resolution, or that there is a point of legal importance. In fact, a lot of cases are resolved by mediations that have these features and the group challenges whether these should be genuine reasons not to. A more proactive stance is likely to be taken about cost penalties for refuseniks and very likely with fewer excuses not to mediate.

One process from foreign jurisdictions under consideration is service by one party of a notice to

mediate. The opposite party would have to agree, unless there was a good reason not to, or face cost sanctions.

A difficult problem for any party is a relatively modest dispute, say between £25,000 and £150,000 in value. In many ways, using ADR is ideal as the cost of litigation through to the end is likely to be disproportionate to the issues in question. On the other hand, the cost of a day locked up with a mediator and the other party, and both parties requiring legal representation, is not welcome either, especially if the case does not settle. A need was identified for more mediation schemes that involve a short number of hours or a telephone intervention by a mediator, as the way forward. Experience of telephone mediation is that it can be a pretty useful solution for cases where the economics mean a low or no cost way forward is needed.

Perhaps the most exciting proposed change, which admittedly needs a bit of engineering, is the approach of online dispute resolution. Much court process is online, so why not ADR?

Digitalisation is a real opportunity to construct something user-friendly, cost-effective and accessible for both individuals and businesses with a lot of smaller disputes, to utilise. It may be that large businesses providing services to consumers ought to be more involved in engineering and operating such a system. In-house lawyers should really be involved.

Businesses with a lot of claims from consumers may also be interested in the group's perspective on a European directive's requirement that an ombudsman service is mentioned but not actually offered to consumers. The group suggests offering it should be considered as a requirement. Perhaps an early example of UK laws being aligned differently to the EU's after Brexit.

One key question posed by the report, but not really addressed, is how to secure a cultural change that normalises mediation and its alternatives. The report's authors were genuinely reaching out for help. As far as the dispute resolution industry is concerned, they suggest that this may be achieved by the courts just being proactive in pressing for it

with various signposts and pressure through the litigation process. That will embed cultural change. But perhaps something more fundamental, but not mentioned, is needed. Today, mediators are going into schools to teach children how to mediate classroom disputes. That will help change the culture. **CD**

**Cathy Hawkins**

Dispute Resolution Solicitor and Mediator
Cubism Law

T: +44 (0)203 917 0141

E: cathy.hawkins@cubismlaw.com

PERSPECTIVES

A LIGHT AT THE END OF THE TUNNEL FOR INTERNAL INVESTIGATION PRIVILEGE?

BY **CHIRAAG SHAH AND NOAH BENJAMIN STEWART-ORNSTEIN**

> KIRKLAND & ELLIS INTERNATIONAL LLP

Legal professional privilege (LPP) is a fundamental human right and a foundational pillar on which the adversarial litigation system is built. LPP includes both legal advice privilege, which applies to communications in the course of giving and receiving legal advice, and litigation privilege. Litigation privilege applies to documents created: (i) in relation to litigation that is in progress or reasonably in contemplation; (ii) with the sole or dominant purpose of conducting the litigation; and (iii) in relation to litigation that is adversarial, not investigative or inquisitorial (per Lord Carnworth in *Three Rivers* (No 6)).

Once recognised, LPP is virtually absolute and can only be abrogated in the narrowest of

circumstances. However, recent decisions by the English court have called into question the standard to be applied for the recognition of privilege in documents created by companies and their external legal advisers in the course of internal investigations, leaving companies with little confidence that the fruits of their investigations will not be used against them by regulators or civil opponents.

This article considers this issue in light of the decision of Andrews J in *The Director of the Serious Fraud Office v. Eurasian National Resources Corporation Ltd* (ENRC), and the more recent decision of chancellor Vos in *Bilta (UK) Ltd (in Liquidation) v. Royal Bank of Scotland PLC*, which was handed down on 20 December 2017. Described as “a

blow” to LPP and leading one commentator to ask “is there any privilege in investigations anymore?”, the ENRC decision set the low watermark for the court’s protection of LPP in the context of investigations. By contrast, the *Bilta* decision reflected a more traditional view of litigation privilege.

SFO v. ENRC

The *ENRC* decision resulted from an application by the Serious Fraud Office (SFO) for a declaration that documents generated during an internal investigation by ENRC into allegations of fraud, bribery and corruption were not subject to LPP. These included: (i) notes of interviews with current and former employees and others prepared by ENRC’s former external lawyers; (ii) a review by a firm of forensics accounts of ENRC’s internal controls; (iii) documents related to a presentation by ENRC’s former lawyers to its board of directors; and (iv) certain documents referenced in a letter to the SFO. ENRC resisted the application on the basis of both litigation privilege and legal advice privilege.

ENRC claimed litigation privilege on the basis that the relevant documents were created in anticipation of a criminal investigation by the SFO. The purpose of the documents was stated to be to facilitate obtaining legal advice pertaining to the conduct of this anticipated criminal litigation, which ENRC argued satisfied the second leg of the Three Rivers test – that the documents’ dominant purpose was litigation. Andrews J disagreed, concluding that:

(i) until ENRC knew that wrongdoing had taken place, litigation, or more specifically, prosecution, could not be considered to be in reasonable contemplation; (ii) at best, the documents were prepared for the purpose of fact finding, with an eye to avoiding a criminal prosecution by convincing the SFO not to bring charges, which Andrews J viewed as distinct from defending such a prosecution, and was thus unable to satisfy the dominant purpose test; and (iii) many of the documents had been created at a time when the relationship was more collaborative than adversarial with the specific intention of showing them to the SFO, which was fundamentally incompatible with a litigation purpose. Accordingly, the claim to litigation privilege was rejected.

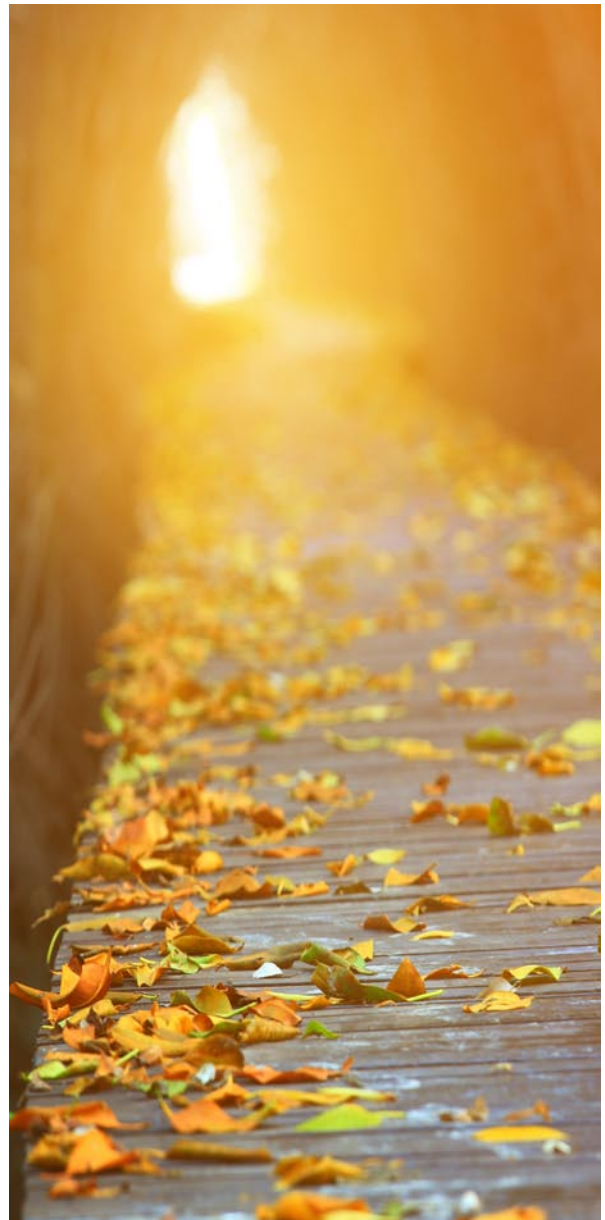
Bilta v. RBS

Bilta arose in different circumstances, although there were clear parallels with the ENRC decision. In 2009, HMRC began investigating the propriety of a number of carbon credit trading schemes, including one involving a Royal Bank of Scotland (RBS) subsidiary. Over a period of two years, HMRC and RBS corresponded on a collaborative basis regarding the HMRC’s investigation. The process changed gears following a March 2012 letter from HMRC to RBS in which HMRC first set out its position that there were grounds to deny RBS £86,247,876 of input tax on the basis that RBS knew or should have known that the transactions concerned were connected with fraud. In response, RBS shifted

the conduct of the matter from its tax group to its internal litigation and investigations team and instructed external counsel, who went on to carry out an investigation, which included interviews with a significant number of current and former employees. At the conclusion of its investigation, external counsel produced a report which concluded that: (i) RBS did not know, nor could it have known that the transactions were fraudulent; and (ii) in any event, any claims by HMRC were time barred. RBS subsequently provided this report to HMRC on the express basis that it did not waive privilege in doing so.

However, in subsequent related proceedings, the liquidators of Bilta applied for disclosure from RBS of documents created by RBS's external legal counsel in the course of their earlier investigation. RBS, in turn, asserted litigation privilege over these documents.

In line with the *ENRC* decision, the liquidators argued that the dominant purpose of RBS' investigation was not litigation but rather: (i) to inform itself of its position; (ii) to prepare a full account of the relevant facts for HMRC pursuant to its duties as a taxpayer; and (iii) to persuade HMRC not to issue an assessment. The liquidators also submitted that, where there are multiple purposes for creating a document, the evidence of the party asserting privilege must specifically address the dominant purpose, which RBS' witness evidence failed to do.



Chancellor Vos departed from the *ENRC* decision, without openly disagreeing with Andrew J's approach. He noted that the inquiry was fact specific and that there was "something of a tension" between the *ENRC* decision and the Court of Appeal's decision in *Re Highgrade Traders* in which it held that the purpose of fact-finding to assess one's potential liability is not separate from a litigation purpose. Chancellor Vos noted that this case did not appear to have been cited to Andrews J, however he did not expressly conclude that the *ENRC* decision had been *per incuriam*.

Chancellor Vos found that the March 2012 letter was a "watershed moment", akin to receiving a letter before claim, after which the overwhelming probability was that an assessment from HMRC would follow and that RBS knew this. The investigation was thus "part of the continuum that formed the road to the litigation that was considered, rightly, as it turned out, to be almost inevitable". The steps that RBS took after the letter, including shifting carriage of the matter to its litigation team and instructing external counsel, were only consistent with preparation for litigation. Although Andrews J had concluded that documents prepared with an eye to avoiding a claim did not qualify as being for the purpose of litigation, that decision was fact specific and did not give rise to

a legal principle of general applicability. Moreover, while *Highgrade Traders* may be distinguishable on the basis that it related to civil litigation and did not involve a regulator, it still made clear that one must take a real world view about what is going on and

"From the point at which a potential regulatory difficulty arises, companies must be alive to the possibility that this may lead to litigation and/or prosecution and formulate or adjust their internal processes accordingly."

consider the purposes for which the information is being collected. Finally, chancellor Vos rejected the submission that the ostensibly collaborative nature of RBS' interactions with HMRC after the letter meant that the investigation was being conducted in order to comply with RBS' regulatory obligations, or to convince HMRC not to bring an assessment, which the liquidator had argued precluded a dominant litigation purpose. Quite to the contrary, chancellor Vos concluded that the documents were clearly prepared for the sole or dominant purpose of litigation and that privilege therefore applied.

So what does it all mean?

First, it should be noted that the *ENRC* decision will be considered by the Court of Appeal in July 2018. While chancellor Vos' reassertion of the primacy of litigation privilege does not undo the much more restrictive position adopted by *Andrews J*, it does provide a blueprint for a more balanced approach, should the Court of Appeal be inclined to decide the *ENRC* appeal in that direction. However, it should be noted that *ENRC* was considered by the criminal division of the Court of Appeal in the recent case of *Health And Safety Executive, R. v. Jukes*, where the court affirmed Andrew J's conclusion that the reasonable contemplation of a criminal investigation does not necessarily equate to the reasonable contemplation of a prosecution for the purposes of litigation privilege. The degree to which this decision circumscribes the ability of the court in the *ENRC* appeal is likely to attract significant argument at the hearing.

Second, irrespective of the outcome of that appeal, privilege analysis will remain an exercise that is driven largely by the facts of the case, companies and their legal advisers would be well advised to therefore consider the following points when faced with the need for an investigation.

First, from the point at which a potential regulatory difficulty arises, companies must be alive to the possibility that this may lead to litigation and/or prosecution and formulate or adjust their internal

processes accordingly. If litigation begins to appear likely, for example upon receiving a letter akin to that received by RBS in *Bilta*, companies should consider giving carriage of the matter to their in-house litigation counsel or instruct specialist external counsel. Companies and their counsel should also bear in mind that the findings of an internal investigation may potentially give rise to claims by parties other than a regulator, as was the case in *Bilta*. Finally, the fact that litigation, whether in civil, regulatory or other form, is likely or in contemplation should be documented to the extent possible.

Second, companies should be conscious of the range of documents that may be created in the course of internal or counsel-led investigations, and should be sensitive to the fact that some of those documents might not be covered by legal advice privilege, such as the notes or transcripts of interviews with employees and others, whether or not those interviews are conducted by counsel. The risk that such documents may ultimately be disclosable should be given active consideration when planning and running an investigation.

Third, as information is collected and documents are created during the course of an investigation, active consideration should be given to the ways in which they may be deployed in any litigation which may eventually ensue. Appropriate steps should be implemented to protect litigation privilege.

Finally, if a request for documents is ultimately forthcoming, whether from a regulator or civil

counterparty, a company and its counsel may also want to consider whether it is worth maintaining a claim for privilege in light of the potentially significant costs that may be incurred and the potential impression that an unnecessary dispute may create with the court. This point was underscored by chancellor Vos in *Bilta* who concluded his judgement by saying, "I must confess that I have wondered in the course of the argument in this case why RBS sought to assert privilege over at least the interviews of the witnesses who will themselves be called to give evidence at the trial. They will obviously cast light on what they said when initially asked about the events that underlie this litigation. [...] disclosing them would dispel a great deal of suspicion". **CD**

**Chiraag Shah**

Partner

Kirkland & Ellis LLP

T: +44 (0)20 7469 2323

E: chiraag.shah@kirkland.com**Noah Benjamin Stewart-Ornstein**

Associate

Kirkland & Ellis LLP

T: +44 (0)20 7469 2497

E: noah.stewart@kirkland.com

PERSPECTIVES

GDPR: COMPLIANCE MOVES UP THE AGENDA

BY **STEVE KUNCEWICZ**

> BLM

2 5 May 2018, a day that may already live in infamy due to the sheer volume of commentary around the introduction of the EU General Data Protection Regulation (GDPR), the most significant update and expansion of data protection law since the introduction of the Data Protection Act back in 2000.

As much as we would like to tell you that Brexit will mean that you do not have to worry about complying with this new set of rules, the GDPR will come into force way before the UK can leave the EU, even on the most optimistic prediction, and given that the new Data Protection Bill 2017 currently passing through parliament transposes its provisions into UK law and even expands upon them, there is

no other option than to get down to asking some fundamental questions about where your business obtains data from and how that data is used.

Awareness of data protection legislation has historically been pretty low in the UK, and many businesses have seen compliance with the current regime as more of a luxury than a priority. As much as we have seen some high-profile breaches and equally high-value fines handed out in extreme examples of breaches, the 'one-size-fits-all' compliance model policed by the Information Commissioner's Office (ICO) has seen many businesses, notably SMEs, view privacy concerns and the likelihood of a claim or regulatory sanction against them as simply another example of EU-led

red tape with which they will comply through gritted teeth.

However, under the GDPR, any business which makes any use of virtually any information which can identify a living individual will need to adopt a whole new outlook. GDPR posits a new model of 'risk-based compliance', with an emphasis on the core concept of accountability. Businesses must now adopt a privacy compliance structure which is appropriate to the risk level associated with their use of personal data, and demonstrate compliance through robust policies, procedures and staff training.

But where should companies start? That largely depends upon a company's current compliance infrastructure. As the GDPR is, at its core, simply the Data Protection Act having evolved to 'grow more teeth', the prevailing wisdom from the ICO is that if a company complies with the current Data Protection Act now, then it should comply with, and have little to fear from, the GDPR. However, this is the best time to start planning for the various new expectations.

The ICO has helpfully set out a 12-stage checklist which any business can follow to move closer to GDPR compliance in time for the 25 May. Starting with building awareness of data protection law generally across an organisation, the next logical step will usually be to carry out a data audit to look

at what personal data the company holds (given the wide definition, this may take some time and involve

“Businesses must now adopt a privacy compliance structure which is appropriate to the risk level associated with their use of personal data, and demonstrate compliance through robust policies, procedures and staff training.”

considerable expense) before considering a privacy impact assessment. These risk assessments will become compulsory in certain circumstances post-GDPR, but also serve as a useful framework to allow companies to think about what personal data they have, and more importantly why they need it.

This is a question many businesses may struggle to answer. As much as companies may need some personal data to fulfil a contractual obligation or for a more operational reason, many may be tempted to say that they need to retain customer data for very long periods so that they can be marketed to. Even under the current Data Protection Act, that is not an easy position to defend; businesses are only meant to take as little personal data as they need for a specified purpose, ensure that it is regularly

refreshed and hold it only for as long as possible to meet that purpose.


Many other businesses may also rely on the fact that they have obtained consent from individual data subjects to process their data. Under the GDPR, consent is much harder to obtain, and must involve a clear, unequivocal and informed choice indicated by the relevant individual, moving away from an 'opt-out' regime to 'opting-in', and with pre-ticked boxes with complex wording being a thing of the past. This may lead many businesses to rush to try and 're-consent' their stakeholders, although this may prove problematic and may even lead to action by the ICO.

Putting the 'reasonable expectation' of the individuals whose personal data is held at the heart of what companies do, and using that data in a way that they can easily justify, based on a lawful reason for doing so is not only going to set companies on the right path from the ICO's perspective, but also help maintain trust and engagement where both can be hard to come by. Recent high-profile breaches by TalkTalk and Carphone Warehouse have put privacy concerns at the heart of public debate and seen record fines of up to £400,000 levied by the ICO.



However, a fine is only part of the potential fallout of a GDPR breach. Following a recent case involving Google, it is now far easier for individuals to sue a data controller for damages based on Data Protection Law, and this has been made even more straightforward by the GDPR providing individuals with an 'effective judicial remedy'. We are certainly going to see more cases, such as the recent decision involving Morrisons where thousands of employees whose data was compromised sued the retail giant, which was found vicariously liable for the breach caused by a 'rogue employee'. With that case about to go to the Court of Appeal, it sets a dangerous precedent for businesses which may have a good cyber security record and have put appropriate safeguards in place (as Morrisons did), only for the human factor to expose them to potentially very significant liability.

With some careful thought, thorough planning and a commitment to accountability, no business should have much to fear from the GDPR. However, the time

to start addressing its requirements is now, and this could be a genuine opportunity for those willing to embrace what the public now expects – personal data may be a hugely valuable asset, but it must be handled with care and justifiably. Breaches will happen, and the more companies can do to be ready for one, the easier it will be to recover. Lawyers can certainly help companies to prepare, but there does need to be a commitment from the C-suite down to putting privacy on the boardroom agenda. If companies do not, then the chances are that the public or the ICO will do it. With Big Data comes big responsibility, even more so from 25 May. 



Steve Kuncewicz

Partner

BLM

T: +44 (0)161 838 3980

E steve.kuncewicz@blmlaw.com

PERSPECTIVES

OUSTING THE BOSS – NAVIGATING THE LEGAL LABYRINTH

BY **NICOLA DIGGLE**
> BLAKE MORGAN

The removal of a company's most senior figure is anomalous in the business world, given that most 'firing' happens from the top-down in any hierarchical organisation. However, high-profile cases where senior figures have been forced out of their positions due to allegations of impropriety have brought into the spotlight this highly precarious corporate scenario that throws up a plethora of legal considerations.

Examples include Harvey Weinstein who was fired from his position as chief executive and resigned in October 2017 from the board of the independent film company he co-founded.

Likewise, in June 2017, Uber boss Travis Kalanick resigned from his position as chief executive

following criticism that he fostered a male-dominated, sexist culture and bent the rules. Following a major internal investigation, several senior executives at Uber also lost their job. Bosses do sometimes return though: Steve Jobs was fired from Apple in a 1985 power struggle with John Sculley, but was reinstated in 1997. Removing senior directors is a legal maze that must be navigated carefully, and it is worth examining in detail the various yardsticks and potential pitfalls any company would have to consider. Given that senior individuals usually have an equity stake in the business, shareholder issues also need to be considered.

When determining whether it is appropriate, viable and legal to oust a boss or senior director

of a UK-based company, the first port of call must be a comprehensive assessment of the fiduciary duties to the company that directors are bound to under the Companies Act, as well as the directors' service agreement (if any) and the company's articles of association. If a shareholders' agreement or any funding documents exist, these should also be carefully looked at. Fundamentally, directors must comply with their company's constitution and exercise their powers only for the reasons for which they were given.

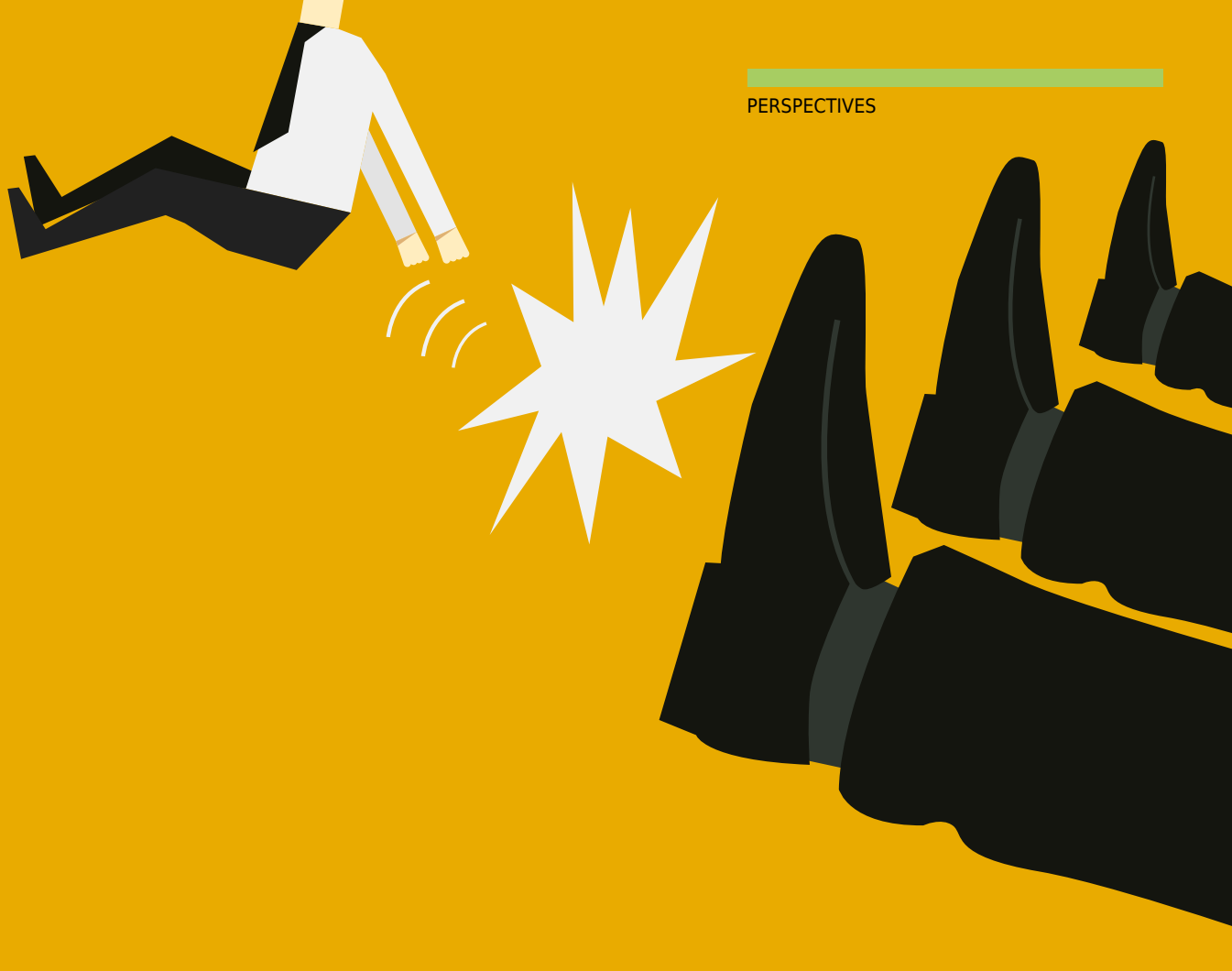
Decision making must also to be scrutinised and, crucially in law, directors must have regard to all relevant matters, including the likely consequences of any decision in the long term and the interest of the company's employees. Furthermore, the law prescribes that directors should be diligent, careful and well-informed about the company's affairs and avoid conflicts between the interests of the director and those of the company. Under the legislation, two significant stumbling blocks that directors could potentially fall foul of are failing to declare any interest in a proposed transaction or, potentially equally as damaging, failing to maintain confidentiality of the company's affairs.

If a company is in financial difficulty, further duties may come into play, such as a duty to act in the best interests of creditors as per the terms of the Insolvency Act, or those particulars found in the director's service contract.

The law states that a director of a UK company can generally be removed from office either in accordance with their notice period or 'for cause' under their service agreement where it requires that a director must resign. In addition, the Companies Act gives members a power by ordinary resolution to remove any director. Removal for cause will depend on the terms of the director's service contract as well as any restrictions contained in the company's articles of association, any shareholders' agreement and the director's service contract. Companies need to be acutely aware of the risks involved because removal of a senior director is also likely to include termination of the director's employment contract and is subject to UK employment law and the right, for example, to bring a claim for unfair dismissal.

Various avenues may be employed to effectively remove the senior figure, the most common procedure being a meeting of the board or a meeting of shareholders. However, companies should tread very carefully here as it is less likely to be this simplistic in practice, for example if there is to be a shareholder resolution for removal, consider who the shareholders actually are and whether they are formally registered with the company's register of members.

As well as considering the application of the Companies Act or Insolvency Act, any company or board that is thinking about removing a director should take legal advice before taking any course of action, which will require a review of the company's



articles of association, the director's service contract and, where relevant, any shareholders' agreement and funding documents. This should ensure that any removal is done in accordance with the law and follows the necessary process, which is often complex, and any downside risks of claims are reduced. The importance of reputation management cannot be underestimated here and public relations, particularly for any company with a public listing, should not be an afterthought. Where an AIM-quoted

public company is seeking to remove a director, it may need to consult with its nominated adviser.

Before taking the decision to remove a director, decision-making boards should consider the aftermath. A disgruntled ousted director, particularly one with minority shareholder rights, could instigate a protracted legal wrangle that could threaten a company financially as well as reputationally. The ousted individual has a number of possible options for recourse, including a claim for breach of employment law such as unfair dismissal. The

ousted director may also have claims against other shareholders, most likely due to a possible breach of the terms of any shareholders' agreement.

A claim of unfair prejudice, such as by reason of exclusion from management, may also arise under Section 994 of the Companies Act. Such a claim may arise if the director is also a shareholder, had an expectation of remaining in management and has been removed for reasons that are not 'fair'. If a director has been removed 'for cause', then it is likely that the reasons for the removal were fair and the claim will not be successful.

If the ousted director has reasonable grounds for a claim, he or she may bring litigation to resolve the dispute and that could mean substantial legal costs for both sides. Companies should consider the necessity of litigation and whether it can be avoided by early attempts to settle the dispute between the parties outside the courtroom. The use of an independent mediator to bring both parties to a place of mutual understanding and agreement can often be a pragmatic way of reaching a negotiated solution.

If an individual shareholder has a claim, for example for unfair prejudice under Section 994 of the Companies Act, the costs of proceeding with such a claim all the way to trial can be prohibitively expensive. It is therefore often the case that such a

shareholder would struggle to personally fund the litigation. In such circumstances, a better funded defendant shareholder may be able to aggressively

“In the world of business where accountability, profits and long-term corporate success are prioritised, no leader is immune.”

defend the matter to deal a knock-out blow to the claimant.

However, the balance between claimant and defendant can be drastically altered if the claimant is able to fund the claim him or herself or with the assistance of litigation funding. There are litigation funders operating in the UK and overseas markets who specialise in funding litigation between shareholders. The ability of funders to fund a claim will depend not only on the legal merits of the claim but also the ability of the defendant to meet any financial award made by the court.

Prevention is undoubtedly better than a cure. The foundation stone for companies being in a strong and secure position to successfully remove a director from a private company is a watertight


shareholders' agreement. This is a contractual arrangement binding on the signatories, usually owner managers, regarding management of the company and dealings regarding shares.

However, boards should be aware that provisions in a shareholder agreement may be trumped by a company's articles of association and provisions of the Companies Act and Insolvency Act. An example would be an owner manager's contractual right to remain a director or executive director in a shareholders' agreement for so long as he or she owns shares, which may be overridden by other directors on the board having a duty to act in the best interests of the company and to remove an 'errant' director who is not acting in the best interests of the company. Even though there is no legal requirement to have a formal shareholders' agreement, every company with more than one shareholder is well advised to have one. When embroiled in a dispute, such an agreement is worth its weight in gold.

There are a number of provisions commonly used in shareholder agreements in order to minimise disputes between owner managers, including incorporating 'the good and bad leaver' options which come into play when a shareholder leaves the company. Good leaver shares could cover where a

director ceases to be employed due to reasons such as ill health or redundancy.

It is often the case that good leaver shareholders are required to sell their shares on termination of employment but at 'fair value'. Conversely, 'bad leaver' shareholders are typically those who breach their service contract or shareholders' agreement and often must sell their shares to the company. A well-drafted shareholders agreement will also include a clear procedure and outline what options there are if there is a deadlock, i.e., there are equal votes for and against.

The decision to remove a director should never be taken lightly and will always present a problematic path for companies. But it is a viable option if the correct elements are in place. In the world of business where accountability, profits and long-term corporate success are prioritised, no leader is immune. 



Nicola Diggle

Senior Associate

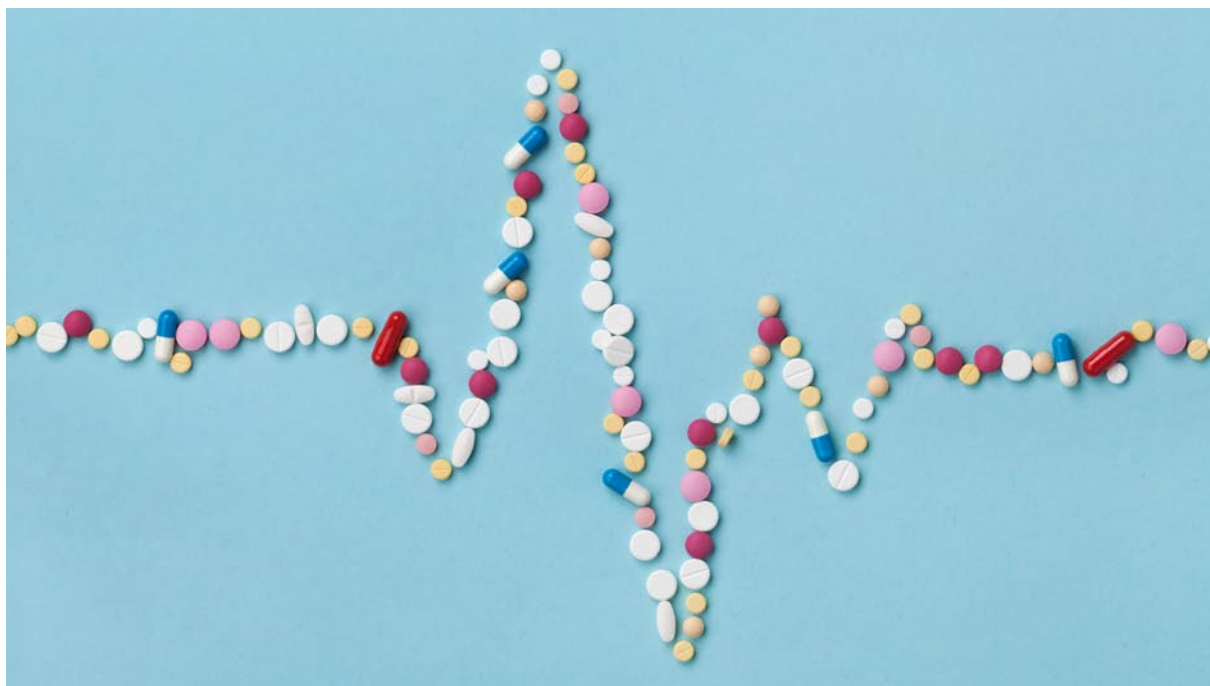
Blake Morgan

T: +44 (0)1865 254 285

E: nicola.diggle@blakemorgan.co.uk

HOT TOPIC

LITIGATION IN THE PHARMACEUTICAL AND MEDICAL DEVICE SECTOR



PANEL EXPERTS

**Gregory K. Bell**

Group Vice President and Life Sciences
Practice Leader

Charles River Associates

T: +1 (617) 425 3357

E: gbell@crai.com

Gregory K. Bell, PhD, is a Group Vice President at Charles River Associates, a global economics and management consulting firm headquartered in Boston, Massachusetts. For more than 20 years, Dr Bell has been testifying as an expert witness on damages issues in a variety of contexts and venues. He has appeared in antitrust, intellectual property, transfer pricing, financial markets, valuation and general commercial damages matters in courts and arbitration proceedings in North America, Europe and Australia.

**Jennifer L. Greenblatt**

Partner

Goldman Ismail Tomaselli Brennan &
Baum LLP

T: +1 (312) 881 5949

E: jgreenblatt@goldmanismail.com

Jennifer Greenblatt is a partner in the Chicago office of Goldman Ismail Tomaselli Brennan & Baum LLP. She defends complex product liability, antitrust and commercial cases for a diverse roster of clients, including multinational pharmaceutical and medical device manufacturers, technology companies and major retailers. She is recognised for her litigation successes in *The Legal 500*, *Law360* and *Benchmark Litigation*.

**Brennan Torregrossa**

Vice President and Associate General
Counsel

GSK

T: +1 (215) 751 4181

E: brennan.j.torregrossa@gsk.com

Brennan Torregrossa is vice president and associate general counsel in GlaxoSmithKline's litigation department. He serves as the head of GSK's global external legal relations team (GELRT) devoted to securing outside counsel engagements for the company and employing value-based fee arrangements whenever feasible. In this role, he also represents the company in litigation and government investigations. Prior to joining GlaxoSmithKline, he was a partner at Dechert LLP in the product liability practice group.

CD: How would you characterise recent litigation activity involving companies operating in the pharmaceutical and medical device sector? What types of dispute are common and what factors are driving them?

Bell: In the US, we are seeing an upswing in litigation across multiple jurisdictions and involving multiple parties in the industry that is reminiscent in scope of the AWP cases of years past. A prominent example is the wide-ranging opioid litigation against drug manufacturers, distributors and retailers. In these cases, governments and other parties are accusing the defendants of contributing to the overuse of opioids by allegedly engaging in marketing that downplayed the risk of addiction and failing to report suspicious orders. Another significant case is the multidistrict generic price-fixing litigation, in which government entities and private parties allege that companies conspired to fix the prices of certain generic drugs. In essence, the plaintiffs are claiming that alleged price increases for the drugs in question result from a collusive agreement among the defendants as opposed to changes in market conditions that the defendants responded to unilaterally.

Greenblatt: Litigation remains frequent in this sector. Common litigation involving pharmaceutical

and medical device companies includes everything from Hatch-Waxman patent infringement disputes between innovators and would-be generic entrants, to antitrust lawsuits based on brand manufacturer decisions that may alter the timing of generic competition, to mass tort product liability actions involving negligence or strict liability personal injury claims. Both the volume and diversity of cases is driven by the complexity of the business, as well as the specialised regulatory and doctrinal rules in place. Further, consolidated multidistrict litigations have expanded to make up nearly 40 percent of federal court civil actions, a large number of which involve pharmaceutical or medical device companies.

Torregrossa: In the US, there has been a shift away from the class action vehicle. That shift is partly a result of two Supreme Court decisions – *Wal-Mart v. Dukes* and *Comcast v. Behrend* – addressing the requirements for meeting class certification generally. It is also the result of a series of decisions in pharmaceutical class action cases finding a lack of causation because the aggrieved parties did not change their use or reimbursement of the product as a result of the alleged misconduct. That shift away from class actions has led to increased filings and focus on individual actions, mass tort actions and multi district litigation (MDLs). More generally, there are increased business-to-business disputes around the world. Increasingly, healthcare companies are interdependent on each other in a way that was

not the case 30 or 40 years ago. This increase in licensing, co-promotion agreements, joint ventures and more has led to a corresponding increase in business disputes, particularly international arbitrations.

CD: Could you outline any key legal and regulatory developments that are influencing litigation activity?

Greenblatt: Over the past few years, disputes involving personal jurisdiction have become increasingly common, given the US Supreme Court's decisions significantly limiting both general and specific personal jurisdiction over out-of-state defendants. Lower courts continue to address the boundaries of federal pre-emption doctrines set by the Supreme Court, from deciding when a claim states a parallel requirement claim against a medical device manufacturer of a pre-market approved product, to what counts as clear evidence the FDA would refuse to approve the warnings forming a claim against a pharmaceutical company.

Torregrossa: It will be interesting to see how the significant changes in the discovery rules in the US federal courts impact litigation activity. Almost every litigator is familiar with the old standard that a

party could obtain discovery from another party if it was "reasonably calculated to lead to the discovery of admissible evidence". That broad standard has been replaced with a 'proportionality' standard, based on several factors, including the amount at

"Both the volume and diversity of cases is driven by the complexity of the business, as well as the specialised regulatory and doctrinal rules in place."

*Jennifer L. Greenblatt,
Goldman Ismail Tomasevski Brennan & Baum*

stake, the resources of the parties, the burden of collecting the information and more. Currently, many cases are resolved because the risks and the costs outweigh the benefit of proceeding to a full trial. This has led some to pronounce the 'death of the trial' because so few cases are tried anymore. There is a lot of litigation around what this new proportionality standard means, but if it results in significantly reduced discovery demands, which, in turn, reduces case expense, it is certainly possible that defendants will begin to try more cases to verdict. If that is the case, it could be an even more exciting time to be a litigator.

Bell: A growing number of intellectual property cases have now reached the courts that originated with the implementation of the Biologics Price Competition and Innovation Act of 2009. The BPCIA was meant to enable the approval of 'biosimilar' biologic products by, among other things, providing a framework for parties to address patents relating to a reference biologic product. It has taken a while for these cases to progress, but there are a number of interesting issues here. The patent estate on an innovator reference product can include a large number of formulation and process patents, many of which may be asserted in the case at issue. Needless to say, this raises challenges for the parties in addressing patent infringement, validity and enforceability; it also poses interesting issues from a damages perspective, particularly in terms of assessing the relevance and impact of non-infringing alternatives to the patents in suit.

CD: Have any recent, high-profile litigation cases gained your attention? What lessons can the pharmaceutical and medical device sector learn from their outcome?

Torregrossa: The recent California Supreme Court decision in *T.H., et al. v. Novartis Pharmaceuticals*

Corporation is a very notable decision. While the vast majority of courts reject brand-name manufacturers, owing a duty of reasonable care to ensuring that product labelling includes adequate warnings on

“The concept of foreseeability is being stretched so far under the law that every company, not just the companies in the pharma and medical device sector, should stand up and take notice.”

*Brennan Torregrossa,
GSK*

generic versions, the court found that brand name manufacturers can be liable for their competitors' generic products. Even further, the court found that this liability might exist even after the brand name manufacturer sold the product and stopped selling the drug. The concept of foreseeability is being stretched so far under the law that every company, not just the companies in the pharma and medical device sector, should stand up and take notice.

Bell: Recent US cases are bringing an antitrust focus to the common US practice of manufacturers contracting with third-party payors, such as managed

care organisations. One example is Pfizer alleging that Johnson & Johnson engaged in anticompetitive contracts with payors to disadvantage Pfizer's biosimilar version of J&J's Remicade. In addition to exposing contracting practices to antitrust scrutiny, the Remicade case is also likely to illuminate some of the challenges faced by biosimilar manufacturers attempting to dislodge established incumbents.

Greenblatt: Personal jurisdiction is a topic that has received increased attention lately following the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, which held due process did not allow non-California residents' claims without a connection to California to proceed against a foreign pharmaceutical manufacturer. In *Bristol-Myers Squibb*, like many other cases pending across the country, the out-of-state plaintiffs had joined in complaints filed by California residents. In addition to sorting out the impact on pending cases, some in the midst of trial, *Bristol-Myers Squibb* has quickly altered the course of initial dispositive motions as defendants challenge filings in venues with little to no connection to the defendants' actions.

CD: What advice would you offer to companies on preparing for litigation in this sector? Are there any pre-emptive steps they should take based on current disputes dominating the sector?

Greenblatt: On the product liability defence side, litigation is often reactive. However, trying to avoid internal correspondence that can be misread in the context of litigation can go a long way toward keeping lawsuits focused on the merits. Regular training could especially benefit those who do not frequently interact with legal disputes and therefore may not appreciate the implications imprecise written communications may have in defending a company. On patent and antitrust issues, key court decisions have driven major changes in procedure, for example patent venue, and substance, for example, 'product hopping' Sherman Act liability, requiring a fresh perspective on litigation strategies to employ. On the business side, it is also worth reviewing contracts across stakeholders to ensure that key trends, for instance courts upholding class action waivers, are considered and incorporated as appropriate.

Torregrossa: Without question, the best offence is a good defence. In our experience, these companies should have a world class early case assessment programme to proactively analyse and address potential litigation issues. These programmes should be designed to facilitate more informed and expedited decision making at the early stages of a dispute. The days of first learning of a dispute when you get the court-filed complaint should be over. One needs to attack these issues early and often. The earlier in the dispute that one can address it, the less

likely it is that the dispute will turn into a full-blown crisis.

CD: What are the main issues and challenges that typically face pharmaceutical and medical device companies during the litigation process? How might they go about addressing these issues?

A close-up photograph of a wooden gavel with a gold band, resting on a dark surface. Scattered around the base of the gavel are several colorful pills and capsules in various shapes and sizes, including round tablets, oval capsules, and a blue and white capsule. The background is a soft, out-of-focus white.

Greenblatt: The disparity in discovery burdens is a challenge. For instance, the typical product liability plaintiff may only have a handful of medical records and other documents to produce, but may demand millions of pages of product development and safety

information in return, complete with extensive ESI. These issues may be further exacerbated by court-specific expedited timelines, for instance the Mandatory Initial Discovery Pilot Programme recently launched in the Northern District of Illinois and the District of Arizona. Among other tools available in federal cases, moving to dismiss insufficiently pled claims under the US Supreme Court's standards in *Bell Atlantic Corp. v. Twombly*, and *Ashcroft v. Iqbal*, may cabin the material that is relevant to the claims or defences.

Torregrossa: The greatest challenge is to explain to the decision maker that the company is more than a corporate entity, but rather an organisation made up of people trying to improve the lives and health of others. If you can tell that human story, it goes a long way to reaching a good outcome.

Bell: Litigation tends to be a complex and lengthy process, and companies face many challenges along the way. One issue that I frequently confront as an expert witness is identifying which company personnel are the best sources of key pieces of information, whether as potential fact witnesses or just custodians who should be consulted to gain a more complete understanding of the relevant circumstances. Counsel may have difficulty finding the right people within the company to speak to the various facts and documents; this is particularly common in the case of large organisations where,

for example, the legal department may have little interaction with the marketing team, which in turn may have little interaction with clinical personnel. Involving expert witnesses early in the process can help identify those individuals – or roles within the company – that are likely to be important in establishing the basic facts.

CD: Do expert witnesses play an important role in bringing their knowledge and experience to pharmaceutical and medical device litigation? What are the main benefits of engaging expert witnesses to assist with the process?

Torregrossa: Sometimes, it feels as though pharmaceutical and medical device cases are 90 percent science and 10 percent law. If you work in the industry you will be familiar with the famous court observation that the “law lags science, it does not lead it”. That is true of working on these cases as well. One must master the science in order to master what the result under the law should be. The use of expert witnesses is critical in this regard. An expert witness who can act a science teacher for the attorneys, judge and jury can have a profound influence on a case.

Bell: Experts can be an important part of the litigation team. A good expert already has knowledge of the industry and can engage with the company personnel involved in the litigation without placing an undue burden on corporate attention and resources.

“A good expert already has knowledge of the industry and can engage with the company personnel involved in the litigation without placing an undue burden on corporate attention and resources.”

*Gregory K. Bell,
Charles River Associates*

This can be very important during the process of collecting documents and data to be produced as part of expert discovery, which can sometimes be a lengthy process. Additional benefits include acting as an independent sounding board for issues arising in the case, vetting information produced by the parties, and serving as a gateway to staff who can assist counsel in locating the right people and information.

Greenblatt: Expert witnesses remain an important element in almost any pharmaceutical and medical device litigation, both in developing affirmative and defensive positions. By way of example, establishing

that plaintiffs cannot support their theory of causation through admissible expert testimony can spell the end to thousands of MDL cases in a matter of a few motions. In the meantime, experts for the defence can provide helpful context for testing those opinions. In any case where the outcome may hinge on the strength of the medical or scientific theory of the case, promptly engaging experts can help align the early case themes for maximum effect.

CD: How do you envisage the level of litigation in the pharmaceutical and medical device sector unfolding over the next few years? Are there any particular trends you expect to see?

Bell: There will continue to be high-profile antitrust litigation involving life sciences companies. Some of this will be a continuation of the patent settlement challenges we have seen in prior years – examples include the ongoing Effexor XR and Lipitor cases, which are back before the courts in the US. We will see some new types of claims being brought as well, spurred by the advent of biosimilars in the marketplace. As biosimilar versions of innovator products increase their presence in the marketplace, I expect that these cases will give rise to some interesting damages issues involving analyses of pricing and sales that differ significantly from the types of analyses that have been done in the past with respect to small-molecule products.

Greenblatt: Over the next few years, we expect to see many of the current legal trends continue to impact the course of complex pharmaceutical and medical device litigation, including evolving doctrines concerning personal jurisdiction, pre-emption, discovery limits and consolidation. On the product liability side, the recent downward trend in the number of MDL petitions granted has the potential to lower the overall volume of federal cases and shift more cases to state consolidated proceedings in defendants' home states. In the antitrust arena, both the FTC and private litigants continue to challenge settlements of patent litigation in the pharmaceutical industry with new precedents shaping the contours of liability. High-stakes patent disputes are likely to remain a consistent feature in this sector, although venue and challenge procedures are in a state of flux.

Torregrossa: The level of litigation should remain somewhat constant in the US. The litigation funding practice, in which a litigant obtains third-party financing, could increase that level of litigation, but that remains to be seen. Despite increased money behind these cases, litigation still requires lawyers, cases and courts to handle that increased volume. The potential for increased litigation capacity is really outside the US. There are a few pockets of the world that are adopting practices that signal the dawn of a US-like litigation environment. **CD**

Bird & Bird

EDITORIAL PARTNER

www.twobirds.com

Bird & Bird

Bird & Bird is an international law firm with an in-depth knowledge of its clients' industries. The firm has particular expertise in sectors that have traditionally been or are increasingly exposed to product liability risks, such as automotive, aviation or life sciences & medical devices. Bird & Bird's product liability specialists understand the commercial and product liability issues for all parties along these industries' supply chain and the ways to mitigate them contractually in advance or once personal injury or property damage have been caused. The team has extensive experience in handling product liability disputes and non-contentious matters, both domestically and across the border.



Christian Kessel

Partner

Frankfurt, Germany

T: +49 (0) 69 74222 6223

E: christian.kessel@twobirds.com



Jonathan Speed

Partner

London, UK

T: +44 (0)20 7415 6000

E: jonathan.speed@twobirds.com



Russell Williamson

Senior Associate

London, UK

T: +44 (0)20 7415 6000

E: russell.williamson@twobirds.com



EDITORIAL PARTNER

www.crai.com

Charles River Associates

Charles River Associates (CRA) is a leading global consulting firm that offers economic, financial and strategic expertise to major law firms, corporations, accounting firms and governments around the world. With proven skills in complex cases and exceptional strength in analytics, the firm provides economic and financial analysis in litigation and regulatory proceedings and guides businesses through critical strategy and operational issues. Since 1965, clients have engaged CRA for its unique combination of functional expertise and industry knowledge, and for its objective solutions to complex problems. Headquartered in Boston, CRA has offices internationally.

KEY CONTACT

**Gregory K. Bell**

Group Vice President and Life Sciences
Practice Leader
Boston, MA, US
T: +1 (617) 425 3357
E: gbell@crai.com



EDITORIAL PARTNER

www.epiqglobal.co.uk

Epiq

Epiq, a global leader in the legal services industry, takes on large-scale, increasingly complex tasks for corporate counsel, law firms, and business professionals with efficiency, clarity and confidence. Clients rely on Epiq to streamline the administration of business operations, class action and mass tort, court reporting, e-discovery, regulatory, compliance, restructuring and bankruptcy matters. Epiq subject-matter experts and technologies create efficiency through expertise and deliver confidence to high-performing clients around the world.

KEY CONTACTS



Deborah Blaxell

Senior Consultant
London, UK
T: +44 (0)20 7367 9154
E: dblaxell@epiqglobal.co.uk



Martin Bonney

Senior Director (International Consulting Services)
London, UK
T: +44 (0)20 7367 9120
E: mbonney@epiqglobal.co.uk



Matt Grant

Director, Consulting Services
London, UK
T: +44 (0)20 7367 9183
E: mjgrant@epiqglobal.co.uk



EDITORIAL PARTNER

www.uk.gt.com

Grant Thornton UK LLP

Grant Thornton UK LLP is part of one of the world's leading organisations of independent advisory, tax and audit firms. They help dynamic organisations unlock their potential for growth by providing meaningful, forward looking advice. The firm's underlying purpose is to build a vibrant economy, based on trust and integrity in markets, dynamic businesses and communities where businesses and people thrive. They work with banks, regulators and government to rebuild trust through corporate renewal reviews, advice on corporate governance and remediation in financial services. The firm also work with the public sector to build a business environment that supports growth.

KEY CONTACT

**Michael Leeds**

Partner

London, UK

T: +44 (0)20 7728 2368

E: michael.t.leeds@uk.gt.com



EDITORIAL PARTNER

www.hfw.com

HFW

HFW is a global, sector-focused law firm providing expert advice to clients in aviation, commodities, construction, energy & resources, insurance & reinsurance, and shipping. The firm prides itself on its deep industry expertise. HFW specialises in dispute resolution with 75 percent of its revenue derived from contentious work. It is consistently ranked among the top three firms for use of the Commercial Court and the IDRC in London. With over 500 lawyers and 18 offices across the Americas, Europe, the Middle East, Asia and Australia, HFW takes a progressive approach to its role in commercial business.

KEY CONTACTS



Andrew Williams

Partner
 London, UK
 T: +44 (0)20 7264 8364
 E: andrew.williams@hfw.com



Noel Campbell

Head of Commercial Litigation
 London, UK
 T: +44 (0)20 7264 8272
 E : noel.campbell@hfw.com



Damian Honey

Head of International Arbitration
 London, UK
 T: +44 (0)20 7264 8354
 E: damian.honey@hfw.com



INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION®

EDITORIAL PARTNER

www.adr.org

International Centre for Dispute Resolution (ICDR)

The **International Centre for Dispute Resolution (ICDR)** is the global component of the American Arbitration Association (AAA), providing services to individuals and organisations around the world who wish to resolve conflicts out of court. A leader in the field of alternative dispute resolution (ADR), the ICDR administers cases from initiation to closing, from more than 90 countries. With a multilingual staff and a worldwide panel of independent arbitrators and mediators, the ICDR manages the process through arbitration or mediation until completion. A particular specialty of the ICDR is handling large international disputes.

KEY CONTACTS



Steve K. Andersen
Vice President
Los Angeles, CA, US
T: +1 (619) 813 2889
E: andersens@adr.org



Luis M. Martinez
Vice President
New York, NY, US
T: +1 (212) 716 5833
E: martinezl@adr.org



Michael D. Lee
Vice President
Singapore
T: +65 6227 2879
E: leem@adr.org



EDITORIAL PARTNER

www.itgroup-uk.com

IT Group

IT Group is a leading supplier of IT consultancy and expert witness services. Our experts have over 25 years of experience in the industry, and are regularly instructed to prepare CPR Part 35 expert reports and/or give oral evidence for complex litigations in the High Court, County Courts, Crown Court and Magistrates Court as well as numerous arbitrations and mediations. IT Group specialises in IT disputes, particularly in relation to: IT/telecommunications project delay, failure and fitness for purpose; software/source code copyrights and quality analysis; software licensing disputes and technology patent validity and infringement.

KEY CONTACTS



Aaron Pickett

Digital Forensic Examiner
 Preston, UK
 T: +44 (0)845 226 0331, ext 505
 E: aaron.pickett@itgroup-uk.com



Kieran Maher

Assistant Digital Forensic Examiner
 Preston, UK
 T: +44 (0)845 226 0331
 E: kieran.maher@itgroup-uk.com



EDITORIAL PARTNER

www.nera.com

NERA Economic Consulting

NERA Economic Consulting is a global firm of experts dedicated to applying economic, finance and quantitative methods to complex business and legal challenges, and providing advice and expert testimony in business disputes, litigation and arbitrated matters. NERA's economists produce strategies, studies, reports, expert testimony and policy recommendations for government authorities and the world's leading law firms and corporations. Practice areas include intellectual property, competition and antitrust, securities and finance, telecommunications and energy, and bankruptcy. With its main office in New York City, NERA serves clients from more than 25 offices across North America, Europe and Asia Pacific.

KEY CONTACTS



Dr David Blackburn

Director

Washington, DC, US

T: +1 (202) 466 9264

E: david.blackburn@nera.com

Dr Subbu Ramanarayanan

Associate Director

New York, NY, US

T: +1 (212) 345 0745

E: subbu.ramanarayanan@nera.com



EDITORIAL PARTNER

www.vwys.com.mx

Von Wobeser y Sierra, S.C.

Von Wobeser y Sierra, S.C. was established in 1986 with the aim of providing high quality, integrated services to both domestic and international clients. With this vision, the firm has successfully advised clients not only from a legal point of view, but also from a business perspective. Additionally, Von Wobeser y Sierra, S.C. has developed its dispute resolution area very effectively in the face of the growing demand for specialised services in high level litigation involving claims for significant amounts in damages and lost profits, arising from contractual breaches or wrongful conducts in general.

KEY CONTACT

**Marco Tulio Venegas Cruz**

Senior Partner, Head of the Arbitration and Litigation Department

Mexico City, Mexico

T: +52 (55) 5258 1034

E: mtvenegas@vwys.com.mx

ORGANISATION

Chartered Institute of Arbitrators (CIArb)

The **Chartered Institute of Arbitrators (CIArb)** is a leading professional membership organisation representing the interests of alternative dispute practitioners worldwide. With over 15,000 members located in more than 130 countries, CIArb supports the global promotion, facilitation and development of all forms of private dispute resolution. In addition to providing education and training for arbitrators, mediators and adjudicators, the organisation acts as an international centre for practitioners, policy makers, academics and those in business concerned with the cost-effective and early settlement of disputes. As a not-for-profit, UK registered charity, CIArb works in the public interest through an international network of 38 branches.

Sabina Adascalitei

Research and Academic Affairs Coordinator
London, UK

T: +44 (0)20 7421 7446

E: sadascalitei@ciarb.org

www.ciarb.org



ORGANISATION

Hong Kong International Arbitration Centre (HKIAC)**Hong Kong International Arbitration Centre (HKIAC)**

is the foremost venue for alternative dispute resolution in Asia. Specialising in arbitration, mediation, adjudication and domain name dispute resolution, HKIAC maintains one of the largest commercial caseloads in the Asia-Pacific region, having handled over 9000 commercial cases since its establishment in 1985. HKIAC has been recognised as the most favoured arbitral institution outside of Europe and the third most preferred and used arbitral institution worldwide. HKIAC's Administered Arbitration Rules have introduced innovative provisions that can be strategically used to control costs and increase efficiency for users.

Dr Ling Yang

Deputy Secretary-General
Shanghai, People's Republic of China
E: lyang@hkiac.org

Kiran Sanghera

Business Development Deputy Director
Hong Kong
T: +852 2912 2220
E: ksanghera@hkiac.org

www.hkiac.org



ORGANISATION

DIFC Courts

The United Arab Emirates' (UAE) **DIFC Courts** administer a unique English-language common law system – offering swift, independent justice to settle local and international commercial or civil disputes. The Courts, based in Dubai, provide certainty through transparent, enforceable judgments from internationally-recognised judges, which adhere to the highest global legal standards. The DIFC Courts are independent of, but complementary to, the UAE's Arabic-language civil law system – offering a choice that strengthens both processes while ensuring public access to world-class justice.

Nour Hineidi Kirk

Deputy Registrar
United Arab Emirates
T: +971 (4) 427 3308
E: nour.kirk@difccourts.ae

Mahika Hart

Postgraduate Law Fellow
United Arab Emirates
T: +971 (4) 427 3350
E: mahika.hart@difccourts.ae

www.difccourts.ae



CD corporate
disputes

APR-JUN 2018

www.corporatedisputesmagazine.com