SLAUGHTER AND MAY/

DISPUTES BRIEFCASE

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

MAY 2025

/ 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. Previous editions of 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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NEW HOPE FOR PASSIVE INVESTORS IN SECURITIES LAW CLAIMS

High Court judgment gives hope to passive investors who feared last year's decision in *Barclays* barred them from bringing s.90A FSMA claims

Section 90A/Schedule 10A FSMA impose a liability on listed companies to compensate investors who suffer loss from untrue or misleading statements and omissions in certain publications. Liability is contingent on a claimant showing it traded in securities "in reliance on" the defective information.

Whether a claimant can plead reliance on the market share price is a crucial question for passive or tracker funds and has been the subject of two High Court decisions. In March 2025, in Standard Chartered, the Court allowed claims brought by passive investors to proceed to trial, declining to follow the 2024 decision in Barclays, where another judge struck out apparently similar claims.

BACKGROUND

Issuers must make full, accurate and timely market disclosures of information relevant to their securities. Where that information contains untrue or misleading statements, omits anything required to be included, or is published later than it should be, the issuer may be liable to compensate investors who have suffered loss as a result.

Under s.90A/sch.10A (prospectus liability is dealt with separately in s.90), as well as proving the relevant false representation or omission was dishonest, a claimant must show it held or traded in relevant securities "in reliance on" the allegedly misleading information. What 'reliance' means here has never been fully tested at trial. It was, though, considered last year in an interim application in Barclays.

THE DECISION IN BARCLAYS

Barclays sought summary dismissal of a sub-set of claims brought by passive, tracker funds. It argued that the 'reliance' requirement could only be met where a claimant had actually read and considered the information– something a passive fund, by its nature, never did. The passive investors defined reliance differently: their investment processes assumed that Barclays' share price would reflect the market's assessment of information published by Barclays. They accordingly relied on published information to the extent the whole market relied on it.

Granting Barclays' application, Leech J held that the test for 'reliance' should be the common law test for inducement or reliance in the tort of deceit. Therefore, a claimant needed to prove they had heard or read the misrepresentation, understood it in the sense it was alleged to be false, and then acted in a way that caused them loss. As passive investors could never clear this hurdle, their claims could not proceed.

THE DECISION IN STANDARD CHARTERED

Standard Chartered is being sued under ss.90-90A/sch.10A for £1.5 billion by claimants representing c.1,391 funds. Relying on Barclays, Standard Chartered applied to strike out passive investors' s.90A/sch.10A claims.

Michael Green J was uncomfortable with parts of the Barclays decision. There were difficulties with importing the definition of reliance in deceit into sch.10A because it was inapt to deal with omissions. He considered this was still a live and possibly developing area of law. In any event the facts in Standard Chartered were distinguishable from Barclays. In the circumstances, the claims should proceed to trial, where they could be tested with the benefit of full expert and factual evidence.

WHAT HAPPENS NOW?

In the immediate term, further attempts to strike-out passive investors' s.90A/sch.10A claims look unlikely – a relief to claimants and funders. The Barclays litigation settled following Leech J's decision, but Standard Chartered is due to go to trial next year. The outcome is far from certain: the judge recognised the claims face "an uphill struggle". The huge size of the passive investment market means it will be closely watched.

ASYMMETRIC JURISDICTION CLAUSES CAN BE VALID IN EU

A long-awaited decision from the CJEU confirms that asymmetric jurisdiction clauses can be valid and enforceable under EU law – but there are strings attached

Frequently used in financing contracts, asymmetric jurisdiction clauses require one party to bring any claims in the court of a specified state, while allowing the other party to sue in any jurisdiction that will accept the case. Exclusive jurisdiction agreements generally enjoy a privileged status in EU law (and other countries' systems), but the imbalance inherent in asymmetric clauses has long been an unhelpful source of uncertainty in the EU.

In **Società Italiana Lastre SpA v Agora Sàrl**, the CJEU has brought some clarity. It held there is no principled reason why asymmetric clauses should not be valid under EU law, provided that the clause only permits claims to be brought in the courts of EU member states and countries party to the Lugano Convention.

BACKGROUND

Asymmetric jurisdiction clauses are a hybrid, combining exclusive and non-exclusive elements. Lenders, in particular, value this in financing contracts: they can ensure that any claims brought against them will be in courts with which they are familiar, while preserving the flexibility to sue a borrower in any country where there may be assets to enforce against.

But jurisdiction clauses have value only to the extent the courts of different countries are willing to uphold them. English courts have long treated asymmetric clauses as a species of exclusive jurisdiction clause and given effect to them, including – while the UK was in the EU – for the purposes of the Recast Brussels Regulation, the relevant EU law. Article 25 of the Regulation provides that where parties nominate the courts of a member state to settle their disputes, the courts of every other member state must (as a general rule) respect that agreement and decline to hear any claim under it. However, not all member state courts agree that asymmetric clauses, with their inherent one-sidedness and lack of precision as to which court will have jurisdiction, can fall within the scope of Article 25.

THE CJEU JUDGMENT

The CJEU's **judgment** resolves core questions of principle, even if their application in practice remains to be worked out. In response to a reference from the French court, the CJEU said that:

- complaints relating to the alleged imprecision or one-sidedness of a jurisdiction clause should be determined in accordance with autonomous EU rules, not the national law of the member state which governs the agreement; and
- those autonomous rules, derived from the meaning and purpose of the Regulation, provide that an asymmetric jurisdiction can be valid.

There was nothing in Article 25 that prevented parties agreeing that more than one court could hear a claim, nor could there be any objection to an asymmetric arrangement given that other provisions of the Regulation, e.g. those dealing with consumers, were one-sided in favour of structurally weaker parties. But these features were only unobjectionable so long as they did not undermine the Regulation's objectives of predictability, transparency and legal certainty. These could only be assured if the choice of courts under the clause was limited to those which apply the Regulation or a the Lugano Convention – i.e. the EU member states plus Norway, Iceland and Switzerland.

TAKEAWAYS

The ruling will have no effect on how English courts treat asymmetric clauses. In EU courts, asymmetric jurisdiction clauses, to be valid in EU law must limit, or be construed as limiting, the choice of courts to those in the EU or Lugano states. That likely means that asymmetric clauses that nominate English courts will not be valid as a matter of EU law. In reality, though, that just confirms what was already widely understood to be the position. And also as before, where EU law does not apply, the national law of the relevant member state will instead – and in many cases, that law will uphold the bargain agreed by the parties.

CAT REJECTS PROPOSED WATER COLLECTIVE ACTIONS

CAT refuses to certify collective proceedings against water and sewerage companies as claims excluded by sector regulation laws

In March, the Competition Appeal Tribunal delivered its **judgment** in respect of applications for collective proceedings orders in proceedings brought against six water and sewerage companies. In this significant decision, the CAT refused to certify the proceedings on the basis that they were excluded by **section 18(8) of the Water Industry Act 1991**.

This is the first set of environmental claims brought under the UK's collective proceedings regime and an example of the non-traditional types of claims that have more recently emerged – seeking to take advantage of the opt-out nature of the regime. It is also one of only a handful of cases in which the CAT has declined certification. The judgment is important for its consideration of claims that arise from an alleged or actual breach of water and sewerage regulations and will be of interest to companies operating in this and other highly regulated sectors.

THE CLAIMS

The claims alleged that the companies had been under-reporting the number of pollution incidents on their networks, which led to them charging customers higher prices than they otherwise would have been permitted to charge. The proceedings were brought on behalf of several million household customers on the basis that the alleged under-reporting and higher prices consequently charged constituted an abuse of a dominant position under competition laws. The companies challenged the applications for CPOs.

THE CAT'S DECISION

The CAT refused to certify the proceedings because the claims for abuse of dominance were excluded by **section 18(8) WIA91**. In reaching its decision, the CAT focussed not on the alleged abuse (i.e. the misreporting of pollution incidents which led to a contravention of the companies' conditions of appointment) but rather the causation of damage (i.e. the price control mechanism being integral to the alleged loss suffered). The CAT found that the damage allegedly suffered, and the remedy sought for the alleged over-charging, arose only because the reporting of pollution incidents fed into the revenue allowance determination by the economic regulator for the water and sewerage sector (Ofwat), and the companies would have contravened their conditions of appointment in supplying Ofwat with inaccurate information for that purpose. Therefore, the alleged failure of the companies to supply accurate information for the statutory price control regime under the WIA91 was an essential ingredient of the claims for breach of statutory duty.

Given the CAT's determination that the claims were excluded by section 18(8), any assessment of the conditions for certification was academic. The CAT found, however, that if the claims were not so excluded, it would have granted a collective proceedings order in each set of proceedings.

IMPLICATIONS

The CAT's judgment demonstrates that the CAT is willing to recognise certain boundaries to the collective actions regime. This is a welcome recognition in view of the novel (non-traditional competition) claims that are now being brought under the regime.

More generally, the CAT has recently demonstrated a more critical approach to certification, having recently declined certification in **Riefa v Apple and Amazon** because the Proposed Class Representative failed to satisfy the authorisation condition. This is the only other outright refusal of the CAT to grant a collective proceedings order post-**Merricks v Mastercard** (see our **January edition of Briefcase** for a summary of the CAT's decision in Riefa). It remains to be seen whether future proposed collective proceedings – particularly those that are novel and which stretch the traditional boundaries of competition law – will face greater scrutiny at the certification stage.

Read more in our **briefing**.

Slaughter and May **acts** for United Utilities in the proceedings.

ARBITRATION BILL BECOMES LAW

Legal reforms seeking to maintain London's position as a leading seat for arbitration have been passed into law

The Arbitration Act 2025 (amending the Arbitration Act 1996), has become law after receiving royal assent in February. As reported in previous editions of Briefcase, the new Act brings into force recommendations by the Law Commission, which aim to ensure that London remains a leading destination for international arbitration. While the Act will not bring about wholesale reform (the existing legislation was considered to work well and "root and branch reform was not needed or wanted"), it includes important amendments for arbitration users.

WHAT ARE THE CHANGES?

Changes brought in by the new Act include:

- **Summary disposal:** an express power to enable tribunals to issue awards on a summary basis and summarily dispose of claims or issues where a party has no real prospect of success (the test applied by English courts for summary judgment applications);
- **Third parties:** clarifying expressly that the English court can make orders against third parties in support of arbitration proceedings;
- **Emergency arbitrators:** expressly providing that emergency arbitrators have the same pathways to enforce orders as are available to arbitrators under the Act, such as peremptory orders (which are typically issued when a party fails to comply with a tribunal's order);
- **Impartiality:** codifying an arbitrator's existing common law duty to disclose any circumstances that should reasonably give rise to justifiable doubts as to their impartiality;
- **Challenging awards:** prescribing amendments to court procedure rules to streamline the process for challenging arbitral awards, including placing limits on the grounds and evidence for challenging awards and preventing a re-hearing of evidence already heard by the tribunal;
- **Jurisdiction:** restricting the English court's ability to make a preliminary determination of the tribunal's jurisdiction where the tribunal has already ruled on its jurisdiction;
- **Immunity:** strengthening an arbitrator's immunity in situations of resignation or removal.

NEW GOVERNING LAW RULE

Among the most significant changes is the new default rule on the law applicable to arbitration agreements. The new rule prescribes that, unless the parties agree otherwise, the law applicable to their arbitration agreement will be the law of the seat of arbitration. This will be the case even where the parties have chosen a different law to govern the main contract. The new rule simplifies the position under the complex common law test in Enka v Chubb, which in broad terms provides that where the law applicable to the arbitration agreement is not specified, the arbitration agreement will typically be governed by the law of the main contract.

Whilst the new rule potentially brings greater certainty for arbitration users, it may not always align with the expectations of international parties who may assume that a choice of law for the underlying contract will automatically extend to their arbitration clause. The law governing an arbitration agreement plays a central role in ensuring an arbitration agreement operates effectively and as intended by the parties but it is sometimes overlooked at the transaction stage. To reduce uncertainty or where parties wish to displace the new English default rule (and the chosen institutional rules do not make provision), parties should consider expressly specifying in their arbitration clauses the law governing their arbitration agreement (in addition to specifying the law governing the underlying contract).

WHEN DO THE CHANGES COME INTO FORCE?

Although the Act has been passed into law, the rule changes are not yet in force; they will come into force by statutory instrument on a date to be determined. Once in force, the changes – including the new governing law rule – will (subject to certain exceptions) apply to arbitration agreements whenever made. Parties should consider the implications of the reforms when drafting their arbitration clauses.

STATE IMMUNITY AND ENFORCEMENT OF ARBITRAL AWARDS

Court of Appeal provides guidance on exceptions to state immunity in the context of attempts to enforce arbitral awards against states

The Court of Appeal in **General Dynamics v Libya** and **Hulley & Ors v Russia** has provided guidance on the English courts' approach to the rules on state immunity in relation to attempts to enforce arbitral awards against states. In both cases, the Court found that exceptions to state immunity applied.

The decisions offer guidance for commercial parties seeking to enforce arbitral awards against states in the UK, and, where negotiating positions allow, they are a helpful reminder of the importance of clear drafting to carve outs from state immunity.

GENERAL DYNAMICS V LIBYA

In **General Dynamics v Libya**, the Court of Appeal held that Libya had waived its immunity by providing "written consent" to execution against its property within the meaning of section 13(3) **State Immunity Act 1978**, for the purposes of enforcing an ICC award against it. The dispute concerned a Swiss law contract between company GDUK and Libya. The contract contained an ICC arbitration clause which provided that the decision of the arbitral tribunal shall be "final, binding and wholly enforceable". It was agreed that for section 13(3) to apply, there was no requirement to use any specific wording such as "consent". The Court considered that it was unclear what would be required, beyond that the words used show consent, for that consent to be regarded as "express". As it was already the case that words would not be construed as giving consent if they express an intention which is unclear or equivocal, there was no scope for an additional requirement for "clear words" as contended for by Libya.

The Court unanimously found that, as a matter of construction, the arbitration agreement constituted Libya's consent to execution of its property, with a majority of the bench finding that the words "wholly enforceable" in themselves were sufficient to constitute consent to execution. This was reinforced by the incorporation of the ICC Rules which required Libya "to carry out any award without delay".

HULLEY & ORS V RUSSIA

In **Hulley & Ors v Russia**, the Court of Appeal held that the English court could rely on an issue estoppel arising from the decision of a foreign court in determining whether an exception to state immunity (here the arbitration exception in section 9 **SIA78**) applied.

The decision follows a long-running arbitration dispute in which Russia was ordered to pay more than US$ 50bn to the claimants, former majority shareholders in OAO Yukos Oil Company. The claimants sought to enforce the awards in England. Russia challenged the jurisdiction of the English court on state immunity grounds. Russia also challenged the awards in the Dutch court which found that Russia had agreed to submit the dispute to arbitration. The English Court of Appeal held that the English court could rely on the Dutch court's finding as an issue estoppel preventing Russia from re-arguing the point before the English court when determining whether Russia was immune from their jurisdiction.

In the Court of Appeal's view, when the English court gives effect to an issue estoppel from a foreign court judgment, it was not correct to say that the English court was not deciding the issue. Rather, it meant that any evidence seeking to contradict the earlier judgment was irrelevant. In this case, the High Court had found that Russia agreed to submit the dispute to arbitration, applying the English law principle that when an issue estoppel arises, the previous decision of a court of competent jurisdiction was conclusive on the relevant issue.

The states in both cases have sought permission to appeal to the Supreme Court. These decisions, alongside other recent cases such as the **High Court's decision** that a state had not waived immunity by virtue of it ratifying the New York Convention, illustrate the complexities faced by commercial parties seeking to enforce awards against states. Read more in our **briefing**.

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:

SETTLEMENT APPROVED IN MERRICKS V MASTERCARD

Following a three day hearing in February, the Competition Appeal Tribunal approved a £200 million settlement in the long-running Merricks v Mastercard proceedings. This is notwithstanding the fact the claim was originally valued at circa £14 billion. The approval was given despite resistance from the funder, who argued that the settlement was "too low" and "premature" (see our January edition of Briefcase). We await reasons for the decision from the CAT.

FUNDERS AND LAWYERS CAN BE PAID BEFORE CLASS MEMBERS IN COLLECTIVE PROCEEDINGS

In Gutmann v Apple, the Court of Appeal held that (1) the Competition Appeal Tribunal has jurisdiction to make an order allowing funders and lawyers to be paid from a damages award, before any damages have been distributed to the class and (2) litigation funding agreements contemplating such an order are enforceable. Exactly when such an order should be made will be a matter for the CAT. However, this would seem likely where the take-up of damages is predicted to be high (e.g. where defendants have an ongoing relationship with the class and could pay damages via account credit). Whether the Court of Appeal takes as funder-friendly an approach to the remaining ground of appeal (whether, post PACCAR, funders can base returns on a multiple of capital committed) will be watched with interest. Appeals on this issue have been scheduled to be heard by the Court of Appeal on 10 June.

RECENT DEVELOPMENTS IN ANTI-SUIT INJUNCTIONS

Following our earlier coverage of the Supreme Court's decision in UniCredit v RusChemAlliance, the Court of Appeal has held that the English court has the power to vary or revoke its own final anti-suit injunction on the request of the party (UniCredit) that obtained it. The decision follows-on from the Supreme Court's earlier decision in the proceedings that the English court can grant an anti-suit injunction in support of foreign-seated arbitration agreements where the arbitration agreement is governed by English law. RCA did not comply with the English anti-suit injunction and instead secured an order from the Russian courts requiring UniCredit to seek to cancel the English anti-suit injunction or face a penalty of EUR 250m.

The Court of Appeal granted UniCredit's application to discharge the English anti-suit injunction. Whilst the Court disapproved of RCA's conduct, which was in contempt of the English court, and acknowledged potential public policy concerns, it accepted that UniCredit was acting in its own commercial interests and had asked the English court to revoke or vary the injunction because of changed circumstances. The Court considered it would be unfair to force UniCredit to risk incurring a significant penalty in Russia by not agreeing to the bank's application. The decision reflects the practical realities that UniCredit had more to lose and could not ignore the Russian court order as it had a business and assets in Russia. Whereas, RCA did not have assets or officers in England and would not have to enforce any judgment in England, meaning there was little the English court could do in practice to enforce its anti-suit injunction against RCA.

Separately, the English court has considered the availability of anti-suit relief in the context of third parties. In the unusual case of Manta Penyez Shipping and Uraz Shipping v Zuhoor Alsaeed Foodstuff Company, the High Court granted anti-suit injunctions to third parties, relying on the Contracts (Rights of Third Parties) Act 1999 (CRTPA), against a company that was in breach of its contractual obligations not to sue. This case and another case of Renaissance Securities v Chlodwig Enterprises illustrate the English courts' willingness to exercise their discretion to grant anti-suit relief in support of parties' contractual bargains and dispute resolution agreements, including where third parties are affected. However, as Renaissance illustrates, the English court will only be willing to do so where parties act transparently and the court is given sufficient information to exercise its discretion. Read more in our briefing.

EXCLUSION CLAUSES: EXCLUDING ANTICIPATED PROFITS

The Court of Appeal in **EE v Virgin Mobile** has provided guidance on the interpretation of an exclusion of liability clause in a mobile network services contract. The Court of Appeal (by a majority) upheld the High Court's decision to dismiss EE's claim on the basis that it fell within the exclusion clause. The central issue was whether a claim for "charges unlawfully avoided" fell within the meaning of "loss of anticipated profits" which were excluded by the exclusion of liability clause. A majority of the Court agreed with Virgin that EE's claim for such charges was excluded by the exclusion clause. The decision is a reminder that cases turn on their facts and when trying to interpret exclusions of liability such as for loss of profits, previous judgments made in different contexts do not create an established meaning or definition that applies to all contracts. As ever, the case is a reminder of the importance of clear and consistent drafting. Read more in our **blog post**.

AUTHORISED PUSH PAYMENT FRAUD: KEY UPDATES

The English court is continuing to grapple with a steady stream of APP fraud cases. In **Santander v CCP Graduate**, the High Court struck out a novel duty of retrieval claim against a receiving bank in an APP fraud claim. In doing so, it overturned the earlier decision of Master Brown (covered in our **October 2024 Briefcase**). The High Court held that the fact a fraudster holds an account with a bank (and stolen funds are temporarily transferred to that account), is not a sufficient basis for imposing a duty of care towards a non-customer victim. To impose such a duty would require a bank to ignore instructions from its own customer and chase funds through a chain of subsequent receiving banks. CCP has **applied** to the Court of Appeal for permission to appeal.

Although the door has (for now) been closed on the possibility of a duty of retrieval for banks receiving stolen funds, the possibility of such a duty for banks sending them has been left open. Mrs Philipp's retrieval duty/loss of chance claim (which we have written about previously in **Briefcase** and in this **briefing**) will be watched closely.

In another recent APP fraud case, **Hamblin v Moorwand**, the High Court ruled in favour of two victims of APP fraud in a derivative action brought against a payment services provider on behalf of its corporate customer. Given the difficulties faced by victims of APP fraud following the Supreme Court's decision in **Philipp v Barclays** (covered in our **briefing**), the fact that this innovative claim succeeded is noteworthy. Read more about this case in our **Financial Regulation Weekly bulletin**.

UK SUPREME COURT'S CLIMATE DECISION IN FINCH CONTINUES TO HAVE KNOCK-ON EFFECTS FOR FOSSIL FUEL PROJECTS

The Court of Session in Scotland (Scotland's supreme civil court) recently **quashed** decisions by the previous UK Government to grant consent for the development of the Rosebank and Jackdaw oil and gas fields in the North Sea. The decision is the latest example of UK courts quashing public authority decisions approving fossil fuel projects for failing to take into account downstream (Scope 3) greenhouse gas emissions, following the UK Supreme Court's landmark climate litigation judgment in **R (Finch) v Surrey County Council** last year. As a result, the North Sea Transition Authority (NSTA) and the UK Government will have to reconsider their decisions taking into account downstream emissions. However, the court has suspended its quashing of the decisions until they have been reconsidered, enabling the developers, if they wish, to continue work on the projects – but not produce oil and gas – until the consents have been revisited. In doing so, the court has sought to balance the unlawfulness of the decisions with the need to appreciate commercial interests and the practicalities and costs involved in managing complex energy infrastructure projects.

Separately, a **decision** by a local council to refuse a planning application for a 'megafarm' in reliance on Finch indicates that the Supreme Court's decision may have implications beyond the fossil fuel sector.

Public law challenges continue to be a busy route through which climate and environmental activists seek to pursue their policy agendas. For example, recently the High Court **heard a challenge** to licences granted by the UK Government for oil and gas exploration and the Court of Appeal **heard an appeal** of a legal challenge to the government's decision to approve a 'net zero' power station in Teeside.

Whilst public law challenges target public sector decision-making, they can have significant consequences for private companies whose projects can be delayed or cancelled as a result. Following our report in the **January 2025 edition of Briefcase**, the Government's plans to reduce delays for Nationally Significant Infrastructure Projects by streamlining the process for legal challenges against these projects have been published in the **Planning and Infrastructure Bill**.

ACCESS TO COURT DOCUMENTS BY NON-PARTIES

We have written previously (most recently in our **January Briefcase**) about potential changes to the rules governing the rights of non-parties/members of the public to access court documents. Although it is likely to be some time before permanent changes are made to the rules, work on the potential changes remains ongoing. The body responsible for court rules, the Civil Procedure Rule Committee, confirmed **recently** that it will soon be invited to consider a draft pilot scheme to test out potential rule changes in this area.

OUR OTHER RECENT CONTENT

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RECENT WORK

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