SLAUGHTER AND MAY/

DISPUTES BRIEFCASE

Need-to-know disputes updates for General Counsel and their teams

APRIL 2024

/ INTRODUCTION

Welcome to Slaughter and May's Disputes Briefcase, a regular digest of key developments in litigation and arbitration, produced by members of our market-leading disputes team. Our previous editions of Disputes Briefcase are available here. The Disputes Briefcase team would welcome any thoughts and feedback.

Richard Swallow
Head of Disputes and Investigations

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ARBITRATION AND ANTI-SUIT INJUNCTIONS

SUPREME COURT CONFIRMS THE ENGLISH COURT CAN ISSUE AN ANTI-SUIT INJUNCTION TO STOP A PARTY FROM PURSUING COURT PROCEEDINGS IN BREACH OF A FOREIGN ARBITRATION AGREEMENT

The Supreme Court's recent decision (upholding that of the Court of Appeal) in ***UniCredit Bank v RusChemAlliance*** is the latest in a series of cases in which the lower courts have considered - and reached different conclusions on - whether to grant anti-suit injunctions to restrain a party from continuing foreign court proceedings brought in breach of foreign arbitration agreements.

RCA called on on-demand performance bonds issued by UniCredit (and other banks) guaranteeing a third-party contractor's performance in connection with a Russian construction project. UniCredit refused to make payment citing EU sanctions against Russia. The bonds were governed by English law and provided for ICC arbitration in Paris, but there was no express choice of law for the arbitration agreement. RCA brought Russian court proceedings against UniCredit seeking payment under the bonds. UniCredit applied to the English court for an anti-suit injunction to stop RCA from continuing the Russian court proceedings arguing they breached the parties' arbitration agreement.

After an interim anti-suit injunction was granted by the High Court without notice to RCA, UniCredit sought an anti-suit injunction on a final basis. RCA challenged the English court's jurisdiction and the injunction application. Following an expedited appeal, the Court of Appeal (overturning the **High Court**) unanimously **held** the English court had jurisdiction to hear UniCredit's claim and granted a final anti-suit injunction against RCA. The Supreme Court has now **upheld** the Court of Appeal's decision, although it has not yet released its reasons for the decision.

The Court of Appeal found the English court had jurisdiction to hear the application. Applying the ***Enka v Chubb test***, the Court held the arbitration agreement was governed by English law. (The general rule in Enka is that, in the absence of an express choice by the parties, the law of main contract - in this case, English law - is the law of the arbitration agreement.) The English courts were also the appropriate forum to hear the application. Although the French courts (as the courts of the seat) had supervisory jurisdiction over any arbitration proceedings and did not have the power to issue anti-suit injunctions, the evidence indicated that the French court would not consider the English court's grant of an anti-suit injunction as an interference with their jurisdiction, and it was unlikely a French arbitration could proceed without the protection of an anti-suit injunction.

The Court of Appeal considered it was appropriate to grant an anti-suit injunction in this case. Whilst the court must exercise caution when granting relief in support of foreign arbitration, there was no reason in principle why the English court, having jurisdiction pursuant to an English law contract, should not grant an anti-suit injunction in this situation.

Although we await the Supreme Court's reasoning, its decision, and the Court of Appeal's judgment, provide welcome clarification as to when the English court will exercise its powers in support of foreign-seated arbitrations. However, the overhaul of the Enka test in the Arbitration Bill (discussed in **previous editions** of Briefcase) will have implications for similar cases in future. To avoid uncertainty, including over the courts that can step in to support arbitration, parties to cross-border contracts should spell out in clear terms the key features of their arbitration agreement, including the applicable law and seat.

LITIGATION FUNDING UPDATE

FUNDERS WELCOME A PROPOSED NEW LAW THAT WOULD ALLOW THEM TO TAKE A PERCENTAGE OF DAMAGES AWARDS IN THE CASES THEY BACK, REVERSING A CONTROVERSIAL SUPREME COURT DECISION FROM LAST YEAR – BUT A FORTHCOMING REVIEW OF THE SECTOR COULD LEAD TO TIGHTER REGULATION

As reported in previous **editions** of Disputes Briefcase, the litigation funding market was roiled last summer by the Supreme Court's judgment in ***PACCAR***. The Court held that litigation funding agreements that entitle funders to a percentage of a claimant's damages in the event their case succeeds are properly characterised as damages-based agreements. DBAs are valid only if they comply with certain rules which, in practice, most litigation funding agreements do not. The effect was to render the majority of LFAs unenforceable at a stroke. That had wide and potentially destabilising implications, not least because most of the group litigation in the English courts is only made possible by third party litigation finance. The Government's response was to promise new legislation to reverse the effects of the *PACCAR* decision. A draft law has now been introduced in Parliament, and a broader review is evaluating the need for more extensive reform.

The **Litigation Funding Agreements (Enforceability) Bill** would create a new definition of litigation funding agreements which it then carves out of the existing definition of DBAs. Importantly, the Bill would have retrospective effect. In other words, percentage-based LFAs would be deemed never to have been DBAs. In many cases that will have no immediate impact because funders and claimants have already amended their agreements to replace percentage-based recovery with a mechanism entitling the funder of a successful claim to a multiple of its investment. If the Bill becomes law, these funders may seek to revisit their amended agreements. Other funders, meanwhile, are likely to see the benefit of a decision to hedge their bets by retaining in their amended agreements a provision for a percentage-based payment, conditional on the law being changed to permit it.

In yet other cases, claimants will need to consider the potential impact of the sudden resurrection of funding agreements they thought had become invalid, and had perhaps replaced with alternative arrangements with new funders. The Bill had its second reading in the Lords on 15 April and was considered in committee on 29 April, where two small amendments were agreed. It now goes to the report stage, where peers may seek to amend it further. Ministers have said they hope the Bill can be enacted before the next general election.

But further change is on the horizon. In March, the Ministry of Justice announced that it had commissioned a review of the litigation funding sector by the Civil Justice Council. On 23 April, the CJC published the review's **terms of reference**. They propose to "explore whether the current arrangements for [third party funding] deliver effective access to justice and identify possible alternatives and limitations". The CJC could make recommendations for reform, which it envisages might include replacing the current light-touch system of self-regulation with a mandatory system, capping the return funders can make on cases, and/or amending court rules to allow the court to control the conduct and costs of funded litigation. We expect the review to test the implied premise that the market as currently structured may not always adequately safeguard the interests of funded claimants. The CJC expects to publish an interim report this summer which will form the basis of a wider consultation. A final report is due in summer 2025.

NEW GUIDANCE ON PRIVILEGE

COURT OF APPEAL PROVIDES PRACTICAL GUIDANCE ON WHEN PRIVILEGE CAN BE CLAIMED TO PROTECT DOCUMENTS FROM DISCLOSURE AND WHEN CRIME, FRAUD OR SOME OTHER INIQUITY WILL PREVENT PRIVILEGE FROM ARISING IN THE FIRST PLACE

In *Al Sadeq v Dechert*, the claimant appealed the dismissal of challenges he had to made to the privilege claimed over certain documents by the defendant law firm and three of its former partners. Granting the appeal in part, the Court considered several important points relating to the scope of the two limbs of legal professional privilege: legal advice privilege and litigation privilege. In particular, it clarified that in some circumstances, a non-party to proceedings may be able to assert litigation privilege over documents. The judgment also provides valuable guidance on the application of the so-called iniquity exception, which operates to prevent privilege arising over communications where there has been an abuse of the lawyer-client relationship. We set out below three key takeaways.

Litigation privilege can be asserted by someone not a party to the relevant litigation. Litigation privilege protects confidential communications between (1) a lawyer or their client and (2) a third party, where made for the dominant purpose of litigation, whether existing or reasonably contemplated. The Court of Appeal held this definition did not prevent a non-party to the relevant proceedings claiming litigation privilege, provided they satisfied all the other elements of the definition. The Court noted that it was not uncommon for persons to have a close interest in litigation, such that they would have reason to gather evidence in connection with it, without being technically a party to it: litigation funders, insurers and members of a class of represented persons in group litigation were three examples.

Legal advice privilege may apply even in the early stages of an investigation. The Court upheld a claim to legal advice privilege over documents generated by Dechert in the initial fact-finding stage of their engagement. Mr Al Sadeq argued that a large part of that work required no legal skill – it was just fact-gathering. The Court disagreed. It said the work was done in a relevant legal context and was therefore privileged. This doesn't imply a blanket claim to privilege will be acceptable. But where a law firm is instructed to advise in relation to, in this case, a suspected fraud, it is reassurance that judges will not welcome attempts to carve up the elements of their engagement with a view to defeating privilege.

Meaning and scope of the iniquity exception. A document which might otherwise attract privilege will not be privileged if it came into existence in the course of or in furtherance of a fraud, crime or other iniquity. The Court first had to decide the correct test to establish the existence of an iniquity and, after that, the relationship between the iniquity and documents required to engage the exception. On the first point, the Court said that (save in exceptional circumstances) an iniquity needed to be established on the balance of probabilities: the iniquity must be more likely than not on the basis of the material available to the decision-maker (meaning the party and its lawyers or a court). Any lower threshold would involve parties being required to disclose documents that were more likely than not to be privileged, a highly unsatisfactory result. On the second point, the Court held that documents and communications brought into existence as part of, or in furtherance of, the iniquity would not attract privilege. "Part of" included documents reporting on or revealing the iniquitous conduct. "In furtherance of" was capable of catching documents brought into existence in preparation for the iniquity as well as afterwards.

MULTI-CASE PROCEEDINGS – CASE MANAGEMENT TRENDS

COMPETITION APPEAL TRIBUNAL PURSUES A NEW APPROACH TO CASE MANAGEMENT OF MULTI-CASE PROCEEDINGS

The Competition Appeal Tribunal (CAT) has been giving fresh consideration to the case management of multi-case proceedings raising similar issues, particularly in the *Interchange* and *Trucks* proceedings. The complexity and scale of such multi-case proceedings raise difficult case management and evidential questions regarding manageability and proportionality. These questions have been particularly salient in competition claims involving the 'pass-on' of alleged overcharges, which can concern a wide range of businesses, markets and sectors at different levels of a supply chain (including claims by both businesses and their customers). Recently, the CAT has tended to adopt an 'issues-based' approach to case management in such multi-case proceedings, seeking to try the most substantive issues in one go.

Key features of this new case management approach include:

- **Active case management:** The CAT has been prepared to take an active and "hands-on" approach to case management. In particular, the CAT has indicated a willingness to grapple with difficult issues at an early stage, making use of informal case management meetings, preliminary issues and staged trial structures. In parallel, the CAT has also encouraged the greater use of ADR by parties.
- **Expert-led approach:** The CAT has adopted an "expert-led" approach to dealing with the key issues in dispute. The parties' experts are treated as significant players in their own right: the CAT has directed "hot tub" expert hearings and the provision of expert methodologies at an early stage of the proceedings.
- **No disclosure:** The CAT has been clear that there will be no "disclosure" in the traditional sense; instead, the CAT envisages information flows between the parties based on expert-led data or information requests.
- **Positive cases:** Rather than adopting a traditional sequence of stages to trial (i.e. pleadings, disclosure, evidence, etc.), the CAT has adopted a "one-shot" approach where the parties have to each put in a "positive case" comprising all of the material on which they rely to make good their case at trial. Positive cases are then followed by a "negative case", which is an essentially destructive exercise in respect of the other side's positive case.

Although this approach has so far been adopted in competition claims, similar case management challenges arise in other types of complex multi-case proceedings. The courts are increasingly alive to case management issues and place strong emphasis on active judicial case management, as we have seen in cases such as the **COVID-19 business interruption insurance claims**. Accordingly, key features and themes from the CAT's approach may be of broader relevance to other proceedings, particularly given the growing number of complex mass claims. This new case management approach is likely to be watched closely by potential parties and lawyers as it continues to develop.

Slaughter and May, led by Jonathan Clark, Damian Taylor and Holly Ware, act for MAN in the Trucks proceedings.

OTHER RECENT DEVELOPMENTS AND WHAT TO WATCH OUT FOR

Here is a round-up of other recent noteworthy developments in litigation and arbitration, and what to watch out for in the coming months:

CLIMATE CHANGE LITIGATION

Courts across the world continue to grapple with increasing climate change litigation in the public and private spheres, which poses new and developing challenges for companies. Several significant decisions concerning companies have been delivered in recent months. For example, in February, the New Zealand Supreme Court in ***Smith v Fonterra & Ors*** permitted a novel climate change claim brought against several of New Zealand's largest corporations to proceed to trial, creating a potential pathway for the development of climate related tort-based common law actions (see our **blog post**).

In March, a Dutch court found in ***Fossielvrij v KLM*** that airline KLM's advertising was misleading and breached EU consumer law as it falsely promoted the sustainability of flying.

In April, the European Court of Human Rights found in ***Verein KlimaSeniorinnen Schweiz and Others v Switzerland*** that Switzerland had breached its obligations under Article 8 (right to respect for private and family life) and Article 6(1) (right to a fair trial/access to the court) of the European Convention on Human Rights by not taking sufficient action to mitigate the effects of climate change (see our **blog post**). The Court held that Article 8 includes a right to effective protection by State authorities from the serious adverse effects of climate change on lives, health, well-being and quality of life. Although Convention duties do not directly apply to the private sector, the decision will affect companies where States change their laws and regulations following the ruling or any future piggyback litigation against States, and companies themselves may potentially face new litigation risk in some jurisdictions inspired by new human rights arguments.

Significant court decisions are pending in other cases. For example, in the UK, we are awaiting the Supreme Court's decision in ***R(Finch) v Surrey County Council*** in which the Court will decide if it was unlawful for a local authority not to require the environmental impact assessment submitted as part of an application for planning permission concerning an onshore well site to include an assessment of the impacts of downstream greenhouse gas emissions resulting from the eventual use of the refined products of the extracted oil. The decision could have significant ramifications for future planning policy in connection with new carbon intensive projects. Elsewhere, in June, the Paris Court of Appeal is expected to rule on the admissibility of a claim against TotalEnergies in ***Notre Affaire à Tous & Ors v Total***, which alleges the company has failed to align with the Paris Agreement 1.5°C temperature target under the French duty of vigilance law. In November, a Dutch appeal court will deliver its decision in ***Milieudefensie v Shell***, which concerns a 2021 ruling that Shell must cut its carbon emissions by 45% by 2030 against 2019 levels.

APP FRAUD: A NEW DUTY OF RETRIEVAL?

'APP' Fraud (a type of fraud in which a deceived customer directly authorises a bank to move funds towards a fraudster) is a growing threat. With confirmation from the Supreme Court last year that the 'Quincecare' duty of care does not apply to APP fraud (see our **October 2023 edition of Briefcase** and **briefing**), claimants have continued to come up with creative ways to hold banks handling stolen funds liable.

In ***CCP Graduate School v National Westminster Bank***, a claimant was allowed to amend its claim to include a novel 'duty of retrieval' against the bank receiving the stolen funds. Despite attempts to have the claim struck out, the High Court held that it should proceed to trial. If successful, it could impose a significant burden on receiving banks to take steps to retrieve or recover stolen monies as soon as they become aware that APP fraud may have been committed.

NON-PARTIES TO BE GIVEN AUTOMATIC ACCESS TO MORE COURT DOCUMENTS?

The Civil Procedure Rule Committee (CPRC), the body responsible for court procedure rules, is **consulting** on changes to the rights of non-parties/members of the public to access court documents.

Currently, non-parties can get copies of statements of case (such as claim forms, particulars of claim and defences) and public court judgments and orders without the permission of the parties or the court. Under the proposals, non-parties would be automatically entitled to a wider range of documents, including witness statements/affidavits, expert reports and skeleton arguments. Although non-parties can presently obtain these documents with the court's permission, the presumption of an automatic entitlement is new (though parties would still be able to apply to the court to restrict access).

Slaughter and May has engaged with industry bodies and other stakeholders in the consultation, which closed on 8 April. For now, the rules governing non-party access to court documents remain unchanged.

STRENGTHENING COURT-ORDERED ADR RULES?

In a further consultation, the CPRC is **consulting** on changes to court rules concerning alternative dispute resolution. This follows the Court of Appeal's decision in ***Churchill v Merthyr Tydfil*** in which it was held that a court can stay proceedings or order parties to engage in ADR provided the order does not impair a claimant's right to proceed to a court hearing, and it is proportionate to the overriding objective of settling disputes fairly, quickly and at reasonable cost.

The CPRC's proposed rule changes include: adding that the court's objective of dealing with a case justly and at proportionate cost includes, so far as practicable, using and promoting ADR; clarifying that the court may order (as well as encourage) parties to participate in ADR; requiring the court to consider whether to order or encourage parties to participate in ADR including for the most complex and high value claims; and expressly stating that failure to comply with an order for ADR or an unreasonable failure to participate in ADR proposed by another party would be relevant to decisions on costs.

UK TO WITHDRAW FROM ENERGY CHARTER TREATY

In February, the UK confirmed its intention to withdraw from the Energy Charter Treaty (see our **blog post**). In April, MEPs in the European Parliament also **consented** to the EU withdrawing from the ECT, paving the way for the Council to adopt the decision by qualified majority.

The ECT is a multilateral treaty signed in the nineties to promote international investment and provide protections for investors in the energy sector, including fossil fuels. It enables investors to bring investor-state dispute settlement claims against ECT signatory states for violating obligations to promote and protect energy-related investments. While the UK (which has never been subject to an ECT claim) and the EU assert that their concerns regarding the ECT emanate from the treaty's interference with their net zero ambitions, a closer examination reveals broader sovereignty, energy security, and political issues. The UK and the EU's withdrawal will take effect one year after they each formally notify their intention to withdraw, although the treaty's 'sunset clause' grants existing covered investments continuing protections for 20 years after the withdrawal dates.

ARBITRATION BILL PROGRESSING THROUGH THE LORDS

The Arbitration Bill (reported in the **January edition of Briefcase**) is continuing to progress through the House of Lords. The Bill has been considered by a special public bill committee who have **proposed** minor amendments following a call for evidence from stakeholders. However, a question has been raised about the implications of the **new governing law provision** on investment treaty arbitration, which the Government is reflecting on. The committee will now report back to the House of Lords at a date to be announced and the House will have an opportunity to make further changes before the Bill is passed to the Commons. Whilst no further updates have been given on timings for the Bill, it is being progressed "as soon as possible" with the aim of passing it into law before the next general election.

UPDATED IBA GUIDELINES ON CONFLICTS OF INTEREST IN ARBITRATION

The IBA Arbitration Committee has updated **its Guidelines on Conflicts of Interest in International Arbitration**, which set out what are widely considered to be internationally recognised standards of best practice concerning conflicts of interest and disclosures in international arbitration. The Guidelines were last updated in 2014. The revised Guidelines retain the same overall approach and structure as their predecessor, but include some important modifications, such as broadening the relationships that may be relevant in determining the existence of a conflict of interest to include third-party funders and insurers, for example, and extending the list of circumstances which may require disclosure in the so-called 'Orange List'.

UNIFORM PRIVILEGE GUIDELINES FOR INTERNATIONAL ARBITRATION?

In February, an IBA taskforce published a **report** proposing that uniform guidelines for legal privilege should be developed for international arbitration. The IBA considers that guidelines would be desirable because the way privilege is currently managed in international arbitration lacks clarity and consistency, and because guidelines seem to be expected from the international arbitration committee. The IBA proposes to develop guidelines on legal advice privilege, legal proceedings privilege and settlement privilege, along with a uniform choice of law guideline for categories of privilege not covered by the guidelines (e.g. public interest immunity) or as an alternative to the guidelines where parties so choose. The taskforce has proposed creating an expanded taskforce to take the project forward.

PROGRESS ON CROSS-BORDER ENFORCEMENT OF JUDGMENTS

As we reported in **January**, the UK is signing up to the **Hague Judgments Convention**, an international agreement that will make it significantly easier to enforce many English court judgments in, among other countries, the member states of the EU (and vice versa). Accession will move a step closer on 16 May, when Parliament is expected to confirm it has no objection to the Government ratifying the Convention. Ratification - an essentially administrative step - will trigger a 12-month period at the expiry of which the Convention will come into force for the UK (probably around June 2025). Domestic legislation to give effect to the Convention is expected in the coming months and steps are also being taken to design court rules to facilitate its implementation.

Although participation in the Hague Convention will be a net benefit for those doing business in the UK, its effects will take a little time to be felt: the Convention will only apply to judgments in cases started after its entry into force.

OUR OTHER RECENT CONTENT

(a) **GIG Bulletin – January edition**

(b) **GIG Bulletin – March edition**

(c) **New ICO fining guidance and an update on the ICO's enforcement approach**

(d) **Tax Disputes Podcast Series**

CONTACTS

If you would like to discuss any of the above in more detail, please contact your relationship partner or email one of our Disputes team.

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